



Reno's Whistledown

Washoe County, Nevada will be abuzz with the facts we impart to you, graced with information from many sources, all factual as the exhibits prove out.

Kate Thomas, has been Assistant County Manager since 2017.

Sworn depositions and other materials are now emerging from a federal sexual harassment lawsuit filed against the City of Reno in 2017, then settled in 2019. These materials contain allegations concerning Kate before and while she was Assistant City Manager of Reno.

A new county commissioner and old crony of Kate's from their days at the City, raises the question of back-channel meddling by Reno officials in County business – never mind that Nevada law prohibits such interference.

Why should you care? Isn't this politics as usual? Well, yes and no.

Sure, politics can be bruising, but political skullduggery isn't *governing*. From the County Commission on down, folks who work for the County were elected to *govern*, not to connive to reward allies or collude with the City.

If you displease anyone on Team Kate, if one of their fellow travelers wants your job, will they come for you next?

“Something is rotten in the state of Denmark.” – Hamlet, Act 1, Scene 4

Is something rotten in the County of Washoe, too?

Let us examine the rot. Let's cut to September 2019. The County Commission had just named Eric Brown as Washoe County Manager. Two County Commissioners, Bob Lucey and Vaughn Hartung, supported Kate Thomas for the job. Two others supported Eric Brown. Another Commissioner initially supported the third candidate but changed her vote to Brown, leading to his selection.

This history is well-known. What isn't well-known is the vote switch took Team Kate by surprise. The job was supposed to have been hers; now, she'd have to report to a man from private industry, a man from outside the clique of local public officials who move from one outrageously paid gig to the other.

Bob Lucey, can be counted among Kate's team. His support for her doesn't arise from friendship. Political insiders have long speculated that Kate, had she been chosen would have been far more amenable to direction from Bob than an independent Eric Brown. (Of note: Bob was born Robert Leon Lingenfelter. In 2004, he changed his name to Robert Leon Lucey. Also, in 2008, Bob's father, Brad L. Lingenfelter entered into a lawsuit CV08-03172 [see Exhibit 1].

In August 2020, Bob and former Commissioner Marsha Berkbigler got into a spat that resulted in lawyers letters being exchanged [see Exhibit 2]. Causing the dispute – Marsha voted for Eric Brown, not Kate Thomas you will remember – issues regarding race emerged which is clearly defined in the communications.



In 2015, Kate Thomas was promoted to Reno's Assistant City Manager. In sworn depositions, reports and other documents from the aforementioned lawsuit, questions and allegations are variously raised about Kate's personal conduct and professional performance at the City, including, but not limited to:

- i. Behaving unprofessionally with Andrew Clinger [see Exhibit 3];
- ii. Involvement in sharing misogynistic "Hot Crazy Matrix" YouTube video that graphs women according to their attractiveness and "craziness," with "Unicorns" being women who are attractive but not crazy [see Exhibit 4];
- iii. Not understanding the budget and personnel software system then in use when she ran the City's management and budget office [see Exhibit 5];
- iv. Later, selecting ADP to replace this older software system, a choice, that ultimately cost the City millions of dollars when ADP spectacularly failed [see Exhibits 5 and 6];
- v. Receiving a 40.9 percent/\$44,000 raise and a promotion to Assistant City Manager after the ADP debacle [see Exhibit 7]; and
- vi. Participating in a coffeehouse meeting of City officials in which the homeless were described as "garbage" and "human debris" [see Exhibit 8], even through her job then required her to work on homeless issues and now requires work on the Nevada Cares Campus homeless shelter debuting this month.

The foregoing is but a sampling of the questions and allegations raised about Kate's workplace conduct across more than a dozen depositions and other documents in the federal lawsuit.

In the November 2020 election, Alexis Hill defeated incumbent Marsha Berkgigler for a seat on the Washoe County Commission.

