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

ELAINE BLANCHARD, KEEDRAN FRANKLIN, PAUL GARNER and BRADLEY WATKINS, Plaintiffs, and ACLU OF TENNESSEE, Inc. Intervening Plaintiff, v. THE CITY OF MEMPHIS, Defendant.	)	No. 2:17-cv-02120-JPM-egb

DEFENDANT'S REPLY BRIEF IN FURTHER SUPPORT OF ITS MOTION TO DISMISS

Defendant, The City of Memphis (the "City") respectfully submits this Reply Brief in Further Support of its Motion to Dismiss the Complaint (ECF No. 8) filed by Elaine Blanchard, Keedran Franklin, Paul Garner, and Bradley Watkins (collectively, "Plaintiffs"). Throughout Plaintiffs' Response, Plaintiffs cite incorrect and inapplicable rules of law. This Reply addresses several significant errors in Plaintiffs' Response to Defendant's Motion to Dismiss (ECF No. 26) (hereafter, "Plaintiffs' Response").

For the reasons set forth in its Motion to Dismiss and Memorandum in Support and in this Reply Brief, the City respectfully submits that Plaintiffs' claims against the City should be dismissed with prejudice.

I. Plaintiffs Cite an Incorrect Rule of Civil Procedure and Suggest an Inapposite Standard of Review

Pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(1), the City filed its Motion to Dismiss Plaintiffs' claims based on Plaintiffs' lack of standing and the court's lack of subject matter jurisdiction (Mot. to Dismiss ¶ 1; Mem. in Supp. of Mot. to Dismiss ¶ 1). Surprisingly, Plaintiffs ask this Court to apply the standard of review applicable to a Rule 12(b)(6) Motion; however, this is not a 12(b)(6) Motion, it is a Motion to Dismiss based on Rule 12(b)(1). (Pls.' Resp. ¶ 2.) Plaintiffs' error was not a simple typographical one. Plaintiffs subsequently expounded on the standard of review for a Rule 12(b)(6) Motion, citing Supreme Court precedent as well as Sixth Circuit precedent in support of it. (Pls.' Resp. ¶ 2.)

The City's Rule 12(b)(1) Motion to Dismiss is based on: (1) the Plaintiffs' lack of standing, and (2) this Court's lack of jurisdiction. Because a Rule 12(b)(1) motion to dismiss asks the court to address the Constitutional threshold matters of the Plaintiffs' Article III standing and the court's subject matter jurisdiction, the applicable procedure that this Court should apply to the City's Rule 12(b)(1) Motion to Dismiss is necessarily different than that of a Rule 12(b)(6) motion to dismiss.

Under Rule 12(b)(1), an inquiry into standing is a threshold matter, it "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. . . . In both dimensions it is founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). "Where subject matter jurisdiction is challenged pursuant to Rule 12(b)(1), the plaintiff has the burden of proving jurisdiction in order to survive the motion." *Rogers v. Stratton Industries, Inc.*, 798 F.2d 913, 915 (6th Cir.1986). "Moreover, the court is empowered to resolve factual disputes when

subject matter jurisdiction is challenged." *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990).

In contrast, an inquiry into a Rule 12(b)(6) motion requires the court to focus its attention on the allegations in the complaint and a complaint will not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Mayer v. Mylod*, 988 F.2d 635, 638 (6th Cir. 1993). Moreover, the complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

The distinction between a Rule 12(b)(6) motion and a Rule 12(b)(1) motion is more than a "battle of labels." *Rogers*, 798 F.2d at 915. Unlike a Rule 12(b)(6) motion, where a party's supplementation of the record converts the motion into a Rule 56 motion for summary judgment, in a Rule 12(b)(1) motion, this supplementation does not convert the motion into a Rule 56 summary judgment motion. *Id.* at 916 (citing *Land v. Dollar*, 330 U.S. 731, 735 n. 4, 67 S.Ct. 1009, 1011 n. 4, 91 L.Ed. 1209 (1947)); *Gordon v. National Work Youth Alliance*, 675 F.2d 356, 363 (D.C.Cir.1982). Thus, in a Rule 12(b)(6) motion in which matters outside the record are relied upon, the moving party has the burden of showing there are no genuine issues as to any material facts, as the motion shall be treated as one for summary judgment. Conversely, where subject matter jurisdiction is challenged under Rule 12(b)(1), as it is here, the plaintiff has the burden of proving jurisdiction in order to survive the motion. *Id.*

