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

V.R. ENTERTAINMENT,
VICKASH MANGRAY,
JEFF MANGRAY,
MONNIE MANGRAY,
Plaintiffs,

vs.

CITY OF ANN ARBOR, CITY OF ANN ARBOR POLICE DEPARTMENT, CITY OF ANN ARBOR CHIEF OF POLICE BARNETT JONES, ANN ARBOR CITY ADMINISTRATOR STEVE POWERS, ROGER FRASER PREVIOUS CITY ADMINISTRATOR, JOINTLY AND SEVERALLY AND IN THEIR INDIVIDUAL CAPACITY

Defendants.

Case No. 12 –cv- 10203

Honorable Paul D. Borman

Roger A. Farinha (P62269)
Attorney for Plaintiffs
615 Griswold, Suite 405
Detroit, MI 48226
(313) 657-6532
roger.farinha@yahoo.com

Stephen K. Postema (P38871)
Robert W. West (P31009)
Counsel for Defendants
OFFICE OF THE CITY ATTORNEY
301 E. Huron St., P.O. Box 8647
Ann Arbor, MI 48107-8647
(734) 794-6170
SPostema@a2gov.org
Rwest@a2gov.org

DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

ORAL ARGUMENT REQUESTED

Defendants, by their attorneys, move the Court to dismiss Plaintiffs' Complaint for failure to state a claim on which relief can be granted and lack of jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(2), and 12(b)(6). Plaintiff's Complaint should be dismissed with prejudice because it does not contain factual allegations sufficient to state a plausible claim under any of the legal theories pleaded. Plaintiffs' claims should also be dismissed to the extent they are barred by governmental, absolute, or qualified immunity and therefore lack jurisdiction. In further support of this motion, Defendant relies upon the accompanying brief and exhibits thereto.

Pursuant to Local Rule 7.1(a), concurrence in the relief requested was sought but not obtained.

Respectfully submitted,

Dated: February 17, 2012

By: /s/ Stephen K. Postema

Stephen K. Postema (P38871)
Robert W. West (P31009)
Counsel for Defendant
OFFICE OF THE CITY ATTORNEY
301 E. Huron St., P.O. Box 8647
Ann Arbor, MI 48107-8647
(734) 794-6170
SPostema@a2gov.org
Rwest@a2gov.org

CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2012, I electronically filed the foregoing document with the Clerk of the Court using the ECF System which will send notice of such filing to the following: Plaintiff's Counsel, Roger A. Farinha, and I hereby certify that I have mailed by US Mail the document to the following non-ECF participants: None.

/s/ Jane Allen
Assistant
Ann Arbor City Attorney's Office
City of Ann Arbor
301 E. Huron St., P.O. Box 8647
Ann Arbor, MI 48107-8647
(734) 794-6180

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Counsel for Defendants
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Rwest@a2gov.org

BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

STATEMENT OF ISSUES PRESENTED

Should Plaintiffs' federal civil rights claims under 42 USC §1983 and 42 USC §1985 and constitutional claims under the Fourth, Fourteenth, and Eighth Amendment to the U.S. Constitution be dismissed for failure to state a claim, where Plaintiffs' supporting allegations are legal conclusions unsupported by factual allegations sufficient to state a plausible claim for relief?

The City Answers: Yes

This Court Should Answer: Yes

Should Plaintiffs' intentional inflection of emotional distress claim be dismissed for failure to state a claim and lack of jurisdiction where Plaintiffs' supporting allegations are legal conclusions unsupported by factual allegations sufficient to state a plausible claim for relief and the claim is barred by governmental immunity?

The City Answers: Yes

This Court Should Answer: Yes

Should Plaintiffs' conspiracy claims be dismissed for failure to state a claim and lack of jurisdiction where Plaintiffs' supporting allegations are legal conclusions unsupported by factual allegations sufficient to state a plausible claim for relief and because a municipal corporation cannot conspire with itself and Plaintiffs have alleged no underlying unlawful act?

The City Answers: Yes

This Court Should Answer Yes

Should Plaintiffs' claims against the individual City Defendants and City police department be dismissed for failure to state a claim and lack of jurisdiction because they are not proper parties or are immune from suit?

The City Answers: Yes

This Court Should Answer: Yes

CONTROLLING OR MOST APPROPRIATE AUTHORITY

CASES

RULES

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INDEX OF AUTHORITIES

CASES

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INDEX OF EXHIBITS

Exhibit 1: Plaintiffs' Complaint, *V.R. Entertainment, et al v City of Ann Arbor, et al,* Case no. 12-cv-10203, filed in the Eastern District of Michigan

Exhibit 2: *City of Ann Arbor v Mangray, GCW* 11-597-CH (the Third Lawsuit), Verified Complaint, filed in the 22nd Circuit Court, Washtenaw County, Michigan

Exhibit 3: City's Motion and Brief for Temporary Restraining Order, Third Lawsuit, *City of Ann Arbor v Mangray, GCW* 11-597-CH

Exhibit 4: Temporary Restraining Order Issued on June 2, 2011, in Third Lawsuit

Exhibit 5: Defendants' (Plaintiffs herein) Reply Brief, Third Lawsuit

Exhibit 6: City's (Plaintiff's) Reply Brief with three attached redacted police reports (A – C), Third Lawsuit

Exhibit 7: Court Order dissolving TRO and appointing security receiver, Third Lawsuit

Exhibit 8: Security Receiver's Report, Third Lawsuit

Exhibit 9: Michigan Liquor Control Commission Complaint

Exhibit 10: *HDC, LLC v. City of Ann Arbor*, 2010 WL 2232220, 5 (E.D. Mich. 2010) (unpublished)

Exhibit 11: *Nali v. Ekman*, 355 Fed.Appx. 909, 913 (6 Cir. 2009) (unpublished)

Exhibit 12: *EBI-Detroit, Inc. v City of Detroit*, 279 Fed. Appx. 340, 351 (6th Cir. 2008) (unpublished)

Exhibit 13: *Fisher v. City of Detroit,* 1993 WL 344261, 5 (6th Cir. 1993) (unpublished)

