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

IAN MOBLEY, et al.,

Plaintiffs,

vs.

CITY OF DETROIT, et al.,

Defendants.
_____/

Case No. 10-cv-10675

Hon. Victoria A. Roberts
Magistrate Judge Mona K. Majzoub

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PLAINTIFFS' COMBINED RESPONSE IN OPPOSITION TO
DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT [DKT. ## 84 & 85]

Plaintiffs oppose Defendants' motions for summary judgment (Dkt. ## 84 and 85) for the reasons that follow:

Local Rule

1. Counsel for Defendants City of Detroit, McWhorter, Potts, Turner, Brown, Cole, Gray, Johnson, and Singleton did not seek concurrence from Plaintiffs' counsel as required by Local Rule 7.1(a) before filing their motion (Dkt. # 84).

2. Counsel for Defendants Yost and Buglo did not seek concurrence from Plaintiffs' counsel as required by Local Rule 7.1(a) before filing their first motion (Dkt. # 80). Counsel for Defendants Yost and Buglo did seek concurrence from Plaintiffs' counsel before filing an amended motion (Dkt. # 85), but the amended motion was untimely because it was filed two days after summary-judgment motions were due, and it was filed less than half an hour after sending an email to Plaintiffs' counsel that sought concurrence for the first time.

Constitutional Violations: Probable Cause and Reasonable Suspicion

3. Viewing the record evidence in the light most favorable to Plaintiffs, and based on the facts and circumstances known to the Defendant police officers at the time of the raid, there was no probable cause:

a. that Plaintiffs Ian Mobley, Paul Kaiser, Angie Wong, James Washington, Nathaniel Price, Stephanie Hollander, Jason Leverette-Saunders, and Darlene Hellenberg knew that the CAID did not have a liquor license or knew that the CAID was selling alcohol after 2:00 a.m.; or

b. that the cars possessed or owned by Plaintiffs Ian Mobley, Kimberly Mobley, Angie Wong, Nathaniel Price, Jerome Price, Jason Leverette-Saunders, Wanda Leverette, Darlene Hellenberg, and Laura Mahler were used for an unlawful act.

4. Viewing the record evidence in the light most favorable to Plaintiffs, and based on the facts and circumstances known to the Defendant police officers at the time of the raid, Defendants did not have reasonable suspicion that Plaintiffs Ian Mobley, Paul Kaiser, Angie Wong, James Washington, Nathaniel Price, Stephanie Hollander, Jason Leverette-Saunders, and Darlene Hellenberg were presently armed and dangerous.

Municipal Liability

5. Viewing the record evidence in the light most favorable to Plaintiffs, Defendant City of Detroit had an unconstitutional policy or custom of detaining, searching, and prosecuting everyone present in an establishment that was selling alcohol unlawfully for "loitering in a place of illegal occupation," and impounding the cars they drove there for forfeiture proceedings under Michigan's nuisance abatement law, regardless of whether there was probable cause that each individual present knew the facts that made the sale unlawful, and regardless of whether there was probable cause that their cars were "used for the unlawful manufacture, transporting, sale, keeping for sale, bartering, or furnishing of" alcohol.

6. Viewing the record evidence in the light most favorable to Plaintiffs, this unconstitutional policy or custom was the moving force behind the unconstitutional detention, search, and prosecution of Plaintiffs and the unconstitutional seizure of their cars.

7. Accordingly, Defendant City of Detroit's motion for summary judgment should be denied as to Counts One, Three, Four, Five, Six, and Seven of Plaintiffs' Amended Complaint (Dkt. # 21).

Qualified Immunity Regarding Counts One, Three, Four, Five, Six, and Seven[1]

8. Viewing the record evidence in the light most favorable to Plaintiffs, and based on

[1] Qualified immunity regarding Count Two, excessive force, is addressed separately below.

the facts and circumstances known to Defendant Vicki Yost at the time of the raid, no reasonable police officer in Defendant Yost's position would have believed that probable cause existed as to any of the following facts:

a. that Plaintiffs Ian Mobley, Paul Kaiser, Angie Wong, James Washington, Nathaniel Price, Stephanie Hollander, Jason Leverette-Saunders, and Darlene Hellenberg knew that the CAID did not have a liquor license or knew that the CAID was selling alcohol after 2:00 a.m.; or

b. that the cars possessed or owned by Plaintiffs Ian Mobley, Kimberly Mobley, Angie Wong, Nathaniel Price, Jerome Price, Jason Leverette-Saunders, Wanda Leverette, Darlene Hellenberg, and Laura Mahler were used for an unlawful act.

9. The law governing probable cause and reasonable suspicion, and the requirement that they be particularized with respect to the person or property being searched or seized, was clearly established at the time of the raid.

10. Accordingly, Defendant Yost's motion for summary judgment based on qualified immunity should be denied as to Counts One, Three, Four, Five, Six, and Seven.

11. Defendants Buglo and Turner were supervisors who directly participated in the constitutional violations authorized by Defendant Yost. Defendant Buglo was deputy raid commander, and Defendant Turner was responsible for "processing" Plaintiffs, charging them with loitering, and impounding their vehicles. For the same reasons and on the same counts that Defendant Yost's motion for summary judgment should be denied, Defendants Buglo and Turner's motions for summary judgment should be denied as well.

12. The remaining Defendants' motions for summary judgment should be denied:

a. Defendant McWhorter, for unreasonably charging Plaintiff James Washington

with loitering in a place of illegal occupation without probable cause.

b. Defendant Potts, for unreasonably charging Plaintiffs Ian Mobley and Nathaniel Price with loitering in a place of illegal occupation without probable cause.

c. Defendant Brown, for unreasonably charging James Washington with loitering in a place of illegal occupation without probable cause, and for repeatedly failing to appear for his deposition (a motion to compel [Dkt. # 68] is pending).

d. Defendant Gray, for unreasonably charging Plaintiff Jason Leverette-Saunders with loitering in a place of illegal occupation without probable cause.

e. Defendant Johnson, for unreasonably charging Plaintiffs Darlene Hellenberg and Paul Kaiser with loitering in a place of illegal occupation without probable cause.

f. Defendant Singleton, for unreasonably charging Plaintiff Stephanie Hollander with loitering in a place of illegal occupation without probable cause.

g. Defendant Cole, for his participation in the unreasonable search and seizure of Plaintiffs and issuing the citation that led to the seizure of Plaintiff Laura Mahler's car.

Excessive Force

13. As to the excessive force claims (Count Two) asserted by Plaintiffs Paul Kaiser, Angie Wong, Nathaniel Price, James Washington, and Jason Leverette-Saunders, summary judgment should be denied because:

a. The use of force used against Plaintiffs was objectively unreasonable, in

violation of Plaintiffs' clearly established rights.

b. Defendants have failed to produce timely requested discovery material that would assist Plaintiffs in identifying the officers who used excessive force against them. A discovery motion (Dkt. # 68) is pending, and a Rule 56(d) declaration accompanies this response (Ex. 44).

c. Plaintiffs' inability to identify the officers who used excessive force against them is attributable to a policy or custom of the City of Detroit.

Supporting Briefs

In further support of this response, Plaintiffs refer the Court to their accompanying brief and its exhibits as well as the legal arguments already set forth in Plaintiffs' motion for partial summary judgment and supporting brief (Dkt. # 81).

Respectfully submitted,

/s/ *Kathryn Bruner James*

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Dated: May 8, 2012

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QUESTIONS PRESENTED

I. Where there is evidence of a widespread, routine, and standard police practice of detaining, searching, and prosecuting all patrons of establishments where alcohol is being sold unlawfully, and impounding their cars for forfeiture, without individualized probable cause that they knew the facts that made such sales unlawful or used their cars for an unlawful act, were Plaintiffs' constitutional rights violated pursuant to a municipal policy or custom such that Defendant City of Detroit's motion for summary judgment should be denied?

Defendant City of Detroit answers "No."

Plaintiffs answer "Yes."

II. Where the Fourth Amendment requirements for individualized probable cause and reasonable suspicion were clearly established at the time of the raid and there was no reason to believe that Plaintiffs knew that alcohol was being sold after 2:00 a.m. or had used their cars for an unlawful act, was the Defendant officers' conduct in detaining, searching, and charging Plaintiffs with a crime and impounding their cars for forfeiture objectively unreasonable such that their motions for summary judgment on grounds of qualified immunity should be denied?

Defendant officers answer "No."

Plaintiffs answer "Yes."

III. Where Plaintiffs who did not resist or try to flee were physically assaulted by unidentified officers wearing masks and dark clothing with no badge or nametag, should summary judgment be denied:

a. as to Defendant officers so long as Plaintiffs' relevant discovery requests remain unanswered and their discovery motion remains pending?

b. as to Defendant City of Detroit where there is evidence of a custom or policy of concealing officers' identities, the highly predictable consequence of which is to create an environment in which officers can use excessive force with impunity?

Defendants answer "No."

Plaintiffs answer "Yes."

AUTHORITY FOR RELIEF SOUGHT

Fed. R. Civ. P. 56

Beck v. City of Pittsburgh, 89 F.3d 966 (3d Cir. 1996)

Bobo v. UPS, Inc., 665 F.3d 741 (6th Cir. 2012)

Burchett v. Kiefer, 310 F.3d 937 (6th Cir. 2002)

Cash v. Hamilton County Dep't of Adult Probation, 388 F.3d 539 (6th Cir. 2004)

Graham v. Connor, 490 U.S. 386 (1989)

Grawey v. Drury, 567 F.3d 302 (6th Cir. 2009)

Gregory v. City of Louisville, 444 F.3d 725 (6th Cir. 2006)

Hansen v. Williamson, 440 F. Supp. 2d 663 (E.D. Mich. 2006)

Lanman v. Hinson, 529 F.3d 673 (6th Cir. 2008)

Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978)

Parsons v. City of Pontiac, 533 F.3d 492 (6th Cir. 2008)

Pucci v. Nineteenth District Court, 628 F.3d 752 (6th Cir. 2010)

Russo v. Massullo, 927 F.2d 605, 1991 WL 27420 (6th Cir. 1991)

Staples v. United States, 511 U.S. 600 (1994)

Thompson v. City of Los Angeles, 885 F.2d 1439 (9th Cir. 1989)

United States v. Cortez, 449 U.S. 411 (1981)

Williams ex rel. Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991)

Ybarra v. Illinois, 444 U.S. 85 (1979)

INTRODUCTION

On May 31, 2008, Defendants carried out an armed police raid at the Contemporary Art Institute of Detroit ("CAID"), in the middle of its popular and publicly advertised late-night music and dance event known as "Funk Night." The raid was based on probable cause that the CAID was a "blind pig"—defined by Defendants as an establishment serving liquor without a license, or an establishment (whether licensed or not) serving liquor after 2:00 a.m.[1] Although Defendants' summary-judgment briefs largely seek to justify their belief that the *CAID and its proprietors* were serving alcohol unlawfully because they did not have a license and were serving after 2:00 a.m.,[2] Plaintiffs are not contesting the reasonableness of that belief. Rather, this case is about whether Defendants could lawfully detain, search, and prosecute every single one of the CAID's approximately 130 *patrons* (that is, the members of the public attending the advertised "Funk Night" event), and impound for forfeiture proceedings the 41 cars driven by those patrons to or near the CAID, *based solely on the patrons' presence* at the CAID, without probable cause that each such patron knew that the CAID lacked a liquor license or that alcohol was being served there after 2:00 a.m., and without probable cause that their cars were "used for the unlawful manufacture, transporting, sale, keeping for sale, bartering, or furnishing of" alcohol as required by the relevant forfeiture statute.[3] Plaintiffs are eight of the 130 patrons detained, searched, and prosecuted simply for being present when the raid occurred, and four people who were not present but owned cars that were taken by the police that night.

