

KWAME M. KILPATRICK, MAYOR
CITY OF DETROIT
EXECUTIVE OFFICE

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August 25, 2008

Mr. Kelly Keenan Esq.
Legal Counsel to the Governor
111 South Capitol Avenue
Lansing, Michigan 48909

**Re: In the Matter of the Request for the Removal of Kwame M. Kilpatrick from the
Office of Mayor of the City of Detroit, No. EO-2008-004-LO**

Dear Mr. Keenan,

Attached please find Respondent's Reply Brief and Witness List in the above- referenced case. We are forwarding the information via facsimile in order to meet your 6:00 pm deadline. Per your kind offer, we will forward the exhibits by Federal Express.

Thank you for your consideration.

Sincerely,


Sharon McPhail

Cc: Governor Jennifer M. Granholm
William H. Goodman
James C. Thomas
David D. Whittaker

**RESPONDENT, KWAME M. KILPATRICK'S REPLY TO PETITIONER'S
PLEADINGS PURSUANT TO PREHEARING ORDER OF AUGUST 11, 2008**

INTRODUCTION

Pursuant to a petition filed by five members of the Detroit City Council,¹ Governor Jennifer Granholm has scheduled a hearing to determine whether there exists a basis for her to remove Mayor Kwame Kilpatrick from the Office of Mayor of the City of Detroit. The hearing will begin on September 3, 2008 and will continue from day- to- day until completed unless the Governor grants the Respondent's motion to dismiss the proceedings or to stay them pending the outcome of the Prosecutor's case.

The Prehearing Order of August 11, 2008 sets forth the only procedures of which the parties have been advised: The "rules of evidence" (presumably the Michigan Rules of Evidence) are only a guideline and the Governor indicates that she will give "probative effect to evidence of a type commonly relied upon by reasonable prudent persons in the conduct of their affairs." In that the Governor has indicated that she has no authority to apply to any court for the necessary subpoenas to compel the attendance of witnesses, each party is required to secure the voluntary attendance of any witnesses he or she may wish to call.

¹ Ken Cockrel Jr., Sheila Murphy Cockrel, Joann Watson, Brenda Jones and Kwame Kenyatta----One member, the Council President, Ken Cockrel, voted in violation of the Council Rules of Order, effective September 1, 2007 by voting on a matter in which he had a personal interest (i.e.: he would take office as Mayor should the Mayor be removed and then would be able to run for Mayor without giving up his Council seat, as there would be a special election held at a time when he would not have to make the choice between running for Council and running for Mayor.)

Petitioner, the Detroit City Council, by five of its members, has filed several three ring binders with "testimony" from its own investigative hearing, in which Respondent was not allowed to cross examine their witnesses, nor to call his own; as well as several deposition transcripts from a civil Freedom of Information Act lawsuit filed by the Detroit Free Press. The central issues to the Governor's determination are not fully developed in any of these transcripts, as they are all in the nature of, or are actual depositions of the witnesses. Accordingly, as is the case in all depositions, witnesses, responding to a series of leading questions, answer only the questions they are asked and do not elaborate. Most of the witnesses are attorneys who asserted the attorney-client privilege; no ruling as to privilege has been made by any court.

The counsel to the Governor, Kelly Keenan, has advised that there are only two issues before the Governor, to wit:

1. Did the Mayor mis-use public funds solely for personal gain.
2. Did the Mayor fail to advise City Council of the facts required for their "informed consent" of the settlement²

Perhaps coincidentally, the language used by Mr. Keenan is precisely that used by the Petitioner's attorney, William Goodman, in framing the issues as he sees them. The term "informed consent" is not used in the Michigan Rules of Professional Conduct except as relates to medical procedures³: The American Bar Association Rules of Professional conduct give guidance on the notion of obtaining "informed consent" from a client to settle a case. Rule 1.0(e) provides as follows:

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation

² Letter from Kelly Keenan to the Detroit Free Press dated August 10th

³ The term "informed consent" in Michigan is one used generally in the medical arena and relates to a patient's knowing choice about a medical treatment or procedure, made after a physician (usually) provides the patient with all of the risks involved and the alternative treatments available.

about the material risks of and reasonably available alternatives to the proposed course of conduct.

Additionally, the lawyer is not allowed to reveal information about a client which would be embarrassing or would be likely to be detrimental to a client. Where a lawyer is acting as an intermediary between two "clients", whether by agreement, or as it is here, by Charter, the lawyer is required to maintain the confidentiality as to each client:⁴ Obviously, complying with the privilege and protecting the confidential information of two clients requires a delicate balance.

