

1 IRWIN M. ZALKIN, ESQ. (#89957)
2 DEVIN M. STOREY, ESQ. (#234271)
3 ALEXANDER S. ZALKIN, ESQ. (#280813)
4 RYAN M. COHEN, ESQ. (#261313)
5 The Zalkin Law Firm, P.C.
6 12555 High Bluff Drive, Suite 301
7 San Diego, CA 92130
8 Tel: 858-259-3011
9 Fax: 858-259-3015
10 Email: Irwin@zalkin.com
11 dms@zalkin.com
12 alex@zalkin.com
13 ryan@zalkin.com

14 WILLIAM LITVAK, ESQ. (#90533)
15 Dapeer, Rosenblit & Litvak, LLP
16 11500 W. Olympic Blvd., Suite 550
17 Los Angeles, CA 90064-1524
18 Tel: 310-477-5575
19 Fax: 310-477-7090
20 Email: wlitvak@rllaw.com

21 Attorneys for Plaintiff

22 **UNITED STATES DISTRICT COURT**
23 **NORTHERN DISTRICT OF CALIFORNIA**

24 **HEATHER MARLOWE**, an individual,
25 Plaintiff,

26 vs.

27 **CITY AND COUNTY OF SAN**
28 **FRANCISCO**, a governmental entity;
29 **SUZY LOFTUS**, individually and in her
30 official capacity as President of the San
31 Francisco Police Commission; **GREG**
32 **SURH**, individually and in his official
33 capacity as Chief of Police of the San
34 Francisco Police Department; **MIKAIL**
35 **ALI**, individually and in his official
36 capacity of Deputy Chief of the San
37 Francisco Police Department; **JOE**
38 **CORDES**, individually and in his official
39 capacity as an officer of the San Francisco
40 Police Department; and Does 6 through
41 100, inclusive,

42 Defendants.

Case No.:

COMPLAINT FOR DAMAGES

1. **VIOLATION OF
SUBSTANTIVE DUE PROCESS,
42 U.S.C. § 1983**
2. **VIOLATION OF EQUAL
PROTECTION,
42 U.S.C. § 1983**
3. **VIOLATION OF EQUAL
PROTECTION,
CALIFORNIA CONSTITUTION
ARTICLE 1, § 7**

[DEMAND FOR JURY TRIAL]

Date of Filing: January 6, 2016

1 **NATURE OF ACTION**

- 2 1. Plaintiff is an individual who reported her sexual assault to the San Francisco Police
3 Department (“SFPD”). The SFPD failed to investigate diligently the allegations made
4 by Plaintiff, including failing to test Plaintiff’s rape kit. Plaintiff seeks damages resulting
5 from violations of due process, equal protection, and the California Constitution.
6 Plaintiff also seeks a writ of mandate to compel the City and County of San Francisco to
7 test her rape kit, or in the alternative, release the results of her tested rape kit to Plaintiff.

8 **PARTIES, JURISDICTION AND VENUE**

- 9 2. Plaintiff Heather Marlowe (“Marlowe”) is an individual, and at all times relevant was a
10 citizen and resident of the County of San Francisco, State of California.
11 3. Defendant City and County of San Francisco (“San Francisco”), is a consolidated city-
12 county located in California, and operates the SFPD.
13 4. Defendant Suzy Loftus was, at all times relevant, President of the San Francisco Police
14 Commission. As stated on its website (<http://sf-police.org/index.aspx?page=2572>), “The
15 mission of the Police Commission is to set policy for the Police Department...”
16 5. Defendant Greg Suhr is, and was at all times relevant, the Chief of Police of the SFPD.
17 Defendant Suhr is responsible for overseeing the entire SFPD.
18 6. Defendant Mikail Ali is, and was at all times relevant, Deputy Chief of the SFPD in
19 charge of the Forensic Division, which includes oversight of the SFPD forensic lab.
20 7. Defendant Joe Cordes was at all times relevant, an officer with the SFPD.
21 8. This action is brought pursuant to 42 U.S.C. § 1983, the Constitution of the State of
22 California, and the common law.
23 9. This Court has original jurisdiction over this matter pursuant to 28 U.S.C. § 1331 and §
24 1343, and supplemental jurisdiction pursuant to 28 U.S.C. § 1367.
25 10. Venue is proper in this district, pursuant to 28 U.S.C. § 1391, because the Defendants
26 reside in this district and all wrongful acts and injuries occurred in this district.

