

NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
12 CVS _____

NORTH CAROLINA CITIZENS FOR)
PROGRESS; and DEMOCRATIC)
GOVERNORS ASSOCIATION,)
)
Plaintiffs,)
)
v.)
)
PATRICK L. McCRORY; and)
THE PAT McCRORY COMMITTEE,)
)
Defendants.)
)

FILED
2012 MAY 24 AM 8:30
WAKE COUNTY, C.S.C.

BY _____

**COMPLAINT
(COMP)**

Plaintiffs North Carolina Citizens for Progress (“NCCP”) and the Democratic Governors Association (“DGA”) (collectively, “Plaintiffs”), complaining of Defendants Patrick L. McCrory (“McCrory”) and The Pat McCrory Committee (the “McCrory Committee”) (collectively, “Defendants”), allege and say as follows:

PARTIES

1. NCCP is a nonprofit corporation organized and existing under the laws of the State of North Carolina with its principal place of business located in Wake County, North Carolina.
2. DGA is a political organization making an election under Section 527 of the Internal Revenue Code with its principal place of business located in Washington, D.C.
3. Upon information and belief, McCrory is a citizen and resident of Mecklenburg County, North Carolina and the Republican candidate in the 2012 election

for the office of North Carolina Governor. McCrory previously held office as mayor of Charlotte for 14 years. McCrory is a public figure and a public official.

4. Upon information and belief, the McCrory Committee is a political committee formed pursuant to the provisions of Chapter 163 of the North Carolina General Statutes and is the candidate campaign committee of McCrory.

JURISDICTION AND VENUE

5. Subject matter jurisdiction over this cause and personal jurisdiction over Defendants is conferred upon this Court under and by virtue of N.C. Gen. Stat. §§ 1-75.4, 1-253 *et seq.*, and 7A-240.

6. Venue for this cause is properly in this Court pursuant to and in accordance with N.C. Gen. Stat. § 1-82.

STATEMENT OF FACTS

NORTH CAROLINA CITIZENS FOR PROGRESS

7. NCCP is a nonprofit organization whose purposes include conducting research, sponsoring educational activities and events, and disseminating accurate and timely information to promote the general public's understanding of ways to maintain and improve North Carolina's common good, quality of life and social welfare.

8. NCCP is governed by an independent board of directors comprised exclusively of North Carolina citizens, none of whom is affiliated with the DGA.

9. NCCP relies upon donations to support its operations. NCCP's donors currently include the DGA and the NEA Advocacy Fund.

THE AD

10. In furtherance of its purposes, NCCP commissioned a television advertisement entitled “Today’s Tree” (the “Ad”) questioning the ethics of McCrory.

11. The Ad contains the following sentences or sentence fragments:
- a. “Pat McCrory’s questionable ethics.”
 - b. “Case number one: Tree.com – a company that paid Pat McCrory over \$140,000 to sit on its board while he was mayor of Charlotte.”
 - c. “Its mortgage companies, charged with deceiving customers, paid millions to settle.”
 - d. “And Pat McCrory?”
 - e. “He used his position as mayor to lobby state government for millions in tax breaks for the company.”
 - f. “Is Pat McCrory the guy to clean up Raleigh?”
 - g. “You’ve got to be kidding.”

(each, “Statement [letter]”)

12. Statement (c) is not about McCrory but is a statement about Tree.com.
13. Statements (d) and (f) are questions that make no factual assertion.
14. Statements (a) and (g) are statements of opinion.
15. Statements (b) and (e) are true factual statements.
16. In the alternative, Statements (b) and (e) are substantially true factual statements.
17. NCCP is the sponsor of the Ad.
18. The Ad is political speech.

19. The Ad and the Statements contained therein are constitutionally privileged.

20. At all relevant times herein, NCCP and its directors, officers and authorized agents lacked knowledge of any alleged falsity pertaining to the Ad and the factual Statements contained therein (which falsity is expressly denied) and did not act with reckless disregard of any alleged falsity pertaining to the Ad and the factual Statements contained therein (which falsity is again expressly denied).

21. NCCP, acting through its authorized agents, purchased approximately \$247,000 worth of airtime from certain North Carolina television broadcasters (the “Broadcasters”) to run the Ad.

22. The Ad began running on Thursday, May 17, 2012.

23. At least two news organizations have independently fact-checked the Ad and confirmed that the factual Statements contained therein are accurate.

DEFENDANTS’ CENSORSHIP AND INTIMIDATION CAMPAIGN

24. On Friday, May 18, 2012, Cleta Mitchell, a D.C. lawyer representing Defendants, sent a twelve-page cease and desist letter to the Broadcasters (the “First Mitchell Demand Letter”). A true and accurate copy of the First Mitchell Demand Letter is attached hereto as Exhibit A. Defendants, through counsel in the First Mitchell Demand Letter, claim, among other things, that the Ad is “demonstrably, blatantly false” and contains “substantial” “egregious false statements” about McCrory which are “deliberately false and misleading.” In fact, Defendants’ counsel states in the letter that “*There can be no doubt that the Ad is false.* This isn’t even a close factual or legal

question.” (emphasis in original). The First Mitchell Demand Letter threatens that unless the Broadcasters “stop airing the Ad immediately, we will seek all legal remedies to force the Ad off the air.” The letter continues to repeat the threat of legal action no fewer than three more times: (i) “Please be advised that the McCrory campaign will, in fact, take the necessary legal steps to stop this false ad from continuing to air.”; (ii) “We reiterate: we will file the necessary complaints with the Federal Communications Commission and seek other appropriate remedies to block the continuation of what is apparently a scheme to air a series of false and defamatory personal attacks against Pat McCrory.”; and (iii) “If you are unwilling to do so, we hereby put you on notice that we *will* pursue all appropriate legal action to enjoin the further dissemination of the Ad and its ilk.” (emphasis in original)

25. The First Mitchell Demand Letter is addressed to the Broadcasters and was not sent to either Plaintiff.

26. On Monday, May 21, 2012, Ms. Mitchell sent another cease and desist letter to the Broadcasters (the “Second Mitchell Demand Letter”), a true and accurate copy of which is attached hereto as Exhibit B. In this letter Ms. Mitchell again alleges that the Ad is defamatory and also claims, among other things, that the First Mitchell Demand Letter “triggered the statutory notice of five (5) days prior to commencement of legal proceedings of your continued dissemination of defamatory advertisement.” Like her first letter, Ms. Mitchell concludes with a threat of legal action against the Broadcasters—“Please be advised, again, that we will pursue all legal remedies related to this false and defamatory ad unless your station immediately takes the ad off the air.”

27. The Second Mitchell Demand Letter is addressed to the Broadcasters and was not sent to either Plaintiff.

28. Also on Monday, May 21, 2012, NCCP, through its counsel, promptly provided the Broadcasters a document rebutting the assertions made in the First and Second Mitchell Demand Letters. A true and accurate copy of that document is attached hereto as Exhibit C.

29. That same day, Ms. Mitchell filed a “demand” for “immediate action” with the Commissioner of the Federal Communications Commission claiming that the “true sponsor” of the Ad was the DGA and that the Broadcasters were violating 47 U.S.C. § 317 in allowing the Ad to air without identifying the DGA as the sponsor.

30. Also on that day, a spokesman for Defendants issued a statement to the media claiming that “North Carolina Citizens for Progress is a front group for Governor Perdue and the Democratic Governor’s Association on behalf of Walter Dalton and North Carolinians deserve to know who is paying to defame Pat McCrory’s good name.”

31. The next day, Tuesday, May 22, 2012, Eugene Boyce, another attorney for Defendants, transmitted a cease and desist letter addressed to the DGA, several of its board members and officers individually, NCCP, and its board members and custodian of records, individually (the “Boyce Demand Letter”). A true and accurate copy of the Boyce Demand Letter is attached hereto as Exhibit D. In the letter, Mr. Boyce claims, among other things, that the Ad “quite clearly violates North Carolina General Statutes § 163-247(7), § 163-274(8), § 163-272.1, § 163-276, and §§ 99-1-2 [sic],” and that it is “false and defamatory.” Mr. Boyce further alleges in the letter that the Ad contains “inaccurate information” which “violates Articles 2 and 10” of NCCP’s “nonprofit

charter.” The Boyce Demand Letter demands that the recipients “(1) withdraw your authorization of the [Ad]; (2) cease any and all publication of the misinformation contained therein; and (3) publicly retract, correct, and apologize for your actions.”

32. In a News and Observer article filed Wednesday May 23, 2012, McCrory was quoted as referring to the Ad as “a total lie.”

33. Upon information and belief, since the Ad began airing, Defendants’ authorized representatives have undertaken a campaign to browbeat the Broadcasters into complying with their demand that they cease airing the Ad by repeatedly calling the Broadcasters and threatening to take legal action.

34. As a result of Defendants’ actions as alleged herein, at least one Broadcaster has stopped airing the Ad.

CLAIM FOR RELIEF
DECLARATORY JUDGMENT

35. The allegations contained in the preceding paragraphs are realleged and incorporated herein by reference.

36. A genuine, real, and actual controversy exists between Plaintiffs, on the one hand, and Defendants, on the other hand, with respect to their respective rights, status and legal relations as a result of and related to the Ad.

37. Plaintiffs contend, among other things, that NCCP is the sponsor of the Ad, that the DGA is not the sponsor of the Ad, that the Ad and the Statements contained therein are constitutionally privileged, that the factual Statements contained in the Ad are true or at least substantially true, that NCCP and the DGA have complied with all applicable laws, rules and regulations in all respects as they pertain to the Ad, and that the Ad complies with all applicable laws, rules and regulations in all respects.

38. Defendants contend, among other things, that the DGA is the “true sponsor” of the Ad, that the Ad and the Statements contained therein are false and defamatory, and that the Ad “quite clearly violates North Carolina General Statutes § 163-247(7), § 163-274(8), § 163-272.1, § 163-276, and §§ 99-1-2 [sic].” Exhibit D.

39. Based on the representations of Defendants’ agents, there is a practical certainty that litigation will ensue between the Plaintiffs and the Defendants.

40. Absent the declaration of rights, status and legal relations requested herein, NCCP faces uncertainty as to whether its Ad can continue to air in its current form. Indeed, at least one station has refused to continue airing the Ad based on the threats of legal action made by Defendants’ lawyers.

41. Absent the declaration of rights, status and legal relations requested herein, the DGA continues to be subjected to the false allegations made and/or authorized by Defendants that the DGA controls NCCP and that the DGA sponsored the Ad.

42. Pursuant to N.C. Gen. Stat. § 1-253, this Court has jurisdiction and authority to enter judgment declaring the rights, status and legal relations of the parties as a result of and related to the Ad.

43. Plaintiffs are entitled to a declaratory judgment:

- a. That the Ad and the Statements contained therein are political speech;
- b. That the Ad and the Statements contained therein are constitutionally privileged;
- c. That McCrory is a public figure;
- d. That McCrory is a public official;

- e. That the Ad and the factual Statements contained therein, including Statements (b) and (e), are true and/or substantially true;
- f. In the alternative, in the event the Court concludes the Ad or any of the factual Statements contained therein is false, which is expressly denied, that Plaintiffs and their respective directors, officers, employees and agents lacked knowledge of such falsity;
- g. In the alternative, in the event the Court concludes the Ad or any of the factual Statements contained therein is false, which is expressly denied, that Plaintiffs and their respective directors, officers, employees and agents did not act with reckless disregard of such falsity;
- h. That Statement (c) is not about McCrory but is a statement about Tree.com;
- i. That Statements (d) and (f) are questions that make no factual assertion and are not actionable as a matter of law;
- j. That Statements (a) and (g) are statements of opinion and are not actionable as a matter of law;
- k. That the Ad and the Statements contained therein are not defamatory;
- l. That NCCP is the sponsor of the Ad;
- m. That the DGA is not the sponsor of the Ad;
- n. That the Ad complies with all applicable laws, rules and regulations;
- o. That NCCP has complied with all applicable laws, rules and regulations as they pertain to the Ad; and

- p. That the DGA has complied with all applicable laws, rules and regulations as they pertain to the Ad.

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a jury trial on all issues so triable.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs North Carolina Citizens for Progress and the Democratic Governors Association respectfully pray the Court for the following relief:

1. That the Court enter a declaratory judgment declaring the parties' rights, status and legal relations as set forth herein;
2. That the costs of this action be taxed to Defendants;
3. That Plaintiffs have a trial by jury on all issues so triable; and
4. That the Court grant such other and further relief as the Court may deem just and proper.

This the 24th day of May, 2012.

Respectfully submitted,

BAILEY & DIXON, L.L.P.



