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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

REDFLEX TRAFFIC SYSTEMS, INC., a Delaware corporation,

Plaintiff,

v.

AARON M. ROSENBERG and LISA F. ROSENBERG, husband and wife,

Defendants.

AARON M. ROSENBERG and LISA F. ROSENBERG, husband and wife,

Counterclaimants,

v.

REDFLEX TRAFFIC SYSTEMS, INC., a Delaware corporation; DOES – X; BLACK PARTNERSHIPS I-X; and XYZ CORPORATIONS I-X,

Counterdefendants.

No. CV2013-001166

RESPONSE TO REDFLEX'S MOTION TO DISMISS COUNT II OF AARON AND LISA ROSENBERG'S COUNTERCLAIM

(Oral Argument Requested)

(Assigned to the Honorable Douglas Rayes)

Defendants, Aaron M. Rosenberg and Lisa F. Rosenberg, by and through counsel undersigned, respond in opposition to Redflex Traffic Systems, Inc.'s ("Redflex") Motion to Dismiss Count II of the Rosenbergs' Counterclaim ("Mot.") as follows:

BACKGROUND AND FACTS IN SUPPORT OF COUNT II

As set forth in Defendants' Counterclaim, Redflex employed Aaron Rosenberg as its vice president of Sales and instilled in Mr. Rosenberg its practice of lavishly providing customers, including governmental officials, with perquisites in various forms. (Counterclaim, ¶ 2). Mr. Rosenberg carried out his employer's orders in a completely open fashion in this regard in dozens of cities, until October of 2012. (Counterclaim, ¶¶ 2-3). In October of 2012, the Chicago Tribune reported that Mr. Rosenberg paid a $910 hotel bill for a Chicago city official. (Counterclaim, ¶ 5). Redflex's leadership and general counsel met with Mr. Rosenberg and asked him to "take one for the team" and accept the sole blame for the expenditure. (Counterclaim, ¶ 5). Redflex did so because it needed to make every attempt possible to salvage its current contract with the City of Chicago. This contract generated over 10% of Redflex's revenue (worth about $100,000,000) and the City was in the process of a competitive bid for the contract. Redflex felt that by admitting to a nominal indiscretion and by "blaming" it entirely on Mr. Rosenberg, the $910 gift to a city official could be swept under the rug.

Thereafter, Redflex began a pattern of publicly, falsely impugning Mr. Rosenberg's character to use him as a scapegoat for the company's wrongdoings. (Counterclaim, ¶¶ 2, 6-7). This included, among other things, reporting that Redflex sent Mr. Rosenberg to "anti-bribery" training after the incident, which Redflex knew was completely false.

In November of 2012, Redflex held its first ever "foreign corrupt practices act" training. (Counterclaim, ¶ 8). At this training, for the first time, Mr. Rosenberg learned that Redflex's policy and practice of providing perquisites to government officials was improper. (Counterclaim, ¶ 8). He, thus, contacted Redflex's general counsel and provided counsel with evidence of Redflex's widespread corporate wrongdoings in the many cities with which Redflex contracted. (Counterclaim, ¶ 8). Despite being provided with such evidence, Redflex did not correct the obvious misstatements to the media concerning company expense policies, and continued to submit false reports and defame Mr. Rosenberg by portraying Mr. Rosenberg as the sole rogue employee who engaged in the unethical conduct.

In February of 2013, after Mr. Rosenberg's above-described disclosure, Redflex

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terminated Mr. Rosenberg. (Counterclaim, ¶ 9). Shortly after doing so, Redflex sued Mr. Rosenberg and issued press releases which continued to disseminate false and defamatory information about him. This included the baseless allegation that Mr. Rosenberg had engaged in "dishonest and unethical conduct over a number of years" and had engaged in a "protracted and covert scheme to misappropriate company funds over a period of years." (Counterclaim, ¶ 9). Redflex knew full well that Mr. Rosenberg did not misappropriate company funds but at all times acted with the approval and encouragement of Redflex "leadership". (Counterclaim, ¶ 9). Unlike Mr. Rosenberg, Redflex's "leadership," namely its CEO and General Counsel, were permitted to quietly resign and have not been subjected to a public lawsuit and related press releases.

The Rosenberg's Emotional Distress

As a result of Redflex's extreme and outrageous conduct (as described above), the Rosenbergs have experienced severe emotional distress. (Counterclaim, ¶¶ 9-10, 13-14). Redflex's conduct has predictably destroyed the Rosenbergs' lives. Specifically, due the above referenced conduct:

- The Rosenbergs have experienced public shame from Mr. Rosenberg's professional network, which he developed over the last decade with Redflex;
- The Rosenbergs have experienced public shame from Mr. Rosenberg's personal network. Since Redflex's false statements were repeatedly printed in the largest traditional and on-line media outlets, these statements were viewed by the Rosenbergs' personal network, thereby causing shame on the Rosenbergs' immediate and extended family;
- Mr. Rosenberg is completely unemployable as a result of this press. Executive recruiters and HR professionals have directly told Mr. Rosenberg that they cannot work with him, because of the press and statements provided by Redflex;
- Mr. Rosenberg was publically terminated and sued;
- As a result of his termination, Redflex did not pay Mr. Rosenberg severance and refused to pay Mr. Rosenberg the bonus to which he was entitled. Redflex will not allow Mr. Rosenberg to sell company stock. Mr. Rosenberg lost his health insurance;
- Mr. Rosenberg had to see a psychologist, which he can no longer afford; and
- With no income and no ability to earn income, Mr. Rosenberg sold his family home. The Rosenbergs have had to move twice in less than a year to reduce expenses. This has completely uprooted the Rosenbergs' family, which includes three young children.

