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

DEFENDANT'S RESPONSE TO DISMISSED PLAINTIFFS' MOTION FOR RULE 54(b) CERTIFICATION

Defendant, the City of Memphis (the "City"), submits the following Response to the dismissed Plaintiffs', Elaine Blanchard, Keedran Franklin, Paul Garner, and Bradley Watkins (the "Blanchard Plaintiffs" or "Dismissed Plaintiffs"), Motion for Rule 54(b) Certification (Doc. 49). For the reasons that follow, the Dismissed Plaintiffs' Motion should be denied.

I. INTRODUCTION AND PROCEDURAL BACKGROUND

On June 30, 2017, this Court entered an Order granting the City's Motion to Dismiss the Blanchard Plaintiffs' Complaint (Doc. 41, p. 13). The Court based its decision on well-settled Sixth Circuit law that holds that "even intended third-party beneficiaries of a consent decree lack standing to enforce its terms." *Id.* (quoting *Aiken*, 37 F.3d at 1168).

In the same Order, this Court denied the City's Motion to Dismiss the Intervening Plaintiff, American Civil Liberties Unions, Inc. of Tennessee ("ACLU-TN") on the grounds that the ACLU-TN was a successor in interest to the original party to the Kendrick consent decree, the West Tennessee Civil Liberties Union, Inc. ("WTCLU"). *Id.* at 14.

On August 1, 2017, the Blanchard Plaintiffs appealed this Court's dismissal of their claims to the Sixth Circuit Court of Appeals (COA Doc. 1). On August 31, 2017, the Sixth Circuit entered an Order requiring the Blanchard Plaintiffs to show cause as to why their appeal should not be dismissed for lack of a final, appealable order. (COA Doc. 14-2).

On September 11, 2016, the Blanchard Plaintiffs filed a Motion for Rule 54(b) certification (Doc. 49) with this Court arguing, *inter alia*, that they should allowed to appeal their dismissal via interlocutory appeal because the Sixth Circuit has the ability to overrule its binding precedent on which this Court relied when granting the City's Motion to Dismiss the Blanchard Plaintiffs. (Doc. 49-1, p. 6). The Blanchard Plaintiffs similarly responded to the Sixth's Circuit Order to Show Cause on September 15, 2017, arguing that the their appeal should not be dismissed for lack of a final appealable order pending this Court's ruling on their Motion for Rule 54(b) for Certification. (COA Doc. 16).

II. LAW AND ARGUMENT

1. Legal Standard

Rule 54(b) of the Federal Rules of Civil Procedure permits immediate review of certain district court orders before the ultimate disposition of a case. *Gen. Acquisition, Inc. v. GenCorp, Inc.*, 23 F.3d 1022, 1026 (6th Cir. 1994). The rule is "designed to facilitate the entry of judgment on one or more claims, or as to one or more parties, in a multi-claim/multi-party action." *Solomon v. Aetna Life Ins. Co.*, 782 F.2d 58, 60 (6th Cir.1986).

Rule 54(b) certification requires two independent findings. First, the district court must expressly "direct the entry of final judgment as to one or more but fewer than all the claims or parties" in a case. Fed.R.Civ.P. 54(b). The first step in certification "is satisfied where some decision made by the district court ultimately disposes of one or more but fewer than all of the claims or parties in a multi-claim/multi-party action." *Gen. Acquisition, Inc.*, 23 F.3d at 1026–27.

Second, the district court must "expressly determine that there is no just reason" to delay appellate review. Fed.R.Civ.P. 54(b). The second step "requires the district court to balance the needs of the parties against the interests of efficient case management." *Gen. Acquisition, Inc.*, 23 F.3d at 1027. A nonexhaustive list of factors which a district court should consider when making a Rule 54(b) determination includes:

> (1) the relationship between the adjudicated and unadjudicated claims;
> (2) the possibility that the need for review might or might not be mooted by future developments in the district court;
> (3) the possibility that the reviewing court might be obliged to consider the same issue a second time;
> (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final;
> (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.

