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, INC..

Intervenor-Plaintiff,

vs. NO. 2:17-cv-02120-JPM-dkv

THE CITY OF MEMPHIS

MOTION TO BIFURCATE AND STAY OR LIMIT DISCOVERY

Pursuant to Rule 42(b) of the Federal Rules of Civil Procedure, Defendant City of Memphis (the "City") moves for an Order (1) bifurcating the two threshold issues in this case from the merits issues, and (2) granting a stay of discovery, or alternatively limiting discovery initially to the standing issue. The two related threshold issues are (1) whether any of the plaintiffs to this litigation have standing to seek to enforce the agreed upon Order, Judgment and Order entered by former United States District Court Judge Robert McRae in *Kendrick, et. al. v. Chandler et al,* No. C76-449 (W.D. Tenn. 1978) (hereafter the "1978 Consent Order"), and (2) whether the Court has subject matter jurisdiction of the case based on the 1978 Consent Order. Bifurcation and staying/limiting discovery will avoid prejudice to the City, further the convenience of the parties, and economize and expedite these proceedings.

In support of its Motion, the City relies upon its memorandum and supporting exhibits

filed contemporaneously herewith.

Respectfully Submitted,

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

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CERTIFICATE OF CONSULTATION

Pursuant to Rule 24 of the Federal Rules of Civil Procedure and Local Rule 7.2(a)(B), counsel for the City, Buckner Wellford, certifies that I emailed plaintiffs' counsel to seek consent to file this Motion at 5:26 p.m. on March 6, 2017. On March 7, at 2:17 p.m. I received a response on behalf of counsel for all plaintiffs. The parties are unable to agree upon the parameters of a stay or limitation of discovery that precludes the necessity of filing this motion.

s/ Buckner Wellford
Buckner Wellford

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2017 the foregoing will be served by this Court's ECF system to:

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Buckner Wellford

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ELAINE BLANCHARD, KEEDRAN FRANKLIN, PAUL GARNER, and BRADLEY WATKINS,

Plaintiffs,

and NO. 2:17-cv-02120-JPM-dkv

ACLU OF TENNESSEE, INC.,

Intervenor-Plaintiff

vs.

THE CITY OF MEMPHIS

Defendant

MEMORANDUM IN SUPPORT OF MOTION TO BIFURCATE AND STAY OR LIMIT DISCOVERY

Pursuant to Rule 42(b) of the Federal Rules of Civil Procedure, Defendant The City of Memphis (the "City") moves for an Order bifurcating the issues in this case as follows: (1) the Court should address threshold issues of standing and/or subject matter jurisdiction, limiting discovery to the standing issue in particular, (2) relieving the parties from the obligation to develop a discovery plan and prepare a Scheduling Order as part of the Court's standard or complex track preparations for a Case Management Conference, and (3) deferring the parties' obligations to prepare and provide Initial Disclosures and entry of a Scheduling Order until such time as the Court resolves these threshold issues. Such an Order will promote the parties, and the Court's interests of convenience, avoiding prejudice, judicial economy and expediency.

The threshold issues in this case are: (1) whether the provisions of an agreed upon Order, Judgment and Order entered in 1978 by former United States District Court Judge Robert McRae in *Kendrick, et. al. v. Chandler, et al.,* No. C76-449 (W.D. Tenn. 1978) (the "1978 Consent Order") applies to these plaintiffs, and/or to this case, and (2) whether the Court has subject matter jurisdiction of this case based on the 1978 Consent Order.

PROCEDURAL BACKGROUND

On September 24, 1978, Judge Robert McRae entered a 1978 Consent Order in a lawsuit brought by Chan Kendrick, Mike Honey, and the American Civil Liberties Union in [sic] West Tennessee, Inc. as well as a "John Doe" plaintiff. (Civ. Action C76-449). The Complaint in that case, at Para. 3 (c), used the acronym "WTCLU" to reference the American Civil Liberties Union of West Tennessee, Inc.

As will be explained below, at the time of the entry of the 1978 Consent Order, no legal entity by the name American Civil Liberties Union of West Tennessee, Inc. (or "in") existed. A for-profit corporate entity known as the "West Tennessee Civil Liberties Union, Inc." (WTCLU) did exist, along with the present plaintiff, ACLU of Tennessee, Inc.

