STATE OF NORTH CAROLINA
COUNTY OF HAYWOOD

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

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HAYWOOD COUNTY C.S.C.

DEBORAH KING

Plaintiff,

v.

HAYWOOD REPUBLICAN ALLIANCE, ET AL.

Defendants.

File No. 18-CVS-116

DEFENDANT EDDIE CABE'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COMPLAINT

Defendant Eddie Cabe, by and through his undersigned counsel, hereby files a Memorandum in Support of his Motion to Dismiss the Complaint. Plaintiff Deborah King's Complaint fails to state a claim for intentional infliction of emotional distress ("IIED") or invasion of privacy by appropriation of name or likeness for the reasons discussed below. Therefore, the Complaint should be dismissed pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

FACTUAL BACKGROUND

The facts detailed in this section are as alleged in the Complaint. By reciting them, Defendant Eddie Cabe does not admit the allegations as pled but accepts them as true only for the purposes of this Motion to Dismiss.

Plaintiff Deborah King, the vice chair of the Haywood County Republican Party,[1] initiated this action against multiple members of the Haywood Republican Alliance ("Alliance"),

[1] That King is the vice chair of the Haywood County Republican Party is incorporated by reference in the Complaint. Indeed, in Exhibit C-3, the Complaint incorporates by reference an article entitled *Party disloyalty ??? (*SIGH*)*, Daily Haymaker (July 5, 2017), *available at:* http://dailyhaymaker.com/?p=18262, that explicitly notes that the "HCGOP Chair [is] Ken

including Cabe. The Alliance is a registered Political Action Committee in the State of North Carolina. Compl. ¶ 6. The official leadership of the Haywood County Republican Party and the Alliance have had continued political disagreements over whether particular GOP ballot candidates and elected officials represent and reflect the party's best interests. *See* Compl. Exhibit C-3 (incorporating by reference *The Mountaineer* article describing ongoing political dispute between the Alliance and the Haywood County Republican Party). As part of that political dispute, members of the Alliance have criticized the Plaintiff. *See* Compl. Exhibit G (Cabe expressing that he thought the Plaintiff and Ken Henson, the chair of the Haywood County Republican Party, "[c]heated the Good Republicans out of their leadership roles"). Members of the Alliance similarly have criticized Ken Henson, the chair of the Haywood County Republican Party. *Id.*

Around the spring or summer of 2017, two short JibJab videos of the Plaintiff and Henson's faces singing to the Sonny and Cher song "I Got You Babe" and "Barbie Girl" surfaced on social media. Compl. Exhibit D-1, D-2. JibJab is a digital entertainment company that allows users of its website to insert someone's head onto the body of a celebrity or other individual to create a spoof video or e-card.[2] The Plaintiff does not specifically allege that Cabe

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Henson and Vice Chair [is] Debbie King." Compl. Exhibit C-3. The Complaint also cites numerous times to a blog run by Monroe Miller called Haywood County Toeprints (www.haywoodtp.net) that explicitly refers to King as Vice Chair. *See* http://www.haywoodtp.net/oldStuff.html; Compl. Exhibits C-2, D-3. Furthermore, it is clear from Exhibit G of the Complaint that King retains a "leadership role[]" in the Haywood County Republican Party.

[2] *See* https://www.jibjab.com/browse/movie-ecards (describing JibJab as a "spoof" website). The Court may take judicial notice of this fact, as the plaintiff refers to JibJab in her Complaint. *See* **Error! Main Document Only.** *West v. G.D. Reddick, Inc.*, 302 N.C. 201, 203 (1981) ("a court may take judicial notice of a fact which is . . . capable of demonstration by readily accessible sources of indisputable accuracy").

created either video. Around the relevant time, Cabe, among others, posted one of the videos on his Facebook page, *Id.*, Compl. Exhibits D1-4, and someone unidentified in the Complaint took a screenshot of one of the spoof videos with the Plaintiff's face included and used it to create a "campaign style" button. Compl. at ¶ 10. The Plaintiff does not allege that Cabe created the "campaign style buttons." Compl. at ¶¶ 10-12. Members of the Alliance subsequently "offered [the campaign style buttons] for sale in the commerce of Haywood County and other places," including at the Hillbilly Jam and "political rallies, social events, fairs and entertainment events." Compl. ¶ 10; Compl. Exhibit C-4. These "campaign style buttons" were disseminated by the Alliance. Compl. ¶ 10.

