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10 **IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA**  
11 **IN AND FOR THE COUNTY OF MARICOPA**

12 Usama Abujbarah, ) Case No.: CV 2013-011198  
13 )  
14 Plaintiff, )  
15 v. ) **PLAINTIFF’S MOTION FOR SUMMARY**  
16 ) **JUDGMENT**  
17 )  
18 Town of Cave Creek; Vincent Francia; Adam ) **(ORAL ARGUMENT REQUESTED)**  
19 Trenk; Mike Durkin; Reg Monachino; Charlie )  
20 Spitzer; Ernie Bunch; and Thomas McGuire, )  
21 )  
22 Defendants. )  
23 \_\_\_\_\_ )

24 Pursuant to Ariz. R. Civ. P. 56 (a) & (c), Plaintiff, Usama Abujbarah, (“Plaintiff” or “Mr. Abujbarah”) hereby moves for summary judgment against Defendants for the relief requested in his verified Complaint for Violation of Arizona Open Meetings Law and Special Action Mandamus Relief (“Complaint”) and for a writ of mandamus compelling Defendants to comply with their duties under the terms of the Arizona Open Meetings Law (“AOML”), A.R.S. §38-431 *et seq.*; the Cave Creek Town Code (“Town Code”) and applicable state law. This motion is supported by Plaintiff’s Separate Statement of Facts (“PSOF”) together with the exhibits attached thereto, the record presently before this Court and the following memorandum of points and authorities.

25 **MEMORANDUM OF POINTS AND AUTHORITIES**

26 **I. FACTS**

27 **A. Plaintiff Has Standing to Bring This Special Action**

28 At all times relevant, Mr. Abujbarah was and is a resident of the Town of Cave Creek, Arizona (“Town” or “Cave Creek”). He was employed by the Town from 1996 to June 10, 2013

1 -- the last fourteen as Town Manager. (PSOF ¶ 1, 2) At the time of his termination, Mr.  
2 Abujbarah was working as Town Manager pursuant to a signed Employment Agreement  
3 (“Agreement”) with the Town that covered the period August 6, 2012 through August 5, 2014.  
4 (PSOF ¶ 3)

5 The position of Town Manager and the associated duties are set forth in the Cave Creek  
6 Town Code (“Town Codes”) and the Agreement. (PSOF ¶¶ 4-6) Section 31.25 of the Town  
7 Code provides that the Town Manager is the chief administrative officer of Cave Creek whose  
8 duties generally are administrative and exercising supervisory control over the affairs of the  
9 Town as well as the performance of all acts necessary to carry out to the Town’s policy  
10 objectives. (*Id.*) During his tenure as Town Manager, Mr. Abujbarah reported directly to the  
11 Cave Creek Town Council (“Town Council”) which consists of the Mayor and six additional  
12 council members. (PSOF ¶ 10)

13 The individual defendants are all current members of the Town Council. (PSOF ¶¶ 14-  
14 19) Defendant, Vincent Francia (Francia”), is the mayor and was elected to his current term on  
15 March 12, 2013. (PSOF ¶ 14) Defendant, Adam Trenk (“Trenk”) was elected to his current term  
16 as a councilmember on March 12, 2013 and is the vice-mayor. (PSOF ¶ 15) Defendants, Ernie  
17 Bunch (“Bunch”), and Thomas McGuire (“McGuire”), were elected to their current terms as  
18 councilmembers on March 12, 2013 and May 21, 2013, respectively. (PSOF ¶16) Defendants,  
19 Mike Durkin (“Durkin”), Reg Monachino (“Monachino”) and Charlie Spitzer (“Spitzer”), each  
20 were elected to their current terms as councilmembers in a special runoff election held on May  
21 21, 2013. (PSOF ¶ 17)

22 Francia, Bunch and McGuire were incumbents at the time of the election to their current  
23 terms and have held office continuously during the relevant timeframe. (PSOF ¶ 18) Trenk,  
24 Durkin, Monachino and Spitzer did not assume office as members of the Town Council until  
25 they were officially sworn in at the June 3, 2012 Regular Meeting of the Town, however; each  
26 appeared at the May 28, 2013 Special Meeting of the Town Council as members-elect knowing  
27 that they would officially assume office at the June 3, 2013 meeting. (PSOF ¶ 19) At the first  
28

1 available opportunity and as their first order of business, Trenk, Monachino, Durkin and Spitzer  
2 (a majority of the Town Council) terminated Plaintiff's Agreement with the Town and  
3 immediately removed him as Town Manager. (PSOF ¶¶ 20-24) They did so without  
4 establishing any goals or expectations for Plaintiff's performance as Town Manager under the  
5 direction of the new Town Council or reviewing any of Mr. Abujbarah's prior performance  
6 evaluations. (PSOF ¶ 25)

7 **B. Defendant Trenk's Request for Meeting Agenda Item Before Taking Office**

8 Even though he was not yet sworn in as a member of the Town Council, Trenk appeared  
9 at the May 28, 2013 Meeting of the Town Council along with Durkin, Monachino and Spitzer  
10 and requested that an item be placed on the June 3, 2013 Regular Meeting Agenda, ostensibly,  
11 for the purpose of terminating Plaintiff's employment as Town Manager. (PSOF ¶¶ 20-22) Due,  
12 in part, to the fact that Plaintiff's counsel was unavailable for the June 3, 2013 meeting, a Special  
13 Council Meeting was noticed for June 10, 2013 and a single subject "Action Item" placed on the  
14 Notice and Agenda (hereinafter, the "June 10<sup>th</sup> Agenda Item") which stated, in pertinent part:

15 . . . Council discussion and possible action regarding the employment,  
16 assignment, compensation, benefits, promotion, demotion, dismissal, termination  
17 and/or resignation of the Town Manager.

