IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 07-cv-01814-WDM-MJW

DEBBIE ULIBARRI, *et al.*,

Plaintiffs,

v.

CITY & COUNTY OF DENVER, *et al.*,

Defendants.

PLAINTIFFS' MOTION TO STRIKE

Four categories of evidence submitted by Defendants in support of their Summary Judgment Motions violate the Federal Rules of Civil Procedure ("FRCP") and/or the Federal Rules of Evidence ("FRE"). Plaintiffs respectfully request this Court to strike:

1. Statements that constitute expert testimony under FRE 702 from witnesses that Defendants did not designate pursuant to FRCP 26(a)(2);
2. Statements that are not made on personal knowledge, in violation of FRCP 56(e)(1);
3. Statements that contradict testimony from witnesses designated by Defendants pursuant to FRCP 30(b)(6) to testify on those topics, in violation of that Rule; and
4. Statements that constitute inadmissible hearsay.

Appendix A sets forth each of the statements Plaintiffs move to strike, where each was cited in Defendants' Motions for Summary Judgment, and the grounds to strike each statement.

BACKGROUND

Shawn Vigil -- a deaf prisoner -- was arrested and confined at the Denver County Jail ("DCJ") and ultimately committed suicide there. Based entirely on his deafness, he was placed in Administrative Segregation, where he was isolated from other inmates. He was never, during his stay, provided a sign language interpreter that would have permitted him to effectively communicate with jail personnel. Although he attempted to request to meet with the Administrative Review Board, Defendants ignored this request. Mr. Vigil -- alone in his cell -- hung himself.

Plaintiff Roger Krebs -- who is also deaf -- was detained at Denver's Pre-Arraignment Detention Facility ("PADF") on charges relating to disturbing the peace and was not provided an interpreter at any time he was at the PADF despite his repeated requests. Ultimately, Defendants informed him that if he wanted an interpreter for his arraignment, he would have to remain detained at the PADF for an additional three days until an interpreter could be provided, but that if he pled guilty without an interpreter, he would be released immediately. Faced with those choices, Mr. Krebs pled guilty to all charges.

Plaintiff Sarah Burke -- who is deaf and diabetic -- was arrested in her home based on an outstanding warrant. Ms. Burke had just taken an insulin shot and was preparing dinner for her family. The police refused her request for an interpreter, handcuffed her -- thus restricting her ability to communicate -- and refused to permit her to bring her medication or her pager. During her detention at the police station and later at the PADF, she was never provided -- despite her repeated requests -- with an interpreter, with the food necessary to control her diabetes following the administration of the insulin shot just prior to her arrest, or with access to medical care

required by a diabetic in her condition. During her almost eight-hour detention, her blood sugars became dangerously low. Ms. Burke was released at approximately 2:00 in the morning, but because Defendants did not have an operating TTY device and had not permitted her to bring her pager, she was unable to contact her husband to pick her up. Still feeling desperately ill and disoriented with low blood sugars, Ms. Burke started walking toward a light rail station to go home, but discovered train service did not start for another two hours. Ms. Burke -- ill and confused -- accepted a ride from a stranger who attempted to assault her. Though she managed to escape, she was afraid to report the incident to police based on her experiences of the previous twelve hours.

PROCEDURAL STATUS

Ms. Burke, Mr. Krebs and Mr. Vigil's estate and executrix (his mother, Debbie Ulibarri) have brought suit against the City and County of Denver and a number of its representatives under 42 U.S.C. § 1983, section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq*.

On September 17, 2009, Defendants filed two motions for summary judgment totaling 118 pages[1] -- the 35-page factual recitations in each are apparently identical -- along with over 500 pages of supporting affidavits, depositions and exhibits. Simultaneous with the filing of this Motion to Strike, Plaintiffs are filing their memorandum in opposition to these motions.

Because a number of statements on which Defendants rely in support of their Motions for Summary Judgment are inadmissible or otherwise in violation of the Federal Rules of Civil

[1] Mot. for Summ. J. (Docket No. 197); Mot. for Summ. J. (Docket No. 198).

Procedure and/or the Federal Rules of Evidence, Plaintiffs respectfully request that this Court strike those statements and not consider them in connection with Defendants' Motions.

1. Undisclosed Expert Testimony Must Be Struck

Defendants have submitted three affidavits containing undisclosed expert testimony concerning: whether Mr. Vigil's suicide was preventable; whether he received adequate medical attention; and communication between Defendants' staff members and deaf detainees. *See* Affidavit of Peter Crum, M.D. ("Crum Aff.") ¶¶ 14, 17 and 19; Affidavit of John Romero ("Romero Aff.") ¶¶ 11, 17, 19, and 20; and Affidavit of Gary Wilson ("Wilson Aff") ¶ 14. These paragraphs will be referred to collectively as "The Challenged Expert Opinions."

Expert testimony such as this may be admitted pursuant to FRE 702; however, any witness Defendants intend to use to present evidence under this rule must be disclosed pursuant to FRCP 26(a)(2). *See id.* Rule 26(a)(2)(A). Defendants did not disclose Dr. Crum, Sgt. Romero or Maj. Wilson as experts. Robertson Decl. ¶ 10.

