

HONORABLE LONNIE R. SUKO

HOWARD F. DELANEY
City Attorney
ROCCO N. TREPPEDI
Assistant City Attorney
OFFICE OF THE CITY ATTORNEY
808 W. Spokane Falls Blvd.
SPOKANE, WA 99201-3326
Telephone: (509)625-6225
Fax:(509)625-6277
Attorneys for Defendants

CARL ORESKOVICH, WSBA #12779
Etter, McMahon, Lamberson, Clary & Oreskovich, P.C.
Bank of Whitman, Suite 210
618 West Riverside Avenue
Spokane, WA 99201
(509) 747-9100
(509) 623-1439 Fax
Email: carl@ettermcmahon.com
Attorney for Karl Thompson

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ESTATE OF OTTO ZEHM, deceased, and
ANN ZEHM, in her personal capacity and
as representative of the Estate of Otto
Zehm,

Plaintiffs,

v.

CITY OF SPOKANE, JIM NICKS, KARL
THOMPSON, STEVEN BRAUN, ZACK
DAHLE, ERIN RALEIGH, DAN TOROK,
RON VOELLER, JASON UBERAGA, and
THERESA FERGUSON, each in their
personal and representative capacities,

Defendants.

NO. CV-09-80-LRS

DEFENDANTS' ANSWER TO
PLAINTIFFS' AMENDED COMPLAINT
FOR DAMAGES FOR VIOLATION OF
CIVIL RIGHTS AND STATE-BASED
CLAIMS, AFFIRMATIVE DEFENSES,
AND JURY DEMAND

Come now the defendants, City of Spokane, Jim Nicks, Karl Thompson,
Steven Braun, Zack Dahle, Erin Raleigh, Dan Torok, Ron Voeller, Jason Uberuaga,
DEFS' ANSWER TO PLTFs' AMENDED
COMPLAINT FOR DAMAGES ...,
AFFIRMATIVE DEFENSES, AND JURY
DEMAND – PAGE 1

HOWARD F. DELANEY, City Attorney
OFFICE OF THE CITY ATTORNEY
5th Floor Municipal Building
Spokane, WA 99201-3326
(509) 625-6225
FAX (509) 625-6277

1 and Theresa Ferguson, by and through their attorneys, Howard F. Delaney, City
2 Attorney, Rocco N. Treppiedi and Ellen M. O'Hara, Assistant City Attorneys, and
3 answer the plaintiffs' "Amended Complaint for Damages for Violation of Civil Rights
4 and State-Based Claims," dated April 24, 2009. Except as expressly admitted
5 below, all allegations are denied.
6

7 **I. PARTIES.**

8 1.1. Answering paragraph 1.1, on information and belief, these defendants
9 admit the same.
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11 1.2. Answering paragraph 1.2, on information and belief, these defendants
12 admit the same.

13 1.3. Answering paragraph 1.3, these defendants admit the same.

14 1.4. Answering paragraph 1.4, these defendants admit the same, except the
15 allegation regarding Jim Nicks to be a municipal policy maker is vague, and is
16 therefore denied.
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18 1.5. Answering paragraph 1.5, these defendants admit the same.

19 1.6. Answering paragraph 1.6, these defendants admit the same.
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21 1.7. Answering paragraph 1.7, these defendants admit that Jason
22 Uberuaga at all times pertinent to this complaint was a law enforcement officer
23 employed by the City of Spokane. The remainder of said paragraph relates to an
24 "Officer Walker" being sued in his personal and representative capacities. These
25 defendants assume this is a typographical error, and the allegation was meant to
26 pertain to Jason Uberuaga. Defendants admit Jason Uberuaga is sued in his
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1 personal and representative capacities. These defendants assert that the allegation
2 regarding Officer Walker in said paragraph is a legal conclusion to which no
3 response is required, and therefore deny the same.
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5 1.8. Answering paragraph 1.8, these defendants admit the same.

6 1.9. Answering paragraph 1.9, these defendants admit the same.

7 1.10. Answering paragraph 1.10, these defendants admit the same.

8 1.11. Answering paragraph 1.11, these defendants admit the same.

9 1.12. Answering paragraph 1.12, these defendants admit the same.
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11 **II. JURISDICTION.**

12 2.1. Answering paragraph 2.1, these defendants admit the same.

13 2.2. Answering paragraph 2.2, these defendants admit the same.

14 2.3. Answering paragraph 2.3, these defendants assert that the allegations
15 in said paragraph are legal conclusions to which no response is required, and
16 therefore deny the same.
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18 2.4. Answering paragraph 2.4, these defendants assert that the allegations
19 in said paragraph are legal conclusions to which no response is required, and
20 therefore deny the same.
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22 **SUPPLEMENTAL JURISDICTION.**

23 2.5. Answering paragraph 2.5, these defendants assert that the allegations
24 in said paragraph are legal conclusions to which no response is required, and
25 therefore deny the same.
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27 2.6. Answering paragraph 2.6, these defendants admit the same.

28 2.7. Answering paragraph 2.7, these defendants admit the same.

III. FACTS.

INTRODUCTION: RESPONSE TO ALLEGATIONS REGARDING SPOKANE POLICE TRAINING & POLICIES.

3.1. Answering paragraph 3.1, these defendants admit the same.

3.2. Answering paragraph 3.2, these defendants admit the same.

3.3. Answering paragraph 3.3, these defendants admit the policy of the

Spokane Police Department (SPD) at all relevant times, states, in pertinent part:

I. PURPOSE

This policy shall establish the professional philosophy of the Spokane Police Department relative to proper use of force in the performance of service to the community.

II. DISCLAIMER

This statement of policy and the accompanying procedures are for internal Departmental use only and are not to be applied to criminal or civil proceedings. They do not create a higher legal standard of safety or care with respect to third parties. Violation of procedures based on this policy may be the basis of administrative discipline only. Additionally, violations of the law may be the basis for civil and/or criminal penalties in a court of law.

III. POLICY

Officers of the Spokane Police Department may use force only when lawful and necessary, and shall use only that force which is reasonable under the totality of the circumstances. All force applications shall comply with all relevant laws, the Constitution of the United States, and the Constitution of the State of Washington. Force applications shall be consistent with the Spokane Police Department's philosophy of Integrated Force Management, founded upon the Department's use of force model, and in compliance with departmental training and the Defensive Tactics Manual.

Officers of the Department must generally employ the tools, tactics, and timing of force application consistent with the model's directions and departmental training modules. This policy, while requiring the officers to maintain controlled superiority over a subject, supports the practice of progressive application of force as part of a continuous risk assessment process. Risk is assessed objectively, based on the on-scene reasonable officer's perspective,

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taking into account the facts and circumstances of the particular situation that are known to the officer. When situations are reasonably stabilized, application of force must proportionally de-escalate or cease, in accordance with the subject’s actions, or when control is gained or threat is removed.

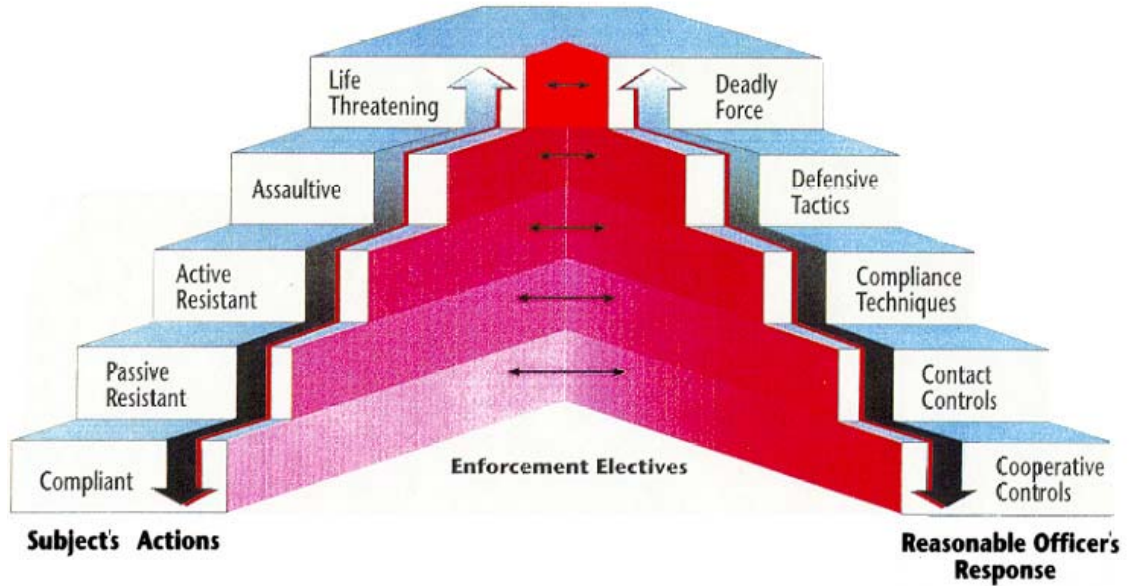
Due to the fact that officer/citizen confrontations occur in environments that are potentially unpredictable and are tense, uncertain, and rapidly evolving, officers may depart from the normally trained tools and tactics when necessary. All departures from trained tactics shall meet the same standard of reasonableness as those which have been previously identified and approved.

Due to the unique nature of K-9’s, they are covered separately in policy POL480L. However, all K-9 handlers must comply with this Use of Force policy and procedure in every circumstance when the K-9 is used for the detection and/or apprehension of a person.

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1 **IV. USE OF FORCE MODEL**

2 **Spokane Police Department**
3 **Integrated Force Management**
4 **USE OF FORCE MODEL**



15 **NOTE: The colors and shades in the depiction of the model are**
16 **important to an accurate understanding of it.**

17
18 The Department's use of force model is designed to proportionally
19 align the officer's use of force with the subject's actions. This model
20 also allows for escalation, stabilization, and de-escalation as the
21 subject's actions change. Although this model is in an escalating
22 progression, all tools and techniques need not be used and/or
23 exhausted prior to moving to a higher or lower level. Circumstances
24 will dictate response.

25 **V. DEFINITIONS**

26 The following definitions are for terms used throughout the policy.

27 **A. SUBJECT'S ACTIONS**

- 28 **1. Compliant** - Cooperative response to lawful commands.
- 2. Passive Resistant** - Noncompliance to lawful authority without physical resistance or mechanical enhancement.
- 3. Active Resistant** - Use of physical effort or mechanical assistance in achieving and/or maintaining noncompliance.
- 4. Assaultive** - Noncompliance perceived as or resulting in an

1 actual assault on an individual or officer. The scope and
2 severity of the attack would support the reasonable
3 assumption that the actions would not result in death or
4 great bodily harm.