The Plaintiff alleges that dissemination of the "campaign style buttons" and the spoof videos are actionable as a misappropriation of her likeness for commercial gain and intentional infliction of emotional distress. Cabe filed a Motion to Dismiss for Failure to State a Claim under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure on September 11, 2018 while representing himself pro se. After retaining counsel, Cabe now submits this memorandum in support of his motion to dismiss.

<u>ARGUMENT</u>

The Complaint shows that to the extent Cabe participated in disseminating the "campaign buttons" and sharing the parodic videos involving the plaintiff, he did so for a political purpose and as a means of engaging in protected expression. Nowhere does the Complaint demonstrate facts indicating that Cabe's actions were done for a commercial purpose or enterprise. The Plaintiff has failed to plead facts sufficient to find Cabe liable for IIED or misappropriation of likeness under North Carolina law altogether and her claims must fail on that basis. Finally, to the extent that either of the Plaintiff's claims are based on Cabe's reposting of the relevant videos

or his otherwise limited association with the politically-charged expression at issue, the Plaintiff's claims are barred by the First Amendment. Accordingly, the Complaint should be dismissed.[3]

I. Standard of Review

On a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the standard of review is whether, as a matter of law, the allegations of the Complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. "[A] claim should be dismissed where it appears that plaintiff is not entitled to relief under any set of facts which could be proven." *White v. Collins Bldg., Inc.*, 209 N.C. App. 48, 50 (2011) (internal quotation marks omitted).

II. The Plaintiff does not adequately state a claim for relief for intentional infliction of emotional distress.

To succeed on a claim for intentional infliction of emotional distress, a plaintiff must plead and prove "(1) extreme and outrageous conduct [by the defendant], (2) which is intended to cause and does cause (3) severe emotional distress to another." *Turner v. Thomas,* 369 N.C. 419, 427 (2016) (internal quotation marks omitted). Here, the Complaint fails to properly plead all three elements and should be dismissed on that basis. Furthermore, because the expression on which the IIED claim rests squarely falls within the scope of First Amendment protections, the IIED claim cannot be constitutionally sustained.

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[3] The Plaintiff has stated that defamation is not before the court and, thus, the court should not construe the Complaint as alleging defamation. *See* Plf's Mem. Opp. to Def's West and Davis Mot. to Dismiss (Mar. 29, 2018), at 2. To the extent Plaintiff seeks to convert this action or add a claim for defamation at a later date, the First Amendment would bar the claim for the reasons discussed below.

A. The Complaint fails to properly plead any of the elements of IIED.

In her Complaint, Plaintiff fails to show that Cabe engaged in "(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress." *Id.* Failure to properly plead even a single element is fatal to the claim; here, the Complaint fails to properly plead any of the three elements.

As to the first element of the tort, North Carolina sets a "high threshold" for "extreme and outrageous conduct." *Id.* Conduct is considered extreme and outrageous only when it "'exceeds all bounds of decency tolerated by society.'" *West v. King's Dept. Store, Inc.*, 321 N.C. 698, 704 (1988). The conduct must be "regarded as atrocious, and utterly intolerable in a civilized community. *Briggs v. Rosenthal*, 73 N.C. App. 672, 677 (1985) (internal quotation marks omitted). As such, "liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Id.* (citation omitted). Plaintiffs are expected—and "required"—to cope with "a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind." *Id.* (citation omitted).

