

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

SCOTT HEGWOOD and
NASTY HABIT, INC.,

Plaintiffs,

v.

Case No. 08 CV 634 bbc

CITY OF EAU CLAIRE, et al.,

Defendants.

BRIEF IN SUPPORT OF THE DEFENDANTS'
FRCP 12 (b) (6) MOTION TO DISMISS

The City of Eau Claire (the "City") and the other named individual defendants, by their attorneys, Weld, Riley, Prenn & Ricci, S.C., for their brief in support of defendants' FRCP Rule 12 (b) (6) motion to dismiss state and represent to the district court as follows:

INTRODUCTION AND STANDARD OF REVIEW

Rule 12 (b) (6) mandates dismissal where a complaint fails to state a claim upon which relief can be granted. *See*, FRCP Rule 12 (b) (6). When a complaint's allegations do not plausibly suggest that the plaintiff has a right to relief, raising that possibility above a "speculative level," the district court must dismiss the case. *See, EEOC v. Concentra Health Sys., Inc.*, 496 F.3d 773, 777 (7th Cir. 2007). For purposes of a motion to dismiss, the district court must accept as true all *well-pleaded* factual allegations in a civil complaint and draw all inferences in favor of the non-moving party. *See, Hager v. City of West Peoria*, 84 F.3d 865, 868-869 (7th Cir. 1996). Essentially a motion to dismiss tests the legal sufficiency of the plaintiff's complaint.

To state such a claim for relief, the complaint need only contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” *See, Concentra Health Services, Inc., supra.*, 776. The Supreme Court has interpreted that language to impose two easy-to-clear hurdles. *See, Id.* [Citing to *Bell Atlantic Corp. v. Twombly*, ____ U.S. ____, 127 S.Ct. 1955, 1964, 167 L.Ed.2d 929 (2007)].

First, the complaint must describe the claim in sufficient detail to give the defendant “fair notice of what the . . . claim is and the grounds upon which it rests.” *See, Concentra Health Services, Inc., supra.*, at 776. Second, its allegations must plausibly suggest that the plaintiff has a right to relief, raising that possibility above a “speculative level;” if they do not, then the plaintiff pleads itself out of court. *See, Id.*

While a complaint attacked by a Rule 12 (b) (6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the “grounds” of his or her “entitlement to relief” requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. *See, Bell Atlantic Corp., supra.*, S.Ct. at 1964-1965. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact). *See, Id.*, S.Ct. at 1965. The Court says this does not require “heightened fact pleading of specifics, but only enough facts to state a claim for relief that is plausible on its face.” *See, Id.*, S.Ct. at 1974. However, any failure to meet this standard should result in a dismissal.

Looking at this case, defendants are on notice about the various § 1983 claims being made by the plaintiffs. Where plaintiffs’ complaint falls short, and therefore mandates a dismissal, is the absence of factual allegations sufficient to support its legal conclusions.

LIMITATION OF ACTIONS FOR § 1983 CLAIMS

Although Congress created a federal action in § 1983, it did not specify a federal statute of limitations for such actions. *See, Gray v. Lacke*, 885 F.2d 399, 407 (7th Cir. 1989). Thus, courts have traditionally borrowed the most analogous state statute of limitations. *See, Id.* In Wisconsin, it has been determined there is a 6-year statute of limitations for bringing civil rights claims under 42 U.S.C. § 1983. *See, Id.*, at 409.

For this case, there appear to be a number of alleged facts which are far beyond the 6-year limit. Because of the complaint's drafting, it is difficult to discern if plaintiffs are saying events which occurred outside the statute of limitations constitute an actionable claim. To the extent any of plaintiffs' claims are barred by the limit then those should be disregarded by the district court. This action was commenced on October 28, 2008.¹

ARGUMENT FOR DISMISSAL

Plaintiffs essentially make three separate claims against the City and/or the individual defendants: 1) a First Amendment retaliation claim; 2) a "class of one" Equal Protection claim; and 3) a Due Process claim based upon the alleged unconstitutionality of Wis. Stats. § 125.12 (2) (ag) (2). To address these claims and the parties who bring them, the defendants will first analyze the status of the plaintiffs in the context of this litigation.

Plaintiffs' Status as Parties.

In their complaint, plaintiffs allege that Nasty Habit, Inc.: 1) is a Minnesota corporation which has the capacity to sue or be sued in this court; 2) was formed on February 23, 1996, to own and operate the Nasty Habit tavern; and, 3) hired Scott Hegwood to run the tavern. *See, Plaintiffs'*

¹ From the date of filing, the six-year limitation extends back to October 27, 2002.

Complaint (10/28/08), ¶¶ 302, 419 and 421, pp. 2 and 6. Based upon a review of public records available on the internet and comparing it with the complaint's allegations, Nasty Habit, Inc., is not now nor was it at anytime in the past a Minnesota corporation. Rather, it is a Wisconsin corporation which was administratively dissolved on July 8, 2008.

On December 8, 2008, a search of the Minnesota Secretary of State's online access of corporate records did not show a corporate listing for "Nasty Habit, Inc." *See*, Exhibit A, attached hereto. That same search did find a business which is known as "The Nasty Habit Bar and Grill," located in Albert Lea, Minnesota, where the original date of filing for the company is June 15, 2001. *See*, Exhibit B, attached hereto.

