Gmail Joseph Turner <jtnict@gmail.com>

Freed vs ICMA

1 message

James Freed <jamesfreedmlgmalistserv1@gmail.com> Thu, Sep 5, 2024 at 3:01 PM
To: James Freed <jamesfreedmlgmalistserv1@gmail.com>

Dear Colleagues,

First, I want to thank so many of you for the remarkable support my family and I have received over the last two years. Whether it was letters, phone calls, texts, emails or LinkedIn messages, literally hundreds of managers from across the country reached out to provide encouragement. Words cannot fully convey just how much this has meant to myself and my family during this time.

I never truly believed something like this would happen to me or could for that matter. I am a believer in processes and systems. However, it did, and now we must work ensure it can never happen to anyone ever again.

Attached, is our final filing before the October 29th trial begins. Unlike other documents released in the past, these filings lay out the whole case with direct quotes from supporting exhibits, including deposition transcripts and primary source documents. The ICMA has attempted numerous times to get this case dismissed and a change in venue but has lost every single motion that they have filed in front of both state and federal judges.

This summary is a quick read, but tragically shocking and an embarrassment to our profession. The sworn statements of Marc Ott and ICMA staff are just jaw dropping.

We are looking forward to laying out this case in an extremely public manner in just a few weeks. The country needs to know what happened so that it can never happen again.

My wife and I have spoken in great length about this, and my family and I are in total agreement: There will never be a settlement of any kind that doesn't include a full retraction and apology, no matter the monetary value thrown at us. The ICMA did offer me a large sum of money to settle during facilitation and we soundly rejected that offer. We will continue to do so.

We have two little girls that need to know the truth about their father and the actions he took during the pandemic to keep his residents and employees safe, while at the same time defending individual liberty and freedom of choice. All of which I have the legal authority and the legal obligation to do.

This important work continues. This story goes on. And an angel still rides in the whirlwind and directs this storm.

God Bless,

The Freed Family

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF ST. CLAIR

JAMES R. FREED,
an Individual,
Plaintiff,

vs.

Case No. 22-001981- CZ
Hon. Michael West

INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION,
a D.C. Non-Profit Corporation, et al
Defendants.

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PLAINTIFF'S RESPONSE TO
DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

I. INTRODUCTION

This is a defamation (Count I)/false light (Count II)/civil conspiracy (Count III) case where ICMA (International City/County Management Association), a professional association, its Ethics Investigator Jessica Cowles, and several of their Board Members abused their power and engaged in a personal vendetta to destroy Plaintiff's future in municipal government when they "publicly censured" him by issuing a press release to the media on July 5, 2022 (Ex. 1) and a separate, more detailed newsletter to its members that was also placed on their website (which remains on the website to the present day)(Ex. 2). Both of these documents included false and defamatory statements falsely accusing Plaintiff of lacking integrity, being dishonest, acting unlawfully, and

being unethical (see Exs. 1-2)[1]. None of these factual statements were remotely true, and they destroyed Plaintiff's professional reputation. Defendants' motion for summary disposition as to ICMA, the 13 Board Members who voted to issue the public censure, and the ICMA ethics "investigator" (Jessica Cowles) and Board Member (Victor Cardenas) who drafted the public censure should be denied in its entirety.

II. THE FACTS

1. Plaintiff James Freed is a highly successful 39-year-old City Manager for the City of Port Huron, a role he has held since 2014. In 2016 he was named to Crain's Detroit Magazine's Top 40 Under 40 list, and in January 2022, shortly before Defendants defamed him and destroyed his professional reputation, Plaintiff was selected by his Michigan peers for the 2022 Michigan Municipal Executive ("MME") Community Leadership Award because of his creative ideas having led to financial success for the City of Port Huron. As a college student, he joined ICMA for networking purposes and the resources offered by IMCA to municipal executives and was a member in good standing with ICMA's highest designation afforded as a "credentialed manager" until the events of this lawsuit. He was also a member of the Ethics Committee for the MME in 2016-2017, which applied the same ICMA Code of Ethics to non-ICMA MME members. He was a heavily recruited executive who was a top candidate for city manager positions with much larger municipalities that pay very large salaries, and now because of the public censure he has no future outside of the City of Port Huron (Ex. 4 - Pl. Inter. Answers).

2. ICMA is a voluntary professional association for municipal executives headquartered in Washington, D.C. that has a code of ethics that applies to all its members (Ex. 5 - Code of Ethics; Exs. 6 (Vol 1) and 7 (Vol II) Cowles dep., pp. 31, 128 and Ex. 8 - Ott dep., p. 11). The Code of

[1] U.S. District Court Judge Shalina Kumar stated: "these announcements reported that Freed issued a 'preemptive declaration to city employees that he would never implement a specific law or policy when it is the manager's duty to do so.' *Id.* They also stated that Freed violated his commitment to 'honesty and integrity.' *Id.* at PageID.26-27" (see Ex. 3, p 4). Defendants failed to inform this Court that Judge Kumar already ruled that there is "a disputed question of fact" as to the claims against Defendant Cardenas based upon his drafting of the defamatory publications (Id at p. 8).

