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

Gary Donahoe and Cherie Donahoe, husband
and wife,

Plaintiffs,

v.

Sheriff Joseph Arpaio and Ava Arpaio,
husband and wife; Andrew Thomas and
Anne Thomas, husband and wife; Lisa
Aubuchon and Peter R. Pestalozzi, wife and
husband; Deputy Chief David Hendershott
and Anna Hendershott, husband and wife;
Peter Spaw and Jane Doe Spaw, husband
and wife; Maricopa County, a municipal
entity; Jon Does I-X; Jane Does I-X; Black
Corporations I-V; and White Partnerships I-
V,

Defendants.

Donald T. Stapley, Jr. and Kathleen
Stapley, husband and wife,

Plaintiffs,

v.

Sheriff Joseph Arpaio and Ava Arpaio,
husband and wife; et al.,

Defendants.

No. CV-10-02756-PHX-NVW

CONSOLIDATED WITH:

No. CV-11-0902-PHX-NVW

ORDER

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1 Before the Court are seven motions for summary judgment filed by Plaintiff
2 Donald T. Stapley, Jr. and Defendants Joseph Arpaio, Lisa Aubuchon, David
3 Hendershott, and Andrew Thomas. For the following reasons, Plaintiff's motions will be
4 denied and Defendants' motions will be granted in part and denied in part.

5
6 **I. SUMMARY OF RULINGS**

7 The allegations underlying this dispute are set forth in *Donahoe v. Arpaio*, 869 F.
8 Supp. 2d 1020 (D. Ariz. 2012), *aff'd sub nom. Stapley v. Pestalozzi*, 733 F.3d 804 (9th
9 Cir. 2013). They describe an extended criminal and civil campaign against the Maricopa
10 County Board of Supervisors, of which Stapley was then a member, by the Maricopa
11 County Sheriff's Office (MCSO), the Maricopa County Attorney's Office (MCAO), and
12 their joint anti-corruption task force (MACE). The details are not recounted here except
13 as necessary to explain the rulings. Stapley has now moved for partial summary
14 judgment against Sheriff Joseph Arpaio (Doc. 1060), former Deputy County Attorney
15 Lisa Aubuchon (Doc. 1065), and former Chief Deputy David Hendershott (Doc. 1056).
16 In turn, Arpaio (Doc. 1062), Aubuchon (Doc. 1066), Hendershott (Doc. 1072), and
17 former County Attorney Andrew Thomas (Doc. 1063) have moved for summary
18 judgment. Stapley's motion for partial summary judgment against Thomas (Doc. 1147)
19 and Maricopa County's motion for summary judgment against Stapley (Doc. 1149) were
20 previously denied.

21 Stapley seeks summary judgment that

- 22 (1) Arpaio ordered a retaliatory arrest in violation of 42 U.S.C. § 1983;
23 (2) Aubuchon engaged in judicial deception and searched his office in
24 violation of 42 U.S.C. § 1983; and
25 (3) Hendershott wrongfully instituted a federal racketeering action
26 against him in violation of state law and 42 U.S.C. § 1983.

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All Defendants seek summary judgment that

- (1) they are not liable for maliciously prosecuting or investigating Stapley in the criminal actions commonly referred to as *Stapley I* and *Stapley II*;
- (2) they are not liable for retaliating against Stapley for exercising his constitutional rights;
- (3) they are not liable for the search of Stapley's office;
- (4) they have absolute or qualified immunity as to various claims;
- (5) they are not liable for intentional infliction of emotional distress; and
- (6) Stapley may not recover punitive damages.

Arpaio, Aubuchon, and Hendershott also seek summary judgment that they are not liable for Stapley's arrest.

Arpaio and Hendershott also seek summary judgment that

- (1) their roles in the federal racketeering action do not give rise to liability; and
- (2) they are not liable for establishing unconstitutional policies or customs within MCSO, for failing to train employees, or for negligently supervising them.

The Defendants' motions for summary judgment will be granted against the following claims.

As to Defendant Arpaio, summary judgment will be granted against Stapley's ninth claim for unconstitutional policies, customs, failure to train, and negligent supervision.

As to Defendant Aubuchon, summary judgment will be granted against Stapley's second and fifth claims for malicious prosecution and against his fourth claim for false arrest.

As to Defendant Hendershott, summary judgment will be granted against Stapley's ninth claim for unconstitutional policies, customs, failure to train, and negligent supervision.

1 As to Defendant Thomas, summary judgment will be granted against Stapley's
2 second and fifth claims for malicious prosecution and against his tenth claim for unlawful
3 search.

4 The motions will otherwise be denied.

5
6 **II. LEGAL STANDARD**

7 A motion for summary judgment tests whether the opposing party has sufficient
8 evidence to merit a trial. At its core, it questions whether sufficient evidence exists from
9 which a reasonable jury could find in favor of the party opposing the motion for summary
10 judgment. Summary judgment should be granted if the evidence shows there is no
11 genuine dispute about any material fact and the moving party is entitled to judgment as a
12 matter of law. Fed. R. Civ. P. 56(a). The moving party has the burden of demonstrating
13 that no material issue of fact exists for the jury to decide. See *Celotex Corp. v. Catrett*,
14 477 U.S. 317, 323 (1986). To meet this burden, the moving party must point out the lack
15 of evidence supporting the nonmoving party's claim but need not produce evidence
16 negating that claim. *Id.* at 325.

17 When the moving party has carried its burden under Federal Rule of Civil
18 Procedure 56(c), the nonmoving party must show that there are genuine issues of material
19 fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). A material fact is one
20 that might affect the outcome of the suit under the governing law, and a factual issue is
21 genuine "if the evidence is such that a reasonable jury could return a verdict for the
22 nonmoving party." *Id.* at 248. The nonmoving party must produce evidence to support
23 its claim or defense by more than simply showing "there is some metaphysical doubt as
24 to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574,
25 586 (1986). The Court must view the evidence in the light most favorable to the
26 nonmoving party, must not weigh the evidence or assess its credibility, and must draw all
27 justifiable inferences in favor of the nonmoving party. *Reeves v. Sanderson Plumbing*
28 *Prods., Inc.*, 530 U.S. 133, 150 (2000); *Anderson*, 477 U.S. at 255. Where the record,

1 taken as a whole, could not lead a rational trier of fact to find for the nonmoving party,
2 there is no genuine issue of material fact for trial. *Matsushita*, 475 U.S. at 587.

3 On summary judgment, the nonmoving party's evidence is presumed true, and all
4 inferences from the evidence are drawn in the light most favorable to the nonmoving
5 party. *Eisenberg v. Ins. Co. of North America*, 815 F.2d 1285, 1289 (9th Cir. 1987);
6 *Baldwin v. Trailer Inns, Inc.*, 266 F.3d 1104, 1117 (9th Cir. 2001). But the evidence
7 presented by the parties must be admissible or able to be produced in admissible form.
8 *See Fed. R. Civ. P. 56(c)(2)*. Conclusory and speculative testimony in affidavits and
9 moving papers is insufficient to raise genuine issues of fact and to defeat summary
10 judgment. *Thornhill Publ'g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

11 12 **III. STAPLEY I**

13 On November 20, 2008, a grand jury returned a 118-count indictment against
14 Stapley (*Stapley I*), charging him largely with violations of disclosure laws related to his
15 position as a Maricopa County Supervisor. *See Doc. 1112-9 at 26*. On December 2, an
16 MCSO sergeant served Stapley with the summons. *See id. at 29*.

17 Stapley seeks damages for malicious prosecution based on the investigations that
18 led to this indictment—his third claim for relief. Stapley no longer asserts separate
19 malicious prosecution claims against Thomas and Aubuchon, which the Court has held
20 absolutely immune from suit. Thus, Arpaio and Hendershott are the only remaining
21 defendants with respect to the malicious prosecution claims. Each moves for summary
22 judgment.

23 24 **A. Legal standard**

25 For malicious prosecution under Arizona law, Stapley must prove (1) Defendants
26 initiated or procured the criminal proceeding, (2) the prosecution terminated in Stapley's
27 favor, (3) the prosecution lacked probable cause, and (4) malice, or a primary purpose
28 other than bringing him to justice. *See Restatement (Second) of Torts § 653 (1977)*; *see*

1 also *Frey v. Stoneman*, 150 Ariz. 106, 109, 722 P.2d 274, 277 (1986). “A criminal
2 defendant may maintain a malicious prosecution claim not only against prosecutors but
3 also against others—including police officers and investigators—who wrongfully caused
4 his prosecution.” *Smith v. Almada*, 640 F.3d 931, 938 (9th Cir. 2011).

5 Notably, “a malicious prosecution claim is treated differently from one for false
6 arrest: whereas probable cause to believe that a person has committed *any* crime will
7 preclude a false arrest claim, even if the person was arrested on additional or different
8 charges for which there was no probable cause, . . . probable cause as to one charge will
9 not bar a malicious prosecution claim based on a second, distinct charge as to which
10 probable cause was lacking.” *Holmes v. Vill. of Hoffman Estate*, 511 F.3d 673, 682 (7th
11 Cir. 2007) (internal citations omitted); accord *Jernigan v. Richard*, 907 F. Supp. 2d 998,
12 1041 (D. Ariz. 2012) (upholding malicious prosecution claim where probable cause
13 supported some—but not all—of the criminal counts charged against plaintiff).

14 15 **B. Probable cause**

16 Both Arpaio and Hendershott assert the existence of probable cause. “In the
17 context of malicious prosecution, probable cause is defined as ‘a reasonable ground of
18 suspicion, supported by circumstances sufficient to warrant an ordinarily prudent man in
19 believing the accused is guilty of the offense The test generally applied is: upon the
20 appearances presented to the defendant, would a reasonably prudent man have instituted
21 or continued the proceeding?’” *Gonzales v. City of Phoenix*, 203 Ariz. 152, 155, 52 P.3d
22 184, 187 (2002) (quoting *McClinton v. Rice*, 76 Ariz. 358, 367, 265 P.2d 425, 431
23 (1953)). The question of probable cause is generally one for the court. *Gonzales*, 203
24 Ariz. at 155, 52 P.3d at 187. “If, however, the evidence is conflicting, so that on one
25 conclusion as to the facts drawn therefrom probable cause exists, while from another it
26 does not, it is then for the jury to determine the true state of facts and to apply the law as
27 laid down by the court to those facts.” *Sarwark Motor Sales, Inc. v. Woolridge*, 88 Ariz.
28 173, 177, 354 P.2d 34, 36 (1960). Summary judgment is appropriate if a reasonable jury

1 could not find an absence of probable cause based on the undisputed facts. *See, e.g.,*
2 *Gasho v. United States*, 39 F.3d 1420, 1428 (9th Cir. 1994).

3
4 **1. The 1994 Board of Supervisors resolution**

5 The *Stapley I* charges were premised on Stapley’s knowing failure to disclose
6 financial transactions as required by state law. As early as January 2007, Special Deputy
7 County Attorney Mark Goldman—a volunteer attorney with MCAO—and MCSO
8 Sergeant Brandon Luth began investigating Stapley. *See* Doc. 1112-6 at 74–75; Doc.
9 1112-14 at 132; 1112-3 at 75. Thomas either directed Goldman to search public records
10 regarding Stapley’s relationship with another lawyer, Tom Irvine, or approved Goldman
11 voluntarily undertaking the task. *Compare* Doc. 1112-6 at 74–75 *with id.* at 90. Luth
12 was ordered by Hendershott to “start looking into [Stapley’s] business dealings and
13 [other] matters.” Doc. 1112-3 at 75.

14 The parties dispute the origin of the investigation. There is evidence that “[t]here
15 was no traditional complainant for any of the investigations concerning Supervisor
16 Stapley” and instead that the investigations “spawned from Thomas’[s] directive to
17 Goldman to search public records to find evidence of a crime.” Doc. 1112 ¶¶ 122, 132;
18 *see also* Doc. 1112-9 at 6 (MCAO employee suggesting Thomas decided to investigate
19 Stapley in response to news reports regarding Stapley). *But see* Doc. 1112-6 at 108–11
20 (Thomas testifying that Goldman volunteered to research Stapley’s financial relationship
21 with Irvine after Thomas received a tip about potential wrongdoing between Stapley and
22 Irvine); Doc. 1142 ¶ 122 (Arpaio also stating there was a complainant in the earlier
23 investigation regarding Irvine).

24 By May 2007, Goldman informed Thomas of potential issues with Stapley’s
25 records and then informed MACE at Thomas’s direction. *See* Doc. 1112-6 at 113–14,
26 117–18. No further action appears to have been taken until March 2008¹ when

27 _____
28 ¹ As discussed below, Stapley has offered evidence that his public criticism of
Thomas motivated revival of the investigation.

1 Aubuchon took over Goldman’s research, learned from him that there were “issues” with
2 Stapley’s records, and concluded there were criminal nondisclosures. *See* Doc. 1112-8 at
3 11–15. When Aubuchon received Goldman’s research, she noted that they were time
4 stamped from early 2007. *See id.* at 15. She then met with MACE deputies on May 14,
5 2008, *see id.* at 25–26, presented a draft indictment dated May 29, *see id.* at 22, and told
6 the deputies to use May 14 as the date on which the investigation started. *See* Doc. 1112-
7 3 at 88.

8 On May 8, 2009, Thomas enlisted MCAO Commander Mark Stribling to assist
9 the investigation. *See* Doc. 1112-9 at 5. At Aubuchon’s suggestion, Stribling contacted
10 Fran McCarroll, the Clerk of the Board of Supervisors, to “get some documents about
11 resolutions that the board had passed related to how disclosures were done because
12 apparently throughout the years the way disclosures were handled had changed some.”
13 *Id.* at 17. Because MCAO sought to indict Stapley for violating the 1994 Maricopa
14 County rule or resolution applying state disclosure rules to *county* officers, his criminal
15 culpability turned on whether the Board’s 1994 resolution had in fact adopted state law.

16 On May 22, 2008, McCarroll informed Stribling that the Board had in fact adopted
17 a resolution “consistent with [state law].” Doc. 1069-2 at 3. Stribling informed Luth of
18 this the same day, and Luth entered it into an MCSO supplemental report. *Id.* at 2.
19 Indeed, McCarroll “confirmed that elected county officials, including the Board of
20 Supervisors, were required to file financial disclosure statements with her office.” Doc.
21 1073 at 2. McCarroll also provided copies of past Board minutes. These reflect that the
22 Board resolved to adopt the disclosure requirements in 1974 and amended the
23 requirements in 1979. They further reflect that in 1994 the Board resolved to *rescind* the
24 1979 resolution “and update the Financial Disclosure form for Elected Officials to bring
25 the form and process into compliance with A.R.S. 38-541.” Doc. 1112 ¶ 110 (“Financial
26 disclosure forms must be filed by January 31, each year, with the Clerk of the Board.”).
27 Stribling appears to have provided these documents to Luth, and it appears that somebody
28 created a handwritten timeline on one of these documents indicating that the Board

1 rescinded the 1979 resolution. *See* Doc. 1069-2 at 4 (“1994—Rescind reso re: Exempt
2 employees & update Fin. Disc. Form”). Notwithstanding the Board’s apparent intent to
3 update its disclosure protocol, the Board’s 1994 resolution did not adopt state law
4 requiring disclosures. *See State v. Stapley*, 227 Ariz. 61, 65–66, 251 P.3d 1048, 1052–53
5 (Ct. App. 2011).

6 MCSO deputies obtained Stapley’s financial disclosures and discovered evidence
7 that Stapley had “omitted information in his required disclosures for thirteen years, from
8 1994 through 2007.” Doc. 1072 at 4. Aubuchon presented the case to a grand jury, *see*
9 Doc. 1112-9 at 50, which returned a 118-count indictment against Stapley “in connection
10 with false and/or incomplete financial disclosures he filed,” Doc. 1072 at 4, in violation
11 of “A.R.S §§ 38-542, 38-542(A)(5), 38-544, 38-541, 38-545, 13-707, 13-802, and
12 Maricopa County Rule or Resolution adopted January 20, 1994.” *Stapley*, 227 Ariz. at 64
13 n.4, 251 P.2d at 1051 n.4.

