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**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH**

**NORTHERN DIVISION**

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| BMG, LLC, dba SUBWAY; DALLAS BUTTARS; and KRISTIN MYERS,<br><br>Plaintiffs,<br><br>vs.<br><br>LAYTON CITY, a municipal corporation, CLINT BOBROWSKI, a Layton City Public Information Officer; and John and Jane Does 1-10.<br><br>Defendants. | **COMPLAINT**<br><br>Civil No. 1:17-cv-127-DB<br><br>Judge Dee Benson |

Plaintiffs BMG, LLC, dba Subway, Dallas Buttars, and Kristin Myers, through counsel, complain and allege against Defendants as follows:

## PRELIMINARY STATEMENT

This is a civil rights action in which the Plaintiffs seek relief for Defendants' violations of their rights guaranteed by the United States Constitution, specifically the Fourteenth, Fourth, and Fifth Amendments. These rights are further secured by the

Civil Rights Act of 1871, codified as 42 U.S.C. § 1983 and § 1988, and by the laws and the Constitution of the State of Utah. Plaintiffs seek compensatory and punitive damages; affirmative and equitable relief; an award of attorney's fees, costs, and interest; and other and further relief as this Court deems just and equitable. This action also arises under the constitution, law, and statutes of the State of Utah.

## JURISDICTION AND VENUE

**1.** This action arises under the United States Constitution and federal law, particularly under the provisions of the Fourteenth, Fourth, and Fifth Amendments to the Constitution of the United States, and 42 U.S.C. §§ 1983, 1985, and 1988.

**2.** This action seeks redress for violations of the civil rights laws of the United States, and jurisdiction is therefore invoked pursuant to 28 U.S.C. § 1343 and 42 U.S.C. § 1983.

**3.** The claims made in this Complaint occurred and arose in Davis County, State of Utah, in this District. Venue is therefore proper under 28 U.S.C. § 1391.

**4.** This Court also has supplemental jurisdiction over claims of due process violations under Article I §7 of the Utah Constitution (deprivation of liberty or property without due process of law).

**5.** Plaintiffs are seeking damages pursuant to the claims for relief specified below in amounts to be proved at trial.

**6.** This Court therefore has jurisdiction for trial of the above captioned matter.

## PARTIES

**7.** Plaintiff **BMG, LLC dba Subway** is a limited liability company, a franchisee of Subway Corporation, which serves the public as a sandwich restaurant in Layton City, Davis County, State of Utah.

**8.** Plaintiff **Dallas Buttars** is an owner of BMG, LLC dba Subway. Buttars is a citizen of the United States of America and is a resident of Davis County, State of Utah. Many friends, neighbors, and acquaintances knew that Buttars owned this particular Subway.

**9.** Plaintiff **Kristin Myers** is an owner of BMG, LLC dba Subway; Myers is a citizen of the United States of America and is a resident of Weber County, State of Utah. Many friends, neighbors, and acquaintances knew that Myers owned this particular Subway.

**10.** Defendant **Layton City** ("Layton") is a municipal corporation located in Davis County. The Layton Police Department (LPD) is a division of Layton City, which appoints the police chief of the LPD and makes policy for the LPD. **Bobrowski** at all times was a police officer in the police department of Layton City, and was acting according to directions and official policy given to him by his superiors in the police department, which included the policy of the PIO to meet with the press and

answer questions about criminal matters. This action is therefore brought against both Layton City and Bobrowski in their official capacities.

**11.** Defendant **Clint Bobrowski** ("Bobrowski") is a Layton City police officer and, at the relevant time, served as the police department's Public Information Officer (PIO). He is presumed to be a citizen of the United States of America, and presumed to be a resident of Davis County, State of Utah.

**12.** At the time the acts occurred upon which this Complaint is based, **Defendant Bobrowski** was acting both personally and in his official capacity as a Public Information Officer employed by Layton City through the Layton City Police Department. This action is therefore brought against **Bobrowski** in both his individual and official capacities. His authority to act was derived from Utah State law, the official policies and procedures of Layton City, and/or the commands and directives of his superiors. All of his acts listed in the following paragraphs were performed under color of the laws, statutes, ordinances, regulations, policies, customs, and usages of the State of Utah and Layton City.

## FACTUAL ALLEGATIONS

**13.** In the early afternoon of August 8, 2016, a Layton City police officer was on a lunch break and went through a drive-through line to get a Subway sandwich at the Plaintiffs' Subway shop located at 1148 East Highway 193, Layton, Utah.

**14.** The officer received a sandwich and a drink, alleged he took a sip of the soda, and claimed to immediately feel strange or ill.

**15.** The officer drove back to the police department and allegedly related what happened to fellow officers, i.e., his belief that his drink had been adulterated with some kind of drug.

**16.** According to the Layton City PD, "fellow officers" reportedly tested the ill officer's remaining drink with a "screening test" involving an ion scanner, and the test allegedly came back positive for methamphetamine and THC.

**17.** The screening test is only preliminary, cannot generally be used in court, and has a very high false positive rate for showing drugs when there are no drugs.

