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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 CITY DEFENDANTS' MEMORANDUM IN OPPOSITION TO THE UNITED STATES' MOTION TO INTERVENE IN AND STAY CIVIL CASE AND DISCOVERY HEARING DATE/TIME: SEPTEMBER 23, 2009 AT 10:30 A.M. ORAL ARGUMENT REQUESTED

I. INTRODUCTION.

The United States of America ("U.S.A.") filed a motion to stay this entire case for a minimum of six months on September 14, 2009. (Ct. Doc. No. 30.) In the

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alternative, the U.S.A. seeks a stay of all discovery for a minimum of six months. The defendants object to both requests. (The objection of defendant Karl Thompson is submitted independent of this brief.) The defendants other than Karl Thompson are referred to herein as "City defendants" for ease of reference.

The U.S.A.'s arguments are based on a list of perceived problems which are not based on fact, and are not relevant under the law. The U.S.A.'s allegations demonstrate its overreaching desire to not only manage the prosecution of *U.S.A. v. Karl Thompson,* but the entire civil case and each of the civil litigants herein. The U.S.A.'s concerns are baseless, and its motions to stay should be denied because it fails to establish the substantial prejudice required by Ninth Circuit case law.

This memorandum addresses the six factors that must be analyzed under the relevant case law. In addition, it addresses the myriad inaccurate factual assertions made by the U.S.A. Contrary to the U.S.A's assertions: there is no "gag order" with respect to the City Attorney's Office; it is expressly lawful for a grand jury witness to discuss his/her testimony with other people; plaintiffs' counsel has worked hand-in-glove with the Department of Justice ("DOJ"); the City of Spokane has cooperated fully with the DOJ's investigation; and the City of Spokane, the individual defendants herein, and the City's employees have significant rights under the attorney-client privilege and attorney work product doctrine which have been repeatedly and unlawfully abused by the DOJ.

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II. STATEMENT OF FACTS.

The following facts are supported by the declarations of the parties, various witnesses, and counsel, as well as the court record to date. An index of the declarations filed earlier today is appended to this brief.

On March 18, 2006, the Spokane Police Department (SPD) received contact from 9-1-1 dispatchers involving a "suspicious person" at an ATM machine. SPD officers were dispatched to check on the situation. SPD officers received continuous, developing information from the complainant/victims as they proceeded to the location of the call.

Defendant Karl Thompson was the first officer to arrive. The last bit of information he received before contacting the suspect was that the suspect had taken the complainant's money at the ATM. Officer Thompson confronted the suspect, Mr. Otto Zehm, in a "ZipTrip" convenience store. Mr. Zehm and Officer Thompson engaged in a physical altercation during Officer Thompson's efforts to detain him. Officer Thompson used his baton, TASER, and "hands on" techniques in order to stop and control Mr. Zehm, all to no avail.

A second officer, Defendant Steven Braun, arrived and assisted Officer Thompson. He also used his baton, a TASER, a stun device and other "hands-on" techniques, all to no avail. The two officers struggled to control Mr. Zehm, and ultimately put out an emergency call for immediate backup assistance.

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Several other additional officers arrived as backup and assisted Officers Braun and Thompson. Ultimately, Mr. Zehm was handcuffed, then placed in leg restraints and "hobbled" by connecting his ankles to his hands with a strap. Among the officers who arrived and assisted were Defendants Dahle, Raleigh, Torok, and Uberuaga. Mr. Zehm struggled continuously, strenuously, and with apparent "super human" strength and endurance, and was completely irrational and uncontrollable.

Mr. Zehm was evaluated by medical personnel while at the ZipTrip. After he was cleared to be taken to a hospital for further evaluation, and as the officers and paramedics were awaiting arrival of an ambulance for transport, Mr. Zehm was spitting at officers; paramedics provided a mask to prevent spitting upon the officers.

Prior to the arrival of the ambulance, Mr. Zehm stopped breathing and his heart stopped beating, while paramedics were a few feet away. They were unable to resuscitate him on scene. Mr. Zehm was transported to a hospital, where he was pronounced dead two days later.

The SPD immediately began an investigation into the full events of the incident. The SPD utilized its "fatal incident protocol" by which the incident would be investigated by its "Major Crimes Unit" (MCU), along with a "shadow" investigation conducted by the Spokane County Sheriff's Office (SCSO).

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This ZipTrip store had a video security system with several cameras. The store voluntarily produced all relevant video to the police for their investigation. The video was preserved for use by investigators, prosecutors, and the civil litigants.

Defendant Theresa Ferguson, a SPD detective, was assigned to be the lead investigator. SPD Detective Mark Burbridge was assigned to the role of lead scene investigator.

Pursuant to standard policy, the SPD notified the SPD legal advisor, claims adjuster, City Attorney's Office, and others.

The MCU and SCSO conducted a thorough investigation into the incident to determine if anyone – citizens or officers – committed any crime.

Additionally, the City of Spokane undertakes its own risk or potential claim/civil suit investigation immediately rather than waiting for a claim or lawsuit to be filed. Assistant City Attorney Rocco N. Treppiedi was assigned this task.

The City Attorney's Office represents all City employees in accordance with the Charter of the City of Spokane. The City of Spokane is required to indemnify its employees under RCW 4.96.041.

The City Attorney's Office is responsible for analyzing all known facts and law and reporting, within the attorney-client privilege, to its internal clients (Risk Management, SPD, elected officials, involved individuals, etc.), its insurance

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company, its claims adjusting firm and others. The City Attorney's Office represents its clients within the attorney-client privilege and attorney work product doctrine.