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RULE 8 LEGAL STANDARD and ELEMENT OF IIED

Under Arizona Rule of Civil Procedure 8(a), a pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim, shall contain a short and plain statement of the (1) grounds for jurisdiction, (2) claim, and (3) a demand for relief. This is a notice pleading standard, the purpose of which is to give the opponent fair notice of the nature and basis of the claim, and indicate generally the type of litigation involved. *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419 (2008).

To survive a motion to dismiss for failure to state a claim under Arizona Rule of Civil Procedure 12(b)(6), a claimant generally must satisfy only the minimal notice pleading requirements, which, as stated, require only that the pleading include a short and plain statement of the claim showing that the pleader is entitled to relief. *Rowland v. Kellogg Brown and Root, Inc.*, 210 Ariz. 530, 534 (Ariz. Ct. App. 2d Div. 2005). Motions to dismiss for failure to state a claim are not favored. *Corbin v. Pickrell*, 136 Ariz. 589, 593 (1983). The test as to whether complaint (or pleading) is sufficient to withstand a motion to dismiss is whether enough is stated therein which, if true, would entitle the claimant to some kind of relief on some theory, and a court should not grant a motion to dismiss unless it appears certain that the claimant would be entitled to no relief under any state of facts which is susceptible of proof under the claim as stated. *Mackey v. Spangler*, 81 Ariz. 113, 115 (1956).

Under Arizona law, a claimant must prove the following three elements to successfully establish a claim for intentional infliction of emotional distress (IIED): (1) the defendant's conduct must be "extreme" and "outrageous"; (2) the defendant must either intend to cause the emotional distress or recklessly disregard the near certainty that severe distress will result from the conduct; and (3) severe emotional distress must occur as a result of the defendant's conduct. Ford v. Revlon, 153 Ariz. 38, 43 (1987). The trial court determines whether the acts at issue are sufficiently outrageous to state a claim for relief. *See e.g. Leal v. Alcoa*, No. CV 04-2671-PHX-MHM, 2007 WL 1412501, at *4 (Dr. Ariz. May 11, 2007) (applying Arizona law). However, a claim for the intentional infliction of emotional distress is sufficient as a matter of law if the court determines that "reasonable [people] may differ" as to whether the conduct was sufficiently outrageous. Lucchesi v.

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Stimmell, 149 Ariz. 76, 79 (1986) (quoting Restatement (Second) of Torts § 46 cmt. h).

Because the terms "outrageous conduct" and "severe emotional distress" evade precise legal definition, a case-by-case analysis is necessary. *Lucchesi*, 149 Ariz. at 79. One factor used by courts to analyze these terms is the "position occupied by the defendant." *Id.* (citing Restatement (Second) of Torts § 46 comment e). Comment e Restatement (Second) of Torts § 46 provides that "the extreme and outrageous character of conduct may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests."

ARGUMENT

I. The Rosenbergs Sufficiently Plead They Have Suffered Severe Emotional Distress Under Arizona Pleading Standards and Applicable Law.

Plaintiff first claims the Rosenbergs fail to allege their emotional distress was "severe" enough to support a claim for intentional infliction of emotional distress. (Mot., pp. 3-4). Plaintiff acknowledges, however, that the Rosenbergs plead that they have suffered "severe emotional distress," as set forth in paragraphs 13 and 14 of their Counterclaim as follows:

> 13. The actions of Counterdefendant, as described above, constitute extreme and outrageous conduct that is and was likely to inflict severe emotional distress on Counterclaimants.
>
> 14. As a direct and proximate result of Counterdefendant's extreme and outrageous conduct, Counterclaimants have experienced severe emotional distress.

The Rosenbergs support those allegations further in paragraphs 1-11 of their Counterclaim. The Rosenbergs submit that this, alone, is sufficient under Arizona's notice pleading standard and for purposes of a motion to dismiss.

Plaintiff's argument is that the Rosenbergs' loss of income and injury to reputation and character (as alleged in paragraphs 1, 6-8, 11, 13-14 of the Rosenbergs' Counterclaim), does not rise to the level of severe emotional distress necessary to support a claim for IIED. Plaintiff cites no cases to support that argument. See (Mot., p. 4, ll 12-15).

