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

ACLU OF TENNESSEE, Inc.	)	
Intervening Plaintiff,	)	
v.	)	No. 2:17-cv-02120-jpm-DKV
THE CITY OF MEMPHIS,	)	
Defendant.	)	

CITY'S RESPONSE TO MOTION TO INTERVENE IN POST-TRIAL LITIGATION

The Movants (collectively, "the Blanchard Plaintiffs") are not entitled to intervene in this case because they were not original parties to the Consent Decree. The Court has already found that the Blanchard Plaintiffs lack standing to enforce the Consent Decree (ECF No. 41). Sixth Circuit law has not changed since the Court's dismissal of the Blanchard Plaintiffs.

The Blanchard Plaintiffs' standing to intervene is no different from any other citizen of the City of Memphis. They certainly do not satisfy the requirements for intervention as of right under Fed. R. Civ. P. 24(a)(2). Nor do they satisfy the requirements for permissive intervention under Fed. R. Civ. P. 24(b)(1). For these reasons, the Blanchard Plaintiffs' Motion to Intervene in Post-Trial Litigation should be denied.

I. PROCEDURAL HISTORY

A timeline of the case and the Blanchard Plaintiffs' numerous failed attempts to insert themselves into this litigation is enlightening.

February 22, 2017	The Blanchard Plaintiffs filed a Complaint against the City asking the Court for enforcement of an agreed upon Order, Judgment and Order (hereafter the "Consent Decree") (ECF No. 3), entered in *Kendrick, et. al. v. Chandler et al*, No. C76-449 (W.D. Tenn. 1978).
March 1, 2017	The City filed its Motion to Dismiss Blanchard Plaintiffs' Complaint (ECF No. 9) on the basis that Blanchard Plaintiffs were not original parties to the Consent Decree, and thus lacked standing to enforce the Consent Decree.
March 2, 2017	The very next day, ACLU of Tennessee, Inc. ("ACLU-TN") filed a Motion to Intervene as Plaintiff in the suit. (ECF No. 12) on the basis that it was an original party to the Consent Decree and that its interests would be impaired if it was not permitted to intervene. The Court granted this motion on the same day.
March 3, 2017	ACLU-TN filed its Intervening Complaint. (ECF No. 16).
March 8, 2017	The City filed a Motion to Dismiss ACLU-TN's Intervening Complaint (ECF No. 22) on the basis that ACLU-TN lacked standing to enforce the Consent Decree.
March 29, 2017	Blanchard Plaintiffs filed their Response to the City's Motion to Dismiss arguing that they had standing to enforce the Consent Decree as "intended beneficiaries" of the order -- the same argument advanced for purposes of this intervention motion. (ECF No. 26)
June 30, 2017	This Court issued an Order dismissing Blanchard Plaintiffs from the case based on their lack of standing to enforce the *Kendrick* Consent decree. (ECF No. 41).
August 1, 2017	Blanchard Plaintiffs filed a Notice of Appeal of their dismissal with the Sixth Circuit. (COA No. 1).
August 31, 2017	The Sixth Circuit ordered Blanchard Plaintiffs to Show Cause why their appeal should not be dismissed for lack of a final, appealable order. (COA No. 14-2).
September 11, 2017	Blanchard Plaintiffs filed a Motion for Rule 54(b) certification with this Court. (ECF No. 49).
November 1, 2017	This Court denied Blanchard Plaintiffs' Motion for Rule 54(b) Certification. (ECF No. 57).
January 17, 2017	The Sixth Circuit issued an Order dismissing Blanchard Plaintiffs' appeal for lack of jurisdiction. (COA No. 22-2).

