HOLLEY, DRIGGS, WALCH,
FINE, WRAY, PUZEY & THOMPSON
JAMES W. PUZEY, ESQ.
Nevada Bar No. 5745
BRITTANY K. PUZEY, ESQ.
Nevada Bar No. 13745
800 S. Meadows Parkway
Reno, Nevada 89521
Telephone: 775/851-8700
Facsimile: 775/851-7681

Attorneys for Defendants
HiCaliber Horse Rescue, Inc., Michelle Cochran,
Daniel Grove, Romney Snyder and Barbara Weller.

IN THE THIRD DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF LYON

RICK BELL ET AL; LAURA BELL; THE STARLIGHT SANCTUARY, INC.

Plaintiffs,

v.

MICHELLE COCHRAN; HI CALIBER HORSE RESCUE, INC.; ROMNEY SNYDER; DANIEL GROVE, MILES DUNBAR; KONRAD TROPE; SANDY GARRETSON; BARBARA WELLER; TERI CRUTCHFIELD; LEEANN MILLER; LINDA MCBRIDE HACKNEY; NICKI BRANCH; CASEY OCONNER; SUMMER HOLLOMAN; SHARI HIGGINBOTHUM; KERRY MAYER; ASHLEE BOYKE; CHRISTINE KAUFMAN; CHARLOTTE OLHAUSEN; SEANA OTTINGER; ANNE HOUGHTON, BESSIE HOLDSWORTH; MAUREEN KEO; KERI HELLIGE; KRYSTE WAY; LACEY FORD; CATY TROPE; ANITA NELSON; DAN WINDER; RACHEL BENDLER; ANGELA LEWIS; NANCY ANN TURMELL-RICHARDS; DEBORAH GLICK,

Defendants.

Case No: 15-CV-01007
Dept. No.: 1

MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Pursuant to Nevada Rules of Civil Procedure, Defendants HICALIBER HORSE RESCUE, INC., MICHELLE COCHRAN, DANIEL GROVE, ROMNEY SNYDER and BARBARA WELLER (collectively "Defendants"), by and through their counsel of record, Holley, Driggs, Walch, Fine, Wray, Puzey & Thompson, hereby move to dismiss each and every

claim against them as asserted in Plaintiffs' Complaint and "Amended" Complaint (collectively, the "Complaints"), because:

(1) Plaintiffs have not alleged that this Court has jurisdiction over any of the Parties or acts or omissions alleged in the Complaints, in violation of 12(b)(1) and 12(b)(2);

(2) Service has not been made upon the Defendants (insufficient process and insufficient service of process), in violation of 12(b)(3) and 12(b)(4);

(3) Any alleged service was not made on Defendants within 120 days after filing of the Complaint, in direct violation of Nev. R. Civ. P. 4(i); and,

(4) The Complaints fail to state a claim upon which relief can be granted, in violation of Nev. R. Civ. P. 12(b)(5).

Defendant's Motion to Dismiss Plaintiffs' Complaint ("Motion to Dismiss") is made based upon the papers and pleadings on file herein, the Points and Authorities attached hereto, and any oral argument that may be adduced at a hearing of this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION/STATEMENT OF RELEVANT FACTS

On or about August 14, 2015, Plaintiffs filed their original Complaint solely against MICHELLE COCHRAN (aka Michelle Knuttila, Chevelle Justice, Mi Kanechiwa) and HI CALIBER HORSE RESCUE, INC., alleging six (6) causes of action claiming (1) tortious interference with contractual relationships; (2) intentional infliction of mental distress through [sic] harrassment; (3) negligent infliction of mental distress through extreme and outrageous conduct; (4) trespass to property; (5) defamation; and, (6) invasion of privacy/false light. As prescribed by NRCP 4(i), the original complaint and summons was required to be served within 120 days of filing the Complaint, which expired on or before December 12, 2015. On information and belief, the only defendants named in the Original Complaint – Michelle Cochran and Hi Caliber Horse Rescue, Inc. — **were never served**. No extension of time for service was ever requested.