The Governor, through her legal counsel, has advised the parties that the only matters before the Governor will be:

- Misuse of public funds for private gain and
- Failure to obtain the "informed consent" of City Council

There is no information that has been provided by which the parties can determine the definition to be applied by the Governor as to "private gain" and/or the necessary facts underlying an "informed consent" to the City Council.

The City Council takes the position that the only reason that the Brown case was settled by the Mayor.....for more than 8 million dollars....was solely to protect personal revelations about himself. The Council approval for the amount of the settlement, Council suggests, was somehow fraudulently obtained because they were never informed of allegations of infidelity on the part of the Mayor. Despite the statements of members of the Council to the news media,⁵ in support of settling the case, those same members never suggest that had they known of the allegations against the Mayor, somehow that would have changed their position in terms of the settlement of the matters included in the 8.4 million dollar approval.

⁴ MPR 2.2

⁵ See attached Exhibit 1, summary of statements made by Council members to local media.

Respondent, in this Reply will not restate previously made arguments as to legal or factual issues but does hereby incorporate them by reference thereto, whether made in the motions, memoranda or responses previously filed. With regard to this Reply, Respondent avers that

CITY COUNCIL HAS NOT PRESENTED THE GOVERNOR WITH ANY EVIDENCE THAT THE MAYOR FAILED TO INFORM THEM OF ANY FACTS NECESSARY TO RESOLVE THE “BROWN” CASE (INCLUDING NELTHORPE AND HARRIS) , NOR HAS CITY COUNCIL DEMONSTRATED ANY BASIS FOR THE GOVERNOR TO CONCLUDE THAT THE MAYOR MISUSED CITY FUNDS TO RESOLVE THESE MATTERS SOLELY FOR PERSONAL GAIN.

The Detroit City Council has no process by which it requires the City Law Department to inform them of any specific set of facts prior to their approval of a dollar amount to settle a case. No witness has testified that the Council has such a process, and in fact, the Special Counsel, as a part of his Special Counsel's Report, recommends that one be created. The argument made by City Council seems to be that since this is such an “unusual” case, the Law Department should have given them information that they never get in any other case. It is alleged by Council that they were not aware of the accusations made against the Mayor with regard to his personal behavior: Yet, as early as 2004, fully three years before the Council approved the settlement amount, the local print media wrote of those allegations. In an article dated September 11, 2004, by the Detroit Free Press reporters M.L.Elrick and Jim Schaefer wrote:

“ Detroit Mayor Kwame Kilpatrick must respond to questions about his personal life that he avoided answering earlier this summer and also must provide scores of text messages from his pager, a Wayne County judge ruled Friday.....”

“..... Stefani will be permitted to ask Kilpatrick whether he is having an affair with his chief of staff, Christine Beatty.”

“Callahan also ruled that Kilpatrick must provide several months worth of text messages he sent and received around the time of a rumored wild party at the city-owned Manoogian Mansion” (Exhibit 2)

As will be proven at the Governor’s hearing, if she decides to proceed with the hearing, the Council members were indeed informed of accusations with regard to the Mayor’s personal conduct (See Exhibit 3, the document which the Council President admitted was submitted by the Law Department to recommend settlement of Brown, Nelthorpe and Harris)⁶ and, despite two opportunities to do so, chose to ask no questions about that alleged “conduct” prior to approval of the dollar amount of the settlement of the three “Brown” case plaintiffs for a total of 8.4 million dollars. (See Exhibit 4, a DVD summary of the two meetings of the Internal Operations Committee and the Council session at which the vote was taken to approve the amount of the settlement of the cases)

Moreover, as any trial lawyer knows, highly prejudicial allegations of this nature could only have INCREASED the potential for a higher verdict, in the event of a re-trial. The fact that these kinds of allegations are made against the primary witness in a case, whether true or not, has the potential to lead to prejudice by some members of the jury against a party. The position of the Council that somehow having this “knowledge” would somehow have led to a different result in terms of the settlement is ridiculous and illogical.