January 29, 2018	Blanchard Plaintiffs filed a Motion for Leave to Amend Previous Response to Establish Jurisdiction (COA No. 24) and a Petition for Rehearing on Appellants' Response to the Court's Order to Show Cause (COA No. 25), in which Plaintiffs sought interlocutory appeal of their dismissal under § 1292(a)(1).
March 2, 2018	The Sixth Circuit dismissed the Blanchard Plaintiffs' appeal for lack of jurisdiction. (COA NO. 36).
April 2, 2018	The Sixth Circuit issued a mandate back to this Court concerning the dismissal.
August 15, 2018	The City filed a Motion to Modify and/or Vacate Judgment or Order (ECF No. 124).
August 20-23, 2018	The Court conducted an evidentiary hearing. Three of the Blanchard Plaintiffs as well the attorney for the Blanchard Plaintiffs, Bruce Kramer, were material witnesses in the ACLU-TN's (Intervening Plaintiff) case.
October 26, 2018	The Court issued an Opinion and Order on the case. (ECF No. 151).
November 14, 2018	A Scheduling Order was entered setting various deadlines for the Consent Decree modification proceeding, including a deadline for "Notice of this Order by ACLU-TN Upon Chan Kendrick and Michael Honey by First-Class Mail or Other Reliable Means" no later than November 23, 2018. (ECF No. 159, PageID 6306). The Scheduling Order next listed a deadline for parties to join or intervene in the modification proceedings of December 14, 2018. (*Id.*).
December 14, 2018	The Blanchard Plaintiffs filed their Motion to Intervene. (ECF No. 168).

II. LAW AND ARGUMENT

The proper parties, based on the Court's confirmation of the ACLU-TN's standing, are before the Court. The only real issue was whether two other potential parties -- Mr. Kendrick and Mr. Honey -- should or would be interested in becoming parties with the modification issue on the table. They chose not to do that. Now, yet again, the Blanchard Plaintiffs attempt to interject themselves into the case to pursue their individual agendas, based on absolutely no legal authority.

The Blanchard Plaintiffs' entire argument is premised on the theory that they are entitled to intervene as intended beneficiaries of the Consent Decree. (ECF No. 168, PageIDs 6463-6466.) The Court has already held that intended beneficiaries who are not themselves original parties to the lawsuit lack standing to seek any form of relief in the case. (ECF No. 41). The Blanchard Plaintiffs fail to cite a single case to support their argument that intervention at a different procedural *part* of the same case provides an indirect mechanism of circumventing the clear line of caselaw demonstrating that they *lack standing* for *any* purpose in the lawsuit. Lacking any legal authority whatsoever, the Blanchard Plaintiffs are relegated to arguing that, as intended beneficiaries of the Consent Decree, they have a right "to defend" the Consent Decree. This circular logic is unavailing.

To the extent that the Blanchard Plaintiffs claim that they have some sort of elevated status as aggrieved "intended beneficiaries" of the Consent Decree because of their allegations that the City "had injured them personally and affected their interests" (*Id.* at 6458), that argument holds no water, and they cite no case law to support that argument.

As the Blanchard Plaintiffs point out, three of the four Blanchard Plaintiffs testified at trial (*Id.*). The Court, however, found that the "ACLU-TN did not prove that the City harassed anyone" exercising their First Amendment Rights. (ECF No. 151, PageIDs 6270-71.) In doing so, the Court specifically addressed the testimony of two of the Blanchard Plaintiffs, Keedran Franklin and Elaine Blanchard, who testified regarding their fear of surveillance by the Memphis Police Department ("MPD"). (*Id.* at 6271).

> While an individual may have a negative subjective reaction to MPD, the ACLU-TN has specifically failed to prove by clear and convincing evidence that MPD's actions constituted disruption or harassment, or discredited individuals, or otherwise interfered with the exercise of First Amendment rights.
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> (*Id.*) (emphasis added).

The record does not establish that the Blanchard Plaintiffs have some kind of special status as aggrieved intended beneficiaries of the Consent Decree. The Blanchard Plaintiffs' status in relation to the Consent Decree is no different than of any other citizen of Memphis, Tennessee. Because they were not parties to the Consent Decree, they have no legal "right" to participate as a party in its enforcement, its modification, or its "defense."

