**LAW OFFICES OF KIMBERLY A. ECKERT**
1050 East Southern Avenue Suite A3
Tempe, Arizona 85282
(480) 456-4497 Fax (866) 583-6073
Kimberly A. Eckert – 015040
keckert@arizlaw.biz
**Attorney for Plaintiff**

UNITED STATES OF AMERICA DISTRICT COURT
DISTRICT OF ARIZONA

| | |
|---|---|
| Stephen Gesell,<br><br>Plaintiff,<br>v.<br><br>City of Cottonwood, a municipal corporation, Tim Elinski, an individual, Jesus Rodriguez, an individual, Scotty Douglass, an individual, Jennifer Winkler, an individual, Amanda Wilber, an individual, and Helaine Kurot, an individual,<br><br>Defendants. | Case No: 3:24-cv-08090-DWL<br><br>RESPONSE TO DEFENDANTS' MOTION FOR PARTIAL DISMISSAL OF PLAINTIFF'S COMPLAINT AND TO STRIKE REFERENCES TO PRIVILEGED/CONFIDENTIAL MATERIAL |

Plaintiff Stephen Gesell, by and through undersigned counsel, hereby responds to the Motion for Partial Dismissal and to Strike references and asks that it be denied. The claimed basis for the Motion is unsupported factually or legally and despite its excessive length that is generally double the allowable length under the Rules, it is mostly just an oral argument that belongs in front of a finder of fact.

The issue as to whether any of the stated information is confidential is directly disputed. This Motion was followed by a Motion to Disqualify Counsel and much of the claimed "privileged matter" is thus further complicated by the parties' relationships and

how matters were disclosed and discussed throughout the government in the City of Cottonwood, an entity that has seen constant chaos over the last couple of years.

Specifically, the claims that Plaintiff "misstates the law, mischaracterizes the record, and attempts to assert non-existent claims (such as seeking civil relief for alleged violations of a criminal statute)" is unfounded. As to the service issue, as this Court is aware, Arizona allows the employer to be responsible for an employee's actions even if that employee has not been served with a Notice of Claim. S*ee Laurence v. Salt River Project Agric. Improvement & Power Dist*., 255 Ariz. 95, 105 ¶ 41, 528 P.3d 139, 149 (2023) ("[T]he doctrine of respondeat superior imputes the employee's tortious acts to the employer, not the employee's liability." *See Moore v. State of Arizona, et al.*, Defendants. No. CV 22-01938-PHX-JAT (JFM), recognizing the liability of the entity even if the individual has not been served. Additionally, here, the Clerk accepted the documents which conveyed that the Clerk had authority to accept the service. It is unjust to allow the Defendants to not convey that there was no such authority until after the time to serve has lapsed.

Should this Court agree that the individuals were not served, Plaintiff requests that he be permitted to amend the Complaint to substitute the City of Cottonwood. *Laurence v. Salt River Project Agric. Improvement & Power Dis*t., 255 Ariz. 95, 105 ¶ 41, 528 P.3d 139, 149 (2023).

Finally, the argument that Plaintiff was simply an "at will" employee flies in direct face of the state statutes setting forth protection of police officers employed by

governments. The case cited by Defendant, which it heavily relies on for pages of its motion, to support its theory, does not apply to the facts here. It is a district court case only, and deals with a police officer that actually signed an employment contract with the City, distinguishable from the case at hand. As such, that court stated the prior POBOR rules did not apply and there was no retroactivity. Here, there was no contract and thus the rules did apply.

The termination of Plaintiff was after he was sent correspondence titled "Notice of Investigation and Officer Rights" and cites to the rights under A.R.S. §38-1102 ("POBOR"). The claim that POBOR does not convey any property interest is baseless.

**Factual Claims**

As this Court is aware, when considering a motion to dismiss under Rule 12(b)(6), a court must assess whether the complaint "contain[s] sufficient factual matter, accepted as true, to `state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009*) (quoting Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. "Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679, 129 S.Ct. 1937.

