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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Jay Kennedy Johari, et al.,

No. CV-17-00095-PHX-ROS

10 Plaintiffs,

ORDER

11 v.

12 City of Tempe, et al.,

13 Defendants.
14

15 Plaintiff Jay Johari, a managing member and operator of a bar in Tempe, Arizona,
16 was arrested in connection with two incidents: the first involving allegations of sexual
17 abuse and the second involving a bar fight. Following Johari’s arrests, Plaintiffs brought
18 claims against Defendants—the City of Tempe and various officers of the Tempe Police
19 Department—for malicious prosecution, selective prosecution, abuse of process, violation
20 of the right to pursue an occupation, conspiracy, Monell liability, negligence and gross
21 negligence, and tortious interference with business relations. The parties cross-moved for
22 summary judgment. (Docs. 77, 87.) For the following reasons, summary judgment is
23 granted to Defendants.¹

24 **BACKGROUND**

25 Plaintiffs Jay Johari (“Johari”) and Christina P. Lamb (“Lamb”) are husband and
26 wife.² (Doc. 6 at 2.) Plaintiff R.J.E., LLC is an Arizona limited liability company doing

27 ¹ Plaintiffs’ request for oral argument is denied because the issues have been fully briefed
and oral argument will not aid the Court’s decision.

28 ² Unless otherwise noted, factual statements included in the Court’s summary are
undisputed.

1 business as Vintage Bar and Grill and, later, renamed as BAC Lounge (collectively, the
2 “Bar”). (Doc. 6 at 2.) Johari is a managing member and operator of the Bar. (Doc. 6 at
3 2.) While operating the Bar, Johari has had multiple encounters with the Tempe Police
4 Department, and has been arrested on two separate occasions: the LG matter and the Sims
5 matter.

6 **I. The LG Matter**

7 On October 16, 2012, at 3:29 A.M., Officer Daniel Reynolds was dispatched to the
8 Silver Mine Subs restaurant in Tempe, Arizona, in response to a 911 call reporting that a
9 woman was held captive in a local bar. (Doc. 70-1 at 3.) Officer Reynolds located Samuel
10 Fleager (“Fleager”) and Larissa Gossmann (“LG”), the complainants, outside of Silver
11 Mine Subs, and separately interviewed the two. (Doc. 70-2 at 3.)

12 Fleager told Officer Reynolds that one of his employees at Silver Mine Subs
13 informed him that LG had come to the restaurant requesting help because she had been
14 “held captive in the bar above.” (Doc. 70-2 at 49.) Fleager called 911 and observed a male
15 approach LG and talk to her. (Doc. 70-2 at 49.) Fleager told police that he assumed the
16 male was the person that had held her captive. (Doc. 70-2 at 49.)

17 Officer Reynolds also interviewed LG, who was “clearly intoxicated” and vomited
18 on the sidewalk. (Doc. 70-2 at 49.) She submitted to a Preliminary Breath Test (“PBT”)
19 and registered a BrAC of 0.183. (Doc. 70-2 at 50.) LG told the police the following
20 account, which was recorded in the police report: LG responded to a Craigslist
21 advertisement for employment at a “new bar” in Tempe. (Doc. 70-2 at 50.) LG then
22 received an email from someone named Jay,³ who identified himself as the manager of
23 Vintage Bar, and requested her age and a photo. (Doc. 70-2 at 50.) LG told Jay Johari she
24 was twenty years old and submitted a photo, and Johari asked LG to come to the Bar and
25 interview for a “promo girl” position on October 15, 2012. (Doc. 70-2 at 50; Ex. 3.) At
26 approximately 10 P.M. on October 15, 2012, LG arrived at the Bar for her interview. (Doc.
27 70-2 at 50.) Johari brought LG to his office and interviewed her for approximately 45

28 ³ It is undisputed that “Jay” is Plaintiff Jay Johari. Although the police reports use “Jay”
to refer to Jay Johari, the Court uses “Johari” for consistency.

1 minutes. (Doc. 70-2 at 50.) During the interview, Johari made a copy of LG's Arizona ID
2 card showing that she was twenty years old. (Doc. 70-2 at 50.) Johari instructed LG to
3 change into the swimsuit that she was asked to bring, and left the office while she did so.
4 (Doc. 70-2 at 51.) After she changed, Johari returned with a female employee and the three
5 individuals stayed in the office for approximately ten more minutes. (Doc. 70-2 at 51.)
6 Johari asked LG to change into another outfit, a strapless cocktail dress, and to "mingle"
7 with the guests at the Bar. (Doc. 70-2 at 51.)

8 Johari and LG then went to the bar area and talked to some guests. (Doc. 70-2 at
9 52.) Johari poured LG a "Mexican Birthday" shot of hard alcohol and she drank it. (Doc.
10 70-2 at 52.) Johari told LG that she was hired as a promo girl and asked her to stay at the
11 Bar. (Doc. 70-2 at 52.) LG stayed because "she did not feel the interview was over" and
12 felt that "if she left she may not get the job." (Doc. 70-2 at 52.) Johari continued to pour
13 shots for LG and she drank approximately four to five shots of hard alcohol. (Doc. 70-2 at
14 52.) At some point in the night, Johari, LG, and the female employee went back to the
15 office. (Doc. 70-2 at 52.) LG was not feeling well due to drinking too much alcohol and
16 laid down on the black leather couch in the office and fell asleep. (Doc. 70-2 at 52.) At an
17 unknown time, LG woke up to someone "rubbing her on her exposed side from her
18 shoulder to her thigh," as well as kissing her neck. (Doc. 70-2 at 53.) LG saw that it was
19 Johari, who was kneeling on the couch on his knees in front of her and pulling on her waist.
20 (Doc. 70-2 at 53.) LG told Johari to "stop" and pushed his hand away. (Doc. 70-2 at 53.)
21 Johari then lifted LG's dress at the bottom and slid his hand under the dress to "grip[] her
22 butt cheek." (Doc. 70-2 at 53.) Next, Johari "place[d] his hand in between [LG's] butt
23 cheeks rubbing against her anus. . . . [Johari] touched [LG's] anus over her thong
24 underwear. [Johari] then slid his hand from [LG's] anus to her vagina. [Johari] rubbed his
25 hand against [LG's] vagina over her thong underwear." (Doc. 70-2 at 53.)