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*Attorneys for Plaintiffs North Carolina
Citizens for Progress and the Democratic
Governors Association*

EXHIBIT A

MEMORANDUM

CLIENT-MATTER NUMBER
999100-0130

TO: Station Manager

FROM: Cleta Mitchell, Esq., Counsel
Pat McCrory and McCrory for Governor Campaign

DATE: May 18, 2012

RE: False Advertisement Against Pat McCrory

This firm serves as counsel to Pat McCrory for Governor campaign. My client has advised me today that your station has begun to air an advertisement sponsored by the Democratic Governors Association (“DGA”) which is demonstrably, blatantly false (“the Ad”).

Following in this memorandum are the egregious false statements about Mayor McCrory, which are substantial and which require that your station immediately cease airing the Ad. Unless you stop airing the Ad immediately, we will seek all legal remedies to force the Ad off the air.

Script of the Ad / False Statement(s) / Documentation of Falsity

The script of the advertisement (*entitled “Today’s Tree”*) is incorporated below, followed by the substantial documentation that the statements in the Ad are deliberately false and misleading.

Ad Script:

Audio	Video	Alleged Verification	Rebuttal
AVO: “Pat McCrory’s questionable ethics. Case number one Tree.com:	Pat McCrory “Questionable Ethics” Case Number One Photo of McCrory Image of Tree.com	None	NO SUBSTANTIATION FOR “QUESTIONABLE ETHICS” CLAIM Ad includes no verification to quote “Questionable Ethics,” misleading viewer to believe McCrory has been accused of questionable ethics.

			<p>NEWSPAPERS LAUDED MCCRORY FOR GOVERNOR OVER PERDUE IN 2008</p> <p><i>Charlotte Observer:</i> “We believe McCrory's experience, approach to government, outsider perspective and willingness to take a stand make him a better choice than Democrat Bev Perdue.” (Editorial, “We Recommend McCrory For Governor,” <i>Charlotte Observer</i>, 10/5/08)</p> <ul style="list-style-type: none">• “As Charlotte Mayor for 13 years, McCrory, 51, has shown steady leadership. . . he has generally kept city government clean and helped make Charlotte a place where people want to live, and one which has attracted thousands of newcomers.” (Editorial, “We Recommend McCrory For Governor,” <i>Charlotte Observer</i>, 10/5/08) <p><i>The News & Observer:</i> “McCrory, who turned 52 a few days ago, comes across as intelligent, ambitious, well-spoken. He is well-regarded in the city he leads, having won seven mayoral elections. That's a testament to his political skills and appeal, especially considering that Republican voters in Charlotte are outnumbered by Democrats and independents. . . we encourage voters to give Pat McCrory a chance. Bev</p>
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			<p>Perdue is a good candidate, but McCrory suits the moment. He's loaded with energy and fresh ideas. On several levels, he could be just what this state needs.” (Editorial, “McCrory’s Time,” <i>The News & Observer</i> [Raleigh, North Carolina], 10/26/08)</p>
<p>“a company that paid Pat McCrory over \$140,000 to sit on its board while he was mayor of Charlotte.</p>	<p>Tree.com paid McCrory over \$140,000 while he was Mayor of Charlotte.</p>	<p>SEC, 2009 Tree.com Proxy Statement, Schedule 14A, 3/19/10</p>	<p>MCCRORY SERVED AS MAYOR AND ON BOARD OF TREE.COM FOR LESS THAN ONE YEAR</p> <p>McCrory Did Not Join Board Of Tree.Com Until The End Of January 2009. “Tree.com, Inc. (Nasdaq: TREE) today announces the appointment of Patrick L. McCrory to the company's Board of Directors.” (Tree.com, “Patrick L. McCrory Joins Board Of Directors Of Tree.com, Inc.,” <u>Press Release</u>, 1/26/09)</p> <ul style="list-style-type: none"> • “Patrick McCrory, age 53, has served as a member of our Board of Directors since January 2009.” (Tree.com, “Proxy Statement for the 2010 Annual Meeting of Stockholders,” <u>SEC Website</u>) <p>McCrory Served As Mayor Until The Beginning Of December 2009. “Pat McCrory... was mayor for 14 years until December 2009.” (Steve Harrison, “State Invokes Privacy In Turner Case,” <i>Charlotte Observer</i>,</p>

			<p>4/28/10)</p> <p>McCrorry's Successor, Anthony Foxx, Sworn Into Office In Early December 2009. "It was a night that was 14 years in the making. Anthony Foxx officially took over the seat of mayor of Charlotte from Mayor Pat McCrory Monday night." ("Anthony Foxx Sworn In As Charlotte's Mayor," <i>WSOCTV.com</i>, 12/7/09)</p> <p>MCCRORY WAS NOT A PAID LOBBYIST FOR LENDING TREE</p> <p>McCrorry Served In 2009 As A "Non-Employee Director Compensation" And On "Board Of Directors." (SEC, 2009 Tree.com Proxy Statement, <u>Schedule 14A</u>, 3/19/10)</p>
<p>"Its mortgage company's charged with deceiving customers. Paid millions to settle.</p>	<p>Mortgage Lawsuits Settled; S.C. To Get \$3M from Lending Tree</p>	<p>Post and Courier, 1/5/12 Arizona Republic, 11/10/10 Office of The Arizona Attorney General, 11/3/10</p>	<p>SOUTH CAROLINA LAWSUITS AGAINST LENDING TREE FILED BEFORE MCCRORY JOINED BOARD</p> <p>McCrorry Did Not Join Board Of Tree.Com Until The End Of January 2009. "Tree.com, Inc. (Nasdaq: TREE) today announces the appointment of Patrick L. McCrorry to the company's Board of Directors." (Tree.com, "Patrick L. McCrorry Joins Board Of Directors Of Tree.com, Inc.," <u>Press Release</u>, 1/26/09)</p> <p>Lawsuits Filed In Early September 2008. "Tenth</p>

			<p>Judicial Circuit Solicitor Chrissy Adams has joined eight other state solicitors in suing Lending Tree, a mortgage firm based in Charlotte. Adams' lawsuit is on behalf of Lending Tree borrowers in Oconee and Anderson counties. Adams, who filed the lawsuit on Sept. 4, declined to comment, referring inquiries to Spartanburg attorney Doug Smith." (Pearce Adams, "Chrissy Adams Sues Mortgage Firm Lending Tree," <i>Anderson Independent-Mail</i> [South Carolina], 9/18/08)</p> <ul style="list-style-type: none"> • "In 2008, all 16 solicitors in the state filed a suit against Lending Tree for failure to make disclosures that are required by state law for brokers doing business in South Carolina." (Cindy Pitts, "Lending Tree Suit Pays Restitution To County," <i>The Newberry Observer</i>, 3/11/12)
<p>"And Pat McCrory? He used his position as mayor to lobby state government for millions in tax breaks for the company.</p>	<p>Mayor's Official Stationary</p>	<p>UNC Charlotte Special Collections, Mayor Pat McCrory Papers, 1/4/06</p>	<p>UNDER NORTH CAROLINA LAW PAT MCCRORY DID NOT LOBBY AND WAS NOT A LOBBYIST IN 2006</p> <p>Under North Carolina Law Through January 1, 2007, The Definition Of "Lobbying" And "Lobbyist" Was:</p> <p>"§ 120-47.1. Definitions."</p>

			<p>(Article 9A, Lobbying, “Lobbying Laws Effective Until January 1, 2007,” North Carolina Department Of The Secretary Of State Website)</p> <p>“For The Purposes Of This Article, The Following Terms Shall Have The Meanings Ascribed To Them In This Section Unless The Context Clearly Indicates A Different Meaning:” (Article 9A, Lobbying, “Lobbying Laws Effective Until January 1, 2007,” North Carolina Department Of The Secretary Of State Website)</p> <p>“(5) The Term ‘Lobbying’ Means:” (Article 9A, Lobbying, “Lobbying Laws Effective Until January 1, 2007,” North Carolina Department Of The Secretary Of State Website)</p> <ul style="list-style-type: none">• “a. Influencing or attempting to influence legislative action through direct oral or written communication with a member of the General Assembly; or b. Solicitation of others by lobbyists to influence legislative action.” (Article 9A, Lobbying, “Lobbying Laws Effective Until January 1, 2007,” North Carolina Department Of The Secretary Of State Website) <p>“(6) The Term ‘Lobbyist’ Means An Individual Who:”</p>
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		<p>(Article 9A, Lobbying, “Lobbying Laws Effective Until January 1, 2007,” North Carolina Department Of The Secretary Of State Website)</p> <ul style="list-style-type: none"> • “a. Is employed and receives compensation, or who contracts for economic consideration, for the purpose of lobbying; or b. Represents another person and receives compensation for the purpose of lobbying.” (Article 9A, Lobbying, “Lobbying Laws Effective Until January 1, 2007,” North Carolina Department Of The Secretary Of State Website) <p>“The Term ‘Lobbyist’ Shall Not Include Those Individuals Who Are Specifically Exempted From This Article By G.S. 120-47.8.” (Article 9A, Lobbying, “Lobbying Laws Effective Until January 1, 2007,” North Carolina Department Of The Secretary Of State Website)</p> <p>“§ 120-47.8. Persons Exempted From Provisions Of Article.” (Article 9A, Lobbying, “Lobbying Laws Effective Until January 1, 2007,” North Carolina Department Of The Secretary Of State Website)</p> <p>“The Provisions Of This Article Shall Not Be Construed To Apply To Any</p>
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		<p>Of The Following:” (Article 9A, Lobbying, “Lobbying Laws Effective Until January 1, 2007,” North Carolina Department Of The Secretary Of State Website)</p> <ul style="list-style-type: none">• “(3) a. A duly elected or appointed official or employee of the State, the United States, a county, municipality, school district or other governmental agency, when appearing solely in connection with matters pertaining to his office and public duties.” (Article 9A, Lobbying, “Lobbying Laws Effective Until January 1, 2007,” North Carolina Department Of The Secretary Of State Website) <p>MCCRORY WAS NOT ON THE TREE.COM BOARD AT THE TIME</p> <p>McCrary Did Not Join Board Of Tree.Com Until The End Of January 2009. “Tree.com, Inc. (Nasdaq: TREE) today announces the appointment of Patrick L. McCrary to the company's Board of Directors.” (Tree.com, “Patrick L. McCrary Joins Board Of Directors Of Tree.com, Inc.,” Press Release, 1/26/09)</p> <p>IN 2006, MAYOR MCRORY WROTE TO ALERT DEPARTMENT OF COMMERCE THAT</p>
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			<p>SOUTH CAROLINA WAS RECRUITING LENDING TREE AND KEEPING LENDING TREE IN NORTH CAROLINA WAS IMPORTANT TO THE ECONOMY AND JOBS</p> <p>Keeping Lending Tree And Another Company Represented “A Combined \$240 Million And 3,500 Jobs, In North Carolina.” “Thank you for taking my phone call before Christmas to discuss two pressing business retention projects we are working on in Charlotte – namely Lending Tree and Brooks Pharmacy/Eckerd distribution center. . . . Our staff is working with Susan Fleetwood in your office to leave no stone unturned in our effort to retain Lending Tree in North Carolina. . . . We could use your help in two distinct ways on this project. First of all, we are competing against an estimated \$53 million in state and local incentives from South Carolina. . . . I believe we can keep these projects, representing a combined \$240 million and 3,500 jobs, in North Carolina.” (UNC Charlotte Special Collections, Mayor Pat McCrory Papers, Letter to Commerce Secretary James Fain, <u>1/4/06</u>)</p>
<p>“Is Pat McCrory the guy to clean up Raleigh? You’ve got to be kidding.”</p>	<p>Is Pat McCrory the guy to clean up Raleigh?</p>	<p>None</p>	<p>Unsubstantiated</p>

Clearly, the ad is false and must not continue to be aired on your station.

Legal Arguments.

Under Columbia Broadcasting System, 412 U.S. 94 (1973), and its progeny, and Federal Communication Commission precedents, your station is not obligated to air any advertisements from the DNC. See National Conservative Political Action Comm., 89 FCC 2d 626 (1982). These precedents hold that third-party spenders such as the organization sponsoring this Ad do not have a guaranteed right of access to air their advertisements on your station.

In fact, if your station does not stop airing this advertisement after gaining knowledge that it contains false and misleading statements, you are subjecting your station to potential liability. See 47 U.S.C. § 315 (providing immunity to stations for statements made in legally qualified candidate ads, but not extending such protections to third-party ads).

Please be advised that the McCrory campaign will, in fact, take the necessary legal steps to stop this false ad from continuing to air.

Violation of Federal Communications Act – Failure to Identify True Sponsor of the Ad.