Alexis, again, is an old comrade of Kate Thomas from their days at the City of Reno, where Alexis worked as the arts, culture and special events manager, a position some thought Kate had helped secure.

At County Commission meetings, Alexis has been frequently observed scrolling and tapping on her smartphone while business is conducted.

Her behavior calls to mind lobbyist Jessica Sferrazza furiously texting Reno City Councilors during meetings; indeed, some City employees called Jessica No. 8, a reference to her being like the eighth member of the seven-member council because of her outsize influence on its members [see Exhibit 9].

With Alexis joining Bob Lucey and Vaughn Hartung on the Commission, supporters of Kate Thomas now outnumber supporters of Eric Brown, 3-2, and the city has one of its (former) own on the dais.

We think, it's fair to ask what issues that rightfully fall to the County will the City try to usurp or influence? As the County seeks to emerge from a pandemic – we must ask ourselves what choices are Bob, Vaughn and Kate making for the County. All questions will be revealed in time, patience; after all, it is a virtue – but at what cost?

EXHIBIT 1

ORIGINAL

1 Code: 3370

FILED

04 SEP -7 P1:18

RONALD A. LONGTIN, JR.
BY [Signature]
DEPUTY

2
3
4
5
6 IN THE FAMILY DIVISION
7 OF THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
8 IN AND FOR THE COUNTY OF WASHOE

9
10 In The Matter of the Petition

11 Of:

12 ROBERT LEON LINGENFELTER
(Your name)

Case No. FV04 03005

13 For change of Name.

14 Dept. No. 5

15
16 ORDER CHANGING NAME

17 This Court having reviewed the Petition of ROBERT LEON LINGENFELTER
(Your name)

18 to change his name, proof of Publication having been filed and the statutory time for
(His or Her)

19 opposing having run and no opposition having been filed to the Petition,

20 **IT IS HEREBY ORDERED** that the name of ROBERT LEON LINGENFELTER

21 **be, and hereby is, legally changed from** ROBERT LEON LINGENFELTER to

22 ROBERT LEON LUCEY

23 Dated: 9-3-04

24
25
26 [Signature]
DISTRICT JUDGE

27
28
FVCA-03005 DC-9900020074-008
NAME CHANGE - ROBERT LEON LING 1 Page
District Court 09/07/2004 01 24 PM
Washoe County 2792
COUNTY

Lucey Properties, LLC.

6966 Peacepipe Court, Reno, NV 89511
Phone (775)851-2889 - Fax (775)851-2889

RECEIVED
NOV 20 2008

BY:

November 13, 2008

Barry L. Breslow, Esq.
Robison, Belaustegui, Sharp & Low
71 Washington Street
Reno, Nevada 89503

Re: Lucey/Lingenfelter matters


Mr. Breslow,

Due to the changes in the economy, excessive legal expense and extended negotiations, the majority members of Lucey Properties and Triple "L" Properties are no longer in a position to buy out the interests of your client, Brad Lingenfelter, in these LLC's. As such, we will continue to both operate these LLC's under their current ownership and conduct ourselves in a manner consistent with our fiduciary obligations. We will also expect the same of your client.

Since your client is not only a member of the LLC's, but also a tenant of the properties owned by the LLC's, keep in mind that our current inability to buy out your client's interest does not exempt your client from the notice of required repairs to the leased properties at 2001 Prater Way, Sparks NV and 7025 Longley Lane, Suite 40, Reno, Nevada. Further, at this time it is the position of the management of both LLC's that the outstanding security deposits remain due. Any uncompleted repairs or non-payment of rent, additional rent, re-imburement of utilities or securities deposits will be considered a default of the leases.

Please also review the following Utility and CAM fee billing with your client which is also due and payable now. There are separate billings for each of the LLC's and separate locations. Copies of invoices and prior CAM billings will be provided at your request.