26 LG again told Johari to stop and moved his hand away. (Doc. 70-2 at 53.) She got
27 up from the couch and exited the office to the bar area, which was deserted. (Doc. 70-2 at
28 53.) Johari followed LG out of the office. (Doc. 70-2 at 53.) LG tried to exit the bar but

1 found that several of the doors were locked and Johari refused to unlock them. (Doc. 70-
2 2 at 53.) Meanwhile, Johari tried to get LG to calm down and told her that she was “crazy”
3 and “drunk.” (Doc. 70-2 at 53.) After trying three to four doors, LG finally found an
4 unlocked door and ran out. (Doc. 70-2 at 53.) She saw that an employee was still working
5 at Silver Mine Subs and asked him to call 911. (Doc. 70-2 at 53.) Johari then arrived at
6 Silver Mine Subs and tried to talk to LG. (Doc. 70-2 at 53.) At the request of a Silver
7 Mine Subs employee, LG went inside to wait for the police. (Doc. 70-2 at 53.)

8 In a photo lineup, LG positively identified Johari as the suspect that gave her alcohol
9 and touched her anus and vagina. (Doc. 70-2 at 54.) The police secured the front and rear
10 entrances of the Bar. (Doc. 70-2 at 54.) Detective Bradley Breckow was assigned to the
11 investigation. (Doc. 70-2 at 6.) On the morning of October 16, Detective Breckow
12 arranged for LG to undergo a SANE⁴ exam at the Scottsdale Family Advocacy Center.
13 (Doc. 70-2 at 8.) At around 8:50 A.M., Johari exited the secured rear door of the Bar and
14 asked police why they were there. (Doc. 70-2 at 8.) Detective Breckow then interviewed
15 Johari. According to the interview summary, Johari stated “he had just arrived at the bar
16 and wanted to know what was going on.” (Doc. 70-2 at 8.) Detective Breckow questioned
17 how Johari arrived without being noticed by police, since both the front and rear doors of
18 the Bar were secured. (Doc. 70-2 at 8.) Johari stated he arrived at the Bar after the property
19 manager told him police officers were there, and he came in through the front entrance and
20 did not see any police. (Doc. 70-2 at 8.)

21 Johari told Detective Breckow that he was the owner of the Bar. (Doc. 70-2 at 8.)
22 When Detective Breckow told Johari that a girl had called the police to report an incident,
23 Johari stated “there was no incident, however a girl had come to the bar last night to apply
24 for a job.” (Doc. 70-2 at 8.) Johari explained that he could not remember the girl’s name,
25 but that she “and another promo girl named Tejia had been drinking in the bar.” (Doc. 70-
26 2 at 8.) Johari said he did not know how much the girl drank because “he was not with

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28 ⁴ Although the parties do not define “SANE exam,” the Court notes that the Arizona Child
and Family Advocacy Network—of which the Scottsdale Family Advocacy Center is a
part—refers to Sexual Assault Nurse Examiners as SANEs.

1 her very much, as the girl was drinking with Tejia.” (Doc. 70-2 at 9.) Johari insisted that
2 the girl was 21, “which he knew because he had photocopied her ID.” (Doc. 70-2 at 9.)
3 According to Johari, “the girl got drunk and passed out on the couch in the office.” (Doc.
4 70-2 at 8.) Johari then “woke the girl up at approximately 0230 hours after she had been
5 sleeping for approximately 40 minutes” and “told her she had to leave.” (Doc. 70-2 at 8.)
6 After she slept for 15 more minutes, she woke up, “freak[ed] out,” and left the bar. (Doc.
7 70-2 at 8.)

8 Johari asked Detective Breckow what the girl had reported, and Detective Breckow
9 told him “she reported some touching occurred in the bar’s office after she fell asleep.”
10 (Doc. 70-2 at 9.) Johari insisted he had not touched her except on her shoulder to wake her
11 up, and “stated specifically that he never touched her underneath her dress.” (Doc. 70-2 at
12 9.) Johari also stated, inconsistently, that he could not have touched her because he “was
13 never in [his] office.” (Doc. 88 at 16.) Johari informed Detective Breckow that there was
14 a camera inside the office. (Doc. 70-2 at 9.) According to Johari, he told “the new girl,”
15 who had changed in the office during her interview, that she was being filmed
16 “everywhere” in the Bar. (Doc. 70-2 at 10.) Finally, Johari admitted that he had initially
17 lied to the police about his arrival in the morning. (Doc. 70-2 at 10.) The police report
18 noted: “He initially stated he did not go into the office. He then reluctantly stated he went
19 into the office upon his arrival. After a little bit longer, [Johari] admitted he was inside the
20 bar all night, as he never went home.” (Doc. 70-2 at 11.)

21 On October 16, 2012, at 10:46 A.M., Detective Breckow served a search warrant.
22 (Doc. 70-2 at 11.) Detectives began to copy the Bar’s surveillance video from the computer
23 on which it was stored. (Doc. 70-2 at 11.) The police found LG’s purse outside the Bar’s
24 office, which contained LG’s Arizona ID card, as well as the Arizona ID cards of three
25 individuals over the age of 21. (Doc. 70-2 at 11.) Inside the office, police found a copy of
26 one of the over-21 IDs on the photocopier. (Doc. 70-2 at 12.) In the office trash can, police
27 found two forms with LG’s Arizona ID card photocopied onto the bottom; one was ripped
28 into pieces and the other was crumpled. (Doc. 70-2 at 12.)

