

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

IAN MOBLEY, KIMBERLY MOBLEY, Et. Al.,

Plaintiffs,

vs.

CITY OF DETROIT, VICKI YOST, DANIEL
BUGLO, ET. AL.,

Defendants.

Honorable Victoria A. Roberts
Magistrate Judge Mona K. Majzoub

Case No. 10-cv-10675

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**DEFENDANT CITY OF DETROIT'S RESPONSE TO
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

Defendant, CITY OF DETROIT, responds as follows to Plaintiffs' Motion For Partial Summary Judgement:

1. Admitted Plaintiffs claim constitutional violations resulting from police action at the Contemporary Arts Institute of Detroit on May 31, 2008.
2. Admitted.
3. Denied that the activities at "Funk Night" included or were limited to the activities stated in Plaintiffs' corresponding paragraph.
4. Admitted a membership fee was charged and alcoholic beverages were sold.
5. Admitted the Contemporary Arts Institute of Detroit ("CAID") did not have a State of Michigan liquor license.
6. Denied as untrue.
7. Neither admitted nor denied whether or why CAID members were "shocked" or "terrified" based on lack of information.
8. Admitted the CAID members were detained and ticketed for loitering in a place of illegal occupation, a criminal misdemeanor.
9. Admitted Detroit Police officers seized 44 vehicles under the Nuisance Abatement Statute.
10. Denied as untrue.
11. Denied as untrue.
12. Denied as untrue.
13. Denied as untrue.
14. Denied as untrue.
15. Denied as untrue. Plaintiffs' knew or should have known they were present in a place of illegal occupation.

16. Admitted Detroit Police officers ticketed the CAID Plaintiffs.
17. Admitted the tickets were dismissed without prejudice.
18. Neither admitted nor denied based on lack of information.
19. Neither admitted nor denied based on lack of information.
20. Denied as untrue. Detroit Police officers had reasonable suspicion and probable cause to ticket Plaintiffs for knowingly loitering in a place of illegal occupation.
21. Denied as untrue. Detroit Police officers had reasonable suspicion and probable cause to believe the vehicles were used as a mode of transport to contribute to the nuisance at the CAID.
22. Denied as untrue.
23. Denied as untrue.
24. Admitted City of Detroit does not concur in the relief requested by Plaintiffs.

WHEREFORE, Defendant City of Detroit respectfully request that this honorable Court deny Plaintiffs' Motion for Partial Summary Judgement.

Respectfully Submitted,

CITY OF DETROIT LAW DEPARTMENT

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May 8, 2012

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**DEFENDANT CITY OF DETROIT'S BRIEF IN OPPOSITION TO
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

TABLE OF CONTENTS

	<u>Page No.</u>
Index of Authorities	ii
Issues Presented	iv
Introduction	1
Statement of Facts	2
Argument	10
No Monell Claim; Probable Cause Present	11
Nuisance Abatement Statute Not Unconstitutionally Applied	17
Conclusion	18

INDEX OF AUTHORITIES

CASES

Celotex Corp v Caltrett, 477 US 317, 322; 106 SCt 2548; 91 LEd 2d 265 (1986)

Street v J.C. Bradford & Co., 886 F2d 1472, 1479-80 (CA 6, 1989)

Pembauer v Cincinnati, 475 US 469 (1986)

Farmer v Brennan, 114 S Ct 1970 (1994)

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County of Sacramento v Lewis, 523 US 833; 118 S Ct 1708; 140 L Ed 2d 1043 (1998)

Kline v City of Traverse City, 1999 US Dist Lexis 4655 (WD Mich, March 18, 1999)

Monell v New York Department of Social Services, 436 US 685; 98 SCt 2018; 56 LEd 611(1978)

Webster v Houston, 735 F2d 838 (5 CA, 1984)

City of Canton v Harris, 489 US 378 (1989)

Searcy v City of Dayton, 38 F3d 282 (CA 6, 1994)

Brewer v Perrin, 132 Mich App 520, 527; 349 NW2d 198 (1984)

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FEDERAL COURT RULES

FR Civ P 56

STATUTES AND ORDINANCES

42 USC § 1983

MCL §600.3801

Detroit City Code, §38-5-1

ISSUES PRESENTED

- I. WHETHER PLAINTIFFS ARE ENTITLED TO JUDGEMENT AS A MATTER OF LAW BECAUSE IT IS UNDISPUTED NO CITY OF DETROIT POLICY OR CUSTOM, PROMULGATED BY A POLICYMAKER, WAS THE MOVING FORCE BEHIND PLAINTIFFS' ALLEGED CONSTITUTIONAL DEPRIVATION?
- II. WHETHER PLAINTIFFS ARE ENTITLED TO JUDGEMENT AS A MATTER OF LAW BECAUSE IT IS UNDISPUTED REASONABLE SUSPICION AND PROBABLE CAUSE EXISTED TO SEARCH, DETAIN, TICKET, AND PROSECUTE PLAINTIFFS AND SEIZE PLAINTIFFS' VEHICLES?
- III. WHETHER PLAINTIFFS ARE ENTITLED TO JUDGEMENT AS A MATTER OF LAW BECAUSE THE NUISANCE ABATEMENT STATUTE WAS UNCONSTITUTIONALLY APPLIED AGAINST THEM?

