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Elizabeth A. Brown  
Clerk of Supreme Court

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

\*\*\*

MARK E. SMITH, an individual, D/B/A  
LAKE TAHOE WALL OF SHAME,

Appellant,

vs.

CARL LACKEY,

Respondent.

Supreme Court Case No.: 74461

District Court Case No.: CV17-00434

**DOCKETING STATEMENT**

Appellant, MARK E. SMITH dba LAKE TAHOE WALL OF SHAME,  
("SMITH"), by and through his undersigned counsel of record, and hereby files this  
Docketing Statement herein as follows:

1. Judicial District: Second Department: 4  
County: Washoe Judge: Honorable Judge Steinheimer  
District Ct. Case No.: CV17-00434
2. Attorney filing this docketing statement:  
Attorney(s): Stephanie Rice and Winter Street Law Group

1 Telephone: (775) 786-5800

2 Firm: Winter Street Law Group

3 Address: 96 & 98 Winter Street, Reno, Nevada 89503

4 Client(s): Appellant, Carolyn Stark

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

6 Attorney(s): Sean P. Rose, Esq.

7 Telephone: (775) 824-8200

8 Firm: Rose Law Office

9 Address: 150 W. Huffaker Lane, Suite 101, Reno, NV 89511

10 Client(s): Respondent, Carl Lackey ("Lackey")

11 Attorney(s): Thomas R. Brennan, Esq.

12 Telephone: (775) 322-2923

13 Firm: Durney & Brennan, Ltd.

14 Address: 6900 S. McCarran Blvd., Suite 2060, Reno, NV 89509

15 Client(s): Respondent, Carl Lackey ("Lackey")

16  
17 **4. Nature of disposition below (check all that apply):**

18 ☐ Judgment after bench trial

☐ Dismissal:

19 ☐ Judgment after jury verdict

☐ Lack of jurisdiction

20 ☐ Summary judgment

☐ Failure to state a claim

21 ☐ Default judgment

☐ Failure to prosecute

22 ☐ Grant/Denial of NRCP 60(b) relief

☒ Other (specify):

Denial of Anti-SLAPP Motion

24 ☐ Grant/Denial of injunction

☐ Divorce decree:

25 ☐ Grant/Denial of declaratory relief

☐ Original Modification

26 ☐ Review of agency determination

☐ Other disposition (specify):

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

2       No.

3       \_\_\_\_\_ Child custody

4       \_\_\_\_\_ Venue

5       \_\_\_\_\_ Termination of parental rights

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

10      Appeal Concurrently Pending before this Court:

11           Carolyn Stark, an individual, D/B/A NDOW Watch Keeping Them  
12           Transparent, v. Carl Lackey; Nevada Supreme Court Case No. 74449. That  
13           appeal relates to the District Court's denial of a similar anti-SLAPP motion  
14           filed by a different Defendant in the District Court action.

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

19       None.

20       **8. Nature of the action.** Briefly describe the nature of the action, including a  
21       list of the causes of action pleaded, and the result below:

22           This is a case where Carl Lackey, an employee of the Nevada Department of  
23           Wildlife ("NDOW") and public figure responsible for the bear population in Northern  
24           Nevada, filed this action against Appellant and others, to silence public comment and  
25           communications regarding Mr. Lackey and his actions on behalf of NDOW, matters of  
26           public concern in Northern Nevada and the surrounding areas.

27           Mr. Lackey filed the present action against Appellant Smith herein alleging claims  
28           for defamation, intentional infliction of emotional distress, negligent infliction of  
29           emotional distress, and civil conspiracy. Mr. Lackey's entire suit rests upon allegations

1 that Defendants Bear League, a California Corporation, Ann Bryant, an individual, Mark  
2 E. Smith an, individual dba Lake Tahoe Wall of Shame, and Carolyn Stark, an individual  
3 dba NDOW Watch Keeping Them Transparent, “published false and malicious  
4 comments” regarding Mr. Lackey.

5 However, noticeably absent from Mr. Lackey’s First Amended Complaint are any  
6 allegations that Appellant Mr. Smith published any comments whatsoever, and certainly  
7 not any comments about or concerning Mr. Lackey.

8 Instead, Mr. Lackey, in a clear effort to discourage Defendants’ free speech and  
9 free assembly rights under the First Amendment, premises his entire suit on comments  
10 purportedly posted by the Bear League and comments posted by various third parties on  
11 the Bear League’s Lake Tahoe Wall of Shame’s and NDOW Watch Keeping them  
12 Transparent’s respective social media (Facebook) pages.

13 However, Mr. Smith did not create and is not an administrator or responsible party  
14 for either one of the subject social media (Facebook) pages; and, as such, comments  
15 posted on the subject Facebook pages cannot be attributed to Mr. Smith under even the  
16 most generous interpretation of the term “publication.” Further, assuming arguendo that  
17 Mr. Smith had any management control over either social media pages, which Mr. Smith  
18 has at all times herein expressly denied, such comments cannot be attributed to Mr.  
19 Smith under the Communications Decency Act. 11 U.S.C. § 230(c)(1). Accordingly,  
20 Mr. Smith filed a Special Motion to Dismiss pursuant to Nevada’s Anti-SLAPP statutes.  
21 See, NRS 41.635, et seq. and NRCP 12.

22 This is exactly the type of case that the Anti-SLAPP (Strategic Lawsuits Against  
23 Public Participation) was designed to protect. Thereafter, instead of ruling on the matter  
24 within twenty (20) judicial days after the motion was served on the Plaintiff pursuant to  
25 NRS 41.660(3)(f), on June 30, 2017, the District Court Ordered that the matter be set  
26 for oral arguments. Oral arguments were held on July 26, 2017 after which, the District  
27 Court took the matter under advisement. The District Court then issued its Order denying  
28



1 Appellant's Special Motion to Dismiss as to the three (3) claims on appeal herein  
2 (Defamation, Intentional Infliction of Emotional Distress and Civil Conspiracy) and  
3 granted the same as to an additional cause of action for Negligent Infliction of Emotional  
4 Distress on October 23, 2017. A Notice of Entry of Order was filed thereon on  
5 November 13, 2017. Accordingly, Appellant herein files the instant interlocutory appeal  
6 of this anti-SLAPP matter in accordance with NRS 41.670(4).

7 **9. Issues on appeal.** State concisely the principal issue(s) in this appeal  
8 (attach separate sheets as necessary):

9 Appellant herein asserts the following issues on appeal:

- 10 • Did the District Court err in denying Appellant, Mark E. Smith's, anti-  
11 SLAPP special motion to dismiss?

12  
13 **10. Pending proceedings in this court raising the same or similar issues.** If  
14 you are aware of any proceeding presently pending before this court which  
15 raises the same or similar issues raised in this appeal, list the case name and  
docket number and identify the same or similar issues raised:

16 Another Defendant in this action, Carolyn Smith, filed a similar appeal herein  
17 arising from a virtually identical Order as the one Appellant Smith appeals here, denying  
18 Stark's Anti-SLAPP Special Motion to Dismiss. See, Carolyn Stark, an individual,  
19 D/B/A NDOW Watch Keeping Them Transparent, v. Carl Lackey; Nevada Supreme  
Court Case No. 74449.

20 **11. Constitutional issues.** If this appeal challenges the constitutionality of a  
21 statute, and the state, any state agency, or any officer or employee thereof  
22 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?

23   X   N/A

24        Yes

25        No

26  
27 If not, explain: N/A

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

2       \_\_\_\_\_ Reversal of well-settled Nevada precedent (on an attachment, identify the  
3       case(s))

4       \_\_\_\_\_ An issue arising under the United States and/or Nevada Constitutions

5       \_\_\_\_\_ A substantial issue of first impression

6         X   An issue of public policy

7       \_\_\_\_\_ An issue where en banc consideration is necessary to maintain uniformity  
8       of this court's decisions

9       \_\_\_\_\_ A ballot question

10       **If so, explain:**

11       This case involves trying to hold someone liable for allegedly defamatory  
12       statements made on social media pages; however, the persons that the Plaintiff seeks to  
13       hold liable for such social media statements are not the individuals, but other, third  
14       parties. Essentially, Plaintiff seeks to hold Defendant Smith liable for statements made  
15       on a public Facebook page.

16       Public policy is implicated in that, if every person who has a social media page  
17       can be held liable for statements made by others and posted to the page, virtually every  
18       citizen with internet access has the potential to be subject to such liability.

19       **13. Assignment to the Court of Appeals or retention in the Supreme Court.**

20       Briefly set forth whether the matter is presumptively retained by the  
21       Supreme Court or assigned to the Court of Appeals under NRAP 17, and  
22       cite the subparagraph(s) of the Rule under which the matter falls. If  
23       appellant believes that the Supreme Court should retain the case despite its  
24       presumptive assignment to the Court of Appeals, identify the specific  
25       issue(s) or circumstance(s) that warrant retaining the case, and include an  
26       explanation of their importance or significance:

27       The statute authorizing this appeal, NRS 41.670, specifically provides that "[i]f

1 the court denies the special motion to dismiss filed pursuant to NRS 41.660,” as occurred  
2 here, “an interlocutory appeal lies to the Supreme Court.” NRS 41.670(4).

3 In addition, Appellant herein respectfully believes this matter should be  
4 presumptively retained by the Nevada Supreme Court in accordance with NRAP  
5 17(a)(11), concerning, “Matters raising as a principal issue a question of statewide  
6 public importance, or an issue upon which there is an inconsistency in the published  
7 decisions of the Court of Appeals or of the Supreme Court or a conflict between  
8 published decisions of the two courts.” Due to the fact that this case deals with a new  
9 era of technology, specifically social media, in connection with First Amendment rights,  
10 this matter rises to the level of a question of statewide public importance. This matter  
11 also involves significant public policy issues.

12 **14. Trial.** If this action proceeded to trial, how many days did the trial last?

13 N/A, this action did not proceed to trial.

14 Was it a bench or jury trial?

15 N/A.

16 **15. Judicial disqualification.** Do you intend to file a motion to disqualify or  
17 have a justice recuse him/herself from participation in this appeal? If so,  
18 which Justice?  
19

20 No, the undersigned does not intend to file a motion to disqualify or have a justice  
21 recuse him or herself from participation at this time.

22 **TIMELINESS OF NOTICE OF APPEAL**

23 **16. Date of entry of written judgment or order appeal from:**

24 October 23, 2017.

25 If no written judgment or order was filed in the district court, explain the  
26 basis for seeking appellate review.  
27

1 **17. Date written notice of entry of judgment or order served**

2 November 13, 2017.

3 Was service by:

4        Delivery

5   X   Mail

6 \*Service was made by both ECF, electronic filing system, and mail.

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

9 N/A. No tolling Motions pursuant to NRCP 50, 52 or 59 were filed herein.

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

12        NRCP 50(b) Date served        Date of filing       

13        NRCP 52(b) Date served        Date of filing       

14        NRCP 59 Date served        Date of filing       

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

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

19       .

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

21       .

22 Was service by:

23        Delivery

24        Mail

19. Date notice of appeal filed November 13, 2017.

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:

N/A- All appeals in this action arise from separate, individual Orders

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

NRAP 4(a)(1).

### SUBSTANTIVE APPEALABILITY

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

(a)

\_\_\_\_ NRAP 3A(b)(1) \_\_\_\_ NRS 38.205

\_\_\_\_ NRAP 3A(b)(2) \_\_\_\_ NRS 233B.150

\_\_\_\_ NRAP 3A(b)(3) \_\_\_\_ NRS 703.376

X Other (specify) NRS 41.670(4)

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

The instant appeal is an appeal to the Supreme Court by the aggrieved party from an order denying an Anti-SLAPP Special Motion to Dismiss in a civil action/ proceeding commenced in the Second Judicial District Court and there were no tolling motions filed.

///

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///

1       **22. List all parties involved in the action or consolidated actions in the**  
2       **district court:**

3       **(a) Parties:**

4               Carl Lackey

5               Bear League

6               Anne Bryant

7               Mark E. Smith, an individual dba Lake Tahoe Wall of Shame

8               Carolyn Stark, an individual dba NDOW Watch Keeping Them Transparent

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

12               All parties in the District Court are not parties to this appeal because this is an  
13               interlocutory appeal from an Order Denying (in part) Mark E. Smith's Anti-  
14               SLAPP Special Motion to Dismiss.

