

September 16, 2013

Via Certified U.S. Mail or Hand Delivery

Town of Cave Creek
c/o The Office of the Town Clerk
5785 E. Azure Hills Drive
Cave Creek, AZ 85331

Mr. Adam Trenk, individually and in his
official capacity as Councilman of the
Town of Cave Creek, Arizona

Cave Creek, Az _____

Mr. Charlie Spitzer, individually and
in his official capacity as Councilman
of the Town of Cave Creek, Arizona

Mr. Mike Durkin, individually and in his
official capacity as Councilman of the
of the Town of Cave Creek, Arizona

Cave Creek, AZ _____

Cave Creek, AZ _____

Mr. Reg Monachino, individually and
in his official capacity as Councilman
of the Town of Cave Creek, Arizona

Cave Creek, AZ _____

Re: Usama Abujbarah

NOTICE OF CLAIM

Pursuant to Arizona Revised Statute § 12-821.01, notice is hereby given by and on behalf of Usama Abujbarah (“Claimant” or “Mr. Abujbarah”) that he¹ has various claims against the Town of Cave Creek, Arizona (the “Town” or “Cave Creek”) and the above-named individual members of the Town Council (“Individual Councilmembers”) arising out of the Town and Individual Councilmember’s breach of the implied covenant of good

¹Because many of the claims asserted herein are claims that affect Mr. Abujbarah’s marital community, all claims are made on behalf of Mr. Abujbarah, personally, and his spouse, Juman Abujbarah, and their marital community.

faith and fair dealing, wrongful termination and violations of Claimant's federal and state constitutional rights under the Arizona Constitution and the United States Constitution.²

FACTUAL BASIS FOR CLAIMS

Mr. Abujbarah is and has been a resident of the Town of Cave Creek, and has been a faithful employee of the Town for the past seventeen (17) years, the last fourteen (14) of which have been as Town Manager. Mr. Abujbarah signed an Employment Agreement (the "Agreement") with the Town of Cave Creek on August 6, 2012 setting for the terms and conditions of his employment through August 5, 2014. The Agreement is a matter of public record and is incorporated herein by reference thereto, however, a copy is attached hereto as Exhibit "1." In addition, Mr. Abujbarah's terms of employment were governed by applicable provisions of the Town Code of the Town of Cave Creek ("Town Code") and Arizona statutory law. Relevant sections of the Town Code are attached hereto as Exhibit "2."

After faithfully and competently carrying out his duties and responsibilities as Town Manager as evidenced by the last performance evaluation Claimant received on February 21, 2012, the Individual Councilmembers voted on June 10, 2013 to terminate Mr. Abujbarah's written employment contract effective September 9, 2013 in violation of the Arizona Open Meetings Law ("AOML"), A.R.S. §38-431 *et seq.* A special action proceeding is presently pending in the Superior Court of Maricopa County, Arizona entitled, "*Usama Abujbarah, Plaintiff, v. Town of Cave Creek, et al. Defendants,*" Case No. CV 2013-011198 (the "Special Action"). The Special Action seeks injunctive and mandamus relief against the Town, the Individual Councilmembers and those additional councilmembers not named herein.³

A new Town Council was sworn in on June 3, 2013 at which time the Individual Councilmembers assumed office. At no time prior to the vote by the Individual Councilmembers on June 10, 2013 was Mr. Abujbarah given a new or supplemental performance evaluation nor was he given any direction or instruction from either the Town or the Town Council members which he refused or failed to perform in his

²Claimant is not required to serve a statutory notice of claim in order to pursue claims for monetary relief stemming from violations of any federally protected right. Reference is made to violations of constitutional rights protected by the United States Constitutional only because the constitutional rights protected by the Arizona Constitution as asserted herein overlap with Claimant's federally protected rights.

³All members of the Town Council were named as defendants in the Special Action in order to obtain the complete relief requested in that action. Claimant seeks monetary relief only against the Town and those councilmembers named herein as Individual Councilmembers.

capacity as Town Manager. Claimant was given no instruction by the Town nor any opportunity whatsoever by the Individual Councilmembers to work alongside them, to follow any new agenda or vision they might have or wish to establish for the Town or to identify or resolve any actual or perceived differences. Instead, the first order of business of the Individual Councilmembers was to remove all duties and responsibilities of Mr. Abujbarah as Town Manager and terminate his employment.

