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April 17, 2018

VIA U.S. MAIL
Clerk of Superior Court
Haywood County Justice Center
285 N. Main Street, Suite 1500
Waynesville, NC 28786

Re: *King v. Haywood Republican Alliance,* Haywood County File No. 18 CVS 116

Dear Clerk:

Enclosed for filing please find an original and one (1) copy of a Certificate of Service with regard to the above-referenced matter. Please return a date-stamped copy to me in the self-addressed and stamped envelope provided.

By copy of this letter, I am also serving all parties with a copy of the document. If you have any questions, please do not hesitate to contact me.

Sincerely,

Patricia A. Pritchard
Paralegal

/pap
Enclosure
C: R. McLean
A. Cabe
Haywood Republican Alliance

NORTH CAROLINA
HAYWOOD COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 18-CVS-116

DEBORAH KING,

Plaintiff,

vs.

HAYWOOD REPUBLICAN ALLIANCE, a Non-Incorporated Political Action Committee by and through, RICHARD OWEN WEST, Individually and as Treasurer of the HAYWOOD REPUBLICAN ALLIANCE, JEREMY DAVIS, Individually and as Member of the HAYWOOD REPUBLICAN ALLIANCE, and EDDIE CABE, Individually and as Member of the HAYWOOD REPUBLICAN ALLIANCE, and JOHN DOE 1 THROUGH 6,

Defendants.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the attached Motion to Dismiss and Memorandum in Support of Motion to Dismiss was served by depositing a true copy thereof with the United States Postal Service, first class postage prepaid, addressed to:

Russell L. McLean, III
P.O. Box 4
Waynesville, NC 28786

Arnold E. Cabe
13 Haven Place
Canton, NC 28716

Haywood Republican Alliance
Richard Owen West
561 Westwood Circle

Waynesville, NC 28786

This the 17th day of April, 2018.

STEVENS MARTIN VAUGHN & TADYCH, LLP

C. Amanda Martin

C. Amanda Martin
N.C. Bar No. 21186
Attorneys for Defendants
1101 Haynes St., Suite 100
Raleigh, North Carolina 27604
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NORTH CAROLINA
HAYWOOD COUNTY

IN THE GENERAL COURT OF JUSTICE
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Defendants.

FILED
2018 MAR 12 AM 8:50
HAYWOOD COUNTY, C.S.C.

MOTION TO DISMISS

NOW COME Defendants Richard Owen West and Jeremy Davis, by and through undersigned counsel and pursuant to Rules 8 and 12(b)(6) of the North Carolina Rules of Civil Procedure, and move the Court to dismiss the Complaint filed by Plaintiff in its entirely, for failure to state a claim upon which relief can be granted.

The alleged facts do not state a claim for misappropriation or intentional infliction of emotional distress. Additionally, the complaint fails to state with particularity any specific actions by defendants West and Davis, and pursuant to

G.S. § 59B-7, neither defendant is vicariously liable for any alleged liability of the defendant Haywood Republican Alliance or any of its members.

WHEREFORE, Defendants West and Davis request (a) that the Court dismiss the Complaint filed by Plaintiff in its entirety for failure to state a claim upon which relief can be granted, (b) that the Court find a complete absence of justiciable issues raised by the complaint and (c) all other proper relief.

Respectfully submitted this the 8th day of March, 2018.

STEVENS MARTIN VAUGHN & TADYCH, LLP

C. Amanda Martin

C. Amanda Martin
N.C. Bar No. 21186
Attorneys for Defendants
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Raleigh, North Carolina 27604
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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing upon plaintiff by depositing a copy with the United States Postal Service, first-class postage prepaid, addressed to:

Russell L. McLean, III
P.O. Box 4
Waynesville, NC 28786

This the 8th day of March, 2018.

C. Amanda Martin

C. Amanda Martin

NORTH CAROLINA
HAYWOOD COUNTY

IN THE GENERAL COURT OF JUSTICE
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Defendants.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Plaintiff's lawsuit takes aim at protected speech on matters of public concern and misses the mark. The complaint alleges Invasion of Privacy by Appropriation of Name or Likeness and Intentional Infliction of Emotional Distress and seeks both punitive damages and injunctive relief. Even if all the plaintiff's allegations were true – which they are not – they would not give rise to any cognizable legal injury or right to legal redress. As alleged, the facts do not state a claim for either invasion of privacy or intentional infliction of emotional distress, and the injunctive relief sought by plaintiff would amount to an unconstitutional prior restraint.

