

MICHAEL K. JEANES  
 Clerk of the Superior Court  
 By David Gunn, Deputy  
 Date 08/21/2013 Time 15:59:02

Description	Amount
CASE# CV2013-011198	
CIVIL NEW COMPLAINT	319.00
TOTAL AMOUNT	319.00
Receipt# 23199356	

1 **DANIEL BONNETT (AZ # 014127)**  
 2 **MARK A. BRACKEN (AZ # 026532)**  
 3 **MARTIN & BONNETT, P.L.L.C.**  
 1850 N. Central Avenue, Suite 2010  
 Phoenix, Arizona 85004  
 Telephone: (602) 240-6900

4 Attorneys for Plaintiff

5  
 6 **IN THE SUPERIOR COURT FOR THE STATE OF ARIZONA**  
 7 **IN AND FOR THE COUNTY OF MARICOPA**

8 Usama Abujbarah,	)	CASE NO.: CV2013-011198
	)	
9	)	
10 Plaintiff,	)	<b>COMPLAINT FOR VIOLATION</b>
vs.	)	<b>OF ARIZONA OPEN MEETINGS</b>
	)	<b>LAW AND SPECIAL ACTION</b>
11	)	<b>MANDAMUS RELIEF</b>
12 Town of Cave Creek; Vincent Francia;	)	
Adam Trenk; Mike Durkin; Reg	)	
13 Monachino; Charlie Spitzer; Ernie Bunch;	)	
and Thomas McGuire,	)	
	)	
14 Defendants.	)	
	)	

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 16 **NATURE OF THE ACTION**

17 This is an action for violations of the Arizona Open Meetings Law, A.R.S. §38-431 *et*  
 18 *seq.*, for relief permanently enjoining the Town of Cave Creek, Arizona (“Town” or “Cave  
 19 Creek”) from violating the Arizona Open Meeting Law, issuance of a writ of mandamus  
 20 pursuant to A.R.S. §12-2021 *et seq.* and granting Plaintiff further relief relative to the Rules of  
 21 Procedure for Special Action for certain actions taken by Defendants pursuant to a June 10, 2013  
 22 motion of the City Council (“Council”) to terminate Plaintiff’s employment Agreement  
 23 (“Agreement”) as Town Manager effective September 9, 2013.

24 **JURISDICTION AND VENUE**

25 1. This Court has jurisdiction over this action pursuant to the Rules of Procedure for  
 26 Special Actions, A.R.S. Vol. 17B and A.R.S. §38-431.07. Venue is proper in this Court pursuant  
 27 to Rule 4 of the Rules of Procedure for Special Actions and §38-431.07.  
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**PARTIES**

2. At all times relevant, Plaintiff, Usama Abujbarah, was and is a resident of the Town of Cave Creek, Maricopa County, Arizona. At all times relevant, Mr. Abujbarah was and is an employee of the Town of Cave Creek, currently employed as the Town Manager pursuant to a written employment agreement dated August 6, 2012 and covering the period August 6, 2012 through August 5, 2014. Plaintiff had a reasonable expectation of continued employment as Town Manager with Cave Creek for the duration of his employment agreement.

3. Cave Creek is a town located outside of metropolitan Phoenix, which at all times relevant, was Plaintiff's employer. Defendants, Cave Creek and the individual members of the Council, are the parties-in-interest with regard to Plaintiff's request for special action review of the actions of the Council Plaintiff's termination as Town Manager.

4. Defendant Vincent Francia is, and was at all times relevant, the Mayor of Cave Creek and a member of the Council.

5. Defendant Adam Trenk is the Vice-Mayor of Cave Creek and a member of the Council since June 3, 2013 being elected to the Council on March 12, 2013 and became a Council member-elect upon certification of the election result.

6. Defendants Ernie Bunch, and Thomas McGuire are, and were at all times relevant, members of the Council.

7. Defendants Mike Durkin, Reg Monachino and Charlie Spitzer became members of the Council on June 3, 2013, however, each was elected to the Council in a special runoff election held on May 21, 2013 and became Council members-elect upon certification of the election results.

