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 a minor by and through her Guardian Ad Litem, Isela Gonzalez,
 12 and KANANI BOYD, a minor by and through her
 Guardian Ad Litem, Kamilah Boyd
 13

14 **UNITED STATES DISTRICT COURT**
 15 **NORTHERN DISTRICT OF CALIFORNIA**
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17 MARYLON BOYD, individually and as
 Executor of the Estate of CAMMERIN BOYD,
 18 ISABEL GONZALEZ, a minor by and through
 her Guardian Ad Litem, Isela Gonzalez, and
 19 KANANI BOYD, a minor by and through her
 Guardian Ad Litem, Kamilah Boyd,
 20

21 Plaintiffs,

22 vs.

23 CITY AND COUNTY OF SAN FRANCISCO,
 HEATHER J. FONG, WILLIAM ELIEFF,
 24 GREGORY KANE, JAMES O'MALLEY,
 TIMOTHY PAINE, STEVEN STEARNS, and
 25 DOES 1 to 10, inclusive,

26 Defendants.

CASE NO.: CV 04-5459-MMC

**PLAINTIFFS' JOINT NOTICE OF
 MOTION AND MOTION FOR LEAVE OF
 COURT FOR PLAINTIFFS TO FILE AN
 AMENDED COMPLAINT;
 MEMORANDUM OF POINTS AND
 AUTHORITIES AND DECLARATION OF
 DALE K. GALIPO IN SUPPORT
 THEREOF**

Date of Hearing: December 22, 2006
 Time of Hearing: 9:00 a.m.
 Courtroom No: 7

27
 28 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

1 PLEASE TAKE NOTICE that on December 22, 2006 at 9:00 a.m., or as soon
2 thereafter as this matter may be heard in Courtroom 7 of the above-entitled Court,
3 located at 450 Golden Gate Avenue, in the City of San Francisco, California, the
4 Plaintiffs, will and hereby do move this Court for an Order for Leave of Court for
5 Plaintiffs to File an Amended Complaint.

6 Plaintiffs and defendants have stipulated to allow amendment to the complaint and to
7 deem the defendants' answer to the plaintiffs' original complaint the answer to the plaintiffs'
8 first amended complaint. Plaintiffs make this motion to the Court for an order granting leave
9 to amend the complaint to add an eighth cause of action for battery. A copy of the proposed
10 First Amended Complaint is attached hereto as Exhibit "1." A copy of the stipulation to
11 amend the complaint is attached hereto as Exhibit "2."

12 This motion is being made pursuant to Federal Rules of Civil Procedure Sections 7(b)
13 and 15(a) and on the grounds that such an amendment to the complaint is necessary to
14 preserve the rights and claims of the plaintiffs and would serve the interests of justice.
15 Furthermore, allowing plaintiffs to amend the complaint would not cause undue delay or
16 prejudice defendants, as the facts supporting the current contentions and causes of action in the
17 complaint also support a battery cause of action against defendants OFFICERS WILLIAM
18 ELIEFF, GREGORY KANE, JAMES O'MALLEY, TIMOTHY PAINE, STEVEN
19 STEARNS, and DOES 5 through 10. Specifically, the allegations of shots fired striking the
20 decedent and the decedent's vehicle support the battery cause of action. The shots fired at the
21 decedent, by the defendants included shots fired at the decedent while the decedent was in his
22 vehicle and shots fired at the decedent after the decedent exited his vehicle.

23 This motion is based on this notice of motion, the attached memorandum of points and
24 authorities, the attached Declaration of Dale K. Galipo, upon the proposed First Amended
25 Complaint, the stipulation by plaintiffs and defendants, the pleadings on file herein, and upon
26 such other oral and documentary evidence as may be presented at the time of the hearing.

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1 I hereby attest that I have on file all holograph signatures for any signatures indicated
2 by a "conformed" signature (/S/) within this efiled document.

