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Plaintiff, *in propria persona*

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

DANIEL ARTHUR GUTENKAUF, an unmarried man

Plaintiff,

Vs.

THE CITY OF TEMPE, a municipal corporation and body politic, et al.:

Defendants.

Civil Action No. 2:10-cv-02129-FJM

PLAINTIFF'S RESPONSE TO TEMPE DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

(Oral Argument Requested)

Plaintiff hereby submits his Response to Rule 12 (b)(6) Motion to Dismiss by Defendants Hugh Hallman, Susan Hallman, Joel Navarro, Mark W. Mitchell, Debra Mitchell, P. Ben Arredondo, Ruthann Albrighton-Arredondo, Shana Ellis, Richard Antonio, Onnie Shekerjian, Brian Hart Shekerjian, Corey D. Woods, Jan Hort, Gerald Hort, Charlie W. Meyer, Deborah W. Meyer, Thomas Ryff, Rose Ann Ryff Noah Johnson, Jennifer Johnson, Aaron Colombe, Susan Colombe, Bianca Gallego, Kerby Rapp, Lillian Rapp, Shelly Seyler, Louraine C. Arkfeld, Mary Jo Barsetti, David E. Nerland, Nancy Rodriguez, David J. McAllister, Jaquelina McAllister, and Michael Greene (collectively, the "Tempe Defendants"). Plaintiff's Response to MTD is supported by exhibits, and the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. RELEVANT FACTS

II. LEGAL STANDARD GOVERNING MOTIONS TO DISMISS

The Tempe Defendants assert that Plaintiff has failed to state a claim upon which relief can be granted, pursuant to **Rule 12 (b)(6), F. R. Civ. P.** Federal courts construe *pro se* complaints liberally and thus, *pro se* complaints are held to less rigorous standards than formal pleadings drafted by lawyers. *Haines v. Kerner*. 404 U.S. 519, 92 S.Ct. 594, 30 L. Ed. 2d 652. A motion to dismiss raising the issue at the initial pleading stage, however *is not favored* and *sua sponte* dismissals for failure to state a claim are *strongly disfavored. Acker v. Chevira*, 188 Ariz. 252, 934 P.2d 816 (App. 1997). In considering such a motion, all material allegations of the complaint are taken as true and read in the light most favorable to the plaintiff. *Fidelity Security Life Insurance Company v. State of Arizona,* 191 Ariz. 222, 954 P.2d 580 (1998) A motion to dismiss for failure to state a claim admits the truth of facts alleged, for purposes of the motion. *State v. Superior Court of Maricopa County* (1979) 123 Ariz. 324.

The motion to dismiss *should not be granted* unless it appears that the plaintiff would not be entitled to relief under any state of facts susceptible of proof under the pleadings. *Doe ex rel. Doe v. State of Arizona,* 200 Ariz. 174, 24 P3d 1269 (2001). *San Manuel Copper Corp. v. Redmond* (App. 1968) 8 Ariz. App. 214, 445 P.2d 162. If the deficiency in the Complaint is one that can be cured by further pleading, *the motion should be denied* or, if granted, the plaintiff should be given leave to amend. *Sun World Corp. v. Pennysaver Inc.* 130 Ariz. 585, 637 P.2d 1088 (App. 1981) *In re Cassidy's Estate*, 77 Ariz. 228, 270 P.2d 1079 (1954). Pro Se pleadings are to be liberally construed, particularly where civil rights claims are involved. *Christensen v. C.I.R.*, 786 F.2d 1382, 1384-85 (9th Cir. 1986). Dismissal is not appropriate in this case because Plaintiff's complaint has stated facts sufficient to support cognizable legal theories.

III. PLAINTIFF HAS ALLEGED A PROPER CAUSE OF ACTION UNDER 42 U.S.C. SEC. 1983 AGAINST THE TEMPE DEFENDANTS

To sustain an action under section 1983, a plaintiff must show (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprived the plaintiff of a constitutional right. *Rinker v. Napa County,* 831 F.2d 829, 831 (9th Cir. 1987) (citing *Parratt v. Taylor*, 451 U.S. 527, 535, (1981). Officer Colombe, Aide Gallego, Judge Barsetti were acting under color of enforcing **A.R.S. 28-701 A.**

A plaintiff may bring an action under 42 U.S.C sec. 1983 to redress violations of his "rights, privileges, or immunities secured by the Constitution and [federal] laws" by a person or entity, including a municipality, acting under color of State law. *Monell v. Dep't of Social Serv.* 436 U. S. 658, 690-95. (1978) Plaintiff has a cause of action for malicious prosecution under sec. 1983. In order to prevail on a sec. 1983 claim of malicious prosecution, a plaintiff "must show that the defendants prosecuted [him] with malice and without probable cause and that they did so for the purpose of denying [him] equal protection or another specific constitutional right." *Freeman v. City of Santa Ana,* 68 F.3d 1180, 1189 (9th Cir. 1995) In this case, Defendants prosecuted him without probable cause for the purpose of denying him his right to property and his right to a fair trial before depriving him of that property, protected under the 14th Amendment. Malicious prosecution actions are not limited to suits against prosecutors but may be brought, as here, against other persons who have wrongfully caused the charges to be filed. *Galbraith v. County of Santa Clara,* 307 F. 3d 1119, 1126-27 (9th Cir. 2002)