On December 8, 2008, a similar search of the online records for the Wisconsin Department of Financial Institutions, Corporate Records, found the "Nasty Habit, Inc.," was formed in Wisconsin on February 23, 1996, as a Domestic Close Corporation. *See*, Exhibit C, attached hereto. State public records further show that Nasty Habit, Inc., was administratively dissolved prior to the filing of the above-captioned action.

The Seventh Circuit has found plaintiffs are under no obligation to attach to their complaint any documents upon which a civil action may be based, but any defendant filing a motion to dismiss under FRCP Rule 12 (b) (6) may choose to introduce certain pertinent documents if the plaintiffs failed to do so. *See, Venture Associates Corporation v. Zenith Data Systems Corporation*, 987 F.2d 429, 431 (7th Cir. 1993). Documents that defendants attach to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to the claim. *See, Wright v. Associated Ins. Cos.*, 29 F.3d 1244, 1248 (7th Cir. 1994).

In addition, a district court may take judicial notice of public records and other documents from public offices when considering a motion to dismiss. *See generally, Menominee Indian Tribe of Wisconsin v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998). A court may consider judicially noticed documents without converting a motion to dismiss into a motion for summary judgment. *See, Id.* Public records searched and available via open internet access should qualify for purposes of taking judicial notice.

The administrative dissolution of the Nasty Habit, Inc., does *not* prevent commencement of a civil proceeding by or against the corporation in its corporate name. *See, Wis. Stats. § 180.1407 (2) (e).* But there is no allegation in plaintiffs' civil complaint which indicates in what capacity, if any, Scott Hegwood is authorized to act on behalf of a currently defunct Nasty Habit, Inc.

For instance, he does not claim to be an owner of or have any ownership interest in Nasty Habit, Inc., or in the Nasty Habit bar. Also, there is no indication from the complaint's allegations that any corporate authorization was ever granted to approve commencement of the above-captioned action. The one thing that is certain regarding Scott Hegwood's status as a party plaintiff is that his actions as an individual are not a subject of this lawsuit. It is only his actions as a "designated agent of Nasty Habit, Inc., doing business at 341 Water St., Eau Claire, Wisconsin" which are at issue. *See, Plaintiffs' Complaint (10/28/08), ¶ 301, p. 2.*

Alleged Basis for Plaintiffs' Claims.

Though plaintiffs have filed a 40+ page complaint with the district court, their claims ultimately derive from a single factual circumstance - - the City's administrative decision in June, 2006, to revoke the Nasty Habit's license to sell alcoholic beverages pursuant to its municipal authority under Wis. Stats. § 125.12. *See, Plaintiffs' Complaint (10/28/08), ¶¶ 464-490, pp. 14-19.*

In their civil rights action, plaintiffs identify eight (8) “incidents” which lead the City to file its Complaint against the Nasty Habit. *See, Plaintiffs’ Complaint* (10/28/08), ¶ 488, p. 18. Thereafter, plaintiffs provide detailed explanations about those incidents which in the end caused the revocation of Nasty Habit’s license to sell alcoholic beverages in the City of Eau Claire. *See, Plaintiffs’ Complaint* (10/28/08), ¶¶ 491-574, pp. 19-28.

Apparently these allegations are meant to tell Nasty Habit’s “side of the story” and thereby justify plaintiffs’ respective conduct or other responses relative to the license revocation. And, presumably their account repeats what was presented by plaintiffs to the City in 2006 at the revocation hearing. However, their account did not persuade the City in 2006 and does not provide a basis now for the constitutional claims alleged in this lawsuit.

Plaintiffs’ First Amendment Retaliation Claims.

Scott Hegwood and Nasty Habit, Inc., charge in a conclusory manner that the individual defendants and the City retaliated against plaintiffs in violation of their First Amendment rights. *See, Plaintiffs’ Complaint* (10/28/08), ¶¶ A. and B., pp. 36-37. Plaintiffs identify the “protected speech” at issue as being complaints made by Scott Hegwood - - on the Nasty Habit’s behalf - - directly to the Eau Claire Police Department for its supposed failure to properly respond to calls for police assistance at the Nasty Habit from 2003 to 2006. Mr. Hegwood and Nasty Habit say because those complaints were made to the Police Department that the defendants retaliated by harassing the Nasty Habit and eventually revoking its license to sell alcoholic beverages.

To prevail on their § 1983 free speech retaliation claim, the plaintiffs need to prove the following elements: 1) that they were engaged in constitutionally protected speech - - that is speech which touches upon matters of public concern; 2) that public officials took adverse action against

them; and 3) that the adverse actions were motivated at least in part as a response to the plaintiffs' protected speech. *See, Springer v. Durflinger*, 518 F.3d 479, 483 (7th Cir. 2008). While there is no denying that Nasty Habit's license to sell alcohol was revoked in June, 2006, at least satisfying the second element of an adverse action against the business, the concern at this point is the lack of specificity in plaintiffs' pleading to factually state a First Amendment retaliation claim.

