IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

MARY SMITH and GEORGE SMITH, Individually, and MARY SMITH, as Administrator of the ESTATE OF MARCUS DEON SMITH, deceased,	)	
Plaintiffs,	)	
v.	)	Case No. 1:19CV386
CITY OF GREENSBORO, et al.,	)	
Defendants.	)	

PLAINTIFFS' RESPONSE BRIEF IN OPPOSITION TO DEFENDANT CITY OF GREENSBORO'S MOTIONS TO DISMISS

STANDARD OF REVIEW

Plaintiffs incorporate the standard of review section contained in their response to the Officer Defendants' motion to dismiss.

ARGUMENT[1]

I. Plaintiffs Have Pleaded a Number of Plausible *Monell* Policy and Practice Claims

The City, like the Officers, unabashedly attempt to scrutinize Plaintiffs' well pleaded and detailed allegations as if it had filed a motion for summary judgment after discovery, rather than on a motion to dismiss.[2] While the Supreme Court has tightened to some degree the notice pleading standards set forth in Fed R. Civ. P. 8(a) to require that a plaintiff must plead "enough facts to state a claim for relief that is plausible on its face," *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007), Rule 12(b)(6) "does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations" nor may it be dismissed "even if it appears that recovery is very remote." *Id.* Nor is there a heightened pleading standard in 42 U.S.C. § 1983 cases, *Leatherman v. Tarrant Cty.*, 507 U.S. 163 (1993), and, unlike individual police officers, the City has no qualified immunity defense. *Owen v. Independence*, 445 U.S. 622, 650 (1980). Well pleaded factual allegations, unlike legal conclusions, must be accepted as true, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and the Supreme Court in *Twombly* "does not appear to have believed that it was changing the Rule 8 or Rule 12(b)(6) framework." *Phillips v. County of Allegheny*, 515 F. 3d 224, 230, 234 (3d Cir. 2008). *See also Bryson v. Gonzales*, 534 F.3d 1282

[1] Plaintiffs incorporate by reference the Statement of Facts set forth in their response to the Defendant Officers' motion and assert additional facts as necessary in the Argument section of this brief.

[2] Contrary to the City's superfluous argument (Br. at 7), Plaintiffs clearly only sue the individual officers in their individual capacities. Compl. ¶ 21. ("Each of the individual defendants is sued in his or her individual capacity.") The necessary additional allegations of color of law and scope of employment do not alter the individual capacity allegation.

(10th Cir. 2008) (if some necessary facts are omitted, the pleading may still be sufficient if "the court can plausibly infer the necessary unarticulated assumptions.").

A. The Relevant Policies, Practices and Customs Alleged

In paragraph 62 of their Complaint, Plaintiffs allege, *inter alia*, as their interrelated *Monell* policy and practice claims that "City of Greensboro and its Police Department, and their decision makers, including Greensboro Police Chief Scott, with deliberate indifference, gross negligence, and reckless disregard to the safety, security, and constitutional and statutory rights of the Decedent, plaintiffs, and all persons similarly situated, maintained, enforced, tolerated, permitted, acquiesced in, and applied written and *de facto* policies, practices, or customs and usages" that included: (1) "encouraging and/or authorizing officers to use hogtie restraint devices to bind a subject's arms and feet together behind his back without regard to whether a person was a criminal suspect or was particularly vulnerable to the potential lethal consequences of hogtying" (Compl. ¶ 62(b)); (2) subjecting people to unreasonable uses of force when they are experiencing symptoms of mental illness and/or drug intoxication, and present a health emergency rather than a law enforcement problem (*id.* ¶ 62(c)); (3) failing to train officers as to whether, under what circumstances, and/or how to use hogtie restraint devices to bind a subject's arms and feet together behind his back" (*id.* ¶ 62(a)); (4) training officers to use hogtie restraint devices to bind a subject's arms and feet together behind his back without regard to whether a person was a criminal suspect, or was particularly vulnerable to the potential lethal consequences of hogtying (*id.* ¶ 62 (b)); (5) failing to adequately train officers not to treat people who present mental health issues as criminal suspects in determining whether, when and how they should be restrained or taken into custody (*id.* ¶ 62(d)); (6) failing to adequately train employees in the dangers of the use of hogtie restraint devices, especially for people like Marcus Deon Smith,

whose physical and mental state make them particularly vulnerable to the lethal effects of hogtie restraint devices and render such tactics unreasonably dangerous (*id.* ¶ 62(e)); and (7) failing to implement protocols and train officers in the proper way to contain, treat and secure people like Marcus Deon Smith who are not criminal suspects but who may be in an irrational and/or delusional and/or agitated state because of a mental health crisis (*id.* ¶ 62(f)).

