No. _____

In the
Supreme Court of the United States

ANIMAL CARE TRUST, ACTING UNDER THE ASSUMED NAME OF MCKAMEY ANIMAL CARE OR MCKAMEY ANIMAL CARE AND ADOPTION CENTER; PAULA HURN; AND KAREN WALSH, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES
Petitioners,

v.

UNITED PET SUPPLY, INC.
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

McKamey Animal Care and Adoption Center is a private non-profit entity retained by the City of Chattanooga to help enforce the City's animal code and regulate commercial pet dealers. After receiving numerous complaints about a pet store, a team of professional McKamey employees, joined by an independent state officer, went to the store to investigate. During a consensual inspection, the McKamey and state officials found animals suffering in deplorable conditions. The officials jointly agreed that the animals needed to be removed immediately.

In the midst of the investigation, the pet store sought injunctive relief in state court to prohibit the seizure. The state court conducted an evidentiary hearing and held that McKamey could lawfully remove the pet store's animals and related animal records.

Relying on that decision, McKamey officials removed the animals, took photocopies of the related animal records, and temporarily suspended the store's city permit to sell animals pending a hearing in city court nine days later. The pet store brought this action under § 1983 alleging due process and Fourth Amendment violations. The questions presented are:

1. Whether the Sixth Circuit correctly held, in an acknowledged split with other circuits, that private entities are categorically ineligible to claim qualified immunity.

2. Whether the Sixth Circuit erred in denying individual McKamey employees Karen Walsh and Paula Hurn qualified immunity.

PARTIES TO THE PROCEEDINGS BELOW

Defendants-Appellants before the Court of Appeals were: Animal Care Trust, acting under the assumed name of McKamey Animal Care or McKamey Animal Care and Adoption Center; Paula Hurn; Karen Walsh; and Marvin Nicholson, in their individual and official capacities.

The City of Chattanooga is a defendant in the case, but did not appear in the Court of Appeals.

Plaintiff-Appellee before the Court of Appeals was United Pet Supply, Inc.

CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rules 14.1(b) and 29.6, Petitioner Animal Care Trust (McKamey) states that it does not have a parent corporation and no publicly held corporation owns 10% or more of McKamey.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners McKamey, Paula Hurn, and Karen Walsh respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case. This petition gives the Court an opportunity to resolve an acknowledged split among the circuits on whether private entities performing governmental functions are eligible to claim qualified immunity.

OPINIONS BELOW

On February 5, 2013, the United States District Court for the Eastern District of Tennessee denied Petitioners' motions for judgment on the pleadings on qualified-immunity grounds. *United Pet Supply, Inc.* v. *City of Chattanooga*, 921 F. Supp. 2d 835 (E.D. Tenn. 2013). A copy of the district court's memorandum appears at Appx. 48a and its order at Appx. 107a.

The District Court subsequently denied Petitioners' motions for summary judgment on qualified-immunity grounds. *United Pet Supply, Inc.* v. *City of Chattanooga*, Nos. 1:11-cv-157 & 1:11-cv-193, 2013 WL 449760 (E.D. Tenn. Feb. 6, 2013). A copy of the district court's memorandum appears at Appx. 109a and its order at Appx 145a.

On September 18, 2014, in a published opinion, the United States Court of Appeals for the Sixth Circuit affirmed in part the District Court's denial of qualified immunity. *United Pet Supply, Inc.* v. *City of Chattanooga*, 768 F.3d 464 (6th Cir. 2014). A copy of the court's opinion appears at Appx. 1a and its judgment at Appx. 147a.

On November 6, 2014, the Sixth Circuit denied Petitioners' request for rehearing. A copy of the order appears at Appx. 149a.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on September 18, 2014. Appx. 147a. The Court of Appeals denied Petitioners' timely request for rehearing on November 6, 2014. Appx. 149a. This petition is being filed within 90 days thereafter. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND ORDINANCES INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated."

The Fourteenth Amendment provides in relevant part that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law."

Section 1983 of Title 42 of the United States Code states in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Section 7-33(a) of the Chattanooga City Code provides:

> Any pet/animal dealer, as defined in this chapter, must apply for and receive a pet/animal dealer permit from McKamey Animal Center.

Section 7-34 of the Chattanooga City Code provides in relevant part:

> (a) All animal-related permits will be valid from January 1st to December 31st of the year of purchase and will be required in addition to any other licenses or permits required by this chapter.
>
> (b) Said permits shall be:
>
> (1) Multiple-Pet Permit: fifty dollars ($50.00) per year providing that all animals are altered. Any unaltered animal cannot be covered under the multiple pet permit.
>
> (2) Pet Dealer Permit: three hundred dollars ($300.00) per year. . . .
>
> (c) Facilities or quarters where animals are kept shall meet minimum standards based on the definitions regarding adequate care.
>
> (d) Facilities of any of the above permit applicants and registered rescue organizations will be subject to inspection by Animal Service Officers for compliance with this chapter's and the permit's minimum standards.

(e) Such permits may be revoked if negligence in care or misconduct occurs that is detrimental to animal welfare or to the public. Revocation of such permit may only be reinstated after successfully passing an inspection of such facilities and paying the cost of such permit and any applicable fines and fees. . . .

STATEMENT OF THE CASE

McKamey is a non-profit private entity retained by the City of Chattanooga to help enforce the City's animal code and regulate commercial pet dealers. At all relevant times in this case, Petitioner Karen Walsh was McKamey's Executive Director and Petitioner Paula Hurn was McKamey's Director of Operations. Defendant Marvin Nicholson was an Animal Services Officer for McKamey.

A. McKamey Receives Numerous Complaints About The Pet Company.

Beginning in early 2010, McKamey officials received numerous complaints about The Pet Company, a commercial pet store located in Chattanooga's Hamilton Place Mall. The complaints ranged from concerns about the sizes of the cages to sick animals to animal neglect and abuse. Appx. 6a.

As a result of the complaints, McKamey officials visited The Pet Company on at least seven different occasions over a four-month period. *Id.* During these visits, the officials discussed the pertinent provisions of the City's animal code with Pet Company employees and suggested changes at the store to ensure compliance. Appx. 111a.

In June 2010, Pet Company employee Ashley Knight contacted McKamey officials and told them that the store's air conditioner had been broken for several weeks, that employees had placed a dead puppy in the store's freezer, and had put an injured (but living) hamster in a garbage compactor. Appx. 6a.

B. McKamey Officials And State Officer Burns Inspect The Pet Company.

As a result of Knight's revelations and the previous complaints, Officer Walsh contacted the Tennessee Department of Agriculture, which has responsibility for enforcing state animal laws. *Id.* Walsh "wanted the State's perspective on what was going on in the store," *Id.*; Walsh Test., R70-5, Page ID #1546, and asked if the Department would assist in McKamey's investigation. Appx. 7a. The State Veterinarian asked State Officer Joe Burns, a state Animal Health Technician with the Tennessee Department of Agriculture, to join McKamey in its investigation. *Id.*

On June 15, 2010, McKamey Officers Walsh and Nicholson, and State Officer Burns, conducted an onsite investigation. The Pet Company's manager, Brandy Hallman, voluntarily allowed the officers to inspect the premises. *Id.*

Inside, the officers found deplorable conditions. The store's temperature was "extremely hot" and animals were panting and "very lethargic." *Id.* Urine and feces were dripping down from cracked trays in upper cages onto animals below. *Id.* Several of the dogs had dried, crusted feces and urine on their bodies. *Id.* Pets were drinking from water bowls that contained feces and other dirty debris. Appx. 11a. Animals were dehydrated (*id.*), some of the puppies were struggling to drink water, and many of the cages were broken and "trapped the feet of the animals." Appx. 7a; Nicholson Test., R70-6, Page ID #1595. Many of the animals also subsequently tested positive for the infectious and communicable parasite Giardia. Appx. 11a.

The officers discussed these conditions with Hallman. When asked about the temperature in the store, Hallman said that the air conditioning had not been working for a number of weeks and that she had notified The Pet Company's corporate office. Appx. 7a. Walsh also discussed the officers' findings on the telephone with Christopher Brooks, The Pet Company's Vice President. Appx. 9a.

C. The McKamey And State Officials Decide To Remove The Neglected Animals.

Based on their findings, collective experience, and training, Officer Walsh and State Officer Burns jointly agreed that the animals needed to be removed immediately. Appx. 9a. The officers notified Pet Company officials of their intentions to remove the animals from the store and their reasons for doing so. *Id.*

D. The State Court Contemporaneously Authorizes Removal Of The Neglected Animals And Related Animal Records.

In the midst of the investigation, The Pet Company filed an emergency petition for injunctive relief in Hamilton Circuit Court seeking to prevent removal of the animals and related animal records. *Id.* The state court held a hearing at 1:30 p.m. the same day of the inspection. *Id.*

At the hearing, the state court considered the evidence presented and heard testimony from Officer Walsh and State Officer Burns regarding their observations and the conditions at The Pet Company. Appx. 9a–10a.

At the conclusion of the hearing, the state court denied The Pet Company's petition and concluded that McKamey could lawfully and immediately remove the animals and related animal records based on the conditions of the store and the officers' findings of neglect. Appx. 10a.

E. McKamey's Removal Of The Animals And Temporary Suspension Of The Pet Company's Permit.

Relying on the state court's decision, Walsh returned to the store and removed the animals. Officers of the Chattanooga Police Department arrived on the scene and helped secure the premises during the animals' removal. Appx. 73a. McKamey's Director of Operations, Paula Hurn, worked with Pet Company employees to make photocopies of the animals' records—just as the state court had authorized. Hurn Aff., R67-1, Page ID #1207–08. In the end, McKamey issued 43 citations for 90 instances of animal neglect under the City's animal code. Appx. 10a.

To prevent The Pet Company from subjecting other animals to the same deplorable conditions, Walsh exercised her authority under the City Code to suspend The Pet Company's commercial permit to sell animals pending a hearing in city court nine days later. Appx. 10a–11a. The permit suspension did not affect the store's ability to sell pet supplies and other goods and services. Appx. 11a. The City Code expressly grants McKamey the power to suspend a permit to sell live animals if it finds "negligence in care or misconduct . . . that is detrimental to animal welfare or to the public." Appx. 39a; City Code § 7-34(e), R70-4, Page ID #1513.

The City Code does not require any pre-deprivation hearing. The city court hearing on the citations and permit suspension was scheduled for June 24, 2010, nine days later.

State Officer Burns also issued a citation to The Pet Company for similar violations of state animal welfare laws. Appx. 11a. The state veterinarian subsequently notified The Pet Company of his intent to suspend the store's state license. *Id.*

F. The City Court Affirms McKamey's Findings Of Neglect And Removal Of The Animals.

The city court commenced proceedings on the citations and permit suspension as originally scheduled, nine days after the seizure. After hearing "voluminous testimony" over four days (Appx. 12a; Ruling, R70-11, Page ID #1667–68), the court held that the numerous code violations "necessitated [the animals'] removal." Ruling, R70-11, Page ID #1671.

The city court continued the case for two weeks to give store officials an opportunity to address the conditions at the store. Importantly, the city court ordered that the permit suspension be kept in place by prohibiting the return of any animals to the store "until an inspection is conducted and approved by McKamey and by the state department of agriculture." Appx. 12a; Ruling, R70-11, Page ID #1677–78.

Later, once the city court determined that the "major issues" at the store "ha[d] been addressed," it ruled that it would not permanently revoke the permit to sell animals. Appx. 12a; Hearing, R70-12, Page ID #1681. Before the city court could fully resolve The Pet

Company's liability for fines and court costs, the city court judge recused herself from the case and declared a mistrial based on *ex parte* communications from the City's mayor about the case. Appx. 14a.

A special judge was appointed to handle the case and The Pet Company moved to dismiss the case on double jeopardy grounds. While the motion was pending, McKamey voluntarily agreed to return the city permit. Appx. 54a. The special judge eventually dismissed the city court case on the basis of double jeopardy. Appx. 14a. McKamey returned the animals pursuant to an agreed state court order. *Id.*

G. The Pet Company Files This Federal Lawsuit.

The Pet Company subsequently filed this federal lawsuit under 42 U.S.C. § 1983. The jurisdiction of the district court was invoked under 28 U.S.C. § 1331.

In relevant part, The Pet Company alleged that McKamey, Walsh, Nicholson, and Hurn violated due process by seizing the store's animals and suspending its animal sales permit without a pre-deprivation hearing. It also alleged that the Petitioners' seizure of store's animals and related records violated the Fourth Amendment.

H. The District Court Denies Qualified Immunity.

McKamey and its employees moved for judgment on the pleadings, arguing that they were entitled to qualified immunity. The District Court denied the motion in relevant part. Appx. 49a. Although the

District Court held that McKamey and its employees were eligible to claim qualified immunity, it held that they were not entitled to qualified immunity on the facts as alleged in the complaint. Appx. 96a.

Following discovery, McKamey and its employees filed motions for summary judgment asserting qualified immunity. The District Court summarily rejected McKamey's qualified-immunity defense "[f]or the reasons stated in its previous order." Appx. 131a.

I. The Sixth Circuit Partly Affirms The District Court's Denial Of Qualified Immunity.

McKamey and its employees brought this interlocutory appeal challenging the District Court's denial of qualified immunity. The Sixth Circuit's opinion (Moore, J.) is published at 768 F.3d 464 (6th Cir. 2014) and is attached at Appx. 1a.

The Sixth Circuit held that McKamey's status as a non-profit private entity categorically precluded it from claiming qualified immunity. Appx. 31a. Although the court acknowledged that several other circuits have allowed private entities to claim qualified immunity, the Sixth Circuit held that private entities are ineligible to claim qualified immunity. *Id.* & n.3. According to the Sixth Circuit, qualified immunity is "a defense available only to individual government officials sued in their personal capacity." Appx. 31a.

As for the individual defendants, the Sixth Circuit held that Officers Walsh and Nicholson could claim qualified immunity because they "were commissioned as special police officers of the City of Chattanooga." Appx. 19a. The court held, however, that fellow McKamey

employee Hurn could not claim immunity because she "was not commissioned as a special police officer" and "[t]here is no tradition of immunity for animal-welfare officers." Appx. 20a–21a.

Addressing the merits of the officers' qualified immunity claims, the Sixth Circuit held that Walsh and Nicholson were entitled to immunity on the animal-seizure claims. As the court explained, The Pet Company did "not dispute that when the McKamey officials arrived, the animals had feces and urine matted in their fur, water bottles were empty, and a dead hamster was found in the cage of which its staff was unaware." Appx. 37a. The Pet Company also did "not dispute that the temperature was at or above eighty-five degrees for the entirety of the McKamey employees' time at the store and that the air conditioner had been broken for weeks." Appx. 38a. Consequently, the court held that the officers did not violate clearly established law in temporarily removing the animals without a warrant or pre-deprivation hearing. *Id.*

At the same time, however, the Sixth Circuit held that Walsh was not entitled to qualified immunity on the animal permit suspension claim. According to the court, the post-deprivation hearing was not sufficient to satisfy due process because the special judge subsequently determined, *sua sponte*, that "the city court did not have authority over the permit and could not order the reinstatement of the permit." Appx. 39a. The court also held that Walsh was not entitled to qualified immunity on the store's claim that she unreasonably seized pet store business records. Appx. 46a–47a.

REASONS FOR GRANTING THE PETITION

The Court should grant this petition to resolve an acknowledged conflict among the circuits on whether private entities performing governmental functions are eligible to claim qualified immunity.

Departing from their sister circuits, the Sixth and Ninth Circuits categorically deny qualified immunity to private entities performing public functions, exposing such entities to unfettered civil damages liability under § 1983. This approach threatens state and local governments' ability to partner with private entities—as they increasingly must do—to provide a variety of important public services. The Court should grant review, resolve the circuit split, and hold that private entities are eligible to claim qualified immunity to the same extent as private individuals.

Additionally, the Court should review the Sixth Circuit's denial of qualified immunity to McKamey employees Paula Hurn and Karen Walsh. In denying qualified immunity to Hurn, the Sixth Circuit held that a private individual's entitlement to qualified immunity necessitates a "complicated" and "fact-intensive" inquiry. Appx. 20a. But this Court's decision in *Filarsky* v. *Delia*, 132 S. Ct. 1657 (2012), rejected such an approach given its "significant line-drawing problems" and resulting "uncertain[ty]." *Id.* at 1666. The Sixth Circuit's denial of qualified immunity to Officer Walsh conflicts with this Court's repeated admonitions that officers are denied qualified immunity only for "plainly incompetent" conduct. *Stanton* v. *Sims*, 134 S. Ct. 3, 6 (2013). Walsh's actions were objectively reasonable, particularly given the state court decision—issued in the

midst of the investigation—affirming the officials' findings of animal neglect and authorizing Walsh to remove the animals and make photocopies of the relevant records.

I. This Court's Intervention Is Necessary To Resolve A Circuit Split On Whether A Private Entity Is Eligible To Claim Qualified Immunity.

This Court has addressed the circumstances under which private *individuals* are eligible to claim qualified immunity. *See Filarsky* v. *Delia*, 132 S. Ct. 1657 (2012); *Richardson* v. *McKnight*, 521 U.S. 399 (1997); *Wyatt* v. *Cole*, 504 U.S. 158 (1992). But it has never addressed whether private *entities* are eligible to claim qualified immunity in performing governmental functions.

As the decision below acknowledges, the Courts of Appeals are divided on this important and frequently recurring question. This Court should grant the petition and resolve the established circuit split concerning whether private entities are eligible to claim qualified immunity. Reversal of the Sixth and Ninth Circuits' categorical rule denying private entities qualified immunity is necessary to ensure effective functioning of state and local government bodies, which increasingly look to the private sector to help carry out important public functions.

A. Most Circuits Hold That Private Entities Are Eligible To Claim Qualified Immunity.

At least five circuits have held that private entities are eligible to claim qualified immunity in performing public functions.

In *DeVargas* v. *Mason & Hanger-Silas Mason Co.*, 844 F.2d 714 (10th Cir. 1988), a job applicant brought a § 1983 action against a private corporation and several of its employees retained to provide security for a government research laboratory. *Id.* at 715–16. The applicant alleged that the corporation's failure to hire him violated his civil rights. *Id.* The plaintiff specifically argued that, even if the individual defendants were eligible to claim qualified immunity, the corporation was not. *Id.* at 722.

The Tenth Circuit rejected the plaintiff's argument, holding that a private actor's corporate status does not affect its eligibility to claim qualified immunity. *Id.* at 723. As the Tenth Circuit explained, the policy reasons supporting qualified immunity "apply equally to all private defendants pursuant to contract, whether individuals or corporations." *Id.* "A nonimmune contractor defendant would be required to bear the total cost of plaintiff's injury, regardless of the objective reasonableness of its actions." *Id.* "In addition, denying immunity would make contractor defendants—whether individual or corporate—more timid in carrying out their duties and less likely to undertake government service." *Id.*

For these reasons, the Tenth Circuit "conclude[d] that the corporate status of [a defendant] should not affect its immunity." *Id.*; *accord Rosewood Servs. Inc.* v. *Sunflower Diversified Servs., Inc.*, 413 F.3d 1163, 1166 (10th Cir. 2005) (reiterating Tenth Circuit's rule "that there is no bar against a private corporation claiming qualified immunity").

The Seventh Circuit adopted the same rule in *Sherman* v. *Four County Counseling Center*, 987 F.2d 397 (7th Cir. 1993). In that case, a former state mental patient brought a civil rights action against a private mental institution and several individual defendants. *Id.* at 399. The patient alleged that the private firm violated his constitutional rights by administering anti-psychotic medication against his will. *Id.* at 403. The patient further argued that, "even if [the] private defendants are entitled to qualified immunity, private corporations should not be." *Id.* at 403 n.4.

The Seventh Circuit rejected the argument, holding that private corporations can claim qualified immunity to the same extent as private individuals. *Id.* Like the Tenth Circuit, the Seventh Circuit found "no persuasive reason to distinguish between a private corporation and a private individual." *Id.* As the court explained, "[t]he policy justifications which underlie the doctrine of qualified immunity for government officials apply with full force to [the private hospital's] activities." *Id.* at 405. If the hospital were not afforded immunity, the court noted, "private hospitals might well refuse to accept involuntary patients," which would "increase the load on the strained resources of the state[]." *Id.* at 406.

Several additional circuits have allowed private entities to claim qualified immunity without expressly questioning their eligibility to do so.

For example, in *Fabrikant* v. *French*, 691 F.3d 193 (2d Cir. 2012), a pet owner brought a § 1983 action against a private non-profit animal-rescue organization and several of its private employees. *Id.* at 202. The pet owner alleged that the organization violated her civil

rights by seizing and performing surgery on her pets against her wishes. The Second Circuit held that the non-profit entity and its employees were carrying out important governmental functions and were both eligible to claim qualified immunity. *Id.* at 211–14.

Similarly, in *Shipley* v. *First Federal Savings & Loan Association of Delaware*, 877 F.2d 57 (3d Cir. 1989) (Table), the Third Circuit affirmed a district court's holding that a private bank, even if considered to be a state actor, "would still be entitled to assert a defense of qualified immunity." *Shipley* v. *First Fed. Sav. & Loan Ass'n of Del.*, 703 F. Supp. 1122, 1131–34 (D. Del. 1988).

And in *Frazier* v. *Bailey*, 957 F.2d 920 (1st Cir. 1992), the First Circuit affirmed a district court's grant of qualified immunity to a private children's welfare group retained by the state to investigate allegations of sexual abuse. *Id.* at 931–32.

B. The Sixth And Ninth Circuits Hold That Private Entities Are Ineligible To Claim Qualified Immunity.

Unlike their sister circuits, the Sixth and Ninth Circuits hold that private entities are not eligible to claim qualified immunity.

In the decision below, the Sixth Circuit concluded that qualified immunity is "a defense available only to *individual* government officials sued in their personal capacity." Appx. 31a (emphasis added). As a result, the court held that qualified immunity is categorically unavailable to private *entities*. *Id.*

Likening private entities to municipalities, the Sixth Circuit held that public entities cannot claim qualified immunity if sued in an "official capacity." *Id.* The court acknowledged that "other circuits have permitted private corporations to assert qualified immunity." *Id.* n.3. But the Sixth Circuit dismissed those cases as being "unclear as to whether the suit was in the corporation's personal capacity or official capacity." *Id.*

The Sixth Circuit's decision is not limited to private corporations providing animal-welfare functions. It establishes a blanket rule that private firms performing any type of public function are categorically ineligible for qualified immunity. *Id.*

The Ninth Circuit has adopted the same rule, although it has been less direct in doing so. In *Halvorsen* v. *Baird*, 146 F.3d 680 (9th Cir. 1998)—a case relied on by the Sixth Circuit below (Appx. 26a)—the Ninth Circuit held that a private firm providing detox services for a city could not claim qualified immunity. *Id.* at 685–86. The court emphasized that the defendant was not entitled to immunity because it was "a firm" and "not a private individual." *Id.* at 686.

The Ninth Circuit reached the same result in *Ace Beverage Co.* v. *Lockheed Information Management Services*, 144 F.3d 1218 (9th Cir. 1998). There, the court held that a private corporation that processed parking tickets for the City of Los Angeles could not claim qualified immunity largely because it was a "firm" and not an "individual." *Id.* at 1220.

In other cases as well, the Ninth Circuit has repeatedly and uniformly rejected a private entity's eligibility for qualified immunity. *See Clement* v. *City of*

Glendale, 518 F.3d 1090, 1096–97 (9th Cir. 2008) (denying qualified immunity to private firm providing towing services); *Bibeau* v. *Pac. Nw. Research Found. Inc.*, 188 F.3d 1105, 1111–12 (9th Cir. 1999) (same for private medical research firm); *Ellis* v. *City of San Diego*, 176 F.3d 1183, 1191 (9th Cir. 1999) (same for private ambulance company). As one district court recognized, "the Ninth Circuit has clearly held that qualified immunity is not available to private entities." *Smith* v. *Levine Leichtman Capital Partners, Inc.*, 723 F. Supp. 2d 1205, 1213 (N.D. Cal. 2010).

C. A Private Entity's Eligibility For Qualified Immunity Is An Important And Recurring Issue.

State and local governments across the country increasingly depend on private entities to provide a variety of public services. For example, governmental entities often partner with private firms to provide specialized law enforcement services (as in this case), health care, waste management, science and research, education, finance, mental health, public welfare, benefit administration, and fire and ambulance services.

Given the increasing extent to which state and local governments depend on private entities to provide these (and other) important public services, a private entity's eligibility to claim qualified immunity in carrying out those functions is a particularly important question.

Because lower federal courts are split on this question, governmental and private entities do not have uniform guidance regarding the extent to which private entities are eligible to claim qualified immunity. As this Court recently explained in *Filarsky* v. *Delia*, 132 S. Ct.

1657 (2012), such uncertainty is intolerable in this context: "An uncertain immunity is little better than no immunity at all." *Id.* at 1666.

The Court should grant review on this recurring issue of importance and resolve the established circuit split.

D. Private Entities Should Be Eligible To Claim Qualified Immunity.

The Sixth and Ninth Circuits' blanket rule—categorically denying qualified immunity to all private entities performing public functions—is wrong.

First, private entities are not, as the Sixth Circuit concluded, analogous to municipalities for purposes of qualified immunity. As the Tenth Circuit recognized in *DeVargas*, the principal concerns that led this Court to deny qualified immunity to municipalities in *Owen* v. *City of Independence*, 445 U.S. 622 (1980), are inapplicable to private entities performing public functions.

Unlike municipalities, private firms cannot treat liabilities as "the inevitable costs of government [to be] borne by all the taxpayers." *Owen*, 445 U.S. at 654–55. Thus, while "the liability of [a] municipality itself will have little chilling effect on the acts of its officers," the risk of unfettered private-entity liability "would make contractor defendants—whether individual or corporate—more timid in carrying out their duties and less likely to undertake government service." *DeVargas*, 844 F.2d at 723.

Second, private entities do not—as the Sixth Circuit concluded—have "a governmental capacity" in which they can be subject to unfettered § 1983 liability. Appx. 31a. By definition, a *private* entity does not have a "governmental capacity." *Id.* The Sixth Circuit cites no authority authorizing a government- or official-capacity action against a *private entity*. Even if private entities had an "official capacity," any claims brought against private entities in that capacity would be nothing more than a claim against the contracting governmental entity. Here, for example, the City of Chattanooga is a defendant and is being sued for damages based on McKamey's conduct. There is no reason for an asymmetrical rule, allowing private individuals to claim qualified immunity but not private entities. Plaintiffs cannot sidestep a private entity's qualified immunity simply by suing it in a fictional "governmental" or "official capacity."

Finally, the policy reasons for applying qualified immunity to government employees and private individuals apply equally to private firms providing public functions. The fear of crippling entity liability would produce "unwarranted timidity" in a private firm's performance of public functions and deter such firms "from entering public service" in the first place. *Filarsky*, 132 S. Ct. at 1665. The government's need to attract talented and specialized assistance is not limited to government employees or private individuals, but also extends to private firms.

Categorically denying private entities qualified immunity would threaten the ability of state and local governments to partner with such entities to provide a wide range of important public services. Without

qualifying a private entity's liability for civil damages, the cost of the services would necessarily increase. As a result, the services may not be provided or might not be provided with the same degree of "specialized knowledge or expertise." *Id.* Unfettered damages liability especially threatens non-profit groups (such as McKamey) that are in no position to assume such substantial financial risks.

Qualified immunity further helps prevent the many "harmful distractions" that often accompany damages suits." *Id.* at 1665. If private entities were to face unfettered § 1983 liability, the entities and their employees would be "embroil[ed] in litigation," as would other public employees with whom they work. *Id.* at 1666.

For purposes of qualified immunity, institutional agents should be treated no differently than individual ones. If entities were ineligible to claim qualified immunity at all, claimants will target them, not the individuals actually responsible for the unconstitutional conduct. *Cf. Correctional Servs. Co.* v. *Malesko*, 534 U.S. 61, 71 (2001) ("For if a corporate defendant is available for suit, claimaints will focus their collection efforts on it, and not the individual directly responsible for the alleged injury."). Private entities should be able to claim qualified immunity to the same extent as private individuals.

This is not to say that *all* private entities performing public functions necessarily should be entitled to qualified immunity, only that private entities should not be categorically foreclosed from asserting the defense simply because of their corporate status.

Here, McKamey is entitled to qualified immunity in carrying out its law-enforcement functions for the same reasons as its individual officials. As the Sixth Circuit correctly held, McKamey officials did not violate clearly established law in removing the neglected animals without a warrant or an additional pre-deprivation hearing. Appx. 35a–38a. And, as explained below, the McKamey officials did not violate clearly established law in temporarily suspending the city permit and making photocopies of the related animal records as part of the same investigation. *See infra* § II(B).

