

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MASSACHUSETTS

CIVIL ACTION: 03-CV-11895-MLW

**François Gouin, Jr.**

Plaintiff

v.

**Dori C. Gouin, Esq., a/k/a Dori Faith Chadbourne, in her professional and individual capacities,  
John G. DiPiano, Esq., in his partnership, professional, and individual capacities,**

**Mauser & Mauser,**

**Timothy M. Mauser, Esq., in his partnership, professional, and individual capacities**

**Martha D. Mauser, Esq., in her partnership, professional, and individual capacities**

**Susan DiPiano, in her official and individual capacities,**

**City of Boston**

Defendants

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**PLAINTIFF'S OPPOSITION TO JOHN DiPIANO'S  
MOTION FOR RECONSIDERATION (#80) OF MEMORANDUM AND ORDER OF  
SEPTEMBER 2004 DENYING DiPIANO'S MOTION TO DISMISS (#4)**

Now comes Plaintiff François Gouin ["Gouin"] of Massachusetts and opposes John DiPiano's Motion for Reconsideration (Parts 2 and 3 of Consolidated Motion #80)<sup>1</sup> of Memorandum and Order of September 2004 denying DiPiano's Motion to Dismiss (#4). A supporting affidavit accompanies this pleading, above the certification of service at the bottom of this document.

As grounds for opposing DiPiano's Motion for Reconsideration, Gouin states that:

- (1) a more definite statement is unnecessary, regardless of which standard of pleading -- notice or heightened pleading -- is deemed applicable,
- (2) where DiPiano willfully participated in a conspiracy with Dori Chadbourne Gouin a/k/a Dori Chadbourne ["Dori"] and members of the Boston Police Department, dismissal is inappropriate<sup>2</sup>.

In support of his opposition, Gouin argues below the facts and the law and its application to the issues arising out DiPiano's two motions.

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<sup>1</sup> Part II is DiPiano's Motion for More Definite Statement. Part III is DiPiano's Motion to Reconsider Judge Wolf's Memorandum and Order.

<sup>2</sup> The goal of the alleged conspiracy by Dori and John DiPiano ["DiPiano"] was to get Gouin arrested, charged, prosecuted, and convicted of a violation of a restraining order. Members of the Boston Police Department later in-sinuated themselves into the conspiracy. Conspiracy claims were brought under §1985(3) and common law.

**NOTE**

Gouin incorporates herein by reference his objections to the Reports and Recommendations made by this court regarding the defendants and all of Gouin's memoranda in this action. He calls them out specifically below where they are of particular relevance.

- 1. Where the particularity of Gouin's Complaint and the 24 exhibits attached thereto are more than sufficient to satisfy either notice or heightened pleading,<sup>3/</sup> a more definite statement is unnecessary and DiPiano's motion for an amended complaint is frivolous.**

Because the facts of this case were clearly set out in the Complaint and the two dozen exhibits attached thereto, then spun by the various defendants, then corrected by Gouin in his oppositions, then again touched upon in his objections to the Reports and Recommendations, Gouin is laying out those facts which are related to Defendant DiPiano (and a few foundational facts for the conspiracy claim) in chronological tabular form, where this court can see at a glance:

- (a) the evidence that supports each of Gouin's averments,
- (b) the facts that satisfy each of the elements of each of Gouin's claims,
- (c) the basis for assertions, none of which is bald,<sup>4/</sup>
- (d) the basis for characterizations, none of which is subjective,
- (e) the basis of predictions, if any, none of which is optimistic,
- (f) the basis of suppositions, none of which is problematic,
- (g) the basis of conclusions, none of which is unsupportable or periphrastic,
- (h) the basis of epithets, none of which is opprobrious,<sup>5/</sup> and
- (i) if there are any skips, which DiPiano must be claiming there are.

Given that DiPiano has moved for a more definite statement, he should have identified, at the very least, an area about which he needed more information. He did not. Gouin contends he skipped nothing, and the table on the following pages should evidence that contention.

<sup>3</sup> The notice versus heightened pleading controversy is set out in some detail in both Swierkiewicz v. Sorema N.A., 534 U.S. 50 (2002) and Educadores Puertorriqueños en Acción v. Hernandez, 367 F.3d 61 (1st Cir. 2004).

<sup>4</sup> United States v. AVX Corp., 962 F.2d 108, 115 (1st Cir. 1992).

<sup>5</sup> Chongris v. Bd. of Appeals, 811 F.2d 36, 37 (1st Cir. 1987).