In *Glenn v. Johnson*, the plaintiff, his church's treasurer, filed an IIED claim after disagreements with other church leaders culminated in the church's leadership publicly requesting his resignation before the congregation. 787 S.E.2d 65, 68 (N.C. App. 2016). Plaintiff was "surprised" by the public request, "stood up in front of the body, handed over his keys, and renounced his responsibilities as treasurer." *Id.* The plaintiff filed an IIED claim, *inter alia*, based, in part, on defendants' public request for plaintiff's resignation and the defendants' behavior in "ignoring, refusing, or laughing at efforts by plaintiff for reconciliation or mediation." *Id.* at 73.

Despite the public embarrassment that the plaintiff claimed to have felt, the Court of Appeals held that "*as a matter of law*, plaintiff has failed to allege or present evidence that defendants' conduct in this case rose to the level of extreme and outrageous." *Id.* (emphasis added). In doing so, the court distinguished the case at hand from *Phillips v. Rest. Mgmt. of Carolina, L.P.*, 146 N.C.App. 203 (2001), where the Court of Appeals concluded that a restaurant worker spitting in a patron's food could be found by a jury to "rise to the level of 'extreme and outrageous.'" *Glenn*, 787 S.E.2d at 72 (quoting *Phillips*, 146 N.C. App. at 207). As the court in *Glenn* noted, spitting in someone's food is a criminal act in some states. *Glenn*, 787 S.E.2d at 72. Alleged public embarrassment based on a church's public request for its treasurer's resignation was "simply not comparable to spitting in food." *Id* at 73.

Here, the Plaintiff is attempting to hold Cabe liable for the alleged public embarrassment resulting from satirical videos and campaign style buttons that he reposted or shared but did not and is not alleged to have created. *See* Compl. ¶ 25 (alleging that the "wrongful conduct" caused "embarrassment [and] humiliation."). As in *Glenn*, the conduct alleged here stems from conflict over the proper management of an organization—here, the Haywood County Republican Party—and not, as in *Phillips*, conduct that is sometimes criminalized. As a matter of law, such conduct is not "extreme and outrageous." *See Phillips*, 146 N.C. App. at 207. The Complaint is therefore insufficient in pleading the first prong of the IIED tort.

Second, there are no factual assertions within the Complaint that suggest Cabe acted with the intent to cause any emotional distress. The Complaint states that the acts of the Defendant were "done intentionally," and "with the specific intent to harm the Plaintiff and her reputation in the community." Compl. ¶¶ 18, 22. Yet, these are conclusory allegations that simply restate one of the elements of the tort, and as such they are not entitled to the presumption of truth. The

Complaint does not allege any *facts* suggesting that Cabe ever acted with the intent to cause Plaintiff extreme emotional distress. *See Miller v. Rose*, 138 N.C. App. 582, 592 (2000) ("In ruling on a Rule 12(b)(6) motion to dismiss, the trial court regards all factual allegations of the complaint as true. Legal conclusions, however, are not entitled to a presumption of truth.") (citations omitted).

Third, there is also a high bar for the "severe emotional distress" element of the tort. "It is only where it is extreme that the liability exists. Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is part of the price of living among people." *Waddle v. Sparks*, 331 N.C. 73, 84 (1992) (citation omitted). Thus, to satisfy this element, North Carolina courts have required a plaintiff to plausibly allege, and then prove, that a defendant's conduct caused an "emotional or mental disorder, for example neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals to do so." *Glenn*, 787 S.E.2d at 70 (quoting *Johnson v. Ruark Obstetrics and Gynecology Associates, P.A.*, 327 N.C. 283, 304 (1990)). Feelings of embarrassment and humiliation do not qualify as "severe or disabling" in the context of intentional infliction of emotional distress claims under North Carolina law. *Payne v. Whole Foods Market Group, Inc.*, 812 F. Supp. 2d 705, 710 (E.D.N.C. 2011), *order aff'd*, 471 Fed. Appx. 186 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 666, 184 L. Ed. 2d 463 (2012) (applying North Carolina law). Not even a loss of sleep and appetite qualifies as "severe emotional distress." *Strickland v. Jewell*, 562 F. Supp. 2d 661, 676 (M.D.N.C. 2007) (applying North Carolina law). Therefore, this element is met only when "the distress inflicted is so severe that no reasonable man could be expected to endure it." *Id.* (internal citations omitted).