The Ad purports to be sponsored by “North Carolina Citizens for Progress”. In fact, published reports state that the *true* sponsor of the Ad is the Democratic Governors Association (“DGA”). Late yesterday, the web-based *NewsObserver.com* reported that fact, to-wit:

Democratic Governor's Association buys airtime to hit back at Pat McCrory

Submitted by John_Frank on 2012-05-17 15:07

UPDATED: An advocacy group funded by the Democratic Governor's Association is preparing to air a TV ad designed to hit GOP gubernatorial nominee Pat McCrory just days after the Republican Governors Association attacked Democratic nominee Walter Dalton.

The N.C. Citizens for Progress paid \$217,000 to run a commercial in the Raleigh and Greensboro market, according to political media buyers. The content of the ad is unknown. The DGA declined to elaborate further.

The RGA spent about \$850,000 to air an ad that tied Dalton to the unpopular Gov. Bev Perdue but included a number of dubious claims.

Read more here:

http://projects.newsobserver.com/under_the_dome/liberal_group_buys_airtime_to_hit_back_at_republican_pat_mccrory#storylink=cpy

Section 317 of the Federal Communications Act requires that, generally, when a broadcast station is paid to broadcast any material except for product advertising, the station must announce that the broadcast is paid for, and who paid for it.

In a letter to broadcasters in Oregon in 1996, where an 'issue ad' was purportedly sponsored by a 'group' when the ads were actually paid for by the Tobacco Institute, the FCC ordered the stations to disclose the 'true identity of the sponsor', which was different from the stated sponsor on the ads. According to the FCC in its order:

"The announcement must be made at the time the program is broadcast. The law applies to paid political broadcasts as well as to other sponsored programs and spots. The sponsorship identification rules, which implement Section 317, are set out in Section 73.1212 of the Commission's rules. 47 C.F.R Section 73.1212. The purpose of the identification requirement is to inform the public of the identity of the persons or entities attempting to persuade them.

Section 317(c) of the Act requires broadcasters to "exercise reasonable diligence" to obtain from "persons with whom it deals directly" the requisite information to assure that a proper identification is made. Section 73.1212(e) obligates a licensee to "fully and fairly disclose the true identity of the person or persons, or corporation, committee, association or other unincorporated group, or entity by whom or on whose behalf such payment is made."

The Commission and the courts have not interpreted these provisions as obligating broadcasters to act as private investigators to ascertain whether the persons with whom they deal are the true sponsors. Rather, unless furnished with credible, unrefuted evidence that a sponsor is acting at the direction of a third party, the broadcaster may rely on the plausible assurances of the person(s) paying for the time that they are the true sponsor. In this context, the Commission and the court agreed in *Loveday v. FCC*, 707 F. 2d 1443, 1459 (D.C. Cir.), *cert.denied*, 464 U.S. 1008 (1983) that the source of funding together with control of editorial content is the kind of evidence broadcasters should consider. While emphasizing that, under normal circumstances, broadcasters cannot be expected to investigate whether the persons with whom they deal directly are themselves the true sponsors, the *Loveday* court stated:

There may be cases where a challenger makes so strong a circumstantial

case that someone other than the named sponsor is the real sponsor that licensees, in the exercise of reasonable diligence, would have to inform the named sponsor that they could not broadcast the message without naming another party.

707 F.2d at 1459. We believe that the evidence provided by [Complainants] presents a compelling circumstantial case that the Tobacco Institute is the true sponsor of the ads.”

In this instance, the DGA has publicly acknowledged that it has paid 100% of the costs of the Ad.

We hereby demand that the Ad be immediately pulled from your station and that any/all future advertising by the so-called North Carolina Citizens for Progress be required to disclose the *true* identity of the source of payment / sponsor of any future ads it seeks to air.

We reiterate: we will file the necessary complaints with the Federal Communications Commission and seek other appropriate remedies to block the continuation of what is apparently a scheme to air a series of false and defamatory personal attacks against Pat McCrory.

You must fulfill your obligation to operate in the public interest and pull the Ad immediately.

We have highlighted *and documented* the false and misleading statements contained in the advertisement. *There can be no doubt that the Ad is false.* This isn't even a close factual or legal question. The Ad does not disclose the true identity of its sponsor, a violation of federal law.

If you are unwilling to do so, we hereby put you on notice that we *will* pursue all appropriate legal action to enjoin the further dissemination of the Ad and its ilk.

Please contact me at my office or my cell or contact me via email. I will expect your immediate response to this communication.

Thank you in advance for your prompt attention to this Memorandum.

EXHIBIT B

MEMORANDUM

CLIENT-MATTER NUMBER
999100-0130

TO: Station Manager

FROM: Cleta Mitchell, Esq., Counsel
Pat McCrory / McCrory for Governor

DATE: May 21, 2012

RE: Renewed Demand to Cease Airing False Advertisement

On Friday, May 18, 2012, you received a Memorandum from this Firm, notifying you that an ad currently being aired on your station personally and falsely attacking my client, Pat McCrory, is a) defamatory and b) does not disclose the true identity of its sponsor as required by federal law.

This is to advise you as follows:

1. The false ad is defamatory and you should be aware that, pursuant to North Carolina law (N.C. Gen. St. §99.1), the notice provided to your station on May 18, 2012 triggered the statutory notice of five (5) days prior to commencement of legal proceedings for your continued dissemination of the defamatory advertisement.
2. You were furnished ample documentation of the Ad's false and defamatory statements in my May 18, 2012 Memorandum. Accordingly, your station is negligent in continuing to air the ad. (*See* N.C. Gen. St. §99.5)
3. The Ad falsely claims to be sponsored by an entity called "North Carolina Citizens for Progress" when, in fact, the true sponsor is the Democratic Governors Association. Your failure to announce the true identity of the sponsor of the ad is a violation of federal law and we have filed today a complaint against your station with the Federal Communications Commission ("FCC") on the grounds that you have failed to announce to the public the true identity of the sponsor of the ad. *See* 47 U.S.C. §317(c).

There is ample case authority in North Carolina – and elsewhere – that even a candidate for office can recover damages for defamation by a political opponent sponsoring false advertising during a political campaign. See *Boyce & Isley, PLLC v. Cooper*, 153 N.C. App. 25, 568 S.E.2d 893 (2002) (“Boyce I”) and *Boyce & Isley, PLLC v. Cooper*, 169 N.C. App. 572, 611 S.E.2d 175 (2005) (“Boyce II”). *Boyce & Isley, PLLC v. Cooper*, Case No. COA 10-243 (NC Ct. App., May. 3, 2011) (“Boyce III”).

As the Court of Appeals noted in Boyce III, “In Boyce I, reviewing a motion for judgment on the pleadings, our Court determined that assuming that the statements in the advertisement were false, *they were defamatory as a matter of law.*” (emphasis added)

The statements in the Ad are false and have been made with reckless disregard of the truth. We documented to you last Friday that the statements in the ad are false, to-wit:

- Pat McCrory has *never* had a hint of an ethical misdeed associated with his public service as Mayor of Charlotte.
- Pat McCrory’s efforts to keep two companies located in Charlotte from relocating to South Carolina in 2006 were a) important duties of his office and b) were not ‘lobbying’ as that term is defined in N.C. law.
- Pat McCrory received not one dime of compensation from Tree.com (or the other employer) as a result of his efforts to keep 3500 jobs from leaving North Carolina.
- Pat McCrory was not a member of the Tree.com board until well after the filing of the lawsuits referenced in the Ad
- The job of Mayor of Charlotte is a part-time, citizen position, anticipating and expecting that the mayor will earn his/her livelihood elsewhere. Pat McCrory had no conflict of interest nor are there *any* ethical issues associated with his duties as Mayor of Charlotte and his service on the Board of Directors of Tree.com during the final months of his tenure as mayor.

We reiterate that the ad is false and defamatory. It is so blatantly false that the Democratic Governors Association, who admits publicly that it paid for the ad, is not even willing to put its name on the ad.

Please be advised, again, that we will pursue all legal remedies related to this false and defamatory ad unless your station immediately takes the ad off the air.

Please contact me at (202) 431-1950 if you have any questions. Thank you.

EXHIBIT C

May 21, 2012

mlweisel@bdixon.com

Via Email and Fax as applicable to:

North Carolina Television Station Managers
North Carolina Cable System Owners/Operators

*Re: "Today's Tree" Advertisement and The Pat McCrory Committee
and Pat McCrory May 18, 2012 Memorandum*

Dear Broadcasters:

On late Friday, May 18, 2012 and this morning, May 21, 2012, you received two memorandum (collectively the "Memo") from the Foley & Lardner LLP law firm representing Pat McCrory, individually, and The Pat McCrory Committee (SBOE identification: STA-AIYGP3-C-001)(collectively "McCrory"). McCrory demanded your station or system immediately cease airing an advertisement entitled "*Today's Tree*" (the "Ad") being run by North Carolina Citizens for Progress.

In fact, McCrory threatened each of you with serious legal consequences if you did not immediately cease airing the Ad; "...if your station does not stop airing this advertisement after gaining knowledge that it contains false and misleading statements, you are subjecting your station to potential liability. See 47 U.S.C. § 315 (providing immunity to stations for statements made in legally qualified candidate ads, but not extending such protections to third-party ads)".

McCrory then launched into a series of convoluted "rebuttals" to the facts presented in the Ad, which after analyzing, only highlighted the accuracy of the claims asserted. Although McCrory stated, "*There can be no doubt that the Ad is false*" [emphasis original], there appears to be some doubt, as **every North Carolina television and cable system North Carolina Citizens for Progress' purchased airtime on continues to run the Ad**. Nonetheless, full documentation for the Ad is presented below in the same chart form utilized in the Memo (including McCrory's "rebuttals"), along with factual backup and citation.

Finally, McCrory made serious accusations concerning North Carolina Citizens for Progress, without appropriate due diligence. North Carolina Citizens for Progress ("Citizens") is a duly formed (August 5, 2011), nonprofit corporation in good standing with the State of North Carolina. Citizens is governed by an independent board of directors comprised exclusively of North Carolina residents. These board members authorized Citizens' Chair and President, Ms. Sarah A. Boney, to enter into a media consulting services contract ("Contract"). The executed Contract further authorized the media consulting firm to enter into contracts, as a disclosed agent for the Citizens, with advertising media for the order of space, time, facilities, or other means to be utilized to effectuate the Citizens' media programming and other advertising.

NC Television Station Managers
NC Cable System Owners/Operators
May 21, 2012

Consequently, all current purchases made on your station or system are authorized by Citizens, as well as any future ones. Please place a copy of this correspondence in your public political file. This firm represents Citizens and its board members and officers.

Once again, had McCrory exercised a modicum of reasonable due diligence prior to making accusations as to funding disclosure, they would have discovered that Citizens has fully and timely complied with all applicable federal and state political campaign law disclaimer and disclosure requirements. All currently required federal and state filings by Citizens are, and future filings will be, publically available with the appropriate regulatory agencies.

Should you have any remaining questions or wish to obtain further documentation concerning the Ad, please do not hesitate to contact me at 919.828.0731 or via email at mlweisel@bdixon.com.

Citizens will continue to raise questions about Pat McCrory's ethics that are factual and well documented for the remainder of the 2012 North Carolina election cycle. If Foley & Lardner LLP or any other law firm representing McCrory transmits other communications making unsubstantiated claims, demanding action or otherwise interfering with Citizens' contractual rights, please contact Bailey & Dixon, LLP. We will respond as quickly as possible to any address any concerns you or your counsel may have about any aspect of an factual claim made by a Citizens' advertisement.

Very truly yours,

BAILEY & DIXON, LLP



Michael L. Weisel

mlw/db

cc: Ms. Sarah A. Boney, Chair and President of NC Citizens for Progress
David S. Coats, Esq., Bailey & Dixon, LLP



Citizens' Response to McCrory "Rebuttal"

Script of the Ad / "Rebuttal" / Original Documentation

A script of the Ad is outlined below, followed by McCrory's "Rebuttal" with the last column delineating the original documentation (also forwarded separately).