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4 LAW OFFICES OF DALE K. GALIPO

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7 DATE: November 13, 2006

8 _____
9 /S/
10 DALE K. GALIPO
11 Attorneys for Plaintiff MARYLON BOYD,
12 Individually, and as Executor of the Estate of
13 Cammerin Boyd

14
15 LAW OFFICES OF VICKI I. SARMIENTO

16
17
18 Dated: November 13, 2006

19 _____
20 /S/
21 VICKI I. SARMIENTO
22 Attorneys for Plaintiffs ISABEL
23 GONZALEZ, a minor by and through her
24 Guardian Ad Litem, Isela Gonzalez, and
25 KANANI BOYD, a minor by and through her
26 Guardian Ad Litem, Kamilah Boyd

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 This case arises out the shooting death of Cammerin Boyd, which occurred on May 5,
5 2004, at Larch Way in the City of San Francisco and in front of numerous witnesses. The
6 decedent was an African-American male, and a double amputee with prosthetic legs below the
7 knees. It is the plaintiffs' contention that Mr. Boyd was unarmed and posed no immediate
8 threat of death or serious bodily injury to the officers or anyone else at the time he was shot
9 and killed by the defendants. Plaintiffs further contend that, Mr. Boyd had voluntarily
10 surrendered to the police and had his hands raised when he was shot.

11 The defendants, Officers WILLIAM ELIEFF, GREGORY KANE, JAMES
12 O'MALLEY, TIMOTHY PAINE, STEVEN STEARNS, and DOES 5 through 10 engaged the
13 decedent in a pursuit, which ended at Larch Way, a residential area of the City of San
14 Francisco. The defendants fired rounds at Mr. Boyd while he was in his vehicle and after he
15 exited his vehicle. Both Mr. Boyd and Mr. Boyd's vehicle was struck by the gunfire,
16 supporting the proposed battery cause of action.

17 Plaintiffs now move to amend the complaint pursuant to Rule 15(a) and Rule 15(c)
18 Federal Rules of Civil Procedure. Plaintiffs seek to add "battery" as an eighth cause of action
19 to the complaint. The battery cause of action alleges the same underlying facts and involves
20 the same parties, but alleges an alternate theory of wrongful death under state law. Plaintiff
21 Marylon Boyd's new counsel has substituted in as attorney of record for Ms. Boyd, and has
22 recently taken the defendants' depositions and believes this proposed amendment is
23 appropriate under the facts and related law. Plaintiffs propose no other amendments to the
24 complaint and believe the proposed amendment will not cause any undue delay or prejudice to
25 the defendants. Plaintiffs and defendants have stipulated to allow amendment to the complaint
26 and to deem the defendants' answer to the plaintiffs' original complaint the answer to the
27 plaintiffs' first amended complaint.

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II.

**THERE IS A STRONG POLICY PERMITTING
AMENDMENTS TO PLEADINGS**

Federal Rules of Procedure Rule 15(a) requires that “leave shall be freely given when justice so requires.” And according to the Court in Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990), the policy favoring amendments to pleadings is to be applied with “extraordinary liberality.” In Moore v. Baker, 989 F.2d 1129, 1131 (11th Cir. 1993), the court held that, “justifying reasons must be apparent for denial of a motion to amend.” Further, the Court in Union Pacific Railroad Co. v. Nevada Power Co., 950 F.2d 1129, 1432 (9th Cir. 1991), held that, “Amendments seeking to add claims are to be granted more freely than amendments adding parties.” Moreover, the party seeking amendment need only establish the reason why amendment is required. The burden then shifts to the party opposing the motion to convince the Court that “justice” requires denial of the motion. Shipner v. Eastern airlines, Inc., 868 F.2d 401, 406-407 (5th Cir. 1989).

Plaintiffs contend that the defendants shot the decedent, Cammerin Boyd, and shot at his vehicle, with intent and without justification. The operative pleading as it stands is insufficient in regards to a battery cause of action, and therefore, justice requires an amendment to the complaint to preserve the plaintiffs’ rights in this matter. Furthermore, plaintiffs’ request for leave to amend the complaint is not being made in bad faith, will not cause undue delay, and will not unduly prejudice the defendants.

III.