14 Here, there is a factual dispute as to what MCSO and MCAO officials believed
15 and when they believed it. Aubuchon presented *Stapley I* to the grand jury in November
16 2008, six months after McCarroll disclosed the relevant documents and communicated
17 her belief regarding the disclosure requirements to Stribling. At the grand jury hearing, a
18 state witness explained that “there’s a resolution by the county that was adopted in ’94
19 that requires county officials to comply with the Arizona statute 38-542, which requires
20 those disclosures be completed.” Doc. 1112-9 at 50. Aubuchon asked whether the
21 resolution “address[ed] candidate disclosure forms” and the witness responded that “[i]t
22 wasn’t clearly covered under the resolution.” *Id.*

23 Even if McCarroll actually believed the 1994 resolution adopted the disclosure
24 requirements—and it appears she did—MACE had six months to review the language of
25 the 1994 resolution and conduct further investigation as to whether the intention reflected
26 in the 1994 resolution was ever acted on (it was not). It is clear that someone handwrote
27 on the documents McCarroll disclosed to Stribling that the 1994 resolution rescinded the
28 1979 resolution, but it is unclear whether the author of those notes appreciated the impact

1 of the 1994 resolution—the grand jury testimony quoted above suggests it was either
2 misunderstood or deliberately ignored. Further, it is unclear who wrote it or when. If
3 everyone believed that the resolution had been adopted at the time Aubuchon presented
4 the indictment to the grand jury—because that is what McCarroll told them—then an
5 ordinarily prudent person may have continued the investigation. But it is at best a matter
6 of debate, and therefore jury trial, whether it was reasonable to seek indictment without
7 ever seeing the supposed resolution to confirm its existence and to know exactly what the
8 text of the resolution required to be disclosed. Moreover, if Stribling (or Luth, or
9 Aubuchon) knew the effect of the resolution prior to the grand jury hearing in November
10 2008, and thus had reason to know that McCarroll was incorrect, then an ordinarily
11 prudent person would not have believed probable cause existed to charge *Stapley* with
12 disclosure violations. A plain reading of the 1994 resolution shows that it rescinded prior
13 resolutions and adopted nothing in their place. The facts preclude summary judgment
14 that probable cause existed.

15 **2. Statute of limitations**

16 Irrespective of whether Luth or Stribling had probable cause to charge Stapley
17 based on McCarroll’s statement and a misreading of the 1994 resolution, Aubuchon
18 attended the MACE meeting and presented the *Stapley I* draft indictment *before* the
19 Stribling–McCarroll interactions. Because McCarroll had not yet stated the 1994
20 resolution adopted the Arizona statutes regarding financial disclosures, her statement
21 could not supply a factual basis for probable cause at that point—mere inconsistencies
22 among Stapley’s publicly recorded disclosures do not establish what he was required to
23 disclose.
24

25 Moreover, when questioned by Stribling about whether the inconsistencies might
26 reflect clerical error rather than knowing nondisclosure, Aubuchon stated that “if [the
27 disclosure information is] not there then it’s a crime.” Doc. 1112-9 at 18. This also
28

1 suggests lack of probable cause to believe Stapley *knowingly* failed to disclose the
2 relevant information.

3 Further, as noted above there is evidence Aubuchon instructed MACE deputies at
4 the May 14 meeting to forward date their investigation, using May 14, 2008, rather than
5 January 2007, as the date on which their work began. *See* Doc. 1112-3 at 87–88. This
6 supports a finding that Aubuchon knew the statute of limitations on filing misdemeanor
7 charges had run. Indeed, Luth testified that he understood that forward dating could have
8 been an attempt to circumvent the statute of limitations. *See id.* at 9–10. This could lead
9 a reasonable juror to conclude that even if Luth had probable cause to believe Stapley
10 failed to disclose information, he knew or suspected that any resulting misdemeanor
11 charges would be barred by the statute of limitations. This is consistent with
12 Commissioner Passomonte’s concerns at the *Stapley I* grand jury hearing, who declined
13 to issue an arrest warrant in part because “[s]ome of th[e] charges, on their face,
14 appear[ed] to be outside of the statute of limitations time.” Doc. 1112-9 at 58, 64.
15 Indeed, Aubuchon’s negligence or knowledge as to the statute of limitations constituted
16 partial grounds for her disbarment. *See In re Aubuchon*, 233 Ariz. 62, 309 P.3d 886,
17 892–93 (2013). To the extent Aubuchon, Luth, or other MACE deputies knew the claims
18 were time barred, this supports a finding that there was no probable cause by the time
19 Aubuchon presented the case to the grand jury. The evidence precludes summary
20 judgment for Defendants.

21
22 **C. Malice**

23 Arpaio and Hendershott have not refuted an inference of malice—that they
24 “initiate[d] or procure[d] the proceedings . . . primarily for a purpose other than that of
25 bringing an offender to justice” Restatement (Second) of Torts § 653 (1977). A
26 lack of probable cause may serve as evidence of improper purpose. *Id.* § 669. “The
27 converse is not true. The fact that the defendant initiated or continued the prosecution or
28 procured it for an improper purpose . . . is not in any way inconsistent with his reasonable

1 belief in the guilt of the accused and the existence of grounds reasonably justifying that
2 belief.” *Id.* § 669A cmt. b. Finally, “[w]hen there is evidence that [an ulterior] motive
3 played a substantial part in influencing his decision, the determination of whether the
4 ulterior purpose was the primary one is normally for the jury.” *Id.* § 668.

5 Here, Stapley has testified that Arpaio and Hendershott both threatened to sue him
6 sometime prior to the spring of 2008 for making budget decisions adverse to MCSO and
7 that in the spring of 2008 Hendershott told Stapley that if the supervisor crossed a
8 metaphorical line in the sand regarding budget cuts, “I will get you. We will get you.”
9 Doc. 1112-5 at 20. A reasonable jury could conclude that these coinciding threats were
10 made and reflect that Arpaio and Hendershott directed or approved the criminal
11 investigation that concluded with the *Stapley I* indictment for an improper purpose.
12 Arpaio and Hendershott therefore have not refuted the inference that they acted with
13 malice.

14
15 **D. Favorable termination**

16 Arpaio and Hendershott are nonetheless entitled to summary judgment on
17 malicious prosecution of *Stapley I* if the case did not terminate in Stapley’s favor.

18 Generally, a criminal proceeding terminates favorably by “final order in favor of
19 the accused by a trial or appellate court.” Restatement (Second) of Torts § 659(f).
20 “When a termination or dismissal indicates in some fashion that the accused is innocent
21 of wrongdoing it is a favorable termination. However, if it is merely a procedural or
22 technical dismissal it is not favorable.” *Frey v. Stoneman*, 150 Ariz. 106, 110, 722 P.2d
23 274, 278 (1986); *see also Jaffe v. Stone*, 18 Cal. 2d 146, 150, 114 P.2d 335, 338 (1941)
24 (“If, however, the dismissal is on technical grounds, for procedural reasons, or for any
25 other reason not inconsistent with his guilt, it does not constitute a favorable
26 termination.”).

27 Here, *Stapley I* terminated by final order of the court of appeals in favor of
28 Stapley. The *Stapley I* termination was inconsistent with guilt because one cannot be

1 guilty of a law that does not exist. *See Stapley*, 227 Ariz. at 66, 251 P.3d at 1053.
2 Irrespective of what McCarroll and Stapley believed Stapley was required to do by law,
3 the fact is there was no properly adopted law requiring the disclosures.

4
5 **E. Accrual of action**

6 “A claim for malicious prosecution does not accrue until the prior proceedings
7 have terminated in the accused’s favor, including any pending appeal that could lead to
8 further proceedings.” *Ekweani v. Maricopa Cnty. Sheriff’s Office*, No. CV-08-01551-
9 PHX-FJM, 2010 WL 2079773, at *6 (D. Ariz. May 24, 2010), *aff’d*, 471 F. App’x 583
10 (9th Cir. 2012). *Cf. Amfac Distribution Corp. v. Miller*, 138 Ariz. 152, 154, 673 P.2d
11 792, 794 (1983) (concluding that the “damaging effect” of litigation is “not ascertainable
12 until the appellate process is completed or is waived by a failure to appeal”).

13 The Court of Appeals affirmed dismissal of the misdemeanor charges on March
14 24, 2011. Stapley filed his suit on December 23, 2010. His claim is not time barred by
15 state law, which requires that “actions against any public entity or public employee shall
16 be brought within one year after the cause of action accrues” Ariz. Rev. Stat.
17 Ann. § 12-821.

18 For the forgoing reasons, Arpaio and Thomas are not entitled to summary
19 judgment as to Stapley’s claim for malicious prosecution based on *Stapley I*.

20
21 **IV. THE SEARCH**

22 On February 25, 2009, MCSO Sergeant Jeff Gentry presented an application for a
23 search warrant and supporting affidavit to Justice of the Peace Ore. Judge Ore issued the
24 search warrant for Stapley’s office. *See* Doc. 1067-2 at 8–12. The accompanying
25 affidavit set out the evidence uncovered by MCSO and MCAO allegedly suggesting that
26 Stapley may have committed bribery, fraudulent schemes, and/or conspiracy to misuse
27 public money. *See* Doc. 1067-2 at 13–24. The next day, MCSO executed the warrant.
28 *See* Doc. 1072 at 7.

1 Stapley seeks summary judgment that Aubuchon violated the Fourth Amendment
2 because she effected the warrant without probable cause. *See* Doc. 1065 at 5. Stapley
3 asserts the warrant issued because of judicial deception. *See, e.g.*, Doc. 1065 at 5; Doc.
4 246 ¶¶ 307–08. Defendants seek summary judgment that the search was supported by
5 probable cause, precluding liability, *see, e.g.*, Doc. 1072 at 6–7; Doc. 1062 at 13; Doc.
6 1066 at 12 n.7, that they are entitled to immunity, *see, e.g.*, Doc. 1066 at 13–15; Doc.
7 1063 at 11 n.8, or that they were otherwise uninvolved. Doc. 1063 at 10–11; Doc. 1139
8 at 4. Defendants’ motions are addressed presently.

9
10 **A. Legal standard**

11 The Fourth Amendment prohibits search warrants that lack probable cause. U.S.
12 Const. amend. IV (“no Warrants shall issue, but upon probable cause”). Probable cause
13 for a search exists “where the known facts and circumstances are sufficient to warrant a
14 man of reasonable prudence in the belief that contraband or evidence of a crime will be
15 found.” *Ornelas v. United States*, 517 U.S. 690, 696 (1996). When evaluating an
16 affidavit for probable cause, a judge may draw “reasonable inferences” from the
17 materials offered. *United States v. Gourde*, 440 F.3d 1065, 1071 (9th Cir. 2006). A “fair
18 probability” that evidence of a crime will be found suffices for probable cause, *Illinois v.*
19 *Gates*, 462 U.S. 213, 238 (1983); “mere suspicion” of criminal activity does not. *United*
20 *States v. Martinez*, 588 F.2d 1227, 1234 (9th Cir. 1978).

21 As a general matter, a determination of probable cause by a judge deserves a great
22 deal of deference. *Gates*, 462 U.S. at 236. The deference, however, has limits. *United*
23 *States v. Leon*, 468 U.S. 897, 914 (1984). To prevail in a § 1983 action asserting
24 deception in an affidavit, a plaintiff must establish both (1) the defendant deliberately or
25 recklessly made false statements in the affidavit and (2) the falsehoods or omissions were
26 material to the finding of probable cause. *KRL v. Moore*, 384 F.3d 1105, 1117 (9th Cir.
27 2004). Omissions or falsehoods are material if the judge could not have “issued the
28 warrant in the absence of the contested statements.” *Hervey v. Estes*, 65 F.3d 784, 789

1 (9th Cir. 1995). Materiality is a matter for the court to determine. *KRL*, 384 F.3d at
2 1117. No good-faith exception preserves the reasonableness of a search when the
3 affidavit underlying the warrant included information that the affiant knew was false or
4 would have known was false, save for reckless disregard for the truth. *Leon*, 468 U.S. at 923.

5 Finally, whether a particular set of facts constitutes probable cause is a question of
6 law for the court. *Cullison v. City of Peoria*, 120 Ariz. 165, 168, 584 P.2d 1156, 1159
7 (1978). As such, absent a factual dispute, a court decides the question of probable cause.
8 *Hansen v. Garcia*, 148 Ariz. 205, 207, 713 P.2d 1263, 1265 (Ct. App. 1986). However,
9 “if from one set of facts the conclusion can be inferred that probable cause exists, and
10 from another that it does not, it is for the jury to determine the true state of facts.”
11 *Carroll v. Kalar*, 112 Ariz. 595, 598–99, 545 P.2d 411, 414–15 (1976).

12 Because Stapley asserts judicial deception, Defendants are not entitled to summary
13 judgment if Stapley makes a “substantial showing” that they deliberately or recklessly
14 disregarded the truth and establishes that the search would not have occurred but for the
15 dishonesty. *See Chism v. Washington*, 661 F.3d 380 (9th Cir. 2011). Consequently, the
16 Court must determine (1) whether the affidavit contained false statements,
17 misrepresentations, or omissions, (2) whether those statements and omissions were
18 material to the probable cause determination, and (3) whether Stapley has made a
19 substantial showing of deliberate or reckless disregard for the truth.

20 21 **B. Evidence supporting the search warrant**

22 The affidavit signed and sworn to by Gentry declared that between 1995 and 2009,
23 Stapley committed the crimes of bribery in violation of A.R.S. § 13-2602(A), engaging in
24 a fraudulent scheme in violation of A.R.S. § 13-2310(A), and/or conspiracy to commit
25 misuse of public monies in violation of A.R.S. § 35-301. *See* Doc. 1067-2 at 13–14.

26 To commit bribery, an individual must: (1) “confer[] or agree[] to confer any
27 benefit upon a public servant or party officer,” and (2) do so with the “intent to influence
28 the public servant’s . . . vote, opinion, judgment, exercise of discretion or other action in

1 his official capacity” A.R.S. § 13-2602(A)(1). An individual is guilty of
2 participating in a fraudulent scheme when, “pursuant to a scheme or artifice to defraud,
3 [he] knowingly obtains any benefit by means of false or fraudulent pretenses,
4 representations, promises or material omissions” *Id.* § 13-2310(A). Finally, a
5 “public officer or other person . . . charged with the receipt, safekeeping, transfer or
6 disbursement of public money” commits misuse, inter alia, by appropriating it, without
7 authority of law, “to his own use, or to the use of another.” *Id.* § 35-301.

8 The affidavit offered the following in support of probable cause: (1) evidence that
9 Stapley misreported income “for the purpose of obtaining commercial loan funding”; (2)
10 evidence of undocumented payments by Wolfswinkel-owned entities to Stapley, which
11 “raise[d] suspicion regarding potential issues he may have voted or used influence to
12 impact the transactions or decisions so that it may be construed as favorable to land and
13 properties owned by Conley Wolfswinkel or related entities, in short—bribery or related
14 crimes”; (3) evidence that Stapley or the Board may have misused public funds because
15 Stapley’s secretary, Susan Schuerman, used county-issued equipment to facilitate
16 Stapley’s personal business and because the Board may have “pay[ed] for criminal
17 defense services for [Schuerman]” in violation of procurement laws. *See* Doc. 1067-2 at
18 17–23.

19
20 **1. Evidence regarding fraud**

21 The entirety of evidence of fraudulently obtained loans, as presented in the
22 affidavit for the search warrant, was the following:

23 [Stapley’s] reported income for purposes of the U.S. Individual Tax Return
24 is/was not consistent with reported income statements and records filed by,
25 and on behalf of, Donald T. Stapley, Jr., and in his behalf as an owner of
26 Arroyo Pacific Investments and / or Arroyo Pecans Partners, LLC, and
Arroyo Pacific Partners, LLC for the purpose of obtaining commercial loan
funding.

27 An analysis of [Stapley’s] personal and corporate account balances
28 reveals an approximate reported personal worth of \$8,061,246 according to
a financial statement dated 5/10/2006; however, [Stapley’s] U.S. Individual

1 income Tax Return documents filed on his behalf by his accountant . . .
2 show significant difference between claimed personal worth and reported
3 personal worth, specifically adjusted gross income shows -\$49,577.00 in
4 2006.

4 *Id.* at 17. Claims of high net worth and low net income are not, without more,
5 evidence of a crime. Many assets have more carrying expense than regular
6 income. Taxable income in any one year may not be proportional to asset value.