LEGAL ARGUMENT

I. Defendants' Participation in the Haywood Republican Alliance is Irrelevant.

Plaintiff has alleged participation by defendants West and Davis in the Haywood Republican Alliance (and Richard West's position as treasurer) as if those facts have some legal significance. They do not. In 2006, North Carolina's General Assembly passed into law the Uniform Unincorporated Nonprofit Association Act, Chapter 59B, which makes clear that neither the members nor management of an unincorporated association has liability for the actions of the association or its other members.

> (b) A person is not liable for the contract, tort, or other obligations of a nonprofit association merely because the person is a member, is authorized to participate in the management of the affairs of the nonprofit association, or is referred to as a "member" by the nonprofit association.
>
> ***
>
> (d) A tortious act or omission of a member or other person for which a nonprofit association is liable is not imputed to a person merely because the person is a member of the nonprofit association, is authorized to participate in the management of the affairs of the nonprofit association, or is referred to as a "member" by the nonprofit association.

G.S. § 59B-7. Put another way, members of an unincorporated association are entitled to the same insulation from liability that members of a corporation enjoy. Therefore, the Court must examine the specific allegations that are made against the specific, moving defendants: Richard Owen West and Jeremy Davis. The complaint makes no short and plain statement of any specific activity that these defendants are alleged to have undertaken that would give rise to any liability. N.C.R. Civ. P. 8(a)(1).

II. Plaintiff's Misappropriation Claim Must Be Dismissed.

The cornerstone of a misappropriation claim is commercial use, most commonly in advertising. In *Flake v. Greensboro News Co.*, our state's seminal misappropriation case, the Court of Appeals wrote "we are presently called upon to decide only the right of an individual to prohibit the unauthorized use of an image of her features and figure ***in connection with and as a part of an advertisement.***" *Flake v. Greensboro News Co.*, 212 N.C. 780, 195 S.E. 55, 63 (1938). The Court found a right of action had been recognized in prior cases, from other jurisdictions, in which there was "the unauthorized publication of plaintiff's photograph ***in connection with an advertising enterprise.***" *Id.* (emphasis supplied). No North Carolina case has recognized a misappropriation claim outside the context of using a plaintiff's name or likeness to advertise some product.

Likewise, courts outside North Carolina recognize the broad protections for the use of an individual's name or likeness in news, commentary and other non-commercial contexts. Perhaps the most well-known such case was Dustin Hoffman's lawsuit against *Los Angeles Magazine* for the article "Grand Illusions" in its "Fabulous Hollywood Issue!" Hoffman v. Capital Cities/ABC, Inc., 255 F.3d 1180, 1183 (9th Cir. 2001). Through computer technology, the publication altered the iconic photograph of Dustin Hoffman as Tootsie in a red sequined dress. In the image, the American flag and Hoffman's head "remained as they appeared in the original, but Hoffman's body and his long-sleeved red sequined dress were replaced

by the body of a male model in the same pose, wearing a spaghetti-strapped, cream-colored, silk evening dress and high-heeled sandals." *Id.* Hoffman sued for misappropriation, and the Ninth Circuit explored the contours of what "commercial speech" means for the purposes of the First Amendment and invasion of privacy claims.

> "Commercial speech" has special meaning in the First Amendment context. Although the boundary between commercial and noncommercial speech has yet to be clearly delineated, ***the "core notion of commercial speech" is that it "does no more than propose a commercial transaction."***

Id. at 1184 (emphasis supplied). Notwithstanding the fact that Los Angeles Magazine was sold, notwithstanding the fact that the articles of clothing were identified by brand name in the fashion article, and notwithstanding the fact that there was a "shopper's guide" in the back of the magazine, the Ninth Circuit found the use of Hoffman's image was protected by the First Amendment.

> Viewed in context, the article as a whole is a combination of fashion photography, humor, and visual and verbal editorial comment on classic films and famous actors. Any commercial aspects are "inextricably entwined" with expressive elements, and so they cannot be separated out "from the fully protected whole."

Id. at 1185. Accordingly, the Court found the magazine was "entitled to the full First Amendment protection accorded noncommercial speech." *Id.* at 1186.

