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The Honorable FRED VAN SICKLE

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11 UNITED STATES DISTRICT COURT
12 EASTERN DISTRICT OF WASHINGTON

13 UNITED STATES,)	NO. CV-09-0088-FVS
)	
14 Plaintiffs,)	AUSA DURKIN’S REPLY
15 vs.)	DECLARATON TO DEFENSE
)	COUNSEL’S SUPPLEMENTAL
16 KARL F. THOMPSON, JR.)	RESPONSE MATERIALS
)	
17 Defendant.)	
)	

19
20 *TIMOTHY M. DURKIN*, Assistant United States Attorney, declares and states
21 under the penalty of perjury under the laws of the United States, 28 U.S.C. § 1746,
22 that the following information is true and correct to the best of his knowledge,
23 information and belief. AUSA Durkin further declares that he is above the age of 18,
24 is not a party hereto, is competent to testify to the matters stated herein, which are
25 based on personal knowledge, personal information, and/or information that has been
26 acquired by the DOJ during the course of its federal investigation into the events of
27 the defendant Karl F. Thompson’s forcible detention of Otto Zehm on March 18,

1 2006, which force (i.e., baton strikes and taser application) precipitated Mr. Zehm
2 expiring while in the custody of the Spokane Police Department (“SPD”), and/or
3 during the course of the prosecution of this case Mr. Durkin further declares that
4 these statements are provided in good faith and should be admissible as evidence
5 and/or accepted as a proffer and/or as an offer of proof at the time of hearing or trial.

6 This declaration is being submitted to the Court to provide it with a concise
7 overall summary and to respond to defendant’s and his counsel’s additional response
8 materials.

9
10 **I. Background & Scope of Defense Counsel’s Retention & Representation**

11 1. During the **spring-summer of 2008**, the DOJ and Grand Jury proceeds
12 with its investigation, including the DOJ’s collection of records and materials from
13 the SPD and City of Spokane.

14 2. On or about **September 3, 2008**, while the Estate of Otto Zehm’s multi-
15 million dollar (i.e., **\$2.9 million**) civil claim against defendant is pending and the
16 DOJ’s criminal investigation continues, which defendant is aware of, defendant’s
17 wife, Mrs. Diana Jean Thompson files a petition for divorce in the District Court for
18 the State of Idaho, Kootenai County. The defendant and Mrs. Thompson have been
19 married for approximately thirty-eight (38) years and have three (3) daughters from
20 their marriage. During this time, defendant is being civilly represented by the City
21 Attorney’s Office.

22 3. In her divorce complaint, Mrs. Thompson requests the court to award
23 her all real property interests owned by the couple, including the family home, as
24 well as a motor vehicle and other personal property. Plaintiff also requests “one-
25 half” of the defendant’s retirement plan through the City of Spokane. Mrs.
26 Thompson also seeks 100% of defendant’s interest in another deferred compensation
27

1 plan and trust. Mrs. Thompson, who reportedly works part time, also asks the court
2 to order defendant to pay “all” existing community debts.

3 4. On **September 29, 2008**, a little over three (3) weeks after filing the
4 divorce petition, an uncontested decree of divorce is entered with the Court. This
5 decree transfers “all” interest in the family’s home to defendant’s purported ex-wife.
6 The order of decree further directs that the home be sold for a reasonable price and
7 on reasonable terms.

8 5. Mrs. Thompson is also awarded 50% of defendant’s retirement with the
9 City and 100% interest in defendant’s other deferred compensation plan, presumably
10 from his prior employment. Defendant is also directed in the decree to pay all
11 existing community debts. Defendant is also purportedly ordered to pay
12 \$1500/month in spousal support to his wife of 38 years “until plaintiff’s death” (i.e.,
13 spousal support of \$1,500 month for life). The decree further provides, however,
14 that he can continue to reside in the family’s home “rent free” until the home is sold.
15 *See Exhibit #29 – copy of September 29, 2009, Divorce Decree filed in Kootenai Co.*
16 *Dist. Ct., Ct. Rec. #187.*

17 6. Over nine months later, on **July 8, 2009**, while defense counsel Mr.
18 Oreskovich (and the City Attorney’s Office) is representing defendant Thompson,
19 defendant submits an application to the federal court for appointment of counsel at
20 public expense under the Criminal Justice Act (CJA). At the time, defendant
21 continues to reside with his purported ex-wife Mrs. (Thompson) Harrison. At the
22 time, the family home, consisting of a log home on approximately two acres, was
23 listed with a realty agency and was offered for sale at six hundred seventy-five
24 thousand dollars (\$675,000).

