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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Aaron Ludwig,

10 Plaintiff,

11 v.

12 State of Arizona and Donald Conrad,

13 Defendants.  
14

No. CV-16-03826-PHX-DGC

**ORDER**

15 Defendants Donald Conrad and the State of Arizona have filed a motion for  
16 judgment on the pleadings under Federal Rule of Civil Procedure 12(c), asking the Court  
17 to dismiss Counts 1, 2, 4, and 5 of Plaintiff Aaron Ludwig's complaint. Doc. 12. The  
18 motion is fully briefed. Docs. 19, 26. No party requests oral argument. The Court will  
19 deny the motion.

20 **I. Background.**

21 Plaintiff was employed by the Arizona Attorney General's Office (AGO) as an  
22 Assistant Attorney General. Doc. 1, ¶ 12. In January 2015, Plaintiff was reprimanded by  
23 his superior, Defendant Conrad. *Id.*, ¶ 13. Two days later, Plaintiff was given the choice  
24 of resigning his position or being fired. *Id.*, ¶ 14. On January 30, 2015, Plaintiff resigned  
25 and physically handed over his official AGO badge and credentials to Conrad. *Id.*, ¶ 15.  
26 On May 1, 2015, Plaintiff, in an attempt to help his friend retrieve a towed vehicle,  
27 became involved in a dispute with the towing company's owner. *Id.* ¶¶ 44-113. During  
28 the dispute, Plaintiff presented his old business card to the towing company, which

1 identified him as “Chief of the Financial Remedies Section of the Attorney General’s  
2 Office.” *Id.*, ¶¶ 82-83, 113. Plaintiff ultimately secured the release of his friend’s  
3 vehicle. *Id.*, ¶¶ 108-10.

4 Later that day, the towing company owner called the AGO, objecting to the  
5 “agent” who “laid his badge on the counter” and was “using [his] color of authority to  
6 intimidate people.” *Id.*, ¶¶ 114, 123. The owner’s call led to an investigation by the  
7 AGO and resulted in Plaintiff being charged with Criminal Impersonation. *Id.*, ¶¶ 124,  
8 158. Plaintiff was served with a criminal summons on August 3, 2015. *Id.*, ¶ 157. At the  
9 urging of Plaintiff’s attorney, the Maricopa County Attorney’s Office (MCAO)  
10 conducted an “investigation into the bona fides of the charge against [Plaintiff].” *Id.*,  
11 ¶ 192. On October 22, 2015, following the investigation, the charges against Plaintiff  
12 were dismissed. *Id.*, ¶¶ 194-95.

13 On April 19, 2016, Plaintiff filed a notice of claim with the authorized service  
14 recipient at the AGO’s main office. Doc. 19 at 1. It is undisputed that Plaintiff did not  
15 deliver a notice of claim to Defendant Conrad personally. *See id.*; Doc. 12 at 2. On  
16 October 20, 2016, Plaintiff filed this action in Maricopa County Superior Court. Doc. 1-1  
17 at 1. Plaintiff alleged six counts: (1) malicious prosecution, (2) abuse of process,  
18 (3) deprivation of civil rights under color of state law, (4) liability under the theory of  
19 respondeat superior, (5) malicious abuse of discretion, and (6) violation of civil rights.  
20 *Id.*, ¶¶ 218-64. Defendants removed the action to this Court. Doc. 1

## 21 **II. Legal Standard.**

22 Dismissal under Rule 12(c) is proper when “the moving party clearly establishes  
23 on the face of the pleadings that no material issue of fact remains to be resolved.” *Hal*  
24 *Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1989).  
25 The Court applies the “same standard of review” in ruling on a 12(c) motion as a Rule  
26 12(b)(6) motion. *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th Cir.  
27 1989). Dismissal is appropriate if the complaint does not contain “sufficient factual  
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1 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft*  
2 *v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted).

3 **III. Analysis.**

4 **A. Defendants’ motion is not premature.**

5 Rule 12(c) states that “after the pleadings are closed . . . a party may move for  
6 judgment on the pleadings.” Fed. R. Civ. P. 12(c). Plaintiff argues that Defendants’  
7 motion is premature because Plaintiff may still be permitted to amend his complaint, and  
8 thus the pleadings are not yet closed. Doc. 19 at 9. Plaintiff is incorrect. “[T]he  
9 pleadings are closed for the purposes of Rule 12(c) once a complaint and answer have  
10 been filed, assuming, as is the case here, that no counterclaim or cross-claim is made.”  
11 *Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005).

12 **B. Arizona’s Notice of Claim Statute – A.R.S. § 12-821.01.**

13 Under Arizona’s notice of claim statute, “[p]ersons who have claims against a  
14 public entity, public school or a public employee shall file claims with the person or  
15 persons authorized to accept service for the public entity, public school or public  
16 employee as set forth in the Arizona rules of civil procedure within one hundred eighty  
17 days” of when the action accrues. A.R.S. § 12-821.01(A). A claimant must serve both  
18 the employer and individual employee in accordance with the Arizona rules of civil  
19 procedure. *Id.*; *Harris v. Cochise Health Sys.*, 160 P.3d 223, 230 (Ariz. Ct. App. 2007);  
20 *Quade v. Arizona Bd. of Regents*, No. CV-15-00610-PHX-JJT, 2015 WL 10939902, at \*5  
21 (D. Ariz. Sept. 14, 2015).

22 Under Arizona Rule of Civil Procedure 4.1(d), the requirement for individual  
23 service is met where a copy of the notice of claim is (1) delivered to the employee, either  
24 in person or by mail, (2) left with a person of suitable age who is residing with the  
25 employee, or (3) served on a person who is authorized to accept service on behalf of the  
26 employee. *Simon v. Maricopa Med. Ctr.*, 234 P.3d 623, 629 (Ariz. Ct. App. 2010) (citing  
27 Ariz. R. Civ. P. 4.1(d)).