The SPD/MCU investigation was completed by Detective Ferguson and presented to the Spokane County Prosecutor's Office for review. Chief Deputy Prosecutor Jack Driscoll was assigned to review the matter. He requested additional expert analysis of the available audio and video tapes and suggested to Detective Ferguson that she utilize the services of Mr. Grant Fredericks, an independent expert video analyst. Detective Ferguson did so. Detective Ferguson provided Mr. Fredericks access to the materials necessary for his analysis.

Mr. Fredericks completed his analysis and created a report that he submitted to the SPD on September 26, 2006. That report was immediately provided to the Spokane County Prosecutor's Office for consideration.

The Spokane County Prosecutor announced that he did not determine that anyone had committed a crime with respect to the detention of Mr. Zehm; however, the DOJ/FBI announced that it would investigate the matter, and the prosecutor deferred to the DOJ.

In the meantime, the City Attorney's Office continued to review and analyze all available information consistent with its duties to evaluate potential liability creating incidents.

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Shortly after Mr. Zehm died, Mr. Zehm's mother, plaintiff Ann Zehm, contacted the Center for Justice, a local law firm. From that point forward, the Center for Justice has represented Mrs. Zehm and, thereafter, the estate of Otto Zehm. They have engaged in direct communication with the City Attorney's Office about their allegations that Mr. Zehm's detention was unlawful, the force used was excessive, and that the City and various City employees are responsible for Mr. Zehm's death.

The Center for Justice requested access to investigative information as the SPD investigated the matter. The City Attorney's Office was the official contact for the Center for Justice. The Center for Justice and the City Attorney's Office ultimately agreed to the terms of a protective order that could in the probate case in Superior Court, under RCW 11.48.010, which authorized the administrator of the estate to "investigate" potential claims for the estate. The main goal in entering the order was to quickly provide the estate with a full copy of the SPD investigative report. Access to the report via public disclosure laws would take much longer, normally only being after the County Prosecutor completed review of the matter, and would have been redacted.

The City and the Center for Justice have been exchanging written and verbal communication about their respective positions on this case ever since, well before any official "claim for damages" was filed, and before the DOJ initiated its investigation. The letter dated June 21, 2006 from the City

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Attorney's Office does not "exonerate" anyone as an official report. The terms of the letter to the Center for Justice state it is based on the author's "initial review."

The Department of Justice has indicated, on several different occasions, that it will complete its investigation long before it completed it three years later. Initially, the City was informed that its review would be completed by approximately November, 2006. Then the estimate was by the end of 2006; then early 2007; then later in 2007; thereafter it was converted into a Grand Jury investigation. The investigation completed in June, 2009 with the indictment of defendant Officer Karl Thompson.

At the time of the indictment in June 2009 the U.S. Attorney's Office had informed the City that Officer Thompson was the only "target" of its investigation and Grand Jury proceeding.

Since the inception of the DOJ review and investigation of the March 18, 2006 incident, the DOJ has requested innumerable documents and bits of information. Initially, all requests were fairly informal, not under subpoena, and were coordinated either through the City Attorney's Office or the Police Chief's Office. All requests for documents and information, regardless of whether via subpoena or not, have been complied with, with the exception of any recent subpoenas that may be outstanding.

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The City Attorney's Office confers with all City employees who have received subpoenas to testify in trials, depositions, hearings, and official proceedings of various nature that are related to their job duties with the City. The City Attorney's office routinely meets with such employees to review any questions the employee may have about the nature of the specific proceeding involved, their rights and responsibilities as a witness, etc.

In addition to a description of the nature of the proceeding, such witnesses are routinely advised to always be prepared, be professional, make sure they understand the questions that are asked, and to answer each question truthfully.

During the 3-1/2 years since the incident, the City Attorney's Office has met with various individual officers and City employees. All such meetings were within the attorney-client privilege. Often the meeting was for the assistance of the City Attorney's Office under the work product doctrine. Often, it was to meet with individuals with respect to discuss the potential that they could be named in the threatened lawsuit from the plaintiffs.

After the grand jury process began, several City employees received subpoenas to testify. Many contacted the City Attorney's Office for basic advice about the Grand Jury process, the subpoena, and their rights and responsibilities. As always, they were advised to answer each question truthfully.

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Bob Bragg is the defensive tactics trainer for the Washington State Criminal Justice Training Commission. The Spokane Police Department's defensive tactic trainers have all been certified as instructors by Mr. Bragg. One of the main issues in the civil litigation involves the use of leg restraints, hobbling devices, and related custodial care of a suspect. In preparing the Answer to the Complaint for Damages filed in this case, the City Attorney's Office contacted Mr. Bragg to develop specific factual background information to answer the Complaint about that and other issues. Mr. Bragg and Assistant City Attorney Treppiedi conferred by telephone on June 5, 2009. Mr. Bragg provided a variety of factual information to Mr. Treppiedi about the Commission's policies, training, and the like. During the conversation, Mr. Bragg informed Mr. Treppiedi that he had been retained by the U.S. Attorney's Office and Mr. Durkin to provide expert opinion testimony. Mr. Treppiedi stopped the conversation and told Mr. Bragg that they should not discuss the matter further, but should contact Mr. Durkin to determine appropriate ground rules for any further conversation with Mr. Bragg for factual information. Mr. Treppiedi called Mr. Durkin that day. A.U.S.A. Durkin objected to any and all contact by the City Attorney's Office and with Mr. Bragg. A.U.S.A. Durkin asserted that Mr. Bragg is not a fact witness because he was not at the scene on March 18, 2006. Mr. Durkin argued that since Mr. Bragg is an expert retained by him, he cannot be fact witness in the civil case.

