

DOCUMENT 5

DOCUMENT 5

1 **CODE 2540**
2 MICHAEL PAGNI (NSBN #6444)
3 ADAM HOSMER-HENNER (NSBN #12779)
4 McDonald Carano Wilson LLP
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6 Reno, NV 89501
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9 Email: mpagni@mcdonalddcarano.com
10 *Attorneys for Plaintiff/Counterdefendant*

11 **SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
12 **IN AND FOR THE COUNTY OF WASHOE**

13 BEN KIECKHEFER, an individual,
14 Plaintiff/Counterdefendant,
15 vs.

CASE NO.: CV14-01227
DEPT. NO.: 3

16 GARY SCHMIDT, an individual, and DOES 1-
17 10, inclusive,
18 Defendant/Counterclaimant.

19 **NOTICE OF ENTRY OF ORDER DENYING SPECIAL MOTION TO DISMISS**

20 PLEASE TAKE NOTICE that on the 5TH day of September, 2014, the Court entered an
21 Order Denying Defendant's Special Motion to Dismiss, in the above-entitled matter, a true and
22 correct copy of which is attached hereto.

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AFFIRMATION

The undersigned does hereby affirm that this document does not contain the Social Security number of any person.

DATED: September 15, 2014.

MCDONALD CARANO WILSON LLP

/s/ Adam Hosmer-Henner

MICHAEL PAGNI (NSBN #6444)

ADAM HOSMER-HENNER (NSBN #12779)

McDonald Carano Wilson LLP

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Attorneys for Plaintiff/Counterdefendant

CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I hereby certify that I am an employee of McDONALD CARANO WILSON LLP and that on September 15, 2014, I served the within **NOTICE OF ENTRY OF ORDER DENYING PLAINTIFF'S SPECIAL MOTION TO DISMISS** on the parties in said case by filing the document electronically with the above-entitled court, and by causing the documents to be electronically served via the court's electronic filing system to the following attorneys associated with this case:

CHARLES R. KOZAK, ESQ.
KOZAK LAW FIRM
3100 MILL STREET, SUITE 115
RENO, NEVADA 89502

I declare under penalty of perjury that the foregoing is true and correct.

Executed September 15, 2014, at Reno, Nevada.

By /s/ Jill Nelson
An Employee of McDonald Carano Wilson LLP

1 **CODE 2840**

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7 **SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
8 **IN AND FOR THE COUNTY OF WASHOE**
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10 BEN KIECKHEFER, an individual,
11 Plaintiff/Counterdefendant,

CASE NO.: CV14-01227

DEPT. NO.: 3

12 vs.

13
14 GARY SCHMIDT, an individual, and DOES 1-
15 10, inclusive,
16 Defendant/Counterclaimant.

17
18 **[REDACTED] ORDER DENYING SPECIAL MOTION TO DISMISS**

19 The Court has reviewed and considered Defendant GARY SCHMIDT's ("Schmidt")
20 Special Motion to Dismiss filed in this matter on August 4, 2014. Plaintiff BEN KIECKHEFER
21 ("Sen. Kieckhefer") filed an Opposition on August 8, 2014 and Schmidt filed a Reply on August
22 12, 2014. A hearing was held in Department 3 on August 13, 2014 at 9:00 A.M. where Sen.
23 Kieckhefer and Schmidt were both represented by counsel. Having fully considered the parties'
24 pleadings, points and authorities and all exhibits attached thereto, having heard and carefully
25 considered all proffered evidence and the arguments of counsel, and deeming itself fully advised
26 of the matter and applicable law, the Court hereby enters the following Decision and Order:

27 //

28 //

1 Sen. Kieckhefer and Schmidt were political opponents in the 2014 Republican primary
2 election for Nevada State Senate District 16. Shortly before the primary election, Sen. Kieckhefer
3 and his campaign became aware on June 5, 2014 that Schmidt was airing television campaign
4 advertisements stating that Sen. Kieckhefer "endorsed and supported Harry Reid in 2010." Sen.
5 Kieckhefer's campaign notified Schmidt that these statements were false, but Schmidt did not
6 pull the advertisements. Consequently, on June 6, 2014, Sen. Kieckhefer filed a Complaint
7 asserting claims of defamation and defamation per se against Schmidt for making the false
8 statement that Sen. Kieckhefer endorsed and supported Senator Harry Reid.

9 On August 4, 2014, Schmidt filed a Special Motion to Dismiss pursuant to NRS
10 41.660(2). If a special motion to dismiss is filed, the Court must, by statute, conduct a two-part
11 inquiry to determine if dismissal is warranted. First, pursuant to NRS 41.660(3)(a), the Court
12 must determine whether Schmidt has established, by a preponderance of the evidence, that the
13 claims in the Complaint were based upon a good faith communication in furtherance of the right
14 to petition or the right to free speech in direct connection with an issue of public concern. The
15 Court finds Schmidt has shown, by a preponderance of the evidence, the statements in question
16 were made in the course of a political campaign and therefore satisfy the definitions contained
17 within NRS 41.637 and NRS 41.660.

18 Second, under NRS 41.660(3)(b), the Court must determine whether Sen. Kieckhefer can
19 establish by clear and convincing evidence a probability of prevailing on the claims for
20 defamation and defamation per se. The general elements of a defamation claim require a plaintiff
21 to prove "(1) a false and defamatory statement by [a] defendant concerning the plaintiff; (2) an
22 unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4)
23 actual or presumed damages." *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 718, 57 P.3d 82,
24 90 (2002). If the defamatory communication also imputes a "person's lack of fitness for trade,
25 business, or profession, or tends to injure the plaintiff in his or her business, it is deemed
26 defamation per se and damages are presumed." *Clark Cnty. Sch. Dist. v. Virtual Educ. Software,*
27 *Inc.*, 125 Nev. 374, 385, 213 P.3d 496, 503 (2009) (citations omitted).

1 Based on the evidence, including Sen. Kieckhefer's sworn denial and contrasting lack of
2 credible evidence from Schmidt, the Court finds there is clear and convincing evidence that Sen.
3 Kieckhefer has a probability of showing the claim that Sen. Kieckhefer "endorsed and supported
4 Harry Reid in 2010" was false.

5 The Court further notes that the statements by Schmidt were made in the context of a
6 heated political campaign, and an analysis of those statements requires the Court to examine the
7 atmosphere of the political situation as it existed prior to the primary election and from the
8 perspective of a political conservative. The unrefuted evidence in the record indicates that the
9 statement in question could be harmful to the reputation of a Republican politician. Accordingly,
10 the Court finds there is clear and convincing evidence that Sen. Kieckhefer has a probability of
11 showing the statements by Schmidt were defamatory.

12 Furthermore, the Court notes that these statements may damage Sen. Kieckhefer by way
13 of loss of political capital, harm to political relationships, or loss of electoral support. The
14 evidence also shows the statements affected Sen. Kieckhefer's trade, business, or profession and
15 therefore damages may be presumed under the defamation per se analysis. Thus, the Court finds
16 there is clear and convincing evidence that Sen. Kieckhefer has a probability of establishing
17 damages and/or prevailing on the defamation per se claim. The Court also finds that Schmidt's
18 statements were published to third parties via television stations and that there is no evidence in
19 the record that these statements were privileged.