The intent of the Individual Councilmembers was made clear prior to the June 10, 2013 Town Council meeting. Following the election of Council members Trenk, Durkin, Monachino, and Spitzer but before they were sworn in as members of the Council, each of the Individual Councilmember appeared at the May 28, 2013 Special Council Meeting. At that time, Adam Trenk made a verbal and written request to the Mayor and Town Clerk to place an agenda item on the next regular meeting agenda of the Town Council to take place on June 3, 2013 with the intended purpose of removing Claimant from his position of Town Manager. Minutes of the May 28, 2013 Special Council Meeting and Mr. Trenk's written requests are public records within the custody and control of the Town Clerk, however; copies are attached hereto as Exhibits "3" and "4," respectively. Due to scheduling matters, Mr. Trenk's request was not placed on the June 3, 2013 Regular Council Meeting Agenda. Instead, a Special Council Meeting was set for June 10, 2013 with the item requested by Adam Trenk placed on the agenda as the sole item. At Claimant's request, the meeting was held as a public meeting.

Despite having just taken office, the Individual Councilmembers made it clear from the outset that they intended to terminate Claimant's employment as Town Manager. The Individual Councilmembers did so without performing any evaluation of Claimant's performance as Town Manager that would justify terminating Claimant's Agreement, provided no direction to Claimant as Town Manager of what each might expect of him as Town Manager, and gave Claimant no opportunity to perform his duties under their direction as members of the Cave Creek Council.

Instead, during the June 10, 2013 Special Council Meeting, Adam Trenk made statements and implied that he and the others Individual Councilmembers were voting to remove Claimant, in whole or in part, because he had made statements to one or more members of the press and had otherwise commented publicly on matters of public concern regarding the Town. In addition, statements were also made by Adam Trenk and _____ that they did not like the fact that Mr. Abujbarah had associated with and supported their political opponents. An audio recording was made of the June 10, 2013 Special Council Meeting (including the comments of the Individual Councilmembers) which is a public record. That recording is under the custody and control of the Town Clerk and is incorporated herein by reference. A copy of the minutes of the June 10, 2013 Special Council Meeting is attached as Exhibit "5."

In addition, prior to the June 10, 2013 Special Meeting, on June 9, 2013, Claimant met in person with Adam Trenk at approximately 10:00 am at the Elencanto Restaurant in Cave Creek. Also present was Ray Fontaine Cave Creek resident and a member of the Town's Planning Commission. During the course of this meeting, Adam Trenk demanded assurances from Mr. Abujbarah that Claimant would not speak to the press on any matter involving the Town. This included matters of public concern affecting the Town of Cave Creek and its residents. When Mr. Abujbarah refused to such a blanket prior restraint on his right of free speech, Adam Trenk told Mr. Abujbarah that he would take action to have him removed as Town Manager. Comments made by some of the Individual Councilmembers at the June 10, 2013 Special Council Meeting indicate that this information was shared among and between the Individual Councilmembers in advance of the meeting to further the purpose of removing Claimant as Town Manager.

During the June 10, 2013 Special Meeting, AdamTrenk made a motion (“Trenk Motion”) by reading from a document that was prepared in advance of the meeting. A copy of what is believed to be that paper from which Adam Trenk read is attached hereto as Exhibit “6.” The Trenk Motion was seconded by Individual Councilmember Durkin. The Trenk Motion was voted on without a single amendment offered or a point of order raised by any Individual Councilmember. The Trenk Motion carried by a vote of four (4) to three (3) despite its procedural defects with each of the Individual Councilmembers voting in favor of the Trenk Motion. Following passage of the Trenk Motion, Claimant was notified that his employment terminated, effective, September 9, 2013.

Following the June 10, 2013 Special Council Meeting, Adam Trenk, acting in both his individual and official capacity as a member of the Town Council, sent an email to John Hoepfner on June 11, 2013. In that email, Adam Trenk published false information about Claimant, including, but no limited to, deliberately disseminating inaccurate information to the public; concealing information about government activities from the public; deliberately engaging in the selective enforcement of ordinances so he could target certain individuals; placing items on consent agenda as a favor to a friend; deciding the location of public works projects without oversight or survey thereby costing the town millions; improperly amending public documents; soliciting signatures on petitions from friends “in an effort to create the aura of support for new policies” then calling a special council meeting jus to adopt these policies; soliciting public participation from friends; leaking incomplete information to the media in an effort to shape public opinion; and providing unsolicited disclosures of private information to the media about citizens. Mr. Trenk also stated in the email that Mr. Abujbarah had engaged in improper behavior that had cost the Town “millions” and hurt people and that Claimant had taken “these actions together with the toxic pen of his close friend” referring to Mr. Abujbarah’s constitutionally protected speech with members of the media including the *Sonoran News*. A copy of the email is attached hereto as Exhibit “8.”