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**TABLE 1**

<b>ten</b>	<b>Document containing averment</b>	<b>Date of act or event</b>	<b>Averment</b>	<b>Documentary evidence</b>	<b>Characterization, motive or intent, etc.</b>
1	Complaint, Docket No. 02-CV-10873-JLT, ¶¶13-14, 17	August 2000 FSI appraisal performed on Pelham property	Pelham appraisal by FSI  Gouin incorporates herein by reference his averments in the Complaint of Docket No. 02-CV-10873-JLT (not attached hereto).  DiPiano attached at Tab A to his Motion for Reconsideration the decision dismissing the §1983 action for attempted fraud by DiPiano, Dori, <i>et al</i> , of between \$156,000 and \$312,000 (by secreting evidence), and for emotional distress.	The appraisal of the Pelham property, at <u>Exh. D</u> , attached to the Complaint of No. 02-CV-10873-JLT	Dori and prior counsel denied that the appraisal of the Pelham property took place. Dori's two successor counsel (one of whom was DiPiano) continued to deny it. When Gouin managed to obtain a copy of the appraisal, Dori and DiPiano moved successfully to preclude use of it.  The denial of the occurrence of that appraisal fed into the reason Gouin videocam-recorded the appraisal of the Boston condo. Fortunately he did so. <i>See</i> Items 27 and 36, <i>infra</i> .
2		3/15/2001	Dori files complaint for Protection from Abuse in Portland, Maine, District Court	Maine Docket Sheet (not attached hereto)	The temporary Maine Protection from Abuse order remained in effect until 4/12/02, when it became final
3	Complaint ¶15	4/26/2001	Gouin given exclusive use and possession of the Boston condo	<u>Compl. Exh. B</u> , Order of 4/26/01	
4	Complaint ¶16	4/30/2001	4 criminal charges initiated by Dori were dismissed	<u>Compl. Exh. C</u> , Docket Sheet	Case brought by Dori originally to gain collateral advantage in divorce.
5	Complaint ¶17	5/1/2001	Gouin took occupancy and possession of the Boston condo		
6	Complaint ¶18	5/18/2001	Gouin brought Gouin I, <u>Docket # 01-CV-10890-RBC</u>	<u>Docket # 01-CV-10890-RBC, Complaint Exhibit D, docket sheet.</u>	
7		1/29/2002	Wanting dates for appraising Boston property, DiPiano writes Discovery "Master" Gerald Nissenbaum	Email	
8	<u>Gouin v. Gouin</u> , 249 F.2d 62, 71 (D.Mass. 2003) ( <u>Gouin I</u> ).	3/21/2002	Dori's Motion to Dismiss <u>Gouin I</u> was denied – as was that of her stepbrother, whom she was representing in <u>Gouin I</u>	<u>Gouin I</u> , Paper 46, dated 3/21/2002	<b>A hairy assertion:</b> Dori became upset upon learning her motion to dismiss was denied
9		Between 3/30 and 4/9/2002	DiPiano and Dori communicate regarding the planned appraisals	Basis: EXH A Email fr DiPiano: 4/9/02 10:25 A.M	<b>Step 1 of the conspiracy.</b> <i>See</i> Item 10. DiPiano and Dori know the Maine RO is still in effect.
10		4/9/02 10:25 A.M.	DiPiano wrote in email:  "DORI WISHES TO ATTEND AND THE COURT ORDER DOES NOT PREVENT HER ATTENDANCE, SO I DO NOT ANTICIPATE THAT THIS SHOULD BE A PROBLEM."	EXH A ATTACHED HERETO Email fr DiPiano: 4/9/02 10:25 A.M.	<b>Step 2 of the conspiracy.</b> DiPiano pushing for appraisal of the Gouins' Boston property on 4/11/02. Knowing that Gouin and his counsel are fearful of Dori attending the appraisal, DiPiano writes that there will be no problem should Dori attend.

