

STATE OF MICHIGAN  
3rd JUDICIAL CIRCUIT  
WAYNE COUNTY

REQUEST FOR HEARING ON  
MOTION  
(PRAECIPE)  
ORDER/JUDGMENT

GOODFELLAS WEAR LLC , et al. v CO  
Hon. Wendy M Baxter 12/10/2008



08-018235-CZ

PLAINTIFF NAME(S)  
  
Goodfellas Wear, LLC and Wissam  
Aoun

vs.

DEFENDANT  
  
Macy's Retail Holdings, Inc. and Douglas  
Bucher

PLAINTIFF'S ATTORNEY, BAR NO., ADDRESS,  
AND TELEPHONE NO.  
  
CYRIL C. HALL P29121  
Attorney for Plaintiffs  
149 Franklin Blvd.  
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DEFENDANT'S ATTORNEY, BAR NO., ADDRESS AND  
TELEPHONE NO. \*\*  
  
JENNIFER G. DAMICO (P51403)  
PLUNKETT COONEY, P.C.  
Attorneys for Macy's and Bucher  
535 Griswold Street, Ste. 2400  
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List additional attorneys on other side.

1. Motion Title: Motion for Summary Disposition

2. Moving Party: Defendants Macy's and Bucher

Telephone No. 313-983-4334

3. Please place on the motion calendar for:

Judge	Bar No.	Date	Time
Wendy M. Baxter		Tues., March 9, 2010	11:00 A.M.

Adjourned to: \_\_\_\_\_ Adjourned to: \_\_\_\_\_ Adjourned to: \_\_\_\_\_

4. I certify that I have made personal contact with Plaintiff on 1/22/10 regarding concurrence in relief sought in this motion and that concurrence has been approved/denied.

Date:  
February 5, 2010

Attorney:   
JENNIFER G. DAMICO

Bar No. P51403

ORDER/JUDGMENT

DATED: \_\_\_\_\_

IT IS HEREBY ORDERED THAT THIS MOTION IS:

- DENIED
- GRANTED IN PART/DENIED IN PART
- TAKEN UNDER ADVISEMENT
- DISMISSED

GRANTED, AND IT IS FURTHER ORDERED AND ADJUDGED:

Approved as to form and substance by Counsel for:  
Plaintiff: \_\_\_\_\_

Defendant:: \_\_\_\_\_  
Dated: \_\_\_\_\_

CIRCUIT COURT JUDGE

FILE EITHER IN PERSON OR BY MAIL  
WITH THE WAYNE COUNTY CLERK

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

GOODFELLAS WEAR, LLC, a Michigan,  
Limited Liability Company and WISSAM AOUN,

GOODFELLAS WEAR LLC , et al. v CO  
Hon. Wendy M Baxter 12/10/2008



08-018235-CZ

Plaintiffs,

vs.

MACY'S EAST, an unincorporated division of  
MACY'S RETAIL HOLDINGS, INC., and  
DOUGLAS BUCHER,

Defendants.

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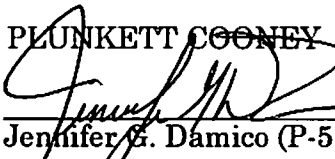
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**NOTICE OF HEARING**

TO: ALL COUNSEL OF RECORD

PLEASE TAKE NOTICE that the within Motion for Summary Disposition will  
be heard before the Hon. Wendy M. Baxter, on Tuesday, March 9, 2010 at 11:00 a.m.

By:   
PLUNKETT COONEY  
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DATED: February 5, 2010

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

GOODFELLAS WEAR, LLC, a Michigan,  
Limited Liability Company and WISSAM AOUN,

Plaintiffs,

vs.

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GOODFELLAS WEAR LLC , et al. v CO  
Hon. Wendy M Baxter 12/10/2008



08-018235-CZ

**DEFENDANTS MACY'S AND DOUGLAS BUCHER'S MOTION  
FOR SUMMARY DISPOSITION**

NOW COME Defendants, MACY'S EAST, an unincorporated division of  
MACY'S RETAIL HOLDINGS, INC., and DOUGLAS BUCHER, ("Macy's  
hereinafter), by and through their attorneys, PLUNKETT COONEY, and for their  
Motion for Summary Disposition, state as follows:

1. This cause of action was filed by Plaintiffs on December 10, 2008 as the  
result of an authorized search and seizure of Plaintiffs' business, pursuant to a  
search warrant obtained by Co-Defendant, Wayne County.

2. That settlement was reached in this matter for \$5,000.00 on November 17, 2009, the date originally set for this Motion for Summary Disposition.

3. Nonetheless, on January 22, 2010, after Defendants were forced to file a Motion to Enforce Settlement, Plaintiff, Wissam Aoun, personally appeared in front of this Court stating that he never authorized his counsel to settle this matter for \$5,000.00.

4. While this counsel was present when settlement was reached, Plaintiff's counsel nonetheless told the Court that he did not have authority and Defendants' Motion was denied.<sup>1</sup>

5. As such, Defendants have refiled this Motion for Summary Disposition.

6. During the search and seizure ("seizure" hereinafter), Wayne County recovered Macy's merchandise that was sold to Plaintiff's brother in a "reverse buy sting operation" conducted by Wayne County.

7. At least 29 items recovered in the seizure were supplied by Macy's to Wayne County in an attempt to shut down the illegal fencing operation.