**18.** A short time later, still on August 8, 2016, Plaintiffs were contacted by Layton PD and told that an employee of their Subway sandwich shop had poisoned a Layton City police officer by surreptitiously putting some illegal substance into the drink he had ordered.

**19.** Plaintiffs did not believe this allegation, but they cooperated with police investigators and the Davis County Health Department in every way, including, but not limited to, (a) voluntarily permitting a thorough physical search of the premises; (b) providing samples of all drink liquids and materials; (c) allowing all employees to be interviewed on the scene by police officers; (d) allowing a drug-sniffing dog to sniff the

restaurant; (e) providing the surveillance video recorded during the time of the alleged "poisoning;" and (f) watching it with LPD officers.

**20.** None of the six (6) activities listed above turned up any evidence of drugs in the restaurant.

**21.** The alleged perpetrator (referred to as "TU" herein), age 18, was an employee of the plaintiffs' Subway and had prepared the alleged victim officer's drink.

**22.** TU absolutely denied any impropriety or misconduct.

**23.** Additionally, (a) TU was thoroughly searched; (b) his personal work area was examined; and (c) his car was thoroughly searched and sniffed by a police dog at the scene. No evidence of drugs of any kind was found.

**24.** TU was arrested early in the afternoon of the same day – August 8, 2016 – and charged with surreptitious administration of a substance, a felony.

**25.** In the early afternoon of August 8, a KSL TV reporter did a "beat check" with the Layton City Police Department. A beat check involves calling police PIOs and inquiring about possible stories that may interest the public.

**26.** The LPD PIO on August 8 was Defendant Clint Bobrowski.

**27.** The KSL reporter was told by PIO Bobrowski that Layton City "might have something" and that she should check back in a few minutes. Bobrowski then got permission from Layton City to reveal the poisoning story to the press, even though poison in the drink had not been confirmed, and despite the facts set forth in

¶¶19-23 above. So, Bobrowski called the reporter back and set up an interview on camera, to occur later that afternoon at the subject Subway.

**28.** Layton City, through PIO Bobrowski, therefore offered KSL a scoop on this "poisoning story" before it had definitively tested the drink, i.e., before it knew whether any crime had been committed, and before it knew whether anyone had in fact been poisoned.

**29.** Layton City and the LPD knew at the time the interview was offered that there was no probable cause to believe TU had poisoned the officer's drink. The LPD and Bobrowski also knew at this time that there was considerable exculpatory information that TU was innocent and that there had been no poisoning at the Subway.

**30.** Pursuant to official policy, the LPD directed its PIO to interview with the KSL TV reporter.

**31.** LPD personnel provided Sgt. Bobrowski with considerable false information about what happened with the drink, including information that was inaccurate or unknown at the time.

**32.** By the time of the actual interview, Bobrowski knew or should have known the facts set forth in ¶¶ 19 – 23 above, all of which suggested to a reasonable officer that TU was innocent and that there had been no poisoning at the Subway.

**33.** Based on reasonable belief and inference, LPD personnel instructed Bobrowski, in sum and substance, what to tell the press about this alleged poisoning

story, but to omit key facts known to LPD and Bobrowski by the time of the interview. See ¶¶ 19 – 23 above.

**34.** The information LPD and Sgt. Bobrowski provided to KSL was false and defamatory, and stated, suggested, and/or implied that Layton police had seen and confirmed that a Subway employee deliberately put "meth" or other drugs in the police officer's drink.

**35.** Sgt. Bobrowski allowed himself to be interviewed by KSL between approximately 5:00 and 6:00 p.m. directly behind the Layton Subway, such that this particular Subway, owned by Plaintiffs, was clearly visible and identifiable by any of its customers who saw the TV broadcast.

**36.** In the KSL interview, Sgt. Clint Bobrowski, as the official spokesperson and PIO of the Layton PD, stated:

**a.** "Our business causes us, a lot of us, to eat out every single meal, so something like this is incredibly terrifying. I don't use the word 'terrifying' lightly. It's scary."

**b.** "***The drink*** [served by TU at the Subway in question] ***tested positive for THC and methamphetamine.***"

**c.** "We were able to view video surveillance of him [TU] pouring the drink. For some odd reason the individual leaves the drink on the counter and walked away for an unknown reason for a short period of time, returns to the beverage

that still had its cap off, and appeared to be leaning over the beverage for an unknown reason for an unusual amount of time."

**d.** "***We can obviously assume it [the poisoning] was because he was a police officer*** in a marked vehicle but we don't know for sure." (Bracketed words and emphasis added.)

**37.** The clear implication of these statements was that a Subway employee poisoned the officer's drink with harmful, illegal drugs.

**38.** These implications were false and defamatory toward Subway and the Plaintiffs.

**39.** Layton and Bobrowski intentionally failed to disclose to KSL or the public that the ion screening test was just a preliminary screening device, not generally admissible as proof in court, and that it had a known high false positive rate. In other words, the test would often show the presence of a controlled substance when there was no illegal drug in the test sample.

