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 REPLY TO ACLU OF TENNESSEE, INC.'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF STANDING

The Defendant, the City of Memphis ("the City"), hereby replies to Intervening Plaintiff ACLU of Tennessee, Inc.'s ("ACLU-TN") Response to Defendant's Motion for Summary Judgment on the Issue of Standing.

The Intervening Plaintiff has produced no evidence that it was an original party to the Consent Decree entered in the case of *Kendrick, et. al. v. Chandler*, Civil Action No. C76-449 W.D. Tenn. 1978) (hereafter the "Consent Decree"), nor has the Intervening Plaintiff proved that it is a successor in interest to the entity that was an original party to the Consent Decree. For these reasons, the Intervening Plaintiff has failed to meet its burden of proving that is has standing to enforce the provisions of the Consent Decree.

I. Intervening Plaintiff has presented no evidence that it was an original party or a successor in interest to the original party of the Consent Decree.

Intervening Plaintiff has the burden of proving it was an original party to the Consent Decree in order to have standing to enforce the Consent Decree and survive summary judgment. That burden is not light. The City is entitled to summary judgment on the issue of standing if

the City shows that there is not genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *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).

In short, Intervening Plaintiff has produced no evidence, much less significant, probative evidence to support the assertions made in its Response brief (hereafter "the Response") (ECF No. 90.) Indeed, the Response is replete with bald assertions unsupported by any evidence. *See generally* City's Response to Intervening Plaintiff's Statement of Facts in Response to Defendant's Motion for Summary Judgment on the Issue of Standing ("Response to Facts").

As a threshold matter, it should be noted that ACLU-TN's theory of standing has changed from the time it filed its Response to the City's Motion to Dismiss until now. *See generally* ECF No. 33. In that brief, ACLU-TN claimed it had standing based on the assertion that the West Tennessee Civil Liberties Union, Inc. was a "chapter" of the ACLU-TN. Thus, or so the argument goes, the "ACLU-TN was the actual party in interest in Kendrick v. Chandler…" *Id.* at Page ID 373; *see also* Response To Facts No. 7.

Now, for the first time, Intervening Plaintiff is making an entirely different claim to establish standing. It is now asserting that it was not the West Tennessee Civil Liberties Union, Inc. that was a chapter of the ACLU-TN in 1978, but rather the "American Civil Liberties Union, Inc." (which is denoted in the *Kendrick* Complaint as "WTCLU") that was the "West Tennessee Chapter" of the ACLU-TN at that time. (ECF No. 90, Page ID 1699.)

Furthermore, the Intervening Plaintiff now claims, for the first time, that the East Tennessee Civil Liberties Union, Inc., Middle Tennessee Civil Liberties Union, Inc., and West Tennessee Civil Liberties Union, Inc. were "created as affiliates of the ACLU" (ECF No. 90 Page ID 1694; *see also* Response to Facts No. 2), and were not "chapters" of ACLU-TN; and that "[t]he idea of having three separate corporations serve as regional Tennessee affiliates for the ACLU was reconsidered." *Id.* Intervening Plaintiff, however, *has presented no evidence at all* to support that assertion.

Intervening Plaintiff then claims, without any evidentiary basis, that "American Civil Liberties Union, Inc. (WTCLU)" [1], was not a properly formed corporation under Tennessee law or the laws of any other state, and blames any confusion on the "misuse of the abbreviation, 'inc.'" (See ECF No. 90 at PageID 1699.) While true that there was no "American Civil Liberties Union, Inc." incorporated with the State of Tennessee, it is undisputed that the West Tennessee Civil Liberties Union, Inc. *was incorporated* with the State of Tennessee on April 18, 1967. (ECF No. 22-2.) If West Tennessee Civil Liberties Union was a "chapter" of ACLU-TN, as Intervening Plaintiff earlier claimed, then its assertion that its chapters were not separately chartered corporate entities is demonstrably false.

In the face of the dearth of evidence available to support the ACLU-TN's earlier assertion that the West Tennessee Civil Liberties Union, Inc. was absorbed by ACLU-TN and became the West Tennessee Chapter of the ACLU (*See* ECF No. 33, Page ID 373), the ACLU-TN now asserts that the West Tennessee Civil Liberties Union, Inc. was not operating at all in West Tennessee during the time of the Consent Decree (ECF No. 90, PageID 1697.) Instead, Intervening Plaintiff claims that the West Tennessee Chapter that existed in 1978 was, in fact,

[1] The *Kendrick* Complaint lists this entity as a plaintiff in this format. (ECF No. 33-1, Page ID 385.)

the original party to the Consent Decree, but it was wholly unrelated to the entity known as the West Tennessee Civil Liberties Union, Inc. *Id.* Intervening Plaintiff stated that "the simplest solution to absorbing the West Tennessee Civil Liberties Union, Inc. would not be to make it a chapter, but to create a new West Tennessee Chapter under the rules set out in the By-laws, and abandon the now unnecessary corporation." (ECF No. 90, PageID 1701.) This statement is pure conjecture. *See also* Response to Facts No. 27.