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A series of correspondence took place between the City Attorney's Office and U.S. Attorney's Office regarding these issues. Ultimately the City Attorney's Office determined that it was futile to discuss this issue with A.U.S.A. Durkin, and that the matter needed to be resolved in court.

The City Attorney's Office became aware that several City employees who testified before the grand jury were questioned about the employee's contact with lawyers, their discussions with lawyers, and the nature of the questions asked by the lawyers and documents and/or items reviewed with the lawyers. The City Attorney's Office conferred with A.U.S.A. Durkin, objected to the questioning of the witnesses in that manner, and referred A.U.S.A. Durkin to RPC 4.2, *United States v. Stein*, 495 F.Supp. 2d 390 (S.D.N.Y. 2007), the attorney-client privilege, the work product doctrine, the Filip memorandum, and the DOJ's guidelines with respect to the attorney-client privilege and the attorney work product doctrine. A.U.S.A. Durkin has apparently continued to nevertheless question witnesses about their contacts with attorneys, and their discussions with attorneys.

During the week before the indictment of Officer Thompson was issued, the U.S. Attorney's Office subpoenaed a series of police officers to testify before the grand jury. The U.S. Attorney's Office, along with FBI agents, interviewed the officers in the U.S. Attorney's Office, while they were under subpoena, and apparently used ruses to suggest that the FBI had "newly discovered evidence"

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that would directly contradict whatever they had testified to before. The witnesses routinely rejected the baseless efforts to change their testimony. The witness complained that the contacts appeared to be efforts to influence or change their testimony.

The office of the Chief of Police has never instructed officers that they cannot confer with the City Attorney's Office about this civil case or the grand jury process. No "gag order" was issued as it relates to officers' ability to confer with the City Attorney's Office. See Declarations of Nicks, Bowman and Treppiedi.

None of the defendants agree with the request to stay the civil suit or the discovery process. Each of the named individuals has a personal and professional reputation that he or she is proud of and wishes to protect. Each wants to clear his or her name from the allegations made in the lawsuit.

The Spokane news media has made the Otto Zehm incident a focal point for news coverage. The main local newspaper, the Spokesman Review has openly editorialized against the SPD and the involved officers in this matter, and even sells "Otto" buttons in support of the plaintiffs in this matter. Plaintiffs' counsel have informed the City Attorney's Office on several occasions that the F.B.I. will shut down the investigation in to the March 18, 2006 incident if the Zehm counsel resolve their claims with the City.

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III. ISSUES PRESENTED.

A. Should the United States be allowed to Intervene in this lawsuit for the limited purpose of requesting this Court to issue a stay of the entire civil case and/or discovery in this matter?

B. Should this Court stay the entire case until the case of *United States of America v. Karl Thompson* is resolved?

C. Should this Court stay all discovery until the case of *United States of America v. Karl Thompson* is resolved?

IV. DISCUSSION.

A. ONLY LIMITED INTERVENTION FOR THE LIMITED PURPOSE OF ADDRESSING DISCOVERY ISSUES SHOULD BE CONSIDERED.

Federal Rule of Civil Procedure (FRCP) 24 governs the procedure regarding any intervention in an action. Upon a timely filed motion to intervene, this court rule allows applicants the ability to intervene in an action as a matter of right or with the court's permission. FRCP 24 (a) (b).

The motion to intervene must present the grounds for intervention accompanied by pleadings setting forth the claim or defense for which intervention is sought. FRCP 24 (c).

The U.S.A. has failed to bring a proper motion to intervene. Although the U.S.A.'s motion for a stay also requests an Order authorizing intervention, the Motion and Memorandum In Support of the United States' Motion to Stay Civil Case & Discovery only summarily discusses FRCP 24. *Court Documents 30 and*

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31. This is not what is contemplated by Rule 24. Without a properly noted motion to intervene before this court, these responding defendants respectfully request this court to deny the U.S.A.'s underlying request to intervene.

It appears that the U.S.A. automatically presumes that it is a party or has standing in this private civil lawsuit simply because it has a criminal prosecution of one of the multiple defendants in this private civil lawsuit. The U.S.A. does not have standing in this civil lawsuit or any basis to intervene as a matter of right. Courts have denied intervention requested by the U.S.A. where the reason cited for the requested intervention was based upon parallel grand jury and/or criminal prosecution of one or more of the civil litigants. *White v. Mapco Gas Products, Inc.*, 116 F.R.D. 498 (E.D. Ark. 1987).

Any intervention by the United States would be purely permissive by the court. This determination is left to this Court's sound discretion after considering whether the intervention will unduly delay or prejudice the adjudication of the original parties' lawsuit. *Bureerong v. Uvawas,* 167 F.R.D.83,85 (C.D. Cal 1996).

In the instant case, after considering the submissions by all parties, these responding defendants submit that any intervention sought by the United States in order to seek a stay of this civil lawsuit and civil discovery will unduly delay and prejudice the original parties' rights. As such, this court should deny the United States' attempt to intervene.

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B. THE NINTH CIRCUIT HAS ESTABLISHED A SIX FACTOR BALANCING TEST TO DETERMINE WHETHER A STAY OF CIVIL PROCEEDINGS IN LIGHT OF PARALLEL CRIMINAL PROCEEDINGS IS WARRANTED.

Should this court allow the U.S.A. to intervene in this matter, this court must next determine whether to grant the U.S.A. the relief it seeks, i.e. a stay of this private civil lawsuit and/or all civil discovery pertaining thereto.

