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17 CITY OF SALINAS and SALINAS POLICE DEPARTMENT;  
18 MICHAEL DOMINICI, JAMES GODWIN, LEK LIVINGSTON,  
19 and JUAN RUIZ

20 UNITED STATES DISTRICT COURT  
21 NORTHERN DISTRICT OF CALIFORNIA  
22 SAN JOSE DIVISION

<p>23 BETTY LOU HESTON, individually, and ) 24 ROBERT H. HESTON, individually and as the ) 25 personal representatives of ROBERT C. ) 26 HESTON, deceased, ) 27 ) 28 ) 29 ) 30 ) 31 ) 32 ) 33 ) 34 ) 35 ) 36 ) 37 ) 38 ) 39 ) 40 ) 41 ) 42 ) 43 ) 44 ) 45 ) 46 ) 47 ) 48 ) 49 ) 50 ) 51 ) 52 ) 53 ) 54 ) 55 ) 56 ) 57 ) 58 ) 59 ) 60 ) 61 ) 62 ) 63 ) 64 ) 65 ) 66 ) 67 ) 68 ) 69 ) 70 ) 71 ) 72 ) 73 ) 74 ) 75 ) 76 ) 77 ) 78 ) 79 ) 80 ) 81 ) 82 ) 83 ) 84 ) 85 ) 86 ) 87 ) 88 ) 89 ) 90 ) 91 ) 92 ) 93 ) 94 ) 95 ) 96 ) 97 ) 98 ) 99 ) 100 ) 101 ) 102 ) 103 ) 104 ) 105 ) 106 ) 107 ) 108 ) 109 ) 110 ) 111 ) 112 ) 113 ) 114 ) 115 ) 116 ) 117 ) 118 ) 119 ) 120 ) 121 ) 122 ) 123 ) 124 ) 125 ) 126 ) 127 ) 128 ) 129 ) 130 ) 131 ) 132 ) 133 ) 134 ) 135 ) 136 ) 137 ) 138 ) 139 ) 140 ) 141 ) 142 ) 143 ) 144 ) 145 ) 146 ) 147 ) 148 ) 149 ) 150 ) 151 ) 152 ) 153 ) 154 ) 155 ) 156 ) 157 ) 158 ) 159 ) 160 ) 161 ) 162 ) 163 ) 164 ) 165 ) 166 ) 167 ) 168 ) 169 ) 170 ) 171 ) 172 ) 173 ) 174 ) 175 ) 176 ) 177 ) 178 ) 179 ) 180 ) 181 ) 182 ) 183 ) 184 ) 185 ) 186 ) 187 ) 188 ) 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SMITH IN SUPPORT OF MOTION FOR LEAVE TO FILE A MOTION FOR RECONSIDERATION BY DEFENDANTS, CITY OF SALINAS, SALINAS POLICE DEPARTMENT, MICHAEL DOMINICI, JUAN RUIZ, LEK LIVINGSTON and JAMES GODWIN;</p> <p>AND,</p> <p>REQUEST TO AMEND THE ORDER TO CERTIFY THE ISSUES FOR APPEAL</p> <p>Trial Date: April 8, 2008</p>
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I, Patrick (Rick) W. Smith, hereby declare:

1           1.       I am presently the Chief Executive Officer and a Co-founder of TASER  
2 International, Inc. (TASER) (formerly AIR TASER, Inc. and ICER Corporation), which is  
3 extensively involved in electronic control devices (ECDs or devices) product concepts,  
4 feasibilities, historical research of electronic weapons, electrical and electronic medical device  
5 safety and injury studies, research, testing, and prototype designs and fabrications of AIR  
6 TASER®, AUTO TASER, ADVANCED TASER M26 (M26 or TASER M26), ADVANCED  
7 TASER M18, Animal TASER (MX), TASER X26 (X26), TASER CAM™, TASER C2, and  
8 TASER XREP products, and am the inventor of the electrical waveform for the TASER M26  
9 and X26 devices. The company, which began in September 1993, became the largest ECD  
10 manufacturer in the United States in its first year of sales. We have thoroughly researched and  
11 redeveloped a technology which had been dormant for over 20 years, refined it, and brought it  
12 successfully to worldwide market (in 64 countries) for the first time.

13           2.       I have read the Court's order on summary judgment denying qualified immunity  
14 to four Salinas police officers and holding that there is a triable issue of fact whether or not  
15 Salinas Police Department trained its officers and had policies preventing "coercion". I also read  
16 in the order that the Court believes that the TASER M26 ECD delivers 50,000 volts (V), which,  
17 in the Court's impression should be expected to injure someone, the Court's belief that the State  
18 of New York banned the use of TASER ECDs, and the Court's belief that the State of Georgia  
19 ranks TASER ECDs as a deadly weapons.