20 The Court does find Sen. Kieckhefer to be a public figure and therefore he is required to
21 demonstrate actual malice in order to prevail on a claim for defamation. The evidence showed
22 that Schmidt's only support for the allegation that Sen. Kieckhefer endorsed or supported Senator
23 Harry Reid was an October 31, 2010 newspaper article from the Las Vegas Sun, entitled "Reid
24 endorsement may put Raggio on the outs in GOP," attached as Exhibit 1 to the Special Motion to
25 Dismiss. The Court finds that Schmidt misread the article, which does not support a conclusion
26 that Sen. Kieckhefer endorsed or supported Senator Harry Reid. Therefore, the Court finds that
27 Sen. Kieckhefer has a probability of showing that Schmidt's statements were made with
28 knowledge of or reckless disregard for their falsity.

1 At the hearing on the Special Motion to Dismiss, Schmidt admitted during cross-
2 examination that he gave an interview to the Reno Gazette-Journal and made certain statements
3 concerning his political advertisements about Sen. Kieckhefer and Senator Harry Reid. The
4 evidence shows that Schmidt offered to pull the advertisement linking Sen. Kieckhefer to Senator
5 Harry Reid if "[Sen. Kieckhefer] or [the reporter] comes up with anything where [Sen.
6 Kieckhefer] supported or endorsed or spoke favorably – during the campaign and after the
7 primary – for Sharron Angle I'll pull that spot." (Plaintiff's Motion for Temporary Injunction Ex.
8 5); *see also* (Hearing Tr. 16:9-17:9) ("Q: But you offered to pull that ad if anything turned up? A:
9 Yeah. Well, I would in any event. If anything conflicting came up that would put into question
10 the article, I would naturally discontinue running the ad."). The Court finds that on the basis of
11 this and other evidence that Schmidt entertained serious doubts as to the truth of his statements
12 and that the advertisements "should have been pulled." (Hearing Tr. 52:6). Therefore, the Court
13 finds Sen. Kieckhefer has a probability of showing that Schmidt's statements were made with
14 actual malice.

15 The Court finds, after considering all available evidence and arguments, that Sen.
16 Kieckhefer has established by clear and convincing evidence a probability of prevailing on his
17 claims for defamation and defamation per se. The Court does not find that Sen. Kieckhefer's
18 lawsuit was meritless, frivolous, or vexatious.

19 Nevertheless, the Court does not have a sufficient basis to find that the Special Motion to
20 Dismiss was brought frivolously or vexatiously and therefore does not award fees or costs to Sen.
21 Kieckhefer under NRS 41.670.

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1 Accordingly, for good cause it is hereby ordered that Defendant/Counterclaimant GARY
2 SCHMIDT's Special Motion to Dismiss is DENIED.

3 DATED this 5th day of Spt. ~~August~~, 2014

4
5 
6 DISTRICT COURT JUDGE

7 Submitted by:

8 McDONALD CARANO WILSON LLP

9 
10 MICHAEL PAGNI (NSBN #6444)
11 ADAM HOSMER-HENNER (NSBN #12779)
12 McDonald Carano Wilson LLP
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18 Attorneys for Plaintiff/Counterdefendant

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7 **SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**
8 **IN AND FOR THE COUNTY OF WASHOE**
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10 BEN KIECKHEFER, an individual,
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CASE NO.: CV14-01227

DEPT. NO.: 3

12 vs.

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14 GARY SCHMIDT, an individual, and DOES 1-
15 10, inclusive,
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20 Special Motion to Dismiss filed in this matter on August 4, 2014. Plaintiff BEN KIECKHEFER
21 ("Sen. Kieckhefer") filed an Opposition on August 8, 2014 and Schmidt filed a Reply on August
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24 pleadings, points and authorities and all exhibits attached thereto, having heard and carefully
25 considered all proffered evidence and the arguments of counsel, and deeming itself fully advised
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2 election for Nevada State Senate District 16. Shortly before the primary election, Sen. Kieckhefer
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19 Nevertheless, the Court does not have a sufficient basis to find that the Special Motion to
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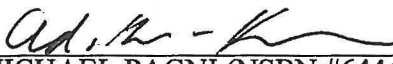
1 Accordingly, for good cause it is hereby ordered that Defendant/Counterclaimant GARY
2 SCHMIDT's Special Motion to Dismiss is DENIED.

3 DATED this 5th day of Spt. August, 2014

4
5 
6 DISTRICT COURT JUDGE

7 Submitted by:

8 McDONALD CARANO WILSON LLP

9 
10 MICHAEL PAGNI (NSBN #6444)
11 ADAM HOSMER-HENNER (NSBN #12779)
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18 *Attorneys for Plaintiff/Counterdefendant*

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DOCUMENT 3

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1 CODE 1137
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4 Nevada State Bar #11179
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6 Reno, Nevada 89502
7 (775) 322-1239
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10 ATTORNEY FOR DEFENDANT/COUNTERCLAIMANT

11 **IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

12 **IN AND FOR THE COUNTY OF WASHOE**

13 BEN KIECKHEFER;
14 AND DOES 1-100

Case No. CV14-01227

15 Plaintiff/Counterfendants,

Dept. 3

16 vs.

17 GARY SCHMIDT,

18 Defendant/Counterclaimant.
19 /

20 **ANSWER AND FIRST AMENDED COUNTERCLAIM**

21 **COMES NOW**, Defendant/Counterclaimant GARY SCHMIDT, by and through his
22 Attorney of Record, CHARLES R. KOZAK, ESQ., and hereby submits his ANSWER AND
23 FIRST AMENDED COUNTERCLAIM of the Plaintiff/Counterdefendants BEN
24 KIECKHEFER and DOES 1-100 on file herein. The true names or capacities of
25 Counterdefendants, DOES 1 through 100, whether individual, corporate, associate, business
26 entity of any kind or otherwise, are unknown to Schmidt, who therefore makes claims against
27 said Counterdefendants by such fictitious names. Schmidt believes and alleges that each of the
28 Counterdefendants designated as a DOE is responsible in some manner for the events and

1 occurrences herein alleged and therefore caused injuries and damages to Schmidt as alleged
2 below. Upon determining the true identities of any such DOE Counterdefendants, Schmidt
3 will ask leave of the Court to amend his Counterclaim further to insert the true names and
4 capacities of said Counterdefendants when the same have been ascertained and to add said
5 Counterdefendants as parties to this action together with the proper charges and allegations
6 pertaining thereto.
7

8 ANSWER

9
10 Answering Paragraph 1 of Plaintiff's Complaint, Schmidt admits that he has paid for
11 television advertising relating to Plaintiff's endorsement of U.S. Senator Harry Reid in 2010
12 and Denies the remaining allegations contained therein;

13 Answering Paragraph 2, Schmidt Denies the allegations contained therein;

14 Answering Paragraph 3, Schmidt Denies the allegations contained therein;

15 Answering Paragraph 4, Schmidt Denies the allegations contained therein;

16 Answering Paragraph 5, Schmidt Denies the allegations contained therein;

17 Answering Paragraph 6, Schmidt Denies the allegations contained therein;

18 Answering Paragraph 7, Schmidt Denies the allegations contained therein;

19 Answering Paragraph 8, Schmidt Admits the allegations contained therein;

20 Answering Paragraph 9, Schmidt Admits the allegations contained therein;

21 Answering Paragraph 10, Schmidt Admits the allegations contained therein;

22 Answering Paragraph 11, Schmidt Admits the allegations contained therein;

23 Answering Paragraph 12, Schmidt Admits the allegations contained therein;

24 Answering Paragraph 13, Schmidt Admits the allegations contained therein;

Answering Paragraph 14, Schmidt Admits he purchased airtime on Channels 2, 4, 8, 11, and 21 and narrated the ads but Denies the remaining allegations contained therein;

Answering Paragraph 15, Schmidt Denies the allegations contained therein;

Answering Paragraph 16, Schmidt Denies the allegations contained therein;

Answering Paragraph 17, Schmidt Denies the allegations contained therein;

Answering Paragraph 18, Schmidt Denies the allegations contained therein;

Answering Paragraph 19, Schmidt Denies the allegations contained therein;

Answering Paragraph 20, Schmidt Denies the allegations contained therein:

Answering Paragraph 21, Schmidt Denies the allegations contained therein:

Answering Paragraph 22, Schmidt Denies the allegations contained therein:

Answering Paragraph 23, Schmidt Denies the allegations contained therein:

Answering Paragraph 24, Schmidt Denies the allegations contained therein;

Answering Paragraph 25, Schmidt Denies the allegations contained therein:

Answering Paragraph 26, Schmidt Denies the allegations contained therein:

Answering Paragraph 27, Schmidt Denies the allegations contained therein:

Answering Paragraph 28, Schmidt Denies the allegations contained therein:

Answering Paragraph 29, Schmidt Denies the allegations contained therein:

Answering Paragraph 30, Schmidt Denies the allegations contained therein:

Answering Paragraph 31, Schmidt Denies the allegations contained therein.