In Plaintiffs' motion for partial summary judgment and supporting brief (Dkt. # 81),

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[1] Defs. City of Detroit et al.'s Br. (Dkt. # 84) at Pg ID 1805, n.4.

[2] *Id.* at Pg ID 1801-1806, 13; Defs. Yost & Buglo's Br. (Dkt. # 85) at Pg ID 2286-2289, 2294-2296.

[3] Pls.' Am. Compl. (Dkt. # 21) ¶¶ 5-6, 54-56, 236-43, 252-76.

Plaintiffs explained that, as a legal matter, a person's mere presence in a place where alcohol was being served unlawfully was not by itself a crime, and thus could not serve as probable cause for (1) the detention, search, and prosecution of that person for "loitering in a place of illegal occupation," or (2) the seizure of the vehicle that person drove to the location under Michigan's nuisance abatement statute.[4] Defendants, in their two motions for summary judgment and supporting briefs (Dkt. ## 84 and 85), appear largely to concede those points, at least implicitly, because their principal argument for dismissing this case is that Plaintiffs actually knew or should have known that the CAID was, in fact, serving alcohol unlawfully.[5] There is no basis, either legally or factually, for Defendants' position.

Viewing the facts in the light most favorable to Plaintiffs (as required under Rule 56 for a defendant's motion for summary judgment), the record evidence shows that:

- At the time of the raid, and based on the facts known to the Defendant officers at that time about each individual CAID patron, none of the Defendant police officers had probable cause to believe that Plaintiffs Ian Mobley, Paul Kaiser, Angie Wong, James Washington, Nathaniel Price, Stephanie Hollander, Jason Leverette-Saunders, and Darlene Hellenberg knew that the CAID did not have a liquor license or that the CAID was selling alcohol after 2:00 a.m.; nor was there probable cause to believe that the cars possessed or owned by Plaintiffs Ian Mobley, Kimberly Mobley, Angie Wong, Nathaniel Price, Jerome Price, Jason Leverette-Saunders, Wanda Leverette, Darlene Hellenberg, and Laura Mahler were used for an unlawful act.
- At the time of the raid, and based on the facts known to the Defendant officers at that

[4] Pls.' Br. (Dkt. # 81) at Pg ID 1307-1328.

[5] Defs. City of Detroit et al.'s Mot. (Dkt. # 84) ¶ 8, Br. at Pg ID 1815-1816; Defs. Yost & Buglo's Br. (Dkt. # 85) at 2295-2296.

time about each individual CAID patron, none of the Defendant police officers had reasonable suspicion that Plaintiffs Ian Mobley, Paul Kaiser, Angie Wong, James Washington, Nathaniel Price, Stephanie Hollander, Jason Leverette-Saunders, and Darlene Hellenberg were presently armed and dangerous.

- Plaintiffs were detained, searched, and prosecuted based solely on their presence at the CAID, and their cars were seized for forfeiture proceedings based solely on their presence at the CAID.
- Defendant City of Detroit had an unconstitutional policy or custom of detaining, searching, and prosecuting everyone present in an establishment that was selling alcohol unlawfully for "loitering in a place of illegal occupation," and impounding the cars they drove there for forfeiture proceedings under Michigan's nuisance abatement law, regardless of whether there was probable cause that each individual present knew the facts that made the sale unlawful, and regardless of whether there was probable cause that their cars were "used for the unlawful manufacture, transporting, sale, keeping for sale, bartering, or furnishing of" alcohol.
- This policy or custom was the moving force behind the unconstitutional detention, search, and prosecution of Plaintiffs and the unconstitutional seizure of their cars.
- It was objectively unreasonable for the Defendant officers to have believed that Plaintiffs knew that the CAID was unlicensed or that the CAID was serving alcohol after 2:00 a.m.
- Plaintiffs were the victims of objectively unreasonable uses of force by Detroit police officers during the raid, and Defendants have withheld relevant discovery on this point.
- Defendant City of Detroit had a policy or custom of concealing the identities of police officers who participate in blind pig raids, which carries the known or obvious risk that

such concealment will encourage the use of force through lack of accountability and failure to discipline.

Accordingly, a reasonable jury could find in favor of Plaintiffs on all their claims, and Defendants' motions for summary judgment should therefore be denied.

FACTS

The CAID is a known local arts organization that hosts exhibitions, performances, and other arts-related events at its headquarters on Rosa Parks Boulevard in the City of Detroit.[6] On the last Friday of each month, the CAID hosted a popular late-night event and fundraiser known as "Funk Night," which was advertised online.[7] Funk Night was an opportunity for those interested in local arts and music to visit the CAID, become members or supporters of the organization, look at art, listen to music, dance, and socialize with one another.[8]

The CAID served alcohol at Funk Night even though it had no liquor license.[9] After conducting undercover surveillance at a few Funk Night events, Defendant Sergeant Daniel Buglo obtained a warrant to search the CAID for evidence of "blind pig" activity.[10] The warrant authorized Buglo to

> seize . . . the following property and things: All suspected controlled substances, all monies, contraband, books, and paraphernalia used in connection with illegal narcotic trafficking and gambling; alcoholic beverages of any type and the money and profits from same; any photographic video and audio equipment, computers, hard drives,

[6] Ex. 1, Korobkin Declaration and attachments; Ex. 2, Leverette-Saunders 11-13; Ex. 3, Leverette 11-15; Ex. 4, L. Maher 34.

[7] Ex. 5, Hellenberg 34; Ex. 6, Funk Night Ad.

[8] Ex. 2, Leverette-Saunders 30; Ex. 5, Hellenberg 31, Ex. 7, I. Mobley 25-27; Ex. 8, Washington 21-22.

[9] Ex. 9, Buglo 42-44; Ex. 10 at 4, Anticipatory Search Warrant & Affidavit.

[10] Ex. 10, Anticipatory Search Warrant & Affidavit.

> any storage devices to store data, commonly used in association with the operation of a **"Blind Pig."** All firearms used in connection with the above described activities, all ownership occupancy, possession or control of the premises [sic].[11]

The warrant did not authorize the search or seizure of any person or automobile.

On May 31, 2008, Defendants Lieutenant Vicki Yost and Sergeant Buglo entered the CAID in an undercover capacity to confirm that alcohol was being served unlawfully.[12] Upon observing the unlawful sale of alcohol shortly after 2:00 a.m., Yost called in a heavily armed raid team to execute the search warrant.[13]

Although the CAID and its proprietors were allegedly violating the law by serving alcohol without a license, Yost and the other officers had no basis for thinking that the unlawfulness of Funk Night would have been readily apparent to each of the CAID *patrons* who were merely present when the raid took place. Everyone attending Funk Night was required to show ID to enter, and only persons of drinking age were given a wrist band or hand stamp to indicate that they could drink.[14] Although under Michigan law alcohol may not be sold after 2:00 a.m., the consumption of alcohol is allowed until 2:30, and given the proper license and permit an organization like the CAID may (a) host special events that continue through the night, and (b) admit persons under the age of 21 to the event provided they are not served alcohol.[15] There were 130 patrons attending Funk Night at the time of the raid, many of whom were

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[11] *Id.* at 1 (emphasis in original).

[12] Ex. 9, Buglo 57; Ex. 11 at 7, DPD Crime Report.

[13] Ex. 11 at 7, DPD Crime Report; Ex. 9, Buglo 88-89; Ex. 12, Yost 68.

[14] Ex. 13, Timlin Declaration and Ex. 14, DVD Tracks 1 & 2; Ex. 9, Buglo 42; Ex. 2, Leverette-Saunders 14; Ex. 5, Hellenberg 21, 27; Ex. 7, I. Mobley 22; Ex. 8, Washington 19; Ex. 15, Hollander 11-12; Ex. 16, Kaiser 28, 65; Ex. 17, T. Mahler 7-8, 18-19; Ex. 18, N. Price 11; Ex. 19, Wong 21, 26.

[15] Ex. 29 at 4-7, MLCC Club Licensee Information; Ex. 12, Yost 91-98.

nowhere near the bar.[16] There was no basis for believing that those patrons knew the CAID did not have a license, sold alcohol after 2:00, or was otherwise flouting the law.

Plaintiffs Ian Mobley, Paul Kaiser, Angie Wong, James Washington, Nathaniel Price, Stephanie Hollander, Jason Leverette-Saunders, and Darlene Hellenberg were among the 130 patrons attending Funk Night when the raid occurred. Ian, Paul, Angie, James, Stephanie, and Jason were all in a fenced-in courtyard or patio area just outside the building, where no alcohol was being served.[17] Paul and Angie were about to leave, having just stopped by briefly to pick up a friend who, as it turned out, was not actually there.[18] Ian, Paul, and James had never been to the CAID before.[19] Nathaniel had just arrived at the CAID and was standing near the front door, and Darlene was in a back room where people were dancing.[20]

At approximately 2:10 a.m. dozens of police officers stormed the CAID in paramilitary raid gear and with their weapons drawn.[21] CAID patrons and staff were trampled, manhandled, thrown to the ground, hit, and kicked.[22] Among the CAID patrons subjected to the use of force by the police that night were Plaintiffs Paul Kaiser, Angie Wong, Nathaniel Price, James

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[16] Ex. 9, Buglo 76-77; Ex. 12, Yost 82-90; Ex. 2, Leverette-Saunders 24-25, 29-31; Ex. 5, Hellenberg 27, 32; Ex. 7, I. Mobley 26, 28; Ex. 8, Washington 21-23; Ex. 15, Hollander 20-24; Ex. 16, Kaiser 30-34; Ex. 17, T. Mahler 27-31; Ex. 18, N. Price 18-20; Ex. 19, Wong 27-30.

[17] Ex. 2, Leverette-Saunders 30-31; Ex. 7, I. Mobley 28; Ex. 8, Washington 22; Ex. 15, Hollander 22-24; Ex. 16, Kaiser 34; Ex. 19, Wong 27-30.

[18] Ex. 16, Kaiser 33; Ex. 19, Wong 26-28.

[19] Ex. 7, I. Mobley 19; Ex. 8, Washington 14; Ex. 16, Kaiser 17.

[20] Ex. 5, Hellenberg 32; Ex. 18, N. Price 18-20.

[21] Ex. 14, Tracks 3, 4, and 5; Ex. 11 at 1, 7, DPD Crime Report; Ex. 20, DPD Activity Logs; Ex. 21, Turner 53.

