DISTRICT COURT, BOULDER COUNTY, COLORADO
Boulder County Justice Center
1777 6th Street
Boulder, Colorado 80302

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Plaintiffs:
FEET FORWARD – PEER SUPPORTIVE SERVICES AND OUTREACH d/b/a FEET FORWARD, a nonprofit corporation; JENNIFER SHURLEY, JORDAN WHITTEN, and SHAWN RHOADES, individuals,

Intervenor Plaintiffs: MARY FALTYNSKI, ERIC BUDD, AND JOHN CARLSON, Individuals;
v.

CITY OF BOULDER and MARIS HEROLD, Chief of Police for the City of Boulder.

▲ COURT USE ONLY ▲

Case Number: 2022CV30341

Division: 2

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OPPOSITION TO MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

Defendants, City of Boulder (the "City") and Maris Herold (the "Chief"), by their undersigned attorneys, respectfully submit their opposition to Plaintiffs' April 21, 2023 motion for partial judgment on the pleadings (the "Motion").

I. Introduction

Although styled as a motion for partial judgment on the pleadings under C.R.C.P. 12(c), the Motion seeks relief far beyond what is requested in the Complaint. The Motion asks the Court to enjoin enforcement of the Camping Ban as to all homeless persons who cannot access shelter, including nonparties, on the theory the Court held the nonprofit and the then-taxpayer plaintiff have standing to seek such relief in their own right. The Court held no such thing; rather, the Court determined that it did not need to examine the standing of Feet Forward ("Feet Forward" or the "Nonprofit") and the taxpayer who was a Plaintiff at that stage of the case, because they were asserting identical claims for relief as Jennifer Shurley, Jordan Whitten, and Shawn Rhoades (the "Individual Plaintiffs"), with the exception that the Individual Plaintiffs are also seeking nominal damages for alleged deprivation of their constitutional rights. Because the Complaint does not seek relief beyond the three Individual Plaintiffs, whose status as homeless persons and reasonable fear of prosecution for violation of the Camping Ban are in dispute, the Motion must be denied.

II. The Governing Standard on Motions for Judgment on the Pleadings

As a threshold matter, it must be noted that while C.R.C.P. 56(a) and (b) allow entry of summary judgment on "all or any part thereof" of a claim, no such comparable language can be found in C.R.C.P. 12(c). "That the Civil Rules explicitly provide for summary judgment on part of a claim under Rule 56(a) but not for judgment on part of a claim under Rule 12(c) counsels

strongly against reading Rule 12(c) to implicitly permit such judgments." *Kenall Mfg. Co. v. Cooper Lighting, LLC*, 354 F. Supp. 3d 877, 894 (N.D. Ill. 2018). Thus, "a court cannot enter 'judgment on the pleadings' under Rule 12(c) on only a part of a claim." *Id*.; *accord Affordable Aerial Photography, Inc. v. John Abdelsayed & Trends Realty USA Corp*., 2022 U.S. Dist. LEXIS 70143, *15-16, 2022 WL 1124795 (S.D. Fla. 2022). Because C.R.C.P. 12(c) does not contain language permitting entry of judgment on "any part" of a claim, there is no such thing as a motion for partial judgment on the pleadings. The Motion can be denied on this basis alone.

If the Court determines to consider the merits of the Motion, it must "construe the allegations of the pleadings strictly against the movant and must consider the allegations of the opposing party's pleadings as true." *Abts v. Bd. of Educ.*, 622 P.2d 518, 521 (Colo. 1980). The Court "should not grant the motion unless the pleadings themselves show that the matter can be determined on the pleadings." *Parsons v. Allstate Ins. Co.,* 165 P.3d 809, 814 (Colo. App. 2006). "Entry of judgment on the pleadings is proper only if the material facts are undisputed and the movant is entitled to judgment as a matter of law." *Sterenech v. Goss,* 266 P.3d 428, 432 (Colo. App. 2011). "[F]or purposes of the court's consideration of the Rule 12(c) motion, all of the well pleaded factual allegations in the adversary's pleadings are assumed to be true and all contravening assertions in the movant's pleadings are taken to be false. Thus, in effect, the party opposing the motion has the benefit of all possible favorable assumptions." Wright & Miller, Federal Practice and Procedure Civil 3d § 1368. "Because a Rule 12(c) 'motion calls for an assessment of the merits of a case at an embryonic stage, the court must view the facts contained in the pleadings in the light most favorable to the non-movant and draw all reasonable inferences therefrom' in the nonmovant's behalf." *Santander Consumer USA Inc. v. Walsh,* 2010 WL

4955556 at * 11 (D. Mass. 2010) (quoting *R.G. Financial Corp. v. Vergara-Nunez,* 446 F.3d 178, 182 (1st Cir. 2006).