Here, even accepting the Complaint's conclusory allegations as to the Plaintiff's emotional distress, the Complaint fails entirely to allege a factual basis for any claim that the Plaintiff suffered the level of emotional or mental disorder necessary, as a matter of law, to show IIED. Thus, because the Plaintiff has failed to adequately plead any of the required elements of an IIED claim, the IIED claim should be dismissed with prejudice.

B. The First Amendment bars the IIED claim.

The Plaintiff's IIED claim against Cabe is also subject to dismissal because the expression at issue falls squarely within the scope of First Amendment protections. As the U.S. Supreme Court has explained, the First Amendment "can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress." *Snyder v. Phelps*, 562 U.S. 443, 451 (2011). First Amendment protection was first extended to IIED defendants in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). There, the defendant published a parodic advertisement that described Jerry Falwell, a prominent minister and an active commentator on political public affairs, as admitting that his "'first time' was during a drunken incestuous rendezvous with his mother." *Id.* at 48. The advertisement portrayed Falwell and his mother as "drunk[s] and immoral, and suggest[ed] that [Falwell] [was] a hypocrite who preaches only when he is drunk." *Id.*

The Supreme Court held that the First Amendment barred Falwell's IIED claim. In so doing, the Court concluded that public figures and public officials may not recover for IIED claims without showing that the publication was published with "actual malice," or "with knowledge that the statement was false or with reckless disregard as to whether or not it was true." *Id.* at 56. This heightened standard gives "breathing space" to "the free flow of ideas and

opinions on matters of public interest and concern," which necessarily includes criticism of public figures and officials. *Id.* at 50–52.

Here, the Plaintiff is a public figure. King is the vice chair of the Haywood County Republican Party, the political organization at the heart of the controversy at issue in this case. King may well be a general public figure in the Haywood County community in which the buttons and videos were shared, given that she is an official in one of the major political parties. She is, at the very least, a limited-purpose public figure as to matters that involve the Haywood County Republican Party. *See Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 34 (2002) ("[A]n individual may become a limited purpose public figure by his purposeful activity amounting to a thrusting of his personality into the vortex of an important public controversy.") (internal quotation marks omitted). Limited-purpose public figures are treated the same as general public figures for First Amendment purposes. *See Gaunt v. Pittaway*, 139 N.C. App. 778, 785–86 (2000) (noting that a limited purpose public figure "becomes a public figure for a limited range of issues" and is "treat[ed] . . . as a public figure for the limited purpose of comment on a particular public controversy"). *See also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974) (public figure status "may rest on either of two alternative bases ... pervasive fame or notoriety" or involvement in "a particular public controversy and ... for a limited range of issues"). The public controversy at issue is evident from the face of the Complaint. Compl. Exhibit C-3 incorporates an article written by *The Mountaineer*, which indicates that Cabe and several others left the Haywood County Republican Party.[4] The Alliance disagrees that the

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[4] The Plaintiff has not demonstrated that the speech at issue belongs to Cabe. Indeed, Exhibit D-1 does not show Cabe as the creator of the Jib Jab video. Furthermore, Exhibit C-3 also does not implicate nor show Cabe wearing the button in question, let alone engaging in advertising or using the button for a commercial purpose. In any event, the plaintiff does not allege with

Haywood County Republican Party is upholding conservative ideals, and the Complaint demonstrates how this controversy consumed local media. Compl. Exhibit C-3.

