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

BRIAN A. WILKINS,
Plaintiff,

v.

CITY OF TEMPE;
TEMPE POLICE DEPARTMENT;
TOM RYFF, in his individual and official
capacity as Tempe Police Chief;
OFFICER MIKE WALLACE in his
individual and official capacity;
OFFICER T. JOHNSON in his individual
and official capacity;
DEFECTIVE JEFF LOEWENHAGEN, in
his individual and official capacity;
Defendants.

No. CV-09-0752-PHX-MHM

**DEFENDANTS' MOTION TO
DISMISS COMPLAINT**

Tempe City Attorney's Office
21 East Sixth Street, Suite 201
P.O. Box 5002
Tempe, Arizona 85280

Pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, Defendants City of Tempe, Tempe Police Department, Tom Ryff, Officer Mike Wallace, Officer Travis Johnson, and Detective Jeff Loewenhagen move to dismiss Plaintiff's Complaint with prejudice because it fails to state a claim upon which relief can be granted. This Motion is supported by the following Memorandum of Points and Authorities.

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RESPECTFULLY SUBMITTED this 30th day of June, 2009.

TEMPE CITY ATTORNEY'S OFFICE

s/ Clarence E. Matherson, Jr. _____
Andrew B. Ching
Clarence E. Matherson, Jr.
Catherine M. Bowman
Attorneys for Defendants

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTS.

On July 22, 2008, Plaintiff Brian Wilkins was arrested by Officer Mike Wallace and Officer Travis Johnson after Plaintiff became involved in a dispute with a neighbor and discharged a firearm within city jurisdictions. Complaint ¶ 7. Plaintiff alleges that he fired three shots into the air because his neighbor lunged at him with a knife, and had he not done so, he would have been seriously injured by his neighbor. Id. ¶ 12. Plaintiff further alleges that his neighbor walked around outside his door for the next several hours yelling threats and racial slurs at him. Id. ¶ 13. According to Plaintiff, his neighbor attempted to extort money from him and sent several threatening text messages laced with racial slurs. Id. ¶ 14.

At around 2:40 a.m., Officer Johnson arrived to conduct an investigation of the incident. Id. ¶ 17. According to Plaintiff, Officer Johnson spoke to the neighbor who told Officer Johnson that Plaintiff pointed a gun at his head “thirty minutes ago.” Id. Again, according to Plaintiff, the neighbor could not remember a lot of the events as he was “too intoxicated.” Id.

At around 3:00 a.m., Plaintiff exited his apartment and was confronted by five to seven Tempe police officers who told him to put his hands up. Id. ¶ 18. Plaintiff complied without incident and was placed in handcuffs. Id. Plaintiff states he was interviewed by Officer Mike Wallace. Id. ¶ 19. Plaintiff states that he was also

1 intoxicated at the time. Id. Plaintiff states that he told Officer Wallace that he was
2 threatened by his neighbor and he showed Officer Wallace the text messages and a
3 extortion note from his neighbor. Id. ¶ 20. Plaintiff states that Officer Wallace viewed all
4 the messages but falsely and maliciously wrote in his narrative that there was nothing
5 threatening and referred to all the messages as “basically name calling.” Id. ¶ 21.
6 Plaintiff further states, “This was a clear mischaracterization fo the evidence and the
7 Plaintiff believes and alleges Wallace did this with malice because the Plaintiff is
8 ‘black.’” Id. According to Plaintiff, Officer “Wallace does not want ‘black’ men legally
9 owning guns, even though all Americans are entitled to do so via the Second Amendment
10 and the State of Arizona’s gun laws.” Id. ¶ 22.

11 According to Plaintiff, he was arrested and charged with aggravated assault with a
12 deadly weapon, possession of marijuana during a gun crime, and three counts of
13 disorderly conduct. Id. ¶ 23. Plaintiff’s neighbor was not charged with any crimes on that
14 night. Id. Plaintiff alleges that his neighbor was not arrested because he was white and
15 the officers were also white. Id. Plaintiff subsequently pled guilty to disorderly conduct
16 and possession of drug paraphernalia. Id. ¶ 26. (See certified copy of Plaintiff’s Plea
17 Agreement and Notice of Conviction attached hereto as Exhibits A and B, respectively.)
18 Plaintiff’s conviction for those charges remains outstanding.