25 7. Another nine (9) months later (1.5 years after entry of the divorce
26 decree), however, a review of Kootenai County real estate records reveals that the
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1 home has not been sold. Further, the family home is no longer for sale. Defendant
2 is reported to still reside at the home with his purported ex-wife. *See First Judicial*
3 *District of State of Idaho, Kootenai County, Case No. CV-08-7037.*

4 8. **In early October 2008**, Spokane Police Chief Anne Kirkpatrick is
5 contacted by DOJ representatives and is informed that the FBI and the U.S.
6 Attorney's Office anticipates calling a number of SPD personnel in front of the
7 Grand Jury to provide testimony. Asst. Chief Kirkpatrick volunteers to assist the
8 DOJ by offering to institute a "gag order" on all SPD personnel who are subpoenaed
9 and/or who provide testimony before the grand jury. Chief Kirkpatrick's offer to
10 impose a gag order on SPD personnel appearing before the grand jury, in the interest
11 of maintaining the confidentiality and integrity of the DOJ's on-going investigation
12 into "any federal crimes" that may have been committed by SPD personnel in
13 detaining Otto Zehm, and forcibly holding him in restraints and/or in connection
14 with obstructing and/or misleading the SPD's and/or the DOJ's investigation, was
15 accepted by the DOJ. *Id.*

16 9. **In early fall 2008**, the United States Attorney's Office is prepared to
17 issue an official target letter to the Defendant Karl Thompson. Asst. city atty.
18 Treppiedi is contacted **on October 6, 2008**, and queried on whether Officer
19 Thompson has private criminal counsel. Treppiedi indicates that Thompson does
20 not have separate criminal counsel, but offers that since he represents Thompson's
21 interests relative to Thompson's defense of his use of force on Zehm that the City
22 Attorney can accept the DOJ's target letter on Mr. Thompson's behalf. The United
23 States respectfully declines Treppiedi's offer.

24 10. Approximately two weeks later, on or about **October 20, 2008**, the City
25 Attorney's Office and its Risk Management Division "officially" prepared and
26 submitted a resolution to the Spokane City Council requesting approval for the
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1 retention of well known criminal defense attorney Carl Oreskovich for the purpose
2 of representing and defending “the City” and it’s “employees” in connection with
3 the Zehm Estate’s pending “civil” civil rights action. *See Spokesman Review news*
4 *article of October 21, 2009, Def. Disc #9, Exhibit #10 and Exhibit #13, copy of news*
5 *article. See Exhibits 23-24, and 25-27, Ct. Rec. 187.*

6 11. In reality, Mr. Oreskovich had already met with the City Attorney’s
7 Office in **mid-October** to discuss and review the Zehm use of force/in-custody
8 death incident. During which the City Attorney’s Office shared with him
9 confidential information involving “all of its employees” and “clients” concerning
10 their respective involvement in the *Otto Zehm In-Custody Death Incident. See*
11 *Declaration of assistant city attorney Rocco Treppiedi, filed in civil action, Ct. Rec.*
12 *63.*

13 12. The City Council, based on representations of the City Attorney’s
14 Office, approved up to \$45,000 in defense fees and costs associated with Mr.
15 Oreskovich’s alleged “civil” representation of “the City” and its “employees” in the
16 pending Zehm claim review and forthcoming litigation. *Id.* This “Resolution”
17 specifically states that Mr. Oreskovich has been retained **to represent “The City of**
18 **Spokane and its employees.”** *Id.*

19 13. In addition to the City Council’s resolution, Mr. Oreskovich executed a
20 “contract” on behalf of himself and his law firm with the City Attorney’s Office and
21 the City of Spokane which also specifically states that he will be providing legal
22 services as “special counsel” to the City Attorney’s Office and will be representing
23 “The City of Spokane and its employees” relative to the Zehm in-custody death
24 incident. *See Contracts, Exhibits A-F, attached to AUSA Durkin’s First Reply*
25 *Declaration, Ct. Rec. 273.*

26 14. Mr. Oreskovich represents in his Supplemental Response Declaration
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1 that on some unspecified date later in the month of October that Karl Thompson
2 contacted him and asked Mr. Oreskovich to also represent his criminal interests
3 relative to the on-going DOJ criminal investigation. However, Mr. Oreskovich
4 represented to the undersigned in early November 2008 that defendant had not yet
5 returned from an alleged month-long hunting trip and that he did not as yet
6 “officially” represent Karl Thompson’s interests, although he had been retained by
7 the City Attorney’s Office to provide legal advice and counsel concerning the
8 underlying use of force/in-custody death incident involving Mr. Zehm.