Exactly forty (40) days after 120-day service deadline expired, on or about January 21,

2016, Plaintiffs submitted a document styled as an Amended Complaint ("Amended Complaint"), which was really a new *caption* to the original complaint adding **thirty-one** (31) new Defendants: ROMNEY SNYDER; DANIEL GROVE, MILES DUNBAR; KONRAD TROPE; SANDY GARRETSON; BARBARA WELLER; TERI CRUTCHFIELD; LEEANN MILLER; LINDA MCBRIDE HACKNEY; NICKI BRANCH; CASEY OCONNER; SUMMER HOLLOMAN; SHARI HIGGINBOTHUM; KERRY MAYER; ASHLEE BOYKE; CHRISTINE KAUFMAN; CHARLOTTE OLHAUSEN; SEANA OTTINGER; ANNE HOUGHTON, BESSIE HOLDSWORTH; MAUREEN KEO; KERI HELLIGE; KRYSTE WAY; LACEY FORD; CATY TROPE; ANITA NELSON; DAN WINDER; RACHEL BENDLER; ANGELA LEWIS; NANCY ANN TURMELL-RICHARDS; and DEBORAH GLICK.

In all other respects, the Complaint and "Amended" Complaint are identical. The Amended Complaint admits that it was filed to "name and allege conduct for previously unknown Does." Am. Complaint 3:2-2. The Complaints do not describe any of the parties, do not allege the jurisdiction wherein the acts or omissions giving rise to the claims allegedly occur, and do not describe which causes of action apply to which of the thirty-one newly listed defendants. It appears, therefore, that Plaintiffs are claiming that all six causes of action allegedly apply to all thirty-three named defendants.

II. LEGAL ARGUMENT

A. MOTION TO DISMISS STANDARD

Rule 12 of the Nevada Rules of Civil Procedure allows a party to move to dismiss where a complaint fails to state a claim upon which relief can be granted. NEV. R. CIV. P. 12(b)(5). For purposes of a Rule 12(b)(5) motion, a court must accept the allegations of the complaint as true and draw all inferences in favor of the non-moving party. *See Simpson v. Mars Inc.*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997). However, a court does not "assume the truth of legal conclusions merely because [the claimant casts them] in the form of factual allegations." *Warren*

v. Fox Family Worldwide, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003) (interpreting the analogous federal failure to state a claim standard) (citations omitted). A movant must do more than provide a "formulaic recitation of the elements of a cause of action" to withstand a motion to dismiss. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint will be dismissed for failure to state a claim when it appears beyond a doubt that the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him or her to relief. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008); *see also Simpson*, 113 Nev. at 190, 929 P.2d at 967. Dismissal of a complaint is appropriate when the allegations, taken at face value and construed favorably to the plaintiff, fail to state a cognizable claim for relief. *Morris v. Bank of Am. Nev.*, 110 Nev. 1274, 1276, 886 P.2d 454, 456 (1994). Furthermore, "as a general rule, the court may not consider matters outside the pleading being attacked. 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, Civil 2D § 1356 (2d ed. 1990) (discussing the federal counterpart to NRCP 12(b)(5), FRCP 12(b)(6)). However, the court may take into account matters of public record, orders, items present in the record of the case, and any exhibits attached to the complaint when ruling on a motion to dismiss for failure to state a claim upon which relief can be granted." *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993) (emphasis added).

B. PLAINTIFFS' COMPLAINT MUST BE DISMISSED FOR LACK OF JURISDICTION.

Nevada courts are mandated to dismiss an action when they lack personal jurisdiction over a defendant. *See Hansen v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 116 Nev. 650, 656, 6 P.3d 982, 986 (2000). Personal jurisdiction can exist either via "general"[1] personal jurisdiction or

[1] General jurisdiction occurs where a defendant is held to answer in a forum for causes of action unrelated to the defendant's forum activities. *Budget Rent–A–Car v. District Court,* 108 Nev. 483, 485, 835 P.2d 17, 19 (1992) (internal citations omitted). General jurisdiction over the defendant "is appropriate where the defendant's forum activities are so 'substantial' or 'continuous and systematic' that it may be deemed present in the forum." *Budget,* 108 Nev. at 485, 835 P.2d at 19 (internal citations omitted); *Price and Sons v. District Court,* 108 Nev. 387, 390, 831 P.2d 600, 601 (1992). General jurisdiction will only lie where the level of contact between the defendant and the

"specific"[2] personal jurisdiction. This Court does not have jurisdiction in this matter, as **no allegations of jurisdiction are found *anywhere*** within Plaintiffs' Complaint. The Complaint does not even attempt to describe *where* the thirty-three defendants *or* Plaintiffs reside for purposes of jurisdiction in this action, nor does it explain *where* the actions/omissions alleged in the Complaint occurred. This Court cannot have jurisdiction over the defendants or, generally, this case, as **no jurisdiction has been alleged** for any of the parties or alleged acts or omissions. Because no jurisdiction has been alleged in the Complaint, it must be dismissed by this Court.

