APPENDIX

TABLE OF CONTENTS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LISA M. AUBUCHON, an individual dealing with a sole and separate debt and RACHEL ALEXANDER, an individual dealing with a sole and separate debt, Plaintiffs-Appellants, v. COUNTY OF MARICOPA; et al., Defendants-Appellees.

No. 16-15484 D.C. No. 2:14-cv-01706-SPL

MEMORANDUM*

FILED JAN 3 2018 MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

Appeal from the United States District Court
for the District of Arizona
Steven Paul Logan, District Judge, Presiding

Argued and Submitted November 13, 2017
Pasadena, California

Before: NGUYEN and HURWITZ, Circuit Judges, and EATON,** Judge.

Lisa Aubuchon and Rachel Alexander claim that Maricopa County is obligated to pay costs awarded against them by the Supreme Court of Arizona in bar

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** Richard K. Eaton, Judge of the United States Court of International Trade, sitting by designation.

disciplinary proceedings. *See In re Aubuchon*, 309 P.3d 886 (Ariz. 2013) (ordering disbarment); In re Alexander, 300 P.3d 536 (Ariz. 2013) (ordering suspension). The district court granted the County's motion for summary judgment. We affirm.

1. The district court correctly granted summary judgment against Alexander because she did not comply with the Arizona governmental notice of claim statute, Ariz. Rev. Stat. § 12-821.01(A). *See Simon v. Maricopa Med. Ctr.*, 234 P.3d 623, 630 (Ariz. Ct. App. 2010) (requiring "strict compliance" with the statute).

2. Aubuchon's breach of contract claims fail because she provided no evidence creating a material issue of fact as to whether her original employment contract obligated the County to cover bar costs or that there was a subsequent relevant modification of the contract.

a. Aubuchon proffered no evidence that her original contract of employment provided for payment of costs imposed against Deputy County Attorneys in bar disciplinary proceedings. Aubuchon testified only that, years after she was hired, a supervisor told her that the County covered the costs of disciplinary proceedings. But, this legal conclusion about what Aubuchon's contract provided is not evidence that it actually did so. *See Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 738–39 (9th Cir. 1979).

b. The Trust Agreement did not require the County to pay Aubuchon's bar costs. Aubuchon correctly so conceded at her deposition, because the Agreement expressly provides that the Trust does not cover costs or expenses "arising out of a disciplinary or licensure proceeding before a professional regulatory body" absent prior written approval from the Trustees.

c. The Trustees' decision to approve the payment of costs in two other instances, did not modify Aubuchon's employment contract. *Heimer v. Price, Kong & Co.,* No. 1 CA-CV 07-0643, 2008 WL 5413368, at *5–6 (Ariz. Ct. App. Dec. 30, 2008) (unreported) (determining that an employer was not obligated to provide an employee severance pay merely because it had done so for several others).1

3. Aubuchon's unjust enrichment claim fails because she neither provided work not required under her contract of employment nor did the County retain a benefit from her work that equity requires now be disgorged. *See Flooring Sys., Inc. v. Radisson Grp., Inc.*, 772 P.2d 578, 581 (Ariz. 1989) (citations omitted) ("[A] party may be liable to make restitution for benefits received, even though he . . . is not contractually obligated to the plaintiff" if "it be shown that it was not intended or expected that the services be rendered or the benefit conferred gratuitously . . . .").

4. The district court did not err in granting summary judgment on Aubuchon's 42 U.S.C. § 1983 claims. Aubuchon's First Amendment retaliation

1 Because Aubuchon's contract claims fail, so must her claim for intentional interference with a contract.

claim fails because the decision not to pay her bar costs was made before she testified about alleged corruption in the County. Her equal protection claim fails because "the class-of-one theory of equal protection does not apply in the public employment context," *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 598 (2008). And, Aubuchon's Monell claim fails because she has not established that the County had a policy that "amounts to deliberate indifference to [her] constitutional right." *Dougherty v. City of*

Covina, 654 F.3d 892, 900 (9th Cir. 2011) (citation omitted).

5. The district court did not consider the evidence in the County's response to Aubuchon's motion for summary judgment and therefore did not err in finding her motion to strike moot.

AFFIRMED.

EATON, Judge, concurring in part and dissenting in part:

I concur in the majority's disposition, except for those portions dealing with the evidence produced by Aubuchon to support her contract and unjust enrichment claims, from which I respectfully dissent. As to those claims, I believe that the district court erred in finding that the evidence presented did not raise triable issues of material fact, and would reverse. See *Aubuchon v. Brock*, No. 1 CA-CV 13-0451, 2015 WL 2383820 (Ariz. Ct. App. May 14, 2015); *Aubuchon v. Brock*, No. CV2011-014754 (Super. Ct. Maricopa Cty. Oct. 26, 2016).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LISA M. AUBUCHON, an individual dealing with a sole and separate debt and RACHEL ALEXANDER, an individual dealing with a sole and separate debt, Plaintiffs-Appellants, v. COUNTY OF MARICOPA; et al., Defendants-Appellees.

No. 16-15484 D.C. No. 2:14-cv-01706-SPL District of Arizona, Phoenix ORDER

Before: NGUYEN and HURWITZ, Circuit Judges, and EATON,* International Trade Judge.

The panel has voted to deny the petition for panel rehearing. Judges Nguyen and Hurwitz have voted to deny the petition for rehearing en banc and Judge Eaton so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and rehearing en banc, Dkt. 53, is DENIED.

* Richard K. Eaton, Judge of the United States Court of International Trade, sitting by designation.

FILED MAR 6 2018 MOLLY C. DWYER, CLERK U.S. COURT OF APPEALS Case: 16-15484, 03/06/2018, ID: 10787348,

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
No. CV-14-01706-PHX-SPL
Lisa M. Aubuchon, et al,
Plaintiffs,
vs.
Maricopa County, et al.,
Defendants.
ORDER
Before the Court are Defendants' Motion for Summary Judgment (Doc. 55),
Plaintiffs' Motion for Summary Judgment (Doc. 57), and Plaintiffs' Motion to Strike Defendants' Response and Statement of Facts (Doc. 64.) The motions are fully briefed and ready for decision. For the reasons that follow, Defendants' motion will be granted and Plaintiffs' motions will be denied as moot.