18 Placed on the Agenda at the request of Vice Mayor Trenk, Town of Cave Creek.

19 (PSOF ¶ 23)

20 **C. The June 10, 2013 Special Meeting and Motion**

21 At the June 10, 2013 Special Meeting, Trenk made one motion consisting of multiple parts  
22 by reading from a document prepared in advance of the meeting.<sup>1</sup> (PSOF ¶¶ 75-76) The Trenk  
23 Motion had no less than seven (7) separate parts and, in summary, called for, among other  
24 things: (1) delivery of notice of intent to terminate Plaintiff as Town Manager; (2) removal of all  
25 of Plaintiff's duties despite the fact that the effective date of his termination was not until

26 <sup>1</sup>For purposes of identification and brevity, Plaintiff has referred to this single, multi-part motion  
27 as the "Trenk Motion" and is intended to mean the motion made by Defendant Trenk, seconded  
28 by Defendant Durkin, and passed by a majority vote at the June 10<sup>th</sup> Special Meeting that is the  
subject of this action.

1 September 9, 2013; (3) reassignment of Plaintiff to an undefined, limited assignment offsite  
2 which never occurred; (4) calling for the payment to Mr. Abujbarah of a lump sum severance  
3 amount equal to five months base salary [\$46,875] upon execution of a full release; (5) calling  
4 for a special meeting two days later for the purpose of appointing Rodney Glassman interim  
5 Town Manager through an independent contractor agreement; (6) overseeing the selection of an  
6 independent third party to conduct an audit of Town funds; and (7) beginning a selection process  
7 for a new, permanent Town Manager. (PSOF ¶ 79) The Trenk Motion was seconded by Durkin.  
8 No amendment was offered nor was a point-of-order raised. (PSOF ¶¶ 80-81) The Trenk  
9 Motion passed by a vote of 4-3 with Trenk, Durkin, Monachino and Spitzer voting in favor and  
10 Francia, Bunch and McGuire opposing it. (PSOF ¶ 82)

11 Plaintiff's Complaint challenges the validity of the passing of the Trenk Motion on three  
12 grounds: (1) the Trenk Motion was procedurally defective because it exceeded the permissible  
13 scope of subject matter contained in the Notice and Agenda for the June 10, 2013 Special  
14 Meeting, (2) the Trenk Motion was procedurally defective because it contained multiple,  
15 unrelated parts that could not properly be included in or voted on by the Town Council in a  
16 single motion and (3) that Trenk, Durkin, Monachino and Spitzer engaged in improper  
17 communications concerning the June 10<sup>th</sup> Agenda Item in violation of the Arizona Open  
18 Meetings Law ("AOML"), Ariz. Rev. Stat. 38-431.01, thereby rendering passage of the Trenk  
19 Motion, null and void, *ab initio*.

## 20 II. ARGUMENT

### 21 A. LEGAL STANDARD FOR SUMMARY JUDGMENT

22 Summary judgment may be granted when "there is no genuine issue as to any material  
23 fact and ... the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c).  
24 Summary judgment should be granted "if the facts produced in support of the claim or defense  
25 have so little probative value, given the quantum of evidence required, that reasonable people  
26 could not agree with the conclusion advanced by the proponent of the claim or defense."  
27 *Brookover v. Roberts Enterprises, Inc.*, 215 Ariz. 52, 55, 156 P.3d 1157, 1160, ¶ 8 (App. 2007)  
28

1 *citing and quoting Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

2 Stated another way, if the facts produced by Defendants in support of their defense that  
3 they did not violate the AOML have so little probative value, given the quantum of evidence  
4 required, that no reasonable person could agree with such a conclusion, Plaintiff is entitled to  
5 judgment as a matter of law. Arizona courts also recognize that summary judgment is an  
6 appropriate mechanism for resolving the legal meaning or effect of facts not in dispute. *United*  
7 *California Bank v. Prudential Ins. Co. of America*, 140 Ariz. 238, 280, 681 P.2d 390, 432 (App.  
8 1983).

9 As explained, because Defendants' actions are in violation of the AOML, the Trenk  
10 Motion and the ensuing Notice of Intent to Terminate are each void *ab initio*. *Johnson v. Tempe*  
11 *Elementary Sch. Dist. No. 3 Governing Bd.*, 199 Ariz. 567, 570, 20 P.3d 1148, 1151 (App.  
12 2001)(if action is taken at a meeting on an item not properly noticed, then action violates the  
13 Open Meeting Law and is null and void).

