

1 DENNIS J. HERRERA, State Bar #139669  
City Attorney  
2 THERESE STEWART, State Bar #104930  
Chief Deputy City Attorney  
3 JAMES M. EMERY, State Bar #153630  
ANDREW SHEN, State Bar #232499  
4 ANN M. O'LEARY, State Bar #238408  
Deputy City Attorneys  
5 Office of the City Attorney  
Fox Plaza  
6 1390 Market Street, 6th Floor  
San Francisco, California 94102-5408  
7 Telephone: (415) 554-4261  
Facsimile: (415) 554-3837  
8 E-Mail: jim.emery@sfgov.org

9 Attorneys for Plaintiffs  
10 CITY AND COUNTY OF SAN FRANCISCO,  
JOHN ARNTZ and DENNIS J. HERRERA  
11 on behalf of THE PEOPLE OF  
THE STATE OF CALIFORNIA

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
13 COUNTY OF SAN FRANCISCO  
14 UNLIMITED JURISDICTION  
15

16 CITY AND COUNTY OF SAN  
FRANCISCO, a municipal corporation  
17 and a political subdivision of the State of  
California, JOHN ARNTZ, Director of the  
18 Department of Elections for the City and  
County of San Francisco, and THE  
19 PEOPLE OF THE STATE OF  
CALIFORNIA, acting by and through  
20 City Attorney Dennis J. Herrera,

21 Plaintiffs,

22 vs.

23 ELECTION SYSTEMS AND  
SOFTWARE, INC., a Delaware  
24 corporation,

25 Defendant.  
26  
27  
28

Case No.

**COMPLAINT FOR DAMAGES,  
PENALTIES, AND INJUNCTIVE  
RELIEF**

1. BREACH OF CONTRACT;
2. FRAUD;
3. NEGLIGENT  
MISREPRESENTATION;
4. VIOLATIONS OF CALIFORNIA  
ELECTIONS CODE § 18564.5;
5. VIOLATIONS OF THE  
CALIFORNIA FALSE CLAIMS  
ACT (CAL. GOV'T CODE §§ 12650  
*et seq.*);
6. VIOLATIONS OF THE UNFAIR  
COMPETITION ACT (CAL. BUS.  
& PROF. CODE §§ 17200 *et seq.*);

**(DEMAND FOR JURY TRIAL)**

INTRODUCTION

1  
2           1.     Plaintiff City and County of San Francisco ("San Francisco" or "the City") conducts  
3 elections to consider candidates for local, state, and federal offices, local and state ballot initiatives,  
4 and political primaries—including three elections in the upcoming year (2008). San Francisco uses  
5 electronic voting equipment to aid voters in marking paper ballots and to tabulate votes cast on  
6 these paper ballots. For the past eight years, San Francisco has contracted with Defendant Election  
7 Systems and Software, Inc. ("ES&S") to provide electronic voting equipment and voting services  
8 that aid the City in conducting elections.

9           2.     All voting equipment used in California must comply with applicable state and  
10 federal law. State law requires that all voting equipment used in California be approved by the  
11 California Secretary of State and be federally certified.

12           3.     On December 30, 1999, San Francisco and ES&S entered into the Voting Systems  
13 Project Agreement. The parties have amended the contract seven times. The December 30, 1999  
14 Voting Systems Project Agreement, as amended, is hereafter referred to as the "Agreement." The  
15 Agreement contains guarantees and assurances by ES&S that its voting system and equipment did  
16 and would comply with all applicable state and federal law, including certification requirements.  
17 ES&S has breached its obligations.

18           4.     One of the pieces of voting equipment San Francisco purchased under the  
19 Agreement was the "AutoMARK," a paper ballot-marking device designed for use by disabled  
20 voters. The Agreement requires the AutoMARK machines that ES&S sold to San Francisco to have  
21 been certified by the California Secretary of State, as state law requires. In April 2006, San  
22 Francisco agreed to purchase 565 certified AutoMARK A100 machines at a cost of approximately  
23 \$3.8 million. In May 2006, ES&S delivered to San Francisco 565 uncertified AutoMARK A200  
24 machines; not the certified A100 machines. Unlike the A100 machines, the A200s contained  
25 modified hardware, software and/or firmware that the Secretary of State had never certified for use  
26 in California elections. Federal certification stickers on the AutoMARK machines delivered to San  
27 Francisco, manuals and other written materials that ES&S provided with the uncertified A200  
28 machines further represented that the machines were certified A100 machines. On November 19,

1 2007, the California Secretary of State released formal findings that the AutoMARKs ES&S sold  
2 and delivered to San Francisco were uncertified, thus establishing that ES&S had breached the  
3 Agreement and that its prior representations were false.

4 5. The AutoMARK is a component of the ES&S voting system that San Francisco uses.  
5 In September 2007, the California Secretary of State, in considering whether to re-certify the ES&S  
6 voting system used in San Francisco, separately announced that the voting system was unacceptably  
7 prone to inaccuracies. To meet minimum standards of accuracy and reliability, the Secretary of  
8 State administratively re-certified the system, for the November 2007 election only, on the  
9 condition that San Francisco and ES&S comply with a number of restrictions. These restrictions  
10 delayed the publication of final election results in the November 27 election and make San  
11 Francisco's elections significantly more costly to conduct. The Secretary of State also required  
12 ES&S to pay for all additional costs required to comply with the Secretary of State's re-certification  
13 of the ES&S voting system. Despite the Secretary of State's express condition that ES&S bear the  
14 costs of maintaining certification and ES&S's contractual obligations to abide by state laws and  
15 requirements, ES&S has refused to pay for these costs.