Section 1983 imposes liability upon municipalities for constitutional deprivations resulting from actions taken pursuant to government policy or custom. *Monell v. Dep't of Social Services* 426 U.S. 658, 694 (1978) In this circuit, a claim of municipal liability under section 1983 is sufficient to withstand a motion to dismiss "even if the claim is based on nothing more than a bare allegation that the individual officers' conduct conformed to official policy, custom,

or practice." *Shah v. County of Los Angeles* 797 F.2d 743, 747 (9th Cir 1986). In civil rights cases where plaintiff appears pro se, the court must construe the pleadings liberally and must afford the plaintiff the benefit of any doubt *Bretz v. Kelman,* 773 F.2d 1026, 1027, n.1 (9th Cir. 1985 (en banc) A pro se litgant must be given leave to amend his or her complaint, *Noll v. Carlson,* 809 F.2d 1446, 1447 (9th Cir. 1987). And before dismissing a pro se civil rights complaint for failure to state a claim, the district court must give the plaintiff a statement of the complaint's deficiencies *Eldridge v. Block,* 832 F.2d 1132 at 1136 (9th Cir. 1987)

A. Plaintiff's 1983 claim can be based on violation of 14th Amendment right and a claim for malicious prosecution

Tempe Defendants argue that Plaintiff's 1983 claim cannot be based upon a violation of his Fourth Amendment Rights. In *Awabdy v. City of Adelanto*, 368 F.3d 1062 (9th Cir. 2004) the court stated

> "We do not interpret *Albright* as establishing a rule that Fourth Amendment violations are the only proper grounds for malicious prosecution claims under sec. 1983. In decisions subsequent to *Albright*, we have continued to follow our earlier precedents establishing that malicious prosecutions with the intent to deprive a person of equal protection of the law or otherwise to subject a person to a denial for constitutional rights is cognizable under sec. 1983".
> *Poppell v. City of San Diego*, 149 F. 3d 851, 961 (9th Cir. 1998)

B. The Sixth Amendment Does Apply to Civil Traffic Hearings

Tempe Defendants allege that Plaintiff was not subject to criminal prosecution, therefore, he had no Sixth Amendment right to confront Officer Colombe at the civil traffic hearing. The U.S. Supreme Court in *Halper* held that the statutory classification of an action as civil or criminal must be assessed in light of the sanction or fine. "The labels affixed whether to the proceeding or to the relief imposed… are not controlling and will not be allowed to defeat the applicable protections of federal constitutional law" *United States v. Halper,* 490 U.S. 435, 448 (1989), citing *Hicks v. Feiock, 485* U.S, 624, 631 (1988).

"[I]n determining whether a particular civil sanction constitutes criminal

> punishment, it is the purposes actually served by the sanction in question, not the underlying nature of the proceeding giving rise to the sanction, that must be evaluated." Halper, at 447, FN7

"Retribution and deterrence are not legitimate nonpunitive governmental objectives". *Bell v. Wolfish,* 441 U.S. 520, 539, n. 20 (1979). "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment." *Halper*, at 448.

Whether a penalty is criminal or civil in nature was addressed in *Hudson v. United States*, 522 U.S. 93 (1997) and *Kansas v. Hendricks*, 521 U.S. 346 (1997). *Hendrix* stated that"we will reject the legislature's manifest intent only where a party challenging the statue provides the clearest proof that the statutory scheme is so punitive either in purpose or effect as to negate [the legislature's] intention to deem it civil…'.*Hendrix*, 521 U.S. at 361. The Supreme Court noted in *Harmelin v. Michigan* 501 U.S.957, 978 n.9 (1991) that disproportionately high fines "are certainly punishments". As discussed in depth in Plaintiff's Response to Redflex Defendants" Motion to Dismiss (pgs. 8, 9, &10), Arizona's penalty scheme is disproportionately high in monetary terms and with points against driver's license and insurance. Thus, it is so punitive in effect as to negate the "civil" designation, as cited in *Hendrix*, supra. And as the *Shavitz* court correctly noted, "[e]ven though the ordinance may have a goal beyond the traditional aims of punishment, Defendants are nevertheless using a tool of deterrence-monetary penalties to reach that goal." *Shavitz,* 270 F.Supp. 2d at 715. "This factor supports Balban's contention that the ordinance imposes a criminal sanction." It also supports Plaintiff's contention that Tempe's scheme negates the Legislature's intent to deem it "civil".The Tempe traffic sanctions clearly promote the traditional aims of punishment and retribution.

Crawford v. Washington 541 U.S. 36 (2004). requires that, with limited exception, witness testimony against a defendant is inadmissible unless the witness appears at trial. As

shown on page 2 of 4 in the FAQ for civil traffic cases in Gilbert, AZ, "At a civil traffic hearing, the state's witness(es), *usually the officer who cited you,* will attempt to prove that you committed the civil traffic violation on your citation." (**Exhibit. A,** attached) Officer Colombe was subpoenaed to testify, (**Ex G,** 1st Am. Comp.) but Gallego appeared. (See **Ex. B**, attached)

A subpoena is the medium for compelling the attendance of a witness, and *it is a process*, in the name of the court or judge, *carrying with it a command dignified by the sanction of law. Ingalls v. Superior court in and for Pima County*, 573 P. 2d 522, 117 Ariz. 443. (italics added) The only basis which a witness would have for justifying refusal to answer a court ordered appearance would be a matter of statutory or case law. *Ingalls*, Id. Tempe Defendants cite no statute or case law justifying Colombe's contempt of court order. Colombe's attendance as a witness for the citation he issued to Plaintiff was clearly a process that was due under the law, and Plaintiff was denied that right to confront the witness who made the false certification. In the case of *State of Arizona v. A, Melvin McDonald,* LC2006042175, Judge Bruce R. Cohen Ruled that:

> "Central to the adversarial process is the right for a party to confront the evidence presented against that party. There is nothing more fundamental than this right and it is questionable, at best, for a substitute person to testify as to information and evidence gathered by another. For there also to be a lack of disclosure of the fact that the testifying person lacked personal knowledge must be deemed fundamental error since it goes to the heart of the "integrity of the system." (See **Exhibit C**, attached hereto)

The Defendants right to confront the state's witnesses may not be denied at trials. *Crawford v. Washington* 541 U.S. 36 (2004). requires that, with limited exception, witness testimony against a defendant is inadmissible unless the witness appears at trial.[1]

1. Plaintiff was unable to confront and cross-examine Redflex employees, whose exhibits were prepared only after citation was issued and it was decided that the case would be litigated. State's exhibits were "prepared for litigation" and not in the regular course of business, making them inadmissible as business records, and subject to cross-examination as testimonial statements as described in *Crawford* and *Melendez-Diaz.*

"[A]bsent a showing that the [custodial or other witness} is unavailable to testify at trial and that defendants had a prior opportunity to cross-examine [her], the defendants here are entitled to" 'be confronted with'" the testifying witness at trial." (See *Melendez-Diaz,* 129 S.Ct at p. 2532, and *Crawford, supra,* 541 U.S. at p. 54)[2]

Greene v. McElroy, 360 U.S. 474, 496-497 (1959) is particularly pertinent here.

> "We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment...This Court has been zealous to protect these rights from erosion. It has spoken out *not only in criminal cases,...but also in all types of cases where administrative....actions were under scrutiny.*"
> Cited in *Goldberg v. Kelly* 397 U.S. 254 at 270 (*italics* added)

C. Plaintiff Was Not Provided Procedural Due Process by Tempe Defendants

Tempe Defendants' citation of *Hudson v. Palmer*, 468 U.S. 517, 533 (1984) is off point. and lacks merit in the instant case, because the holding in *Hudson* applied to only to *a single unauthorized, random* intentional deprivation of property by a state employee. In the instant case, the violation of procedural requirements of the Due Process Clause was an *authorized* intentional deprivation of Plaintiff's property, authorized by the Redflex/DPSand Redflex/COT procedures manual, **Ex. K** and **Ex. L,** 1st Amend. Compl. As stated in *Hudson,*

> "Two Terms ago, we reaffirmed our holding in *Parratt* in *Logan v. Zimmerman Brush Co.*,455 U. S. 422 (1982), in the course of holding that the postdeprivation remedies do not satisfy due process where a deprivation of property is caused by conduct pursuant to established state procedure, rather than random and unauthorized action." *Hudson v. Palmer*, 468 U.S. 517, at 532. Also see fn 13 at 532.

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2. **A.R.S. 12-2211** requires the attendance of a witness who is summoned. **See Exhibit D,** attached hereto). In the instant case, the traffic court's subpoena power was negated by Officer Colombe's contempt for the court order. Plaintiff had no opportunity to confront the officer/complainant who issued the perjured traffic ticket. On its website, the Maricopa County Superior Court lists the Rights of Civil Traffic Defendants, which includes the right to have subpoenas issued by the court to compel the attendance of witnesses and the right to question witnesses testifying against you and cross-examine them as to the truthfulness of their testimony. (See **Exhibit E,** attached hereto) (*See* **Exhibit F,** attached, The Truth About Cars article "California; Another Judge Discards Red Light Camera Evidence", citing *Menendez v. Diaz* 129 S.Ct.2527 (2009) and the Sixth Amendment right to confront "testimonial statements" of custodian of records for photo enforcement vendor.)

Parratt "was not designed to reach…a situation where the deprivation is the result of an established state procedure." 455 U.S., at 436. Clearly, it cannot be denied that the use of a "gender match" as a basis for the State of Arizona to issue a traffic citation is "an established state procedure". And upon failure to reach a meeting of the minds with Tempe Risk Mgr. Mr. McAllister, Plaintiff had no further State postdeprivation remedy to collect the $699 cost of appeal. As Judge Eartha K. Washington ruled on Plaintiff's appeal, the procedure to issue the traffic ticket violated State law. Clearly, Plaintiff has demonstrated a damage, both in his property and his procedural Due Process rights. In spite of Plaintiff's opportunity to appeal Judge Barsetti's decision, and the payment refunded to Plaintiff, he has not had an "opportunity to be heard" on the uncompensated lossof his property due to the malicious prosecution by the City of Tempe, which was initiated without probable cause. Plaintiff is entitled to further Due Process or at minimum, a cause of action for Malicious Prosecution.

A. Phaintiff Has Stated a Valid Substantive Due Process Claim Against Tempe Defendants

Tempe Defendants deceptively emphasize the "liberty" interest under Substantive Due Process instead of the injury to Plaintiff's "property", and they attempt to minimize a deliberate pattern perjured traffic tickets as "erroneously" certified traffic tickets. Behavior that "shocks the conscience" as required to state civil rights claim based on substantive due process violation against police officer is outrageous behavior, *or behavior that offends the sense of justice.* *Fagan v. City of Vineland,* 804 F. Supp. 591. "Justice" means that end which ought to be reached[3]

3. Denying Plaintiff right to confront complaining officer, who issued perjured traffic ticket, in violation of state law, and who took no oath to Constitution, who illegally collected a paycheck, whose office was legally "vacant" and who ignored court ordered subpoena, in "deliberate indifference" to Plaintiff's constitutional right to a fair trial and right to confront and cross-examine witness, deeply offends sense of justice. That Plaintiff was found "responsible" by judge who knew she had no jurisdiction and ruled against him without preponderance of evidence and shifted burden of proof, deeply offends sense of justice. And Plaintiff suffered$699 loss to get justice on appeal.

in a case by regular administration of principles of law involved as applied to the facts. *City of Sioux Falls v. Marshall*, 204 N.W. 999.

