IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No: 18-cv-03305-CMA-KMT

VDARE FOUNDATION,

Plaintiff,

v.

CITY OF COLORADO SPRINGS;
JOHN SUTHERS,

Defendants.

REPLY TO RESPONSE TO MOTION TO DISMISS

Defendants, the City of Colorado Springs ("City") and John Suthers ("Mayor"), by and through the Office of the City Attorney, hereby submit this reply to Plaintiff's opposition to the motion to dismiss.

I. INTRODUCTION

The complaint fails to state any claim for one overarching reason—no connection exists between the Mayor's public statement and the Resort's decision to terminate the contract with Plaintiff. The response[1] does not cast doubt on this central premise.

II. ARGUMENT

A. The contract was not terminated due to state action

[1] The equal protection claim may be dismissed since Plaintiff does not argue against its dismissal. *See Howard v. Werner Co.*, No. 16-CV-01299-PAB, 2018 WL 4334009, at *2 (D. Colo. Sept. 10, 2018).

A private party's decision to terminate a contract gives rise to this action. No well-pled factual allegations in the complaint reflect that the City or the Mayor communicated with, influenced, contacted or otherwise coordinated with the Resort when it ended its contractual relationship with Plaintiff. Nothing in the complaint indicates that the Resort was even aware of the Mayor's statement. Because the action giving rise to this suit was wholly private in nature, it should be dismissed for failure to allege state action.

Plaintiff relies on the nexus test in the face of the motion to dismiss. (Doc. # 32, p. 3). "Under this approach, a state normally can be held responsible for a private decision 'only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.'" *Loyd v. Prendergast*, No. 08CV02182-PAB-KMT, 2009 WL 2514175, at *7 (D. Colo. Aug. 13, 2009) (quoting in part *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)). Plaintiff cites no precedent, nor has the undersigned found any, where an elected official's public statement was found to satisfy the test.

Plaintiff relies exclusively on a single case—*Jackson v. Curry Cty.*, 343 F. Supp. 3d 1103 (D.N.M. 2018)—to argue its point. The facts in *Jackson* are markedly different than they are here. In *Jackson*, a county contracted with a company to manage events at a county arena. *Id.* at 1105. The county representative made direct contact with the management company on two separate occasions immediately before the concert was to be held. *Id.* at 1112-13. The day before the concert, the county representative emailed the management company and expressed disapproval of the event. *Id.* at 1113. The representative noted that the promoters had criminal records and one had previously shot someone. *Id.* The representative also specifically referenced cancelling

the concert. *Id.* The next day, county representatives placed a conference call with the management company to again convey their concerns about the concert. *Id.* Hours after the call, the management company cancelled the concert for the reasons expressed by the county. *Id.*

Unlike the county representatives in *Jackson*, no one within the City government had any contractual relationship, control over, or contact with the Resort before or when it decided to cancel the conference. The Mayor, for his part, expressly noted the City's inability to interfere with the relationship. (Doc. # 13, p. 4, ¶ 12). While the response argues that cancellation of its event was the "direct result" of the statement; made it "impossible" for the Resort to comply with the contract; and "amounted to a continuing threat to any other private venue," factual details supporting these self-styled conclusions do not appear in the complaint. In the end, the decision to terminate the contract is not connected to the Mayor's statement. As such, state action is not alleged.

B. Plaintiff's speech, assembly and association rights were not infringed

The Mayor's statement did not threaten or demand anything from anyone in an effort to stifle speech, limit association or assembly. The remark that the City "will not provide any support or resources to this event . . . [,]" only answers in the negative the question whether the City was to be involved in the private conference. The City does not typically devote public resources to private events at private resorts.

"The First Amendment is intended to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *McCullen v. Coakley*, 573 U.S. 464, 476 (2014) (internal quotation marks omitted). "That marketplace of ideas is undermined if

public officials are prevented from responding to speech of citizens with speech of their own." *Mulligan v. Nichols*, 835 F.3d 983, 989 (9th Cir. 2016).

Plaintiff contends that *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963) and *Rattner v. Netburn*, 930 F.2d 204 (2d Cir. 1991) are the "governing" precedent which demonstrate that its First Amendment rights were infringed. (Doc. # 32, p. 7). In *Bantam Books*, the Rhode Island Commission to Encourage Morality in Youth sent 35 notices to a publisher that the commission viewed certain books and magazines as objectionable. *Bantam Books*, 372 U.S. at 61-62. The notices asked for cooperation in the commission's objectives and noted the commission's duty to recommend "prosecution of purveyors of obscenity." *Id.* at 62. The publisher was notified that lists of objectionable publications were circulated to local police. *Id.* Police then followed up by visiting recipients of the letter. *Id.* at 63. The Supreme Court found "[t]he Commission's notices, phrased virtually as orders, reasonably understood to be such by the distributor, invariably followed up by police visitations, in fact stopped the circulation of the listed publications ex proprio vigore." *Id.* at 68. *Rattner* involved shutting down a newspaper that ran an unfavorable advertisement and a threatened commercial boycott in the course of a legal squabble. *Rattner*, 930 F.2d at 205-07.