Ethics (the "Code") is comprised of "Tenets" approved by a vote of the members and "Guidelines" approved by the executive board (Ex. 5). Under its own rules, ICMA is not allowed to punish a member for an alleged ethical violation unless it is for conduct barred by one of its Tenets or something that is further explained in the Guidelines (Cowles dep. (Vol. 1), pp. 31-32; Ott dep., p. 12; Perego dep., pp. 95-96). Claims of ethics violations were investigated by Jessica Cowles, then the Ethics Advisor, and her then boss Martha Perego, the Ethics Director (Id at 24, 45). Ms. Perego in turn reported to the Executive Director of ICMA, Marc Ott. A subcommittee of the Executive Board of ICMA, known as the Committee on Professional Conduct ("CPC"), acts on the advice of the Ethics Advisor (Ms. Cowles) and makes a recommendation as to a finding and then a final decision on an ethics review is made by the full Executive Board. Where the facts are unknown or in dispute, the CPC is required to submit the matter to a fact-finding committee of the state affiliate of ICMA, in this case the Michigan Municipal Executives ("MME")(Ex. 9 – Ethics rules; Cowles dep. Vol. 2, p. 36; Ott dep, p. 46). Where there is a proven violation of the rules of ethics, ICMA can issue either a private censure or public censure (Ex. 9). A public censure is only issued where there is a very clear violation of the ethical rules and only for the most serious violations, such as when a member fails to uphold the "public trust" (a violation of Tenet 3), i.e., actions that impinge on "honesty" or "integrity", such as embezzlement of funds or commission of a crime (Id. at 34, 40, 47-48; Ex. 15 – Wolf dep., p. 37). ICMA knows that a public censure for a violation of Tenet 3 can destroy a member's career in municipal government (Cowles dep., pp. 33-34; Ott dep., p. 10; Ex. 15 - Wolf dep., pp. 32-33 ["I would 100 percent say a public censure does tremendous damage to your career and limits future employment opportunities"]; Perego dep., pp. 72-73).

3. Tenet 7 of the Code requires that members be non-partisan and non-political (Cowles dep., p. 114; Ex. 5, pp.3-4 ["shall not participate in political activities to support the candidacy . . . of individuals running for . . . federal offices", "shall not endorse candidates, make financial contributions, . . . participate in fund-raising activities."]; Ex. 37-Perego dep., p. 14). In late 2018, Plaintiff raised concerns with Ms. Perego and Mr. Ott that Ms. Perego was using the

@ICMAEthics Twitter handle to support pro-democrat party political causes, which he believed was improper given her role in enforcing Tenet 7 of the Code (see Ex. 11; Cowles dep., p. 114). His letter assumed that she was not a member of ICMA and thus not subject to the Code, but he politely asked that she either change her Twitter handle to disassociate her posts from ICMA or remove the partisan posts from the @ICMAEthics Twitter account (see Ex. 11). In response, Mr. Ott told Plaintiff that Ms. Perego was in fact an ICMA member but that Tenet 7 did not apply to her because she was an ICMA employee and was not in a government position (Ex. 12; Perego dep., pp. 16-17). Plaintiff shared both letters with his fellow MME members on a confidential listserv available only to MME members, and then he and the MME President had a conference call with Mr. Ott where they questioned whether that decision violated the ICMA Constitution voted on by the members (Pl. dep. pp.127-128). Mr. Ott disagreed with Plaintiff and became very angry during the call (Id).

4. Immediately thereafter, for the first time in his more than a decade long membership with ICMA, Plaintiff was then subjected by Ms. Cowles to two lengthy (4.5 months and 9 months) baseless ethics investigations (Cowles dep., pp. 138-139, 143-144, 147; see Exs. 13 and 14). Because neither of these investigations were based upon any conduct that would state a prima facie case of a violation of the Code, these investigations should never have been started against Plaintiff under ICMA rules (Ex. 9 pp. 4-5). Nonetheless, Ms. Cowles aggressively pursued discipline against Plaintiff to get back at him for his challenge to Ms. Perego (her direct boss). First, Cowles accused Plaintiff of violating the rule against disclosing an ethics complaint because he sent his initial letter to MME members via the Listserv account (Ex. 13). She did this even though she knew his letter was not an ethics complaint—in fact he stated right in the letter that he did not believe the Code applied to Ms. Perego (Exs. 11 and 16), and he made it clear that he did not wish to pursue any ethics complaint against Ms. Perego (Id). Although the Ethics Committee initially moved to discipline Plaintiff at Ms. Cowles' recommendation over this trumped-up charge, cooler heads prevailed and Plaintiff was ultimately cleared 4.5 months later (see Exs. 16, 17). Second,

Ms. Cowles turned the tables on Plaintiff and opened an investigation into Plaintiff's social media accounts and asked that he prove that several photos with various Republican Party public officials were not taken at "campaign events" in violation of Tenet 7 (Ex. 14). Under the ICMA rules, the duty is on the complainant to show that a photo is from a campaign event, not for Plaintiff to prove they were not (see Ex. 9, pp. 4-5). After Plaintiff provided a post-by-post response of his social media photos showing they were not campaign events and provided similar photos of himself with Democratic Party public officials, Ms. Cowles was still not satisfied and assigned the matter to MME to conduct a full-blown fact-finding investigation (Ex. 18). The MME fact finding committee ultimately found no violations and questioned why there was even an investigation, stating it was "not aware of any broad prohibition of being photographed with anyone at the time they are a candidate for elected office" and "[e]ach member of the FFC agrees that we would certainly pose for a similar photograph with any of the elected officials pictured" (Id), and thus Plaintiff was again cleared (Ex. 19).