B. Relevant Facts Alleged

After observing Marcus Smith for an extended period of time, and determining both that he was in a mental health crisis and was not committing a crime, Defendant GPD officer Duncan said, "we probably ought to RIPP Hobble him." Compl. ¶¶ 26, 27, 31, 53, 54. At that time there were eight GPD officers present, including Sergeants Bradshaw and Strader. *Id.* ¶¶ 15, 17, 31-32. These officers, including Bradshaw and Strader, cooperated in holding down Marcus, who was not resisting, and using a RIPP Hobble device and handcuffs to brutally and unconstitutionally hogtie him, with his legs at an angle well beyond 90 degrees, while he was in a prone position. *Id.* ¶¶ 46, 47. The two sergeants on the scene did not stop this unconstitutional conduct but rather facilitated it. *Id.* ¶ 47. This hogtying was a direct and proximate cause of Marcus Smith's death, which was classified by the medical examiner as a homicide, with the first cause being listed as "prone restraint." *Id.* ¶ 52.

The manufacturer of the RIPP Hobble expressly directed in its packaging "NEVER Hog-Tie a Prisoner." Compl. ¶ 60. The GPD had in effect at the time of Marcus's homicide a Directive that read in part:

> At no time shall the wrists and ankles of an arrestee be linked together using the RIPP HOBBLE restraining device, unless the arrestee can be seated in an upright position, or on their side. If this is done, the knees of the arrestee will not be bent more than 90 degrees **(unless extenuating circumstances exist**) to prevent stress being placed on the arrestee's chest muscles or diaphragm which might contribute to a positional asphyxia situation. . .

Id. ¶ 58 (emphasis added).

GPD and its Chief, "immediately and publicly covered up the fact that Marcus was hogtied , issuing a press release that contained misinformation, lies, and omissions, stating that Marcus had collapsed while he was in police custody (he did not), that he was combative (he was not), that officers rendered aid (they did not), that he died at the hospital (he died face down on the street), and blatantly omitting that Marcus was taken to the ground by the police and forcibly restrained and hogtied." Compl. ¶ 57. Chief Scott followed up by publicly announcing that "the Directive only applied to the transport of persons in custody, and since Marcus was dead before they got to the point of transporting him, the Directive did not apply. *Id.* ¶ 59. Chief Scott further stated that GPD did not have a specific directive on applying the RIPP Hobble, or hogtying, restraint prior to transporting detainees." *Id.* None of the Defendant officers, including the supervising sergeants, received any discipline for their actions and inactions relating to the death of Marcus Smith. *Id.* ¶ 61.

City of Greensboro and its Police Department have a long history of racist police violence and misconduct and deliberate indifference, including, most recently, the targeting of African-Americans for, among other things, driving while black and being downtown while black, and the accompanying use of force, violence, false charges, perjury, and cover up by superiors using the Professional Standards Division, the Chief of Police, the City Manager, the City Attorney, and the City Council, to condone and ratify police misconduct, which causes Greensboro police officers, such as the officers in this case, to believe that they can abuse Black citizens with impunity and with no fear of consequences. Compl. ¶ 63.

C. Hogtying Policy

In summary, Plaintiffs' well pleaded facts that support Plaintiffs' *Monell* hogtying policy and practice claims include: (1) the GPD's written policy concerning the hogtying of citizens with its catchall "extenuating circumstances" exception; (2) the brutal hogtying of Marcus Smith; (3) the fact that Marcus was not under arrest, posed no threat, was not resisting, and was suffering from a mental crisis; (4) the participation of eight GPD officers, including two supervising sergeants in the hogtying; (5) the public statements of the Chief and the GPD defending and ratifying the hogtying of Marcus Smith; (6) the Chief's public statement that the hogtying Directive did not apply to Marcus because it only applied to prisoners during transportation; (7) the directions on the RIPP Hobble which state NEVER Hog-Tie a Prisoner; (8) the fact that none of the Defendants, including the supervising sergeants, were disciplined by the GPD for violating the hogtying Directive; and (9) the cover-up by the Chief and the GPD.

