

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

ELAINE BLANCHARD, KEEDRAN
FRANKLIN, PAUL GARNER, and
BRADLEY WATKINS,

Plaintiffs,

vs.

NO. 2:17-cv-02120-JPM-dkv

THE CITY OF MEMPHIS

ANSWER TO COMPLAINT

The defendant, The City of Memphis ("City") answers the Complaint filed against it as follows:

JURISDICTION AND VENUE

1. Admitted that this is an action which claims as its jurisdictional basis a 1978 Consent Order involving parties who are not parties to this case, *Kendrick, et al v. Chandler*, Civil Action No. C76-449. Denied that this Consent Order is applicable to the present plaintiffs or this case and denied that the Order continues "in perpetuity." Denied that this Consent Order provides a jurisdictional basis for this action.

2. Admitted that venue is proper in this Court and Judicial District, although it is denied that there is a jurisdictional basis for this claim and that the plaintiffs have standing to obtain the relief requested.

PARTIES

3. The allegations concerning residency and citizenship status of the plaintiff are neither admitted nor denied, the defendant demanding strict proof if its interests are to be

affected.

4. The allegations concerning residency and citizenship status of the plaintiff are neither admitted nor denied, the defendant demanding strict proof if its interests are to be affected.

5. The allegations concerning residency and citizenship status of the plaintiff are neither admitted nor denied, the defendant demanding strict proof if its interests are to be affected.

6. The allegations concerning residency and citizenship status of the plaintiff are neither admitted nor denied, the defendant demanding strict proof if its interests are to be affected.

7. Admitted that the City of Memphis is an incorporated municipality under the laws of the State of Tennessee and that under a "Home Rule Charter," it is a political subdivision of the State of Tennessee that among its central functions maintains and operates a law enforcement agency known as the Memphis Police Department. The City admits that it is under an obligation to operate the activities encompassed within the Police Department in a lawful manner that preserves the individual constitutional rights of its citizens while providing the core function of protecting and securing the person and property of its citizens, including the employees performing their job functions at City Hall. Admitted that the City, as a municipality, is potentially subject to federal civil rights actions under 42 U.S.C. Section 1983, but denied that there is a basis for such a lawsuit in this action. Admitted that service of process has been effectuated on the City.

STATEMENT OF THE CASE

8. Admitted that the plaintiffs purport to state a cause of action under state and

federal law. Denied that these plaintiffs are the intended beneficiaries of the *Kendrick* Consent Order, which was entered almost 39 years ago under a completely different set of facts and circumstances and it is further denied, as more fully set forth in an affirmative defense in this Answer and a previously filed Motion to Dismiss, that even intended beneficiaries of the Consent Order, if they are not named plaintiffs in the underlying action, have standing to assert rights under a Consent Order in this federal circuit.

FACTUAL STATEMENT

9. Admitted that United States District Judge Robert McRae entered a Consent Order in the *Kendrick* case on September 14, 1978. The Consent Order, attached as an exhibit to the Complaint, speaks for itself.

10. Denied that the Consent Order is presently in full force and effect as of the present date, especially as to these plaintiffs. Admitted that the City has "knowledge" of the Consent Order and it is averred that the City has, in fact, endeavored over the years since the Consent Order to satisfy a common sense reading and interpretation of it, regardless of issues concerning its present enforceability. Admitted that the City, as set forth in the Consent Order, undertook the responsibility to "...familiarize each of its law enforcement personnel with the contents of [First] Amendment rights." It is averred that the Memphis Police Department presently has, and has had for a period of time exceeding six years, a written policy concerning the protection of First Amendment rights and the right to political expression as set forth in Exhibit One to this Answer.

11. The City admits that it, as well as the Police Department, "had notice of" the *Kendrick* Consent Order but denies that at the present time the Consent Order is applicable or

independently enforceable, especially with respect to these plaintiffs. The City further denies that the City has "willfully and wantonly violated its core provisions."