IV. PLAINTIFF STATES A VIABLE CLAIM FOR CONSPIRACY TO DEPRIVE HIM OF CONSTITUTIONAL RIGHTS

Tempe Defendants reference Count XI of 1st Amended Complaint and inappropriately cite 42 USC 1985(2). Plaintiff has made no reference to section 1985(2), which deals with intent to deny any citizen of the equal protection of the laws, and allegations that the conspiracy was motivated by racial or some other class-based discrimination. See *Laboy v. Zuley*, 747 1284,1288 (N.D. Ill. 1990) Tempe Defendants' citation of 1985(2) is misleading, disingenuous and a smoke screen, and their citation of *Rutledge v. Arizona Bd. Of Regents* 859 F.2d 732, is inapposite.

In stating a claim for conspiracy to violate one's constitutional rights under section 1983 appellants must state specific facts to support the existence of the alleged conspiracy. See *Burns v. County of King* 883 F.2d 819, 821 (9th Cir. 1989); To plead civil conspiracy claim with sufficient particularity, the plaintiff must allege with sufficient factual particularity that the Defendants reached some explicit or tacit understanding. *Ares Funding L.L. C. v MA Maricopa, L.L. C* 602 F. Supp. 2d 1144. Plaintiff has alleged an agreement between the City of Tempe and Redflex to use a procedures manual which instructs police officer to issue citations based on "gender match", instead of positively identifying the driver, based on "reasonable grounds", as required under **A.R.S. 28-1561.** Public officials may not violate plain terms of statute because they believe better results will be attained by doing so, and if they knowingly violate the law, regardless of their intentions, they and their bondsmen are liable. *Button v. Nevin* 36 P 2d 568, 44 Ariz. 247. Use of the Redflex procedures manual (**Exhibit L,** 1st Am. Compl.) is evidence of the agreement between COT employees, Redflex employees, and State Defendants, and AAA Photo Safety Defendants to conspire to deprive defendant drivers, including Plaintiff, of property, in violation of the Fourteenth Amendment. Defendants have agreed to conduct a sham court

proceeding to rule against defendant drivers in spite of all legal arguments, using the CAM training as a guide, to result in a predetermined outcome. Tempe Defendants refuse to disclose those training documents in violation of public records act **A.R.S. 39-121** and in violation of **A.R.S.13-2407,** Tampering with a public record. Plaintiff has stated a valid claim of conspiracy to deprive rights under section 1983, and 14th Amendment right to fair trial in **paras. 184, 185.**

V. PLAINTIFF HAS STATED A VIABLE CLAIM UNDER CIVIL RICO ACT

Plaintiff has alleged a "pattern of racketeering activity", which requires at least two acts of activity. (See **Para. 296,** 1st Am. Comp.) He has shown (1) the racketeering predicates are related (See **Para. 339, 317, 318)** and (2) that the predicates "amount to or pose a threat of continued criminal activity". (See **para. 296, 338, 339**) Plaintiff has alleged the elements for violation of mail fraud by showing that (1) the defendants formed a scheme or artifice to defraud (See **paras. 266, 267, 294, 322, 363, 364**, and **Ex K,** 1st Am. Comp.) He has shown defendants used the United States mails or caused the use of the United States mails in furtherance of the scheme (See **paras. 266, 267, 294, 322, 363**) and (3) the defendants did so with intent to deceive of defraud" (See **para. 260**). Plaintiff has adequately alleged all elements under civil RICO.

Tempe Defendants allege that Plaintiff fails to state his claim against them with specificity required in any fraud claim. Section 904 (a) of RICO, 84 Stat. 947 directs that "[t]he provisions of this Title shall be liberally construed to effectuate its remedial purposes." *U. S. v. Turkette*, 452 U.S.576, 587 (1981) Fed. R. Civ. P. 8(a)(2) requires only notice pleading, and its liberal pleading standard only requires that "the averments of the complaint sufficiently establish a basis for judgment against the defendant." See *Yamaguchi v. United States Dep't of the Air Force* 109 F.3d 1475, 1481 (9th Cir. 1997). A court may deny a motion to dismiss for failure to plead with sufficient particularity where a plaintiff represents that he or she cannot plead with specificity because the facts underlying the claim are particularly within the defendant's knowledge, and if

granted an opportunity to take discovery, will file an amended complaint and cure any pleading defect which revolves around the failure to plead with specificity.[4] See Fed. R. Civ. P. Rule 15(a); *Eaby v. Richmond* 561 F. Supp. 231 (E.D. Pa. 1983)

Tempe Defendants claim Plaintiff fails to allege specific intent to deceive or defraud, but see **para. 260.** "Fraudulent intent is shown if a representation is made with reckless indifference to its truth or falsity". *United States v. Cusino,* 694 F.2d 185, 187 (9th Cir. 1982) cert. denied 461 U.S. 932. See also *United States v .Federbush* 625 F.2d 246, 255 (9th Cir. 1980) Officer Colombe demonstrated reckless indifference to the truth or falsity of his certification of the traffic ticket, since, as Gallego testified on 2-17-2008, there was no driver's license comparison before the ticket was issued and no driver's license available on the day of trial. And there is a pattern of reckless indifference about truth or falsity of traffic tickets certified by Tempe P.D. and sent through mail by Redflex, and two predicate acts of mail fraud in 10 year period. (See ticket for Joseph Michael Nuccio, **Ex P,** Plaint. Resp. Redflex Def. MTD) "The instruction correctly stated the law in this Circuit that reckless disregard for truth or falsity is sufficient to sustain a mail fraud conviction ." *United States v. Schaflander,* 719 F.2d 1024, 1027 (9th Cir. 1983) cited in *United States v. Gay*, 967 F.2d 322. (9th Cir. 1992)