"Perhaps even more importantly, when a Rule 12(b)(6) motion is converted to a Rule 56 motion for summary judgment, the court, upon finding genuine issues as to material facts, must deny the motion; whereas on a Rule 12(b)(1) challenge to subject matter jurisdiction, the court is empowered to resolve factual disputes." *Rogers*, 798 F.2d at 915. (citing *Williamson v. Tucker*,

645 F.2d 404 (5th Cir.), *cert. denied*, 454 U.S. 897, 102 S.Ct. 396, 70 L.Ed.2d 212 (1981); *Mortensen v. First Federal Savings & Loan Assn.*, 549 F.2d 884 (3d Cir.1977)).

When considering a Rule 12(b)(1) motion to dismiss, the court may review or accept any evidence, such as affidavits, or it may hold an evidentiary hearing to determine if a plaintiff has standing. "[I]t is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing. If, after this opportunity, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed." *Warth*, 422 U.S. at 501–02.

Moreover, when presented with both a Rule 12(b)(1) motion and a Rule 12(b)(6) motion, courts are "bound to consider the 12(b)(1) motion first, since the Rule 12(b)(6) challenge becomes moot if this court lacks subject matter jurisdiction." *Id.* at 918. See also *Bell v. Hood*, 327 U.S. 678, 682, 66 S.Ct. 773, 776, 90 L.Ed. 939 (1946) (holding that a motion to dismiss for failure to state a claim may be decided only after establishing subject matter jurisdiction, since determination of the validity of the claim is, in itself, an exercise of jurisdiction).

Because the instant motion is based on Rule 12(b)(1), the burden of proof to establish standing and subject matter jurisdiction remains with Plaintiffs, despite their attempt to have the Court apply an incorrect legal standard pursuant to the inapposite Rule 12(b)(6). Plaintiffs' assertion that this Court treat the City's Motion to Dismiss as a Rule 12(b)6) Motion rather than a Rule 12(b)(1) motion is entirely without merit or legal support. Unfortunately, the mistake regarding the standard of review is not the only legal error in Plaintiffs' Response.

II. Plaintiffs Fail to Acknowledge Binding Sixth Circuit Precedent

Compounding Plaintiffs' decision to cite an incorrect standard of review, the most concerning legal error in Plaintiffs' Response is their incredible failure to acknowledge binding Sixth Circuit precedent that is contrary to their position.

Plaintiffs' entire argument rests on the patently incorrect assertion that intended third-party beneficiaries of a consent order have standing to later enforce that decree. (Pls.' Resp. ¶ 10.) Plaintiffs acknowledge that the Supreme Court held in *Blue Chip Stamps* "that a well-settled line of authority from this Court establishes that a consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it even though they were intended to be benefited by it." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750 (1975). However, Plaintiffs attempt to limit the holding in *Blue Chip Stamps* to "incidental" third-party beneficiaries, as opposed to "intended" third-party beneficiaries. (Pls.' Resp. ¶ 11.)

In doing so, Plaintiffs completely ignore currently binding Sixth Circuit precedent on the issue of whether an *intended* third party beneficiary has standing to enforce a consent order. The law in the Sixth Circuit is exceedingly clear: "The plain language of *Blue Chip* indicates that even intended third-party beneficiaries of a consent decree lack standing to enforce its terms." *Aiken v. City of Memphis*, 37 F.3d 1155, 1168 (6th Cir. 1994). *See also S.E.C. v. Dollar Gen. Corp.*, 378 Fed. Appx. 511, 516, (6th Cir. 2010) ("Supreme Court and Sixth Circuit precedent are clear that nonparties to a consent order or, analogously, an agreed or consent judgment entered by the Court incorporating a settlement agreement or a Consent Order, do not have standing to enforce a judgment."); *Sanders v. Republic Servs. of Kentucky, LLC*, 113 Fed. Appx. 648, 650 (6th Cir. 2004)(a nonparty lacks standing to enforce a Consent Order even though that person was "within the zone of interests protected by the judgment.").