Finally, since we now consider our buy-out negotiations to be concluded, please advise whether we must continue to communicate with Mr. Lingenfelter, as both a tenant and a member of the LLC's, through your office.


Marcia Lucey
Triple L LLC, manager
Lucey Properties LLC, manager

DC-9900004869-037
CV08-03172
BRAD LINGENFELTER VS. MARCI 20 Pages
District Court 11/25/2008 10:36 AM \$1425
Washoe County NV

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\$1425
Barry L. Breslow, Esq.
State Bar No. 3023
Carmen DiBitonto, Esq.
State Bar No. 10563
ROBISON, BELAUSTEGUI, SHARP & LOW
71 Washington Street
Reno, Nevada 89503
(775) 329-3151

Attorneys for Plaintiff

FILED

2008 NOV 25 AM 10:35

CLARA W. CONYERS

BY *aj*
DEPUTY

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

BRAD L. LINGENFELTER,
Plaintiff,

CASE NO.:
DEPT. NO.:
CV08 03172
3

vs.

MARCIA R. LUCEY; BRETT H.
LINGENFELTER; ROBERT L. LUCEY,
formerly known as ROBERT L.
LINGENFELTER; KRISTYN L.
LINGENFELTER; and DOES I-X,
Defendants.

VERIFIED COMPLAINT FOR INJUNCTIVE RELIEF, SPECIFIC PERFORMANCE,
ACCOUNTING AND DAMAGES

(EXEMPT FROM ARBITRATION)

For his Complaint, Brad L. Lingenfelter alleges as follows:

I. Parties.

1. Plaintiff Brad L. Lingenfelter is a resident of Washoe County,

1 determined by a majority vote of the Members.

2 24. For the past several years, Marcia, with primarily the assistance
3 of Robert, has acted both as the *de facto* managing member of Lucey
4 Properties and Triple L, as well as the property manager of the real property
5 owned by both LLCs.
6

7 25. On information and belief, Marcia, with the primary assistance of
8 Robert, has knowingly and purposefully mismanaged the two LLCs to
9 Plaintiff's detriment.
10

11 26. No distributions have been paid to Plaintiff despite the two LLCs
12 having had a consistent positive cash flow. On information and belief, Marcia
13 has caused improper payments to be made from the two LLCs, disguised as
14 "management payments" and other miscellaneous fees to herself and some of
15 the other Defendants, in order to show no distributable income and avoid
16 paying to Plaintiff pursuant to his membership interest percentage.
17

18 27. Plaintiff recently hired Reno business consulting firm Meridian
19 Business Advisors ("MBA") to provide forensic accounting services regarding
20 questionable and related party transactions for Lucey Properties and Triple L
21 (hereafter the "MBA Analysis"). A true and correct copy of the MBA Analysis
22 dated September 15, 2008 is attached hereto as Exhibit "3".
23

24 28. Among other things, the following observations were made in the
25 MBA Analysis:

- 26
- 27 • *CAM Fees-Income (Common Area Maintenance Fees) and Common*
28 *Area Costs-Expense: Common Area Costs and CAM Fee Income were*
very sporadic. Based on wording in the lease agreements, (other than

1 those signed with A Plus Animal Hospital. The agreements with A Plus
2 Animal Hospital were unavailable during the viewing period), CAM fees
3 are considered "Other Costs" and were to be passed on to the tenants
4 proportionately. **This does not appear to have occurred** (emphasis
5 added). Costs were not consistently charged to the Common Area Cost
6 account and these costs were not consistently charged back to the
7 tenants and subsequently collected as CAM Fee income. Based on
8 discussions with the Ms. Lucey (property manager and person
9 responsible for the record-keeping) most of these costs have been
10 incorrectly identified as other costs within the financial statements,
11 such as "Maintenance," etc. Ms. Lucey commented that this was due
12 to a **lack of paying attention in the past** and that she was in the process
13 of taking more care in classifying Common Area Costs so they may be
14 correctly charged to the tenants and ultimately be collected as CAM Fee
15 income in the future.

