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

ELAINE BLANCHARD, KEEDRAN FRANKLIN, PAUL GARNER and BRADLEY WATKINS, (Dismissed per Court Order) Plaintiffs,	)	
and	)	
ACLU OF TENNESSEE, Inc. Intervening Plaintiff,	)	
v.	)	No. 2:17-cv-02120-jpm-DKV
THE CITY OF MEMPHIS, Defendant.	)	

PLAINTIFF'S RESPONSE IN OPPOSITION TO
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56, Plaintiff ACLU of Tennessee ("ACLU-TN" or "Plaintiff"), submits this response in opposition to the *Motion for Summary Judgment on the Issue of Contempt* filed by the City of Memphis ("Defendant").

Defendant's Motion for Summary Judgment is premised on its contention that Plaintiff will be unable "to come forward with clear and convincing evidence of violations of the Consent Order so as to justify shifting the burden to the City to defend its actions." (Doc. No. 81-1, at 11.) This contention is made in error — clear and convincing evidence demonstrates that Defendant through its Police Department ("MPD") has violated the Consent Decree entered in *Kendrick v. Chandler*, Civil Action No. C76-449 (the "Decree"). As argued more fully in Plaintiff's Motion for Summary Judgment and papers filed in support, MPD's violations, both wide-ranging and pervasive,

constitute a pattern of political intelligence collection, electronic and covert surveillance, harassment of those exercising their First Amendment rights, and attempts to deter the free exercise of First Amendment rights.

Accordingly, Plaintiff respectfully requests that *Defendant's Motion for Summary Judgment on the Issue of Contempt* be denied.

I. NEWS ARTICLES RELIED UPON BY DEFENDANT ARE NOT ADMISSIBLE IN EVIDENCE AND SHOULD BE STRICKEN

In its summary judgment papers, Defendant relies on numerous news articles drawn from the internet and provided as hyperlinks.[1] These citations appear to be an attempt to use the news article links as evidence to construct a narrative regarding national events, groups, and individuals. These articles are inadmissible as hearsay and, where quotations have been offered, double hearsay. Accordingly, Plaintiff requests that the inadmissible links and related statements be stricken from Defendant's Motion, Memorandum, and Statement of Facts.

"[H]earsay evidence cannot be considered on a motion for summary judgment." *Cary v. Cordish Co.*, No. 17-5103, 2018 WL 1734696, at *3 (6th Cir. Apr. 10, 2018) (citing *Wiley v. United States*, 20 F.3d 222, 226 (6th Cir. 1994); *Tranter v. Orick*, 460 Fed. Appx. 513, 514–15 (6th Cir. 2012)). Federal Rule of Evidence 801 defines hearsay as "a statement, other than one made by the declarant while testifying, at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801(c). "Media reports themselves are routinely excluded as hearsay because of their inherent unreliability." *Adcock v. City of Memphis*, No. 06-2109-STA, 2011 WL 13269785, at *1 (W.D. Tenn. Jan. 4, 2011).

Defendant cites these articles for their content, or in other words, for their truth. The assertions at issue include the dates and circumstances of events, the purposes and motives of

[1] The articles were not filed with the Court or produced in discovery.

individuals and groups, the motivations behind criminal acts, and the origins and beliefs of activist groups. (Doc. No. 81-3, ¶¶ 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 19, 20, 21, 22, 23, 29.) In addition, Defendant attempts to use these news articles to prove facts related to the removal of names from the AOA as well as to provide the details regarding MPD's involvement in joint task forces with other law enforcement agencies. (Doc. No. 81-3, ¶¶ 32, 35.) Defendant further includes quotes drawn from news sources that are both inadmissible and irrelevant. (Doc. No. 81-3, ¶¶ 20, 21.)

The articles cited by Defendant are classic hearsay. They are statements made by someone other than Defendant or its witnesses, offered for the truth of the matters they assert, and they are not made under oath. They do not fall within any of the exceptions provided by the Federal Rules of Evidence. Accordingly, such articles are inadmissible hearsay. *See Kallstrom v. City of Columbus*, 165 F. Supp. 2d 686, 693 (S.D. Ohio 2001). Because these articles are inadmissible, Plaintiff respectfully requests that the Court strike paragraphs 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 19, 20, 21, 22, 23, 29, 32, and 35 of the *Statement of Undisputed Material Facts in Support of Defendant's Motion for Summary Judgment on the Issue of Civil Contempt*. On the same basis, Plaintiff requests that the Court strike those portions of *Defendant's Memorandum in Support of Motion for Summary Judgment on Civil Contempt* that rely upon citation to the stricken portions of its statement of facts. (Doc. No. 81-1, at 2-3, 5-6, 8, 9, & 10.)