8 **2. Evidence regarding bribery**

9 The crux of the evidence of bribery, as presented in the affidavit for the search
10 warrant, was the following: Stapley's former bookkeeper, Joan Stoops, told detectives
11 that Stapley had received monthly payments of \$10,000 for a "partnership" he had with
12 Conley Wolfswinkel having to do with land in Queen Creek, Arizona. *See id.* at 18. She
13 initially told detectives that the payments were made in 2003 before erroneously stating,
14 and then repeating, that they occurred in 2002. *See Doc. 1067-4* at 26, 29. Stoops
15 indicated that the payments were deposited into the Bank of America account of
16 Stapley's company, Arroyo Pacific Investments, Inc. The affidavit noted, however, that
17 the funds could not be reconciled with the bank records but that the "existence of the
18 funds may be found in additional accounts but these accounts are currently unknown to
19 investigators." *Id.* at 18. Stoops further explained that she never saw any documentation
20 relating to the Stapley-Wolfswinkel "partnership," and she was unable to identify how
21 the \$10,000 payments were reported on Stapley's 2002 individual tax return. *See id.* at
22 18-19. In addition, the affidavit explained that no documented partnership between
23 Stapley and Wolfswinkel could be found in public records during the relevant period, and
24 that Stapley never made the requisite disclosures as a member of the Maricopa County
25 Board of Supervisors of the \$10,000 payments or of any partnership. *See id.* at 18. The
26 affidavit then suggested that this "raise[s] suspicion regarding potential issues [Stapley]
27 may have voted or used [his] influence" as a county supervisor in a manner favorable to
28 Conley Wolfswinkel. *Id.* at 19. It remarked that "further analysis of financial records is

1 still pending,” and it listed known payments from Wolfswinkel-owned companies to
2 Arroyo Pacific, none of which occurred in 2002. *Id.*

3 Additionally, it asserted that Maricopa County board minutes showed that Stapley
4 voted on tax issues and other issues related to land, and that in “some of these minutes,
5 Supervisor Stapley is noted voting on issues concerning land or nearby land that he
6 would later own or be affiliated with himself or was or would be owned by a company
7 described above.” *Id.* at 20. The only example of such a vote, however, is that in
8 October 2002, Stapley signed the resolution “appointing Brandon Wolfswinkel to serve
9 as trustee of the Spectrum Irrigation Water Delivery District No. 48 and approving the
10 organization [of the District] that included parcels owned by Vanderbilt Farms, a
11 [Wolfswinkel] company that he did not declare a conflict on until 2006 when he indicated
12 that he had business dealings with the principals of Vanderbilt Farms.” *Id.*

13 14 **3. Evidence regarding misuse of public funds**

15 As set out in the affidavit, the evidence that someone² conspired to misuse public
16 funds comprises two distinct issues:

17 (1) Stapley’s secretary, Susan Schuerman, served as the Statutory Agent for
18 Arroyo Pacific and listed her Board office telephone number as a contact number for
19 Arroyo Pacific on the Arizona Corporation Commission website. *See* Doc. 1067-2 at 20.
20 Moreover, investigators learned of a fax cover sheet with an official Board cover form
21 that was sent from Stapley to a business associate regarding property “associated with
22 Stapley’s companies and the Wolfswinkels” and instructed the recipient to direct
23 questions to Schuerman. *See id.* at 22. From this, investigators believed that Schuerman
24 “is/has used county issued equipment including, but not limited to: telephones, fax
25 machines, emails, computers, for use in personal business dealings in regards to that of
26 [Stapley]. If these actions were committed, it is the belief of investigators that Susan

27 _____
28 ² As the quoted language below illustrates, the affidavit is particularly vague about
who actually committed the criminal misuse of public funds.

1 Schuerman may have been compensated by [Stapley] in some other means or by way of a
2 financial compensation through her pay by the County of Maricopa.” *Id.* at 21.

3 (2) Attorney Stephen Dichter emailed the MCAO and stated he would be
4 representing Schuerman, citing a contract with Maricopa County Materials Management,
5 and had consulted with her regarding interviews with MCSO detectives. The affidavit
6 continues:

7 Since any contract with Dichter’s firm from the Maricopa County Materials
8 Management would be limited to civil matters, Dichter, by his own
9 acknowledgment is representing Schuerman in this criminal matter and
10 may be doing so at taxpayer expense, which is a violation of procurement
11 laws.

12 [MCAO] sent a response to Dichter’s email that they would not
13 honor this representation, and that such actions would be in violation of the
14 current Procurement Law. In response to that, Dichter stated that if
15 [MCAO] was unwilling to compensate him for his legal assistance that he
16 would agree to represent [Schuerman] “Pro Bono.” Investigators believe
17 that this order of events and communications show that . . . Schuerman had
18 already sought legal council [sic] pertaining to these matters and that [the
19 Board] would be in violation of procurement law with regard to the
20 retention of Mr. Dichter for the criminal defense of Ms. Schuerman.

21 In a letter to [MCAO] dated February 20, 2009[,] Mr. Dichter again
22 stated that he is representing . . . Schuerman without regard to when or how
23 he will be paid. It is clear however that Schuerman will not be paying for
24 her own defense. Dichter stated in the first paragraph of this letter,
25 “. . . although I had been asked to provide legal services to Susan
26 Schuerman in connection with the Don Stapley case . . .” it remains unclear
27 to investigators exactly who it is that asked Mr. Dichter for any type of
28 representation in this criminal matter. If in fact [the board] and/or Sandi
Wilson in some way asked for this representation it would violate
procurement law, but would also have to have been approved in an open
meeting of the Board Investigators have been unable to locate any
public record of such an approval.”

. . . .

Therefore, investigators believe that evidence of misuse of public monies
by the use of public funds to retain and pay for criminal defense services
for Susan Schuerman and theft will be found in the offices of [Stapley and
Schuerman].

Id. at 21–22.

1 **C. Misrepresentations and omissions in the supporting affidavit**

2 Stapley argues the affidavit presented to Judge Ore in support of the search
3 warrant contained a number of misrepresentations and omissions, given the relevant facts
4 and circumstances that were known at the time the warrant was sought. *See Ornelas*, 517
5 U.S. at 696. Those misrepresentations and omissions created false impressions as to the
6 nature and extent of the evidence suggestive of criminal activity by Stapley.

7
8 **1. Misrepresentation and omissions of evidence of bribery**

9 **i. Review of bank records**

10 The proposed evidence of bribery hinged on Stoops’s testimony that Stapley
11 received payments from Wolfswinkel-owned companies in 2002, which could not
12 otherwise be explained by legitimate business dealing between Stapley and the
13 Wolfswinkels beginning in 2003. Similarly, probable cause for the Wolfswinkel search
14 also turned largely on Stoops’s statements regarding payments from Wolfswinkel to
15 Stapley’s Bank of America account in 2002. Thus, when MCSO sought the Wolfswinkel
16 search warrant on January 21, 2009, the affidavit indicated that “[a]s of 01/20/2009,
17 Investigators ha[d] not received all the documents requested by subpoena from Bank of
18 America. After speaking with Bank of America representatives, Investigators were
19 informed that the anticipated time for these documents is between eight to ten days”
20 Doc. 1067-3 at 22. MCSO sought Stapley’s bank records to establish the bribery.

21 Over a month later, when MCSO sought the Stapley search warrant, a draft
22 affidavit repeated that information from Bank of America was still unavailable: “As of
23 02/24/2009, investigators have not received all the documents requested by subpoena
24 from Bank of America. After speaking with Bank of America representatives,
25 investigators were informed that the anticipated time for these documents is between
26 eight to ten days” Doc. 1112-17 at 5. By the time the final affidavit was submitted,
27 the following language took its place: “As of 02/24/2009, further analysis of financial
28 records is still pending.” Doc. 1067-2 at 19.

1 This statement obscures the undisputed fact that by the time MCSO searched
2 Stapley’s office it already had over 3500 pages of the records that Stoops indicated might
3 confirm the Wolfswinkel payments (and which of course did not). *See* Doc. 1067 ¶ 33.
4 Indeed, at oral argument, Hendershott conceded that he believed the “further analysis”
5 language reflected that the documents simply had not been reviewed. *See* Doc. 1167 at
6 45. The affidavit’s representation that further analysis was pending, while not untrue,
7 obfuscated the fact MCSO had all the bank records it had requested and had not found
8 any support for Stoops’s misstatement about payments in 2002.

9
10 **ii. Partnership documents**

11 As part of its discussion of the alleged “partnership” between Wolfswinkel and
12 Stapley, the affidavit stated that Stoops said she never saw any documentation relating to
13 the Queen Creek land deal or the Wolfswinkel–Stapley “partnership.” Doc. 1067-2 at 18.
14 Stoops repeatedly clarified, however, that she added “[c]ommon paperwork” between the
15 two, such as “closing papers,” to Stapley’s files. Doc. 1067-4 at 28. Moreover, Stoops
16 clarified that she dropped off papers from Stapley at Wolfswinkel’s office and that she
17 had picked up papers from Wolfswinkel for Stapley that she was “sure” was “paperwork
18 to the partnership.” Doc. 779-1 at 90, 92. Thus, while the affidavit did not misquote
19 Stoops, it falsely implied that she believed—and that in fact—there was no
20 documentation about the “partnership” in question.

21
22 **iii. Public records of partnership**

23 Like the affidavit’s note on partnership documentation, its assertion regarding
24 public documentation of the “partnership” was technically correct but misleading. The
25 affidavit indicated that investigators searching public records had found “no documented
26 partnership” between Stapley and Wolfswinkel during the relevant period. Doc. 1067-2
27 at 18. While this was true (albeit unsurprising, as investigators later learned that no
28 actual partnership existed), the affidavit neglected to mention that there were public

1 records documenting the relevant transactions between Stapley and Wolfswinkel. In
2 particular, an exclusive option agreement between Arroyo Pacific and Wolfswinkel
3 entities regarding Queen Creek land, which was dated August 11, 2003, and which
4 resulted in Wolfswinkel making monthly payments to Stapley’s company, was on file
5 with the Pinal County Recorder. Doc. 1067 ¶ 24; Doc. 1067-5 at 4–14. The affidavit’s
6 insinuation that no public record existed concerning Stapley’s business dealings with the
7 Wolfswinkels misrepresented the truth.

8
9 **iv. Disclosure**

10 According to the affidavit, neither the monthly \$10,000 payments from the
11 “partnership” with Wolfswinkel nor the “partnership” itself “were ever disclosed” on
12 Stapley’s Financial Disclosure Statements as required by his position on the Maricopa
13 County Board of Supervisors. Doc. 1067-2 at 18. This lack of disclosure, according to
14 the affidavit, raised “suspicion regarding potential issues he may have voted or used
15 influence to impact the transactions or decisions so that it may be construed as favorable
16 to land and properties owned by Conley Wolfswinkel or related entities” *Id.* at 18–
17 19. But this was partly belied by the affidavit itself. Two pages later, the affidavit states
18 that in 2006, Stapley disclosed a conflict of interest arising out of business dealings with
19 Wolfswinkel-company Vanderbilt Farms before a vote involving Vanderbilt Farms came
20 before the Board of Supervisors. *See id.* at 20; Doc. 1067-5 at 2. He did so in a letter to
21 the Clerk of the Maricopa County Board of Supervisors, citing the statutes requiring such
22 disclosure. *See id.* Thus, the affidavit fairly suggested Stapley failed to disclose his
23 business relationship with the Wolfswinkels before stating, somewhat obliquely, that he
24 later formally declared a conflict because of that relationship.

25
26 **v. Voting record**

27 As evidence that Stapley had received bribes and as a result acted favorably to the
28 Wolfswinkels in his position as supervisor, the affidavit offered the following:

1 Investigators have learned from official Maricopa County board minutes
2 that Donald Stapley voted on tax issues for land and other land related
3 issues. In some of these minutes, Supervisor Stapley is noted voting on
4 issues concerning land or nearby land that he would later own or be
5 affiliated with or was or would be owned by [one of other companies
6 described in the affidavit].

7 Doc. 1067-2 at 19.

8 Gentry testified, however, that he never found any evidence supporting that
9 Stapley had ever voted concerning land he or his friends owned. *See* Doc. 1067-3 at 5,
10 10. Instead, Gentry recalled “one or two [votes] where he recused himself
11 because . . . the Board was going to vote on something that he was personally involved
12 in . . .” *Id.* at 5. This is consistent with the fact that Stapley disclosed his business
13 dealings with Vanderbilt Farms in writing to Fran McCarroll and recused himself from a
14 vote “to avoid any appearance of impropriety.” Doc. 1067-5 at 2. Indeed, Aubuchon
15 conceded that even after the search warrant she could not identify any votes implicating
16 Wolfswinkel-owned land. *See* Doc. 1067-4 at 20.

17 In fact, the only vote identified in the affidavit was from April 2002. There,
18 Stapley “voted to approve the district impact statement and authorize the persons
19 proposing the district to circulate petitions” for the Spectrum Irrigation Water Irrigation
20 District, to which the Board had earlier appointed Conley Wolfswinkel’s son, Brandon,
21 as trustee, and which comprised parcels owned by Vanderbilt Farms. Doc. 1067-2 at 20.

22 The affidavit suggests Stapley may have voted in favor of organization in
23 exchange for the (nonexistent) 2002 payments. Stapley has offered evidence, however,
24 showing that the approval of Brandon Wolfswinkel was a ministerial and unanimous
25 decision by the Board of Supervisors: Stapley characterizes the vote as “rote” because
26 “the petition [to form the district] had been signed by all affected landowners, so the
27 Board was statutorily-authorized [under A.R.S. § 48-3425] to enter an order immediately
28 approving it.” Doc. 1065 at 9. Indeed, Wolfswinkel’s name did not even appear on the
Board agenda when the organization was approved. *See* Doc. 1167 at 87. Defendants do
not offer any evidence contradicting the ministerial nature of the water district vote.

1 Thus, at best the statement in the affidavit declaring that Stapley had voted on a
2 matter involving land he or his associates would one day own or with which they would
3 be affiliated is severely misleading. As noted above, the affidavit also asserted that
4 Stapley “may have voted or used influence to impact the transactions or decisions so that
5 it may be construed as favorable to land and properties owned by Conley Wolfswinkel or
6 related entities” Doc. 1067-2 at 19–20. For the same reason, this assertion that
7 Stapley “may” have acted improperly misrepresented the truth; it was belied by the lack
8 of evidence at the time the affidavit was signed that Stapley had voted or used his
9 influence to benefit himself or the Wolfswinkels in any meaningful way.³

10 2. Misrepresentation and omissions of evidence of misused public 11 funds

12 The second justification for alleging conspiracy to misuse public funds involved
13 Stephen Dichter providing counsel to Schuerman. There is a dispute, however, as to
14 whether Aubuchon, Gentry, or both knew that Dichter would represent Schuerman pro
15 bono or otherwise had reason to know there was no crime when Gentry declared that
16 Dichter might have been representing her “at taxpayer expense, which is a violation of
17 procurement laws.” *Compare* Doc. 1067-2 at 21 *with* Doc. 1123 at 25.

18 On February 13, 2009, Andrew Thomas copied a letter to Dichter in which he
19 wrote that Dichter’s representation was impermissible because “[r]etaining a criminal
20 defense attorney at county expense, to advise or represent a Maricopa County employee
21 suspected of criminal activity, is an unlawful expenditure of county funds.” Doc. 1067-6
22 at 2. Thomas went on to note that “[g]overnment employees suspected of criminal
23 activity are required to retain counsel at their own expense. They may not hire criminal
24 defense lawyers at county taxpayer expense.” *Id.* at 3. Thomas did not articulate any
25

26
27 ³ To the extent that the earlier vote appointing Brandon Wolfswinkel as trustee
28 involved a distinct action from the otherwise ministerial task of organizing the district, it
does not support the conclusion that Stapley voted on issues involving Wolfswinkel-
owned *land*.

1 particular procurement law or regulation. The affidavit likewise refers only to “the
2 current Procurement Law” and to “procurement laws” generally. Doc. 1067-2 at 21.

3 But the county hired Dichter to represent Schuerman in December 2008 as an
4 interviewee, before she became a suspect (or at least before the county, Dichter, or
5 Schuerman believed she was a suspect). Doc. 1067-5 at 72. And both before and after
6 Thomas’s letter, Dichter wrote Aubuchon to inform her that he would represent
7 Schuerman irrespective of whether he would ultimately be paid. *Id.* at 72, 74. The
8 obvious inference is that nobody, let alone the Board or the county, had paid Dichter—
9 and certainly not after Schuerman transformed from an interviewee to a suspect.
10 Dichter’s second letter to Aubuchon was dated two days before Gentry sought the search
11 warrant. Moreover, the affidavit plainly states that Dichter agreed to represent
12 Schuerman if he was not compensated. *See* Doc. 1067-2 at 21. Thus, the assertion that
13 Dichter *may* have been representing a criminal suspect at taxpayer expense was belied by
14 the facts known to MCSO and MCAO and included in the affidavit—and it did not create
15 probable cause to believe Stapley or the Board “[*k*]nowingly transfer[ed] . . . money
16 when not authorized or directed by law,” A.R.S. § 35-301(9), or otherwise misused or
17 conspired to misuse public funds.

18
19 **D. Materiality of misrepresentations and omissions**

20 Without the misleading statements regarding Stapley’s actions, the affidavit
21 amounts to a discrepancy between Stapley’s reported personal worth and his adjusted
22 income in 2006, an insufficient proclamation by Stoops, refuted by unreviewed bank
23 records in MCSO’s possession, that Conley Wolfswinkel was making payments to
24 Stapley’s company in 2002, and two facts about Stapley’s secretary: She listed her county
25 office telephone number as a contact number for Arroyo Pacific on the Arizona
26 Corporation Commission website, and she sent a fax three years before the search
27 warrant regarding Stapley’s non-county business and put her county phone number as a
28 contact. These two facts are trivial and simply would not lead “a man of reasonable

1 prudence [to believe] that contraband or evidence of a crime [would] be found” by
2 searching the office. *Ornelas v. United States*, 517 U.S. 690, 696 (1996).