AFFIRMATIVE DEFENSES

Without admitting he has caused harm to Plaintiff in any way whatsoever, Schmidt asserts the following defenses:

1. Plaintiff has failed to state a claim upon which relief can be granted.

1. Plaintiff has waived his claims herein.
2. Plaintiff's suit is barred by unclean hands.
3. Plaintiff did not perform a reasonable inquiry into the law, facts, issues or
4. circumstances prior to bringing his claims.
5. Plaintiff's suit is not grounded in or warranted by law.
6. Plaintiff has brought his claims primarily for an ulterior and improper purpose.
7. Plaintiff has incurred no damage.
8. Any injury allegedly suffered by Plaintiff was caused by Plaintiff's own
9. actions.
10. Any injury allegedly suffered by Plaintiff was caused by an independent
11. intervening source over which Schmidt has no control.
12. Any injury allegedly suffered by Plaintiff was caused by the acts or omissions
13. of third parties.
14. Schmidt was not the proximate cause of Plaintiff's alleged injury.
15. Plaintiff has failed to mitigate his alleged damages.
16. Plaintiff has brought a frivolous suit in order to chill Schmidt's free speech and
17. campaign activities.
18. Plaintiff was negligent, at fault and otherwise responsible for the matters upon
19. which his suit is based.
20. In bringing his suit, Plaintiff has acted in bad faith.
21. Schmidt acted in good faith.
22. Schmidt asserts the defense of justification to Plaintiff's claims.
23. Schmidt's actions are immune from liability.

19. Schmidt's actions are protected under the First Amendment.
20. Schmidt has a constitutional right to engage in the acts alleged.
21. Schmidt's actions are privileged.
22. Schmidt's actions are protected by the absolute privilege.
23. Schmidt's actions are protected by the qualified/conditional privilege.
24. Schmidt's actions are protected by the self-defense privilege.
25. Schmidt's actions are protected by the common interests privilege.
26. The actions taken by Schmidt are a matter of public and general concern.
27. Since Kieckhefer is a public figure/public official, Plaintiff's claims are subject to the defamation laws regarding public figures.
28. Schmidt asserts the defense of truth.
29. Schmidt asserts the defense of substantial truth.
30. Schmidt asserts the Doctrine of Incremental Harm.
31. Schmidt asserts the defense of opinion.
32. Schmidt asserts the defense of fair comment.
33. Schmidt asserts the defense of criticism.
34. Schmidt asserts the defense of belief.
35. The "defamatory statements" alleged to have been made are not even capable of a defamatory meaning.
36. Plaintiff's failure to plead special damages in accordance with NRCP 9(g) bars recovery.
37. Plaintiff's failure to plead actual malice, as required, bars recovery.
38. Plaintiff has engaged in judge shopping.

39. Plaintiff has misused the Court's process.

40. Schmidt reserves the right to supplement his affirmative defenses as all may not be presently known.

WHEREFORE, Schmidt prays as follows:

1. That Plaintiff takes nothing by virtue of his suit filed herein and that his action be dismissed with prejudice in its entirety;

2. That Schmidt be awarded his attorney fees and costs;

3. That Schmidt be afforded relief pursuant to NRS 7.085; and

4. That Schmidt be afforded such other and further relief as the Court may deem just and proper.

FIRST AMENDED COUNTERCLAIM

COMES NOW, Counterclaimant GARY SCHMIDT by and through his Attorney of Record CHARLES R. KOZAK, ESQ. and hereby alleges, avers and complains against Countcrdefendants, BEN KIECKHEFER and DOES 1-100, as follows:

1. This is an action by GARY SCHMIDT ("Schmidt"), who was a Republican candidate for Nevada State Senate District 16 in the 2014 primary election against incumbent BEN KIECKHEFER ("Kieckhefer"). Kieckhefer paid for and published false and defamatory television, internet and radio advertisements, fliers, press releases and other communications. With knowledge of their falsehoods and in reckless disregard of the truth, Kieckhefer published these communications to various third parties.

2. Aside from being counsel of record for Kieckhefer in the current action, the McDonald, Carano, Wilson law firm and its members share many other relationships with Kieckhefer. According to its current website, McDonald, Carano, Wilson law firm employs

1 Kieckhefer as its "Director, Corporate Communications". (See **Exhibit 1.**) A January 21,
2 2011 press release relayed this employment as follows:

3 McDonald Carano Wilson Managing Partner George F. Ogilvie announced
4 today that the firm has hired Megan Mandeville and Ben Kieckhefer to assist
5 the firm in its marketing, business development, and communications
6 initiatives. Mandeville is an experienced business development and marketing
7 professional with over 15 years in the fields of marketing and advertising
8 of law firms and other service providers. Kieckhefer was recently elected to
9 represent Washoe District 4 in the Nevada State Senate.

(See **Exhibit 2.**)

10 Consequently, the firm and its members control many of Kieckhefer's actions. The firm's
11 current website even brags about its history of connections with Senators and the Nevada State
12 Legislature. (See **Exhibit 1.**) Not only this, but the firm does a substantial amount of lobbying
13 in the Legislature.

14 3. Fearful that they may lose their State Senator and his influence in government, the
15 firm and its members agreed to assist Kieckhefer in his campaign to defeat Schmidt. Together
16 they agreed to engage various plans to chill Schmidt's protected free speech/electoral activities,
17 defame Schmidt, deplete his finances, bestow emotional distress upon him and abuse court
18 process.
19

