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

Civil Action No. 15-cv-00891-RPM

MICHAEL YOUNG, an individual,

Plaintiff,

v.

THE CITY OF LOVELAND, a municipal corporation,
DEREK STEPHENS, individually; and in his official capacity as a Loveland Police Officer, and
CHRISTOPHER BROWN, individually and in his official capacity as a Loveland Police Officer,

Defendants.

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**REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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Defendants, **CITY OF LOVELAND** (hereinafter "Loveland"), and **CHRISTOPHER BROWN**, by their attorneys, **SENTER GOLDFARB & RICE, LLC**, and pursuant to Fed. R. Civ. P. 56, submit this Reply Brief in support of their Motion for Summary Judgment, as follows:

## I. REPLY IN SUPPORT OF UNDISPUTED MATERIAL FACTS

Plaintiff failed to respond to each of Defendants' Undisputed Material Facts. Plaintiff appears to admit, at least in part, Defendants' SUMF ¶¶ 2, 3, 7, 8, 9, 10, and 11. Because Plaintiff did not provide a substantive response to portions of the paragraphs listed above and Defendants' remaining facts [SUMF ¶¶ 1, 4, 5, 6, 12, and 13], those facts should be deemed admitted for purposes of the Motion.

## II. RESPONSE TO PLAINTIFF'S "DISPUTED" FACTS

Plaintiff failed to set forth any material disputed facts in his Response, even though his burden was to provide "specific facts that show the existence of a genuine issue of material fact." *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991). Instead, Plaintiff recites immaterial and prolix facts, most of which are not in dispute, but are irrelevant to the Court's analysis. Factual disputes about immaterial items are irrelevant. *Hall v. Bellmon*, 935 F.3d 1106, 1111 (10th Cir. 1991).

1. Undisputed that Plaintiff did not possess a gun when officers made contact with him, but immaterial to the Motion. It is also undisputed that Officers Brown and Stephens did not know that.

2. Undisputed that no daggers were found in Plaintiff's house, but immaterial to the Motion. Officers had reasonable suspicion that Plaintiff was in possession of a firearm.

3. This is argument, not fact. Denied, but immaterial. The conduct at issue is Officer Brown's alleged use of force, and whether Loveland has an unconstitutional policy that was the direct cause of Plaintiff's alleged injuries.

4. This is argument, not fact. Denied, but immaterial. Officers had reasonable suspicion that Plaintiff was in possession of a firearm.

5. "Direct knowledge" is vague and undefined, but immaterial whether the affiant supervisor for the warrant had direct knowledge of the events of April 14, 2014.

6. Denied. Plaintiff's Exhibit 3 shows that Officer Sauter stated she saw a gun, but immaterial to the Motion whether there was actually a gun at the residence. The officers had reasonable suspicion that Plaintiff was in possession of a firearm.

7. Undisputed, but immaterial to the Motion.

8. This is argument, not fact. Denied, but the content of reports authorized after the incident is immaterial to the Motion.

9. This is argument, not fact. Undisputed that information from prior contacts with Plaintiff was used in swearing out an arrest warrant, but immaterial to the Motion.

10. This is argument, not fact. Denied, but immaterial that Plaintiff alleges his house was damaged.

11. Undisputed that Plaintiff advised the Loveland Police Department he could not drive to the station, but denied as to the rest. Also immaterial to the Motion.

12. Undisputed that Plaintiff's mother spoke with the Loveland Police Department, but immaterial and irrelevant whether Plaintiff's mother advised the Loveland Police Department that she would obtain exact change to bond Plaintiff out.

13. Denied, but immaterial to the Motion. *See* SUMF ¶ 7 – Officer Brown could see that plaintiff appeared injured and had a cane. Given the apparent injury, the officers modified their felony stop.

14. Immaterial whether Plaintiff complied with orders to the best of his ability. It is undisputed that Plaintiff failed to comply with orders, including eventually exiting the vehicle and telling the officers to "fuck off." *See* SUMF ¶ 6.

15. This is argument, not fact. Denied as there is no evidence of a policy of using "overwhelming force and intimidation."

16. Undisputed that officers yelled at Plaintiff to get him to comply with commands, and that a firearm was pointed at him. The rest is argument, not fact.

17. Undisputed that Plaintiff told the officers to "fuck off" in response to commands.

18. Denied, but immaterial to the Motion. Officer Stephens' alleged use of excessive force is not at issue in this Motion. Undisputed that Officer Brown provided cover from over a car length away from Officer Stephens and Plaintiff.