I. INTRODUCTION

Plaintiffs are maintaining this cause of action claiming 42 USC §1983 civil rights and constitutional violations arising out of the search of Plaintiffs and the detention/arrest and prosecution of Plaintiffs for knowingly loitering in a place of illegal occupation contrary to the City of Detroit Disorderly Conduct Ordinance, City of Detroit Code, §38-5-1. Although Plaintiffs claim City of Detroit has a custom, policy, and practice of these constitutional violations, Plaintiffs have failed to produce any evidence of any City of Detroit unconstitutional customs, policies, or practices, put into effect by a policymaker, that were the moving force behind the alleged constitutional deprivations in Plaintiffs' Complaint. Even if Plaintiffs' constitutional rights were violated at the Contemporary Arts Institute of Detroit ("CAID"), there is ***no evidence of policies or practices of constitutional violations regarding earlier police action*** at places of illegal occupation, put into effect by a policymaker, that were the moving force behind the alleged constitutional deprivations in Plaintiffs' Complaint. ***Further, Defendants constitutional rights were not violated at the CAID.*** Defendants had reasonable suspicion and probable cause to detain and ticket the CAID Plaintiffs and probable cause to believe the vehicles were used as a mode of transport to contribute to the nuisance at the CAID.

City of Detroit does not contest Plaintiffs' argument that knowledge is an implied element of the misdemeanor offense "loitering in a place of illegal occupation". But there was probable cause to believe Plaintiffs knew that the CAID was selling alcoholic beverages without a liquor license and selling liquor after 2:00 a.m. The existence of probable cause justified detention, arrest, search, and prosecution of the CAID Plaintiffs. The existence of probable cause also justified the towing of Plaintiffs' vehicles. There is evidence that many, if not all, of the CAID members knew or should have known the CAID was operating as a blind pig.

City of Detroit disputes Plaintiffs' claim that the Nuisance Abatement Statute has an implied knowledge requirement and, if not, the Statute was unconstitutionally applied to Plaintiffs at the time of the police action at the CAID. The Statute merely provides that Plaintiffs must have used the vehicles to contribute to the nuisance. The purpose of the Statute is deterrence, not punishment, and therefore, no knowledge element is required. Further, the City of Detroit's police action of seizing and towing vehicles was justified by the existence of probable cause. The CAID Plaintiffs knew or should have known the CAID was operating as a blind pig.

II. STATEMENT OF FACTS

Prior to March 29, 2008, Lieutenant Vicki Yost, the commanding officer of the Detroit Police Department's Vice Enforcement Unit, received complaints of unlicensed and after hours liquor sales and narcotic activity at the Contemporary Arts Institute of Detroit (hereinafter referred to as the "CAID") located at 5141 Rosa Parks Boulevard, Detroit, Michigan (**Dk 84, Exh 1**, Anticipatory Search Warrant #08001827; **Dk 84, Exh 2**, CAID photographs; **Dk 84, Exh 3**, Yost dep., p. 41, lines 14-25, p. 42, lines 1-7, p. 49, lines 9-11; **Dk 84, Exh 4**, Buglo dep., p. 30, lines 10-16, p. 32, lines 14-25). This activity was occurring on the last Friday of each month and carrying over into the early morning hours of Saturday (**Dk 84, Exh 1**, p. 2). CAID referred to these events as "Funk Night" for "members only" (**Dk 84, Exh 5**, CAID Funk Night advertisements).

In response to the complaints, on March 29, 2008, Yost and Detroit Police Sergeant Daniel Buglo conducted a surveillance operation outside of the CAID (**Dk 84, Exh 1**, p. 2; **Dk 84, Exh 6**, Buglo DPD Preliminary Complaint Record dated 3/29/08). At the location, the officers observed a large number of parked vehicles and many young people entering the side door of the building, heard loud music coming from inside the building, observed young white male and female CAID members concealing and drinking intoxicants, and smelled a strong odor of marijauna coming from a fenced-in outside patio area where several CAID members were gathered (**Dk 84, Exh 1**, p. 2; **Dk 84, Exh 2**;

DK 84, Exh 3, p. 31, lines 17-25, p.32, line 1, p. 38, lines 3-10, p. 39, lines 16-18, p. 59, lines 18-25, p. 60, lines 1-12; **Dk 84, Exh 4**, pp. 34-38, lines 1-5).

On April 26, 2008, at 1:00 a.m., Yost and Buglo conducted an undercover operation at the CAID (**Dk 84, Exh 1**, p. 2; **Dk 84, Exh 3**, p. 32, line 11-21, p. 44, line 1, p. 45, lines 1-6; **Dk 84, Exh 4**, pp. 39-49; **Dk 84, Exh 7**, Buglo DPD Preliminary Complaint Record dated 4/26/08). The officers entered the CAID in response to “blind pig” activity complaints (**Dk 84, Exh 1**, p. 2; **Dk 84, Exh 7**). Upon entry, both officers paid a \$5.00 cover charge and purchased the required one month membership for \$3.00 from the doorman and filled out a membership card as requested by the doorman (**Dk 84, Exh 1**, p. 3; **Exh 3**, p. 52, lines 7-11; **Dk 84, Exh 7**). CAID personnel entered the officers’ information into a laptop computer (**Dk 84, Exh 1**, p. 3). Then the officers were allowed to enter into the location. Id.

The officers approached the bar and observed member purchases of Budweiser Select beer on tap and boxed wine for sale (**Dk 84, Exh 1**, p. 3; **Dk 84, Exh 4**, p. 42, lines 21-25, p. 43, lines 1-12; **Exh 7**). Both officers purchased a cup of beer for \$3.00 from the bartender (**Dk 84, Exh 1**, p. 3; **Dk 84, Exh 3**, p. 52, lines 15-22; **Dk 84, Exh 4**, p. 44, lines 13-16; **Dk 84, Exh 7**).¹ The officers then mingled with the crowd of approximately 100 CAID members while a live band was playing (**Dk 84, Exh 1**, p. 3; **Dk 84, Exh 7**).

