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May 1, 2017

VIA EMAIL and USPS CERTIFIED MAIL TO:

Mr. Kent Volkmer
Pinal County Attorney
Pinal County
County Attorney
30 North Florence Street, Building D
Florence, AZ 85132

Re: your defamation of Paul Babeu, Lando Voyles, and Dwight Fujimoto

Dear Mr. Volkmer:

Please be advised this firm represents former Pinal County Sherriff Paul Babeu, former Pinal County Attorney Lando Voyles, and Dwight Fujimoto, Mr. Voyles' Chief of Staff while County Attorney, with respect to the defamatory statements you have made regarding our clients. On numerous occasions, you have made disparaging statements about our clients to the media with respect to our clients' management of RICO funds. The statements are demonstrably false and made with malice. The statements constitute defamation per se. We demand that you make a public retraction of the comments or we will use all legal remedies available to us.

With respect to Mr. Babeu and Mr. Voyles, the Arizona Court of Appeals has said “[a] defendant is subject to liability for defamation of a public official only if he, with actual malice, publishes to a third party a false and defamatory communication concerning the plaintiff.” *Pinal Cty. v. Cooper ex rel. Cty. of Maricopa*, 238 Ariz. 346, 351, 360 P.3d 142, 147 (Ct. App. 2015)(citing *Peagler v. Phoenix Newspapers, Inc.*, 114 Ariz. 309, 315, 560 P.2d 1216 (1977); *Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 486, 724 P.2d 562 (1986); *Dube v. Likins*, 216 Ariz. 406, 417, ¶ 36, 167 P.3d 93 (App.2007)). The same Court of Appeals went on to define “actual malice”: “[u]nder the ‘actual malice’ standard, the speaker must actually have

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subjectively known of or recklessly disregarded the falsity of a statement. In Arizona, that constitutional standard has been strengthened to require ‘conscious disregard’ of the truth.” *Id.* at 350, 146 (citing *New York Times v. Sullivan*, 376 U.S. 254, 279–86, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) and *Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 487, 724 P.2d 562 (1986) respectively). The Supreme Court of Arizona said of meeting the conscious disregard standard “[o]ne factor is defendant's failure to investigate after letters and demands; failure to investigate is not reckless disregard per se, ... but it provides some evidence of actual malice when the facts confronting defendant are such that no reasonable person would fail to investigate.” *Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 487, 724 P.2d 562, 573 (1986)(citing *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1569 (D.C.Cir.1984)). The Supreme Court of Arizona has stated that defamation that accuses someone of committing a “crime is defamatory per se.” *McClinton v. Rice*, 76 Ariz. 358, 364, 265 P.2d 425, 429 (1953). You have defamed Mr. Babeu and Mr. Voyles per se via your false statements to others by accusing them of criminal activity: the misuse of RICO funds. Your statements were made with fundamental conscious disregard of the truth.

It is unreasonable that you have failed to investigate the County Attorney Anti-Racketeering Fund Audit from September 2014 conducted by Pinal County’s Office of Internal Audit. Another such audit was requested by the Pinal County Board of Supervisors in 2016. Additionally, you should have investigated every yearly audit the Arizona Criminal Justice Commission and the Arizona Attorney General’s Office conducted of Pinal RICO expenditures while Mr. Voyles and Mr. Babeu held elective office. Not one of the aforementioned audits denoted improper use of RICO funds by either Mr. Babeu or Mr. Voyles. These audits are all public records which are easy for you to obtain and were obvious starting points for determining the truth of the matter before you made your patently false statements. You, with actual malice, have willfully failed to investigate the matters on which you commented and intentionally published falsehoods about Mr. Voyles, Mr. Babeu, and Mr. Fujimoto.

Both Mr. Babeu and Mr. Voyles had controls in place to ensure that RICO funds were expended according to the law. Requests for funding that came to former Sherriff Babeu’s office were reviewed by a committee of employees to determine if the applications met funding guidelines. The committee then recommended to the Sheriff whether the application be

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approved or denied. If the Sheriff approved the application for funding, the request was forwarded to the fiduciary which was former County Attorney Voyles for his review and approval. The approval process was non-partisan under the oversight of former County Attorney Voyles and the prior County Attorney, Mr. James Walsh. The County Attorney then submitted the request to the County Treasurer's Office who reviewed it and cut a check for the organization. As one can plainly see, there was a tremendous amount of oversight and transparency in the process of distributing and expending RICO funds. Reviewing published audits outlining the Sheriff's Office's protocols for awarding funds would have been another obvious first investigatory step for you to take, but you willfully refused to do so.

