**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**

Civil Action No. 18-cv-03112-RBJ-STV

SEAN SLATTON,

Plaintiff

v.

TODD HOPKINS, in his individual capacity,
DEFENDANT BARNES, in his individual capacity,
JOHN HUTTO, in his individual capacity, and
CITY OF FORT COLLINS, A MUNICIPALITY,

Defendants.

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**DEFENDANT BRANDON BARNES, JOHN HUTTO AND CITY OF FORT COLLINS' MOTION TO DISMISS PLAINTIFF'S FOURTH AMENDED COMPLAINT (ECF No. 94) PURSUANT TO FED. R. CIV. P. 12(b)(6)**

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Defendants Brandon Barnes, John Hutto, and the City of Fort Collins, through their Attorneys, Mark S. Ratner, Esq., and Hall & Evans, L.L.C., hereby submit the following as their Motion to Dismiss Plaintiff's Fourth Amended Complaint (ECF No. 94) pursuant to Fed. R. Civ. P. 12(b)(6):

**Certificate of Conferral**

Undersigned Counsel conferred with Counsel for the Plaintiff, and pursuant to the Court's Practice Standards, submitted a letter outlining the parties' efforts. Furthermore, the Court granted leave to file this Motion to Dismiss on January 7, 2020 (ECF No. 95). Counsel for the Plaintiff objects to the requested relief. Undersigned Counsel also attempted to confer via email on January 15, 2020, but did not receive a response. Based on previous representations, and the filing of a Fourth Amended Complaint, it is assumed the Plaintiff still objects to the requested relief.

## I. INTRODUCTION[1]

Plaintiff's Fourth Amended Complaint attempts to allege a claim against Defendant Barnes for violation of his Fourth Amendment rights, pursuant to an "unlawful seizure" (ECF No. 94 at 15, ("First Claim for Relief"), and in particular for a failure to intervene. The Plaintiff also attempts claims pursuant to both the Fourth and Fourteenth Amendments, against former City of Fort Collins Police Chief John Hutto and the City of Fort Collins, delineated as "excessive force" (ECF No. 94 at 18 ("Second Claim for Relief"); ECF No. 94 at 21 ("Third Claim for Relief"), respectively. All of these claims purportedly arise from an incident which occurred on December 3, 2016 (ECF No. 94, ¶ 1).

Plaintiff's Complaint is deficient in multiple respects. In particular, the allegations on the face of Plaintiff's Complaint establish he was not "seized" and therefore cannot maintain a Fourth Amendment excessive force claim. Therefore, the Plaintiff fails to comply with Federal pleading standards established pursuant to ***Bell Atl. Corp. v. Twombly***, 550 U.S. 544 (2007). Additionally, as to Defendants Barnes and Hutto, the doctrine of qualified immunity precludes Plaintiff's claims against them. ***Bennett v. Passic***, 545 F.2d 1260, 1262 (10th Cir. 1976).

The claims against the City of Fort Collins also fail, as there are no specific allegations identifying any custom, practice, policy, or procedure which was the moving force behind any alleged Constitutional violation, or how any actions were purportedly taken as a result of a custom, practice, policy, or procedure. Additionally, the Plaintiff does not provide any proper allegations establishing that Defendants Hutto or the City acted under the Fourteenth Amendment Substantive

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[1] To avoid duplicative arguments as directed in the Court's Order (ECF No. 95), these Defendants incorporate Defendant Hopkins' Motion to Dismiss (ECF No. 96), including the body-cam footage, by reference and to the extent possible.

Due Process clause, which might "shock the conscience."

These Defendants incorporate the "timeline of events" as set forth in Defendant Hopkins' Motion to Dismiss (ECF No. 95 at 1-2).

## II. STANDARD

These Defendants incorporate by reference the Standard of Review as set forth in Defendant Hopkins' Motion to Dismiss (ECF No. 96 at 2-3).