After several minutes, Yost and Buglo walked out of the building into a fenced-in yard or patio area (**Dk 84, Exh 1**, p. 3; **Dk 84, Exh 7**). Buglo observed several CAID members with cans of beer and liquor bottles (**Dk 84, Exh 1**, p. 3; **Dk 84, Exh 7**). Yost and Buglo also observed several members smoking what appeared to be and smelled like marijuana (**Dk 84, Exh 1**, p. 3; **Dk 84, Exh**

¹Plaintiff Jason Leverette-Saunders had attended six or seven CAID Funk Nights before the May 31, 2008, Funk Night (**Dk 84, Exh 8**, Leverette-Saunders dep., p. 13, lines 1-5). He purchased alcohol and witnessed alcohol sales by the cup inside the CAID. Id., p. 14, lines 4-23.

3, p. 54, lines 11-24; **Dk 84, Exh 7**). The officers sat at a picnic table near a member named “Dan” and observed Dan take out a baggie of suspected marijauna (**Dk 84, Exh 1**, p. 3; **Dk 84, Exh 3**, p. 54, lines 11-24; **Dk 84, Exh 4**, p. 46, lines 8-17; **Dk 84, Exh 7**). Dan rolled three marijauna cigarettes, lit the cigarettes, and passed the cigarettes around to other members sitting around the picnic table (**Dk 84, Exh 1**, p. 3; **Dk 84, Exh 3**, p. 54, lines 11-24; **Dk 84, Exh 7**).

At approximately 2:20 a.m., Buglo purchased another beer from the bar (**Dk 84, Exh 1**, p. 3; **Dk 84, Exh 4**, p. 48, lines 17-25, p. 49, lines 3-5; **Dk 84, Exh 7**). The officers departed the CAID at 2:30 a.m. as CAID members were standing in line to enter the building and members in vehicles were continuing to arrive in the CAID parking lot (**Dk 84, Exh 1**, p. 3; **Dk 84, Exh 4**, p. 49, lines 11-14; **Dk 84, Exh 7**).

At some point after Yost observed the CAID’s illegal activities, but before the May 31, 2008, raid, Yost reached out, met with, and spoke to Aaron Timlin, the CAID operating manager responsible for Funk Nights regarding the illegal activities she had observed (**Dk 84, Exh 3**, p. 91, lines 5-25, p.92, lines 1-9, 21-25, p. 93, lines 1-25, p. 94, lines 1-13, p. 98, lines 5-12). But Timlin rejected Yost’s enforcement counseling efforts. Id.

On May 24, 2008, Buglo conducted another surveillance operation outside the CAID in furtherance of the Vice Enforcement investigation of blind pig activity (**Dk 84, Exh 1**, p. 3). Again, at the location, Buglo observed a large number of parked vehicles and several young people entering the building carrying cans of beer, heard loud music coming from inside the building, observed young white male and female CAID members concealing and drinking intoxicants, and smelled a strong odor of marijauna coming from an attached outside patio area where several CAID members were gathered. Id.².

² Plaintiff Darlene Hellenberg admitted in her deposition testimony that during the multiple times she had previously visited the CAID, she smelled marijauna (**Dk 84, Exh 9**,

On May 29, 2008, Buglo checked with the City of Detroit Consumer Affairs Department and confirmed the CAID was not licensed to conduct business in the City of Detroit (**Dk 84, Exh 1**, p. 4). Buglo also confirmed with the Michigan Liquor Control Commission that the CAID was not licensed to sell liquor in the State of Michigan. Id.

Subsequently, on May 29, 2008, Sergeant Daniel Buglo obtained a signed Anticipatory Search Warrant for the Contemporary Arts Institute of Detroit. Id.³ The Warrant was approved by Assistant Wayne County Prosecutor Sarah Ann DeYoung and State of Michigan 36th District Court Magistrate Steven Lockhart (**Dk 84, Exh 1**, pp.1-5; **Dk 84, Exh 4**, p. 65, lines 5-9).

The Warrant allowed for the Vice Enforcement Unit to continue their investigation on May 30, 2008, and, upon making further observations of the operation of the CAID as a place of illegal occupation⁴, authorized execution of the Warrant by the Detroit Police Department (**Dk 84, Exh 1**, pp. 1, 4, 5). The Warrant allowed Detroit Police officers to enter the premises, secure the premises, detain the occupants including Plaintiffs Ian Mobley, Paul Kaiser, Angie Wong, James Washington, Nathaniel Price, Stephanie Hollander, Jason Leverette-Saunders, Darlene Hellenberg, and Thomas Mahler, take enforcement action against the CAID members, and seize evidence or contraband during the search (**Dk 84, Exh 1**, pp.1, 4).

Hellenberg dep., p. 27, line 20-25, p. 28, lines 1-7).

³A search warrant labeled “Anticipatory” requires additional observations of illegal activities consistent with those outlined in the search warrant to be valid. In this case, “Anticipatory” refers to additional observations of alcohol sales without a liquor license or sale after 2:00 a.m. (**Dk 84, Exh 1**, pp.1, 4, 5; **Dk 84, Exh 3**, p. 30, lines 23-25, p. 31, lines 1-4)

⁴The “illegal occupation” at issue in this lawsuit is the CAID, an unlicensed establishment serving liquor without a Michigan liquor license or an establishment, whether licensed or not, serving liquor after legal hours (2:00 a.m.), contrary to Michigan law. Such establishment is commonly referred to as a “blind pig” (**Dk 84, Exh 3**, p. 51, lines 3-19; **Dk 84, Exh 4**, p. 29, lines 14-21; **Dk 84, Exh 6**; **Dk 84, Exh 7**).

