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11
12 UNITED STATES DISTRICT COURT
13 EASTERN DISTRICT OF WASHINGTON

14 **UNITED STATES OF AMERICA,**)
15)
16 **Plaintiff,**)
17 **v.**)
18 **ZEHM V. THOMPSON, ET AL.,**)
19 **Defendant.**)

No. 09-CV-0080-LRS

**MEMORANDUM IN SUPPORT
OF UNITED STATES' MOTION TO STAY
CIVIL CASE & DISCOVERY**

20 COMES NOW the Plaintiff United States of America, through its counsel
21 James A. McDevitt, United States Attorney for the Eastern District of Washington,
22 and Assistant U.S. Attorney Timothy Durkin, and Victor Boutros, U.S. Department
23 of Justice Criminal Rights Division and submits the following memorandum in
24 support of the United States' Motion to Stay Civil Case Discovery until the criminal
25 case against Officer Karl Thompson is concluded.
26

27 The United States has moved to stay this civil civil rights suit and its motion

1 is supported by Rules 24, 16, and 26 of the Federal Rules of Civil Procedure, Rule
2 16 of the Federal Rules of Criminal Procedure, the United States' *Ex Parte*
3 Statement of Facts In Support of Stay, the records and files in this civil action and
4 in the related case of *United States v. Karl F. Thompson Jr., Cause No. 09-cr-*
5 *0088-FVS*, and the following Memorandum In Support of Stay,

6 **I. OVERVIEW & PROCEDURAL HISTORY**

7 This civil (civil rights) lawsuit and its related criminal (civil rights) case of
8 *United States v. Karl Thompson Jr.* (Cause No. 09-cr-0088-FVS) arise out of the
9 same set of facts and circumstances, which is when the Defendant, Spokane Police
10 Department (SPD) Patrol Officer Karl Thompson Jr. used an impact weapon (i.e., a
11 baton) and a taser to forcibly detain and seize Otto Zehm at a north Spokane Zip
12 Trip convenience store during the early evening of **March 18, 2006**. *See United*
13 *States Ex Part Statement of Material Facts*, ¶ 1. Officer Thompson used force for
14 the purpose of detaining Mr. Zehm for questions about a "suspicious circumstance"
15 involving a possible theft of money from a nearby bank ATM.

16 Mr. Zehm was ultimately forcibly restrained by Defendant Thompson and
17 the other in named Defendant SPD Patrol Officers in a prone, four point (full
18 appendage) restraint (commonly referred to as a "hog tie") for approximately 17
19 minutes. During the last three minutes, SPD Patrol Officer Erin Raleigh applied a
20 plastic non-rebreather mask to Mr. Zehm's face due to concerns that the Plaintiff
21 may "spit" at the Officer. Mr. Zehm quit breathing three minutes later. He was
22 transported to the ER at Deaconess Hospital, but never regained consciousness,
23 and was declared "brain dead" two days later.

24 The following is a general overview of certain underlying events involved in
25 the criminal prosecution and this related civil case. This overview is also based, in
26 large part, on Officer Thompson's recorded statement of March 22, 2006 (*see*
27

1 *attached **Exhibit #1***), percipient witness information provided to SPD investigators
2 during its 2006 investigation, the Zip Trip convenience store security video
3 footage, SPD dispatch records, Otto Zehm's autopsy and/or other identified
4 medical, employment and grand jury information (provided only to the Court), and
5 is more specifically outlined in the United States *Ex Parte* Statement of Salient
6 Facts Supporting the Stay of Civil Discovery and this case.

7 This overview is not intended to be complete or exhaustive the Defendant
8 Officer Thompson presumed innocent until the criminal charges are proven beyond
9 a reasonable doubt at trial. Presently, the criminal trial is set **for February 8,**
10 **2010, for four (4) weeks.** At this trial, the United States does intend to prove
11 beyond a reasonable doubt that Defendant Thompson's use of force – consisting of
12 multiple baton strikes to Zehm's body, including both lethal force (e.g., head
13 strikes) and non-lethal force (e.g., leg and torso strikes) – caused a serious physical
14 injury and violated Mr. Zehm's clearly established constitutional right in violation
15 of 18 U.S.C. § 242. The United States also intends to prove at trial, beyond a
16 reasonable doubt, that the Defendant Thompson also committed obstruction of
17 justice in violation of 18 U.S.C. 18 U.S.C. § 1519 by making a "false entry" in a
18 police record, specifically by making numerous false statements in a recorded
19 March 22, 2006, interview that he gave to SPD Det. Terry Ferguson.

20 **A. Chronological Summary & Procedural History.**

21 After Otto Zehm was expired and was transported to the ER, the SPD Major
22 Crimes Unit assumed jurisdiction over the Zip Trip crime scene and commenced the
23 SPD's "criminal" investigation. That evening, SPD's Acting Chief Jim Nicks
24 triggered the Critical (fatal) Incident Protocol, which placed the SPD-MCU
25 Detectives in the position of lead investigators in the case. The Spokane County
26 Sheriff's Office was designated to serve as "shadow" investigators and they were
27

1 reportedly to “shadow” and observe their SPD counterparts’ investigation activities.
2 SPD Detective Terry Ferguson, a named Defendant in this action, was designated the
3 lead detective for the SPD’s MCU. Det. Mark Burbridge was designated the crime
4 scene detective and was in charge of handling and processing the crime scene, as
5 well as contacting and interviewing certain percipient witnesses.

6 At approximately 7:30 p.m. on **March 18, 2006**, Asst. Chief Nicks arrives on
7 scene and is given a briefing by SPD Patrol and MCU personnel. Chief Nicks then
8 arranges a contact with Asst. City Attorney Rocky Treppiedi, the SPD’s legal
9 adviser and the City’s acting Risk Manager. Mr. Treppiedi is consulted before the
10 Spokane County Prosecutor, who has jurisdiction over all felonies within Spokane
11 County, is contacted. Later in the evening of **March 18, 2006**, Acting Chief Nicks
12 gave a press conference and provided the following description of the Zehm
13 detention events during a TV interview (KREM 2):

14 “I’ll begin with officers responded to a suspicious persons call, actually
15 occurred several blocks from here at a bank and citizens observed this
16 individual near a cash machine concerned about his behavior. Concerned that
17 he might be looking a possibly doing a robbery. The citizen called the police
18 department. Officers responded to the area in order to investigate this
19 person’s actions.