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**GENERAL ALLEGATIONS**

8. Plaintiff, Usama Abujbarah, has been continuously employed by the Town since 1996 and has served continuously as its Town Manager since 1999.

9. Following the election of Defendants, Trenk, Durkin, Monachino and Spitzer but before they were sworn in as members of the Council, Defendant, Trenk, made a written request

1 to the Mayor and Town Clerk to place an agenda item on the regular meeting agenda of the  
2 Council to take place on June 3, 2013 with the intended purpose to remove Plaintiff as Town  
3 Manager. A copy of Defendant, Trenk's request is attached hereto as Exhibit "A."

4 10. Because Plaintiff's attorney was unavailable on June 3, 2013, the agenda item  
5 requested by Defendant Trenk was not placed on the regular meeting agenda. Rather, a Special  
6 Council Meeting was set for June 10, 2013 with the agenda item requested by Defendant Trenk  
7 constituting the sole item on the June 10, 2013 Special Meeting Agenda.

8 11. At the request of Plaintiff, the meeting was rescheduled to June 10, 2013 as a  
9 Special Council Meeting to be held as a public meeting. A copy of the notice and agenda for the  
10 June 10, 2013 Special Council Meeting is attached as Exhibit "B."

11 12. The Agenda for the Special Meeting of the Council on June 10, 2013 reads, in  
12 pertinent part:

13 Council discussion and consideration of the employment,  
14 assignment, compensation, benefits, promotion, demotion,  
15 dismissal, termination and/or resignation of the Town Manager  
16 and/or consultation with the attorneys of the public body for legal  
17 advice regarding the employment, assignment, compensation,  
18 benefits, promotion, demotion, dismissal, termination and/or  
19 resignation of the Town Manager. A.R.S. §38-431.03(A)(1) and  
20 (3).

21 13. Plaintiff attended the meeting and was represented by an attorney, Daniel L.  
22 Bonnett of the law firm of Martin & Bonnett, PLLC.

23 14. Before and at the June 10, 2013 objections were raised by Plaintiff's attorney to  
24 the manner in which the Council was proceeding. These objections included, *inter alia*,  
25 procedural matters relating to the setting and notice of the Special Council Meeting.

26 15. These objections were never clearly ruled on by the Mayor nor were they voted  
27 on by the Council. Nonetheless, the Special Meeting was held on June 10, 2013 at 7:00pm and  
28 with a large attendance from the public.

16. Four of the members of the Council, namely; Defendants, Trenk, Durkin,  
Monachino and Spitzer made clear from the outset their intention to dismiss Plaintiff as Town  
Manager despite having just taken office, not performing any evaluation of Plaintiff as Town

1 Manger while on the Council that would justify Plaintiff's termination, not having given specific  
2 formal direction to Plaintiff as Town Manager of what each expected of him as Town Manager  
3 and giving Plaintiff no opportunity to perform as Town Manager under their direction as  
4 members of the Cave Creek Council.

5 17. It became clear during this Special Meeting that Defendants, Trenk, Durkin,  
6 Monachino and Spitzer came to the June 10, 2013 Special Meeting with the understanding that  
7 they had the votes to oust Plaintiff as Town Manager and they acted immediately to do so despite  
8 the objections of a number of residents who were present at the meeting.

9 18. During the June 10, 2013 Special Meeting, Defendant Trenk made a motion  
10 (hereinafter, the "Trenk Motion") by reading from a document that appeared to have been  
11 prepared in advance of the meeting. Upon information, a copy or of that document or,  
12 alternatively, the substance of that document is attached hereto as Exhibit "C." The Trenk  
13 Motion was seconded by Defendant Durkin.

14 19. The Trenk Motion as read by Defendant Trenk was called for a vote without a  
15 single amendment offered or a point of order raised by a Council member.

16 20. The Trenk Motion contained multiple issues, several of which were not set forth  
17 in the Notice of the Special Meeting (Exhibit "A") nor were they contained in the Special  
18 Meeting Agenda (Exhibit "B"), namely; holding another meeting to appoint a search committee  
19 for a new Town Manager, appointing a chairperson of such a committee and conducting an  
20 independent audit of Town funds -- the latter implying impropriety on the part of Plaintiff.