1 At approximately noon, detectives noticed that the surveillance computer was
2 apparently being remotely accessed. (Doc. 70-2 at 12.) Although police did not touch the
3 computer, the mouse cursor was moving and closed the program that was copying the
4 surveillance video. (Doc. 70-2 at 12.) Detective Todd Bailey observed “the portions of
5 the surveillance video he had been attempting to copy had been deleted,” so he immediately
6 shut down the computer and seized it as evidence. (Doc. 70-2 at 12.) Detectives were able
7 to recover some, but not all, portions of the deleted surveillance video. (Doc. 70-2 at 18.)
8 After further analysis, Detective Bailey determined that some video clips were deleted
9 before the remote access occurred, as the files were accessed from the computer between
10 5:29 A.M. and 6:13 A.M. on October 16, 2012. (Doc. 70-2 at 18.) According to the police
11 report, “[a]t that time, there had been no remote computer access, so the files could only
12 have been accessed by someone sitting at the computer. [Johari] was the only person in
13 the bar at that time, as the bar had already been secured by police.” (Doc. 70-2 at 18.)

14 Detective Breckow reviewed the surveillance video, which the parties provided to
15 the Court. (Doc. 96.) The video evidence, reviewed by the Court, shows that on October
16 15, at around 10:18 P.M., LG and Johari walked into the office and began talking.
17 Approximately half an hour later, Johari left the office and LG changed into a bikini. LG
18 did not look at the camera as she changed. A few minutes later, Johari and another woman
19 entered the office. Johari made some photocopies and left again with the other woman.
20 LG, alone in the office, changed for a second time without looking at the camera. This
21 time, her breast and nipple are visible on the video. At around 11:10 P.M., LG left the
22 office and went into the bar area. For the next couple of hours, LG and Johari socialized
23 and appeared to drink alcohol continuously. At times, they danced together on the dance
24 floor. At 1:26 A.M., LG and Johari entered the office again. Both LG and Johari sat down
25 on the couch and Johari put his arm around LG. Johari appeared to pull LG close such that
26 she was lying across his lap, but LG sat up almost immediately. Johari grabbed LG’s hand
27 and moved it toward his leg and she moved her hand away. Next, Johari attempted to
28 uncross LG’s legs by putting his hand on the inside of her right leg, picking it up, and

1 putting it in between his own legs. LG immediately pulled away and re-crossed her legs.
2 The two continued to talk and at 1:31 A.M., the video cut off. According to the police
3 report, the subsequent clip was not recovered. (Doc. 70-2 at 20.)

4 The video resumes at 2:01 A.M. but the camera angle is different, as if the camera
5 had been tilted. The video shows LG lying on the couch, apparently asleep. For the next
6 hour or so, the video cuts off frequently as certain clips were not recovered. (Doc. 70-2 at
7 21.) What was recovered shows LG apparently falling in and out of sleep on the couch.
8 On more than one occasion, Johari touched LG while she attempted to push him away. For
9 example, at 2:03 A.M., Johari rubbed LG's side and then put his hand under her dress to
10 rub her hip while she weakly tried to move his hand in what was apparently a semi-
11 conscious state. About ten minutes later, Johari rubbed LG's back, side, and thigh, and
12 lifted up her dress to expose her hip as LG quickly pulled her dress back down. Just as
13 Johari reached between LG's legs, the video cuts off for the next five minutes. At
14 approximately 3:22 AM, LG stood up and walked toward the door. Videos from other
15 cameras show her walking down the stairs and exiting the Bar. Video evidence shows that
16 after LG left, Johari returned to the office and attempted to clean it, including by
17 rearranging the pillows on the couch and wiping down the cushions with a towel.

18 On June 6, 2014, DNA results from LG's buccal and vaginal swabs were produced.
19 (Doc. 83-4 at 19.) The results indicated that two sperm samples from LG's body did not
20 match Johari's DNA. (Doc. 83 at 63.) On July 2, 2014, police arrested Johari. (Doc. 88-
21 4 at 75.) The case was submitted to the Maricopa County Attorney. (Doc. 70-2 at 35.) On
22 July 11, 2014, a Maricopa County Grand Jury issued the following indictments against
23 Johari: two counts of sexual abuse, two counts of voyeurism, one count of tampering with
24 physical evidence, and one count of providing alcohol to a minor. (Doc. 70-6 at 1-3.)
25 Johari's counsel "sent a deviation request to prosecutor Brad Miller explaining why the
26 claims against Johari should be dismissed." (Docs. 83 at 66; 83-5.) On May 19, 2016,
27 Johari pled guilty to one count of providing alcohol to a minor and the other counts were
28 dismissed. (Doc. 70-8.)

1 **II. The Sims Matter**

2 On October 11, 2015, at 1:53 A.M., Tempe police officers Kurt Buczkowski, S.
3 Neff and M. Momcilov were dispatched to Johari’s bar—renamed as BAC Lounge—after
4 a call to police reporting that two males were fighting on the back patio. (Doc. 70-9 at 5.)
5 Each officer authored a separate report in connection with the incident. (70-9 at 5–12.)

6 According to Officer Buczkowski, when he arrived at the bar, Johari pointed at guest
7 DJ Devin Sims⁵ and yelled “he punched me.” (Doc. 70-9 at 5.) The officers separated the
8 two men. (Doc. 70-9 at 5.) Officer Buczkowski interviewed Frank Ramirez, a bouncer at
9 the bar, who stated “[Johari’s] claims of assault were false and [Sims] never punched him.”
10 (Doc. 70-9 at 6.) Ramirez told Officer Buczkowski that Johari was dissatisfied with Sims’
11 performance and ten minutes before the end of the performance, Johari got on stage and
12 attempted to kick out Sims. (Doc. 70-9 at 6.) Ramirez also stated that Johari was
13 intoxicated while at work. (Doc. 70-9 at 6.) Next, Officer Buczkowski talked to Odis
14 Robinson, the resident DJ at the Bar. (Doc. 70-9 at 6.) As Officer Buczkowski led
15 Robinson away, Johari yelled to Robinson: “tell him that guy punched me in the face three
16 times.” (Doc. 70-9 at 6.) Robinson stated Johari was working that night and Robinson
17 “was with [Johari] in the DJ booth area when [Johari] confronted [Sims] regarding his poor
18 DJ performance.” (Doc. 70-9 at 6.) According to Robinson, Johari “said something” to
19 Sims; Sims then replied “don’t talk to me like that” and punched Johari in the face three
20 times. (Doc. 70-9 at 6.) Officer Buczkowski also interviewed Kevin Lewandowski, who
21 was a managing partner with Johari. (Doc. 70-9 at 7.) Lewandowski told Officer
22 Buczkowski that Johari was “operating the bar while intoxicated.” (Doc. 70-9 at 7.)
23 Lewandowski further stated “that the fight that [Johari] started spilled into a VIP booth.”
24 (Doc. 70-9 at 7.)