16 6. On November 7, 2007, San Francisco sent ES&S a Notice of Default, confirming  
17 San Francisco's assertions of ES&S's breaches of various contractual provisions and the City's  
18 demand for cure. On November 19, 2007, ES&S responded to the City's Notice of Default without  
19 acknowledging those breaches or offering to cure. Now, the breaches of contract outlined in the  
20 Notice of Default, along with related claims of fraud, negligent misrepresentation, and violations of  
21 the California Elections Code, False Claims Act, and the Unfair Competition Law, form the basis  
22 for the instant suit.

### 23 THE PARTIES

24 7. Plaintiff San Francisco is a municipal corporation duly organized under the laws of  
25 the State of California. San Francisco has more than 750,000 residents as determined by the  
26 Demographic Research Unit of the State of California's Department of Finance.

27 8. Plaintiff John Arntz ("Arntz") is the Director of the Department of Elections for the  
28 City. Under section 13.104 of the San Francisco Charter, the Director of the Department of

1 Elections administers the day-to-day conduct and management of the Department of Elections,  
2 voter registration, and other matters involving elections in San Francisco.

3 9. Dennis J. Herrera, City Attorney for San Francisco, acting to protect the public from  
4 unlawful business practices, brings this action in the name of the People of the State of California  
5 under the statutes that prohibit unlawful, fraudulent and unfair business practices. California  
6 Business and Professions Code sections 17204 and 17206(a) authorize him to bring this action.

7 10. Defendant ES&S is a corporation incorporated under the laws of the State of  
8 Delaware, having its principal place of business in the State of Nebraska, that at all relevant times  
9 was doing business in California.

#### 10 VENUE

11 11. Venue is proper because a substantial part of the events or omissions giving rise to  
12 the claim occurred in San Francisco. In addition, the Agreement states that "[v]enue for all  
13 litigation relative to the formation, interpretation and performance of this Agreement shall be in San  
14 Francisco." See Exhibit A, ¶ 56.

#### 15 **I. ES&S'S SALE OF UNCERTIFIED VOTING MACHINES TO SAN FRANCISCO**

16 12. In 2006, ES&S sold San Francisco 565 AutoMARK voting machines. AutoMARK  
17 voting machines are used by disabled voters to mark ballots; they do not count or tabulate votes.  
18 San Francisco purchased the 565 AutoMARKs from ES&S for \$6,185.89 per machine, paying a  
19 total purchase price of nearly \$3.8 million (\$3.495 million for the AutoMARK machines and  
20 \$297,000 in state and local sales tax).

21 13. ES&S and San Francisco contracted for the purchase of the AutoMARKs in an  
22 amendment to a previous agreement for voting equipment and services. Several years earlier, in  
23 December 1999, ES&S entered into a contract with San Francisco to provide voting equipment and  
24 voting services. See Exhibit A. As set forth in paragraph 3 above, the Agreement has been  
25 amended on seven occasions, most recently in March 2007. See Exhibits B-H. The Fifth  
26 Amendment, dated April 10, 2006, addressed the sale of the AutoMARK voting machines. See  
27 Exhibit F.

1           14. Under state law, all voting equipment and systems must be certified by the California  
2 Secretary of State before their use in an election. Through several provisions in the Agreement (as  
3 amended through the Fifth Amendment), ES&S agreed that it would provide San Francisco with  
4 AutoMARK voting machines that have been certified by the Secretary of State and that ES&S  
5 would be responsible for all failures to do so:

- 6           • In the Fifth Amendment, ES&S specifically stated that the "accessible ballot-  
7 marking voting system solution," *i.e.*, the AutoMARK it was selling to San  
8 Francisco, would not require any "additional federal or state certification . . . for use  
9 in the June 6, 2006 Election." Id. ¶ 17(f) (amending Section 20 of the Agreement).  
10 ES&S and the City also agreed "that they [would] work together in good faith to  
11 manage any and all certification requirements after the June 6, 2006 Election,"  
12 further indicating that no additional efforts were necessary to achieve certification  
13 for the June 6, 2006 election. Id.
- 14           • ES&S agreed to "keep itself fully informed of . . . all state, and federal laws in any  
15 manner affecting the performance of this Agreement, and . . . at all times [to] comply  
16 with . . . all applicable laws as they may be amended from time to time." Id. ¶ 17(i)  
17 (amending Section 59.A of the Agreement).
- 18           • In the same section, ES&S agreed with regard to software that "[s]o long as City is  
19 receiving ES&S software maintenance and support, the ES&S software shall be  
20 maintained or upgraded by ES&S in such a way as to remain compliant with all  
21 applicable federal and state election laws and regulations, including all current and  
22 future requirements necessary to remain certified for use in the City's location." Id.
- 23           • ES&S also agreed that: "Pursuant to this Agreement and by order of the Secretary of  
24 State, voting systems certified for use in California shall comply with all applicable  
25 state and federal statutes, regulations, rules and requirements, including, but not  
26 limited to, those voting system requirements set forth in the California Elections  
27 Code . . . ." In this same section, ES&S assumed "full responsibility for any  
28 representation" that the equipment sold to San Francisco "complies with all  
applicable state and federal requirements referenced above." Id. ¶ 17(i) (amending  
Section 59.B. of the Agreement).

21           15. ES&S violated these promises and guarantees by selling and delivering to San  
22 Francisco AutoMARK voting machines that in fact were uncertified when ES&S sold and delivered  
23 them. On August 3, 2005, the Secretary of State certified AutoMARK A100 machines for use in  
24 California elections. Approximately six months later, San Francisco agreed to purchase 565 of the  
25 recently certified A100 machines. Instead of receiving the certified A100 machines, in May 2006,  
26 ES&S delivered to San Francisco 565 uncertified AutoMARK A200 machines. The Secretary of  
27 State had never certified the A200 machines for use in California elections. Under state law, the

1 City cannot presently use those machines in future elections—despite paying ES&S approximately  
2 \$3.8 million—because they are uncertified.