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MOTION FOR RECONSIDERATION (#80) OF MEMORANDUM AND ORDER OF  
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11		4/9/02 11:49 A.M.	Gouin's counsel wrote in email: "I do not want Dori to be there. The reason the judge did not mention Dori regarding Boston is that no request for Dori to be in attendance for the Boston appraisal. I object strenuously. She only wants to go there to snoop on Jake's privacy. There is no reason. If Dori's counsel and Dori insist on her presence at Temple Street, I herewith this email, Jerry, request a protective order for Jake from Dori.	EXH B ATTACHED HERETO Email to DiPiano: 4/9/02 11:49 A.M.	The parties were ordered to have all motions approved for filing by Nissenbaum. Given that Nissenbaum did not seek the protective order on Gouin's behalf, Gouin would have sought a protective order directly from the court but for the order requiring Nissenbaum's approval before filing a motion.  Thereafter Gouin's counsel did not receive notice that Dori would attend.
12		4/9/2002 12:20:14 EDT	Discovery Master Nissenbaum, who is an unnamed co-conspirator, wrote <b>that he would recommend denial</b> of Gouin's motion for a protective order should he file one.	EXH C ATTACHED HERETO	<b>Unnamed co-conspirator or accomplice aids and abets conspiracy.</b>  After Gouin asked Nissenbaum to file a motion for a protective order, tensions increased between Dori's and Gouin's counsel.
13		4/11/2002	The appraisal of the Boston condo did not go forward on 4/11/2002.		The conspiracy had a minor temporary setback on 4/11/2002 when the appraisal did not go forward on that date.
14	Complaint ¶19	4/12/2002	Dori obtained final restraining order in Portland, Maine, where she lived.  The Maine RO required only that Gouin stay away from Dori's home in Maine and her law office in Portland, Maine.	<u>Compl. Exh. E</u> , the Maine Order  Complaint ¶45	<b>Step 3 of the conspiracy.</b> The conspiracy heated up when the final RO issued. Written notice of Dori's final intention to appear or not to appear then became critical.  <b>Dori's Motive: To gain a collateral advantage in the divorce.</b>
15		4/12/2002 3:34 P.M.	DiPiano pushing for appraisal of Gouin's properties.	Email fr DiPiano: 4/12/02 3:34 P.M.	<b>Step 4 of the conspiracy:</b> Furthering the conspiracy
16	Complaint ¶20	5/2/2002	DiPiano files motion on Dori's behalf to compel real estate appraisals in Boston and Pelham.  Significant about the motion is that DiPiano did <b>not</b> state that Dori intended to attend the appraisal inspections.	<u>Compl. Exh. F</u> , the motion  <u>Complaint and Compl. Exh. D of Docket No. 02- CV-10873-JLT</u>	<b>Step 5 of the conspiracy.</b> The Pelham property had already been appraised. See Item #1.  <b>DiPiano's Motive for Conspiring: To retaliate against Gouin for accusing him in family court of attempting to commit larceny upon Gouin and for attempting to conceal evidence of that wrongdoing.</b>
17	Complaint ¶21	5/2/2002	<b>Order:</b> Husband " <b>shall</b> " make condo available for appraisal on 5/13 <sup>th</sup> . Dori " <b>may</b> " attend.  Gouin did not receive notice ever that Dori chose to attend the inspection on May 13 <sup>th</sup> .	<u>Compl. Exh. G</u> , the Mass. Order	There was no provision made in the Order regarding what Gouin should do were Dori to choose to attend the appraisal inspection.  Neither was there a provision commanding Dori to give Gouin notice should she choose to attend.

**PLAINTIFF'S OPPOSITION TO JOHN DiPIANO'S  
MOTION FOR RECONSIDERATION (#80) OF MEMORANDUM AND ORDER OF  
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18	Complaint ¶22	5/2 through 5/13/2002	DiPiano—also Dori -- did <b>not</b> give notice that Dori intended to attend the appraisal in Boston	<u>Compl. Exh. F</u> , the motion	<b>Step 6 of the conspiracy.</b> In his motion, DiPiano had <b>not</b> raised the issue of Dori's attendance or notice by her. See <u>Compl. Exh. F</u> .
19	Complaint ¶23	5/13/2002	Gouin was present at the Boston condo in compliance with May 2d order (Item #17)	EXH D, a transcript of the event. ATTACHED HERETO Audiovideo produced to defendants and filed on 8/26/2004	<b>Step 7 of the conspiracy.</b> Gouin's presence at the condo that day was a goal of he conspiracy, and he was there <b>because</b> Dori and DiPiano had successfully moved for him to be there.
20	Complaint ¶24	5/13/2002	Dori waited outside condo for DiPiano's arrival.	EXH D. Audiovideo produced to defendants and filed on 8/26/2004.	<b>Step 8 of the conspiracy.</b> Dori had Maine restraining order with her. The Maine RO required only that Gouin stay away from her home in Maine and her law office in Maine.
21	Complaint ¶24	5/13/2002	DiPiano arrived and Dori walked up to DiPiano with the Maine restraining order openly in her grasp.  <b>Dori:</b> "Apparently somebody doesn't care about restraining orders."  . . . <b>John (to Gouin):</b> "There's one in Maine and I think it's effective here."  . . . <b>John (to Gouin):</b> "Why don't you step outside?"	EXH D, a transcript of the event. Audiovideo produced to defendants and filed on 8/26/2004.	<b>Step 9 of the conspiracy.</b> Dori DiPiano immediately began confronting Gouin about there being a restraining order in Maine.  Gouin refused to "step outside" with DiPiano because the court had ordered Gouin to make the condo available for inspection.  DiPiano, with Dori at his side, then called 911 telling the 911 calltaker that Gouin had an RO against him and refused to leave. (See Item #24.)  Remarkably, this was from the man who wrote a few weeks earlier : "I DO NOT ANTICIPATE THAT THIS SHOULD BE A PROBLEM." (EXH A) (caps in original).
22	Complaint ¶25	5/13/2002	Both Dori and DiPiano knew that there was no Massachusetts restraining order against Gouin and both knew that the Maine restraining order had not been domesticated here in the Commonwealth	<u>Compl.Exh. H</u> , Restraining Order History.	<b>Step 10 of the conspiracy.</b> Ignoring the truth to further their plan to make Gouin the <b>bait</b> for arrest by the police. Both Dori and DiPiano, being lawyers, knew or should have known about the "arrest preferred policy" of the DV guidelines and police rules
23	Complaint ¶27	5/13/2002	DiPiano, with Dori at his side, cell-phoned the Boston Police Department and informed the call-taker <b>(a)</b> that Dori had a restraining order against Gouin and <b>(b)</b> that Gouin was refusing to leave the condo	EXH D and audiovideo tape. <u>Compl. Exhs. I and J</u> (911 report and transcript of 911 call by DiPiano).	<b>Step 11 of the conspiracy.</b>
24	Compl. Exh. I	5/13/2002	DiPiano <b>falsely</b> denies calling 911 to police officer who called DiPiano's cellphone to confirm that 911 call was a "real" one	<u>Compl. Exh. I and Transcript of 911 caller's testimony</u>	<b>Step 12 of the conspiracy.</b>