5. A third investigation against Plaintiff was then started in November 2021 by Ms. Cowles over COVID-19 related issues (Ex. 20). When COVID-19 struck in March 2020, Plaintiff took an aggressive response to attempt to keep his employees safe, including the institution of mask mandates and other preventive measures (Ex. 21, p. 6). In July 2020, a MIOSHA inspector showed up unannounced to perform an inspection as to the City's compliance with the Governor's mask mandates (Id). Despite the fact that the City was in total compliance with the mask mandate, and that there were masks available at all City entrances and all City employees were wearing masks, MIOSHA cited the City for *inter alia*, not following the mask mandate (Id). Governor Whitmer then issued a statewide press release through the Michigan State Police about the City's citation and stated that MIOSHA only cited the "worst offenders" (Id). Plaintiff chose to fight that citation and was ultimately successful, and the case was dismissed in October 2021 (Id). During discovery in the case, the investigator confirmed that there was no direct evidence that the City was not following the mask mandate and that he burned all of his notes and emails regarding the matter at

the direction of his bosses (Id). After the case was dismissed, the case was extensively reported in the local and national media, and there were editorials published about the fact that the burning of documents seemed to conflict with the Governor's pre-election pledge of transparency (Id). In late October 2021, Plaintiff shared one of the news articles with other city managers in Michigan on the MME Listserv (Ex. 22). In response, another member falsely accused him of violating Tenet 7 (Id). Plaintiff criticized the accusation as a "false flagging" (Ex. 22). This exchange occurred only on the confidential listserv, so the dispute was not known to the general public (Ex. 21). Plaintiff also shared a *USA Today* editorial critical of Governor Whitmer's handling of the MIOSHA complaint against the City on private social media with the statement "@gewhitmer, you shouldn't mess with a father who cares about the world his little girl grows up in" (Ex. 23).

6. On November 5, 2021, OSHA adopted an Emergency Temporary Standard ("ETS") that gave employers with 100 or more employees the option of adopting one of two different policies: (1) a policy requiring all employees be vaccinated (a "vaccine mandate"), or (2) a policy requiring all employees who are not vaccinated to be subject to weekly Covid testing (a "testing alternative")(see 86 FR 61402 at 29 CFR 1910.501(d)). Plaintiff, who was fully vaccinated himself and had hosted vaccine clinics for city employees in April 2021, was concerned that if he chose the vaccine mandate option, he would lose employees who had chosen not to be vaccinated (primarily police and fire department employees) that he could not replace; thus, he reassured his employees in the clearest terms possible that he would not force them to be vaccinated, and instead Plaintiff chose the "testing alternative" and created a "vaccine or test policy" for the City of Port Huron and purchased testing kits and lined up vendors to perform the weekly testing (see Ex. 21; Pl. dep., pp. 114-115). On November 5, 2021, he sent an email to his employees that stated:

> I know there has been significant news and information floating around regarding OSHA and a forthcoming vaccine mandate for employers with 100 or more employees.
>
> Municipalities do not fall under the jurisdiction of OSHA. However, we do fall under the jurisdiction of MIOSHA, and they will need to promulgate additional rules if they seek to include us in any future mandate.

> Hear me now, I will never enforce a vaccine mandate upon my employees. I took an oath to protect and uphold the Constitution when I took this position. I will uphold my oath, come what may.
>
> I earnestly believe that one of the many federal judges across this country will issue an injunction soon. I also believe the U.S. Supreme Court will soundly reject this overreach of the administrative state. Laws are made by duly elected members of the U. S. Congress, Senate and signed by the President, not unelected bureaucrats.
>
> I hope I have made my position on this issue clear to you (Ex. 24).

This email was shared on the MME Listserv, and several other managers stated they made the same decision and would not enforce a vaccine mandate on employees (Ex. 21; Ex. 15, Wolf dep., p. 30). The next day, the Fifth Circuit issued an injunction against the ETS, which Plaintiff also shared with the listserv (Ex.21). On January 13, 2022, the U.S. Supreme Court struck down the ETS as unconstitutional. *Nat'l Fed'n of Indep.Bus. v. DOL, OSHA*, 142 S. Ct. 661 (2022).

7. The November 2021 Ethics complaint (Ex. 20) involved three items: (1) the social media post made by Plaintiff where he linked a news article about the City's MIOSHA complaint victory (Ex. 23), (2) the email he sent on the private MME Listserv on the same topic (Ex. 22), and (3) the email Plaintiff sent to City employees telling them that he would not force his employees to receive a COVID-19 vaccine in response to the ETS (Ex. 24). Mr. Ott determined that Ms. Perego should not be involved in the investigation due to Plaintiff's prior concern regarding her (Ott dep., pp.50-51 ["she should not be involved in the investigation or leading it"]). Contrary to Mr. Ott's directive and unknown to him, Ms. Perego played an active role and believed she had no such limit (Perego dep., pp. 25-26). Prior to the start of the investigation and despite the requirement that a member be presumed innocent, Ms. Perego expressed bias against Plaintiff and told Ms. Cowles, "This guy is really unbelievable" (Ex. 25; Perego dep., pp. 32-35). Mr. Ott testified that this was "an unfortunate comment. One that she shouldn't have made" (Ott dep., p. 54).

