

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88-2406-CIV-MORENO

MICHAEL POTTINGER, PETER
CARTER AND BERRY YOUNG,
Plaintiffs,

vs.

CITY OF MIAMI,
Defendant.

**PLAINTIFFS' REPLY TO THE CITY OF MIAMI'S RESPONSE IN OPPOSITION TO
PLAINTIFFS' MOTION TO ENFORCE THE *POTTINGER* CONSENT DECREE AND
TO HOLD THE CITY IN CONTEMPT**

I. Introduction

In its Response to the Plaintiffs' Motion to Enforce the *Pottinger* Consent Decree and to Hold the City in Contempt, the City is quick to question the Plaintiffs' motives, but remarkably short on the facts – particularly concerning the voluminous evidence Plaintiffs presented of a widespread and systematic policy and practice of arbitrary police sweeps and destruction of homeless people's property. The City, moreover, continues its silence on a central factual issue – a severe lack of available shelter and affordable housing in the City of Miami. That shortage leaves hundreds of people with nowhere to live but on the streets, and makes continued enforcement of the Consent Decree all the more important.

II. The City Fails to Address Plaintiffs' Compelling Evidence of the City's Systematic Violations of the Consent Decree, and Fails to Offer Any Evidence to the Contrary

As described in detail in Plaintiffs' Motion to Enforce, and supported by affidavits, for the past three to six months, the City has been systematically violating the Consent Decree by seizing and destroying the Plaintiffs' property, banishing Plaintiffs from certain areas of the City, and engaging with Plaintiffs and arresting them for "life sustaining misdemeanor conduct" without offering shelter or assistance as require by the Consent Decree. DE 568: 2-19. Yet for the most

part the City ignores the evidence set out Plaintiffs' Motion. Instead, it asserts that any violations are "isolated" exceptions to a pattern of compliance. DE 586: 5. This assertion is wide of the mark.

A. There Is Strong Evidence of Systematic Violations of the Consent Decree, Both Recently and in the Past

First, with respect to the recent period (the focus of the Plaintiffs' Motion to Enforce), the City's violations are so grave and systematic as to preclude termination or modification of the Consent Decree. The twenty-three declarations filed on May 30 provide extensive evidence of those violations. Moreover, they represent only a portion of those individuals affected by the City's recent violations, and only a portion of the violations. The declarations themselves document violations against more than the 23 declarants, as a number of the declarants recount the violations committed against others. In addition, Plaintiffs continue to gather additional evidence.¹

Second, the City's assertion of long compliance with the Consent Decree is simply wrong, as is its claim that Plaintiffs have implicitly acknowledged the City's compliance. DE 586: 1, 5. In fact, the City *has* engaged in serious and systematic violations of the Consent Decree on earlier occasions, and equally importantly, has acted in ways that are inconsistent with any confidence that its conduct has truly changed – as Plaintiffs' Response to the City's Motion for Termination, or Alternatively, Modification of the Pottinger Consent Decree makes clear. DE 587: 4-10. The City effectively concedes this by summarily denying Plaintiffs allegations, but failing to offer a single piece of evidence to rebut them, other than to dispute the meaning of a single photograph.

Remarkably, there *is* one basic factual matter as to which the City continues its utter silence. That is the lack of adequate shelter space and affordable housing, which condemns hundreds of people to live on the streets. DE 587: 13-16. The City's assertion that Plaintiffs'

¹ Inevitably, the evidence will not and could not cover every violation. Getting and staying in touch with persons living on the streets poses many challenges, which are made even more difficult in the face of the City's violations. DE 568, ¶ 16.

efforts to enforce the Consent Decree somehow prevent it from offering shelter and treatment to those in need, DE 586: 2, 7 n.4, is flagrantly contradictory to this basic fact.

The City's lack of compliance with its own documentation obligations – critical to monitoring compliance – is also highly relevant. The Consent Decree has detailed provisions requiring City police to document their interactions with homeless persons through Field Information Cards/Homeless Encounter Forms (FICs). *See* DE 525-1: 1-8. Yet, as noted in Plaintiffs' Motion to Enforce, the City did not fill them out in respect of the violations cited in Motion. DE 568, ¶ 33. That in itself is a violation of the Consent Decree. Further, as Plaintiffs will show at hearing, the FICs indicate other serious problems with the City's compliance.

More generally, the City's handling of its documentation obligations underscores its lack of commitment to serious compliance with the Consent Decree. Prior to 2014, the City did not make the FICs available to Plaintiffs except through public records requests at Plaintiffs' expense, making effective monitoring difficult.² Only with the 2014 modification have the FICs regularly been provided to Plaintiffs, twice a year. DE 525-1: 8 (§ VII ¶ 15(f)). While specific references to electronic FICs were included in the 2014 modification at the City's suggestion, and while the City indicated to Plaintiffs that it planned to switch to electronic filing of FICs, no such change has been made. Thus although the City has a system of laptop entry of arrest records by the police, the FICs continue to be filled in by hand, and not consistently, making systematic tracking of the City's conduct difficult.