On May 30, 2008, at approximately 10:45 p.m., Lieutenant Yost and the Vice Enforcement Unit conducted roll call and then began preparing for the undercover operation and, if necessary, raid of the CAID (**Dk 84, Exh 10**, May 30-31 Vice Enforcement Activity Log).

On May 31, 2008, at approximately 12:15 a.m., the Vice Unit arrived at the Tactical Mobile Unit base to further prepare for the CAID operation (**Dk 84, Exh 3**, p. 61, lines 14-17; **Dk 84, Exh 10**).

At approximately 1:45 a.m. - 1:55 a.m., Yost and Buglo arrived at the CAID, in an undercover capacity, to confirm the illegal blind pig activity (**Dk 84, Exh 3**, p.55, line 25; p. 56, lines 1-10; **Dk 84, Exh 10; Dk 84, Exh 11**, DPD Crime Rpt #0805310096.1). Several Plaintiffs such as Darlene Hellenberg, Stephanie Hollander, Ian Mobley, James Washington, and Jason Leverette-Saunders were already in attendance at the CAID when the officers arrived (**Dk 84, Exh 8**, p. 18, line 25; p. 19, line 1; **Dk 84, Exh 9**, p. 17, lines 2-10; **Exh 12**, Hollander dep., p. 18, lines 10-11; **Dk 84, Exh 13**, Mobley dep., p. 25, lines 16-19; **Dk 84, Exh 14**, Washington dep., p. 20, lines 16-22; **Dk 84, Exh 15**, Nathaniel Price dep., p. 17, lines 23-24). Other Plaintiffs such as Thomas Mahler, Nathaniel Price, Angie Wong and Paul Kaiser arrived after the Yost and Buglo, at approximately 2:00 a.m. (**Dk 84, Dk 84, Exh 16**, Mahler dep., p. 18, lines 11-14; **Dk 84, Exh 17**, Kaiser dep., p. 33, lines 6-7) After Paul Kaiser and Angie Wong entered the CAID, Paul's brother, Mark Kaiser, purchased three beers (**Dk 84, Exh 17**, p. 28, lines 14-21, p. 32, lines 2-11; **Dk 84, Exh 18**, Wong dep., p. 26, lines 8-14, lines 24-25, p. 27, line 1). Plaintiffs Angie Wong, Darlene Hellenberg, Jason Leverette-Saunders, Stephanie Hollander, Thomas Mahler, and Nathaniel Price had been present at prior CAID Funk Nights (**Dk 84, Exh 8**, p. 11, lines 20-24; **Dk 84, Exh 9**, p. 11, line 25, p. 12, lines 1-9, p. 27, lines 20-24; **Dk 84, Exh 15**, p. 10, lines 12-25; **Dk 84, Exh 16**, p. 7, lines 1-16; **Dk 84, Exh 18**, p. 20, lines 8-13; **Dk 84, Exh 19**, Wanda Leverette dep., p. 11, lines 7-17, p. 13, lines 1-5).

To enter the CAID on May 31, 2008, the doorman required Yost and Buglo to pay a \$5.00 cover charge and purchase a \$3.00 monthly membership (**Dk 84, Exh 11**). After Yost and Buglo entered the CAID, they stood by the bar, smelled a strong odor of marijuana, and observed alcohol was being sold to members, before and after 2:00 a.m., in the absence of a State of Michigan Liquor License (**Dk 84, Exh 3**, p. 57, lines 3-25; p. 58, lines 1-25; p. 59, lines 1-17; p. 63, lines 20-25; p. 64, lines 1-3; p. 69, lines 7-13; **Dk 84, Exh 4**, p. 57, lines 7-17; p. 58, lines 9-23; p. 59, lines 24-25; p. 60, lines 1-3; **Dk 84, Exh 8**, p. 26, lines 6-25; p. 27, lines 1-25; p. 28, lines 1-6; **Dk 84, Exh 11; Dk 84, Exh 12**, p. 19, line 25, p. 20; line 1-2; **Dk 84, Exh 16**, p. 20, lines 23-25; p. 21, lines 14-23; p. 24, lines 8-18; **Dk 84, Exh 17**, p. 28, lines 14-25; p. 29, lines 1-6 **Dk 84, Exh 18**, p. 26, lines 8-14, lines 24-25, p. 27, line 1). According to Defendant Brandon Cole, there was a sign displaying an alcoholic beverage price list at the bar (**Dk 84, Exh 20**, Cole dep., p. 51, lines 1-4).

At approximately 2:10 a.m., Yost made the decision and advised approximately 40 assembled police officers positioned outside the building to execute the Warrant (**Dk 84, Exh 3**, p. 68, lines 3-7, p. 81, lines 5-25, p. 82, lines 1-6). The assembled police units included two Narcotics crews (entry) including Defendant Kathy Singleton, Tactical Mobile Crews (crowd control/perimeter security/processing) including Defendants Gregory McWhorter, Anthony Potts, Michael Brown, and Brandon Cole, and the remaining six members of the Vice Enforcement Unit (perimeter security/processing) including Defendants Tyrone Gray, Sheron Johnson, and Charles Turner (**Dk 84, Exh 3**, p. 74, lines 9-16; **Dk 84, Exh 10; Dk 84, Exh 11; Dk 84, Exh 21**, DPD Crime Rpt #0805310096.3; **Dk 84, Exh 22**, McWhorter dep., p. 24, lines 17-25; **Dk 84, Exh 23**, Potts dep., p. 38, lines 16-18). The small Narcotics entry team entered the CAID building at approximately 2:20 a.m., followed immediately by many Tactical Mobile officers, and the small number of remaining Vice Enforcement Unit officers (**Dk 84, Exh 10**). Several Tactical Mobile officers also took security

positions around the perimeter of the building.