Nowhere in the Complaint does the Plaintiff allege constitutional actual malice, as public figures or limited-purpose public figures are required to do. *Hustler*, 485 U.S. at 56. The Complaint's only allegations as to the defendants' intentions are that the conduct "was done intentionally, spitefully, with the specific intent to harm the Plaintiff and her reputation," "was done with spiteful purpose and intent to cause ridicule and embarrassment," and "was done with an intentional spiteful purpose . . . with the intent to embarrass, humiliate and ridicule the Plaintiff." Compl. ¶¶ 21, 22. These allegations are not even relevant to the actual malice standard, which requires reference not to spite or intent to harm, but to the defendants' "knowledge that the statement was false" or "reckless disregard as to whether or not it was true." *Hustler*, 485 U.S. at 56. In other words, even if a defendant sets out with an intent to be spiteful or to cause a public figure emotional distress, he is immune from liability if he believes what he says is true. *See Desmond v. News & Observer Pub. Co.*, -- S.E. 2d --, 2018 WL 6613813, at *7 (N.C. App. Dec. 18, 2018) (noting that the actual malice standard "is a subjective one" and requires evidence "that the defendant actually had a high degree of awareness of probable falsity" or "entertained serious doubts as to the truth" of a statement).

Moreover, the statements regarding the defendants' intent are conclusory, and not entitled to the presumption of truth. *See, e.g., Meyer v. Walls*, 347 N.C. 97, 114 (1997) (noting that a "conclusory allegation" of willful and wanton behavior is not "sufficient, by itself, to withstand a Rule 12(b)(6) motion to dismiss"); *Miller*, 138 N.C. at 592. Paragraph 21 of the Complaint cites

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specificity that Cabe was personally involved in the making or selling of the buttons, or of the video. Cabe cannot be held liable for IIED for the alleged actions of others.

Exhibit G to support its allegation that the defendants acted with an intent to harm, ridicule, and embarrass. But no reasonable inference can be drawn from Exhibit G to support those allegations, which, again, are irrelevant to the actual malice inquiry.

In fact, all that Exhibit G indicates is that Cabe was engaged in protected political speech by criticizing Plaintiff and Ken Henson for "[c]heat[ing] the Good Republicans out of their leadership roles." Compl. Exhibit G. He spoke as a member or former member of the Haywood Republican Party and criticized a member of that party's leadership, the Plaintiff, who was a political, public figure. Such criticism is at the heart of the First Amendment's protections. *See Varner v. Bryan*, 113 N.C. App. 697, 703 (1994) ("The rule requiring 'public officials' to prove actual malice is based on First Amendment principles and reflects the Court's consideration of our national commitment to robust and wide-open debate on public issues.") (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964)). Nevertheless, Cabe's speech in Exhibit G is not the speech upon which the claims here lie—the Sonny and Cher videos and the "campaign style buttons"—and thus cannot support the causes of action in the Complaint. Because King is a public figure and has failed to plead constitutional actual malice, her IIED claim should be dismissed.

Furthermore, even if the Plaintiff were not a public figure, her claim would still be barred by the First Amendment because the speech involved a matter of public concern.[5] While *Hustler*

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[5] The North Carolina Court of Appeals has considered speech to be on a matter of public concern when "it relates to any matter of political, social, or other concern to the community." *Leiphart v. N.C. School of the Arts*, 80 N.C.App. 339, 354 (1986) (internal quotation marks omitted). Furthermore, in *Snyder*, the U.S. Supreme Court explained that speech addresses a public concern when it "can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Snyder*, 562 U.S. at 453 (internal citations and quotation marks omitted).

provided First Amendment protection for IIED defendants where their speech was directed at public figures, *Snyder* extended this protection to defendants where their speech was directed at private figures but involved a matter of public concern. 562 U.S. at 458 (2011). *Snyder* concerned the Westboro Baptist Church's picketing of a funeral for a veteran killed in Iraq while in the line of duty. *Id.* at 448. The Court barred the IIED claim brought by the veteran's father against the church. *Id.* at 459. In doing so, the Court explained that speech on matters of public concern is "at the heart of the First Amendment's protection," which reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Id.* at 451–52.

