

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

JOSEPH W. COTCHETT (SBN 36324)
jcotchett@cpmlegal.com
ADAM J. ZAPALA (SBN 245748)
azapala@cpmlegal.com
COTCHETT, PITRE & McCARTHY, LLP
840 Malcolm Road
Burlingame, California 94010
Telephone: (650) 697-6000
Facsimile: (650) 692-3606

Attorneys for Plaintiff

**IN THE AMERICAN ARBITRATION ASSOCIATION
SAN FRANCISCO REGIONAL OFFICE**

Michael Ogaz;

Plaintiff,

v.

**The City of Milpitas; City Manager, Thomas
C. Williams; and Councilmember Debbie
Giordano.**

Defendants.

Case No.

**COMPLAINT FOR DAMAGES AND
OTHER RELIEF; DEMAND FOR
ARBITRATION**

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

	Page
I. INTRODUCTION	1
II. THE PARTIES.....	3
A. Plaintiff	3
B. Defendants	3
III. JURISDICTION AND VENUE	4
IV. FACTUAL ALLEGATIONS	4
A. The City of Milpitas’s Governance Structure	4
B. Plaintiff Ogaz’s Exemplary Service as City Attorney	4
C. Plaintiff Ogaz Submits Several City Attorney Office Budgets Without Objection.....	5
D. Several High-Profile Employees Leave the City of Milpitas as a Result of Defendant Williams’s Conduct.....	5
E. The McHarris Workplace Complaint.....	6
F. The EEOC Charge and Lawsuit Concerning Age Discrimination	7
G. Plaintiff Michael Ogaz Engages in Protected Activity	8
H. Defendants Retaliate Against Plaintiff Ogaz for Engaging in Protected Activity ...	8
I. Defendants’ Pretextual Termination of Plaintiff Ogaz for “Budgetary” Reasons.	10
J. Defendants Admit that the Review Was Motivated by Plaintiff Ogaz’s Engagement in Protected Activity	12
K. Defendants’ Sham Investigation into Williams’s Workplace Conduct	13
V. CONDITIONS PRECEDENT TO FILING ACTION	14
VI. CAUSES OF ACTION	15
FIRST CAUSE OF ACTION AGAINST DEFENDANT CITY OF MILPITAS (Retaliation under California Gov. Code §12940(h)).....	15
A. Plaintiff Ogaz Opposed Unlawful Conduct	15
B. Defendants Perceived Plaintiff Ogaz as Engaged in Protected Activity	16
C. Plaintiff Ogaz Participated in a Proceeding under the Act	16

1 D. Direct and Circumstantial Evidence of a Causal Connection between Plaintiff
 Ogaz’s Protected Activity and His Discharge Exists.....16

2 SECOND CAUSE OF ACTION AGAINST ALL DEFENDANTS
 (Violations of Whistleblower Protection Laws, Cal. Lab. Code §1102.5(b))17

3

4 THIRD CAUSE OF ACTION AGAINST DEFENDANT CITY OF MILPITAS
 (Violations of California Constitution, Art. I, §2)18

5 VII. PRAYER FOR RELIEF19

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 Plaintiff alleges as follows:

2 **I. INTRODUCTION**

3 1. Plaintiff Michael Ogaz brings this action against Defendants, the City of Milpitas,
4 City Manager Thomas C. Williams, and Councilmember Giordano for unlawful termination of his
5 employment as City Attorney for the City of Milpitas. Plaintiff Ogaz brings this lawsuit under
6 Cal Gov. Code §12940(h) for a retaliatory discharge; Cal. Lab. Code §1102.5(b) for a retaliatory
7 discharge for whistleblowing activity, and Cal. Const. Art. I §2 for a retaliatory discharge in
8 violation of his free speech rights.

9 2. Plaintiff Ogaz was hired as head City Attorney on October 15, 2007, and served
10 with distinction in this position for 7and ½ years. Throughout his tenure, Plaintiff Ogaz
11 performed his job with excellence and received positive performance reviews from the City
12 Council. Neither the City Manager nor the City Council expressed any concern about Plaintiff
13 Ogaz’s performance or the City Attorney Office’s budget prior to the events that led to his
14 termination.

15 3. Plaintiff Ogaz was terminated from his position of City Attorney effective July 1,
16 2015 after raising concerns about the discriminatory and unethical conduct of Defendant City
17 Manager Thomas C. Williams and, as several news outlets have reported, advocating for an
18 investigation into that conduct.

19 4. After a series of personnel complaints and high-level employee departures from
20 the City of Milpitas due to conflicts with Defendant City Manager Thomas Williams, on or about
21 April 3, 2015, Mr. Steve McHarris, the former City Planning Director, filed yet another
22 workplace complaint against Defendant Williams (“McHarris Complaint”). He alleged, among
23 other things, that Defendant Williams engaged in racial harassment by using racial slurs, age
24 discrimination, defamation, and unethical conduct with developers. Plaintiff Ogaz reviewed the
25 complaint, was concerned about its serious allegations (especially against the backdrop of the
26 number of other personnel issues reported against Defendant Williams), and, as several news
27 outlets have reported, advocated for launching a serious and robust investigation into these
28 disturbing claims and Defendant Williams’s conduct. Plaintiff Ogaz informed the Mayor of the

1 serious allegations and scheduled a Special City Council meeting to inform the City Council of
2 the situation and express his opposition and the need to conduct a thorough investigation.