[22] Ex. 14, Track 3; Ex. 2, Leverette-Saunders 32-33; Ex. 7, I. Mobley 30-32; Ex. 8, Washington 25-28; Ex. 15, Hollander 26-27; Ex. 16, Kaiser 38, 42; Ex. 17, T. Mahler 34-37; Ex. 18, N. Price 21, 23, 30; Ex. 19, Wong 31-32.

Washington, and Jason Leverette-Saunders.[23] Many of the officers were dressed in all-black or dark-colored clothing, did not wear visible badges, and in some cases even wore ski masks to conceal their faces.[24] Some of the patrons initially thought that the CAID was being robbed because the raid team was not readily recognizable as law enforcement.[25]

Although the warrant did not authorize the search or arrest of any person, the police searched and detained every single person present.[26] Men and women were separated into different rooms, patted down, and detained for several hours under police guard while the officers "processed" them.[27] The police searched all the patrons' pockets and placed their belongings in plastic bags.[28]

Supervised by Lieutenant Yost and Sergeants Buglo and Turner, the police charged all 130 patrons attending Funk Night with the crime of "loitering in a place of illegal occupation" in violation of City Code § 38-5-1.[29] No inquiry was made as to whether any of the patrons knew

[23] Ex. 16, Kaiser 37-46; Ex. 19, Wong 31-32; Ex. 18, N. Price 30; Ex. 8, Washington 25-28; Ex. 2, Leverette-Saunders 31-33.

[24] Ex. 16, Kaiser 34-35, 65-66; Ex. 19, Wong 29-34; Ex. 8, Washington 22-25; Ex. 2, Leverette-Saunders 32; Ex. 17, T. Mahler 31.

[25] Ex. 19, Wong 29-30; Ex. 17, T. Mahler 31.

[26] Ex. 10, Anticipatory Search Warrant & Affidavit; Ex. 14, DVD Tracks 7 & 8; Ex. 22, Potts 40.

[27] Ex. 14, DVD Tracks 9 and 10; Ex. 9, Buglo 122; Ex.12, Yost 72, 119-20, 128-29; Ex. 22, Potts 46-48; Ex. 23, Cole 63-64; Ex. 2, Leverette-Saunders 34-37; Ex. 5, Hellenberg 37-39; Ex. 7, I. Mobley 32-34, 40; Ex. 8, Washington 32; Ex. 15, Hollander 25-28; Ex. 16, Kaiser 38, 42-46, 49; Ex. 17, T. Mahler 37-39; Ex. 18, N. Price 20-22; Ex. 19, Wong 36.

[28] Ex. 5, Hellenberg 37-38; Ex 15, Hollander 28; Ex. 16, Kaiser 38, 44; Ex. 2, Leverette-Saunders 35; Ex. 7, I. Mobley 33-34; Ex. 18, N. Price 20-22; Ex. 17, T. Mahler 37; Ex. 8, Washington 26, 39.

[29] Ex. 11, DPD Crime Report; Ex. 9, Buglo 76-77, 85-86, 98; Ex. 12, Yost 99, 104, 124-25, 129-30; Ex. 21, Turner 41-43, 66-69; Ex. 24, Gray 65. After this lawsuit was filed, the ordinance was amended to prohibit loitering in a place of illegal occupation "with the intent to engage in such illegal occupation." Detroit Ordinance (Mich.) No. 29-10 (2010), Ex. 25.

the CAID was unlicensed or had served alcohol after hours.[30] Instead, each patron was charged with a crime merely for being present.[31] Each Plaintiff was required to go to court to defend against the criminal loitering citation.[32] Their criminal cases were eventually dismissed.[33]

Before they were allowed to leave the CAID, patrons were also all asked if they had driven to the CAID and parked outside.[34] If they had, the police impounded their car for forfeiture proceedings under Michigan's "nuisance abatement" statute, M.C.L. § 600.3801 *et seq.*[35] Drivers were handed a piece of paper entitled "Nuisance Abatement: Notice of Impoundment of Vehicle," which stated:

> The motor vehicle you were driving or in which you were a passenger was seized pursuant to an arrest or a state misdemeanor or a comparable city ordinance violation involving lewdness, assignation, and/or solicitation for prostitution, *or used for the unlawful manufacture, storing, possessing, transporting, sale, keeping for sale, giving away, bartering, or furnishing of any controlled substance or any intoxicating liquors . . . .*[36]

Although the search warrant did not authorize the seizure of any cars, at Lieutenant Yost's directive and under Sergeant Turner's supervision the police "abated" the car of every

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[30] Ex. 9, Buglo 62, 83-86, 98; Ex. 12, Yost 89-90; Ex. 21, Turner 35; Ex. 23, Cole 83-84; Ex. 24, Gray 23, 65.

[31] Ex. 9, Buglo 98; Ex. 12, Yost 89; Ex. 21, Turner 59-60; Ex. 22, Potts 72-73; Ex. 24, Gray 63, 66; Ex. 26, Johnson 76-80; Ex. 27, McWhorter 70; Ex. 28, Singleton 42-43.

[32] Ex. 2, Leverette-Saunders 42; Ex. 5, Hellenberg 45; Ex. 7, I. Mobley 43; Ex. 8, Washington 34; Ex. 15, Hollander 30-33; Ex. 16, Kaiser 61-63; Ex. 30, N. Price Declaration; Ex. 31, Wong Declaration.

[33] Ex. 32, Dismissal Orders.

[34] Ex. 9, Buglo 110-11; Ex. 21, Turner 67-68; Ex. 2, Leverette-Saunders 39-40; Ex. 5, Hellenberg 39; Ex. 7, I. Mobley 34-35; Ex. 15, Hollander 28-29; Ex. 17, T. Mahler 39; Ex. 18, N. Price 22-23; Ex. 19, Wong 36-37.

[35] Ex. 5, Hellenberg 39; Ex. 19, Wong 36-37.

[36] Ex. 33, Notice of Impoundment of Vehicle (emphasis added); Ex. 4, L. Mahler 18-19; Ex. 5, Hellenberg 39-40; Ex. 19, Wong 36-37; Ex. 34, K. Mobley 11.

CAID patron attending Funk Night who had parked outside or nearby.[37] Among the 44 cars taken that night were those driven by Plaintiffs Ian Mobley (who had parked *a mile away* at the house of an acquaintance and walked to the CAID), Angie Wong, Nathaniel Price, Jason Leverette-Saunders, and Darlene Hellenberg.[38] Plaintiffs Kimberly Mobley, Jerome Price, Wanda Leverette, and Laura Mahler owned the cars being driven by their respective sons Ian, Nathaniel, Jason, and Thomas.[39]

There was no allegation, and no reason to believe, that Plaintiffs used their cars to transport alcohol, or even that they drove their cars to the CAID knowing that they were driving to an unlicensed establishment or event.[40] The police took the cars solely because they had transported Plaintiffs to, or near, the CAID.[41]

The police actions described above were the standard operating procedure of Defendant City of Detroit's police force.[42] Officers testified that it is the widespread practice of the Detroit Police Department that *all* patrons present during *all* blind pig raids are detained, searched, and charged with loitering in a place of illegal occupation, and their cars seized for nuisance

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[37] Ex. 10 at 1, Anticipatory Search Warrant & Affidavit; Ex. 12, Yost 130; Ex. 21, Turner 66-67, 72-73.

[38] Ex. 37, DPD Follow Up Report; Ex. 2, Leverette-Saunders 40; Ex. 5, Hellenberg 39-40; Ex. 7, I. Mobley 19-21, 34-40; Ex. 18, N. Price 22-23; Ex. 19, Wong 36-38.

[39] Ex. 3, Leverette 17; Ex. 4, L. Mahler 16-18; Ex. 34, K. Mobley 10; Ex. 38, J. Price 7-8.

To get their cars back, most patrons had to pay a $900 "redemption fee" to the Wayne County Prosecutor's Office, which is responsible for nuisance abatement actions under M.C.L. § 600.3805. Ex. 3, Leverette 25-26; Ex. 4, L. Mahler 23-24; Ex. 19, Wong 41; Ex. 38, J. Price 22. The City of Detroit then recovered two-thirds of those fees. Ex. 35, Defs' Resp. to Interrog. # 11. The City of Detroit has recovered over $1 million in "nuisance abatement" revenue since 2005 as a result of motor vehicle seizures under M.C.L. § 600.3801. Ex. 36.

[40] Ex. 9, Buglo 110; Ex. 23, Cole 78.

[41] Ex. 12, Yost 140-141; Ex. 21, Turner 73; Ex. 23, Cole 78; Ex. 26, Johnson 88.

[42] Ex. 39 at 3, Defs' Resp. to RFA # 3.

abatement, regardless of whether the patron knows the place is unlicensed or operating unlawfully and regardless of whether the patron intended to engage in any illegal activity.[43]

SUMMARY-JUDGMENT STANDARD

A motion for summary judgment may be granted only if 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). In considering a motion for summary judgment, the court must view the evidence and draw all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986). If a reasonable juror could return a verdict for a plaintiff, then a defendant's motion for summary judgment must be denied. *Pucci v. Nineteenth District Court*, 628 F.3d 752, 759-60 (6th Cir. 2010).

Additionally, the motion may not be granted if the "nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." Fed. R. Civ. P. 56(d). For example, "'a litigant who fails to answer potentially relevant discovery requests on schedule will be unable to demand summary judgment until after he remedies his failure.'" *Bobo v. UPS, Inc*., 665 F.3d 741, 753 (6th Cir. 2012) (quoting *Resolution Trust Corp. v. N. Bridge Assocs., Inc.*, 22 F.3d 1198, 1208 (1st Cir. 1994)).

ARGUMENT

I. Defendant City of Detroit's motion for summary judgment should be denied because Plaintiffs were unlawfully detained, searched, and prosecuted, and their cars unlawfully seized, pursuant to an unconstitutional municipal policy or custom.

"To succeed on a municipal liability claim, a plaintiff must establish that [A] his or her constitutional rights were violated and that [B] a policy or custom of the municipality [C] was

[43] Ex. 9, Buglo 77-79, 85-86, 107-10, 145-49; Ex. 12, Yost 104, 129; Ex. 21, Turner 24, 32-35, 72-73; Ex. 22, Potts 44, 78; Ex. 23, Cole 27, 83; Ex. 24, Gray 21-23, 29-30, 62, 74-75.

the 'moving force' behind the deprivation of the plaintiff's rights." *Miller v. Sanilac County*, 606 F.3d 240, 254-55 (6th Cir. 2010). Plaintiffs meet those requirements here.

A. Plaintiffs' constitutional rights were violated because there was no probable cause to believe they knew the facts that made the CAID's sale of alcohol unlawful and no probable cause to believe they used their cars for an unlawful act.

The question of whether Plaintiffs' rights were violated was briefed extensively in Plaintiffs' motion for partial summary judgment and supporting brief (Dkt. # 81).[44] Rather than duplicate those legal arguments and authorities, Plaintiffs hereby incorporate them by reference.