25 Officer Momcilov interviewed Johari, who told him the following: Sims, who was
26 hired as a DJ for the evening, was doing a “horrible job” and Johari asked him to leave.
27 (Doc. 70-9 at 8.) Sims then “punched [Johari] with his closed fist three times on the left

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⁵ The parties refer to this individual as “Sims” but the police reports refer to him as “Sim.”
For consistency, the Court uses “Sims.”

1 side of the face and they both fell on the ground of the DJ booth.” (Doc. 70-9 at 8.) Officer
2 Momcilov wrote there were “[n]o marks or bruises . . . observed on [Johari’s] face during
3 this interview that would be consistent with his assault allegations.” (Doc. 70-9 at 8.)
4 Further, Johari had “slurred speech, bloodshot watery eyes, and difficulty articulating what
5 had allegedly taken place prior to [police] arriving to the scene.” (70-9 at 8.) Officer
6 Momcilov wrote that he was “able to smell the odor of intoxicating beverage emanating
7 from [Johari’s] breath while he was speaking.” (Doc. 70-9 at 8.) However, Johari denied
8 drinking alcohol “as he was working.” (Doc. 70-9 at 8.) Police performed a PBT and
9 found Johari’s BAC level was 0.089. (Doc. 70-9 at 8–9.) Officer Momcilov also found a
10 flask in Johari’s pocket, which tested positive for alcohol. (Doc. 70-9 at 9.) When Officer
11 Momcilov asked Johari “if there was any video that may have captured the incident,” Johari
12 replied there was a surveillance camera but “he was not sure if it would have captured the
13 incident as the camera may not [have been] pointing in the direction of the DJ booth.”
14 (Doc. 70-9 at 8.)

15 Officer Neff wrote that when he arrived on the scene, he removed Sims from the
16 back patio and escorted him down the stairs. (Doc. 70-9 at 10.) Officer Neff was
17 approached by Ramirez, who informed him that Sims had done nothing wrong while Johari
18 was drunk and “out of control.” (Doc. 70-9 at 10.) When Officer Neff asked Sims whether
19 he had punched Johari, Sims denied the allegations and Officer Neff observed that “[Sims’]
20 hands displayed no signs of physical injury indicating that he had punched anyone or
21 anything.” (Doc. 70-9 at 11.) Officer Neff also observed that Johari was “heavily
22 intoxicated” with bloodshot eyes, slurred speech, and the odor of alcohol on his breath.
23 (Doc. 83-4 at 12.)

24 At 2:14 A.M., Officer Buczkowski arrested Johari for false reporting to a law
25 enforcement officer, being intoxicated while operating a bar, and disorderly conduct. (Doc.
26 70-9 at 9.) Officer Buczkowski did not review the surveillance video before making the
27 arrest. (Doc. 88-4 at 86.) On January 7, 2016, after receiving a copy of the surveillance
28 video, which shows Sims apparently punching Johari, Assistant City Attorney Richard

1 Speer filed a motion to dismiss the charges against Johari. (Doc. 70-10 at 2.) The motion
2 stated: “New information provided to the State tends to contradict statements given to the
3 police at the time of their investigation. Although probable cause existed for the arrest, the
4 State believes it is in the interest of justice to dismiss the matter.” (Doc. 70-10 at 2.)

5 **III. Other Incidents**

6 In addition to the two arrests described above, Johari has had other prior interactions
7 with the Tempe Police Department. Before 2012, Johari received multiple citations for
8 violating noise ordinances while operating the Bar. (Doc. 88-1 at 298–99.) Johari
9 complained that the noise ordinances were disproportionately enforced and that other bars
10 were allowed to operate with higher noise levels. (Doc. 88-1 at 299.) In August 2012,
11 Tempe police responded to an altercation at the Bar involving a customer. (Doc. 88-1 at
12 300.) The police then referred a liquor law violation against Johari to the Arizona
13 Department of Liquor Licenses. (Doc. 87 at 3.) An administrative court imposed sanctions
14 on Johari but the sanctions were overturned on appeal. (Doc. 88-1 at 300.)

15 **IV. The Present Suit**

16 In January 2017, Plaintiffs brought claims against Defendants City of Tempe (the
17 “City”), Detective Bradley Breckow, Officer Kurt Buczkowski, and other officers of the
18 Tempe Police Department, alleging claims under 42 U.S.C. § 1983 and Arizona law. (Doc.
19 6.) The parties cross-moved for summary judgment. (Docs. 77, 87.)

20 **STANDARD OF REVIEW**

21 Summary judgment is proper where “the movant shows that there is no genuine
22 dispute as to any material fact and the movant is entitled to judgment as a matter of
23 law.” Fed. R. Civ. P. 56(a). Material facts are those that “might affect the outcome of the
24 suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
25 (1986). A dispute of material fact is only genuine “if the evidence is such that a reasonable
26 jury could return a verdict for the nonmoving party.” *Id.* In reviewing a motion for
27 summary judgment, all evidence must be construed in the light most favorable to the non-
28 moving party. *Id.* When resolving a motion for summary judgment, a court is not required

1 to “scour the record in search of a genuine issue of triable fact.” *Keenan v. Allan*, 91 F.3d
2 1275, 1279 (9th Cir. 1996). Thus, when opposing a motion for summary judgment, a party
3 must “identify with reasonable particularity the evidence that precludes summary
4 judgment.” *Id.*

5 Here, both parties moved for summary judgment. “[W]hen simultaneous cross-
6 motions for summary judgment on the same claim are before the court, the court must
7 consider the appropriate evidentiary material identified and submitted in support of both
8 motions, and in opposition to both motions, before ruling on each of them.” *Tulalip Tribes*
9 *of Wash. v. Washington*, 783 F.3d 1151, 1156 (9th Cir. 2015) (citation omitted).

