IN THE EIGHTH CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE, AT NASHVILLE

THOMAS NATHAN LOFTIS, SR.,	)	D.C.
Plaintiff,	)	Case No. 17C-295
v.	)	Hon. Kelvin D. Jones
RANDY RAYBURN,	)	JURY DEMAND
Defendant.	)	

DEFENDANT'S MEMORANDUM IN SUPPORT OF HIS MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

I. Introduction

This is a libel action against both *The Tennessean* and its award-winning food columnist, Mr. Jim Myers, that is masquerading as a defamation and false light claim against the Defendant, Mr. Randy Rayburn. The entirety of the Plaintiff's Amended Complaint concerns statements published in a March 2, 2016 *Tennessean* article that were neither made by nor attributed to Mr. Rayburn. In fact, at no point in the relevant article is Mr. Rayburn even quoted. Further, nearly all of the statements referenced in the Plaintiff's Amended Complaint do not mention the Plaintiff, are not even alleged to be false, and, in any event, are not capable of any defamatory meaning or inference as a matter of law.

Significantly, although the Plaintiff's Amended Complaint itself is frivolous, the implications that it will carry if it is not dismissed *ab initio* are anything but. Forcing the subject of a news story to defend against an astounding $1.5 million defamation lawsuit

for the simple transgression of being *mentioned* alongside objectively innocuous coverage that the Plaintiff considers unflattering poses serious and severe risks to the viability of newsgathering in Tennessee. Thus, if permitted to move forward beyond a motion to dismiss, the Plaintiff's Amended Complaint could severely chill both constitutionally protected speech and the public's willingness to engage with the media at all.

Further still, allowing the Plaintiff's hurt feelings about a lawful termination decision made by multiple public officials[1] to be recast as a $1.5 million defamation claim against a single defendant in his individual capacity impairs two significant public policies of the State of Tennessee. First, it frustrates Tennessee's public policy that "[u]ninhibited communication with the public about governmental affairs is essential and must be protected." *Jones v. State*, 426 S.W.3d 50, 56 (Tenn. 2013). Second, it undermines public officials' "flexibility to make important decisions free from fear that they will have to defend themselves from lawsuits." *Id.*

For these reasons, and for the additional reasons provided below, the Plaintiff's Amended Complaint against Mr. Rayburn should be dismissed with prejudice.

II. Legal Standards that Apply to Resolving Defamation Claims on a Motion to Dismiss

"A motion to dismiss a complaint for failure to state a claim pursuant to Rule 12.02(6) of the Tennessee Rules of Civil Procedure asserts that the allegations in the complaint, accepted as true, fail to establish a cause of action for which relief can be granted." *Conley v. State*, 141 S.W.3d 591, 594 (Tenn. 2004). Such a motion is resolved by examining the pleadings alone. *See Legett v. Duke Energy Corp.*, 308 S.W.3d 843,

[1] *See* Plaintiff's Amended Complaint, ¶¶ 9–11.

851 (Tenn. 2010). Where, as here, it "appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief," a defendant's motion to dismiss must be granted. *Crews v. Buckman Labs. Int'l, Inc.*, 78 S.W.3d 852, 857 (Tenn. 2002).

With respect to defamation cases specifically, the Tennessee Supreme Court has recognized that "the Supreme Court of the United States has constitutionalized the law of libel and [defamation]." *Press, Inc. v. Verran*, 569 S.W.2d 435, 440 (Tenn. 1978). *See also N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). As a consequence, defamation claims present several threshold and outcome-determinative questions of law that do not require any deference to a plaintiff's own characterizations of the statements at issue. *See, e.g., Moman v. M.M. Corp.*, No. 02A01-9608-CV00182, 1997 WL 167210, at *3 (Tenn. Ct. App. Apr. 10, 1997) ("If the [allegedly defamatory] words are not reasonably capable of the meaning the plaintiff ascribes to them, the court must disregard the latter interpretation."). *See also Brown v. Mapco Express, Inc.*, 393 S.W.3d 696, 708 (Tenn. Ct. App. 2012); *McWhorter v. Barre*, 132 S.W.3d 354, 364 (Tenn. Ct. App. 2003). Accordingly, "ensuring that defamation actions proceed only upon statements which may actually defame a plaintiff is an essential gatekeeping function of the court." *Pendleton v. Newsome*, 772 S.E.2d 759, 763 (Va. 2015) (internal quotation omitted).

With this essential gatekeeping function in mind, both our Court of Appeals and our Supreme Court have instructed that in defamation cases, "**the issue of whether a communication is capable of conveying a defamatory meaning is a question of law for the court to decide in the first instance** . . . ." *Brown*, 393 S.W.3d at 708 (emphasis added). *See also Aegis Scis. Corp. v. Zelenik*, No. M2012-00898-COA-R3CV, 2013 WL 175807, at *6 (Tenn. Ct. App. Jan. 16, 2013) (quoting *Revis v. McClean*, 31

S.W.3d 250, 253 (Tenn. Ct. App. 2000) ("[T]he preliminary question of whether a statement 'is capable of conveying a defamatory meaning' presents a question of law."); *McWhorter*, 132 S.W.3d at 364 (quoting *Memphis Publ'g Co. v. Nichols*, 569 S.W.2d 412, 419 (Tenn. 1978)) ("The question of whether [a statement] was understood by its readers as defamatory is a question for the jury, but the preliminary determination of whether [a statement] is '*capable* of being so understood is a question of law to be determined by the court.'"). If an allegedly defamatory statement is *not* capable of being understood as defamatory as a matter of law, then it must be dismissed for failure to state a claim. *Id.* *See also Riley v. Reagan*, Davidson County Circuit Court Case No. 2016-CV-479 (2016) (granting defendant's motion to dismiss defamation claim that failed as a matter of law).

