

THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BLACK LIVES MATTER SEATTLE-KING
COUNTY, ABIE EKENEZAR, SHARON
SAKAMOTO, MURACO KYASHNA-
TOCHA, ALEXANDER WOLDEAB,
NATHALIE GRAHAM, and ALEXANDRA
CHEN,

Plaintiffs,

v.

CITY OF SEATTLE,

Defendant.

NO. 2:20-cv-00887

THE CITY OF SEATTLE'S RESPONSE
TO PLAINTIFFS' MOTION FOR ORDER
TO SHOW CAUSE WHY THE CITY OF
SEATTLE SHOULD NOT BE HELD IN
CONTEMPT

NOTE ON MOTION CALENDAR:
October 5, 2020

ORAL ARGUMENT REQUESTED

CITY OF SEATTLE'S RESPONSE TO
PLAINTIFFS' MOTION FOR ORDER TO
SHOW CAUSE (2:20-cv-00887) - 1

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1 **I. INTRODUCTION AND RELIEF REQUESTED**

2 The City of Seattle (“The City”) is not in contempt and has substantially complied with
3 this Court’s Orders. (Dkts.. 42 & 110). For nearly four months, protests have occurred throughout
4 the nation in support of Black lives. Almost daily, these protests occur across the City, and most
5 have been peaceful and without any police involvement. Problems have arisen, however, at certain
6 demonstrations with individuals, acting independently or in concert with others, assaulting
7 officers, throwing dangerous projectiles, using explosive devices against officers and/or property,
8 engaging in de-arrest tactics, or refusing to obey lawful orders to disperse such that their refusals
9 hinders lawful police response to criminal activity or lawful police attempts to protect themselves
10 and others from physical harm.

11 Plaintiffs’ Motion for Contempt addresses four demonstrations that occurred on August
12 26, September 7, September 22, and September 23, 2020. (Dkt. 114). The declarations supporting
13 the motion contain important snapshots of a complex series of events, but they do not present a
14 complete story. These accounts lack context and a circumstantial understanding of what
15 information the police commanders and officers had about the non-peaceful individuals they
16 would be encountering, what was transpiring in the broader field of confrontation beyond their
17 immediate field of vision, and why the trained police professionals employed specific force at a
18 specific time against specific individuals or threats. The reality is that not all participants in these
19 protests were peaceful, with many armed and armored individuals intent on destroying property,
20 assaulting officers, or serving as obstruction or cover for others engaged in such conduct.

21 With time to collect and compile the necessary evidence, the City is prepared to address in

1 detail the uses of force deployed on these four dates. Only then, with a complete set of evidence,
2 would the Court be in a position to fairly determine whether any particular less lethal deployment
3 or set of deployments violated the terms of the Court's Orders, and whether any violation, proven
4 by clear and convincing evidence, justifies a finding that the City should be held in contempt.
5 Entering the order requested by Plaintiffs, which is devoid of reference to the clear and convincing
6 burden of proof, poses serious due process violations, as the City does not have a meaningful
7 opportunity to be heard on the important, challenging, and nuanced issues raised with respect to
8 four separate events.

9 The City has consistently and continuously instructed the members of its police department
10 on the rules of engagement for the use of chemical irritants and projectiles (crowd control weapons
11 or "CCWs") and the parameters of this Court's Orders. (*See* Brooks and Allen Decls.) The City
12 also employs a robust system for review of alleged policy violations and uses of force with the
13 level of depth and specificity necessary to meaningfully assess police uses of force in
14 demonstration contexts and determine compliance, discipline, and/or needed policy changes. (*See*
15 Sharifi Decl.) This review process cannot meaningfully take place in a rushed timeframe, with
16 limited review of video snapshots posted online, and with isolated witness accounts. Plaintiffs
17 essentially request the Court to broaden the scope of its prior order and implement new relief that
18 shifts oversight of the City's crowd management training and policies away from those institutions
19 and processes created and strengthened through the City's work with the DOJ as part of the
20 Consent Decree, and instead create a mechanism for immediate review by these plaintiffs and this
21 Court.

