

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DWAYNE IVERY,

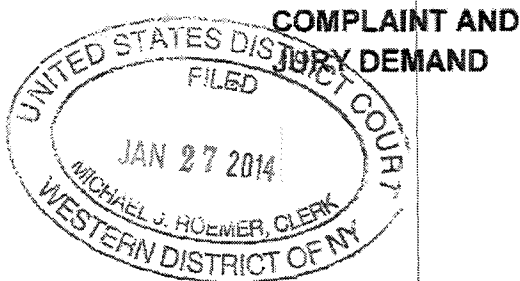
Plaintiff,

CA: No. 14CV6041 L

vs.

ALEXANDER C. BALDAUF,
RICKEY J. HARRIS, JR.,
JAMES M. SHEPPARD and
CITY OF ROCHESTER,

Defendants.



Plaintiff Dwayne Ivery (hereinafter "Plaintiff"), by and through his attorney, Burkwit Law Firm, PLLC, as and for his complaint against Defendants Alexander C. Baldauf, Rickey J. Harris, Jr., James M. Sheppard and City of Rochester (collectively "Defendants"), alleges as follows:

INTRODUCTION

1. This is an action for declaratory judgment and monetary damages for violations of Plaintiff Dwayne Ivery's constitutional rights brought pursuant to 42 U.S.C. 1983, 1985, 1988 and related New York State law claims. Plaintiff alleges that the Defendants, while acting in their official capacities and under color of State law, illegally searched and arrested Plaintiff Dwayne Ivery and used excessive force in effectuating that arrest in violation of the Fourth and Fourteenth Amendments to

the United States Constitution. Plaintiff Dwayne Ivery also brings claims against Defendants under New York State Law for battery, assault, intentional infliction of emotional distress or in the alternative, negligent infliction of emotional distress and negligence, including negligent training, supervision and retention. Plaintiff Dwayne Ivery further alleges that the Defendant officers conspired to violate his rights under the Fourth and Fourteenth Amendments and that Defendants City of Rochester and James M. Sheppard have demonstrated a custom and policy of deliberate indifference to the constitutional rights of its citizens.

JURISDICTION

2. This action arises in part under 42 U.S.C. Section 1983 and accordingly, this Court has original subject matter jurisdiction under 28 U.S.C. Section 1331. For all remaining claims which do not present a federal question under 28 U.S.C. Section 1331, this Court has supplemental jurisdiction under 28 U.S.C. Section 1367.

3. The causes of action alleged herein arise from the factual allegations which occurred in this judicial district. All parties are domiciled within the Western District of New York and therefore, this Court has personal jurisdiction over the Defendants.

VENUE

4. Venue is proper in the United States District Court for the Western District of New York pursuant to 28 U.S.C. Section 1391 because the events or omissions giving rise to the claim occurred within this District and at all times relevant herein, all parties resided within this District.

PARTIES

5. At all times relevant herein, Plaintiff Dwayne Ivery was and still is a resident of the City of Rochester, County of Monroe and State of New York.

6. Defendant Alexander C. Baldauf (hereinafter "Defendant Baldauf") is and at all times relevant herein was a citizen of New York State residing in Monroe County and was employed as a police officer with the City of Rochester Police Department.

7. At all times relevant to this Complaint, Defendant Baldauf was acting under color of law and is sued in his individual capacity and in his official capacity as a police officer for the Defendant City of Rochester.

8. Defendant Rickey J. Harris, Jr. (hereinafter "Defendant Harris") is and at all times relevant herein was a citizen of New York State residing in Monroe County and was employed as a police officer with the City of Rochester Police Department.

9. At all times relevant to this Complaint, Defendant Harris was acting under color of law and is sued in his individual capacity and in his official capacity as a police officer for the Defendant City of Rochester.

10. Defendant James M. Sheppard (hereinafter "Defendant Sheppard") is and at all times relevant herein was a citizen of New York State residing in Monroe County and was employed as a police officer with the City of Rochester Police Department.

11. At all times relevant to this Complaint, Defendant Sheppard was acting under color of law and is sued in his individual capacity and in his official capacity as a police officer for the Defendant City of Rochester.

12. At all times relevant to this Complaint, as Chief of Police for the City of Rochester Police Department, Defendant Sheppard was responsible for the

supervision, training and retention of Defendants Baldauf and Harris and for making and implementing policies, customs and practices used by law enforcement officers employed by Defendant City of Rochester regarding arrests and the use of force in performance of the acts herein alleged.

13. At all times material to the allegations on this Complaint, Defendants Baldauf, Harris and Sheppard were acting in their capacities as police officers employed by Defendant City of Rochester and were acting under color of State law.

14. Defendant City of Rochester is and at all times relevant herein, was and still is a municipal corporation duly organized and existing under the laws of the State of New York with its principal place of business in the County of Monroe, State of New York.

15. Defendant City of Rochester is a political subdivision of the State of New York for which at all times relevant to this Complaint, Defendants Baldauf, Harris and Sheppard were employed by and served as police officers.