To summarize, Detroit's ordinance prohibiting "loitering in a place of illegal occupation" was not a strict liability offense (or could not be enforced as such constitutionally), and thus a person's mere presence in a place where alcohol was being served unlawfully was not a crime and did not by itself establish probable cause to detain, search, or prosecute that person. Similarly, a person's car is not a "nuisance" subject to "abatement" under any constitutional application of M.C.L. § 600.3801 *et seq.* solely because it is driven to a place where alcohol is being served unlawfully, and thus a person's mere presence in such a place does not by itself establish probable cause to seize and impound the car that person drove there. A "conventional *mens rea* element . . . would require that the defendant *know the facts* that make his conduct illegal." *Staples v. United States*, 511 U.S. 600, 606 (1994) (emphasis added). But Yost and the other police officers who carried out the raid had no reason to believe any individual Plaintiff (a) knew that the CAID did not have a liquor license or was serving alcohol after 2:00 a.m., or (b) used his or her car for an unlawful act. "Where the standard is probable cause, a search or seizure of a person must be supported by probable cause *particularized* with respect to that person." *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979) (emphasis added). Thus, Plaintiffs' rights

[44] Pls.' Br. (Dkt. # 81) at Pg ID 1307-1328.

were violated under six counts: unlawful detention, unreasonable searches of persons, malicious prosecution, unreasonable seizure of property, due process in the application of the ordinance, and due process in the application of the nuisance abatement statute.[45]

Defendants argue that Plaintiffs' constitutional rights were not violated at all, but their arguments are supported neither by the facts (particularly when viewed in the light most favorable to Plaintiffs) nor the law. Principally, Defendants argue that Plaintiffs knew or should have known that the CAID was selling alcohol unlawfully because they were present when these sales continued to take place after 2:00 a.m., which is the time that all lawful sales of alcohol in the State of Michigan must stop.[46] If, when the raid took place at 2:10 a.m., the Defendant officers truly had probable cause to believe that *every* CAID patron knew that sale of alcohol was continuing, this might be a viable argument. However, the record reflects that Plaintiffs (like many of the CAID's 130 patrons) were nowhere near the bar, the only place where alcohol was being sold.[47] The CAID was not a small one-room venue in which the sale of alcohol was clearly visible to all patrons throughout the establishment.[48] In fact, there were between 30 and 50 patrons in the outdoor patio area where no alcohol was being served or sold,[49] and Yost—the commanding officer who initiated the raid and decided that probable cause existed for every

[45] *Id.* Note that Count Two for excessive force is addressed separately in Section III below.

[46] Defs. City of Detroit et al.'s Mot.& Br. (Dkt. # 84): Mot. ¶ 8 at Pg ID 1794; Br. at Pg ID 1815; Defs. Yost & Buglo's Br. (Dkt. # 85) at Pg ID 2295-2296.

[47] Ex. 9, Buglo 76-77; Ex. 2, Leverette-Saunders 24-25, 29-31; Ex. 5, Hellenberg 27, 32; Ex. 7, I. Mobley 26, 28; Ex. 8, Washington 21-23; Ex. 15, Hollander 20-24; Ex. 16, Kaiser 30-34; Ex. 17, T. Mahler 27-31; Ex. 18, N. Price 18-20; Ex. 19, Wong 27-30; Ex. 41, Hellenberg Declaration; Ex. 42, Supplemental N. Price Declaration.

[48] Ex. 2, Leverette-Saunders 24-25; Ex. 5, Hellenberg 27; Ex. 7, I. Mobley 26; Ex. 8, Washington 21-22; Ex. 15, Hollander 19-20; Ex. 16, Kaiser 30-33; Ex. 19, Wong 28-30.

[49] Ex. 16, Kaiser 32; Ex. 2, Leverette-Saunders 30-31.

single patron[50]—admitted that (a) she did not know whether alcohol was being sold on the patio because she never went out there on the night of the raid, (b) the bar where alcohol was being sold was not visible from the patio, and consequently (c) the patrons on the patio were detained and charged with loitering ***solely because they were present***, not because they were reasonably suspected of knowing alcohol was being served without a license or after 2:00 a.m.[51] Ian Mobley, Paul Kaiser, Angie Wong, James Washington, Stephanie Hollander, and Jason Leverette-Saunders were all on the patio at the time of the raid, where no sales of alcohol were taking place or visible.[52] Similarly, Darlene Hellenberg was in a back room where people were dancing (no alcohol sales were taking place there or visible), and Nathaniel Price had just arrived at the CAID and was standing near the front door (also where no alcohol sales were visible).[53] Thus, there was no reasonable basis for Yost or any other officer present when the raid took place to think that Plaintiffs knew the CAID was selling alcohol after 2:00.[54]

Defendants also attempt to justify their conduct by pointing to evidence, discovered during the depositions in this lawsuit, that some of the Plaintiffs had been to the CAID on

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[50] Ex. 12, Yost 68, 123, 130.

[51] *Id.* at 85-90.

[52] Ex. 2, Leverette-Saunders 30-31; Ex. 7, I. Mobley 28; Ex. 8, Washington 22; Ex. 15, Hollander 22-24; Ex. 16, Kaiser 34; Ex. 19, Wong 27-30.

[53] Ex. 41, Hellenberg Declaration; Ex. 42, Supplemental N. Price Declaration.

[54] It is worth noting that under Michigan's liquor laws, licensees may allow their patrons to continue *consuming* alcohol until 2:30, and non-profit organizations such as the CAID may obtain a special permit allowing dance and music events to continue through the night. Ex. 29 at 4, 6-7, MLCC Club Licensee Information. Therefore, there was no reasonable basis for Defendants' belief that Plaintiffs were somehow "on notice" at 2:10 that the CAID was a "place of illegal occupation" just because patrons were drinking on the premises or just because Funk Night had been advertised as an all-night event. Similarly, although Defendants suggest that the CAID's illegal status was evident because patrons under 21 were being admitted (*see* Defs. City of Detroit et al.'s Br. [Dkt. # 84] at Pg ID 1808, n. 5), this is mistaken because Michigan law allows non-profit organizations with a liquor license to admit minors provided they are not actually served alcohol. Ex. 29 at 5.

previous Funk Nights and were therefore allegedly familiar with its "illegal activities."[55] This argument ignores the well-established legal standard for probable cause, which "depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest." *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004). When the raid occurred in this case, the Defendant officers knew nothing about any Plaintiff except that he or she was present at the CAID.[56] Police officers may not cobble together "probable cause" from facts they learn for the first time when they depose the plaintiffs whose rights they have already violated. Facts known to Plaintiffs but not to the Defendant officers at the time of the raid are irrelevant to the question of whether a Fourth Amendment violation occurred.

Finally, Defendants state that their seizure of Plaintiffs' cars was authorized by the search warrant.[57] There is absolutely no basis for that assertion. "It is well-settled that items to be seized pursuant to a search warrant must be described *with particularity* to prevent the seizure of one thing under a warrant describing another in violation of the Fourth Amendment." *United States v. Richards*, 659 F.3d 527, 536-37 (6th Cir. 2011) (emphasis added). The search warrant obtained by Sergeant Buglo authorized him to

> seize, secure, tabulate and make return according to the law the following property and things: All suspected controlled substances, all monies, contraband, books, and paraphernalia used in connection with illegal narcotic trafficking and gambling; alcoholic beverages of any type and the money and profits from same; any photographic video and audio equipment, computers, hard drives, any storage devices to store data, commonly used in association with the operation of a **"Blind Pig."** All firearms used in connection with the above described activities, all ownership

[55] Defs. City of Detroit et al.'s Br. (Dkt. # 84) at Pg ID 1803, n.1, 1806, 1816.

[56] Sergeant Buglo admitted that he had no reason to believe that the same patrons attending one Funk Night were present at previous Funk Nights. Ex. 9, Buglo 51-52.

[57] Defs. City of Detroit et al.'s Br. (Dkt. # 84) at Pg ID 1811.

occupancy, possession or control of the premises [sic].[58]

No reference is made to the seizure of cars driven to the CAID, either in the warrant or even its supporting affidavit. Nor does the "Return to Search Warrant" list the 44 cars that were seized.[59] Thus, the seizure of Plaintiffs' cars was *not* authorized by the warrant.

B. The City of Detroit and its officers have admitted to a widespread, routine, and standard practice of detaining, searching, and prosecuting all patrons at establishments where alcohol is being sold unlawfully and impounding their cars, without individualized probable cause that each patron knew the facts that made such sales unlawful or used his or her car for any unlawful act.

A municipality is liable under 42 U.S.C. § 1983 if the acts that violated a person's rights were undertaken pursuant to its policy or custom. *Monell v. Dep't of Soc. Servs*., 436 U.S. 658, 690-94 (1978). An official legislative or executive act is not required to establish liability; "local governments . . . may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." *Id*. at 690-91. A city may be liable for "a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled as to constitute a custom or usage with the force of law." *Cash v. Hamilton County Dep't of Adult Probation*, 388 F.3d 539, 543 (6th Cir. 2004) (quoting *Monell*, 436 U.S. at 691).

In this case, the City of Detroit is liable because it had a widespread practice, permanent and well settled, of: (1) detaining, searching, and prosecuting large groups of persons for "loitering in a place of illegal occupation" based on their mere *presence* at an establishment where liquor was being sold unlawfully, without probable cause that each individual being detained, searched, and prosecuted knew the facts that made the alcohol sales unlawful; and (2) impounding all the cars that are driven to such places, also based solely on the drivers' collective

[58] Ex. 10 at 1, Anticipatory Search Warrant & Affidavit (emphasis in original).

[59] Ex. 40, Return to Search Warrant.

presence there and without probable cause that each car was knowingly used for an unlawful act.

1) The officers acted pursuant to "standard operating procedure."

Although the City denies the existence of any unconstitutional custom,[60] there is ample evidence that such a custom existed. In response to a request for admission under Rule 36, the City admitted that its "*standard operating procedure* when raiding an establishment that was selling alcohol without a license and/or selling alcohol after 2 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."[61] This "standard operating procedure" admission was sufficient to establish municipal liability. *Hunter v. City of Sacramento*, 652 F.3d 1225, 1233 (9th Cir. 2011).

The admission was also consistent with the testimony of numerous police officers who had participated in countless raids of suspected "blind pigs" over many years.[62] For example:

- Sergeant Buglo, the deputy raid commander, testified that it was "standard procedure," "general practice," and the "custom and usage of the Detroit Police Department."[63] He further testified that "It's been done that way long before I got to [the vice unit]. That's just how it was done. . . . It's just part of the raid procedure . . . ."[64] He admitted, without objection, that "this was routine practice and policy of the vice enforcement unit of the Detroit Police Department."[65]
- Sergeant Turner, who was involved in about 100 blind pig raids over approximately

[60] Defs. City of Detroit et al.'s Br. (Dkt. # 84) at Pg ID 1810-1811.

[61] Ex. 39 at 3, Defs' Resp. to RFA # 3 (emphasis added).

[62] Ex. 9, Buglo 77-79, 85-86, 107-10, 145-49; Ex. 12, Yost 104, 129; Ex. 21, Turner 24, 32-35, 72-73; Ex. 22, Potts 44, 78; Ex. 23, Cole 27, 83; Ex. 24, Gray 21-23, 29-30, 62, 74-75.