Further, courts have recognized the fundamental incongruity of a plaintiff using a motion for judgment on the pleadings to obtain affirmative relief, particularly when a defendant raises affirmative defenses to the plaintiff's claims. *See, e.g., Lasser v. Am. Gen. Life Ins. Co.,* 2015 U.S. Dist. LEXIS 52164 at *11-16 & n. 3 (D. Minn. Apr. 3, 2015) (cataloguing cases); *Burns v. Consol. Amusement Co.,* 182 F.R.D. 609, 612-13 (D. Haw. 1998) (same).[1]

III. Key Allegations of the Complaint are Denied.

The City complied with its obligation under C.R.C.P. 8(b) to accurately respond to the allegations of the Complaint. Plaintiffs inaccurately portray the Answer as having conceded the elements of a claim, not actually asserted in the Complaint, for relief on behalf of nonparties. In fact, the Answer denied critical allegations of the Complaint that Plaintiffs must establish to prevail. The City denied that Boulder Shelter for the Homeless ("BSH") "turns people away on days when exposure to the weather is dangerous to human health and safety," Answer, ¶ 33, that "for every unhoused person in the city, there is some risk on any given night that they will not be able to get a bed at BSH," Answer, ¶ 32, and that "there are unhoused residents of the City for whom sheltering at BSH is not realistic or safe." Answer, ¶ 49. The City denied that at any given time, approximately 30 homeless people are suspended from BSH, and that the reasons for suspensions are "disproportionately punitive." Answer, ¶¶ 33-34. The City denied that "on any given day or night, many unhoused residents are left with no access to indoor shelter in the City"

[1] Notably, this Court must analyze the pleadings in the light most favorable to the Defendants, the opposite of the applicable standard used by this Court in its February 23, 2023, Order Re Defendants' Motion to Dismiss Plaintiffs' Complaint ("Order").

and further averred that "[t]he City does not set rules for any shelter in Boulder." Answer, ¶ 24. Although there exists on paper a 90-night per year limit at BSH, that limit does not apply to critical weather nights, and individuals can utilize additional nights through the reserved bed program. Answer at ¶ 50. Defendants deny that they have enforced the Camping Ban on many nights when, or mornings after, BSH was full and had turned people away. Answer, ¶ 94.

The Chief's Directive on Camping Violations (Exhibit 1 to the Motion) does not prevent officers from considering whether a person has access to alternative shelter at the time a ticket is written; to the contrary, the Directive expressly authorizes officers to consider "any other factors deemed appropriate by the on-duty supervisor." Answer, ¶ 91. Moreover, by its own terms the Directive applies only to police officers' response to encampments. Exhibit 1 to the Motion. Defendants deny that because of the Directive, officers do not inquire about a person's ability to access shelter or the potential dangers of remaining in the elements when they enforce the Camping Ban. Answer, ¶¶ 92-93.

Whether the Individual Plaintiffs are currently experiencing homelessness is unknown to Defendants, and accordingly was denied. Answer, ¶¶ 132, 145, 157. Defendants denied that any of the Individual Plaintiffs face a credible risk of enforcement of the Camping Ban. Answer, ¶¶ 143, 144, 155, 156, 169, 170. Plaintiff Feet Forward is not injured by enforcement of the Camping Ban. Answer, ¶¶ 108-121. As to the Intervenor Plaintiffs Mary Faltynski, Eric Budd, and John Carlson (the "Taxpayer Plaintiffs"), the amounts spent on enforcement of the Camping Ban are in dispute. Answer, ¶ 125. The "$2.7 million" figure repeatedly alleged by Plaintiffs includes spending on compliance as well as enforcement of the Camping Ban and the Tent Ban

and (crucially and most expensively) encampment removal and clean-up. Answer, ¶¶ 88, 127; *see also* Section V.A. below.

