GALLAGHER, CALLAHAN & GARTRELL

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October 10, 2013

VIA FEDERAL EXPRESS

James I. Peale, Clerk
Cheshire County Superior Court
12 Court Street
Keene, NH 03431

Re: City of Keene v. James Cleaveland, et al.
Docket No.: 213-2013-CV-00098

Dear Clerk Peale:

Enclosed for filing is City of Keene's Supplemental Memorandum of Law regarding the above-captioned case.

Thank you for your attention to this matter.

Very truly yours,

Charles P. Bauer

CPB:lbl
Enclosure

cc: Jon Meyer, Esquire
Peter Eyre, *Pro Se*
Thomas Mullins, Esquire

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STATE OF NEW HAMPSHIRE

CHESHIRE, SS. SUPERIOR COURT

CITY OF KEENE

v.

JAMES CLEAVELAND, ET AL.

Docket No. 213-2013-CV-00098

SUPPLEMENTAL MEMORANDUM OF LAW

NOW COMES the City of Keene and submits this supplemental memorandum of law in response to the closing arguments made before the Court on October 1, 2013, and says:

Respondents' reliance on *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), is misplaced. *Claiborne* does not preclude the City's request for injunctive relief. *Claiborne*, instead, merely holds that the exercise of protected First Amendment rights could not be the basis for economic damages to private businesses injured by an N.A.A.C.P. boycott. The facts and circumstances here are substantially different because Respondents' intentional interference with the City's economic employment relationships is not protected by the First Amendment. As was made clear in the recent case of *Glik v. Cunniffe*, 655 F.3d 78 (2011), expressive conduct and speech that interferes with a municipal officer's performance of his or her duties may be subject to reasonable time, place and manner restrictions, and "is not without limitations." *See Glik*, 655 F.3d at 84.

In *Glik*, the right to record officers was recognized under limited circumstances where Glik "filmed [the officers] from a comfortable remove" and "neither spoke to nor molested them in any way." *Id.* In contrast, there was considerable evidence presented at trial that Respondents do <u>not</u> film from a comfortable remove, that they speak incessantly to the City's parking

enforcement officers ("PEO[s]"), and that Respondents molest and harass the PEOs on a unrelenting basis, with the express intent of physically shutting down the parking enforcement operations of the City of Keene. The holding in *Glik* is clear – such conduct by Respondents is not protected. While officers must be expected to endure provocative and challenging speech, that expectation exists only "when [the officers] are merely the subject of videotaping that memorializes, without impairing, their work in public spaces." *Id.* (emphasis supplied).

The holding in *Glik* is in accord with *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994), which postdates *Claiborne*, and which recognizes that expressive conduct is subject to limitation when, as here, it impairs significant governmental interests. In *Madsen*, the United States Supreme Court held that injunctions, appropriately tailored, may be placed on individuals in order to balance significant governmental interests, such as "the free flow of traffic on public streets and sidewalks," "ensuring public safety and order," and "protecting the property rights of all of its citizens." *Madsen*, 512 U.S. at 768. Similarly, here, the Court may impose an injunction on Respondents to protect the City's interest in its economic employment relationships with the parking enforcement officers (a property right that belongs to all of the citizens of Keene), to protect the City's obligation to enforce its laws and ordinances, the City's obligation to protects its employees from hostile and potentially unsafe working conditions, and the City's interest in ensuring public safety and order on the streets and sidewalks of Keene, among other interests.[1]

Additionally, the holding in *Madsen* dispenses with two other invalid arguments raised by Respondents in their closing remarks: (1) that an injunction cannot remain viewpoint neutral if it burdens a select group of individuals, and (2) that the City should draft an ordinance rather

[1] The City's significant governmental interests are also addressed in the City's prior memoranda of law, which are incorporated herein in full.

than seek an injunction from the Court. Both of those positions are without support under *Madsen.*

The Supreme Court has been explicit, "the fact that [an] injunction cover[s] people with a particular viewpoint does not itself render the injunction content or viewpoint based." *See Madsen*, 512 U.S. at 763. The Supreme Court explained that "[a]n injunction, by its very nature, applies only to a particular group (or individuals) and regulates the activities, and perhaps the speech, of that group. It does so, however, because of the group's past actions in the context of a specific dispute between real parties." *Id.* at 762. Similarly, the City does not need to draft an ordinance, as Respondents contend. In this case, as in *Madsen*, an injunction is the appropriate remedy because "[i]njunctions, of course, have some advantages over generally applicable statutes in that they can be tailored by a trial judge to afford more precise relief than a statute where a violation of the law has already occurred." *Id.* at 765.

Respondents do not have an unfettered right to harass and interfere with the City's economic employment relationships with the PEOs and the PEOs performance of their work. A reasonable injunction that balances the City's significant governmental interests with the Respondents' desire to engage in speech and other expressive conduct, is not only permissible, but is required to prevent further injury to the City. The City's requested injunction burdens no more speech than is necessary and is based on the Respondents' interference with the City's contractual relations, not the content of their speech.

The evidence presented to the Court demonstrates that the City has been intentionally harmed by the Respondents, that the City is likely to be further harmed, that the Respondents' actions impair the City's ability to hire a new PEO to replace PEO Givetz, and that the City is

likely to prevail on the merits of its civil damages claim before a New Hampshire jury.[2] Therefore, for the reasons set forth herein, and in the City's prior legal memoranda, the Court should issue a properly tailored injunction against the six Respondents, enjoining them from interfering with the PEO's employment relationship with the City, either through the City's proposed thirty-foot injunction, or through any other reasonable injunction that the Court deems appropriate. *See Dunlop v. Daigle*, 122 N.H. 295, 300 (1982) ("The trial court has broad and flexible equitable powers which allow it to shape and adjust the precise relief to the requirements of the particular situation."). Such an order will strike a balance between the competing interests in this case, and ensure public safety and prevent further escalation of the circumstances now existing on the streets and sidewalks of Keene.

Respectfully submitted,
CITY OF KEENE
By Its Attorneys

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Dated: October 10, 2013

By: _____
Charles P. Bauer (#208)
Robert J. Dietel (#19540)

CERTIFICATE OF SERVICE

I hereby certify that I have this date forwarded a copy of the foregoing to Thomas Mullins, Esquire; Jon Meyer, Esquire counsel for Ian Bernard a/k/a Ian Freeman, Garret Ean, James Cleaveland, Kate Ager, and Graham Colson; and Peter Eyre, *pro se*.

Dated: October 10, 2013

By: _____
Charles P. Bauer (#208)

[2] Counsel for Respondents incorrectly stated during closing argument that the City has not requested a jury trial. The City's complaint in Docket No. 213-2013-CV-00241 specifically requests a jury trial at ¶ 1.