Regarding protected speech, it is not explained in plaintiffs' pleading how Scott Hegwood's complaints to the Police Department about its enforcement response to calls from the Nasty Habit has anything to do with matters of "public concern." Likewise, it is not stated how the revocation of the Nasty Habit's license was motivated by complaints Mr. Hegwood made about police services. After all, plaintiffs' pleadings concede there was a more than sufficient factual basis to support a revocation of the Nasty Habit's license to serve alcohol. The Nasty Habit had a long history and pattern of fostering violence on or about its premises, of serving overly intoxicated patrons, of allowing bar employees to brawl with patrons and of being a breeding ground for numerous violations of the law by Nasty Habit employees - - including a number of criminal misdemeanor charges and convictions for disorderly conduct. *See, infra.*, at pp. 13-15.

Leaving aside the issue of whether the elements of a *prima facie* case are supported by plaintiffs' conclusory allegations, no factual detail is supplied by their pleadings which identify what complaints from Hegwood are being referenced, when his complaints were made, to whom the complaints were made and how those complaints supposedly lead to the revocation of the Nasty Habit's alcohol license. *See, Plaintiffs' Complaint* (10/28/08), ¶ 701, p. 36. Similarly, there is no explanation as to how any of the individual defendant police officers took retaliatory action against the plaintiffs because of complaints that Scott Hegwood says he made to the Police Department. *See,*

Plaintiffs' Complaint (10/28/08), ¶ 702, p. 36. The plaintiffs' claims against the City and the individual defendants suffer from a basic factual infirmity and rely solely upon self-serving conclusions. Accordingly, as plaintiffs' complaint currently reads, it fails to set forth a First Amendment retaliation claim under 42 U.S.C. § 1983.

Plaintiffs' "Class of One" Equal Protection Claim on behalf of the Nasty Habit.

At paragraphs 702 and 703 of their complaint, plaintiff's allege that Nasty Habit, Inc.'s constitutional right to Equal Protection of the laws was violated when the City and the individual defendants discriminated against it. Nasty Habit, Inc., does not allege it has cognizable group status but instead claims entitlement to equal protection as a "class of one." Essentially, plaintiffs charge they were the object of selective law enforcement by the defendants.

In the usual equal protection case the plaintiff is complaining about discrimination against a group to which he belongs, such as a racial minority. *See, Indiana Land Company, LLC, v. City of Greenwood*, 378 F.3d 705, 712 (7th Cir. 2004). However, the Supreme Court and the Seventh Circuit have found that "an individual who does not claim membership in any group narrower than the human race can still obtain a remedy under the equal protection clause for 'irrational and wholly arbitrary' treatment as a so-called 'class of one.'" *See, Id; and also, Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000).

The Seventh Circuit has also stated and held as follows:

"... Repeating what we said in our opinion in *Olech*, and Justice Breyer in his concurring opinion in the Supreme Court, 120 S.Ct. at 1075, we gloss 'no rational basis' in the unusual setting of 'class of one' equal protection cases to mean that to make out a prima facie case the plaintiff must present evidence that the defendant deliberately sought to deprive him of the equal protection of the laws for reasons of a personal nature unrelated to the duties of the

defendant's position. We described the class of equal protection cases illustrated by *Olech* as 'vindictive action' cases and said they require 'proof that the cause of the differential treatment of which the plaintiff complains was a totally illegitimate animus toward the plaintiff by the defendant.'"

See, Hilton v. City of Wheeling, 209 F.3d 1005, 1008 (7th Cir. 2000).

The Equal Protection Clause provides a remedy when a powerful public official picks on a person out of "sheer vindictiveness," or because of a "totally illegitimate animus" toward the plaintiff. *See, Cruz v. Town of Cicero, Illinois*, 275 F.3d 579, 587 (7th Cir. 2001).

But whatever the outer bounds of the "class of one" concept, there are cases such as *United States v. Armstrong*, 517 U.S. 456, 464-65, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996) holding that selective enforcement of the laws is *not* actionable as a violation of equal protection *unless* the selection is based upon an invidious criterion - - such as race. *See, Tuffendsam v. Dearborn County Board of Health*, 385 F.3d 1124, 1127-28 (7th Cir. 2004). The Constitution does not require states to enforce any of their laws (or cities their ordinances) with Prussian thoroughness as the price of being allowed to enforce them at all. *See, Id.*, at 1128. Otherwise few speeders would have to pay traffic tickets. *See, Id.*

Selective, incomplete enforcement of the law is the norm in this country. *See, Tuffendsam, supra.*, at 1128. Moreover, one cannot be guilty of treating people unequally if one doesn't know they are not the same, as the Supreme Court made clear in *Oyler v. Boles*, 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962) - - another decision by the Court involving a charge of "selective enforcement" in violation of the Equal Protection Clause. *See, Smart v. International Brotherhood of Electrical Workers, Local 702*, 315 F.3d 721, 728 (7th Cir. 2002).

The gravamen of plaintiffs' Equal Protection claim is that defendants supposedly practiced selective law enforcement relative to the Nasty Habit. According to plaintiffs, such conduct denied Nasty Habit, Inc., its constitutional rights. But the Nasty Habit does not identify any invidious criterion which lead to an alleged denial of equal protection. Without such support, plaintiffs fail to state an actionable Equal Protection claim against any of the defendants.