9 15. On or about **November 17, 2008**, FBI Special Agent Lisa Jangaard and
10 AUSA Tim Durkin meet with Carl Oreskovich to discuss the United States’ offer to
11 allow the Defendant Thompson to appear and testify in front of the grand jury. In
12 this meeting, Mr. Oreskovich confirmed that he had spoken with Officer Thompson
13 and informs the DOJ that he “exclusively” represents Karl Thompson. Mr.
14 Oreskovich further stated that he did not, notwithstanding any City Attorney
15 Office’s representation, City Council resolution, and/or newspaper article to the
16 contrary, represent “the City” or for that matter, any other Spokane Police
17 Department officers, any other SPD administrators, and/or any other city
18 “employees.” *See Ct. Rec. #60, ¶¶ 58-63.*

19 16. Mr. Oreskovich further states that he and only he will be representing
20 Mr. Thompson’s “criminal” and “civil” interests stemming from the Otto Zehm
21 arrest incident. *Id.* However, this representation later turns out to be inaccurate. *See*
22 *¶23, infra.*

23 17. Mr. Oreskovich also discloses to Special Agent Jangaard and AUSA
24 Durkin that the city attorney’s office has already retained a number of defense
25 experts in connection with its civil liability defense of the likely (but not then filed)
26 Zehm civil civil rights lawsuit, including specifically defensive tactics and police
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1 procedures expert D.P. Van Blaricom (a former Bellevue PD Chief (retired in
2 approx. 1984)). The city attorney's Office has frequently retained Van Blaricom to
3 assist it in its defense of civil rights/torts claims-suits against the Spokane PD. Mr.
4 Oreskovich further discloses that defense experts retained and paid for by the City
5 would be made available by the City Attorney's Office to help defend Thompson in
6 the event any criminal indictment was returned by the Grand Jury in the future. *Id.*

7 18. In **December 2008**, Oreskovich calls the Spokane County Medical
8 Examiner's Office to schedule an appointment with Medical Examiner, Dr. Sally
9 Aiken. Although Oreskovich has reportedly been provided access to the autopsy
10 through his "co-counsel" in the City Attorney's Office, who is also the legal advisor
11 to the SPD, Oreskovich likewise is not an investigating law enforcement officer and
12 is not a prosecutor. Thus, the appointment is canceled when Oreskovich is advised
13 that Dr. Aiken cannot meet with him because he is not authorized under RCW
14 68.50.105 to discuss/review the autopsy.

15 19. On **March 13, 2009**, the Estate of Zehm and his mother Ann Zehm file
16 their civil civil rights action seeking damages for civil rights violations, wrongful
17 death, and state tort law claims. *See Estate of Otto Zehm, et al., v. Thompson, City of*
18 *Spokane, et al., 09-cv-0080-LRS, Dckt. #1.*

19 20. **From October 2008 through June 2009**, it became apparent to the
20 DOJ that Asst. City Atty. Treppiedi was briefing and preparing most of the Spokane
21 Police Department and/or the City of Spokane witnesses called to testify before the
22 Grand Jury. It was also learned that Treppiedi was debriefing SPD witnesses who
23 appeared before the grand jury. *See Ct. Rec. #60, ¶ 65.*

24 21. The DOJ also learned that Treppiedi was conducting an "investigation"
25 that appeared to "shadow" in some of the investigative activities of the DOJ and/or
26 Grand Jury. For instance, in addition to preparing and/or debriefing the many SPD
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1 witnesses, Mr. Treppiedi also conducted post-GJ testimony interviews of one or
2 more non-SPD witnesses that had recently appeared before the Grand Jury. *Id.*

3 22. On **February 2, 2009**, Oreskovich has a telephone conversation with
4 AUSA Durkin wherein he informs the United States that he and he alone represents
5 Mr. Thompson's "criminal and civil interest."

6 23. On **February 3, 2009**, AUSA Durkin sends a letter to Oreskovich
7 confirming the parties' previous conversations concerning Mr. Oreskovich's
8 exclusive representation of Mr. Thompson and expressing concern over Treppiedi's
9 reported disclosure of grand jury material, gleaned from other witnesses, to
10 Thompson and to Oreskovich. *See Ct. Rec. #187, Exhibit #28.*

11 24. On **February 18, 2009**, the DOJ learns, based on conversations and
12 exchanges of correspondence with Treppiedi and Oreskovich, that notwithstanding
13 Oreskovich's earlier representation to AUSA Durkin and FBI Special Agent Jangaard
14 that "he and he alone" represented the defendant Thompson's criminal and civil
15 interests, Treppiedi was now asserting (notwithstanding Oreskovich's independent
16 retention at public expense) that Treppiedi and the City Attorney's Office also
17 continued to represent Thompson's global "interests" arising out of his use of non-
18 lethal and lethal force on Otto Zehm. *See Dckt. #60, Exhibit #6, Oreskovich's*
19 *February 18, 2009*, letter advising that Asst. City Attorney Treppiedi continues to
20 represent Thompson's, the SPD's, SPD administrators, other SPD officers, and the
21 City's interests in the Zehm incident, and any possible civil liability.