The Complaint does not make a single, specific allegation regarding activity by Defendant Davis or Defendant West other than their association with the Haywood Republican Alliance. Even if they had been involved in the conduct alleged in general terms, such activity would be fully protected by the First

Amendment. The alleged use in this case is analogous to the defendant's use of an individual's image in a political ad, which was held by a New York Supreme Court not to be actionable. *Davis v. Duryea*, 99 Misc. 2d 933, 934, 417 N.Y.S.2d 624 (Sup. Ct. 1979). In that case, a political advertisement used a picture of the plaintiff without plaintiff's consent. *Id.* Interpreting New York's right of privacy statute (analogous to North Carolina's misappropriation tort), the court wrote,

> The use of the plaintiff's picture during the political campaign was not for the advertising or trade purposes within the statute's intendment. Furthermore, in the balancing of rights and interests, the plaintiff's claims of privacy right may not vitiate or abridge the paramount rights of society to information and necessary free expression in preparing for the exercise of the electoral franchise. ...
>
> These statutory provisions were enacted in 1903 to create a privacy right barring unauthorized commercial exploitation of a person's name or picture. ...
>
> Consistent with this legislative intent, our courts have developed exceptions to narrowly construe the commercialism required for applicability of the statute in order to prevent any curtailment of "the right of free speech, or free press, or to shut off the publication of matters newsworthy or of public interest, or to prevent comment on matters in which the public has an interest or the right to be informed"

Id. at 936.

The North Carolina Supreme Court has rejected two of the four traditional invasion of privacy torts, grounded on the fact that they intrude too deeply on First Amendment principles and values. See *Hall v. Post*, 323 N.C. 259 (1988) (rejecting private facts); *Renwick v. News and Observer Publ'g Co.*, 310 N.C. 312 (1984), cert. denied, 469 U.S. 858 (1984) (rejecting false light). In that same vein, North Carolina's right of privacy claim for misappropriation must be construed narrowly

to afford as much breathing room as possible to free speech interests. That concern is especially prominent with respect to speech on matters of public concern. The United States Supreme Court has said as much:

> The First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. Speech concerning public affairs is more than self-expression; it is the essence of self-government. Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the "highest rung of the hierarchy of First Amendment values," and is entitled to special protection.

Connick v. Myers, 461 U.S. 138, 145, 103 S. Ct. 1684, 1689, 75 L. Ed. 2d 708 (1983) (internal quotations and citations omitted).

Much can be discerned from the injury plaintiff alleges. The complaint alleges that "Plaintiff has been damaged in her reputation, her prestige, her social standing and has suffered embarrassment and humiliation amongst the community and amongst her peers, friends and acquaintances." Complaint ¶ 16. The complaint alleges further that defendants' actions were undertaken "with the specific intent to harm the Plaintiff and her reputation within the community, was done with spiteful purpose and the intent to cause ridicule and embarrassment to the Plaintiff." Complaint ¶ 21. The gravamen of a misappropriation claim is intrusion into commercial, economic interests, not reputational interests. In this case, the alleged activity constitutes core political speech. As such, it is entitled to full First Amendment protection. For these reasons, plaintiff's complaint does not even allege the facts necessary to state a claim for invasion of privacy by misappropriation, and the lawsuit should be dismissed.

III. Plaintiff's Emotional Distress Claim Must Be Dismissed.

A plaintiff cannot cure defects in a defamation action by alternatively couching her claim as something else. See *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); Ault v. Hustler Magazine, 860 F.2d 877, 880 (9th Cir.), cert. denied 489 U.S. 1080 (1988); *Foretich v. Advance Magazine Publishers, Inc.*, 765 F. Supp. 1099, 1106 (D.D.C. 1991) ("It would subvert defamation law to permit a cause of action for emotional distress based on a statement held as a matter of law to be not defamatory of the plaintiff."). It would be equally inappropriate to allow a plaintiff complaining of ***any*** speech-based activity to simply dodge the protections of the First Amendment by putting the label "intentional infliction of emotional distress" on her lawsuit.