In addition, at paragraph 702 of the complaint, plaintiffs fail to explain what the City actually did to deny Nasty Habit, Inc., equal protection of the law. There is a general conclusion but no facts are stated which back up plaintiffs' conclusion. For example, the complaint does not inform on any of the following: 1) what vindictive conduct was engaged in by the City; 2) when did the vindictive conduct occur; and 3) who carried out the vindictive conduct. If plaintiffs could reasonably state a viable Equal Protection claim, at a minimum some material detail needs to be offered in support of that charge.

Likewise, at paragraph 703, plaintiffs provide no detailed explanation regarding alleged "vindictive" conduct on the part of any individual defendant. For instance, the complaint's allegations do not say anything which: 1) identifies the individual defendants by name and associates that person with some specific vindictive conduct; 2) states when the vindictive conduct occurred; and 3) describes how the actions of any individual defendant officer constitutes unlawful discrimination against the Nasty Habit, Inc.

Nasty Habit, Inc., can not make an equal protection claim based upon its allegations of selective law enforcement in the absence of invidious discrimination. Even if the Nasty Habit, Inc., could make such a charge there are no facts alleged in the complaint which support those claims against the City or against any of the individual defendants.

Plaintiffs' Attack on Wis. Stats. § 125.12 (2) (ag) (2) on behalf of the Nasty Habit.

Plaintiffs' final charge is that "all of the Defendants" enforced an unconstitutionally vague statute against the Nasty Habit, Inc. They complain about Wis. Stats. § 125.12 (2) (ag) (2), which provides regarding the sale of "Alcohol Beverages" in Wisconsin as follows:

(2) REVOCATION OR SUSPENSION OF LICENSES BY LOCAL AUTHORITIES. (ag) *Complaint.* Any resident of a municipality issuing licenses under this chapter may file a sworn written complaint with the clerk of the municipality alleging one or more of the following about a person holding a license issued under this chapter by the municipality: . . . 2. The person keeps or maintains a disorderly or riotous, indecent or improper house.

Notably, Nasty Habit, Inc., does not explain how the state's statute is "unconstitutionally vague" nor does it demonstrate how its right to constitutional Due Process was deprived by any improper conduct of the individually named defendants or by the City. Rather, Nasty Habit, Inc., simply denies running a disorderly house and plaintiffs state their opinion as to why the Nasty Habit bar was *not* a threat to the general public back in 2006 - - for whatever that is worth.

A municipality is subject to liability under § 1983 if the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. *See, Thorp v. Town of Lebanon*, 2000 WI 60, ¶ 19, 235 Wis.2d 610, 624, 612 N.W.2d 59, 68. And, it is well-established there is a presumption of constitutionality which attends every legislative enactment in Wisconsin and that the burden of proving a statute unconstitutional beyond a reasonable doubt rests upon the party attacking the statute. *See, State v. Holmes*, 106 Wis.2d 31, 41, 315 N.W.2d 703, 708 (1982). None of the named defendants have any responsibility to challenge the constitutionality of state law on plaintiffs' behalf *prior* to following that law's provisions.

While plaintiffs may now wish to challenge - - for the first time - - the constitutionality of Wis. Stats. § 125.12 (2) (ag) (2), that by itself does not make any defendant liable to plaintiffs in damages for previously complying with an existing state statute. Moreover, even if defendants could be held liable, plaintiffs have already plead sufficient facts which admit not only that § 125.12 (2) (ag) (2) is constitutional but also that the Nasty Habit properly had its license to sell alcoholic beverages revoked in June of 2006 for keeping a “disorderly house”

Plaintiff’s civil complaint acknowledges that on or about March 1, 2006, the City of Eau Claire issued a Summons and Complaint seeking revocation *or* suspension of the Nasty Habit, Inc.’s Combination Class B Intoxicating Liquor & Fermented Malt Beverage license. *See, Plaintiffs’ Complaint* (10/28/08), ¶ 464, p. 14. That Complaint against the Nasty Habit was filed by police Chief Matysik and City Attorney Nick pursuant to provisions found at Wis. Stats. §§ 125.12 (2) (ag) (2) and 62.11 (5). *See, Id.* The City reviewed the Complaint for revocation or suspension of the Nasty Habit’s alcohol license, processed the Complaint, held hearings and eventually revoked the license - - all done pursuant to its authority under Wis. Stats. § 125.12 (1).

While plaintiffs denied the City’s Complaint then and say now that there was no cause for the City to revoke the Nasty Habit’s license in 2006, the plaintiffs admit that all of the following allegations were made a part of the Complaint against Nasty Habit, Inc., *prior* to revocation of the Nasty Habit’s license to sell alcohol in Eau Claire:

“The Complaint against the Nasty Habit listed incidents in support of the allegation that the Nasty Habit was a threat to the public, including an incident regarding underage patrons being found in the bar.” *See, Plaintiffs’ Complaint* (10/28/08), ¶ 471, p. 16.