I. Background

Plaintiffs Lisa Aubuchon and Rachel Alexander were employed as deputy county attorneys for the Maricopa County Attorney's Office ("MCAO"). (Doc. 37 ¶ 7.) Bar counsel filed a formal complaint against Andrew Thomas ("Thomas"), Aubuchon, and Alexander in February 2011 for actions taken while they worked for MCAO. (Doc. 56 ¶8.) After extensive hearings, the parties were sanctioned: Thomas and Aubuchon were disbarred, and Alexander was suspended. (Doc. 56 ¶¶ 10-11.) After negotiation, the parties stipulated to costs and expenses of $101,293.75 ("Bar Costs"). (Docs. 56-2 at 43- 46; 58-1 at 24-27.) This action is limited to the payment, or lack thereof, of these Bar Costs. Plaintiffs bring this action against Maricopa County (the "County"),

William Montgomery as statutory agent for MCAO, and William Montgomery ("Montgomery") in his individual capacity. (Doc. 37.) Additionally, Plaintiffs bring this action against certain board members of the Maricopa County Board of Supervisors (the "Board") in their individual capacities: Mary Rose Wilcox, Andrew Kunasek, Denny Barney, Clint Hickman, and Steve Cuchri (collectively, the "Board Defendants"). (Id.) Plaintiffs bring four state-law claims, breach of contract (Count I), intentional interference with contract (Count II), unjust enrichment (Count IV), and punitive damages (Count III). (Id.) Plaintiffs also bring a 42 U.S.C. § 1983 claim (Count V), including seeking punitive damages. (Id.) On May 29, 2015, the parties filed cross-motions for summary judgment. (Docs. 55, 57.) The parties responded to the appropriate motions (Docs. 58, 61), and subsequently replied (Docs. 65, 67). Plaintiffs moved to strike Defendants' response to its motion for summary judgment. (Doc. 64.) Defendants responded (Doc. 68), and Plaintiffs replied (Doc. 69). The motions are ready for decision.

II. Legal Standard

A court must grant summary judgment if the pleadings and supporting documents, viewed in the light most favorable to the non-moving party, "show[] that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A fact is "material" when, under the governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine dispute of material fact arises if "the evidence is such that a reasonable jury could return

a verdict for the nonmoving party." *Id.* The party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, and affidavits, which it believes demonstrate the absence of any genuine issue of material fact. *Celotex*, 477 U.S. at 323. The burden then shifts to the party opposing summary judgment, who "must make a showing sufficient to establish a genuine dispute of material fact regarding the existence of the essential elements of [their] case that [they] must prove at trial." *Gorman v. Wolpoff & Abramson, LLP,* 584 F.3d 1147, 1153 (9th Cir. 2009) (citation omitted); *see also Celotex*, 477 U.S. at 322-23 ("[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no 'genuine issue as to any material fact,' sinc e a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.").

III. Defendants' Motion for Summary Judgment

A. State Claims

"When interpreting state law, federal courts are bound by decisions of the state's highest court. In the absence of such a decision, a federal court must predict how the highest state court would decide the issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance." *Trishan Air, Inc. v.*

Fed. Ins. Co., 635 F.3d 422, 427 (9th Cir. 2011) (internal citation omitted).[1] "[A] state's highest court would consider dictum in a decision by a lower state court persuasive, but certainly not binding." *Hillery v. Rushen,* 720 F.2d 1132, 1138 n.5 (9th Cir. 1983).

1. Notice of Claim

A.R.S. § 12-821.01 permits an action against a public entity to proceed only if a claimant files a notice of claim that includes (1) facts sufficient to permit the public entity to understand the basis upon which liability is claimed, (2) a specific amount for which the claim can be settled, and (3) the facts supporting the amount claimed. A.R.S. § 12- 821.01(A). The statutory requirement is designed to permit a public entity to assess its 1 The *Erie* principles apply equally whether in the context of diversity or pendent jurisdiction. *Mangold v. Cal. Pub. Util. Comm'n,* 67 F.3d 1470, 1478 (9th Cir. 1995). liability through investigation, assist the entity in budgeting, and facilitate possible settlement of the claim. *Backus v. Arizona,* 203 P.3d 499, 502 (Ariz. 2009) (en banc). The notice must be filed within 180 days after the cause of action accrues or the claim is barred. A.R.S. § 12-821.01(A). The claim must be filed " with the person or persons authorized to accept service for the public entity ... as set forth in the Arizona rules of civil procedure." A.R.S. § 12-821.01(A). Rule 4.1(h) proscribes proper service on a governmental agency. Ariz. R. Civ. P. 4.1(h). For service on a County, service must be made on the Clerk of the Board of Supervisors. Ariz. R. Civ. P. 4.1(h)(2). For service on other governmental agencies, service must be made

[1] The Erie principles apply equally whether in the context of diversity or pendent jurisdiction. *Mangold v. Cal. Pub. Util. Comm'n,* 67 F.3d 1470, 1478 (9th Cir. 1995).

on the statutory agent. Ariz. R. Civ. P. 4.1(h)(4)(A). If there is no statutory agent, service may be made upon the chief executive officer, or the official secretary, clerk or recording officer. Ariz. R. Civ. P. 4.1(h)(4)(B). The notice-of-claim statute is "clear and unequivocal," and the failure to comply with any aspect of the statute prevents a plaintiff's claim from going forward. *Deer Valley Unified Sch. Dist. v. Houser,* 152 P.3d 490, 493 (Ariz. 2007). "Claims that do not comply with A.R.S. § 12-821.01 are statutorily barred." *Id.* at 492. "Actual notice and substantial compliance do not excuse failure to comply with the statutory requirements of A.R.S. § 12-821.01(A)." *Falcon ex rel. Sandoval v. Maricopa Cnty.,* 144 P.3d 1254, 1256 (Ariz. 2006) (en banc).

a. Alexander's Notice of Claim

On December 26, 2013, Alexander sent an email to Pauline Hecker, the County's Director of Risk Management. (Docs. 56-2 at 48-49; 58-1 at 21-22.)[2] In the email, Alexander requested that the email be considered a notice of claim. (Id.) On January 29, 2014, Ms. Hecker responded that "We respectfully deny your claim." (Doc. 58-1 at 23.) Defendants argue that Alexander's failure to comply with the notice-of-claim statute bars her from seeking recovery on the state-law claims. (Doc. 55 at 5.) Alexander does not dispute that her notice of claim does not comply with A.R.S. § 12-821.01(A). Rather Alexander responds that Defendants waived their right to assert this affirmative defense. (Doc. 59 at 4.) Alexander relies

[2] Plaintiffs adopted the facts set forth in their Motion for Summary Judgment (Doc. 57), and the documents submitted in the accompanying Statement of Facts (Doc. 58). Additionally, "[t]he court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3).

on *Pritchard v. State,* 788 P.2d 1178, 1183 (Ariz. 1990), for the proposition that "[t]he notice of claim statute, like a statute of limitations, is subject to waiver." (Doc. 59 at 3.) Specifically, Alexander alleges that Defendants waived their rights through their conduct. (Doc. 59 at 4.) Alexander appears to make two separate arguments.[3] The first argument is that Defendants treated the email like a "legitimate notice of claim," thereby waiving the defense by their conduct prior to litigation. (Id.)

The second argument is that, after the filing of this action, Defendants engaged in "substantial litigation," thereby waiving the defense by conduct. (Id.)