21 21. The Trenk Motion carried by a vote of 4 to 3 with Defendants, Trenk, Durkin,  
22 Monachino and Spitzer voting in favor of the motion. Defendants, Francia, Bunch and McGuire  
23 voted against the motion.

24 22. Following passage of the Trenk Motion, Plaintiff was notified in writing that his  
25 employment will terminate, effective, September 9, 2013, however, as the Trenk Motion  
26 provided, Plaintiff has not been allowed to carry out any duties as Town Manager since June 10,  
27 2013. A copy of the written notification is attached hereto as Exhibit "D."  
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COUNT I

**(Violation of the Arizona Open Meetings Law and Request for Permanent Injunctive Relief  
and Mandamus)**

23. Plaintiff repeats and realleges the previous paragraphs as though set forth fully herein.

24. A.R.S. §38-431.02G reads in pertinent part,  
“Notice required under this section shall include an agenda of the matters to be discussed or decided at the meeting or information on how the public may obtain a copy of such an agenda.”

25. A.R.S. §38-431.02H reads in pertinent part,  
“Agendas required under this section shall list the *specific matters* to be discussed, considered or decided at the meeting. The public body may discuss, consider or make decisions *only* on matters listed on the agenda and other matters related thereto.” (Emphasis added)

26. A.R.S. §38-431.05A reads in pertinent part,  
“All legal action transacted by any public body during a meeting held in violation of any provision of this article is null and void...”

27. By virtue of the foregoing, Defendants could only discuss and deliberate regarding matters that were properly listed on the June 10, 2013 Agenda.

28. By virtue of the manner in which the June 10, 2013 Special Meeting was called and conducted as set forth herein, Plaintiff alleges that discussion, deliberation and a “straw vote” occurred among or between Defendants, Trenk, Durkin, Monachino and Spitzer on each issue contained in the Trenk Motion and an agreement was reached by these four Defendants to vote in favor of the Trenk Motion in advance of the meeting.

29. By virtue of the foregoing, Defendant Council members have violated the Arizona Open Meetings Law and passage of the Trenk Motion is null and void, *ab initio*.

30. Plaintiff requests, *inter alia*, that on remand, any motion regarding Plaintiff’s employment status or his employment agreement as Town Manager be contained in a single

1 motion with deliberation and voting occurring only in accordance with applicable Arizona law.

2 31. A.R.S. §38-431.07A reads in pertinent part,

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4 “Any person affected by an alleged violation of this article, may  
5 commence a suit in the superior court in the county in which the  
6 public body ordinarily meets, for the purpose of requiring  
7 compliance with, or the prevention of violations of, this article, by  
8 members of the public body... .”

9 32. Due to Defendants’ violations of the Arizona Open Meetings Law, Plaintiff seeks  
10 preliminary and permanent injunctive relief enjoining Defendants from further violations of the  
11 Open Meetings Law and issuance of an appropriate writ of mandamus compelling Defendants to  
12 comply with the Open Meetings Law, rescind Plaintiff’s termination and restore Plaintiff as  
13 Town Manager with full authority to perform the duties of Town Manager in accordance with  
14 the Cave Creek Town Code, sec. 31.25.

15 33. Pursuant to A.R.S. §12-2030, Plaintiff requests an award of attorneys’ fees and  
16 costs incurred in connection with bringing this action.

17 **COUNT II**

18 **(Special Action – Mandamus)**

19 34. Plaintiff repeats and realleges the previous paragraphs as though set forth fully  
20 herein.

21 35. Since on or about May 28, 2013, Plaintiff or his attorney has been in  
22 communication with one or more of the Defendants or their representatives to address and  
23 remedy the matters set forth herein. Despite Plaintiff’s efforts, no satisfactory resolution has  
24 been reached and Plaintiff’s employment is scheduled to terminate effective September 9, 2013.

25 36. Plaintiff seeks special action relief because there is no equally plain and speedy  
26 remedy available to Plaintiff and Defendants have failed to exercise discretion which they have a  
27 duty to exercise; have failed to perform a duty required by law as to which they have no  
28 discretion; have proceeded or threatened to proceed without or in excess of jurisdiction or legal  
abuse of discretion.