Rather, Plaintiff cites the case *Midas Muffler Shop v. Ellison*, 133 Ariz. 194, 198-99 (Ariz. Ct. App. 1st Div. 1982), for examples of the types of emotional distress that are

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"severe." (Mot., p. 4) (citing heart attack, fright resulting in premature birth of child, writhing in a bed in a state of extreme shock and hysteria, and severe anxiety requiring hospitalization, as examples of severe emotional distress).[1] The Rosenbergs agree that those are examples of the types of conduct that can make emotional distress severe. However, to the extent Plaintiff suggests that those are the only types of conduct that can result in a finding of severe emotional distress, and to the extent Plaintiff suggests that a finding of physical injury or medical attention is required for emotional distress to be severe, those suggestions are incorrect. Arizona courts have explicitly criticized and noted the inapplicability of the string cite Plaintiff cites to in *Midas*, stating:

> To the extent that Appellant argues that the Appellees' distress was not "severe" because they did not suffer the type of physical injuries described in *Midas Muffler Shop v. Ellison*, 113 Ariz. 194, 650 P.2d 496, 501 (Ariz. App. 1982), Arizona courts have since made clear that bodily injury is not required. *See, e.g., Pankratz v. Willis*, 155 Ariz. 8, 744 P.2d 1182, 1191 (Ariz.App.1987). *Vicente v. Barnett*, 415 Fed.Appx. 767, 769 (9th Cir. 2011) (applying Arizona law).

Contrary to Redflex's assertion, Arizona courts do find the kind of distress experienced by the Rosenbergs to be sufficiently "severe" for purposes of an IIED claim. For example, in *Fedoseev v. Alexandrovich*, plaintiffs Nikilai M. Fedoseev and Gulzhan Fedoseeva hired Defendant Marina N. Alexandrovich to perform legal services related to plaintiffs' immigration issues. *Fedoseev v. Alexandrovich*, No. CV–05–536–TUC–DCB, 2006 WL 964281, at *1 (D.Ariz. Apr. 11, 2006). Sometime later, the plaintiffs discharged Marina. *Id.* Subsequently, plaintiffs allege that Marina and her husband began defaming plaintiffs by speaking and publishing untrue statements and materials concerning them. *Id.* Some of the alleged instances of defamation include the following: (1) defendant(s) wrote a letter to plaintiffs' new attorney claiming that "Mrs. Fedoseeva is afflicted with a

[1] It should be noted that *Midas* is distinguishable from the present case. In *Midas*, a collection company botched a collection matter and wrongfully threatened debtor-consumers with legal action, called the consumers names, and, generally, harassed the consumers over the telephone. *Midas Muffler Shop v. Ellison*, 133 Ariz. 194, 197 (Ariz. Ct. App. 1st Div. 1982). A jury awarded compensatory and punitive damages in the consumers' favor on an intentional infliction of emotional distress theory. *Id.* The creditor moved for judgment notwithstanding the verdict, which was granted and an appeal followed. *Id.* The court examined the testimony at trial to find the emotional distress complained of was not severe enough. *Id.* at 198-99. The court was not deciding a motion to dismiss, but was weighing the facts and evidence ultimately offered and proven at trial. *See id.* That is not the same standard here. Indeed, the Rosenbergs will certainly testify more extensively at trial as to the severity and details of their emotional distress than they did in their Counterclaim. Arizona's pleading standard simply does not require such detailed testimony in a pleading, and, in fact discourages that in some scenarios.

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behavioral disorder and is not in full control of her faculties"; (2) defendant(s) made phone calls to the new attorney which included additional defamatory remarks; (3) defendants placed posters at stores in Phoenix which gave the impression that Gulzhan Fedoseeva was soliciting legal business and engaging in the unauthorized practice of law; (4) defendant(s) wrote a letter to the State Bar accusing Gulzhan of unauthorized practice of law and including a picture of the poster as an exhibit; and (5) defendant(s) made a false report to the Pima County Sheriff's Office accusing the plaintiffs of harassment among other claims. *Id.* Plaintiffs alleged defendants engaged in this defamatory conduct intentionally to jeopardize their immigration issues. *Id.* at *6.

Plaintiffs brought a claim against defendants, for, among other things, intentional infliction of emotional distress. *Id.* The court found plaintiffs properly pled the elements of intentional infliction of emotional distress by alleging the following:

> that the Defendants' slanderous and libelous conduct was extreme and outrageous and that Defendants knew and intended it to cause injury to Plaintiffs' marital community and adversely impact Plaintiffs' legal status and complicate Plaintiff's immigration proceedings causing severe emotional distress.