16. Defendant City of Rochester is responsible for the hiring, training, supervision and retention of Defendants Baldauf, Harris and Sheppard.

17. At all times relevant herein, Defendant City of Rochester has established and/or delegated to Defendant Sheppard the responsibility for establishing and implementing policies, practices, procedures and customs used by law enforcement officers employed by the City of Rochester regarding arrests and the use of force on persons.

18. At all times herein relevant, Defendants Baldauf, Harris and Sheppard were and/or are agents and/or employees of Defendant City of Rochester and were acting within the course and scope of their employment and/or agency in performance of the acts herein alleged.

19. On or about November 13, 2013, Defendant City of Rochester was served with a Verified Notice of Claim detailing its culpability and Plaintiff's damages.

Defendant City of Rochester has failed and refused to make payment to Plaintiff in accordance with said Verified Notice of Claim.

20. At least thirty (30) days have elapsed since the service of the Verified Notice of Claim upon Defendant City of Rochester and adjustment of payment thereof has been neglected or refused by Defendant City of Rochester.

FACTS

21. On August 17, 2013 at approximately 10:15 p.m., Defendants Baldauf and Harris were dispatched to Plaintiff Dwayne Ivery's property located at 1509 East Main Street, Rochester, New York 14609.

22. Defendants Baldauf and Harris were dispatched to Plaintiff Dwayne Ivery's property due to a disagreement between Plaintiff and his girlfriend Winnette Delancy who had called 911.

23. When Defendants Baldauf and Harris arrived at Plaintiff Dwayne Ivery's property, Plaintiff Dwayne Ivery came outside his home and went to his driveway where he and Winnette Delancy began discussing removing license plates from a GMC truck in Plaintiff's driveway. The GMC truck was registered to Winnette Delancy and titled to plaintiff Dwayne Ivery.

24. Plaintiff Dwayne Ivery agreed that Winnette Delancy could remove the license plates from the GMC truck in his driveway since the vehicle was titled in Plaintiff's name but was registered in her name.

25. Plaintiff Dwayne Ivery stood at the back of the GMC truck with Defendant Harris while Winnette Delancy went to the front of the GMC truck with Defendant Baldauf who assisted her with removing the front license plate.

26. As Defendant Baldauf was at the front of the GMC truck removing the front license plate, Plaintiff Dwayne Ivery walked calmly and slowly from the rear of the

truck towards the front of the truck and asked Defendant Baldauf if he or Defendant Harris could go with him to Winnette Delancy's home to retrieve two (2) of his televisions.

27. When Plaintiff Dwayne Ivery calmly and slowly approached the front of the GMC truck and asked if one of the Defendant officers could assist him getting his television sets from Winnette Delancy's home, Defendant Baldauf stood up, and said "I thought I told you to be quiet". Defendant Baldauf then reached out and grabbed Plaintiff Dwayne Ivery's hand.

28. After Defendant Baldauf grabbed Plaintiff Dwayne Ivery's hand, Defendant Baldauf punched Plaintiff Dwayne Ivery in the head. Plaintiff Dwayne Ivery then stumbled around the front of the vehicle and tried to move away from Defendant Baldauf who continued punching him numerous times in the head and face before Defendant Baldauf landed Plaintiff Dwayne Ivery on the ground near the rear passenger side of the parked GMC truck.

29. After Defendant Baldauf landed Plaintiff Dwayne Ivery on the ground, Defendant Baldauf jumped on Plaintiff Dwayne Ivery and continued punching Plaintiff in the head, face and over many areas of his body. Defendant Baldauf stomped on Plaintiff's head with his foot. Defendant Harris stood quietly and watched as Defendant Baldauf continued beating Plaintiff Dwayne Ivery who lost consciousness.

30. After numerous more punches to Plaintiff's body, Defendant Harris and/or Baldauf placed handcuffs on Plaintiff Dwayne Ivery.

31. After Plaintiff Dwayne Ivery was placed in handcuffs, Defendant Baldauf continued punching and beating Plaintiff Dwayne Ivery who screamed asking Defendant Harris why he was letting Defendant Baldauf beat him.

32. After Defendant Baldauf delivered more punches to Plaintiff Dwayne Ivery, Defendant Harris replied "Alright". Defendant Baldauf then punched Plaintiff

Dwayne Ivery a couple more times in the head and then stopped physically harming Plaintiff.

33. Defendant Baldauf then stood Plaintiff Dwayne Ivery to his feet and placed him in a police car. Defendant Harris stood quiet as Plaintiff was brought to the police vehicle. The aforescribed incident was captured on an outdoor video surveillance camera at Plaintiff's home.

34. As a result of Plaintiff's injuries, an ambulance was called and Plaintiff Dwayne Ivery was handcuffed to a gurney and transported to Rochester General Hospital for medical treatment.

35. After Plaintiff Dwayne Ivery received medical treatment at Rochester General Hospital, he was transported to Monroe County Jail where he was placed in a jail cell.