3 All of the other purported “evidence” of criminal activity—Stoops’s inability to
4 locate the payments on Stapley’s tax records, the lack of public documentation of a
5 partnerships, and even the absence of \$10,000 payments on Stapley’s bank records—
6 were at least as exculpatory as they were inculpatory. Defendants’ theory of probable
7 cause for bribery hinged on the wild assumption that if no records of payments existed,
8 then the payments were made under the table. They disregarded the more logical
9 inference: that no record of payments in 2002 meant no payments then but instead in
10 2003 as publicly documented and as Stoops first said. For the information in an affidavit
11 to constitute probable cause, it must include reason to believe (1) that a crime was
12 committed, (2) that the individual identified in the affidavit committed the crime, and (3)
13 that evidence of the crime will be found in the place to be searched. *Chism v.*
14 *Washington*, 661 F.3d 380, 389 (9th Cir. 2011). Absent the misrepresentations regarding
15 Stapley’s actions, the affidavit does not satisfy even the first prong of this triad. As such,
16 the misstatements as to Stapley’s conduct were material to the finding of probable cause.

17 Moreover, the misrepresentations shrouded the fact that the investigation was
18 less complete than it was made out to be. Through its misleading statements, the
19 affidavit cloaked that investigators (1) had not reviewed the relevant bank statements,
20 which they had in their possession; (2) had not found the paperwork that Stoops believed
21 existed relating to the payments in question; and (3) had not located—or at least had not
22 revealed they had found—public records related to Stapley’s business dealings with the
23 Wolfswinkels. At least two of those sets of documents were publicly available, but in
24 early 2009, some six or seven years after the alleged crimes occurred, investigators
25 appeared to be in too much of a rush to look for them. The misstatements covered holes
26 in the investigation that undermined any “fair probability” of a crime. As such, they were
27 material to the question of probable cause.

28

1 “The false statements and omissions contained in [the] affidavit were material if
2 ‘the affidavit, once corrected and supplemented,’ would not have provided a magistrate
3 judge with a substantial basis for finding probable cause.” *Id.* at 389. Here, even making
4 any reasonable inferences, *see Gourde*, 440 F.3d at 1071, the affidavit falls short of the
5 “fair probability” of a crime needed to establish probable cause. As a general matter,
6 investigators have no duty to corroborate their evidence once they have established
7 probable cause. *Id.* at 1073. Similarly, they need not gather exculpatory evidence once
8 probable cause has been established. *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1147
9 (9th Cir. 2012). However, they cannot stop looking at evidence before they have
10 probable cause for a search, which is what happened here. A reasonable magistrate
11 would not have issued the warrant based on an accurate and complete representation of
12 the known evidence. *See Chism*, 661 F.3d at 392.

13
14 **E. Deliberate or reckless disregard for the truth**

15 To survive Defendants’ motion for summary judgment, Stapley “need only make a
16 ‘substantial showing’ of the [their] deliberate or reckless false statements and omissions.
17 ‘Clear proof of deliberation or recklessness is not required’ at the summary judgment
18 stage. If [he] make[s] such a substantial showing, then ‘the question of intent or
19 recklessness is a factual determination’ that must be made by the trier of fact.” *Chism*,
20 661 F.3d at 387–88 (alterations and internal citations omitted). “Summary judgment is
21 improper where ‘there is a genuine dispute as to the facts and circumstances within an
22 officer’s knowledge or what the officer and claimant did or failed to do.’” *Bravo v. City*
23 *of Santa Maria*, 665 F.3d 1076, 1087 (9th Cir. 2011) (quoting *Hopkins v. Bonvicino*, 573
24 F.3d 752, 763 (9th Cir. 2009)).

1 **1. Aubuchon**

2 **i. Involvement**

3 Aubuchon was the lead prosecutor for MACE and oversaw its day-to-day operations.
4 *See* Doc. 797-6 at 7. Although her general role was to provide legal advice and guidance,
5 Stapley has offered evidence that she in fact directed MACE investigations rather than
6 the MCSO case agents. *See* Doc. 1112-1 at 29. For example, one MCSO employee
7 described her role in MACE activities thus: “I realized [it] did not matter what detectives
8 said or what . . . sergeants, lieutenants, captains said, it mattered what Lisa Aubuchon
9 said.” Doc. 1112-2 at 28. There is evidence that her role generally involved reviewing
10 applications for search warrants to ensure they were “accurate and defensible.” Doc.
11 1112-1 at 42–43. And there is also disputed evidence that her role went further. For
12 example, Hendershott testified that Aubuchon made the ultimate call that MCSO had
13 sufficient probable cause to take the Wolfswinkel affidavit to court for a search warrant,
14 *see id.* at 54, and that her role in other MACE investigations was similar. *See id.* at 57.
15 *But see* Doc. 1108-2 at 3 (Hendershott testifying that Aubuchon did not have “any
16 authority to order any Sheriff’s detective or deputy to do anything”).

17 As noted above, Aubuchon began investigating Stapley in the spring of 2008. To
18 investigate “a lot of questionable things that were going on with his finances,” *see* Doc.
19 797-3 at 56, Aubuchon may have recommended that MCSO interview Stoops. *See id.* at
20 89. She monitored the interview while it was being conducted and provided questions to
21 an MCSO interviewer during breaks. *See id.* at 90–91. Further, she was familiar enough
22 with the details of the case to know that Stoops’s assertion that payments to Arroyo
23 Pacific began in 2002 was meaningful, *see* Doc. 1067-1 at 21, enough so that she
24 exclaimed “we got it”—apparently with reference to evidence of criminal activity—
25 immediately after the interview. *See* Doc. 797-5 at 46; *see also* Doc. 1112-2 at 31.
26 Aubuchon was also part of the collective decision to seek the earlier Wolfswinkel search
27 warrant, *see* Doc. 797-3 at 64–65, which sought evidence to support the same bribery
28 allegations.

1 With respect to the specific affidavit in support of the Stapley search, Aubuchon
2 reviewed the draft penned by Gentry, helped prepare it, and made edits to it before it
3 went to Judge Ore. *See* Doc. 1067-3 at 8, 11. Stapley offers Hendershott’s testimony
4 that Aubuchon concluded the search warrant affidavit was “good to proceed” or “good to
5 go,” but Hendershott appears to be referring to the Wolfswinkel search affidavit in this
6 instance as well. Doc. 1112-1 at 49, 51. Nonetheless, Gentry testified that he copied
7 many of the paragraphs in the Stapley affidavit directly from the Wolfswinkel affidavit.
8 *See* Doc. 1112-2 at 98–99. Aubuchon testified that the final decision to get the search
9 warrant fell to MCSO, *see* Doc. 1108-1 at 10, and Gentry testified that he took it to Judge
10 Ore after his direct superior, Lieutenant Tucker, approved it. *See* Doc. 1067-3 at 15.

11
12 **ii. Evidence**

13 There is evidence that further investigation either by Stoops or by MCSO could
14 have cleared up whether the payments were in 2002 or 2003. Stoops indicated in her
15 January 21, 2009 interview,⁴ which Aubuchon watched, that she believed she could
16 determine when Stapley received Wolfswinkel payments by reviewing her “yellow
17 papers” and checking the computer she had used while employed by Stapley. *See* Doc.
18 1067-4 at 27, 30, 36. She informed her interviewers that she did not “know what has
19 happened to the computers that were in the office. If you had those, you’d, you’d have it
20 all.” *Id.* at 30. Neither Aubuchon nor MCSO followed up with respect to either Stoops’s
21 papers or the office computer to which she referred. *See* Doc. 1067-1 at 23, 28, 33–34.

22 Although neither the computer nor the “yellow papers” were in Stoops’s
23 possession when she was interviewed, “[m]aybe a week to two weeks” after the interview
24 she reviewed her work papers and confirmed that there were no payments in 2002. Doc.
25 1108-14 at 22; Doc. 1067-2 at 29. This shows that slight further investigation would
26 have quickly corrected Stoops’s incorrect recollection about when the payments were
27 received. Nonetheless, nobody conducted further investigation in light of Stoops’s

28

⁴ The interview may have been on January 12, 2009. *See* Doc. 1108-14 at 22.

1 statements—notwithstanding testimony from an MCSO officer who interviewed Stoops
2 that she was “old” and “seemed confused.” Doc. 1112-2 at 32.

3 Moreover, there is evidence that Aubuchon had reason to know there were no
4 payments in 2002 even without following up Stoops’s statements. On February 25, 2009,
5 the same day Gentry applied for the search warrant and the day before it was executed,
6 the Wolfswinkels filed a motion to controvert the earlier search warrant executed against
7 them. *See* Doc. 1067 ¶ 10. In support of their motion, the Wolfswinkels submitted
8 affidavits from Stoops and Kathleen Holderbach, the Wolfswinkels’ business controller.
9 Both testified that the Wolfswinkels had not made any payments to Stapley in 2002. *See*
10 *id.* ¶¶ 10, 12. Although the Stoops affidavit was dated March 4, 2013, Aubuchon again
11 did not dispute Stapley’s assertion that it in fact supported the February 25, 2009 motion
12 to controvert. *Compare id.* ¶ 10 with Doc. 1108 ¶ 10. Holderbach’s affidavit was dated
13 February 25, 2009.

14 The fair inference is that Aubuchon may have learned that Stoops’s initial
15 assertion regarding 2003, rather than 2002, was in fact correct before MCSO executed the
16 search. *See* Doc 1067-4 at 43–44 (reflecting that Aubuchon learned the details of the
17 motion to controvert at an unidentified time after it was filed). Aubuchon does not deny
18 that she had the motion but argues only that “[t]here is no showing that information [in
19 the motion to controvert] was available to Aubuchon or detectives prior to the Stapley
20 search warrant.” Doc. 1108 ¶ 10; *see also* Doc. 1112-2 at 104–05 (Gentry stating he did
21 not know about Wolfswinkel’s motion to controvert when he applied for the Stapley
22 search warrant).

23 Further, Aubuchon’s testimony as to whether she was aware that Gentry’s research
24 had not located any vote by Stapley involving the Wolfswinkels’ land—the *quo* to the
25 nonexistent 2002 payments’ *quid*—is unclear. She may have been aware that Gentry’s
26 research had not yet produced any results before the affidavit was taken to Judge Ore.
27 *See* Doc. 1067-4 at 20; Doc. 1067-3 at 5.

28

1 There is also evidence that Aubuchon told investigators to lie regarding the
2 Stapley affidavit or at least knew it contained “creative writing.” In a meeting regarding
3 a search warrant, Aubuchon told then-Lieutenant Rich Burden to “put a little fluff above,
4 fluff below, use a little creative writing, any judge will sign that.” Doc. 1112-9 at 107.
5 Burden testified that Aubuchon’s words and mannerisms led him to believe she wanted
6 him to be “possibly dishonest.” *Id.* at 115. Burden testified that Aubuchon made the
7 fluff remarks to him in a meeting about a search warrant, which was to be based in part
8 on some news article that “had something to do with bug sweeping.” *Id.* at 101, 106.
9 Burden has similarly described this meeting as regarding a search warrant for “[t]he
10 Board of Supervisors Office, due to some bug sweep and funds used, county funds used.”
11 Doc. 1112-9 at 120.

12 Luth similarly testified about a meeting attended by Burden and Aubuchon in
13 which Aubuchon made comments about creative writing with respect to a search warrant.
14 *See* Doc. 1112-3 at 19. Luth testified, however, that Burden seemed to be referring to a
15 warrant he had in his hand and on which he had made markings to reflect things “he
16 didn’t like.” *Id.* at 20. In fact, the item in Burden’s hand was a copy of Gentry’s
17 affidavit in support of the Stapley search warrant. *See id.* at 20–21; Doc. 1112-17 at 2.

18 Other evidence suggests that although the “creative writing” comments were made
19 regarding an affidavit that post-dated the Stapley search, Aubuchon instructed that the
20 Stapley search warrant application should be used as a model—presumably of such
21 creative writing. *See* Doc. 1112-16 at 64. Thus, there is evidence that Aubuchon
22 suggested MCSO deputies add “fluff” and “creative writing” to the affidavit in support of
23 the Stapley search warrant or a different warrant—and even if it was a different affidavit,
24 that her statements impliedly conceded that such “creative writing” infected the Stapley
25 affidavit.

26 Defendant Aubuchon, then, both had knowledge of details associated with the
27 investigation and was involved in editing and finalizing the affidavit for the search
28 warrant. Her involvement went significantly beyond simply advising officers that a

1 search warrant would be necessary to gather more evidence or providing general legal
2 advice. *See Butler v. Elle*, 281 F.3d 1014, 1022 (9th Cir. 2002). Further, Stapley has
3 offered disputed evidence that she knew the Stapley affidavit included “creative writing”
4 to misrepresent probable cause. He has made a “substantial showing of deliberate
5 falsehood or reckless disregard for the truth,” *id.* at 1024; a reasonable jury could
6 conclude that the material misstatements in the affidavit followed from her reckless
7 disregard for the truth or from her intentional deceit. Accordingly, Aubuchon is not
8 entitled to summary judgment on the issue of whether she is liable for judicial deception.

9 10 **2. Thomas**

11 Thomas was the Maricopa County Attorney and partnered with Arpaio to form
12 MACE. As a general matter, Thomas attended MACE meetings, *see* Doc. 1112-1 at 40,
13 oversaw Defendant Aubuchon’s work on MACE cases, and provided advice as to how
14 cases should be handled. *See* Doc. 1112-13 at 133–34. Aubuchon testified that she kept
15 Thomas informed about all MACE matters through “an ongoing dialogue” and that “all
16 of [her] actions” were taken with his “full knowledge and consent.” *Id.* at 133–35, 137.

17 However, there is no material dispute as to Thomas’ involvement with the details
18 of the Gentry affidavit or the search warrant. Stapley has offered no evidence that
19 Thomas was aware of the moving parts of the bribery investigation, including the
20 research into Stapley’s record and the review of Arroyo Pacific’s bank records. Stapley
21 has offered evidence that Thomas knew of and took an active role in investigating
22 whether Schuerman and Stapley were misusing county money. *See* Doc. 1067-6 at 2–3.
23 But there is no evidence that he contributed to or had knowledge of how that information
24 was framed and described in the affidavit—or even that it would be included. Gentry
25 similarly testified that Thomas did not give him any input on MACE investigations. *See*
26 Doc. 1064-1 at 25. Finally, there is no evidence that he participated in the search itself.

27 Stapley has not offered evidence that Thomas knew of the affidavit’s flaws. As
28 such, Stapley has not made a “substantial showing” that his limited involvement in the

1 affidavit and search reflect reckless disregard for the truth or intentional dishonesty that
2 contributed to the material misrepresentations in the affidavit. Thomas is entitled to
3 summary judgment on the issue of judicial deception in obtaining the warrant.
4

5 **3. Hendershott**

6 Hendershott was second in command at MCSO; he ran the department at the
7 direction of Arpaio and reported directly to him. Doc. 797-2 at 4. Hendershott's duties
8 included directly supervising the operations of the MACE unit targeting public
9 corruption. *Id.* at 8–10. Arpaio explained that Hendershott was “the ultimate supervisor”
10 of MACE investigations. *See* Doc. 797-1 at 11. When asked if he was intimately
11 involved in the MACE cases,” he testified that it was “absolutely” fair to say that he was;
12 he further deemed it a “semi-fair characterization” to say that he “essentially controlled
13 the MACE investigations.” Doc. 1112-1 at 41. Hendershott elaborated: “If there was
14 something going on in MACE that would be a major movement in any case, . . . I tried
15 my very best to understand completely what was going on . . .” *Id.* By his own
16 admission, he “watched the MACE operations like a hawk,” *id.* at 41–42, and had an
17 “extremely active role” in them. *Id.* at 42. Hendershott explained that the need for his
18 heavy involvement in MACE cases stemmed in part from the fact that he had to keep
19 Arpaio up-to-date on investigations. He briefed Arpaio almost daily on MACE
20 investigations; keeping him well informed was particularly important in high-profile
21 cases that would likely attract media attention. *Id.* at 31, 36.

22 There is also evidence that Hendershott was intimately involved in MACE's
23 investigation into Stapley, specifically. Hendershott watched the Stoops interview, *see*
24 Doc. 1073-3 at 5, and afterwards it became clear to MCSO employees that the Stapley
25 investigation was “top down,” with Hendershott and Aubuchon directing it, Doc. 1112-2
26 at 37; *see also id.* at 34, and telling deputies whether probable cause existed for certain
27 actions. *See id.* at 58. Hendershott and Aubuchon, rather than the detectives, became the
28 “case agents.” Doc. 1067-1 at 30–31. And indeed, beginning at least in January or

1 February of 2009—corresponding with the Stoops interview and the subsequent *Stapley*
2 *II* investigation—Hendershott (along with Aubuchon) was making investigative decisions
3 “in direct contradiction to detectives’ desires and investigative experience” and that
4 “detectives’ opinions . . . were not being considered by Lisa Aubuchon and by Chief
5 Hendershott.” Doc. 1112-17 at 110–11. Perhaps most troubling given Hendershott’s
6 direct decisionmaking, MCSO Detective Jonathan Halverson testified that he “chose to
7 ignore certain facts that were in front of him.” *Id.* at 111.

