

**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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**NO. 13-1636**

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PETER SHAREEF ARABO,  
Plaintiff-Appellant,

vs.

GREEKTOWN CASINO, LLC, LEE  
HOWES, JOHN DOE #1, JOHN DOE  
#2, JOHN DOE #3, JOHN DOE #4,  
WAYNE GALLAGHER, JOHN H.  
AUTREY, JOHN DOE #5, JANE DOE  
#1, JOHN DOE #6, JOHN DOE #7,  
CITY OF DETROIT, TERRY BONDS,  
WILLIAM BREWSTER, REBECCA  
GAJESKI, MGM GRAND DETROIT,  
LLC, JANE SMITH #1, JAMES  
ROGERS, MICHIGAN GAMING  
CONTROL BOARD, JOHN JONES  
#1, AMY BRANNON, STEPHEN  
FORD, JOHN DOES #8 TO 100,  
RICHARD ROES #1 TO 100, JOHN  
SMITHS #2 TO 100, JOHN JONES #2  
TO 100;

Defendants-Appellees.

ON APPEAL FROM THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
(DETROIT)

CASE #2:12-CV-1103-AC-MJH

HONORABLE AVERN COHN,  
U.S.D.J.

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**BRIEF OF DEFENDANT-APPELLEE  
MGM GRAND DETROIT, LLC**

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UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

## Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit

Case Number: 13-1636

Case Name: Peter Arabo v. Greektown Casino, et al

Name of counsel: Louis Theros

Pursuant to 6th Cir. R. 26.1, MGM Grand Detroit, LLC

*Name of Party*

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Yes. MGM Resorts International

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

### CERTIFICATE OF SERVICE

I certify that on September 19, 2013 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Louis Theros

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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**STATEMENT REQUESTING ORAL ARGUMENT**

Defendant-Appellee, MGM Grand Detroit, LLC, suggests oral argument is unnecessary. The dispositive issues have been authoritatively decided, and the arguments will be adequately presented in the briefs and authorities cited by the parties, thereby negating any need for oral argument. Fed. R. App. P. 34. Alternatively, if the panel believes oral argument should be conducted, then the attorneys on behalf of Defendant-Appellee MGM Grand Detroit, LLC request the opportunity to appear before the panel.

**Jurisdictional Statement**

Defendant-Appellee MGM Grand Detroit (“MGM Detroit”) agrees that jurisdiction over Appellant's federal constitutional claims was vested in the District Court pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331 and 1343(3). On September 21, 2012, the District Court granted MGM Detroit’s motion to dismiss brought pursuant to Fed. R. Civ. Proc. 12(b). Upon the entry of the trial court’s April 17, 2013 Order, the court's previous order as to MGM Detroit became a final judgment within the meaning of Fed. R. APP. Proc. 4(a)(1)(A).

The Appellant then filed a timely Notice of Appeal on May 14, 2013, (Record Entry (“RE”) No. 42, Notice of Appeal, Page ID #393-394), limiting this appeal to a challenge to the dismissals granted to the Michigan Gaming Control Board, Amy Brannon and the MGM Detroit defendants. Jurisdiction over this appeal is vested in this Court pursuant to 28 U.S.C. § 1291.

**Statement Of Issues Presented For Review**

- I. Should this Court uphold the dismissal of Arabo's 42 U.S.C. § 1983 claims (Counts II and IV) against MGM Detroit, pursuant to Fed. R. Civ. P. 12(b)(6) when Plaintiff-Appellant has failed to identify a constitutionally protected property right?

Defendant-Appellee MGM Detroit answers: Yes

Plaintiff-Appellant answers: No

- II. Should this Court uphold the dismissal of Arabo's 42 U.S.C. § 1983 claims (Counts II and IV) against MGM Detroit, pursuant to Fed. R. Civ. P. 12(b)(6), when MGM Detroit and its employees are not state actors?

Defendant-Appellee MGM Detroit answers: Yes

Plaintiff-Appellant answers: No

- III. Should this Court uphold the dismissal of Plaintiff's claims against MGM Detroit because they fail to meet the pleading standard set forth in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct 1937 (2009)?