1 The City seeks direction from the Court on what standard it will be applying to determine
2 whether the City is in contempt of its orders, given the undisputed burden of proof that a violation
3 must be established clearly and convincingly. The City requests that the Court clarify if it
4 contemplates a single incident, multiple incidents, single event date, or multiple event dates as
5 potentially rising to the level justifying a contempt finding. It will take considerable time to collect
6 the necessary documentation to identify and assess each use of force portrayed in the videos
7 presented by Plaintiffs. The City requests that the Court identify whether there is a preferred way
8 to narrow the response to specific uses of force or specific incidents that raise the Court's concern.

9 The City also seeks guidance on the types of sanctions this Court may contemplate with
10 such a contempt request. Twice now, Plaintiffs requested sweeping changes to the preliminary
11 injunction, SPD policies, training, practices, and resources. In doing so, Plaintiffs seek to bypass
12 the threshold injunctive requirements packaged in the form of a contempt motion. If this Court is
13 considering changes to training, policies, or procedures, this will require the City to respond both
14 to the substance of the considered remedies and to determine and present the possibility that any
15 such remedy is feasible, permitted by law, or will violate its obligations under the Consent Decree.
16 The City has respectfully requested this Court to set a status conference allowing the parties to
17 address these questions and allow for a more efficient and meaningful response to Plaintiffs'
18 motion. Based upon the limited information presented to the Court, Plaintiffs cannot meet their
19 burden of establishing that the City should be held in contempt or that they are entitled to a new
20 preliminary injunction. The Court should deny Plaintiffs' motion.

21 ///

II. STATEMENT OF FACTS

A. Procedural Facts

On June 17, 2020, this Court entered a preliminary injunctive order enjoining the City from employing chemical irritants or projectiles of any kind (tear gas, OC spray, blast balls, rubber bullets) against peaceful protestors. (Dkt. 42.) The Order did not prohibit the use of these crowd control weapons when necessary, reasonable, proportional, and targeted to protect against a specific imminent threat of physical harm to themselves or others or destruction of property. (*Id.*) On August 10, 2020, the parties stipulated to an Order amending the terms of the preliminary injunction, which the Court entered on August 10, 2020. (Dkt. 110).

On August 28, 2020, Plaintiffs' counsel sent a letter to the City requesting information regarding SPD's use of CCWs at a demonstration in the Eastlake neighborhood on August 26 and how City viewed its response as consistent with the Court's Orders. (Dkt. 115 at Ex. A.) The letter did not mention a motion for contempt. (*Id.*) On September 4, the City timely replied with the detailed information requested. (Dkt. 115 at Ex. B.) Plaintiffs' counsel did not respond to the City's letter, nor did they request additional information or a meet and confer with respect to any issues arising from the August 26 demonstration. (Declaration of Ghazal Sharifi, ¶ 4.)

On September 9, 2020, Plaintiffs' counsel sent a letter to the City requesting information regarding SPD's use of CCWs at a demonstration near the Seattle Police Officer's Guild ("SPOG") building on September 7. (Dkt. 115 at Ex. C.) Plaintiffs requested information about the CCWs deployed and how the City viewed its response as consistent with the Court's Orders. (*Id.*) The letter indicated that Plaintiffs were considering asking the Court to reopen contempt proceedings.

1 (*Id.*) On September 11, the City promptly replied with the requested information. (Dkt. 115 at
2 Ex. D). Again, Plaintiffs' counsel did not respond to the City's letter, request additional
3 information, or schedule a conference to discuss the issues raised. (Sharifi Decl., ¶ 6.)

4 Finally, on Thursday, September 24, 2020, Plaintiffs' counsel sent another letter,
5 requesting information regarding SPD's use of CCWs at demonstrations taking place in the Capitol
6 Hill neighborhood over September 22 and 23. (Dkt. 115 at Ex. E). In addition to seeking detailed
7 information, Plaintiffs' counsel made a number of claims against the City beyond the scope of the
8 Court's Orders, essentially demanding concessions of civil liability with respect to allegations of
9 excessive force under the Fourth Amendment. (*Id.*) The City's counsel acknowledged receipt of
10 the letter on Friday, September 25, and indicated that a response would be forthcoming the
11 following week. (Sharifi Decl, Ex. A.) The City began collecting the requested information and
12 preparing its response. (*Id.*, ¶ 8.)