Congress has given a broad definition to RICO "enterprise" and this definition makes no exception for public entities such as the judiciary. The courts have recognized a municipal police department and municipal traffic courts as "enterprises" within the meaning of RICO. See *U.S. v Vignola* 484 F. Supp. 1091, 1096 (1979) See *United States v. Sutherland,*656 F.2d 1181 (1981)

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4. Plaintiff needs discovery of documents and emails from both Redflex and City of Tempe, to determine if Officer Colombe attached his own computer signature to the ticket, or if a Redflex employee attached Colombes' electronic signature. (See Harper testimony, **Ex F**, Pl. Resp. MTD by AAA Photo Safety) If the latter occurred, that is evidence of the fraudulent, false representation, needed to prove the elements of Plaintiff's allegations mail fraud and wire fraud.

United States v. Angelilli, 660 F.2d 23 (1981) (participating in affairs of Civil Court through a pattern of racketeering sec 1962 (c). *U.S. v Oaoud,* 777 F.2d 1105 (A state or local government office or organization may be properly charged as a RICO "enterprise.") *Pelfresne v. Village of Rosemont,* 22 F.Supp.2d 756 (Office of the mayor of a village and defendants associated therewith qualified as "enterprise" under RICO. In *Hoekstra v. City of Arnold* 2009 WL 259857 (E.D. Mo.), the RICO claim against the Police Chief remained because he was sued in his individual capacity (as is Defendant Chief Ryff in this case).

A RICO conspiracy agreement consists of a defendant agreeing to participate in the conduct of an enterprise's affairs with the knowledge and intent that two predicate acts be committed. See *U.S. v. Tille*, 729 F.2d 615 (9th Cir 1984) See *U.S. v. Brooklier,* 685 F.2d 1208 (9th Cir. 1982) Plaintiff has shown injury to his "business or property" within meaning of 1964 (c) and has standing to pursue RICO claims. Under statute defining scheme or artifice to defraud as including scheme to deprive another of intangible right of honest services, "honest services" can include honest and impartial government. See *U.S. v. Brumley* 116 F.3d 728 (5th Cir. 1997)

VI. DEFENDANTS BARSETTI, ARKDFELD, GALLEGO AND RODRIGUEZ ARE NOT ENTITLED TO JUDICIAL IMMUNITY

Immunity afforded judges and prosecutors is not absolute. *Ashelman v. Pope,793* F. 2d 1072 at 1075 (9th Cir. 1986).A judge lacks immunity where he acts in the "clear absence of all jurisdiction," *Bradley v. Fisher*, 80 U.S. (13Wall) 335 at 351, or performs an act that is not "judicial" in nature. *Stump v. Sparkman* 435 U.S. 349, 360 (1978) *Ashelman v. Pope,793* F. 2d 1072 at 1075 (9th Cir. 1986). To determine if a given action is judicial, courts focus on whether (1) the precise act is a normal judicial function; (2) the events occurred in the judge's chambers; (3) the controversy centered around a case then pending before the judge; and (4) the events at issue arose directly and immediately out of a confrontation with *the judge in his or her official capacity. See e.g. Dykes v. Hosemann* 776 F. 2d 942, 946 (11th Cir. 1985 (citations omitted)

A judge's private, prior agreement to decide in favor of one party is not a "judicial act" for purposes of judicial immunity within the meaning of the *Stump* definition. See *Beard v. Udall*, 648 F.2d 1264, 1269 (9th Cir. 1981). As the 9th Circuit acknowledged in *Ashelman,* Id., 1078, the Supreme Court has not clearly rejected the analysis of the prior decisions in *Rankin* and *Beard* conspiring to predetermine the outcome of a proceeding. And participating in a RICO enterprise is not a "judicial act".[5]

Requirements of subject matter and personal jurisdiction are conjunctional, as both must be met before a court has authority to adjudicate rights of parties to a dispute. If a court lacks jurisdiction over a party, then it lacks all jurisdiction to adjudicate the party's rights, whether or not the subject matter is properly before it. A judge who acts in the clear and complete absence of personal jurisdiction loses his judicial immunity. When a judge knows that he lacks jurisdiction or acts in the face of clearly valid statutes or caselaw expressly depriving him of jurisdiction, judicial immunity is lost.[6] Judge Barsetti acted in complete absence of jurisdiction.

Judges are *generally* absolutely immune from civil suits for money damages, including 1983 suits, due to the long-settled understanding that the independent and impartial exercise of judgment vital to the judiciary might be impaired by exposure to potential damages liability Judges are only immune for judicial acts, not administrative acts. A judge is not immune for

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5. A private prior agreement, no matter how broadly interpreted, is still an illegal act that takes place before the judicial process ever begins. If the *Stump* definition is properly applied to the private prior agreement, it will fail the test convincingly. See "What Constitutes a Judicial Act for Purposes of Judicial Immunity" Vol. 55 *Fordham Law Review* 1503, 1505, 1514-15. The problems with this two-factor test develop when the act in question is not clearly a judicial function. A judge's act can be ministerial, administrative, executive, legislative, or purely judicial. A certain act performed by a judge may be a normal official function for that judge without being a judicial act. Pgs 1508-09.