B. The City's Account of Its Clean Up Operations Is Not Supported by Relevant Facts

The City paints a picture of well-run clean-up operations in service of a legitimate public

² The original settlement agreement provided for an Advisory Committee to oversee the City's compliance for a three-year period, renewable for an additional three-year term. DE 382: 14-16 (§ IX. Advisory Committee).

interest in keeping the city clean and safe. The City is correct that Plaintiffs acknowledge such a public interest. DE 586: 3. Indeed, Plaintiffs share that interest, so long as the clean ups are carried out in a manner consistent with the constitutional rights protected by the Consent Decree. The City overlooks Judge Atkins' observations that a legitimate governmental interest cannot override constitutionally protected rights, and that the public itself has an interest in respecting the property rights of homeless people. See DE 568: 11-13.

The City's account of how the clean ups proceed is simply not supported by the facts. To be sure, the highly planned and deliberate nature of the operations is not in dispute. DE 586: 3-4. Where the City errs is in asserting that the clean-up operations are carried out in a manner consistent with the Consent Decree. The City states that these operations are announced in advance by postings and conducted with scrupulous regard for the belongings on homeless people. DE 586: 3-5. As Plaintiffs set out in their Motion to Enforce, and will show at the evidentiary hearing, this is simply not what happens in practice, in many instances, on a regular basis. Similarly, the City's claim that it offers shelter to everyone affected by the clean-ups, DE 586: 4-5, is inconsistent with the facts. *See* DE 568, ¶ 18. Finally, the City takes note of another major claim that Plaintiffs made in their Motion – that at least some of these clean-ups have involved police telling homeless people to leave the area and not come back, *see* DE 568: ¶ 29 – but never points to any evidence to contradict Plaintiffs' account. DE 586: 4-5.

Where the City does point to evidence, its argument is beside the point. The City characterizes Plaintiffs' account of the City's clean-up operation on April 17, 2018 as "exaggerated" and "desperate." DE 586: 7. Yet all it offers in support of that characterization is a claim that the threatening pose of NET employee Willie (Bishop) Rachel, *see* DE 578, Pl. Ex. 41D was in fact a private gesture of friendship between Mr. Rachel and another individual present,

Rodney Thomas. DE 586: 6, 586-1, Ex. B. The City offers nothing to counter the evidence Plaintiffs presented in their Motion that the clean-up operation was conducted in an intimidating manner. Referring to Mr. Rachel (though not by name), Wilber Cauley recounts that when he attempted to save his belongings from being thrown away, Mr. Rachel “aggressively grabbed my arm and prevented me from getting my property.” He goes on to describe other aggressive behavior, including the intimidating impression that – whatever may have been the private intentions of Mr. Rachel and Mr. Thomas – Mr. Rachel’s threatening pose created. Declaration of Wilber Cauley, DE 578, Pl. Ex. 3 ¶ 9; DE 578, Pl. Ex. 40B. Nor does the City offer anything to contradict Plaintiffs’ account that City employees, working with the police present, seized and destroyed property clearly belonging to homeless people – all in violation of the Consent Decree. *Id.* ¶¶ 9-12; Declaration of David V. Peery, DE 578, Pl. Ex. 10 ¶¶ 13-15.

III. The City’s Attacks on Plaintiffs for Seeking Vindication of Their Rights under the Consent Decree Underscore the Continuing Need for the Protections of the Decree

Having failed to offer any evidence to counter Plaintiffs’ assertions, the City resorts to attacking Plaintiffs’ counsel. It asserts that Plaintiffs have “exaggerated” the facts in “their desperation to use the Pottinger Consent Decree to generate fees for their cadre of attorneys,” DE 586: 7. A desire to generate attorneys’ fees is, according to the City, “the Plaintiffs’ sole objective in filing their motion to enforce.” DE 586: 2. Though it initiated a major systematic program of clean-ups without informing or consulting with Plaintiffs’ counsel, the City also takes the Plaintiffs to task for not “collaborating with the City” to help persons living on the streets. DE 586: 2. As if that were not enough, the City accuses Plaintiffs of encouraging people to remain homeless and thereby contributing to the needless deaths of persons living on the streets, DE 586: 7 n.4.

In fact, after thorough investigation and two days of mediation with the City, Plaintiffs simply sought enforcement of the rights the Consent Decree protects. It is no disrespect to the

Consent Decree for the City to mount a vigorous factual and legal defense against Plaintiffs' claims. It *is* inconsistent with respect for the Consent Decree for the City to take umbrage at the very filing of a claim against it. Nor is it worthy of this Court for the City to accuse experienced attorneys – four with many years on the case as cooperating attorneys with the ACLU, one of the most respected civil rights organization in the U.S., and two with the Florida Justice Institute, one of the most respected Florida civil rights public interest law firms – of filing a major enforcement motion with the “sole objective” of generating attorneys' fees, DE 586: 2.