36. Plaintiff Dwayne Ivery was charged in Rochester City Court with Harassment in the Second degree in violation of Penal Law Section 240.26 (1) and Resisting Arrest in violation of Penal Law Section 205.30.

37. On or about November 13, 2013, an Adjournment In Contemplation of Dismissal was granted by Rochester City Court with respect to both charges.

38. Upon information and belief, the accusatory informations/complaints which were filed by Defendant Baldauf contained false and fabricated allegations in an effort to justify the harassment and resisting arrest charges against Plaintiff Dwayne Ivery.

39. Before and during the aforescribed incident, Plaintiff Dwayne Ivery was never told he was being placed under arrest, was not engaged in any unlawful activity and he did not resist arrest as Defendants Baldauf and Harris proceeded to arrest, search and apply physical force to his person.

40. Upon information and belief, Defendants Baldauf and Harris were never reprimanded, suspended or terminated from their employment by Defendant Sheppard or Defendant City of Rochester following the August 17, 2013 incident involving Plaintiff Dwayne Ivery and upon information and belief, said officers remain on full time active duty patrol as City of Rochester Police officers.

41. Upon information and belief, Defendants Baldauf and Harris had inadequate training and supervision regarding arrests and reasonable use of force which led to constitutional and New York State law violations in this case.

42. Based on the foregoing, Defendants City of Rochester and Sheppard failed to adequately train and supervise Defendants Baldauf and Harris.

43. Defendants City of Rochester and Sheppard's failure to properly train and/or supervise their subordinates, including but not limited to Defendants Baldauf and Harris, amounts to a deliberate indifference to the rights of those with whom City of Rochester employees and officers will come into contact, including Plaintiff Dwayne Ivery.

44. Defendants Sheppard and City of Rochester were aware or should have been aware that their officers, including Defendants Baldauf and Harris, require special training, procedures, policies and customs to be used so as to not infringe upon the legal and constitutional rights of City of Rochester citizens, including Plaintiff Dwayne Ivery. The failure to promulgate and implement such procedures, policies or customs led to the violation of Plaintiff Dwayne Ivery's legal and constitutional rights and the use of excessive and unreasonable force against his person.

45. The foregoing actions taken or decisions made by City of Rochester government officials responsible for establishing municipal policies caused the alleged violations of Plaintiff Dwayne Ivery's civil rights.

46. The policies and practices of the City of Rochester in authorizing its police officers to use excessive force is so persistent and widespread that it constitutes

a custom or usage and implies the actual or constructive knowledge of City of Rochester policy-making officials.

47. As a consequence of the aforescribed August 17, 2013 incident and the use of unreasonable and excessive force upon Plaintiff by Defendants, Plaintiff Dwayne Ivery suffered a mildly displaced left nasal fracture, left eye pain, hematoma superior to left eye, seven or more large throbbing bumps on his face and neck, multiple contusions, right elbow pain and tendonitis, eyes swollen shut, left facial swelling, loss of consciousness multiple times, neck pain, multiple facial and head contusions, neck, back, head and right arm pain, headaches, post concussive syndrome, memory problems/closed head injury, right shoulder pain, posttraumatic stress disorder, together with other physical injuries. The full nature and extent of Claimant's injuries is unknown as Claimant Dwayne Ivery continues treating for his injuries.

48. As a direct and proximate result of the intentional and/or negligent acts of the Defendants, Plaintiff Dwayne Ivery has suffered and continues to suffer serious physical and mental injuries and pain and suffering and other damages in an amount that will be established at trial.

49. Plaintiff Dwayne Ivery is entitled to compensation for the constitutional harms and State law violations that Defendants inflicted upon him.

CAUSES OF ACTION

COUNT I

**VIOLATION OF 42 U.S.C. SECTION 1983 BY DEFENDANTS BALDAUF, HARRIS
AND CITY OF ROCHESTER FOR ILLEGAL SEARCH AND SEIZURE OF PLAINTIFF
DWAYNE IVERY'S PERSON**

50. The Plaintiff repeats and realleges the allegations in paragraphs 1 through 49 above and incorporates them by reference as if set forth in their entirety herein.

51. On August 17, 2013 at approximately 10:27 p.m., Defendants Baldauf and Harris illegally searched and seized Plaintiff Dwayne Ivery's person without probable cause or reasonable suspicion that a crime has been or was being committed in violation of the Fourth Amendment to the United States Constitution.

52. By the actions described in paragraphs 1 through 51 above, Defendants, without a warrant or without probable cause and while acting under color of law, arrested Plaintiff Dwayne Ivery and deprived him of certain constitutionally protected rights to be free from unreasonable searches and seizures, the right not to be deprived of liberty without due process of law and the right to be free from false arrest, all in violation of 42 U.S.C. Section 1983 and his Fourth and Fourteenth Amendment rights as guaranteed by the United States Constitution.

53. Defendants Baldauf and Harris were acting under color of state law when they, without probable cause or reasonable suspicion, exercised their authority as police officers by falsely arresting and searching Plaintiff Dwayne Ivery while he was cooperative and acting in a lawful manner on his own property in the City of Rochester, New York.