1) Pre-Litigation Waiver

The claims statute states that "[a] claim against a public entity or public employee

filed pursuant to this section is deemed denied sixty days after the filing of the claim unless the claimant is advised of the denial in writing before the expiration of sixty days." A.R.S. § 12-821.01(E). The statute places no burden on the government; the public entity is not required to formally deny the notice. The statute further states that "[i]f a genuine issue of material fact exists as to whether the requirements of this section have been complied with, the issue shall be resolved before a trial on the merits and at the earliest possible time." A.R.S. § 12-821.01(G). The requirement that the issue be

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[3] Alexander's response is a single paragraph that alleges that "Defendants began the pre-litigation process of defending against the Plaintiffs' lawsuit never filing a motion to dismiss." (Doc. 59 at 4.) The Court is unclear whether Alexander intends to raise two separate issues, nevertheless, the Court will address both possible allegations.

resolved prior to trial infers that the issue is raised during litigation, not prior to the filing of suit. The plain language of the statute places no burden on the public entity to dispute the validity of an improperly filed claim prior to litigation. Arizona's case law on the issue is limited to *Young v. City of Scottsdale,* 970 P.2d 942 (Ariz. Ct. App. 1998), a case that was severely criticized by the Arizona Supreme Court in *Deer Valley.* The *Young* court, *sua sponte*, proclaimed that the defendant waived any complaint about service of process when it processed the claim, but provided no support for its declaration and gave no analysis. *Id.* at 946. This Court is not bound by the rulings of a state appellate court. *Hillery,* 720 F.2d at 1138 n.5. Rather, this Court must predict how the Arizona Supreme Court would decide the issue. *Trishan Air,* 635 F.3d at 427. In *Deer Valley*, the Arizona Supreme Court "reject[ed] and disapprove[d] *Young's* conclusion that the statute includes a reasonableness standard." *Deer Valley,* 152 P.3d at 496. The reasonableness standard referred to the claims statute's requirement that the notice of claim include a specific amount for which the claim could be settled. That is not the holding at issue here. Nevertheless, the Arizona Supreme Court clearly disagreed with the court's analysis in *Young.* Additionally, the *Young* court gave no reasoning or analysis for its proclamation of pre-litigation waiver and it is not supported by any other case law. The Arizona Supreme Court consistently holds that "[c]laims that do not comply with A.R.S. § 12-821.01.A are statutorily barred." *Id.* at 492; *see also Falcon,* 144 P.3d at 1256 ("Actual notice and substantial compliance do not excuse failure to

comply with the statutory requirements of A.R.S. § 12-821.01(A).").

Young cannot be reconciled with the plain language of the claims statute; nor can it be reconciled with the interpretations of the claims statute by the Arizona Supreme Court. Accordingly, this Court finds that the denial of Alexander's email claim by Maricopa County Risk Management did not waive Defendants' defense of improper service of the notice of claim.

2) Waiver After the Filing of an Action

"An assertion that the plaintiff has not complied with the notice of claim statute is an affirmative defense to a complaint." *City of Phoenix v. Fields,* 201 P.3d 529, 535 (Ariz. 2009) (en banc). Generally, the claims statute requires unyielding compliance.[4] However, in a few cases, Arizona courts have found conduct by the government to constitute waiver.5 "The notice of claim statute is 'subject to waiver, estoppel and equitable tolling.'" *Jones v. Cochise Cnty.,* 187 P.3d 97, 104 (Ariz. Ct. App. 2008) (citing *Pritchard,* 788 P.2d at 1183). Conduct that warrants an inference of intentional relinquishment may constitute waiver. *Id.* (citation omitted). [5]"Waiver by conduct must be

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[4] *Deer Valley,* 152 P.3d at 492 ("Claims that do not comply with A.R.S. § 12-821.01.A are statutorily barred."); Falcon, 144 P.3d at 1255 (finding that service on a member of the Board of Supervisors does not comply with the claims statute); and *Martineau v. Maricopa Cnty.,* 86 P.3d 912, 914, 917 (Ariz. Ct. App. 2004) (service of notice of claim on the Risk Management Office of the Maricopa County Attorney's Office was "precluded for lack of compliance with the public entity claim statute requirements set out in A.R.S. § 12-821.01(A).").

[5] The most relevant cases are *Fields,* 201 P.3d at 529; Pritchard, 788 P.2d at 1178; and *Jones v. Cochise Cnty.,* 187

established by evidence of acts inconsistent with an intent to assert that right." *Id.* A party may waive a defense by conduct even if they asserted an affirmative defense in their pleadings. *Id.* Generally, courts find waiver by conduct "when a governmental entity has taken substantial action to litigate the merits of the claim that would not have been necessary had the entity promptly raised the defense." *Id.* at 105. Here, Defendants raised the notice-of-claim defense in their Answer (Doc. 4), and their Answer to the SAC (Doc. 48), properly reserving the defense. Plaintiffs, however, allege that Defendants' failure to file a 12(b)(6) motion to dismiss and their engagement in discovery constitutes "substantial litigation," which waives their defense. (Doc. 59 at 4.) This argument fails for three reasons. First, a motion to dismiss involving a notice of claim must be converted to a motion for summary judgment if the notice of claim is outside the pleadings, as is the case here. *Lee v. State,* 182 P.3d 1169, 1173 (Ariz. 2008); *Pritchard,* 788 P.2d at 1184 (Ariz. 1990); and *Jones,* 187 P.3d at 100 (Ariz.

P.3d 97 (Ariz. Ct. App. 2008). Pritchard was the seminal case finding that the time requirements of the notice-of-claim statute were procedural in nature, rather than jurisdictional, thereby allowing the trial court to reach the issue of whether the lack of timeliness was excusable. *Pritchard,* 788 P.2d at 1183-84. *Pritchard,* however, has been called into question because it was decided prior to the 1994 revisions of the claims statute. In 1994, the "legislature amended the statute to remove the 'excusable neglect' exception in favor of language that requires strict compliance with the statutory filing prerequisites." *Lee v. State,* 182 P.3d 1169, 1179 (Ariz. 2008) (McGregor, C.J. dissenting). Nevertheless, waiver by conduct is a valid legal theory in Arizona. *See Fields,* 201 P.3d at 535 (the government "may waive that defense by its subsequent conduct in the litigation.").