Defendant-Appellee MGM Detroit answers: Yes

Plaintiff-Appellant answers: No

### Statement of the Case

Plaintiff Peter Shareef Arabo (“Plaintiff” or “Arabo”), a patron of MGM Grand Detroit (“MGM Detroit”) and an admitted card counter, filed this action against MGM Detroit and its employees, James Rogers and unidentified employees Jane Smith #1 and John Smiths #2 to 100; Greektown Casino and its employees; the City of Detroit; and the Michigan Gaming Control Board.<sup>1</sup>

Plaintiff’s Complaint against MGM Detroit included claims of due process and equal-protection violations of 42 U.S.C. § 1983 (Count II and IV), and claims of national origin discrimination in violation of 42 U.S.C. § 2000a-1 and the Elliot-Larsen Civil Rights Act (“ELCRA”), Mich. Comp. Laws 37.2101 *et seq.* (Counts XIII and IX). It appears from Arabo’s Brief on Appeal that his appeal is limited to the dismissal of Counts II and IV. Thus, as Plaintiff has not appealed the dismissal of Counts XIII or IX, he has waived his right of appeal of their dismissal.<sup>2</sup>

Arabo’s claims against MGM Detroit arise out of an alleged June 8, 2011 incident during which MGM Detroit asked Arabo to bet only the table minimum

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<sup>1</sup> Defendant James Rogers and certain MGM John and Jane Smith Defendants were never served with the Complaint even though they continue to be identified in the caption. The summons has also expired. (RE No. 2, Summons issued for \*All Defendants\*, to James Rogers, Page ID # 59-60). Nonetheless, the District Court’s dismissal included Mr. Rogers and the MGM Detroit “Smith” Defendants. (RE No. 33, Memorandum and Order, Page ID #272-273, 276).

<sup>2</sup> To the extent the Court may consider the discrimination claims, MGM Detroit relies on the arguments set forth in its Brief in Support of its Motion to Dismiss. (RE No. 17, MGM Detroit’s Motion and Brief in Support of Motion to Dismiss, Page ID #144-167).

while playing blackjack; Arabo refused; MGM Detroit stopped the game; it requested that Arabo leave because he sought to bet more than the table minimum; and it escorted him from the premises. This is the full extent of Arabo's allegations against MGM Detroit.

Plaintiff's claims lack merit for several reasons. First, Plaintiff's claims fail because he has never identified a constitutionally protected right of which he is deprived. He is, in essence, taking a case of a proprietor enforcing its "no shoes, no service" policy (in this case regulating the betting of admitted card counters) to a constitutional level.

Second, Plaintiff's Section 1983 claims fail as a matter of law because MGM Detroit and its employees involved in this action are not state actors. Casinos and their employees are not acting under color of state law even when they are extensively regulated by the Michigan Gaming Control Board rules and regulations.

Finally, his claims fail because there are no allegations in the Complaint that meet the pleading standard set forth in *Ashcroft v. Iqbal*, 556 U.S. 662; 129 S. Ct. 1937, 1949 (2009).

Therefore, MGM Detroit respectfully requests that this Court uphold the dismissal of all the claims against MGM Detroit (and the unserved MGM Detroit Defendants).

### **Statement Of Relevant Facts**<sup>3</sup>

On June 8, 2011, Arabo was playing blackjack at MGM Detroit. MGM Detroit informed Arabo that he could not bet more than the table minimum of \$50.00. Arabo protested. James Rogers, the MGM Detroit Shift Manager, came over to the blackjack table and informed Arabo that MGM Detroit was refusing his business. MGM Detroit's security guards then escorted Arabo off the premises. (RE No. 1, Complaint, Page ID # 23, ¶¶ 144-150.) Arabo subsequently filed a complaint with the Michigan Gaming Control Board. (*Id.* at Page ID # 24, ¶ 153.) This is the extent of Arabo's allegations against MGM Defendant.

