IN THE UNITED STATES DISTRICT COURT
DISTRICT COURT OF COLORADO

Civil Action No. 1:23-cv-01951-CNS-MDB

JACQUELINE ARMENDARIZ and CHINOOK CENTER,

Plaintiffs,

v.

CITY OF COLORADO SPRINGS;
DANIEL SUMMEY, a detective with the Colorado Springs Police Department, in his individual capacity;
B.K. STECKLER, a detective with the Colorado Springs Police Department, in his individual capacity;
JASON S. OTERO, a sergeant with the Colorado Springs Police Department, in his individual capacity;
ROY A. DITZLER, a police officer with the Colorado Springs Police Department, in his individual capacity; and
FEDERAL BUREAU OF INVESTIGATION;

Defendants.

PLAINTIFFS' OPPOSITION TO THE UNITED STATES' MOTION TO SUBSTITUTE THE UNITED STATES FOR DANIEL SUMMEY AS DEFENDANT TO CLAIM 4 PURSUANT TO 28 U.S.C. § 2679(D)(1)

Plaintiffs Jacqueline Armendariz and Chinook Center ("Plaintiffs") submit this Response to the United States' Motion to Substitute the United States for Daniel Summey as Defendant to Claim 4 Pursuant to 28 U.S.C. § 2679(d)(1) ("Motion"), and state the following in opposition:

INTRODUCTION

Defendant Summey violated the Colorado Constitution when he drafted and submitted warrant applications for the search and seizure of Armendariz's digital devices lacking probable cause and particularity. Now, relying on the federal Westfall Act, the United States asks to be substituted as defendant—and for the Court effectively to declare Summey immune from liability—based on two conclusory sentences asserting he was a full-time FBI task force

employee and acting within the scope of his federal employment during the events in question. But the Court may not grant the United States the relief it seeks where, as here, Plaintiffs have made numerous factual allegations based on undisputed evidence regarding Summey's scope of employment; Summey's own sworn statements suggest he was in fact acting under the direction and control of the Colorado Springs Police Department ("CPSD"); and the United States has failed to offer any factual allegations to the contrary. The Court should deny the United States' Motion and Summey should remain a defendant in Plaintiffs' Fourth Claim because there is a factual dispute as to whether the FBI directed and controlled Summey's work in drafting and submitting the applications and affidavits for the search warrants at issue. In the event the United States attempts to rebut Plaintiffs' factual assertions, Plaintiffs respectfully request limited discovery and an evidentiary hearing to resolve disputed fact issues concerning Summey's scope of employment.

LEGAL STANDARD

Under the Westfall Act, "federal employees are absolutely immune from state-law tort claims that arise 'out of acts they undertake in the course of their official duties.'" *Hockenberry v. United States*, 42 F.4th 1164, 1170 (10th Cir. 2022) (quoting *Fowler v. United States*, 647 F.3d 1232, 1235 (10th Cir. 2011)). An Attorney General's certification constitutes prima facie evidence that a defendant was acting within the scope of his employment, but such certification is "'not the final word' on whether the federal officer is immune from suit and, correlatively, whether the United States is properly substituted as defendant." *Osborn v. Haley*, 549 U.S. 225, 246 (2007) (quoting *De Martinez v. Lamagno*, 515 U.S. 417, 432 (1995)). A plaintiff has the right to challenge the appropriateness of the certification, and can rebut the United States'

evidence with "specific facts." *Hockenberry*, 42 F.4th at 1170 (quoting *Richman v. Straley*, 48 F.3d 1139, 1145 (10th Cir. 1995)).

