No. _____

In The
Supreme Court of the United States

REX J. MOATS,

Petitioner,

v.

REPUBLICAN PARTY OF NEBRASKA,

Respondent.

On Petition For A Writ Of Certiorari To The Nebraska Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the First Amendment protect political speech in attack advertising used in a public election campaign that is malicious and intentionally misleading because it seeks to induce the reader to reach a false conclusion about a factual matter concerning the target of the speech?

2. Does campaign speech uttered by or about a candidate, issue or other matter relevant to a political campaign preceding a public election enjoy heightened First Amendment political speech protections beyond the level described in *New York Times v. Sullivan*, 376 U.S. 254 (1964) and *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990)?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The Petitioner is an individual.

The Respondent is a Nebraska entity which operates under a constitution but is not incorporated. The Respondent has officers and maintains a website and an office. It employs persons and publishes a newsletter, but has neither shareholders nor members.

No parent or publicly-owned company is known to own more than 10% of the Respondent.

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PETITION FOR WRIT OF CERTIORARI

Rex Moats respectfully petitions for a writ of certiorari to review the judgment of the Nebraska Supreme Court holding that malicious and misleading political speech uttered in a campaign for public office is protected from suit for defamation under U.S. Const. amend. I. The Nebraska decision distinguishes between maliciously false political speech, which the State Supreme Court viewed as outside the First Amendment's ambit, and maliciously misleading political speech designed to induce a false conclusion, which it viewed as protected even though its purpose is to induce a false conclusion by the reader.

This Court is not known to have decided a First Amendment speech case arising directly from a political campaign before now. The facts below present statements by a political party about a candidate for the nonpartisan unicameral Nebraska Legislature.

OPINION BELOW

The Nebraska Supreme Court's Opinion is published as *Moats v. Nebraska Republican Party*, 281 Neb. 411, 796 N.W.2d 584 (2011).

No Petition for Further Review (rehearing) was filed below. The state district court did not publish an opinion.

JURISDICTION

The Nebraska Supreme Court filed its decision on April 28, 2011. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a) to review the Nebraska Court's decision on a Writ of Certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The First Amendment of the U.S. Constitution provides:

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

2. The Fourteenth Amendment of the U.S. Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall . . . abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Art. IV, Sec. 4 of the U.S. Constitution provides:

> The United States shall guarantee to every state in this union a republican form of

> government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.

STATEMENT OF THE FACTS

Petitioner Rex Moats ran for the nonpartisan Nebraska Legislature. He was attacked by mailings of a political party accusing him of submitting a false affidavit in a court and suggesting he covered up an insurance company's financial failure. His defamation case, brought because the candidate was accused of a crime in the malicious mailings, was dismissed by the state court. Nebraska's Supreme Court affirmed, finding a malicious motive, but that the mailings were not "provably false." Instead, they were misleading with the intent to induce the public to reach a false conclusion about Petitioner's veracity.

The defamed candidate now asks this Court to grant a writ of certiorari to review the Nebraska Supreme Court's decision affirming dismissal of a Complaint alleging, with specificity, defamation against Moats by the Respondent. Nebraska's lawmaking body is unique for its nonpartisanship and its unicameral structure. Moats ran without party affiliation or support. His opponent ran as a nonpartisan candidate, as do all persons seeking legislative office in Nebraska. The statements challenged include assertions that the candidate, a lawyer, swore a false

affidavit in court, causing a failed insurance company to default on coverage. The truth is that the candidate blew the whistle on the company and protected its policyholders by forcing the company into receivership. No prior case is known to have presented free speech issues where the challenged statements were made as part of a political campaign for public office. Prior cases have dealt with public officials but not where they are objects of campaign abuse.

Petitioner asks this Court to decide whether the First Amendment protects political speech contained in attack advertising in a public election campaign contest for a nonpartisan office that is malicious and *misleading* with false implications and an intention to induce the reader to conclude the target of the speech lied in court. Must the speech be malicious and *false* on its face to fall outside First Amendment bounds, or does it fall outside First Amendment protection if the speech is malicious and misleading so as to induce, by design, false conclusions by the reader or viewer? The Court is asked to consider, too, whether the context of a campaign before a public election heightens First Amendment free speech protections beyond the level described in *New York Times v. Sullivan*, 376 U.S. 254 (1964). Stated differently, does the public's interest in free, fair elections counterbalance First Amendment political speech breadth where the speech is a threat to the election process?

New York Times and its progenitors require that a statement regarding a public figure must be made with "actual malice" to be actionable. When actual

malice and state law elements of the tort of defamation are proven, a claim for trial is stated under *New York Times*. The Petitioner alleged actual malice and all elements of defamation under Nebraska law in his Complaint. The trial court dismissed his Complaint for failure to state a claim upon which relief could be granted; the State's highest court affirmed. The Nebraska Supreme Court held that this Court's decision in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) gave constitutional protection against suit for defamation to Respondent's mailings alleging that Petitioner committed perjury in a court affidavit. Nebraska's Court concluded the statements, made in a campaign for the nonpartisan State Legislature, were "not meant to assert objective fact" and not "capable of being proved true or false." The damaging words used in the materials, and their intent and impact, are to the contrary, as the Petitioner's Complaint alleges.

The record for review, if certiorari is granted, consists of Petitioner Moats' 16-page Complaint, the Defendant's dismissal motion, the trial court's dismissal order, and the divided Nebraska Supreme Court's opinion. The Complaint avers that Moats, as a candidate for the Nebraska Unicameral, was a public official for defamation law purposes. Moats asserts he waged a nonpartisan campaign. His Complaint sets out verbatim, and with actual images, the challenged publications; they contain the accusations against Moats that the Nebraska Court found to be protected by the First Amendment because they were

seen by the Court below as maliciously misleading but not maliciously, provably false.

The Complaint alleges in ¶ 9 that "Moats has been a registered Democrat, but he has never contributed funds to support an activity of the Democratic Party, or a Democratic candidate for public office to the best of his recollection. Moats has supported Republican candidates for office. . . ." Paragraph 10 alleges "Moats became a candidate for election to the Nebraska State Legislature in District 39. . . ." Moats received the most votes in the primary election and proceeded to the general election against a single opponent. During the general election campaign, the Nebraska Republican Party paid for and distributed publications about Moats. Petitioner affirmatively alleges that these false, misleading, and deceptive publications were raised, and published at the direction of, and under the immediate supervision and control of, the Republican Party. This point is not contested. Moats asserts the Republican Party's publications were "false and defamatory, beyond the scope of the qualified constitutional privilege [the Respondent] had to speak about and against [Moats] because they exhibited actual malice, which means knowledge of falsity or reckless disregard for the truth."

All publications in the series of mailings by Respondent are summarized in the Complaint. The most offensive publications are described, then summarized, here:

Publication # 2

> May 7, 2008, an 8½ x 11 folder designated NE GOP 39-003 asserts "*Moats received a $50,000 trust fund from the director of National Warranty.*"

In fact, Moats never received a trust fund or funds from the director of National Warranty. On the contrary, Moats was hired by the judicially-appointed liquidator of the company to protect the company's assets for the benefit of the liquidation process and its insureds and owners. Moats remained employed by the liquidators throughout the course of the liquidation process up to and through the time when this litigation commenced.

Publication # 3

> May 5, 2008: *Would you put a shady insurance company based in the Cayman Islands ahead of Nebraska's consumers? You wouldn't. But trial attorney Rex Moats would. . . .*
>
> *How did Rex Moats mislead creditors and the public? Rex Moats claimed in an affidavit that National Warranty was doing financially well.*

Moats did not claim in an affidavit that National Warranty was doing well financially, only to be proven false later. To the contrary, National Warranty entered into insolvency proceedings because Moats reported its condition to regulatory officials in the Cayman

Islands. He did so as an act of conscience because of matters he learned in his capacity as legal counsel employed for the company and did so to protect the company's insureds.

Publication # 4

May 9, 2008 NE GOP 39-004 as follows:

Greetings from the Cayman Islands.

From insurance company trial lawyer extraordinaire Rex Moats.

Dear Nebraskan,

Hello from the Cayman Islands! I have really enjoyed my time over here. The weather is great, the food is great, and most importantly – ***I have a fantastic job working for a shady insurance company that is incorporated right here in the Cayman Islands.*** The tax benefits sure are great out here!

Unfortunately my company, National Warranty, has gone bankrupt and is unable to pay off numerous claims for thousands of Nebraskans. Also, it looks like I have made misleading statements in an affidavit. Evidently, I claimed that my company is doing "just fine," but then declared bankruptcy two weeks later. ***No worries, even though thousands of people got ripped off by the company I represented, I still received a $50,000 trust fund.***

Anyway, I can't wait to get back – **I have a lead on a new job, I'm running for state legislature.** I just hope my political career is as rewarding as my old job with National Warranty.

See you on the campaign trail,
Rex Moats

Paid for by The Nebraska Republican Party
1610 "N" Street
Lincoln, NE 68508

This publication is false in that a) Moats did not write it; b) Moats did not make misleading statements in an affidavit as outlined above; c) Moats did not receive a $50,000 trust fund; and d) the publication is false in numerous lesser ways.

Petitioner's Complaint can be summarized with these references to key publications

Pub #	Allegation Summarized	Petitioner's Position
2.	*Moats received a $50,000 trust fund from the Director of National Warranty.*	Moats did not receive money or a trust fund.
3.	*Rex Moats claimed in an affidavit that National Warranty was doing financially well.*	Moats did not. He blew the whistle on National Warranty, and his conduct led to its insolvency proceedings. The Nebraska Court called this "misleading."

4.	*Presents the letter attributed to Moats and making statements about his actions in the Cayman Islands.*	This publication is false. It was not written by Moats at all. The Nebraska Court called this "misleading."
6.	*"National Warranty's directors set aside $50,000 for Rex Moats."*	This statement is false, as is # 1.
7, 8, 9.	*"Rex Moats took a $50,000 golden parachute from National Warranty."*	All 3 publications are false. Moats received no parachute.
11.	*Rex Moats was legal counsel for a now bankrupt insurance company that cost Nebraskans their jobs but rewarded Rex with a $50,000 trust. . . .*	This statement is false as are ¶¶ 7, 8 & 9.

The State Supreme Court decided this case on Nebraska's version of Fed. R. Civ. P. 12(b)(6). The Court's majority concluded the assertion that Moats lied in a court affidavit was not capable of being proven false. The Court held that the accusations of felonious conduct against Moats were constitutionally protected because they were statements of "opinion." Moats never had the chance to prove that he did not make false affidavits. He never got to present the affidavit alleged to have been false or have a jury

compare it to the Party's assertions. Had he done so, Moats' apodictic affidavit and its history would have revealed the actual falsity of the Respondent's malicious mailings. The Nebraska Court recognized Respondent's malice.

The Nebraska Court held the First Amendment precluded a trial to decide the truthfulness or falsity of the publications. It recognized that the Respondent's mailings were maliciously designed to impress the reader with the conclusion that Moats is a perjurer. This malicious impression, which the Nebraska Court thought was intended to induce a false conclusion, was deemed protected speech. The decision that Petitioner asks this Court to review concludes that falsehood can be intended and communicated but is protected if the speech accomplishes its nefarious goal with a false impression instead of a facially false statement.

REASONS TO GRANT THE PETITION

A. A Decision by This Court Addressing the Role of Malice in First Amendment Jurisprudence Involving Political Speech During an Election Campaign is Needed.

The Court can use this case as a means to resolve the tension between its decisions in *New York Times v. Sullivan* and *Milkovich* about political speech in general and election politics specifically. Although these two cases do not conflict facially, the Nebraska

Supreme Court's application of *Milkovich* to Moats' case led to a result inconsistent with the holding of *New York Times*.

Moats contends the First Amendment and this Court's decisions in *New York Times v. Sullivan* and its progeny do not protect political speech that is malicious and misleading, just as malicious and false speech is not protected. He contends the breathing space required to ensure free speech does not justify First Amendment protection of maliciously false or maliciously misleading statements. It is Moats' position that malice is never embraced by the First Amendment.

Since *New York Times v. Sullivan*, this Court has limited a public official's right to recover for defamation. *New York Times* holds that a public official seeking redress for defamation must prove the statement was made with "actual malice," i.e., with knowledge that the statement was false or made with reckless disregard of its falsity. *Id.* at 279-80. This Court clarified the actual malice standard in *Garrison v. Louisiana*, 279 U.S. 64 (1964). *Garrison* held that a defendant who made false statements with at least a "high degree of awareness of the probable falsity" made them with actual malice. *Id.* at 74. Until the Nebraska Supreme Court did so below, no court distinguished between constitutionally protected "maliciously misleading" and unprotected "maliciously false" political speech.