16 • *Leasing Fees and Leasing Expense:* Not until 2007 had leasing related
17 expenses appeared on the financial statements. Based on our viewing of
18 the supporting documents, 100% of these fees, (\$3,709 in 2007)
19 relate to amounts paid to Robert Lucey for the leasing of Triple L.
20 Properties, LLC units. *The description of this charge relates to*
21 commissions for lease negotiations. The amount paid to Robert Lucey
22 was based on a percentage of the gross lease amount negotiated.

23 • *Management Fees:* These fees not only include the fee charged by Ms.
24 Lucey as the property manager, **but also include random payments to**
25 **Robert Lucey and Kristyn Lingenfelter for management services and**
26 **preparation of board of director minutes for Lucey Properties, LLC.**
27 Amounts paid to Robert Lucey and Kristyn Lingenfelter was \$2,140 and
28 \$200 respectively. **The payments to Robert Lucey and Kristyn**
Lingenfelter are above and in addition to the management fee collected
by Marcia Lucey for her property management services. Ms. Lucey's fee
was raised from \$500/month per property to \$1,000/month per
property beginning in January 2006. According to Ms. Lucey, the raise
the monthly management fee was agreed to by a majority of the
stockholders of each entity and documented in the board of director's
minutes. I was not provided access to the entities board of director's
minutes and was unable to confirm Ms. Lucey's statement. **In addition,**
Lucey Properties, LLC made payments to an outside vendor that were
described as "property management." The outside vendor was Alliance
Commercial and between 2004 through 2007 payments to this vendor
ranged from approximately \$3,000 to \$11,000 per year. The Alliance
Commercial invoices described the fees as commissions due for leases
negotiated.

1 • *Office Expense:* Office expenses in 2008 increased from less than \$500
2 for each entity to amounts in excess of \$2,000 and \$3,500 for Lucey
3 Properties, LLC and Triple L. Properties, LLC respectively. According to
4 our viewing of the supporting records, the increase is predominately the
5 result of both entities being charged "office rent" by Marcia Lucey. We
6 found that in 2008, Ms. Lucey had charged monthly rent to Triple L.
7 Properties, LLC \$3,500 and to Lucey Properties, LLC \$4,500. Of the
8 \$4,500 rent charged to Lucey Properties, LLC, \$1,500 was classified in
9 the trial balance as office expense and \$3,000 was classified as
management fees. When we inquired of Ms. Lucey what this amount
was for and how it was determined, she responded that she uses a
portion of her home to store documents and manage the day-to-day
operations of the two entities, therefore she felt it was proper to charge
a fee for rent.

10 • **Credit Card Charges**

11 ... "Based on our limited viewing time, it could not be determined if the
12 charges were business related or if they were charges for personal
13 items."

14 • **CONCLUSIONS**

15 Many times we found similar expenses categorized in more than one
16 income statement expense category. For example, landscaping
17 expenses have been found in the following income statement expense
18 categories: CAM fees, common area costs, maintenance, and
19 management fees. **There appears to not have been much attention paid
20 to classification of expenses and/or the charging of time related to the
21 two entities (emphasis added).** This has made for a difficult analysis.
22 When discussing the various expense items noted above with Ms.
23 Lucey, we were told that these were necessary costs, many of which
24 have not been charged or passed through to the entities in past years.
Per Ms. Lucey, now that the entities will be managed less like a family
business and **more like proper LLCs**, in the future many of these types
of costs will be correctly charged to the entities as they should have
been in the past and efforts will be made to classify expenses in the
proper expense categories ...

25 From our investigation, it appears there were amounts paid to related
26 parties that may not necessarily be for the performance of actual
27 services, but are for the arrangement of those services to be performed
28 by outside vendors. It could be argued that the \$2,000 per month paid
to Marcia Lucey would cover those services...