INTRODUCTION

Although pleaded under the guise of federal Civil Rights Act and Constitutional claims, Plaintiffs' Complaint is simply an incoherent and disingenuous attempt to deflect attention from their ongoing operation of a nuisance nightclub, the Dream Niteclub ("Nightclub"), in the City of Ann Arbor ("City"). Plaintiffs' Nightclub has a long history of violence, which has imperiled life and property while draining police resources from the rest of the City. Over the last three years alone, the City has filed three nuisance lawsuits against Plaintiffs in an effort to protect the public and force Plaintiffs and their partners to gain control of the situation, which they have so far proven unable or unwilling to do. The most recent nuisance lawsuit was filed after two incidents in May, 2011: fights and a stabbing incident on May 1, and then a violent beating of a patron inside the nightclub followed by a retaliatory shooting outside the club on May 29. Based on these events, the Washtenaw County Circuit Court issued a temporary restraining order on June 2, 2011 enjoining the Nightclub from operating. The Court then allowed the Nightclub to reopen with a receiver appointed to monitor security issues for a period of time. Plaintiffs have now filed this superficial and rambling federal Complaint (Exh. 1) ranging from civil rights violations to conspiracy to cruel and unusual punishment.[1]

This lawsuit has been filed without any shred of legal or factual basis and in complete disregard of relevant law and federal pleading requirements. The case is so deficient that Plaintiffs have failed to plead any plausible claim for relief and it should therefore be dismissed with prejudice under Fed. R. Civ. P. 12(b)(6). Plaintiffs' claims are also absurdly contradictory on their face. As just one highlight, in paragraph 14 of the Complaint, Plaintiffs refer to the state nuisance lawsuit that the City has filed against the Nightclub and assert that the "Police Department has focused extraordinary police attention on the club without justification." (Exh. 1 at ¶ 14.) However that same lawsuit contains pleadings with a description of the police potentially saving the life of one of the Plaintiffs, Jeff Mangray, from an attacker who pushed

[1] It should be noted that counsel for Plaintiffs in the state nuisance case, David Shand, did not file the present federal action, and the state law claims now alleged in this federal case have never been raised in the state nuisance case.

him to the ground and then drew a "large black long barrel semi-auto pistol" during a riotous night at the Nightclub.[2] Plaintiffs cannot seriously argue that such incidents do not justify police attention.

All of Plaintiffs' claims in this lawsuit are similarly conclusory and implausible and they have not and cannot plead any factual allegations that state a plausible claim under the Civil Rights Act, the United States Constitution, or under state law.

STATEMENT OF FACTS[3]

Plaintiffs have operated the Nightclub at 314 S. Fourth Avenue in the City of Ann Arbor for a number of years. They lease the property and there is currently an eviction action against them pending in the Michigan 15th District Court (Case No. 12-0095 LT). The Nightclub formerly was called "Studio 4," but now operates under the inapt name "Dream Niteclub." In both its incarnations, the Nightclub has been the source of numerous dangerous and violent incidents, which have required the City to file three nuisance lawsuits in an effort to compel Plaintiffs to improve security and control over the Nightclub.

On September 16, 2009, the City filed its first verified complaint in the Washtenaw County Circuit Court based on nuisance allegations, which was entitled *City of Ann Arbor v Mangray et al.*, Case No. 09-1104-CH, and was assigned to Judge Melinda Morris ("the First Lawsuit"). The precipitating event for the First Lawsuit occurred on Saturday, September 12,

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[2] "Within seconds officers observed suspect appear and observed him yelling at the front door of the bar and then witnessed him forcefully push the manager of the bar, JEFF MANGRAY to the ground. Suspect pushed MANGRAY so hard that he flew several feet thru the air before landing on the sidewalk....officers noticed that suspect was reaching for something in his pants near the front of his waistband. As suspect began to step back from where he had pushed MANGRAY he pulled a large black long barrel semi-auto pistol from the front of his pants. Officers Spickard and Lukas had already drawn their guns on the suspect prior to him pulling the pistol out and he was given verbal commands to drop the gun. ....the suspect was forced to the ground by the officers after being slow to react to verbal commands to do so." (Exh. 6, Plaintiff's Reply to Defendants' Response to Plaintiff's Motion for TRO at Exh. C, Ann Arbor P.D. Follow-Up Report No. 1000003974.2 p. 1)

[3] All of the facts below are fully referenced in the verified complaint filed in the most recent state court nuisance lawsuit (Exh. 2) or the other state case pleadings (Exhs. 3-7).

2009, when a large and rowdy crowd – estimated at 700 to 800 people – gathered outside the bar. The police were forced to twice shut down the street in front of the Nightclub for lengthy periods of time while they attempted to disperse the crowd and then control fighting. The police had the Nightclub close early because of the problems. Over the course of the incident, twenty (20) police officers were required to maintain order in and around the Nightclub.

After the First Lawsuit was filed, the City agreed to hold the case open for approximately four months, until January 2010, and to dismiss without prejudice if there were no further nuisance incidents at the Nightclub. As there were no further incidents while the lawsuit was in place, a stipulated order of dismissal without prejudice was filed on or about January 20, 2010.

Almost as soon as the First Lawsuit was dismissed, the City had to file, on February 19, 2010, a second nuisance complaint in the Washtenaw County Circuit Court entitled *City of Ann Arbor v Mangray et al.*, Case No. 10-178 CH ("Second Lawsuit"), which was also assigned to Judge Melinda Morris. On January 31, 2010, the City received reports of large groups of people fighting outside the Nightclub and dispatched patrol units to the Nightclub at 1:57 a.m. Upon arrival, officers observed numerous fights in the street and in the adjacent parking structure. Police estimated the crowd to number approximately 300 people. The volatility of the situation and the non-cooperative nature of the crowd required approximately 13 of the 16 officers working that night for the City to report to the scene. It took approximately 40 minutes for City and University police to clear vehicles and people out of the area. In one instance, police found it necessary to deploy pepper spray to calm and disperse the crowd.

The Second Lawsuit was held open for one year until it was dismissed without prejudice on February 14, 2011. However, for much of the last half of 2010, the Nightclub was voluntarily closed, after a particularly violent night on June 2, 2010. As noted above in footnote 1, the incidents that night included a patron confronting Plaintiff Jeff Mangray with a gun after being thrown out of the Nightclub for fighting. Plaintiff Mangray was saved from harm by police who quickly intervened to subdue the attacker.