Id. The court declined to dismiss the claim due to those allegations. *Id.*

Plaintiff next cites three cases for the proposition that simply alleging that a person has "suffered severe emotional distress," without more facts, is insufficient to plead severe emotional distress. (Mot., pp. 3-4) (citing *Leon v. Arizona*, 2013 WL 2152559 (D. Ariz. May 16, 2013); *Hank v. Andrews*, 2006 WL 273606 (D. Ariz. Jan. 30, 2006); and *Mills v. Bristol-Myers Squibb Co.*, 2011 WL 3566131 (D. Ariz. Aug. 12, 2011)). However, the cases Plaintiff cites are distinguishable from this case, because Rosenbergs have pled more than just "severe emotional distress." *See* (Counterclaim, ¶¶ 1, 6-8, 11, 13-14). Further, the cases Plaintiff cites are contrary to applicable cases that hold pleading "severe emotional distress" is sufficient to meet that element of an IIED claim, for purposes of a motion to dismiss under notice pleading standards.

The cases Plaintiff cites can be factually summarized as follows. In *Leon v. Arizona*, a *pro se* Plaintiff filed a lawsuit against the State of Arizona, arguing the state's agents intentionally and/or recklessly inflicted emotional distress by denying him, a

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terminally ill ADA plaintiff, access to the courts and failing to provide reasonable accommodations. *Leon*, 2013 WL 2152559, at **1-2, 4-5. Although he alleged he suffered harassment, embarrassment, emotional distress, and medical abuse, he failed to provide any factual support for those claims. *Id.* at *5 (emphasis added). Accordingly, the court dismissed the IIED claim.

In *Hanks v. Andrews*, the court screened a *pro se* plaintiff's Complaint under 28 U.S.C. § 1915(e)(2), which provides that a court must dismiss a complaint or portion thereof if the plaintiff has raised claims that are legally "frivolous or malicious," that fail to state a claim upon which relief may be granted. *Hanks*, 2006 WL 273606, at *1. The court's only discussion on the element of severe emotional distress was as follows:

> Hanks's claim for intentional infliction of emotional distress falls far short of stating a claim. First, Hanks does not allege facts establishing that he actually suffered severe emotional distress, other than conclusorily alleging such to be the case.

Id. at *3. The court also found Hanks' IIED claim deficient regarding the "extreme and outrageous" element. *Id.* However, the Court found that because Hanks may have been able to cure this pleading deficiency, Hanks's intentional infliction of emotional distress claim was only dismissed without prejudice. *Id.*

In *Mills v. Bristol-Myers Squibb Co.*, plaintiff sought damages allegedly suffered as a result of taking Plavix. *Mills,* 2011 WL 3566131, at *1. However, the facts regarding plaintiff's case were only contained in one paragraph of the complaint, and, in that paragraph, there was no conduct linking the defendant drug company to the plaintiff. *Id.* Rather, the plaintiff's allegations were that a doctor prescribed Plavix, plaintiff had blood clotting and other problems, and was re-admitted to the hospital. *Id.* With regard to her IIED claim, plaintiff alleged defendant's conduct in "withholding information of known design and manufacturing defects," was extreme and outrageous, but those were the only allegations on that issue. *Id.* at *3. The court found simply alleging that plaintiff has suffered "severe and permanent injuries" and "embarrassment and humiliation," without more facts, is insufficient to plead severe emotional distress. *Id.* Additionally, even though plaintiff's complaint as to Bristol-Myers Squibb contained only 1 paragraph of facts, the court permitted Plaintiff to file a motion for leave to amend the complaint. *Id.*

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The cases Plaintiff cites are examples of arguably frivolous complaints that are so lacking in any factual support that they do not meet the required legal elements of the test. The present case is different. Here, the Rosenbergs have pled, in detail, the facts supporting their claims that they have experienced severe emotional distress. *See* above and (Counterclaim, ¶¶ 1, 6-8, 11, 13-14). For instance, Aaron Rosenberg has suffered injury to his reputation among his peers and in the industry, effectively ruining his career and preventing him from ever finding a job. He has similarly lost his ability to earn an income and has been publicly disgraced. The facts backing up those claims are similarly pled. This is not a case where the Rosenbergs plead severe emotional distress, "with nothing more." Thus, *Leon, Mills*, and *Hanks* do not apply.

Further, the cases Plaintiff cites can be contrasted with other, more applicable cases which hold that an allegation that the claimant has "suffered severe emotional distress," alone, meets notice pleading standards. For example, in *Harris v. Maricopa County Super. Ct*, a claimant alleged only that he had suffered "severe emotional distress" as opposed to alleging "bodily harm" for purposes of a negligent infliction of emotional distress claim, which requires more injury than an IIED claim. *Harris v. Maricopa County Super. Ct*, 631 F.3d 963, 978 (9th Cir. 2011) (applying Arizona law). The court found "Harris's invocation of 'severe emotional distress' in his complaint appears sufficient as a matter of pleading." *Id.* at 978-79. *See also Fedoseev*, 2006 WL 964281 (plaintiffs survived a motion to dismiss and properly pled the elements of intentional infliction of emotional distress by alleging that the Defendants' slanderous and libelous conduct was extreme and outrageous and that Defendants knew and intended it to cause injury to Plaintiffs' marital community and adversely impact Plaintiffs' legal status and complicate Plaintiff's immigration proceedings *causing severe emotional distress*).