20 4. During the 2014 campaign, Kieckhefer and his associates ran several television and
21 internet popup ads where they defamed Schmidt. For use in these ads, Kieckhefer and his
22 associates obtained a picture from Schmidt's own website in 2014 where Schmidt was actually
23 dressed in a red shirt during a Republican parade in which Schmidt was a participant for the
24 Carson City Republican Party. Kieckhefer and his associates then photo shopped the picture,
25 changing the picture of Schmidt's shirt from red to blue to suit the statement they wish to make
26 about Schmidt's political designation to prospective voters.
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1 5. In these ads, Kieckhefer and his associates put together a series of four pictures or
2 video scenes of Schmidt popping up like a rodent out of the ground at various places on the
3 map of Nevada. In these ads Schmidt's body was photo shopped to be smaller and his head
4 was photo shopped to be larger and was made to "bobble", thus this ad has come to commonly
5 be known as the "bobble head" ad. One picture showed Schmidt popping up, dressed in a
6 photo shopped blue shirt, the Democratic color, where his place of residence is stated as
7 "Sparks" and designating him as a "Democrat" in "2008". Another picture showed Schmidt
8 popping up, dressed in a photo shopped blue shirt, where his place of residence is stated as
9 "Gerlach" and designating him as a "Democrat" in "2010". Schmidt was a Democrat
10 candidate in both 2008 and 2010. Prior to that time Schmidt had been a Republican candidate
11 in 2006 and had been a Republican for almost fifty (50) years). No mention was made in the
12 ad of Schmidt's Republican candidacy in 2006. The third picture showed Schmidt popping up
13 where his place of residence is stated as "Dayton in 2012" **but his political designation was**
14 **intentionally omitted.** The picture of Schmidt was photo shopped by placing him in a blue
15 shirt, the Democratic color, when in actuality Schmidt was a registered Republican and was a
16 Republican candidate for Assembly District 39. Verification of this was at all times readily
17 available to Kieckhefer from the Lyon, Storey and Douglas County Voter Registration Offices
18 along with the Office of the Secretary of State. By dressing Schmidt in a blue shirt and leaving
19 off his party designation, Kieckhefer and his associates knowingly and falsely stated to third
20 parties that Schmidt was a Democrat in 2012. Also during this third "pop up", the ad stated "in
21 2012 Schmidt claimed to live in Dayton" calling into challenge whether Schmidt actually lived
22 in Dayton at that time with no proof offered. The final picture showed Schmidt popping up,
23 dressed in a red shirt, the Republican color, where his place of residence is stated as the

1 “Reindeer Lodge” and designating him as a “Democrat?” in “2014”. In actuality, Schmidt
2 was a registered Republican running as a Republican candidate opposing Kieckhefer in
3 the Republican primary election for State Senator District 16. If Kieckhefer had any
4 doubts about Schmidt’s political affiliation, verification could have easily been ascertained
5 from the Washoe County Voter Registration Office and the Office of the Secretary of State.
6 Kieckhefer in fact knew that Schmidt was a Republican running against him in the Republican
7 primary for State Senate District 16. Although Schmidt remained a **Republican** since the 2012
8 election, Kieckhefer’s voiceover accompanying the final picture stated that Schmidt moved to
9 the Reindeer Lodge “this time to run as a Republican”, knowingly and falsely making the
10 representation that Schmidt had **changed** his political affiliation for 2014.
11
12

13 6. As a direct result of these false statements, numerous voters contacted the Schmidt
14 campaign and inquired as to whether or not Schmidt was a Republican or Democratic
15 candidate for the 2014 election. The falsities were a deliberate attempt to reduce
16 Schmidt’s votes in the June 10, 2014 election by convincing prospective voters that he was not
17 a legitimate Republican running in the Republican Primary.
18

19 7. Kieckhefer and his associates mailed out to prospective voters in Senate District 16
20 flyers that defamed Schmidt.
21

22 8. In the fliers, Kieckhefer and his associates knowingly and falsely stated that, in the
23 context of the current time period (2014), Schmidt “claims to live in a shuttered business on the
24 Mount Rose Highway--the Reindeer Lodge”. In actuality, Schmidt is the owner of the
25 Reindeer Lodge business which is located at 9000 Mt. Rose Highway. The property at 9000
26 Mt. Rose Highway is also owned by Schmidt and has legitimate uses for both residential and
27 business. Contiguous to the building housing the business is a **residence** where Schmidt has
28

1 lived twenty-eight (28) of his forty-two (42) years he has resided in the state of Nevada. It is in
2 this **residence** where Schmidt lived during the entire time he ran for State Senate District 16.
3 Schmidt had a sworn Affidavit on file with the Secretary of State attesting to the fact that he
4 resided at 9000 Mt. Rose Highway. Nowhere in the Affidavit does Schmidt state he resides "in
5 a shuttered business on the Mt. Rose Highway—Reindeer Lodge". The Affidavit is and has
6 been available to the public, including Kieckhefer and his associates during the entire course of
7 the 2014 campaign.
8

9
10 9. Kieckhefer had no evidence that Schmidt is merely "claiming" residency and is not the
11 "actual" resident at 9000 Mt. Rose Highway. This was a calculated and intentional attempt to
12 mislead the voters into thinking Schmidt was some sort of "transient" "opportunistic"
13 "carpetbagger" in District 16 who recently moved into someone's "shuttered" lodge as
14 opposed to residing in a legitimate **residence** Schmidt owned for forty-two (42) years.
15

16 10. By using the term "shuttered business", Kieckhefer and his associates knowingly and
17 falsely depicted the Lodge as a legally non-functional and non-operating business. In actuality,
18 the Lodge has been a licensed business continuously for over half a century as it is today.
19 These facts were easily verified by current business license information on file with the
20 Washoe County Community Development Office.
21

22 11. Nevada voters are traditionally persuaded by the longevity and legitimacy of the
23 residence attached to their candidates. The statement about living "in a shuttered business", by
24 itself, would cause strong negative feelings about a Republican candidate and sway voters'
25 decisions.
26

27 12. All of the aforementioned statements, representations and depictions were made by
28 Kieckhefer and his associates with full knowledge of their falsity or in reckless disregard to

1 their truth and could very well have been the deciding factor in the primary election won by
2 Kieckhefer.

3 13. In an effort to chill Schmidt's protected free speech/electoral activities and disparage
4 Schmidt further in the election, Kieckhefer filed a defamation suit against Schmidt on June 6,
5 2014 and moved ex-parte, the same day, for a Temporary Restraining Order and Permanent
6 Injunction preventing Schmidt from airing television commercials stating that Kieckhefer had
7 endorsed and supported Democrat Harry Reid during the 2010 Senate race against Republican
8 Sharron Angle. Kieckhefer and his associates then notified the media of his court action which
9 was publicized by the Reno Gazette Journal, various periodicals, internet news services and
10 television channels Saturday, June 7, 2014. However, in asserting defamation and moving for
11 a TRO/Injunction, Kieckhefer had absolutely no evidence of actual malice when seeking what
12 amounts to an Unconstitutional Prior Restraint. Remarkably, at no time prior to filing suit did
13 Kieckhefer contact Schmidt to inform him his television commercials were false and ask that
14 he voluntarily retract them. The court action was simply a last minute effort to publicize
15 Schmidt as an unsavory character to Republican voters.

16
17
18
19 **FIRST CLAIM FOR RELIEF**
20 **DEFAMATION**

21 14. Schmidt incorporates herein as though fully set forth all prior allegations.

22 15. Kieckhefer committed Defamation by composing and intentionally publishing false
23 and defamatory statements about Schmidt to numerous third parties.

24 16. Kieckhefer published the statements with actual malice, knowing that they were
25 false or in reckless disregard to the truth.

26 17. Schmidt on information and belief alleges that various DOES repeated the
27
28

1 defamatory statements with actual malice to the media and other persons.

2 18. The false statements would tend to lower Schmidt in the estimation of the
3 Republican voters and excite derogatory opinions about him.

4 19. The defamatory statements may very well have resulted in Republican Primary
5 voters voting against Schmidt in the June 10, 2014 Primary Election.

6 20. As a direct and proximate result of Kieckhefer's Defamation, Schmidt has and will
7 suffer damages including special damages for gas, copies, law library printouts, postage, filing
8 fees, paralegal fees, attorney fees and advertising expenses. Furthermore, Kieckhefer's
9 conduct was fraudulent, oppressive and malicious entitling Schmidt to an award of punitive
10 damages.

11
12
13 **SECOND CLAIM OF RELIEF**
14 **DEFAMATION PER SE**

15 21. Schmidt incorporates herein as though fully set forth all prior allegations.