8. After the seizure, all but the 29 conclusively identified Macy's items were returned to Plaintiffs in April, 2008.

9. Plaintiffs bring this instant action against Macy's claiming conspiracy, concert of action, tortious interference with a contract or advantageous business relationship or business expectancy and statutory conversion.

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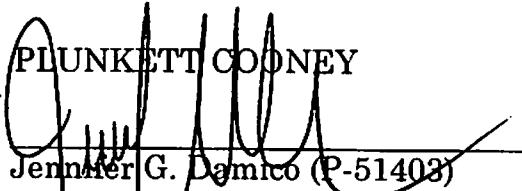
<sup>1</sup> This Court ordered \$1,000 in sanctions against Plaintiff's counsel for allegedly entering into settlement for which he had no authority to do so.

10. All of Plaintiffs' claims against Macy's should be dismissed as Macy's conduct was neither tortious, unlawful or illegal.

11. Plaintiffs have failed to state a claim upon which relief can be granted in that Plaintiffs' bare allegations do not support the necessary elements for a *prima facie* case against Macy's.

12. Moreover, Plaintiffs Complaint must be dismissed because there is no genuine issue of material fact for the jury to decide as Plaintiffs cannot satisfy the required elements of the counts they have alleged against Macy's.

WHEREFORE, MACYS EAST, an unincorporated division of MACYS RETAIL HOLDINGS, INC., and DOUGLAS BUCHER, respectfully request that the Court grant their Motion for Summary Disposition pursuant to MCR 2.116(C)(8) and (10), and award costs and attorney fees.

By   
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DATED: February 5, 2010  
Detroit.19947.84919.1383209-1

CERTIFICATE OF SERVICE

The undersigned certifies that on the 5th day of Feb, 2010, a copy of the foregoing document was served upon the attorney(s) of record by mailing a copy of same to said attorney(s) at their stated business address with pre-paid first-class postage affixed thereto. I declare under the penalty of perjury that the foregoing statement is true to the best of my information, knowledge and belief.

  
Janet Behrik

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

GOODFELLAS WEAR, LLC, a Michigan,  
Limited Liability Company and WISSAM AOUN,

Case #08-018235-CZ  
Hon. Wendy M. Baxter

Plaintiffs,

vs.

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**BRIEF IN SUPPORT OF DEFENDANTS MACY'S AND DOUGLAS BUCHER'S  
MOTION FOR SUMMARY DISPOSITION**

**I - INTRODUCTION**

On December 10, 2008, Plaintiffs filed this action alleging various torts against Defendants, Macy's and its employee, Douglas Bucher, (hereinafter collectively referred to as "Defendant" or "Macy's") and Wayne County and Sheriff Warren Evans ("Wayne County"), in connection with a lawfully authorized search and seizure ("seizure"), that took place at the Goodfellas store on December 12, 2007. In the seizure, merchandise, cash, illegal guns and computer equipment were recovered by Wayne County. (Exhibit A - Complaint).

As a result of this lawful seizure wherein Macy's merchandise was recovered, Plaintiffs allege the following counts against Macy's: Count IV – Concert of Action, Count V – Civil Conspiracy, Count VI – Tortious Interference with A Contract or Advantageous Business Relationship or Expectancy, and Count VII – Conversion.

All of Plaintiffs' claims against Macy's must be dismissed as Plaintiffs have failed to state a claim upon which relief can be granted. Further, there is no genuine issue of material fact as Plaintiffs cannot meet their burden in proving the requisite elements of any of above-listed torts. As such, Defendant, Macy's and Douglas Bucher, request that this Court grant their Motion for Summary Disposition pursuant to MCR 2.116(C)(8) and (10).

## **II – PROCEDURAL BACKGROUND**

Defendants originally filed their Motion for Summary Disposition on October 5, 2009. The hearing was scheduled for November 17, 2009. Prior to the hearing, a settlement was reached, but subsequently denied by Plaintiff, Wissam Aoun. Accordingly, Defendants re-filed their Motion for Summary Disposition.

It must be noted that the Scheduling Order states that discovery in this matter concluded on October 22, 2009. Based upon the fact that the parties purportedly settled the matter on November 17, 2009, the hearing date of Defendants' Motion for Summary Disposition, case evaluation never took place.

Accordingly, Defendants object to any potential new witnesses, evidence and/or any additional discovery by Plaintiffs in that all dates and deadlines have elapsed.

### III – STATEMENT OF FACTS

On August 2, 2007, Macy's Northland loss prevention personnel apprehended a shoplifter who indicated that he was selling stolen merchandise to a person named "Mo" at a store called Da Hook Up.<sup>2</sup> One day later, on August 3, 2007, Macy's Fairlane loss prevention personnel apprehended two women shoplifters who stated that they were also selling stolen Macy's goods to "Mo" at Da Hook Up and the Da Jump Off. They agreed to cooperate with loss prevention in order to avoid criminal prosecution. (Exhibit C - deposition of Vereea Griffin-Boatman, pp 17-23).

As Macy's had information regarding evidence of organized retail crime, namely, a suspected "fencing" operation, Macy's Organized Retail Crime Unit (ORC), headed by Defendant Douglas Bucher and Vereea Griffin-Boatman, began an investigation of Da Hook Up, Da Jump Off and Off Da Hook; all owned by Plaintiff's relatives, Ibrahim and Nithal Aoun. Mohammad "Mo" Aoun is Plaintiff, Wissam Aoun's brother, and worked at Da Hook Up. Plaintiff, Wissam Aoun, owns Goodfellas Wear, LLC. Goodfellas Wear is not under suspicion at this time.