The City further argues that Plaintiffs' Motion to Enforce was filed, not because Plaintiffs believe they have strong evidence of violations by the City, but as a maneuver designed to distract from the City's Motion for Termination. The only grounds it offers for this assertion are that Plaintiffs' Motion was filed after the City Commission voted to seek termination or modification of the Consent Decree, and “*after* the City initiated a consent decree modification proceeding” (*i.e.*, after the City filed its Motion for Termination, DE 566). See DE 586: 1 & n.1, 5 (emphasis in original).

The most telling response to this argument is the strength of the evidence Plaintiffs offered in support of their Motion to Enforce. That evidence included twenty-three concrete, detailed affidavits from individuals who had personally experienced the City's violations or witnessed them, gathered as part of a thorough investigation by Plaintiffs, and filed in court only after the City declared impasse after two days of mediation initiated by the Plaintiffs. To treat the Motion to Enforce as a distraction is simply not credible.

In any case, even if the precise sequence of events were important to evaluating the Plaintiffs' Motion to Enforce – it is not – that sequence in no way supports the City's argument that Plaintiffs' Motion is no more than an effort to undercut the City's Motion for Termination.

In March of this year, Plaintiffs began to receive reports of widespread violations. Plaintiffs' counsel began a thorough investigation of these reports. That investigation revealed that many violations had been taking place over the last 3-6 months.

On April 6, 2018, Plaintiffs' counsel notified the City of the violations and demanded that they cease. DE 583, Pl. Ex. 14. Plaintiffs did not receive any response at all from the City, other than an acknowledgment of receipt. Plaintiffs did not go to court immediately in light of the provision of the Consent Decree requiring mediation. DE 382: 28-29 (§ X (Enforcement/Mediation) ¶ 25a).

On April 12, 2018, having waited nearly a week with no response by the City, Plaintiffs invoked the mediation provision. DE 583, Pl. Ex. 15.

On April 24, 2018, the first mediation session was held, ending with the understanding by both parties that there would be a second day of mediation.

Two days later, on April 26, 2018 (nearly three weeks after the Plaintiffs notified the City of the violations), the City Commission voted to seek termination or modification of the Consent Decree. The second day of mediation was May 17. That session ended with the understanding that the City's attorneys would confer with their client as to whether to continue mediating. See Plaintiffs' Motion to Enforce DE 568: 1 n.1.

On May 30, 2018, the City declared impasse. The mediator filed a notice of impasse with the Court in the morning of May 30, 2018. DE 564. A little over an hour later the City filed its Motion for Termination, DE 566, and later that same day Plaintiffs filed their Motion to Enforce and Hold the City in Contempt. DE 566.

In one respect, however, the City is correct in treating Plaintiffs' Motion to Enforce as having some bearing on the City's Motion for Termination. As Plaintiffs have set out in their

Response to the City's Motion for Termination, the City's violations preclude termination or modification of the Consent Decree. That fact is not the product of legal maneuvering by Plaintiffs, but a reflection of the well-established caselaw that requires defendant seeking termination or modification of a consent decree to show compliance with the decree. *See* Plaintiffs' Response to City's Motion for Termination, DE 587: 2-3.³

IV. Conclusion

The Consent Decree protects basic constitutional right of those experiencing homelessness: the right not to be arrested or subjected to unlawful police conduct simply for being homeless, and the right to have one's property free from arbitrary seizure and destruction by government officials. It is no exaggeration to describe the impact on Plaintiffs of the City's violations of those rights as devastating. The City's Response to Plaintiffs' Motion to Enforce fails to substantiate its broad claims, free of any specifics, that it has complied with the Consent Decree.

WHEREFORE, Plaintiffs respectfully request the Court to issue an order granting the relief requested in Plaintiffs' Motion to Enforce, DE 568: 19-20.

³ The City also asserts that "Plaintiffs' failure to move for an order to show cause before filing for contempt belies their contempt claim." DE 586: 7. Yet Plaintiffs' Motion to Enforce leaves no doubt that they are asking this court to hold the City in contempt, as the court itself acknowledged in its Order Setting Procedure and Evidentiary Hearing. DE 576: 2. This court's order sets out a procedure that gives the City a fair opportunity to present evidence and arguments in support of its position that it has not violated the Consent Decree and should not be held in contempt. *Id.* That is exactly what the cases the City cites require. *See Reynolds v. Roberts*, 207 F.3d 1288, 1298 (11th Cir. 2000) ("If satisfied that the plaintiff's motion states a case of non-compliance, the court orders the defendant to show cause why he should not be held in contempt and schedules a hearing for that purpose," at which the court hears from the parties, determines whether there has been a violation, and if there has been, issues appropriate sanctions); *Thomason v. Russell Corp.*, 132 F.3d 632, 634 n.4 (11th Cir. 1998) (requiring motion "citing the precise provision of the Decree" alleged to have been violated, rather than "plea for the court to 'do something' about a violation"); *Wyatt v. Rogers*, 92 F.3d 1074, 1078 n.8 (11th Cir. 1996) ("status conferences in which the court is briefed, sometimes through testimony," formed insufficient basis for holding of contempt).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10 day of July, 2018, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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