8 Whether Hendershott was involved in securing the search warrant is more a matter
9 of inference. Although Hendershott testified that he knew every time MACE executed a
10 search warrant, he did not draft, review, or approve individual affidavits. *See* Doc. 1067-
11 6 at 16–17. Indeed, sometimes he would simply rely on Aubuchon’s approval of
12 affidavits. *See* Doc. 1112-1 at 51. Hendershott did not ask Gentry to write the *Stapley*
13 search warrant or affidavit. *See* Doc. 1112-2 at 90. Nor did Hendershott give Gentry
14 final direction to take the warrant application to Judge Ore or anyone else—he took it to
15 Judge Ore after his direct superior, Lieutenant Tucker, approved it. *See* Doc. 1067-3 at
16 15. Tucker testified, however, that the Wolfswinkel and *Stapley* search warrant
17 applications went to Hendershott before they were submitted, *see* Doc. 1112-16 at 104,
18 and that Hendershott specifically ordered that they be taken to Judge Ore rather than to a
19 superior court judge. *Id.* There is no evidence that Hendershott was involved in
20 executing the *Stapley* search beyond general assertions that “there was nothing that went
21 on [in MACE] that [Hendershott] didn’t direct.” Doc. 1112-2 at 3.

22 There is, however, ample evidence that Aubuchon and Hendershott essentially
23 acted “as one.” Doc. 1112-17 at 110. Hendershott and Aubuchon communicated very
24 frequently—sometimes daily. *See* Doc. 1112-1 at 47–48. They had a “very tight
25 working relationship.” *Id.* at 169. Indeed, MCSO subordinates testified that Hendershott
26 and Aubuchon were “really one and the same,” *id.* at 171, and being “in essence one
27 being, one mind.” Doc. 1112-17 at 105. One officer testified that if Aubuchon wanted
28 something done, she would tell Hendershott and he would order it. Doc. 1112-1 at 169;

1 *see also* Doc. 1112-2 at 28. On the other hand, Luth noted that their directions didn't
2 "always match[] up," Doc. 1112-3 at 36, and Aubuchon testified that sometimes she and
3 Hendershott disagreed with each other. *See* Doc. 1112-4 at 23.

4 Stapley has offered evidence that Hendershott was intimately involved in MACE
5 activities generally and the Stapley investigation specifically. Moreover, there is
6 substantial evidence that Hendershott and Aubuchon largely functioned as a unit, and it is
7 a fair inference that Hendershott's knowledge paralleled Aubuchon's. On balance,
8 Stapley has made a substantial showing that Hendershott recklessly disregarded the truth
9 with respect to MCSO's decision to seek a search warrant.

11 **4. Arpaio**

12 The extent of Sheriff Arpaio's involvement with the MACE unit is disputed.
13 There is inconsistent evidence that Arpaio attended regular MACE meetings, *compare*
14 Doc. 1112-1 at 36–37 (Hendershott testifying that Arpaio attended two-thirds of MACE
15 meetings) *with* Doc. 1112-3 at 22 (Luth testifying that Arpaio attended fewer).
16 Nonetheless, Arpaio generally suggested how MACE should operate. *See* Doc. 1112-1 at
17 37. Moreover, Hendershott had "almost daily" meetings with Arpaio, *id.* at 31, and
18 "[a]bsolutely" briefed Arpaio "regularly" on MACE activities. *Id.* at 36. Hendershott
19 kept Arpaio informed in particular of "activity against a high-profile person, someone
20 that would generate potential media," *id.*, and that Hendershott briefed Arpaio before
21 executing search warrants of high-profile targets. *See id.* at 48.

22 Aubuchon also played a role in keeping Arpaio in the loop. Hendershott testified
23 that Aubuchon would brief Arpaio "on the nuts and bolts" of cases. *Id.* Aubuchon
24 likewise testified that she attended fifteen to twenty meetings in which she and
25 Hendershott discussed the Stapley investigations and prosecutions with Arpaio. *See* Doc.
26 1112-4 at 39.

27 Nonetheless, there is no direct evidence that Arpaio knew of the details in the
28 Stapley search warrant application. Hendershott testified that he did not inform Arpaio of

1 day-to-day activity and that neither he nor Arpaio needed to read or approve warrants.
2 *See* Doc. 1112-1 at 46. This is consistent with Gentry’s testimony that Arpaio did not
3 make any comments to him regarding the search warrant affidavit. *See* Doc. 1067-3 at 13.

4 In the end, the evidence that Arpaio intentional or recklessly disregarded the truth
5 with respect to MCSO’s decision to seek the search warrant is that he was regularly
6 briefed by Hendershott and Aubuchon and had a particular interest in high-profile cases
7 like this. It is a closer question whether the evidence has the force of a “substantial
8 showing.” The persuasiveness and inferential force of that evidence must be left to the
9 jury, which could reasonably conclude that Aubuchon and Hendershott shared with
10 Arpaio everything they knew about the details and defects in the search warrant. Arpaio
11 is not entitled to summary judgment as to the issue of judicial deception and liability for
12 the search.

13
14 **F. Qualified immunity**

15 **1. Legal standard**

16 “Qualified immunity shields federal and state officials from money damages
17 unless a plaintiff pleads facts showing (1) that the official violated a statutory or
18 constitutional right, and (2) that the right was ‘clearly established’ at the time of the
19 challenged conduct.” *Ashcroft v. al-Kidd*, ___ U.S. ___, 131 S. Ct. 2074, 2080 (2011).
20 Courts may address either prong first and may grant qualified immunity based on the
21 second prong alone without deciding the first prong. *Pearson v. Callahan*, 555 U.S. 223,
22 236 (2009); *James v. Rowlands*, 606 F.3d 646, 650–51 (9th Cir. 2010).

23 “A [g]overnment official’s conduct violates clearly established law when, at the
24 time of the challenged conduct, the contours of a right are sufficiently clear that every
25 reasonable official would have understood that what he is doing violates that right.” *al-*
26 *Kidd*, 131 S. Ct. at 2083 (internal quotation and alteration marks omitted). For a right to
27 be “clearly established,” there need not be case law “directly on point, but existing
28 precedent must have placed the statutory or constitutional question beyond debate.” *Id.*

1 “The principles of qualified immunity shield an officer from personal liability when an
2 officer reasonably believes that his or her conduct complies with the law.” *Pearson*, 555
3 U.S. at 244.

4 To get qualified immunity, the officer must “reasonably believe in good faith that
5 [his] actions are constitutional.” *Smiddy v. Varney*, 665 F.2d 261, 266 (9th Cir. 1981);
6 *see also Pierson v. Ray*, 386 U.S. 547, 557 (1967). Qualified immunity protects “all but
7 the plainly incompetent or those who knowingly violate the law” and offers “ample room
8 for mistaken judgments.” *Malley v. Briggs*, 475 U.S. 335, 341, 343 (1986).

9 10 **2. Application to the search**

11 Once a plaintiff has made out a claim for judicial deception against particular
12 defendants, summary judgment in their favor on qualified immunity grounds is
13 inappropriate. This is because it is clearly established that plaintiffs have “a
14 constitutional right to not be searched . . . as a result of judicial deception.” *Chism v.*
15 *Washington*, 661 F.3d 380, 393 (9th Cir. 2011). For the reasons elucidated above,
16 Aubuchon and Hendershott are not entitled to qualified immunity with respect to the
17 search; Thomas and Arpaio are.

18 19 **V. THE ARREST AND STAPLEY II INDICTMENT**

20 In August 2009, eight months after the *Stapley I* indictment and sixth months after
21 the search of Stapley’s office, Superior Court Judge Kenneth Fields dismissed a number
22 of the misdemeanor charges that formed the basis of *Stapley I*. On Friday, September 18,
23 2009, Yavapai County Attorney Sheila Polk—to whom the Stapley prosecution had been
24 conflicted out—voluntarily dismissed the remaining charges to appeal Judge Fields’s
25 order and informed Arpaio and Hendershott of her decision by phone. *See* Doc. 1112-10
26 at 14–15. She also specifically told Arpaio and Hendershott that she had directed MCSO
27 to probe further the actions motivating the *Stapley II* investigation and that the *Stapley II*
28 case was not ready to go forward.

1 Nonetheless, MCSO arrested Stapley without a warrant on Monday, September
2 21—the very next business day. *See* Doc. 1112 ¶¶ 196–203. The charges included
3 fraudulent schemes and artifices, perjury, theft, and other prohibited acts, *see* Doc. 1072
4 at 7, and were based on allegations Stapley committed mortgage and loan fraud,
5 campaign account fraud with respect to his 2004 and 2008 bids for county supervisor,
6 campaign account fraud with respect to his campaign for the executive committee of the
7 National Association of Counties (NACo), and theft also with respect to his NACo
8 campaign. *See* Doc 1073-3 at 45–53. Nobody showed up to prosecute the case within
9 forty-eight hours, *see* Doc. 1112-4 at 43, so the charges were dismissed. Stapley’s fourth
10 cause of action states a claim against Arpaio, Aubuchon, and Hendershott for false arrest.

11 Less than three months after he was arrested, Stapley was indicted again—this
12 time largely for the crimes underlying his arrest: fraudulent schemes and artifices,
13 perjury, forgery, false swearing, and theft. These charges all arose from Stapley’s alleged
14 mortgage fraud (one count) and misuse and misreporting regarding campaign funds
15 raised to support his election to the Board and to the NACo executive committee (twenty
16 six counts).

17 As a result of the arrest, Stapley seeks summary judgment that Arpaio ordered a
18 retaliatory arrest in violation of § 1983 (irrespective of whether probable cause existed to
19 support the arrest), *see* Doc. 1060 at 1–2, while Arpaio and Hendershott seek summary
20 judgment that probable cause supported the arrest and thus that it was valid. *See* Doc.
21 1072 at 1–3, 7–8; Doc. 1062 at 10–11. Aubuchon seeks summary judgment that she was
22 insufficiently involved in the arrest to be liable. *See* Doc. 1066 at 3.

23 As a result of the *Stapley II* indictment, Stapley seeks damages for malicious
24 prosecution—his sixth claim for relief. As noted above, Stapley no longer asserts
25 malicious prosecution counts against Thomas and Aubuchon, and only Arpaio and
26 Hendershott remain as defendants with respect to the malicious prosecution claims. Each
27 moves for summary judgment. Because the same actions formed the bases of the arrest
28

1 and the subsequent indictment, they are analyzed together here. The Court considers
2 Defendants' motions and draws inferences in Stapley's favor.

3
4 **A. Legal standard**

5 To prove false arrest, a plaintiff must demonstrate detention "without his consent
6 and without lawful authority." *Reams v. City of Tucson*, 145 Ariz. 340, 343, 701 P.2d
7 598, 601 (Ct. App. 1985)). "The essential element necessary to constitute either false
8 arrest or imprisonment is unlawful detention.' A detention that occurs pursuant to legal
9 authority, such as an arrest based on probable cause, 'is not an unlawful detention.'" *Al-*
10 *Asadi v. City of Phoenix*, No. CV-09-47-PHX-DGC, 2010 WL 3419728, at *3 (D. Ariz.
11 Aug. 27, 2010) (quoting *Slade v. City of Phoenix*, 112 Ariz. 298, 300, 541 P.2d 550, 552
12 (1975)). "A plaintiff establishes a prima facie case by showing that he was arrested by
13 the defendant without a warrant, and the burden then devolves upon the defendant to
14 establish that the arrest was founded upon probable cause." *Reams*, 145 Ariz. at 343, 701
15 P.2d at 601. Generally, "probable cause to believe that a person has committed any crime
16 will preclude a false arrest claim, even if the person was arrested on additional or
17 different charges for which there was no probable cause." *Ewing v. City of Stockton*, 588
18 F.3d 1218, 1230 n.19 (9th Cir. 2009) (quoting *Holmes v. Vill. Of Hoffman Estate*, 511
19 F.3d 673, 682 (7th Cir. 2007)). To establish false arrest against Aubuchon, a prosecutor,
20 Stapley must demonstrate that she "ordered or otherwise procured the arrest," in addition to
21 proving a lack of probable cause. *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 918 (9th Cir.
22 2012) (en banc).

23 As discussed above, malicious prosecution requires a criminal proceeding that
24 lacked probable cause and terminated in Stapley's favor, and which was motivated by
25 malice or a primary purpose other than bringing him to justice. *See* Restatement
26 (Second) of Torts § 653 (1977).

1 **B. Probable cause**

2 In support of their argument that probable cause supported the arrest—and thus
3 that Stapley’s false arrest claim must fail—Arpaio and Hendershott assert that ample
4 evidence supporting probable cause is contained in the Probable Cause Addendum to the
5 Arrest Submittal Form. In support of their argument that probable cause supported the
6 *Stapley II* indictment—and thus that this particular claim for malicious prosecution must
7 fail—Arpaio and Hendershott assert that ample evidence is contained in the Charging
8 Summary. Defendants’ anemic analysis and invitation for this Court to proceed largely
9 unguided through the Addendum and Charging Summary is insufficient for summary
10 judgment—especially with respect to the warrantless arrest. Nonetheless, a close
11 analysis of the evidence also precludes summary judgment for Defendants.

12 MCSO deputies attached the Probable Cause Addendum to the Arrest Submittal
13 Form, which was dated the same day as the Stapley arrest: September 21, 2009. *See* Doc.
14 1073-3 at 38. The Addendum includes nearly nine pages of information purporting to
15 show Stapley violated A.R.S. 13-2310.A (fraudulent schemes and artifices), A.R.S. § 13-
16 2702.A.2 (perjury), A.R.S. § 13-1802.A.3 (theft), and A.R.S. § 38-504C (prohibited acts).
17 The Charging Summary, which was dated September 9, 2009, appears to contain
18 information compiled by MCSO officers that was eventually used to craft the Probable
19 Cause Addendum. *See* Doc. 1073-3 at 55–86.

20 The fraudulent schemes and perjury charges described in the Probable Cause
21 Addendum were premised largely on campaign reporting violations related to Stapley’s
22 campaigns for the Board of Supervisors. The subsequent *Stapley II* indictment included
23 the perjury charges, and it also repackaged the perjury and these fraudulent schemes
24 charges as false swearing charges. The fraudulent schemes charges were also partly
25 premised on mortgage fraud and tax fraud, but there was no probable cause to support
26 those theories. The arresting officer testified that the evidence was “overwhelming and
27 blatant” that there was no mortgage fraud, *see* Doc. 1112-2 at 48; and the tax fraud
28 charges were based on Stapley’s alleged failure to report option and loan payments that

1 MCSO knew were not required to be reported by law. *See* Doc. 1073-3 at 47; Doc. 1112-
2 11 at 109; *see generally Hardee v. United States*, 708 F.2d 661 (Fed. Cir. 1983). The
3 subsequent *Stapley II* indictment included the mortgage fraud charges. It did not include
4 the tax fraud charges. *See* Doc. 1112-13 at 32–45.

5 The theft, prohibited acts, and some of the fraud charges described in the
6 Addendum were premised on Stapley’s personal use of gifts to his NACo campaign. But
7 it is also clear that the prohibited acts and theft charges lacked probable cause. They
8 were premised on the theory that it was illegal for Stapley to use the NACo contributions
9 for personal purchases—but it was not. Stapley’s campaign for NACo, a private,
10 nonprofit organization, was not governed by any election law. More importantly, there is
11 evidence that MCSO significantly mischaracterized the witness interviews that formed
12 the basis of the NACo-related charges. *See* Doc. 1112-16 at 46–47; Doc. 1123 at 35. In
13 fact, although these charges were premised on the idea that Stapley misused donor
14 contributions, no donor had authority to restrict Stapley’s use of the money, and none had
15 attempted to do so. No donor had ever “expressed unhappiness as to how the funds had
16 been used,” *see* Doc. 1112-10 at 51, and none served as a complainant leading to the
17 arrest. *See Beier v. City of Lewiston*, 354 F.3d 1058, 1065 (9th Cir. 2004) (“Probable
18 cause cannot be established by an erroneous understanding of the law.”). The subsequent
19 *Stapley II* indictment was based largely on the theft theory (theft comprised eighteen of
20 the twenty-seven charges). It did not include charges for prohibited acts. Thus, the only
21 charges that merit further attention are the fraudulent schemes and artifices allegation
22 based on reporting violations and on the perjury and false swearing allegations.

23
24 **1. Fraudulent schemes and artifices (arrest)**

25 MCSO asserted in the Addendum that Stapley committed fraudulent schemes and
26 artifices “by knowingly using campaign funds for personal gain by filing false campaign
27 finance reports” related to his 2004 and 2008 elections to the Board, by transferring
28 money between his Board campaign accounts and his NACo account, and by failing to

1 report a transfer between his a Board campaign account and an Arroyo Pacific account.
2 Doc. 1073-3 at 46.

3 Arizona criminalizes fraudulent schemes and artifices and provides the following:
4 “Any person who, pursuant to a scheme or artifice to defraud, knowingly obtains any
5 benefit by means of false or fraudulent pretenses, representations, promises or material
6 omissions is guilty of a class 2 felony.” A.R.S. § 13-2310.

