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

ELAINE BLANCHARD, KEEDRAN FRANKLIN, PAUL GARNER, and BRADLEY WATKINS, Plaintiffs, (dismissed pursuant to Court Order) and ACLU OF TENNESSEE, Intervening Plaintiff, v. THE CITY OF MEMPHIS, Defendant.	No.: 2:17-cv-02120-JPM-dkv

MEMORANDUM IN SUPPORT OF MOTION FOR RULE 54(b) CERTIFICATION

COMES NOW the dismissed Plaintiffs, Elaine Blanchard, Keedran Franklin, Paul Garner, and Bradley Watkins (the "Blanchard Plaintiffs"), by and through counsel, and respectfully submits this Memorandum in Support of Motion for Rule 54(b) Certification.

BACKGROUND

This action involved multiple parties, namely the Blanchard Plaintiffs, the Intervening Plaintiff ACLU of Tennessee, Inc. (ACLU-TN); and the Defendant-Appellee the City of Memphis ("City").

The Blanchard Plaintiffs filed their Complaint against the City petitioning the district court for enforcement of the Order, Judgment and Decree entered by the district court in

Kendrick, et al. v. Chandler, Civil Action No. C76-449 ("*Kendrick* Order"), and to order the City to appear and show what cause exists to excuse the City's willful and wanton disregard of the terms and provisions of the *Kendrick* Order. (ECF No. 1 at PageID 1). The Blanchard Plaintiffs' Complaint also sought to vindicate their constitutional and statutory rights under the Constitutions of the United States and the State of Tennessee, and of the laws of both jurisdictions, asserting that they were intended beneficiaries of a *Kendrick* Order preventing the City and the Memphis Police Department from conducting surveillance of peaceful protests protected by the First Amendment to the United States Constitution and of the Tennessee Constitution, the Tennessee Human Rights Act 4 T.C.A. Sections 21-101 et. seq. and the Civil Rights Act of 1964, specifically Section 42 U.S.C. § 1983. (ECF No. 1 at PageID 3-4).

ACLU-TN intervened pursuant to Fed. R. Civ. P. 24, in part on the grounds that the Blanchard Plaintiffs did not adequately represent the interest of ACLU-TN. (ECF Nos. 12-16). The district court found that ACLU-TN was a successor in interest to the American Civil Liberties Union of West Tennessee, Inc. ("WTCLU"), which was an original named plaintiff in *Kendrick*. (ECF No. 41 at PageID 14).

On June 30, 2017, this Court entered its Order Granting Motion to Dismiss as to Blanchard Plaintiffs; Order Denying Motion to Dismiss as to Intervening-Plaintiff ACLU of Tennessee, Inc. (ECF No. 41). In dismissing the Blanchard Plaintiffs, the district court found:

> The Blanchard Plaintiffs assert that they are intended, not incidental third-party beneficiaries, and so have standing to enforce the Decree. (ECF No. 26 at PageIDs 326-29.) The Blanchard Plaintiffs recycle the same argument that was rejected by the Sixth Circuit in Aiken. In Aiken, the Sixth Circuit clearly stated that "even intended third-party beneficiaries of a consent decree lack standing to enforce its terms." Aiken, 37 F.3d at 1168. As such, the Blanchard Plaintiffs lack standing to enforce the Kendrick Decree.
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> For the reasons stated above, the Court GRANTS Defendant's Motion to Dismiss the Complaint of the Blanchard Plaintiffs (ECF No. 1) due to lack of standing. All complaints asserted by Plaintiffs Elaine Blanchard, Keedran Franklin, Paul Garner, and Bradley Watkins against Defendant City of Memphis are hereby DISMISSED WITHOUT PREJUDICE.