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

18               Respondent, Carl Lackey, brought the following claims against the Bear League,  
19               Anne Bryant, Mark E. Smith (an individual dba Lake Tahoe Wall of Shame) and  
20               Carolyn Stark (an individual dba NDOW Watch Keeping Them Transparent):

21                       Defamation;

22                       Negligent Infliction of Emotional Distress;

23                       Intentional Infliction of Emotional Distress; and,

24                       Civil Conspiracy.

1 On October 20, 2017, the District Court entered an Order denying Carolyn Stark's  
2 Special Motion to Dismiss brought under NRS 41.635 and NRCP 12 as to the claims of  
3 Defamation, Civil Conspiracy and Intentional Infliction of Emotional Distress and  
4 granted dismissal of the claim for Negligent Infliction of Emotional Distress;

5 On October 23, 2017, the District Court entered an Order denying Mark E.  
6 Smith's Special Motion to Dismiss brought under NRS 41.635 and NRCP 12 as to the  
7 claims of Defamation, Civil Conspiracy and Intentional Infliction of Emotional Distress  
8 and granted dismissal of the claim for Negligent Infliction of Emotional Distress;

9 On October 23, 2017, the District Court entered an Order denying Anne Bryant's  
10 Special Motion to Dismiss brought under NRS 41.635 and NRCP 12 as to the claims of  
11 Defamation, Civil Conspiracy and Intentional Infliction of Emotional Distress and  
12 granted dismissal of the claim for Negligent Infliction of Emotional Distress; and,

13 On November 27, 2017, the District Court entered an Order denying Bear League's  
14 Special Motion to Dismiss brought under NRS 41.635 and NRCP 12 as to the claims of  
15 Defamation, Civil Conspiracy and Intentional Infliction of Emotional Distress and granted  
16 dismissal of the claim for Negligent Infliction of Emotional Distress.

17 **24. Did the judgment or order appealed from adjudicate ALL the claims**  
18 **alleged below and the rights and liabilities of ALL the parties to the action**  
19 **or consolidated actions below?**

20        Yes  
21   X   No

22 **25. If you answered "No" to question 24, complete the following:**

23 (a) Specify the claims remaining pending below:

24 Defamation

25 Intentional Infliction of Emotional Distress

26 Civil Conspiracy  
27  
28

1 (b) Specify the parties remaining below:

2 Bear League

3 Anne Bryant

4 Carolyn Stark, an individual dba NDOW Keeping Them Transparent\*

5  
6 \*Although Carolyn Stark has filed a separate appeal arising from a  
7 separate Order denying her separate Anti-SLAPP Motion to Dismiss

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

10        Yes  
11   X   No

12 (d) Did the district court make an express determination, pursuant to NRCP  
13 54(b), that there is no just reason for delay and an express direction for the  
14 entry of judgment?

15        Yes  
16   X   No

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

20 The Order by which this appeal arises under is independently appealable under  
21 NRS 41.670(4).

22 **27. Attach file-stamped copies of the following documents:**

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



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**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.

Carolyn Stark

**Name of appellant(s)**

12/4/2017

**Date**

Washoe County, Nevada

**State and County Where Signed**

Stephanie Rice, Esq., Del Hardy, Esq.,  
Richard Salvatore, Esq.

**Name of counsel of record**



**Signature of Counsel of Record**

## CERTIFICATE OF SERVICE

I certify that on the 4th day of December, 2017, I served a copy of this completed docketing statement upon all counsel of record:

By personally serving it upon him/her; or

X

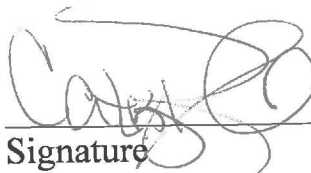
By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

**Sean P. Rose, Esq.**  
**Rose Law Office**  
**150 W. Huffaker Lane, Suite 101**  
**Reno, NV 89511**  
**F: 775-657-8517**

**Thomas R. Brennan, Esq.**  
**Durney & Brennan, Ltd.**  
**6900 S. McCarran Blvd., Suite 2060**  
**Reno, NV 89509**  
**F: 775-322-3014**

**Madelyn Shipman**  
**Settlement Judge**  
**5650 Mount Rose Highway**  
**Reno, NV 89511**

Dated this 4th day of December, 2017.

  
Signature

1090

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9

10 Attorneys for Plaintiff

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

12 IN AND FOR THE COUNTY OF WASHOE

13 CARL LACKEY,  
14 Plaintiff,

15 vs.

Case No.: CV17-00434

Dept. No.: 4

16 BEAR LEAGUE, a California Corporation,  
17 ANNE BRYANT, an individual, MARK E.  
18 SMITH, an individual dba LAKE TAHOE  
19 WALL OF SHAME, CAROLYN STARK, an  
individual dba NDOW WATCH KEEPING  
20 THEM TRANSPARENT and DOES 1-20,  
INCLUSIVE,

21 Defendants.

22  
23 **FIRST AMENDED COMPLAINT FOR DAMAGES**

24 Plaintiff CARL LACKEY, by and through his undersigned counsel, Sean Rose, Esq. of the  
25 Rose Law Office and Thomas R. Brennan, Esq. of Durney & Brennan, Ltd., hereby complains and  
26 alleges against the above-named defendants, and each of them, as follows:

27 **I. PARTIES**

1           1.       Plaintiff is now and was, at all times relevant to this action, an individual and  
2 resident of Minden, Douglas County in the State of Nevada.

3           2.       Plaintiff is informed and believes and thereupon alleges that at all times material  
4 hereto, Defendant BEAR LEAGUE was and is a California Corporation, doing business as and  
5 organized and existing by virtue of the laws of the State of California with its principle place of  
6 business in Placer County, State of California.

7           3.       Plaintiff is informed and believes and thereupon alleges that at all times material  
8 hereto, Defendant ANNE BRYANT is an individual, residing in Homewood, Placer County, State  
9 of California and is a responsible officer of BEAR LEAGUE.

10          4.       Plaintiff is informed and believes and thereupon alleges that at all times material  
11 hereto, Defendant MARK E. SMITH, is an individual, residing in Incline Village, Washoe County,  
12 State of Nevada and is doing business as LAKE TAHOE WALL OF SHAME.

13          5.       Plaintiff is informed and believes and thereupon alleges that at all times material  
14 hereto, Defendant CAROLYN STARK, is an individual, residing in Incline Village, Washoe  
15 County, State of Nevada and is doing business as NDOW WATCH KEEPING THEM  
16 TRANSPARENT.

17          6.       Defendants DOES 1-20, inclusive, are sued herein under fictitious names because  
18 their true names, capacities or involvement, whether individual, associate, corporate or  
19 governmental, are not known to Plaintiff. Plaintiff is informed and believes and, upon such  
20 information and belief, alleges that each of said Defendants is negligently or otherwise legally  
21 responsible in some manner for the events and happenings herein referred to, and negligently or  
22 otherwise caused injury and damages proximately thereby to Plaintiff, as hereinafter alleged.  
23 Without limiting the generality of the foregoing, Plaintiff is informed and believes, and upon such  
24 information and belief, alleges that each of the Defendants named herein as DOE engaged in a  
25 defamatory, slanderous, and libelous smear campaign targeting Plaintiff by the widespread  
26 publicity of highly offensive and erroneous information that placed Plaintiff in a false light and  
27 resulted in harm to his reputation.

28                               **II.     FACTUAL ALLEGATIONS**

1           7.     Plaintiff CARL LACKEY is employed by the Nevada Department of Wildlife  
2 (“NDOW”) as a Biologist III.

3           8.     The NDOW Series Concept for a Biologist III, describes that, among many other  
4 responsibilities, biologists are to “manipulate fish and wildlife populations and habitats by  
5 introducing species into suitable habitats consistent with biological and social constraints; bait and  
6 trap, tranquilize, radio collar or band wildlife and transport to selected locations” and “investigate  
7 and assess damage caused by wildlife upon private property and public lands; recommend  
8 appropriate courses of action to mitigate or resolve the problem.”

9           9.     CARL LACKEY, as a Biologist III, is under the supervision of Biologist IV, who  
10 is responsible to, among other things, “direct the operation of wildlife programs” and “train,  
11 supervise, and evaluate the performance of assigned personnel,” and “assign and review work”  
12 involving game, non-game, fish, botanical, and habitat within a region

13          10.    Citizens are encouraged to contact the NDOW when there is a human-bear conflict.

14          11.    CARL LACKEY, in the course and scope of performing his employment duties,  
15 has become the victim of continuing online and in person threatening and harassing conduct from  
16 members of activist groups BEAR LEAGUE and the online forums LAKE TAHOE WALL OF  
17 SHAME and NDOW WATCH KEEPING THEM TRANSPARENT.

18          12.    BEAR LEAGUE volunteers and members of the online forums “LAKE TAHOE  
19 WALL OF SHAME” and “LAKE TAHOE WALL OF SHAME and NDOW WATCH KEEPING  
20 THEM TRANSPARENT” have made and continue to make false statements regarding CARL  
21 LACKEY’s character in a vicious and calculated effort to damage his reputation and jeopardize  
22 his employment.

23          13.    Defendants BEAR LEAGUE, LAKE TAHOE WALL OF SHAME and LAKE  
24 TAHOE WALL OF SHAME and NDOW WATCH KEEPING THEM TRANSPARENT have  
25 and continue to initiate public comment threads on their public Facebook pages and other  
26 Facebook pages slandering CARL LACKEY in his official capacity as a state employee and urging  
27 and encouraging the public at large to shame and harass Plaintiff so that he will lose his job and/or  
28 feel threatened enough to leave the community.

1           14. Plaintiff is informed and believes and, upon such information and belief, alleges  
2 that Defendants BEAR LEAGUE, LAKE TAHOE WALL OF SHAME and LAKE TAHOE  
3 WALL OF SHAME and NDOW WATCH KEEPING THEM TRANSPARENT acted  
4 intentionally and with malice with the primary purpose being to harm, threaten, intimidate, cause  
5 fear, anxiety, embarrassment and damage to Plaintiff's reputation by publishing false and vicious  
6 comments accusing Plaintiff of criminal conduct (including accepting bribes and conspiracy),  
7 designed to incite public outrage. These comments include, but are not limited to, the following:

- 8           a. "Get a grip NDOW...Leave the Bears Alone! They aren't yours to torture, kill  
9           and/or deliver to your hunting cronies." Commenter BEAR LEAGUE  
10           (CL0013);
- 11           b. We must rid Nevada of this monster who lives and is paid to kill bears. Far too  
12           many innocents have died at his evil hands" Commenter: BEAR LEAGUE,  
13           attaching a petition "Fire Carl Lackey" (CL0016);
- 14           c. "It appears NDOW is short on bears in the hunt zone." Commenter: Bill Morton  
15           in response to BEAR LEAGUE's post (CL0014);
- 16           d. "Another bear trap was brought in yesterday by Carl Lackey in order to capture  
17           bears at Tahoe and deliver them to the hunters elsewhere." Commenter: BEAR  
18           LEAGUE CL0018);
- 19           e. "Definitely corruption at its finest." Commenter: Victoria LeDoux Serpa on  
20           Bear League's Facebook post (CL0018);
- 21           f. "Bear trap set by NDOW's infamous Carl Lackey in the forest near the home  
22           of a long-time bear feeder (according to all neighbors) because she is now older  
23           and fearful of the bears she's invited for dinner over the years. She has lured  
24           these bears to their death with the blessing of NDOW. When is  
25           enough...enough. Oh, wait! The Nevada bear hunt is about to begin...Lackey  
26           needs to bring trophies to his hunting cronies so he can be richly rewarded with  
27           'pocket money' because they do not like to go home empty-handed. Now it all  
28

1 makes sense...not good sense, but it's business as usual in NDOWLand."