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MOTION FOR RECONSIDERATION (#80) OF MEMORANDUM AND ORDER OF  
SEPTEMBER 2004 DENYING DiPIANO'S MOTION TO DISMISS (#4)**

25	Complaint ¶28	5/13/2002	Gouin welcomed the appraisers, who entered the condominium and performed the inspection for the appraisal	<u>Compl. Exh. K</u> , Appraiser Goulet's trial testimony at pages 5420-21, 5563-65. <u>Compl. Exh. N</u> , first page of appraisal report	
26	Complaint ¶29	5/13/2002	Police responded to DiPiano's 911 phonecall. Dori and DiPiano greet the responding police officers	<u>Compl. Exh. L</u> , incident report	<b>Step 13 of the conspiracy.</b>
27	Complaint ¶30	5/13/2002	DiPiano <b>falsely</b> reported to the Discovery Master Gerald L. Nissenbaum ["Nissenbaum"] that the appraisal in Boston did <b>not</b> go forward that morning of May 13 <sup>th</sup>	<u>Compl. Exh. M</u> , page 35 of Dori's deposition on 13 May 2002. <b>See also Item #36</b>	<b>Step 14 of the conspiracy.</b> DiPiano trying to stir up trouble for Gouin in family court by telling GLN that the court-ordered inspection did not go forward.
28	Complaint ¶34	5/13/2002 and forward	Subsequent to the appraisal inspection, Dori was in contact with Defendant Detective James of the Boston Police Department	<u>Compl. Exh. O</u> , 3 pages of James' handwritten notes	<b>Step 15 of the conspiracy.</b>
29	Complaint ¶35	5/17/2002	Detective James allegedly dated an Application for Complaint as being filed on 5/17/02, but that date was later altered. The application identified Dori as the Co-Complainant.	<u>Compl. Exh. P</u> , Application for Complaint and <u>Compl. Exh. Q</u> , modified application	<b>Step 16 of the conspiracy.</b>
30	Complaint ¶36		DiPiano failed to tell Def. Det. James that Gouin was acting pursuant to Mass. family-court order		<b>Step 17 of the conspiracy</b>
31	Complaint ¶37		DiPiano failed to tell Def. Det. James that he did not give notice to Gouin or his counsel that Dori would be present on May 13 <sup>th</sup> for appraisal	<u>Compl. Exhs. P-Q</u>	<b>Step 18 of the conspiracy</b>
32	Complaint ¶41	Week around 5/20/2002	Gouin told Det. James about (a) court order for May 13 <sup>th</sup> appraisal, (b) Dori arriving unannounced, (c).not receiving any notice that she would attend, (d) Dori's purpose to get Gouin arrested to gain advantage in divorce, (e) Dori's false charges against him the year before, and (f) his suit in federal court against the BPD officers, Dori et al	Communications with Detectives James and Jackson.	At the Area-A1 police station, Gouin showed James and several other high-ranking officers the audiovideo tape of the May 13 <sup>th</sup> event.

**PLAINTIFF'S OPPOSITION TO JOHN DiPIANO'S  
MOTION FOR RECONSIDERATION (#80) OF MEMORANDUM AND ORDER OF  
SEPTEMBER 2004 DENYING DiPIANO'S MOTION TO DISMISS (#4)**