10 ANALYSIS

11 Plaintiffs assert claims for malicious prosecution, selective prosecution, abuse of
12 process, violation of the right to pursue an occupation, and conspiracy, pursuant to 42
13 U.S.C. § 1983, which allows suits against state actors for actions taken under state law that
14 violate the Constitution. (Doc. 6 at 7–10.) In addition, Plaintiffs allege a Monell claim
15 under § 1983. (Doc. 6 at 8.) Plaintiffs also assert state law claims for malicious
16 prosecution, abuse of process, negligence and gross negligence, and tortious interference
17 with business relations. (Doc. 6 at 10–12.)

18 Officers sued under § 1983 are entitled to qualified immunity if “they act reasonably
19 under the circumstances, even if the actions result in a constitutional violation.” *Ramirez*
20 *v. Butte-Silver Bow County*, 298 F.3d 1022, 1027 (9th Cir. 2002). In determining whether
21 an officer is entitled to qualified immunity, courts ask (1) whether the officer’s conduct
22 violated a constitutional right; and (2) whether the right was clearly established at the time
23 of the conduct. *Lacey v. Maricopa County*, 693 F.3d 896, 915 (9th Cir. 2012). Courts have
24 discretion in deciding which of the two questions to address first. *Id.* If the answer to
25 either question is negative, “then the officer’s conduct was constitutional, and there can be
26 no violation of § 1983.” *Id.*

27 I. Malicious Prosecution

28 Plaintiffs allege that Johari was subjected to malicious prosecution with regard to

1 both the LG matter and the Sims matter, in violation of § 1983 and Arizona state law. “In
2 order to prevail on a § 1983 claim of malicious prosecution, a plaintiff ‘must show that the
3 defendants prosecuted [him] with malice and without probable cause, and that they did so
4 for the purpose of denying [him] equal protection or another specific constitutional right.’”
5 *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1066 (9th Cir. 2004) (citation omitted).
6 “Federal courts rely on state common law for elements of malicious prosecution.” *Mills v.*
7 *City of Covina*, 921 F.3d 1161, 1169 (9th Cir. 2019). In Arizona, the elements of malicious
8 prosecution are (1) a criminal prosecution, (2) that terminates in favor of plaintiff, (3) with
9 defendants as prosecutors, (3) actuated by malice, (5) without probable cause, and (6)
10 causing damages. *Slade v. City of Phoenix*, 112 Ariz. 298, 300, 541 P.3d 550, 552 (Ariz.
11 1975). “Malicious prosecution actions are not limited to suits against prosecutors but may
12 be brought . . . against other persons who have wrongfully caused the charges to be filed.”
13 *Awady*, 368 F.3d at 1066. Here, Plaintiffs allege that Detective Breckow wrongfully
14 caused charges to be filed against Johari in the LG matter and Officer Buczkowski
15 wrongfully caused charges to be filed against Johari in the Sims matter.

16 “The failure to establish lack of probable cause is a complete defense” in a malicious
17 prosecution claim. *Bird v. Rothman*, 128 Ariz. 599, 602, 627 P.2d 1097, 1100 (Ariz. Ct.
18 App. 1981). “Whether the facts in a case are sufficient to constitute probable cause is a
19 question of law for the court to be determined by a reasonable person test[.]” *Id.* Probable
20 cause “is not a high bar.” *District of Columbia v. Wesby*, 138 S.Ct. 577, 586 (2018).
21 “When the police make an arrest based upon probable cause, it is not material that the
22 person arrested may turn out to be innocent, and the arresting officer is not required to
23 conduct a trial before determining whether or not to make the arrest.” *Cullison v. City of*
24 *Peoria*, 120 Ariz. 165, 168 (Ariz. 1978). Rather, the existence of probable cause depends
25 on whether “the arresting officers have reasonably trustworthy information of facts and
26 circumstances which are sufficient in themselves to lead a reasonable man to believe an
27 offense . . . has been committed and that the person to be arrested . . . did commit it.” *State*
28 *v. Richards*, 110 Ariz. 290, 291 (Ariz. 1974). In evaluating probable cause, the Court

1 applies a “totality of the circumstances” test rather than an “excessively technical
2 dissection.” *Wesby*, 138 S.Ct. at 586.

3 **A. The LG Matter**

4 Detective Breckow had probable cause in having Johari arrested in the LG matter.
5 Thus, Detective Breckow did not violate Johari’s constitutional rights and is entitled to
6 qualified immunity.

7 “Generally, probable cause for an arrest ‘may be satisfied by an indictment returned
8 by a grand jury.’” *Lacy v. County of Maricopa*, 631 F. Supp. 2d 1183, 1194 (D. Ariz. 2008)
9 (citation omitted). The grand jury’s indictment is “prima facie evidence of probable
10 cause,” and the “presumption of probable cause can be rebutted if officers improperly
11 exerted pressure on the prosecutor, knowingly provided misinformation, concealed
12 exculpatory evidence, ‘or otherwise engaged in wrongful or bad faith conduct that was
13 actively instrumental in causing the initiation of legal proceedings.’” *Bryant v. City of*
14 *Goodyear*, No. CV-12-00319, 2014 WL 2048013, at *3 (D. Ariz. May 19, 2014) (citation
15 omitted). Here, Johari was indicted by a grand jury on two counts of sexual abuse, two
16 counts of voyeurism, one count of tampering with physical evidence, and one count of
17 providing alcohol to a minor. Thus, there is a presumption of probable cause that Plaintiffs
18 must rebut.