C. PLAINTIFFS' COMPLAINT MUST BE DISMISSED PURSUANT TO NRCP 4(i), BECAUSE PLAINTIFF FAILED TO SERVE DEFENDANTS WITHIN 120 DAYS OF FILING ITS COMPLAINT.

Nevada law mandates dismissal of any complaint which a plaintiff fails to serve upon a defendant, along with a summons, within 120 days after filing of the complaint.[3] Nev.R.Civ.P.4(i). "Dismissal is mandatory unless there is a legitimate excuse for failing to serve within the 120 days. *See Dougan v. Gustaveson*, 108 Nev. 517, 835 P.2d 795 (1992); *Scrimer v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 116 Nev. 507, 512-13, 998 P.2d 1190, 1193-94 (2000).

Continuing, a 2004 Amendment to NRCP 4(i) ("2004 Amendment") includes a primary,

(continued)

forum state is high. *Trump v. Eighth Judicial Dist. Court*, 109 Nev. 687, 699, 857 P.2d 740, 748 (1993).

[2] Absent general jurisdiction, specific personal jurisdiction over a defendant may be established only where the cause of action arises from the defendant's contacts with the forum. *Budget*, 108 Nev. at 486, 835 P.2d at 20; *Price*, 108 Nev. at 390, 831 P.2d at 602. A state may exercise specific personal jurisdiction only where: (1) the defendant purposefully avails himself of the privilege of serving the market in the forum or of enjoying the protection of the laws of the forum, or where the defendant purposefully establishes contacts with the forum state and affirmatively directs conduct toward the forum state, **and** (2) the cause of action arises from that purposeful contact with the forum or conduct targeting the forum. *Budget*, 108 Nev. at 487, 835 P.2d at 20 (internal citations omitted); *Trump*, 109 Nev. at 699-700.

[3] **Summons: Time Limit for Service.** If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, **the action <u>shall</u> be dismissed** as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion, unless the party on whose behalf such service was required files a motion to enlarge the time for service and shows good cause why such service was not made within that period. If the party on whose behalf such service was required fails to file a motion to enlarge the time for service before the 120-day service period expires, the court shall take that failure into consideration in determining good cause for an extension of time. Upon a showing of good cause, the court shall extend the time for service and set a reasonable date by which service should be made." (emphasis added).

additional consideration for the District Court when ruling on motions to dismiss pursuant to NRCP 4(i). The 2004 Amendment requires a plaintiff to move to "enlarge the time for service **prior** to the expiration of the 120-day period." (Emphasis added). Moreover, "if the party fails to move to enlarge the time for service within the 120-day period, 'the Court shall take that failure into consideration in determining good cause for an extension of time.'" *Saavedra-Sandoval v. Walmart Stores, Inc.*, 126 Nev. Ad.Op. 26, 245 P.3d 1198, 1199 (2010). In *Walmart,* the court dismissed the plaintiff's action for failure to accomplish service within 120 days, noting that the first consideration for the Court is to determine if good cause exists for filing an untimely motion for the enlargement of time. Specifically, *Walmart* held that the 2004 NRCP 4(i) amendment "creates a threshold question for the district court requiring it to first evaluate whether good cause exists for a party's failure to file a timely motion seeking an enlargement of time. **Failure to demonstrate such good cause ends the district court's inquiry**." *Walmart* 245 P.3d at 1201 (emphasis added).

Here, Plaintiffs' original complaint was filed August 14, 2015; however, no original defendant has ever been served.[4] Moreover, to date, Plaintiffs have not filed any motion to enlarge time for service. The Plaintiffs have not moved to enlarge time for service, and have already missed the 120-day deadline. Plaintiffs' failure to timely move to enlarge time for service **ends this Court's inquiry**. Accordingly, Plaintiffs' Complaint must be summarily dismissed, in accordance with NRCP 4(i).

Moreover, Plaintiffs' self-described "Amended" Complaint does not alter the 120-day

[4] On information and belief, former counsel for HiCaliber Horse Rescue, Konrad Trope (("Mr. Trope"), another named Defendant in this action who was dismissed) had a summons and Amended Complaint thrown at his office door, and his staff threatened by Plaintiffs' process server. This attempt at "service" is insufficient for a myriad of reasons, but most notably, because no one knows whether the "service" was meant for Mr. Trope as an individual defendant, or Mr. Trope as HiCaliber Horse Rescue's agent for service. In any event, assuming without conceding that "service" on Mr. Trope was sufficient, and that HiCaliber was the party intended to be served, this incident occurred on February 4, 2016, exactly **sixty (60) days after the 120-day deadline for service expired**. Such service, even if proper and made on HiCaliber, is well outside the deadline for service of a Complaint. On information and belief, no other attempts at service have been made on Defendants.