On February 22, 2017, plaintiffs Elaine Blanchard, Keedran Franklin, Paul Garner, and Bradley Watkins (collectively "Plaintiffs") sued to enforce the provisions of the 1978 Consent Order. (Doc. 1).

On March 1, 2017, the City filed its Motion to Dismiss and Memorandum of Law in Support. (Docs. 8, 9). The Motion focused on what appears to be clear Tennessee law precluding these plaintiffs from having standing to enforce the *Kendrick* 1978 Consent Order, and also raised the possibility that the Court should consider whether it had subject matter jurisdiction over the action. *Id.*

On March 2, 2017, the City filed its Answer to the Blanchard plaintiffs' Complaint. (Doc. 14).

Also on March 2, 2017, ACLU of Tennessee, Inc. ("ACLU-TN"), filed a Motion to Intervene, claiming intervention rights in its supporting Memorandum "[t]hrough its then active West Tennessee chapter, which was also known as the West Tennessee Civil Liberties Union." (Doc. 12, p. 3, fn. 1).) Following an Order granting permission to intervene, ACLU-TN filed its Intervening Complaint on March 3, 2017. (Doc. 16).

MATERIAL FACTS

The Complaints of both the *Blanchard* plaintiffs and ACLU-TN rely upon the 1978 *Kendrick* Consent Order to establish federal court jurisdiction, and allege one essential claim: that the City violated the *Kendrick* Consent Order. Pls. Compl., ¶¶ 1, 18-23 (Doc. 1); ACLU-TN Compl., ¶¶ 3-5, 34-41. (Doc. 16). From this premise the *Blanchard* plaintiffs seek enforcement of the 1978 Consent Order and request the following relief: (1) issuance of an order that the City show cause, if any, of why it violated the 1978 Consent Order and why it should not be adjudicated in contempt of court; (2) damages, both compensatory and punitive; (3) an Order directing the City to dissolve, as plaintiffs incorrectly call it, the "black list" immediately and without delay; and (4) an award of attorneys' fees and costs taxed to the City. Pls. Compl. p. 7. (Doc. 1) ACLU-TN requests: (1) an order of contempt for violation of the 1978 Consent Order; (2) injunctive relief; (3) costs and attorneys' fees; and (4) such other and further relief that the Court deems proper. ACLU-TN Compl., p. 7. (Doc. 16).

LAW AND ARGUMENT

There are clear standing issues involving all plaintiffs and the applicability of the 1978 *Kendrick* Consent Order, as well as serious issues over whether this Court, after almost forty

years, has subject matter jurisdiction over this lawsuit through the vague reference in the 1978 *Kendrick* court Consent Order retaining jurisdiction for what appears to be a limited purpose in both scope and time. Those threshold issues should be resolved before proceeding with discovery on the merits.

The standard for bifurcating parts of a case is set forth in Federal Rule of Civil Procedure 42(b):

> For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.

This case is ripe for bifurcation. Each element of Rule 42(b) is present. If the issues are not separated, the City will be prejudiced and inconvenienced because adjudication of whether the 1978 Consent Order applies at all in this matter may not occur until the City has been compelled to undergo extensive, intrusive discovery on issues having noting to do with the threshold issue of jurisdiction.[1] A prompt determination of the standing of the plaintiffs, in addition to, or alternatively to, a subject matter jurisdiction analysis of the continued viability of the 1978 Consent Order will streamline litigation and crystallize the issues pertaining to the plaintiffs' alleged injuries.

[1] The City will file shortly a Motion to Dismiss ACLU-TN's Intervening Complaint, which will join a similar Motion filed with respect to the original plaintiffs. ACLU-TN, in its Memorandum in Support of its Motion to Intervene as plaintiff asserts that the original party to the Consent Order in Kendrick was the "West Tennessee Civil Liberties Union." *See* Mem. in Sup. of Mot. to Intervene, p. 3 n.1. (Doc. 12). In its Motion to Dismiss, the City will provide documentation which demonstrates that ACLU-TN and the West Tennessee Civil Liberties Union, Inc. were, as of the time of the *Kendrick* case, separate and distinct entities. To the extent that there needs to be discovery at this stage of the present litigation, it needs to focus on whether these two entities were in fact essentially one and the same, as alleged by the present plaintiff in the Intervening Complaint.

