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 MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF STANDING

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I. STATEMENT OF UNDISPUTED FACTS

The City incorporates by reference the Statement of Undisputed Material Facts ("Facts") filed contemporaneously with this Motion.

II. PROCEDURAL BACKGROUND

This case involves an action initially filed by now dismissed plaintiffs Elaine Blanchard, Keedran Franklin, Paul Garner, and Bradley Watkins (collectively, "the individual plaintiffs") to enforce the provisions of the Order, Judgment and Decree entered by this Court in *Kendrick, et. al. v. Chandler et al*, No. C76-449 (W.D. Tenn. 1978) (hereafter the "Consent Decree"). Facts ¶ 35. ACLU-TN, which was not a party to the Consent Decree, intervened shortly thereafter seeking a finding of contempt and injunctive relief. Facts ¶ 36. The City moved to dismiss the individual plaintiffs on the grounds that they were not parties to the consent decree, and thus lacked standing to enforce it. Facts ¶ 37. The City then moved to dismiss ACLU-TN on the grounds that the intervening plaintiff was not the entity that was a party to the 1978 Kendrick Consent Decree. Instead, the separately incorporated American Civil Liberties Union in West Tennessee, Inc., which was also known as the West Tennessee Civil Liberties Union, Inc. ("WTCLU") -- an acronym repeatedly used in the *Kendrick* Complaint to reference the plaintiff in that action, was the plaintiff. Because the ACLU-TN was not a party to the Consent Decree, the City argued it lacked standing to enforce the provisions of the Consent Decree. Facts ¶ 38.

In response, ACLU-TN relied on language in the original *Kendrick* Complaint and on ACLU-TN's bylaws to support its claim that the American Civil Liberties Union of West Tennessee, Inc./West Tennessee Civil Liberties Union, Inc. was operating as part of ACLU-TN at the time of the *Kendrick* Consent Decree, and was essentially the same party for purposes of standing. Facts ¶ 39.

The Court dismissed the individual plaintiffs for lack of standing, but denied the City's Motion with respect to ACLU-TN. Facts ¶¶ 40, 41. The Court based its partial denial of the City's Motion on its finding that ACLU-TN's "close relationship" with the WTCLU indicated that ACLU-TN was a "successor in interest" to the WTCLU and was, therefore, "a party in privity to the Decree." Facts ¶ 41.

III. SUMMARY OF ARGUMENT

The parties have now completed discovery. Based on the evidence produced, and in some instances the lack of evidence produced of any connection between ACLU-TN and the WTCLU, the City renews its argument that the ACLU-TN was not a party to the *Kendrick* complaint or the Consent Decree, nor was it in any legally relevant sense the same entity as the American Civil Liberties Union of West Tennessee. Inc./WTCLU. ACLU-TN has provided no evidence that the entity that was a party to the *Kendrick* Consent Decree was functionally the same entity that is operating today as the ACLU-TN. Nor has the ACLU-TN produced any evidence that ACLU-TN at any time subsumed the entity that was listed as the "American Civil Liberties Union in West Tennessee, Inc." or the WTCLU. In fact, all the evidence produced by ACLU-TN points to the opposite conclusion: the American Civil Liberties Union of West Tennessee, Inc./WTCLU was a separately chartered entity that functioned independently of ACLU-TN. Moreover, the American Civil Liberties Union of West Tennessee, Inc. was dissolved as a corporate entity in 1983, and the West Tennessee Chapter was officially shut down by the ACLU-TN in 1987. Thus, whether or not the American Civil Liberties Union of West Tennessee, Inc. was "functioning" as a chapter of ACLU-TN in 1978, that entity, which was the entity that was a party to the *Kendrick* Consent Decree, no longer exists in any capacity.

For these reasons, the City respectfully disagrees that ACLU-TN was a successor in interest to the American Civil Liberties Union of West Tennessee, Inc. There is no question that the entity that existed as the American Civil Liberties Union of West Tennessee, Inc./WTCLU that was a party to the 1978 Consent Decree, no longer exists. Similarly, there is no evidence that the ACLU-TN subsumed that organization and continued its operations in perpetuity as its West Tennessee chapter.