In this case, the Verified Amended Complaint set forth the facts to support the

Claims. Doc. 6. The "facts" relied on by the Defendants are nothing more than an attempt at summary judgment though its distorted version of the facts, i.e. since there was a determination by an administrative body that IT believed some discrimination occurred, then all of the Defendants' actions are proper. This Court is well aware that the Arizona Attorney General Civil Rights' Division does not adjudicate cases. Just like the Equal Employment Opportunity Commission (EEOC), it can only pursue them in court. That did not occur here. The facts claimed in that report will be directly refuted in this lawsuit. Even more interesting is that the attorney that "Represented" Mr. Gesell told numerous people that Chief Gesell did not do anything wrong that warranted any action.

Numerous facts are taken out of context and disputed and are improperly cited as this is a Rule 12(b) Motion, not a summary judgment. Further, an attorney by the law firm who filed this Motion monitored the interview with the ACRD and not included in the Defendant's "facts" were other reasons that will be set forth in this litigation.

Whether the court can take judicial notice of the investigation or findings is a red herring. This "determination" has no preclusive effect and is disputed. It is simply an opinion of the agency and is not binding and is not conclusive. There are numerous problems with this "investigation" all of which will be addressed in this litigation.

As to the general claim that POBOR does not apply, that flies in the face of the conduct of the Defendants who told Plaintiff the statutory right to appeal did not apply and now tries to hide behind the statute claiming that is the only relief that can be brought. They cannot have it both ways. Finally, the POBOR statutes state that an action may be brought, nothing says it is the exclusive remedy. It does not say that a person

cannot avail themselves of the wrongful termination statute. There was an appeals board however, Defendants told Plaintiff he could not access it.

Defendants' Exhibits 1, 2 and 11 should be stricken by this Court as they are an impermissible attempt to establish as "facts" matters that are in dispute. These documents are not relevant to the consideration of the Motion to Dismiss. If Exhibit 11 is being considered, it fails as a contract, as it specifically says so. Doc. 11-1, Page 80.

**Legal Analysis**

Defendants are attempting to dismiss the case despite the *Iqbal/Twombly* analysis calling the facts cited are mere conclusions. That position completely throws out the entire legal jurisprudence of decades. There can be no possible argument that the facts in Plaintiff's detailed and specific Amended Complaint are simply conclusions.

**A. ARIZONA'S NOTICE OF CLAIM STATUTE**

Plaintiff served the City of Cottonwood's deputy city clerk with the Notice of Claim for the individuals as admitted by the Defendants. The process server gave the deputy the documents and she accepted service. Plaintiff had a right to rely on the representations of the deputy clerk, however, even if not, the City is still liable. *See Laurence v. Salt River Project Agric. Improvement & Power Dist.*, 255 Ariz. 95, 105 ¶ 41, 528 P.3d 139, 149 (2023).

Defendants admit that the Deputy City Clerk is legally authorized to receive service for the City, thus, if the Court finds that the individuals were not properly served, the City is still liable if the case against them is proven under the *respondeat superior*

doctrine. *See Felder v. Casey*, 487 U.S. 131, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988) (notice-of-claim statute inapplicable to § 1983 actions). The Arizona Supreme Court has made it clear that service on the City is sufficient to allow these claims to go forward even if the service on the individuals is deficient. *Laurence v. Salt River Project Agric. Improvement & Power Dist.,* 255 Ariz. 95, 105 ¶ 41, 528 P.3d 139, 149 (2023).

**B. SECTION 1983 CLAIMS ARE VIABLE**

1. Plaintiffs' claims satisfy the *Monell* Standard for Municipal Liability.

Defendants rest their argument on the claim that in "this case, Plaintiff's Complaint is devoid of any facts even remotely suggesting that the City has a policy or custom of violating employees' rights under the Due Process Clause." Further, Defendants claim "Plaintiff's failure to establish that Elinski, Rodriguez, Winkler, Douglass, and/or Wilber qualify as final policymakers is unsurprising, as only the City Council possesses such authority." That is not the test here.