No constitutional mandate exists requiring civil proceedings be stayed pending the outcome of criminal proceedings. *Keating v. Office of Thrift Supervision,* 45 F.3d 322, 324 (9th Cir. 1995) *cert. denied,* 516 U.S. 827, 116 S.Ct. 94, 133 L.Ed.2d 49 (1995); *Federal Sav. and Loan Ins. Corp. v. Molinaro,* 889 F.2d 899 (9th Cir. 1989). "In the absence of *substantial prejudice* to the rights of the parties involved, simultaneous parallel civil and criminal proceedings are unobjectionable under our jurisprudence." *Id.* (emphasis added); *Harris v. United States,* 933 F. Supp. 972, 974 (1995); *SEC v. Fraser,* 2009 WL 1531854 (D. Ariz. 2009). Nevertheless, case law is uniform that a trial court has discretion to determine whether to stay civil litigation or to fashion some other relief for the fairest, and most efficient way of handling multiple parties and claims while similar criminal proceedings are pending.

The Ninth Circuit has adopted a multi-factor balancing test to determine when a stay of civil proceedings in the face of parallel criminal proceedings is warranted. *Keating,* 45 F. 3rd at 324-25. In determining whether a stay is warranted, the trial court must consider: 1) the extent to which the Fifth

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Amendment rights are implicated; 2) the interest of the plaintiff in proceeding expeditiously with the litigation or any particular aspect thereof, and the potential prejudice delay would cause to the plaintiff; 3) the burden that any particular aspect of the proceedings may impose on the defendant; 4) the convenience of the court in the use of judicial resources; 5) the interest of non-parties; and 6) the interest of the public in the pending civil and criminal cases. *Id.*

1. The First Factor: Fifth Amendment Rights.

The first factor is not implicated here. The United States contends that proceeding simultaneously with both the civil and criminal proceeding will "place the Defendant Karl Thompson, who is charged in the federal case, and other SPD employees who may still be under *investigation in the posture of having to make decisions with concerns relative to asserting their Fifth Amendment privilege in the civil case* at a time when criminal charges are pending against one or more of them." (Doc. #31, *United States' Memorandum in Support of Stay*, 19:27-20:1-4). However, as indicated by the declarations submitted by the defendants in this civil lawsuit, they oppose a stay in the civil lawsuit. Karl Thompson is the only defendant, out of ten named in the civil lawsuit, that has been criminally indicted, thus having a real and present interest in asserting his Fifth Amendment privilege. The United States has been investigating the March 18, 2006 encounter for over three years. There have been no other target letters issued by the United States; in fact there have been assurances made that no other officer faces an indictment

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arising from this incident. These responding defendants agree with and incorporate by reference the factual and legal analysis submitted on behalf of Karl Thompson by Mr. Oreskovich on this first factor of the Court's consideration. Since all named defendants oppose the stay, the U.S.A.'s reliance on placing the defendant(s) in an untenable position as a basis for its motion is completely without merit.

2. The Second Factor: Plaintiffs' Interest in Proceeding Expeditiously.

The second factor weighs in favor of denying the U.S.A.'s motion to stay. The Plaintiffs also oppose the motion. Defense counsel have been informed on several occasions by the plaintiffs' counsel since the suit was filed, (as was the court at a recent status conference), that plaintiff Ann Zehm is elderly and in apparent frail health, and plaintiffs' counsel therefore wants to take a preservation deposition of her for trial. Defense counsel do not agree to any such deposition until all necessary discovery has been conducted, and defendants are prepared to properly cross-examine her. There are significant liability issues (i.e., was Ann Zehm dependent upon Otto Zehm at the time of his death, etc.) and damages issues which must be identified and investigated under oath before Ann Zehm's preservation deposition can be taken. Any delay in the Rule 26 disclosure process and discovery process is therefore completely contrary to plaintiffs' stated interest.

3. The Third Factor: Burdens on the defendants.

The third factor likewise weighs in favor of denying the U.S.A.'s motion. As

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discussed above, all named defendants' interests lie in the speedy resolution of the civil proceedings arising from the police encounter with Otto Zehm on March 18, 2006. The named defendants have a very strong interest in being able to defend themselves as to the serious allegations asserted in this civil case as soon as possible. *Fraser*, 2009 WL 1531854, at * 3. A complete stay would directly impact this interest and result in substantial prejudice against all named defendants. *Id.* All named defendants have endured living under suspicion of these allegations, which have been sensationally and falsely played out in the media over the last three and one-half years. As the U.S.A.'s own submission proves, the defendants have been whipsawed by the U.S.A., the plaintiffs and the media with sensationalized snippets of information, bereft of context.

From the defendants' perspective, this was never a case that would be tried fairly in the "court of public opinion." The defendants have always – since March, 2006 – had to wait for their opportunity to have a fair trial in a court of law, where the full body of evidence can be considered under the relevant legal standards. The plaintiffs, and now the U.S.A., want to control the factual information that can be revealed to and sensationalized by the media, and castigate the City (and all defendants) should the City attempt to discuss issues publicly, in context. See, for example, the U.S.A.'s irrelevant discourse about the use of the term "lunge," and the discussion of the press conference where the autopsy was discussed (both over three years ago). (Ct. Doc. No. 31, pages 4-8.)

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Most importantly, the defendants have significant motions to dismiss to present, many of which are based on Fed. R. Civ. P. 12 and qualified immunity. These motions should be heard as soon as possible rather than at the U.S.A.'s convenience. The delay requested by the U.S.A. will have significant negative impacts on the defendants; therefore the third factor weights heavily against the U.S.A.'s motion. All defendants have been anxiously awaiting their opportunity to provide facts in a court of law.