**40.** Additionally, Layton and Bobrowski failed to disclose the following facts that were known to Layton and Bobrowski at the time of the KSL interview, or shortly thereafter:

**a.** **Thorough Search of Premises.** The Subway had voluntarily permitted a thorough physical search of the premises by police officers sometime in the

early afternoon, between approximately 2:30 and 3:30 p.m. on the day of the alleged incident.

**b.** **TU Personally Searched**. TU had been thoroughly searched personally, and no evidence of drug use or the presence of drugs were found on his person.

**c.** **TU Personal Work Area Searched**. The police had searched the personal work area of TU and had found no evidence of illegal drugs.

**d.** **Employees Interviewed at the Scene**. The Subway had allowed all employees present at the time to be interviewed on the scene by police officers, with no evidence being found of drug use or other impropriety by TU or others.

**e.** **Drug-Sniffing Dog Search**. The Subway had allowed a drug-sniffing dog to sniff the premises, without finding any indication of the presence of drugs anywhere in the restaurant.

**f.** **Officers Watched Video at the Scene**. Plaintiffs had provided the surveillance video of activities inside the restaurant at the time of the alleged poisoning; officers had watched the video and had seen no evidence of poisoning.

**g.** **TU Car Searched and Sniffed**. The car belonging to TU, parked in the parking lot of the Subway, was searched and dog-sniffed thoroughly at the scene, and no evidence of drugs of any kind was found therein.

h. **TU Steadfast Denial**. TU was arrested and taken to the Layton Police Department, where he was interrogated by two detectives. Throughout the day, TU consistently and steadfastly denied any possession or use of drugs and any poisoning of the officer.

i. **High False Positives on LPD Screening Test**. The ion chemical screening test, which the LPD initially claimed showed the presence of THC (marijuana) and meth in the drink served to the officer, is only a preliminary screening device. It is generally not admissible in court and is known to have a high rate of false positives.

j. **5:00 p.m. Urine Test Negative**. At approximately 5:00 p.m. in the early evening hours of August 8, 2016, the officer claiming to have been poisoned was taken to a local hospital for urine testing, searching for the presence of any illegal drugs in his system. None were found.

k. **9:00 p.m. Urine Test Negative**. At 9:00 p.m. on the same day, the officer was given a second urine test, which was likewise negative for the presence of any drugs.

41. Based on information gathered from Bobrowski and other LPD employees or officials, and pursuant to Layton's official policy to have its PIO meet with the press, Nicole Vowell, a KSL-TV reporter, broadcast the following statements about

the incident in question on the 10:00 o'clock news on the evening of August 8, 2016 (broadcast at 11:00 p.m. that day due to the Olympics):

**a.** "What caused those side effects, police say, turned out to be a double dose of illegal narcotics inside his cup."

**b.** "According to investigators, ***this 18-year-old Subway employee*** [photo of TU] ***is the one who slipped him the drugs.***" (Emphasis added.)

**c.** "A horrifying set of circumstances, Sgt. Bobrowski says, for all officers who put on a uniform each day not knowing if they too could become a lunch-time target."

**42.** On August 8, on two occasions at approximately 5:00 p.m. and 9:00 p.m., the officer who consumed the soda at the subject Subway was tested at a local medical facility and was found to have no impairing drugs (THC, meth, etc.) in his system.

**43.** Thus, by the time KSL ran the defamatory story about the alleged poisoning on the August 8, 2016, 11:00 p.m. news, the conclusive facts demonstrating the innocence of TU and the Subway (nine key facts plus 2 urine tests) were known to Layton and Bobrowski.

**44.** KSL was unaware of the falsity or probable falsity of any of the facts or events set forth in paragraphs 19-23 and 40 above. It would not have run the story on the August 8th 11:00 p.m. news if it had known **any** of these facts.

**45.** Despite the exculpatory findings and urine tests demonstrating the tragic error, neither Layton City, the LPD, nor Sgt. Bobrowski, made any attempt to notify KSL or Reporter Vowell prior to the August 8th 11:00 p.m. newscast that the officer had **not been poisoned** by Subway's employee, TU.

**46.** On August 9, 2016, Plaintiff Kristin Myers and the Subway's Field Consultants, Valerie Firth and Brennon Trolley, met at the Subway and watched the relevant video of the officer's drink being prepared. They determined that they could observe all aspects of the transaction, and that *at no time* did TU put any substance into the officer's drink.

**47.** On August 9, 2016, at 12:30 p.m., LPD Detective Rushton called and requested that Plaintiffs bring to the station all the video camera tapes from the day of the incident.

**48.** Plaintiffs reviewed the videos, frame by frame, with Detective Rushton.

**49.** At the conclusion of the viewing, Detective Rushton indicated to Plaintiffs that the alleged victim police officer had taken two separate tests for drugs in a hospital, at 5:00 p.m. and at 9:00 p.m. on August 8, the day of the incident. Detective Rushton informed Plaintiffs that the officer had tested *negative for any drugs* on both tests.

**50.** After viewing the video with Plaintiffs on August 9, LPD's Detective Rushton indicated to Plaintiffs that he did not think TU did anything wrong, that he

could not see any foreign substance being put into the officer's drink, that there was insufficient evidence to charge TU, and that TU would most likely not be charged with any crime.