2 Commenter: BEAR LEAGUE (CL0026)

3 g. "How is [Lackey] being 'richly rewarded' with 'pocket money' because they  
4 do not like him going home empty handed? Are people bribing [Carl  
5 Lackey] or does he get paid more to kill the bear by NDOW? Asking because  
6 it's a confusing statement." Commenter: John Adam on BEAR LEAGUE's  
7 Facebook post (CL0026);

8 h. "The hunters give [Carl Lackey] under the table cash for bringing trophy bears  
9 into the hunt zone." Commenter: BEAR LEAGUE in response to John Adam's  
10 comment above (CL0019);

11 i. "No. They trap. Then if the bear is lucky it gets released into a hunt zone. If you  
12 want to call that luck." Commenter Randy L. Simar, on Bear League's  
13 Facebook post (CL0020);

14 j. "So [Carl Lackey's] been trapping these bears saying they were euthanized and  
15 actually stocking up for the bear hunt/slaughter? Could be!" Commenter: Mary  
16 Morten-Johnson on Bear League's Facebook post (CL0020);

17 k. "Bear hunters are simply Trophy Hunters. We need to stop Lackey from setting  
18 Bear Traps in Nevada since it is senseless murder and even NDOW says  
19 relocation doesn't work. So why does NDOW relocate? It's simple to stock the  
20 hunt zone." Commenter: Jane Rothman on BEAR LEAGUE's Facebook post  
21 (CL0021);

22 l. "Obviously bears that dine on trash aren't going to be tasty. It is all trophy  
23 killing. And it's not population control, because Lackey is plucking them off as  
24 quick as he can." Commenter: Shanen Ruppel on BEAR LEAGUE's Facebook  
25 post (CL0022);

26 m. "Stocking the pond. Did [Lackey's] disgusting self apply for a permit? What a  
27 major conflict of interest. I can't believe Nevada enables such corruption."  
28

- 1 n. "Corruption 100%." Commenter: Kevin McGrew on BEAR LEAGUE's  
2 Facebook post (CL0022);
- 3 o. "This is crazy. Poor bears will get trapped and dropped off and not have a clue  
4 where to run from all those hunters in the hunt zone." Commenter: Deanna  
5 Betker on BEAR LEAGUE's Facebook post CL0020);
- 6 p. "A department with no real interest in wildlife other than to make it available  
7 for hunters and trappers...some might say they are criminals against  
8 nature...they are certainly ignorant about it." Commenter: Sean Sarsfield on  
9 LAKE TAHOE WALL OF SHAME's Facebook post (CL0042);
- 10 q. "He and his family directly benefit by him moving bears to a hunting area if  
11 they are issued a license and the killing of them in the name of public safety  
12 must simply be something that excites him-all of it in conflict with NDOW's  
13 mission. Additionally, if we can establish that he or his family benefits  
14 financially from selling bear parts or selling the location where he recently  
15 released a bear- he should go to jail." Commenter: Colleen Hemingway on  
16 NDOW WATCH KEEPING THEM TRANSPARENT's Facebook post  
17 (CL0048);
- 18 r. "Yes he should go to jail! The treatment of our bears is paramount cruelty.  
19 Moving mothers without their cubs, moving them to hunt zones, moving them  
20 great distances knowing full well there are no food sources or water and that  
21 they will try to return home! Animal cruelty is a felony in all 50 states. Him  
22 and his NDOW murderers need to go to jail and stay there." Commenter: JoAnn  
23 Hill on NDOW WATCH KEEPING THEM TRANSPARENT's Facebook post  
24 (CL0048);
- 25 s. "It's time for the NV ENGINEERED bear hunt." Commenter: Mary LoBuono  
26 Bryden on NDOW WATCH KEEPING THEM TRANSPARENT's Facebook  
27 post (CL0053);
- 28



- 1 t. "NDOW knows their manual says this and Lackey chooses not to follow the  
2 protocol which is extremely concerning. Healy backs him up by releasing  
3 idiotic excuses to the media why a certain bear was relocated to the hunt zone  
4 instead of released on site." Commenter: Jane Rothman on BEAR LEAGUE's  
5 Facebook post (CL0048);
- 6 u. "This page is what's wrong with Tahoe, you should try another tactic to educate  
7 our community. No one wants to be bullied and threatened to understand a valid  
8 argument. You are creating fear and tearing neighborhoods apart. Perhaps  
9 spending so much energy in a negative way should be forwarded to create a  
10 positive change. No one should live in fear! This whole thing is comparable to  
11 the Salem witch trials of 1692!!" Commenter: Kevin Dangers Bouchard on  
12 NDOW WATCH KEEPING THEM TRANSPARENT' post regarding "trolls"  
13 who support Carl Lackey (CL0078);
- 14 v. Photo showing Carl Lackey's home address: Poster: Dianne Gross on BEAR  
15 LEAGUE'S Facebook wall (CL0118);
- 16 w. "This is the most outrageous editorial from Lackey to date. These two  
17 communities were given 'awards' not because they are Bear Aware but because  
18 they invite [Lackey] to set his traps, catch bears, and then kill them or move  
19 them into the hunt zone." BEAR LEAGUE, posting link to Reno Gazette  
20 Journal opinion piece by Carl Lackey. (CL0119);
- 21 x. "Lackey must go!! POS!!!!" Commenter: Gerald Palla on BEAR LEAGUE's  
22 Facebook post (CL0123);
- 23 y. "Lackey is such an incompetent asshole!! Fire his ass!!" Commenter: Karen  
24 Lietzell-Vick on NDOW WATCH KEEPING THEM TRANSPARENT's  
25 Facebook post (CL 0050);
- 26 z. "This is becoming unreal! Out of control, crazy, Hmmm.... maybe time for  
27 an assassination." Commenter: Victoria LeDoux Serpa on BEAR LEAGUE's  
28 Facebook post (CL 0063);



23. Plaintiff suffered damages in an amount in excess of this Court's jurisdictional limits.

**WHEREFORE**, Plaintiff prays for judgment against Defendants, and each of them, as set forth below.

## SECOND CLAIM FOR RELIEF

**(Intentional Infliction of Emotional Distress - Against all Defendants)**

24. Plaintiff realleges and reincorporates paragraphs 1-22 set forth hereinabove.

25. Defendants engaged in willful, malicious, wanton, and egregious conduct that was extreme and outrageous causing emotional distress.

26. Plaintiff has suffered severe and extreme emotional distress as a result of Defendants' conduct and remain fearful of physical harm or violence directed at them.

27. Defendants' conduct caused Plaintiffs' severe and extreme emotional distress.

28. Plaintiff suffered damages in an amount in excess of this Court's jurisdictional limits.

**WHEREFORE**, Plaintiff prays for judgment against Defendants, and each of them, as set forth below.

### THIRD CLAIM FOR RELIEF

**(Intentional Infliction of Emotional Distress - Against all Defendants)**

29. Plaintiff realleges and reincorporates paragraphs 1-27 set forth hereinabove.

30. Defendants acted negligently in causing Plaintiff severe emotional distress.

31. As a result of Defendants' negligence, Plaintiff has suffered severe and extreme emotional distress.

32. Defendants' negligence caused Plaintiff severe and extreme emotional distress.

33. Plaintiff suffered damages in an amount in excess of this Court's jurisdictional limits.

**WHEREFORE**, Plaintiff prays for judgment against Defendants, and each of them, as set forth below.

1 **FOURTH CLAIM FOR RELIEF**

2 **(Civil Conspiracy)**

3 34. Plaintiffs reallege and reincorporate paragraphs 1-32 set forth hereinabove.

4 35. Defendants, and each of them, continuously over the past several years have acted  
5 in concert with one another to accomplish the goals of harassing and threatening Plaintiff and  
6 causing him fear, anxiety, embarrassment and damaging to his reputation.

7 36. As a result of these concerted actions by the Defendants and each of them, Plaintiff  
8 feels harassed and intimidated, and feels that ANNE BRYANT, MARK E. SMITH, CAROLYN  
9 STARK, BEAR LEAGUE, LAKE TAHOE WALL OF SHAME and NDOW WATCH  
10 KEEPING THEM TRANSPARENT and LAKE TAHOE WALL OF SHAME officers, members  
11 and supporters pose a threat to Plaintiff's safety and as a result, he suffered damages in excess of  
12 this Court's jurisdictional limits.

13 37. Plaintiff has been required to retain the services of an attorney to prosecute this  
14 matter and are entitled to reasonable attorney's fees and costs of suit.

15 **WHEREFORE**, Plaintiff prays for judgment against Defendants, and each of them, as  
16 follows:

17 1. For past and future special damages in an amount in excess of this Court's  
18 jurisdictional limits;

19 2. For past and future general damages in an amount in excess of this Court's  
20 jurisdictional limits;

21 3. For punitive damages;

22 4. For reasonable attorneys' fees incurred herein;

23 5. For costs of suit incurred; and

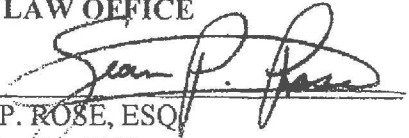
24 6. For such other and further relief as the Court may deem just and proper under the  
25 circumstances.

26 **AFFIRMATION**

27 The undersigned hereby affirms that the preceding document does not contain the social  
28 security number of any person.

1 DATED this 31<sup>st</sup> day of March, 2017.

2 ROSE LAW OFFICE

3 

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

CARL LACKEY,

Plaintiff,

v.

BEAR LEAGUE, a California Corporation,  
ANNE BRYANT, an individual, MARK E.  
SMITH, an individual dba LAKE TAHOE  
WALL OF SHAME, CAROLYN STARK,  
individual dba NDOW WATCH KEEPING  
THEM TRANSPARENT, and DOES 1-20  
Inclusive.

Defendants.

Case No. CV17-00434

Dept. No.: 4

**ORDER REGARDING MARK E. SMITH'S SPECIAL MOTION TO DISMISS/MOTION  
TO DISMISS**

On March 31, 2017, Carl Lackey (hereinafter "Lackey") filed a *First Amended Complaint* (hereinafter "FAC"), by and through his undersigned counsel, Sean Rose, Esq. of the Rose Law Office and Thomas R. Brennan, Esq. of Durney & Brennan, Ltd., against Bear League, a California Corporation, Anne Bryant (hereinafter "Bryant", an individual, Mark E. Smith (hereinafter "Smith"), an individual dba Lake Tahoe Wall of Shame, Carolyn Stark (hereinafter "Stark") an individual dba NDOW Watch Keeping Them Transparent (hereinafter "NDOW WATCH"), and DOES defendants. The FAC sets forth four claims against all Defendants: Defamation, Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress, and Civil Conspiracy. On June 5, 2017, Smith, by and through his counsel Cameron D. Bordner, Esq., and Robin D. Shofner, Esq., of Molsby & Bordner, LLP, filed *Special Motion to Dismiss/Motion to Dismiss*. Lackey filed an opposition on June 23, 2017. Smith filed a reply on July 3, 2017. Lackey filed a

1 supplement to his opposition on July 26, 2017. The Court heard oral arguments on July 26, 2017  
2 and took the matter under advisement.

3 Smith asserts the FAC is subject to dismissal under Nevada's Anti-SLAPP statutes, NRS  
4 41.635, et. seq, as well as 12(b)(5) for failure to state a claim. Smith alleges absent from the FAC  
5 are any allegations that Smith published any comments whatsoever, and certainly not any  
6 comments about or concerning Lackey. Smith contends he is not an administrator or responsible  
7 party for Lake Tahoe Wall of Shame. As such, he is not responsible for comments posted on Lake  
8 Tahoe Wall of Shame. Further, even assuming arguendo that Smith had any management control  
9 over the page, such comments cannot be attributed to him under the Communications Decency  
10 Act (hereinafter "CDA"), 11 U.S.C. 230(c)(1). In his capacity as an employee for Nevada  
11 Department of Wildlife (hereinafter "NDOW"), a governmental organization, there is no doubt  
12 Lackey is a public figure. Or at a minimum, Lackey is a limited purpose public figure and he must  
13 plead and prove actual malice. Smith asserts he did not act with actual malice. Because the  
14 preservation and treatment of bears is undoubtedly a matter of public concern, Smith contends, the  
15 lone comment posted on Lake Tahoe Wall of Shame's Facebook page addresses the same.

16 Smith argues Lackey has failed to state a claim for defamation, as he has failed to allege  
17 that Smith published any statements whatsoever. Similarly, Smith alleges, as Lackey has not  
18 alleged any conduct by Smith, Lackey has failed to plead facts to establish the first element of  
19 intentional infliction of emotional distress, extreme and outrageous conduct, and the second  
20 element of a negligent infliction of emotional distress, breach of duty. Additionally, as with Smith,  
21 Lackey has failed to allege any conduct of Bryant or Stark. Lackey has only alleged conduct by  
22 one defendant, Bear League, as such, Lackey has also failed to allege how Smith purportedly acted  
23 in concert for the conspiracy claim.

24 Lackey argues Nevada's Anti-SLAPP legislation only protects a defendant's First  
25 Amendment free speech rights and not threats and fighting words. Further, Nevada's Anti-SLAPP  
26 statute does not apply because the statements do not involve a public interest. The statements are  
27 directed at Lackey who was simply performing his duties as a NDOW, Biologist III, who is under  
28 the supervision of a Biologist IV. There are false statements alleged that Lackey is corrupt, taking

1 bribes, and illegally torturing and killing bears. Defendants threaten Lackey and his family with  
2 both violence and murder. Lackey contends Smith's reliance on the CDA is misplaced, as Smith  
3 is also an information content provider. Lackey asserts that Smith does business as Lake Tahoe  
4 Wall of Shame and is essentially its voice. Lackey alleges just because Smith may not have created  
5 the Facebook page or manage it does not mean that he did not author the posts. Even though  
6 Lackey contends the burden has not shifted pursuant to Nevada's Anti-SLAPP legislation, Lackey  
7 nonetheless argues, while providing additional evidence, he will be successful on his claims.

#### 8 ANTI-SLAPP

9 "A SLAPP suit is a meritless lawsuit that a party initiates primarily to chill a defendant's  
10 exercise of his or her First Amendment free speech rights." Stubbs v. Strickland, 129 Nev. Adv.  
11 Op. 15, 297 P.3d 326, 329 (2013). "Under Nevada's anti-SLAPP statutes, a defendant may file a  
12 special motion to dismiss if the defendant can show 'by a preponderance of the evidence, that the  
13 claim is based upon a good faith communication in furtherance of the right to petition or the right  
14 to free speech in direct connection with an issue of public concern.'" Shapiro v. Welt, 133 Nev.  
15 Adv. Op. 6, 389 P.3d 262, 267 (2017)(quoting NRS 41.660(3)(a)). The term "good faith  
16 communication" includes "[c]ommunication made in direct connection with an issue of public  
17 interest in a place open to the public or in a public forum, which is truthful or is made without  
18 knowledge of its falsehood." NRS 41.637(4). If a defendant makes this initial showing, the burden  
19 shifts to the plaintiff to show "with prima facie evidence a probability of prevailing on the claim."  
20 Id.; NRS 41.660(3)(b).