[63] Ex. 9, Buglo 77-79

[64] *Id*. at 108

[65] *Id*. at 110.

fifteen years as an officer and supervisor, testified that "normally anyone inside the location is going to be ticketed," that this "decision has been made even before you go in" for the raid, and "we're ticketing the person because he's in the location and there's illegal activity inside the location, *whether he knew it or not*."[66] He further testified that "Normally, . . . if they drove a vehicle, it's going to be impounded."[67]

- Sergeant Potts, who participated in multiple blind pig raids while assigned to the tactical mobile unit, the special response team, Eastern Precinct support, and the Thirteenth Precinct, admitted without objection that "it's the standard operating procedure to detain *all* of the patrons, to pat them down, to remove the contents of their pockets, and to ultimately ticket them."[68] He further agreed that "it was the custom of the police department that when raiding an establishment that was selling alcohol without a license or selling after 2:00 a.m., to charge *all persons in the building* with loitering in a place of illegal occupation and seiz[e] their vehicles under the nuisance abatement statute."[69]
- Officer Cole, who took part in hundreds of blind pig raids, agreed without objection that "it was the standard operating procedure of the City of Detroit Police Department, when raiding a blind pig, to ticket everyone there for loitering in a place of illegal occupation and to confiscate the cars that they drove there," regardless of whether they knew they were in a blind pig.[70]
- Officer Gray likewise agreed without objection that "it was the standard operating pro-

[66] Ex. 21, Turner 24, 34-35 (emphasis added).

[67] *Id.* at 73.

[68] Ex. 22, Potts 10, 15-16, 20-22, 44 (emphasis added).

[69] *Id.* at 78 (emphasis added).

[70] Ex. 23, Cole 27, 83-84.

> cedure of the police department and the city that when raiding an establishment that was selling alcohol without a license or selling alcohol after two a.m., to charge *all persons in attendance* either as an engager or for loitering in a place of illegal occupation and to seize their vehicles under the nuisance abatement statute. . . . . And of the ten or so blind pig raids that [he has] participated in, [they have] generally followed this same procedure."[71]

2) The custom was widespread.

The City's suggestion that its custom was not "widespread" because the vice unit has only six to eight officers in it is simply misleading.[72] Although blind pig raids were organized by the vice squad, the raids were carried out by fifty or more officers assigned to multiple units and divisions of the Detroit Police Department.[73] Narcotics crews rotated through the vice squad every 28 days.[74] Sergeant Potts was not a member of the vice unit, but he participated in blind pig raids while assigned to the tactical mobile unit, the special response team, the Eastern Precinct support unit, and the Thirteenth Precinct; and he was fully aware that the loitering ordinance and nuisance abatement statute were enforced against everyone in a blind pig location based on their mere presence.[75] Likewise, Officer Cole was not a member of the vice unit, but he participated in *hundreds* of blind pig raids, and he too fully comprehended and participated in the relevant custom of detaining, searching, and prosecuting all the patrons, and seizing their cars for forfeiture, merely because they were present at the raid location.[76]

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[71] Ex. 24, Gray 75.

[72] Defs. City of Detroit et al.'s Br. (Dkt. # 84) at Pg ID 1811.

[73] Ex. 22, Potts 20.

[74] Ex. 9, Buglo 17.

[75] Ex. 22, Potts 10, 15-16, 20-22, 44, 78.

[76] Ex. 23, Cole 24-27, 83-84, 95-96.

3) There is no policymaker requirement.

Notwithstanding the City's suggestion to the contrary,[77] Plaintiffs are not required to identify a policymaker such as the mayor or police chief who personally approved a policy or displayed "deliberate indifference" to Plaintiffs' rights. Although evidence of a policymaker's specific decision or deliberate indifference are *potential* avenues of establishing municipal liability, they are not necessary if a plaintiff can point to other testimony from which a jury can reasonably infer an unconstitutional municipal custom and practice. *See, e.g.*, *Thompson v. City of Los Angeles*, 885 F.2d 1439, 1444 (9th Cir. 1989) ("If such a showing is made, . . . a local government may be liable for its custom irrespective of whether official policymakers had actual knowledge of the practice at issue."); *see also Cash*, 388 F.3d at 543-44 (reversing summary judgment for city and county based on evidence of long-standing police custom of destroying personal property belonging to homeless persons); *Fairley v. Andrews*, 430 F. Supp. 2d 786, 801 (N.D. Ill. 2006). Where there is evidence that the conduct in question was, for example, a "standard practice," *Monistere v. City of Memphis*, 115 F. App'x 845, 851 (6th Cir. 2004), "common knowledge," *Williams v. DeKalb County*, 327 F. App'x 156, 163 (11th Cir. 2009), "done all the time," *id.*, "a common occurrence," *Fairley*, 430 F. Supp. 2d at 802, or "routine[]," *id.*, a jury may conclude that it was a municipal custom or usage with the force of law. The officer testimony recounted above clearly satisfies that requirement.

C. The City's unconstitutional custom and practice was the "moving force" behind the violation of Plaintiffs' constitutional rights.

There can be little doubt that the policy or custom identified above was the "moving force" behind the violation of Plaintiffs' rights. "At bottom, this is a causation inquiry, requiring the plaintiff to show that it was the defendant's custom or policy that led to the complained of

[77] Defs. City of Detroit et al.'s Br. (Dkt. # 84) at Pg ID 1810-1811.

injury." *Powers v. Hamilton County Public Defender Comm'n*, 501 F.3d 592, 608 (6th Cir. 2007); *see, e.g.*, *Garner v. Memphis Police Dep't*, 8 F.3d 358, 364-65 (6th Cir. 1993) (concluding that police department's unconstitutional policy authorizing deadly force against nondangerous fleeing felons caused the death of plaintiff's son). Here, the police custom at issue—enforcing the loitering ordinance and nuisance statute against patrons based on *mere presence*, as opposed to individualized probable cause—is what led to Plaintiffs being detained, searched, and prosecuted, and their cars taken, in violation of the Fourth Amendment. Had Defendants directed their law enforcement efforts at the CAID's proprietors, only those patrons who were reasonably suspected of *knowing* the facts that made Funk Night illegal, and only those cars that had been "used for the unlawful manufacture, transporting, sale, keeping for sale, bartering, or furnishing of" alcohol, Plaintiffs' rights would not have been violated.

To the extent the City argues that it is not liable because "Yost took full responsibility for the law enforcement action and decision-making at the CAID as the raid commander,"[78] this argument misses the point. Because municipalities are not human beings, *all* customs and policies must be implemented by a natural person (such as a police lieutenant) in order to become actionable in an individual case. The involvement of such a person does not allow the municipality to evade liability for "a widespread practice that . . . is so permanent and well settled as to constitute a custom or usage with the force of law." *Cash*, 388 F.3d at 543 (quoting *Monell*, 436 U.S. at 691). Although Yost had operational command, the record reflects that she was not some rogue officer who made a bad decision for which the City cannot be held accountable under 42 U.S.C. § 1983. Rather, Plaintiffs were detained, searched, and charged with loitering, and their cars towed, based on their mere presence at the CAID, *because that was*

[78] Defs. City of Detroit et al.'s Br. (Dkt. # 84) at Pg ID 1811.

the City's custom and practice when raiding a blind pig.[79]

D. The City has withheld discovery material relevant to training and discipline.

Plaintiffs also alleged in their Amended Complaint that the City is liable for its failure to train and/or discipline its officers regarding searches and seizures.[80] This claim is separate from the unconstitutional "custom or usage" claim described above. *City of Canton v. Harris*, 489 U.S. 378 (1989). As described in Plaintiffs' attached Rule 56(d) declaration (Ex. 44) and in their pending discovery motion (Dkt. # 68), Defendants have failed to produce discovery material relevant to this claim.[81] Any summary judgment ruling on Plaintiffs' claims against the City for failure to train or discipline would be premature until relevant discovery material is produced and Plaintiffs' pending discovery motion is resolved. *Bobo v. UPS, Inc.*, 665 F.3d 741, 753-54 (6th Cir. 2012).

For all the reasons discussed above, Defendant City of Detroit's motion for summary judgment should be denied.

II. The Defendant officers should be denied qualified immunity because the Fourth Amendment requirements for individualized probable cause and reasonable suspicion were clearly established at the time of the raid and the officers' actions were objectively unreasonable in light of this clearly established law.

Qualified immunity must be denied "'if it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Grawey v. Drury*, 567 F.3d 302, 314 (6th Cir. 2009) (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)). Once a plaintiff shows that her constitutional rights were violated, the qualified-immunity inquiry turns to whether the

[79] It is noteworthy that, in response to Plaintiff Kim Mobley's citizen complaint regarding the seizure of her vehicle, the seizure was found to be "consistent with practices and policies… the alleged conduct did not violate Detroit Police Department policies, procedures, or training…" Ex. 54 (see page marked "Def-City-0703" in lower right corner).

[80] Pls.' Am. Compl. (Dkt. # 21) ¶¶ 243, 257, 263, etc.

[81] *See also* Ex. 55, 1st & 2nd Dep. Notices of Supervising Investigator Ainsley Cromwell.

constitutional right at issue (1) "was clearly established at the time of the defendant's alleged misconduct," *Saucier*, 533 U.S. at 201, and (2) whether "what the official allegedly did was objectively unreasonable in light of the clearly established constitutional right," *Grawey*, 567 F.3d at 309. "[T]here need not be a case with the exact same fact pattern or even 'fundamentally similar' or 'materially similar' facts; rather, the question is whether the defendants had 'fair warning' that their actions were unconstitutional." *Id*. at 313-14 (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). As explained below, Plaintiffs' rights were clearly established and the Defendant officers' conduct was objectively unreasonable in light of those rights. Therefore, qualified immunity should be denied.

A. At the time of the raid, the Fourth Amendment law on the need for *individualized* probable cause and reasonable suspicion was clearly established.

At the time of the raid in this case, it was clearly established under the Fourth Amendment that prolonged detentions, arrests, and prosecutions must be supported by *individualized* probable cause as to the *particular* person being seized. *United States v. Cortez*, 449 U.S. 411, 417-18 (1981); *Ybarra v. Illinois*, 444 U.S. 85, 91-94 (1979); *Peet v. City of Detroit*, 502 F.3d 557, 579 (6th Cir. 2007); *Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 827-28 (6th Cir. 2007). It was also clearly established that *Terry*-style pat-down and frisk searches must be supported by *individualized* reasonable suspicion that the specific person searched is presently armed and dangerous; general cursory searches based on conclusory references to "officer safety" are unconstitutional. *Ybarra*, 444 U.S. at 91-94; *United States v. Ritter*, 416 F.3d 256, 268-69 (3d Cir. 2005); *Bennett v. City of Eastpointe*, 410 F.3d 810, 824 (6th Cir. 2005); *Russo v. Massullo*, 927 F.2d 605, 1991 WL 27420 at *4 (6th Cir. 1991); *see also United States v. Street*, 614 F.3d 228, 233-34 (6th Cir. 2010) (verbal order to

empty pockets is a Fourth Amendment search).[82] The Sixth Circuit routinely denies qualified immunity where the plaintiff's central claim is lack of probable cause or reasonable suspicion in violation of the Fourth Amendment, as the law in that area is clearly established. *See Parsons v. City of Pontiac*, 533 F.3d 492, 504 (6th Cir. 2008); *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 310 (6th Cir. 2005); *Gardenhire v. Schubert*, 205 F.3d 303, 313 (6th Cir. 2000).