12. Denied that the Police Department has acted with the purpose of gathering "political intelligence" or conducting "political surveillance." Admitted that participants at a protest held on February 21, 2017 in front of City Hall were subject to a "Sky Cam" continuous video feed from a fixed location posted openly outside of City Hall and which provides video footage of any activity within its field of vision. Denied that the protest held on February 21, 2017 in front of City Hall was lawful. Admitted further that police officers are often equipped with body cameras which record the events taking place as officers fulfill their duties as they transpire. Denied that such video-taping violates the referenced consent order or any other applicable laws. Denied further that the Police Department has established or presently has in place "a list" which violates the First Amendment rights of individuals involved in lawful and peaceful protests and denied that the conduct of the City or its Police Department in any systemic manner violates a common sense interpretation of the Consent Order, to the extent that the Consent Order is found to have continued legal viability or effect.

13. The statement in the *Kendrick* Consent Order concerning "dissemination and posting of this Decree" speaks for itself and is not subject to a response in this Answer. Denied that the City or the Police Department have violated the meaning and intent of the Consent Order on this subject, to the extent that the Consent Order is construed to have continued legal viability and effect. It is averred that since December 23, 2010 (and certainly during the term of the present City Administration and Director of the Police Department) the *Kendrick* Order has, in fact, been posted on and is available for review and inspection on the Memphis Police

Department website kiosk, with the location referenced in the First Amendment Protection Policy attached as Exhibit One to this Answer.

14. The allegations concerning the details of the Geofeedia Software Program or any other past, present or future software program capable of collecting information concerning public social media postings, for the purposes of monitoring or responding to indications of potential illegal, criminal or terrorist activity and/or security risks to City employees, property, and members of the public, is a matter which impacts upon the confidential processes used by the Memphis Police Department, often in conjunction with law enforcement agencies at the state and federal level, which processes are entitled to confidentiality for those purposes. Without waiving the confidentiality associated with such processes, the City denies that the use of such a program violates the Consent Order or any other applicable laws.

15. Admitted that the October 13, 2016 letter referenced in this numbered paragraph was sent to the Chief Legal Officer of the City on or about the date specified.

16. Admitted that Deputy City Attorney J. Michael Fletcher, on October 27, issued a response to this correspondence.

17. Denied that the City and the Memphis Police Department have created a so-called "black list" or list of any kind requiring that the individuals "cannot come to City Hall without a police escort to wherever they are going in the building." It is specifically averred that one or more of the plaintiffs have, in fact, entered City Hall since their names were placed on the alleged "blacklist" with no escort or individualized attention of any kind. It is acknowledged that the Police Department has, since 2010, maintained a security book which has been kept at the security desk at the front desk of City Hall. The security book, which was kept in paper form for use of the police officers operating within City Hall and was not circulated throughout the police

department, consists of identifying information regarding individuals known or observed by law enforcement or city employees to have engaged in violent, harassing, or intimidating conduct or who have expressed a willingness to commit violent, harassing, or intimidating acts or engage in unlawful activity having nothing to do with the peaceful and non-violent expression of political opinion within the confines of City Hall. Such individuals have included individuals attempting to carry weapons or other contraband through metal detectors or physical pat downs, individuals threatening to set fire to, kill or physically harm individuals working within City Hall, individuals observed to act in an erratic or mentally unstable manner, terminated City Hall or police employees, individuals engaging in inappropriate and harassing behavior toward female City employees, and individuals subject to Court issued protective orders protecting City of Memphis employees working in City Hall. Additionally, while conducting lawful investigations, the Police Department, including the Office of Homeland Security, has determined that other individuals pose security concerns. Such a security book is necessary in order to protect employees of the City at all levels and visitors to City Hall from threatening and/or physically intimidating conduct.