For these reasons, the Court should grant the petition, resolve the circuit split on this issue, and hold that private entities retained to perform public functions are eligible to claim qualified immunity.

II. The Court Of Appeals' Denial Of Qualified Immunity To Paula Hurn And Karen Walsh Conflicts With This Court's Precedents.

The Court should also review the Sixth Circuit's denial of qualified immunity to McKamey employees Paula Hurn and Karen Walsh. Although these individual immunity holdings are sufficiently important to warrant plenary review, the Court may wish to consider the possibility of summary reversal on this second question presented.

A. The Sixth Circuit's Denial Of Qualified Immunity To Paula Hurn Conflicts With *Filarsky* v. *Delia*.

In denying Paula Hurn qualified immunity, the Sixth Circuit adopted an approach to private-actor immunity that conflicts with this Court's decision in

Filarsky v. *Delia*, 132 S. Ct. 1657 (2012). The Sixth held that a private individual's entitlement to qualified immunity is a "complicated question" requiring "a fact-intensive analysis under" *Richardson* v. *McKnight*, 521 U.S. 399 (1997). Appx. 20a.

Filarsky, however, explicitly disavowed such an approach to qualified immunity as creating "significant line-drawing problems." 132 S. Ct. at 1666. "An uncertain immunity," this Court explained, "is little better than no immunity at all." *Id.* Consequently, this Court held that the scope of qualified immunity does not "vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis." *Id.* at 1665.

Paula Hurn's entitlement to qualified immunity falls squarely within *Filarsky*'s "rule." *Id.* at 1667. McKamey was retained to help provide a variety of law-enforcement and regulatory functions for the City of Chattanooga. At all relevant times, Paula Hurn was "working for the government in pursuit of [these] government objectives." *Id.* Hurn videotaped the conditions at The Pet Company and recorded temperature readings at the store. Appx. 124a. She also served as "the McKamey representative in charge" at the scene during the state court hearing on the store's request for injunctive relief. *Id.* Hurn Aff., R67-1, Page ID #1207. And Hurn assisted other McKamey personnel in removing the seized animals and worked with Pet Company employees in photocopying the seized animals' records. *Id.* at 1207–08. Because this lawsuit challenges these law-enforcement actions, Hurn is entitled to qualified immunity.

The Sixth Circuit's extensive reliance on *Richardson v. McKnight* was mistaken. *Filarsky* established the governing rule in this context, carefully limiting the "narrow decision" in *Richardson* to "the particular circumstances of that case." *Filarsky*, 132 S. Ct. at 1667. *Richardson* involved employees of "a private [prison] firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, undertaking that task for profit and potentially in competition with other firms." *Id.* (quoting *Richardson,* 521 U.S. at 413).

Richardson is inapplicable here for several reasons. First, McKamey "serv[es] as an adjunct to government in an essential governmental activity." *Richardson*, 521 U.S. at 413. Under the city code, McKamey officials and city police officers jointly "have the authority and duty" to enforce the animal code. Animal Code §§ 7-1(c), 7-48, Page ID #1490, 1519. Consequently, McKamey and its employees routinely work with local police officers, as they did here, to enforce the city code. They also routinely work with state animal officials, as they did here, in enforcing state animal-welfare laws. *See* Tenn. Code Ann. § 39-14-210 (authorizing members of private humane societies to help enforce state animal-welfare laws). McKamey's extensive coordination with government employees alone makes *Richardson* inapplicable.

Second, unlike the prison firm in *Richardson*, McKamey is not merely subject to "limited direct supervision by the government." *Richardson*, 521 U.S. at 413. Quite the contrary, the Mayor of Chattanooga and the City Council actively supervise McKamey and its

various law-enforcement activities. The Mayor appoints a special City Representative to "monitor the services performed by [McKamey]." Agreement §§ 1.1, 6.14, Page ID #1411, 1434. And McKamey is required to provide the City Council with extensive *monthly reports* on its law-enforcement activities. *Id.* § 1.11(B), Page ID #1423. This active monitoring is far removed from the type of "limited" governmental involvement at issue in *Richardson*.

Finally, unlike a for-profit prison firm facing competitive market pressures, McKamey is a non-profit entity that, as the district court found, "does not compete with other organizations in administering its function for the city." Appx. 91a. *Filarsky* controls the question presented here, not the limited exception recognized in *Richardson*.

Applying qualified immunity to Hurn is fully consistent with the common law at the time of § 1983's enactment. As the Court in *Filarsky* explained, private individuals carrying out law enforcement responsibilities at common law were "protected to the same extent" as their public-employee counterparts. 132 S. Ct. at 1664. Just as private individuals "serving as part of [a] posse comitatus" were historically entitled to immunity, *id.* at 1664, so too is Hurn.

The Sixth Circuit held that Hurn was not entitled to claim qualified immunity because "[t]here is no tradition of immunity for animal-welfare officers." Appx. 22a. But that approach to qualified immunity is extremely problematic. An individual's entitlement to qualified immunity does not vary depending on the *type* of law that is being enforced. If it did, a variety of law-

enforcement activities would be ineligible for qualified immunity simply because they are aimed at conduct that was not outlawed at the time of § 1983's enactment.

In any event, "the prohibition of animal cruelty itself has a long history in American law, starting with the early settlement of the Colonies." *United States* v. *Stevens*, 559 U.S. 460, 469 (2010). As this Court explained in *Nicchia* v. *People of State of New York*, 254 U.S. 228 (1920), private entities in particular have "long been recognized"—even before § 1983's enactment—as a "valuable and efficient aid" in "enforc[ing] the laws enacted to prevent cruelty to animals." *Id.* at 230. Providing such entities and their employees qualified immunity would be fully consistent with common-law traditions.

The policy reasons for extending qualified immunity to private actors set forth in *Filarsky* also support granting qualified immunity to Hurn. If private law-enforcement officials were deprived of qualified immunity, they would fear unfettered personal liability for violations of yet-to-be established constitutional law.

As this Court expressly recognized in *Filarsky*, the concern of "unwarranted timidity" is particularly heightened in cases, such as this, where a private party works "in close coordination with" other officials who are entitled to qualified immunity. 132 S. Ct. at 1666. In her concurring opinion in *Filarsky*, Justice Sotomayor emphasized this very point: "When a private individual works closely with immune government employees, there is a real risk that the individual will be intimidated from performing his duties fully if he, and he alone, may

bear the price of liability for collective conduct." *Id.* at 1670 (Sotomayor, J., concurring).

Here, Hurn worked closely with Officers Walsh and Nicholson, as well as State Officer Burns, all of whom are entitled to claim qualified immunity. The city police officers who helped secure the scene during the investigation are also entitled to claim qualified immunity. If officials such as Hurn cooperatively working with immunized officials are denied qualified immunity, they would "think twice" about enforcing public laws because they alone would "be left holding the bag—facing full liability for actions taken in conjunction with government employees who enjoy immunity for the same activity." *Filarsky*, 132 S. Ct. at 1666.

It is true, as the Sixth Circuit noted, that Hurn was not commissioned as a special police officer. Appx. 6a. But entitlement to qualified immunity does not turn on whether an individual is a sworn police officer. *Cf. Filarsky*, 132 S. Ct. at 1667 (private attorney entitled to qualified immunity). The important point is that Hurn was engaged in law enforcement activities for the City of Chattanooga, working alongside other law-enforcement officials who *are* entitled to claim qualified immunity.

The policy interests in preventing "the distractions that can accompany even routine lawsuits" further counsel in favor of applying qualified immunity to Hurn. *Id.* at 1666. A civil-damage action would not only distract Hurn, but also all of the other private and public employees embroiled in this litigation, including a number of McKamey employees, State Officer Burns, and the city police officers who helped secure the scene. This would "substantially undermine an important

reason immunity is accorded public individuals in the first place." *Filarsky*, 132 S. Ct. at 1666.

The Sixth Circuit's approach to qualified immunity conflicts with the straightforward rule announced in *Filarsky*. As this case illustrates, the Sixth Circuit's approach produces bizarre and unpredictable results. There is no reason Hurn should be denied qualified immunity when all of the other state, local, and McKamey law-enforcement officials are entitled to claim such protection. Hurn is entitled to claim qualified immunity and should be awarded immunity for the same reasons set forth below as to Walsh.

B. The Sixth Circuit's Decision Denying Karen Walsh Immunity Conflicts With This Court's Qualified-Immunity Holdings.

The Sixth Circuit also erroneously held that Karen Walsh was not entitled to immunity on The Pet Company's permit-suspension and record-seizure claims. The undisputed facts establish that the alleged illegality of her actions was not "beyond debate" at the time they were taken. *Plumhoff* v. *Rickard*, 134 S. Ct. 2012, 2023 (2014).

1. Walsh Is Entitled To Qualified Immunity On The Permit Claim.

Officer Walsh reasonably believed that she could lawfully suspend The Pet Company's animal sales permit pending a judicial hearing in city court nine days later.

The city code expressly granted McKamey the power to suspend a permit if it finds "negligence in care or misconduct . . . that is detrimental to animal welfare

or to the public. Appx. 64a; City Code § 7-34(e), R70-4, Page ID #1513. No provision of the city code required McKamey officials to conduct a formal hearing before temporarily suspending a city permit. At the time of the challenged conduct in this case, there was no indication that this provision was unconstitutional.

Remarkably, the Sixth Circuit concluded that no body of relevant case law was required to clearly establish the alleged due process rights. Appx. 41a. According to the court, the unconstitutionality of the animal permit suspension was "plainly obvious" because the city court "did not have authority over the permit and could not order the reinstatement of the permit." Appx. 39a, 41a. In support, the Sixth Circuit cited a footnote in the special judge's order opining "that the City Court has no authority to revoke or make any order relative to the license of the Pet Company." Appx. 39a.

But the special judge's *sua sponte* opinion was not expressed until well *after* the challenged conduct in this case. As a result, it does not bear on Walsh's entitlement to immunity. Objective reasonableness must be judged not "with the 20/20 vision of hindsight," *Graham* v. *Connor*, 490 U.S. 386, 396–97 (1989), but "against the backdrop of the law *at the time of the conduct*." *Brosseau* v. *Haugen*, 543 U.S. 194, 198 (2004) (emphasis added). The Sixth Circuit's decision ignores this well-established principle.

At the time of the challenged conduct, nobody conceivably thought that the city court was without jurisdiction to review the merits of McKamey's findings of neglect and temporary suspension of the animal permit. McKamey's suspension made clear that the

permit was only suspended pending the city court hearing. Appx. 11a. Additionally, throughout the city court's handling of this matter, all of the parties operated under the seemingly safe assumption that the city court *did* have jurisdiction over the animal permit.

In fact, the city court exercised jurisdiction over the animal sales permit, ordering that the permit suspension be kept in place "until an inspection is conducted and approved by McKamey and by the state department of agriculture." Appx. 12a; Ruling, R70-11, Page ID #1667–68. As the Pet Company's counsel acknowledged at the time, the special judge's subsequent opinion on jurisdiction was a "real curve ball." Hearing, R87-21, Page ID #2922.

Of course, due process *generally* affords a right to a hearing before a property deprivation. But this Court has "repeatedly told courts . . . not to define clearly established law at [such] a high level of generality." *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2084 (2011). At the time of the challenged conduct, there was no case law clearly establishing a constitutional right to a pre-deprivation hearing in this or any analogous context.

This Court has "rejected" the proposition that a formal hearing must always be provided prior to the initial deprivation of property. *Parratt* v. *Taylor*, 451 U.S. 527, 540–41 (1981). "[O]n many occasions" this Court has held that "postdeprivation process satisfies the requirements of the Due Process Clause." *Gilbert* v. *Homar*, 520 U.S. 924, 932 (1997) (suspension of police officer accused of drug possession); *see also Barry* v. *Barchi*, 443 U.S. 55, 64–65 (1979) (suspension of horse trainer's license given suspicions that he drugged a

horse); *Hodel* v. *Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 300 (1981) (suspension of company's operations based on suspected violations of environmental laws); *Mackey* v. *Montrym*, 443 U.S. 1, 17 (1979) (suspension of individual's driver's license for failure to take a breathalyzer test).

Walsh reasonably could have interpreted this case law, as well as the general factors set forth in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), as not requiring another formal hearing before temporarily suspending the store's animal-sales permit. *First*, Walsh only temporarily suspended the permit pending a prompt judicial hearing nine days later and the suspension did not prevent the store from staying open for other purposes, such as selling pet supplies. *Second*, the risk of an erroneous deprivation was slight because the officials were trained professionals from independent entities and the state court had already reaffirmed the officials' findings of animal neglect. *Finally*, substantial governmental interests in protecting public health and animal welfare justified McKamey's suspension of the permit. If the permit had not been suspended, The Pet Company could have subjected new animals to the very same deplorable conditions, further exposing consumers and their pets to all of the same health risks.

Because the unconstitutionality of the temporary animal permit suspension was not "beyond debate at the time [Walsh] acted," *Lane* v. *Franks*, 134 S. Ct. 2369, (2014), Walsh is entitled to qualified immunity.

2. Walsh Is Entitled To Qualified Immunity On The Records Claim.

The Sixth Circuit also erred in failing to afford Walsh immunity on The Pet Company's record-seizure claim. A reasonable officer could have believed that it was lawful under the Fourth Amendment to make photocopies of the related animal records in order to provide the animals with necessary and age-appropriate medical care.

Again, in the midst of the investigation, a state court expressly authorized Walsh to take the animal records. The Pet Company sought an "immediate temporary injunction" to "preclud[e] defendant from removing animals or records." Appx. 9a; Petition, R87-17, Page ID #2873–74. It alleged that "records are being removed from the store" and The Pet Company would "suffer harm if records are removed." *Id.* The state court held an evidentiary hearing, gave both sides the opportunity to present evidence, and denied the store's request. Appx. 10a.

Walsh was not "plainly incompetent," *Stanton* v. *Sims*, 134 S. Ct. 3, 6 (2013)—as she must have been for the Sixth Circuit's decision to be correct—for doing what the state court told her that she could do. *Cf. Messerschmidt* v. *Millender*, 132 S. Ct. 1235, 1245 (2012) (explaining that "the fact that a neutral magistrate has issued a warrant is the clearest indication that the officers acted in an objectively reasonable matter").

The Sixth Circuit's decision seems to be premised on the mistaken impression that Hurn seized more than just "photocopies of the animals' records." Appx. 47a. Although the Sixth Circuit's decision cites The Pet

Company's complaint *alleging* that McKamey seized such business records, Appx. 46a, The Pet Company has never advanced that claim. Because a reasonable officer could have believed that taking photocopies of the related animal records was lawful, Walsh did not violate clearly established Fourth Amendment law.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari and resolve the circuit split on whether a private entity is entitled to claim qualified immunity. Additionally, the court should review the Sixth Circuit's denial of qualified immunity to individual McKamey employees Paula Hurn and Karen Walsh.

Respectfully submitted,

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February 3, 2015

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED SEPTEMBER 18, 2014

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 13-5181

UNITED PET SUPPLY, INC.,

Plaintiff-Appellee,

v.

CITY OF CHATTANOOGA, TENNESSEE,

Defendant,

ANIMAL CARE TRUST, acting under the assumed name of McKamey Animal Care or McKamey Animal Care and Adoption Center; PAULA HURN, KAREN WALSH, and MARVIN NICHOLSON, JR., in their individual and official capacities,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Tennessee of Chattanooga
Nos. 1:11-cv-00157; 1:11-cv-00193—
Curtis L. Collier, District Judge.

Argued: October 8, 2013
Decided and Filed: September 18, 2014

Before: GUY, BATCHELDER, and MOORE, Circuit Judges.

Appendix A

OPINION

KAREN NELSON MOORE, Circuit Judge. In June 2010, Animal Care Trust ("McKamey"), a private non-profit corporation that contracted with the City of Chattanooga to provide animal-welfare services, received complaints of neglect and unsanitary conditions at a mall pet store owned by United Pet Supply, Inc. ("Pet Supply"). McKamey employees Karen Walsh and Marvin Nicholson, Jr. went to the store to investigate and discovered animals in unpleasant conditions, without water, and with no working air conditioner in the store. Walsh and Nicholson, aided by McKamey employee Paula Hurn, proceeded to remove the animals and various business records from the store and to revoke the store's pet-dealer permit. Pet Supply then brought the instant § 1983 suit in federal district court against the City of Chattanooga; McKamey; and McKamey employees Karen Walsh, Marvin Nicholson, Jr., and Paula Hurn in their individual and official capacities. Pet Supply alleged that the removal of its animals and revocation of its pet-dealer permit without a prior hearing violated procedural due process and that the warrantless seizure of its animals and business records violated the Fourth Amendment. Walsh, Nicholson, Hurn, and McKamey asserted qualified immunity as a defense to all claims.

We conclude that Hurn, acting as a private animal-welfare officer, may not assert qualified immunity as a defense against suit in her personal capacity because there is no history of immunity for animal-welfare officers and allowing her to assert qualified immunity is not consistent

with the purpose of 42 U.S.C. § 1983. However, Walsh and Nicholson, acting both as private animal-welfare officers and as specially-commissioned police officers of the City of Chattanooga, may assert qualified immunity as a defense against suit in their personal capacities. With respect to entitlement to summary judgment on the basis of qualified immunity in the procedural due-process claims: Walsh and Nicholson are entitled to summary judgment on the claim based on the seizure of the animals, Nicholson is entitled to summary judgment on the claim based on the seizure of the permit, and Walsh is denied summary judgment on the claim based on the seizure of the permit. Regarding entitlement to summary judgment on the basis of qualified immunity on the Fourth Amendment claims: Walsh and Nicholson are entitled to summary judgment on the claim based on the seizure of the animals, Nicholson is entitled to summary judgment on the claim based on the seizure of the business records, and Walsh is denied summary judgment on the claim based on the seizure of the business records.

Because qualified immunity is not an available defense to an official-capacity suit, we conclude that Walsh, Nicholson, Hurn, and McKamey may not assert qualified immunity as a defense against suit in their official capacities.

For the reasons set forth below, we AFFIRM in part and REVERSE in part the district court's entry of summary judgment, and REMAND for further proceedings consistent with this opinion.

Appendix A

I. BACKGROUND

A. Jurisdiction

Typically, the denial of summary judgment is a non-final order that cannot be appealed under 28 U.S.C. § 1291. The interlocutory appeal of the denial of qualified immunity is permissible under the collateral-order doctrine "only 'to the extent that it turns on an issue of law.'" *Quigley v. Tuong Vinh Thai*, 707 F.3d 675, 679 (6th Cir. 2013) (quoting *Estate of Carter v. City of Detroit*, 408 F.3d 305, 309 (6th Cir. 2005)). "[A] defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record set forth a 'genuine' issue of fact for trial." *Johnson v. Jones*, 515 U.S. 304, 319-20, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995). "[A]n appellant's contention that the district court erred in finding a genuine issue of fact for trial is not the type of legal question which we may entertain on an interlocutory basis." *Gregory v. City of Louisville*, 444 F.3d 725, 743 (6th Cir. 2006). Improper arguments contesting whether a genuine issue of fact exists do not deprive this court of jurisdiction; "even where, as here, the defendant makes 'impermissible arguments regarding disputes of fact,' if the defendant also raises the purely legal issue of whether the plaintiff's facts show that the defendant violated clearly established law, 'then there is an issue over which this court has jurisdiction.'" *Quigley*, 707 F.3d at 680 (quoting *Estate of Carter*, 408 F.3d at 310)).

The defendants in this case are a private non-profit corporation that contracts with the City of Chattanooga and the corporation's employees. As with government officials, we permit "private parties to obtain interlocutory review of denials of qualified immunity." *Brotherton v. Cleveland*, 173 F.3d 552, 559 (6th Cir. 1999). Accordingly, we have jurisdiction over this appeal of the denial of qualified immunity.

B. Factual Background

The plaintiff-appellee in this suit is United Pet Supply, Inc., ("Pet Supply"), a private corporation that owns multiple pet stores, including the Hamilton Place Mall pet store at the center of this dispute ("the pet store"). The defendants-appellants are Animal Care Trust ("McKamey"), a private non-profit corporation that contracts with the City of Chattanooga to provide animal-welfare services, and McKamey employees Paula Hurn, Karen Walsh, and Marvin Nicholson, Jr. Defendant Walsh is the executive director of McKamey. R. 70-7 (Walsh Aff. at ¶ 2) (Page ID #1603). Defendant Nicholson is an animal-services officer at McKamey. R. 70-8 (Nicholson Aff. at ¶ 2) (Page ID #1635). Defendant Hurn is the Director of Operations at McKamey. R. 67-1 (Hurn Aff. at ¶ 2) (Page ID #1205). The contract between McKamey and the City of Chattanooga permitted McKamey employees to be commissioned as special police officers of the city authorized to investigate animal neglect and cruelty complaints and to issue citations. R. 70-2 (Contract at 2-3) (Page ID #1411-112). Both Walsh and Nicholson were commissioned as special police officers for the City

of Chattanooga at the time of the events in this lawsuit. R. 70-7 (Walsh Aff. at ¶ 4) (Page ID #1604); R. 70-8 (Nicholson Aff. at ¶ 4) (Page ID #1636). Hurn was not commissioned as a special police officer.

In the months preceding the incident that gave rise to this suit, McKamey received complaints about "animal neglect occurring and unsanitary conditions existing" at the pet store. R. 70-7 (Walsh Aff. at ¶ 7) (Page ID #1604). According to Steven Zerilli, the President of Pet Supply, Walsh and Nicholson visited Pet Supply on seven occasions between January and April 2010 and issued only one warning; the warning involved availability of treatment records for a canary. R. 96-4 (Zerilli Aff. at ¶ 12) (Page ID #3270). On May 11, 2010, McKamey issued Pet Supply a permit certifying that the store "has met the requirements of the Code of the City of Chattanooga and is approved by the McKamey Animal Services Division to operate as a Pet Dealer in the City of Chattanooga." R. 69-3 (Pet Dealer Permit at 1) (Page ID #1340).

In June 2010, Pet Supply employee Ashley Knight came to McKamey and requested a meeting with Walsh. Walsh reported that Knight described "incidents of animal neglect and abuse" at the store, "including a dead puppy listed 'Fit for Sale' was stuffed in a refrigerator freezer with the employees' lunches, a broken air conditioner, and a live hamster that [Pet Supply manager Brandy] Hallman placed in a garbage compactor." R. 70-7 (Walsh Aff. at ¶ 10) (Page ID #1605). Based on this report, Walsh contacted the Tennessee Department of Agriculture, which enforces state animal law, and asked whether the

Department would assist in an investigation of the pet store. *Id.* at ¶ 11 (Page ID #1605-06). State Animal Health Technician Joe Burns agreed to assist McKamey with the investigation. *Id.*

Without notifying Pet Supply in advance, Walsh, Burns, and Nicholson arrived at the pet store on June 15, 2010, around 8:00 a.m. *Id.* at ¶ 15 (Page ID #1606). Hallman permitted the three individuals to enter the store. *Id.* at ¶ 17-18 (Page ID #1607). Hallman confirmed Knight's report that a puppy had recently died at the store and that the puppy's carcass had been placed in the refrigerator freezer. R. 70-8 (Nicholson Aff. at ¶ 18) (Page ID #1639). Walsh and Nicholson observed "little to no evidence of food or water for the puppies"; "unsanitary conditions such as dried fecal matter that was matted in the fur of the puppies"; "damaged and cracked cages"; "puppies that appeared to be very lethargic and dehydrated," some of whom were struggling to drink water; and "that the store's interior temperature was considerably hotter than the Mall's open corridor section." R. 70-7 (Walsh Aff. at ¶ 16, 19) (Page ID #1606, 1607); *see also* R. 70-8 (Nicholson Aff. at ¶ 16, 19) (Page ID #1638, 1639). Walsh asked Hallman about the air conditioner and was told that it had been broken for several weeks; Hallman had reported the problem to corporate headquarters, but she was unaware of when, or if, the air conditioner would be repaired. R. 70-7 (Walsh Aff. at ¶ 20) (Page ID #1607). While cleaning out the hamster cages, Hurn "discovered that there was a dead hamster in one of the plastic hamster houses. The hamster was stiff and the hair had fallen off its body." R. 67-1 (Hurn Aff. at ¶ 14) (Page ID #1208).

Hurn averred that the Pet Supply staff "did not have any knowledge about the dead hamster." *Id.* Walsh observed a hamster with a large bite wound; Hallman reported that the animal had not been seen by a veterinarian. R. 87-12 (Walsh Dep. at 155) (Page ID #2815). Walsh testified that there was only one person cleaning when they arrived at the store and that she was told that the next employee did not arrive until 10:00 a.m. R. 70-5 (Walsh Dep. at 327) (Page ID #1566). Walsh did not see anyone providing water to the puppies when she arrived, and there was no evidence that food had been provided that morning. R. 87-12 (Walsh Dep. at 192) (Page ID #2818). Walsh asked a Pet Supply employee when they usually fed the animals and was told that they usually feed the animals when they arrive, but the employees had arrived at 7:00 a.m. and there was no food for the animals when the McKamey employees arrived approximately one hour later. *Id.* at 193 (Page ID #2819).

Walsh and Nicholson concluded "that the animals were suffering from the conditions in the Pet [Supply] Store and that these conditions had persisted for a period of time." R. 70-7 (Walsh Aff. at ¶ 21) (Page ID #1607); R. 70-8 (Nicholson Aff. at ¶ 21) (Page ID #1639). Walsh "determined that the animals were suffering from neglect and inadequate care in violation of the Chattanooga City Code and that the animals were subject to impound by McKamey." R. 70-7 (Walsh Aff. at ¶ 25) (Page ID #1609). In her deposition, Walsh testified that she believed that under the city code, "[i]f animals are in a situation where it's our understanding that they are in a neglectful situation or they're in a situation where they're in imminent danger,

we are permitted to remove them." R. 70-5 (Walsh Dep. at 314) (Page ID #1553). Walsh later explained that her main concerns that led to the decision to remove the dogs were:

> [T]hat the conditions in the store were very hot, that the animals were very listless, that they were not as responsive as puppies would normally be, that the store itself, there were many poorly maintained cages where body fluids were going down from one puppy to another. In the isolation room, the puppy in there had some pretty severe diarrhea, and it was extremely hot in there, for even a healthy animal, let alone being a debilitated one. There were some animals that were panting. There were some that were just, like their eyes were sunken, which is a symptom of dehydration. I felt like they weren't receiving adequate hydration from the bottles that they were given.

R. 87-12 (Walsh Dep. at 156-57) (Page ID #2816).

Walsh spoke with Christopher Brooks, Pet Supply vice president, and explained that she was going to remove the animals from the store. R. 70-7 (Walsh Aff. at ¶ 29) (Page ID #1609). Pet Supply proceeded to file an emergency petition for injunctive relief in Hamilton County Circuit Court to prevent the removal of the animals and related records. R. 87-17 (Pet. for Inj.) (Page ID #2972-74). At 1:30 p.m., in the midst of the removal of the animals from the store, a hearing was held on the petition. Walsh testified about her observations of the store and her belief that

the animals' health and safety was at risk. R. 70-7 (Walsh Aff. at ¶ 32) (Page ID #1610). Walsh reported that the judge stated that "he believed the City Code authorized McKamey to remove the animals from the store and that the testimony demonstrated McKamey had good cause to remove the animals," and denied the request for a temporary restraining order. *Id.*

Walsh, Nicholson, and Burns returned to the store and continued removing the animals. The animals were placed in a McKamey truck with air conditioning and water, and were inspected by veterinarians. Two puppies needed immediate medical attention. R. 70-7 (Walsh Aff. at ¶ 35) (Page ID #1611). McKamey employees obtained the impound information and medical records for the animals from Pet Supply employees. R. 67-1 (Hurn Aff. at ¶ 13) (Page ID #1207-08). In total, the officers seized thirty-two puppies and fifty-five exotic pets. R. 70-7 (Walsh Aff. at ¶ 34) (Page ID #1611). The McKamey employees did not remove the reptiles "[b]ecause reptiles don't react badly to the heat that was present in the store." R. 87-12 (Walsh Dep. at 156) (Page ID #2816). Walsh gave Pet Supply employees a Summons Ordinance that cited ninety violations of the City Code. There was a handwritten notation on the document: "§ 7-34(e) revoked permit."[1] R.

1. The State of Tennessee ultimately declined to pursue suspension of the license contingent on the store correcting problems with broken cages, remedying inadequate cleaning practices, improving employee training, verifying health of sick animals before they are sold, improving ventilation, and ensuring adequate provision of clean water to animals. R. 87-10, Ex. 6 (Tenn. Dep't of Ag. Letter at 1-3) (Page ID #2782-84).