21 When determining whether the conduct is protected under the anti-SLAPP statute, the court  
22 should not look to First Amendment law, but to Nevada's anti-SLAPP legislation. See Delucchi  
23 v. Songer, 133 Nev. Adv. Op. 42, 396 P.3d 826, 833 (Nev. 2017). Thus, when analyzing whether  
24 the defendant's conduct constitutes "good faith communication" the court must determine whether  
25 "it falls within one of the four categories enumerated in NRS 41.637, and whether it is truthful or  
26 is made without knowledge of its falsehood." Delucchi, 133 Nev. Adv. Op. at 15; 396 P.3d at  
27 833(internal quotations omitted). However, if the alleged conduct is illegal as a matter of law,  
28 then the conduct is not protected activity within the anti-SLAPP context.



1 To determine whether an issue is one of public interest as used in NRS 41.637(4), the  
2 Nevada Supreme Court adopted the guiding principles California utilizes. Shapiro, 133 Nev. Adv.  
3 Op. 6, 389 P.3d at 268 (citing Piping Rock Partners, Inc. v. David Lerner Assocs, Inc., 946  
4 F.Supp.2d 957, 968 (N.D. Cal 2013). Specifically,

- 5 (1) "public interest" does not equate with mere curiosity;  
6 (2) a matter of public interest should be something of concern to a substantial  
7 number of people; a matter of concern to a speaker and a relatively small specific  
8 audience is not a matter of public interest;  
9 (3) there should be some degree of closeness between the challenged statements  
10 and the asserted public interest—the assertion of a broad and amorphous public  
11 interest is not sufficient;  
12 (4) the focus of the speaker's conduct should be the public interest rather than a  
13 mere effort to gather ammunition for another round of private controversy; and  
14 (5) a person cannot turn otherwise private information into a matter of public  
15 interest simply by communicating it to a large number of people.

16 Id.

17 The FAC attributes the following statement to Smith: "A department with no real interest  
18 in wildlife other than to make it available to hunters and trappers...some might say they are  
19 criminals against nature...they are certainly ignorant about it." Commenter Sean Stansfield on  
20 Lake Tahoe Wall of Shame's Facebook Page. [FAC, Statement P].

21 First the Court considers whether the alleged conduct is illegal as a matter of law, and  
22 therefore does not fall within the protection of Nevada's anti-SLAPP legislation. 18 USC § 2261A  
23 (the federal stalking statute) provides in relevant part, whoever,

24 (2) with the intent to kill, injure, harass, intimidate, or place under surveillance with  
25 intent to kill, injure, harass, or intimidate another person, uses the mail, any  
26 interactive computer service or electronic communication service or electronic  
27 communication system of interstate commerce, or any other facility of interstate or  
28 foreign commerce to engage in a course of conduct that--

- (A) places that person in reasonable fear of the death of or serious bodily  
injury to a person described in clause (i), (ii), or (iii) of paragraph (1)(A); or  
(B) causes, attempts to cause, or would be reasonably expected to cause  
substantial emotional distress to a person described in clause (i), (ii), or (iii)  
of paragraph (1)(A),

shall be punished as provided in section 2261(b) of this title.

Here, the Court cannot conclude as a matter of law that the conduct was illegal. The Court  
does not find that suggesting a government department is a "criminal against nature" places a  
person in reasonable harm or fear of death or would cause a person severe emotional distress.

Second, the Court finds this statement was made in a public forum as it was made on Facebook. Third, the Court considers the Shapiro factors to determine whether the statement was made in the public interest. Smith's articulated public interest is conservation of natural resources, specifically the preservation and treatment of bears, as well as bribery of a public official. The Court finds this interest does not equate with mere curiosity.

In order to evaluate the degree of closeness between the asserted public interest and speaker's statements/conduct, the Court must evaluate the specific statements (statement P) attributed to Smith. When determining whether these statements are related to the public interest, the court should focus on the specific nature of the speech rather than the generalities. The Court questions whether there is a sufficient degree of closeness between this statement and purported public interest of preserving wildlife or bribery of a public official. There is no indication of what this "department" is (although, the Court presumes it is referring to the NDOW).

Nonetheless, even if this statement fell within the broadly stated public interest, in order to shift the burden to Lackey, Smith must prove, by the preponderance of the evidence, that the statements are true or were made without knowledge of their falsehood. See NRS 41.637; NRS 41.660. Here, there is no evidence provided that shows the statement is truthful or was made without knowledge of its falsehood. In fact, Smith attests that he had no role in drafting or publishing the comment of Sean Sarsfield on the Lake Tahoe Wall of Shame Facebook's page. Therefore, the Court finds the first prong of NRS 41.660 has not been satisfied. Thus, the Court does not find the burden shifts to Lackey to prove his likelihood of success on his claims. The Court will deny Smith's motion to dismiss under Nevada's anti-SLAPP legislation.

**NRCP 12**

Next the Court considers Smith's 12(b) motion to dismiss. Although evidence was provided for the purposes of the Anti-SLAPP motion, the Court will not convert the motion to dismiss under into a motion for summary judgment by considering matters outside the pleadings at this stage of the case.

NRCP 8 requires that a complaint contain a “(1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the

1 pleader seeks.” “A complaint must set forth sufficient facts to establish all necessary elements of  
2 a claim for relief, so that the adverse party has adequate notice of the nature of the claim and relief  
3 sought.” Hay v. Hay, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984).

4 Pursuant to NRCP 12(b)(5), a party may bring a motion to dismiss for failure to state a  
5 claim upon which relief should be granted. A motion to dismiss should be granted only if “it  
6 appears beyond a doubt that it could prove no set of facts, which, if true, would entitle it to relief.  
7 Buzz Stew, LLC v. City of North Las Vegas, 124 Nev. 224, 181 P.3d. 670 (2008). As a notice-  
8 pleading jurisdiction, the court must “liberally construe pleadings to place into issue matters which  
9 are fairly noticed to the adverse party.” Hay, 100 Nev. at 198, 678 P.2d at 674. In ruling on a  
10 motion to dismiss, the court must take all allegations in the complaint as true and draw all  
11 inferences in favor of the complainant. Id.; Torres v. Nev. Direct Ins. Co., 131 Nev. Adv. Op. 54,  
12 353 P.3d 1203, 1210 (2015). However, the court does not have to “assume the truth of legal  
13 conclusions merely because they are cast in the form of factual allegations.” Hotel Employees &  
14 Rest. Employees Int’l Union Welfare Fund v. Gentner, 815 F. Supp. 1354, 1357 (D. Nev. 1993).

#### 15 *Communications Decency Act*

16 First, the Court address arguments concerning the CDA, as Smith is of the position that the  
17 statements/conduct alleged are not attributable to him by virtue of the statute. The CDA  
18 immunizes interactive computer services or users from any cause of action that would make them  
19 liable for publishing information provided by a third-party user of the service. See 47 U.S.C.A  
20 230(c)(1)(“[n]o provider or user of an interactive computer service shall be treated as the publisher  
21 or speaker of any information provided by another information content provider”).<sup>1</sup> The CDA  
22 defines “interactive computer service” to mean, “any information service, system, or access  
23 software provider that provides or enables computer access by multiple users to a computer server,  
24 including specifically a service or system that provides access to the Internet and such systems

25  
26 <sup>1</sup> See also Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1122 (9th Cir.2003); Zeran v. America Online, Inc.,  
27 129 F.3d 327, 330–31 (4th Cir.1997) (finding “lawsuits seeking to hold a service provider liable for its exercise of a  
28 publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter  
content—are barred”); Doe v. MySpace, Inc., 528 F.3d 413, 420 (5th Cir. 2008) (noting there is no liability under  
the CDA for “decisions relating to the monitoring, screening, and deletion of content” by an interactive computer  
service provider).

1 operated or services offered by libraries or educational institutions.” Courts have consistently  
2 found Facebook operates as an interactive computer service.<sup>2</sup>

3 The CDA, however, does not immunize an interactive computer service if it also functions  
4 as an information content provider for the portion of the statement or publication at issue.<sup>3</sup>  
5 “Information content provider” means “any person or entity that is responsible, in whole or in part,  
6 for the creation or development of information provided through the Internet or any other  
7 interactive computer service.” 47 USC 230(3). A website may lose immunity under the CDA by  
8 making a material contribution to the creation or development of content.<sup>4</sup>

9 Thus, passive websites or websites that permit comments (without encouraging or  
10 developing the content at issue) have not been deemed information content providers for the  
11 purposes of the CDA.<sup>5</sup> Therefore, absent some solicitation/encouragement of the defamatory  
12 remarks, an interactive website/user will not be liable for the content that originated from a third  
13 party.

14 Here, the FAC alleges that Smith is doing business as Lake Tahoe Wall of Shame. The  
15 FAC alleges a specific comment of a person (not Smith) on Lake Tahoe Wall of Shame’s Facebook  
16 page as well as generally states that members of Lake Tahoe Wall of Shame, and Lake Tahoe Wall  
17 of Shame (itself) has made and continues to make false statements regarding Lackey and initiates  
18 public comment threads on Facebook slandering Lackey including accusing him of criminal  
19

20 <sup>2</sup> See e.g. Fraley v. Facebook, Inc., 830 F.Supp.2d 785, 801–02 (N.D.Cal.2011); Klayman v. Zuckerberg, 753 F.3d  
21 1354, 1359 (D.C. Cir. 2014).

22 <sup>3</sup> Carafano, 339 F.3d at 1123-25 (47 USC 230(c)(1) would bar plaintiff’s claims unless defendant “created or  
23 developed the particular information at issue”); see also Anthony v. Yahoo! Inc., 421 F.Supp. 2d 1257, 1262-1263  
24 (N.D. Cal. 2006)(finding the CDA did not bar claims arising out of dating service’s alleged creation of false profiles  
25 which induced plaintiff to maintain his membership there).

26 <sup>4</sup> Kimzey v. Yelp! Inc., 836 F.3d 1263, 1269 (9th Cir. 2016)(noting Roommates.Com, 521 F.3d at 1171, clarified “the  
27 language used in Carafano [Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir.2003)] recognizing that a website could  
28 be a developer of content where it encouraged users to provide illegal content”). In Fair Hous. Council of San  
Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157, 1172 (9th Cir. 2008), the court discussed when a website  
may also act as an information content provider: “The salient fact in Carafano was that the website’s classifications  
of user characteristics did absolutely nothing to enhance the defamatory sting of the message, to encourage defamation  
or to make defamation easier: The site provided neutral tools specifically designed to match romantic partners  
depending on their voluntary inputs. By sharp contrast, Roommate’s website is designed to force subscribers to divulge  
protected characteristics and discriminatory preferences, and to match those who have rooms with those who are  
looking for rooms based on criteria that appear to be prohibited by the FHA.”

<sup>5</sup> See e.g. Stevo Design, Inc. v. SBR Mktg. Ltd., 919 F.Supp.2d 1112, 1125–26 (D. Nev. 2013; Spreadbury v.  
Bitterroot Pub. Library, 856 F.Supp.2d 1195, 1198 (D. Mont. 2012; Piping Rock, 946 F.Supp.2d at 957.

1 conduct (accepting bribes and conspiracy). [FAC, at 3:18-28; 4: 1-7)]. It further alleges that Smith  
2 and Lake Tahoe Wall of Shame published and encouraged statements. [FAC, at 8:14-19].

3 Facebook permits a comment by both the webpage as well as third party users. An original  
4 post may contain a reply, as well as a reply to the reply, and can continue, the Court supposes,  
5 indefinitely. Given the nature of Facebook, the Court cannot conclude for the purposes of a motion  
6 to dismiss, that Smith did not encourage the third party user's statement. Therefore, at this time,  
7 the Court cannot find Smith is immunized from liability for the third party comments under the  
8 CDA.<sup>6</sup>

9 For the purposes of a motion to dismiss, that the Court is declining at this time in the  
10 litigation to convert to summary judgment, the Court will not consider the evidence provided by  
11 the parties that discusses Smith's role (or lack thereof) in Lake Tahoe Wall of Shame.

#### 12 ***Defamation***

13 Pursuant to Rule 8, defamation must be pled by setting forth sufficient facts to demonstrate  
14 the necessary elements of the claim so the defending party has adequate notice of the nature of the  
15 claim.