5 **5. Life Threatening** - Reasonable perception that the imminent
6 and/or immediate actions of an individual could likely cause
7 the death of, or great bodily harm to, an individual or officer.

8 **B. OFFICER'S RESPONSE**

9 **1. Cooperative Controls** - Fundamentals of professional
10 training designed to be employed with compliant subjects
11 which capitalize on the acceptance of authority to gain
12 cooperation and control.

13 **2. Contact Controls** - Tactical skills designed to be deployed
14 upon passively resistant subjects to proportionally gain
15 control and cooperation.

16 **3. Compliance Techniques** - Tactical procedures and tools
17 designed to be deployed upon actively resistant subjects who
18 employ physical force or mechanical means to enhance
19 resistance or noncompliance.

20 **4. Defensive Tactics** - Tools and tactics designed to be
21 deployed upon the assaultive subject.

22 **5. Defensive Tactics Manual** - Manual which describes
23 authorized techniques and tools used in use of force
24 situations. This manual may serve as a guide during
25 training.

26 **6. Deadly Force** - The use of any force that is likely to cause
27 death. Deadly force does not include force that is not likely to
28 cause death or great bodily harm which unexpectedly results
in death or great bodily harm. Designed to be deployed upon
a life threatening subject.

7. Defense from Attack - Forceful countermeasures to a life
threatening subject to gain or regain control.

8. Controlled Superiority Principle - Principle that an officer
must always maintain balanced, controlled superiority over a
subject's level of noncompliance.

9. Draw and Direct - The forceful display of a tool by a police
officer to gain compliance or to de-escalate and stabilize a
subject.

10. Enforcement Elective - Tools, tactics, timing parameters,
techniques and training available at each level of force
application.

11. Force - Any effort toward detention or control.

12. Force Continuum - Continual risk assessment, including
escalation, stabilization, and de-escalation, relating to

1 proportional force application correlating the subject's
2 actions and reasonable officer's response.

- 3 **13. Great Bodily Harm - Serious Bodily Injury** - Bodily injury
4 which creates a probability of death, or which causes
5 significant serious permanent disfigurement, or which causes
6 a significant permanent loss or impairment of the function of
7 any bodily part or organ.
- 8 **14. Imminent Danger** - A danger that is either threatening,
9 menacing, impending, proximate, or immediate in nature.
10 Imminent danger is the threat as perceived by the on-scene
11 reasonable officer.
- 12 **15. Integrated Force Management** - The systematic alignment
13 of policy, training, practice, supervision and review of all
14 force-related issues and practices.
- 15 **16. Mechanical Assistance** - Use of any effort to further
16 noncompliance or resistance.
- 17 **17. Personal Weapons** - Use of body parts to gain or regain
18 control.
- 19 **18. Progressive Application of Force** - Patterned cause and
20 effect relationship of logic and law that correlates the
21 subject's action to the officer's response.
- 22 **19. Qualified Medical Assistance** - Shall include members of
23 any county or municipal fire department, ambulance service,
24 or health care facility, who are employed to apply and/or
25 administer first aid treatment.
- 26 **20. Reasonable Officer Standard** - Standard of professional
27 conduct relating to force application based on training,
28 experience, facts, and perceptions known to the officer at the
time.
- 21. Reportable Use of Force** - Any incident where, under the
color of authority, a Spokane police officer employs a control
device or any physical force to:
- Compel a noncompliant person to obey direction.
 - Overcome resistance during arrest or detention.
 - Defend self or another from an aggressive action by a
suspect
- 22. Supervisor** - Any officer of the rank of Sergeant or above.
- 23. Tactics** - Application of the tools.
- 24. Timing** - The point at which the proper force is used by
degree and design.
- 25. Tool** - Any device, mechanical means, or strategy used, as
taught and approved by the Department, in the application of
force.
- 26. Unintended Fatality** - A fatality resulting from the

1 application of any force not intended to be lethal in nature.

2 **VI. GUIDELINES**

3 The following guidelines provide direction in the application of force
4 and are approved by the Department.

5 During the course of interaction with the public, an officer may
6 encounter all types of responses from compliant interaction to life
7 threatening. A reasonable officer's use of force in response to the
8 subject's actions shall be based upon available tools, tactics, timing
9 parameters, techniques and training.

10 Officers should respond to the subject's actions in order to gain
11 compliance and control, based on training and continual risk
12 assessment of the circumstances. Timing is an important element
13 of the risk assessment process and is demonstrated by the officer's
14 response to the actions of the subject, measured in terms of
15 immediacy and necessity.

16 The use of force model correlates a suspect's actions and an
17 officer's response.

18 **A. Reasonable Officer's Assessment of the Subject's Actions:**
19 **COMPLIANT**

20 **Reasonable Officer's Response: COOPERATIVE CONTROLS**
21 **Enforcement Electives:**

- 22 • Mental Preparation
- 23 • Spatial Positioning
- 24 • Communication Skills
- 25 • Handcuffing Techniques
- 26 • Search Techniques
- 27 • Opposite Sex Searches
- 28 • Frisk Techniques
- Escort Controls
- Draw and Direct
- Transport Controls

B. Reasonable Officer's Assessment of the Subject's Actions:
PASSIVE RESISTANT

Reasonable Officer's Response: CONTACT CONTROLS
Enforcement Electives:

- All Cooperative Control Enforcement Techniques
- Advanced Communication Skills
- Contact Controls

C. Reasonable Officer's Assessment of the Subject's Actions:
ACTIVE RESISTANT

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Reasonable Officer’s Response: COMPLIANCE TECHNIQUES

Enforcement Electives:

- All Cooperative Control Enforcement Electives
- All Contact Control Enforcement Electives
- Control Techniques
- Neuro-Muscular Controls
- OC/Chemical Application
- Leverage Techniques/Tools
- Restraint Devices
- Takedown Techniques
- Hollow Spike Strip
- Level I Lateral Neck Restraint

D. Reasonable Officer’s Assessment of the Subject’s Actions: ASSAULTIVE

Reasonable Officer’s Response: DEFENSIVE TACTICS

Enforcement Electives:

- All Cooperative Control Enforcement Electives
- All Contract Control Enforcement Electives
- All Compliance Techniques Enforcement Electives
- Personal Weapons Defenses
- Impact Techniques/Tools
- Level II Lateral Neck Restraint

E. Reasonable Officer’s Assessment of the Subject’s Actions: LIFE THREATENING

Reasonable Officer’s Response: DEADLY FORCE

Enforcement Electives:

- All Cooperative Control Enforcement Electives
- All Contact Control Enforcement Electives
- All Compliance Techniques Enforcement Electives
- All Defensive Tactics Enforcement Electives
- Defense from Attack
- Forcible Stop Techniques
- Weapon Utilization

Spokane Police Department Use of Force Policy 800L.

Except as expressly admitted, paragraph 3.3 is denied.

3.4. Answering paragraph 3.4, these defendants restate their answer to paragraph 3.3. By way of further answer, these defendants assert Mr. Zehm was

1 not a passively resistant subject at any time during his contact with the defendants
2 on March 18, 2006.

3 3.5. Answering paragraph 3.5, these defendants admit the SPD's use of
4 force policy does not authorize the use of deadly force against passive resistance,
5 and deny the remainder of said paragraph.
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7 3.6. Answering paragraph 3.6, is overly broad and vague, the plaintiffs' use
8 of the term "civil rights" is overly broad and vague, and therefore the defendants
9 deny the use of the phrase in said paragraph, but otherwise admit the remainder of
10 said paragraph.
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12 3.7. Answering paragraph 3.7, these defendants admit the same.

13 3.8. Answering paragraph 3.8, these defendants assert the allegations in
14 said paragraph are vague and are legal conclusions to which no response is
15 required and therefore deny the same.
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17 3.9. Answering paragraph 3.9, these defendants assert that the allegations
18 in said paragraph are vague and are legal conclusions to which no response is
19 required and therefore deny the same.
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21 3.10. Answering paragraph 3.10, these defendants assert the paragraph is
22 vague and ambiguous regarding "senior officers," and therefore deny the use of the
23 phrase in said paragraph. The defendants admit that SPD employs experienced,
24 well trained police officers to conduct internal investigations of incidents involving
25 the use of force by a member of the SPD. These officers have additional training in
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1 the methods of investigation appropriate to internal reviews. Except as expressly
2 admitted, paragraph 3.10 is denied.

3 3.11. Answering paragraph 3.11, these defendants assert the paragraph is
4 vague and ambiguous regarding time and nature of incidents to be investigated.
5 These defendants are without sufficient knowledge or information to form a belief as
6 to the truth or veracity of said paragraph and therefore deny the same. Without
7 waiving said objections, defendants admit that, on March 18, 2006, the Spokane
8 County Sheriff was authorized to work with the SPD to investigate certain incidents
9 involving SPD officers, including incidents during which a subject in the custody of
10 the SPD died.

11 3.12. Answering paragraph 3.12, these defendants admit the SPD had, at the
12 time of the incident on March 18, 2006, written policies and procedures in place to
13 reduce the risk of in-custody death related to the condition known as “Manic
14 Exhaustive Syndrome” (“M.E.S.”) and similar conditions, which could include
15 “Excited Delirium Syndrome.” Except as expressly admitted, paragraph 3.12 is
16 denied.

17 3.13. Answering paragraph 3.13, these defendants assert the phrase “four-
18 point restraint” is vague, and the allegations in said paragraph are therefore denied.
19 Without waiving said objection, the defendants admit the SPD had policies and
20 procedures in place to handle those situations in which subjects must have both
21 their hands and feet restrained, and that policies and procedures were in place to
22 reduce the risk of injury to the officers, the public, and the subject, or an in-custody
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1 in-custody death.

2 **RESPONSE TO ALLEGATIONS REGARDING 911 CALL, DISPATCH & POLICE**
3 **RESPONSE.**

4 3.14. Answering paragraph 3.14, these defendants admit the same. By way
5 of further answer, the defendants note that the characterization of “suspicious
6 person” was the initial characterization, and that the nature of the call changed to a
7 theft/robbery before the first officer was able to contact the “suspicious person,”
8 later identified as Mr. Otto Zehm.