A. The Blanchard Plaintiffs have no legal interest in enforcing or defending the Consent Decree.

In this Circuit, it is well-settled that non-parties to a consent decree have no cognizable legal interest in the consent decree. This includes intended beneficiaries of a consent decree. *See Aiken v. City of Memphis*, 37 F.3d 1155, 1168 (6th Cir. 1994) ("The plain language of *Blue Chip* indicates that even intended third-party beneficiaries of a consent decree lack standing to enforce its terms."). *See also 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 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)) (emphasis added).

i. The Blanchard Plaintiffs have no substantial legal interest that warrants intervention as of right.

The Blanchard Plaintiffs claim that they have a right to intervene in the case as intervenors of right pursuant to Fed. R. Civ. P. 24(a) (ECF NO. 168, PageID 6459), which states:

> On timely motion, the court must permit anyone to intervene who:
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> (1) is given an unconditional right to intervene by a federal statute; or
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> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.
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> Fed. R. Civ. P. 24(a).

The Sixth Circuit has construed Rule 24(a) to require a party attempting to intervene to establish: (1) the timeliness of the application to intervene; (2) the applicant's substantial legal interest in the case; (3) the impairment of the applicant's ability to protect that interest in the absence of intervention; and (4) the inadequate representation of that interest by parties already before the court. *Grutter v. Bollinger*, 188 F.3d 394, 397–98 (6th Cir.1999). Each of these elements "must be satisfied before intervention as of right will be granted." *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997).

While the Sixth Circuit "has opted for a rather expansive notion of the interest sufficient

to invoke intervention of right," *see id.*, there are defined limits. The *Michigan State AFL-CIO* court explained that an intervenor must have a "direct, substantial, and legally protectable interest in the litigation," and that legal interest must be something more than the intervenors' "general concern" shared with "all citizens concerned about the ramifications" of the outcome of the litigation. *Id.* at 1246 (citing with approval *Athens Lumber Co. v. Federal Election Comm'n*, 690 F.2d 1364 (11th Cir.1982)).

The Blanchard Plaintiffs baldly assert that as intended beneficiaries of the Consent Decree, they have a substantial legal interest "in the City's future compliance with the Decree." (ECF No. 168, PageID 6459). This interest, however, is nothing more than their "general concern" shared with other citizens about the ramifications of the outcome of the modification proceedings. *See Michigan State AFL-CIO*, 103 F.3d at 1246. That general concern is not enough to constitute a direct, substantial, and legally protectable interest in this litigation.

Even if the Blanchard Plaintiffs established that they have a substantial legal interest in the outcome of the modification proceedings (which they do not), they failed to establish the other elements for intervention as a matter of right. First, they have not shown how their substantial legal interest would be impaired if intervention is denied. *See Purnell v. City of Akron*, 925 F.2d 941, 948 (6th Cir. 1991). Instead, the Blanchard Plaintiffs state, without any supporting factual allegations, that: "[t]he Blanchard Plaintiffs' interest will be impaired if they are not permitted to intervene."(ECF No. 168, PageID 6459.) This rote recitation of an element of permissive intervention is not enough to meet the burden required to intervene in this case as a matter of right.[1]

[1] To the extent that the Blanchard Plaintiffs fear their voices will not be heard if they are not allowed to intervene in the modification proceedings, that fear is baseless. The Court has provided a mechanism for the public, including the Blanchard Plaintiffs, to be heard in this proceeding by way of a Public Written Comment Period. (ECF No. 159,

Similarly, the Blanchard Plaintiffs failed to show how the ACLU-TN's representation of their interests would be inadequate. The "proposed intervenors bear the burden of demonstrating inadequate representation" by the parties before the court. *Purnell*, 925 F.2d at 949. Some of the factors courts consider in determining whether representation is adequate include:

> (1) if there is collusion between the representative and an opposing party; (2) if the representative fails in the fulfillment of his duty; and (3) if the representative has an interest adverse to the proposed intervenor. . . . The burden placed on the would-be intervenor requires "overcom[ing] the presumption of adequacy of representation that arises when the proposed intervenor and a party to the suit ... have the same ultimate objective."