COUNT ONE

18. This paragraph does not require a response.

19. The City denies that there is a "black list" of individuals including the plaintiffs, and denies that the City or the Police Department has violated the terms of the *Kendrick* Consent Order, to the extent that Order has present enforceability. The City avers that information concerning individuals described in Paragraph 17 herein may be contained in a security book maintained at the entrance to City Hall. Those individuals are considered potential threats to the safety and security of individuals working in the building, as well as members of the public and

the officers themselves, or, in the case of terminated employees not falling within those categories, are considered potential security risks relating to the proper functioning of the departments to which they were previously assigned. None of the named plaintiffs are included in that repository of information nor were they intended by the Mayor or Police Director to be included with individuals described in Paragraph 17 in the security book. The City acknowledges that in January, 2017 the plaintiffs were included in a grouping of individuals in an "Authorization of Agency" document presented to and signed by the Mayor following an illegal trespass and unlicensed protest which took place at his residence, on his property, on December 19, 2016. This incident involved individuals, several of whom were wearing masks or scarves covering their faces, seeking to peer into the windows of the Mayor's personal residence and who conducted a "die in" in his front yard, while the Mayor and his family were inside. Following this unlawful gathering, public statements and social media posts by participants and others following the incident confirmed their intention to conduct similar "protests" at the Mayor's home in the future and warning the Mayor to "watch his back." The Authorization of Agency form was initially intended to identify and prevent these individuals from conducting or facilitating further illegal activities at the Mayor's residence. An Authorization of Agency is a process that can be requested by any citizen or business, in which the property owner authorizes the police to remove the persons listed on the form from their property. An Authorization of Agency does not, and cannot, interfere with a person lawfully exercising his/her constitutional rights. In an erroneous, but good faith attempt to protect the Mayor's office at City Hall from similar unlawful protests, the Authorization of Agency form was included with the security book containing information regarding individuals potentially subject to escort at City Hall described in Paragraph 17 herein. The Authorization of Agency has since been removed from

the security book. None of the plaintiffs, along with the other individuals listed on the Authorization of Agency, are on an "escort" or other "list" at City Hall. The Police Director is presently engaged in the process creating applicable protocols or policies concerning the parameters for the classification of individuals who would be identified for placement in the security book referenced in paragraph 17 herein. The Police Director will work to have protocols or policies which clearly define the set of parameters for the Police Department or other security personnel to identify the individuals subject to be included in the security book referenced in Paragraph 17. Once finalized, the protocols and policies will be made available to the public. The Police Director, in conjunction with the Chief Legal Officer, will also establish an administrative process to periodically review and potentially remove certain individuals from inclusion in the security book and in order to develop a process for citizens to object to or otherwise seek removal of an individual's name from that security book. The City avers that the specific processes and mechanisms for identification of individuals falling within those parameters, and the processes used or available to be used to provide a safe and secure facility for City business and for City employees, including the Mayor, are and will remain confidential under state law and are not subject to public disclosure.

20. Denied, and denied further that these plaintiffs have standing to enforce the Consent Order. It is further specifically denied that the use in the past of the Gofedia software, or any similar proprietary software program used in the past, present or future to identify, and as necessary in the course of lawful criminal investigations or monitoring and/or responding to public social media posts for the purpose of ensuring the safety and protection of citizens and businesses from illegal, non- permitted protest activities, violates First Amendment rights or privileges.

21. Denied that the Police Department has failed to publish the *Kendrick* Consent Order on its internal web site. It is averred to the contrary that at least since December 23, 2010 the Consent Order has been specifically referenced in a written policy established within the Police Department acknowledging the importance and necessity to protect the First Amendment rights of individuals, with instructions on how to locate and view the Consent Order on the Police Department internal website.