Moreover, even if ACLU-TN is considered by the Court to be a successor in interest to the entity that was the American Civil Liberties Union in West Tennessee, Inc./WTCLU, the ACLU-TN still lacks standing to enforce the *Kendrick* Consent Decree since it was not an original party to the Consent Decree. The law in the Sixth Circuit is clear: a successor in interest lacks standing to enforce a consent a decree to which it was not an original party.

IV. HISTORY OF THE KENDRICK LITIGATION AND CONSENT DECREE

The original parties to the *Kendrick* Complaint were "Chan Kendrick, Mike Honey, John Doe, and the American Civil Liberties Union in Western Tennessee, Inc." Facts ¶ 1. Chan Kendrick was the Executive Director of ACLU-TN. Facts ¶ 2. Mike Honey was the Southern Director of the National Committee Against Repressive Legislation. Facts ¶ 2. Both Kendrick and Honey alleged that they were the subject of unlawful surveillance by the Domestic Intelligence Unit. Facts ¶ 2.

The Kendrick Complaint described the plaintiff listed as "American Civil Liberties Union in Western Tennessee, Inc." as follows: "The American Civil Liberties Union of West Tennessee, Inc. ("WTCLU") … a Chapter of the American Civil Liberties Union of Tennessee, Inc., which is an affiliate of the American Civil Liberties Union." Facts ¶ 3. The WTCLU alleged that it was also the subject of unlawful surveillance by the MPD's Domestic Intelligence

Unit. Facts ¶ 3. Notably, the *Kendrick* Complaint did not allege that ACLU-TN was the subject of unlawful surveillance by the Memphis Police Department. Facts ¶ 4.

The party listed as John Doe was said to represent "all those persons and/or organizations who were engaged in conduct and activities protected by" the Constitution, and that John Doe intended to continue in those activities in the future. Facts ¶ 5. The *Kendrick* complaint also attempted to bring a class action suit on behalf of "all persons similarly situated pursuant to Rule 23(a) of the Federal Rules of Civil Procedure." Facts ¶ 6.

The *Kendrick* complaint referenced one other individual who allegedly suffered at the hands of the Domestic Intelligence Unit, Eric Carter. Facts ¶ 7. In August 1976, Mr. Carter requested the file the Domestic Intelligence Unit kept on him. Instead of producing the file, the defendants burned it rather than allowing Mr. Carter to review it. Facts ¶ 7. Despite his status as an alleged victim of the defendants' conduct, Mr. Carter was not a plaintiff to the *Kendrick* complaint nor the *Kendrick* Consent Decree. *See Id.*

Plaintiff Chan Kendrick sued "…individually and in his official capacity as Executive Director of the American Civil Liberties Union of Tennessee, and plaintiff WTCLU…". Facts ¶ 8. This sentence is important for two reasons. First, it clearly demonstrates that Chan Kendrick had the authority to act individually and/or *in his official capacity* as the Executive Director of ACLU-TN. Yet, he chose to sue in his *individual capacity only*. *See Id.* If ACLU-TN intended to be a party to the *Kendrick* litigation, Chan Kendrick could have easily sued both in his individual capacity as well as in his official capacity as Executive Director of ACLU-TN. He did not.

Second, the aforementioned sentence regarding Chan Kendrick clearly shows that the entity that *was* a plaintiff to the *Kendrick* litigation was not the ACLU-TN, but rather the

"WTCLU", which was the acronym listed for the "The American Civil Liberties Union of West Tennessee, Inc. ("WTCLU") … a Chapter of the American Civil Liberties Union of Tennessee, Inc., which is an affiliate of the American Civil Liberties Union." Facts ¶ 3.

Two years later, on September 14, 1978, the City and a slightly different set of plaintiffs agreed upon a settlement memorialized in a consent "Order, Judgment, and Decree." Facts ¶ 9. The only plaintiffs who were listed as parties on the *Kendrick* Consent Decree were: "Chan Kendrick, Mike Honey, and the American Civil Liberties Union in West Tennessee, Inc." Facts ¶ 9.