“The Complaint listed incidents in support of the allegation that the Nasty Habit was a threat to the public, including an incident regarding

a patron being taken to detox by police.” *See, Plaintiffs’ Complaint* (10/28/08), ¶ 474, p. 16.

“The Complaint listed incidents in support of the allegation that the Nasty Habit was a threat to the public, including incidents regarding drunken patrons engaging in brawls.” *See, Plaintiffs’ Complaint* (10/28/08), ¶ 477, p. 17.

“Eau Claire’s complaint against Mr. Hegwood’s license alleged that eight incidents rose to the level of creating a disorderly house and creating a threat to the public, namely incidents occurring on 11/20/03, 10/29/04, 5/9/05, 5/27/05, 7/20/05, 11/1/05, 1/23/06, and 2/11/06.” *See, Plaintiffs’ Complaint* (10/28/08), ¶ 488, p. 18.

Regarding each of the dates set forth above which support the Complaint for revocation or suspension of the Nasty Habit’s license to serve alcohol beverages, plaintiff’s civil complaint in the above-captioned matter admits all of the following actually happened at the Nasty Habit:

1. On November 20, 2003, an employee of the Nasty Habit tried to hide three underage girls in the bar’s basement while police were doing an underage check. Later, the employee plead no contest to misdemeanor disorderly conduct. The employee was fired but subsequently hired back. *See, Plaintiffs’ Complaint* (10/28/08), ¶ ¶ 491-496, pp. 19-20.

2. On October 29, 2004, there was a brawl outside of the Nasty Habit at closing time. During the brawl, several bar patrons were fighting with Nasty Habit employees. There was a video tape of this incident which was handed over to the Eau Claire Police Department. *See, Plaintiffs’ Complaint* (10/28/08), ¶ ¶ 497-501, p. 20.

3. On May 9, 2005, a brawl occurred inside the Nasty Habit bar. This brawl started amongst intoxicated patrons. Nasty Habit employees eventually took part in the fight. One of those employees later plead guilty to misdemeanor disorderly conduct. *See, Plaintiffs’ Complaint* (10/28/08), ¶ ¶ 503-508, pp. 20-21.

4. On May 27, 2005, a drunk bar patron got into a fight in the Nasty Habit with several employees. When one of Nasty Habit's employees put a choke hold on him the patron passed out. The employees then placed the unconscious person out on a public sidewalk in front of the bar. City police later learned through use of a preliminary breath test that he was extremely intoxicated. *See, Plaintiffs' Complaint* (10/28/08), ¶ ¶ 511-520, pp. 22-23.

5. On July 20, 2005, another fight broke out amongst bar patrons at the Nasty Habit. Again an employee of the bar got embroiled in the fight. Plaintiffs say that employee was seriously injured during the fight. *See, Plaintiffs' Complaint* (10/28/08), ¶ ¶ 526-531, pp. 23-24.

6. On November 1, 2005, an employee of the Nasty Habit got involved in a fight with a pedestrian who had thrown a bottle at one of the bar's windows. The employee followed the bottle thrower and yelled toward him. A fight ensued between them and another person but that was broken up by the police. The employee then ran away from the scene and hid in the Nasty Habit's basement. City police began a search for him as part of their investigation. Another Nasty Habit employee knew where the fleeing employee was hiding but did not disclose that to the police. Eventually, City police officers located the Nasty Habit employee who was involved in the fight. That employee later plead guilty to misdemeanor battery while the other employee, who did not assist the police, plead no contest to obstructing an officer. *See, Plaintiffs' Complaint* (10/28/08), ¶ ¶ 537-550, pp. 24-25.

7. On January 23, 2006, a Nasty Habit patron became so intoxicated while drinking there that he fell off his stool. The Nasty Habit's bouncer then picked up the drunk patron and left him outside. City police happened to be nearby and sent him to detox. *See, Plaintiffs' Complaint* (10/28/08), ¶ ¶ 554-558, p. 26.

8. On February 11, 2006, there was a violent fight at the Nasty Habit between three bar patrons and two employees of the Nasty Habit. The City police broke up the fight. Each of the Nasty Habit's employees plead guilty to charges of misdemeanor disorderly conduct. *See, Plaintiffs' Complaint* (10/28/08), ¶ ¶ 564-572, pp. 27-28.

It is clear enough from this litany of admitted offenses what constitutes a "disorderly house" and sufficiently demonstrates why Nasty Habit, Inc., lost its license to sell alcohol in the City of Eau Claire. There was a consistent pattern exhibited by the Nasty Habit of letting its patrons become overly intoxicated that predictably lead to violent consequences resulting in frequent interventions by Eau Claire Police Department officers; as well as requiring the City to respond to the criminal conduct engaged in by numerous Nasty Habit employees.

Contrary to plaintiffs' claim, there is no unconstitutional vagary in the language of Wis. Stats. § 125.12 (2) (ag) (2). The Nasty Habit, Inc., was simply unable or unwilling to meet its legal obligations and responsibilities to run an orderly establishment pursuant to its license. As a result, there can be no reasonable argument that the above-stated statute is unenforceable.

