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

Daniel S. Korobkin (P72842)
Michael J. Steinberg (P48085)
Sarah L. Mehta
Kary L. Moss (P49759)
American Civil Liberties Union
Fund of Michigan
2966 Woodward Ave.
Detroit, MI 48201
(313) 578-6824
dkorobkin@aclumich.org
msteinberg@aclumich.org

William H. Goodman (P14173)
Julie H. Hurwitz (P34720)
Kathryn Bruner James (P71374)
Goodman & Hurwitz, P.C.
Cooperating Attorneys, American Civil
Liberties Union Fund of Michigan
1394 E. Jefferson Ave.
Detroit, MI 48207
(313) 567-6170
bgoodman@goodmanhurwitz.com
jhurwitz@goodmanhurwitz.com
kjames@goodmanhurwitz.com

Attorneys for Plaintiffs

Lee'ah D.B. Giaquinto (P60168)
City of Detroit Law Department
660 Woodward Avenue
1650 First National Building
Detroit, MI 48226
(313) 237-3035
basel@detroitmi.gov

Attorney for Defendants Yost and Buglo

Jerry Ashford (P47402)
John A. Schapka (P36731)
City of Detroit Law Department
660 Woodward Avenue
1650 First National Building
Detroit, MI 48226
(313) 237-3089
ashfj@detroitmi.gov
schaj@law.ci.detroit.mi.us

Attorneys for All Other Defendants

_____/

PLAINTIFFS' REPLY BRIEF ON THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST DEFENDANT CITY OF DETROIT

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I. Plaintiffs are entitled to partial summary judgment because their rights were violated pursuant to an unconstitutional custom of the City of Detroit.

The City has acknowledged, as it must, that knowledge was an element of loitering in a place of illegal occupation.[1] Now that there is no dispute about this point, the rest of the City's defense essentially collapses, for two reasons. First, it means the City had an unconstitutional custom, as the *undisputed* evidence shows that the ordinance was *routinely* enforced as a strict liability offense. Second, it means that pursuant to that custom, Plaintiffs' rights were violated, as the undisputed evidence also shows a lack of probable cause that Plaintiffs knew the facts that allegedly made Funk Night illegal.

A. The undisputed facts show that the City had an unconstitutional custom.

The City's assertion that Plaintiffs rely solely on their request for admission, without pointing to any evidence of a policy or custom,[2] is plainly incorrect. Plaintiffs' opening brief cited and relied upon *undisputed testimony* by many officers who regularly participated in blind pig raids.[3] For the Court's reference, much of that testimony is quoted at length on pages 16-18 of Plaintiffs' brief opposing Defendants' motions for summary judgment.[4] The City, having had an opportunity to respond, failed to meet its burden under Rule 56 of coming forward with *any* evidence to contest these officers' statements that enforcing the ordinance as a strict liability offense was the City's "standard procedure," "general practice," and "custom and usage."

Even had Plaintiffs relied solely on the City's response to their request for admission, that

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[1] Def. City of Detroit's Resp. Br. (Dkt. # 91) at Pg ID 2408.

[2] *Id.* at Pg ID 2419.

[3] Pls.' Br. (Dkt. # 81) at Pg ID 1306 n.44 & 1329 n.82.

[4] Pls.' Comb. Resp. Br. (Dkt. # 92) at Pg ID 2455-57.

would have been sufficient. Evidence of a municipality's "standard operating procedure" is evidence of its "custom or policy." *Villegas v. Gilroy Garlic Festival Ass'n*, 541 F.3d 950, 964 (9th Cir. 2008). Plaintiffs asked the City to admit 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."[5] The City answered: **"It is admitted."**[6] Although the City went on to say that it enforces all ordinances and laws "where probable cause exists to believe the laws have been violated,"[7] this surplusage does nothing to negate the City's specific, unqualified admission that its standard operating procedure was to enforce the loitering ordinance against *all persons in attendance*—regardless of whether there is probable cause that they know the facts that allegedly make the establishment illegal.