To state a claim under §1983, Plaintiffs must allege that they suffered a specific injury as a result of a defendant's specific conduct and show an affirmative link between the injury and the conduct of that defendant. *Rizzo v. Goode*, 423 U.S. 362, 371-72, 377 (1976). A supervisor may be liable in an individual capacity under § 1983 "if there exists either (1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011) (citation omitted). A sufficient causal connection can be shown where a supervisor "set[s] in motion a series of acts by others" or "knowingly refus[es] to terminate a series of acts by

others, which the supervisor knew or reasonably should have known would cause others to inflict a constitutional injury." *Id*. at 1207-08 (cleaned up).

42 U.S.C. § 1983 is a constitutional tort which "provides that every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. Section 1983 is derived from the Act of April 20, 1871." C. Antieau, Federal Civil Rights Acts: Civil Practice at 48-49 (1971).

As such the cause of action must demonstrate in its prima facie case (1) that the Defendants were acting under color of law; (2) that the deprivation complained of was a right or interest secured by the federal constitution or laws; (3) that the deprivation complained of was intentional or the reasonably foreseeable result of a voluntary act or omission and (4) that the injury alleged was proximately caused by the defendant(s). J. Cook and J. Sobieski, Jr., Civil Rights Actions (1984). *See Monroe v. Pape,* 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961).

A "person" includes local government entities. *Monell v. Dep't of Soc. Servs. of the City of New York,* 436 U.S. 658, 690 (1978). *Monell* recognized one way to plead a Section 1983 claim against a governmental entity is to allege: (1) that the plaintiff possessed a constitutional right of which he or she was deprived; (2) that the municipality had a policy, custom, or practice that amounted to deliberate indifference to the plaintiff's constitutional right; and, (3) that the policy, custom, or practice was the moving force

behind the constitutional violation. *Dougherty v. City of Covina, 654 F.3d 892, 900 (9th Cir. 2011) (quoting Plumeau v. Sch. Dist. No. 40 Cnty. of Yamhill,* 130 F.3d 432, 438 (9th Cir. 1997)). However, the Defendant City can be held liable if it delegated its policymaking authority or that its policymakers ratified the unconstitutional conduct. Here, Plaintiff set forth the claims that the Mayor, City Attorney, City Manager and City Council itself, the policy maker per the Defendants, were directly involved in the termination process thus ratifying it. Liability may also attach "when the individual who committed the constitutional tort was an official with final policy-making authority or such an official ratified a subordinate's unconstitutional decision or action and the basis for it." *Clouthier v. Cnty of Contra Costa*, 591 F.3d 1232, 1250 (9th Cir. 2010), overruled on other grounds by *Castro v. Cnty. of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016) (cleaned up).

2. Property Interest in Employment

Defendants base their argument on the claim that the POBOR statutes have no applicability here. Despite this claim, all of the paperwork submitted with the Amended Complaint shows that in fact the City itself not only believed POBOR applied, it claimed there was no appeal allowed. Clearly by their actions Defendants admit that POBOR has protections. Doc. 6 Exhibit D is entitled "Notice of Investigation and Officers Rights." In fact, the document states "As an employee, you have specific rights and responsibilities in accordance with A.R.S. §38-1102." That statute states: "38-1102 Peace officers bill of rights; preemption."

Under Defendants' argument, the POBOR statutes are meaningless. There was no contract here unlike the case cited by the Defendant, and that is not binding case law regardless. The *Blunt* case even states "these protections are primarily procedural and include protection during an internal investigation, notice and opportunity to be heard before termination of employment, and an opportunity for a post-termination appeal. *Blunt v. Town of Gilbert,* No. CV-23-02215-PHX-SMB. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) ("Property interests are not created by the Constitution, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.") (cleaned up). In *Blunt,* the court specifically stated that "the at-will agreement is certainly at odds with the protections outlined in the POBOR" statutes. Thus, there are clearly protections set forth in POBOR.

Importantly, here there was no contract waiving the POBOR rights thus POBOR did and does create a property interest as certain requirements are set forth in statute. Those were ignored here when it came time to terminate and deny any appeal option.

a) Retroactive

This issue has not been resolved other than the opinion in the *Blunt* case. However, this is meant to mislead. There was no contract between Gesell and the City that supplemented the terms of Gesell's employment in this case.