Thus, it is more than plausible to conclude from these well pleaded facts that the GPD had a hybrid written and *de facto* policy which permitted and encouraged GPD officers to brutally hogtie defenseless, law abiding citizens including those who were in mental health crisis, despite the express knowledge that hogtying in the manner effected against Marcus Smith could well be deadly. Further, particularly given the manufacturer's warning, the specific acknowledgment of the potential for asphyxiation in the Directive itself, and the ratification of the hogtying, deliberate indifference is more than plausibly alleged; this policy and practice, as demonstrated by its use against Marcus, was clearly unconstitutional in design and practice, and, was clearly a moving force behind the death of Marcus Smith.[3]

[3] Discovery, as already reflected in the public record, will further demonstrate this policy, as well as the City's adoption of, deliberate indifference to, and ratification of, this policy. *See, e.g.,* GPD public information officer Glenn, when asked why GPD had not followed the instructions included with the device, responded that "the statements regarding the application of this restraint remain accurate and in

There are a substantial number of cases that uphold *Monell* policy claims in similar circumstances. In *Garcia v. Salt Lake Cty*., 768 F.2d 303, 306-07 (10th Cir. 1985), the evidence established that the County Jail had adopted written policy statements regarding unbooked arrestees: that prisoners who are injured, unconscious, or otherwise in need of immediate care, or diagnosis will be transported to the hospital by the arresting officer before the prisoner will be accepted for booking; that Deputies will not deliver to the County Jail any prisoners who are unconscious or semiconscious and have to be carried into the jail; and that all arrested persons in the above stated condition shall be taken directly to the hospital for emergency treatment or medical diagnosis before being booked. *Id.* At trial there was testimony by the Sheriff, corroborated by other witnesses, that the actual policy was that unconscious individuals who were suspected of being intoxicated were admitted to the jail rather than first taken to the hospital. *Id.* The Tenth Circuit upheld the verdict against the County on the plaintiff's *Monell* policy claim on the basis of the testimony of the Sheriff and the other witnesses.

In *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1096-97 (9th Cir. 2013), the evidence established that the Police Department had a policy that defined tasers as a low level of force—lower than any other hands-on force, including a firm grip. Defendant Sheldon, who tased the plaintiff, and at one time had been a taser instructor for the Department, described the policy as classifying tasers as a "low," "very low," or "very, very low" level of force. He also explained

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compliance with GPD Directives. In this incident officers use[d] the device as a maximum restraint tool that follows GPD policy and training on restraint." https://yesweekly.com/never-hog-tie-a-prisoner-instructions-on-device-warn-against-fatal-restraint/; the 1995 bulletin from the National Law Enforcement and Technology Center of the Department of Justice cautioned to "avoid the use of maximally prone restraint techniques (e.g., hogtying)." It also states: "As soon as the suspect is handcuffed, get him off his stomach." *Id.*; "RIPP has been training to NOT hog-tie an individual since at least 1994. That's the furthest I can find, for sure, and that was when my father, Bill DeVane, Sr. started training law enforcement on the subject of Sudden Custody Death Syndrome, which covers positional asphyxia, positional restraint asphyxia, excited delirium and cocaine psychosis." *Id.*; Mayor Vaughan said on December 3 that "the very first press release, obviously, is a lie" https://yesweekly.com/hogtying-homicide-and-humanity-doj-document-warns-about-restraint-that-killed-marcus-deon-smith/

that, pursuant to the City's taser policy, "I don't need to be threatened to use a taser." The City recognized that this stated policy, as further described and implemented by the defendant was unconstitutional, and the Court held with regard to the actual policy:

> Given this evidence, Sgt. Shelton's testimony that he did not tase Blondin because of a specific City policy means little. No one contends the City had a policy requiring officers to tase non-threatening suspects such that Blondin's tasing could have occurred because a specific policy directed it. Instead, the City's policy told Sgt. Shelton that tasing non-resisting individuals in circumstances like this one was acceptable. It informed him that even a firm grip entails more force than a taser and deputized him with the power to tase an individual who presents no threat at all. A reasonable factfinder could look at this incident, in which Sgt. Shelton acted in accordance with a policy he claims never to have departed from, and conclude that such policy was the moving force behind his use of the taser in this case.

Id.