6. In a civil traffic case, subject matter jurisdiction is established by means of a valid citation, certifying that the signing individual has reasonable grounds to believe and does believe that the named individual committed the violation. The law sets this requirement. **A.R.S. 28-1561(A).** Arizona Superior court has consistently ruled that lack of probable cause to identify the driver fails to confer jurisdiction on the court. (See p.2, **Ex E & F,** Pl. Resp. AAA Photo MTD).

tortious acts committed in a purely administrative, non judicial capacity. *Forrester v. White,* 484 U.S. 219 at 227-229 (1988); *Stump v. Sparkman,* 435 U.S. at 380. *Mireles v. Waco* 112 St. 286 at 288 (1991) Administrative capacity torts by a judge do not involve the performance of the function of resolving disputes between parties or of authoritatively adjudicating private rights, and therefore do no have the judicial immunity of judicial acts[7] . See *Forrester,* Id.

In present case, the purpose behind judicial immunity is compromised and negated because Judge Barsetti did not act with *independence*. Nor was her decision *principled,* because there was no preponderance of evidence, she improperly shifted burden of proof, and she allowed Officer Colombe to violate his subpoena as a witness. She had pre-arranged agreement with Redflex to rule against all defendant drivers according to the Court Administration Module (CAM) training, which teaches the judges how to overcome objections of defendants. Thus, there was *no independence or principled* decision-making, which are purposes of judicial immunity. Plaintiff needs discovery of this CAM module and all other judicial training materials provided by Redflex to Barsetti. COT knowingly, deliberately, and intentionally withheld these documents from Plaintiff, pursuant to his Public Records request. (See **Ex. R & S,** 1st Am. Compl.).

As Presiding Judge for Tempe City Court, Judge Arkfeld had a duty to properly train and supervise Judge Barsetti. She clearly failed to train her that there must be a preponderance of evidence before finding a Defendant responsible. Judge Arkfeld also failed to train Judge Barsetti to reject traffic tickets with computerized signatures without personal involvement, as held by *State v. Johnson* 184 Ariz. 521, which was clearly established law at that time.

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7. By those terms, Judge Arkfeld's computer signature placed on the traffic ticket was not a judicial act. Judge Arkfeld's had a duty to supervise Judge Barsetti's performance as a pro tem judge, and Arkfeld's failure to properly train Barsetti regarding reasonable grounds for issuing theTraffic ticket, and failure to require Officer Colombe to obey the subpoena, and duty to rule based on the preponderance of evidence and burden of the State, resulted in the financial and constitutional injuries to the Plaintiff.

Defendant Arkfeld appointed Judge Barsetti and had supervisory authority over her. **A.R.S. 28-1553 C., (Exhibit G,** attached hereto) To hold a supervisor liable under section 1983, a plaintiff must allege and show that the supervisor personally participated in or had direct responsibility for the alleged violations. *Martin v. Sargent*, 780 F.2d 1334 at 1338 (8th Cir.) Or a plaintiff could show that the supervisor actually knew of and was deliberately indifferent to or tacitly authorized the unconstitutional acts. *Pool v. Missouri Dept of Corr. & Human Resources,* 883 F.2d 640, 645 (8th Cir. 1989) See *McDowell v. Jones*, 990 F.2d 433 at 435 (8th Cir.). Judge Arkfeld signed the traffic ticket which contained Colombe's computer-generated signature, in violation of *State v. Johnson.* Defendant Arkfeld tacitly authorized the issuance of the traffic ticket, knowing that the driver had not been identified, based on no information on line 5 of the ticket (**Ex M**, 1st Am. Comp.) Plaintiff needs discovery of the judicial system whereby lower courts are notified of reversals on appeal for other photo enforcement cases initiated by Redflex.

Traffic aide Gallego is not entitled to immunity. It was clearly established law under *State v. Johnson,* regarding rejection of computerized signatures on traffic tickets. It was clearly established law that the testimony of a substitute witness is fundamentally unfair, and is a deprivation of the right to a fair trial under the Fourteenth Amendment, which is clearly established law. Public officers are immune so long as their actions do not violate clearly established law, which a reasonable person would have known. *Harlow v. Fitzgerald, supra.*

In *Malley v. Briggs,* 475 U.S 335, 340-341 (1986) the Supreme Court held that police officers were not entitled to absolute immunity for statements made in an affidavit submitted to a magistrate for the purpose of obtaining an arrest warrant. The court noted that, at common law, a "complaining witness" who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause, The police officers' actions were analogous to those of a "complaining witness", so

absolute immunity did not apply. See *Burns v. County of King* 883 F.2d 819, 822 (9th Cir. 1989) Officer Colombe has no immunity since his complaint was made maliciously and without probable cause, in violation of **A.R.S. 28-1561.** Public officials may not violate plain terms of statute because they believe better results will be attained by doing so, and if they knowingly violate the law, regardless of their intentions, they and their bondsmen are liable. *Button v. Nevin* 36 P 2d 568, 44 Ariz. 247 . Discretionary decisions of police officers are not immune from liability. *Chamberlain-Castanes v. King County,* 669 P.2d 451, 457 (1983); *Bender v. City of Seattle* 664 P.2d 492, 498-99 (1983) The common law policy in Arizona is that , as a rule, the government is liable for its tortuous conduct, immunity is an exception to that rule. *Ryan v. State,* 134 Ariz. 308 at 309. 656 P.2d. 597 (1982)