69-7 (Citation at 1) (Page ID #1346). Walsh also gave a note to Hallman stating that their case will be in city court on June 24, 2010, and "[d]uring this time you are not able to sell pets. This does not mean that you are unable to sell retail items during the period between now and court." R. 69-6 (Walsh Note at 1) (Page ID #1345).

Officer Burns cited Pet Supply for violations of state animal-welfare law. R. 87-10, Ex. 1 (Citation & Report at 1-4) (Page ID #2770-73). In his Field Activity Report, Burns noted "[a]ir conditioner not working," "[w]ater bowls dirty or empty," "[i]solation for sick puppies 80+ degree's [sic] at 7am C.S.T," "hamsters + gerbils water container dirty," "cages cleaned with bleach — not disinfectant." R. 87-10, Ex. 2 (Field Activity Report at 1) (Page ID #2770). Walsh and Burns conferred; Burns averred that "it was my opinion that Officer Walsh made the reasonable and necessary decision regarding the removal of the animals." R. 87-10 (Burns Aff. at ¶ 14) (Page ID #2764). The state veterinarian notified Pet Supply of his intent to suspend the store's state pet-dealer license. R. 87-10, Ex. 4 (Notice to Suspend) (Page ID #2776-89).

On June 18, 2010, Walsh sent fecal samples from four puppies to a laboratory for testing; all four tested positive for Coccidia and Giardia. R. 70-7 (Walsh Aff. at ¶ 39) (Page ID #1612). On July 3, 2010, the laboratory confirmed that eighteen puppies tested positive for Giardia and/or Coccidia. *Id*. at ¶ 40 (Page ID #1813).

C. City Court Proceedings

Nine days after the seizure, on June 24, 2010, the parties appeared in Chattanooga City Court for a hearing. The court heard three days of testimony from multiple witnesses. R. 70-11 (6/24/2010 Hr'g Tr. 492) (Page ID #1667-68). The judge noted that "the heat in the store, accompanied with the sick animals in isolation, along with the smell necessitated their removal." *Id*. at 496 (Page ID #1671). The judge concluded that the violations of the city code could be remedied and that the store had already fixed the air conditioner, and so decided "to pass this case for two weeks for the issues presented to be remedied and reinspected before any animals may be brought back for sale," and to allow the state department of agriculture decide whether it would take any action. *Id*. at 502 (Page ID #1677). The judge ordered that the healthy animals be returned to Pet Supply to place them in another store that had no violations, but that animals could not return to the Hamilton Place Mall pet store until the store was inspected and approved by McKamey and the state department of agriculture, should it choose to participate. *Id*. at 502-03 (Page ID #1676-77). The judge ordered that none of the sick animals would be returned until treated and cleared by a veterinarian. *Id*. at 503 (Page ID #1678). On July 14, 2010, the city court resumed proceedings. The judge concluded that Pet Supply had addressed "[t]he major issues" in the store. R. 69-8 (7/14/2010 Hr'g Tr. at 88) (Page ID #1348). She also ruled that she was "not going to revoke the permit or prohibit [Pet Supply] from operating their store at this point unless subject to the State, unless the state department of agriculture suspends or revokes

the license for some reason . . . . That's my ruling today." *Id.* She reserved the issue of expenses, fines, and court costs until the next hearing. *Id.*

At the hearing on July 21, 2010, counsel for McKamey argued that Pet Supply needed to re-apply for their permit and could be issued a permit at the order of the court. R. 69-9 (7/21/2010 Hr'g Tr. at 113-14) (Page ID #1350-51). Counsel for Pet Supply argued that "[t]he Court ruled that we may get our license back, that it was not revoking our license. We should have the license returned to us, the same one that they took from our store." *Id.* at 114 (Page ID #1351). Counsel for McKamey responded that licensure was "an administrative decision" and that Pet Supply had to re-apply. *Id.* The judge expressed confusion over whether the City of Chattanooga, McKamey, or the court had the power to decide whether the permit was revoked. *Id.* at 1352. The judge concluded that the citations for abuse and neglect were independent of the revocation of the permit: "I could still impose a fine and court costs on these violations for neglect, but they could be corrected or have been corrected, which would not result in the revocation of their dealer permit." *Id.* at 116-17 (Page ID #1353-54). The judge concluded that she was "not going to withhold the permit subject to whatever the Tennessee Department of Agriculture does" and that she was "not going to require reapplication for something that has never been actually determined to be revoked, if that makes sense." *Id.* at 117-18 (Page ID #1354-55).

On July 26, 2010, due to the receipt of an ex parte email communication from the Chattanooga Mayor Ron

Littlefield advocating for a particular outcome in the dispute, the judge declared a mistrial and recused herself. R. 69-10 (Mistrial Order at 1) (Page ID #1356). The case was assigned to a different judge, who granted Pet Supply's motion to dismiss on the basis of double jeopardy. R. 69-12 (City Court Order at 3-4) (Page ID #1370-71). The judge stated that "[t]he court is [ ] of the opinion the City Court has no authority to revoke or make any order relative to the license of the Pet Company." *Id.* at 3 n.1 (Page ID #1370). The judge ordered that the dogs should be delivered to a veterinarian, and once the veterinarian deemed the dogs medically fit they could be transferred to Pet Supply; the judge also ruled "that the dogs are not to be returned to [Pet Supply's] store at Hamilton Place Mall." R. 70-16 (Dogs Order at 1-2) (Page ID #1713-14). The dogs were delivered to the veterinarian on or around October 3, 2010. R. 70-7 (Walsh Aff. at ¶ 46) (Page ID #1613). "McKamey incurred approximately $50,000 in expenses to provide shelter and veterinary care for the animals." *Id.* at ¶ 47 (Page ID #1614).

D. Federal District Court Proceedings

Pet Supply filed this 42 U.S.C. § 1983 suit in the United States District Court for the Eastern District of Tennessee against the City of Chattanooga; McKamey; and Walsh, Nicholson, and Hurn in their individual and official capacities. R. 1 (Compl. at ¶ 17, 22) (Page ID #4, 5). Pet Supply alleged that its procedural due-process rights were violated by the seizure of the animals, business records, and permit without prior notice and hearing, and that its Fourth Amendment rights were violated by

the warrantless search of the store and seizure of the animals and records. McKamey moved for judgment on the pleadings, asserting that the "Moving Defendants" (McKamey, Walsh, Nicholson, and Hurn) are entitled to qualified immunity. R. 38 (McKamey Memo. J. Pleadings at 1, 16) (Page ID #375, 390).

Before the district court ruled on the motion for judgment on the pleadings, Walsh, Hurn, and Nicholson moved for summary judgment in their individual capacities, asserting that they were immune from suit on the basis of qualified immunity, amongst other arguments. R. 73 (Walsh Mot. Summ. J. at 21) (Page ID #2052); R. 65 (Nicholson Mot. Summ. J. at 10) (Page ID #982); R. 68 (Hurn Memo. Summ. J. at 9) (Page ID #1320). McKamey also moved for summary judgment, asserting that it was immune from suit on the basis of qualified immunity. R. 71 (McKamey Memo. Summ. J. at 34) (Page ID #1797). Pet Supply moved for partial summary judgment on the Fourth Amendment search-and-seizure claim. R. 82 (Mot. Partial Summ. J. at 1-2) (Page ID #2446-47).

The district court granted in part and denied in part McKamey's motion for judgment on the pleadings. In a discussion of qualified immunity, the district court rejected the plaintiffs' argument that qualified immunity was not applicable to Walsh because she was a private actor and concluded that "immunity is available to Defendant Walsh." *United Pet Supply, Inc. v. City of Chattanooga ("Pet Supply I")*, 921 F. Supp. 2d 835, 857-58 (E.D. Tenn. 2013). The district court did not rule on whether qualified immunity was available to Nicholson and Hurn in their

individual capacities. The district court held that Pet Supply pleaded a violation of clearly established rights, therefore precluding a grant of qualified immunity to the defendants. *Pet Supply I*, 921 F. Supp. 2d at 860. Next, the district court considered the official-capacity suits; noting that "a suit for damages against an officer in his official capacity . . . is construed as a suit against [the] entity for which he works," the district court construed the official-capacity suits against Walsh, Nicholson, and Hurn "as claims against Defendant McKamey, who Plaintiff also listed separately as a defendant." *Id*. at 860. The district court concluded that liability may be imputed to McKamey, and then determined that "[f]or the reasons the Court concluded qualified immunity was inappropriate for the individual defendants, it also concludes qualified immunity is inappropriate for McKamey." *Id*.

One day later, the district court ruled on the cross-motions for summary judgment. On the procedural due-process claim based on the revocation of the permit, the district court found that "no relevant factual dispute exists as to the revocation of Plaintiff's permit," granted Pet Supply's motion for summary judgment on that claim, and denied defendant's motion for summary judgment on the claim. *United Pet Supply, Inc. v. City of Chattanooga ("Pet Supply II")*, Nos. 1:11-CV-157, 1:-11-CV-193, 2013 U.S. Dist. LEXIS 16041, 2013 WL 449760, at *6 (E.D. Tenn. Feb. 6, 2013). On the Fourth Amendment warrantless-search claim, the district court found that consent was voluntarily given to the McKamey employees to enter the store, and the district court granted summary judgment to defendants. 2013 U.S. Dist. LEXIS 16041, [WL] at

*7-8. On the procedural due-process claim based on the seizure of the animals without a prior hearing and the Fourth Amendment claims of warrantless seizure of animals and business records, the district court concluded that significant factual disputes existed, and declined to grant summary judgment to either party. 2013 U.S. Dist. LEXIS 16041, [WL] at *6-7, *8-10. The district court denied qualified immunity to defendants in their individual capacities, concluding that "[f]or the reasons stated in its previous order, the Court concludes the rights allegedly violated were clearly established to a reasonable individual." 2013 U.S. Dist. LEXIS 16041, [WL] at *10. The district court also "conclude[d] a question of fact remains regarding liability of the City," 2013 U.S. Dist. LEXIS 16041, [WL] at *11, denied the City of Chattanooga's motion for summary judgment, and denied McKamey's "motion for summary judgment on the same issue." 2013 U.S. Dist. LEXIS 16041, [WL] at *13.

Defendants McKamey, Walsh, Nicholson, and Hurn appeal the denial of their joint motion for judgment on the pleadings and the four separate motions for summary judgment.

II. ANALYSIS

"Section 1983 provides a cause of action against any person who deprives an individual of federally guaranteed rights 'under color' of state law. Anyone whose conduct is 'fairly attributable to the state can be sued as a state actor under § 1983." *Filarsky v. Delia*, 132 S. Ct. 1657, 1661, 182 L. Ed. 2d 662 (2012) (internal citation omitted). "It is well

settled that private parties that perform fundamentally public functions, or who jointly participate with a state to engage in concerted activity, are regarded as acting 'under the color of state law' for the purposes of § 1983." *Bartell v. Lohiser*, 215 F.3d 550, 556 (6th Cir. 2000). McKamey is a private non-profit corporation and Walsh, Nicholson, and Hurn are employees of that corporation; Walsh and Nicholson were also commissioned as special police officers of the City of Chattanooga. "The parties agree Defendants acted under color of state law." *Pet Supply II*, 2013 U.S. Dist. LEXIS 16041, 2013 WL 449760, at *6.

The defendants appeal the district court's denial of qualified immunity. "Qualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions." *Wyatt v. Cole*, 504 U.S. 158, 167, 112 S. Ct. 1827, 118 L. Ed. 2d 504 (1992). In response to an assertion of qualified immunity, "the plaintiff bears the burden of demonstrating that the defendant is not entitled to qualified immunity." *Livermore ex rel. Rohm v. Lubelan*, 476 F.3d 397, 403 (6th Cir. 2007). "[A] defendant cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023, 188 L. Ed. 2d 1056 (2014). We review de novo "the district court's denial of a defendant's motion for summary judgment on the basis of qualified immunity." *Summers v. Leis*, 368 F.3d 881, 885 (6th Cir. 2004).

We first consider whether Walsh, Nicholson, and Hurn may assert qualified immunity in their individual capacities, and whether Walsh, Nicholson, Hurn, and McKamey may assert qualified immunity in their official capacities. We will then consider whether any defendants who may assert qualified immunity are entitled to summary judgment on that basis.

A. May Defendants Assert Qualified Immunity?

1. Walsh, Nicholson, and Hurn in their individual capacities

In the individual-capacity suits, we conclude that Walsh and Nicholson may assert qualified immunity, but that Hurn may not.

Walsh and Nicholson were commissioned as special police officers of the City of Chattanooga at the time of the Pet Supply incident. R. 70-7 (Walsh Aff. at ¶ 4) (Page ID #1604); R. 70-8 (Nicholson Aff. at ¶ 4) (Page ID #1636). It is well established that police officers may assert qualified immunity. *See Malley v. Briggs*, 475 U.S. 335, 340-41, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986); *Pierson v. Ray*, 386 U.S. 547, 556-57, 87 S. Ct. 1213, 18 L. Ed. 2d 288 (1967). Because Walsh and Nicholson were acting in their capacity as public police officers, they may assert qualified immunity in the suit against them in their individual capacities. Whether they are entitled to qualified immunity will be discussed *infra* .

Hurn's claim of qualified immunity presents a more complicated question. Hurn was not commissioned as a special police officer; she was working only in the capacity of her position as a McKamey employee, that is, an employee of a private contractor. Determining whether an employee of a private contractor that is acting under color of state law may herself assert qualified immunity demands a fact-intensive analysis under which some employees may be permitted to assert qualified immunity and some may not. *See Richardson v. McKnight*, 521 U.S. 399, 404-12, 117 S. Ct. 2100, 138 L. Ed. 2d 540 (1997) (guards employed by a private prison corporation may not assert qualified immunity); *McCullum v. Tepe*, 693 F.3d 696, 702-04 (6th Cir. 2012) (a prison psychiatrist employed by a non-profit entity may not assert qualified immunity); *Harrison v. Ash*, 539 F.3d 510, 521-25 (6th Cir. 2008) (prison nurses employed by a private medical provider may not assert qualified immunity); *Cooper v. Parrish*, 203 F.3d 937, 952-53 (6th Cir. 2000) (private attorney working alongside a prosecutor may not assert qualified immunity). *But see Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 442 F.3d 410, 438-40 (6th Cir. 2006), *rev'd on other grounds*, 551 U.S. 291, 127 S. Ct. 2489, 168 L. Ed. 2d 166 (2007), (executive director of a private high school athletics association may assert qualified immunity); *Cullinan v. Abramson*, 128 F. 3d 301, 310-11 (6th Cir. 1997) (private attorneys serving as outside counsel to a city may assert qualified immunity); *Bartell*, 215 F.3d at 556-57 (employees of a private foster-care agency may assert qualified immunity).

To determine whether a private party may assert qualified immunity, we consider:

> [I]f a party seeking immunity would have been shielded from tort liability when Congress enacted the Civil Rights Act of 1871—§ 1 of which is codified at 42 U.S.C. § 1983—we infer from legislative silence that Congress did not intend to abrogate such immunities when it imposed liability for actions taken under color of state law. But even with such an inference, and irrespective of the common law support, we will not recognize an immunity available at common law if § 1983's history or purpose counsel against applying it in § 1983 actions. Thus, when a private party . . . seeks qualified immunity from a § 1983 suit, we determine whether: (1) there was a firmly rooted history of immunity for similarly situated parties at common law; and (2) whether granting immunity would be consistent with the history and purpose of § 1983.

McCullum, 693 F.3d at 700 (internal quotation marks and citations omitted). After considering whether there was a common-law tradition of immunity for similarly situated defendants and whether granting immunity would further the purposes of § 1983, the district court concluded that the individual defendants may assert qualified immunity. We disagree with respect to Hurn.

First, we look to history. There is no history of immunity for animal-welfare organizations or their employees in 1871 when Congress enacted § 1983. Indeed, we do not find, and the parties do not identify, any cases

involving animal-welfare organizations whatsoever prior to 1871. "This is not surprising in view of the reality that the [defendant Pennsylvania Society for the Prevention of Cruelty to Animals] only came into being in 1868 and that it is not unlikely that other such societies were not established until after 1871." *Kauffman v. Pa. Soc'y for the Prevention of Cruelty to Animals*, 766 F. Supp. 2d 555, 564-65 (E.D. Pa. 2011) (footnote omitted). Thus, there is no tradition of immunity for animal-welfare officers, nor is there a clear tradition of denying immunity to employees of animal-welfare organizations. We have previously held that the absence of a "'firmly rooted' history" of immunity does not preclude eligibility for qualified immunity when the particular organization has "only recently grown in importance and stature, and litigation involving such associations has been relatively rare." *Brentwood Acad.*, 442 F.3d at 439 (concluding that the executive director of a private high school athletics association was entitled to qualified immunity). Accordingly, the absence of a history of qualified immunity for similarly situated defendants, under *Brentwood*, does not necessarily preclude Hurn from asserting qualified immunity.[2]

2. We recently noted, however, that it was unclear "'whether policy and history form a conjunctive or disjunctive test,'" and we questioned whether a court may "extend qualified immunity where there was no history of immunity at common law, even if sound policy justified the extension." *McCullum*, 693 F.3d at 700 n.7 (quoting *Developments in the Law—State Action and the Public/Private Distinction, III. Private Party Immunity from Section 1983 Suits*, 123 Harv. L. Rev. 1266, 1271 (2010)).

Next, we consider whether granting qualified immunity to Hurn is consistent with the purpose of § 1983. "[O]ur analysis hinges on three of § 1983's goals: (1) protecting the public from unwarranted timidity on the part of public officials; (2) ensur[ing] that talented candidates were not deterred by the threat of damages suits from entering public service; and (3) guarding against the distraction from job duties that lawsuits inevitably create." *McCullum*, 693 F.3d at 704 (internal quotation marks and citations omitted).

Preventing unwarranted timidity is "'the most important special government immunity-producing concern.'" *Filarsky*, 132 S. Ct. at 1665 (quoting *Richardson*, 521 U.S. at 409)). In *Richardson*, the Supreme Court concluded that the concern about unwarranted timidity was alleviated by the existence of market pressures on a private prison corporation. The corporation ran the prison with little state supervision, was required by the state contract to buy insurance to compensate victims of civil-rights violations, and the contract expired in three years, thus creating market pressure to perform or be replaced. *Richardson*, 521 U.S. at 409-11. Additionally, unlike the government, the private firm could incentivize the desired bold action by "permit[ting] employee indemnification and avoid[ing] many civil-service restrictions." *Id.* at 410. Because of these features, the private prison corporation more closely resembled a private firm than the government:

> [T]he employees before us resemble those of other private firms and differ from government

> employees. . . . [G]overnment employees typically act within a *different* system. They work within a system that is responsible through elected officials to voters who, when they vote, rarely consider the performance of individual subdepartments or civil servants specifically and in detail. And that system is often characterized by multidepartment civil service rules that, while providing employee security, may limit the incentives or the ability of individual departments or supervisors flexibly to reward, or to punish, individual employees. Hence a judicial determination that "effectiveness" concerns warrant special immunity-type protection in respect to this latter (governmental) system does not prove its need in respect to the former. Consequently, we can find no *special* immunity-related need to encourage vigorous performance.

Id. at 410-11.

"*Richardson* was a self-conciously 'narrow[ ]' decision" and the particular circumstances of that prison corporation are often not "involved . . . in the typical case of an individual hired by the government to assist in carrying out its work." *Filarsky*, 132 S. Ct. at 1667 (quoting *Richardson*, 521 U.S. at 413). However, many of the characteristics present in *Richardson* are present here. Like the prison corporation for which the defendant prison guards in *Richardson* worked, McKamey is "systematically organized to assume a major lengthy

administrative task (managing an institution) with limited direct supervision by the government." *Richardson*, 521 U.S. at 413. McKamey is wholly responsible for animal-welfare services for the City of Chattanooga. Under the contract, McKamey is obligated to run a facility; care for all of the animals that are placed into McKamey's custody; attempt to re-connect owners with impounded animals; sell and process applications for animal licenses; observe, test, and/or euthanize rabies-suspect animals; and create and run a spay/neuter program. R. 70-2 (Contract at 3-10) (Page ID #1412-18). The City does not in any way supervise McKamey employees. Although McKamey worked with state officer Burns on the particular investigation at issue in this case, that relationship was a collaboration of equals, not a hierarchy with Burns leading or supervising the McKamey employees. *See* R. 70-7 (Walsh Aff. at ¶ 11, 24) (Page ID #1605, 1608). This situation is quite different from the employees of a private foster-care agency permitted to assert qualified immunity in *Bartell*, 215 F.3d at 556-57, where the state agency closely supervised the private agency, including appointing a caseworker to monitor foster-care plans and specifically approving the plan for the child at issue in the case.

Where the replacement of a private contractor "may be burdensome" but "not so burdensome that [the entity] do[es] not face the threat of replacement," the threat of replacement adds to the market pressure. *Rosewood Servs., Inc., v. Sunflower Diversified Servs., Inc.*, 413 F.3d 1163, 1169 (10th Cir. 2005). McKamey's contract with the City of Chattanooga is even shorter than the prison corporation's contract with the State of Tennessee in

Richardson. The initial contract term was one year, and the City may renew the contract for subsequent one-year periods, but the City may decline to renew the contract for any reason or no reason at all. R. 70-2 (Contract at 10-11) (Page ID #1418-19). A for-profit corporation or non-profit organization that provides a truly unique service and has no competitors may exist outside of normal market pressures. *See Brentwood Acad.*, 442 F.3d at 439 (permitting the executive director of a private high school athletics association to assert qualified immunity, and noting that the association, "does not have to compete with other firms for the job it does on behalf of the state."). However, there is no evidence in the record that McKamey has no competitors in the city or state that could feasibly replace the organization should the city decline to renew McKamey's contract. Thus, the record does not demonstrate any barriers to the City's declining to renew McKamey's contract.

Unlike the prison corporation in *Richardson*, McKamey does not "undertake[] [its] task for profit" but that does not mean that it is not "potentially in competition with other firms." *Richardson*, 521 U.S. at 413. Non-profit organizations can be, and often are, part of a competitive marketplace seeking limited grant funding, government contracts, and volunteer support. "[B]oth profit and nonprofit firms compete for municipal contracts, and both have incentives to display effective performance." *Halvorsen v. Baird*, 146 F.3d 680, 686 (9th Cir. 1998); *see also Payton v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 82 F. Supp. 2d 901, 906 (N.D. Ill. 2000) (quoting Troyen A. Brennan, *Symposium: Implementing U.S. Health*

Care Reform, 19 Am. J.L. & Med. 37, 74 (1993) ("[T]he behavior of not-for-profit hospitals is similar to that of for-profits: 'while the former does not legally earn a profit for shareholders, it does attempt to maximize fund balances and other measures of economic health.'")). Additionally, in its capacity as an animal shelter seeking homes for animals and money spent on animals, McKamey competes with the private pet-store market. Appellee Br. at 58-59.

The ease by which the City can discontinue its contract with McKamey and the absence of evidence that McKamey is irreplaceable together demonstrate that McKamey is subject to the sort of market pressures that obviate unwarranted timidity in the absence of qualified immunity.

Next, we consider whether prohibiting Hurn from asserting qualified immunity would discourage talented candidates from entering public service. In *Filarsky*, the Supreme Court explained the importance of qualified immunity to ensuring that the government can attract the best and the brightest:

> [I]t is often when there is a particular need for specialized knowledge or expertise that the government must look outside its permanent work force to secure the services of private individuals. . . . To the extent such private individuals do not depend on the government for their livelihood, they have freedom to select other work—work that will not expose them to liability for government actions. This makes it

> more likely that the most talented candidates will decline public engagements if they do not receive the same immunity enjoyed by their public employee counterparts.

132 S. Ct. at 1665-66. However, "a private firm's ability to 'offset any increased employee liability risk with higher pay or extra benefits'" can mitigate the concern that individuals will refuse to work on behalf of the government without qualified immunity protection. *McCullum*, 693 F.3d at 704 (citation omitted). Pet Supply points to language in the contract requiring McKamey to purchase general liability insurance and to indemnify the city, R. 70-2 (Contract at 20-21) (Page ID #1428-29), but there is no evidence that McKamey indemnifies its employees or provides higher pay or benefits to mitigate the risk of liability. Qualified individuals may be discouraged from contracting with the city if they are at risk of liability and do not have the protection of qualified immunity. Accordingly, this factor leans in favor of permitting McKamey and its employees to assert qualified immunity.

Finally, we consider whether denying qualified immunity would lead to distraction from job duties. "[L]awsuits may well distract these employees from their . . . duties, but the risk of distraction alone cannot be sufficient grounds for an immunity. Our qualified immunity cases do not contemplate the complete elimination of lawsuit-based distractions." *Richardson*, 521 U.S. at 411 (internal quotation marks and citation omitted). However, the Supreme Court has expressed concern that the distraction of a lawsuit may extend beyond the private contractors to full-time government

employees with whom the contractors work. *Filarsky*, 132 S. Ct. at 1666. For example, if this suit continues, state officer Burns may be required to testify. Without qualified immunity there is a risk that various McKamey employees and a single state employee may be distracted from their animal-welfare duties, so this factor counsels in favor of permitting the assertion of qualified immunity, but does not weigh heavily in the overall calculation.

In sum: there is no history of immunity for similarly situated defendants, but similar organizations did not exist in 1871 and there is no history of denying immunity; McKamey faces market pressures; refusing to allow qualified immunity could discourage qualified animal-welfare advocates from working on behalf of the City of Chattanooga; and having to go through a lawsuit could distract the defendants-appellants and possibly a single state employee from their job duties. This is a very close case but because there is no history of immunity and the most important immunity-producing concern—preventing unwarranted timidity—counsels against permitting the assertion of qualified immunity, we conclude that Hurn may not assert qualified immunity as a defense to suit in her personal capacity.

2. Walsh, Nicholson, Hurn, and McKamey in their official capacities

"A suit against an individual in his [or her] official capacity is the equivalent of a suit against the governmental entity." *Matthews v. Jones*, 35 F.3d 1046, 1049 (6th Cir. 1994). "In an official capacity action, the plaintiff seeks damages not from the individual officer, but from the

entity for which the officer is an agent." *Pusey v. City of Youngstown*, 11 F.3d 652, 657 (6th Cir. 1993). Thus, in *Pet Supply I*, the district court properly construed Pet Supply's claim against Walsh, Nicholson, and Hurn in their official capacity as a claim against McKamey. *Pet Supply I*, 921 F. Supp. 2d at 860. The district court concluded that "although it is an entity, McKamey can also assert the defense of qualified immunity," but denied qualified immunity to McKamey because the plaintiffs had pleaded a violation of a clearly established constitutional right. *Id*. at 860. In *Pet Supply II*, the district court denied McKamey's motion for summary judgment asserting qualified immunity. *Pet Supply II*, 2013 U.S. Dist. LEXIS 16041, 2013 WL 449760, at *13.

The district court's suggestion that McKamey could assert qualified immunity as a defense to an official-capacity suit was in error. The Supreme Court very clearly held in *Kentucky v. Graham* that qualified immunity was not an available defense in an official-capacity suit:

> On the merits, to establish *personal* liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. More is required in an official-capacity action, however, for a governmental entity is liable under §1983 only when the entity itself is a moving force behind the deprivation; thus, in an official-capacity suit the entity's policy or custom must have played a part in the violation of federal law. When it comes to defenses to liability, an official in a personal-capacity action may, depending

> on his position, be able to assert personal immunity defenses, such as [absolute immunity or qualified immunity]. In an official-capacity action, these defenses are unavailable. The only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment.

473 U.S. 159, 166-67, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985) (internal quotation marks, citations, and footnotes omitted).

We have always understood qualified immunity to be a defense available only to individual government officials sued in their personal capacity. "As qualified immunity protects a public official in his individual capacity from civil damages, such immunity is unavailable to the public entity itself." *Everson v. Leis*, 556 F.3d 484, 501 n.7 (6th Cir. 2009); *see also Hidden Vill., LLC v. City of Lakewood*, 734 F.3d 519, 523 (6th Cir. 2013) ("Lakewood is not eligible for qualified immunity because it is a city, not an individual."). That McKamey is a private entity acting in a governmental capacity does not change the unavailability of qualified immunity as a defense in an official-capacity suit. Just as the City of Chattanooga cannot assert qualified immunity as a defense against an official-capacity suit, neither can Walsh, Nicholson, Hurn, or McKamey.[3]

3. We note that in *Bartell* we permitted a non-profit entity to assert qualified immunity in a case where it was not specified whether the defendants were sued in their official or individual capacity. *Bartell*, 215 F.3d at 557. Because we previously permitted

B. Did Walsh and Nicholson violate a clearly established constitutional right?

Having concluded that Walsh and Nicholson may assert qualified immunity in their individual capacities, we now consider whether Walsh and Nicholson are entitled to qualified immunity in this § 1983 suit. An assertion of qualified immunity may be overcome if the defendants violated a clearly established constitutional right. We consider whether, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). "If the court can find, 'on a favorable view of the [plaintiff's] submissions,' a violation of a constitution[al] right, the next step in *Saucier*'s sequential analysis is to

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a corporate defendant to assert qualified immunity as a defense to an individual-capacity suit, *Cullinan*, 128 F.3d at 310-11, and because permitting an assertion of qualified immunity as a defense to an official-capacity suit would conflict with clear Supreme Court precedent, we presume that *Bartell* involved an assertion of qualified immunity only in the defendants' individual capacity.