16 22. Kieckhefer committed Defamation Per Se by composing and intentionally
17 publishing false and defamatory statements about Schmidt to numerous third parties.

18 23. Kieckhefer published the statements with actual malice, knowing that they were
19 false or in reckless disregard to the truth.

20 24. Schmidt on information and belief alleges that various DOES repeated the
21 defamatory statements with actual malice to the media and other persons.

22 25. The false statements would tend to lower Schmidt in the estimation of the
23 Republican voters and excite derogatory opinions about him.

24 26. The defamatory statements may very well have resulted in Republican Primary
25 voters voting against Schmidt in the June 10, 2014 Primary Election.

1 27. Damages are presumed because the statements tend to damage Schmidt's reputation
2 in his business, trade and political candidacy.

3
4 **THIRD CLAIM OF RELIEF**
5 **ABUSE OF PROCESS**

6 28. Schmidt incorporates herein as though fully set forth all prior allegations.

7 29. Kieckhefer committed Abuse of Process by bringing an action designed to
8 chill Schmidt's protected free speech/electoral activities.

9 30. Kieckhefer with the consent and assistance of members of the McDonald, Carano,
10 Wilson law firm committed Abuse of Process by pursuing CV14-01227 primarily for the
11 ulterior purpose of chilling Schmidt's protected free speech/electoral activities in his race
12 against Kieckhefer for Nevada State Senator District 16.

13 31. Kieckhefer committed Abuse of Process by using CV14-01227 primarily for the
14 ulterior purpose of promoting negative press about Schmidt and derailing his chances of
15 winning the Republican primary election in Senate District 16.

16 32. Kieckhefer committed Abuse of Process by pursuing CV14-01227 primarily for the
17 ulterior purpose of harassing, embarrassing, punishing, intimidating, mentally anguishing and
18 financially depleting Schmidt during the 2014 campaign.

19 33. Kieckhefer committed Abuse of Process through his willful act of filing a complaint
20 on June 6, 2014 and moving ex-parte for a TRO/Injunction preventing Schmidt from airing
21 television commercials stating that Kieckhefer endorsed and supported Democrat Harry Reid
22 during the 2010 Senate race against Republican Sharron Angle.

23 34. Kieckhefer committed Abuse of Process by moving for and obtaining an
24 Unconstitutional Prior Restraint in CV14-01227.
25
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1 35. As a direct and proximate result of Kieckhefer's Abuse of Process, Schmidt has
2 suffered and will suffer damages including those for fear, anxiety, mental and emotional
3 distress, humiliation, embarrassment, inconvenience, loss of time, injury to his reputation and
4 costs defending himself. Furthermore, Kieckhefer's conduct was fraudulent, oppressive and
5 malicious entitling Schmidt to an award of punitive damages.
6

7 **FOURTH CLAIM FOR RELIEF**
8 **INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS**

9 36. Schmidt incorporates herein as though fully set forth all prior allegations.

10 37. Schmidt is entitled to recover under Intentional Infliction of Emotional Distress as
11 the conduct of Kieckhefer was extreme and outrageous causing Schmidt stress, anxiety,
12 sleeplessness, night sweats, grinding of teeth, tooth pain, loss of weight, nausea, diarrhea,
13 heaves, nervousness, inability to concentrate, depression, humiliation, embarrassment, chagrin,
14 loss of appetite, anger and shock. Court filings and Court Orders occupy Schmidt's mind
15 constantly. Schmidt has obtained medical attention for the conditions caused by Kieckhefer's
16 conduct.
17

18 38. As a direct and proximate result of Kieckhefer's Intentional Infliction of Emotional
19 Distress, Schmidt has suffered and will suffer damages. Furthermore, Kieckhefer's conduct
20 was fraudulent, oppressive and malicious entitling Schmidt to an award of punitive damages.
21

22 **FIFTH CLAIM FOR RELIEF**
23 **NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS**

24 39. Schmidt incorporates herein as though fully set forth all prior allegations.

25 40. Schmidt is entitled to recover under Negligent Infliction of Emotional Distress as
26 the conduct of Kieckhefer was extreme and outrageous causing Schmidt stress, anxiety,
27 sleeplessness, night sweats, loss of weight, nausea, diarrhea, heaves, nervousness, inability to
28

1 concentrate, depression, humiliation, embarrassment, chagrin, loss of appetite, anger and
2 shock. Court filings and Court Orders occupy Schmidt's mind constantly. Schmidt has
3 obtained medical attention for the conditions caused by Kieckhefer's conduct.

4
5 41. As a direct and proximate result of Kieckhefer's Negligent Infliction of Emotional
6 Distress, Schmidt has suffered and will suffer damages. Furthermore, Kieckhefer's conduct
7 was fraudulent, oppressive, and malicious entitling Schmidt to an award of punitive damages.

8
9 **SIXTH CLAIM FOR RELIEF**
CIVIL CONSPIRACY

10 42. Schmidt incorporates herein as though fully set forth all prior allegations.

11 43. Kieckhefer and members of the McDonald, Carano, Wilson law firm engaged in a
12 civil conspiracy by agreeing to accomplish an unlawful objective causing harm to Schmidt.
13 They intended to chill Schmidt's protected free speech/electoral activities and hinder his
14 election efforts. They intended to inflict emotional distress and abuse process.

15
16 44. As a direct and proximate result of this Conspiracy, Schmidt has suffered and will
17 suffer damages. Furthermore, Kieckhefer's conduct was fraudulent, oppressive and malicious
18 entitling Schmidt to an award of punitive damages.

19
20 **SEVENTH CLAIM FOR RELIEF**
AIDING AND ABETTING (COMMON LAW)

21
22 45. Schmidt incorporates herein as though fully set forth all prior allegations.

23 46. Kieckhefer and members of the McDonald, Carano, Wilson law firm aided and
24 abetted each other by knowingly and substantially assisting one another to chill Schmidt's
25 protected/free speech electoral activities. They aided and abetted by knowingly and
26 substantially assisting one another to inflict emotional distress and abuse process.
27
28

1 47. As a direct and proximate result of this Aiding and Abetting, Schmidt has suffered
2 and will suffer damages. Furthermore, Kieckhefer's conduct was fraudulent, oppressive and
3 malicious entitling Schmidt to an award of punitive damages.
4

5 **EIGHTH CLAIM FOR RELIEF**
6 **CONCERT OF ACTION**

7 48. Schmidt incorporates herein as though fully sets forth all prior allegations.

8 49. Kieckhefer and members of the McDonald, Wilson, Carano law firm engaged in a
9 Concert of Action. Pursuant to their agreement, they committed unlawful conduct while acting
10 in concert. They endeavored to chill Schmidt's protected free speech/electoral activities by
11 using CV14-01227. They inflicted emotional distress and abused process.
12

13 50. As a direct and proximate result of this Concert of Action, Schmidt has suffered and
14 will suffer damages. Furthermore, Kieckhefer's conduct was fraudulent, oppressive and
15 malicious entitling Schmidt to an award of punitive damages.
16

17 **PRAYER FOR RELIEF**

18 **WHEREFORE**, Schmidt prays for relief as follows:

- 19 1. For judgments against Counterdefendants in excess of \$10,000;
20 2. For general and compensatory damages;
21 3. For special damages including gas, copiers, law library printouts, postage, filing fees,
22 paralegal fees, attorney fees and advertising expenses;
23 4. For economic damages;
24 5. For damages for loss of earnings and loss of earning capacity;
25 6. For damages for all the natural and probable consequences of the wrongs;
26 7. For damages for injury to feelings from humiliation, embarrassment, indignity and
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1 disgrace;

2 8. For damages for inconvenience;

3 9. For damages for injury to reputation;

4 10. For damages for loss of time;

5 11. For damages for fear, anxiety, and mental and emotional distress;

6 12. For punitive damages;

7 13. For pre-judgment and post-judgment interest;

8 14. For costs and attorney fees;

9 15. For relief pursuant to NRS 7.085; and

10 16. For such other relief that appears just and proper.