3 5. The very next day, in response to this complaint and Plaintiff Ogaz's opposition,
4 Defendant Williams unsuccessfully attempted to terminate Mr. McHarris, the original
5 complainant, and verbally threatened to have Plaintiff Ogaz disbarred. After discovering that
6 Plaintiff Ogaz intended to launch a thorough investigation into the complaint and Defendant
7 Williams's conduct, Defendant Councilmember Debbie Giordano, at the behest of Defendant
8 Williams, immediately retaliated against Plaintiff Ogaz by adding an agenda item to the City
9 Council's meeting to evaluate the performance of Plaintiff Ogaz. Later, despite claiming that
10 Plaintiff Ogaz's termination was motivated by budgetary concerns, Councilmember Giordano
11 admitted to a reporter that she launched the review of Plaintiff Ogaz's performance because he
12 had engaged in protected activity and sought to investigate Defendant Williams. Plaintiff Ogaz
13 was subsequently terminated.

14 6. Defendant Williams himself also directly informed Plaintiff Ogaz that he intended
15 to retaliate against him and perceived Plaintiff Ogaz as engaged in protected activity. In addition
16 to verbally threatening to have Plaintiff Ogaz disbarred, at the City Council meeting on this topic,
17 Defendant Williams stated that Plaintiff Ogaz's conduct in calling for a robust investigation had
18 put him "in the crosshairs." *See Milpitas City Manager Blamed for Toxic Work Environment, San*
19 *Jose Inside*, attached hereto as Exhibit A ("Ex. A"). Most striking, shortly after the McHarris
20 Complaint, Defendant Williams said to Plaintiff Ogaz: "I'm going to get you, Mike." When
21 Plaintiff Ogaz asked if this meant that Defendant Williams was going to retaliate against him,
22 Defendant Williams responded, "Yes, you bet."

23 7. As a result of his termination, Plaintiff Ogaz has suffered lost back wages,
24 compensatory damages, losses to his CalPERS retirement, lost future wages and emotional
25 distress, as well as other damages to be proved at trial.

1 **II. THE PARTIES**

2 **A. Plaintiff**

3 8. Plaintiff Michael Ogaz was the City Attorney for the City of Milpitas from
4 October 15, 2007 to July 1, 2015. After seven and a half years of outstanding service, the City
5 Council for the City of Milpitas terminated Plaintiff Ogaz’s employment because he engaged in
6 protected activity under Cal Gov. Code §12940(h); Cal. Lab. Code § 1102.5(b), and Cal. Const.
7 Art. I §2.

8 **B. Defendants**

9 9. The City of Milpitas is a general law city, located in the County of Santa Clara,
10 California. The City is governed by a five member City Council, comprised at the time by Mayor
11 Jose Esteves, Vice Mayor/Councilmember Carmen Montano, Councilmembers Debbie Giordano,
12 Garry Barbadillo, and Marsha Grilli. The City of Milpitas is home to approximately 73,672, and
13 employs 383 full-time and 226 part-time employees. The City’s website describes the City’s
14 form of government as “council/city manager.”

15 10. Defendant City Manager Thomas Williams has been the City Manager for the City
16 of Milpitas since September 2005. The City Manager is, by City Code, the Chief Executive
17 Officer (“CEO”) of the City and manages the City’s day-to-day operations. *See* Milpitas
18 Municipal Code Title VI-101-2.02. All of the various City Departments and their Heads report
19 directly to Defendant Williams. *See Id.* at VI-3-2.00, 3.00. Defendant Williams is also the head
20 Human Resources Officer for the City of Milpitas. This means, with very few exceptions,
21 Defendant Williams has authority over the hiring and firing of City employees and personnel.
22 *See Id.* at 2.03. As alleged herein, Defendant Williams was an aider and abettor in the scheme to
23 retaliate against Plaintiff Ogaz and have him terminated.

24 11. Defendant Councilmember Debbie Giordano is a Councilmember for the City of
25 Milpitas. As alleged herein, Councilmember Giordano was a primary actor in the scheme to
26 retaliate against Plaintiff Ogaz and have him terminated.

1 **III. JURISDICTION AND VENUE**

2 12. The American Arbitration Association (“AAA”) has jurisdiction over this action
3 pursuant to Plaintiff Ogaz’s “Agreement for Employment of City Attorney,” which specifies that
4 AAA shall have jurisdiction for any and all disputes arising out of Plaintiff Ogaz’s employment
5 with Defendant City of Milpitas.

6 **IV. FACTUAL ALLEGATIONS**

7 **A. The City of Milpitas’s Governance Structure**

8 13. The City of Milpitas is governed by an elected five-member City Council and City
9 Manager, appointed by the City Council, who manages its day-to-day operations. At present, the
10 City of Milpitas City Council is comprised of Mayor Jose Esteves, Vice Mayor/Councilmember
11 Carmen Montano, and Councilmembers Debbie Giordano, Garry Barbadillo, and Marsha Grilli.
12 The City Manager is Thomas Williams. See Milpitas City Council, *available at*:
13 http://www.ci.milpitas.ca.gov/government/council/city_council.asp; *see* Milpitas Municipal Code
14 Title VI-101-2.02. Notably, the only other position for which the City Council has exclusive
15 power to appoint and remove is the City Attorney. *Id.* at VI-101-2.03.

16 14. The City Manager acts as the Chief Executive Officer and as an agent of the City
17 Council. The City Manager is responsible for the day-to-day operations of the City, including
18 dealings with administrative staff and the hiring and firing of employees. *Id.* at 2.02, 2.03. The
19 City Manager manages the organization of city government and is responsible for creating annual
20 budgets and providing them to the City Council. *Id.* at 2.04, 2.05.

21 **B. Plaintiff Ogaz’s Exemplary Service as City Attorney**

22 15. Plaintiff Ogaz was hired as the City Attorney for the City of Milpitas on October
23 15, 2007. He served in this capacity for seven and a half years with uniformly positive
24 performance reviews by the City Council. Plaintiff Ogaz had informed the City Council when he
25 was hired that he intended to stay in the City Attorney job for at least 10 years, and hoped to retire
26 with the City.

1 **C. Plaintiff Ogaz Submits Several City Attorney Office Budgets Without**
2 **Objection**

3 16. Throughout his tenure, Plaintiff Ogaz submitted approximately six proposed
4 budgets, all of which were approved by the City Manager and the City Council without objection
5 or criticism.