19 **II. LEGAL ARGUMENT.**

20 When ruling on a motion to dismiss, the trial court accepts all material allegations
21 of the complaint as true and reads them in light most favorable to the plaintiff. Logan v.
22 Forever Living Prods. Int’l, 52 P.3d 760, 761 (Ariz. 2002); Doe ex rel. Doe v. State, 24
23 P.3d 1269, 1270 (Ariz. 2001). A motion to dismiss should be granted when the plaintiff is
24 not entitled to relief under any state of facts susceptible of proof under the pleadings.
25 Mohave Disposal, Inc. v City of Kingman, 922 P.2d 308, 311 (Ariz. 1996). A motion to
26 dismiss should be granted in this case because Plaintiff failed to present facts that would
27 entitle him to judicial relief.
28

1 A. **PLAINTIFF'S § 1983 AND § 1985(3) CLAIMS SHOULD BE**
2 **DISMISSED.**

3 The plaintiff alleges a cause of action under 42 U.S.C. § 1983 and 42 U.S.C.
4 § 1985(3). A valid § 1983 claim requires Plaintiff to show a deprivation of his or her
5 federal constitutional or statutory rights by a person acting under color of State law. See
6 42 U.S.C. § 1983. A valid § 1985(3) claim requires Plaintiff to show: "(1) a conspiracy;
7 (2) for the purpose of depriving, either directly or indirectly, any person or class of
8 persons of the equal protection of the laws, or of equal privileges and immunities under
9 the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either
10 injured in his person or property or deprived of any right or privilege of a citizen of the
11 United States." United Bhd. of Carpenters & Joiners, Local 610 v. Scott, 463 U.S. 825,
12 829 (1983); see also 42 U.S.C. § 1985(3).

13 Plaintiff's § 1983 and § 1985(3) claims should be dismissed for two alternative
14 reasons. First, Plaintiff's claims should be dismissed because his suit would necessarily
15 require him to prove the unlawfulness of his conviction. Heck v. Humphrey, 512 U.S.
16 477 (1994). Alternatively, Plaintiff's claims should be dismissed on the merits as to
17 Tempe because he failed to show that Tempe has a policy or custom of violating the civil
18 rights of individuals. Monell v. Dept. of Soc. Serv. Of N.Y., 436 U.S. 658 (1978).
19 Moreover, Plaintiff has failed to show the existence of a conspiracy entitling him to relief
20 under § 1985(3). United Bhd. of Carpenters & Joiners, Local 610, 463 U.S. at 829.

21 **1. Plaintiff's § 1983 and § 1985(3) claims should be dismissed**
22 **because the action necessarily requires the plaintiff to prove the**
23 **unlawfulness of his conviction.**

24 Plaintiff's § 1983 and § 1985(3) claims must be dismissed because his claims are
25 tantamount to a collateral attack on his conviction. A plaintiff may not bring a claim that,
26 if litigated, would necessarily require the individual to prove the unlawfulness of his
27 conviction. Heck, 512 U.S. at 486-87. In the instant case, the § 1983 and § 1985(3)
28 actions appear to claim that Wilkins' arrest was unlawful and as a result his constitutional
rights were violated when he was arrested. However, Plaintiff pled guilty to some of the

1 charges for which he was arrested. By pleading guilty to those charges, Plaintiff admitted
2 that his rights were not violated by his arrest.

3 Should a plaintiff wish to proceed in a claim that would otherwise be tantamount to
4 a collateral attack, the plaintiff must show that the conviction or sentence “has been
5 reversed on direct appeal, expunged by executive order, declared invalid by a state
6 tribunal authorized to make such a determination, or called into question by a federal
7 courts’ issuance or a writ of habeas corpus.” Heck, 512 U.S. at 487. Plaintiff’s
8 conviction remains outstanding. Until his conviction is reversed, expunged, declared
9 invalid or called into question by a federal court, Plaintiff is not allowed to bring this
10 action; thus, the claims against Defendants should be dismissed.