20           3.       A TASER M26 is powered by a battery of 8 "AA" penlight cells and has a peak  
21 arcing voltage of 50,000 V. This voltage represents the peak voltage potential across the electric  
22 probes when the circuit is in the open state – i.e. no current is flowing because the circuit is not  
23 physically connected to the target (for example, when the dart-probes are attached to the  
24 clothing, but not touching the skin of the target). The 50 KV is an important factor for  
25 calculating how much clothing and air gap the arc can penetrate (the higher the peak open circuit  
26 voltage, the greater the gap that the current can arc across). However, while the 50 KV potential  
27 is important for calculating how far the arc can bridge across and air-gap, it is not relevant to the  
28 bio-effect of the current on the target person. The human subject never experiences the 50 KV

1 because the voltage drops as soon as the arc forms between the tips of the darts and the human  
2 body and current starts to flow. (I like to use the analogy of a blocked water hose. While it's  
3 blocked, the pressure builds up inside the hose. When the blockage breaks loose and the water  
4 begins to flow, the pressure drops immediately such that the pressure measured at the output of  
5 the hose never hits the peak pressures experienced within the hose prior to the blockage breaking  
6 free). The peak voltage during current flow through the body is about 5,000 V, and the average  
7 voltage during the 5 second duration of the pulse series is only about 1.4 V. TASER has trained  
8 law enforcement instructors to train its officers that it is not the voltage which is dangerous, but  
9 rather the electrical current (measured in amperes (A)) that measures both effectiveness and  
10 potential danger. By way of example, a static shock from a doorknob on a dry day can create an  
11 arcing voltage that exceeds 50,000 V, but there has never been a death or electrical injury from  
12 such a static shock. The delivered electrical current from a TASER M26 into a human subject is  
13 only 3.6 milliamperes (mA), or 0.0036 A, which is far below published electrical safety  
14 standards. In fact, in our Version 12 follow-up training to Version 8, copyright 2004, we provide  
15 the slide which is attached to this declaration, showing a mother and daughter laughing while  
16 touching a Van De Graaff generator which is discharging 1 to 20 million volts. **See Exhibit 1.**  
17 We also state in the same slide that the 50,000 V involved in TASER's ECDs should be  
18 compared to the 35,000 to 100,000 V that a person receives on a mere static electricity discharge  
19 when touching a doorknob after walking on carpets. Also, the peak electrical current from a level  
20 4 static electrical shock is approximately twice the peak electrical current of an M26.

21 3. In other words, as of February 2005, officers were not trained that the 50,000 V  
22 peak arcing voltage was deadly or would cause injury, as the Court seemed to find in its Order.

23 4. TASER Training Version 8 was released in August 2002, Version 9 was released  
24 in May 2003, Version 10 was released in July 2003, Version 10.1 was released in January 2004,  
25 Version 11 was released in January 2004, and Version 12 was created in November 2004 and  
26 released in January 2005.

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1           5.       I was the principle author, and in charge of the development team, on TASER  
2 Training Version 8, and have been an integral author in the subsequent training versions, through  
3 (current) Version 14.

4           6.       The Court relied on a slide from TASER Training Version 8 which stated “never  
5 use [a Taser] for physical coercion.” **See Order 10:9-10.**

6           7.       The statement against using a TASER ECD for “coercion” was written by me,  
7 and intended to advise law enforcement departments and officers to not use TASER ECDs to do  
8 such things as illegally torture confessions from people, which was a primary concern of some  
9 human rights organizations. I am not a lawyer, but rather the founder of a company who was  
10 trying to be responsive to the concerns of groups in the community by including language to  
11 dissuade any potential use of my invention for the purposes of torturing confessions out of  
12 people. I certainly did not envision this language being used to set a legal standard that would  
13 preclude police officers in the field from using the TASER ECD as a pain compliance tool  
14 during the restraint process in a manner which was consistent with other pain compliance  
15 techniques within their agency’s use of force spectrum. TASER did not intend to train officers  
16 that they could not use TASER ECDs for legitimate pain compliance as a use of force  
17 alternative. In fact, field data clearly shows that TASER ECD electrical stimulation has a lower  
18 injury potential than other pain compliance techniques, such as joint locks that carry risks of  
19 bone breaks, tendon tears, and joint dislocations. A TASER ECD used in drive stun is “pain  
20 compliance.” In fact, in the same training, the TASER certification lesson plan taught officers  
21 that the TASER “... is a great tool to use as an alternative to a hands on fight or ‘wrestling  
22 match’ that can result in injuries to officers as well as suspects” , and the TASER device “... can  
23 fill the gap between less-lethal munitions and hands on control techniques”.

