IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:16-cv-2155-WJM-CBS

RAYMOND LYALL, on behalf of himself and all other similarly situated, et al.,

Plaintiffs,

v.

CITY AND COUNTY OF DENVER,

Defendant.

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO STRIKE EVIDENCE SUBMITTED BY PLAINTIFFS IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Plaintiffs, by and through their attorneys Jason Flores-Williams, and David A. Lane and Andy McNulty of Killmer, Lane & Newman, LLP, hereby submit the following Response to Defendant Motion to Strike Evidence Submitted by Plaintiffs in Support of their Motion for Summary Judgment and, in support, state as follows:

1. **Introduction**

"[L]itigation should promote the finding of the truth, and, wherever possible, the resolution of cases on their merits." *Enos-Martinez v. Bd. of Cty. Comm'rs*, Civil Action No. 10-cv-00033-WJM-DLW, 2012 U.S. Dist. LEXIS 44460, at *4 (D. Colo. Mar. 30, 2012) (Martinez, J.). Denver seeks to strike an abundance of evidence that is admissible, and helpful to this Court in determining whether Denver violated the constitutional rights of the Plaintiff Class and did so customarily. In order to provide context as to why some of the evidence Denver seeks to strike is admissible, it is important to outline a portion of the history of this case.

At Denver's request, the parties went before this Court for a discovery conference regarding, *inter alia*, Plaintiff's supplemental declarations on May 19, 2017. Denver expressly chose not to strike the declarations, but sought leave to depose the declarants. The undersigned counsel did not object and this Court granted that leave, which set into motion weeks of work, organization, and resource expenditure.

Plaintiffs' counsel had to find homeless declarants on the streets to notify them of their depositions, which required sending teams out on bicycles for two to three days at a time to locate Plaintiff Class Members as Plaintiff Class Members do not have cell phones or access to email. Plaintiffs' counsel then had to arrange to meet the declarants prior to their depositions. Taking, for example, Roy Vincent Browne and Margaret Dotson. The Arkins Court sweep they endured was so disturbing and violative, that they can no longer live in Denver and have been forced outside the Nederland area. To arrange for their deposition, the Plaintiffs had to drive up to the Nederland area once to find where they were camping, let them know of their scheduled depositions; then, drive up again the night before to bring them down to Denver and find them a motel. The next day, Plaintiffs picked them up prior to the deposition, transported them to the deposition at the City Attorney's Office, waited for the City Attorney to conduct their depositions, and then transport them back to their campsite in Nederland — all while having to address and assuage the trauma inflicted during depositions that forced them to revisit the worst episodes of their lives.

Denver now moves to strike declarations that were submitted by homeless residents who are not too afraid to come forward, or have left the city to escape Denver's unconstitutional policies. Denver misconstrues caselaw and moves to strike clearly admissible evidence on the grounds that it was not plead in the Complaint. Further, Denver has moved to strike the video

that was disclosed by Plaintiffs and that Denver used at Mr. Peterson's deposition. Plaintiffs objected to the use of this video, but despite Plaintiff's objection, Denver continued to use the video at Mr. Peterson's deposition, waiving any objection it might have had to the admissibility of the video. Denver also improperly seeks to strike sworn testimony on the grounds of hearsay, ignoring well-established exceptions to the hearsay rule. Finally, Denver seeks to strike Mr. Burton's declaration. Mr. Burton, a military veteran, suffering from a bone disease and post-traumatic stress disorder, was unable to attend his scheduled deposition. Plaintiffs agreed that he be dismissed as a representative class member, but they never agreed that this man's voice be silenced in this litigation. Mr. Burton has suffered the brunt of the homeless sweeps. He has been charged, tried and convicted of violating the Camping Ban, had his property seized, Denver Police Officer Vincent Lombardi, of the Homeless Outreach Unit, used a racial slur against him (sadly familiar to many African-Americans) and, like the rest of Plaintiff Class, has spent the last several years being ordered to "move along" and told "If you people would just leave—then all of this would stop" in an systematic effort to push him—and other Plaintiff Class Members—out of an increasingly affluent Downtown area.[1] Mr. Burton, like so many Plaintiff Class members, has been broken by the policies, conduct and practices of Denver in the homeless sweeps.