11 **2. Plaintiff’s § 1983 and § 1985(3) claims fail on the merits.**

12 In addition to the § 1983 and § 1985(3) claims being invalid because they are used
13 as instruments to attack his conviction, Plaintiff’s claims also fail on the merits. First, as a
14 preliminary matter, the majority of Plaintiff’s chosen defendants are inappropriate
15 defendants and should be dismissed as such. Second, Plaintiff failed to allege facts
16 tending to show that the City of Tempe has a policy or custom of violating civil rights or
17 that there is a conspiracy within the City of Tempe.

- 18 a. Chief Ryff and Detective Loewenhagen should be dismissed
19 from this case because they did not play an affirmative part in
20 any alleged deprivation.

21 Defendants Ryff and Loewenhagen should be dismissed from the case because
22 they had no personal involvement in the actions that allegedly led to the violation of
23 Plaintiff’s rights. “State officials are not subject to suit under § 1983 unless they play an
24 affirmative part in the alleged deprivation.” King v. Atiyeh, 814 F.2d 565, 568 (9th. Cir.
25 1987) (citing Rizzo v. Goode, 423 U.S. 362, 377 (1976)) (internal quotations omitted).
26 Additionally, “a plaintiff must allege facts, not simply conclusions, that show that an
27 individual was personally involved in the deprivation of his civil rights.” Barren v.
28 Harrington, 152 F.3d 1193, 1194 (9th. Cir. 1998).

1 Plaintiff names Defendant Ryff in the suit without alleging any facts tending to
2 show that he played a personal and affirmative role in the incident which led to his arrest
3 and the alleged deprivation of his rights. Plaintiff's allegations against Defendant Ryff are
4 conclusory at best and do not support his allegations against the other defendants such that
5 Defendant Ryff should be subject to suit.

6 Additionally, while Plaintiff states that Defendant Loewenhagen "deemed the case
7 closed," Complaint ¶ 25, he fails to allege how this action in deeming the case closed was
8 in deprivation of his constitutional rights. Plaintiff seems to merely assume that
9 Defendants Ryff and Loewenhagen deprived him of his civil rights. However, under
10 Barren, this bare assumption alone is insufficient to maintain these claims. Consequently,
11 the charges against Defendants Ryff and Loewenhagen should be dismissed.

12 b. Officer Mike Wallace and Officer T. Johnson should be
13 dismissed from the suit in their official capacities because the
City of Tempe is the real party in interest in this case.

14 Officer Mike Wallace and Officer T. Johnson should be dismissed as defendants in
15 their official capacities from the § 1983 and § 1985(3) claims because they are not the real
16 parties in interest in this case. Under Kentucky v. Graham, 473 U.S. 159, 167 (1985), "an
17 official-capacity suit is . . . to be treated as a suit against the entity" because "the real party
18 in interest is the entity." The City of Tempe is the real party in interest in this case. As a
19 result, the charges against the officers in their official capacities should be dismissed.

20 c. The Tempe Police Department should be dismissed because it
21 is a non-jural entity.

22 The Tempe Police Department should be dismissed from the case because police
23 departments are not jural entities. A non-jural entity is "incapable of suing or being sued
24 in its own name." De Jesus Ortega Melendres v. Arpaio, 598 F. Supp.2d 1025, 1039
25 (D.Ariz., 2009). The Tempe Police Department is a non-jural entity because it does not
26 have a separate legal existence and is incapable of suing except in concert with the City of
27 Tempe. See Edmonds v. Dillin, 485 F. Supp 722, 724 (D.C. Ohio 1980); Darby v. City of
28

1 Pasadena Police Dep't, 939 F.2d 311, 313 (5th. Cir. 1991). Therefore, the Tempe Police
2 Department should be dismissed as a party in this matter.

3 d. The § 1983 and § 1985(3) claims should be dismissed as to
4 Tempe because Plaintiff has failed to allege facts tending to show
5 a city policy or custom that led to the alleged deprivation of his
6 civil rights and Plaintiff has not alleged a proper conspiracy.