New York Times stands for the proposition that redress for defamation requires a public official to prove a challenged statement was made with actual malice. It requires nothing more. *Milkovich* requires a public figure defamation plaintiff to prove the challenged statement is false and to disprove that the statement "cannot be reasonably interpreted as stating actual facts" under the circumstances. *Milkovich* has been viewed as adding, or expanding, provable falsity as a defamation element where a public figure seeks redress. Petitioner pled that he would meet this standard of proof; he was not allowed to reach trial. Some might say *Milkovich* encumbers First Amendment clarity. The Nebraska Court's consternation with the facts before it was induced by *Milkovich.*

The Nebraska High Court decided Petitioner Moats could not prove actual falsity. It saw the Respondent's challenged election mailings as maliciously misleading the public to reach a false opinion of the candidate's veracity, but it found the statements were incapable of being proven actually false. Moats' Complaint makes it clear he was prepared to prove the Respondent's claim that he swore a false affidavit was an untrue allegation hurled by the Respondent to make the public think Moats was a liar unfit for elected office.

The Nebraska Court decided that because the Respondent's statements against Moats were uttered in campaign materials, its accusation of perjury (a crime under Nebraska Law and a disbarable offense for Moats who is a lawyer) was protected political

speech because the statements were not reasonably capable of being proven false. Moats allegedly lied about an insurance company's financial condition. But Moats proved that the Court which put the company in receivership accepted his version of the company's finances as true, and they proved to be true during the receivership process. Moats was the whistle-blower who told the truth, not a perjurer. The State Court read *Milkovich* as permitting an "anything goes" approach to political campaigning, thereby making candidates vulnerable to the most outrageous accusations with no recourse in the law. The Nebraska decision purports to create a new category of First Amendment Speech that goes beyond political speech. This category would be "political campaign speech." Moats contends the First Amendment provides no special layer of protection against defamation claims and subjects those who are falsely accused in a campaign to no greater exposure from hurtful statements protected by the First Amendment than one serving in public office and not engaged in campaigning.

"[T]he First Amendment "'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957))." *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 548 (2001). But statements that are malicious simply are outside the bounds of what the constitution protects.

> The First Amendment protects authors and journalists who write about public figures by requiring a plaintiff to prove that the defamatory statements were made with what we have called "actual malice," a term of art denoting deliberate or reckless falsification.

Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 499 (1991). The fetter on saying anything is the tort of defamation, with the additional element of actual malice.

> Actual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will. . . . We have used the term actual malice as a shorthand to describe the First Amendment protections for speech injurious to reputation, and we continue to do so here. But the term can confuse as well as enlighten. In this respect, the phrase may be an unfortunate one. . . . In place of the term actual malice, it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity. This definitional principle must be remembered in the case before us.

Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 510-11 (1991).

The Nebraska decision misapprehends *New York Times* and *Milkovich* jurisprudence, which define the "safeguards for freedom of speech and press that are required by the First and Fourteenth Amendments in

a libel action brought by a public official against critics of his official conduct." *New York Times*, 354 U.S. at 256. "[N]either factual error nor defamatory content suffices to remove the constitutional shield from criticism of official conduct, [and] the combination of the two elements is no less inadequate." *Id.* at 273. This Court's precedent concludes that a public figure must prove "actual malice" in addition to the requirements imposed by state law to bring a successful libel action. First Amendment jurisprudence provides breathing space for different points of view, but not for malice in any form.

Actual malice is the *only* additional requirement imposed on a defamation tort plaintiff who is a public figure by *New York Times.* The *New York Times* decision did not hold that the nature of the defamatory language at issue must be "worse" for a public official plaintiff to recover damages for defamation. *New York Times* does not hold that "anything goes" because speech is related to an election campaign. Malicious falsity, whether in facial statements or intended impressions, are both actionable if malice is proven and the falsity element is met. *Milkovich* does not hold that greater First Amendment protection exists for campaign talk than for political speech in any context. Any contrary impression should be stamped out.

B. A Free Speech Decision Arising Out of an Actual Campaign Provides an Instrument for This Court to Help Assure Truthful Campaigning.

The public has a vital interest in this Court's decision concerning whether the First Amendment will protect malicious speech if it is misleading, but not facially false. *New York Times* is nearly a half century old. *Milkovich* has aged for a human generation and a hundred technological ones. Methods of political speech have transformed, techniques for impacting public opinion have changed, and false impressions can easily become national policy, only to find, too late, that the false impression was someone's intentional manipulation. The First Amendment is the vanguard of free speech. It is not the safe harbor of malice and deception. "[S]peech on 'matters of public concern' . . . is 'at the heart of the First Amendment's protection.'" *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985).

> The First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). That is because "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Accordingly, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to

> special protection." *Connick v. Myers,* 461 U.S. 138, 145, (1983) (internal quotation marks omitted).

Snyder v. Phelps, ___ U.S. ___, 131 S.Ct. 1207, 1215 (2011). As this Court observed in June, 2011 in *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S.Ct. 2806 *21 (2011):

> "[T]here is practically universal agreement that a major purpose of" the First Amendment "was to protect the free discussion of governmental affairs," "includ[ing] discussions of candidates." *Buckley[v. Valeo]*, 424 U.S. [1], at 14, 96 S.Ct. 612 (internal quotation marks omitted; second alteration in original). That agreement "reflects our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" *Ibid.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)).

New York Times protects erroneous statements but provides no protection for malice. Regarding statements that were false, but not maliciously so, this Court concluded that an "erroneous statement is inevitable in free debate and that it must be protected if the freedoms of expression are to have the breathing space that they need to survive." *Id.* at 271-72 (citation omitted). Accord, *Philadelphia Newspapers, Inc., v. Heppes*, 475 U.S. 767 (1986). It has never allowed breathing space for malice. This Court explained that erroneous statements were inevitable in public

debate and the failure to protect such erroneous statements subtracted from public debate. "Actual malice" must exist, too. The decision below suggests a new class of protection for "malicious impressions" and "provable falsity" that has no roots in this Court's First Amendment jurisprudence or in a credible view of the role of free speech in our democracy's process for selection of public officials.

Courts are called upon in cases like this one to "struggl[e] . . . to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). But no accommodation is made where speech is malicious, and neither the core message, nor the result it induces with its misleading nature, are constitutionally protected. This Court has not squarely addressed campaign speech or distinctions between political speech that is maliciously false and that which is maliciously misleading but designed to induce false conclusions. The Nebraska Court drew this dangerous distinction.

Petitioner urges this Court to grant certiorari to decide at what point political speech made in a campaign for public office loses its First Amendment protection and becomes defamatory. Petitioner urges that all doubt about whether malice can find a home in the First Amendment when clothed as a sheep, but constituting a wolf, should be resolved by this Court's judgment.

C. The First Amendment Protects Truthful Campaign Speech But Not Malice. Without Fair Elections Founded in Truthful Campaigning, the Republican Form of Government is At Risk.

At least two competing constitutionally-recognized interests are balanced when considering the First Amendment's role in protecting speech during a political campaign. First, and most often discussed, is freedom to speak. Second, and the object of the election process, is the right to "Republican Form of Government" guaranteed by U.S. Const. Art. IV, Sec. 4, which provides in pertinent part "[t]he United States shall guarantee to every State in this Union a Republican Form of Government. . . ." This Court has explained that:

> [T]he distinguishing feature of [a republican form of government] is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, national and state, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities.

Duncan v. McCall, 139 U.S. 449, 461 (1891).

Where speech is malicious and used to convince voters to believe things that are false, either patently or because false impressions induce false conclusions by design, the public's right to select "officers" freely and in an honest environment is compromised. Maliciously misleading speech run amok across "modern means of communication" can easily create a misguided mere majority today, and another tomorrow, and tomorrow. The First Amendment's purpose is to preserve the right to speak and give speech meaning, not to provide safe passage for malicious soothsayers. This constitutional tension deserves this Court's consideration.

D. The Public Needs This Court's Decision Concerning Whether Maliciously Deceptive Speech that Induces False Conclusions Enjoys Different Protection from Facially False Speech Producing the Same Outcome.

The Nebraska Court's opinion frames an issue of significant public importance, i.e., will candidates for elective office and their supporters reasonably present their issues to the electorate on the merits of those issues, without malice limited to either false statements or misleading ones designed to induce false conclusions in the reader. The First Amendment's purpose is to assure that all points of view are heard, regardless of their popularity. *Snyder v. Phelps*, ___ U.S. ___, 131 S.Ct. 1207, 1215, 179 L. Ed. 2d 172 (2011).

The First Amendment admits no margin, even in closely-guarded and zealously-protected political speech contexts, for malicious statements or those that are maliciously designed to induce the reader to reach false conclusions. The Nebraska Court viewed campaign speech as wide open. But:

> That said, "[e]ven protected speech is not equally permissible in all places and at all times." *[citations omitted.]* Westboro's choice of where and when to conduct its picketing is not beyond the Government's regulatory reach – it is "subject to reasonable time, place, or manner restrictions" that are consistent with the standards announced in this Court's precedents. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

Snyder v. Phelps, ___ U.S.___, 131 S.Ct. 1207, 1218, 179 L. Ed. 2d 172 (2011). The time and this case have come for this Court to consider the parameters of tweeted distinctions with no real difference: like maliciously false speech versus maliciously misleading speech designed to induce false conclusions. The outcome is the same. The distinction is sophistry.

The political process in America is not given breathing space by malicious campaign conduct. Instead, the oxygen leaves democracy's atmosphere when the political process is reduced to sifting and sorting between directly false and directly misleading speech to induce a false conclusion, where both are accompanied by malice.

The First Amendment envisions political speech between persons with zealously-held diverse points of view, each of whom speaks the truth or makes honest mistakes and none of whom maliciously endeavor to trick the public. Petitioner contends that no crack in the First Amendment allows malicious misdirection to enjoy the pedestal of constitutional utterances while malicious falsehood falls outside of constitutional bounds.

E. The First Amendment's Boundaries Need to Be Squarely Considered in a Political Campaign Context.

This Court's recent First Amendment jurisprudence has focused on the authority of Congress to restrict campaign finance, *Citizens United v. Federal Trade Comm'n*, ___ U.S. ___, 130 S.Ct. 876 (2010), and the distinction between free expression and speech that incites or enrages. *Snyder v. Phelps*, *supra*. The Court has not addressed the contours of protected expression in a political speech context since *New York Times* and *Milkovich*. Petitioner is unable to identify a prior decision of this Court resolving free speech issues in the election campaign context. This is such a case.

Moats is aware that:

> "[A]s a general matter, . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. American Civil Liberties*

Union, 535 U.S. 564, 573, 122 S.Ct. 1700, 152 L.Ed.2d 771 (2002) (internal quotation marks omitted). There are of course exceptions. "'From 1791 to the present,' . . . the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas,' and has never 'include[d] a freedom to disregard these traditional limitations.'" *United States v. Stevens*, 559 U.S. ___, ___, 130 S.Ct. 1577, 1584, 176 L.Ed.2d 435 (2010) (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 382-383, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992)). These limited areas – such as obscenity, *Roth v. United States*, 354 U.S. 476, 483, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), incitement, *Brandenburg v. Ohio*, 395 U.S. 444, 447-449, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) *(per curiam)*, and fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S.Ct. 766, 86 L.Ed. 1031 (1942) –

represent "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem," *id.,* at 571-572, 62 S.Ct. 766.

Brown v. Entm't Merchants Ass'n, 131 S.Ct. 2729 (2011). However, this is a case presenting malicious conduct designed to produce a false conclusion in the reader in an election contest. The restrictions noted in *Brown* apply to attempts by legislatures to restrict speech, not to the First Amendment's role in defamation litigation brought by public figure victims of

or designed to create a provably false conclusion in the reader, though perhaps not with facially false assertions of fact. Certainly,

> [t]he Speech Clause "has its fullest and most urgent application to speech uttered during a campaign for political office." *Citizens United v. Federal Election Comm'n*, 558 U.S. ___, ___, 130 S.Ct. 876, 898, 175 L.Ed.2d 753 (2010) (internal quotation marks omitted). The unique protection granted to political speech is grounded in the history of the Speech Clause, which "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Connick, supra*, at 145, 103 S.Ct. 1684 (internal quotation marks omitted).

Borough of Duryea, Pa. v. Guarnieri, 131 S.Ct. 2488 (2011). Petitioner is mindful of this admonition as he presents this issue for the Court's consideration. This Court's First Amendment work in its last term sets the stage for this case.