Ad Script:

Audio	Video	"Rebuttal"	Original Documentation
<p>AVO: "Pat McCrory's questionable ethics. Case number one Tree.com"</p>	<p>Pat McCrory "Questionable Ethics" Case Number One Photo of McCrory Image of Tree.com</p>	<p style="text-align: center;">NO SUBSTANTIATION FOR "QUESTIONABLE ETHICS" CLAIM</p> <p>Ad includes no verification to quote "Questionable Ethics," misleading viewer to believe McCrory has been accused of questionable ethics.</p> <p style="text-align: center;">NEWSPAPERS LAUDED MCCRORY FOR GOVERNOR OVER PERDUE IN 2008</p> <p><i>Charlotte Observer:</i> "We believe McCrory's experience, approach to government, outsider perspective and willingness to take a stand make him a better choice than Democrat Bev Perdue." (Editorial, "We Recommend McCrory For Governor," <i>Charlotte Observer</i>, 10/5/08)</p> <p><i>The News & Observer:</i> "McCrory, who turned 52 a few days ago, comes across as intelligent, ambitious, well-spoken. He is well-regarded in the city he leads, having won seven mayoral elections. That's a testament to his political skills and appeal, especially considering that Republican voters in</p>	<p style="text-align: center;">Opinion</p> <p>"Rebuttal" citations provide no positive statements, attestations or endorsements as to McCrory's ethics.</p>



		<p>Charlotte are outnumbered by Democrats and independents. . . . we encourage voters to give Pat McCrory a chance. Bev Perdue is a good candidate, but McCrory suits the moment. He's loaded with energy and fresh ideas. On several levels, he could be just what this state needs." (Editorial, "McCrory's Time," <i>The News & Observer</i> [Raleigh, North Carolina], 10/26/08)</p>	
<p>"a company that paid Pat McCrory over \$140,000 to sit on its board while he was mayor of Charlotte.</p>	<p>Tree.com paid McCrory over \$140,000 <u>while</u> he was Mayor of Charlotte.</p>	<p>MCCRORY SERVED AS MAYOR AND ON BOARD OF TREE FOR LESS THAN ONE YEAR</p> <p>McCrory Did Not Join Board Of Tree.Com Until The End Of January 2009. "Tree.com, Inc. (Nasdaq: TREE) today announces the appointment of Patrick L. McCrory to the company's Board of Directors." (Tree.com, "Patrick L. McCrory Joins Board Of Directors Of Tree.com, Inc.," Press Release, 1/26/09)</p> <ul style="list-style-type: none"> • "Patrick McCrory, age 53, has served as a member of our Board of Directors since January 2009." (Tree.com, "Proxy Statement for the 2010 Annual Meeting of Stockholders," SEC Website) <p>McCrory Served As Mayor Until The Beginning Of December 2009. "Pat McCrory... was mayor for 14 years until December 2009." (Steve Harrison, "State Invokes Privacy In Turner Case," <i>Charlotte Observer</i>, 4/28/10)</p> <p>McCrory's Successor, Anthony Foxx, Sworn Into Office In Early December</p>	<p>SEC, 2009 Tree.com Proxy Statement, Schedule 14A, 3/19/10</p> <p>Pat McCrory served as Mayor of Charlotte during 2009. Tree.com paid Pat McCrory over \$140,000 for serving on the Board during 2009 according to an SEC filing, <u>while</u> he was Mayor of Charlotte.</p> <p>As of 2011, Pat McCrory has been paid at least \$355,833 for serving as a Tree.com director.</p> <p>SEC, 2009 Tree.com Proxy Statement, Schedule 14A, 3/19/10; SEC, 2010 Tree.com Proxy Statement, Schedule 14A, 4/28/11; SEC, 2011 Tree.com Proxy Statement, Schedule 14A, 4/27/12</p>



		<p>2009. "It was a night that was 14 years in the making. Anthony Foxx officially took over the seat of mayor of Charlotte from Mayor Pat McCrory Monday night." ("Anthony Foxx Sworn In As Charlotte's Mayor," <i>WSOCTV.com</i>, 12/7/09)</p> <p>MCCRORY WAS NOT A PAID LOBBYIST FOR LENDING TREE</p> <p>McCrory Served In 2009 As A "Non-Employee Director Compensation" And On "Board Of Directors." (SEC, 2009 Tree.com Proxy Statement, Schedule 14A, 3/19/10)</p>	
<p>"Its mortgage companies charged with deceiving customers. Paid millions to settle."</p>	<p>Mortgage Lawsuits Settled; S.C. To Get \$3M from Lending Tree</p>	<p>SOUTH CAROLINA LAWSUITS AGAINST LENDING TREE FILED BEFORE MCCRORY JOINED BOARD</p> <p>McCrory Did Not Join Board Of Tree.Com Until The End Of January 2009. "Tree.com, Inc. (Nasdaq: TREE) today announces the appointment of Patrick L. McCrory to the company's Board of Directors." (Tree.com, "Patrick L. McCrory Joins Board Of Directors Of Tree.com, Inc.," Press Release, 1/26/09)</p> <p>Lawsuits Filed In Early September 2008. "Tenth Judicial Circuit Solicitor Chrissy Adams has joined eight other state solicitors in suing Lending Tree, a mortgage firm based in Charlotte. Adams' lawsuit is on behalf of Lending Tree borrowers in Oconee and Anderson counties. Adams, who filed the lawsuit on Sept. 4, declined to comment, referring inquiries to</p>	<p>Post and Courier, 1/5/12 Arizona Republic, 11/10/10 Office of The Arizona Attorney General, 11/3/10</p> <p>McCrory does not dispute the accuracy of statements that Tree.com's mortgage companies charged with deceiving customers paid millions to settle to lawsuits.</p> <p>McCrory notes the South Carolina lawsuit was filed in 2008 before he became a board member, although it settled in 2012.</p> <p>The other settlement referenced in the Ad was for a complaint filed by the Arizona Attorney General in 2010 that settled in the amount of \$1.15 million, after McCrory became a board member.</p> <p>Due to the Ad's limited amount of time, it was impossible to list other fines and penalties imposed on Tree.com and its affiliates/subsidiaries, after McCrory became a board member.</p>



		<p>Spartanburg attorney Doug Smith.” (Pearce Adams, “Chrissy Adams Sues Mortgage Firm Lending Tree,” Anderson Independent-Mail [South Carolina], 9/18/08)</p> <ul style="list-style-type: none"> • “In 2008, all 16 solicitors in the state filed a suit against Lending Tree for failure to make disclosures that are required by state law for brokers doing business in South Carolina.” (Cindy Pitts, “Lending Tree Suit Pays Restitution To County,” The Newberry Observer, 3/11/12) 	<p>A partial list follows:</p> <p><u>Tree.com’s Direct Lending Unit Paid Penalties To The State Of Maryland For Buying Mortgages From Unlicensed Lenders</u></p> <p>2010: Home Loan Center Paid A \$68,900 Penalty To The State Of Maryland For Buying Mortgage Loans From Unlicensed Mortgage Lenders.</p> <p>In 2010, the State of Maryland’s Office of the Commissioner of Financial Regulation reached a settlement agreement with Home Loan Center, Inc, the direct mortgage lending arm of Tree.com. According to the Settlement Agreement and Consent Order, Home Loan Center “accepted mortgage loans from, and otherwise engaged in the mortgage lending business through fifty-seven (57) unlicensed mortgage loan originators; and...these Unlicensed Loan Originators violated Maryland law by originating, on behalf of the Respondent, one hundred four (104) mortgage loans involving Maryland residential real property. [...] Immediately upon execution and delivery of the Agreement, Respondent will remit a \$68,900 civil penalty to the Commissioner by check, money order or certified check made payable to the Commissioner of Financial Regulation.” [Office of the Maryland Commissioner of Financial Regulation, 8/27/10]</p> <p><u>Massachusetts Bank Regulators Fined Tree.com’s Direct Lending Unit & Forced It To Reimburse Consumers For Undisclosed Fees</u></p>
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			<p>2012: The Massachusetts Banking Commissioner Issued An Enforcement Action Requiring Home Loan Center To Reimburse Consumers For Fees That Were Not Disclosed Prior To Closing.</p> <p>On March 2, 2009, the Massachusetts Office of Consumer Affairs' Division of Banks found that Home Loan Center involved with "alleged non-compliance with applicable state and federal statutes, rules, and regulations governing the conduct of those engaged in the business of a mortgage lender and mortgage broker in Massachusetts.</p> <p>On January 30, 2012, the Massachusetts Commissioner of Banks issued a consent order requiring Home Loan Center to "reimburse the consumers identified in the Report for the amounts collected as loan fees, application fees, processing fees, discount fees, points, or similar fees at settlement that had not been disclosed to the consumer, in writing, prior to loan closing. The amount of such reimbursement shall equal the difference between the actual charges assessed to the consumer and the amount disclosed in writing for such fee(s) prior to loan closing." [Massachusetts Officer of Consumer Affairs, Division of Banks, 1/30/12]</p> <p>Home Loan Center Also Agreed To Pay A \$38,000 Penalty To The State Of Massachusetts For Using Mortgage Loan Originators Who "Did Not Hold An Active Mortgage Loan Originator License."</p> <p>According to the consent order issued on January 30, 2012,</p>
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			<p>“Home Loan Center agrees to submit a payment in the amount of thirty-eight thousand dollars (\$38,000.00) in satisfaction of an administrative penalty collected in consideration of the Corporation’s conducting business with mortgage loan originators who either did not hold an active mortgage loan originator license or were not sponsored by the Corporation.” [Massachusetts Officer of Consumer Affairs, Division of Banks, 1/30/12]</p> <p>California Appeals Court Ruled That Tree.com’s Lending Arm Could Be Sued For Violating State Anti-Fraud Laws By Failing To “Disclose The Negative Consequences” Of Its Loans.</p> <p>Lawyer Weekly USA reported, “A home lender can be sued for fraud based on its alleged failure to clearly disclose the negative consequences when only the scheduled monthly payments are made on an adjustable rate mortgage loan, the California Court of Appeal has ruled in reversing a dismissal. The plaintiff obtained an option adjustable rate mortgage (ARM) loan from the defendant. He sued for fraud under state law, alleging that loan documents failed to adequately disclose that ‘negative amortization’ occurred when he only made his monthly payments in accordance with the schedule provided by the defendant. [...] The state court decided that such allegations were likewise sufficient to pursue a claim for fraud under California law.” The lender in the case was Home Loan Center, Inc., the lending arm of Tree.com. [Lawyers Weekly USA, 8/16/11]</p>
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<p>“And Pat McCrory? He used his position as mayor to lobby state government for millions in tax breaks for the company.</p>	<p>Mayor’s Official Stationary</p>	<p style="text-align: center;">UNDER NORTH CAROLINA LAW PAT MCCRORY DID NOT LOBBY AND WAS NOT A LOBBYIST IN 2006</p> <p>Under North Carolina Law Through January 1, 2007, The Definition Of “Lobbying” And “Lobbyist” Was:</p> <p>“§ 120-47.1. Definitions.” (Article 9A, Lobbying, “Lobbying Laws Effective Until January 1, 2007,” North Carolina Department Of The Secretary Of State Website)</p> <p>“For The Purposes Of This Article, The Following Terms Shall Have The Meanings Ascribed To Them In This Section Unless The Context Clearly Indicates A Different Meaning:” (Article 9A, Lobbying, “Lobbying Laws Effective Until January 1, 2007,” North Carolina Department Of The Secretary Of State Website)</p> <p>“(5) The Term ‘Lobbying’ Means:” (Article 9A, Lobbying, “Lobbying Laws Effective Until January 1, 2007,” North Carolina Department Of The Secretary Of State Website)</p> <ul style="list-style-type: none"> • “a. Influencing or attempting to influence legislative action through direct oral or written communication with a member of the General Assembly; or b. Solicitation of others by lobbyists to influence legislative action.” 	<p>UNC Charlotte Special Collections, Mayor Pat McCrory Papers, 1/4/06</p> <p>The Ad does not claim that Pat McCrory is a registered lobbyist under North Carolina law.</p> <p>On his official Mayor’s stationary, Pat McCrory wrote to then NC Secretary of Commerce, James Fain [this portion omitted in his “Rebuttal”]:</p> <p>“Let me also thank you [<i>NC Secretary of Commerce James Fain</i>] for agreeing to call Mr. Tom Reddin, the new CEO of LendingTree... In addition to the phone call to Mr. Reddin, we could use your help in two distinct ways on this project. First of all, we are competing against an estimated \$53 million in state and local incentives from South Carolina. While we clearly can’t match this package, I would ask that you consider any and all means available to you to increase the amount of the State’s incentive. Currently, the North Carolina package sits at approximately \$24 million, less than half of the South Carolina amount.” {Emphasis added}</p> <p>Pat McCrory was attempting to influence the decision of NC Secretary of Commerce James Fain, an executive branch public official.</p> <p>The definition of “lobby” as defined by <i>Webster’s Third International Dictionary</i> (Springfield, Mass.: Merriam-Webster, 1986):</p> <p>... “to conduct activities (as</p>



