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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

Daniel Arthur Gutenkauf,  
Plaintiff,  
v.  
City of Tempe, et al.,  
Defendants.

No. CV 10-2129-PHX-FJM

**TEMPE DEFENDANTS' REPLY IN  
SUPPORT OF MOTION TO DISMISS  
PLAINTIFF'S FIRST AMENDED  
COMPLAINT**

Defendants City of Tempe, 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 J. 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"), hereby submit their Reply in Support of Motion to Dismiss Plaintiff's First Amended Complaint. Plaintiff's Complaint is premised on an incorrect notion that his constitutional rights were violated when Tempe issued a civil traffic ticket for speed greater than reasonable or prudent. Neither Tempe nor any of its employees or officials violated Plaintiff's constitutional rights. Therefore, his Complaint should be dismissed in its entirety.

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1 **I. PLAINTIFF HAS NOT ALLEGED A PROPER CAUSE OF ACTION**  
2 **UNDER 42 U.S.C. § 1983.**

3 Plaintiff has not alleged a cause of action under 42 U.S. C. § 1983 because he fails  
4 to properly allege that Tempe Defendants deprived him of a specific constitutional right.<sup>1</sup>

5 **A. Plaintiff Has Not Properly Alleged That Tempe Defendants Maliciously**  
6 **Prosecuted Him.**

7 Plaintiff states that his § 1983 claim is based on Tempe Defendants’ malicious  
8 prosecution of him. Plaintiff rightly alleges that he must show that Tempe Defendants  
9 prosecuted him with malice and without probable cause and that they did so for the  
10 purpose of denying him equal protection or another specific constitutional right. *Freeman*  
11 *v. City of Santa Ana*, 68 F.3d 1180, 1189 (9th Cir. 1995). Malice sufficient to support a  
malicious prosecution claim is

12 manifested by furthering some charge of crime from base and  
13 improper motives; that is, from some motive other than a  
14 desire to have the laws enforced, crime suppressed, and the  
15 guilty brought to justice. Such improper motive may spring  
16 from personal hatred and ill will toward the person charged  
with crime, the pursuit of some selfish advantage, or from any  
desire or impulse other than the one legitimate purpose—the  
enforcement of the law.

17 *Leeker v. Ybanez*, 24 Ariz. 574, 577, 211 P. 864, 865 (1923). Malice is a state of mind  
18 and lack of probable cause does not prove that there was malice. *Id.* This is so because  
19 “the information on which a defendant acted may have induced him to act in the utmost  
20 good faith, so that his mind is entirely free from malice, and yet it may not be sufficient to  
21 constitute probable cause.” *Id.* at 24 Ariz. at 578, 211 P. at 865.

22 Plaintiff does not sufficiently allege that Tempe Defendants acted with malice in  
23 prosecuting the civil traffic violation against him. Although Plaintiff states the word  
24 “malice” in his Complaint, the Supreme Court has stated that a complaint that pleads facts  
25 “that are merely consistent with a defendant’s liability . . . stops short of the line between

26 <sup>1</sup> In his Response, Plaintiff fails to contest that Tempe Defendants did not violate his  
27 Fourth Amendment rights. Presumably, Plaintiff agrees with Tempe Defendants’  
28 arguments made in their Motion to Dismiss that the Fourth Amendment does not apply in  
this case.

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1 plausibility and possibility” sufficient to entitle the plaintiff to relief. *Iqbal v. Ashcroft*,  
 2 129 S.Ct. 1937, 1949 (2009) (internal citations omitted). Plaintiff has not alleged that  
 3 Officer Colombe, Ms. Gallego or any other Tempe Defendant had any personal malice or  
 4 ill will toward him or received some selfish advantage in their prosecution of him.