(ECF No. 41 at PageID 520-1, & 524). Following the Court's Order, the Blanchard Plaintiffs timely appealed under the belief that the Court's Order constituted a final decision as to the Blanchard Plaintiffs because the Court dismissed all complaints asserted by the Blanchard Plaintiffs due to lack of standing based on the Sixth Circuit's holding in *Aiken v. City of Memphis*, 37 F.3d 1155 (6th Cir. 1994). The appellate process has already begun and the parties have recent participated in a Sixth Circuit mediation conference. However, because the Court's Order Granting Motion to Dismiss as to Blanchard Plaintiffs did not use the express language required under Rule 54(b) of the Federal Rules of Civil Procedure necessary to allow the appeal of one or more parties, but fewer than all parties, the Sixth Circuit filed an Order on August 31, 2017, ordering the Blanchard Plaintiffs to show cause within fifteen (15) days of the file date of the order why the appeal should not be dismissed for lack of final, appealable order.

Accordingly, the Blanchard Plaintiffs filed its Motion for Rule 54(b) Certification.

ARGUMENT

The Court should grant the Blanchard Plaintiffs' Motion for Rule 54(b) Certification because it has entered a final judgment as to the Blanchard Plaintiffs' and there is no just reason for delay in their ability to appeal the issue of their standing to enforce the *Kendrick* Order. Rule 54(b) states that "when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all…parties only if the court expressly determines that there is no just reason for delay." Fed. R. Civ. P. 54(b). "Rule 54(b) relaxes the traditional finality requirement for appellate review…[and] attempts to strike a balance between the undesirability of piecemeal appeals and the need for making review

available at a time that best serves the needs of the parties." *Lowery v. Fed. Express Corp.*, 426 F.3d 817, 820 (6th Cir. 2005) (internal quotations omitted). Proper certification under Rule 54(b) is a two-step process. *EJS Props., L.L.C. v. City of Toledo*, 689 F.3d 535, 537 (6th Cir. 2012).

The first step requires the district court to expressly direct the entry of final judgment as to one or more but fewer than all the parties in a case. *Id.*. Here, the Court dismissed all complaints asserted by the Blanchard Plaintiffs due to lack of standing based on the Sixth Circuit's holding in *Aiken* that "even intended third-party beneficiaries of a consent decree lack standing to enforce its terms." *Aiken*, 37 F.3d at 1168, Absent the Sixth Circuit overruling its decision in Aiken, the Court's Order Granting Motion to Dismiss as to Blanchard Plaintiffs will not be revised at any time before the entry of a judgment adjudicating the remaining claims of the ACLU-TN. *See* Fed. R. Civ. P. 54. The Court's Order adjudicates all claims brought by and ends the litigation as it pertains to Blanchard Plaintiffs. *See Page Plus of Atlanta, Inc. v. Owl Wireless, L.L.C.*, 733 F.3d 658, 659 (6th Cir. 2013) (A final decision ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.). Therefore, the Court's Order is a final decision as to the Blanchard Plaintiffs, and effectively directs the entry of a final judgment as to the Blanchard Plaintiffs, and constitutes good cause for the Court to make the express direction required by Rule 54(b) in order to allow the Blanchard Plaintiffs to continue with their appeal.

The second step requires to the Court to expressly determine that there is no just reason to delay appellate review. *EJS Props., L.L.C.*, 689 F.3d at 537. This step requires the Court to articulate its reasons for certifying a final order. *Id.*. Here, the Court's Order did not provide an express statement that there was no just reason for delay; however, good cause exists for the

Court to expressly determine there is no just reason for delay. The Sixth Circuit has identified the following non-exhaustive list of factors to consider in determining if there is no just reason for delay:

> (1) the relationship between the adjudicated and unadjudicated claims;
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> (2) the possibility that the need for review might or might not be mooted by future developments in the district court;
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> (3) the possibility that the reviewing court might be obliged to consider the same issue a second time;
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> (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final;
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> (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense and the like.

Lowery, 426 F.3d at 822.