19 We had one officer that came to the store here contacted the suspect inside the
20 store. The officer was alone at the time, confronted the individual. **The**
21 **suspect lunged at the officer during the initial contact and basically a fight**
22 **occurred at that time.**

22 . . .

23 Oh of course, yes [the officers followed procedure], the officers came on
24 scene used the lowest level mean to control him verbally. **The suspect**
25 **attacked the officer.**

26 The Officer was by himself. **The officer used a straight handled baton as a**
27 **defensive technique . . .** tried to use his taser that was ineffective . . .

27 *See United States Ex Parte Statement of Facts.* On or about **March 21st** and **March**

1 **23rd**, Cpl. Tom Lee, the SPD's Public Information Officer issues press releases
2 and/or is quoted by media as describing Zehm as having "lunged" at or "attacked"
3 the Defendant Thompson.

4 On or about **March 22, 2006**, Defendant Thompson gives a recorded
5 interview to Det. Ferguson. See *Exhibit #1* attached to *United State's Ex Parte*
6 *Statement of Facts Supporting Stay*. That same day, Dr. Sally Aiken, Medical
7 Examiner, conducted an autopsy on Otto Zehm.

8 The morning of **March 23, 2006**, footage from two Zip Trip store security
9 camera angles (i.e., camera angles #1 and #2) are reviewed by MCU Detectives with
10 SPD Brass, including Acting Chief Nicks, Asst. Chief Odenthal, Asst. Chief Bruce
11 Roberts, and Asst. City Attorney Rocky Treppiedi. "No Lunge" or "attack" by
12 Zehm is revealed in either of these video angles. The DOJ's investigation has
13 revealed that Asst. Chief Odenthal (retired) spliced off two (#3 and #4) of the four
14 camera angles. Cameras at angles #3 and #4 are digital, whereas camera angles #1
15 and #2 are analog recorders.

16 On or about **March 29, 2006**, Det. Ferguson consults with Asst. City Atty.
17 Treppiedi regarding the release of Zehm's approximate \$500.00 payroll check that
18 was in his possession to his mother Anne Zehm and/or her counsel. In **late March**
19 **2006**, Det. Ferguson no longer follows the SPD's "Critical Incident Protocols" and
20 begins conducting her investigative contacts and interviews without any Spokane
21 County Detective being present. See *SPD MCU Investigation reports and file notes*.

22 On or about **May 22, 2006**, Dr. Sally Aiken issues her report on autopsy
23 findings. Dr. Aiken concludes that Mr. Zehm's cause of death was *Hypoxic*
24 *Encephalopathy due to Cardiopulmonary Arrest while restrained (total appendage*
25 *restraint) in prone position for excited delirium*. See *May 22, 2006, Autopsy report*.
26 Dr. Aiken also deemed Mr. Zehm's "brain death" (hypoxic encephalopathy) to be a
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1 *homicide* under state law since the death was causally related to personal
2 intervention and not the result of a naturally occurring demise. Dr. Aiken also finds
3 evidence of “blunt force” trauma (i.e., sub-scalp (galean) hematomas).

4 On **May 30, 2006**, Acting Chief Jim Nicks holds a press conference to
5 announce and discuss certain autopsy findings and conclusions, in apparent violation
6 of RCW 68.50.105 (Autopsy privacy act) and a mutual “protective order” that was
7 entered into between the SPD, its civil counsel Mr. Treppiedi, and the Zehm Estate
8 and its counsel with the Center for Justice. Asst. City Attorney Treppiedi continues
9 to advise the SPD and its administrators.

10 The MCU continues its investigation activities from **March 18, 2006**, through
11 **May 31, 2006**, when Det. Ferguson packages up her investigative file and issues a
12 case summary and a referral to the Spokane County Prosecuting Attorney’s Office.
13 In this May 31, 2006, report to the County Prosecutor, Det. Ferguson concludes that
14 there is “*no evidence*” *of any excessive force*, “*only that amount of force that was*
15 *reasonably necessary*.” See *Exhibit #2* attached to *Ex Parte Statement of Facts*.
16 Det. Ferguson further recommends the declination of any criminal charges against
17 any SPD participant.

18 In **June 2006**, the United States Department of Justice opens a preliminary
19 case investigation into the circumstances of the force used on Zehm and his
20 proximally related death while in SPD custody. In July 2006, the U.S. Attorney’s
21 Office requests a complete copy of Det. Ferguson’s investigative file materials. This
22 request would be repeated on several occasions over the next 2.5 years and
23 notwithstanding, the DOJ would not actually receive a “complete” copy of Det.
24 Ferguson’s and the SPD’s MCU investigative file materials until a grand jury
25 subpoena is issued in the spring of 2009. See *Statement of Facts Supporting Stay*.

26 On **June 7, 2006**, the Center for Justice sends Asst. City Attorney Treppiedi a
27

1 letter asserting that the City, through Acting Chief Nicks's May 30, 2006, press
2 conference wherein he discussed and discloses Dr. Aiken's autopsy findings and
3 results, violated Washington's Autopsy privacy Act. The Center for Justice also
4 claims that the SPD and its counsel have also violated the parties agreed protective
5 order. *See **Exhibit # 3.***

6 On **June 21, 2006**, Asst. City Attorney Rocky Treppiedi issues a nine page
7 letter to the Center for Justice denying any violations of state law, the terms of the
8 parties protective order, and goes on further to exonerate Defendant Thompson from
9 any excessive use of force allegations. Mr. Treppiedi also exonerates the other law
10 enforcement officers who physically suppressed Otto Zehm the evening of March
11 18, 2006. Acting Chief Nicks, Asst. Chief Odenthal and Asst. Chief Bruce Roberts,
12 who reportedly oversaw the MCU and the SPD's investigation division, were all
13 copied in on Mr. Treppiedi's letter exonerating Defendant Thompson.

14 Notably, on **June 21, 2006**, the SPD's own investigation was not complete at
15 the time that Mr. Treppiedi exonerated Defendant Thompson. *See **Exhibit #4** to Ex*
16 *Parte Statement of Facts In Support of Stay.* On **June 27, 2006**, per direction of
17 Asst. City Attorney Treppiedi, Det. Ferguson displayed Mr. Zehm's personal
18 property items to the Zehm Estate's legal representatives at the SPD's evidence
19 building. *See Ex Parte Statement of Facts In Support of Stay.*

20 On **July 10, 2006**, Spokane County Chief Prosecuting Attorney Jack Driscoll
21 directs Det. Ferguson to have the plastic 2-liter Diet Pepsi bottle recovered from the
22 Zip Trip examined for latent fingerprints. This had not been previously pursued by
23 SPD investigators.