16 Based on the substantial similarity between the language in F.R.C.P. 8(a) and N.R.C.P.  
17 8(a), the court may look to decisions interpreting N.R.C.P. 8(a)'s federal counterpart for guidance,  
18 especially the federal opinions that were decided prior the US Supreme Court's adoption of the  
19 higher pleading standard as set forth in Ashcroft v. Iqbal, 556 U.S. 662 (2009) and Bell Atlantic  
20 Corporation v. Twombly, 550 U.S. 544 (2007). Although, some federal courts, applying FRCP 8,  
21 have required defamation to be pled with more specificity, such as dictating the claim must set  
22 forth an adequate identification of the communication, who made the statements, to whom they  
23 were made, and when the statements were made. See Bushnell Corporation v. ITT Corporation,  
24 973 F.Supp. 1276 (D.Kan.1997); Decker v. Vermont Educ. Television, Inc., 13 F. Supp. 2d 569,

25  
26 <sup>6</sup> See e.g. Hy Cite Corp v. badbusinessbureau.com, L.L.C., 418 F. Supp. 2d 1142, 1148-49 (D. Ariz. 2005)(declining  
27 to grant defendants' motion to dismiss based on CDA immunity because plaintiffs alleged that defendants added  
28 editorial comments, titles, and original content to third-party complaints posted on defendants' website); Whitney  
Info. Network, Inc. v. Xcentric Venture, LLC, 199 Fed. Appx. 738, 744 (11<sup>th</sup> Cir. 2006)(finding whether Defendants  
were entitled to CDA immunity remained in question because the complaint plead Defendants' involvement in  
creating or developing the alleged defamatory content posted on their website.

1 573–74 (D. Vt. 1998); (Blanck v. Hager, 360 F. Supp. 2d 1137, 1160 (D. Nev. 2005), aff'd, 220  
2 Fed. Appx. 697 (9th Cir. 2007).

3 Other federal courts have expressed disfavor about requiring a higher pleading requirement  
4 as defamation is not covered by FRCP 9. See Okeke v. Biomat USA, Inc., 927 F. Supp. 2d 1021,  
5 1027 (D. Nev. 2013); Rivera v. Allstate Ins. Co., 140 F. Supp. 3d 722, 728 (N.D. Ill. 2015).

6 As the Nevada Supreme Court has not adopted the higher pleading standards many courts  
7 have advocated for as discussed *supra*, the Court will not do so here. However, to the extent a  
8 claim for damages is not premised on defamation per se, special damages must be pled with  
9 particularity. See NRCP 9; see also Branda v. Sanford, 97 Nev. 643, 646, 637 P.2d 1223, 1225  
10 (1981).

11 The general elements of a defamation claim require a plaintiff to prove: “(1) a false and  
12 defamatory statement by [a] defendant concerning the plaintiff; (2) an unprivileged publication to  
13 a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages.  
14 Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 718, 57 P.3d 82, 90 (2002). “Statements are  
15 libel per se under Nevada law when they ‘naturally tend to degrade [the plaintiff] in the estimation  
16 of his fellow men, or hold him out to ridicule or scorn, or would tend to injure him in his business,  
17 occupation or profession.’” Flowers v. Carville, 292 F. Supp. 2d 1225, 1232 (D. Nev. 2003), aff'd,  
18 161 Fed. Appx. 697 (9th Cir. 2006)(citing Talbot v. Mack, 41 Nev. 245, 169 P. 25 (1917)).

19 When a public figure or a limited public figure is involved, a plaintiff must plead and prove  
20 actual malice as opposed to negligence. Pegasus, 118 Nev. at 719, 57 P.3d at 91. “General public  
21 figures are those individuals who achieve such pervasive fame or notoriety that they become a  
22 public figure for all purposes and in all contexts,” as well as those who hold government office.  
23 Id. at 719; 91; Gertz v. Robert Welch, Inc., 94 S. Ct. 2997, 3008 (1974). A limited public figure  
24 “voluntarily injects himself or is thrust into a particular public controversy or public concern, and  
25 thereby becomes a public figure for a limited range of issues.” Id.; Bongiovi v. Sullivan, 122 Nev.  
26 556, 573–74, 138 P.3d 433, 446 (2006).

27 The FAC generally alleges Smith is doing business as Lake Tahoe Wall of Shame. The  
28 FAC states that Lake Tahoe Wall of Shame has and continues to initiate public comment threads

1 on its Facebook page slandering Lackey in his official capacity as a state employee and urging and  
2 encouraging the public at large to shame and harass Lackey so that he will lose his job and/or feel  
3 threatened enough to leave the community. The FAC alleges Lake Tahoe Wall of Shame acted  
4 intentionally and with malice with the primary purpose being to harm, threaten, intimidate, cause  
5 fear, anxiety, embarrassment and damage to his reputation by publishing false and vicious  
6 comments accusing Lackey of criminal conduct (including accepting bribes and conspiracy)  
7 designed to incite public outrage. The FAC lists some, but allegedly not all of the comments made  
8 by Lake Tahoe Wall of Shame and the other defendants (see above for statements alleged  
9 attributable to Smith dba Lake Tahoe Wall of Shame). The FAC asserts Lackey is either a limited  
10 purpose public figure or a private individual. The FAC sets forth that Smith and Lake Tahoe Wall  
11 of Shame published and encouraged statements despite having actual knowledge that such  
12 statements were false, or with reckless disregard for their veracity. [FAC, at 8:14-19]. The FAC  
13 states defendants know the inflammatory false information they were posting was malicious, false,  
14 and accusatory of criminal conduct and had the purposes of harming, threatening, intimidating and  
15 or harassing plaintiff and his livelihood. It further alleges Lackey has suffered damages and has  
16 incurred attorneys' fees.

17 The specific statements attributed to Smith is Statement P. Generally, whether a statement  
18 is capable of defamatory construction is a question of law. K-Mart Corp. v. Washington, 109 Nev.  
19 1180, 886 P.2d 274 (1993). "Statements of opinion as opposed to statements of fact are not  
20 actionable," however, "expressions of opinion may suggest that the speaker knows certain facts to  
21 be true or may imply that facts exist which will be sufficient to render the message defamatory if  
22 false." Pegasus, 118 Nev. at 714, 57 P.3d at 88. A "statement may be ambiguous or a 'mixed  
23 type,' which is an opinion, which gives rise to the inference that the source has based the opinion  
24 on underlying, undisclosed defamatory facts;" and when a statement is ambiguous, "the question  
25 of whether it is a fact or evaluative opinion is left to the jury." Lubin v. Kunin, 117 Nev. 107, 113,  
26 17 P.3d 422, 426 (2001).

27 Statement P critiques an unspecified "department" and not Lackey himself. As Lackey is  
28 the plaintiff, and not NDOW or some other "department," the Court finds that this is not a



1 statement about the plaintiff by the defendant. Therefore, the Court finds, as a matter of law,  
2 statement P is not actionable in this case for defamation. However, because the FAC generally  
3 alleges the elements of defamation, and specifically states that Smith and Lake Tahoe Wall of  
4 Shame published and encouraged the statements, the Court finds Lackey has stated a claim for  
5 defamation. Lackey has put Smith on notice of the defamatory conduct by alleging defendants  
6 have accused him of criminal conduct (accepting bribes and conspiracy), have slandered Lackey  
7 in his official capacity, and made false statements of his character. These general allegations,  
8 especially when read together with the specific examples provided, give Smith notice of the nature  
9 of the defamation claim.

#### 10 ***Civil Conspiracy***

11 Civil conspiracy "consists of a combination of two or more persons who, by some  
12 concerted action, intend to accomplish an unlawful objective for the purpose of harming another,  
13 and damage results from the act or acts." Consol. Generator-Nevada, Inc. v. Cummins Engine Co.,  
14 Inc., 114 Nev. 1304, 1311, 971 P.2d 1251, 1256 (1998). The FAC sets forth that defendants  
15 continuously over the past several years have acted in concert with one another to accomplish the  
16 goals of harassing and threatening Lackey. The FAC alleges Lackey feels the defendants and their  
17 supporters post a threat to his safety and as a result he has suffered damages. The Court finds  
18 Lackey has properly alleged a claim for civil conspiracy against Smith. Lackey has pled the  
19 unlawful objective is to harass and threaten Lackey. Further, in stating a claim for conspiracy,  
20 Lackey incorporates by reference the other allegations in his complaint. See discussion supra,  
21 discussing the conduct Smith has been specifically alleged to do, such as using Facebook to  
22 encourage the public to shame and harass Lackey. In addition to the conduct attributed to Smith  
23 (through Lake Tahoe Wall of Shame), the FAC likewise sets forth specific Facebook  
24 threats/comments attributed to the other defendants.

#### 25 ***Intentional Infliction of Emotional Distress:***

26 The elements of a claim for intentional infliction of emotional distress are: 1) that the  
27 defendant's conduct was extreme and outrageous; (2) that the defendant either intended or  
28 recklessly disregarded the causing of emotional distress; (3) that the plaintiff actually suffered



1 severe or extreme emotional distress; and (4) that the defendant's conduct actually or proximately  
2 caused the distress. Nelson v. City of Las Vegas, 99 Nev. 548, 555, 665 P.2d 1141, 1145 (1983).  
3 "[E]xtreme and outrageous conduct is that which is outside all possible bounds of decency and is  
4 regarded as utterly intolerable in a civilized community." Maduik v. Agency Rent-A-Car, 114  
5 Nev. 1, 4, 953 P.2d 24, 26 (1998).

6 Based on the allegations set forth above, the FAC alleges, defendants have engaged in  
7 willful, malicious, wanton, and egregious conduct that was extreme and outrageous causing  
8 emotional distress. The FAC alleges Lackey has suffered severe and extreme emotional distress as  
9 a result of defendants' conduct and remains fearful of physical harm or violence directed at him.  
10 Taking the factual allegations set forth in the FAC as true, the Court finds Lackey has properly  
11 stated a claim for intentional infliction of emotional distress against Smith as the FAC alleges,  
12 among other allegations, that Lake Tahoe Wall of Shame (who Smith does business as) has  
13 initiated public comment to encourage the public to shame and harass Lackey so he will lose his  
14 job and/or feel threatened enough to leave the community, and that Smith and Lake Tahoe Wall  
15 of Shame published and encouraged the statements. Here, the FAC alleges Smith (in addition to  
16 Lake Tahoe Wall of Shame) engaged in tortious conduct by publishing and encouraging  
17 statements. Thus, for purposes of a motion to dismiss, taking the allegations in light most favorably  
18 to Lackey, the Court cannot find that Smith is shielded for tortious acts.<sup>7</sup> Thus, a jury could find  
19 this is extreme and outrageous conduct. The Court incorporates by reference the analysis of the  
20 CDA and purported defamatory statements set forth above.

#### 21 *Negligent Infliction of Emotional Distress*<sup>7</sup>

22 A claim for negligent infliction of emotional distress requires a showing that defendant  
23 owed a duty of care to the plaintiff, defendant breached that duty, the breach was the legal cause  
24 of the plaintiff's injuries, and plaintiff suffered serious emotional damages. Olivero v. Lowe, 116  
25

26 <sup>7</sup> See: "Directors or officers of a corporation do not incur personal liability for torts of the corporation merely by  
27 reason of their official position, unless they participate in the wrong or authorize or direct that it be done."  
United States Liab. Ins. Co. v. Haidinger-Hayes, Inc., 1 Cal. 3d 586, 595 (1970)(emphasis added).

28 <sup>7</sup> Although this third claim for relief is titled as "Intentional Infliction of Emotional Distress," because the FAC  
alleges that Defendants acted negligently under this heading, the Court assumes it should be titled "Negligent  
Infliction of Emotional Distress."

1 Nev. 395, 399, 995 P.2d 1023, 1026 (2000); Turner v. Mandalay Sports Entm't, LLC, 124 Nev.  
2 213, 222, 180 P.3d 1172, 1178 (2008). The Nevada Supreme Court has cited favorable in Turner,  
3 *supra*, the explanation of the duty required when a person complains they are the direct victim of  
4 emotional distress in Moon v. Guardian Postacute Services, Inc., 116 Cal. Rptr. 2d 218, 220-21  
5 (2002):

6 The distinction between the "bystander" and the "direct victim" cases is found in  
7 the source of the duty owed by the defendant to the plaintiff. 'Bystander' claims  
8 are typically based on breach of a duty owed to the public in general, whereas a  
9 right to recover for emotional distress as a 'direct victim' arises from the breach of  
a duty that is assumed by the defendant or imposed on the defendant as a matter of  
law, or that arises out of the defendant's preexisting relationship with the plaintiff.

10 "In cases where emotional distress damages are not secondary to physical injuries, but  
11 rather, precipitate physical symptoms, either a physical impact must have occurred or, in the  
12 absence of physical impact, proof of 'serious emotional distress' causing physical injury or illness  
13 must be presented." Barnettler v. Reno Air, Inc., 114 Nev. 441, 448, 956 P.2d 1382, 1387 (1998).

