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

3 * * *

4 MARK E. SMITH, AN
5 INDIVIDUAL, D/B/A LAKE TAHOE
6 WALL OF SHAME,

7 Appellant,

8 vs.

9 CARL LACKEY,

10 Respondent.

Electronically Filed
Supreme Court Case No. 2016-11:40 a.m.
District Court Case No. CV17-00434
Elizabeth A. Brown
Clerk of Supreme Court

11 **JOINT APPENDIX**

12 **VOLUME I**

13 JA 0001 – JA 0113

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

18 IN AND FOR THE COUNTY OF WASHOE

19 CARL LACKEY,

20 Plaintiff,

21 vs.

Case No.:

Dept. No.:

22 BEAR LEAGUE, a California Corporation,
23 ANNE BRYANT, an individual, MARK E.
24 SMITH, an individual dba LAKE TAHOE
25 WALL OF SHAME, and DOES 1-20,
26 INCLUSIVE,

27 Defendants.

28 **COMPLAINT FOR DAMAGES**

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

I. PARTIES

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

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

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

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

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

II. FACTUAL ALLEGATIONS

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

7. The NDOW Series Concept for a Biologist III, describes that, among many other responsibilities, biologists are to “manipulate fish and wildlife populations and habitats by introducing species into suitable habitats consistent with biological and social constraints; bait and trap, tranquilize, radio collar or band wildlife and transport to selected locations” and “investigate

1 and assess damage caused by wildlife upon private property and public lands; recommend
2 appropriate courses of action to mitigate or resolve the problem.”

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

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

8 10. CARL LACKEY, in the course and scope of performing his employment duties,
9 has become the victim of continuing online and in person threatening and harassing conduct from
10 members of activist groups BEAR LEAGUE and the online forum LAKE TAHOE WALL OF
11 SHAME.

12 11. BEAR LEAGUE volunteers and members of the online forum “LAKE TAHOE
13 WALL OF SHAME” have made and continue to make false statements regarding CARL
14 LACKEY’s character in a vicious and calculated effort to damage his reputation and jeopardize
15 his employment.

16 12. Defendants BEAR LEAGUE and LAKE TAHOE WALL OF SHAME have and
17 continue to initiate public comment threads on their public Facebook pages and other Facebook
18 pages slandering CARL LACKEY in his official capacity as a state employee and urging and
19 encouraging the public at large to shame and harass Plaintiff so that he will lose his job and/or feel
20 threatened enough to leave the community.

21 13. Plaintiff is informed and believes and, upon such information and belief, alleges
22 that Defendants BEAR LEAGUE and LAKE TAHOE WALL OF SHAME acted intentionally and
23 with malice with the primary purpose being to harm, threaten, intimidate, cause fear, anxiety,
24 embarrassment and damage to Plaintiff’s reputation by publishing false and vicious comments
25 accusing Plaintiff of criminal conduct (including accepting bribes and conspiracy), designed to
26 incite public outrage. These comments include, but are not limited to, the following:

- 1 a. "Get a grip NDOW...Leave the Bears Alone! They aren't yours to torture, kill
2 and/or deliver to your hunting cronies." Commenter BEAR LEAGUE
3 (CL0013);
- 4 b. We must rid Nevada of this monster who lives and is paid to kill bears. Far too
5 many innocents have died at his evil hands" Commenter: BEAR LEAGUE,
6 attaching a petition "Fire Carl Lackey" (CL0016);
- 7 c. "It appears NDOW is short on bears in the hunt zone." Commenter: Bill Morton
8 in response to BEAR LEAGUE's post (CL0014);
- 9 d. "Another bear trap was brought in yesterday by Carl Lackey in order to capture
10 bears at Tahoe and deliver them to the hunters elsewhere." Commenter: BEAR
11 LEAGUE CL0018);
- 12 e. "Definitely corruption at its finest." Commenter: Victoria LeDoux Serpa on
13 Bear League's Facebook post (CL0018);
- 14 f. "Bear trap set by NDOW's infamous Carl Lackey in the forest near the home
15 of a long-time bear feeder (according to all neighbors) because she is now older
16 and fearful of the bears she's invited for dinner over the years. She has lured
17 these bears to their death with the blessing of NDOW. When is
18 enough...enough. Oh, wait! The Nevada bear hunt is about to begin...Lackey
19 needs to bring trophies to his hunting cronies so he can be richly rewarded with
20 'pocket money' because they do not like to go home empty-handed. Now it all
21 makes sense...not good sense, but it's business as usual in NDOWLand."
22 Commenter: BEAR LEAGUE (CL0026)
- 23 g. "How is [Lackey] being 'richly rewarded' with 'pocket money' because they
24 do not like him going home empt [sic] handed? Are people bribing [Carl
25 Lackey] or does he get paid more to kill the bear by NDOW? Asking because
26 it's a confusing statement." Commenter: John Adam on BEAR LEAGUE's
27 Facebook post (CL0026);
- 28

- 1 h. "The hunters give [Carl Lackey] under the table cash for bringing trophy bears
2 into the hunt zone." Commenter: BEAR LEAGUE in response to John Adam's
3 comment above (CL0019);
- 4 i. "No. They trap. Then if the bear is lucky it gets released into a hunt zone. If you
5 want to call that luck." Commenter Randy L. Simar, on Bear League's
6 Facebook post (CL0020);
- 7 j. "So [Carl Lackey's] been trapping these bears saying they were euthanized and
8 actually stocking up for the bear hunt/slaughter? Could be!" Commenter: Mary
9 Morten-Johnson on Bear League's Facebook post (CL0020);
- 10 k. "Bear hunters are simply Trophy Hunters. We need to stop Lackey from setting
11 Bear Traps in Nevada since it is senseless murder and even NDOW says
12 relocation doesn't work. So why does NDOW relocate? It's simple to stock the
13 hunt zone." Commenter: Jane Rothman on BEAR LEAGUE's Facebook post
14 (CL0021);
- 15 l. "Obviously bears that dine on trash aren't going to be tasty. It is all trophy
16 killing. And it's not population control, because Lackey is plucking them off as
17 quick as he can." Commenter: Shanen Ruppel on BEAR LEAGUE's Facebook
18 post (CL0022);
- 19 m. "Stocking the pond. Did [Lackey's] disgusting self apply for a permit? What a
20 major conflict of interest. I can't believe Nevada enables such corruption."
- 21 n. "Corruption 100%." Commenter: Kevin McGrew on BEAR LEAGUE's
22 Facebook post (CL0022);
- 23 o. "This is crazy. Poor bears will get trapped and dropped off and not have a clue
24 where to run from all those hunters in the hunt zone." Commenter: Deanna
25 Betker on BEAR LEAGUE's Facebook post CL0020);
- 26 p. "A department with no real interest in wildlife other than to make it available
27 for hunters and trappers...some might say they are criminals against
28

1 nature...they are certainly ignorant about it.” Commenter: Sean Sarsfield on
2 LAKE TAHOE WALL OF SHAME’s Facebook post (CL0042);

3 q. “He and his family directly benefit by him moving bears to a hunting area if
4 they are issued a license and the killing of them in the name of public safety
5 must simply be something that excites him-all of it in conflict with NDOW’s
6 mission. Additionally, if we can establish that he or his family benefits
7 financially from selling bear parts or selling the location where he recently
8 released a bear- he should go to jail.” Commenter: Colleen Hemingway on
9 NDOW WATCH KEEPING THEM TRANSPARENT’s Facebook post
10 (CL0048);

11 r. “Yes he should go to jail! The treatment of our bears is paramount cruelty.
12 Moving mothers without their cubs, moving them to hunt zones, moving them
13 great distances knowing full well there are no food sources or water and that
14 they will try to return home! Animal cruelty is a felony in all 50 states. Him
15 and his NDOW murderers need to go to jail and stay there.” Commenter: JoAnn
16 Hill on NDOW WATCH KEEPING THEM TRANSPARENT’s Facebook post
17 (CL0048);

18 s. “It’s time for the NV ENGINEERED bear hunt.” Commenter: Mary LoBuono
19 Bryden on NDOW WATCH KEEPING THEM TRANSPARENT’s Facebook
20 post (CL0053);

21 t. “NDOW knows their manual says this and Lackey chooses not to follow the
22 protocol which is extremely concerning. Healy backs him up by releasing
23 idiotic excuses to the media why a certain bear was relocated to the hunt zone
24 instead of released on site.” Commenter: Jane Rothman on BEAR LEAGUE’s
25 Facebook post (CL0048);

26 u. “This page is what’s wrong with Tahoe, you should try another tactic to educate
27 our community. No one wants to be bullied and threatened to understand a valid
28 argument. You are creating fear and tearing neighborhoods apart. Perhaps

1 spending so much energy in a negative way should be forwarded to create a
2 positive change. No one should live in fear! This whole thing is comparable to
3 the Salem witch trials of 1692!!” Commenter: Kevin Dangers Bouchard on
4 NDOW WATCH KEEPING THEM TRANSPARENT’ post regarding “trolls”
5 who support Carl Lackey (CL0078);

6 v. Photo showing Carl Lackey’s home address: Poster: Dianne Gross on BEAR
7 LEAGUE’S Facebook wall (CL0118);

8 w. “This is the most outrageous editorial from Lackey to date. These two
9 communities were given ‘awards’ not because they are Bear Aware but because
10 they invite [Lackey] to set his traps, catch bears, and then kill them or move
11 them into the hunt zone.” BEAR LEAGUE, posting link to Reno Gazette
12 Journal opinion piece by Carl Lackey. (CL0119);

13 x. “Lackey must go!! POS!!!!” Commenter: Gerald Palla on BEAR LEAGUE’s
14 Facebook post (CL0123);

15 y. “Lackey is such an incompetent asshole!! Fire his ass!!” Commenter: Karen
16 Lietzell-Vick on NDOW WATCH KEEPING THEM TRANSPARENT’s
17 Facebook post (CL 0050);

18 z. “This is becoming unreal! Out of control, crazy, Hmmmm.... maybe time for
19 an assassination.” Commenter: Victoria LeDoux Serpa on BEAR LEAGUE’s
20 Facebook post (CL 0063);

21 **III. CLAIMS FOR RELIEF**

22 **FIRST CLAIM FOR RELIEF**

23 **(Defamation – Against all Defendants)**

24 14. Plaintiff realleges and reincorporates paragraphs 1-13 set forth hereinabove.

25 15. Plaintiff is either a limited purpose public figure or a private individual thrust into
26 an area of public concern.

16. Defendants, and each of them, utilized Defendants BEAR LEAGUE and LAKE TAHOE WALL OF SHAME Facebook pages to publish false and defamatory statements of and concerning Plaintiff and threatening his livelihood.

17. A statement is defamatory when it would tend to lower the subject in the estimation of the community, excite derogatory opinions about the subject, and hold the subject up to contempt.

18. Defendants ANNE BRYANT, MARK E. SMITH, BEAR LEAGUE and LAKE TAHOE WALL OF SHAME published and encouraged the statements despite having actual knowledge that such statements were false, or with reckless disregard for their veracity, to the extent that a reasonable person would likely understand the remarks as statements of existing fact rather than expression of opinions.

19. Defendants, and each of them, in making public posts on Facebook, made and/or condoned the publication of such false and defamatory statements of and concerning Plaintiff.

20. Defendants, and each of them, knew that the inflammatory false information they were posting was malicious, false, and accusatory of criminal conduct and had the purpose of harming, threatening, intimidating and/or harassing Plaintiff and his livelihood.

21. That as a further direct and proximate result of Defendants' willful conduct and/or negligence, as aforesaid, Plaintiff have been required to retain the services of an attorney to prosecute this matter and are entitled to reasonable attorney's fees and costs of suit.

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

SECOND CLAIM FOR RELIEF

(Intentional Infliction of Emotional Distress - Against all Defendants)

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

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

25. 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.

1 26. Defendants' conduct caused Plaintiffs' severe and extreme emotional distress.
2 27. Plaintiff suffered damages in an amount in excess of this Court's jurisdictional
3 limits.

4 **THIRD CLAIM FOR RELIEF**

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

6 28. Plaintiff realleges and reincorporates paragraphs 1-27 set forth hereinabove.
7 29. Defendants acted negligently in causing Plaintiff severe emotional distress.
8 30. As a result of Defendants' negligence, Plaintiff has suffered severe and extreme
9 emotional distress.
10 31. Defendants' negligence caused Plaintiff severe and extreme emotional distress.
11 32. Plaintiff suffered damages in an amount in excess of this Court's jurisdictional
12 limits.

13 **FOURTH CLAIM FOR RELIEF**

14 **(Civil Conspiracy)**

15 33. Plaintiffs reallege and reincorporate paragraphs 1-32 set forth hereinabove.
16 34. Defendants, and each of them, continuously over the past several years have acted
17 in concert with one another to accomplish the goals of harassing and threatening Plaintiff and
18 causing him fear, anxiety, embarrassment and damaging to his reputation.
19 35. As a result of these concerted actions by the Defendants and each of them, Plaintiff
20 feels harassed and intimidated, and feels that ANNE BRYANT, MARK E. SMITH, BEAR
21 LEAGUE and LAKE TAHOE WALL OF SHAME officers, members and supporters pose a
22 threat to Plaintiff's safety and as a result, he suffered damages in excess of this Court's
23 jurisdictional limits.
24 36. Plaintiffs have been required to retain the services of an attorney to prosecute this
25 matter and are entitled to reasonable attorney's fees and costs of suit.

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

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

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

3. For punitive damages;

4. For reasonable attorneys' fees incurred herein;

5. For costs of suit incurred; and

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

AFFIRMATION

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

DATED this 7 day of March, 2017.

~~ROSE LAW OFFICE~~

~~SEAN P. ROSE, ESQ.~~

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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.
SMITH, an individual dba LAKE TAHOE
18 WALL OF SHAME, CAROLYN STARK, an
19 individual dba NDOW WATCH KEEPING
THEM TRANSPARENT and DOES 1-20,
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**
28

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 [sic] 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);

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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

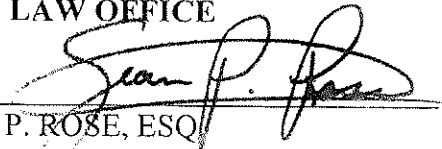
24 6. For such other and further relief as the Court may deem just and proper under the
25 circumstances.

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 31st day of March, 2017.

2 ROSE LAW OFFICE

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4 SEAN P. ROSE, ESQ.
5 State Bar No. 5472
6 150 W. Huffaker Lane, Suite 101
7 Reno, NV 89511
8 (775) 824-8200

9 In association with:

10 THOMAS R. BRENNAN
11 State Bar No. 481
12 6900 S. McCarran Blvd., Suite 2060
13 Reno, NV 89509

14 Attorneys for Plaintiff
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1005

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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 **ACKNOWLEDGMENT AND ACCEPTANCE OF SERVICE OF PROCESS**

23 The undersigned hereby acknowledges receipt of copies of the *First Amended Complaint*
24 *for Damages and Summons* in the above-entitled action and accepts service of process thereof on
25 behalf of the Defendants MARK E. SMITH, individually and dba LAKE TAHOE WALL OF
26 SHAME, and the BEAR LEAGUE.

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AFFIRMATION

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

DATED this 24 day of May, 2017.



CAMERON D. BORDNER, ESQ.
Law Offices of Molsby & Bordner LLP
6380 Mac Anne Ave., Unit 7
Reno, NV 89523
(775) 624-9480

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CERTIFICATE OF SERVICE

Pursuant to NRCp 5(b), I hereby certify that I am an employee of the Rose Law Office and that on the date indicated below, I served a true copy of the foregoing ***Acknowledgement and Acceptance of Service of Process***, on the party(s) set forth below by:

_____ Placing an original or true copy thereof in a sealed envelope, postage prepaid for collection and mailing in the United States Mail, at Reno, Nevada

_____ Hand Delivery

_____ Facsimile

X All parties signed up for electronic filing have been served electronically, all others have been served by placing a true copy thereof in a sealed envelope for collection and mailing in the United States mail, at Reno, Nevada, postage prepaid, following ordinary business practices

addressed as follows:

Del Hardy, Esq.
Stephanie Rice, Esq.
Winter Street Law Group
96 & 98 Winter Street
Reno, NV 89503

Thomas R. Brennan, Esq.
Durney & Brennan, Ltd.
6900 S. McCarran Blvd. Suite 2060
Reno, NV 89509

Cameron D. Bordner, Esq.
Law Offices of Molsby & Bordner, LLP
6380 Mae Anne Ave., Unit 7
Reno, NV 89523

DATED this 24th day of May, 2017



Stacey Stallings

3880

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

CARL LACKEY,

Plaintiff,

CASE NO.: CV17-00434

vs.

DEPT. NO.: 4

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

Defendants.

RESPONSE AFTER MAY 24, 2017 CONFERENCE CALL

Rose Law Office
SEAN P. ROSE
150 W. Huffaker Lane, Suite 101, Reno, Nevada 89511
Telephone (775) 824-8200 Facsimile (775) 657-8517

May 25, 2017

VIA FACSIMILE (328-3532)
VIA E-MAIL (Audrey.Austin@washoecourts.us)
ORIGINAL VIA U.S. REGULAR MAIL

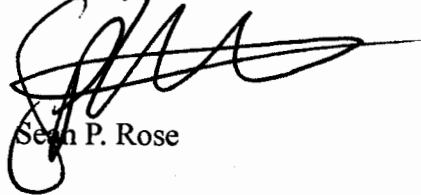
Honorable Connie Steinheimer
Second Judicial District Court
Department 4
75 Court Street
Reno, NV 89501

RE: Lackey v. Bear League et al. – Case No. CV17-00434

Dear Judge Steinheimer:

In follow-up to the telephonic hearing on May 24, 2017, I have discussed with my client and Mr. Brennan the fact that you own a home in Incline Village, Nevada and that you had a bear incident at your home in the past. We have no objection to you remaining as the trial judge on this matter.

Sincerely,



Sean P. Rose

SPR:sts

Cc: Carl Lackey
Thomas Brennan, Esq.



LAW OFFICES OF
MOLSBY & BORDNER, LLP
TRUCKEE | SACRAMENTO | RENO | SOUTH LAKE TAHOE

Richard E. Molsby, Esq. *
Cameron D. Bordner, Esq. **
Jennifer M. Schaller, Esq. +
Robin D. Shofner, Esq. **
Craig C. Weaver, Esq. ***
Keenan L. Hawkins, Esq. **
Shawn L. Murphy, Esq. +
Erica S. Cooper, Esq. ***

May 30, 2017

SENT VIA EMAIL AND U.S. MAIL

The Honorable Connie J. Steinheimer
Second Judicial District Court
75 Court Street, Dept. 4
Reno, Nevada 89501
c/o marci.trabert@washoecourts.us

Re: **Carl Lackey v. Bear League, et al.**
Case No. CV17-00434

Dear Judge Steinheimer:

Thank you for contacting us regarding the Lackey v. BEAR League case and arranging the telephone conference among all counsel on May 24, 2017. We sincerely appreciate your candor about your encounters with bears in Incline Village and we have discussed the issue with our clients (Ann Bryant, individually and as the authorized representative of the BEAR League, and Mark Smith), as you requested. Based on those discussions, we do not feel that you need to recuse yourself in this matter. If you need any additional information, please do not hesitate to contact our office.

Sincerely,

Robin D. Shofner, Esq.
MOLSBY & BORDNER, LLP

cc: Sean P. Rose, Esq.
Thomas R. Brennan, Esq.
Del Hardy, Esq.
(all via email)

t 775.624.9480 | f 775.201.1444
6380 Mae Anne Avenue, Unit 7 | Reno, NV 89523

* Licensed in CA, ** Licensed in CA and NV, *** Licensed in CA and ID. The State Bar of California Board of Legal Specialization: "Certified Family Law Specialist," "Certified Estate Planning, Trust and Probate Law Specialist"

IA 0027



Del Hardy, Esq.
Del@WinterStreetLawGroup.com

May 30, 2017

2nd Judicial District Court – Department 4
ATTN: Audrey Austin
75 Court Street
Reno, NV 89501

RE: Lackey v. Stark et al.
Case No: CV17-00434

Via fax only: 775 328 3821

Dear Judge Steinheimer:

As you know, this office represents defendant Carolyn Stark. Ms. Stark has no objection or concern about you being on the case. She was told about your bear experience and does not feel that would have any impact on your opinion in the case.

Also, in discussing the matter with her, she expressed that she wishes and requests that her matter be decided as soon as practicable by the court in that the pressure and stress of litigation has been very taxing on her.

Sincerely,

Del Hardy, Esq.

Cc: client
Cc: Cameron Bordner, Esq. via fax
Cc: Sean Rose, Esq. via fax

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SECOND JUDICIAL DISTRICT COURT
COUNTY OF WASHOE, STATE OF NEVADA

AFFIRMATION
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding document, _____

Response After May 24, 2017

Conference Call

(Title of Document)

filed in case number: _____



Document does not contain the social security number of any person

-OR-



Document contains the social security number of a person as required by:



A specific state or federal law, to wit:

(State specific state or federal law)

-or-



For the administration of a public program

-or-



For an application for a federal or state grant

-or-



Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230 and NRS 125B.055)

Date: May 30, 2017

Audrey A. Austin

(Signature)

Audrey A. Austin

(Print Name)

(Attorney for)

2290
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Attorneys for Defendant:
MARK E. SMITH, an individual¹

SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR WASHOE COUNTY

| | | | |
|----------------------------|---|-------------------|-------------------|
| CARL LACKEY, |) | Case No.: | CV17-00434 |
| |) | | |
| Plaintiff, |) | Dept. No.: | 4 |
| |) | | |
| vs. |) | | |
| |) | | |
| BEAR LEAGUE, etc., et al., |) | | |
| |) | | |
| Defendants. |) | | |
| |) | | |
| |) | | |

SPECIAL MOTION TO DISMISS/MOTION TO DISMISS

COMES NOW, Defendant MARK E. SMITH, an individual (SMITH) by and through his undersigned attorneys, and hereby moves this Court to dismiss Plaintiff CARL LACKEY ("LACKEY" or "Plaintiff")'s First Amended Complaint (FAC) pursuant to Nevada's Anti-

¹ Erroneously named as MARK E. SMITH an individual and dba LAKE TAHOE WALL OF SHAME.