IV. Feet Forward and the Taxpayer Plaintiffs Do Not Assert Cruel and Unusual Punishment Claims on Behalf of Nonparties.

As the discussion in Section III above makes clear, key allegations as to whether the Individual Plaintiffs remain homeless or face a credible threat of prosecution for violation of the Camping Ban remain disputed. This requires the denial of the Motion because – as the Court carefully noted in its February 23, 2023 Order – the nonprofit Plaintiff and Taxpayer Plaintiffs "maintain the same claims" as those asserted by the individual, allegedly homeless Plaintiffs. Order at p. 9. Because a court need not address a party's standing when it asserts identical claims as parties whose standing is not in dispute, the Court denied Defendants' motion to dismiss to the extent the supplemental briefing argued that Feet Forward and the then-taxpayer plaintiff lacked standing. *Id*. at pp. 9-10; *see also* Plaintiffs' October 21, 2022 Response to Defendants' Supplemental Brief at 7 ("[t]he taxpayer plaintiffs and plaintiff Feet Forward raise the same claims as the individual plaintiffs," and therefore, need not show "standing independent of plaintiffs with standing") (quotations and internal brackets omitted).

In making this determination, the Court quoted from Plaintiffs' prayer for relief where they request that the Court "enter a permanent injunction prohibiting Defendants, and all persons and entities acting at their direction or on their behalf, from enforcing the [Camping and Tent] Bans *against the individual Plaintiffs* when they cannot access indoor shelter." Order at 4 (emphasis added). Contrast this request -- which was essential to the Court's determination that it need not determine if Feet Forward and the then-taxpayer plaintiff have standing because they assert claims identical to those of the Individual Plaintiffs -- with the relief sought by the Motion:

an order prohibiting "Defendants, and all persons and entities acting under their direction or on their behalf, from enforcing the [Camping] Ban *against unhoused individuals* when they cannot access indoor shelter." Motion at 16 (emphasis added). Plaintiffs' request for relief benefitting nonparty homeless persons flies in the face of the Court's determination that "the taxpayer Plaintiff and Feet Forward maintain the same claims as the individual unhoused Plaintiffs, with the exception that the individual unhoused Plaintiffs also assert claims for individual nominal damages." Order at 9.

Leave to amend the complaint may be freely granted, but if the Complaint were amended, Defendants would have an opportunity to respond to that amended complaint via an answer or motion to dismiss the amended complaint. C.R.C.P. 15(a). The Court should not permit Plaintiffs to amend their complaint through the back door, by deeming it to include a new claim on behalf of a class of nonparty homeless persons, which is not presently pled, without class certification and without giving Defendants a chance to file a response to that amended complaint. Only then could the Court determine whether the partial judgment Plaintiffs request in the Motion is warranted on those pleadings. Under the pleadings as they stand, the only relief sought relates to the three Individual Plaintiffs. And, because those Plaintiffs' status as homeless persons and their alleged reasonable fear of prosecution are denied in the Answer, judgment on the pleadings is not appropriate. *Abt*, 622 P.2d at 521; *Sterenech,* 266 P.3d at 432.

V. The Court Cannot Resolve the Standing Question in the Context of the Motion.

A. Plaintiffs' Standing is Contested.

In its Order, the Court did not rule the Nonprofit and Taxpayer Plaintiffs had established standing for all purposes as the case moves forward. In ruling on Defendants' motion to dismiss

for failure to state a claim under C.R.C.P. 12(b)(5), the Court ruled only that the allegations of the Complaint, read in the light most favorable to the Plaintiffs as non-moving parties, sufficiently alleged standing. Order at p. 12 ("based on the allegations of the complaint, the taxpayer Plaintiff has standing"); *id*. at p. 13 ("based on the allegations of the complaint, Feet Forward has standing"). Now the Court is presented with a Motion for partial judgment on the pleadings, pursuant to which the Court has to construe the allegations of the pleadings against the Plaintiffs and draw all inferences in favor of Defendants. *Abt*, 622 P.2d at 521; *Parsons*, 165 P.3d at 814. In this context, Defendants' denials of the key jurisdictional allegations of the Complaint lead only to the conclusion that the Motion must be denied.

As noted in Section III, above, all of the allegations upon which the Court found Feet Forward had sufficiently alleged facts supporting standing are denied by Defendants for lack of sufficient information to admit or deny them. Feet Forward's mission, business plans, and alleged harm as a result of the Camping Ban are all topics requiring exploration in discovery.