24 On or about **July 13, 2006**, the SPD finally releases two of the Zip Trip
25 security store video angles in response to public records act requests. Asst. Chief Al
26 Odenthal gives a presentation to the media regarding the content of the two camera
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1 angles. With the release, the SPD realizes for the first time that the “plastic spit
2 mask” applied to Zehm’s face shortly before he expired had not been forwarded or
3 examined by Dr. Aiken.

4 On **July 13, 2006**, Acting Chief Nicks admits to the media for the first time
5 since the SPD’s news announcement the night of **March 18, 2006**, (and in
6 subsequent media releases) that the security video does not show Zehm “lunging” or
7 attacking Officer Thompson. *See Spokesman Review July 14, 2006, article.* By way
8 of further explanation, Nicks states: *That’s the information that I was provided on*
9 *scene based on the observations of the witnesses and officers.” See Exhibit #5 to*
10 *United States Ex Parte Statement of Facts Supporting Stay.*

11 On **July 17, 2006**, MCU Lt. Scott Stephens notifies Det. Ferguson that the
12 plastic spit mask needs to be forensically examined and considered by the Medical
13 Examiner for a possible contributing cause of death. The mask was not originally
14 retrieved and maintained as evidence, and was recovered later from a bio-hazard
15 waste drop site. The mask is now, four (4) months post-incident, forwarded to Dr.
16 Aiken for examination.

17 On **July 19, 2006**, Det. Ferguson has a meeting with Chief Criminal Deputy
18 Prosecutor Jack Driscoll who requests that a forensic video analysis be performed of
19 the two security video angles that show the first minute plus of Officer Thompson’s
20 engagement and force on Zehm. On **July 19, 2006**, Det. Ferguson contacts Chief
21 Deputy Prosecutor Jack Driscoll again and Asst. City Atty. Treppiedi concerning
22 “authority” to open the plastic pop bottle and empty contents so fingerprinting
23 analysis can be performed.

24 On **July 22, 2006**, Chief Deputy Driscoll meets with Det. Ferguson and
25 forensic videographer Grant Fredericks, and discusses parameters of technical
26 review (i.e., initial contact and exchange between Defendant Thompson and Zehm).
27

1 On or about **August 2, 2006**, SPD Chief Nicks and administrators learn for
2 the first time that there were actually “four” security video camera angles at the Zip
3 Trip, not just the two reportedly shown the morning of March 23, 2006, to SPD
4 Administrators and Asst. City Attorney Rocky Treppiedi. Asst. City Attorney
5 Treppiedi reportedly advises that the missing two cameras “show nothing of value.”
6 On **August 3, 2006**, Det. Ferguson reviews cameras #3 and #4, which show clearer
7 footage of Zehm using the plastic Diet Pepsi bottle to shield his head and face from
8 Defendant Thompson.

9 On **August 8, 2006**, Chief Nicks learns that Det. Ferguson has removed
10 original video discs from the property booking room and has provided the “master
11 copy” to Grant Fredericks, the video forensic technician. Det. Ferguson reportedly
12 did this without advising her supervisor. Det. Ferguson reportedly explained that
13 she understood the SPD “chain of command” had approved the release of the
14 original property/evidence because Asst. City Attorney Treppiedi told her the
15 County Prosecutor made the request. The master copy is later recovered.

16 In approximately **September 2006**, Anne Kirkpatrick is selected and
17 appointed to Spokane’s vacant Chief of Police position.

18 On or about **September 26, 2006**, forensic videographer Grant Fredericks
19 finishes his report in which he concludes that he cannot confirm Officer Thompson’s
20 use of his baton during the first 1:13 seconds of Defendant Thompson’s attack on
21 Otto Zehm. This conclusion, however, is contradicted by Defendant Thompson’s
22 own statement of immediate “preemptive” strikes to Zehm’s body. Mr. Fredericks’s
23 conclusion also conflicts with eye witness accounts of vertical baton strikes to
24 Zehm’s head, neck and upper torso until the second officer (Officer Braun) arrives,
25 when Defendants baton strikes are to Zehm’s lower extremities.

26 In approximately **October 2006**, the City Police Department suspends its
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1 investigation pending a charging decision by Spokane County Prosecuting Attorney
2 Steve Tucker. Meanwhile, the DOJ opens a full investigation into the Zehm force –
3 custodial death issue. As a result of the FBI pushing forward with a full
4 investigation, Spokane County Prosecuting Attorney Steve Tucker defers making
5 any charging decision until after completion of the FBI's investigation.

6 From **March 2006 through the present**, however, Asst. City Attorney Rocky
7 Treppiedi and others within the City Attorney's Office actively pursued a pre-suit
8 and pre-indictment investigation on behalf of Defendant Karl Thompson and other
9 named Defendants in this civil civil rights action. *See United States Ex Parte*
10 *Statement of Facts In Support of Stay*.

11 On **July 23, 2007**, the Estate of Otto Zehm and Mrs. Anne Zehm, Otto's
12 mother, individually and as personal representative of the Estate, files a notice of a
13 \$2.9 Million tort claim with the City of Spokane, its Risk Management Office, and
14 the City Attorney's (Civil) Office. In this claim, submitted pursuant to RCW
15 4.96.010 (Washington's tort claim statute), Plaintiffs alleged damages for civil
16 rights violations, wrongful death, and other state law tort claims.

17 During the **spring of 2007**, the DOJ scheduled a meeting with Grant
18 Fredericks and learns that Mr. Fredericks's \$5,400 bill for forensic services provided
19 to the SPD was coordinated by Asst. City Attorney Rocky Treppiedi and paid for by
20 the City's Risk Mgmt. Division, not the Spokane Police Department. In the **spring**
21 **of 2007**, the DOJ requested Mr. Fredericks perform some additional forensic work
22 on the Zip Trip video. Specifically, the DOJ requests that Mr. Fredericks prepare
23 stills of each frame of each of the four camera angles of the Zip Trip security video
24 for the critical time frame involved (i.e., the approximate first 1:30 minutes showing
25 Defendant Thompson's approach, initial attack, and continued use of force on
26 Zehm). Since the United States was dealing with Mr. Fredericks as an expert
27

1 consultant for the DOJ's continuing investigation and since the SPD had suspended
2 its investigation, and had not contracted with Mr. Fredericks to provide any further
3 law enforcement related services, it was the DOJ's expectations that the still
4 photographs prepared by Mr. Fredericks would be provided exclusively to the DOJ
5 on a confidential basis. However, when the still photographs, placed into a Power
6 Point program were provided by Mr. Fredericks, the DOJ was very surprised to learn
7 that a copy of the stills and work performed by Mr. Fredericks on behalf of the DOJ
8 was provided to Asst. City (civil) Attorney Rocky *Treppiedi*.