Lay opinion may be offered pursuant to FRE 701 without expert disclosure; however, such opinions must meet the criteria in that rule, including that they be "rationally based on the perception of the witness" and "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." FRE 701. The testimony listed above does not meet this definition and, pursuant to Rule 37(c)(1) -- prohibiting the use of undisclosed testimony -- must be struck.

a. The Challenged Expert Opinions.

Dr. Crum testifies in his affidavit that he reviewed Mr. Vigil's medical records and "concluded that there was no evidence of high risk behavior by Vigil that would be a warning

sign of suicide, and that his suicide was not preventable." Crum Aff. ¶ 19. He testifies further that "[t]he routine multiple daily nursing rounds and the weekly nursing round for inmates in Special Management provided ample opportunity for Vigil to receive medical attention." *Id.* ¶ 17. Finally, Dr. Crum testifies that nurses at DCJ make rounds of inmate cells two to three times a day, at which time they "communicate with inmates about their medical problems." *Id.* ¶ 14. Dr. Crum was not disclosed as an expert; in fact, Defendants disclosed Dr. Crum as an ordinary witness, describing his subjects of discoverable information as follows: "Dr. Crum presumably has knowledge and information regarding the subject matter of this action." Defs.' Fourth Supplemental Disclosures Pursuant to Fed. R. Civ. P. 26(a)(1) at 5-6 (Robertson Decl. Ex. 1). Because of this vague description and the fact that he was not disclosed as an expert, Plaintiffs elected not to use one of their ten depositions on him. Robertson Decl. ¶ 3.

Both Sgt. Romero and Maj. Wilson offer testimony concerning communications with inmates at PADF and DCJ, including at times Mr. Vigil. For example, Sgt. Romero testifies that, "[i]n 2005, there were two deputy sheriffs assigned to Building 6 who knew sign language, and were able to communicate with a deaf inmate if needed. Deputy sheriffs also communicated with deaf inmates by exchanging written notes." Romero Aff. ¶ 11; *see also id.* ¶ 17 (testifying that inmates had the opportunity to report problems or submit kites); 19 (testifying that a deputy asked Mr. Vigil several questions); 20 (testifying that Mr. Vigil declined to meet with the Administrative Review Board). Maj. Wilson testifies that "[t]hroughout 2007, deputy sheriffs communicated by exchanging written notes with deaf inmates, and the deputies could request a sign language interpreter if needed to communicate with a deaf inmate." Wilson Aff. ¶ 14. or Neither Sgt. Romero nor Maj. Wilson was disclosed as an expert, and Defendants' Rule 26(a)(1)

disclosures gives no indication that they have information concerning communication with deaf inmates in general or Plaintiffs in particular. Defs.' Mandatory Initial Disclosures Pursuant to Fed. R. Civ. P. 26(a)(1) at 3, 10 (Robertson Ex. 2).

b. The Challenged Expert Opinions Are Not Rationally Based on the Perception of the Witnesses.

The first criterion for lay opinion under FRE 701 is that it be "rationally based on the perception of the witness." FRE 701. There is no evidence that Dr. Crum treated, evaluated, communicated with or observed Mr. Vigil, or observed others doing so. Nor is there evidence that either Sgt. Romero or Maj. Wilson ever observed anyone communicating with Mr. Vigil or any other deaf detainee. As such, none of the Challenged Expert Opinions can be based on the perception of the witnesses. "Under Rule 701, lay opinion must be based on the perception of the witness." 29 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure*, § 6253 (1st ed., current through 2009 update). While doctors may provide testimony under FRE 701, the requirement that it be based on the "perception of the witness" limits this to treating physicians providing testimony based on their personal knowledge of the patient's treatment. *See, e.g., Blodgett v. United States*, 2008 WL 1944011, at *5 (D. Utah May 1, 2008) ("treating physicians not disclosed as experts are limited to testimony based on personal knowledge and may not testify beyond their treatment of a patient" (quotation omitted)).

c. The Challenged Expert Opinions Require Scientific, Technical, or Other Specialized Knowledge.

These opinions also fail to qualify as lay opinion under FRE 701 because they require "scientific, technical, or other specialized knowledge." The Tenth Circuit has held that "a person may testify as a lay witness only if his opinions or inferences do not require any specialized

knowledge and could be reached by any ordinary person." *LifeWise Master Funding v. Telebank*, 374 F.3d 917, 929 (10th Cir. 2004) (internal quotations omitted). "When the subject matter of proffered testimony constitutes 'scientific, technical, or other specialized knowledge,' the witness must be qualified as an expert under Rule 702." *Id.* There is no question that opinions that a suicide was not preventable, that an individual had not evidenced behavior that would warn of suicide, and that an individual received "ample" medical attention, *see* Crum Aff. ¶¶ 17, 19, cannot be reached by an ordinary person, but rather require highly technical medical and psychological knowledge. *See, e.g., Hendricksen v. ConocoPhillips Co.*, 605 F. Supp. 2d 1142, 1160 (E.D. Wash. 2009) (excluding causation testimony of treating physician as it was "testimony which results from a process of reasoning which can be mastered only by specialists in the field." and thus not proper under FRE 701); *Cook v. Rockwell Int'l, Inc.*, 233 F.R.D. 598, 601-02 (D.Colo. 2005) (excluding the testimony of an epidemiologist on the grounds that "there can be no question that [the] intended testimony would be based on [the expert's] knowledge and alleged experience in epidemiology and thus on scientific, technical and specialized knowledge . . .").