## III. INCORPORATION OF OUTSIDE EVIDENCE INTO A MOTION TO DISMISS

These Defendants incorporate by reference the statement with respect to submission of the body-cam footage and the transcript concerning the probable cause determination, as set forth in Defendant Hopkins' Motion to Dismiss (ECF No. 96 at 3-5).

## IV. ARGUMENT

### A. Plaintiff's First Claim For Relief Against Defendant Barnes Fails, As There Was No "Seizure" Pursuant To The Fourth Amendment

Plaintiff's First Claim for Relief against Defendant Barnes is predicated as an "unlawful seizure" pursuant to the Fourth Amendment (ECF No. 94 at 15). As it pertains to Defendant Barnes, Plaintiff seeks liability on the purported failure to intervene and prevent alleged unconstitutional conduct in the form of preventing an unlawful restraint, (ECF No. 94 at ¶ 88) and an alleged failure to intervene as a result of a purported lack of probable cause (ECF No. 94 at 98). (*See* also, ECF No. 94 at ¶ 91-95)[2]. With respect to both aspects of a "seizure" as alleged in the First Claim for Relief,

[2] In the Second Claim for Relief, the Plaintiff also alleges excessive force pursuant to the Fourth Amendment, which requires a "seizure" in order to be a valid cause of action. The lack of any seizure, however, negates Plaintiff's Fourth Amendment excessive force claim, and any notion Officer Barnes somehow failed to intervene even with respect to any extent the Plaintiff intends on

Defendant Barnes incorporates those arguments set forth by Defendant Hopkins in his Motion to Dismiss (ECF No. 96 at 5-11).

Additionally, with respect to the seizure of Plaintiff in the form of precluding an unlawful restraint, Plaintiff was never seized as required under a proper Fourth Amendment analysis. ***Brooks v. Gaenzle***, 614 F.3d 1213 (10th Cir. 2010). In ***Brooks***, the district court "relied on the Supreme Court's decision in ***Brower v. County of Inyo***, 489 U.S. 593, 595-96 (1989) for the proposition a seizure only occurs if the government's actions 'restrain the movement of the suspect.' ***Brooks***, 614 F.3d at 1216. For a seizure to occur, " (t)he government must have substantially precluded the suspect's ability to loose himself from the government's control." ***Brooks***, 614 F.3d at 1216-17. There is no seizure during the course of a foot chase because the government's "show of authority" did not "produce his stop." ***Brooks***, 614 F.3d at 1217. Here, Plaintiff alleges he fled from Defendant Hopkins (ECF No. 94 at 7, ¶ 39) and was ultimately apprehended by "other officers" (ECF No. 94 at ¶ 42). There was no seizure and therefore no proper claim against Defendant Barnes pursuant to the Fourth Amendment. These Defendants incorporate by reference the remaining arguments made by Defendant Hopkins (ECF No. 96 at 5-6).

**1. The Existence of Probable Cause Also Precludes Plaintiff's First Claim for Relief Against Defendant Barnes.**

Plaintiff also bases his First Claim for Relief against Defendant Barnes on the notion probable cause to seize Plaintiff without a warrant, was lacking. (*See* ECF No. 94, ¶ 85 ("There was no probable cause or reasonable suspicion to believe that Mr. Slatton had committed…any violation of law…prior to…Barnes' seizing Mr. Slatton and /or causing him to be seized."); ECF No. 94, ¶ 87 ("Neither …Defendant Barnes had a reasonable belief that there was probable cause…to believe that

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arguing as much. *See* ***Brooks v. Gaenzle***, 614 F.3d 1213, 1219 (10th Cir. 2010) and ECF No. 96 at 2). Officer Barnes, however, is not named as a Defendant in the Second Claim for Relief.