9 In **August 2007**, The DOJ also learns that Mr. Fredericks will not perform any
10 confidential forensic services in connection with its investigation since he believes
11 that he is "under contract" with the City Attorney's Office. Mr. Fredericks conveys
12 that unless and until the City Attorney's Office and Asst. City Attorney Rocky
13 Treppiedi releases him from his contract-ethical obligation concerning the civil
14 liability case, that he cannot perform any additional forensic work for the FBI-DOJ
15 in Spokane. On or about **August 8, 2007**, the U.S. Attorney's Office arranged a
16 conference call with City Attorney James Craven, who released Mr. Fredericks from
17 any further expert of legal obligation to the City Attorney's Office relative to the that
18 office's handling of "civil liability" issues for its clients.

19 From the **fall of 2006 through the winter of 2007-2008**, DOJ continued with
20 its forensic investigation activities. During the **spring of 2008**, the Grand Jury and
21 the United States DOJ commenced its 14 month investigation into the Otto Zehm
22 use of force, custodial death, and SPD investigation misrepresentation issues.

23 In **mid-October 2008**, the United States Attorney's Office prepared to issue
24 an official target letter to the Defendant Karl Thompson. Assistant City Attorney
25 Rocky Treppiedi was inquired as to whether Mr. Thompson had private criminal
26 counsel. Mr. Treppiedi indicated that Mr. Thompson did not have separate criminal
27

1 counsel but that since he represented Mr. Thompson's interests civilly, he would
2 happy to accept the DOJ's intended letter to Mr. Thompson on his client's behalf.
3 This offer is politely declined.

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

16 On or about **October 20, 2008**, the City Attorney's Office submits a
17 resolution to the Spokane City Council approving the retention of private, well
18 known criminal defense attorney Carl Oreskovich to represent and defend "the City"
19 in connection with the Zehm Estate's pending "civil" civil rights action. *See*
20 *Spokesman Review news article of October 21, 2009*. The City Council, presumably
21 based on representations of the City Attorney's Office, approves up to \$45,000 in
22 defense fees and costs associated with Mr. Oreskovich's "civil" defense and
23 representation of "the City" in the pending Zehm civil litigation.

24 On **November 17, 2008**, FBI Special Agent Lisa Jangaard and AUSA Tim
25 Durkin met with Carl Oreskovich to discuss the United States offer to allow the
26 Defendant Thompson to appear and testify in front of the grand jury. Mr.
27

1 Oreskovich informs the DOJ that he “exclusively” represents Carl Thompson and
2 did not, notwithstanding any City resolution to the contrary, represent “the City,” the
3 Police Department, and/or any other SPD administrators or officers. Mr. Oreskovich
4 further indicates that he, and only he, would be representing Mr. Thompson’s
5 “criminal” and “civil” interests in the Otto Zehm incident.

6 Mr. Oreskovich also discloses to Special Agent Jangaard and AUSA Durkin
7 that the City Attorney’s Office has already retained a number of defense experts for
8 its defense of the pending Zehm civil rights lawsuit, including defensive tactics and
9 police procedures expert D.B. Van Blaricom, who is a former Bellevue PD Chief
10 who retired in 1992 and who the City Attorney’s Office has frequently retained to
11 assist it in the defense of civil rights/torts claims-suits against the SPD. Mr.
12 Oreskovich further discloses that the City Attorney’s Office represented that the
13 defense experts retained and paid for by the City would be made available to help
14 criminally defend Mr. Thompson in the event any indictment is returned by the
15 Grand Jury.

16 On **March 14, 2009**, the Plaintiffs herein filed the present action seeking
17 damages for civil rights violations, wrongful death, and state tort law claims.

18 **From October 2008 through June 2009**, it became apparent that Asst. City
19 Attorney Rocky Treppiedi has been briefing and/or preparing most of the Spokane
20 Police Department and/or the City of Spokane witnesses called to testify before the
21 Grand Jury. It is also learned that Mr. Treppiedi has substantively debriefed
22 witnesses that have appeared before the grand jury.

23 In addition, the DOJ learns that Asst. City Attorney Treppiedi has been
24 conducting his own “investigation” that has substantially “shadowed” the
25 investigative activities of the Grand Jury. For instance, in addition to preparing and
26 debriefing the majority of SPD witnesses, Mr. Treppiedi also conducted post-GJ
27

1 testimony interviews of some non-SPD witnesses that recently appeared before the
2 Grand Jury. The DOJ also learned, based on conversations and exchanges of
3 correspondence with Mr. Treppiedi and Mr. Oreskovich, that notwithstanding Mr.
4 Oreskovich's earlier statement that "he and he alone" represented Mr. Thompson's
5 criminal and civil interests, that Mr. Treppiedi was now asserting that (and
6 notwithstanding the City's retention of private counsel (Mr. Oreskovich) at public
7 expense) the City Attorney's Office continued to represent Mr. Thompson's
8 "interests" relative to the Zehm use of force incident.¹ See Exhibit #6 to *Ex Parte*
9 *Statement of Facts In Support of Stay*.

10 In the **spring of 2009**, the United States learned that the Asst. City Attorney
11 Treppiedi contacted and attempted to interview one of the DOJ's expert witnesses
12 and consultants in its continuing investigation. Upon learning of Mr. Treppiedi's
13 contact with Mr. Robert Bragg, a defensive tactics expert and program director of
14 the Washington State Criminal Justice Training Commission's defensive tactics
15 program, AUSA Tim Durkin contacted Mr. Treppiedi and requested that he cease
16 and desist all further contact with the DOJ's expert. Mr. Treppiedi refused this
17 request and expressed a belief that even though Mr. Bragg had no involvement in
18

19 ¹ The Defendant Karl Thompson is being represented and defended in the victim
20 Otto Zehm's Estate's federal civil rights (excessive force – §1983) action by three (3)
21 different Asst. City Attys.: 1) Rocco Treppiedi, 2) Ellen O'Hara, and 3) Salvatore
22 Faggiano; in addition to 4) Mr. Oreskovich, who represents Mr. Thompson in both the
23 civil and criminal action. See *Cause No. 09-CV-0080-LRS*.