The objective of Macy's investigation was to determine whether the stores were receiving and selling merchandise that was stolen from Macy's. *Id.* at 20-21. During this time period, Vereea Griffin-Boatman surveilled Da Hook Up wherein she saw evidence of fencing.<sup>3</sup>

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<sup>2</sup> A Time line of Events is attached as Exhibit B to provide assistance to the Court.

<sup>3</sup> Ms. Boatman testified that one occasion she saw a person walking into Da Hook Up with several purses and merchandise and leaving without them. She testified that this was evidence that they were selling merchandise to Da Hook Up. *Id.* at 27-28.



On August 29, 2007, Vereea Griffin-Boatman contacted Wayne County Sheriff's Deputy, Kristyn Montgomery, to discuss her findings. Thereafter, the Wayne County Sheriff Department agreed to partner with Macy's in an investigation. *Id.* at 29. The purpose of the investigation was to set up "reverse buys" wherein undercover sheriff deputies would be provided with Macy's merchandise and would attempt to sell it to Mohammad "Mo" Aoun where he, in turn, would sell it at Da Hook Up. (See, **Exhibit D**, deposition of Kristyn Montgomery, p 6). In order to identify the merchandise used in the "reverse buy" or "sting," Macy's used identifiers on the merchandise. These identifiers were pin pricks in the letter "i" in decimal points on the manufacturer's tags, and marking the tags with a pen that could only be seen with ultraviolet light. (See, **Exhibit C** - deposition of Vereea Griffin-Boatman, p 48; **Exhibit D** - deposition of Kristyn Montgomery, p 13). After obtaining Mo's contact information from the female shoplifters, on October 22, 2007, Wayne County Sheriff Deputy Cleaster Maxwell, posing as a Macy's employee who stole merchandise from the store, sold Macy's merchandise to Mohammad Aoun at Da Hook Up. (See, **Exhibit D**, deposition of Montgomery, p. 12).

At a debriefing between Wayne County and Macy's, after the first "reverse buy," Deputy Maxwell received a telephone call from Mohammad Aoun wherein he placed an order for certain merchandise from Macy's. (**Exhibit C** - deposition of Virginia Griffin-Boatman, p 34). On November 6, 2007, Maxwell sold more Macy's merchandise to Mohammad Aoun. *Id.*

On the same day, Doug Bucher and Macy's retail crime employee, Marc Haire, followed Mohammad Aoun to his home. At that time, they observed him carrying the merchandise in Macy's shopping bags that had just been sold to him by Deputy Maxwell. Thereafter, they followed him to Goodfellas Wear owned by Plaintiff, Wissam Aoun. Both Haire and Bucher saw Mohammad Aoun take the merchandise, still in Macy's bags, into the Goodfellas store and saw him leave without them. (See, Exhibit E - deposition of Douglas Bucher, pp 11-12). At this point, Goodfellas Wear became a target of the investigation having received stolen merchandise from Macy's.

On December 4, 2007, Deputy Maxwell again sold purportedly stolen Macy's merchandise to Mohammad Aoun. On December 5, 2007, Vereea Griffin-Boatman and Deputy Montgomery went into Goodfellas looking for merchandise that Maxwell sold to Mohammad on December 4, 2007. Vereea Griffin-Boatman identified merchandise from the November 6, 2007 "reverse buy" by Maxwell. (Exhibit C - deposition of Virginia Griffin-Boatman, pp 49-52). The items were identified as a pair of Coogi jeans and a white Coogi top. *Id.* Ms. Boatman was able to identify these items because of the pin pricks in the tags that were placed by Macy's ORC. *Id.*

As a result of the investigation and armed with sufficient evidence and probable cause, Wayne County Sheriff Deputy Montgomery signed an affidavit in support of a search warrant which was authorized by the Wayne County prosecutor

and issued by the 36<sup>th</sup> District Court. (Exhibit F). The scope of the Search Warrant states:

“To seize, secure, tabulate and make return according to law the following property and things: All suspected stolen merchandise; all monies, books, records, electronic and telephonic devices used in connection with illegal activity, all equipment and supplies used in the delivery, of stolen merchandise, all firearms used in connection with the above described activities: all evidence of ownership occupancy, possession or control of premises.” (See, Exhibit F).

Thereafter, three teams were compiled consisting of Wayne County Sheriff Deputies, Macy's employees, Target employees, and Home Depot employees, who were all actively investigating fencing activities of the Aoun family. The team that entered Goodfellas was lead by Wayne County Sheriff Deputy Montgomery and her supervisor, Lt. Sam Milanovich. Deputy Montgomery testified that she and her supervisor, Lt. Milanovich, were in charge of this seizure. (Exhibit D - Deposition of Kristyn Montgomery, p 39).

There is absolutely no question of fact that the seizure was authorized by the 36<sup>th</sup> District Court and conducted by the Wayne County Sheriff Department as a private citizens such as Macy's and its employees, are not authorized by law to conduct any type of search, seizure or raid. *Id.*

During the seizure at Goodfellas, the team retrieved approximately 50% to 60% of the merchandise on the sales floor. (Exhibit G - deposition of Goodfellas employee, Virginia Smith, p 22). Deputy Montgomery testified that she made the decision of what merchandise and how much merchandise to seize. (See, Exhibit D - deposition of Kristyn Montgomery, pp 45-47). Of the merchandise taken during

the raid, 29 items were conclusively identified as items from Macy's sold to Mo during the "reverse buy" operation. Plaintiffs do not dispute this fact. (Exhibit H – deposition of Wissam Aoun, pp 80-83, 86). All of the seized merchandise, contained in approximately 70 boxes, was taken to a Home Depot warehouse. Only the Wayne County Sheriff's Department had access to the property which was now evidence in a criminal investigation. (Exhibit D – deposition of Deputy Montgomery, pp 48-49).

