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

Civil Action No. 16-cv-02155-WJM-CBS

RAYMOND LYALL, et al.,

Plaintiffs,

v.

CITY AND COUNTY OF DENVER, et al.,

Defendants.

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**DEFENDANTS' RESPONSE IN OPPOSITION TO**
**PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

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Defendants, the City and County of Denver and Chief Robert C. White, Mayor Michael B. Hancock, Jose Cornejo, Evan Dreyer, and Antonio Lopez, in their official capacities, ("Denver"), submit this response in opposition to Plaintiffs' Motion for Class Certification ("Motion") [Doc. #15].

## INTRODUCTION

Plaintiffs ask this Court to certify a class, pursuant to Fed. R. Civ. P. 23(b)(2) and (b)(3), consisting of "all persons in the City of Denver who were, are, or will be homeless at any time after May 14, 2012,[1] and whose personal belongings have been or may in the future be taken or destroyed by one or more of the Defendants." [Doc. #15, pp. 6, 15.] However, Plaintiffs have not provided objective criteria for determining membership in the class, an analysis which will require extensive individual factual inquiry. Likewise, the allegations in the Amended

[1] Denver need not address the statute of limitations here, since Plaintiffs' Amended Complaint clarifies that the relevant period is from August 26, 2014 to the present. [Doc. #54, ¶ 46.]

Complaint—far from suggesting a uniform policy or practice—demonstrate the wide variety and dissimilarity of the facts underlying each Plaintiff's claims. As a result, Plaintiffs cannot meet the requirements for class certification under Rule 23 and the Motion should be denied.

**PLAINTIFFS' CLASS ALLEGATIONS**

Plaintiffs have the burden to prove compliance with Fed. R. Civ. P. 23. *Wal-Mart v. Dukes*, 564 U.S. 338, 350 (2011) ("Rule 23 does not set forth a mere pleading standard," instead a "party seeking class certification must affirmatively demonstrate his compliance with the Rule – that is, he must be prepared to prove that there are *in fact* sufficient numerous parties, common questions of law, etc."). Here, Plaintiffs' own allegations and evidence demonstrate the specific individualized nature of their claims.[2] As shown below and summarized in the attached chart (Ex. Q), Plaintiffs allege a series of incidents on different dates, on both private and public property, involving a variety of Denver agencies and implicating different statutes, ordinances, and/or regulations.

**October 24, 2015:** Plaintiffs allege that, on October 24, 2015, Denver police officers "descended on the area around 2500 Lawrence St.," where homeless individuals including Plaintiffs Lyall and Burton had congregated. [Doc. #54, ¶¶ 55-56, 64; Doc. #15-8, ¶ 7; Doc. #15-9, ¶ 7.] Some ten individuals, including Lyall, were arrested. *Id*. Other than Mr. Lyall, Plaintiffs do not specify who was arrested, what they were charged with, or whether they were later

[2] Several allegations in Plaintiffs' Amended Complaint are not supported by evidence offered in support of Plaintiffs' Motion; therefore, the following claims cannot form the basis for class certification: (1) all allegations regarding Plaintiff Cooks [Doc. #54, ¶ 68)]; (2) all allegations regarding Plaintiffs Farrell and McEvoy. [*Id.* at ¶ 71]; (3) allegations that Plaintiff Burton was "detained without cause" on Aug. 18, 2016, and had his belongings seized by police officers, with no notice of how he could retrieve his property [*Id.* at ¶ 69]; and (4) allegations that on August 20, 2016, there was a sweep of the Platte River, during which "personal belongings were seized and destroyed." [*Id.* at ¶ 60].

convicted. Plaintiffs also allege that DPD seized and destroyed military records, identification, blankets, clothing, and a wheelchair, and did not allow individuals to retrieve that property. *Id.*

2500 Lawrence Street is owned by the Denver Housing Authority ("DHA"), not Denver; thus, it is private property. [Exhibit A, Declaration on Behalf of DHA, ¶¶ 2-3.] On the date in question, numerous people trespassed onto DHA property and erected illegal structures. [*Id*. at ¶ 4.] DHA called the Denver Police Department ("DPD") which responded and the trespassers who refused to leave the property, including Mr. Lyall, were arrested. [*Id*. at ¶¶ 6-8.] Mr. Lyall was later convicted of trespassing. [*See* Exhibit B, certified court record of conviction.] After the trespassers left the property, DHA hired a private company (not DPD or any other Denver agency) to remove the illegal structures and other items left by the trespassers. [Ex. A, ¶ 8.]

**December 15, 2015:** On December 15, 2015, Plaintiffs allege that police told them to go inside Samaritan House "but leave their belonging [*sic*], telling Plaintiffs and Plaintiff Class that if they returned before being told that it was permissible, then they would be arrested." [Doc. #54, ¶¶ 14, 57, 70; Doc. #15-7, ¶ 6; Doc. #15-10, ¶ 4; Doc. #15-8, ¶ 7; Doc. #15-9, ¶ 8.] Plaintiffs claim they were forced into sub-10-degree weather without jackets or blankets, and that when they returned to the area, they found their property discarded without notice. *Id.*

DPD's Homeless Outreach Unit ("HOU") officers were on duty December 15, 2015, and sought out people who were outside in that day's bitter cold, intending to connect them with services. [Exhibit C, Declaration of Robert Parks, ¶¶ 2, 26.] The HOU is a specialized team of police officers whose specific mission is to perform homeless outreach. [*Id.* ¶ 2.] In addition to HOU officers, regular patrol officers were also instructed to check on people outside and help them find services; many individuals were transported to shelters that day. [Exhibit F,

Declaration of Commander Antonio Lopez, ¶ 7.] HOU Officer Robert Parks contacted several homeless individuals on December 15 and he encountered some encampments and large piles of property, but took no action with respect to them. [Ex. C, ¶ 27.] HOU Officer Ligeia Craven also contacted service providers and homeless individuals that day, to get people inside and out of the cold. [Exhibit D, Declaration of Ligeia Craven, ¶¶ 24-25]. Officer Craven advised the individuals to take everything important with them and to head inside the shelter. [*Id*. at ¶ 25.]