Even assuming *arguendo* that the "American Civil Liberties Union of West Tennessee, Inc. ("WTLCU")" was the "West Tennessee Chapter," Intervening Plaintiff has presented no evidence that "American Civil Liberties Union of West Tennessee, Inc. ("WTCLU")" was ever absorbed by ACLU-TN pursuant to its by-laws. In fact, all the evidence presented by ACLU-TN proves that it was the West Tennessee Civil Liberties Union, Inc. that was contemplated to be absorbed by the ACLU-TN *at a later time.* (ECF No. 33-4, Page ID 405; See also Response No. 4.)

It is undisputed that the West Tennessee Civil Liberties Union, Inc., or WTCLU, which was the original party to the Consent Decree, was loosely affiliated with ACLU-TN at the time of the Complaint. However, there is no evidence to even suggest, must less establish, that the West Tennessee Civil Liberties Union, Inc. ever legally became a part of the corporate organization of the ACLU-TN through the adoption of its by-laws or through any type of corporate "absorption."

It is clear from the evidence that the West Tennessee Civil Liberties Union, Inc. *never* subjected itself to the requirements of "chapter-hood" of ACLU-TN. Becoming a chapter of the ACLU-TN was not something that a local affiliate would take lightly. The Meeting Minutes provided by Intervening Plaintiff shed light as to why a local affiliate might not choose to give

up its charter to become an official chapter of the ACLU-TN. "Chapters must sacrifice income, raise moneys for local problems, and even consider the prospect of raising local moneys for local problems, and even consider the prospect of raising local monies to support the State Affiliate office." (ECF No. 90-2, PageID 1731.)

If the West Tennessee Civil Liberties Union, Inc. decided it did not want to make the "sacrifices" necessary to be absorbed by the ACLU-TN, then it remained a separate legal entity, operating independently of the ACLU-TN. It is undisputed that West Tennessee Civil Liberties Union, Inc. had similar objectives and worked in conjunction with the ACLU-TN, but there is no evidence to establish that those entities ever became one.

Moreover, Intervening Plaintiff has presented no evidence to suggest that ACLU-TN could rightfully be considered a successor in interest to the ACLU-TN. Indeed, ACLU-TN admitted that its West Tennessee Chapter ceased existing and the Memphis Field Office was closed in the 1980s. *See* ACLU-TN's Responses to the Statement of Undisputed Material Facts, ECF No. 90-1, PAGE IDs 1720-25, Response Nos. 27, 28, 29, 30, 31, 32, 33.

In sum, Intervening Plaintiff asks this Court to assume, with no evidentiary basis, the following:

- that West Tennessee Civil Liberties Union, Inc. was not the West Tennessee Chapter of ACLU-TN at the time of the Consent Decree;
- that the "American Civil Liberties Union of West Tennessee, Inc. ("WTCLU")" was the West Tennessee Chapter of ACLU-TN, but that it was not a separately incorporated entity;

- that the "American Civil Liberties Union of West Tennessee, Inc. ("WTCLU")", which it claims was the West Tennessee Chapter, was at some point in time absorbed by the ACLU-TN;
- that "[i]n effect, ACLU-TN was 'doing business as' the American Civil Liberates Union in West Tennessee when it filed the lawsuit. This is akin to a company's Memphis office conducting its affairs in Memphis, while its headquarters manages the various offices around the state." " (ECF 90, Page ID 1701.)
- that "the chapter system of corporate management has fallen by the wayside in the past decades, the ACLU-TN persists and is the proper party to the 1978 Decree." *Id.*

For the purposes of summary judgment, those assumptions will not suffice. There is not even a scintilla of evidence to support any of these assertions, and the Intervening Plaintiff has failed to meet its burden to establish standing and to survive summary judgment.

II. Intervening Plaintiff has presented no case law stating that a successor in interest has standing to enforce a consent decree.

Even if Intervening Plaintiff could prove that it was a successor in interest to the West Tennessee Civil Liberties Union, Inc., which it has not, the Intervening Plaintiff has failed to provide any precedent that affirmatively establishes that a successor in interest to a party to a consent decree has standing to enforce that consent decree.