Ct. App. 2008). Therefore, Defendants notice of claim on the Risk Management Office of the Maricopa County Attorney's Office was "precluded for lack of compliance with the public entity claim statute requirements set out in A.R.S. § 12-821.01(A).").

lack of filing a motion to dismiss is not "inconsistent with an intent to assert that right." *Jones,* 187 P.3d at 104. Second, the cases cited by the parties involve situations where a successful notice of- claim defense would bar the entire case. Such is not the case here. If Defendants are successful in their defense, Alexander's § 1983 claim remains and all of Aubuchon's claims remain. Regardless of the outcome of the notice-of-claim issue, Defendants' need for discovery and depositions does not change. *Cf. Fields,* 201 P.3d at 536 (defense waived by conduct because prompt resolution would have spared considerable expense and resources). Here, no resources have been wasted. Third, Arizona courts have found waiver by conduct only when the parties were involved in litigation for significant periods of time prior to raising the defense. *Fields,* 201 P.3d at 536 (defendants' conduct waived their claims defense because they waited more than four years after the filing of the complaint and engaged in extensive briefing prior to raising the issue); *Jones,* 187 P.3d at 101, n.4 ("The County did not raise the notice of claim as a possible defense until nearly a year after the Joneses filed their

complaint."). Here, Plaintiffs filed suit on July 2, 2014. Defendants raised the defense in their Answer on August 5, 2014. (Doc. 4.) Defendants did not delay in raising their defense. Additionally, the cross-motions for summary judgment are the first significant briefing in the case. Defendants did not

engage in "significant litigation" prior to raising the defense. Plaintiffs have failed to show that Defendants waived the notice-of-claims defense by their conduct. Defendants' actions were not inconsistent with an intent to raise the defense. Accordingly, Alexander's state-law claims are barred for lack of compliance with A.R.S. § 12-821.01(A).

b. Notice of Claim Against the Individual Board Members

Defendants assert that Plaintiffs cannot maintain any state-law claims against the individual members of the Board for failure to serve a notice of claim on the Board Defendants. (Doc. 55 at 6.) Plaintiffs agree and acknowledge that the inclusion of "all defendants" under Counts I and IV in the SAC was a clerical error. (Doc. 59 at 1.) No state-law claims are brought against the Board defendants and the Court need not reach the issue. As such, Aubuchon's state-law claims against Maricopa County and Montgomery are the only remaining state-law claims.

2. Count I – Breach of Contract

Aubuchon brings Count I against Montgomery. To prevail on a breach-of-contract claim, a plaintiff must prove the existence of a contract, a breach of that contract, and resulting damages. *Graham v. Asbury,* 540 P.2d 656, 657 (Ariz. 1975). "It is elementary that for an enforceable contract to exist there must be an offer, an acceptance, consideration, and sufficient specification of terms so that the obligations involved can be ascertained." *Savoca Masonry Co., Inc. v. Homes & Sons Const. Co., Inc.,* 542 P.2d 817, 819 (Ariz. 1975). Aubuchon alleges that Plaintiffs "had an employment contract with the

defendants that including [sic] providing services as deputy county attorneys at the direction of the Maricopa County Attorney. The offer of the job was accepted by the Plaintiffs, consideration was present for the contract to pay salary and pay any costs associated with actions taken as deputy county attorneys including any bar disciplinary matters." (Doc.47 ¶ 17.) Despite this description, the parties do not dispute that no formal employment contract exists between any of the Defendants and Aubuchon.

a. Burden of Proof of Existence of a Contract

At trial, Aubuchon has the burden of proving that a contract exists. *Graham,* 540 P.2d at 657. Here, Defendants are seeking summary judgment. As such, Defendants bear the initial burden of informing the Court of the basis for its motion and identifying the portions of the record it believes demonstrate the absence of any genuine issue of material fact. *Celotex,* 477 U.S. at 323. Defendants allege that Aubuchon was a merit system employee and no employment contract exists. (Doc. 56 ¶ 20.) Defendants assert that Aubuchon has failed to identify *any* documents that would memorialize or support the existence of the alleged employment contract. (Doc. 56 ¶¶ 18-19.) If no contract exists, there can be no breach. "[A] complete failure of proof concerning an essential element of the [Plaintiffs'] case necessarily renders all other facts immaterial." *Celotex,* 477 U.S. at 322-23. Defendants successfully meet their burden of identifying the issue—the lack of a contract—and pointing to lack of evidence in the record to support the existence of a contract or identifiable terms of a contract. The burden then shifts to Aubuchon to make a showing sufficient to establish h a genuine dispute of material fact

regarding the existence of the contract. Aubuchon responds that verbal promises can become part of the contract and whether the verbal promises were made is a question of fact that must go to a jury. (Doc. 59 at 6.) Aubuchon argues that she offered an affidavit ("Affidavit") to support her allegations of verbal promises. In Aubuchon's sworn affidavit, she states that "[she] was advised by Andrew Thomas and throughout the years of employment that the office would cover any sanctions assessed if [her] actions were taken in [her] roles [sic] as deputy county attorneys [sic]." (Doc. 58-1 at 3.) Aubuchon offers no evidence other than her Affidavit. Aubuchon asserts that this is "the ONLY evidence" of verbal promises and Defendants have failed to present facts to contradict her Affidavit; therefore, summary judgment must fail. (Doc. 59 at 4-5.)[6] However, Defendants need not disprove matters on which Plaintiff has the burden of proof at trial. *Celotex,* 477 U.S. at 323. Again, Aubuchon has the burden of proving the existence of an employment contract at trial; Defendants are not required to disprove the existence of the contract, either here or at trial. Defendants' burden is to point to the lack of evidence proving the existence of a contract, which is an essential element of a breach-of-contract claim. As

[6] Affidavits are acceptable evidence on summary judgment. See Fed. R. Civ. P. 56(c)(1)(A). Aubuchon is not required to offer further evidence at this stage of the litigation and the strength of her evidence is not the focus of this analysis. Rather, the Court explains the burden of proof required by the parties. However, the Court notes that Plaintiffs' Affidavits (Doc. 58-1 at 1-12) consist largely of conclusions of law. The Affidavits contain few facts that would raise a genuine issue of material fact.

such, summary judgment does not fail for lack of proof that no verbal promises were made. Now the Court turns to the specific arguments made by the parties.

b. Creation of an Employment Contract

The parties do not dispute that Aubuchon was an at-will employee. "Complete at will employment is for an indefinite term, and ... can be terminated at any time for good cause or no cause at the will of either party. At-will employment contracts are unilateral and typically start with an employer's offer of a wage in exchange for work performed; subsequent performance by the employee provides consideration to create the contract." *Demasse v. ITT Corp.,* 984 P.2d 1138, 1142-43 (Ariz. 1999) (en banc) (internal citations omitted). "The very nature of the at-will agreement precludes any claim for a prospective benefit. Either employer or employee may terminate the contract at any time." *Wagenseller v. Scottsdale Mem'l Hosp.,* 710 P.2d 1025, 1040 (Ariz. 1985) (in banc) *superseded by A.R.S. § 23-1501 on other grounds.* The parties also do not dispute that Aubuchon was a merit employee. Defendants assert that Aubuchon's rights are limited to those of the merit system. (Doc. 55 at 7.) Aubuchon, however, argues that "there is no evidence that the system precludes other agreements between and [sic] employer and employee." (Doc. 59 at 5.) Aubuchon alleges that the "promises became a contract of employment." (Id.) Aubuchon also describes the contractual provisions as a "kind of a fluid thing." (Doc. 56-2 at 16.) Aubuchon was an at-will employee hired under the merit system. If an employment contract existed, it was executed on her first day of work. Aubuchon's description of additional promises

and changing terms would be a modification of an existing contract as she has presented no evidence, nor has she alleged, that she was told at the time of hiring that all bar costs would be paid in the case of a formal bar complaint being filed against her for ethical violations.[7]

c. Modification of an Employment Contract

"Once an employment contract is formed—whether the method of formation was

unilateral, bilateral, express, or implied—a party may no longer unilaterally modify the terms of that relationship." *Demasse,* 984 P.2d at 1144. "[T]o effectively modify a contract, ... there must be: (1) an offer to modify the contract, (2) assent to or acceptance of that offer, and (3) consideration." *Id.* "Separate consideration, beyond continued employment, is necessary to effect a modification." *Id.* at 1145. The party asserting the modification bears the burden of proof. *Yeazell v. Copins,* 402 P.2d 541, 546 (Ariz. 1965) (in banc).