**March 8-9, 2016:** Plaintiffs allege that on March 8 and 9, 2016, a "sweep" was conducted at 2301 Lawrence Street in Denver [Doc. #54, ¶¶ 59, 65-67, 69] and Denver seized blankets and personal belongings without prior notice or an opportunity to retrieve their property after it was seized. [*Id*.; Doc. #15-8, ¶¶ 5-6; Doc. #15-9, ¶ 9.] Plaintiffs claim their belongings were thrown into Department of Public Works dump trucks [Doc. #54, ¶ 65; Doc. #15-8, ¶¶ 5-6; Doc #15-9, ¶ 9], and that DPD executed the sweep. [Doc. #54, ¶ 67.] Plaintiffs' Motion treats this March cleanup as the centerpiece of their allegations that Denver has a deliberate policy of "raids, sweeps, and confiscations of property." [Doc. #15, p. 13, *citing* Docs. ##15-1 to 15-4.]

In the fall of 2015, after numerous public complaints related to safety concerns, unsanitary conditions, and continuous build-up of trash of the right-of-way in the Triangle Park area (Park Avenue, Lawrence Street, and Broadway), the HOU team, other Denver agencies, and homeless service providers developed a plan to clean up the area while connecting the homeless with services. [Exhibit G, Declaration of Charlotte Pitt, ¶ 6; Exhibit H, Declaration of Geoff Bennett, ¶¶ 5-6; Exhibit I, Declaration of Josh Geppelt, ¶ 8; Exhibit J, Declaration of Chris Conner, ¶¶ 10-11; Ex. C, ¶ 20; Ex. F, ¶ 8.] Denver agencies performed the cleanup on March 8 and 9, 2016. [Ex. C, ¶¶ 20-23; Ex. G, ¶¶ 8-15.] Prior to March 8th, signs were posted in an

approximately three-block radius around Triangle Park to notify citizens of the cleanup; notice was also verbally given by members of HOU and service providers to individuals in the area. [Ex. C, ¶ 21; Ex. F, ¶ 11; Ex. G, ¶ 9; Ex. H, ¶ 8; Ex. I, ¶ 8; Ex. J, ¶ 15; Exhibit K, Declaration of Tom Leuhrs, ¶ 12.]

Most of the individuals who had been occupying the Triangle Park right-of-way departed in the weeks leading up to the March cleanup. [Ex. G, ¶ 10; Ex. J, ¶ 16; Ex. I, ¶ 9.] Those who remained appeared to be those who had constructed semi-permanent shelters, or protestors. [Ex. G, ¶ 10; Ex. I, ¶ 9.] They were asked to move trash and other unwanted property to one side of the sidewalk so that Public Works employees could dispose of it, and told that they could voluntarily store property with the City at no charge. [Ex. C, ¶ 23; Ex. F, ¶ 14; Ex. G, ¶ 11; Exhibit O, Declaration of David Peachey, ¶¶ 7-9.] A private contractor hired by Denver was responsible for marking and storing any personal private property collected at the site. [Ex. G, ¶ 11; Ex. O, ¶ 6.] The contractor put property into bags, tagged the bags, and gave property receipts to the owners, along with instructions on how to reclaim it, and transported it to the Emily Griffith building, where the city had leased space specifically to store property from the cleanup. [Ex. C, ¶¶ 20-23; Ex. G, ¶¶ 8, 11; Ex. O, ¶ 8.] During the cleanup, DPD stood by to keep the peace while Public Works employees and private contractors identified and stored personal property, and DSD inmate crews disposed of trash. [Ex. C, ¶¶ 22-23; Ex. F, ¶ 13; Ex. G, ¶ 11; Ex. O, ¶¶ 7-8.]

Personal property gathered during the March cleanup was stored at Emily Griffith until May 5, 2016, a total of 60 days. [Ex. G, ¶ 13.] The facility was open every weekday for reclaiming items. [*Id*.] Only four individuals ever appeared to retrieve property. [*Id*. at ¶ 14.]

Plaintiff Jackson was among those who voluntarily stored property and never came to reclaim it. [*Id*.] After 60 days, Public Works and the contractor sorted the items again, removing any that appeared to have personal value, such as personal identification and medical documents, placing them into a "Do Not Destroy" container, and moving them to the Public Works warehouse, where they remain. [*Id*. at ¶ 16.]

**June 15, 2016:** Plaintiff Jackson alleges that on June 15, 2016, "police, Public Works and inmates from county jail came sweeping the area of Lawrence and 23rd," and that his "stuff" including a sleeping bag, blankets, and a mountain bike, was thrown away [Doc. #15-7, ¶¶ 4-5].