24 The City Attorney's Office has been actively defending Mr. Thompson on the
25 Zehm's "civil rights" claim for over three years. See *Asst. City Atty. Treppiedi's June*
26 *21, 2006, letter exonerating Mr. Thompson* from any civil rights culpability, even
27 though at the time the Spokane Police Department who Mr. Treppiedi also serves as its
"legal advisor" had not yet "officially" concluded its criminal investigation. This letter
was also reportedly made available to the media.

1 Defendant Thompson's and the SPD's detention of Zehm on March 18, 2006, that he
2 felt that Mr. Bragg could still be "fact witness" that he could directly contact. *See*
3 **Exhibit #7** to *Ex Parte Statement of Facts Supporting Stay* (a copy of Mr. Durkin's
4 **June 12, 2009** e-mail to Mr. Treppiedi outlining the DOJ's objection to City
5 Attorney's attempt to use the civil case and civil discovery processes as explanation
6 for engaging in ex parte contact with another party's expert).

7 During the course of the United States and the Grand Jury's investigation, the
8 United States expressed concerns to Mr. Treppiedi and City Attorney Delaney
9 relative to "conflicts" that it believed constituted "obvious" and "apparent "conflicts
10 with the City Attorney Office's representation of "the SPD and all SPD employees"
11 relative to the Otto Zehm incident, which representation also the target of the
12 criminal investigation, SPD Patrol Officer Karl Thompson.¹

13 Mr. Treppiedi and the City Attorney's Office responded that they did not
14 perceive "any" conflicts in and between the representation of: i) The City of
15 Spokane, ii) The Police Department, iii) Chief Kirkpatrick, iv) Asst. Chief Nicks, v)
16 Karl Thompson, vi) Steven Braun, vii) Zach Dahle, viii) Erin Raleigh, ix) Dan
17 Torok, x) Ron Voeller, xi) Jason Uberuaga, xii) Theresa Ferguson, xiii) Mark
18 Burbridge, or any other SPD employee relative to the DOJ's' investigation and/or
19 the Zehm civil suit.

20 On **June 15, 2009**, AUSA Durkin sent an e-mail to Mr. Treppiedi and Howard
21 Delaney, among others, memorializing the United States' Department of Justice's

23 ¹ The target of the investigation, Karl J. Thompson, Jr., was first notified by
24 former Asst. Chief Oldenthal in July of 2006 that he was the target and/or subject
25 of the DOJ's investigation. Mr. Thompson was provided with an official target
26 letter and notified of an opportunity to appear in front of the grand jury in
27 November 2009. Mr. Thompson, through his counsel, Mr. Oreskovich declined
this invitation.

1 concerns with the City Attorney's Office's actual and/or apparent conflicts of
2 interest in claiming "global representation" of all SPD employees. *See Exhibit #8* (a
3 copy of AUSA Durkin's June 15, 2009 e-mail outlining "conflict concerns" in City
4 Attorney's Office's "global scope" representation of the target and other SPD
5 employees involved in the DOJ's investigation of the Zehm incident).

6 The DOJ further learned that Mr. Treppiedi, given his and the City Attorney's
7 continued representation (at public expense) of the target of the criminal civil rights
8 investigation, was channeling traditionally confidential grand jury information (and
9 presumably testimony) to Mr. Thompson and his criminal (and civil) defense
10 counsel Carl Oreskovich. This circumstance was disconcerting because Mr.
11 Treppiedi's primary client, SPD Chief Kirkpatrick, voluntarily issued a "gag order"
12 to SPD employees in the fall of 2008 that was calculated to maintain the
13 confidentiality and integrity of the DOJ's investigation. The gag order was also
14 intended to prevent the dissemination of DOJ criminal case investigation activities to
15 the target of that investigation (i.e., the Defendant Thompson).

16 Mr. Treppiedi acknowledged being aware of his client's gag order, but
17 explained that since he was not an SPD employee that he was not bound by his
18 client's gag order nor by Chief Kirkpatrick's expressed intention to help maintain
19 the confidentiality of the DOJ's investigation. Mr. Treppiedi further explained that
20 since he continued to represent the criminal target Mr. Thompson that he had an
21 ethical obligation to provide *any and all information* that he acquired in his position
22 as the Asst. City Attorney to the SPD to Mr. Thompson and Mr. Thompson's private
23 counsel. *See Exhibit #9 to Ex Parte Statement of Facts* (a copy of Mr. Durkin's June
24 **17, 2009**, e-mail to City Attorney Howard Delaney and Asst. City Attorney
25 Treppiedi expressing DOJ's objections to City Attorney's Office channeling
26 normally confidential grand jury information to the target of DOJ investigation).

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1 On information and belief, and based on a review of the Criminal Chiefs in the
2 U.S. Attorney's Office (EDWA) for the past approximate 25 years, this is the first
3 time that the target of a federal criminal and grand jury investigation has been
4 provided direct access, through a fellow law enforcement agency's "civil legal
5 counsel," to the normally confidential investigation activities and proceedings held
6 before the Grand Jury. *See Ex Parte Statement of Facts Supporting Stay.*

7 On **June 18, 2009**, Asst. City Attorney Rocky Treppiedi and Carl Oreskovich
8 filed a unified Answer and affirmative defenses in this civil action. The 56 page
9 Answer, signed by Mr. Treppiedi and Mr. Oreskovich on behalf of the Defendant
10 Thompson (and others) alleges that the Plaintiff Otto Zehm, a mentally disabled
11 janitor with cognitive delay, threatened Defendant Thompson with a plastic pop
12 bottle and therefore was solely responsible for causing Officer Thompson's use of an
13 impact weapon to repeatedly strike Mr. Zehm and tasered him, and ultimately
14 forcibly subdue him in a prone hogtie restraint, from which Mr. Zehm ultimately
15 died. *See Dckt. #12.*

16 On **June 19, 2009**, the Grand Jury for the Eastern District of Washington
17 returned a Two Count Indictment against Defendant Thompson charging him with
18 criminal violations of Mr. Zehm's constitutional rights (i.e., excessive force) and
19 with obstruction of justice by providing a false statement to justify his excessive
20 force on the victim Zehm. *See U.S. v. Thompson, Cause 09-cr-0088-FVS, Dckt #1.*