Further still, Tennessee courts have adopted several categorical bars that prevent claimed defamations from being actionable, at least three of which independently control this case:

First, to provide substantial breathing room to promote free speech, unfettered communication, and commentary on issues of public importance, our courts have held that statements that are merely "annoying, offensive or embarrassing" are not actionable. *Davis v. Covenant Presbyterian Church of Nashville*, No. M2014-02400-COA-R9-CV, 2015 WL 5766685, at *3 (Tenn. Ct. App. Sept. 30, 2015), *appeal denied* (Feb. 18, 2016). Instead, "[f]or a communication to be libelous [or defamatory], it must constitute a serious threat to the plaintiff's reputation. A libel [or defamation] does not occur simply because the subject of a publication finds the publication annoying, offensive or embarrassing. The words must reasonably be construable as holding the plaintiff up to public hatred, contempt or ridicule. They must carry with them an element 'of disgrace.'" *Id.* (quoting *Davis v. The Tennessean*, 83 S.W.3d 125 (Tenn. Ct. App. 2001)).

Second, to encourage the free exchange of ideas and avoid chilling public commentary, our courts have held that "comments upon true and nondefamatory published facts are not actionable, 'even though [the comments] are stated in strong or abusive terms.'" *Id.* (quoting *Stones River Motors, Inc. v. Mid–South Publ'g Co., Inc.*, 651 S.W.2d 713, 720 (Tenn. Ct. App. 1983)). Our Court of Appeals has also recognized that this prohibition against liability has "been given constitutional protection under the First Amendment by the United States Supreme Court." *Moman*, 1997 WL 167210, at *4 (citing *Greenbelt Coop. Publ'g Ass'n. v. Bresler*, 398 U.S. 6 (1970)).

Third, our courts have held that opinions have constitutional protection under the First Amendment. *Stones River Motors*, 651 S.W.2d at 722. As a result, "an opinion is not actionable as libel unless it implies the existence of unstated defamatory facts." *Id.*

Based on the threshold questions of law that apply to defamation claims and these three categorical proscriptions against defamation liability, none of the statements underlying Plaintiff's defamation claim is capable of a defamatory meaning as a matter of law. Accordingly, Plaintiff's Amended Complaint must be dismissed with prejudice in its entirety.

III. Statements that the Plaintiff Insists Are Tortious, and Fatal Defects in Plaintiff's Allegations

The Plaintiff's Amended Complaint is premised in full upon the March 2, 2016 *Tennessean* article attached hereto as **Exhibit A** (hereinafter, "the Article"). Construing the Plaintiff's Amended Complaint liberally, the following sentences from the Article appear to represent the full universe of statements that the Plaintiff insists are tortious:

> **Statement #1**. "Rayburn recognized [the need for qualified line cooks in Nashville] every day in his kitchens at the old Sunset Grill, Midtown Cafe and

Cabana, so he decided to do something about it by dedicating himself to helping build the culinary arts program at what used to be called Nashville Tech."[2]

Statement #2. "Rayburn will tell you [that helping build the culinary arts program at Nashville Tech] hasn't been easy."[3]

Statement #3. "When [Rayburn] enlisted the help of local restaurateurs and chefs to offer feedback on the program and the quality of its graduates, the reports he got back weren't flattering."[4]

Statements #4-#5. "[**#4**] Myers then wrote: 'they started by cleaning house from the top by removing director Tom Loftis. It was a politically inexpedient move last year since Loftis was the brother-in-law of Bill Freeman who was running for mayor at the time. [**#5**] If the election had gone a different way, it might have affected funding for the school.'"[5]

IV. Threshold Elements of Defamation by Implication/False Light Claims

The Plaintiff advances two overlapping theories of liability based on the above-described statements: (1) a defamation by implication claim, and (2) a false light claim. Defamation by implication is a subset of defamation that carries all of its elements. *See Grant v. Commercial Appeal*, No. W201500208COAR3CV, 2015 WL 5772524, at *12 (Tenn. Ct. App. Sept. 18, 2015) ("**For defamation by implication, a plaintiff must prove all elements of defamation**, including that a statement is provably false—either because it is a false statement or leaves a false impression.") (quotation omitted) (emphasis added).

Additionally, our Court of Appeals has instructed that "there is significant and substantial overlap between false light and defamation." *See Eisenstein v. WTVF-TV, News Channel 5 Network, LLC*, 389 S.W.3d 313, 318 (Tenn. Ct. App. 2012) (quotation omitted). Thus, the tort of false light invasion of privacy carries nearly identical elements

[2] *See* Plaintiff's Amended Complaint, ¶ 14.
[3] *See* Plaintiff's Amended Complaint, ¶ 15.
[4] *See* Plaintiff's Amended Complaint, ¶ 15.
[5] *See* Plaintiff's Amended Complaint, ¶ 17.

to defamation, requiring a Plaintiff to prove that: [1] a defendant gave publicity, [2] to a matter concerning the plaintiff, [3] that placed the plaintiff in a false light [4] that would be highly offensive to a reasonable person, and [5] that the defendant acted with reckless disregard to the falsity of the publicized matter. *See West v. Media Gen. Convergence, Inc.*, 53 S.W.3d 640, 643–44 (Tenn. 2001) (adopting modified Second Restatement elements of false light). The Tennessee Supreme Court has also instructed that a plaintiff "must [6] specifically plead and prove damages allegedly suffered from the invasion of their privacy." *Id.* at 648.