1 If payments made for services to the related parties noted above are
2 also being deducted as business expenses of the two entities, these
3 amounts should be subject to income tax reporting and both entities
4 should be filing the appropriate federal Form 1099 Miscellaneous
5 income reports with the International Revenue Service. **No evidence
was provided that this reporting requirement was complied with
(emphasis added).**

6 29. Based on the foregoing conclusions of MBA, as well as the
7 personal knowledge of Plaintiff as a Member of the two LLCs and records
8 maintained by him, on information and belief, Marcia, with the primary
9 assistance of Robert, has knowingly and purposefully mismanaged the two
10 LLCs to Plaintiff's detriment.

11 30. Plaintiff has recently contacted reputable property managers
12 Gaston & Wilkerson Management Group, Inc. ("G&W"). G&W has proposed
13 to manage the properties owned by the two LLCs at rates significantly lower
14 than the LLCs are being charged by Marcia. A true and correct copy of
15 G&W's proposals are attached hereto as Exhibit "4".

16 **IV. Agreement to Purchase Plaintiff's Membership Interests.**

17 31. In light of the Defendants' clear effort to deny Plaintiff his right to
18 distributions from the two LLCs, and based on Plaintiff's belief that certain
19 Defendants were intentionally mismanaging the two LLCs, Plaintiff pursued
20 attempts to extricate himself from Defendants in the two LLCs.

21 32. Plaintiff retained counsel to facilitate a fair and equitable buy-out
22 of Plaintiff's interest in the two LLCs, or in the alternative, for Plaintiff to buy
23 out the remaining Members' interests, using the appraised value of the LLCs
24 real property identified above.

EXHIBIT 2



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Reno, Nevada 89519

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(775) 827-2000

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E-Mail:
rhu@mclawfirm.com

Rick R. Hsu, Esq.

August 24, 2020

Via Email mberkbigler@charter.net
and U.S. Mail

Marsha Berkbigler
2090 Allen Street
Reno, NV 89509

Re: CEASE AND DESIST DEMAND

Dear Ms. Berkbigler:

This law firm represents Robert Lucey. As you know, Mr. Lucey is the Chairman of the Washoe County Board of County Commissioners who has worked with you for years as a fellow commissioner. He is also the owner of Advanced Pet Care of Northern Nevada and owns Lucey Properties LLC. On Saturday, August 22, 2020 at 9:23 p.m., you sent an email to Gary Pestello, stating:

Apparently Bob Lucey has decided to not support me and is pushing people to send money to my opponent.

As a result I am doing a fundraiser at Jim House' house on Thursday August 27th 5-7 PM. I hope you can attend the event at Jim's house.

I'm not sure what is going on with Bob but I'm being told he has decided to support Kitty Jung in her effort to replace me so he can replace Eric Brown as our County Manager. Apparently *he doesn't like black people* and he thinks he can control the female he is planning to replace him with. (Emphasis added).

For the record, Mr. Lucey does not support your political opponent in the 2020 election. Even if he did, such perceived support for your opponent does not justify you making the patently defamatory statement that "*he doesn't like black people*."

The elements of a case of defamation are (1) a false and defamatory statement by defendant concerning the plaintiff; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages. *Wynn v. Smith*, 117 Nev. 6, 10, 16 P.3d 424 (2001). Your statement that Mr. Lucey "doesn't like black people" is patently false. It was not a

August 24, 2020
Page 2

privileged communication but instead was published to a disinterested third person, Mr. Pestello. The anger caused by your incorrect perception about Mr. Lucey supporting your opponent is clear evidence that you made this false statement with actual malice in reckless disregard of the truth. Such malice continues based on your refusal to retract the inflammatory and defamatory statement despite Mr. Pestello's email of August 23, 2020 politely requesting you to do so. Finally, your defamatory statement constitutes defamation *per se* because it tends to injure Mr. Lucey in his business and profession as a County Commissioner and local business owner. Therefore, damages to Mr. Lucey are presumed. *Nevada Ind. Broadcasting v. Allen*, 99 Nev. 404, 409, 664 P.2d 337 (1983).