After the seizure, Plaintiff, Wissam Aoun, filed a Complaint against Wayne County Sheriff Department, only, for claim and delivery, alleging that the Wayne County seized merchandise that was outside of the scope of the search warrant. (Exhibit I – Complaint, Case no. 07-733098-PD). On January 19, 2008, the Court ordered that the parties perform an inventory of the merchandise and attempt to identify whether or not they could determine if any of the items in the remaining 70 boxes of merchandise were stolen from Macy's. (Exhibit J – Court Order). Macy's participated in this two day inventory pursuant to the Court's Order. At the conclusion of the inventory, and after contacting vendors (pursuant to the Court's Order), Macy's was unable to determine what merchandise was lawfully delivered to Goodfellas, or was stolen from Macy's, as the UPC Codes and other markings were not store specific. (Exhibit K – hearing transcript dated February 22, 2008).

As such, Wayne County agreed to release all but the 29 items to Plaintiffs. *Id.* Macy's was not a party to the claim and delivery action, and had no control over the inventory and/or the release of the merchandise to Plaintiffs. While Wissam

Aoun was not charged with any crime, his brother, Mohammad Aoun, pled guilty to the crime of receiving and concealing stolen property. (Exhibit H – deposition of Wissam Aoun, pp 183-184).

Plaintiffs' employee, Virginia Smith testified that although the returned merchandise was wrinkled and slightly dusty, it was steamed, cleaned and ultimately sold. (Exhibit G - deposition of Virginia Smith, pp 27-32).<sup>4</sup>

Approximately one-half of the returned merchandise, which was deemed "out-of-season," was placed on sale at 15% to 50% off the original price. *Id.* The remaining merchandise was placed for sale at its original price. *Id.* Only a couple of pairs of pants and 5 Coogi sweaters were deemed damaged because of "snags" that allegedly occurred during the seizure and were sold at a "super discount." (Exhibit G - deposition of V. Smith, pp 29-32). Ms. Smith further testified that the returned merchandise never underwent additional mark downs and that all of it, other than a few \$800.00 leather jackets, were sold. *Id.* at pp 30-31. This is important to note because it belies Wissam Aoun's conversion claim wherein he alleges that all of the merchandise that was returned was "unsellable and a total loss." (Exhibit A – Complaint, Count VII).

In this instant action, Plaintiffs are suing Macy's for concert of action, civil conspiracy, tortious interference with a contract or advantageous business relationship or expectancy and statutory conversion. All of Plaintiffs' must fail for

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<sup>4</sup> This testimony clearly discredits Plaintiffs' claim that they sustained damages in excess of \$300,000 in lost merchandise seized in the raid. (Exhibit A – Complaint; Exhibit H – deposition of Wissam Aoun).

the reasons set forth in the Argument section of this brief. Accordingly, Macy's is entitled to summary disposition pursuant to MCR 2.116(C)(8) and (C)(10).

#### IV – STANDARD OF REVIEW

A motion for summary disposition brought pursuant to MCR 2.116(C)(8) tests the legal sufficiency of a complaint. *Maiden v. Rozwood*, 461 Mich 109, 119; 597 NW2d 810 (1999). While all well pleaded allegations are considered as true and construed in the light most favorable to the non-movant, when deciding a motion brought under this subsection, only the pleadings are considered to determine whether the claims as alleged are so clearly unenforceable as a matter of law, that no factual development could justify recovery. *Maiden* at p 119.

A motion pursuant to MCR 2.116(C)(10) tests the factual disputes between the parties. A motion should be granted as a matter of law, where the Court is convinced that there are no genuine issues of material fact in dispute between the parties, and it is impossible for the non-movant's claim or defense to be supported at trial. *Candeleria v B.C. General Contractors, Inc.*, 252 Mich App 681-686; 653 NW2d 630 (2002).

In *Smith v Globe Life Ins. Co.*, 460 Mich 446; 597 NW2d 28 (1999), the Supreme Court stated:

“Under MCR 2.116(C)(10), it is no longer sufficient for plaintiffs to promise to offer factual support for their claims at trial - - -. [A] party faced with a motion for summary disposition brought under MCR 2.116(C)(10), is, in responding to the motion, required to present evidentiary proof creating a genuine issue of material fact. Otherwise, summary disposition is properly granted.”

460 Mich 446.

Non-movants may no longer rest on their bare assertions, but now must come forward with specific affidavits, deposition testimony, or other admissible evidence showing a genuinely contested issue of material fact for trial. *Maiden, supra* at 120.

Because an issue of fact must be established with a presentation of admissible evidence, mere opinion evidence, conclusory denials, and inadmissible hearsay, do not create an issue of fact. *Taylor v Modern Engineering, Inc.*, 252 Mich App 665, 668; 653 NW2d 625 (2002). Discovery in this matter concludes on October 21, 2009.

## V - LAW AND ARGUMENT

### A. **PLAINTIFFS' CLAIM FOR STATUTORY CONVERSION MUST BE DISMISSED AS PLAINTIFFS HAVE FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.**

Plaintiffs have alleged a claim of statutory conversion, pursuant to MCL § 600.2919a, against Defendant Macy's (and against Wayne County). (Exhibit A – Complaint, ¶ 55-63).