First Amendment cases focus on whether speech can be restricted with campaign finance laws, but whether malicious speech is permissible in the election campaign process has not been focal in this Court's decisional opportunities. Yet, truthful speech is so systemically important that the subject deserves this Court's attention. See, Williams, *A Necessary Compromise: Protecting Electoral Integrity Through the Regulation of False Campaign Speech*, 52 SD L.

Rev. 321 (2007); and, Kane, *Malice, Lies, and Video-Tape: Revisiting New York Times v. Sullivan in the Modern Age of Political Campaigns*, 30 Rutgers L.J. 755 (1999).

This case presents a campaign of cumulative messages maliciously issued to persuade voters that a candidate for nonpartisan public office was a liar who perjured himself in a court affidavit. The opposite was true. In a decision that portends abuse and appears to sanction fraud if performed surgically, though maliciously, the Nebraska Supreme Court distinguished between false statements and misleading statements producing false conclusions, subjecting the former to tort liability while according the latter constitutional protection.

Words that are not literally false but are designed to create a false impression and lead the reader to a false conclusion when uttered maliciously incite the same damage and in some instances greater harm than a direct false assertion. The whispers of falsehood, cunningly choreographed in a campaign, kill candidate credibility because they defy response. This is not a campaign art. It is a malicious process of deception which undermines democracy.

Democracy is a quest for leadership. It is not likely to be achieved if its constitutional architecture enables malicious misleading speech during the election process. The Nebraska Supreme Court's departure from this Court's teachings places a dangerously

weak joist in the structure of First Amendment jurisprudence.

> [W]hatever the challenges of applying the Constitution to ever-advancing technology, "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary" when a new and different medium for communication appears. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503, 72 S.Ct. 777, 96 L.Ed. 1098 (1952).

Brown v. Entm't Merchants Ass'n, 131 S.Ct. 2729 (2011).

This Court is urged to consider how the distinction between maliciously false and maliciously misleading statements that, by design, produce false impressions will be used in future campaigns without the Court's guidance. The drift away from robust debate of issues to election by impressions and soundbytes, particularly with the electronic media and new technological messaging methods, pose new First Amendment concerns that were unimaginable when Sullivan sued the New York Times.

CONCLUSION

This Court's attention to the First Amendment's 222-year-old mandate as applied to political speech during a campaign for public office is needed. The Court is urged to grant this Petition for a Writ of

Certiorari, hear the merits, and reverse the Nebraska Supreme Court.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF NEBRASKA

REX J. MOATS, APPELLANT, V. REPUBLICAN PARTY OF NEBRASKA, ALSO KNOWN AS THE NEBRASKA REPUBLICAN PARTY, APPELLEE.

___ N.W.2d ___

Filed April 28, 2011. No. S-09-929.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Affirmed.

David A. Domina, of Domina Law Group, P.C., L.L.O., and, on brief, Mark D. Raffety, for appellant.

L. Steven Grasz, of Husch, Blackwell & Sanders, L.L.P., for appellee.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

PER CURIAM.

INTRODUCTION

The appellant, Rex J. Moats, a former candidate for the Nebraska Legislature, filed a complaint in the district court for Douglas County against the appellee, the Republican Party of Nebraska, also known as the Nebraska Republican Party (Republican Party). In his complaint, Moats identified 11 numbered publications issued by the Republican Party which he alleges were actionable under various theories. With respect to each publication, except publication No. 10, Moats alleged that the publication violated his rights under Nebraska's Consumer Protection Act (CPA), see Neb. Rev. Stat. § 59-1601 et seq. (Reissue 2010);

defamed him; and amounted to an invasion of privacy by putting him in a false light in violation of Neb. Rev. Stat. § 20-204 (Reissue 2007). Moats also alleged that publication No. 10, although not defamatory, violated his rights under the CPA and amounted to an invasion of privacy by putting him in a false light.

The Republican Party filed a motion to dismiss the complaint. The district court for Douglas County dismissed Moats' complaint in its entirety under Neb. Ct. R. Pldg. § 6-1112(b)(6) for failing to state a claim upon which relief could be granted. Moats appeals. We affirm.

FACTUAL BACKGROUND

In 2008, Moats became a candidate for the Nebraska Legislature in District 39. During the course of the election, the Republican Party paid for and distributed publications in opposition to Moats' candidacy. Moats filed a complaint in Douglas County District Court in which he identified 11 numbered publications that he alleged were actionable. Moats claimed that 10 of these publications were actionable under three theories: violation of the CPA, defamation, and the tort of invasion of privacy by false light. In his complaint, Moats claimed that publication No. 10 was actionable only under the theories of violation of the CPA and the tort of invasion of privacy by false light. The content of publication No. 10 is not quoted in the complaint.

The relevant portions of the 11 publications are described in Moats' complaint as follows:

Publication No. 1: On or about April 20, 2008, a publication designated "NE GOP 39-001" asserted: "'*Trial attorney Rex Moats is a registered Democratic* [sic] *and the Democrat* [sic] *Party is supporting him!*'"

Publication No. 2: On May 7, 2008, an 8½- by 11-inch folder designated "NE GOP 39-003" asserted: "'*Moats received a $50,000 trust fund from the director of National Warranty.*'"

Publication No. 3: On May 5, 2008, a publication stated: "'*Would you put a shady insurance company based in the Cayman Islands ahead of Nebraska's consumers? You wouldn't. But trial attorney Rex Moats would. . . .*'" This publication further stated: "'*How did Rex Moats mislead creditors and the public? Rex Moats claimed in an affidavit that National Warranty was doing financially well.*'"

Publication No. 4: This publication was an illustrated letter purportedly sent by Moats from the Cayman Islands to Nebraskans. On the front, it stated: "'*Greetings from the Cayman Islands. From insurance company trial lawyer extraordinaire Rex Moats.*'" On the back of the letter, it stated in relevant part:

> **Dear Nebraskan,**
>
> Hello from the Cayman Islands! I have really enjoyed my time over here. The weather is great, the food is great, and most importantly – ***I have a fantastic job working for a shady insurance company that is incorporated right here in the Cayman Islands.*** The tax benefits sure are great out here!

> Unfortunately my company, National Warranty, has gone bankrupt and is unable to pay off numerous claims for thousands of Nebraskans. Also, it looks like I have made misleading statements in an affidavit. Evidently, I claimed that my company is doing "just fine," but then declared bankruptcy two weeks later.

Publication No. 5: On October 2, 2008, a brochure publication designated "NE GOP 0004" asserted: "'*Rex Moats and National Warranty went down as a result of the same irresponsibility we see on Wall Street.*'"

Publication No. 6: On October 8, 2008, a publication designated "NE GOP 002" asserted: "'*Rex Moats cannot be trusted with your money.*'" The publication further stated that Moats was a "'*trial attorney*'" and that "'*National Warranty's directors set aside $50,000 for Rex Moats.*'"

Publication No. 7: An October 20, 2008, publication asserted that Moats was sued as a defendant in litigation. According to the complaint, the publication failed to disclose that the litigation against Moats was dismissed without a trial and had no merit. The publication also asserted: "'*Rex Moats took a $50,000 golden parachute just as National Warranty cost 150 Nebraskans their jobs and left unpaid promises to hundreds of thousands of vehicle buyers.*'"

Publication No. 8: On October 30, 2008, a publication designated "NE GOP 009" asserted: "'*Rex Moats received a $50,000 golden parachute even though 150*

Nebraskans lost their jobs.'" On October 31, the Republican Party issued a publication which stated: "'*Rex Moats misled creditors and the public about the solvency of National Warranty. Even worse, right before the company folded, Moats received $50,000 from the directors of National Warranty*.'"

Publication No. 9: On November 1, 2008, a publication designated "NEB 023," exhibiting a newborn baby, asserted: "'[*A*]*ccording to his own letter to the editor of a local newspaper, Rex Moats supports using your tax dollars to fund abortions*.'"

Publication No. 10: On November 1, 2008, the Republican Party issued a publication designated "NEB-015" which, according to the complaint, asserted "false information." The complaint does not contain the substance of the publication. Moats alleges that this publication was within the bounds of what is permissible under the law of defamation.

Publication No. 11: On November 3, 2008, the Republican Party issued a publication which asserted: "'*Rex Moats was legal counsel for a now bankrupt insurance company that cost Nebraskans their jobs but rewarded Rex with a $50,000 trust*,'" and "'*Rex Moats supports using tax dollars to fund abortions*.'"

In his complaint, Moats claimed that each one of the above publications was false and that the statements in each of the publications were made by the Republican Party with actual malice. Moats further alleged that the actions undertaken by the Republican Party constituted "smears against . . . Moats, i.e.,

deliberate and unsubstantiated accusations intended to foment distrust or hatred against . . . Moats." Moats' complaint stated that he suffered actual and special damages but did not plead damages with particularity.

The Republican Party filed a motion to dismiss the complaint for failure to state a claim for relief pursuant to § 6-1112(b)(6). The court held a hearing on the matter on May 27, 2009, and filed an order granting the motion to dismiss the complaint in its entirety on September 3. Moats appeals.

ASSIGNMENTS OF ERROR

Moats claims that the district court erred in (1) dismissing Moats' complaint for failure to state any claim upon which relief could be granted; (2) failing to recognize that the 11 publications constituted a violation of the CPA by the Republican Party; (3) failing to recognize that the claims asserted by Moats constituted defamation against him; (4) failing to recognize that Moats has stated "one or more" claims for having been placed in a false light contrary to § 20-204; and (5) failing to grant Moats leave to amend his complaint to cure any technical deficiencies, such as pleading special damages with particularity.

STANDARD OF REVIEW

An appellate court reviews a district court's order granting a motion to dismiss de novo, accepting all

the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party.[1] To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.[2]

ANALYSIS

CONSTITUTIONAL CONSIDERATIONS

As an initial matter, both Moats and the Republican Party draw our attention to the fact that this case arises in the context of a political campaign and has First Amendment implications. While considering a First Amendment challenge to the constitutionality of a federal criminal statute, the U.S. Supreme Court recently summarized the historical and accepted restrictions upon the content of speech as follows:

> "From 1791 to the present," . . . the First Amendment has "permitted restrictions upon the content of speech in a few limited areas,"

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[1] *Doe v. Board of* Regents, 280 Neb. 492, 788 N.W.2d 264 (2010).

[2] *Id.*

> and has never "include[d] a freedom to disregard these traditional limitations." . . . These "historic and traditional categories long familiar to the bar," . . . including obscenity, . . . defamation, . . . fraud, . . . incitement, . . . and speech integral to criminal conduct, . . . are "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[3]

Both parties note that the First Amendment's provision of freedom of speech affords broad protection to political expression[4] and that free "discussions of candidates" are to be encouraged.[5] It has been said that "'in public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate "breathing space" to the freedoms protected by the First Amendment.'"[6] Both parties agree that Moats is a public figure and acknowledge that in order to protect his reputation, as a former candidate, he is entitled to bring an action relative to the discourse

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[3] *U.S. v. Stevens*, ___ U.S. ___, 130 S. Ct. 1577, 1584, 176 L. Ed. 2d 435 (2010) (citations omitted).

[4] See *Roth v. United States*, 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957).

[5] *Mills v. Alabama*, 384 U.S. 214, 218, 86 S. Ct. 1434, 16 L. Ed. 2d 484 (1966).

[6] *Snyder v. Phelps*, ___ U.S. ___, 131 S. Ct. 1207, 1219, 179 L. Ed. 2d 172 (2011) (quoting *Boos v. Barry*, 485 U.S. 312, 108 S. Ct. 1157, 99 L. Ed. 2d 333 (1988)).

which occurred during the campaign.[7] It is in this context that we examine the viability of the allegations in the complaint filed by Moats.

PUBLICATIONS ISSUED BY REPUBLICAN PARTY DID NOT VIOLATE CPA

Moats claims that the statements issued by the Republican Party violate the CPA, which provides that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce shall be unlawful."[8] Elsewhere, the CPA provides: "Trade and commerce shall mean the sale of assets or services and any commerce directly or indirectly affecting the people of the State of Nebraska."[9]

> [The] CPA mirrors federal law. *Compare* 15 U.S.C. § 45(a)(1) ("[U]nfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.") *with* Neb. Rev. Stat. § 59-1602 ("[U]nfair or deceptive acts or practices in the conduct of any trade or commerce shall be unlawful.") . . . the CPA is essentially the state version of the Sherman Antitrust Act. . . . Although the CPA provides both a private right of action and a public right, disputes that fall within the ambit of the CPA are unfair or deceptive

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[7] See *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 109 S. Ct. 2678, 105 L. Ed. 2d 562 (1989).