service window. A plaintiff may not miss the 120-day deadline for filing its Complaint, and then revive its lifeless complaint by simply resubmitting the same document framed as an "Amended" Complaint. For example, in *Lacey v. Wen–Neva*, Inc., 109 Nev. 341, 849 P.2d 260 (1993), plaintiff Lacey filed a complaint on the final day of the limitations period, and then served a copy of the summons and complaint on the defendant's agent. Both parties acknowledged that service was improper. After doing nothing with respect to service for more than one year, Lacey properly served the defendant with an amended complaint. The defendant moved to dismiss, and the district court granted the motion, holding that filing an amended complaint against the same party does not restart the 120–day period for service. *Lacey* at 349, 849 P.2d at 265; see also *Scrimer v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 116 Nev. 507, 515-16, 998 P.2d 1190, 1195 (2000).

Here, the 120-day service period is expired and has not been revived. Like the plaintiff in *Lacey*, Plaintiffs' "Amended Complaint" did not add a new party to this action. Instead, Plaintiffs re-filed their original Complaint and, in an attempt to redate its original complaint due to a failure to timely serve, slapped the names of additional individuals into the caption of the original complaint and alleged that these individual were "previously unknown Does". In all other respects, the original and "amended" complaints are virtually identical. Allowing Plaintiffs to employ such a tactic to compensate for their untimely service would render NRCP 4(i) meaningless—any time the 120-day deadline is missed, the complainant would simply add a new name to the caption of their Complaint, identify them as a "previously unknown Doe" and refile an identical document. Here, the "new" "defendants" are not mentioned anywhere in the "Amended" Complaint save for the caption, exposing Plaintiffs' desperate attempt to re-date the Complaint for service purposes. Plaintiffs missed the 120-day deadline to serve their Complaint, did not seek to enlarge time, and did not even attempt to give this Court a good reason for missing the deadline for service. Accordingly, this action must be dismissed pursuant to NRCP 4(i).

D. PLAINTIFFS' COMPLAINT MUST BE DISMISSED AS NO EVIDENCE SUPPORTS THE ALLEGATIONS IN THE COMPLAINT.

Assuming without conceding that the Complaint should not be summarily dismissed pursuant to NRCP 4(i), the Complaint is rife with further fatal procedural error. Because Nevada is a notice-pleading jurisdiction, pleadings are liberally construed to place into issue matters which are fairly noticed to the adverse party. NRCP 8(a); *Chavez v. Robberson Steel Co.*, 94 Nev. 597, 599, 584 P.2d 159, 160 (1978). However, a complaint must set forth sufficient facts to establish all necessary elements of a claim for relief, *Johnson v. Travelers Ins. Co.*, 89 Nev. 467, 472, 515 P.2d 68, 71 (1973), so that the adverse party has adequate notice of the nature of the claim and relief sought. *Branda v. Sanford*, 97 Nev. 643, 648, 637 P.2d 1223, 1227 (1981); *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984). Here, the "Complaint" provides no facts. Instead, Plaintiffs spend at least half of the "Complaint" attempting to educate this Court on a new purported phenomenon, described by Plaintiffs as "animal enterprise terrorism AKA seizure scams and rescue raids". Plaintiffs' diatribe against "animal enterprise terrorism AKA seizure scams and rescue raids" is even more confusing, as **nowhere in the Complaint do Plaintiffs allege that a single one of the thirty-three named defendants engaged in the "animal enterprise terrorism"** actions.

Further, each cause of action as alleged by Plaintiffs has at least one element (most actions cannot support a single element) which is not supported by any "allegations" in the Complaint. Finally, each cause of action is purportedly directed at every one of the 31 "defendants", although a number of the defendants are included nowhere in the Complaint besides the caption. As a result, Defendants are entirely deprived of notice of the nature of the claim and relief sought by Plaintiffs. Clearly, Plaintiffs have failed to state a claim for relief, and Plaintiffs' Complaint should be dismissed.

1. Plaintiffs' Claim for Tortious Interference with Contractual Relationships Must Be Dismissed, as *None* of the Elements are Met.