7 Here, the Probable Cause Addendum states that (1) Stapley routed money from his
8 2004 Board campaign account (“Stapley for Supervisor”), through his NACo account,
9 and ultimately to a different Board campaign account (“Stapley 08”)—and that in doing
10 so he retained over \$600 in Board campaign money in the NACo account; (2) he failed to
11 report a seven-day loan of \$8000 from a campaign account to a personal account; (3) he
12 transferred \$2117.34 from the Stapley 08 account to an Arroyo Pacific account without
13 reporting it; and (4) he reported paying \$1500 in rent to Arroyo Pacific, but the
14 disbursement went to an address other than Arroyo Pacific’s address of record and bank
15 records did not reflect such a disbursement. *See* Doc. 1073-3 at 46.

16 The Charging Summary adds only two relevant sentences—and it is with respect
17 to the money routed from the 2004, through the NACo account, and ultimately to the
18 2008 account: “It appears that [Stapley] ‘washed’ these funds through this account
19 because he could not reconcile his bank balance to his 2004 campaign finance reports.
20 The effect of this series of transactions was to leave \$644 donated by citizens or Political
21 action committees to his Board of Supervisors 2004 political campaign in an account
22 where expenditure reporting is not required.” Doc. 1073-3 at 74–75.

23 This is not “information sufficient to lead a person of reasonable caution to believe
24 that an offense has been or is being committed by the person being arrested.” *United*
25 *States v. Lopez*, 482 F.3d 1067, 1072 (9th Cir. 2007). It is improbable that an elected
26 official of considerable means would intentionally move money between accounts in an
27 attempt to defraud campaign donors of \$2800. The more likely explanation is simple
28 oversight. Later investigation suggested Stapley made a payment from his Arroyo

1 Pacific account to a Bank of America Business credit card on the exact same day as the
2 \$2117.34 transfer and in the exact same amount. But that conclusion came twenty
3 months *after* the Addendum and Charging Summaries were prepared, and neither
4 contained this fact.

5 “[W]hen specific intent is a required element of the offense, the arresting officer
6 must have probable cause for that element in order to reasonably believe that a crime has
7 occurred.” *Gasho v. United States*, 39 F.3d 1420, 1428 (9th Cir. 1994). MCSO did not
8 present in the Addendum or the Charging Summary evidence rising above “mere
9 suspicion, common rumor, or even strong reason to suspect” that Stapley had knowingly
10 obtained a benefit by means of false or fraudulent pretenses. *McKenzie v. Lamb*, 738
11 F.2d 1005, 1008 (9th Cir. 1984). There was not a “fair probability” of such a crime.
12 *Lopez*, 482 F.3d at 1072. It is perhaps unsurprising both that the Charging Summary did
13 *not* recommend fraudulent schemes charges based on these transfers and that the
14 subsequent indictment did *not* present these transfers as evidence of fraudulent schemes
15 or artifices.

16 17 **2. Perjury (arrest and indictment)**

18 Based on the same unreported (or misreported) transfers, MCSO also asserted in
19 the Probable Cause Addendum that Stapley committed perjury in violation of A.R.S. 13-
20 2702(A)(2) by knowingly filing false campaign finance reports: (1) He filed two reports
21 stating money had been transferred directly from the Stapley for Supervisor account to
22 the Stapley 08 account when in fact it had been routed through his NACo account; (2) he
23 failed to report a transfer of \$2000 from the Stapley to Supervisor account to Arroyo
24 Pacific; and (3) he failed to report that \$8000 was transferred from the Stapley 08 to his
25 personal account and then back again seven days later. *See* Doc. 1073-3 at 46. The
26 *Stapley II* indictment included these perjury charges. *See* Doc. 1112-13 at 34–35.

27 In Arizona, “[a] person commits perjury by making either[] (1) [a] false sworn
28 statement in regard to a material issue, believing it to be false,” or “(2) [a] false unsworn

1 declaration, certificate, verification or statement in regard to a material issue that the
2 person subscribes as true under penalty of perjury, believing it to be false.” A.R.S. § 13-
3 2702(A). “Materiality is a necessary element of the offense of perjury.” *State v. Fodor*,
4 179 Ariz. 442, 453, 880 P.2d 662, 673 (Ct. App. 1994). “‘Material’ means that which
5 could have affected the course or outcome of any proceeding or transaction.” A.R.S. §
6 13-2701. Generally, this refers to affecting the decision of a tribunal. *See United States*
7 *v. McKenna*, 327 F.3d 830, 839 (9th Cir. 2003) (“A statement is material if ‘it has a
8 natural tendency to influence, or was capable of influencing, the decision of the decision-
9 making body to which it was addressed.’”) (quoting *United States v. Leon-Reyes*, 177
10 F.3d 816, 820 (9th Cir.1999)).

11 Here, MCSO suspected that Stapley lied in his campaign finance reports. But
12 neither the Addendum nor the Charging Summary refers to any proceeding that might be
13 affected by any misrepresentations. Thus, even assuming there was evidence that Stapley
14 lied rather than made a mistake, doing so was not “material” to any proceeding and thus
15 could not support probable cause to believe he had committed perjury. It is again
16 unsurprising that the Charging Summary did not recommend perjury charges.

17 18 **3. False swearing (indictment)**

19 As noted above, the *Stapley II* indictment did *not* pursue fraudulent schemes and
20 artifices charges based on these unreported transfers. The indictment did include two
21 false swearing charges (Counts 7 and 8), however, and these allegedly suspect transfers
22 identified in the Probable Cause Addendum and discussed above appear to undergird
23 both. *Compare* Doc. 1112-13 at 36 *with* Doc. 1073-3 at 46. Similarly, the indictment
24 appeared to repackage the perjury charges in the same two false swearing counts (Counts
25 7 and 8). *See* Doc. 1112-13 at 36.

26 In Arizona, false swearing comprises the “making [of] a false sworn statement,
27 believing it to be false.” A.R.S. § 13-2703(A). For the same reasons discussed above,
28

1 however, the Addendum and Charging Summary contain no evidence showing Stapley
2 believed his disclosures were false—even if they were incorrect.

3 Arpaio and Hendershott do not point to any other consolidated evidence to support
4 probable cause for the arrest.⁵ Defendants also do not identify any specific evidence
5 developed during the three months between the arrest and the indictment that might have
6 caused MCSO or MCAO to determine that the misrepresentations in Stapley’s campaign
7 finance reports were lies rather than errors—or to determine probable cause existed for
8 any of the other charges in the indictment. It is unsurprising then that Gila County
9 Attorney Daisy Flores—to whom the *Stapley II* prosecution was conflicted out in March
10 2010—later concluded that “[a]s to all counts contained in the [*Stapley II*] indictment[,]
11 there is insufficient evidence to go forward with the prosecution” Although Flores
12 would conclude seventeen months after MCAO indicted Stapley that “there [was]
13 sufficient evidence to prove that Stapley committed seven (7) separate felony offenses of
14 false swearing related to the NACo campaign and 2004–2008 Campaign Finance
15 Reports,” Doc. 1112-16 at 32, her later conclusion is not dispositive as to what
16 Defendants knew at the time they arrested and charged Stapley. Nor is it admissible
17 evidence as to probable cause. There is a reasonable view of the facts that precludes
18 probable cause, and thus summary judgment is not warranted.⁶

19 20 **C. Defendants’ roles in the arrest**

21 Hendershott ordered Stapley’s arrest. *See* Doc. 1112-2 at 40, 52. Although
22 Arpaio argues that “there is no evidence that [he] knew about any of the specific evidence
23 other than that Hendershott and others believed there was probable cause for Stapley’s

24
25 ⁵ There is no merit to Arpaio’s statute of limitation defense regarding the arrest.
26 Stapley executed a tolling agreement with the county specifically referencing A.R.S. §
12-821, *see* Doc. 1112-11 at 134–35, and Arpaio has offered no evidence that the
agreement was ever terminated.

27
28 ⁶ As noted above, claims for malicious prosecution are charge specific.
Consequently, even if Defendants were entitled to summary judgment that probable cause
supported the two false swearing charges in the indictment, Stapley could still try his
malicious prosecution claim based on the other twenty-five charges in the indictment.

1 arrest,” he also concedes that “[t]here is a question of fact regarding Sheriff Arpaio’s
2 involvement in Stapley’s arrest, created by Hendershott saying that Sheriff Arpaio was
3 involved in making the decision to arrest Stapley.” Doc. 1139 at 4. Neither Arpaio nor
4 Hendershott seeks summary judgment based on their roles in the arrest.

5 In contrast, Aubuchon’s motion for summary judgment as to the false arrest claim
6 turns on her role in the arrest—whether she procured or induced it. Stapley’s evidence
7 demonstrates that Halverson arrested Stapley because MCSO Sergeant Rich Johnson
8 directed it at Hendershott’s orders, *see* Doc. 1112-2 at 40, despite the fact Halverson
9 disagreed with the way in which the arrest was effected (in-custody arrest for a
10 nondangerous, nonviolent offense). *Id.* at 39–40. Although Halverson testified that
11 Aubuchon (and Hendershott) informed him that there was probable cause to arrest
12 Stapley, *see id.* at 62, this evidence falls short of demonstrating Aubuchon procured the
13 arrest, given Halverson’s other testimony. *See Lacey v. Maricopa Cnty.*, 693 F.3d 896,
14 918 (9th Cir. 2012) (en banc) (finding that special prosecutor procured arrest when he
15 “authorize[d] and advise[d]” the sheriff to arrest the plaintiff). Aubuchon’s motion for
16 summary judgment will be granted on the false arrest claim.

17
18 **D. Malice or improper purpose in prosecuting *Stapley II***

19 As noted above, malice is generally a question of fact for the jury. Malice may be
20 inferred from a lack of probable cause. Additionally, Stapley has offered evidence that it
21 was at least contemplated that criminal indictments might strengthen the federal
22 racketeering action, which Aubuchon filed on behalf of Arpaio and Thomas a week
23 before *Stapley II*. From this and the temporal proximity between the two, a jury could
24 infer that *Stapley II* was filed in part to lend color to the frivolous RICO action. *See* Doc.
25 1112-3 at 140–41. Moreover, Stapley offers Flores’s letter to Thomas’s successor at
26 MCAO, in which she concluded that the Stapley prosecutions, including *Stapley II*,
27 comprised a “mosaic of questionable investigative techniques and dishonorable conduct.”
28 Doc. 1112-16 at 54. In addition to chastising Aubuchon and Thomas, *see id.* at 56

1 (noting “their conduct was so egregious that we are unwilling to even attempt to justify
2 it”), she noted, “The arrest of Stapley . . . against conflict counsel’s advice and three days
3 after *Stapley I* was dismissed shows vindictive intent by MCSO (Hendershott).” *Id.* This
4 and other evidence supports finding improper motive in investigating the *Stapley II*
5 prosecution. It is sufficient to defeat a motion for summary judgment.

6
7 **E. Favorable termination**

8 As indicated above, in March 2010 Thomas conflicted the *Stapley II* prosecution
9 out to Gila County Attorney Flores. Her office conducted a fourteen-month investigation
10 in conjunction with MCSO and ultimately declined to prosecute. Generally speaking,
11 “the formal abandonment of the proceedings by the public prosecutor” constitutes
12 favorable termination. Restatement (Second) of Torts § 659(c) (1977). As noted above,
13 however, this inquiry turns on whether the termination is inconsistent with guilt.

14 Here, Flores concluded that there was “insufficient evidence to go forward” and
15 prosecute Stapley as to all counts contained in the indictment and declined to prosecute
16 Stapley “due to overriding concerns as to the investigation by [MCSO] and prosecution
17 by [MCAO].” Doc. 1112-16 at 32. Some of these concerns are articulated in the
18 preceding section. Ultimately, they led Flores to conclude that Stapley could likely
19 defeat any criminal prosecution because of the misconduct, *see id.* at 55, and that “any
20 subsequent prosecution of Stapley would be our ratification of government misconduct
21 on the part of the MCAO and the MCSO.” *Id.* at 58. Her substantial concerns warranted
22 the following conclusion: “The vast record is littered with behavior so egregious that a
23 reasonable person’s sense of fairness, honesty and integrity would be offended. The
24 GCAO is left with no choice but to decline this matter.” *Id.* at 59. The evidence
25 precludes summary judgment that this was not a favorable termination.

1 **F. Qualified immunity for the arrest**

2 Defendants are not entitled to qualified immunity for arresting Stapley “if
3 reasonable jurors could believe that Defendants violated [his] constitutional right, and the
4 right at issue was clearly established.” *Torres v. City of Los Angeles*, 548 F.3d 1197,
5 1210 (9th Cir. 2008). As discussed above, qualified immunity shields from suit the
6 officer who “makes a decision that, even if constitutionally deficient, reasonably
7 misapprehends the law governing the circumstances.” *Brosseau v. Haugen*, 543 U.S.
8 194, 198 (2004).

9 As discussed above, a reasonable view of the evidence precludes finding probable
10 cause for the arrest as a matter of law. Defendants are not entitled to qualified immunity
11 if they ordered Stapley’s arrest without a reasonable belief that they had probable cause.
12 *See Lacey*, 693 F.3d at 919. A jury could easily conclude that Arpaio and Hendershott
13 could not have reasonably believed they had probable cause to proceed given their
14 conversation with Sheila Polk almost immediately preceding the arrest.

15 Again, Polk discussed the *Stapley II* investigation with Arpaio and Hendershott the
16 Friday before the Monday arrest. She told them she “personally had reviewed the
17 investigation involving the *Stapley II* matters, that [she] felt that there was evidence there,
18 but that [the] case was not ready to charge, that [her office] had directed the detectives to
19 do some additional investigation.” Doc. 1112-10 at 14. She emphasized to Arpaio and
20 Hendershott that the case was “not ready to move forward.” *Id.* at 15.

21 Consequently, Polk was “shocked” when she learned that the very next business
22 day—Monday, September 21, 2009—Arpaio and Hendershott ordered the arrest despite
23 the prosecutor in charge of the case advising them to the contrary. *Id.* at 13, 15. The
24 arrest prompted Polk to ask Arpaio to take MCSO off the case because she did not
25 believe “he could proceed impartially with the cases.” *Id.* at 16. She subsequently
26 published an editorial in the *Arizona Republic* entitled “Arpaio, Thomas are abusing
27 power,” which responded to charges against Stapley and others by chastising Arpaio and
28

1 Thomas that “[p]rosecutors are ethically bound to refrain from prosecuting a charge that
2 the prosecutor knows is not supported by probable cause.” *Id.* at 2–3.

3 Moreover, despite the requirement that an arrestee be charged within two days of
4 his arrest, no prosecuting agency brought charges against Stapley until three months later
5 when the *Stapley II* indictment was filed. MCAO did not bring charges following the
6 arrest since the case had been conflicted out to the Yavapai County Attorney’s Office.
7 And YCAO had already expressed to Arpaio and Hendershott that the case was not ready
8 to charge.

9 From all this, a jury could conclude that Arpaio and Hendershott never had
10 probable cause to order a warrantless arrest of Stapley—and that any misapprehension
11 that they did have probable cause was patently unreasonable given the surrounding
12 events.

13 14 **VI. THE RACKETEERING ACTION**

15 On December 1, 2009, Aubuchon and Thomas filed a federal civil racketeering
16 action on behalf of Arpaio and Thomas. The complaint named as defendants Stapley, the
17 rest of the Board of Supervisors, County Manager David Smith, Deputy County Manager
18 Sandi Wilson, and four Arizona Superior Court judges, among others. The complaint
19 centered on “a concerted scheme to hinder the criminal investigation and prosecution of
20 elected officials and employees of Maricopa County” Doc. 1073-4 at 50.

21 Stapley’s first claim for relief seeks damages against all the individual Defendants
22 for their involvement in the racketeering action. Defendants Arpaio and Hendershott
23 seek summary judgment that they did not wrongfully institute civil proceedings against
24 Stapley. Stapley seeks summary judgment that Hendershott is liable.

25 26 **A. Background**

27 The exact origin of the civil racketeering action is nebulous. In early September
28 2009, the law firm Ogletree Deakins was retained to determine whether the authority of

1 the Board of Supervisors could be placed “with a receiver for ‘misfeasance and
2 malfeasance in office.’” Doc. 1112-3 at 108. Ogletree, and in particular attorney Eric
3 Dowell, undertook this assignment after appointment by the Maricopa County Office of
4 Special Litigation Services “to represent the Maricopa County Sheriff” in an action
5 against the Board. Doc. 1112-11 at 55. On the same day Stapley was arrested, one of
6 Dowell’s associates began researching removal of elected officials from office. *See* Doc.
7 1112-3 at 108. Dowell testified that Hendershott acted as the client contact within
8 MCSO, *see id.* at 104–05, and that Arpaio informed Dowell that Hendershott was
9 authorized to act on behalf of MCSO. *See id.* at 1112-3 at 105–06.