Although Officer Kathy Singleton assisted as a member of a Narcotics crew, she does not recall the particulars of the entry into the CAID location (**Dk 84, Exh 24**, Singleton dep., p. 29, lines 23-25, p. 30, lines 1-25, p. 31, lines 1-13). When Sergeant Gregory McWhorter arrived at the CAID, he initially stayed outside the building to supervise and manage his Tactical Mobile crew members conducting perimeter security and subsequently went inside the CAID doorway to check on his crew members responsible for securing the doorway area (**Dk 84, Exh 22**, p. 49, lines 9-25, p. 50, line 1). Sergeant Anthony Potts entered the CAID after the Narcotics entry team and supervised his Tactical Mobile crew members segregating the male members from the female members (**Dk 84, Exh 23**, p. 69, lines 6-11). Officer Brandon Cole merely entered the building a couple of minutes behind the Narcotics crew, did a quick sweep of the interior of the building, and then exited the building and maintained a perimeter security post outside the building (**Dk 84, Exh 20**, p. 50, lines 5-6, 17-25).

Officer Tyrone Gray entered the CAID with the entry team and was responsible for clearing the various parts of the building of any danger to the entering police officers and subsequently monitoring the CAID members (**Dk 84, Exh 25**, Gray dep., p. 42, lines 22-25, p. 43, lines 1-4). After the location was secured by the entry team and Tactical Mobile units, Sergeant Charles Turner supervised the seizure of evidence from the CAID and supervised the prisoner processing table (**Dk 84, Exh 26**, Turner dep., p. 42, lines 1-2). Officer Sheron Johnson assisted in securing the female CAID members by searching them and, subsequently, worked at the prisoner processing table (**Dk 84, Exh 27**, Johnson dep., p. 52, lines 22-24, p. 55, lines 18-25, p. 56, lines 1-17).

During the execution of the Warrant, 134 people were detained including Plaintiffs Ian Mobley, Paul Kaiser, Angie Wong, James Washington, Nathaniel Price, Stephanie Hollander, Jason Leverette-Saunders, Darlene Hellenberg, and Thomas Mahler (**Dk 84, Exh 10; Exh 11**). Most, if

not all, of the detained individuals were issued misdemeanor citations and released in lieu of arrest (**Dk 84, Exh 10; Dk 84, Exh 11**). Four individuals were cited for “Engaging in an Illegal Occupation” or operating a blind pig in violation of Section 38-5-1 of the Detroit City Code (**Dk 84, Exh 10; Dk 84, Exh 11**). These operators were Joseph Timlin (doorman and host), Christopher Shoemaker (doorman), Jennifer Schraeder (bartender), and Brandon Walley (houseman) (**Dk 84, Exh 10; Dk 84, Exh 11**). The remaining occupants were cited for “loiter in a place of illegal occupation” or loitering in a blind pig, contrary to Section 38-5-1 of the Detroit City Code⁵ (**Dk 84, Exh 10; Dk 84, Exh 11**). Plaintiffs Ian Mobley, Paul Kaiser, Angie Wong, James Washington, Nathaniel Price, Stephanie Hollander, Jason Leverette-Saunders, Darlene Hellenberg, and Thomas Mahler were cited for loitering in a blind pig (**Dk 84, Exh 10; Dk 84, Exh 11**).

The officers present did not complete any use of force reports and occupants did not report any administrative complaints to the Detroit Police Department or any governmental entity prior to suit.

During the criminal proceedings, the operators of the CAID entered guilty pleas. Just before the trial date, all citations against the remaining occupants were dismissed without prejudice by the City of Detroit prosecutor based on insufficient evidence of proof beyond a reasonable doubt for the offense alleged (**Dk 84, Exh 28**, Mahler misdemeanor ordinance violation ticket).

During the execution of the Warrant, Detroit Police officers seized 44 vehicles under the Michigan Nuisance Abatement Statute including vehicles owned by Plaintiffs Kimberly Mobley, Jerome Price, Wanda Leverette-Saunders, and Laura Mahler (**Dk 84, Exh 10; Dk 84, Exh 21**).

⁵ 93% of the occupants were non-residents of the City of Detroit (**Dk 84, Exh 10; Dk 84, Exh 11**). Nearly half or approximately 48% of the patrons were under 21 years of age according to the identification presented to police officers (**Dk 84, Exh 10; Dk 84, Exh 11**). At least two of the patrons were minors indicating **there was no legal drinking age or adult age restrictions for membership or admission** (**Dk 84, Exh 3**, p. 77, lines 3-7; **Dk 84, Exh 10; Dk 84, Exh 11**).

According to the Warrant Return, the officers also seized large amounts of beer and wine, and United States currency as proceeds from the unlawful activity (**Dk 84, Exh 1**, Return To Search Warrant; **Dk 84, Exh 29**, DPD Crime Rpt #0805310096.2).

The Wayne County Prosecutors Office handled the civil nuisance abatement actions and ultimately returned the vehicles to the Plaintiff vehicle owners with the exception of Plaintiff Jerome Price (**Dk 84, Exh 30**, Wayne County Prosecutor Release of Vehicle form). Although Plaintiff Jerome Price's vehicle was stolen from the tow yard, he filed a claim and received a monetary settlement from the towing company (**Dk 84, Exh 31**, Jerome Price dep., p. 27, lines 12-16). Plaintiffs Laura Mahler, Wanda Leverette, Angie Wong, Darlene Hellenberg, Jerome Price paid fees ranging from \$400.00 - \$1200.00 for the return of their vehicles; Plaintiff Kimberly Mobley did not pay a fee for the return of her vehicle.