24           8.       The entire context of that particular training is as follows (ADVANCED  
25 TASER® M26, Certification Lesson Plan, Version 8.0, TASER International, pages 24-25.):

26                   “Slide 117 The Decision to Deploy

27                   a. ONLY USE TO STOP A THREAT. The ADVANCED TASER  
28                   should only be used to stop a threat. This would include threats to  
                    the officer’s safety, threats to others, or even if the suspect is posing

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a threat of injuring himself. It should never be used for coercion of any type. The ADVANCED TASER gives you a non-injurious way of averting dangerous situations.

- b. NEVER USE FOR PHYSICAL COERCIONS. The department should develop strong policies to deter misuse.
- c. Warn suspect prior to M26 application when feasible in light of *Deorle v Rutherford* (9<sup>th</sup> Circuit 2001).
- d. Attempts to subdue the suspect with lesser force options have been ineffective or will likely be ineffective in the situation. Discussion.

INSTRUCTOR’S NOTE: The main point to realize when talking about the actual deployment and use of the ADVANCED TASER is that it is not a substitute for common sense and good judgment. However, it can be an excellent tool to augment other options already in place in your use of force continuum. The ADVANCED TASER is not a cure all for all violent offenders nor should it be used in all circumstances.

....

The ADVANCED TASER can be best utilized in situations where a hostile or potentially hostile individual is threatening himself or another person. *It is a great tool to use as an alternative to a hands on fight or “wrestling match” that can result in injuries to officers as well as suspects.* (Emphasis added). The ADVANCED TASER is likely to have more of an incapacitating effect on most individuals compared to chemical agents. The ADVANCED TASER is not a foolproof weapon. When used within the design parameters of the device, the ADVANCED TASER is a very effective less-lethal control device. Admittedly, the window of operation of the ADVANCED TASER is restricted to 3-21 feet, but on the other hand it could be very useful in an environment in which deploying of a less-lethal munitions is possible. **The ADVANCED TASER can fill the gap between less-lethal munitions and hands on control techniques.** (Emphasis in original.)

....

INSTRUCTOR’S NOTE: The [Deorle decision] could arguably apply to any use of projectiles, stun guns, OC spray, K-9, baton, choke holds, and even fists and feet as well as any tactical devices likely to cause serious injury. ... “

See Page 24-25 of TASER Certification Lesson Plan Version 8 attached as **Exhibit 2** to this declaration.

1           9.       TASER did not consider avoidance of “hands on” and “wrestling matches” to be  
2 prohibited “coercion”. TASER training included training that TASER ECDs could be used in  
3 “hands on” situations to avoid “wrestling matches”.

4           10.       Officers should not have understood statements about coercion to prevent ECD  
5 use for pain compliance, because officers are trained to use the devices when necessary for pain  
6 compliance. Officers are trained about the “drive stun mode” in Version 8 that persons in mental  
7 health crisis, under the influence of mind-altering substances, or extremely focused are prone to  
8 “mind body disconnection”. Officers are trained that the TASER device used in the stun mode  
9 for pain compliance is an appropriate technique to limit and reduce the threat. Officers were  
10 trained that the use of pain compliance worked 92.1 percent of the time. **See Ex. 3 to this Dec.**

11           11.       Interpreting training to prohibit pain compliance would have been totally contrary  
12 to TASER’s intent, and would have been thoroughly confusing to officers, since TASER in fact  
13 did train officers to use ECDs for pain compliance as it was and is a safer force method, than  
14 other force tools or techniques, for gaining compliance in order to restrain violent persons.

15           12.       In its Order at Page 8, fn 15, the Court found that TASER ECDs were banned in  
16 the State of New York. However, TASER ECDs have never been banned for police use by law  
17 enforcement in the State of New York. Also, the first TASER shipments of thirty (30) M26  
18 ECDs were delivered to the New York City Police Department in December 1999. At this time,  
19 202 law enforcement agencies in the State of New York have purchased TASER devices.