Mr. Slatton had committed or was about to commit any violation of law prior to …Barnes' seizing Mr. Slatton and/or causing him to be seized."). Plaintiff also attempts to allege that Defendant Barnes "made no attempt to correct the information provided to Defendant Harres in order to prevent Mr. Slatton from being arrested…" (ECF No. 94 at 8, ¶ 47). The probable cause determination with respect to Plaintiff's criminal trespassing charge, negates the notion that the Officers lacked probable cause in a manner to support a failure to intervene claim against Defendant Barnes. Generally, a law enforcement officer has an affirmative duty to intercede on behalf of a citizen whose constitutional rights are being violated. ***Mick v. Brewer***, 76 F.3d 1127, 1136 (10th Cir. 1996) referring to ***O'Neill v. Krzeminski***, 839 F.2d 9, 11 (2d Cir. 1988). In this matter, however, as argued above, there is no Constitutional violation properly alleged, and therefore no duty exists to intercede on Plaintiff's behalf. In addition, Defendant Barnes incorporates by reference those arguments made by Defendant Hopkins pertaining to the existence of probable cause and issue preclusion (ECF No. 96 at 7-11).

**2. Defendant Barnes Is Entitled To Qualified Immunity.**

To any extent Defendant Barnes could ever be liable for any Constitutional claim respecting alleged individual behavior violating any right of Plaintiff, qualified immunity doctrine shields him from any damages claimed. *See* ***Harlow v. Fitzgerald***, 457 U.S. 800, 806 (1982). Defendant Barnes incorporates those arguments made by Defendant Hopkins with respect to qualified immunity (ECF No. 96 at 11).

The only claim levied against Defendant Barnes is for a purported Fourth Amendment violation titled as an "unlawful seizure." "The Fourth Amendment protects '[t]he right of the people to be secure in their persons…against unreasonable…seizures.'" ***Manuel v. City of Joliet***, 137 S. Ct. 911, 917 (2017). "A person is seized whenever officials 'restrain his freedom of movement' such that he is 'not free to leave'" ***Manuel***, 137 S. Ct at 917.

Here, the allegations in the Complaint are devoid of any notion Defendant Barnes somehow

restrained Plaintiff's freedom of movement, or effectuated a seizure. As argued by Defendant Hopkins, "(t)he relevant footage confirms Slatton never stopped moving once the officers told him he was being detained" (ECF No. 96 at 5), and, "Slatton broke into a sprint to flee from police" (ECF No. 96 at 4, referring to Exhibit A, and ECF No. 94, ¶ 39). There are no allegations respecting any seizure by Defendant Barnes, and therefore his only participation was being present at the time of the brief incident. On this basis alone, the Plaintiff has not alleged a violation of a clearly established Constitutional right by Defendant Barnes and therefore he is entitled to qualified immunity.

Furthermore, in order for Plaintiff to establish a separate claim for "failure to intervene", he must show an existing underlying Constitutional violation. ***Duncan v. Quinlin***, 2015 U.S. Dist. LEXIS 48159 at *13 (D. Colo. April 13, 2015) citing ***Harper v. Albert***, 400 F.3d 1052, 1064 (7th Cir. 2005). Here, Plaintiff's allegations fail as he does not allege, in anything other than a conclusory fashion, an underlying Constitutional violation by Defendant Barnes. Therefore, Defendant Barnes is entitled to qualified immunity on this basis as well.

**3. Plaintiff's Complaint Fails to Satisfy Federal Pleading Standards As To Defendant Barnes**

To state a claim for relief, a Federal complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), "that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." ***Conley v. Gibson***, 355 U.S. 41, 47 (1957). At the pleading stage, it is not the defendant's or the court's responsibility to guess at plaintiff's claims. ***Conley***, 355 U.S. 41, 47 (1957). ***Robbins v. State of Oklahoma***, 519 F.3d 1242, 1248–49 (10th Cir. 2008). The court may not "assume that a plaintiff can prove facts that the plaintiff has not alleged or that the defendants have violated the laws in ways that the plaintiff has not alleged. Although the plaintiffs' pleadings are to be liberally construed, mere conclusory allegations without supporting factual averments will not suffice." ***Baumeister v. N.M.***

