IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-00977-PAB

THOMAS CARRANZA;
JESUS MARTINEZ;
RICHARD BARNUM;
THOMAS LEWIS;
MICHAEL WARD;
COLBY PROPES; and
CHAD HUNTER,

Plaintiffs, on their own and on behalf of a class of similarly situated persons,

v.

STEVEN REAMS, Sheriff of Weld County, Colorado, in his official capacity,

Defendant.

DEFENDANT'S SUPPLEMENTAL RESPONSE TO MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND EXPEDITED HEARING [ECF 1] IN COMPLIANCE WITH COURT ORDER [ECF 39]

Defendant Sheriff Steven Reams ("Sheriff"), by and through counsel, Matthew J. Hegarty, Esq., Andrew D. Ringel, Esq., and John F. Peters, Esq., of Hall & Evans, L.L.C., submits his Supplemental Response to Plaintiffs' Motion for ... Preliminary Injunction" [ECF 1] in Compliance with Court Order [ECF 39] and requests Plaintiffs' Motion be denied in its entirety,[1] as follows:

[1] In compliance with the Court's April 22, 2020, Minute Order [ECF 39], the Sheriff responds to ECF 1 only insofar as it seeks a preliminary injunction.

I. INTRODUCTION AND SUMMARY

Plaintiffs did not meet the applicable heightened standard for disfavored injunctive relief when their Motion was filed and Plaintiffs' ability to meet that standard has only weakened, and considerably so, due to the ongoing efforts of the Weld County Sheriff's Office ("WCSO") to keep staff, inmates, and the community safe. The Sheriff has previously provided this Court with a thorough discussion of the legal deficiencies in ECF 1, *see* ECF 26, and the Sheriff directs the Court to that pleading for a full treatment of those issues. Put simply, the WCSO has worked tirelessly to maintain inmate safety and Plaintiffs' arguments are completely without merit.

Plaintiffs are thus unable to satisfy the heightened burden necessary to attain a preliminary injunction. Plaintiffs' Motion must be entirely denied.

II. FACTUAL DEVELOPMENTS SINCE APRIL 10, 2020

The Supplemental Declaration of Captain Matthew Turner of the WCSO Detention Division responsible for the Weld County Jail ("WCJ") is filed with this Response. [*See* Turner Dec. , **Exh. B**].[2] Cpt. Turner's Declaration, along with its extensive attachments comprising emails, protocols, and other documents substantiating its contents, further supports the comprehensive and sustained effort the WCSO, initially outlined in the Sheriff's Declaration, *see* **Exh. A** to ECF 26, to address COVID-19 at the WCJ.

Since April 10, 2020, the Sheriff and the WCSO have continually refined and reassessed the policies and protocols of the WCSO to address COVID-19. Cpt. Turner's

[2] **Exh. A**, Decl. of Sheriff Steven Reams, was attached to ECF 26. [*See* ECF 26-1 to 26-47.] For clarity, the Sheriff will continue that sequence of exhibits.

Declaration, and the myriad supporting documents, contain a more complete description of the steps taken, but in compliance with the Court's order in ECF 39, the Sheriff summarizes several factual developments since April 10, 2020:

- Masks were issued to all inmates on April 9, 2020. [**Exh. B-1**].

- On April 13, 2020, the medical unit at the jail, managed by Turn Key Health Clinic ("TKHC"), received COVID-19 test kits, which TKHC had requested on April 3, 2020. [*See* **Exh. B-6**; Declaration of Dustin Owens, ¶ 9(m), **Exh. C**].

- State District Court Judge Thomas Quammen ordered the WCSO to provide information on the WCJ's medical capabilities, to consider in connection with a COVID-19-positive inmate's motion to reduce bond. [*See* **Exh. B-6**]. Dustin Owens, the WCJ Health Services Administrator, employed by TKHC, provided a description of WCJ's medical capabilities. [*See* **Exh. B-6**]. That inmate remains in the WCJ.

- WCSO command staff has continued to stress the importance of making inmates maintain proper sanitation, including cleaning sinks, toilets, and common areas after each use. [*See* **Exh. B-5, B-9**].