54. Plaintiff Dwayne Ivery was not free to leave by Defendants Baldauf and Harris' show of authority and Plaintiff was therefore seized within the meaning of the Fourth Amendment.

55. By illegally seizing Plaintiff Dwayne Ivery, Defendants Baldauf and Harris caused Plaintiff Dwayne Ivery to suffer a violation of his Fourth Amendment right to be secure in his person.

56. Defendant City of Rochester caused Plaintiff Dwayne Ivery to be subjected to the Fourth Amendment violation of illegal search and seizure and false arrest because the Defendant officers' actions were part of the customary practices of the City of Rochester Police Department.

57. Based upon the foregoing allegations, Defendant City of Rochester and its Police Department have shown a deliberate indifference to an obvious need for training of its officers, including Defendants Baldauf, Harris and Sheppard and the failure to adequately train them resulted in the Defendant officers' actions that caused Plaintiff Dwayne Ivery's harm.

58. As a direct and proximate result of Defendants' violations of Plaintiff Dwayne Ivery's constitutional rights, Plaintiff has suffered general and special damages to be proved at trial and is entitled to relief under 42 U.S.C. Section 1983.

59. As a direct and proximate result of the Defendants' conduct, Plaintiff Dwayne Ivery has been compelled to retain the services of counsel to protect and enforce his rights and therefore, Plaintiff has incurred and continues to incur attorney's fees, expert fees and costs for which Plaintiff Dwayne Ivery is entitled to reimbursement in an amount to be established at the time of trial pursuant to 42 U.S.C. Section 1988.

60. Defendants Baldauf and Harris' conduct was willful, malicious, oppressive and/or reckless and was of such a nature that Plaintiff Dwayne Ivery claims punitive damages against each of them in an amount commensurate with the wrongful acts alleged herein.

COUNT II

VIOLATION OF 42 U.S.C. SECTION 1983 BY DEFENDANTS BALDAUF, HARRIS AND CITY OF ROCHESTER FOR USE OF EXCESSIVE FORCE AGAINST PLAINTIFF DWAYNE IVERY'S PERSON

61. The Plaintiff repeats and realleges the allegations in paragraphs 1 through 60 above and incorporates them by reference as if set forth in their entirety

herein.

62. Based upon the aforescribed conduct, Defendants Baldauf and Harris illegally used excessive force under the circumstances against Plaintiff Dwayne Ivery in violation of his Fourth Amendment right to be secure in his person from unreasonable seizures.

63. Plaintiff Dwayne Ivery did nothing to provoke Defendants Baldauf and Harris to use physical force or arrest his person.

64. Defendants Baldauf and Harris' conduct under the circumstances was an excessive use of force on Plaintiff which a reasonable officer in their position would not have used under the circumstances.

65. Defendant City of Rochester caused Plaintiff Dwayne Ivery to be subjected to the Fourth Amendment violations of illegal search and seizure, false arrest and excessive force because the Defendant officers actions were part of the customary practices of the City of Rochester Police Department.

66. Based upon the foregoing allegations, Defendant City of Rochester and its Police Department have shown a deliberate indifference to an obvious need for training of its officers, including Defendants Baldauf, Harris and Sheppard and the failure to adequately train them resulted in the Defendant officers' actions that caused Plaintiff Dwayne Ivery's harm.

67. As a direct and proximate cause of the excessive use of force by Defendants, Plaintiff Dwayne Ivery suffered and continues to suffer serious physical and mental injuries and other damages in an amount that will be established at trial.

68. As a direct and proximate result of Defendants' violations of Plaintiff Dwayne Ivery's constitutional rights, Plaintiff has suffered general and special damages to be proved at trial and is entitled to relief under 42 U.S.C. Section 1983.

69. As a direct and proximate result of the Defendants' conduct, Plaintiff Dwayne Ivery has been compelled to retain the services of counsel to protect and

enforce his rights and therefore, Plaintiff has incurred and continues to incur attorney's fees, expert fees and costs for which Plaintiff Dwayne Ivery is entitled to reimbursement in an amount to be established at the time of trial pursuant to 42 U.S.C. Section 1988.

70. Defendants Baldauf and Harris' conduct was willful, malicious, oppressive and/or reckless and was of such a nature that Plaintiff Dwayne Ivery claims punitive damages against each of them in an amount commensurate with the wrongful acts alleged herein.

COUNT III

VIOLATION OF 42 U.S.C. 1983 (CONSPIRACY TO VIOLATE) BY DEFENDANTS BALDAUF AND HARRIS

71. The Plaintiff repeats and realleges the allegations in paragraphs 1 through 70 above and incorporates them by reference as if set forth in their entirety herein.

72. By and through the actions described in paragraphs 1 through 71 above, Defendants Baldauf and Harris, acting under color of state law, conspired to deprive Plaintiff Dwayne Ivery of his constitutional rights, in violation of 42 U.S.C Section 1983 and his Fourth and Fourteenth Amendment rights as guaranteed by the United States Constitution.