**51.** Detective Rushton also informed Plaintiffs that he had called the jail to get TU released, but his parents had already posted bail.

**52.** Despite that meeting and the admission of Det. Rushton, neither Layton City nor the LPD took any steps to correct the falsehoods published about the Subway and, by implication, its owners. No effort was made, for example, to contact KSL and provide this new and important exculpatory information.

**53.** Many friends, acquaintances, and customers of the Subway in question knew that Plaintiffs Buttars and Myers were the owners and operators of this Subway.

**54.** Their opinions of Buttars and Myers were diminished and damaged because these friends, acquaintances, and customers thought that Buttars and Myers ran a shoddy operation that hired people who would poison the drink of a police officer.

**55.** For several days on and after August 8, 2016, the local news media continued to report that a police officer was deliberately poisoned with drugs at Plaintiffs' Subway shop.

**56.** For several days after the August 8 and August 9 events described above, multiple news agencies from all over the state were onsite during Subway's lunch

rush to broadcast live about the "poisoning," the falsity of which Layton City had failed to correct despite having had multiple reasons and opportunities to do so.

**57.** The false story of this alleged poisoning of the officer was also reported nationally and internationally by news organizations.

**58.** On August 24, 2016, Plaintiff Buttars spoke with Assistant Layton City Attorney Steven Garside and asked why Layton City had not yet issued a statement indicating that the blood test results on the police officer were negative, and the in-store video showed no drug or other substance had been placed in the officer's drink.

**59.** Garside reported to Buttars on that date that he was "waiting for the state crime lab," and Garside said the results of the testing on the drink would probably be another week.

**60.** On September 6, 2016, in response to questions similar to those in ¶58 above, Buttars was informed that the investigation was still ongoing.

**61.** On September 23, 2016, Buttars and Myers attended a meeting with the Mayor of Layton City, the City Manager, and the LPD Chief of Police.

**62.** At the above-referenced meeting, Buttars expressed grief at the "ongoing investigation" since the LPD and Layton City knew that all evidence gathered to that point had been exculpatory, indicating that no criminal act or misconduct had occurred at the Subway.

## DAMAGES AND ADDITIONAL HARM BY THE LPD

**63.** Within a day of the KSL news story, Plaintiffs experienced a precipitous 30% drop in sales at the Subway. These reduced sales continued for weeks.

**64.** On August 9, the LPD came to the Subway and demanded that three Subway employees, all on the same shift as TU on August 8, come into the police station for an interview. Those employees were terrified, as they were grilled and cross-examined about the alleged poisoning of a police officer, what they knew about it, their own personal habits and views, and whether or not they participated in the poisoning.

**65.** Other employees later learned of the grilling of the three employees.

**66.** Shortly after this questioning, two (2) of the three (3) employees quit working at the subject Subway. Later, four (4) more employees quit, all because of police interrogations.

**67.** During the days after the incident, at least one Subway employee was confronted in the parking lot and harassed and questioned about his activities and lifestyle by an LPD detective.

**68.** Within a few weeks after the incident, a valued, competent manager of the Subway shop quit because of the stress she was receiving from the police, continuing media reports, and unpleasant comments from the public.

**69.** It is very expensive for a Subway store to train new employees and new managers. Each "sandwich artist" undergoes 40 hours of training before they are allowed to work independently in a Subway store.

**70.** Plaintiffs' Subway was forced to shoulder the expense of training many new employees due to the consequences of Defendant's actions.

**71.** The manager quit just before the Labor Day 2016 holiday weekend, and this required Plaintiff Kristin Myers to cancel her own vacation and work the shifts that the manager otherwise would have worked.

**72.** The KSL news story had a comment page that allowed viewers of the story to record their comments. Before it was taken down, the comment page had 205 comments, almost all of which were overwhelmingly negative toward this Subway shop.

**73.** This Subway shop lost several long-standing, valuable customers because of the false story published as a result of the LPD's actions. For example, one private school had regularly, for several years, ordered sandwiches from the Subway for its school lunch program. It quit ordering immediately after the news reports mentioned herein, and it has not ordered anything since.

**74.** In October 2016, the State Crime Lab results were finally made available. The determination was that no THC or methamphetamine was found in the drink. On October 11, 2016, the LPD informed Plaintiffs of the results.

**75.** It took the Subway shop several months to recoup its former sales, resulting in the loss of $17,000 in revenue. In addition, Plaintiffs sustained additional losses as follows: loss of food costs of $500; the cost to train new employees of $4,300; franchisee costs of $20,000; and a drug stigmatization loss of at least $250,000.

**76.** Plaintiffs Buttars and Myers have also sustained significant mental and emotion stress and suffering as a result of Defendants' actions, in an amount to be determined at trial.

**77.** These events were incredibly stressful for Plaintiffs. Dallas Buttars consulted a physician for anxiety as a result.

**78.** Plaintiffs discussed this matter with the Subway Corporation "incident team" in Orlando, Florida. The team reported that there were 300,000,000 social media hits on this incident.