B. The Defendant officers' conduct was objectively unreasonable.

The multiple violations of Plaintiffs' clearly established constitutional rights in this case all flow directly from the lack of *individualized* probable cause with respect to the patrons who were present at the CAID when the raid occurred. Where probable cause is lacking, an officer may still seek qualified immunity if she was reasonably mistaken about the *facts* underlying her incorrect probable cause determination. *See, e.g., Feather v. Aey*, 319 F.3d 843, 851 (6th Cir. 2003) (qualified immunity granted where unconstitutional traffic stop was based on inaccurate information supplied by the dispatcher which, if true, would have made the stop reasonable); *Pray v. City of Sandusky*, 49 F.3d 1154, 1158-60 (6th Cir. 1995) (qualified immunity granted insofar as the officers mistakenly executed a search warrant at the wrong address but denied insofar as the officers did not promptly retreat once they recognized the error). But here, no reasonable factual errors relieve the Defendant officers of liability. Viewing the evidence in the

[82] Defendants also try to justify their searches of Plaintiffs by reference to the "search incident to arrest" doctrine. Defs. City of Detroit et al.'s Br. (Dkt. # 84) at Pg ID 1814. However, it is clearly established that this narrow exception to the warrant requirement applies only where the arrest itself is supported by individualized probable cause, and only where a full "*custodial*" and "*formal* arrest follows quickly on the heels of the challenged search." *United States v. Montgomery*, 377 F.3d 582, 586 & 587 n.4 (6th Cir. 2004) (emphasis added); *see also Bennett v. City of Eastpointe*, 410 F.3d 810, 824 (6th Cir. 2005) ("The mere fact that an officer has the *authority* to arrest an individual does not, and never has, automatically permitted the officer to conduct a pat-down search should he choose not to effectuate the arrest. For an officer to conduct a search incident to arrest, there must be an *actual arrest*." (emphasis in original; citation omitted)). In this case, Defendants deny that anyone was "arrested." Ex. 12, Yost 80-81, 102; Ex. 9, Buglo 76, 117.

light most favorable to Plaintiffs, there was no objectively reasonable basis for Defendants to have believed that their actions as to each Plaintiff were supported by probable cause.

1) Lieutenant Yost

Yost is liable because, as commanding officer, she initiated the raid and authorized enforcement against each patron and car.[83] She is also liable for "set[ting] in motion a series of events that [she] knew or should reasonably have known would cause others to deprive [Plaintiffs] of [their] constitutional rights." *Hansen v. Williamson*, 440 F. Supp. 2d 663, 669 (E.D. Mich. 2006) (Roberts, J.); *see also Harris v. Roderick*, 126 F.3d 1189, 1196 (9th Cir. 1997).

In her motion for summary judgment, Yost argues that qualified immunity is appropriate because

> a fair-minded person of average intelligence would believe that the patrons at the CAID, after 2:00 am on May 31, 2008 were loitering in a place of illegal occupation ***and knew or should have known that they were doing so.***[84]

Entirely absent from her brief is any explanation as to *why* it would have been reasonable for Yost to have believed that all of the CAID's patrons "knew or should have known" that the CAID was unlicensed or that alcohol was being sold there after 2:00. In Yost's own deposition, she acknowledged having previously informed the CAID's *proprietor*, Aaron Timlin, that the CAID could legally host Funk Night after obtaining a license.[85] It stands to reason that she could not have reasonably assumed that the CAID's 130 *patrons* would all be personally aware that Timlin chose not to follow Yost's advice and did not get the license that would have made Funk Night a properly licensed event. She also acknowledged that the after-hours sale of alcohol was

[83] Ex. 12, Yost 68, 123, 130.

[84] Defs. Yost & Buglo's Br. (Dkt. # 85) at Pg ID 2295 (emphasis added).

[85] Ex. 12, Yost 91-98.

not visible to many of the CAID's patrons at the time she decided to call in the raid.[86] Thus, she had no reason to believe all the patrons knew alcohol was being sold after 2:00. Yost could not have reasonably concluded that each Plaintiff "knew or should have known" they were in a "place of illegal occupation."

As for Yost's decision to impound all the patrons' cars,[87] she likewise had no basis for concluding that each Plaintiff's car was "used for the unlawful manufacture, transporting, sale, keeping for sale, bartering, or furnishing of" alcohol as required by M.C.L. § 600.3801. Although Yost's deposition makes passing reference to a "conversation" she had with a Wayne County prosecutor before the raid,[88] there is no evidence that any prosecutor, with full knowledge of the material facts and circumstances of this raid, actually authorized the seizure of the vehicles. In any event, such approval does not typically immunize a police officer from violating a person's clearly established constitutional right. *See Ross v. City of Memphis*, 423 F.3d 596, 603 (6th Cir. 2005) ("reliance on the advice of counsel is not usually a component of the qualified immunity defense"); *York v. Purkey*, 14 F. App'x 628 (6th Cir. 2001).

Qualified immunity is especially unwarranted regarding the seizure of the car driven by Plaintiff Ian Mobley and owned by Plaintiff Kimberly Mobley. Ian parked his car *a mile away* at the house of an acquaintance and walked to the CAID, but police officers went searching for the car and actually drove it back to the CAID so it could be towed away.[89] Although Yost does not personally remember the Mobley vehicle, other officers testified that under such circumstances

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[86] *Id*. at 85-90. Ian Mobley, Paul Kaiser, Angie Wong, James Washington, Stephanie Hollander, and Jason Leverette-Saunders were on the patio. *See supra* note 17. Darlene Hellenberg and Nathaniel Price were in other areas of the CAID where the bar was not visible. Ex. 41, Hellenberg Declaration; Ex. 42, Supplemental N. Price Declaration.

[87] Ex. 12, Yost 130, 143; Ex. 21, Turner 72-73; Ex. 23, Cole 86-87.

[88] Ex. 12, Yost 131.

[89] Ex. 7, I. Mobley 34-40.

the car would be not have been towed without Yost's approval.[90]

2) Sergeant Buglo

Buglo worked with Yost to investigate the CAID, obtain a search warrant, call in the raid team after confirming that alcohol was being sold there unlawfully, and process the criminal citations that were being issued to every CAID patron for merely being present.[91] As deputy raid commander, he had supervisory authority over the officers who were issuing the citations, and he knowingly acquiesced in the unconstitutional conduct of his subordinates.[92] *Lanman v. Hinson*, 529 F.3d 673, 686 (6th Cir. 2008) (supervisory liability); *Baker v. Monroe Twp.*, 50 F.3d 1186, 1190-91 (3d Cir. 1995) (same). Like Yost, Buglo seeks qualified immunity based on the argument that Plaintiffs "should have known that the sale of alcohol after 2:00 am is illegal in the State of Michigan."[93] And also like Yost, he offers absolutely no explanation as to why it was reasonable for him to think that Plaintiffs—most of whom were outside and none of whom were near the bar—should have known that such sales had taken place in the ten minutes prior to the raid.[94] Buglo, like Yost, could not have reasonably concluded that each Plaintiff "knew or should have known" they were in a "place of illegal occupation."

3) Sergeant Turner

Turner had supervisory responsibility for processing the patrons, issuing them criminal

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[90] Ex. 23, Cole 86-87; Ex. 24, Gray 72.

[91] Ex. 9, Buglo 64, 88-89, 95.

[92] Ex. 21, Turner 41; Ex. 9, Buglo 98.

[93] Defs. Yost & Buglo's Br. (Dkt. # 85) at Pg ID 2296.

[94] Buglo admitted that he had no reason to believe that the same patrons attending one Funk Night were present at previous Funk Nights. Ex. 9, Buglo 51-52. He also testified that at the time of the raid, he and Yost were not in the same room of the CAID as most of the other patrons. *Id.* at 120.

citations, and towing their cars.[95] *See Lanman*, 529 F.3d at 686; *Baker*, 50 F.3d at 1190-91. He was responsible for the decision to search every single patron for officer safety without individualized suspicion that each patron was armed and dangerous.[96] He was also the officer who issued Angie Wong a criminal citation for loitering in a place of illegal occupation, and he admits that the only basis he had for issuing that citation was her mere presence at the CAID.[97]

4) Sergeants McWhorter and Potts and Officers Brown, Gray, Johnson, Singleton, and Cole

The remaining Defendant officers are liable for two reasons. First, they were members of the team of officers who knowingly worked together to detain and search Plaintiffs without individualized probable cause or reasonable suspicion and tow their cars. "[W]here there is a team effort or where the members were an integral part of an unlawful search and seizure," "all members of the team are liable." *Russo v. Massullo*, 927 F.2d 605, 1991 WL 27420 at *5 (6th Cir. 1991). Second, they were directly responsible for issuing criminal citations to Plaintiffs, thereby giving rise to their claims for malicious prosecution.[98]

These Defendants all argue that they are entitled to qualified immunity because they reasonably relied on the information provided to them by Yost and Buglo to satisfy the probable cause standard.[99] That defense is unpersuasive here. *See Schneider v. Franklin County*, 288 F. App'x 247, 251 (6th Cir. 2008) ("Our case law states that a seizure conducted in reliance on a dispatch is proper only if the law enforcement officer who issued the information possessed the necessary reasonable suspicion."). Although the other officers could reasonably rely on Yost

[95] Ex. 21, Turner 42, 66-67; Ex. 12, Yost 124-25.

[96] Ex. 12, Yost 128-29.

[97] Ex. 21, Turner 58-60.

[98] *See* Pls.' Br. (Dkt. # 81) at Pg ID 1316-1317.

[99] Defs. City of Detroit et al.'s Br. (Dkt. # 84) at Pg ID 1814.

and Buglo's determination that the CAID was serving alcohol unlawfully, Yost and Buglo never gave their fellow officers reason to believe that the CAID's patrons knew the facts that made the CAID's sale of alcohol unlawful. To the contrary, the only reasonable belief these officers could have had was that Plaintiffs were being detained, searched, and prosecuted, and having their cars towed, because they were present at the CAID when the raid occurred.[100]

- **Sergeant McWhorter** issued a criminal citation to Plaintiff James Washington for loitering in a place of illegal occupation.[101] He admits that although he charged James with this crime, he never met James and has no personal knowledge of whether James committed any criminal act.[102] He has no idea who does have such personal knowledge; he signed the criminal citation simply because it was handed to him by a fellow officer.[103]
- **Sergeant Potts** issued criminal citations to Plaintiffs Ian Mobley and Nathaniel Price for loitering in a place of illegal occupation.[104] He admits that their mere presence at the CAID was the sole reason they were charged.[105]
- **Officer Brown** issued a criminal citation to Plaintiff James Washington.[106] In addition, he has been noticed for deposition five times and has never appeared.[107] His repeated

[100] Ex. 21, Turner 58-60, 67.

[101] Ex. 11 at 4, DPD Crime Report. (James was given two citations for the same offense—one signed by McWhorter and one signed by Defendant Officer Brown.)

[102] Ex. 27, McWhorter 69-71, 74-76.