DPD, DSD, and Public Works collaborated on regularly-scheduled cleanings around Park Avenue and Lawrence in June 2016. [Ex. D, ¶ 15; Ex. O, ¶ 5.] HOU officers gave notice prior to each cleaning. [Ex. D, ¶ 15; Ex. O, ¶ 5; Ex, K, ¶ 11.] When crews arrived, most people would collect their belongings and move to the other side of the street. [*Id*.; Ex. H, ¶ 7.] Those who did not were asked to move and take their property with them. [Ex. D, ¶ 16.] If the HOU team saw unattended property, they would attempt to locate the owner or someone else willing to take custody of the property; officers were almost always able to get someone to move the property before the cleaning took place. [*Id*. at ¶ 17; Ex. C, ¶ 19.] Trash which was left behind on the right-of-way would be thrown away; this included empty food containers, wrappers, human waste, wet boxes, and soiled items. [Ex. D, ¶ 16; Ex. C, ¶ 19.] After the right-of-way was cleaned, people could and did return with their property. [*Id*.; Ex. H, ¶ 7.]

**July 13, 2016:** Plaintiffs allege that, on July 13, 2016, a group of homeless individuals "sheltering" next to the Platte River were "unnecessarily confronted by Defendant Denver Police, told to move or be arrested, forced to leave their belongings that they never saw again nor

had the opportunity to retrieve." [Doc. #54, ¶ 53.] None of the named Plaintiffs say that they were involved or affected by this incident, and the only evidence relating to it is from Terese Howard, an advocate from Denver Homeless Out Loud. Ms. Howard states that she witnessed police ticketing people sleeping along the river and "learned from friends on the street that about 75 people staying on Atkins St." were "forced to leave under threat of arrest and had all their belongings thrown straight in the trash." [Doc. #15-11, ¶ 7.]

These allegations likely involve a coordinated cleanup effort of park facilities managed by Denver Parks and Recreation, which took place along the South Platte River Corridor, including an area near Arkins Court and 29th Street on July 13, 2016.[3] This cleanup was an annual event, coordinated by multiple Denver agencies and civilian volunteers. [Exhibit L, Declaration of Bob Toll, ¶11; Exhibit M, Declaration of Scott Gilmore, ¶¶ 7-8; Ex. G, ¶ 18; Ex. D, ¶ 26; *see also* Exhibit N, Declaration of Eric Knopinski, ¶ 8 & Ex. C attached thereto (photos of condition prior to cleanup).] Notice was posted and provided to those in the area for several days prior to the cleanup, stating that private property could not be stored in a Denver park area, and that camping in a Denver park was prohibited. [Ex. D, ¶ 27.] People were allowed several days to remove their property from the area. [*Id*.] Property was not taken if the individual with the property identified it as theirs and took the items with them. [*Id*.] Only after notice was given and individuals voluntarily removed their property were any remaining items discarded. [*Id*.]

**The Alleged "Policy and Practice":** Throughout the Amended Complaint and the Motion, Plaintiffs repeatedly assert that Denver has a "practice and policy" of unlawfully seizing and destroying property. Defendants cannot emphasize strongly enough that this allegation is

[3] The South Platte River Corridor is a mix of private property, property owned by Denver, and property owned by other public and private entities. [Ex. M, ¶ 7 & Ex. A attached thereto (maps).]

baseless. No such policy exists. [Exhibit E, Declaration of Bennie L. Milliner, ¶ 15; Ex. D, ¶ 23; Ex. F, ¶¶ 15-16; Ex. G, ¶ 20; Ex. J, ¶ 19; Ex. L, ¶ 12; Ex. M, ¶ 16; Ex. N, ¶ 10; Ex. O, ¶ 12.]

## ARGUMENT

### I. Plaintiffs' Proposed Class is Not Adequately Defined

"[A]n essential prerequisite to an action under Rule 23 is that there must be a class." *Edwards v. Zenimax Media, Inc.*, No. 12-cv-00411-WYD, 2012 WL 4378219, at *5 (D. Colo. Sept. 25, 2012). A class is sufficiently defined "if it is administratively feasible for the court to determine whether a particular individual is a member of the proposed class." *Davoll v. Webb*, 160 F.R.D. 142, 144 (D. Colo. 1995). "Administrative feasibility means that identifying class members is a manageable process that does not require much, if any, individual factual inquiry." *Friedman v. Dollar Thrifty Auto. Group, Inc.*, 304 F.R.D. 601, 606 (D. Colo. 2015) (quoting *Carrera v. Bayer Corp.*, 727 F.3d 300, 307-08 (3d Cir. 2013)).

Plaintiffs' proposed class definition is impermissibly broad, vague, and indefinite. It does not define a particular group, harmed at a particular time and location, in a particular way. Instead, contending that Denver has a policy of "seizing and summarily destroying" the property of homeless people in Denver, Plaintiffs seek to certify a class that would contain every person now homeless in Denver and anyone who may in future become homeless, without any objective criteria to identify the class members whose personal belongings have been or will be taken by Denver employees. [Doc. #15, p. 7.] This definition, if accepted, would be in a constant state of flux. It is also overbroad, because it includes "a great number of members who could not have been harmed by the defendants' allegedly unlawful conduct." *Friedman*, 304 F.R.D. at 606

(internal quotations omitted); *see also Edwards*, 2012 WL 4378219, at *5 (class including every buyer "regardless of whether he or she was ever injured" is overbroad).