## FIRST CAUSE OF ACTION

### ~ Against Layton City in Its Official Capacity ~

### For Violations of the Fourteenth, Fourth, and/or Fifth Amendments to the Constitution of the United States Cognizable Under 42 U.S.C. § 1983

**79.** The allegations contained in all above paragraphs are incorporated herein by reference.

**80.** "Section 1983 does, however, protect against the deprivation of a property interest 'whenever the State seeks to remove or significantly alter' the status

of liberty or property interests recognized by state law." *San Jacinto Sav. & Loan v. Kacal,* 928 F.2d 697, 701 (5th Cir. 1991).

**81.** False assertions that drug traffic took place on Plaintiffs' premises deprived Plaintiffs of the right to have property and enjoy the benefits of it, as well as to have the liberty to operate it as a legitimate business.

**82.** Defamatory actions of a police official at a press conference can be the basis of a constitutional slander case, where there is otherwise independent harm resulting from the event. *Cooper v. Dupnik,* 963 F.2d 1220 (9th Cir. 1992).

**83.** To prevail on this claim, Plaintiffs "must allege and establish that there was information published that was false and stigmatizing." *Whitney v. State of N.M.,* 113 F.3d 1170, 1175 (10 Cir. 1997). Fact No. 36, among others, establishes this element.

**84.** The stigmatization must also be coupled with the loss of a liberty or property interest "initially recognized and protected by state law." *Id.* (citing, *Paul v. Davis*, 424 U.S. 693, 710 (1976); *see Allen v. Denver Pub. Sch. Bd.*, 928 F.2d 978, 982 (10th Cir.1991)).

**85.** In order to prevail on a constitutional slander claim, the plaintiff must show an independent harm to satisfy the "plus" part of the "stigma plus" test.

**86.** The independent harm suffered by Plaintiffs in this case includes as least the following:

**a.** ***Immediate loss of revenue*** of approximately 30%, beginning the day after the news stories began to run, and lasting at least 5 months.

**b.** ***Police harassment and accosting*** of the Subway's employees, beginning the day of the alleged poisoning and continuing over the next several days when employees were subjected to accusatory and hostile police interrogations, accosted in the parking lot, and/or ordered to report to the police station and be drilled in an accusatory manner regarding this event and their alleged possible participation therein.

**c.** ***Failure of Defendants to announce publicly and promptly*** that: (i) two urine tests had been done the night of the alleged event, and both were negative for any alleged poisoning, (ii) the restaurant, including TU's workspace, had been thoroughly searched, with no drugs being found; (iii) a dog sniff had occurred at the restaurant, with no "hits" for drugs; (iv) TU personally, and TU's car, had been searched and dog-sniffed, and no drugs had been found; (v) all other employees had been interviewed, without turning up any evidence of drug use by TU or anyone else; and (vi) LPD detectives had watched the video of TU filling the drink on the day of the incident and again the next day, and saw no evidence that he put anything in the soda cup other than soda. Such a prompt announcement would have significantly limited the damages sustained by Plaintiffs.

**d.** ***A long delay in announcing*** that the Subway and its employees were innocent of any poisoning, even after Defendants knew on the evening of August

8, at 5:00 p.m. and 9:00 p.m., that there had been no poisoning. This delay continued to cause harm to Plaintiffs.

**87.** Plaintiffs were clearly defamed (Fact No. 36) when Layton City and Bobrowski alleged, stated, and/or implied that the Subway's employee had poisoned an LPD officer with illegal drugs.

**88.** "Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, a protectable liberty interest may be implicated that requires procedural due process in the form of a hearing to clear his name." *Martin Marietta Materials, Inc. v. Kansas Dept. of Trans.*, 810 F.3d 1161 (10th Cir. 2016), citing *Gwinn v. Awmiller,* 354 F.3d 1211, 12 16 (10th Cir. 2004) (other citations and punctuation omitted). This "hearing" is essential. *Board of Regents v. Roth,* 408 U.S. 564, 573 (1972) (citations omitted); *see also, Goss v. Lopez,* 419 U.S. 565, 574 (1975).

**89.** "The liberty interest that due process protects includes the individual's freedom to earn a living." *Setliff v. Memorial Hosp. of Sheridan County,* 850 F.2d 1384, 1396 (10th Cir. 1988) (citation omitted).

**90.** "Moreover it is necessary that the alleged stigmatization be entangled with some further interest.... For example, plaintiffs must allege and present evidence of ***present harm to established business relationships.***" *Jensen v. Redevelopment Agency of Sandy City,* 998 F.2d 1550, 1558 (10th Cir. 1993) (punctuation and citations

omitted; emphasis added). Plaintiffs sustained harm to their present business relationships, as set forth above. *See* Fact No. 73, among others.

**91.** Layton City's actions, as implemented by the Layton City Police Department and its Public Information Officer, have significantly altered Plaintiffs' liberty interests by interfering with Plaintiffs' rights to successfully operate their previously successful business, and to continue to make a fair profit unfettered by the defamatory publication by Defendants. This defamation, together with harassment of employees, has directly resulted in a significant "harm to present business relationships," including loss of customers, loss of profit, loss of employees due to harassment, and loss of employment opportunity. In other words, Layton not only defamed and "stigmatized" Plaintiffs, but added a "plus" that foreclosed and damaged Plaintiffs' freedom to take profitable advantage of their business enterprise or other employment opportunities with businesses that needed catering. *See Corbitt v. Andersen,* 778 F.2d 1471, 1474-5 (10th Cir. 1985) ("Under Corbitt's theory of the case, we are dealing with something more than a damaged reputation. The right to pursue one's chosen profession unfettered by state action which does not comport with the 14th Amendment, is referred to in *Schware v. Board of Bar Examiners*, 353 U.S. 232 ... (1957)."