Given the overlapping nature of defamation and false light claims and their shared elements, the instant motion to dismiss does not distinguish between them. And because, as noted, "the Supreme Court of the United States has constitutionalized the law of libel and [defamation]," *Verran*, 569 S.W.2d at 440, any statement that is protected by the First Amendment cannot be considered tortious under either theory of liability, either.

"[I]n order to establish a prima facie case of defamation a plaintiff must establish that the defendant communicated defamatory matter to a third person with knowledge of its falsity or defamatory nature to the plaintiff, reckless disregard for the truth of the statement, or negligence in failing to ascertain the truth of the statement." *Steele v. Ritz*, No. W2008-02125-COA-R3-CV, 2009 WL 4825183, at *2 (Tenn. Ct. App. Dec. 16, 2009). Tennessee's Civil Pattern Jury Instructions break this definition into seven essential elements that, for purposes of this motion, are materially indistinguishable from false light claims. Specifically:

"To recover damages for defamation, a plaintiff must prove:

> 1. That the defendant communicated a statement that referred to the plaintiff; and

2. That the statement was made to persons other than the plaintiff; and

3. That the statement was defamatory; and

4. That the statement was read or heard by [persons] who understood its defamatory meaning and that it referred to the plaintiff; and

5. That the defendant was negligent or acted recklessly in failing to determine if the statement was true before communicating it, or that the defendant knew the statement was false before communicating it; and

6. That the plaintiff was injured by the communication of the statement; and

7. That the statement referring to the plaintiff was false."[6]

Critically, none of the statements that Plaintiff insists are tortious can satisfy all of these essential elements—or even most of them. The Plaintiff's Amended Complaint fails to state a legally cognizable claim for relief as a result.

V. Plaintiff's Amended Complaint Fails to State Any Claim of Defamation as a Matter of Law

The Plaintiff insists that the following five statements are defamatory:

> **Statement #1**. "Rayburn recognized [the need for qualified line cooks in Nashville] every day in his kitchens at the old Sunset Grill, Midtown Cafe and Cabana, so he decided to do something about it by dedicating himself to helping build the culinary arts program at what used to be called Nashville Tech."[7]
>
> **Statement #2**. "Rayburn will tell you [that helping build the culinary arts program at Nashville Tech] hasn't been easy."[8]
>
> **Statement #3**. When [Rayburn] enlisted the help of local restaurateurs and chefs to offer feedback on the program and the quality of its graduates, the reports he got back weren't flattering."[9]

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[6] T.P.I.—CIVIL7.02 Ordinary (Non-privileged) Defamation, 8 Tenn. Prac. Pattern Jury Instr. T.P.I.-Civil 7.02 (2016 ed.). *Also* see *generally Brown v. Mapco Express, Inc.*, 393 S.W.3d 696, 708 (Tenn. Ct. App. 2012).

[7] *See* Plaintiff's Amended Complaint, ¶ 14.

[8] *See* Plaintiff's Amended Complaint, ¶ 15.

[9] *See* Plaintiff's Amended Complaint, ¶ 15.

> **Statements #4-#5.** "[#4] Myers then wrote: 'they started by cleaning house from the top by removing director Tom Loftis. It was a politically inexpedient move last year since Loftis was the brother-in-law of Bill Freeman who was running for mayor at the time. [#5] If the election had gone a different way, it might have affected funding for the school.'"[10]

Because none of these statements satisfies all of the necessary elements of defamation, however, the Plaintiff's claims must all be dismissed for failure to state a claim as a matter of law.

Specifically, although the Plaintiff imputes nefarious intent to Statements #1-#3, these statements contain at least six (6) fatal defects that render them unable to state a claim for defamation as a matter of law. In particular, these first three statements: (1) do not quote Mr. Rayburn and are not attributed to him; (2) do not concern or reference the Plaintiff (much less defame him); (3) are not capable of any defamatory meaning or inference as a matter of law, (4) were not communicated either recklessly or negligently; (5) did not injure Plaintiff; and (6) are not false (and, in fact, the Plaintiff does not even contend otherwise).

Similarly, the Plaintiff's allegation that Statements #4-#5 are tortious cannot survive a motion to dismiss, either, given that these statements: (1) are not attributed to Mr. Rayburn even by the Plaintiff (who specifically attributes them to "Myers" and "the article"[11]); (2) contain a true—and admitted—assertion of fact regarding Plaintiff's termination; (3) reflect a non-actionable opinion of the statement's author which is not capable of being proven false due to its hypothetical and prospective nature; (4) are not capable of any defamatory meaning or inference regarding the Plaintiff; (5) were not recklessly or negligently made; and (6) are not false.

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[10] *See* Plaintiff's Amended Complaint, ¶ 17.
[11] *See* Plaintiff's Amended Complaint, ¶¶ 17 & 19.

Further, even if any of the Plaintiff's claims satisfied all (or even most) of the required elements of defamation—and they do not—the Plaintiff's claims would still be subject to dismissal with prejudice because:

(1) the Defendant is immune from the Plaintiff's defamation claims, which reflect commentary in the Defendant's official capacity as a public official; and

(2) the one-year statute of limitations has long since expired on these claims pursuant to the single publication rule.

1. Statements #1-#5 were not communicated by Mr. Rayburn.

As a threshold matter, the Article that forms the basis of Plaintiff's Amended Complaint indicates that Statements #1-#5 were not communicated by Mr. Rayburn. This fatal omission alone justifies dismissal of the Plaintiff's entire Complaint and pretermits all other issues raised in the instant motion. *See Steele*, 2009 WL 4825183 at *2 ("A plaintiff must . . . allege and prove that *the defaming party* communicated a false or defamatory statement concerning the plaintiff.") (emphasis added). The Article at issue does not quote Mr. Rayburn, and it does not attribute any of the statements that form the basis of Plaintiff's Amended Complaint to him. *See* Exhibit A. Mr. Rayburn was also neither the Article's author nor its publisher.