3. Procedural Due Process

As the POBOR statutes have specific procedural rights, Plaintiff's allegations that

those rights were violated allows his 1983 claims to proceed. To hold otherwise would state that the statutes are there for no reason. Clearly the statutes provide a procedure that must be followed. It was not here. The statute is not merely procedural. It directly impacts the substantive rights of peace officers employed in Arizona. Defendant City did not have Plaintiff sign anything like in the *Blunt* case. Defendants cannot rely on policies such as unilateral changes to employee manuals to remove POBOR protections. The policy manual here even gives rights which were not followed here. See Doc. 6, ¶¶69-70. "Chief Gesell was notified of his termination on September 14, 2023. Pursuant to A.R.S. §38-1106, he timely appealed the decision. Defendant Douglass stated that Chief Gesell was not entitled to an appeal because he was the Chief of Police." A plain reading of the statutes shows that only an at-will officer employed by a state agency is excluded from the appeal process.

The POBOR protections pursuant to statute would be meaningless if Defendants are simply allowed to throw it in their policies or ordinances. Some of the examples as set forth in the Amended Complaint include Doc. 6, ¶67 "Defendants failed to follow the requirement of A.R.S. §38-1104, which requires that before any interview in a termination investigation that "the employer shall provide the law enforcement officer with a written notice informing the officer of the alleged facts that are the basis of the investigation, the specific nature of the investigation, the officer's status in the investigation, all known allegations of misconduct that are the reason for the interview and the officer's right to have a representative present at the interview." And ¶68 "The

ACRD report was also not included in notice of investigation nor mentioned as a concern in Mr. Sturr's investigation or findings."

Plaintiff was also denied the ability to appeal to the Personnel Board. Doc. 6, ¶69. Defendant Douglass claimed that a police chief did not have appeal rights which has no legal support. Doc. 6, ¶70. Following POBR with the exception of honoring the right to appeal, nullifies the entire reason the statue exists resulting in this kind of abuse and violation of Arizona law.

4. Substantive Due Process

Defendants violated Plaintiff's right to substantive due process, which Plaintiff has alleged deprived him of life, liberty, or property, and that the actions of the government were such that they "shock[] the conscience." *Brittain v. Hansen*, 451 F.3d 982, 991 (9th Cir. 2006). Again, Defendants' argument that there was no property interest because they put in their policies that he was "at will" does not mean the POBOR protections are meaningless absent a contract like in *Blunt*.[1] Defendants regularly amended their polices- the excerpt take about "the Employees who serve at the pleasure of the City Manager or City Council are at-will and may not appeal any disciplinary action" was an excerpt of the employee manual was taken from a section that was revised in 2021. Are Defendants permitted to simply ignore state law through modification of their policies? No, because policies do not equate to a contract here.

[1] The applicable Policy Manual in this case does not even refer to "at will" employees.

Modification of a contract requires "(1) an offer to modify the contract, (2) assent to or acceptance of that offer, and (3) consideration." *Demasse v. ITT Corp.*, 194 Ariz. 500, 506, ¶ 18 (1999). (mere descriptions "of the employer's present policies [are] neither a promise nor a statement that could reasonably be relied upon as a commitment"). While Arizona courts have recognized that "[w]hether any particular personnel manual modifies any particular employment-at-will relationship and becomes part of the particular employment contract is a question of fact," it is also true that "[w]here the terms of an agreement are clear and unambiguous, the construction of the contract is a question of law for the court." *Leikvold v. Valley View Community Hospital,* 141 Ariz. 544, 545-546 n. 1, 688 P.2d 170, 171-172 n. 1 (1984).

The analysis of "contract" modification also flies in the face of Defendant's own Policy manual which states that not only does the policy not form a contract, it assures employees that the City follows all state and federal guidelines and does not deny employees their civil liberties. Doc. 11-1, Page 80. Defendants did not even allow Gesell's appeal to go forward that was stated in the policy manual.

Additionally, the employee manual included a list of at-will employees that report to the City Manager. This list included the police chief. However, this section of the manual was revised July of 2021 and removed the list of at-will employees completely. Doc. 11-1, Pages 78-88.