22 25. From **October 2008 through June 18, 2009**, defense counsel Mr.
23 Oreskovich was also actively participating in investigating and reviewing excessive
24 force claims against Thompson and apparently the City, and other officers. Mr.
25 Oreskovich's activities include conducting pre-grand jury and post-grand jury
26 interviews of investigators and other SPD personnel. *See Exhibit #30, copy of Det.*
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1 *Ferguson's October 28, 2008, e-mail confirming meeting with Treppiedi and three*
2 *additional attorneys (i.e., Oreskovich, Faggiano and O'Hara), Ct. Rec. 187 and 60.*

3 26. On or about **May 26, 2009**, the Spokane City Council, based on another
4 resolution prepared by the City Attorney's Office and its recommendation, authorizes
5 an additional **\$200,000** in "civil" defense fees and costs to pay Mr. Oreskovich for his
6 continued representation and defense of "*The City of Spokane*" and "*its employees*"
7 relative to the Otto Zehm matter. *See Spokesman Review article of May 27, 2009*
8 *([www.spokesman.com/stories/2009/may/27/city-approves-200000-for-defense-in-](http://www.spokesman.com/stories/2009/may/27/city-approves-200000-for-defense-in-zehm-case)*
9 *[zehm-case](http://www.spokesman.com/stories/2009/may/27/city-approves-200000-for-defense-in-zehm-case)). See also Exhibit #27 (City Council Resolution), Ct. Rec. 60 and 187.*

10 27. In the **spring of 2009**, the United States learns that asst. city attorney
11 Treppiedi contacted and attempted to interview one of the DOJ's retained expert
12 witnesses and consultants in its continuing investigation of defendant Thompson,
13 Treppiedi's claimed client. Upon learning of Treppiedi's contact with Robert Bragg,
14 a defensive tactics expert and the program director of the Washington State Criminal
15 Justice Training Commission's defensive tactics division, AUSA Durkin contacted
16 Treppiedi and requested that he and the City Attorney's Office cease and desist all
17 further contact with the DOJ's expert on their client's (including Thompson's) behalf.

18 28. Mr. Treppiedi refused the DOJ's request and expressed the belief that
19 while Mr. Bragg had no direct involvement in defendant Thompson's and/or any
20 other SPD officers' detention of Zehm the night of March 18, 2006, that Mr. Bragg
21 could nonetheless be a "fact witness" (concerning State and SPD training) and
22 therefore he had the right to engage in ex parte contact with and interview Mr.
23 Bragg, even if he was a DOJ expert and Treppiedi represented a directly adverse
24 party. *See Exhibit #7, Ct. Rec. 60.*

25 29. On **June 12, 2009**, AUSA Durkin sent Treppiedi an e-mail outlining
26 the DOJ's objection to Treppiedi's/City Attorney's attempt to use the civil case and
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1 civil discovery processes to engage in *ex parte contact* with another party's expert
2 wherein privileged and/or confidential criminal case investigation information could
3 be improperly solicited and/or obtained. *Id.*

4 30. City Attorney Howard Delaney responded to AUSA Durkin's
5 correspondence indicating that the City would temporarily "stay" further attempts to
6 engage in *ex parte contact* with the United States' expert witness until a "further
7 review" of the issue was performed. *See Ct. Rec. 60, Exhibit #7, copy of the June*
8 *12th e-mail exchange concerning City Attorney's ex parte interviews with the United*
9 *States' expert.* Treppiedi's co-counsel Mr. Oreskovich was copied in on this
10 transmittal. No further response was received or provided City Attorney Delaney or
11 his Office.

12 31. During the course of the United States' and Grand Jury's investigation,
13 the United States expressed repeated concerns to Treppiedi and City Attorney
14 Delaney about what it believed to be "obvious" and "apparent "conflicts relative to
15 Treppiedi's and the City Attorney Office's "global representation" of "the SPD and
16 all SPD employees" connected to the Otto Zehm incident, including but not limited
17 to the City Attorney's continued representation of the target Karl Thompson.¹ The
18 DOJ was concerned on multiple fronts. First, it is well established that excessive
19 force used by a police officer at the time of the arrest is not within the performance
20 of the officer's duty." *Smith v. City of Hemet*, 394 F.3d 689, 695-96 (9th Cir.2005),
21 cert. denied, 545 U.S. 1128, 125 S.Ct. 2938, 162 L.Ed.2d 866 (2005) ("Excessive
22

23 ¹ The DOJ was informed in the fall of 2006 that the target of the investigation,
24 Karl J. Thompson, Jr., was notified by a SPD Administrator in July of 2006 that he was a
25 target and/or subject of the DOJ's investigation. Thompson was (officially) provided
26 with an official target letter and notified of an opportunity to appear in front of the grand
27 jury in November 2009.