In reply to the City's remaining points, Plaintiffs refer the Court to pages 18-19 of their brief opposing Defendants' motions for summary judgment and incorporate by reference its subsections entitled "The custom was widespread" and "There is no policymaker requirement."[8]

B. The undisputed facts show that Plaintiffs' rights were violated.

Although the City states that it is "undisputed the Detroit police officers had reasonable suspicion and probable cause to search, detain, ticket, and prosecute Plaintiffs,"[9] its brief contains no actual explanation, grounded in fact or law, as to why it believes probable cause existed. "The non-moving party cannot rely on conclusory allegations to counter a motion for

[5] Ex. 1 at 3, Defs.' Resp. to RFA # 3 (emphasis added).

[6] *Id*.

[7] *Id.*

[8] Pls.' Comb. Resp. Br. (Dkt. # 92) at Pg ID 2457-58.

[9] Def. City of Detroit's Resp. Br. (Dkt. # 91) at Pg ID 2420.

summary judgment." *Nix v. O'Malley*, 160 F.3d 343, 347 (6th Cir. 1998). Given that the City has conceded that knowledge was an element of the loitering offense, Plaintiffs' rights were violated because there was no probable cause that they knew any facts that allegedly made the CAID "a place of illegal occupation." Although the CAID's *proprietors* did not obtain a license to host Funk Night, such a license was readily available under Michigan law and the police had no reason to believe the CAID's *patrons* each knew that the CAID had not procured one.[10] Furthermore, although Yost personally observed a sale of alcohol after 2:00, she admitted that she had no reason to think the CAID's *patrons* each knew that alcohol had been sold after 2:00.[11]

The City says that some of its officers justifiably "relied on information" provided by Yost and Buglo and contained within the search warrant,[12] but this explanation is senseless for two reasons. First, the City never actually identifies this so-called "information" that it believes established probable cause as to each individual Plaintiff. Probable cause does not exist just because an officer vaguely alludes to having had "information." Second, Yost *herself* called in the raid and made the decision to detain and prosecute each Plaintiff, and she did so *without* probable cause that each Plaintiff had knowledge of unlawful alcohol sales.[13] Since probable cause was lacking, the *other* officers' reasons for joining the unreasonable searches and seizures do not negate the City's liability.

The City also says that some Plaintiffs should have known that unlawful alcohol sales

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[10] *See* Pls.' Br. (Dkt. # 81) at Pg ID 1301, 1313-14.

[11] *See* Pls.' Br. (Dkt. # 81) at Pg ID 1300-03, 1313-14 & n.54; *see also* Pls.' Comb. Resp. Br. (Dkt. # 92) at Pg ID 2445 & 2451-52. Most of the Plaintiffs were in the outdoor courtyard, where no alcohol was being served and the bar was not even visible. There was therefore no reason to believe, at 2:10 or 2:20 when the raid began, that *everyone* present knew that an after-hour sale had taken place.

[12] Def. City of Detroit's Resp. Br. (Dkt. # 91) at Pg ID 2420.

[13] *See* Pls.' Br. (Dkt. # 81) at Pg ID 1300-03, 1313; *see also* Pls.' Comb. Resp. Br. (Dkt. # 92) at Pg ID 2463-64.

were taking place because they had attended prior Funk Nights "and had intimate knowledge of the party operations and illegal activities of the CAID."[14] This allegation, even if true, is totally irrelevant; the Fourth Amendment's probable cause standard is based on facts known to the police *at the time* the relevant search or seizure takes place, not facts the police learn *after* the search or seizure. *United States v. Ferguson*, 8 F.3d 385, 391 (6th Cir. 1993) (en banc). At the time of the raid, the police knew nothing about each Plaintiff except that he or she was *there*.[15]

Finally, the City claims that searches were "conducted for officer safety or incident to arrest."[16] Again, these are wholly conclusory statements without any facts or law to back them up. *See Sibron v. New York*, 392 U.S. 40, 62-65 (1968); *Bennett v. City of Eastpointe*, 410 F.3d 810, 824 (6th Cir. 2005). As such, they are insufficient to defeat summary judgment.

II. The nuisance abatement law does not allow police to seize a car merely for being driven to a location where alcohol is unlawfully sold when there is no probable cause that the car's driver or passengers knew of any unlawful conduct or used the car for an unlawful act.

Although conceding that its loitering ordinance contained a knowledge requirement, the City argues that the seizure of Plaintiffs' cars was proper because the nuisance abatement statute does not contain a knowledge requirement.[17] This argument has no support in the law.