5. <u>The Individual Defendants.</u>

"Plaintiff alleges that five individual Defendants violated his due process rights (Elinski, Rodriguez, Douglass, Winkler, and Wilber), but he has not pled sufficient facts

to provide fair notice of the alleged grounds for liability. Thus, he has once again failed to raise the right to relief above a speculative level"

Here, Plaintiff has set forth the facts that show, despite the affirmative statements by Defendants through the termination process, that they were well aware of his rights under POBOR but chose to ignore them.

Specifically, Defendant Elinski, Rodriguez and Wilbur:

- Defendants Elinski, Rodriguez and Wilber all knew the Chief planned on assigning Officer Dever to Patrol for justifiable reasons, yet never advised him against it. Doc. 6 §55;

Specifically, Defendant Elinski and Rodriguez:

- attempted to leverage an Arizona Civil Rights Division discrimination report ("ACRD Report"), in order to disparage and harm the Cottonwood Police Department and its then Chief of Police, Plaintiff Stephen Gesell, ("Chief Gesell") in part by manipulating the City Council. Doc. 6 §11;

Specifically, Defendant Elinski:

- instructed Defendant Rodriguez to exclude Plaintiff from the May 9, 2023 meeting. Doc. 6 §13;

Specifically Defendant Elinski,

- Defendant Elinski asked Chief Gesell if he would be available to answer questions at the executive session just prior to its start and he agreed. Despite that action, Defendant Elinski misled Chief Gesell and the Council

by acting as if he wanted Chief Gesell to be included in the executive session prior to the session. Doc. 6 §16;

Specifically Defendants Wilber and Winkler:

- were aware of the alteration and failed to notify the Council. Doc. 6 §96

Specifically Defendant Douglass:

- altered that document before presenting it to Council as if it was in its original form. Doc. 6 §96.

Specifically, Defendant Rodriguez:

- Sent an email to the Human Resources Director Defendant Amanda Wilber one hour prior to the meeting and instructed her to attend and to tell Chief Gesell he was not permitted in the meeting. Doc. 6 §15.

**C. Qualified Immunity Does Not Exist Here**

Here, the Amended Complaint has set forth the facts of a very troubling series of events that resulted in the termination of Plaintiff. These actions show how the individuals' involvement led to Plaintiff's termination. "Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was `clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd,* 563 U.S. 731, 735 (2011). Plaintiff was very specific in setting forth facts and law that supports that qualified immunity cannot be given at this juncture.

Here, Defendants violated Chief Gesell's rights under A.R.S. §38-1101 et seq. by not providing him the required notice of the investigation, the proper notice and ability to

appear at the "Executive Session," the appeal remedy as authorized by statute, and/or due process under state and/or federal law. They further violated his rights when they failed to comply with A.R.S. §38-431.03 by going beyond the stated purpose and notice. Doc. 6 ¶119, 122.

Defendants were acting under color of law at all relevant times herein and are not entitled to qualified immunity based on their actions. *See Pearson v. Callahan,* 555 U.S. 223, 230-32, 235-36 (2009). Defendants violated Plaintiff's constitutional rights under the United States' Constitution, Fourteenth Amendments and Ariz. Const. art. II, § 4 as to procedural due process and substantive due process as well as violated his rights under Arizona statutes as set forth herein. The conduct shocks the conscience depriving Plaintiff of a property interest, employment, as well as violated procedural and statutory rights.

Qualified immunity only protects government officials "for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). Here, there was no mistake made by the Defendants but instead, they engaged in a coordinated effort to terminate and falsely disparage Chief Gesell without following the statutes required by Arizona law and thus his rights to procedural and substantive due process. Doc. 6. Further, the retaliation against Plaintiff for the reporting of the altering of a public record is evidence of the evil actions.

A local government may be sued under § 1983 for an injury inflicted solely by its employees or agents when execution of a government's policy or custom, whether made

by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Monell v. Dep't of Soc. Servs. of the City of New York*, 436 U.S. 658, 694 (1978).

Here, the City was well aware of what the employees and agents were doing when they placed Chief Gesell on leave and terminated him claiming the policies for discipline were being followed when in fact, they were not. Further, as the Mayor, City Manager, City Attorney and City Council were involved in the process and decision, the actions represented official policy. Doc. 6 ¶122.