Similarly, in *Buben v. City of Lone Tree*, 2010 U.S. Dist. LEXIS 104853, at *12-18 (D. Colo. Sep. 30, 2010), the Department had a written policy regarding tasers that did not prohibit their use against (1) passively resisting subjects and (2) a subject who was on an elevated surface. Warnings against the use of tasers in these circumstances were clearly set forth in the TASER International training provided to the Department. The Court found that this inadequate policy, together with a failure to properly train on the subject, established a *Monell* claim that was sufficient to withstand a motion for summary judgment. *See also Woodward v Corr. Med. Servs.*, 368 F.3d 917, 929 (7th Cir. 2004) ("ignoring a policy is the same as having no policy in place in the first place.")

These cases further support Plaintiffs' well founded claims, grounded on facts alleged in their Complaint that they have marshalled before having the benefit of discovery, that the GPD had an actual policy, as interpreted and ratified by its Chief, which permitted and encouraged the brutal hogtying of mentally disturbed citizens who were committing no crimes, that this policy, in clear defiance of the manufacturer's prohibition, and despite the Directive's express

acknowledgment of potentially deadly dangerousness, was implemented with deliberate indifference, and that it was a moving force behind the homicide of Marcus Smith.

D. Training Policies and Practices

The factual allegations set forth in Section B above, also support Plaintiffs' related *Monell* training claims. It is more than plausible to conclude, as Plaintiffs allege, that the GPD training concerning the hogtying of citizens, particularly those in mental health crisis, a specific and extremely important component of the use of potentially deadly force, was woefully inadequate, callously indifferent, and a moving force behind the homicide of Marcus Smith. First, it is plausible, given the brutal hogtying of Marcus Smith in clear contravention of the general prohibition of the GPD Directive, to conclude that the GPD trained its officers and supervisors that hogtying disruptive, but non-threatening persons before transportation, including those in mental health crisis, presented "extenuating circumstances" which permitted them to use a restraint tactic that the GPD recognized to be dangerous and potentially life threatening. This reasonable inference is further supported by the Chief's statement ratifying the conduct of the Defendants, the Sergeants' failure to intervene to stop the hogtying, and the GPD's failure to discipline the team of hog-tiers. An equally plausible alternative is the inference that there was no, or at most, woefully inadequate, training concerning hogtying, the Directive, and, even more specifically, what did, and did not, constitute "extenuating circumstances." Under the facts alleged, either training theory is plausible, as is the allegation that this specific training, or the lack thereof, in the face of the Directive's express acknowledgement and the manufacturer's prohibition, evidenced deliberate indifference and was a moving force in the unconstitutional taking of Marcus Smith's life.

In *City of Canton v. Harris*, 489 U.S. 378, 389, (1989) the Supreme Court, while reviewing a jury instruction given in a Section 1983 municipal liability case, defined the contours of an actionable *Monell* failure to train claim: "only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983." The Court continued:

> It may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees. But it may happen that in light of the duties assigned to specific officers or employees, the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.

Id. at 390.

Further, "in resolving the issue of a city's liability, the focus must be on adequacy of the training program in relation to the tasks the particular officers must perform," and "the identified deficiency in a city's training program must be closely related to the ultimate injury." *Id*. at 390-91. Significantly, the court further stated that "the need to train officers in the constitutional limitations on the use of deadly force . . . can be said to be so obvious, that failure to do so could properly be characterized as deliberate indifference to constitutional rights." *Id*. at 390 n. 10.

Most often after discovery, a number of Courts have uniformly validated failure to train claims in factual circumstances similar to those alleged by the Plaintiffs here, circumstances where the plaintiff had the benefit of discovery and live testimony from policymakers, police practices experts, and the officers involved in the underlying constitutional violations. In *Russo v. Cincinnati*, 953 F.2d 1036, 1045-1046 (6th Cir. 1992), the court applied *Canton* on a motion for summary judgment, to hold that the plaintiff, by tendering an expert's opinion, had tendered sufficient evidence to create a question of fact as to whether the City's police training in the

specific area of "the use of force on mentally disturbed persons was constitutionally adequate," and, whether that training "falls to the level of 'deliberate indifference' under *City of Canton*." In *Warren v. Lincoln*, 816 F. 2d 1254, 1262-63 (8th Cir 1987), the Court relied on the Chief of Police's testimony during which he admitted that officers were trained to take people into custody and question them on the basis of reasonable suspicion to hold that "at the very least, [this testimony] puts into issue the question of whether the Lincoln police department failed to properly train its officers." *See also Cruz v. City of Laramie*, 239 F.3d 1183, 1191 (10th Cir. 2001) (affirming denial of summary judgment on *Monell* claim concerning the City's "fail[ure] to train its officers on the use of hobble restraints"); *Diaz v Salazar*, 924 F. Supp. 1088, 1098-99 (D.N.M. 1996) (the actions of four officers in using improper tactics that led to the unconstitutional use of deadly force, when combined with the opinion of a police practices expert, held to be sufficient under *Canton* to defeat summary judgment on the issue of inadequate training in the specific area of handling "drunken, rude, and potentially violent suspects.").

