

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF MICHIGAN
3 SOUTHERN DIVISION
4

MAHMOUD SAAD, Individually, And
ZIHRA SAAD, Individually,

Plaintiffs

- Vs -

MICHAEL KRAUSE, Individually And In His
Official Capacity, CITY OF DEARBORN
HEIGHTS, CITY OF DEARBORN HEIGHTS
POLICE DEPARTMENT, CITY OF
DEARBORN, CITY OF DEARBORN
POLICE DEPARTMENT, And JOHN DOE
OFFICERS I-XXX,

Defendants.

CASE NO. 10-cv-12635

**PLAINTIFFS' REPLY TO DEFENDANTS'
RESPONSE TO PLAINTIFFS'
COMBINED MOTION TO STRIKE
AND TO PERMIT DISCOVERY**

(Honorable Patrick J. Duggan)

5
6 **HADOUSCO. | PLLC**

7 **Nemer N. Hadous (CA: 264431) (AZ: 027529)**
8 **Admitted to practice in the U.S. District Court,**
9 **Eastern District of Michigan**
10 16030 Michigan Avenue, Suite 200
11 Dearborn, Michigan 48126
12 P: (313) 846-6300
13 F: (313) 846-6358
14 E: nhadous@hadousco.com

15 **ATTORNEY FOR PLAINTIFF**

16
17
18 **PUCKETT & FARAJ, PC**

19 **Haytham Faraj**
20 6200 Schaefer Road, Suite 202
21 Dearborn, Michigan 48126
22 P: (760) 521-7934

23 **ATTORNEY FOR PLAINTIFF**
24

5
6 **CUMMINGS, McLOREY, DAVIS,**
7 **& ACHO, PLC**

8 **Jeffrey Clark (P33074)**
9 **33900 Schoolcraft Road**
10 **Livonia, Michigan 48150**
11 **P: (734) 261-2400**
12 **E: jclark@cnda-law.com**

13 **ATTORNEY FOR DEFENDNTS**

14 *Michael Krause, City of Dearborn*
15 *Heights, and City of Dearborn Heights*
16 *Police Department.*
17

25
26 **PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFFS' COMBINED**
27 **MOTION TO STRIKE AND TO PERMIT DISCOVERY**

ARGUMENT

A. Federal Rule of Civil Procedure 12(d) Affords the Plaintiffs Reasonable Opportunity to Conduct Discovery

Notwithstanding the Defendants’ recitation of the distinction between a Rule 12(b)(6) motion and a Rule 56 motion, Federal Rule of Civil Procedure 12(d) supports the Plaintiffs’ Motion to Permit Discovery.

Federal Rule of Civil Procedure 12(d) provides:

(d) Result of Presenting Matters Outside the Pleadings.

If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to **and not excluded by the court**, the motion **must** be treated as one for summary judgment under Rule 56. All parties **must** be given a **reasonable opportunity** to present all the material that is pertinent to the motion. (Emphasis added).

The Defendants ask the Court to apply the “intracorporate conspiracy doctrine” to bar the Plaintiffs’ 42 U.S.C. § 1983 conspiracy claim. Whether the intracorporate conspiracy doctrine would apply to a 42 U.S.C. § 1983 conspiracy claim against a municipality engaged in an unlawful commercial enterprise by or through its agents, employees, and/or officials who act outside the scope of their employment in furtherance of the conspiracy¹ is unsettled, and, in any event, would appear to transcend the scope of the pleadings.

Were the Court inclined to apply the intracorporate conspiracy doctrine when deciding on the Defendants’ Rule 12(b)(6) motion, the Court would be required to make factual determinations regarding whether the Defendants acted outside the scope of their employment— a question which is the province of a reasonable trier of fact. Rule 12(d) would appear then to afford the Plaintiffs reasonable opportunity to conduct discovery before the Court make such determinations. Further discovery pursuant the Plaintiffs Motion to Permit Discovery pursuant to Rule 56(f) would accomplish this.

¹ The Plaintiffs’ Complaint alleged a conspiracy, whether between the municipality itself and the collective individual conspirators, or, amongst the individual conspirators. See the Plaintiffs’ Complaint at ¶¶ 112, 164. Invariably, the individual conspirators would have been acting outside the scope of their employment. “[The] complaint must contain either direct or inferential allegations with respect to all material elements necessary to sustain a recovery under some viable legal theory.” Weiner v. Klais & Co., 108 F.3d 86, 88 (6th Cir. 1997).

1 **B. The Defendants ask the Court to Weigh the Evidence**

2 The Defendants contend that the Plaintiffs have made “wild allegations of a conspiracy
3 that do not state a claim.” The Defendants further contend that the Plaintiffs have not pled their
4 conspiracy claim with the required specificity.² However, the Plaintiffs have alleged specific
5 circumstantial and inferential evidence upon which the Plaintiffs’ allegation that the Defendants
6 are engaged in a conspiracy to conduct an unlawful commercial enterprise under color of law is
7 not only plausible—but also likely.³ As the Sixth Circuit in Weberg noted, “rarely in a
8 conspiracy case will there be direct evidence of an express agreement among all the conspirators
9 to conspire; circumstantial evidence may provide adequate proof of conspiracy.” Weberg v.
10 Franks, 229 F.3d 514, 528 (6th Cir. Mich. 2000).