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10 3.15. Answering paragraph 3.15, these defendants admit the 911 caller
11 described the suspect’s physical appearance. Defendants further admit that, at
12 various times during the 9-1-1 call, the caller provided information such as the
13 suspect “was trying to get into this car,” the suspect was “messaging with [the ATM]
14 forever” and “he had like a big wad of something so I think it was money and then
15 he –put it in his jacket because when we started driving to see where he was going,
16 uh, he ran.” The complainant also said, “I think he got her money.” The plaintiffs’
17 references to the time these statements were made are vague, and are therefore
18 denied. The callers made other references about the suspect taking money from the
19 ATM and running away from them. The recording of the 9-1-1 call speaks for itself.
20 Except as otherwise admitted, paragraph 3.15 is denied.

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24 3.16. Answering paragraph 3.16, these defendants assert the statement in
25 said paragraph is vague and incomplete, and therefore deny the same. The caller
26 indicated that she was scared by the person (Mr. Zehm) and that she did not know
27 if the transaction was cancelled.
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1 3.17. Answering paragraph 3.17, these defendants deny the same. By way of
2 further answer, the defendants assert the 9-1-1 caller was asked at 18:17:06 of the
3 audio transcript, “Did he seem high or intoxicated?” The caller responded at
4 18:17:09, “I don’t think he was drunk. ... he’s on something.” The dispatcher
5 stated at 18:17:33 of the audio transcript, “and the complainant thinks he appears
6 to be high.” Prior to that discussion the caller stated that the suspect “was trying to
7 get into this car,” and “he came over to the window and was getting way too close to
8 us and talking and ... and playing with the ATM, so we drove off, ‘cause I thought
9 he was going to do something to us and it was scary. ...” “It scared me so we drove
10 off. ...” “That’s why we drove off, ‘cause it scared us and he was like, getting way
11 too close. So I told her to drive. ‘Cause he was trying to talk to us, and” The 9-
12 1-1 operator then asked, “Did he seem high or intoxicated.”

13 3.18. Answering paragraph 3.18, these defendants deny the same. By way of
14 further answer, the recording of the 9-1-1 call speaks for itself.

15 3.19. Answering paragraph 3.19, these defendants deny the same. By way of
16 further answer, there were times during the call when the operator asked clarifying
17 questions about what Mr. Zehm had at the ATM. At one time, it was believed he
18 had “everything,” which would include the complainant’s bank card. The caller
19 clarified that point at 18:21:28 through 18:21:32 of the audio recording, when she
20 asked the other complainant if she had her card, and confirmed she had it.
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1 3.20. Answering paragraph 3.20, these defendants deny the same. The
2 complainants stated several times that the person (Mr. Zehm) took money.

3 3.21. Answering paragraph 3.21, these defendants admit Officer Thompson
4 heard the dispatch broadcasts, knew Officer Braun declared he would respond, and
5 chose to respond to the area along with Officer Braun. It is speculative whether
6 Officer Thompson would get to the area “ahead” of Officer Braun, but Officer
7 Thompson believed he could be of assistance to Officer Braun. Officer Thompson
8 could tell from the CAD information that the nature of the call had changed from a
9 mere “suspicious person” to a possible robbery call. Except as otherwise expressly
10 admitted, paragraph 3.21 is denied.
11

12 3.22. Answering paragraph 3.22, these defendants admit the same.
13

14 3.23. Answering paragraph 3.23, these defendants assert the paragraph is
15 vague as to whom and at what time Mr. Zehm showed no objective signs of “excited
16 delirium” and therefore deny the same. By way of further answer, assert Mr. Zehm
17 was acting in a bizarre manner – enough to scare the two complainants at the ATM,
18 and enough for them to consider him to appear “high” – and assert Mr. Zehm had
19 avoided taking his prescribed medication for his long-standing medical condition,
20 paranoid schizophrenia, which upon information and belief, was a significant
21 predicate factor for the onset of an excited delirium episode.
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23 3.24. Answering paragraph 3.24, these defendants admit that Officer
24 Thompson was able to observe Mr. Zehm before Mr. Zehm entered the store.
25 Defendants further admit that, at that time, Officer Thompson did not see Mr. Zehm
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1 Zehm shed his clothing, move with a staggered gait, or act in a manner that showed
2 gross agitation. All other allegations are denied. Defendants further assert that Mr.
3 Zehm observed Officer Thompson and his patrol car as Officer Thompson
4 approached the ZipTrip store, in the seconds before Mr. Zehm entered the store.
5 The defendants deny that Officer Thompson had no reason to believe that Mr. Zehm
6 posed a threat to himself or others, and deny he had no reason to believe Mr. Zehm
7 was armed with a weapon. Officer Thompson was, at that time, responding to a
8 possible robbery/theft, had the suspect clearly identified, had information that the
9 suspect might be “high,” saw the suspect was wearing clothing that could easily
10 conceal weapons, and the suspect was known to be evading the alleged victims and,
11 apparently, Officer Thompson. Except as otherwise admitted, paragraph 3.24 is
12 denied.
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16 3.25. Answering paragraph 3.25, these defendants admit that an officer,
17 believed to be Officer Braun, asked the dispatcher at approximately 18:23:17 on the
18 audio transcript, “...and just to confirm: he took her money?”, and at approximately
19 18:23:31 on the audio transcript the dispatcher stated, “affirm” to all officers, and
20 that Officer Thompson heard the broadcast, and deny the remainder of said
21 paragraph.
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23 3.26. Answering paragraph 3.26, these defendants deny the same.

24 3.27. Answering paragraph 3.27, these defendants assert that the reference
25 to “within moments” is vague, and therefore deny said paragraph. Without waiving
26 said objection, defendants admit that at approximately 18:24:17 of the audio
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1 transcript, the dispatcher stated that, "... the complainant's advising she's not
2 entirely positive that he did get her money," and deny the remainder of said
3 paragraph. The dispatcher's statement was made after Officer Thompson had
4 already attempted to detain and control Mr. Zehm. Regardless, Officer Thompson
5 did not hear the radio transmission.
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7 3.28. Answering paragraph 3.28, these defendants admit the same.

8 3.29. Answering paragraph 3.29, these defendants admit the same. By way
9 of further answer, Officer Thompson brings his baton on calls for service for various
10 lawful reasons consistent with applicable police procedure.
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12 3.30. Answering paragraph 3.30, these defendants admit that Officer
13 Thompson has stated that, based on his training and experience and the totality of
14 the circumstances known to him, he did not have probable cause to arrest Mr.
15 Zehm, but did have reasonable suspicion and authority to effect a "Terry Stop"
16 upon Mr. Zehm when he entered the store and confronted him, and deny the
17 remainder of said paragraph.
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19 3.31. Answering paragraph 3.31, these defendants admit that Officer
20 Thompson knew the call was dispatched to Officer Braun, did not know Officer
21 Braun's exact location, and entered the store before other officers arrived when he
22 saw the clearly identified suspect, Mr. Zehm, enter the store, and deny the
23 remainder of said paragraph.
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25 3.32. Answering paragraph 3.32, these defendants admit the same.
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1 3.33. Answering paragraph 3.33, these defendants admit the same. By way
2 of further answer, the safety of the individuals was one of several considerations he
3 had under the rapidly evolving, tense and uncertain circumstances he faced.
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5 3.34. Answering paragraph 3.34, these defendants admit Officer Thompson's
6 intention upon entering the store was to stop and detain the suspect, Mr. Zehm,
7 about the investigation into the reported theft/robbery and be certain the suspect
8 was not armed and would not attack him, and deny the remainder of said
9 paragraph.
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11 3.35. Answering paragraph 3.35, these defendants admit the same.

12 3.36. Answering paragraph 3.36, these defendants admit: Officer Thompson
13 identified Mr. Zehm as the suspect and knew that the suspect had reportedly run
14 away from the complainant two times, and knew the ZipTrip store had at least two
15 other readily available doorways from which the suspect could flee; Officer
16 Thompson accelerated his pace toward Mr. Zehm in order to catch up to him before
17 a foot pursuit would begin; Officer Thompson moved his baton from his left hand to
18 his right hand as he pursued Mr. Zehm; Officer Thompson was concerned the
19 suspect could have a concealed weapon on his person and had ready access to
20 other items he could use as weapons; and deny the remainder of said paragraph.
21 By way of further answer, the readiness of the baton was purely defensive.
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24 3.37. Answering paragraph 3.37, these defendants deny the same.
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3.38. Answering paragraph 3.38, these defendants admit that Mr. Zehm turned and faced Officer Thompson at approximately 18:26:11 or sooner on the ZipTrip and deny the remainder of said paragraph.

3.39. Answering paragraph 3.39, these defendants admit Mr. Zehm was holding a full two liter bottle of soda when he turned toward Officer Thompson, as reported by Officer Thompson, and deny the remainder of said paragraph.

3.40. Answering paragraph 3.40, these defendants admit Officer Thompson hesitated in his advance when he reached the northwest corner of the store and saw Mr. Zehm had stopped. Mr. Zehm was holding the bottle at chest level with both hands, holding it in a manner that Officer Thompson realized could be used as a significant weapon against him, and ordered Mr. Zehm to drop the bottle, all as reported by Officer Thompson, and deny the remainder of said paragraph.

3.41. Answering paragraph 3.41, these defendants admit the same.

3.42. Answering paragraph 3.42, these defendants admit the same.

3.43. Answering paragraph 3.43, these defendants admit not every person in the store was immediately aware of the confrontation, or heard or saw the initial confrontation, but some people in the store did hear and see it, and deny the remainder of said paragraph.

3.44. Answering paragraph 3.44, these defendants deny the same. By way of further answer, Mr. Zehm's response, under the totality of the circumstances, was not considered "passive resistance."

1 3.45. Answering paragraph 3.45, these defendants admit that, according to
2 SPD policy, passive resistance does not authorize an officer to use deadly force, and
3 deny said policy prohibits an officer from using a weapon as part of a cooperative
4 control or contact control to proportionally gain control and cooperation of a
5 passively resistant subject. Further, the defendants admit Officer Thompson
6 reached the northwest corner aisle and then faced Mr. Zehm, and respond to sub-
7 paragraphs 3.45.1.a through 3.45.h as follows:
8

- 9
- 10 a. Answering paragraph 3.45.a, these defendants admit Mr. Zehm was
11 approximately 15 feet away from Officer Thompson;
 - 12 b. Answering paragraph 3.45.b, these defendants admit the same;
 - 13 c. Answering paragraph 3.45.c, these defendants admit Mr. Zehm was in
14 full view after Officer Thompson cleared the corner;
 - 15 d. Answering paragraph 3.45.d, these defendants admit the same;
 - 16 e. Answering paragraph 3.45.e, these defendants admit the same;
 - 17 f. Answering paragraph 3.45.f, these defendants admit Officer Thompson
18 believed Officer Braun was responding to the scene;
 - 19 g. Answering paragraph 3.45.g, these defendants deny the same; and
20 h. Answering paragraph 3.45.h, these defendants deny the same.

