

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION**

<b>ELAINE BLANCHARD, et al.</b>	)
	)
<b>Plaintiffs,</b>	)
	)
<b>ACLU OF TENNESSEE, INC.,</b>	)
	)
<b>Intervening-Plaintiff</b>	)
	)
<b>v.</b>	)
	)
<b>CITY OF MEMPHIS</b>	)
	)
<b>Defendant.</b>	)
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**ACLU OF TENNESSEE, INC.’S RESPONSE TO DEFENDANT’S  
MOTION TO BIFURCATE AND STAY OR LIMIT DISCOVERY**

Intervening Plaintiff, ACLU of Tennessee, Inc. (“ACLU-TN”) responds to Defendant’s Motion to Bifurcate and Stay or Limit Discovery and requests that the Court deny Defendant’s Motion.

**STATEMENT OF THE CASE**

Before the Court is Defendant’s Motion to bifurcate the proceedings and stay discovery pending the Court’s decision on Defendant’s separate motions seeking dismissal of the Complaint and Intervening Complaint on the basis of standing and subject matter jurisdiction. The Motion to Dismiss Intervening Complaint was filed on March 8, 2017. Under Local Rule 12.1(B), ACLU-TN’s response is due twenty-

eight days from the filing date, or on April 6, 2017. The Scheduling Conference in this case is set for April 4, 2017.

Defendant's Motion to Dismiss challenges ACLU-TN's standing to enforce the 1978 Order, Judgment and Decree (the "Decree") entered by this court prohibiting Defendant from conducting "political intelligence" on individuals exercising their Free Speech rights under the First Amendment to the U.S. Constitution. Defendant also raises the issue of whether this court has subject matter jurisdiction to enforce the Decree. ACLU-TN's response to Defendant's arguments will be fully briefed in its response to the Motion to Dismiss.

#### **ARGUMENT AND CITATION TO AUTHORITY**

Bifurcation is the exception to the general rule that disputes should be resolved in a single proceeding. *Chubb Custom Ins. Co. v. Grange Mut. Cas. Co.*, 2008 WL 4823069, at \*2 (S.D. Ohio Nov. 3, 2008). A decision on bifurcation should be grounded in the facts and circumstances of each case. *See Saxio v. Titan-C-Mtg, Inc.*, 86 F.3d 553, 556 (6th Cir.1996). "Federal courts 'have long adhered to the rule that bifurcation should be ordered *only in exceptional cases* because the piecemeal trial of separate issues in a single lawsuit or the repetitive trial of the same issue in severed claims is not to be the usual course.'" *Gen. Elec. Credit Union v. Nat'l Fire Ins. of Hartford*, 2009 WL 3210348, at \*2 (S.D. Ohio Sept. 30, 2009) (emphasis in original) (quoting Wright & Miller, *Federal Practice and Procedure* § 2388, at 474 (2nd ed.2006)); *see also, Momentive Speciality Chemicals, Inc. v. Chartis Speciality Ins. Co.*, 2012 WL 832288, at \*6 (S.D. Ohio Mar. 12, 2012). The party moving for

bifurcation bears the burden of demonstrating that concerns of judicial economy and prejudice weigh in favor of granting the motion. *Farmers Bank of Lynchburg v. BancInsure, Inc.*, 2011 WL 2023301, at \*1 (W.D. Tn. May 20, 2011); *Valley Ford Truck, Inc. v. Phoenix Ins. Co.*, 2011 WL 841177, at \*1 (N.D. Ohio Mar. 7, 2011).

**A. Defendant has not demonstrated how bifurcating discovery would promote judicial economy.**

Because bifurcation is an exceptional procedure, it is generally granted in those cases where the issues are so complex that it would be more expeditious to resolve them in separate trials. *Organic Chemicals, Inc. v. Carroll Prod., Inc.*, 86 F.R.D. 468, 469 (W.D. Mich. 1980). Bifurcation is denied where no such complexity exists. *See Eighth Floor Promotions, LLC v. R.S. Owens & Co.*, 2009 WL 2982873, at \*2 (S.D. Ohio Sept. 15, 2009) (finding that case was not so complex that it warranted adoption of atypical procedure of bifurcation); *Payne v. A.O. Smith Corp.*, 99 F.R.D. 534, 539 (S.D. Ohio 1983) (court not convinced that case is of sufficient complexity to warrant bifurcation).

The facts of the present case do not warrant bifurcation. Unlike cases that involve complex factual issues, standing and subject matter jurisdiction are standard preliminary issues at issue in many cases. Typically, bifurcation is sought in trials, such as conducting individual trials on damages and liability. *Saxio*, 86 F.3d at 556. The Defendant has simply raised issues contemplated in Fed. R. Civ. P. 12 that can, and often must, be raised at the initiation of a law suit. These issues can be resolved by the Court relatively quickly and without complication. This is

not a case where full discovery must be completed on the threshold issues before the Court may entertain them.