Assuming, for the purposes of this argument, the existence of a valid employment contract, modification requires consideration other than continued employment. Here, Aubuchon describes the terms as "promises that became a contract of employment." (Doc. 59 at 5.) In Aubuchon's own words, there were only promises, but no consideration. Aubuchon also alleges that "[t]he offer

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[7] Aubuchon argues that, pursuant to public policy, the employment relationship is contractual in nature pursuant to A.R.S. § 23-1501(A)(1). (Doc. 59 at 5.) However, Aubuchon fails to further develop this argument. Even if Aubuchon is correct that her employment relationship was contractual, this does nothing to further her argument. As an at-will employee, the unilateral contract consisted of an offer of wages in exchange for work performed.

f the job was accepted by the Plaintiffs and continued employment was CONDITIONED on following those additional directives." (Doc. 59 at 6 (emphasis in original).) [8] However, Arizona law prevents an employment contract from being modified based only on continued employment. 8 *Demasse,* 984 P.2d at 1145. Here, Aubuchon was under a preexisting duty to performwork for MCAO, for which she received a paycheck. *See Travelers Ins. Co. v. Breese,* 675 P.2d 1327, 1330 (Ariz. Ct. App. 1983) ("A promise lacks consideration if the promisee is under a preexisting duty to counter-perform."). Aubuchon bears the burden to show a valid contract modification. She

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[8] Plaintiffs repeatedly allege that they "would not have acted at the direction of the County Attorney if they could be subjected to financial ruin." (Docs. 59 at 3; 58-1 at 5, 10.) The Court is particularly troubled by this statement. It infers that Plaintiffs knew they were acting unethically, but did so anyways because they believed they were indemnified against potential economic consequences even if wrong. Plaintiffs' position that they are indemnified because they were acting on the orders of their employer does not hold weight. An employer may not require his employees to act criminally or unethically. See *Wagenseller*, 710 P.2d at 1036 (an employee may not be required "to do that which public policy forbids or refrain from doing that which it commands"); see also A.R.S. § 23-1501 (employer cannot terminate employee for "refusal by the employee to commit an act or omission that would violate the Constitution of Arizona or the statutes of the this state"). Dismissal for failure to comply with such a command is itself against the law. Id. While *Wagenseller* is explicitly discussing criminal acts, requiring an employee who is a lawyer to breach her ethical duties would necessarily be against public policy. See Ariz.R. Prof. Conduct, ER 5.2(a) ("A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.") For purposes of this motion, the Court will assume that Plaintiffs are repeating a poorly-worded statement and will not consider the statement.

has failed to show that there was a modification to include payment of Bar Costs, because, assuming verbal promises were made, those additional promises lacked consideration.

d. Terms of the Contract

Alternatively, assuming the existence of an employment contract, Aubuchon must

be able to identify "sufficient specification of terms so that the obligations involved can be ascertained." *Savoca Masonry,* 542 P.2d at 819. In the SAC, Aubuchon alleges that the employment contract includes payment of Bar Costs. (*See* Doc. 47 ¶¶ 7, 8, 10, 17.) Aubuchon's Affidavit, her only evidence in this case, does not address the existence of an employment contract or describe its terms. (*See* Doc. 58-1 at 1-6.) In her deposition, she was asked to describe the contract. Aubuchon stated: Well, I think that's a legal question. But in terms of my understanding of it was, was that I was hired as a deputy county attorney. I was supposed to comply with the policies, procedures of the office, which included directives from my supervisors. And that as long as I did that, I would be compensated and protected from any other type of financial obligations. (Doc. 56-2 at 15.) Aubuchon further referred to the contract as a "kind of fluid thing," and was unable to identify specific terms that apply in a contract. (Doc. 56-2 at 16.) Contracts, by their very nature, are not fluid. A contract must contain "sufficient specification of terms so that the obligations involved can be ascertained." *Savoca Masonry,* 542 P.2d at 819. No reasonable jury could find that Aubuchon has sufficiently identified terms in order to find the existence of an enforceable

contract. As such, Aubuchon has failed to prove the existence of a valid contract.

e. Policies and Procedures Manual and Training Materials

In the SAC, Aubuchon alleges that MCAO's policies and procedures "are part of the employment contract," including "memorandums and training materials given to the employees. These materials all established a contract with the Plaintiffs that included that any costs associated with disciplinary proceedings that occurred while Plaintiffs were acting as deputy county attorneys would be paid for by the attorneys." (Doc. 37 ¶ 13.) However, Defendants point to a form signed by Aubuchon, acknowledging that she received the policies and procedures manual, that states that "[s]he also understand[s] that nothing in this manual in any way creates an express or implied contract of employment...." (Doc. 56-3 at 25.) Defendants also identified specific policies and training materials regarding ethical violations and their consequences. (Doc. 55 at 8.)

These materials do not support Aubuchon's allegations. In her Response to Defendants' Motion for Summary Judgment ("Response"), Aubuchon states that she has "not argued that the contract was based on a manual or rules- [she] argue[s] it was based on assurances and promises that [she] relied on." (Doc. 59 at 5-6.) Additionally, Aubuchon has not submitted any specific policy or procedure on which she relied. The Court, therefore, considers her claim that MCAO's policies and procedures are part of the employment contract as abandoned.

f. Trust Agreements

Aubuchon does not mention a Trust Agreement in the SAC or in her Affidavit; however, she mentions it in her Response (Doc. 59 at 8) and she attaches multiple versions of the Self-Insured Trust Fund ("Trust Agreement") to her summary judgment motion (Doc. 58-1 at 28-103). Aubuchon alleges that Defendants modified the Trust Agreement twice in 2011 in order to avoid paying her Bar Costs. (Doc. 59 at 8-9.) However, no version of the Trust Agreement requires Defendants to pay Aubuchon's Bar Costs. Aubuchon tacitly admits this by alleging that "costs related to disciplinary proceedings *can* be paid from the Trust as long as the payment is approved." (Doc. 59 at 8) (emphasis added). Aubuchon's efforts to attribute nefarious motives to Defendants does nothing to strengthen an argument that is meritless. Even if the Trust Agreement were to be part of the employment contract, nothing in the Trust requires payment of Aubuchon's Bar Costs. Aubuchon has failed to meet her burden of proving the existence of a valid employment contract beyond a unilateral contract in which she was offered a job and corresponding wages and which she accepted by performance of her duties. As such, summary judgment is found in favor of Montgomery on the breach-of-contract claim.