Of particular note, even the Plaintiff does not seriously attribute the allegedly offending statements to Mr. Rayburn. Instead, the Plaintiff complains repeatedly that the statements that form the basis for this lawsuit were attributable to "The Tennessean," "the article," "Jim Myers, "Mr. Myers," or "Myers." *See, e.g.*, Plaintiff's Amended Complaint, ¶ 12 (stating that "The Tennessean published an article . . . under the byline of Jim Myers."); ¶ 13 (stating that "Mr. Myers" is the person who "wrote" the statement at issue, and attributing subsequent statements to "[t]he article"); ¶ 14 (noting that the referenced

statement was made "according to Myers"); ¶ 17 (noting that "Myers then wrote" the statements designated above as Statements #4-#5) ¶ 19 (stating that "[t]he article inexplicably referred to" the statements designated above as Statements #4-#5). *See also* Cause of Action I (complaining about "[t]he tenor of the article").

Thus, any reading of the Article at issue reflects that the statements that form the basis of this lawsuit were written by Jim Myers, *The Tennessean*'s award-winning food journalist, and then published by *The Tennessean* itself—without a single statement in the Article either quoting Mr. Rayburn or even being attributed to him. However, because the Plaintiff's claim for defamation requires him to prove that *Mr. Rayburn*—and not some other person—"communicated a false or defamatory statement concerning the plaintiff," *Steele*, 2009 WL 4825183 at *2, the Plaintiff's Amended Complaint categorically fails to state any claim for defamation as a matter of law. *Conley v. State*, 141 S.W.3d 591, 594 (Tenn. 2004). As a consequence, the Plaintiff's Amended Complaint should be dismissed with prejudice in its entirety.

Attempting to address the above deficiency, it is true that the Plaintiff's Amended Complaint did add the conclusory allegation that "the words in the article were spoken by Randy Rayburn."[12] However, the rest of the Plaintiff's Amended Complaint—which, as noted, directly attributes the Article's statements to Jim Myers, who is its actual author—irreconcilably conflicts with this allegation. Further, the Article itself—which is incorporated into the Plaintiff's Amended Complaint, and which this Court may thus consider independently of the Plaintiff's characterizations—demonstrates this allegation to be false as a matter of objective reality. *See* Exhibit A. "[A]llegations that are

[12] *See* Plaintiff's Amended Complaint, ¶ 12.

sufficiently fantastic to defy reality as we know it" are not entitled to factual deference even at the motion to dismiss stage. *Harris v. LNV Corp.*, No. 3-12-0552, 2014 WL 3015293, at *5 (M.D. Tenn. July 2, 2014). The Plaintiff's Amended Complaint may safely be dismissed accordingly.

2. Statements #1-#3 and Statement #5 did not concern Plaintiff.

A second threshold requirement of any defamation claim is that an allegedly defamatory statement must "refer[] to the plaintiff," rather than referring to somebody else. *See* 8 Tenn. Prac. Pattern Jury Instr. T.P.I.-Civil 7.02 (2016 ed.). As our Court of Appeals explained in *Steele*:

> As an essential element of a cause of action for defamation, the plaintiffs must prove a false and defamatory statement *concerning another*. Otherwise stated at common law, one of the required elements of proof was the "colloquium," a showing that the language was directed to or concerning *the charging party*. The burden of proving this element of the cause of action is on the plaintiff.

2009 WL 4825183, at *3 (partial emphasis in original) (quoting *Stones River Motors, Inc.*, 651 S.W.2d at 717).

In the instant case, Statements #1-#3 do not refer to the Plaintiff at all. Nor do they imply any reference to the Plaintiff or concern him in any way. In fact, the Plaintiff had not even been *mentioned* in the Article when these statements were made, evidencing the reality that no reasonable reader would or even could construe them as having referred to the Plaintiff. *See* Exhibit A. Thus, the Plaintiff's assertions that these statements defamed him is unsupportable on its face, because the statements do not refer to him or even concern him.

Importantly, Statement #5—"If the election had gone a different way, it might have affected funding for the school"—also does not refer to the Plaintiff. Instead, the subject

of this sentence is plainly the Plaintiff's brother-in-law Bill Freeman, who is not a party to this action. The Plaintiff cannot assert defamation claims on his brother-in-law's behalf, and as a consequence, this statement cannot form the basis of any defamation claim filed by the Plaintiff, either. Accordingly, Plaintiff's claims premised upon Statement #5 fail to state a claim for relief as a matter of law as well. *See id.*

3. Statements #1-#5 are not capable of any defamatory meaning as a matter of law.

A. *Whether a statement is capable of a defamatory meaning is a question of law to be decided by this Court without any deference to the Plaintiff's characterizations.*