14 **B. THE JUNE 13, 2013 SPECIAL MEETING NOTICE AND AGENDA DID NOT**  
15 **PERMIT THE ACTION TAKEN BY DEFENDANTS**

16 Arizona statutes and Attorney General Opinions as well as the *Arizona Agency Handbook*,  
17 available at <https://www.azag.gov/agency-handbook>, have addressed issues of the adequacy of  
18 notice of agenda items under the AOML. A.R.S. § 38-431.02(H) provides, "Agendas required  
19 under this section shall list the *specific* matters to be discussed, considered or decided at the  
20 meeting. The public body may discuss, consider or make decisions only on matters listed on the  
21 agenda and other matters related thereto." (Emphasis added)

22 The *Arizona Agency Handbook* gives the following guidance.

23 **7.7.2 Contents of the Agenda -- Public Meeting.** The agenda for a public  
24 meeting must contain a listing of the "specific matters to be discussed, considered  
25 or decided at the meeting." A.R.S. § 38-431.02(H). This requirement *does not*  
26 *permit the use of generic agenda items* such as "personnel," "new business," "old  
27 business," or "other matters" unless the specific matters or items to be discussed  
are separately identified. See *Thurston v. City of Phoenix*, 157 Ariz. 343, 344, 757  
P.2d 619, 620 (App. 1988). *The degree of specificity of the agenda depends on*  
*the circumstances.* (Emphasis added)

28 *Arizona Agency Handbook*, §7.7.2 available at <https://www.azag.gov/agency-handbook>.

1 The Town Code also mandates that all agenda items be clearly identified with specificity  
2 and that the Town distribute and make public certain materials prior to a Town Council meeting.  
3 . . . at least seven calendar days prior to each Town Council meeting . . . , the Clerk,  
4 . . . **shall collect** all . . . **communications**, . . . **resolutions**, contracts, and other  
5 documents to be submitted to the Town Council, prepare an agenda . . . **make a**  
6 **copy of** the agenda and **submission documents** available for public inspection . . .  
at the Town Hall, **and provide a copy of the** agenda and **submission documents** to  
each Council Member, the Mayor, and the Town Attorney. The agenda may  
include a consent agenda of one or more items.

7 \* \* \*

8 To fully effect the intent of this section, **all information required for submittal of**  
9 **the action item** to the Town Council **shall be provided** to the Town Clerk **no less**  
10 **than seven days prior** to the Town Council meeting at which the action item is to  
be considered. (Emphasis added)

11 (PSOF ¶ 88)

12 The Trenk Motion was prepared in advance by, or on behalf of, Trenk with the intention  
13 that it be presented at the June 10, 2013 Special Meeting and adopted as a resolution of the  
14 Town. (PSOF ¶¶ 75-76) As such, it fell within the category of submissions to be made public  
15 and distributed prior to the meeting. Notwithstanding this requirement, it was not provided to  
16 the Town Clerk in a timely manner and was never distributed to other Council members or made  
17 available to the public at any time in advance of the meeting. (PSOF ¶ 77) Durkin, Monachino  
18 and Spitzer each claim to never have seen it before the June 10, 2013 Meeting despite evidence  
that Trenk shared it with others.<sup>2</sup> (PSOF ¶ 78)

19 These circumstances are similar to the facts in *Thurston v. City of Phoenix*, 157 Ariz. 343,  
20 757 P.2d 619 (App. 1988). There, a city ordinance was set aside because it included three  
21 annexation proposals and additional acreage when the meeting notice mentioned only two of the  
22 proposals and failed to include a description of a parcel of land that was annexed. The appellate  
23 court rejected the city's argument that the proposals were reasonably related to the agenda items  
24 contained in the notice as well as the argument that no AOML violation occurred because both  
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26 <sup>2</sup>There is evidence that Trenk sent a copy to Glassman in advance of the meeting and, it is  
27 possible that he may have circulated it to others as well but it is undisputed that no draft of the  
28 Trenk Motion was provided to any Council member or made available to the public seven days  
in advance of the June 10<sup>th</sup> meeting as required by Town Code §30.38. (PSOF ¶ 88)

1 those in favor and those opposed to the annexation appeared and spoke at the meeting. 157 Ariz.  
2 at 345, 757 P.2d at 621. *See also Tanque Verde Unified School Dist. No. 13 of Pima County v.*  
3 *Bernini*, 206 Ariz. 200, 76 P.3d 874 (App. 2003)(observing that declared public policy of AOML  
4 is the open rather than secret decision-making of government and that anything “which tends to  
5 ‘cabin, crib or confine’ the public in this respect would be destructive of the right . . .” *citing and*  
6 *quoting Washington Sch. Dist. No. 6 v. Superior Court*, 112 Ariz. 335, 336, 541 P.2d 1137, 1138  
7 (1975)); *Carefree Improvement Ass'n v. City of Scottsdale*, 133 Ariz. 106, 649 P.2d 985  
8 (App.1982)(invalidating action taken at public meeting due to defective notice); *Karol v. Bd. of*  
9 *Educ. Trs.*, 122 Ariz. 95, 593 P.2d 649 (1979)(recognizing underlying purpose of the Opening  
10 Meetings Law is to open the conduct of government business to public scrutiny and prevent  
11 secret decisions); Ariz. Op. Atty. Gen. No. I83-128, 1983 WL 42773, 1-2 (“By defining these  
12 terms expansively, the Open Meeting Law advances the goal of allowing any citizen of this state  
13 to witness all governmental policy-making activities, including any discussions leading to formal  
14 decisions made by the public body.”).