Even if Nasty Habit, Inc., could make such a claim it would not be properly made against the City or the other individual defendants. While the City had the statutory authority to revoke or suspend the Nasty Habit's license, neither it or its police officers were responsible for determining the constitutional validity of Wis. Stats. § 125.12 (2) (ag) (2) in 2006.

Presumably Nasty Habit, Inc., is not making a procedural Due Process claim since it concedes having ample notice of the charges made against it prior to the revocation hearing. The complaint also explains that it appealed the revocation of the Nasty Habit's license to the Eau Claire City Council and then filed a statutory appeal in the courts.

Entity Liability for the City of Eau Claire.

It is well established after the Supreme Court's decision in *Monell v. Department of Social Services*, 436 U.S. 658 (1978), that local government units may be sued, in federal court or state court, as persons under 42 U.S.C. §1983. *Monell* holds that local governments can be sued for damages, as well as declaratory and injunctive relief, whenever it can reasonably be shown by a civil rights plaintiff that:

“the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover ... local governments ... may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's decision making channels.” 436 U.S. at 690-91.

While municipal "policy" is found most obviously in municipal ordinances, regulations and the like which directly command or authorize constitutional violations, it may also be found in formal or informal *ad hoc* "policy" choices or decisions of municipal officials authorized to make and implement municipal policy. *See, Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 1301 (1986). "Policy" in this context implies most obviously and narrowly a "course of action consciously chosen from among various alternatives" respecting basic governmental functions, as opposed to episodic exercises of discretion in the operational details of government. *See, City of Oklahoma v. Tuttle*, 471 U.S. 808, 823, 105 S.Ct. 2427, 2436 (1985). Correspondingly, "policy making authority" implies authority to set and implement general goals and programs of municipal government, as opposed to discretionary authority in purely operational aspects of government. *See, Pembaur, supra.*, 106 S.Ct. at 1299-1300 and fn.12; *Bennett v. Slidell*, 728 F.2d 762, 769 (5th Cir., 1984) (en banc); *and, Spell v. McDaniel*, 824 F.2d 1380, 1385-1386 (4th Cir., 1986).

Municipal liability is found only when the municipality itself can be directly charged with fault for a constitutional violation, liability results only when a government policy or custom is (1) fairly attributable to the municipality as its "own" (*see, Monell, supra.*, U.S. at 683), and is (2) the "moving force" behind the particular constitutional violation. *Polk County v. Dodson*, 454 U.S. 312, 326, 102 S.Ct. 445, 454 (1981). *See also, Spell, supra.*, at 1386. When a municipal "policy or custom" is itself unconstitutional, i.e., when it directly commands or authorizes constitutional violations, the causal connection between policy and violation is manifest and does not require independent proof. *See, Tuttle, supra.*, U.S. at 822 ("no evidence ... needed [in such a case] other than a statement of the policy"). A policy or custom which is not unconstitutional in this strict sense of the term must be independently proven to have caused the violation.

Proof merely that such a policy or custom was "likely" to cause a particular violation is not sufficient; there must be proven at least an "affirmative link" between policy or custom and violation; in tort principle terms, the causal connection must be "proximate," not merely "but-for" causation-in-fact. *Tuttle, supra.*, at 823. Neither the existence of such a policy or custom nor the necessary causal connection can be established by proof alone of the single violation charged. *Id.* *See also, Spell, supra.*, at 1387-1388. Ordinarily, one incident is not sufficient to establish a custom that can give rise to *Monell* liability. *Williams v. Heavener*, 217 F.3d 529, 532 (7th Cir. 2000).

In this case, the plaintiffs' complaint at ¶ 705 says the City of Eau Claire is liable to plaintiffs because "(t)he unlawful actions of the Defendant City were undertaken pursuant to its customs and policies . . ." While that conclusion provides the City with some level of notice regarding plaintiffs' claims, the complaint does not identify what custom or policy has offended their constitutional rights. There is no factual support for plaintiffs' conclusion on municipal liability.

Plaintiffs alternatively asserts the City is liable to plaintiffs under § 1983 even in the absence of an unlawful municipal custom or policy because it is responsible for acts taken by its police officers in the scope of their employment. *See, Plaintiffs' Complaint* (10/28/08), ¶ 706, p. 38. This assertion is clearly wrong since a municipality may not be held liable under § 1983 based on a theory of respondeat superior or vicarious liability. *See, Jenkins v. Bartlett*, 487 F.3d 482, 492 (7th Cir. 2007). [Citing *Monell, supra.*, U.S. at 694.]

Qualified Immunity for the Individual Defendants.

Since plaintiff's § 1983 lawsuit against the above-captioned individual defendants relates to actions taken in the course of performing their duties as law enforcement officers for the City of Eau Claire, then Jerry Matysik, Bradley Venaas, Gary Foster, Craig West, and Derek (not "Garrett") Thomas, are all entitled to claim qualified immunity from prosecution of this suit against them.² However, the court should note once more that plaintiffs fail to identify by their pleading precisely what actions were taken by which defendant officer, when the actions were supposedly taken and how those actions violated any of their protected constitutional rights.