The question whether nurses succeeded in "communicat[ing] with [Mr. Vigil] about [his] medical problems," *see* Crum Aff. ¶ 14, also requires specialized knowledge, as Mr. Vigil was pre-lingually deaf, and could not speak or read lips. Similarly, the questions whether deputy sheriffs "knew sign language," "were able to communicate with a deaf inmate," or "communicated with deaf inmates by exchanging written notes," *see* Romero Aff. ¶ 11, whether Mr. Vigil had the opportunity to report problems or submit kites, *id.* ¶ 17, or succeeded in communicating with Deputy Line, *id.* ¶¶ 19-20, and whether "deputy sheriffs communicated by

exchanging notes with deaf inmates," Wilson Aff. ¶ 14, require specialized knowledge of sign language and/or the communications abilities of deaf inmates. *See* Decl. of Dr. Jean F. Andrews ¶ 5.

Indeed, FRE 701 was amended in 2000 to add the third clause -- requiring that a lay opinion "not [be] based on scientific, technical, or other specialized knowledge within the scope of Rule 702" -- specifically to avoid situations such as this, where "the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing. . . . By channeling testimony that is actually expert testimony to Rule 702, the amendment also ensures that a party will not evade the expert witness disclosure requirements set forth in Fed. R. Civ. P. 26 . . . by simply calling an expert witness in the guise of a layperson." Advisory Committee Notes to the 2000 Amendments to the Federal Rules of Evidence, 28 U.S.C. App. at 356 (2006). Defendants are attempting to rely on highly specialized medical and communications testimony without either the reliability requirements of FRE 702 or the disclosure requirement of FRCP 26(a)(2).

d. It is Appropriate to Strike The Challenged Expert Opinions.

Because Defendants did not disclose Dr. Crum, Sgt. Romero, or Maj. Wilson pursuant to FRCP 26(a)(2), Defendants may not use their expert testimony in support of their Motions for Summary Judgment unless the failure to disclose was substantially justified or is harmless. FRCP 37(c)(1). Defendants have the burden to show that they were substantially justified in failing to comply with Rule 26. *See Gallegos v. Swift & Co.*, 2007 WL 214416, at *2-3 (D. Colo. Jan. 25, 2007). Defendants have, so far, offered no justification for their failure. Nor is this failure harmless. In the absence of disclosure and a report, Plaintiffs had no opportunity to

depose Dr. Crum, to depose Sgt. Romero on any alleged understanding of sign language, to depose Sgt. Romero or Maj. Wilson on the communications abilities of deaf inmates,[2] or to designate rebuttal experts on these matters. Without designation, reports, depositions and possible rebuttal witnesses, this Court has no way to evaluate Dr. Crum's, Sgt. Romero's or Maj. Wilson's qualifications to offer the opinions they offer or the bases for those opinions. Indeed, there is no evidence that any of these individuals has any background whatsoever in any field that would provide expertise in communication with people who are deaf, and there is no evidence -- even within the medical field -- that Dr. Crum has any specialized knowledge or training relating to suicide prediction or prevention or any other psychological training or expertise.[3]

Plaintiffs respectfully request that this Court strike paragraphs 14 (to the extent he opines concerning communication with Mr. Vigil), 17 and 19 of the Affidavit of Peter Crum, M.D.,

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[2] Indeed, Sgt. Romero testified that he had no training concerning "English proficiency of individuals who have been deaf since either birth or early childhood" or "whether deaf individuals who primarily communicate through ASL should be given forms . . . to read and complete." Romero Dep. at 90:9 - 91:5 (Robertson Decl. Ex. 3).

[3] The Tenth Circuit has a four factor test for determining whether to strike an expert for late disclosure. *See Summers v. Mo. Pac. R.R. Sys.*, 132 F.3d 599, 604 (10th Cir. 1997). Defendants did not disclose Dr. Crum late; rather, they never disclosed him at all and do not propose to do so even at this late juncture. Nevertheless, were they to offer a disclosure now, the prejudice to Plaintiffs would be extreme and the ability effectively to cure the prejudice minimal: the case has been ongoing for two and a half years with the discovery cut-off over a year in the past. As noted above, Plaintiffs have been denied the opportunity to depose Dr. Crum on his opinions and/or to designate a rebuttal expert. Additional delay and disruption of the schedule is not harmless. *See, e.g., Wong v. Regents of the Univ. of Cal.*, 410 F.3d 1052, 1062 (9th Cir. 2005) (Striking witness for late disclosure, holding that if the plaintiff "had been permitted to disregard the deadline for identifying expert witnesses, the rest of the schedule laid out by the court months in advance, and understood by the parties, would have to have been altered as well. Disruption to the schedule of the court and other parties in that manner is not harmless.")

paragraphs 11, 17, 19 and 20 of the Affidavit of John Romero, and paragraph 14 of the Affidavit of Gary Wilson.

2. Statements Made without Personal Knowledge Must be Struck.

Affidavits supporting a motion for summary judgment "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated." FRCP 56(e)(1). In addition, such affidavits "must set forth facts, not conclusory statements." *BancOklahoma Mortgage Corp. v. Capital Title Co., Inc.*, 194 F.3d 1089, 1101 (10th Cir. 1999). The following paragraphs of the following declarations are not made on personal knowledge and/or consist of conclusory statements unsupported by specific facts:

Affidavit of Peter Crum, M.D., ¶¶ 4-7, 9, 13-15, 17, and 19.