A handful of other circuits have permitted private corporations to assert qualified immunity, but all of the cases were similarly unclear as to whether the suit was in the corporation's personal capacity or official capacity. *See Sherman v. Four Cnty. Counseling Ctr.*, 987 F.2d 397, 403-06 (7th Cir. 1993) (private psychiatric center); *DeVargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714, 723 (10th Cir. 1988) (private corporation providing security inspectors for Los Alamos National Laboratory); *Folsom Inv. Co. v. Moore*, 681 F.2d 1032, 1036-38 (5th Cir. 1982), *abrogated by Wyatt v. Cole*, 504 U.S. 158, 163-68, 112 S. Ct. 1827, 118 L. Ed. 2d 504 (1992) (private investment company).

determine if the right was clearly established." *Leonard v. Robinson*, 477 F.3d 347, 354-55 (6th Cir. 2007) (quoting *Saucier*, 533 U.S. at 194). Although addressing both questions is "often beneficial," we are "permitted to exercise [our] sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson v. Callahan*, 555 U.S. 223, 236, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009).

When considering whether a right is clearly established, "[t]he key determination is whether a defendant moving for summary judgment on qualified immunity grounds was on notice that his alleged actions were unconstitutional." *Grawey v. Drury*, 567 F.3d 302, 313 (6th Cir. 2009). "'[I]n an obvious case, general standards can clearly establish the answer, even without a body of relevant case law.'" *Sample v. Bailey*, 409 F.3d 689, 699 (6th Cir. 2005) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 199, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004)).

C. Procedural Due Process

1. Animals

Pet Supply argues that the defendants-appellants violated a clearly established right to a hearing prior to the seizure of their animals. Pet Supply does not argue that the post-seizure hearing was not sufficiently prompt or otherwise did not comply with due process; it simply argues that the defendants-appellants were obliged to provide a hearing before seizing the animals.

"A fundamental requirement of due process is the opportunity to be heard. It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965) (internal quotation marks and citations omitted). We apply the well-known balancing test from *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), to determine if due process was afforded, and we consider: "the private interest that will be affected by the official action," "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," and "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335.

Usually, due process requires that a hearing is mandated before the deprivation of property or liberty occurs.[4] *Zinermon v. Burch*, 494 U.S. 113, 127, 110 S. Ct.

4. Under *Parratt*, "[i]f an official's conduct would otherwise deprive an individual of procedural due process but is 'random and unauthorized,' the *Parratt* doctrine allows the state to avoid liability by providing adequate remedies after the deprivation occurs." *Daily Servs., LLC v. Valentino*, 756 F.3d 893, 901 (6th Cir. 2014) (quoting *Parratt v. Taylor*, 451 U.S. 527, 541, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981)). The *Parratt* doctrine does not present "an exception to the *Mathews* balancing test, but rather an application of that test to the unusual case in which one of the variables in the *Mathews* equation—the value of predeprivation safeguards—is negligible in preventing the kind of deprivation at issue." *Zinermon*, 494 U.S. at 129. The district court concluded

975, 108 L. Ed. 2d 100 (1990). However, we have held that the failure to provide a pre-deprivation hearing does not violate due process in situations where a government official reasonably believed that immediate action was necessary to eliminate an emergency situation and the government provided adequate post-deprivation process. *See Harris v. City of Akron*, 20 F.3d 1396, 1403-05 (6th Cir. 1994) (the demolition of a home without notice and a hearing did not violate due process where the building inspector believed that the home was "dangerously close" to falling onto the street and another home); *Mithrandir v. Brown*, 37 F.3d 1499, at *2-3 [published in full-text format at 1994 U.S. App. LEXIS 27808] (6th Cir. 1994) (table decision) (confiscation of a prisoner's typewriter without a hearing was justified by an emergency because two prison guards had been assaulted in the prior month and one had been stabbed with a part from an inmate's typewriter). And most relevant to the instant situation, in an unpublished per curiam opinion we affirmed a district court's conclusion that a government official's seizure of "marauding cattle" without a prior hearing did not violate due process. The cattle had escaped from their land and were running wild in the community: trampling gardens, eating wheat from nearby fields, running onto the road and causing car accidents, and charging at people. *Lowery v. Faires*, 57 F. Supp. 2d 483, 492-94 (E.D. Tenn. 1998), *aff'd*, 181 F.3d 102 (6th Cir. 1999) (table decision). Local officials served an impoundment notice on the farmer who owned the cattle and then seized the cattle without

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that the actions of the McKamey employees were not random and unauthorized and so the *Parratt* rule does not apply to this situation; neither party challenges that conclusion on appeal.

providing a hearing. The district court concluded that the failure to provide a pre-deprivation hearing did not violate due process where taking the time to provide a pre-deprivation hearing would leave the animals and the public exposed to an emergency situation. *Id*. We held that "we are not persuaded that the district court erred in granting summary judgment to defendants" and affirmed on the reasoning of the district court. *Lowery*, 181 F.3d 102. Although these cases did not apply the *Mathews* balancing test, the conclusion that the failure to provide a pre-deprivation hearing does not violate due process likely reflects that the governments' strong interest in immediately ending an emergency situation places a heavy thumb on the scale.

Applying the *Mathews* balancing test, we conclude that the seizure of the animals did not violate due process.

First, we agree with Pet Supply that an important property interest was affected by the seizure. "[T]he property interest in a person's means of livelihood is one of the most significant that an individual can possess." *Ramsey v. Bd. of Educ. of Whitley Cnty.*, 844 F.2d 1268, 1273 (6th Cir. 1988). Although Pet Supply has a strong interest in not being deprived of the income-generating animals, we note that Pet Supply was not totally deprived of its property; while Pet Supply lost control over the animals for multiple months, the animals were eventually all returned to the company.

Second, the risk of an erroneous deprivation was low due to the participation of trained animal-welfare

officers in the seizure, and there is little value to additional procedural safeguards. *Compare Reams v. Irvin*, 561 F.3d 1258, 1264 (11th Cir. 2009) (holding that "the risk of an erroneous deprivation . . . was relatively low" when a veterinarian and trained inspectors observed conditions at a farm, concluded that donkeys and horses were in unsafe conditions, and removed the animals without a prior hearing), *with Siebert v. Severino*, 256 F.3d 648, 660 (7th Cir. 2001) (holding that "the risk of an erroneous deprivation . . . through the procedures used is great" when a "volunteer investigator who apparently lacked sufficient knowledge about horses to determine whether appropriate care was given" ordered the removal of horses from a home without prior notice or a hearing). Additionally, it is difficult to see the value of the additional procedural safeguard of a hearing prior to the seizure, given that Pet Supply requested a temporary restraining order in the midst of the animal seizure and its request was denied.

Finally, we conclude that there was a great governmental interest in the immediate seizure of the animals without pausing for a prior hearing. Pet Supply does not dispute that when the McKamey officials arrived, the animals had feces and urine matted in their fur, water bottles were empty, and a dead hamster was found in the cage of which its staff was unaware. Pet Supply does not dispute that the temperature was at or above eighty-five degrees for the entirety of the McKamey employees' time at the store and that the air conditioner had been broken for weeks. Pet Supply explained that the state of affairs was the result of the McKamey employees arriving

while Pet Supply workers were in the midst of their daily cleaning routine, but Pet Supply has not introduced any evidence that the degree of filth was normal, nor has Pet Supply disputed the evidence that its employees arrived over an hour before the McKamey employees arrived and that the employees had not provided food or water to the animals during that time. As in *Lowery v. Faires*, the government has a strong desire to eliminate immediately a situation that posed a danger to the animals. Additionally, Pet Supply received a hearing in city court nine days after the seizure on the violations of city animal code and the city court had the power to order the return of the animals. *Cf. Flatford v. City of Monroe*, 17 F.3d 162, 165, 169-71 (6th Cir. 1994) (although a reasonable building inspector could conclude that an immediate threat to the safety of residents existed given severe "dilapidation and disrepair" and conditions that posed "an immediate risk of electrocution or fire" that justified evacuation and demolition without a prior hearing, the failure to provide any post-deprivation hearing violated a clearly established constitutional right).

On balance, given the low risk of an erroneous deprivation and the minimal value of additional safeguards, the great governmental interest in immediately removing the animals from an overly hot, filthy environment, and the fact that a hearing was provided nine days later, we conclude that the seizure of the animals did not violate due process.

Because the seizure of the animals without a prior hearing did not violate due process, Walsh and Nicholson are entitled to qualified immunity on this claim.

2. Permit

Pet Supply also argues that the revocation of its pet dealer permit without a prior hearing violated a clearly established due-process right. The parties agree that Pet Supply had a protected property interest in the permit.

Pet Supply alleges that McKamey and Walsh revoked the permit. R. 1 (Compl. at ¶ 60, 62, 64) (Page ID #11, 12). Pet Supply does not allege that Nicholson played any role in the permit revocation. Accordingly, Nicholson is entitled to qualified immunity on this claim.

We conclude that the revocation of the permit violated due process. The City Code authorized the revocation of a permit "if negligence in care or misconduct occurs that is detrimental to animal welfare or to the public." R. 70-4 (City Code at 25) (Page ID #1513). After McKamey revoked Pet Supply's permit, Pet Supply never had an opportunity—either predeprivation hearing or post-deprivation—to challenge the permit revocation. Pet Supply could challenge the citations for violations of animal-welfare laws in city court, but the city court did not have authority over the permit and could not order the reinstatement of the permit. R. 69-12 (City Court Order at 3 n.1) (Page ID #1370) ("[t]he court is [ ] of the opinion the City Court has no authority to revoke or make any order relative to the license of the Pet Company."). It was the policy and practice of McKamey and the City of Chattanooga to require an individual or company whose permit was revoked to apply for a new permit. R. 69-9 (7/21/2010 Hr'g Tr. at 113-16) (Page ID #1350-53). This

process does not truly allow for a reinstatement of the permit; even if the City Court were to conclude that the permit holder had not violated the City Code, the permit holder was nonetheless required to apply for a new permit, pay the fee, and go through the inspection process again. The fact that the permit holder can ultimately obtain a new permit after jumping through various hoops does not address the lack of a mechanism to challenge the initial revocation.

Due process requires an opportunity to be heard at a "meaningful time and in a meaningful manner." *Armstrong*, 380 U.S. at 552. The failure to provide a hearing prior to a license or permit revocation does not per se violate due process. *See Barry v. Barchi*, 443 U.S. 55, 65-66, 99 S. Ct. 2642, 61 L. Ed. 2d 365 (1979) (holding that the summary suspension of a horse trainer's license without a prior hearing did not violate due process, but the failure to provide a timely post-suspension hearing did violate due process). But there is no dispute that *never* providing an opportunity to challenge a permit revocation violates due process. Thus, the revocation of Pet Supply's permit without a pre-deprivation hearing or a post-deprivation hearing violated due process.

No reasonable officer could believe that revoking a permit to do business without providing any pre-deprivation or post-deprivation remedy was constitutional. Walsh argues that she was entitled to rely on the constitutionality of the Chattanooga City Code, which does not provide for a hearing on the revocation of a pet-dealer permit. Certainly, there are policy reasons

that counsel in favor of allowing government officials to presume the constitutionality of statutes and ordinances. *See Michigan v. DeFillippo*, 443 U.S. 31, 38, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979). But the Chattanooga City Code does not make the revocation of the permit automatic upon the determination that negligence or misconduct has occurred. The Code states that an animal-related permit "*may be* revoked if negligence in care or misconduct occurs that is detrimental to animal welfare or to the public." R. 70-4 (City Code at 25) (Page ID #1513). The Code did not tie Walsh's hands; it was her discretionary decision immediately to revoke the permit.

This is one of the rare situations where the unconstitutionality of the application of a statute to a situation is plainly obvious. In *Leonard v. Robinson*, 477 F.3d 347 (6th Cir. 2007), we denied qualified immunity to a police officer in a § 1983 suit alleging First Amendment violations because there was no probable cause to support arresting an individual for uttering "God damn" at a township board meeting. *Id.* at 359-60. We rejected the police officer's argument that various Michigan statutes supported probable cause because we concluded that "no reasonable police officer would believe that any of the three other Michigan statutes relied upon by the district court are constitutional as applied to [the individual's] political speech during a democratic assembly." *Id.* Similarly, here, no reasonable officer could believe that revoking this permit without providing any opportunity for a hearing was constitutional. Accordingly, the evidence taken in the light most favorable to Pet Supply demonstrates the violation of a clearly established right, and so we deny qualified immunity to Walsh on this claim.

D. Fourth Amendment

Pet Supply next argues that the warrantless seizure of its animals and business records violated a clearly established Fourth Amendment right. The Fourth Amendment of the United States Constitution protects citizens from unreasonable searches and seizures. "A 'seizure' of property, [the Supreme Court has] explained, occurs when 'there is some meaningful interference with an individual's possessory interests in that property.'" *Soldal v. Cook Cnty.*, 506 U.S. 56, 61, 113 S. Ct. 538, 121 L. Ed. 2d 450 (1992) (quoting *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984)). The protections of the Fourth Amendment are not limited to criminal investigations. *See New Jersey v. T.L.O.*, 469 U.S. 325, 335, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985). No one disputes that dispossessing Pet Supply of its animals and business records is a seizure of property within the meaning of the Fourth Amendment. The only issue is whether the warrantless seizure of the animals and records violated a clearly established Fourth Amendment right.

The Fourth Amendment is a powerful background norm that prohibits government officials from engaging in a warrantless search or seizure, with limited exceptions. "[A] search or seizure carried out on a suspect's premises without a warrant is *per se* unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances,'" *Coolidge v. New Hampshire*, 403 U.S. 443, 474-75, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971), or

another of the carefully delineated exceptions to the warrant requirement. The defendants-appellants argue that the warrantless seizure of the animals and business records was justified by the plain-view and exigent-circumstances doctrines. Thus, we must "evaluate whether 'an objectively reasonable officer confronted with the same circumstances could reasonably believe that exigent circumstances existed.'" *Kovacic v. Cuyahoga Cnty. Dep't of Children & Family Servs.*, 724 F.3d 687, 695 n.1 (6th Cir. 2013) (quoting *Ewolski v. City of Brunswick*, 287 F.3d 492, 501 (6th Cir. 2002)).

Under the plain-view doctrine, "if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant." *Minnesota v. Dickerson*, 508 U.S. 366, 375, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993). Generally, the lawful-right-of-access requirement obliges a government official to "get a warrant if possible before he seizes an item in plain view. He cannot seize absent exigent circumstances. If he could obtain a warrant, then . . . he cannot use the 'plain view' exception for the evidence." *United States v. McLevain*, 310 F.3d 434, 443 (6th Cir. 2002).

Under the exigent-circumstances doctrine, there must be a "'need for prompt action by government personnel, and [a conclusion] that delay to secure a warrant would be unacceptable under the circumstances.'" *Kovacic*, 724 F.3d at 695 (quoting *United States v. Rohrig*, 98 F.3d 1506, 1517 (6th Cir. 1996)). Classic examples of exigent

circumstances that may justify a warrantless property seizure include the likelihood that a suspect will destroy evidence, *see Illinois v. McArthur*, 531 U.S. 326, 331-32, 121 S. Ct. 946, 148 L. Ed. 2d 838 (2001), and when there exists "'the need to assist persons who are seriously injured or threatened with such injury,'" *Kovacic*, 724 F.3d at 695 (quoting *Johnson v. City of Memphis*, 617 F.3d 864, 868 (6th Cir. 2010)).

1. Animals

We conclude that the warrantless animal seizure did not violate the Fourth Amendment. As discussed *supra*, it is undisputed that the animals were dehydrated and in high heat and without water, that one hamster had a large cut that had not received medical care, and that the Pet Supply employees were unaware that a hamster had died in its cage. A reasonable officer could believe that this constituted neglect under the Chattanooga City Code[5] and

5. Chattanooga City Code § 7-28(a) makes it "unlawful for any person to neglect an animal as neglect is defined in this Chapter." R. 70-4 (City Code at 21) (Page ID #1509). "Neglect" is defined in § 7-2 as:

> (1) Failing to sufficiently and properly care for an animal to the extent that the animal's health is jeopardized;
>
> (2) Failing to provide an animal with adequate living conditions as defined in this chapter (adequate feed, adequate water, adequate shelter, adequate space, etc.);
>
> (3) Failing to provide adequate veterinary care;

that the conditions justified the warrantless seizure of the animals. Unlike in *Kovacic*, where exigent circumstances did not justify the warrantless seizure of a child from a home based on "reliance on weeks-old incidents" and the fact that the child's mother had missed a meeting, here, the conditions of the store created an imminent and ongoing danger to the health of the animals. *Cf. Siebert*, 256 F.3d at 657-58 (concluding that exigent circumstances did not justify the warrantless seizure of horses because standing in a muddy pasture, drinking from streams, and being exposed to cold temperatures do not constitute exigent circumstances). Given the high heat and squalid conditions in which the animals were found, on June 15, 2010, a reasonable official could believe that the exigent circumstances justified the warrantless seizure of the animals. Accordingly, Walsh and Nicholson are entitled to qualified immunity on this claim.

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(4) Keeping any animal under conditions which increase the probability of the transmission of disease;

(5) Failing to provide an adequate shelter for an animal;

(6) Negligently allow any animal, including one who is aged, diseased, maimed, hopelessly sick, disabled, or not ambulatory to suffer unnecessary neglect, torture, or pain; or

(7) Meeting the requirements of the definition of an Animal Hoarder.

R. 70-4 (City Code at 8-9) (Page ID #1496-97.

2. Business Records

Pet Supply asserts that the warrantless seizure of business records "including the store operations manual, employee handbook, animal logs, animal health certificates, veterinary treatment records, pedigree records, and transportation records," R. 1 (Compl. at ¶ 58) (Page ID #11), violated the Fourth Amendment. Because Pet Supply does not allege or present any evidence that Nicholson removed business records, it has not demonstrated that he violated a constitutional right, and so Nicholson is entitled to qualified immunity on this claim. Pet Supply alleges that Walsh seized the records. R. 74 (Memo. Summ. J. at 5) (Page ID #2066). Walsh is not entitled to qualified immunity on this claim because no reasonable officer could conclude that the plain-view doctrine or exigent circumstances justified the warrantless seizure of the business records.

The defendants-appellants do not even attempt to argue that the very nature of the records was incriminating, so the seizure was not justified by the plain-view doctrine.

Nor is the seizure of the records justified by the exigent-circumstances doctrine. There is no evidence in the record that the seized business records provided evidence of a crime or other legal violation, or that the McKamey employees feared destruction of the evidence. *See United States v. Plavcak*, 411 F.3d 655, 662-65 (6th Cir. 2005) (exigent circumstances justified warrantless seizure of documents providing evidence of an alien smuggling

and fraud ring when police came upon defendants burning other documentary evidence). The business records obviously do not pose a danger to anyone's health or safety. To the extent that the defendants-appellants needed information about the animals to care for them properly, that need was satisfied by obtaining photocopies of the animals' records from Pet Supply employees. R. 67-1 (Hurn Aff. at ¶ 13) (Page ID #1207-08).

There is no pre-2010 caselaw that disrupts the presumption that the Fourth Amendment applies to the seizure of business records. No reasonable officer could have concluded that the seizure of the business records was justified by an exception to the warrant requirement. Accordingly, the seizure violated a clearly established Fourth Amendment right, and so Walsh is not entitled to qualified immunity on this claim.

III. CONCLUSION

For the foregoing reasons, we **REVERSE** the district court's entry of summary judgment in part and **AFFIRM** in part and **REMAND** for further proceedings consistent with this opinion.

APPENDIX B — MEMORANDUM OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF TENNESSEE AT CHATTANOOGA, FILED FEBRUARY 5, 2013

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

1:11-CV-157; 1:11-CV-193

UNITED PET SUPPLY, INC.,

Plaintiff,

v.

CITY OF CHATTANOOGA, *et al.*,

Defendants.

February 5, 2013, Filed

Collier/Lee

MEMORANDUM

Before the Court is Defendants Animal Care Trust's, Karen Walsh's, Marvin Nicholson, Jr.'s, and Paula Hurn's ("Defendants") motion for judgment on the pleadings (Court File No. 37).[1] Plaintiff United Pet Supply, Inc.

1. Defendant City of Chattanooga did not take part in the motion for judgment on the pleadings. All court file numbers listed refer to the court files of Case 1:11-CV-157.

("Plaintiff") responded to the motion (Court Files No. 40), and Defendants replied (Court Files No. 46). For the following reasons, the Court **GRANTS IN PART** and **DENIES IN PART** Defendants' motion for judgment on the pleadings (Court File No. 37). Specifically, the Court denies Defendants' motion with respect Fourth Amendment and abuse of process claims. The Court grants in part and denies in part Defendant's motion as to Plaintiff's procedural due process claim. The Court grants in part and denies in part Defendants' motion with respect to Plaintiff's conversion claim. The Court also grants Defendants' motion with respect to Plaintiff's claims under the Tennessee Constitution, tortious interference with a business relationship claim, and tortious interference with a contract claim. Those claims on which the Court has granted Defendant's motion are **DISMISSED WITH PREJUDICE.**

I. FACTS

The following facts are alleged in the complaint, which the Court accepts as true for the purposes of a motion for judgment on the pleadings. *Thurman v. Pfizer, Inc.*, 484 F.3d 855, 859 (6th Cir. 2007). Plaintiff operated a pet store in Hamilton Place Mall in Chattanooga, Tennessee (Court File No. 1, ¶ 7). Plaintiff was licensed to operate a pet store by the state. Defendant Animal Care Trust, also called McKamey Animal Care and Adoption Center ("McKamey"), is a Tennessee corporation with which the City of Chattanooga ("City") contracts for animal control services. As a result of changes to the Chattanooga City Code ("City Code") in 2010, the City delegated

enforcement of provisions of the City Code pertaining to animals to McKamey, including the issuance of permits for businesses engaged in dealing in the sale of pets or animals. Defendants Walsh, Hurn, and Nicholson are all employees of McKamey, serving as Executive Director, Director of Operations, and Animal Service Officer, respectively.

In March and April 2010, pursuant to McKamey's authority under the City Code, Defendants Walsh and Nicholson began appearing at the pet store operated by Plaintiff. Over a two month period, Defendants arrived during business hours seven times. On four of the seven site visits, Defendants spoke to Plaintiff's landlord to discuss issues with Plaintiff's business. On May 11, McKamey issued a permit to Plaintiff, signed by Defendant Walsh, stating Plaintiff was approved as a pet dealer in Chattanooga. However, on June 15, 2010, Defendants Walsh, Nicholson, State Inspector Joe Carroll Burns, and several members of the Chattanooga Police Department arrived at Plaintiff's pet shop around 8:10 a.m., before business hours, and confiscated animals, business records, certain other property, and Plaintiff's city permit. Defendant Hurn would arrive around 10:00 a.m.. This event was apparently precipitated by statements made to Defendant Walsh by a former employee of the pet shop one week earlier.

When Defendants and others arrived on June 15, they gained access by "asserting their official authority to 'inspect' the Pet Shop's premises" (Court File No. 1, ¶ 44). When they arrived they saw soiled kennels, unreplenished

water receptacles, and other signs of neglect. However, every morning Plaintiff's employees undertook a three-hour cleaning procedure, which normally began at 7:00 a.m. and ended at 10:00 a.m.. Due to the hour Defendants arrived at the pet shop, much of the cleaning had not yet occurred. Defendants instructed Plaintiff's employees not to interfere with their investigation, and after Defendant Hurn arrived she began videotaping the conditions of the premises. State Inspector Burns issued a written warning to Plaintiffs to repair one of the compressors in its air conditioning system. Around 11:00 a.m., Defendants confiscated Plaintiff's animals, including thirty-two puppies, six rabbits, one ferret, one guinea pig, and forty-two hamsters or mice. Defendants then confiscated business records and Plaintiff's physical copy of its city permit. Defendant Walsh informed Plaintiffs they could not sell pets until their hearing on June 24, 2010. While this process was ongoing, Plaintiff sought temporary injunctive relief in Hamilton County Circuit Court (Court File No. 37-1). Plaintiff's motion was apparently denied by the Circuit Court, but the grounds on which it was denied are unknown to the Court. Moreover, while the complaint states the property confiscation began at 11:00 a.m., the petition for injunction was filed at 1:20 p.m.

McKamey issued forty-three citations alleging ninety violations of the City Code. The facts supporting the violations were alleged as follows.

1. Air conditioning not working 3 weeks or more

2. No report to operations manager of mall

3. Isolation room at 85+ at 7 AM east

4. Hamsters and gerbils given dirty water in open bowls capable of drowning them

5. Cages cleaned with "Fabuloso," Mr. Clean or Lysol

6. Water bottles leaking until empty

7. Empty water bottles in isolation

8. Hamster was attacked "several days ago" no vet treatment provided

9. No water in any hamster cages in ISO ["isolation room"]

10. Cages broken undisinfectable

11. Cage bottoms/grates broken can trap feet

12. Dog died 4 days after health check, no record as to vet check.

13. Food for human consumption stored with vax

14. Cleaning containers not labeled

15. Training manager no knowledge of procedures.

(Court File No. 1, ¶ 65). The day following the raid, McKamey's website linked to an online petition to close the pet shop in Chattanooga. The petition called for a boycott of the Hamilton Place Mall until Plaintiff's pet shop was closed.

When McKamey took possession of the pet shop's puppies, they were all considered "bright, alert, and responsive" by McKamey, except for one German Shepherd puppy that was being treated by the pet shop's veterinarian. McKamey did not seek immediate care for the German Shepherd puppy. McKamey began seeking homes for the puppies. In September, the German Shepherd puppy died.

On June 24, 2010, nine days after Plaintiff's property was confiscated, the Chattanooga City Court held a hearing regarding the charges against Plaintiff. McKamey sought permanent custody of the animals confiscated during the raid. On June 30, the City Court ruled some of the conditions listed by Defendant Walsh could be remedied, McKamey would inspect the pet shop before allowing Plaintiffs to return the animals to the premises, and Plaintiffs were to receive all animals not diagnosed with disease or illness. McKamey, however, refused to return the animals. The Mayor of Chattanooga also sent a letter to the City Court, explaining he did not want McKamey to go uncompensated for its expenses, McKamey should be able to maintain custody of the animals until they are repaid, and he did not trust Plaintiff. McKamey then inspected the store again and failed it for new violations of the City Code.

After a brief continuance, the City Court heard further evidence regarding the inspection of the pet shop. The City Court then declined to withdraw Plaintiff's permit, and deferred to the state with respect to its state license. Plaintiff's state license was subsequently renewed. The City sought repayment from Plaintiffs for some of its expenses incurred while caring for Plaintiff's confiscated animals. The City Court maintained McKamey must return the permit without a reapplication process, because McKamey did not have the authority to revoke the permit without a hearing, and that it would issue a ruling on the City's expenses. The Mayor later disseminated an open letter to the City Court critical of its ruling. The City Court then declared a mistrial due to the Mayor's actions.

After a different judge was assigned to the case in City Court, briefing was sought on the issue of whether the revocation of Plaintiff's permit was unlawful. The City Court later dismissed the case on double jeopardy grounds and stated the City Court was without authority to make an order regarding Plaintiff's permit. After multiple demands for its license and animals, the City returned the permit to Plaintiff and Plaintiff reopened its shop. Subsequently, McKamey returned Plaintiff's animals, apparently in compliance with a court order. Plaintiff's dogs were no longer puppies and were adopted to families without charge.

Plaintiff sought redress in this court and in Hamilton County Circuit Court. Once the latter case was removed, the cases were consolidated. After the instant motion was filed, the City amended the relevant portion of the

City Code, essentially removing the permit provisions delegating the task to McKamey altogether and establishing an "Animal Control Board" to determine whether the City should require permits and, if so, what type of permits to require. Chattanooga City Ordinance 12653 (Oct. 2, 2012). References to the City Code refer to the Code as it existed when the alleged violations occurred.