Here, the videos and "campaign style buttons" were part of a political controversy and constituted political commentary. As such, the speech at issue involved a matter of public concern and is entitled to First Amendment protection. When analyzing whether the speech addresses a matter of public concern, a court must look to the "content, form and context of that speech, as revealed by the whole record." *Id.* at 453. Like in *Snyder*, the speech here was conducted in public and in a political context. *See* Compl. ¶10 (alleging that the buttons were disseminated at "political rallies, social events, fairs and entertainment events"). The "campaign style buttons"at issue were placed next to Donald Trump campaign buttons, reflecting their fundamentally political nature. Compl. Exhibit C-4. In fact, the proper context of the suit is demonstrated conclusively in Exhibit C-3, which incorporates by reference an article published in *The Mountaineer*. The article reports that Cabe, along with others, differed ideologically with the Haywood County Republican Party. This ideological difference caused controversy among members of the Haywood County Republican Party, including the Plaintiff, that attracted "legitimate news interest," *Snyder*, 562 U.S. at 453, and related to political matters concerning

the community. Under *Snyder*, then, the expression at issue would be protected *even if* the Plaintiff were not a public figure. The First Amendment bars the IIED claim, and, thus, the Complaint should be dismissed.

III. Plaintiff does not adequately state a claim for relief for invasion of privacy by misappropriation of name or likeness.

The Plaintiff has not adequately pled a factual basis under North Carolina law for her claim of invasion of privacy by misappropriation of her likeness. Accordingly, the court should dismiss this claim pursuant to Rule 12(b)(6).

A. The Complaint fails to state a cause of action for misappropriation of one's name or likeness since plaintiff has not properly alleged that Cabe's distribution of the buttons or videos was part of a commercial enterprise.

North Carolina state tort law recognizes the tort of misappropriation of one's name or likeness. However, this tort is only actionable when the defendant appropriates a plaintiff's likeness "for the defendant's advantage as a part of an advertisement." *Renwick v. News and Observer Pub. Co.*, 310 N.C. 312, 322 (1984). North Carolina courts have affirmed that misappropriation of name or likeness must be tied to a commercial purpose. *See, e.g.*, *Flake v. Greensboro News Co.*, 195 S.E. 55, 64 (1938) ("the unauthorized use . . . in connection with an *advertisement or other commercial enterprise* gives rise to a cause of action") (emphasis added); *Merritt, Flebotte, Wilson, Webb & Caruso, PLLC v. Hemmings*, 196 N.C.App. 600, 614 (2009) (holding that claim for invasion of privacy by misappropriation of likeness failed where claimants "fail[ed] to articulate how [the other party's actions] would constitute misappropriation of their image or biographies *for any commercial purpose*.") (emphasis added). *See also Hartford Casualty Ins. Co. v. Ted A. Greve & Assocs., PA*, 742 F. App'x 738, 741 (4th Cir. 2018) (noting that, in North Carolina, the "tort of appropriation of likeness" requires that the defendants "sought to . . . use the plaintiffs to advertise").

Here, the count for invasion of privacy by appropriation of name or likeness should be dismissed. The use of the Plaintiff's likeness in the video and on the buttons was not part of any advertisement or commercial enterprise, and is therefore non-actionable. The Plaintiff's own allegations and exhibits demonstrate that the buttons and videos at issue were part of a struggle for control of the local Republican Party, rather than an element of a money-making enterprise, an enterprise which would be barred in any case given the Alliance's alleged status as a political action committee. Compl. ¶ 6, Exhibit A.