13 At 6:30 a.m. on Tuesday, September 29, 2020, Plaintiffs' counsel sent an email requesting
14 to meet and confer with the City that day about their "forthcoming motion for contempt." (Sharifi
15 Decl., Ex. B.) Plaintiffs did not provide any details on the basis of the motion or their requested
16 relief. (*Id.*) The City's counsel promptly responded and indicated that its work responding to the
17 September 24 letter would be paused, as it appeared Plaintiffs' counsel had changed their mind
18 about their request for information. (Sharifi Decl., Ex. C). A conference was scheduled for the
19 same day, with Plaintiffs' counsel expecting "it will be a short call, as it seems that we
20 fundamentally disagree about whether SPD's tactics involving less-lethal weapons are consistent
21 with the Court's orders." (Sharifi Decl., Ex. D.)

1 During the telephonic conference on September 29, Plaintiffs' counsel stated they would
2 be filing the subject motion based on events taking place on August 26 and September 7, 22, and
3 23. (Sharifi Decl., ¶ 11.) Given the volume of relevant evidence and the significant effort
4 necessary to respond to the July motion for contempt, which only dealt with one specific
5 demonstration, the City suggested the parties request a status conference with the Court to address
6 the timing of a substantive response and next steps. (*Id.*) The parties agreed that such a conference
7 would be beneficial. (*Id.*).

8 Plaintiffs' motion is supported by nineteen witness declarations, and significant individual
9 video clips, some of which are quite long and others that were not previously provided to the City.
10 (Sharifi Decl., ¶ 12.) As officers continue to draft and submit reports related to these four
11 demonstrations, the City can review those drafts and associated body worn video. (*Id.*) Setting
12 aside the challenges of producing that information before it is finalized consistently with the City's
13 policies, the City would need multiple weeks to devote the staffing necessary to identify the
14 officers involved in conduct referenced by Plaintiffs or their video footage in order to provide a
15 full response to those allegations. (*Id.*)

16 **B. Facts Related to the Four Demonstrations**

17 The City adopts and incorporates the facts contained in the declarations of Lieutenant John
18 Brooks, Captain Matt Allen, and Ghazal Sharifi, filed herewith.

19 **III. AUTHORITIES AND ARGUMENTS**

20 **A. Plaintiffs Cannot Establish the City Violated This Court's Order.**

21 The City fully articulated the legal standards applicable to this motion in its Response to

1 plaintiffs' first Motion. In the interest of judicial economy, and sensitive to the page limitations
2 for this brief, the City incorporates its prior Response (Dkt. 78). It is undisputed that a party filing
3 a motion for civil contempt must prove that the non-moving party has violated a court order by
4 clear and convincing evidence, something that plaintiffs acknowledged in their Reply brief. (Dkt.
5 87, p. 6, ll. 11-12.) Moreover, Plaintiffs have failed to provide the Court with clear and convincing
6 evidence that the City failed to substantially comply with the Courts' Orders.

7 ***1. It is undisputed that the City has unequivocally and consistently apprised its***
8 ***police officers of the terms of the Courts' Orders and the requirement that they***
comply with those Orders.

9 Since the inception of the Court's TRO and later converted preliminary injunction, SPD
10 has been disseminating and instructing officers of the parameters of the Court's Orders. Relevant
11 to the time frame of this motion, on August 11, 2020, Detective Puente sent an email to all SPD
12 officers attaching the Court's June 17, 2020 and August 10, 2020 Orders, copying the language
13 from each of those orders into the body of the email, and indicated in bold that "[a]ll SPD members
14 are required to read each of these orders and be familiar with their terms." (Dkt. 112.)

15 SPD also holds mandatory briefings before each shift in which officers are expected to
16 provide crowd control management. (Brooks Decl, ¶ 3.) As part of that briefing, one or more
17 members of the command staff share with the group of officers the anticipated schedule and events
18 for the day, intelligence gathered about potential threats, the Commander's intent and objectives,
19 and the rules of engagement. (*Id.*) This briefing always includes a reminder to SPD officers to act
20 consistently with SPD policies and the Court's Orders regarding use of CCWs. (*Id.*) Command
21 staff also provides the SPD officers with a copy of the Incident Action Plan (IAP) associated with

1 that shift. (*Id.*) This standard protocol was followed on August 26, September 7, September 22,
 2 and September 23. (*Id.*; Allen Decl. ¶ 8.) The City of Seattle and its Police Commanders are not
 3 encouraging or inciting officers to violate the Courts' Orders, or that the City has failed to
 4 substantially comply with the Court's Orders in good faith.