1 SLAPP statutes, NRS 41.635, et seq., and NRCP 12(b)(5). This Motion is made and based upon
2 the pleadings and papers on file herein, the following Memorandum of Points and Authorities,
3 and the Declarations of SMITH and Robin D. Shofner.

4
5 Dated: June 5, 2017

MOLSBY & BORDNER, LLP

6
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15 ROBIN D. SHOFNER, ESQ.
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17 Nevada Bar No. 13758
18 1830 15th Street, Suite 100
19 Sacramento, CA 95811
20 (916) 447-0529
21 Facsimile: (916) 848-3500
22 Attorneys for Defendant:
23 MARK E. SMITH, an individual
24
25

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

LACKEY has filed the present suit against SMITH alleging claims for defamation, intentional infliction of emotional distress (IIED), negligent infliction of emotional distress (NIED), and civil conspiracy. LACKEY's entire suit rests upon allegations that Defendants BEAR LEAGUE, a California Corporation (BEAR LEAGUE); ANN BRYANT, an individual (BRYANT); SMITH and CAROLYN STARK, an individual dba NDOW WATCH KEEPING THEM TRANSPARENT (STARK) (BEAR LEAGUE, BRYANT, SMITH and STARK will be referred to collectively as "Defendants") "published false and malicious comments" regarding LACKEY. Noticeably absent from the FAC are any allegations that SMITH published any comments whatsoever, and certainly not any comments about or concerning LACKEY. Instead, LACKEY, in a clear effort to discourage Defendants' free speech and free assembly rights under the First Amendment, premises his entire suit on comments purportedly posted by BEAR LEAGUE and comments posted by various third parties on BEAR LEAGUE's, LAKE TAHOE WALL OF SHAME's and NDOW WATCH KEEPING THEM TRANSPARENT's respective Facebook pages.

SMITH did not create and is not an administrator or responsible party for LAKE TAHOE WALL OF SHAME. As such, comments posted on the Facebook page of LAKE TAHOE WALL OF SHAME cannot be attributed to SMITH under even the most generous interpretation of the term "publication". Further, assuming *arguendo* that SMITH had any management control over LAKE TAHOE WALL OF SHAME, which SMITH expressly denies, such comments cannot be attributed to SMITH under the Communications Decency Act. 11 U.S.C. § 230(c)(1). And given the fact that LACKEY has entirely failed to allege that SMITH published any comments whatsoever, his suit is frivolous on its face and clearly designed to restrain SMITH from exercising his right to free speech. As such, the FAC is subject to dismissal under Nevada's Anti-

1 SLAPP statutes. NRS 41.635, et seq. The FAC is subject to dismissal on the additional ground
2 that it fails to state a claim under NRCP 12(b)(5).

3 **II. SUMMARY OF FACTUAL ALLEGATIONS**

4 As a purported Biologist III with the Nevada Department of Wildlife (NDOW),
5 LACKEY's self-proclaimed responsibilities are to "manipulate fish and wildlife populations and
6 habitats by introducing species into suitable habitats consistent with biological and social
7 constraints; bait and trap, tranquilize, radio collar or band wildlife and transport to select
8 locations" and "investigate and assess damage caused by wildlife upon private property and
9 public lands; recommend appropriate courses of action to mitigate or resolve the problem." FAC
10 ¶ 8 (internal quotation marks omitted). When nominated as a representative of the International
11 Association for Bear Research and Management (IBA) Council in 2007, LACKEY described
12 himself as a "black bear manager for the Nevada Department of Wildlife for the last 20 years."
13 Shofner Decl. Ex. 1. In his capacity as an employee for NDOW, a governmental organization,
14 there is no doubt that LACKEY is a public figure/public official.

15 LACKEY has also purposefully amplified his public persona by thrusting himself into the
16 spotlight. LACKEY has been featured in many newspaper articles in his capacity as a "bear
17 manager" for NDOW. In an article in the Tahoe Daily Tribune entitled "Bear Warrior: 15 Minutes
18 with Carl Lackey," LACKEY was interviewed by Dylan Riley (Riley). *Id.* at Ex. 2. Riley began
19 the article as follows: "Nevada Department of Wildlife Biologist Carl Lackey and his Karelian
20 bear dogs Rooster and Stryker are local celebrities featured in a National Graphic Channel
21 Program titled 'The Animal Extractors'" *Id.* (emphasis added). LACKEY described "The
22 Animal Extractors" as "a series of about 12 or 13 episodes" in which "several different film
23 crews" "spent all summer with us" and "went on every call with us and filmed all kinds of stuff."
24 *Id.* See also *Id.* at Ex 3. LACKEY also confirmed his celebrity by stating as follows: "Yeah, I
25 am called the bear guy or the bear man or other things depending on whether they [the public] are

1 happy with me or not They recognize me or they recognize the dogs. A lot of people see
2 the dogs and they make the connection that way.” *Id.*

3 After his stint on Animal Extractors was over, LACKEY continued to increase his
4 influence at NDOW. Presently, LACKEY is prominently featured on NDOW’s “Black Bear
5 Research” webpage with his photo appearing next to the following text:

6 Working together since 1999 the NDOW/WCS [Wildlife Conservation Society]
7 team with Jon Beckmann of WCS and Carl Lackey of NDOW led the way in urban
8 bear research. . . . As of 2013, they have handled nearly 1,000 bears and marked
9 well over 350 bears. Their most recent publication in the Journal of Wildlife
Management revised historical range maps for black bears in North America and
documented the expansion of the species back into some of this habitat in Nevada.

10 *Id.* at Ex. 4. The publication referenced on NDOW’s webpage, which was authored in part by
11 LACKEY as a member of the NDOW Game Bureau, stated that NDOW,

12 [N]eeded to know if the increase in complaints was due to an increasing or
13 expanding bear population, or a redistribution of the existing bear population into
14 the urban interface. These questions were important to managers, in part, because
15 this phenomenon of increasing human-bear conflicts was not the case in Nevada
16 just less than 3 decades ago. Furthermore, if the population is increasing, managers
17 should have reliable estimates of abundance on which to make managerial
recommendations, such as legal harvest. Additionally, if the bear population is
expanding into formally occupied habitat, then our results would provide the
context on which NDOW could make decisions regarding where occupancy by
black bears is desirable.

18 *Id.* at Ex. 5.

19 LACKEY was also the lead speaker before the Special Nevada Wildlife Commission that
20 met on January 17, 2014. *Id.* at Ex. 6. During that meeting, which was scheduled to review
21 Nevada’s controversial bear hunt, LACKEY briefed panel members “on how the bear hunt has
22 gone so far and how it fits into [NDOW’s] overall bear management plan.” *Id.* NDOW staff,
23 including LACKEY, ultimately recommended that the “bear hunt go forward under the same rules
24 as last year.” *Id.*

25 LACKEY further thrust himself into the spotlight when he volunteered to appear donned

1 in his NDOW uniform, in advertisements for Pneu Dart, Inc. (Pneu Dart), a company specializing
2 in “remote injection equipment and tranquilizer guns for animal control.” *Id.* at Ex. 7. The
3 caption to LACKEY’s over five (5) minute commercial on behalf of Pneu Dart reads as follows:
4 “Carl Lackey, Wildlife Biologist with the Nevada Department of Wildlife, demonstrates how he
5 used Pneu Dart drug delivery systems when responding to human-bear conflict calls and/or when
6 conducting bear research during the winter.” *Id.*

7 LACKEY filed the present suit against SMITH based on purported defamatory statements
8 that LACKEY alleges gave rise to a myriad of damages, including reputational damage,
9 emotional distress and attorney’s fees. *See* FAC. The entirety of LACKEY’s claims against
10 SMITH are premised on a lone comment posted on LAKE TAHOE WALL OF SHAME’s
11 Facebook page that does not even reference LACKEY let alone defame him. FAC ¶ 14p (“A
12 department with no real interest in wildlife other than to make it available for hunters and trappers
13 . . . some might say they are criminals against nature . . . they are certainly ignorant about it.”).
14 LACKEY does not once even allege that SMITH made any comments at all and certainly not any
15 comments concerning LACKEY. Additionally, SMITH has no managerial role in LAKE
16 TAHOE WALL OF SHAME. Smith Decl. ¶¶ 3-5.

17 III. APPLICABLE LAW

18 A. Special Motion to Dismiss Under Anti-SLAPP

19 Nevada's Anti-SLAPP (Strategic Lawsuits Against Public Participation) statutes, NRS
20 41.635, et seq., permit a defendant to file a special motion to dismiss if the defendant can show
21 “by a preponderance of the evidence, that the claim is based upon a good faith communication in
22 furtherance of the right to petition or the right to free speech in direct connection with an issue of
23 public concern.” NRS 41.660(3)(a). A special motion to dismiss under the Anti-SLAPP statutes
24 is treated as a motion for summary judgment. NRS 41.660(3)(a). To avoid summary judgment,
25 once the defendant makes this initial showing, the nonmoving party may not “rest upon the mere

1 allegations or denials of the [nonmoving party's] pleading, but the [nonmoving party's] response,
2 by affidavits or otherwise . . . must set forth specific facts showing that there is a genuine issue
3 for trial." NRCPP 56(e). Put another way, once the moving party has met its burden, the burden
4 shifts to the plaintiff to show "with prima facie evidence a probability of prevailing on the claim."
5 NRS 41.660(3)(b). *See Shapiro v. Welt*, No. 37636, No. 67596, 2017 Nev. LEXIS 1, at *7, 389
6 P.3d 262, 267 (2017).

7 If the court grants an Anti-SLAPP motion to dismiss, "[t]he court shall award reasonable
8 costs and attorney's fees to the person against whom the action was brought." NRS 41.670(1)(a).
9 In addition to reasonable costs and attorney's fees, "[t]he court may award . . . an amount of up
10 to \$10,000 to the person against whom the action was brought." *Id.* at 41.670(1)(b). The person
11 against whom the action is brought may also file a separate suit to recover "(1) compensatory
12 damages; (2) punitive damages; and (3) attorney's fees and costs of bringing the separate action."
13 *Id.* at 41.670(1)(c)(1)-(3).

14 **B. Motion to Dismiss for Failure to State a Claim Under NRCPP 12(b)(5)**

15 NRCPP 12(b)(5) provides that a defense based on "failure to state a claim upon which relief
16 may be granted" may be asserted by motion. *Gull v. Hoalst*, 77 Nev. 54, 59, 359 P.2d 383, 385
17 (1961). In considering a motion to dismiss, a court accepts as true the allegations set forth in the
18 complaint. *Hynds Plumbing & Heating Co. v. Clark County Sch. Dist.*, 94 Nev. 776, 777; 587
19 P.2d 1331, 1332 (1978). A claim should be dismissed under NRCPP 12(b)(5) where plaintiff is
20 "not entitled to relief under any set of facts which could be proved in support of the claim." *Hale*
21 *v. Burkhardt*, 104 Nev. 632, 636, 764 P.2d 866, 868 (1988). Dismissal under NRCPP 12(b)(5) is
22 proper where the non-moving party has pled insufficient facts to establish each element of a claim
23 for relief. *Stockmeier v. Nev. Dep't of Corr. Psychological Review Panel*, 124 Nev. 313, 316, 183
24 P.3d 133, 135 (2008) (per curiam).

25 ///

IV. ARGUMENT

A. The Complaint Constitutes an Abuse of Judicial Process Designed to Censor, Chill, Intimidate and Punish SMITH for Involving Himself in Public Affairs Under Nevada’s Anti-SLAPP Statutes

Where a defendant shows by merely a preponderance of the evidence that the claims against him arise out of a “good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern,” said defendant has grounds to file a special motion to dismiss under Nevada’s Anti-SLAPP statutes. *Shapiro, supra*, at 267; NRS 41.637. A “good faith communication” is defined as any “[c]ommunication made in direct connection with an issue of public interest in a place open to the public or in a public forum, which is truthful or is made without knowledge of its falsehood.” NRS 41.637(4).

Where the suit being challenged under Anti-SLAPP concerns an allegation of defamation by a public or limited public figure, more than mere negligence must be pled and proven. As stated by the United States Supreme Court,

Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth.

Gertz v. Robert Welch, 418 U.S. 323, 342 (1974) (emphasis added). The requirement that a plaintiff who is a public or limited public figure plead and prove “actual malice” stems from a desire “[t]o promote free criticism of public officials, and avoid any chilling effect from the threat of a defamation action.” *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 719, 57 P.3d 82, 90 (2002). The “actual malice” requirement also arises from recognition that victims of purported defamation often turn to “self-help” and that “[p]ublic officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.”

1 *Gertz, supra*, at 344.

2 Whether a plaintiff is a public figure or a limited public figure is a question of law.
3 *Bongiovi v. Sullivan*, 122 Nev. 556, 572, 138 P.3d 433, 445 (2006) (citing *Schwartz v. Am. Coll.*
4 *of Emergency Physicians*, 215 F.3d 1140, 1145 (10th Cir. 2000)).

5 **1. LACKEY is a Public Figure Required to Plead and Prove Actual Malice**

6 The United States Supreme Court has created two (2) categories of public figures: “[t]hose
7 who, by reason of the notoriety of their achievements or the vigor and success with which they
8 seek the public's attention, . . . and those who hold governmental office [(i.e public officials)].”
9 *Gertz, supra*, at 342.

10 There is, first, a strong interest in debate on public issues, and, second, a strong
11 interest in debate about those persons who are in a position significantly to
12 influence the resolution of those issues. Criticism of government is at the very
13 center of the constitutionally protected area of free discussion. Criticism of those
14 responsible for government operations must be free, lest criticism of government
15 itself be penalized. It is clear, therefore, that the “public official” designation
16 applies at the very least to those among the hierarchy of government employees
17 who have, or appear to the public to have, substantial responsibility for or control
18 over the conduct of governmental affairs.

15 *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) (emphasis added). Under this rubric, courts have held
16 the following individuals to be public officials required to plead and prove “actual malice”:
17 federal drug enforcement agents (*Meiners v. Moriarity*, 563 F.2d 343 (7th Cir. 1977)); county
18 supervisors (*Sierra Breeze v. Superior Court of El Dorado County*, 149 Cal.Rptr. 914 (Cal.
19 1978)); assistant public defenders (*Tague v. Citizens for Law & Order, Inc.*, 142 Cal.Rptr. 689
20 (Cal. 1977)); police officer deputy sheriffs (*Hirman v. Rogers*, 257 N.W.2d 563 (Minn.1977));
21 junior social workers in county offices (*Press, Inc. v. Verran*, 569 S.W.2d 435 (Tenn.1978));
22 administrators of county motor pools (*Clawson v. Longview Pub. Co.*, 589 P.2d 1223 (Wash.
23 1979)); and members of highway boards (*Johnson v. Capital City Press*, 346 So.2d 819 (La. App.
24 1977), writ denied, 350 So.2d 677);

25 There is no doubt that LACKEY is a public figure/official. As a purported Biologist III

1 at NDOW, LACKEY has, or at least appears to the public to have, “substantial control over the
2 conduct of [NDOW].” This is because according to LACKEY’s own description, he manipulates
3 populations, transports wildlife to select locations, investigates complaints about the conduct of
4 wildlife on public and private property, and recommends actions to mitigate or resolve any
5 problems presented by wildlife. FAC ¶ 8.

6 LACKEY has also released many statements that confirm his capacity as a public official.
7 When nominated as a representative of the IBA Council in 2007, LACKEY flatly stated that he
8 was a “black bear manager for the Nevada Department of Wildlife for the last 20 years.” Shofner
9 Decl. Ex. 1. LACKEY is also prominently featured on NDOW’s “Black Bear Research” webpage
10 with his photo appearing next to the following text: “Carl Lackey of NDOW led the way in urban
11 bear research.” *Id.* at Ex. 4. That same webpage refers to the article “Bear Historical Ranges
12 Revisited: Documenting the Increase of a once Extirpated Population in Nevada”, which was
13 authored in part by LACKEY as a member of the NDOW Game Bureau. *Id.* In that article,
14 LACKEY proclaimed that his research “would provide the context on which NDOW could make
15 decisions regarding where occupancy by black bears is desirable” if the bear population were
16 increasing. *Id.* at Ex. 5.

17 LACKEY is also instrumental in guiding state policy related to the hunting of bears.
18 When speaking before the Special Nevada Wildlife Commission that met on January 17, 2014 on
19 the topic of Nevada’s controversial bear hunt, LACKEY briefed panel members “on how the bear
20 hunt has gone so far and how it fits into [NDOW’s] overall bear management plan.” *Id.* at Ex.
21 6. LACKEY, ultimately recommended that the “bear hunt go forward under the same rules as
22 last year” despite the substantial public outcry to cease the bear hunt. *Id.*

23 From the foregoing, it is apparent that LACKEY holds himself out as, and is actually, a
24 government employee; specifically, a Biologist III and bear manager, that has “substantial
25 responsibility for or control over the conduct of” NDOW. *Rosenblatt, supra.* LACKEY pioneers

1 research on behalf of NDOW for the purpose of enabling managers such as himself to determine
2 whether or not to permit “legal harvest” (i.e. legally permissible killing) of bears and to determine
3 “where occupancy by black bears is desirable” (i.e. where to relocate bears if at all). Because
4 LACKEY is instrumental in performing research and making decisions concerning the bear
5 population in Nevada, LACKEY is undeniably a public official. Further, regardless of
6 LACKEY’s actual influence over NDOW, LACKEY, at a minimum, “appear[s] to the public to
7 have[] substantial responsibility for or control over the conduct of” NDOW due to LACKEY’s
8 and NDOW’s comments concerning LACKEY’s apparently instrumental role in managing the
9 bear population in Nevada. *Id.* For each of these reasons, LACKEY is a public figure who must
10 plead and prove “actual malice” with clear and convincing evidence in order to sustain a viable
11 defamation cause of action.

12 **2. Alternatively, LACKEY is a Limited Pubic Figure Required to Plead and**
13 **Prove Actual Malice**

14 “A limited-purpose public figure is a person who voluntarily injects himself or is thrust
15 into a particular public controversy or public concern, and thereby becomes a public figure for a
16 limited range of issues.” *Pegasus, supra*, at 720, 91. To determine whether a person is a limited
17 public figure, the court “examin[es] the ‘nature and extent of an individual's participation in the
18 particular controversy giving rise to the defamation.’” *Bongiovi, supra*, at 572, 445 (quoting
19 *Gertz, supra*, at 352). “The test for determining whether someone is a limited public figure
20 includes examining whether a person's role in a matter of public concern is voluntary and
21 prominent.” *Pegasus, supra*, at 720, 91 (citing *Gertz, supra*, at 351-52). There is no doubt that,
22 to the extent LACKEY is not an outright public figure/official, LACKEY is a limited purpose
23 public figure in that he has actively thrust himself into the spotlight in relation to management of
24 the bear population in Nevada.

25 LACKEY has been featured in many newspaper articles in his capacity as a “bear

1 manager” for NDOW. In one such article, LACKEY was described as a “local celebrity”.
2 Shofner Decl. at Ex. 2. Therein, LACKEY described that he was featured on the National
3 Geographic show Animal Extractors, which he described as “a series of about 12 or 13 episodes”
4 in which “several different film crews” “spent all summer with us” and “went on every call with
5 us and filmed all kinds of stuff.” *Id. See also Id.* at Ex. 3. In response to a question concerning
6 his notoriety, LACKEY responded, “Yeah, I am called the bear guy or the bear man or other
7 things depending on whether they [the public] are happy with me or not They recognize me
8 or they recognize the dogs. A lot of people see the dogs and they make the connection that way.”
9 *Id.*

10 LACKEY has also volunteered to appear in his NDOW uniform in advertisements for
11 Pneu Dart, a company specializing in “remote injection equipment and tranquilizer guns for
12 animal control.” *Id.* at Ex. 7. The caption to LACKEY’s over five (5) minute commercial on
13 behalf of Pneu Dart reads as follows: “Carl Lackey, Wildlife Biologist with the Nevada
14 Department of Wildlife, demonstrates how he used Pneu Dart drug delivery systems when
15 responding to human-bear conflict calls and/or when conducting bear research during the winter.”
16 *Id.*

17 LACKEY has voluntarily and with great vigor thrust himself into the spotlight as it relates
18 to issues concerning management of the bear population in Nevada. He has sat for many
19 interviews, appeared on a popular national television show, and appeared in television
20 commercials as a spokesperson for Pneu Dart while in an NDOW uniform and in his capacity as
21 an NDOW employee. LACKEY even refers to himself as the Bear Warrior and acknowledges
22 that he is a local celebrity. Under this set of facts, there is no question that, at a minimum,
23 LACKEY is a limited public figure and that he must, therefore, plead and prove malice in order
24 survive a special motion to dismiss under Nevada’s Anti-SLAPP statutes.

25 ///

3. SMITH Did Not Act with Actual Malice

Actual malice must be proven with “clear and convincing evidence.” *Nev. Indep. Broad. Corp. v. Allen*, 99 Nev. 404, 410, 664 P.2d 337, 341-42 (1983) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964)).