1 force used by a police officer at the time of the arrest is not within the performance
2 of the officer's duty. [citations].") *United States v. Span*, 970 F.2d 573, 581 (9th
3 Cir.1992) (an officer who uses excessive force is not in good faith performance of
4 his duties); *State v. Hoffman*, 116 Wash.2d 51, 100, 804 P.2d 577 (1991) (Officer
5 involved in crime of violence acts outside scope of authority); and *People v. White*,
6 101 Cal.App.3d 161, 164 (1980) (The performance of an officer's duty does not
7 include the infliction of excessive force.). Second, a conflict exists where an
8 attorney owes duties to an entity whose interests is and/or may become adverse to
9 the individual client. *State v. Nielsen*, 29 Wash.App. 451, 453, 629 P.2d 1333
10 (1981) (Interests are sufficiently adverse if it is shown that attorney owes a duty to
11 defendant to take some action that could be detrimental to his other client(s)). The
12 DOJ was also concerned that the legal department for a fellow law enforcement
13 agency was releasing sensitive law enforcement information to the target of the
14 criminal investigation in contradiction of the law enforcement agency's expressed
15 interests.

16 32. Treppiedi and the City Attorney's Office responded that it did not feel
17 that it had "any" conflicts of interest in and/or among its representation of the City of
18 Spokane, the Police Department, Chief Kirkpatrick, Asst. Chief Nicks, Karl
19 Thompson, Steven Braun, Zach Dahle, Erin Raleigh, Dan Torok, Ron Voeller, Jason
20 Uberuaga, Theresa Ferguson, Mark Burbridge, and/or any other SPD employee. *Id.*

21 33. On **June 15, 2009**, AUSA Durkin sent an e-mail to Treppiedi and City
22 Attorney Delaney that, among other things, memorialized the United States'
23 Department of Justice's concerns with the City Attorney's Office's actual and/or
24 apparent conflicts of interest in claiming "global representation" of all SPD
25 employees relative to the DOJ's investigation and excessive force claims. *See Ct.*
26 *Rec. 60, Exhibit #8, copy of AUSA Durkin's June 15, 2009 e-mail outlining*
27

1 “conflicts concerns” with the “global scope” of City Attorney’s representation of
2 target and other SPD employees involved in the DOJ’s investigation of the Zehm
3 matter. *Treppiedi’s co-counsel, Mr. Oreskovich was provided a copy of this*
4 *transmittal.*

5 34. The DOJ further learned that Treppiedi, given his and the City
6 Attorney’s Office’s continued representation (at public expense) of the target
7 Defendant Thompson, was channeling confidential grand jury information
8 (including debriefed testimony) to Thompson and to Treppiedi’s co-defense counsel
9 Carl Oreskovich. This circumstance was disconcerting to DOJ in light of
10 Treppiedi’s primary client, Chief Kirkpatrick’s issuance of a “gag order” to SPD
11 employees that was intended to maintain the confidentiality and integrity of the
12 DOJ’s investigation, and which order was intended to prevent the dissemination of
13 DOJ investigation activities to the target of the United States investigation (i.e., the
14 Defendant Thompson). *See Ct. Rec. 60, Exhibit #9.*

15 35. Treppiedi was aware of his client Chief Anne Kirkpatrick’s gag order,
16 but asserted that since he is not an SPD employee that he is not bound by the gag
17 order and/or by Chief Kirkpatrick’s desire to maintain the confidentiality of the
18 DOJ’s/Grand Jury’s investigation. Treppiedi further asserted that since he continued
19 to represent the target Thompson that, notwithstanding any conflict, he had an
20 ethical obligation to provide any and all information that he acquired to Mr.
21 Thompson and to his co-counsel Mr. Oreskovich. *See Ct. Rec. 60, Exhibit #9*, a true
22 and correct copy of AUSA Durkin’s **June 17, 2009**, e-mail to City Attorney Delaney
23 and Treppiedi conveying DOJ’s objections to dissemination of traditionally
24 confidential grand jury investigation information to criminal target. *Id.*

25 36. **During the week of June 17, 2009**, representative of the United States
26 Attorney’s Office and the FBI spoke by phone, conferred and met with Mr.
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1 Oreskovich in person to discuss the United States Department of Justice's disclosure
2 intention to propose an Indictment to the Grand Jury. At 8:00 a.m. on June 18, 2009,
3 defendant and his counsel Carl Oreskovich and Steve Lamberson met with DOJ
4 representatives at the United States Attorney's Office for the purpose of reviewing
5 certain pre-indictment evidentiary materials and for entertaining any possible pre-
6 indictment resolutions (i.e., plea in lieu of indictment). Obviously, no pre-
7 indictment resolution was reached.