7 Plaintiff has not alleged any facts against Tempe that would show that Tempe has a
8 policy or custom of violating the civil rights of any individual, including Plaintiff.
9 Municipalities cannot be held liable in § 1983 claims for the actions of its employees
10 under a *respondeat superior* theory. Greenawalt v. Sun City West Fire Dist., 250
11 F. Supp.2d 1200, 1215 (D.Ariz. 2003). Instead, to maintain a § 1983 action against
12 Tempe, Plaintiff must show that Tempe had a practice, custom or policy of violating
13 rights. Monell v. Dept. of Soc. Serv. Of N.Y., 436 U.S. 658. Additionally, for a practice,
14 custom or policy to be actionable in a § 1983 case, there must be a “deliberate action that
15 constitutes a moving force behind the plaintiff’s deprivation of federal rights.”
16 Greenawalt, 250 F. Supp.2d at 1215 (*quoting Board of Supervisors v. Brown*, 520 U.S.
17 397, 400) (internal quotations omitted). The plaintiff must allege facts that could infer a
18 discriminatory custom. See id., at 1217.

19 Plaintiff’s § 1985(3) claim should be dismissed because he has failed to allege facts
20 tending to show a conspiracy. To show the existence of a conspiracy, Plaintiff must show
21 that the conspirators acted with invidious discriminatory animus to deprive individuals of
22 equal protection. Griffin v. Breckenridge, 403 U.S. 88, 102 (1971). In a § 1985(3) claim,
23 allegations of conspiracy must be supported by material facts, not mere conclusory
24 statements. Fonda v. Gray, 707 F.2d 435, 438 (9th Cir. 1983); see also Aldabe v. Aldabe,
25 616 F.2d 1089 (9th Cir. 1980).

26 Plaintiff’s § 1983 and § 1985(3) claims cannot be maintained because the plaintiff
27 failed to allege facts tending to show a conspiracy or a discriminatory custom or policy. In
28 support of his contentions, Plaintiff merely lists two alleged incidents involving one of the
named defendants (Defendant Wallace) and a former Tempe police officer that he

1 believes supports his position that Tempe targets black citizens unfairly. Complaint
2 ¶¶ 31-32. Plaintiff also states that “there are at least 11 Tempe Police Officers on the
3 Maricopa County Attorney’s Officer Integrity Database.” Complaint ¶ 33. However,
4 Plaintiff fails to allege how these incidents show a custom or policy of racism. These
5 incidents, even taken as true, do not provide any material evidence of a conspiracy or
6 allude to the existence of a conspiracy. Consequently, Plaintiff’s § 1983 and § 1985(3)
7 claims should be dismissed for failure to state a claim.

8 **B. PLAINTIFF’S SELECTIVE ENFORCEMENT CLAIM IS WITHOUT**
9 **MERIT AND SHOULD BE DISMISSED.**

10 Plaintiff alleges a cause of action for selective enforcement of state law based on
11 racism. A valid selective enforcement claim requires Plaintiff to prove that (1) there was
12 a policy or custom motivated by a discriminatory purpose, which (2) had a discriminatory
13 effect. United States v. Armstrong, 517 U.S. 456, 465 (1996). Plaintiff failed to show
14 either element of a selective enforcement claim.

15 First, Plaintiff failed to allege facts tending to show that Tempe has a policy or
16 custom motivated by a discriminatory purpose. “[A]llegations of random acts, or single
17 instances of misconduct...are insufficient to establish a municipal custom.” DeGroote v.
18 City of Mesa, 2009 U.S. Dist. LEXIS 15082, 14-15 (D.Ariz. 2009); see also Trevino v
19 Gates, 99 F.3d 911, 918 (9th Cir 1996); McDade v West, 223 F.3d 1135, 1142 (9th Cir
20 2000); Thompson v City of Los Angeles, 885 F.2d 1439, 1444 (9th Cir 1989).
21 Additionally, “[w]hen one must resort to inference, conjecture and speculation to explain
22 events... [the events do not] constitute an actionable policy or custom.” Trevino, 99 F.3d
23 at 920. Plaintiff, at best, has alleged two random events to demonstrate a custom of
24 racism. Even accepting the allegations as true for the purposes of this motion, it requires a
25 great leap of inference to connect the alleged action to a custom or policy, which Plaintiff
26 has not identified. Under the current case law, these two alleged incidents are insufficient
27 to demonstrate a custom motivated by a discriminatory purpose.
28