27 **ALLEGATIONS OF WRONGFUL CONDUCT**

- 28 11. On April 6, 2010, Marlowe attended Bay to Breakers, a city-sponsored race, with a

1 group of friends.

2 12. While at Bay to Breakers, Marlowe was handed a beer in a red plastic cup by a male
3 attendee, and Marlowe drank the beer.

4 13. Subsequently, Marlowe began feeling much more inebriated than would have been
5 normal given her moderate alcohol consumption up to that point. Marlowe regained
6 consciousness inside an unfamiliar home approximately 8 hours after she was last seen
7 at Bay to Breakers. Marlowe was physically injured, experienced vaginal and pelvic
8 pain, was nauseous and vomited several times, was dazed, confused, and had no memory
9 of what had occurred in the house.

10 14. After gathering herself, Marlowe went to the nearest emergency room and contacted
11 SFPD. SFPD arrived thereafter, and drove Marlowe to San Francisco General Hospital
12 (“Hospital”).

13 15. While at Hospital, Marlowe underwent a “rape kit” procedure performed by a Sexual
14 Assault Nurse Examiner (“SANE”) nurse.

15 16. At the end of the “rape kit” examination, Marlowe was assured by Hospital and SFPD
16 that the results would be processed, and the results would be returned to her within
17 fourteen (14) to sixty (60) days.

18 17. Around May 17, 2010, Marlowe returned to the neighborhood where she believed the
19 house was located in which the rape occurred. She recognized what she believed to be
20 the house in which it occurred, and immediately called Officer Joe Cordes of the SFPD.

21 18. Around May 24, 2010, Marlowe met Cordes at the house that she had identified. They
22 knocked on the door and a man answered. Cordes demanded that Marlowe enter the
23 home while Cordes distracted the owner to see if Marlowe could identify the home as
24 the scene of her rape.

25 19. Cordes’ actions contributed to and increased the risk of harm to Marlowe, as well as
26 changed the risk of harm that otherwise existed. Marlowe was terrified that she would
27 encounter her rapist inside the home with no protection from Cordes or any other officer
28 of the SFPD.

- 1 20. As Marlowe searched the home, the home owner repeatedly yelled at Marlowe and
2 Cordes that Cordes had no search warrant.
- 3 21. Marlowe could not reasonably identify the home as the location of her rape.
- 4 22. Around May 25, 2010, Marlowe searched google for what she believed was the name of
5 her rapist. She found a picture of a man that resembled what she could remember of her
6 rapist (“Suspect”). Marlowe informed Cordes of this new information.
- 7 23. Around May 27, 2010, Marlowe met Cordes at the police station. Cordes instructed
8 Marlowe to make contact with Suspect, and flirt with him in order to elicit a confession
9 that Suspect had indeed raped Marlowe. Cordes also instructed Marlowe to set up a date
10 with Suspect to prove that Marlowe could identify Suspect in a crowd. Cordes told
11 Marlowe that if she refused to engage in these actions, SFPD would cease its
12 investigation of her rape.
- 13 24. Around June 8, 2010, Marlowe again met with Cordes at the police station to clarify
14 what Cordes wanted Marlowe to do. At this time, Cordes strongly discouraged Marlowe
15 from further pursuing her case, indicating that it was too much work for the SFPD to
16 investigate and prosecute a rape in which alcohol was involved.
- 17 25. Nonetheless, Marlowe continued to pursue the investigation. Marlowe created an alias
18 and began communicating with Suspect. Marlowe purchased a disposable mobile phone
19 in order to text with Suspect, without revealing her true phone number. Eventually,
20 Marlowe set up a “date” with Suspect, as required by Cordes. Suspect canceled the
21 “date” and subsequently cancelled a second “date” that the two had set up.
- 22 26. Marlowe then contacted SFPD and informed them that she refused to continue to
23 privately investigate her case. In response, SFPD informed Marlowe that they had
24 brought Suspect in for questioning and had obtained a DNA sample from him.
- 25 27. Marlowe was also told that Suspect’s DNA was sent to the lab for processing, and that
26 the results of her “rape kit” should be available “any day now.”
- 27 28. Marlowe contacted SFPD on December 14, 2010 to request an update on the processing
28 of her rape kit. On December 15, 2010, Marlowe received a call back from Officer

1 Hutchings, informing Marlowe that neither her rape kit, nor Suspect's DNA had yet
2 been processed. Hutchings told Marlowe to call back in six months to check if her rape
3 kit, and Suspect's DNA had been processed.