3 16. For San Francisco to use the AutoMARK machines for the November 2006 election,  
4 ES&S was required to seek certification of the machines specifically for use in San Francisco's  
5 Ranked Choice Voting ("RCV") elections. On October 26, 2006, the Secretary of State granted  
6 ES&S conditional certification for one election (November 2006) for the RCV Enhanced System,  
7 including the use of the AutoMARKs sold to San Francisco in April 2006. But the certification,  
8 requested by ES&S and granted by the Secretary of State, was again for the A100 AutoMARKs, not  
9 the A200 machines that San Francisco had unwittingly purchased.

10 17. On August 21, 2007, the California Secretary of State announced she would hold a  
11 public hearing to examine ES&S's sale of uncertified AutoMARK machines to five California  
12 counties, including San Francisco. The Secretary of State's investigation revealed that all 565  
13 machines sold to San Francisco (as well as 407 AutoMARKs sold to other California counties) were  
14 uncertified. The Secretary of State held the public hearing on October 15, 2007. The Secretary's  
15 final statement of findings and decision was released on November 19, 2007, confirming the results  
16 of its investigation.

17 18. Shortly after hearing of the Secretary of State's initial announcement, the Director of  
18 Elections confirmed that the voting machines ES&S sold to San Francisco were not the certified  
19 AutoMARK A100 machines. Instead, all of the machines were actually the uncertified AutoMARK  
20 A200 machines.

21 19. Until the Secretary of State's announcement, San Francisco was unaware that ES&S  
22 had manufactured a second version of the AutoMARK machines with modified hardware, software  
23 and/or firmware that the Secretary of State had not certified, let alone that the AutoMARKs ES&S  
24 had delivered to San Francisco were the uncertified A200s. Unless the machines are opened, the  
25 A100 and A200 machines appear to be identical, but the City was unaware that there were two  
26 different AutoMARK machines and had no reason to consider differences in appearance. ES&S  
27 placed a sticker on the A200 machines it had delivered to San Francisco indicating that the  
28 machines were federally certified when, in fact, the machines had not been federally certified at the

1 time of delivery. When the machines were shipped to San Francisco, ES&S included copies of  
2 system installation and maintenance guides specifically for the certified model A100 machines, not  
3 the A200 machines. The checklists used by ES&S employees to verify that the machines were in  
4 good condition upon delivery indicated that the machine's firmware had been certified. In July  
5 2006 and again in April 2007, when ES&S submitted a request for extension of certification to the  
6 Secretary of State, it explicitly identified the certified AutoMARK machines as part of the voting  
7 system for which it was seeking certification. The City relied on ES&S's repeated  
8 misrepresentations that the company had sold certified voting machines to San Francisco.

9 20. Misled by ES&S's multiple false representations and statements, the City paid over  
10 \$3.8 million for uncertified AutoMARK machines. Defendant ES&S presented San Francisco with  
11 an invoice on May 31, 2006 for this amount, which the City paid in full. See Exhibit I.

12 21. At no time before the Secretary of State's announcement on August 21, 2007 or at  
13 any time after did ES&S inform the City that it had sold San Francisco uncertified AutoMARKs.  
14 Unaware that ES&S's representations were false that the machines sold and delivered to San  
15 Francisco were certified, San Francisco unwittingly used what turned out to have been uncertified  
16 AutoMARK ballot marking machines in both the June 2006 and November 2006 elections.

17 22. Finally informed that its 565 AutoMARK machines were uncertified, San Francisco  
18 borrowed certified AutoMARK machines from neighboring Contra Costa County for its November  
19 6, 2007 election to comply with state law requiring the use of certified voting machines in all  
20 elections.

21 **II. ES&S'S FAILURE TO COMPLY WITH THE SECRETARY OF STATE'S**  
22 **ADMINISTRATIVE RECERTIFICATION REQUIREMENTS**

23 23. As the truth regarding the uncertified AutoMARKs came to light, the Secretary of  
24 State was considering the re-certification of the entire voting system ES&S had sold to San  
25 Francisco.

26 24. The AutoMARK voting machine is one component of the voting system San  
27 Francisco purchased from ES&S and uses in its elections. In addition to the AutoMARK, the ES&S  
28 system employs several other components, including: (1) Optech Eagles ("Eagles"), optical

1 scanners used to tabulate ballots cast at individual precincts on Election Day; (2) Optech IV-Cs  
2 ("IV-Cs"), high-speed optical scanners used to tabulate larger quantities of ballots such as those cast  
3 by absentee voters; and (3) the UNITY Election Management System, a suite of data and program  
4 management software. San Francisco has used the ES&S voting system for the traditional one-  
5 candidate or measure, one-vote elections such as those used for state propositions, candidates for  
6 state office, and candidates for federal office. San Francisco has also used the voting system for the  
7 RCV elections run for certain public offices in the City including Mayor, Sheriff, District Attorney,  
8 City Attorney, Treasurer, Assessor-Recorder, Public Defender, and members of the Board of  
9 Supervisors.

10         25. For the last several elections, the Secretary of State has raised concerns about the  
11 ability of the ES&S system to properly tabulate and record all votes and, as a result, has only  
12 conditionally certified the ES&S voting system on an election-by-election basis. To ensure that  
13 ES&S obtained the necessary certification for November 2007 election, the most recent amendment  
14 to the Agreement required ES&S to "submit an application to the California Secretary of State no  
15 later than May 1, 2007 for certification of the City's voting system, including RCV, in the  
16 November 6, 2007 election." See Exhibit H ¶ 1(d). Instead of submitting an application for  
17 certification by this deadline, on April 20, 2007, ES&S sent a one-page "Certification Extension  
18 Request" asking that the Secretary of State administratively re-certify its RCV voting system  
19 through December 31, 2008 -- even though the Secretary of State had explicitly stated in the  
20 October 2006 re-certification that the certification was "on a one-time basis for use only in the  
21 upcoming November 2006 General Election." See Exhibit J. On May 9, 2007, the Secretary of  
22 State denied this request.