As the party moving for bifurcation, Defendant bears the burden to demonstrate how bifurcation would result in a more expeditious case. Defendant has failed to do so. Defendant argues that bifurcation is judicially economical because the threshold issues may be resolved in its favor, thus obviating further discovery. The mere fact that a preliminary issue may be dispositive of a case does not make it judicially economical to postpone discovery until the issue is resolved. In *Valley Ford Truck, Inc.*, the district court rejected this argument, finding that bifurcation on such a basis weighed against judicial economy. The court reasoned that bifurcation of the issues was only expeditious if defendant succeeded on the threshold issue of the contract claim. 2011 WL 841177, at \*2 (N.D. Ohio Mar. 7, 2011). If the defendant did not succeed, the court would proceed with the asserted claim, and be faced with two discovery phases, and potentially two trials. *Id.* The court therefore denied defendant's motion to bifurcate and stay discovery, finding that bifurcation would be wasteful and delay resolution of the case. *Id.*

As was the case in *Valley Ford*, Defendant in this case fails to show how bifurcation will promote judicial economy. While it may be more convenient to Defendant if these preliminary issues are resolved before it is subjected to the discovery process, Defendant fails to address how bifurcation will result in a more expeditious resolution of the case if the Court finds in favor of ACLU-TN on these issues. If the Defendant's Motion to Dismiss fails, all parties will suffer a needless

delay in the initiation of discovery. Bifurcation will burden the judicial system by needlessly delaying discovery in a case that can easily be resolved in a single trial.

**B. Defendant has not demonstrated how bifurcation would avoid prejudice.**

Defendant bears the burden to demonstrate that bifurcation is necessary to avoid prejudice. When courts have addressed the possibility of prejudice, they are usually concerned with the effect that trying several issues will have on juries.

*Organic Chemicals, Inc. v. Carroll Prod., Inc.*, 86 F.R.D. 468, 469–70 (W.D. Mich. 1980). This may occur when evidence is admissible only on a certain issue and it is feared that the party may be prejudiced in the minds of the jury. *Id.* District courts have routinely denied bifurcation in cases where the party moving for bifurcation has failed to make a specific showing of prejudice. *Wolkosky v. 21st Century Centennial Ins. Co.*, 2010 WL 2788676, at \*4 (S.D. Ohio July 14, 2010) (mere assertion of prejudice is insufficient to require bifurcation); *Woods v. State Farm Fire & Casu. Co.*, 2010 WL 1032018, at \*3 (S.D. Ohio Mar. 16, 2010) (denying motion to bifurcate because any prejudice to Defendant from simultaneous discovery was too speculative); *Chubb Custom Ins. Co. v. Grange Mut. Cas. Co.*, 2008 WL 4823069, at \*4 (S.D. Ohio Nov. 3, 2008) (denying motion to bifurcate because plaintiff did not demonstrate that it would be unfairly prejudiced by proceeding with claims all at once).

Fed. R. Civ. P 42(b) is primarily concerned with the prejudicial effect that trying simultaneous claims will have on a jury, not on the burden it may impose on the parties. There is no jury demand in this matter, so this concern is not implicated. Defendant mainly argues that failure to bifurcate will require

Defendant to undergo “extensive, intrusive discovery” and that the issues in the Motion to Dismiss would be delayed. *See* Memorandum in Support of Motion to Bifurcate and Stay or Limit Discovery, Docket No. 19, p. 7. The Defendant fails to articulate why this would be the case. The Motion to Dismiss is governed by Fed. R.Civ. P. 12, which is specifically designed to bring these threshold issues before the court at the beginning of the case. The issues presented - standing and subject matter jurisdiction - are almost purely questions of law. ACLU-TN’s response to these motions is due on April 6, 2017, two days after the initial scheduling conference in this matter. Even in the case that some limited, expedited discovery is sought on the standing issue, the Court’s resolution of this Motion will not necessitate any exceptional delay. In no event will the resolution of these issues be delayed until the completion of full discovery. At most, the parties would be in the initial phases of discovery when the Court rules on the Motion to Dismiss.

The prejudice that Defendant identifies if discovery is not stayed, therefore, is not “extensive, intrusive discovery,” but rather the beginning of the discovery process. Undergoing any part of discovery may present some burden on the parties, but it does not amount to prejudice within the meaning of Fed. R. Civ. P. 42(b). Staying discovery would not avoid some great prejudice to the parties, but would unnecessarily delay the progress of the case.

### CONCLUSION

For the above reasons, Plaintiff requests that the Court deny the Defendant’s Motion to Bifurcate and Stay or Limit Discovery. The purpose of Fed. R. Civ. P

42(b) will not be furthered by bifurcating this case because bifurcation will not promote judicial economy or avoid prejudice.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 21, 2017, a true and correct copy of the foregoing document and the above-described exhibits has been served via ECF to:

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