Affidavit of John Romero, ¶¶ 11, 15, 16, 17, 19, 20, and 21.

Affidavit of Gary Wilson, ¶¶ 4, 5, 8, 9, 10, 11, 13, and 14.

"'Under the personal knowledge standard, an affidavit is inadmissible if the witness could not have actually perceived or observed that which he testifies to.'" *Argo v. Blue Cross and Blue Shield of Kan., Inc.*, 452 F.3d 1193, 1200 (10th Cir. 2006) (quotation omitted). Accordingly, the Tenth Circuit has held that it was proper to strike testimony by a co-worker that no female employees in positions similar to the plaintiff's were terminated, *id.* at 1199-1200, and by employees who worked at the location where a disputed piece of equipment was being used that the equipment was "not intended to be permanent." *Goad v. Buschman Co.*, 316 Fed. Appx. 813, 816 (10th Cir. Mar. 19, 2009). Conclusory statements with "no facts to show [the affiants] have knowledge of the underlying events" are also inappropriate on summary judgment. *See*

Dalvit v. United Air Lines, Inc., 2008 WL 3468703, at *8 (D. Colo. Aug. 11, 2008); *see also BancOklahoma,* 194 F.3d at 1101; *FrontRange Solutions USA, Inc. v. NewRoad Software, Inc.*, 505 F. Supp. 2d 821, 829 (D. Colo. 2007) (striking affidavits that were "replete with factually unsupported conclusions, hearsay, statements indicating no personal knowledge at all, and self-serving assertions not corroborated by reference to any record evidence . . .").

Dr. Crum testifies, for example, concerning the presence of other professionals at the PADF and DCJ every day since August 2005, Crum Aff. ¶¶ 4-7, and the activities they perform while on site. *Id.* ¶¶ 4-7, 13-15. He also testifies concerning the training that is provided to deputy sheriffs. *Id.* ¶ 9. Dr. Crum's affidavit provides no evidence suggesting that he could have "actually perceived or observed" these facts. *See Argo*, 452 F.3d at 1200. As noted above, Dr. Crum's testimony in paragraphs 17 and 19 constitute medical opinions that were not properly disclosed. The doctor also provides no evidence of personal knowledge of Mr. Vigil's behavior or suicide, or of his ability to get medical attention during daily and weekly nursing rounds.

Sgt. Romero's affidavit similarly contains a number of paragraphs consisting of conclusory statements the underlying facts of which he could not possibly have "actually perceived or observed." *See* Romero Aff. ¶¶ 11, 15, 16, 17. For example, he testifies that deputy sheriffs communicated with deaf inmates using notes, *id.* ¶ 11, and described the circumstances of inmates in Administrative Segregation in 2005 and the activities of the staff assigned to supervise them, *id.* ¶¶ 15-17, despite the fact that there is no evidence that he was able to observe all such circumstances and activities. In paragraphs 19, 20 and 21 of his affidavit, Sgt. Romero discusses Administrative Review Board hearings for a number of dates,

including August 28, 2005, despite the fact that he testified that he was not present on that date. Romero Dep. 141:22 - 142:6 (Robertson Decl. Ex. 3). In Paragraphs 19 and 20, Sgt. Romero testifies to what Deputy Line asked the inmates and what Mr. Vigil told Deputy Line. As discussed in Section 4 *infra*, this constitutes inadmissible hearsay; it is also something of which Sgt. Romero does not profess to have personal knowledge.

Finally, paragraphs 4, 5, 8, 9, 10, 11, 13, and 14 of Maj. Wilson's affidavit consist of conclusory statements concerning the activities of inmates and deputies at the PADF between 2000 and the present -- a broad sweep of time as to which he could not possibly have knowledge of all underlying facts. For example, in paragraph 5 he states that "[e]very inmate bought into PADF is triaged and medically screened . . .." In paragraph 10, he asserts that, since 2000, "all inmates at PADF have had access to a telephone twice daily, and deaf inmates have had access to the TDD telephone twice daily." Nowhere does Maj. Wilson explain how he could actually have perceived or observed every inmate since 2000 being medically screened or provided access to a telephone twice daily. In addition, paragraphs 9 and 10 make assertions as to conditions at the PADF since 2000, though Maj. Wilson testifies elsewhere in his declaration that he has only been assigned to the PADF since July, 2006. Wilson Aff. ¶ 2.

Plaintiffs respectfully request that this Court strike the paragraphs listed at the beginning of this Section on the grounds that they are conclusory and not based on personal knowledge. Fed. R. Civ. P. 56(e)(1); *Argo*, 452 F.3d at 1200.; *BancOklahoma,* 194 F.3d at 1101.