[103] *Id.* at 65-66

[104] Ex. 11 at 4-5, DPD Crime Report.

[105] Ex. 22, Potts 69-73.

[106] Ex. 11 at 4, DPD Crime Report.

[107] Ex. 43, 4th & 5th Dep. Notices of Def. Brown, w/ cover letters; *see also* Dkt. # 68 at Pg ID 812; Dkt. # 69-10; Dkt. # 69-11; and Dkt. # 77 at Pg ID 1165.

failure to appear for deposition is the subject of a pending motion to compel.[108] Summary judgment should not be granted where "reasonably diligent efforts to obtain evidence from the summary judgment proponent have been thwarted" and "the incompleteness of discovery is [his] fault." *Resolution Trust Corp. v. N. Bridge Assocs., Inc.*, 22 F.3d 1198, 1208 (1st Cir. 1994).

- **Officer Gray** issued a criminal citation to Plaintiff Jason Leverette-Saunders for loitering in a place of illegal occupation.[109] He admits that Jason's mere presence at the CAID was the sole reason he was charged.[110]
- **Officer Johnson** issued criminal citations to Plaintiffs Darlene Hellenberg and Paul Kaiser for loitering in a place of illegal occupation.[111] She admits that their mere presence at the CAID was the sole reason they were charged.[112]
- **Officer Singleton** issued a criminal citation to Plaintiff Stephanie Hollander for loitering in a place of illegal occupation.[113] She testified that she wrote this citation because somebody else told her to.[114] She has no recollection as to why Stephanie was charged with this offense.[115]
- **Officer Cole** issued a citation to Thomas Mahler for loitering in a place of illegal occupation based on his mere presence, which led directly to the impoundment of the car

[108] Dkt. # 68 at Pg ID 812; *see also* Dkt. # 77 at Pg ID 1165-1165.

[109] Ex. 11 at 5, DPD Crime Report.

[110] Ex. 24, Gray 66-69.

[111] Ex. 11 at 2, 6, DPD Crime Report.

[112] Ex. 26, Johnson 78-80.

[113] Ex. 11 at 3, DPD Crime Report.

[114] Ex. 28, Singleton 45.

[115] *Id.* at 41-43.

driven by him and owned by Plaintiff Laura Mahler.[116] He entered the CAID less than a minute after the raid began, did a quick sweep around the building, and then went outside where 30 to 50 patrons (including six Plaintiffs—Ian Mobley, Paul Kaiser, Angie Wong, James Washington, Jason Leverette-Saunders, and Stephanie Hollander) were being detained and searched.[117] As one of several officers who made up "an integral part of an unlawful search and seizure," *Russo*, 927 F.2d 605, 1991 WL 27420 at *5, he is liable for his role in the detention, search, and processing of these patrons.[118]

For the reasons discussed above, the individually named officers' requests for qualified immunity should be denied as to Counts One, Three, Four, Five, Six, and Seven.

III. Summary judgment should be denied on Plaintiffs' excessive force claims because Defendants have withheld relevant discovery materials in violation of a court order, and because Defendant City of Detroit is liable for its policy or custom of concealing officers' identities.

In Count Two of their Amended Complaint (Dkt. # 21), Plaintiffs Paul Kaiser, Angie Wong, Nathaniel Price, James Washington, and Jason Leverette-Saunders assert excessive force claims against "Unnamed Detroit Police Officers"—who may or may not eventually be identified as one or more of the named Defendants. The record contains ample evidence supporting Plaintiffs' allegations that such excessive force occurred. In fact, Defendants do not deny that excessive force was used; their only defense is that Plaintiffs cannot identify which officers did it.[119] Due to Defendants' refusal to provide Plaintiffs with relevant discovery materials,[120] coupled with the City of Detroit's custom and practice of concealing the identities

[116] Ex. 23, Cole 70-72; Ex. 26, Johnson 88; Ex. 37 at 2, DPD Follow Up Report.

[117] Ex. 23, Cole 50-53; Ex. 16, Kaiser 32.

[118] Ex. 23, Cole 59-63.

[119] Defs. City of Detroit et al.'s Br. (Dkt. # 84) at Pg ID 1812-1813.

[120] Ex. 44, Rule 56(d) Declaration.

of officers who participate in blind pig raids,[121] summary judgment should be denied.

A. Viewing the evidence in the light most favorable to Plaintiffs, police officers carrying out the raid violated their clearly established Fourth Amendment rights to be free from excessive force.

Excessive force claims are examined under an "objectively reasonable" standard under the "totality of the circumstances." *Graham v. Connor*, 490 U.S. 386, 397 (1989); *Ciminillo v. Streicher*, 434 F.3d 461, 466-67 (6th Cir. 2006). Whether the force used was objectively reasonable "depends on the facts and circumstances of each case viewed from the perspective of a reasonable officer on the scene." *Fox v. DeSoto*, 489 F.3d 227, 236 (6th Cir. 2007). These include "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. At the time of the raid in this case, it was clearly established that officers must detain persons using "only the *least intrusive means* reasonably available," *Burchett v. Kiefer*, 310 F.3d 937, 946 (6th Cir. 2002) (emphasis added; internal quotation marks omitted), and that the use of force against someone who is not resisting or trying to flee is objectively unreasonable, *Wysong v. City of Heath*, 260 F. App'x 848, 855-56 (6th Cir. 2008).

The record reflects that Plaintiffs' clearly established rights were violated by unnamed Detroit police officers:

- **Paul Kaiser** was standing outside in the patio area when the police arrived.[122] He got down on his knees on the muddy ground and made sure his hands were visible to police to show he was not a threat.[123] Paul told the police his name and explained that he was

[121] Ex. 9, Buglo 137-39; Ex. 23, Cole 33-34; Ex. 24, Gray 47-48.

[122] Ex. 16, Kaiser 34.

[123] *Id*. at 37.

attorney; he asked police what was going on. Rather than respond to Paul's inquiry, an officer kicked Paul several times in his back until his entire body was down on the ground, and then the officer stepped on Paul's back.[124] Paul's testimony is supported by the CAID surveillance video footage of the back yard.[125] Although the video quality is somewhat grainy and lighting is sparse, careful review of the footage shows an officer kicking Paul to the ground and stomping on his back.[126] Paul's testimony is also supported by photographic evidence showing boot prints on the back of his shirt[127] as well as the testimony of others who witnessed the incident.[128] Even Sergeant Buglo

[124] Ex. 14, DVD Track 6; Ex. 45, Kaiser Declaration; Ex. 16, Kaiser 38-39; Ex. 46, Photograph of Kaiser's Back.

[125] Ex. 14, DVD Track 6; Ex. 45, Kaiser Declaration.

[126] Ex. 14, DVD Track 6. Using the red time stamp in the lower right side of the screen, a factfinder (guided by Paul's declaration and deposition testimony) could observe the following:

- 02:18:10 — Paul is slightly to the right of the center of the screen. He is kneeling on the ground with his head and torso up, facing the right side of the screen, turned slightly away from the camera; the camera's view of Paul is obstructed briefly at the beginning of the clip as an officer walks directly behind him. (There is another figure whose head and hands are pointed at the feet of the standing officer; Paul is slightly left and up on the screen from that figure). At the very beginning of the clip, Paul's hands are visible above his waist.
- 02:18:15 — Paul puts his hands on the ground in front of him. Within a second, the officer kicks Paul, and his body drops to the ground (from the view of the camera, his head and torso drop to right from where they were positioned upright).
- 02:18:16 through 02:18:26 — Although the next several seconds are not well lit due to the roaming flashlights, the officer's movement behind Paul's prone body suggests that he kicks Paul more than once.
- 02:18:27 through 02:18:32 — The officer's right leg clearly extends to the right and kicks and/or stomps on Paul's body at least twice.
- 02:18:33 — The officer who kicked Paul and another officer who is visible to the left walk away from Paul toward the right side of the screen.

[127] Ex. 46, Photograph of Kaiser's Back; Ex. 16, Kaiser 68-69; Ex. 19, Wong 39.

[128] Ex. 19, Wong 31; Ex. 8, Washington 27-28; Ex. 7, I. Mobley 30-31; Ex.15, Hollander 26-27.

admits that Paul complained that night about the excessive force used against him.[129]

- **Angie Wong** was standing outside near Paul when the police arrived.[130] Angie crouched down, and an officer said to her, "Bitch, you think you're too pretty to get in the mud?" and stomped on her while she got down on the muddy ground.[131]
- **Nathaniel Price** was tripped to the ground during the raid. Dozens of police officers, including the named Defendants, stormed into the CAID in an aggressive, reckless, and objectively unreasonable manner. Many compliant patrons were caught up in the chaos caused by the unnecessarily violent entry, including Nathaniel, who was tripped as he tried to get to the ground not far from the CAID's entrance.[132]
- **James Washington** was in the courtyard when the raid began.[133] Anyone who did not lie in the mud fast enough, including James, was thrown to the ground by an officer.[134] Along with other patrons, James's face was pushed in the mud and a knee placed in his back while he was searched multiple times by different officers.[135] After being moved inside with the other detainees, James was forced to kneel on the floor with his hands behind his head and ankles crossed, with little or no room between him and the man in front of or behind him.[136] At some point during the hour or more that he was forced to

[129] Ex. 9, Buglo 120-21.

[130] Ex. 19, Wong 27-28, 30.

[131] Ex. 19, Wong 32; Ex. 16, Kaiser 41-42.

[132] Ex. 18, N. Price 30. Video footage demonstrates the recklessness with which the police stormed into the CAID. Ex. 14, DVD Track 3. Note how the doorman who had been checking ID in Track 2 is trampled by police officers in the doorway at time stamp 02:11:22 in Track 3.

[133] Ex. 8, Washington 23.

[134] *Id.* at 25.

[135] *Id.* at 25-26.

[136] *Id.* at 26-27; Ex. 17, T. Mahler 37-38; Ex. 14, DVD Track 8.

kneel this way, he uncrossed his legs because it was painful, but a police officer kicked his legs and told him to cross them again.[137]

- **Jason Leverette-Saunders** was also assaulted by an officer in the back yard shortly after the raid began.[138] Given the confusion and lack of identification of police, Jason asked to see a badge. Instead, officers grabbed Jason and twice threw him to the ground.[139] Then, an officer kicked Jason in the back and handcuffed him.[140] Jason's assault was also witnessed by others.[141]

Viewing these facts in the light most favorable to Plaintiffs, a reasonable jury could find that excessive force was used against them. Their only "offense" was mere presence in a place where alcohol was being sold unlawfully, and police had no reason to believe (nor have they asserted) that they were armed or posed any threat. Nor did they actively resist arrest or attempt to flee. Some Plaintiffs were understandably confused about what was happening since they had no reason to expect an armed police raid and the intruders were not easily identifiable as law enforcement officers. But their legitimate questions about what was going on did not give the police license to physically assault them.[142]

B. Summary judgment as to the individual Defendant officers is premature because Defendants have withheld discovery that is relevant to Plaintiffs' excessive force claims.

Plaintiffs were unable to identify the officers who physically assaulted them because they

[137] Ex. 8, Washington 27.

[138] Ex. 2, Leverette-Saunders 32-33.