8. When Ms. Cowles called Plaintiff to inform him that he was now being subjected to a third investigation, this time over his email to his employees, he demanded to know how his email could

be construed as an ethics violation (Pl. dep., pp. 55-57). When Ms. Cowles refused to tell him, he responded "I don't have time for this IMCA bullsh!t" (Id). Under ICMA protocols, because of the devastating effect an ethics violation can have on the career of a municipal executive, it is often the case that the target of a complaint reacts emotionally, and part of Ms. Cowles' job expectations was to be empathetic with the person and to not hold such an emotional reaction against the person (Cowles dep.., pp. 163-164). Nonetheless, when Ms. Cowles reported Plaintiff's reaction to Ms. Perego, Ms. Perego directed Ms. Cowles "someone that unprofessional doesn't need to be part of ICMA" (Ex 26). Mr. Ott testified that this type of bias was the exact reason he did not want Ms. Perego involved in the investigation (Ott dep., p. 57).

9. In various parts of the country, including the District of Columbia, a vaccine mandate had been issued to employers, but no such mandate existed in Michigan. Ms. Cowles mistakenly believed that Michigan did in fact have a vaccine mandate and that the ETS was also a vaccine mandate (Cowles dep., Vol. 2, pp. 32, 37, 39-40). She also mistakenly believed the prior MIOSHA complaint was because Plaintiff had failed to follow vaccine protocols, which, as this Court is aware, did not exist in Michigan (Id at p. 40). As a result, Ms. Cowles sent a lengthy list of questions to Plaintiff that made it clear that she believed that Plaintiff was required to or should have implemented a vaccine protocol for his employees (e.g., she asked Plaintiff to explain how his email "conflict[s] with your risk management responsibilities as the CAO" and "expose[s] the city to future liability", and "send the message to your employees you have no intention of implementing a law as required to do in a CAO position")(Ex. 27). She also questioned Plaintiff about the amount of legal fees expended to defend the MIOSHA complaint, making it clear that Ms. Cowles believed that the City was guilty and should not have fought the MIOSHA citations, which is not an ICMA ethics issue and was not part of the complaint (Id).

10. In response to the listserv exchange over the sharing of the news article (Ex. 22) and the social media post regarding a different news article (see Ex. 23), Plaintiff pointed out that the Code specifically states that "[m]embers share with their fellow citizens the right and responsibility to

voice their opinion on public issues" (Ex. 5 p. 4), that his social media account was restricted to friends only, and the listserv exchange was on a confidential forum limited to members; thus, there was nothing wrong with either post (Ex. 21). ICMA agreed that neither post violated Tenet 7 (Perego dep., p. 61). In response to the allegations that he violated the Code by telling his employees he would not force them to be vaccinated, Plaintiff explained that ETS gave him the option to choose either a vaccine mandate or a testing option, and his email was not an indication that he was refusing to follow the law, as he had chosen the testing option (Ex. 21). He also provided proof that he was planning to implement the testing option—he had a draft policy, purchased testing kits, and sourced a vendor to do the testing in case the ETS was adopted by MIOSHA (Id). He also pointed out that he was correct—the ETS had already been struck down by the Courts (Id). Unfortunately, Ms. Cowles chose not to review the veracity of Plaintiff's claims and testified that **she did absolutely no investigation into the facts** (Cowles dep., Vol II, p. 36). Ms. Cowles, Ms. Perego and CPC Chair Ms. Molly Mehner were unaware that the ETS did not mandate employers to have a vaccine mandate, were unaware that the ETS did not apply to City employees unless and until it was adopted by MIOSHA, were unaware that MIOSHA had not implemented a vaccine mandate, and were unaware, even though Plaintiff told them, that in January 2022 the Supreme Court struck down the ETS as unconstitutional (Cowles dep., pp.108-109, 111-112; Vol 2, p. 46; Perego dep., pp. 66-69, 76; Mehner dep., pp. 43-44). ICMA was also unaware that the policy decision for City employees under the Port Huron City Charter and Ordinances was a decision for Plaintiff, and not his City Council, so his email was a simple reflection of his decision (Mehner dep., pp 46-47; Ex. 21). When Mr. Ott later found out that his subordinates did no investigation, he testified he expected them to do an investigation "as they always do" (Ott dep., p. 45). Moreover, under ICMA rules, if the facts are in dispute, or if the investigators do not have the necessary information, ICMA is required to send the matter to MME for a fact-finding hearing (Ex. 9; Perego dep, pp. 70-71). Here, ICMA, at Ms. Cowles' recommendation, decided not to send the matter for a fact-finding hearing (Cowles dep., Vol II,

pp. 77-78), undoubtedly because the last time the fact-finding committee supported Plaintiff and MME recently gave him a major award. Both Mr. Ott and Ms. Perego agreed that this decision violated ICMA rules and was very concerning (Ott dep., pp. 47-48 ["Of course I'm concerned when the rules aren't followed"]; Perego dep., p. 49 ["it makes me nervous when we don't follow the Rules of Procedure"]). Ms. Mehner agreed that there were important missing facts the CPC needed but the CPC did no investigation (Mehner dep., pp. 46-47, 56, 69).