III. ARGUMENT

Summary Judgement is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgement as a matter of law". FR Civ P 56 (c). Any doubt as to the existence of a genuine issue of material fact will be resolved against the moving party. Bd of Educ of City School Dist, of City of Cincinnati v Dept of HEW, Region 5, 532 F2d 1070 (CA 6, 1976). Because the burden is on the moving party, the evidence presented to the court *always* is construed in favor of the party opposing the motion and the opponent is given the benefit of all favorable inferences that can be drawn from it. Matsushita Elec Indus Co v Zenith Radio Corp, 475 US 574; 106 S Ct 1348; 89 L Ed 2d 538 (1986). Facts asserted by the party opposing the motion, if supported by affidavits or other evidentiary material, are regarded as true. Day v UAW, 466 F2d 83 (CA 6, 1972).

A. PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT MUST BE DENIED AND CITY OF DETROIT IS ENTITLED TO JUDGEMENT AS A MATTER OF LAW BECAUSE IT IS UNDISPUTED NO CITY OF DETROIT POLICY OR CUSTOM, PROMULGATED BY A POLICYMAKER, WAS THE MOVING FORCE BEHIND PLAINTIFFS' ALLEGED INJURY.

A plaintiff seeking to impose liability on a municipality under §1983 must identify an underlying municipal policy or custom causing the alleged injury. Pembauer v Cincinnati, 475 US 469 (1986). Plaintiff must show a written policy which is unconstitutional on its face or establish the existence of a de facto unconstitutional policy which is “deliberately indifferent to the rights of others”. Farmer v Brennan, 114 S Ct 1970 (1994)(objective test to determine deliberate indifference); Patterson v Cleveland, 173 F3d 429 (CA 6, 1999)(stringent standard for liability that governmental entity disregarded a “known or obvious risk”); County of Sacramento v Lewis, 523 US 833; 118 S Ct 1708; 140 L Ed 2d 1043 (1998)(policy must be so “patently egregious as to shock the conscience”); accord Kline v City of Traverse City, 1999 US Dist Lexis 4655 (WD Mich, March 18, 1999). A municipality may be liable under §1983 only when execution of a government’s policy or custom, whether made by its lawmakers and their edicts, may be said to fairly represent official policy and inflicts the injury. Monell v New York Department of Social Services, 436 US 658; 98 SCt 2188; 56 LEd 611(1978); Webster v Houston, 735 F2d 838 (5 CA, 1984). The policy or custom must be *the* “moving force” behind the constitutional deprivation. City of Canton v Harris, 489 US 378 (1989); Searcy v City of Dayton, 38 F3d 282 (CA 6, 1994).

Plaintiffs cannot produce any City of Detroit policy or custom which authorizes or encourages excessive force or detention and prosecution without reasonable suspicion or probable cause. Brewer v Perrin, 132 Mich App 520, 527; 349 NW2d 198 (1984)(false arrest/imprisonment); Wilson v Yono, 65 Mich App 441, 443; 237 NW2d 494 (1975)(malicious prosecution). Plaintiffs also cannot show evidence of any custom or policy which authorizes the seizure of vehicles under the Michigan Nuisance Abatement Statute where City employees lack probable cause to believe the vehicles were

used as a mode of transportation or otherwise to contribute to a nuisance. In fact, in this case, the valid Anticipatory Search Warrant authorized the seizure of the vehicles (**Dk 84, Exh 1**, pp. 1, 4, 5).

In fact, in Plaintiffs' lengthy 33 page supporting Brief, they only dedicate one page (pp. 31-32) or three paragraphs to explaining why they believe the City of Detroit has a custom or policy of unconstitutional acts. *Plaintiffs fail to point out any evidence of such policy or custom*, but instead rely on Defendants' response to a Request For Admission. The Request asks that Defendants admit that "standard operating procedure when raiding an establishment that was selling alcohol without a license or selling alcohol after 2:00 a.m. was to ticket all persons in attendance for loitering in a place of illegal occupation and to seize their vehicles under the nuisance abatement statute" (Plaintiffs' SJ supporting brf, Exh 39). Defendants' responded it is admitted it is "the City of Detroit's standard operating procedure to ...enforce ...Detroit City Code 38-5-1 , and ...the Nuisance Abatement Statute ...*where probable cause exist* to believe the laws have been violated". *Id.* Such procedure is constitutional and does not subject City of Detroit to §1983 liability. *see Michigan v Bennis*, 516 US 442; 116 S Ct 994 (1994); *Ross v Duggan*, 402 F3d 575, 582 (CA 6, 2004). Further, the admission only inquired into "**standard**" operating procedure and does not request information concerning an exceptional circumstance such as the absence of probable cause to believe the person knew of the illegal acts. *Id.*

Even if Plaintiffs had uncovered a custom or policy of unconstitutional conduct in prior blind pig raids, there is no *persistent, widespread, unconstitutional* policy or custom in this case and no evidence of *deliberate indifference*. *see City of Los Angeles v Heller*, 475 US 796; 799; 106 S Ct 1571; 89 L Ed 2d 806 (1986)(no liability arises if identified unconstitutional policies, practices, and/or procedures did not actually cause the deprivation of any constitutional right possessed by plaintiffs). Lieutenant Vicki Yost took full responsibility for the law enforcement action and decision-making at the CAID as the raid commander. The raid was conducted based upon her personal observations

and at her direction based on probable cause to believe a crime was being committed (**Dk 84, Exh 1**, pp. 2-5; **Dk 84, Exh 3**, p.68, lines 3-7, p. 81, lines 5-25, p. 82, lines 1-6).