5 **B. Plaintiff Fails To State A Valid Sixth Amendment Violation.**

6 In his Response, Plaintiff alleges that the civil traffic violation he received was a  
 7 criminal penalty rather than a civil penalty. To support his position, Plaintiff relies on  
 8 *United States v. Halper*, 490 U.S. 435, 448, 109 S.Ct. 1892, 1902 (1989), in which the  
 9 Supreme Court stated that a civil sanction may constitute punishment “when the sanction  
 10 as applied in the individual case serves the goals of punishment.” However, in *Hudson v.*  
 11 *U.S.* 522 U.S. 93, 99-100, 118 S.Ct. 488, 493 (1997), the Supreme Court abrogated its  
 12 ruling in *Halper* and stated that whether a particular punishment is civil or criminal is  
 13 initially determined as a matter of statutory construction. When making the determination  
 14 a court must first attempt to determine whether the legislature, when creating the statutory  
 15 scheme, indicated a preference for a criminal or civil sanction. *Id.* Although a penalty  
 16 clearly intended to be civil may be deemed to be too punitive in its effect or purpose such  
 17 that it has now become a criminal penalty, before reaching that conclusion, a court should  
 18 consider the following factors:

19 (1) whether the sanction involves an affirmative disability or  
 20 restraint; (2) whether it has historically been regarded as a  
 21 punishment; (3) whether it comes into play only on a finding  
 22 of *scienter*; (4) whether its operation will promote the  
 23 traditional aims of punishment-retribution and deterrence; (5)  
 24 whether the behavior to which it applies is already a crime; (6)  
 25 whether an alternative purpose to which it may rationally be  
 26 connected is assignable for it; and (7) whether it appears  
 27 excessive in relation to the alternative purpose assigned.

28 *Id.* at 99-100, 118 S.Ct. at 493 (internal citations and quotation marks omitted). The  
 enumerated factors must be “considered in relation to the statute on its face, and only the  
 clearest proof will suffice to override legislative intent and transform what has been  
 denominated a civil remedy into a criminal penalty.” *Id.* at 100, 118 S.Ct. at 493.

1 In this case, nothing about the statutory scheme devised by the Arizona legislature  
2 would support Plaintiff's contention that A.R.S. § 28-701 is a criminal penalty rather than  
3 a civil one. The legislative intent is shown in A.R.S. § 28-121(B), which states,

4 A violation of or failure or refusal to do or perform an act or  
5 thing required by chapter 3, 5, 7 or 8, or chapter 9, article 4 or  
6 chapter 10, article 10 of this title is a civil traffic violation  
7 unless the statute defining the violation provides for a different  
8 classification. Civil traffic violations are subject to chapter 5,  
9 articles 3 and 4 of this title.

10 Section 28-701 is contained in chapter 3, article 6 of Title 28, and it does not contain a  
11 different classification than a civil traffic violation; therefore, it is subject to a civil  
12 penalty under chapter 5. Section 28-1598 prescribes the maximum civil penalty: "A  
13 person who violates a civil traffic offense is subject to a maximum civil penalty of two  
14 hundred fifty dollars." If a person fails to pay the civil penalty, the only repercussion for  
15 the responsible party is the suspension of his driving privileges. A.R.S. § 1601(A). Here,  
16 upon a finding of responsible, Plaintiff was required to pay \$171 plus \$26 for the service  
17 of process fee. Based on the statutory scheme, a violation of § 28-701, is a civil violation  
18 and not criminal, and it is not so punitive that it has become a criminal violation.

19 Additionally, Plaintiff cannot show any of the factors enumerated in *Hudson* that  
20 would transform a statute that was meant to be a civil penalty into a criminal violation.  
21 Thus, Plaintiff was not subject to criminal prosecution, and he had no Sixth Amendment  
22 right to confront Officer Colombe at the civil traffic hearing.

23 Plaintiff cites to *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004), to  
24 support his proposition that he had a right to confront Officer Colombe at his civil traffic  
25 hearing. However, *Crawford* is not instructive here because *Crawford* involved a charge  
26 of first-degree assault while armed with a deadly weapon. *Id.* *Crawford* clearly  
27 implicated the Sixth Amendment because it involved a criminal prosecution. That is not  
28 the case here where Plaintiff was found responsible for a civil traffic violation.