4. <u>Fourth Factor: Judicial Economy</u>.

The fourth factor, concerned with judicial economy, is not dispositive here. The U.S.A.'s motion asserts that if this case is allowed to proceed, "unnecessary consumption of the court's time and the parties' resources concerning matters that may largely be resolved by the outcome of the criminal case" will result. (*United States' Memorandum in Support of Stay*, 20:4-6). However, the United States fails to acknowledge the fact that while "proceedings in a criminal case might refine issues in the civil case, the opposite could also be true, and thus judicial economy may just as well be served by conducting the civil case together with the criminal case." *Fraser*, 2009 WL 1531854, at * 2 n. 3. The U.S.A.'s assertion that judicial resources will be expended in an attempt to sort out inevitable discovery issues in both cases is based upon conjecture and has no basis in fact. "It is unrealistic [for the Court] to rely upon fortuitous events to

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manage its docket." *Id.* (quoting *Digital Equip. Corp. v. Currie Enters.*, 142 F.R.D. 8, 14 (D.Mass. 1991).

Further, as previously discussed, the defendants will bring significant motions to dismiss under Rule 12. Such motions do not require discovery. The Court's resources can and should be used on such matters, rather than merely waiting at least six months before they can even be filed.

The U.S.A.'s argument regarding judicial resources is without support or merit. The defendants, at the Court's request, have proposed an order which contains a few simple limitations on the discovery process that would allow the litigation to proceed without involving the Court's resources.

5. Fifth Factor: Potential Effect on the Interests of Non-Parties.

In addressing the fifth factor, the potential effect on the interests of nonparties, the U.S.A.'s asserts that proceeding in this case will prove unnecessarily burdensome for the same reasons stated in its argument for judicial economy. Like its argument for judicial economy, the assertion that nonparties will be burdened also lacks a basis in fact. The U.S.A.'s *Memorandum in Support of its Motion to Stay Civil Case & Discovery* does not assert one specific example where a witness or nonparty will be prejudiced if the civil case is allowed to proceed. In any event, if such a burden exists, it does not outweigh the potential prejudice to the actual parties of this proceeding if a stay is ordered. In particular, those parties which are named defendants in this civil proceeding but are not

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party to *United States v. Karl F. Thompson Jr., Cause No. 09-cr-0088-FVS*, will be substantially prejudiced if a complete stay of this proceeding is granted. Any basis of prejudice asserted by the U.S.A. is solely based upon the criminal prosecution of Karl Thompson, and does not implicate the numerous other defendants in this action. There is no logical reason to hold everyone hostage for at least six more months.

The defendants' motions to dismiss do not implicate the U.S.A. in any way. Accordingly, there is no reason to allow the U.S. A. to prevent the motions from being developed and heard.

The discovery issues in the criminal case can be easily resolved via the simple, practical terms set forth in the "[Defendants' Proposed] Order Re Motion to Stay." In essence, the pending resolution of the criminal trial, litigants in this civil case can refrain from (a) deposing certain witnesses (U.S.A. government agents, expert witnesses retained for the criminal trial, and Karl Thompson); and (b) disclosing documents or electronic discovery from the criminal case. A protective order can be issued by this Court. The defendants' proposed order contains protective terms.

The U.S.A. argues that the City Attorney's Office has provided "traditionally" confidential grand jury testimonial information to Karl Thompson. First and foremost, the grand jury witnesses are not bound by the secrecy provisions of Fed. R. Crim. P. 6(e)(2). *United States v. Sells Engineering*, 463 U.S. 418, 425, 103 S.Ct.

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3133, 77 L.Ed.2d 743 (1983); *Oracle Corp. v. SAP AG,* 566 F.Supp.2d 1010, 1011 (2008). The Advisory Committee Notes to Rule 6(e), when adopted in 1944, specifically state:

> Note to subdivision (e). ... 2. The rule does not impose any obligation of secrecy on witnesses.

Perhaps that is why the U.S.A. did not allege that learning testimonial information from witnesses is unlawful or improper. The U.S.A.'s brief only complains that the City Attorney's Office might be violating an undefined, unenforceable "tradition." Second, no testimonial disclosures have been made (despite the fact that such disclosures can be made lawfully). See declarations of counsel.

The interests of non-parties can be protected without a stay.

6. Sixth Factor: Public's Interest in the Pending Cases.

Finally, the sixth factor examines the public's interest in the pending civil and criminal cases. As stated in *Fraser,* "although the public at large might be served by having a criminal case decided as a first priority over a civil case, the public also has a significant interest in the prompt resolution of all lawsuits, both civil and criminal." *Fraser,* 2009 WL 1531854, at * 2 n. 3 (citing *Digital Equip.*, 142 F.R.D. at 14).

This is especially true in this situation due to the enormous (and often speculative and erroneous) media attention given to each case. As Chief Nicks points out in his declaration, the incomplete manner in which information is discussed during investigations can lead to frustration and significant

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misunderstandings by the news media and the public. Presentation of factual information (evidence) in open court, in context (in relation to other evidence and the law) is helpful to the public. Preventing the civil litigants – including a local government and its police officers – from litigating an important matter is not in the public's interest; it perpetuates the harm.