To state a claim for defamation, it goes without saying that a statement must be capable of conveying a defamatory meaning. Crucially, "whether a communication is capable of conveying a defamatory meaning is a question of law for the court to decide in the first instance . . . ." *Brown*, 393 S.W.3d at 708. *See also Aegis Scis. Corp.*, 2013 WL 175807, at *6 (quoting *Revis*, 31 S.W.3d at 253) ("[T]he preliminary question of whether a statement 'is capable of conveying a defamatory meaning' presents a question of law."); *McWhorter*, 132 S.W.3d at 364 (quoting *Memphis Publ'g Co.*, 569 S.W.2d at 419 (Tenn. 1978) ("The question of whether [a statement] was understood by its readers as defamatory is a question for the jury, but the preliminary determination of whether [a statement] is '*capable* of being so understood is a question of law to be determined by the court.'"). Consequently, Plaintiff's contentions that the referenced statements are reasonably capable of conveying a defamatory meaning **represent questions of law that must be decided by this Court without any deference to the manner in which the Plaintiff characterizes them**. *See Brown*, 393 S.W.3d at 708–09 ("The issue of whether a communication is capable of conveying a defamatory meaning is a question of law for the court to decide in the first instance . . . . To make this

determination, courts 'must look to the words themselves and are not bound by the plaintiff's interpretation of them.'"); *Moman*, 1997 WL 167210, at *3 ("If the words are not reasonably capable of the meaning the plaintiff ascribes to them, the court must disregard the latter interpretation."). *See also Riley v. Reagan*, Davidson County Circuit Court Case No. 2016-CV-479 (2016), at 10–11 ("This Court is not bound by [the Plaintiff's] interpretation of the posts."). Additionally, every statement that the Plaintiff insists is defamatory "should be read as a person of ordinary intelligence would understand it in light of the surrounding circumstances." *Aegis Scis. Corp.*, 2013 WL 175807, at *6 (quoting *Revis*, 31 S.W.3d at 253).

Importantly, to avoid frivolous litigation over non-actionable statements that a Plaintiff merely finds "annoying, offensive or embarrassing," a statement must also clear a high bar of contemptuousness before it can legally be deemed capable of conveying a defamatory meaning. *See Davis*, 2015 WL 5766685, at *3. Specifically, "[f]or a communication to be libelous [or defamatory], it must constitute a serious threat to the plaintiff's reputation. A libel [or defamation] does not occur simply because the subject of a publication finds the publication annoying, offensive or embarrassing. The words must *reasonably be construable as holding the plaintiff up to public hatred, contempt or ridicule*. They must carry with them an element 'of disgrace." *Id.* (quotation omitted). *See also* T.P.I.—CIVIL, 7.01 "Defamation" Defined, 8 Tenn. Prac. Pattern Jury Instr. T.P.I.-Civil 7.01 (2016 ed.) (defining a statement as "defamatory" when it "exposes [a] person to wrath, public hatred, contempt, or ridicule, or deprives that person of the benefits of public confidence or social interaction"). Further, neither commentary upon true, published facts nor the expression of a mere opinion is actionable in tort. *See, e.g., Davis*, 2015 WL 5766685, at *3 (quoting *Stones River Motors, Inc.*, 651 S.W.2d at 720)

("[C]omments upon true and nondefamatory published facts are not actionable, 'even though the comments are stated in strong or abusive terms.'"); *Stones River Motors*, 651 S.W.2d at 722.

For the reasons provided in the following subsection, none of the statements that form the basis of Plaintiff's Amended Complaint comes anywhere close to clearing these hurdles. As such, they all fail to state a claim for defamation as a matter of law.

B. *As a matter of law, none of the Statements in the Article is capable of a defamatory meaning.*

Even construed liberally, Statements #1-#3 represent innocuous descriptions of Nashville's culinary scene and Mr. Rayburn's successful efforts to improve it. Accordingly, they are not reasonably susceptible to any defamatory construction. Additionally, whether Nashville had a "need for qualified line cooks" (Statement #1); whether building Nashville State's culinary arts program "had[n]'t been easy" for Mr. Rayburn (Statement #2); and whether the feedback that Mr. Rayburn had received about the program hadn't been "flattering" represent mere opinions of their author, which independently precludes these statements from being actionable. *See Davis*, 2015 WL 5766685, at *3. As such, any claim based upon these statements must be dismissed for failure to state a claim as a matter of law. *See, e.g., McWhorter*, 132 S.W.3d at 364 ("[T]he preliminary determination of whether [a statement] is '*capable* of being [understood as defamatory] is a question of law to be determined by the court.'").

The profound unreasonableness of the Plaintiff's contention that the statements in the Article imply defamatory facts about him is perhaps best highlighted by the allegation presented in paragraph 14 of the Plaintiff's Amended Complaint, which the instant motion refers to as Statement #1. To the reasonable reader, the innocuous statement that:

"Rayburn recognized [the need for qualified line cooks in Nashville] every day in his kitchens at the old Sunset Grill, Midtown Cafe and Cabana, so he decided to do something about it by dedicating himself to helping build the culinary arts program at what used to be called Nashville Tech" would simply imply what it says: that Mr. Rayburn, a successful restaurateur in town, recognized the need for more quality line cooks in Nashville and sought to improve the culinary community by offering his professional assistance. To the Plaintiff, however, this statement carries a downright insidious implication; according to his Complaint, "these words . . . portray Rayburn as the savior of culinary arts from the incompetence of the Plaintiff."[13]

The fact that the supposedly offending statement does not even mention the Plaintiff and never comes close to using the word "incompetence"—not to mention the fact that the Plaintiff had not even been mentioned in the Article to that point at all—is apparently of no moment. According to the Plaintiff, "even though that statement was not literally made," "[w]hen read and construed in the sense in which a reader would ordinarily understand it, the clear implication was that any failure of a restaurant employee who had attended the school was the fault of Plaintiff."[14]

This assertion is ridiculous. No reasonable reader would impute the meaning that the Plaintiff suggests. In fact, is not even clear than an unreasonable reader could do so, given that the Plaintiff had not even come up in the Article by the time this statement was made. The Plaintiff's claims premised upon Statement #1 fail accordingly. *See Aegis Scis. Corp.*, 2013 WL 175807, at *6 (instructing that an allegedly defamatory statement "should be read as a person of ordinary intelligence would understand it in light of the

[13] *See* Plaintiff's Amended Complaint, ¶ 14.
[14] Plaintiff's Amended Complaint, pp. 6–7.

surrounding circumstances"). *See also Brown*, 393 S.W.3d at 708–09 (instructing that "courts 'must look to the words themselves and are not bound by the plaintiff's interpretation of them'"). Moreover, even if the Article *had* referred to the Plaintiff as "incompetent"—something that, as a matter of reality, it decidedly did not do—court after court has held that calling someone "incompetent" represents a a constitutionally protected opinion ***that can never be actionable as defamation.***[15] Consequently, any claim premised upon Plaintiff's supposedly implied "incompetence" cannot lawfully form the basis for liability, either.