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1           **C. Plaintiff Received Due Process.**

2           Plaintiff has not properly alleged a due process violation. The Due Process clause  
 3 requires that an individual be given notice and an opportunity to be heard at a meaningful  
 4 time and in a meaningful manner. *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S.Ct. 1983,  
 5 1994 (1972). Plaintiff alleges that his due process rights were violated when he was  
 6 hailed into court to respond to the traffic complaint based on a “gender match.” However,  
 7 even if Tempe Defendants were wrong in believing that he was the person who committed  
 8 the traffic offense, Plaintiff admits that he received the required due process. In his  
 9 Response, Plaintiff states, “In spite of Plaintiff’s opportunity to appeal Judge Barsetti’s  
 10 decision, and the payment refunded to Plaintiff, he has not had an ‘opportunity to be  
 11 heard’ on the uncompensated loss of (sic) his property due to the malicious prosecution by  
 12 the City of Tempe. . . .” Response at pg. 8, lns 8-12. Plaintiff received all of the process  
 13 he was due. Plaintiff received a civil traffic ticket. He had the opportunity to contest the  
 14 ticket in Tempe City Court, which he did. After being found responsible for the civil  
 15 traffic ticket, Plaintiff was provided the opportunity to appeal Judge Barsetti’s ruling to  
 16 Maricopa County Superior Court, which he did. And once the superior court overturned  
 17 Judge Barsetti’s ruling, the fine Plaintiff paid was refunded to him.

18           Plaintiff was provided additional process for the wrong that he believed Tempe  
 19 Defendants committed on him because he had the right to file a notice of claim against  
 20 Tempe and its employees for the alleged violation. *See* A.R.S. § 12-821.01. Even though  
 21 Tempe agreed to settle the matter for the amount Plaintiff requested (\$699.00), Plaintiff  
 22 attempted to withdraw his offer and he filed this lawsuit. Additionally, the conduct of  
 23 Tempe Defendants was not the type of “shock the conscious” conduct that would  
 24 implicate substantive due process.

25           **II. TEMPE DEFENDANTS DID NOT VIOLATE THE RACKETER**  
 26           **INFLUENCED AND CORRUPT ORGANIZATIONS ACT**

27           Plaintiff alleges that Tempe Defendants committed the predicate act of mail fraud  
 28 by mailing the traffic ticket to him. “To allege a violation of the mail fraud statute, it is  
 necessary to show that (1) the defendants formed a scheme or artifice to defraud; (2) the

1 defendants used the United States mails or caused a use of the United States mails in  
2 furtherance of the scheme; and (3) the defendants did so with the specific intent to deceive  
3 or defraud.” *Schreiber Distributing Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393,  
4 1399 -1400 (9th Cir. 1986). “Similarly, a wire fraud violation consists of (1) the  
5 formation of a scheme or artifice to defraud (2) use of the United States wires or causing a  
6 use of the United States wires in furtherance of the scheme; and (3) specific intent to  
7 deceive or defraud.” *Id.* Despite Plaintiff’s protestations to the contrary, he fails to state  
8 his claims against Tempe Defendants with the specificity required in any fraud claim.  
9 Plaintiff also fails to allege that Tempe Defendants acted with the specific intent to  
10 deceive or defraud that is necessary to allege a proper wire or mail fraud claim.  
11 Moreover, Plaintiff cannot allege that Tempe Defendants intended to defraud him because  
12 nothing Plaintiff has stated thus far shows that Officer Colombe mailed the ticket to  
13 Plaintiff believing that he had no reasonable grounds to think that Plaintiff committed the  
14 traffic offense. Moreover, simply mailing or sending the traffic ticket in the mail did not  
15 constitute mail or wire fraud. *See Tassio v. Mullarkey*, No. 07-CV-2167-WYD-KMT,  
16 2008 WL 3166149 (D. Colo. Aug. 5, 2008) (the act of mailing tax notices does not  
17 constitute mail even if the recipient believes the notice is fraudulent).