The doctrine of qualified immunity shields from liability public officials who perform discretionary duties. *See, Jewett v. Anders*, 521 F.3d 818, 822 (7th Cir. 2008). Public officials, police officers among them, often are called to make difficult decisions in high pressure and high risk situations. *See, Id.* Inevitably, some of those decisions will be mistaken. *See, Id.* Subjecting police officers to liability for each reasonable but ultimately mistaken decision would result in "unwarranted timidity," would deter talented candidates from becoming police officers and would result in lawsuits that distract officers from their duties. *See, Id.*

² The name "Garrett" Thomas, found in the lawsuit's caption, is incorrect.

Qualified immunity provides “ample room for mistaken judgments,” and it protects all but the “plainly incompetent or those who knowingly violate the law.” *See, Jewett, supra.*, at 822. Even if public officials truly acted in the manner alleged by a particular person, qualified immunity holds that individual defendants not only can be immune from liability for damages to a plaintiff but also can be protected from that plaintiff’s civil action. *See, e.g., Mitchell v. Forsyth*, 472 U.S. 511 (1985). The doctrine thus acts as “a powerful shield that insulates officials from suit.” *Gregorich v. Lund*, 54 F. 3d 410, 413 (7th Cir. 1995).

Whether an official may prevail in his qualified immunity defense depends upon the “objective reasonableness of [his] conduct as measured by reference to clearly established law.” *See, Davis v. Scherer*, 468 U.S. 183, 191, 104 S. Ct. 3012 (1984). No other “circumstances” are relevant to the issue of qualified immunity. *See, Id.* Actions which are taken by local officials may be considered objectively *unreasonable* only if the constitutional right allegedly violated is clearly established in a sufficiently particularized sense at the time of the actions. *See, e.g., Hall v. Ryan*, 957 F.2d 402, 404 (7th Cir. 1992) (*Italics added*).

When required to rule upon the qualified immunity issue courts must consider this threshold question: Taken in the light most favorable to the party asserting the inquiry, do the facts alleged show the officer’s conduct violated a constitutional right? *See, Saucier v. Katz, supra.*, U.S. at 201. If no constitutional right would have been violated had the allegations been established, then there is no need for further inquiries on qualified immunity. *See, Id.* However, if a violation could be made out on a favorable view of the parties’ submissions, the next sequential step is to ask whether the right was clearly established. *See, Id.* This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition. *See, Id.*

The relevant, *dispositive* inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable government official that his or her conduct was unlawful in the situation he or she confronted. *See, Saucier v. Katz, supra.*, U.S. at 202. Immunity should be applied unless "it has been authoritatively decided that certain conduct is forbidden." *Upton v. Thompson*, 930 F.2d 1207, 1212 (7th Cir. 1991).

To prove the presence of a clearly established constitutional right, the plaintiff must point to "closely analogous cases decided prior to the defendant's challenged actions." *Id.* The factual circumstances need not be "identical" to prior holdings in order to find that an official is not entitled to qualified immunity. *Id.* Clearly established rights are those which are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *McGrath v. Gillis*, 44 F.3d 567, 570 (7th Cir. 1995) (citations omitted).

Here, plaintiffs provide no detail as to what offensive conduct was engaged in by any of the individual defendants. In that context, perhaps the idea of qualified immunity does not come into play - - at least not with any specificity. But to the extent plaintiffs' complaint generally charges that any of the individual defendants failed to lawfully perform their job duties then qualified immunity should apply and bar those claims.

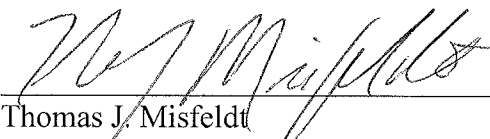
DEFENDANT'S CONCLUSION

The defendants have filed a comprehensive motion to dismiss all of the civil rights claims in plaintiffs' complaint. On the whole, their complaint fails to provide sufficient factual allegations which raise their stated claim for relief up above a "speculative level." Accordingly, the City of Eau Claire along with the individual defendant City police officers respectfully request that their motion to dismiss be granted.

Dated this *22nd* day of December, 2008.

WELD, RILEY, PRENN & RICCI, S.C.

By:



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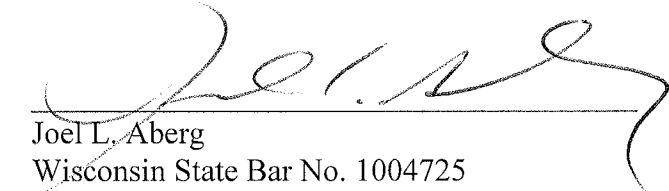
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I hereby certify this document was electronically filed with the United States District Court for the Western District of Wisconsin at Madison, Wisconsin, and was electronically served upon Attorney Jeff Scott Olson, counsel for the plaintiff, by means of the district court's CM/ECF system on December 22, 2008.

Dated this *22nd* day of December, 2008.

WELD, RILEY, PRENN & RICCI, S.C.

By:


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ENTITY NAME : Nasty Habit, Inc.