### 15 C. THE “TRENK MOTION” WAS PROCEDURALLY DEFECTIVE

16 The Trenk Motion had multiple, unrelated parts. As such, they could not be properly  
17 joined in a single motion.<sup>3</sup> Often referred to as the “single subject rule,” the concept has also  
18 been applied to legislative action in order to insure the integrity of the legislative process, to keep  
19 the public fully informed and to avoid surprise or subterfuge. *Manic v. Dawes*, 213 Ariz. 252,  
20 256, 141 P.3d 732, 736 (App. 2006)(recognizing purpose of single subject rule is to prevent  
21 combining of unrelated issues into single bill); *Cf. Bruce v. City of Colorado Springs*, 252 P.3d  
22

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23 <sup>3</sup>Alternatively, even if these issues could be properly joined in a single motion, a point which  
24 Plaintiff does not concede, they are not all so “related” as to be subsumed in the single “Action  
25 Item” contained in the June 10<sup>th</sup> Agenda. Expenditure of taxpayer funds in regard to the  
26 proposed severance payment and the appointment of an interim Town Manager while still paying  
27 Mr. Abujbarah are not distinct issues about which the public and Council members received  
28 proper advance notice. (PSOF ¶ 77) *Thurston v. City of Phoenix*, *supra*. *See also Wilson v. City*  
*of Tecumseh*, 194 P.3d 140, 143-44 (Okla.Civ.App. Div. 1 2008)(holding that agenda failed to  
adequately notify public of consideration of expenditure of public funds by simply including a  
discussion of “employment, hiring, resignation” of city manager and payment of severance  
bonus).

1 30 (Colo.App.2010)(upholding lower court finding of violation of single subject rule concerning  
2 citywide initiative relating to more than one subject having two distinct and separate purposes).<sup>4</sup>

3 Defendants argue that all components of the Trenk Motion were “related” to the decision  
4 to terminate the Agreement. While some items may be facially related (e.g. returning Town  
5 property, vacating his office) other aspects of the motion necessarily include the contemplated  
6 expenditure of public funds that were not identified in the June 10<sup>th</sup> Agenda Item, including,  
7 payment of a severance amount, expenditures associated with appointing an interim Town  
8 Manager and conducting an independent audit of Town funds appear nowhere in the June 10<sup>th</sup>  
9 Agenda. (PSOF ¶ 72)

10 Mr. Abujbarah’s Agreement as Town Manager was set to expire on August 5, 2014. In  
11 preparation of non-renewal (if that were the choice), the Council would have to decide by motion  
12 to start searching for a permanent successor. Such a process would have no relation to whether  
13 or not Mr. Abujbarah (or anyone else) occupied the position of Town Manager. Even removing  
14

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15 <sup>4</sup>See also *Pennsylvania v. Neiman*, 5 A.3d 353, 355 (Pa. Super. Ct. 2010) (“single subject” rule  
16 prohibits hiding of unpopular legislation by attaching a rider to popular bill); *Douglas v. Cox Ret.*  
17 *Properties, Inc.*, 302 P.3d 789, 793 (Okla. 2013) (“single subject” rule is not to inhibit  
18 legislation, rather to prevent legislature from making bill “veto proof”); *Missouri Roundtable for*  
19 *Life, Inc. v. Missouri*, 396 S.W.3d 348, 351 (Mo. 2013) (limiting legislative bills to single issue  
20 facilitates orderly procedure, avoids surprise, and prevents “logrolling” for passage of unpopular  
21 matters); *Wallace v. Minnesota*, 820 N.W.2d 843, 852 (Minn. 2012) (“The function of the title  
22 [and single subject] requirement is to provide notice of the interests likely to be affected by the  
23 law and to prevent surprise and fraud upon the people and the legislature); (quoting *Wass v.*  
24 *Anderson*, 252 N.W.2d 131, 134-35 (1977)); *Washington Ass’n for Substance Abuse and*  
25 *Violence Prevention v. Washington*, 278 P.3d 632, 639 (Wash. 2012) (“The single-subject rule  
26 aims to prevent the grouping of incompatible measures and to prevent ‘logrolling.’); *Kansas*  
27 *One-Call System, Inc. v. Kansas*, 274 P.3d 625, 631 (Kan. 2012) (affirming that one-subject rule  
28 is to prevent “logrolling” by the legislatures when voting on bills); *Loparex, LLC v. MPI Release*  
*Technologies, LLC*, 964 N.E.2d 806, 813 (Ind. 2012) (stating that state constitutional provision  
for single subject requirement is to prevent fraud by legislatures and to prevent combination of  
nonrelated subjects in same bill); *Tomra Pacific, Inc. v. Chiang*, 131 Cal.Rptr.3d 743, 757 (Cal.  
Ct. App. 2011) (stating that single subject rule’s “universally recognized purpose” is to prevent  
Legislature from logrolling bills); *Smith v. Guest*, 16 A.3d 920, 929 (Del. 2011) (single subject  
provision intended to assure that sleeper legislation does not slip through General Assembly);  
*Browning v. Florida Prosecuting Attorneys Ass’n, Inc.*, 56 So.3d 873, (Fla. Dist. Cr. App. 2011)  
(single subject provision is to prevent logrolling and to ensure integrity of legislative process);  
*Wirtz v. Quinn*, 942 N.E.2d 765, 771 (Ill. App. Ct. 2011) (designing of single subject rule was to  
prevent passage of legislation that alone would not receive enough votes for enactment); *General*  
*Motors Corp. v. Dep’t of Treasury*, 803 N.W.2d 698 (Mich. Ct. App. 2010) (single object rule is  
to ensure prevention of deceit and give public proper notice).