11
12
13
14 **Pursuant to NRS 239B.030, the undersigned certifies that this document does not contain**
15 **a Social Security number.**

16 DATED this 9th day of July 2014.

17
18 /s/ CHARLES R. KOZAK
19 KOZAK LAW FIRM
20 CHARLES R. KOZAK, ESQ.
21 Nevada State Bar #11179
22 3100 Mill Street, Suite 115
23 Reno, Nevada 89502
24 (775) 322-1239
25 Fax (775) 800-1767
26 chuck@kozaklawfirm.com
27 ATTORNEY FOR THE DEFENDANT/
28 COUNTERCLAIMANT

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CERTIFICATE OF SERVICE

I, NAN ADAMS certify that on the 9th day of July 2014, I caused to be delivered by:

_____ MESSENGER SERVICE

_____ FASCIMILE to the following number: _____

_____ U.S. MAIL

_____ CERTIFIED MAIL, RETURN RECEIPT REQUESTED

_____ FEDERAL EXPRESS or other overnight delivery

XXXXXX ELECTRONIC FILING

A true and correct copy of the within document: **ANSWER AND FIRST AMENDED COUNTERCLAIM**, Case #CV14-01227, addressed as follows:

MICHAEL A. PAGNI, ESQ.
McDONALD CARANO WILSON
100 W. Liberty, 10th Floor
Reno, Nevada 89505

I hereby certify that on the 9th day of July 2014, I electronically filed the foregoing with the Clerk of the Court by using the ECF System that will send a Notice of Electronic filing to the above-named party.

/s/ NAN ADAMS
NAN ADAMS
3100 Mill Street, Suite 115
Reno, Nevada 89502

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EXHIBIT LIST

<u>NO.</u>	<u>DESCRIPTION</u>	<u>PAGES</u>
1	McDonald, Carano, Wilson website printout-July 3, 2014	5
2	McDonald, Carano, Wilson press release-January 21, 2011	3

DOCUMENT 2

DOCUMENT 2

1 **CODE \$4170**
2 MICHAEL PAGNI (#6444)
3 McDonald Carano Wilson LLP
4 100 West Liberty Street. 10th Floor
5 Reno, NV 89501
6 Telephone: (775) 788-2000
7 Facsimile: (775) 788-2020
8 Email: mpagni@mcdonaldcarano.com
9 *Attorney for Plaintiff*

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SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

BEN KIECKHEFER, an individual,
Plaintiff,

CASE NO.:

DEPT. NO.:

vs.

GARY SCHMIDT, an individual, and DOES
1-10, inclusive,
Defendant.

ORDER GRANTING TEMPORARY RESTRAINING ORDER

Plaintiff Ben Kieckhefer's EX PARTE MOTION FOR TEMPORARY
RESTRAINING ORDER AND REQUEST FOR PRELIMINARY INJUNCTION
HEARING, was filed on Friday, June 6, 2014. The Court, having considered the
Motion, and finding that Ben Kieckhefer is likely to suffer irreparable injury to his career
and reputation from Defendant's television advertisements in the absence of injunctive
relief, and good cause appearing therefore,

IT IS HEREBY ORDERED that Plaintiff's Motion for Temporary Restraining
Order is GRANTED.

1 IT IS FURTHER ORDERED that Defendant Gary Schmidt shall immediately
2 withdraw all advertisements expressing or implying that Ben Kieckhefer has endorsed
3 or supported Harry Reid.

4 IT IS FURTHER ORDERED Plaintiffs' Motion for Preliminary Injunction shall be
5 set for hearing on June 18th, 2014, at 1:30^{pm}.

6 IT IS FURTHER ORDERED that this temporary restraining order shall ~~not~~ take
7 ~~effect until such time as~~ ^{immediately.} Plaintiff ^{must} posts security ^{by June 9, 2014}, pursuant to N.R.C.P. 65(c), in the
8 amount of \$ 1,000⁻.

9 IT IS SO ORDERED, this 6th of June, 2014, at 6:12 p.m.
10
11

12 Patrick Flanagan
13 DISTRICT COURT JUDGE
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DOCUMENT 1

DOCUMENT 1

FILED

2014 JUN -6 PM 2:50

JUDY STEWART, CLERK OF THE COURT

BY

DEPUTY

CODE \$1425

MICHAEL PAGNI (#6444)

ADAM HOSMER-HENNER (#12779)

McDonald Carano Wilson LLP

100 West Liberty Street, 10th Floor

Reno, NV 89501

Telephone: (775) 788-2000

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Email: mpagni@mcdonaldcarano.com

Attorney for Plaintiff

SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

BEN KIECKHEFER, an individual

Plaintiff,

vs.

GARY SCHMIDT, an individual; DOES I-V,
inclusive; and ROE ENTITIES VI-X, inclusive
Defendants.

CASE NO.: CV14 01227

DEPT. NO.: 3

Exempt from Arbitration Per N.A.R. 3(A)
- Action seeks extraordinary and
equitable relief.

VERIFIED COMPLAINT

COMES NOW, Plaintiff BEN KIECKHEFER, an individual, ("Plaintiff"), by and through his attorneys, Michael A. T. Pagni and Adam Hosmer-Henner of McDonald Carano Wilson LLP, and as a Complaint against Defendant GARY SCHMIDT, an individual, alleges as follows:

I. NATURE OF THE ACTION

1. This is an action by Ben Kieckhefer, Nevada State Senator, against defendant Gary Schmidt for defamation. Defendant has paid for and published false and misleading

1 television advertisements which falsely assert that Senator Kieckhefer "endorsed and
2 supported Harry Reid in 2010".

3 2. Defendant has made these statements with full knowledge that they are false.

4 3. Despite knowing that the statements were false, Defendant published the
5 defamatory statements widely through television advertisements broadcast to the general
6 public on at least 5 television channels, as well as to members of the press, in order to
7 injure and to harass Senator Kieckhefer and misrepresent his political record and position
8 on the eve of the primary election.

9 4. Defendant's statements and misrepresentations of Senator Kieckhefer's
10 political endorsement actions on the eve of the primary election damage his reputation, both
11 personally and professionally.

12 5. Upon information and belief, Harry Reid is a polarizing figure in Republican
13 politics and the endorsement and/or support of Harry Reid can, in and of itself, be a
14 deciding factor against voting for a candidate in a Republican primary. Upon information
15 and belief, the support or endorsement of Senator Reid by a Republican public officer
16 will, by itself, cause strong negative feelings about a Republican candidate among
17 some Republican voters and will cause some Republican voters to vote against that
18 Republican candidate for office.

19 6. Defendant's false statements have particularly harmful effects on Senator
20 Kieckhefer, whose re-election campaign, credentials as a conservative candidate and
21 political beliefs and position could be disadvantaged if he does not defend and uphold his
22 reputation and ensure information provided to voters about his political decisions is
23 accurate.

24 7. Senator Kieckhefer has been forced to bring this action in order to protect his
25 reputation and his livelihood from Defendant's false and malicious attacks and to ensure
26 voters have accurate information from which to make an informed decision about Senator
27 Kieckhefer.

1
2 **II. PARTIES**

3 8. Ben Kieckhefer ("Senator Kieckhefer" or "Plaintiff") resides in Washoe County,
4 Nevada. He is currently the Nevada State Senator for District 16 and is running for re-
5 election in the 2014 election.