Accordingly, based on the above, (1) the Rosenbergs have sufficiently plead the severity of their emotional distress, and (2) the harm they experienced is the type of severe emotional distress that Courts find sufficient for an IIED claim. In the unlikely event this Court finds the Rosenbergs' claim deficient under Arizona's liberal notice pleading requirements, the Rosenbergs request leave of court, pursuant to Arizona Rules of Civil Procedure 15(a) to amend their counterclaim. Plaintiffs acknowledge that Rule 15(a)(2)

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requires that they attach a proposed amended complaint to any motion for leave to amend under Rule 15. In the unlikely event that the Court determines that the Rosenbergs have not plead the nature of the emotional distress they have suffered with sufficient particularity, plaintiff requests the opportunity to submit a proposed amended complaint within ten days from the date of any ruling in favor of Redflex.

II. Redflex's Conduct Was and Is Extreme and Outrageous.

Plaintiff next argues that Redflex's conduct was not extreme and outrageous enough to meet such an element under an IIED claim. (Mot., pp. 4-7). Plaintiff relies mainly on non-Arizona cases to argue that false or defamatory statements are ordinarily not sufficiently extreme or outrageous to support a claim for IIED. See (Mot., pp. 6-7). Those cases, however, are (1) not applicable or are distinguishable, and (2) contrary to cases finding defamatory statements leading to emotional distress are sufficiently "extreme and outrageous" for purposes of an IIED claim in Arizona.

Plaintiff cites *Johnson v. McDonald* and *Duhammel v. Star* for the proposition that false and/or defamatory statements about a plaintiff normally do not rise to the level of "extreme and outrageous" conduct. (Mot., p. 6) (citing *Johnson v. McDonald*, 197 Ariz. 155 (Ariz. Ct. App. 1st Div. 1999) and *Duhammel v. Star*, 133 Ariz. 558 (Ariz. Ct. App. 1st Div. 1982)). Those cases are not applicable and/or are distinguishable from the present case. In *Johnson v. McDonald*, three individuals sued another individual, Bruce Frankie, for sexual abuse that occurred when they were in high-school. *Johnson*, 197 Ariz. at 157. The court dismissed the lawsuit for statute of limitations reasons and the individuals worked with Arizona legislators to draft a new law extending the statute of limitations in such a situation. *Id.* Before the bill reached the senate for reading and vote, Frankie's attorney allegedly advised some senators that one of the alleged sexual abuse victims, Johnson, had embezzled $250,000 from her father and then falsely accused Johnson of child abuse. *Id.* The attorney also allegedly informed senators that the trial judge had felt that the appellants were lying in their earlier lawsuit. *Id.* The alleged sexual abuse victims then sued Frankie and his attorneys for IIED. *Id.*

The court found the conduct was not so outrageous that it goes beyond all bounds of decency because the allegations had previously been disclosed in a lawsuit filed by the

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father of one of the alleged sexual abuse victims. *Id.* at 159. "Thus, the content of McDonald's statements was already a matter of public record before McDonald's statements were made to legislators. McDonald's reiteration of these already public assertions to benefit his clients does not constitute outrageous and extreme conduct." *Id.* This case is completely different as Redflex's false and defamatory statements were not previously raised in a public record or lawsuit.

In *Duhammel v. Star*, a Scottsdale police officer came to a homeowners' residence in response to a noise complaint. *Duhammel*, 133 Ariz. at 559. The officers arrested one of the homeowners and his son, and a year later the homeowners sued. *Id.* The police officer counterclaimed alleging the homeowners made false statements of police brutality by leading a demonstration around the Scottsdale City Council building, by appearing before the Council and verbalizing such accusations, and by making such accusations in the local newspaper. *Id.*

The court found the homeowner's conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" to support an IIED claim. *Id.* at 561. The present case is notably different. *Duhammel* involved a public figure, a police officer, who did not lose his job as did Mr. Rosenberg. Police officers are in the public eye and are occasionally alleged to engage in acts of such character, which is why courts require heightened pleading standards for cases are brought against public officers. That is not the case for a private employee falsely alleged of corruption and bribery, like Mr. Rosenberg. Accordingly, *Duhammel* does not apply.