21 On **August 31, 2009**, a Pre-trial Conference was held in front of the
22 Honorable Fred Van Sickle, at which time the Court addressed three motions by the
23 Defendant Thompson. The first was a motion to continue the trial date, which the
24 Court granted and set a trial date of February 8, 2010 (scheduled for four weeks).
25 The second motion was for a Bill of Particulars on Count Two of the Indictment
26 (obstruction (false statement(s)) charge related to Defendant Thompson's recorded
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1 statement of March 22, 2006). The Court denied this motion. *See Dckt # 47(U.S. v.*
2 *Thompson, Cause 09-cr-0088-FVS).*

3 Defendant's third motion was for criminal case discovery. As outlined below,
4 the United States has disclosed a substantial amount of criminal case investigation
5 materials to Defendant Thompson and his criminal counsel. The Court granted
6 Defendant's discovery request in part, which substantially involved materials the
7 United States previously agreed that it would disclose. However, the Court denied
8 Defendant's discovery requests that were outside the scope of Rule 16 and the
9 United States' agreed disclosures. *Id.*

10 The United States has reviewed the Defendant Thompson's motion for a stay
11 of Plaintiffs' discovery in this civil action while the criminal case remains pending.
12 However, Defendant Thompson's motion is unilateral in scope only seeks to prevent
13 the Plaintiffs' from using the civil discovery processes against Mr. Thompson. The
14 Defendant's motion does not seek to limit or restrict the Defendant Thompson's
15 and/or all "four" of his attorneys' use of the civil discovery process against the
16 Plaintiffs herein and even conceivably the United States. *See Dckt # 19-21 (Zehm*
17 *Estate v. Thompson, Cause 09-cv-0080-LRS).*

18 In fact, during the course of Mr. Oreskovich's, Mr. Finer's and AUSA Tim
19 Durkin's conference last week to address the discoverability of the criminal case
20 materials the United States has provided to the Defendant, Mr. Oreskovich expressed
21 his intention to have the full use of the civil discovery processes available to him to
22 defend Mr. Thompson on the Plaintiff's and the United States' excessive force
23 claims. *See United States Ex Parte Statement of Facts.*

24 Based on assertions and arguments made by Asst. City Attorney Treppiedi at
25 the time of the party's September 10, 2009 conference call, and based on the
26 foregoing history, the United States fully expects that Asst. City Attorney Treppiedi
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1 and the City Attorney's Office also intend to make full use of the civil discovery
2 processes to defend their client and the primary Defendant, Karl Thompson Jr., as
3 well as the other named Defendants.

4 **II. LAW & DISCUSSION**

5 **A. United States has Standing to Seek Stay of Civil Discovery.**

6 In prior discussions with Defendant Thompson's civil and criminal counsel,
7 Mr. Oreskovich, he has expressed a belief to this Court and to the United States that
8 the United States does not have standing to seek a stay of civil case discovery
9 proceedings in a parallel "civil" civil rights case. Mr. Oreskovich's assertion is in
10 error.

11 Rule 24 of the Federal Rules of Civil Procedure specifically provides that
12 "anyone" shall be permitted to intervene in an action when: 1) a statute of the United
13 States confers an unconditional right to intervene; or 2) the applicant claims an
14 interest relating to the "transaction" which is the subject of the action and the
15 disposition of which may as a practical matter impair or impede the intervener's
16 ability to protect its interest. See FRCP 24 (a)(1) and (2). Permissive intervention is
17 also allowed under Rule 24(b) where a statute confers conditional right to intervene
18 or when the intervener's claims or defenses in the related action have issues of fact or
19 law in common in the main action. See Rule 24(b) providing for permissive
20 intervention.

21 Here, the United States submits that allowing the civil discovery process to
22 continue in this action will continue to: **1) Disrupt and unfairly prejudice the interests**
23 **of the United States in its prosecution of the criminal case by allowing the Defendant**
24 **Karl Thompson to obtain discovery of which is not permitted by Rule 16 in the**
25 **Federal Rules of Criminal Procedure, such as the taking of depositions of government**
26 **witnesses and agents; 2) Place the Defendant Karl Thompson, who is charged in the**
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1 federal case, and other SPD employees who may still be under investigation in the
2 posture of having to make decisions with concerns relative to asserting their fifth
3 amendment privilege in the civil case at a time when criminal charges are pending
4 against one or more of them; 3) Result in unnecessary consumption of the court's
5 time and the parties' resources concerning matters that may largely be resolved by the
6 outcome of the criminal case; and 4) Prove unnecessarily burdensome to the
7 witnesses and other non parties for the same reason.

8 Federal rules, statutes and the case law have carefully circumscribed
9 criminal discovery. It is not -- and cannot be -- as broad as civil discovery, nor as
10 broad as defendant's motion wish to make it. This tenant of criminal law is
11 especially true in the case at bar, because granting Defendant's motions would be
12 an unprecedented broadening of the criminal discovery rules and would open the
13 floodgate for similar burdensome discovery requests in future cases involving
14 criminal civil rights and obstruction cases, making them difficult to prosecute in an
15 orderly and timely fashion if tied up with invasive and multiple discovery requests.
16 "As a matter of general construction '[t]he measure of discovery permitted by the
17 Rules of Criminal Procedure is not intended to be as broad as in a civil case."
18 *United States v. Ross*, 511 F.2d 757, 762 (5th Cir.), cert. denied, 423 U.S. 826
19 (1975)(citations omitted). The scope of disclosure under Rule 16(a)(1)(C) is
20 "necessarily circumscribed by the Rule's materiality requirement." *United States v.*
21 *Buckley*, 586 F.2d 498, 506 (5th Cir.), cert. denied, 440 U.S. 982 (1979).

22 Because of the limitations imposed by Criminal Rule 16, the Courts have been
23 particularly weary and vigilant of allowing a criminal defendant and/or his civil
24 counsel from using the more liberal discovery process to circumvent the Criminal
25 Rules and disrupt the Government's investigation and prosecution interests. In a
26 Second Circuit case involving intervention by the government to stay discovery in a
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1 civil case pending completion of a related criminal investigation, the court concluded
2 that “intervention under either 24(a) or (b)” was appropriate, noting:

3 “The government had a discernible interest in intervening in order to prevent
4 discovery in the civil case from being used to circumvent the more limited
5 scope of discovery in the criminal matter.”

