

Snell & Wilmer

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December 12, 2019

VIA EMAIL AND CERTIFIED MAIL RETURN RECEIPT REQUESTED

Silvia Smith  
Town Clerk  
Town of Payson  
303 N. Beeline Highway  
Payson, Arizona 85541  
ssmith@paysonaz.gov

*Re: Notice of Claim Pursuant to A.R.S. § 12-821.01*

Dear Ms. Smith:

Snell & Wilmer represents MHA Foundation, its President Kenny Evans, and its subsidiary Rim Country Educational Foundation ("RCEF"). This letter serves as a formal Notice of Claim pursuant to A.R.S. § 12-821.01 to the Town of Payson by MHA Foundation, Evans, and RCEF. This Notice of Claim describes MHA Foundation's, Evans', and RCEF's tort claims against James L. Ferris as a result of his defamatory and injurious statements.<sup>4</sup> As set forth below, MHA Foundation, Evans, and RCEF are entitled to, and intend to file a complaint to recover for their damages totaling \$87,400,000. Pursuant to A.R.S. § 12-821.01, however, they are willing to settle this matter for a sum-certain amount of \$10,000,000 with respect to Ferris.

**I. Nature of the Claim**

MHA Foundation's, Evans', and RCEF's Notice of Claim and future complaint are based on Ferris' repeated false and injurious statements accusing MHA Foundation, through its President Kenny Evans, of scamming Payson and unlawfully using funds otherwise intended to benefit Payson and Star Valley. Ferris has used multiple forums to share his defamatory message. Importantly, Ferris' statements concerning MHA Foundation and Evans are materially misleading and lead his audience to believe that they are unethical, untrustworthy, and regularly engaged in unlawful activities.

As a result of Ferris' statements, MHA Foundation, Evans, and RCEF have and will continue to suffer irreparable reputational and financial harm. Accordingly, MHA Foundation, Evans, and RCEF intend to pursue their tort claims against Ferris to recover the damage sustained.

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In addition to compensatory damages, MHA Foundation, Evans, and RCEF will seek punitive, and/or exemplary damages as allowable under law, reasonable costs under A.R.S. § 12-341, and pre- and post-judgment interest at the highest rate allowable by law.

## II. Background

MHA Foundation is a 501(c)(3) charitable organization formed to promote health and education through various initiatives and projects in Rim Country. MHA Foundation is able to maintain its work in Rim Country through the support of individual financial donors from the greater Payson community.

RCEF is a limited liability company organized to promote and enhance educational opportunities in the greater Payson community. RCEF is a subsidiary of MHA Foundation, its sole member. Together, MHA Foundation and RCEF work on initiatives to benefit the greater Payson community. Harm to MHA Foundation therefore likewise causes reputational and financial harm to RCEF.

One of MHA Foundation's and RCEF's current initiatives is to facilitate development of a four-year university in Payson to provide affordable access to higher education. In addition, the proposed university site plans to accommodate community amenities such as a community center, ballfields, college preparatory school, an aquatic center, and an ice arena. Together MHA Foundation's and RCEF's projects will further the economic development, vitality, and enhancement throughout the greater Payson Community.

To date, MHA Foundation, in part through RCEF, has invested a considerable amount of time, resources, and financial investment into these projects. In particular, MHA Foundation and RCEF have an existing publicly-known contractual relationship with Piper Jaffray, an investment broker. And, MHA Foundation and RCEF have actively and publicly pursued prospective business relationships with Summit Smith Development and B.C. Ziegler Company to further develop and fund the projects.

Within the last two months, Ferris has, in coordination with others, led an unfounded public smear campaign against MHA Foundation and its President Kenny Evans through radio shows, public meetings, and social media. This campaign is motivated by Ferris' opposition to MHA Foundation's and RCEF's projects and is intended to interfere with current and prospective relationships with project partners and investors.

Specifically, Ferris was a guest on KMOG's radio show, Rim Country Forum, on October 24, 2019. While on the air, Ferris gave a prepared speech to provide background "foundation" to listeners regarding the MHA Foundation and its projects, ultimately accusing MHA Foundation of illegal activity. Ferris' on-air speech contained the following false and defamatory statements:

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- "I'm not trying to accuse anyone of corruption or any violation of law. But follow me on this here and see if you don't agree that some things done in the past may have not been done in the most ethical fashion."
- "'Although [MHA Foundation] received an offer \$21 million over what Banner offered, the Foundation went with Banner.' . . . From this, I can only assume that we left \$21 million on the table."
- "[B]ut had the citizens of Payson been made aware of their real options, I think the outcome of the survey would have been much different. If we were given the option to either use the \$41 million donated from Banner to invest and to invest millions in Forest Service land and other efforts to try and convince a college to come to Payson, or they could accept Dignity Health's offer and use that \$21 million to build a very nice community center, aquatic center, and cover the event center and still have \$40 million in the Foundation where the investment income would cover any operating short falls. . . . Which would you choose? Those were two very real options at that time facing the MHA officers and directors – if they had their blinders off."
- "In my humble opinion, it appears that *the community's investment in the hospital was confiscated to pursue the desires and possible benefit of a select few and a narrow segment of our population.*" (emphasis added).
- "The assets of MHA belong to you the people of Payson. The several that had captured control of those assets seem to have acted as if they personally own those assets and knew better what was in your best interest. Sounds like our government to me."
- "You need to ask yourself, who was Mayor while all of this was taking place? Who orchestrated, negotiated, voted for, and signed the agreements to authorize the creation of the RCEA, SLE, the RCEF, the SLE Intergovernmental Agreement, and the SLE Governance Agreement? And who controls the purse strings that allows these entities to function? Follow the money, and all the money they are spending is your money. How much say do you have in how your assets are being used?"
- "It seems quite obvious. And it's called control. It's called conflict of interest and you're not appointed to these organizations if you're not loyal. If you're not gonna [sic] loyally support that Kenny Evans and company agenda. That's just the bottom line. And past members that -- disagreed were soon driven off those boards."<sup>1</sup>

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<sup>1</sup> A portion of this radio show was filmed and published on a community Facebook Page called Payson First on or about October 26, 2019. The video published includes this statement.

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Ferris' purported disclaimer is rendered meaningless by accusing MHA Foundation of acting unethically; engaging in behavior equivalent to corruption and illegal acts (like purposefully choosing a lower offer so that MHA Foundation could control and benefit from the proceeds of the sale); lying to the public to manipulate it into supporting an allegedly self-serving business scheme; that some of the money from the sale of the hospital was confiscated and mismanaged by MHA Foundation; and that Evans is running a corrupt network of organizations to MHA Foundation's financial benefit.

Ferris' false rhetoric continued on or about October 29, 2019, when he hosted an "informational" presentation at Piñon Cafe. At this presentation, Ferris presented a graphic "explaining" the relationships between MHA Foundation, RCEA, and RCEF—and Evans' alleged involvement with each. The graphic indicated that Evans engineered a scheme with nefarious motives to benefit himself and the organizations. In addition, the graphic featured a narrative falsely stating that MHA Foundation, under Evans' alleged direction, operates outside the confines of the law:

Once the Separate Legal Entity was created the arrangement would also allowed [sic] the new owner of the property to follow its own rules and zoning (not confined to educational use) without regard for the town of Payson's ordinances. Kenny Evans was president of the MHA foundation concurrently with being the Mayor of Payson, during the creation of the SLE and thus he was in a position to vote for approval the SLE that the MHA Foundation (Kenny was president) wanted. Very sweet deal !!

By stating that Evans ignored Payson's ordinances to get a "sweet deal", the statement accuses Evans of purposefully breaking the law and using MHA Foundation and RCEA to cover up past illegal activity. Furthermore, Ferris distributed notes to the attendees of his presentation that restated nearly verbatim his comments from the Rim Country Forum radio show.

Around November 8, 2019, Payson First, a community Facebook page, published two videos titled "Jim Ferris Reports His Research About How MHA Does NOT Benefit Payson." These videos feature Ferris sharing a slightly abbreviated reprise of his comments from the Rim Country Forum radio show and a comment indicating that the chart from Piñon Cafe was available at the meeting. Further, in the description to part two of the November 8 video, Payson First states that "MHA left 21 million dollars of the Town's money on the table to gain control of the hospital along with the millions of dollars that belong to the town."

Finally, on December 4, 2019, Ferris published an article in *The Payson Reformer*. *The Payson Reformer* was allegedly "created by the citizens of Payson who demand the TRUTH to be told in Payson." Ferris' article featured another substantially similar iteration of his Rim Country radio speech. Ferris' article further accused Evans of using his prior "position as mayor to coerce

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the Forrest Service to come up with a purchase agreement on property in which he has a personal interest" or alternatively "to diminish the value of the land and ultimate sale price." Ultimately, Ferris' article ties Evans' action back to MHA Foundation and RCEF, stating: Evans' "insistence that the RCEF take[] an undivided one-half interest in the 253-acre parcel shows a direct connection between the MHA/RCEF and the RCEA-SLE. Kenny has a huge conflict of interest."