73. Defendants Baldauf and Harris conspired amongst themselves to use excessive force against Plaintiff Dwayne Ivery, to unlawfully search, seize and arrest his person and to fabricate a story which would result in Plaintiff Dwayne Ivery's arrest and their own exonerations.

74. Defendants Baldauf and Harris agreed to deprive Plaintiff Dwayne Ivery of his constitutional rights and deprived him of his constitutional rights by unlawfully searching, seizing and arresting him and by using unlawful excessive force against his person thus causing serious physical and mental injuries and damages in an

amount that will be established at trial.

75. Defendants Baldauf and Harris' conduct was willful, malicious, oppressive and/or reckless and was of such a nature that Plaintiff Dwayne Ivery claims punitive damages against each of them in an amount commensurate with the wrongful acts alleged herein.

COUNT IV

VIOLATION OF 42 U.S.C. SECTION 1983 BY DEFENDANT CITY OF ROCHESTER (FAILURE TO IMPLEMENT POLICIES, CUSTOMS AND PRACTICES)

76. The Plaintiff repeats and realleges the allegations set forth in Paragraphs 1 through 75 above and incorporates them by reference as if set forth in their entirety herein.

77. By the actions described in paragraphs 1 through 76 above, Defendant City of Rochester has demonstrated a policy, ordinance, custom, regulation and/or decision of deliberate indifference to the rights of its citizens by:

- a. failing to adequately train its police officers regarding the proper methods for stopping citizens, the use of force, arrest procedures and refraining from participating in conspiracies to violate constitutional rights;
- b. promoting and tolerating a custom and policy in which officers violate the constitutional rights of citizens through excessive force, unlawful stops, searches and seizures and by participating in conspiracies to violate constitutional rights;
- c. failing to suspend, terminate or take disciplinary action against officers who violate rights of citizens by using excessive force, making unlawful stops, searches and seizures and participating in conspiracies to violate constitutional rights; and
- d. failing to adequately supervise officers who are prone to use excessive force, make unlawful stops, searches and seizures and participate in conspiracies to violate constitutional rights.

78. The actions of Defendant City of Rochester were taken under color of law, constitute an official policy or custom of the City of Rochester, deprived Plaintiff Dwayne Ivery of a constitutional or statutory right and caused injuries and damages to his person in an amount to be determined at the trial of this action.

79. As a direct and proximate cause of the City of Rochester policy, ordinance, custom, regulation and/or decision or usage of deliberate indifference, Plaintiff Dwayne Ivery suffered violations of his rights as secured under the Fourth Amendment to the United States Constitution to be free from unreasonable searches and seizures, false arrest and the use of excessive force.

80. As a direct and proximate result of Defendant City of Rochester's violations of Plaintiff Dwayne Ivery's constitutional rights, Plaintiff has suffered general and special damages to be proved at trial and is entitled to relief under 42 U.S.C. Section 1983.

81. As a direct and proximate result of the Defendants' conduct, Plaintiff Dwayne Ivery has been compelled to retain the services of counsel to protect and enforce his rights and therefore, Plaintiff has incurred and continues to incur attorney's fees, expert fees and costs for which Plaintiff Dwayne Ivery is entitled to reimbursement in an amount to be established at the time of trial pursuant to 42 U.S.C. Section 1988.

COUNT V

**VIOLATION OF 42 U.S.C. SECTION 1983
BY DEFENDANTS CITY OF ROCHESTER AND JAMES M. SHEPPARD
(Supervisory Liability/Monell v. Dept. of Social Services,
436 U.S. 658 (1978)), and DECLARATORY RELIEF**

82. The Plaintiff repeats and realleges the allegations set forth in Paragraphs 1 through 81 above and incorporates them by reference as if set forth in their entirety herein.

83. At all times relevant herein, Defendant City of Rochester and Chief Sheppard have supervised Defendants Baldauf and Harris and are responsible for said officers' retention, training and supervision.

84. Defendants Sheppard and City of Rochester have condoned a pattern of brutality committed by City of Rochester police officers. Defendants Sheppard and City of Rochester maintained or permitted one or more of the following official policies, customs or practices:

- A. Failure to adequately train and supervise City of Rochester police officers regarding constitutional limitations on the use of force, arrests and searches and seizures on persons;
- B. Failure to adequately discipline or retrain officers involved in misconduct;
- C. Hiring, assigning/selecting and retention of City of Rochester police officers with demonstrable propensities for use of excessive force, violence, dishonesty and other misconduct;
- D. Condoning and encouraging City of Rochester police officers in the belief that they can violate the rights of persons such as Plaintiff with impunity, and that such conduct will not adversely affect their opportunities for promotion and other employment benefits;
- E. Failure to take adequate measures to discipline City of Rochester police officers who engage in the use of excessive force, unlawful arrests, violence, dishonesty and other misconduct;
- F. Failure to practice and enforce proper reporting and investigation of use of force by City of Rochester police officers; and
- G. Ratification by the highest levels of authority of the specific unconstitutional acts alleged in this Complaint.