1 him as Town Manager would not automatically trigger such an event because the Town Code  
2 empowers the Town Clerk to undertake the duties of Town Manager on an interim basis. (PSOF  
3 ¶ 26) Similarly, the Council was free to call for an audit of Town funds at any time and would  
4 had to have separately approved such a course of action and expenditure of any public funds  
5 associated with the undertaking of such an audit, regardless of Plaintiff's employment. (PSOF ¶  
6 27)

7         There is no relationship between any action taken with regard to Mr. Abujbarah's  
8 employment status and those portions of the Trenk Motion calling for formation of a search  
9 committee to be chaired by Rodney Glassman, hiring him as an independent contractor, calling  
10 for an independent audit or expending funds in connection with such action. Likewise, no one  
11 could know from looking at the June 10<sup>th</sup> Agenda Item that a motion would be made  
12 contemplating the expenditure of taxpayer dollars in a lump sum amount equal to five months of  
13 base salary equivalent as a severance payment. Accordingly, since the June 10<sup>th</sup> Agenda makes  
14 no mention of these items and they were incorporated in a single motion passed by a majority of  
15 the Council, a fundamental purpose underlying the AOML was violated. The entire Trenk  
16 Motion should be declared null and void, *ab initio*. *Johnson v. Tempe Elementary Sch. Dist. No.*  
17 *3 Governing Bd.*, 199 Ariz. 567, 570, 20 P.3d 1148, 1151 (App. 2001); A.R.S. § 38-431.05(A).

18 **D. DEFENDANTS ENGAGED IN IMPERMISSIBLE COMMUNICATIONS IN**  
19 **VIOLATION OF THE ARIZONA OPEN MEETINGS LAW.**

20         The Court may recall that during oral argument on their motion to dismiss, Defendants  
21 seemed to take the position that in order to violate the AOML, they must be physically present in  
22 the same room at the same time and discuss a matter on a noticed agenda. That is not the law in  
23 Arizona and with good reason.

24         “Public officials may not circumvent public discussion by splintering the quorum  
25 and having separate or serial discussions.... Splintering the quorum can be done  
26 by meeting in person, by telephone, electronically, or through other means to  
27 discuss a topic that is or may be presented to the public body for a decision.”  
28 *Arizona Agency Handbook* § 7.5.2. (Ariz. Att'y Gen. 2001) Thus, even if  
communications on a particular subject between members of a public body do not  
take place at the same time or place, the communications can nonetheless  
constitute a “meeting.” *See Del Papa v. Board of Regents*, 114 Nev. 388, 393, 956

1 P. 2d 770, 774 (1998) (rejecting the argument that a meeting did not occur  
2 because the board members were not together at the same time and place);  
3 *Roberts v. City of Palmdale*, 20 Cal. Rptr. 2d 330, 337, 853 P. 2d 496, 503 (1993)  
4 (“[A] concerted plan to engage in collective deliberation on public business  
through a series of letters or telephone calls passing from one member of the  
governing body to the next would violate the open meeting requirement.”)  
(footnote omitted).

5 2005 Ariz. Op. Atty. Gen. No. I05-004, 2005 WL 1795918 (Ariz.A.G.).

6 It cannot be legitimately disputed that Trenk conceived a plan to remove Plaintiff and  
7 make his running partner, Rodney Glassman (“Glassman”), Town Manager in late March or  
8 early April 2013 and that the two began working cooperatively to accomplish that goal in April,  
9 2013. (PSOF ¶¶ 28-29) In furtherance of their conspiratorial effort, Trenk arranged for  
10 Glassman to communicate and meet with Durkin, Monachino and Spitzer -- each of whom Trenk  
11 knew were likely to be aligned with him on the issue. (PSOF ¶¶ 28-35) Trenk also  
12 communicated indirectly with Durkin, Monachino and Spitzer through intermediaries such as  
13 Mike Chutz and Eileen Wright and those closely associated with these individuals to accomplish  
14 this end. (PSOF ¶¶ 32, 35, 69) In order for Glassman to become Town Manager, however,  
15 Trenk obviously knew that it would be necessary to remove the incumbent, Mr. Abujbarah.