22. Denied that the City or Police Department have conducted "political surveillance" or intentionally made video recordings of the plaintiffs for unlawful purposes during the process of the plaintiffs participation in any lawfully permitted protest activity. It is averred that to the extent any of the plaintiffs participated in a demonstration outside City Hall held on February 21, 2017, as alleged in the Complaint, their images may have been captured by a permanently installed "Sky Cam" device clearly and openly visible outside City Hall and which provides a continuous video feed of the activities of anyone on the mall plaza in front of the building and/or may have been captured on one or more police body cameras. It is denied that these recordings, or to the extent any other recording exists, was done as a part of any intentional or planned "surveillance" activity. It is further averred that at least one of the plaintiffs may be seen or have been seen on "live Facebook" posts, or media video reports resulting from an illegal and disruptive demonstration conducted at a private business location on January 16, 2017. This incident resulted in the arrests of twelve individuals for, among other things, chaining themselves to and locking their arms inside cement filled 55-gallon drums and blocking ingress and egress from the site. Since there was no permit sought or obtained relating to this protest, or any assurance that the drums used by the protesters did not contain explosive materials, the incident necessitated a concerted effort on the part of police and fire officials to secure the location, cut

through the chains, use a jack-hammer to cut the cement to release the protestors from the barrels and restore ingress and egress from the facility --- all posing a significant risk to the safety of individuals involved and at significant expense and administrative burden to the City. Although it is possible that this plaintiff may have been recorded on one or more police officer mobile camera devices during this illegal gathering, to the extent such a recording exists it was not done as a part of any intentional or planned "surveillance" activity. It is similarly possible that during participation in one or more lawful and peaceful protests or demonstrations, as to which a permit was obtained or as to which the City Attorney's office designated as a "spontaneous" demonstration as to which no permit was required, one or more of the plaintiffs may have been video recorded by one or more police officer's mobile cameras. If so, this was not done as an intentional or planned attempt to conduct "surveillance" and would have instead been part of the process of these cameras recording whatever activities occurred in the line of vision of the officers. At least one or more of the plaintiffs, on information and belief, often themselves record the police officers who are sometimes present to ensure that protests or demonstrations remain peaceful.

23. Denied.

First Affirmative Defense:

For the reasons set forth in the contemporaneously filed Motion to Dismiss, the plaintiffs lack standing to pursue the relief requested under the *Kendrick* Consent Order.

Second Affirmative Defense:

There is no presently justiciable controversy necessitating Court intervention or oversight between the parties.

Third Affirmative Defense:

Pleading in the alternative, in the event that one or more of the plaintiffs are considered to have legal standing, although the City and its Police Department have, on information and belief in the past, and certainly since December 2010, maintained a good faith effort to carry out a common sense interpretation of the provisions of the *Kendrick* Consent Order, and have committed through policies and procedures to protect the First Amendment rights and privileges of its citizens regardless of whether the *Kendrick* Consent Order is legally enforceable, the provisions of a Consent Order entered almost 39 years ago, under completely different facts and circumstances, does not warrant the continued enforcement powers of this Court.

Fourth Affirmative Defense:

Pleading in the alternative, in the event one or more plaintiffs are considered to have legal standing for any purpose, the terms of the *Kendrick* Consent Order constitute a full and final adjudication of the matters raised in that action warranting injunctive relief as to the named plaintiffs, with the Court retaining jurisdiction for the limited purposes of addressing the issue of attorneys' fees and "effectuating", not maintaining "in perpetuity" as alleged by the plaintiffs, the provisions of the Decree. The alleged retention of federal court jurisdiction under the *Kendrick* Decree, under facts and circumstances having little to no resemblance to the alleged concerted, longstanding, and institutionalized practices of the Memphis Police Department almost four decades ago, including the alleged deliberate destruction by burning of documents describing the scope of such activities, should not be considered a necessary component of "effectuating" the measures referenced in the *Kendrick* Order.