1           37. Defendant, City Council, is a legislative body that governs the Town of Cave  
2 Creek. At all times relevant hereto, Defendants who are the members of the Council were  
3 charged with the responsibility of carrying out certain duties and responsibilities pursuant to the  
4 Cave Creek Town Code regarding Plaintiff's employment status.

5           38. As set forth herein, Defendants were required to comply with Arizona Open  
6 Meetings Law as well as other applicable federal, state and local laws. Defendants have failed to  
7 do so by: (1) deliberating and voting on issues that were not properly listed on the Agenda for the  
8 Special Meeting of the Council, and (2) voting on a procedurally defective motion that contained  
9 multiple issues for consideration rather than a single, stand-alone issue.

10           39. By virtue of the foregoing, Plaintiff is entitled to relief in the form of a judgment  
11 for mandamus compelling the Defendants, Council and Town of Cave Creek to reinstate Plaintiff  
12 to his former position, rescind his termination, restore all benefits and restore full seniority as  
13 though he had not been previously terminated.

14           40. Pursuant to A.R.S. §12-2030 and Rule 4 of the Rules of Procedure for Special  
15 Actions, Plaintiff is entitled to an award of attorneys' fees and costs incurred in connection with  
16 bringing this action.

17           WHEREFORE, Plaintiff respectfully requests that this Court enter an order granting the  
18 following relief:

- 19           A. Declaring that Defendant Council members violated the Arizona Open Meetings  
20 Law, A.R.S. § 38-431 *et. seq.*;
- 21           B. Declaring the motion of the Council terminating Plaintiff's employment  
22 Agreement null and void, *ab initio*, for violation of the Arizona Open Meetings  
23 Law;
- 24           C. Issuing a permanent injunction and/or a writ of mandamus preventing the  
25 Defendants from any further violations of the Arizona Open Meetings Law;
- 26           D. Issuing a mandamus ordering the Defendants to rescind Plaintiff's termination,  
27 order that he be restored to his position as Town Manager and returned to his  
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1 duties;

2 E. Awarding Plaintiff his attorneys' fees and costs pursuant to A.R.S. §§12-2030 and  
3 38-431.07 and Rule 4 of the Rules of Procedure for Special Actions; and

4 F. Granting such other and further relief as the Court would deem equitable and just.

5 Respectfully submitted this 26<sup>th</sup> day of August, 2013.  
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7 MARTIN & BONNETT, P.L.L.C.

8  
9 By: 

10 Daniel L. Bonnett  
11 Mark Bracken  
12 1850 N. Central Avenue, Suite 2010  
13 Phoenix, Arizona 85004  
14 (602) 240-6900

15 *Attorneys for Plaintiff*  
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**VERIFICATION**

I, Usama Abujbarah, hereby verify and affirm that I have read the allegations set forth in the Complaint for Violation of Arizona Open Meetings Law, Permanent Injunctive Relief and Special Action Mandamus Relief and that the allegations are accurate, true and correct.

Usama Abujbarah

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# EXHIBIT A

**5/28/2013**

**To: Mayor and Clerk, Town of Cave Creek**

**From: Adam Trenk, Councilman-Elect**

**Re: Proposed Agenda Items for June 3, 2013 meeting.**

**Dear Mr. Mayor and Ms. Dyrek,**

**Below is an agenda item I would like to have the council deliberate on. Specifically I request to have the below labeled "Agenda Item A" posted for discussion and possible action at the regularly scheduled meeting of the Council that will be held on June 3, 2013. In accordance with §30.38(E) of the Town Code, I hereby request that the Mayor waive the seven-day deadline and amend the agenda accordingly. Considering the agenda for said meeting was only just released today, one day short of the requisite seven day posting period due to yesterday's holiday, it should be acceptable to amend the agenda this evening or at latest tomorrow and post the amended in excess of the minimum 24 hour noticing time frame.**

**Agenda Item A:**

**Council discussion and possible action regarding the employment, compensation, benefits, promotion, demotion, dismissal, termination and/or resignation of the Town Manager:**