Plaintiffs' proposed class definition is virtually identical to the class proposed by plaintiffs in *Kincaid v. City of Fresno*, 244 F.R.D. 597, 600-01 (E.D. Cal. 2007) (Proposing class of "All persons in the City of Fresno who were, are, or will be homeless at any time after October 17, 2003, whose personal belongings have been or may in the future be taken or destroyed by one or more Defendants."). However, *Kincaid* is readily distinguishable. There, the evidence showed that Fresno had a policy of immediately destroying any property that was not physically attended to. *Kincaid v. City of Fresno*, No. 1:06-cv-1445 OWW SMS, 2006 WL 3542732, at * 6 (E.D. Cal. Dec. 8, 2006). Even belongings stored on private property with the permission from the owner were considered abandoned and immediately destroyed by the City. *Id*. No such facts are present here. Further, the *Kincaid* court significantly narrowed the plaintiff's proposed class definition, only certifying a class of "[a]ll persons in the City of Fresno who were or are homeless, without residence, after October 17, 2003, and whose personal belongings have been unlawfully taken and destroyed a sweep, raid, or clean up by any of the Defendants." *Kincaid*, 277 F.R.D. at 601. Similarly, in *Pottinger v. City of Miami*, the court carefully limited the proposed class to "homeless persons who reside or will reside on the streets, sidewalks, parks, and in other public places in the geographic area bound [by four landmarks] within the City of Miami, who have been, expect to be, or will be arrested, harassed, or otherwise interfered with by members of the City of Miami Police Department for engaging in the ordinary and essential activities of daily living in public due to the lack of other adequate alternatives." 720 F. Supp. 955, 960 (S.D. Fla. 1989).

As shown above, unlike in *Kincaid* or *Pottinger*, the circumstances here involve facts that vary significantly between Plaintiffs (and among any potential class members as well). Plaintiffs cannot show a common pattern of conduct or enforcement by Denver; nor does the class definition sufficiently delineate which homeless individuals fall within the class. Plaintiffs cannot show how, without intensive and individualized inquiry, this Court could determine whether a potential class member is homeless, whether their personal property was taken, or the circumstances surrounding the taking of the property, including the location of the individual and the property, whether notice was provided or whether the seizure was permitted by law. *See Smith v. City of Corvallis*, No. 6:14-CV-01382-MC, 2016 WL 3193190, at *10 (D. Or. June 6, 2016) (refusing to certify homeless class "because each plaintiff's claims are based on facts and dates that are separate and distinct from each other" such that "[t]he individual plaintiffs' claims are too distinct from even each other to satisfy the requirements of a class action, let alone any additional potential class members."); *Anderson v. City of Portland*, No. CIV. 08-1447-AA, 2011 WL 6130598, at *6-7 (D. Or. Dec. 7, 2011) (distinguishing *Kincaid* and finding that the breadth of the proposed class precluded class certification altogether, since "various fact patterns relevant to putative class members" made it too difficult to determine commonality or predominance).

Plaintiffs' proposed class is so broad and indefinite that it is not feasible for the Court to determine whether homeless people living in Denver are correctly included as members of the proposed class. Accordingly, without even reaching the threshold requirements of Rule 23(a), the Court should deny Plaintiffs' Motion. *See Edwards, supra.*

## II. Plaintiffs have not met the requirements of Rule 23

In addition to failing to define a sufficient class, Plaintiffs have failed to prove that all requirements of Rule 23 are satisfied. "The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Dukes*, 564 U.S. at 348 (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-701 (1979)). "In order to justify a departure from that rule, 'a class representative must be part of the class and possess the same interest and suffer the same injury as the class members.'" *Id*. at 348-49 (quoting *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)).

A court must "conduct a 'rigorous analysis' of Rule 23's requirements." *Vallario v. Vandehey*, 554 F.3d 1259, 1265 (10th Cir. 2009) (quotation omitted); *see also Trevizo v. Adams*, 455 F.3d 1155, 1162 (10th Cir. 2006) ("A party seeking class certification must show 'under a strict burden of proof' that all four requirements are clearly met.") (quotation omitted). Frequently this rigorous analysis "will entail some overlap with the merits of the plaintiff's underlying claim … the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Dukes*, 564 U.S. at 351 (quotation omitted). However, a plaintiff "must be prepared to prove that there are *in fact* sufficient numerous parties, common questions of law, etc." *Id*. at 350 (emphasis in original). Thus, "it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Id*. (quotation omitted). Here, once the Court probes behind the pleadings, it becomes evident that Plaintiffs cannot meet the requirements of Rule 23.

### A. *Plaintiffs have not satisfied the Numerosity Requirement*

Rule 23(a)(1) requires Plaintiffs to "establish that the class is so numerous that joinder of all members is impracticable." *Peterson v. Okla. City Housing Auth.*, 545 F.2d 1270, 1273 (10th Cir. 1976). Impracticability is not "a question of numbers," rather it requires a fact-specific inquiry into "the nature of the action, the size of the individual claims, and the location of the members of the class or the property that is the subject matter of the dispute." *Colorado Cross-Disability Coal. v. Abercrombie & Fitch, Co.*, 765 F.3d 1205, 1215 (10th Cir. 2014) (internal citations omitted). Accordingly, the Tenth Circuit has refused to create a bright-line, presumptive numerical threshold. *Trevizo*, 455 F.3d at 1162. Still, Plaintiffs must present "some evidence of established, ascertainable numbers constituting the class in order to satisfy even the most liberal interpretation of the numerosity requirement." *Rex v. Owens ex rel. State of Okl.* 585 F.2d 432, 436 (10th Cir. 1978).