On or about February 14, 2011, a stipulated order of dismissal without prejudice was

entered into in the Second Lawsuit because of lack of incidents at the Nightclub (primarily because the Nightclub was closed). At some point in late 2010 or early 2011, the Nightclub reopened, however it did not take long for violence to reoccur. On May 1, 2011, a patron was stabbed with a knife following several fights that same night at the Nightclub (Exhibit 6, Attachment B, police report of May 1, 2011). Then on May 29, 2011, police officers in the area heard and observed a subject firing a handgun outside the Nightclub. Upon arrival, the officers also found a volatile crowd of approximately 30 to 40 individuals congregating in a parking lot adjacent to the Nightclub. The officers learned that the crowd consisted of the Nightclub's patrons, who had just been involved in fights inside the Nightclub. The fights inside had included a "beat down" of one person, who then was put out into the street along with his assailants. The victim of the "beat down" returned with a gun and began shooting outside the Nightclub (Exhibit 3, attachment A, police report). After police subdued the shooter, an investigation revealed that one person had been shot through the arm and at least one other had suffered serious injuries from being assaulted. Two persons were transported to the hospital and two additional guns were recovered at the scene.

After these May, 2011 incidents, the City filed a third nuisance lawsuit on June 2, 2011, which is currently pending in Washtenaw County Circuit Court before Judge Melinda Morris. (Exhibit 2, complaint Case No. 11-597-CH, *City of Ann Arbor v. Jeff Mangray et al.* ("Third Lawsuit")). The Third Lawsuit is based on the verified complaint signed by City Deputy Chief of Police, John Seto, which details the history of violence and liquor violations at the Nightclub, including fights, stabbings, shootings, and over 200 police calls since September 2007. (Exh. 2 at ¶¶ 21-32.)

When the Third Lawsuit was filed, the City Attorney called legal counsel for the Nightclub and informed him that the City would present the pleadings for a temporary restraining order to the court and seek a TRO. The City Attorney requested that opposing counsel be present, as the City was not requesting an *ex parte* TRO. Upon arriving at the courthouse, the assigned judge, Judge Melinda Morris, was out of the office, so the TRO request

was made to the judge on call, Judge Timothy Connors. The TRO sought to enjoin the nightclub from operating beginning on June 2, 2011. Judge Connors reviewed the documents and then signed the TRO in the presence of both attorneys with a show cause hearing set for June 8, 2011 before Judge Morris. (Exh. 4.) The TRO also contained, among other things, a provision that a receiver for security issues was to be appointed with the parties providing appropriate names to the Court.

At the June 8, 2011 show cause hearing, Judge Morris did not rule on the preliminary injunction request and instead left the TRO in place because the Nightclub's counsel had not brought the names of any security receivers as required by the TRO. The hearing was then postponed until June 15, 2011. At the hearing on June 15, 2011, Judge Morris dissolved the TRO as requested by the Nightclub, but only after appointing retired Washtenaw County Sheriff's sergeant, John Phillips, as a security receiver with the stipulation that he be on the Nightclub's premises at all hours that the Nightclub was open. (Exh. 7.) The court required the security receiver to monitor security at the Nightclub, train the Nightclub security staff, and then prepare a security report for the court, with the cost of the receiver to be paid by the Nightclub.

On July 25, 2011, Sergeant Phillips issued the security report. On August 3, 2011, after the Nightclub represented that it had adopted the receiver's recommendations, the Court allowed the Nightclub to operate without the receiver present, although without a specific written order to that effect. At some point in the fall of 2011, the Nightclub stopped operating regularly, although it evidently has opened again as of January, 2012.

ARGUMENT

I. STANDARD OF REVIEW: PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED IF IT DOES NOT STATE A "PLAUSIBLE CLAIM FOR RELIEF."

Under Fed. R. Civ. P. 12(b)(6), the court must accept all the factual allegations as true and construe the complaint in the light most favorable to the plaintiff. *Louisville/Jefferson County Metro Government v. Hotels.com, L.P.*, 590 F.3d 381, 384 (6th Cir. 2009) (citation omitted). However, in the recent cases of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)

and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), the Supreme Court clarified the pleading requirements of Fed. R. Civ. P. 8:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"

Iqbal, 129 S.Ct. at 1949 (citing *Twombly*, 550 U.S. at 570). The *Iqbal* Court then set forth a two-pronged approach to guide the federal district courts in deciding a motion to dismiss under this standard. Noting that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions," the Court suggested that district courts "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* at 1950. Once the district court has eliminated these "legal conclusions couched as factual allegations," it should determine whether the well-pleaded allegations in the complaint state a plausible claim of relief. *Id.*

In evaluating allegations, "bare assertions," which "amount to nothing more than a 'formulaic recitation of the elements'" of a claim must be disregarded. *Iqbal*, 129 S.Ct. at 1951. The Supreme Court has held that Rule 8 notice pleading is generous "but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions" and that "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—"that the pleader is entitled to relief." *Id.* at 1949-50 (alteration in original). *See also, e.g. HDC, LLC v. City of Ann Arbor*, 2010 WL 2232220, 5 (E.D. Mich. 2010) (unpublished)(Exh. 10) (where plaintiffs do not provide any specific factual allegations of discrimination from which the Court can infer claims for relief, case must be dismissed).