Plaintiffs ask that this Court deny Denver's Motion to Strike Evidence Submitted by Plaintiffs in Support of their Motion for Summary Judgment in its entirety.

2. Argument

2.1 Legal Standard

[1] It is, sadly, Mr, Burton who we see in the viral video of Nov, 28, 2016 Denver Police seizing blankets from the homeless in the bitter cold. Alejandro Lazo, *Denver Pauses on Homeless Policy After Videos Show Police Seizing Blankets in Cold Weather*, THE WALL STREET JOURNAL, (December 15, 2016) https://www.wsj.com/articles/denver-pauses-on-homeless-policy-after-videos-show-police-seizing-blankets-in-cold-weather-1481831708.

"Motions to strike are disfavored, particularly in the context of motions for summary judgment." *Lobato v. Ford,* No. 05cv-01437, 2007 U.S. Dist. LEXIS 65574, 2007 WL 2593485, at *11 (D. Colo. Sept. 5, 2007) (internal citations and quotation marks omitted); see also *Alexander v. Archuleta Cnty*., No. 08-cv-00912, 2009 U.S. Dist. LEXIS 92571, 2009 WL 3245915, at *4 (D. Colo. Oct. 2, 2009) ("[S]triking affidavits is disfavored in the context of a summary judgment motion. . . .[L]itigation should promote the finding of the truth, and, wherever possible, the resolution of cases on their merits.") (internal citations and quotation marks omitted). A decision whether to grant or deny a motion to strike lies "within the sound discretion of the district court." *Fed. Deposit Ins. Corp. v. Isham*, 782 F. Supp. 524, 530 (D. Colo. 1992).

2.2 The unsigned affidavits submitted by Plaintiffs should not be stricken.

Denver argues that the declarations were not properly sworn. Plaintiffs posit that they do comply with 28 U.S.C. § 1746; further, cite to the equitable evidentiary doctrine memorialized at Fed.R.Evid. 106, i.e. Rule of Completeness. Fed.R.Evid. 106 expressly applies when witnesses are questioned about writings (declarations) or recorded statements (video). "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Fed.R.Evid. 106. See also *Beech Aircraft Corp., v. Rainey*, 488 U.S. 153 (1998), *U.S. v Williston*, 862 F.3d 1023 (10th Cir. 2017). The Rule of Completeness is not a panacea for admitting all sorts of evidence, but being that Denver conducted depositions based on a number of the declarations they now seek to strike (and also based on the video of Thomas Peterson that they seek to strike) — it militates against

Fed.R.Evid. 106 to now exclude the very writings and recordings that served as the cause of and basis for the depositions.

Further, a party whose harassment intends to and causes a witness to disappear can find that witness's prior statements admitted against them via forfeiture by wrongdoing. The party attempting to introduce such a statement must demonstrate by a preponderance of the evidence that a declarant is an unavailable witness and that the other party intended to cause that witness's absence at trial. Most of the cases discussing forfeiture by wrongdoing have arisen in the criminal context and thus more often discuss a waiver of rights under the Confrontation Clause. But in the Tenth Circuit, "[a] valid waiver of the constitutional right [of confrontation] is a fortiori a valid waiver of an objection under the rules of evidence." *Gettings v. McKune*, 88 F.Supp. 2d 1205, 1212 (D. Kan. 2000) (quoting *U.S. v. Balano*, 618 F.2d 624, 626 (10th Cir. 1979), overruled on other grounds by *Richardson v. United States*, 468 U.S. 317 (1984)). It is not clear that the Circuits or Supreme Court have ever dealt with an issue exactly analogous to the present case.[2] Nevertheless, the Tenth Circuit has concluded that where "defendants intimidated the witness, thus preventing his testimony at trial, his statement . . . should be considered by the court on remand." *Green v. Johnson*, 977 F.2d 1383, 1390 (10th Cir. 1992) (requiring consideration of the witness's statement where Plaintiff presented evidence that corrections officers told the inmate "that 'if he testified he could lose his Trustee status and be back 'behind the wall'"). This covers a similar scenario in which law enforcement officers allegedly used a show of authority, rather than an overt violent threat, to dissuade a member of a captive population from testifying.