Plaintiffs rely upon expert testimony in support of their contention that "there are right now 5,500 homeless persons in the Denver Metro Area" and declare without sufficient evidence that "[a]ll of them are impacted by Defendants' policies of confiscating personal property." [Doc. #15, p. 18; Doc. #15-12, ¶¶ 8, 11.] This contention is inaccurate in several respects. First, Denver has no such policy—the conclusory opinion offered by Plaintiffs' expert regarding the existence of a "homeless sweeps" policy in Denver is even contradicted by Plaintiffs' own factual allegations (as discussed above). Second, the 5,500 figure applies to the entire metro area, and no Denver policy could "impact" all homeless person in the metro area because the area spans seven counties and Denver's Ordinances are only enforceable in Denver. [Ex. E, ¶¶ 4-5.]

Finally, Plaintiffs' number ignores their own proposed class definition. They do not seek to certify a class of "all homeless," but rather a class of homeless individuals in Denver "whose personal belongings have been or may in the future be taken or destroyed by [Denver]." Merely reciting the total number of homeless is the first step, not the last, to establish impracticability of joinder. Plaintiffs implicitly concede this with the conclusory assertion that "[e]ven if … the class is only comprised of those whose property has actually been taken by the City," then "the number of Plaintiffs is over 3,000 homeless persons." [Doc. #15, p. 18.] But Plaintiffs' statistics cannot support even this smaller figure. Even assuming that the expert's numbers are reliable,[4] his estimate of 600 people per year adds up to only 1,200 within the two-year time frame. [*Id.*, *citing* Doc. #15-12, ¶ 15.]

Plaintiffs' conclusory approach to numerosity does not meet their burden of proof. A party seeking certification must provide evidence as to the size of the class so that the Court may undertake its "rigorous analysis" of impracticability. Plaintiffs offer *no* evidence which the Court could use as a basis to infer, much less determine: (a) how many homeless people in Denver refuse to use shelters and instead reside in public right-of-ways, private property, or park facilities; (b) how many in that subgroup have lost property, and under what specific circumstances; or (c) how many of that sub-subgroup lost property without notice or an opportunity to retrieve their property. Consequently, Plaintiffs' purported class must fail.

[4] Dr. Robinson offers questionable statistics. First, he inexplicably relies on 2012 data, rather than publicly-available data from 2016. [Doc. #15-12, ¶ 11; Ex. E, ¶¶ 4, 7.] Second, his numbers appear to include individuals from a seven-county "Metro Area," not just Denver. [*See* Ex. E, ¶¶ 4-5, 7]. Third, his conclusion that 61% of homeless "reported that the police or city employees had taken their belongings" is based on self-reporting; he makes no attempt to verify these reports or to distinguish lawful from unlawful seizures. [Doc. #15-12, ¶ 15.] Finally, his claim that "the City's official estimate counts more than homeless 1000 individuals [*sic*] every night that are sleeping without shelter" is simply wrong; the 2016 estimate is 449. [Doc. #15-12, ¶ 15; Ex. E, ¶ 7.]

**B. *Commonality is lacking***

Plaintiffs' Motion offers the conclusory contention that commonality is established because they have shown that Denver has a policy and engaged in a common practice of "conducting raids that result in the seizure and immediately [*sic*] destruction of the personal property of homeless individuals without adequate notice or an opportunity to retrieve the property after it is taken." [Doc. #15, p. 20.] Plaintiffs' purported common issues of law and fact—the nature of Denver's policies, practices and conduct, whether these policies, practices and conduct violate the class members' constitutional rights, and whether injunctive relief should be ordered—are wholly dependent upon the presumed existence of this alleged policy. The determination of whether these questions will "generate common answers apt to drive the resolution of the litigation" on a class-wide basis requires the Court to examine the facts that will produce those answers, and the law to be applied to such facts. *See Dukes*, 564 U.S. at 350-51. Here, Plaintiffs fail to meet their burden of presenting a common question of law or fact that can be adjudicated "in one stroke." *Id.* at 350.

Plaintiffs' claims are governed by questions of law and fact which are unique and specific to each incident and each Plaintiff's involvement (if any) in that incident. The diverse situations alleged by Plaintiffs show only that, over the course of a year, property may have been taken by: DPD when it detained or arrested an individual; Public Works pursuant to Ordinances when property is unclaimed, left unattended, or encumbering the right-of-way; and Parks and Recreation employees or contractors, pursuant to other Ordinances enforced by Parks, when someone erects a structure and/or camps somewhere along the public areas of the South Platte River Corridor or the Cherry Creek Greenway. The authority and reasoning for taking or

removing property is dependent upon the circumstances, location, and behavior. Each discrete incident involves a different set of facts involving the location of the individual or property, the conduct of the specific individual, legal theories, and applicable laws and regulations. In short, rather than adequately advancing a discrete question of law or fact, Plaintiffs improperly attempt to conflate a variety of distinct claims. *See J.B. v. Valdez,* 186 F.3d 1280, 1288-90 (10th Cir. 1999) (finding lack of commonality to certify a class of "all children in state custody who have any form or mental and/or developmental disability for which they require some kind of therapeutic services" due to the diverse situations of the named plaintiffs).