The Defendant City of Cottonwood is not entitled to qualified immunity. *See Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980) which involved the vote of the City council terminating the police chief.

It is a violation of 42 U.S.C. § 1983 Civil Rights, *see Bd. of Cnty. Comm'rs of Bryan Cnty*, 520 U.S. at 405, where the municipal action is the moving force behind the plaintiff's injury if "the action taken or directed by the municipality or its authorized decision maker itself violates federal law"); municipalities' tort liability for proprietary actions is the same as private parties, *Owen,* 445 U.S. at 639-40. Here the decision makers were the City Manager and/or Mayor thus the Defendant City is liable.

**D. WHETHER THERE WAS "Inadvertent Disclosure" IS A FACTUAL ISSUE**

In Doc. 6. Exhibit E, Plaintiff filed a complaint with HR complaint about the crime committed by the City Attorney Winkler for her reckless release of the executive session recording. Despite their contention the city already knew, both Defendants

Douglass and Winkler withheld this information from the City Council for weeks. Winkler was forced to inform them she had made the error (although she attempted to mitigate it and spread blame to the city clerk) two days after Plaintiff filed his retaliatory complaint. It is alleged that this is not an inadvertent disclosure.

**E. CRIMINAL TAMPERING IS A VIABLE TORT**

Defendants claim that a criminal statute does not create a private right of action. To the contrary. Arizona law permits a criminal violation to be pled in tort such as here,

Doc. 6 ¶95 alleges Tampering with a public record; A.R.S. §13-2407 states that a person commits tampering with a public record if, with the intent to defraud or deceive, such person knowingly: 1. Makes or completes a written instrument, knowing that it has been falsely made, which purports to be a public record or true copy thereof or alters or makes a false entry in a written instrument which is a public record or a true copy of a public record. . . "Public record" is defined as a record that is a "public record" that is required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law or directed by law to serve as a memorial and evidence of something written, said or done. *Mathews v. Pyle,* 251 P.2d 893, 75 Ariz. 76 (1952)

The alteration of Plaintiff's complaint to HR regarding Defendant Winkler by former City Manager Defendant Douglass and Plaintiff's subsequent retaliatory complaint was submitted just prior to receiving the notice to terminate. Doc. 6 ¶¶86-90.

As to the claim that the information was simply being parroted back as from Plaintiff, that is false.

It is well settled that "[t]he existence of a statute criminalizing conduct is one aspect of Arizona law supporting the recognition of [a] duty." *Estate of Hernandez v. Ariz. Bd. of Regents*, 177 Ariz. 244, 253, 866 P.2d 1330, 1339 (1994). Not all criminal statutes, however, create duties in tort. A criminal statute will "establish a tort duty [only] if the statute is `designed to protect the class of persons, in which the plaintiff is included, against the risk of the type of harm which has in fact occurred as a result of its violation....'" *Id*. (citing Keeton et al., supra, § 36, at 229-30).

Here, Plaintiff submitted a complaint that should have become a public record so there was a record of the allegations of misconduct. Instead of keeping the Complaint intact, Defendant altered the complaint. Because he wanted his Complaint addressed in the official records as an employee and a citizen, he would be included in the class that the statute is to protect.

**F. DEFAMATIION BY KUROT IS A VIABLE CLAIM**

To recover for defamation, a plaintiff must prove (1) that the defendant made a false statement, (2) that the statement was defamatory, and (3) that the defendant published the statement to a third party, (4) with the requisite level of fault, (5) causing damages. *See Dombey v. Phx. Newspapers, Inc*., 150 Ariz. 476, 480-81 (1986); *Peagler v. Phx. Newspapers, Inc.*, 114 Ariz. 309, 315-16 (1977).

Plaintiff as a private figure needs only prove the defendant negligently published the statement. *Dombey*, 150 Ariz. at 480-81, 487. Damages may be presumed for statements that are defamatory per se, or facially defamatory. *See Boswell v. Phx. Newspapers, Inc.*, 152 Ariz. 1, 6 n.4 (App. 1985) (supplement by 152 Ariz. 9 (1986)).