After taking office in January 2013, Mr. Voyles established and implemented a formal process for review and approval of RICO Community Outreach Fund requests. This included the development of the RICO Community Outreach Fund Guidelines and Memorandum of Understanding between the County Attorney's Office and funding recipients as part of a comprehensive process that would ensure that proper controls and procedures were followed in the review and approval of RICO Community Outreach Fund requests made to the Pinal County Attorney's Office (PCAO). While such measures were not statutorily required, PCAO adopted these sound guidelines and procedures for its management of the RICO Community Outreach Fund.

The guidelines developed by the PCAO for the RICO Community Outreach Fund required certain criteria for program funding approval. A review committee, convened bi-annually, carefully evaluated each request to determine program awards. The PCAO, under County Attorney Voyles, made best efforts to ensure that recipients of Community Outreach Funds followed established guidelines and maintained program compliance. Recipients were required to sign a Memorandum of Understanding acknowledging the guidelines and program requirements for acceptance of Community Outreach funds.

Be aware that former County Attorney Lando Voyles ensured the proper use of asset forfeiture funds by requesting a return of funds from organizations that did not properly spend the funds after an audit revealed improper expenditure of the funds. Mr. Voyles also received the advice of counsel before spending funds acquired through asset forfeiture. Again, obtaining

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copies of the County Attorney's protocols for awarding funds would have been another obvious first investigatory step for you to take, but you willfully refused to do so.

It also behooved you to have investigated that the United States Department of Justice's Guide to Equitable Sharing for State and Local Law Enforcement Agencies and the Arizona Revised Statute §13-2314.01, to familiarize yourself with the permissible uses of funds derived from seized assets before you intentionally made your defamatory comments. (<http://www.justice.gov/usao/ri/projects/esguidelines.pdf>).

With respect to Mr. Fujimoto, the standard of malice is objective malice rather than actual malice. The Court of Appeals of Arizona said of the objective malice standard, "in a defamation case, qualified immunity will protect a public official if the facts establish that a reasonable person, with the information available to the official, 'could have formed a reasonable belief that the defamatory statement in question was true and that the publication was an appropriate means for serving the interests which justified the privilege.'" *Pinal Cty.*, 238 Ariz. at 350. You have access to the audits listed above and no reasonable person in possession of said audits could have formed the reasonable belief that the statements you made were true or that your statements served the public interest.

News stories propagating your defamatory statements have indicated that you have called on the Arizona Auditor General to investigate the use of asset forfeiture funds while Mr. Babeu was Sheriff, Mr. Voyles was County Attorney, and Mr. Fujimoto was Mr. Voyles Chief of Staff. As noted above, multiple audits have already been conducted on the subject. Not only will another audit turn up the same answer: that there was absolutely no impropriety on the parts of Mr. Babeu, Mr. Voyles, or Mr. Fujimoto, but it is not the Pinal County Attorney's place to call on the Arizona Auditor General to conduct an investigation. The Auditor General is directed by the Legislature's Joint Legislative Audit Committee (JLAC), not the Pinal County Attorney. If you want the Auditor General to conduct an investigation, you should seek the approval of JLAC. Our clients welcome yet another audit to prove your statements are abject falsehoods.

Finally, it is unbecoming of a County Attorney to make extrajudicial statements that will have the substantial likelihood of materially prejudicing an adjudicative proceeding or heightening public condemnation of the accused. You have violated Ethical Rules 3.6(a) and 3.8(f).

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As noted above, you have met every element of defamation per se against both a public official and a private individual. You have also violated the Ethical Rules and acted in a manner unbecoming of a County Attorney. Again, Mr. Babeu, Mr. Voyles, and Mr. Fujimoto are owed a public apology and a retraction.

GOLDMAN & ZWILLINGER PLLC

A handwritten signature in black ink that reads "Marcus Kelley". The signature is written in a cursive style with a prominent horizontal line underlining the name.

Marcus A. Kelley

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http://www.pinalcentral.com/casa_grande_dispatch/area_news/county-attorney-welcomes-preemptive-audit-of-rico-accounts/article_e02c2c2f-dcc0-5c94-8e77-e56209f0b20d.html

County attorney welcomes preemptive audit of RICO accounts
By KATIE CAMPBELL Staff Writer Mar 1, 2017

FLORENCE — Just days after agents from the Federal Bureau of Investigation visited the Pinal County Sheriff's Office, County Attorney Kent Volkmer opened his doors to the Arizona Auditor General's Office.

His purpose: Give PCAO a clean slate.

The audit will focus on the office's RICO accounts, analyzing the money that has gone in and out over at least the last four years as requested by Volkmer. Former Pinal County Attorney Lando Voyles oversaw the office during that time. The state auditors arrived at PCAO on Tuesday after the recently elected county attorney requested a review to determine whether allegations of RICO misuse hold water.

