

Because the Court-appointed monitor will be engaging in some of the same inquiries of the City's policies, procedures, and technologies that the City would necessarily have to provide to the ACLU-TN during discovery on its Motion to Modify, proceeding simultaneously on dual tracks would be duplicative and a potentially inefficient use of resources.

Furthermore, the Parties believe that they will make significant progress on proposed joint modifications to the Consent Decree if they have more time to collaborate with each other and with the Court-appointed Monitor.

PROCEDURAL HISTORY

On September 14, 1978, the Court entered a Consent Decree in *Kendrick, et al v. Chandler, et al*, No. 2:76-cv-00449 (W.D. Tenn. 1978). In an Order entered August 10, 2018, (ECF No. 120), the Court granted summary judgment in part to the ACLU-TN, stating that the City had violated Sections C(1) and G of the Decree in several enumerated respects. (ECF No. 120 at PageIDs 4880-4882, 4886.) The Court also noted that in the event that the Consent Decree "...is outdated due to a change in legal or other circumstances, the City is free to file a motion to modify the Consent Decree." *Id.* at 4877.

On August 15, 2018, the City filed its Motion to Modify and/or Vacate the Consent Decree. (ECF No. 124.) The City argued that the Consent Decree was outdated due to changes in legal or factual circumstances. (*Id.* at PageID 5011.) The City also argued that the Consent Decree should be modified because the practices of the Memphis Police Department ("MPD") that the Court found violative of the Consent Decree did not constitute independent federal constitutional violations. (*Id.* at PageIDs 5011-5012.) The ACLU-TN filed a Response opposing the City's Motion to Modify and/or Vacate the Consent Decree.

Subsequently, the Court conducted an evidentiary hearing from August 20 to 23, 2018. (ECF Nos. 128-31.) The Court issued an Opinion and Order on October 26, 2018, and ordered

specific sanctions, including the development of policies and training materials and the appointment of a Monitor to supervise the implementation of the sanctions and to provide closer guidance to the City on what constitutes political intelligence.¹ (ECF No. 151 at PageID 6275.)

On November 14, 2018, the Court entered an Order Setting Consent Decree Modification Schedule and Setting Public Comment Period ("the Scheduling Order"), (ECF No. 159), which established deadlines for motions to join parties or to intervene, completion of discovery, expert witness disclosures and depositions, and jointly proposed modifications. (*Id.* at PageIDs 6305-06.) The Court set a non-jury trial on the matter for July 8, 2018. (*Id.* at PageID 6307.)

On December 5, 2018, the parties exchanged discovery requests. The deadline for completing written discovery is January 4, 2019. (ECF No. 159 at PageID 6306.)

On December 12, 2018, the Court entered an Order Establishing Final Protocol for Monitor Selection Process, (ECF No. 165), requiring that both candidates² for the monitor position be made available for interviews on December 20 or 21, 2018.

On December 14, 2018, a Motion to Intervene in Post-Trial Litigation (ECF No. 168), was filed by the original, but now dismissed, plaintiffs to this action.³

On December 18, 2018, the Court held a status conference at the request of the City. During the status conference, the City raised with the Court and the ACLU-TN its desire to stay the Motion to Modify proceedings in view of the impending appointment of the Monitor by the

¹ The Court also noted that certain provisions of the Consent Decree, such as its definition of "maintenance" and "storage" are "likely outdated." (*Id.* at PageID 6276.)

² The City submitted Edward Stanton as its proposed monitor. (ECF No. 158.) The ACLU-TN submitted Bill Nettles as its proposed monitor. (ECF No. 164.)

³ The Court also asked the City to respond promptly to the Motion to Intervene in Post-Trial Litigation, and the City agreed to file its Response by the end of the day, December 21, 2018. ACLU-TN does not oppose the Motion to Intervene and advised the Court that it will file no response.

Court. The Court ordered the City to file the instant motion and indicated that it will allow the ACLU-TN the appropriate time to respond.

After discussion with the City, ACLU-TN has since notified the City that it will join the City in this Joint Motion to Stay.

LEGAL STANDARDS

It is well-settled that "[t]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North American Co.*, 299 U.S. 248, 254–255 (1936). This calls for the Court to "weigh competing interests and maintain an even balance." *Id.*

Courts consider several factors when weighing a party's motion to stay proceedings. For example, when making its determination on whether to grant a stay in one case pending the resolution of another potentially dispositive case by a higher court, courts weigh the following factors: "[1] the potentiality of another case having a dispositive effect on the case to be stayed, [2] the judicial economy to be saved by waiting on a dispositive decision, [3] the public welfare, and [4] the hardship/prejudice to the party opposing the stay, given its duration." *Beydown v. Holder*, No. 14-CV-13812, 2015 WL 631948, at *3 (E.D. Mich. Feb. 13, 2015) (citations and quotations omitted).