3. Dr. Crum's Testimony That Conflicts With Testimony By FRCP 30(b)(6) Designees Must be Struck.

Plaintiffs noticed the deposition of the City and County of Denver pursuant to FRCP 30(b)(6) on a number of topics. Robertson Decl. Ex. 4 (Am. Notice of Dep. of City & County of

Denver Pursuant to Fed. R. Civ. P. 30(b)(6)). In response, the City designated a total of four witnesses to provide testimony on these topics. Robertson Decl. Exs. 5 (Feb. 17, 2009 letter from S. Fasing designating witnesses) and 6 (July 16, 2009 email from S. Fasing amending designation). In attempting to establish the factual predicates for their Motions for Summary Judgment, however, Defendants submit testimony from Dr. Crum on three of those topics that differs from that of the witnesses they designated. This constitutes grounds to strike the later testimony. *See Caraustar Indus. v. N. Ga. Converting, Inc.*, 2006 WL 3751453, at *7 (W.D. N.C. Dec. 19, 2006) (striking declaration that conflicted with testimony of Rule 30(b)(6) designee); *Rainey v. Am. Forest and Paper Ass'n*, 26 F. Supp. 2d 82, 94 (D.D.C. 1998)(same).

In *Rainey*, for example, the defendant submitted in opposition to the plaintiff's motion for partial summary judgment an affidavit that contradicted and expanded on the testimony of its Rule 30(b)(6) designees. The court held that "[u]nless it can prove that the information was not known or was inaccessible, a corporation cannot proffer new or different allegations that could have been made at the time of the 30(b)(6) deposition." *Id.*, 26 F. Supp. 2d at 94. This was so despite the fact that the affiant -- whose testimony differed from the 30(b)(6) designees -- was a former employee. The corporation had a duty either to designate the former employee -- the rule empowers a corporation to designate "any 'persons who consent to testify on its behalf'" -- or to prepare its designees to testify to what the former employee knew. *Id.* at 95 & n.3 (quoting FRCP 30(b)(6)); *see also Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1146 (10th Cir. 2007) ("The law is well-settled that corporations have an 'affirmative duty' to make available as many persons as necessary to give 'complete, knowledgeable, and binding answers' on the corporation's behalf." (Quotation omitted.)).

In *Caraustar*, the witness designated by the plaintiff corporation had testified that the corporation had not performed certain tests. *Id.,* 2006 WL 3751453, at *5. In opposition to the defendant's summary judgment motion, the plaintiff submitted an affidavit by a different individual asserting that the tests had been performed. *Id.* at *6. The court struck the later affidavit, holding that in the absence of a showing why the test could not have been performed before the Rule 30(b)(6) deposition and given that the plaintiff was on notice that the test was a central issue in the case, "it could not first take the position that it had no information on that subject and then later, after the close of discovery and the filing of the . . . dispositive motion, completely reverse itself." *Id.* at *7.

Ultimately, the *Rainey* court held that what the defendant had done was precisely what FRCP 30(b)(6) was intended to prevent. The Advisory Committee notes state that the purpose of rule 30(b)(6) was to "'curb the "bandying" by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it.'" *Rainey*, 26 F. Supp. 2d at 95 (quoting Advisory Committee Notes). "In other words, the Rule aims to prevent a corporate defendant from thwarting inquiries during discovery, then staging an ambush during a later phase of the case." *Id.* The court struck the later affidavit on the grounds that "Rule 30(b)(6) requires such relief." *Id.*

With respect to four areas, Defendants here have done precisely what the *Rainey* and *Caraustar* courts held that Rule 30(b)(6) prohibits: they submitted testimony from Dr. Crum in support of their Motions for Summary Judgment that either contradicts testimony by the City's

Rule 30(b)(6) designees or supplies information where the designees professed not to have information.

Testimony Concerning Medical and Mental Health Services at DCJ. Sgt. Romero was the City's designee on the "provision of medical services and mental health screening to the inmates or detainees at the [DCJ] . . . since August 2005." *See* Robertson Decl. Exs. 4-6. In that capacity, he testified that there was no evidence that a mental health screening was performed on Mr. Vigil, or that his the medical screening consisted of anything beyond taking his temperature and blood pressure. Romero Dep. 49:4 - 51:24; 59:6-14. Despite this testimony, Defendants submitted Dr. Crum's testimony stating that "Nursing staff [at DCJ] performs screening, assessment and treatment of inmates throughout the day, seven days a week." Crum Aff. ¶ 6. To the extent this was meant to suggest that Mr. Vigil was properly screened, the testimony must be struck.

Under this topic as well, Sgt. Romero testified that he knew of no evidence that "the sign language interpreter has ever been brought into assist the medical staff at" the DCJ. Romero Dep. 63:8 - 14. Despite this, Dr. Crum testified repeatedly that medical staff "communicated" with inmates in one way or another. Crum Aff. ¶¶ 14, 15, 17. To the extent this testimony is intended to include deaf inmates such as Mr.Vigil, it must be struck in light of Sgt. Romero's testimony.

Testimony Concerning Medical and Mental Health Services at PADF. Sgt. Romero was also the City's designee on the topic of "provision of medical services and mental health screening to the inmates or detainees at the [PADF] . . . since August 2005." *See* Robertson Decl. Exs. 4-6. When asked whether he could answer questions about policies and procedures

at the PADF, he responded, "No." Romero Dep. 14:3-5 (Robertson Decl. Ex. 3). Despite this, Defendants submitted Dr. Crum's testimony concerning medical policies and staffing at the PADF. Crum Aff. ¶¶ 4-5. Dr. Crum's testimony must be struck.