***Comm'n for the Blind***, 425 F. Supp. 2d 1250, 1257 (D. N.M. 2006). Plaintiff must explain what each defendant did to him, when the defendant did it, how the defendant's action harmed him, and what specific legal right the defendant violated. ***Nasious v. Two Unknown B.I.C.E. Agents***, 492 F.3d 1158, 1163 (10th Cir. 2007). Additionally, Federal pleading standards require Plaintiff to also establish personal participation in conduct in which he alleges is a violation of his Constitutional rights. *See* ***Fogarty v. Gallegos***, 523 F.3d 1147, 1162 (10th Cir. 2008).

Plaintiff offers nothing more than conclusory allegations respecting any purported action by Defendant Barnes, which might otherwise result in a violation of Constitutional or statutory law. *See* for example ECF No. 94, ¶ 87 ("Neither…Defendant Barnes had a reasonable belief that there was probable cause…); ECF No. 94, ¶ 92 ("Defendants (sic) Barnes knew that Defendant Hopkins' conduct toward Mr. Slatton constituted unreasonable seizures…"). *See* also ECF No. 94, ¶ 93-97. Plaintiff's inability to comply with Federal pleading standards should result in dismissal of the First Claim for Relief against Defendant Barnes.

**B. Plaintiff's Second Claim For Relief Fails To Properly Allege Claims Against John Hutto Or The City Of Fort Collins**

Plaintiffs Second Claim for Relief attempts to allege a claim for excessive force, pursuant to the Fourth Amendment, against both former Fort Collins Police Chief John Hutto and the City of Fort Collins (ECF No. 94 at 18).

**1. Plaintiff Fails To Comply With Federal Pleading Standards As To His Claim Against John Hutto.**

To establish liability pursuant to § 1983 against Defendant Hutto, the Plaintiff must assert that: (i) any named individual personally participated in the conduct; (ii) exercised control or direction over it; (iii) failed to supervise; (iv) failed to train; or (v) tacitly authorized the conduct that resulted in a constitutional deprivation. *See* ***Fogarty v. Gallegos***, 523 F.3d 1147, 1162 (10th Cir. 2008). Plaintiff must also allege that the individual Defendant's conduct violated a clearly

established Constitutional or federal statutory right that would have been known by a reasonable government official.

The allegations against Defendant Hutto are nothing more than conclusory with respect to any participation in any conduct alleged to be a violation of Plaintiff's Constitutional rights. The Complaint does not properly allege anything, other than in a conclusory fashion, that Defendant Hutto personally participated in pertinent conduct or that he exercised control or direction over any relevant activity. For example, "…Defendant Hutto failed to properly train, supervise, and/or discipline their employees regarding the proper use of physical restraint and force, resulting in the use of excessive force. (ECF No. 94, ¶ 111); "Defenant (sic) Hutto's inadequate training, supervision, and/or discipline resulted from a conscious or deliberate choice to follow a course of action from among various alternatives available…" (ECF No. 94 at ¶ 112); "Such failure to properly train, supervise, and/or discipline constitutes an unconstitutional policy, procedure, custom, and/or practice…" (ECF No. 94 at ¶ 114). There are no allegations identifying any training, supervision or discipline that was not properly provided or inadequate, nor are there any proper allegations identifying personal participation of Defendant Hutto. The conclusory allegations are improper, and the Second Claim for Relief against Defendant Hutto should be dismissed. ***Twombly***, 550 U.S. 544 (2007) and ***Fogarty v***, 523 F.3d 1162 (10th Cir. 2008).

**2. Defendant Hutto Is Entitled To Qualified Immunity**

To any extent Plaintiff's Complaint can be considered to have properly set forth allegations against Defendant Hutto, he is entitled to qualified immunity. As with Defendant Barnes, the Complaint is devoid of any underlying violation of a Constitutional right establishing a seizure for purposes of the Fourth Amendment. Defendant Hutto incorporates those arguments made above, and the arguments with respect to qualified immunity made by Defendant Hopkins.