18 Finally, Plaintiff has not alleged a proper extortion claim against Tempe  
19 Defendants because Tempe Defendants cannot commit extortion on behalf of Tempe. *See*  
20 *Wilkie v. Robbins*, 551 U.S. 537 (2007) (the Hobbs Act does not apply when the National  
21 Government is the intended beneficiary). In this case, the intended beneficiary of any  
22 monies collected by Tempe Defendants was the City of Tempe; thus, a claim of extortion  
23 cannot lie against Tempe Defendants.

24 **III. THE JUDICIAL ACTORS ARE ENTITLED TO ABSOLUTE IMMUNITY.**

25 Plaintiff’s assertion that Defendants Barsetti, Gallego, Arkfeld and Rodriguez are  
26 not entitled to judicial immunity is not supported by the law or the facts of this case.  
27 Judicial immunity provides absolute protection from civil suits to judicial officials and  
28 others intimately related to the judicial process for their judicial acts. *Burke v. State*, 215

1 Ariz. 6, 9, ¶ 7, 156 P.3d 423, 426 (App. 2007). Judicial immunity applies no matter how  
2 "erroneous the act may have been, and however injurious in its consequences it may have  
3 proved to the plaintiff." *Bradley v. Fisher*, 80 U.S. 335, 347 (1872). "Nor can this  
4 exemption be affected by the motives with which their judicial acts are performed." *Id.*  
5 The purpose behind the judicial immunity doctrine is to "assure that judges will exercise  
6 their functions with independence and without fear of consequences." *Acevedo v. Pima*  
7 *County Adult Probation Dept.*, 142 Ariz. 319, 320, 600 P.2d 38, 39 (1984). Judicial  
8 immunity protects all "those who perform functions intimately related to or which amount  
9 to an integral part of the judicial process." *Id.* (internal citations and quotations omitted).  
10 Witnesses, including police officers, enjoy the protections of judicial immunity because  
11 they are "integral parts of the judicial process." *Cleavinger v. Saxner*, 474 U.S. 193, 200  
12 (1985) (quoting *Briscoe v. LaHue*, 490 U.S. 325, 335 (1983)). "[J]udicial immunity is an  
13 immunity from suit, not just from ultimate assessment of damages." *Mireles v. Waco*,  
14 502 U.S. 9, 11 (1991). "Accordingly, judicial immunity is not overcome by allegations of  
15 bad faith or malice, the existence of which ordinarily cannot be resolved without engaging  
16 in discovery and eventual trial." *Id.*; see also *Stump v. Sparkman*, 435 U.S. 349, 356  
17 (1978) ("A judge will not be deprived of immunity because the action he took was in  
18 error, was done maliciously, or was in excess of his authority; rather, he will be subject to  
19 liability only when he has acted in the clear absence of all jurisdiction."); *Burk*, 215 Ariz.  
20 at 9, ¶ 7, 156 P.3d at 426 (immunity applies even when judicial officer is alleged to have  
21 acted maliciously or corruptly).

22 The judicial actors in this case are entitled to immunity and nothing Plaintiff states  
23 in his Response changes that fact. Judge Barsetti was the judge who presided over  
24 Plaintiff's hearing. Everything Judge Barsetti did in this case occurred while she was on  
25 the bench in Plaintiff's traffic hearing; her actions were the essence of judicial functions.  
26 Judge Arkfeld signed the traffic ticket, which could only be done by a judicial officer.  
27 The only thing Judge Arkfeld knew at the time she signed the ticket was that Officer  
28 Colombe believed that he had reasonable grounds to believe that Plaintiff committed the

1 alleged offense. Plaintiff's conclusory statements to the contrary do not create sufficient  
2 grounds to strip her of judicial immunity.

3 Ms. Gallego was a witness called by the State. Witnesses in judicial proceedings are  
4 protected by judicial immunity. *Cleavinger v. Saxner*, 474 U.S. 193, 200 (1985). That  
5 protection exists even if the witness presents perjured testimony. *Franklin v. Terr*, 201  
6 F.3d 1098, 1099 (9th Cir. 2000) ("A witness has absolute immunity from liability for civil  
7 damages under § 1983 for giving perjured testimony at trial.").