The Sixth Circuit has also held that when considering a Rule 12(b)(6) motion, "a court

may consider 'exhibits attached [to the complaint], public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the complaint and are central to the claims contained therein,' without converting the motion to one for summary judgment." *Rondigo, L.L.C. v. Twp. of Richmond*, 641 F.3d 673, 680-81 (6th Cir. 2011) (alteration in original) (quoting *Bassett v. National Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008). The Sixth Circuit has also held that a court may take judicial notice of state or federal court proceedings without converting a Rule 12(b)6 motion into one for summary judgment. *Buck v. Thomas M. Cooley Law School*, 597 F.3d 812, 816 (6th Cir. 2010). In this case, the central claims of Plaintiffs' Complaint are that the City's police force has improperly targeted Plaintiffs and that the City has filed nuisance actions and Michigan Liquor Control Commission complaints and obtained court orders affecting their business. The Defendants (hereinafter "City Defendants" as all are City employees or departments) have therefore attached to this motion the public records referred to in the Complaint which relate to these claims. The attachments from the Third Lawsuit are as follows: Exhibit 2, City's Verified Complaint; Exhibit 3, Motion and Brief; Exhibit 4, Temporary Restraining Order Issued on June 2, 2011; Exhibit 5, Defendant's Reply Brief; Exhibit 6, Plaintiffs' Reply Brief with three attached redacted police reports (A – C); Exhibit 7 Court Order dissolving TRO and appointing security receiver, Exhibit 8, Security Receiver's Report.[4]

[4] Plaintiffs also complain about an action of the Michigan Liquor Control Commission ("MLCC"). (Exhibit 1 at ¶ 15.) Following the May 29, 2011 incident, the City police department filed a case report of possible violations of state regulations with the MLCC. Opposing counsel is perhaps unaware that these reports are reviewed by the Michigan Attorney General's Office to determine whether the state will proceed with a case in the MLCC. On August 31, 2011, the MLCC issued a complaint in this matter and requested a hearing (Exh. 9). That hearing was scheduled for January 26, 2012, but was evidently adjourned. It is worth noting that the May 2, 2011 incident was also submitted to the Attorney General for review and resulted in five charges being brought in the MLCC. At that hearing, Plaintiffs stipulated to and admitted wrongdoing on two counts of allowing the "annoying or molesting" of two customers, contrary to MLCC Rule 436.1011(6)(a) (Mich. Admin. Code). These were two customers injured by the fighting at the nightclub that night.

II. PLAINTIFFS' CIVIL RIGHTS AND CONSTITUTIONAL CLAIMS SHOULD BE DISMISSED WITH PREJUDICE BECAUSE THEY DO NOT AND CANNOT STATE A PLAUSIBLE CLAIM FOR RELIEF.

A. All Of Plaintiffs' Claims Fail Because They Are Conclusory And Unsupported By Facts And The City Acted Within Its Authority To Protect The Public From Violence And Nuisance.

Plaintiffs' civil rights and other constitutional claims depend entirely upon conclusory allegations unsupported by facts, which are insufficient to avoid dismissal under Fed. R. Civ. P. 12(b)6. Essentially, Plaintiffs' factual claims boil down to two assertions: 1) that they and their patrons are racial minorities and 2) that the City Defendants have responded to crime at their Nightclub. However, Plaintiffs have not and cannot provide any factual allegations linking these two assertions with any illegal discrimination because there is none. Plaintiffs have provided speculative and conclusory allegations regarding constitutional violations, but their factual allegations show only that the City Defendants were properly discharging their duty to protect the public. Furthermore, all allegations in Plaintiffs' Complaint must be weighed against "more likely explanations." *Iqbal*, 129 S.Ct. at 1951-52. Where there is an "obvious alternative explanation" for challenged acts, the complaint should be dismissed. *Id.* at 1952. In this case, the "obvious alternative explanation" for the City Defendant's police monitoring and nuisance lawsuits is to eliminate extensively documented and recurring threats to life, property, and the public peace fostered by Plaintiffs at their Nightclub. Nuisance abatement is a valid and proper exercise of the City's police powers to protect public health, safety, and welfare. *Rental Property Owners Ass'n v. City of Grand Rapids*, 455 Mich. 246, 255 (1997).

B. Plaintiffs' 42 U.S.C. § 1983 Claim (Count I) Should Be Dismissed Because Plaintiffs Fail To State A Plausible Claim For Relief.

In Count I of the Complaint, Plaintiffs assert that the City Defendants owed a duty to Plaintiffs under 42 USC § 1983 to "not discriminat[e] against the Plaintiff [sic] on the basis of sex, race, religion, ethnicity and national origin" (Exh. 1 at ¶ 22.) However, this alleged duty is

wholly an invention of Plaintiffs, as neither the text of § 1983 nor relevant case law refer to the existence of any legal duty under § 1983. In pertinent part, the text of § 1983 reads:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State… subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . ."

The Supreme Court has stated that "[t]he statute creates no substantive rights; it merely provides remedies for deprivations of rights established elsewhere." *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985). Accordingly, Plaintiffs cannot seek damages from the City Defendants under § 1983 without asserting a separate infringement of a constitutional right. *Id.* Plaintiffs make conclusory allegations of constitutional infringements in later paragraphs of their Complaint, but do not incorporate them into their Count I § 1983 claim, which Plaintiffs apparently believe stands separately (contrary to US Supreme Court case law). *Id.* Plaintiffs' Count I claim for violation of a duty under §1983 must therefore be dismissed, as it does not state a valid claim for relief under 42 USC § 1983.[5]

C. Plaintiffs' 42 U.S.C. § 1985 Claim (Count II) Should Be Dismissed Because Plaintiffs Fail To State A Plausible Claim For Relief.

The elements of a 42 U.S.C. § 1985 claim are:

> "1) a conspiracy; 2) for purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; 3) an act in furtherance of the conspiracy; and 4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States."

Riddle v. Egensperger, 266 F.3d 542, 549 (6th Cir. 2001). A complaint alleging a § 1985 violation must "allege both a conspiracy and some class-based discriminatory animus behind the conspirators' action." *Newell v. Brown*, 981 F.2d 880, 886 (6th Cir. 1992) (quoting *Griffin v. Breckenridge*, 91 S.Ct. 1790 (1971)). Furthermore, "conspiracy claims must be pled with some

[5] To the extent that this § 1983 claim is duplicative of Plaintiffs' Fourth, Eighth, or Fourteenth Amendment claims, one or the others should be dismissed as duplicative and therefore frivolous. *Verdon v. Consolidated Rail Corp.*, 828 F.Supp. 1129, 1136 (S.D.N.Y. 1993).

degree of specificity and... vague and conclusory allegations unsupported by material facts will not be sufficient to state such a claim." *Pahssen v. Merrill Community School Dist.*, 2012 WL 333779 (6th Cir. 2012) (recommended for full-text publication) (quoting *Gutierrez v. Lynch*, 826 F.2d 1534, 1538–39 (6th Cir. 1987)).