While the U.S.A.'s interest in maintaining the integrity of its criminal prosecution is substantial, a complete stay of this proceeding is unwarranted. *Harris*, 933 F. Supp. at 975. The U.S.A.'s motion does nothing more than make blanket assertions regarding the factors this Court is required to weigh under *Keating* and *Molinaro*. Specifically, the U.S.A.'s "conclusory allegation that the criminal case might be harmed simply because civil discovery rules are more broad than criminal discovery rules" is insufficient to support a motion to stay all civil proceedings. *Fraser*, 2009 WL 1531854, at * 2. This broad assertion does not establish the "substantial prejudice" requirement mandated by *Keating*. *Keating*, 45 F.3d at 324. Absent an adequate showing of why a stay is necessary, this court is respectfully asked to refuse to hold this civil matter in abeyance.

C. RESPONSE TO OTHER ISSUES NOTED BY THE U.S.A.'S MOTION.

1. <u>The City's Civil Claim Investigation Preceded the DOJ Investigation</u>.

The U.S.A. argues as if the City's civil claim investigation did not take place until after the DOJ investigation was undertaken, which the U.S.A. states was in June, 2006. Not only is its argument irrelevant, but it is also incorrect.

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1 The City's Risk Manager, City Attorney, and claims adjusting service are all
2 notified immediately of any significant event that may involve potential liability.
3 Certainly, when a person dies while in the custody of the police department, it is
4 considered such an event. In this case, basic information about the event is
5 immediately collected and the City's insurance carrier is notified. Efforts are
6 undertaken to gather information without interfering with any law enforcement
7 investigation, regardless of whether it is conducted by the City's police
8 department, the County Sheriff, or any other agency.

9 In addition, Mr. Zehm's family and mother was apparently in contact with
10 the Center for Justice, the plaintiffs' attorneys in this matter, almost immediately,
11 and the City Attorney's Office began receiving phone calls and correspondence
12 from the Center shortly after Mr. Zehm's death. The City Attorney's Office was the
13 official contact with the Center for Justice. Even though no claim for damages or
14 lawsuit was filed within the first month or two, it was clear from the allegations
15 they were making to the City Attorney's Office and to the media that they
16 considered the City and several of its employees (though unnamed at the time) as
17 being responsible for Mr. Zehm's death. The City Attorney's Office, consistent with
18 the attorney work product doctrine and attorney-client privilege, gathered
19 information from that point forward and has actively assessed and re-assessed the
20 matter over the course of time.

21 The necessity for protection of attorney work product does not
22 diminish because an attorney represents a government agency.

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> Regardless of who the client is, " 'the attorney's professional task is to provide his client a frank appraisal of strength and weakness, gains and risks, hopes and fears.' "

Soter v. Cowles Pub. Co., 162 Wash.2d 716,743; 174 P.3d 60 (2007); *Port of Seattle v. Rio,* 16 Wash.App. 718, 724-25, 559 P.2d 18 (1977) (quoting *Sacramento Newspaper Guild v. Sacramento County Bd. of Supervisors,* 263 Cal.App.2d 41, 56, 69 Cal.Rptr. 480 (1968)).

In the instant case, as in *Soter,* the City "... reasonably anticipated the [Zehm] family's claim from the day of [this incident]; the *threat* of litigation began immediately ..." and the investigation undertaken by the City Attorney's Office was done "... in the course of the [City's] preparation to defend itself [and the other potential employee defendants] in a lawsuit." *Soter,* 162 Wn.2d at 744, FN 13 (emphasis in original).

The DOJ's argument that it, in effect, has "exclusive" jurisdiction over any investigation is disingenuous. While it has every right to conduct an investigation, and the City does not object to the scrutiny provided, the DOJ does not own any of the fact witnesses, despite its assertions to the contrary. Neither the DOJ, nor the plaintiffs, nor the defendants can prevent any of the other parties from talking to fact witnesses.

2. <u>There is No "Gag Order" That Restricts the City's Attorneys From Talking to Witnesses</u>.

Just as the DOJ argues as if it owns access to all witnesses, it argues as if it is the DOJ, not the Chief of Police, that determines the terms and applicability of

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the "gag order." Despite the U.S. Attorney's constant misinterpretation and misrepresentation of the "gag order," no such order exists -ever existed-with respect to the contact with the City Attorney's Office. Indeed, it would be reprehensible for an attorney that is not representing a person to instruct that person on whether, and under what conditions, he or she could confer with their own attorney. Nevertheless, that is precisely the way the U.S. Attorney's Office has attempted to manipulate the so-called "gag order." As the declaration from the City's attorneys and the police officers state, there never was any such order with respect to officers contacting the City Attorney's Office.

3. The U.S.A.'s Repeated Efforts to Talk to the City's Attorney's Clients About Attorney-Client Privileged Communications and Attorney Work Product Violates Case Law, DOJ Guidelines, and Washington RPC 4.2

The City Attorney's Office engaged in discussions with A.U.S.A. Durkin as soon as the City Attorney's Office learned that the U.S. Attorney's Office was attempting to improperly question witnesses about attorney-client privileged communications and attorney work product. It was pointed out to Mr. Durkin, more than once, that his efforts, or anyone else's efforts in his office, to contact and discuss issues related to this matter without first obtaining the approval of that person's attorney (the City Attorney's Office), was a direct violation of RPC 4.2, as well as significant recent case law on point, and the DOJ's own guidelines.