8 37. Later that very same day, **June 18, 2009**, after first meeting with DOJ
9 officials, defense counsel Carl Oreskovich and his co-counsel asst. atty. attorney
10 Treppiedi file a "unified" **Answer and Affirmative Defenses** in the civil action.
11 This 56 page Answer, **signed Treppiedi and Oreskovich on behalf of the**
12 **Defendant Thompson (and all other Defendants)** alleges that the Plaintiff Otto
13 Zehm (the mentally disabled janitor with cognitive delay) threatened Defendant
14 Thompson with a plastic pop bottle and therefore was solely responsible for causing:
15 a) Officer Thompson's use of an impact weapon to strike Mr. Zehm multiple times
16 and taser him; b) the need to forcibly subdue him in a prone hog-tie restraint; and c)
17 his proximally related brain death. *See Zehm v. Thompson, City of Spokane, et al,*
18 *Dckt. # 12.* This answer also avers that Defendant Thompson "never" struck the
19 victim Zehm in the head with his baton. *Id.*

20 38. Obviously, defense counsel Oreskovich must have exercised significant
21 "due diligence" along with his co-counsel Mr. Treppiedi during their pre-Answer &
22 Affirmative Defenses review and investigation of the civil Plaintiffs' civil rights
23 "excessive force" claims so as to allow him and his co-counsel with the City to
24 prepare and file a 54 page Answer & Affirmative Defenses not only on behalf of
25 defendant Thompson, but also defendants *Asst. Chief Nicks, Det. Ferguson, Sgt.*
26 *Torok, Officer Braun, Officer Raleigh, Officer Uberuaga, Officer Voeller, Officer*
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1 *Dahle*, and *City of Spokane* (i.e., Mayor, City Council, SPD, et al).

2 39. The very next day, **June 19, 2009**, the Grand Jury for the Eastern
3 District of Washington returned a Two Count Indictment against Defendant
4 Thompson charging him with criminal violations of Mr. Zehm's constitutional rights
5 (i.e., excessive force) and with obstruction of justice by providing one or more false
6 entries in a law enforcement report to justify his excessive force on the victim Zehm
7 (i.e., false statements in his recorded interview statement). *See U.S. v. Thompson,*
8 *Cause 09-cr-0088-FVS, Dckt #1.*

9 40. Defendant Thompson's "unified Answer & Affirmative Defenses will
10 be offered as a prosecution exhibit at the time of trial (i.e., "admissions" contained
11 within).

12
13 **A. Zehm Estate, et al, v. Spokane Police Dept., Thompson, Nicks, et al**

14 41. In addition to filing a "joint Answer" (which Answer will be an Exhibit
15 in the criminal case – and unless stipulated to by defendant, could necessitate the
16 need to call one of his counsel), Messrs. Orkesovich and Treppiedi opposed the
17 United States' Motion to Intervene and Stay the civil court proceeding so that the
18 criminal case could move forward without the improper use and interference of the
19 civil discovery process. *See Ct. Rec.*

20 42. In connection with Messrs. Oreskovich and the city attorney office's
21 opposition to the United States motion to intervene and stay the civil case, assistant
22 city attorney Rocco Treppiedi filed a sworn declaration in which he represents and
23 attests to the Court the following information concerning defense counsel Mr.
24 Oreskovich's "legal services" to the City of Spokane, the City Attorney's Office, and
25 the City's SPD employees:

26 "45. In the *fall of 2008*, I conferred with City Attorney Howard
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1 Delaney and other lawyers in the office to consider *hiring special counsel to*
2 *work with our office to represent the City and its employees* in the claim filed
3 by the estate of Otto Zehm. We unanimously concluded that Mr. Carl
4 Oreskovich would be of assistance. *After we conferred with Mr. Oreskovich*
5 *and he agreed to be of service, the City Council adopted a resolution*
6 *authorizing the expenditure of funds. The resolution clearly authorizes M[r].*
7 *Oreskovich to work with our office to represent the City and the officers. . . The*
8 *City Attorney has the authority and responsibility to determine how attorney*
9 *resources are allocated. When the lawsuit was filed in March, 2009, defense*
10 *counsel discussed the nature of who would represent whom.* Mr. Oreskovich
11 is still authorized to represent all defendants under the resolutions passed by
12 the City Council; *at this point*, he is only representing Officer Thompson.