Contrary to the allegations in Plaintiffs' Complaint, it is undisputed the Detroit police officers had reasonable suspicion and probable cause to search, detain, ticket, and prosecute Plaintiffs. See Terry v Ohio, 392 US 1, 20, n.16; 88 S Ct 1868; 20 L Ed 2d 889 (1968) ("reasonable suspicion" that criminal activity is afoot required for lawful seizure). Probable cause to arrest and prosecute is based on the facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person in believing that the suspect has committed, is committing, or is about to commit an offense. Criss v City of Kent, 867 F2d 259, 262 (CA 6, 1988); accord People v Champion, 452 Mich 92; 549 NW2d 849, 860 (1996). It is undisputed the CAID Plaintiffs were loitering in an unlicensed establishment (**Dk 84, Exh 1**, p. 4). The establishment was unlawfully selling liquor to its members before and after 2:00 a.m. (**Dk 84, Exh 1; Dk 84, Exh 3**, p. 57, lines 3-25; p. 58, lines 1-25; p. 59, lines 1-17; p. 63, lines 20-25; p. 64, lines 1-3; p. 69, lines 7-13; **Dk 84, Exh 4**, p. 57, lines 7-17; p. 58, lines 9-23; p. 59, lines 24-25; p. 60, lines 1-3; **Dk 84, Exh 8**, p. 26, lines 6-25; p. 27, lines 1-25; p. 28, lines 1-6; **Dk 84, Exh 11; Dk 84, Exh 12**, p. 19, line 25, p. 20; line 1-2; **Dk 84, Exh 16**, p. 20, lines 23-25; p. 21, lines 14-23; p.24, lines 8-18; **Dk 84, Exh 17**, p. 28, lines 14-25; p. 29, lines 1-6 **Dk 84, Exh 18**, p. 26, lines 8-14, lines 24-25, p. 27, line 1; **Dk 84, Exh 20**, Cole dep., p. 51, lines 1-4). The defendant police officers relied on the information provided to them by Yost and Buglo and the information contained in the Anticipatory Search Warrant as a basis for probable cause. McWhorter, Cole, Brown, Potts, Singleton, Turner, Johnson, and Gray were entitled to rely on the Yost and Buglo hearsay and first hand observation is not required. U.S. v Helton, 314 F3d 812 (CA 6, 2003); U.S. v Graham, 275 F3d 490 (CA 6, 2001); U.S. v Smith, 510 F3d 641 (CA 6, 2007). Police officers are presumptively reliable, and self-authenticating details establish reliability. People v Ulman, 244 Mich App 500; 625 NW2d 429 (2001). There is a presumption an affidavit supporting

a search warrant is valid. People v Martin, 271 Mich App 280; 721 NW2d 815 (2006). Erroneous statements constituting mere negligence or innocent mistake are insufficient to void a warrant. U.S. v Degado, 121 F Supp 2d 631 (ED Mich, 2000). Therefore, the officers had probable cause to detain and prosecute Plaintiffs for loitering in the blind pig.

The Anticipatory Search Warrant authorized Detroit Police officers to seize evidence or contraband during the search (**Dk 84, Exh 1**, pp.1, 4). Further, the patdown and inventory searches of the Plaintiffs were lawful because they were either conducted for officer safety or incident to arrest depending on the situation of the Plaintiff at issue. Terry, 392 US at 21-22 (limited patdown search allowed for officer safety); United States v McCray, 102 F3d 239 (CA 6, 1996)(inventory search incident to arrest is an exception to the warrant request and inherently “reasonable”). There is no bright-line test for determining when an investigatory stop crosses the line and becomes an arrest. United States v Lopez-Arias, 344 F 3d 623, 627-28 (CA 6, 2003). The analysis is a fact-sensitive inquiry, depending on the totality of the circumstances. Id. A court is to consider a variety of factors: (1) transportation of the detainee to another location; (2) significant restraints on freedom of movement involving physical confinement or other coercion; (3) use of weapons or bodily force; and (4) issuance of Miranda warnings. Id., citing United States v Richardson, 949 F2d 851, 857 (CA 6, 1991); United States v. Montgomery, 377 F3d 582, 588 (CA 6, 2004)(holding that the reading of *Miranda* warnings is evidence of an arrest). No single factor is dispositive. Id.

There is no evidence McWhorter, Potts, Cole, Brown, Singleton, or Gray took any action regarding the vehicle seizures. Regarding Johnson and Turner, based on the admissions of the Plaintiffs inside the building that the vehicles were used as their mode of transportation, the officers had probable cause to believe the vehicles had been knowingly used as a mode of transportation to contribute to the nuisance of unlicensed and after hours liquor sales at the CAID. Therefore, the officers were authorized to abate the nuisance as a deterrent measure under the Michigan Nuisance

Abatement Statute, MCL §600.3801, and Michigan v Bennis, 116 S Ct 994 (1994). See Ross v Duggan, 402 F3d 575 (CA 6, 2004)(vehicles allowed to be seized even if illegal conduct occurred outside vehicles).