The distribution of political buttons was *itself* a political campaign against the Plaintiff and thus not equivalent to a commercial endeavor. The act of distributing the "campaign buttons" and videos at issue was a means of attacking the Plaintiff's role in the party, not a means of *selling more buttons and videos* for commercial gain. *See Flake*, 195 S.E. at 64 ("One of the accepted and popular methods of advertising . . . is to procure and publish the [e]ndorsement *of the article being advertised* by some well-known person whose name supposedly will lend force to the advertisement.") (emphasis added). The Complaint itself admits within the same paragraph that it was done for a political purpose when it characterizes the buttons as "campaign style buttons." Compl. ¶ 10. Elsewhere in the Complaint, Plaintiff makes the conclusory allegation that "the dissemination of the Plaintiff's likeness was part of a commercial enterprise through advertisements and other means which created a commercial benefit to the named Defendants." *See id.* ¶ 13. A mere recitation of the legal standard, without more, does not suffice to survive a Rule (12)(b)(6) motion.

The Complaint does point to four exhibits—C-1 through C-4—to demonstrate the commercial use element required to show a misappropriation of likeness. However, the exhibits do not in fact indicate that the buttons were commercial advertising, or an attempt to make

money from the Plaintiff's likeness: the exhibits underline the political character and purpose of the buttons.

Exhibit C-1 indicates that Monroe Miller wanted to wear his button to the next political meeting of the Haywood County GOP while failing to show how Cabe was using the button for an advertisement or commercial purpose. Neither Exhibits C-2 nor C-3 purport to show Cabe misappropriating the Plaintiff's name or likeness for an advertising or commercial purpose. Exhibit C-2 does not lead to a reasonable inference of an advertising or commercial purpose. Exhibit C-2 suggests that Cabe might bring buttons to the county fair, but in context it indicates that the buttons were tied to the "Haywood 5," a group of politically-engaged citizens who expressly differed in conservative ideologies and viewpoints from some members of the Haywood Republican party. Exhibit C-4 does show the "selling" of the buttons in question, but once again the context of the exhibit illustrates that the "sales" were political speech like the Donald Trump buttons nearby.

Looking elsewhere in the Complaint, there are no "facts sufficient to make a good claim." *See Bissette v. Harrod*, 226 N.C. App. 1, 7 (2013). Paragraph 10 attempts to show a commercial purpose by claiming that the political campaign buttons "were offered for sale in the commerce of Haywood County and other places," and again stating that the defendants "offer[ed] the same for sale to the public." Compl. ¶ 10. However, this is insufficient to demonstrate a commercial purpose, as both North Carolina courts and neighboring jurisdictions with comparable tort law have repeatedly held. *E.g.*, *Merritt*, 196 N.C.App. at 614 (attorney biographies were not misappropriated for a commercial purpose where law firm could not remove residual html code of images from third-party server that could still be viewed via search engine); *Showler v. Harper's Magazine Foundation*, 222 Fed. Appx. 755, 763 (10th Cir. 2007) (applying New York

and Oklahoma law and holding that a for-profit magazine's publication of a photograph of a deceased serviceman's open casket did not amount to an appropriation of the serviceman's name or likeness for commercial purposes in the absence of any evidence that the use of the photograph was for advertising or trade, because the photograph was used to illustrate an article on a matter of public interest); *Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1326 (11th Cir. 2006) (applying Florida law and holding that a retailer that displayed images of book covers in furtherance of its Internet book sales did not use the plaintiff's image "for purposes of trade or for any commercial or advertising purpose" within the meaning of commercial misappropriation statute where its use of those images was not an endorsement or promotion of any product or service but was merely incidental to, and customary for, the business of Internet book sales); *Tyne v. Time Warner Entertainment Co., L.P.*, 901 So. 2d 802, 810 (Fla. 2005) (holding that the term "commercial purpose" as used in Florida's commercial misappropriation statute does not apply to publications, including motion pictures, that do not directly promote a product or service; thus, the term did not apply to a motion picture depicting individuals killed in a fishing vessel during a storm where the motion picture did not directly promote a product or service); *Edward Lewis Tobinick, MD v. Novella*, 848 F.3d 935, 952 (11th Cir. 2017) ("Even if [defendant] receives some profit for his quasi-journalistic endeavors as a scientific skeptic, the articles themselves, which never propose a commercial transaction, are not commercial speech simply because extraneous advertisements and links for memberships may generate revenue."); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 970 (10th Cir. 1996) ("Cardtoons' trading cards . . . do not merely advertise another unrelated product. Although the cards are sold in the marketplace, they are not transformed into commercial speech merely because they are sold for profit.").