8 Defendant Rodriguez is the deputy court administrator for the Tempe City Court  
9 and supports the judicial functions of the Tempe City Court and its judges. Her duties are  
10 essential to the proper administration of the court system; thus, she is also entitled to  
11 immunity.<sup>2</sup>

12 **IV. THE TEMPE CITY COUNCIL IS ENTITLED TO LEGISLATIVE**  
13 **IMMUNITY.**

14 All of the actions taken by the city council were taken during official city council  
15 meetings; therefore, the council members are entitled to absolute legislative immunity  
16 when being sued in their individual capacity. *See Bogan v. Scott-Harris*, 523 U.S. 44, 49  
17 (1998) (holding that local legislators are entitled to absolute immunity from suit under §  
18 1983 for their legislative activities). Legislative immunity "attaches to all actions taken  
19 'in the sphere of legitimate legislative activity.'" *Id.* at 52 (citing *Tenney v. Brandhove*,  
20 341 U.S. 367, 376 (1951)). When determining whether an act is legislative, courts must  
21 look at the nature of the act itself, rather than any alleged motive or intent of the official  
22 performing it. *Id.* at 54. The Tempe City Council is entitled to absolute immunity for  
23 claims made against them in their individual capacity because they were involved in  
24 purely legislative acts when they considered and approved the contract with Redflex.  
25 Plaintiff cites *Hoekstra v. City of Arnold*, No. 4:08CV0267, 2009 WL 259857 (E.D. Mo.  
26 Feb. 3, 2009), to support his position that the council members are not entitled to  
27 immunity. However, the *Hoekstra* court found that the council members in that case were

28 <sup>2</sup> Plaintiff does not seem to contest Ms. Rodriguez's assertion of judicial immunity in his  
Response.

1 entitled to immunity in their individual capacity for their approval of a contract with a  
 2 private business to install and operate a red light camera system in the City of Arnold. *Id.*  
 3 at \*11 (dismissing all the claims against the city council in their individual capacity based  
 4 on legislative immunity). *Hoekstra* is remarkably similar to the instant case, and the result  
 5 should be the same. All claims against the city council members, who were sued in their  
 6 individual capacity, should be dismissed because they are cloaked in absolute legislative  
 7 immunity.

8 **V. THE REMAINING TEMPE DEFENDANTS SHOULD ALSO BE**  
 9 **DISMISSED.**

10 In Plaintiff's "kitchen sink" approach to this lawsuit, he has named almost  
 11 everybody who might have had any involvement with the photo enforcement system,  
 12 whether they truly had anything to do with his case or not. Plaintiff's allegations against  
 13 Defendant McAllister, Greene, Seyler, Rapp, Meyer, Ryff, Johnson and Hort are merely  
 14 conclusory in nature and do not state a valid cause of action. Mr. McAllister did not  
 15 abuse any process by attempting to resolve Plaintiff's claim. Likewise, Mr. McAllister  
 16 did not attempt to deceive Plaintiff regarding the meaning of the release. The fact that Mr.  
 17 McAllister disagreed with Plaintiff's interpretation of the release does not establish that he  
 18 was committing fraud. Similarly, Mr. Greene only forwarding information to Plaintiff  
 19 that he requested pursuant to a public records request and his conduct does not implicate  
 20 the First Amendment.<sup>3</sup> Plaintiff has also failed to properly allege that the remaining  
 21 defendants cooperated in a conspiracy under § 1983.

22 **VI. PLAINTIFF LACKS STANDING TO ALLEGE A LOYALTY OATH**  
 23 **VIOLATION.**

24 Plaintiff has not shown that he has suffered an injury to a legally protected interest,  
 25 or injury in fact, that is concrete and particularized. As stated previously, Plaintiff is  
 26 unable to show that Tempe Defendants violated his constitutional rights. Plaintiff also  
 27 cannot show that the injury affected him in an individual and personal way. Moreover,  
 28

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<sup>3</sup> Plaintiff does not allege a First Amendment violation in his Complaint.