On March 6, 2012, Arabo filed the underlying Complaint against MGM Detroit (and its employees) related to the June 8, 2011 incident; Greektown Casino, its employees, and the City of Detroit related to a separate incident arising out of his card counting during a blackjack game; and the Michigan Gaming Control Board and certain of its employees. Arabo's Complaint included the following claims against MGM Detroit:

- Count II – denial of due process pursuant to 42 U.S.C. § 1983;
- Count IV – denial of equal protection pursuant to 42 U.S.C. § 1983;
- Count VIII – violation of 42 U.S.C. § 2000a-1 for national origin discrimination; and

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<sup>3</sup> Because MGM Detroit's Motion below was brought pursuant to Fed. R. Civ. P. 12(b)(6), the statement of facts is drawn from Arabo's Complaint.

- Count IX – violation of the Elliot-Larsen Civil Rights Act, Mich. Comp. Laws 37.2101, *et seq.*, for national origin discrimination.

As Plaintiff has not argued the dismissal of the discrimination counts found in Counts VIII and IX in his Brief on Appeal, MGM Detroit does not brief them here as they have been waived. *Marks v. Newcourt Credit Grp., Inc.*, 342 F.3d 444, 462 (6th Cir. 2003) ("An appellant waives an issue when he fails to present it in his initial briefs before this court."); *Thaddeus-X v. Blatter*, 175 F.3d 378, 403 n.18 (6th Cir. 1999) (en banc) ("We do not address defendants' belated argument . . . [because] [i]t was not presented to this court in the initial briefs on appeal and is therefore waived."); see also, *LoCoco v. Medical Sav. Ins. Co.*, 530 F.3d 442, 451 (6th Cir. 2008) (citing *Marks, supra*, at 462). To the extent those claims are considered, MGM Detroit relies on its Brief in Support of its Motion to Dismiss (RE No. 17, MGM Detroit's Motion in Brief in Support of Motion to Dismiss, Page ID #144-167) and the District Court's order dismissing those claims (RE No. 33, Memorandum and Order, Page ID # 274).

### **STANDARD OF REVIEW ON APPEAL**

Lower court decisions based upon motions brought pursuant to F.R.Civ.P. 12(b) are reviewed *de novo* by this Court. *Courie v. Alcoa Wheel & Forged Prods.*, 577 F.3d 625, 629 (6<sup>th</sup> Cir. 2009).

**A. Fed. R. Civ. P. 12(b)(6)**

Pursuant to Fed. R. Civ. P. 12(b)(6), a party may move to dismiss a case when a plaintiff has failed to state a claim upon which relief can be granted. In ruling on a motion to dismiss, a court must construe the complaint in a light most favorable to the plaintiff and accept all well-pled factual allegations as true. *Bishop v. Lucent Tech., Inc.*, 520 F.3d 516, 519 (6th Cir. 2008).

To state a valid claim, a complaint must contain either direct or inferential allegations respecting all the material elements to sustain recovery under some viable legal theory. *League of United Latin American Citizens v. Bredesen*, 500 F.3d 523, 528 (6th Cir. 2007). A complaint containing a statement of facts that “merely creates a suspicion of a legally cognizable right of action is insufficient.” *Bishop*, 520 F.3d at 519. While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, “a plaintiff’s obligations to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555. *See also Ass’n of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 548 (6th Cir. 2007) (“[E]ven though a complaint need not contain ‘detailed’ factual allegations, its

“[f]actual allegations must be enough to raise a right to relief above the speculative level.”) (citing *Twombly*, 550 U.S. at 555).

That rule that a court “must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of all the elements of a cause of action, supported by mere conclusory statements do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662; 129 S. Ct. 1937, 1949 (2009). A court is “not bound to accept as true a legal conclusion couched as a factual allegation.” *Id.* at 1950 (internal quotation marks and citation omitted). Moreover, “[o]nly a complaint that states a plausible claim for relief survives a motion to dismiss.” *Id.* A complaint may not contain specific allegations for some elements of a cause of action, but only formulaic recitations of other elements—this error by plaintiff is “especially glaring” and leads to dismissal. *In re NM Holdings Co., LLC*, 622 F.3d 613, 623-24 (6th Cir. 2010).

### **Summary of Argument**

In his brief on appeal, Arabo relies on case law describing situations where plaintiffs have suffered alleged deprivations of constitutionally protected rights at the hands of state actors. Unfortunately for Arabo, unlike those cases, his claims fail because he has never identified a constitutionally protected right of which MGM Detroit deprived him. This, alone, warrants dismissal of his claims.