4 29. On or about May 15th, 2011, Marlowe contacted SFPD to follow up on the status of her
5 rape kit processing. Marlowe was told that because there was such a "backlog" at the lab
6 of more "important crimes" that it could substantially more time until the processing of
7 her rape kit. She was told that Suspect's DNA may also be in a different lab, but that
8 SFPD did not know the exact the location of Suspect's DNA. Marlowe was told to keep
9 "following up," and that eventually the "rape kit" would be processed.

10 30. On or about December 2011, Marlowe contacted SFPD. Marlowe was again told that
11 the lab was backed up but that they will eventually get the rape kit processed. Marlowe
12 was also told that SFPD was having trouble locating Suspect's DNA could not be
13 located by SFPD.

14 31. Around August 28, 2012, Marlowe went to the SFPD station to follow up on the status
15 of her rape kit. Marlowe was told that due to the passage of time, her case was
16 considered "inactive" and was placed in a storage facility. SFPD also told Marlowe that
17 because she was "a woman," "weighs less than men," and has her "menstruations," that
18 Marlowe should not have been out partying with the rest of the city on the day she was
19 drugged, kidnapped, and forcibly raped.

20 32. Despite these comments, Marlowe asked SFPD to retrieve her case from storage. SFPD
21 again told Marlowe to follow up in six months.

22 33. Around September 25, 2012, Marlowe reached out to a third party, well connected
23 woman ("Woman") who had seen a performance written and performed by Marlowe
24 about her experience with the SFPD's investigation of her rape. Woman connected
25 Marlowe with a person at Victim's Services, an entity affiliated with SFPD.

26 34. After several attempts Marlowe was unable to connect with this Victim's services
27 representative. Woman then offered to reach out to California Attorney General Kamala
28 Harris and San Francisco Police Commissioner Suzy Loftus to get Marlowe's rape kit

1 tested.

2 35. On October 18, 2012, Loftus informed Marlowe that her rape kit had been sent to the lab
3 to be processed.

4 36. On October 20, 2012, SFPD informed Marlowe that her rape kit was tested and placed in
5 their DNA database known as CODIS.

6 37. In November 2012, Marlowe learned of the national epidemic of law enforcement
7 agencies failing to process thousands of rape kits nationwide. Marlowe attempted to
8 contact Loftus to inquire about SFPD's processing of rape kits in light of this new
9 information, but Loftus never responded.

10 38. Subsequently, Loftus invited Marlowe to speak about her experience at a City Police
11 Commissioner's meeting.

12 39. On May 8, 2013, at the City Commissioner's meeting, city representatives gave a
13 glowing review of the SFPD lab and represented to Marlowe and the public that every
14 rape kit in its possession had been processed, and that there was no backlog of untested
15 rape kits.

16 40. Due to pressure by the media at the meeting, SFPD promised to perform an audit to
17 substantiate their claims that there was no backlog of rape kits, and that all rape kits had
18 been processed.

19 41. On January 14, 2104, Marlowe filed a Citizen's Complaint with Defendant San
20 Francisco.

21 42. Around February 20, 2014, SFPD announced the results of their audit. SFPD admitted
22 that they were in possession of several thousand untested rape kits. However, SFPD
23 only committed to testing 753 of the several thousand untested rape kits.

24 43. On December 10, 2014, SFPD issued a press release confirming that SFPD would only
25 be testing 753 of the several thousand untested rape kits it had identified in its audit.

26 44. Around March 28, 2015, Marlowe read an article in the San Francisco Chronicle that
27 outlined several ways in which the SFPD forensic lab was deficient, including but not
28 limited to, "irregularities" in the handling of several pieces of forensic evidence

1 including rape kit evidence, as well as employment and retention of technicians that had
2 failed proficiency tests.

3 45. Doubtful that her rape kit had in fact been processed, or processed correctly, Marlowe
4 made a Public Records Request under the Freedom of Information Act. On May 5, 2015
5 Marlowe learned that the results of her rape kit, and any other information pertaining to
6 it, were not “public records” subject to a Freedom of Information Act request.

7 46. To this day, Marlowe has never been given the results of her rape kit test, nor has she
8 been provided with any documentation to substantiate the oral representations that her
9 rape kit was, in fact, processed.

10 47. Based on information and belief, Marlowe’s rape kit has, to this day, yet to be processed
11 by the SFPD.

12 48. Furthermore, to this day, Marlowe has never been given any information, written or oral,
13 that Suspect’s DNA has been processed, nor has she been assured that Suspect’s DNA
14 was not lost by SFPD.