**3. There Are No Proper Allegations Against The City of Fort Collins**

A local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. ***Waller v. City & Cnty. of Denver***, 932 F.3d 1277 (10th Cir. 2019) (affirming Rule 12 dismissal); ***Mocek v. City of Alb***., 813 F.3d 912, 934 (10th Cir. 2015). Instead, to adequately allege municipal liability, a plaintiff must state sufficient nonconclusory facts on: "(1) official policy or custom, (2) causation, and (3) state of mind." ***Schneider v. City of Grand Junction Police Dep't***, 717 F.3d 760, 769 (10th Cir. 2013). A custom, practice, policy, or procedure must take one of five forms: (1) a formal regulation or policy statement; (2) an informal custom amounting to a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law; (3) the decisions of employees with final policymaking authority; (4) the ratification by such final policymakers of the decisions—and the basis for them—of subordinates to whom authority was delegated subject to these policymakers' review and approval; or (5) the failure to adequately train or supervise employees, so long as that failure results from deliberate indifference to the injuries that may be caused. ***Waller***, 932 F.3d at 1283. Municipal liability attaches only where "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy" as to the subject. ***Pembaur v. City of Cincinnati***, 475 U.S. 469, 483 (1986). When the asserted policy is a failure to act, the plaintiff must show the inaction was the result of "deliberate indifference" to citizens' rights. ***Gaylor v. Does***, 105 F.3d 572, 577 (10th Cir. 1997). An alleged policy or custom must consist of much more than what allegedly happened to the plaintiff. E.g., ***Griego v. City of Albuquerque***, 100 F. Supp. 3d 1192, 1215 (D.N.M. 2015) ("[A]t the pleading stage, the existence of a Monell policy is a 'conclusion' to be built up to, rather than a 'fact' to be baldly asserted.").

The entity, via "deliberate" conduct, must have been the "moving force" behind the alleged injury, requiring both an action "taken with the requisite degree of culpability" and a "direct causal

link" between the action and the alleged deprivation of rights. ***Bd. of Cnty. Comm'rs v. Brown***, 520 U.S. 397, 404 (1997). But an underlying constitutional violation must exist to hold a public entity liable. *See* ***City of L.A. v. Heller***, 475 U.S. 796, 799 (1986) (per curiam); ***Martinez v. Beggs***, 563 F.3d 1082, 1091 (10th Cir. 2009). And even if a constitutional violation occurred, no municipal liability can be pure respondeat superior. *See* ***Monell v. Dep't of Soc. Servs***., 436 U.S. 658, 694 (1978).

Furthermore, to impose liability, the alleged failure to train itself must amount to "deliberate indifference" to the rights of persons with whom allegedly untrained employees interact. ***Connick v. Thompson***, 563 U.S. 51, 61 (2011), citing ***City of Canton Ohio v. Harris***, 489 U.S. 378, 388 (1989). "Deliberate indifference" is a "stringent standard" of fault, requiring proof an entity "disregarded a known or obvious consequence of [its] action." ***Id.*** citing ***Brown***, 520 U.S. at 409.

In an attempt to support a claim against the City, the Plaintiff relies on conclusory allegations. For example, "it was the custom, an actual practice of FCPS…to ratify and condone the use of excessive force by FCPS officers." (ECF No. 94 at 9, ¶ 52); "Defendant Fort Collins…thus knew or had constructive knowledge, based on FCPS's history and widespread practice of its officers using excessive force…" (ECF No. 94 at 11, ¶ 61); Because Defendant Fort Collins…created and tolerated a custom of deliberate indifference and continuously failed…to adequately train and supervise FCPS officers in these areas, citizens including Mr. Slatton, were repeatedly been (sic) subjected to violations of their constitutional rights." (ECF No. 94 at 11, ¶ 63); "Defendant Fort Collins…fostered 'a policy of inaction' in the face of knowledge that FCPS officers were routinely violating specific constitutional rights…"(ECF No. 94 at ¶ 64). Nowhere in Plaintiff's Complaint is a specific custom, practice, policy or procedure identified, nor is there any indication respecting a causal link between any such custom, practice or policy and the alleged unconstitutional conduct. Furthermore, the Complaint is devoid of a proper allegation regarding a purported violation of Plaintiff's

Constitutional rights, as no seizure pursuant to the Fourth Amendment occurred.