Since *Ex parte Young,* 209 U.S. 123, 28. S.Ct. 441, 52 L.Ed. 714 (1908), it has been settled that the Eleventh Amendment provides no shield for a state official confronted by a claim that he deprived another of a federal right under the color of state law. Ex parte Young teaches that when a state officer acts under a state law in a manner violative of the Federal Constitution, he

> "comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected *in his person* to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States."
> *Ex parte Young,* 209 U.S. 209 at 159-160, 28 S.Ct., at 454 (emphasis supplied)
> See *Scheuer v. Rhodes,* 94 S.Ct, 1683 at 1687. (1974)

Monroe v. Pape held that 42 USC 1983 was meant "to give a remedy to parties deprived of constitutional rights, privileges, and immunities by an officials abuse of his position." Id.., 365 U.S. at 172, 81 S.Ct. at 476. Qualified immunity shield government officials from liability for civil damages only insofar as their conduct does not violate clearly established constitutional or statutory rights of which a reasonable person should have known. *Harlow v. Fitzgerald,* 457

U.S. 800, 818. If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Id., 818-19.The rule of qualified immunity "provides ample support to all but the plainly incompetent or those who knowingly violate the law." *Burns v. Reed* 500 U.S. 478, 494-95 (1991) (quoting *Malley v. Briggs,* 475 U.S. 335, 341 (1986)

VII. DEFENDANTS HALLMAN, ARREDONDO, WOODS, NAVARRO, SHEKERJIAN, ELLIS, AND MITCHELL ARE NOT ENTITLED TO IMMUNITY FOR MINISTERIAL ACTS

In actions under 42 U.S.C. 1983, the absolute immunity that attaches to legislative acts does not attach to ministerial acts. *Bogan v. Scott-Harris,* 523 U.S. 44, 52 (1998) Likewise the qualified immunity that may be readily available for legislative acts will not exist for the improper performance of a ministerial duty if the law governing the rights that have been violated is so clear, at the time of their conduct, that a reasonably competent person, in their position, would not have believed the conduct to be lawful. See *Harlow v. Fitzgerald,* 457 U.S. 800 (1982); *Anderson v. Creighton*, 483 U.S. 635 (1987)

Tempe City Council is charged with " Policy making and all other powers of the city shall be vested in the council…" Tempe City Charter Sec. 2.04. However, it is when the execution of a government's policy or custom, whether made by is lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the govern-nment as an entity is responsible under section 1983. *DePiero v. City of Macedonia,* 180 F.3d 770, 786 (6th Cir. 1999) The policy and custom here is the issuance of traffic tickets based on gender match, not positive ID of the driver and without "reasonable grounds" in violation of **A.R.S. 28-1561** and in violation of procedural due process under 14th Amendment. The rule of qualified immunity "provides ample support to all but the plainly incompetent or those who knowingly violate the law." *Burns v. Reed* 500 U.S. 478, 494-95 (1991) (quoting *Malley v.*

Briggs, 475 U.S. 335, 341 (1986)

Under the Tort Claims Act, city governments may be liable for limited damages resulting from the actions of council members and other city officials. See Chapter 9 Personal Liability of Councilmembers (Texas) (**Exhibit H**,attached.) In the instant case, the city council voted on a photo enforcement vendor contract. They did not legislate an *ordinance*. The Tempe City council has the power to regulate the Tempe Police [8] **(A.R.S. 9-240 B.(12). (See Exhibit I,** , attached) The City Council's failure to properly regulate Tempe Police and Redflex in their photo enforcement ticketing procedures involves ministerial acts, not legislative acts.[9] Because participating in a RICO enterprise is not a legislative function. Because Tempe City Council failed to train, supervise, control and instruct Tempe Police, absolute legislative immunity does not protect them, sued in their individual capacity. See *Hoekstra v. City of Arnold,* 2009 WL 259857 (E.D. Mo.)

I. DEFENDANTS MEYER, RAPP, SEYLER, JOHNSON, HORT, RYFF, MCALLISTER AND GREEN SHOULD NOT BE DISMISSED

McAllister deprived Plaintiff of his rights to honest services, which is included under fraudulent scheme or artifice.[10] Mr. McAllister's threat to sue Plaintiff for alleged breach of contract, when there was no meeting of the minds, was an apparent Abuse of Process. McAllister attempted to deceive Plaintiff of the meaning of the terms of COT boilerplate

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8. Under **A.R.S. 9-240 General powers of common council, B.** The common council shall also have the power within the limits of the town: **(12)** to establish and *regulate the police of the town, to appoint watchmen and policemen, and to remove them,* and to prescribe their powers and duties. (See **Exhibit I** attached) Those powers are administrative/executive, *not legislative.*

9. Tempe City Code, **Article 1, sec. 2-1 Compliance by city with applicable laws. "**The city and its officers and its employees shall comply with all applicable state and federal laws." (See **Exhibit J,** attached hereto)

10. **18 USC 1346 Definition of "scheme or artifice to defraud".** For the purposes of this chapter [18 USCS 1341 et seq.] the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.to the constitutional rights of its citizens.

Settlement contract, and attempted to deprive him of his right to recover loss of property through Arizona's "collateral source" rule. Defendant Greene deprived Plaintiff of his 1st Amendment right to access public records. Defendants Meyer, Rapp, Seyler, Johnson, Ryff are liable under conspiracy under 1983, because they cooperated on a common plan in implementing photo radar. (See **Ex P,** 1st Am. Compl.) and **Ex Y** shows that the police, mayor, city council all knew that driver ID was required to issue citations. Yet, as Gallego testified, no driver's license I D was obtained before issuing ticket to Gutenkauf.

