

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

ACLU OF TENNESSEE,)	
)	
Intervening Plaintiff,)	
v.)	No. 2:17-cv-02120-JPM-dkv
)	
THE CITY OF MEMPHIS,)	
)	
Defendant.)	

**DEFENDANT’S NOTICE OF FILING PLEADING REGARDING JOINTLY-
PROPOSED MODIFICATIONS TO THE CONSENT DECREE**

Defendant, the City of Memphis ("the City"), files this pleading pursuant to the Court’s Final Amended Scheduling Order, which requires the parties to file any jointly-proposed modifications to the Consent Decree entered into in *Kendrick, et al v. Chandler, et al*, No. 2:76-cv-00449 (W.D. Tenn. 1978), no later than April 17, 2020. (ECF No. 293, PageID 9099.)

The City states as follows:

I. Procedural History

The City filed its initial Motion for Relief From Judgment or Order on August 16, 2018 on the eve of the trial of the underlying litigation. (*See* ECF No. 124.) After the trial, in October 2018, the Court found the City in violation of the Consent Decree in several respects. (*See* ECF No. 151.) The Court implemented sanctions and appointed an independent monitor to ensure future compliance with the Consent Decree. (*See* ECF No. 152.)

In December 2018, the Parties agreed to stay the modification proceedings. (*See* Joint Motion to Stay the City's Motion to Modify and/or Vacate Judgement, ECF No. 175, PageID 6523.)

On December 31, 2018, the Court granted the Joint Motion to Stay the City's Motion to Modify and/or Vacate Judgment, and stayed the proceedings until January 2, 2020. (ECF No. 178, PageID 6545.)

In September 2019, after a series of findings made by the independent monitor, the City moved for immediate modification of the Consent Decree. (ECF No. 227.) The ACLU-TN opposed this Motion. (ECF No. 231.) The Court denied the City's Motion for Immediate Modification, but it allowed the modification proceedings to go forward through discovery and eventually a full evidentiary hearing. (ECF No. 250, PageID 8430.) The Court entered an Amended Final Scheduling Order, which, *inter alia*, set a deadline of April 17, 2020 for the parties to file any jointly-proposed modifications to the Consent Decree by (ECF No. 293, PageID 9099.)

II. The parties' efforts to agree on proposed modifications to the Consent Decree

The parties have discussed potential modifications to the Consent Decree on numerous occasions since the trial. More recently, on March 10, 2020, the parties met in person in Memphis, Tennessee for several hours to discuss areas implicated by the Consent Decree and any possible agreed-upon modifications to the Consent Decree. The meeting was fruitful, and the City believed that parties found a number of broad areas of general agreement as to conduct which is or should be permissible under the Consent Decree.

The parties continued to negotiate via email and phone over the next few weeks. On March 26, 2020, the City memorialized the points of understanding from the March 10th meeting into a memorandum and forwarded it to the ACLU-TN for further discussion.

On April 15, 2020, the parties met virtually to discuss the points of possible understanding. In that meeting, the parties clarified the areas on which they agreed, the areas in

which further revisions were necessary, and the areas in which they could not agree.

On April 16, 2020, the City memorialized its understanding of that meeting in a letter to counsel for the ACLU-TN.

On April 17, 2020, counsel for the ACLU-TN notified the City that it could only agree to one specific modification of the language of the Consent Decree.

Throughout its discussions with the ACLU-TN, the City maintained that modifying the actual language of the 1978 Consent Decree might be problematic and would likely not effectuate the intent of the parties' understanding as to the specific areas of permissible conduct implicated by the Consent Decree. The City proposed an addendum to or stipulation to the Consent Decree, which would list certain areas of permissible conduct on which the parties agreed, rather than attempt to modify the actual language of the Decree. The procedural mechanism of stipulations/addendums to consent decrees is not unprecedented. *See* Stipulation of Settlement and Order, *Handschu v. Police Dep't of the City of New York*, No. 02203, ECF NO. 472 (S.D.N.Y. Mar. 27, 2017); Stipulation Modifying Consent Decree, *League of United Latin American Citizens v. Fl. Bd. Of Education*, No. 90-1913, ECF. No. 97 (M.D.Fla. Sept. 5, 2003); *Keepseagle v. Perdue*, 856 F.3d 1039, 1042 (D.C. Cir. 2017).