As set forth in Doc. 6, ¶¶11-112, Defendant Kurot published false statements to individuals and at least one media outlet who claimed Chief Gesell had been fired for threatening Defendant Rodriquez. An utterance is slander per se when its publication "tends to injure a person in his profession, trade or business." *Modla v. Parker*, 495 P.2d 494, n.1 (Ariz. Ct. App. 1972). Further, Plaintiff alleged Kurot told Councilmember Duvernay that Chief Gesell "threatened" Defendant Rodriguez and Defendant Elinski and had "crossed the line." Stating that Plaintiff committed a crime is defamation per se.

The statements by Defendant Kurot have resulted in immense harm to Plaintiff's personal and professional reputation as set forth in his Complaint which will be proven at trial. Having content out on the internet alleging that Plaintiff "threatened" others and also discriminated against a "female officer" are grave concerns. The common law of torts long recognized that a defamatory statement, can cause unjustified torment and anguish—both by tarnishing one's name and by costing the accused money in legal fees and the like. *See generally* W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 119, pp. 870-889 (5th ed. 1984); T. Cooley, Law of Torts 180-187 (1879).

These allegations are sufficient to withstand a motion to dismiss.

**G. PUNITIVE DAMAGES**

"It is well-established that a `jury may award punitive damages under section 1983 either when a defendant's conduct was driven by evil motive or intent, or when it involved a reckless or callous indifference to the constitutional rights of others.'" *Morgan*

*v. Woessner*, 997 F.2d 1244, 1255 (9th Cir.1993) (*quoting Davis v. Mason County*, 927 F.2d 1473, 1485 (9th Cir.1991)).

**H. THE PARAGRAPHS ARE NOT PRIVILEGED OR CONFIDENTIAL**

Defendants claim paragraphs 25, 26, 28, 44, and 46 are confidential or privileged.

Paragraphs 25, 28- these statements are not for purposes of legal advice. They centered around a discussion about an employee, Plaintiff, which was not proper in the listed Executive session. Doc. 6, ¶¶28-31;

Paragraph 26- the statement is that he failed to advise the Council:

Paragraph 44- this paragraph refers to Mr. Coleman's changing opinions and does not specifically reference any Executive session. If he did not tell people this in a privileged context, it is not privileged. In his Complaint, Plaintiff alleges that Mr. Coleman told people this in a training session as well as Mr. Coleman was told by Plaintiff about his plans as to Officer Dever. Doc. 6, ¶¶ 54, 55, 56;

Paragraph 46- it is a statement is that the individuals failed to advise the Council.

Mislabeling the Executive Session to mask the discussion that focused on employees rather than legal advice is a violation of AZ Open Meetings Law and thus it is not confidential.

**Conclusion**

This Court should deny the Motion to Partially Dismiss and the Strike paragraph of the Amended Complaint. Should this Court believe additional facts should be alleged to satisfy Plaintiff's burden, he requests the ability to file a Second Amended Complaint. Federal Rule of Civil Procedure 15(a) requires that leave to amend be "freely give[n]

when justice so requires." Leave to amend should not be denied unless "the proposed amendment either lacks merit or would not serve any purpose because to grant it would be futile in saving the plaintiff's suit." *Universal Mortg. Co. v. Prudential Ins. Co.*, 799 F.2d 458, 459 (9th Cir. 1986). Therefore, "a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (cleaned up).

Respectfully submitted this 18th day of December, 2024.

LAW OFFICES OF KIMBERLY ECKERT

By: /s/ Kimberly A. Eckert
Kimberly A. Eckert
Law Offices of Kimberly A. Eckert
Attorney for Plaintiff Stephen Gesell

Original efiled this 18th day of December, 2024.

**CERTIFICATE OF SERVICE**

I hereby certify that on December 18, 2024, I efiled this Response via ECF and served this Response via ECF on the following parties:

Justin S. Pierce
Joseph D. Estes
**PIERCE COLEMAN PLLC**
7730 East Greenway Road, Suite 105
Scottsdale, AZ 85260
Justin@PierceColeman.com
Joseph@PierceColeman.com
*Attorneys for Defendants*

By: /s/ Kimberly A. Eckert