ARGUMENT

The City filed its Motion to Modify before trial, before the Court's Order clarifying some of the questions the City posed in its Motion to Modify, and before the Court determined that it would implement a Monitor. The Court-ordered policies and procedures, as well as the Court's appointment of the Monitor, will likely have a substantial impact on the City's Motion to Modify. After the Parties have the benefit of the Monitor's insight to inform the City's request for

modification, the Motion to Modify (if still necessary) will likely look different than the one filed in August 2018. The Monitor and his team will devote significant time and resources to determining how the City can comply, and in some limited cases, cannot effectively comply with the Consent Decree as presently drafted. With the benefit of the Monitor's guidance, the City will later be able to tailor its Motion to Modify to the specific issues that the Court needs to address. The City and the ACLU also believe that over the course of the next year, with the guidance of the Monitor, they will be able to work collaboratively on the modifications that are sought.

A stay is proper here when weighing the relevant factors courts consider regarding staying proceedings. There is no threat of harm to the public welfare in staying the proceedings because the Monitor will be in place assuring the City's compliance with the Consent Decree and the Court's Order.

Judicial economy will also be promoted by a stay of the Motion to Modify. Proceeding on dual tracks with both the Monitor and the Motion to Modify would be an inefficient use of the Court's and the Parties' resources. The City will already be incurring the expense of the Monitor, regardless of the procedural posture of its Motion to Modify. It makes sense to let the Monitor take the laboring oar on the identification of the problem areas within the City and to let the Monitor implement solutions to remedy those issues before the Parties litigate the very issues that the Monitor will be exploring.

Moreover, a stay will also allow the parties more time to engage in a collaborative effort to modify the Consent Decree. The Parties believe that, with the assistance of the Monitor's guidance, they will be able to significantly narrow, and possibly even eliminate, many of the disputed issues before the Court through mutual agreement, subject to the Court's Approval.

This will also preserve judicial resources and is another factor in favor of the Court granting the Joint Motion to Stay.

In view of the above, the Parties propose the following regarding the City's Motion to Modify:

1. The Scheduling Order, (ECF No. 159), will be suspended for a period of one year.
2. Discovery will be stayed for a period of one year.
3. The Stay will not have any effect on the City's compliance with the Court's Order dated October 26, 2018 and the sanctions proscribed therein. (ECF No. 151.)
4. The Parties, with the input of the Monitor, will continue to work together towards a workable approach to complying with the Consent Decree over the course of the year.
5. The Parties will withdraw the pending discovery requests without prejudice to refile of those or new requests.

To the extent the ACLU-TN requires access to certain documents and information as part of the collaborative modification effort, the City agrees to provide documents and information to ACLU-TN as needed through an informal discovery process that will be subject to the Protective Order (ECF No. 52) in the case. The Parties propose that any disputes related to the limited discovery required during this process be mediated by the Monitor.

For these reasons, the Parties respectfully request that the City's Motion to Modify be stayed for a period of one year, or until the Parties reach an agreement as to a modified Consent Decree that they will present to the Court for its approval, or until either party in good faith believes that the collaborative attempt to suggest Consent Decree modifications has reached an impasse, in which case the Motion to Modify can be re-docketed and a new scheduling order sought.

Respectfully Submitted,

BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, P.C.

s/ Buckner Wellford

Buckner Wellford (#9687)
R. Mark Glover (#6807)
Lawrence Laurenzi (#9529)
Jennie Vee Silk (#35319)
Mary Wu Tullis (#31339)
165 Madison Avenue, Suite 2000
Memphis, Tennessee 38103
Telephone (901) 526-2000
E-mail: bwellford@bakerdonelson.com
mglover@bakerdonelson.com
jsilk@bakerdonelson.com
mtullis@bakerdonelson.com

*Attorneys for Defendant, The City of
Memphis*

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF TENNESSEE

/s/ Thomas H. Castelli

Thomas H. Castelli (BPR# 24829)
Mandy Strickland Floyd (BPR# 31123)
P.O. Box 120160
Nashville, Tennessee 37212
tcastelli@aclu-tn.org
mfloyd@aclu-tn.org

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2018 the foregoing will be served by this Court's ECF system to:

Thomas H. Castelli, Esq.
Mandy Floyd, Esq.
ACLU Foundation of Tennessee
Post Office Box 120160
Nashville, Tennessee 37212

/s Buckner Wellford

Buckner Wellford