LEGAL BASIS FOR CLAIM

Breach of Implied Covenant of Good Faith and Fair Dealing

The Agreement between Claimant and the Town is a contract of employment. Arizona provides that the implied covenant of good faith and fair dealing applies to all contracts including this Agreement since “a party may nevertheless breach its duty of good faith without actually breaching an express covenant of the contract.” *See Wells Fargo Bank v. Arizona Laborers, Teamsters, and Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 38 P.2d 12 (Ariz. 2002); *Nelson v. Phoenix Resort Corp.*, 181 Ariz. 188, 197, 888 P.2d 1375, 1384 (App. 1994)(“every contract, including employment contracts, contains an implied-in-law covenant of good faith and fair dealing that requires ‘neither party do anything that will injure the right of the other to receive the benefits of their agreement.’”); *Price v. Town of Dewey-Humboldt*, 2012 WL 2415206, 3 (D.Ariz.,2012)(citing *Wagenseller v. Scottsdale Mem'l Hosp.*, 147 Ariz. 370, 385, 710 P.2d 1025, 1040 (1985) and recognizing that “every contract contains implied covenants of good faith and fair dealing, including at-will employment contracts”).

The Trenk Motion required that Mr. Abujbarah agree to serve in some undefined role and to carry out undefined duties and responsibilities not consist with the duties as Town Manager and did so with no evaluation of past performance. Furthermore, this was done as a condition of receiving the benefits to which Mr. Abujbarah was already entitled under the terms of his employment Agreement. *See for example* Exhibit “1” at Section 4.2. This is a clear breach of the contract itself as well as a breach of the implied covenant of good faith and fair dealing embodied in every written contract. As further example of the breach of the implied covenant of good faith and fair dealing, Adam Trenk published the following statement in his June 11, 2013 email to John Hoepfner. “[A]bsent any offer from Mr. Abujbarah to amend his contract in a way that he could be held accountable there was no way I could work with him to achieve the necessary objectives. I deliberately did not propose terms, because amending his contract (*sic*) would have to be a bilateral action.” This statement is false because the Agreement and Town Code not only gave the Town and the Individual Councilmembers the ability to conduct an annual performance evaluation of Claimant, it requires it.

The Town and Individual Councilmembers breached the implied covenant of good faith and fair dealing by acting precipitously to terminate Claimant without conducting a performance review as required by the terms of the Agreement and applicable provisions of the Town Code, refusing to explain to Mr. Abujbarah what was expected of him as Town Manager or establish standards or metrics against which his performance could be measured, failing to give Claimant a reasonable opportunity to demonstrate that he could meet performance standards and giving Claimant no opportunity to demonstrate that he

could work with the Individual Councilmembers and Town despite a demonstrated record of 14 years of doing just that as Town Manager.

The implied covenant of good faith and fair dealing prohibits a party from doing anything to prevent other parties to the contract from receiving the benefits and entitlements of the agreement. *Id.* Mr. Abujbarah was prepared to work with the new Council for the remainder of the term of his employment Agreement, take direction, be evaluated on his performance and be given an opportunity to address and actual or perceived deficiencies in performance. Due to the actions of the Town and Individual Councilmembers, however; Claimant was deprived of these and other benefits, terms and conditions of his contract of employment.