[139] *Id.*

[140] *Id.* at 33; *see also* Ex. 8, Washington 28.

[141] Ex. 17, T. Mahler 34-35; Ex. 15, Hollander 26-27; Ex. 7, I. Mobley 31; Ex. 8, Washington 28.

[142] "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *Lewis v. City of New Orleans*, 415 U.S. 130, 135 (1974) (Powell, J., concurring).

wore all-black or dark-colored outfits, there were no badges or nametags visible, and many had dark ski masks covering their faces.[143] As Paul Kaiser testified, "It was like they had an intent to disguise their identity."[144] Some patrons thought the CAID was being robbed because the intruders were not even readily recognizable as law enforcement.[145]

During discovery, Plaintiffs requested information and documents that would help them identify the officers who assaulted them—namely, the identity of all police officers who participated in the initial entry, documentation regarding the assignments of the officers who participated in the raid, and color photographs of each officer that participated in the raid.[146] As explained in Plaintiffs' accompanying Rule 56(d) Declaration (Ex. 44), Defendants have failed to produce the requested discovery, even after this Court ordered them to comply. Plaintiffs' motion for sanctions and other relief (Dkt. # 68) remains pending.

Under Rule 56(d), it is improper to grant a motion for summary judgment where the non-moving party is still awaiting discovery that is relevant to those claims, particularly where the moving party is at fault for not having produced the discovery. *Resolution Trust Corp. v. N. Bridge Assocs., Inc.*, 22 F.3d 1198, 1208-09 (1st Cir. 1994) ("Here, the government went too far, frustrating [plaintiffs'] legitimate discovery initiatives by playing keepaway."). In this case, it is premature to rule on the Defendant officers' motion for summary judgment as to Plaintiffs' excessive force claims because Plaintiffs are still awaiting discovery that may enable them to identify some of the Defendant officers as perpetrators of the excessive force used against

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[143] Ex. 16, Kaiser 34-35, 65-66; Ex. 19, Wong 29-33; Ex. 8, Washington 23-24, 25; Ex. 2, Leverette-Saunders 32.

[144] Ex. 16, Kaiser 66.

[145] Ex. 19, Wong 29; Ex. 17, T. Mahler 31.

[146] Ex. 44, Rule 56(d) Declaration.

them.[147] Identifying the officers responsible for this conduct is difficult enough given that they were evidently dressed to conceal their identities; Plaintiffs should at least have the benefit of the discovery that they requested, and this Court ordered produced, before Defendants' summary-judgment motion as to Count Two is resolved.

C. Summary judgment as to Defendant City of Detroit should be denied because its policy or custom of concealing the identities of officers who participate in blind pig raids carries the known or obvious risk that excessive force will go unchecked and undisciplined.

If the officers who assaulted Plaintiffs are never identified because they wore masks and took other measures to deliberately conceal their identities, then they will ultimately escape personal liability. However, if the City of Detroit is also responsible for the concealment of their identities, then it should be held accountable for the obvious and highly predictable consequences of allowing masked and unidentifiable officers to operate with impunity. Viewing the facts in the light most favorable to Plaintiffs, a reasonable jury could find that the City is responsible and is thus liable for the use of excessive force.

In addition to being liable for its unconstitutional customs and policies, a city can be liable for a custom or policy that is not *itself* unconstitutional but nonetheless *causes* the violation of a plaintiff's constitutional rights. *Williams ex rel. Williams v. Ellington*, 936 F.2d 881, 884 (6th Cir. 1991). For example, a city is liable for its police department's policy or custom of one-on-one show-ups for eyewitness identification because such procedures are

[147] While most of the excessive force described by Plaintiffs occurred within the first several minutes of the raid, one cannot assume that the perpetrators were limited to the initial entry team. Video footage shows that within the first two minutes of the raid, dozens of officers poured into the building—first the initial entry team with their ski masks and dark uniforms, then another group with a paramilitary style dress, and eventually a group of more traditionally uniformed officers. Ex. 14, DVD Track 3. Any of the Defendant officers could have been responsible for personally using excessive force or for failing to intervene to stop it. *See Turner v. Scott*, 119 F.3d 425, 429 (6th Cir. 1997); *Bruner v. Dunaway*, 684 F.2d 422, 426 (6th Cir. 1982).

inherently unreliable and have the "'highly predictable consequences' of resulting in constitutional violations." *Gregory v. City of Louisville*, 444 F.3d 725, 756 (6th Cir. 2006) (citing *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 409 (1997)). Similarly, a city is liable for its police department's customary "code of silence" because its "known or obvious consequences would result in the deprivation of a constitutional right." *Fairley v. Andrews*, 430 F. Supp. 2d 786, 803-05 (N.D. Ill. 2006).

Here, the evidence is sufficient for a reasonable jury to infer a custom of concealing the identities of police officers who conduct blind pig raids. Officers who have personal experience with many blind pig raids testified that in such raids some officers wear face masks and some wear all-black uniforms without any police markings or nametags on them.[148] Furthermore, a member of the vice squad who had participated in numerous blind pig raids was unaware of any departmental policy that requires officers to be identifiable during such raids.[149] Thus, it appears that officers maintain individual or unit discretion regarding dress and nametags.[150] *Cf. Monistere v. City of Memphis*, 115 F. App'x 845, 851 (6th Cir. 2004) (city liable for "allowing . . . sergeants . . . to conduct their investigations *without any defined parameters*" (emphasis added)). Defendants' responses to Plaintiffs' discovery requests also reflect that the City has a custom of not even maintaining records as to the identities and assignments of officers who participate in raids.[151] And, as detailed above, the City refuses to produce photographs of the officers involved or a complete list of their identities and assignments in response to discovery

[148] Ex. 23, Cole 34-35; Ex. 24, Gray 47-48.

[149] Ex. 24, Gray 48.

[150] As Officer Cole testified, "there is some individuality to their dress." Ex. 23, Cole 35.

[151] Ex. 47, Defs' Resp. to Interrog. ## 3, 14, 19, & 20. *See also* Ex. 54, Mobley Citizen Complaint. The officer investigating the complaint had "difficulties identifying officers" involved in the incident (see page marked "Def-City-0737" in lower right corner).

requests and court orders.

Where, as here, a city allows raid officers to conceal their identities, does not even keep records as to officers' raid assignments, [152] and refuses to disclose their identities in subsequent litigation, a highly predictable consequence is that some officers will take advantage of their anonymity and use excessive force with impunity. *See Parrish v. Luckie*, 963 F.2d 201, 205 (8th Cir. 1992) (affirming judgment against city whose "police officers operated in a system where reports of [misconduct] were discouraged, ignored, or covered up" because "officers operating under this system recognized they could act with impunity"). This obvious risk is similar to that created by a municipality's failure to discipline its officers for unlawful conduct; the violation of citizens' constitutional rights is a known or obvious consequence of an institutional failure to discipline. *See James v. Harris County*, 577 F.3d 612, 617-18 (5th Cir. 2009). Thus, a city's failure to track citizen complaints regarding police misconduct "can create an environment where officer misconduct could go unchecked," and "'a jury could find that officers are guaranteed repeated impunity.'" *Clark v. Pena*, 2000 WL 35427177 at *7 (W.D. Mich. 2000) (quoting *Beck v. City of Pittsburgh*, 89 F.3d 966, 974 (3d Cir. 1996)). Here, too, the custom or policy of disguising raid officers (or allowing them to disguise themselves) and not disclosing their identities during litigation creates a similar environment of impunity and unaccountability.

Furthermore, one must not view this identity-concealment custom in a vacuum. In addition to allowing its officers to raid blind pigs anonymously, the City of Detroit:

- does not maintain records regarding lawsuits filed against its officers;[153]
- does not maintain records regarding citizen complaints filed before 2007 (the year before

[152] Ex. 21, Turner 64-66.

[153] Ex.48, Defs' 3rd Supp. Resp. to Doc. Req. # 15. Plaintiffs have obtained several complaints for lawsuits against some of the named Defendants herein alleging excessive use of force. Ex. 49

the raid in this case);[154]

- knows that several Defendant officers collectively have dozens of citizen complaints against them for claims of excessive force;[155] and
- did not meaningfully discipline or retrain some Defendant officers after they were found responsible for misconduct.[156]

Thus, the identity-concealment custom is part of a larger pattern in which the City of Detroit was deliberately indifferent to a high probability that its officers would use excessive force.

In sum, a reasonable jury could find that the excessive force in this case was caused in part by a municipal custom or policy of concealing or allowing the concealment of raid officers'

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[154] Ex. 50, Orr Memo to Zarembski.

[155] Although Defendants have not provided the complete files regarding citizen complaints, they have provided a list of complaints made against each officer ("Officer Information Reports"). Ex. 51. These reports show that there have been more than thirty use of force complaints against just six of the named Defendants. Defendant Tyrone Gray, who was a member of Vice Enforcement at the time of this incident, has ten use of force complaints alone. *Id. See Vann v. City of New York*, 72 F.3d 1040, 1049 (2d Cir. 1995) ("An obvious need [for better supervision] may be demonstrated through proof of repeated complaints of civil rights violations; deliberate indifference may be inferred if the complaints are followed by no meaningful attempt on the part of the municipality to investigate or forestall further incidents."); *Fiacco v. City of Rensselear*, 783 F.2d 319, 327 (2d Cir. 1986) ("Whether or not the claims had validity, the very assertion of a number of such claims put the City on notice that there was a possibility that its police officers had used excessive force.").

Note also that the Mobley Citizen Complaint (Ex. 54) file suggests that Defendant City does not meaningfully investigate citizen complaints; for example: eight months passed between the date of the complaint and the time the investigator obtained a statement from the complainant; then, another year passed before the investigator interviewed Defendant Lt. Yost who was the subject of the complaint. The investigation became significantly more active in February 2010, when this lawsuit was initiated—a fact that is prominently noted in the investigation file. This example demonstrated Plaintiffs' need to obtain the complete citizen complaint files they have requested to support their claim that the City failed to supervise its officers thereby causing the violation of their constitutional rights.

[156] Ex. 52; Ex. 24, Gray 90-93; Ex. 26, Johnson 100; Ex. 53, Singleton Demeanor Complaint; Ex. 28, Singleton 52-57. *See Hayward v. City of New Orleans*, 2004 WL 258116 (E.D. La. 2004) (city's failure to discipline single officer in light of multiple official abuse complaints can evidence an official policy of deliberate indifference to civil rights).

identities. Accordingly, Defendant City of Detroit's motion for summary judgment as to Count Two should be denied.

CONCLUSION

When a community arts organization fails to obtain a liquor license before hosting an event, the appropriate law enforcement response is to shut down the event, issue citations to its organizers (or arrest them), and send the patrons home. That is far from what happened here. Viewing the facts in the light most favorable to Plaintiffs, a reasonable jury could find that Defendants' actions in this case were unreasonable, unlawful, undertaken pursuant to a longstanding municipal policy or custom, and violated Plaintiffs' clearly established constitutional rights.

Accordingly, Defendants' motions for summary judgment should be denied.

Respectfully submitted,

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Dated: May 8, 2012

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2012, I electronically filed the foregoing paper and its exhibits with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

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