IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 15-cv-1775-WJM-MJW

ERIC VERLO;
JANET MATZEN; and
FULLY INFORMED JURY ASSOCIATION;

Plaintiffs,

v.

THE CITY AND COUNTY OF DENVER, COLORADO, a municipality; and ROBERT C. WHITE, in his official capacity as chief of police for Denver; MICHAEL MARTINEZ, in his official capacity as Chief Judge of the Denver district court;

Defendants.

MOTION FOR ORDER TO SHOW CAUSE WHY DEFENDANT ROBERT C. WHITE SHOULD NOT BE HELD IN CONTEMPT OF COURT

Plaintiffs by and through attorney David Lane, hereby files the following MOTION FOR ORDER TO SHOW CAUSE WHY DEFENDANT ROBERT C. WHITE SHOULD NOT BE HELD IN CONTEMPT OF COURT. The grounds for this motion are set forth fully herein:

1. This Honorable Court rendered an Order yesterday, August 25, 2015 stating that "…the Court deems it conceded for preliminary injunction purposes that Plaintiffs are likely to succeed on the question of whether the First Amendment protects their message." (Order page 14). In other words, the jury nullification literature and speech associated with it are protected forms of expression under the Constitution of the United States.

2. This Court further Ordered:

> 1. The City and County of Denver, its police chief, Robert C. White, in his official capacity, and the Second Judicial District (including their respective officers, agents, servants, employees, attorneys, and other persons who are in active concert or participation with any of them) (collectively, "Defendants") are PRELIMINARILY ENJOINED as follows (all capitalized terms bear the respective meanings assigned above):
>
> > a. Save for any Plaintiff physically located on the Landscaping or Gravel Area, Defendants shall not enforce Paragraph 1 of the Plaza Order against any Plaintiff (including any FIJA member) physically located in the Restricted Area to the extent he or she is otherwise lawfully seeking to distribute and/or orally advocate the message contained in the pamphlets titled "Fresh Air for Justice" and/or "Your Jury Rights: True or False?"
> >
> > b. To the extent consistent with the foregoing prohibition, Defendants remain free to enforce Paragraphs 2–4 of the Plaza Order.

(Order, pps. 25-26).

3. The Plaintiffs in this case, along with others, were in the Lindsey-Flanigan plaza this morning, peacefully passing out jury nullification literature. (See attached photos).

4. At approximately 10:00 a.m., a cadre of Denver police officers swarmed into the group of pamphleteers and began seizing items from them. The items seized included but are not limited to the following: All literature regarding jury nullification including about 1,000 pamphlets, a small shade shelter, a table, four chairs, buckets, a cooler, signs and other items.

5. While on-scene, the police attempted to take personal property such as purses, computers, backpacks and other items. The pamphleteers resisted the attempts by the

police to steal their personal property.

6. In talking with Wendy Shea, counsel for Denver and the Chief, she indicated that this action was taken pursuant to the following Denver Municipal Ordinances:

> **Sec. 49-246. Order of removal.**
>
> The manager of public works or the manager's designee (hereinafter in this article, "manager") is authorized to remove or to order the removal of any article, vehicle or thing whatsoever encumbering any street, alley, sidewalk, parkway or other public way or place (any such thing hereinafter in this article to be called an "encumbrance"). The manager may prescribe appropriate methods, specifications, placement and materials for encumbrances in the public right-of-way.
>
> (Code 1950, § 336.1-1; Ord. No. 757-04, § 1, 10-18-04)
>
> **Sec. 49-247. Failure to remove; removal by city.**
>
> (a) If the manager orders the removal of an encumbrance which has previously been permitted or is legally in place in the right-of-way and said encumbrance is not removed within a reasonable time after notice to the owner or person in charge thereof under, such time to be specified in the notice, or if the owner or person in charge cannot be readily found for the purpose of serving such notice, the manager shall cause the encumbrance to be removed.
>
> (b) If the manager orders the removal of an encumbrance which has not previously been permitted, or is not legally in the right-of-way, said encumbrance shall be immediately removed by the owner or the manager may immediately remove said encumbrance.
>
> (c) Notwithstanding the above, the manager may, without notice to the owner, immediately remove any non-permitted, illegal encumbrance without notice to the owner.
>
> (Code 1950, § 336.1-2; Ord. No. 757-04, § 1, 10-18-04)
>
> **Sec. 49-248. Duty of police department.**
>
> It shall be the duty of all members of the police department to report to the manager such encumbrances and to remove the same in accordance with the provisions hereof.

7. In seizing the aforementioned property, the City is blatantly ignoring the Order of this Court. The police are engaged in retaliatory action for the exercise of protected speech. There is no statute in Denver defining the word “encumbrance” thus the police

have decided that anything and everything in the possession of the Plaintiffs and their associates is an "encumbrance" and may be removed. They have taken this action to punish the Plaintiffs and their associates for the exercise of free speech as defined by this Court one day previously.

8. Merriam-Webster dictionary defines "encumbrance" as "something that encumbers: impediment, burden" It further defines "encumber" as : to make (someone or something) hold or carry something heavy: to cause problems or difficulties for (someone or something).

9. Clearly, as the attached photographs show, the pamphleteers were not "encumbering" ingress, egress or anything else simply by their presence peacefully passing out jury nullification literature. The mere presence of a packet of literature, a small shade shelter canopy, a cooler, a small table and signs encumbered nothing.

10. The Denver police, acting as jack-booted thugs in blatant violation of this Court's Order, came into the plaza and began seizing all property not being carried by a pamphleteer. The only plausible explanation for this is that the police were acting in retaliation for the exercise of the free speech rights of the pamphleteers.

11. Retaliation for the exercise of free speech has long been prohibited. The Tenth Circuit has previously held that First-Amendment retaliation claims are clearly established. *See Buck v. City of Albuquerque*, 549 F.3d 1269, 1293 (10th Cir. 2008; *Mimics. Inc. v. Village of Angel Fire*, 394 F.3d 836, 848 (10th Cir. 2005)("It has long been clearly established that the First Amendment bars retaliation for protected speech and association."); *See also Crawford-El v. Britton*, 523 U.S. 574, 592 (1998)); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574

(1968).

12. The patently unconstitutional actions of the Denver police should first result in this Court issuing an Order to Show Cause Why Chief White Should Not Be Held In Contempt, followed by an *immediate* hearing on this Order. If this Court concludes that the actions of the police were motivated by retaliation for the exercise of the Constitutional Right of Free Speech, sanctions should be imposed by this Court.

13. All Defendants in this case oppose this motion.

WHEREFORE it is respectfully requested that this motion be granted and for any other relief which this Court deems just and proper.

Respectfully submitted this 26th day of August 2015.

KILLMER, LANE & NEWMAN, LLP

s/ David A. Lane

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ATTORNEY FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of August, 2015, a true and correct copy of the foregoing MOTION FOR ORDER TO SHOW CAUSE was filed with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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s/ David A. Lane