Intentional Interference with Contractual Relations only exists where: (1) A valid contract exists between plaintiff and a third party; (2) Defendant knew of the contract; (3) Defendant committed intentional acts intended or designed to disrupt the contractual relationship; (4) There was an actual disruption of the contract, resulting in damages to the plaintiff. *Hilton Hotels Corp. v. Butch Lewis Productions, Inc*, 109 Nev. 1043, 862 P.2d 1207 (1993); *Sutherland v. Gross*, 105 Nev. 192, 772 P.2d 1287 (1989). Liability does not exist unless the defendant has knowledge of the contract with which he is interfering and of the fact that he is interfering with the performance of the contract. *J.J. Industries, LLC v. Bennett*, 119 Nev. 269, 71 P.3d 1264 (2003). The plaintiff cannot merely show that the defendant intended the act which caused the interference; the intent element requires evidence that the defendant intended to cause the interference itself. *Ramona Manor Convalescent Hosp. v. Care Enterprises*, 255 Cal.Rptr. 120 (Cal. Ct. App. 1996). At the very least, the plaintiff must demonstrate that the defendant knew of the existing contract. *J.J. Industries*, 119 Nev. at 269.

Plaintiffs miss the mark on virtually every element of this cause of action. First, they fail to describe a valid existing contract between themselves and a third party, and instead vaguely reference "several longstanding contractual associations with organizations that assisted The Starlight Sanctuary, Inc. in facilitating the rescue of slaughter bound horses from the Fallon Feedlot." Am. Complaint at 6:19-22. No valid and existing contract is described. Second, it is axiomatic that Defendants could not possibly know of a "contract" when no valid and existing contract has been alleged. Third, even if a contract existed and was disrupted, Plaintiffs do not allege that defendants intended to disrupt a valid and existing contract through any of their alleged "calumnies and lies". Finally, disruption of a non-existent contract is a legal impossibility. Not a single element for this cause of action is satisfied; accordingly, this cause of

action must be dismissed.

2. Plaintiffs' Claim for Intentional Infliction of Emotional Distress Must Be Dismissed, as the Complaint Does Not Support A Single Element.

A claim for Intentional Infliction of Emotional Distress ("IIED") requires that (1) Defendant's conduct was extreme or outrageous with either the intention of, or reckless disregard for causing emotional distress to plaintiff; and (2) Plaintiff suffered severe or extreme emotional distress as the actual or proximate result of defendant's conduct. *Dillard Dep't Stores, Inc. v. Beckwith*, 115 Nev. 372, 989 P.2d 882 (1999); *Miller v. Jones*, 114 Nev. 1291, 970 P.2d 571 (1998). Extreme or outrageous conduct is that which is outside all possible bounds of decency and is regarded as utterly intolerable in a civilized community; persons must necessarily be expected and required to be hardened to occasional acts that are definitely inconsiderate and unkind. *Maduike v. Agency Rent-A-Car*, 114 Nev. 1, 953, P.2d 24 (1998). Plaintiff must present some objectively verifiable indicia of the severity of emotional distress. *Miller*, 114 Nev. at 1291. The less extreme the outrage, the more appropriate it is to require evidence of physical injury or illness from the emotional distress. *Chowdry v. NLVH, Inc.*, 109 Nev. 478, 851 P.2d 459 (1993); *C.A. Nelson v. City of Las Vegas*, 99 Nev. 548, 665 P.2d 1141 (1983).

Here, Plaintiff failed to allege a single required element. Plaintiff simply alleged that the Defendants "posted various comments on public forums throughout the internet…with the goal of causing emotional distress to Plaintiffs." Complaint at 7:8-11. First, "posting various comments on public forums throughout the internet" is a right guaranteed to the Defendants by the First Amendment. Surely, such speech is not extreme or outrageous, and nowhere do Plaintiffs claim it is so. More importantly, however, Plaintiffs do not describe what conduct defendants' purportedly engaged in that caused Plaintiffs' alleged "substantial amount of emotional distress". Second, Plaintiffs did not allege that a single one of the Defendants acted recklessly or intended to cause Plaintiffs' alleged emotional distress. Third, Plaintiffs did not suffer severe or extreme

emotional distress as a result of the defendants' conduct, for several reasons:

- Plaintiffs do not allege that they suffered "severe or extreme" emotional distress,[5] and do not allege that they suffered any physical symptoms from the alleged emotional distress.

- Plaintiff The Starlight Sanctuary ("Starlight") is incapable of having "emotional distress," severe or otherwise, as **Starlight is a corporation, incapable of emotion**. Emotional distress on the part of Plaintiff Starlight is, plainly, a legal impossibility. [6]

Plaintiffs have not pleaded a single element to support a cause of action for IIED against any of the 31 named Defendants. Moreover, it is impossible for Starlight to suffer from emotional distress. Accordingly, this cause of action must be dismissed.

3. Plaintiffs' Claim for Negligent Infliction of Emotional Distress Must Be Dismissed, as *None* of the Elements are Met.