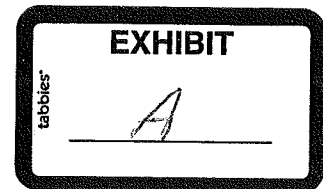
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<u>ORG ID</u>	<u>Name</u>	<u>Entity Type ID</u>	<u>City</u>	<u>State</u>	<u>Cross Reference</u>
6893-LLC	Nastrom Consulting, LLC	LLC	St Cloud	MN	
253089	The Nasty Habit Bar and Grill	AN	Albert Lea	MN	
951331-2	Nasty Habit Tattoos	AN	Mayer	MN	
272394	Nasty North	AN	Apple Vall	MN	
2125029-2	Nasty North Productions	AN	Eagan	MN	
2446577-5	NASUE LLC	LFC			
4Q-1142	Nasus, Inc.	DC	Mpls	MN	
1616789-2	Nasvik Remodeling	AN	Savage	MN	
256446	NASWAUK AUTO SALES	AN	Nashwauk	MN	
1034593-2	NataDesign	AN	Monticello	MN	
1955319-2	Natalex Engineering LLC	LLC	Pine City	MN	
1462-LFC	Natalia Maria I, LLC	LFC			
282186	Natali & Holley	AN	St Paul	MN	
2337709-2	Natalie Organics Personal Care	AN	Ham Lake	MN	
3026564-2	Natalie's	AN	Brooklyn P	MN	
2425857-2	Natalie's Cleaning Service	AN	South St P	MN	
2204831-2	Natalie's Nail Studio, LLC	LLC	Grand Rapi	MN	
285016	Natalie's Salon	AN	Pierz	MN	
1426825-2	Natalie's Swedish Pockets	AN	Mpls	MN	
9V-63	NATALIS CORPORATION	DC	Ramsey	MN	
2565126-2	NATALIS COUNSELING AND PSYCHOLOGY SOLUTIONS	AN	St Paul	MN	
122724	NATALTO WORLD PUBLICATIONS	AN	Plymouth	MN	
1382591-3	NATALYA CORNELIUS MUSIC	AN	Burnsville	MN	
2408083-4	NATALYA'S CLEANING INC.	DC	Maple Grov	MN	



<u>2408083-3</u>	NATALYA'S SERVICES INC.	DC	Maple Grov	MN
<u>2961589-2</u>	Natasha H. Martin, LLC	LLC	St Paul	MN
<u>873518-2</u>	Natasha's Gift Shop	AN	Mpls	MN
<u>1A-604</u>	NATCHEZ PLACE CONDOMINIUM ASSOCIATION	NP	Mpls	MN
<u>1G-1040</u>	Natco, Inc.	DC	Twin Valle	MN
<u>3096092-2</u>	NATCO INVESTMENT PROPERTIES LLC	LLC	Roseville	MN
<u>5201-LLC</u>	NATCOL LLC	LLC	Becker	MN
<u>69380</u>	N.A.T.C.O. Transmission	AN	Bethel	MN
<u>1258646-2</u>	NATD Trading Network (NTTN)	AN	Delray Bea	FL
<u>2822584-2</u>	Nate Couette Plumbing LLC	LLC	Annandale	MN
<u>2662713-2</u>	NATEDOG.COM, LLC	LLC	Hutchinson	MN
<u>2219668-2</u>	Nateemo Capital Group, LLC	LLC	Eagan	MN
<u>1876779-2</u>	Nate Giller Productions, LLC	LLC	Fridley	MN
<u>2447443-2</u>	Nate-In and Out Solutions	AN	St Louis P	MN
<u>768328-2</u>	Nate Jopp Builders, LLC	LLC	Lester Pra	MN
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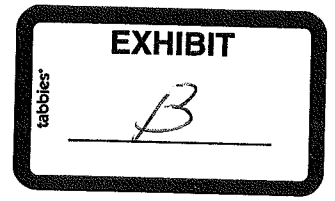
Filing Number: 253089 **Entity Type:** Assumed Name
Original Date of Filing: 6/15/2001 **Entity Status:** Active
Entity Date to Expire: 06/15/2011

Name: The Nasty Habit Bar and Grill
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Vital Statistics

Entity ID N024707

Registered Effective Date 02/23/1996

Period of Existence PER

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Status Date 07/08/2008

Entity Type Domestic Close Corporation

Annual Report Requirements Close Corporations are required to file an Annual Report under s.180.1622 WI Statutes.

Addresses

Registered Agent Office PAUL ENGSTROM
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EAU CLAIRE , WI 54701

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Principal Office

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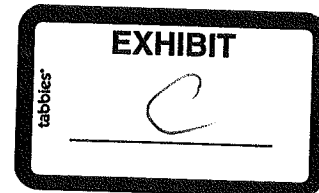
Annual Reports None

Certificates of Newly-elected Officers/Directors None

Old Names None

Chronology

Effective Date	Transaction	Filed Date	Description
02/23/1996	Incorporated/Qualified/Registered	02/29/1996	



01/01/1998	Delinquent	01/01/1998	
01/07/2008	Notice of Administrative Dissolution	01/07/2008	RTND UNDELIVERABLE
02/18/2008	Notice of Administrative Dissolution	02/18/2008	RTND UNDELIVERABLE
05/08/2008	Notice of Administrative Dissolution	05/08/2008	PUBLICATION
07/08/2008	Administrative Dissolution	07/08/2008	PUBLICATION

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