- Two pregnant inmates were released, on April 14, 2020, based on advice from the Weld County Department of Public Health and Environment ("WCDPHE") that COVID-19 posed a risk to their fetuses. [*See* **Exh. B**, ¶ 21].

- Inmates in isolation, i.e. inmates suspected, presumed, or confirmed positive for COVID-19, were tested for COVID-19 on April 14, 2020. [*See* **Exh. B**, ¶ 22].

- On April 14, WCSO staff wrote "10 minutes of surface contact time" on every bottle of cleaning spray in the WCJ, on the advice of the WCDPHE. [*See* **Exh. B-11**].

- On April 16, 2020, Colorado Supreme Court Chief Justice Nathan Coats continued a prior Chief Justice Directive barring all jury calls in Colorado state courts through June 1, 2020. [*See* **Exh. B-15**]. Similarly, on April 16, 2020, Chief Judge James Hartmann, Jr. of the 19th Judicial District of Colorado, vacated all court dates through 8 a.m. on June 1, 2020, excepting court dates necessary for public safety (including setting bonds), and certain court dates for in-custody criminal defendants. [*See* **Exh. B-15**].

- On April 17, 2020, WCSO command staff created a video based on a Centers for Disease Control ("CDC") video now played daily in each jail unit giving guidance on how to prevent COVID-19 spread to all WCJ inmates. [*See* **Exh. B-16**].

- WCJ refused to accept someone who violated a work release sentence, pursuant to a protocol requiring all other sentence options to be exhausted before the WCJ will accept convicts who violate alternative sentences, to reduce new arrivals in the WCJ. [*See* **Exh. B-18**].

- District Judges have ordered furloughs of convicts sentenced to the WCJ, ordering releases and returns to serve their remaining sentences later. [*E.g.,* **Exh. B-20**].[3]

- On April 20, 2020, Mr. Owens revised the criteria for moving patients out of isolation, per updated CDC guidance. [*See* **Exh. B-21**; Owens Dec., ¶ 9(r), **Exh. C**].

- On April 23, 2020, the WCSO took multiple steps to combat COVID-19, including:

  - implementing an order of the Colorado Department of Public Health and Environment ("CDPHE"), by requiring all WCSO deputies, both in the WCJ and in all other capacities, to wear masks whenever they cannot socially distance, wear gloves when appropriate, and maintain a six-foot distance from others whenever feasible [*see* **Exh. B-26**, **B-28**];

  - issuing five masks to each deputy staffing the WCJ to allow rotating of masks daily and to permit the other masks four days to decontaminate per CDC guidance [*see* **Exh. B-26**, **B-28**];

  - issuing all inmates new masks, and WCSO requested additional masks so each inmate can have two [*see* **Exh. B-29**];

  - asking Colorado Department of Corrections ("CDOC") to transport 27 inmates from the WCJ to CDOC, as the WCJ had completed the "DOC COVID-19 Screening Tool" for them [*see* **Exh. B-29**; *see also* **Exh. B-14** (protocol)].[4]

[3] These judicial decisions are important because of the Sheriff's lack of authority to modify any sentence or bond for anyone at the WCJ. [*See* ECF 26, at 21-23].

[4] However, the CDOC has determined not to accept any inmates from any Colorado jails including WCJ. [*See* **Exh. B-14**].

The WCSO has also continually assessed how best to house inmates within the physical limitations of the WCJ.[5] Efforts to most safely house inmates include:

- Unit movements for "high risk inmates," i.e., inmates a TKHC medical professional determined are at particularly high health risk from COVID-19, so these inmates can be housed in a cell by themselves to keep them as safe as possible. (Notably, this list does not include any of the named Plaintiffs.) [*See* **Exh. B-22, B-25**].

- The WCJ has continued to use its system, established before April 10, 2020, of placing units on quarantine status after an inmate in the unit tests positive for COVID-19; this quarantine remains for 14 days. After 14 days, the unit is sanitized and moves to a modified general population unit, in which 9 inmates are allowed out of their cells at a time with one deputy, to adhere to the State's 10-person limit on gatherings. [*See* **Exh. B-23**].

- The WCJ continues to have an isolation unit housing inmates suspected, presumptive, or confirmed positive for COVID-19. [*See* ***id.***].