15 **SAN FRANCISCO’S POLICIES, PRACTICES AND CUSTOMS**

16 49. Defendant San Francisco had the policy, practice and/or custom of failing to diligently
17 investigate sexual assault allegations. For example, according to SFPD’s own internal
18 audit, several thousand rape kits, including 753 dating back to 2003, in SFPD’s
19 possession were not processed as of December 10, 2014.

20 50. Defendants failed to:

- 21 a. Assure that evidence was not lost;
- 22 b. Determine if an offense was committed;
- 23 c. Arrange for the timely analysis and evaluation of evidence;
- 24 d. Determine if other crimes may have been committed by the suspect;

25 51. On information and belief, the failure to investigate crimes of sexual assault were
26 consistent with an institutional practice of the SFPD, which was known to and ratified
27 by the City and County of San Francisco and its agents, the Defendant San Francisco
28 having failed to take any effective action to prevent the SFPD police personnel from

1 continuing to engage in such misconduct.

2 52. On information and belief, Defendant San Francisco had prior notice of the reckless,
3 willful and wanton, deliberate and/or intentional actions of their employees and agents,
4 but took no steps to train them, correct abuses of authority, or discourage the unlawful
5 use of authority. The failure to properly train their employees and agents included the
6 failure to instruct them as officers of the peace and in applicable laws of California.

7 53. On information and belief, Defendant San Francisco authorized, tolerated as institutional
8 practices, and ratified the misconduct above by:

- 9 a. Failing to properly supervise SFPD personnel;
- 10 b. Failing to properly train SFPD personnel;
- 11 c. Failing to properly discipline, restrict, and control employees, including but not
12 limited to, investigating crimes of sexual assault against females;
- 13 d. Failing to take adequate precautions in the hiring, promotion and retention of
14 police personnel;
- 15 e. Failing to protect and ensure evidence is not lost or mishandled; and
- 16 f. Failing to establish and/or assure the functioning of a bona fide and meaningful
17 departmental system for dealing with complaints of sexual assault, but instead
18 responding to such complaints with bureaucratic power and official denials
19 calculated to mislead the public.

20 54. Defendants Loftus, Suhr and Ali were all individually, and collectively, responsible for
21 creating and perpetuating the policy of failing to test rape kits.

22 **FIRST CAUSE OF ACTION**

23 **42 U.S.C. § 1983 - VIOLATION OF SUBSTANTIVE DUE PROCESS**

24 55. Plaintiff incorporates paragraphs 1 to 54 as if fully stated herein.

25 56. At all times relevant herein, Defendants and the SFPD acted under the color of the state.
26 Upon information and belief, the SFPD was following policies and procedures.

27 57. At all times relevant herein, Defendant knew that victims of sexual assault had provided
28 evidence of sexual assault, and that Defendants were not taking steps to investigate

1 properly the allegations.

2 58. Defendants had a duty to investigate diligently the allegations and to submit the sexual
3 assault kits for testing.

4 59. At all times relevant herein, Defendants with deliberate indifference, intentionally,
5 willfully and wantonly, and/or with reckless disregard deprived Plaintiff of rights and/or
6 privileges secured by the constitution, including but not limited to:

7 a. Defendants violated Plaintiff's Due Process Clause property interests in her
8 DNA samples, which had been provided and stored at the SFPD's facility, and
9 her right to redress in the courts, by failing to investigate, by either failing to
10 submit sexual assault kits for testing or failing to report the results to the victims
11 whose kits were tested, or arrest the accused;

12 b. Defendants violated Plaintiff's Due Process Clause property interests in her
13 persons, by failing to investigate, by either failing to submit sexual assault kits
14 for testing or failing to report the results to the victims whose kits were tested, or
15 arrest the accused.

16 60. Defendants with deliberate indifference, failed to train its police officers as to the rights
17 of persons with whom the police come into contact, including but not limited to
18 Marlowe.

19 61. Defendants' deliberate indifference, and willful and wanton behavior, created a danger
20 of and increased the risk of harm by sexual abuse.

21 62. Defendants violated Plaintiff's civil rights by having an express policy that, when
22 enforced, caused a constitutional deprivation to Plaintiff, or by having a widespread
23 practice and/or custom that, although not authorized by written law or express municipal
24 policy, was so permanent and well settled as to constitute a custom or usage with the
25 force of law.

26 63. The constitutional injury inflicted by Defendants was caused by a person with final
27 policymaking authority at The City and County of San Francisco.