What is most notable about the named parties to the Consent Decree is who is not listed as a plaintiff, but could have been based upon the allegations in the *Kendrick* complaint. The original plaintiff "John Doe" was not a party to the *Kendrick* Consent Decree. Facts ¶ 10. Similarly, the class of plaintiffs of "all persons similarly situated pursuant to Rule 23(a) of the Federal Rules of Civil Procedure" were not included as parties to the Consent Decree. Facts ¶ 11. Furthermore, The National Committee Against Repressive Legislation, the entity for which plaintiff Mike Honey was the Southern Director, was not a party to the Consent Decree. Facts ¶ 12. Chan Kendrick in his official capacity as Executive Director of American Civil Liberties Union of Tennessee, Inc., was not a party to the Consent Decree. Facts ¶ 13. Eric Carter, was not a party to either the complaint or the Consent Decree. Facts ¶ 14. The American Civil Liberties Union, which is presumably the national organization of the ACLU and was mentioned in the "PARTIES" section of the *Kendrick* complaint was not a party to the Consent Decree.

Facts ¶ 15. And most importantly, the ACLU-TN was not a party to the 1978 Kendrick Consent Decree. Facts ¶ 16.[1]

Now, some forty years later, the ACLU-TN, who was indisputably not a party to the 1978 Consent Decree, seeks enforcement of the Consent Decree. For the reasons set forth below, this Court should find that non-parties to the Consent Decree, including the ACLU-TN, lack standing to enforce or modify the provisions *Kendrick* Consent Decree.

V. STANDARD OF REVIEW

A party is entitled to summary judgment on any claim or defense if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

To refute such a showing, the non-moving party must present some significant, probative evidence indicating the necessity of a trial for resolving a material factual dispute. *Id.* at 322. A mere scintilla of evidence is not enough. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *McClain v. Ontario, Ltd.*, 244 F.3d 797, 800 (6th Cir. 2000). This Court's role is limited to determining whether the case contains sufficient evidence from which a jury could reasonably find for the non-moving party. *Anderson*, 477 U.S. at 248–49; *Nat'l Satellite Sports v. Eliadis*, 253 F.3d 900, 907 (6th Cir. 2001). If the non-moving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to summary judgment. *Celotex*, 477 U.S. at 323. If this Court concludes that a fair-minded jury could not return a verdict in favor of the non-moving party based on the

[1] Moreover, there is nothing in the Kendrick Consent Decree that preserves the right of enforcement to any successors of the American Civil Liberties Union of West Tennessee, Inc. Facts ¶ 9.

evidence presented, it may enter a summary judgment. *Anderson*, 477 U.S. at 251–52; *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994).

The applicable standard of review requires the plaintiff to prove it has standing. "Article III of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies,'" and "[t]he doctrine of standing gives meaning to these constitutional limits by 'identify[ing] those disputes which are appropriately resolved through the judicial process.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). The Supreme Court recently explained that "the 'irreducible constitutional minimum' of standing consists of three elements." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Lujan*, 504 U.S. at 560). A plaintiff "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of a defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.*

The plaintiff "bears the burden of showing that he has standing," *Summers v. Earth Island Institute*, 555 U.S. 488, 493 (2009), and "[e]ach element of standing 'must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.'" *Fair Elections Ohio v. Husted*, 770 F.3d 456, 459 (6th Cir. 2014) (quoting *Lujan*, 504 U.S. at 561).

At the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice," for on a motion to dismiss the court presumes "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) (citing *National Wildlife Federation*, 497 U.S. 871, 889, (1990)). "In response to a summary judgment motion, however, the plaintiff can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' which for purposes

of the summary judgment motion will be taken to be true." *Id.* (quoting Fed.Rule Civ.Proc. 56(e)).

VI. LAW AND ARGUMENT

A. In the Sixth Circuit, Non-Parties to a Consent Decree Lack Standing to Enforce It.

It is well-settled 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) (citing U*nited States v. Armour & Co.*, 402 U.S. 673, 91 S.Ct. 1752, 29 L.Ed.2d 256 (1971); *Buckeye Coal & R. Co. v. Hocking Valley Co.*, 269 U.S. 42, 46 S.Ct. 61, 70 L.Ed. 155 (1925)). The Sixth Circuit interpreted *Blue Chip Stamps* to mean that even *intended* third-party beneficiaries of a consent order 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.").

In order to examine whether a plaintiff has standing to enforce a consent order or decree, courts borrow the reasoning underlying contract law. A consent order "is a contract founded on the agreement of the parties." *Long v. City of Saginaw*, 911 F.2d 1192, 1201 n. 5 (6th Cir.1990)(emphasis added); *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479, 484 (6th Cir.1985); *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir.1983). A consent order "should be

construed to preserve the position for which the parties bargained." *Vogel v. City of Cincinnati*, 959 F.2d 594, 598 (6th Cir. 1992)(emphasis added).