23         26. On June 25, 2007, ES&S belatedly re-applied for certification of its RCV voting  
24 system. But the Secretary of State recently indicated that this application was incomplete. See  
25 Exhibit K. On September 14, 2007, the Secretary of State notified ES&S and San Francisco that  
26 she would administratively re-certify the existing RCV system for use in the November 6, 2007  
27 election only. But the Secretary of State imposed significant restrictions on the use of the voting  
28 system. The Secretary determined that these conditions were necessary because the "ES&S Optech

1 Eagle and related components have a number of problems in accurately tallying the votes that  
2 simply cannot be overlooked." See Exhibit L. Among other conditions, the Secretary of State  
3 imposed the following restrictions on the voting system for the November 6, 2007 election:

- 4 • The Eagles could not be used to tabulate votes independently. Only the central  
5 tabulating machines, the IV-Cs, could be used to count ballots. The Eagle machines  
6 were only allowed to determine whether an individual ballot contained overvotes  
7 (*i.e.*, too many selections were made) or undervotes (*i.e.*, not enough selections were  
8 made) and to store marked ballots at the polling place.
- 9 • Before inserting any ballots into the IV-C optical scan machines, San Francisco  
10 Department of Elections staff were required to visually inspect each ballot. For any  
11 ballots marked "incorrectly," including all those containing overvotes or undervotes,  
12 the pollworkers were required to duplicate the entire ballot with the correct markings  
13 prior to tabulation.
- 14 • San Francisco was required to conduct a manual tally of all the ballots cast in 10% of  
15 the City's voting precincts.
- 16 • San Francisco was required to conduct a manual tally of 25% of all the absentee  
17 ballots cast in the election.

18 The Secretary of State's conditional administrative recertification also expressly required ES&S to  
19 reimburse San Francisco for all additional costs incurred by San Francisco to comply with these  
20 conditions.

21 27. San Francisco incurred significant burdens and costs as a direct result of the  
22 conditions imposed by the Secretary of State on the use of the ES&S voting system, including at  
23 least the following:

- 24 • The Department of Elections could not release election results in a timely manner  
25 because all of the ballots cast at each precinct could only be tabulated by the  
26 centrally-located IV-C optical scan machines. Adding to the delay, Department of  
27 Elections staff were required to "remake" thousands of ballots which contained  
28 overvotes and undervotes prior to their tabulation. San Francisco normally  
announces election results from the polling places by 11:00 p.m. on Election Day.  
For the November 6, 2007 election, the City was delayed in providing the election  
results from the polling places and has been unable to provide final election results  
and does not expect to be able to release the final results until December 4, 2007  
(four weeks after the election).
- Department of Elections staff were required to work thousands of overtime hours, at  
considerable extra cost to the City, to manually review every ballot card; conduct the  
additional manual tallies of all ballots; remake ballots that cannot be properly read by  
the ES&S machines; resolve discrepancies between the manual tallies and machine  
tallies; and, log, box, and move ballots to various locations in the City for  
processing.

- 1 • City Hall has remained open long past normal business hours to allow for the  
2 observation of ballot processing, imposing direct costs on the City to heat and light  
the building, and to provide building security by requiring sheriff deputies and the  
building engineer to work overtime.

3 28. Section 59 of the Agreement, as amended in the Fifth Amendment, provides that  
4 ES&S must abide by all state laws and requirements, including all conditions imposed by the  
5 Secretary of State:

- 6 • "ES&S shall keep itself fully informed of the City's Charter, codes, ordinances and  
7 regulations of the City and of all state, and federal laws in any manner affecting the  
8 performance of this Agreement, and must at all times comply with such local codes,  
9 ordinances, and regulations, and all applicable laws as they may be amended from  
time to time." See Fifth Amendment, Exhibit F, ¶ 17(i) (amending Section 59.A of  
the Agreement).
- 10 • "Pursuant to this Agreement and by order of the Secretary of State, voting systems  
11 certified for use in California shall comply with all applicable state and federal  
12 statutes, regulations, *rules and requirements*, including, but not limited to, those  
voting system requirements set forth in *the California Elections Code . . .*" Id. ¶  
17(i) (amending Section 59.B of the Agreement) (emphasis added).
- 13 • ". . . voting systems shall also comply *with all applicable state and federal voting*  
14 *system guidelines, standards, regulations and requirements that derive authority*  
*from or are promulgated pursuant to and in furtherance of the California Elections*  
*Code . . .*" Id. (emphasis added).

15 Section 19201(a) of the California Elections Code requires all voting systems to be certified by the  
16 Secretary of State before use in any elections, and Section 19205 provides the Secretary of State the  
17 authority to prescribe the specifications and regulations governing the use of voting machines in  
18 California. These sections authorize the Secretary of State to impose conditions on certification and  
19 to enforce those conditions.

20 29. Prior to signing the Fifth Amendment to the Agreement on April 10, 2006, ES&S  
21 was on notice that the Secretary may invoke her authority to impose additional conditions on  
22 certification. In March 2005, the Secretary of State conditionally approved the use of the ES&S  
23 voting system for use in San Francisco's RCV elections. This conditional approval stated: "The  
24 Secretary of State reserves the right . . . to impose additional requirements with respect to the use of  
25 the system if the Secretary determines that such modifications or additions are necessary to enhance  
26 the accuracy, reliability or security of the voting system. Such modifications or additions shall be  
27 deemed to be incorporated herein as if fully set forth." See Ex. M (¶ j., Mar 2005 certification).