II. PLAINTIFF HAS STANDING TO DEMAND THAT THE COURT DECLARE THAT TEMPE DEFENDANTS LOYALTY OATHS DO NOT COMPLY WITH FEDERAL LAW AND ARIZONA LAW

Tempe Defendants deprived Plaintiff of his right to a fair trial protected by the Fourteenth Amendment. The failure of Tempe Defendants to take their oath, in a manner that is binding on the conscience, has a direct causal connection to the mindset of the Defendant's and shows their deliberate indifference to the Constitutional rights of citizens, which all public officers have a duty to uphold. The failure of Tempe Defendants to take the loyalty oath is further evidence of failure to train by Police Chief Ryff, who did not take the oath himself. It is evidence of a custom or policy of City of Tempe employees, to not take the oath, in deliberate indifference

The oath is evidence of authority to act. *U.S. v.. Pigniatiello* 582 F. Supp 251. A peace officer or duly authorized agent of a traffic enforcement agency may serve a copy of the traffic complaint. See **A.R.S. 28-1594**.The oath must be in proper affidavit form. *Elfbrandt v. Russell* 94 Ariz. 1,11 (1963) A warrant may only be served by a peace officer who is duly deputized or the court lacks subject matter jurisdiction. *Commonwealth v. Bader*. 31 Pa. Dist. & Co. 693 **A.R.S. 38-232** requires the oath to be "taken, subscribed, and filed." Merely signing a piece of paper does not constitute a swearing. *People v. Coles* 535 N.Y.S 2d 897 (Sup. 1988) *White v. State* 717 P. 2d 45 (Nev. 1986) The officer administering the oath is the proper one to certify it.

Dunn v. Ketchum 38 Ca 93 (Cal. 1869) A traffic ticket is jurisdictionally defective if an oath is improperly administered *People v. Crouch* 274 N.Y.S. 2d 642. The Tempe Defendants not in affidavit form and are clearly not in compliance with Arizona law **A.R.S. 38-231, 232, & 233.** (See **Exhibits B, F, H, I, J,** 1st Am. Comp. and **paras. 384 - 400)** Tempe Defendants have not complied with oath requirement under Art. VI of the United States Constitution. Plaintiff has shown that he has suffered a concrete and particularized financial injury (property) and violation of his Constitutional rights.

III. TEMPE DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY

In *Saucier v. Katz,* 533 U.S. 194 the 10th Circuit mandated a two-step sequence for resolving government official's qualified immunity claims: A court must decide (1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right, and (2) if so, whether that right was "clearly established" at the time of the defendant's alleged misconduct. When qualified immunity is asserted at the pleading stage, the answer to whether there was a violation may depend on a kaleidoscope of facts not yet fully developed. And the first step may create a risk of bad decision making, as where the briefing of constitutional questions is woefully inadequate. *Pearson v. Callahan* 555 U.S. 253. (2009)

Public officers and officials are presumed to know what the law requires and may be liable for civil rights violations when their actions cross well-marked boundaries. *Slakan v. Porter* 737 F.2d 368 (4th Cir.) Officer Colombe and Aide Gallego had no excuse for not knowing that driver's license must be used to identify defendant drivers.(See Kerby Rapp's memo to City Council, **Ex Y,** 1st Am. Comp.) They either knowingly violated the law or were plainly incompetent. Qualified immunity protects all except those who knowingly violate the law or the plainly incompetent. *Malley v. Briggs,* 475 U.S. 335, 341 (1986) It is well-settled law in Arizona that governmental immunity is the exception and liability is the rule. See *City of Tucson v.*

Fahringer, 795 P.2d 819, 820 (Ariz. 1990) Finally, While qualified Immunity may shield government officials for actions committed within the scope of their governmental duties, it is not available to government agents who engage in racketeering activities, because acts of racketeering are per se beyond the scope of the officials legitimate authority.

IV. CONCLUSION

For the foregoing reasons, and in the interest of public policy and public confidence in Governmental institutions, this Court should deny Tempe Defendants' Motion to Dismiss, order them to file and Answer and allow discovery of those items which City of Tempe has denied Plaintiff, which could supply proof of his claim. Oral argument requested.

RESPECTFULLY SUBMITTED,

DATED this 11th day of April, 2011.

Daniel Arthur Gutenkauf

Daniel Arthur Gutenkauf, Pro Per
1847 E. Apache Blvd. #41
Tempe, Arizona 85281
480-966-7018

ATTESTATION

I, Daniel Arthur Gutenkauf, am the Plaintiff in this action, and I hereby attest and solemnly affirm that I have read the foregoing, and the facts stated within this document are based in part upon information and belief, and based in part on personal knowledge, and those facts are true, correct, and accurate, to the best of my knowledge and ability at this time, under penalty of perjury.

DATED this 11th day of April, 2011.

Daniel Arthur Gutenkauf

Daniel Arthur Gutenkauf, Pro Per
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CERTIFICATE OF SERVICE

I, Daniel Gutenkauf, hereby certify that copies of the foregoing were served in the following manner:

ORIGINAL and One Copy of the foregoing
Filed this 12th day of April, 2011 with:

Clerk of the Court
United States District Court- District of Arizona
Sandra Day O'Connor Courthouse
401 W. Washington St.
Phoenix, AZ
85003

A copy of the foregoing mailed by U. S. Postal Service this 12th day of April, 2011 to

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