1 Second, Plaintiff failed to provide evidence that any Tempe policy or custom had a
2 discriminatory effect. In order to show that a policy or custom has a discriminatory effect,
3 “the claimant must show that similarly situated individuals of a different race were not
4 prosecuted.” Armstrong, 517 U.S. at 465. To be similarly situated, “comparators must be
5 prima facie identical in all relevant respects or directly comparable to plaintiff in all
6 material respects.” Racine Charter One, Inc. v. Racine Unified Sch. Dist., 424 F.3d 677,
7 680 (E.D. Wisc. 2005) (*quoting* Purze v. Vill of Winthrop Harbor, 286 F.3d 452, 455-56
8 (7th. Cir, 2004); Ajayi v. Aramark Bus. Servs., Inc., 336 F.3d 520, 532 (7th. Cir. 2003)).

9 In this case, Plaintiff has failed to demonstrate that similarly situated individuals of
10 a different race were treated differently. While the plaintiff presented his neighbor as a
11 comparator, his neighbor is not similarly situated to him because the neighbor is not prima
12 facie identical to Plaintiff in all relevant respects. First, the alleged misconduct
13 perpetrated by the comparators is not directly comparable. While Plaintiff contends that
14 his neighbor committed extortion, that is not a crime Plaintiff was accused of committing.
15 Second, several of the crimes that Plaintiff was alleged to have committed that night were
16 not crimes that Plaintiff alleged that his neighbor committed. For instance, Plaintiff pled
17 guilty to possession of drug paraphernalia; however, there is neither an allegation nor
18 evidence that his neighbor possessed drug paraphernalia. Additionally, Plaintiff admits
19 that he was in possession of a handgun and fired the handgun three times that night.
20 Plaintiff does not allege that his neighbor possessed and discharged a handgun on the
21 night of Plaintiff’s arrest.

22 While it is true that Plaintiff was arrested while his neighbor was not, “different
23 treatment of dissimilarly situated persons does not violate the equal protection clause.”
24 E T Realty v. Strickland, 830 F.2d 1107, 1109 (11th. Cir. Ala. 1987); Ables v. Eichenlaub,
25 2009 U.S. Dist. LEXIS 25103, 20 (N.D. Fla. Mar. 18, 2009); Campbell v. Rainbow City,
26 434 F.3d 1306, 1314 (11th. Cir. 2006). The differences between Plaintiff and his
27 neighbor demonstrate that these individuals are not similarly situated for the purposes of a
28

1 selective enforcement claim. Because they are not directly comparable in all material
2 respects, Plaintiff has failed to make out a valid selective enforcement claim.

3 C. **PLAINTIFF'S DEFAMATION OF CHARACTER CHARGE**
4 **SHOULD BE DROPPED BECAUSE THE STATEMENTS WERE**
5 **NOT DEFAMATORY.**

6 Plaintiff has failed to lay out an actionable defamation charge. To create liability
7 for defamation, there must be: (a) a false and defamatory statement concerning another;
8 (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence
9 on the part of the publisher; and (d) either actionability of the statement irrespective of
10 special harm or the existence of special harm cause by the publication. Restatement
11 (Second) of Torts § 558. In Arizona, "[i]t has long been the law... that truth is a complete
12 defense to an action for defamation." Cullison v. City of Peoria, 584 P.2d 1156, 1161
13 (Ariz. 1978) (*citing* Central Arizona Light & Power Company v. Akers, 46 P.2d 126, 134
14 (Ariz. 1935)). In the instant case, the statements Plaintiff claims are defamatory are
15 truthful statements. It is true that he was arrested on suspicion of the charges specified in
16 the police report and it is also true that he committed the crimes of which he was accused.
17 It is evident that Plaintiff committed the crimes he was accused of because Plaintiff pled
18 guilty to the charges of disorderly conduct and possession of drug paraphernalia.
19 Furthermore, Plaintiff admits he fired his gun several times on the night of the incident.