19 Plaintiffs present no evidence indicating that Detective Breckow exerted pressure
20 on the prosecutor, knowingly provided misinformation, concealed exculpatory evidence,
21 or engaged in bad faith conduct. Plaintiffs make much of the fact that Detective Breckow
22 apparently did not inform the prosecutor that “DNA sperm evidence [found on LG]
23 matched other male(s), not Johari.” (Doc. 87 at 20.) However, LG never accused Johari
24 of ejaculating upon her, and DNA sperm evidence matching other males is not
25 “exculpatory evidence.” Further, Plaintiffs assert that Detective Breckow failed to inform
26 the prosecutor that certain portions of LG’s account—such as her description of leaving
27 the bar and encountering locked doors—did not match the surveillance video evidence.
28 (Doc. 87 at 13, 20.) Detective Breckow did not conceal any such evidence because the

1 Maricopa County Attorney was provided with the entirety of the Tempe Police
2 Department’s file, which included recorded interviews, physical evidence, photographic
3 evidence, and surveillance video evidence. (Docs. 83-6 at 368; 70-2.)

4 Even without a presumption of probable cause, when considering the totality of the
5 circumstances, Detective Breckow had probable cause to believe that Johari committed the
6 crimes for which he was arrested. LG accused Johari of touching her, including her vagina
7 and anus, without consent. LG also recounted to police what she could remember of the
8 evening, including her arrival, the interview, changing her clothes during the interview,
9 being provided alcohol, falling asleep on the couch in the office, and Johari’s position
10 relative to hers on the couch. Most of these details were confirmed by video evidence,
11 which shows LG changing in the office and Johari’s subsequent interactions with her while
12 she slept on the couch. On the other hand, Johari admitted to Detective Breckow that he
13 lied about his arrival at the bar—Johari initially said he arrived in the morning but later
14 admitted he had stayed at the bar all night—and officers are entitled to infer that “lies
15 suggest[] a guilty mind.” *Wesby*, 138 S.Ct. at 587. Johari’s version of the events was also
16 contradicted by the video evidence that police reviewed, which revealed that Johari made
17 the following inaccurate statements to police: he was not with LG very much that night, he
18 was “never in [his] office,” he touched LG only on her shoulder to wake her up, and he
19 “wasn’t even talking” to LG. (Doc. 88 at 15–16.)

20 Plaintiffs argue “the objective video evidence does not show any sexual abuse”;
21 therefore, there was no probable cause to believe that sexual abuse occurred. (Doc. 87 at
22 18.) This argument is preposterous. Under Arizona law, sexual abuse is defined as
23 “intentionally or knowingly engaging in sexual contact with any person fifteen or more
24 years of age without consent of that person.” A.R.S. § 13-1404(A). The video evidence
25 shows Johari repeatedly touching and attempting to touch LG, even after she tried to push
26 him away multiple times, while she was apparently unconscious and/or semi-conscious.
27 Plaintiffs also completely ignore the fact that the video cuts off for a few minutes just after
28 Johari placed his hand between LG’s legs, and police saw clips of the surveillance video

1 being deleted through remote access to the office computer. Police also determined that
2 between 5:29 A.M. and 6:13 A.M., someone sitting at the computer had deleted video clips
3 as well, and Johari was the only person that had physical access to the computer at that
4 time. (Doc. 88 at 27–28.) Plaintiffs assert that LG’s accusations were not credible because
5 portions of her account to police, particularly with regard to how she left the bar, did not
6 match the video evidence. However, some inconsistencies and/or lack of verification of a
7 victim’s statement do not necessarily preclude the finding of probable cause. See *Jimenez*
8 *v. Yuma County*, No. 1 CA-CV 14-0724, 2016 WL 126285, at *3 (Ariz. Ct. App. Jan 12,
9 2016). That LG did not recount how she left the bar with complete accuracy—for example,
10 whether she walked or ran, and whether she encountered locked doors—does not mean she
11 “lost all credibility” with regard to her accusations. (Doc. 87 at 18.) Viewed in light of all
12 the facts and circumstances, police had “reasonably trustworthy information” to believe
13 Johari had committed the offenses for which he was arrested.

14 Because Detective Breckow had probable cause to believe Johari committed the
15 crimes for which he was arrested, summary judgment is granted to Defendants with regard
16 to Plaintiffs’ malicious prosecution claim under both § 1983 and Arizona law.

17 **B. The Sims Matter**

18 With regard to the Sims matter, Officer Buczkowski is entitled to qualified
19 immunity because there is no evidence that he violated a clearly established constitutional
20 right. The Supreme Court has instructed courts “not to define clearly established law at a
21 high level of generality.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). Rather, courts
22 ask whether the “violative nature of particular conduct is clearly established.” *Id.*
23 (emphasis added); see, e.g., *Thompson v. Rahr*, 885 F.3d 582, 584 (9th Cir. 2018) (holding
24 that particular police conduct of pointing a loaded gun at an unarmed suspect’s head after
25 he had already been searched did not violate clearly established law on excessive force).
26 “The plaintiff bears the burden to show that the contours of the right were clearly
27 established.” *Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1109 (9th Cir. 2011).
28 While the Supreme Court does not “require a case directly on point” for a right to be clearly

1 established, “existing precedent must have placed the . . . constitutional question beyond
2 debate.” *White v. Pauly*, 137 S.Ct. 548, 551 (2017) (citation omitted).

3 Here, Plaintiffs have not even identified exactly what the particular violation is.
4 Rather, they argue generally that Officer Buczkowski lacked probable cause when he
5 arrested Johari. Johari was arrested for false reporting to a law enforcement officer, being
6 intoxicated while operating a bar, and disorderly conduct. Police arrested Johari after
7 observing that Johari was intoxicated and did not have marks to indicate that he was
8 punched, and after overhearing Johari instruct a witness to tell police that Johari was
9 punched by Sims. In addition, a witness told police that Johari was lying about being
10 punched by Sims, and multiple witnesses stated that Johari was intoxicated while working
11 at the Bar. Despite these facts, Plaintiffs insist that Johari was arrested without probable
12 cause. But Plaintiffs do not point to which particular police conduct was violative of clearly
13 established law.