II. PLAINTIFF HAS SOUGHT SUMMARY JUDGMENT ON THE ISSUE OF CONTEMPT AND INCORPORATES ITS PAPERS HEREIN

Plaintiff has sought summary judgment on the issue of Defendant's contempt. Accordingly, the facts that support Plaintiff's claim have been summarized fully in papers previously filed. Rather than duplicating the recitation of facts, Plaintiff incorporates by reference its Motion for Summary Judgment, Memorandum in Support, and related Exhibits as if stated fully

herein.[2] (Doc. No. 79.)

III. THE CONSENT DECREE

In order to determine whether Defendant has violated the Consent Decree, it is critical to begin with an analysis of the Decree itself.

A. Legal Standard Applicable to Interpretation of the Decree

Consent decrees "bear some of the earmarks of judgments entered after litigation" and "[a]t the same time, because their terms are arrived at through mutual agreement of the parties, consent decrees also closely resemble contracts." *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 519 (1986) (citations omitted). As the Supreme Court opined:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. . . . Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the *decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. *For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it.*

United States v. Armour & Co., 402 U.S. 673, 681 (1971) (first and second emphases in original; third emphasis added). "A consent decree . . . should be strictly construed to preserve the bargained for position of the parties." *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir.1983).

Defendant has not argued that the Decree is ambiguous, and indeed, it is not. The language of the Consent Decree is not vague or susceptible to multiple interpretations. The requirements set forth in the Decree were negotiated by the parties and are clearly enumerated. Accordingly, the scope of the Consent Decree must be discerned within its four corners.

[2] Unless otherwise noted, references in this Response to deposition excerpts and exhibits refer to those excerpts and exhibits attached to *Plaintiff's Motion for Summary Judgment*.

B. Language of the Decree

The Decree begins with a *Statement of General Principals*, which states that the provisions of the Decree prohibit Defendant from engaging in "law enforcement activities which interfere with any person's rights protected by the First Amendment to the United States Constitution" and specifically enumerates protection for the right "to communicate an idea or belief, to speak and dissent freely, to write and to publish, and to associate privately and publicly for any lawful purpose." The *Statement of General Principals* also emphasizes the specific limitations on law enforcement activities conducted in connection with the investigation of criminal conduct.

The Decree enumerates four categories of conduct prohibited by its provisions: (1) Political Intelligence; (2) Prohibition against Electronic Surveillance for Political Intelligence; (3) Prohibition Against Covert Surveillance for Political Intelligence; and (4) Harassment and Intimidation Prohibited.

"Political Intelligence" is defined by the Decree as "the gathering, indexing, filing, maintenance, storage or dissemination of information, or any other investigative activity, relating to any person's beliefs, associations or other exercise of First Amendment rights." Decree § B(4). "First Amendment rights" is defined as "rights protected by the First Amendment to the Constitution of the United States including, but not limited to, the rights to communicate an idea or belief, to speak and dissent freely, to write and to publish, and to associate privately and to publicly for any lawful purpose." Decree § B(1).

Under the first category of conduct — Political Intelligence — the Decree includes two restrictions: (1) Defendant "shall not engage in political intelligence"; (2) Defendant "shall not operate or maintain any office, division, bureau or any other unit for the purpose of engaging in political intelligence." Decree § C.

Under the second category of conduct — Electronic Surveillance — the Decree states that Defendant "shall not intercept, record, transcribe or otherwise interfere with any communication by means of electronic surveillance for the purpose of political intelligence." Decree § D.

Under the third category of conduct — Covert Surveillance — the Decree includes two restrictions: (1) Defendant "shall not recruit, solicit, place, maintain or employ and informant for political intelligence"; and (2) no officer, employee or agent of Defendant "for the purpose of political intelligence, infiltrate or pose as a member of any group or organization exercising First Amendment rights." Decree § E.