Testimony Concerning Training Relating to Diabetes. Michael Than was the City's designee on the topic of "provision of training on inmates who . . . have diabetes for Denver sheriff deputies and police officers since January 26, 1993." *See* Robertson Decl. Exs. 4-6. Capt. Than testified that he was not able to say how "Denver Sheriff Department officers were trained regarding how they would know whether or not an inmate or detainee had diabetes." Than Dep. 66:19 - 23; *see also generally id.* at 66-69 (explaining lack of knowledge of training concerning many facets of diabetes). Despite this, Dr. Crum testified that the medical staff provides training to deputies concerning "how to recognize common acute presentations." Crum Aff. ¶ 9. To the extent this was intended to cover training relating to how to recognize presentations caused by or relating to diabetes, it must be struck in light of the designee's lack of knowledge.

Because in none of these cases was the information unavailable at the time of the Rule 30(b)(6) deposition, the later testimony -- Crum Aff. ¶¶ 4-5, 9, 14, 15, 17 -- must be struck. *See Rainey*, 26 F. Supp. 2d at 94; *Caraustar*, 2006 WL 3751453, at *7. The fact that Dr. Crum is not a city employee is irrelevant; as noted above, the City could have designated him to testify on these topics. *Rainey*, 26 F. Supp. 2d at 95 & n.3 (quoting FRCP 30(b)(6)); *see also Ecclesiastes*, 497 F.3d at 1146.

Finally, the prejudice to Plaintiffs cannot be cured by a deposition of Dr. Crum at this late date. The *Rainey* court addressed just such a suggestion:

> The cure for this violation should not be simply to give plaintiff a chance to depose [the later affiant]. If such were the remedy, corporate parties would have every incentive to "bandy" or attempt "trial by ambush," as the only downside to their strategy would be that their adversary might eventually procure access to their theretofore-concealed witness. This incentive structure would eviscerate the force of Rule 30(b)(6), and would delay litigation, heighten suspicions, and obfuscate the discovery process. Rule 30(b)(6) was designed to prevent such consequences, and in order to adhere to its terms, it is improper to consider the [later] affidavit for purposes of plaintiff's motion for summary judgment.

Id., 26 F. Supp. 2d at 96; *see also Caraustar*, 2006 WL 3751453, at * 6 (holding that the defendant "reasonably declined" the plaintiff's offer to permit the deposition of the later affiant). The proper remedy for this violation of Rule 30(b)(6) is to strike paragraphs 4, 5, 6, 9, 14, 15, and 17 of Dr. Crum's affidavit.

4. Hearsay Statements Contained in Affidavits Must Be Struck

"[A]t summary judgment courts should disregard inadmissible hearsay statements contained in affidavits . . .." *Argo*, 452 F.3d at 1199; *see also FrontRange*, 505 F. Supp. 2d at 829-30 (refusing to consider affidavits containing hearsay and other inadmissible statements). In paragraph 16 of his affidavit, Dr. Crum asserts that Mr. Vigil's medical records document that he was seen by a nurse and that there were no problems reported by him or observed by the nurse. This statement is essentially double hearsay: Dr. Crum is asserting the truth of a statement that was allegedly made by Mr. Vigil ("no problems") to a nurse, and then recorded in a document for which no hearsay exception has been claimed much less supported.

In paragraphs 19 and 20 of his affidavit, Sgt. Romero makes assertions concerning what Deputy Roy Line said to Mr. Vigil and what Mr. Vigil responded. Again, these statements are either hearsay (what Deputy Line told Sgt. Romero he said) or double hearsay (what Deputy Line told Sgt. Romero that Mr. Vigil said) and therefore inadmissible. "[H]earsay testimony that

would be inadmissible at trial may not be included in an affidavit to defeat summary judgment because '[a] third party's description of [a witness'] supposed testimony is not suitable grist for the summary judgment mill.'" *Thomas v. Int'l Bus. Machs.*, 48 F.3d 478, 485 (10th Cir. 1995) (internal quotations omitted). Under Rule 56(e), the same standards apply to affidavits supporting and opposing summary judgment, so Defendants' hearsay testimony is equally unacceptable.

For these reasons, Plaintiffs respectfully request that this Court strike Paragraph 16 of the Crum Affidavit and Paragraphs 19 and 20 of the Romero Affidavit.

Certificate of Compliance with D. Colo. L.R. 7.1A

The undersigned certifies that, on January 14, 2010, she wrote to counsel for Defendants describing the testimony that Plaintiffs would ask the Court to strike and requesting the Defendants' position. The following day, she called counsel for Defendants to discuss the matter, and later followed up with an email raising two additional questions. She was ultimately informed that Defendants oppose this motion.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court strike:

Paragraphs 4, 5, 6, 7, 9, 13, 14, 15, 16, 17, and 19 of the Affidavit of Peter Crum, M.D.;

Paragraphs 11, 15, 16, 17, 19, 20, and 21 of the Affidavit of John Romero; and

Paragraphs 4, 5, 8, 9, 10, 11, 13, and 14 of the Affidavit of Gary Wilson.