11. On February 2, 2022, less than one month after Plaintiff was given the Executive of the Year award by MME, the CPC, with Ms. Perego and Mr. Ott both present, voted to publicly censure him for violating Tenet 3—breach of the public trust, a violation usually reserved for only the worst criminals (Ex. 28; Perego dep., pp. 38-39). There was some confusion as to whether the vote included the vaccine email, but Ms. Perego, who wasn't even supposed to be involved, intervened and pushed to make sure it was (Perego dep., p. 43). Plaintiff then retained counsel and in a lengthy letter asked that the CPC reconsider its decision (see Ex. 21), pointing out that his email to employees was proper legal position to take and providing numerous supporting exhibits backing up his position (Ex. 21). The CPC rejected the request by letter dated April 20, 2022 (Ex. 29), and Ms. Perego admitted she didn't even review it (Perego dep., p. 83). In her letter to Plaintiff, Ms. Cowles made it clear that she and the CPC were operating under the mistaken presumption that Plaintiff's email to employees indicated a refusal to follow some type of Michigan vaccine mandate:

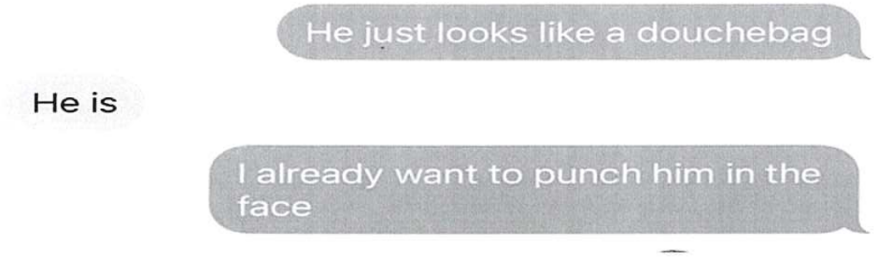
> . . . the CPC wished to share with you that the CPC found your statement in your November 4, 2021 email to city employees that you shared on the Michigan Municipal Executives (MME) listserv, "Laws are made by duly elected members of the U.S. Congress, Senate and signed by the President, not unelected bureaucrats" **was inappropriate because it overlooked the fact that the governor is an elected official** and it undermined the value of the local government management profession (see Ex. 29).

12. Defendants' failure to investigate this issue led to the incorrect conclusion that somehow the Michigan Governor had issued a vaccine mandate (Cowles dep., Vol. 2., pp. 23, 33 ["It seemed to me to be a state regulation"], 39-40; Ott dep., p. 33), and, thus, concluded that Plaintiff was

violating his commitment to "honesty and integrity" by "not enforcing a law itself" (Cowles dep., Vol. 2, p. 32, p. 37 ["The issue was was there a policy or law in place and was it followed", 39-40 [erroneously concluding the earlier MIOSHA citation was due to a vaccine mandate]; Perego dep., p. 72 ["I thought the [CPC]'s issue was . . . a declaratory statement that I won't implement what is the law"]); Mehner dep., p. 28 ["It's my understanding that he was upset about the probe into the City of Port Huron's administration of the vaccine protocol"; p. 67 " . . . what law required that he issue a vaccine mandate to his employees? A. The MIOSHA ETS").

13. Plaintiff then appealed the decision to the full 19 member ICMA Executive Board, and a hearing was scheduled for June 11, 2022 at the ICMA annual meeting in Floria at a resort hotel (Ex. 30). Plaintiff exercised his right to be present and have his legal counsel present his case through a Zoom connection (Ex. 31). CPC Chair Molly Mehner was assigned to present the case against Plaintiff, and once she found out he planned to attend in person, she became "fearful of her well-being" and personal safety, and Plaintiff was falsely accused of having sent her "hostile correspondence"—which turned out to be his email letting staff know that he would be appearing in person for the hearing (Ex. 32 - Mehner dep., pp. 21, 24-26, 106). In fact, Plaintiff flew to Florida despite having a newborn baby at home and arrived in a suit and tie to try to save his career and reputation (Ex. 10 - Pl. dep., pp. 118-119). Unfortunately, what was supposed to be a fair hearing before unbiased board members, was a Salem-witch trial. ICMA has strict rules against board members participating in the ethics investigation or decision making if there is even an appearance of a bias, and a member is presumed innocent until there is a full investigation and a determination by the Executive Board to the contrary (Ott dep., pp. 14-15, 50-53; Cowles dep, pp. 40-41, 43, 162, Vol. 2, pp. 87-88). Ms. Mehner spoke first and falsely claimed that Plaintiff had "past ethical issues"—when in truth, he had no prior ethical violations (Mehner dep., pp. 15-18; Pl. dep., pp. 120-121). When Plaintiff's counsel began providing a 20-minute rebuttal of the charges against Plaintiff, while by all accounts Plaintiff was seated quietly and awaiting his turn

to speak (Mehner dep, p. 20), two Board Members—Pam Antil and William Fraser—exchanged the following text:



(See Exhibit 33 [blue is Fraser, grey is Antil]). ICMA admits that this exchange demonstrates disqualifying personal bias against Plaintiff and is "highly unprofessional" (Perego dep., p. 96).