Defamation

As set forth above, Individual Councilmember, Adam Trenk, published false and misleading statements about or concerning Mr. Abujbarah that impugn Claimant's character and competence as Town Manager as well as falsely accuse him of dishonesty and being unprofessional. There were similar defamatory statements posted by Mr. Trenk on his Facebook page. Each of these statements is actionable and constitutes defamation, *per se*. The elements of a defamation claim are: (1) defendant made a false defamatory statement about plaintiff, (2) defendant published the statement to a third party, and (3) defendant knew the statement was false, acted in reckless disregard of whether the statement was true or false, or negligently failed to ascertain the truth or falsity of the statement. *Farrell v. Hitchin' Post Trailer Ranch*, 2011 WL 6057930, 2 (Ariz.App. Div. 1 2011)(citing *Peagler v. Phoenix Newspapers, Inc.*, 114 Ariz. 309, 315, 560 P.2d 1216, 1222 (1977)). Furthermore, since these statements injure Claimant in his chosen profession as a town or city manager, damages are presumed. "A plaintiff may prove defamation *per se* by showing that the statements fell into at least one category of statements presumed to cause damage, and therefore need not offer evidence of actual damage Two such categories that might be relevant to this case are statements that injure a person in his or her profession, trade, or business, and statements accusing a person of a crime involving moral turpitude." *Allen v. Arizona Dept. of Corrections*, 2009 WL 2382026, 6, n. 7 (Ariz.App. Div. 1 2009)(citing *Boswell v. Phoenix Newspapers, Inc.*, 152 Ariz. 1, 3 n. 1, 730 P.2d 178, 180 n. 1 (App.1985)).

Mr. Abujbarah reserves the right to further supplement the Notice of Claim with additional facts that support his defamation claim as he discovers additional information.

Violation of Constitutional Rights of Free Speech and Right to Petition

The Town and the Individual Councilmembers, acting under the color of law, deprived Claimant of his constitutional rights of free speech, association and to petition

the government for redress of grievances. Under both the United States and Arizona Constitutions, a citizen has the right to engage in free expression, association and to petition the government for redress of grievances. *See* U.S. Const. amend I; Ariz. Const. art. 2, §§ 5 & 6. The right to petition the government for redress of grievances includes the right to file lawsuits such as the Special Action proceeding. *See Franco v. Kelly*, 854 F.2d 584, 589 (2nd Cir. 1988); *City of Tucson v. Grezaffi*, 200 Ariz. 130, 136, 23 P.3d 675, 681 (App. 2001)(right to associate includes right to do so for the purpose of engaging in First Amendment activities including speech); *Arizona Libertarian Party v. Schmerl*, 200 Ariz. 486, 491, 28 P.3d 948, 953 (App. 2001)(recognizing the constitutional right to associate with others to further common political beliefs and including participation in partisan politics).

Speaking as a private citizen and as a resident concerned with the composition and competence of his local government, Mr. Abujbarah made several statements to the press discussing his personal beliefs about municipal projects and certain political candidates. Mr. Abujbarah was not paid by the Town to make these statements. The manner in which the Town allocates funding for municipal projects and the election of political leaders are undoubtedly significant matters of public concern. “Speech involves a matter of public concern when it fairly can be said to relate to any matter of political, social, or other concern to the community.” *Anthoine v. N. Cent. Counties Consortium*, 605 F.3d 740, 748 (9th Cir. 2010)(citing *Eng v. Cooley*, 552 F.3d 1062, 1070 (9th Cir. 2009)). Moreover, these statements were not made pursuant to Claimant’s official capacity as Town Manager, but instead were made while off-duty in conversations held as a private citizen with likeminded residents of the Town and/or member(s) of the media, and are protected speech. Despite the protected nature of these statements, the Individual Councilmembers referenced them during the June 10, 2013 Special Council Meeting. “The First Amendment shields a public employee if he speaks as a citizen on a matter of public concern.” *Huppert v. City of Pittsburg*, 574 F.3d 696, 702 (9th Cir. 2009). Claimant’s protected speech was a substantial or motivating factor leading to his termination.

Also, in a June 25, 2013 letter sent to Claimant’s counsel on behalf of the Town, an attempt was made to discourage and, accordingly, interfere with Mr. Abujbarah’s right to even file a notice of claim stating that any such attempt by Claimant would be viewed as an anticipatory breach of his employment Agreement. In fact, the letter even stated that the Town may take steps to rescind or not honor Mr. Abujbarah’s severance package unless he signed a full and complete release of all claims in favor of the Town including, presumably, forgoing his right to file the Special Action proceeding. The letter also stated that any Notice of Claim would trigger this rescission. The June 25, 2013 letter also contained an implied threat of counterclaims. The letter is attached hereto as Exhibit “7.”