- As units come out of quarantine, the WCSO continues to assess how best to house inmates, considering inmate health, safety, security, and other necessary considerations. Multiple units have now gone through a full 14-day quarantine period with no inmates showing COVID-19 symptoms. [*See generally* **Exh. B**, **Exh. B-1** to **B-31**].

Finally, TKHC continues to monitor guidance from the CDC, the World Health Organization, the National Commission on Correctional Health Care, and state and local governments, agencies, and health departments, to implement recommendations and requirements for the WCJ and other jails to remain in compliance with this guidance, as

[5] In compliance with ECF 39, the Sheriff has attached as **Exh. B-32** floor plans and pod diagrams of the WCJ for WCJ's three most common housing unit types. There are a limited number of pod designs in the jail, each of which is used for multiple pods; the different designs in **Exh. B-32** are representative of these three types. Due to the obvious security concerns from divulging this information publicly, the exhibits show generic pod layouts and floor plans but do not identify particular pods, the overall floor plan or layout of the WCJ, or other sensitive information that could create a security risk. Moreover, the other WCJ types of housing units are nonstandard and, due to their unique layout and the safety and security concerns which would result from their public disclosure, are unable to be provided to the Court apart from its *in camera* review. [*see* **Exh. B** at 12, ¶ 45(d).]

much as practicable. [*See* **Exh. C**, Owens Decl., ¶¶ 9(q)-(r); **Exh. D,** Cooper Decl., ¶ 10]. As these TKHC Declarations show, TKHC has put in place numerous procedures and protocols—almost all of which were in place before this lawsuit was filed—to provide inmates with the appropriate level of health care at the WCJ. Moreover, if TKHC medical staff determine they cannot provide level of care necessary to ensure the inmate's health and safety in the WCJ they are transported to an outside facility.

The steps the WCSO has taken, and continues to take, in collaboration with TKHC, public health officials, and other appropriate experts, show the WCSO has remained vigilant and proactive in protecting the health and safety of inmates and staff in the WCJ, and the community at large.

III. STANDARD OF REVIEW

As the Sheriff has previously argued [ECF 26, at 5-8], Plaintiffs provide an incorrect standard for a preliminary injunction.[6] Plaintiffs must establish: (1) they will suffer irreparable injury unless the relief issues; (2) the threatened injury outweighs whatever damages the relief might cause the Sheriff's ability to operate the WCJ; (3) such injunctive relief will not be adverse to the public interest; and (4) Plaintiffs have a substantial likelihood of succeeding on the merits of their case. ***Schrier v. Univ. of Colo.***, 427 F.3d 1253, 1258 (10th Cir. 2005). Injunctive relief is "extraordinary" and should not issue unless

[6] This Court applies the same standard in ruling on a preliminary injunction as on a temporary restraining order ("TRO"), so all the arguments in ECF 26 are equally applicable to this Response. *See* ***Tooele Cnty. v. United States***, 820 F.3d 1183, 1187 (10th Cir. 2016) (footnote omitted) (citation omitted) ("[TROs] and preliminary injunctions differ in how long they can last. Temporary restraining orders can last no more than fourteen days; preliminary injunctions can last longer.")

the right to relief is "clear and unequivocal." ***Kikumura v. Hurley***, 242 F.3d 950, 955 (10th Cir. 2001). But here Plaintiffs must also meet the "heightened burden" for injunctive relief where the sought-after relief: (1) disturbs the status quo; (2) is mandatory instead of prohibitory; or (3) affords the movant substantially all the relief it may recover after a full merits trial. ***SCFC ILC, Inc. v. VISA USA, Inc.***, 936 F.2d 1096, 1098-99 (10th Cir. 1991); *accord* ***O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft***, 389 F.3d 973, 975 (10th Cir. 2004) (en banc) ("***O Centro***"), *aff'd on other grounds sub nom.*, ***Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal***, 546 U.S. 418 (2006); *see also* ***In re HomeAdvisor, Inc. Litig.***, 2019 U.S. Dist. LEXIS 141984, at *11-14 (D. Colo. Aug. 20, 2019) (Brimmer, C.J.) (discussing whether injunction disturbs status quo or is mandatory). Plaintiffs "must make a strong showing both with regard to the likelihood of success on the merits and with regard to the balance of harms, and may not rely on our modified likelihood-of-success-on-the-merits standard." ***O Centro***, 389 F.3d at 976. As set forth in ECF 26, all three bases for this heightened burden apply here. *See* ECF 26, pp. 7-8.