**Possible Executive Session:**

**Notice is hereby given that, at any time during the discussion of the agenda item before taking action, the Town Council may make a motion to recess into Executive Session regarding discussion or consideration of the employment, compensation, benefits, promotion, demotion, dismissal, termination and/or resignation of the town manager or to consult with the attorneys and representatives of the public body for legal advice regarding the employment, compensation, benefits, promotion, demotion, dismissal, termination and/or resignation of the Town Manager. A.R.S. §38-431.03(A)(1) and (A)(3).**

**Your attention to this matter is greatly appreciated.**

**Sincerely,**

**Adam Trenk**

# EXHIBIT B

**Americans with Disabilities Act Notification:** *In accordance with the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973 (Section 504), the Town of Cave Creek does not discriminate on the basis of disability in the admission of or access to, or treatment or employment in, its programs, activities, or services. For information regarding rights and provisions of the ADA or Section 504, or to request reasonable accommodations for participation in Town programs, activities, or services contact the Town Clerk, 37622 N. Cave Creek Rd., Cave Creek, AZ 85331; (480) 488-1400.*

AMENDED

**NOTICE AND AGENDA  
SPECIAL TOWN COUNCIL MEETING  
TOWN OF CAVE CREEK, ARIZONA  
MONDAY, JUNE 10, 2013**

**CALL TO ORDER 7:00 P.M.** Vincent Francia, Mayor, 37622 N. Cave Creek Road, Cave Creek, AZ.

**ROLL CALL** Mayor Vincent Francia, Vice Mayor Adam Trenk, Council Members Ernie Bunch, Mike Durkin, Thomas McGuire, Reginald Monachino, Charles Spitzer.

**PLEDGE OF ALLEGIANCE**

**PUBLIC ANNOUNCEMENTS**

**CALL TO THE PUBLIC**

**ACTION ITEMS:**

**A. GENERAL AGENDA ITEMS**

1. **Council discussion and consideration of the employment, assignment, compensation, benefits, promotion, demotion, dismissal, termination and/or resignation of the Town Manager and/or consultation with the attorneys of the public body for legal advice regarding the employment, assignment, compensation, benefits, promotion, demotion, dismissal, termination and/or resignation of the Town Manager. A.R.S. §38-431.03(A)(1) and (3).**

**MOVED FROM AN EXECUTIVE SESSION TO PUBLIC MEETING AGENDA.**

**A. GENERAL AGENDA ITEMS**

2. **Council discussion and possible action regarding the employment, assignment, compensation, benefits, promotion, demotion, dismissal, termination and/or resignation of the Town Manager.**

**Placed on the Agenda at the request of Vice Mayor Trenk, Town of Cave Creek.**

**Public Comment**

**Council Action Needed:** Council discussion and possible action regarding the employment, assignment, compensation, benefits, promotion, demotion, dismissal, termination and/or resignation of the Town Manager.

**SUMMARY OF CURRENT EVENTS BY MAYOR**

**ADJOURNMENT**

**POSTED THIS \_\_\_\_\_ day of JUNE, 2013**

**BY: \_\_\_\_\_**

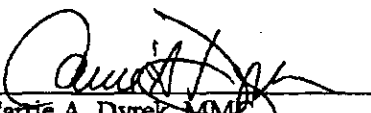
**Carrie A. Dyrek, Town Clerk**

June 3, 2013

**Notice to Employee Of Executive Session**

Notice is hereby given that an executive session has been schedule for June 10, 2013 at 7:00 p.m. to discuss and consider your employment, assignment, compensation, benefits, promotion, demotion, dismissal, termination and/or resignation. A copy of the Agenda is attached hereto. Pursuant to A.R.S. §38-431.03(A)(1) you have the right to have this discussion and consideration occur at a public meeting. Please advise the Town Clerk no later than 12:00 p.m. on June 3 if you would like this meeting to be held at the public meeting scheduled for 7:00 p.m. on June 10, 2013.

Given this 3rd day of June, 2013.

  
Carrie A. Dyrek, MMC  
Town Clerk, Town of Cave Creek

I want all issues related to my employment with the Town of Cave Creek be in public meeting.

