**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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**DEFENDANTS BRANDON BARNES, JOHN HUTTO AND CITY OF FORT COLLINS' REPLY IN SUPPORT OF 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 (collectively, "Defendants"), through their Attorneys, Mark S. Ratner, Esq., and Hall & Evans, L.L.C., hereby submit the following as their Reply in Support of Motion to Dismiss Plaintiff's Fourth Amended Complaint (ECF No. 94) pursuant to Fed. R. Civ. P. 12(b)(6):

## I. ARGUMENT

### A. Hopkins' Actions Did Not Effectuate A Seizure Under the Fourth Amendment

A seizure pursuant to the Fourth Amendment occurs "only when there is a governmental termination of freedom of movement *through means intentionally applied*…" (*See* Pltfs. Resp., ECF No. 109 at 4, citing ***Brower v. County of Inyo***, 489 U.S. 593, 596-97 (1989)) (emphasis in Pltfs. brief). Plaintiff's position implicitly acknowledges the similarity between the facts in ***Brower*** and the instant matter when it comes to the governmental termination and intentional application of force

sufficient to effectuate a seizure under the Fourth Amendment. Specifically, Plaintiff cites to ***Brower*** and states, "(t)he pursuing police car sought to stop the suspect only by the show of authority represented by flashing lights and continuing pursuit…" (ECF No. 109 at 4, citing ***Brower***, 489 U.S. at 596-97). The show of authority in ***Brower*** is consistent with the factual allegations in Plaintiff's Complaint: Officer Hopkins attempted to stop Plaintiff Slatton through a show of authority, but was ultimately unsuccessful. (*See* Pltfs. Cmp., ECF No. 94 at 7, ¶¶ 39 & 42) (eg. Plaintiff alleges he *fled* from Defendant Hopkins and was ultimately apprehended by *other officers*). Semantics aside, Plaintiff was not seized by Hopkins (or Barnes) as the pepper spray was not the governmental termination considered by the Supreme Court in ***Brower***. Despite Plaintiff's belief the pepper spray acted as the "governmental termination" of Plaintiff's efforts to flee a lawful arrest, it was instead other police officers from Fort Collins Police Services ("FCPS") who ultimately apprehended Mr. Slatton (*See* ECF No. 109 at 7, referring to ECF No. 94 ¶¶ 37, 41, 42, & 88 ("When Hopkins pepper sprayed Mr. Slatton for the purpose of seizing him, and the pepper spray caused his termination of movement and subsequent apprehension, Mr. Slatton was seized for purposes of the Fourth Amendment")); (C.f. ECF No. 109 at 2, citing ECF No. 94 at ¶ 42 ("He was then *apprehended* by FCPS officers")).

The notion that no seizure was effectuated by Hopkins application of pepper spray (or other actions by Officer Hopkins), is supported by the Tenth Circuit's rejection of the "ongoing seizure" theory. ***Farrell v. Montoya***, 878 F. 3d 933, 938 (10th Cir. 2017). Read together, neither the application of pepper spray nor other attempted use of authority by Hopkins or Barnes constituted a seizure under the Fourth Amendment, a position also recognized by the Plaintiff. "(A) seizure under the Fourth Amendment requires 'intentional acquisition of physical control, through termination of movement by physical force or submission to a show of authority.'" (ECF No. 109 at 5, citing ***Brooks v. Gaenzle***, 614 F.3d 1213, 1215 (10th Cir. 2010)). This is the Tenth Circuit's view, which is

consistent with the view adopted by the United States Supreme Court. *See* ***California v. Hodari, D***., 499 U.S. 621 (1991).

To support his position, Plaintiff resorts to citing non-Tenth Circuit matters, which are distinguishable. For example, in ***Yelverton v. Vargo***, 386 F. Supp. 3d 1224 (M.D. Ala. 2005), the court provides no analysis in its determination that application of pepper spray was a seizure under the Fourth Amendment. Without explanation, the court relied on ***Hodari D,*** for its one line holding that use of pepper spray constituted a seizure. ***Yelverton***, 386 F. Supp. 3d at 1228 referring to ***Hodari D.***, 499 U.S. at 626. But, as the Supreme Court recognized in ***Hodari D.***, "the word 'seizure' has meant a 'taking possession…'" ***Hodari D***., 499 U.S. at 623, citing 2 N. Webster, An American Dictionary of the English Language 67 (1828); 2 J. Bouvier, A Law Dictionary 510 (6th ed. 1856). 'For most purposes at common law, the word connoted not merely grasping, or applying physical force to, the animate or inanimate object in question, but *actually brining it within physical control*." ***Hodari D***., 499 U.S. at 624 (emphasis added). For example, "(a) ship still fleeing, even though under attack, would not be considered to have been seized as a war prize." ***Hodari D***., 499 U.S. at 624, referring and comparing ***The Josefa Segunda***, 10 Wheat. 312, 325-32 (1825). Here, Plaintiff's pleading with respect to the deployment of pepper spray, and his subsequent flight away from the Defendants, at most constitutes an attempt at a seizure. "But neither usage nor common-law tradition makes an *attempted seizure* a seizure." ***Hodari D***., 499 U.S. at 626, ftnt. 2 (emphasis added). By way of analogy, Mr. Slatton was the "fleeing ship," unseized by Officer Hopkins.