21 Except as expressly admitted, all paragraph 3.45 is denied.
22

23
24 **RESPONSES TO ALLEGATIONS REGARDING OFFICER THOMPSON'S USE OF**
25 **FORCE.**

26 3.46. Answering paragraph 3.46, these defendants deny said allegations. By
27 way of further answer, Officer Thompson responded based on the totality of the
28

1 circumstances known to and perceived by him; he did not merely, as alleged,
2 respond to Mr. Zehm's words.

3
4 3.47. Answering paragraph 3.47, these defendants deny the same. By way of
5 further answer, defendants assert Mr. Zehm was, under the totality of the
6 circumstances known to and perceived by Officer Thompson, defiant to lawful
7 commands given clearly and repeatedly to Mr. Zehm, under circumstances that
8 were tense, uncertain, and rapidly evolving, and that Officer Thompson would not
9 have struck Mr. Zehm if Mr. Zehm had dropped the bottle.
10

11 3.48. Answering paragraph 3.48, these defendants deny the same.

12 3.49. Answering paragraph 3.49, these defendants deny the same.

13 3.50. Answering paragraph 3.50, these defendants deny the same.

14
15 3.51. Answering paragraph 3.51, these defendants deny the same. By way of
16 further answer, what Officer Thompson observed under the totality of the
17 circumstances was a felony criminal suspect who posed a potential danger to his
18 and others' physical safety and who clearly repeatedly defied the commands of a
19 uniformed officer to clear his hands of an item (several pound bottle) the suspect
20 could use instantly to hurt or distract the officer.
21

22 3.52. Answering paragraph 3.52, these defendants deny the same.

23 3.53. Answering paragraph 3.53, these defendants deny the same.

24
25 3.54. Answering paragraph 3.54, these defendants assert the allegations in
26 said paragraph are legal conclusions to which no response is required. Without
27 waiving said objections, defendants deny the same. By way of further answer,
28

1 please see the responses to paragraphs 3.1 through 3.53, above. By way of further
2 answer, all of Officer Thompson's actions were reasonable and lawful based upon
3 the totality of the circumstances known by and perceived by him at the time, as
4 authorized by *Graham v. Connor*, 490 U.S. 386 (1989).
5

6 3.55. Answering paragraph 3.55, these defendants assert the allegations in
7 said paragraph are legal conclusions to which no response required, and therefore
8 deny the same. Further, defendants deny Officer Thompson's use of force was
9 unlawful at any time.
10

11 3.56. Answering paragraph 3.56, these defendants assert the allegations in
12 said paragraph are legal conclusions to which no response required, and therefore
13 deny the same. Further, defendants deny Officer Thompson's use of force was
14 unlawful at any time.
15

16 3.57. Answering paragraph 3.57, these defendants assert the allegations in
17 said paragraph are legal conclusions to which no response required, and therefore
18 deny the same.
19

20 3.58. Answering paragraph 3.58, these defendants deny the same.

21 3.59. Answering paragraph 3.59, these defendants admit that Mr. Zehm did
22 not throw the bottle at Officer Thompson and deny the remainder of said
23 paragraph.
24

25 3.60. Answering paragraph 3.60, these defendants admit Officer Thompson,
26 pursuant to appropriate police procedure and training, struck Mr. Zehm's upper left
27 leg, intending to strike a large muscle mass containing a nerve and thereby causing
28

1 causing temporary disruption, which would bring Mr. Zehm to the ground, and
2 deny the remainder of said paragraph.

3 3.61. The amended complaint does not contain a paragraph numbered 3.61.

4
5 3.62. Answering paragraph 3.62, these defendants admit a struggle followed
6 during which Officer Thompson gave Mr. Zehm many verbal commands, such as
7 “drop it,” “stop resisting,” and “stop fighting,” which Mr. Zehm again defiantly and
8 angrily rejected at first by stating, “No,” and thereafter by making loud growls,
9 roars, and loud guttural sounds as Mr. Zehm physically resisted the officer’s efforts
10 to get him under control, and assaulted the officer by punching him and repeatedly
11 kicking him. Defendants further admit that Officer Thompson deployed his TASER
12 against Mr. Zehm, but that it was ineffective, and struck Mr. Zehm, pursuant to
13 appropriate police procedure and training, while attempting to defend himself from
14 Mr. Zehm’s kicks and attempted, unsuccessfully, to get Mr. Zehm under physical
15 control. Except as expressly admitted, paragraph 3.62 is denied.
16
17

18 3.63. Answering paragraph 3.63, these defendants admit a witness stated to
19 investigators he believes Officer Thompson struck Mr. Zehm in the head with his
20 police baton, and deny the remainder of said paragraph. By way of further answer,
21 Officer Thompson never struck Mr. Zehm in the head with his police baton, never
22 intended to strike him in the head with his police baton, and Mr. Zehm did not
23 receive any injuries to his head that are consistent with a strike by the police baton,
24 and the video from the ZipTrip store does not depict any baton strikes to Mr.
25 Zehm’s head.
26
27
28

1 3.64. Answering paragraph 3.64, these defendants deny the same. By way of
2 further answer, the Medical Examiner’s Report contains a section entitled, “Police
3 Baton Injuries” which does not describe any injury above Mr. Zehm’s eye that is
4 consistent with a police baton. It states:
5

6 POLICE BATON INJURIES: Multiple pattern contusions were noted
7 on the decedent’s extremities and over the left flank. However, there
8 were no associated significant internal injuries. Specifically, there
9 was no evidence of trauma to the chest, abdomen, neck, or brain. No
10 injuries were seen during organ donation. Baton injuries can result
11 in significant soft tissue hemorrhage, but upon hospital admission
and during the subsequent hospital course the decedent’s hematocrit
and hemoglobin showed no significant decrease (not explainable by
resuscitative measures).

12 Medical Examiner’s Report, page 4.

13 Further, the Medical Examiner’s Report does not describe the injury as
14 consistent with a baton strike. It describes the injury as follows:
15

16 EXTERNAL EVIDENCE OF INJURY:

17 ...

18 2. Merging into the lateral side of the right eyebrow are two
19 injuries which parallel one another. These linear injuries are
20 separated by a 3/8 inch distance. The lower line of injury is
21 obliquely oriented and consists of an interrupted line of bright
22 red to purple-red, petechial, very thin contusion 1 inch in total
23 dimension. At the lateral aspect of this line and above it is the
24 other parallel line, formed by scab, only ¼ inch in length.
Extending from the scabbed line at the lateral end upward is a
¼ inch in dimension, oval-shaped area of scab (this may be a
healing pattern injury).

25 Medical Examiner’s Report, page 12.
26
27
28

1 3.65. Answering paragraph 3.65, these defendants deny the same. By way of
2 further answer, the County Medical Examiner's findings regarding a wound under
3 Mr. Zehm's scalp states:
4

5 INTERNAL EVIDENCE OF INJURY:

- 6 1. There are two areas of subgaleal hemorrhage on the anterior
7 skull flap. Both of these include associated periosteal
8 hemorrhage. The zone of subgaleal hemorrhage at the midline
9 measures 1-1/2 inches and examination of the scalp overlying
10 this demonstrates no injuries. The left subgaleal hemorrhage
11 covers a 3 inch area and examination of the scalp overlying it
12 demonstrates no injuries. Both subgaleal hemorrhages are red
13 to purple-red in color.

14 Medical Examiner's Report, page 18.

15 Further, when asked during the autopsy by a detective about the significance
16 of the two areas, the medical examiner showed the detective there was no obvious
17 discoloration on the corresponding outer portion of the skin that covered those
18 areas and there was no subdural or visible internal brain hemorrhage. The medical
19 examiner stated these were minor injuries that could have been the result of the
20 decedent hitting his head against counters or the floor while struggling with officers.

21 3.66. Answering paragraph 3.66, these defendants admit the training does
22 not authorize an intentional strike to the head with a baton except when deadly
23 force is authorized, or when necessarily used as an exceptional technique when
24 other options are unavailable under the totality of the circumstances known or
25 perceived by the officer, and deny the remainder of said paragraph.
26

27 3.67. Answering paragraph 3.67, these defendants deny the same. By way of
28

1 of further answer, these defendants specifically deny that any deadly force was ever
2 used by Officer Thompson, and deny he ever struck Mr. Zehm in the head, and
3 assert that all force used by Officer Thompson was justified by his training and
4 experience and the totality of the facts and circumstances known to and perceived
5 by him at the time.