Under the fourth category of conduct — Harassment and Intimidation — the Decree describes further prohibited activities. First, Defendant "shall not disrupt, discredit, interfere with or otherwise harass any person exercising First Amendment rights." Under this heading the Decree enumerates a non-exclusive list of prohibited conduct, including that (1) Defendant "shall not disseminate damaging, derogatory, false or anonymous information about any person for the purpose of political intelligence," and (2) Defendant shall not "attempt to provoke disagreement, dissention or violence between persons." Decree § F(1). Second, the Decree provides that Defendant "shall not engage in any action for the purpose of, or reasonably having the effect of, deterring any person from exercising First Amendment rights." Decree § F(2). As an illustration, the Decree states: "Defendant shall not, at any lawful meeting or demonstration, for the purpose of chilling the exercise of First Amendment rights or for the purpose of maintaining a record, record the name of or photograph any person in attendance . . . ." Decree § F(2).

The Decree contemplates that certain criminal investigations may collect information regarding the exercise of First Amendment rights; thus, the parties agreed to a protocol for review and authorization of such criminal investigations. Any officer "conducting or supervising a lawful

investigation of criminal conduct which investigation may result in the collection of information about the exercise of First Amendment rights . . . must immediately bring such investigation to the attention of the Memphis Director of Police for review and authorization." Decree § G(1). The same procedure applied to investigations that interfered with the exercise of First Amendment rights. *Id.* Upon receipt of such a notification, the Director of Police was to review the factual basis of the investigation and the investigative techniques to be employed. The Director could then authorize the investigation for a period of ninety (90) days after making the following written findings: (1) The investigation does not violate the provisions of the Decree; and (2) The expected collection of information about, or interference with, First Amendment rights is unavoidably necessary for the proper conduct of the investigation; and (3) Every reasonable precaution has been employed to minimize the collection of information about, or interference with, First Amendment rights; and (4) The investigation employs the least intrusive technique necessary to obtain the information. Decree § G(2). Pursuant to the Decree, the Director could approve additional 90-day extensions as needed. *Id.*

The Decree further regulates the maintenance and dissemination of personal information. Decree § H. The Decree prohibits collection of personal information unless it is collected in the course of a lawful investigation of criminal conduct and specifically provides that Defendant "shall not disseminate personal information about any person collected in the course of a lawful investigation of criminal conduct to any other person, except that such information may be disseminated to another government law enforcement agency then engaged in a lawful investigation of criminal conduct." *Id.*

The Decree restricts Joint Operations that violate the Decree and specifies how the Decree must be disseminated and posted. Decree §§ K, J.

C. Defendant's Attempts to Look Outside the Four Corners of the Decree to Interpret Its Requirements Are Improper

Defendant incorrectly contends that the Court should look outside of the Decree to interpret its requirements in determining whether Defendant has committed a violation. Based upon the initial Complaint filed in *Kendrick*, Defendant argues that "implicit in the *Kendrick* Consent Decree's definition of 'political intelligence' is a malicious intent to harass and intimidate persons advocating unpopular political [opinions]."[3] (Doc. No. 81-1, at 12-13.) The Decree contains no such "implicit" element of malice that must be proven.

As outlined above, the Decree specifies four specific categories of prohibited conduct, regulates criminal investigations, limits the dissemination of personal information and joint operations, and it regulates the posting of the Decree. Only one category of conduct — Section F: Harassment and Intimidation Prohibited — speaks to harassment and intimidation. Even then, the section does not require a finding of malicious intent. It states that Defendant shall not "disrupt, discredit, interfere with or otherwise harass," and by way of example prohibits disseminating "damaging, derogatory, false or anonymous information." Decree § F(1). Even then, Section F prohibits not only conduct that has the *purpose* of chilling First Amendment rights but also that conduct reasonably having the *effect* of deterring any person from exercising First Amendment rights. Decree § F(2).

Defendant has not argued that the Decree is vague, ambiguous, or susceptible to multiple interpretations. Accordingly, as held in *United States v. Armor*, the scope of the Consent Decree must be discerned within its four corners.

Defendant relies on two cases — *Handschu v. Special Services Division*, 605 F. Supp. 1384

[3] Defendant's Memorandum reads "political locations" instead of "political opinions." From context, it appears that this is a typographical error and Plaintiff has substituted what it assumes is the intended word in argument above.

(S.D.N.Y. 1985), *aff'd* 787 F. 2d 828 (2d Cir. 1986) ["*Handschu I*"], and *Handschu v. Special Servs. Div.*, 737 F. Supp. 1289, 1292 (S.D.N.Y. 1989), *amended*, 838 F. Supp. 81 (S.D.N.Y. 1989) ["*Handschu II*"][4] — to argue that the Court should read into the Decree an "implicit" requirement of "malicious intent to harass and intimidate." (Doc. No. 81-1, at 13.)