"[O]nce a scope of employment certification is challenged, the district court must resolve factual disputes and cannot simply defer to the United States' understanding of the facts." *Id.* at 1174. "[T]he government must provide ***evidence and analysis*** to support its conclusion that the torts occurred within the scope of employment." *Maron v. United States*, 126 F.3d 317, 323 (4th Cir. 1997) (emphasis added); *see also, Arthur v. U.S.*, 45 F.3d 292, 296 (9th Cir. 1995). If there are disputed issues of fact, the district court "should hold such hearings as appropriate (including an evidentiary hearing if necessary) and make the findings necessary" to decide the Westfall Act certification question. *Arthur,* 45 F.3d at 296; *Hockenberry*, 42 F.4th at 1174.

The Westfall Act "does not set out a test to determine whether an employee was acting within the scope of his office or employment; rather, Congress intended that courts would apply the principles of *respondeat superior* of the state in which the alleged tort occurred in analyzing the scope-of-employment issue." *Saleh v. Bush*, 848 F.3d 880, 889 (9th Cir. 2017) (cleaned up). Under Colorado law, "[t]he determination of whose servant an employee is in a given case depends on who has the right to control him with respect to the work in question." *Bernardi v. Cmty. Hosp. Asso*c., 166 Colo. 280, 294 (Colo. 1968) (finding doctor not liable for nurse's conduct where nurse was employed by hospital and, despite providing instruction, doctor did not have control over nurse's administration of treatment when he was not present at time of administration); *see Settle v. Basinger*, 411 P.3d 717 (Colo. App. 2013) (for requisite relationship to exist, "the employer or principal must have the power and right to control the employee's or agent's actions within the scope of the employment or agency."); Colo. Civ. Jury Instr. 8:6 (requiring exclusive control over loaned employee before "employee becomes the employee of

that other person."). Indeed, "[t]he central element in an employer-employee relationship is the right of the employer to control the details of performance of the employee's duties." *Perkins v. Regional Transp. Dist.*, 907 P.2d 672, 674 (Colo. App. 1995).

ARGUMENT

The Court should deny the United States' motion because (i) Plaintiffs have alleged facts more than sufficient to challenge the United States' blanket statement that Summey was acting within the course and scope of his federal employment during the relevant events, (ii) the United States has failed to provide any factual support whatsoever for its blanket statement, and (iii) even if it did, the Court must permit limited discovery and an evidentiary hearing to resolve the factual disputes.

Plaintiffs' Amended Complaint—as well as documentary evidence on its face—makes clear that in drafting and submitting unconstitutionally overbroad and insufficiently particularized warrants for the search of Armendariz's electronic devices and social media, Summey was acting under the direction and control of the state of Colorado, not the FBI. For example:

- Defendant Roy A. Ditzler, a CSPD officer without any asserted affiliation with the United States or FBI, was Summey's supervisor for purposes of the events in question. Am. Compl. ¶ 114.
- As Summey's CSPD supervisor, Defendant Roy A. Ditzler, reviewed and approved his warrant applications and affidavits. Am. Compl. ¶¶ 113, 115.
- Summey signed the warrant applications and affidavits and stated after the signature line that he was "Employed by" the Colorado Springs Police Department and that his position was Task Force Officer (without mentioning the United States or the FBI). Am. Compl. ¶ 111.
- Each application and affidavit indicated the "Agency" for whom it was submitted was "Colorado Springs Police Department" and gave "Agency Number 21-29044." Am. Compl. ¶ 111.

- In his affidavits, Summey stated that he was a Police Officer for CSPD and that he had been employed by CSPD for over 6 years. He also noted his assignment to the FBI Joint Terrorism Task Force but provided no indication that his work for the FBI related to the warrant applications. Am. Compl. ¶ 112.

- The warrants for Armendariz's devices were approved and issued by a Colorado state court in El Paso County. Am. Compl. ¶ 118.

- CSPD took Armendariz into custody during the search of her home while they seized her devices. Am. Compl. ¶¶ 89, 90.

- The applications and affidavits were drafted and submitted ostensibly in connection with investigation of an alleged state crime, i.e., Armendariz dropping a bike in front of a CSPD police officer during a march advocating for change in Colorado Springs' housing policies. Am. Compl. ¶¶ 88, 92, 157.