10 Eventually, “Ogletree was asked to research a potential racketeering lawsuit
11 against members” of the Board. *Id.* at 111. Emails and memoranda in late October and
12 early November 2009 among Ogletree lawyers and between them and Peter Spaw, an
13 MCAO attorney considered the office’s “RICO expert,” *see* Doc. 1112-12 at 37, reflect
14 Ogletree’s conclusion MCSO probably could not maintain a RICO action against the
15 Board. *See* Doc. 1112-11 at 142–48. At several points, Hendershott offered to Ogletree
16 lawyers hypothetical acts by Board members and questioned whether such acts could
17 sustain or strengthen the racketeering action. *See* Doc. 1112-3 at 118–19. As early as
18 October 30, 2009, Peter Spaw had summed up Ogletree’s advice to Hendershott: “You
19 can’t do this,” Doc. 1112-12 at 34–35, although Hendershott testified he did not recall
20 speaking to Spaw about the RICO action at that time. *See id.* at 78. By late November
21 2009, Ogletree lawyers had advised Hendershott several times against the racketeering
22 charges. *See* Doc. 1112-3 at 116.

23 MCAO attorneys also expressly condemned the idea. Hendershott emailed Sally
24 Wells, MCAO’s third in command, Phil MacDonnell, MCAO’s second in command, and
25 Thomas—all regulars at MACE meetings, *see* Doc. 1112-12 at 43—on November 3 that
26 Arpaio was “all good with the civil rico” action. *Id.* at 37. MacDonnell responded the
27 next day to Thomas that “[t]he idea of a civil RICO action based on current evidence is
28 unfounded. Peter Spaw, our RICO expert, thinks it makes no sense. . . . It would be a

1 misuse of the law” *Id.*; *see also* Doc. 1112-8 at 51–53. The advice of MCAO
2 deputies led Thomas to state that the racketeering action would not be filed and that he
3 would let Dowell “deliver the bad news to Hendershott.” *Id.* at 53. Nonetheless, in mid-
4 November, Aubuchon began drafting the complaint and provided it to Thomas. *See* Doc.
5 1112-7 at 51.

6 On December 1, 2009, Aubuchon filed a federal civil racketeering action that
7 named Arpaio and Thomas as plaintiffs. *See* Doc. 1073-4 at 49; Doc. 1112-12 at 141–42.
8 Hendershott testified that he was never involved in the decision to file it. *See* Doc. 1112-
9 12 at 77. Both MCAO and MCSO then approached Ogletree about taking over the
10 representation of the filed action. *See id.* at 96 (Dowell email indicating Hendershott
11 sought representation for plaintiffs in “nuclear bomb” RICO action); *id.* at 123–25
12 (Dowell testimony indicating that Sally Wells contacted him after the filing regarding
13 representation). Ogletree declined to undertake the representation and put in an
14 appearance, *see* Doc. 1112-3 at 122–23, 130, although it agreed to provide “background”
15 counsel to MCAO. *Id.* at 133. In January, Dowell recommended the action be dismissed.
16 *Id.* at 152. MCAO then fired Ogletree. *Id.* at 155.

17 Around the same time, MCSO hired Robert Driscoll of Alston & Bird to represent
18 Arpaio. *See* Doc. 1073 at 11. Indeed, on December 31, 2009, Aubuchon had written to
19 Driscoll, “I understand Chief Hendershott spoke to you this morning about assisting our
20 offices” with the motions to dismiss the RICO action. Doc. 1112-12 at 104. She
21 followed that up with a copy of the complaint, which Driscoll forwarded to an associate
22 and referred to as an “excuse for a pre-noontime scotch” and “pretty freakin thin.” *Id.* at
23 106–08. Nonetheless, Driscoll testified he believed the complaint satisfied Rule 11. *See*
24 Doc. 1073 ¶ 65.

25 In early March, Driscoll recommended to Hendershott that they refer the matter to
26 the Department of Justice’s public integrity section and dismiss the action. *See* Doc.
27 1112-12 at 117–18. Although he did not rule out a RICO action altogether, he
28 communicated to MCSO that the chances of success were “way south of 50 percent.” *Id.*

1 at 118. Arpaio and Thomas agreed, dismissed the RICO action, and referred the
2 underlying matters to DOJ. *See* Doc. 1073 ¶ 65.

3 Arpaio and Hendershott have moved for summary judgment that they are not
4 liable for wrongful litigation for their respective roles in the racketeering action.

5 6 **B. Legal standard**

7 To prove wrongful institution of civil proceedings, Stapley must demonstrate
8 Defendants (1) instituted a civil action, (2) motivated by malice, (3) begun or maintained
9 without probable cause, and which (4) terminated in his favor and (5) damaged him. *See*
10 *Bradshaw v. State Farm Mut. Auto. Ins. Co.*, 157 Ariz. 411, 416–17, 758 P.2d 1313,
11 1318–19 (1988).

12 Because Aubuchon’s RICO complaint was, as this Court has previously noted,
13 frivolous on its face, Arpaio and Hendershott are entitled to summary judgment only if
14 they were insufficiently involved in the case as a whole, they sufficiently relied on advice
15 of counsel notwithstanding that the suit was meritless, there is no evidence from which a
16 reasonable jury could find malice, or the dismissal of the action in 2010 did not constitute
17 a favorable termination.

18 19 **C. Analysis**

20 **1. Involvement**

21 Liability may attach to a person who initiates, continues, or procures wrongful
22 civil proceedings. *See* Restatement (Second) of Torts § 674 (1977). “The person who
23 initiates civil proceedings is the person who sets the machinery of the law in motion,” *id.*
24 at 674 cmt. a, and “one who procures the initiation of civil proceedings is liable under the
25 same conditions as the one who initiates them.” *Id.* at 674 cmt. b.

26 Here, despite having “no memory of seeing the complaint” before Aubuchon filed
27 it, it is undisputed that Arpaio agreed to serve as a plaintiff in the RICO lawsuit. *See*
28 Doc. 1062 at 7. Moreover, a reasonable jury could determine that Hendershott took “an

1 active part” in initiating, procuring, or continuing the RICO action despite not being
2 named as a plaintiff. Arpaio was named as a plaintiff in his official capacity as head of
3 MCSO. As noted above, Dowell testified that Hendershott acted as the client contact and
4 that he was authorized to act on behalf of MCSO. Hendershott repeatedly corresponded
5 with Ogletree lawyers to strategize ways to maintain or strengthen the racketeering
6 action. Indeed, when Thomas appeared initially to disfavor a RICO action, he decided to
7 let Ogletree lawyer Eric Dowell “deliver the bad news to Hendershott.” Doc. 1112-8 at
8 53. Finally, when Aubuchon initially corresponded with Driscoll regarding Alston &
9 Bird assisting MCAO in responding to motions to dismiss the RICO action, she appeared
10 to be following up on an earlier phone call between Driscoll and Hendershott. *See* Doc.
11 1112-12 at 104. Viewing the evidence most favorably to Stapley, Hendershott’s
12 involvement was sufficient for liability for procuring wrongful litigation.

13 14 **2. Probable cause (reasonable belief and advice of counsel)**

15 Defendants had probable cause to initiate, continue, or procure the suit if they
16 “reasonably believe[d] in the existence of the facts upon which the claim [was] based”
17 and “reasonably believe[d] that under those facts the claim may be valid” or “believe[d]
18 to this effect in reliance upon the advice of counsel.” Restatement (Second) of
19 Torts § 675. Counsel’s advice must be “sought in good faith and given after full
20 disclosure of all relevant facts within his knowledge and information.” *Id.* Finally, “the
21 advice of counsel is a protection only if the client who consults him has no reason to
22 know that the attorney is himself interested in the result of the proceedings,” *id.* at 675
23 cmt. h, and only if the client does not shop lawyers for a favorable opinion. *See id.* § 666
24 cmt. e.

25 Defendants cannot establish as a matter of law that their belief in the merits of the
26 RICO action was reasonable either at the time it was filed or after. Ogletree lawyers
27 expressed serious doubt to Hendershott about the viability of a RICO action on multiple
28 occasions. Further, there is evidence MCAO attorney Peter Spaw also told Hendershott

1 he could not maintain the action. Arpaio concedes he never read the RICO complaint,
2 *see* Doc. 1069 ¶ 22, and “did not know the ‘nuts and bolts’ of the facts or allegations.”
3 Doc. 1139 at 5.

4 Moreover, Defendants cannot rely on Thomas’s advice supporting the RICO
5 action. As a threshold matter, the facts are in dispute as to whether Thomas thought it
6 was justified. Although Defendants offer evidence that Thomas believed the RICO case
7 against the Board was strong, *see* Doc. 1073-4 at 73, there is also evidence, described
8 above, that Thomas’s second-in-command, MacDonnell, told Thomas the RICO action
9 “would be a misuse of the law” and that this prompted Thomas to choose at one point not
10 to file it. Additionally, Hendershott fired Ogletree after they provided negative advice,
11 and he then shopped the case to another law firm. Finally, Thomas was named as a
12 plaintiff and the complaint sought redress for threats allegedly made against Thomas and
13 his wife. *See* Doc. 1073-4 at 50–51. Hendershott and Arpaio knew Thomas was
14 interested in the proceeding. The evidence defeats summary judgment for Defendants on
15 the defense of advice of counsel.

16 17 **3. Malice**

18 Stapley and Hendershott agree that the question of malice should go to a jury.
19 *Compare* Doc. 1123 at 54 (Stapley asserting that “[a] jury should be permitted to
20 determine whether Defendants’ actions [with respect to the RICO action] were
21 improper”) *with* Doc. 1110 at 5 (Hendershott asserting that “[t]here is no question
22 that genuine disputes on the issue of malice exist requiring the jury to weigh the evidence
23 and credibility of witnesses before making a determination.”).

24 Whether malice motivated Arpaio turns largely on resolving how Thomas advised
25 him (given conflicting evidence about what Thomas thought) and what information
26 Hendershott relayed from Ogletree and Spaw. *Compare* Doc. 1139 at 5 (“[Arpaio] did
27 not know the ‘nuts and bolts’ of the facts or allegations.”) *with* Doc. 1112-3 at 157–58
28 (Dowell testifying that he spoke with Arpaio, whose knowledge was consistent with

1 receiving updates from Hendershott) *and* Doc. 1073-4 at 71 (Thomas testifying that he
2 discussed the complaint with Arpaio before he filed it). Arpaio chose to serve as plaintiff
3 in a meritless federal racketeering action against elected officials and sitting judges. He
4 did so without ever reading the complaint or familiarizing himself with the facts or
5 allegations underlying it—instead, he “discussed it” with Thomas and relied on him.
6 Doc. 1069 ¶¶ 20–21. There is sufficient evidence to support a jury finding of malice,
7 precluding summary judgment.

8 9 **4. Favorable termination**

10 “Civil proceedings may be terminated in favor of the person against whom they
11 are brought. . . by . . . the withdrawal of the proceedings by the person bringing them.”
12 Restatement (Second) of Torts § 674 cmt. j. Indeed, “where there has been no
13 adjudication on the merits the existence of a ‘favorable termination’ of the prior
14 proceeding generally must be found in the substance rather than the form of prior events
15 and often involves questions of fact.” *Frey v. Stoneman*, 150 Ariz. 106, 111, 722 P.2d
16 274, 279 (1986).

17 “In determining the effect of withdrawal the same considerations are decisive as
18 when criminal charges are withdrawn; and therefore §§ 660-661 and 665, and the
19 Comments under those Sections are pertinent to this Section.” Restatement (Second) of
20 Torts § 674 cmt. j. “The abandonment of the proceedings because the accuser believes
21 that the accused is innocent or that a conviction has, in the natural course of events,
22 become impossible or improbable, is a sufficient termination in favor [of] the accused.”
23 *Id.* § 660 cmt. d. Ultimately, “when the circumstances surrounding the termination of the
24 prior proceedings are ambiguous, the determination of those circumstances belongs to the
25 factfinder.” *Frey*, 150 Ariz. at 111, 722 P.2d at 279.

26 By March 2010, Driscoll was advising Arpaio and Thomas to dismiss the RICO
27 complaint and refer the underlying matters to the public corruption unit at the Department
28 of Justice. *See* Doc. 1112-12 at 117–18. Although Driscoll believed the complaint met

1 the pleading requirements of Rule 11, Driscoll’s testimony establishes that he ultimately
2 believed the RICO complaint would not survive—that there would be a “nasty”
3 dismissal. *Id.* at 128. And emails between Alston & Bird lawyers reflect that Driscoll at
4 least at one point believed the RICO complaint was “pretty freakin thin—like anorexic,”
5 *see id.* at 108, and “an excuse for a pre-noontime scotch.” *Id.* at 106.

6 Further, there is disputed evidence that Driscoll recommended referral to DOJ to
7 avoid “admitting that there is no basis to those claims.” *Id.* at 124. This is consistent
8 with internal Alston & Bird emails reflecting that the referral to DOJ was intended in part
9 “to make it clear that this isn’t an admission that the complaint was a piece of crap.” *Id.*
10 at 110.

11 This is ample evidence that Arpaio and Thomas dismissed the RICO action
12 because success was improbable. As a result, the termination was favorable, or a jury
13 could so find. For the foregoing reasons, Arpaio and Hendershott are not entitled to
14 summary judgment on the RICO action.

15 16 **VII. RETALIATION AND QUALIFIED IMMUNITY**

17 Stapley’s eighth claim for relief in his Second Amended Complaint named each
18 individual Defendant and sought redress for “retaliatory conduct for his political
19 speech”—a violation of 42 U.S.C. § 1983. Doc. 246 ¶ 290. “A plaintiff may bring an
20 action under § 1983 to redress violations of his ‘rights, privileges, or immunities secured
21 by the Constitution and [federal] laws’ by a person or entity, including a municipality,
22 acting under the color of state law.” *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1066
23 (9th Cir. 2004). Stapley incorporated the matters underlying his individual claims—the
24 *Stapley I* prosecution, the search, the arrest, the *Stapley II* indictment, and the RICO
25 action—and alleged a First Amendment violation. *See* Doc. 246 ¶ 289–90. The
26 complaint also incorporated conduct not alleged as individual causes of action. *See* Doc.
27 246 at 289–90.

1 Stapley’s briefing clarifies the grounds for his retaliation claim. “It is premised
2 upon the Defendants’ 15 retaliatory, and well-publicized investigations of him, which
3 spanned three years, and included, but was not limited to, the searches of his and the
4 Wolfswinkels’ offices; the RICO Lawsuit; and, Sheriff Arpaio and Hendershott’s
5 retaliatory *Stapley I* and *II* prosecutions and orders to arrest Supervisor Stapley.” Doc.
6 1112 ¶ 14; *see also* Doc. 1123 at 69 (referring to “the over-arching three-year
7 investigation and media campaign” as the basis for the retaliation claim).

8
9 **A. Constitutional violation**

10 Stapley alleges that Defendants investigated, prosecuted, and otherwise harassed
11 him in retaliation for “speaking to the media, otherwise engaging in political speech, or
12 opposing them in the courts.” Doc. 1123 at 61. He asserts their conduct violated his
13 “First Amendment right not to be investigated as a result of . . . valid free speech
14 activity.” Doc. 1145 at 26.

15 “[T]he First Amendment prohibits government officials from subjecting an
16 individual to retaliatory actions . . . for speaking out.” *Hartman v. Moore*, 547 U.S. 250,
17 256 (2006). “[T]o demonstrate a First Amendment violation, a plaintiff must provide
18 evidence showing that ‘by his actions the defendant deterred or chilled the plaintiff’s
19 political speech and such deterrence was a substantial or motivating factor in the
20 defendant’s conduct.’” *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 916 (9th Cir. 2012) (en
21 banc) (alterations omitted) (quoting *Mendocino Env’tl. Ctr. v. Mendocino Cnty.*, 192 F.3d
22 1283, 1300 (9th Cir. 1999)).

23 Stapley must first prove Defendants’ “acts would chill or silence a person of
24 ordinary firmness from future First Amendment activities,” *id.* (quoting *Crawford–El v.*
25 *Britton*, 93 F.3d 813, 826 (D.C.Cir.1996), *vacated on other grounds*, 520 U.S. 1273
26 (1997), but he need not demonstrate that “his speech was actually inhibited or
27 suppressed.” *Id.* (quoting *Mendocino Env’tl. Ctr.*, 192 F.3d at 1300). Second, he must
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1 “‘prove the elements of retaliatory animus as the cause of injury,’ with causation being
2 ‘understood to be but-for causation.’” *Id.* at 917 (quoting *Hartman*, 547 U.S. at 260).