14 Throughout, the FAC alleges defendants acted negligently in causing severe and emotional  
15 distress, and Lackey suffered severe and emotional distress as a result of Defendants' negligence.  
16 However, the Court finds the FAC has failed to plead that Smith owed Lackey a duty. As such,  
17 the Court finds Lackey has failed to state a claim for negligent infliction of emotional distress.

18 Based on the forgoing, and good cause appearing,

19 IT IS HEREBY ORDERED that Mark E. Smith's *Special Motion to Dismiss brought under*  
20 *NRS 41.635 et seq.* is DENIED.

21 IT IS HEREBY FURTHER ORDERED that Mark E. Smith's *Special Motion to Dismiss*  
22 *brought under NRCP 12* is DENIED as to claims of defamation, civil conspiracy and intentional  
23 distress, and GRANTED as to the claim of Negligent Infliction of Emotional Distress, said claim  
24 shall be DISMISSED.

25 ///

26 ///

27 ///

28 ///

1 IT IS HEREBY FURTHER ORDERED that Mark E. Smith shall file an Answer to the  
2 First Amended Complaint within twenty (20) days of the date of this Order.

3 DATED this 23 day of October, 2017.

4 Connie J. Steinheimer  
5 DISTRICT JUDGE  
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**CERTIFICATE OF SERVICE**

CASE NO. CV17-00434

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 23 day of October, 2017, I filed the **ORDER REGARDING MARK E. SMITH'S SPECIAL MOTION TO DISMISS/MOTION TO DISMISS** with the Clerk of the Court.

I further certify that I transmitted a true and correct copy of the foregoing document by the method(s) noted below:

       Personal delivery to the following: [NONE]

  X   Electronically filed with the Clerk of the Court, using the eFlex system which constitutes effective service for all eFiled documents pursuant to the eFile User Agreement.

SEAN ROSE, ESQ. for CARL LACKEY

THOMAS BRENNAN, ESQ. for CARL LACKEY

DEL HARDY, ESQ. for CAROLYN STARK DBA NDOWL WATCH KEEPING THEM TRANSPARENT

CAMERON BORDNER, ESQ. for BEAR LEAGUE, MARK E SMITH, ANNE BRYANT

       Transmitted document to the Second Judicial District Court mailing system in a sealed envelope for postage and mailing by Washoe County using the United States Postal Service in Reno, Nevada: [NONE]

       Placed a true copy in a sealed envelope for service via:

       Reno/Carson Messenger Service – [NONE]

       Federal Express or other overnight delivery service [NONE]

DATED this 23 day of October, 2017.



1 **CODE: 2540**

2 DEL HARDY, ESQ.(SBN 1172)  
3 STEPHANIE RICE, ESQ. (SBN 11627)  
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5 96 & 98 Winter Street  
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9 *Attorneys for Defendant Mark E. Smith*

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

12 **CARL LACKEY,**

13 Plaintiff,

14 vs.

15 BEAR LEAGUE, a California Corporation,  
16 ANNE BRYANT, an individual, MARK E.  
17 SMITH, an individual dba LAKE TAHOE WALL  
18 OF SHAME, CAROLYN STARK, an individual  
19 dba NDOW WATCH KEEPING THEM  
20 TRANSPARENT, and DOES 1-20, INCLUSIVE.

21 Defendants.

CASE NO.: CV17-00434

DEPT. NO.: 4

22 **NOTICE OF ENTRY OF ORDER REGARDING MARK SMITH'S**  
23 **SPECIAL MOTION TO DISMISS/MOTION TO DISMISS**

24 NOTICE IS HEREBY GIVEN that an ORDER was entered in the above-entitled matter on  
25 October 23, 2017, a copy of which is attached hereto.

26 Dated this 13<sup>th</sup> day of November, 2017.

27 

28 DEL HARDY, ESQ. (SBN 1172)  
STEPHANIE RICE, ESQ. (SBN 11627)  
WINTER STREET LAW GROUP  
*Attorneys for Defendant*

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of WINTER STREET LAW GROUP, 96 & 98 Winter Street, Reno, Nevada 89503, and that on this date I served the foregoing document(s) described as **NOTICE OF ENTRY OF ORDER (AS TO MARK E. SMITH)** on all parties to this action by:

☒ Placing an original or true copy thereof in a sealed envelope placed for collection and mailing in the United States Mail, at Reno, Nevada, postage paid, following ordinary business practices.

☐ Personal Delivery

☐ Facsimile (FAX)

☐ Federal Express or other overnight delivery

☐ Messenger Service

☐ Certified Mail with Return Receipt Requested

☒ Electronically filed

addressed as follows:

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**1830 15<sup>th</sup> Street, Ste. 100**  
**Sacramento, CA 95811**

**AFFIRMATION**

Pursuant to NRS 239B.030, the undersigned does hereby affirm that the proceeding document and attached exhibits, if any, do not contain the Social Security Number of any person.

DATED this 13<sup>th</sup> day of November, 2017.

  
EMPLOYEE OF WINTER STREET LAW GROUP

1 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

2 IN AND FOR THE COUNTY OF WASHOE

3 IN THE MATTER OF THE ESTATE OF:  
4 CARL LACKEY v. BEAR LEAUGE, et al

CASE NO. CV17-00434

DEPT. NO. 4

EXHIBIT INDEX

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EXHIBIT #	DESCRIPTION	LENGTH
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Clerk of the Court  
Transaction # 6391616

# EXHIBIT 1

# EXHIBIT 1



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

CARL LACKEY,

Plaintiff,

v.

BEAR LEAGUE, a California Corporation,  
ANNE BRYANT, an individual, MARK E.  
SMITH, an individual dba LAKE TAHOE  
WALL OF SHAME, CAROLYN STARK,  
individual dba NDOW WATCH KEEPING  
THEM TRANSPARENT, and DOES 1-20  
Inclusive.

Defendants.

Case No. CV17-00434

Dept. No.: 4

**ORDER REGARDING MARK E. SMITH'S SPECIAL MOTION TO DISMISS/MOTION  
TO DISMISS**

On March 31, 2017, Carl Lackey (hereinafter "Lackey") filed a *First Amended Complaint* (hereinafter "FAC"), by and through his undersigned counsel, Sean Rose, Esq. of the Rose Law Office and Thomas R. Brennan, Esq. of Durney & Brennan, Ltd., against Bear League, a California Corporation, Anne Bryant (hereinafter "Bryant", an individual, Mark E. Smith (hereinafter "Smith"), an individual dba Lake Tahoe Wall of Shame, Carolyn Stark (hereinafter "Stark") an individual dba NDOW Watch Keeping Them Transparent (hereinafter "NDOW WATCH"), and DOES defendants. The FAC sets forth four claims against all Defendants: Defamation, Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress, and Civil Conspiracy. On June 5, 2017, Smith, by and through his counsel Cameron D. Bordner, Esq., and Robin D. Shofner, Esq., of Molsby & Bordner, LLP, filed *Special Motion to Dismiss/Motion to Dismiss*. Lackey filed an opposition on June 23, 2017. Smith filed a reply on July 3, 2017. Lackey filed a

1 supplement to his opposition on July 26, 2017. The Court heard oral arguments on July 26, 2017  
2 and took the matter under advisement.

3 Smith asserts the FAC is subject to dismissal under Nevada's Anti-SLAPP statutes, NRS  
4 41.635, et. seq, as well as 12(b)(5) for failure to state a claim. Smith alleges absent from the FAC  
5 are any allegations that Smith published any comments whatsoever, and certainly not any  
6 comments about or concerning Lackey. Smith contends he is not an administrator or responsible  
7 party for Lake Tahoe Wall of Shame. As such, he is not responsible for comments posted on Lake  
8 Tahoe Wall of Shame. Further, even assuming arguendo that Smith had any management control  
9 over the page, such comments cannot be attributed to him under the Communications Decency  
10 Act (hereinafter "CDA"), 11 U.S.C. 230(c)(1). In his capacity as an employee for Nevada  
11 Department of Wildlife (hereinafter "NDOW"), a governmental organization, there is no doubt  
12 Lackey is a public figure. Or at a minimum, Lackey is a limited purpose public figure and he must  
13 plead and prove actual malice. Smith asserts he did not act with actual malice. Because the  
14 preservation and treatment of bears is undoubtedly a matter of public concern, Smith contends, the  
15 lone comment posted on Lake Tahoe Wall of Shame's Facebook page addresses the same.

16 Smith argues Lackey has failed to state a claim for defamation, as he has failed to allege  
17 that Smith published any statements whatsoever. Similarly, Smith alleges, as Lackey has not  
18 alleged any conduct by Smith, Lackey has failed to plead facts to establish the first element of  
19 intentional infliction of emotional distress, extreme and outrageous conduct, and the second  
20 element of a negligent infliction of emotional distress, breach of duty. Additionally, as with Smith,  
21 Lackey has failed to allege any conduct of Bryant or Stark. Lackey has only alleged conduct by  
22 one defendant, Bear League, as such, Lackey has also failed to allege how Smith purportedly acted  
23 in concert for the conspiracy claim.

24 Lackey argues Nevada's Anti-SLAPP legislation only protects a defendant's First  
25 Amendment free speech rights and not threats and fighting words. Further, Nevada's Anti-SLAPP  
26 statute does not apply because the statements do not involve a public interest. The statements are  
27 directed at Lackey who was simply performing his duties as a NDOW, Biologist III, who is under  
28 the supervision of a Biologist IV. There are false statements alleged that Lackey is corrupt, taking

1 bribes, and illegally torturing and killing bears. Defendants threaten Lackey and his family with  
2 both violence and murder. Lackey contends Smith's reliance on the CDA is misplaced, as Smith  
3 is also an information content provider. Lackey asserts that Smith does business as Lake Tahoe  
4 Wall of Shame and is essentially its voice. Lackey alleges just because Smith may not have created  
5 the Facebook page or manage it does not mean that he did not author the posts. Even though  
6 Lackey contends the burden has not shifted pursuant to Nevada's Anti-SLAPP legislation, Lackey  
7 nonetheless argues, while providing additional evidence, he will be successful on his claims.

#### 8 ANTI-SLAPP

9 "A SLAPP suit is a meritless lawsuit that a party initiates primarily to chill a defendant's  
10 exercise of his or her First Amendment free speech rights." Stubbs v. Strickland, 129 Nev. Adv.  
11 Op. 15, 297 P.3d 326, 329 (2013). "Under Nevada's anti-SLAPP statutes, a defendant may file a  
12 special motion to dismiss if the defendant can show 'by a preponderance of the evidence, that the  
13 claim is based upon a good faith communication in furtherance of the right to petition or the right  
14 to free speech in direct connection with an issue of public concern.'" Shapiro v. Welt, 133 Nev.  
15 Adv. Op. 6, 389 P.3d 262, 267 (2017)(quoting NRS 41.660(3)(a)). The term "good faith  
16 communication" includes "[c]ommunication made in direct connection with an issue of public  
17 interest in a place open to the public or in a public forum, which is truthful or is made without  
18 knowledge of its falsehood." NRS 41.637(4). If a defendant makes this initial showing, the burden  
19 shifts to the plaintiff to show "with prima facie evidence a probability of prevailing on the claim."  
20 Id.; NRS 41.660(3)(b).

21 When determining whether the conduct is protected under the anti-SLAPP statute, the court  
22 should not look to First Amendment law, but to Nevada's anti-SLAPP legislation. See Delucchi  
23 v. Songer, 133 Nev. Adv. Op. 42, 396 P.3d 826, 833 (Nev. 2017). Thus, when analyzing whether  
24 the defendant's conduct constitutes "good faith communication" the court must determine whether  
25 "it falls within one of the four categories enumerated in NRS 41.637, and whether it is truthful or  
26 is made without knowledge of its falsehood." Delucchi, 133 Nev. Adv. Op. at 15; 396 P.3d at  
27 833(internal quotations omitted). However, if the alleged conduct is illegal as a matter of law,  
28 then the conduct is not protected activity within the anti-SLAPP context.

1 To determine whether an issue is one of public interest as used in NRS 41.637(4), the  
2 Nevada Supreme Court adopted the guiding principles California utilizes. Shapiro, 133 Nev. Adv.  
3 Op. 6, 389 P.3d at 268 (citing Piping Rock Partners, Inc. v. David Lerner Assocs, Inc., 946  
4 F.Supp.2d 957, 968 (N.D. Cal 2013). Specifically,

- 5 (1) "public interest" does not equate with mere curiosity;  
6 (2) a matter of public interest should be something of concern to a substantial  
7 number of people; a matter of concern to a speaker and a relatively small specific  
8 audience is not a matter of public interest;  
9 (3) there should be some degree of closeness between the challenged statements  
10 and the asserted public interest—the assertion of a broad and amorphous public  
11 interest is not sufficient;  
12 (4) the focus of the speaker's conduct should be the public interest rather than a  
13 mere effort to gather ammunition for another round of private controversy; and  
14 (5) a person cannot turn otherwise private information into a matter of public  
15 interest simply by communicating it to a large number of people.