The Court held the then-taxpayer plaintiff had sufficiently alleged standing because the Complaint alleged the City had allocated $2.7 million, of which $1.7 million was allocated to enforcement of the Camping Ban and the Tent Ban. Order at p. 10. What Plaintiffs specifically alleged was that "the City allocated $2.7 million specifically to fund enforcement of the anti-homeless criminal ordinances *and encampment removal*," Complaint, ¶ 127 (emphasis added); including $186,000 to new urban park rangers "*whose job responsibilities include* issuing warnings and citations for violations of the Tent and [Camping] Bans," *id*., ¶ 128 (emphasis added); and $1.5 million for new officers to enforce the Camping Ban. *Id*., ¶ 129. The Complaint does not allege these new urban park rangers or officers have actually been hired, only their

positions have been budgeted. Moreover, all of this must be viewed in the context of Plaintiffs' allegation that the City spends over $40 million per year on the police department and an additional $2 million on Open Space and Mountain Parks ("OSMP") Rangers. Complaint, ¶ 126. Under these allegations, read in the light most favorable to Defendants, Defendants are entitled to establish any funds spent writing tickets for violations of the Camping Ban (the "enforcement" complained of by Plaintiffs, *see* Complaint, ¶ 84) are "nominal" in the context of overall police and OSMP Ranger spending, thus defeating taxpayer standing. *See* Order at 11.

B. Feet Forward and the Taxpayers' Injuries Are Not Within The Zone of Interests Protected By the Cruel and Unusual Punishment Clause.

The question of Feet Forward's and the Taxpayer Plaintiffs' standing has been litigated only in the context of supplemental briefing ordered by the Court in connection with Defendants' C.R.C.P. 12(b)(5) motion. *See* Order: Supplemental Briefing Motion to Dismiss, Standing/Political Question (Aug. 26, 2022). Defendants in their motion to dismiss and supplemental brief did not raise the question whether the injuries alleged by Feet Forward and the Taxpayer Plaintiffs fall within the zone of interests protected by the Cruel and Unusual Punishment Clause, and therefore, the Court made no ruling on the issue. The Motion, however, squarely presents the question.

Standing in Colorado is a two-factor analysis. A plaintiff must demonstrate that they have suffered: (1) an injury in fact; (2) "to a legally protected interest as contemplated by statutory or constitutional provisions." *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (Colo. 1975). The Court has ruled the Nonprofit and Taxpayer Plaintiffs sufficiently alleged injury in fact, viewing the allegations of the Complaint in the light most favorable to them. Order at pp. 12-13. The Court should now rule Feet Forward and the Taxpayer Plaintiffs have not established standing because

their alleged injuries do not fall within the zone of interests protected by the Cruel and Unusual Punishment Clause, Colo. Const. art. II, § 20.

That constitutional provision provides in full: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id*. This language indicates that the interest being protected is that of the person who against whom cruel and unusual punishment may be inflicted, not nonprofits whose missions might be adversely affected or taxpayers who don't want tax dollars spent on cruel and unusual punishments. *See Whitmore v. Arkansas*, 495 U.S. 149, 160 (1990) (no "personal constitutional right" to ensure that others are not subjected to cruel and unusual punishment); *see also Gilmore v. Utah*, 429 U.S. 1012, 1016-17 (1976) (Burger, C.J., concurring) (mother could not file cruel and unusual punishment claim on behalf of her son, who had waived death penalty appeals).

In a case involving the Eighth Amendment to the U.S. Constitution, the language of which is identical to Colo. Const. art. II, § 20, a federal court ruled a bail bond surety corporation did not have standing to assert claims under the Excessive Bail Clause of the Eighth Amendment. Even though the corporation sufficiently alleged that it had suffered economic injury as a result of the state law alleged to violate the Excessive Bail Clause, that injury was not to an interest legally protected by that clause. *Holland v. Rosen*, 277 F. Supp. 3d 707 (D.N.J. 2017). "[T]he Eighth Amendment's bail clause protects the interests of criminal defendants, not corporations who seek to provide bail bonds to them." *Id*. at 728. *Holland* quoted a Supreme Court opinion holding "the Eighth Amendment places limits on the steps a government may take against an *individual*, whether it be keeping him in prison, imposing excessive monetary sanctions, or using cruel and unusual punishments." *Id*. at 729 (*quoting Browning-Ferris Indus.*

of Vermont v. Kelco Disposal, Inc., 492 U.S. 257, 275 (1989)) (emphasis by the court); *see also Nashville Cmty. Bail Fund v. Gentry*, 496 F. Supp. 3d 1112, 1128 (M.D. Tenn. 2020) ("the rights secured by the Eighth Amendment belong to the defendant in a criminal proceeding, not to any third party"). The Cruel and Unusual Punishment Clause creates a personal right to be free from such punishments, not a right enforceable by third parties on behalf of those facing allegedly cruel and unusual punishment.