33		Week around 5/20/2002	Communications with Eve Piemonte-Stacey regarding communication with Margot Hill, Commander of BPD DV unit, James' ultimate boss.		<b>Step 19 of the conspiracy.</b> BPD working out tactical strategy to go forward or not.  <b><u>One Ulterior Motive for Going Forward:</u></b> to use conviction of Gouin in May 13 <sup>th</sup> case against him in <u>Gouin I</u> .
34		Between 5/20 and 5/29/2002	Circumstantial evidence that a ranking official assigned Area-A1 Detective Jackson to turn up the heat in the case by coercing Gouin to give himself up.		<b>Step 20 of the conspiracy.</b> BPD Det. Jackson joins the conspiracy and tries to coerce Gouin by intimidation into giving himself up. <i>See</i> Item #35
35		5/29/2002, Wednesday	BPD Area-A1 Detective Jackson spoke by phone with Gouin's counsel. Jackson said he was getting warrant to arrest Gouin.  Received FAX of police report.  Gouin's counsel spoke twice by phone to Det. James.		<b>Step 21 of the conspiracy.</b> More police action in response to DiPiano's and Dori's 911 call and desire for Gouin's arrest and conviction.  <b><u>Another Ulterior Motive for ur-</u></b> <b><u>pose:</u></b> Boston and James wanted to retaliate against Gouin where he had already sued two officers and the City of Boston.
36	Complaint ¶40	6/3/2002	DiPiano <b>falsely</b> represented to the court, "I never mentioned to Mr. Nissenbaum that the appraisal did not go forward"	<u>Compl. Exh. R</u> , page 27 of transcript of hearing on 3 June 2002. <b>See also Item #27</b>	DiPiano was trying to withhold from the Probate & Family Court judge the fact of his involvement in the potential criminal case, out of which the instant action arose.
37	<u>Compl. Exh. P (2 of 3)</u> ,	6/10 or 6/14/2002	James files Application for Complaint in BMC allegedly on behalf of Dori because Dori wanted one to issue. Dori named as victim	<u>Compl. Exh. P (2 of 3)</u> , Application for Complaint <i>See</i> Item 38.	<b>Step 22 of the conspiracy.</b>
38	James' Motion to Dismiss page 7 ¶2, page 8 ¶2, page 11 ¶2, page 13 ¶1, page 16 ¶4, page 17 ¶2		James repeatedly admitted that she wrote the Application <b>solely</b> because Chadbourne wanted James to do so.  Having insinuated herself into the conspiracy, Det. James – and Det. Jackson – thereby made DiPiano and Dori not “mere complainants” but “state actors.”  State action is not necessary for a claim of conspiracy under §1985(3), which contemplates private as well as public conspiracies. <i>See Adickes v. Kress &amp; Co.</i> , 398 U.S. 144, 152 (1970); <u>United States v. Price</u> , 383 U.S. 787, 794 (1966).	<i>See</i> James' Motion to Dismiss and <u>Compl. Exh O</u> is that <u>Exh. O (p. 1 of 3)</u> .	<b><u>Admission of working in conjunction with Dori in furthering the conspiracy begun by Dori and DiPiano.</u></b>  A private party's conduct is attributable to the state if the state "has so far insinuated itself into a position of interdependence with [the private party] that it must be recognized as a joint participant in the challenged activity." <u>Barrios-Velazquez v. Asociacion De Empleados Del Estado Libre Asociado</u> , 84 F.3d 487, 494 (1st Cir.1996) (citation and internal quotation marks omitted; alteration in the original).  <u>Camilo-Robles v. Hoyos</u> , 151 F.3d 1, 10 (1st Cir., 1998).

**PLAINTIFF'S OPPOSITION TO JOHN DiPIANO'S  
MOTION FOR RECONSIDERATION (#80) OF MEMORANDUM AND ORDER OF  
SEPTEMBER 2004 DENYING DiPIANO'S MOTION TO DISMISS (#4)**

39			Hearing date gets postponed to 7/22/2002	<u>Compl. Exh. Q (1 and 2 of 3)</u>	<b>Step 23 of the conspiracy.</b>
40		7/22/2002	After "hearing," a criminal complaint 0201CR003706 issued. Dori was the named Complainant	<u>Compl. Exh. S, Criminal complaint</u>	<b>Step 24 of the conspiracy.</b> Det. James and Dori, as well as Gouin and his counsel, were present.

**1. Where DiPiano not only was a willing participant in, at least, the first half (Steps 2-11) of the conspiracy, which included State actors, but also aided Dori in creating a situation out of which the potential prosecution of Gouin could and would likely grow and lead to possible conviction, dismissal of Gouin's claim against DiPiano for conspiracy is inappropriate.**

DiPiano is not a "mere complainant" if he is implicated in the conspiracy to a significant and blameworthy degree. Gouin v. Gouin, 249 F.2d 62 (D.Mass. 2003) (Gouin I, Docket # 01-CV-10890-RBC), slip op. at 39, citing Wagenmann v. Adams, 829 F.2d 196, 210 (1st Cir. 1987). Here, DiPiano supplied both false information to the police (Item 23, Step 13 of the conspiracy), to wit, that Gouin refused to leave, and misleading information by omission, to wit, **(a)** that there was no Massachusetts restraining order in effect, **(b)** that the Maine order had not been filed in any Massachusetts court, and **(c)** that Gouin had been ordered by a Probate & Family Court to be at the condominium in Boston to make it available for an inspection for an appraisal.

DiPiano's duplicity was made evident by two major events: On 9 April 2002, he wrote, for for all intents and purposes, that there would be no problem were Dori to attend the appraisal inspection even though she had an active temporary Maine restraining order (known as a "Protection from Abuse" order in Maine). That order was extended at the request of Dori on 12 April 2002. Despite the fact that DiPiano knew that he had explicitly promised that there would be no problem at the inspection were Dori to attend, the first words out of DiPiano's mouth were, in essence, about the restraining order, after which he asked Gouin to "step outside." And when Gouin declined to step outside, DiPiano cellphoned 911.