6 9. Defendant Gary Schmidt ("Defendant") is a Nevada resident. Defendant is
7 running as a Republican opponent against Senator Kieckhefer in the primary election
8 scheduled for June 10, 2014.

9 **III. JURISDICTION AND VENUE**

10 10. This Court has subject matter jurisdiction pursuant to Article 6, Section 6 of the
11 Nevada Constitution.

12 11. This Court has personal jurisdiction over Defendant pursuant to NRS 14.065.

13 12. Venue is proper in Washoe County pursuant to NRS 13.040.

14 **IV. BACKGROUND FACTS**

15 13. Plaintiff Ben Kieckhefer is a Republican Nevada State Senator for District 16
16 and is running for re-election in the 2014 election. The primary election for District 16 is
17 scheduled for June 10, 2014. Defendant is running as a Republican opponent against
18 Senator Kieckhefer in the June 10, 2014 primary election.

19 14. On or about June 5, 2014, Senator Kieckhefer learned that Defendant was
20 running a television campaign advertisement in which Defendant falsely stated that Senator
21 Kieckhefer "endorsed and supported Harry Reid in 2010." Upon information and belief,
22 Defendant is the narrator in this advertisement and the statement was made by him
23 personally. Defendant has purchased air time for this advertisement on Channels 2, 4, 8,
24 11 and 21 on the eve of the June 10, 2014 primary election.

25 15. Defendant has made and published these statements with full knowledge that
26 they are false. Senator Kieckhefer has never endorsed, contributed any money or
27 otherwise supported Harry Reid's campaign for United States Senate. Specifically, Senator
28

1 Kieckhefer did not endorse, contribute money or otherwise support Harry Reid's campaign
2 for the United States Senate in 2010.

3 16. When asked for factual support for his statement by the Reno Gazette Journal,
4 Defendant responded that it was "guilt by association" because Senator Kieckhefer had
5 supported the late Senator Bill Raggio (who had been a supporter of Harry Reid in his 2010
6 U.S. Senate race against Sharon Angle). Defendant further stated that "the biggest
7 secondary evidence" he has for this statement is that Kieckhefer did not support or endorse
8 Sharron Angle in the 2010 U.S. Senate race.

9 17. Despite knowing that the statements were false and with reckless disregard for
10 their falsity, Defendant published the defamatory statements widely through television
11 advertisements broadcast to the general public on at least 5 television channels, as well as
12 to members of the press, in order to injure and to harass Senator Kieckhefer and
13 misrepresent his political record and position on the eve of the primary election.

14 18. Defendant's statements and misrepresentations of Senator Kieckhefer's
15 political record on the eve of the primary election damage his reputation, both personally
16 and professionally. Harry Reid is a polarizing figure in Republican primary elections and
17 endorsement of Harry Reid can, in and of itself, be a deciding factor against voting for a
18 candidate in a Republican primary. Defendant's false statements have particularly harmful
19 effects on Senator Kieckhefer, whose re-election campaign, credentials as a conservative
20 candidate and political beliefs and position could be disadvantaged if he does not defend
21 and uphold his credentials as a conservative candidate and political record.

22 19. Senator Kieckhefer has been forced to bring this action in order to protect his
23 reputation and his livelihood from Defendant's false and malicious attacks.

24 **FIRST CLAIM FOR RELIEF**

25 **(Defamation Per Se)**

26 20. Senator Kieckhefer re-alleges paragraphs 1 through 19 as if fully set forth
27 herein.

21. Defendant composed and intentionally published a false and defamatory statement concerning Senator Kieckhefer to numerous third parties.

22. Defendant's statement was false, misleading, disparaging and defamatory of Senator Kieckhefer.

23. Defendant published the statement with actual malice and knowledge that it was false or disregarded obvious warning signs of falsity and published the statement with an awareness of a high probability it was false.

24. The false statement would tend to harm Senator Kieckhefer's reputation in the estimation of the relevant community, and deter third persons from associating or dealing with him, in with respect to the Republican primary election.

25. Damages are presumed because the statement constitutes defamation *per se*: the statement tends to damage Senator Kieckhefer's reputation as conservative Republican candidate amongst Republican primary voters in Washoe County and could result in Republican voters voting against Senator Kieckhefer in the June 10, 2014 primary election.

SECOND CLAIM FOR RELIEF

(Defamation)

26. Senator Kieckhefer re-alleges paragraphs 1 through 25 as if fully set forth herein.

27. Defendant composed and intentionally published a false and defamatory statement concerning Senator Kieckhefer to numerous third parties.

28. Defendant's statement was false, misleading, disparaging and defamatory of Senator Kieckhefer.

29. Defendant published the statement with actual malice and knowledge that it was false or disregarded obvious warning signs of falsity and published the statement with an awareness of a high probability it was false.

30. As a direct result of Defendant's false and defamatory statement, Plaintiff has suffered compensatory damages in an amount to be determined at trial.

31. Plaintiff has also suffered injury in his reputation and good standing in the community in which he lives, in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against Defendant as follows:

1. A temporary restraining order, preliminary injunction, and a permanent injunction that enjoins Defendant, and any person or entity acting in concert with Defendant from publishing any statement expressing or implying that Senator Kieckhefer has endorsed or supported Harry Reid.

2. For compensatory and general damages in an amount to be proven at trial, which will exceed the \$10,000.00 jurisdictional requirements of this Court;

3. For pre-judgment and post-judgment interest, as allowed by law;


4. For attorneys' fees and costs, as allowed by law, in an amount to be determined; and

5. For such other and further relief as the Court may deem just and proper.

The undersigned affirms pursuant to NRS 239B.030 that this document does not contain the social security number of any person

DATED THIS 6th day of June, 2014.

MCDONALD CARANO WILSON LLP

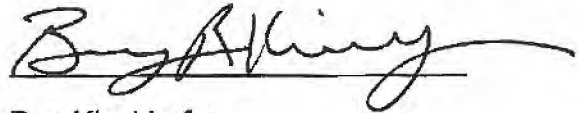
By: 
Michael Pagni NSBN-6444
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Attorneys for Plaintiff

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VERIFICATION

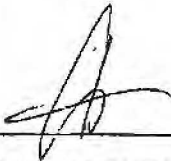
I, Ben Kieckhefer, under penalty of perjury, deposes and says:

That I am a plaintiff in the above-entitled action and am competent to make this verification; that I have read the foregoing VERIFIED COMPLAINT and know the contents thereof; that the same is true of my own knowledge, except as to those matters which are therein stated on information and belief and as to those matters, I believe them to be true.



Ben Kieckhefer

SUBSCRIBED and SWORN to before
me this 6 day of June, 2014



NOTARY PUBLIC



IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

GARY SCHMIDT,
Appellant,

vs.

BEN KIECKHEFER,
Respondent.