6 17. At no point prior to the events that led to Plaintiff Ogaz’s unlawful termination did
7 either the City Manager or the City Council raise concerns about the budget of the City
8 Attorney’s Office.

9 18. In January 2015, prior to the events giving rise to Plaintiff Ogaz’s unlawful
10 termination, Plaintiff Ogaz submitted a preliminary budget to the City Council without objection.
11 The proposed budget even included an expansion of the City Attorney’s Office, by proposing to
12 add a Deputy City Attorney position. In January, Defendant Williams supported Plaintiff Ogaz’s
13 proposed budget for Fiscal Year 2015-2016, including with the addition of a new position. Only
14 a few months later and after having engaged in protected activity, Defendants terminated Plaintiff
15 Ogaz, citing pretextual budgetary concerns, despite not previously objecting to his proposed
16 budget. Defendants’ abrupt change in course regarding the City Attorney’s budget, in addition to
17 all of the other facts outlined in this complaint, demonstrate that his termination was pretextual
18 and not for the stated “budgetary reasons.”

19 **D. Several High-Profile Employees Leave the City of Milpitas as a Result of**
20 **Defendant Williams’s Conduct**

21 19. Defendant Williams, and by virtue the City of Milpitas, have a long history of
22 engaging in retaliatory conduct against employees engaged in protected activity.

23 20. In an article entitled *Milpitas City Manager Blamed for Toxic Work Environment*,
24 San Jose Inside “spoke to a dozen current and former employees who blame Williams for creating
25 a hostile work environment that’s led to unprecedented turnover of department heads over the
26 past several years.” *See* Ex. A. According to the article, Williams’s conduct led to the departure
27 of longtime Public Works Director/City Engineer Greg Armenderiz. His replacement, Jeff
28 Moneda, also resigned allegedly due to Defendant Williams’s conduct. Diana Barnhart, the

1 former Planning and Neighborhood Services Director, left under similar circumstances.
2 Defendant City of Milpitas has gone through five fire chiefs in the past six years alone. As one
3 person put it, the “body count is pretty high.” Ex. A. Carmen Valdez, the City’s former Human
4 Resources director, also left after harassment by Defendant Williams. Ms. Valdez has filed an
5 EEOC charge against the City of Milpitas and Thomas Williams for retaliation. Steve McHarris
6 also left, alleging a hostile work environment created by Williams.

7 21. In another article entitled *Milpitas City Hall Loses Another Department Head*, the
8 San Jose Inside reported that Defendant Tom Williams’s “angry outbursts have allegedly scared
9 off a litany of staffers.” In addition to the department heads listed above that left employment
10 with the City, the article states “[t]here are more—not to mention a steady clip of mid-
11 management turnover” See *Milpitas City Hall Loses Another Department Head*, San Jose
12 Inside, attached hereto as Exhibit B (“Ex. B”).

13 **E. The McHarris Workplace Complaint**

14 22. On or about Friday, April 3, 2015, Steve McHarris, the City’s now-former
15 Planning Director, filed yet another workplace complaint against Defendant Williams. According
16 to newspaper articles and other public accounts, the complaint raised, among other things,
17 allegations that Defendant Williams engaged in racial harassment by using racial slurs, age
18 discrimination, defamation, and unethical conduct with developers. Mr. McHarris filed the
19 complaint with the City’s Human Resources Director, Carmen Valdez, who was still employed at
20 the time. Valdez brought the McHarris complaint to the attention of then-City Attorney, Plaintiff
21 Ogaz.

22 23. Shortly after McHarris filed his complaint, Defendant Williams continued his
23 pattern and practice of retaliatory conduct against individuals engaged in protected activity.
24 Despite being inconsistent with good human resources practices, City Manager Williams—the
25 subject of the McHarris complaint—was informed of it only days after it was filed, including the
26 identity of the complainant. On information and belief, certain members of the City Council
27 leaked the personnel complaint to Defendant Williams. On April 6, 2015—the first business day
28 after the McHarris Complaint—Defendant Williams filled out a “Personnel Action Form”

1 purporting to terminate McHarris’s employment in response his own complaint—a blatant (and
2 misguided) attempt at retaliation by Defendant Williams. *See* Emails from Tom Williams to
3 Various City of Milpitas Staff Seeking to Retaliate Against McHarris, Exhibit C (“Ex. C”).

4 **F. The EEOC Charge and Lawsuit Concerning Age Discrimination**

5 24. The McHarris Complaint was not the first to make allegations regarding age
6 discrimination against Defendant Williams and the City of Milpitas. In the spring of 2015—
7 shortly before the events giving rise to Plaintiff Ogaz’s unlawful termination—the federal agency,
8 the Equal Employment Opportunity Commission (“EEOC”), sought to investigate charges of age
9 discrimination against the City and Williams. On September 28, 2015, after an agency
10 investigation, the EEOC filed a lawsuit against the City of Milpitas under the Age Discrimination
11 in Employment Act (“ADEA”). The lawsuit alleges that Defendants City of Milpitas and
12 Williams engaged in age discrimination against a number of employment candidates, specifically
13 alleging that Defendants failed to hire Rhonda Anderson, Felila Toleafoa, Margaret Espinoza and
14 Rosavida Galindez Penas because of their age, despite higher scores from members of the
15 interview panel. *See* Complaint, *U.S. Equal Employment Opportunity Commission v. City of*
16 *Milpitas*, available at: [http://www.sanjoseinside.com/wp-content/uploads/2015/10/Milpitas-](http://www.sanjoseinside.com/wp-content/uploads/2015/10/Milpitas-EEOC-lawsuit.pdf)
17 [EEOC-lawsuit.pdf](http://www.sanjoseinside.com/wp-content/uploads/2015/10/Milpitas-EEOC-lawsuit.pdf).