[2] Though not identical, *see Trentadue v. U.S. Cent. Intelligence Agency*, 2014 WL 4232679 (D. Utah Aug. 26, 2014).

Forfeiture by wrongdoing can encompass threats, intimidation, and coercion that intend to and do procure a witness's absence. *Giles v. California*, 554 U.S. 353 (2008). The Tenth Circuit has arguably recognized a need to protect vulnerable populations. *United States v. Montague*, 421 F.3d 1099, 1103-04 (10th Cir. 2005); *see also Giles*, 554 U.S. at 377.

Here, Denver has illegally seized Mr. Burton's property. Police have called him a racial epithet. He has been on the front lines of an all-out war on the poor while suffering from a terrible disease and post-traumatic stress disorder arising from his military service. He has been prosecuted for sleeping on the streets. He has had his blanket seized by police in frigid temperatures. Along with many other members of the Plaintiff Class, he has been told repeatedly: "If you people would leave, then all of this would stop."

At a certain point, this takes a toll. Whether the aforementioned threats, coercion, harassment and rights violations were *intentionally* meant to cause Mr. Burton's and other Plaintiff Class Members' unavailability; or whether the threats, coercion, harassment and rights violations were simply a function of Denver's policy, conduct and practice, *Giles*, 554 U.S. at 367; *Smith v. Archuleta*, 658 Fed. Appx. 422 (10th Cir. 2016), this ultimately becomes a distinction without a difference. The exhaustion, sickness, every time you try to get back on your feet Denver is there to knock to knock you back down, the constant pounding messaging that you are not wanted here, so you eventually reach a point where the system represents nothing but abuse and terror. There is this song by Woody Guthrie called *Plane Wreck at Los Gatos* that haunts this litigation. It is a song about the nameless, the beaten, and the unseen pain of their lives. It is a song about the fear and inflictions that go ignored, so that we have the equitable doctrine of forfeiture by wrongdoing—to give evidentiary voice to the voiceless, so that

"litigation should promote the finding of the truth, and, wherever possible, the resolution of cases on their merits." *Enos-Martinez*, 2012 U.S. Dist. LEXIS 44460, at *4 (Martinez, J.).

2.3 Striking evidence of the March 25, November 15, and November 28, 2016 sweeps is improper.

Denver argues that the Plaintiffs have improperly sought summary judgment based on three incidents that were not identified in the Amended Complaint, March 25, November 15 and November 28, 2016. It has moved to strike evidence of them on the grounds that the Plaintiffs' inclusion of new claims or theories at this late stage is allegedly untimely and prejudicial, *citing Bio Med Tech. Corp. v. Sorin CRM USA, Inc.*, 2015 WL 4882572, at *9 (D. Colo. Aug. 17, 2015).

Denver's contentions are wrong. By referencing those three incidents in their Motion for Summary Judgment, the Plaintiffs were not, as Denver claimed, adding new claims or legal theories. Rather, the Plaintiffs were merely citing to evidence of Denver official's violation of Plaintiff Class Members constitutional rights during the sweeps and that those violations were pursuant to Denver's customs and practices.

It is well settled that "evidence need not be pleaded." *United States ex rel. Mikes v. Straus*, 853 F.Supp. 115, 117 (S.D.N.Y. 1994); *see also In re: Whitaker*, 2014 WL 1329363 (Bankr. N.M. Mar. 28, 2014) (stating that "a complaint need not 'include specific evidence [or] factual allegations in addition to those required by Rule 8'") (citing *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 119 (2nd Cir .2010); *E.E.O.C. v. Peoplemark, Inc.*, 732 F.3d 584, 619 (6th Cir. 2013) (holding that a complaint "need not include evidence"). And that is what the references to those three sweeps were: just evidence. The three sweeps that Denver seeks to strike are relevant evidence as to the Denver's customs and practices at the time with respect to its homeless sweeps.