5 **2. Police Officers Deployed CCWs in Compliance with the Court's Orders.**

6 Plaintiffs present numerous declarations of individuals who claim to have been peacefully
 7 protesting when they either witnessed what they believed to be an inappropriate use of force or
 8 experienced the impact of OC spray or a blast ball. However, the declarations of Plaintiffs'
 9 witnesses do not capture the events from the officers' perspectives and exemplify the incomplete
 10 nature of their perceptions. For instance, the blast ball that Plaintiffs claim was targeted at the
 11 person on the ground was not, in fact, directed at that person and did not detonate near that person.
 12 (Brooks Decl., ¶ 25, Ex. C.). Other examples of the same have unfolded during these demonstration
 13 events. (*See* Dkt. 80; Sharifi Dec., ¶ 23 (referencing recent OPA decisions from viral videos.)).

14 These demonstrations present extreme challenges to both sides: protesters who want to
 15 exercise their right to demonstrate peacefully in support of causes that matter and police officers
 16 who are vastly outnumbered while also expected to protect others, protect each other, protect
 17 themselves, and prevent the destruction of property. When individual members of the crowd fail
 18 to follow lawful orders to disperse, assault officers, attempt arson, throw projectiles, vandalizing
 19 businesses, and block traffic in way that poses a danger to others, the police are authorized – indeed
 20 charged - to act to protect safety of self and others and to address property destruction. The issue
 21 is not whether crowd control devices were used and impacted members of the crowd; instead, the

1 issue before the Court is whether officers, at the time they deployed that force, to the extent
 2 reasonably possible, did so in a manner consistent with the Court's Orders. There is no evidence
 3 in this record of officers deploying CCWs in violation of the Court's Orders.

4 **3. *The Court should not address police conduct not governed by its June 17, 2020***
 5 ***and August 10, 2020 Orders.***

6 Plaintiffs complain about various police conduct, including perceptions of police officer
 7 demeanor, the use of bikes to move crowds, police tactics involving the decision to move crowds
 8 away from a specific location, the decision not to allow cars to block the road, and music played
 9 by SPOG members. Respectfully, this type of conduct is not governed by this Court's Orders, nor
 10 is this the appropriate forum to determine whether any specific officer or the City in general has
 11 engaged in an excessive use of force under the Fourth Amendment or conduct that may trigger
 12 criminal or civil liability.¹

13 **B. Plaintiffs' Motion Seeks Infeasible Relief that Goes Beyond the Bounds of a Civil**
 14 **Contempt Filing.**

15 In addition to asking the Court to find the City in contempt, Plaintiffs seek new injunctive
 16 relief well beyond the bounds of the Orders: that the City (1) institute additional in-person training
 17 subject to this Court's approval; (2) notify Plaintiffs and the Court regarding its internal
 18 investigative process, including potential disciplinary actions, criminal investigations, and
 19 prosecutorial considerations within a matter of weeks; and (3) file with the Court within five

20 ¹ For example, plaintiffs highlight the highly publicized video of a bike officer that appeared to roll over the head of
 21 an individual on the ground. This incident was immediately addressed by SPD command staff and later referred for
 criminal investigation by the Office of Police Accountability. See <https://spdblotter.seattle.gov/2020/09/24/bike-officer-placed-on-leave-opa-sheriffs-office-conducting-reviews/>; Allen Decl., ¶ 41-45.

1 working days of every CCW deployment its determination whether that deployment is consistent
2 with the Court's Orders. (Dkt. 114-1.) This requested extraordinary relief is beyond the bounds
3 of the available civil sanctions that may be awarded to a party seeking contempt. *See General*
4 *Signal Corp.*, 787 F.2d 1376; *BMG Music v. Perez*, 952 F.2d 318 (9th Cir. 1991).

5 Additionally, TROs "should be restricted to serving [its] underlying purpose of preserving
6 the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and
7 no longer." *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 438-39 (1974). "[T]he
8 standards for issuance of a temporary restraining order are at least as exacting as those for a
9 preliminary injunction." *Pohlman v. Hormann*, 2014 WL 5425502 *1 n.1 (D. Or. Oct. 20, 2014)
10 (citing *Los Angeles Unified Sch. Dist. v. United States Dist. Court for the Cent. Dist. of Cal.*, 650
11 F.2d 1004, 1008 (9th Cir. 1981)). "Plaintiffs bear the burden of proving each one of the [four]
12 elements." *Klein v. City of San Clemente*, 584 F.3d 1196, 1201 (9th Cir. 2009). Plaintiffs fail to
13 meet or even address this standard.