In *Swofford v. Eslinger*, 686 F. Supp. 2d 1277, 1284-87 (M.D. Fla 2009), the court examined the question of training in light of the *Canton* court's specific highlighting of the importance of adequate training in the field of use of deadly force. Reviewing the evidentiary record, the court first found, like the courts in *Diaz* and *Woodward*, that, in certain circumstances, a single unconstitutional incident can support a municipal training claim:

> In certain cases, there need not be a pattern of similar conduct equating to notice for *Monell* liability to stand. "A single constitutional violation may result in municipal liability when there is 'sufficient independent proof that the moving force of the violation was a municipal policy or custom.'" *Vineyard* [*v. County of Murray*], 990 F.2d at 1212. . . [I]n this case, the municipal policy or custom is the abject failure to train in an area singled out by the Supreme Court as being fundamental to the protection of constitutional rights. *See Canton*, 489 U.S. at 390 (A municipality's failure to train can qualify as a "policy or custom" that is actionable under § 1983).

Swofford, 686 F. Supp. 2d at 1284; *Woodward*, 368 F.3d at 929 (citing *Board of the County Comm'rs v. Brown*, 520 U.S. 397, 409 (1997) for the proposition that a single violation can trigger municipal liability if the violation was "highly predicable," and stating that the municipality does not get a "one suicide pass"). The *Swofford* court also found that the evidence, when viewed in the light most favorable to the plaintiff, demonstrated the failure to provide any meaningful training on when to use deadly force, and that a reasonable jury could conclude that the county's abject failure to provide such training constitutes deliberate indifference to the innocent victims of deadly force." *Swofford*, 686 F. Supp. 2d at 1286-87. *See also Buben*, 2010 U.S. Dist. LEXIS 104853, at *12-18 (denying summary judgment on inadequate training claim where there were no allegations of an ongoing pattern of misconduct and the focus was solely on the incident involving the plaintiff because "disputed issues of fact as to whether the failure to train officers in [the] specific skill needed to handle recurring situations – i.e. skills for interacting with mentally ill person and skills regarding the use of TASERS on individuals on elevated surfaces, or who are passively resisting – presented an obvious potential for constitutional violations rising to the level of deliberate indifference."); *Spell v. McDaniel*, 824 F.3d 1380, 1394-95 (4th Cir. 1987) (upholding a verdict against the municipality that was premised in part on the Department's training, encouraged by the Chief, that sanctioned the use of excessive force (grabbing the testicles and kicking the groin) to subdue arrestees).

It is therefore apparent that Plaintiffs, at this early stage of the proceedings, have made out a highly plausible claim that the City of Greensboro, by and through its Police Department, had either no, or woefully inadequate, training in the related, specific, and crucial areas that included the use of potentially deadly force (*i.e.*, hogtying) and the handling of citizens suffering from an active mental crisis. These claims, whether considered together with the actual policy

concerning hogtying, or standing alone, clearly also sufficiently allege deliberate indifference by the City of Greensboro that is closely linked as a moving force in the homicide of Marcus Smith.

E. Custom and Practice of Abusing Black Citizens

Finally, Plaintiffs allege a custom and practice of the GPD, its supervisors and policymakers, of "racist police violence and misconduct and deliberate indifference, including, most recently, the targeting of African-Americans for, among other things, driving while black and being downtown while black, and the accompanying use of force, violence, false charges, perjury, and cover up . . . . which causes Greensboro police officers, such as the officers in this case, to believe that they can abuse African American citizens with impunity and with no fear of consequences." This custom and practice which, like the hogtying and training policies, can also be plausibly alleged to be constructively and/or actually known to the City's policymakers, and as a deliberately indifferent moving force behind the homicide of Marcus Smith, is amply supported by numerous incidents over the past 50 years that are generally referenced in Plaintiffs' complaint (*see* Compl. ¶ 63), are further detailed in the public record, and can be further supplemented after discovery.[4] *See Spell*, 824 F.3d at 1395 (upholding a jury verdict against the municipality based in part on a pattern and practice of police brutality).