19. Denied, but immaterial. Officer Stephens' alleged use of excessive force is not at issue in this Motion.

20. Denied, but immaterial to the Motion. Officer Stephens' alleged conduct is not at issue in this Motion.

21. Denied, but immaterial. Plaintiff's allegation is irrelevant to the claims at issue in this Motion.

## III. RESPONSE TO PLAINTIFF'S UNDISPUTED FACTS

1. Undisputed, but immaterial to the Motion.

2. Undisputed, but immaterial to the Motion.

3. Undisputed that Plaintiff did not have a gun in his possession when the vehicle was stopped, but immaterial to the Motion. The arresting officers had reason to believe Plaintiff may have had a gun.

4. Undisputed that the potential gun may have been Plaintiff's ice bag when the vehicle was stopped, but immaterial to the Motion. It is unknown whether Plaintiff had a gun previously at his residence, or whether Plaintiff had a gun on his person at the time of the felony stop.

5. Undisputed that officers located the ice bag at the time of the stop, but immaterial to the Motion.

6. Undisputed, but immaterial to the Motion.

7. Plaintiff's evidence, Exhibit 6, does not support his alleged fact that the Loveland Police Department knew the black bag was full of money, and did not contain a gun. Again, Plaintiff may have had a gun on his person. However, immaterial to the Motion.

8. Immaterial to the Motion.

9. Undisputed that Plaintiff's mother and Loveland police discussed Plaintiff's bond and that she was to bring Plaintiff to the police station, but immaterial to the Motion whether the discussion concerned exact change, and whether a route and time of arrival were discussed.

10. Ms. Young's compliance with the stop was questioned by the officers. Undisputed that Ms. Young eventually stopped in a parking space at the end of the parking lot. *See* Defendants' SUMF ¶ 6. Immaterial whether Ms. Young was trying to elude police.

11. Defendants disagree with Plaintiff's characterization of the officers' actions, but admit the officers were in an unmarked vehicle, wore plain clothing, and pointed their firearms at the vehicle.

12. Undisputed, but immaterial to the Motion.

13. It is undisputed that the officers perceived there to be a threat given Plaintiff's history and these officers' knowledge of the weapons. Plaintiff's injuries are immaterial to the Motion. It is undisputed that Plaintiff was not initially cooperative with the officers' commands, and when he exited the vehicle, he told the officers to "fuck off." *See* Defendants' SUMF ¶ 6.

## IV. ARGUMENT

### A. Plaintiff's Municipal Liability Claim Fails for Lack of Evidence of an Unconstitutional Policy, Custom or Practice.

Plaintiff provides much argument, but fails to cite to any applicable legal authority and disputed facts necessary to defeat the requested dismissal of his municipal liability claim. Plaintiff offers no evidence that Loveland has a custom or practice of allowing officers to use excessive force against persons so situated as Plaintiff. He fails to reference any other excessive force incidents, nor does Plaintiff explain through legal or factual citation how such a policy caused Plaintiff's injuries.

#### 1. No Evidence that Loveland's Written Policies are Unconstitutional.

Though Plaintiff's argument remains unclear to Defendants, he appears to challenge Loveland's written policies concerning use of force, taking complaints, and officer safety as unconstitutional because such policies were allegedly not followed during the subject incident. However, Plaintiff does not explain how the policies listed are unconstitutional on their face. That said policies do not address matters Plaintiff believes they should address, *i.e.*, care of property during a search, and probable cause determinations, does not make Loveland's written policies unconstitutional.

Further, Plaintiff fails to show how the Constitution, not just Loveland's written policies, is implicated. *Porro v. Barnes*, 624 F.3d 1322, 1329 (10th Cir. 2010); *Hovater v. Robinson*, 1 F.3d 1053, 1068 (10th Cir. 1993) ("Failure to adhere to administrative regulations does not equate to a constitutional violation."). None of the policies identified by Plaintiff facially permit unconstitutional conduct. *See Okla. City v. Tuttle*, 471 U.S. 808, 824 (1985) ("Where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be

necessary."). Plaintiff offers no evidence that any of the challenged policies directly caused his injuries. Thus, Plaintiff's purported municipal liability theory based upon an unconstitutional written policy fails.

**2. No Evidence that Loveland Failed to Supervise the Involved Officers Necessary to Establish an Unconstitutional Custom or Practice.**

Though this argument also remains unclear to Defendants, Plaintiff appears to allege that Loveland has a custom or practice of failing to supervise its officers such that the officers made an unsupported determination that Plaintiff was a felon in possession of a firearm, which Plaintiff alleges led to the search of his home and his physical injuries. In essence, Plaintiff appears to argue that Loveland was required by law to supervise the officers to find an actual gun in Plaintiff's possession before stopping him. A municipal custom may have not received formal approval through the government body's official decision-making channels. *Monell v. Dept. of Soc. Servs. of New York*, 436 U.S. 658, 691 (1978). However, Plaintiff fails to cite any applicable law supporting his apparent theory that Loveland's alleged faulty supervision of the officers in making reasonable suspicion determinations rose to the level of an unconstitutional custom. As well, the undisputed facts are that Loveland Police Department supervisors received the information contained in Plaintiff's Exhibits 3, 11, 12 and 13, and an arrest warrant reasonably issued based upon the same. Therefore, the factual record is likewise devoid of evidence of an unconstitutional municipal custom or practice.