28 64. Defendants knew about the above-described conduct and facilitated it, approved it,

1 Marlowe.

2 72. Defendants' deliberate indifference, and willful and wanton behavior, created a danger
3 of and increased the risk of harm by sexual abuse.

4 73. Defendants' conduct was motivated by gender.

5 74. Defendants' conduct was intentional, and due to Plaintiff's female gender.

6 75. Defendants have a history of discriminating against females. Defendants have treated
7 sexual assault reports from women with less priority than other crimes not involving
8 women reporting sexual assaults.

9 76. Defendants violated Plaintiff's civil rights by having an express policy that, when
10 enforced, had the effect of discriminating against women based solely on their gender.

11 77. Defendants violated Plaintiff's civil rights by having an express policy that, when
12 enforced, caused a constitutional deprivation to Plaintiff, or by having a widespread
13 practice and/or custom that, although not authorized by written law or express municipal
14 policy, was so permanent and well settled as to constitute a custom or usage with the
15 force of law.

16 78. The constitutional injury inflicted by Defendants was caused by a person with final
17 policymaking authority at The City and County of San Francisco.

18 79. Defendants knew about the above-described conduct and facilitated it, approved it,
19 condoned it, and/or turned a blind eye to the conduct.

20 80. The above-described conduct of Defendants constitutes a violation of Section 1983.
21 Plaintiff is entitled to compensatory damages for physical injury, emotional pain,
22 suffering, mental anguish and other non-pecuniary losses.

23 **THIRD CAUSE OF ACTION**

24 **CALIFORNIA CONSTITUTION ARTICLE 1, § 7 – VIOLATION OF EQUAL**
25 **PROTECTION**

26 81. Plaintiff incorporates paragraphs 1 to 54 as if fully stated herein.

27 82. Defendants violated Plaintiff's civil rights by having an express policy of failing to
28 properly investigate sexual assault reports made by women that, when enforced, caused

1 a constitutional deprivation to Plaintiff, or by having a widespread practice and/or
2 custom of failing to properly investigate sexual assault reports made by women that,
3 although not authorized by written law or express municipal policy, was so permanent
4 and well settled as to constitute a custom or usage with the force of law.

5 83. This policy was intentional and, when enforced, had a discriminatory impact on women.

6 84. The constitutional injury inflicted by Defendants was caused by a person with final
7 policymaking authority at The City and County of San Francisco.

8 85. Defendants knew about the above-described conduct and facilitated it, approved it,
9 condoned it, and/or turned a blind eye to the conduct.

10 86. The above-described conduct of Defendants constitutes a violation Article 1, § 7 of the
11 California Constitution. Plaintiff is entitled to compensatory damages for physical
12 injury, emotional pain, suffering, mental anguish and other non-pecuniary losses.

13 **REMEDIES, COSTS AND ATTORNEY'S FEES**

14 87. Plaintiff incorporates paragraphs 1 to 86 as if fully stated herein.

15 88. Pursuant to [Code of Civil Procedure section 1085](#), Plaintiff is entitled to a writ of
16 mandate to compel Defendant San Francisco to test Plaintiff's rape kit, or if the rape kit
17 has been tested provide Plaintiff with the results of the test. Petitioner is further entitled
18 to damages under [Code of Civil Procedure section 1095](#).

19 89. Plaintiff is entitled to recover reasonable costs, including attorney fees under the Civil
20 Rights Act ([42 U.S.C., § 1988](#)), to enforce constitutional rights in the administrative and
21 judicial proceedings.

22
23 **WHEREFORE**, Plaintiffs pray for a writ of mandate compelling Defendant San
24 Francisco to test Plaintiff's rape kit or release the results of the processed rape kit to Plaintiff;
25 damages; costs; interest; statutory/civil penalties according to law; attorneys' fees and costs of
26 litigation pursuant to 42 U.S.C. §1988 or other applicable law; and such other relief as the court
27 deems appropriate and just.

28 **DEMAND FOR TRIAL BY JURY**

1 NOW COME Plaintiff, by and through her counsel, and hereby demands a trial by jury
2 as to all of those issues so triable as of right.

3
4 Date: January 6, 2016

Respectfully submitted,

5 By: /s/ Alexander S. Zalkin
Alexander S. Zalkin

6 THE ZALKIN LAW FIRM, P.C.
7 IRWIN M. ZALKIN
8 DEVIN M. STOREY
9 ALEXANDER S. ZALKIN
RYAN M. COHEN

10 DAPEER, ROSENBLIT & LITVACK LLP
11 WILLIAM LITVAK, ESQ.

12 Attorneys for Plaintiff
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28