In addition to this heightened burden, Plaintiffs must, but cannot, meet the additional limitations and requirements of the Prison Litigation Reform Act of 1995 ("PLRA") applicable to injunctive relief here. [*See* ECF 26, at 9-14]. Moreover, the important legal principles previously articulated by the Sheriff continue to apply. Namely, this Court must show appropriate deference to the expertise and judgment of jail officials. [ECF 26, at 14-16]. Plaintiffs have misinterpreted applicable conditions of confinement law. [ECF 26, at 16-18]. Both this Court and the Sheriff lack the authority to modify state court sentences and bonds. [ECF 26, at 18-22]. Plaintiffs are required to establish a

custom, policy, or practice of the Sheriff violated their constitutional rights, including meeting the applicable causation and state of mind requirements, under ***Monell v. Dep't of Soc. Servs.***, 436 U.S. 658, 694 (1978). [ECF 26, at 23-26]. And any purported violation of CDC guidelines is not the equivalent of a constitutional violation. [ECF 26, at 27-28].

IV. ARGUMENT

Plaintiffs have not satisfied and cannot satisfy any of the four elements necessary to grant a preliminary injunction. Importantly, the Court must assess Plaintiffs' claimed entitlement to a preliminary injunction in light of the state of the facts as of April 28, 2020, not as of April 7, 2020. This Court should deny Plaintiffs' Motion and deny the requested preliminary injunction as a matter of law.

1. Plaintiffs have no likelihood of success on the merits whatsoever.

Plaintiffs have entirely failed to address how they succeed on a claim of municipal liability, Plaintiffs' only claim. [ECF 26, at 23-27 (providing the requirements for a Plaintiff to prove a claim pursuant to ***Monell***, 436 U.S. 658); ***id.*** at 32-33 (discussing Plaintiffs' complete failure to argue municipal liability in ECF 1)]; *see also* ***Waller v. City & Cnty. of Denver***, 932 F.3d 1277 (10th Cir. 2019) (analyzing at length the Tenth Circuit municipal liability standard). But Plaintiffs cannot even reach this issue, as they have ***no*** likelihood of success on the merits of an underlying Eighth or Fourteenth Amendment claim for deliberate indifference to jail conditions. [ECF 26, at 16-18 (single applicable standard for Eighth and Fourteenth Amendment jail conditions claims); ***id.*** at 29-32 (outlining many of proactive steps taken well before or on April 10, 2020, to combat COVID-19 in the WCJ and explaining these steps prove Sheriff and WCSO were not deliberately indifferent)].

In light of the additional steps the Sheriff and the WCSO have taken since April 10, 2020, as outlined above and in the attachments to this Response, Plaintiffs now have even less of a prospect of success on the merits. The WCSO continues to proactively protect inmate health and safety and has made well more than the "reasonable efforts" necessary to defeat a jail conditions claim. *See* ***Despain v. Uphoff***, 264 F.3d 965, 975 (10th Cir. 2001) ("If an official is aware of the potential for harm but takes reasonable efforts to avoid or alleviate that harm, he bears no liability under this standard.").

This conclusion is borne out by the reducing numbers of inmates in isolation and "suspected positive" for COVID-19 in the WCJ. Data compiled by the Sheriff—and sent daily to Plaintiffs' counsel—in compliance with the Court's Order Granting In Part and Denying in Part Plaintiffs' requested expedited discovery, [ECF 36] shows on April 11, 2020, **14** inmates were in isolation in the WCJ, **6** tested positive for COVID-19 as diagnosed by a health care professional, and **9** were designated "suspected positive" by a health care professional. After hovering around similar numbers for several days, as of April 23, 2020, **9** inmates were in isolation in the WCJ, **8** tested positive for COVID-19 as diagnosed by a health care professional, and **1** was designated "suspected positive" by a health care professional.[7] While there has been a slight increase in the number of positive cases, this is an understandable consequence of tests confirming some of the medical professionals' suspected diagnoses. The far more important data point is the number of "suspected positive" cases which dropped dramatically, from **9** to only **1**. Fewer

[7] Plaintiffs' counsel possess this data as it was transmitted to them on April 23, 2020, and the email transmission can be provided to the Court upon its request.

suspected positive inmates will by definition lead to fewer future confirmed positive inmates. Simply, the Sheriff's and WCSO's efforts to reduce COVID-19 transmission in WCJ have proved successful.