		<p>(Article 9A, Lobbying, "Lobbying Laws Effective Until January 1, 2007," North Carolina Department Of The Secretary Of State Website)</p> <p>“(6) The Term ‘Lobbyist’ Means An Individual Who:” (Article 9A, Lobbying, "Lobbying Laws Effective Until January 1, 2007," North Carolina Department Of The Secretary Of State Website)</p> <ul style="list-style-type: none"> • “a. Is employed and receives compensation, or who contracts for economic consideration, for the purpose of lobbying; or b. Represents another person and receives compensation for the purpose of lobbying.” (Article 9A, Lobbying, "Lobbying Laws Effective Until January 1, 2007," North Carolina Department Of The Secretary Of State Website) <p>“The Term ‘Lobbyist’ Shall Not Include Those Individuals Who Are Specifically Exempted From This Article By G.S. 120-47.8.” (Article 9A, Lobbying, "Lobbying Laws Effective Until January 1, 2007," North Carolina Department Of The Secretary Of State Website)</p> <p>“§ 120-47.8. Persons Exempted From Provisions Of Article.” (Article 9A, Lobbying, "Lobbying Laws Effective Until January 1, 2007," North Carolina Department Of The Secretary Of State Website)</p>	<p>engaging in personal contacts or the dissemination of information) with the objective of influencing public officials and esp. members of a legislative body with regard to legislation and other policy decisions. ...to advance or otherwise secure favorable treatment for (as a desired project) by influencing public officials before the beginning or following the completion of the legislative process.”</p> <p><i>Britannica Concise Encyclopedia</i> (Chicago: Encyclopedia Britannica, 2007) defines lobbying as:</p> <p>“Any attempt by a group or individual to influence the decisions of government. The effort may be a direct appeal to a decision maker in either the executive or legislative branches, or it may be indirect (e.g., through attempts to influence public opinion). It may include oral or written efforts of persuasion, campaign contributions, public-relations campaigns, research supplied to legislative committees, and formal testimony before such committees.”</p>
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		<p>“The Provisions Of This Article Shall Not Be Construed To Apply To Any Of The Following:” (Article 9A, Lobbying, “Lobbying Laws Effective Until January 1, 2007,” North Carolina Department Of The Secretary Of State Website)</p> <ul style="list-style-type: none">• “(3) a. A duly elected or appointed official or employee of the State, the United States, a county, municipality, school district or other governmental agency, when appearing solely in connection with matters pertaining to his office and public duties.” (Article 9A, Lobbying, “Lobbying Laws Effective Until January 1, 2007,” North Carolina Department Of The Secretary Of State Website) <p>Under Current North Carolina Law, The Definition Of “Lobbying” And “Lobbyist” Is:</p> <p>“§ 120C-100. Definitions.” (North Carolina Lobbying Laws, Chapter 120C, Lobbying, North Carolina General Assembly Website)</p> <p>“(A) As Used In This Article, The Following Terms Mean:” (North Carolina Lobbying Laws, Chapter 120C, Lobbying, North Carolina General Assembly Website)</p> <p>“(9) Lobby Or Lobbying. – Any Of The Following:” (North Carolina Lobbying Laws, Chapter 120C, Lobbying, North Carolina General Assembly Website)</p> <ul style="list-style-type: none">• “a. Influencing or	
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		<p>attempting to influence legislative or executive action, or both, through direct communication or activities with a designated individual or that designated individual's immediate family.” (North Carolina Lobbying Laws, Chapter 120C, Lobbying, North Carolina General Assembly Website)</p> <ul style="list-style-type: none">• “b. Developing goodwill through communications or activities, including the building of relationships, with a designated individual or that designated individual's immediate family with the intention of influencing current or future legislative or executive action, or both. The terms ‘lobby’ or ‘lobbying’ do not include communications or activities as part of a business, civic, religious, fraternal, personal, or commercial relationship which is not connected to legislative or executive action, or both.” (North Carolina Lobbying Laws, Chapter	
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		<p>120C, Lobbying, North Carolina General Assembly Website)</p> <ul style="list-style-type: none"> • “(10) Lobbyist. – An individual who engages in lobbying <u>for payment</u> and meets any of the following criteria:” (North Carolina Lobbying Laws, Chapter 120C, Lobbying, North Carolina General Assembly Website) • “a. Repealed by Session Laws 2007-348, s. 8(a), effective October 10, 2007.” (North Carolina Lobbying Laws, Chapter 120C, Lobbying, North Carolina General Assembly Website) • “b. Represents another person or governmental unit, but is not directly employed by that person or governmental unit.” (North Carolina Lobbying Laws, Chapter 120C, Lobbying, North Carolina General Assembly Website) • “c. Contracts for payment for lobbying.” (North Carolina Lobbying Laws, Chapter 120C, Lobbying, North Carolina General Assembly Website) • “d. Is employed by a person and a significant part of that employee's 	
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		<p>duties include lobbying. In no case shall an employee be considered a lobbyist if in no 30-day period less than five percent (5%) of that employee's actual duties include engaging in lobbying as defined in subdivision (9)a. of this section or if in no 30-day period less than five percent (5%) of that employee's actual duties include engaging in lobbying as defined in subdivision (9)b. of this section.” (North Carolina Lobbying Laws, Chapter 120C, Lobbying, North Carolina General Assembly Website)</p> <ul style="list-style-type: none">• “The term ‘lobbyist’ shall not include individuals who are specifically exempted from this Chapter by G.S. 120C-700 or registered as liaison personnel under Article 5 of this Chapter.” (North Carolina Lobbying Laws, Chapter 120C, Lobbying, North Carolina General Assembly Website) <p>“§ 120c-700. Persons Exempted From This Chapter.” (North Carolina Lobbying Laws, Chapter 120C, Lobbying, North Carolina General Assembly Website)</p>	
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		<p>“Except As Otherwise Provided In Article 8, The Provisions Of This Chapter Shall Not Be Construed To Apply To Any Of The Following:” (North Carolina Lobbying Laws, Chapter 120C, Lobbying, North Carolina General Assembly Website)</p> <ul style="list-style-type: none">• “(3) A duly elected or appointed official or employee of the State, the United States, a county, municipality, school district, or other governmental agency, when acting solely in connection with matters pertaining to the office and public duties, except for a person designated as liaison personnel under G.S. 120C-500 or G.S. 120C-502. For purposes of this subdivision, an individual appointed as a county or city attorney under Part 7 of Article 5 of Chapter 153A of the General Statutes or Part 6 of Article 7 of Chapter 160A of the General Statutes, respectively, shall be considered an employee of the county or city.” (North Carolina Lobbying Laws, Chapter 120C, Lobbying, North Carolina General Assembly Website) <p>MCCRORY WAS NOT ON</p>	
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		<p>THE TREE.COM BOARD AT THE TIME</p> <p>McCrorry Did Not Join Board Of Tree.Com Until The End Of January 2009. “Tree.com, Inc. (Nasdaq: TREE) today announces the appointment of Patrick L. McCrorry to the company's Board of Directors.” (Tree.com, “Patrick L. McCrorry Joins Board Of Directors Of Tree.com, Inc.,” <u>Press Release</u>, 1/26/09)</p> <p>IN 2006, MAYOR MCRORY WROTE TO ALERT DEPARTMENT OF COMMERCE THAT SOUTH CAROLINA WAS RECRUITING LENDING TREE AND KEEPING LENDING TREE IN NORTH CAROLINA WAS IMPORTANT TO THE ECONOMY AND JOBS</p> <p>Keeping Lending Tree And Another Company Represented “A Combined \$240 Million And 3,500 Jobs, In North Carolina.” “Thank you for taking my phone call before Christmas to discuss two pressing business retention projects we are working on in Charlotte – namely Lending Tree and Brooks Pharmacy/Eckerd distribution center. . . . Our staff is working with Susan Fleetwood in your office to leave no stone unturned in our effort to retain Lending Tree in North Carolina. . . . We could use your help in two distinct ways on this project. First of all, we are competing against an estimated \$53 million in state and local incentives from South Carolina. . . . I believe we can keep these projects, representing a combined \$240</p>	
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NC Television Station Managers
 NC Cable System Owners/Operators
 May 21, 2012

		million and 3,500 jobs, in North Carolina.” (UNC Charlotte Special Collections, Mayor Pat McCrory Papers, Letter to Commerce Secretary James Fain, <u>1/4/06</u>)	
“Is Pat McCrory the guy to clean up Raleigh? You’ve got to be kidding.”	Is Pat McCrory the guy to clean up Raleigh? You’ve got to be kidding.	Unsubstantiated	Opinion



EXHIBIT D

NEXSEN | PRUET

Eugene Boyce
Of Counsel

May 22, 2012

VIA EMAIL, FACSIMILE AND MAIL

Democratic Governors Association
1401 K Street, NW, Suite 200
Washington, DC 20005

Martin O'Malley, Chairman
Beverly Perdue, Vice Chair
Richard Sullivan, Treasurer
Colm O'Comartun, Executive Director
Ben Metcalf, Chief Operating Officer, Custodian
1401 K Street, NW, Suite 200
Washington, DC 20005

Charleston	North Carolina Citizens for Progress
Charlotte	434 Fayetteville Street, Suite 2500
Columbia	Raleigh, NC 27601
Greensboro	Michael L. Weisel, General Counsel, Secretary and Treasurer
Greenville	Kristen C. Smith, Director
Hilton Head	M.E. Clark, Director
Myrtle Beach	Sarah A. Boney, Director and Chair of the Board
Raleigh	Michael Schierbeek, Custodian 434 Fayetteville Street, Suite 2500 Raleigh, NC 27601

Re: Cease and Desist Demand

To the above-named individuals and organizations:

Our firm is counsel to Pat McCrory and the Pat McCrory Committee. We have reviewed the political ad that you financed, sponsored and authorized, a transcript of which is attached hereto at Exhibit 1 (the Political Ad). We note that this Political Ad has been running for several days at a number of television stations in North Carolina;

4141 Parklake Ave., Ste 200 T 919.653.7826
Raleigh, NC 2762 F 919.653.0435
www.nexsenpruet.com E gboyce@nexsenpruet.com
Nexsen Pruet, PLLC
Attorneys and Counselors at Law

Democratic Governors Association
North Carolina Citizens for Progress
May 22, 2012
Page 2

one or more of these stations have chosen to discontinue same. It is presently running at a lesser number of television stations in North Carolina. A partial list of said stations (the Stations) is attached hereto at Exhibit 2.

The Political Ad referenced above is false and defamatory. Even some of the media have confirmed the true "gist and sting of it," as do the courts in these controversies.

Co-counsel to Pat McCrory and the Pat McCrory Committee, Ms. Clea Mitchell, has provided statutory notice to these Stations on May 18, 2012, demanding they cease airing this false and defamatory advertisement. A renewed demand to the Stations was issued on May 21, 2012. Additionally, on May 21, 2012 the Federal Communications Commission was notified of the ongoing violation of the Federal Communications Act by these Stations.

By this letter we formally demand both of your organizations withdraw all authorization of the Political Ad, cease publication of the misinformation contained therein, and retract, correct, and apologize for the defamatory content contained therein.

Your Political Ad quite clearly violates North Carolina General Statutes, § 163-274(7), § 163-274(8), § 163-272.1, § 163-276, and §§ 99-1-2.

Among other things, through the Political Ad, you, and with your funds, the media are propagating the following false information:

1. That the Political Ad is sponsored by the 'North Carolina Citizens for Progress' when, in fact, the true sponsor is the "Democratic Governors Association.'
2. An unsubstantiated claim of "questionable ethics" on the part of Pat McCrory that is void of any specific allegation, factual verification or accusation.
3. That it was/is unethical for Pat McCrory to serve on the Board of Directors of Tree.com (including your material misrepresentation of facts regarding: (1) the nature of his service, and (2) the timing and duration of said service).
4. That Pat McCrory, as Mayor, unethically "lobbied" State Government for millions in tax breaks for Tree.com (including your substantially misleading and falsely vague use of the term "lobby;" a precisely, statutorily defined term under North Carolina law).

Democratic Governors Association
North Carolina Citizens for Progress
May 22, 2012
Page 3

5. The implication that Pat McCrory was on the Board of, or otherwise employed by, Tree.com at the time he was advocating on their behalf to State Government officials, and the direct implication that the entity he assisted in 2006 is the identical entity as Tree.com.
6. The implication and “gist and sting” is that there is a quid pro quo between Pat McCrory’s activities as Mayor of Charlotte in assisting Lending Tree, not the City of Charlotte, and his subsequent much later role as a board member of Tree.com.
7. The material omission that the customer deception allegations against Lending Tree were not North Carolina actions, nor was Pat McCrory, in many instances, affiliated in any manner with the company or its parent company at the time of said allegations.

Ample current case authority in North Carolina exists: A candidate for political office can recover damages for defamation by a political opponent sponsoring false advertising during a political campaign. Our firm, you might note, has ample experience with such claims. For your reference purposes please find enclosed:

See Boyce & Isley, PLLC v. Cooper, 153 N.C. App. 25, 568 S.E.2d 893 (2002) (“Boyce I”) and *Boyce & Isley, PLLC v. Cooper*, 169 N.C. App. 527, 611 S.E.2d 175 (2005) (“Boyce II”). *Boyce & Isley, PLLC v. Cooper*, Case No. COA 10-243 (NC Ct. App., May. 3, 2011) (“Boyce III”). Review twice denied by the U.S. Supreme Court, most recently on May 14, 2012.