For example, Lyall and Burton claim that Denver employees took their property at 2500 Lawrence Street on October 24, 2015. However, that location is private property owned by the DHA[5] and those present, including Lyall and Burton, were trespassing. [Ex. A, ¶ 4.] Burton was not arrested and does not claim that he lost property. In contrast, Lyall was arrested (and later convicted) for trespassing. [*See* Ex. B.] Further, DHA contractors, not Denver employees, removed the trespassers' property. [Ex. A, ¶ 8.] Thus, to the extent any property was taken (whether or not its owners were homeless), the factual and legal inquiry is significantly different from other incidents alleged by Plaintiffs.

The allegations regarding December 15, 2015 likewise require individualized factual and legal examination. Mr. Jackson claims that he was threatened with arrest at the Denver Rescue Mission and that his property was thrown away. Mr. Lyall, in contrast, claims that he was forced to remove his belongings from an unidentified area, but does not claim that his property was taken. Ms. Howard claims that people at an unidentified location were told to go into the shelter

[5] DHA is an entity which is distinct and independent from Denver. *See* C.R.S. § 29-4-201, *et seq.*

and their belongings were thrown away by unidentified individuals, while she and other people sleeping in tents a "few blocks away" were forced to take down their tents, but she does not claim that their tents or any other property was taken. [Doc. #15-11, ¶ 5.]

The Triangle Park area cleanup in March 2016 likewise generates a variety of allegations. Mr. Burton claims that he was threatened with arrest at 2600 Lawrence and that Public Works employees took property from him and others without notice as to how to get their property back. In contrast, Mr. Lyall admits that he and others were given written notice in the form of fliers, but that the police, public works and inmates began to clear the area the same day, deciding what was garbage and what would be stored, without telling them how to get the property back. Mr. Anderson claims that he stored his property in an undisclosed location and when he returned from looking for work, his belongings had been taken by DPD without notice. Finally, Mr. Jackson claims that Public Works and Denver Sheriff inmates took his property from unidentified location while his friend was guarding it. The variety in times, locations, circumstances and relevant agencies is apparent even from the face of these allegations.

Plaintiffs attempt to cobble together commonality of class members through a variety of other alleged incidents. Mr. Peterson claims that on March 25, 2016 he left his property unattended at 25th and Lawrence to get breakfast at the Denver Rescue Mission and he *thinks* that DPD and Public Works took his property and he was unable to get it back. [Doc. #15-10, ¶¶ 5-6.] Plaintiffs allege that around June 1, 2016, Mr. Farrell and Ms. McEvoy were somewhere on the "Cherry Creek Pathway," when "defendants" seized their property and police officers told them that their medication had been taken to the dump and thrown away. [Doc. #54, ¶ 71.] Mr. Jackson claims that on June 15, 2016 the police, Public Works, and inmates came to the area of

Lawrence and 23rd and, ignoring his protests, discarded his property into a dump truck. [Doc. #15-7, ¶ 4.] Mr. Cooks allegedly lost property on an unspecified date at an unspecified location, at Park Avenue and Lawrence in "Summer 2015," and at the "Platte River area and Confluence Park" on April 4, 2016, which also allegedly resulted in his arrest. [Doc. #54, ¶ 68.] Ms. Howard claims that DPD officers ticketed people (not Plaintiffs) sleeping along the "river," but does not say where the people were sleeping or identify the specific violation for which these people allegedly received citations. [Doc. #15-11, ¶ 7.] Mr. Anderson claims that on September 20, 2016 police came to Broadway and Park Avenue and told "everyone" to give up their blankets, and that on September 21, 2016 he was on the sidewalk on Broadway between Park and Lawrence and was told by the police that he was trespassing on private property. [Doc. #28, ¶ 9.]

Plaintiffs' own allegations refute the notion that they share a common basis of law and fact. Nor can injunctive relief cure the separate and distinct violations alleged due to the substantial dissimilarities within the specific allegations related to each Plaintiff and the proposed class. Accordingly, Plaintiffs cannot prove commonality.

**C. *Plaintiffs' claims are not typical of the class***

Rule 23(a)(3) requires that the "claims or defenses of the representative parties are typical of the claims or defendants of the class." This requirement ensures that the absent class members are adequately represented by the lead plaintiffs such that the interests of the class will be fairly and adequately protected in their absence. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982). Therefore, the claims of the class representatives and class members must be based on the same legal or remedial theory. *Colorado Cross-Disability Coal.*, 765 F.3d at 1216. "A plaintiff's claim is typical of class claims if it challenges the same type of conduct that would be

challenged by the class." *Maez v. Springs Auto. Grp., LLC*, 268 F.R.D. 391, 395–96 (D. Colo. 2010) *see also Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997) (typicality "is satisfied when each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability"). Nevertheless, "it is well-established that a proposed class representative is not "typical' under Rule 23(a)(3) if 'the representative is subject to a unique defense that is likely to become a major focus of the litigation.'" *Marcus v. BMW of N. America, LLC*, 687 F.3d 583, 599 (3d Cir. 2012); *see also Maez*, 268 F.R.D. at 395–96.

Plaintiffs claim "there is virtually no sunlight between putative class representatives and class members" due to Denver's alleged uniformity with respect to Plaintiffs' claims. [Doc. #15, p. 22.] However, as explained above, Plaintiffs are unable to show that their claims are typical of the claims of class members—or each other's claims—due to the unique and distinct allegations related to each of them. The legal theories underlying such claims necessarily vary and are subject to unique defenses which will become a major focus of the litigation.