As a threshold matter, Plaintiffs' § 1985 claim fails because the City cannot, as a matter of law, conspire with its own agents and employees. The Sixth Circuit dismissed a § 1985 conspiracy claim against a school district, holding:

> It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation.

Hull v. Cuyahoga Valley Joint Vocational School Dist. Bd. of Educ., 926 F.2d 505, 509 (6th Cir. 1991) (citing *Nelson Radio & Supply Co., Inc. v. Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952)). Similar to *Hull*, all the City Defendants in this case are employees, agents, or departments of the City, therefore there can be no conspiracy among them.

Furthermore, under Count II, Plaintiffs state no facts from which a § 1985 claim could plausibly be inferred because Plaintiffs have not alleged the elements with specificity, as required. First, Plaintiffs have alleged no facts supporting that the City Defendants formed an agreement to deprive Plaintiffs of their constitutional rights. *Hooks v. Hooks*, 771 F.2d 935, 943-44 (6th Cir. 1985) (a civil conspiracy is an agreement between two or more persons to injure another person by an unlawful action).

Second, Plaintiffs have alleged no facts that could plausibly show discriminatory animus or purpose. Plaintiffs merely state that "[t]he actions and antics of Defendants clearly demonstrate that their motives are racially and ethnically motivated." (Exh. 1 at ¶ 28.) This is precisely the type of "naked assertion devoid of further factual enhancement" that the Supreme Court ruled insufficient in *Iqbal*. *Iqbal*, 129 S.Ct. at 1949. The Sixth Circuit has agreed that "a complaint that includes conclusory allegations of discriminatory intent without additional supporting details does not sufficiently show that the pleader is entitled to relief." *Nali v. Ekman*,

355 Fed.Appx. 909, 913 (6th Cir. 2009) (unpublished)(Exh. 11).

Third, as discussed more fully below under Plaintiffs' equal protection claim, Plaintiffs have not alleged any specific facts showing an act in violation of Plaintiffs' right to equal protection or to the privileges and immunities of the law. Plaintiffs only make the vague assertion that the City Defendants "fail[ed] to prosecute other similarly situated businesses within the city that have actually had repeated fights and injuries to patrons." (Exh. 1 at ¶ 27.) Plaintiffs do not identify any similar business, or similar incidents, or that the operators of any such business are of a different protected class than Plaintiffs. This lack of factual allegations to show disparate treatment means that Plaintiffs' Count II should be dismissed. *Center for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011) (dismissing complaint where "allegations contained in the Amended Complaint as to disparate treatment amount to conclusory and unadorned assertions that, consequently, are not well-pleaded, and not entitled to a presumption of truth at this stage in the litigation").

D. Plaintiffs' Fourth And Fourteenth Amendment Claims (Count III) Should Be Dismissed Because Plaintiffs Fail To State A Plausible Claim For Relief.

As with the rest of their Complaint, Plaintiffs' equal protection claims are so spare and conclusory that they do not approach plausibility under the *Iqbal* standard. To survive a motion to dismiss on an equal protection claim, Plaintiffs must allege disparate treatment "as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis." *Club Italia Soccer & Sports Organization, Inc. v. Charter Tp. of Shelby, Mich.*, 470 F.3d 286, 298 (6th Cir. 2006). As discussed above, Plaintiffs' only reference to disparate treatment is the vague, conclusory, and unsupported assertion that the City Defendants "fail[ed] to prosecute other similarly situated businesses within the city that have actually had repeated fights and injuries to patrons." (Exh. 1 at ¶ 27.) Plaintiffs have not alleged that any other similar nightclub (owned by persons of a different race or national origin) had the same history of violence and illegal activity, culminating in a serious knife attack, fight, and shooting in the same month, and was not the subject of police attention or

a nuisance lawsuit. *Napolitano*, 648 F.3d at 379 (quoting *Nali v. Ekman*, 355 Fed.Appx. at 913) (disparate treatment in an equal protection claim must be "accompanied by some evidence that the people not disciplined were similarly situated and of a different race"). Moreover, Plaintiffs' conclusory allegations do not state a plausible claim given the alternative explanation of the City Defendants for their actions, i.e. that the City was taking appropriate and lawful steps to abate a nuisance. Since Plaintiffs rely on merely a "formulaic recitation of the elements," their equal protection claim should be dismissed. *Iqbal*, 129 S.Ct. at 1951.

1. Plaintiffs' Substantive Due Process Claim Should Be Dismissed Because Plaintiffs Fail To State A Plausible Claim For Relief.

Plaintiffs' Complaint also contains extremely curt and conclusory allegations that the City Defendants violated Plaintiffs' "right to liberty protected in the substantive component of the Due Process Clause of the Fourteenth Amendment, which includes personal safety, freedom from captivity, and right to privacy." (Exh. 1 at ¶ 30(a).) To sustain a claim for a violation of substantive due process under the Fourteenth Amendment and § 1983, Plaintiffs must allege (1) a constitutionally protected fundamental right (2) that was deprived by arbitrary and capricious state action. The government action must be such that it "shocks the conscience," and "mere negligence is definitely not enough." *MSI Regency, Ltd. v. Jackson*, 433 Fed.Appx. 420, 429 (6th Cir. 2011) (citations omitted).

Under the first prong, Plaintiffs must identify the violation of a protected "liberty interest" or "fundamental right." *Collins v. City of Harker Heights, Tex.*, 112 S.Ct. 1061, 1068 (1992) (noting "[i]t is important, therefore, to focus on the allegations in the complaint to determine how petitioner describes the constitutional right at stake and what the city allegedly did to deprive... that right"); *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). Furthermore, the fundamental rights recognized by the courts as protected under substantive due process are specific and limited. *Id.* Since Plaintiffs' Complaint is devoid of factual allegations describing the constitutional rights at stake, especially how their "personal safety," "freedom from captivity," or "right to privacy" were infringed, it is impossible to say whether Plaintiffs'

conception of these violations comports with the protections recognized by the courts. This failure alone requires dismissal of Plaintiffs' due process claims.