6 *SEC v. Chestmen*, 861 F.2d 49, 50 (2nd Cir. 1988). Intervention here by the United
7 States is appropriate in this action under both Rule 24(a)(2) (e.g., intervener claims
8 interest in transaction that is subject of action and is situated so that disposition may
9 impair or impede intervener’s ability to protect that interest) and 24(b)(2) (e.g.,
10 applicant’s claim or defense in the main action have issues of fact or law in common).

11 The Ninth Circuit similarly concluded in the case of *Federal Sav. and Loan*
12 *Ins. Cor. v. Molinaro*, 889 F.2nd 899, 902-903 (9th Cir. 1989), where it held that
13 District Courts have power to stay civil proceedings pending resolution of parallel
14 criminal proceedings. *Id.*; *see also Mediterranean Enters., Inc. v. Ssangyong*, 708
15 F.2nd 1458, 1465 (9th Cir. 1983).

16 **B. Stay of Civil Case Serves Public’s Interest & Interests of Justice.**

17 In *Molinaro*, *supra*, the Ninth Circuit set forth certain factors to serve as a
18 guide to a Court in ruling on a motion to stay. This nonexclusive list includes: i) the
19 extent to which a defendant’s fifth amendment rights are implicated; ii) the interest of
20 the plaintiff in proceeding expeditiously with the civil action and the potential burden
21 to the plaintiff of delay; iii) the burden on the defendant; iv) the convenience of the
22 court and the management of its cases and the efficient use of judicial resources; v)
23 the interest of the persons, not parties to the civil litigation; and vi) the interest of the
24 public in the pending civil and criminal litigation. *Molinaro, Id.*; *see also Board of*
25 *Governors of Fed. Reserve Sys. v. Pharaon*, 140 F.R.D. 634 (S.D.N.Y. 1991)
26 (granting stay of discovery in civil action pending termination of Grand Jury
27 investigation of defendant in criminal case).

1 The case of *Campbell v. Eastland*, 307 F.2nd 478 (5th Cir. 1962), *cert. denied*,
2 371 U.S. 955 (1963), also supports the United States' position. In *Campbell*, supra,
3 the appellate court reversed the District Court's denial of the IRS's motion to stay a
4 plaintiff's civil action for a tax refund while a criminal prosecution of the plaintiff for
5 tax fraud was being considered. Even though the government did not yet present the
6 criminal fraud case against the plaintiff to the grand jury, the Fifth Circuit reversed
7 the District Court's denial of stay. *Id* at 483-85.

8 In reversing, the Fifth Circuit noted the dangers of allowing a civil case to go
9 forward where the civil case intimately related to an ongoing criminal investigation
10 and/or trial:

11 **“There is a clear-cut distinction between private interests in civil**
12 **litigation and the public interest in a criminal prosecution**, between a
13 civil trial and a criminal trial, and between the Federal Rules of Civil
14 Procedure and the Federal Rules of Criminal Procedure. But these
15 distinctions do not mean that a civil action and a criminal action involving
16 the same parties and some of the same issues are so unrelated that in
17 determining good cause for discovery in the civil suit, a determination that
18 requires the weighing of effects, the trial judge in the civil proceeding should
19 ignore the effect discovery would have on a criminal proceeding that is
20 pending or just about to be brought. **The very fact that there is clear**
21 **distinction between civil and criminal actions requires a government**
22 **policy determination of priority: which case should be tried first.**
Administrative policy gives priority to the public interest in law
enforcement. This seems so necessary and wise that a trial judge should
give substantial weight to it in balancing the policy against the right of a
civil litigant to a reasonably prompt determination of his civil claims or
liabilities.”

23 *Id.* at 487 (*emphasis added*). The *Campbell* court, supra, went on to state that
24 where a civil litigant is aware of a criminal case or even the “possibility” of a
25 criminal case against him, the civil litigant “...should not be allowed to make use
26 of the liberal discovery procedures applicable to a civil suit as a dodge to avoid the
27 restrictions of criminal discovery and thereby obtain documents that he would not

1 otherwise be entitled to for use in his criminal suit.” *Campbell, id.*

2 In *Trbovich v. UMW*, 404 U.S. 528, 538, N.10 (1972), the Supreme Court
3 stated that the showing for intervention of right “is satisfied if the applicant shows
4 that representation of his interest ‘may be’ inadequate; and the burden of making
5 that showing should be treated as minimal.” *Id.* The Supreme Court has also
6 recognized that the government has a substantial interest in maintaining the
7 integrity of criminal prosecutions when a parallel civil action may be used by the
8 named defendant to circumvent the priority of the criminal case as well as the rules
9 and restrictions imposed by the Federal Criminal Rules of Procedure. *Id.*

10 The United States’ motion here clearly meets the requirement for granting
11 intervention and a stay because of the compelling public interest in this case and
12 more immediate interest of maintain timely and effective law enforcement action.
13 The Supreme Court has permitted intervention on this basis under both sections of
14 Rule 24’s intervention provisions. *See Cascade National Gas Corp. v. El Paso*
15 *Natural Gas Company*, 386 U.S. 129, 132-36 (1967) (permitting intervention as
16 right by State of California in antitrust divestiture action due to “general public
17 interest” in effective competition within state); *SEC v. United States Realty and*
18 *Improvement Co.* 310 U.S. 434, 458-60(1940) (holding that Court of Appeals
19 should have granted intervention by SEC in bankruptcy proceeding because
20 resolution of those proceedings might “defeat the public interest which the
21 commission was designated to represent.”).

22 **C. Analogous Stays in Civil Forfeiture Proceedings.**

23 Comparatively, Congress and the courts have recognized that stays in
24 parallel civil forfeiture proceedings should be imposed when the Court surmises
25 that civil discovery will adversely affect the ability of the government to conduct a
26 related criminal investigation and/or prosecution of a related criminal case. See
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1 *United States v. One of 703 Firearms*, 352 F.Supp.2d 2, 4 (D.Maine 2005); and 18
2 U.S.C. Sec 981(g)(1). Civil discovery will “adversely” a related criminal
3 investigation and/or prosecution if “it will subject the government’s criminal
4 investigation to earlier and broader civil discovery than would otherwise be
5 possible in the context of the criminal proceeding.” *Id.*

6 Here, the Government has shown, not only by inference, but by specific
7 instances, that allowing discovery in the civil proceeding will lead to significant
8 discovery disputes between the criminal and civil action, and will compromise the
9 DOJ’s ongoing criminal prosecution efforts as well as its continuing criminal
10 investigations.