Plaintiffs have failed to state a *prima facie* claim that Macy's converted their property pursuant to MCL § 600.2919a. MCL § 600.2919a “stealing, embezzling, or converting of property, or buying, receiving, possessing, concealing, or aiding in concealment of stolen, embezzled, or converted property; recover of treble damages, costs, attorney fees; other rights and remedies,” states the following:

“Section 1. A person damaged as a result of either or both of the following may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees:

- a. Another person stealing or embezzling property or converting property to the other person's own use.

b. Another person buying, receiving, possessing, concealing or aiding in the concealment of stolen, embezzled, or converted property when the person buying, receiving, possessing, or aiding in the concealment of stolen, embezzled, or converted property knew the property was stolen, embezzled or converted."

MCL § 600.2919(1)(a) and (b) (emphasis added).

"Statutory conversion" consists of knowingly buying, receiving or aiding in the concealment of any stolen, embezzled or converted property. *Lawsuit Financial, LLC v Curry*, 261 Mich App 579; 683 NW2d 233 (2004). The conversion statute provides a remedy against the accomplice only and not against the person who actually stole, embezzled or converted the property. *Echolon Homes, LLC v Carter Lumber Co.*, 261 Mich App 424; 683 NW2d 171 (2004); *Campbell v Sullins*, 257 Mich App 179; 667 NW2d 887 (2003). In this case, Plaintiffs allege that Macy's actually stole their merchandise. Clearly, the statute upon which Plaintiffs base their claim applies to situations where a person knowingly buys, receives or conceals stolen property and is clearly not applicable in this instance. A statutory conversion occurs when, in this case, Plaintiffs knowingly buy, receive, possess or conceal the purportedly stolen Macy's merchandise from "Mo" and sell it at Goodfellas, or "Mo" buys, receives or conceals purported stolen merchandise from undercover Deputy Maxwell in the "sting" operation. It is ridiculous that Plaintiffs are claiming statutory conversion against Macy's!

Nonetheless, pursuant to Michigan law, "converted property" is property over which any distinct act of dominion has been wrongfully exerted over another's



property. *Willis v New World Van Lines, Inc.*, 123 F Supp 2d 380 (ED Mich 2000). Obviously, Plaintiffs cannot prove this as: 1) the merchandise was seized as part of a lawful investigation, 2) Macy's merchandise that was used in the sting operation was found on the sales floor at Goodfellas, 3) all but 29 items were returned to Plaintiffs, and 4) the returned items were ultimately sold by Goodfellas. In order to be liable for statutory conversion, Plaintiffs must prove that Macy's either: 1) knowingly bought, received, possessed or aided in the concealment of Plaintiffs' stolen property, or 2) converted the property for its own use. MCL § 600.2919(1)(a) and (b).

There is no question of material fact that the 29 items not returned to Plaintiffs were Macy's merchandise sold to Mohammad Aoun, and were never the lawful property of Plaintiffs. Wissam Aoun has admitted this fact. (Exhibit H – deposition of Wissam Aoun, pp 80-82; 86). As the 29 items that were not returned were not “converted” because they were never Plaintiffs' lawful property, Plaintiffs cannot maintain a cause of action for statutory conversion against Macy's.

Importantly, the remaining 70 boxes of merchandise were returned after the Court-ordered investigation. These items were sold albeit some items were discounted. (Exhibit “G” – deposition of V. Smith, pp 27-32). With respect to these items, Plaintiffs cannot prove that Macy's knowingly bought, had possession or concealed merchandise that it knew was stolen, embezzled or converted. On August 24, 2009, Defendant requested that Plaintiffs dismiss their baseless claim

for statutory conversion against Macy's, but Plaintiffs refused. Defendants are entitled to dismissal and costs from Plaintiffs.

**B. PLAINTIFFS' HAVE FAILED TO STATE A CLAIM FOR TORTIOUS INTERFERENCE WITH A CONTRACT OR ADVANTAGEOUS BUSINESS RELATIONSHIP OR EXPECTANCY.**

After the raid, Plaintiffs claim that Macy's contacted their vendors and creditors and advised them that Goodfellas had been involved in a raid, was selling stolen and counterfeit merchandise, and that they should not do business with Goodfellas. (Exhibit A - Complaint). Wissam Aoun *speculates* that Macy's, a company with over 800 stores in the United States, contacted these entities because Macy's thought Goodfellas was competition and it wanted to put Goodfellas out-of-business. (Exhibit H - deposition of Aoun, p 79).

Plaintiffs have no admissible evidence, other than Wissam Aoun's own speculative testimony, that anyone from Macy's ever attempted to interfere with Plaintiffs' business relationships with their vendors and their claim should be dismissed.

Wissam Aoun bases his claim on unsupported hearsay, and in some instances, double and triple hearsay. He asserts that he spoke to several sales representatives who stated that "someone" contacted "someone" at their employment and told them about the seizure. Wissam Aoun cannot name any specific person from Macy's who initiated the contacts, cannot specifically name the recipient of the Macy's contacts, and does not know the date or time frame when these contacts allegedly occurred. (Exhibit I - deposition of Wissam Aoun, pp 103-

118).<sup>5</sup> After being questioned about each manufacturer and how he believes Macy's tortiously interfered with Plaintiffs' business relationships with the manufacturers, Wissam Aoun testified to the following:

"Q. Okay. So, I asked you what facts and evidence you have that you believe - - first I asked you if you believed it was Macy's who was directing the raid and you said yes and I asked what facts and evidence you had and you just told me because Macy's directed the raid because they went to the store and Macy's popped off clothing tags. So, that's the facts you have that you believe Macy's was in charge of this raid?