1 Similar language was included in the Secretary of State's approval of ES&S's voting system for use  
2 in the November 2006 election. See Ex. J (¶3.E, Oct 2006 certification).

3 30. ES&S breached the Agreement by refusing to comply with the condition imposed by  
4 the Secretary of State that it pay for the additional costs incurred by San Francisco to meet the  
5 Secretary of State's other certification conditions. On September 20, 2007, Director Arntz wrote to  
6 request that ES&S fulfill its obligations under the Agreement, including its obligation to pay for the  
7 additional costs of the conditional certification. Director Arntz requested that ES&S respond to  
8 that letter by October 1, 2007.

9 31. ES&S failed to provide a formal written response to Director Arntz until October 18,  
10 2007. In its letter, ES&S refused to comply with the Secretary of State's requirement that it pay for  
11 all of the costs associated with the administrative recertification. With respect to the AutoMARKs,  
12 ES&S agreed to pay for the transportation and some of the maintenance costs imposed by  
13 borrowing the machines, but refused to pay for all potential maintenance and repair costs and all  
14 costs required to convert the Contra Costa machines to provide a Cantonese language option for  
15 voters, as required in San Francisco.

16 32. On November 7, 2007, pursuant to section 33 of the Agreement, San Francisco sent  
17 ES&S a notice of default stating that the company had breached its Agreement with the City by: (1)  
18 failing to provide certified AutoMARK voting machines; and (2) refusing to comply with the  
19 Secretary of State's requirement, issued on September 14, 2007, that ES&S pay for all costs  
20 associated with the administrative re-certification of the voting system. See Exhibit N. The notice  
21 demanded that ES&S cure its breaches by: (1) paying for all costs associated with borrowing  
22 certified AutoMARKs for the November 6, 2007 election; (2) permanently replacing San  
23 Francisco's uncertified AutoMARKs with certified AutoMARKs in time for San Francisco's  
24 upcoming 2008 elections; and (3) complying with the Secretary of State's requirement that the  
25 company pay for all costs resulting from the administrative re-certification. Id. On November 19,  
26 2007, Defendant ES&S refused to cure any of its breaches of contract.

**FIRST CLAIM FOR RELIEF**

**Breach of Contract  
(By San Francisco Against Defendant ES&S)**

1  
2  
3 33. San Francisco restates and incorporates all of the above paragraphs as though fully  
4 set forth here.

5 34. Plaintiff San Francisco and Defendant ES&S are parties to the Agreement. See  
6 Exhibits A-G.

7 35. Except as otherwise excused by the conduct of Defendant ES&S, San Francisco has  
8 performed all conditions, covenants, and terms of the Agreement on its part to be performed. As  
9 alleged above, pursuant to Section 33 of the Agreement San Francisco sent ES&S a Notice of  
10 Default of the Agreement on November 7, 2007.

11 36. In selling and delivering uncertified AutoMARK machines to the City, Defendant  
12 ES&S has materially breached the following provisions of the Agreement:

- 13 a. ES&S has breached Sections 59.A and 59.B of the Agreement, as amended  
14 by paragraph 17(i) of the Fifth Amendment, which require it "at all times [to]  
15 comply with . . . all applicable laws," including "all applicable state and  
16 federal voting system guidelines, standards, regulations and requirements that  
17 derive authority from or are promulgated pursuant to and in furtherance of  
18 the California Elections Code or the Help America Vote Act of 2002 or other  
19 applicable state or federal law when appropriate, that are in effect as of the  
20 date of this Agreement . . . ." The California Elections Code requires that the  
21 California Secretary of State certify all voting machines in California prior to  
22 their use. Defendant ES&S breached Sections 59.A and 59.B by providing  
23 San Francisco with uncertified AutoMARK voting machines.
- 24 b. In Section 20 of the Agreement, as amended by paragraph 17(f) of the Fifth  
25 Amendment, ES&S covenanted to provide San Francisco with "an accessible  
26 ballot-marking voting system," *i.e.*, the AutoMARK, that required "no  
27 additional federal or state certification." The AutoMARK Model A100 is the  
28 only version of the AutoMARK that has been certified by the California  
Secretary of State. Instead of the certified A100s, ES&S shipped uncertified  
AutoMARK A200 machines to San Francisco, thereby breaching Section 20  
of the Agreement.
- c. In Section 59.B of the Agreement, ES&S "assume[d] full responsibility for  
any representation that the voting system sold and/or licensed hereunder  
complies with all applicable state . . . requirements as referenced above." In  
the same section, "[i]n the event such representation is determined to be false  
or misleading," ES&S further undertook responsibility "for the cost of any  
upgrade, retrofit or replacement, of the voting system or its component parts  
sold and/or licensed hereunder found to be necessary for certification or to  
otherwise be in compliance." Since ES&S misrepresented that the  
AutoMARKs it provided to San Francisco were certified under state law,  
under Section 59.B it was fully responsible for that misrepresentation,

1 including but not limited to all of the costs of borrowing certified  
2 AutoMARKs from neighboring counties for the November 6, 2007 election  
3 and permanently replacing the uncertified voting machines for future  
4 elections. By refusing to pay all such costs and refusing to provide the City  
5 with certified AutoMARK machines for use in future elections, ES&S has  
6 breached Section 59.B of the Agreement.