For example, the specific Plaintiffs who claim their property was wrongfully taken by DPD officers during various illegal detentions or arrests will face unique defenses, including whether reasonable suspicion or probable cause existed for the detention or arrest and—specific to Lyall—his conviction for trespassing on October 24, 2015. With respect to the specific Plaintiffs who claim that their due process rights were violated during the March 2016 cleanup of the right-of-way by Park and Lawrence, unique defenses include whether notice was provided and, if so, the adequacy of such notice, the storage of personal property taken during the clean-up and the failure of individuals to claim their property, including Jackson. Finally, the Plaintiffs

who claim their property was taken at various other locations will confront unique defenses such as whether Plaintiffs or their property were located on private or public property, whether a park facility curfew was being violated or whether the area was closed to the public, whether property was left unattended, and whether any other park facility ordinances were violated. Thus, an examination of the specific claims and defenses confirm typicality is not met.

**D. *Plaintiffs do not adequately represent the class***

Rule 23(a)(4) requires that the class representatives "fairly and adequately protect the interests of the class." This requirement "tends to merge with the commonality and typicality criteria of Rule 23(a), which serve as guideposts for determining whether maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 626 n.20 (1997) (internal quotations omitted). "[T]o be an adequate class representative, the 'representative must be part of the class and possess the same interest and suffer the same injury as the class members.'" *Id.* at 625-26. The Tenth Circuit has identified two questions relevant to this inquiry: "(1) do the named plaintiffs and their counsel have any conflicts with other class members; and (2) will the named plaintiffs and their counsel vigorously prosecute the action on behalf of the class?" *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1187–88 (10th Cir. 2002). A plaintiff may be an inadequate representative and have conflicts with other class members if a likelihood of varied circumstances of the proposed class members exists. *See Friedman*, 304 F.R.D. at 613.

The record before the Court raises significant concerns of interclass conflicts between the Plaintiffs and the absent class members. The incidents in which the named Plaintiffs were

involved and the nature of their claims is so varied that each has a specific interest in spending time and effort litigating his or her own claims, including countering Denver's unique defenses to those claims. Under such circumstances, it cannot be said that the interests of the proposed class members are fairly and adequately protected by the class representatives. Further, the ability of Plaintiffs' counsel to prosecute this action vigorously on behalf of the class may be compromised due to the named Plaintiffs' differing interests. For these reasons, Plaintiffs fail to show they will fairly and adequately protect the interests of the class.

**E. Plaintiffs have not met the requirements of Rule 23(b)(2)**

A class action may be maintained only if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). This imposes two distinct requirements on Plaintiffs: (1) to demonstrate that defendants' actions or inactions are based on grounds generally applicable to all class members; and (2) to establish that their requested relief is appropriate for everyone in the class. *Shook*, 543 F.3d at 604. These requirements require "cohesiveness" among class members as to their injuries. *Id*. This cohesiveness, in turn, has two elements: plaintiffs must illustrate that (1) the class is sufficiently cohesive such that any injunctive relief would satisfy Rule 65(d)'s requirement that every injunction state its terms specifically and describe in reasonable detail the act or acts restrained or required; and (2) that class members' injuries are sufficiently similar that they can be remedied in a single injunction without differentiating between class members. *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1199-1200 (10th Cir. 2010). "[I]f redressing the class members' injuries requires time-consuming inquiry into individual circumstances or

characteristics of class members or groups of class members, 'the suit could become unmanageable and little value would be gained in proceeding as a class action.'" *Shook*, 543 F.3d at 604 (citing *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998)). Thus, a plaintiff must demonstrate that "injunctive relief—relative to the class—is conceivable and manageable without embroiling the court in disputes over individualized situations and constantly shifting class contours." *Id*. at 608.

Plaintiffs cannot meet these requirements. Plaintiffs' conclusory claim that "[a]ll class members have suffered the same injury: deprivation of property due to Defendants' policy and conduct," is insufficient. [Doc. #15, p. 26.] As described in Section I, *supra*, Plaintiffs' claims, and the alleged actions taken by Denver, differ greatly by individual, date, and location. Redressing the class members' injuries will inevitably require a time-consuming inquiry into the individual circumstances of each Plaintiff and each class member, at the very least to determine what injury that individual has suffered and whether such injury was caused by the action of a Denver employee attributable to the municipality.

Furthermore, there is no relief that would uniformly satisfy the needs of all of the class members. Plaintiffs seek "an injunctive order permanently enjoining and restraining Defendants from continuing and repeating the unlawful policies, practices and conduct complained of herein; declaratory judgment that Defendants' policies, practices and conduct as alleged herein were in violation of Plaintiffs' rights under the United States Constitution as set forth herein; [i]f any property remains, an order compelling Defendants to return Plaintiffs' property—especially unique personal belongings of sentimental worth." [Doc. #54, p. 35 ("Prayer for Relief").]

Plaintiffs additionally seek monetary damages.[6] *Id.* Plaintiffs cannot establish that this relief is appropriate for the whole class. Rather, the nature of the injunction would vary and impose individualized requirements based on the differing circumstances of each Plaintiff's circumstances. Plaintiffs' request for the return of seized property, if still in existence, or (presumably) the value of the property if it is not in existence, will require testimony and evidence as to what property was seized, from where it was taken, if it was stored, what its value was, and whether it is still in existence, among other questions as to each item of property allegedly seized. This would embroil the Court in "mini-trials" as to each class member and their lost property.