3. Count II – Intentional Interference with Contract

Aubuchon brings an intentional-interference-with-contract claim against the County. The tort of intentional interference with contract requires a plaintiff to prove: "(1) existence of a valid contractual relationship, (2) knowledge of the relationship on the part of the interferor, (3) intentional interference inducing or causing a breach, (4) resultant damage to the party whose relationship has been disrupted, and

(5) that the defendant acted improperly." *Safeway Ins. Co. v. Guerrero*, 106 P.3d 1020, 1025 (Ariz. 2005) (en banc). Aubuchon has failed to prove the existence of a valid contractual relationship other than an at-will employment relationship in which she was paid wages in exchange for her performance. Aubuchon does not allege that she was not paid her wages. Therefore, the Court grants summary judgment in favor of the County on the intentional-interference-with-contract claim as a matter of law.

4. Count IV – Unjust Enrichment

If there is "a specific contract which governs the relationship of the parties, the

doctrine of unjust enrichment has no application." *Brooks v. Valley Nat'l Bank*, 548 P.2d 1166, 1171 (Ariz. 1976) (in banc). Assuming, for purposes of this argument, that the parties do not have a contract, Aubuchon brings an alternative claim for unjust enrichment against the County and William Montgomery. A plaintiff bringing an unjust enrichment claim has the burden of proving five elements: "(1) an enrichment, (2) an impoverishment, (3) a connection between the enrichment and impoverishment, (4) the absence of justification for the enrichment and impoverishment, and (5) the absence of a remedy provided by law." *Freeman v. Sorchych*, 245 P.3d 927, 936 (Ariz. Ct. App. 2011). "In short, unjust enrichment provides a remedy when a party has received a benefit at another's expense and, in good conscience, the benefitted party should compensate the other." *Wang Elec., Inc. v. Smoke Tree Resort, LLC*, 283 P.3d 45, 49 (Ariz. Ct. App. 2012). "The [unjust enrichment] remedy is flexible and available when equity demands compensation for benefits received, 'even though [the party] has

committed no tort and is not contractually obligated to the [other].'" *Id.* (quotation omitted).

Here, the County spent approximately a million and a half dollars in the defense of Thomas, Aubuchon, and Alexander. (Doc. 67 at 5.) These dollars are ultimately paid for by taxpayers and come at the expense of other County operations. It is nonsensical to argue that Defendants are unjustly enriched because they did not pay Aubuchon's bar costs, to which they were not contractually or morally obligated to pay. *See City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247, 267 (1981) (Finding that "punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers.").[9] Aubuchon was employed by MCAO and received paychecks for her services. She received the benefit of the bargain; Aubuchon is entitled to no more. Neither the County nor MCAO are enriched by not paying a bill that they did not incur. As such, the Court grants summary judgment in favor of Defendants on the unjust-enrichment claim.

5. Count III – Punitive Damages as to State Claims

Aubuchon seeks punitive damages against Montgomery on the breach-of-contract claim. (Doc. 59 at 11.) "Neither a public entity nor a public employee acting within the scope of his employment is liable for punitive or exemplary damages." A.R.S. §

[9] Although the Supreme Court is discussing punitive damages, their reasoning is no less persuasive. Any monetary amount imposed on a governmental entity is paid for by the taxpayers.

12-820.04. Arizona law precludes punitive damages against Montgomery who was acting within the scope of his employment. As such, summary judgment is granted to Montgomery on the punitive-damages claim.

B. 42 U.S.C. § 1983 Claims

In Plaintiffs' SAC, they allege a single count under 42 U.S.C. § 1983. However, it appears Plaintiffs intend to bring three causes of action under § 1983: a First Amendment retaliation claim against Montgomery and the Board Defendants, a Fourteenth Amendment equal-protection claim against Montgomery and the Board Defendants, and an equal-protection claim against Maricopa County pursuant to *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).[10] (Doc. 37 ¶¶ 31-36.)

1. First Amendment Retaliation Claim

Plaintiffs allege that Defendants did "not treat[] the Plaintiffs equally with other similarly situated employees in order to retaliate, punish, harass or otherwise injure Plaintiffs, resulting in the loss of their benefits." (Doc. 37 ¶ 33.) Plaintiffs allege that Defendants retaliated against them by failing to pay Plaintiffs' Bar Costs because they exercised their First Amendment right to speak during the bar disciplinary proceedings. (Doc. 59 at 15.) Plaintiffs must prove that they exercised their First

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[10] Although Plaintiffs incorporate the legal buzzwords of three separate claims, none of the claims are developed. Plaintiffs' allegations are essentially a formulaic recitation of the elements of causes of actions without any application to their set of facts. Plaintiffs' claim is three short paragraphs. (Doc. 37 ¶¶ 33-35.) "[S]ummary judgment is not a procedural second chance to flesh out inadequate pleadings." *Wasco Products, Inc. v. Southwall Techn., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006). Nevertheless, the Court will address the merits of the claims.

Amendment right to speak as a private citizen rather than pursuant to their official duties. *Garcetti v. Ceballos,* 547 U.S. 410, 418-19 (2006). Here, however, the Court need not engage in an analysis of whether Plaintiffs' speech was as private citizens or public employees. The timing of events is dispositive of the claim. On January 3, 2011, Montgomery issued letters to Plaintiffs stating that "the MCAO will not pay and shall not be responsible for any restitution, State Bar costs, or other monetary sanctions that may be imposed upon or charged to you as part of any decision on the Bar Complaint." (Doc. 56-3 at 50-51.) A formal complaint by the State Bar was not filed until February 2011. (Doc. 56 ¶ 8.) Plaintiffs, therefore, could not have engaged in speech until February 2011. Accordingly, Montgomery could not have retaliated against Plaintiffs for speaking during the disciplinary hearing process. However, Plaintiffs also bring this claim against the Board Defendants. Throughout Plaintiffs' SAC, Affidavits, and Response, Plaintiffs generically use the term "Defendants." Plaintiffs often do not identify which Defendants performed which actions.

A plaintiff must allege that they suffered a specific injury as a result of specific conduct of a defendant and show an affirmative link between the injury and the conduct of that defendant. *See Rizzo v. Goode*, 423 U.S. 362, 371-72, 377 (1976). "[A] plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009).

Here, Plaintiffs allege that "the defendants were each involved in the decision to deny the payment of

bar costs." (Doc. 59 at 14.) Plaintiffs also allege that "a separate claim went to the Board for compliance with the contract between Plaintiffs and the Thomas administration." (Doc. 59 at 11.) This is the extent of the evidence that Plaintiffs bring against the Board Defendants. First, Plaintiffs have failed to prove the existence of a contract that guarantees payment of their Bar Costs. Second, Plaintiffs have not produced any evidence that they submitted a claim to the Board and that it was subsequently denied. Third, Plaintiffs fail to identify any connection between the Board Defendants' individual actions and the violation of their constitutional right to free speech. Plaintiffs make broad allegations, but provide no factual support. Lastly, Defendants submitted the

Declaration of William G. Montgomery stating that "[t]he decision that MCAO would not be responsible for or pay the Bar Costs was [his]." (Doc. 56-3 at 49.) Plaintiffs fail to make a claim against the Board Defendants for retaliation. Accordingly, the Court will grant summary judgment in favor of Montgomery and the Board Defendants on the First Amendment retaliation claim.