7 37. In submitting a late application for certification of the ES&S voting system to the  
8 Secretary of State and refusing to pay the costs associated with the Secretary of State's  
9 administrative re-certification of the ES&S voting system, ES&S has materially breached the  
10 following provisions of the Agreement:  
11

12 a. In Section 20 of the Agreement, as amended by paragraph 1(d) of  
13 the Seventh Amendment, ES&S agreed to "submit an application to  
14 the California Secretary of State no later than May 1, 2007 for  
15 certification of the City's voting system, including RCV, in the  
16 November 6, 2007 election." ES&S breached this obligation by  
17 failing to submit an application to the California Secretary of State  
18 until June 25, 2007 and by submitting an application even at that late  
19 date that was incomplete in that it failed to provide the Secretary of  
20 State with all of the required materials and equipment.

21 b. On September 14, 2007, the California Secretary of State required  
22 ES&S, as a condition for administrative certification of San  
23 Francisco's voting system, to compensate San Francisco for all costs  
24 associated with the conditions set forth in its administrative re-  
25 certification. ES&S has refused to reimburse San Francisco for  
26 these costs, thus violating a rule and requirement set by the  
27 Secretary of State pursuant to the California Elections Code and  
28 breaching Sections 59.A and 59.B of the Agreement.

37. As a direct and proximate result of the breaches by Defendant ES&S, San Francisco  
has been damaged in an amount subject to proof at trial. The City has incurred substantial damages,  
all resulting from Defendant's material breaches of the Agreement:

- a. Defendant's refusal to abide by the Secretary of State's requirement to pay for all costs associated with the Secretary's administrative re-certification of the ES&S voting system has forced San Francisco to bear burdens and costs of:
- i. Being unable to release election results in a timely manner because all of the ballots cast at each precinct could only be tabulated by the centrally-located IV-C optical scan machines;
  - ii. Requiring Department of Elections staff to work thousands of overtime hours, at considerable extra cost to the City, to manually review every ballot card; to conduct the additional manual tallies of all ballots; to remake ballots that cannot be properly read by the ES&S machines; to resolve discrepancies between the manual tallies and machine tallies; and, to log, box, and move ballots to various locations in the City for processing of the ballots; and



1           41. All of ES&S's representations regarding the AutoMARKs were false because the  
2 voting machines provided to the City were uncertified A200 machines instead of certified A100  
3 machines.

4           42. On information and belief, at the time these representations were made, Defendant  
5 ES&S had knowledge that the representations were false.

6           43. Further, on information and belief, after these false representations were made,  
7 Defendant ES&S had exclusive knowledge that the representations were false and concealed the  
8 fact that the AutoMARKs delivered to the City were the uncertified A200 machines. Further,  
9 because ES&S had exclusive knowledge of material facts and actively concealed those facts from  
10 the City, Defendant ES&S had a duty to disclose those material facts—the identity and certification  
11 status of the AutoMARKs—to the City.

12           44. On information and belief, ES&S's false representations regarding the AutoMARKs  
13 were made with the intent to deceive the City that it would receive certified A100 machines.

14           45. At the time these various false representations and false promises were made, San  
15 Francisco was ignorant of their falsity and acted in justifiable reliance on Defendant's false  
16 representations. San Francisco justifiably relied on those false representations because the two  
17 different AutoMARK machines are visually identical, even though the A200 machine contains  
18 modified hardware, software, and/or firmware.

19           46. As a result of Defendant's false representations and San Francisco's justifiable  
20 reliance on those representations, San Francisco has been damaged and will further be damaged in  
21 the following respects:

- 22           a. Executing the Fifth Amendment with Defendant and paying ES&S millions  
23 of dollars for the AutoMARK machines that in fact, were not certified.
- 24           b. Using the uncertified AutoMARK voting machines in the City's June and  
25 November 2006 elections.
- 26           c. Foregoing the opportunity to purchase certified voting machines from another  
27 voting systems vendor.
- 28           d. Expending funds to borrow, use and return certified AutoMARKs from a  
neighboring county and to convert them for use in San Francisco elections.

- 1 e. Possibly having to expend funds to borrow, use and return certified  
2 AutoMARKs for future San Francisco elections and to convert them for use  
3 in such elections.  
4 f. Having to expend funds to purchase certified disabled accessible voting  
5 machines and have those machines converted for use in future San Francisco  
6 elections.  
7 g. Loss of use of City resources devoted to addressing the lack of certification  
8 of the AutoMARKs provided by ES&S and to rectifying that situation.

9 47. On information and belief, in doing the things alleged in this Complaint, Defendant  
10 ES&S acted with malice and fraud so as to justify the award of punitive and exemplary damages.  
11

12 **THIRD CLAIM FOR RELIEF**

13 **Negligent Misrepresentation**  
14 **(By San Francisco Against Defendant ES&S)**

15 48. San Francisco restates and incorporates all of the above paragraphs as though fully  
16 set forth herein.

17 49. Defendant ES&S made the false representations set forth in paragraph 40 above  
18 without any reasonable ground for believing them to be true. Among other things, ES&S was  
19 aware or should have been aware that (a) at all relevant times California law provided that "[n]o  
20 voting system, in whole or in part, shall be used unless it has received the approval of the Secretary  
21 of State prior to any election at which it is to be first used" (Cal. Elec. Code § 19201(a)); that the  
22 California Elections Code prohibited modifications of voting equipment and machines, without  
23 prior approval and authorization by the Secretary of State (see Cal. Elec. Code §§ 18564.5, 19213);  
24 and that on August 3, 2005, the California Secretary of State issued a conditional certification of the  
25 ES&S voting system, including the AutoMARK A100, stating that "[n]o substitution or  
26 modification of the voting systems shall be made with respect to any component of the voting  
27 systems, including the Procedures, until the Secretary of State has been notified in writing and has  
28 determined that the proposed modification does not impair the accuracy and efficiency of the voting  
systems sufficient to require a re-examination and approval." (See Exhibit Q.) ES&S knew that the  
machines it provided to San Francisco were not the certified AutoMARK A100 machines but were  
instead AutoMARK A200 machines that it had never submitted to the Secretary of State for  
approval.