6
7 3.68. Answering paragraph 3.68, these defendants deny the same. By way of
8 further answer, these defendants assert that Mr. Zehm refused to comply, at least
9 twice, with lawful commands from a uniformed police officer before any force was
10 used, that the officer's commands and use of force were lawful under the totality of
11 the circumstances known to and perceived by the officer, and that Mr. Zehm was
12 not authorized by law to reject the officer's commands or resist the officer's efforts to
13 obtain and maintain control of him.
14
15

16 **RESPONSE TO ALLEGATIONS RELATING TO OFFICERS' RESTRAINT OF**
17 **ZEHM.**

18 3.69. Answering paragraph 3.69, these defendants admit Officer Braun
19 entered the ZipTrip store from the west door at approximately 18:26:47 as shown
20 on the ZipTrip surveillance video, observed Mr. Zehm resisting arrest and
21 assaulting Officer Thompson, and assisted Officer Thompson in trying to get control
22 of Mr. Zehm. Defendants further admit Officer Braun used the "drive stun"
23 component of his Taser device against Mr. Zehm, to no avail. Defendants further
24 admit Officers Thompson and Braun could not obtain control of Mr. Zehm, and that
25 Mr. Zehm continuously forcibly resisted the officers' efforts and verbal commands
26 as he assaulted and kicked the officers, and that Officer Braun used his portable
27
28

1 portable radio to call for additional assistance at 18:25:38 of the audio transcript
2 (approximately 18:27:41 of the ZipTrip video), stating, "He's fighting pretty good,"
3 and Officer Thompson did the same at 18:25:40 of the audio transcript
4 (approximately 18:27:43 of the ZipTrip video), stating "Code 6," which is SPD radio
5 code for "officer needs assistance," and directs all available officers to respond to the
6 scene as quickly as possible. Defendants further admit Officers Raleigh, Voeller,
7 Uberuaga, Dahle, and Torok, among others, immediately responded to the "Code 6,"
8 arriving a few minutes later. Mr. Zehm was still not under control upon their
9 arrival, and was forcefully physically resisting both officers Thompson and Braun
10 when the additional officers arrived. The additional officers relieved Officers
11 Thompson and Braun, who were both exhausted, and gained control of Mr. Zehm
12 on the floor, and handcuffed him behind his back. Except as expressly admitted,
13 paragraph 3.69 is denied.
14
15
16

17 3.70. Answering paragraph 3.70, these defendants admit that, even though
18 handcuffed, Mr. Zehm continued to thrash about and scream incomprehensible
19 sounds, in an angry tone, and refused to comply with the officers' directions to stop
20 resisting, etc., and the officers' determined that Mr. Zehm's legs needed to be
21 restrained in order to gain and maintain control of him, and that officers attached
22 the leg restraint to the handcuffs, leaving sufficient slack, per SPD training and
23 policy. Except as otherwise admitted, paragraph 3.70 is denied.
24
25
26
27
28

1 3.71. Answering paragraph 3.71, these defendants admit the SPD conducted
2 training as of March 18, 2006 to place, when necessary, detainees in handcuffs and
3 leg restraints, such as Mr. Zehm was in, consistent with the training provided by
4 the Washington State Criminal Justice Training Commission. Defendants further
5 admit such training included observational monitoring of the condition of the
6 detainee to reduce the risk of the detainee suffering medical distress, including
7 death, and deny the remainder of said paragraph.
8

9
10 3.72. Answering paragraph 3.72, these defendants deny the same.

11 3.73. Answering paragraph 3.73, these defendants assert the allegation in
12 said paragraph is vague with respect to time, and therefore deny the same. Without
13 waiving said objection, defendants admit in March, 2006 officers were trained to
14 place restrained detainees on their side, if possible, depending upon the totality of
15 circumstances, and to continually monitor the detainee to reduce the risk of the
16 detainee suffering medical distress, including death, and deny the remainder of said
17 paragraph.
18

19
20 3.74. Answering paragraph 3.74, these defendants deny the same.

21 3.75. Answering paragraph 3.75, these defendants deny the same. By way of
22 further answer, defendants assert Mr. Zehm continued to struggle until he was
23 observed to have stopped breathing. Despite the restraints, Mr. Zehm actively
24 moved, turned and kicked toward the officers. Mr. Zehm's struggle against the
25 restraints was so violent at times that he was pulling his hands through the
26 handcuffs by kicking hard with his feet, and officers had to place a second pair of
27 handcuffs by kicking hard with his feet, and officers had to place a second pair of
28

1 handcuffs on him. Mr. Zehm was kicking so hard that he stretched the nylon strap
2 between his wrists and feet, an act no officer on scene had ever witnessed before.
3 The officers had to re-adjust the strap after he stretched it.
4

5 **RESPONSE TO ALLEGATIONS REGARDING FIRE DEPARTMENT CALLED TO**
6 **SCENE**

7 3.76. Answering paragraph 3.76, these defendants admit an SPD dispatcher
8 informed the City of Spokane Fire Department (SFD) that a suspect had been
9 TASERed and a team responded to the scene to remove a barbed TASER dart from
10 Mr. Zehm's chest area. The four person team, which included two paramedics and
11 two Emergency Medical Technicians, also evaluated Mr. Zehm's overall medical
12 condition as best they could. However, Mr. Zehm was combative with the SFD
13 emergency medical personnel, refused to cooperate verbally and physically, and
14 even though restrained, continued to move about and was violently resisting. An
15 officer asked the SFD personnel to check Mr. Zehm's vital signs; however, they
16 could not check Mr. Zehm's pulse, respiratory rate, blood pressure or body
17 temperature due to his violent resistance. They noted he was obviously able to
18 breath without difficulty, as he continually screamed, he did not appear to be
19 suffering from low blood pressure as he continued to thrash about and yell and
20 scream, he had no obvious injuries other than the TASER barb marks, and he did
21 not make any verbal complaints about his condition even though the emergency
22 personnel continued to tell him they were there to help him and they tried to get
23 him to talk. They informed the officers Mr. Zehm was cleared to take to jail,
24 however, the officers on scene requested an ambulance to take him to a hospital for
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1 evaluation. The police officers and SFD personnel on scene contacted their
2 respective dispatchers to determine the status of the ambulance to ensure one was
3 on the way. Except as expressly admitted, paragraph 3.76 is denied.
4

5 3.77. Answering paragraph 3.77, these defendants admit police officer Erin
6 Raleigh, who was next to Mr. Zehm, observed Mr. Zehm with blood and saliva in his
7 mouth, running down his chin while continually yelling and screaming, and still
8 wildly erratic. Defendants admit Officer Raleigh asked a firefighter if they had a
9 mask or face shield he could place over Mr. Zehm's mouth to prevent him from
10 spitting on the officers because he was concerned about the health risk of
11 pathogens. Defendants further admit that some officers and firefighters saw Mr.
12 Zehm spitting. Defendants further admit that one firefighter's notes reflect that the
13 police officer was concerned that Mr. Zehm might spit and the mask was to reduce
14 the health risk to people near Mr. Zehm of pathogens or bites.
15
16

17 3.78. Answering paragraph 3.78, these defendants assert the defendants'
18 uniforms were not tested to determine if there was any residue from Mr. Zehm
19 having spit on an officer's uniform and therefore deny the allegations in said
20 paragraph.
21

22 3.79. Answering paragraph 3.79, these defendants admit the same. By way
23 of further answer, the mask used was a partial non-rebreather mask. There are two
24 portals, one on either side of the mask. One of the portals has a one-way valve that
25 will close upon inspiration. The other port is a safety vent that allows entrainment
26 of room air.
27
28

1 3.80. Answering paragraph 3.80, these defendants admit the partial non-
2 rebreather mask was not connected to an oxygen source, and the air reservoir bag
3 and tubing had been removed, and that air was available through a portal that is
4 approximately the size of a nickel in the nose and mouth area, and has other vents
5 previously described, and is not skin tight, and deny the remainder of said
6 paragraph.
7

8 3.81. Answering paragraph 3.81, these defendants admit it is possible for the
9 approximately nickel size hole, and the other vents, to become blocked or occluded,
10 and deny the remainder of said paragraph. By way of further answer, defendants
11 assert the nickel-sized hole and vents were not blocked or occluded.
12

13 3.82. Answering paragraph 3.82, these defendants assert that upon
14 information and belief, the mask has been and can be used in the fashion used
15 upon Mr. Zehm, and therefore deny the same. By way of further answer, the nose
16 piece is not easily compressible in a face-down position. The cylindrical opening is
17 constructed of hard plastic and is not compressible.
18

19 3.83. Answering paragraph 3.83, these defendants are without sufficient
20 knowledge or information to form a belief as to the truth or veracity of said
21 paragraph and therefore deny the same.
22

23 3.84. Answering paragraph 3.84, these defendants are without sufficient
24 knowledge or information to form a belief as to the truth or veracity of said
25 paragraph and therefore deny the same. By way of further answer, defendants
26 assert the mask placed on Mr. Zehm was not obstructed.
27
28

1 3.85. Answering paragraph 3.85, these defendants admit the same.

2 3.86. Answering paragraph 3.86, these defendants deny the same. By way of
3 further answer, the SPD officers did not direct the fire department personnel to
4 provide any specific mask. The Fire Department personnel chose the mask based
5 on prior experience, with knowledge and belief it would not compromise Mr. Zehm's
6 safety.
7

8 3.87. Answering paragraph 3.87, these defendants admit the same.

9 3.88. Answering paragraph 3.88, these defendants deny the same. By way of
10 further answer, SFD firefighters did monitor Mr. Zehm for a period after the mask
11 was applied, and members of the SPD monitored Mr. Zehm as they awaited the
12 arrival of an ambulance to take him to a hospital for evaluation.
13

14 3.89. Answering paragraph 3.89, these defendants admit Mr. Zehm
15 continued to struggle with the officers after the mask was placed on him and
16 officers moved down to the floor to attempt to physically control Mr. Zehm and stop
17 his aggressive behavior. Mr. Zehm did not have any breathing problems before or
18 during the few seconds the officers held him to the floor to keep him from injuring
19 himself or others. He continued to scream incomprehensibly through the mask.
20 The officers released him and he continued to breath normally. The officers
21 temporarily placed some of their weight at one point to hold him to the ground
22 before releasing him. Except as expressly admitted, the allegations in paragraph
23 3.89 are denied.
24
25

26 3.90. Answering paragraph 3.90, these defendants deny the same.
27
28

1 3.91. Answering paragraph 3.91, these defendants admit Mr. Zehm stopped
2 breathing while he was face down on the floor with his hands and legs restrained
3 behind his back, possibly with the partial non-rebreather mask over his mouth and
4 nose, and deny the remainder of said paragraph.
5

6 3.92. Answering paragraph 3.92, these defendants admit the officers, upon
7 determining that Mr. Zehm had stopped breathing, immediately yelled to the
8 paramedics, who were still inside the store a couple of steps away, to inform them
9 he had stopped breathing, seeking their assistance for the medical emergency. The
10 firefighters were just a few feet away, and one was outside. They immediately
11 responded to the officers' urgent call. Except as expressly admitted, paragraph 3.92
12 is denied.
13

14 3.93. Answering paragraph 3.93, these defendants admit the firefighters
15 (paramedics and EMTs) engaged in a coordinated effort to evaluate and treat Mr.
16 Zehm. By way of further answer, they had oxygen and an electrocardio monitor/
17 heart defibrillator available on the fire truck, which they accessed. The
18 electrocardio monitor records the electrical activity of the heart over time via skin
19 electrodes. They applied cardio-pulmonary resuscitation efforts, administered
20 medications intravenously, and used the electrocardiograph to get a reading of
21 electrical activity from his heart. Mr. Zehm was asystolic; his reading was flat-lined.
22 The paramedics were very surprised by the reading. Mr. Zehm had a major cardiac
23 event. They were unable to revive him. The paramedics continued their efforts to
24 resuscitate him after the arrival of the ambulance and during the transport to the
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1 transport to the hospital.