Neither Feet Forward nor the Individual Taxpayers allege that they themselves are at risk of being penalized for violation of the Camping Ban. As a matter of law, they cannot raise Cruel and Unusual Punishment Clause claims on behalf of third parties. Accordingly, the Court cannot enjoin Defendants from enforcing the Camping Ban against nonparties to vindicate the claimed rights of the Taxpayer Plaintiffs or Feet Forward. Moreover, the Court cannot enjoin Defendants from enforcing the Camping Ban against the three named Individual Plaintiffs while it is factually contested that they actually are currently homeless or face a reasonable fear of prosecution. Thus, the Motion must be denied.

VI. The Proposed Injunction Is Too Vague.

C.R.C.P. 65(d) provides that "[e]very order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." Plaintiffs request an injunction prohibiting Defendants from enforcing the Camping Ban against any homeless persons "when they cannot access indoor shelter." But what being unable to access indoor shelter means is disputed. As Defendants averred in the Answer, ¶ 178, "the Individual Plaintiffs may not be able to access shelter due to their own choices." *See*

Powell v. Texas, 392 U.S. 514, 551-52 (White, J., concurring) (plaintiff failed to establish Eighth Amendment violation when record did not show "it was not feasible for him to have made arrangements to prevent his being in public when drunk").

Plaintiffs' view of the case is a person who prefers to stay with her dogs, whose work shift prevents him from entering the shelter lottery[2], or who has been expelled from the shelter for conduct violations is a person who cannot access indoor shelter. Complaint, ¶¶ 137, 150, 162. Defendants' view is that none of these establish that the Individual Plaintiffs' alleged inability to access shelter is truly involuntary. Answer, ¶ 178; *see also* Order at 19 ("[t]he *Martin* holding was premised on the situation where no alternative shelter is available"). As the Court stated, "a factual record on this claim is appropriate and will facilitate appellate review on this particular claim." Order at 25. Under the state of the pleadings, Defendants are entitled to develop evidence the Individual Plaintiffs' alleged inability to access shelter is not involuntary. Only after consideration of such evidence, and only if Plaintiffs establish a reasonable fear of conviction for violation of the Camping Ban, could the court fashion an injunction that gives clear guidance as to what the City can and cannot do.

VII. Attorneys' Fees are Unavailable.

C.R.S. § 13-21-131(1) provides a cause of action against a peace officer for a person who has been "subjected . . . to the deprivation of any individual rights that create binding obligations on government actors secured by the bill of rights, article II of the statute constitution." Only the Individual Plaintiffs assert a claim under this provision, and only against the Chief. *See Ditirro v.*

[2] Nothing in the Complaint suggests Plaintiff Whitten is ineligible to reserve a bed at BSH. *See* Answer, ¶¶ 31-32.

Sando, 2022 COA 94, ¶¶ 35-38 (no claim under C.R.S. § 13-21-131 against employer of peace officer alleged to have deprived plaintiff of individual rights). Attorneys' fees are available only against the Chief, and only upon proof that the Chief subjected the Individual Plaintiffs to a deprivation of constitutionally protected rights. C.R.S. § 13-21-131(3).

Plaintiffs do not, however, ask the Court to find their rights have been violated in the past; the Motion seeks only forward-looking declaratory and injunctive relief, leaving the question whether the individual Plaintiffs have ever suffered a deprivation of rights under the Cruel and Unusual Punishment Clause for another day. Motion at 3. In other words, even if the Motion were to be granted and partial judgment entered, Plaintiffs would not have established that any of them have been subjected to a deprivation of their rights under the Cruel and Unusual Punishment Clause, much less from any action of the Chief. Answer, ¶ 91. In the absence of proof that the Chief caused a deprivation of the Individual Plaintiffs' rights in the past, attorney's fees are unavailable under the plain language of C.R.S. § 13-21-131.

WHEREFORE, Defendants respectfully request that the Motion be denied.

Respectfully submitted this 26th day of May 2023.

OFFICE OF THE CITY ATTORNEY

By: *s/ Luis A. Toro*
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Senior Counsel

Attorney for Defendants, City of Boulder and Maris Herold

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of May 2023, a true and correct copy of the foregoing **OPPOSITION TO MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS** was served via the Colorado Courts E-Filing System to counsel of record appearing herein.

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