[8] § 59-1602.

[9] § 59-1601(2).

> trade practices that affect the public interest.[10]

Moats contends that the statements made by the Republican Party during the campaign were deceptive acts or practices in the conduct of the Republican Party's trade or commerce; Moats claims the trades at issue are political speech and political campaigns. We understand Moats' argument to be that because the Republican Party conducts a trade, it is subject to the provisions of the CPA. The Republican Party disagrees with Moats. It claims that the complaint involves campaign literature which is political speech and not an asset or service under § 59-1601(2) and, therefore, not covered by the CPA. The Republican Party claims that the complaint fails to allege facts actionable under the CPA and does not raise a reasonable expectation that discovery will cure the defects.

The district court concluded that this case does not fall within the ambit of the CPA because the Republican Party was not engaged in "the sale of assets or services" and therefore not engaged in "[t]rade and commerce" under the CPA.[11] The district court cited to Black's Law Dictionary which defines commerce as "[t]he exchange of goods and services."[12] The court concluded that with respect to each of the 11 publications,

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[10] *Triple 7, Inc. v. Intervet, Inc.*, 338 F. Supp. 2d 1082, 1087 (D. Neb. 2004).

[11] See § 59-1601(2).

[12] Black's Law Dictionary 304 (9th ed. 2009).

Moats was attempting to expand the CPA beyond that which it was intended to regulate. This ruling was not error.

On appeal, Moats claims that the Republican Party is a business and therefore subject to the CPA. Moats relies on cases and treatises noting that political parties must organize and file tax returns, and argues that such activities show that political parties conduct a "trade or commerce" for purposes of § 59-1602 of the CPA.[13] Moats relies on *Grebner v. State*,[14] in which the Michigan Supreme Court considered a statute regulating balloting and indicated that a political consulting firm was a business. Moats also asserts that "'political speech'" is a "'"trade"'" and refers this court to publications indicating that large sums of money are spent on campaigns.[15] We do not find these authorities, references, or arguments to be persuasive in establishing Moats' contention that this court should read the CPA to encompass the political speech made during the campaign at issue. We also note that in his arguments, Moats has not set forth any case holding that the CPA of this state, or any other state, regulates speech used during a political campaign.

In assessing the meaning of a statute, we are guided by the principle that in the absence of anything to the

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[13] See, e.g., 25 Am. Jur. 2d *Elections* § 197 (2004).

[14] *Grebner v. State*, 480 Mich. 939, 744 N.W.2d 123 (2007).

[15] Brief for appellant at 28.

contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.[16]

The CPA states in § 59-1602 that it is unlawful to engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. Trade and commerce mean the sale of assets or services.[17] This case involves the propriety of the content of political speech used during a political campaign; regardless of the fact that the public was exposed to the speech and regardless of whether the Republican Party is a form of business, this case does not involve the sale of goods or services to the public. As the district court correctly concluded, the plain language of the CPA does not encompass a prohibition on the content of the campaign literature or political speech issued by the Republican Party in this case. Accordingly, we affirm the district court's ruling that none of the 11 claims made under the CPA are actionable.

PUBLICATIONS ARE NOT DEFAMATORY

Moats claims that with the exception of publication No. 10, the publications made by the Republican

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[16] *Swift & Co. v. Nebraska Dept. of Rev.*, 278 Neb. 763, 773 N.W.2d 381 (2009).

[17] § 59-1601(2).

Party were defamatory. Moats further contends that he should be given leave to amend his complaint to cure any technical deficiencies in the complaint. Moats argues that he has not waived his right to amend because there was no opportunity to request leave to amend, at the district court level.

The Republican Party challenges the allegations of defamation for various reasons, including that the allegations of defamation in the complaint lack contextual specificity, and asserts that even if the complaint were sufficiently pled, the publications were not defamatory because they were generally either opinion, parody, or were otherwise not actionable assertions. The Republican Party also argues that the complaint is insufficient because Moats did not plead special damages with particularity.

The district court determined that none of the statements made by the Republican Party were defamatory per se and that therefore, it was necessary for Moats to plead the defamatory nature of the language. The district court determined that because Moats failed to do so, the complaint was insufficient and dismissed the complaint.

We first address whether the contents of the publications at issue are potentially viable in defamation.

In the ordinary case, a claim of defamation requires (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged publication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either

actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.[18] However, with respect to fault, when the plaintiff in a libel action is a public figure and the speech is a matter of public concern, the plaintiff must demonstrate "actual malice," which means knowledge of falsity or reckless disregard for the truth, by clear and convincing evidence.[19] The plaintiff in a "public-libel" action must establish that the alleged statement is false by clear and convincing evidence and establish special damages.[20] In this case, the parties agree that Moats is a public figure.

There are two types of libel: Words may be actionable per se, that is, in themselves, or they may be actionable per quod, that is, only on allegation and proof of the defamatory meaning of the words used and the existence of special damages.[21] Whether a communication is libelous per se is a threshold question of law for the court.[22]

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[18] *Nolan v. Campbell*, 13 Neb. App. 212, 690 N.W.2d 638 (2004).

[19] See *Hoch v. Prokop*, 244 Neb. 443, 445, 507 N.W.2d 626, 629 (1993).

[20] See *id.* See, also, *K Corporation v. Stewart*, 247 Neb. 290, 526 N.W.2d 429 (1995).

[21] *K Corporation v. Stewart, supra* note 20.

[22] *Id.*

In *Matheson v. Stork,*[23] we stated:

> Spoken or written words are slanderous or libelous per se only if they falsely impute the commission of a crime involving moral turpitude, an infectious disease, or unfitness to perform the duties of an office or employment, or if they prejudice one in his or her profession or trade or tend to disinherit one. . . . In determining whether a communication is libelous or slanderous per se, the court must construe the questioned language "in its ordinary and popular sense." [However,] [w]here a communication is "ambiguous or . . . meaningless unless explained, or . . . *prima facie* innocent, but capable of defamatory meaning, it [is per quod and it] is necessary to specially allege and prove the defamatory meaning of the words used, and to allege and prove special damages." . . . Further, the circumstances under which the publication of an allegedly defamatory communication was made, the character of the audience and its relationship to the subject of the publication, and the effect the publication may reasonably have had upon such audience must be taken into consideration.

Moats argues that the statements in publications Nos. 3 and 4 involving misleading statements made by him in an affidavit accuse him of falsifying an

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[23] *Matheson v. Stork*, 239 Neb. 547, 553, 477 N.W.2d 156, 160-61 (1991) (citations omitted).

affidavit and were defamatory per se, because falsifying an affidavit is a crime.[24] We disagree with Moats' conclusion. A review of the language in these publications shows that the publications accused Moats of making *misleading* statements in an affidavit, not of making *false* statements in an affidavit. As such, the statements in publications Nos. 3 and 4 do not rise to the level of accusing Moats of committing any crime and therefore are not defamatory per se. Indeed, after reviewing all 10 publications, we conclude that none of the publications were defamatory per se.

Because the publications at issue were not defamatory per se, it was necessary for Moats to plead the defamatory nature of the words and special damages to properly plead his defamation per quod claims.[25] A defamation per quod claim is available within the context of a political campaign.[26] In assessing whether Moats has sufficiently pled a claim for defamation per quod, we consider that the statements at issue in this case were made in the course of a political campaign. We also acknowledge the tension between the need to protect one's reputation through a defamation action and the importance of

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[24] See Neb. Rev. Stat. §§ 28-915 and 28-915.01 (Reissue 2008).

[25] See *K Corporation v. Stewart, supra* note 20. See, also, *Norris v. Hathaway*, 5 Neb. App. 544, 561 N.W.2d 583 (1997).

[26] See, e.g., *Maag v. Illinois Coalition for Jobs*, 368 Ill. App. 3d 844, 858 N.E.2d 967, 306 Ill. Dec. 909 (2006) (discussing defamation in connection with judicial retention campaign).

First Amendment guarantees as they relate to political speech. Indeed, the U.S. Supreme Court noted that the First Amendment has "'"its fullest and most urgent application"'" to speech uttered during political campaigns.[27] The U.S. Supreme Court has pointed out the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on . . . public officials."[28] We have similarly observed that the "First Amendment encourages robust political debate,"[29] though we have also noted that "its protections are not absolute."[30] It is well settled that there is no constitutional right to espouse false assertions of facts, even against a public figure in the course of public discourse.[31]

It is within this context that we review the defamatory nature of the statements made by the Republican Party. "A communication is defamatory if it tends so to harm the reputation of another as to

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[27] See, *McIntrye v. Ohio Elections Comm'n*, 514 U.S. 334, 347, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995) (quoting *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976)). See, also, *Ky. Registry of Election Finance v. Blevins*, 57 S.W.3d 289 (Ky. 2001); *State v. Brookins*, 380 Md. 345, 844 A.2d 1162 (2004).

[28] *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).

[29] *State v. Drahota*, 280 Neb. 627, 637, 788 N.W.2d 796, 804 (2010).

[30] *Id.* at 632, 788 N.W.2d at 801.

[31] *New York Times Co. v. Sullivan, supra* note 28.

lower him in the estimation of the community or to deter third persons from associating or dealing with him."[32] Trial courts initially determine whether a statement is capable of defamatory meaning, and then the jury decides whether the words were so understood.[33] Courts make the determination in the first instance because a jury is "'unlikely to be neutral with respect to the content of [the] speech,' posing 'a real danger of becoming an instrument for the suppression of . . . "vehement, caustic, and sometimes unpleasan[t]" ' expression."[34]

In the context of a defamation claim, the First Amendment protects the publication of statements which cannot be interpreted as stating actual facts, but, rather, is the opinion of the author.[35] Courts considering the distinction between fact and opinion have generally determined that making the distinction is a question of law to be decided by the trial judge.[36]

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[32] Restatement (Second) of Torts § 559 at 156 (1977).

[33] *Henry v. Halliburton*, 690 S.W.2d 775 (Mo. 1985); W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 111 (5th ed. 1984). See, also, *Davis v. Ross*, 754 F.2d 80 (2d Cir. 1985); *Worley v. OPS*, 69 Or. App. 241, 686 P.2d 404 (1984); *Thomas Merton Ctr. v. Rockwell Intern. Corp.*, 497 Pa. 460, 442 A.2d 213 (1981).

[34] 34 *Snyder v. Phelps, supra* note 6, 131 S. Ct. at 1219 (quoting *Bose Corp. v. Consumers Union of U. S., Inc.*, 466 U.S. 485, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984)).

[35] See *Wheeler v. Nebraska State Bar Assn.*, 244 Neb. 786, 508 N.W.2d 917 (1993).

[36] *Henry v. Halliburton, supra* note 33.

"'While courts are divided in their methods of distinguishing between assertions of fact and expressions of opinion, they are universally agreed that the task is a difficult one.'"[37] The Restatement (Second) of Torts provides that a "defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion."[38]

In assessing whether a statement implies a false assertion of fact or a protected opinion, this court "looks at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed."[39] Courts applying the totality of the circumstances test in a defamation claim look to factors such as "(1) whether the general tenor of the entire work negates the impression that the defendant was asserting an objective fact, (2) whether the defendant used figurative or hyperbolic language that negates the impression, and (3) whether the statement in question is susceptible of being proved true or false."[40]

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[37] *Id.* at 787 (quoting *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984)).

[38] Restatement, *supra* note 32, § 566 at 170.

[39] *Wheeler v. Nebraska State Bar Assn., supra* note 35, 244 Neb. at 791, 508 N.W.2d at 921.

[40] *Gardner v. Martino*, 563 F.3d 981, 987 (9th Cir. 2009). See, also, *Klein v. Victor*, 903 F. Supp. 1327 (E.D. Mo. 1995).

As noted above, context is important to an analysis of whether a communication expresses a fact or an opinion: "[L]iterary, public, and social contexts are a major determinant of whether an ordinary reader would view an alleged defamatory statement as constituting fact or opinion."[41] Specifically with respect to a public debate, one court has held that

> "'where potentially defamatory statements are published in a public debate . . . or in another setting in which the audience may anticipate efforts by the parties to persuade others of their positions by use of epithets, fiery rhetoric, or hyberbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion.'"[42]

We first consider the allegedly defamatory statements in publication No. 3, which begins by asking: "'*Would you put a shady insurance company based in the Cayman Islands ahead of Nebraska consumers? You wouldn't. But trial attorney Rex Moats would. . . . How did Rex Moats mislead creditors and the public? Rex Moats claimed in an affidavit that National Warranty was doing financially well.*'"

In examining the totality of the circumstances, we note that this statement appeared in a political

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[41] *Brennan v. Kadner*, 351 Ill. App. 3d 963, 970, 814 N.E.2d 951, 958, 286 Ill. Dec. 725, 732 (2004).