85. Defendants City of Rochester and Sheppard have maintained and permitted the aforescribed practices, policies and customs, were aware of widespread abuses of power and use of excessive force by City of Rochester police officers and failed to take proper measures to discipline said officers.

86. Instead of taking proper measures to discipline City of Rochester police officers who have engaged in abuse of power and use of excessive force, Defendant Sheppard condoned, encouraged, fostered and/or ratified the unlawful conduct of said officers.

87. Upon information and belief, Defendants Sheppard and City of Rochester have ratified Defendants Baldauf and Harris' unconstitutional conduct towards Plaintiff Dwayne Ivery.

88. Based on the foregoing, Defendants City of Rochester and Sheppard had actual or constructive knowledge that their subordinates were engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury to citizens and their response to that knowledge was so inadequate as to show deliberate indifference to or a tacit authorization of the alleged offensive practices and there is an affirmative causal link between Defendants' inaction and the particular constitutional injury suffered by Plaintiff Dwayne Ivery.

89. Upon information and belief, by and through policy, custom and training, Defendants City of Rochester and Sheppard had actual or constructive knowledge that their subordinates, including Defendants Baldauf and Harris were engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury to citizens like Plaintiff Dwayne Ivery and have condoned this custom, policy and training whereby unconstitutional practices occur.

90. Upon information and belief, Defendants Baldauf and/or Harris had a prior employment history involving alleged misconduct and Defendants City of Rochester and Sheppard were negligent for their training, supervision and retention of said officers.

91. Upon information and belief, despite Defendants City of Rochester and Sheppard's knowledge that their subordinates, including Defendants Baldauf and Harris, engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury to citizens like Plaintiff, their response to said knowledge was so inadequate as to show deliberate indifference to or tacit authorization of the alleged offensive practices of their subordinates, including the actions of Defendants Baldauf and Harris.

92. Upon information and belief, there is an affirmative causal link between the aforescribed culpable action and/or inaction of Defendants City of Rochester and Sheppard and the particular constitutional injuries suffered by Plaintiff Dwayne Ivery.

93. As a direct and proximate result of Defendants' violations of Plaintiff Dwayne Ivery's constitutional rights, Plaintiff is entitled to relief under 42 U.S.C. Section 1983 and has suffered general and special damages in an amount to be determined at trial.

94. Based upon the foregoing, Plaintiff Dwayne Ivery also seeks a declaratory judgment declaring that his constitutional rights to be free from unlawful stops, searches and seizures and excessive force under the Fourth and Fourteenth Amendments were violated by Defendants.

95. As a direct and proximate result of the Defendants' conduct, Plaintiff Dwayne Ivery has been compelled to retain the services of counsel to protect and enforce his rights and therefore, Plaintiff has incurred and continues to incur attorney's fees, expert fees and costs for which Plaintiff Dwayne Ivery is entitled to reimbursement in an amount to be established at the time of trial pursuant to 42 U.S.C. Section 1988.

96. Based upon the foregoing, Defendant Sheppard's conduct was willful, malicious, oppressive and/or reckless and was of such a nature that Plaintiff Dwayne

Ivery claims punitive damages against Defendant Sheppard in an amount commensurate with the wrongful acts alleged herein.

COUNT VI

BATTERY BY DEFENDANTS BALDAUF, HARRIS AND CITY OF ROCHESTER

97. The Plaintiff repeats and realleges the allegations set forth in paragraphs 1 through 96 above and incorporates them by reference as if set forth in their entirety herein.

98. The aforescribed actions of Defendants Baldauf and Harris constitute an intentional battery upon Plaintiff Dwayne Ivery's person.

99. Defendant Baldauf committed a battery upon Plaintiff Dwayne Ivery's person by grabbing his hand, punching him in the head, landing Plaintiff on the ground, punching and beating him in the head, face and over many parts of his body numerous times, stomping on Plaintiff's head and placing Plaintiff under arrest and incarcerating him.

100. Upon information and belief, Defendant Harris committed a battery upon Plaintiff Dwayne Ivery's person by grabbing Plaintiff's arms, pulling then back and handcuffing Plaintiff, grabbing, pushing and striking Plaintiff's body and placing him under arrest and incarcerating him.

101. The battery committed upon Plaintiff Dwayne Ivery was without provocation by Plaintiff and without his consent.

102. As a direct and proximate result of the battery committed upon his person by Defendants, Plaintiff Dwayne Ivery suffered severe and permanent physical and mental injuries and damages in an amount to be determined at trial.

103. Defendant City of Rochester is liable under the doctrine of Respondeat Superior for the acts and omissions of its employees and/or agents Defendants Baldauf and Harris who were purporting to act or were acting in the course and scope of their employment as police officers with Defendant City of Rochester when the alleged battery was committed upon Plaintiff Dwayne Ivery's person.