A. In the Sixth Circuit, Only One Factor of Rule 42(b) is Necessary.

"[T]he district court ha[s] broad discretion to order separate trials[.]" *In re Benedictin Litig.*, 857 F.2d 290, 307 (6th Cir. 1988) (internal quotation marks omitted). The court may bifurcate, trifurcate, or further subdivide a case at whatever point the division will promote economy and accuracy in adjudication. *Hydrite Chem. Co. v. Calumet Lubricants Co.*, 47 F.3d 887, 891 (7th Cir. 1995).

The Sixth Circuit has recognized that "Rule 42(b) is sweeping in its terms and allows the court, in its discretion, to grant a separate trial of any kind of issue in any kind of case" in order to expedite the trial and conserve resources. *Saxion v. Titan–C Mfg.*, 86 F.3d 553, 556 (6th Cir. 1996) (emphasis added); *Benedictin*, 857 F.2d at 307–08; *Little Traverse Bay Bands of Odawa Indians v. Snyder*, 194 F. Supp. 3d 648, 650 (W.D. Mich. 2016) (quoting 9 *Fed. Pract. & Procedure*, § 2389 at 284). "The principal purpose of the rule is to enable the trial judge to dispose of a case in a way that both advances judicial efficiency and is fair to the parties." *Benedictin*, 857 F.2d at 307.

"In deciding whether one trial or separate trials will best serve the convenience of the parties and the court, avoid prejudice, and minimize expense and delay, the major consideration is directed toward the choice most likely to result in a just final disposition of the litigation." *Benedictin*, 857 F.2d at 307–308 (quoting *In re Innotron Diagnostics*, 800 F.2d 1077, 1084 (Fed. Cir. 1986) (emphasis added). "Only one of these criteria need be met to justify bifurcation." *Saxion*, 86 F.3d at 556. "Whether to bifurcate and stay discovery is dependent on the circumstances in each case, [citation omitted], and the party moving to bifurcate bears the burden of demonstrating that bifurcation is appropriate." *Farmers Bank of Lynchburg, Tennessee v. BancInsure, Inc.*, No. 2:10-CV-02222-DKV, 2011 WL 2023301, at *1 (W.D. Tenn. May 20,

2011) (emphasis added) (citing *Saxion*, 86 F.3d at 556; 9A Wright and Miller § 2388 (3d ed. 1998)). While only one factor from Rule 42(b) need be met to justify bifurcation, all three are present in this case. *See, c.f, Saxion*, 86 F.3d at 556.

B. The Court Should Determine Separately Whether the 1978 Consent Order Applies in This Case as a Threshold Issue Before Determining Whether the City Violated It.

The Court need not address the City's alleged liability in this case until it has adjudicated whether the 1978 Consent Order is in effect. The plaintiffs may not bring an action for violation of the 1978 Consent Order and pray for damages and injunctive relief if the 1978 Consent Order does not apply. *See* Mem. in Sup. of Mot. to Dismiss Intervening Compl., p. 8. Bifurcation and a stay of discovery will further the convenience of the parties and certainly the Court. It will both economize and expedite these proceedings because it will bring the applicability of the 1978 Consent Order to the forefront of the case for the Court's consideration. *See, e.g., Wilson v. Morgan*, 477 F.3d 326, 339–340 (6th Cir. 2007) (courts should consider the resulting convenience and economy when determining whether to bifurcate) (citation omitted). If the plaintiffs and ACLU-TN do not have standing, or, alternatively, if the Court does not believe it has subject matter jurisdiction based on the long dormant *Kendrick* case, no plaintiff is entitled to relief, and the Court will have economically and expeditiously disposed of this case.

The situation in this case in analogous to *Wilson*, in which the Sixth Circuit found no abuse of discretion in the magistrate judge's decision to order separate trials to determine individual liability first and then, if necessary, municipal liability in a Section 1983 excessive force trial. 477 F.3d at 340. Plaintiffs moved for the county to be tried first and argued that the county's custom and practice of using investigative detentions amounted to arrest without probable cause and was itself a violation of federal law sufficient to establish municipal liability under *Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658 (1978). *Id.* at 339–340.