2. Fourteenth Amendment Equal Protection Claim

"The Equal Protection Clause of the Fourteenth Amendment commands that no

State shall deny to any person within its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (internal quotation marks omitted). An equal protection claim may be established in two ways. The first requires a plaintiff to "show that the defendants acted with an intent or purpose to discriminate against the

plaintiff based upon membership in a protected class." *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998). Plaintiffs do not allege that Defendants acted with discriminatory intent based on Plaintiffs' membership in a protected class. (Doc. 56-2 at 18, 40-41.) When the challenged action does not involve a suspect classification, a plaintiff may establish an equal protection claim by showing that she was "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam). "When an equal protection claim is premised on unique treatment rather than on a classification, the Supreme Court has described it as a 'class of one' claim." *North Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 486 (9th Cir. 2008)

(citing *Olech*, 528 U.S. at 564). Here, Plaintiffs' equal-protection claim is a class-of-one claim.

In *Engquist v. Oregon Department of Agriculture*, the Supreme Court distinguished the "class-of-one" theory applied in *Olech,* holding "that such a 'class-of one' theory of equal protection has no place in the public employment context." 553 U.S. 591, 594, 602 (2008). The Court stressed the distinction between government exercising its power to regulate or license and government acting "as proprietor, to manage its internal operations." *Id.* at 598. In the former situation, there exists "a clear standard against which departures, even for a single plaintiff, could be readily assessed." *Id.* at 602; *see Olech*, 528 U.S. at 564-65 (recognizing class-of-one claim where the plaintiff alleged that Village intentionally and arbitrarily demanded a 33-foot easement as condition of connecting her property to municipal

water supply where the Village required only a 15-foot easement from other similarly situated property owners). But where the government is acting as proprietor or manager, officials have discretion to make subjective decisions. *See Engquist*, 553 U.S. at 602 (class-of-one claim not cognizable where the plaintiff sued after she was laid off; "[t]o treat employees differently is not to classify them in a way that raises equal protection concerns. . . . it is simply to exercise the broad discretion that typically characterizes the employer employee relationship.). The Court explained that "[t]here are some forms of state action . . . which by their nature involve discretionary decision making based on a vast array of subjective, individualized assessments. In such cases the rule that people should be 'treated alike, under like circumstances and conditions' is not violated when one person is

treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted." *Id.* at 603. To support a class-of-one claim, a plaintiff must demonstrate that the defendant "(1) intentionally (2) treated [the plaintiff] differently than other similarly situated [individuals], (3) without a rational basis." *Gerhart v. Lake Cnty., Mont.*, 637 F.3d 1013, 1022 (9th Cir. 2011) (citations omitted).

"Evidence of different treatment of unlike groups does not support an equal protection claim." *Thornton v. City of St. Helens*, 425 F.3d 1158, 1168 (9th Cir. 2005). Plaintiffs acknowledge that class-of-one claims are generally not applicable in the employment context; however, Plaintiffs attempt to distinguish their claim from *Engquist* by describing *Engquist* as "a personnel action and grievance

issues" and describing their claim as a contract claim. (Doc. 59 at 15.) Plaintiffs allege that "[t]o find that the *Engquist* case would apply simply because Plaintiff [sic] was a public employee is inconsistent with all other law." (Id.) *Engquist* is dispositive of this claim. Here, Defendants were acting as employers and a class-of-one claim is inapposite. Nonetheless, the Court will address the merits of Plaintiffs' equal-protection claim. Plaintiffs must prove that Defendants intentionally treated Plaintiffs differently than other similarly-situated employees without a rational

basis. *Gerhart*, 637 F.3d at 1022. Plaintiffs allege that they were treated differently than other deputy county attorneys who went through disciplinary proceedings, specifically Peter Spaw and Tom Duffy. (Doc. 59 at 8.) Defendants, however, explain their decisions in detail. Defendants took the position that Duffy was wrongly disciplined and, therefore, elected to pay the costs assessed by the State Bar. (Doc. 67 at 4.) In the case of Spaw, Alexander's supervisor, he was indeed disciplined for being negligent in his supervision of Alexander. (Id.) Spaw stipulated to his negligent conduct and to the sanctions imposed rather than fight the charges. (Id.) The County made a rational business decision to pay $15,000 to cover Spaw's bar costs because the alternative was to pay Spaw's defense costs for a bar proceeding, which could cost hundreds of thousands of dollars. (Id.)County prosecutors are not often disciplined by the State Bar. The parties can only identify five people as having been disciplined since 1995: Plaintiffs, Thomas, Spaw, and Duffy. Defendants did not pay Plaintiffs' or Thomas's bar costs. Naming two other prosecutors who had their bar costs paid does not create a pattern or practice that MCAO will

always pay bar costs, regardless of the circumstances. Defendants made individual determinations based on the individual circumstances. Plaintiffs fail to show that Spaw and Duffy were similarly situated or that there was no rational basis for any difference in treatment in this case. *See Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 367 (2001) ("the burden is upon the challenging party to negative any reasonably conceivable state of facts that could provide a rational basis for the [difference in treatment]") (citation and quotation marks omitted) The Court therefore finds that Defendants are entitled to summary judgment as a matter of law on the equal-protection claim against Montgomery and the Board Defendants.

3. *Monell* Claim Against Maricopa County

Plaintiffs bring a *Monell* claim against Maricopa County. A local governmental unit may not be held responsible for the acts of its employees under a respondeat superior theory of liability. *See Connick v. Thompson*, 563 U.S. 51, 60 (2011); *Monell,* 436 U.S. at 691. A plaintiff must demonstrate that the alleged constitutional deprivation was the product of a policy or custom of the local governmental unit, because municipal liability must rest on the actions of the municipality, and not the actions of the employees of the municipality. *Connick,* 563 U.S. at 60. "In order to establish liability for governmental entities under *Monell,* a plaintiff must prove '(1) that [the plaintiff] possessed a constitutional right of which [s]he was deprived; (2) that the municipality had a policy; (3) that this policy amounts to deliberate indifference to the plaintiff's constitutional right; and, (4) that the policy is the

moving force behind the constitutional violation.'" *Dougherty v. City of Covina,* 654 F.3d 892, 900 (9th Cir. 2011) (citing *Plumeau v. Sch. Dist. No. 40 Cnty. of Yamhill,* 130 F.3d 432, 438 (9th Cir. 1997) (alterations in original).