[42] *Id.*

campaign brochure. It was written to persuade voters to vote against Moats through the use of both rhetoric and hyberbole – namely that National Warranty was "shady" and that Moats would choose it over Nebraska consumers. And the general tone of the publication suggests that the Republican Party was not making assertions of fact and that no reasonable reader would conclude otherwise. Nor are the terms "mislead" and "doing financially well" capable of being proved true or false. These terms are instead relative to the situation, and constitute opinion statements.

Given this context, we simply cannot find this statement to be reasonably susceptible of an interpretation which implies a false assertion of fact, but instead conclude that it constitutes an opinion protected by the First Amendment.

We turn next to publication No. 4, which was a letter or greeting card mailing decorated with tropical artwork, including a tiki carving. The text of the card is purportedly sent by Moats from the Cayman Islands. In this text, Moats makes comments about the great food and great weather, states that he has a "***fantastic job working for a shady insurance company***," and comments that the "tax benefits sure are great" in the Cayman Islands. The card continues with Moats' expressing concern about his company's bankruptcy and suggesting that he may have made "misleading statements in an affidavit." Included on the card is a disclaimer indicating that the mailing was paid for by the Republican Party.

As with publication No. 3, we examine the totality of the circumstances surrounding this card. It was written as if by Moats, but from the contents of the mailing, it was very clearly not written by Moats. This card includes epithets, rhetoric, and hyberbole. The general tenor of the card suggests that it was not meant to assert objective fact, and its statements could not be mistaken for ones intended as truthful. And as we found above with regard to publication No. 3, the card's reference to Moats' making "misleading statements" and claiming that his company was doing "'just fine'" are not capable of being proved true or false, and constitute opinion statements. We therefore conclude that this card, like publication No. 3, is also protected speech under the First Amendment.

Publications Issued by Republican Party Did Not Set Forth Separate Claim for Tort of Invasion of Privacy by False Light

Moats also claims that each of the publications referenced earlier in this opinion violated the tort of invasion of privacy by false light. In his complaint, Moats alleged that each of the 11 statements outlined above "were false, made knowingly or with reckless disregard for the truth, and were made for the purpose, and with the effect, of placing . . . Moats in a false light, to create a false public persona and image of him."

Section 20-204 provides:

> Any person, firm, or corporation which gives publicity to a matter concerning a

> natural person that places that person before the public in a false light is subject to liability for invasion of privacy if:
>
> (1) The false light in which the other was placed would be highly offensive to a reasonable person; and
>
> (2) The actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Invasion of privacy as a common-law tort has evolved over the years into several separate torts, one of which is the false light privacy claim at issue here.[43] We have recognized that publications that are alleged to constitute a false light invasion of privacy merit the same constitutional protections as publications alleged to be defamatory.[44] It has been stated that "[i]n order to survive as a separate cause of action, a false light claim must allege a non-defamatory statement. If the statements alleged are defamatory, the claims would be for defamation only, not false light privacy."[45] Thus, it has been widely held that a false light invasion of privacy claim "'sufficiently duplicative of libel'" is subsumed within

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[43] William L. Prosser, *Privacy*, 48 Calif. L. Rev. 383 (1960).

[44] See *Schoneweis v. Dando*, 231 Neb. 180, 435 N.W.2d 666 (1989).

[45] *Dworkin v. Hustler Magazine Inc.*, 867 F.2d 1188, 1193 n.3 (9th Cir. 1989). See *Time, Inc. v. Hill*, 385 U.S. 374, 87 S. Ct. 534, 17 L. Ed. 2d 456 (1967).

the defamation claim.[46] We agree with these authorities and conclude that a statement alleged to be both defamatory and a false light invasion of privacy is subsumed within the defamation claim and is not separately actionable.

In this case, Moats alleged a false light claim which is duplicative of his defamation claim with respect to each publication except publication No. 10, and therefore the false light aspects of his privacy claim, with the exception of publication No. 10, are subsumed in his defamation claims. Because each allegedly defamatory publication failed to state a claim for relief under defamation, they likewise fail to state a claim for relief for false light invasion of privacy. We consider publication No. 10, "NEB-015," separately because it is alleged to be a false light invasion of privacy, but not defamatory.

Publication No. 10 is not quoted in the complaint, and the allegation in the complaint merely suggests that it is in bad taste. We therefore determine that nothing in the complaint regarding publication No. 10, even under liberal notice pleading standards, see Neb. Ct. R. Pldg. § 6-1108(a)(2), indicates that a claim for relief under false light invasion of privacy is plausible or suggests that discovery will reveal evidence of a claim regarding publication No. 10. Thus,

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[46] See *Dworkin v. Hustler Magazine, supra* note 45 at 1193 n.3. See, e.g., *Rice v. Comtek Mfg. of Oregon, Inc.*, 766 F. Supp. 1539 (D. Or. 1990); *Bollea v. World Championship* Wrestling, 271 Ga. App. 555, 610 S.E.2d 92 (2005).

the complaint fails to state a false light invasion of privacy claim with respect to publication No. 10.

Although our reasoning differs somewhat from that of the district court, the district court did not err when it concluded that Moats failed to state a claim for relief based on invasion of privacy by false light with respect to all publications. We affirm this ruling.

CONCLUSION

The publications issued by the Republican Party are not in violation of the CPA or the tort of invasion of privacy by false light. Nor are the publications defamatory. We therefore affirm the decision of the district court.

AFFIRMED.

WRIGHT, J., not participating.

MILLER-LERMAN, J., concurring in part, and in part dissenting.

I concur in part in the majority opinion of the court and would affirm the district court's grant of the pretrial motion to dismiss the claims under Nebraska's Consumer Protection Act and the tort of invasion of privacy by false light. With respect to the defamation claims, I concur in affirming the dismissal of all the claims, with the exception of allegations regarding publications Nos. 3 and 4.

I respectfully dissent in part, and would reverse the district court's grant of the pretrial motion to dismiss the defamation claims regarding publications Nos. 3 and 4, the latter of which includes the statement that Moats "made misleading statements in an affidavit." The affidavit-related statements impute that Moats committed the specific criminal act of making false statements under oath. See Neb. Rev. Stat. §§ 28-915 (felony false statement under oath) and 28-915.01 (misdemeanor false statement under oath) (Reissue 2008). Even though they were made in a political campaign, such accusations, if proved at trial to be false and made with malice, are not constitutionally protected under the First Amendment. Upon such proof, such accusations are defamatory. Charges of illegal conduct by a public individual are not opinion and, if false, are protected solely by the actual malice test. *Rinaldi v. Holt, Rinehart*, 42 N.Y.2d 369, 366 N.E.2d 1299, 397 N.Y.S.2d 943 (1977). Regardless of the ultimate success of these defamation claims at trial, I conclude at this early stage of this case that they state a claim for relief and because they are plausible, should have survived the pretrial motion to dismiss.

As an initial matter, I am aware of the rough-and-tumble nature of political campaigns and that under the First Amendment, "debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co. v. Sullivan*, 376 U.S.

254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). We have recognized the foregoing, but have also noted that the First Amendment's "protections are not absolute." *State v. Drahota*, 280 Neb. 627, 632, 788 N.W.2d 796, 801 (2010). It is well settled that there is no constitutional right to espouse false assertions of facts, even against a public figure in the course of public disclosure. *New York Times Co. v. Sullivan, supra.*

In the present case, I emphasize that we must view Moats' claims of defamation in the procedural posture of this case. This case was dismissed based on a pretrial motion to dismiss in which it was claimed that the complaint failed to plausibly state a claim for relief and could not be proved meritorious at trial. This case is at the early pleading stage. We have recently explained the new standard that this court has adopted in assessing when a complaint survives a motion to dismiss in *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010). In *Doe*, we explained that to prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim. *Id.*

Keeping these principles in mind, I have reviewed each of the 10 publications. I would conclude that

specific crime of making a false statement under oath. See §§ 28-915 and 28-915.01. Regarding public officials, it has been stated that "[n]o First Amendment protection enfolds false charges of criminal behavior," *Rinaldi v Holt, Rinehart*, 42 N.Y.2d 369, 382, 366 N.E.2d 1299, 1307, 397 N.Y.S.2d 943, 951 (1977), and "'a charge of criminal conduct . . . can never be irrelevant to . . . a candidate's fitness for office for purposes of application of the "knowing falsehood or reckless diregard" rule of *New York Times Co. v. Sullivan*,'" *Cianci v. New Times Pub. Co.*, 639 F.2d 54, 59 (2d Cir. 1980). Contemporary candidates are evidently expected to suffer insults, but under accepted jurisprudence, they are not expected to suffer false charges of criminal conduct without recourse.

As a preliminary matter, I reject the suggestion that publication No. 4 cannot be actionable because it was printed on an island-themed card and is therefore protected as parody or satire. Although the medium containing publication No. 4 is more colorful than a conventional campaign flyer, I do not accept the argument that the statement that Moats "made misleading statements in an affidavit" is immunized simply by its appearance on fanciful stationery. Compare, *Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S. Ct. 876, 99 L. Ed. 2d 41 (1988); *Garvelink v. Detroit News*, 206 Mich. App. 604, 522 N.W.2d 883 (1994) (parodies, political cartoons, and satires are generally entitled to protection). Further, although publication No. 4 is purportedly from Moats, I do not think a reasonable reader would adopt the conceit

that the publication was actually sent by the candidate himself. Instead, publication No. 4 clearly states the factual assertion of the author that Moats "made misleading statements in an affidavit."

The first task regarding the affidavit-related statements in publications Nos. 3 and 4 is to inquire whether the statements are reasonably susceptible of a defamatory connotation so as to warrant submission to a fact finder to determine if in fact the defamatory connotation was conveyed. See *Cianci v. New Times Pub. Co., supra*. The statements are considered in the context in which they appear, and the words taken as they are commonly understood. See *id.* To perform this task, I would consider the words "misleading" and "affidavit."

I reject the suggestion that the word "misleading" used to describe an "affidavit" is ambiguous and is incapable of defamatory connotation. It has been stated that the plain meaning of the word "misleading" is to cause to have a false impression. *Concordia Theological Seminary, Inc. v. Hendry*, No. 1:05-CV-285-TS, 2006 WL 1408385 (N.D. Ind. May 17, 2006) (unpublished opinion). See, similarly, Merriam Webster's Dictionary of Law 315 (1996). More particularly, the federal obstruction of justice criminal statute provides that "misleading conduct" includes making a false statement. 18 U.S.C. § 1515(a)(3) (2006). Thus, "misleading" can connote falsity and a "misleading statement" can connote a false statement.

An affidavit is a legal instrument, and "affidavit" is a word of art. "Affidavit" is defined in Nebraska statutes as follows: "An affidavit is a written declaration under oath, made without notice to the adverse party." Neb. Rev. Stat. § 25-1241 (Reissue 2008). An affidavit has been described as a verified pleading that sets forth evidentiary facts within the personal knowledge of the verifying signatory. *Mata v. State*, 124 Idaho 588, 861 P.2d 1253 (Idaho App. 1993); 3 Am. Jur. 2d *Affidavits* § 8 (2002). Statements in affidavits are not casual musings but must set forth facts asserted to be true and show affirmatively that the affiant obtained personal knowledge of those facts. 3 Am. Jur. 2d, *supra*. We have stressed the legal significance of an affidavit and the importance that the statements in an affidavit be made under oath. See, e.g., *Moyer v. Nebraska Dept. of Motor Vehicles*, 275 Neb. 688, 747 N.W.2d 924 (2008). Further, we have stated that "[d]eliberate false testimony in a court proceeding tends to destroy the integrity of the judicial system and cannot be tolerated." *State v. McCaslin*, 240 Neb. 482, 493, 482 N.W.2d 558, 566 (1992). Thus, an "affidavit" is a legally significant statement made "under oath." See § 25-1241. I would conclude that the use of the word "misleading" proximate to the word "affidavit" is reasonably susceptible of the defamatory connotation that Moats committed a crime of false statement under oath.