11 Here, the United States motions and filings made clear that the Defendant
12 Karl Thompson and his “multiple” attorneys knew of the criminal investigation
13 against Mr. Thompson prior to his indictment and prior to the Otto Zehm Estate’s
14 filing of the present civil action.

15 Notably, the Defendant Mr. Thompson seeks to stay the Plaintiff Otto
16 Zehm’s request for discovery, but does not want any restriction on his and/or the
17 other SPD Defendants’ ability to use the civil discovery process to circumvent the
18 criminal case discovery limitations imposed by Criminal Rule 16 and the
19 Discovery Orders entered by Judge Van Sickle and Magistrate Imbrogno in the
20 criminal case. In fact, defense counsel has expressed a belief that Judge Van
21 Sickle has no control over the Defendant Thompson’s and his counsel’s actions in
22 this civil civil rights case. .

23 The United States has demonstrated that it has a continuing investigation
24 about other possible federal obstruction offenses and that this investigation
25 conceivable includes one or more of the other Defendants named in this civil suit.
26 *See United States Ex Parte Statement of Facts Supporting Stay.* In light of the
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1 compelling government and public interests, and the preference for the speedy
2 resolution of the criminal case trial, as well as the conclusion of the ongoing and
3 continuing obstruction investigation, the United States respectfully submits that a
4 global stay of the civil action and discovery processes is warranted.

5 **D. Defendants Not Prejudiced By Six Month Stay.**

6 Defendants will not be prejudiced by a six (s) month stay. First, the trial in
7 this case was and is not likely to be set until sometime in late 2010 or early 2011
8 per the Court's prior status conference order. Therefore a short stay (i.e. six (5)
9 months) does not significantly impair the civil Defendants' ability to prepare the
10 case for trial. Second, several of the named Defendants actually participated in the
11 SPD's criminal investigation and notwithstanding the City's counsel's recent
12 suggestions to the contrary, Mrs. Zehm and the Zehm Estate most likely have not
13 been provided with all of the City's "criminal case file materials" in response to the
14 Plaintiffs' long ago "public records" requests.

15 Further, the City Attorney's Office has been "defending" claims of excessive use
16 of force in the Zehm incident practically from the night it occurred (March 18, 2006).
17 A significant pre-indictment and pre-suit investigation has been performed by
18 Defendant Thompson's public and private counsel over the past three plus (3+) years.
19 The City Attorney's Office and Mr. Oreskovich's pre-suit investigation closely
20 paralleled the Grand Jury's investigation that has continued over these past two years.
21 Further evidence that a significant public-private investigation was performed on all of
22 the Defendants' behalf is Defendants' Answer, which was filed on **June 18, 2009** (one
23 day before the Grand Jury's Indictment). In that 56 page Answer, the Defendant
24 Thompson's "public counsel" (i.e., Asst. City Attys. Rocco Treppiedi, Ellen O'Hara
25 and City Attorney Howard Delaney) and his publicly retained "private counsel" (i.e.,
26 Mr. Oreskovich) set forth many specific averments, including claims. The Answer
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1 goes on to blame Mr. Zehm for his forcible detention, the necessity of Officer
2 Thompson's baton strikes, and even blames him for proximally causing his own "in-
3 custody death." This Answer also denies that any head strikes were deployed. *See*
4 *Estate of Zehm v. Thompson, et al, id, Dckt. # 12.*

5 In addition, it is clear that experts have been retained by the City's on behalf of
6 "all" the Defendants and for their benefit. Notably, the Defendant Thompson has not
7 disclosed a single document of criminal and/or civil discovery to date.

8 In stark contrast, during the past three (3) years the Zehm family attorneys have
9 provided the City Attorney's Office with access to witnesses, employers, and health
10 care providers. They also have not interfered with nor "shadowed" the DOJ's and/or
11 the Grand Jury's investigation. In fact, the Estate's counsel has purposely not engaged
12 in significant pre-suit investigative activities in order to allow the United States DOJ's
13 investigation to proceed unencumbered. In contrast, the Plaintiffs and their counsel
14 have been fully cooperative and responsive to the City Attorney's Office's various pre-
15 suit records and interview requests. Noteworthy, however, is that the United States
16 prosecution on the alleged criminal civil rights violation and obstruction charge could,
17 if a conviction is returned, determinative of several of Plaintiff's liability claims.

18 **III. CONCLUSION**

19 The United States has presented compelling reasons to grant its Motion to
20 Stay all civil case proceedings. Discovery in the civil action could directly and
21 adversely affect the government's position in any future related criminal
22 proceedings against Defendant Thompson and possibly others. The United States'
23 ongoing and continuing investigation in the *U.S. v. Thompson* and into other
24 possible unlawful obstructive conduct by others persons connected to the SPD 's
25 Zehm investigation, conceivably including some defendants named herein, could
26 also be compromised by civil discovery processes.

1 “Administrative policy gives priority to the public interest in law
2 enforcement” and the United States respectfully requests that it be allowed to
3 prosecute its criminal case “first” and unencumbered with unauthorized civil
4 discovery.

5 RESPECTFULLY SUBMITTED this 15th day of September 2009.

6 JAMES A. MCDEVITT
7 United States Attorney (EDWA)

8 *s/ Timothy M. Durkin*
9 TIMOTHY M. DURKIN
10 Assistant United States Attorney
11 Attorneys for Plaintiff United States
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Certificate of ECF and/or Mailing

I hereby certify that on the date of the filing of this document with the Clerk of the Court using the CM/ECF System that the Clerk’s ECF system will send notification of such filing to all counsel and/or I hereby certify that I have arranged for mailing by United States Postal Service and/or arranged other delivery of the document the following day to non-CM/ECF participant(s):

- Jeffry Finer, Esq.
- Breann Beggs, Esq. – Attorneys for Plaintiffs Zehm; and

- Carl Oreskovich, Esq. – Attorney for Karl Thompson; and

- Rocco Treppiedi, Asst. City Attorney
- Sam Faggiano, Asst. City Attorney
- Ellen O’Hara, Asst. City Attorney
- Attorneys for Karl Thompson & all remaining Defendants

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

s/ Timothy M. Durkin
Timothy M. Durkin