Mere errors in judgment are not sufficient to constitute actual malice and a defamatory statement must have been made with an awareness of its probable falsity, as demonstrated by “sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.”

Hirman v. Rogers, 257 N.W.2d 563, 566 (Minn. 1977) (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)).

Actual malice, as opposed to common law malice, focuses on the defendant’s belief regarding the veracity of the publication, not on defendant’s feelings towards the plaintiff. *See Greenblet Coop. Pub. Ass’n, Inc. v. Bresler*, 398 U.S. 6, 10 (1970). “It is not enough for a public official to show that the defendant has acted from personal ill-will but rather he must prove that the publication was made with a high degree of awareness that it was probably false.” *Hirman, supra* (citing *Time, Inc. v. Pape*, 401 U.S. 279 (1971); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967); *Standke v. B. E. Darby & Sons, Inc.*, 193 N.W.2d 139 (Minn. 1971); *Beatty v. Ellings*, 173 N.W.2d 12 (Minn. 1969), *cert. denied*, 398 U.S. 904 (1970)). “The test is subjective, with the focus on what the defendant believed and intended to convey, not what a reasonable person would have understood the message to be.” *Nev. Indep. Broad. Corp., supra*, at 415, 344 (citation omitted).

Under the Communication Decency Act (CDA), “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 11 U.S.C. § 230(c)(1). The CDA “bars those causes of action that would require treating an [internet computer service] as a publisher of third party-content.” *Chi. Lawyers’ Comm. for Civ. Rights Under the Law, Inc. v. Craigslist, Inc.*, 461 F.

1 Supp. 2d 681, 693 (N.D. Ill. 2006). The CDA “immunizes providers of interactive computer
2 services from liability arising from content created by third parties.” *Fair Hous. Council v.*
3 *Roommates.com, LLC (Roommates.com II)*, 521 F.3d 1157, 1162 (9th Cir. 2008). “The
4 touchstone of section 230(c) is that providers of interactive computer services are immune from
5 liability for content created by third parties. The immunity applies to a defendant who is the
6 ‘provider’ . . . ‘of any information provided by’ someone else. ‘[R]eviewing courts have treated
7 § 230(c) immunity as quite robust.’” *Fair Housing Council v. Roommates.com, LLC*
8 *(Roommates.com)*, 489 F.3d 921, 925 (9th Cir. 2007) (citations and footnotes omitted), vacated
9 for en banc rehearing in *Fair Housing Council v. Roommates.com (Roommates.com II)*, 521 F.3d
10 1157 (9th Cir. 2008)). A social networking website, such as Facebook, qualifies as an interactive
11 computer service under the CDA. *Klayman v. Zuckerberg*, 753 F.3d 1354 (D.C. 2014).

12 The fatal flaw in LACKEY’s claims against SMITH is that LACKEY fails to allege that
13 SMITH published any comments whatsoever and consequently fails to allege that SMITH
14 published any comments maliciously. FAC ¶ 14a-z. The apparent basis of LACKEY’s allegations
15 against SMITH is a single comment, which does not even refer to LACKEY, that a third party,
16 Sean Sarsfield (Sarsfield), posted on the LAKE TAHOE WALL OF SHAME Facebook page.
17 FAC ¶ 14p (“A department with no real interest in wildlife other than to make it available for
18 hunters and trappers . . . some might say they are criminals against nature . . . they are certainly
19 ignorant about it.”). SMITH did not create and has no managerial role in LAKE TAHOE WALL
20 OF SHAME. Smith Decl. ¶¶ 3-5. Accordingly, to the extent that any comments complained of
21 are attributable to LAKE TAHOE WALL OF SHAME, they are not attributable to SMITH.
22 Additionally, under the CDA, SMITH, who has no affiliation with LAKE TAHOE WALL OF
23 SHAME in any event, is not a publisher of third party comments on the LAKE TAHOE WALL
24 OF SHAME Facebook page and cannot be held liable for the purportedly defamatory comments
25 of said third parties thereon. 11 U.S.C. § 230(c)(1).

1 Because SMITH did not publish any statement concerning LACKEY, he certainly did not
2 publish any statement against LACKEY maliciously. On this basis, the FAC should be dismissed
3 as to SMITH.

4 **4. LAKE TAHOE WALL OF SHAME’s Communications Addressed a Matter**
5 **of Public Concern**

6 Nevada has adopted California jurisprudence setting forth the following guiding
7 principles in determining what constitutes “an issue of public interest”:

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

14 *Shapiro, supra*, at 9-10, 268 (citing *Piping Rock Partners, Inc. v. David Lerner Assocs., Inc.*, 946
15 F.Supp.2d 957, 968 (N.D. Cal. 2013), *aff’d*, 609 F.App’x 497 (9th Cir. 2015) (citing *Weinberg v.*
16 *Feisel*, 110 Cal.App.4th 1122 (Cal. Ct. App. 2003)).

17 The singular comment posted on LAKE TAHOE WALL OF SHAME’s² Facebook page,
18 which apparently forms the basis of LACKEY’s claims against SMITH, addresses a matter of
19 public concern. FAC ¶ 14p. The conservation of natural resources is widely understood to be a
20 matter of public concern under the public trust doctrine. In the seminal case of *Geer v.*
21 *Connecticut*, 161 U.S. 519, 529 (1895), *overruled on other grounds by Hughes v. Oklahoma*, 441
22 U.S. 322 (1979), the United States Supreme Court held that:

23 Whilst the fundamental principles upon which the common property in game rests
24 have undergone no change, the development of free institutions has led to the

25 ² Because SMITH did not publish any comments, SMITH analyzes those statements made by LAKE TAHOE WALL
OF SHAME to demonstrate that the statement that forms the basis of the allegation against SMITH addresses a
matter of public concern.

1 recognition of the fact that the power or control pledged in the State, resulting from
2 this common ownership, is to be exercised, like all other powers of government, as
3 a trust for the benefit of the people, and not as a prerogative for the advantage of
the government, as distinct from the people, or for the benefit of private individuals
as distinguished from the public good.

4 (emphasis added.) The Supreme Court, in overruling *Geer* on other grounds, expressly stated
5 that “[t]he overruling of *Geer* does not leave the States powerless to protect and conserve wild
6 animal life within their borders. Today's decision makes clear, however, that States may promote
7 this legitimate purpose only in ways consistent with the basic principle that ‘our economic unit is
8 the Nation’” *Hughes, supra*, at 338-39 (citation omitted). *See also* Mich. Const. art. 4, § 52
9 (“The conservation and development of the natural resources of the state are hereby declared to
10 be of paramount public concern in the interest of the health, safety and general welfare of the
11 people.”); *Davis v. Allen Parish Serv. Dist.*, 210 Fed. App’x 404, 409 (5th Cir. 2006) (finding that
12 comments concerning threats to destroy natural resources addressed a matter of public concern);
13 *Mannington Mills, Inc. v. Shinn*, 877 F. Supp. 921, 929-30 (D.N.J. 1995) (“There is no doubt that
14 a strong state interest of substantial public concern is at issue in this case. The Third Circuit has
15 recognized the strong state interest in the regulation of important state natural resources[.]
16 (internal quotation marks and citation omitted); *Harthman v. Texaco (In Re Tutu Wells*
17 *Contamination Litig.)*, 846 F.Supp. 1243 (V.I. 1993) (“the protection of rapidly diminishing and
18 irreplaceable natural resources (the environment) . . . is of current public concern”) (internal
19 quotation marks and citation omitted); *Wheeler v. Gregg*, 203 P.2d 37, 44-45 (Cal. Ct. App. 1949)
20 (finding that “development of natural resources” constituted a use of public concern in permit
21 issuance context); *State v. Thompson*, 136 P.3d 213, 215 (Idaho Ct. App. 2001) (“The State has a
22 compelling interest in the management and conservation of its natural resources, including
23 wildlife. . . . Fish and game violations are matters of grave public concern The wild game
24 within our state belongs to the people as a whole in their collective, sovereign capacity and is
25 treated as a common trust.”) (internal quotation marks and citations omitted).

1 The single comment posted by Sarsfield on LAKE TAHOE WALL OF SHAME’s
2 Facebook page concerns the preservation of natural resources (wildlife) in Nevada. FAC ¶ 14p
3 (“A department with no real interest in wildlife other than to make it available for hunters and
4 trappers . . . some might say they are criminals against nature . . . they are certainly ignorant about
5 it.”). Because the preservation and treatment of bears is undoubtedly a matter of public concern
6 and because the lone comment posted on LAKE TAHOE WALL OF SHAME’s Facebook page
7 addresses the same, the comment complained of by LACKEY and apparently attributed to
8 SMITH, clearly addresses a matter of public concern.

9 **B. LACKEY Has Failed to Plead Sufficient Facts to State a Claim for Relief for**
10 **Defamation**

11 In order to prevail on a claim for defamation, whether in the form of slander or libel, a
12 plaintiff must plead and prove: “(1) a false and defamatory statement by defendant concerning
13 the plaintiff; (2) an unprivileged publication to a third person; (3) fault, amounting to at least
14 negligence; and (4) actual or presumed damages.” *Chowdhry v. NLVH, Inc.*, 109 Nev. 478, 481-
15 82, 851 P.2d 459, 462 (1993) (citing Restatement (Second) of Torts, § 558 (1977)). Whether a
16 statement is “capable of defamatory construction” is a question of law. *Branda v. Sanford* (1981)
17 97 Nev. 643, 646, 637 P.2d 1223, 1225 (citations omitted). As already noted above, public and
18 limited public figures must plead and prove “actual malice” as opposed to mere negligence to
19 sustain a defamation cause of action. *Supra* IV(A)(1)-(2). “[S]tatements of opinion as opposed
20 to statements of fact are not actionable. *Nevada Indep. Broadcasting Corp. v. Allen*, 99 Nev. 404,
21 410, 664 P.2d 337, 341-42 (1983). As stated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339
22 (1974), “[u]nder the first amendment, there is no such thing as a false idea, and the societal value
23 of robust debate militates against a restriction of the expression of ideas and opinions.”

24 As briefed extensively above, LACKEY has failed to allege that SMITH published any
25 statements whatsoever. *Supra* IV(A)(3). LACKEY has, therefore, failed to plead facts to

1 establish the first (statement) and second (published) elements of defamation as to SMITH and
2 has failed to state a claim for relief under this theory. Accordingly, SMITH respectfully requests
3 that this claim be dismissed.

4 **C. LACKEY Has Failed to Plead Sufficient Facts to State a Claim for Relief for**
5 **Intentional Infliction of Emotional Distress (IIED)**

6 The elements of a cause of action for IIED are as follows: “(1) extreme and outrageous
7 conduct with either the intention of, or reckless disregard for, causing emotional distress, (2) the
8 plaintiff’s having suffered severe or extreme emotional distress and (3) actual or proximate
9 causation.” *Star v. Rabello*, 97 Nev. 124, 125, 625 P.2d 90, 91-92 (1981) (citing *Cervantes v.*
10 *J.C. Penney, Inc.*, 595 P.2d 975 (Cal. 1979)).

11 Again, LACKEY has not alleged any conduct by SMITH whatsoever. *Supra* IV(A)(3).
12 LACKEY has, therefore, failed to plead facts to establish the first (extreme and outrageous
13 conduct) element of IIED as to SMITH. Accordingly, SMITH respectfully requests that this claim
14 be dismissed.

15 **D. LACKEY Has Failed to Plead Sufficient Facts to State a Claim for Relief for**
16 **Negligent Infliction of Emotional Distress (NIED)**

17 NIED is a ““a tort in negligence, and the plaintiff must establish the elements of duty,
18 breach of duty, causation and damages.”” *Turner v. Mandalay Sports Entm’t, LLC*, 124 Nev. 213,
19 222, fn. 32, 180 P.3d 1172, 1178, fn. 32 (2008) (citing *Moon v. Guardian Postacute Services,*
20 *Inc.*, 95 Cal.App.4th 1005 (2002)). The Nevada Supreme Court has held that negligent infliction
21 of emotional distress can be an element of the damage sustained by the negligent acts committed
22 directly against a direct victim-plaintiff. *Shoen v. Amerco, Inc.*, 111 Nev. 735, 748, 896 P.2d 469,
23 477 (1995). “[I]n cases where emotional distress damages are not secondary to physical injuries,
24 but rather, precipitate physical symptoms, either a physical impact must have occurred or, in the
25 absence of physical impact, proof of ‘serious emotional distress’ causing physical injury or illness

1 must be presented.” *Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 448, 956 P.2d 1382, 1387(1998).

2 As with all claims against SMITH, LACKEY has not alleged any conduct by SMITH
3 whatsoever. *Supra* IV(A)(3). LACKEY has, therefore, failed to plead facts to establish the
4 second (breach of duty) element of negligence, a necessary prerequisite to a valid NIED claim,
5 as to SMITH. Accordingly, SMITH respectfully requests that this claim be dismissed.

6 **E. LACKEY Has Failed to Plead Sufficient Facts to State a Claim for Relief for Civil**
7 **Conspiracy**

8 An actionable civil conspiracy ““consists of a combination of two or more persons who,
9 by some concerted action, intend to accomplish an unlawful objective for the purpose of harming
10 another, and damage results from the act or acts.”” *Consol. Generator-Nevada v. Cummins*
11 *Engine Co.* (1998) 114 Nev. 1304, 1311, 971 P.2d 1251, 1256 (citations omitted).

12 As with SMITH, LACKEY had failed to allege any conduct by BRYANT or STARK.
13 FAC ¶ 14a-z. Instead, LACKEY asks this Court, without any basis in law or logic, to apparently
14 attribute comments purportedly made by BEAR LEAGUE or other third parties to SMITH. *Id.*
15 at ¶ 14a-b, d, f, h, w. Similarly, LACKEY disingenuously seeks to attribute comments posted by
16 various third parties on NDOW WATCH KEEPING THEM TRANSPARENT’s Facebook page
17 to STARK. *Id.* at ¶ 14q-s, u, y. LACKEY’s only allegations of statements made by any
18 defendant, are statements made by BEAR LEAGUE. Put another way, LACKEY has only
19 alleged conduct by one defendant. LACKEY has also failed to allege how exactly SMITH
20 purportedly “acted in concert with [the other defendants] to accomplish the goals of harassing and
21 threatening Plaintiff and causing him fear, anxiety, embarrassment and damaging [sic] to his
22 reputation.” FAC ¶ 35. In fact, SMITH has never conspired with the other defendants to harass
23 or threaten LACKEY. Smith Decl. ¶ 5. SMITH has also never worked in concert with the other
24 defendants to cause LACKEY fear, anxiety, embarrassment or damage to his reputation. *Id.*

25 Because LACKEY has failed to allege conduct of more than one defendant and has also

1 failed to plead any specific conspiratorial conduct by SMITH, LACKEY has failed to plead
2 conduct by “two or more persons” and “concerted action” and has, therefore, failed to plead
3 sufficient facts to give rise to civil conspiracy claim. On this basis, SMITH respectfully requests
4 that the civil conspiracy claim be dismissed.

5 **V. CONCLUSION**

6 The FAC constitutes a flagrant attempt by LACKEY to intimidate SMITH and other
7 citizens from expressing their constitutionally guaranteed right to speak freely about matters of
8 public concern. The frivolous nature of LACKEY’s suit is made evident by LACKEY’s utter
9 failure to allege that SMITH published any comments about LACKEY. Instead, LACKEY
10 attempts to hold SMITH accountable for a solitary statement of a third party on a Facebook page
11 completely unrelated to SMITH, whom LACKEY does not have the courage to address directly.
12 In doing so, LACKEY is attempting to frighten Defendants and others into silence. The Nevada
13 Anti-SLAPP statutes were specifically designed to thwart this type of abusive litigation that
14 threatens the basic constitutional principles that our judicial system was designed to uphold. For
15 this reason and also because the FAC fails to, even under the most favorable reading, state any
16 claims as to SMITH, SMITH respectfully requests that the Court dismiss the FAC with prejudice
17 and award SMITH reasonable costs and attorney’s fees.

18 ///

19 ///

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23 ///

24 ///

25 ///

VI. AFFIRMATION

The undersigned does hereby affirm that the preceding document does not contain the personal information of any person.

Dated: June 5, 2017

MOLSBY & BORDNER, LLP

By: 

CAMERON D. BORDNER, ESQ.

Nevada Bar No. 13831

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Attorneys for Defendant:

MARK E. SMITH, an individual

CERTIFICATE OF SERVICE

I am employed in the City of Reno, County of Washoe, State of Nevada by the law offices of MOLSBY & BORDNER, LLP. My business address is 6380 Mae Anne Avenue, Suite 7, Reno, Nevada 89523. I am over the age of 18 years and not a party to this action. On June 5, 2017, I served the following document: **SPECIAL MOTION TO DISMISS/MOTION TO DISMISS** in the manner described below:

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| | BY HAND: by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below. |
| | BY MAIL: by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Reno, Nevada addressed as set forth below. |
| | BY OVERNIGHT MAIL: by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day. |
| | BY PERSONAL DELIVERY: by causing personal delivery via courier of the document(s) listed above to the person(s) at the address(es) set forth below. |
| X | BY ECF FILING: by causing the document(s) to be electronically served via the court's electronic filing system to the following attorneys associated with this case. |

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Del Hardy, Esq.

Attorneys for Defendant Carolyn

Stephanie Rice, Esq.

Stark

Winter Street Law Group

96 & 98 Winter Street

Reno, NV 89503

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

/s/ Melissa M. Paschal, CP

Melissa M. Paschal, CP

1 **1520**
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10 Attorneys for Defendants:
11 MARK E. SMITH, an individual¹

12 **SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

13 **IN AND FOR WASHOE COUNTY**

14 CARL LACKEY,) **Case No.: CV17-00434**
15)
Plaintiff,) **Dept. No.: 4**
16)
vs.)
17)
BEAR LEAGUE, etc., et al.,)
18)
Defendants.)
19)

20 **DECLARATION OF ROBIN D. SHOFNER**
21 **IN SUPPORT OF SPECIAL MOTION TO DISMISS/MOTION TO DISMISS**

22 I, ROBIN D. SHOFNER, hereby declare:

23 1. I am one of the attorneys of record for MARK E. SMITH, an individual (SMITH)

24 _____
25 ¹ Erroneously named as MARK E. SMITH an individual and dba LAKE TAHOE WALL OF SHAME.

1 in this matter. I am licensed to practice law in the courts of the State of Nevada. I have personal
2 knowledge of the facts stated in this Declaration and, if called as a witness, could and would
3 testify competently to the truth of the facts stated herein. I make this Declaration in support of
4 Defendant SMITH's Motion to Dismiss.

5 2. Attached hereto as Exhibit 1 is a true and correct copy of LACKEY's 2007
6 Candidacy Statement submitted in connection with his nomination as a representative of the
7 International Association for Bear Research and Management (IBA).

8 3. Attached hereto as Exhibit 2 is a true and correct copy of an article in the Tahoe
9 Daily Tribune entitled "Bear Warrior: 15 Minutes with Carl Lackey," LACKEY was interviewed
10 by Dylan Riley (Riley). Dylan Riley, *Bear Warrior: 15 Minutes with Carl Lackey*, TAHOE DAILY
11 TRIB., Apr. 12, 2007, [http://www.tahodailytribune.com/news/bear-warrior-15-minutes-with-](http://www.tahodailytribune.com/news/bear-warrior-15-minutes-with-carl-lackey/)
12 [carl-lackey/](http://www.tahodailytribune.com/news/bear-warrior-15-minutes-with-carl-lackey/) (Apr. 12, 2007).

13 4. Attached hereto as Exhibit 3 is a true and correct copy of a screenshot from the
14 National Geographic webpage entitled "Animal Extractors",
15 <http://www.nationalgeographic.com.au/tv/animal-extractors/> (last visited May 8, 2017).

16 5. Attached hereto as Exhibit 4 is a true and correct copy of a screenshot from
17 NDOW, *Black Bear Research*,
18 http://www.ndow.org/Nevada_Wildlife/Bear_Logic/Bear_Research/ (last visited May 8, 2017).

19 6. Attached hereto as Exhibit 5 is a true and correct copy of Carl W. Lackey, Jon P.
20 Beckman, James Sedinger, *Bear Historical Ranges Revisited: Documenting the Increase of a*
21 *once Extirpated Population in Nevada*, 77 J. WILDLIFE MGMT. 812, 812 (2013).

22 7. Attached hereto as Exhibit 6 is a true and correct of Associated Press, *Nevada*
23 *Wildlife Panel Reviews Bear Hunt*, WASH. TIMES, Jan. 18, 2014,
24 <http://www.washingtontimes.com/news/2014/jan/18/nevada-wildlife-panel-reviews-bear-hunt/>
25

1 (Jan. 18, 2014).

2 8. Attached hereto as Exhibit 7 is a true and correct copy of a screenshot from Pneu
3 Dart, Inc.'s webpage entitled "Pneu-Dart Used with Bears & the Nevada Department of Wildlife,"
4 <http://www.pneudart.com/project/pneu-dart-used-with-bears-the-nevada-department-of-wildlife/>
5 (last visited May 8, 2017).

6 I declare under penalty of perjury under the laws of the State of Nevada that the foregoing
7 is true and correct.

8 **AFFIRMATION**

9 The undersigned does hereby affirm that the preceding document does not contain the
10 personal information of any person.