14. After the hearing, the Board then voted to publicly censure Plaintiff for the vaccine email, the listserv email, and the social media post (Ex. 34). This was the first time in ICMA memory there was a split vote, given that in all other cases the violations were clear cut (see Minutes, showing a 11-7 vote (Ex. 35), with 1 person non-voting and Answers to Interrogatories which tally to a vote of 13-6). None of the Board Members did any investigation themselves into the issue and most were unaware of the ETS details, the fact that the ETS would not apply to Michigan municipal employers unless MIOSHA adopted it, the fact that the ETS allowed a testing alternative, or the fact that the Supreme Court struck down the mandate. Many of the Board Members were strong vaccine mandate advocates—in fact Ms. Antil forced her employees to be vaccinated or lose their jobs (Ex. 36), and Ms. Perego admitted she was in favor of such mandates (Perego dep., p. 79).

15. None of the three items for which Plaintiff was publicly censured were specifically prohibited or addressed in the Tenets or the Guidelines (Cowles dep., pp. 53, 55, 57-58, 69, Vol. 2, pp. 103, 106; Perego dep., p. 84). In the history of ICMA, no member has ever been publicly censured for a social media post, a listserv email, or an email to employees like that which Plaintiff sent to his employees (Cowles dep., p. 24-27, Cowles dep., p. Vol. 2, p. 10; Ott dep., p. 68; Perego dep., pp. 55-57). Other managers who agreed with his vaccine position were not subjected to an investigation or censured (Wolff dep., pp. 30-31). ICMA admits that members have made social

media posts far worse than Plaintiff and have not been subject to any discipline (Cowles dep., Vol. 2, pp. 10-13; Ott dep., pp. 79-81). As to the private listserv exchange, ICMA has never publicly censured a member for any such exchange, and there was a member who sent an email on a listserv far worse than Plaintiff's listserv post who did not receive a public censure, even though he shared the post outside of the listserv (Cowles dep., Vol. 2, pp. 7-9; Ott dep., pp. 85-86; Perego dep., p. 62)). In that case, ICMA determined that he did not violate their rules because it was only shared privately (even though it was shared at a public meeting as well) (Id; Ex. 33), and no one can explain why ICMA reached a different conclusion as to Plaintiff's listserv post that was less egregious and not shared publicly. In fact, both Mr. Ott and Ms. Perego testified that neither saw anything about Plaintiff's listserv post that violated Tenet 3 (Ott dep., p. 84; Perego dep., p. 61).

16. Ms. Cowles, with the assistance of Ms. Perego, Mr. Cardenas, Mr. Ott, and ICMA legal counsel, then drafted a press release that was sent to the Port Huron and Detroit area media (see Ex. 1), and a newsletter was sent to all ICMA members and placed on the ICMA website where it remains to this day (see Ex. 2). These public statements largely mirrored the CPC recommendation for a public censure (Compare Ex. 28 with Exs. 1 and 2). These documents falsely stated that Plaintiff made a "preemptive declaration to city employees that he would never implement a specific law or policy when it is the manager's duty to do so",[2] falsely stated that Plaintiff violated his duty to "honesty and integrity", and falsely stated that he violated the ICMA Code of Ethics (Exs. 1-2; Cowles dep. Vol. 2, p. 115). Defendants ignored all demands for retraction (Ott dep., p. 102).

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[2] The censure also stated that "a member has an affirmative duty to follow the law as outlined in Tenet 3's commitment to honesty and integrity; (2) a member may choose to resign from their position if they find they cannot implement a law" (Ex. 2). This leads to the clear impression that ICMA was accusing Plaintiff of violating a current law, not a future law as they now claim, as the duty to resign would not arise until a law is actually in effect (Wolf dep., pp. 30-31("him taking that stand, or any other manager taking that stand, still having the right to resign when that day comes, to me is not a violation of the Code of Ethics. The code is when you're forced with that choice and you choose to do your job and not follow the law.")

III. ARGUMENT

A. THE CLAIMS AGAINST DEFENDANT ICMA

Plaintiff's lawsuit includes three counts: defamation/libel, false light invasion of privacy and civil conspiracy. The elements of a libel cause of action are (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by publication. *Rouch v. Enquirer & News of Battle Creek (After Remand)*, 440 Mich. 238, 251(1992). A claim of false light invasion of privacy is slightly different than a defamation case because it does not require proof of falsity, the "gravamen of this tort is that a defendant's publication 'attributed to the plaintiff characteristics, conduct, or beliefs that were false and placed a plaintiff in a false position'". *Battaglieri v. Mackinac Ctr for Pub Policy*, 261 Mich App 296, 303-04(2004)(citing *Duran v Detroit News, Inc*, 200 Mich App 622, 632 (1993). Given that Plaintiff is a public figure, both of these claims require proof of actual malice, which Plaintiff can easily provide since Defendants never did the investigation required by their rules and should have known that the claims against Plaintiff were false. *Id* at 304. A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means. *Swain v Morse*, 332 Mich App 510, 530 (2020). Such a claim relies on an underlying tort—in this case the defamation and false light claims—but provides a cause of action against defendants who acted tortiously pursuant to a common design which is clearly what happened here. *Urbain v Beierling*, 301 Mich App 114, 132 (2013).