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1           If a plaintiff does not comply with A.R.S. § 12-821.01, his claim is statutorily  
2 barred. *Falcon ex rel. Sandoval v. Maricopa Cnty.*, 144 P.3d 1254, 1256 (2006). Strict  
3 compliance is required. “Failure to comply with the statute is not cured by actual notice  
4 or substantial compliance.” *Harris*, 160 P.3d at 230; *Simon*, 234 P.3d at 630; *see also*  
5 *Baker v. City of Tempe*, No. CV-07-1553-PHX-MHM, 2008 WL 2277882 (D. Ariz. May  
6 30, 2008). Because A.R.S. § 12-821.01 is a procedural requirement, it is “subject to  
7 waiver, estoppel, and equitable tolling.” *Pritchard v. State*, 788 P.2d 1178, 1181 (Ariz.  
8 1990).

9           Here, it is uncontested that Plaintiff did not deliver the notice of claim to  
10 Defendant Conrad in person or by mail. Doc. 12 at 2; Doc. 19 at 1-2. Thus, Plaintiff’s  
11 state law claims against Defendant Conrad are barred unless Plaintiff can show that  
12 Conrad was served with the notice of claim through an authorized agent, that he waived  
13 his statutory right to be served, or that he should be equitably estopped from asserting the  
14 defense. *See Pritchard*, 788 P.2d at 1181.

15           Plaintiff asserts that “[f]ormal, personal service on AGO former employees is not  
16 required if the entity served has the authority, or *de facto* assumes the authority, to accept  
17 service.” Doc. 19 at 6-7. He further asserts that the AGO is authorized to accept service  
18 because Conrad “was employed by the AGO at material times, and accepting service for  
19 its employees is what the AGO does.” *Id.* Plaintiff submits an affidavit stating that he  
20 was named in a notice of claim while employed with the AGO and understood that  
21 service on the AGO was tantamount to service on him. Doc. 19-1, ¶¶ 4-5, 8. He further  
22 avers that he is “aware of at least two other circumstances involving attorneys in the  
23 [AGO] . . . who were named in Notices of Claim and who also were not personally  
24 served with Notices of Claim, but were represented by the AGO in subsequent  
25 proceedings.” *Id.*, ¶ 9.

26           In reply, Defendants provide evidence rebutting Plaintiff’s assertions about AGO’s  
27 policies and practices. *See* Doc. 26 at 3-7. Defendants argue that “The [AGO] was not  
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1 Conrad's agent" and "was not authorized to accept service [for Conrad] under Rule  
2 4.1(d)." *Id.* at 3-4.

3 The Court cannot consider the extrinsic evidence submitted by either side without  
4 converting this Rule 12(c) motion to a motion for summary judgment, Fed. R. Civ. P.  
5 12(d), something the Court will not do given the factual disagreement between the parties  
6 and the possible need for discovery before summary judgment decisions are made.  
7 Because Defendants have not shown that they are entitled to judgment on the pleadings,  
8 the Court will deny their Rule 12(c) motion as to Defendant Conrad. The Court will also  
9 deny the motion as to the State of Arizona because it rests on dismissal of the claims  
10 against Conrad.

11 The Court notes that Plaintiff has taken a directly opposite position before this  
12 Court before, arguing that service of a notice of claim on the AGO was not service upon  
13 him. *See Taraska v. Ludwig*, No. CV-12-2544-PHX-DGC, 2013 WL 655124, at \*4 (D.  
14 Ariz. Feb. 21, 2013) ("Ludwig contends that he is entitled to dismissal of Plaintiffs'  
15 claims because Plaintiffs failed to comply with Arizona's notice of claim statute.").  
16 Although this inconsistency makes Plaintiff's position on this issue doubtful, the Court  
17 cannot consider extrinsic evidence in ruling on a motion for judgment on the pleadings.<sup>1</sup>

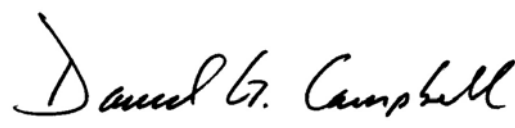
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20 <sup>1</sup> Plaintiff also appears to argue that service under A.R.S. § 12-821.01 is excused  
21 because Conrad would have received actual knowledge of the notice of claim during the  
22 State's evaluation of whether it was required to indemnify him under A.R.S. § 41-621.  
23 Doc. 19 at 3, 6. But "[f]ailure to comply with [A.R.S. § 12-821.01] is not cured by actual  
24 notice or substantial compliance." *Harris*, 160 P.3d at 230. The notice of claim statute  
25 clearly requires formal service under the Arizona rules of civil procedure. A.R.S. § 12-  
26 821.01. To the extent Plaintiff is arguing that the AGO's obligation to represent Conrad  
27 effectively resulted in acceptance of service by Conrad's counsel, Arizona law provides  
28 that an attorney must be "authorized, either expressly or impliedly, to receive service of  
process for his client, and if such agency is to be implied, it must be implied from all  
circumstances accompanying the attorney's appointment which indicate the extent of  
authority the client intended to confer." *Kline v. Kline*, 212 P.3d 902, 908 (Ariz. Ct. App.  
2009). Thus, even if § 41-621 was met and the AGO was obligated to represent Conrad  
in this matter, Plaintiff would still be required to show that the AGO was authorized to  
accept service on Conrad's behalf.

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**IT IS ORDERED** that Defendants' Motion for Judgment on the Pleadings (Doc. 12) is **denied**.

Dated this 6th day of March, 2017.



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David G. Campbell  
United States District Judge