[4] *See, e.g.*, 1969 Killing of Willie Grimes and National Guard shoot-in at NC A&T; https://www.greensboro.com/life/community_news/who-killed-willie-grimes/article_f3a2d30f-e060-5743-bc42-b2ded1d125dd.html; 1979 Greensboro Massacre of anti-Klan protestors; https://www.nytimes.com/1979/11/04/archives/four-shot-to-death-at-antiklan-march-ambush-at-a-north-carolina.html; 2009 GPD brutality whistleblower case; https://www.greensboro.com/news/suit-race-basis-for-firing-officers/article_d4f4878d-caf6-5d72-92c1-8ff0ffcb368f.html; 2009 Foster brutality case; https://www.greensboro.com/news/local_news/greensboro-reaches-settlement-in-eva-foster-lawsuit/article_9f696371-3e66-5b7d-b803-9a5d2ee4f70a.html; 2012 Armstrong police frame-up case; https://www.huffpost.com/entry/lamonte-armstrong-wrongfully-convicted_n_1644714; GPD police discrimination case; 2015 analysis of GPD's own statistics to find racial disparities in policing, including auto stops and searches; https://www.nytimes.com/2015/10/25/us/racial-disparity-traffic-stops-driving-black.html; 2013 Scales brutality case; 2016 Yourse brutality case; https://www.wfdd.org/story/city-greensboro-reaches-financial-settlement-dejuan-yourse; 2016 Charles brutality case; https://www.washingtonpost.com/news/post-nation/wp/2017/04/06/a-body-cam-captured-a-cops-violent-encounter-with-a-teen-but-a-new-law-keeps-the-video-secret/?noredirect=on&utm_term=.c1eedacb5622;

The City of Greensboro's motion to dismiss Plaintiffs' *Monell* claims should be denied.[5]

II. Plaintiffs Have Sufficiently Pleaded an ADA Claim

Plaintiffs' ADA claim alleges that the Greensboro Police Department is a program and service as defined by Title II of the ADA and thus, the ADA applies to the GPD. Compl. ¶¶ 86-87. Plaintiffs allege that Marcus had mental health disabilities through the time he was in contact with the Officer Defendants, but GPD and the Officer Defendants failed to reasonably accommodate Marcus's mental health disabilities and to modify their operations and services to take his disabilities into account. *Id.* at ¶¶ 22, 26, 54, 62, 88-89.

Specifically, Plaintiffs allege the following facts in support of their ADA claim: that Marcus had been diagnosed with bipolar disorder and schizophrenia, which manifested in episodes of psychosis that substantially limited major life activities; that Marcus was experiencing a psychotic episode when he encountered the Officer Defendants; that the Officer Defendants were aware that Marcus was having a mental health crisis throughout their encounter with him; that the Officer Defendants knew that Marcus was particularly vulnerable to the potential lethal consequences of hogtying and prone restraint due to his impaired mental state;

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and 2016 assault and arrest of Zared Jones and three other black men for being downtown while black. https://www.greensboro.com/news/crime/greensboro-police-reopen-investigation-into-officers-actions-after-video-of/article_590aaff4-1de3-5772-a2d1-207bcc1aab47.html

[5] The City mistakenly reads Plaintiffs' Complaint to assert an additional theory of municipal liability that is premised on its final decision maker's participation in, or decision to, hogtie Marcus Smith. City Br. at 10-11. Furthering this erroneous conclusion, they argue that Chief Scott is not the final police decision maker, the City Manager is. Resolution of this issue at this early stage in the proceedings is unnecessary for purposes of the *Monell* theories that Plaintiffs do allege, because there can be multiple policymakers, of which the Chief is the most obvious and likely candidate, for purposes of devising, approving, and implementing GPD policies, practices and training in the areas of restraint, use of force, hogtying, and dealing with persons with mental disabilities. *See Spell* 824 F.3d at 1384-85 (Evidence at trial established that the police chief, "with the concurrence and acquiescence perhaps of the City Manager" made, implemented, and was responsible for the policies and training in the area of the use of excessive force); *Vodak v. Chicago*, 639 F.3d 738, 747-50 (7th Cir. 2011) (finding on summary judgment that a decision of a final policymaker can serve as a basis for municipal liability, specifically that Chicago's Superintendent of Police was the final policymaker with regard to public demonstrations and mass arrests).

and that the Officers nevertheless brutally restrained and hogtied him. *Id.* at ¶¶ 22, 26- 27, 35-47, 53-54, 88-89. Plaintiffs further specifically allege that GPD failed to adequately train its officers in how to treat people who present mental health issues. *Id.* ¶ 62(d-f). Plaintiffs allege that Defendants' failure to accommodate Marcus was the proximate cause of his death and the resulting damage to his estate. *Id.* at ¶¶ 90-91.