11
12 Dated: June 5, 2017

Respectfully submitted,
MOLSBY & BORDNER, LLP

13
14 

15 Robin D. Shofner, Esq.
16 Attorney for Defendant:
17 MARK E. SMITH, an individual
18
19
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21
22
23
24
25

CERTIFICATE OF SERVICE

I am employed in the City of Reno, County of Washoe, State of Nevada by the law offices of MOLSBY & BORDNER, LLP. My business address is 6380 Mae Anne Avenue, Suite 7, Reno, Nevada 89523. I am over the age of 18 years and not a party to this action. On June 5, 2017, I served the following document: **DECLARATION OF ROBIN D. SHOFNER IN SUPPORT OF SPECIAL MOTION TO DISMISS/MOTION TO DISMISS** in the manner described below:

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/s/ Melissa M. Paschal, CP

Melissa M. Paschal, CP

INDEX OF EXHIBITS

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EXHIBIT 1

EXHIBIT 1

IBA

BEAR SPECIALIST GROUP

URSUS

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Carl Lackey - Candidate for Councillor

Candidacy Statement

I am honored to be nominated as a representative of the IBA Council. To me the IBA characterizes the relationships between management and research, and how these networks benefit the bear species we are working with. As a black bear manager for the Nevada Department of Wildlife for the last 20 years I have been lucky enough to form partnerships with bear researchers whom I respect very much. In Lake Tahoe where I spend the majority of my time, we have dealt with some extremely high levels of conflict where black bears were almost non-existent 25 years ago. As a result we became innovative and flexible in our approach to conflict management, with much of our research focusing on urban dwelling bears and their ecological differences from wildland bears. These collaborative experiences are what I feel can be most rewarding for people tasked with monitoring bear populations and the inherent human-bear conflicts. As a longtime member of the IBA, and of the IBA's Management Committee for the last couple years, one of my goals has been to continue forming this bridge between management and research, a bridge that was started years ago by the first organizers of the IBA. As an IBA council member representing the western US, I would strive to further engage agency managers and their participation within the IBA.

JOIN IBA

GIVE TO BEAR CONSERVATION

BYLAW VOTING

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Contact the Webmaster
Contact the Secretary

EXHIBIT 2

EXHIBIT 2

Bear warrior: 15 Minutes with Carl Lackey

April 12, 2007

By Dylan Riley

Nevada Department of Wildlife Biologist Carl Lackey and his Karelian bear dogs Rooster and Stryker are local celebrities featured in a National Geographic Channel program titled "The Animal Extractors," a series that explores what happens when the boundaries between cities and natural habitats blur and creatures of all kinds find their way into populated areas looking for food and new places to shelter.

Q: How long have you been with the department of wildlife?

A: Since 1993. Almost 14 years now. The last 10 of that have been as a the biologist here dealing with the bears.

Q: Did you start with the bears or just wildlife in general?

A: I started titling boats in the Reno office and then I moved to a wildlife management area. I Kind of just lucked into the bears. It wasn't planned that way.

Q: How big is the local bear population?

A: We estimate it at somewhere between 200 and 300 animals total in the state and that's restricted to just the far western edge of Nevada.

Q: How are people more of a threat to bears than bears are to people?

A: Well, people are a threat to the bears through constriction and destruction of the habitat. Bears are what you call, I guess, a keystone species. Their abundance and the health of the bear population is indicative of the habitat and the ecosystem in general because they are at the top of the food chain in a lot of instances. So they are an indicator species. They indicate what the ecosystem is doing and the health of the habitat. Bears as a threat to people? There is always that possibility because they are a carnivore. They are a wild animal.

Q: Even black bears?

A: Absolutely. Black bears predaciously kill people. I don't want to say every year in North America but pretty close to at least one instance every year in all of North America. A lot of times down here in the U.S. we've had predacious attacks in Arizona, Colorado, Tennessee. People either have the Disney view of bears or the horrific view that they're out there to attack at the drop of a hat. One extreme or the other but bears really fall somewhere

in-between. We've had some people doing some pretty stupid things. What they don't realize is that by habituating the bears to people or by feeding the bears intentionally or unintentionally they are creating a situation where the bears may ultimately have to be killed or are killed because of humans. Mostly by cars, mostly getting hit by cars. Although a few have to be put down for management reasons every year because they become so bold around people that they're approaching people for food and breaking into homes for food and becoming a threat to safety.

Q: Do you relocate bears?

A: We haven't relocated as a general practice since 1996 when I took over the position. We have chosen instead to use on-site releases, meaning releasing right where we catch them or in very close proximity in the bear's home range. And then we subject the bears to the aversive conditioning which is the use of the rubber bullets or pepper spray and Karelian bear dogs and give the bear a real bad experience and teach him that his behavior is unwanted and he's not welcome around people.

Q: What is a Karelian bear dog?

A: It's a Russian and Finnish breed that were originally bred to hunt big game animals and mainly brown bears in Europe and Russia. We're using them here for hazing of problem bears and using them to modify their behavior around people.

Q: How big was the biggest bear you ever encountered?

A: We had several that were 600 pounds, but the biggest was 640 pounds, and that was one of our collared males last year over at Incline Village.

Q: Is that the one that was breaking into places?

A: No, all he's been doing is getting into garbage. We had one up here about a year ago that was tearing doors off of trucks and breaking into garages and stuff, he was 620 pounds. But the 640 pounder is alive and well, as far as I know; he's feeding on all the good food over in Incline.

Q: Smart bear. They are pretty smart, too, right?

A: Oh yeah, they're real smart.

Q: Are they smarter than trappers? Can they dodge people like wolves or are they not considered as smart in the wildlife world?

A: No, there are smart bears; they're curious. I guess their intelligence is driven by their curiosity. Or vice versa. And they can learn from one experience and then remember that behavior, so they're smart in that way, I guess.

Q: There aren't any brown bears around here right?

A: No brown bears, grizzlies, same thing. The closest is going to be up in Yellowstone, Idaho, and I think there's even a possibility of a few over in Washington.

Q: You will be on the National Geographic Channel?

A: It's been a series of about 12 or 13 episodes called ... the "Animal Extractors" is what they ended up calling it. They spent all summer with us last year. Several different film crews kind of took turns, they were from England and they went on every call with us and filmed all kinds of stuff.

Q: Did any good bear stories happen during that time when they were with you?

A: Yeah, but not as good as we've had. We had one in Gardnerville at a youth camp that locked itself into a bathroom and then proceeded to rip sinks off the wall and toilets off the wall and flooded the bathroom. We've had some interesting and hair-raising experiences with bears in homes, breaking into homes and being in the house when we got there. We've had tons of stuff.

Q: How do you track bears?

A: Every bear that we put our hands on we ear tag and tattoo. Tattoo on the inner lip, put in a corresponding number on the ear tag so if we ever catch them again we can positively identify them. We do a lot of collaring with the Wildlife Conservation Society since 1999. I think we've radio collared 60 some odd bears with them over that period and tracked the bears through a VHF signal via radio telemetry. And with the Wildlife Conservation Society, we've put out seven GPS collars that take a fix off a satellite so many times a day and then store that data on the collar so that when you retrieve the collar you have a dot to dot of everywhere that bear was at.

Q: How long do bears live for?

A: In the wild I'd say the average is probably 15 to 20 years they lose their competitiveness after that. But there are bears that have lived to be well over 20 years old. I think the oldest in captivity was 33 years old.

Q: Do people recognize you as the bear guy in public and ask you for your autograph?

A: No, no autographs. Yeah I'm called the bear guy or the bear man or other things depending on whether they're happy with me or not, but I've never been asked for my autograph. They recognize me or they recognize the dogs. A lot of people see the dogs and make the connection that way.

EXHIBIT 3

EXHIBIT 3



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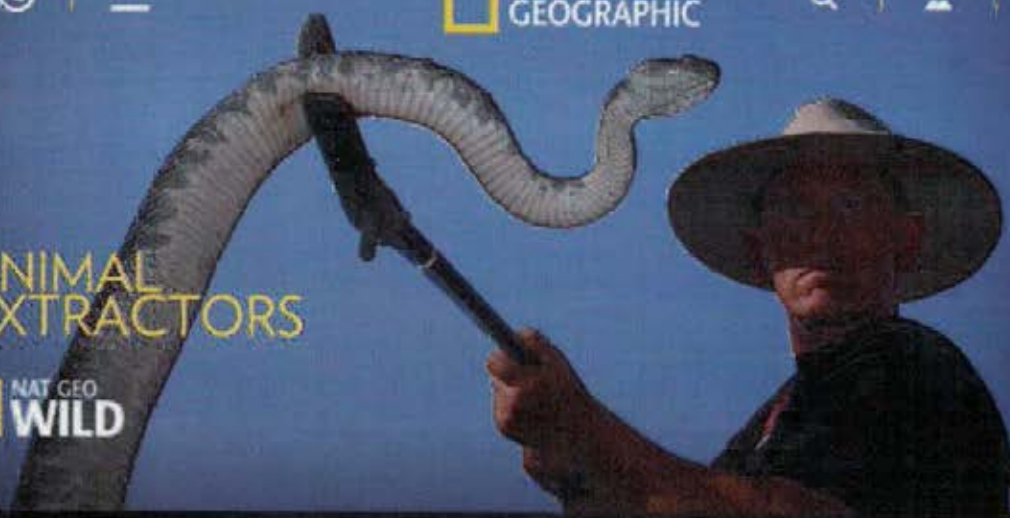


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**ANIMAL
EXTRACTORS**

**NAT GEO
WILD**



ABOUT THE SHOW

UPCOMING EPISODES



DISCUSS

f FACEBOOK PAGE

ABOUT THE SHOW —

Animals are all around us. Sometimes too close for comfort. Preserving the balance between man and wildlife are the animal extractors. With every big city, there's a big nuisance animal

problem.



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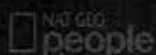
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EXHIBIT 4

EXHIBIT 4



HOME FISH HUNT BOAT NEVADA WILDLIFE EDUCATION OUR AGENCY



> NEVADA WILDLIFE

Living with Wildlife

> Bear Logic

Karelian Bear Dogs

Bear Research

Bear Month

Bear Data

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Animals

Health and Disease

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Sage Grouse

Conservation

Wildlife Management Areas

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BLACK BEAR RESEARCH



Nevada's bear program, which includes public education and the Karelian Bear Dog program, has benefitted immensely by its relationship with the [Wildlife Conservation Society](#). Working together since 1999 the NDOW/WCS team with Jon Beckmann of WCS and Carl Lackey of NDOW led the way in urban bear research. It is one of the longest running studies in North America and has produced several peer-reviewed publications in professional journals. As of early 2013 they have handled nearly 1,000 bears and marked well over 350 bears. Their most recent publication in the *Journal of Wildlife Management* revised historical range maps for black bears in North America and documented the expansion of the species back into some of this habitat in Nevada (see [JWM 77\(4\) 2013](#)).

They are currently partnered with the University of Nevada, Reno on a bear DNA project, the University of Tennessee on an isotope analysis of bear hair, and Columbia University in New York analyzing GPS data to learn just how bears utilize their habitat.

Download - 10th Western Black Bear Workshop [PDF]

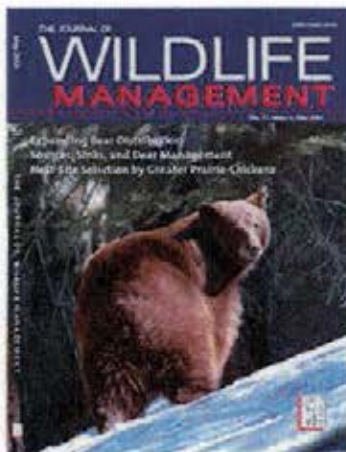
Research Publications

- [Using Black Bears to Test Ideal-Free Distribution Models Experimentally](#)
- [Rapid ecological and behavioural changes in carnivores: the responses of black bears to altered food](#)
- [Are Desert Basins Effective Barriers to Movements of Relocated Black Bears](#)
- [Carnivores, urban landscapes, and longitudinal studies: a case history of black bears](#)
- [Evaluation of Deterrent Techniques on Altering Behavior of Black Bears](#)
- [Using Genetic Relatedness to Investigate the Development of Conflict Behavior in Black Bears](#)

Other Research

- [Going into the 21st Century: A Perspective on Trends and Controversies in the Management of the American Black Bear](#)

- [How agencies respond to human-black bear conflicts: a survey of wildlife agencies in North America](#)



The full manuscript is available through [The Journal of Wildlife Management](#)

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EXHIBIT 5

EXHIBIT 5



Population Ecology

Bear Historical Ranges Revisited: Documenting the Increase of a Once-Extirpated Population in Nevada

CARL W. LACKEY,¹ Nevada Department of Wildlife, Game Bureau, 1100 Valley Road, Reno, NV, USA

JON P. BECKMANN, Wildlife Conservation Society, North America Program, 301N. Willson Ave., Bozeman, MT 59715, USA

JAMES SEDINGER, Department of Natural Resources and Environmental Science, University of Nevada, Reno, 1000 Valley Road, Reno, NV 89512, USA

ABSTRACT Black bears (*Ursus americanus*) were once abundant in Nevada and distributed throughout the state, yet recognition of the species' historical occurrence in the state is uncommon and has therefore been ignored in published distribution maps for North America. The lack of representation on distribution maps is likely due to the lack of any scientific data or research on bears in Nevada until 1987. Historical records dating back to the 1840s compiled by Nevada Department of Wildlife (NDOW) biologist Robert McQuivey indicate presence of black bears throughout the state in the 1800s through about 1930. The paucity of historical references after 1931 suggest extirpation of black bears from Nevada's interior mountain ranges by this time. We report on historical records of black bears in the state of Nevada and the results of a current population estimate of black bears derived from a sample of marked bears ($n = 420$) captured 707 times between 1997 and 2008. Using Pradel and Cormack–Jolly–Seber models in Program MARK, we estimated overall population size, finite rate of growth ($\lambda = 1.16$), quarterly and annual survival rates for males and females, seasonal capture probabilities, and recruitment rates. Our results indicate an overall population size of 262 ± 31 adult black bears in western Nevada. These results suggest that the once abundant, then extirpated population of black bears in Nevada is increasing at an annual average rate of 16%. Although the current distribution is limited to the western part of the state, our findings suggest possible expansion of the population into historical habitat within the interior and eastern portions of the state that have been absent of bears for >80 years. Finally, based on historical records, we present suggested revised historical distribution maps for black bears that include the Great Basin ranges in Nevada. © 2013 The Wildlife Society.

KEY WORDS black bear, extirpated population, historical records, Nevada, population estimation, *Ursus americanus*.

Conflicts between humans and black bears (*Ursus americanus*) have increased in North America (Gore et al. 2005, Hristienko and McDonald 2007) and in Nevada, where a 10-fold increase in the number of complaints and a 17-fold increase in bear mortalities due to collisions with vehicles were reported between the early 1990s and mid-2000s (Beckmann and Berger 2003a). In 1997, motivated by these increasing bear–human conflicts, but without knowing what catalyst was driving the increase, we began a long-term study of Nevada's black bears that continues to present. Nevada Department of Wildlife (NDOW) needed to know if the increase in complaints was due to an increasing or expanding bear population, or a redistribution of the existing bear population into the urban interface. These questions were important to managers, in part, because this phenomenon of increasing human–bear conflicts was not the case in Nevada just less than 3 decades ago. Furthermore, if the population is increasing, managers should have reliable estimates of

abundance on which to make management recommendations, such as a legal harvest. Additionally, if the bear population is expanding into formally occupied habitat, then our results would provide the context on which NDOW could make decisions regarding where occupancy by black bears is desirable.

Prior to the late 1980s, bear sightings and bear deaths from vehicles were considered such a rare event (Goodrich 1993) that the then director of the NDOW made the statement at the First Western Black Bear Workshop, "Nevada has no bear, except for an occasional one that strays in along the Sierras adjacent to Lake Tahoe in California. Therefore, we have no management responsibilities" (LeCount 1979:63). Yet, historical records from newspapers and pioneer journals dating to 1849 (McQuivey 2004; see Appendix) indicate presence of American black bears in all of their current range (Lackey 2004) and in the interior mountain ranges of Nevada. Unfortunately, this historical information has never been disseminated outside the NDOW and therefore the historical range of this species in Nevada has never been fully represented in the published literature (e.g., Hall 1981, Pelton and van Manen 1994, Servheen et al. 1999; Fig. 1).

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We analyzed historical newspaper and journal accounts of black bears to illustrate their distribution throughout the state and their consequent extirpation from all but the far western part of Nevada. We used these records to suggest revised historical range maps for black bears in North America, a more accurate representation of this species'

historical distribution. Furthermore, we used an extensive 12-year data set to estimate current population size and rate of population change for the black bear population in Nevada. Finally, we overlaid recent sightings of black bears from 1988—present onto a map of historical habitat to show that this population increase is resulting in expansion of the species into areas of the Great Basin that have been unoccupied by black bears for >80 years.

STUDY AREA

The current distribution of black bears in Nevada is restricted to the Carson Range of the Sierra Nevada, Pine Nut Range, Pine Grove Hills, Sweetwater Range, Virginia Range, and the Wassuk Range in western Nevada (Beckmann and Berger 2003a; Lackey 2004; NDOW, unpublished data). These 6 mountain ranges and associated basins cover an area of approximately 12,065 km² and are characterized by steep topography with high granite peaks and deep canyons. Mountain ranges are separated by desert basins that range from 15 to 64 km across (Grayson 1993). These basins are often large expanses of unsuitable habitat (e.g., large areas of sagebrush [*Artemisia* spp.]) that bears do not use as primary habitat (Goodrich 1990, Beckmann and Berger 2003a). For the population demographics portion of our analysis, the study area extended from the Carson Range of the Sierra Nevada eastward to the Virginia Range and Pine Nut Mountains, and from Reno south to Topaz Lake, an area collectively referred to as the Carson Front. Additionally, because many captures were in response to conflicts (see the Methods Section), the urban-interfaces of cities and towns within the study area were represented as well and included developed areas in the Lake Tahoe Basin: Incline Village, Glenbrook, Cave Rock, Zephyr Cove, and Stateline, Nevada, and the lower elevation urban centers of Reno, Carson City, Minden, and Gardnerville and their associated valleys. Even though human–bear conflicts increased in number over the period of our study (1997–2008), the geographic distribution of those conflicts did not change and therefore the study area itself remained consistent. The expanding geographic distribution of black bears is occurring concurrently with the increasing bear population, but it is occurring beyond the study area boundaries defined above for the population demographics portion of our study.

METHODS

Historical Distribution

We analyzed historical newspaper records and pioneer journals with notation of bears from 1833 to 1964 and categorized them as either black bear or grizzly bear (*Ursus arctos*) as both species are recognized in the records. Intended species for some records (14%) was clear based on use of the terms “grizzly bear,” “brown bear,” or “black bear.” Nine percent of records used the term “cinnamon bear,” which we interpreted as black bear records in all instances ($n = 27$) except 1. Seventy-seven percent of the records were not specific to species ($n = 237$), but in every case except 2 we categorized them as black bears. We mapped historical

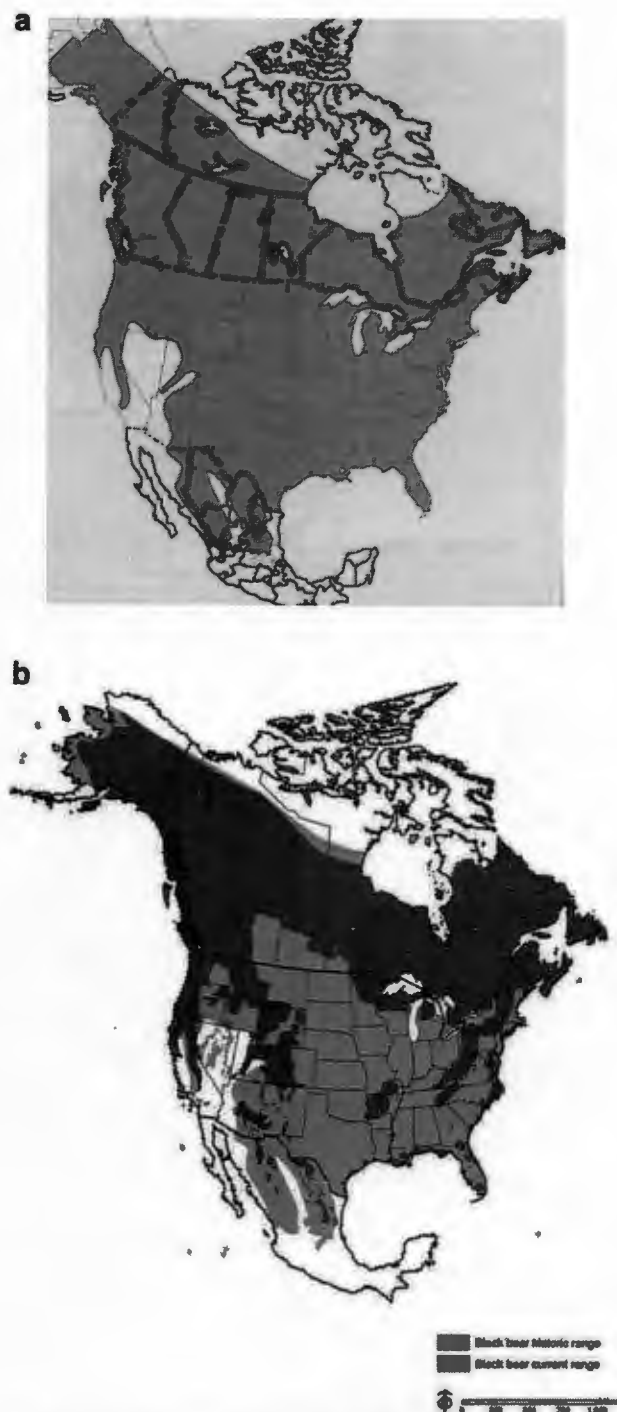


Figure 1. (a) Historical distribution of the American black bear (*Ursus americanus*) in North America. Modified from Hall (1981). (b) Revised historical distribution map and current distribution map of American black bear in North America based on our data from Nevada. Modified from Pelton and van Manen (1994).

distribution of black bear in Nevada using geographic information system (GIS) software (ArcGIS Desktop 10, Environmental Systems Research Institute, Inc., Redlands, CA) to overlay the historical sighting records with 8-digit hydrologic unit code (HUC) watershed polygons. Thus, we interpreted black bear historical range areas to be those watersheds that contained historical sighting records (Fig. 2). We also documented and mapped every sighting since 1988 of a bear or bear sign outside of their currently recognized range (Lackey 2004). We relied on confirmed sightings of bears, bear tracks, or scat by NDOW biologists, other agency personnel such as United States Department of Agriculture Animal and Plant Health and Inspection Service (APHIS) Wildlife Services, or in some cases 2 or more hunters reporting the same sighting. Additionally, we had information from bears captured from 1988 to present within the historical range. We plotted these points on a map illustrating possible expansion of black bears into historical habitat (Fig. 2).