B. The First Amendment bars the misappropriation claim.

Because the Complaint contains no facts that demonstrate misappropriation for advertisement or a commercial purpose, the claim for misappropriation of likeness should be dismissed. Moreover, even if the Complaint did state a claim of misappropriation, the imposition of liability would be barred by the First Amendment. *See Flake*, 195 S.E. at 63 ("In determining to what extent a newspaper may publish the features of an individual under any given circumstances necessarily involves a consideration of the constitutional right of free speech and of a free press."); *see also infra* Sec. II.B. Because the buttons and videos are core political expression on a matter of public concern, *Falwell* and *Snyder* establish that actual malice needs to be pled and proven. As discussed above, the Plaintiff has failed to do so.

IV. **The Complaint does not state a claim for punitive damages.**

"North Carolina follows this general rule of law," that "[i]f the injured party has no cause of action independent of a supposed right to recover punitive damages, then he has no cause of action at all." *Iadanza v. Harper*, 169 N.C. App. 776, 783 (2005) (internal quotation marks omitted). For the reasons stated above, the Plaintiff has failed to state a claim for IIED or misappropriation, and thus she has pled no basis on which to recover punitive damages. Moreover, if the Complaint did state a claim, the First Amendment would bar any award of punitive damages.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the United States Supreme Court held that the First Amendment does not require plaintiffs who are not public figures to plead and prove knowing or reckless disregard for the truth ("actual malice") in order to recover compensatory damages for defamation. *Id.* at 343. But the Court also held that if the speech in question addresses a matter of public concern, state law "may not permit recovery of ... punitive

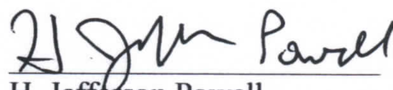
damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." *Id.* at 349. Given that the *Hustler* and *Snyder* decisions require pleading and proof of actual malice before any IIED plaintiff, public figure or not, can recover compensatory damages, it is clear that the same constitutional requirement applies to claims for punitive damages where tort liability is premised on speech addressing matters of public concern.

The controversy that gave rise to this lawsuit is no private feud, but rather a struggle over control of the Republican Party in Haywood County. Speech that is part of that struggle is self-evidently addressed to a matter of public concern, for it relates to the conduct of electoral politics. The buttons and the videos that Plaintiff alleges to have been tortious were, as her Complaint makes clear, a political criticism and thus expression that receives the highest level of First Amendment protection. The Plaintiff nevertheless has made no effort to plead constitutional actual malice, and even if she had stated a cause of action under state common law, punitive damages would be barred by the First Amendment.

CONCLUSION

For the foregoing reasons, the Complaint against Cabe should be dismissed with prejudice.

Respectfully submitted,



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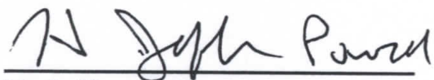
Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served the foregoing Memorandum in Support of Motion to Dismiss Complaint on the person named below by electronic mail.

This 15th day of February, 2019.

Russell L McLean, III
Counsel for the Plaintiff
1878 Camp Branch Road
Waynesville, NC 28786



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