The second event occurred when DiPiano did not want to be questioned about his false al-

legations to the 911 calltaker. To a police officer who called DiPiano at 10:19:48 on his cell-phone to confirm that DiPiano made the reporting call at 10:10:07, DiPiano falsely denied that he was the reporting person [Compl. Exh. I]:

/101007 (85731) ENTRY CLR STS HIS CLIENT DORIE CHADBOURNE HAS R/O AGAINST FRANCOIS GOUIN (HUSB AND) WHO IS AT ABV AND IS REFUSING TO LEAVE

/101948 MISC ,CLR KNOWS NOTHING AND IS NOT THE RP

That final prevarication to the second police officer is an indice that DiPiano knew exactly that he had implicated himself to a significant and blameworthy degree in the conspiracy inspired by Dori alone or he and Dori together. And clearly their conspiracy included orchestrating around the imminent appraisal of the Gouins' Boston property a situation in which Gouin would appear to be guilty of violating a restraining order. And clearly, both Dori and DiPiano, being lawyers practicing in the arena of family law, knew well of the arrest-preferred policy implemented statewide. What could be better? They would move for the court to order Gouin to be at the appraisal at a place and time certain and they would call the police. To jail with Gouin, whose position in the ongoing divorce would deteriorate quickly. Dori would gain a super collateral advantage in the divorce and DiPiano would get paid from the equity in the mortgage-free Beacon Hill property. (See **EXH. F**, liens). There is no doubt that Gouin has made out a *prima facie* case of conspiracy under federal law.

The First Circuit has had occasion to explain the law of civil conspiracy  
in the Commonwealth at some length:

Under Massachusetts law, either of two possible causes of action may be called "civil conspiracy."

First. There is precedent supporting a "very limited cause of action in Massachusetts" for "civil conspiracy" of a coercive type. See *Jurgens v.*

*Abraham*, 616 F. Supp. 1381, 1386 (D. Mass.1985).  
“In order to state a claim of [this type of] civil conspiracy, plaintiff must allege that defendants, acting in unison, had some peculiar power of coercion over plaintiff that they would not have had if they had been acting independently.” *Id.* (quotations omitted) (citing *Fleming v. Dane*, 304 Mass. 46, 22 N.E.2d 609 (1939))...

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Second. This second type of civil conspiracy is more akin to a theory of common law joint liability in tort. It is explicitly recognized in Massachusetts law. *See Gurney v. Tenney*, 197 Mass. 457, 84 N.E. 428, 430 (1908); *see also Phelan v. Atlantic Nat'l Bank*, 301 Mass. 463, 17 N.E.2d 697, 700 (1938) (“[A]verment of conspiracy does not ordinarily change nature of cause of action [sounding in tort] nor add to its legal force.”). In the civil context, both elsewhere and in Massachusetts, the word conspiracy is frequently used to denote vicarious liability in tort for “concerted action.” *See* W. Page Keeton, *Prosser and Keeton on Torts* 322 (5th ed. 1984); *Restatement (Second) of Torts* §876 cmt. b (1977). That is, the concept is invoked to support liability of one person for a tort committed by another. For liability to attach on this basis, there must be, first, a common design or an agreement, although not necessarily express, between two or more persons to do a wrongful act and, second, proof of some tortious act in furtherance of the agreement. *See Restatement (Second) of Torts* §876 cmt. b. Where two or more persons act in concert, each will be jointly and severally liable for the tort. *See id.*; *see also New England Foundation Co. v. Reed*, 209 Mass. 556, 95 N.E. 935, 935 (1911) (“The gist of a civil action of this sort is not the conspiracy, but the deceit or fraud

causing damage to the plaintiff, the combination being charged merely for the purpose of fixing joint liability on the defendants.”).

*Aetna Cas. Sur. Co. v. P & B Autobody*, 43 F.3d 1546, 1563-4 (1 Cir., 1994); *see also Tingley Systems, Inc. v. CSC Consulting, Inc.*, 152 F. Supp.2d 95, 113 (D. Mass., 2001).

*Gouin v. Gouin*, 249 F.2d 62 (D.Mass. 2003) (*Gouin I*, Docket # 01-CV-10890-RBC), slip op. at 33-35.

As set out above, there are two forms of conspiracy recognized in the Commonwealth.