1           54. Section 18564.5(a)(5) of the California Elections Code provides that any local  
2 elections official may bring a civil action against a business or legal entity that, before, during, or  
3 after an election, "[k]nowingly, and without authorization, inserts or causes the insertion of  
4 uncertified hardware, software, or firmware, for whatever purpose, into any voting machine, voting  
5 device, voting system, vote tabulating device, or ballot tally software."

6           55. Defendant ES&S violated section 18564.5(a)(5) by committing the following acts:

- 7           a. Knowingly inserting uncertified hardware, software and/or firmware into a  
8 voting machine or device, the AutoMARK A100, without the authorization  
9 of either the California Secretary of State or the Department of Elections for  
10 San Francisco; and
- 11           b. Knowingly inserting the AutoMARK A200, an uncertified voting machine  
12 into the voting system used in San Francisco elections without the  
13 authorization of either the California Secretary of State or the Department of  
14 Elections for San Francisco.

15           56. Section 18564.5(a)(6) of the California Elections Code provides that any local  
16 elections official may bring a civil action against a business or legal entity that, before, during, or  
17 after an election, "[f]ails to notify the Secretary of State prior to any change in hardware, software,  
18 or firmware to a voting machine, voting device, voting system, or vote tabulating device, certified  
19 or conditionally certified for use in this state."

20           57. Defendant ES&S has violated section 18564.5(a)(6) by failing to notify the Secretary  
21 of State prior to changes in the hardware, software and/or firmware to the AutoMARK A100. The  
22 Secretary of State conditionally certified the AutoMARK A100 for use in the City's June and  
23 November 2006 elections.

24           58. Defendant ES&S committed the aforementioned acts before the City's June and  
25 November 2006 elections.

26           59. Section 18564.5(b) of the California Elections Code provides that in any civil action  
27 brought pursuant to either section 18564.5(a)(5) or 18564.5(a)(6), the violator will be subject to a  
28 civil penalty of \$50,000 per violation and appropriate injunctive relief. Due to its shipment of 565  
uncertified AutoMARKs to San Francisco that were used in two separate elections, ES&S has  
committed at least 1,130 violations of this statute.

**FIFTH CLAIM FOR RELIEF**

**Violations of California False Claims Act  
(California Government Code § 12650, et seq.)  
(By San Francisco Against Defendant ES&S)**

1  
2  
3 60. San Francisco restates and incorporates all of the above paragraphs as though fully  
4 set forth herein.

5 61. Under the California False Claims Act, any person, corporation or business is liable  
6 to the affected political subdivision for three times the amount of damages which the political  
7 subdivision sustains, plus the costs of a civil action brought to recover such penalties or damages,  
8 and a civil penalty for each of the following acts committed by that person, corporation or business:

- 9 a. Knowingly presents or causes to be presented to an officer or employee of the  
10 state or of any political subdivision thereof, a false claim for payment or  
11 approval;  
12 b. Knowingly makes, uses, or causes to be made or used a false record or  
13 statement to get a false claim paid or approved by the state or by any political  
14 subdivision;  
15 c. Is authorized to make or deliver a document certifying receipt of property  
used or to be used by the state or by any political subdivision and knowingly  
makes or delivers a receipt that falsely represents the property used or to be  
used;

16 62. Defendant ES&S violated the California False Claims Act by committing the  
17 following acts:

- 18 a. Knowingly presenting to Suzanne Berg, former Deputy Director for the  
19 Department of Elections, a false claim for payment on May 31, 2006. See  
20 Exhibit I. The claim for payment was false because the underlying purchase  
21 agreement, the Fifth Amendment, promised the delivery of certified  
22 AutoMARK A100 machines whereas uncertified AutoMARK A200s were  
23 actually provided. Further, the claim stated that payment would be due upon  
24 acceptance of the AutoMARKs and receipt of Prop 41 and HAVA funds.  
One of the criteria for the City's acceptance of AutoMARKs was that the  
25 AutoMARK machines contained certified Firmware Version 1.0, the  
26 firmware associated with certified A100 machines. And the claim's reference  
27 to California Proposition 41 and HAVA funds as a condition of payment  
28 further falsely suggested that the machines provided would be AutoMARK  
A100s because in order to qualify for HAVA and Proposition 41 funds, the  
voting machines must be certified.  
b. Knowingly making a series of false statements in Section 20 of the  
Agreement, as amended by paragraph 17(f) of the Fifth Amendment,  
providing that the AutoMARK ballot-marking machines sold to San  
Francisco would not require further state certification for use in the City's  
elections. See Exhibit F. On information and belief, Defendant ES&S

1 knowingly made those statements to get a false claim, the May 31, 2006  
2 invoice, approved by San Francisco.

3 c. Section 16.A of the Agreement, authorized the delivery and completion of  
4 documentation attesting that the property to be used was acceptable. See  
5 Exhibit F. Concurrent with the delivery of the AutoMARK machines, ES&S  
6 employees completed "ACCEPTANCE CRITERIA" checklists certifying the  
7 property to be used by San Francisco. ES&S personnel filled out a checklist  
8 for each machine and delivered those checklists to Elections Department staff  
9 in early May 2006. Each checklist states that every machine contained  
10 "Firmware Version 1.0." See Exhibit R. The AutoMARK machines sent to  
11 San Francisco did not, in fact, contain the certified Firmware Version 1.0  
12 provided with A100 machines, thus falsely representing the property to be  
13 used by the City in its elections.

14 63. The False Claims Act provides that any person who knowingly submits or causes to  
15 be submitted a false or fraudulent claim to the government for payment or approval is liable for a  
16 civil penalty of up to \$10,000 for each such claim submitted or paid, plus three times the amount of  
17 damages sustained by the government.