Demand is made for you immediately to retract this defamatory statement and to cease and desist making any future statements that Mr. Lucey "doesn't like black people," or statements similar in content. If you do not retract the defamatory statement by close of business day, **Friday, August 28, 2020**, or you continue to publish such false and defamatory statements, Mr. Lucey will have no choice but to pursue legal remedies including filing a lawsuit seeking obtaining a temporary restraining order and preliminary and permanent injunction against you, and damages for your defamatory statements.

Should any part of this demand be unclear, please do not hesitate to contact me.

Sincerely yours,



Rick R. Hsu

R.R.H.
cc: client (via email)

SIMONS HALL JOHNSTON

September 1, 2020

VIA EMAIL: rhsu@mcclawfirm.com

Original Via U.S. Mail

Rick R. Hsu
Maupin, Cox & LeGoy
4785 Caughlin Pkwy
PO Box 30000
Reno, NV 89520

RE: Marsha Berkbigler / Bob Lucey

Dear Mr. Hsu:

As I previously advised, I have been retained to represent Marsha Berkbigler ("Ms. Berkbigler") in response to the contentions and assertions in your letter dated August 24, 2020. Thank you for allowing me the time to investigate and respond to your contentions.

Initially, I would like to point out that Commissioner Lucey and Commissioner Berkbigler have enjoyed a long relationship sitting together on the Washoe County Board of County Commissioners (the "Board"). While they have not always agreed on matters presented to the Board, it is my understanding they had a very good professional relationship. Unfortunately, it appears that that professional relationship became strained as a result of the selection of Eric Brown for County Manager in November of 2019.

As I understand the background, Mr. Lucey wanted the Board to select Kate Thomas as the next County Manager. Mr. Lucey appears to have a close personal relationship with Ms. Thomas. Mr. Lucey apparently wanted Ms. Thomas to be the next County Manager due to his personal relationship with her and that she would be more receptive to direction from Mr. Lucey rather than an independent county manager. However, Ms. Thomas' credentials did not warrant her selection.

Instead, Ms. Berkbigler, Ms. Jung and Ms. Herman voted to select Eric Brown as the County Manager since he was the most qualified. Mr. Brown is an African-American. Ms. Berkbigler's vote for Mr. Brown as the County Manager appears to be the genesis of Mr. Lucey's resentment towards Ms. Berkbigler.

6490 S. McCarran Boulevard, Suite F-46 Reno, NV 89509
Phone 775-785-0088 Fax 775-785-0087 Website SHJNevada.com

Previous to the November, 2019, vote for county commissioner, Mr. Lucey and Mindy Elliott, both members of Arrowcreek Golf Club ("Arrowcreek") promised to host a political fundraising event at Arrowcreek for Ms. Berkgigler. As I further understand it, Mr. Lucey and Ms. Elliott are actively supporting and assisting Ms. Berkgigler's political opponent in the upcoming election—Alexis Hill. Apparently, Mr. Lucey and Ms. Elliott believe that Ms. Hill will be more tractable and subordinate to Mr. Lucey's control on the Board if she is elected. It is with this backdrop, that the Arrowcreek fundraiser was to proceed so as to make it appear that Mr. Lucey and Ms. Elliott were outwardly supportive of Ms. Berkgigler while at the same time secretly working to undermine Ms. Berkgigler and support her opponent.¹

During the site visit for the political event at Arrowcreek, Ms. Berkgigler was instructed by Mr. Lucey to communicate with Gary Pestello, Arrowcreek's representative. During the communications with Mr. Pestello, Ms. Berkgigler did send her email communication you reference in your letter.