This Notice of Claim is mandated by Arizona law, Ariz. Rev. Stat. § 12-821.01 if Mr. Abujbarah wants to preserve his right to pursue his state law claims even if he later decides not to do so. It is also embodied within the remedies available to Mr. Abujbarah under the terms of the Agreement. (See for example Exhibit “1” at Section 9) With the exception of his federal claims, Mr. Abujbarah cannot pursue claims against the Town or the Individual Councilmembers (in their official capacities) for monetary damages based on state law without first timely serving them with this Notice. Serving the Notice, however, does not obligate either the Town or the Individual Councilmembers to approve it and pay the amount demanded. Likewise, it does not obligate Mr. Abujbarah to file a lawsuit. He cannot assert state law claims for monetary damages, however, without first timely serving this Notice as required by statute. Accordingly, the mere act of serving the notice is the first step in petitioning the Town to redress his grievances (i.e. alleged violations of state law giving rise to monetary damages).

Since Arizona law requires Claimant to file a Notice of Claim to pursue certain claims against the Town and the Individual Councilmembers, the threat of rescinding his contractually guaranteed severance package and instituting counterclaims against his for doing that which he is required by statute interferes with Claimant’s right to petition the government for redress of his grievances chilling Claimant’s constitutional rights. *See Lytle v. Wondrash*, 182 F.3d 1083 (9th Cir. 1999)(recognizing constitutional right of access to the courts and actionable claim under 42 U.S.C. §1983 for deliberate retaliation for exercising that right).

Wrongful Termination in Violation of Public Policy

The Town and the Individual Councilmembers were responsible for the Claimant’s termination from his employment as Town Manager at the Town of Cave Creek in violation of public policy. *See A.R.S. § 23-1501, et seq.* The Town and Individual Councilmembers terminated the Claimant because he was associated with likeminded individuals who are or were political opponents of the Individual Councilmembers including, but not limited to, those individuals who were candidates or supporters of candidates for seats on the Cave Creek Town Council. In addition, the Town, acting through the Individual Councilmembers, terminated the Claimant because he spoke to members of the media on matters of public concern affecting the Town and its residents. Accordingly, the actions of the Town and the Individual Councilmembers actions violated the Claimant’s rights under the First Amendment to the United States Constitution and Article 2, Sections 5 and 6 of the Arizona Constitution. Finally, Mr. Abujbarah has petitioned his government to redress grievances by commencing the Special Action proceeding because of violations of the AMOL by the Town and the Town Council regarding the June 10, 2013 Special Council Meeting and the Trenk Motion. To the extent Claimant suffers economic injury by virtue of his constitutional right to petition his government to redress grievances, he may amend or further

supplement this notice of claim.

AMOUNT OF CLAIM

The Town of Cave Creek and the Individual Councilmembers have violated Mr. Abujbarah's constitutional right, have breached the implied covenant of good faith and fair dealing embodied in every written contract and have wrongfully terminated him in violation of public policy. Consequently, Claimant asserts that he is entitled to, among other things, all money due under the terms of this Employment Agreement, non-economic damages such as emotional distress and mental anguish and attorneys' fees. Furthermore, with regard to violations of Claimant's constitutional rights committed by any Individual Councilmember acting in his individual capacity, Claimant is entitled to punitive or exemplary damages.

By virtue of the foregoing, Claimant asserts that he has a valid claim for monetary relief in the amount of no less than \$2,963,717.61 as set forth in the attached Schedule of Damages attached hereto as Exhibit "9."

OFFER OF SETTLEMENT AND COMPROMISE OF CLAIM

Claimant hereby offers to settle and compromise his claim on the following terms and conditions:

1. Reinstatement to the position of Town Manager with restitution of all duties and responsibilities, payment of back pay and restoration of benefits and payment of Claimant's attorneys' fees and costs to date in the amount of \$16,808.25.
2. Alternatively, in lieu of reinstatement on the terms set forth in item #1 above, payment of the lump sum of \$2,963,717.61.

Upon confirmation of the foregoing, Claimant will accept the above as full and complete satisfaction of his claim and will execute any such release or covenant not to sue as may be required.

The undersigned states, under penalty of perjury, that the above amounts are justly due and owing.

Dated September 16, 2013

Usama Abujbarah

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Dated September 16, 2013

Attorney for Claimant

Please reply to:
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