18 64. As a direct and proximate result of Defendant's false claims and statements, San  
19 Francisco has been damaged in the amount of \$3,792,105.22, the price of the AutoMARK voting  
20 machines purchased by San Francisco, plus all un-reimbursed costs to borrow certified  
21 AutoMARKs from a neighboring county and to convert them for use in San Francisco elections.  
22 Whereas the full extent of such damages and penalties have not yet been ascertained, San Francisco  
23 reserves its right to later amend this Complaint, to allege further false claims as discovery allows the  
24 investigation of such claims, to affix those damages when they are determined with greater certainty  
25 and to assess such penalties and treble damages allowable under the Act.

#### 26 SIXTH CLAIM FOR RELIEF

##### 27 Unfair Competition 28 (California Business & Professions Code § 17200, et seq.) (By the People Against Defendant ES&S)

65. Plaintiff People of the State of California, acting by and through San Francisco City  
Attorney Dennis J. Herrera, restate and incorporate all of the above paragraphs as though fully set  
forth here.

66. Section 17200 of the California Business and Professions Code provides that unfair  
competition shall mean and include any "unlawful, unfair, or fraudulent business act or practice and  
unfair, deceptive, untrue or misleading advertising."



2. Exemplary or punitive damages in an amount sufficient to punish and deter;
3. Costs of suit incurred, including costs of investigation and court costs;
4. Interest on sums due; and
5. Such other and further relief as the Court deems just and proper.

**Third Claim for Relief (Negligent Misrepresentation):**

1. General, consequential, and compensatory damages according to proof;
2. Costs of suit incurred, including costs of investigation and court costs;
3. Interest on sums due; and
4. Such other and further relief as the Court deems just and proper.

**Fourth Claim for Relief (Violations of California Elections Code):**

1. Pursuant to Elections Code Section 18564.5(b), assessment of a civil penalty not to exceed fifty thousand dollars (\$50,000) for each violation of section 18564.5(a), based on the number of violations and penalty amount per violation to be ascertained in accordance with the evidence. These penalties shall be cumulative to any other penalties or other remedy;
2. Pursuant to Elections Code Section 18564.5(b) and the Court's equitable power, an order enjoining Defendant ES&S from performing or proposing to commit any of the aforementioned violations of the California Elections Code within California;
3. Pursuant to Elections Code Section 18564.5(b) and the Court's equitable power, an order that the Department of Elections for San Francisco recover its costs, including costs of investigation and suit incurred by San Francisco and its departments, including the City Attorney's Office;
4. Pursuant to Elections Code Section 18564.5(b) and the Court's equitable power, an order that Defendant remove and/or replace any uncertified hardware, software, or firmware that it inserted or caused to insert, for whatever purpose, into any voting machine, voting device, voting system, vote tabulating device, or ballot tally software, without authorization from either the California Secretary of State or the Department of Elections for San Francisco;
5. Pursuant to Elections Code Section 18564.5(b) and the Court's equitable power, an order that Defendant remove and/or replace any change in hardware, software, or firmware to a voting machine, voting device, voting system, or vote tabulating device, certified or conditionally certified for use in this state, for which it did not provide prior notification to the California Secretary of State;
6. Such other and further relief as this Court may deem just and proper.

**Fifth Claim for Relief (Violations of California False Claims Act):**

1. General, consequential, and compensatory damages according to proof;

2. Damages in an amount equal to three times the amount of actual damages suffered by San Francisco;
3. Penalties in an amount equal to \$10,000 for each false claim, as ascertained in accordance with the evidence;
4. Costs of suit incurred, including costs of investigation and court costs;
5. Interest on sums due; and
6. Such other and further relief as the Court may deem proper.

**Sixth Claim for Relief (Unfair Competition):**

1. Pursuant to Business & Professions Code Section 17206, assessment of a civil penalty not to exceed two thousand, five hundred dollars (\$2,500) for each violation of section 17200, based on the number of violations and penalty amount per violation to be ascertained in accordance with the evidence. These penalties shall be cumulative to any other penalties or other remedy;
2. Pursuant to Business & Professions Code section 17203 and 17204, an order enjoining Defendant ES&S from performing or proposing to perform any of the aforementioned acts of unfair competition within California;
3. Pursuant to Business & Professions Code section 17203, an order requiring Defendant ES&S to restore to San Francisco and the other victims of its practices the amounts obtained through the aforementioned acts of unfair competition, cumulative to any other remedy;
4. Imposition of a constructive trust upon any and all funds in Defendant's possession obtained through acts of unfair competition;
5. Costs of suit;
6. Such other and further relief as this Court deems just and proper in order to fully and successfully dissipate the effects of the unfair, fraudulent and unlawful acts, practices and patterns of conduct complained of herein.

Dated: November 20, 2007

DENNIS J. HERRERA  
City Attorney  
THERESE STEWART,  
Chief Deputy City Attorney  
JAMES M. EMERY  
ANDREW SHEN  
ANN M. O'LEARY  
Deputy City Attorneys

By: \_\_\_\_\_  
JAMES M. EMERY

Attorneys for Plaintiffs  
CITY AND COUNTY OF SAN FRANCISCO, et al.

1 **DEMAND FOR JURY TRIAL**

2 Plaintiffs hereby demand a jury trial in the above-entitled action.

3  
4 Dated: November 20, 2007

5 DENNIS J. HERRERA  
6 City Attorney  
7 THERESE STEWART,  
8 Chief Deputy City Attorney  
9 JAMES M. EMERY  
ANDREW SHEN  
ANN M. O'LEARY  
Deputy City Attorneys

10 By: \_\_\_\_\_  
11 JAMES M. EMERY

12 Attorneys for Plaintiffs  
13 CITY AND COUNTY OF SAN FRANCISCO, et al.  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28