In essence, Plaintiffs' ADA claim alleges that GPD and the Officer Defendants: (1) failed to accommodate Marcus's disability during his arrest by employing unnecessary and unreasonable force to hogtie him prone on the ground when they could have used far less aggressive tactics; and (2) failed to adequately train officers to reasonably accommodate and interact with individuals exhibiting signs of mental illness or disability.

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in, or be denied the benefits of, the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. § 12132. To state an ADA claim against a public entity, a plaintiff must allege that :(1) [he] has a disability, (2) [he] is otherwise qualified to receive the benefits of a public service, program, or activity, and (3) [he] was excluded from participation in or denied the benefits of such service, program, or activity, or otherwise discriminated against, on the basis of [his] disability." *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 498 (4th Cir. 2005). The City concedes that the ADA applies to arrests and that the Fourth Circuit recognizes an ADA claim "where police properly arrest a suspect but fail to reasonably accommodate his disability during the investigation or arrest, causing him to suffer greater injury or indignity than other arrestees." *Waller ex rel. Estate of Hunt v. Danville*, 556 F.3d 171, 174

(4th Cir. 2009); *see also Gohier v. Enright*, 186 F.3d 1216, 1221 (10th Cir.1999); *Gorman v. Bartch*, 152 F.3d 907 (8th Cir. 1998).

The City does not contest whether Marcus qualifies as a disabled individual under the ADA, but only whether the ADA applies to the facts of this case. The City argues that Plaintiffs' claim should be dismissed because (1) the Defendant Officers had no knowledge of Marcus's disability; (2) the Defendant Officers had no knowledge that Marcus required an accommodation; and (3) the ADA does not apply to the purported exigent circumstances alleged in Plaintiffs' Complaint. These arguments should be rejected because they ignore the well-pleaded factual allegations of Plaintiffs' Complaint and require the Court to draw inferences in favor of the Defendants, which would be improper at the motion to dismiss stage.[6]

A. Knowledge of Marcus's disability

Contrary to the City's argument, Plaintiffs have adequately alleged that the Officer Defendants knew Marcus had mental health disabilities. Paragraph 26 of the Complaint states, "It was clear to these Defendants that Marcus was . . . in the throes of a mental health crisis," and Paragraph 54 states, "Defendants were aware of Marcus's mental state and vulnerability from the moment they encountered him." The City asserts that these allegations should be ignored because they are purportedly "contradicted" by another allegation concerning the Officer Defendants' belief that Marcus was under the influence of drugs, but this argument should be

[6] The City does not address the failure to train portion of Plaintiffs' ADA claim, which courts within the Fourth Circuit have found to be actionable. *See Estate of Saylor v. Regal Cinemas, Inc.*, 54 F. Supp. 3d 409, 425 (D. Md. 2014) (denying motion to dismiss ADA claim based on failure to train, finding that "courts have recognized an implicit duty to train officers as to how to interact with individuals with disabilities in the course of an investigation or arrest."). *See also Hogan v. City of Easton*, 2004 U.S. Dist. LEXIS 16189 (E.D. Pa. Aug. 17, 2004) (concluding that "the Complaint states a valid claim under the ADA based on the failure of the [defendants] to properly train its police officers for encounters with disabled persons"); *Buben*, 2010 U.S. Dist. LEXIS 104853, at *24-34 (denying summary judgment on plaintiff's ADA claim based on the theory that the city "should have adopted policies to accommodate disabled individuals such as Plaintiff, and should have properly trained its officers to recognize and reasonably accommodate individuals exhibiting signs of 'excited delirium,' mental illness or disability.").

rejected because it not only inverts the motion to dismiss standard, but also fails to recognize that these allegations are not necessarily contradictory, *i.e.*, the Officers could know both that Marcus had mental health disabilities and was high on drugs.