Plaintiff also cites *Rosales v. City of Eloy* for the proposition that an employer's statement to a newspaper about the reasons for an employee's termination does not constitute extreme and outrageous conduct. (Mot., p. 6) (citing *Rosales v. City of Eloy*, 122 Ariz. 134, 136 (App. 1979)). That case, though, again involved public allegations about a police officer, who the court characterized as a "public official," and the court implied the alleged "false" statements about the officer were not actually false. *Id.* Here, the statements made about Mr. Rosenberg, a private employee, were blatantly and intentionally false. Also, decidedly, the *Rosales* court was not reviewing the allegations on a motion to

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dismiss, but after a trial. *See id.* Therefore *Rosales* has no application here as the facts in this case have not been fully presented. Similarly, Plaintiff's next cited case, *Bodett v. CoxCom, Inc.*, 366 F.3d 736, 747 (9th Cir. 2004), was also decided at summary judgment, not on a motion to dismiss, and therefore has no application here. Simply put, "Because [*Bodett* and *Rosales* were] decided on summary judgment, [they] ha[ve] little application here." *Coffin v. Safeway, Inc.*, 323 F.Supp.2d 997 (D. Ariz. 2004). (distinguishing *IIED cases decided on summary judgment* in denying employer's motion to dismiss employee's IIED claim).[2]

In addition to the cases Plaintiff cites being distinguishable, Arizona courts do find false and/or potentially defamatory statements are sufficiently extreme or outrageous to support a claim for IIED, for purposes of a motion to dismiss. For example, in *Fedoseev*, plaintiffs properly pled the elements of intentional infliction of emotional distress claim by alleging that the defendants' slanderous and libelous conduct was extreme and outrageous when defendants defamed plaintiffs by writing a letter containing false information about plaintiffs to plaintiffs' attorneys, making false reports about plaintiffs to the state bar and a sheriff's office, and placing posters with false information about plaintiffs at stores. *Fedoseev*, 2006 WL at 964281.

Also, in *Lombardi v. Copper Canyon Academy, LLC*, a plaintiff, Lombardi, was hired to work at an Academy for girls with behavioral problems and her performance reviews were generally excellent. *Lombardi v. Copper Canyon Academy, LLC*, No. 09–CV–8146–PCT–PGR, 2010 WL 3775408, at *1 (D. Ariz. Sept. 21, 2010). On June 4, 2008, Ms. Lombardi complained to the executive director of the Academy and its parent company about (1) the Academy's violations of the FMLA with respect to other employees and (2) the Academy's firing of older employees and replacing them with younger employees. *Id.* at *2. The Academy did nothing in response to plaintiff's complaint but

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[2] Moreover, *Bodett* is distinguishable because the court found an employer's termination of its employee was justifiable, and did not amount to extreme and outrageous conduct, where the employee violated the employer's policies. *Bodett v. CoxCom, Inc.*, 366 F.3d 736, 747 (9th Cir. 2004). On the other hand, Mr. Rosenberg was terminated for blowing the whistle on his employer and he always followed the company line. Redflex's conduct in this regard is markedly different than the employer's conduct in *Boddett*.

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allegedly the program director and plaintiff's supervisor then started harassing Ms. Lombardi by closely monitoring her, reporting false job performance corrective action complaints, defaming her, and instituting unfair schedule assignments with the intent to force her to quit her job. *Id.* As a result of her complaints about the defendant's compliance with the law, Ms. Lombardi was assigned to work another dorm which had physical limitation for Ms. Lomardi. *Id.* On December 18, 2008, the Academy fired Ms. Lombardi, citing "reduction in force." *Id.*

Ms. Lombardi sued the Academy and its parent company alleging IIED and other claims and the Academy moved to dismiss. *Id.* The court found Ms. Lombardi set forth sufficient factual allegations in her to permit the Court to draw reasonable inferences to support plausible claims of IIED and NIED. *Id.* The court found, determination of such fact-intensive claims is generally based upon the sufficiency of evidence, testimony, and may often depend upon the credibility of witnesses-all to be weighed by the fact-finder, not the Court. Unless it is a matter of clearly established law, the Court will not dismiss such a claim at this stage of the litigation without further inquiry and discovery. *Id.* at *10. Here, the Rosenbergs allegations are sufficient for purposes of a motion to dismiss and those facts should be reviewed by a jury.

Similarly, in *in re Peck*, a debtor willfully and maliciously intended to slander an individual with a charge of child molestation. *In re Peck*, 295 B.R. 353, 358 (9th Cir. 2003) (applying California law which applies an analogous standard to Arizona law on IIED claims). The court found such conduct was outrageous for purposes of an IIED claim because the debtor completely disregarded the fact that it would be extremely devastating to charge the individual with child molestation when the individual spent his entire career working with children. *Id.* at 366. As such, the conduct is "so extreme as to exceed all bounds of that usually tolerated in a civilized community." *Id.* The defamation at issue here was similar because it has effectively prevented Mr. Rosenberg from ever working in the industry again.

Additional cases where a newspaper or media organization published defamatory information about a claimant and the Courts found the defamatory conduct sufficiently extreme and outrageous for purposes of an IIED claim are as follows:

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- In *Doe v. Gangland Productions, Inc.*, the court found that allegations that producers of a documentary television series on gangs agreed to conceal the identity of former gang member, but then intentionally disclosed it, consisted extreme and outrageous conduct, as required to state claim for intentional infliction of emotional distress. *See Doe,* 730 F.3d at 946.