On appeal, the panel for the Sixth Circuit noted that "[t]he magistrate judge determined that bifurcation would be an expeditious way to proceed, but decided that, in light of *Monell*, trial should proceed first on the claims against the individual officers." *Id.* at 340. In affirming the magistrate judge's decision, the Sixth Circuit concluded that "[t]here can be no *Monell* liability under § 1983 unless there is an underlying constitutional act." *Id.* (citing *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (reasoning that there could be no municipal liability if the officer had been exonerated)).

If discovery on the merits issues is not stayed in this case, the City will be prejudiced and inconvenienced because adjudication of whether the 1978 Consent Order applies will be delayed by the time it will take to conduct extensive, intrusive discovery on the issue of compliance with what appears to be a case with serious subject matter jurisdiction issues and certainly one where standing is a major issue. *See, c.f.*, *BancInsure*, 2011 WL 2023301, at *2 (determining that resolution of the coverage dispute would be delayed due to the discovery on the bad faith and Tennessee Consumer Protection Act ("TCPA") claims is a justification for bifurcation).

As in *Wilson*, and a litany of other cases in Section 1983 actions involving separate trials of the underlying issues of a constitutional violation from the separate concept of "deliberate indifference", the Court should separately determine threshold issues impacting whether further proceedings in the case are necessary before proceeding to resolve those issues. *See BancInsure*, 2011 WL at *2 (citing to Wright & Miller § 2387 (3d ed. 2008)): "One of the purposes of Rule 42 (b) is to permit the stay of discovery pending the possible resolution of a dispositive issue.").

This ordering of the issues promotes convenience to the parties and promotes judicial economy and expedience. If resolution of one issue could save the time of the court and reduce the expenses of the parties, bifurcation is desirable. *See, e.g., Snyder*, 194 F. Supp. 3d at 650.

To the extent that there needs to be discovery relating to the issues on standing before the Court, it needs to focus on whether the West Tennessee Civil Liberties Union, a separate and distinct entity from ACLU-TN, was the real party in interest in the *Kendrick* case, and therefore, ACLU-TN lacks standing to intervene. *See* Mem. in Sup. of Mot. to Intervene, p. 3 n.1. As in *BancInsure*, where the magistrate judge stayed discovery relating to the claims to be taken up in the latter phase of the trial, the overlap in discovery concerning the relationship between ACLU-TN and the West Tennessee Civil Liberties Union and the merits issues will be minimal; convenience, economy, and expediency favor a stay on the broader discovery on the merits issues.

In *Snyder*, the court bifurcated the proceedings into two parts because adjudication of whether the 1855 Treaty of Detroit created reservation boundaries for the Little Traverse Bay Bands of Odawa Indians (the "Tribe") allowed the resolution of the remaining issues in the case. 194 F. Supp. 3d at 650. The Tribe brought a one-count declaratory judgment action seeking a declaration that its reservation existed and that all lands within the reservation were Indian country under federal law. The Tribe sought to permanently enjoin the State of Michigan and its officials from asserting jurisdiction over the Tribe or its citizens. *Id.* at 651. At issue in the case was whether the state could assert equitable defenses against the Tribe for failure to seek relief for the diminution of the reservation. *Id.*

The district court in *Snyder* determined *sua sponte* that the lawsuit sought two distinct and separate claims: one sounding in declaratory relief and the other in equitable relief; therefore, the case was "ripe for bifurcation." *Id.* at 650. The court applied the factors from Rule 42(b) and found that "[d]eciding the reservation boundaries first will simplify discovery, expedite resolution of the threshold issue, and either obviate the need for a second phase or

crystallize the issues in that later phase." *Id.* The court ultimately determined that "convenience, expedition, and economy will be furthered with bifurcation, with little prejudice to either side," and that bifurcation also simplified resolution of the Tribe's motion for partial summary judgment. *Id.*

CONCLUSION

For the foregoing reasons, the Court should enter an Order bifurcating the proceedings and staying, or limiting discovery (to standing issues) until the threshold issue of the applicability of the 1978 *Kendrick* Consent Order can be adjudicated. This Order should preclude and override any "standard" or default obligations generally imposed upon the parties with respect to development of a discovery plan and exchange of Initial Disclosure information in preparation for a Case Management Conference.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2017 the foregoing will be served by this Court's ECF system to:

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