Because a consent order is the result of the parties to the lawsuit coming to a compromise, "[t]he 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 to achieve." *United States v. Armour & Co.*, 402 U.S. 673, 681–82 (1971). Thus, a consent order "[i]s 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*, 421 U.S. at 750.

In the case at bar, ACLU-TN's only clearly stated basis for federal court jurisdiction in its suit against the City is that it was at one time affiliated with the party that brought suit against the City in the *Kendrick* action. Based upon the uncontroverted fact that ACLU-TN was not a party to the *Kendrick* Consent Decree (Facts ¶ 16), and coupled with the probative documents produced by ACLU-TN during discovery showing that the legal existence of the entity that was a party to the Consent Decree ended in 1987, this Court should find that ACLU-TN lacks standing to enforce the provisions of the *Kendrick* Order.

B. The 1978 West Tennessee Chapter of ACLU-TN Ceased Existing In Any Capacity in 1987

The Court appears to have based its denial of the City's Motion to Dismiss ACLU-TN's Intervening Complaint on the grounds that the WTCLU "acted on behalf of ACLU-TN in the filing of the Kendrick lawsuit," coupled with the premise that "[w]hen WTCLU dissolved in 1983, ACLU-TN 'assume[d] and continue[d] the operations of the WTCLU.'" Facts ¶ 41 (Doc. 41, PageID 523). While this assumption may have been a reasonable one based upon the

pleadings and before discovery, it is now clear that ACLU-TN did not initiate the *Kendrick* litigation nor did it assume and continue the operations of the WTCLU.

A timeline of the corporate histories of the relevant entities is instructive.

- **April 18, 1967** - "West Tennessee Civil Liberties Union, Inc." was incorporated with the State of Tennessee. Facts ¶ 17.

On April 18, 1967, WTCLU filed formation papers with the State. Facts ¶ 17. According to its Charter, WTCLU was granted the power "[t]o sue and be sued by the corporate name." The Charter also states that the purpose of the WTCLU "shall be to further the objectives of the American Civil Liberties Union and to advance the cause of civil liberties in the State of Tennessee." The WTCLU's charter does not say that its purpose was to further the objectives of the ACLU-TN. *See Id.* In point of fact, the ACLU-TN did not exist at the time WTCLU was chartered in 1967. Facts ¶ 18.

- **September 18, 1968** - "ACLU of Tennessee, Inc." was incorporated.

On September 18, 1968, ACLU-TN filed formation papers with the State. Facts ¶ 19. According to its Charter, ACLU-TN was formed, in relevant part, "for the purpose of (1) consolidating the affairs and activities of the previously existing East Tennessee Civil Liberties Union, Inc., and Middle Tennessee Civil Liberties Union, Inc., and continuing the previous operations of said corporations," and (2) [t]o also absorb at a future time, if agreed to by the membership and/or Board of Directors of both corporations, to assume and continue the operations of the West Tennessee Civil Liberties, Inc., a Tennessee corporation." Facts ¶ 19.

ACLU-TN has presented no evidence that ACLU-TN ever absorbed the WTCLU. In fact, ACLU-TN admitted "that it has no records in its possession, custody or control that evidence ACLU-TN approving or adopting by-laws for an entity known as the West Tennessee

Civil Liberties Union, Inc." Facts ¶ 20. Even ACLU-TN's corporate representative admitted that she had no knowledge of ACLU-TN adopted and absorbing the WTCLU. *See Id.*

- **1967-1983** - The WTCLU was affiliated with the ACLU-TN, but its bylaws were never formally adopted by ACLU-TN, and it operated independently of the ACLU-TN.

Although its bylaws were never formally adopted by ACLU-TN, the WTCLU/West Tennessee Chapter that existed in the 1970s was affiliated with the ACLU-TN around the time of the *Kendrick* litigation. Facts ¶ 21. However, it is clear from the evidence that the WTCLU/West Tennessee Chapter remained a separate entity from ACLU-TN, including being largely responsible for funding itself and choosing its own litigation, until the time that it was fully dissolved as a functioning entity in 1987.

During the 1970s and 1980s, each chapter of the ACLU-TN was largely responsible for its own fundraising, including the WTCLU/West Tennessee Chapter. The Minutes from the WTCLU Board Meeting on January 10, 1983, explained that the WTCLU's fundraising efforts in the prior year were "insufficient to adequately support the Chapter. The Memphis office depends on raising enough money to support it." Facts ¶ 22.