- In *Holloway v. American Media, Inc.*, the court found allegations by a mother that a tabloid publication published a false story that contained graphic descriptions of the treatment of her daughter's corpse with the intent to cause mother emotional distress were sufficient to plead outrageous conduct, as required for intentional infliction of emotional distress (IIED) claim under Alabama law. *See Holloway v. American Media, Inc.*, No. 2:12–cv–2216–TMP, 2013 WL 2247990 (N.D. Ala. May 22, 2013).

- In *Cartwright v. Cooney*, an attorney stated a claim against her client's former business partner for intentional infliction of emotional distress in connection with the former business partners' online comments on a local news website that allegedly falsely accused the attorney of perpetrating a crime through her legal representation of the client. See *Cartwright v. Cooney*, 788 F.Supp.2d 744 (N.D.Ill. 2011).

Plaintiff next argues that Redflex's alleged portrayal of Mr. Rosenberg as a rogue employee and alleged use of Mr. Rosenberg as a scapegoat to divert attention from Redflex's alleged improper conduct does not constitute extreme and outrageous conduct under Arizona law. (Mot., p. 7). Plaintiff's allegations are not supported by the law, however. Many cases find that an employer's harassing and/or retaliating behavior against an employee who blows the whistle on or complains about his or her superiors or co-workers, is sufficiently "extreme or outrageous" to support an IIED claim for purposes of a motion to dismiss. For example, in *Thompson v. Paul*, attorneys Lewis & Roca, represented a company, YP.Net, and hired detectives to follow the company's CFO and children. *Thompson v. Paul*, 657 F.Supp.2d 1113, 1115 (D. Ariz. 2009). The CFO resigned soon after as a result of "questionable accounting practices" she claimed took place at YP.Net. *Id.* She forwarded her resignation from YP to the SEC because of her concerns. *Id.* The detectives then, allegedly, "stalked and harassed" Thompson and her children, by harassing her in her car, sitting outside her house, and following her and her children. *Id.* at 1115-16. They allegedly were following and harassing the CFO to keep her from cooperating with parties adverse to YP.Net's CEO in a criminal investigation, litigation and to keep her from cooperating with federal and state law enforcement officials. *Id.*

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Thompson filed a claim for IIED and the detectives and law firm moved to dismiss. *Id.* at 1117. The court noted:

> Arizona does not require proof of relentless physical and verbal harassment to state a claim for intentional infliction of emotional distress. Here, Plaintiff[s] allege[ ] Defendants repeatedly followed and "stalked" Ms. Thompson and [her] children, used a racial slur in reference to Ms. Thompson's children, trespassed on Ms. Thompson's property, terrorized Ms. Thompson's children, and hired individuals to assault Ms. Thompson. The Court finds that reasonable minds could differ about whether the alleged conduct is sufficiently outrageous, and therefore, dismissal is not appropriate. *Id.* at 1124.

In *Leal v. Alcoa*, an employee-plaintiff was transferred to work at a plant under a supervisor Keith Benbown. *Leal*, 2007 WL 1412501, at *1. The plaintiff alleged that as a result of Mr. Benbow's constant harassment (yelling profanities and acting aggressively toward plaintiff), which was motivated by plaintiff's national origin, plaintiff suffered from and was diagnosed with severe depression and anxiety. *Id.* The plaintiff alleged that the abusive behavior continued on numerous subsequent occasions despite bringing it to upper management's attention several times. *Id.* Plaintiff ultimately brought a claim for IIED against the company. *Id.*

The Defendant-company sought to dismiss the case. *Id.* The court noted defendant's motion to dismiss must be denied "unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at *4 (citing Barnett v. Centoni, 31 F.3d 813, 816 (9th Cir.1994)). Considering pleading standards and viewing allegations in the light most favorable to the plaintiff, the court found that reasonable minds could differ about whether the alleged conduct was sufficiently outrageous. *Id.* Therefore, dismissal was inappropriate. *Id.* *See also Forsman v. Chi. Title Ins. Co.*, No. 05–CV–3514–PHX–FJM, 2006 WL 4682253 (D. Ariz. Jan. 20, 2006) (Forsman alleged that her supervisor failed to prevent ongoing verbal and physical sexual harassment; that her co-worker retaliated against her after she complained of the harassment; and that she was discharged for complaining about her co-worker's retaliation. Assuming that all of these allegations are true, as we must for purposes of the motion to dismiss, we believe that a reasonable member of this community could find Chicago Title's conduct outrageous);

Also in *Thorp v. Home Health Agency--Arizona, Inc.*, plaintiff was a Jehovah's

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Witness and after plaintiff was transferred to a new team in defendant's health agency, the president of the team made the topics of drug use and abuse, sex and sexual activity, and the mockery of religious and moral stances, daily conversations. *Thorp v. Home Health Agency--Arizona, Inc.*, No. CV 12–02193–PHX–MHB, 2013 WL 1767989, at *2 (D.Ariz. Mar. 18, 2013). The team president teased plaintiff asking plaintiff if he would "do" his managers and made him watch an explicit video, allegedly for training purposes, and made fun of his religious beliefs. *Id.* at **2-3.