Under *Monell,* a local governmental policy may be based on any of three theories: (1) an expressly adopted official policy; (2) a longstanding practice or custom; or (3) the decision of a person with final policymaking authority. *Lytle v. Carl,* 382 F.3d 978, 982 (9th Cir. 2004). A policy "promulgated, adopted, or ratified by a local governmental entity's legislative body unquestionably satisfies *Monell*'s policy requirement." *Thompson v. City of Los Angeles,* 885 F.2d 1439, 1443 (9th Cir. 1989), *overruled on other grounds by Bull v. City & Cnty. of San Francisco,* 595 F.3d 964 (9th Cir. 2010). Moreover, a policy of inaction may be a governmental policy within the meaning of *Monell. See Waggy v. Spokane Cnty. Washington,* 594 F.3d 707, 713 (9th Cir. 2010). Even if there is not an explicit policy, a plaintiff may establish liability upon a showing that there is a permanent and well-settled practice by the governmental unit that gave rise to the alleged constitutional violation. *See City of St. Louis v. Praprotnik,* 485 U.S. 112, 127 (1988). Allegations of random acts, or single instances of misconduct, however, are insufficient to establish a municipal custom. *See Navarro v. Block,* 72 F.3d 712, 714 (9th Cir. 1995).

Plaintiffs allege that that Defendants intentionally treated "Plaintiffs differently under the policies, procedures and customs of the Maricopa County Attorney's Office." (Doc. 37 ¶¶ 34-35.) While Plaintiffs' argument is not well-defined or well

developed, they have included the legal buzzwords "policies, procedures, and customs" that indicates they are seeking County liability under a *Monell* claim. Read broadly, Plaintiffs argue that, because the bar costs of Spaw and Duffy were paid for, MCAO has a policy, procedure, or custom of paying bar costs; therefore, the County treated Plaintiffs differently by not paying their Bar Costs. (Doc. 59 at 13-14.) This *Monell* claim fails for three reasons. First, Defendants have a written policy of not paying attorney's bar costs. Second, Montgomery sent Plaintiffs a letter, prior to their testimony, that MCAO would not cover their Bar Costs. Third, Plaintiffs have identified only five people who have been disciplined by the State Bar: Plaintiffs, Thomas, Spaw, and Duffy. Out of those five people, the County paid the bar costs for two people. Those two people had vastly different situations and their bar costs were reviewed on an individual basis. Plaintiffs have not proven that the County has established "a permanent and well-settled practice" of paying all bar costs.

4. Qualified Immunity

To determine whether a government official is entitled to qualified immunity, courts must determine whether the official violated a statutory or constitutional right, and whether that right was clearly established at the time of the challenged conduct. *Ashcroft v. al-Kidd,* 131 S. Ct. 2074, 2080 (2011). If no constitutional right was violated, "there is no necessity for further inquiries concerning qualified immunity." *Brittain v. Hansen,* 451 F.3d 982, 988 (9th Cir. 2006). Here, Defendants have not violated Plaintiffs' First or Fourteenth Amendment

rights. Therefore, Montgomery and the Board Defendants are entitled to qualified immunity.

5. Punitive Damages

Plaintiffs seek punitive damages against the Montgomery and the Board Defendants in their individual capacities on the § 1983 claims. (Doc. 59 at 11.) Plaintiff may seek punitive damages as a remedy, but not as a substantive claim for relief. *Martin v. Medtronic, Inc.*, 2014 WL 6633540, at *8 (D. Ariz. Nov. 24, 2014); *Beavers-Gabriel,* 15 F. Supp. 3d 1021, 1043 (D. Haw. April 10, 2014). Because all other counts are dismissed and punitive damages cannot stand alone, the Court will grant summary judgment on Count III in favor of Defendants.

IV. Additional Matters

A. Plaintiffs' Motion for Summary Judgment and Motion to Strike

Having granted summary judgment in favor of Defendants on all counts, the Court need not reach Plaintiffs' Motion for Summary Judgment or Motion to Strike. The Court notes that the parties' arguments are the same in the cross-motions for summary judgment. Additionally, the Court need not reach the contested materials in Plaintiffs' Motion to Strike.

B. Attorneys' Fees

Defendants seek an award of attorneys' fees pursuant to A.R.S. § 12-341.01(A) for the state-law claims and 42 U.S.C. § 1988 for the 42 U.S.C. § 1983 claims.

1. A.R.S. § 12-341.01(A)

"In any contested action arising out of contract, express or implied, the court may award the

successful party reasonable attorney fees." A.R.S. § 12-341.01(A). Courts must consider six factors in deciding whether to grant attorney's fees: (1) the merits of the unsuccessful party's claim; (2) whether the litigation could have been avoided or settled or whether the successful party's efforts were completely superfluous in achieving the ultimate result; (3) whether assessing fees against the unsuccessful party would cause extreme hardship; (4) whether the successful party prevailed with respect to all relief sought; (5) whether the legal question presented was novel or had been previously adjudicated; and (6) whether a fee award would discourage other parties with tenable claims from litigating. *Associated Indem. Corp. v. Warner,* 694 P.2d 1181, 1184 (Ariz. 1985) (in banc).

The majority of factors favor granting attorneys' fees to Defendants. Plaintiffs'

claims had little merit; Plaintiffs could not identify the terms of the contract they allege was breached. The parties attempted settlement, but were unable to settle. Defendants' efforts were not superfluous in the outcome. Defendants prevailed in full and the legal questions were not novel. A fee award will not discourage those who have meritorious claims. The remaining factor, however, weighs in Plaintiffs' favor. Plaintiffs have a $101,293.75 judgment to pay and cannot presently work as attorneys. Assessing fees against Plaintiffs would result in extreme hardship and would be an exercise in futility. As such, the Court will deny Defendants motion for attorneys' fees pursuant to A.R.S. § 12-341.01(A).

2. 42 U.S.C. § 1988

Section 1988 authorizes a discretionary fee award to the prevailing party. 42 U.S.C. § 1988. However,

such an award is limited in application. *See Legal Servs. of N. Cal., Inc. v. Arnett,* 114 F.3d 135, 141 (9th Cir. 1997) ("A prevailing defendant is awarded attorneys' fees only where the action is found to be unreasonable, frivolous, meritless or vexatious.") (citation and quotation marks omitted). While the Court finds Plaintiffs' claims had little merit, the Court does not go so far as to find it meritless. Therefore, the Court will deny Defendants motion for attorneys' fees pursuant to 42 U.S.C. § 1988. Accordingly,

IT IS ORDERED:

1. That Defendants' Motion for Summary Judgment (Doc. 55) is **granted**;

2. That Plaintiffs' Motion for Summary Judgment (Doc. 57) and Motion to

Strike (Doc. 64) are **denied** as moot;

3. That Defendants' request for an award of attorneys' fees is **denied**; and

4. That the Clerk of Court shall **terminate** this action and enter judgment accordingly.

Dated this 29th day of February, 2016.

/s/ Honorable Steven P. Logan

United States District Judge