16 **1. Relevant and Undisputed Communications Prior to May 28, 2013**

17 Glassman confirmed that as early as April, 2013, Trenk had approached him about being  
18 Town Manager. (PSOF ¶¶ 28-29) While Defendants may contend that this was in furtherance  
19 of some generalized campaign promise to replace Mr. Abujbarah, this explanation is unworthy of  
20 credence because Trenk, Monachino and Spitzer each maintain that they did not make up their  
21 mind to remove Plaintiff as Town Manager until or just before the June 10<sup>th</sup> Meeting. (PSOF ¶  
22 78) In other words, these three Defendants have sworn that were “undecided” about being  
23 firmly committed to remove Plaintiff before June 10, 2013. Nonetheless, Trenk was  
24 communicating with Glassman all along, encouraging him to act as the intermediary with  
25 Durkin, Monachino and Spitzer to discuss and move toward achieving his agenda (i.e. removing  
26 Plaintiff and replacing him with his friend, Glassman). (PSOF ¶¶ 28-46, 52-58, 61-70) Trenk  
27 even went so far as to insure that Spitzer would participate in the June 10<sup>th</sup> Meeting because he  
28

1 knew Spitzer's vote was needed for their objective to be accomplished. (PSOF ¶¶ 66-68) There  
2 are numerous email and oral communications that demonstrate Defendants' intent as well as  
3 conduct in furtherance of their objective. (PSOF ¶¶ 28-71, 87)

4 **2. Undisputed Communications Between May 28 and June 10, 2013**

5 There were multiple communications among these Defendants and related conduct  
6 between the time Trenk, Monachino, Durkin and Spitzer appeared together at the May 28, 2013  
7 Council Meeting and the vote on the Trenk Motion at the June 10<sup>th</sup> Meeting. (PSOF ¶¶ 38-48,  
8 51-62, 66-71)

9 On June 7, 2013, Trenk and Mayor Francia met for lunch at Houston's in Scottsdale.  
10 (PSOF ¶¶ 47-48) Despite Francia's testimony during his deposition that this was the only time  
11 he met with Trenk, a secret audio-recording made by Trenk of this meeting refers to an earlier  
12 meeting between these two where Mr. Abujbarah's status of Town Manager was discussed.<sup>5</sup>

13 (PSOF ¶¶ 49-50) At the June 7, 2013 meeting between Trenk and Francia, the following  
14 statements were made:

15 Francia: "... he's been the best of all town managers we've had... to get  
16 rid of him now doesn't feel right to me. Morally, ethically, in terms of  
17 energy the town, what I know will happen if that what all transpires, it will  
18 plunge the community in to a place neither you nor I want it to go and,  
19 quite frankly, although I can write until my fingers bleed, I don't think I'm  
20 going to be persuasive enough to stop what's coming. And that is very  
21 destructive to you and to the town. When I look at that, I say, now how  
22 can this possibly be beneficial to the community?... You're asking me to ...  
23 what I think you're asking me is to possibly join in something that is ... has  
24 to do with his removal.

25 Trenk: His eventual removal.

26 Francia: Well ....

27 Trenk: I understand that you wouldn't vote for his removal on the spot. I  
28 can appreciate that. I'm not telling you that I'm going to do this. But I'm

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<sup>5</sup>Plaintiff has filed with the Court two CD's containing the audio-recordings of the June 7, 2013 and June 9, 2013 meetings that were produced by Defendants and made and authenticated by Defendant Trenk. All statements made by Francia and Trenk are admissible pursuant to Rules 801(d)(2) and 901(a) & (b)(1), (5) of the Arizona Rules of Evidence. No audio-recording was produced of the earlier meeting between Trenk and Francia referenced in recording of the June 7<sup>th</sup> meeting and Plaintiff has no information if one exists.

1 telling you that if given the choice ....

2 Francia: It's what you would do for a middle ground ....

3 Trenk: Right. Given the choice between the status quo and removal on the  
4 spot. ... ***I'm choosing removal on the spot.***... "I can't do it without you. I  
5 cannot be a uniter without you. There is no unity if I'm the leader of a 4/3  
6 vote. Especially on an issue as divisive as this. And so, that's what I want  
7 to talk to you about. This is your opportunity, I believe, first of all, to  
8 make those, there are people in town, and I wouldn't want to say this to  
9 you because I don't want to hurt your feelings, there are people in town  
10 who don't like you, who think you are a weak leader, who think you have  
11 been complicit in letting Usama run roughshod over the Town. This is  
12 your opportunity to change that perception, to stand together with me to  
13 make all parties here happy..." (emphasis added)

14 \* \* \* \* \*

15 Trenk: "I don't think the waters have calmed down at all. When that was  
16 my intent and ***when we met for lunch last week at this - I think it was***  
17 ***actually this exact same table*** - I thought, I thought I had relayed that to  
18 you and if, ***if you kept our conversation in confidence, I am happy about***  
19 ***that.*** If you didn't... (emphasis added)