Additionally, in the context of a Section 1983 claim, a state actor must be the party that deprives the plaintiff of a constitutionally protected right. However, MGM Detroit (and its employees) are not state actors. As the trial court correctly held, the simple fact that MGM Detroit operates a business regulated by the State of Michigan does not make it, as a matter of law, a state actor subject to claims under Section 1983.

Finally, even if a constitutionally protected right is at issue, and even MGM Detroit is considered a state actor, Arabo cannot support his claims as his conclusory allegations that he was treated differently than unknown and unidentified similarly situated patrons do not satisfy the federal pleading requirements to survive a motion to dismiss.

### **Argument**

#### **I. THE DISMISSAL OF ARABO'S SECTION 1983 CLAIMS (COUNTS II AND IV) SHOULD BE AFFIRMED**

As the trial court correctly noted:

Section 1983 on its own creates no substantive rights; rather it is a vehicle by which a plaintiff may seek redress for deprivations of rights established in the Constitution or federal laws. Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979). To state a claim under §1983, a plaintiff must establish '(1) the deprivation of a right secured by the Constitution or the laws of the United States (2) caused by a person acting under the color of state law.' Miller v. Sanilac Cnty., 606 F.3d 240, 247 (6<sup>th</sup> Cir. 2010)....

(RE No. 33, Memorandum and Order, Page ID # 270)

Here, as the trial court held, Arabo failed to allege facts sufficient to support either of prong of the above test to avoid dismissal of his claims.

**A. Plaintiff Has Not Alleged A Right Protected By the Constitution or Federal Laws From Which He Was Deprived**

Arabo's allegations against MGM Detroit are straightforward: he was gaming at a blackjack table; he was asked to cap his bet at the table minimum; he refused; he was asked to leave, and then he did so escorted by MGM Detroit security personnel. (RE No. 1, Complaint, Page ID # 23-24, ¶¶ 144 - 152). He was, in every sense of the word, simply a MGM Detroit customer. His allegations lack an important element: he has not identified any Constitutional right or federal law that protects his right to gamble. Why? Because no such right exists.

Likewise, his bare bones allegation in his brief and Complaint that other, unidentified "similarly situated" persons were not so treated does not create a Constitutional right, even if true.<sup>4</sup> Both Arabo and the similarly situated persons

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<sup>4</sup> In paragraphs 30, 31 and 32 of Plaintiff's Complaint, generically Plaintiff claims that he "asserts that he is entitled to seek redress for his deprivation of his rights" pursuant to certain statutes and the protections under those statutes. (RE No. 1, Complaint, Page ID # 7, ¶¶ 30-32). The only paragraph at issue now is paragraph 30 of the Complaint which deals with the § 1983 claims; paragraphs 31 and 32 dealt with his discrimination claims, which were dismissed below and not appealed here.

must have been engaged in an activity protected by the Constitution or federal laws, but Arabo has not described any such right.<sup>5</sup>

Therefore, Arabo fails the first prong of his Section 1983 claim, and the lower court correctly dismissed his claims against MGM Detroit.<sup>6</sup>

**B. Arabo's Section 1983 Claims Also Fail Because MGM Detroit and Its Employees Are Not State Actors**

There are no allegations in Arabo's Complaint involving any recognizable state action on the part of MGM Detroit or its employees. Arabo's 42 U.S.C. § 1983 claims against the MGM Detroit Defendants, therefore, were properly dismissed on this basis. (RE No. 33, Memorandum and Order, Page ID # 272-273).

Section 1983 makes liable only those who, while acting under color of state law, deprive another of a right secured by the Constitution or federal law. 42 U.S.C. § 1983; *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978). A private actor acts under color of state law when its conduct is "fairly attributable to the state." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 947 (1982). The Supreme Court has developed three tests for analyzing the existence of state action: (1) the

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<sup>5</sup> The only alleged "property" that Arabo admits he was ever denied were "chips" that were taken when he tried to leave former Defendant Greektown Casino's premises. (RE No. 1, Complaint, Page ID # 14-17, ¶¶ 87-100).