The one that is "akin to a theory of common law joint liability in tort" [*supra*] is akin to a theory of joint venture in the criminal context:

"The test [for joint venture] is whether [the] defendant was (1) present at the scene of the crime, (2) with knowledge that another intends to commit the crime or with intent to commit a crime, and (3) by agreement is willing and available to help the other if necessary." Commonwealth v. Sabetti, 411 Mass. 770, 779 (1992), quoting Commonwealth v. Costa, 407 Mass. 216, 224 (1990). See Commonwealth v. Amaral, 13 Mass.App.Ct. 238, 242 (1982) (Commonwealth not required to show that defendant participated in actual commission of crime; it is sufficient to show that defendant "somehow participated in the venture to the extent that [he] sought to make it succeed"). "Knowledge or intent ... may be proved by inference from all the facts and circumstances developed at trial." Commonwealth v. Costa, *supra* at 225. See Commonwealth v. Beckett, 373 Mass. 329, 341 (1977) (person's intent may be shown "from circumstances and need not, and often cannot, be established by direct evidence"); Commonwealth v. Santiago, 30 Mass.App.Ct. 207, 217 (1991) ("It is rare that one's state of mind can be proved by direct evidence"). "[A] person who acts as a lookout while others are engaged in a criminal enterprise can be convicted on a joint enterprise theory." Commonwealth v. Ward, 45 Mass.App.Ct. 901, 902 (1998), quoting Commonwealth v. James, 30 Mass.App.Ct. 490, 499 n. 10 (1991).

Com. v. Miranda, 441 Mass. 783, 791 (2004). Here, DiPiano not only was present when the falsity was told to the police, he was the one who committed the falsity (violating M.G.L. c, 269 §13A).

He was committed to the planned conspiracy to get Gouin falsely accused and false convicted.

Despite DiPiano's denial, his intent to participate in the conspiracy can be proved either directly from the facts iterated in some detail in the table above or by reasonable inferences to be developed at trial. It is sufficient that Gouin can show (see the table, *supra*) that DiPiano "somehow participated in the venture to the extent that [he] sought to make it succeed". *Id.*, citing Amaral.

The venture was, indeed, successful for almost 1½ years. Det. James did write an Application for Complaint as a result of his 911 phonecall and she was the star witness at the Show Cause Hearing on 22 July 2002. And the criminal complaint did issue as DiPiano, Dori, James, and others intended. There was on one issue an interlocutory appeal, which was denied. The case was sent back to the BMC, and Gouin continued to be caused physical and mental injuries, including but not

limited to anxiety and horrific stress and distress, and damages until Justice Thomas C. Horgan dismissed the ill-motivated case from his court on 19 September 2003 [Compl. ¶45].

To establish a civil conspiracy, a plaintiff must demonstrate that “a combination of persons [acted] pursuant to an agreement to injure the plaintiff.” J.R. Nolan & L.J. Sartorio, Tort Law § 99, at 136 (2d ed.1989).

Gutierrez v. Massachusetts Bay Transp. Authority, 437 Mass. 396, 415 (2002). To establish a criminal conspiracy is a bit more demanding. Under either standard, Gouin has made out a *prima facie* case of conspiracy against both DiPiano, Dori, and members of the City of Boston police department.

"The elements of conspiracy are 'a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose.... [T]he unlawful agreement constitutes the gist of the offence....' " Commonwealth v. Benson, 389 Mass. 473, 479, *cert. denied*, 464 U.S. 915 (1983), quoting from Commonwealth v. Dyer, 243 Mass. 472, 483 (1922). *See also* Commonwealth v. Fidler, 23 Mass.App.Ct. 506, 513 (1987) ("[t]he essence of the crime of conspiracy is the agreement of the conspirators").

Com. v. Costa, 55 Mass.App.Ct. 901, 901-902 (2002). As the audiovideo tape shows, on May 13<sup>th</sup>, when Dori first laid sight on DiPiano arriving at the Boston property, she pulled out the Maine restraining order, walked up to DiPiano, handed it to him, and said, “So much for restraining orders.” (The audiovideo tape has been filed in this court.)

DiPiano’s first words to Gouin were, “Isn’t there a restraining order against you in Massachusetts?”

“No, there’s no restraining order against me in Massachusetts, John.” (*See EXH. D*, transcript). The inferences to be drawn from this dialogue shall be developed at trial and left for the jury to conclude whether there was a meeting of Dori’s and DiPiano’s minds to get Gouin arrested, prosecuted, and convicted of violating a restraining order. Com. v. Costa, 55 Mass.App.Ct. at 902, citing Com. v. DeCillis, 41 Mass.App.Ct. 312, 314 (1996) (the "agreement that must be shown to prove a conspiracy is a meeting of the minds of the conspirators separate and distinct from and

prior to the common intent that is implicit in the commission of the substantive crime").

That DiPiano was also Dori's attorney is no defense. *See Kurker v. Hill*, 44 Mass.App.Ct. 184, 190, 190 n. 5 (1998) (reversing the dismissal as to the defendant attorneys of count three for civil conspiracy), citing *Logotheti v. Gordon*, 414 Mass. 308, 310 (1993), "in which the plaintiff's complaint should not have been dismissed as to the defendant attorneys." and *Spinner v. Nutt*, 417 Mass. 549, 556, 631 N.E.2d 542 (1994), in which the plaintiff beneficiaries were required to show that the defendant attorneys knew of the trustees' breach of fiduciary duty and actively participated in the breach."

"In the tort field, the doctrine appears to be reserved for application to facts which manifest a common plan to commit a tortious act where the participants know of the plan and its purpose and take affirmative steps to encourage the achievement of the result." *Stock v. Fife*, 13 Mass.App.Ct. 75, 82 n. 10 (1982).