I have reviewed your letter and its contents and disagree with your assessment that the following statement is defamatory: "Apparently, he doesn't like black people and he thinks he can control the female he is planning to replace him with." You correctly outline the elements of a claim for defamation in your letter. However, our perception of the facts and legal analysis is dramatically different from yours as detailed below.

A. No False and/or Defamatory Statement:

Initially, truth is always a defense and even statements with a "basis in truth" are not actionable. Wellman v. Fox, 108 Nev. 83, 88, 825 P.2d 208, 211 (1992) ("factual assertions are not actionable unless they have no basis in truth.") (citing Milkovich v. Lorain Journal Co., 497 U.S. 1, 110 S.Ct. 2695, 2707-2708 (1990)). I will make no comment on this point other than to point out that Mr. Brown is an African-American, Mr. Lucey did not want him selected, Mr. Lucey was very angry with Mr. Brown's selection and Mr. Lucey has made it known he wants Mr. Brown replaced with Ms. Thomas. It would appear on these limited facts that there is at least some basis in truth regarding the statement made. I also have additional responses on this point but I do not believe there is a need to provide any further response at this time.

Moving on, as you are aware the law recognizes a distinction between an assertion of fact and an opinion. Opinions are not actionable. Nevada Independent

¹ I note your letter also states: "For the record, Mr. Lucey does not support your political opponent in the 2020 election." As you know, the use of the phrase "for the record" is a colloquialism for asserting a public position while I harbor a personal position that is contrary.

Broadcasting Corp. v. Allen, 99 Nev. 404, 664 P.2d 337, 341 (1983) ("statements of opinion as opposed to statements of fact are not actionable."). In the present case, Ms. Berkbigler's statement is clearly an opinion by the prefatory use of the word "apparently". Because of this, Ms. Berkbigler's comment is easily interpreted to be an opinion rather than a statement of fact. See e.g., Wellman v. Fox, 108 Nev. 83, 88, 825 P.2d 208, 211 (1992) ("exaggerated statements are permissible in contexts in which the statements would be interpreted by a reasonable person as mere rhetorical hyperbole. . . . Fox's exaggerations and overbroad generalizations were not libelous."); Culinary Workers Union v. Eighth Judicial Dist. Ct., 66 Nev. 166, 177, 207 P.2d 990, 995 (1949) (use of "unfair" or "fascist" are opinion and not defamatory (overruled in part on other grounds in Vegas Franchises, Ltd. v. Culinary Workers Union, Local No. 226, 83 Nev. 236, 427 P.2d 959 (1967); see also Letter Carriers v. Austin, 418 U.S. 264, 284-286, 94 S.Ct. 2770, 2781-2782, 41 L.Ed.2d 745 (1974) (use of the word "traitor" in literary definition of a union "scab" not basis for a defamation action under federal labor law since used "in a loose, figurative sense" and was "merely rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members"); Susan B. Anthony List v. Driehaus, 805 F. Supp. 2d 423, 432 (S.D. Ohio 2011) ("apparently defamatory statements are contained in a letter clearly meant to be a persuasive statement of the declarant's opinion, then they are not actionable."); Burns v. Davis, 993 P.2d 1119, 1129 (Az. 1999) ("political invective, opinion, or hyperbole" cannot support defamation claim).

Further, even if Ms. Berkbigler's statement could be construed as defamatory, because Mr. Lucey is a "public figure", he is obligated to support his allegations with proof of "actual malice". This element of a defamation claim for a public figure was discussed by the Nevada Supreme Court in Rosen v. Tarkanian, 135 Nev. 436, 442, 453 P.3d 1220, 1225 (2019), wherein the Court held:

Where, as here, the plaintiff is a public figure, the statements must be made with "actual malice."

Id. In a defamation action, "actual malice" must be shown by "clear and convincing evidence". Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 721, 57 P.3d 82, 92 (2002). There is no proof, either contained in the written statement or contextually that Ms. Berkbigler exhibited "actual malice" when her statement was made. Therefore, the assertions of wrongdoing against Ms. Berkbigler are baseless.