Field Methods

We captured bears using culvert traps (Teton Welding, Choteau, MT), modified Aldrich foot snares, and free-range

techniques (i.e., tranquilizing unconfined animals). We captured bears in response to ongoing conflict complaints (urban-interface bears) as received from NDOW dispatch or through direct communications with complainants, and in remote areas absent of conflicts (wildland bears) as described in Beckmann and Berger (2003a). We captured bears year-round to the extent that some urban-interface bears did not enter dens during the winter months (Beckmann 2002). Per NDOW conflict policy (NDOW 1998), we either released captured bears on-site (point of capture) or we relocated them to areas within their home range. On 8 occasions, we translocated marked bears to other areas within the study area (Beckmann and Lackey 2004); however, on every one of these occasions, the bear returned to the capture site in 18 days or less.

We tranquilized bears with a mixture of 4.4 mg/kg Telazol[®] (Fort Dodge Animal Health, Fort Dodge, IA) and 2.2 mg/kg xylazine. We assigned a unique identification number to each bear that we captured and released and marked each bear with a corresponding ear tag (AllFlex USA, Inc., TX) and lip tattoo. Dates of capture were from 27 June 1997 to 26 November 2008. Additionally, we recorded all known mortalities during the course of the study. For every capture or mortality event, we recorded date of handling, sex, age, weight, color, physical condition, reproductive status, and various morphological measurements. We pulled 1 tooth, either the first or second premolar (PM1 or PM2) to determine age of the bear (Matson's Laboratory, Milltown, MT; Stoneberg and Jonkel 1966) and classified animals as dependant young (<1.5 years), juveniles (1.5–3 years), or adults (>3 years).

Population Demographics

We used captures of individually marked bears to develop capture histories, which we used to perform 2 analyses: 1) a Cormack–Jolly–Seber (CJS) analysis (Cormack 1964, 1989; Jolly 1965; Seber 1965, 1986) and 2) a Pradel analysis (Pradel 1996). Pradel models use capture histories analyzed in both the typical forward direction and in the backward direction to estimate capture probability (P), survival (ϕ), seniority (the probability an individual captured on a given occasion was present in the population before that occasion), and λ (per capita rate of population change; Pradel 1996). Pradel (1996) models require the same assumptions as are required by Cormack–Jolly–Seber capture-mark methods, including the assumption that individuals have identical capture and survival probabilities and independent fates. Pradel models also assume that marked and unmarked animals are equally likely to be captured. Because capture histories were sparse, we consolidated monthly capture occasions ($n = 138$) into seasonal capture occasions ($n = 44$) and recorded captures (or lack thereof) for each individual bear for each season: winter (1 Dec–28 Feb), spring (1 Mar–31 May), summer (1 Jun–31 Aug), and fall (1 Sep–30 Nov). We did not use annual encounter histories because doing so would violate the assumption of instantaneous sampling. Violation of this assumption introduces heterogeneity into survival probabilities because individuals captured near the beginning of an

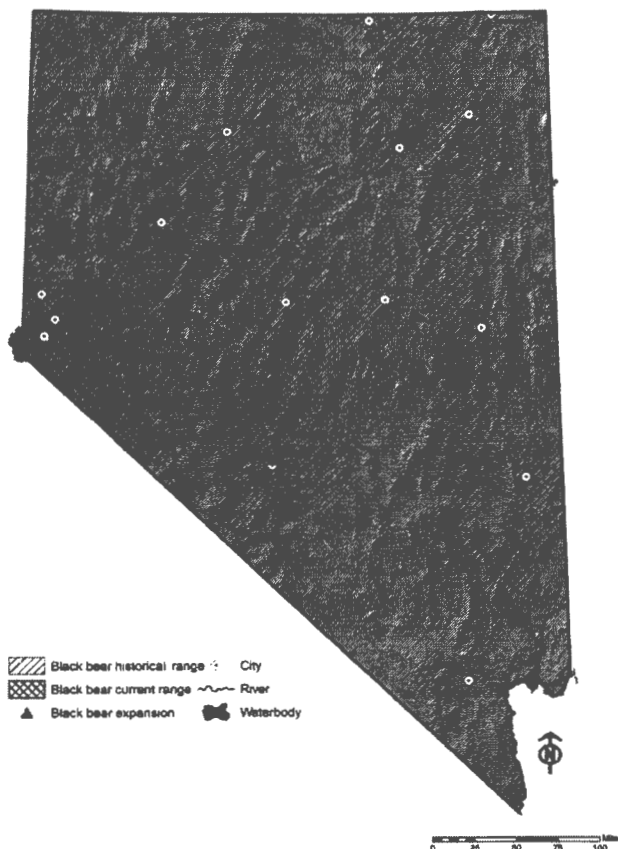


Figure 2. American black bear (*Ursus americanus*) historical (from McQuivey 2004) and current distribution in Nevada, and recent sightings (1988–2012) of black bear indicating possible expansion into historical range that has been unoccupied for >80 years. Historical black bear range was developed by overlaying historical sighting records with 8-digit hydrologic unit code watershed polygons.

occasion have a lesser probability of surviving to the next occasion than individuals captured near the end of an occasion. This is because the former group is exposed to mortality for a longer period than the latter group. We violated this assumption by using 3-month sampling intervals; however, we felt that the 3-month intervals we used represented the best balance between the assumption of instantaneous sampling and producing capture histories with sufficiently high capture probabilities. Using seasonal capture occasions also captured seasonal variation in bear activity, survival, and capture probabilities.

We used the Pradel model structure in Program MARK (White and Burnham 1999) to estimate seasonal capture probabilities, survival, and λ . Because capture histories had a seasonal structure and we were interested in annual estimates of λ , we constrained 3 of the 4 seasonal estimates of λ to equal 1.0 so the product of the 4 seasonal estimates produced an annual estimate of λ . We allowed estimates of survival, capture probability, and λ to vary between the sexes. We also allowed estimates of capture probabilities to vary among seasons. Models that allowed survival, capture probability, or λ to vary among years of the study did not converge, likely because of the sparseness of the data. Our estimates of parameters, therefore, represent averages across the years of the study.

Pradel and CJS models generally require similar assumptions as other capture-mark-recapture approaches (Pradel 1996). In these models, animals are assumed to be identical and to have independent fates. We also assumed that marks were not lost. Differentiating emigration out of the study area from mortality of individuals was not possible; therefore, survival estimates represent apparent survival. Although conflicts increased during certain seasons (summer and fall), the geographic area of these captures did not change over the course of the population demographics portion of our study. Further, we removed 62 dependent cubs from the analysis because we restricted encounter histories to individuals >16 months old. Our estimates of λ , therefore, refer to the adult portion of the population only. We estimated total population size as the sum of CJS estimates of population size for female and male bears.

We calculated \hat{c} using the bootstrap goodness-of-fit procedure in Program Mark to account for heterogeneity in capture and survival probabilities and adjusted second-order Akaike's Information Criterion (AIC_c) scores accordingly. We therefore report quasi-likelihood AIC_c (QAIC_c) scores. We report model-averaged parameter estimates from both the Pradel and CJS analyses. We used the delta method (Powell 2007) to calculate standard errors of estimates of annual survival and population size.

RESULTS

Historical Distribution Records

Historical records of bears analyzed ($n = 308$) included 278 black bear records occurring throughout the state. We produced a map illustrating the historical distribution of black bears (Fig. 2) that we suggest as a revision (see Fig. 1b) to the

published maps of the historical distribution of this species in North America (Fig. 1a). We plotted sightings of black bears ($n = 12$) and captures ($n = 4$) from 1988 to present that occurred within our historical range polygons but from regions not currently thought to contain resident bear populations in Nevada, illustrating possible geographic expansion of the species into historical habitat (Fig. 2).

Population Demographics

We encountered 420 individual black bears during 707 capture events throughout the study. Of these 420 bears, we first encountered 161 as mortalities (hit by cars, management kills, etc.) and 62 were dependent offspring (≤ 15 months); therefore, we removed both groups from the analysis. Our capture-mark-recapture analysis, therefore, included the remaining 197 bears (123 males and 74 females) captured a total of 546 times. Bears encountered in the front country (urban-interface) areas accounted for 79% of this total, whereas we encountered 21% in wildland areas, as classified by Beckmann and Berger (2003a) and NDOW. These included 19 dependant young males (<1.5 years) captured later as juveniles or adults in the encounter histories, 34 juvenile males (1.5–3 years), and 70 adult males (>3 years); and 16 dependant young females (<1.5 years) captured later as juveniles or adults in the encounter histories, 12 juvenile females (1.5–3 years), and 46 adult females (>3 years).

For the Pradel analysis, no models of capture probability lacking a seasonal structure were competitive ($\Delta\text{QAIC}_c > 120$; Table 1). Model-averaged capture probabilities suggested that males had slightly greater probabilities of capture than females (Table 2). Model-averaged estimates of seasonal survival were 0.968 ± 0.012 for males and 0.959 ± 0.010 for females. Lack of a seasonal structure for survival likely reflected sparseness of our capture data rather than constant survival among seasons.

Table 1. Performance of Pradel models of capture-mark-recapture data for black bears in the Carson Front and Reno-Lake Tahoe area, Nevada, 1997–2008.

| Model ^a | ΔQAIC_c^b | w_i^c | K^d | QDeviance ^e |
|---|-------------------------|---------|-------|------------------------|
| $\phi(\cdot), P(\text{season}), \lambda(\cdot)$ | 0 | 0.23 | 6 | 616.77 |
| $\phi(S), P(\text{season}), \lambda(S)$ | 0.13 | 0.21 | 8 | 612.67 |
| $\phi(\cdot), P(\text{season}), \lambda(S)$ | 0.35 | 0.19 | 7 | 615.01 |
| $\phi(\cdot), P(S + \text{season}), \lambda(S)$ | 0.44 | 0.18 | 8 | 612.98 |
| $\phi(S), P(S + \text{season}), \lambda(S)$ | 1.66 | 0.10 | 9 | 612.06 |
| $\phi(S), P(S + \text{season}), \lambda(\cdot)$ | 1.99 | 0.08 | 8 | 614.53 |
| $\phi(\cdot), P(\cdot), \lambda(\cdot)$ | 119.97 | 0 | 3 | 742.97 |
| $\phi(S), P(S), \lambda(S)$ | 121.96 | 0 | 6 | 738.73 |

^a Model notation follows Lebreton et al. (1992). ϕ indicates seasonal survival, P indicates seasonal capture probability, and λ indicates rate of population change. S indicates the parameter was allowed to differ between the sexes and season indicates the parameter was allowed to vary among seasons. λ was constrained to 1.0 for 3 of the 4 seasons within each year so the product of the 4 seasonal estimates produced an annual estimate of λ .

^b Quasi-likelihood second-order Akaike's Information Criterion.

^c Akaike model weights.

^d Number of parameters.

^e Quasi-deviance.

Table 2. Capture probabilities for male and female black bears in the Carson Front and Reno-Lake Tahoe area, Nevada, 1997–2008. Capture probabilities and standard errors are based on model averaged estimates from Pradel models.

| | Capture probability (\pm SE) | | | |
|---------|---------------------------------|-----------------|------------------|------------------|
| | Summer | Fall | Winter | Spring |
| Males | 0.15 \pm 0.02 | 0.13 \pm 0.02 | 0.02 \pm 0.005 | 0.02 \pm 0.005 |
| Females | 0.13 \pm 0.02 | 0.11 \pm 0.02 | 0.02 \pm 0.005 | 0.02 \pm 0.006 |

However, products of seasonal survival should represent accurate estimates of annual survival for the 2 sexes. Our estimates of annual survival were 0.88 ± 0.044 for males and 0.85 ± 0.038 for females. Model averaged estimates of λ were 1.21 ± 0.05 for males and 1.14 ± 0.03 for females; indicating that males were increasing 21% per year, whereas females were increasing 14% per year on average.

Only relatively constrained CJS models converged, likely because of the relatively sparse capture histories. The best-supported model allowed survival to differ between the sexes but was otherwise constrained to be constant (Table 3). This model also allowed capture probabilities to vary among seasons and between sexes. This model allowed probability of entry (pent) to vary among seasons, but we constrained all pent to 0 except that for fall. Estimates of seasonal survival and capture probabilities were the same as those from the Pradel analysis. We estimated the global population size within our study area at 262 ± 31 based on our estimate of 171 ± 20 males and 91 ± 11 females.

DISCUSSION

Historical Distribution and Range Expansion

The historical records we analyzed demonstrate that black bear populations in Nevada were once distributed throughout the state, within the Great Basin. Our analysis allowed us to plot these records and illustrate the historical distribution of black bears within the interior of Nevada during the 1800s and into the early 1900s. As such, we suggest that historical range maps for black bears in North America be revised and include the historical records and maps we have produced, which include mountain ranges in the Great Basin. Further, we have shown how these historical records can be useful in documenting the extirpation of a species despite the pitfalls associated with interpreting historical records (Moulton et al.

2010). Although historical records from newspaper accounts can be suspect, such historical records are often used in biological studies and to document historical distributions of species (e.g., see Foster et al. 2002, Hagler et al. 2011). Additionally, these historical records indicate that grizzly bears were present in the Great Basin of Nevada; the last record occurring in 1930, 8 years after grizzly bears were declared extinct in California.

Black bears were probably completely extirpated from the interior mountain ranges of the Great Basin by the first or second decade of the 1900s because of anthropogenic factors. Although over-hunting by pioneers and conflicts with domestic livestock operators likely contributed to this extirpation (Murie 1948, Mattson and Merrill 2002), we suggest that landscape-level changes in patterns of land use also contributed to the extirpation of black bears from Nevada (Goodrich 1990), specifically clear-cutting of forests throughout western and central Nevada (DeQuille 1947, Lord 1883, Nevada Forest Industries Committee 1963). One such example is the Comstock Lode of Virginia City in western Nevada where a 80–96-km swath of the Carson Range in the Sierra Nevada, including the Lake Tahoe Basin in Nevada and California, was clear-cut to supply wood for use in the Virginia City mines (DeQuille 1947, Nevada Forest Industries Committee 1963). The dispensation of this timber would exceed 300 cords of wood every 2 hours at various sawmills processing the logs (Knowles 1942). These clear-cutting practices occurred across the state and resulted in almost total removal of the pinyon-juniper forest canopy in sections of Nevada's interior (Sargent 1879, Young and Budy 1979). Additionally, in western Nevada alone, timber companies cleared over an estimated 190,000 acres in the area around Virginia City, Reno, and Carson City (Young and Budy 1979). As a result, historical records of black bears in western Nevada and in the state's interior declined by the turn of the century. The decline continued until the nation's dependency on fossil fuels increased post World War I; this change combined with changes in forestry practices such as wildfire control, and grazing practices resulted in the slow reforestation of some of these areas (Nevada Forest Industries Committee 1963).

We hypothesize that as this habitat regeneration took place through the 1900s (Young and Budy 1979), black bears slowly increased in abundance in the Carson Range of the Sierra Nevada mountains along the eastern shore of Lake

Table 3. Performance of Cormack–Jolly–Seber models for black bears in the Carson Front and Reno-Lake Tahoe area, Nevada during 1997–2008. Capture histories had a seasonal structure: winter, spring, summer, and fall.

| Model ^a | ΔQAIC_c^b | w_i^c | K^d | QDeviance ^e |
|---|-------------------------|---------|-------|------------------------|
| $\phi(S), P(S + \text{seas}), \text{pent}(\text{seas}), N(S)$ | 0 | 0.61 | 10 | 57.19 |
| $\phi(.), P(S + \text{seas}), \text{pent}(.), N(S)$ | 0.99 | 0.37 | 9 | 60.34 |
| $\phi(.), P(S + \text{seas}), \text{pent}(\text{seas}), N(S)$ | 7.57 | 0.01 | 12 | 60.40 |

^a Model notation as in Lebreton et al. (1992). ϕ indicates seasonal survival, P indicates capture probability, pent indicates probability of entry into the population, and N indicates total population size at the start of the study. Pent was constrained to be 0 except for the fall season to restrict entry to the fall season. S indicates the parameter was allowed to differ between the sexes and seas indicates the parameter was allowed to vary among seasons.

^b Quasi-likelihood second-order Akaike's Information Criterion.

^c Akaike model weights.

^d Number of parameters.

^e Quasi-deviance.

Tahoe in extreme western Nevada, and by 1987 bears were sufficiently common in western Nevada that NDOW began receiving and annually recording bear-human conflicts. Although we found no record of yearly complaints prior to 1987, complaints rose steadily from 1987 to present and culminated in 2007 at over 1,500. We emphasize that the lack of complaint records prior to 1987 is not because NDOW failed to keep records but rather because bear-human conflicts were almost non-existent (Goodrich 1990, Beckmann 2002). The fact that Nevada's black bear population was ignored in the published literature both geographically (absent from distribution maps) and scientifically (i.e., no rigorous studies of population size or demographics) until the late 1980s has resulted in our knowledge of this population dating back only 25 years. This seemingly rapid reoccupation of western Nevada by black bears resulted in the initiation of the current long-term study of black bears from 1997 to present (e.g., see Beckmann and Berger 2003a, b; Beckmann and Lackey 2008). Further, California Department of Fish and Game believes their black bear population has grown from an estimated 15,000 in the 1980s to over 38,000 currently, with roughly 32% of these occurring in the Sierra Nevada population along the Nevada-California state line (California Department of Fish and Game-Draft Environmental Document 2011; M. Kenyon, California Department of Fish and Game, personal communication).

Our results suggest that regeneration of the habitat and an increasing population of black bears may be contributing to the geographic expansion of the species into historical habitat in the Great Basin where bears have been absent for >80 years. We documented occupancy in these historical ranges by black bears on at least 16 occasions 1988–2012, and on 4 of these occasions bears were captured. Of the 4 bears captured by NDOW, all were in younger age-classes (2–3 years) and consisted of 3 males and 1 female. Such a small sample makes definite conclusions difficult, but 1 explanation of dispersal of young bears on the edge of their currently known range is an expanding population into unoccupied areas in search of competition-free space (Rogers 1987, Lee and Vaughn 2003, Støen et al. 2006).

Population Demographics

The black bear population in the late 1980s was estimated to be 150–290 when Beckmann (2002) extrapolated from Goodrich's (1990) density estimates to known occupied bear habitat at that time, with a sample of $n = 30$ marked bears. Beckmann and Berger (2003b) estimated the population in 2002 at 180 (± 117 ; 95% CI) with a larger sample size ($n = 99$) using closed-capture models in Program MARK. These estimates were within the range calculated from Goodrich's (1990) density data from the late 1980s although direct statistical comparisons were not possible; thus, they did not detect a change in population size based on comparisons between Goodrich's (1990) data and data over the 15-year period from 1987 to 2002 (Beckmann and Berger 2003b). Therefore, the conclusion was that the population was not increasing at that time. Using similar mark-recapture

techniques and a much larger data set ($n = 197$) from our long-term study (1997–2008), our results indicate a positive rate of change, which we interpreted as a population increase.

We addressed potential violations of key assumptions in our Pradel analysis including trap response bias (capture probability) and we believe data generally met the assumptions. One exception is the assumption that individuals were identical. Biases in estimates of λ become significant when heterogeneity in capture probabilities is large (differences >0.4 between subpopulations of individuals; Hines and Nichols 2002). Our capture probabilities were <0.2 and we therefore believe a trap bias was unlikely. However, we suspect some heterogeneity in capture probabilities because most captures were contingent on individuals having been reported as conflict bears and some individuals were transient in this state. Beckmann (2002) classified bears as conflict or wildland based on behavior characteristics and we noted a change in some bears in these behavioral patterns, particularly later in the study (2006–2008). For example, bears captured during the drought year of 2007 in conflict situations turned out to be wildland bears, based on collar data. However, heterogeneity of capture probability associated with whether bears were conflict or wildland bears does not represent a fundamentally different process than other sources of heterogeneity. Further, heterogeneity in capture probabilities can negatively bias estimates of survival (Pollock and Raveling 1982) and estimates of population size (Otis et al. 1978); therefore, we believe our estimates of population size and λ , if biased, would be low. Our estimate of \hat{c} indicates that heterogeneity and trap response was modest. Our incorporation of \hat{c} into our analyses controlled for any heterogeneity, had it existed.