20           13.       The Court also commented that TASER ECDs were classified as deadly weapons.  
21 The Court’s factual mistake arises from the misunderstanding about the device. The ECD  
22 referred to in the *Michenfelder* case published in 1988 and cited by the Court was not the  
23 TASER manufactured ECD that has only been sold to law enforcement since December 1999, by  
24 a company first formed in 1993. The TASERTron ECD that would have likely been the  
25 “TASER” ECD used in the *Michenfelder* case would have been a special class firearm as defined  
26 by the United States’ Treasury Department’s Bureau of Alcohol, Tobacco, and Firearms (ATF).  
27 The reasons why the early (1988) TASERTron was defined by the ATF as a special firearm was  
28 because: (1) the probes were propelled by gun powder, and (2) the device was not shaped like a



1 handgun, thus, it was ATF classified the same as a sawed-off shotgun. The State of Georgia  
2 does not list TASER devices as deadly weapons. To the contrary, they are listed as “non-deadly  
3 weapons”. **See Exhibit 4, The Georgia Association of Chiefs of Police Review &**  
4 **Recommendations Regarding Electronic Control Weapons in Georgia, June 20, 2005, p. 3, fn 9,**  
5 where the Chief’s Association stated:

6 The committee is deliberately describing the electronic control weapon as a non-  
7 deadly weapon and not as a “less lethal” weapon. The electronic control weapon  
8 properly deployed is non-deadly force because it is “extremely unlikely to cause  
9 death or serious injury.” The term “less lethal” implies that the weapon is “lethal,  
just less so”. (Citations omitted.) For these reasons, it will be referred to  
throughout this paper as a non-deadly weapon.”

10 No law enforcement agency or law enforcement officer has ever been put on notice by  
11 TASER that use of a TASER device for pain compliance is *per se* prohibited. Use of a TASER  
12 ECD for lawful pain compliance has been taught within TASER’s training materials from  
13 Versions 1 through the current Version 14. Also, the use of a TASER ECD in either drive-stun  
14 or probe deployment both contain the element known as “pain compliance.” Incapacitation, by  
15 activation of motor neurons, cannot be achieved without the same sensory nerve activation  
16 performed in drive-stun deployment mode. In TASER Training Version 8, released in August  
17 2002, there were PowerPoint® slides and videos demonstrating the use of a TASER M26 on a  
18 person who was resisting capture, restraint, and custody by turtling (laying supine on the floor,  
19 placing arms and hands under body, and resisting or struggling against officers’ efforts to  
20 capture and control the person’s arms and restrain the person and take him into custody).

21 14. TASER Version 8 - Instructor PowerPoint – included the following:

- 22 - Slide 65 – Use of Drive Stun Backup (drive stun is pain compliance)
- 23 - Slide 66 - Use of Stun Only Mode
- 24 - Slide 67 - Stun Mode Potential
- 25 - Slide 68 – Use of Drive-Stun Mode
- 26 - Slide 69 included a video ("Taser\_calf1.mpg") demonstration of using a TASER  
27 ECD in drive stun mode, and trained officers how to use the TASER in drive stun

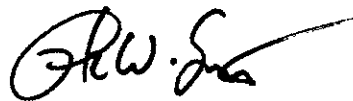
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mode when a person has "turtled" by lying on his stomach with his arms underneath him, refusing to surrender and let officers handcuff him.

- Slide 70 included a video ("Drive-Stun.mpg") included a demonstration of using a TASER ECD in drive stun mode, and trained officers how to use the TASER in drive stun mode when a person has "turtled" by laying on his stomach with his arms underneath him, refusing to surrender and let officers handcuff him.
- Slide 99 - Proper Marksmanship – trained officers how to aim at a suspect, and how to aim when deploying the TASER ECD into a suspect's back while he was lying down in a prone position.

15. In TASER Training Version 12, User Certification Course, TASER M26 non-Lethal Weapon, Version 12.0, created in November 2004 and released in January 2005 with Version 12 Lesson Plan, TASER X26 User Program, TASER X26 Instructor Program, and TASER M26 Instructor Program there were PowerPoint slides and video demonstrating the use of a TASER M26 on a person who was resisting custody by turtling (laying supine on the floor, placing arms and hands under body, and resisting or struggling against officers' efforts to capture, control, restrain the person and take him into custody). Version 12 M26 User Certification. Slide 143 is the same source video "'Drive-Stun.wmv'" as used in Version 8. However, in Version 12, the video is modified to reduce its file size. The source video showing the drive-stun demonstration on a person turtling is the same video (in both Versions 8 and 12).

I declare under penalty of perjury under the laws of the United States of America, the State of Arizona, and the State of California, that the foregoing is true and correct and was executed on December 31, 2007.




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Patrick (Rick) W. Smith