Similarly, several WCJ units which went on 14-day quarantines after having an inmate confirmed positive for COVID-19 have either now completed the 14-day period or are close to doing so. [*See generally* **Exh. B**, **Exh. B-1** to **B-31**].[8]

Finally, as of April 24, 2020, only two of the Plaintiffs for the Fourteenth Amendment claim remain in WCJ custody, and neither Plaintiff for the Eighth Amendment claim remains in custody. Longstanding Tenth Circuit precedent this Court must follow dictates the released Plaintiffs' claims for injunctive relief (the only type of relief sought in ECF 1) are moot. *E.g.*, ***Green v. Branson***, 108 F.3d 1296, 1300 (10th Cir. 1997). And even were this Court to consider the interests of the putative class to avoid a mootness determination, Plaintiffs' injunctive relief claim still fails on its merits.

Plaintiffs have no likelihood of success on the merits and certainly cannot make the "strong showing" required for this Court to grant disfavored injunctive relief. But even if Plaintiffs had some minimal likelihood of proving their claims, they have neither argued nor have any likelihood of success on their municipal liability claims which, it bears repeating, are the ***only*** types of claims they advance in this litigation. *See generally* ***Monell***, 436 U.S. 658, and its progeny, including ***Waller***, 932 F.3d 1277.

[8] In this context, the Sheriff notes it cannot be the constitutional standard for the Sheriff to have to prevent ***all*** inmates from getting COVID-19 in the WCJ or ***any*** spread of the disease in the WCJ population. A comparison of the Sheriff's efforts to the ongoing public spread of COVID-19 in various locations publicly reported demonstrates the overall efficacy of the WCJ's efforts. [*See* **Exh. E**, Greeley Tribune Story about JBS].

2. Decreasing numbers of COVID-19 cases in the WCJ show Plaintiffs do not face irreparable harm

The Sheriff acknowledges falling ill with COVID-19 poses real and serious health risks to many people worldwide, including Plaintiffs. To the Sheriff's knowledge, however, none of the Plaintiffs is sick with COVID-19. Further, contrary to Plaintiffs' claim they face uniquely high health risks from their co-morbidities, none of them were included in the list of inmates WCJ medical staff identified as high risk for dangers from COVID-19. [*See generally* **Exh. B-22, B-25**]. And those Plaintiffs no longer in the WCJ face no risk of contracting COVID-19 from the WCJ, let alone irreparable harm from such a risk. Further, as the objective medical data outlined above shows, the WCJ has successfully reduced the risk of inmates contracting COVID-19. Considering the heightened showing needed for this disfavored injunctive relief, Plaintiffs cannot demonstrate the current WCJ conditions create any greater risk of irreparable harm than exists in Colorado generally.

3. The threatened injury does not outweigh potential harm to WCJ and WCSO.

As previously argued [ECF 26, at 33-35], Plaintiffs entirely fail to acknowledge the many identifiable harms to the WCJ from Plaintiffs' requested injunctive relief. These multiple potential harms weigh even more heavily against a preliminary injunction. Expenses to taxpayers could be nearly uncapped; the Court would be required to intervene in the minutiae of jail management continuously to address changing circumstances and updated public health recommendations; and the Sheriff's legal right to maintain control over the WCJ would be severely compromised, to list just a few potential harms. Plaintiffs cannot make the "strong showing" required for the Court to

grant this disfavored injunctive relief. The Court must conclude Plaintiffs have not met their burden on this "balance of harms" factor.

4. Plaintiffs' requested injunctive relief would be adverse to the public interest because it unreasonably threatens public safety.