No. 66528

AMENDED

DOCKETING STATEMENT
CIVIL APPEALS

Electronically Filed
Oct 13 2014 01:49 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

GENERAL INFORMATION

All appellants not in proper person must complete this docketing statement. NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, classifying cases for en banc, panel, or expedited treatment, compiling statistical information and identifying parties and their counsel.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 26 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. *See KDI Sylvan Pools v. Workman*, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District Second Department 3
County Washoe Judge Jerome Polaha
District Ct. Case No. CV14-01227

2. Attorney filing this docketing statement:

Attorney Charles R. Kozak Telephone (775) 322-1239
Firm Kozak Law Firm
Address 3100 Mill Street, Suite 115
Reno, Nevada 89502

Client(s) Gary Schmidt

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

3. Attorney(s) representing respondents(s):

Attorney Adam Hosmer-Henner, co-counsel Telephone (775) 788-2000
Firm McDonald.Carano.Wilson
Address 100 West Liberty Street, 10th Floor
Reno, Nevada 89505-2670

Client(s) Ben Kieckhefer

Attorney Michael Pagni, co-counsel Telephone (775) 788-2000
Firm McDonald.Carano.Wilson
Address 100 West Liberty Street, 10th Floor
Reno, Nevada 89505-2670

Client(s) Ben Kieckhefer

(List additional counsel on separate sheet if necessary)

4. Nature of disposition below (check all that apply):

- | | |
|---|--|
| <input type="checkbox"/> Judgment after bench trial | <input type="checkbox"/> Dismissal: |
| <input type="checkbox"/> Judgment after jury verdict | <input type="checkbox"/> Lack of jurisdiction |
| <input type="checkbox"/> Summary judgment | <input type="checkbox"/> Failure to state a claim |
| <input type="checkbox"/> Default judgment | <input type="checkbox"/> Failure to prosecute |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief | <input type="checkbox"/> Other (specify): _____ |
| <input type="checkbox"/> Grant/Denial of injunction | <input type="checkbox"/> Divorce Decree: |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input type="checkbox"/> Review of agency determination | <input checked="" type="checkbox"/> Other disposition (specify): <u>Grant of TRO and</u> |

5. Does this appeal raise issues concerning any of the following?

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

6. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

N/A

7. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

In Appellant Gary Schmidt's Answer and First Amended Counterclaim, Appellant's claims of Defamation Pro Se, Intention Infliction of Emotional Distress, and Negligent Infliction of Emotional Distress remain pending in the Second Judicial District Court of the State of Nevada in and for the County of Washoe, Case No. CV14-01227, Department 3.

8. Nature of the action. Briefly describe the nature of the action and the result below:

Gary Schmidt and Ben Kieckhefer were political opponents running for State Senate in the 2014 primary election. On June 6, 2014, Kieckhefer initiated a SLAPP suit by filing his Complaint and Ex Parte Motion for Temporary Restraining Order. The Complaint claimed Defamation and sought TRO relief based on statements Schmidt made in a political television advertisement.

On June 6, 2014, the Court entered its Order Granting Temporary Restraining Order preventing the ad from running further. On September 5, 2014, the Court entered its Order denying Schmidt's NRS 41.660 Special Motion to Dismiss allowing the Defamation claim to proceed onward.

9. Issues on appeal. State specifically all issues in this appeal (attach separate sheets as necessary):

1. Whether the District Court erred in granting the TRO.
2. Whether the District Court erred in denying Schmidt's NRS 41.660 Special Motion to Dismiss.

10. Pending proceedings in this court raising the same or similar issues. If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

N/A

11. Constitutional issues. If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

12. Other issues. Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent(identify the case(s))

☒ An issue arising under the United States and/or Nevada Constitutions

☐ A substantial issue of first impression

☒ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain: The Appeal concerns the issue of political free speech protected by the U.S. and Nevada Constitutions and Nevada's anti-SLAPP statutes.

13. Trial. If this action proceeded to trial, how many days did the trial last? _____

Was it a bench or jury trial? N/A

14. Judicial Disqualification. Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?
N/A

TIMELINESS OF NOTICE OF APPEAL

15. Date of entry of written judgment or order appealed from (see below) _____

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

1. Order Granting Temporary Restraining Order entered on June 6, 2014.
2. Order Denying Special Motion to Dismiss entered on September 5, 2014.

16. Date written notice of entry of judgment or order was served _____

Was service by:

- ☐ Delivery
☐ Mail/electronic/fax

17. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing _____

☐ NRCP 52(b) Date of filing _____

☐ NRCP 59 Date of filing _____

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. ___, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion _____

(c) Date written notice of entry of order resolving tolling motion was served _____

Was service by:

- ☐ Delivery
☐ Mail

18. Date notice of appeal filed September 12, 2014

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

19. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other

NRAP 4(a)

SUBSTANTIVE APPEALABILITY

20. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:

(a)

- | | |
|--|---------------------------------------|
| <input type="checkbox"/> NRAP 3A(b)(1) | <input type="checkbox"/> NRS 38.205 |
| <input type="checkbox"/> NRAP 3A(b)(2) | <input type="checkbox"/> NRS 233B.150 |
| <input type="checkbox"/> NRAP 3A(b)(3) | <input type="checkbox"/> NRS 703.376 |
| <input checked="" type="checkbox"/> Other (specify) <u>NRS 41.670(4)</u> | |

(b) Explain how each authority provides a basis for appeal from the judgment or order:

NRS 41.670(4) allows for the interlocutory Appeal from an Order denying a Special Motion to Dismiss.

21. List all parties involved in the action or consolidated actions in the district court:

(a) Parties:

Gary Schmidt - Defendant/Counterclaimant

Ben Kieckhefer - Plaintiff/Counterdefendant

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

N/A

22. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.

In his Complaint, Kieckhefer claimed Defamation and Defamation Per Se while seeking TRO/Injunctive relief. In relation to these, the District Court entered its Order granting TRO on June 6, 2014 and entered its Order denying Schmidt's Special Motion to Dismiss on September 5, 2014. In Schmidt's Amended Counterclaim, Schmidt claimed Defamation, Defamation Per Se, Abuse of Process, Conspiracy, Concert of Action and Aiding and Abetting. Pursuant to an NRCP 12(b) Motion, the District Court dismissed with prejudice Schmidt's claims for Abuse of Process, Conspiracy, Concert of

23. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?

☐ Yes

☒ No

24. If you answered "No" to question 23, complete the following:

(a) Specify the claims remaining pending below:

Both Kieckhefer's and Schmidt's claims for Defamation and Defamation Per Se remain pending.

(b) Specify the parties remaining below:

Kieckhefer and Schmidt

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☒ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☒ No

25. If you answered "No" to any part of question 24, explain the basis for seeking appellate review (e.g., order is independently appealable under NRAP 3A(b)):

NRS 41.670(4) allows for an interlocutory Appeal of an Order denying a Special Motion to Dismiss.

26. Attach file-stamped copies of the following documents:

- ☐ The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- ☐ Any tolling motion(s) and order(s) resolving tolling motion(s)
- ☐ Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- ☐ Any other order challenged on appeal
- ☐ Notices of entry for each attached order

SECTION 26 FILE-STAMPED DOCUMENTS

<u>DOCUMENTS</u>	<u>DATE FILED</u>
1. Kieckhefer's Verified Complaint	June 6, 2014
2. Order Granting Temporary Restraining Order (no Notice of Entry has been filed)	June 6, 2014
3. Schmidt's Answer and Amended Counterclaimant	July 9, 2014
4. Order Denying Special Motion to Dismiss	September 5, 2014
5. Notice of Entry of Order (Document No. 4)	September 15, 2014

VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Gary Schmidt
Name of appellant

Charles R. Kozak, Esq.
Name of counsel of record

October 7, 2014
Date

/s/ CHARLES R. KOZAK, ESQ.
Signature of counsel of record

Nevada, County of Washoe
State and county where signed

CERTIFICATE OF SERVICE

I certify that on the 13th day of October, 2014, I served a copy of this completed docketing statement upon all counsel of record:

☐ By personally serving it upon him/her; or

☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

Adam Hosmer-Henner
Michael Pagni
McDonald Carano Wilson LLP
100 West Liberty Street, 10th Floor
Reno, Nevada 89501

Dated this 13th day of October, 2014

/s/ NAN ADAMS
Signature