18 25. The EEOC’s lawsuit against the City of Milpitas indicates that Mr. Williams’s
19 conduct is among the most clear-cut and egregious that the EEOC has seen. When deciding
20 whether to file a lawsuit pursuant to an employee charge, the EEOC considers, among other
21 things, the seriousness of the violation and the wider impact the lawsuit could have on EEOC
22 efforts to combat workplace discrimination. *See* “Litigation Procedures,” available at:
23 <http://www.eeoc.gov/eeoc/litigation/procedures.cfm>. Due to limited resources, the EEOC brings
24 suit in only a very small number of the most serious, impactful cases. Indeed, in fiscal year 2014,
25 the EEOC brought lawsuits or intervened in only 0.188% of charges, under two-tenths of one
26 percent of total charges.¹ Additionally, this number has remained relatively constant over the last

27 ¹ In FY 2014, the EEOC received 88,778 total charges. Also in FY 2014, the EEOC filed suit on
28 only 167 charges. *See* “Charge Statistics,” available at:
<http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm>; “Litigation Statistics,” available
at: <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm>.

1 five years.² Accordingly, the EEOC's charges against the City of Milpitas demonstrate not
2 merely a potential violation of anti-discrimination laws, but a potential violation so egregious and
3 injurious to workplace equality that it merited intervention, an action limited to less than two-
4 tenths of one percent of charges.

5 **G. Plaintiff Michael Ogaz Engages in Protected Activity**

6 26. Because of the serious allegations contained in the McHarris Complaint, the
7 workplace civil rights issues that they raised, the credibility of the complainant and the other
8 workplace issues alleged against Defendant Williams in the past, Plaintiff Ogaz immediately
9 began an investigation into the matter and brought the issue to the City Council's attention.

10 27. Plaintiff Ogaz sought to oppose the potentially unlawful conduct raised in the
11 McHarris Complaint and to participate in the investigation and any subsequent proceedings. The
12 McHarris Complaint and Plaintiff Ogaz's opposition and participation also took place against the
13 backdrop of the high-level departures of Department heads and other employees related to
14 allegations of harassment by Defendant Williams, *see supra* Sections E and F, and against the
15 backdrop of the EEOC age discrimination charges, investigation and subsequent lawsuit against
16 the City by the EEOC—one of the issues raised in the McHarris Complaint.

17 **H. Defendants Retaliate Against Plaintiff Ogaz for Engaging in Protected**
18 **Activity**

19 28. On or about April 3, 2015, Steven McHarris filed his workplace complaint against
20 Williams. In light of the serious issues raised in the McHarris Complaint as well as the other
21 personnel complaints discussed *supra*, Plaintiff Ogaz asked for a meeting on a Saturday with the
22 City's Human Resources Director, Carmen Valdez, and Mayor Jose Esteves to discuss the issue
23 and investigate the matter.

24 29. On or about April 6, 2015, the following Monday, at the behest of Plaintiff Ogaz, a
25 Special Council Session was set for April 7, 2015 to discuss the McHarris Complaint and
26

27 ² In FY 2013, the EEOC brought charges in roughly 0.158% of total charges. In FY 2012, the
28 EEOC brought charges in roughly 0.156% of total charges. In FY 2011, the EEOC brought
charges in roughly 0.3% of total charges. In FY 2010, the EEOC brought charges in roughly
0.27% of total charges.

1 Defendant Williams’s conduct. The information regarding the McHarris Complaint and the
2 Special Council Session had already been leaked to Defendant Williams.

3 30. On or about April 7, 2015—the day of the Special Council Session to discuss the
4 McHarris Complaint—Defendant Williams visited Plaintiff Ogaz and requested that he produce
5 the City Council tapes from closed sessions wherein the Council evaluated Plaintiff Ogaz’s
6 performance, despite the fact that the McHarris Complaint and Defendant Williams’s conduct had
7 nothing to do with Plaintiff Ogaz’s performance. Plaintiff Ogaz rebuffed Defendant Williams and
8 told him that only the City Council was entitled to see those performance evaluations under state
9 law. Only a short time later on the same day—in an extraordinary twist of coincidence—Plaintiff
10 Ogaz received a written email request from Councilmember Debbie Giordano to provide her with
11 the same tapes containing the performance evaluations that Defendant Williams had just
12 requested. Evidence of this email chain is attached hereto and incorporated herein by reference as
13 Exhibit D (“Ex. D”).

14 31. In point of fact, this series of events was no coincidence. After Defendant
15 Williams became aware of the personnel investigation, he immediately began enlisting the
16 support of the City Council to head-off any serious investigation into, or ramifications for, his
17 conduct. On information and belief, Defendant Williams colluded with Defendant
18 Councilmember Giordano to request the performance evaluations from Plaintiff Ogaz as part of
19 Defendants’ effort to retaliate against him.

20 32. Not satisfied with merely obtaining Plaintiff Ogaz’s performance evaluations—on
21 the same day as the Special Council Session to discuss Williams’s conduct—Defendant
22 Councilmember Giordano added an agenda item to that same Council Session to evaluate the City
23 Attorney’s performance. *See* Email from Councilmember Giordano to City of Milpitas Clerk,
24 Exhibit E, (“Ex. E”). As noted above, for the over seven years that Plaintiff Ogaz had served the
25 City, he had received uniformly positive performance evaluations. It was no coincidence that
26 Councilmember Giordano placed an agenda item on the Council meeting to evaluate Plaintiff
27 Ogaz’s performance. This was done to retaliate against Plaintiff Ogaz for his involvement in
28 protected activity.