Corrosioneering, Inc. v. Thyssen Envtl. Sys., Inc., 807 F.2d 1279, 1283 (6th Cir. 1986).

Furthermore, even if the district court finds there is no just reason for delay, appeals of partial rulings should be allowed only "sparingly." *Novacor Chemicals Inc. v. GAF Corp.*, 164 F.R.D. 640, 646, 1996 WL 101919 (E.D. Tenn. 1996). "By limiting interlocutory appeals under Rule 54(b) to 'infrequent harsh cases,' courts can alleviate hardship resulting from unnecessary delay without undermining the historic federal policy against piecemeal appeals." *Gen. Acquisition, Inc.*, 23 F.3d at 1027 (quoting *Rudd Construction Equip. Co., Inc. v. Home*

Insurance Co., 711 F.2d 54, 56 (6th Cir.1983)) (other internal quotations omitted). If courts routinely granted requests for appeals of rulings that do not dispose of the entire case, "such requests would lead to duplicative litigation, and such determination could adversely affect the administration of justice." *Novacor Chemicals Inc.*, 164 F.R.D. at 646.

2. The Blanchard Plaintiffs' Motion for Rule 54(b) Certification should be denied because there is just reason for delay.

a. The relationship between the adjudicated and un-adjudicated claims is too similar to warrant certification as final.

The Blanchard Plaintiffs argue that the unadjudicated claims of the ACLU-TN are unrelated to the adjudicated claims of the Blanchard plaintiffs. (Doc. 49-1, p. 5). They mistakenly assert that ACLU-TN's only unadjudicated claims involve only "general enforcement of the *Kendrick* Order," and those claims are unrelated to the "adjudicated claims of the Blanchard Plaintiffs for the specific enforcement of the *Kendrick* Order by third party beneficiaries." *Id.*

However, ACLU-TN's status as a proper party to this litigation is far from final and the issue of standing is still present before this Court. While this Court denied the City's Motion to Dismiss ACLU-TN based on its finding that ACLU-TN has standing as a successor in interest (Doc. 41, p. 14), it could, and should, determine that ACLU-TN lacks standing upon the City's anticipated impending Motion for Summary Judgment on the same issue.

"At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice," because courts "presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (citation and quotations omitted). However, in response to a motion for summary judgment on the issue of standing, "the plaintiff can no longer rest on such 'mere allegations,'

but must 'set forth' by affidavit or other evidence 'specific facts,' Fed.Rule Civ.Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true." *Lujan*, 504 U.S. 561. Indeed, "[a]t the summary judgment stage, of course, a party seeking judgment can put the opposing party to its proof merely by pointing out to the district court that there is an absence of evidence to support the nonmoving party's case." *Sault Ste. Marie Tribe of Chippewa Indians v. United States*, 288 F.3d 910, 915 (6th Cir. 2002).

If the City is successful on summary judgment of showing that ACLU-TN lacks standing to enforce the *Kendrick* Consent Order, then ACLU-TN would be forced to argue on appeal that it, like the Blanchard Plaintiffs, has standing to enforce the *Kendrick* Consent Order as a nonparty to the original consent order. Thus, the issue of standing of a nonparty's ability to enforce a consent decree *has not* been fully adjudicated, and that factor weighs in favor of not certifying the Blanchard's dismissal as final.

b. If ACLU-TN is determined to be a proper party to this litigation, the Blanchard Plaintiffs need for review will be mooted by future developments in the litigation.

On the other hand, if the City is unsuccessful at its attempts to have ACLU-TN's claims dismissed for lack of standing at the summary judgment stage, there is a possibility that the Blanchard Plaintiffs' need for appellate review would then be mooted by the continuing litigation at the district court level.