Statement #2 (indicating that building a culinary arts program is not easy) and Statement #3 (stating that Mr. Rayburn received unflattering reports) fare no better. Once again, these statements are not about the Plaintiff, and they also do not even so much as mention him—rendering any claimed defamatory implications about the Plaintiff imaginary. At best, even when construed liberally, these statements imply little more than the speaker's negative opinion about *line cooks*. This implication also makes perfect sense in context, given that line cooks are the actual subject of the Article in question. Helpfully, the Article even begins with the lede: "A restaurant is only as good as the team in the kitchen. It doesn't matter how talented the chef is, how steeped in

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[15] *See, e.g., Am. Heritage Capital, LP v. Gonzalez*, 436 S.W.3d 865, 876 (Tex. App. 2014) ("a statement expressly calling someone incompetent is a nonactionable statement of opinion."); *Hopewell v. Vitullo*, 299 Ill. App. 3d 513, 520 (1998) ("'[F]ired because of incompetence' is nonactionable opinion. First, the statement does not have a precise and readily understood meaning. Regardless of the fact that "incompetent" is an easily understood term, its broad scope renders it lacking the necessary detail for it to have a precise and readily understood meaning. There are numerous reasons why one might conclude that another is incompetent; one person's idea of when one reaches the threshold of incompetence will vary from the next person's."); *Einhorn v. LaChance*, 823 S.W.2d 405, 412 (Tex. App. 1992) ("References to appellants as incompetent . . . are assertions of pure opinion. These terms of derision, considered in context and in light of the EMS debate are not capable of proof one way or the other. Therefore, as to each of these statements, the absolute constitutional privilege applies."); *Ollman v. Evans*, 750 F.2d 970, 981 (D.C. Cir. 1984) (favorably citing precedent that "concluded that the term 'incompetent' as applied to a judge was too vague to support a claim of libel."); *Robertson v. Sw. Bell Yellow Pages, Inc.*, 190 S.W.3d 899, 903 (Tex. App. 2006) ("a statement implying a coworker is incompetent is not a statement of fact, but rather a nonactionable opinion.").

hospitality the waitstaff is or how beautiful the décor. It starts and ends on the cooking line." *See* Exhibit A. Thus, the Plaintiff's claims premised upon Statements #2 and #3 are not reasonably susceptible to any defamatory meaning, either. *See McWhorter*, 132 S.W.3d at 364.

Statement #4—referencing Plaintiff's termination—also cannot reasonably be construed as having held the Plaintiff "up to public hatred, contempt or ridicule," or "carr[ied] with [it] an element 'of disgrace.'" *Davis*, 2015 WL 5766685, at *3. The beginning of this statement simply states—accurately—that the public entity at issue "started by cleaning house from the top by removing director Tom Loftis."[16] Given the public nature of the proceedings involved, Plaintiff's termination was a matter of public record, and it had also been so for more than a full year by the time Mr. Myers' Article was published. Because "comments upon true and nondefamatory published facts are not actionable," however, this commentary is properly subject to a motion to dismiss as well. *Davis*, 2015 WL 5766685, at *3 (quoting *Stones River Motors, Inc.*, 651 S.W.2d at 720).

The latter portion of Statement #4—that terminating the Plaintiff's contract "was a politically inexpedient move last year since Loftis was the brother-in-law of Bill Freeman who was running for mayor at the time"[17]—also is not reasonably capable of any defamatory meaning. By any reading, whether an official decision was "a politically inexpedient move" represents nothing more than the opinion of the statement's author. Because it is blackletter law that "opinions have constitutional protection under the First Amendment" and that "an opinion is not actionable as libel [or defamation] unless it

[16] *See* Plaintiff's Amended Complaint, ¶ 17.
[17] *See* Plaintiff's Amended Complaint, ¶ 17.

implies the existence of unstated defamatory facts," however, *Davis*, 2015 WL 5766685, at *3, this statement is not actionable, either.

Further still, as far as the opinion expressed in the balance of Statement #4 is concerned, no defamatory facts about *the Plaintiff* are stated or implied, either. It is similarly unclear how any characterization of something as "a politically inexpedient move" could have held the Plaintiff "up to public hatred, contempt or ridicule," or "carr[ied] with [it] an element of disgrace.'" *Id.* Simply put: this statement is not capable of any defamatory meaning, and it is not actionable as a result.

Next, Statement #5—"If the election had gone a different way, it might have affected funding for the school"[18]—also does not imply anything defamatory about the Plaintiff. This inevitable conclusion is largely attributable to the fact that—as noted previously—*this statement is not about the Plaintiff* and does not imply anything about him whatsoever. Instead, the subject of this statement is rather clearly the Plaintiff's brother-in-law, former mayoral candidate Bill Freeman. As such, the reader is left to wonder how Statement #5's commentary on Mr. Freeman's hypothetical future decisions as Mayor could even theoretically have affected *the Plaintiff*'s reputation. Consequently, to the extent that this statement can be read to imply something contemptuous at all—itself a highly dubious proposition—the Plaintiff is not the subject of it. The Plaintiff also cannot assert defamation on behalf of his brother-in-law, who is not a party to this action. Consequently, the Plaintiff's defamation claim based upon Statement #5 fails.