1 33. As discussed in several articles concerning the toxic work environment at the City
2 of Milpitas, Defendant Williams has difficulty controlling his anger and emotions. In addition to
3 seeking to evaluate Plaintiff Ogaz’s performance in retaliation for his protected activity,
4 Defendant Williams expressly informed Plaintiff Ogaz of his retaliatory intent. In a meeting
5 outside of Williams’s office, he told Plaintiff Ogaz that he planned to retaliate against him.
6 Defendant Williams told Mr. Ogaz: “I’m going to get you, Mike.” Plaintiff Ogaz responded:
7 “Are you saying you are going to retaliate against me?” Defendant Williams responded: “Yes,
8 you bet.”

9 34. Defendant Williams’s remarks came only a short time after he had initially
10 threatened to file a harassment charge against Plaintiff Ogaz for having the audacity to investigate
11 the charges of discrimination in the first place.

12 35. During the Special Council Session to discuss Defendant Williams’s conduct and
13 the McHarris Complaint, Defendant Williams and the City Council clearly perceived Plaintiff
14 Ogaz to be engaged in protected activity and opposition to Williams’s conduct. Defendant
15 Williams pleaded with the City Council to provide him with yet more details about the personnel
16 complaint filed against him and told the City Council that Plaintiff Ogaz had put him “right in the
17 crosshairs.” *See Ex. A.*

18 36. Similarly, the City Council also clearly perceived Plaintiff Ogaz as being engaged
19 in protected activity. As just one example, the City Council excluded Plaintiff Ogaz from
20 subsequent closed session meetings and conversations concerning the McHarris Complaint and,
21 more generally, from discussions about Defendant Williams’s unlawful conduct.

22 **I. Defendants’ Pretextual Termination of Plaintiff Ogaz for “Budgetary”**
23 **Reasons**

24 37. Shortly after engaging in protected activity, as discussed above, Defendants began
25 a process that ended with the termination of Plaintiff Ogaz. Defendant City claimed that Plaintiff
26 Ogaz was terminated for budgetary reasons. Defendants claimed that it could save money by
27 outsourcing the City Attorney Office’s functions to outside law firms. Even if this were true, the
28 motivating factor was Plaintiff Ogaz’s protected activity, not the purported budgetary concerns.

1 The extreme temporal proximity between Plaintiff Ogaz’s involvement in protected activity and
2 the events giving rise to his termination create a strong inference of retaliatory motive by itself.

3 38. While Defendant Councilmember Giordano clearly acted at the behest of
4 Defendant Williams in seeking the performance evaluations of Plaintiff Ogaz shortly after he
5 engaged in protected activity, it was also Defendant Councilmember Giordano that subsequently
6 pushed to form a Council Subcommittee to evaluate the financial impact of in-house versus
7 outside counsel. At the time, no other City department was proposed to have a similar financial
8 review as the City Attorney’s Office. The report on the City Attorney’s Office was prepared by
9 none other than Defendant Williams, despite the obvious conflict of interest he had regarding the
10 matter.

11 39. The singular focus on the City Attorney’s budget appeared strange to several
12 onlookers, including a member of the Council that was not part of Defendant Williams’s and the
13 other Councilmembers’ plan to retaliate against Plaintiff Ogaz. When the City Council discussed
14 Giordano’s request for a budgetary review of the City Attorney’s office, Vice Mayor and
15 Councilmember Carmen Montano was perplexed by the singular focus on Plaintiff Ogaz and his
16 Department. She stated during the Council Session “[i]t just seems to me if we are going to be
17 doing [city department financial reviews] we might as well do the other departments to see if they
18 are not overspending. So, it doesn’t make sense just how we are just, how we are honing in on
19 just one department.” During the same session, Vice Mayor Montano again expressed her
20 concern with targeting only the City Attorney’s office, and stated, “yeah, I just want to make sure
21 that we’re not just picking on them I just want to say if we’re going to do it for one
22 department, let’s do it for all.”

23 40. Despite the obvious conflict of interest given the personnel issues, the McHarris
24 Complaint and Plaintiff Ogaz’s protected activity, Defendant Williams prepared a report for the
25 City Council on financial issues related to the City Attorney’s office. The pretextual report was
26 perfunctory and woefully inaccurate. For example, the report failed to consider several important
27 factors, including inflation and key comparator cities. It also contained explicit factual
28 inaccuracies, including the outrageous claim that “over the past eight years, there are only three

1 occasions where in-house legal counsel was used exclusively.” Though Mr. Ogaz corrected this
2 statement by identifying over a hundred incidents of in-house handling of matters during his
3 tenure, the Council did not question the data or conclusions in Defendant Williams’s analysis.

4 41. The “evidence” gathered to support the pretextual termination merely
5 demonstrated that the City Attorney’s budget increased to a little over \$1 million in 2014 from
6 approximately \$700,000 in 2000—fourteen years earlier. Inflation alone accounted for roughly
7 41% of the increase in costs. Moreover, the focus of the City Council’s inquiry into the City
8 Attorney’s Office changed over time, further impeaching its pretextual reasons for the
9 termination.

10 42. Further impeaching Defendants City of Milpitas and Williams’s claims is the
11 historical City Attorney Office funding and spending. The data shows that, in prior years, it was
12 more expensive to utilize solely outside counsel, rather than a mix of in-house and outside
13 counsel. The figures utterly failed to support the Defendants’ claim that changing to outside
14 counsel would save the City money. The figures show that Defendants’ budgetary reasons for
15 terminating Plaintiff Ogaz were purely pretextual.

16 43. Additionally, throughout Plaintiff Ogaz’s tenure as City Attorney, neither the City
17 Manager nor the City Council had expressed any concerns regarding the cost or workload of the
18 City Attorney’s office. As previously noted, City Manager Williams, with the concurrence of
19 Finance Director Emma Karlen, had already approved the 2015/2016 City Attorney budget,
20 including the addition of the Deputy City Attorney position.