We reiterate that the Political Ad is false and defamatory. It is offensive not only for its content but for the fact that the Democratic Governors Association, who admits publicly to having paid for the media buy, is not even willing to put its name on the defamatory product and tell the Public the whole truth. In addition, the Officers and Directors of North Carolina Citizens for Progress knew when the Political Ad was funded and created, and continue to know as the Political Ad is broadcast, that the inaccurate information contained therein violates Articles 2 and 10 of their own nonprofit charter.

The Political Ad clearly gets an “F” grade when it comes to “ethics.” Nothing questionable about your lack of ethics in authorizing and sponsoring the Political Ad.

‘Pat McCrory’s path to cleaning up Raleigh’ begins with this Firm’s efforts to clean up the political playing field presently littered with your contemptible array of false and defamatory misinformation. We thereby demand that you: (1) withdraw your authorization of the Political Ad; (2) cease any and all publication of the

Democratic Governors Association
North Carolina Citizens for Progress
May 22, 2012
Page 4

misinformation contained therein; and (3) publicly retract, correct, and apologize for your actions.

We must insist upon extending a time of twenty-four (24) hours for you to comply with the above demands, and to communicate your compliance to the undersigned.

Sincerely,

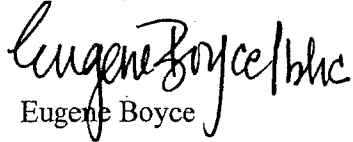

Eugene Boyce

Exhibit 1

The Political Ad

State/District: North Carolina
 Sponsor: North Carolina Citizens For Progress
 Title: "Today's Tree"
 Script:

AVO: "Pat McCrory's questionable ethics. Case number one Tree.com: a company that paid Pat McCrory over \$140,000 to sit on its board while he was mayor of Charlotte. Its mortgage company's charged with deceiving customers. Paid millions to settle. And Pat McCrory? He used his position as mayor to lobby state government for millions in tax breaks for the company. Is Pat McCrory the guy to clean up Raleigh? You've got to be kidding."

"Today's Tree"

Audio	Video	Alleged Verification	Rebuttal
<p>AVO: "Pat McCrory's questionable ethics. Case number one Tree.com:</p>	<p>Pat McCrory "Questionable Ethics" Case Number One Photo of McCrory Image of Tree.com</p>	<p>None</p>	<p>NO SUBSTANTIATION FOR "QUESTIONABLE ETHICS" CLAIM</p> <p>Ad includes no verification to quote "Questionable Ethics," misleading viewer to believe McCrory has been accused of questionable ethics.</p> <p>NEWSPAPERS LAUDED MCCRORY FOR GOVERNOR OVER PERDUE IN 2008</p> <p><i>Charlotte Observer:</i> "We believe McCrory's experience, approach to government, outsider perspective and willingness to take a stand make him a better choice than Democrat Bev Perdue." (Editorial, "We Recommend McCrory For Governor," <i>Charlotte Observer</i>, 10/5/08)</p> <p><i>The News & Observer:</i> "McCrory, who turned 52 a few days ago, comes across as intelligent, ambitious, well-spoken. He is well-regarded in the city he leads, having won seven mayoral elections. That's a testament to his political skills and appeal, especially considering that Republican voters in Charlotte are outnumbered by Democrats and independents. . . . we encourage voters to give Pat McCrory a chance. Bev Perdue is a good candidate, but McCrory suits the moment. He's loaded with energy and fresh ideas. On several levels,</p>

			he could be just what this state needs." (Editorial, "McCrorry's Time," <i>The News & Observer</i> [Raleigh, North Carolina], 10/26/08)
"a company that paid Pat McCrorry over \$140,000 to sit on its board while he was mayor of Charlotte.	Tree.com paid McCrorry over \$140,000 while he was Mayor of Charlotte.	SEC, 2009 Tree.com Proxy Statement, Schedule 14A, 3/19/10	<p>MCCRORY SERVED AS MAYOR AND ON BOARD OF TREE FOR LESS THAN ONE YEAR</p> <p>McCrorry Did Not Join Board Of Tree.Com Until The End Of January 2009. "Tree.com, Inc. (Nasdaq: TREE) today announces the appointment of Patrick L. McCrorry to the company's Board of Directors." (Tree.com, "Patrick L. McCrorry Joins Board Of Directors Of Tree.com, Inc.," Press Release, 1/26/09)</p> <ul style="list-style-type: none"> • "Patrick McCrorry, age 53, has served as a member of our Board of Directors since January 2009." (Tree.com, "Proxy Statement for the 2010 Annual Meeting of Stockholders," SEC Website) <p>McCrorry Served As Mayor Until The Beginning Of December 2009. "Pat McCrorry... was mayor for 14 years until December 2009." (Steve Harrison, "State Invokes Privacy In Turner Case," <i>Charlotte Observer</i>, 4/28/10)</p> <p>McCrorry's Successor, Anthony Foxx, Sworn Into Office In Early December 2009. "It was a night that was 14 years in the making. Anthony Foxx officially took over the seat of mayor of Charlotte from Mayor Pat McCrorry Monday night." ("Anthony Foxx Sworn In As Charlotte's Mayor," WTOCL.com, 12/7/09)</p> <p>MCCRORY WAS NOT A PAID LOBBYIST FOR LENDING TREE</p> <p>McCrorry Served In 2009 As A "Non-Employee Director Compensation" And On "Board Of Directors." (SEC, 2009 Tree.com Proxy Statement, Schedule 14A, 3/19/10)</p>

<p>"Its mortgage company's charged with deceiving customers. Paid millions to settle.</p>	<p>Mortgage Lawsuits Settled; S.C. To Get \$3M from Lending Tree</p>	<p>Post and Courier, 1/5/12 Arizona Republic, 11/10/10 Office of The Arizona Attorney General, 11/3/10</p>	<p>SOUTH CAROLINA LAWSUITS AGAINST LENDING TREE FILED BEFORE MCCRORY JOINED BOARD</p> <p>McCrary Did Not Join Board Of Tree.Com Until The End Of January 2009. "Tree.com, Inc. (Nasdaq: TREE) today announces the appointment of Patrick L. McCrary to the company's Board of Directors." (Tree.com, "Patrick L. McCrary Joins Board Of Directors Of Tree.com, Inc.," Press Release, 1/26/09)</p> <p>Lawsuits Filed In Early September 2008. "Tenth Judicial Circuit Solicitor Chrissy Adams has joined eight other state solicitors in suing Lending Tree, a mortgage firm based in Charlotte. Adams' lawsuit is on behalf of Lending Tree borrowers in Oconee and Anderson counties. Adams, who filed the lawsuit on Sept. 4, declined to comment, referring inquiries to Spartanburg attorney Doug Smith." (Pearce Adams, "Chrissy Adams Sues Mortgage Firm Lending Tree," <i>Anderson Independent-Mail</i> [South Carolina], 9/18/08)</p> <ul style="list-style-type: none"> • "In 2008, all 16 solicitors in the state filed a suit against Lending Tree for failure to make disclosures that are required by state law for brokers doing business in South Carolina." (Cindy Pitts, "Lending Tree Suit Pays Restitution To County," <i>The Newberry Observer</i>, 3/11/12)
<p>"And Pat McCrary? He used his position as mayor to lobby state government for millions in tax breaks for the company.</p>	<p>Mayor's Official Stationary</p>	<p>UNC Charlotte Special Collections, Mayor Pat McCrary Papers, 1/4/06</p>	<p>UNDER NORTH CAROLINA LAW PAT MCCRORY DID NOT LOBBY AND WAS NOT A LOBBYIST IN 2006</p> <p>Under North Carolina Law Through January 1, 2007, The Definition Of "Lobbying" And "Lobbyist" Was:</p> <p>"§ 120-47.1. Definitions." (Article 9A, Lobbying, "Lobbying Laws Effective</p>

			<p>Until January 1, 2007,” North Carolina Department Of The Secretary Of State Website)</p> <p>“For The Purposes Of This Article, The Following Terms Shall Have The Meanings Ascribed To Them In This Section Unless The Context Clearly Indicates A Different Meaning:” (Article 9A, Lobbying, “Lobbying Laws Effective Until January 1, 2007,” North Carolina Department Of The Secretary Of State Website)</p> <p>“(5) The Term ‘Lobbying’ Means:” (Article 9A, Lobbying, “Lobbying Laws Effective Until January 1, 2007,” North Carolina Department Of The Secretary Of State Website)</p> <ul style="list-style-type: none"> • “a. Influencing or attempting to influence legislative action through direct oral or written communication with a member of the General Assembly; or b. Solicitation of others by lobbyists to influence legislative action.” (Article 9A, Lobbying, “Lobbying Laws Effective Until January 1, 2007,” North Carolina Department Of The Secretary Of State Website) <p>“(6) The Term ‘Lobbyist’ Means An Individual Who:” (Article 9A, Lobbying, “Lobbying Laws Effective Until January 1, 2007,” North Carolina Department Of The Secretary Of State Website)</p> <ul style="list-style-type: none"> • “a. Is employed and receives compensation, or who contracts for economic consideration, for the purpose of lobbying; or b. Represents another person and receives compensation for the purpose of lobbying.” (Article 9A, Lobbying, “Lobbying Laws Effective Until January 1, 2007,” North
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Carolina Department Of The
Secretary Of State [Website](#)

“The Term ‘Lobbyist’ Shall Not Include Those Individuals Who Are Specifically Exempted From This Article By G.S. 120-47.8.” (Article 9A, Lobbying, “Lobbying Laws Effective Until January 1, 2007,” North Carolina Department Of The Secretary Of State [Website](#))

“§ 120-47.8. Persons Exempted From Provisions Of Article.” (Article 9A, Lobbying, “Lobbying Laws Effective Until January 1, 2007,” North Carolina Department Of The Secretary Of State [Website](#))

“The Provisions Of This Article Shall Not Be Construed To Apply To Any Of The Following:” (Article 9A, Lobbying, “Lobbying Laws Effective Until January 1, 2007,” North Carolina Department Of The Secretary Of State [Website](#))

- “(3) a. A duly elected or appointed official or employee of the State, the United States, a county, municipality, school district or other governmental agency, when appearing solely in connection with matters pertaining to his office and public duties.”
(Article 9A, Lobbying, “Lobbying Laws Effective Until January 1, 2007,” North Carolina Department Of The Secretary Of State [Website](#))

Under Current North Carolina Law, The Definition Of “Lobbying” And “Lobbyist” Is:

“§ 120C-100. Definitions.”
(North Carolina Lobbying Laws, Chapter 120C, Lobbying, North Carolina General Assembly [Website](#))

“(A) As Used In This Article, The Following Terms Mean:”
(North Carolina Lobbying Laws, Chapter 120C, Lobbying, North Carolina General Assembly [Website](#))

			<p>“(9) Lobby Or Lobbying. – Any Of The Following:” (North Carolina Lobbying Laws, Chapter 120C, Lobbying, North Carolina General Assembly Website)</p> <ul style="list-style-type: none"> • “a. Influencing or attempting to influence legislative or executive action, or both, through direct communication or activities with a designated individual or that designated individual’s immediate family.” (North Carolina Lobbying Laws, Chapter 120C, Lobbying, North Carolina General Assembly Website) • “b. Developing goodwill through communications or activities, including the building of relationships, with a designated individual or that designated individual’s immediate family with the intention of influencing current or future legislative or executive action, or both. The terms ‘lobby’ or ‘lobbying’ do not include communications or activities as part of a business, civic, religious, fraternal, personal, or commercial relationship which is not connected to legislative or executive action, or both.” (North Carolina Lobbying Laws, Chapter 120C, Lobbying, North Carolina General Assembly Website) • “(10) Lobbyist. – An individual who engages in lobbying <u>for payment</u> and meets any of the following criteria.” (North
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			<p>Carolina Lobbying Laws, Chapter 120C, Lobbying, North Carolina General Assembly Website)</p> <ul style="list-style-type: none"> ● “a. Repealed by Session Laws 2007-348, s. 8(a), effective October 10, 2007.” (North Carolina Lobbying Laws, Chapter 120C, Lobbying, North Carolina General Assembly Website) ● “b. Represents another person or governmental unit, but is not directly employed by that person or governmental unit.” (North Carolina Lobbying Laws, Chapter 120C, Lobbying, North Carolina General Assembly Website) ● “c. Contracts for payment for lobbying.” (North Carolina Lobbying Laws, Chapter 120C, Lobbying, North Carolina General Assembly Website) ● “d. Is employed by a person and a significant part of that employee's duties include lobbying. In no case shall an employee be considered a lobbyist if in no 30-day period less than five percent (5%) of that employee's actual duties include engaging in lobbying as defined in subdivision (9)a. of this section or if in no 30-day period less than five percent (5%) of that employee's actual duties include engaging in lobbying as defined in subdivision (9)b. of this section.” (North Carolina Lobbying Laws, Chapter 120C,
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			<p>Lobbying, North Carolina General Assembly Website)</p> <ul style="list-style-type: none"> • “The term ‘lobbyist’ shall not include individuals who are specifically exempted from this Chapter by G.S. 120C-700 or registered as liaison personnel under Article 5 of this Chapter.” (North Carolina Lobbying Laws, Chapter 120C, Lobbying, North Carolina General Assembly Website) <p>“§ 120c-700. Persons Exempted From This Chapter.” (North Carolina Lobbying Laws, Chapter 120C, Lobbying, North Carolina General Assembly Website)</p> <p>“Except As Otherwise Provided In Article 8, The Provisions Of This Chapter Shall Not Be Construed To Apply To Any Of The Following:” (North Carolina Lobbying Laws, Chapter 120C, Lobbying, North Carolina General Assembly Website)</p> <ul style="list-style-type: none"> • “(3) A duly elected or appointed official or employee of the State, the United States, a county, municipality, school district, or other governmental agency, when acting solely in connection with matters pertaining to the office and public duties, except for a person designated as liaison personnel under G.S. 120C-500 or G.S. 120C-502. For purposes of this subdivision, an individual appointed as a county or city attorney under Part 7 of Article 5 of Chapter 153A of the General Statutes or Part 6 of Article 7 of Chapter
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160A of the General Statutes, respectively, shall be considered an employee of the county or city." (North Carolina Lobbying Laws, Chapter 120C, Lobbying, North Carolina General Assembly [Website](#))