Nevada recognizes two theories for Negligent Infliction of Emotional Distress ("NIED")—Bystander Theory[7] and Direct Theory[8]. Plaintiffs misstated the law[9] for **both** theories of NIED. Am. Complaint 7:13-24. Not only did Plaintiffs misstate the law, but here,

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[5] *See* Am.Complaint at 7:11-12 "These Defendants succeeded in causing a substantial amount of emotional distress to the Plaintiffs in this case." A "substantial amount" does not rise to level required for a valid claim of IIED.

[6] Multiple federal courts, each applying state law, have found that a corporation cannot suffer emotional distress because "**a corporation lacks the cognizant ability to experience emotions**." *FDIC v. Hulsey*, 22 F.3d 1472, 1489 (10th Cir.1994); *Nicor Intern. Corp. v. El Paso Corp.*, 292 F.Supp.2d 1357, 1378 (S.D.Fla.2003) ("corporation is incapable of suffering any emotional distress"); *Earth Scientists (Petro Services) Ltd. v. U.S. Fidelity & Guar. Co.*, 619 F.Supp. 1465, 1474 (D.Kan.1985) (corporations could not recover for the tort of outrage based on inability to suffer emotionally); *Wilson v. Colonial Penn Life Ins. Co.*, 454 F.Supp. 1208, 1213 n. 9 (D.Minn.1978) (applying Minnesota law IIED claims) ("Certainly, the plaintiff National City Bank of Minneapolis is incapable of suffering emotional distress.");*HM Hotel Properties v. Peerless Indem. Ins. Co.*, 874 F. Supp. 2d 850, 854 (D. Ariz. 2012)("Plaintiff has failed to state a claim for IIED because, as a corporate entity, it cannot experience emotional distress.")

[7] Bystander Theory NIED requires 1) Defendant negligently committed an injury upon another; 2) Plaintiff is closely related to the victim of the accident; 3) Plaintiff was located near the scene of the accident; and 4) Plaintiff suffered a shock resulting from the sensory and contemporaneous observance of the accident. *Crippens v. Sav On Drug Stores*, 114 Nev. 760, 961 P.2d 761 (1998).

[8] Direct Theory NIED requires 1) Defendant owed a duty of care to Plaintiff; 2) Defendant breach that duty; 3) The breach was the legal cause of plaintiff's injuries; and 4) Plaintiff suffered serious emotional distress. *Olivero v. Lowe*, 116 Nev. 395, 995 P.2d 1023 (2000).

[9] Plaintiffs contend that NIED requires: "1) The Defendant engaged in conduct that the Defendants should have realized involved an unreasonable risk of causing emotional distress and that the distress, if it were caused, might result in illness or bodily injury; 2) that the conduct caused emotional distress to the Plaintiffs; 3) That the distress was of such a nature as might result in illness or bodily harm; and 4) actual and proximate causation." Am.Complaint at 7:13-23. Those elements, if satisfied, do not constitute **any** cause of action; and certainly, do not give rise to a claim for NIED.

again, Plaintiffs' allegations are legally impossible as to Starlight. A corporation simply cannot suffer from emotional distress. *Supra* at FN 6. Clearly, this cause of action must be dismissed.

4. Plaintiffs' Claim for Trespass Must Be Dismissed, as the Complaint Does Not Support A Single Element of Trespass.

Nevada defines trespass as the "wrongful interference with the right of exclusive possession of real property." *Palm Springs Transfer & Storage v. City of Reno*, 125 Nev. 1068, 281 P.3d 1208 (2009)(internal citations omitted); *see Lied v. County of Clark*, 94 Nev. 275, 279, 579 P.2d 171, 173–74 (1978). To prove trespass, the plaintiff must show that the defendant invaded the property. *See Lied*, 94 Nev. at 279, 579 P.2d at 173–74. Not any "invasion" will do; instead, trespass will not lie unless the invasion was direct and tangible. *Palm Springs*, 125 Nev. at 1068 (internal citations omitted). Finally, the invasion must result in damages. *Id.*

Plaintiffs' trespass claim must be dismissed for a number of reasons. First, Plaintiffs do not allege any ownership interest in the property that was allegedly trespassed upon, and certainly, do not allege "exclusive possession" as required for a trespass action. Second, Plaintiffs do not allege **any** invasion of the property.[10] Finally, Plaintiffs do not allege any resulting damages. Clearly, this admittedly "tangential"[11] issue must be dismissed.

5. Plaintiffs' Remaining "Causes of Action" Must Be Dismissed, As Plaintiffs Merely Regurgitate Law, and Do Not Allege a Single Fact.