Respectfully submitted,

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Dated: January 19, 2010

CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2010 I electronically filed the foregoing document, the Declaration of Amy F. Robertson in Support of Plaintiffs' Motion to Strike and a proposed order with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following email address:

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Appendix A to Plaintiffs' Motion to Strike

Statement or Fact to be Struck	Defs.' Fact No.	Basis/Bases
Crum Affidavit ¶ 4: From August 2005 through the present, PADF has had 24 hour on-site coverage by registered nurses. The nursing staff conducts a medical screening of all inmates booked into the facility, and the nurses assess problems reported by the inmate, and any problems that are observed. There is ongoing nursing assessment of both old and new complaints, such as diabetes. The nurses make rounds of every inmate cell several times per day, to pass medication and communicate with inmates about their medical problems, and the nurses look into each cell to observe each inmate. Psychiatric nurses also provide on-site coverage at PADF seven days a week.	Not cited.	No evidence of personal knowledge/conclusory. Improper under Rule 30(b)(6).
Crum Affidavit ¶ 5: From August 2005 through the present, physicians and psychiatrists have been on site at PADF every weekday for several hours each day. There has also been 24 hour on-call coverage by physicians and psychiatrists for inmate medical and psychiatric issues.	Not cited.	No evidence of personal knowledge/conclusory. Improper under Rule 30(b)(6).
Crum Affidavit ¶ 6: From August 2005 through the present, the county jail has had 24 hour on-site coverage by registered nurses. Nursing staff performs screening, assessment and treatment of inmates throughout the day, seven days a week. Psychiatric nurses also provide on-site coverage at the county jail seven days a week.	Not cited.	No evidence of personal knowledge/conclusory. Improper under Rule 30(b)(6).

Statement or Fact to be Struck	Defs.' Fact No.	Basis/Bases
Crum Affidavit ¶ 7: From August 2005 through the present, physicians and psychiatrists have been on site at the county jail every weekday for several hours each day. There has also been 24 hour on-call coverage by physicians and psychiatrists for inmate medical and psychiatric issues.	Not cited.	No evidence of personal knowledge/conclusory.
Crum Affidavit ¶ 9: The medical staff provides training to the deputy sheriffs during their pre-service training at their training academy concerning proper response to inmate medical complaints and how to recognize common acute presentations.	Not cited.	No evidence of personal knowledge/conclusory. Improper under Rule 30(b)(6).
Crum Affidavit ¶ 13: From August 2005 to the present, the routine practice at the county jail has been for inmates to submit kites to the nursing staff if they needed non-emergency medical care. A kite is a paper form that is filled out by the inmate and then submitted to the nursing staff. The nursing staff generally reviews kites the same day they are submitted, and triages the inmates' needs with regard to medical priority. Inmates are seen every day for non-emergency medical complaints. Vigil's medical chart does not include any kites that he submitted.	Not cited.	No evidence of personal knowledge/conclusory.
Crum Affidavit ¶ 14: From August 2005 to the present, the routine practice at the county jail has been for the deputy sheriffs to accompany nurses on their rounds of every inmate cell two or three times per day, when the nurses pass medication and communicate with inmates about their medical problems, and the nurses look into each cell to observe each inmate.	49	Expert opinion. No evidence of personal knowledge/conclusory. Improper under Rule 30(b)(6).

Statement or Fact to be Struck	Defs.' Fact No.	Basis/Bases
Crum Affidavit ¶ 15: In August and September 2005, the routine practice at the county jail was for the nursing staff to make an additional round each week to see all of the inmates who were housed in the Special Management area in Building 6 of the county jail. This was called a "segregation round." The nurse was required to complete a subjective assessment and an objective assessment of each inmate in special management, and to complete a form that is part of the inmate's medical record.	50	No evidence of personal knowledge/conclusory. Improper under Rule 30(b)(6).
Crum Affidavit ¶ 16: Vigil's medical record documents that he was seen by a nurse each week on the segregation round. According to Vigil's medical record, there were no problems reported by Vigil, or observed by the nurse on the following dates: August 27, 2005, September 3, 2005, September 10, 2005, September 17, 2005, and September 24, 2005.	51	Hearsay.
Crum Affidavit ¶ 17: The routine multiple daily nursing rounds and the weekly nursing round for inmates in Special Management provided ample opportunity for Vigil to receive medical attention.	52	Expert opinion. No evidence of personal knowledge/conclusory. Improper under Rule 30(b)(6).
Crum Affidavit ¶ 19: As the Medical Director when the suicide of Shawn Vigil occurred, I reviewed the medical record and medical information concerning him. I concluded that there was no evidence of high risk behavior by Vigil that would be a warning sign of suicide, and that his suicide was not preventable.	53	Expert opinion. No evidence of personal knowledge/conclusory.

Statement or Fact to be Struck	Defs.' Fact No.	Basis/Bases
Romero Affidavit ¶ 11: In 2005, there were two deputy sheriffs assigned to Building 6 who knew sign language, and were able to communicate with a deaf inmate if needed. Deputy sheriffs also communicated with deaf inmates by exchanging written notes.	40	Expert opinion. No evidence of personal knowledge/conclusory.
Romero Affidavit ¶ 15: In 2005, inmates in Administrative Segregation were separated from the general population of inmates, but they were not isolated from other inmates in Building 6. In 2005, inmates in Administrative Segregation had interaction with other inmates in Building 6, from one inmate's cell to another, and when they had out-of-cell time, and recreation time, and when watching television. They also had daily interaction with the inmate-tier clerks. Inmates in Administrative Segregation also interacted with other inmates when their cell assignment was changed, if another inmate assisted with the move, by carrying a mattress or other personal belongings.	36	No evidence of personal knowledge/conclusory.
Romero Affidavit ¶ 16: In 2005, inmates classified as Administrative Segregation were not isolated from the deputy sheriffs or the medical staff. These inmates had interaction with the deputy sheriffs who conducted rounds twice each hour, twenty-four hours of every day. In 2005, these inmates also had interaction with staff and tier clerks when their meals were delivered to their cells three times each day. In 2005, there were five daily shifts of Sergeants, who each made one round of every inmate cell during the Sergeant's shift.	37	No evidence of personal knowledge/conclusory.