The cases that Denver cites to support its contention that Plaintiffs' evidence regarding the March 25, November 15, and November 28, 2016, sweeps are inapposite. In *Sanchez v. Pinnacle Credit Servs., LLC*, 195 F. Supp. 3d 1184, 1190 (D. Colo. 2016), the district court held that the plaintiff's unpled legal claims, which were asserted for the first time in its response to the defendant's motion for summary judgment, were properly stricken. In this case, Plaintiffs have not alleged new legal claims or theories in their Motion for Summary Judgment. In fact, since the outset of this litigation Plaintiffs have asserted the same legal claims and theories: that Denver officials' conduct during the sweeps violated Plaintiff Class Members Fourth and Fourteenth Amendment rights according to Denver custom and practice. The other cases that Denver cites follow essentially the same fact pattern (and reach the same conclusion) as *Sanchez*: that unpled *legal claims* may not be raised for the first time in summary judgment briefing. *See Bio Med Tech. Corp. v. Sorin CRM USA, Inc.*, No. 14-cv-0154-WJM-CBS, 2015 WL 4882572, at *9 (D. Colo. Aug. 17, 2015); *Pater v. City of Casper*, 646 F.3d 1290, 1299 (10th Cir. 2011); Plaintiff Class Members do not raise any new legal claims during summary judgment briefing; Denver improperly seeks to strike *evidence*. Plaintiff Class Members ask that this Court not adopt Denver's strained (and, frankly, erroneous) reading of the case law.

Even if this Court were to determine that Plaintiff Class Members erred by failing to amend their Complaint to include the specific evidence of the sweeps that Denver seeks to strike from Plaintiffs' Motion for Summary Judgment, this evidence came as no surprise to the Denver and, therefore, Denver cannot show prejudice. The evidence as to the three incidents all comes from Plaintiff Class Members' depositions. The March 25 incident affected Thomas Peterson, and he testified about it in his deposition on January 24, 2017, eight months before the Motion for Summary Judgment. *See* Motion, Statement of Undisputed Material Facts, ¶¶63-68, *citing*

Doc. 124-3. And in fact even the briefest review of that portion of Mr. Peterson's depositions shows that it was actually the Denver's counsel who elicited the testimony regarding the March 25, 2016 sweep from Mr. Peterson, thus showing that this incident was absolutely no surprise to the Denver. Denver has known about it full well all along. Doc. 124-3, at 90.

The November 15 incident involved approximately one hundred and fifty class members. *See* Motion, Statement of Undisputed Material Facts, ¶¶103-107, *citing* Doc. 124-11, at 95-100. This incident was again elicited by defense counsel, which again shows that the incident is nothing new to the Denver. And, finally, the November 28 incident involved another sweep of multiple class members. *See* [Doc. #124], ¶¶108-114, *citing* Doc. 124-11, at 112-118. Questioning about this incident was again elicited by defense counsel, which again shows that the incident is no surprise to Denver.

Because Denver and its counsel are fully aware of the facts surrounding all three of these incidents, and in fact have long since had the opportunity to question the Plaintiffs and their witnesses about all three of these incidents, there is certainly no prejudice to Denver.

2.4 Exhibit 27 has been authenticated and is admissible.

In Point IV of its Motion, the Defendant argued that the video that the Plaintiffs submitted as Exhibit 27 to their motion was not authenticated and is thus inadmissible. To the extent that the Defendant's contentions might have some merit, the Plaintiffs have cured any such deficiency with respect to the video's authentication with the attached declarations of Terese Howard and Alex Binder. *See* **Exhibit 1**; **Exhibit 2**. Ms. Howard affirmed that she filmed the entire incident, that, after she and Mr. Peterson left the storage facility, she took him to get a hamburger, carrying the video camera with her at all times, that, later that day, she downloaded the footage to her computer and transferred it to Alex Binder, who then shortened it and posted it

to YouTube and Facebook, and that the video edited by Ms. Binder is a fair and accurate representation of what took place that day. **Exhibit 1**, ¶¶7-10.