As a threshold matter, the *Handschu* Guidelines and the Decree contain dissimilar language and provisions. As such, there is no basis to use the Guidelines, and another court's interpretation of them, to read requirements or limitations into the Decree. Review of the analysis applied by the *Handschu II* court is useful in that it supports the proposition that where a consent decree is unambiguous, it should be defined within its four corners.

The *Handschu* Guidelines were intended to "oversee the activities of the Public Security Section ('PSS') of the Intelligence Division of the New York City Police Department" and established an Authority to conduct the oversight. *Handschu II*, 737 F. Supp. at 1292. The dispute in *Handschu II* arose, in part, out of allegations that PSS had recorded and profiled personalities who spoke on a radio station and that it had operated a "Black Desk," which compiled materials on and investigated Black community leaders. *Id.* at 1292.

The plaintiffs first contacted the Authority regarding their allegations; the Authority conducted an extensive investigation. *Id.* In its 44-page opinion, the Authority found that while PSS recorded and summarized the public broadcasts, they kept no records or reports and commenced no investigations into those individuals who appeared on the program. *Id.* at 1295. The Authority further found that the allegations regarding the "Black Desk" were unfounded and that PSS had not "compiled materials on Black community leaders, monitored public gatherings or demonstrations, or used undercover personnel at such activities except in the course of

[4] *Handschu I* approved the consent decree referred to as the "*Handschu* Guidelines"; "*Handschu II*" was a lawsuit alleging violations of the *Handschu* Guidelines.

legitimate investigations that were approved by" the Authority. *Id.* at 1296.

The plaintiffs, dissatisfied with the Authorities' conclusions, filed a lawsuit alleging contempt of the *Handschu* Guidelines. *Id.* The court found that the Guidelines were not ambiguous and ruled that "[t]he Guidelines' purpose and definitions may—and accordingly should—be read together to achieve a harmonious and unambiguous whole." *Id.* at 1301. The court declined to adopt an alternate construction and held that "[p]olice conduct falling within the Guidelines is proscribed by the Guidelines if not consistent with them: not proscribed 'generally', but proscribed, period." *Id.* at 1301.

The *Handschu* court held that, while listening to the radio was not conduct prohibited by the Guidelines, PSS did not simply listen. *Id.* at 1303-04. Instead, PSS conducted "monitoring of a radio program for the expression of political or social views, followed by the preparation of summaries and their retention in intelligence files"; the court held this was an "investigation" as defined by the Guidelines — "namely, 'police activity undertaken to obtain information or evidence' about the exercise of the right of expression for political ends." *Id.* at 1304.

Ultimately, the court found that PSS *had* violated the Guidelines. *Id.* at 1308. The only reason the court declined to hold the Department in contempt was because of the considerable efforts undertaken by the Authority to comply with and enforce the Guidelines. *Id.* at 1308.

Handschu II arose out of a different factual and procedural background than the case before the Court here, but in many ways, supports rather than undermines Plaintiff's claims. As in *Handschu II*, the Decree is unambiguous and should be read within its four corners; police conduct falling within the Decree is proscribed by the Decree if not consistent with its provisions, period. However, unlike the defendant in *Handschu II*, Defendant has undertaken no efforts to ensure the achievement of the Decree's purposes and should be found in contempt.

IV. APPLICABLE LEGAL STANDARDS

A consent decree is both a contract between the parties and an order of the Court. *Rufo v. Inmates of Suffolk Cnty Jail*, 502 U.S. 367, 378 (1992). Thus, as with any order, the parties have a duty to take ". . . all reasonable steps within their power to comply with the court's order." *Glover v. Johnson*, 934 F.2d 703, 708 (6th Cir. 1991). The Court retains its inherent power to "protect the integrity of the decree with its contempt powers." *Vanguards of Cleveland v. City of Cleveland*, 23 F.3d 1013, 1018 (6th Cir. 1994).