The incident that underlies this lawsuit occurred on March 18, 2006. The City Attorney's Office has worked with individuals and witnesses within the

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attorney-client privilege and the attorney work product doctrine in preparation for an anticipated claim and/or lawsuit which it would likely have to defend. There is nothing surprising or improper about that; indeed, it is precisely what lawyers do. See *Soter v. Cowles Pub. Co., 162 Wash.2d 716,; 174 P.3d 60 (2007).*

RPC 4.2 is simple, concise, and direct. It states:

Rule 4.2. Communication With Person Represented By Counsel

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

In addition to *Soter* and RPC 4.2, case law and the DOJ's own procedural guidelines prohibit the breach of the attorney-client privilege and attorney work product. Just one year ago the Second Circuit issued its decision in *United States v. Stein*, 495 F.Supp. 2d 390 (S.D.N.Y. 2007). The Second Circuit excoriated the DOJ for its, up until then, practice of bludgeoning witnesses and organizations into waiving the attorney-client privilege and work product protections of internal investigations. The wrath of the court was no surprise to the DOJ. During the pendency of the appeal, the DOJ was actively revising its investigative policies and charging guidelines with members of Congress, the criminal defense bar, and others. On the same day that the *Stein* decision was issued, the DOJ made a public announcement regarding the major revisions the DOJ was making with respect to the attorney-client privilege and work product

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protections. See the "Filip" remarks, dated August 28, 2008, attached to Declaration of Rocco N. Treppiedi. Under the DOJ's "Principles of Federal Prosecution of Business Organizations," Title 9, § 9-28.710, it states:

> The attorney-client privilege and the attorney work product protection serve an extremely important function in the American legal system. The attorney-client privilege is one of the oldest and most sacrosanct privileges under the law. *See Upjohn v. United States,* 449 U.S. 383, 389 (1981). As the Supreme Court has stated, "[i]ts purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of just." *Id.* The value of promoting a corporation's ability to seek frank and comprehensive legal advice is particularly important in the contemporary global business environment, where corporations often face complex and dynamic legal and regulatory obligations imposed by the federal government and also by states and foreign governments. The work product doctrine serves similarly important goals.
>
> ...
>
> The Department understands that the attorney-client privilege and attorney work product protection are essential and long-recognized components of the American legal system. ... In addition, while a corporation remains free to convey non-factual or "core" attorney-client communications or work product—if and only if the corporation voluntarily chooses to do so—prosecutors should not ask for such waivers and are directed not to do so. ... (Emphasis added.)

The clear concepts of attorney work product and attorney-client communications, the *Soter* decision, *U.S. v. Stein* decision, and the DOJ's own principles of federal prosecution have been discussed with the U.S. Attorney's Office. Their intrusion into this civil case raises concerns about each of these standards.

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4. The U.S.A.'s Assertion That Plaintiffs' Counsel Have Not Interfered With Nor "Shadowed" the DOJ's and/or the Grand Jury's Investigation is Belied By Plaintiffs' Counsels' Own Statements.

Contrary to the assertions in the U.S.A.'s brief, the plaintiffs' counsel have, on several occasions, informed the City Attorney's Office that they, in effect, "control" the FBI's review of Mr. Zehm's death. See Declaration of Rocco N. Treppiedi.

Breean Breggs, the Chief Catalyst of the Center for Justice and counsel for plaintiffs, has discussed the FBI's investigation with the City Attorney's Office and directly stated that he can get the FBI and the U.S. Attorney's Office to stop their investigation if the City would settle with his clients. Regardless of whether it is appropriate to threaten criminal sanctions if civil settlement does not follow, plaintiffs' counsels' statements were clear and direct: they were sharing information with the DOJ and could control the DOJ's decision making by, in fact, terminating the investigation completely.

The U.S.A.'s brief complains about its concern that the City may have learned about what a few witnesses know; its real concern should be that plaintiffs' counsel had interfered with its investigation and decision making.

5. The City has Cooperated With the DOJ's Investigation.

The City has cooperated in all regards with the DOJ's investigation. Innumerable requests for information and documents have been received over the past 3-1/2 years, many without subpoena. There have been no objections provided (with some exceptions, for example, to attorney-client privileged

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communications). The DOJ has received many thousands of pages of documentation of every nature whenever sought. See, for example, the declarations of Garv Brakel, Terry Ferguson, Chief Nicks, and counsel. As with any circumstance in which massive amounts of information and/or documents are requested, there are occasional delays, confusion about how and when information can be obtained and transmitted, etc. However, there has never been any road block to access.

6. The City Attorney's Involvement With Mr. Fredericks and Mr. Bragg is Appropriate, and Irrelevant to This Motion.

a. Mr. Fredericks.

The U.S.A. considers the City's hiring of Mr. Fredericks to be troubling, though its argument does not provide any legitimate reasons. Mr. Fredericks' independent expert services as a video analyst were requested by the Spokane County Prosecutor; his services were immediately secured by the Spokane Police Department (SPD). Mr. Fredericks' efforts were coordinated by the detectives and County Prosecutor, not the City Attorney's Office. He produced a report in September, 2006 to the SPD; it was immediately presented to the prosecutor. There was no involvement whatsoever by the City Attorney's Office in the contents, creation, or delivery of his report. However, the U.S. Attorney attempts to flavor Mr. Fredericks' report in some derogatory fashion by arguing that his report was somehow managed or overseen by the City Attorney's Office. That is simply not the case.

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Ultimately, Mr. Fredericks' bill was paid for via the Risk Management Fund simply because neither the County Prosecutor nor the SPD had available funds within their budgets to do so. Regardless of how the bill was paid, the U.S.A.'s belief/argument that the City Attorney managed or influenced his work is simply untrue and completely meritless.