The City relies heavily on *Talley v. City of Charlotte*, 2016 U.S. Dist. LEXIS 96716 (W.D.N.C. July 22, 2016), but that case is distinguishable because it was decided on summary judgment and the plaintiff abandoned her ADA claim by failing to properly present it to the court. Furthermore, the court credited the officers' unrebutted testimony "that they did not recognize her as a person with mental disabilities, but viewed her behavior as consistent with other arrestees they had encountered who were upset and/or fearful over being arrested." *Talley*, 2016 U.S. Dist. LEXIS 96716, at *39. Here, the Court must accept the factual allegations in the Complaint which sufficiently establish that the officers knew Marcus was having a mental health crisis.

B. Knowledge that Marcus required an accommodation

The City next asserts that Plaintiffs have failed to state an ADA claim because the Complaint does not specifically "identify a reasonable accommodation." Def. Br. at 21. However, none of cases relied on by the City stand for the proposition that a reasonable accommodation must be specifically pleaded in the complaint. All of the cases cited by the City were decided on summary judgment and are therefore inapposite. Moreover, such an argument again disregards the motion to dismiss standard, in which all reasonable inferences must be drawn in favor of the plaintiff. Here, the factual allegations in the Complaint allow for the inference that the Officer Defendants could have reasonably accommodated Marcus's disability by continuing to maintain distance, communicating with him and de-escalating the situation. To the extent force was necessary to restrain him for transport to the hospital, Defendants could

have reasonably accommodated his disability by less aggressive tactics than brutally hogtying him prone on the ground.

The City claims that hogtying was reasonable because "[t]he officers were concerned that Smith could not be safely transported, after he struck the car door and window, and pressed his feet against the window." Def. Br. at 21. But this assertion relies not on the allegations in the Complaint but rather on the City's interpretation of the body camera video, which Plaintiffs dispute. As explained in Plaintiffs' response to the Officer Defendants' motion to dismiss, and incorporated herein, the Court should decline to consider the body camera video at this stage, especially the Defendants' self-serving interpretation of the video, and should therefore disregard this portion of the City's argument.

C. Exigent circumstances

The City's argument that "exigent circumstances" bar Plaintiffs' ADA claim suffers from the same deficiency as its previous two arguments: it is based on the City's version of the facts, which is disputed and cannot be considered at the motion to dismiss stage. Specifically, the City alleges, based on its interpretation of the body camera video, that the Officer Defendants acted reasonably in hogtying Marcus because he "did not comply with the officers' requests" and "stated he was going to kill himself at least four times," that "the paramedic . . . stated that Smith would need to be restrained for medical transport" and that the officers "were concerned that he would break the window or worse" and "sought to restrain him for his own safety . . . after he said he was going to kill himself multiple times." Def. Br. at 22-23. None of these allegations are contained in the Complaint. They are all purportedly derived from the body camera video, which the Court should decline to consider for the reasons stated above and more fully explained in Plaintiffs' response to the Officer Defendants' motion to dismiss. The City's argument

exemplifies why courts typically consider ADA claims relating to arrests at the summary judgment stage when they can assess the record to determine whether exigent circumstances were present. It is simply premature at this stage to determine as a matter of law whether exigent circumstances exist in this case. To the extent a determination can be made, it should be made in Plaintiffs' favor, since the Complaint alleges that Marcus had committed no crime, was unarmed, not violent, made no threats and presented to danger to the Defendants or others, and was not actively resisting arrest at any point during the incident, yet the Officer Defendants grabbed him, forced him to the ground, rolled him onto his stomach in the prone position, and used unnecessary, gratuitous and disproportionate force to hogtie him with a hobble restraint after he was already handcuffed and secured.

For all of these reasons, the City of Greensboro's motion to dismiss Plaintiffs' ADA claim should be denied.

III. Governmental Immunity

Plaintiffs recognize that governmental immunity applies to their state law claims against the City but preserves the issue in the event that the North Carolina Supreme Court or General Assembly modifies or repeals the doctrine during the pendency of this case. *Blackwelder v. City of Winston–Salem*, 420 S.E.2d 432, 435–36 (N.C. 1992).

CONCLUSION

Plaintiffs respectfully request that the Court deny Defendant City of Greensboro's motion to dismiss.

Dated: July 26, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD COUNT

The undersigned hereby certifies that the foregoing document complies with Local Rule 7.3(d)'s limitation of no more than 6,250 words (excluding captions, signature lines, certificate of service and any cover page or index) as counted by word processing software.

Dated: July 26, 2019

/s/ Graham Holt
Graham Holt

CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Graham Holt
Graham Holt