Plaintiff reported the abuse to his supervisors, who at first, suggested plaintiff ignore the president, and then had a meeting with the president and plaintiff. *Id.* But plaintiff's supervisors never did anything to actually remedy the problem. *Id.* Plaintiff alleged that as a result of his complaints, his job duties escalated, he was forced to do twice as much work as other similarly situated employees, and he was forced to work unwanted shifts. *Id.* at *3.

The Court found that because reasonable minds could differ about whether the conduct was sufficiently outrageous, dismissal on this basis is inappropriate. *Id.* at *4. *See also Coffin v. Safeway, Inc.*, 323 F.Supp.2d 997 (D. Ariz. 2004) (court denied motion to dismiss IIED claim where Plaintiff asserted that her supervisor "used his position as a managerial supervisor at Safeway" to sexually harass and discriminate against her and that Safeway did not take any corrective measures to stop Lopez after female employees notified Safeway of the sexual harassment).

Based on the foregoing cases, Redflex's conduct in (1) retaliating against Mr. Rosenberg as a result of his revelations about company indiscretions, and (2) attempting to scapegoat him via defamatory statements in the media, is sufficiently extreme and outrageous for purposes of an IIED claim.

Finally, the cases Plaintiff cites in support of its argument--that scapegoating Mr. Rosenberg via false statements in the media--are, again, inapplicable. Specifically, *Diamond Shamrock Refining & Mktg Co. v. Mendez*, is a Texas case and is inapplicable because, in that case, the employer's stated reason for terminating the employee, was arguably true and the employee did not pursue a defamation claim. *See Diamond Shamrock Refining & Mktg Co. v. Mendez*, 844 S.W.2d 198 (Tex. 1992). Here, Redflex's statements to the media were false and defamatory, making Redflex's conduct extreme and

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outrageous. Additionally, like most of the other authority Redflex cites, the court reviewed the conduct in *Diamond* not on a motion to dismiss standard, but after a trial. *See id.* Similarly, *Nelson v. Phoenix Resort Corp.*, was decided at the summary judgment stage, where discovery was complete and the courts' obligation was to determine if there were genuine issues of material fact. *Nelson v. Phoenix Resort Corp.*, 181 Ariz. 188 (1994). As stated above, courts have found that "Because [these] case[s were] decided on summary judgment, [they] ha[ve] little application here." *Coffin*, 323 F.Supp.2d at 1006 (distinguishing *Nelson* in denying employer's motion to dismiss employee's IIED claim because). Similarly, *Coors Brewing Co. v. Floyd* is a Colorado case which is not binding on this court. *Coors Brewing Co. v. Floyd*, 978 P.2d 663, 666 (Colo. 1999). And in *Coors*, there were no allegations that the employer defamed the employee or publicly impugned the employee's character. *Id.* Those facts are present here, and, as shown in the cases cited above, are sufficient to warrant a finding of extreme and outrageous conduct.

Mintz v. Bell Atlantic Systems Leasing Int'l, Inc., has also already been distinguished, notably, by *Coffin v. Safeway*, where the court found the employer's conduct was sufficiently extreme and outrageous because, unlike in *Mintz*, it wasn't just a one-time occurrence. *Mintz v. Bell Atlantic Systems Leasing Int'l, Inc.*, 183 Ariz. 550 (Ariz. Ct. App. 1st Div. 1995); *Coffin*, 323 F.Supp.2d at 1006. The conduct at issue here has similarly been ongoing and is widespread. Therefore, like *Coffin* and unlike *Mintz*, dismissal is not appropriate.

Finally, the remaining case Plaintiff cites for the proposition that an employer's conduct toward an employee often does not rise to the level of extreme and outrageous, *Hinchey v. Horne,* is distinguishable because the plaintiff in that case was a public official who was allegedly isolated and lied about at work for delving into a political corruption investigation. *Hinchey v. Horne*, 2013 WL 4543994, at **2-5 (D. Ariz. Aug. 28, 2013). In *Hinchey*, the employee was not terminated and information about the employee was not published in the media. *Id.* Unlike in *Hinchey*, Redflex's conduct here includes (1) instilling a corrupt corporate culture into its employees (2) terminating Mr. Rosenberg because Mr. Rosenberg brought company legal issues to the attention of his superiors, and (3) repeatedly and intentionally publishing false and defamatory information about Mr.

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Rosenberg in the media. As noted by the cases cited above, this conduct does rise to the level of extreme and outrageous. Therefore, the Rosenbergs request that Redflex's motion to dismiss be denied.

CONCLUSION

For the foregoing reasons, Aaron and Lisa Rosenberg request that this Court deny Redflex's Motion to Dismiss Count II of their Counterclaim. In the unlikely event this Court agrees with Redflex that the Rosenbergs' pleading is insufficient. Because the Rosenbergs have not sufficiently plead the precise nature of their emotional distress, the Rosenbergs request leave of Court to amend their counterclaim to specifically assert those facts.

DATED this 2nd day of December, 2013.

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