"If there were misappropriations, if there was unlawful or inappropriate activity, we want to know about it now," Volkmer said Wednesday. "We want to address it and move forward.

"I am not going to intentionally throw the prior administration under the bus and back it up over them and go forward and backward and forward and backward. But by the same token, I'm not going to hide their misdeeds. I don't believe that is fair to the citizens. I don't believe that is fair to this office."

Volkmer's decision to initiate an audit has long been in the works and was not spurred solely by FBI agents seizing items from PCSO on Friday. According to PCSO spokeswoman Navideh Forghani, those items were related to former Pinal County Sheriff Paul Babeu's administration. Babeu's successor, Sheriff Mark Lamb, is not involved in that investigation, according to Forghani.

Volkmer was encouraged to request the audit when he enlisted the help of Rick Romley, a former four-term Maricopa County attorney. Romley sought Auditor General Debra Davenport's guidance in the past and believed Pinal County could benefit from such scrutiny.

"But for our invitation, I had no indication that they were going to come in and say, 'Hey, we need to do this,'" Volkmer said, emphasizing PCAO has neither received a subpoena nor is the office currently under federal investigation. "We thought it was the best practice moving forward."

If the audit turns up wrongdoing, though, an investigation may follow.

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Volkmer said shortly after he met with Davenport to discuss the review, he received a call from the FBI followed by a cordial visit. He informed the agent of the audit, and from Volkmer's understanding, the FBI is now waiting to get those results.

And anything uncovered will be shared with the FBI as per Volkmer's agreement with the Auditor General's Office.

"They can't do the investigation, tell me that all of these things were done wrong, and then I get to go in the backyard and bury it," he said.

"I view this as a wound that has been festering but covered up. We've ripped the Band-Aid off. We're exposing it to light, and we're going to find out what's there or what's not there. There may be a bumpy road ahead ... but what I can tell you is I'm committed to the people of this community, to doing the right thing, to being transparent."

Two key players that may come under questioning include former County Attorney Voyles as well as his former chief of staff, Dwight Fujimoto. Volkmer said the previous administration contained a "tight-knit group" responsible for making RICO decisions, namely Voyles and Fujimoto; they would likely be questioned if the review revealed anything suspicious.

If the matter leads to prosecution, PCAO likely would not be asked to handle the litigation. Volkmer said he would respectfully decline in any case to avoid the appearance of impropriety.

Babeu and Voyles could face prison time if they are found guilty of illegal use of funds, according to Volkmer. Additionally, Voyles could have his law license suspended, and Babeu could lose his Arizona POST certification.

Volkmer also confirmed the Arizona Public Safety Foundation continues to be an FBI topic of interest.

The Pinal County Board of Supervisors may also become involved.

District 3 Supervisor Steve Miller, R-Casa Grande, said the board has not been subpoenaed, though he was questioned by an FBI agent about six months ago and has been in touch several times since.

"When I had been interviewed by the FBI, I just said, 'You tell me what you need and what you want, and I'll make sure you get it,'" he said. "While I can't speak for the others, I have no problem opening our doors or our books."

During the meeting, Miller said he turned over a number of documents the agent did not already have, and he intends to continue to help in any way he can.

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“There’s too much that wasn’t kosher,” he said of the previous administrations. “The transparency wasn’t there. ... I never thought they were doing it correctly or fairly.”

Beyond seeking long-awaited answers regarding RICO funds, or seized criminal money, Volkmer has also requested guidance on best practices moving forward. He intends to make his office “beyond reproach,” and he would recommend Sheriff Lamb take the same approach by welcoming an audit into his own office.

The audit does not restrict PCAO’s use of RICO in the meantime. Still, Volkmer said the funds are not at a point where he feels comfortable spending anything for at least a few months more. Ideally, he would like a reserve in place before allowing any funds out of the office.

There is also no particular schedule the audit must follow. It could be a matter of weeks, or months before it is finalized. Volkmer said neither side has instituted any “artificial time restraints” so as to ensure it’s done right.

A representative of the Auditor General’s Office did not immediately return a call for comment.

Pinal County has repeatedly been used by state officials as a “degenerate” example when it comes to RICO, Volkmer said. That offends the Casa Grande resident.

He wants Pinal County to lead the way in what he sees as much needed, but currently misguided, statewide RICO reform. And he hopes this is the way to do it.

“I can’t promise the people that this is going to be wonderful,” he said. “I can’t promise that there’s going to be no further embarrassment. But I can promise that we’re going to do everything in our power to rectify the situation. We’re going to make the residents proud.”