Moreover, each chapter, including the WTCLU/West Tennessee Chapter, was entirely responsible for choosing, funding, and litigating whatever cases it chose to initiate. Facts ¶ 23. All throughout the Minutes of the WTCLU's Board of Directors' Meetings during the late 1970s and early 1980s is proof that the WTCLU alone chose the cases it litigated, and not the ACLU-TN. For example, the Minutes from the December 11, 1978 Meeting of the Board of Directors of WTCLU reported: "After due discussion, it was unanimously resolved that the Chapter should undertake representation of this individual in connection with her hearing before the Haywood County School Board." Facts ¶ 23. To take another example, in a 1980 WTCLU Board of Directors' Meeting, "[t]he consensus of the group was that we should not take the case because

the damages were slight and the impact value would apparently be limited. A letter rejecting the case will be sent to the client." Facts ¶ 23.

Furthermore, it is clear from the evidence that the decision of whether to seek enforcement of the *Kendrick* Consent Decree rested with the entity WTCLU/West Tennessee Chapter and not the ACLU-TN. Within a redacted portion of the Minutes of the January 15, 1979 WTCLU Board Meeting, the WTCLU discussed "whether to bring case for violating Kendrick Decree." Facts¶ 24. ACLU-TN has also admitted that it has no evidence that ACLU-TN was the entity that initiated, funded, or pursued the *Kendrick* case. Facts ¶ 25.

Thus, it is evident that the entity with the authority to choose which cases to pursue on behalf of the WTCLU/West Tennessee Chapter was not the ACLU-TN.

- **March 3, 1983** - The last reported meeting of the WTCLU Board of Directors.

ACLU-TN produced meeting minutes from dozens of WTCLU Board meetings during the 1970s and early 80s, including minutes from, what appears to be, the last meeting of the WTCLU. Facts ¶ 26. This makes sense, because the corporate entity that was WTCLU was dissolved and its charter revoked by the State two weeks later. Facts ¶ 27.

- **March 17, 1983** - West Tennessee Civil Liberties Union, Inc. was dissolved as a corporate entity with the State of Tennessee. Facts ¶ 27.

- **December 11, 1987** - "Memphis Field Office" of ACLU of Tennessee was closed.

After its corporate dissolution, the WTCLU/West Tennessee Chapter experienced serious fundraising difficulties in the 1980s and was eventually closed. Facts ¶ 28. In 1983, WTCLU's fundraising efforts from the prior year were "insufficient to adequately support the Chapter. The Memphis office depends on raising enough money to support it." Facts ¶ 28.

As a result, in December 1987, at the December State Board meeting of the ACLU-TN, it was announced that the "Memphis field office" was "officially closed" because the "budget is currently not able to support two offices." Facts ¶ 28.

- **1988** - There was some effort to "reorganize and revitalize" the West Tennessee Chapter.

ACLU-TN made an apparent effort to "revitalize" the West Tennessee Chapter around early 1988. Facts ¶ 29. However, it appears those efforts to reorganize and revitalize the defunct West Tennessee Chapter failed.

- **March 1991** - Another attempt was made to form or reorganize the West Tennessee Chapter.

In March 1991, ACLU-TN made another apparently unsuccessful attempt to "reorganize" the West Tennessee Chapter. Facts ¶ 30.

- **July 1994 - March 1995** - Hedy Weinberg and other individuals unsuccessfully tried again to "revitalize the Memphis Chapter." Facts ¶¶ 31,32.

- **May 1996** - The West Tennessee Chapter was finally re-formed.[2] Facts ¶ 33.

Finally, in 1996, the ACLU-TN's efforts to reform the Memphis Chapter came to fruition. In a letter from [Judge] Lipman dated May 1, 1996, she announced that the "ACLU has come back to town! We now have a core group of people who are meeting and re-forming the Memphis chapter." Facts ¶ 33.

