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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Donna L. Stypeck,

10 Plaintiff,

11 v.

12 City of Clarkdale, et al.,

13 Defendants.
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No. CV-15-08163-PCT-DGC

ORDER

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16 Defendants City of Clarkdale, Clarkdale City Council, Doug Von Gausig, Richard
17 Dehnert, Curtiss Bohall, Bill Regner, and Scott Buckley move to dismiss all claims
18 against them pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Doc. 45.
19 The motion has been fully briefed (Docs. 45, 61, 64), and no party has requested oral
20 argument. For the following reasons, the Court will grant the motion.

21 **I. Background.**

22 Jonathan Millet is a prosecutor for the Town of Clarkdale and Kathy Parker is his
23 assistant. Doc. 13 at 2-3. Defendants Von Gausig, Dehnert, Bohall, Regner, and
24 Buckley are Clarkdale City Council members. *Id.* at 2. On June 13, 2015, Plaintiff's dog
25 allegedly injured Defendant Calvert's horse in Tuzigoot National Monument. Doc. 13 at
26 3-4. In his capacity as Town Prosecutor, Millet sent a letter to Plaintiff on August 3,
27 2015, asking her to call Parker for a phone interview regarding the "Incident at Tuzigoot
28 Park." Doc. 1-1. When Plaintiff called, Parker allegedly said: "And here's how it goes.
If you don't pay the vet bill [for Calvert's horse], then charges will be filed."

1 Doc. 13 at 5. Plaintiff accepted this plea bargain, agreeing to pay the vet bill in exchange
2 for Millet’s agreement not to file charges. Doc. 1-1.

3 Plaintiff filed this lawsuit on August 31, 2015. Her amended complaint alleges
4 that Millet and Parker’s conduct violated her constitutional rights. She seeks relief under
5 42 U.S.C. §§ 1983 and 1985. Doc. 13. The amended complaint also alleges that Millet’s
6 conduct was City “protocol,” and that the City “condoned” his actions and “conspired”
7 with him. *Id.* at 13, 18, 20. Plaintiff also asserts claims for intentional infliction of
8 emotional distress (“IIED”) and extortion. *Id.* at 19-21.

9 **I. Legal Standard.**

10 A successful 12(b)(6) motion must show either that the complaint lacks a
11 cognizable legal theory or fails to allege facts sufficient to support its theory. *Balistreri*
12 *v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). A complaint that sets forth a
13 cognizable legal theory will survive a motion to dismiss as long as it contains “sufficient
14 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”
15 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S.
16 544, 570 (2007)). A claim has facial plausibility when “the plaintiff pleads factual
17 content that allows the court to draw the reasonable inference that the defendant is liable
18 for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556).

19 **II. Analysis.**

20 **A. Claims Against the City Council and Its Members.**

21 Plaintiff does not plead any facts alleging that the City Council or its individual
22 members committed wrongful acts. In fact, she does not even mention these parties in
23 the specific counts of her amended complaint. Doc. 13. Therefore, all claims against the
24 City Council and its individual members are dismissed.

25 **B. Claims Against the City.**

26 Defendants argue that the Court should dismiss all §§ 1983 and 1985 claims
27 against the City because a municipality’s liability for purposes of § 1983 “cannot be
28 based solely on *respondeat superior*.” Doc. 45 at 8. The Court agrees.

1 A municipality cannot be held liable for the torts of its employees “under § 1983
2 on a *respondeat superior* theory.” *Monell v. Dep’t of Soc. Servs. of City of N.Y.*, 436 U.S.
3 658, 691 (1978). Rather, a plaintiff in a § 1983 action must plead facts that, if true, show
4 that “a policy, practice, or custom of the entity . . . [was] a moving force behind a
5 violation of constitutional rights.” *Dougherty v. City of Covina*, 654 F.3d 892, 900 (9th
6 Cir. 2011).

7 Plaintiff fails to plead facts establishing that the City violated her constitutional
8 rights. Count II appears to assert Due Process and Equal Protection violations by Millet,
9 which must be § 1983 claims. Because there is no *respondeat superior* liability under
10 § 1983, however, this claim must be dismissed against the City. Counts IX, XI, and XV
11 allege supervisory liability against the City under § 1983, but include only conclusory
12 allegations, stating that Millet’s conduct was “most likely a protocol” of the City and that
13 the City “condoned” Millet’s actions and “conspired” with him. Doc. 13 at 13, 18, 20.
14 The only fact Plaintiff alleges to support these conclusions, however, is Parker’s
15 statement that charges would be filed if Plaintiff did not pay the vet bill. *Id.* at 18.
16 Parker’s statement is not sufficient to show a “policy, practice, or custom” of the City
17 that violated Plaintiff’s constitutional rights. *Dougherty*, 654 F.3d at 900. Therefore,
18 Plaintiff’s § 1983 claims against the City are dismissed. Because Plaintiff is unable to
19 state a claim under § 1983, her § 1985 claims must also be dismissed. *Olsen v. Idaho*
20 *State Bd. of Med.*, 363 F.3d 916, 930 (9th Cir. 2004) (“[T]o state a claim for conspiracy
21 under § 1985, a plaintiff must first have a cognizable claim under § 1983.”).

22 Defendants argue that Plaintiff’s state law claims against the City are barred
23 because she failed to comply with the 180-day notice requirement of A.R.S. § 12-
24 821.01(A). Doc. 45 at 13. The Court agrees. It appears that Plaintiff’s cause of action
25 accrued between August 3 and 11, 2015. Doc. 13 at ¶¶ 25-26. More than 180 days have
26 passed, and Plaintiff does not dispute that she failed to serve a notice of claim on the
27 City. Doc. 61 at 14. Plaintiff’s state claims against the City (and the City Council and its
28 members) are therefore barred under Arizona law.

1 **IV. Leave to Amend.**

2 “A pro se litigant must be given leave to amend his or her complaint unless it is
3 absolutely clear that the deficiencies of the complaint could not be cured by amendment.”
4 *Karim-Panahi v. L.A. Police Dep’t*, 839 F.2d 621, 623 (9th Cir. 1988) (quotation marks
5 omitted). But “[a] district court does not err in denying leave to amend where the
6 amendment would be futile.” *Gardner v. Martino*, 563 F.3d 981, 990 (9th Cir. 2009).

7 Because Plaintiff’s state law claims are barred by § 12-821.01(A), she may not
8 amend these claims. The Court cannot conclude, however, that Plaintiff is unable to
9 plead facts that might state a claim under §§ 1983 and 1985 against the City, the City
10 Council, or its individual members. The Court therefore will grant Plaintiff leave to
11 amend these claims. Plaintiff has had two opportunities to state a claim against these
12 Defendants. The Court cautions Plaintiff that this third opportunity is her last. If
13 Plaintiff again fails to state a claim, further amendments will not be allowed.

14 **IT IS ORDERED:**

- 15 1. The motion to dismiss claims against the City of Clarkdale, Clarkdale City
16 Council, Doug Von Gausig, Richard Dehnert, Curtiss Bohall, Bill Regner,
17 and Scott Buckley (Doc. 45) is **granted**.
- 18 2. Plaintiff may file a second amended complaint by **May 20, 2016**.

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21 Dated this 29th day of April, 2016.

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David G. Campbell
United States District Judge