- A Colorado Springs Deputy District Attorney filed a request with a Colorado state court to seal the warrant to search Armendariz's devices and recounted that the criminal case against Armendariz was initiated by CSPD. Am. Compl. ¶¶ 116, 117.

Not a single allegation even hints that the United States or FBI had any role or involvement in drafting and submitting the unconstitutional warrants against Armendariz, let alone that they controlled Summey's actions. Rather, taken as true, these allegations establish that Summey was acting under the direction and control of CSPD, not the FBI. *See Bernardi*, 166 Colo. at 294 ("The determination of whose servant an employee is in a given case depends on who has the right to control him with respect to the work in question.").

Moreover, the United States has failed to provide any evidence to support its position. Instead, in a total of two sentences, it asserts that Summey was a full-time Task Force Officer for the FBI and acting within the scope of his federal office or employment at the time of the incidents out of which Plaintiffs' claims arose. But the United States provides no bases for that conclusion—the motion does not include any evidence or even allegations that, for example, the FBI authorized or directed Summey to prepare the applications and affidavits, or reviewed or approved the applications and affidavits. And as other courts have found, being assigned to a

federal task force does not mean that every action taken during that period of assignment is on behalf of or under the direction and control of the United States. In *Laible v. Lanter*, the United States District Court for the Eastern District of Kentucky considered whether a state police officer deputized to a federal task force was within the scope of his federal employment during a traffic pursuit. The Court answered with a resounding "no," citing in particular (i) the lack of evidence to suggest that during the pursuit the federal government had any control over him; and (ii) the fact that the officer declared himself as "officer in charge," notified the state police commander center of as much and approved another state officer's actions during the pursuit. 2022 WL 1913420, at * (E.D. Ky. June 3, 2022). Here, there is similarly no evidence that the United States directed or controlled Summey's work in preparing and submitting the applications and affidavits, and Summey identified himself as employed by CSPD, sought and received approval from his CSPD supervisor, and relied on state Colorado officials to authorize the warrants. Thus, this Court, like the *Laible* court, should deny the United States' motion.

Even if the United States comes forth with evidence that Summey was acting within the course and scope of his federal employment, the Court here should permit limited discovery and an evidentiary hearing. *See Hockenberry*, 42 F.4th at 1174 (holding it was error for district court not to conduct an evidentiary hearing where there were factual disputes concerning course and scope); *see also, Arthur,* 45 F.3d at 296. Given that Summey identified himself as employed by CSPD and was supervised by his CSPD sergeant, discovery would be necessary to show the relationship and arrangement between CSPD and the FBI, whether the FBI had the authority to direct CSPD to apply for a warrant to search and seize Armendariz's devices in connection with her bike drop in front of a CSPD officer, whether the FBI (in addition to CSPD) advised and/or supervised Summey in drafting the applications and affidavits, and whether the FBI approved the

applications and affidavits, among other things. Permitting discovery regarding Summey's course and scope of employment, as well as an evidentiary hearing would satisfy the Tenth Circuit's mandate in *Hockenberry* and be consistent with the practice of numerous courts around the country facing a Westfall substitution motion. *See, e.g., Hockenberry*, 42 F.4th at 1174; *Arthur,* 45 F.3d at 296; *Stokes v. Cross*, 327 F.3d 1210, 1215 (D.C. 2003) (reversing Westfall substitution where complaint alleged "sufficient factual allegations to warrant discovery on the question of scope of employment"); *Wilson v. Jones*, 902 F. Supp. 673, 680 (E.D. Va. 1995) (allowing limited additional discovery on scope of employment).

CONCLUSION

For the reasons above, Plaintiffs respectfully request that the Court deny the United States' Motion, or, in the alternative, grant limited discovery and an evidentiary hearing.

Dated: November 29, 2023

/s/ Jacqueline V. Roeder

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CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2023, a copy of the foregoing was filed electronically with the Court. In accordance with Fed. R. Civ. P. 5, notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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