11 The Defendants, by their contention that the Plaintiffs have not pled their conspiracy
12 claim with the requisite particularity when the Plaintiffs support their conspiracy claim with
13 factual evidence and pertinent circumstantial and inferential evidence (as well as by their further
14 contention that the intracorporate conspiracy doctrine applies), essentially ask the Court to make
15 factual determinations and to weigh evidence—tasks more akin to ruling on a Rule 56 motion.⁴
16 The Plaintiffs are not opposed to this provided they are afforded reasonable opportunity to
17 conduct discovery—even on a limited basis.

18 The Plaintiffs have highlighted the pertinent, discoverable evidence required to determine
19 whether and to what extent the Defendants acted outside the scope of their employment in

² See generally, Defendants’ Reply to Plaintiffs’ Response and Brief in Opposition to Defendants’ Motion for Partial Dismissal.

³ See the Plaintiffs’ Complaint at ¶¶ 58-60, 86, 114.

⁴ The Defendants have also asked the Court to rule on “standing.” This would require the Court to make a factual determination regarding proximate causation, which is the province of a reasonable trier of fact. The remoteness determination involves questions of foreseeability and proximate cause and both of those questions are generally determined by the finder of fact (unless no reasonable trier of fact could find otherwise). Sheets v. Mullins, 287 F.3d 581, 592 (6th Cir. Ohio. 2002) (citing See Grover Hill Grain Co. v. Baughman-Oster, Inc., 728 F.2d 784, 792 (6th Cir.1984)); see also Stanford v. Kuwait Airways Corp., 89 F.3d 117, 127 (2d Cir.1996) (“Questions regarding what is normal or foreseeable, like other questions of proximate cause, are generally issues for the trier of fact.”)

1 furtherance of what the Defendants have termed the Plaintiffs’ “wild allegations of conspiracy.”

2 This discovery regards:

- 3 (1) The prevalence of formal and/or informal ticket quotas for Dearborn Heights
4 police officers. And whether such quotas arose at or near the time the City of
5 Dearborn Heights constructed its \$22-million dollar police station and adopted
6 DROP.
- 7 (2) The monetary incentive for Dearborn Heights police officers to issue civil
8 infractions.
- 9 (3) The formal and/or informal overtime policies adopted by the Dearborn Heights
10 Police Department, including whether Dearborn Heights police officers are able
11 to work for only 3 overtime hours but be paid for 4 overtime hours provided they
12 issue a minimum number of civil infractions.
- 13 (4) Whether the City of Dearborn Heights has complied with Public Act 85 of 2006.
- 14 (5) The percentage of civil infractions converted to “impeding traffic” violations,
15 (which do not accrue “points” on one’s driving record but usually have higher
16 monetary penalties). This ensures that the City of Dearborn Heights does not
17 have to share the revenue generated by the civil infraction with the State of
18 Michigan.
- 19 (6) Whether Krause issued one or more civil infractions by false pretenses on the day
20 he led several armed Dearborn Heights police officers and two vicious police
21 dogs into the Saad’s home to pursue the unarmed 61-year-old Joseph for an
22 alleged minor traffic infraction.

23 **CONCLUSION**

24 For the reasons stated above, the Plaintiffs respectfully request that the Court grant its
25 Motion to Permit Discovery pursuant to Rule 56(f).

26
27 **RESPECTFULLY SUBMITTED** this 9th Day of September, 2010.

28
29 **HADOUSCO. | PLLC**

30
31
32 **By: /s/ Nemer Hadous**
33 **Nemer N. Hadous**

16030 Michigan Avenue
Suite 200
Dearborn, Michigan 48126
P: (313) 846-6300
F: (313) 846-6358
E: nhadous@hadousco.com
ATTORNEY FOR PLAINTIFFS
Zihra Saad and Mahmoud Saad

CERTIFICATE OF SERVICE

I hereby certify that on September 9, 2010, I electronically filed the foregoing with the Clerk of the Court using the ECF system which will send notice of such filing to all attorneys of record in this matter. Since none of the attorneys of record are non-ECF participants, hard copies of the foregoing have not been provided via personal delivery or by postal mail.

HADOUSCO. | PLLC

By: /s/ Nemer Hadous
Nemer N. Hadous
16030 Michigan Avenue
Suite 200
Dearborn, Michigan 48126
P: (313) 846-6300
F: (313) 846-6358
E: nhadous@hadousco.com
ATTORNEY FOR PLAINTIFFS
Zihra Saad and Mahmoud Saad