II. STANDARD OF REVIEW

A motion for judgment on the pleadings under Fed. R. Civ. P. 12(c) is considered using the same standard of review as a Rule 12(b)(6) motion. *Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 722 (6th Cir. 2010). A Rule 12(b)(6) motion should be granted when it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 405 (6th Cir. 1998). For purposes of this determination, the Court construes the complaint in the light most favorable to the Plaintiff and assumes the veracity of all well-pleaded factual allegations in the complaint. *Thurman*, 484 F.3d at 859. The same deference does not extend to bare assertions of legal conclusions, however, and the Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986). The Court next considers whether the factual allegations, if true, would support a claim entitling the Plaintiff to relief. *Thurman*, 484 F.3d at 859. Although a complaint need only contain a "short and plain statement of the claim showing that the pleader is entitled to relief," *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173

L. Ed. 2d 868 (2009) (quoting Fed. R. Civ. P. 8(a)(2)), this statement must nevertheless contain "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In other words, "[T]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

When considering a motion for judgment on the pleadings under Fed. R. Civ. P. 12(c), "all well-pleaded material allegations of the pleadings of the opposing party must be taken as true, and the motion may be granted only if the moving party is nevertheless clearly entitled to judgment." *Id.* (citing *JP Morgan Chase Bank, N.A. v. Winget*, 510 F.3d 577, 581 (6th Cir. 2007)). The Court, however, "need not accept as true legal conclusions or unwarranted factual inferences." *JP Morgan Chase Bank*, 510 F.3d at 581-82. "Pleadings" include, *inter alia*, the complaint and answer. Fed. R. Civ. P. 7(a)(1)-(2). "A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes." Fed. R. Civ. P. 10(c). Because "documents attached to the pleadings become part of the pleadings[, they] may be considered on a motion to dismiss . . . without converting a motion to dismiss into one for summary judgment." *Commer. Money Ctr., Inc. v. Ill. Union Ins. Co.*, 508 F.3d 327, 335 (6th Cir. 2007). However, a district court must not consider other evidence submitted outside of the pleadings or the court's decision will effectively convert the motion for judgment on the pleadings to a motion for summary judgment. *Max Arnold*

& Sons, LLC v. W.L. Hailey & Co., Inc., 452 F.3d 494 (6th Cir. 2006). Beyond not considering the offered evidence, a district court must exclude submitted evidence offered by the parties extraneous to the pleadings. *Id.* at 503.

The Court can, however, take judicial notice of matters within the public record and not convert a Rule 12(c) motion into a motion for summary judgment. *Commercial Money Center, Inc. v. Illinois Union Ins. Co.*, 508 F.3d 327, 336 (6th Cir. 2007). Accordingly, the Court will take judicial notice of the certified copies of court records and filings that have been provided to the Court (Court File Nos. 37-1, 37-2, 37-3). *See Lynch v. Leis*, 382 F.3d 642, 647 n.5 (6th Cir. 2004). The Court notes it will only take notice of the *existence* of these filings and their contents. *See In re Unumprovident Corp. Secs. Litig.*, 396 F. Supp. 2d 858, 875 (E.D. Tenn. 2005). Not only would considering their contents to resolve factual disputes be improper, *id.*, but on a Rule 12(c) motion the Court must regard the factual allegations in the complaint as true. The Court also may consider the City Code. Although the Sixth Circuit has "refined" the meaning of the term "judicial notice" to exclude local law, because courts "find" or "determine" law rather than take notice of it, *United States v. Alexander*, 467 F. App'x 355, 360-61 (6th Cir. 2012) (citing *United States v. Dedman*, 527 F.3d 577 (6th Cir 2008)), the effect of the Sixth Circuit's distinction is largely semantic, *Dedman*, 527 F.3d at 587, and the Court may consider the City Code.

The Court will not, however, consider the American Society for the Prevention of Cruelty to Animals

("ASPCA") grant application offered by Plaintiff, because it does not appear to be a public document (Court File No. 40-1). Moreover, the Court will not take judicial notice of the transcript of Chattanooga City Council committee meetings because, although such meetings may be public record, the copies provided the Court are uncertified and the Court is disinclined to take notice of uncertified documents (Court File Nos. 40-2, 40-3). Similarly, the police report offered by Plaintiffs is uncertified and likely refers to matters in dispute and would therefore be inappropriate for judicial notice (Court File No. 40-4). Fed. R. Evid. 201(b); *see also United States v. Bonds*, 12 F.3d 540, 553 (6th Cir. 1993). The Court excludes those exhibits of which it will not take judicial notice, will not consider them in rendering its decision, and will properly consider Defendants' motion only on the pleadings and those documents it found appropriate for judicial notice.

III. ANALYSIS

A. Section 1983

To state a viable claim under 42 U.S.C. § 1983, a plaintiff must allege he was deprived of a right, privilege, or immunity secured by the Constitution or laws of the United States by a person acting under color of law, without due process of law. *Flagg Brothers Inc. v. Brooks*, 436 U.S. 149, 155, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (1978); *Chatman v. Slagle*, 107 F.3d 380, 384 (6th Cir. 1997); *Brock v. McWherter*, 94 F.3d 242, 244 (6th Cir. 1996); *O'Brien v. City of Grand Rapids*, 23 F.3d 990, 995 (6th Cir. 1994); *Rhodes v. McDannel*, 945 F.2d 117, 119 (6th

Cir. 1991), *cert. denied*, 502 U.S. 1032, 112 S. Ct. 872, 116 L. Ed. 2d 777 (1992). Although the Federal Rules of Civil Procedure do not require a plaintiff to set out in detail the facts underlying the claim, the plaintiff must provide sufficient allegations to give defendants fair notice of the claims against them. *Leatherman v. Tarrant County Narcotic Intelligence & Coordination Unit*, 507 U.S. 163, 168, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993). To state a § 1983 claim, Plaintiff must allege sufficient facts that, if true, would establish the defendants deprived him of a right secured by the Constitution of the United States while acting under color of law. *See Brock*, 94 F.3d at 244. Defendants do not dispute they were acting under color of state law. The Court will therefore turn to the question whether Plaintiff has properly pleaded violations of its constitutional rights.

1. Procedural Due Process

Plaintiff's first two counts argue Defendants violated its right to procedural due process when they took Plaintiff's permit, animals, and business records without a pre-deprivation hearing. Plaintiff argues it had a property interest in the permit, animals, and business records and that a pre-deprivation hearing was possible, practicable, and necessary.

Procedural due process claims require a two-part analysis. "First, the Court must determine whether the interest at stake is a protected liberty or property interest under the Fourteenth Amendment." *Wojcik v. City of Romulus*, 257 F.3d 600, 609 (6th Cir. 2001) (citing *Mathews*

v. Eldridge, 424 U.S. 319, 322, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)). The Court will only determine if the deprivation of the interest fell short of due process requirements if the underlying interest is protected. *Id.* Property interests are not created by the Constitution, but "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* (quoting *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981)). Such a "legitimate claim of entitlement" or "justifiable expectation" exists where the approval of the permit is mandatory once an applicant meets certain minimal requirements. *Silver v. Franklin Tp. Bd. of Zoning Appeals*, 966 F.2d 1031, 1035 (6th Cir. 1992).

If the Court determines Plaintiff has established a protected property interest, it then determines whether the deprivation of that interest violated due process. "Generally, the process that is due before a property deprivation includes prior notice and an opportunity for a predeprivation hearing." *Warren v. City of Athens, Ohio*, 411 F.3d 697, 709 (6th Cir. 2005). A plaintiff pursuing a claim under § 1983 must demonstrate either "(1) an established state procedure that itself violates due process rights, or (2) a 'random and unauthorized act' causing a loss for which available state remedies would not adequately compensate the plaintiff." *Id.* "Unauthorized" in this context means the official who performed the deprivation did not have the power or authority to do so. *Id.* The established state procedure prong applies

to municipal procedures. *See Warren*, 411 F.3d at 710 (concluding, in the alternative, that a city's action violated the plaintiff's rights under the established state procedure prong); *Burtnieks v. City of New York*, 716 F.2d 982, 988 (2d Cir. 1983) ("[D]ecisions made by officials with final authority over significant matters, which contravene the requirements of a written municipal code, can constitute established state procedure.").

When a plaintiff proceeds under the "established state procedure" prong, the plaintiff need not plead nor prove the inadequacy of the state remedies it was afforded. *Warren*, 411 F.3d at 709. Rather, the Court must "evaluate the challenged procedures directly to ensure that they comport with due process." *Moore v. Bd. Ed. Johnson City Schools*, 134 F.3d 781 (6th Cir. 1998) (quoting *Macene v. MJW, Inc.*, 951 F.2d 700 (6th Cir.1991)). This determination is made according to three factors outlined by the Supreme Court in *Mathews*.

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335.

Appendix B

a. Property Interest

Although Defendants do not dispute Plaintiff had a property interest in its animals and business records, Defendants argue Plaintiff fails to establish a property interest in its permit sufficient to incur the protection of procedural due process. Defendants cite *Littlefield v. City of Afton*, 785 F.2d 596 (8th Cir. 1992) and *Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111 (10th Cir. 1997) in support of their argument Plaintiff's claim did not allege facts sufficient to establish a property interest. In *Littlefield*, the Eighth Circuit reversed a district court's decision that plaintiffs did not have a protected property interest in a building permit. The court determined the plaintiffs had a property interest in the building permit because Minnesota state law required the city to issue a permit when an applicant complied with the ordinance. Conversely, in *Jacobs*, the Tenth Circuit concluded plaintiffs did not have a protected property interest in a rezoning application because, although Kansas required cities to make "reasonable" decisions with respect to zoning ordinances and Kansas courts had listed six factors a zoning body should consider when hearing requests for a change, the scant limitations on the zoning board's discretion were insufficient to establish a legitimate claim of entitlement. *Jacobs*, 927 F.2d at 1117.

The Court concludes Plaintiff has pleaded sufficient facts to show a legitimate claim of entitlement to the pet dealer permit. Unlike the plaintiffs in either of the cases relied upon by Defendants, Plaintiff already held the permit issued by McKamey. Whether McKamey was

sufficiently constrained by the City Code in its *initial* determination is not at issue, because here Plaintiffs already received the permit. Rather this case deals with the *revocation* of a permit, in which the Court finds Plaintiff had a "legitimate claim of entitlement." Under Tennessee law, a professional license that is only revocable upon a showing of cause "is a constitutionally protectable property interest because the holder of the license has a clear expectation that he or she will be able to continue to hold the license absent proof of culpable conduct." *Martin v. Sizemore*, 78 S.W.3d 249, 263-64 (Tenn. Ct. App. 2001). For example, once a bail bondsman is granted the right to engage in the bail bonds business, it becomes a right protected by due process. *State v. AAA Aaron's Action Agency Bail Bonds, Inc.*, 993 S.W.2d 81, 85 (Tenn. Crim. App. 1998). Recognizing a license or permit as protectable after it has been granted is consistent with the broader procedural due process case law. *See, e.g., Wojcik*, 257 F.3d at 609-10 ("Michigan courts have held that the *holder* of a liquor license has a constitutionally protected interest and is therefore entitled to proper proceedings prior to making decisions regarding renewal or revocation.") (emphasis in original); *Chandler v. Village of Chagrin Falls*, 296 F. App'x 463, 469 (6th Cir. 2008) ("This Court has held that the holder of a building or zoning permit has a constitutionally protected interest and is therefore entitled to proper proceedings prior to a final determination regarding revocation."); *Watts v. Burkhart*, 854 F.2d 839, 842 (6th Cir. 1988) ("[S]tate regulation of occupations through a licensing process gives rise to protected property interests."); *but see Silver*, 966 F.2d at 1036 (holding a plaintiff did not have a protectable interest in a conditional zoning certificate).

Further, unlike an initial issuance, the revocation of a permit by McKamey is subject to some limitation. Section 7-34(e) of the City Code provides,

> [Pet dealer] permits may be revoked if negligence in care or misconduct occurs that is detrimental to animal welfare or to the public. Revocation of such permit may only be reinstated after successfully passing an inspection of such facilities and paying the cost of such permit and any applicable fines and fees.

Although McKamey makes the determination whether negligence in care or misconduct detrimental to animal welfare or to the public has occurred, it is only entitled to revoke a permit if that standard is met. The City Code is silent as to the proper procedure for the revocation, but McKamey's discretion to do so is limited by the standard in § 7-34(e). The Court finds Plaintiff has pleaded sufficient facts to show a "legitimate claim of entitlement" or "justified expectation" to the permit because its permit had already been issued, and McKamey's discretion to revoke the permit was limited.

b. Deprivation procedures

Because the Court has determined Plaintiff pleaded sufficient facts to support a legitimate claim of entitlement to its pet dealer permit, and because Defendants do not dispute Plaintiff had a protectable property interest in its animals and business records, the Court must consider whether Plaintiff pleaded sufficient facts to show the

inadequacy of the deprivation procedures it was afforded in the confiscation of those items.

i. Permit

Defendants and Plaintiff dispute the adequacy of the post-deprivation hearing provided in the City Court as well as a hearing on Plaintiff's pre-deprivation petition for a temporary restraining order. Defendants argue these procedures were adequate under the rule announced in *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981). In *Parratt*, the Supreme Court held, where a deprivation of property is "random and unauthorized," a pre-deprivation proceeding would be impossible to provide. Therefore, an adequate post-deprivation tort remedy would be sufficient to satisfy due process requirements because "[it] is the only remed[y] the State could be expected to provide." *Zinermon v. Burch*, 494 U.S. 113, 128-29, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990). In such a case, the plaintiff must prove "that the post-deprivation process afforded by the state is somehow inadequate to right the wrong at issue." *Macene v. MJW, Inc.*, 951 F.2d 700, 706 (6th Cir. 1991). That is, the *Parratt* rule precludes a plaintiff from showing he was due a *pre*-deprivation hearing; he must instead show whatever post-deprivation remedies he was afforded were still constitutionally insufficient.

The *Parratt* rule, however, is inapplicable here. First, the Court notes Plaintiff's claim is not comfortably in the category of a challenge to established state procedures. With respect to the permit revocation, the Court notes

§ 7-34(e), is not explicit as to the procedure to be used for revoking permits. However, it accords McKamey authority to determine when grounds for revocation occur. Moreover, Defendants admit in their answer to Plaintiff's complaint their policy, adopted pursuant to McKamey's authority under the City Code, is to revoke permits without a pre-deprivation hearing.

> The Answering Defendants aver that the Chattanooga City Code, considered and applied as a whole, provides for an officer, or special officer, of the City of Chattanooga to investigate complaints of negligence in care or misconduct that is detrimental to animal welfare or to the public made against pet dealers and provides the authority for the officers or special officers to revoke a pet dealer's license when it is found to be operating in violation of the City Code. A special officer or officer of the City of Chattanooga is authorized to issue citations for the violation of City Code to a pet dealer and a hearing is provided pursuant to the City Code in the Chattanooga City Court within a reasonable period of time. If the Chattanooga City Court determines there was no violation of the City Code, the pet dealer's license is reinstated. If a violation of the City Code is determined to have occurred, the pet dealer's license is not reinstated until the pet dealer's facility successfully passes an inspection.
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> . . . .

Appendix B

> The Answering Defendants aver that ACT's position with respect to a pet dealer's permit was, and is, that a pet dealer's permit can be revoked upon a finding of negligence in care, misconduct, abuse and/or cruelty by a duly appointed officer of the City of Chattanooga and upon issue of a citation to City Court for such conduct. The Answering Defendants aver that ACT's policy is to reinstate the license if an effective order from the Chattanooga City Court determines there is no violation of the Chattanooga City Code or upon a satisfactory inspection of the pet dealer's premises.

(Court File No. 20, ¶¶ 25, 89). Actions pursuant to agency policy that itself is in compliance with established procedure can be considered an attack on "established state procedure" for the purposes of procedural due process. *See Watts v. Burkhart*, 854 F.2d 839, 843-44 (6th Cir. 1988) ("The relevant state action in the instant case is the state agency's deliberate decision to obtain either the voluntary surrender of Watts' DEA authorization or the summary suspension of Watts' license, which was done under established state procedure; the focus is not on the possibly random actions taken in carrying out the state procedures."); *Spruytte v. Walters*, 753 F.2d 498, 509-10 (6th Cir. 1985), *abrogated on other grounds by Sandin v. Conner*, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995) (holding the *Parratt* rule does not apply where actions were performed pursuant to a prison policy directive); *Burtnieks*, 716 F.2d at 988 ("[D]ecisions made by officials with final authority over significant matters,

which contravene the requirements of a written municipal code, can constitute established state procedure.").

However, the Court cannot say Plaintiff's challenge is to the provisions of the City Code itself. The City Code does not require revocation without a pre-deprivation hearing. Indeed, in Plaintiff's complaint it repeatedly emphasizes Defendants acted without explicit authority to deprive it of its permit and property without a pre-deprivation hearing (*see* Court File No. 1, ¶¶ 25, 56) ("The revised City Code stated that the City Permit 'may be revoked if negligence in care or misconduct 'occurs' that is detrimental to animal welfare or to the public,' without specifying any procedures for revoking the permit or any provision for a hearing."); ("No provision of the revised City Code provides for the summary seizure of the Pet Shop's animals, and the state laws and regulations governing licensed commercial pet dealers prohibit such seizures."). Somewhat contradicting itself, the complaint then asserts the "City Code as written and as applied to [Plaintiff] conflicts with, infringes on, and disregards rights specifically granted by State law, and the accompanying regulatory scheme, governing the licensing of commercial pet dealers in the State of Tennessee" (*id.* at ¶ 117). This provision of the complaint was likely included to suggest the City Code itself was somehow inconsistent with state law. Plaintiff's argument apparently stems from Tenn. Code. Ann. § 44-17-122, which provides "[w]hen implementing the provisions for issuance of [pet] dealer licenses, the commissioner [of agriculture] shall take into consideration other federal and/or local licensing regulations that may apply, it being the intent of the legislature not to impose duplicative

licensing requirements and costs for dealers." Plaintiff argues the City Code thus conflicts with the state policy of avoiding duplicative licensing requirements. However, the Court reads § 44-17-122 to suggest the state anticipates local licensing will exist, and instructs the commissioner to avoid duplicating it at the state level, not the other way around.

The complaint also states the City Code "as written and as applied is arbitrary, capricious and without rational basis in that it, in effect, authorizes and permits defendant Walsh to effectively close a lawful business indefinitely, or even permanent, at whim, and without any mechanism for any hearing or review."[2] Plaintiff appears to contend the

2. The Court notes Plaintiff has not challenged the Code as unconstitutionally vague or overbroad. *See City of Chicago v. Morales*, 527 U.S. 41, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999) (concluding a vague no loitering statute is not unconstitutional on First Amendment grounds, but violates due process due to its vagueness and failure to limit discretion of enforcement officials). Indeed neither of those words appears in the complaint, nor in Plaintiff's many filings. Rather, Plaintiff lists this language as an allegation under the count alleging a violation of procedural due process. *See, e.g., Simon v. Cook*, 261 F. App'x 873 (6th Cir. 2008) (treating void-for-vagueness, overbreadth, and procedural due process as separate claims). Given none of the parties addresses a vagueness challenge in its filings, the Court concludes Defendants were not on notice of a vagueness challenge contained in the ambiguous complaint, to the extent Plaintiff would have asserted one. *See Cummings v. City of Akron*, 418 F.3d 676, 681 (6th Cir. 2005) ("We apply a 'course of the proceedings' test to determine whether defendants in a § 1983 action have received notice of the plaintiff's claims where the complaint is ambiguous."). The Court will therefore take the complaint as written.

City Code is invalid because it provides Defendant Walsh the authority to revoke a permit without a pre-deprivation hearing, although it does not require it. The Code itself does not, however, contain procedures, as Plaintiff states many times in its complaint. *See Zinermon v. Burch*, 494 U.S. 113, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990) ("Burch's suit is neither an action challenging the facial adequacy of a State's statutory procedures, nor an action based only on state officials' random and unauthorized violation of state laws."). To the extent the complaint states the City Code on its face is an established state procedure that violates due process, the Court concludes the revocation provision of the City Code itself does not contain violative procedures.

Therefore, the challenge is not to the facial validity of the City Code, but to the manner by which Defendants exercised their authority pursuant to the City Code. Although cases such as this do not fit neatly within either the "established state procedure" category or the "random and unauthorized" act category, "it is not necessarily the case that a due process challenge to state action not involving an 'established state procedure' must automatically come within the *Parratt* and *Hudson* rule governing random and unauthorized acts." *Mertik v. Blalock*, 983 F.2d 1353, 1365-66 (6th Cir. 1993). Rather, the Supreme Court's ruling in *Zinermon v. Burch*, 494 U.S. 113, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990), demonstrates cases such as the instant case, although not challenging an established state procedure, still fall outside the *Parratt* rule.

Appendix B

Zinermon involved a plaintiff who had been voluntarily admitted to a state mental health facility in Florida. The plaintiff was not discharged for five months, and he filed suit claiming his consent to be admitted to the facility was not given voluntarily due to his mental state at the time he was admitted. The Court considered Florida's statutes on point for admission to mental health facilities and concluded, as the plaintiff conceded, "if Florida's statutes were strictly complied with, no deprivation of liberty without due process would occur." *Zinermon*, 494 U.S. at 117-18 n.3. The Court concluded, however, that the *Parratt* rule was inapplicable to the case, contrary to what the hospital administrator had argued. Pertinent here, the Court stated

> It may be permissible constitutionally for a State to have a statutory scheme like Florida's, which gives state officials broad power and little guidance in admitting mental patients. But when those officials fail to provide constitutionally required procedural safeguards to a person whom they deprive of liberty, the state officials cannot then escape liability by invoking *Parratt* and *Hudson*. It is immaterial whether the due process violation Burch alleges is best described as arising from petitioners' failure to comply with state procedures for admitting involuntary patients, or from the absence of a specific requirement that petitioners determine whether a patient is competent to consent to voluntary admission. Burch's suit is neither an action challenging the facial adequacy of

> a State's statutory procedures, nor an action based only on state officials' random and unauthorized violation of state laws. Burch is not simply attempting to blame the State for misconduct by its employees. He seeks to hold state officials accountable for their abuse of their broadly delegated, uncircumscribed power to effect the deprivation at issue.

494 U.S. at 135-36.

The Court then concluded the *Parratt* rule was inapplicable for three reasons. First, the deprivation was not unpredictable because "[a]ny erroneous deprivation will occur, if at all, at a specific, predictable point in the admissions process-when a patient is given admission forms to sign." *Id.* 136. Second, pre-deprivation procedures were not impossible because "Florida already has an established procedure for involuntary placement." *Id.* 136-37. Third, the conduct of the hospital was not "unauthorized" under the *Parratt* rule because the state delegated the "power and authority to effect the very deprivation complained of here . . . and also delegated to them the concomitant duty to initiate the procedural safeguards set up by state law to guard against unlawful confinement." *Id.* at 138.

Thus, as the Sixth Circuit has concluded, the Court must look "to the nature of the deprivation complained of and the circumstances under which the deprivation occurred to determine whether the rule of *Parratt* and *Hudson* applies to defeat a procedural due process claim."

Mertik, 983 F.2d at 1366. This analysis is "particularly warranted" where "the plaintiff specifically alleges that the conduct at issue was not random and unauthorized (and thus outside the rule of *Parratt* and *Hudson*) but does not specifically challenge or identify an established state procedure that caused the liberty and property deprivations at issue." *Id.* at 1366-67. The Court concludes the factors counsel against applying the *Parratt* rule here.

First, as in *Zinermon*, the deprivation here was predictable. Permits will only be revoked after negligence or mistreatment has been alleged and discovered. In the instant case, McKamey apparently became aware of the possible violations through a former employee. Officials arrived en masse, complete with local law enforcement and state officials. Such a procedure is predictable. There is also no need to surprise permit holders with revocation, because the City Code confers on McKamey the authority to inspect premises upon reasonable cause to believe there is a violation of the provisions of Chapter 7 of the City Code. Chattanooga City Code § 7-12. Any notice provided would presumably come after such an investigation occurred and evidence was acquired. Second, pre-deprivation procedures are clearly not impossible here. Tennessee, with respect to state pet dealer licensing procedures, provides ten days written notice and an opportunity for a hearing when the state license is to be revoked or suspended. Tenn. Code Ann. § 44-17-107. Finally, McKamey is authorized by the City Code to carry out the permit procedures on behalf of the City. Chattanooga City Code § 7-1. It is undisputed the McKamey officials were delegated the authority to determine when and how to revoke an issued permit.

Having concluded the *Parratt* rule is inapplicable, the Court must consider the proper procedures due under *Mathews*. As discussed above, the Court must consider the following factors to determine whether the procedures afforded Plaintiff were sufficient to satisfy due process.

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335. The Court is aware "that the fundamental requirement of the Due Process Clause 'is the opportunity to be heard and it is an opportunity which must be granted in a meaningful time and in a meaningful manner.'" *Ramsey v. Board of Educ. of Whitley County, Ky.*, 844 F.2d 1268, 1272 (6th Cir. 1988) (quoting *Parratt*, 451 U.S at 540). "[I]n some cases due process is satisfied by the opportunity for hearing in state court after a deprivation of property has occurred." *Id.* (citing *Parratt*, 451 U.S. at 534-44; *Hudson v. Palmer*, 468 U.S. 517, 536-37, 104 S. Ct. 3194, 82 L. Ed. 2d 393 (1984)).

First, the private interest at issue here is an important one: "operating a business and, stated more broadly, pursuing a particular livelihood." *Tanasse v. City of St.*

George, 172 F.3d 63 (10th Cir. 1999); *see also Spinelli v. City of New York*, 579 F.3d 160, 171 (2d Cir. 2009) (quoting *Tanasse*). "The Supreme Court has held repeatedly that the property interest in a person's means of livelihood is one of the most significant that an individual can possess." *Ramsey*, 844 F.2d at 1273. Accordingly, the private interest is a compelling factor in favor of robust procedural protection. Second, the Court finds a pre-deprivation hearing would lessen the risk of erroneous deprivation. Here, the City Court found Plaintiff's permit had been erroneously revoked and concluded it should be reinstated.[3] Clearly, had there been some means of pre-deprivation review, the erroneous deprivation would have been less likely to occur.

The third factor, the government's interest, also weighs in favor of pre-deprivation hearing and notice. Although McKamey will be required to establish violations of the City Code before revoking a permit, such a pre-deprivation showing requires nothing additional from McKamey. McKamey is still free to inspect and obtain evidence that can be used at the hearing. Moreover, the actual hearing itself need not change in character; the hearing need only occur at a different time. McKamey is empowered to impound and confiscate animals in exigent circumstances. Therefore, no danger need befall an animal or the public before a pre-deprivation hearing takes place on the revocation of a pet dealer's permit.

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3. More specifically stated, the City Court apparently concluded the permit was never effectively revoked.

Because the Court concludes the *Mathews* factors weigh in favor of traditional pre-deprivation notice and hearing,[4] Plaintiff suffered a violation of its rights under the Due Process Clause.

ii. Animals

With respect to the animals confiscated, the Court also concludes the *Parratt* rule is inapplicable. Indeed, the authority to impound animals is more explicitly provided in the City Code, including the procedure for *post*-deprivation notice. Section 7-19 provides

> (a) The McKamey Animal Center shall take up and impound any animal found running at large and/or in violation of this Chapter.
>
> . . .
>
> (c) Excluding owner-relinquished animals, if the McKamey Animal Center takes custody

4. Defendants argue Plaintiff did receive such a hearing, because Plaintiff sought a temporary restraining order in circuit court while the confiscation was ongoing. The Court notes this was not a *pre*-deprivation hearing. Although Defendants claim the officers on site did not begin confiscating materials until after the circuit court denied Plaintiff's petition, the complaint states the confiscation started at 11:00 a.m., whereas the petition was not filed until after 1:00 pm. The Court must, in a Rule 12(c) motion, treat the allegations in the complaint as true. Moreover, because Plaintiff is not subject to the *Parratt* rule, it need not establish the inadequacy of its state tort remedy.

> of a domestic animal pursuant to this chapter, the McKamey Animal Center shall give notice of such seizure by posting a copy of it at the property location at which the animal was seized or and at the property at which an [sic] McKamey Animal Center officer reasonably believes the animal may reside or by delivering it to a person residing on such properties within two (2) business days of the time the animal was seized.

Chattanooga City Code § 7-19. Sections 7-21 and 7-27 duplicate the notification procedure of § 7-19(c), for all animals and only domestic animals, respectively. Section 7-22 provides a means of claiming and redeeming the impounded animal upon payment of a fee. Then, with respect to the confiscated animals, Plaintiff challenges an established state procedure and is not subject to the *Parratt* rule.