Additionally, because our trapping effort was largely in response to human-bear conflicts and therefore presumably biased toward male bears, we estimated parameters of capture probability, population size, and λ separately for the 2 sexes. We found only modest support for differences in capture probabilities between the sexes (Table 2). Furthermore, in our study area, male bears were not captured more often than females in conflict situations throughout the entire course of the study, although a male bias in conflict bears occurred early on in the study (1997–2001). This sex bias in conflict bears early on was reported by Beckmann (2002), but it differed by year and in later years of the long-term study it changed from male bears to female bears, particularly in certain years (e.g., 2002, 2004, and 2007; NDOW, unpublished data). Additionally, we doubt our estimates of λ were affected by the male survival rates reported because of the polygamous nature of black bears (Taylor et al. 1987).

Our reported lambdas ($\lambda = 1.21$ and 1.14 for males and females, respectively) are a result of our reported annual survival rates and recruitment. These estimates are similar to reported estimates of lambda in other studies (Bridges 2005, Ryan 2009, Sawaya 2012). Bridges (2005), working within a shorter time period (1998–2001), reported a λ of 1.07 when both sexes were combined and acknowledged the need for long-term data sets when evaluating bear population dynamics. Brongo et al. (2005) further recognized that

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EXHIBIT 6

EXHIBIT 6

JA 0076

Nevada wildlife panel reviews bear hunt

By - Associated Press - Saturday, January 18, 2014

RENO, Nev. (AP) - The long-term viability of Nevada's black bear population "appears favorable," a panel reviewing the state's controversial bear hunt has been told.

Carl Lackey, a bear biologist for the Nevada Department of Wildlife, said the bruin population has increased from roughly 450 in 2011 to more than 500 now.

Over the same period, 39 bears have been killed by hunters in Nevada. The annual limit has been set at 20 bears but that has never been reached.

The special Nevada wildlife commission panel met Friday to review the first three years of the bear hunt and plans to meet again on Feb. 21. The review of the hunt was required under legislation passed by the 2013 Legislature.

Wildlife department spokesman Chris Healy said the panel will make recommendations about the hunt to the wildlife commission, which is moving ahead with plans to continue it.

The committee can either recommend changing rules governing the hunt or leave them alone, Healy said, but the wildlife commission has the ultimate say.

Department staff is recommending the hunt go forward under the same rules as last year.

Plans call for the wildlife commission to set dates for the hunting season in early February and to set a quota in May for the number of bears that can be killed.

Hunting seasons and quotas for other big-game wildlife will be considered at the same time.

Friday's meeting began with a report from Lackey on how the bear hunt has gone so far and how it fits into the department's overall bear management plan.

Wildlife Commissioner Jack Robb of Reno, a member of the bear committee, told the Reno Gazette-Journal that a limited hunt is likely justified as long as Nevada's bear population is stable and growing.

"From all indications, we do have a healthy bear population in the state of Nevada," Robb said, adding the department uses a science-based approach to manage Nevada's wildlife.

But committee member Kathryn Bricker, executive director of NoBearHuntNV, criticized the wildlife commission for supporting the hunt despite widespread opposition by the public.

"The larger question in all this is should we have a hunt, and that question has been avoided," she told the Gazette-Journal, adding the commission continues to bend to the desires of hunters.

Bricker called for a ban on the use of dogs by bear hunters, a proposal rejected by commissioners last year.

EXHIBIT 7

EXHIBIT 7

Pneu-Dart used With Bears & the Nevada Department of Wildlife



Pneu-Dart used With Bears & the Nevada Department of Wildlife from Pneu-Dart on Vimeo.

Carl Lackey, Wildlife Biologist with the Nevada Department of Wildlife, demonstrates how he uses Pneu-Dart drug delivery systems when responding to human-bear conflict calls and/or when conducting bear research during the winter.

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10 Attorneys for Defendant:
11 MARK E. SMITH, an individual¹

12 **SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA**

13 **IN AND FOR WASHOE COUNTY**

14 CARL LACKEY,) **Case No.: CV17-00434**
15)
Plaintiff,) **Dept. No.: 4**
16)
17 vs.)
18)
BEAR LEAGUE, etc., et al.,)
19)
Defendants.)
20)

21 **DECLARATION OF MARK E. SMITH**
IN SUPPORT OF SPECIAL MOTION TO DISMISS/MOTION TO DISMISS

22 I, MARK E. SMITH, hereby declare:

23 1. I am one of the defendants in this matter. I have personal knowledge of the facts
24

25 ¹ Erroneously named as MARK E. SMITH an individual and dba LAKE TAHOE WALL OF SHAME.

1 stated in this declaration and, if called as a witness, could and would testify competently to the
2 truth of the facts stated herein. I make this declaration in support of Defendant's Motion to
3 Dismiss.

4 2. I was named herein erroneously as MARK E. SMITH, an individual dba LAKE
5 TAHOE WALL OF SHAME.

6 3. I am neither the creator nor an administrator for LAKE TAHOE WALL OF
7 SHAME's Facebook page.

8 4. I am also not responsible for the management of content on the LAKE TAHOE
9 WALL OF SHAME Facebook page.

10 5. I had no role in drafting or publishing the comment of Sean Sarsfield on the LAKE
11 TAHOE WALL OF SHAME Facebook page identified in the First Amended Complaint in ¶ 14p.
12 In fact, I was not even aware of the comment until I became aware of this lawsuit.

13 6. I have never worked in concert with any of the other defendants in this lawsuit
14 with the goal to harass or threaten LACKEY. I have also never worked in concert with any of
15 the other defendants in this lawsuit with the goal of causing LACKEY fear, anxiety,
16 embarrassment or damage to his reputation.

17 I declare under penalty of perjury under the laws of the State of Nevada that the foregoing
18 is true and correct.

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

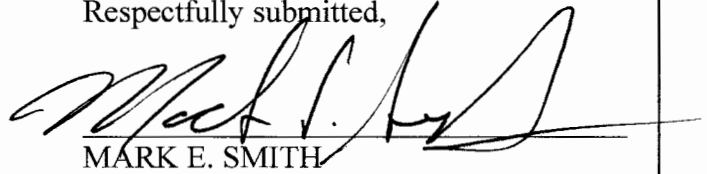
25 ///

AFFIRMATION

The undersigned does hereby affirm that the preceding document does not contain the personal information of any person.

Dated: June 1, 2017

Respectfully submitted,


MARK E. SMITH

CERTIFICATE OF SERVICE

I am employed in the City of Reno, County of Washoe, State of Nevada by the law offices of MOLSBY & BORDNER, LLP. My business address is 6380 Mae Anne Avenue, Suite 7, Reno, Nevada 89523. I am over the age of 18 years and not a party to this action. On June 5, 2017, I served the following document: **DECLARATION OF MARK E. SMITH IN SUPPORT OF SPECIAL MOTION TO DISMISS/MOTION TO DISMISS** in the manner described below:

| | |
|----------|--|
| | BY FAX: by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. |
| | BY HAND: by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below. |
| | BY MAIL: by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Reno, Nevada addressed as set forth below. |
| | BY OVERNIGHT MAIL: by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day. |
| | BY PERSONAL DELIVERY: by causing personal delivery via courier of the document(s) listed above to the person(s) at the address(es) set forth below. |
| X | BY ECF FILING: by causing the document(s) to be electronically served via the court's electronic filing system to the following attorneys associated with this case. |

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I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

/s/ Melissa M. Paschal, CP
Melissa M. Paschal, CP

2645

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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,

vs.

Case No.: CV17-00434

Dept. No.:4

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

Defendants.

**PLAINTIFF CARL LACKEY'S OPPOSITION TO DEFENDANT MARK E. SMITH'S
SPECIAL MOTION TO DISMISS/MOTION TO DISMISS**

Plaintiff Carl Lackey opposes Defendant Mark E. Smith's *Special Motion to Dismiss/Motion to Dismiss* ("Motion") and submits the following Memorandum of Points and Authorities and attached exhibits in support of his opposition.

///

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This action arises out of Defendants' outrageous, harassing, intimidating and threatening
4 conduct towards Plaintiff, an innocent third party in Defendants' crusade to change the way the
5 Nevada Department of Wildlife ("NDOW") deals with problem bears in the Lake Tahoe area.
6 Defendant Smith's Motion is predicated upon the following grounds: (1) Nevada's anti-SLAPP¹
7 statutes mandate dismissal of all claims against him; (2) the Communications Decency Act
8 ("CDA") as codified in 42 U.S.C. § 230 immunizes Defendant Smith from liability; (3) Plaintiff is
9 a public figure; and (4) Plaintiff's claims for relief cannot survive an NRCP 12(b) motion to
10 dismiss. Neither the facts nor case law support any of these asserted grounds.

11 **II. STATEMENT OF FACTS**

12 Plaintiff is employed as a Biologist III by the NDOW. First Amendment Complaint
13 ("FAC") ¶ 7. NDOW's Biologist III duties are to "manipulate fish and wildlife populations and
14 habitats by introducing species into suitable habitats consistent with biological and social
15 constraints; bait and trap, tranquilize, radio collar or band wildlife and transport to selected
16 locations" and "investigate and assess damage caused by wildlife upon private property and public
17 lands; recommend appropriate courses of action to mitigate or resolve the problem." Id. ¶ 8.
18 Citizens are encouraged to contact the NDOW when there is a human-bear conflict. Id. ¶ 10.
19 Defendant Smith does business as Defendant Lake Tahoe Wall of Shame and is essentially its
20 voice. Id. ¶ 4.

21 In the course and scope of performing his employment duties, Plaintiff has become the
22 victim of continuing vicious online and in person threatening and harassing conduct from members
23 of Defendant Bear League and the online forums Lake Tahoe Wall of Shame, NDOW Watch
24 Keeping Them Transparent, and Bear League. Id. ¶ 11. Defendant Bear League volunteers and
25 members of the online forums Lake Tahoe Wall of Shame and NDOW Watch Keeping Them
26

27 ¹ SLAPP is an acronym for "strategic lawsuit against public participation".
28

Transparent have made and continue to make false statements regarding Plaintiff's character in a vicious and calculated effort to damage his reputation and jeopardize his employment. Id. ¶ 12. Defendants Bear League, Lake Tahoe Wall of Shame, and NDOW Watch Keeping Them Transparent have and continue to initiate public common threads on their public Facebook pages and other Facebook pages slandering Plaintiff in his official capacity as a state employee and urging and encouraging the public at large to shame and harass him. Id. ¶ 13.

The FAC alleges and the posts show that Defendants published false and vicious comments about Plaintiff rising to the level of slander per se by accusing Plaintiff of criminal conduct and attacking his livelihood, including allegations that Plaintiff purportedly accepted payments from hunters to disclose locations of bears, purportedly accepted payments from hunters to place bears in hunt zones and allegedly conspired with others to commit illegal acts. See generally FAC ¶¶ 14, 19. One outrageous post even accuses Plaintiff of murdering his first wife. Defendants egregiously contend that their slander per se accusations and statements inciting violence are somehow protected by the First Amendment. The First Amendment simply does not protect Defendants' perverse statements and accusations.

Many of these published comments incite violence or illegal conduct. *See, e.g., id.* ¶ 14.z. (post suggests that Plaintiff should be assassinated); *see also* Date unknown Post from Victoria LeDoux Serpa ("time for a assassination"); May 21, 2013 Post from Lake Tahoe Wall of Shame ("we Must rid Nevada of this monster who lives and is paid to kill bears"); July 4, [year unknown] Post from Carolyn D. Bennett Ford ("Carl Lackey is disgrace!! I wish someone would shoot him with a tranquilizer and let him see how it feels!"); June 22, [year unknown] Post from Cindy Pollard McAyeal ("I agree lackey needs to be darted in a trap and driven far far away. hard release. bring in the dogs shot guns pellet bags rock salt."); April 17, [year unknown] Post from Kathy Compton ("Lets put both of them [referring to Plaintiff and his wife] in the trap."); Date Unknown Post from Sunni Enciso ("I would rather see human traps, and get them out of the bears backyard"); Date Unknown Post from Jayne Forman (in response to a post where someone reported seeing a truck carrying a bear trap, Ms. Forman posted the following: ". . . Should have run it off the road

. . ."); Date Unknown Post from Dave Waltz ("Wonder what happens if these traps get vandalized??"); August 23, [year unknown] Post from Carolyn D Bennett Ford ("Carl Lackey needs to be relocated, preferably to someplace HOT for eternity!!!!"); August 24, [year unknown] Post from Edward Wodeshick ("Let's use Carl as bait"); August 24, [year unknown] Post from Vicki Brown ("How about putting Carl lackey in that trap and roll it into bear territory"); August 24, [year unknown] Post from Aaron Jones ("I'd love to run into Carl at a bar. I'll ram a fist full of marshmallows and a pie up his backside, tie him to a trailer and let the bears climb on in, then take him to Iraq and drop him off in a hunting zone"); August 24, [year unknown] Post from Jillian Torrez ("Can we push this trap into the forest and light it on fire?!! . . ."); August 24, [year unknown] Post from Lorene Cole ("Let's trap Carl Lackey and ship him off!"), collectively **Exhibit 1** hereto.

Significantly, a number of the posts inciting violence or illegal conduct were posted on Defendant Lake Tahoe Wall of Shame's Facebook page. *See, e.g.*, July 4, [year unknown] Post from Carolyn D. Bennett Ford ("Carl Lackey is a disgrace!! I wish someone would shoot him with tranquilizer's and let him see how it feels!!!"); May 17, 2013 Post from Ava Sands ("Oh please beat the crap out of this guy."); May 18, 2013 Post from Cheryl Gibson (" . . . Need to put Lackey and the guy who killed Sunny in a firing squad and start shooting!"); May 23, 2013 Post from Janis Hallert (" . . . This poor excuse of a man, needs to be taken out!! Way out, . . ."); May 30, 2013 Post from Cheryl Gibson ("I just want someone to put Carl Lackey out of our misery!"); June 21, [year unknown] Post from Patricia Miller ("Has anyone thought of the obvious? Relocate Carl Lackey . . ."); June 22, [year unknown] Post from Cindy Pollard McAyeal (" . . . I agree lackey needs to be darted in a trap and driven far far away. hard release. bring in the dogs shot guns pellet bags rock salt. . ."); June 21, [year unknown] Post from Mary Morton-Johnson " . . . Lackey has to be stopped, removed, relocated! What an idiot!!!!"), collectively **Exhibit 2**.

Plaintiff brought suit against Defendants Carolyn Stark, Bear League, Anne Bryant, Mark E. Smith, NDOW Watch Keeping Them Transparent and Lake Tahoe Wall of Shame asserting defamation, intentional infliction of emotional distress, negligent infliction of emotional distress

1 and civil conspiracy claims. See generally FAC. Defendant Smith filed the instant Motion seeking
2 dismissal of Plaintiff's claims on the grounds that the statements are protected under Nevada's
3 anti-SLAPP statutes as the statements were communications purportedly made in direct connection
4 with an issue of public interest in a place open to the public or in a public forum. Defendant Smith
5 further seeks dismissal based upon NRCF 12(b)(5). Defendant Smith's reliance upon these
6 theories are entirely misplaced.

7 The Motion is also predicated upon the erroneous assertion that the FAC contains no
8 allegations that Defendant Smith made any postings on Facebook. To support this incorrect
9 contention, Defendant Smith provides a declaration stating that he is neither the creator nor the
10 administrator of Defendant Lake Tahoe Wall of Shame's Facebook page. See Exhibit 1 ¶ 3 to
11 Motion. Defendant Smith also states that he is not responsible for the management of the content
12 on the Facebook page. Id. ¶ 4. Lastly, he states that he had no role in drafting or publishing the
13 comment from Sean Sarsfield as set forth in the FAC. Id. ¶ 5.

14 Conspicuously absent from Defendant Smith's declaration, however, are any statements
15 that the posts from Defendant Lake Tahoe Wall of Shame on its own Facebook page were not
16 authored by him but were authored by someone else. See generally Id. The fact that he may not
17 have created the Facebook page, administrates it or manages its content does not mean that he did
18 not author the posts from Lake Tahoe Wall of Shame, particularly those discussed herein.

19 It is Plaintiff's position that Defendant Smith and Defendant Lake Tahoe Wall of Shame
20 are one and the same. Defendant Smith is the face and the voice of Defendant Lake Tahoe Wall
21 of Shame. In other words, Defendant Smith and Defendant Lake Tahoe Wall of Shame are
22 synonymous with each other.² See, e.g., May 18, 2013 Post of a Picture from Defendant Lake
23 Tahoe Wall of Shame Showing a Copyright Belonging to Defendant Mark E. Smith and "Tensions
24 high over Tahoe bears" by Tom Knudson from the Sacramento Bee October 13, 2013 (article
25 indicates that Defendant Smith and Defendant Lake Tahoe Wall of Shame are one and the same:
26 "Mark Smith, an Incline Village mining consultant who rallies bear lovers to trap sites on a website
27

28 ² Defendant Smith and Defendant Lake Tahoe Wall of Shame will be used interchangeably herein.

called the Lake Tahoe Wall of Shame, said citizen action is crucial."), collectively **Exhibit 3**. If this Court concludes that the FAC is deficient in this regard, Plaintiff seeks leave to amend his complaint accordingly.

III. STANDARDS FOR DISMISSAL

It is axiomatic that to withstand a motion to dismiss, Plaintiff is *not* required to provide evidence of or prove the truthfulness of his allegations. *See Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).³ In assessing the legal feasibility of Plaintiff's claims, this Court should not assay the weight of the evidence that might support the requested dismissal. *See Id.*, 181 P.3d at 672.

In ruling on the instant motion to dismiss, this Court must accept the allegations as true and the FAC may not be dismissed unless it appears beyond a doubt that Plaintiff can prove no set of facts in support of claims that would entitle him to relief. *See, e.g., Bermann v. Boyce*, 109 Nev. 670, 856 P.2d 560 (1993); *Edgar v. Wagner*, 101 Nev. 226, 699 P.2d 110 (1985); *Zalk-Josephs Co. v. Wells Cargo, Inc.*, 81 Nev. 163, 400 P.2d 621 (1965). Because motions to dismiss are disfavored, all doubts must be resolved in favor of Plaintiff. *See, e.g., Simpson v. Mars Inc.*, 113 Nev. 188, 929 P.2d 966 (1997).

If this Court considers documents presented by the parties outside of the pleadings, then this Court would treat the *Motion* as one for summary judgment. *See, e.g., MacDonald v. Kassel*,

³Plaintiff's FAC does not allege every factual act and omission by Defendants that gave rise to the action. Rather, Plaintiff simply pled general facts sufficient to place Defendants on notice of the claims against them. Nevada is a notice pleading state. NRCP 8(a); *Chavez v. Robberson Steel Company*, 94 Nev. 597, 599 (1978) ("Nevada is a notice pleading jurisdiction and liberally construes pleadings to place into issue matter which is fairly noticed to the adverse party."). A complaint is sufficient so long as it gives the defendant fair notice of the nature and basis of the claims being asserted. *Crucil v. Carson City*, 95 Nev. 583 (1979). A plaintiff is only required to provide a short and plain statement of his claim showing that he is entitled to relief. Thereafter, the defendant may use discovery mechanisms, such as interrogatories, to ascertain more details regarding the complaint allegations. *Remick v. Manfredy*, 238 F.3d 248 (3^d Cir. 2001); *Starks v. Northeast Ill. Reg'l Commuter R.R. Corp.*, 245 F. Supp. 2d 896 (N.D. Ill. 2003)(Rule 8 does not require plaintiff to plead facts, legal theories, cases or statutes, but merely to describe his claims briefly and simply - defendant may then ferret out case through interrogatories). The notice pleading system established by Rule 8 of the Federal Rules of Civil Procedure, from which NRCP 8 was derived, does not require the plaintiff to plead facts or legal theories. *Nance v. Vieregge*, 147 F.3d 589 (7th Cir. 1998). A complaint is sufficient to withstand a motion to dismiss if there is any set of facts, consistent with the allegations, under which relief could be granted. *Id.* In other words, Plaintiff does not have to prove anything by a preponderance of the evidence in the FAC, especially claims that could not be protected by NRS 41.660 (Nevada's anti-SLAPP legislation), such as claims for defamation.

1 97 Nev. 305, 629 P.2d 1200 (1981). Under this standard, dismissal of Plaintiff's claims against
2 Defendant Smith is also inappropriate.

3 The Nevada Supreme Court has held that summary judgment should not be used as a
4 "shortcut" to resolve disputes upon facts material to the determination of the case. *See, e.g., Sierra*
5 *Nev. Stagelines v. Rossi*, 111 Nev. 360, 892 P.2d 592 (1995); *Parman v. Petricciani*, 70 Nev. 427,
6 272 P.2d 492 (1954). For this reason, the district courts must take great care in granting a motion
7 for summary judgment. *Posadas v. City of Reno*, 109 Nev. 448, 851 P.2d 438 (1993); *Johnson v.*
8 *Steel, Inc.*, 100 Nev. 181, 678 P.2d 676 (1984).

9 When reviewing a motion for summary judgment, "the evidence, and any reasonable
10 inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." *Wood*
11 *v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). In fact, this Court is obligated
12 to accept as true all evidence favorable to Plaintiff. *See, e.g., Hidden Wells Ranch, Inc. v. Strip*
13 *Realty, Inc.*, 83 Nev. 143, 425 P.2d 599 (1967). And, in doing so, it is clear that questions of fact
14 remain.

15 IV. DISCUSSION

16 A. Nevada's Anti-SLAPP Statutes Protect Only a Defendant's First Amendment Free 17 Speech Rights and Not Threats and "Fighting Words".