The second step of a substantive due process claim requires Plaintiffs to also show that the conduct complained of is so arbitrary and capricious that it "shocks the conscience." *County of Sacramento v. Lewis*, 118 S.Ct. 1708, 1716-17 (1998). Plaintiffs have not done so. Plaintiffs rattle off a list of empty and conclusory phrases, stating that the City Defendants "showed intentional, outrageous, and reckless disregard for Plaintiffs [sic] constitutional rights," and "authorized, tolerated, ratified, permitted, or acquiesced in the creation of policies, practices, and customs, establishing a de facto policy of deliberate indifference to individuals diverse in race and national origin such as the Plaintiffs." (Exh. 1 at ¶ 34.) Of course, Plaintiffs do not articulate any such policies, practices, or customs of the City Defendants, nor how they would violate any constitutional rights, nor how they would "shock the conscience." Furthermore, Plaintiffs cannot articulate any such policies, practices, or customs because none exist.

Plaintiffs' substantive due process claim is fatally deficient for the same reason as all their other claims – they are no more than "naked assertion[s] devoid of further factual enhancement" that should be dismissed for failure to state a claim. *Iqbal*, 129 S.Ct. at 1949.

2. Plaintiffs' Fourth Amendment Claim Should Be Dismissed Because Plaintiffs Fail To State A Plausible Claim For Relief.

Plaintiffs' caption for Count III claims that the City Defendants violated the Plaintiffs' Fourth Amendment rights, however as Plaintiffs do not add any further allegations regarding purported Fourth Amendment violations, the City Defendants are left to guess at Plaintiffs' meaning. If Plaintiffs are referring to their allegation that City police "routinely target[ed] surveillance on the club as evidenced by parked Police vehicles directly in front of the Plaintiffs club" (Exh. 1 at ¶ 14), and thereby violated Plaintiffs' Fourth Amendment rights by improper search, then Plaintiffs' claim fails as a matter of law. To establish a Fourth Amendment claim, Plaintiffs would have to allege some subjective and reasonable expectation of privacy, which they have not. *California v. Ciraolo*, 106 S.Ct. 1809, 1811-12 (1986). The Nightclub is open to

the public and whatever Plaintiffs expose to the public is not a subject of Fourth Amendment protection. *Katz v. U.S.*, 389 U.S. 347, 352 (1967).[6] Because Plaintiffs have failed to allege a cognizable or plausible claim, their Fourth Amendment claim should be dismissed.

E. Plaintiffs' Eighth Amendment Claim (Count IV) Should Be Dismissed Because Plaintiffs Fail To State A Plausible Claim For Relief.

Plaintiffs' Eighth Amendment claim is not only implausible, it is preposterous, and evidences a complete misunderstanding of the law. The Eighth Amendment states that, "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. 8. The Supreme Court has written that "[e]very decision of this Court considering whether a punishment is 'cruel and unusual' within the meaning of the Eighth and Fourteenth Amendments ***has dealt with a criminal punishment.***" *Ingraham v. Wright*, 430 U.S. 651, 666 (1977) (emphasis added). The Supreme Court has further written that "[i]n the few cases where the Court has had occasion to confront claims that impositions outside the criminal process constituted cruel and unusual punishment, it has found no difficulty finding the Eighth Amendment inapplicable." *Id.* at 667-68. The Eighth Amendment applies to prisoners and the terms set for their bail, prison sentence, or occurrences within the prison while being incarcerated. *Helling v. McKinney*, 509 U.S. 25, 40 (1993); *Parrish v. Johnson*, 800 F.2d 600, 604 (6 Cir. 1986). Plaintiffs have not alleged that they are prisoners nor subject to criminal punishment and thus cannot state a claim for relief under the Eighth Amendment.

F. Plaintiffs' Intentional Infliction Of Emotional Distress Claim (Count V) Should Be Dismissed Because Plaintiffs Fail To State A Plausible Claim For Relief And The Claim Is Barred By Governmental Immunity.

Plaintiffs also allege intentional infliction of emotional distress, presumably under Michigan law, as no such federal tort exists (although the Michigan Supreme Court has also cast

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[6] Furthermore, across the street from the Nightclub is a bus station that retains a City police officer on contract to the Ann Arbor Transportation Association. There is no parking on that side of the street because of the bus stops. The police officer's vehicle is therefore often parked at a reserved meter in front of the Nightclub.

doubt on whether such a tort exists in Michigan, (*Smith v Calvary Christian Church*, 462 Mich. 679, 690 (2000)). As a threshold matter, this claim should be dismissed because the City is entitled to governmental immunity under Michigan law.

1. Michigan's Governmental Immunity Statute Bars Plaintiffs' Tort Claims Against the City.

Michigan's governmental immunity statute provides: "Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). The Sixth Circuit agrees that: "All Michigan cases agree that government agencies are immune from liability for intentional torts." *EBI-Detroit, Inc. v City of Detroit*, 279 Fed. Appx. 340, 351 (6th Cir. 2008) (unpublished). "Governmental function" is defined as: "An activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(f). Plaintiffs allege under Count V that the City targeted them for closure based on unfounded allegations, however the City obtained the TRO through a court proceeding based on an action to abate a nuisance, authorized under MCL 600.2940, which was sought on the grounds that conditions at Dream Niteclub constituted a threat to public safety. The Michigan Supreme Court has held that "[i]t is well established that nuisance abatement, as a means to promote public health, safety, and welfare, is a valid goal of municipal police power." *Rental Property Owners Ass'n*, 455 Mich. at 255. With regard to Plaintiffs' allegations, the City Defendants have clearly been engaged in a governmental function and are therefore immune from Plaintiffs' tort claims.

2. Plaintiffs Fail To State A Claim For Intentional Infliction Of Emotional Distress.

Even if Plaintiffs' tort claims were not barred by immunity, they still fail as a matter of law. Intentional infliction of emotional distress requires showing the following elements: (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. *VanVorous v Burmeister*, 262 Mich. App. 467, 481 (2004). Liability attaches

only when a plaintiff can demonstrate conduct that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Lewis v Legrow*, 258 Mich. App. 175, 179 (2003). It is not enough that a defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice', or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. *Roberts v Auto-Owners Ins. Co.*, 422 Mich. 594, 602-03 (1985).