In *Zeran v. America Online, Inc.*, the United States Court of Appeals for the Fourth Circuit noted that the Plaintiff Zeran "[t]o be sure, [] is not the first plaintiff to attempt to avoid the strictures of defamation law by disguising a defamation claim as another tort. Courts uniformly reject such attempts." *Zeran v. America Online, Inc.*, 958 F. Supp. 1124, 1133 n. 19 (E.D. Va.), aff'd 129 F.3d 327 (4th Cir. 1997). The court noted the decisions in *Hustler Magazine v. Falwell* and *Moldea v. New York Times Co.* 15 F.3d 1137, 1151 (D.C.Cir.1994), modified on other grounds, 22 F.3d 310 (D.C.Cir.1994) (plaintiff cannot avoid strictures of defamation law through pleading alternative tort of false light invasion of privacy). In reviewing the lower court in *Zeran*, the Fourth Circuit writes, "Although Zeran attempts to

artfully plead his claims as ones of negligence, they are indistinguishable from a garden variety defamation action." *Zeran*, 129 F.3d 329, 332 (4th Cir 1997).

Likewise, the plaintiff here has attempted to avoid the fact that the defendants' actions are privileged and protected by creatively pleading different theories. This is precisely what the United States Supreme Court, in *Hustler Magazine v. Falwell*, said a plaintiff cannot do.

Even if the First Amendment were not to preclude plaintiff's claims, the facts alleged in the complaint simply do not give rise to a claim for intentional infliction of emotional distress. "The elements of intentional infliction of emotional distress are: (1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress." *Denning-Boyles v. WCES, Inc.*, 123 N.C. App. 409, 412-13, 473 S.E.2d 38, 40-41 (1996). The elements of a negligent infliction claim are that "the defendant was negligent, that it was foreseeable to the defendant that his negligence would cause the plaintiff severe emotional distress, and that the conduct, in fact, caused severe emotional distress." *Fox-Kirk v. Hannon*, 142 N.C. App. 267, 273, 542 S.E.2d 346, 352 (citation omitted), disc. review denied and dismissed, 353 N.C. 725, 551 S.E.2d 437 (2001). As in a claim for intentional infliction, "[i]n a claim for negligent infliction of emotional distress, the emotional distress which must be foreseeable is ***severe*** emotional distress." *Williamson v. Woodard Funeral Home, Inc.*, 188 N.C. App. 168, 654 S.E.2d 832 (2008) (emphasis in original). "[T]he initial determination of whether conduct is

extreme and outrageous is a question of law for the court." *Tuck v. Turoci*, 2008 WL 304719, 9 (N.C. App. 2008).

As the United States Supreme Court fairly recently reiterated, even "arguably 'inappropriate or controversial" speech is entitled to full First Amendment protection. *Snyder v. Phelps*, 562 U.S. 443, 453, 131 S. Ct. 1207, 1216, 179 L. Ed. 2d 172 (2011). In *Snyder*, the Court considered an intentional infliction claim brought by a father after the Westboro Baptist Church picketed his son's funeral with astoundingly offensive signs carrying messages such as "God Hates the USA/Thank God for 9/11," "Thank God for Dead Soldiers" and "Priests Rape Boys." *Id.* at 454. Notwithstanding the targeted nature and extreme vitriol of defendant's messages and the context that "made the expression of those views particularly hurtful to many, especially to Matthew's father," the Court found that the speech was a matter of public concern. As such, it was

> entitled to "special protection" under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Indeed, "the point of all speech protection ... is to shield just those choices of content that in someone's eyes are misguided, or even hurtful."

Id. at 443.

Whether the buttons and websites and videos poking fun at the plaintiff are in good taste may be a matter of opinion. Whether they were effective political speech may be up for debate. That they were protected, political speech, however, is beyond question. Re-labeling the claim as an

"intentional infliction of emotional distress" does nothing to cure its legal infirmity.

IV. Plaintiff's Request for Injunctive Relief Must Be Denied.

Finally, the plaintiff's request that this court impose a prior restraint on defendants' speech is outrageous. Prior restraints on speech long have been recognized as "the most serious and least tolerable infringement on First Amendment rights" and as "one of the most extraordinary remedies known to our jurisprudence." *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559, 562 (1976). If the United States Supreme Court has not countenanced such extreme action even in the face of publication of classified military materials by the *New York Times* and the *Washington Post*, *New York Times Co. v. U.S.*, 403 U.S. 713 (1971), there is no question that the plaintiff here fails to come within shouting distance of justifying a prior restraint.

CONCLUSION

Because the complaint fails to even allege the core elements of invasion of privacy by misappropriation or intentional infliction of emotional distress, defendants implore the Court to dismiss the complaint outright without delay.

Respectfully submitted this the 8th day of March, 2018.

STEVENS MARTIN VAUGHN & TADYCH, LLP

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