18 A "strategic lawsuit against public participation suit" is a lawsuit that a party initiates to
19 chill a defendant's exercise of his First Amendment free speech rights. *Stubbs v. Strickland*, __
20 Nev. __, 297 P.3d 236 (2013). If the declared speech is illegal as a matter of law, then that speech
21 is not protected by Nevada's anti-SLAPP statutes. *Id.*, 297 P.3d at 236; *see also Flatley v. Mauro*,
22 139 P.3d 2 (Cal. 2006)(holding declared speech or petitioning activities that are illegal as a matter
23 of law are not protected by anti-SLAPP statute).⁴ That is unequivocally the case here.

24 Not all speech and petition activities are constitutionally protected. *See, e.g., United States*
25 *v. Alvarez*, 132 S. Ct. 2537, 2544 (2012). Obscenity, libel and "fighting words" have long been

26 _____
27 ⁴In *Shapiro v. Welt*, the Nevada Supreme Court adopted California's guiding principles for what distinguishes a "public
28 interest" from a private one for purposes of Nevada's anti-SLAPP statute and therefore one could conclude that the
Nevada Supreme Court finds California case law persuasive. __ Nev. __, 389 P.3d 262 (2017).

1 recognized as falling outside the scope of the First Amendment protection because they lack any
2 social value. *Id.*

3 [I]t is well understood that the right of free speech is not absolute at all times and
4 under all circumstances. There are certain well-defined and narrowly limited
5 classes of speech, the prevention and punishment of which have never been thought
6 to raise any Constitutional problem. These include the lewd and obscene, the
7 profane, the libelous, and the insulting or "fighting" words . . . It has been well
8 observed that such utterances are no essential part of any exposition of ideas, and
9 are of such slight social value as a step to truth that any benefit that may be derived
10 from them is clearly outweighed by the social interest in order and morality.

11 *Chapinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942).

12 In other words, if the subject communication is such that a reasonable person would
13 perceive it as a threat to cause him harm or it could incite others to cause harm, it is not subject to
14 First Amendment protection. In *D.C. v. R.R.*, the California Court of Appeals was called upon to
15 determine if California's anti-SLAPP statutes applied to threaten cyber-bullying statements by
16 high school students toward another student they believed to be gay. 106 Cal. Rptr. 3rd 399 (2010).

17 The victim student and his parents filed an action against the perpetrators for violations of
18 California's hate crime statute, defamation and intentional infliction of emotional distress. *Id.* at
19 405. In response, one of the defendants filed an anti-SLAPP motion to dismiss. *Id.*

20 In denying the defendant's motion to dismiss, the court set out a detailed and well-reasoned
21 discussion of the application of California's anti-SLAPP statutes and First Amendment free speech
22 rights to speech involving threats and incitement:

23 [T]he *First Amendment* does not protect true threats--"statements where the speaker
24 means to communicate a serious expression of an intent to commit an act of
25 unlawful violence to a particular individual or group of individuals." *Virginia v.*
26 *Black*, 538 U.S. 343, 358-360 (2003) "The speaker **need not actually intend to**
27 **carry out the threat.**" *Id.* "A true threat is a serious one, not uttered in jest, idle
28 talk, or political argument." *U.S. v. Fuller*, 387 F.3d 643, 646 (7th Cir. 2004).

Id. at 419 (emphasis added).

The court noted that an **objective standard** is applied to determine if a statement is a "true
threat" unworthy of protection.

"In the context of a threat of physical violence, '[w]hether a particular statement
may properly be considered to be a threat is governed by an **objective standard**--

1 whether a reasonable person would foresee that the statement would be interpreted
2 by those to whom the maker communicates the statement as a serious expression
3 of intent to harm or assault. . . . Although a threat must be distinguished from what
4 is constitutionally protected speech ... this is not a case involving statements with a
5 political message. A true threat, where a reasonable person would foresee that the
6 listener will believe he will be subjected to physical violence upon his person, is
7 unprotected by the *first amendment*.' ... Moreover, '**[a]lleged threats should be
8 considered in light of their entire factual context, including the surrounding
9 events and reaction of the listeners.**' . . ."

Under an objective standard, the court's inquiry focuses on whether a reasonable person would foresee that the speaker's or author's statement would be interpreted by the recipient as a serious expression of intent to inflict bodily harm.

8 *Id.* (emphasis added)(citations omitted); *see also Uss-Posco Industries v. Edwards*, 111 Cal. App.
9 4th 436, 444 - 446 (Ca. Ct. App. 2003)(First Amendment does not protect threats that cause
10 listeners to fear for their safety); *Planned Parenthood v. American Coalition of Life Activists et al*,
11 290 F. 3d 1058, 1070 (9th Cir. 2002)(“while advocating violence is protected, threatening a person
12 with violence is not”)(citations omitted).

13 In *Planned Parenthood*, the court noted that “a true threat, that is one ‘where a reasonable
14 person would foresee that the listener will believe he will be subjected to physical violence upon
15 his person, is unprotected by the *First Amendment*.’” *Planned Parenthood*, 290 F. 3d at 1075
16 (citations omitted). “[A] true threat is: a statement which, in the **entire context and under all
17 circumstances**, a reasonable person would foresee would be interpreted by those to whom the
18 statement is communicated as a serious expression of intent to inflict bodily harm upon that
19 person.” *Id.* at 1077(emphasis added)(citations omitted). The court further noted that “it is not
20 necessary that the defendant intend to, or be able to carry out his threat; the only intent requirement
21 for a true threat is that the defendant intentionally or knowingly communicate the threat.” *Id.*
22 (citations omitted).

23 Whether the communication is a “true threat” is for the trier of fact to determine. *Id.* at
24 1069 (citations omitted). “Thus, it is a jury question whether actions and communications are
25 clearly outside the ambit of *First Amendment* protection.” *Id.* (citations omitted).

26 Under this rubric, it is indisputable that the First Amendment does not protect the subject
27 communication and that they are a “true threat”. Pursuant to the objective standard for true threats,
28

1 when Defendants' actions and statements are considered under the “**entire context and under all**
2 **circumstances**” it is undeniable that a reasonable person would interpret the statements as
3 conveying a serious intent for defendants to cause physical harm to Plaintiff or that they were
4 inciting others to inflict physical harm on Plaintiff. *See generally Exhibits 1 and 2; see also* FAC
5 ¶ 14.z. These posts, along with a photo showing Plaintiff's home address, undeniably establish
6 that a reasonable person would interpret the statements and the posting of Plaintiff's address as
7 conveying a serious intent for Defendants to cause physical harm to Plaintiff or that they were
8 inciting others to inflict physical harm on Plaintiff. FAC ¶ 14.v.

9 Defendants knew or should have known that these threatening posts, coupled with the
10 posts by various individuals on Defendant Lake Tahoe Wall of Shame's Facebook Page
11 encouraging everyone to post pictures of Plaintiff's wife and their children, would incite their
12 followers to take action against Plaintiff. *See* Unknown Dated Postings, **Exhibit 4**; *see also*
13 Unknown Date Post on Defendant Lake Tahoe Wall of Shame's Facebook Page posting pictures
14 of Plaintiff and his children with a bear, **Exhibit 5**.

15 In fact, Defendant Smith's own post on Defendant Lake Tahoe Wall of Shame's Facebook
16 specifically encouraged the harassing and threatening posts:

17 We've found that reporting bad acts by NDOW employees never results in action.
18 But exposing them to public scrutiny gets the attention of senior NDOW
19 management and sometimes even Governor Sandoval's office. This is one of the
core reasons that the Wall of Shame was created.

20 Date Unknown Post from Defendant Lake Tahoe Wall of Shame, **Exhibit 6**; *see also* Defendant
21 Lake Tahoe Wall of Shame's Posts specifically encouraging and thanking individuals for posting
22 harassing and bullying statements and photographs about Plaintiff, **Exhibit 7**.

23 The overwhelming evidence, when “**considered in light of their entire factual context,**
24 **including the surrounding events and reaction of the listeners**” supports the conclusion that a
25 reasonable person would foresee that Defendants’ statements and conduct would be viewed as a
26 threat of bodily harm or would incite others to cause Plaintiff bodily harm. Accordingly, Defendant
27
28

1 Smith cannot make a sufficient showing of First Amendment protection under an objective
2 standard for identifying true threats.

3 For these reasons alone, this Court should deny in its entirety Defendant Smith's Motion.
4 Even assuming this Court could conclude that the declared speech falls within the First
5 Amendment protections, Nevada's anti-SLAPP statutes still have no application as a matter of law.

6 **B. Legal Standard Applicable to an Anti-SLAPP Motion to Dismiss.**

7 Nevada's anti-SLAPP statutes apply to "[g]ood faith communication in furtherance of the
8 right to petition or the right to free speech in direct connection with an issue of public concern"
9 and defines such communication as any "[c]ommunication made in direct connection with an issue
10 of public interest in a place open to the public or in a public forum, **which is truthful or is made**
11 **without knowledge of its falsehood.**" *NRS 41.637(4)* (emphasis added). Nevada's anti-SLAPP
12 statutes permit a defendant to file a special motion to dismiss. *NRS 41.660*.

13 The standard for dismissal under Nevada's anti-SLAPP statutes, however, is different from
14 that applicable to a standard NRCP 12(b) motion. A motion to dismiss based upon Nevada's anti-
15 SLAPP statutes involves a two-part test. *NRS 41.660(3)*.

16 The first part requires Defendant Smith to show "by a preponderance of the evidence, that
17 the claim is based upon a good faith communication in furtherance of the right to petition or the
18 right to free speech in direct connection with an issue of public concern . . ." *NRS 41.660(3)(a)*.
19 Defendant Smith cannot make this initial showing with any evidence, let alone a preponderance
20 of the evidence.

21 If Defendant Smith makes this initial showing, the burden shifts to Plaintiff to show "with
22 prima facie evidence a probability of prevailing on the claims." *NRS 41.660(3)(b)*. Assuming,
23 *arguendo*, Defendant Smith can make the initial showing, Plaintiff can show with prima facie
24 evidence a probability of prevailing on his claims.

25 **C. Issue of Public Interest.**

26 Because the Nevada Supreme Court has yet to determine what constitutes "an issue of
27 public interest" as contemplated by the anti-SLAPP statutes, the court in *Shapiro*, "look[ed] to
28

California law for guidance on this issue" and "adopt[ed] California's guiding principles, as enunciated in *Piping Rock Partners, Inc. v. David Lerner Assocs., Inc.*, 946 F. Supp.2d 957, 968 (N.D. Cal. 2013), for determining whether an issue is of public interest under NRS 41.637(4)." ___ Nev. at ___, 389 P.3d at 268. In doing so, the court adopted the following guiding principles.

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

Id., 389 P.3d at 268 (citing *Piping Rocks Partners*, 946 F. Supp.2d at 968).

Once the court determines that the issue is of public interest, it must next determine whether the communication was made "in a place open to the public or in a public forum." *NRS 41.637*. *Id.*, 389 P.3d at 268 (citing *NRS 41.637*). "Finally, no communication falls within the purview of *NRS 41.660* unless it is 'truthful of or made without knowledge of its falsehood.'" *Id.*, 389 P.3d at 268 (citing *NRS 41.637*).

In analyzing the statements at issue and as pled in the FAC, this Court is compelled to conclude that the statements simply do not involve an issue of public interest as contemplated by *NRS 41.637*. "“In evaluating the first [step] of the anti-SLAPP statute, we must focus on ‘the *specific nature of the speech* rather than the generalities that might be abstracted from it. . . .’”” *D.C.*, 106 Cal. Rptr.3d at 418 (brackets in original)(emphasis in original). In other words, the Court must look at the specific speech, not simply the fact that it may have some remote relationship to a public concern.

Defendant Smith claims that the harassing communications regarding Plaintiff are protected because they are a matter of public concern and Defendants have a right to petition for a

1 change in the manner in which black bears are handled by the State of Nevada. Defendants'
2 statements directed at Plaintiff giving rise to this action are unrelated to a public concern.

3 First, the subject speech only involves a matter of concern to a relatively small specific
4 audience - Defendant Bear League, Wall of Shame and NDOW Watch Keeping Them Transparent
5 followers. As such, it cannot be a matter of public interest.

6 As noted above, in order for communications to enjoy First Amendment protection, "there
7 should be **some degree of closeness** between the challenged statements and the asserted public
8 interest." *Shapiro*, ___ Nev. at ___, 389 P.3d at 268. The subject communications are directed at
9 Plaintiff, who was simply performing his duties as an NDOW's Biologist III to "manipulate fish
10 and wildlife populations and habitats by introducing species into suitable habitats consistent with
11 biological and social constraints; bait and trap, tranquilize, radio collar or band wildlife and
12 transport to selected locations" and "investigate and assess damage caused by wildlife upon private
13 property and public lands; recommend appropriate courses of action to mitigate or resolve the
14 problem." FAC ¶ 8.

15 As an NDOW Biologist III, Plaintiff "is under the supervision of a Biologist IV who is
16 responsible to, among other things, 'direct the operation of wildlife programs' and 'train, supervise,
17 and evaluate the performance of assigned personnel,' and 'assign and review work' involving game,
18 non-game, fish, botanical, and habit within a region." *Id.* ¶ 9. As a Biologist III, Plaintiff has no
19 ability to change the law or the manner in which NDOW directs the operation of wildlife programs.

20 Moreover, the communications posted on Defendant Lake Tahoe Wall of Shame's
21 Facebook Page falsely accused Plaintiff of corruption, illegally torturing and killing the bears, and
22 most disturbingly of all, incited and encouraged violence towards Plaintiff. *Id.* ¶ 14; *see also* May
23 18, 2013 Post from Debbie Glantz ("Which bear is this the dead one??? That Carl Lackey
24 murdered????"); May 21, 2013 Post from Defendant Lake Tahoe Wall of Shame ("... The Killing
25 MUST stop!"); Unknown Date Post from Linda Larson Amundson ("These pictures have to be
26 illegal . . ."); Unknown Date Post from Defendant Lake Tahoe Wall of Shame ("At a minimum
27 they violate both the rules of his employment . . . and NDOW rules . . ."); and Unknown Date Post
28

1 from Defendant Lake Tahoe Wall of Shame on Defendant NDOW Watch Keeping Them
2 Transparent's Facebook Page (" . . .It seems everyone but NDOW knows that this is wrong.");
3 Unknown Date Post from Lillian Mae Lang ("He is despicable and should be removed from his
4 job . . . Immediately . . . He is a murderer . . ."); Unknown Date Post from Danielle Prichard ("Wtf?
5 This Lackey guy has crossed the line many times . . ."), collectively **Exhibit 8**. There is even a
6 post on Defendant Bear League's Facebook that accuses Plaintiff of murdering his first wife: ". .
7 .There is evidence that Lackey 'accidentally' killed his first wife. ('accidentally' . . . ummmm,
8 where have we heard that before with deaths he's caused?", **Exhibit 9**.

9 In addition to falsely accusing Plaintiff of illegal activity, Defendant Smith also encouraged
10 others to post information on Plaintiff so that a "psychological profile" could be prepared on
11 Plaintiff so that Defendants can acquire a better understanding of "what makes [Plaintiff] tick":

12 . . . [I]n fact the profiler wants to hear feedback from people who know him better
13 so that the profile can be improved. There is zero chance Lackey will submit to a
14 proper psych interview so this is the only reasonable way a profile can be done;
15 understanding what makes him tick should help us interact with him. Those of us
16 who know him well see a lot of truth in this profile, as the post from The BEAR
League attests. So while you might call it a crock, those of us that must work with
or around him are finding it both accurate and helpful.

17 Undated Post from Defendant Lake Tahoe Wall of Shame, **Exhibit 10**. This is nothing more than
18 harassment and bullying.

19 These posts accusing Plaintiff of corruption and illegal activity, including allegedly killing
20 his first wife, the posts inciting violence, along with posts by various individuals on Defendant
21 Lake Tahoe Wall of Shame's Facebook Page encouraging everyone to post pictures of Plaintiff's
22 wife and their children, cannot as a matter of law involve an issue of public interest. *See Exhibits*
23 **4 and 5**. Accusing Plaintiff of corruption and illegally torturing and killing bears and his first wife
24 in addition with threatening both violence and murder towards him has absolutely no "degree of
25 closeness" to Defendants' claimed "public concern". Instead, the focus of Defendants' conduct
26 was "**a mere effort to gather ammunition for another round of private controversy . . .**"

1 *Shapiro*, __ Nev. at __, 389 P.3d at 268 (emphasis added). That private controversy is nothing
2 more than harassing and defaming Plaintiff and inciting violence against him.

3 Because Defendant Smith cannot establish that the subject communications involve a
4 matter of public interest, the communications do not, as a matter of law, fall within the purview of
5 Nevada's anti-SLAPP statutes and dismissal is not warranted. Even assuming that this Court could
6 conclude that the harassing and defaming statements of and concerning Plaintiff and statements
7 encouraging violence, including killing Plaintiff, involve a matter of public interest, Defendant
8 Smith cannot show that the subject communications are truthful or made without knowledge of
9 their falsehood to justify dismissal.

10 **D. Defamatory Communications Are Not Protected.**

11 In light of the clear language of the statute, the Nevada Supreme Court concluded that "no
12 communication falls within the purview of [Nevada's anti-SLAPP] unless it is **"truthful or is
13 made without knowledge of its falsehood."** *Shapiro*, __ Nev. at __, 389 P.3d at 268 (emphasis
14 added). The FAC alleges that Defendants published false and vicious comments accusing Plaintiff
15 of criminal conduct (including accepting and conspiracy to commit illegal acts). FAC ¶¶ 14, 19.
16 Defendants further accused Plaintiff of murder. *Id.* One post even accused Plaintiff of allegedly
17 murdering his first wife and falsely claiming that it was an accident. **Exhibit 9.**

18 First, as an employee with NDOW, Plaintiff was merely performing his employment
19 duties. Second, there is absolutely no evidence, and Defendants cannot proffer any, that Plaintiff
20 purportedly accepted any bribes or conspired with others to commit illegal acts. Third, Plaintiff
21 could not be a murderer as a matter of law where only bears are involved and not humans; and
22 murder is the unlawful taking of a human life. As for the accusation that Plaintiff allegedly
23 murdered his first wife, there is absolutely no evidence to support this horrific accusation.

24 Notably, Defendants were fully aware of these facts when they published the false
25 statements. Nevertheless, Defendants published the false statements. At a minimum, Defendants
26 failed to take any steps to investigate the truthfulness of their statements.

1 Based upon the foregoing, Defendant Smith may not invoke Nevada's anti-SLAPP statutes'
2 protections because the subject communications do not arise from protected speech. Plaintiff's
3 defamation claim arises out of contentions that some of Defendants' statements were false and
4 defamatory. Defendants' Motion must be denied as Nevada's anti-SLAPP statutes and the First
5 Amendment do not protect defamatory statements.

6 **E. Defendants' Speech Is Not Protected by the First Amendment as It Violated the**
7 **Federal Stalking Statutes as Codified in 18 U.S.C. § 2261A.**

8 18 U.S.C. § 2261A provides, in pertinent part:

9 Whoever--

10 (1) travels in interstate . . . of the United States, . . . with the intent to . . . injure,
11 harass, intimidate, . . . with intent to . . . injure, harass, or intimidate another person,
12 and in the course of, or as a result of, such travel or presence engages in conduct
13 that--

14 (A) places that person in reasonable fear of the death of, or serious bodily injury
15 to--

16 (i) that person;

17 (ii) an immediate family member of that person; or

18 (iii) a spouse or intimate partner of that person; or

19 (B) causes, attempts to cause, or would be reasonably expected to cause
20 substantial emotional distress to a person described in clause (i), (ii), or (iii) of
21 subparagraph (A); or

22 (2) with the intent to . . . injure, harass, intimidate, . . . with intent to . . . injure,
23 harass, or intimidate another person, uses the mail, any **interactive computer**
24 **service or electronic communication service or electronic communication**
25 **system** of interstate commerce, or any other facility of interstate or foreign
26 commerce to engage in a course of conduct that--

27 (A) places that person in reasonable fear of the death of or serious bodily injury
28 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*.

18 U.S.C. § 2261A (emphasis added).

Communications that are intended to injure, harass and intimidate and reasonably cause
fear of injury or substantial emotional distress in violation of 18 U.S.C. § 2261A are not protected
by First Amendment. *United States v. Petrovic*, 701 F.3d 849 (8th Cir. 2012); *see also United*
States v. Sayer, 748 F.3d 425 (1st Cir. 2014)(speech integral to criminal stalking recognized as

1 long-established category of unprotected speech); *United States v. Osinger*, 753 F.3d 939 (9th Cir.
2 2014)(defendant's threatening messages to victim and to victim's co-workers and friends
3 unquestionably evinced defendant's intent to harass and intimidate victim and to cause substantial
4 emotional distress, and thus, defendant's course of conduct was unmistakably proscribed by this
5 section, and any related speech was not afforded First Amendment protection).

6 When the facts alleged by Plaintiff are taken as true, as the Court must, and combined with
7 the additional facts contained in the exhibits attached hereto, it is indisputable that Plaintiff has
8 alleged sufficient facts from which the trier of fact could conclude that Defendants' conduct and
9 speech were intended to harass and intimidate Plaintiff and to cause him substantial emotional
10 distress in violation of 18 U.S.C. § 2261A. As such, Defendants' speech is not protected by the
11 First Amendment, and Defendant Smith's Motion based upon Nevada's anti-SLAPP statutes must
12 be denied.

13 For these same reasons, Defendant Smith's reliance upon the CDA is misplaced. Even
14 assuming that this Court could conclude that 18 U.S.C. § 2261A has no application, Defendant
15 Smith's reliance upon the CDA is still misplaced where Defendant Smith is also an information
16 content provider.