A. I had - - well, after - - a day after the incident or a couple of days when they had it on the news, one lady said that she worked for Macy's customer service, I believe I still have her name and number, I wrote it down, she made a comment saying that every time a customer came in and returned something to Macy's, they'll ask them like - - they'll ask the customers why they are returning it. They responded: I could get a better deal at Goodfellas, and that probably piled up and - -.

Q. That was one of the reasons - -?

A. One of the reasons I believe that Macy's had something to do with it.

Q. Now when you say you believe that Macy's was trying to put you out of business, do you believe it's Macy's corporate or just a certain Macy's store?

A. A certain Macy's store.

Q. And what certain Macy's store are you talking about?

A. Fairlane mall.

Q. Is this where this lady, this customer service lady was from?

A. Yes.

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<sup>5</sup> While Wissam Aoun testified that two employees from Coogi told him that someone in their company was contacted by Macy's, Plaintiffs have no admissible evidence to support these alleged statements.

Q. Do you have any other facts or evidence that you plan to introduce at trial of this matter to substantiate your claim that Macy's was trying to put Goodfellas out of business other than a feeling and this lady's comment?

A. I had a friend of mine that used to shop at Goodfellas. He is with the Wayne County Sheriff Department. They called - - I knew him by the name of - - he came into my store after the incident because he did not want to get involved. He was upset. His name was Big Greg I believe.

Q. Is he a Wayne County Sheriff?

A. He was a Wayne County Sheriff, undercover. He came to the store the next day. After talking to his friend at the Wayne County Sheriff Department, he was telling me I think they made a big mistake at your store, they took a lot of stuff they shouldn't have took and they are saying - - I'm not sure who was they, he said the people that came in here are saying that Macy's got them in this mess. That's another reason I believe Macy's had something to do with it.

Q. Okay. Any other facts or evidence you plan to introduce at trial to prove your allegation that Macy's was trying to put Goodfellas out of business and that's why they started this whole business, the raid?

A. Not at this time.

(Exhibit H – deposition of Wissam Aoun, pp 78-79).

After the raid, Plaintiff testified that he heard from some of his vendor contacts that someone in their respective corporate offices had been contacted by someone from Macy's. With respect to Coogi, Aoun testified that one of his two contacts from Coogi, Melissa Butrum or "Trevor" told him that "Bruce," the owner of Coogi, was contacted by Macy's. He did not know the purpose of the call. Further, he later testified that he heard that "Bruce" was contacted by another Coogi employee named "Pam" who told Melissa or "Trevor" about the seizure. *Id.* at 107.

Clearly, this double and triple hearsay is inadmissible and cannot be used to defeat this Motion for Summary Disposition

Importantly, Wissam Aoun admitted that he believes that "Bruce" was contacted by Macy's to determine if Goodfellas was actually authorized to sell Coogi wear at the store. *Id.* at 107-109.

With respect to the remaining manufacturers, Plaintiff provided absolutely no testimony that anyone from Macy's ever contacted any of the manufacturers and stated that Macy's was selling stolen or counterfeit goods, and that they should not do business with Macy's. In fact, Plaintiff testified that he does not know the purpose of these phone calls and it could possibly have been to match the UPC codes with the manufacturers pursuant to the Court's Order. *Id.* at 107-108.

Plaintiff also testified that he did not have a problem with any of the telephone calls made to his vendors after the Court ordered same. *Id.* at 181.

Douglas Bucher was the Macy's representative who actually contacted the vendors, after the Court's Order, to assist in verifying whether the remaining merchandise seized was stolen. When Mr. Bucher contacted the vendors, he: 1) never told them he was investigating Goodfellas, 2) never told them that Goodfellas was the subject of a police raid, 3) never told them that Goodfellas was under suspicion or was selling counterfeit goods, 4) and never told them not to do business with Goodfellas. (Exhibit E – deposition of Douglas Bucher, pp 44-45). Bucher testified:

"Q. Was it your purpose or any part of your purpose in making these phone calls to jeopardize or ruin the relationship between these manufacturers and Goodfellas?

A. No.

\* \* \* \* \*

Q. Did you ever have any type of fraudulent or wrongful intent to cause any type of harm to the relationship that may or may not have existed between these manufacturers and Goodfellas when you made these phone calls?

A. No."

*Id.*

Tortious interference with a contract or advantageous business relationship or expectancy are actually two separate causes of action. *Woody v Tanner*, 158 Mich App 764; 405 NW2d 213 (1987). It is well established in Michigan that a prerequisite to an action for tortious interference with contractual relations is a breach of a contract. See, *Woody, supra*, at 215. In an action based upon a contract, the Court may examine the contract in conjunction with a motion for summary disposition for failure to state a claim. See, *Second Benton Harbor Corp. v St. Paul Title Ins. Corp.*, 126 Mich App 580, 585; 337 NW2d 585 (1983).

Here, Plaintiffs have failed to produce any contract between Goodfellas Wear, LLC, Wissam Aoun, and any of the merchandise vendors or financing companies for which Plaintiffs claim their relationships were adversely affected because of Macy's conduct. (Exhibit L, Response to Request to Produce, no.'s 6, 7 and 8). Accordingly, Plaintiffs have failed to state a claim for tortious interference with a contract and this claim must be dismissed.