104. Defendants alleged actions were malicious, oppressive, reckless, wanton and in willful disregard of Plaintiff Dwayne Ivery's rights that Plaintiff claims punitive damages against Defendants Baldauf and Harris in an amount to be determined at trial commensurate with the wrongful acts alleged herein.

COUNT VII

ASSAULT BY DEFENDANTS BALDAUF, HARRIS AND CITY OF ROCHESTER

105. The Plaintiff repeats and realleges the allegations set forth in paragraphs 1 through 104 above and incorporates them by reference as if set forth in their entirety herein.

106. The aforescribed actions of Defendants Baldauf and Harris constitute an intentional assault upon Plaintiff Dwayne Ivery's person.

107. Defendants Baldauf and Harris intentionally placed Plaintiff Dwayne Ivery in fear of imminent, harmful or offensive contact when Defendant Baldauf grabbed Plaintiff's hand, punched him in the head, chased him around the front of the GMC truck, landed him on the ground, beat him and when Defendants Baldauf and Harris used excessive force, arrested and detained Plaintiff Dwayne Ivery.

108. Defendants Baldauf and Harris made an intentional attempt, displayed by violence or threatening gesture, to do injury to or commit a battery upon Plaintiff Dwayne Ivery's person.

109. The assault committed upon Plaintiff Dwayne Ivery by Defendants Baldauf and Harris was without provocation by Plaintiff Dwayne Ivery.

110. Defendant City of Rochester is liable under the doctrine of Respondeat Superior for the acts and omissions of its employees and/or agents including Defendants Baldauf and Harris who were purporting to act or acting in the course and scope of their employment as police officers with Defendant City of Rochester when the alleged assault was committed upon Plaintiff Dwayne Ivery's person.

111. As a direct and proximate result of the assault committed upon his person, Plaintiff Dwayne Ivery suffered severe and permanent injuries and damages in an amount to be determined at trial.

112. Defendants Baldauf and Harris' actions were malicious, reckless, wanton and in willful disregard of Plaintiff Dwayne Ivery's rights that Plaintiff claims punitive damages against Defendants Baldauf and Harris in an amount to be determined at trial commensurate with the wrongful acts alleged herein.

COUNT VIII

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS BY DEFENDANTS BALDAUF, HARRIS AND CITY OF ROCHESTER

113. The Plaintiff repeats and realleges the allegations set forth in paragraphs 1 through 112 above and incorporates them by reference as if set forth in their entirety herein.

114. Defendants Baldauf and Harris, by and through their
aforedescribed conduct, intentionally inflicted emotional distress upon Plaintiff Dwayne

Ivery through their tortious conduct as alleged in this Complaint.

115. Defendants Baldauf and Harris owed a duty of care to Plaintiff Dwayne Ivery to use reasonable care to avoid causing him severe emotional distress.

116. The assault and/or battery committed upon Plaintiff Dwayne Ivery by Defendants were intentional and in reckless disregard of the probability of causing Plaintiff severe emotional distress and these acts did in fact cause and result in severe and extreme emotional distress to the Plaintiff.

117. The Defendants' conduct alleged herein transcends the bounds of human decency and constitutes shocking and outrageous conduct.

118. As a direct and proximate result of the intentional infliction of emotional distress committed by Defendants upon the Plaintiff, the Plaintiff has and continues to suffer great fear, anxiety, emotional distress, nightmares, mental anguish, fear of being stalked and attacked by police officers, inability to function effectively in his daily life in an amount to be determined at trial.

119. Defendant City of Rochester is liable under the doctrine of Respondeat Superior for the acts and omissions of its employees and/or agents Defendants Baldauf and Harris who were purporting to act or were acting in the course and scope of their employment with Defendant City of Rochester when the alleged intentional infliction of emotional distress was committed upon Plaintiff Dwayne Ivery.

120. Defendants Baldauf and Harris' actions were malicious, reckless, wanton and in wilful disregard of Plaintiff Dwayne Ivery's rights that Plaintiff claims punitive damages against Defendants Baldauf and Harris in an amount to be determined at trial commensurate with the wrongful acts alleged herein.

COUNT IX

**NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS BY
DEFENDANTS BALDAUF, HARRIS AND CITY OF ROCHESTER**

121. The Plaintiff repeats and realleges the allegations set forth in paragraphs 1 through 120 above and incorporates them by reference as if set forth in their entirety herein.

122. In the event that it is determined that Defendants Baldauf and Harris, by and through their aforescribed conduct as alleged in this Complaint, did not intentionally inflict emotional distress on Plaintiff Dwayne Ivery, in the alternative, said Defendants' conduct amounts to a negligent infliction of emotional distress upon Plaintiff Dwayne Ivery.

123. The Defendants owed a duty of care to Plaintiff Dwayne Ivery to use reasonable care to avoid causing him severe emotional distress.

124. The actions of Defendants Baldauf and Harris in using force upon Plaintiff Dwayne Ivery were done negligently and in reckless disregard of the probability of causing Plaintiff severe emotional distress and these acts did in fact cause and result in severe and extreme emotional distress to the Plaintiff.