In this case, Plaintiffs again merely recite elements of the claim, alleging no facts in support. Plaintiffs allege in conclusory fashion that the City Defendants' behavior was "so extreme and outrageous that it was calculated to intentionally induce severe emotional, mental and physical trauma in Plaintiffs" and that "Defendants' actions have caused severe emotional, mental and physical injury to the Plaintiffs." (Exh. 1 at ¶¶ 43-44). These are precisely the type of "bare assertions," which "amount to nothing more than a 'formulaic recitation of the elements'" and therefore fail to state a plausible claim for relief. *Iqbal*, 129 S.Ct. at 1951. Police response to violence at the Nightclub and the City's state court nuisance claim do not plausibly create such a tort claim.

G. Plaintiffs' Entire Lawsuit Should Be Dismissed As Against The Individual City Defendants Powers, Fraser, and Jones, As They Are Entitled To Immunity Under State and Federal Law And Plaintiffs Have Not Alleged Any Facts Stating A Plausible Claim Against Them. [7]

Plaintiffs' claims against the three individual City employees, Fraser, Powers, and Jones, should be dismissed for all the reasons stated above. In addition, Plaintiffs' claims against the three individual Defendants should also be dismissed because the individual Defendants are protected by absolute immunity under state law and qualified immunity under federal law. Under state law, "[a] judge, a legislator, and the elective or highest appointive executive official

[7] This lawsuit should also be dismissed in its entirety as against the City of Ann Arbor Police Department because the police department is not a legal entity against whom a suit can be directed, but merely a creature of the City, who is the real party in interest. *See, e.g. Haverstick Enterprises, Inc. v. Financial Federal Credit, Inc.*, 803 F.Supp. 1251, 1256 (E.D.Mich. 1992).

of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority." MCL 691.1407(5). As the City Administrator is the highest appointive executive in the City, Defendants Fraser and Powers are entitled to absolute immunity from tort liability. Defendant Jones, as the Chief of the Ann Arbor Police Department, is the highest executive officer of the police department, and is therefore also entitled to absolute immunity under Michigan law. *Meadows v. City of Detroit*, 164 Mich.App. 418, 427 (1987). Even if they were not entitled to absolute immunity under MCL 691.1407(5), they would still be immune under MCL 691.1407(2) for negligent torts or common law qualified immunity for intentional torts. *See, e.g., Odom v. Wayne County*, 482 Mich. 459, 479-480 (2008).

Under federal law, government officials are entitled to qualified immunity from actions for damages "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated," which depends on the "objective legal reasonableness" of the action. *Jackson*, 433 Fed.Appx. at 428. Here, all the actions of the individual Defendants were objectively legally reasonable and permissible under state law, as they were taken in response to illegal and dangerous activity to abate a nuisance and prevent harm to the public and to Plaintiffs themselves. *Rental Property Owners Ass'n*, 455 Mich. at 255.

Furthermore, the Sixth Circuit has consistently held that a city official may only be held accountable for a civil rights violation carried out by police officers if that administrator "at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers." *Hays v. Jefferson Cnty., Ky.*, 668 F.2d 869, 874 (6th Cir. 1982). Plaintiffs have no factual allegations that either City Administrator or the Police Chief authorized, approved, or knowingly acquiesced in any unconstitutional conduct of any subordinate. Plaintiffs merely parrot some of the elementary language, stating that "Defendants acting under the color of state law, authorized, tolerated, ratified, permitted, or acquiesced in the creation of policies, practices, and customs, establishing a de facto policy of deliberate indifference to individuals diverse in race and national origin such as Plaintiffs." (Exh. 1 at ¶ 34.) Plaintiffs

allege no plausible facts in support of this assertion.[8]

H. Plaintiffs' Conspiracy Claim (Count VI) Should Be Dismissed Because Plaintiffs Fail To State A Claim For Relief.

As with Plaintiffs' other claims, their conspiracy count is a jumbled assortment of nonsensical conclusions that are insufficient to state a claim. Plaintiffs' conclusory assertion is that "[t]he Defendants conspired and worked inconjunction [sic] to permanently close the Plaintiffs [sic] business establishment by soliciting former employee [sic] to act as the Defendant's [sic] confidential informant by threats and promises." (Exh. 1 at ¶ 52.) As stated above in discussing Plaintiffs' § 1985 claim, the City (which includes its employees or agents, i.e. the City Defendants) cannot conspire with itself. *Hull*, 926 F.2d at 509; *Blair v. Checker Cab Co.*, 219 Mich.App. 667, 675, 558 (1996). Plaintiffs' claim can be dismissed on this principle alone. However, to the extent that Plaintiffs mean to allege that the City conspired with former Nightclub employees or informants, Plaintiffs still fail to state any plausible claim for relief (however it should be noted that Plaintiffs never directly allege any such conspiracy in their Complaint and the Court has no duty to infer claims not alleged. *See, e.g., Newton v. Kentucky State Police*, 2009 WL 648989, 5 (E.D. Ky. 2009) ("the court will not read causes of action into the complaint which are not alleged") (citing *Superior Kitchen Designs, Inc. v. Valspar Indus*, 263 F.Supp .2d 140, 148 (D. Mass. 2003)).

To the extent that Plaintiffs are alleging a conspiracy between the City and former Nightclub employees or informants under § 1983 (although their Complaint also does not state this either), they fail to state a claim. Because of the high number of frivolous lawsuits, federal courts have traditionally viewed conspiracy claims against public officials with suspicion and

[8] Furthermore, neither former City Administrator Fraser nor current City Administrator Powers was in office at the time of the May, 2011 violent incidents and police response, or at the time the Third Lawsuit was filed in June, 2011. Mr. Fraser left the City of Ann Arbor in April, 2011 and Mr. Powers arrived in September, 2011. Thus, it is impossible that either Mr. Fraser or Mr. Powers "implicitly authorized or knowingly acquiesced" in any alleged unconstitutional conduct at that time.

disfavor, and thus require specific pleadings of material facts to support a claim. *Fisher v. City of Detroit,* 1993 WL 344261, 5 (6th Cir. 1993) (unpublished). A civil conspiracy is defined under federal law as an agreement between two or more persons to injure another person by an unlawful action. *Hooks*, 771 F.2d at 943-44. Plaintiffs must show that there was a single plan, that the alleged co-conspirator shared in the general conspiratorial objective, and that an overt act was committed in furtherance of the conspiracy that caused injury to the complainant. *Id.* Furthermore, "[c]laims of conspiracy must be pled with some specificity: vague and conclusory allegations that are unsupported by material facts are not sufficient to state a § 1983 claim." *Farhat v. Jopke*, 370 F.3d 580, 599 (6th Cir. 2004).