To prove a case of civil contempt, a plaintiff must provide clear and convincing evidence that the defendant violated the Court's prior order. *N.L.R.B. v. Cincinnati Bronze, Inc.,* 829 F.2d 585, 590 (6th Cir. 1987). Once a plaintiff establishes a *prima facie* case for contempt, the burden shifts to the defendant to produce evidence that it is "presently unable to comply with the court's order." *Elec. Workers Pension Tr. Fund of Local Union 58, IBEW v. Gary's Elec. Serv. Co.*, 340 F.3d 373, 382 (6th Cir. 2003).

V. CLEAR AND CONVINCING EVIDENCE DEMONSTRATES THAT DEFENDANT HAS VIOLATED THE CONSENT DECREE

Defendant has violated nearly every provision of the Decree. The evidence is sufficient to defeat Defendant's Motion for Summary Judgment, as well as to demonstrate clearly and convincingly that Defendant has committed numerous violations of the Decree and should be held in contempt.

As an initial matter, Plaintiff rebuts Defendant's emphasis throughout its Memorandum that there is "no evidence that MPD engaged in any surveillance of any First Amendment activities before July 2016." (Doc. No. 81-1, at 17, 12.) This representation is both incorrect and disingenuous. This assertion is incorrect because evidence demonstrates that, at the very least, the "Bob Smith" account was actively adding friends from the Memphis community as early as July

2015. (Ex. Z at 577 (Tami Sawyer).) But more importantly, this assertion misrepresents the character of the evidence that was provided to Plaintiff by Defendant in discovery. The parties agreed to limit the timeframe of discovery to between July 2016 and March 2017. If Defendant wishes to rely on unchecked assertions that there were no violations of the Decree prior to July of 2016, then Plaintiff certainly has a right to discover the relevant documents regarding police practices from 1979 to today. Plaintiff is available and willing to conduct such an investigation.

Decree § C(2) — Prohibition of Political Intelligence Unit

Defendant violated Section C(2) of the Decree by operating the Office of Homeland Security ("OHS") as a unit dedicated to the collection and dissemination of political intelligence.

OHS is a specialized unit within MPD "originally designed to deal with threats to the Memphis Police Department or Memphis in general"; it shifted its mission in recent years to focus on "local individuals or groups that were staging protests." (Chandler Dep. 11-15; Reynolds Dep. 17.) OHS functioned as a hub for gathering and disseminating intelligence between Command staff, RTCC, precincts where events were to take place, the permit's office and other specialized units, such as the Organized Crime Unit and the Multiagency Gang Unit.

The Real Time Crime Center ("RTCC") assisted OHS in investigating free speech activities through monitoring of live camera feeds, general and targeted social media account research, and application of powerful software analysis to map the relationships between individuals and events. (Reynolds Dep. 43; Chandler Dep. 28-29; Wilburn Dep. 13, 21, 24-25, 27-28, 46-47; Patty Dep. 6-26, 34; Bass Dep. 58-59; *see, e.g.*, Exs. S, T, U, V, W, PP.)

In pursuing its mission, OHS collected and disseminated intelligence regarding political activists and individuals who participated in protests, rallies, or other free speech activities in the City. OHS conducted research on individuals that "may have something to do with either Keedran

Franklin or the CCC" and prepared the AOA for the Mayor's residence and City Hall; OHS prepared and distributed dossiers on each of the members of the list. (Bonner Dep. 9, 33-35; Reynolds Dep. 25; Ex. C.) OHS prepared and circulated Joint Intelligence Briefings ("JIBs" (*see, e.g.*, Exs. E, F, H, L), created and maintained a database of protests (Ex. P), and conducted weekly power point presentations regarding activists and protest groups (Exs. Q, R). MPD collected information for OHS through electronic surveillance and investigation of public and private social media accounts (Exs. X, Y, Z, AA, BB, CC, Z), through ground surveillance of public free speech events through uniformed and undercover officers (Exs. DD, FF, SS, GG, HH), and through covert surveillance of private events (Exs. JJ, LL, MM). OHS aggressively contacted individuals who were perceived to be organizing free speech events (Ex. HH). Each of these acts constitutes its own violation of the Decree.

Decree § C(1) — Prohibition of Political Intelligence

Defendant violated Section C(1) of the Decree by engaging in the systematic gathering, indexing, filing, maintenance, storage and dissemination of information, or any other investigative activity, relating to person's beliefs, associations or other exercise of First Amendment rights.

Defendant's violations include the creation and dissemination of the AOAs, the daily JIBs, the protest list, and weekly Power Point presentations.