The PLRA requires this Court "give substantial weight to any adverse impact on public safety" in considering injunctive relief that would release prisoners. 18 U.S.C. § 3626(a)(2); [ECF 26 at 9-14]. Plaintiffs disregarded this requirement and do not discuss public safety or acknowledge public safety risks at any point. As the floor plans and pod diagrams in **Exh. B-32** show, it is neither possible nor advisable for the WCSO to patrol the WCJ to ensure all inmates are at least six feet from all other people at all times. Plaintiffs ask, in the alternative, this Court order prisoners released from the WCJ. [ECF 1, at 7]. Beyond the multiple legal impediments to such an order [ECF 26, at 9-14, 18-23], releasing inmates would create an unjustifiable public safety risk. Decisions about the total number of inmates remaining in the WCJ are therefore better left to the state judges who have been carefully examining inmates' requests for release. [*See* **Exh. B-6**, **B-20**]. This Court should be mindful of comity and federalism in this context.

5. If the Court orders injunctive relief, significant security should be required.

Fed. R. Civ. P. 65(c) allows the Court to order a security as a condition of any injunctive relief "to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." The Sheriff asserts any preliminary injunction is likely to cause the taxpayers of Weld County to bear significant costs. Thus, to compensate those taxpayers for what could be months of potentially improvident relief, the Court should order posting of a security interest of at least $1,000,000, which is less than two

weeks' cost of running the WCJ. [ECF 26 at 39 n. 13]. The basis for a security is further elaborated in the Sheriff's prior submission. [ECF 26 at 39-40].

V. CONCLUSION

In conclusion, for the foregoing reasons, as well as based on all the previously articulated arguments, authorities, and evidence in ECF 26, Defendant Sheriff Steven Reams, the elected Sheriff for the County of Weld, State of Colorado, respectfully requests this Court enter an Order: denying Plaintiffs' application for a preliminary injunction in this matter; and granting all other relief deemed just and proper.

Respectfully submitted this 24th day of April, 2020.

s/ Matthew J. Hegarty
Matthew J. Hegarty, Esq.
Andrew D. Ringel, Esq.
John F. Peters, Esq.
of HALL & EVANS, LLC
1001 17th Street, Suite 300
Denver, CO 80202
T: (303) 628-3300
F: (303) 628-3368
hegartym@hallevans.com
ringela@hallevans.com
petersj@hallevans.com
ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on this 24th day of April, 2020, on or before 12:00 PM MDT, a true and correct copy of the foregoing **DEFENDANT'S SUPPLEMENTAL RESPONSE TO MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND EXPEDITED HEARING [ECF 1] IN COMPLIANCE WITH COURT ORDER [ECF 39]** was electronically filed with the Clerk of Court which will send notification of such filing to the following email addresses:

Darold W. Killmer
David A. Lane
Andrew Joseph McNulty
Michael Paul Fairhurst
KILLMER LANE & NEWMAN LLP
dkillmer@kln-law.com
dlane@kln-law.com
amcnulty@kln-law.com
mfairhurst@kln-law.com
Attorneys for Plaintiffs Thomas Carranza, Jesus Martinez, Michael Ward, Colby Propes, and Chad Hunter

David George Maxted
MAXTED LAW LLC
dave@maxtedlaw.com

Jamie Hughes Hubbard
STIMSON STANCIL LABRANCHE HUBBARD LLC
hubbard@sslhlaw.com

Attorneys for Plaintiffs Thomas Carranza, Jesus Martinez, Michael Ward, Colby Propes, and Chad Hunter

Daniel David Williams
Lauren Elizabeth Groth
HUTCHINSON BLACK & COOK, LLC
williams@hbcboulder.com
groth@hbcboulder.com
Attorneys for Plaintiffs Richard Barnum and Thomas Lewis

Mark Silverstein
Rebecca Teitelbaum Wallace
Sara R. Neel
AMERICAN CIVIL LIBERTIES UNION-DENVER
msilverstein@aclu-co.org
rtwallace@aclu-co.org
sneel@aclu-co.org
Attorneys for Plaintiffs Richard Barnum and Thomas Lewis

s/ Amber Tamborello, Paralegal at
HALL & EVANS, L.L.C.