Plaintiffs' fifth and sixth causes of action for defamation and invasion of privacy **do not allege *anything***. The fifth and sixth causes of action appear to be merely an attempted description of applicable Nevada law. Not a single fact is alleged or applied. Certainly, "notice pleading" requires more than simply a regurgitation of law to which Plaintiff ascribes. Indeed, notice pleading requires the plaintiff to set forth the **facts** which support a legal theory. *Liston v. Las Vegas Metro. Police Dep't*, 111 Nev. 1575, 1578, 908 P.2d 720, 723 (1995); *Swartz v.*

[10] Obviously, because no invasions are alleged, the non-existent invasions are not "direct and intangible" as required to support a trespass claim.

[11] Complaint at 8:2.

Adams, 93 Nev. 240, 245, 563 P.2d 74, 77 (1977). Here, Plaintiffs failed to afford the Defendants fair notice of its fifth and sixth causes of action, as they did not allege a single fact to support their legal theories. These causes of action must be dismissed.

6. The "Exhibits" Attached to Plaintiffs' Amended Complaint are Inadmissible and Must Be Ignored.

In considering a Motion to Dismiss, the court may not consider matters outside the pleading being attacked. 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, Civil 2D § 1356 (2d ed. 1990) (discussing the federal counterpart to NRCP 12(b)(5), FRCP 12(b)(6)). However, the court may take into account matters of public record, orders, items present in the record of the case, and any exhibits attached to the complaint when ruling on a motion to dismiss for failure to state a claim upon which relief can be granted. *Id.* at § 1357; *Berk v. Ascott Inv. Corp.*, 759 F.Supp. 245, 249 (D.C.Pa.1991) (court may consider document *incorporated by reference* into the complaint); *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993). While exhibits may be attached, they must be comprised of admissible evidence. *See, e.g., Beyene v. Coleman Sec. Servs., Inc.*, 854 F.2d 1179, 1182 (9th Cir.1988) (citing Fed.R.Civ.P. 56 and *Hollingsworth Solderless Terminal Co. v. Turkey*, 622 F.2d 1324, 1335 n. 9 (9th Cir.1908)).

Here, Plaintiffs attached "exhibits" to the Complaint; however, those documents are not incorporated by reference in the Complaint, nor are they admissible evidence. Rather, exhibits supporting Plaintiffs' causes of action are summations, prepared by the Plaintiffs, of alleged social media postings. The exhibits are not copies of the postings, nor do they indicate a source of origin. Again, Plaintiffs failed to afford the Defendants fair notice of the applicability of the attached "exhibits" to the claims asserted in the Complaint. No affidavit or other evidence exists "sufficient to support a finding that the item is what the proponent claims it is." NRS 52.015.

Continuing, the exhibits are comprised entirely of inadmissible hearsay. Hearsay is "a

statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." NRS 51.035. Hearsay is inadmissible unless it is defined as non-hearsay or falls within a hearsay exception. NRS 51.035. Inadmissible hearsay may not be considered on a motion to dismiss. *See Anheuser–Busch, Inc. v. Natural Beverage Distributers*, 69 F.3d 337, 345, n. 4 (9th Cir.1995) (citing Blair Foods, Inc. v. Ranchers Cotton Oil, 610 F.2d 665, 667 (9th Cir.1980)). Here, Plaintiffs attached the documents (which are not authenticated or certified as "true and correct") for the truth of the matter asserted—that is, that the information therein supports the causes of action alleged in Plaintiffs' complaint. Because every exhibit attached to the Complaint is uncertified, unauthenticated inadmissible hearsay, the exhibits must be ignored by this Court in considering this Motion to Dismiss.

Additionally, Exhibit Bell B-2 is plainly[12] a confidential settlement communication from counsel for HiCaliber Horse Rescue and Michelle Cochran. Such communications are inadmissible and may not be attached as a Complaint exhibit. Nev. Rev. Stat. Ann. § 48.105. As described herein, the Complaint itself does not state a claim for relief. All of the exhibits attached to Plaintiffs' hollow Complaint **are not admissible**. Accordingly, Plaintiffs' complaint must be dismissed.