The Court concludes the *Mathews* factors again weigh in favor of requiring a pre-deprivation hearing with respect to a pet dealer's animals. The Court notes the above-discussed property interest is again implicated here: The animals confiscated by Defendants were the basis of Plaintiff's business and livelihood. Additionally, animal owners have a "substantial interest in maintaining [their] rights in a seized animal." *O'Neill v. Louisville/ Jefferson County Metro Gov't*, 662 F3d 723, 733 (6th Cir. 2011) (quoting *Siebert v. Severino*, 256 F.3d 648, 660 (7th Cir. 2001)) (internal quotations omitted). Further, the risk of erroneous deprivation is also implicated as

it was above. The Court concludes the government's interest is not significantly heightened here. There is no suggestion in the complaint the animals or public were in grave danger. Were exigent circumstances present, the analysis may be different, but no such circumstances are apparent from the complaint. *See Siebert*, 256 F.3d at 660 n.10 (holding seizure of animals without a pre-deprivation hearing may be appropriate where exigent circumstances exist). Moreover, a hearing body could issue an order of protection if there were legitimate concerns regarding the animals' safety.

Plaintiff has therefore successfully pleaded a procedural due process violation with regard to confiscation of its animals as well.

iii. Business Records

Although less clear, the Court concludes the Plaintiff is not subject to the *Parratt* rule with respect to its confiscated business records. No provision of the City Code specifically discusses business records or documents, but McKamey is conferred broad authority under the City Code to inspect, regulate, and enforce laws regarding pet dealers within Chattanooga city limits. *See* City Code § 7-1 ("McKamey Animal Center shall provide animal services for the City of Chattanooga. . . . [including] . . . the enforcement of animal-related codes as stated in the Tennessee code and City Code."). Additionally, § 7-34(h) requires any person who sells a dog or cat to keep a written record, which shall be provided to McKamey upon request. Then, much like the revocation of its permit, the

City Code is silent as to the business records at issue, but the City Code's broad delegation to McKamey provided "the power and authority to effect the very deprivation complained of here . . . and also delegated to them the concomitant duty to initiate the procedural safeguards set up by state law to guard against unlawful confinement." *Zinermon*, 494 U.S. at 138. In addition, the deprivation certainly was not "unpredictable," for the same reasons the permit revocation was not unpredictable, and a pre-deprivation hearing was similarly not impossible. Accordingly, the *Parratt* rule is inapplicable to all of the property confiscated by McKamey without a pre-deprivation hearing.

The Court concludes, however, a post-deprivation hearing and notice is all that is required in confiscation of business records. The private interest at stake with respect to its business records is minimal. *See Germano*, 648 F. Supp. at 985. Moreover, Plaintiff has a remedy for unconstitutionally confiscated documents under state tort remedies. *See Int'l Metal Trading, Inc. v. City of Romulus, Mich.*, 438 F. App'x 460, 463 (6th Cir. 2011). The government, on the other hand, has a strong interest in obtaining evidence of violations of the City Code. Were Plaintiff entitled to a pre-deprivation hearing as to its business records, evidence could be lost. Balancing the *Mathews* factors, the Court concludes Plaintiff was not entitled to a pre-deprivation hearing with respect to its business records. Plaintiff therefore fails to state a claim in confiscation of its business records.

For the foregoing reasons, the Court **GRANTS IN PART** and **DENIES IN PART** Defendant's motion with respect to Plaintiff's procedural due process claim. The Court denies the motion on count one, which alleges a procedural due process violation in the revocation of its permit. The Court grants in part and denies in part Defendant's motion on count two, which claims a violation as to the confiscation of Plaintiff's animals and business records. Specifically, the Court denies the motion in regard to the confiscation of Plaintiff's animals, but grants it in regard to the confiscation of Plaintiff's business records.

2. Fourth Amendment

Plaintiff claims Defendant violated its Fourth Amendment rights when it searched the pet shop and seized its animals and business records. Plaintiff also attacks the facial validity of the City Code.

The Fourth Amendment protects individuals from, *inter alia*, unreasonable searches and seizures. U.S. Const. amend. IV. In addition to private homes, the Fourth Amendment's protections are applicable to commercial premises. However, warrantless inspections of commercial premises may be reasonable under the pervasively regulated business doctrine, which applies if three factors are satisfied:

> (1) a "substantial" government interest exists "that informs the regulatory scheme pursuant to which the inspection is made"; (2) the inspection is "necessary to further the regulatory

> scheme"; and, (3) the statute's inspection program provides a "constitutionally adequate substitute for a warrant" in that it "advise[s] the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope" and it "limit[s] the discretion of the inspecting officers."

United States v. Branson, 21 F.3d 113, 116 (6th Cir. 1994) (quoting *New York v. Burger*, 482 U.S. 691, 702, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987)). Plaintiff does not seriously contest the applicability of the first two considerations. Indeed, the Court finds animal control is a substantial government interest that informs the regulatory scheme and that inspections of pet dealer premises are necessary to further that regulatory scheme.

Rather, Plaintiff's focus is on the third factor: whether the City Code is a constitutionally adequate substitute for a warrant in that it advises the owner of a commercial premises that the search is being made pursuant to law, that the scope is properly defined, and that limits the discretion of inspecting officers. The Court finds that it does. Plaintiff focuses on § 7-34(d) of the City Code which notes permit applicants may be subject to inspection. Section 7-34(d) states "[f]acilities of any of the above permit applicants[5] and registered rescue organizations

5. Although this section is directed at *applicants* the Court agrees with Plaintiff it also provides authority to inspect premises of current permit *holders*. The Court so concludes because it would be impossible for an applicant to "comply" with Chapter 7 or the permit's minimum standards, given those standards only

will be subject to inspection by Animal Service Officers for compliance with this chapter's and the permit's minimum standards." Plaintiff argues there is simply no limit in discretion or otherwise codified standards in that section sufficient to satisfy the standard outlined in *Burger*. The Court, however, finds the authority to inspect is circumscribed by § 7-12 which provides the following.

> Whenever it is necessary to make an inspection to enforce any of the provisions of or perform any duty imposed by this Chapter or other applicable law, or whenever there is reasonable cause to believe that there exists in any building or upon any premises any violation of the provisions of this Chapter or other applicable law, an animal service officer or police officer is hereby empowered to enter such property at any reasonable time and to inspect the property and perform any duty imposed by this chapter or other applicable law, but only if the consent of the occupant or owner of the property is freely given or a search warrant is obtained, as follows:

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apply to permit *holders*. Moreover, the next subsection (e), states a permit may only be reinstated following revocation if the holder passes an inspection. It would hardly be logical to assume only permit *applicants* may be inspected, especially when a dealer seeking reinstatement can hardly be said to be an applicant. The Court concludes the phrase "above permit applicants" was used to include all types of organizations that must apply for a permit under § 7-33, which covers more than just pet dealers.

> (a) If such property is occupied, the officer shall first present proper credentials to the occupant and request permission to enter, explaining his reasons therefore;
>
> (b) If such property is unoccupied, the officer shall first make a reasonable effort to locate the owner or other persons having charge or control of the property, present proper credentials and request permission to enter, explaining his reasons therefore; and
>
> (c) If such entry is refused or cannot be obtained because the owner or other person having charge or control of the property cannot be found after due diligence, the animal services officer shall seek to obtain a warrant to conduct a search of the property.

This provision adequately informs the owner of the commercial premises that the search is being made pursuant to law and limits the discretion of the inspecting officers. The section requires either consent to search or a search warrant. McKamey's and its officers' authority to inspect a pet dealer's premises is thus circumscribed to the normal level of protection afforded a personal residence. The Court sees no constitutional issue with this provision.

Moreover, the authority to confiscate animals is codified in §§ 7-19, 7-21, 7-27 discussed above. The confiscation of an animal is explicitly limited to instances where a provision

of Chapter 7 of the City Code has been violated. This provision adequately advises the owner of the commercial premises the seizure is made pursuant to law and is properly defined in scope and also sufficiently limits the discretion of inspecting officers. Although the provision provides for confiscation without a warrant or permission, such authority is required to adequately implement the regulatory scheme of animal control. The Court can hardly say an animal control officer who witnesses an individual preparing for a dog fight, for example, must first obtain a warrant to confiscate that animal. This is particularly true where, as here, a pervasively regulated business is at issue. Confiscating animals in mistreatment is an important tool at McKamey's disposal, and is one provided by the City Code.

With respect to Plaintiff's as applied challenge, the Court concludes Plaintiff has sufficiently pleaded a Fourth Amendment violation as to the search of its premises. Plaintiff's complaint states

> 43. The raid of the Pet Shop's store premises was contrary to state law governing administrative inspections, which permits inspections of the Pet Shop's store premises during business hours only.
>
> 44. Defendants Walsh and Nicholson, and state inspector Burns, gained access to the Pet Shop's premises by asserting their official authority to "inspect" the Pet Shop's premises, although they had no legal authority to do so at 8:10 a.m.

(Court File No. 1, ¶¶ 43, 44). Defendants argue valid consent was provided for the search and the search therefore did not violate the Fourth Amendment. However, the Court must take the complaint as written in a motion for judgment on the pleadings, and the complaint does not state consent was provided for the search. *See Siebert*, 256 F.3d at 656 n.4 (holding that absence of evidence the government did not have a warrant is not a basis for rejecting a Fourth Amendment claim because the burden should be on the government to show a warrant in fact existed). Because a search of Plaintiff's premises without a warrant or consent would violate both the statutory authority provided by the City Code, and the Fourth Amendment, Plaintiff has sufficiently pleaded a Fourth Amendment violation in the search of its premises.

Plaintiff also argues the seizure of its animals was unconstitutional. Under the authority conferred on Defendants in the City Code, which the Court has concluded is constitutionally valid, the impoundment of animals is valid if they are found in violation of Chapter 7. The Court then, must consider whether Plaintiff has pleaded sufficient facts to show the seizure of its animals was unreasonable under the circumstances. In considering a Fourth Amendment seizure claim, the Court "must examine the facts and circumstances surrounding the [seizure of property]. Such an inquiry does not require a determination of whether there was in fact a need for the [defendants] to [seize the property]; instead we are required to determine whether the [defendants'] decision to [seize the property] was reasonable under the circumstances." *Lowery v. Faires*, 57 F. Supp. 2d 483, 495

(E.D. Tenn. 1998) (quoting *Collins v. Nagle*, 892 F.2d 489, 493 (6th Cir. 1989)).

The Court concludes Plaintiff has pleaded a Fourth Amendment violation in the seizure of its animals. Whether the seizure itself was reasonable under the circumstances is a fact-intensive inquiry not appropriate for resolution on a motion for judgment on the pleadings. Plaintiff's complaint contends the animals were healthy and the store was in compliance with state law and the City Code. Defendant's argument they believed the animals were in danger is in conflict with the factual allegations in the complaint. *See Siebert*, 256 F.3d at 656 (holding although exigent circumstances would support a seizure of animals no exigent circumstances existed and to the extent the defendant suggested exigent circumstances existed it was a misrepresentation of the animals' condition). Because the complaint states the animals were in good health and no violations of state law or the City Code had occurred, the Court concludes Plaintiff has pleaded a Fourth Amendment violation in the seizure of its animals.

Plaintiff has also pleaded a Fourth Amendment violation in the seizure of its business records. The City Code is silent on the question of confiscating records. As noted above, however, the City Code grants McKamey broad authority to investigate and enforce the City Code and the Tennessee code. *See* City Code § 7-1(b)(1) ("McKamey Animal Center shall provide animal services for the City of Chattanooga. . . . [including] . . . the enforcement of animal-related codes as stated in the Tennessee code and City Code."); *see also* § 7-1(b)

(7) ("[McKamey's duties shall include] [i]nvestigation of cruelty, neglect or abuse of companion animals . . . ."). Provisions of the City Code require creation and preservation of records, as well as providing for inspection of those records. *See* City Code § 7-34(h) ("Whether or not required to have a permit, any person or shelter who sells, barters, adopts out or otherwise gives away a dog or cat shall keep a written record of the description of the animal and the name and address of the purchaser/adoptee. Such records shall be kept for at least one year and will be provided to the McKamey Animal Center upon request.").

However, as the Court previously discussed, the facts alleged in the complaint pleaded a Fourth Amendment violation in the search of the premises and the seizure of Plaintiff's animals. For the same reasons, the seizure of Plaintiff's business records, as alleged in the complaint, violated the Constitution. Indeed, Defendant's exigent circumstances argument is even less compelling with respect to Plaintiff's business records. Nor could Defendants' confiscation of Plaintiff's business records be supported under the plain view doctrine, because the Court has concluded Plaintiff sufficiently pleaded a Fourth Amendment violation in the search itself. Even if the Court had concluded Plaintiff failed to plead a Fourth Amendment violation with respect to the search of Plaintiff's premises, the factual allegations in the complaint do not support a finding the records themselves were in plain view. Plaintiff has therefore pleaded a Fourth Amendment violation in the seizure of its business records.

For the foregoing reasons, the Court **DENIES** Defendant's motion with respect to Plaintiff's Fourth Amendment claims in count three of the complaint.

3. Liability

Although the Court concludes Plaintiff has sufficiently pleaded facts to show its constitutional rights were violated, its inquiry does not end there. Plaintiff sues Defendants Walsh, Nicholson, and Hurn in both their official and individual capacities. Defendants raise the defense of qualified immunity. The Court will consider Defendants' argument on their individual and

a. Individual Capacity

Defendants raise the defense of qualified immunity. The defense of qualified immunity shields government officials performing discretionary functions where their "conduct does not violate clearly established statutory or constitutional rights which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). This defense "can be raised at various stages of the litigation including at the pleading stage in a motion to dismiss." *English v. Dyke*, 23 F.3d 1086, 1089 (6th Cir. 1994).

Plaintiff makes an initial argument the Court must address. Plaintiff argues qualified immunity is inapplicable to Defendant Walsh because she is a private actor. Plaintiff cites *Kauffman v. Penn. Soc. for the Prevention of Cruelty to Animals, et al.*, 766 F.Supp.2d 555, 565 (E.D. Pa. 2011),

for the proposition "qualified immunity is not generally available to officers of humane societies when they enforce animal cruelty laws." *Kauffman* analyzed a claim similar to the claim at issue here and concluded qualified immunity was not available to employees of a nonprofit organization that enforces Pennsylvania's animal cruelty laws. The court concluded qualified immunity was inapplicable to the organization's employees because there was no historical evidence such organizations were due immunity. The court specifically concluded a defendant must establish both (1) immunity is supported by the underlying policy reasons justifying qualified immunity, and (2) there is a historical tradition of immunity. Because the court found none of the latter, it found immunity inappropriate.

The court in *Kauffman* based this conclusion on the Supreme Court's explanation of qualified immunity in *Wyatt v. Cole*, 504 U.S. 158, 112 S. Ct. 1827, 118 L. Ed. 2d 504 (1992), and *Richardson v. McKnight*, 521 U.S. 399, 117 S. Ct. 2100, 138 L. Ed. 2d 540 (1997). *Richardson* held that prison guards of a privately run, for-profit prison were not entitled to qualified immunity. The Court found no historical evidence qualified immunity was to be extended to private prison guards. It also concluded the purposes of the immunity doctrine did not suggest immunity was appropriate. This was in part based on the fact "'marketplace pressures provide the private firm with strong incentives to avoid overly timid, insufficiently vigorous, unduly fearful, or 'nonarduous' employee job performance,' and that to this extent, the prison employees were more akin to private workers than public officials." *Bartell v. Lohiser*, 215 F.3d 550, 556-57

(6th Cir. 2000) (quoting *Richardson*, 521 U.S. at 410). The Court made clear, however, it was answering the immunity question "narrowly" and in the "context [of] a private firm, systematically organized to assume a major lengthy administrative task (managing an institution) with limited direct supervision by the government, undertak[ing] that task for profit and potentially in competition with other firms." *Richardson*, 521 U.S. at 413. The Court specifically noted "[t]he case does not involve a private individual briefly associated with a government body, serving as an adjunct to government in an essential governmental activity, or acting under close official supervision."

The Sixth Circuit has distinguished *Richardson* and applied immunity in cases, such as this one, where a nonprofit entity performed a governmental function. For instance, in *Bartell*, the court concluded immunity extended to a private, non-profit entity that provided foster care services to a public entity when the public entity was unable to "meet the needs" of an individual child. 215 F.3d at 557. The Court concluded immunity applied, distinguishing *Richarson*, because the private entity was nonprofit and was closely supervised by the public entity. *Id.* ("Accordingly, because of the closely monitored, non-profit interrelationship between FIA and LSS, we hold that the LSS defendants may assert qualified immunity."). Similarly, in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 442 F.3d 410 (6th Cir. 2006), *rev'd on other grounds Tennessee Secondary School Athletic Ass'n v. Brentwood Academy*, 551 U.S. 291, 127 S. Ct. 2489, 168 L. Ed. 2d 166 (2007), the Sixth Circuit distinguished *Richardson.* The court

noted that the limited government supervision of the defendant weighed in favor of finding immunity did not apply. It also noted, however, the defendant was a nonprofit corporation. The court then found one more consideration tipped the balance in favor of a finding of immunity: "[T]here are no [] marketplace pressures [as the kind identified in *Richardson*]; the TSSAA, unlike the prison firm in *Richardson*, does not have to compete with other firms for the job it does on behalf of the state." *Brentwood Academy*, 442 F.3d at 438-39. Moreover, the court noted, it is "unreasonable in the first place" to note a lack of "firmly rooted" history showing a tradition of immunity in the kind of organization at issue, because that kind of organization had "only recently grown in importance and stature, and litigation involving such association has been relatively rare." *Id.*

The Court concludes immunity is available to Defendant Walsh. Although, as in *Brentwood Academy*, supervision of Defendants is minimal, the Court notes McKamey is a nonprofit organization that does not compete with other organizations in administering its function for the city. There are, as in *Brentwood Academy*, no market pressures that could ensure Defendant Walsh would not exercise its authority in a timid manner. McKamey is similar to the entity in *Bartell* and in *Brentwood Academy*, "serving as an adjunct to government in an essential governmental activity," and doing so without a profit-seeking motive or private market competition.

The court in *Kauffman* explicitly found a defendant must establish a historical tradition of immunity. The

Sixth Circuit, however, has concluded it is "unreasonable" to consider whether a historical tradition of immunity exists where a type of organization is relatively new, and litigation involving that type of organization is rare. *See Brentwood Academy*, 442 F.3d at 438-39; *but see McCullum v. Tepe*, 693 F.3d 696, 700 n.7 (6th Cir. 2012) (concluding *Richardson* allows the application of qualified immunity without a history of immunity at common law but noting the Supreme Court's jurisprudence on the issue "may be questionable"). It would be "unreasonable" to require historical evidence of immunity here, because humane societies performing the function of issuing pet dealer permits is, as far as the Court is concerned, a rare and recent development with little litigation.[6] Accordingly, the Court disagrees with the conclusion in *Kauffman*, and concludes qualified immunity is applicable in this case. *See also Fabrikant v. French*, 691 F.3d 193, 212 (2d Cir. 2012) (holding animal control organization defendants were entitled to qualified immunity without discussion of whether immunity was appropriate).

"Once the issue of qualified immunity is properly injected in the case either by a motion to dismiss, an affirmative defense or a motion for summary judgment, the plaintiff is obliged to present facts which if true would constitute a violation of clearly established law."

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6. In *Kauffman*, the issue was Fourth Amendment violations on the part of the humane society's employees. Section 5511(i) of Title 18 of the Pennsylvania Code authorizes "An agent of any society or association for the prevention of cruelty to animals . . . to initiate criminal proceedings provided for police officers by the Pennsylvania Rules of Criminal Procedure."

Dominique v. Telb, 831 F.2d 673, 677 (6th Cir. 1987) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)). There are two parts to the qualified immunity analysis: (1) whether, viewing the facts in the light most favorable to the plaintiff, there was a violation of the plaintiff's constitutional right(s), and (2) whether the right was clearly established to a reasonable person, such that its violation would be objectively unreasonable. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001); *Silberstein v. City of Dayton*, 440 F.3d 306, 311 (6th Cir. 2006). If either of the prongs is answered in the negative, the individual officer is entitled to qualified immunity. *See Saucier*, 533 U.S. at 201.

The Court has already concluded Plaintiff pleaded constitutional violations. The question for the Court is whether the rights were clearly established to a reasonable person. The Court concludes they were, and denies qualified immunity. With respect to the procedural due process violations, the Court concludes Plaintiff's entitlement to the permit was clearly established. *See Martin*, 78 S.W.3d at 263-64. It is also "well established that possessory interests in property invoke procedural due process protections." *Thomas v. Cohen*, 304 F.3d 563, 576 (6th Cir. 2002). Moreover, the general requirement of a pre-deprivation hearing is clearly established. *See Warren*, 411 F.3d at 709. Although Defendants argue they are entitled to rely on a presumptively constitutional city code, the Court has already concluded the provisions of the City Code itself do not contain procedures. Defendants were conferred authority under the City Code, but they were not relying on any presumptively constitutional

procedures. To the extent uncertainty exists regarding procedures required to comport with the Constitution, the Court notes facts were alleged in the complaint to suggest any violations identified by Defendants on Plaintiff's premises were either exaggerated or wholly contrived. Such misrepresentation precludes a finding of qualified immunity. *See Siebert*, 256 F.3d at 658-59.

The same must be said for the Fourth Amendment violations alleged. The right to be free from unreasonable searches and seizures is clearly established. *See Ruby v. Horner*, 39 F. App'x 284, 286 (6th Cir. 2002). The Fourth Amendment's applicability to commercial premises was also clearly established at the time of the conduct at issue. *See Burger*, 482 U.S. at 699. As noted above, the facts as alleged by Plaintiff support a finding Defendants entered the premises without a warrant or consent and unreasonably seized Plaintiff's animals and business records. Defendants then claimed numerous violations of the City Code, which the complaint suggests were nonexistent. This misrepresentation again precludes a finding of qualified immunity. *See Siebert*, 256 F.3d at 658-59. This claim is corroborated by allegations in the complaint McKamey sought a boycott against Plaintiff on its website in an effort to close the store. Administrative searches cannot be used as fishing expeditions for violations. *See Ruttenberg v. Jones*, 283 F. App'x 121, 133 (4th Cir. 2008) ("Our sister circuits have held that an administrative search should be considered a pretext, and thus deemed impermissible, if the inspection was performed solely to gather evidence of criminal activity.") (internal quotations omitted). The facts alleged in the

complaint preclude the Court from granting qualified immunity for Defendants.

b. Official Capacity and Organizational Liability

When a party brings a suit for damages against an officer in his official capacity, it is construed as a suit against entity for which he works. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989); *Matthews v. Jones*, 35 F.3d 1046, 1049 (6th Cir. 1994). Plaintiff's claim against Defendants in their official capacities must therefore be construed as claims against Defendant McKamey, who Plaintiff also listed separately as a defendant.

Section 1983 does not support a theory of *respondeat superior* liability. *Spears v. Ruth*, 589 F.3d 249, 256 n.6 (6th Cir. 2009) (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)); *see also Street v. Corrections Corp. of America*, 102 F.3d 810, 818 (6th Cir. 1996) ("'Monell involved a municipal corporation, but every circuit to consider the issue has extended the holding to private corporations as well.'") (quoting *Harvey v. Harvey*, 949 F.2d 1127, 1129-30 (11th Cir. 1992)). Rather, liability must be based on "a policy or custom" of McKamey's that "was the moving force behind the deprivation of [P]laintiff's rights." *Savoie v. Martin*, 673 F.3d 488, 494 (6th Cir. 2012). A § 1983 plaintiff can draw from one of four sources to establish liability for an illegal custom or policy: "(1) . . . official agency policies; (2) actions taken by officials with final decision-

making authority; (3) a policy of inadequate training or supervision; or (4) a custom of tolerance or acquiescence of federal rights violations." *Thomas v. City of Chattanooga*, 398 F.3d 426, 429 (6th Cir. 2005)).

Plaintiff pleaded facts supporting a finding of unconstitutional actions taken by Defendant Walsh, who was the official with final decision-making authority in McKamey. Moreover, Defendant Walsh acted pursuant to McKamey's policy with respect to the revocation of Plaintiff's permit. The allegations in the complaint suggest the individual defendants acting in their official capacity were acting pursuant to McKamey policy, and liability may therefore be imputed to McKamey as well.

However, although it is an entity, McKamey can also assert the defense of qualified immunity. *See Bartell*, 215 F.3d at 556-57 (applying qualified immunity to foster care organization); *see also Rosewood Services, Inc. v. Sunflower Diversified Services, Inc.*, 413 F.3d 1163, 1166 (10th Cir. 2005) ("We therefore hold that there is no bar against a private corporation claiming qualified immunity."); *Barbara v. New York Stock Exchange, Inc.*, 99 F.3d 49, 58 (2d Cir. 1996) (holding New York Stock Exchange absolutely immune from suit); *but see Smith v. Levine Leichtman Capital Partners, Inc.*, 723 F.Supp.2d 1205, 1213 (E.D. Cal. 2010) ("[T]he Ninth Circuit has clearly held that qualified immunity is not available to private entities."). For the reasons the Court concluded qualified immunity was inappropriate for the individual defendants, it also concludes qualified immunity is inappropriate for McKamey.

B. State Claims

Plaintiff also asserts violations of the Tennessee Constitution and four other state law claims: abuse of process, conversion, tortious interference with a business relationship, and tortious interference with a contract. The Court will consider each in turn.

1. Tennessee Constitution

In counts one through three, which allege violations of Plaintiff's procedural due process rights and right to be free from unreasonable searches and seizures, Plaintiff lists general violations of the Tennessee Constitution in addition to the violations of the United States Constitution discussed above. However, "unlike Section 1983 which provides for a private right of action for violations of the United States Constitution, Tennessee 'has not recognized any such implied cause of action for damages based upon violations of the Tennessee Constitution.'" *Arbuckle v. City of Chattanooga*, 696 F. Supp. 2d 907, 931-32 (E.D. Tenn. 2010) (quoting *Bowden Bldg. Corp. v. Tennessee Real Estate Comm'n*, 15 S.W.3d 434, 446 (Tenn. Ct. App. 1999)) (citing *Lee v. Ladd*, 834 S.W.2d 323, 325 (Tenn. Ct. App. 1992); *Cline v. Rogers*, 87 F.3d 176, 179-80 (6th Cir. 1996)). Accordingly, Defendant's motion is **GRANTED** as to Plaintiff's claims under the Tennessee Constitution.

2. Abuse of Process

Plaintiff claims Defendant McKamey committed the tort of abuse of process because it prosecuted the charges

against Plaintiff with the ulterior motive of damaging and destroying Plaintiff's business and to extract the payment of money and surrender of property from Plaintiff. "To establish an abuse of process claim, a plaintiff must show '(1) the existence of an ulterior motive; and (2) an act in the use of process other than such as would be proper in the regular prosecution of the charge.'" *In re McKenzie*, 476 B.R. 515, 534-35 (E.D. Tenn. 2012) (quoting *Priest v. Union Agency*, 174 Tenn. 304, 125 S.W.2d 142, 143 (1939)). In Tennessee, "[m]ere initation" of a suit is not sufficient; "abuse of process lies 'for the improper use of process after it has been issued, not for maliciously causing process to issue.'" *Bell* ex rel. *Snyder v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A.*, 986 S.W.2d 550, 555 (Tenn.1999) (quoting *Priest*, 125 S.W.2d at 143). This is the key distinction between abuse of process and malicious prosecution: The former occurs after process has been initiated whereas the latter is the actual wrongful initiation of process. *See In re McKenzie*, 476 B.R. at 534-35. The process itself must be perverted to successfully make an abuse of process claim. "The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club." *Bell*, 986 S.W.2d at 555 (internal quotations omitted).

Here, Plaintiff has pleaded an abuse of process claim. As an initial matter, the complaint alleges the charges in City Court were prosecuted by a member of McKamey's Board of Directors, rather than the City Attorney as is

normal procedure. As to the first element, Plaintiff alleges McKamey sought "to unlawfully extract the payment of money and surrender of property from" it. According to the complaint, Defendant McKamey sought the boycott of Plaintiff's store the day after it confiscated Plaintiff's property and revoked its permit. After a City Court ordered McKamey to reinspect the premises and return Plaintiff's animals, McKamey created a new portion of its website for concerned citizens to inform the Chattanooga City Council of their thoughts and concerns. These facts suggest an ulterior motive of preventing Plaintiff from conducting its business, rather than merely ensuring enforcement of the City Code.