Thus, it is clear that the entity that was the American Civil Liberties Union of West Tennessee, Inc./ WTCLU/West Tennessee Chapter was dissolved as a corporate entity in 1983 and then closed as a chapter of the ACLU of Tennessee, Inc. in 1987. It is also indisputable that no West Tennessee chapter existed in West Tennessee from late 1987 until mid-1996, and no West Tennessee chapter exists today. Even if the ACLU-TN somehow subsumed the American Civil Liberties Union of West Tennessee, Inc. when it had its corporate dissolution in 1983 (a

[2] ACLU-TN no longer has any chapters. Facts ¶ 34.

proposition for which no evidence was ever presented), the ACLU-TN chose to stop supporting that chapter in 1987.

In the Court's Order dismissing the City's Motion to Dismiss the Intervening Complaint, the Court stated: "When WTCLU dissolved in 1983, ACLU-TN "assume[d] and continue[d] the operations of the WTCLU." Facts ¶ 41. Respectfully, and based upon documents and evidence now before the Court, it is clear that was not the case. WTCLU was dissolved by the Secretary of State; the West Tennessee Chapter of ACLU-TN's field office was closed, and there was no ACLU presence in Memphis or West Tennessee from late 1987 until May 1996. In sum, the entity that was a party to the *Kendrick* Consent Decree stopped existing in 1987, and ACLU-TN did not subsume and continue the operations of that entity.

C. The Successor In Interest Cases Cited by the Court are Distinguishable

The Court's finding that ACLU-TN had standing to enforce the Consent Decree occurred at time when the court had only pleadings before it, and rested on the premise that ACLU-TN was a successor in interest, or party in privity, to the American Civil Liberties Union in West Tennessee, Inc./WTCLU. Facts ¶ 41. (Doc. 41, Page IDs 521-23). The cases cited by the Court, respectfully, are inapplicable to whether a successor in interest has Article III standing to enforce a consent decree in the Sixth Circuit.

1. The Standing Cases cited by the Court do not involve consent decrees.

Only three of the cases cited by the Court discuss the issue of whether a successor in interest has standing, and none of those three cases address standing to enforce a consent decree.

The first case cited in the Court's opinion is a Tennessee state case applying Tennessee property law involving a deed of trust obtained by Bank of America when it acquired Countrywide Bank. The Appellant defaulted on his loan obligation and the Appellee, as

successor in interest, sought to enforce its rights by foreclosure. *Bank of Am., Nat'l Ass'n v. Meyer*, No. M2014-01123-COA-R3CV, 2015 WL 1275394, at *1 (Tenn. Ct. App. Mar. 17, 2015). The state court ruled that Bank of America, as successor in interest to Countrywide Bank, had standing to enforce its rights by foreclosure. *Id.* at *3. Unlike the instant case, *Meyer* involved a separate acquisition, did not involve a consent decree, and was not litigated in federal court.

The second case cited by the Court regarding the derivative standing of a successor in interest did not analyze Article III standing under the Constitution, but rather statutory standing under ERISA, 29 U.S.C. § 1132(a)(1)(B). *Scott v. Regions Bank*, 702 F. Supp. 2d 921, 927, 2010 WL 908888 (E.D. Tenn. 2010).

The only other case cited by the Court involving the standing of a successor in interest is a First Circuit case brought under diversity jurisdiction that applied New York contract law and Massachusetts statutory consumer protection law. *See Katz v. Pershing, LLC*, 672 F.3d 64 (1st Cir. 2012). Not only did *Katz* not involve consent decrees, the *Katz* court found that the plaintiff did not have standing to pursue any of her claims as a third party beneficiary under New York law. *Id.* at 80-81. "This makes perfect sense in view of New York's immutable requirement that the contracting parties must intend to benefit the third party: absent such intent, the third party is merely an incidental beneficiary with no right to enforce the particular contract." *Id.* at 73 (quotations and citation omitted).

2. The consent decree cases cited by the court do not address the issue of standing.

The other cases cited in the Court's opinion that actually involve consent decrees do not address the standing of a "party in privity" to the consent decree to enforce the provisions of the decree, but rather whether parties in privity are bound by the provisions of a consent decree. In

Tennessee Ass'n of Health Maint. Organizations, Inc. v. Grier, 262 F.3d 559 (6th Cir. 2001) plaintiff-intervenors, who were not parties to the original litigation that gave rise to a revised consent decree, were found to be, by virtue of their contractual obligations to the state and as agents of the state, bound by the revised consent decree. *Id.* at 565.