Contrary to Plaintiff's assertion, in *Bantam Books* and *Rattner*, government action went far beyond simply "deliver[ing] messages to private parties to discourage them from doing business with plaintiffs on the basis of . . . plaintiffs' speech." (Doc. # 32, p. 8). As discussed below, the Mayor's statement and the City's actions bear no resemblance to these cases. None of the factual allegations in the complaint support finding that Plaintiff's ability to associate, speak, publish, recruit or otherwise express

and disseminate its views generally or Colorado Springs have been impaired. Plaintiff is just as free today to exercise any of its constitutional rights as it was at any other time. Consequently, its rights to speak, associate and assemble have not been infringed.

C. Plaintiff was not retaliated against for exercising its rights

"As part of the duties of their office, [public] officials surely must be expected to be free to speak out to criticize practices, even in a condemnatory fashion, that they might not have the statutory or even constitutional authority to regulate." *Penthouse Int'l, Ltd. v. Meese*, 939 F.2d 1011, 1015 (D.C. Cir. 1991); *see also Goldstein v. Galvin*, 719 F.3d 16, 30 (1st Cir. 2013) ("Not only do public officials have free speech rights, but they also have an obligation to speak out about matters of public concern."). Since the alleged retaliatory conduct is speech by a public official, the speech is only actionable "in situations of threat, coercion, or intimidation that punishment, sanction, or adverse regulatory action will immediately follow." *Novoselsky v. Brown*, 822 F.3d 342, 356 (7th Cir. 2016); *see also Phelan v. Laramie Cty. Cmty. Coll. Bd. of Trustees*, 235 F.3d 1243, 1247 (10th Cir. 2000) ("Although the government may not restrict, or infringe, an individual's free speech rights, it may interject its own voice into public discourse.").

Because public officials also have First Amendment rights, "[r]etaliation claims involving government speech warrant a cautious approach by courts." *Mulligan*, 835 F.3d at 989; *see also Goldstein*, 719 F.3d at 30 ("Courts have not been receptive to retaliation claims arising out of government speech."). So long as the public official's speech is free of a punishment or the threat of punishment, "[i]t would be the height of irony, indeed, if mere speech, in response to speech, could constitute a First Amendment violation." *Nunez v. City of Los Angeles*, 147 F.3d 867, 875 (9th Cir. 1998).

Here, the Mayor's public statement did not cause Plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing to engage in protected activity. The Mayor said far more than the one line Plaintiff attributes to him. It must not be lost that the Mayor began his statement by recognizing that the City could not "restrict freedom of speech nor direct private businesses like the Cheyenne Mountain Resort as to which events they may host." (Doc. # 13, p. 4, ¶ 12). As the statement correctly noted, the decision to host Plaintiff's or any other conference rested exclusively and without restriction with the Resort.

Plaintiff also loses sight of the fact that the Mayor followed up his statement about the role the City would play in the upcoming conference with an expression of the City's "steadfast . . . commitment to the *enforcement of Colorado law* . . . regardless of race, religion, color, ancestry, national origin, physical or mental disability, or sexual orientation to be *secure and protected from fear, intimation, harassment and physical harm*." (Doc. # 13, p. 4, ¶ 12) (emphasis added). No objective interpretation suggests that Plaintiff was excluded from these broad protections.

Looking beyond the statement, the City and the Mayor are not alleged to have taken any action which lends credence to Plaintiff's interpretation that all city services would have been withheld. Unlike cases such as *Bantam Books*, Plaintiff was not subjected to increased City scrutiny or follow-up on the alleged threat. No one within the City confirmed in any way any intent to "withhold" City services from the conference. Plaintiff's interpretation that the Mayor was threatening to "withhold" City services was wholly subjective and is insufficient to support its retaliation claim. *See Phelan*, 235 F.3d

at 1247–48 ("A discouragement that is 'minimal' and 'wholly subjective' does not . . . impermissibly deter the exercise of free speech rights.").

Public officials are free to criticize members of the public, and to do so in a far more direct and aggressive way than what the Mayor did here. *See Suarez Corp. Indus.*, 202 F.3d at 687-88 (listing cases). The Mayor's statement lies well below the threshold between an appeal to conscience and a threat. *See Phelan*, 235 F.3d at 1248 (listing examples of governmentally imposed cognizable injuries). For these reasons, Plaintiff was not subject to actions which would chill a person of ordinary firmness from continuing to exercise his or her constitutional rights.

Turning to the third and final element of a retaliation claim—"adverse action was substantially motivated as a response to plaintiff's exercise of constitutionally protected conduct"—the impetus of the community conversation about Plaintiff's planned conference was Plaintiff's debated involvement in the Charlottesville incident. (Doc. # 13, p. 5, fn. 2). The Mayor's statement was generated in light of the deadly incident; not in response to Plaintiff's exercise of constitutionally protected conduct. As such, the complaint fails to allege the third element of a retaliation claim.

D. The Mayor did not violate clearly established law

Plaintiff cites no controlling authority which gives fair notice to the Mayor. "[I]t is important that courts be especially sensitive to the need to ensure a substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited, where the legal standards of liability under the prior law are broad and general or depend on a balancing of discrete and sometimes opposing interests." *Cummings v. Dean*, 913 F.3d 1227, 1240 (10th Cir.