Further, the Nevada Supreme Court made it abundantly clear that political speech is not subject to typical defamation considerations between private individuals because "the remedy" for any "type of factually incorrect criticism of a political opponent is not a lawsuit, but competing speech." Rosen v. Tarkanian, 135 Nev. 436, 442, 453 P.3d 1220, 1225 (2019); see also Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974) "[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.”).

B. Ms. Berkbigler’s Statement was Privileged.

In Circus Circus Hotels, Inc. v. Witherspoon, 99 Nev. 56, 62 657 P.2d 101 (1983), the Nevada Supreme Court discussed the application of the qualified and/or conditional privilege as follows:

A qualified or conditional privilege exists where a defamatory statement is made in good faith on any subject matter in which the person communicating has an interest, or in reference to which he has a right or a duty, if it is made to a person with a corresponding interest or duty. . . . Whether a particular communication is conditionally privileged by being published on a “privilege occasion” is a question of law for the court; the burden then shifts to the plaintiff to prove to the jury’s satisfaction that the defendant abused the privilege by publishing the communication with malice in fact.”

Id. Here, Ms. Berkbigler was communicating with Mr. Pestello regarding a political event and her communication was relating to political activities. Mr. Pestello, who is the liaison for the political event at Arrowcreek, coordinated the political event on behalf of Mr. Lucey and Ms. Elliott. Therefore, Mr. Pastello, the recipient of the communication, had an interest in the subject matter of the communication. Accordingly, Ms. Berkbigler’s statements are privileged.

C. Nevada’s Policy of Free Speech.

In addition, Mr. Lucey’s contentions run contrary to Nevada’s clear policy of free speech. In matters of politics, the Nevada Supreme Court has consistently held of matters concerning public officials and of public interests there is a wide latitude for free speech and that defamation claims cannot be abused to interfere with that right. See *e.g.*, People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd., 110 Nev. 78, 867 P.2d 1121, 1127 (1994) (“We believe that ‘open and robust debate’ should be encouraged in Nevada”); Culinary Workers Union, Local No. 226 v. Eighth Judicial District Ct., 66 Nev. 166, 207 P.2d 990, 994 (1949) (“It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction”).

D. Mr. Lucey’s Sexist and Misogynistic Statements.

Unfortunately, during my investigation, I learned that Mr. Lucy commonly refers to Ms. Berkbigler as an “old lady.” Facially, this statement is sexist and misogynistic. However, Ms. Berkbigler recognizes that on occasion, comments or statements are

made that may not necessarily reflect true feelings and/or are not intended to give offense.

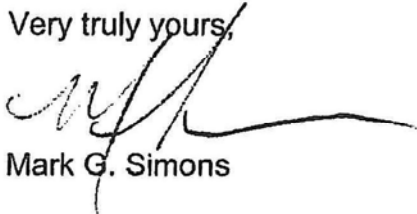
E. Moving Forward Considerations.

As you can perceive from the tone and tenor of this letter, we feel very comfortable in defending any action or claims initiated by Mr. Lucey. While Ms. Berkbigler would like to avoid what she perceives as unnecessary and unwarranted litigation, if she is forced to defend herself, she will do so.

I suggest, however, that it would be more productive and beneficial for Mr. Lucey and Ms. Berkbigler, and for all the constituents of Washoe County, for Mr. Lucey and Ms. Berkbigler to meet and discuss any differences they have and/or perceive. Productive and cooperative County Commissioners, especially those filling the Chair and Vice Chair positions, is beneficial to everyone and is something I believe we should strive for, not hostile and combative participants engaged in litigation while they attempt to perform their public functions.

If, however, your client believes a different approach is more preferable, please be advised that I am authorized to accept service.

Very truly yours,



Mark G. Simons

MGS/ja