First, the City's reliance on *Bennis v. Michigan*, 516 U.S. 442 (1996), is misplaced. *Bennis* stands for the proposition that property may be forfeited by an *innocent owner* when it was used by someone else to commit a crime. It does not mean that *innocently used* property, whether used by its owner or by someone else, is subject to forfeiture simply for being present at

[14] Def. City of Detroit's Resp. Br. (Dkt. # 91) at Pg ID 2422.

[15] Buglo admitted that he had no reason to believe that the same patrons attending one Funk Night were present at previous Funk Nights. *See* Pls.' Comb. Resp. Br. (Dkt. # 92) at Pg ID 2453 n.56.

[16] Def. City of Detroit's Resp. Br. (Dkt. # 91) at Pg ID 2421.

[17] *Id*. at Pg ID 2424.

a location where unlawful conduct occurs. *See In re Maynard*, 53 N.W.2d 370, 371-72 (Mich. 1952). The City cites no cases (and Plaintiffs are not aware of any) in which innocently used property is subject to forfeiture based merely on its general proximity to other property that is used unlawfully. *Cf. Bennis*, 516 U.S. at 456 (Thomas, J., concurring) ("Improperly used, forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners . . . , or a tool wielded to punish those who associate with criminals, than a component of a system of justice.").

Nor does Michigan's statute, by its own terms, authorize the "abatement" of vehicles merely for being driven to a place where alcohol is unlawfully sold. The statute specifies that the abated property must be "*used for* the *unlawful* manufacture, transporting, sale, keeping for sale, bartering, or furnishing of [a] controlled substance . . . or intoxicating liquors." M.C.L. § 600.3801 (emphasis added). The City has failed to advance *any* argument as to how this statutory language can be fairly read to include Plaintiffs' vehicles in this case. There was no probable cause to believe Plaintiffs' cars were "used for" any of these enumerated acts.

Finally, to the extent the nuisance abatement statute applies as broadly as the City believes, it is unconstitutional as applied in this case. Plaintiffs' argument on this point was set forth on pages 30-31 of their opening brief, [18] and the City has offered no response.

Respectfully submitted,

Dated: May 22, 2012

/s/ Daniel S. Korobkin
Daniel S. Korobkin (P72842)
American Civil Liberties Union Fund of Michigan
2966 Woodward Avenue, Detroit, Michigan 48201
(313) 578-6824
dkorobkin@aclumich.org

Attorney for Plaintiffs

[18] Pls.' Br. (Dkt. # 81) at Pg ID 1327-28.

CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2012, I electronically filed the foregoing paper and its exhibit with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

Jerry L. Ashford	ashfj@detroitmi.gov
Lee'ah D. B. Giaquinto	basel@detroitmi.gov
William H. Goodman	bgoodman@goodmanhurwitz.com
Julie H. Hurwitz	jhurwitz@goodmanhurwitz.com
Kathryn Bruner James	kjames@goodmanhurwitz.com
Daniel S. Korobkin	dkorobkin@aclumich.org
John A. Schapka	schaj@law.ci.detroit.mi.us
Michael J. Steinberg	msteinberg@aclumich.org

/s/ Daniel S. Korobkin

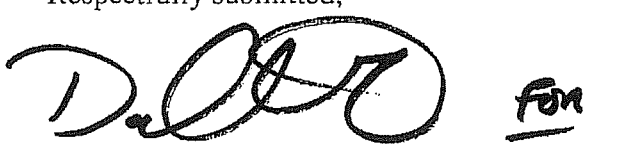
Exhibit 1

REQUEST FOR ADMISSION #3:

3. As of May 31, 2008, Defendant City's 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.

ANSWER: **It is admitted. It is the City of Detroit's standard operating procedure to carry out its lawful duties to enforce the City of Detroit ordinances, such as Detroit City Code 38-5-1, and State laws, such as the Nuisance Abatement Statute, where probable cause exists to believe the laws have been violated.**

Respectfully submitted,



Jerry Ashford (P47402)
City of Detroit Law Department
660 Woodward Avenue
1650 First National Building
Detroit, MI 48226
(313) 237-3089
ashfj@detroitmi.gov
Attorney for Defendant City of Detroit

Dated: January 19, 2011

CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2011, I served a copy of the foregoing document upon:

Daniel S. Korobkin, Esquire
Michael J. Steinberg, Esquire
Kary L. Moss, Esquire
American Civil Liberties Union Fund of Michigan
2966 Woodward Ave.
Detroit, MI 48201