17 The CDA immunizes providers of interactive computer services against liability arising
18 from content created by third parties. 47 U.S.C. § 230(c). This grant of immunity, however,
19 applies only if the interactive computer service provider is **not** also an "information content
20 provider". 47 U.S.C. § 230(f)(3). An "information content provider" is someone who is
21 "responsible in whole or in part, for the creation or development of" the offending content. *Id.*

22 Defendant Smith erroneously contends that he is not an "information content provider" and
23 therefore CDA immunizes him from liability. This is false. It is Plaintiff's position that any
24 postings made by Defendant Lake Tahoe Wall of Shame is essentially Defendant Smith's postings.
25 As discussed above, Defendant Smith is the voice and face of Defendant Lake Tahoe Wall of
26 Shame.

1 **F. Plaintiff Will Likely Prevail on His Claims.**

2 Because Defendant Smith cannot carry his burden of establishing that Defendants' conduct
3 and statements were protected as being in the subject of public concern, the burden has not shifted
4 to Plaintiff to demonstrate that he will likely prevail on his claims. "[T]he plaintiff . . . has no
5 obligation to demonstrate [a] probability of success if the defendant fails to meet [his] threshold
6 burden [at the first step]." *D.C.*, 182 Cal. App. 4th at 1225, 106 Cal. Rptr. 3d at 425. Nevertheless,
7 Plaintiff submits that there is a high probability that his claims will be successful. For the same
8 reasons discussed herein, Plaintiff's claims are legally cognizable and are not subject to an NRC
9 12(b)(5) dismissal.

10 **1. Defamation.**

11 A claim for defamation requires Plaintiff to establish the following: (1) Defendants made
12 a false and defamatory statement concerning Plaintiff; (2) an unprivileged publication of this
13 statement was made to a third person; (3) Defendants were at least negligent in making the
14 statement; and (4) Plaintiff sustained actual or presumed damages as a result of the statement.
15 *Pegasus*, 118 Nev. at 706, 57 P.3d at 82. Defamation per se are false statements made involving
16 any of the following: (1) the imputation of a crime; (2) the imputation of having a loathsome
17 disease; (3) imputing a person's lack of fitness for trade, business, or profession; and (4) imputing
18 serious sexual misconduct. *K-Mart Corp. v. Washington*, 109 Nev. 1180, 866 P.2d 274 (1993).
19 No proof of any actual harm to reputation or any other damage is required for these four types of
20 defamation. *Id.*, 866 P.2d at 274.

21 Plaintiff's FAC alleges that Defendants maliciously attacked his reputation by publishing
22 false and vicious comments accusing him of criminal conduct (including accepting bribes and
23 conspiracy) designed to incite public outrage. FAC ¶ 14. The FAC further alleges that Defendants
24 maliciously published false and vicious comments imputing his lack of fitness for the profession
25 in which he is engaged. *Id.* One post even accuses Plaintiff of murdering his first wife. **Exhibit**
26 **9.** Some of the published statements at issue, therefore, are defamatory per se and Plaintiff is not
27 required to prove actual harm to his reputation or any other damages in order to prevail.

1 It is likely that Plaintiff will prevail on the merits where there is no evidence that Plaintiff
2 accepted bribes and conspired to kill the bear population. Nor is there any evidence that Plaintiff
3 murdered his first wife. It is further undisputed that the published statements were not privileged
4 and were made to third parties. In light of the maliciousness of some of the speech, it is clear that
5 more than mere negligence was involved.

6 Defendant Smith nevertheless incorrectly contends that Plaintiff is a public figure. In *Gertz*
7 *v. Robert Welch, Inc.*, the high court clarified the definition of a public figure. 418 U.S. 323, 342-
8 343 (1974). The court in *Gertz* created two categories of public figures: (1) general public figures
9 are those individuals who "achieve such pervasive fame or notoriety that [they] become[] a public
10 figure for all purposes and in all contexts" and (2) limited public figures are individuals who have
11 only achieved fame or notoriety based on their role in a particular public issue. *Id.* at 351. Plaintiff
12 is neither a general public figure nor a limited public figure.

13 There is absolutely no evidence whatsoever that Plaintiff has achieved such pervasive fame
14 or notoriety that he has become a public figure for all purposes and in all contexts. Plaintiff submits
15 that he has achieved the purported notoriety only with Defendants Bear League and Lake Tahoe
16 Wall of Shame followers. *See, e.g., Northern Nevada Regional Intelligence Center Washoe*
17 *County, Nevada Unclassified//For Official Use Only Advisory Bulletin, Exhibit 11* (recognizing
18 that Plaintiff has achieved the purported notoriety only with Defendants Bear League and Lake
19 Tahoe Wall of Shame Followers). This, however, does not make him a general public figure as
20 defined by the high court.

21 "A limited-purpose figure is a person who voluntarily injects himself or is thrust into a
22 particular public controversy or public concern, and thereby becomes a public figure for a limited
23 range of issues." *Pegasus*, 118 Nev. at 720, 57 P.3d at 91. "Whether a person becomes a public
24 figure depends on whether the person's role in a matter of public concern is voluntary and
25 prominent." *Bongiovi v. Sullivan*, 122 Nev. 556, 572, 138 P.3d 433, 445 (2006). The Court
26 determines this by examining the "nature and extent of an individual's participation in the particular
27
28

1 controversy giving rise to the defamation." *Pegasus*, 118 Nev. at 720, 57 P.3d at 91 (quoting
2 *Gertz*, 418 U.S. at 352).

3 Plaintiff did not voluntarily inject himself into a particular public controversy or public
4 concern. First, Plaintiff was merely performing his duties as a Biologist III with NDOW. *See*,
5 *e.g.*, **Exhibit 11**. Second, his role as argued by Defendant Smith is neither voluntary nor
6 prominent. *Id.* The issue of how NDOW treats bear is really of concern to only Defendants Bear
7 League and Lake Tahoe Wall of Shame followers. There is no evidence that it is a matter of
8 prominent or even national concern.

9 Even assuming that this Court could conclude that Plaintiff was somehow a limited public
10 figure, "no protection is warranted when 'the speech is wholly false and clearly damaging to the
11 victim's business reputation." *Id.* at 572, 138 P.3d at 445 (quoting *Dun & Bradstreet, Inc. v.*
12 *Greenmoss Builders*, 472 U.S. 749, 762 (1985)). As discussed above, the allegations that Plaintiff
13 accepted bribes, illegally conspired to kill bears and allegedly murdered his first wife are not only
14 false, but clearly impugns his reputation.

15 There is also no public issue when the speech is "solely in the individual interest of the
16 speaker and [the speaker's] specific . . . audience." *Dun & Bradstreet, Inc. v. Greenmoss Builders*,
17 472 U.S. 749, 762 (1985). Such is the case here as discussed above. Defendant Smith's defamatory
18 statements solely promote his specific interest and Defendant Lake Tahoe Wall of Shame
19 followers' interest to harass, intimidate, and threaten Plaintiff. Why else would Defendant Smith
20 post Plaintiff's address and pictures of Plaintiff and his family? There is no public issue.

21 As such, no protection is afforded to Defendant Smith even if this Court were to conclude
22 that Plaintiff is a limited public figure. Under these circumstances, it is likely that Plaintiff will
23 prevail on his defamation claim. In the event this Court concludes that Plaintiff's defamation claim
24 has been insufficiently pled, this Court should grant Plaintiff leave to amend any purported
25 pleading deficiencies.

26 ///

27 ///

1 **2. Civil conspiracy.**

2 An actionable civil conspiracy claim is defined as a combination of two or more persons
3 who by some concerted action intend to accomplish some unlawful objective for the purpose of
4 harming another which results in damage. *See, e.g., Guilfoyle v. Olde Monmouth Stock Transfer*
5 *Company, Co., Inc.*, __ Nev. __, 335 P.3d 190 (2014). Plaintiff alleges that Defendants Bear
6 League, Anne Bryant, Mark E. Smith, Lake Tahoe Wall of Shame, Carolyn Stark, and NDOW
7 Watch Keeping Them Transparent "acted in concert with one another to accomplish the goals of
8 harassing and threatening Plaintiff and causing him fear, anxiety, embarrassment and damaging
9 his reputation." FAC ¶ 35. Defendant Smith's contention that Plaintiff has failed to allege conduct
10 involving more than one defendant is simply not supported by the allegations of the FAC. *See*
11 *generally Id.* As shown by the evidence, Defendants post on each other's Facebook pages. The
12 evidence also supports the allegation that Defendants conspired with their followers to harass,
13 bully, and intimidate Plaintiff.

14 In Nevada, a civil conspiracy claim predicated upon defamation is not subject to a
15 heightened pleading requirement. *See, e.g., Flowers v. Carville*, 266 F. Supp.2d 1245 (D. Nev.
16 2003). Plaintiff submits that the allegations as alleged are sufficient to withstand an NRCP
17 12(b)(5) request for dismissal. Plaintiff will likely prevail on his claim for civil conspiracy. In the
18 event this Court concludes that Plaintiff's civil conspiracy claim has been insufficiently pled, this
19 Court should grant Plaintiff leave to amend any purported pleading deficiencies.

20 **3. Intentional Infliction of Emotional Distress.**

21 The elements of a claim for intentional infliction of emotional distress are: (1) Defendants'
22 conduct was extreme and outrageous; (2) Defendants either intended or recklessly disregarded to
23 cause emotional distress; (3) Plaintiff suffered severe or extreme emotional distress; and (4)
24 Defendants' conduct actually or proximately caused the distress. *See Nelson v. City of Las Vegas*,
25 99 Nev. 548, 665 P.2d 1141 (1983). "[E]xtreme and outrageous conduct is that which is 'outside
26 all possible bounds of decency' and is regarded as 'utterly intolerable in a civilized community.'"
27 *Maduikie v. Agency Rent-A-Car*, 114 Nev. 1, 4, 953 P.2d 24 26 (1998)(quoting California Book
28

1 of Approved Jury Instructions (hereinafter “BAJI”) No. 12.74). Whether a defendant engaged in
2 extreme and outrageous conduct is a question of fact for the jury. *Posadas v. City of Reno*, 109
3 Nev. 448, 456 (1993); *Branda v. Sanford*, 97 Nev. 643, 645 (1981).

4 Plaintiff submits that based upon the alleged facts, a jury could easily find that Defendants
5 acted with extreme and outrageous conduct. Defendants undertook conduct of posting false
6 information and personal information about Plaintiff on their Facebook pages with the apparent
7 sole purpose of harassing, intimidating and bullying Plaintiff. The postings also impugned
8 Plaintiff's reputation and viciously accused him of criminal conduct, including murdering his first
9 wife. More egregiously of all, the postings incited violence towards Plaintiff. Defendants' acts as
10 alleged in the FAC and as set forth in the exhibits hereto undoubtedly amounted to extreme and
11 outrageous conduct.

12 Defendants' conduct clearly caused Plaintiff severe emotional distress where he remains
13 fearful of physical harm and violence directed at him and his wife and children. Plaintiff will likely
14 prevail on his claim for intentional infliction of emotional distress. In the event this Court
15 concludes that Plaintiff's intentional infliction of emotional distress claim has been insufficiently
16 pled, this Court should grant Plaintiff leave to amend any purported pleading deficiencies.

17 **4. Negligent Infliction of Emotional Distress.**

18 A claim for negligent infliction of emotional distress requires Plaintiff to show that
19 Defendants acted negligently and “either a physical impact . . . or, in the absence of physical
20 impact, proof of ‘serious emotional distress’ causing physical injury or illness.” *Barmettler v.*
21 *Reno Air, Inc.*, 114 Nev. 441, 447, 956 P.2d 1382, 1387 (1998). Plaintiff lives in fear of physical
22 harm and violence directed towards him and his family. For the same reasons set forth above,
23 Plaintiff will likely prevail on his claim for negligent infliction of emotional distress. In the event
24 this Court concludes that Plaintiff's negligent infliction of emotional distress claim has been
25 insufficiently pled, this Court should grant Plaintiff leave to amend any purported pleading
26 deficiencies.

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V. CONCLUSION

As a matter of law, Nevada's anti-SLAPP statutes have no applicability to the instant case and Defendant Smith's reliance upon those statutes are entirely misplaced. The anti-SLAPP statutes do not protect speech that is illegal as a matter of law. The anti-SLAPP statutes also do not protect speech that is untruthful. Dismissal pursuant to Nevada's anti-SLAPP is simply not warranted.

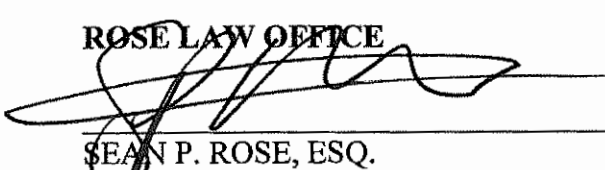
When this Court views the allegations as alleged in the FAC and accept the allegations as true, it does not appear beyond a doubt that Plaintiff can prove no set of facts in support of claims that would entitle him to relief. If this Court concludes that there are pleading deficiencies, Plaintiff respectfully requests leave to amend. Leave to amend should be freely given. *Stephens v. So. Nev. Music Co.*, 89 Nev. 104, 507 P.2d 138 (1973)(absent undue delay, bad faith or dilatory motive, leave to amend should be freely given).

AFFIRMATION

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

DATED this 23rd day of June, 2017.

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LIST OF EXHIBITS

| Exhibit | Description | Pages |
|----------------|---|--------------|
| 1 | Bear League and Lake Tahoe Wall of Shame Facebook posts | 14 |
| 2 | Lake Tahoe Wall of Shame Facebook posts | 7 |
| 3 | Mark E. Smith's photo on Lake Tahoe Wall of Shame Facebook page | 6 |
| 4 | Lake Tahoe Wall of Shame Facebook posts | 19 |
| 5 | Lake Tahoe Wall of Shame Facebook page picture of Plaintiff and kids | 5 |
| 6 | Lake Tahoe Wall of Shame Facebook posts | 2 |
| 7 | Lake Tahoe Wall of Shame Facebook posts | 6 |
| 8 | Lake Tahoe Wall of Shame Facebook posts | 8 |
| 9 | Bear League's Facebook post | 2 |
| 10 | Lake Tahoe Wall of Shame Facebook post | 2 |
| 11 | <i>Northern Nevada Regional Intelligence Center Washoe County, Nevada Unclassified//For Official Use Only Advisory Bulletin</i> | 3 |

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of the Rose Law Office and that on the date indicated below, I served a true copy of the foregoing ***Plaintiff Carl Lackey's Opposition to Defendant Mark E. Smith's Special Motion to Dismiss/Motion to Dismiss***, on the party(s) set forth below by:

_____ Placing an original or true copy thereof in a sealed envelope, postage prepaid for collection and mailing in the United States Mail, at Reno, Nevada

_____ Hand Delivery

_____ Facsimile

☒ All parties signed up for electronic filing have been served electronically, all others have been served by placing a true copy thereof in a sealed envelope for collection and mailing in the United States mail, at Reno, Nevada, postage prepaid, following ordinary business practices

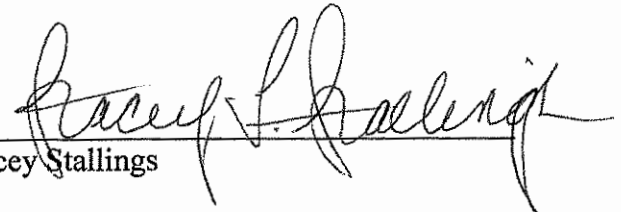
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DATED this 23rd day of June, 2017



Stacey Stallings

EXHIBIT "1"

EXHIBIT "1"

BEAR League

Search for posts on this Page

14,198 people like this
Bryan Porterson

42 people have been here

Invite friends to like this Page

4.6 of 5 stars · 221 reviews
View Reviews

ABOUT



Ask for BEAR League's address

(530) 525-7237

http://www.secretahobears.org/

APPS



LINKED BY THIS PAGE

Humane Society of Truckee

2 Replies · 1 hr

Randy L Simer So what reason are they using this time?? Bear in trash? Bear break into the house cuz ???

Don't they need a reason to set a trap??

Like · Reply · 12 hrs

3 Replies

Brenda Bender-Smith This is absurd. Don't they have anything to do besides harass bears?

Like · Reply · 1 · 13 hrs

Randy L Simer Can people request a trap set? As in one that won't catch a bear. Use up there resources and traps in places that they won't catch anything??

Like · Reply · 4 · 13 hrs

Victoria LeDoux Serpa This is becoming UNREAL OUT OF CONTROL. CRAZY, Hummm...maybe time for a assassination.

Like · Reply · 12 hrs · Edited

Victoria LeDoux Serpa Why this time did someone call and complain about the bears?

Like · Reply · 12 hrs

Leslie Benton Nice way to treat me when I have supported the Bear League for YEARS! I AM NOT THE ENEMY. Get your facts straight before you attack me on here!!!!

Like · Reply · 12 hrs

BEAR League What are you talking about, Leslie? I can't find a post from you or a comment about you anywhere.

Like · Reply · 1 · 12 hrs

Carolya Stark Leslie Benton, you are part of the bear team! You are on the right side with us. Who is doing this?

Like · Reply · 12 hrs · Edited

Leslie Benton I took a screenshot, reported to FB, then deleted it. (It was a comment to my comment, so it all got erased). Someone thought I was associated with NDOW. All is good now. But I don't like people trying to smear my name

Like · Reply · 4 · 12 hrs

View more replies

Write a reply...

Melanie Ann Lindsay Can we all pull together and protest this !!!?? This has got to STOP!!!

Like · Reply · 3 · 12 hrs

JA 0111

POSTED BY

Anyone

You

Your Friends

Your Friends and Groups

Choose a Source

TAGGED LOCATION

Anywhere

Corpus City, NV

Choose a Location

DATE POSTED

Anyone

2013

2015

2014

Choose a Date

BEAR LEAGUE via Lake Tahoe Wall of Shame

PLEASE sign and share...we must rid Nevada of this monster who lives and is paid to kill bears. Far too many innocents have died at his evil hands.



Nevada Dept of Wildlife: Fire Carl Lackey

Another Injune Village bear killed last night by Carl Lackey of NCDOW. Thanks to Carl we are down to three bears left in this area. A woman left her...

CHARGE CRG

97

31 Comments 42 Shares

Like Comment Share

Shannon Jean Mason Signed

May 21, 2013 at 10:22am Like 2

Uana Ruth Done

May 21, 2013 at 10:28am Like 1

Renee Hooper Done...get that SOB outta there!

May 21, 2013 at 10:40am Like 1

Lafne Ryan-Pearce Signed and shared

May 21, 2013 at 10:51am Like

Willow Allie Done, I'm so mad he gets paid to do this. He has gotten away with too much for to long now.

May 21, 2013 at 10:55am Like

Eva Lipson Done

May 21, 2013 at 10:58am Like

Rebecca Woodruff There is something wrong with the petition, keeps cycling the signatures needed.

May 21, 2013 at 11:04am Like

Eve Corbett SAS

May 21, 2013 at 11:05am Like

Isa Victoria Valhalla Yay signed!! 4 more needed!!

May 21, 2013 at 11:10am Like

Lyn Cowper Pollard I am fed up with the number of times questionable bear deaths have been explained away by this man. While other versions of their

Titular action

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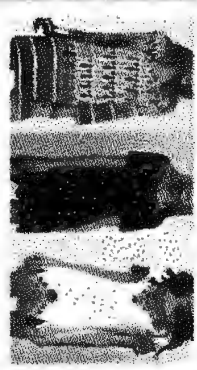
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Team Mackay keeps getting up for Joe Mack. His supporters pick on the Mack. We pay the price



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Lake Tahoe Wall of Shame



VISITOR POSTS

Peter Hussmann
Wednesday at 7:15pm
Like Comment



Peter Hussmann
Wednesday at 7:15pm
Like Comment



Behind CVS (Emerald Bay Rd) in South Lake Tahoe.



Peter Hussmann
Wednesday at 7:15pm
Like Comment



2 Comments
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Lake Tahoe Wall of Shame

July 3 at 12:20pm · #

NDO's chief bear biologist, Carl Lackey, takes frequent selfies of himself and with friends and family with trapped or tranquilized bears.
<https://theconversation.com/ever-science-take-selfies-wi...>
#ackeymustgo



Even scientists take selfies with wild animals. Here's why they shouldn't.

Why do so many people take safety risks or abuse wild animals for the sake of a photo with them? In one researcher's view, scientists may encourage this trend by...
THE CONVERSATION.COM | BY CHRISTINE A. WARD #WAGS

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Leann Dyer So very unprofessional. Do your job!!! Lackey. Stop taking Bears and all Wildlife.
Like Reply 0 July 3 at 2:20pm Edited



Carolyn D Bennett Ford Carl Lackey is a disgrace!! I wish someone would shoot him with tranquilizers and let him see how it feels! He doesn't care about wildlife and should be fired!!
Like Reply 0 July 4 at 3:20pm



Mary Campbell You see him on tv. The local news (KABQ) has him on all the time as if he were king. Can't stand the man. Full of bs!
Like Reply 0 1 Wednesday at 7:50am



Lake Tahoe Wall of Shame Has an arrogant, incompetent POS
Like Reply 0 2 Wednesday at 7:57am



Melanie Olin Can charges of professionalism be brought up? ASAP?
Like Reply 0 1 Wednesday at 12:20pm



Carol Raphael Lake Tahoe Wall of Shame ...and its so apparent so those of us outside that self-indulgent circle of cronies.
Like Reply 0 1 Wednesday at 1:00pm



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