**92.** Layton's communications, issued by the Defendant PIO, Clint Bobrowski, represent the antithesis of due process, which requires some form of hearing when an individual is to be deprived of a liberty or property interest by government action. Here, Plaintiffs received no due process before Layton provided false and

defaming information to the news media for general and wide-spread dissemination. *See id.*

**93.** Defendants' actions herein were intentional and/or reckless, entitling Plaintiffs to punitive damages, such as may be allowed by law.

**94.** The Court should order Defendants to issue a public apology, stating that absolutely no wrong had been committed by either TU or the Subway.

**95.** Plaintiffs are entitled to attorney fees under § 1988.

## SECOND CAUSE OF ACTION

**~ Against Defendant Bobrowski in his Individual Capacity ~**

**For Violations of the Fourteenth, Fourth, and/or Fifth Amendments to the Constitution of the United States Cognizable Under 42 U.S.C. § 1983**

**96.** The allegations contained in all above paragraphs are incorporated herein by reference.

**97.** Plaintiffs had a constitutional right not to be defamed by Layton's PIO, Sgt. Bobrowski.

**98.** A reasonable officer in Bobrowski's position would have known that Plaintiffs had such a right.

**99.** The right not to be defamed by government action or by a PIO such as Bobrowski is clearly established in the Tenth Circuit, as set forth in the cases cited above in the First Cause of Action.

**100.** Defendant's actions herein were intentional and/or reckless, entitling Plaintiffs to punitive damages, such as may be allowed by law.

**101.** The Court should order Bobrowski to issue a public apology, stating that absolutely no wrong had been committed by either TU or the Subway.

**102.** Plaintiffs have been damaged as set forth in the First Cause of Action, which damages are incorporated herein by reference.

**103.** Plaintiffs are entitled to attorney fees under § 1988.

## THIRD CAUSE OF ACTION

**~ Against All Defendants ~**

**For Outrageous Conduct That Shocks the Conscience and Violates the Fourteenth Amendment to the Constitution of the United States Cognizable Under 42 U.S.C. § 1983**

**104.** The allegations contained in all above paragraphs are incorporated herein by reference.

**105.** **Prior** to the highly defamatory story running on the KSL 11:00 p.m. news on August 8, 2016, Layton City, the LPD, and Sgt. Bobrowski, acting for Layton City, the LPD, and for himself, knew at least the following facts that conclusively proved the innocence of TU and the Subway restaurant:

**a. Thorough Restaurant Search.** The Subway had voluntarily permitted a thorough physical or manual search of the premises by police officers sometime in the early afternoon, between approximately 2:30 p.m. and 3:30 p.m.

**b. Thorough Personal Search.** TU had been thoroughly searched, and no evidence of drug use or the presence of drugs were found on his person.

**c. Employees Interviewed.** The Subway had allowed all employees to be interviewed on the scene by police officers, with no evidence being found of drug use or other impropriety by TU or others.

**d. TU's Personal Work Area.** The Subway allowed police to thoroughly search the entire restaurant and TU's personal work area, with no evidence found of the presence of illegal drugs.

**e. Dog Sniff.** The Subway and TU had allowed a drug-sniffing dog to sniff the premises and TU's car, without finding any indication of the presence of drugs anywhere in the restaurant or car.

**f. TU's Car.** The car belonging to TU, parked in the parking lot of the Subway, was searched and dog-sniffed at the scene, and no evidence of drugs of any kind were found therein.

**g. Surveillance Video.** Plaintiffs had provided the surveillance video of activities in the restaurant at the time of the alleged poisoning; officers had watched the video, and had seen no evidence of poisoning.

**h. TU's Steadfast Denial.** TU was arrested and taken to the Layton Police Department, where he was interrogated by two detectives. He

consistently and steadfastly denied any possession or use of drugs and any poisoning of the officer.

i. **5:00 P.M. Urine Test.** At approximately 5:00 p.m. on August 8, 2016, the officer claiming to have been poisoned was taken to a local hospital for urine testing, searching for the presence of any illegal drugs in his system. The urine test was negative.

j. **9:00 P.M. Urine Test.** At 9:00 p.m. on the same day, the officer was given a second urine test, which was likewise negative for the presence of any drugs in his blood system.

k. **Ion Screening and False Positives.** The ion chemical screening test, which the LPD initially claimed showed the presence of THC (marijuana) and meth in the drink served to the officer, is only a preliminary screening device. It is generally not admissible in court and is known to have a high rate of false positives.

**106.** None of the information set forth above was disclosed to KSL prior to the 11:00 p.m. news, despite the fact that there was plenty of time to do so.