The Blanchard Plaintiffs and the ACLU-TN seek the exact same remedy: enforcement of the *Kendrick* Consent Order. *See* Compl., Doc. 1, ¶¶ 19-23, and Intervening Compl., Doc. 16, ¶¶ 34-41. If ACLU-TN is successful at the district court level, and this Court orders the City to be in violation of the *Kendrick* Consent Order, then the Blanchard Plaintiffs will have obtained their desired relief by proxy. In other words, if ACLU-TN prevails, then its success would inure to

the benefit of the Blanchard Plaintiffs. Thus, the Blanchard Plaintiffs will have no need for review at the appellate court level because they will have the remedy they sought in their initial Complaint. This possibility of mootness at the district court level weighs in favor of not certifying the Blanchard Plaintiffs' dismissal as final at this time.

c. The reviewing court will be obliged to consider the same issue a second time.

This Court should also deny the Blanchard Plaintiffs' Motion because of the possibility that the reviewing court will be obliged to consider the same issue two times. Assuming *arguendo* that this Court certifies the dismissal of the Blanchard Plaintiffs as final and that the City is successful on summary judgment of having ACLU-TN's claims dismissed for lack of standing, then the Sixth Circuit will most likely be obliged to consider the same issue multiple times, i.e. whether a nonparty has standing to enforce a consent decree.

For the same reasons set forth in Subsection (a) *supra*, the third *Corrosioneering, Inc.* factor also weighs in favor of not certifying the Blanchard Plaintiffs dismissal as final.

d. Because the Sixth Circuit has routinely upheld its decision in *Aiken*, it is almost certain that the Blanchard Plaintiffs will not be successful on appeal.

The fifth *Corrosioneering, Inc.* factor[1] encompasses any "miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like." *Corrosioneering, Inc.*, 807 F.2d at 1283. One such miscellaneous factor for this Court to consider is the utter unlikelihood that the Blanchard Plaintiffs will be successful on appeal.

[1] The City and the Blanchard Plaintiffs agree that the fourth *Corrosioneering, Inc.* factor is inapplicable to this situation. See Doc. 49-1, p. 5.

The law in the Sixth Circuit is well settled that even an intended third party beneficiary of a consent decree lacks standing to enforce that decree. *Aiken v. City of Memphis*, 37 F.3d 1155 (6th Cir. 1994). Since its decision in *Aiken*, the Sixth Circuit has reaffirmed its holding in at least two other instances. *See S.E.C. v. Dollar Gen. Corp.*, 378 Fed. Appx. 511, 516, 2010 WL 1995121, at *4 (6th Cir. 2010) (finding that corporation lacked standing to enforce officer's consent decree with SEC); and *Sanders v. Republic Servs. of Kentucky, LLC*, 113 Fed. Appx. 648, 650 (6th Cir. 2004) (holding that plaintiffs who were not parties to the agreed judgment lacked standing to enforce that judgment, even if they were intended third-party beneficiaries of the judgment).

The Sixth Circuit definitively ruled on the very issue the Blanchard Plaintiffs seek to appeal on at least three occasions, and each time it came to the same result, i.e. that nonparties to a consent decree lack standing to enforce that decree. The Blanchard Plaintiffs have no basis for hoping or expecting that their appeal of that very same issue will end any differently than it did for the plaintiffs in *Aiken*, *Dollar General*, or *Sanders*. Thus, in addition to the reasons noted above, certifying the Blanchard Plaintiffs' dismissal at this phase would be pointless. Allowing immediate appeal of their dismissal would do nothing more than unnecessarily bifurcate this litigation onto two tracks. Such bifurcation would be burdensome and costly for the City, and could be avoided by requiring the Blanchard Plaintiffs to simply wait until the remaining litigation is resolved before appealing their dismissal to the Sixth Circuit.

III. CONCLUSION

For the reasons set forth above, this Court should deny the Blanchard Plaintiffs' Motion for Rule 54(b) certification of their dismissal as final.

Respectfully submitted,

s/ Thomas L. Parker

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CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2017, the foregoing will be served by this Court's ECF system to:

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