<sup>6</sup> In its Brief on Appeal, the State of Michigan correctly asserts that a while "the Constitution extends various procedural safeguards to certain interests, it does not create property interests. [*Roth*, 408 U.S. at 569-571]" (RE No. 6111788153, State of Michigan's Brief on Appeal, Page ID # 25).

public function test, (2) the state compulsion test, and (3) the symbiotic relationship or nexus test. *Chapman v. The Higbee Co.*, 319 F.3d 825, 833 (6th Cir. 2003) (citation omitted). Courts have analyzed the existence of state action by casinos under the public function test. *See, e.g., Lindsey v. Detroit Entm't, LLC*, 484 F.3d 824 (6th Cir. 2007) (finding the state compulsion and symbiotic relationship tests inapplicable).

In *Lindsey*, the plaintiffs were “slot-walkers” who would check in and around slot machines for “unclaimed” tokens. After each plaintiff had picked up tokens, he or she was approached by security, detained, questioned, and then told to leave the casino and not to return. (*Id.* at 826.) The security guards were not licensed under state law, Mich. Comp. Laws 338.1079, to have misdemeanor-arrest authority. (*Id.* at 830.) The plaintiffs filed a Section 1983 claim. The district court dismissed it, and this Court affirmed.

In affirming summary judgment for the casino, this Court held that because the casino’s security guards were not licensed under Mich. Comp. Laws 338.1079, there was no delegation by the state of its police power. The guards accordingly were not acting as state actors under the public function test. (*Id.* at 831.) This Court distinguished its prior decision in *Romanski v. Detroit Entm't, LLC*, 428 F.3d 629 (6th Cir. 2006), which involved a similar set of facts at the same casino. *Romanski* allowed a Section 1983 claim to proceed against the casino as a state

actor because the security guard who detained the plaintiff in that case was licensed under Mich. Comp. Laws 338.1079.

Similarly, the Michigan Court of Appeals in *Moore v. Detroit Entm't, LLC*, 279 Mich. App. 195; 755 N.W.2d 686 (2008), relied on the decisions in *Lindsey* and *Romanski*. It held that a casino's security officers were state actors because, in that case (and unlike the security guards in *Lindsey*) they were licensed under Mich. Comp. Laws 338.1079, as in *Jackson v. Metro Edison Co.*, 419 U.S. 345 (1974). In so doing, however, the court noted as follows: "No portion of our opinion conflicts with the oft-repeated principle, first articulated in *Jackson*, that '[t]he mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment.'" *Moore*, 279 Mich. App. at 212-213 (citing *Jackson v. Metro Edison Co.*, 419 U.S. 345 (1974)).

Arabo's Section 1983 claims against MGM Detroit do not state any allegations of detainment by licensed security guards. In fact, he affirmatively denied any such claim. (RE No. 33, Memorandum and Order, Page ID # 273, fn. 2). Instead, Arabo argues that that MGM Detroit was a state actor based on the Michigan Gaming Control Board's "pervasive" regulation. (Arabo's Brief on Appeal, Page ID # 25-30). In *Lindsey*, this Court rejected the same argument:

Additionally, Plaintiffs argue that the fact that casino gambling is a highly regulated business means that the actions of Defendant's

security personnel can constitute state action for the purpose of § 1983. *See, e.g.,* The Michigan Gaming Control and Revenue Act, Mich. Comp. Laws. §§ 432.201 to 432.256. Specifically, Plaintiffs rely on Rule 1003 of the Michigan Gaming Control Board, which establishes various procedures for detained or arrested persons. Plaintiffs did not make this argument until oral argument, and they therefore have waived it. And in any event, we do not consider that fact that the state pervasively regulates casinos in itself to be sufficient to transform the actions of Defendant's employees, including Defendant's security personnel, into actions of the state.

484 F.3d at 831 n. 9 (emphasis added). The trial court thus ruled that the MGM Detroit employees were not acting under color of state law. (RE No. 33, Memorandum and Order, Page ID # 272-273).