Ms. Binder affirmed that Ms. Howard handed her the memory card directly from the video camera that she used to film the interaction at the storage facility. Exhibit B, ¶1. Binder affirmed that she brought the memory card home with her and uploaded Howard's raw footage to her computer and then watched all of the raw footage. *Id*. at ¶¶3-5. She edited the video, but not any of the interactions between Peterson and the staff members. *Id.* at ¶¶6-7. She affirmed that the content of the raw footage and the video of what occurred that day was in no way altered by her editing. The only purpose of her editing was to make the video more viewable. *Id.* at ¶9. She then showed the edited video to Howard. *Id.* at ¶10.

These declarations completely satisfy the authentication requirement. *United States ex rel. Landis v. Tailwind Sports Corp.*, 191 F.Supp. 3d 40, 42 (D.D.C. 2016) (citations omitted) ("Regardless of whether deletions and rearrangements rendered the finished product misleading, the Court was satisfied that the videos fairly depict the actual events that took place. In short, the tapes fairly and accurately (although perhaps not completely) depict the events they purport to depict, editing and splicing not to the contrary.").

Further, Denver's contention that Plaintiffs' counsel disclaimed any evidentiary use of the video is incorrect because, after Plaintiffs' counsel made the statement in question, defense counsel waived any such objection to the Plaintiffs' use of the video by continuing to question Mr. Peterson about the video. While Denver did accurately recite Plaintiffs' counsel's statements about the video in Mr. Peterson's deposition [Doc. #137-4], at 126, Denver neglected to note that defense counsel continued questioning Mr. Peterson about the video as if what the undersigned had said about the video had never occurred. *See* [Doc. #137-4], at 128.

Denver's continued questioning of Mr. Peterson about the video is inconsistent with Denver asserting whatever rights it might have had based on the undersigned's statement. Accordingly, Denver has waived its right to object to the Plaintiffs' use of the video on the grounds that the undersigned allegedly disclaimed further use of the video. *See, e.g., Brown v. Demco*, 792 F.2d 478, 481 (5th Cir. 1986) (defendant may waive its right to remove "by proceeding to defend the action in state court or otherwise invoking the processes of that court"); *In re Costas*, 346 B.R. 198, 200 n. 3 (9th Cir. 2006) ("The parties have waived [the requirements that there should be a separate document embodying a final judgment that is distinct from and in addition to an order granting a motion for summary judgment] by continuing to treat the order as a final judgment").

2.5 The evidence Denver incorrectly states is "hearsay" and "statements lacking personal knowledge" is, in fact, admissible.

It is unclear precisely what Denver has asked the Court to do in Section V of its Motion. Although the Motion is titled "Motion to strike evidence submitted by plaintiffs in support their motion for summary judgment," Point V did not ask the Court to strike any evidence. Section V only asked the Court to disregard inadmissible statements made in the supporting documents to the Plaintiffs' motion for summary judgment. This distinction is important because, upon review of the statements, it appears that Denver can have no issue with the underlying statements – which are not hearsay – but only with the Plaintiffs' assertions in their Statement of Undisputed Material Facts. But that is not a reason to strike the assertions, merely to object to them and argue why the Court should see it Denver's way.

To begin with Denver's first objection, the supporting evidence for Plaintiffs' Statement of Undisputed Material Facts #2 is Sophia Lawson's deposition (Doc. 124-2), p. 86, lines 8-21. There is no hearsay in that testimony. It might have been a little non-responsive to the question,

but Denver waived that objection by failing to object to the testimony and move to strike it at that time. Fed.R.Civ.P. 32(d)(3)(B). What Denver really objects to is the Plaintiffs' fact #2, which is its right. But it is the Court, not Denver, who decides whether to accept or reject that fact.