Uzama  
6/3/2013  
11:20 am

# EXHIBIT C



**Motion to Remove Usama Abujbarah as Town Manager Pursuant to Section 31.25(F) of the Town of Cave Creek Code and Section 3.1 of the August 6, 2012 Employment Agreement between the Town of Cave Creek and Mr. Abujbarah as follows (1) immediately deliver written notice of <sup>intent to terminate</sup> termination of employment to Town Manager Usama Abujbarah with a termination date of September 9, 2013; (2) immediately <sup>relieve</sup> ~~suspend~~ Mr. Abujbarah from duties as Town Manager and re-assign him to a limited special assignment for the purpose of facilitating the transition of his successor as needed from off-site, effective immediately for the duration of his employment; (3) continue to pay Mr. Abujbarah regular pay and benefits through the termination date; (4) pay Mr. Abujbarah a lump sum severance payment equivalent to five months base salary, as defined in the Employment Agreement, conditioned on Mr. Abujbarah's execution of a release as provided in Sections 3.1 (c) and (d) of the Employment Agreement together with all accrued vacation and one-third of his accrued sick leave not used on the termination date; and (5) agendaize and notice a special meeting to be held no later than June 12, 2013 at 7:00pm for the purpose of appointing Rodney Glassman as Acting Town Manager to perform the Powers and Duties of the Office of Town Manager in accordance with Section 31.25(E)(2) of the Cave Creek Town Code, by and through an independent contractor agreement, whereby the Town will compensate the independent contractor at a rate not to exceed the total compensation paid to the outgoing Town Manager, beginning June 17, 2013 for a term not to exceed 6.5 months with the following directives:**

1. To carry out the duties of the Town Manager as described in Cave Creek Town Code Section 31.25(H).
2. Oversee the selection of an independent third party for the purpose of conducting an audit of the funds of the Town of Cave Creek, with results to be presented to Council no later than December 1, 2013
3. Oversee a process of selecting a new permanent Town Manager for the Town of Cave Creek prior to the expiration of the Acting Town Manager's interim contract.

→ (5) Request Mr. Abujbarah return the town's property no later than noon tomorrow pursuant to Section 8

# EXHIBIT D



Dear Mr. Abujbarah:

This letter is written pursuant to Section 31.25(F) of the Cave Creek Town Code (the "Code"), Section 3.1(a) of the Employment Agreement dated August 6, 2012 between you and the Town of Cave Creek, Arizona (the "Agreement"), and the action approved at the meeting of the Town Council of the Town of Cave Creek on June 10, 2012.

Pursuant to those authorities, this letter constitutes notice of intention to terminate your employment (as provided in the Code) and notice of termination of your employment and of the Agreement (as provided in the Agreement), termination to be effective on September 9, 2013 (the "Termination Date"). Both the Code and the Agreement explicitly provide that your employment is at-will and may be terminated for no cause (*see* Code § 31.25(A)(1), "The Manager shall hold office at the pleasure of the Town Council." and Agreement § 3.1(a), "Employee is employed at the will of Employer, and nothing in this Agreement shall prevent, limit or otherwise interfere with the right of Employer to terminate Employee and this Agreement at any time, without cause . . ."). Nonetheless, the reasons for this decision include (without limitation) concerns about your decisions, communications, and performance, and loss of confidence in your performance as Town Manager.

As provided in Section 3.1(F) of the Code, you are relieved from duties effective immediately, and will be reassigned transition duties as appropriate to be performed away from the Town Hall / Town offices premises. You will continue to receive your salary through the Termination Date. You will receive the severance pay set forth in the Agreement, provided that (as stated in the Agreement) you sign a full release of all claims provided by the Town of Cave Creek and in form and content acceptable to the Town of Cave Creek, and after the time periods required by 29 U.S.C. § 626(f) have expired.

As stated in the motion that was passed last night, please return all property of the Town that is in your possession, custody, or control.

Thank you for your past service on behalf of the Town. If you or your counsel have any questions regarding this Notice, please direct them to the Town in care of the Town Clerk.

Very truly yours,

Carrie A. Dyrek  
Town Clerk

As Authorized by Town Council  
Action on June 10, 2013