**107.** Had this information been disclosed to KSL or Nicole Vowell, the reporter, the story would not have run on the news that night.

**108.** The actions of Defendants are outrageous and conscience shocking. Defendants allowed the story of the poisoning to go forward on the news, despite having considerable evidence that the story was false, and knowing that it would severely harm

not only TU but the Layton Subway store. Defendants' actions that night, as set forth herein, constituted a substantive due process violation of the Fourteenth Amendment in that the Defendants' actions "demonstrate[d] a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking." *Uhlrig v. Harder*, 64 F.3d 567, 574 (10th Cir. 1995).

**109.** To show a defendant's conduct is conscience shocking, a plaintiff must prove a government actor arbitrarily abused his authority or "employ[ed] it as an instrument of oppression." *Williams v. Berney,* 519 F.3d 1216, 1220 (10th Cir. 2008) (internal punctuation omitted).

**110.** The Tenth Circuit has held that "[o]utrageous government conduct during a criminal investigation may constitute a violation of substantive due process rights." *Romero v. United States,* 658 Fed.Appx. 376 (10th Cir. 2016) (citing *United States v. Mosley,* 965 F.2d 906, 908–09 (10th Cir. 1992) (internal punctuation omitted). Such outrageous conduct occurred in this criminal investigation of TU and the Subway.

**111.** Defendants' actions herein were intentional and/or reckless, entitling Plaintiffs to punitive damages, such as may be allowed by law.

**112.** The Court should order Defendants to issue a public apology, stating that absolutely no wrong had been committed by either TU or the Subway.

**113.** Plaintiffs have been damaged as set forth above.

**114.** Plaintiffs are entitled to attorney fees under § 1988.

## FOURTH CAUSE OF ACTION

**~ Against Layton City In Its Official Capacity ~**

**Failure to Train and/or Supervise**
**Cognizable Under 42 U.S.C. § 1983**

**115.** Plaintiff incorporates by reference all above allegations.

**116.** On August 8, 2016, as described above, Layton City, through the LPD and its PIO, Sgt. Bobrowski, perpetrated an outrageous and unjustified slander against Plaintiffs. This slander deprived Plaintiffs of their procedural and substantive constitutional rights, as alleged and described herein, which descriptions are incorporated here by reference.

**117.** It was a common, foreseeable, and usual practice that Layton City would interact with the press, including TV stations like KSL, for the purpose of explaining police matters.

**118.** In fact, Layton City and the LPD had an official policy to talk with the press about police matters, and a PIO was employed for this very purpose. Said PIO would interface with members of the press frequently.

**119.** Layton City and the LPD had a duty to fully and adequately train and supervise LPD officers, and especially its PIO, to follow its policies, procedures, and/or protocols, if they existed, to be truthful to the press, and to not omit facts and truthful information in its press interactions.

**120.** Layton City and the LPD had the duty and responsibility to train and supervise its officers abide by the U.S. Constitution and to protect its citizens, including Plaintiffs, from unnecessary, serious, and foreseeable harm associated with the publication and release of defamatory information about possible criminal conduct.

**121.** Layton City had all these duties in order to avoid the substantial risk and possibility of defaming innocent citizens with false charges of criminal conduct, which would cause serious, irreversible damage to innocent citizens.

**122.** Layton City and its LPD knowingly and recklessly failed to adequately train and/or supervise its PIOs and enforce its policies, procedures, and/or protocols, if they existed, regarding the use and release to the press of information relating to crimes, in order to avoid the risk of constitutional defamation.

**123.** Layton City's and the LPD's failure to utilize and enforce its policies, procedures, and/or protocols, if they existed, and to train and supervise its officers in the lawful utilization of those policies, procedures, and/or protocols, if they existed, demonstrated a reckless indifference to the rights, safety, well-being, and lives of residents of Utah who might live or work in and around Layton City, and in particular, the Plaintiffs.

**124.** Layton City's and the LPD's failure to fully and adequately train and supervise its officers, and to enforce its policies, procedures, and/or protocols, if they existed, proximately caused Plaintiffs' defamation, in that the lack of training,

supervision, and/or education in the lawful publication of facts about the alleged poisoning proximally caused Plaintiffs to be needlessly defamed, which led to the serious damages alleged herein.

**125.** The actions, or inactions, of Layton City, as described above, constitute willful, wanton, and heedless disregard for the rights, well-being, reputation, and safety of Utah citizens, including Plaintiffs, and warrant the imposition of punitive damages.

**126.** The conduct described herein reflects a practice or custom informally and customarily condoned by Layton City, which practice or custom consists of allowing or instructing its PIOs to appear for press interviews, either without having all the true facts, or without checking the true facts. The effect of this was to expose innocent citizens, like Plaintiffs, to defamation such as occurred in this case.

**127.** Layton City was knowingly and deliberately indifferent toward the proper training and supervision of its officers and its PIOs, particularly in the appropriate dissemination to the press of facts about possible crimes, based on incomplete, false, and/or unknown information, or information that was stale, outdated, or not fact-checked. The effect of this was to expose innocent citizens to defamation such as occurred in this case.