Defendants' claim that the press release and newsletter are merely expressions of opinion and, thus, are not actionable ignores both the Michigan Supreme Court and United States Supreme Court precedent on this very issue, as well as the next line of the quote in the opinion they cite in their brief. *Ghanan v Does*, 303 Mich App 522, 545 (2014): "Even statements couched in terms of opinion may often imply an assertion of objective fact and, thus, can be defamatory". See also

Smith v Anonymous Joint Enterprises, 487 Mich 102, 127 (2010); *Milkovich v Lorain Journal Co*, 497 US 1, 18-19 (1990). In *Smith*, the Michigan Supreme Court explained the rule where a defendant claims that their statement was only an "opinion" and not a statement of fact:

> However, we note that a statement of "opinion" is not automatically shielded from an action for defamation because "expressions of 'opinion' may often imply an assertion of objective fact." As explained by the United States Supreme Court, the statement "In my opinion Jones is a liar" may cause just as much damage to a person's reputation as the statement "Jones is a liar." If a statement of opinion is about a matter of public concern, it is protected speech under the First Amendment, unless it can be objectively proven to be false. Thus, a statement of opinion that can be proven to be false may be defamatory because it may harm the subject's reputation or deter others from associating with the subject. The dispositive question with regard to the handwritten caption is whether a reasonable factfinder could conclude that the statement implies a defamatory meaning.

Smith v Anonymous Joint Enterprises, 487 Mich 102, 127 (2000)(citing *Milkovich v Lorain Journal Co.*, 497 US 1, 18-19 (1990))(Supreme Court reversed dismissal of defamation case because there is no absolute privilege protecting opinion from application of defamation laws and author and newspaper article implied that petitioner perjured himself, which is sufficiently factual to be susceptible of being proved true or false). The full quote from *Mikovich* is as follows:

> If a speaker says "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar.". [*Id* at 18-19].

In *Smith*, the Michigan Supreme Court found that the statement "alleged misuse of Village Taxpayer Funds [by plaintiff]" "may be defamatory if it implies that defendants have information that would indicate a misuse of taxpayer funds by plaintiff". 487 Mich at 127. In short, the standard to be applied in this case is as follows: "where a statement of 'opinion' on a matter of public concern reasonably implies false and defamatory facts regarding public figures or officials, those individuals must show that such statements were made with knowledge of their false implications or with reckless disregard of their truth." *Milkovich*, 497 U.S. at 20.

Here, the publications clearly state one objectionable fact and imply several objectionable facts that are provable as false, even if they are couched as an "opinion" or the "board determined". First, the press release (which did not disclose it pertained to a vaccine mandate issue) and newsletter (which did) stated Plaintiff made a "preemptive declaration to city employees that he would never implement a specific law or policy when it is the manager's duty to do so", and that a manager is required to resign if they cannot follow the law. This states an alleged fact (or at the very least implies) that Plaintiff acted unlawfully and broke the law and did not enforce a law he had a duty to follow, and by its specific words accuses Plaintiff of being dishonest, lacking integrity, and acting unlawfully. The statements, at the very least, imply that Plaintiff was required to impose a vaccine mandate on his employees and he refused to follow the law—in fact, that is what Ms. Cowles and most of the Board members mistakenly thought. That is a provably false statement for two reasons. First, there was no law that required him to impose a vaccine mandate on his employees. Second, his statement was not a refusal to follow the law because he had two options if that law ever went into effect (a vaccine mandate or a testing option), so he had direct proof that he planned to follow the pending possible future law by implementing the testing option. Thus, it is easily provable in this case that the accusations are factually false. There was no basis for the accusations of unlawful conduct or impugning Plaintiff's ethics, integrity, or honesty.

Second, the press release itself only referenced a "social media post directed to Michigan's [female] Governor" and said that it did not meet ICMA's standards for "integrity", which falsely implied to the press that Plaintiff was dishonest or lacking in moral principles in his social media post. The substance of the post was not disclosed in the press release. As a result, one reader assumed that Plaintiff must done something really bad, such as sending a "dick pic" to the Governor. The accusation that the post was a breach of Plaintiff's commitment to "integrity" is a verifiable fact that can be proven to be false. In fact, ICMA admits that there was no issue with honesty or integrity in this post, and Mr. Ott and Ms. Perego both agreed the post did not violate the Code.

Third, the publication of the finding that Plaintiff violated the Code creates the impression that Plaintiff engaged in unethical acts that violated the terms of the Code. This is also provable as false. Defendants admitted that none of Plaintiff's actions violated the specific language of any of the Tenets of the Code (which are set only by the members and cannot be added to by ICMA without a vote of the members), or the Guidelines to the Tenets (which are promulgated by the Executive Board), and such acts were never previously a violation of the Code.

Thus, each of the following facts alleged in the press release and website newsletter are "provable as false": (1) Plaintiff did not declare that he would not follow a law he had a duty to follow; (2) Plaintiff did not act unlawfully; (3) Plaintiff did not do anything that was dishonest or lacking in integrity; and (4) Plaintiff did not do anything that was unethical or in violation of ICMA Code of Ethics.

For these same reasons, the claim of false light invasion of privacy is even stronger because it does not require proof of falsity, only that the censure "attributed to the plaintiff characteristics, conduct, or beliefs that were false and placed a plaintiff in a false position". *Battaglieri*, 261 Mich App at 303-04. Here, the press release and website newsletter attributed to Plaintiff the false characteristics of being unethical, unlawful, and lacking integrity and honesty.