Arabo relies extensively on *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288 (2001). *Brentwood*, however, found that the respondent, which was formed to regulate the state's interscholastic sports and whose membership was comprised of 84% of public schools, was engaged in state action based on its significant entanglement with Tennessee's Board of Education and public school officials. This case is not on point. Plaintiff does not allege state entanglement, or that MGM Detroit is a public entity like a school, but merely relies upon state regulation of casinos as the basis for his Section 1983 claims.

Likewise, this case does not fall into any of the other categories that may make MGM Detroit a state actor because 1) the State of Michigan does not provide significant encouragement of casinos, 2) casinos and the State of Michigan are not joint partners in gaming activities, 3) casinos are not "nominally" private (they are

entirely private), as they are not controlled by the State, 4) casinos are not engaged in a public function, and 5) casinos are not intertwined with government policies, nor is the State intertwined with casino management. As the trial court held:

...compliance with the requirements of the Michigan Gaming Control Commission Regulations [i]s not a usurpation of state government authority but rather, a submission to it.

(RE No. 33, Memorandum and Order, Page ID # 273, citing *Smith v. Detroit Entm't, L.L.C.*, 338 F.Supp.2d 775, 783 (E.D. Mich. 2004)).

Like barbershops, doctors, lawyers, masseuses, and other private industries, casinos are private entities/companies regulated by the State of Michigan. If this Court accepts Arabo's argument as true, any company and any employee in a business regulated by State law and subject to government agencies will be considered state actors. Simply enforcing the casino's equivalent of a "no shoes, no service" rule" as to admitted card counters does not make MGM Detroit a state actor.

Therefore, this Court should affirm the dismissal of Arabo's Section 1983 claims at Counts II and IV, pursuant to Fed. R. Civ. P. 12(b)(6), for Arabo's failures to establish that the MGM Detroit Defendants are state actors and to identify any constitutional or federal legal right of which he has been deprived.

## II. ARABO'S CLAIMS ALSO FAIL TO MEET PLEADING STANDARDS

Arabo's allegations supporting his claims under 42 U.S.C. § 1983 are at best conclusory and do not meet the plausibility pleading standard to state claims for a deprivation of his constitutional rights.

### A. Iqbal Raised the Pleading Standard

The Supreme Court in *Iqbal* recently raised the bar for pleading requirements beyond the "no-set-of-facts" test of *Conley v. Gibson*, 355 U.S. 41 (1957). The *Iqbal* decision clarified the scope and application of the Court's ruling in *Bell Atlantic Corp. v. Twombly*, *supra*, holding that the plausibility standard applied to all civil actions and not just anti-trust cases. 129 S. Ct. at 1953.

In *Iqbal*, following the September 11, 2001 terrorist attacks, federal officials arrested and detained Iqbal, who was a Pakistani Muslim, on charges of fraud relating to identification documents. Iqbal filed an action against numerous federal officials, including the petitioners, former Attorney General Ashcroft and Director of the Federal Bureau of Investigation Mueller. Iqbal alleged that the petitioners unlawfully designated Iqbal a person of "high interest" on account of his race, religion, and national origin in violation of the First and Fifth Amendments, and knowingly and maliciously subjected Iqbal to harsh conditions of confinement as a matter of policy. *Id.* at 1944. Iqbal further alleged that this policy was created by Ashcroft and Mueller, who were "instrumental" in its adoption and

implementation. *Id.* The district court denied the petitioners' motion to dismiss on qualified-immunity grounds, and the petitioners invoked the collateral-order doctrine to file an interlocutory appeal with the Second Circuit Court of Appeals, which affirmed. *Id.*

The Supreme Court overruled the Second Circuit and clarified the plausibility standard of *Twombly*. The Court explained this plausibility standard as follows:

[T]he pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement."

\* \* \*

Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not “show[n]” – “that the pleader is entitled to relief.” Fed. Rule Civ. Proc. 8(a)(2).