125. The Defendants conduct alleged herein transcends the bounds of human decency and constitutes shocking and outrageous conduct.

126. As a direct and proximate result of the negligent infliction of emotional distress committed by Defendants upon Plaintiff Dwayne Ivery, Plaintiff Dwayne Ivery has and continues to suffer great fear, anxiety, emotional distress, nightmares, mental anguish, fear of being stalked and attacked by police officers, inability to function effectively in his daily life in an amount to be determined at trial.

127. Defendant City of Rochester is liable under the doctrine of Respondeat Superior for the acts and omissions of its employees and/or agents including Defendants Baldauf and Harris who were purporting to act or acting in the course and scope of their employment as police officers with Defendant City of Rochester when the alleged negligent infliction of emotional distress was committed upon Plaintiff Dwayne Ivery's person.

128. Defendants Baldauf and Harris' actions were reckless, wanton and in willful disregard of Plaintiff Dwayne Ivery's rights that Plaintiff claims punitive damages against Defendants Baldauf and Harris in an amount to be determined at trial commensurate with the wrongful acts alleged herein.

COUNT X
NEGLIGENCE BY ALL DEFENDANTS

129. The Plaintiff repeats and realleges the allegations set forth in paragraphs 1 through 128 above and incorporates them by reference as if set forth in their entirety herein.

130. In the event it is determined that the alleged actions of Defendants were not intentional, in the alternative, Defendants negligently inflicted physical force and injury on Plaintiff Dwayne Ivery's person as alleged above.

131. Defendants owed a duty of care to Plaintiff Dwayne Ivery to act in a lawful manner and to not use excessive physical force when they approached, restrained and arrested him.

132. Defendants breached this duty of care by permitting excessive physical force to be applied under the circumstances to Plaintiff Dwayne Ivery's person causing him physical and mental injuries and damages in an amount to be determined at trial.

133. Upon information and belief, Defendant City of Rochester was negligent by failing to properly investigate the Defendant officers before hiring them.

134. Upon information and belief, Defendants City of Rochester and/or Sheppard negligently instructed, trained, supervised and retained Defendants Baldauf, Harris and Sheppard resulting in the tortious and unlawful conduct as set forth in this Complaint.

135. Defendants City of Rochester and Sheppard owed a duty of care to Plaintiff Dwayne Ivery to properly investigate their police officers at the time of hiring and upon information and belief, failed to do so.

136. Defendants City of Rochester and Sheppard owed a duty of care to Plaintiff to properly instruct, train and supervise their officers including Defendants Baldauf and Harris and upon information and belief, failed to do so.

137. Defendants City of Rochester and Sheppard breached their duty of care to Plaintiff Dwayne Ivery by failing to properly investigate Defendants Baldauf and Harris prior to their hiring.

138. Defendants City of Rochester and Sheppard breached their duty of care to Plaintiff Dwayne Ivery by failing to adequately instruct, train and supervise Defendants Baldauf and Harris.

139. Upon information and belief, Defendants City of Rochester and Sheppard breached their duty of care to Plaintiff Dwayne Ivery by retaining Defendants Baldauf and Harris after learning of their propensity to act in an unlawful and unauthorized manner by applying excessive physical force during encounters with other persons.

140. As a direct and proximate result of Defendants' negligence as alleged herein, Plaintiff Dwayne Ivery suffered severe and permanent physical and mental injuries and damages in an amount to be determined at trial.

141. Defendants alleged actions were malicious, reckless, wanton and in willful disregard of Plaintiff Dwayne Ivery's rights that Plaintiff claims punitive damages be imposed against the individual Defendants in an amount to be determined at trial commensurate with the wrongful acts alleged herein.

WHEREFORE, Plaintiff Dwayne Ivery prays for judgment against Defendants as follows:

1. Compensatory damages in the form of general and special damages against all Defendants, jointly and severally, in an amount that has yet to be ascertained and according to the proof to be determined at trial;
2. Punitive damages against all individual Defendants in an amount to be determined at trial;
3. Declaratory judgment declaring that Plaintiff Dwayne Ivery's constitutional rights to be free from unlawful stops, searches and seizures and excessive force under the Fourth and Fourteenth Amendments were violated by Defendants;
4. Reasonable costs of this suit incurred herein;
5. An award of reasonable attorney's fees pursuant to 42 U.S.C. Section 1988; and
6. Such other and further relief as this Court may deem just and proper.

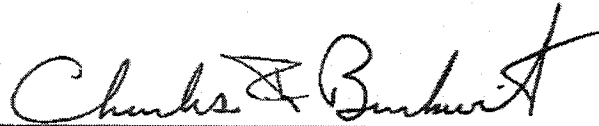
DEMAND FOR JURY TRIAL

A jury trial is hereby demanded.

Dated: January 27, 2014

Respectfully submitted,

BURKWIT LAW FIRM, PLLC

A handwritten signature in black ink, appearing to read "Charles F. Burkwit". The signature is written in a cursive style with a large, stylized initial "C" and "B".

Charles F. Burkwit, Esq.
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