Statement or Fact to be Struck	Defs.' Fact No.	Basis/Bases
Romero Affidavit ¶ 17: In 2005, inmates in Administrative Segregation also had the opportunity for interaction with the nurses, who were accompanied by a deputy sheriff, and made rounds to their cells three times each day. Also, there was a separate segregation round, for every inmate who was in Building 6, that was conducted once each week by the nurse, accompanied by a deputy sheriff. During the weekly segregation round, the inmates had the opportunity to report problems to the nurse, and the nurse also observed each inmate to see if he was having any problems. Inmates in Building 6 also had the same opportunity as all inmates to submit a medical kite, which is a written request for medical attention for a non-emergency medical issue. Inmates could give the medical kite to the nurse during rounds or to a deputy sheriff at any time. Medical kites were reviewed by the nursing staff every day.	38	Expert opinion. No evidence of personal knowledge/conclusory.
Romero Affidavit ¶ 19: Exhibit 4 includes the Administrative Review Board documents for the weeks of August 28, September 11, September 18, and September 25, 2005. Denver Sheriff Department Deputy Roy Line, whom I supervised, contacted each inmate in Building 6 once each week, including Vigil and asked the inmate two questions: "Are you having any problems?" and "Do you want to see the administrative review board?"	42	Expert opinion. No evidence of personal knowledge/conclusory. Hearsay.

Statement or Fact to be Struck	Defs.' Fact No.	Basis/Bases
Romero Affidavit ¶ 20: The records of the Administrative Review Board in Exhibit 4 show that on August 28, September 11, September 18 and September 25, 2005, Vigil communicated to Deputy Line that he was not having any problems. On August 28, September 18 and September 25, Vigil also communicated to Deputy Line that he wanted to see the Administrative Review Board. Vigil was not able to be seen by the Administrative Review Board during the week of August 28 because of time constraints, staff availability, and the high volume of special management inmates. During the week of September 18, Vigil declined to meet with the board, just prior to the meeting. During the week of September 25, 2005, Vigil did not meet with the board because of his suicide on September 27, 2005.	43, 44, 45	Expert opinion. No evidence of personal knowledge/conclusory. Hearsay.
Romero Affidavit ¶ 21: The Administrative Review Board reviewed Vigil's records each week, concerning his classification and housing, even if Vigil did not attend the Administrative Review Board meeting. During the time that Vigil was at the county jail, there was no change in circumstances that would have resulted in a chance in his classification.	46	No evidence of personal knowledge/conclusory.

Statement or Fact to be Struck	Defs.' Fact No.	Basis/Bases
Wilson Affidavit ¶ 4: In the booking process at PADF, a deputy sheriff records information about the inmate's medical problems, social security number, scars, marks or tattoos, and any other names they use (AKA's), and obtains this information either from the inmate, or from the arresting officer, or from the arrest documents. A computer generated charge slip is given to the prisoner showing their charge and bond amount, and the inmate is provided with a copy of the charges upon which they are being held, either from the arresting officer or from the booking officer.	90	No evidence of personal knowledge/conclusory.
Wilson Affidavit ¶ 5: Every inmate brought into PADF is triaged and medically screened by the medical staff in as timely a manner as possible after book-in.	91	No evidence of personal knowledge/conclusory.
Wilson Affidavit ¶ 8: All inmate [sic] have access to a toilet and to a sink with a drinking fountain at all times, throughout the booking process and while they are held in the housing cells at PADF.	94	No evidence of personal knowledge/conclusory.
Wilson Affidavit ¶ 9: There have been two TDD's available for deaf inmates to use since at least 2000 at PADF. One TDD is located in a Sergeant's office, and the other TDD is in the lobby of the building and is available for public use.	95	No evidence of personal knowledge/conclusory.
Wilson Affidavit ¶ 10: Since at least 2000, all inmates at PADF have had access to a telephone twice daily, and deaf inmates at PADF have access to the TDD telephone twice daily.	96	No evidence of personal knowledge/conclusory.

Statement or Fact to be Struck	Defs.' Fact No.	Basis/Bases
Wilson Affidavit ¶ 11: In 2008, a videophone for deaf inmates was installed at PADF. Deaf inmates have access to the videophone twice daily, and in addition, an inmate may request use of the videophone for a special circumstance when a deputy sheriff makes rounds.	97	No evidence of personal knowledge/conclusory.
Wilson Affidavit ¶ 13: Throughout 2007, deputy sheriffs at PADF made rounds twice each hour, throughout the day. In addition, each sergeant on duty made a separate round of all inmate cells, on every shift. The rounds by the deputy sheriffs and the sergeants provided an opportunity for inmates to get the attention of staff if needed.	99	No evidence of personal knowledge/conclusory.
Wilson Affidavit ¶ 14: Throughout 2007, deputy sheriffs communicated by exchanging written notes with deaf inmates, and the deputies could request a sign language interpreter if needed to communicate with a deaf inmate.	100	Expert opinion. No evidence of personal knowledge/conclusory.