129 S. Ct. at 1949-50 (citations omitted; emphasis added).

Analyzing the allegations of Iqbal's complaint under this standard, the Supreme Court concluded that Iqbal failed to sufficiently plead his claims against the petitioners: "Taken as true, these allegations are consistent with petitioners' purposefully designating detainees 'of high interest' because of their race, religion, or national origin. But given more likely explanations, they do not plausibly establish this purpose." *Id.* at 1951 (emphasis added). The Court also rejected Iqbal's argument that he could allege discriminatory intent "generally" and with conclusory allegations. The Court therefore concluded that his allegations – he was discriminated against "on account of [his] religion, race, and/or national origin and for no legitimate penological interest" – constituted legal conclusions that should not be credited "without reference to its factual content." *Id.* at 1954.

**B. Arabo's Section 1983 Due Process and Equal Protection Allegations Fail to Satisfy the *Iqbal* Pleading Standard**

Similar to the allegations in *Iqbal*, Arabo's allegations are conclusory and unsupported. He alleges that he was asked to leave MGM Detroit while playing blackjack. Given his admitted history as an "advantaged player" (i.e. card counter), as alleged in his own Complaint (RE No. 1, Complaint, Page ID # 8, ¶¶ 35-37), the more likely explanation for MGM Detroit's alleged treatment of Arabo is that, in accordance with its rights, MGM Detroit asked Arabo to leave because of his gaming activities at the blackjack table. Indeed, the Michigan Gaming Control Board's administrative rules permit a casino to establish the minimum and

maximum wagers that it will accept. Michigan Administrative Code Rule 432.1803 states: "There shall be no limitation as to the minimum or maximum wager that a casino licensee may accept."

With this likely explanation, Arabo's allegations do not give rise to any inference of unlawful behavior against MGM Detroit, James Rogers, or any other employees. For example, there are no allegations suggesting that similarly situated card counters were allowed to play blackjack while Arabo was not or that similarly situated card counters were allowed to bet in excess of the table minimum, while MGM Grand required Arabo to bet only the table minimum.<sup>7</sup>

Arabo's allegations fail to meet the plausibility pleading standard for his claims. Therefore, the trial court's order of dismissal should be affirmed.

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<sup>7</sup> For instance, to support his equal protection claim against MGM Detroit under Section 1983 (Count IV), he must allege that "other individuals who were treated differently were similarly situated in all material respects." *Aldridge v. City of Memphis*, 404 Fed. Appx. 29 (6<sup>th</sup> Cir. 2010); *see also, Turnboe v. Gundy*, 25 Fed. Appx. 292, 293 (6<sup>th</sup> Cir. 2001)(Plaintiff's "conclusory allegations without any factual support fail[] to state an equal protection claim.")

**CONCLUSION**

For the foregoing reasons, MGM Detroit respectfully requests this Court affirm the trial court's dismissal of Arabo's claims against it and its unserved employees.

Respectfully submitted,  
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BY: s/ Louis Theros  
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Dated: September 19, 2013

**CERTIFICATE OF COMPLIANCE**

I hereby certify that the Brief of Appellee MGM Grand Detroit, LLC complies with the Fed.R.App.R. 32(a)(7)(B) as the brief contains 4146 words, exclusive of tables and certificates of counsel.

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**DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS**

Defendant-Appellant MGM Grand Detroit, LLC, per Sixth Circuit Rule 28(c), 30(b), hereby designated the following portions of the record on appeal:

Description of Entry	Date	Record Entry No.	Page ID Number
Complaint	03/06/2012	1	8-24
Summons issued for *All Defendants*, to James Rogers	03/07/2012	2	59-60
MGM Detroit's Motion and Brief in Support of Motion to Dismiss	05/15/2012	17	144-167
Memorandum and Order granting Defendant MGM Grand's Motion to Dismiss and granting Defendants Michigan Gaming control Board's and Amy Brannan's Motion to Dismiss	09/21/2012	33	270-273
Notice of Appeal	05/14/2013	42	393-394
Arabo's Brief on Appeal	07/17/2013	6111756836	25-30
State of Michigan's Brief on Appeal	08/16/2013	6111788153	25

### CERTIFICATE OF SERVICE

I hereby certify that the Brief of Defendant-Appellee MGM Grand Detroit, LLC, was electronically filed with the Court on September 19, 2013 and is immediately accessible to all counsel of record in its electronic format. I further certify that hard copies of the Brief were served via First Class mail as follows:

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