3 On this record, the Court has no trouble finding sufficient evidence that
4 Defendants’ retaliatory animus substantially motivated their investigation of Stapley.
5 The record is replete with instances of action against Stapley in close proximity to his
6 criticism of their efforts and his success in their litigation against him. For example,
7 MCAO reopened the dormant *Stapley I* investigation just two months after Stapley
8 criticized Thomas’s use of public funds to produce “self-promoting” pamphlets, *see* Doc.
9 1112 ¶ 61, and MCSO’s expenditures. Indeed, there is evidence that Hendershott
10 expressly threatened that MCSO would “get” him near the same time Defendants revived
11 the *Stapley I* investigation. Perhaps most egregiously, MCSO arrested him the next
12 business day after he prevailed in *Stapley I*, despite the prosecuting attorney admonishing
13 Arpaio and Hendershott that the case was not ready to proceed. At around the same time,
14 MCSO began researching the civil suit that would become the RICO action. A jury could
15 reasonably conclude that Defendants’ retaliatory animus was the but-for cause of their
16 investigations.

17 Moreover, “a retaliatory police action such as an arrest or search and seizure
18 would chill a person of ordinary firmness from engaging in future First Amendment
19 activity.” *Ford*, 706 F.3d at 1193. Here, a jury could conclude that Defendants sent a
20 clear message to Stapley by, among other actions, effecting a warrantless arrest on new
21 charges the next business day after he won a partial victory in *Stapley I*. A jury could
22 similarly conclude that this message would chill a person of ordinary firmness—
23 particularly one without Stapley’s political clout and resources—from criticizing the
24 Defendants and vigorously litigating against them. These facts preclude summary
25 judgment for Defendants.

1 **B. Clearly established right**

2 As discussed above, Defendants are entitled to qualified immunity if, viewing the
3 facts in the light most favorable to Stapley, they did not violate a clearly established
4 constitutional right. Stapley specifically claims a right “not to be retaliated against
5 through an investigation,” *see* Doc. 1123 at 63, notwithstanding the presence of probable
6 cause. *See id.* at 61, 63.

7 As a threshold matter, “[t]he initiation of a criminal investigation in and of itself
8 does not implicate a federal constitutional right. The Constitution does not require
9 evidence of wrongdoing or reasonable suspicion of wrongdoing by a suspect before the
10 government can begin investigating that suspect.” *Rehberg v. Paulk*, 611 F.3d 828, 850
11 n.24 (11th Cir. 2010), *aff’d*, 132 S. Ct. 1497 (2012).

12 Similarly, the Supreme Court has not recognized a constitutional right to be free of
13 either retaliatory arrest or retaliatory prosecution if they are supported by probable cause.
14 *See Reichle v. Howards*, ___ U.S. ___, 132 S.Ct. 2088, 2093 (2012) (noting the Supreme
15 Court “has never recognized a First Amendment right to be free from a retaliatory arrest
16 that is supported by probable cause”); *Hartman*, 547 U.S. at 252 (holding that plaintiffs
17 must allege and prove lack of probable cause in an action for retaliatory prosecution).

18 Notwithstanding this precedent, the Ninth Circuit concluded in *Ford v. Yakima*
19 that its “2006 decision in *Skoog* established that an individual has a right to be free from
20 retaliatory police action, even if probable cause existed for that action.” 706 F.3d 1188,
21 1195–96 (9th Cir. 2013). In *Skoog v. County of Clackamas*, the Ninth Circuit resolved an
22 “open question” and concluded that “a plaintiff need not plead the absence of probable
23 cause in order to state a claim for retaliation.” 469 F.3d 1221, 1232 (9th Cir. 2006).
24 There, a police officer executed a search warrant and seized the plaintiff’s property after
25 the plaintiff sued a different officer, and the plaintiff asserted claims against him for
26 violations of both the Fourth and First Amendments. After determining that probable
27 cause existed for the search and granting qualified immunity on the Fourth Amendment
28

1 claim, the court nonetheless concluded that the plaintiff stated the elements of First
2 Amendment retaliation. *Id.* at 1235.

3 Subsequently in *Ford*, the court reversed a grant of qualified immunity to a police
4 officer after he booked and jailed a plaintiff for criticizing a traffic stop, which was
5 supported by probable cause but which plaintiff believed was racially motivated. 706
6 F.3d at 1193. It noted that “[a]t the time the officers acted in 2007, the law in this Circuit
7 gave fair notice that it would be unlawful to jail Ford in retaliation for his First
8 Amendment activity.” *Id.* at 1195. Notwithstanding *Ford* and *Skoog*, one Ninth Circuit
9 panel has subsequently held officers entitled to qualified immunity for making a
10 retaliatory arrest because it was supported by probable cause. *See Acosta v. City of Costa*
11 *Mesa*, 718 F.3d 800, 825 (9th Cir. 2013) (quoting *Reichle* approvingly).

12 This Court need not unravel the tangle of Ninth Circuit and Supreme Court
13 precedents on probable cause in First Amendment retaliation claims. As discussed
14 extensively above, a reasonable jury could find facts amounting to a lack of probable
15 cause for the criminal prosecutions, the search, the arrest, and the civil RICO action.
16 Recurring disputes of fact preclude finding probable cause as a matter of law. Therefore,
17 summary judgment would have to be denied even if the cause of action requires lack of
18 probable cause. Whether Stapley must prove a lack of probable cause would not affect
19 the ruling on these motions and need not be decided until the jury is instructed. And even
20 then the jury might find lack of probable cause, thus mooting the question here and on
21 appeal.

22 The Court also construes the First Amendment retaliation cause of action more
23 narrowly than Stapley does. There is no cause of action for wrongful police investigation
24 as such (though separate torts might be committed in the course of investigation). Settled
25 causes of action for malicious prosecution, tortious search, false arrest, and wrongful civil
26 litigation set boundaries for the appropriate protection of police and prosecutors, and the
27 Court reads the First Amendment retaliation cause of action as confined by those same
28 boundaries, for the same reasons of policy. The Court holds that the First Amendment

1 claim otherwise replicates the elements and immunities of the underlying claims for
2 malicious prosecution, tortious search, false arrest, and wrongful civil RICO litigation,
3 putting aside for now the disputed requirement of lack of probable cause because it need
4 not be resolved on these motions and would not result in summary judgment on this
5 record.

6 What remains of the retaliation claim will not change or add to the preparation and
7 trial of this case as it would be without the surviving retaliation claim. Trial of Stapley's
8 retaliation claim will not expand the evidence beyond the evidence for his underlying
9 causes of action. Though retaliatory purpose must be proved, the evidence of that is the
10 same as the evidence of malice, which is otherwise an issue for trial. The Court will limit
11 the evidence under Rule 403, Fed. R. Evid, to what is direct, probative, and efficient.

12 As a result, allowing the retaliation claim to proceed against Arpaio and
13 Hendershott for their roles in the investigation and prosecution and against Thomas and
14 Aubuchon for their nonprosecutorial actions narrowly comports with the spirit of
15 protecting police officers and public prosecutors. Other than Thomas's and Aubuchon's
16 claims to absolute immunity, Defendants are not entitled to summary judgment on the
17 retaliation claim as it is narrowed in this order.

18 19 **XIII. ABSOLUTE IMMUNITY**

20 Defendants Thomas and Aubuchon seek summary judgment that they are entitled
21 to absolute immunity for their roles in the criminal prosecutions (*Stapley I* and *II*) and the
22 search. *See* Doc. 1063 at 5–6, 11 n.8; Doc. 1066 at 6–7, 13–14. Because Stapley's
23 individual claims for malicious prosecution based on *Stapley I* and *II* fail as to Thomas
24 and Aubuchon, and because Thomas is entitled to summary judgment against Stapley's
25 judicial deception claim, the only issue is whether Aubuchon has absolute immunity for
26 the search.

1 **A. Legal standard**

2 Prosecutors performing prosecutorial functions—the “traditional functions of an
3 advocate”—are entitled to absolute immunity from liability for damages under § 1983.
4 *Genzler v. Longanbach*, 410 F.3d 630, 636 (9th Cir. 2005). When a prosecutor instead
5 performs “administrative functions or ‘investigative functions normally performed by a
6 detective or police officer,’” he is entitled not to absolute immunity but to qualified
7 immunity. *Id.* (quoting *Kalina v. Fletcher*, 522 U.S. 118, 126 (1997)). But the contours
8 of absolute immunity are nuanced. For example, when an investigation is conducted to
9 collect evidence of crimes for which a defendant has already been indicted, such
10 investigatory action is deemed prosecutorial by nature; thus, a prosecutor engaged in such
11 investigation is afforded absolute immunity. *KRL v. Moore*, 384 F.3d 1105, 1111 (9th
12 Cir. 2004); *see also Broam v. Bogan*, 320 F.3d 1023, 1030 (9th Cir. 2003). A “collateral
13 investigation,” however, that goes “beyond any legitimate preparation to prosecute” a
14 defendant who has been indicted rings more of police work than of prosecutorial work.
15 *KRL*, 384 F.3d at 1113. “Like advising officers about the existence of probable cause
16 during the pretrial investigation, . . . approving a search warrant to assist with a collateral
17 investigation into new crimes is an investigative function that is not entitled to absolute
18 immunity.” *Id.* (internal citation omitted). Similarly, a prosecutor who provides legal
19 advice to police during the “investigative phase of a criminal case” is not afforded
20 absolute immunity. *Burns v. Reed*, 500 U.S. 478, 493 (1991).

21 “[A]bsolute freedom from the threat of unfounded lawsuits . . . is the rare
22 exception to the rule.” *Meyers v. Contra Costa Cnty. Dep’t of Soc. Servs.*, 812 F.2d
23 1154, 1158 (9th Cir. 1987). The burden of demonstrating absolute immunity falls on the
24 official seeking it. *Genzler*, 410 F.3d at 636 (quoting *Burns*, 500 U.S. at 486).

25
26 **B. Analysis**

27 Application of absolute immunity to the search thus turns on whether it was an
28 investigation intended to collect evidence for crimes for which Stapley had already been

1 indicted or whether it was a “collateral investigation.” Thus, if the search was conducted
2 to collect evidence of the crimes charged in *Stapley I*, then Aubuchon is entitled to
3 absolute immunity. If, on the other hand, the search was intended to investigate new
4 crimes (such as those composing the later *Stapley II* charges), then absolute immunity is
5 inapplicable.

6 Defendants’ disagree on whether MCSO sought the search warrant to further the
7 *Stapley I* investigation or the *Stapley II* investigation. Aubuchon asserts that “[t]he search
8 of Stapley’s office was the result of and in furtherance of the Stapley I indictment.” Doc.
9 1130 at 4; *see also* Doc. 1106 at 5 (“The Stapley search warrant served to support the
10 then-pending Stapley I case.”). In contrast, Hendershott submitted the search warrant
11 affidavit into the record and labeled it “Exhibit F: Stapley II Search Warrant.” Doc.
12 1073-2 at 1. Thomas appears ambivalent as to the relationship between *Stapley I*, the
13 search, and *Stapley II*. *Compare* Doc. 1063 at 8 (“There is no evidence that Stapley was
14 ever searched or seized within the meaning of the Fourth Amendment as a result of
15 Stapley I or II . . .”) *with* Doc. 1064 ¶ 20 (“The search warrant of the office was a part of
16 the ongoing investigation from Stapley I that led to the Stapley II charges.”).

17 The search warrant itself, however, belies any assertion that it furthered the
18 *Stapley I* investigation. The first indictment was premised on Stapley ostensibly violating
19 disclosure laws. In contrast, the search warrant expressly sought evidence that Stapley
20 was involved in bribery and the knowing misuse of public funds. This is consistent with
21 Arpaio’s assertion that “[t]he Stapley II matter was a totally separate investigation and
22 prosecution from the Stapley I matter.” Doc. 1102 at 2. Consequently, the search
23 warrant implicated “a collateral investigation into new crimes” and thus constituted “an
24 investigative function that is not entitled to absolute immunity,” or the jury could so find
25 from the evidence. *KRL*, 384 F.3d at 1113. Aubuchon is not entitled to summary
26 judgment based on absolute immunity.

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1 **IX. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AND PUNITIVE**
2 **DAMAGES**

3 Stapley asserts a claim for intentional infliction of emotional distress and seeks
4 punitive damages. *See* Doc. 246 at 40. Both claims turn on a showing that Defendants
5 conduct was outrageous and either intentional or reckless. All Defendants seek summary
6 judgment that Stapley is not entitled to put the claims to a jury.

7
8 **A. Legal standard**

9 To recover for intentional infliction of emotional distress, a plaintiff must
10 demonstrate (1) extreme and outrageous conduct; (2) intent to cause emotional distress or
11 reckless disregard for its near certainty; and (3) severe emotional distress resulting from
12 the defendants' conduct. *Ford v. Revlon, Inc.*, 153 Ariz. 38, 43, 734 P.2d 580, 585
13 (1987). "To establish that the conduct was sufficiently 'extreme' or 'outrageous,' a
14 plaintiff must show that it was 'so outrageous in character, and so extreme in degree, as
15 to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly
16 intolerable in a civilized community.'" *Donahoe v. Arpaio*, 869 F. Supp. 2d 1020, 1061
17 (D. Ariz. 2012), *aff'd sub nom. Stapley v. Pestalozzi*, 733 F.3d 804 (9th Cir. 2013)
18 (quoting *Johnson v. McDonald*, 197 Ariz. 155, 160, 3 P.3d 1075, 1080 (Ct. App. 1999)).

19 For punitive damages to be awarded under Arizona law, "there must be evidence
20 of an 'evil mind' and aggravated and outrageous conduct." *Linthicum v. Nationwide Life*
21 *Ins. Co.*, 150 Ariz. 326, 331, 723 P.2d 675, 680 (1986). The evidence in this case
22 supports such a finding. However, by statute "[n]either a public entity nor a public
23 employee acting within the scope of his employment is liable for punitive or exemplary
24 damages." Ariz. Rev. Stat. Ann. § 12-820.04. Nonetheless, punitive damages may be
25 awarded in a § 1983 action when "evil motive or intent" motivates the defendants'
26 conduct or their conduct manifests "reckless or callous indifference to the federally
27 protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983).

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B. Analysis

As the above analysis indicates, Stapley has offered sufficient evidence from which a jury could conclude that Defendants acted outrageously and either intended Stapley harm or were recklessly indifferent to whether their actions would infringe on his rights and cause him severe distress. Defendants are not entitled to summary judgment as to either intentional infliction of emotional distress or punitive damages. Nonetheless, Stapley may not use his intentional infliction claim to tell a broad story untethered from the causes of action described herein or to cast aside the boundaries they draw. Stapley’s intentional infliction claim duplicates his other surviving causes of action. It may not circumvent their strictures. The Court can prevent that more effectively through limitation of evidence under Rule 403 and carefully crafted jury instructions than through summary judgment.

X. UNCONSTITUTIONAL POLICIES OR CUSTOMS

Stapley concedes that all § 1983 claims for unconstitutional policies and procedures are against Defendant Maricopa County. *See* Doc. 1112 ¶ 13. Nor does he contest Arpaio’s and Hendershott’s motions for summary judgment with respect to claims for failure to train and negligent supervision. *See generally* Doc. 1123. Consequently, summary judgment will be granted against the claims in the ninth cause of action (unconstitutional policies and customs, failure to train, and negligent supervision) as against the individual Defendants.

XI. PLAINTIFF’S MOTIONS FOR SUMMARY JUDGMENT

Stapley has moved for summary judgment that Arpaio arrested him for retaliatory purposes in violation of § 1983, that Hendershott initiated the RICO action in violation of § 1983 and state law, and that Aubuchon caused a search warrant to be executed without probable cause in violation of § 1983.

1 Stapley has provided ample evidence to support the conclusion that Defendants'
2 actions lacked probable cause. Nonetheless, the existence of factual questions and
3 considerations of economy militate against summary judgment. Granting any of his
4 motions would not shorten the trial.

5
6 IT IS THEREFORE ORDERED denying Plaintiff Stapley's Motions for Partial
7 Summary Judgment (Docs. 1056, 1060, and 1065).

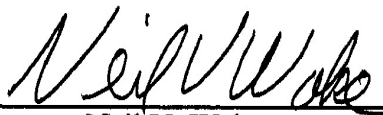
8 IT IS FURTHER ORDERED granting Defendant Arpaio's Motion for Summary
9 Judgment (Doc. 1062) against Stapley's ninth claim for unconstitutional policies,
10 customs, failure to train, and negligent supervision. The motion is otherwise denied.

11 IT IS FURTHER ORDERED granting Defendant Aubuchon's Motion for
12 Summary Judgment (Doc. 1066) against Stapley's second and fifth claims for malicious
13 prosecution and against his fourth claim for false arrest. The motion is otherwise denied.

14 IT IS FURTHER ORDERED granting Defendant Hendershott's Motion for
15 Summary Judgment (Doc. 1072) against Stapley's ninth claim for unconstitutional
16 policies, customs, failure to train, and negligent supervision. The motion is otherwise
17 denied.

18 IT IS FURTHER ORDERED granting Defendant Thomas's Motion for Partial
19 Summary Judgment (Doc. 1063) against Stapley's second and fifth claims for malicious
20 prosecution and against his tenth claim for unlawful search. The motion is otherwise
21 denied.

22 Dated this 5th day of December, 2013.

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24 

25 _____
26 Neil V. Wake
27 United States District Judge
28