14 While Plaintiffs take issue with the fact that Officer Buczkowski did not review the
15 surveillance video evidence or speak with certain other witnesses before arresting Johari,
16 they cite no law suggesting that officers must take these actions before making an arrest.
17 By contrast, courts have been clear that there is no categorical rule requiring review of
18 surveillance videos or performance of an extensive investigation to find probable cause.
19 See, e.g., *Dobrowolski v. City of Mesa*, No. CV 09-1387-PHX-SRB, 2010 WL 11515564,
20 at *6 (D. Ariz. Oct. 27, 2010) (“The information did not indicate that a probable cause
21 decision required review of the surveillance footage.”). As such, Officer Buczkowski did
22 not violate clearly established law and is entitled to qualified immunity. Summary
23 judgment is granted to Defendants with regard to Plaintiffs’ malicious prosecution claim
24 under both § 1983 and Arizona law. See, e.g., *Spooner v. City of Phoenix*, 246 Ariz. 199,
25 435 P.3d 462, 467 (Ariz. Ct. App. 2018).

26 **II. Selective Prosecution**

27 In their operative complaint, Plaintiffs allege that Johari was “subjected to . . .
28 selective investigations and prosecutions without probable cause.” (Doc. 6 at 8.) A § 1983

1 selective prosecution claim requires the plaintiff to “identify a ‘similarly situated’ class
2 against which plaintiff’s class can be compared.” Dowling v. Arpaio, 858 F. Supp. 2d
3 1063, 1081 (D. Ariz. 2012) (citation omitted). If the alleged selective enforcement “does
4 not implicate a fundamental right or a suspect classification, the plaintiff can establish a
5 ‘class of one’ equal protection claim by demonstrating that [he] ‘has been intentionally
6 treated differently from others similarly situated and that there is no rational basis for the
7 difference in treatment.’” Id.

8 In their motion for summary judgment, Defendants argue that Plaintiffs cannot show
9 Johari was treated differently without a rational basis. (Doc. 77 at 18.) Plaintiffs do not
10 address Defendants’ argument in their response and cross-motion for summary judgment;
11 nor do they point to any admissible evidence showing that Johari was treated differently
12 from similarly situated individuals without a rational basis. Rather, Plaintiffs conclusively
13 state that “Defendants . . . violated Plaintiffs’ Fourth Amendment rights by wrongfully
14 causing him to be prosecuted without probable cause. All the above-mentioned
15 constitutional violations underly the § 1983 claims for malicious prosecution, selective
16 prosecution, abuse of process, failure to train, and conspiracy to commit 1983 violations.”
17 (Doc. 87 at 14.) Because Plaintiffs have not demonstrated that Johari was treated
18 differently without a rational basis, summary judgment is granted to Defendants with
19 regard to the selective prosecution claim.

20 **III. Abuse of Process**

21 Next, Plaintiffs allege that Defendants are liable for abuse of process under § 1983
22 and Arizona law. In Arizona, “to establish a claim for abuse of process there must be a
23 showing that the defendant has (1) used a legal process against the plaintiff; (2) primarily
24 to accomplish a purpose for which the process was not designed; and, (3) harm has been
25 caused to the plaintiff by such misuse of process.” Nienstedt v. Wetzel, 133 Ariz. 348, 353,
26 651 P.2d 876, 881 (Ariz. Ct. App. 1982). In order to show that the defendant’s primary
27 motive was improper, a plaintiff “must not only present evidence that the defendant used a
28 court process for a primarily improper purpose, they must also show that, in using the court

1 process, the defendant took an action that could not logically be explained without
2 reference to the defendant’s improper motives.” *Crackel v. Allstate Ins. Co.*, 208 Ariz.
3 252, 259, 92 P.3d 882, 889 (Ariz. Ct. App. 2004). With regard to the federal claim, the
4 Ninth Circuit has not yet determined if an abuse of process claim is cognizable under §
5 1983. See *West v. City of Mesa*, 708 F. App’x 288, 292 (9th Cir. 2017).

6 Even assuming that Plaintiffs have a valid claim under § 1983, they have failed to
7 show that Defendants used any legal process for a purpose for which it was not designed.
8 In support of their abuse of process claims, Plaintiffs state—without identifying
9 Defendants’ allegedly improper purpose—that Plaintiffs “incorporate all previous
10 arguments and facts showing Defendants wrongfully [sic] Plaintiffs’ prosecution in
11 deprivation of their constitutional rights.” (Doc. 87 at 20.) Because Plaintiffs’ abuse of
12 process claims are “essentially duplicative of their malicious prosecution” claims,
13 summary judgment is granted to Defendants with regard to the abuse of process claims.
14 *Donahoe v. Arpaio*, 869 F. Supp. 2d 1020, 1060 (D. Ariz. 2012).

15 **IV. Monell Claim**

16 Plaintiffs assert a Monell claim against the City, arguing that “[a]t the time of the
17 [LG] incident, the City of Tempe employed a non-revictimization approach and formerly
18 had no policy encouraging officers to interview alleged sex-crime victims after they had
19 one to two sleep cycles.” (Doc. 87 at 21.) “Liability may attach to a municipality only
20 where the municipality itself causes the constitutional violation through ‘execution of a
21 government’s policy or custom, whether made by its lawmakers or by those whose edicts
22 or acts may fairly be said to represent official policy.’” *Ulrich v. City and County of San*
23 *Francisco*, 308 F.3d 968, 984 (9th Cir. 2002) (citing *Monell v. Dep’t. of Soc. Servs.*, 436
24 U.S. 658, 694 (1978)). There can be no Monell liability on the part of a municipality based
25 on an officer’s conduct if that officer is found to have committed no constitutional
26 violation. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986). Here, the City cannot
27 be liable because Detective Breckow committed no constitutional violation in the LG
28

1 matter. Thus, summary judgment is granted to Defendants with regard to Plaintiffs' Monell
2 claim.