20 Francia: Not even my wife knows. (PSOF ¶¶ 47-48)

### 21 3. Trenk's Meeting with Plaintiff on June 9, 2013

22 On June 9, 2013, Trenk met with Plaintiff and another individual, Ray Fontaine. (PSOF  
23 ¶ 59-60) Trenk also made a secret audio-recording of this meeting.<sup>6</sup> (*Id.*) In that meeting,  
24 Trenk stated that Plaintiff needed to cease his relationship and communications with Don  
25 Sorchych, the owner and editor of the *Sonoran News* newspaper:

26 Trenk: "I came to see you in April, we had a nice conversation and then  
27 for the next six weeks the rhetoric continued. ***I know that you claim that***  
28 ***you have no control over Don Sorchych but he certainly thinks that he***  
***has control over you.*** Okay? Take it for what it is. This is not just my  
perception, this is a public perception. ***For that rhetoric to continue,***  
***undermines our ability to work together.*** Period. I said it at the podium  
when I called for this review tomorrow night and I'm saying it to your face  
and looking you man to man and looking you in the eye. It undermines  
our ability to work together. . . . There can't ... this incestuous  
relationship between the local media and uh ... the town hall is not good  
for the Town. . . . What does that mean? It could take on any number of  
forms but I'm gonna be perfectly blunt with you, ***it won't satisfy my***  
***objectives for you to fill out your contract til August 14 with no change.***"  
(emphasis added)

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<sup>6</sup> *Id.*

1 (PSOF ¶60).

2 **4. Additional Relevant and Undisputed Communications Between May 31 and**  
3 **June 10, 2013**

4 During the time that the above meetings were taking place and recordings were being  
5 made, Defendants were communicating among themselves, and Trenk with Glassman. It is  
6 undisputed that the following relevant communications and events occurred:

7 • On May 31, 2013, Spitzer received an email from Trenk regarding Spitzer's plans  
8 to be in New York from June 4<sup>th</sup> to 16<sup>th</sup> when the vote was scheduled to occur. Trenk offered his  
9 aunt's residence, as well as one of his family's two offices at the Wall Street Pier and at 34<sup>th</sup>  
10 Street for Spitzer to telephone in and vote. "Let me know – we obviously NEED your vote."  
11 (PSOF ¶¶ 66-68). Trenk and Spitzer discussed this again on June 3, 2013. (*Id.*) While it was  
12 Spitzer's plan to participate in the June 10, 2013 meeting telephonically, after further  
13 communications, he suddenly decided to fly to Arizona to personally attend the June 10<sup>th</sup>  
14 meeting. (*Id.*) He then flew back to New York on June 11<sup>th</sup>. (*Id.*)

15 • On June 3, 2013, Glassman emailed Trenk, stating "Per your request, attached is  
16 the draft we discussed. You would, print 8 copies, have someone make the motion and second  
17 the motion, and then once its made and seconded, pass them out the all of the Mayor and Council  
18 members and the Town Clerk. That's all you need to do if you wanted to. The motion would be  
19 sound, articulated, and move the issues you were wanting to drive." (*Sic*) (PSOF ¶ 39)

20 • Glassman continued, "You would want to have the motion outline the whole  
21 process because this may be the only chance he gives you to steer the process. Once you make  
22 this, pass it, and lock it down, the tracks are set so it's just a matter of the train driving down it.  
23 Anything less and you leave him in the driver's seat. Are you Vice Mayor yet?" (PSOF ¶ 40)

24 • On June 3, 2013, Glassman emailed Trenk and asked "What are the chances of  
25 you getting two other guys to make and second the motion with NO discussion?" (PSOF ¶ 41)

26 • On June 4, 2013, Glassman emailed Trenk again, stating, "Remember. There's 7  
27 which means you can talk to any 2. You're the vice mayor. You'll get it done. Most  
28 importantly, that motion, when sitting in their hands and read completely, will resonate. We  
running Friday?" (PSOF ¶ 42)

29 • On June 7, 2013, Adam Trenk emailed Rodney Glassman attaching a June 10  
30 Motion (Bates RG 0121) that had been sent to the Town Attorney for approval, and then told  
31 Glassman, "Once on the agenda for the 12, I leave it to you to get Reg to nominate you." (*Sic*)  
32 (PSOF ¶ 52)

33 • Glassman responded, "Are you going to talk to him first? At what point do you  
34 want me to visit with him? Does he have 4 votes? Should the three of us visit?" ((PSOF ¶ 53)

35 • Trenk responded, "***He will have the votes*** – you should contact him, Charlie, and  
36 Mike Durkin – lobby for yourself. You may even wait until Tuesday and reach out to the mayor  
37 and the other council people, nothing wrong with that." (emphasis added) (PSOF ¶ 54)

1 • Glassman, asked, “So is your point get my 3 other votes NOW? Should I reach  
2 out to Charlie and Mike *even before you fire the manager?*” (emphasis added) (PSOF ¶ 55)

3 • Trenk continued the June 7<sup>th</sup> discussion, “Those two yes – no sense in waiting  
4 there – be sure to emphasize you are just the INTERIM town manager, and the importance of  
5 that position being filled by an outsider to get an accurate assessment of town operations. If you  
6 want full time permanent you will have six months to make the case, and you will be controlling  
7 the process so don’t even discuss that now. On Tuesday you reach out to McGuire, Bunch, and  
8 the Mayor – saying merely, “I heard this job opened up, and would be interested” and send them  
9 your resume with a cover letter about how fucking awesome you would be at being the interim.  
10 Good?” (PSOF ¶ 56)