MCCRORY WAS NOT ON THE TREE.COM BOARD AT THE TIME

McCrorry Did Not Join Board Of Tree.Com Until The End Of January 2009. "Tree.com, Inc. (Nasdaq: TREE) today announces the appointment of Patrick L. McCrorry to the company's Board of Directors." (Tree.com, "Patrick L. McCrorry Joins Board Of Directors Of Tree.com, Inc.," [Press Release](#), 1/26/09)

IN 2006, MAYOR MCRORY WROTE TO ALERT DEPARTMENT OF COMMERCE THAT SOUTH CAROLINA WAS RECRUITING LENDING TREE AND KEEPING LENDING TREE IN NORTH CAROLINA WAS IMPORTANT TO THE ECONOMY AND JOBS

Keeping Lending Tree And Another Company Represented "A Combined \$240 Million And 3,500 Jobs, In North Carolina."
"Thank you for taking my phone call before Christmas to discuss two pressing business retention projects we are working on in Charlotte – namely Lending Tree and Brooks Pharmacy/Eckerd distribution center. . . . Our staff is working with Susan Fleetwood in your office to leave no stone unturned in our effort to retain Lending Tree in North Carolina. . . . We could use your help in two distinct ways on this project. First of all, we are competing against an estimated \$53 million in state and local incentives from South Carolina. . . . I believe we can keep these projects, representing a

			combined \$240 million and 3,500 jobs, in North Carolina.” (UNC Charlotte Special Collections, Mayor Pat McCrory Papers, Letter to Commerce Secretary James Fain, 1/4/06)
“Is Pat McCrory the guy to clean up Raleigh? You’ve got to be kidding.”	Is Pat McCrory the guy to clean up Raleigh?	None	Unsubstantiated

Exhibit 2

The Stations

Media Market	Station	Network	National Rep Firm	Phone	GM
GREENSBORO-HIGH POINT-WINSTON, NC	WFMY	CBS	Telerep	336-379-9369	Larry Audas
GREENSBORO-HIGH POINT-WINSTON, NC	WGHP	FOX	Millennium	336-841-8888	Karen Adams
GREENSBORO-HIGH POINT-WINSTON, NC	WXLV	ABC	Millennium	336-722-4545	John Hayes
GREENVILLE-NEW BERN-WASHINGTON, NC	WCTI	ABC	Continental	252-638-6803	Lyle Schulze
GREENVILLE-NEW BERN-WASHINGTON, NC	WFXI	FOX	Continental	252-638-6803	Lyle Schulze
GREENVILLE-NEW BERN-WASHINGTON, NC	WITN	NBC	Self-Rep'd	252-946-3131	Chris Mossman
GREENVILLE-NEW BERN-WASHINGTON, NC	WNCT	CBS	HRP	252-355-8500	Vickie Jones
RALEIGH-DURHAM, NC	WNCN	NBC	HRP	919-836-1717	Douglas Hamilton
RALEIGH-DURHAM, NC	WRAL	CBS	Telerep	919-821-8555	Steve Hammel
RALEIGH-DURHAM, NC	WRAZ	FOX	Telerep	919-595-5050	Tommy Schenck
RALEIGH-DURHAM, NC	WTVD	ABC	ABC	919-899-3600	John Idler

STATE OF NORTH CAROLINA

WAKE County

In The General Court Of Justice
District Superior Court Division

Name And Address Of Plaintiff 1
North Carolina Citizens for Progress
P.O. Box 255

2012 MAY 21 AM 8:30

GENERAL

CIVIL ACTION COVER SHEET

Raleigh NC 27602

INITIAL FILING SUBSEQUENT FILING

Rule 5(b), General Rules of Practice For Superior and District Courts

Name And Address Of Plaintiff 2
Democratic Governors Association
1401 K Street, NW
Suite 200
Washington DC 20005

Name And Address Of Attorney Or Party, if Not Represented (complete for initial appearance or change of address)
Michael L. Weisel
P.O. Box 1351

VERSUS

Name Of Defendant 1
Patrick L. McCrory
1963 Maryland Ave.

Raleigh NC 27602

Telephone No. 919-828-0731 Cell Telephone No.

Charlotte NC 28203

NC Attorney Bar No. 9516 Attorney E-Mail Address mlweisel@bdixon.com

Summons Submitted Yes No

Initial Appearance in Case Change of Address

Name Of Defendant 2
The Pat McCrory Committee
1235-E East Blvd #179

Name Of Firm
Bailey & Dixon, L.L.P.

FAX No. 919-828-6592

Charlotte NC 28204

Counsel for All Plaintiffs All Defendants Only (List party(ies) represented)

Summons Submitted Yes No

Jury Demanded In Pleading
Complex Litigation

Amount in controversy does not exceed \$15,000
Stipulate to arbitration

TYPE OF PLEADING

- (check all that apply)
Amend (AMND) Assess Motions Fee (SEE NOTE)
Amended Answer/Reply (AMND-Response) Assess Motions Fee (SEE NOTE)
Amended Complaint (AMND) Assess Motions Fee
Answer/Reply (ANSW-Response) (SEE NOTE)
Change Venue (CHVN) Assess Motions Fee
Complaint (COMP)
Confession Of Judgment (CNFJ)
Consent Order (CONS)
Consolidate (CNSL) Assess Motions Fee
Contempt (CNTP) Assess Motions Fee
Continue (CNTN) Assess Motions Fee
Compel (CMPL) Assess Motions Fee
Counterclaim (CTCL) Assess Court Costs
Crossclaim (List On Back) (CRSS) Assess Court Costs
Dismiss (DISM) Assess Court Costs
Exempt/Waive Mediation (EXMD) Assess Motions Fee
Extend Statute Of Limitations, Rule 9 (ESOL) Assess Motions Fee
Extend Time For Complaint (EXCO) Assess Motions Fee

- (check all that apply)
Failure To Join Necessary Party (FJNP) Assess Motions Fee
Failure To State A Claim (FASC)
Improper Venue/Division (IMVN) Assess Motions Fee
Intervene (INTR) Assess Motions Fee
Interplead (OTHR) Assess Motions Fee
Lack Of Jurisdiction (Person) (LJPN) Assess Motions Fee
Lack Of Jurisdiction (Subject Matter) (LJSM) Assess Motions Fee
Rule 12 Motion In Lieu of Answer (MDLA) Assess Motions Fee
Sanctions (SANC) Assess Motions Fee
Set Aside (OTHR) Assess Motions Fee
Show Cause (SHOW) Assess Motions Fee
Transfer (TRFR) Assess Motions Fee
Third Party Complaint (List Third Party Defendants on Back) (TPCL)
Vacate/Modify Judgment (VCMD) Assess Motions Fee
Withdraw as Counsel (WDCN) Assess Motions Fee
Other (specify and list each separately)

NOTE: See Side Two for a list of motions not subject to the motions fee.

NOTE: Assess fee only if court permission is required to amend.

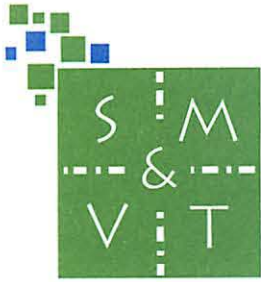
CLAIMS FOR RELIEF

- Administrative Appeal (ADMA)
Appointment Of Receiver (APRC)
Attachment/Garnishment (ATTC)
Claim And Delivery (CLMD)
Collection On Account (ACCT)
Condemnation (CNDM)
Contract (CNTR)
Discovery Scheduling Order (DSCH)
Injunction (INJU)
Medical Malpractice (MDML)
Minor Settlement (MSTL)
Money Owed (MNYO)
Negligence - Motor Vehicle (MVNG)
Negligence - Other (NEGO)
Motor Vehicle Lien G.S. 44A (MVLN)
Limited Driving Privilege - Out-Of-State Convictions (PLDP)
Possession Of Personal Property (POPP)
Product Liability (PROD)
Real Property (RLPR)
Specific Performance (SPPR)
Other (specify and list separately)
Declaratory Judgment

Date May 24, 2012

Signature Of Attorney/Party Michael J. Weisel

NOTE: All filings in civil actions shall include as the first page of the filing a cover sheet summarizing the critical elements of the filing in a format prescribed by the Administrative Office of the Courts, and the Clerk of Superior Court shall require a party to refile a filing which does not include the required cover sheet. For subsequent filings in civil actions, the filing party must either include a General Civil (AOC-CV-751), Motion (AOC-CV-752) or Court Action (AOC-CV-753) cover sheet. (Over)



stevens martin vaughn & tadych, PLLC
attorneys at law

Hugh Stevens
C. Amanda Martin
K. Matthew Vaughn
Michael J. Tadych

amartin@smvt.com
919 755 0889

TO: North Carolina Citizens for Progress
FROM: C. Amanda Martin *cam*
Hugh Stevens *HMS*
DATE: May 22, 2012
RE: Analysis of *Today's Tree* advertisement

In response to the allegations leveled by Pat McCrory and The Pat McCrory Committee,¹ you have asked us for an independent analysis and assessment of the potential liability for defamation of the advertisement entitled *Today's Tree*.

SUMMARY

Given the documentary evidence that we have reviewed, in our opinion it appears that Mr. McCrory can have no reasonable hope or expectation that he can establish the elements of defamation or establish that the statements in the *Today's Tree* ad were published with actual malice by either NC Citizens for Progress or by any broadcast stations airing the advertisement. Despite the threatening language contained in the Cease and Desist Memo that NCCP or broadcast stations are "on notice" of the ad's purported falsity, the Cease and Desist Memo appears to support and underscore the very truth of the statements in the advertisement.

LEGAL ANALYSIS

In order to make out a claim for defamation, Mr. McCrory must demonstrate that the advertisement at issue (1) makes a statement of fact (2) about him (3) that is false and (4) defamatory and that it was (5) published (6) with actual malice and (7) caused injury.

For a host of reasons, discussed more fully below, we find the ad to be constitutionally privileged. To the degree it is factually based, those facts are substantially accurate and therefore not actionable under *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 111 S. Ct. 2419, 115 L. Ed. 2d 447 (1991). To the degree the ad expresses opinions which are neither provably true or false, it is privileged under *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S. Ct. 2695, 111 L. Ed. 2d 1 (1990). Moreover, because Pat McCrory indisputably is a public official (both as the former mayor of Charlotte and as a gubernatorial candidate), he must prove by clear and convincing evidence that the sponsors of the ad

¹ Cleta Mitchell is counsel to Pat McCrory and Pat McCrory for Governor. We have reviewed a May 18, 2012, memorandum prepared by Ms. Mitchell in which she makes accusations of defamation and purports to provide rebuttal to the statements contained in the *Today's Tree* advertisement. Ms. Mitchell's memorandum will be referenced herein as the Cease and Desist Memo, because it was sent to broadcast station managers demanding their cessation of the airing of the *Today's Tree* advertisement.

published it with actual malice – knowledge of falsity – in order to prevail. In light of the substantial evidence supporting the accuracy of the advertisement, we believe he cannot meet such a rigorous standard.