21 **J. Defendants Admit that the Review Was Motivated by Plaintiff Ogaz’s**
22 **Engagement in Protected Activity**

23 44. Despite claiming that Plaintiff Ogaz’s termination was motivated by fiscal
24 concerns, in a moment of candor, the City admitted that its review of Plaintiff Ogaz was
25 motivated by his engagement in protected activity.

26 45. In an interview with a reporter, Defendant Councilwoman Giordano expressly
27 confirmed that the review of Mr. Ogaz’s office was prompted by his call for an investigation into
28 Mr. Williams’s conduct and the McHarris Complaint. Giordano “said she called for the review of

1 Ogaz because she was ‘concerned about the due process and how the [McHarris] dispute was
2 being handled.’” See Quotes from Councilmember Giordano in *City Manager Blamed for Toxic*
3 *Work Environment*, San Jose Inside, Ex. A. This is an extraordinary admission by the City of
4 Milpitas and impeaches its purported reasons for the termination. In this moment of candor,
5 Giordano admitted that the review of Ogaz was not based on “budgetary” concerns.

6 **K. The City’s Sham Investigation into Williams’s Workplace Conduct**

7 46. Rational workplace risk mitigation would have seen the Defendant City hire an
8 outside entity to conduct an investigation into the McHarris Complaint. The Defendant City
9 initially hired an outside law firm to conduct the investigation, but it later fired the law firm and
10 formed its own subcommittee of Councilmembers to conduct the investigation themselves. That
11 subcommittee was made up of Councilmembers beholden to Defendant Williams. The
12 subcommittee conducted a sham investigation into the allegations against Defendant Williams.
13 For example, according to several news outlets, the subcommittee never spoke to Plaintiff Ogaz,
14 Carmen Valdez (the City’s Human Resources Director) or Steve McHarris, the individual filing
15 the complaint that the subcommittee was purportedly “investigating.” See *Milpitas City Manager*
16 *“Praised” After Personnel Investigation*, San Jose Mercury News, attached hereto as Exhibit F
17 (“Ex. F”); see also *All is Hunky-Dory In Milpitas*, San Jose Mercury News, attached hereto as
18 Exhibit G (“Ex. G”).

19 47. A *San Jose Mercury News* article entitled, “Bumbling ‘Defense’ of Embattled City
20 Manager By Council Majority Just Adds Another Cloud Over Tom Williams’ Head”, discussed
21 the sham investigation and asked the rhetorical question: “How could council members avowedly
22 loyal to the city manager do even-handed, believable interviews with the manager’s accusers?”
23 See Exhibit H, attached hereto (“Ex. H”).

24 48. At the conclusion of the subcommittee’s sham “investigation”, it purportedly
25 issued a flowery press release praising the work of Defendant Tom Williams. There were several
26 “quotes” in the press release from members of the City Council. Councilmember Giordano stated
27 “[a]fter reviewing the investigative report, the City Council has more confidence than ever in Mr.
28

1 Williams and his management team and believes that his leadership is continuing to move our city
2 in the right direction.” See Press Release, attached hereto as Exhibit I (“Ex. I”).

3 49. The flowery press release purportedly “issued” by the City of Milpitas appears to
4 have been drafted and concocted by Defendant Tom Williams. As reported in the *San Jose*
5 *Mercury News* and *The Milpitas Post*, almost as soon as the press release was circulated by
6 Defendant Williams’s office, it was rescinded. Defendant Williams contacted newspapers asking
7 for it to be withdrawn. In an email to newspapers, Defendant Williams stated “[a]t this time, I
8 would like to rescind the press release I sent you regarding the results of the city manager
9 investigation from the bogus Steve McHarris complaint.” See Exhibit J (“Ex. J”). On
10 information and belief, Defendant Williams drafted the quotes that were purportedly attributed to
11 the City Council members and had to rescind the press release, in part, because he did not have
12 their authorization to make such quotes on their behalf or to issue the press release in the first
13 instance.

14 **V. CONDITIONS PRECEDENT TO FILING ACTION**

15 50. Plaintiff Ogaz has complied with all required conditions precedent prior to filing
16 this action.

17 51. Plaintiff has complied with the provisions of the California Government Claims
18 Act and other applicable provisions by filing a pre-lawsuit government claim with the City of
19 Milpitas. That claim was rejected by the City of Milpitas on November 25, 2015. In any event,
20 in written correspondence, counsel for Defendants waived any requirement that Plaintiff Ogaz
21 comply with the California Government Claims Act for purposes of this litigation.

22 52. Plaintiff has also complied with any other pre-lawsuit filing requirements,
23 including but not limited to, receiving a right to sue letter from the Department of Fair Housing
24 and Employment (“DFEH”) for the claims covered by this lawsuit.

1 **VI. CAUSES OF ACTION**

2 **FIRST CAUSE OF ACTION AGAINST DEFENDANT CITY OF MILPITAS**

3 **(Retaliation under California Gov. Code §12940(h))**

4 53. Plaintiff hereby reincorporates each and every paragraph and allegation in this
5 complaint as though fully set forth herein.

6 54. Cal. Gov. Code §12940 protects employees from retaliation when engaged in
7 protected activity, or when engaged in activity that the Defendants perceive as protected activity.
8 As alleged herein, (1) Plaintiff Ogaz engaged in protected activity, or the Defendants perceived
9 him as engaged in protected activity; (2) Defendants City of Milpitas and Thomas Williams
10 subjected Plaintiff Ogaz to an adverse employment decision; and (3) there was a causal
11 connection between the two in that Plaintiff Ogaz's engagement in protected activity was a
12 substantial motivating factor in Defendants' decision to discharge Plaintiff Ogaz. Plaintiff Ogaz
13 was harmed by Defendants' conduct and Defendants' conduct was a substantial factor in causing
14 Plaintiff's harm.