2 3.94. Answering paragraph 3.94, these defendants admit the same.

3 3.95. Answering paragraph 3.95, these defendants admit the same.

4
5 3.96. Answering paragraph 3.96, these defendants deny the same. He was
6 reported to have moderate atherosclerosis in his left anterior descending coronary
7 artery of the heart. Further, according to the Medical Examiner's report,
8 microscopic examination of the heart did demonstrate myofiber necrosis, which was
9 non-acute; probably reflecting a period of autonomic instability or catecholamine
10 excess prior to Mr. Zehm's entry into the convenience store.

11
12 3.97. Answering paragraph 3.97, these defendants admit photos disclose
13 multiple bruises, and superficial injuries from the TASER devices, and deny the
14 remainder of said paragraph.

15
16 3.98. Answering paragraph 3.98, these defendants admit the medical
17 examiner concluded:

18 MANNER OF DEATH: Forensic pathologists in multiple
19 jurisdictions have had considerable debate about the appropriate
20 certification of manner of death in similar instances. In some
21 jurisdictions the manner of death in such cases would be
22 "undetermined", because of a lack of significant scientific knowledge
23 about the cause of such events. Many other jurisdictions choose to
24 term the manner of death in these cases as "accident" because of an
25 apparent lack of intent, and because of the unpredictability of these
26 cases of sudden deaths in those with episodes of excited delirium.

27 In this jurisdiction, by convention, similar deaths are categorized as
28 "homicide". This is partly to insure the heightened sense of scrutiny
that deaths occurring under the auspices of police agencies require.
As unpredictable as this death may have been, it is likely not to have
occurred without the prone restraint and total appendage restraint
position. For statistical purposes, certifying manner of death on a

1 death certificate, "homicide" means death at the hands another. It
2 does not imply culpability, intent, or predictability. Therefore, in
3 keeping with these considerations, the manner of death is homicide.

4 Except as expressly admitted, paragraph 3.98 is denied.

5 3.99. There is no paragraph number 3.99 in the Amended Complaint.

6 3.100. Answering paragraph 3.100, these defendants admit Acting
7 Chief of Police Jim Nicks held a press conference after the results of the Medical
8 Examiner's autopsy report had been disclosed by others to the media, and incorrect
9 and/or confusing information about the Medical Examiner's report had been
10 reported by the press, and deny the remainder of said paragraph. By way of further
11 answer, Chief Nicks maintained a privilege under the law to disclose and discuss
12 matters of importance to the public, and the matters he discussed were not violative
13 of Mr. Zehm's privacy rights and were of significant interest to the public.
14

15 3.101. Answering paragraph 3.101, these defendants admit the City
16 and the Plaintiff Estate of Otto Zehm agreed to the terms of a mutual order in
17 Spokane County Superior Court, "Agreed Protective Order," which was signed by
18 the court on May 30, 2006 that contained, in part, terms addressing confidential
19 investigatory information in the possession of the police, and deny the remainder of
20 said paragraph.
21

22 3.102. Answering paragraph 3.102, these defendants assert that the
23 allegations in said paragraph are legal conclusions to which no response is
24 required, and therefore deny the same. Without waiving said objection, defendants
25 deny the same.
26
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1 3.103. Answering paragraph 3.103, these defendants answer as follows:

2
3 a. Answering paragraph 3.103.a, these defendants admit Chief Nicks and
4 a media relations person for the SPD stated, prior to the completion of the
5 investigation, based on their understanding at the time, that the suspect (Mr.
6 Zehm) had lunged/turned on Officer Thompson when verbal contact was first made
7 by Officer Thompson. By way of further answer, this statement was clarified and
8 revised as the investigation proceeded and was completed.
9
10

11 b. Answering paragraph 3.103.b, these defendants admit that Chief Nicks
12 had reported prior to the completion of the investigation, based on his
13 understanding at the time, that Mr. Zehm had been kept on his side for the
14 majority of time he was restrained. By way of further answer, this statement was
15 clarified and revised as the investigation proceeded and was completed.
16

17 3.104. Answering paragraph 3.104, these defendants deny said
18 allegations. By way of further answer, both statements were believed to be true
19 when made.
20

21 3.105. Answering paragraph 3.105, these defendants deny said
22 allegations.
23

24 3.106. Answering paragraph 3.106, these defendants deny said
25 allegations. By way of further answer, Chief Nicks' comment regarding a "lunge" by
26 the suspect was first made on the night of March 18, 2006, before any video had
27 been reviewed, based upon his understanding of the events. His statement was
28

1 revised and clarified after all witnesses had been interviewed and all of the video
2 (and the video is not entirely clear on this point) had been reviewed and analyzed.

3 3.107. Answering paragraph 3.107, these defendants deny the same.

4
5 3.108. Answering paragraph 3.108, these defendants assert the
6 allegations in said paragraph are legal conclusions to which no response is
7 required, and therefore deny the same.

8 3.109. Answering paragraph 3.109, these defendants assert the
9 allegations in said paragraph are legal conclusions to which no response is
10 required, and therefore deny the same. Without waiving said objection, the
11 defendants assert that crimes may, and often must, be investigated regardless of
12 the status of the suspect or victim, and a reasonable officer investigating the events
13 of March 18, 2006 at the ZipTrip store would not stop investigating the events, in
14 their totality, based upon, for example, the death of one or more people who could
15 have been charged with a crime, or could have been alleged to have been the victim
16 of a crime.

17 3.110. Answering paragraph 3.110, these defendants admit Det.
18 Ferguson, as part of the investigation into the events of March 18, 2006, presented
19 a sworn affidavit to a local magistrate requesting access to confidential medical and
20 employment records for the purpose of investigating said events, including the
21 crime of third degree assault, and deny the remainder of said paragraph as legal
22 conclusions to which no response is required, and therefore deny the same. By way
23 of further answer, Det. Ferguson's affidavit clearly and expressly states the records
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1 records she sought "... are essential to the death and Third Degree Assault
2 investigations."

3 3.111. Answering paragraph 3.111, these defendants deny the same.
4
5 By way of further answer, Det. Ferguson's affidavit is entirely factually accurate,
6 and supports the application for a court to order the holder of private records to
7 provide the investigating agency with access to or a copy of the relevant records.
8 Further, the local magistrate who reviewed the affidavit asked her questions about
9 its contents, certified the oath administered to her on the affidavit, and determined
10 that the application and the search warrants he issued thereupon were valid under
11 the law.
12

13 3.112. Answering paragraph 3.112, these defendants assert the
14 allegations in said paragraph are legal conclusions to which no response is
15 required, and therefore deny the same. Without waiving said objection, Det.
16 Ferguson knew she could not obtain the highly relevant employment and medical
17 records without proper authority, such as consent of the Zehm family or court
18 authorization, and deny the remainder of said paragraph.
19
20

21 3.113. Answering paragraph 3.113, these defendants deny the same.
22 By way of further answer, defendants assert that the information sought from
23 medical providers and the employer were relevant and necessary for the
24 investigation into the events of March 18, 2006 and Mr. Zehm's death. Said
25 information is deemed relevant by death investigators nationwide. Mr. Zehm's
26 behavior on March 18, 2006, and in the weeks preceeding his death, were a
27
28

1 significant concern to his family, friends, and co-workers as reported in newspaper
2 accounts before Det. Ferguson sought court authorization to obtain the records. As
3 stated in her affidavit:
4

5 On 3/22/06 an autopsy was conducted by the Medical Examiners
6 Office. The cause and manner of death were undetermined at that
7 time and remain so, pending the results of the toxicology report.

8 Newspaper reports of interviews with Zehm's mother, Ann Zehm, and
9 a friend, Bob Baxter, indicated that Otto Zehm had mental health
10 issues and recently had a change of behavior puzzling to family and
11 friends. Additionally, Ann Zehm told Deaconess Medical Center staff
12 that Otto was not taking his medications and that something had
13 been wrong with him the last couple of weeks. Also, Ann Zehm said
14 that her son's recent behavior had been odd to the point where his
15 employer was concerned and had discussed concerns with Otto.

16 ...

17 Otto Zehm's death occurred after a physical altercation with SPD.
18 Whereas the cause and manner are undetermined, medical records to
19 include x-rays from Deaconess Medical Center are essential to the
20 death and Third Degree Assault investigations. It is expected that the
21 medical records will contain treatment activities, diagnosis and
22 prognosis.

23 In summation, it is anticipated that treatment records from the
24 Spokane Mental Health Center, CHAS Clinic and Deaconess Medical
25 Center plus employment records from Skils'Kin will provide
26 invaluable information reference Otto Zehm's mental health. This
27 information is expected to address past as well as present mental
28 health and physical health issues. The information thus far gathered
indicates a change in behavior for Otto Zehm which may have
impacted his behavior during the contact with SPD on 3/18/06.
Additionally, the medical records from the hospital will verify injuries
and treatment for Otto Zehm.

RESPONSE TO ALLEGATIONS RELATING TO ALLEGED RATIFICATION BY CITY.

1 3.114. Answering paragraph 3.114, these defendants deny the same.
2 By way of further answer, the City, through its Mayors and Police Chiefs, has
3 respectfully disagreed with the allegations made by the plaintiffs. Said
4 disagreement does not equate to ratification of an improper act.
5

6 3.115. Answering paragraph 3.115, these defendants deny the same.
7 By way of further answer, the City has publicly defended the officers and the Chief
8 because they have not violated federal or state law, or departmental policies.
9

10 3.116. Answering paragraph 3.116, these defendants deny the same.

11 3.117. Answering paragraph 3.117, these defendants assert that the
12 allegations in said paragraph are legal conclusions to which no response is
13 required, and therefore deny the same.
14

15 3.118. Answering paragraph 3.118, these defendants assert that the
16 allegations in said paragraph are legal conclusions to which no response is
17 required, and therefore deny the same.
18

19 **RESPONSE TO ALLEGATIONS RELATING TO CONSPIRACY.**

20 3.119. Answering paragraph 3.119, these defendants deny the same.

21 3.120. Answering paragraph 3.120, these defendants deny the same.
22 By way of further answer, please see responses to paragraphs 3.1 through 3.119.

23 3.121. Answering paragraph 3.121, these defendants deny the same.

24 3.122. Answering paragraph 3.122, these defendants admit the same.