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

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 Hopkins.

Even if Plaintiff could establish an underlying Constitutional violation, for the purposes of a 12(b) motion, the allegations against Officer Barnes are merely conclusory and insufficient to overcome dismissal. ***Bell Atl. Corp. v. Twombly, 550 U.S. 544*** (2007); ***Fogarty v. Gallegos***, 523 F.3d 1147, 1162 (10th Cir. 2008). Despite the opportunity to explain the allegations against Defendant Barnes for failure to intervene, Plaintiff offers no further support for any such claims. (*See* ECF No. 109 at 14-15).

**C. Plaintiff's Second Claim For Relief Fails To Properly Allege Claims Against John Hutto**

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. There is no support provided in the response, for the claims respecting a failure to train or supervise. (*See* ECF No. 94, ¶¶ 111, 112, & 114).

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

Likewise, Defendant Hutto is entitled to qualified immunity. Plaintiff provides no argument to the contrary, and as argued in Defendants' Motion, the Complaint is devoid of any underlying violation of a Constitutional right establishing a seizure for purposes of the Fourth Amendment.

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

The Plaintiff attempts to somehow establish a custom or policy, through the citation of previous lawsuits against the City of Fort Collins ("City"). But, any such attempt is improper and misleading. Tellingly, none of the instances are alleged to have resulted in a finding of liability or wrongdoing by the City or any of its employees. For example, in the Stanley Cropp matter, (ECF No. 94 at ⁋ 53), Plaintiff summarily discusses the purported facts of the lawsuit, but provides no evidentiary support for the conclusory statements or any factual similarity with the present matter.

The same arguments apply with respect to Dakota McGrath (ECF No. 94 at ⁋ 54), Joe Heneghan (ECF No. 94 at ⁋ 55), Kimberly Chancellor (ECF No. 94 at ⁋ 59) and Natasha Patnode (ECF No. 94 at ⁋ 60). Resolution of these matters could have been resolved for any purpose other than an admission of liability. *See* ***Rowley v. Morant***, No. 10-cv-1182-WJ-GBW, 2014 U.S. Dist. LEXIS 186532, at *2 (D.N.M. July 14, 2014) ("[T]he mere fact that a lawsuit was filed without any mention of the disposition of the lawsuit or whether the City was found to have violated any rights does not establish a pattern and practice."). Plaintiff also cites to the Michaella Surat matter (ECF No. 94 at ⁋ 57). Claims against the City were dismissed before any adjudication (*See* Surat v. Klamser, 19-cv-0901-WJM-NRN, ECF No. 84 (D. Colo)). As with the other lawsuits cited in the Complaint, there are no factual similarities and no judgment entered against the City or reference to any decisions which could be binding in this matter. *See e.g.* ***Connick v. Thompson***, 563 U.S. 51, 62-63 (2011).

**F. Plaintiff's Third Claim For Relief Fails To Properly Allege A Substantive Due Process Claim Against Defendants Hutto And City**

As with the other claims for relief, the Plaintiff's Response offers nothing more than a conclusory statement with respect to any violation of his purported Fourteenth Amendment Due Process claim. For example, "Hopkins violated clearly established law" (ECF No 109 at 25). No such determination has been made. And, "Hopkins was motivated by malice, excessive zeal, or deliberate indifference to Mr. Slatton, amounting to an abuse of power that shocks the conscience." (ECF No. 109 at 26, citing to ECF No. 84 at ⁋⁋ 82, 129-131-140). No support is provided for this conclusory statement.

## II. CONCLUSION

WHEREFORE, Defendants Barnes, Hutto, and City of Fort Collins, respectfully request 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 23rd day of March 2020.

*/s/ Mark S. Ratner*
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ATTORNEYS FOR DEFENDANTS DEFENDANT BARNES, JOHN HUTTO, AND THE CITY OF FORT COLLINS

**CERTIFICATE OF SERVICE (CM/ECF)**

I HEREBY CERTIFY that on the 23rd day of March, 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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