Id. at 949-50 (citations and quotations omitted) (quoting *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987)(citation omitted).

Here, the Blanchard Plaintiffs have failed to even allege, much less establish, how the ACLU-TN would not adequately represent its interests before the Court. Instead, they simply state that the "present parties do not adequately represent the individual interests of the Blanchard Plaintiffs" (ECF No. 168, PageID 6459). There is no explanation as to why the more than capably represented ACLU-TN could not and would not adequately represent their interests in the modification proceedings.

Further application of the *Bradley* factors *supra* further shows the Blanchard Plaintiffs' failure to establish inadequate representation by the ACLU-TN. For example, there is no allegation that the City and the ACLU-TN are in collusion. Nor are there any allegations that the ACLU-TN has failed to fulfill its duties, or that the ACLU-TN has an interest adverse to the Blanchard Plaintiffs.

Moreover, because the Blanchard Plaintiffs and the ACLU-TN have the same ultimate objective, *i.e.* the upholding and continuation of the Consent Decree, there is a presumption of

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PageID 6306.)

adequacy of the ACLU-TN's representation. *See Bradley*, 828 F.2d at 1192 ("This requires overcoming the presumption of adequacy of representation that arises when the proposed intervenor and a party to the suit ... have the same ultimate objective."). Indeed, three of the Blanchard Plaintiffs and their attorney were all material witnesses on behalf of the ACLU-TN at the trial on this very issue. Because the Blanchard Plaintiffs' interest is indistinguishable from that of the ACLU-TN, the ACLU-TN's representation is presumptively adequate, and the Blanchard Plaintiffs have failed to overcome that presumption.

To the extent that the Blanchard Plaintiffs assert that they are seeking relief different from the relief sought by the ACLU-TN related to the modification of the Consent Decree, the Blanchard Plaintiffs must have Article III standing to pursue such relief. *See Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017) ("an intervenor of right must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing."). This Court has already decided that the Blanchard Plaintiffs lack standing (ECF No. 41), and the Blanchard Plaintiffs are not entitled to intervene under Fed. R. Civ. P. 24(a)(2).

ii. Permissive Intervention is inappropriate.

Alternatively, the Blanchard Plaintiffs seek permissive intervention under Federal Rule of Civil Procedure 24(b)(1) (ECF No. 168, PageID 6459), which provides that, "On timely motion, the court may permit anyone to intervene who ... has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1). In deciding whether to allow a party to intervene, "the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). The district court must find that "the motion for intervention is timely and there is at least one common

question of law or fact," and then balance the factors "of undue delay, prejudice to the original parties, and any other relevant factors." *Mich. State AFL-CIO v. Miller*, 103 F.3d 1240, 1248 (6th Cir. 1997).

The Blanchard Plaintiffs claim that they "have interests that share with the pending litigation one or more questions of law or fact." (ECF No. 168, PageID 6459.), but they fail to elucidate that common question of law or fact.

Intervention would unduly prejudice the adjudication of the City's rights. The Parties have already exchanged extensive discovery in the underlying litigation, and they have subsequently exchanged new discovery requests in the modification proceedings. The addition of four new parties at this juncture, each propounding their own discovery on the City, would only serve to unduly burden the City with redundant and excessive discovery, which is wholly unnecessary for the Court to determine what modifications to the Consent Decree are necessary and appropriate. Thus, permissive intervention is inappropriate, as well.