**PLAINTIFFS’ REQUEST FOR LEAVE TO AMEND
SHOULD BE GRANTED AS THE REQUEST
IS NOT MADE IN BAD FAITH AND
WILL NOT UNDULY PREJUDICE THE DEFENDANTS**

Although the decision of whether to allow amendment is within the discretion of the trial court, FRCP 15 states that leave shall be freely given “when justice requires.” Froman v. Davis, 371 U.S. 178 (1962) (Citing FRCP 15). Courts, in turn, have concluded that the

1 statute's language favoring amendments to pleadings should be applied with extreme
2 liberality. DCD Programs, LTD. v. Leighton, 833 F.2d 183, 186 (1987) (Citing United States
3 v. Webb, 655 F.2d 977 at 979). In determining whether a request for leave to amend is "just"
4 and allowable, courts have developed a four-prong test. Courts will generally grant leave to
5 amend, unless an amendment is sought in bad faith, an amendment will cause undue delay, an
6 amendment will prejudice the opposing party, or an amendment constitutes an exercise in
7 futility. DCD Programs, 833 F.2d 183 at 186.

8 Based on the facts set forth above, plaintiffs respectfully request leave to amend the
9 complaint. The proposed amendment is not made in bad faith since the proposed amendment
10 is supported by facts alleged in the current complaint. The proposed amendment will not
11 cause undue delay or any real prejudice to the defendants. Plaintiffs and defendants have
12 stipulated to the proposed amendment.

13 It is in the interest of justice for the Court to permit the amendment as this will not
14 cause undue delay of the case or prejudice the defendants. Moreover, to justify denial of leave
15 to amend, the prejudice must be *substantial*. Morongo Band of Mission Indians v. Rose, 893
16 F.2d 1074, 1079 (9th Cir. 1990). While the original complaint does not specifically identify
17 battery as an independent cause of action, the facts alleged in the original complaint and
18 existing causes of action arising under 42 U.S.C. § 1983 and the Fourth and Fourteenth
19 Amendments to the U.S. Constitution clearly support battery as a viable cause of action.
20 Plaintiffs have been pursuing claims that allege that defendants caused a harmful or offensive
21 touching of the decedent without his consent, by shooting the decedent and the decedent's
22 vehicle, without justification. As such, defendants' burden in defending against a battery
23 cause of action is not a departure from their defense of plaintiffs' existing causes of action.
24 Accordingly, the proposed amendment to the complaint will not prejudice the defendants or
25 cause any undue delay in the prosecution of the case to a degree that warrants the denial of
26 leave to amend the complaint.

27 Finally, amending the complaint to add a battery cause of action would not be futile.
28 The allegations previously made by the plaintiffs provide a factual basis to allege a cause of

1 action for battery. Plaintiffs' proposed amendment is in the interest of justice and clearly falls
2 within the intent of Rule 15 (a) and 15 (c) of the Federal Rules of Civil Procedure. In essence,
3 the plaintiffs are not alleging new facts, but rather, an alternate theory of recovery under state
4 law.

5 **IV.**

6 **NECESSITY OF MOTION**

7 As set forth in the Declaration of Dale K. Galipo, plaintiffs sought a stipulation to the
8 amendments from defense counsel Blake P. Loeb, attorney for all the named defendants.
9 Defense counsel agreed to stipulate to adding an Eighth Cause of Action for battery. It is
10 unclear if a motion to amend the complaint is necessary given the stipulation to amend, but
11 Federal Rules of Civil Procedure 15(a) supports the filing of this motion.

12 **V.**

13 **CONCLUSION**

14 Plaintiffs respectfully request that the Court grant this motion and grant leave to
15 plaintiffs to amend the complaint as set forth in this motion, and in the proposed First
16 Amended Complaint filed concurrently herewith. A copy of the proposed First Amended
17 Complaint is attached hereto as Exhibit "1."

18 LAW OFFICES OF DALE K. GALIPO

19
20 DATE: November 13, 2006

/s/
DALE K. GALIPO
Attorneys for Plaintiff MARYLON BOYD,
Individually, and as Executor of the Estate of
Cammerin Boyd

24 LAW OFFICES OF VICKI I. SARMIENTO

25
26 DATE: November 13, 2006

/s/
VICKI I. SARMIENTO
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