Next I would consider whether the affidavit-related statements were protected as an expression of opinion. Contrary to the majority's view, I would not

conclude that the affidavit-related statements are mere opinion. In *Cianci v. New Times Pub. Co.*, 639 F.2d 54 (2d Cir. 1980), the Court of Appeals for the Second Circuit provided an often-quoted summary of the law in this area, which I suggest we adopt. To distinguish between statements of fact and opinion with respect to public figures, the controlling principle is

> (1) that a pejorative statement of opinion concerning a public figure generally is constitutionally protected, quite apart from *Sullivan*, no matter how vigorously expressed; (2) that this principle applies even when the statement includes a term which could refer to criminal conduct if the term could not reasonably be so understood in context; but (3) that the principle does not cover a charge which could reasonably be understood as imputing specific criminal or other wrongful acts.

639 F.2d at 64. Applying the foregoing to the instant case, I would conclude that the affidavit-related statements complained of could reasonably be understood as imputing a specific criminal act by Moats; thus, the statements are assertions of fact, not opinion, and are actionable.

Numerous cases are reported which consider whether comments made against political figures suggesting a crime are actionable. For the most part, where the statement is found to be opinion, and therefore, not actionable, the statement suggesting a crime is described by the courts as hyperbole or the

criminal allegation has been used in a figurative sense. See, e.g., *Greenbelt Pub. Assn. v. Bresler*, 398 U.S. 6, 14, 90 S. Ct. 1537, 26 L. Ed. 2d 6 (1970); *Rinaldi v Holt, Rinehart*, 42 N.Y.2d 369, 381, 366 N.E.2d 1299, 1307, 397 N.Y.S.2d 943, 951 (1977) (in advocating for judge's removal, statements claiming judge was "incompetent" are opinion, but statement claiming judge was "'probably corrupt'" was fact). Cases involving nonpolitical figures are to the same effect. *Lauderback v. American Broadcasting Companies*, 741 F.2d 193, 195 (8th Cir. 1984) (suggestion that insurance agent was "a crook and a liar" did not suggest specific criminal conduct); *Henry v. Halliburton*, 690 S.W.2d 775, 778 (Mo. 1985) (statements that insurance agent is "'a fraud and a twister'" did not suggest that agent committed specific crime).

In the instant case, the statements in publications Nos. 3 and 4 were not merely loose or figurative, nor were they limited to the suggestion that the publisher simply disagreed with Moats. The challenged statements suggest that Moats committed a specific crime as well as that he is personally dishonest. See *Gregory v. McDonnell Douglas Corp.*, 17 Cal. 3d 596, 552 P.2d 425, 131 Cal. Rptr. 641 (1976). I would conclude that the ordinary and average reader could likely understand the use of the affidavit-related words, in the context of the entire publication, as meaning that Moats had committed illegal actions. Such accusations are not constitutionally protected, and Moats' claim that such accusations are defamatory is entirely plausible. Charges of illegal conduct

by a public individual are not opinion and, if false, are protected solely by the actual malice test. *Rinaldi v Holt, Rinehart, supra.*

The potentially defamatory meaning of the affidavit-related statements in publications Nos. 3 and 4 can be appreciated based on the words used in the publications when combined with allegations in Moats' complaint. Notwithstanding that the affidavit-related statements were published in the context of a political campaign and giving due weight to the First Amendment concerns, I believe that Moats has alleged sufficient facts with respect to these two statements, when taken as true, to state a claim for relief of defamation per quod that is plausible on its face.

It is important to stress that my conclusion regarding the defamatory potential of portions of publications Nos. 3 and 4 is dictated by the fact that this lawsuit is at the early stage of litigation, and I, and this court, must assess the plausibility of the allegation of defamation based on the allegations in the complaint. See *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010). In this regard, I reiterate that the affidavit in question has not yet been produced for review by the trial court or this court in the limited context of consideration of the pretrial motion to dismiss. Because the affidavit is not part of the record, I make no comment regarding the ultimate merits at trial of Moats' defamation allegations concerning making a misleading affidavit referred to in publications Nos. 3 and 4.

I agree with the majority opinion except with respect to the decision to affirm the pretrial dismissal of the defamation claims regarding publications Nos. 3 and 4. Moats alleges he was defamed in publications Nos. 3 and 4, the latter of which states that Moats "made misleading statements in an affidavit." This statement imputes that Moats committed the specific criminal act of making false statements under oath. Even in rough-and-tumble political discourse, a charge of specific illegal conduct by a public individual, if false and made with actual malice, is not protected by the First Amendment and is defamatory. Whether these accusations are false and made with malice can only be determined by examining evidence at trial. Neither the trial court nor this court has seen the affidavit. I would conclude that the district court erred when it determined prematurely that the affidavit-related allegations in publications Nos. 3 and 4 could not succeed at trial and therefore dismissed these claims at the pretrial stage. To this limited extent, I would reverse the district court's order, permit the case to proceed solely as to the defamation claims regarding publications Nos. 3 and 4, and await the evidence.

IN THE DISTRICT COURT OF
DOUGLAS COUNTY, NEBRASKA

REX J. MOATS, Plaintiff, vs. REPUBLICAN PARTY OF NEBRASKA, A/K/A THE NEBRASKA REPUBLICAN PARTY, Defendant.	)	Doc. 1093 No. 554 **ORDER ON DEFENDANT'S MOTION TO DISMISS**

This matter comes before the Court on Defendant Republican Party of Nebraska's ("Defendant") motion to dismiss pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6). A hearing was held May 27, 2009. Parties appeared by counsel, arguments were heard, and the matter taken under advisement. For the reasons discussed below, Defendant's motion to dismiss is granted.

Facts

Plaintiff Rex J. Moats ("Plaintiff") is an individual who was a candidate for election to the Nebraska Legislature. Defendant is an organization that participates in political campaigns by promoting certain candidates and opposing others. Defendant has offices in Lincoln, Nebraska, and Omaha, Nebraska.

In 2008, Plaintiff became a candidate for the Legislature in District 39, which includes parts of Douglas, Washington, and Sarpy Counties. During

the course of the general election, Defendant paid for and distributed publications in opposition to Plaintiff's candidacy. Plaintiff's candidacy was ultimately unsuccessful.

On March 23, 2009, Plaintiff filed a complaint alleging that Defendant had made a series of false, deceptive, and misleading statements about him. Specifically, Plaintiff claimed that eleven of Defendant's publications were actionable under three theories of recovery: (1) the Nebraska Consumer Protection Act ("NCPA"); (2) defamation; and (3) false light invasion of privacy. Defendant filed a motion to dismiss pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6) on April 27, 2009. The motion came on for a hearing on May 27, 2009, at which time the matter was taken under advisement.

Standard of Review

Pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6), Defendant has filed a motion to dismiss for failure to state a claim upon which relief can be granted. Whether a complaint states a cause of action is a question of law. *Tolbert v. Omaha Hous. Auth.*, 16 Neb. App. 618, 622, 747 N.W.2d 452, 456 (2008).

"Complaints should be liberally construed in the Plaintiff's favor and should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim which would entitle the plaintiff to relief. *McKenna v. Julian*, 277 Neb. 522,

525, 763 N.W.2d 384, 388 (2009). *See also Parkert v. Lindquist*, 269 Neb. 394, 396, 693 N.W.2d 529, 531 (2005) and *Kellogg v. Nebraska Dept. of Correctional Services*, 269 Neb. 40, 45, 690 N.W.2d 574, 578 (2005). In a motion to dismiss, the court must accept as true all well-pled facts and the inferences of law and fact which may be drawn therefrom; however, the court does not have to accept the conclusions of the pleader. *Kanne v. Visa U.S.A., Inc.*, 272 Neb. 489, 493, 723 N.W.2d 293, 297 (2006).

Defendant's publications

Plaintiff seeks to recover damages for eleven publications made by Defendant. Plaintiff bases his allegations on three theories of recovery: the NCPA; defamation; and false light invasion of privacy. These eleven publications, as described in Plaintiff's complaint, are detailed below.

i. Publication # 1

On April 20, 2008, a publication by Defendant designated NE GOP 39-001 asserted that: "Trial attorney Rex Moats is a registered Democratic [sic] and the Democrat [sic] Party is supporting him!" (Compl. ¶ 16).

ii. Publication #2

On May 7, 2008, Defendant published an 8 ½ by 11 folder designated NE GOP 39-003, which asserted

that: "Moats received a $50,000 trust fund from the director of National Warranty." (Compl. ¶ 17).

iii. Publication # 3

On May 5, 2008, a publication by Defendant read: "Would you put a shady insurance company based in the Cayman Islands ahead of Nebraska's consumers? You wouldn't. But trial attorney Rex Moats would . . . How did Rex Moats mislead creditors and the public? Rex Moats claimed in an affidavit that National Warranty was doing financially well." (Compl. ¶ 18).

iv. Publication # 4

On May 9, 2008, Defendant mailed a greeting card designated NE GOP 39-004, which said on front: "Greetings from the Cayman Islands. From insurance company trial lawyer extraordinaire Rex Moats." The back side of this card reads:

> Dear Nebraskan,
>
> Hello from the Cayman Islands! I have really enjoyed my time over here. The weather is great, the food is great, and most importantly – ***I have a fantastic job working for a shady insurance company that is incorporated right here in the Cayman Islands.*** The tax benefits sure are great out here!
>
> Unfortunately my company, National Warranty, has gone bankrupt and is unable to pay off numerous claims for thousands of

> Nebraskans. Also, it looks like I have made misleading statements in an affidavit. Evidently, I claimed that my company is doing 'just fine,' but then declared bankruptcy two weeks later. ***No worries, even though thousands of people got ripped off by the company I represented, I still received a $50,000 trust fund.***
>
> Anyway, I can't wait to get back – **I have a lead on a new job, I'm running for state legislature.** I just hope my political career is as rewarding as my old job with National Warranty.
>
> See you on the campaign trail,
> Rex Moats

(Compl. ¶ 19) (emphasis in original).

v. Publication #5

On October 2, 2008, Defendant issued a brochure designated NE GOP 0004, which asserted that: "Rex Moats and National Warranty went down as a result of the same irresponsibility we see on Wall Street." (Compl. ¶ 20)

vi. Publication #6

On October 8, 2008, Defendant published NE GOP 002, which asserted that: "Rex Moats cannot be trusted with your money." This publication also stated that Rex Moats was a "trial attorney" and that

"National Warranty's directors set aside $50,000 for Rex Moats." (Compl. ¶ 21).

vii. Publication #7

On October 20, 2008, a publication by Defendant asserted that: "Rex Moats took a $50,000 golden parachute just as National Warranty cost 150 Nebraskans their jobs and left unpaid promises to hundreds of thousands of vehicle buyers." (Compl. ¶ 22).

viii. Publication #8

On October 30, 2008, Defendant issued publication NE GOP 009, which asserted that: "Rex Moats received a $50,000 golden parachute even though 150 Nebraskans lost their jobs." On October 31, 2008, Defendant issued publication NE GOP 020 that stated:

> Rex Moats misled creditors and the public about the solvency of National Warranty. Even worse, right before the company folded, Moats received $50,000 from the directors of National Warranty.

(Compl. ¶¶ 23, 23.2).

ix. Publication #9

On November 21, 2008, Defendant published NEB 023, which asserted that: "according to his own letter to the editor of a local newspaper, Rex Moats

supports using your tax dollars to fund abortions." (Compl. ¶ 24).

x. Publication #10

On November 1, 2008, Defendant issued publication NEB-015, which Plaintiff alleges contains "false information." Despite including Publication #10 in his complaint, Plaintiff states he is not asserting a claim against Defendant for this publication. (Compl. ¶ 25).

xi. Publication #11

On November 3, 2008, Defendant issued a four page publication that asserts, in part: "Rex Moats was legal counsel for a now bankrupt insurance company that cost Nebraskans their jobs but rewarded Rex with a $50,000 trust." The publication also asserted that "Rex Moats supports using tax dollars to fund abortions." (Compl. ¶ 26).

Discussion

Plaintiff has alleged that eleven of Defendant's publications are actionable based on three separate legal theories: (1) the NCPA; (2) defamation; and (3) false light invasion of privacy. For the reasons discussed below, the Court finds that Plaintiff has failed to state a claim upon which relief can be granted and that Defendant's motion to dismiss must be granted.

1. The NCPA

Plaintiff's first legal theory of recovery is under the NCPA. Plaintiff's complaint alleges that Defendant's conduct against Plaintiff involved unfair methods of competition and unfair or deceptive acts or practices. (Compl. ¶¶ 30-32).