Individuals were targeted for investigation based on their "associations-in-fact," their affiliations with protest groups, and their participation in free speech activities. (Reynolds Dep. 67-68, 122, 125-26; Ex. B.) The dossiers of those included on the AOA list included drivers' license profiles and photos for all individuals and, for some, included social media profile links, arrest and mental health histories, and alleged gang affiliation. (Bonner Dep. 9, 33-35; Exs. C, D; Reynolds Dep. 25.)

JIBs, which OHS circulated between one and three times per day, were reports prepared by OHS that presented national news stories regarding police involved shootings alongside local criminal activities, photographs and profiles of activists and individuals, and lists of movement meetings and events.[5] (Ex. E.) JIBs were celebrated within MPD as "a regional guide to area law enforcement for current and historical intel in reference to . . . BLM encounters" and focused on specific groups, despite the fact that those groups had "made no direct threat" in Memphis. (Ex. F; Bass Dep. 55-56; Chandler Dep. 23-24.) In addition to wide circulation within MPD, JIBS were disseminated to regional law enforcement and to members of the community. (Exs. G, H, I, J; Reynolds Dep. 54-55.)

JIBs regularly included information about meetings on private property, including panel discussions, townhalls, BLM Meetings for adults and those for youth, and even such innocuous events as "Black Owned Food Truck Sunday." (Exs. G, H, L.) They regularly included photographs of and information about those involved in free speech activities and those who posted about the possibility of free speech events. (Exs. G, M, N.) In disregard of the breadth of circulation, the JIBs included personal information, such as drivers' license profiles, juvenile arrest records, photographs, dates of birth, social security numbers, addresses, mental health histories, and information from police databases. (Exs. G, H, I, J, K, L, M.)

Weekly Power Point presentations were similarly populated with current and historical intel with respect to protest groups, associations, and beliefs and free speech activities of persons. (Reynolds Dep. 98-99; Exs. Q, R.) Presentations incorporated private social media posts, admitted to the use of undercover officers during protests, and provided summaries and assessments

[5] Chandler described the four categories of information that were to be incorporated into the brief as: (1) Police Shootings/deaths; (2) Riots/protests; (3) Black Lives Matter (BLM); (4) Officer Safety. (Ex. E.)

regarding the beliefs, opinions, and goals of the individuals and groups profiled. (*Id.*)

OHS also tracked "Key Members" involved in free speech events to track the "pattern" of leadership. (Ex. P; Reynolds Dep. 30-31) The Database tracked gatherings as small as four individuals. (Ex. P.) According to the Database, only two events resulted in any arrests and no events resulted in damage. (*Id.*)

MPD, and specifically OHS and RTCC, collected information about political activists, protests, and groups through public and private sources. (Reynolds Dep. 43.) MPD collected information for OHS through electronic surveillance and investigation of public and private social media accounts (Exs. X, Y, Z, AA, BB, CC, Z, U), through ground surveillance of public free speech events through uniformed and undercover officers (Exs. DD, FF, SS, GG, HH), and through covert surveillance of private events (Exs. JJ, LL, MM), and by using software to map associations between individuals based on their beliefs, opinions, and associations. (Ex. PP.) Ground surveillance of private events was used when there was no threat of "potential social discord." (Ex. JJ.) MPD covertly surveilled the memorial service of a young man who was killed by law enforcement which was held at a church, reporting back who was in attendance and details as minute as the fact that a tree was planted in his honor. [6] (Ex. KK.)

In addition to the violation of Section C, the dissemination of personal information also violates Section H of the Decree. The exchange of political intelligence with law enforcement agencies, not in the course of a lawful criminal investigation, also violates Section K of the Decree.

Decree § E — Prohibition of Covert Surveillance, Informants, and Undercover Work

Defendant violated Section E of the Decree by covertly surveilling groups engaged in free

[6] Before leaving, the commander surveilling the event reported that he had confirmed that the group "had permission from New Direction to plant a tree." (*Id.*)

speech activities.

Defendant engaged in covert electronic surveillance through the Facebook account under the pseudonym "Bob Smith." Available documents indicate that someone within MPD, or an informant cultivated by MPD, had access to the "Bob Smith" account and used it to communicate with individuals, to view private posts, join private groups, and otherwise to pose as a member of the activist community. (*See* Reynolds Dep. 90-98; Exs. X, Y, Z, AA, BB, CC.) The "Bob Smith" Facebook account has been actively adding "friends" from the Memphis community from at least July 2015 to April 2018. (Ex. Z at 577, 591.)