**128.** Plaintiff demands judgment against Defendants for compensatory damages, for punitive damages, for costs and attorney fees, and for such other relief as is available under law and as this Court deems just and proper.

**FIFTH CAUSE OF ACTION**

**~ Against All Defendants ~**

**For Violation of State Civil Rights**
**Brought Pursuant to the Court's Supplemental Jurisdiction**
**Under 28 U.S.C.A. 1367(a)**

**129.** The allegations contained in all above paragraphs are incorporated herein by reference.

**130.** The Utah Constitution provides as follows:

> Sec. 7. [Due process of law.] No person shall be deprived of life, liberty or property, without due process of law.

Constitution of the State of Utah, Article I, Section 7.

**131.** Article I, Section 25 states in relevant part: "This enumeration of rights shall not be construed to impair or deny others retained by the people." Among other "retained" rights, Plaintiffs had the right not to have Layton City and its PIO slander them on statewide TV under the circumstances described herein.

**132.** The notice provision of the Utah Governmental Immunity Act, as delineated in Utah Code Ann. §630-7-401(2), does not apply to Plaintiffs' State Constitutional claims because such claims are self executing. A Utah State constitutional provision is self executing:

> ... if it articulates a rule sufficient to give effect to the underlying rights and duties intended by the framers. In other words, courts may give effect to a provision without implementing legislation if the framers intended the provision to have immediate effect and if "no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty imposed ..."

*Spackman ex rel. Spackman v. Bd. of Educ. of Box Elder Cnty. Sch. Dist.,* 2000 UT 87, 16 P.3d 533, 535.

**133.** These violations of Plaintiffs' rights by Defendants are guaranteed by the Utah Constitution and other statutes and laws, and such violations entitle them to compensatory and punitive damages, injunctive relief, statutory civil penalties, and attorney's fees, all of which are requested and provided for by the laws and Constitution of Utah.

**134.** A corporation is a "person" under Utah law.

**135.** Defendants are individuals (Bobrowski) and entities (Layton City and the LPD) who were acting under color of law throughout the duration of the events described herein.

**136.** Defendants have deprived Plaintiffs of a property interest without due process of law, as set forth above.

**137.** Defendants caused the publication of a false and defamatory claim that Plaintiffs' restaurant employee poisoned an officer's drink with THC and meth.

**138.** Defendants conducted a news conference leveling these false allegations, and did so such that the Subway was clearly identified in the background.

**139.** At the time these charges were aired on the news, Defendants knew that they were false or likely false, due to many exculpatory pieces of evidence. Yet, Defendants took no actions to prevent the airing of these knowingly false charges.

**140.** After the charges had been aired on the news on the evening of August 8th, Defendants took no prompt action to correct the falsehood by revealing the numerous pieces of evidence that proved or suggested that there had been no poisoning.

**141.** Defendants' actions, as set forth herein, were a flagrant, egregious, outrageous, and conscience-shocking violation of Plaintiffs' Article I § 7 rights to procedural and substantive due process of law, and demonstrated a strong element of venality. Defendants' actions further showed that they arbitrarily abused their authority and employed it as an instrument of oppression.

**142.** Defendants' actions demonstrated a degree of flagrancy and outrageousness, and a magnitude of potential or actual harm, that was truly conscience shocking.

**143.** There were no other existing remedies to redress Plaintiffs' injuries. Further, equitable relief such as an injunction was and is wholly inadequate to protect Plaintiffs' rights or redress their injuries. The damage had already been done on the evening of August 8, 2016, and there was no remedy available after the false statements had been published.

**144.** As a direct and proximate result of the aforementioned conduct of Defendants, and in addition to all damages set forth herein, Plaintiffs Buttars and Myers have suffered and will continue to suffer emotional and psychological distress and mental anguish, the exact nature and amount of which will be determined at trial.

**145.** Defendants acted willfully and with a reckless disregard for Plaintiffs' rights. Plaintiffs are therefore entitled to an award of punitive damages against Defendants for the purpose of punishing these Defendants and to deter them and others from such conduct in the future.

**146.** Plaintiffs are entitled to attorney fees under the inherent authority doctrine, as well as any other provisions of Utah Law that may be found to apply in this case.

**147.** The Court should order Defendants to issue a public apology, stating that absolutely no wrong had been committed by either TU or the Subway.

## REQUEST FOR RELIEF

WHEREFORE, Plaintiffs demand judgment against Defendants as follows:

**1.** For general compensatory damages in an amount to be determined at trial;

**2.** For special damages, such as are shown at trial;

**3.** For punitive damages against Defendants as may be allowed by law;

**4.** For an Order directing Defendants to publish an apology to Plaintiffs and to TU for wrongly accusing them of a drug offense on August 8, 2016;

**5.** For pre-judgment interest on the damages assessed by the verdict of the jury, as allowed by law;

**6.** For Plaintiffs' costs and reasonable attorney fees incurred herein, pursuant to 42 U.S.C. § 1988 and/or pursuant to Utah law; and

**7.** For such other and further relief as the Court deems just and proper.

DATED this 8th day of August, 2017.

**SYKES MCALLISTER LAW OFFICES, PLLC**

*/s/ Robert B. Sykes*
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