⁶ The document states: *“Harris alleges that the Mayor engaged in philandering activities. Harris claims to have been a witness to the Mayor’s infidelity and that he was used to facilitate such activities. This case has received significant media attention. In fact, Harris testified in the Brown/Nelthorpe trial. Harris allegations are inflammatory and salacious and will no doubt be highly prejudicial against the Defendants should this matter proceed to trial. Given the verdict in the Brown/Nelthorpe matter, as well as the fact that Harris’ complaints flow from some of the same facts and circumstances, it is recommended that this matter be settled.”* (Emphasis supplied)

IN THAT THE ALLEGATIONS IN THE CRIMINAL CASE ARE PRECISELY THE SAME AS THOSE THAT ARE BEFORE THE GOVERNOR, AND THAT COUNSEL HAS DEPRIVED THE MAYOR OF ACCESS TO HIS WITNESSES ON A VOLUNTARY BASIS DUE TO THE FILING OF GRIEVANCES AGAINST THEM WITH THE STATE BAR OF MICHIGAN, THE ONLY WITNESS AVAILABLE TO RESPONDENT RELATIVE TO HIS STATE OF MIND IS THE MAYOR HIMSELF. THUS, ANY HEARING HELD BY THE GOVERNOR TO TAKE TESTIMONY AS TO THE MAYOR'S REASONS FOR SETTling THE BROWN CASE(S) WILL CONSTITUTE COMPULSION IN VIOLATION OF THE FIFTH AMENDMENT

The legal arguments have been made relative the issue of the process undertaken by the Governor constituting "compulsion" in violation of the Fifth Amendment: Because City Council's Special Counsel, Goodman, does not agree with them, he continues to insist that Respondent has failed to make the argument. In an improper exercise in burden-shifting, Goodman suggests that the Mayor should articulate what injury will result to him if he testifies. That is precisely the point of the Fifth Amendment: Whether allegations made by the Prosecutor are true or not, no one can be compelled to give testimony that may be used against him.

Oddly, Goodman also suggests that the lawyers who are BOUND BY ATTORNEY/CLIENT PRIVILEGE should testify instead of the Mayor. He fails to mention that his clients were involved in the filing of grievances against those very attorneys and that, given the lack of subpoena power; none of them has to testify at the Governor's hearing.

And finally, incredibly, Goodman asserts that the Tentative Settlement Agreement of October 17th was a binding legal contract...this, he asserts was a final agreement before HIS CLIENTS had voted to approve the amount of the settlement. One can only imagine how the City Council will receive that news!!

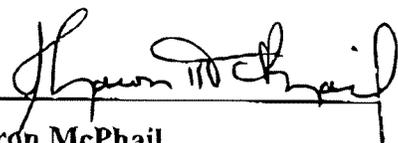
Every witness who has testified has indicated that the October 17th agreement was a draft. The best evidence that this is so is that it was rejected by the Mayor, as Goodman has said more times than anyone cares to recall.

CONCLUSION

The Detroit City Council has wasted hundreds of thousands of dollars paying for an attorney to conduct a political witch hunt against the Mayor. In an effort to secure their right to forfeit his office, as a body they asked the Governor to do what they could not do, remove the Mayor from office. The illogical and inconsistent arguments made in support of their position are not worthy of them as a legislative body and cannot form the basis of any hearings before the Governor.

Respondent respectfully requests that the Honorable Jennifer Granholm decline to join the lynch mob: That she stand up for the rule of law and dismiss this factually inadequate and politically motivated petition.

Respectfully Submitted,

By 
Sharon McPhail
Counsel to the Honorable Kwame M. Kilpatrick

Dated: August 25, 2008

Respondent's Witness List and
Brief Description of the Proposed Testimony of Said Witness

NOW COMES Respondent and hereby notifies the Petitioner that the Respondent will or may call the following witnesses, not necessarily in the order listed. Respondent reserves the right to supplement this list as other matters arise and will notify the Petitioner in the event that it chooses to do so. Respondent also herein notifies the Petitioner as to the areas of questions that Respondent proposes to ask each witness. Respondent reserves the right to question witnesses with regard to other matters should such matters emerge or arise during examinations of opposing counsel. Respondent also reserves the right to call any witness and call any witness, whether named or not named, for impeachment or rebuttal purposes:

1. **Valerie Colbert-Osamuede Esq.** – Chief Assistant Corporation Counsel, and head of the Labor Litigation Section. Nineteen-year veteran of the City of Detroit Law Department. May be asked questions regarding her role as legal counsel in the settlement of the Brown/Nelthrope/Harris cases.
2. **John Johnson Esq.**- Corporation Counsel, City of Detroit. May be asked questions regarding his role as the city's chief lawyer, and his role in the settlement of the Brown/Nelthrope/Harris cases.
3. **Sam McCargo Esq.**- Special Counsel retained by the city of Detroit to represent the interests of Mayor Kilpatrick. . May be asked questions regarding his role as the Mayor Kilpatrick's legal counsel in the settlement of the Brown/Nelthrope/Harris cases and his role as Kwame Kilpatrick's personal attorney.
4. **Wilson Copeland Esq.** - Special Counsel, retained by the city of Detroit to represent the interests of the city of Detroit. May be asked questions regarding his role as counsel to the city of Detroit in the settlement of the Brown/Nelthrope/Harris cases.
5. **William Goodman Esq.** – Special Counsel, Detroit City Council, regarding his case settlements and litigation against the city and those of his firm; his contacts with the State Bar of Michigan regarding the Brown/Nelthrope/Harris litigation; his contacts with U.S. Federal District Court regarding the matters that are before any judge of that court regarding the Detroit Police Department; his ex-parte discussions with judges; his contacts and discussions with Wayne County Prosecutor Kym Worthy and members of the Prosecutor's staff; the fees and costs associated with his representation of City Council YTD; his role in the City Council Investigative hearings, including reference to any exhibits introduced at the hearings

6. **Monica Conyers, J.D., MPA**- Detroit City Council President Pro-Tempore. May be asked questions regarding City Council's case settlement approval process.
7. **Barbara Rose Collins** – Member, Detroit City Council. May be asked questions regarding City Council's case settlement approval process.
8. **Alberta Tinsley –Talabi** - Member, Detroit City Council. May be asked questions regarding City Council's case settlement approval process.
9. **Martha Reeves** - Member, Detroit City Council. May be asked questions regarding City Council's case settlement approval process.
10. **Sheila Cockrel** - Member, Detroit City Council. May be asked questions regarding City Council's case settlement approval process and the political nature of her involvement in this process.
11. **Kwame Kenyatta** - Member, Detroit City Council. May be asked questions regarding City Council's case settlement approval process, and the political nature of his involvement in this process.
12. **Brenda Jones** - Member, Detroit City Council. May be asked questions regarding City Council's case settlement approval process.
13. **JoAnn Watson** - - Member, Detroit City Council. May be asked questions regarding City Council's case settlement approval process.
14. **Ken Cockrel** - Member, Detroit City Council. May be asked questions regarding City Council's case settlement approval process, and the political nature of his involvement in this process.
15. **Michael Stefani Esq.**- Plaintiff's legal counsel. May be asked questions regarding his role in the handling of the Brown/Nelthrope/Harris cases and specifically with respect to the agreements related to the settlement of the case.
16. **Victor Marsh Esq.**- Member, Detroit City Council. May be asked questions regarding City Council's case settlement approval process in the Brown/Nelthrope/Harris cases.
17. **Fletcher Bland** - Nationally recognized trainer and authority on *Robert's Rules*, which together with *City Council's Operating Rules* govern the proceedings and conduct of business by the members of the Detroit City Council. May be asked questions regarding City Council's vote and procedures.

18. **William Mitchell Esq.** – Special Counsel, to the Mayor. May be asked questions regarding his representation in the Brown/Nelthrope/Harris case.
19. **Kwame Kilpatrick Esq.** – Mayor, City of Detroit, regarding the Brown/Nelthrope/Harris case settlement.
20. **Judge Robert Columbo** – regarding his rulings regarding the Skytel messages, and also concerning his contacts with Atty. Goodman, Mr. Goodman's release of privileged material in violation of the Court's order and the failure to sanction him for this act.
21. **Mayer Morganroth Esq.** – Legal Counsel to the city of Detroit for nearly four decades and as an expert on legal practices and procedures regarding the city of Detroit representation and case settlements.
22. **Anthony Adams Esq.** – Deputy Mayor, City of Detroit, as to his role in the Brown/Nelthrope/Harris litigation-settlement and the city's case litigation settlements and practices.
23. **Ellen Ha Esq.** - Asst. Corporation Counsel, city of Detroit. May be asked questions regarding her representation in the Brown/Nelthrope/Harris case and related issues.
24. **Hon. Judge Michael Callahan, Wayne County, Third Circuit Court** – May be asked questions regarding his rulings regarding the Skytel Text Messages and the chain of possession regarding those messages.
25. **David Whitaker Esq., Director, Research and Analysis Division, Detroit City Council** - May be asked questions regarding his involvement in the Brown/Nelthrope/Harris case and related issues concerning City Council proceedings.
26. **John Clarke, Former Chief of Staff, City Council President Ken Cockrel's Office** - May be asked questions regarding his involvement in the Brown/Nelthrope/Harris case and related issues concerning City Council proceedings.
27. **Debra Pospiech Esq., Policy Analyst, Shiela Cockrel's Office** - May be asked questions regarding her involvement in the Brown/Nelthrope/Harris case and related issues concerning City Council proceedings.