Additionally, whether a future event "might have" happened "if the [2015 Mayoral] election had gone a different way" represents a mere opinion of the statement's author

[18] *See* Plaintiff's Amended Complaint, ¶ 17.

that is not legally actionable. *See Davis*, 2015 WL 5766685, at *3. To be considered defamatory, "a question must be reasonably read as an assertion of false fact[.]" *Grant v. Commercial Appeal*, No. W2015-00208-COA-R3-CV, 2015 WL 5772524, at *11 (Tenn. Ct. App. Sept. 18, 2015). This conclusion emanates from a long line of U.S. Supreme Court jurisprudence that has constitutionalized the inquiry. *See Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) ("[T]he *Bresler–Letter Carriers–Falwell* line of cases provides protection for statements that cannot 'reasonably [be] interpreted as stating actual facts' about an individual. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988). This provides assurance that public debate will not suffer for lack of 'imaginative expression' or the 'rhetorical hyperbole' [that] has traditionally added much to the discourse of our Nation. *See id.* at 53–55."). Because predictive commentary on a hypothetical future event that did not transpire is not an assertion of fact, however, Statement #5 is not capable of conveying a defamatory meaning as a matter of law.

Relying on *Milkovich*, its predecessors, and its progeny, myriad courts confronting similar claims have recognized that **hypothetical statements about future events like Statement #5 are never actionable as defamation**. *See, e.g., Oracle USA, Inc. v. Rimini St., Inc.*, No. 2:10-CV-00106-LRH-PA, 2010 WL 4386957, at *3 (D. Nev. Oct. 29, 2010) ("[Defendant's] statements are predictions of the future that could not be proven true or false at the time the statements were made. Therefore, these statements are not defamatory. Accordingly, the court will grant [the defendant's] motion to dismiss as to these allegations of defamation."); *Pillar Panama, S.A. v. DeLape*, No. CIV.A. H-07-1922, 2008 WL 1777237, at *2 (S.D. Tex. Apr. 16, 2008) ("Observations and guesses about another's intentions are not facts; a listener knows that the speaker is speculating, making reliance unreasonable. They are also statements about future potential, making them not

facts but predictions."); *Ulichny v. Merton Cmty. Sch. Dist.*, 93 F. Supp. 2d 1011, 1036 (E.D. Wis. 2000), *aff'd*, 249 F.3d 686 (7th Cir. 2001) ("[T]he predictions regarding what the Board might do in the future with respect to Ulichny's job duties were—as predictions—nothing more than opinions. They did not communicate a false statement of present fact."); *S. Middlesex Opportunity Council, Inc. v. Town of Framingham*, 752 F. Supp. 2d 85, 120 (D. Mass. 2010) ("Because Orr's statement is unambiguously an expression of opinion about a future event, he cannot be held liable for defamation as to this statement."); *Uline, Inc. v. JIT Packaging, Inc.*, 437 F. Supp. 2d 793, 803 (N.D. Ill. 2006) (holding that "a prediction of future events can neither be true nor false," and "is therefore not actionable as defamation"); *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993) (citing *Milkovich*, 497 U.S. at 17–*21*) ("[I]f it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable."); *Rockgate Mgmt. Co. v. CGU Ins./PG Ins. Co. of N.Y.*, 88 P.3d 798, 806 (Kan. 2004) ("Unlike a statement of fact, a purely hypothetical statement may be incapable of proof of truth or falsity without probing the mind of the communicator."); *Caplan v. Winslett*, 218 A.D.2d 148, 151 (N.Y. 1996) (same).

The Plaintiff's Amended Complaint fits neatly within this long line of jurisprudence dismissing defamation lawsuits that are based on predictive commentary. *See id.* Thus, notwithstanding Plaintiff's own (unreasonable) interpretation of Statement #5, this statement is not capable of being proven false, and it cannot be defamatory as a matter of law.

4. None of the statements complained of were made with either reckless or negligent disregard for their supposed falsity.

"Regardless of which party must ultimately prove falsity, any defamation plaintiff must allege it." *Clark v. Viacom Int'l Inc.*, 617 F. App'x 495, 509 (6th Cir. 2015) (internal citation omitted). "In this unusual case," however, the Plaintiff has "failed to do so." *Id.*

A careful review of Plaintiff's Amended Complaint betrays another important omission: The Plaintiff does not even *allege* that the bulk of the supposedly offending statements are false—much less claim that they were made with reckless (or negligent) disregard for their falsity. Significantly, the Plaintiff, a former government official, is at least a limited purpose public figure for purposes of this action—although he wrongly insists that this Court must hold otherwise.[19] Further still, the statements at issue in the Article reflect commentary on government action, and as a result, they are matters of public concern subject to heightened constitutional protection. *See, e.g., Milkovich*, 497 U.S. at 19.