In *Grier*, the parties entered into a consent decree in 1992 that required defendants to give Medicaid recipients written notice upon denial of their requests for medical assistance or their provider's claims of reimbursement. *Id.* at 562. That decree was revised in 1996 ("Revised Consent Decree"). Part of the Revised Consent Decree stated that the provisions of the decree applied specifically to Managed Care Organizations. *Id.* at 563.

Six TennCare MCOs moved to intervene for the purpose of obtaining relief from the Revised Consent Decree. The Sixth Circuit found that the plaintiff-intervenors were contractually bound by the provisions of the Revised Consent Decree because, in their contracts with the State, they agreed that TennCare could develop whatever appeal process guidelines "'in the best interest of the Tenncare Program or if necessary to comply with federal or judicial requirements.'" *Id.* (quoting the MCO's Contractor Risk Agreements). Thus, *Grier* does not stand for the proposition that a party in privity to a consent decree has standing to enforce that consent decree, but rather that the party in privity could be bound by terms of that consent decree if it contractually obligated itself to do so.

In *Vulcan, Inc. v. Fordees Corp.*, 658 F.2d 1106 (6th Cir. 1981) the issue was whether the current defendant, Fordees Corp., was in privity with a prior defendant, M&G, in a patent infringement action, such that the consent decree entered into in the original litigation barred Fordees from reexamining the validity of a patent. *Id.* at 1109. The court found that Fordees was a successor in interest to M&G when Fordees knowingly purchased drawings from M&G

that contained the substance of a patent that M&G admittedly infringed. *Id.* at 1110. The court found that the consent decree entered into by M&G and the patent holder had res judicata effect on Fordees. *Id.* at 1111. Thus, *Vulcan* did not address whether a successor in interest/party in privity had standing to enforce the provisions of a consent decree, but rather whether a successor in interest/party in privity is bound by the res judicata effect of a consent decree.

The Court also cited *Sweeney v. City of Steubenville*, 147 F. Supp. 2d 872, 882 (S.D. Ohio 2001) for the proposition that "a litigant who is not a party to the prior suit may be bound by a prior judgment if he/she is a successor in interest, a nonparty who controlled the earlier lawsuit, or a nonparty who was adequately represented by a party in the prior litigation." (Doc. 41, PageID 517). *Sweeney*, like *Vulcan*, had nothing to do with a party's standing to enforce the provisions of a consent decree, but rather whether a successor in interest/party in privity could be bound by the provisions of a consent decree. The *Sweeney* court found that the consent decree entered did not have a res judicata effect on Sweeny's claims because "persons must either be a party or be given notice as required by statute and an opportunity to object before a consent decree under Title VII may bind such person under the doctrine of res judicata." *Id.*

The Court cited one final case to support the party in privity argument, but that case, like *Sweeney* and *Vulcan*, did not address a nonparty's standing to enforce a consent decree. *See Baltz v. Botto*, 147 F. Supp. 468, 477 (W.D. Tenn. 1956)

D. In the Sixth Circuit, even a true successor in interest does not have standing to enforce a consent decree to which it was a nonparty.

As a threshold matter, ACLU-TN should not be considered a successor in interest to the WTCLU. "A successor in interest is one who follows in ownership or control of property." *AXA Equitable Life Ins. Co. v. Grissom*, No. 3:11-CV-0618, 2012 WL 5879772, at *3 (M.D. Tenn. Nov. 21, 2012) (citations and quotations omitted). *Black's Law Dictionary* defines "successor-

in-interest" as follows: "One who follows another in ownership or control of property." *Acme Printing Ink Co. v. Menard, Inc.*, 812 F. Supp. 1498, 1523 (E.D. Wis. 1992), *as amended* (Nov. 5, 1992) (quoting Black's Law Dictionary 1283 (5th ed. abr. 1979)).

Because a "successor in interest" relationship is based upon the premise of successive ownership, it is inapplicable to an organizational structure that involves a "head organization" and its affiliated local chapters. If the WTCLU was a chapter of the ACLU-TN, then the "successor in interest" analysis is inapplicable to that relationship because a "successor in interest" analysis presumes that ACLU-TN "acquired" the ownership of its affiliate, the WTCLU/West Tennessee Chapter. There is no evidence to support that presumption, and there is evidence to disprove it. *See* Section IV, Subsection B, *supra*.