25 3.123. Answering paragraph 3.123, these defendants deny the same.
26
27
28

1 3.124. Answering paragraph 3.124, these defendants admit the same.
2 By way of further answer, it was provided to the medical examiner for review, and
3 the medical examiner commissioned an independent study of the mask by a
4 Professor of Kinesiology at Michigan State University. Upon receiving the results of
5 the test, the medical examiner prepared an addendum report and noted that the
6 professor concluded, "... that the mask (prepared as described in the investigative
7 report) had no effect on energy consumption or normal air exchange during
8 moderate exercise in two adult males. The mask was 'noticeable' by the two study
9 participants, but not restrictive to breathing. In light of the above considerations,
10 the Hudson RCI non-rebreathing mask has no bearing on the original certification
11 of cause or manner of death of Mr. Otto Zehm."
12

13
14 3.125. Answering paragraph 3.125, these defendants deny the same.

15 3.126. Answering paragraph 3.126, these defendants admit Officer
16 Thompson was interviewed twice: once by SPD Det. Ferguson and Spokane County
17 Sheriff's Det. Bill Frances, and both detectives took notes; a second interview was
18 conducted by the same detectives with an audio recording device, and deny the
19 remainder of said paragraph. By way of further answer, the interviews were taken
20 to elicit the relevant facts known by and the perceptions of Officer Thompson.
21 Neither interview was "off the record." Except as expressly admitted, paragraph
22 3.126 is denied.
23
24
25
26
27
28

1 3.127. Answering paragraph 3.127, these defendants deny the same.
2 By way of further answer, defendants reassert their answers to paragraphs 3.108
3 through 3.113.
4

5 **RESPONSE TO ALLEGATIONS RELATING TO DAMAGES FOR FEDERAL**
6 **CLAIMS.**

7 3.128. Answering paragraph 3.128, these defendants deny the same.
8 3.129. Answering paragraph 3.129, these defendants deny the same.
9 3.130. Answering paragraph 3.130, these defendants deny the same.
10 3.131. Answering paragraph 3.131, these defendants deny the same.
11 3.132. Answering paragraph 3.132, these defendants deny the same.
12

13 **RESPONSE TO ALLEGATIONS RELATING TO OTTO ZEHM AND ANN ZEHM.**

14 3.133. Answering paragraph 3.133, these defendants deny the same.
15 3.134. Answering paragraph 3.134, these defendants deny the same.
16 3.135. Answering paragraph 3.135, these defendants deny the same.
17 3.136. Answering paragraph 3.136, these defendants deny the same.
18 3.137. Answering paragraph 3.137, these defendants deny the same.
19 3.138. Answering paragraph 3.138, these defendants deny the same.
20 3.139. Answering paragraph 3.139, these defendants deny the same.
21 3.140. Answering paragraph 3.140, these defendants deny the same.
22 3.141. Answering paragraph 3.141, these defendants deny the same.
23
24

25 By way of further answer, Mr. Zehm had not reported to work for several
26 days/weeks before the March 18, 2006 incident, and he had been having significant
27 problems at work immediately before that time, due, based upon information and
28

1 information and belief, to a significant degeneration of his mental health disorder
2 and his failure to take his prescribed medication for the condition.

3 3.142. Answering paragraph 3.142, these defendants are without
4 sufficient knowledge or information to form a belief as to the truth or veracity of
5 said paragraph and therefore deny the same.

6 3.143. Answering paragraph 3.143, these defendants deny the same.
7 By way of further answer, upon information and belief defendants assert Mr. Zehm
8 suffered from several medical conditions at the time of his death.

9 3.144. Answering paragraph 3.144, these defendants admit, upon
10 information and belief, that Mr. Zehm and Ann Zehm had a loving mother-son
11 relationship, and that Mr. Zehm provided significant emotional support and
12 enjoyment to his mother, and deny the remainder of said paragraph.

13
14
15
16 **FEDERAL CLAIMS FOR RELIEF.**

17 **Title 42, United States Code § 1983.**

18 4.1. Answering paragraph 4.1, these defendants deny the same.

19 4.2. Answering paragraph 4.2, these defendants deny the same.

20 4.3. Answering paragraph 4.3, these defendants deny the same.

21 4.4. Answering paragraph 4.4, these defendants deny the same.

22 4.5. Answering paragraph 4.5, these defendants deny the same.

23 4.6. Answering paragraph 4.6, these defendants deny the same.

24 4.7. Answering paragraph 4.7, these defendants deny the same.

25 4.8. Answering paragraph 4.8, these defendants deny the same.

26 4.9. Answering paragraph 4.9, these defendants deny the same.

1 **RESPONSE TO ALLEGATIONS REGARDING STATE-BASED CLAIMS FOR**
2 **RELIEF.**

3 4.10. Answering paragraph 4.10, these defendants deny the same.

4 4.11. Answering paragraph 4.11, these defendants deny the same.

5 4.12. Answering paragraph 4.12, these defendants deny the same.

6 4.13. Answering paragraph 4.13, these defendants deny the same.

7 4.14. Answering paragraph 4.14, these defendants deny the same.

8
9 **V. ADDITIONAL FACTS**

10 BY WAY OF FURTHER ANSWER, defendants allege the following additional
11 facts.

12
13 5.1. Two citizen witnesses contemporaneously reported their observations
14 of Mr. Zehm and what appeared to be criminal activity (tampering with the ATM
15 machine; theft of funds from 1 of the victims/witnesses) directly to the Spokane
16 County 9-1-1 Emergency Call Center, at approximately 18:13:43 hours on March
17 18, 2006.

18
19 5.2. The 9-1-1 emergency call center which received and handled the
20 complainants' emergency call is managed and operated by the County of Spokane,
21 Washington.

22
23 5.3. The County's 9-1-1 operator provided some basic information to the
24 Spokane Police Department dispatchers via computer as she received the
25 information. The County's 9-1-1 operator obtained the suspect's basic physical
26 description and location. She asked the citizens if the suspect seemed "high or
27 intoxicated;" they responded that they did not think he was drunk, but that "he's on
28

1 on something” based on their direct observations of, and resultant fear of, the
2 suspect.

3
4 5.4. The County’s 9-1-1 operator transferred the citizen witnesses’ call
5 directly to the Spokane Police Department’s dispatch center at approximately
6 18:19:09 hours on March 18, 2006, after the citizens had told the County’s 9-1-1
7 operator that they believed the man (Mr. Zehm) had taken money from an ATM
8 account belonging to one of them, and he was observed by them to be running away
9 from the ATM.
10

11 5.5. The victims/witnesses continued to observe and follow Mr. Zehm after
12 he left the ATM. They reported his physical description, his actions, his direction,
13 and the fact that “he’s on something,” right up to the point at which he entered the
14 ZipTrip store.
15

16 5.6. The entire SPD investigation of the events of March 18, 2006 between
17 Mr. Zehm and the police was reviewed by the Spokane County Sheriff’s Office, and
18 then by the Spokane County Prosecutor’s Office. The prosecutors asked for
19 additional work to be done (especially related to enhancement and analysis of all
20 audio and video recordings). The additional work was performed by a forensic video
21 analyst and presented to the prosecutor’s office.
22

23 5.7. The Spokane County Prosecutor reviewed the entire investigation and
24 determined in October, 2006 there was no basis to charge any individual with a
25 crime.
26
27
28

1 5.8. Based on information and belief, representatives of the Estate of Otto
2 Zehm have disclosed confidential information about Mr. Zehm's life, including but
3 not limited to his prior contacts with law enforcement and the courts, the autopsy
4 report, and his social, medical, mental health and employment history to members
5 of the community, including the news media.
6

7 5.9. On information and belief, Mr. Zehm had functioned moderately well in
8 the community despite the severity of his mental illness, so long as he took his
9 prescribed psychotropic medication and utilized the support provided by various
10 social service agencies, and including those provided by his most recent employer.
11

12 5.10. On information and belief, Mr. Zehm stopped taking his prescribed
13 psychotropic medication in or about February, 2006, contrary to the advice of his
14 medical providers, leading to a significant deterioration of his functioning capacity,
15 including but not limited to episodes of major confusion and paranoia.
16

17 5.11. In mid February, 2006 Mr. Zehm's supervisors at work observed
18 unusually disturbing behavior from him. They noted increased confusion,
19 distraction, disorientation, poor work performance, need for increased work
20 supervision, nonsensical responses, and verbal aggression. Their concern was so
21 great they considered an involuntary mental health commitment for him at Sacred
22 Heart Medical Center on or about March 2, 2006, but they determined Mr. Zehm
23 apparently did not meet the involuntary commitment criteria.
24

25 5.12. On or about March 7, 2006 his employer determined Mr. Zehm, based
26 on the significant deterioration of his functioning ability, could not report for work
27
28

1 until he returned to his physician for evaluation and treatment. His employer
2 remained very concerned about his welfare due to Mr. Zehm's high level of
3 confusion, and supervisors tried to maintain contact with him. This included
4 contacts by his employer with his mother, Ann Zehm, who also reported to the
5 employer that she was concerned because he was behaving very differently.
6

7 5.13. Mr. Zehm has a history of being physically resistive and aggressive
8 with law enforcement officers, to the point of having to be hobbled prior to being
9 transported to jail.
10

11 (a) On August 3, 1990 Mr. Zehm was observed by a Spokane County
12 Sheriff's Deputy to be wandering along an arterial in a confused manner wearing
13 ripped clothing. The deputy drove back to investigate and determined that Mr.
14 Zehm was lost and very confused, and appeared to have mental health problems.
15

16 (b) Mr. Zehm answered some of the deputy's questions, refused to answer
17 others, and did not appear capable of caring for himself safely in and along the
18 roadway, a major arterial. The deputy determined he would have to take Mr. Zehm
19 to Sacred Hearth Medical Center for an involuntary mental health evaluation and
20 possible involuntary commitment for treatment.
21

22 (c) Mr. Zehm verbally and physically resisted the deputy's efforts to either
23 go with the deputy or remain at the scene.
24

25 (d) When the deputy attempted to prevent him from running away, Mr.
26 Zehm assaulted the deputy, and the deputy had to wrestle him to the ground,
27
28

1 where the two struggled. During the struggle, Mr. Zehm twice tried to get to the
2 deputy's gun in his holster.