Intervening Plaintiff cites *Vulcan, Inc. v. Fordees Corp.*, 658 F.2d 1106, 1111 (6th Cir. 1981) for the proposition that a successor in interest has standing to enforce a consent decree. *Vulcan*, however, was not a standing case, and that distinction is critical.

One of the "landmarks, setting apart the 'Cases' and 'Controversies' that are of the justiciable sort referred to in Article III—serving to identify those disputes which are appropriately resolved through the judicial process, —is the doctrine of standing." *Lujan v. Defs.*

of Wildlife, 504 U.S. 555, 560 (1992) (citation and quotations omitted). "The party invoking federal jurisdiction bears the burden of establishing [standing]." *Id.* at 561. The Supreme Court explained "that the **irreducible constitutional minimum of standing** contains three elements." *Id.* at 560 (emphasis added). The first element is relevant here, i.e. "the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. *Id.* (internal quotations and citations omitted).

Here, Intervening Plaintiff has not established that it suffered an "injury in fact" because it has failed to establish that it has a legally protected interest in enforcing the Consent Decree that is concrete and particularized. Indeed, Intervening Plaintiff has now asked the Court to accept two entirely different hypotheses of standing, each based on pure conjecture.

Intervening Plaintiff also attempts to distinguish *Sanders v. Republic Services of Kentucky, LLC*, 113 Fed. Appx. 648 (6th Cir. 2004), on the basis that it was not a case involving a successor–in-interest or party in privity sought to enforce a consent decree. However, *Sanders* was cited to show the irrefutable requirement in the Sixth Circuit that only an original party to a consent decree itself has standing to enforce it. Even if a person was an original party to complaint, if that party was not a signatory to a consent decree, that person lacks standing to enforce the decree. Moreover, the plaintiffs in *Sanders* could be considered parties in privity to the parties in the consent decree *because* they were the original parties to the complaint.

Regardless, *Sanders* establishes that no matter how close a person or entity is to a lawsuit, if the opposing party does not specifically subject itself to be bound by that initial party, the initial party lacks standing to enforce the later-entered consent decree. Intervening Plaintiff is correct, however, that *Sanders* repeats the well-established "standard that a third-party

beneficiary cannot sue to enforce a consent decree." *Sanders*, 113 F. App'x at 650. The Intervening Plaintiff is nothing more than a third party beneficiary that lacks standing to enforce the Consent Decree.

Intervening Plaintiff similarly conflates the parties to the *Kendrick* Complaint with the parties to the *Kendrick* Decree. It claims that because the name "West Tennessee Civil Liberties Union, Inc." is absent from the Kendrick Complaint, that somehow that establishes that ACLU-TN has standing to enforce the Consent Decree. (ECF No. 90, PageId 1700.) "If the corporation were indeed operating at the time and was an original party to the 1976 lawsuit, its name would certainly have appeared in the Kendrick Complaint in some form more substantial than a mere acronym." *Id.*

However, Intervening Plaintiff ignores the fact that **the name of ACLU-TN is not mentioned in the Consent Decree** at all. (ECF No. 33-2) To use Intervening Plaintiff's logic, if the ACLU-TN, which was undisputedly alive and well at the time of the 1978 Consent Decree, was in any way a party to the Consent Decree, its name should have certainly appeared in the Consent Decree in some fashion.

Most importantly, however, is the fact that **it is not the City's burden** to prove that either the West Tennessee Civil Liberties Union, Inc. or the "American Civil Liberties Union of West Tennessee, Inc. ("WTCLU")" were parties to the Consent Decree. The burden is on the Intervening Plaintiff to prove that ACLU-TN was an original party to the Consent Decree, and it has utterly failed to meet that burden.

CONCLUSION

The Intervening Plaintiff has presented no evidence that it was the original party to the Consent Decree. The Intervening Plaintiff, therefore, has failed to meet its burden of

establishing standing to enforce the provisions of the Consent Decree, and all claims must be dismissed.

Respectfully submitted,

/s/ Jennie Silk

Buckner Wellford (#TN 9687)
R. Mark Glover (#TN 6807)
Jennie Vee Silk (#TN 35319)
BAKER, DONELSON, BEARMAN,
CALDWELL & BERKOWITZ, P.C.
165 Madison Avenue, Suite 2000
Memphis, Tennessee 38103
Telephone: 901.577.2152
Fax: 901.577.0786
Email: bwellford@bakerdonelson.com
mglover@bakerdonelson.com
jsilk@bakerdonelson.com

Attorneys for Defendant, The City of Memphis

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of July, 2018, a copy of the foregoing will be served via the Court's ECF system to:

Thomas H. Castelli
Mandy Floyd
ACLU Foundation of Tennessee
P.O. Box 120160
Nashville, Tennessee 37212

/s/ Jennie Silk