With respect to the second element, the question is not whether McKamey initiated the City Court proceedings for a bad purpose, but whether it improperly used the process afforded to it after the proceedings were initiated "to obtain a result it was not intended to effect." *Donaldson v. Donaldson*, 557 S.W.2d 60, 62 (Tenn. 1977). The complaint alleges no significant violations of the City Code or state law occurred when McKamey instituted proceedings against Plaintiff. Further, in response to the City Court's unfavorable ruling, McKamey ignored the City Court's order and the City claimed it was without authority to order the return of Plaintiff's permit. After the City Court declared a mistrial, the City and McKamey claimed it would prosecute Plaintiff from "ground zero" and McKamey retained possession of a number of Plaintiff's animals pending the new proceeding in contravention of the Court's order. In connection with these actions, the Mayor sought to influence the proceedings in an

ex parte communication. These allegations, in the light most favorable to Plaintiff, support a finding McKamey improperly used the City Court proceedings as a means of permanently confiscating Plaintiff's animals and seeking the permanent closing of Plaintiff's store. *See McCollum v. Huffstutter*, No. M2002-000510COA-R3-CV, 2002 Tenn. App. LEXIS 711, 2002 WL 31247077, at *7 (Tenn. Ct. App. Oct. 8, 2002) (holding jury could have found abuse of process where evidence suggested an attorney only obtained an arrest warrant against the plaintiff in an attempt to force him to turnover property). The City Court proceedings, on the other hand, are available to determine whether violations of the City Code occurred. Given the above allegations, Plaintiff has pleaded a claim of abuse of process.

The Court therefore **DENIES** Defendants' motion on count four of the complaint.

3. Conversion

Plaintiff alleges conversion against Defendants McKamey, Walsh, Nicholson, and Hurn. In Tennessee, "'a party seeking to make out a prima facie case of conversion must prove (1) the appropriation of another's property to one's own use and benefit, (2) by the intentional exercise of dominion over it, (3) in defiance of the true owner's rights.'" *Thompson v. Thompson*, No. W2008-00489-COA-R3-CV, 2009 Tenn. App. LEXIS 99, 2009 WL 637289, at *14 (Tenn. Ct. App. Mar. 12, 2009) (quoting *H & M Enters., Inc. v. Murray*, No. M1999-02073-COA-R3-CV, 2002 Tenn. App. LEXIS 261, 2002 WL 598556, at *3 (Tenn. Ct. App. Apr.

17, 2002)). Additionally, "the defendant must intend to convert the plaintiff's property." *Id.* However, "[i]n order to be liable for conversion, a defendant 'need only have an intent to exercise dominion and control over the property that is in fact inconsistent with the plaintiff's rights, and do so; good faith is generally immaterial.'" *May v. Scott*, 388 F. Supp. 2d 828, 838 (W.D. Tenn. 2005) (quoting *Mammoth Cave Prod. Credit Ass'n v. Oldham*, 569 S.W.2d 833, 836 (Tenn. Ct. App. 1977)).

Here, Plaintiff has alleged sufficient facts to support a conversion claim. Plaintiff alleges Defendants appropriated Plaintiff's property and exercised dominion over it in defiance of Plaintiff's rights. The Court has already concluded Plaintiff alleged facts sufficient to establish a violation of its rights. However, Defendants argue there is insufficient factual allegations in the complaint to suggest Defendants appropriated the property for their own use and benefit. Plaintiff alleges McKamey had a pecuniary interest in taking and keeping Plaintiff's puppies because they would receive increased donations, increased adoption fees, increased "live release rates," inflated claims for "boarding and care" of Plaintiff's animals, and increased grants. Defendant argues this allegation "stands alone" and is insufficient to satisfy the "use and benefit" requirement. However, Defendant offers no explanation for why this allegation would be insufficient. The Court therefore concludes Plaintiff has alleged sufficient facts to establish conversion on the part of McKamey.

However, Plaintiff did not allege facts on which the Court could conclude the individual Defendants Walsh, Nicholson, and Hurn appropriated the property to their individual use and benefit. *See Ibarra v. Barrett*, No. 3:05-0971, 2007 U.S. Dist. LEXIS 29143, 2007 WL 1191003, at *17 (M.D. Tenn. Apr. 19, 2007) (". . . [T]he plaintiff has failed to lay out the claim's basic elements with respect to both the County and Deputy Barrett. In particular, the plaintiff has not indicated any way in which either defendant appropriated the plaintiff's money to that defendant's own use and benefit."); *Ivey v. Hamlin*, No. M2001-01310-COA-R3-CV, 2002 Tenn. App. LEXIS 404, 2002 WL 1254444, at *4 (Tenn. Ct. App. June 7, 2002) (". . . [C]onversion is not implicated in this case and we need not further notice it other than to observe that an element of conversion requires proof Deputy Hamlin appropriated the dog to his own use. There is not proof in the record that Deputy Hamlin appropriated the dog to his own use.") (citation omitted).

Accordingly, the Court **DENIES IN PART** and **GRANTS IN PART** Defendants' motion on count five of the complaint. Specifically, the Court denies the motion as to Defendant McKamey, but grants the motion as to Defendants Walsh, Nicholson, and Hurn.

4. Tortious Interference with a Business Relationship

Plaintiff claims Defendants McKamey, Walsh, and Nicholson committed tortious interference with a business relationship. In Tennessee, the tort of

intentional interference with a business relationship will lie only if the plaintiff can show "(1) an existing business relationship with specific third parties or a prospective relationship with an identifiable class of third persons; (2) the defendant's knowledge of that relationship and not a mere awareness of the plaintiff's business dealings with others in general; (3) the defendant's intent to cause the breach or termination of the business relationship; (4) the defendant's improper motive or improper means, and finally, (5) damages resulting from the tortious interference." *Trau-Med of America, Inc. v. Allstate Ins. Co.*, 71 S.W.3d 691, 701 (Tenn. 2002). (citation and emphasis omitted).

The Court concludes Plaintiff has failed to establish this claim. Plaintiff claims Defendants were aware of its relationship with its landlord, Lebcon Associates, LP, and intended "to cause a disruption, breach, or termination of the relationship." However, the only factual allegations in the complaint suggest Defendant Nicholson met with Plaintiff's landlord on multiple occasions and discussed Plaintiff's business without Plaintiff's knowledge. Plaintiff also alleges it believes its landlord had prior notice of the search and seizure. Defendants addressed a petition to Plaintiff's landlord threatening a boycott of the mall until Plaintiff closed. Notably, although Plaintiff argues it "sustained damages" as a result of the alleged interference, no factual allegations support this contention.[7] Indeed,

7. Plaintiff filed a motion to amend its complaint with a proposed added allegation claiming Plaintiff's landlord facilitated the search of its premises. Accordingly, Plaintiff would claim its lease was breached. However, although the motion was granted,

according to the complaint, Plaintiff resumed its business operations at the mall following return of its permit. *See Golf Science Consultants, Inc. v. Cheng*, No. 3:07-CV-152, 2009 U.S. Dist. LEXIS 37721, 2009 WL 1256664, at *11 (E.D. Tenn. May 4, 2009) ("The Restatement provides that there is liability only when interference consists of 'inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation.'") (quoting Restatement (Second) of Torts § 766B). Because Plaintiff has failed to allege facts supporting its claim of damages from interference with it business relationship, the Court **GRANTS** Defendants' motion on count six.

5. Tortious Interference with a Contract

Finally, Plaintiff alleges Defendants McKamey, Walsh, and Nicholson committed the tort of tortious interference with a contract. Section 47-50-109 of the Tennessee Code, which codifies the common law procurement of breach of contract claim, requires a plaintiff prove the following elements: "1) there must be a legal contract; 2) the wrongdoer must have knowledge of the existence of the contract; 3) there must be an intention to induce its breach; 4) the wrongdoer must have acted maliciously; 5) there must be a breach of the contract; 6) the act complained of must be the proximate cause of the breach of the contract; and, 7) there must have been damages resulting from the

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Plaintiff was instructed to file its amended complaint within fourteen days of the order granting its motion. No amended complaint was ever filed.

breach of the contract." *Myers v. Pickering Firm, Inc.*, 959 S.W.2d 152, 158 (Tenn. Ct. App. 1997).

The Court concludes Plaintiff fails to establish a claim for tortious interference with a contract. Although Plaintiff claims Defendants "induced and procured the breach, violation, refusal and/or failure to perform the contract" by its landlord, no allegation in the complaint suggests the lease was in fact breached.[8] Again, the Court notes the complaint states Plaintiff resumed operations after its permit was reinstated. Moreover, were prior notice of the search and seizure sufficient to allege a breach, the Court could not conclude any damages suffered by Plaintiff resulted from the landlord's breach. The damages suffered, which include the months Plaintiff could not operate its business and the loss in value of its property, were caused by the revocation of its permit and confiscation of its animals, not by any breach of contract. The Court will therefore **GRANT** Defendants' motion on count seven.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS IN PART** and **DENIES IN PART** Defendants' motion or judgment on the pleadings (Court File No. 37). Specifically, the Court denies Defendants' motion with respect Fourth Amendment and abuse of process claims. The Court grants in part and denies in part Defendant's motion as

8. The Court again notes Plaintiff's failure to file its amended complaint.

to Plaintiff's procedural due process claim. The Court grants in part and denies in part Defendants' motion with respect to Plaintiff's conversion claim. The Court also grants Defendants' motion with respect to Plaintiff's Tennessee Constitution claims, tortious interference with a business relationship claim, and tortious interference with a contract claim. Those claims on which the Court has granted Defendant's motion are **DISMISSED WITH PREJUDICE.**

An order shall enter.

/s/
CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF TENNESSEE AT CHATTANOOGA, FILED FEBRUARY 5, 2013

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

1:11-CV-157; 1:11-CV-193

UNITED PET SUPPLY, INC.,

Plaintiff,

v.

CITY OF CHATTANOOGA, *et al.*,

Defendants.

Collier/Lee

O R D E R

Before the Court is Defendants Animal Care Trust's, Karen Walsh's, Marvin Nicholson, Jr.'s, and Paula Hurn's ("Defendants") motion for judgment on the pleadings (Court File No. 37).[1] Plaintiff United Pet Supply, Inc. ("Plaintiff") responded to the motion (Court Files No. 40), and Defendants replied (Court Files No. 46). For the

1. Defendant City of Chattanooga did not take part in the motion for judgment on the pleadings. All court file numbers listed refer to the court files of Case 1:11-CV-157.

reasons discussed in the accompanying memorandum, the Court **GRANTS IN PART** and **DENIES IN PART** Defendants' motion for judgment on the pleadings (Court File No. 37). Specifically, the Court denies Defendants' motion with respect Fourth Amendment and abuse of process claims. The Court grants in part and denies in part Defendants' motion as to Plaintiff's procedural due process claim. The Court grants in part and denies in part Defendants' motion with respect to Plaintiff's conversion claim. The Court also grants Defendants' motion with respect to Plaintiff's Tennessee Constitution claims, tortious interference with a business relationship claim, and tortious interference with a contract claim. Those claims on which the Court has granted Defendants' motion are **DISMISSED WITH PREJUDICE**.

SO ORDERED.

ENTER:

/s/
CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

APPENDIX D — MEMORANDUM OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF TENNESSEE AT CHATTANOOGA, FILED FEBRUARY 6, 2013

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

1:11-CV-157; 1:11-CV-193

UNITED PET SUPPLY, INC.,

Plaintiff,

v.

CITY OF CHATTANOOGA, *et al.*,

Defendants.

February 6, 2013, Filed

Collier/Lee

MEMORANDUM

Before the Court are cross motions for summary judgment filed by Defendants City of Chattanooga ("City") (Court File No. 62, 79), Animal Care Trust, also called McKamey Animal Care and Adoption Center ("McKamey") (Court File No. 70), Karen Walsh ("Walsh") (Court File No. 72), Marvin Nicholson, Jr. ("Nicholson")

(Court File No. 65, 75), and Paula Hurn ("Hurn") (Court File No. 67) (collectively, "Defendants"), and Plaintiff United Pet Supply, Inc. ("Plaintiff") (Court File Nos. 69, 82).[1] For the following reasons, the Court will **DENY IN PART** and will **GRANT IN PART** Defendants' motions for summary judgment (Court File No. 62, 65, 67, 70, 72, 75, 79) and will **DENY IN PART** and will **GRANT IN PART** Plaintiff's partial motion for summary judgment (Court File Nos. 69, 82).

I. FACTS

Plaintiff operated a pet store in Hamilton Place Mall in Chattanooga, Tennessee (Court File No. 1, ¶ 7). Plaintiff was licensed to operate a pet store by the state. Defendant McKamey is a Tennessee corporation with which the City contracts for animal control services. As a result of changes to the Chattanooga City Code ("City Code") in 2010, the City delegated enforcement of provisions of the City Code pertaining to animals to McKamey, including the issuance of permits for businesses engaged in dealing in the sale of pets or animals. Defendants Walsh, Hurn, and Nicholson are all employees of McKamey, serving as Executive Director, Director of Operations, and Animal Service Officer, respectively.

In March and April 2010, pursuant to McKamey's authority under the City Code, Defendants Walsh and Nicholson began appearing at the pet store operated by Plaintiff. Over a two month period, Defendants arrived

1. Court File numbers refer to the docket of 1:11-CV-157.

during business hours several times. On a number of these visits, Defendants spoke to Plaintiff's landlord to discuss issues with Plaintiff's business. On May 11, McKamey issued a permit to Plaintiff, signed by Defendant Walsh, stating Plaintiff was approved as a pet dealer in Chattanooga. McKamey had received a number of complaints regarding Plaintiff's store, and had visited the store on multiple occasions between January 20, 2010 and April 28, 2010. During these visits, McKamey representatives discussed the provisions of the City Code with employees and suggested changes, such as instituting an exercise plan for Plaintiff's puppies. However, on June 15, 2010, Defendants Walsh, Nicholson, and State Inspector Joe Carroll Burns arrived at Plaintiff's pet shop around 8:10 a.m., before business hours, and confiscated animals, business records, certain other property, and Plaintiff's city permit. This event was precipitated by statements made to Defendant Walsh by Ashley Knight, a former employee of the pet shop, one week earlier. The employee informed her a dog had died at Plaintiff's store without veterinary care and had been placed in a freezer. Knight also stated Brandy Hallman, the store's manager, placed an injured but live hamster in an outside garbage compacter. Defendant Hurn would arrive around 10:00 a.m. At 10:35, Sergeant Roger Gibbens of the Chattanooga Police Department responded to a call to assist Defendants and "stand by" while the animals were confiscated. Gibbens states he did not participate in the actual removal, but was merely there in support.

When Defendants and others arrived on June 15, they discussed the complaint with Hallman and requested

review of the dog's records. Hallman let Defendants in the store. Hallman later informed Plaintiffs' district manager, Patti Vacca, about Defendants' presence. When they arrived they saw soiled kennels, unreplenished water receptacles, and other signs of neglect. Of particular concern to Defendants was the temperature of the store. Hallman informed them the air conditioning had not been functioning properly for a number of weeks. Burns then asked to inspect an isolation room, and Hallman led Defendants to the area where the animals slept. Walsh and Nicholson described further unsanitary conditions including sick puppies and dogs with dried feces and urine on their bodies.

However, every morning Plaintiff's employees undertook a three-hour cleaning procedure, which normally began at 7:00 a.m. and ended at 10:00 a.m. Due to the hour Defendants arrived at the pet shop, Plaintiff claims much of the cleaning had not yet occurred. After Defendant Hurn arrived she began videotaping the conditions of the premises. While Defendants were preparing citations, Walsh spoke with Plaintiff's Vice President, Christopher Brooks, who informed her he was going to seek a temporary restraining order against McKamey.

Defendants confiscated Plaintiff's animals, including thirty-two puppies, six rabbits, one ferret, one guinea pig, and forty-two hamsters or mice. Defendants then confiscated business records and Plaintiff's physical copy of its city permit. Defendant Walsh informed Plaintiffs they could not sell pets until their hearing on June 24,

2010. While this process was ongoing, Plaintiff sought temporary injunctive relief in Hamilton County Circuit Court. Plaintiff's motion was denied by the Circuit Court.

McKamey issued forty-three citations alleging ninety violations of the City Code. The facts supporting the violations were alleged as follows.

1. Air conditioning not working 3 weeks or more

2. No report to operations manager of mall

3. Isolation room at 85+ at 7 AM east

4. Hamsters and gerbils given dirty water in open bowls capable of drowning them

5. Cages cleaned with "Fabuloso," Mr. Clean or Lysol

6. Water bottles leaking until empty

7. Empty water bottles in isolation

8. Hamster was attacked "several days ago" no vet treatment provided

9. No water in any hamster cages in ISO ["isolation room"]

10. Cages broken undisinfectable

11. Cage bottoms/grates broken can trap feet

12. Dog died 4 days after health check, no record as to vet check.

13. Food for human consumption stored with vax

14. Cleaning containers not labeled

15. Training manager no knowledge of procedures.

(Court File No. 1, ¶ 65). State Inspector Burns issued a written warning to Plaintiffs to repair one of the compressors in its air conditioning system. The citation also listed dirty or empty water bowls, isolation for sick puppies at over 80 degrees, open food container, hamsters and gerbils water container was dirty, and the cages were cleaned with bleach rather than disinfectant. Charles Hatcher, State Veterinarian, also issued a notice of intent to suspend Plaintiff's state license based on the inspection. The state, however, never revoked Plaintiff's state permit. The day following the raid, McKamey's website linked to an online petition to close the pet shop in Chattanooga. The petition called for a boycott of the Hamilton Place Mall until Plaintiff's pet shop was closed.

When McKamey took possession of the pet shop's puppies, they were all considered "bright, alert, and responsive" by McKamey, except for one German Shepherd puppy that was being treated by the pet shop's veterinarian. McKamey did not seek immediate care for the German Shepherd puppy. McKamey began seeking

homes for the puppies. In September, the German Shepherd puppy died.

On June 24, 2010, nine days after Plaintiff's property was confiscated, the Chattanooga City Court held a hearing regarding the charges against Plaintiff. McKamey sought permanent custody of the animals confiscated during the raid. On June 30, the City Court ruled some of the conditions listed by Defendant Walsh could be remedied, McKamey would inspect the pet shop before allowing Plaintiffs to return the animals to the premises, and Plaintiffs were to receive all animals not diagnosed with disease or illness. The City Court listed requirements in the Code of Federal Regulations requiring minimum standards in treatment of animals, and the corollative state procedures. The City Court noted the store was in poor condition and detailed a number of the issues that caused it concern. It concluded, however, the violations could be remedied. The City Court then continued the case for two weeks to allow the issues to be remedied and reinspected before animals were brought back. The City Court also ordered healthy animals returned to Plaintiff to be taken to a different store where no violations exist, but they were not to be taken back to the store until the violations were addressed. The City Court reserved the issue of both the administrative costs due to McKamey for looking after the animals and the costs imposed due to the violations.

McKamey, however, did not return the animals. The Mayor of Chattanooga also sent a letter to the City Court, explaining he did not want McKamey to go uncompensated

for its expenses, McKamey should be able to maintain custody of the animals until they are repaid, and he did not trust Plaintiff:

> I really need to talk with you about this situation. We must not leave the McKamey Center holding the bag for all these expenses associated with the Pet Company's unacceptable conditions. I want McKamey to hold the animals until the bills are paid and I want the company to confirm with their own veterinarians that any animals that they reclaim are accepted as healthy. I do not trust this company.

(Court File No. 82-1, p. 28). McKamey then inspected the store again and failed it for new violations of the City Code.

After a brief continuance, the City Court declined to withdraw Plaintiff's permit, and deferred to the state with respect to its state license. Plaintiff's state license was subsequently renewed. The City sought repayment from Plaintiffs for some of its expenses incurred while caring for Plaintiff's confiscated animals. The City Court maintained McKamey must return the permit without a reapplication process, because McKamey did not have the authority to revoke the permit without a hearing, and that it would issue a ruling on the City's expenses (Court File No. 69-9). The Mayor later disseminated an open letter to the City Court critical of its ruling:

> In response to inquiries by a number of concerned citizens, I must say that I am totally

frustrated by the slow, soft and reluctant pace of justice in the case of The Pet Company.

Transcribed testimony from the original hearing has clearly established that the conditions existing at the Pet Company were hot, dirty and generally disgusting on June 15, 2010 - the date that animals were seized and removed from the premises. The Court has received evidence that the air conditioning in the store had been malfunctioning for three weeks, cages were in poor condition with cracks in the grates or trays that would allow urine or feces to flow down onto animals below and sick animals were not properly isolated or cared for. Specifically, the court records that "A German Shepherd was in isolation with no water" and that several of the animals tested positive for giardia -- a serious and contagious parasitic infection.

There are other charges involving violations such as outdated and mishandled medications, poorly trained staff, nonexistent training manuals and a general absence of management and care. The evidence supporting the 90 violations is compelling and recorded in graphic detail, yet there seems to be an air of acceptance and willingness to be intimidated by the company's lawyers. I understand that the court must be careful not to discourage private enterprise or drive a company out of

business. Employees who are attempting to protect helpless animals who have clearly been mistreated by a business in this city cannot be so timid. Where public health and the welfare of citizens and animals is involved, I must maintain that we should do the right thing in spite of corporate bullying tactics.

Setting aside all the legal rhetoric and arguments about the exact wording of the definition of what constitutes "cruelty" and "neglect," one fact is glaringly obvious: The Pet Company was marketing sick and dying animals at their poorly maintained store in Hamilton Place with inadequate concern that they were spreading disease and disappointment among the citizens of Chattanooga.

The McKamey Center is the City's animal enforcement division. And is therefore, fully responsible for ensuring that the city codes for animal safety and welfare are adhered to by citizens, as well as corporations.

If not for intervention by staff of The McKamey Center, the practice doubtlessly would have continued. Does anyone believe that the actions removing animals from the documented conditions by McKamey and the State of Tennessee (blessed by a local court) were excessive? Why then does it appear that McKamey is on the defensive and the company

> that permitted the conditions that led to the corrective action is being granted what can only be characterized as amazing grace and remarkable legal latitude?
>
> With all of this said, I must also note that the company is trying to avoid the cost of mishandling their responsibilities. Trying to paint themselves as the victim, the company is attempting to leave McKamey and the citizens of Chattanooga holding the bag for the $40,000 bill for housing and veterinary care for these mistreated animals.
>
> Any person who has ever loved an animal or had a child experience the death of a family pet or anyone who simply pays taxes and expects government to act when action is called for should not accept such calloused behavior from a private enterprise as "business as usual." Our responsibility is to protect our citizens and where the health and welfare of our citizens is in conflict with the profit motives of a New Jersey corporation, I stand with our families.

(Court File No. 82-1, 29-30). The City Court then declared a mistrial due to the Mayor's actions.

After a different judge was assigned to the case in City Court, briefing was sought on the issue of whether the revocation of Plaintiff's permit was unlawful. The City Court later dismissed the case on double jeopardy grounds

and stated the City Court was without authority to make an order regarding Plaintiff's permit (Court File No. 69-12). After multiple demands for its license and animals, the City returned the permit to Plaintiff and Plaintiff reopened its shop. A concurrent proceeding was filed in Hamilton County Circuit Court by Plaintiff seeking a return of the animals still in McKamey's possession. On September 29, 2010, the Circuit Court ordered Plaintiff's animals returned. McKamey subsequently returned the animals still in its possession. Plaintiff's dogs were no longer puppies and were adopted by families without charge.

Plaintiff sought redress in this court and in Hamilton County Circuit Court. Once the latter case was removed, the cases were consolidated. After the instant motion was filed, the City amended the relevant portion of the City Code, essentially removing the permit provisions delegating the task to McKamey altogether and establishing an "Animal Control Board" to determine whether the City should require permits and, if so, what type of permits to require. Chattanooga City Ordinance 12653 (Oct. 2, 2012). References to the City Code refer to the Code as it existed when the alleged violations occurred.

II. STANDARD OF REVIEW

Summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the burden of demonstrating no genuine issue of material fact

exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Leary v. Daeschner*, 349 F.3d 888, 897 (6th Cir. 2003). The Court should view the evidence, including all reasonable inferences, in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); *Nat'l Satellite Sports, Inc. v. Eliadis Inc.*, 253 F.3d 900, 907 (6th Cir. 2001).

To survive a motion for summary judgment, "the non-moving party must go beyond the pleadings and come forward with specific facts to demonstrate that there is a genuine issue for trial." *Chao v. Hall Holding Co., Inc.*, 285 F.3d 415, 424 (6th Cir. 2002). Indeed, a "[plaintiff] is not entitled to a trial on the basis of mere allegations." *Smith v. City of Chattanooga*, No. 1:08-cv-63, 2009 U.S. Dist. LEXIS 103158, 2009 WL 3762961, at *2-3 (E.D. Tenn. Nov. 4, 2009) (explaining the Court must determine whether "the record contains sufficient facts and admissible evidence from which a rational jury could reasonably find in favor of [the] plaintiff"). In addition, should the non-moving party fail to provide evidence to support an essential element of its case, the movant can meet its burden of demonstrating no genuine issue of material fact exists by pointing out such failure to the court. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989).

At summary judgment, the Court's role is limited to determining whether the case contains sufficient evidence from which a jury could reasonably find for the

non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). If the Court concludes a fair-minded jury could not return a verdict in favor of the non-movant based on the record, the Court should grant summary judgment. *Id.* at 251-52; *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994).

III. ANALYSIS

Plaintiff states a 42 U.S.C. § 1983 claim against Defendants for violations of its procedural due process rights and Fourth Amendment rights. Plaintiff also makes state law claims against McKamey. The Court will address Plaintiff's claims in turn.[2]

A. Section 1983

To state a viable claim under 42 U.S.C. § 1983, a plaintiff must allege he was deprived of a right, privilege, or immunity secured by the Constitution or laws of the United States by a person acting under color of law, without due process of law. *Flagg Brothers Inc. v. Brooks*, 436 U.S. 149, 155, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (1978); *Chatman v. Slagle*, 107 F.3d 380, 384 (6th Cir. 1997); *Brock v. McWherter*, 94 F.3d 242, 244 (6th Cir. 1996); *O'Brien v. City of Grand Rapids*, 23 F.3d 990, 995 (6th Cir. 1994); *Rhodes v. McDannel*, 945 F.2d 117, 119 (6th Cir. 1991),

2. Plaintiff also lists Title VII of the Civil Rights Act of 1964 as a foundation for jurisdiction. However, Title VII is irrelevant to this case.

cert. denied, 502 U.S. 1032, 112 S. Ct. 872, 116 L. Ed. 2d 777 (1992). Although the Federal Rules of Civil Procedure do not require a plaintiff to set out in detail the facts underlying the claim, the plaintiff must provide sufficient allegations to give defendants fair notice of the claims against them. *Leatherman v. Tarrant County Narcotic Intelligence & Coordination Unit*, 507 U.S. 163, 168, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993). To state a § 1983 claim, Plaintiff must allege sufficient facts that, if true, would establish the defendants deprived him of a right secured by the Constitution of the United States while acting under color of law. *See Brock*, 94 F.3d at 244. The parties agree Defendants acted under color of state law. Plaintiff claims violations of its procedural due process and Fourth Amendment rights.

1. Procedural Due Process

In its order granting in part and denying in part co-defendants' motion for judgment on the pleadings, the Court found Plaintiff successfully pleaded a procedural due process claim with respect to its permit and the confiscation of its animals. Because no relevant factual dispute exists as to the revocation of Plaintiff's permit with respect to the facts discussed in the Court's prior order, the Court relies on those conclusions in this order, and concludes Plaintiff suffered a procedural due process violation when its permit was revoked without a pre-deprivation hearing. Summary judgment is therefore appropriate for Plaintiff on this claim.

Appendix D

With respect to Plaintiff's procedural due process claim in the confiscation of its animals the Court concludes significant factual disputes exist to render disposition on summary judgment inappropriate. As the Court noted in its prior order, were exigent circumstances regarding the health of the animals present, a pre-deprivation hearing may not be necessary to comport with procedural due process requirements. *See Siebert v. Severino*, 256 F.3d 648, 660 n.10 (7th Cir. 2001) (holding seizure of animals without a pre-deprivation hearing may be appropriate where exigent circumstances exist).

Here, the parties dispute the condition of the animals upon McKamey's arrival, as well as the condition of the premises. Plaintiff and Defendants disagree whether a violation of any applicable law ever occurred. Plaintiff stresses Defendants never recorded the temperature above 85 degrees for a four hour period, citing 9 C.F.R. § 3.2(a) which prohibits the temperature from exceeding 85 degrees for four consecutive hours.[3] However, Defendants stress Hurn recorded the temperature at or above 85 degrees for longer than that time, and did so outside the isolation room wherein many animals were housed. Testimony suggests the room was significantly hotter than the area outside the isolation room. Moreover,

3. Tennessee has incorporated 9 C.F.R. Part 3 by reference in its regulations regarding cat and dog dealers. TENN. COMP. R. & REG. 0080-2-15-.03. McKamey is empowered to enforce the City Code and Tennessee law. *See* City Code § 7-1(b)(1) ("McKamey Animal Center shall provide animal services for the City of Chattanooga. . . . [including] . . . the enforcement of animal-related codes as stated in the Tennessee code and City Code.").