CHARACTERIZATION OF THE STATEMENTS

The *sine qua nom* of an action for defamation is a false statement. Therefore, statements that are not capable of being proven true or false – what we colloquially call “opinion” – cannot form the basis of a defamation action.

[W]e think *Hepps* stands for the proposition that a statement on matters of public concern must be provable as false before there can be liability under state defamation law, at least in situations, like the present, where a media defendant is involved.

Milkovich, 497 U.S. at 19-20, 110 S. Ct. at 2706, 111 L. Ed. 2d at 1.

The ad at issue contains both factual statements and statements of opinion, and they will be analyzed in that framework. There are seven sentences or sentence fragments in the advertisement.

1. Pat McCrory's questionable ethics.
2. Case number one: Tree.com - a company that paid Pat McCrory over \$140,000 to sit on its board while he was mayor of Charlotte.
3. Its mortgage companies, charged with deceiving customers, paid millions to settle.
4. And Pat McCrory?
5. He used his position as mayor to lobby state government for millions in tax breaks for the company.
6. Is Pat McCrory the guy to clean up Raleigh?
7. You've got to be kidding.

Of the seven, Statement 3 is not about Mr. McCrory at all but is a statement about Tree.com.² Two of the sentences or phrases (Statements 4 and 6) are questions that make no factual assertion at all. Of the remaining sentences or phrases, two of the statements (Statements 1 and 7) are pure statements of opinion, incapable of being proven or disproven. The assessment of a person's ethics is by definition a matter of opinion.

As the Third Circuit Court of Appeals held, plaintiff's “claim that it was defamed by the implication that manufacturers are unethical is also unfounded. The portions of the broadcast which could have given rise to such an implication were expressions of opinion and, viewed in the context of

² In two of its bedrock defamation cases, the U.S. Supreme Court has held that a potentially libelous statement about a group is not tantamount to a libelous statement about its leader. *Rosenblatt v. Baer*, 383 U.S. 75, 82, 86 S. Ct. 669, 674, 15 L. Ed. 2d 597 (1966); *New York Times Co. v. Sullivan*, 376 U.S. 254, 288, 84 S. Ct. 710, 730, 11 L. Ed. 2d 686 (1964). This conclusion surely must be yet extended when the complaining party is not even the leader of the group but merely one of its members.

the entire program, the statements create no basis for a defamation action.” *Redco Corp. v. CBS, Inc.*, 758 F.2d 970, 972 (3d Cir.) *cert. denied*, 474 U.S. 843, 106 S. Ct. 131, 88 L. Ed. 2d 107 (1985).

Similarly, the Eighth Circuit Court of Appeals found characterizations of ethics to be non-actionable: “While allegations of specific criminal conduct generally cannot be protected as opinion, broad brush-stroked references to unethical conduct, even using terms normally understood to impute specific criminal acts, may be understood by the reasonable viewer as opinion.” *Lauderback v. Am. Broad. Companies, Inc.*, 741 F.2d 193, 197 (8th Cir. 1984), *cert. denied*, 469 U.S. 1190, 105 S. Ct. 961, 83 L.Ed.2d 967 (1985).

The fact that the Cease and Desist Memo sent from the McCrory campaign cites *editorials* from both the *Charlotte Observer* and the *News & Observer* underscores that these are matters of opinion, subject to debate and disagreement.

Only the two remaining statements (Statements 2 and 6) are factual statements that even conceptually could form the basis of a defamation action. For the reasons discussed below, we are of the opinion that they are not actionable.

TRUTH OR FALSITY

“Truth is an absolute defense” is a legal maxim almost every American knows, and at the root of every defamation action must lie a false statement of fact. *Old Dominion Branch No. 496, Nat’l Assoc. of Letter Carriers v. Austin*, 418 U.S. 264, 283, 94 S. Ct. 2770, 2781, 41 L. Ed.2d 745 (1974). The Restatement (Second) of Torts states: “One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true.” RESTATEMENT (SECOND) OF TORTS, § 581A (1976).

As a backdrop to any discussion of truth or falsity, however, it must be emphasized that the constitutional analysis of defamation requires only substantial truth – accuracy of the gist or sting of a statement – rather than absolute and literal truth. Borrowing from a 1936 case, the U.S. Supreme Court in *Masson v. New Yorker Magazine, Inc.*, held: “Minor inaccuracies do not amount to falsity so long as ‘the substance, the gist, the sting, of the libelous charge be justified.’” 501 U.S. 496, 517, 111 S. Ct. 2419, 2433, 115 L. Ed. 2d 447 (1991) (citation omitted).

North Carolina law not only accords with these federal decisions but predated them. See *Parker v. Edwards*, 222 N.C. 75, 78, 21 S.E.2d 876 (1942) (report that plaintiff “had an abortion performed on her by a negro doctor” did not differ essentially from the truth -- that plaintiff induced her own abortion -- and therefore was not actionable); *Kinloch v. News & Observer Pub. Co.*, 314 F. Supp. 602, 607 (E.D.N.C. 1969), *aff’d*, 427 F.2d 350 (4th Cir. 1970), *cert. denied*, 403 U.S. 905, 91 S. Ct. 2207, 29 L. Ed. 2d 681 (1971) (“The law does not require absolute accuracy in reporting. It does impose the word ‘substantial’ on the accuracy, fairness and completeness. It is sufficient if it conveys to the persons who read it a substantially correct account of the proceedings.”)

In this context, the truth or falsity of the two factual statements will be assessed in turn.

Case number one: Tree.com - a company that paid Pat McCrory over \$140,000 to sit on its board while he was mayor of Charlotte.

The Cease and Desist Memo seemingly admits the accuracy of the charge that Mr. McCrory sat on the Board of Tree.com while he was mayor of Charlotte. The memo states, “MCCRORY SERVED AS MAYOR AND ON BOARD OF TREE FOR LESS THAN ONE YEAR.” The Cease and Desist Memo states that Mr. McCrory was appointed to the Board of Directors of Tree.com on January 26, 2009. (Tree.com

press release) Also according to the Cease and Desist Memo, Mr. McCrory was mayor of Charlotte until December 2009. (April 28, 2010, *Charlotte Observer*) The *Today's Tree* advertisement does not speak to the duration that Mr. McCrory held those dual roles, and thus the Cease and Desist Memo's limitation of that to "less than one year" is irrelevant. Mr. McCrory unquestionably sat on the board of directors of Tree.com while he was mayor of Charlotte.

The second portion of that sentence – that Mr. McCrory was paid \$140,000 -- also is factually accurate according to documents filed with the SEC.³

The following table provides information on the compensation of our non-employee directors in the year ended December 31, 2009. Specifically, the table provides the amount of (1) cash fees earned by non-employee directors for services performed during 2009 and (2) the grant date fair value of stock awards granted in 2009.

<u>Name</u>	<u>Fees Earned or Paid in Cash (\$)</u>	<u>Stock Awards (\$)(1)</u>	<u>Total (\$)</u>
Peter Horan	52,903	50,000	102,903
W. Mac Lackey	93,764	50,000	143,764
Joseph Levin	40,000	50,000	90,000
Patrick McCrory	78,333	62,500	140,833
Lance Melber	80,000	50,000	130,000
Steven Ozonian	80,000	50,000	130,000

He used his position as mayor to lobby state government for millions in tax breaks for the company.

The Cease and Desist memo makes much of the fact that Mr. McCrory was not registered as a lobbyist and that he was not acting in the capacity of a registered lobbyist. This assertion misses the point of the constitutional protections afforded to speech.

In a wide-ranging body of cases, courts have held that a technical and legal interpretation of words, such as "lobbying" here, is not always appropriate. Indeed, First Amendment scholar Rodney Smolla has written,

Almost any word, no matter how emotionally charged or pejorative, can in a given context be merely a hyperbolic figure of speech, not a literal misstatement of fact injurious to reputation. A President accused of being a 'murderer' because of his steadfast prosecution of an unpopular war is not being accused literally of a common law crime, rather, he is being accused of misconduct in a political sense, a sense that ranges into the realm of opinion.

R. SMOLLA, LAW OF DEFAMATION § 4.04[2], at 4-14 (1992).

In *Greenbelt Co-op. Pub. Ass'n v. Bresler*, the Supreme Court found that use of the word "blackmail" in the context of describing a local developer's dealings with the city of Greenbelt was not actionable. "[A]s a matter of constitutional law, the word 'blackmail' in these circumstances was not slander when spoken, and not libel when reported in the *Greenbelt News Review*." 398 U.S. 6, 13, 90 S. Ct. 1537, 1541, 26 L. Ed. 2d 6 (1970).

In *Mattel, Inc. v. RCA Records, Inc.*, 28 F. Supp. 2d 1120 (C.D. Cal. 1998), the court considered comments that used the phrases "bank robber," "heist," "crime" and "theft," and the court found that in

³ 2009 SEC Tree.com Proxy Statement, Schedule 14A, filed 3/19/10

context, those statements were not actionable, factual statements. See also *Rosenauro v. Scherer*, 88 Cal. App. 4th 260, 274, 105 Cal. Rptr. 2d 674 (2001) (use of term “thief” in “heated confrontation at a shopping center between political opponents,” was “reasonably interpreted as loose figurative language and hyperbole, not a claim that the plaintiff actually had a criminal past”); *Ruiz v. Harbor View Community Assn.*, 134 Cal. App. 4th 1456, 1472-1473, 37 Cal. Rptr. 3d 133 (2005) (statement accusing plaintiff of “virtually stalking” properly interpreted as “metaphor used to describe [plaintiff’s] conduct at the board meetings,” not “accusation of a crime”).

Here, the advertisement does not say that Mr. McCrory was engaged as a registered lobbyist but that he used his position as mayor to lobby. The common interpretation of “lobby” is not the statutory term of art of acting as a registered lobbyist. Rather, it means to advocate. According to Merriam-Webster, to lobby is “to conduct activities aimed at influencing public officials and especially members of a legislative body on legislation.” Just as I might lobby dining companions to choose a sushi restaurant for lunch, Mr. McCrory (on official mayoral stationery) lobbied North Carolina Secretary of Commerce James Fain to “consider any and all means available to you to increase the amount of the State’s incentive” to Lending Tree.

The North Carolina Supreme Court, in *Yancey v. Gillespie*, noted that an allegedly libelous statement “must be read and considered in its setting” before determining whether it is libelous. 242 N.C. 227, 230, 87 S.E.2d 210, 212 (1955). The Restatement notes that “many charges are made in terms that are accepted by their recipients in a popular rather than a technical sense.” RESTATEMENT (SECOND) OF TORTS, § 581A.

Based on the documents we have reviewed, the two factual statements in the *Today’s Tree* advertisement are actually, substantially and constitutionally true and therefore cannot form the basis of a defamation action.

THE ACTUAL MALICE STANDARD

Mr. McCrory is a public official, by virtue of having held office as mayor of Charlotte for 14 years and due to his candidacy for governor of North Carolina. This means that he cannot sustain a viable action for defamation without proving actual malice. *New York Times v. Sullivan*, 376 U.S. 254, 265, 84 S. Ct. 710, 718, 11 L. Ed. 2d 686 (1964). The actual malice standard applies to any statement that “might touch on an official’s fitness for office.” *Garrison v. State of La.*, 379 U.S. 64, 77, 85 S. Ct. 209, 217, 13 L. Ed. 2d 125 (1964).

The cases interpreting and applying the actual malice standard have defined it as meaning that the speaker knew the statement was false when published or that he or she “entertained serious doubts as to the [statement’s] truth” and published it anyway. *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S. Ct. 1323, 1325, 20 L. Ed. 2d 262 (1968). “[O]nly those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions.” *Garrison*, 379 U.S. at 74, 85 S. Ct. at 216. Even failure to utilize “readily available means for verifying the veracity of their statements” is insufficient evidence to find actual malice. *Varner v. Bryan*, 113 N.C. App. 697, 706, 440 S.E.2d 295, 301 (1994). That the defendant published with knowledge of falsity or reckless disregard must be established by clear and convincing proof. *Gaunt v. Pittaway*, 139 N.C. App. 778, 785, 534 S.E.2d 660, 665 (2000); *Hall v. Piedmont Publ’g Co.*, 46 N.C. App. 760, 764, 266 S.E.2d 397, 400 (1980).

CONTEXT OF POLITICAL SPEECH

Finally, the importance of the *context* of the *Today's Tree* ad cannot be overstated. The U.S. Supreme Court, in considering political speech, wrote: "We agree with the Court of Appeals' conclusion that the statute trenches upon an area in which the importance of First Amendment protections is 'at its zenith.'" *Meyer v. Grant*, 486 U.S. 414, 425, 108 S. Ct. 1886, 1894, 100 L. Ed. 2d 425 (1988). For that reason alone, the political speech contained in *Today's Tree* must be accorded the breathing space necessary to assure democratic, free debate.