11 • Glassman responded, “If you have your 4 I wonder if there is value in lobbying  
12 everyone. What we need is one champion with four votes. Too much process for this interim  
13 thing could only muddy it.” (PSOF ¶ 57)

### 14 **5. Other Relevant and Undisputed Facts and Communications**

15 Around this same time, Glassman was circulating a draft of an employment agreement  
16 that he wanted to have approved by the Town Council once he was made interim Town  
17 Manager. (PSOF ¶ 45) Most telling is the June 7<sup>th</sup> email in which Trenk assured Glassman that  
18 Monachino had the 4 votes necessary to confirm Glassman’s appointment as interim Town  
19 Manager even before Plaintiff had been removed. (PSOF ¶ 54) As pre-ordained, Glassman  
20 was formally appointed as interim Town Manager on June 24, 2013. (PSOF ¶ 75) While  
21 Defendants may attempt to question the relevance of these communications they are admissible  
22 to show intent and conduct in furtherance of the plan agreed upon by Trenk, Durkin, Monachino  
23 and Spitzer outside a public meeting.<sup>7</sup>

24 There is more than the necessary quantum of evidence showing an unlawful splintering of

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25 <sup>7</sup>Arizona Rules of Evidence, Rules 404(b), 801(d)(1)(A) and 801(d)(2); *State v. Garza*, 216 Ariz.  
26 56, 66, 163 P.3d 1006, 1016 (Ariz. 2007)(tape recorded telephone conversation admitted as a  
27 party admission under Rule 801(d)(2)(A) and holding that “[p]arty admissions require no  
28 external indicia of reliability”); *State v. Martin*, 74 Ariz. 145, 149, 245 P.2d 411,  
413 (Ariz.1952)(“The cases uniformly hold that testimony tending to show a continuing plan or  
system of which prior or subsequent transactions directly involved was a part is competent as  
bearing on the issue of intent.”); *State v. Ashelman*, 137 Ariz. 460, 464, 671 P.2d 901,  
905 (Ariz.1983)(holding evidence of subsequent conduct admissible under Rule 404(b) to show,  
*inter alia*, motive, opportunity, intent or plan); *State v. Nightwine*, 137 Ariz. 499, 502, 671 P.2d  
1289, 1292 (App.,1983)(admitting intercepted telephone calls of co-conspirators despite claims  
conspiracy had ended because conversations referred to the object of the conspiracy); *see also*  
*Henry v. County of Shasta*, 132 F.3d 512, 519 (9th Cir.1997)(“post-event evidence is not only  
admissible for purposes of proving the existence of a municipal defendant's policy or custom, but  
is highly probative with respect to that inquiry”).

1 a quorum of the Town Council involving discussion, consensus building and deliberation over  
2 issues embodied in the Trenk Motion outside the public meeting that occurred on June 10, 2013.  
3 Based on the facts that are not in dispute, it is obvious that when Trenk, Spitzer, Monachino and  
4 Durkin walked into the Cave Creek Town Hall on June 10, 2013 the objectives of the Trenk  
5 Motion had been thoroughly discussed and its passage secured. The only thing Trenk had been  
6 unsuccessful in securing in advance was Franica's support (as well as that of Bunch and  
7 McGuire who undoubtedly would have followed Francia) despite at least two attempts to do so –  
8 one of which is shockingly clear on an audio-recording made by Trenk himself. It is hard to  
9 imagine more obvious violations of the letter and spirit of the AMOL short of a video-recording  
10 catching one or more of the Defendants on film while engaging in AOML violations.

### 11 CONCLUSION

12 For the foregoing reasons, Plaintiff is entitled to summary judgment against the  
13 Defendants finding violations of the Arizona Open Meetings Law, A.R.S. §38-431 *et seq.*;  
14 declaring the Trenk Motion null and void, *ab initio*; and that a writ of mandamus issue  
15 compelling Defendants to comply with their duties under The Town Code of Cave Creek, the  
16 Employment Agreement dated August 6, 2012 and all applicable state laws. Plaintiff further  
17 requests that the Court issue an order requiring Defendants to refrain from acting in excess of  
18 their authority and permanently enjoining Defendants from further violating the the Arizona  
19 Open Meetings Law, A.R.S. §38-431 *et seq.* Plaintiff also respectfully requests that the Court  
20 order Defendants to pay Plaintiff's attorneys' fees and costs for bringing this action pursuant to  
21 A.R.S. § 12-2030 and Rule 4 of the Rules of Procedure for Special Actions. Plaintiff further  
22 requests that the Court award such other and further relief as is just and proper.

23 RESPECTFULLY SUBMITTED this 1st day of August, 2014.

24 MARTIN & BONNETT, P.L.L.C.

25  
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**CERTIFICATE OF SERVICE**

**ORIGINAL of the foregoing e-filed on  
the 1st day of August 2014, with the  
Clerk of the Superior Court  
COPY of the foregoing Hand-delivered  
this 1st day of August 2014 to:**

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