Notwithstanding that fact, in this Circuit, the law is unequivocal about who has the ability to enforce a consent decree: only an original party to the decree itself has standing to enforce a consent decree. *See Aiken*, 37 F.3d at 1168; *Dollar Gen. Corp.*, 378 Fed. Appx. at 516, *Sanders*, 113 Fed. Appx. at 650. In fact, the Sixth Circuit has held that an original party to a complaint that gave rise to a consent decree does not have standing to enforce the decree if that party is not a signatory to the consent decree. *Id.* at 651. In *Sanders,* Defendant Republic Services of Kentucky, LLC was the owner and operator of the Valley View Landfill. Republic's predecessor-in-interest, Valley View Landfill, Inc., brought a federal lawsuit in 1987, seeking an injunction against a state environmental agency and challenging the application of local ordinances adopted by the Trimble County Fiscal Court ("Fiscal Court") and other local agencies. Appellants Sanders and Thiemann intervened in the 1987 case, asking the district court to abstain from adjudicating Valley View's claims on the grounds that the matters involved state interests. Valley View and the Fiscal Court entered settlement discussions, and those

parties ultimately entered into a consent decree that prohibited the landfill from expanding into certain areas. For reasons not apparent from the record, Sanders and Thiemann were not signatories to the judgment, which was executed only by representatives of the landfill company and the Fiscal Court. *Id.* at 649-50.

Several years later, Sanders and Thiemann brought suit against the new owners of the landfill, Republic Services of Kentucky, seeking to enforce the consent decree. The district court dismissed the suit because neither of the plaintiffs was a party to the consent decree, and therefore lacked standing to enforce its terms. *Id.* at 650. The Sixth Circuit upheld the district court's finding that even though Sanders and Thiemann were original parties to the suit that gave rise to the consent decree, because they were not parties to the consent decree itself, they did not have standing to enforce it.

> Sanders and Thiemann emphasize that they were parties to the original action, and they argue that they were '"within the specific 'zone of interests' protected under the Agreed Judgment.'" The fact remains, however, that none of the plaintiffs in this action was a party to the Agreed Judgment. Nor is it relevant that they may fall within the zone of interests protected by the Judgment. '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). It also is worth noting that the plain text of the Agreed Judgment itself reserves the right of enforcement solely to Valley View and its successors. The Judgment does not grant any rights of enforcement to, or even make any mention of, the plaintiffs in the present case. Under these circumstances, we must affirm the district court's dismissal of the case."
>
> *Id.*

This makes sense. A consent decree should be narrowly construed against the party agreeing to be bound by the decree. In this case, the City of Memphis entered into a specific agreement with specific parties when it agreed to the Consent Decree. In executing the Consent Decree, the City did not agree to be bound by "John Doe," or by the class of plaintiffs of "all

persons similarly situated pursuant to Rule 23(a) of the Federal Rules of Civil Procedure," or by the ACLU-TN. Facts ¶¶ 9,10,11,15.

The City certainly could have entered into an agreement with ACLU-TN in its settlement of the *Kendrick* litigation, especially considering Chan Kendrick was the Executive Director of ACLU-TN at that time, but it did not. Indeed, **the Consent Decree does not mention American Civil Liberties Union of Tennessee, Inc. at all.** Facts ¶ 15. The City agreed to be bound by only one entity: The American Civil Liberties Union of West Tennessee, Inc. Since the American Civil Liberties Union of West Tennessee, Inc. was the entity that was a signatory to the 1978 decree, and it no longer exists as an independent entity or even as a subsumed successor entity, the only remaining parties that have standing to enforce the *Kendrick* Decree are Chan Kendrick and Mike Honey.

Moreover, if the Court's "privity in contract" analysis applied here, not only would ACLU-TN have standing to enforce the Consent Decree, but so would the national organization of ACLU. Clearly the City did not enter into an agreement providing that the national ACLU, would have the authority to tell the City of Memphis how to run its police department some forty years later.

ACLU-TN is, at best, nothing more than an intended beneficiary of the Consent Decree and the same analysis applies to it as applies to the dismissed *Blanchard* plaintiffs: even intended beneficiaries of the consent decree do not have standing to enforce it. *Aiken*, 37 F.3d at 1168.

VII. CONCLUSION

For the reasons stated above, and in the Statement of Material Undisputed Facts, this Court should grant summary judgment in the City's favor and dismiss all of Plaintiffs' claims with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2018, the foregoing was served via the Court's ECF system to the following counsel of record:

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