E. PLAINTIFFS' REQUEST FOR PUNITIVE DAMAGES MUST BE DISMISSED, AS NO MALICE, FRAUD OR OPPRESSION EXISTS.

A plaintiff is not automatically entitled to punitive damages. *Dillard Department Stores v. Beckwith*, 115 Nev. 372, 380, 989 P.2d 882, 887 (1999). Instead, punitive damages may only be awarded where the plaintiff proves by clear and convincing evidence that the defendant is "guilty of oppression, fraud or malice, express or implied." NRS 42.005(1).[13]

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[12] The top of the document states, in bold print and all capital letters, **CONFIDENTIAL SETTLEMENT COMMUNICATION PURSUANT TO NEVADA REVISED STATUTE 48.105, CALIFORNIA EVIDENCE CODE 1152(A) AND FEDERAL RULES OF EVIDENCE, RULE 408.**

[13] "'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship with conscious disregard of the rights of the person." NRS 42.001(4). "'Fraud' means an intentional misrepresentation, deception or

Here, the Plaintiffs did not provide **any** evidence that oppression, fraud or malice exist. Instead, the only mention of punitive damages turns up in a section titled "CONCLUSION", wherein Plaintiffs "ask that **each** of the Defendants be held to punitive damages in an amount and rate to ensure that such egregious conduct as engaged in the instant case not recur in the future" Am. Comp at 9:20-23 (emphasis added). As described thoroughly *supra* at D1.-6., Plaintiffs do not describe *who* was involved in the alleged acts or omissions, *where* the acts or omissions took place, or even, *what* the Defendants allegedly did. Second, Plaintiffs do not describe any conduct by any party that constitutes oppression, fraud or malice as required to warrant punitive damages. Clearly, punitive damages are not appropriate in this matter.

F. THE COMPLAINT MUST BE DISMISSED AS PLAINTIFFS COMPLAINT DOES NOT INCLUDE A DEMAND OR PRAYER FOR RELIEF AS REQUIRED BY NRCP 8(a).

Complaints in Nevada Courts **must** include (1) a statement of the claim, and (2) a demand or prayer for relief. Nev. R. Civ. P. 8(a). Pointedly, "a complaint without a prayer for relief is incomplete." *Keyes v. Nevada Gas Co., Ltd.*, 55 Nev. 431, 435, 38 P.2d 66 (1934). Notwithstanding all of the other failings described herein, the Complaint is incomplete as it fails to include a prayer for relief. Accordingly, the Complaint should be dismissed.

III. CONCLUSION

For the all of reasons stated herein, Defendants respectfully requests that this Court grant this Motion to Dismiss and dismiss Plaintiffs' Complaint in its entirety. Additionally, Defendants are entitled to attorney's fees based on Plaintiffs' actions, as they were forced to incur additional expenses due to Plaintiffs' frivolous, malicious and harassing Complaint, which as described herein, manages to violate an extensive swath of the Nevada Rules of Civil Procedure.

(continued)

concealment of a material fact known to the person with the intent to deprive another person of his rights or property or to otherwise injure another person." NRS 42.001(2) "'[E]xpress malice' is 'conduct which is intended to injure a person'; 'implied malice' is 'despicable conduct which is engaged in with a conscious disregard of the rights ... of others.'" *Clark v. Lubritz*, 113 Nev. 1089, 1099, 944 P.2d 861, 867 (1997)(quoting NRS 42.001(3)); *Bongiovi v. Sullivan*, 122 Nev. 556, 581, 138 P.3d 433, 450-51 (2006).

AFFIRMATION Pursuant to NRS 239B.030

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

Dated this 12th day of April, 2016.

HOLLEY, DRIGGS, WALCH,
FINE, WRAY, PUZEY & THOMPSON

Brittany Puzey

JAMES W. PUZEY, ESQ.
Nevada Bar No. 5745
BRITTANY K. PUZEY, ESQ.
Nevada Bar No. 13745
800 S. Meadows Parkway
Reno, Nevada 89521
Telephone:(775) 851-8700
Fax: (775) 851-7681
Attorneys for Defendants HiCaliber Horse Rescue, Inc., Michelle Cochran, Daniel Grove Romney Snyder and Barbara Weller.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that service of the foregoing **MOTION TO DISMISS PLAINTIFFS' COMPLAINT** was made this 12th day of April, 2016 by via U.S. Postal Mail addressed to each of the following and via email to:

Angela Lewis
PO Box 270221
Susanville, CA 96127

Wayne A. Pederson, Esq.
107 N. Main Street
Yerington, NV 89447

Bessie Holdworth
859 Risen Son Rd
Powell, WY 82435

Timothy R. Treffinger, Esq.
3163 Key Largo Dr #204
Las Vegas, NV 89120

Timothy R. Treffinger, Esq.
5841 Alfano Avenue
Pahrump, NV 89061

DATED this 12th day of April, 2016.

Laura ann wood

Laura Ann Wood, an Employee of Holley, Driggs, Walch, Fine, Wray, Puzey & Thompson