A. Law

The NCPA makes "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce" unlawful. *Neb. Rev. Stat.* § 59-1602. *See also State ex rel. Stenberg v. Consumer's Choice Foods, Inc.*, 276 Neb. 481, 488, 755 N.W.2d 583, 590 (2008). The Act creates a private right of action for certain violations; however, this right is limited to unfair or deceptive practices that affect the public interest. *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678, 683, 605 N.W.2d 136, 141 (2000). As the Nebraska Supreme Court has explained:

> "[T]o be actionable under the Act, the unfair or deceptive practice must have an impact upon the public interest and . . . the Act is not available to redress a private wrong where the public interest is unaffected. We [refuse] to apply the Act to isolated transactions between individuals that did not have an impact on consumers at large."

Arthur v. Microsoft Corp., 276 Neb. 586, 595, 676 N.W.2d 29, 36 (2004). "Trade" and "commerce" are defined as "the sale of assets or services and any

commerce directly or indirectly affecting the people of the State of Nebraska." *Neb. Rev. Stat.* § 59-1601(2). Thus, the scope of the Act is limited to the sale of assets or services and any commerce that directly or indirectly affects the people of Nebraska. *Eicher v. Mid. Am. Fin. Inv. Corp.*, 275 Neb. 462, 473, 748 N.W.2d 1, 12 (2008).

B. Application

Plaintiff argues that Defendant's eleven publications are actionable under the NCPA. Plaintiff contends that Defendant is a political party and that its business in [sic] the promotion and election of candidates. Accordingly, Plaintiff claims that Defendant's conduct is covered by the NCPA. This argument is unpersuasive.

As stated above, the NCPA provides a limited private right of action to guard against unfair methods of competition and unfair or deceptive acts in any trade or commerce. The terms "trade" and "commerce" refer to the sale of assets or services and any commerce affecting Nebraskans.

Clearly, this case does not fall within the ambit of the NCPA. First, Plaintiff is not a consumer; rather, he was a candidate for political office. Secondly, Defendant was not engaged in the sale of assets or services. Moreover, Defendant was not engaged in any commerce, as that phrase is commonly understood. *See* BLACK'S LAW DICTIONARY 263 (7th Ed. 1999) (commerce is "[t]he exchange of goods and services"). Instead,

Defendant was engaged in political speech. There is nothing in the NCPA to indicate that it was intended to regulate political speech. Plaintiff's argument attempts to expand the reach of the NCPA beyond what it was designed to regulate.

Therefore, Plaintiff's claims relating to the NCPA fail to state a claim upon which relief can be granted. Accordingly, Defendant's motion to dismiss Plaintiff's NCPA claims is granted.

2. Defamation

Plaintiff's second legal theory of recovery is for defamation. Plaintiff's complaint alleges that eleven of Defendant's publications are false or made with reckless disregard for the truth.

A. Law

Whether a particular publication is defamatory is, in the first instance, a question of law. *Wheeler v. Nebraska State Bar Assoc.*, 244 Neb. 786, 790, 508 N.W.2d 917, 920 (1993). "Defamation is language the nature and obvious meaning of which is to impute to a person the commission of a crime or to subject him to public ridicule, ignominy, or disgrace." *Young v. First United Bank of Bellevue*, 246 Neb. 43, 48, 516 N.W.2d 256, 259 (1994). There are four elements to a defamation claim: (1) a false and defamatory statement concerning the plaintiff; (2) unprivileged publication to a third party; (3) fault on the part of the publisher

amounting to at least negligence; and (4) the existence of special harm caused by publication or actionability of the statement irrespective of special harm. *Sand Livestock Sys. v. Svoboda*, 17 Neb. App. 28, 42, 756 N.W.2d 299, 312 (2008); *Nolan v. Campbell*, 13 Neb. App. 212, 218, 690 N.W.2d 638, 646-47 (2004).

The First Amendment protects statements that cannot be reasonably interpreted as asserting actual facts about an individual. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990). "Thus, the threshold question in defamation suits is whether a reasonable fact finder could conclude that the published statements imply a provably false factual assertion." *Wheeler*, 244 Neb. at 790, 508 N.W.2d at 921. *See also Gardner v. Martino*, 563 F.3d 981, 987 (9th Cir. 2009) ("The threshold question in a defamation claim is whether a reasonable fact finder could conclude that the contested statement implies an assertion of objective fact"). Whether a statement implies a provably false factual assertion is determined by looking at the totality of the circumstances. *Wheeler*, 244 Neb. at 793, 508 N.W.2d at 922. The Nebraska Supreme Court has explained:

> "[S]tatements which cannot be interpreted as stating actual facts are entitled to First Amendment protection. The test in this regard is whether a reasonable fact finder could conclude that the statement implies a provably false factual assertion. In assessing the objectivity and verifiability of a statement, all surrounding circumstances are to

> be considered, examining first the language of the statement and then the context in which it was made."

K Corp. v. Stewart, 247 Neb. 290, 296, 526 N.W.2d 429, 435 (1995) (internal citations omitted).

"There are two types of defamation: Words may be actionable per se, that is, in themselves, or they may be actionable per quod, that is, only on allegation and proof of the defamatory meaning of the words used and of special damages." *Norris v. Hathaway*, 5 Neb App. 544, 548, 561 N.W.2d 583, 585-86 (1997). *See also Hatcher v. McShane*, 12 Neb. App. 239, 245, 670 N.W.2d 638, 644 (2003); and *K Corp.*, 247 Neb. at 293, 526 N.W.2d at 433.

> "Spoken or written words are slanderous or libelous per se only if they falsely impute the commission of a crime involving moral turpitude, an infectious disease, or unfitness to perform the duties of an office or employment, or if they prejudice one in his or her profession or trade or tend to disinherit one. In determining whether a communication is libelous or slanderous per se, the court must construe the questioned language in its ordinary and popular sense. Moreover, where a communication is ambiguous or meaningless unless explained or prima facie innocent, but capable of defamatory meaning, it is necessary to specially allege and prove the defamatory meaning of the words used, and to allege and prove, special damages."

Matheson v. Stork, 239 Neb. 547, 553, 477 N.W.2d 156, 160-61 (1991) (internal citations omitted). A statement is not per se actionable if innuendo or explanation is necessary to make it clear and understandable. *K Corp.*, 247 Neb. at 295, 526 N.W.2d at 434. Whether a communication is defamatory per se is a question of law for the court. *Norris*, 5 Neb. App. at 547, 561 N.W.2d at 585.

B. Application

Plaintiff argues that Defendant's eleven publications, made in the course of a political campaign, are defamatory. As discussed above, there are two types of defamation: defamation per se and defamation per quod. Defamation per se consists of words defamatory in and of themselves. These are words that "falsely impute the commission of a crime involving moral turpitude, an infectious disease, or unfitness to perform the duties of an office or employment, or if they prejudice one in his or her profession or trade or tend to disinherit one." *Matheson*, 239 Neb. at 553, 477 N.W.2d at 160-61. On the other hand, defamation per quod requires the plaintiff to allege and prove the defamatory meaning of the words used and to plead special damages. *Hatcher*, 12 Neb. App. at 245, 670 N.W.2d at 644.

In this case, as a matter of law, the alleged defamatory statements do not constitute defamation per se. That is, the publications that Plaintiff alleges are defamatory do not falsely impute to Plaintiff the

commission of a crime of moral turpitude; they do not falsely impute to Plaintiff an infectious disease; they do not falsely impute to Plaintiff unfitness for office; they do not prejudice Plaintiff in his employment; and they do not tend to disinherit Plaintiff. Defendant's publications, made during a political campaign, are not actionable on their face; rather, they require some sort of innuendo or explanation to make the alleged defamatory meaning clear. Thus, Plaintiff is required to allege the defamatory meaning of the words used.

i. Publication # 1

Defendant's first publication occurred on April 20, 2008. This publication was designated NE GOP 39-001 and asserted that: "Trial attorney Rex Moats is a registered Democratic [sic] and the Democrat [sic] Party is supporting him!" (Compl. ¶ 16).

Plaintiff does not allege how this statement is defamatory, which is required in an action for defamation per quod. Moreover, calling a person a "trial attorney" or a "Democrat" does not rise to the level of defamation. That is, it is not language the nature and obvious meaning of which is to impute to a person the commission of a crime or to subject him to public ridicule, ignominy, or disgrace. As a matter of law, this publication is not defamatory. Therefore, Plaintiffs claim for defamation on this publication is dismissed.

ii. Publication #2

On May 7, 2008, Defendant published an 8 ½ by 11 folder designated NE GOP 39-003, which asserted that: "Moats received a $50,000 trust fund from the director of National Warranty." (Compl. ¶ 17).

Plaintiff does not allege how this statement is defamatory. Standing alone, it is not enough to subject Plaintiff to public ridicule, ignominy, or disgrace, which is required for a statement to be defamatory. Therefore, Plaintiff has failed to state a claim for defamation per quod. Accordingly, Plaintiff's claim for defamation on this publication is dismissed.

iii. Publication # 3

On May 5, 2008, a publication by Defendant read: "Would you put a shady insurance company based in the Cayman Islands ahead of Nebraska's consumers? You wouldn't. But trial attorney Rex Moats would . . . How did Rex Moats mislead creditors and the public? Rex Moats claimed in an affidavit that National Warranty was doing financially well." (Compl. ¶ 18).

In the first part of this statement, the rhetorical question posed by the publication does not imply a provably false factual assertion. Moreover, Plaintiff again fails to allege how being called a "trial attorney" is defamatory to the extent that one is publicly ridiculed or disgraced. The remainder of the statement, which again includes a rhetorical question, does not, in the context of a political publication, imply a

provably false factual assertion about Plaintiff. Accordingly, Plaintiff's claim for defamation on this publication is dismissed.

iv. Publication # 4

On May 9, 2008, Defendant mailed a greeting card designated NE GOP 39-004, which said on front: "Greetings from the Cayman Islands. From insurance company trial lawyer extraordinaire Rex Moats." The back side of this card reads:

> Dear Nebraskan,
>
> Hello from the Cayman Islands! I have really enjoyed my time over here. The weather is great, the food is great, and most importantly – ***I have a fantastic job working for a shady insurance company that is incorporated right here in the Cayman Islands.*** The tax benefits sure are great out here!
>
> Unfortunately my company, National Warranty, has gone bankrupt and is unable to pay off numerous claims for thousands of Nebraskans. Also, it looks like I have made misleading statements in an affidavit. Evidently, I claimed that my company is doing 'just fine,' but then declared bankruptcy two weeks later. ***No worries, even though thousands of people got ripped off by the company I represented, I still received a $50,000 trust fund.***

> Anyway, I can't wait to get back – **I have a lead on a new job, I'm running for state legislature.** I just hope my political career is as rewarding as my old job with National Warranty.
>
> See you on the campaign trail,
> Rex Moats

(Compl. ¶ 19) (emphasis in original).

In determining whether a statement implies a provably false factual assertion, a court must look at the totality of the circumstances. Here, the alleged defamatory statements appear in a political publication made to look like a greeting card. Bearing in mind the context, the publication cannot be taken as implying a provably false assertion of fact. Rather, it is more in line with the type of loose, hyperbolic language protected by the First Amendment. *See The Woodmont Corp. v. Rockwood Ctr. P'ship*, 811 F.Supp. 1478, 1483 (D. K.S. 1993). Moreover, because the publication is not defamatory per se, Plaintiff must allege the defamatory meaning. Plaintiff has not done so. Accordingly, Plaintiff's claim for defamation on this publication is dismissed.

v. Publication #5

On October 2, 2008, Defendant issued a brochure designated NE GOP 0004, which asserted that: "Rex Moats and National Warranty went down as a result of the same irresponsibility we see on Wall Street." (Compl. ¶ 20).

This statement does not imply a provably false assertion of fact. Instead, it is the kind of exaggerated, opinion-based statement that regularly occurs during political campaigns. As such, the publication is protected from defamation actions by the First Amendment. Accordingly, Plaintiff's claim for defamation on this publication is dismissed.

vi. Publication #6

On October 8, 2008, Defendant published NE GOP 002, which asserted that: "Rex Moats cannot be trusted with your money." This publication also stated that Rex Moats was a "trial attorney" and that "National Warranty's directors set aside $50,000 for Rex Moats." (Compl. ¶ 21).

The first part of Defendant's publication is protected, because it cannot reasonably be read as implying a factual assertion regarding Plaintiff's trustworthiness with money. As to the second half of the publication, Plaintiff has failed to allege its defamatory meaning, as required in an action for defamation per quod. Accordingly, Plaintiff's claim for defamation on this publication is dismissed.

vii. Publication #7

On October 20, 2008, a publication by Defendant asserted that: "Rex Moats took a $50,000 golden parachute just as National Warranty cost 150 Nebraskans

their jobs and left unpaid promises to hundreds of thousands of vehicle buyers." (Compl. ¶ 22).