Plaintiff also fails to show how an alleged lack of supervision caused him to be injured. *See Lopez v. LeMaster*, 172 F.3d 756, 760 (10th Cir. 1999) (plaintiff did not tie poor supervision to his alleged injuries). Further, Plaintiff relies solely on this one incident and no others, which does not support the existence of a municipal custom or practice. *See City of Okla. City v. Tuttle*,

471 U.S. 808, 823-24 (1985); *Patterson v. Fort Worth,* 588 F.3d 838, 852 (5th Cir. 2009). For these reasons, Plaintiff's municipal liability claim against Loveland based upon a failure to supervise theory should be dismissed.

### B. Officer Brown is Qualifiedly Immune from Plaintiff's First and Fourth Amendment Claims.

Plaintiff's Response fails to address Defendants' argument that Plaintiff's First Amendment retaliation claim against Officer Brown (Third Claim for Relief) should be dismissed for lack of interaction between Plaintiff and Officer Brown. It is undisputed that Officer Brown had no physical contact with Plaintiff. [SUMF ¶¶ 8, 10, and 12.] It is also undisputed that there was no exchange of words between them after Plaintiff told the officers to "fuck off." [*Id.*] Because Plaintiff offers no evidence of a factual dispute necessary to overcome summary judgment on his First Amendment retaliation claim against Officer Brown, the claim should be dismissed.

#### 1. No Evidence that Pointing Gun at Plaintiff and Grandmother is a Clearly Established Constitutional Violation.

Plaintiff has not shown a constitutional violation based upon the record of this case and has not cited an established guiding principle of law applicable to the facts that if applied, would show a constitutional violation. Plaintiff cites no case law supporting his argument that Officer Brown used excessive force in violation of the Fourth Amendment when he allegedly pointed his gun at Plaintiff and his grandmother. It is undisputed the officers had information that Plaintiff was a felony offender who was under investigation for possession of a weapon. [SUMF ¶¶ 1, 2, and 5.] It is also undisputed that when the officers searched Plaintiff's home, neither Plaintiff nor a weapon were found, so the officers were reasonably cautious that Plaintiff may have the weapon in his possession. [Plaintiff's Exhibit 12, ¶¶ 1 and 2.] Thus, based upon what the officers knew at the

time, they reasonably believed the suspects may be armed. *Holland ex rel Overdorff v. Harrington*, 268 F.3d 1179, 1192 (10th Cir. 2001). Plaintiff cites no case law holding that it is a clearly established constitutional violation to point a gun at a person who is reasonably perceived to pose a risk of danger to the officers. That the officers later searched the black bag, the Plaintiff himself and the car after the fact and did not find weapons, does not create genuine disputes of fact necessary to overcome summary judgment.

**2. No Evidence that Officer Brown Failed to Intervene.**

It is undisputed that Officer Brown was the cover officer in this scenario, but the factual record shows that he did not have a reasonable opportunity to intervene. Plaintiff fails to provide any evidence in his Response necessary to show how Officer Brown could have intervened such that his alleged failure to do so amounts to a constitutional violation. Instead, Plaintiff simply cites several cases where failure to intervene was found to be clearly established. However, "for liability to attach for failure to intervene, the officer must have had the realistic opportunity to prevent the harm from occurring." *Stewart v. City of Prairie Village, Kan.*, 904 F.Supp.2d 1143, 1158 (D. Kan. Oct. 17, 2012); *see also Lanigan v. Village of East Hazel Crest*, 110 F.3d 467, 477 (7th Cir. 1997) (An officer is liable for failure to intervene if he knows a constitutional violation is being committed). The officer must observe or have reason to know the other officer is using excessive force. *Id.*; *Casey v. City of Federal Heights*, 509 F.3d 1278, 1283 (10th Cir. 2007) (Officer must have watched the incident and have done nothing to prevent it to be liable for failure to intervene).

Without more than the fact that Officer Brown provided cover, there are no material facts necessary to show a constitutional violation. Plaintiff does not provide any facts that show Officer Brown had the opportunity to intervene in this rapidly evolving, high intensity situation, or that he

knew a constitutional violation was being committed. *See* SUMF ¶¶ 8, 9, and 10. Indeed, Officer Brown was maintaining cover on the opposite side of the police vehicle when Officer Stephens contacted Plaintiff. As a result, Plaintiff's failure to intervene theory against Officer Brown fails for lack of evidence of a constitutional violation, the first prong necessary to overcome qualified immunity.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that on this 19th day of August 2016, I electronically filed a true and correct copy of the above and foregoing **REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**, with the Clerk of Court using the CM/ECF system which will send notification of such filing to the below email address.

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