Based on the aforementioned facts justifying probable cause, the State of Michigan's Nuisance Abatement Statute were lawfully applied in this case. There was no innocent conduct on the part of the CAID Plaintiffs who knew or should have known they were loitering in an establishment where liquor was being sold in plain view, without a Michigan liquor license, and unlawfully after 2:00 a.m. The Plaintiffs knew they were contributing to a nuisance and had every opportunity to leave the location before the raid officers arrived. Several Plaintiffs such as Darlene Hellenberg, Stephanie Hollander, Ian Mobley, James Washington, and Jason Leverette-Saunders were in attendance at the CAID well before Buglo and Yost arrived (**Dk 84, Exh 8**, p. 18, line 25; p. 19, line 1; **Dk 84, Exh 9**, p. 17, lines 2-10; **Dk 84, Exh 12**, Hollander dep., p. 18, lines 10-11; **Dk 84, Exh 13**, Mobley dep., p. 25, lines 16-19; **Dk 84, Exh 14**, Washington dep., p. 20, lines 16-22; **Dk 84, Exh 15**, Nathaniel Price dep., p. 17, lines 23-24). Other Plaintiffs such as Thomas Mahler, Nathaniel Price, Angie Wong and Paul Kaiser arrived shortly after Yost and Buglo, at approximately 2:00 a.m. (**Dk 84, Exh 16**, Mahler dep., p. 18, lines 11-14; **Dk 84, Exh 17**, Kaiser dep., p. 33, lines 6-7) After Paul Kaiser and Angie Wong entered the CAID, Paul's brother, Mark Kaiser, purchased three beers (**Dk 84, Exh 17**, p. 28, lines 14-21, p. 32, lines 2-11; **Dk 84, Exh 18**, Wong dep., p. 26, lines 8-14, lines 24-25, p. 27, line 1). Plaintiffs Angie Wong, Darlene Hellenberg, Jason Leverette-Saunders, Stephanie Hollander, Thomas Mahler, and Nathaniel Price had been present at prior CAID Funk Nights and had intimate knowledge of the party operations and illegal activities of the CAID (**Dk 84, Exh 8**, p. 11, lines 20-24; **Dk 84, Exh 9**, p. 11, line 25, p. 12, lines 1-9, p. 27, lines 20-24; **Dk 84, Exh 15**, p. 10, lines 12-25; **Dk 84, Exh 16**, p. 7, lines 1-16; **Dk 84, Exh 18**, p. 20, lines 8-13; **Dk 84, Exh 19**, Wanda Leverette dep., p. 11, lines 7-17, p. 13, lines 1-5). The nuisance existed and

Plaintiffs admitted that they had used the vehicles as transportation to attend the CAID event and contribute to the nuisance. As college and college graduates or highly educated citizens in our society, certainly Plaintiffs were provided with fair notice by the City of Detroit Disorderly Conduct ordinance and State of Michigan Nuisance Abatement Statute that such blind pig activity was unlawful.

Even if an unconstitutional policy or custom did exist, Plaintiff cannot show that a policy maker such as the City of Detroit Police Chief, Mayor, or City Council members, implemented the policy or custom or that it was a persistent widespread policy throughout the Detroit Police Department. Yost, a police lieutenant of a small unit of 6-8 Vice Enforcement Unit police officers within the Narcotics Division of the Detroit Police Department, is certainly not a policymaker and had no effect on any policy or practice throughout the Detroit Police Department. Further, Plaintiff cannot show that such a policy, implemented by a policymaker, was the moving force behind the officers' alleged illegal acts on May 31, 2008, at the CAID. Based on the discovery conducted in this case, it is undisputed that any alleged illegal acts were not done in accordance with a City of Detroit custom or policy.

Moreover, assuming the officers engaged in illegal conduct, Plaintiffs have not uncovered any evidence that the City of Detroit, with deliberate indifference, failed to train, supervise, or discipline the defendant officers and that such failure was the cause of the alleged unconstitutional deprivations.

B. THE NUISANCE ABATEMENT STATUTE DOES NOT REQUIRE KNOWLEDGE AND IS CONSTITUTIONALLY APPLIED WITHOUT MEETING THE KNOWLEDGE REQUIREMENT.

In Bennis, the United States Supreme Court upheld the seizure of vehicles from vehicle owners with no knowledge of illegality or “innocent” owners because, although the civil forfeiture of property used in commission of a crime may sometimes also contribute to an offender’s overall punishment for that underlying crime, *the premiere purpose of civil forfeiture is deterrence of future crime*, not punishment for past crime. 516 US at 451-452. Even if an innocent owner loses his/her property, at least two purposes are advanced: (1) elimination of the offending property for future use as a public nuisance; and (2) discouragement of future uses of similar property for similar illegal activities. Id.

Again, the Nuisance Abatement Statute was not unconstitutionally applied to Plaintiffs. Certainly at the time of the raid, the police officers had probable cause to believe the CAID plaintiffs knew they were in a blind pig and several of the CAID members drove their vehicles or their parents’ vehicle to the CAID with full knowledge it was an operating blind pig. (**Dk 84, Exh 8**, p. 11, lines 20-24; **Dk 84, Exh 9**, p. 11, line 25, p. 12, lines 1-9, p. 27, lines 20-24; **Dk 84, Exh 15**, p. 10, lines 12-25; **Dk 84, Exh 16**, p. 7, lines 1-16; **Dk 84, Exh 18**, p. 20, lines 8-13; **Dk 84, Exh 19**, Wanda Leverette dep., p. 11, lines 7-17, p. 13, lines 1-5). But it is irrelevant whether the CAID Plaintiffs knew or did not know their use of the vehicles were contributing to the nuisance. There was probable cause to believe they knew they were contributing to a nuisance and the deterrence purposes of the Statute were served by the seizure of Plaintiffs’ vehicles.

IV. CONCLUSION

Based on the foregoing, Defendant City of Detroit requests that this Court deny Plaintiffs' Motion for Partial Summary Judgment.

Respectfully submitted,

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I hereby certify that on May 8, 2012, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to counsel of record.

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