B. The Blanchard Plaintiffs' lack standing in the "collateral proceeding" of the modification to the Consent Decree.

The Blanchard Plaintiffs' attempt to categorize their intervention as an attempt to "defend" the Consent Decree from modification (ECF No. 168-1, PageID 6466). However, the modification proceeding is a proceeding collateral to the ACLU-TN's suit to "enforce" the Consent Decree. (*See* Intervening Complaint, ECF No. 16, PageID 228.) "A collateral proceeding, as opposed to a direct attack, is an action that has an independent purpose, and contemplates some relief or result other than the overturning of the judgment, although it may be necessary to its success that the judgment be overthrown." *Alford v. Guffy*, 115 S.W. 216, 217 (Ky. 1909).

It is also 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*, 421 U.S. at 750 (emphasis added). *See also Vogel v. City of Cincinnati*, 959 F.2d 594, 598 (6th Cir. 1992) (holding that Vogel, who was not a party to the consent decree, but sought collaterally to enforce it according to his own interpretation of it, lacked standing to assert his claim).

The Court has already unequivocally held that the Blanchard Plaintiffs lacked standing to enforce the provisions of the Consent Decree. (ECF No. 41, PageID 516). Since "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," the Blanchard Plaintiffs lack standing to defend the Consent Decree from modification. *Blue Chip Stamps*, 421 U.S. at 750 (emphasis added).

Indeed, *Blue Chip Stamps* is instructive here. In 1963 the United States filed a civil antitrust action against Blue Chip Stamp Company (Old Blue Chip), and nine retailers who owned 90% of its shares. In 1967 the action was terminated by the entry of a consent decree. *United States v. Blue Chip Stamp Co.*, 272 F.Supp. 432 (C.D.Cal.), *aff'd sub nom. Thrifty Shoppers Scrip Co. v. United States*, 389 U.S. 580, 88 S.Ct. 693, 19 L.Ed.2d 781 (1968). The decree ordered that Old Blue Chip was to be merged into a newly formed corporation, Blue Chip Stamps (New Blue Chip). The holdings of the majority shareholders of Old Blue Chip were to be reduced, and New Blue Chip, was required under the plan to offer a substantial number of its shares of common stock to retailers who had used the stamp service in the past but who were not shareholders in the old company. *Blue Chip Stamps*, 421 U.S. at 725-26.

The reorganization plan was carried out, and a prospectus was created for the offering and distributed to the offerees. Only about 50% of the offered units were actually purchased. In

1970, two years after the offering, Manor Drug Stores, a former user of the stamp service and offeree of the stock offering, sued Blue Chip alleging that the prospectus prepared and distributed by Blue Chip in connection with the offering was materially misleading in its overly pessimistic appraisal of Blue Chip's status and future prospects. *Id.* at 726-27.

The Supreme Court held, inter alia, that even though the offerees were the intended beneficiaries of the 1967 consent decree between the United States and Old Blue Chip, they lacked standing to use the consent decree in its litigation against Blue Chip defendants. *Id.* at. 750. The Supreme Court further explained that because Manor Drug Stores "derives no entitlement from the anti-trust consent decree and does not otherwise possess any contractual rights relating to the offered stock, [it] stands in the same position as any other disappointed offeree of a stock offering." *Id.* at 752 (emphasis added).

The Blanchard Plaintiffs are no different than Manor Drug Stores in *Blue Chip Stamps*. The Court has already determined that the Blanchard Plaintiffs derive no entitlement from the Consent Decree. (ECF 41, PageID 521.) Thus, the Blanchard Plaintiffs stand in the same position as any other person aggrieved by the City's alleged failures to comply with the Consent Decree — they have no legal interest in the Consent Decree.

III. CONCLUSION

The Blanchard Plaintiffs lack standing to enforce the decree, to modify the decree, or to otherwise "defend" the decree. Their Motion to Intervene in Post-Trial litigation should be denied for the reasons previously explained in this Court's previous Order dismissing them from the case. (ECF 41.)

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2018 the foregoing will be served by this Court's ECF system to:

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