Nevertheless, the parties were unable to reach an agreement on such an addendum or stipulation in advance of the April 17, 2020 deadline for filing jointly proposed modifications to the Consent Decree.

The parties have, however, reached an agreement to modify one provision from the Consent Decree.

III. The Director may delegate his duties under Section G to designees

The parties agree that the language of the Consent Decree should be modified under § G

to allow the Director of Police to delegate his duties under § G to designees. This is a concept the Court seemed inclined to consider based upon his Honor's statements during one of the quarterly hearings for the Report of the Independent Monitor.

The original languages of § G is as follows:

G. Criminal Investigations Which May Interfere with the Exercise of First Amendment Rights

1. Any police 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, or interfere in any way with the exercise of such First Amendment rights, must immediately bring such investigation to the attention of the Memphis Director of Police for review and authorization.

2. The Director of Police shall review the factual basis for the investigation and the investigative techniques to be employed. The Director of Police shall issue a written authorization for an investigation for a period not to exceed (90) days only if the Director of Police makes written finding that:

a. The investigation does not violate the provisions of this decree; and

b. The expected collection of information about, or interference with, First Amendment rights is unavoidably necessary for the proper conduct of the investigation; and

c. Every reasonable precaution has been employed to minimize the collection of information about, or interference with, First Amendment rights; and

d. The investigation employs the least intrusive technique necessary to obtain the information.

3. The Director of Police may authorize an extension of such investigation for an additional period specified by the Director of Police not to exceed ninety (90) days. The Director of Police shall authorize each such extension only if the Director of Police re-evaluates the factual basis for the investigation and the investigative techniques to be employed, and makes current written findings as required in Paragraph 2, above.

The parties agree § G shall be modified as follows:

G. Criminal Investigations Which May Interfere with the Exercise of First Amendment Rights

1. Any police 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, or interfere in any way with the exercise of such First Amendment rights, must immediately bring such investigation to the attention of the Memphis Director of Police **or a designee of the Director of Police** for review and authorization.

2. The Director of Police **or his/her designee** shall review the factual basis for the investigation and the investigative techniques to be employed. The Director of Police **or his/her designee** shall issue a written authorization for an investigation for a period not to exceed (90) days only if the Director of Police makes written finding that:

- a. The investigation does not violate the provisions of this decree; and
- b. The expected collection of information about, or interference with, First Amendment rights is unavoidably necessary for the proper conduct of the investigation; and
- c. Every reasonable precaution has been employed to minimize the collection of information about, or interference with, First Amendment rights; and
- d. The investigation employs the least intrusive technique necessary to obtain the information.

3. The Director of Police **or his/her designee** may authorize an extension of such investigation for an additional period specified by the Director of Police not to exceed ninety (90) days. The Director of Police **or his/her designee** shall authorize each such extension only if the Director of Police **or his/her designee** re-evaluates the factual basis for the investigation and the investigative techniques to be employed, and makes current written findings as required in Paragraph 2, above.

4. **The Director of Police may appoint designees to authorize investigations under § G so long as they receive regular training on the decree and the Director of Police exercises periodic review and oversight of the designees.**

IV. Clarification of permissible conduct under the Consent Decree

The City believes that the parties generally have a common understanding on certain areas of permissible conduct under the Consent Decree. While these areas of understanding may not require actual modification of the language Consent Decree, the City believes memorializing

them into an addendum to the Consent Decree will provide important clarification to the parties and to the public.

The City believes that, with the assistance of a mediator or the independent monitor, that the parties could likely come to an agreement as to specific language to be included in an addendum/stipulation to the Consent Decree regarding the following broad issues:

1. There are situations where MPD has a legitimate need to view information on social media. There are further situations where MPD may inadvertently stumble upon “political intelligence,” as defined by the Consent Decree, because of the nature of today’s technology. MPD should be allowed to view information on social media as long as it does not improperly catalog and disseminate that information, and as long it is not targeted at persons or groups exercising their First Amendment rights.
2. MPD may gather intelligence about an upcoming event on social media and otherwise, but if there is no criminal law reason to keep the intelligence, once any threat has passed, the data should be destroyed or removed.
3. MPD may participate in the receiving and sharing of information with other law enforcement agencies, as long as the MPD does not use another law enforcement agency to do what it is not allowed to do under the Consent Decree. In other words, the City may not enlist another agency to act as its surrogate to violate the Consent Decree.
4. MPD may employ “undercover accounts” to solve crimes. MPD may not, however, employ accounts like the “Bob Smith” account, which was used largely to gather information about protests and protestors. MPD will institute tighter regulation and controls over all undercover accounts.
5. MPD may use the “pan/tilt/zoom” functions on its Blue Crush cameras. MPD may not, however, save and catalog images of persons peacefully protesting.
6. MPD may have officers present at gatherings of persons engaged in First Amendment activity for the purpose of public safety, as long as MPD’s presence is not for the purpose of harassment or intimidation.
7. MPD may accept tips from CrimeStoppers. The receipt of that information does not implicate the Consent Decree, as long as MPD does not retain tips that have no criminal nexus and are solely related to First Amendment activity.
8. MPD may use Body Worn Cameras at protests and assemblies, and MPD may utilize the pre-event recording function on the cameras. The use of Body Worn Cameras at First Amendment activity is subject to MPD’s standard policy and procedures for the use of Body Worn Cameras. MPD may not retain footage of such protests or assemblies unless it contains evidence of criminal activity or officer misconduct.

9. There are certain types of crimes that occur exclusively on the internet that are purely criminal. While these crimes may in some instances tangentially implicate the First Amendment, Director authorization under § G is not required. Examples of such cybercrimes include child pornography; identity theft; unauthorized intrusions into private networks; deployment of computer viruses; and cyberbullying. Such investigations will be subject to Director audit annually.
10. MPD may obtain standing authorization from the Director for certain long-running investigations that could intersect with First Amendment activity, including those that require online undercover presence of MPD, such as the Internet Crimes Against Children division of MPD. Such investigations will be subject to audit by the Director annually.
11. MPD may utilize undercover social media accounts for purposes of investigations. The Consent Decree does not prohibit the use of undercover social media accounts. These undercover accounts have legitimate law enforcement purposes, but there is some opportunity for abuse. If First Amendment-protected information is gathered through the use of an MPD undercover social media account, such information shall not be retained unless necessary to further a legitimate law enforcement purpose. MPD will implement supervisory controls to ensure all undercover social media accounts are not being used or created to infiltrate groups expressing their First Amendment rights.
12. MPD may gather intelligence on social media for legitimate law enforcement purposes such as public safety. This intelligence-gathering includes doing threat assessments using social media. MPD may not, however, surveil groups or persons involved in the exercise of their First Amendment rights if no threat to public safety is present or thought to be present.
13. The Consent Decree does not necessarily require Director authorization to run searches on social media. If the search term is directly related to a person or group exercising their First Amendment rights, however, Director authorization would be required. For example, if there is a criminal investigation of the leader of the local Black Lives Matter chapter, then Director approval would be required to run those searches. If, on the other hand, MPD is investigating a murder suspect, Director authorization under § G would not be required to search social media for information about that suspect.
14. MPD may continue its current practice of storing video from Blue Crush cameras on the DVRs of each camera as long as the footage automatically deletes as new footage is recorded. The City will implement a retention policy for camera footage that is downloaded from the cameras.
15. MPD may use the State's interstate cameras, as long as it does not use them in such a way that violates the Consent Decree. The City will implement the same retention policy for camera footage that is downloaded from the TDOT cameras that it adopts for its Blue Crush cameras.
16. Gang activity is not protected by the First Amendment or the Consent Decree.

17. The structure of the Multi-Agency Gang Unit does not necessarily violate the Consent Decree.

CONCLUSION

The City respectfully submits the foregoing for the Court's consideration. The City asks that the Court modify § G as outlined above. The City further requests that the Court order the parties to mediation with a mediator or with the independent monitor in an effort to develop an addendum or stipulation to the Consent Decree that clarifies areas of permissible conduct under the Consent Decree as outlined above, and to narrow the issues in advance of the evidentiary hearing.

Respectfully Submitted,

BAKER, DONELSON, BEARMAN,
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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of April, 2020, a copy of the attached pleading was filed electronically. Notice of this filing will be served by operation of the Court's electronic filing system to all counsel of record.

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