3 (e) The deputy twice had to use his radio to call for immediate, emergent
4 backup assistance during the struggle. Mr. Zehm continued to fight against the
5 efforts of the backup officers as well, and attempted to kick the first deputy in the
6 groin area. The deputies had to hobble Mr. Zehm in hand and leg restraints, carry
7 him to a patrol car, and transport him to jail where he was booked on the charges
8 of third degree assault against the first deputy, and obstructing a public servant.
9

10 (f) Mr. Zehm was not tried on the criminal charges. Instead, he was
11 referred for involuntary mental health evaluation and treatment.
12

13 5.14. The Washington State Criminal Justice Training Commission
14 (WSCJTC) trains and certifies all fully commissioned law enforcement officers in
15 Washington.
16

17 5.15. The WSCJTC trains and certifies specialized law enforcement trainers
18 throughout Washington, including but not limited to Defensive Tactics (DT)
19 trainers.
20

21 5.16. As of March, 2006, the WSCJTC had trained and certified DT trainers
22 for the SPD. Said DT training included the subject of when and how to properly use
23 leg and arm restraints, including hobbling devices.
24

25 5.17. At all relevant times in March 2006, the WSCJTC did not have a
26 standard which would require any person who had been hobbled to be placed on
27 their side by the law enforcement officers. At all relevant times, the WSCJTC taught
28

1 taught SPD instructors that hobbled subjects could remain in a prone position.

2 **VI. AFFIRMATIVE DEFENSES**

3 6.1. The plaintiffs' amended complaint fails to state a cause of action
4 against any defendant.
5

6 6.2. This court does not have jurisdiction over the subject matter of
7 plaintiffs' amended complaint alleging contempt of court under Ch. RCW 7.21.

8 6.3. All force used by defendants against Mr. Zehm was lawful under the
9 standards for reviewing the use of force by police officers established by the U.S.
10 Supreme Court in *Graham v. Connor*, 490 U.S. 386 (1989).
11

12 6.4. The plaintiffs' amended complaint fails to state a cause of action
13 against the defendant City of Spokane for, pursuant to *Monell v. Department of*
14 *Social Services of the City of New York*, 436 U.S. 658, 98 S.Ct. 2018 (1978), there
15 can be no recovery for a federal civil rights violation when there is no constitutional
16 deprivation occurring pursuant to governmental custom or policy.
17

18 6.5. Each individual police officer defendant is entitled to qualified
19 immunity from the plaintiffs' suit because each acted reasonably under the
20 circumstances, none of the officers violated any of plaintiffs' constitutional rights,
21 and the rights allegedly violated were not so clearly established that it would be
22 clear to a reasonable officer that his/her conduct was unlawful in the situation
23 he/she confronted. The qualified immunity extends to all alleged actions in
24 plaintiffs' amended complaint, including but not limited to the detention and
25 subsequent arrest of Mr. Zehm, any and all alleged uses of force (use of baton,
26
27
28

1 TASER, handcuffs, leg restraints, hobbling device, and all other techniques and
2 devices used), investigation, application for and execution of search warrants, and
3 public statements.

4
5 6.6. Otto Zehm was initially lawfully detained prior to being lawfully
6 arrested.

7 6.7. Probable cause existed for the arrest of the plaintiff.

8 6.8. The officers had reasonable cause to believe that a public offense was
9 being committed in their presence.

10
11 6.9. Otto Zehm knew or should have known that he was being detained by
12 a peace officer and had the duty to refrain from using force to resist such detention.

13
14
15 6.10. The force used upon Mr. Zehm was caused and necessitated by his
16 own acts, and said force was necessary and reasonable under the totality of the
17 circumstances known by and perceived by the officers, under tense, uncertain, and
18 rapidly evolving circumstances.

19
20 6.11. Any injury or damage suffered by Mr. Zehm was caused solely by
21 reason of his conduct and his willful resistance to peace officers in the discharge,
22 and attempt to discharge, the duty of their office, and not by reason of any unlawful
23 acts or omissions of any defendant.

24
25 6.12. The force used on Mr. Zehm was reasonable and necessary under the
26 circumstances known to and perceived by the officers, and any injury or damages
27 allegedly suffered by Mr. Zehm was due to and caused by reason of Mr. Zehm's acts
28

1 acts and conduct in the unlawful assault and battery committed by Mr. Zehm
2 against the officers.

3
4 6.13. The City's employees, defendants herein, at all times herein mentioned
5 acted in good faith without malice and within the scope of their duties as police
6 officers of the City of Spokane and peace officers of the State of Washington.

7
8 6.14. The plaintiffs' amended complaint does not state facts sufficient to
9 constitute a cause of action against any defendant herein, because simple
10 negligence, pursuant to the United States Supreme Court decision of *Parratt v.*
11 *Taylor*, 451 U.S. 527, 101 S.Ct. 1908 (1981), is not a Federal Civil Rights violation.

12
13 6.15. A claim for punitive damages against the City of Spokane is not
14 permitted. *City of Newport v. Fact Concerts*, 453 U.S. 247, 101 S.Ct. 2748 (1981).

15
16 6.16. No individual defendant can be held vicariously responsible for any
17 violations, which are denied, of any of plaintiffs' federal rights by any other
18 defendant named herein.

19
20 6.17. Plaintiffs' claims pursuant to federal law should be dismissed because
21 plaintiff has adequate remedies pursuant to the laws of the State of Washington.

22
23 6.18. The defendant City was not aware of any egregious conduct by its
24 employees, nor did the City react with deliberate indifference toward the
25 constitutional rights of the plaintiffs in training its employees. *City of Canton v.*
Harris, 109 S.Ct. 1197 (1989).

26
27 6.19. The defendant City of Spokane's employees, Jim Nicks, Karl
28 Thompson, Steven Braun, Zack Dahle, Erin Raleigh, Dan Torok, Ron Voeller, Jason

1 Uberuaga, and Theresa Ferguson, were at all times mentioned in plaintiffs'
2 complaint and now are duly qualified, appointed and acting police officers of the
3 City of Spokane and peace officers of the State of Washington, and at all times
4 herein mentioned said employees were engaged in the performance of their
5 regularly assigned duties as police officers.
6

7 6.20. Pursuant to the laws of the State of Washington, exemplary or punitive
8 damages are not available to plaintiffs for the causes of action pled under
9 Washington law.
10

11 6.21. Any injury to Otto Zehm was due to and caused by the negligence and
12 omissions of Mr. Zehm to care for himself, which carelessness and negligence and
13 omissions were the proximate cause of the damage, if any, to the plaintiffs.
14

15 6.22. The allegation of inadequate police investigation is not actionable under
16 42 U.S.C.A. § 1983.
17

18 6.23. The allegation of negligent police investigation is not actionable under
19 Washington law.
20

21 6.24. Allegations that an officer or employee of the City of Spokane violated
22 City policy, procedure or training is not actionable as a violation of law.
23

24 6.25. All statements alleged by plaintiffs to have been violative of the law
25 were protected by both absolute and qualified privilege.
26

27 6.26. All statements alleged by plaintiffs to have been violative of the law did
28 not disclose information about Mr. Zehm, that would be considered highly offensive
by a reasonable person, and was made as a matter of public interest, without

1 malice, in the performance of a governmental function, and all of said statements
2 are privileged.

3 6.27. Plaintiffs' injuries and damages, if any, were proximately caused by Mr.
4 Zehm's own fault, including negligence, and assumption of the risk of known and
5 appreciated dangers.
6

7 6.28. Plaintiffs' injuries and damages, if any, arise out of a condition of which
8 the Mr. Zehm had knowledge and to which Mr. Zehm voluntarily subjected himself.
9

10 6.29. Plaintiffs' claims under Washington law are barred by the statute of
11 limitation.
12

13 6.30. Plaintiffs' injuries and damages, if any, were proximately caused by the
14 negligence or intentional acts of third parties over whom the answering defendants
15 had no control or right of control.
16

17 6.31. Plaintiffs' injuries and damages, if any, are barred by plaintiffs' failure
18 to mitigate such injury or damage.
19

20 6.32. The plaintiffs have waived any right to privacy with respect to Mr.
21 Zehm's medical and mental health history and condition, and other matters
22 considered "private" in plaintiffs' amended complaint.
23

24 **JURY DEMAND**

25 In the event this case proceeds to trial these defendants demand that this
26 case be tried to a jury.
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FURTHER, by way of reservation of rights, without waiver, the defendants specifically reserve the right to amend their Answer by way of adding additional Affirmative Defenses, Counter Claims, Cross-Claims, or instituting third-party actions which may be appropriate after further investigation and discovery.

Wherefore, having fully answered plaintiffs' amended complaint, these defendants pray as follows:

1. The plaintiffs' amended complaint be dismissed with prejudice and that plaintiffs take nothing thereby;
2. The defendants be awarded their costs and disbursements in defending this action.
3. For other such relief as the court may deem appropriate.

DATED this 18th day of June, 2009.

s/Rocco N. Treppiedi, WSBA #9137
Rocco N. Treppiedi
Assistant City Attorney
Attorney for Defendants
Office of the City Attorney
808 W. Spokane Falls Blvd.
Spokane, WA 99201-3326
Telephone: (509) 625-6225
Fax: (509) 625-6277
Email: rtreppiedi@spokanecity.org

s/Carl Oreskovich
CARL ORESKOVICH, WSBA #12779
Attorney for Karl Thompson
Etter, McMahon, Lamberson,
Clary & Oreskovich, P.C.
Bank of Whitman, Suite 210
618 West Riverside Avenue
Spokane, WA 99201
(509) 747-9100

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(509) 623-1439 Fax
Email: carl@ettermcmahon.com

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of June, 2009, I electronically filed the foregoing "DEFENDANTS' ANSWER TO PLAINTIFFS' AMENDED COMPLAINT FOR DAMAGES FOR VIOLATION OF CIVIL RIGHTS AND STATE-BASED CLAIMS, AFFIRMATIVE DEFENSES, AND JURY DEMAND," with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

Brean L. Beggs
Jeffrey K. Finer
Center for Justice
35 West Main, Suite 300
Spokane, WA 99201
Attorneys for Plaintiffs

Carl Oreskovich
Etter, McMahon, Lamberson, Clary & Oreskovich, P.C.
Bank of Whitman, Suite 210
618 West Riverside Avenue
Spokane, WA 99201
(509) 623-1439 Fax
Email: carl@ettermcmahon.com

s/Doris Stragier
Doris Stragier
Office of the City Attorney
808 W. Spokane Falls Blvd.
5th Floor, Municipal Building
Spokane, WA 99201-3326
Phone (509) 625-6225
Fax (509) 625-6277