15 **A. Plaintiff Ogaz Opposed Unlawful Conduct**

16 55. Plaintiff Ogaz engaged in protected activity by opposing what he believed to be
17 unlawful discrimination under the Act. Plaintiff Ogaz sought to investigate City Manager Tom
18 Williams's engaging in racial harassment through the use of racial slurs and age discrimination in
19 an effort to root out any and all unlawful discrimination within the City. Plaintiff Ogaz also
20 sought to have Defendant Williams's performance evaluated by the City Council given the
21 number of complaints issued against him, including the McHarris Complaint. Plaintiff Ogaz was
22 fired for this opposition.

23 56. Given several high profile personnel departures, the McHarris Complaint, and the
24 EEOC investigation and ultimate lawsuit concerning age discrimination, Plaintiff Ogaz acted
25 reasonably in opposing the conduct and reasonably believed that a violation of the Act had
26 occurred.

27 57. Moreover, pursuant to 2 C.C.R. 11021, Plaintiff Ogaz participated in the
28 proceedings of a local civil rights agency, constituting opposition under the Act. The McHarris

1 Complaint was a personnel complaint filed in accordance the City of Milpitas’s Standing
2 Operating Procedure for Anti-Discrimination and Internal Complaint Procedure. The Human
3 Resources Director, Carmen Valdez, sought the assistance and participation of Plaintiff Ogaz in
4 the local civil rights agency proceeding. Plaintiff Ogaz’s termination was motivated by his
5 participation in this proceeding.

6 **B. Defendants Perceived Plaintiff Ogaz as Engaged in Protected Activity**

7 58. Additionally, Defendants perceived Plaintiff Ogaz to be engaged in protected
8 activity. For example, during the City Council meeting wherein Plaintiff Ogaz sought a robust
9 investigation into the discriminatory conduct of Defendant Williams, Defendant Williams stated
10 that Plaintiff Ogaz had placed him “in the crosshairs” before the City Council. *See* Ex. A.

11 59. Similarly, after the initial Council meeting, the City Council excluded Plaintiff
12 Ogaz from subsequent meetings and conversations concerning the McHarris Complaint and
13 Defendant Williams’s conduct.

14 **C. Plaintiff Ogaz Participated in a Proceeding under the Act**

15 60. In addition to his opposition under the Act, Plaintiff Ogaz participated in a
16 proceeding that is protected under the Act. Plaintiff Ogaz’s participation in the internal
17 investigation into Defendant Williams’s conduct constituted protected activity. Moreover,
18 Defendants were aware that Plaintiff Ogaz was a potential witness to Defendant Williams’s
19 discriminatory conduct. Finally, as alleged *supra*, Plaintiff Ogaz was participating in a
20 proceeding of a local civil rights agency.

21 **D. Direct and Circumstantial Evidence of a Causal Connection between Plaintiff
22 Ogaz’s Protected Activity and His Discharge Exists**

23 61. Plaintiff Ogaz’s participation in protected activity was a substantial motivating
24 factor in Defendants’ decision to terminate him.

25 62. As alleged *supra*, Defendant Williams directly informed Plaintiff Ogaz that he
26 intended to retaliate against him. Moreover, Defendant Councilwoman Giordano stated in a
27 newspaper article that the Council sought to review Plaintiff Ogaz’s performance for his
28 engagement in protected activity. Moreover, only one day after launching the investigation into

1 the McHarris Complaint, Councilwoman Giordano added an agenda item to the Council session
2 to evaluate the City Attorney's performance, despite having received positive performance
3 reviews throughout his tenure. The fact that Defendant Williams requested the Council tapes
4 wherein Plaintiff Ogaz's performance was evaluated, only to be rebuffed and have Councilwoman
5 Giordano request the tapes on the same day, shows that Williams and the City Council were
6 acting in concert.

7 63. Strong circumstantial evidence also demonstrates that Plaintiff Ogaz's protected
8 activity was a substantial motivating factor in his termination. First, the incredible temporal
9 proximity between Plaintiff Ogaz's protected activity and the events giving rise to his termination
10 are enough to create an inference of retaliatory animus by itself. Second, though just months
11 earlier, Defendant Williams had supported Mr. Ogaz's proposed City Attorney budget that added
12 a deputy city attorney position, Plaintiff Ogaz was terminated almost immediately after he urged
13 the City Council to investigate the performance of Defendant Williams and illegal discrimination,
14 according to news reports.

15 **SECOND CAUSE OF ACTION AGAINST ALL DEFENDANTS**

16 **(Violations of Whistleblower Protection Laws, Cal. Lab. Code §1102.5(b))**

17 64. Plaintiff hereby reincorporates each and every paragraph and allegation in this
18 complaint as though fully set forth herein.

19 65. California Labor Code § 1102.5(b) prohibits an employer or person from retaliating
20 against an employee for disclosing to a person with authority over the employee or another
21 employee who has authority to investigate, discover, or correct the violation or noncompliance,
22 information the employee reasonably believes discloses a violation or noncompliance with a
23 local, state, or federal statute, rule, or regulation.

24 66. Defendants violated Cal. Lab. Code §1102.5(b) by retaliating against Plaintiff
25 Ogaz for disclosing what he reasonably believed to be a violation of state and federal employment
26 and civil rights laws, including the California Fair Employment and Housing Act, Title VII of the
27 Federal Civil Rights Act of 1964, the Federal Age Discrimination in Employment Act, and
28 defamation and unethical conduct with developers.

1 67. At all times relevant to this complaint, the City Council for the City of Milpitas
2 was Plaintiff Ogaz’s employer for the purposes of Cal. Lab. Code §1102.5(b).

3 68. Plaintiff Ogaz provided information to a public body, the Milpitas City Council,
4 regarding reported violations of state and federal employment and civil rights laws as well as
5 unethical conduct with developers when he disclosed the McHarris Complaint to the City
6 Council.