16 Id.

17 The FAC attributes the following statement to Smith: "A department with no real interest  
18 in wildlife other than to make it available to hunters and trappers...some might say they are  
19 criminals against nature...they are certainly ignorant about it." Commenter Sean Stansfield on  
20 Lake Tahoe Wall of Shame's Facebook Page. [FAC, Statement P].

21 First the Court considers whether the alleged conduct is illegal as a matter of law, and  
22 therefore does not fall within the protection of Nevada's anti-SLAPP legislation. 18 USC § 2261A  
23 (the federal stalking statute) provides in relevant part, whoever,

24 (2) with the intent to kill, injure, harass, intimidate, or place under surveillance with  
25 intent to kill, injure, harass, or intimidate another person, uses the mail, any  
26 interactive computer service or electronic communication service or electronic  
27 communication system of interstate commerce, or any other facility of interstate or  
28 foreign commerce to engage in a course of conduct that--

(A) places that person in reasonable fear of the death of or serious bodily  
injury to a person described in clause (i), (ii), or (iii) of paragraph (1)(A); or  
(B) causes, attempts to cause, or would be reasonably expected to cause  
substantial emotional distress to a person described in clause (i), (ii), or (iii)  
of paragraph (1)(A),

shall be punished as provided in section 2261(b) of this title.

Here, the Court cannot conclude as a matter of law that the conduct was illegal. The Court  
does not find that suggesting a government department is a "criminal against nature" places a  
person in reasonable harm or fear of death or would cause a person severe emotional distress.

Second, the Court finds this statement was made in a public forum as it was made on Facebook. Third, the Court considers the Shapiro factors to determine whether the statement was made in the public interest. Smith's articulated public interest is conservation of natural resources, specifically the preservation and treatment of bears, as well as bribery of a public official. The Court finds this interest does not equate with mere curiosity.

In order to evaluate the degree of closeness between the asserted public interest and speaker's statements/conduct, the Court must evaluate the specific statements (statement P) attributed to Smith. When determining whether these statements are related to the public interest, the court should focus on the specific nature of the speech rather than the generalities. The Court questions whether there is a sufficient degree of closeness between this statement and purported public interest of preserving wildlife or bribery of a public official. There is no indication of what this "department" is (although, the Court presumes it is referring to the NDOW).

Nonetheless, even if this statement fell within the broadly stated public interest, in order to shift the burden to Lackey, Smith must prove, by the preponderance of the evidence, that the statements are true or were made without knowledge of their falsehood. See NRS 41.637; NRS 41.660. Here, there is no evidence provided that shows the statement is truthful or was made without knowledge of its falsehood. In fact, Smith attests that he had no role in drafting or publishing the comment of Sean Sarsfield on the Lake Tahoe Wall of Shame Facebook's page. Therefore, the Court finds the first prong of NRS 41.660 has not been satisfied. Thus, the Court does not find the burden shifts to Lackey to prove his likelihood of success on his claims. The Court will deny Smith's motion to dismiss under Nevada's anti-SLAPP legislation.

**NRCP 12**

Next the Court considers Smith's 12(b) motion to dismiss. Although evidence was provided for the purposes of the Anti-SLAPP motion, the Court will not convert the motion to dismiss under into a motion for summary judgment by considering matters outside the pleadings at this stage of the case.

NRCP 8 requires that a complaint contain a “(1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the

1 pleader seeks.” “A complaint must set forth sufficient facts to establish all necessary elements of  
2 a claim for relief, so that the adverse party has adequate notice of the nature of the claim and relief  
3 sought.” Hay v. Hay, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984).

4 Pursuant to NRCP 12(b)(5), a party may bring a motion to dismiss for failure to state a  
5 claim upon which relief should be granted. A motion to dismiss should be granted only if “it  
6 appears beyond a doubt that it could prove no set of facts, which, if true, would entitle it to relief.  
7 Buzz Stew, LLC v. City of North Las Vegas, 124 Nev. 224, 181 P.3d. 670 (2008). As a notice-  
8 pleading jurisdiction, the court must “liberally construe pleadings to place into issue matters which  
9 are fairly noticed to the adverse party.” Hay, 100 Nev. at 198, 678 P.2d at 674. In ruling on a  
10 motion to dismiss, the court must take all allegations in the complaint as true and draw all  
11 inferences in favor of the complainant. Id.; Torres v. Nev. Direct Ins. Co., 131 Nev. Adv. Op. 54,  
12 353 P.3d 1203, 1210 (2015). However, the court does not have to “assume the truth of legal  
13 conclusions merely because they are cast in the form of factual allegations.” Hotel Employees &  
14 Rest. Employees Int’l Union Welfare Fund v. Gentner, 815 F. Supp. 1354, 1357 (D. Nev. 1993).

#### 15 *Communications Decency Act*

16 First, the Court address arguments concerning the CDA, as Smith is of the position that the  
17 statements/conduct alleged are not attributable to him by virtue of the statute. The CDA  
18 immunizes interactive computer services or users from any cause of action that would make them  
19 liable for publishing information provided by a third-party user of the service. See 47 U.S.C.A.  
20 230(c)(1)(“[n]o provider or user of an interactive computer service shall be treated as the publisher  
21 or speaker of any information provided by another information content provider”).<sup>1</sup> The CDA  
22 defines “interactive computer service” to mean, “any information service, system, or access  
23 software provider that provides or enables computer access by multiple users to a computer server,  
24 including specifically a service or system that provides access to the Internet and such systems

25  
26 <sup>1</sup> See also Cerafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1122 (9th Cir.2003); Zeran v. America Online, Inc.,  
27 129 F.3d 327, 330–31 (4th Cir.1997) (finding “lawsuits seeking to hold a service provider liable for its exercise of a  
28 publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter  
content—are barred”); Doe v. MySpace, Inc., 528 F.3d 413, 420 (5th Cir. 2008) (noting there is no liability under  
the CDA for “decisions relating to the monitoring, screening, and deletion of content” by an interactive computer  
service provider).

1 operated or services offered by libraries or educational institutions.” Courts have consistently  
2 found Facebook operates as an interactive computer service.<sup>2</sup>

3 The CDA, however, does not immunize an interactive computer service if it also functions  
4 as an information content provider for the portion of the statement or publication at issue.<sup>3</sup>  
5 “Information content provider” means “any person or entity that is responsible, in whole or in part,  
6 for the creation or development of information provided through the Internet or any other  
7 interactive computer service.” 47 USC 230(3). A website may lose immunity under the CDA by  
8 making a material contribution to the creation or development of content.<sup>4</sup>

9 Thus, passive websites or websites that permit comments (without encouraging or  
10 developing the content at issue) have not been deemed information content providers for the  
11 purposes of the CDA.<sup>5</sup> Therefore, absent some solicitation/encouragement of the defamatory  
12 remarks, an interactive website/user will not be liable for the content that originated from a third  
13 party.

14 Here, the FAC alleges that Smith is doing business as Lake Tahoe Wall of Shame. The  
15 FAC alleges a specific comment of a person (not Smith) on Lake Tahoe Wall of Shame’s Facebook  
16 page as well as generally states that members of Lake Tahoe Wall of Shame, and Lake Tahoe Wall  
17 of Shame (itself) has made and continues to make false statements regarding Lackey and initiates  
18 public comment threads on Facebook slandering Lackey including accusing him of criminal  
19

20 <sup>2</sup> See e.g. Fraleigh v. Facebook, Inc., 830 F.Supp.2d 785, 801–02 (N.D.Cal.2011); Klayman v. Zuckerberg, 753 F.3d  
21 1354, 1359 (D.C. Cir. 2014).

22 <sup>3</sup> Carafano, 339 F.3d at 1123-25 (47 USC 230(c)(1) would bar plaintiff’s claims unless defendant “created or  
23 developed the particular information at issue”); see also Anthony v. Yahoo! Inc., 421 F.Supp. 2d 1257, 1262-1263  
(N.D. Cal. 2006)(finding the CDA did not bar claims arising out of dating service’s alleged creation of false profiles  
24 which induced plaintiff to maintain his membership there).

25 <sup>4</sup> Kimzey v. Yelp! Inc., 836 F.3d 1263, 1269 (9th Cir. 2016)(noting Roommates.Com, 521 F.3d at 1171, clarified “the  
26 language used in Carafano [Metrosplash.com, Inc., 339 F.3d 1119 (9th Cir.2003)] recognizing that a website could  
27 be a developer of content where it encouraged users to provide illegal content”). In Fair Hous. Council of San  
28 Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157, 1172 (9th Cir. 2008), the court discussed when a website  
may also act as an information content provider: “The salient fact in Carafano was that the website’s classifications  
of user characteristics did absolutely nothing to enhance the defamatory sting of the message, to encourage defamation  
or to make defamation easier: The site provided neutral tools specifically designed to match romantic partners  
depending on their voluntary inputs. By sharp contrast, Roommate’s website is designed to force subscribers to divulge  
protected characteristics and discriminatory preferences, and to match those who have rooms with those who are  
looking for rooms based on criteria that appear to be prohibited by the FHA.”

<sup>5</sup> See e.g. Stevo Design, Inc. v. SBR Mktg. Ltd., 919 F.Supp.2d 1112, 1125–26 (D. Nev. 2013); Spreadbury v.  
Bitterroot Pub. Library, 856 F.Supp.2d 1195, 1198 (D. Mont. 2012); Piping Rock, 946 F.Supp.2d at 957.



1 conduct (accepting bribes and conspiracy). [FAC, at 3:18-28; 4: 1-7)]. It further alleges that Smith  
2 and Lake Tahoe Wall of Shame published and encouraged statements. [FAC, at 8:14-19].

3 Facebook permits a comment by both the webpage as well as third party users. An original  
4 post may contain a reply, as well as a reply to the reply, and can continue, the Court supposes,  
5 indefinitely. Given the nature of Facebook, the Court cannot conclude for the purposes of a motion  
6 to dismiss, that Smith did not encourage the third party user's statement. Therefore, at this time,  
7 the Court cannot find Smith is immunized from liability for the third party comments under the  
8 CDA.<sup>6</sup>

9 For the purposes of a motion to dismiss, that the Court is declining at this time in the  
10 litigation to convert to summary judgment, the Court will not consider the evidence provided by  
11 the parties that discusses Smith's role (or lack thereof) in Lake Tahoe Wall of Shame.

### 12 *Defamation*

13 Pursuant to Rule 8, defamation must be pled by setting forth sufficient facts to demonstrate  
14 the necessary elements of the claim so the defending party has adequate notice of the nature of the  
15 claim.

16 Based on the substantial similarity between the language in F.R.C.P. 8(a) and N.R.C.P.  
17 8(a), the court may look to decisions interpreting N.R.C.P. 8(a)'s federal counterpart for guidance,  
18 especially the federal opinions that were decided prior the US Supreme Court's adoption of the  
19 higher pleading standard as set forth in Ashcroft v. Iqbal, 556 U.S. 662 (2009) and Bell Atlantic  
20 Corporation v. Twombly, 550 U.S. 544 (2007). Although, some federal courts, applying FRCP 8,  
21 have required defamation to be pled with more specificity, such as dictating the claim must set  
22 forth an adequate identification of the communication, who made the statements, to whom they  
23 were made, and when the statements were made. See Bushnell Corporation v. ITT Corporation,  
24 973 F.Supp. 1276 (D.Kan.1997); Decker v. Vermont Educ. Television, Inc., 13 F. Supp. 2d 569,

25  
26 <sup>6</sup> See e.g. Hy Cite Corp v. badbusinessbureau.com, L.L.C., 418 F. Supp. 2d 1142, 1148-49 (D. Ariz. 2005)(declining  
27 to grant defendants' motion to dismiss based on CDA immunity because plaintiffs alleged that defendants added  
28 editorial comments, titles, and original content to third-party complaints posted on defendants' website); Whitney  
Info. Network, Inc. v. Xcentric Venture, LLC, 199 Fed. Appx. 738, 744 (11<sup>th</sup> Cir. 2006)(finding whether Defendants  
were entitled to CDA immunity remained in question because the complaint plead Defendants' involvement in  
creating or developing the alleged defamatory content posted on their website.



1 573–74 (D. Vt. 1998); (Blanck v. Hager, 360 F. Supp. 2d 1137, 1160 (D. Nev. 2005), aff'd, 220  
2 Fed. Appx. 697 (9th Cir. 2007).

3 Other federal courts have expressed disfavor about requiring a higher pleading requirement  
4 as defamation is not covered by FRCP 9. See Okeke v. Biomat USA, Inc., 927 F. Supp. 2d 1021,  
5 1027 (D. Nev. 2013); Rivera v. Allstate Ins. Co., 140 F. Supp. 3d 722, 728 (N.D. Ill. 2015).

6 As the Nevada Supreme Court has not adopted the higher pleading standards many courts  
7 have advocated for as discussed *supra*, the Court will not do so here. However, to the extent a  
8 claim for damages is not premised on defamation per se, special damages must be pled with  
9 particularity. See NRCP 9; see also Branda v. Sanford, 97 Nev. 643, 646, 637 P.2d 1223, 1225  
10 (1981).