2019) (internal quotation marks and citation omitted); *see also White v. Pauly*, — U.S. —, 137 S. Ct. 548, 552 (2017) ("'[I]t is again necessary to reiterate the longstanding principle that clearly established law should not be defined at a high level of generality." (internal quotation marks omitted)). The response disregards these admonitions and casts the law in broad and general terms.

Bantam Books, as previously discussed, does not substantially correspond with the conduct here. Neither does *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992). In *Forsyth County*, the Supreme Court found a county ordinance which imposed a fee on rallies, speeches and public meetings was constitutional infirm because it provided an administrator with unconstitutionally broad discretion and impermissibly imposed fees based upon the content of an applicant's speech. *Id.* at 133-36. *Nat'l Commodity & Barter Ass'n v. Archer*, 31 F.3d 1521 (10th Cir. 1994) involves "repeated searches and seizures of materials, including membership lists[,]" *id.* at 1533[,] of "a non-commercial, voluntary, political/educational association of individuals advocating dissident views as to the tax, monetary and fiscal law and policies of the government." *Id.* at 1524. Like *Bantam Books* and *Forsyth County*, *Archer* does not factually resemble the incident here. As such, Plaintiff has failed to show that the Mayor violated any clearly established rights by issuing his statement.

E. Claims against the City are deficient and should be dismissed

First, if no underlying constitutional violation exists then Plaintiff's claim against the City also fails. *See Hinton v. City of Elwood*, 997 F.2d 774, 782 (10th Cir. 1993).

Second, Plaintiff does not dispute that the purported "Hate Speech Policy" was never used before or after the public statement. The response, instead, attempts to

make the City vicariously liable for the Mayor's statement. Plaintiff cites the City Charter extensively in its response and argues that the Mayor is a final policymaker. But, not every word the Mayor utters creates policy on behalf of the City. *See Jett v. Dallas Independent School Dist.*, 475 U.S. 701, 737 (1989) (official must "have the power to make *official policy* on a *particular issue*" (emphasis added)); *Auriemma v. Rice*, 957 F.2d 397, 400 (7th Cir. 1992) ("Unless today's decision ought to govern tomorrow's case under a law or a custom with the force of law, it cannot be said to carry out the municipality's policy."). Though the Mayor has significant general *executive* authority under the Colorado Springs City Charter, the Charter does not identify the Mayor's *policymaking* authority. The Charter states that City Council possesses all "legislative powers of the City." Charter, § 3-10(a). Further, the chiefs of police and fire have authority to "promulgate all rules, regulations and orders of the Department." (Exhibit A, City Code § 8.1.105; § 8.2.105). Thus, in issuing the statement, the Mayor was not acting as a final policymaker.

Third, assuming for the sake of argument that a constitutional violation occurred and a custom or policy existed, "the plaintiff must establish two additional elements: causation and state of mind." *Kramer v. Wasatch Cty. Sheriff's Office*, 743 F.3d 726, 759 (10th Cir. 2014). To prove the culpable state of mind, Plaintiff must allege that a policymaker acted with "deliberate indifference, that the need for more or different action was so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *Id.* (internal quotation marks omitted). The complaint is devoid of facts supporting a finding of deliberate indifference.

For these reasons, Plaintiff's municipal liability claim should be dismissed.

F. The state law claim is barred by Colorado Governmental Immunity Act

The response does not challenge the assertion that Plaintiff's state law claim against the City is barred by the Colorado Governmental Immunity Act ("CGIA").

Next, the Colorado Supreme Court has rejected Plaintiff's position that a judicial determination of willful and wanton conduct is an issue which must wait for trial. *Martinez v. Estate of Bleck*, 379 P.3d 315, 322 (Colo. 2016) (finding that the trial court erred when it found "the ultimate determination of whether he in fact acted willfully and wantonly had to be left to trial.").

Finally, the complaint must do more than "merely assert" willful and wanton conduct; it must "set forth specific facts to support a reasonable inference" of willful and wanton conduct. *Gray v. Univ. of Colorado Hosp. Auth.*, 284 P.3d 191, 198 (Colo. App. 2012). As stated in the motion to dismiss, the complaint does not include any factual enhancement related to the allegation of willful and wanton conduct. The little detail provided—the public statement itself—is not enough to give rise to a reasonable inference to support waiver of immunity. *See id.* (listing cases finding willful and wanton conduct); *see also Martinez v. Estate of Bleck*, 379 F.3d 315, 322-23 (Colo. 2016) (rejecting a "should have realized" definition of willful and wanton conduct and defining it as at least "a conscious disregard of the danger."). As such, the CGIA bars the state law claim against the City and Mayor.

WHEREFORE, for the foregoing reasons, the City respectfully requests that this Honorable Court enter an order dismissing the City and the Mayor with prejudice, and for any other relief this Court deems appropriate.

Respectfully submitted this 7th day of June, 2019.

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CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on the 7th day of June, 2019, I electronically filed the foregoing **REPLY TO RESPONSE TO MOTION TO DISMISS** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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