Plaintiffs have not specifically alleged any material facts supporting the existence of any agreement, common plan, or objective between the City and any former Nightclub employee or informant, nor alleged any act in furtherance of such a plan. Plaintiffs merely state that "[u]pon information and belief Defendants' [sic] have solicited former employees of the Plaintiff's [sic] business to act as confidential informants on behalf of the Defendants," that "[u]pon information and belief the former employees have been asked to wear wires and tape recording devices, gain entry into the club and look for signs of drug deals and prostitution," and that "[t]he Defendants conspired and worked inconjunction [sic] to permanently close the Plaintiffs [sic] business establishment by soliciting former employee [sic]." (Exh. 1 at ¶¶ 46, 47, & 52.) A request or solicitation cannot constitute a plan or agreement nor an act in furtherance thereof.

Also, Plaintiffs have failed to allege any illegal act, stating only that the alleged conspiracy was to "look for signs of drug deals and prostitution," in order "to bolster their case for nuisance allegations against Plaintiffs" and thereby "permanently close the Plaintiffs [sic] business establishment." Of course, these are perfectly legal and appropriate actions for the City to take in response to a nuisance business that generated numerous police calls since September 2007 for violence and other dangerous and illegal activity. Because of these deficiencies, any federal conspiracy claim fails as a matter of law and should be dismissed.

To the extent that Plaintiffs are attempting to allege a state law claim for conspiracy

(although their Complaint makes no explicit claim of this either), then they likewise fail to state a claim. A Michigan civil conspiracy is defined similarly as a combination of two or more persons to accomplish, by some concerted actions a criminal or unlawful purpose or a lawful purpose by criminal or unlawful means. *Temborius v. Slatkin*, 157 Mich.App. 587, 600 (1986). For the same reasons as above, any state law conspiracy claim fails due to conclusory allegations lacking factual support. *Sankar v. Detroit Bd. of Educ.*, 160 Mich.App. 470, 481 (1987) (complaint alleging that defendants acted "maliciously, intentionally, outrageously and with bad faith" insufficient to establish conspiracy). Furthermore, a civil conspiracy, by itself, is not a cognizable claim but is defined by the wrongful act that constitutes the underlying theory of liability, which must be separately established. *Mekani v. Homecomings Financial, LLC*, 752 F.Supp.2d 785, 790 (E.D. Mich. 2010) (citing *Roche v. Blair*, 305 Mich. 608, 613-14 (1943). Plaintiffs have not established any underlying cause of action, but rather seek to have the Court assume one on their behalf. To the extent Plaintiffs seek to rely on their intentional infliction of emotional distress claim (or any other tort claim) as an underlying act, their claim is barred by immunity, as discussed above. To the extent Plaintiffs seek to rely on their constitutional claims, they have also failed to state any claim for a valid cause of action, as discussed above. Since conspiracy cannot stand alone, and Plaintiffs have not stated a valid claim for an underlying wrongful act, their conspiracy claim should be dismissed under both state and federal law.

CONCLUSION

Plaintiffs' Complaint lacks factual and legal merit. It is devoid of any understanding of the law and federal pleading requirements and should be dismissed with prejudice under Fed. R. Civ. P. 12(b)(1), 12(b)(2), and 12(b)(6) for the reasons stated above.

Respectfully submitted,

Dated: February 17, 2012

By: /s/ Stephen K. Postema
Stephen K. Postema (P38871)
Counsel for Defendants
OFFICE OF THE CITY ATTORNEY

CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2012, I electronically filed the foregoing document with the Clerk of the Court using the ECF System which will send notice of such filing to the following: Plaintiff's Counsel, Roger A. Farinha, and I hereby certify that I have mailed by US Mail the document to the following non-ECF participants: None.

/s/ Jane Allen
Legal Assistant
Ann Arbor City Attorney's Office
City of Ann Arbor
301 E. Huron St., P.O. Box 8647
Ann Arbor, MI 48107-8647
(734) 794-6180

INDEX OF EXHIBITS

Exhibit 1: Plaintiffs' Complaint, *V.R. Entertainment, et al v City of Ann Arbor, et al,* Case no. 12-cv-10203, filed in the Eastern District of Michigan

Exhibit 2: *City of Ann Arbor v Mangray, GCW* 11-597-CH (the Third Lawsuit), Verified Complaint, filed in the 22nd Circuit Court, Washtenaw County, Michigan

Exhibit 3: City's Motion and Brief for Temporary Restraining Order, Third Lawsuit, *City of Ann Arbor v Mangray, GCW* 11-597-CH

Exhibit 4: Temporary Restraining Order Issued on June 2, 2011, in Third Lawsuit

Exhibit 5: Defendants' (Plaintiffs herein) Reply Brief, Third Lawsuit

Exhibit 6: City's (Plaintiff's) Reply Brief with three attached redacted police reports (A – C), Third Lawsuit

Exhibit 7: Court Order dissolving TRO and appointing security receiver, Third Lawsuit

Exhibit 8: Security Receiver's Report, Third Lawsuit

Exhibit 9: Michigan Liquor Control Commission Complaint

Exhibit 10: *HDC, LLC v. City of Ann Arbor*, 2010 WL 2232220, 5 (E.D. Mich. 2010) (unpublished)

Exhibit 11: *Nali v. Ekman*, 355 Fed.Appx. 909, 913 (6 Cir. 2009) (unpublished)

Exhibit 12: *EBI-Detroit, Inc. v City of Detroit*, 279 Fed. Appx. 340, 351 (6th Cir. 2008) (unpublished)

Exhibit 13: *Fisher v. City of Detroit,* 1993 WL 344261, 5 (6th Cir. 1993) (unpublished)