*Kurker*, 44 Mass.App.Ct. at 189. Here, Gouin has shown that DiPiano had knowledge of the plan and its purpose, and actively participated by "tak[ing] affirmative steps to encourage the achievement of the result," that is, to injure Gouin and violate his constitutional rights enumerated above.

Additionally, "[l]iability may extend to those who merely assisted in or encouraged the tortious act and does not necessarily require proof of an explicit agreement between defendants." *Ellis v. Varney*, 2004 WL 574827, at 49, No. 9801397 (Mass.Super., 1/9/2004) (Fecteau, J.), citing *Kyte v. Phillip Morris, Inc.*, 408 Mass 162, 167-68 (1990) and *Massachusetts Laborers Health & Welfare Fund v. Phillip Morris, Inc.*, 62 F.Supp.2d 236, 244 (D.Mass.1999). "A tacit understanding is sufficient, and it may be inferred from the conduct of the parties, as proof of conspiracy commonly rests on circumstantial evidence." *Ellis*, 2004 WL 574827, at 49. "The inferences from the evidence need not be inescapable; they need only be reasonable." *Id.*, quoting *Commonwealth v. Camerano*, 42 Mass.App. 363, 366 (1997).

Moreover,

“The heart of a conspiracy is the formulation of the unlawful agreement or combination.” Com. v. Cantres, 405 Mass. 238, 244, 540 N.E.2d 149 (1989), quoting from Com. v. Pero, 402 Mass. 476, 478, 524 N.E.2d 63 (1988). But a conspiracy rarely wears its heart on its sleeve. Thus we have no explicit proof of the defendant's “agreeing” in so many words with Curtis to join in the scheme, although we have much about transactions with M & S, the defendant's company. Agreement, however, may be instinct in the situation as a whole, and proved by circumstantial means. See Com. v. Nelson, 370 Mass. 192, 200-201 (1976); Com. v. Cook, 10 Mass.App.Ct. 668, 675 1326 (1980). It is enough if the parties come even tacitly to an understanding, and this may be inferred from a course of conduct having a common design. See Direct Sales Co. v. United States, 319 U.S. 703, 714 (1943). Finally, “[t]he step from knowledge to intent and agreement may be taken. There is more than suspicion, more than knowledge, acquiescence, carelessness, indifference, lack of concern. There is informed and interested cooperation, stimulation, instigation. And there is also a 'stake in the venture' which, even if it may not be essential, is not irrelevant to the question of conspiracy.” Id. at 713 (Rutledge, J.).

Com. v. Melanson, 53 Mass.App.Ct. 576, 580-581 (2002).

#### NOTES

1. DiPiano restates his entire argument regarding conspiracy in his Motion to Dismiss, citing, amongst other cases, Adickes v. Kress & Co., 398 U.S. 144 (1970). Rather than repeat here what he has already addressed quite thoroughly, Gouin incorporates in entirety, as if set forth herein, his arguments in his Opposition to DiPiano’s Motion to Dismiss. Gouin discusses Adickes, in particular, at 5, 7, 16, 18-19 of that opposition [Paper #19].

2. DiPiano also again, on page 3 of his memorandum [Paper #19], references Slotnick v. Stavisky [*sic*], 560 F.2d 31 (1st Cir. 1977), regarding insufficient allegations of conspiracy in complaint. Ironically, two of the defendants, Burton Pike and Harold Stavisky, were later suspended from the practice of law. Matter of Stavisky, 7 Mass. Att’y Disc. R. 277 (1991) (three months).

3. DiPiano also cited Slotnick v. Garfinkle, 632 F.2d 163 (1st Cir. 1980), in which “[a]ll six attorneys knew that the allegations against Slotnick were false.” But no more is revealed in the case. Thus the case is useless to use one way or the other against Gouin’s position. Slotnick had been institutionalized in a mental-health facility. Gouin incorporates herein by reference the arguments regarding Garfinkle on pages 6-7 in PLAINTIFF'S OPPOSITION AND MEMORANDUM IN SUPPORT OF HIS OPPOSITION TO MOTION TO DISMISS BY DEFENDANT JOHN DiPIANO [Paper #19].

4. DiPiano also writes in his Motion to Reconsider [Paper #80], quite curiously, that Gouin complained of DiPiano interfering with his right to pursue a claim in Gouin I. DiPiano failed to cite the paragraph of the complaint in which such an averment appears and Gouin has failed to find such an averment.

WHEREFORE Gouin prays that both John DiPiano's Motion for More Definite Statement and his Motion for Reconsideration be DENIED.

Respectfully submitted,  
FRANÇOIS GOUIN, JR.,  
By his attorney,

14 November 2004

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**AFFIDAVIT**

I, Barbara C. Johnson, Esq., hereby depose that all statements and observations I attribute to myself saying or observing are true, and all other statements are true upon information and belief.  
Sworn under the pains and penalties of perjury.

14 November 2004

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