Instead of acknowledging the binding Sixth Circuit law that holds contrary to their position, Plaintiffs reached to the Second Circuit to find a case in support of their position. *Berger v. Heckler*, 771 F.2d 1556, 1565 (2d Cir. 1985).[1] As this Court is well aware, Second Circuit precedent is not binding in the Sixth Circuit, especially when the Sixth Circuit has ruled on the issue. The *Aiken* opinion even highlights the fact that its holding is in direct conflict with that of its sister circuits, including that of the Second Circuit. It stated:

> Although other circuits have held to the contrary, see *Hook v. Arizona Dep't of Corrections*, 972 F.2d 1012, 1015 (9th Cir.1992) (concluding that the holding of Blue Chip "does not apply to intended third party beneficiaries"); *Berger v. Heckler*, 771 F.2d 1556, 1565 (2d Cir.1985) ("we think that [Blue Chip] was not intended to preclude nonparties from intervening to enforce a consent decree where otherwise authorized by the federal rules of civil procedure"), we are unable to join them until the Supreme Court revisits the unequivocal language of *Blue Chip*.
>
> *Aiken*, 37 F.3d at 1168.

When there is a clearly established circuit split on a particular issue, like there is here, Second Circuit precedent is not even persuasive, much less binding on this Court.

Furthermore, Plaintiffs not only failed to cite the binding precedent of *Aiken* in their Response, Plaintiffs are asking this Court to ignore binding precedent and hold the exact

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[1] Additionally, Plaintiffs rely on Federal Rule of Civil Procedure 71 in support of their argument that, as non-parties claiming to be third party beneficiaries to a consent decree, they can later seek enforcement of that decree. (Pls.' Resp. ¶ 9.) However, demonstrating the weakness in their position, Plaintiffs cite the old, 1987 version of Rule 71, rather than the current version which was amended in 2007. Plus their reliance on Rule 71 is misplaced. The 1987 Version of Rule 71 states: "When an order is made in favor of a person who is not a party to the action, that person may enforce obedience to the order by the same process as if a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, that person is liable to the same process for enforcing obedience to the order as if a party." However, the current version of Rule 71 simply states: "When an order grants relief for a nonparty or may be enforced against a nonparty, the procedure for enforcing the order is the same as for a party."

Courts have explained that nonparties who lack standing may not invoke Rule 71 in order to provide a right of relief. "While Rule 71 allows non-parties to enforce orders made in their favor, it cannot be adopted by one to enforce an order in an action in which she has no standing to sue." *Moore v. Tangipahoa Par. Sch. Bd.*, 625 F.2d 33, 34 (5th Cir. 1980) (addressing the 1987 Version of Rule 71). Here, the *Kendrick* order from 1978 is not an order granting relief to a "non-party" such that Rule 71 would apply.

opposite of the holding in *Aiken.* Plaintiffs' assertion that intended third-party beneficiaries have standing to seek enforcement of a consent order is directly contradictory to the holding in *Aiken*. Moreover, Plaintiffs relied on a case in support of their argument that the Sixth Circuit clearly distinguished in *Aiken* as inapposite to its holding and reasoning, i.e. *Berger v. Heckler*. *See Aiken*, 37 F.3d at 1168.

It is hard to fathom how Plaintiffs neglected to address the *Aiken* holding, especially since the City relied on it. Plaintiffs, however, based their entire argument on a sister circuit's, inapposite, non-persuasive, non-binding, irrelevant precedent. This Court should follow the law of the Sixth Circuit and grant the City's Motion to Dismiss.

CONCLUSION

For the additional reasons discussed above, the City asks that this Court grant its Motion to Dismiss and that Plaintiffs' claims against the City should be dismissed with prejudice.

Respectfully submitted,

s/Thomas L. Parker

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CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2017, the foregoing will be served by this Court's ECF system to:

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