13 46. In May, 2009 the City Council adopted *a supplemental resolution*
14 *which authorized additional payments for Mr. Oreskovich and his firm.”*
15 *See Ct. Rec. 63, Treppiedi Declaration, ¶¶ 45-46, Estate of Zehm v. City of Spokane,*
16 *et al.*

17 43. According to this purported sworn testimony, Mr. Oreskovich did
18 represent “The City of Spokane and its various employees” as “special counsel” and
19 as “directed” by the City Attorneys Office, for the period **of October 2008 through**
20 **March 13, 2009,** relative to the Zehm in-custody death events, the SPD investigation,
21 and the DOJ’s investigation of both.

22 44. Mr. Treppiedi further indicates in his declaration that the “decision” as
23 to who would represent who was not discussed and determined by the City Attorney
24 until after the Zehm Estate filed its complaint on March 13, 2009. Mr. Treppiedi
25 further states that defense counsel is “still authorized to represent the City and its
26 employees” but that he “currently” only represents Mr. Thompson.

27 45. Notably, during Mr. Oreskovich’s alleged term of work for “the City and

1 its employees” (i.e., **October 2008 through March 13, 2009**), the DOJ and the
2 Grand Jury were in the midst of their investigation and defense counsel, in
3 connection with the City Attorney’s Office, appears to participated in meetings with
4 SPD Officers and City employees and may have provided “advice,” “counsel,” to one
5 or more these “City employees” in his role as “special assistant” to the City
6 Attorney’s Office and in connection with his “co-counsel’s global representation.”

7 46. It is believed that most if not all of these pre-indictment conferences
8 with “City employees” took place at the City Attorney’s Office wherein an assistant
9 city attorney (i.e., Mr. Oreskovich’s “co-counsel”) were present. While Mr.
10 Oreskovich represents to the Court that “he did not have any legal relationship “ with
11 any SPD or City employee other than defendant Thompson, and notwithstanding his
12 three or more signed contracts and City Council Resolutions to the contrary, he still
13 nonetheless may have been provided “confidential information” from one or more
14 SPD Officer employee in the context of a “joint defense” interview. Further, there
15 has been no disclosure as to the existence or non-existence of a “joint defense
16 agreement” which would place “each” SPD Officer/City Employee interviewed in the
17 position of having shared “confidential information” in connection with Mr.
18 Oreskovich’s and the City’s defense of the “civil claim” that may now be
19 inappropriately disclosed, used or exploited during the course of the criminal
20 proceeding. Further still, there may be an expectation by these SPD employees of
21 “confidentiality” and ”loyalty” that now comes to play into play in the criminal case.

22 47. In connection with this “joint representation” of the “City of Spokane”
23 and “all of its employees,” Mr. Oreskovich and seemingly other members of his firm
24 participated in both pre-grand jury and post-grand jury interviews of a number of
25 SPD police officers who appeared before the grand jury. These “conferences” with
26 “clients” of the City Attorney’s Office and, under the specified terms of all of Mr.
27 Oreskovich’s signed contracts with the City, which contracts were reviewed and

1 approved by City Council resolution, resolution of the City Counsel,

2 48. The sworn testimony proffered by assist city attorney Treppiedi asserts
3 that Mr. Oreskovich and his firm represented “the City of Spokane” and “its
4 employees” **from October 2008 through March 2009**, and that it wasn’t until after
5 the filing of the civil suit on March 13, 2009, that the “City Attorney” finally decided
6 for the first time Mr. Oreskovich would thereafter “solely” represent defendant Karl
7 Thompson. This decision, according to city attorney Treppiedi, was seemingly made
8 notwithstanding all counsel’s knowledge of conflicts of interests in “globally
9 representing” actual and potentially adverse witnesses in and among the “City of
10 Spokane and all of its employees.” *See Proffer, ¶10 – 177, Ct. Rec. 187.*

11 **B. *Burton v. City of Spokane, Spokane P.D., Det. Bowman, et al.***

12 49. In addition to the foregoing , this Court is aware that Mr. Oreskovich,
13 Mr. Lamberson and other members of their law firm of Etter, McMahon,
14 Lamberson, Clary & Oreskovich (i.e., Steve Lamberson, et al.) had another
15 contemporaneous legal relationship with “the City of Spokane, the City Attorney’s
16 Office, and other SPD employees” in connection with their defense of recently
17 dismissed case of *Burton v. City of Spokane (SPD Department), Larry Bowman, et*
18 *al. See Ct. Rec. 187.*

19 50. In *Burton*, while defense counsel attempts to “minimize” the nature and
20 extent of their involvement, be their “contract” with the City, which was once again
21 prepared by the City Attorney’s Office, reviewed and approved by the City Council,
22 specifically provides that the Etter, Lamberson and Oreskovich law firm represented
23 the “City of Spokane and its’ employees” relative to the underlying facts, events and
24 claims arising out of the alleged unlawful strip search involving Mr. Burton and
25 several SPD personnel (Det. Larry Bowman being only one of them).