1 Plaintiff cannot show that there is a causal connection between any injury he suffered and  
 2 the fact that Tempe Defendants' loyalty oaths may be improper.

3 **VII. TEMPE DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY.**

4 Plaintiff alleges that Tempe Defendants are not entitled to qualified immunity  
 5 because they should have known that they were required to cross-check the photo  
 6 enforcement ticket photo with his photo on file with the motor vehicle department.  
 7 Plaintiff bears the burden of proving that the right he claims was violated was "clearly  
 8 established" at the time of the alleged violation. *Moran v. State of Washington*, 147 F.3d  
 9 839 (9th Cir. 1998). "Because the focus is on whether the officer had fair notice that [his]  
 10 conduct was unlawful, reasonableness is judged against the backdrop of the law at the  
 11 time of the conduct." *Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S.Ct. 596, 599 (2004).  
 12 "If the law at that time did not clearly establish that the officer's conduct would violate the  
 13 Constitution, the officer should not be subject to liability or, indeed, even the burdens of  
 14 litigation." *Id.* "The relevant, dispositive inquiry in determining whether a right is clearly  
 15 established is whether it would be clear to a reasonable officer that his conduct was  
 16 unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202, 121 S.Ct.  
 17 2151, 2156 (2001).

18 Plaintiff has not shown that Tempe Defendants violated any of the rights he alleged  
 19 in his Complaint. Tempe Defendants' conduct, as alleged by Plaintiff, does not implicate  
 20 the Fourth, Sixth or Fourteenth Amendment. Even if Plaintiff could allege that Tempe  
 21 Defendants violated his constitutional rights, he cannot show that they were clearly  
 22 established at the time of the violation. Plaintiff does not cite any state or federal case law  
 23 or rule to support his position that Officer Colombe was required to review his MVD  
 24 photo before he could conclude that there were reasonable grounds to believe that Plaintiff  
 25 committed the alleged traffic offense. Instead, in his Complaint, Plaintiff references  
 26 several decisions from the lower court division of the Maricopa County Superior Court.  
 27 *See* Compl. at ¶ 149. The lower court decisions Plaintiff cites have no precedential effect  
 28 in Arizona. *See, e.g.*, Ariz. R. Civ. App. P. 28 (stating that memorandum decisions of the

1 Arizona Court of Appeals shall not be regarded as precedent or cited in any court, except  
2 in certain circumstances not applicable here). If appellate court memorandum decisions  
3 have no precedential effect, then surely a lower court decision from the Maricopa County  
4 Superior Court would have no binding or precedential effect on Tempe Defendants. Thus,  
5 Tempe Defendants are entitled to qualified immunity.

6 **VIII. CONCLUSION.**

7 Based on the foregoing, Tempe Defendants respectfully request that Plaintiff's  
8 Complaint against them be dismissed in its entirety.

9 DATED this 21th day of April, 2011.

10 TEMPE CITY ATTORNEY'S OFFICE

11  
12 /s/ Clarence E. Matherson, Jr. \_\_\_\_\_

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15 Catherine M. Bowman  
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18 Tempe, Arizona 85280  
19 Attorneys for Tempe Defendants

20 **CERTIFICATE OF SERVICE**

21 I hereby certify that on April 21, 2011, I electronically transmitted the attached  
22 document to the Clerk's Office using the CM/ECF System for filing and mailed a copy of  
23 same to:

24 Daniel Arthur Gutenkauf  
25 1847 E. Apache Blvd., #41  
26 Tempe, AZ 85281  
27 Plaintiff

28 I further certify that on April 21, 2011, the attached document was hand-delivered  
to:

HONORABLE FREDERICK J. MARTONE  
United States District Court  
Sandra Day O'Connor U.S. Courthouse, Suite 526  
401 W. Washington Street, SPC 62  
Phoenix, AZ 85003

/s/ Erin Fillmore \_\_\_\_\_

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