7 69. Plaintiff Ogaz reasonably believed that he was disclosing a violation of the law and
8 unethical conduct when he disclosed the McHarris Complaint to the City Council. Shortly
9 thereafter, the City of Milpitas terminated Mr. Ogaz from his position as City Attorney.

10 70. Plaintiff Ogaz’s disclosure of violations by Defendant Williams was a contributing
11 factor in the Defendant City of Milpitas’s decision to terminate him. As discussed, in an article,
12 Defendant Councilwoman Giordano confirmed that she called for a review of Plaintiff Ogaz
13 “because she was concerned about the due process of how the dispute was being handled. She
14 added that never in her 10 years on the council has she seen a personnel conflict brought up in this
15 way . . .” *See* Ex. A. Moreover, though just months earlier Defendant Williams had supported
16 Plaintiff Ogaz’s proposed City Attorney budget that added a deputy city attorney position,
17 Plaintiff Ogaz was terminated almost immediately after he engaged in protected activity.

18 **THIRD CAUSE OF ACTION AGAINST DEFENDANT CITY OF MILPITAS**

19 **(Violations of California Constitution, Art. I, §2)**

20
21 71. Plaintiff hereby reincorporates each and every paragraph and allegation in this
22 complaint as though fully set forth herein.

23 72. California’s Constitution guarantees that “every person may freely speak, write,
24 and publish his or her sentiments on all subjects...” These protections extend to public
25 employees who speak on a matter of public concern. *See* California Constitution Art. 1 § 2.

26 73. Plaintiff Ogaz’s speech touched on a matter of public concern, as it concerns the
27 socially important issue of illegal discrimination and unethical conduct with developers within the
28 government.

1 74. Plaintiff Ogaz’s interest in disclosing these allegations and in informing the City
2 Council of the need for a robust investigation far outweighed any purported interest by the City in
3 efficiency and effectiveness, as the City can have no legitimate interest in illegal discrimination
4 and unethical conduct with developers. Plaintiff Ogaz’s speech was not purely employer-based
5 speech, but rather an issue of social concern, that of illegal discrimination and unethical conduct
6 with developers, and accordingly, falls within California’s free speech protections.

7 75. Plaintiff Ogaz suffered an adverse employment action as a result of his protected
8 activity, as he was terminated from his position as City Attorney, effective July 1, 2015. Plaintiff
9 Ogaz’s speech regarding Defendant Williams’s violations of employment and civil rights laws, as
10 well as his unethical conduct with developers, was a substantial or motivating factor in the City of
11 Milpitas’s decision to terminate him.

12 **VII. PRAYER FOR RELIEF**

13 WHEREFORE, Plaintiff prays judgment in his favor and against Defendants City of
14 Milpitas, Williams and Giordano as follows:

- 15 1. For damages, and all other appropriate legal and equitable relief;
- 16 2. For back pay, front pay, compensatory damages, damages for infliction of
17 emotional distress and punitive damages;
- 18 3. For reasonable attorneys’ fees and costs;
- 19 4. For appropriate injunctive and declaratory relief;
- 20 5. For costs of suit herein; and
- 21 6. For such further relief as the Arbitrator may deem just and proper.

22
23 Dated: February 11, 2016

COTCHETT, PITRE & McCARTHY, LLP

24
25 By: /s/ Adam J. Zapala
26 ADAM J. ZAPALA
27 Attorneys for Plaintiff Ogaz
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

I am employed in the County of San Mateo, State of California. I am a citizen of the United States, over the age of 18 years and not a party to the within cause. My business address is the Law Offices of Cotchett, Pitre & McCarthy, LLP, San Francisco Airport Office Center, 840 Malcolm Road, Suite 200, Burlingame, California, 94010.

On February 11, 2016, I served the following document(s) in the manner described below:

- 1. **DEMAND FOR ARBITRATION**
- 2. **COMPLAINT FOR DAMAGES AND OTHER RELIEF**
- 3. **OGAZ EMPLOYMENT AGREEMENT**

BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED: I am readily familiar with this firm's practice for collection and processing of correspondence for certified mailing. Following that practice, I placed a true copy of the aforementioned document(s) in a sealed envelope, addressed to each addressee, respectively, as specified below. The envelope was placed in the mail at my business address, with postage thereon fully prepaid, for deposit with the United States Postal Service on that same day in the ordinary course of business.

BY FACSIMILE: I am readily familiar with this firm's practice for causing documents to be served by facsimile. Following that practice, I caused the aforementioned document(s) to be transmitted to the telephone number(s) of the addressee(s) specified below:

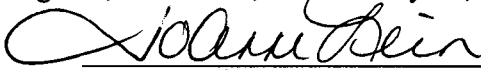
BY OVERNIGHT COURIER SERVICE: I am readily familiar with this firm's practice for causing documents to be served by overnight courier. Following that practice, I caused the sealed envelope containing the aforementioned document(s) to be delivered via overnight courier service to the addressee(s) specified below

BY E-MAIL: My e-mail address is jlein@cpmlegal.com and service of this document(s) occurred on the date shown below. This document is being served electronically and the transmission was reported as complete and without error.

BY PERSONAL SERVICE: I personally hand delivered a sealed envelope containing the aforementioned document(s) to be the addressee(s) specified below.

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed at Burlingame, California, on February 11, 2016.



JoAnne Lein

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SERVICE LIST

Ms. Suzanne Solomon Liebert, Cassidy, Whitmore 135 Main Street, 7 th Floor San Francisco, CA 94105	<i>Counsel for the City of Milpitas</i>
City of Milpitas 455 E Calaveras Blvd. Milpitas, CA 95035	<i>Defendant</i>
City Manager Tom Williams City of Milpitas 455 E Calaveras Blvd. Milpitas, CA 95035	<i>Defendant</i>
Councilmember Debbie Giordano City of Milpitas 455 E Calaveras Blvd. Milpitas, CA 95035	<i>Defendant</i>