20 While the statements published in the police report may have been damaging, true
21 statements are not actionable in a defamation case. Restatement (Second) of Torts
22 § 581(A). If Plaintiff wishes to challenge his conviction he has chosen an inappropriate
23 cause of action--civil torts suits are not the appropriate vehicles for challenging
24 outstanding criminal judgments. Heck v. Humphrey, 512 U.S. at 486. Plaintiff fails to
25 create an actionable defamation claim because the statements published in the police
26 reports were truthful and not defamatory; therefore, his defamation claim should be
27 dismissed.
28

1 **D. PLAINTIFF'S INTENTIONAL INFLICTION OF EMOTIONAL**
2 **DISCTRESS CHARGE SHOULD BE DISMISSED BECAUSE THE**
3 **OFFICERS' CONDUCT WAS NOT EXTREME OR OUTRAGEOUS.**

4 Plaintiff's allegation that the Tempe Police are guilty of intentional infliction of
5 emotional distress is unwarranted. For a claim of intentional infliction of emotional
6 distress, plaintiffs must show:

7 First, the conduct by the defendant must be "extreme" and
8 "outrageous"; second the defendant must either intend to
9 cause emotional distress or recklessly disregard the near
10 certainty that such distress will result from his conduct; and
11 third, severe emotional distress must indeed occur as a result
12 of defendant's conduct. Ford v. Revlon, Inc., 153 Ariz. 38,
13 43, 734 P.2d 580 (1987).

14 Plaintiff's claim of intentional infliction of emotional distress should be dismissed
15 because Officer Wallace and Officer Johnson's actions were not extreme and outrageous
16 and because the officers' actions did not proximately cause the Plaintiff's emotional
17 distress. First, Officer Wallace and Officer Johnson's actions in the case were not
18 extreme and outrageous. To satisfy an intentional infliction of emotional distress claim, the
19 alleged conduct must be "so outrageous in character, and so extreme in degree, as to go
20 beyond all possible bounds of decency, and to be regarded as atrocious, and utterly
21 intolerable in a civilized community." Ford v. Revlon, Inc., 734 P.2d 580, 585 (Ariz.
22 1987) (*citing* Restatement (Second) of Torts § 46 cmt. b (1965)). The "conduct must
23 completely violate human dignity" and the "average member of the community must regard
24 the defendant's conduct . . . as being a complete denial of the plaintiff's dignity as a person."
25 Pankratz v. Willis, 744 P.2d 1182, 1189 (1987) (*citing* Hamilton v. Ford Motor Credit Co.,
26 502 A.2d 1057, 1064 (Md. App. 1986)). Whether conduct was extreme and outrageous
27 enough to state a claim for relief is determined as a matter of law by the court. Midas
28 Muffler v. Ellison, 650 P.2d 492, 499 (Ariz. App. 1982). The officers' conduct should not
 be found to be outrageous because Officer Wallace and Officer Johnson acted responsibly
 and acted within the confines of the law on that night. In fact, in the section of Plaintiff's
 Complaint where he alleges intentional infliction of emotional distress, he fails to present

1 any evidence of officer misconduct and fails to demonstrate how the officers' conduct was
2 extreme and outrageous in any way.

3 Second, Plaintiff's emotional distress was not proximately caused by Officers
4 Wallace and Johnson. Without establishing proximate cause, a plaintiff cannot recover for
5 intentional infliction of emotional distress. See Restatement (Second) of Torts, 46. The
6 Plaintiff failed to show how the City of Tempe is the legal cause of being evicted, failing
7 to graduate or losing his job. While Plaintiff may be suffering from emotional distress,
8 his suffering is not a result of the officers' actions.