As to the second cause of action, Plaintiffs cannot prove the requisite elements for a claim for tortious interference with a business relationship or expectancy. Michigan Civil Jury Instruction 126.01 cites the elements necessary to prove a claim for tortious interference with a business relationship or expectancy.

The instruction states the following:

“Plaintiff claims that defendant intentionally improperly interfered with plaintiff’s business relationship or expectancy [name of third-party]. In order to establish the claim, plaintiff has the burden of proving each of the following:

- a. Plaintiff had a business relationship or expectancy with [name of third-party] at the time of the claimed interference.
- b. The business relationship or expectancy had a reasonable likelihood of future economic benefit for plaintiff.
- c. Defendant knew of the business relationship or expectancy at the time of the claimed interference.
- d. Defendant intentionally interfered with the business relationship or expectancy.
- e. Defendant improperly interfered with the business relationship or expectancy.
- f. Defendant’s conduct caused [name of third-party] to disrupt or terminate the business relationship or expectancy.
- g. Plaintiff was damaged as a result of defendant’s conduct.

Your verdict will be for the plaintiff if you find that plaintiff has proved all of these elements.

Your verdict will be for the defendant if you find that the plaintiff has failed to prove any one of these elements.”

M Civ JI 126.01 (emphasis added); *Jim-Bob, Inc., supra*; *Michigan Podiatric Medical Ass'n. v National Foot Care Program, Inc.*, 175 Mich App 723, 735; 438 NW2d 349 (1989); *Feaheny v Caldwell*, 175 Mich App 291, 301; 437 NW2d (1989); *Woody, supra*.

Plaintiffs cannot satisfy the seven necessary elements that all must be proven in order to maintain a claim. With respect to element "d," "defendant intentionally interfered with the business relationship or expectancy," the jury instruction defines the "intent" element of the claim. Specifically, it states:

"When I say plaintiff must prove that defendant intentionally interfered with the business relationship or expectancy, I mean that: a) defendant's primary, but not necessary sole, purpose was to interfere with plaintiff's relationship or expectancy, or b) defendant acted knowingly that [his/her] conduct was certain or substantially certain to cause interference with plaintiff's business relationship or expectancy."

See, M.Civ. JI 126.03; *Derosia v Austin*, 155 Mich App 647, 654; 321 NW2d 760 (1982); *Formal, Inc. v Community National Bank of Pontiac*, 166 Mich App 72, 781; 421 NW2d 289 (1988).

Moreover, with respect to element "e," "defendant improperly interfered with the business relationship or expectancy," the jury instruction defines the "improper" element of the tort, stating:

"Improper inference is conduct that is fraudulent, not lawful, not ethical, or not justified under any circumstances. If defendant's conduct was lawful, it is still improper if it was done without justification and for the purpose of interfering with plaintiff's business relationship or expectancy, but plaintiff must specifically show affirmative acts by defendant corroborate that defendant had the wrongful purpose of interfering with plaintiff's business relationship or expectancy."



See M.Civ. JI 126.04 (emphasis added); *Feldman v Green*, 138 Mich App 360 NW2d 881 (1984); *Formal, supra*. In determining whether a defendant's conduct was improper, the *Comment* [to the] jury instruction states that courts have considered the following factors:

- a. The nature of defendant's conduct;
- b. Defendant's motive or reasons for its actions;
- c. The interest of plaintiff which the defendant's conduct allegedly interfered;
- d. The interest that defendant sought to advance;
- e. Society's interest in (a) protecting the freedom of defendant to engage in such conduct; and (b) protecting contractual relationships, business relationship or expectancies such as are held or sought by plaintiff;
- f. How directly defendant's conflict influenced the breaching party; and
- g. The nature of the relationships of plaintiff, defendant, and other party to the contract."

See, § 767 of Restatement (2<sup>nd</sup>) of Torts; *Jim-Bob, Inc. v Mehling*, 178 Mich App 71, 96-97; 443 NW2d 451 (1989); *Woody, supra* at 775.

Plaintiffs have absolutely no admissible evidence that anyone from Macy's ever contacted any of its vendors or financing company with the intent to wrongfully interfere with their relationships, or for any improper purpose. As evidenced by Bucher's testimony, Macy's only contacted vendors to verify the legitimacy of the receipts, invoices and merchandise. (Exhibit E at pp 44-45). This Court ordered that "Defendant verify the receipts with the alleged manufacturers and compare the

receipts to units of clothing currently in the possession of Wayne County Sheriff's Department, to verify by manufacturer as having been legitimately purchased by Plaintiff." (Exhibit J – Court Order).

As stated above, Plaintiffs have absolutely no facts or admissible evidence (only having single, double and triple hearsay), that Macy's improperly interfered in their business relationships.<sup>6</sup> Specifically, one who alleges tortious interference with a business relationship must allege that the intentional doing of a per se wrongful act, or the doing of a lawful act with malice and unjustified in law, is for the purpose of invading the contractual rights or business relationship of another. *Badiee v Brighton Area Schools*, 265 Mich App 343, 376; 695 NW2d 521 (2005).

In *Badiee*, the court stated "a wrongful act per se is an act that is inherently wrongful or is an act that can never be justified under any circumstances." *Id.* Obviously, that is not the case here where Macy's was ordered to contact manufacturers and participate in identifying the UPC codes on the merchandise.