26 51. Under that contract and based on their own declarations, defense
27

1 counsel Carl Oreskovich and his partner Steve Lamberson were consulted and
2 provided legal services to the City Attorney's Office and their clients (i.e., "the
3 Mayor, and all SPD employees") involved in and/or related to the alleged unlawful
4 strip search of the Plaintiff Burton. *See Cause No. 06-cv-0322-RHW and Exhibit F*
5 *to the United States Reply Memorandum.*

6 52. It is the apparent practice of the City Attorney's office and its "special
7 counsel" is to assert that they collectively globally represent "All officers and SPD
8 employees" who are "connected" and/or "involved in" in any potential incident that
9 could result in legal claim or legal proceeding. **More specifically, it is the City**
10 **Attorney's Office's position here that "...the City Attorney's clients include all**
11 ***elected officials and city employees, past and present, since March 18, 2006***
12 relative to the *Otto Zehm In-custody Death Incident*. *See City Attorney Howard*
13 *Delaney's October 20, 2008, letter to the counsel representing the Zehm Estate.*
14 Notably, in this letter, city attorney Delaney sets forth a demand that Mrs. Zehm, as
15 part of the City's settlement position, *inform the Department of Justice to "... not*
16 *seek indictment of SPD officers involved..."* *Id.*, pg. 4.

17 53. Defendant's counsel, Mr. Oreskovich first entered a Notice of
18 Appearance in the *Burton v. SPD, et al*, case. Second, he filed a declaration
19 indicating that he had been retained by "the City Attorney's Office" ***to provide "the***
20 ***city and its employees" representation.*** Given that the City Attorney's Office
21 claims, on behalf of itself and its "special counsel" to represent "all city employees
22 and officials" connected to the underlying matters, it is only reasonable to conclude
23 that Messrs. Oreskovich and Lamberson represented and advised the City Attorney's
24 Office and "all of the officers" involved in underlying strip search incident forming
25 the basis of Plaintiff's Complaint. *Id. See Ct. Rec. 210, 212, and 221.*

26 54. In the ***January 27, 2009, declaration*** filed in the *Burton v. SPD* matter,
27

1 Mr. Oreskovich states that he was retained by the City Attorney's Office in the fall
2 of 2008 to assist the City Attorney's Office in a claim made by the Estate of Otto
3 Zehm against defendant Thompson, the City of Spokane, and other officers. *Ct. Rec.*
4 221. Mr. Oreskovich further represents in this declaration that:

5 **"I have worked closely with the City's legal department preparing**
6 **the defense of that [Zehm] claim."** *[sic]*

7
8 *Ct. Rec. 221, pg. 2-3.* This statement seemingly conflicts with certain statements
9 defense counsel made at the time of this Court's August 31, 2009, and November 10,
10 2009, pre-trial hearings relative to his level of involvement in assisting the City
11 Attorney's Office in reviewing and defending the Zehm Estate Excessive Force
12 claim, as well as certain statements made by counsel in defendant's motions to
13 continue. *See Ct. Rec. 31-32, 46-47, 70-71, 83-84.*

14 55. While the Court has resolved, in the United States' view, the conflict
15 issues arising directly and in-directly from defense counsel's law firm's legal services
16 in that case, the potential for "conflict" of defense counsel's "duty of loyalty" to "all
17 of the City Attorney Office's clients" in that case remains.

18 56. The United States, pursuant to this Court's Order, has subpoenaed Asst.
19 Chief James Nicks, Officer Jason Uberuaga, and Det. Terry Ferguson for their
20 appearance at this Court's designated hearing of 10:00 a.m. on Monday, May 24,
21 2010.

22 RESPECTFULLY SUBMITTED this 21st day of May, 2010.

23 JAMES A. MCDEVITT
24 United States Attorney (EDWA)

25 *s/ Tim M. Durkin*
26 TIMOTHY M. DURKIN
27 Assistant U.S. Attorney

Attorneys for Plaintiff United States

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Certificate of ECF and/or Mailing

I hereby certify that on the date of the electronic filing of the foregoing pleading with the Clerk of the Court using the CM/ECF System, that the CM/ECF System will send notification to the following CM/ECF participants:

Carl Oreskovich, Esq.

And to the following non CM/ECF participants: N/A

s/ Timothy M. Durkin
Timothy M. Durkin, AUSA