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2 men hurt in fajita case try to revive suit against S.F.

NINTH U.S. CIRCUIT COURT OF APPEALS

By Bob Egelko

CHRONICLE STAFF WRITER

Lawyers for two men injured by off-duty San Francisco police in an argument over a bag of take-out fajitas asked a federal appeals court Wednesday to reinstate their lawsuit against the city, saying police officials deserved some responsibility for the beatings because they ignored one officer's history of brutality.

The hearing before the Ninth U.S. Circuit Court of Appeals in San Francisco was the latest round in the saga, which began with a late-night brawl outside a Union Street pub in November 2002. Adam Snyder and Jade Santoro said three off-duty officers attacked them after one of the officers demanded that Snyder hand over his bag of steak fajitas. Santoro suffered a gash to his head and a broken nose, and Snyder had minor injuries.

The officers - Matthew Tonsing, David Lee and Alex Fagan Jr., son of then-Assistant Chief Alex Fagan - denied attacking the two men and were acquitted of criminal charges. But a Superior Court

jury found in 2006 that Fagan and Tonsing had used excessive force and awarded \$46,000 in damages.

Snyder and Santoro also filed a civil suit against the city, claiming that a Police Department habit of condoning excessive force had led to their injuries. They

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cited police records showing that Fagan Jr., as a rookie officer, had used violence in 16 incidents in the 13 months before November 2002.

His supervisor had proposed counseling in September 2002, saying Fagan showed a "lack of anger management" and refused to follow orders, but the department had not carried out the plan at the time of the brawl, the plaintiffs noted.

U.S. District Judge Jeffrey White dismissed the suit in 2006, saying the city had no duty to protect

people from harm by off-duty officers, and finding no evidence that police officials should have foreseen or prevented the attack.

In a hearing Wednesday at the UC Berkeley law school, a lawyer for Snyder and Santoro urged the three-judge appellate panel

to revive the suit.

Fagan, in repeated incidents on the job, "was belligerent, he was pushy, he was confrontational, and he used excessive force," said attorney John Houston Scott. "He was led to believe he could get away with it as long as he was within the city limits."

Reinstating the lawsuit would give the plaintiffs a chance to hold the city accountable and also to receive damages, which they have been unable to collect from Fagan and Tonsing, attorney Scott said afterward.

Deputy City Attorney David Newdorf argued that nothing Fagan or the other officers had done on the job had put the Police Department on notice that they might engage in "random violence on the street."

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Two panel members questioned his position. Judge John Noonan asked Newdorf how a police department whose officers "beat up people" differed from the owner of a dangerous animal that repeatedly bites passers-by.

After Newdorf acknowledged that the Police Department had the power to discipline officers for off-duty conduct, Judge Sidney Thomas asked, "Doesn't that imply some responsibility?"

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