Importantly, a class should not be certified under Rule 23(b)(2) if the relief requested relates predominantly to money damages. *Monreal v. Potter*, 367 F.3d 1224, 1236 (10th Cir. 2004). Even though Plaintiffs also seek injunctive relief, under the circumstances alleged, questions of monetary damages will necessarily predominate over any issue of injunctive relief due to the nature of the differing claims. Plaintiffs have been careful not to provide "any specific monetary calculation," lest that figure appear to overwhelm their requested "dignitary" relief. But they indisputably seek damages for lost property "in amount according to proof." [Doc. #54, ¶ 25 & p. 35; Exhibit P, Plaintiffs' Initial Disclosures, p. 7 & n.3.] Plaintiffs cannot have it both ways. If they seek individual damages, then as discussed above, the difficulty and variety of those particularized damage calculations alone is enough to defeat the class. The alternative—classwide monetary relief, as set forth in the Scheduling Order—would result in a multi-million dollar calculation that would loom over the proceedings more than any potential injunction.

[6] In light of the dismissal of the individual capacity defendants, Plaintiffs may not recover punitive damages.

[Doc. #53, p. 7 (proposing formula for calculating class damages, and proposing "a Life and Restoration Fund.")].

**B. Plaintiffs also fail to satisfy the requirements of Rule 23(b)(3)**

To obtain class certification pursuant to Rule 23(b)(3), Plaintiffs must demonstrate that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3)(A)-(D). This predominance inquiry is "far more demanding" than Rule 23(a)'s commonality requirement. *Amchem*, 521 U.S. at 623–24; *Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.*, 725 F.3d 1213, 1219–20 (10th Cir. 2013). "Rule 23(b)(3)'s purpose is to ensure that the class will be certified only when it would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *In re Crocs, Inc. Sec. Litig.*, 306 F.R.D. 672, 689-90 (D. Colo. 2014) (internal quotations and alterations omitted). Thus, courts are called upon "to give careful scrutiny to the relation between common and individual questions in a case." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016).

To establish predominance, Plaintiffs must demonstrate that their claims are "capable of proof at trial through evidence that is common to the class rather than the individual members." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311-12 (3d Cir. 2008). "An individual question is one where 'members of a proposed class will need to present evidence that varies from member to member,' while a common question is one where 'the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to

generalized, class-wide proof.'" *Tyson Foods*, 136 S. Ct. at 1045 (internal citation omitted); *see also Friedman*, 304 F.R.D. at 614–17 (if determining the issues of the case would require individual fact-finding and potentially result in a "series of mini-trials," common issues do not predominate).

In this case, the individualized inquiries as to each Plaintiff and the proposed class members dominate. *See, e.g.*, *Monreal*, 367 F.3d at 1237–38 (if plaintiffs seeking class certification allege multiple different claims, all with different elements and requirements, class certification should be denied); *see also Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1229 (10th Cir. 2013). For example, to establish an underlying constitutional violation based upon Lyall, Burton, and Cook's claims that their property was taken during an illegal detention or arrest by DPD officers would require an individualized inquiry very different from that for claims in the absence of detention or arrest. Further, even the proof regarding the due process claims is individualized under the varying circumstances alleged here. For instance, with respect to the March 2016 right-of-way cleanup at Park Avenue and Lawrence Street, Anderson and Peterson claim that no notice was provided concerning property removal while Lyall and Burton concede that notice was provided but claim that it was insufficient.

More importantly, Plaintiffs seek to demonstrate municipal liability, but there is no common policy which applies to Plaintiffs and the separate and distinct incidents they allege. Rather, the enforcement of multiple and different policies is at issue. Which policy is at issue, and whether municipal liability may be imposed based upon the enforcement of that policy, is dependent upon the specific circumstances alleged by each Plaintiff. Before imposing municipal liability, a factfinder would need to determine, *inter alia*, the location of each specifically alleged

violation (i.e., public right-of-way, park facility or private property), which municipal policy or custom applies to the removal of property from that location, and that the applicable municipal policy or custom was the moving force behind the constitutional deprivation alleged. These individualized inquires will necessarily require varied testimony by the involved individuals, the relevant Denver employees, and other evidence, including whether notice was necessary and if so, what type of notice was provided, and what occurred to the property each specific plaintiff alleges was taken.

In addition, as discussed in Section II.E, Plaintiffs have not provided any model establishing that damages are capable of measurement on a classwide basis. At the class certification stage, the class representative must present a method which demonstrates that it is sufficient to measure and quantify damages on a classwide basis. *See Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013). Otherwise, Rule 23(b)(3)'s predominance requirement would be reduced to a nullity. *Id*.[7] For all of these reasons, Plaintiffs have failed to demonstrate that class certification is appropriate under Rule 23(b)(3).

## CONCLUSION

Under the circumstances of this case, class certification is not appropriate. Therefore, for all of the reasons stated herein, Denver respectfully requests that the Court deny Plaintiffs' Motion for Class Certification.

[7] Plaintiffs also argue that in this case a class action is superior "to other available methods" because Plaintiffs are unfamiliar with the legal system, they do not possess resources, and they fear law enforcement and local government. [Doc. #15, ¶ 44.] However, to meet the 23(b)(3) superiority requirement, "class resolution must be "superior to other available methods for the fair and efficient adjudication of the controversy." *Amchem*, 521 U.S. at 615. Here, class certification is not superior because common issues do not predominate.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on this 28th day of October, 2016 I electronically filed the foregoing **DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Jason Flores-Williams, Esq.
Email: jfw@jfwlaw.net

*s/Wendy Shea*
Denver City Attorney's Office