Denver has the same problem with Facts #4 and 6, which are also supported by Ms. Lawson's deposition. There is no hearsay in the cited excerpts of the supporting testimony.

Denver's arguments with respect to the remaining twenty-two Statements of Undisputed Material Fact and their supporting documents are similar. Denver's real objection is to the statements, not the supporting documents. Because Denver's arguments are so repetitive, Plaintiffs will not address every single one of Denver's objections, but will highlight how they are lacking.

For example, Denver objected to Fact #24, which states, "Member of the Plaintiff class, Petar L/n/u, was personally affected by the December 15, 2015, sweep. Exhibit 2, Sophia Nathalie Lawson Deposition¸ 114:8-118:17; Exhibit 15, Sophia Lawson Declaration, ¶ 2." Denver objected on the grounds that Ms. Lawson's testimony regarding the impact of the December 15, 2015, incident on a man experiencing homelessness relies on inadmissible hearsay.

This is not true. Among other things, Ms. Lawson testified, in response to the question, "And what did Petar say to you?" as follows: "He was very upset. He was panting. He was exasperated. More than words, it was like just sounds of just exasperation." Doc. 124-2, at 116:4-7. There is no hearsay there. There are no out of court statements offered for the truth of the matter asserted. The testimony is based on personal knowledge, and that testimony is perfect

support for the Plaintiffs' assertion that Petar was personally affected by the sweep. Denver's objection to Fact #49 is invalid for the same reasons.

With respect to Fact #30, "Another member of Plaintiff Class, who was confined to a wheelchair, had all of his belongings seized by Denver Police Officers and discarded in a garbage truck. [Doc. #124-17], ¶ 1; [Doc. #124-18], 39:19-40:16, 42:8-23, 48:19-52:8. Denver argues that the Plaintiffs relied on Ms. Romaro for this fact, but that Ms. Romaro "admits that she was not present." This is false. In fact, Ms. Romaro testified as follows: "Q. Okay. And you saw property being taken from that guy, from the guy with the wheelchair? A. Yeah." [Doc. #124-18], 51:21-23.

With respect to Fact #42, "Multiple members of the Plaintiff Class had their property seized during the March 8, 2016 sweep, including named Plaintiff Thomas Peterson. [Doc. #124-11], 1621:25-166:7," Denver objects on the grounds that Ms. Howard was based on hearsay. This is incorrect. Ms. Howard testified that she was there when Mr. Peterson's property was taken and that she recognized his property because she knew him. *Id.*, 162:8-16. She also testified that she was present when Mr. Jackson's property was taken. *Id.*, 164:18-21.

Denver's objection to Fact #94 then shows a basic lack of understanding of the Federal Rules of Evidence. This fact states, "During the sweep, Denver officials told Plaintiff Class Members that they were simply following the orders of Mayor Hancock in conducting the sweep, seizing Plaintiff Class Members' property, and forcing them to leave the area[,]" citing [Doc. #124-1], 101:24-102:5. Denver objects on the grounds that Mr. Browne admitted that his allegation that the sweep was conducted from orders from Mayor Hancock is based entirely on hearsay, but that is not true. Mr. Browne testified that it was the Denver officials conducting the

sweep who told him this. [Doc. #124-1], 96, 101-102. Statements of an employee of the party-opponent are not hearsay. Fed.R.Evid. 801(d)(2)(D).

Accordingly, the Court should deny the requested relief in Section V of Denver's Motion as Denver has not asked for any relief that the Court can award in a motion to strike.

3. **Conclusion**

Denver's Motion not only fails legally, but in the general sense of case management and fairness. Motions to strike are disfavored, and for all of the above-referenced grounds, Plaintiffs respectfully request that this Honorable Court deny Denver's Motion.

Respectfully submitted this 5th day of October 2017.

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CERTIFICATE OF SERVICE

I certify that on this 5th day of October, 2017 I filed a true and correct copy of this Motion for Summary Judgment via CM/ECF which will generate notice to the following via e-mail:

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