Plaintiff alleges that this statement is false. However, Plaintiff fails to allege the defamatory meaning of the statement, as required in an action for defamation per quod. Accordingly, Plaintiff's claim for defamation on this publication is dismissed.

vii. Publication #8

On October 30, 2008, Defendant issued publication NE GOP 009, which asserted that: "Rex Moats received a $50,000 golden parachute even though 150 Nebraskans lost their jobs." On October 31, 2008, Defendant issued publication NE GOP 020 that stated:

> Rex Moats misled creditors and the public about the solvency of National Warranty. Even worse, right before the company folded, Moats received $50,000 from the directors of National Warranty.

(Compl. ¶¶ 23, 23.2).

Plaintiff alleges that this statement is false; however, Plaintiff does not allege the defamatory meaning of this statement, as required in an action for defamation per quod. Accordingly, Plaintiff's claim for defamation on this publication is dismissed.

ix. Publication #9

On November 21, 2008, Defendant published NEB 023, which asserted that: "according to his own letter to the editor of a local newspaper, Rex Moats supports using your tax dollars to fund abortions." (Compl. ¶ 24).

Plaintiff again alleges this statement is false. However, this statement is not defamatory per se; therefore, Plaintiff is required to allege its defamatory meaning. Plaintiff has failed to do so. Accordingly, Plaintiff's claim for defamation on this publication is dismissed.

x. Publication #10

On November 1, 2008, Defendant issued publication NEB-015, which Plaintiff alleges contains "false information." Despite including Publication #10 in his complaint, Plaintiff states he is not asserting a claim against Defendant for this publication. (Compl. ¶ 25). Accordingly, Plaintiff's claim for defamation on this publication is dismissed.

xi. Publication #11

Finally, on November 3, 2008, Defendant issued a four page publication that asserts, in part: "Rex Moats was legal counsel for a now bankrupt insurance company that cost Nebraskans their jobs but rewarded Rex with a $50,000 trust." The publication also

asserted that "Rex Moats supports using tax dollars to fund abortions." (Compl. ¶ 26).

This statement is not defamatory per se. Rather, Plaintiff is required to allege the defamatory meaning of this publication, but has failed to do so. Accordingly, Plaintiff's claim for defamation on this cause of action is dismissed.

For the reasons discussed above, Plaintiff's claims relating to defamation fail to state a claim upon which relief can be granted. Accordingly, Defendant's motion to dismiss Plaintiff's defamation claims is granted.

3. False light invasion of privacy

Plaintiff's third legal theory is false light invasion of privacy. Plaintiff alleges that Defendant's eleven publications placed Plaintiff in a false light.

A. Law

In Nebraska, the tort of invasion of privacy has been divided into three separate causes of action found in Neb. Rev. Stat. §§ 20-202 to 20-204. *Sabrina W. v. Willman*, 4 Neb. App. 149, 154, 540 N.W.2d 364, 369 (1995). Plaintiff's allegation is brought under Neb. Rev. Stat. § 20-204. (Compl. ¶¶ 37-40). This section provides a cause of action for false light invasion of privacy:

> "Any person, firm, or corporation which gives publicity to a matter concerning a natural

> person that places that person before the public in a false light is subject to liability for invasion of privacy, if:
>
> (1) The false light in which the other was placed would be highly offensive to a reasonable person; and
>
> (2) The actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed."

Neb. Rev. Stat. § 20-204. It is essential in a claim under this section that the publicized matter be false. *Schoneweis v. Dando*, 231 Neb. 180, 185-86, 435 N.W.2d 666, 670 (1989); and *Wadman v. State*, 1 Neb. App. 839, 847, 510 N.W.2d 426, 431 (1993). Furthermore, in order to recover for false light invasion of privacy, "the matter must be communicated to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." *Wilkinson v. Methodist, Richard Young Hosp.*, 259 Neb. 745, 749, 612 N.W.2d 213, 216-17 (2000). Publications that are alleged to constitute a false light invasion of privacy merit the same constitutional protections as publications alleged to be defamatory. *See Schoneweis*, 231 Neb. at 186-87, 435 N.W.2d at 670-71.

B. Application

Plaintiff argues that Defendant's eleven publications were made with a knowing or reckless disregard for the truth and placed him in a false light.

i. Publication # 1

Defendant's first publication occurred on April 20, 2008. This publication was designated NE GOP 39-001 and asserted that: "Trial attorney Rex Moats is a registered Democratic [sic] and the Democrat [sic] Party is supporting him!" (Compl. ¶ 16).

Plaintiff's allegation regarding this statement does nothing to explain how being called a "trial lawyer" or "Democrat" is highly offensive to a reasonable person. Accordingly, Plaintiff's claim for false light invasion of privacy based on this publication is dismissed.

ii. Publication #2

On May 7, 2008, Defendant published an 8 ½ by 11 folder designated NE GOP 39-003, which asserted that: "Moats received a $50,000 trust fund from the director of National Warranty." (Compl. ¶ 17).

Plaintiff asserts this statement is false; however, Plaintiff does not allege how this statement might be highly offensive to a reasonable person. Accordingly, Plaintiff's claim for false light invasion of privacy based on this publication is dismissed.

iii. Publication # 3

On May 5, 2008, a publication by Defendant read: "Would you put a shady insurance company based in the Cayman Islands ahead of Nebraska's consumers? You wouldn't. But trial attorney Rex Moats

would . . . How did Rex Moats mislead creditors and the public? Rex Moats claimed in an affidavit that National Warranty was doing financially well." (Compl. ¶ 18).

As noted above, publications alleged to constitute an invasion of privacy merit the same protections as publications alleged to be defamatory. Thus, statements that do not imply a provably false factual assertion are protected by the First Amendment. Whether a statement is so protected is determined by looking at the totality of the circumstances. The totality of this publication, with its use of rhetorical questions and hyperbole, as well as its context within a political campaign, does not imply a provably false factual assertion about Plaintiff. Accordingly, Plaintiff's claim for false light invasion of privacy based on this publication is dismissed.

iv. Publication # 4

On May 9, 2008, Defendant mailed a greeting card designated NE GOP 39-004, which said on front: "Greetings from the Cayman Islands. From insurance company trial lawyer extraordinaire Rex Moats." The back side of this card reads:

> Dear Nebraskan,
>
> Hello from the Cayman Islands! I have really enjoyed my time over here. The weather is great, the food is great, and most importantly – ***I have a fantastic job working for a shady insurance company that is***

> ***incorporated right here in the Cayman Islands.*** The tax benefits sure are great out here!
>
> Unfortunately my company, National Warranty, has gone bankrupt and is unable to pay off numerous claims for thousands of Nebraskans. Also, it looks like I have made misleading statements in an affidavit. Evidently, I claimed that my company is doing 'just fine,' but then declared bankruptcy two weeks later. ***No worries, even though thousands of people got ripped off by the company I represented, I still received a $50,000 trust fund.***
>
> Anyway, I can't wait to get back – **I have a lead on a new job, I'm running for state legislature.** I just hope my political career is as rewarding as my old job with National Warranty.
>
> See you on the campaign trail,
> Rex Moats

(Compl. ¶ 19) (emphasis in original).

This publication comes in the form of a greeting card with tropical artwork. It is marked as having been "paid for by the Nebraska Republican Party." Under the totality of the circumstances, it is clear this publication was not attempting to assert a provable fact. Instead, it is using humor, exaggeration, and rhetorical flourishes to state an opinion about a political candidate. It constitutes political speech protected by the First Amendment. Accordingly, Plaintiff's claim

for false light invasion of privacy based on this publication is dismissed.

v. Publication #5

On October 2, 2008, Defendant issued a brochure designated NE GOP 0004, which asserted that: "Rex Moats and National Warranty went down as a result of the same irresponsibility we see on Wall Street." (Compl. ¶ 20).

This statement does not imply a provably false assertion of fact. To the contrary, it is the kind of exaggerated, opinion-based statement that regularly occurs during political campaigns. As such, the publication is protected by the First Amendment from invasion of privacy actions, in the same manner in which the First Amendment protects allegedly defamatory statements. Accordingly, Plaintiff's claim for invasion of privacy based on this publication is dismissed.

vi. Publication #6

On October 8, 2008, Defendant published NE GOP 002, which asserted that: "Rex Moats cannot be trusted with your money." This publication also stated that Rex Moats was a "trial attorney" and that "National Warranty's directors set aside $50,000 for Rex Moats." (Compl. ¶ 21).

The first part of Defendant's publication is protected, because it cannot reasonably be read as

implying a factual assertion regarding Plaintiff's trustworthiness with money. As to the second half of the publication, Plaintiff has failed to allege how this statement might be highly offensive to a reasonable person. Accordingly, Plaintiff's claim for invasion of privacy based on this publication is dismissed.

vii. Publication #7

On October 20, 2008, a publication by Defendant asserted that: "Rex Moats took a $50,000 golden parachute just as National Warranty cost 150 Nebraskans their jobs and left unpaid promises to hundreds of thousands of vehicle buyers." (Compl. ¶ 22).

Plaintiff alleges that this statement is false. However, Plaintiff fails to allege how the assertion that Plaintiff received $50,000 would be highly offensive to a reasonable person. Accordingly, Plaintiff's claim for false light invasion of privacy based on this publication is dismissed.

viii. Publication #8

On October 30, 2008, Defendant issued publication NE GOP 009, which asserted that: "Rex Moats received a $50,000 golden parachute even though 150 Nebraskans lost their jobs." On October 31, 2008, Defendant issued publication NE GOP 020 that stated:

> Rex Moats misled creditors and the public about the solvency of National Warranty. Even worse, right before the company folded, Moats received $50,000 from the directors of National Warranty.

(Compl. ¶¶ 23, 23.2).

Plaintiff alleges that this statement is false; however, Plaintiff does not allege how this statement would be highly offensive to a reasonable person. That is, there is no indication why this statement is highly offensive when taken in the context of a political campaign in which Plaintiff has voluntarily placed himself before the public as a candidate for office. Accordingly, Plaintiff's claim for false light invasion of privacy based on this publication is dismissed.

ix. Publication #9

On November 21, 2008, Defendant published NEB 023, which asserted that: "according to his own letter to the editor of a local newspaper, Rex Moats supports using your tax dollars to fund abortions." (Compl. ¶ 24).

Plaintiff again alleges this statement is false. However, taken in context, this publication does not imply a provably false factual assertion. That is, this statement was published during a political campaign. Defining the policy positions of an opposing candidate is endemic to a campaign for election to public office. Plaintiff may feel that Defendant's interpretation of Plaintiff's position lacks nuance, but at its core, the

publication is a political opinion protected by the First Amendment. Accordingly, Plaintiff's claim for false light invasion of privacy on this publication is dismissed.

x. Publication #10

On November 1, 2008, Defendant issued publication NEB-015, which Plaintiff alleges contains "false information." Despite including Publication #10 in his complaint, Plaintiff states he is not asserting a claim against Defendant for this publication. (Compl. ¶ 25). Accordingly, Plaintiff's claim for false light invasion of privacy on this publication is dismissed.

xi. Publication #11

Finally, on November 3, 2008, Defendant issued a four page publication that asserts, in part: "Rex Moats was legal counsel for a now bankrupt insurance company that cost Nebraskans their jobs but rewarded Rex with a $50,000 trust." The publication also asserted that "Rex Moats supports using tax dollars to fund abortions." (Compl. ¶ 26).

As to the first part of the publication, Plaintiff does not allege how the statement is highly offensive to a reasonable person, taking into consideration the statement was published during a political campaign for public office. Furthermore, as discussed above, the second part of the publication regarding the use of tax dollars to fund abortions does not imply a provably

false factual assertion. Rather, taken in the context in which it occurs, it amounts to a constitutionally protected opinion. Accordingly, Plaintiff's claim for false light invasion of privacy based on this publication is dismissed.

For the reasons discussed above, Plaintiff's claims relating to false light invasion of privacy fail to state a claim upon which relief can be granted. Accordingly, Defendant's motion to dismiss Plaintiff's false light invasion of privacy claims is granted.

IT IS THEREFORE ADJUDGED, ORDERED, AND DECREED that Defendant Republican Party of Nebraska's motion to dismiss is granted and Plaintiff Rex B. Moats' claims are dismissed.

DATED this 31 day of August, 2009.

BY THE COURT:

/s/ W. Mark Ashford
W. MARK ASHFORD
DISTRICT COURT JUDGE