Simply put, there is no truth to Ferris' statements. MHA Foundation, RCEF and Evans have acted lawfully in all respects and have not stolen or mismanaged any funds. Yet, as a direct and proximate result of Ferris' statements, MHA Foundation, Evans, and RCEF have and will continue to suffer irreparable reputational and financial harm. Because of Ferris' false statements alleging corruption and illegal activity, MHA Foundation's receipt of charitable donations has diminished substantially—compromising its primary source of non-investment income and jeopardizing its private foundation status. Moreover, MHA Foundation, together with its affiliate RCEF, have invested millions of dollars into the projects and their associated infrastructure. If Ferris is successful in derailing MHA Foundation's and RCEF's projects, they will lose millions of dollars invested to date in the projects and sever existing or prospective relationships with project partners and investors. And, through his conduct, Ferris has demonstrated a willful intent to harm, maliciously defame, and consistently interfere with MHA Foundation's and RCEF's ongoing operations and success.

Under Arizona law, there are at least three legal doctrines that entitle MHA Foundation, Evans, and RCEF to an award of damages. *First*, MHA Foundation can recover damages for injurious falsehood because Ferris' statements are "derogatory to the plaintiff's business" and is "calculated to prevent others from dealing with [it]." *Aldabbagh v. Ariz. Dep't of Liquor Licenses & Control*, 162 Ariz. 415, 421 (App. 1989).

*Second*, MHA Foundation and Evans can recover damages for defamation because Ferris' false statements were made with knowledge that the statements were false or in reckless disregard of their truth. *Antwerp Diamond Exchange of Am., Inc. v. Better Business Bureau of Maricopa Cty., Inc.*, 130 Ariz. 523, 527 (1981); *see also Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 491 (1986) (reasoning that "[l]ibel of an individual can cause injury to a corporation if they are so interconnected that a reasonable person would perceive harm to one as harm to the other"), Restatement (Second) of Torts § 561(b) (permitting a nonprofit corporation to bring a defamation claim).

*And third*, MHA Foundation and RCEF can recover damages for intentional interference with a business relationship because MHA Foundation, together with RCEF, have (1) a "valid contractual relationship or business expectancy"; (2) Ferris knew about "the relationship or expectancy"; (3) Ferris made false statements to intentionally interfere with MHA Foundation's and RCEF's relationships or expectancies; and (4) as a result, MHA Foundation and RCEF suffered financial damage. *Antwerp*, 130 Ariz. at 529-30.

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### III. Damages and Proposed Resolution

MHA Foundation and Evans seek general compensatory damages. Specifically, MHA Foundation and Evans estimate that as a result of the misinformation spread by Ferris, they have suffered general reputational harm. Moreover, MHA Foundation and RCEF seek special compensatory damages. MHA Foundation and RCEF have suffered financial harm, including loss of charitable income, lost investment costs due to Ferris' interference with MHA Foundation's and RCEF's projects, and damage to current contractual and prospective business expectancies. What follows is MHA Foundation's, Evans', and RCEF's accounting of compensatory damages sustained to date:

<i>General Compensatory Damages</i>		
	Reputational harm to MHA Foundation	\$1,000,000
	Reputational harm to Kenny Evans	\$1,000,000
<i>Special Compensatory Damages</i>		
<i>Lost charitable income</i>	MHA Foundation's annual loss in receipt of charitable contributions	\$220,000
	Potential annual impact on MHA Foundation if private foundation status is lost	\$1,400,000
<i>Lost investment costs lost due to Ferris' interference with MHA Foundation's and RCEF's projects</i>	Lost investment in developing ultra-high-speed internet service for the university site	\$1,980,000
<i>Damage to current contractual and prospective relationships</i>	Damage to and potential loss in contractual relationship with Piper Jaffray	\$5,350,000
	Damage to and potential loss of near-final relationship with B.C. Ziegler Company	\$400,000
	Damage to and potential loss of near-final relationship with Summit Smith Development	\$10,500,000
<b>Total Compensatory Damages</b>		<b>\$21,850,000</b>

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MHA Foundation, Evans, and RCEF also seek punitive and/or exemplary damages as allowable under law for the improper, repeated, and willful damage caused to them, equal to three times the amount of compensatory damages, or \$65,550,000.

Accordingly, MHA Foundation, Evans, and RCEF seek damages totaling \$87,400,000. These damages grow daily, and additional business relationships and expectancies are at risk of future damage as a consequence of Ferris' continued tortious conduct. MHA Foundation, Evans, and RCEF intend to vigorously pursue their tort claims for the full value of damages sustained as supported by the evidence, plus interest and costs.

**IV. Sum Certain Settlement Amount**

In accordance with A.R.S. § 12-821.01, however, MHA Foundation, Evans, and RCEF are willing to settle their claims against Ferris for a sum-certain of \$10,000,000. This offer shall remain open for sixty (60) days following service of this Notice of Claim. See A.R.S. § 12-821.01(E).<sup>2</sup>

Thank you for your prompt attention to this matter. If you have any questions or would like to discuss this further, please feel free to contact me.

Very truly yours,

Snell & Wilmer



Barry D. Halpern

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<sup>2</sup> Under Arizona Rule of Evidence 408, this letter constitutes a settlement offer and is not admissible "to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction."

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