3 **V. Right to Pursue an Occupation**

4 In their cross-motion for summary judgment, Plaintiffs assert "Defendants deprived
5 Johari of his right to pursue an occupation when it systematically targeted him and
6 attempted to misuse its authority and the legal system to shut him out of business through
7 the [LG] incident." (Doc. 87 at 14.) In response, Defendants argue this claim was
8 improperly raised for the first time at summary judgment. (Doc. 92 at 7.) Plaintiffs reply
9 that they did not raise this claim for the first time at summary judgment; rather, they raised
10 it "in a March 2018, Rule 408 protected communication to Defendants' counsel." (Doc.
11 94 at 8.)

12 Defendants are mistaken. The Ninth Circuit requires that "allegations in the
13 complaint 'give the defendant fair notice of what the plaintiff's claim is and the grounds
14 upon which it rests.'" *Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963, 968 (9th Cir.
15 2006) (citation omitted). A claim for the denial of a right to pursue an occupation requires
16 allegations that the plaintiff is "unable to pursue an occupation" in the relevant business,
17 and that "this inability is due to actions that substantively were 'clearly arbitrary and
18 unreasonable, having no substantial relation to the public health, safety, morals or general
19 welfare.'" *Wedges/Ledges of California, Inc. v. City of Phoenix*, 24 F.3d 56, 65 (9th Cir.
20 2009). Plaintiffs' operative complaint, which did not raise this claim or plead facts to
21 support it, failed to give Defendants fair notice about the claim and the grounds upon which
22 it rests. As such, summary judgment is granted to Defendants with regard to Plaintiffs'
23 claim based on the right to pursue an occupation.

24 **VI. Negligence and Gross Negligence**

25 Plaintiffs allege the arrests of Johari were negligent and/or grossly negligent under
26 Arizona law, arguing: "First, Defendants' arrests of Johari were unlawful. Second, even if
27 they were not unlawful, then Defendants are still liable to Plaintiffs for negligence and
28 gross negligence." (Doc. 87 at 22.) Plaintiffs offer no other explanation, cite no law, and

1 point to no evidence to support their claims of negligence and gross negligence. As such,
2 summary judgment is granted to Defendants with regard to these claims.

3 **VII. Tortious Interference with Business Relations**

4 Plaintiffs allege that Defendants “intentionally and improperly interfered with
5 Plaintiffs’ prospective contractual relations by investigating and pursuing unsubstantiated
6 felony charges against Johari that have harmed the reputation and business of the Bar.”
7 (Doc. 6 at 12.) On summary judgment, Defendants argue this claim is barred by the statute
8 of limitations. (Doc. 77 at 22–23.) Plaintiffs do not respond.

9 Defendants are correct. Under Arizona law, “[a]ll actions against any public entity
10 or public employee shall be brought within one year after the cause of action accrues and
11 not afterward.” A.R.S. § 12-821. “[A] cause of action for tortious interference accrues
12 when the plaintiff knew or reasonably should have known of the intentional interference
13 with the plaintiff’s business expectancy.” *Dube v. Likins*, 216 Ariz. 406, 411–12, 167 P.3d
14 93, 98–99 (Ariz. Ct. App. 2007). Only the LG matter involved felony charges, which
15 Plaintiffs allege form the basis of their claim for tortious interference with business
16 relations. Johari was arrested on July 2, 2004, the date on which the action for tortious
17 interference began to accrue. Plaintiffs filed their complaint on January 11, 2017, well
18 after the one-year deadline. Accordingly, summary judgment is granted to Defendants with
19 regard to the claim for tortious interference with business relations.

20 **VIII. Conspiracy to Commit § 1983 Violations**

21 Plaintiffs have not clearly explained their conspiracy claim, arguing only that a jury
22 “could find a conspiracy existed between, among other things, the City of Tempe’s actions
23 against Johari with respect to the [enforcement of noise ordinances], Officer Ferraro’s
24 comments to the liquor board when referring a case against Johari that would ultimately be
25 dismissed, the [LG] incident, and the DJ Devin Sims incident.” (Doc. 87 at 21.)

26 First, a § 1983 conspiracy claim requires an “underlying constitutional violation.”
27 *Lacey*, 693 F.3d at 935. There was no constitutional violation with respect to the City’s
28 enforcement of noise ordinances, Officer Ferraro’s comments to the liquor board, and the

1 LG matter. Thus, there can be no § 1983 conspiracy claim with regard to these incidents.

2 Second, the Court need not reach the issue of whether there was an underlying
3 constitutional violation in the Sims matter, because the conspiracy claim fails for another
4 reason. Plaintiffs appear to allege that the City conspired with its own police officers to
5 arrest Johari. This theory is wrong under the “intracorporate conspiracy doctrine, which
6 bars a claim for conspiracy where the allegation is that an entity conspired with its
7 employees to violate an individual’s constitutional rights.” Donahoe, 869 F. Supp. 2d at
8 1074.

9 As such, summary judgment is granted to Defendants with regard to the § 1983
10 conspiracy claim.

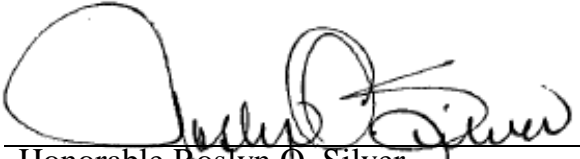
11 Accordingly,

12 **IT IS ORDERED** Defendants’ Motion for Summary Judgment (Doc. 77) is
13 **GRANTED.**

14 **IT IS FURTHER ORDERED** Plaintiffs’ Cross-Motion for Summary Judgment
15 (Doc. 87) is **DENIED.**

16 **IT IS FURTHER ORDERED** the Clerk of Court shall enter judgment against
17 Plaintiffs.

18 Dated this 16th day of September, 2019.

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21 

22 Honorable Roslyn O. Silver
23 Senior United States District Judge
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