In addition, undercover officers were used to gather intel on protestors. (Chandler Dep. 47-49; Exs. DD at 2394, SS, GG, Q.) Bass testified that he sent officers to public forums to gather intel, to "sit down and listen" and to try to find out "the intentions" of those in attendance. (Bass Dep. 52; Ex. HH.) OHS used an undercover phone to gain access to private group communications and sent undercover officers to private meetings. (Exs. LL, MM.)

Decree § F — Prohibition of Harassment & Intimidation

Defendant violated Section F of the Decree by circulating personal and confidential information about individuals involved in the exercise of their free speech rights, including but not limited to arrest and mental health records and information regarding ongoing investigations. This information was circulated in the JIBs multiple times a day both within MPD, outside of MPD to regional law enforcement, and even to members of the community. (Exs. G, H, I, J, K, L, M.) JIBs also included information that was incorrect, unconfirmed, and mere rumor. (*Id.*)

Defendant also violated Section F of the Decree by specifically engaging in conduct used as an example of a violation; as detailed above, Defendant regularly named and photographed individuals exercising their First Amendment rights by attending meetings and free speech events.

Defendant discouraged the exercise of First Amendment rights by enforcing different standards for obtaining a permit for protests than other types of events. (Exs. NN, OO; Howard Dep. 24-25, 39-40.) And, Defendant chilled the exercise of First Amendment rights by aggressively contacting event organizers and questioning them regarding their agenda and their affiliations. (Ex. HH.)

Decree § G — Authorization Related to Criminal Investigations

The Decree allows for collection of information about the exercise of First Amendment rights and even interference with those rights under certain circumstances during the course of a criminal investigation. Investigation of suspected criminal conduct does not, however, give Defendant unfettered discretion to disregard the Decree. To the contrary, the Decree provides a specific protocol for how such investigations should be authorized. Defendant did not even attempt to comply with the Decree's requirements. Defendant disregarded those procedures entirely as it did the remainder of the Decree.

Defendant contends that the preparation and implementation of the AOA was in compliance with the Decree. As a matter of law, it was not. Pursuant to the Decree, the Director must review the investigative techniques to be employed and make specific, written factual findings. Director Rallings testified that the AOA was created by OHS Detective Reynolds in response to his "open-ended question" about protecting the Mayor's house; he testified that he did not recall any specific conversation regarding the AOA as it was being created.[7] (Rallings Dep. 64-66.) This vague conversation falls far short of the Decree's authorization requirements.

OHS collected political intelligence on individuals organizing events that did not require a permit, events that had permits, and lawful free speech activities entirely unrelated to gatherings of any sort. Further, the officers responsible for investigations demonstrated a lack of

[7] Rallings gave conflicting testimony regarding whether he was aware of the City Hall Escort list prior to the news story breaking. (Rallings Dep. 67-68.)

understanding regarding the permitting process and First Amendment rights.[8] A broad overcategorization of events and gatherings as "unlawful" does not transform lawful expression into unlawful expression.

VI. DEFENDANT HAS NOT SUBSTANTIALLY COMPLIED WITH THE CONSENT DECREE

Despite stating expressly that its Summary Judgment Motion is confined to whether Plaintiff will be able to establish a *prima facie* case of contempt, Defendant attempts to justify its failure to comply with the Decree throughout its Memorandum in Support. Accordingly, Plaintiff addresses below those arguments raised by Defendant and the legal standards applicable to the burden Defendant must bear in contempt proceedings.

The Sixth Circuit demands substantial compliance with the court's orders and demands that a party must show they took "all reasonable steps within their power to comply with the court's Order." *Peppers v. Barry*, 873 F.2d 967 (6th Cir.1989). It is not enough for a party to claim that they made an effort to comply; the law demands substantial compliance with the Court's Order.