**C. Plaintiff's Third Claim For Relief Fails To Properly Allege A Substantive Due Process Claim Against John Hutto And The City of Fort Collins.**

Defendant Hutto and the City of Fort Collins incorporate those arguments made by Defendant Hopkins in his Motion to Dismiss pertaining to "Substantive Due Process" (ECF No. 96 at 13). Additionally, as with the other claims for relief, the Plaintiff offers nothing more than a conclusory statement with respect to any violation of his purported Fourteenth Amendment Due Process claim. For example, "Defendant Fort Collins and Defendant Hutto failed to properly train, supervise, and/or discipline their employees regarding the proper use of physical restraint and force, resulting in excessive force. Defendant Fort Collins and Defendant Hutto particularly failed to properly train, supervise, and/or discipline its employees regarding the constitutional limits on use of force." (ECF No. 96 at ¶ 132); cf. ¶¶ 72, 74, 111, 113 and 114; *See also* ECF No. 96, ¶ 135. As argued above, the Plaintiff does not offer any specific action by Defendant Hutto, or any specific custom, practice or policy that might support action which "shocked the conscience." The Plaintiff does not comply with federal pleading standards, and his claim should be dismissed. ***Twombly***, 550 U.S. 544 (2007).

In addition, the Third Claim for Relief is not pled in the alternative. To any extent the Plaintiff intends to pursue both a Fourth Amendment and Fourteenth Amendment claim, he is precluded from doing so. "This case requires us to decide what constitutional standard governs a free citizen's claim that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other 'seizure' of his person. We hold that such claims are properly analyzed under the Fourth Amendment's 'objective reasonableness' standard rather than under a substantive due process standard." ***Graham v. Connor***, 490 U.S. 386, 388 (1989). "Where, as here, the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right 'to be secure in their persons…against unreasonable…seizures' of the person." ***Graham***,

490 U.S. at 394 (ellipses in original) referring to ***Tennessee v. Garner***, 471 U.S. 1 at 7-22 (1985). "Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process' must be the guide for analyzing these claims." ***Graham***, 490 U.S. at 395. Plaintiff's Third Claim for Relief must be dismissed on this basis as well.

Furthermore, to any extent Plaintiff's Third Claim for Relief might be sufficient to state a claim, Defendant Hutto is entitled to qualified immunity. There are no allegations with respect to any specific conduct which violates clearly established statutory or Constitutional right. *See* ***Tonkovich v. Kansas Bd. Of Regents***, 159 F.3d 504, 516 (10th Cir. 1998) citing ***Ramirez v. Oklahoma Dep't of Mental Health***, 41 F.3d 584, 592 (10th Cir. 1994).

## V. CONCLUSION

WHEREFORE, Defendants Barnes, John Hutto, and the City of Fort Collins, respectfully requests the Court to dismiss Plaintiff's Fourth Amended Complaint with prejudice, and for entry of any other relief deemed just and appropriate by this Court.

Respectfully submitted this 16th day of January 2020.

*/s/ Mark S. Ratner*
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**CERTIFICATE OF SERVICE (CM/ECF)**

I HEREBY CERTIFY that on the 16th day of January, 2020, I electronically filed the foregoing **DEFENDANT BRANDON BARNES, JOHN HUTTO AND CITY OF FORT COLLINS' MOTION TO DISMISS PLAINTIFF'S FOURTH AMENDED COMPLAINT (ECF No. 94) PURSUANT TO FED. R. CIV. P. 12(b)(6)** with the Clerk of Court using the CM/ECF system and mailed a copy to the following:

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