Moreover, there is ample evidence of actual malice—i.e. that Defendants "had knowledge that the statement was false" or "acted with reckless disregard as to whether the statement was false". M Civ JI 118.06. Defendants were told that the ETS was struck down by the Supreme Court, that the ETS did not apply to municipal employees unless MIOSHA adopted it and MIOSHA never did so, that the ETS allowed a testing alternative to forced vaccinations, that regardless the ETS was struck down by the Supreme Court (a well-publicized fact). Defendants purposely ignored all these facts. In *Smith*, the Michigan Supreme Court reviewed the evidence of actual malice, citing the United States Supreme Court case of *Harte-Hanks v Connaughton*, 491 U.S. 657 (1989) and quoting the following language from that decision that upheld a finding of

actual malice where the defendant does not review available facts prior to publishing a disparaging statement:

> … it is likely that the newspaper's inaction was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of Thompson's charges. Although failure to investigate will not alone support a finding of actual malice, the purposeful avoidance of the truth is in a different category.

See *Smith*, 487 Mich at 124 (quoting *Harte-Hanks*, 491 U.S. at 692)(finding sufficient evidence of actual malice where the defendant "could have readily confirmed the accuracy of the Stewart report by . . . contact[ing] Stewart directly", and thus "the jury had ample evidence from which it could conclude that Barrows acted in purposeful avoidance of the truth").

Here, Defendants did not investigate the issue or send it to factfinding to learn the facts in violation of their own rules. Instead, they ignored all of Plaintiff's and his attorney's communications telling them that they had it wrong. They were willfully blind as to the vaccine mandate issue. This is clearly overwhelming evidence of actual malice. Moreover, they also knew that none of the items Plaintiff was publicly censured violated the Code and had never been found to be in violation of the Code even when others had done far worse.

B. COWLES AND THE BOARD MEMBER DEFENDANTS

In their Brief, Defendants claims that the Board Members cannot be held personally liable and that only the organization can be liable if the organization did something wrong (Def. Brief, p. 8). But the Board Members can be held liable if they have "done something" through their own acts even if the the organization as a whole is responsible. See *Wines v Crosby & Co*, 169 Mich 210, 215 (1912) ("where an officer of an incorporation performs an illegal act resulting in an injury to another, he is liable. Nor does it exonerate him from such liability because the corporation may also be liable"). The fact that Cowles was the person to send the press releases, and the only Board member who helped her was Defendant Cardenas, does not relieve the other Defendant Board Members from liability, as Defendant Cowles could only do such under their direction—and her publications of the public censure mirror the one they approved. See, e.g., *Davis v. Kuiper*, 364

Mich 134 (1961)(reversing grant of summary judgment to defendant board member in defamation case); *Peterson v Robertson*, unpublished opinion of the MD NC, issued Nov 29, 1995 (Docket No 6:95CV00450) (holding individual board members liable for defamatory statements issued by the corporation that they authorize or ratify)[3]; *Tumbarella v Kroger Co*, 85 Mich App 482, 496 (1978)("The general rule is that one who publishes a defamatory statement is liable for the injurious consequences of its repetition where the repetition is the natural and probable result of the original publication"); *Cole v Doe*, 77 Mich App 138, 142-43 (1977)(viable claim against a defendant who made defamatory statements where it was foreseeable that it "would ultimately mean publication in a Michigan paper like the Detroit News"); *In re Simmons*, 248 Mich 297 (1929)("'Where defendant furnished the information upon which a libel was based, and documents in support thereof, to a[n individual], knowing that the latter intended to publish the story, he caused the defamatory matter to be published . . . .'") (quoting *Valentine v Gonzalez*, 179 NY Supp 711 (1920)); *Kilborn v Amiridis*, unpublished opinion of the ND Ill, issued Feb 15, 2013 (Docket No. 22 C 475)(helped draft allegedly defamatory/false light document).

As set forth above, the Board members who voted to publicly censure Plaintiff were fully aware of the basis of the proposed censure and knew that that it would be published to the outside world because their rules required it. All of them were told that Plaintiff was not acting unlawfully, untruthfully, or without integrity and that he had not violated the Code, but they voted to censure him regardless without doing the required investigation/fact finding committee, and thereafter refused to retract the public censure. As for Cardenas, he actively participated in the drafting of

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[3] Defendants also cite to the case of *James v HRP, Inc*, 852 F Supp 620, 627-628 (WD Mich 1994), which itself relied upon *Covell v Spengler*, 141 Mich App 76, 85 (1985) for the principle that a corporate official cannot be held liable unless he was "acting in their own interest personal interest". However, *Covell* made that ruling dealing with a claim of "tortious interference", because a party to a contract cannot be sued in tort for interfering with its own contract. That holding is misplaced in a defamation claim. See *Davis*, 364 Mich 134 (Michigan Supreme Court ruling that a Board member can be sued for defamation); *Moellers N Am v MSK Covertech*, 912 F Supp 269, 271-72 (WD Mich 1995)(*Covell* should not be read to stand for the general proposition that corporate officers can never be held liable for torts committed on behalf of their corporate employers").

the defamatory publication despite knowing there was no vaccine mandate in Michigan, and the Court already ruled there is an issue of fact on that issue (see Ex. 3). All were part of the common scheme to defame Plaintiff, which is sufficient to support a civil conspiracy claim.

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DATED: Sept. 5, 2024

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause on September 5, 2024, by electronic mail.

/s/ Theresa A. Messing