14 Even if the Court had discretion to implement these requests, and the Plaintiffs established
15 their necessity by clear and convincing evidence, the request should be denied. First, any attempt
16 to alter the City's training and/or policies with respect to access or use of crowd control devices
17 could interfere with the preliminary injunction in *United States v. Seattle*, C12-1282JLR (Dkt.
18 647), depending upon Plaintiff's expectations of changes to the current program. Second, any
19 requirement the City notify Plaintiffs and the Court of internal investigations would likely violate
20 the City's collective bargaining agreement with SPOG, police officers' Fifth Amendment and
21 Garrity rights, and the City's policies allowing officers sufficient time to draft reports.

1 These requests to expand the scope of Court’s injunctive relief are also unnecessary and
 2 threaten the integrity of the processes the City already has in place for systematic, comprehensive
 3 review of individual complaints. As set forth in Ms. Sharifi’s declaration, the Office of
 4 Professional Accountability (OPA) already conducts a thorough and robust review of alleged
 5 inappropriate police activity. Examples of this review highlight (1) that troubling video images
 6 are not always what they seem; (2) comprehensive review focused on an examination of all
 7 available evidence is key to a reliable process; and (3) when police officers act inappropriately,
 8 the City is prepared to issue proper discipline.²

9 **C. The City Requests Additional Time to Substantively Respond.**

10 The City recognizes that these four demonstrations involve several deployments. The City
 11 is committed to continue its effort to collect all relevant evidence and prepare a complete response,
 12 but this process requires time. If the Court is inclined to proceed with Plaintiffs’ motion for
 13 contempt at this time, the City requests the clarification delineated above and an additional 60 days
 14 to provide a more substantive response. However, the City suggests that, instead, the Court hold
 15 a status conference so that the Court and the parties can confer about how best to proceed. It is
 16 clear that what the parties need at this moment is clarity about how the Court sees a civil contempt

17
 18 ² In addition to reviewing specific uses of force and misconduct allegations, the City is undertaking a more systemic
 19 analysis of SPD’s response to the mass protests. On June 5, 2020, Mayor Durkan requested that OPA, OIG, and the
 20 Community Police Commission (“CPC”) evaluate SPD’s crowd management policies and tactics and make
 21 recommendations based on best practices. *See* June 5, 2020 Letter from Mayor Durkan. In addition, the City Council
 has asked the OPA, OIG, and CPC (who is represented in this Consent Decree litigation by Plaintiffs’ lead counsel)
 to analyze SPD’s use of less lethal devices for crowd control management and provide recommendations for future
 use and regulation of these devices. Crowd Control Ordinance Section 2. They are currently carrying out this important
 work. *See e.g.*, OIG’s Project Scoping Documents. Plaintiffs’ request interferes and conflicts with these processes
 from the City subject matter experts tasked with such a responsibility.

1 motion playing out, what issues it intends to address, the extent to which any individual officer
2 violation negates the City's substantial compliance with the Orders, and what relief it is willing to
3 consider. This will allow the City to better understand how, if at all, a contempt motion implicates
4 the City's requirements under the Consent Decree, as well as request a more reasonable time frame
5 for the City to respond to any future motion made by Plaintiffs.

6 IV. CONCLUSION

7 The City of Seattle has been and continues to be committed to deploying its police force in a
8 way that both protects the right of every citizen to peacefully protest, while also protecting the public
9 and officers from physical harm and violent property destruction. The City also takes seriously its
10 obligation to keep the public safe, protect First Amendment rights, and ensure police officers have
11 the tools and resources they need to maintain their own safety while doing so. The City has complied
12 with its legal obligations under this Court's Orders, and it will continue to do so as our police
13 department and our community look to the future. Plaintiffs have not established any violation of the
14 Court's Orders, let alone proving a violation by clear and convincing evidence. This Court should
15 deny Plaintiffs' motion.

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17 ///

18 ///

1 Respectfully submitted this 2nd day of October, 2020.

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