Plaintiff claims the "unrebutted testimony" of Burns shows auxiliary ventilation was provided because he testified there was a fan that was turned on (Court File No. 90-2). However, Hurn testified she did not see or feel any fan or auxiliary ventilation in the isolation room (Court File No. 67-1, p. 3) (Court File No. 67-2, pp. 205-06, 236). This is corroborated by Walsh's affidavit (Court File No. 72-1, p. 6). Whether animals were kept in temperatures that violated the temperature requirements is in factual dispute.

More broadly, Plaintiff claims generally all the allegations of uncleanliness and unsanitary conditions were simply the result of timing; that is, because its employees had not been afforded the opportunity to finish their daily morning tasks, the store appeared far more unclean than it otherwise would. However, Defendants describe a terrible stench as well as urine and feces dripping from upper to lower cages, and fecal matter matted into the fur of puppies (Court File No. 72-5, p. 103); (Court File 72-6, pp. 2-3). When Defendants arrived, they discovered a dead hamster, which had apparently been dead for some time (Court File No. 67-1, p. 4). Additionally, whereas Plaintiff points to Hallman's testimony before the City Court to suggest water was provided to animals continuously (Court File No. 92-3, p. 3), Defendants provide testimony to suggest a number of the animals were without water all together. Whether these conditions are consistent with normal cleaning procedure is a question of fact not appropriate for disposition on summary judgment. The Court is not in a position to grant summary judgment for either party on this claim.

2. Fourth Amendment

In its order granting in part and denying in part co-defendants' motion for judgment on the pleadings, the Court concluded the City Code was facially valid with respect to its provisions on administrative searches of pet dealers as well as seizure of animals. The Court relies on those conclusions in this order as well. However, the Court also concluded Plaintiff stated claims for applied constitutional violations in the actual search and seizure of its premises. The Court will consider those challenges again.

a. Search

With respect to the constitutionality of the search, Defendants argue Hallman provided consent to search the premises. Pursuant to the statutory framework in the City Code, inspections of the premises of a pet dealer may be effected pursuant to consent of the occupant. City Code § 7-12 (empowering animal services officers to search a premises "but only if the consent of the occupant or owner of the property is freely given or a search warrant is obtained"). However, Plaintiff argues the statutory program is insufficient under the test outlined in *United States v. Burger*, 482 U.S. 691, 107 S. Ct. 2636, 96 L. Ed. 2d 601 (1987). As noted above, the Court has already concluded the statutory inspection program in this case passes constitutional muster. Plaintiff also argues consent is simply irrelevant to a warrantless administrative search, and cites *AL Post 763 v. Ohio Liquor Control Comm.*, 82 Ohio St. 3d 108, 1998 Ohio

367, 694 N.E.2d 905, 911 (Ohio 1998) for the proposition a "permit holder's consent . . . is unnecessary when an agent conducts a warrantless administrative search pursuant to a constitutionally acceptable statutory inspection program." However, the key distinction between this case and *AL Post* is the statutory inspection program in this case explicitly requires consent or a warrant, whereas in *AL Post* the program did not require either.

Under the Fourth Amendment, valid consent to search may be given by an employee to search his employer's premises. *See United States v. Ayoub*, 498 F.3d 532, 538-39 (6th Cir. 2007). Although the inquiry whether an employee has authority to consent is fact-specific, "[i]f the employee's job duties include the granting of access to the premises, authority to consent is more likely to be found." *United States v. Jones*, 335 F.3d 527, 531 (2003). Moreover, even if an employee lacks actual authority, the search will still pass constitutional scrutiny if he had apparent authority. Possession of keys to the establishment and authority to open the business to the public have been found sufficient to confer apparent authority to consent to a search even where officers were aware the employee was not the business owner. *See United States v. King*, 627 F.3d 641, 648 (7th Cir. 2010).

The government bears the burden of establishing consent was "freely and voluntarily given." *Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). Courts are to consider "the characteristics of the individual giving consent, such as 'age, intelligence, and education'; whether the questioner engaged in

'coercive or punishing conduct'; and the presence of 'more subtle forms of coercion that might flaw an individual's judgment.'" *Clemente v. Vaslo*, 679 F.3d 482, 489 (6th Cir. 2012). Hallman, the store manager who provided consent in this case, testified she "believed" Defendants asked to inspect the store, then stated "yes, sir [they did]," and after she opened the gate and let them in the store they informed her they were there to inspect a complaint (Court File No. 70-17, pp. 4-5). She stated she opened the gate because she recognized Nicholson and on past occasions had allowed him to inspect the store without objection. There is no evidence of coercion or threats. Indeed, Hallman appeared to "act[] voluntarily in a manner least likely to endanger [her] job." *Clemente*, 679 F.3d at 489. Plaintiff has offered no contradictory evidence to suggest the consent was anything less than voluntary. Indeed, Plaintiff apparently concedes consent was given, but argues consent is insufficient to render the search of its premises constitutional under the pervasively regulated business doctrine.

The Court disagrees, and concludes summary judgment is appropriate for Defendants on this issue.

b. Seizure

The Court, however, concludes substantial issues of fact remain regarding the seizure of Plaintiff's animals and business records. Defendants argue the seizure was reasonable under a number of doctrines. First, Defendants argue the seizure was appropriate under the totality of the circumstances. In considering a Fourth Amendment

seizure claim, the Court "must examine the facts and circumstances surrounding the [seizure of property]. Such an inquiry does not require a determination of whether there was in fact a need for the [defendants] to [seize the property]; instead we are required to determine whether the [defendants'] decision to [seize the property] was reasonable under the circumstances." *Lowery v. Faires*, 57 F. Supp. 2d 483, 495 (E.D. Tenn. 1998) (quoting *Collins v. Nagle*, 892 F.2d 489, 493 (6th Cir.1989)).

Second, Defendants argue seizure of the animals and business records was valid under the plain view doctrine. Four factors must be established to invoke the plain view doctrine: "(1) the object must be in plain view; (2) the officer must be legally present in the place from which the object can be plainly seen; (3) the object's incriminating nature must be immediately apparent; and (4) the officer must have a right of access to the object." *United States v. Garcia*, 496 F.3d 495, 508 (6th Cir. 2007). To determine if an object's incriminating nature is immediately apparent, the Court considers three additional factors: "(1) 'a nexus between the seized object and the items particularized in the search warrant'; (2) 'whether the 'intrinsic nature' or appearance of the seized object gives probable cause to believe that it is associated with criminal activity'; and (3) whether 'the executing officers can at the time of discovery of the object on the facts then available to them determine probable cause of the object's incriminating nature.'" *Id.* at 510 (quoting *United State v. McLevain*, 310 F.3d 434 (6th Cir. 2002)). However, "[i]n addition to the[ ] three factors [that must be proved to establish an objects incriminating nature is immediately apparent], we have specifically held

that an object's incriminating nature is not immediately apparent if it 'appears suspicious to an officer but further investigation is required to establish probable cause as to its association with criminal activity[.]'" *Id.*

Third, Defendants argue seizure of the animals was appropriate under the exigent circumstances exception to the warrant requirement. Courts find exigent circumstances "when the officers were in hot pursuit of a fleeing suspect; (2) when the suspect represented an immediate threat to the arresting officers and public; (3) when immediate police action was necessary to prevent the destruction of vital evidence or thwart the escape of known criminals." *Causey v. City of Bay City*, 442 F.3d 524, 529 (6th Cir. 2006) (quoting *Hancock v. Dodson*, 958 F.2d 1367, 1375 (6th Cir.1992)). Defendants cite *People v. Rogers*, 184 Misc. 2d 419, 708 N.Y.S.2d 795 (N.Y. App. Term 2000), which extends the exigent circumstances exception to protection of animals in danger.

However, the Court is unable to determine this question on summary judgment. As discussed above, significant factual disputes exist regarding the severity of the condition present in the store at the time of the inspection. All of Defendants' theories rely on the Court's crediting their version of the events; namely, the Court must assume the animals were in significant danger and accordingly seizure was justified under one of the above exceptions to the warrant requirement. Given the factual disputes detailed above, the Court is not in a position to make that determination on summary judgment. Moreover, with respect to Plaintiff's business records,

Defendants have offered no evidence the records were in plain view. In fact, employees of the pet store assisted Hurn in "cataloging" the animals and providing her with the animals' health records and impound information (Court File No. 70-1, pp. 3-4). The circumstances of this activity are unknown to the Court, and are certainly insufficient for the Court to grant summary judgment on the basis of the plain view doctrine.

The Court therefore **GRANTS IN PART** and **DENIES IN PART** summary judgment for Defendants and **DENIES** Plaintiff's motion for summary judgment on its Fourth Amendment claim. Specifically, the Court grants summary judgment for Defendants on Plaintiff's claim the search was unconstitutional, but denies the summary judgment on Plaintiff's claim the seizure of its animals and business records was unconstitutional.

3. Liability

a. Qualified Immunity

The Court previously denied qualified immunity for Defendants in its previous order disposing of their motion for judgment on the pleadings (Court File No. 144). The Court must again deny qualified immunity to Defendants. For the reasons stated in its previous order, the Court concludes the rights allegedly violated were clearly established to a reasonable individual.

Defendants Nicholson and Hurn raise an additional argument the Court must address. Defendants Nicholson

and Hurn argue they were acting under orders from their superior, Walsh, and "'[p]lausible instructions from a superior or fellow officer support qualified immunity where, viewed objectively in light of the surrounding circumstances, they could lead a reasonable officer to conclude that the necessary legal justification for his actions exists (*e.g.* a warrant, probable cause, exigent circumstances).'" *Anthony v. City of New York*, 339 F.3d 129, 138 (2d Cir. 2003) (quoting *Bilida v. McCleod*, 211 F.3d 166, 174-75 (1st Cir. 2000)). However, again the Court notes the dispute regarding the condition of the premises. Based on that dispute, the Court cannot conclude "in light of the surrounding circumstances" it would be reasonable for either Defendant to rely on Walsh's instruction to confiscate the animals.

Accordingly, the Court **DENIES** summary judgment for Defendants on this ground.

b. City's Liability and Defendants' Official Capacity

A municipality cannot be liable under a *respondeat superior* theory for § 1983 violations. *Spears v. Ruth*, 589 F.3d 249, 256 n.6 (6th Cir. 2009) (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)). Rather, municipalities are liable when they "have caused a constitutional tort through 'a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.'" *Cash*, 388 F.3d at 542 (quoting *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988)).

A § 1983 plaintiff can draw from one of four sources to establish a municipality's liability for an illegal custom or policy: "(1) the municipality's legislative enactments or official agency policies; (2) actions taken by officials with final decision-making authority; (3) a policy of inadequate training or supervision; or (4) a custom of tolerance or acquiescence of federal rights violations." *Spears*, 589 F.3d at 256 (quoting *Thomas v. City of Chattanooga*, 398 F.3d 426, 429 (6th Cir. 2005)). A plaintiff bears the burden of showing "that the unconstitutional policy or custom existed, that the policy or custom was connected to the [municipality], and that the policy or custom caused [the] constitutional violation." *Napier v. Madison Cnty.*, 238 F.3d 739, 743 (6th Cir. 2001).

The Court concludes a question of fact remains regarding liability of the City. Plaintiff argues, as it did in response to co-defendants' motion for judgment on the pleadings, that § 7-34(d) of the City Code is an official city "policy" that confers direct municipal liability. However, as the Court noted in its order granting co-defendants' motion for judgment on the pleadings, the City Code does not specify the procedures required to revoke a city permit. Indeed, Plaintiff emphasizes the lack of parameters in the City Code (*see* Court File No. 1, ¶¶ 25) ("The revised City Code stated that the City Permit 'may be revoked if negligence in care or misconduct 'occurs' that is detrimental to animal welfare or to the public,' without specifying any procedures for revoking the permit or any provision for a hearing."). Further, the following passage from *Zinermon v. Burch*, 494 U.S. 113, 135-16, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990), clarifies procedural due

process cases challenges such as Plaintiff's are not facial challenges.

> It may be permissible constitutionally for a State to have a statutory scheme like Florida's, which gives state officials broad power and little guidance in admitting mental patients. . . . Burch's suit is neither an action challenging the facial adequacy of a State's statutory procedures, nor an action based only on state officials' random and unauthorized violation of state laws. Burch is not simply attempting to blame the State for misconduct by its employees. He seeks to hold state officials accountable for their abuse of their broadly delegated, uncircumscribed power to effect the deprivation at issue.

The Court concludes the provision of the City Code at issue does not create a municipal policy of not providing a pre-deprivation hearing.

Plaintiff argues the City is liable because Defendant Walsh's actions constituted a final decision from a policy-making official. A "municipality is liable for an official's unconstitutional action only when the official is the one who has the 'final authority to establish municipal policy with respect to the action ordered.'" *Feliciano v. City of Cleveland*, 988 F.2d 649, 655 (6th Cir. 1993) (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1985)). Authority to exercise discretion does not make a municipal official a "final

policymaker unless the official's decisions are final and unreviewable and are not constrained by the official policies of superior officials." *Id.* (quoting *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127, 108 S. Ct. 915, 99 L. Ed. 2d 107 (1988)). Courts look to state law, including relevant municipal codes, to determine whether an official has authority to make final municipal policy. *Id.* Thus the Court must look to the City Code.

This case presents a difficult question: Can an official be "authorized" to commit an act violating procedural due process, such that the case is removed from the rule of *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981), but not vested with final policymaking authority that would confer liability on a municipality? In other words, can a municipality, consistent with the constitution, authorize enforcement to an official in such broad terms[4] as to provide that official discretion

4. The Court notes Plaintiff has not challenged the Code as unconstitutionally vague or overbroad. *See City of Chicago v. Morales*, 527 U.S. 41, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999) (concluding a vague no loitering statute is not unconstitutional on First Amendment grounds, but violates due process due to its vagueness and failure to limit discretion of enforcement officials). Indeed neither of those words appears in the complaint, nor in Plaintiff's many filings. Rather, Plaintiff lists language alleging the lack of limits on McKamey's discretion as an allegation under the count alleging a violation of procedural due process. *See, e.g., Simon v. Cook*, 261 F. App'x 873 (6th Cir. 2008) (treating void-for-vagueness, overbreadth, and procedural due process as separate claims). Given none of the parties addresses a vagueness challenge in their filings, the Court concludes Defendants were not on notice of a vagueness challenge contained in the ambiguous complaint,

to commit a due process violation, but still be insulated from liability because the official was not explicitly given authority to determine policy? The Court must conclude that it can. Indeed, § 1983 cases often result in both a city and its officers authorized to enforce the law being insulate from liability. In *Pembaur*, the Supreme Court clarified, while in some instances a policymaking authority can impute liability to the municipality, in most cases municipalities must not be held liable for the actions of its officers, even if they are authorized to exercise discretion in performance of their duties.

Such is the case here with respect to McKamey and Defendant Walsh. The City Code explicitly authorizes McKamey to "enforce" the law, not to make it. *See* City Code § 7-1 ("McKamey Animal Center shall provide animal services for the City of Chattanooga. . . . [including] . . . the enforcement of animal-related codes as stated in the Tennessee code and City Code."). Moreover, the Mayor is given exclusive executive authority by the City Charter: "The mayor shall be authorized to administer oaths and shall supervise and control all of the divisions of the city, except as otherwise provided, and shall see that the ordinances of the City and the provisions of the Charter are observed." Chattanooga City Charter § 8.28. Additionally, the Mayor is required to oversee enforcement of the City's laws:

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to the extent Plaintiff would have asserted one. *See Cummings v. City of Akron*, 418 F.3d 676, 681 (6th Cir. 2005) ("We apply a 'course of the proceedings' test to determine whether defendants in a § 1983 action have received notice of the plaintiff's claims where the complaint is ambiguous."). The Court will therefore take the complaint as written.

> It shall be the duty of the mayor to be vigilant and active in causing the ordinances of the city and the laws of the state to be executed and enforced within the city . . . [and] to exercise a general supervision over all the executive and ministerial officers of the city, and see that their official duties are honestly and faithfully performed.

City Charter § 8.38. Then the Mayor is given authority to supervise McKamey in the performance of its duties. Indeed, if Walsh were not an "executive [or] ministerial officer" then she could hardly be a final policymaking official for the City. Nor would she be included within *Pembaur*'s language imputing liability onto a city for its officials' actions. Because she did not have final and "unreviewable" authority to set policy for the City, the Court concludes Plaintiff cannot hold the City liable for her actions.

However, the Court concludes the Mayor's actions in regard to the instant case provide an inference of city policy that imputes liability to the City. In his open letter, the Mayor expressly approved of McKamey's decision to confiscate Plaintiff's property, (Court File No. 82-1, pp. 29-30) ("Transcribed testimony from the original hearing has clearly established that the conditions existing at the Pet Company were hot, dirty and generally disgusting on June 15, 2010 - the date that animals were seized and removed from the premises."), and to revoke its permit, (*id.*) ("Setting aside all the legal rhetoric and arguments about the exact wording of the definition

of what constitutes "cruelty" and "neglect," one fact is glaringly obvious: The Pet Company was marketing sick and dying animals at their poorly maintained store in Hamilton Place with inadequate concern that they were spreading disease and disappointment among the citizens of Chattanooga."). The Mayor's reference to McKamey's responsibility also appears to be an express approval of its official actions (*id.*) ("The McKamey Center is the City's animal enforcement division. And is therefore, fully responsible for ensuring that the city codes for animal safety and welfare are adhered to by citizens, as well as corporations."). This evidence combined with McKamey's repeated statements regarding its policy of revocation without a pre-deprivation hearing as well as the presence of McKamey's officials, state officials, and an officer of the Chattanooga Police Department at Plaintiff's place of business on the day in question presents a logical inference McKamey's actions were initiated and approved by the Mayor. This evidence creates an issue of fact with regard to the City's liability not appropriate for disposition on summary judgment.

Accordingly, the Court **DENIES** the City's motion for summary judgment. The Court also **DENIES** Plaintiff's motion for summary judgment on the same issue.

B. Punitive Damages

In its complaint, Plaintiff seeks punitive damages against Defendants McKamey, Walsh, Nicholson, and Hurn. Punitive damages are available pursuant to a § 1983 against individual defendants "if it is shown that

the defendant engaged in behavior that was 'motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.'" *Defoe* ex rel. *Defoe v. Spiva*, 566 F. Supp. 2d 748, 754 (E.D. Tenn. 2008) (quoting *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 536, 119 S. Ct. 2118, 144 L. Ed. 2d 494 (1983)). The Sixth Circuit interprets this standard to mean punitive damages are warranted if a defendant's conduct is "'grossly negligent, intentional or malicious.'" *Id.* at 754-55 (quoting *Hill v. Marshall*, 962 F.2d 1209, 1217 (6th Cir. 1992)).

With respect to Plaintiff's state law claims, Tennessee requires "a defendant has acted either (1) intentionally, (2) fraudulently, (3) maliciously, or (4) recklessly" before punitive damages may be awarded. *Arbuckle v. City of Chattanooga*, 696 F. Supp. 2d 907 (E.D. Tenn. 2010) (quoting *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992)).

> A person acts intentionally when it is the person's conscious objective or desire to engage in the conduct or cause the result. A person acts fraudulently when (1) the person intentionally misrepresents an existing, material fact or produces a false impression, in order to mislead another or to obtain an undue advantage, and (2) another is injured because of reasonable reliance upon that representation. A person acts maliciously when the person is motivated by ill will, hatred, or personal spite. A person acts recklessly when the person is aware of,

> but consciously disregards, a substantial and unjustifiable risk of such a nature that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances.

Hodges, 833 S.W.2d at 901. A plaintiff must prove the intentional, fraudulent, malicious, or reckless character by clear and convincing evidence. *Id.*

Plaintiff does not significantly respond to Defendants' argument against punitive damages, other than to allege it should be awarded punitive damages for Defendant Walsh's abuse of process. However, the abuse of process claim was only lodged against McKamey. Plaintiff alleges Defendants McKamey and Walsh sought to destroy its business through the procedural avenues available to it as well as through publicity generated by its actions. Moreover, Plaintiff alleges Defendant retained possession of its animals after being ordered to return them. Such conduct could be considered intentional and justify an award of punitive damages and the Court **DENIES** Defendants McKamey's and Walsh's motions. However, Plaintiff has not alleged conduct on the part of Defendants Hurn and Nicholson individually, that would rise to that level. Accordingly, the Court **GRANTS** Defendants Hurn's and Nicholson's motion for summary judgment on this issue.

Plaintiff did not seek punitive damages in its complaint against the City. It is well established a plaintiff may not seek punitive damages against a municipality under

§ 1983. *Brock v. Warren County, Tenn.*, 713 F. Supp. 238 (E.D. Tenn. 1989) (citing *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S. Ct. 2748, 69 L. Ed. 2d 616 (1981)). However, in response to the City's motion, Plaintiff alleged it could seek punitive damages through the abuse of process tort. However, Plaintiff never alleged abuse of process against the City. Moreover, the City is correct it is protected by the Tennessee Governmental Tort Liability Act, Tenn. Code Ann. § 29-20-205(2), which immunizes the City from, *inter alia*, abuse of process. *See Ramsey v. Chattanooga Housing Authority*, No. 1:09-CV-233, 2011 U.S. Dist. LEXIS 70352, 2011 WL 2601016, at *8 (E.D. Tenn. June 30, 2011). Accordingly, the City's motion regarding punitive damages is **GRANTED**.

C. State Claims

Two state claims survived the Court's prior order disposing of Defendants' motion for judgment on the pleadings: abuse of process and conversion.

1. Abuse of Process[5]

McKamey moves for summary judgment on Plaintiff's abuse of process claim. "To establish an abuse of process claim, a plaintiff must show '(1) the existence of an ulterior

5. McKamey notes the Sixth Circuit has never determined whether an abuse of process claim is cognizable under § 1983. *See Voyticky v. Village of Timberlake, Ohio*, 412 F.3d 669, 676-77 (6th Cir. 2005). Because "the elements necessary to prove it would likely mirror those of state law," *id.*, the Court considers this claim under the state claim section for the purposes of this motion.

motive; and (2) an act in the use of process other than such as would be proper in the regular prosecution of the charge.'" *In re McKenzie*, 476 B.R. 515, 534-35 (E.D. Tenn. 2012) (quoting *Priest v. Union Agency*, 174 Tenn. 304, 125 S.W.2d 142, 143 (1939)). In Tennessee, "[m]ere initation" of a suit is not sufficient; "abuse of process lies 'for the improper use of process after it has been issued, not for maliciously causing process to issue.'" *Bell* ex rel. *Snyder v. Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A.*, 986 S.W.2d 550, 555 (Tenn. 1999) (quoting *Priest*, 125 S.W.2d at 143). This is the key distinction between abuse of process and malicious prosecution: The former occurs after process has been initiated whereas the latter is the actual wrongful initiation of process. *See In re McKenzie*, 476 B.R. at 534-35. The process itself must be perverted to successfully make an abuse of process claim. "The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club." *Bell*, 986 S.W.2d at 555 (internal quotations omitted).

McKamey argues it enforced the City Code, as was its duty, and did not pervert the process in City Court. Moreover, McKamey claims it did not seek reimbursement for all possible expenses, and accordingly could not have been seeking some collateral goal. However, Plaintiff points to the petition on McKamey's website, to McKamey's actions during the City Court proceedings including its refusal to return the permit when ordered and its refusal to return Plaintiff's animals. The Court

concludes a question of fact remains as to whether McKamey improperly used the process of the City Court proceeding to achieve its ulterior motive of seeking permanent closure of Plaintiff's store due to ideological antipathy and to permanently obtain Plaintiff's animals. The Court **DENIES** McKamey's motion.

2. Conversion

With respect to McKamey's conversion claim, it repeats the arguments the Court rejected in its order disposing of Defendants' motion for judgment on the pleadings. Accordingly, for the reasons the Court discussed in its previous order, the Court **DENIES** McKamey's motion on this claim.

IV. CONCLUSION

For the foregoing reasons, the Court will **DENY IN PART** and will **GRANT IN PART** Defendants' motions for summary judgment (Court File No. 62, 65, 67, 70, 72, 75, 79) and will **DENY IN PART** and will **GRANT IN PART** Plaintiff's partial motion for summary judgment (Court File Nos. 69, 82). Specifically, the Court grants summary judgment for Plaintiff on its procedural due process claim regarding its permit. The Court grants summary judgment for Defendants on Plaintiff's claim the search of its premises violated the Fourth Amendment. The Court grants Defendants Hurn's and Nicholson's motions with respect to punitive damages. The Court also grants the City's motion with respect to punitive damages. The Court denies all parties' motions with respect to Plaintiff's

procedural due process claim regarding its animals and business records, Fourth Amendment claim regarding seizure of its animals and business records, and as to the City's liability. The Court denies Defendants' motions as to qualified immunity. The Court denies Defendants McKamey's and Walsh's motion with respect to punitive damages, and denies McKamey's motion as to the torts of abuse of process and conversion.

An order shall enter.

/s/
CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF TENNESSEE AT CHATTANOOGA, FILED FEBRUARY 6, 2013

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT CHATTANOOGA

1:11-CV-157; 1:11-CV-193

UNITED PET SUPPLY, INC.,

Plaintiff,

v.

CITY OF CHATTANOOGA, *et al.*,

Defendants.

Collier/Lee

ORDER

Before the Court are cross motions for summary judgment filed by Defendants City of Chattanooga ("City") (Court File No. 62, 79), Animal Care Trust ("McKamey") (Court File No. 70), Karen Walsh ("Walsh") (Court File No. 72), Marvin Nicholson, Jr.'s ("Nicholson") (Court File No. 65, 75), and Paula Hurn ("Hurn") (Court File No. 67) (collectively, "Defendants"), and Plaintiff United Pet Supply, Inc. ("Plaintiff") (Court File Nos. 69, 82).[1] For the reasons discussed in this order's accompanying

1. Court File numbers refer to docket of 1:11-CV-157.

memorandum, the Court **DENIES IN PART** and **GRANTS IN PART** Defendants' motions for summary judgment (Court File Nos. 62, 65, 67, 70, 72, 75, 79) and **DENIES IN PART** and **GRANTS IN PART** Plaintiff's partial motion for summary judgment (Court File Nos. 69, 82).

Specifically, the Court grants summary judgment for Plaintiff on its procedural due process claim regarding its permit. The Court grants summary judgment for Defendants on Plaintiff's claim the search of its premises violated the Fourth Amendment. The Court grants Defendants Hurn's and Nicholson's motions with respect to punitive damages. The Court also grants the City's motion with respect to punitive damages. The Court denies all parties' motions with respect to Plaintiff's procedural due process claim regarding its animals and business records, Fourth Amendment claim regarding seizure of its animals and business records, and as to the City's liability. The Court denies Defendants' motions as to qualified immunity. The Court denies Defendants McKamey's and Walsh's motion with respect to punitive damages, and denies McKamey's motion as to the torts of abuse of process and conversion.

SO ORDERED.

ENTER:

/s/_____
CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

APPENDIX F — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED SEPTEMBER 18, 2014

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 13-5181

UNITED PET SUPPLY, INC.,

Plaintiff-Appellee,

v.

CITY OF CHATTANOOGA, TENNESSEE,

Defendant,

ANIMAL CARE TRUST, acting under the assumed name of McKamey Animal Care or McKamey Animal Care and Adoption Center; PAULA HURN, KAREN WALSH, and MARVIN NICHOLSON, JR., in their individual and official capacities,

Defendants-Appellants.

Before: GUY, BATCHELDER, and MOORE, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Tennessee at Chattanooga.

Appendix F

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the district court's entry of summary judgment is REVERSED in part, AFFIRMED in part, and REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/_____
Deborah S. Hunt, Clerk

APPENDIX G — DENIAL OF REHEARING IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED NOVEMBER 6, 2014

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 13-5181

UNITED PET SUPPLY, INC.,

Plaintiff-Appellee,

v.

CITY OF CHATTANOOGA, TENNESSEE,

Defendant,

ANIMAL CARE TRUST, ACTING UNDER THE ASSUMED NAME OF McKAMEY ANIMAL CARE OR McKAMEY ANIMAL CARE AND ADOPTION CENTER, *et al.*

Defendants-Appellants.

ORDER

BEFORE: GUY, BATCHELDER and MOORE, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing

and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/
Deborah S. Hunt, Clerk