According to the U.S.A., Mr. Fredericks was later retained by the DOJ to perform some work. Neither the SPD nor the City Attorney's Office is aware of the nature of his work, or the contents of his report or work product, other than the receipt of an unexpected, unsolicited set of still photographs from a portion the security video at the ZipTrip store. While the U.S. Attorney is not pleased that Mr. Fredericks independently chose to provide the still pictures to the City, there is no analysis or work product of any kind that was submitted along with the pictures. The pictures can apparently be produced with basic software. Furthermore, Mr. Fredericks informed the DOJ that he was providing those photographs to the City at the time he provided them.

b. <u>Mr. Bragg.</u>

The U.S.A. is upset that the City Attorney's Office contacted Mr. Bob Bragg. However, regardless of how upset they may be, the contact was legitimate and for factual investigation. Once it was learned from Mr. Bragg that he had been retained to provide some service to the DOJ, the contact was ended and not pursued any further. Mr. Durkin was called by Assistant City Attorney Rocco N.

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Treppiedi to discuss the contact and seek clarification of the extent of questions counsel could ask, without impinging on any opinion testimony.

The simple contact with Mr. Bragg was for factual information about his work for the Washington State Criminal Justice Training Commission as it relates to the events of March 18, 2006. The factual information obtained from Mr. Bragg was related in the defendants' answer to the amended complaint. See Doc. 12, paragraphs 5.14-5.17.

Mr. Bragg is a fact witness in that regard, and probably on other issues in the civil case. The DOJ has improperly, unilaterally ordered Mr. Bragg to not discuss anything with counsel in the civil case, even factual information regarding the Commission, etc. If he is an expert witness in the criminal case on other matters, that is an issue to be resolved among counsel in the criminal case. The civil litigants can delay any effort to question Mr. Bragg about his opinions in the criminal case until that case is resolved. In the meantime; factual information related to his duties with the Commission should not be withheld from the litigants in the civil case.

7. The U.S.A.'s References to Arguments About the Term "Lunge," the Press Conference Regarding the Autopsy Results, and Other Matters are Simple Non-Sequiturs.

The U.S.A.'s brief makes several references to the use of the term "lunge" by Chief Nicks and media reports within the first few days of the incident. That is a complete non-sequitur with respect to whether or not Mr. Zehm actually "lunged"

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toward Officer Thompson, or whether Officer Thompson would assert that Mr. Zehm did "lunge" toward him. The reason investigations are conducted is to find out what happened. It was determined in the investigation that Mr. Zehm did not "lunge" at Officer Thompson; that was publicly clarified by the SPD back in 2006.

Similarly, the U.S.A. complains about Chief Nicks describing a portion of the autopsy results at a press conference. What is notably missing from the U.S.A.'s argument is whether they are alleging, in any way, that his discussion was inaccurate. In fact, Chief Nicks' comments were entirely accurate. Regardless, the autopsy results had already been published, by the medical examiner's office before his comments, and Chief Nicks was attempting to place the results in context. He has a qualified privilege to do so under Washington law. See *Bender v. City of Seattle*, 99 Wash.2d 582, 664 P.d 492 (1983) (statements of police officers in releasing information to the public and press serve the important functions of informing and education the public).

8. The U.S.A. has Not Provided the Supportive Documents to Defendants in a Timely Fashion.

Counsel for the U.S.A. promised the Court and all counsel that he would have all documents in support of his motion prepared and submitted no later than September 14, 2009. However, the only document filed with the Court and served upon counsel on September 14th was the simple 3-page motion, with supportive briefing or documentation. The U.S.A. did not even file its brief until next evening at 7:34 p.m.; thereafter, copies of exhibits have trickled in over the course of the

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week. Defense counsel has still not received the redacted version of whatever additional materials to which we need to respond. Defense counsel have made every effort herein to rebut what it believes are the arguments provided by the U.S.A., despite the U.S.A.'s failure to provide the materials in a timely fashion under the significant time restraint we have for responding. Counsel for the defendants will endeavor to respond to any further inquiries of the Court in the event that there are any issues outstanding.

V. CONCLUSION.

The U.S.A.'s motions to stay the entire civil case and, alternatively, all discovery are based on supposition and inflammatory rhetoric. The defendants have addressed each of the concerns raised by the U.S.A. The law and the facts demonstrate that the defendants in the civil litigation will be adversely prejudiced by a stay.

The U.S.A.'s motion to stay this civil case should be denied.

The U.S.A.'s motion to stay all discovery in this civil case should be denied.

In the alternative, the limitations suggested by defense in their "[Proposed] Order re Motion to Stay" should be adopted by the Court.

DATED this 22nd day of September, 2009.

Respectfully submitted,

s/Rocco N. Treppiedi
Rocco N. Treppiedi, WSBA #9137
s/Ellen M. O'Hara
Ellen M. O'Hara, WSBA #27019

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of September, 2009, I electronically filed the foregoing "City Defendants' Memorandum in Opposition to the United States' Motion to Intervene in and Stay Civil Case and Discovery," with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

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CITY DEFENDANTS' INDEX OF DECLARATIONS

IN OPPOSITION TO UNITED STATES' MOTION TO STAY

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38	Declaration of Erin Raleigh	9-22-09
39	Declaration of Steven S. Braun	9-22-09
40	Declaration of James E. Nicks	9-22-09
41	Declaration of Zachary Dahle	9-22-09
42	Declaration of Jason Uberuaga	9-22-09
43	Declaration of Ronald Voeller	9-22-09
44	Declaration of Daniel Strassenberg	9-22-09
45	Declaration of Daniel J. Torok	9-22-09
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	Ex Parte Declaration of Rocco N. Treppiedi	9-22-09

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