Thus, if the Defendant's conduct was not wrongful per se, then Plaintiffs must demonstrate specific, affirmative acts that corroborate the unjustified purpose of the interference. *Id.* These specific affirmative acts may be evidenced by affidavits, documents, deposition testimony, etc. As stated in the standard of review section, *supra*, an issue of fact must be established by the presentation of

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<sup>6</sup> Even if Plaintiffs could prove the "intentional" and "improper" elements of the tort, they cannot prove that their relationships were disrupted or terminated. Plaintiffs still have relationships and still purchase merchandise from all of the vendors they did before the seizure and still receive financing from Wells Fargo and CIT.

admissible evidence. Mere opinion evidence and inadmissible hearsay do not create an issue of fact. *Taylor v Modern Engineering Inc.*, 252 Mich App 665; 653 NW2d 625 (2002).

Here, Plaintiffs lack evidence that Defendant intentionally interfered with Plaintiffs' business expectancy, as required by law. See, *Winiemko v Valenti*, 203 Mich App 411, 416; 513 NW2d 181 (1994). On the contrary, the evidence clearly supports the fact that Defendant contacted the manufacturers to assist Wayne County in determining whether the seized merchandise rightfully belonged to Plaintiffs so it could be returned to them.

It is important to note that Macy's contacted the manufacturers pursuant to a Court ordered investigation. (Exhibit J). In the case of *Arim v General Motors Corp.*, 206 Mich App 178; 520 NW2d 695 (1994), the plaintiff, a transmission repair facility, brought an action against state employees and private entities involved in an investigation of fraudulent practices by the facility. *Id.* at 178. The investigation was conducted by the Secretary of State. *Id.*

With respect to plaintiffs' claim for tortious interference with a business relationship, the Court of Appeals stated:

"The trial court properly concluded that there was no genuine issue of material fact regarding plaintiff's claim because defendant participated in a lawful investigation under the authority of the Secretary of State and because there was no indication that defendants had any motive to interfere with the business relationships of plaintiffs, who were not charged with any violations of the act."

*Id.*; see also, *Michigan Podiatric Medical Ass'n. v Nat'l. Foot Care Program, Inc.*, 175 Mich 723, 735; 438 NW2d 349 (1989) (emphasis added). The *Arim* case is

directly on point to this instant action as Macy's contacted Vendors at the direction of the Court and Wayne County attorneys, and had no motive to interfere with Plaintiffs' relationships.

As such, there is no question of material fact that Plaintiffs cannot satisfy the "intentional" and "improper" interference elements of the tort. Plaintiffs' claim should be dismissed.

**C. PLAINTIFFS' CLAIM FOR CONSPIRACY AND CONCERT OF ACTION MUST ALSO BE DISMISSED IN THAT DEFENDANTS ARE NOT LIABLE FOR ANY UNDERLYING TORT.**

For the same reasons that Plaintiffs' claims for tortious interference of a contract or advantageous business relationship and statutory conversion must be dismissed, Plaintiffs have failed to establish a *prima facie* claim for conspiracy and concert of action.

A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by a criminal or unlawful means. *Admiral Ins. Co. v Columbia Cas. Ins. Co.*, 194 Mich App 300, 313; 486 NW2d 351 (1992).

In *Advocacy Organization for Patients & Providers v Auto Club Ins. Ass'n.*, 257 Mich App 365; 670 NW2d 569 (2003), the plaintiffs alleged tortious interference with a business relationship or expectancy, concert of action and conspiracy against defendant Auto Club. In affirming the lower court's granting of summary disposition, the Court of Appeals stated:

"A claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable tort."

257 Mich App 365 at 384. *Early Detection Center, P.C. v New York Life Ins. Co.*, 157 Mich App 618, 632; 403 NW2 830 (1986).

As previously argued, Plaintiffs have simply failed to establish any underlying tort and specifically, they have failed to establish any unlawful purpose or unlawful means in Defendants' actions. Because Plaintiffs have failed to establish any actual underlying tort, their conspiracy claim must also fail. Thus, Plaintiffs have failed to state a *prima facie* case for conspiracy and summary disposition is proper.

Likewise, because there is no genuine issue of material fact that no actionable tort was committed by Defendants, Plaintiffs' concert of action claim must also fail. While a concert of action theory does not necessarily depend on proving an independent claim of civil conspiracy, it requires evidence that the parties knowingly acted to further a common purpose, in this case, to convert Plaintiffs' property or to damage Plaintiffs' business relationships, or intentionally and improperly interfere with Plaintiffs' business relationship with the manufacturers. See, *Abel v Eli Lilly & Co.*, 94 Mich App 59, 73; 289 NW2d 20 (1979).

In the case at bar, Plaintiffs cannot prove that Defendants were jointly engaged in any tortious activity. Plaintiffs have never alleged that the search warrant was improper, or that Wayne County did not have probable cause in obtaining a search warrant. Moreover, Plaintiff, Wissam Aoun, admitted that

Macy's merchandise brought to Goodfellas by his brother was recovered in the seizure. (Exhibit H, pp 80-82, 86).

Like conspiracy, concert of action cannot exist independently of an underlying tort. See, *Cousineau v Ford Motor Co.*, 140 Mich App 19; 363 NW2d 721 (1985). As such, the claim should also be dismissed.

## VI - CONCLUSION

Based upon the foregoing, Plaintiffs cannot maintain a cause of action for statutory conversion, tortious interference with a contract or business relationship or expectancy, conspiracy and concert of action, as Plaintiffs have failed to state a claim upon which relief can be granted, and there are no genuine issues of material facts for the Court to decide. Summary disposition is proper, and Defendants request that this Court grant their Motion for Summary Disposition and enter an order dismissing all claims against Macy's.

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