11 The general elements of a defamation claim require a plaintiff to prove: “(1) a false and  
12 defamatory statement by [a] defendant concerning the plaintiff; (2) an unprivileged publication to  
13 a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages.  
14 Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 718, 57 P.3d 82, 90 (2002). “Statements are  
15 libel per se under Nevada law when they ‘naturally tend to degrade [the plaintiff] in the estimation  
16 of his fellow men, or hold him out to ridicule or scorn, or would tend to injure him in his business,  
17 occupation or profession.” Flowers v. Carville, 292 F. Supp. 2d 1225, 1232 (D. Nev. 2003), aff'd,  
18 161 Fed. Appx. 697 (9th Cir. 2006)(citing Talbot v. Mack, 41 Nev. 245, 169 P. 25 (1917)).

19 When a public figure or a limited public figure is involved, a plaintiff must plead and prove  
20 actual malice as opposed to negligence. Pegasus, 118 Nev. at 719, 57 P.3d at 91. “General public  
21 figures are those individuals who achieve such pervasive fame or notoriety that they become a  
22 public figure for all purposes and in all contexts,” as well as those who hold government office.  
23 Id. at 719; 91; Gertz v. Robert Welch, Inc., 94 S. Ct. 2997, 3008 (1974). A limited public figure  
24 “voluntarily injects himself or is thrust into a particular public controversy or public concern, and  
25 thereby becomes a public figure for a limited range of issues.” Id.; Bongiovi v. Sullivan, 122 Nev.  
26 556, 573–74, 138 P.3d 433, 446 (2006).

27 The FAC generally alleges Smith is doing business as Lake Tahoe Wall of Shame. The  
28 FAC states that Lake Tahoe Wall of Shame has and continues to initiate public comment threads

1 on its Facebook page slandering Lackey in his official capacity as a state employee and urging and  
2 encouraging the public at large to shame and harass Lackey so that he will lose his job and/or feel  
3 threatened enough to leave the community. The FAC alleges Lake Tahoe Wall of Shame acted  
4 intentionally and with malice with the primary purpose being to harm, threaten, intimidate, cause  
5 fear, anxiety, embarrassment and damage to his reputation by publishing false and vicious  
6 comments accusing Lackey of criminal conduct (including accepting bribes and conspiracy)  
7 designed to incite public outrage. The FAC lists some, but allegedly not all of the comments made  
8 by Lake Tahoe Wall of Shame and the other defendants (see above for statements alleged  
9 attributable to Smith dba Lake Tahoe Wall of Shame). The FAC asserts Lackey is either a limited  
10 purpose public figure or a private individual. The FAC sets forth that Smith and Lake Tahoe Wall  
11 of Shame published and encouraged statements despite having actual knowledge that such  
12 statements were false, or with reckless disregard for their veracity. [FAC, at 8:14-19]. The FAC  
13 states defendants know the inflammatory false information they were posting was malicious, false,  
14 and accusatory of criminal conduct and had the purposes of harming, threatening, intimidating and  
15 or harassing plaintiff and his livelihood. It further alleges Lackey has suffered damages and has  
16 incurred attorneys' fees.

17 The specific statements attributed to Smith is Statement P. Generally, whether a statement  
18 is capable of defamatory construction is a question of law. K-Mart Corp. v. Washington, 109 Nev.  
19 1180, 886 P.2d 274 (1993). "Statements of opinion as opposed to statements of fact are not  
20 actionable," however, "expressions of opinion may suggest that the speaker knows certain facts to  
21 be true or may imply that facts exist which will be sufficient to render the message defamatory if  
22 false." Pegasus, 118 Nev. at 714, 57 P.3d at 88. A "statement may be ambiguous or a 'mixed  
23 type,' which is an opinion, which gives rise to the inference that the source has based the opinion  
24 on underlying, undisclosed defamatory facts;" and when a statement is ambiguous, "the question  
25 of whether it is a fact or evaluative opinion is left to the jury." Lubin v. Kunin, 117 Nev. 107, 113,  
26 17 P.3d 422, 426 (2001).

27 Statement P critiques an unspecified "department" and not Lackey himself. As Lackey is  
28 the plaintiff, and not NDOW or some other "department," the Court finds that this is not a

1 statement about the plaintiff by the defendant. Therefore, the Court finds, as a matter of law,  
2 statement P is not actionable in this case for defamation. However, because the FAC generally  
3 alleges the elements of defamation, and specifically states that Smith and Lake Tahoe Wall of  
4 Shame published and encouraged the statements, the Court finds Lackey has stated a claim for  
5 defamation. Lackey has put Smith on notice of the defamatory conduct by alleging defendants  
6 have accused him of criminal conduct (accepting bribes and conspiracy), have slandered Lackey  
7 in his official capacity, and made false statements of his character. These general allegations,  
8 especially when read together with the specific examples provided, give Smith notice of the nature  
9 of the defamation claim.

#### 10 ***Civil Conspiracy***

11 Civil conspiracy "consists of a combination of two or more persons who, by some  
12 concerted action, intend to accomplish an unlawful objective for the purpose of harming another,  
13 and damage results from the act or acts." Consol. Generator-Nevada, Inc. v. Cummins Engine Co.,  
14 Inc., 114 Nev. 1304, 1311, 971 P.2d 1251, 1256 (1998). The FAC sets forth that defendants  
15 continuously over the past several years have acted in concert with one another to accomplish the  
16 goals of harassing and threatening Lackey. The FAC alleges Lackey feels the defendants and their  
17 supporters pose a threat to his safety and as a result he has suffered damages. The Court finds  
18 Lackey has properly alleged a claim for civil conspiracy against Smith. Lackey has pled the  
19 unlawful objective is to harass and threaten Lackey. Further, in stating a claim for conspiracy,  
20 Lackey incorporates by reference the other allegations in his complaint. See discussion *supra*,  
21 discussing the conduct Smith has been specifically alleged to do, such as using Facebook to  
22 encourage the public to shame and harass Lackey. In addition to the conduct attributed to Smith  
23 (through Lake Tahoe Wall of Shame), the FAC likewise sets forth specific Facebook  
24 threats/comments attributed to the other defendants.

#### 25 ***Intentional Infliction of Emotional Distress:***

26 The elements of a claim for intentional infliction of emotional distress are: 1) that the  
27 defendant's conduct was extreme and outrageous; (2) that the defendant either intended or  
28 recklessly disregarded the causing of emotional distress; (3) that the plaintiff actually suffered

1 severe or extreme emotional distress; and (4) that the defendant's conduct actually or proximately  
2 caused the distress. Nelson v. City of Las Vegas, 99 Nev. 548, 555, 665 P.2d 1141, 1145 (1983).  
3 "[E]xtreme and outrageous conduct is that which is outside all possible bounds of decency and is  
4 regarded as utterly intolerable in a civilized community." Maduik v. Agency Rent-A-Car, 114  
5 Nev. 1, 4, 953 P.2d 24, 26 (1998).

6 Based on the allegations set forth above, the FAC alleges, defendants have engaged in  
7 willful, malicious, wanton, and egregious conduct that was extreme and outrageous causing  
8 emotional distress. The FAC alleges Lackey has suffered severe and extreme emotional distress as  
9 a result of defendants' conduct and remains fearful of physical harm or violence directed at him.  
10 Taking the factual allegations set forth in the FAC as true, the Court finds Lackey has properly  
11 stated a claim for intentional infliction of emotional distress against Smith as the FAC alleges,  
12 among other allegations, that Lake Tahoe Wall of Shame (who Smith does business as) has  
13 initiated public comment to encourage the public to shame and harass Lackey so he will lose his  
14 job and/or feel threatened enough to leave the community, and that Smith and Lake Tahoe Wall  
15 of Shame published and encouraged the statements. Here, the FAC alleges Smith (in addition to  
16 Lake Tahoe Wall of Shame) engaged in tortious conduct by publishing and encouraging  
17 statements. Thus, for purposes of a motion to dismiss, taking the allegations in light most favorably  
18 to Lackey, the Court cannot find that Smith is shielded for tortious acts.<sup>7</sup> Thus, a jury could find  
19 this is extreme and outrageous conduct. The Court incorporates by reference the analysis of the  
20 CDA and purported defamatory statements set forth above.

21 ***Negligent Infliction of Emotional Distress<sup>7</sup>***

22 A claim for negligent infliction of emotional distress requires a showing that defendant  
23 owed a duty of care to the plaintiff, defendant breached that duty, the breach was the legal cause  
24 of the plaintiff's injuries, and plaintiff suffered serious emotional damages. Olivero v. Lowe, 116  
25

26 <sup>7</sup> See: "Directors or officers of a corporation do not incur personal liability for torts of the corporation merely by  
27 reason of their official position, unless they participate in the wrong or authorize or direct that it be done."  
United States Liab. Ins. Co. v. Haidinger-Hayes, Inc., 1 Cal. 3d 586, 595 (1970)(emphasis added).

28 <sup>7</sup> Although this third claim for relief is titled as "Intentional Infliction of Emotional Distress," because the FAC  
alleges that Defendants acted negligently under this heading, the Court assumes it should be titled "Negligent  
Infliction of Emotional Distress."

1 Nev. 395, 399, 995 P.2d 1023, 1026 (2000); Turner v. Mandalay Sports Entm't, LLC, 124 Nev.  
2 213, 222, 180 P.3d 1172, 1178 (2008). The Nevada Supreme Court has cited favorable in Turner,  
3 supra, the explanation of the duty required when a person complains they are the direct victim of  
4 emotional distress in Moon v. Guardian Postacute Services, Inc., 116 Cal. Rptr. 2d 218, 220-21  
5 (2002):

6 The distinction between the "bystander" and the "direct victim" cases is found in  
7 the source of the duty owed by the defendant to the plaintiff. 'Bystander' claims  
8 are typically based on breach of a duty owed to the public in general, whereas a  
9 right to recover for emotional distress as a 'direct victim' arises from the breach of  
a duty that is assumed by the defendant or imposed on the defendant as a matter of  
law, or that arises out of the defendant's preexisting relationship with the plaintiff.

10 "In cases where emotional distress damages are not secondary to physical injuries, but  
11 rather, precipitate physical symptoms, either a physical impact must have occurred or, in the  
12 absence of physical impact, proof of 'serious emotional distress' causing physical injury or illness  
13 must be presented." Barnettler v. Reno Air, Inc., 114 Nev. 441, 448, 956 P.2d 1382, 1387 (1998).

14 Throughout, the FAC alleges defendants acted negligently in causing severe and emotional  
15 distress, and Lackey suffered severe and emotional distress as a result of Defendants' negligence.  
16 However, the Court finds the FAC has failed to plead that Smith owed Lackey a duty. As such,  
17 the Court finds Lackey has failed to state a claim for negligent infliction of emotional distress.

18 Based on the forgoing, and good cause appearing,

19 IT IS HEREBY ORDERED that Mark E. Smith's *Special Motion to Dismiss brought under*  
20 *NRS 41.635 et seq.* is DENIED.

21 IT IS HEREBY FURTHER ORDERED that Mark E. Smith's *Special Motion to Dismiss*  
22 *brought under NRCP 12* is DENIED as to claims of defamation, civil conspiracy and intentional  
23 distress, and GRANTED as to the claim of Negligent Infliction of Emotional Distress, said claim  
24 shall be DISMISSED.

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IT IS HEREBY FURTHER ORDERED that Mark E. Smith shall file an Answer to the First Amended Complaint within twenty (20) days of the date of this Order.

DATED this 23 day of October, 2017.

Connie J. Steinhilber  
DISTRICT JUDGE

**CERTIFICATE OF SERVICE**

CASE NO. CV17-00434

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 23 day of October, 2017, I filed the **ORDER REGARDING MARK E. SMITH'S SPECIAL MOTION TO DISMISS/MOTION TO DISMISS** with the Clerk of the Court.

I further certify that I transmitted a true and correct copy of the foregoing document by the method(s) noted below:

       Personal delivery to the following: [NONE]

  X   Electronically filed with the Clerk of the Court, using the eFlex system which constitutes effective service for all eFiled documents pursuant to the eFile User Agreement.

SEAN ROSE, ESQ. for CARL LACKEY

THOMAS BRENNAN, ESQ. for CARL LACKEY

DEL HARDY, ESQ. for CAROLYN STARK DBA NDOWL WATCH KEEPING THEM TRANSPARENT

CAMERON BORDNER, ESQ. for BEAR LEAGUE, MARK E SMITH, ANNE BRYANT

       Transmitted document to the Second Judicial District Court mailing system in a sealed envelope for postage and mailing by Washoe County using the United States Postal Service in Reno, Nevada: [NONE]

       Placed a true copy in a sealed envelope for service via:

       Reno/Carson Messenger Service - [NONE]

       Federal Express or other overnight delivery service [NONE]

DATED this 23 day of October, 2017.