Fifth Affirmative Defense:

To the extent that any of the named plaintiffs have demonstrated a pattern or practice of organizing and/or participating in protest activities, rallies or demonstrations requiring the issuance of a permit under the Ordinances of the City of Memphis or illegally and for an improper purpose impersonating the identity of duly or appointed elected officials of the City of Memphis, and to the extent that the evidence demonstrates that these actions are illegal and/or necessitate the expenditure of public law enforcement and fire safety resources as a result of the illegal activities, or otherwise place the person or property of citizens of the City of Memphis at risk, such plaintiff or plaintiffs are guilty of unclean hands and/or inequitable conduct precluding the right to seek all or part of the specific injunctive relief sought.

Sixth Affirmative Defense:

The Complaint fails to state a claim upon which relief may be granted.

Having now answered the Complaint, The defendant now asserts that the plaintiffs are not entitled to the relief sought, or any other relief, that a show cause proceeding is not appropriate or necessary unless it is a show cause proceeding to determine whether plaintiffs' counsel should be subject to monetary sanctions under Fed. R. Civ. P. 11 (b)(2) or (c)(3) with respect to the sole jurisdictional basis alleged in the Complaint, and that for the reasons set forth in the contemporaneously filed Motion to Dismiss, the Complaint should be dismissed.

Respectfully submitted,

s/ Thomas L. Parker

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served via the ECF System of the United States District Court for the Western District of Tennessee, as well as emailed, this 2nd day of March, 2017, to:

Mr. Bruce Kramer
Mr. Scott Kramer
Apperson Crump
6070 Poplar Avenue, 6th Floor
Memphis, TN 38119

s/ Thomas L. Parker

Thomas L. Parker

EXHIBIT

ONE

MEMPHIS POLICE DEPARTMENT POLICY AND PROCEDURES

SECTION: Rules

When a member is administratively charged with DR 137 the disciplinary hearing dealing with violations of this policy must be heard at the level of Deputy Chief. If disciplinary action is sustained by the respective Deputy Chief, a first time violation will result in a **minimum thirty (30) day suspension**. The member will be required to attend an approved domestic violence and or anger management treatment program via CONCERN or other established treatment programs and sign a *DV Employee Return to Duty Agreement* (last chance letter).

A second sustained violation will result in *termination* of employment.

This policy does not preclude legal prosecution of the member and subsequent convictions. Federal law prohibits police officers convicted of qualifying misdemeanor domestic violence crimes from possessing firearms. Officers found guilty of a qualifying domestic violence through criminal proceedings shall be subject to decertification under Tennessee Police Officers Standards and Training (POST) and will be *terminated* based on their decertification and federal laws.

Members of the department who after final adjudication are subject to a final order of protection/restraining order involving domestic violence, which prohibits a member from possessing a firearm, shall be subject to decertification under Tennessee Police Officers Standards and Training (POST) and will be *terminated* based on their decertification and federal laws.

DR 138 POLITICAL INTELLIGENCE

The Memphis Police Department and the City of Memphis do not engage in political intelligence. No member shall intercept, record, transcribe or otherwise interfere with any communications by means of electronic or covert surveillance for the purpose of political intelligence gathering. No member shall engage in any action or disseminate damaging, derogatory, false or anonymous information about any person which will deprive any individual of their First Amendment Rights; nor will any member encourage, cooperate with, or contract with any local, state, federal or private agency to plan or conduct any investigation involving political intelligence.

Any member conducting or supervising a lawful investigation of criminal conduct (governed by 28 CFR Part 23*) in which the investigation may result in the collection of information about the exercise of First Amendment Rights, or interfere in any way with the exercise of such First Amendment Rights must immediately bring such information to the attention of the Director of Police Services for review and authorization. If approved, the investigation will not exceed more than ninety (90) calendar days. An extension may be granted by the Director for an additional ninety (90) days if necessary.

The regulations for this DR are in accordance with the judgment and decree for Civil Case 76-449 (which can be found on the opening page of the MPD Kiosk website).

- * The fundamental principles found in 28 CFR Part 23 operating policies provide law enforcement with the guidance needed to operate criminal intelligence information systems effectively while safeguarding privacy and civil liberties. The Memphis Police Department will operate within the confines of 28 CFR Part 23.