Here, the unadjudicated claims of ACLU-TN for general enforcement of the *Kendrick* Order are not related to adjudicated claims of the Blanchard Plaintiffs for the specific enforcement of the *Kendrick* Order by third party beneficiaries (i.e., any person, individual, group or organization) or for the violation of their individual rights. There is no possibility that future developments in the remaining litigation will moot the Blanchard Plaintiffs need for review because even if the Court were to order the general enforcement of the *Kendrick* Order it would leave the Blanchard Plaintiffs and other intended beneficiaries in the same position that they have found themselves in now – having a right without a remedy. Whether this appellate court would be obliged to consider the same issue a second time is inapplicable to the Blanchard Plaintiffs' appeal because ACLU-TN's claims do not arise out of an intended third party beneficiary's right to enforce a consent decree or violations of individual rights. There are also no claims or counterclaims which would result in a set-off against the judgment sought to be made final.

Allowing the Blanchard Plaintiffs to continue their appeal by granting their Motion for Rule 54(b) Certification could allow the issue of the Blanchard Plaintiffs' standing to be resolved and potentially permit them to rejoin the current litigation before its final conclusion, as opposed to delaying the appeal of the standing issue until this litigation is fully resolved – resulting in the additional expense of re-opening the litigation and rearguing the case should it be found that Blanchard Plaintiffs do have standing. The Court noted in footnote 5 of its Order that "Plaintiffs argue that the holding in *Blue Chip* is contrary to Federal Rule of Civil Procedure 71, citing cases from the Second Circuit, Ninth Circuit, and Restatement (Second) of Contracts, all of which, unlike Aiken, are merely persuasive and not binding to this Court." (ECF No. 41 at PageID 521). In *Aiken*, the Sixth Circuit, sitting *en banc*, also acknowledged that other circuits have held to the contrary but relied upon its then interpretation of the Supreme Court's language in *Blue Chip*, stating that "we are unable to join them until the Supreme Court revisits the unequivocal language of Blue Chip." *Aiken*, 37 F.3d at 1168.

The Sixth Circuit has the ability to overrule its holding in *Aiken* and find that intended third party beneficiaries have standing to enforce consent decrees. The Supreme Court also has the ability to overrule or clarify its holding in *Blue Chip* and find that intended third party beneficiaries have standing to enforce consent decrees. However, the Blanchard Plaintiffs cannot obtain such a ruling without appealing to the Sixth Circuit and, if necessary, seeking writ of certiorari to the Supreme Court. For these reasons, good cause exist for the Court make an express determination that there is no just cause for delay of the Blanchard Plaintiffs' appeal.

CONCLUSION

The Blanchard Plaintiffs respectfully request this Court enter an Order pursuant to Fed. R. Civ. P. 54(b) expressly directing the entry of a final judgment as to the Blanchard Plaintiffs and expressly determining that there is no just reason for delay.

Respectfully Submitted,

APPERSON CRUMP PLC

s/Bruce Kramer
Bruce S. Kramer, Esq., (#7472)
Scott A. Kramer, Esq. (#19462
Patrick H. Morris, Esq. (#33689)
6070 Poplar Avenue, Sixth Floor
Memphis, TN 38119
Phone: (901) 756-6300
Fax: (901) 757-1296
bkramer@appersoncrump.com
skramer@appersoncrump.com
pmorris@appersoncrump.com

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading is being served via the Court's ECF system, upon the following counsel of record this the 11th day of September, 2017:

Buckner Wellford (#9687)
Thomas L. Parker (#13908)
Jennie V. Silk (#35319)
165 Madison Avenue, Suite 2000
Memphis, Tennessee 38103
Telephone (901) 526-2000
bwellford@bakerdonelson.com
tparker@bakerdonelson.com
Attorneys for Defendant

Tom Castelli
Legal Director
ACLU Foundation of Tennessee
P.O. Box 120160
Nashville, TN 37212
Telephone (615) 320-7142
tcastelli@aclu-tn.org
jsilk@bakerdonelson.com
Attorney for Intervening Plaintiff

s/Bruce Kramer
Bruce S. Kramer