"Courts have been particularly unsympathetic to purported excuses for less-than-substantial compliance where the contemnor has participated in drafting the order against which compliance is measured." *United States v. State of Tenn.*, 925 F. Supp. 1292, 1302–04 (W.D. Tenn. 1995) (citing *Glover v. Johnson,* 934 F.2d 703, 708-09 (6th Cir. 1991) (finding state prison officials in contempt for failing to abide by order consisting of negotiated settlement between the parties); *Spallone v. United States,* 493 U.S. 265, 276 (1990) (upholding finding

[8] Reynolds testified that the term "unlawful assembly" referred to any assembly of more than 25 people without a permit; accordingly, many of the assemblies to which he refers are not in fact in violation of any law or ordinance. Rather, he designated them as unlawful due to an incorrect understanding of the city ordinance in question. (Reynolds Dep. 37.) *See American-Arab Anti-Discrimination Committee v. City of Dearborn*, 418 F.3d 600, 608 (6th Cir. 2005) (statute requiring small groups to get permit before walking on a public right of way is overly broad and not narrowly tailored because it would apply to circumstances that "do[ ] not trigger the [city's] interest in safety and traffic control.").

of contempt against city that had failed to take action required by consent decree)). "A party participating in drafting an order does so with an understanding of what it reasonably can accomplish." *Id.* "When that party subsequently fails to live up to the particulars of the order, it is more difficult for a court to excuse that failure than if the order had been court imposed." *Id.*

Defendant contends that "[a]ny actions taken by the City to monitor and investigate persons or groups exercising their First Amendment rights were . . . for the legitimate law enforcement purpose of community caretaking." (Doc. No. 81-1, at 16.) Defendant argues, without any apparent legal justification, that Fourth Amendment caselaw and "reasonableness analysis" relative to the community caretaking function should apply to the case at bar.

Through an exhaustive search, undersigned counsel has been unable to locate any case in which the community caretaking exception was applied outside of the Fourth Amendment context. Accordingly, such analysis simply does not apply in this case.[9] Even if it were to apply, however, Defendant's conduct was objectively unreasonable and unjustified by exigent circumstances. The rights infringed upon by Defendant's conduct are protected by the U.S. Constitution and are further enshrined in the Decree through the parties' mutual consent. Defendant is not vested with the authority to disregard those rights when and where it chooses and has demonstrated that it will abuse any discretion which it exercises.

Centering back on the appropriate standard — substantial compliance — Defendant cannot demonstrate, and has not attempted to demonstrate, that it has taken all reasonable steps to comply with the Decree. Furthermore, because Defendant participated in drafting the Decree, its failure to comply is further inexcusable.

[9] In fact, the Sixth Circuit has held that a contemnor "would not be relieved of responsibility regardless of the number of violations or the cause thereof because they have a positive duty to insure compliance with the consent decree, stating "[t]he frequency of the violations is not material, nor are the good intentions of the violator." *Screw Mach. Tool Co. v. Slater Tool & Eng'g Corp.*, 480 F.2d 1042, 1044 (6th Cir. 1973).

VII. DEFENDANT HAS NOT SOUGHT TO MODIFY THE DECREE

Defendant contends that "the 1978 Kendrick Consent Decree's prohibition against 'political intelligence' is in essence, preempted by" the Sixth Circuit's interpretation of *Laird v. Tatus*, 408 U.S. 1 (1972), in *Gordon v. Warren Consol. Board of Education*, 706 F.2d 778, 781 (6th Cir. 1983). (Doc. No. 81-1, at 19.) This argument is not supported by the law.

Arguments regarding changes in the law may serve as the basis for a motion to modify an existing consent decree, but do not serve as a justification for a party's contempt. *See Rufo*, 502 U.S. at 392. Defendant concedes that it has not sought to modify or dissolve the consent decree in this action. (Doc. No. 81-1, n.3.)

In any event a discussion of the justiciability of First Amendment claims is not relevant to a determination of whether Defendant has committed contempt through its specific, concrete violations of the Decree, as documented above.

At the time the Decree was entered, the law with respect to the justiciability of First Amendment claims relative to surveillance was established. The Supreme Court held in 1972 that "to allege a sufficient injury under the First Amendment, a plaintiff must establish that he or she is regulated, constrained, or compelled directly by the government's actions, instead of by his or her own subjective chill." *Laird v. Tatum*, 408 U.S. 1, 13 (1972). Accordingly, the Sixth Circuit's application of that same rule in *Gordon* does not represent a change in the law. [10]

VIII. CONCLUSION

For the reasons stated above, Plaintiff respectfully requests that *Defendant's Motion for Summary Judgment on the Issue of Contempt* be denied.

[10] Parties may agree "to do more than that which is minimally required by the Constitution to settle a case and avoid further litigation." *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 392 (1992).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 9, 2018 the foregoing document was electronically filed with the Clerk of the Court using CM/ECF and served via electronic mail to:

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