9 Because Plaintiff has failed to make a threshold showing that the officers' conduct
10 was extreme and outrageous or that the officers' conduct was the legal cause of his
11 distress, the claim for intentional infliction of emotional distress should be dismissed.
12 Furthermore, Plaintiff cannot allege that the officers charged him with crimes that were
13 unwarranted and led to his emotional distress when he pled guilty to those crimes and his
14 conviction has not be overturned or called into question by a federal court.

15 **E. PLAINTIFF'S GROSS NEGLIGENCE CHARGE SHOULD BE**
16 **DISMISSED BECAUSE THE ALLEGATIONS ARE SUBSUMED BY**
17 **OTHER CHARGES.**

18 Plaintiff brings a separate charge alleging gross negligence because the Tempe
19 Police failed to press extortion charges against his neighbor. This charge cannot stand.
20 First, Arizona does not recognize an independent claim for gross negligence. Second,
21 Plaintiff's gross negligence allegations are subsumed by the Plaintiff's other charges. The
22 first allegation of gross negligence for failing to press extortion charges against his
23 neighbor, is addressed in response to Plaintiff's selective enforcement claim. The other
24 allegations of gross negligence, for violation of his Constitutional rights, are addressed in
25 response to Plaintiff's § 1983 claims.

26 **F. PLAINTIFF'S FAILURE TO TRAIN CHARGE SHOULD BE**
27 **DROPPED BECAUSE THERE WAS NO VIOLATION OF A**
28 **COSNTITUTIONAL RIGHT.**

Plaintiff's failure to train allegation is unwarranted. To succeed on a failure to
train claim, Plaintiff must show (1) the need for more training is obvious, (2) the

1 inadequacy so likely resulted in a violation of a Constitutional right that (3) policymakers
2 can reasonably be said to have been deliberately indifferent to the need. Clement v.
3 Gomez, 298 F.3d 898, 905 (9th. Cir. 2002). Importantly, there must be a violation of a
4 Constitutional right because “if no right is violated, there is no basis for finding officers
5 were inadequately trained.” Los Angeles v. Heller, 475 U.S. 796, 799 (1986); Trigalet v.
6 City of Tulsa, 239 F.3d 1150, 1154-56 (10th Cir. 2001).

7 As previously addressed in response to Plaintiff’s other allegations, the officers
8 involved in his arrest did not violate Plaintiff’s rights. The officers did not selectively
9 enforce state law, did not produce a defamatory statement against Plaintiff, did not
10 intentionally inflict emotional distress upon Plaintiff, and were not grossly negligent. As
11 a result, Plaintiff has failed to show any deprivation of a civil right. Consequently, there
12 is no basis for finding that the officers were inadequately trained. See Scott v. Heinrich,
13 39 F.3d 912, 916 (9th. Cir. 1992).

14 **III. CONCLUSION.**

15 Based on the foregoing, Defendants respectfully request that this Court dismiss
16 Plaintiff’s Complaint in its entirety for his failure to state a claim upon which relief can be
17 granted.

18 **RESPECTFULLY SUBMITTED** this 30th day of June, 2009.

19 TEMPE CITY ATTORNEY'S OFFICE

20
21 s/ Clarence E. Matherson, Jr.
22 Andrew B. Ching
23 Clarence E. Matherson, Jr.
24 Catherine M. Bowman
25 21 E. Sixth Street, Suite 201
26 P.O. Box 5002
27 Tempe, Arizona 85280
28 Attorneys for Defendants

1 CERTIFICATE OF SERVICE

2 I hereby certify that on June 30, 2009, I electronically transmitted the attached
3 document to the Clerk's Office using the CM/ECF System for filing, and mailed a copy of
4 same to:

5 Brian A. Wilkins
6 P. O. Box 66
7 Tempe, AZ 85280

8 I further certify that on June 30, 2009, the attached document was hand-delivered
9 to:

10 HONORABLE MARY H. MURGUIA
11 United States District Court
12 Sandra Day O'Connor U.S. Courthouse, Suite 525
13 401 W. Washington Street, SPC 53
14 Phoenix, AZ 85003

15 s/ Cindy Clore

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