However, even assuming, *arguendo*, that the Plaintiff were not a public figure and that the statements at issue addressed purely private matters, the Plaintiff's claims would still have to be dismissed outright because he fails even to *allege* that four of the five statements underlying this lawsuit are false (and he actually admits in his own Complaint that two of them are true). As for Statement #5—that terminating Mr. Loftis "might have" affected funding for the school if his brother-in-law had been elected Mayor—this statement could not have been made with any level of disregard for its falsity, either,

[19] The Plaintiff has previously asserted—wrongly—that the question of whether he is a public official is a question of fact entitled to deference for purposes of this motion. *See* Plaintiff's Response to Defendant's Motion to Dismiss, p. 11. Plaintiff is mistaken. *See Lewis v. NewsChannel 5 Network, L.P.*, 238 S.W.3d 270, 283 (Tenn. Ct. App. 2007) ("the determination concerning whether the plaintiff is a public figure is a question of law") (citations omitted). Consequently, notwithstanding the allegation contained in ¶ 21 of his Complaint, whether the Plaintiff's public employment and the prior discussions of his termination—which he affirmatively admits in his Complaint were public—rendered him a limited purpose public official is exclusively a question of law for this Court to decide, and it is not entitled to Plaintiff's desired factual deference. *Id.*

because it is a hypothetical prediction of a future event that did not transpire which is incapable of being proven false. Moreover, given that our most recent Mayor actually did appropriate $2 million to allow Nashville State Community College to launch satellite campuses in Donelson-Hermitage and Madison,[20] the fact that claiming funding "might have" been affected is plainly true doesn't much help the Plaintiff's case, either.

With respect to Statement #1, for example, the Plaintiff never disputes that "Rayburn recognized [the need for qualified line cooks in Nashville] every day in his kitchens at the old Sunset Grill, Midtown Cafe and Cabana," or that Mr. Rayburn "decided to do something about it by dedicating himself to helping build the culinary arts program at what used to be called Nashville Tech."[21] Instead, he merely *complains* that these words constituted "self-aggrandizement," and that they intimated that Plaintiff was "incompeten[t]."[22] Although the hidden meanings that Plaintiff purports to divine from these assertions are unsupportable, any reading of the Plaintiff's Amended Complaint also reveals that he never alleges that Statement #1 is false—a fatal omission that subjects this claim to dismissal. *See Clark*, 617 F. App'x at 509.

With respect to Statement #2—that "Rayburn will tell you [that helping build the culinary arts program at Nashville Tech] hasn't been easy"[23]—the Plaintiff's Amended Complaint is similarly devoid of any claim of falsity. Nor is this innocent opinion capable

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[20] *See, e.g.*, Joey Garrison, *Mayor Dean proposes pay raise, $520M in new projects*, The Tennessean (Apr. 30, 2015), http://www.tennessean.com/story/news/politics/2015/04/30/mayor-eyes-pay-raises-building-plans-exits/26638945/ ("[Mayor Karl Dean's] plan also calls for $2 million to allow Nashville State Community College to launch planned satellite campuses in Donelson-Hermitage and Madison."). *See also* Nashville State Community College Press Release (Nov. 19, 2016), *available at* https://www.nscc.edu/press-releases/2016/new-madison-campus.

[21] *See* Plaintiff's Amended Complaint, ¶ 14.

[22] *See* Plaintiff's Amended Complaint, ¶ 14.

[23] *See* Plaintiff's Amended Complaint, ¶ 15.

of being proven false. Thus, for the same reason, this omission renders this statement subject to dismissal as well. *Id.*

As for Statement #3—that "when [Rayburn] enlisted the help of local restaurateurs and chefs to offer feedback on the program and the quality of its graduates, the reports he got back weren't flattering"[24]—the basis for the Plaintiff's claim is even less supportable. Rather than alleging that this statement was made falsely, the Plaintiff instead pleads himself that it was *true*. *See* Plaintiff's Amended Complaint, ¶ 6 (admitting that "Dean Karen Stevenson and the director from the Southeast campus claimed to have been contacted by local chefs with concerns regarding the qualifications of program graduates"). It goes without saying that Mr. Rayburn could not have made this statement with either reckless or negligent disregard for its falsity when the Plaintiff himself agrees that the statement was true. Any claim premised upon this statement must be dismissed accordingly.

Statement #4 fails for the same reason. This statement in the Article begins by stating that a "dissatisfied cadre of chefs . . . started by cleaning house from the top by removing director Tom Loftis."[25] Yet again, though, the Plaintiff not only does not *dispute* this statement—he affirmatively admits that it is *true*. *See* Plaintiff's Amended Complaint, ¶ 8 ("In March 2015, Plaintiff was informed that a decision had been made not to renew his contract at the conclusion of the academic year."). The Plaintiff also does not allege that his termination was not "politically inexpedient"—another pure and plainly protected opinion of the author that is similarly incapable of being proven false. Thus, this statement fails to state a legally cognizable claim for defamation, either.

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[24] *See* Plaintiff's Amended Complaint, ¶ 15.
[25] *See* Plaintiff's Amended Complaint, ¶ 17.

As for Statement #5—that "[i]f the election had gone a different way, it might have affected funding for the school"—the Plaintiff's Amended Complaint does, for once, allege both falsity and that the statement was known to be false.[26] As detailed in the preceding section, however, Plaintiff's problem is that **hypothetical statements about future events are never actionable as defamation**. *See, e.g., Haynes*, 8 F.3d at 1227 (citing *Milkovich*, 497 U.S. at 17–21) ("[I]f it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable."); *Oracle USA, Inc.*, 2010 WL 4386957, at *3 ("[Defendant's] statements are predictions of the future that could not be proven true or false at the time the statements were made. Therefore, these statements are not defamatory. Accordingly, the court will grant [the defendant's] motion to dismiss as to these allegations of defamation."); *Pillar*, 2008 WL 1777237, at *2 ("Observations and guesses about another's intentions are not facts; a listener knows that the speaker is speculating, making reliance unreasonable. They are also statements about future potential, making them not facts but predictions."); *Ulichny*, 93 F. Supp. 2d at 1036 ("[T]he predictions regarding what the Board might do in the future with respect to Ulichny's job duties were—as predictions—nothing more than opinions. They did not communicate a false statement of present fact."); *S. Middlesex Opportunity Council, Inc.*, 752 F. Supp. 2d at 120 ("Because Orr's statement is unambiguously an expression of opinion about a future event, he cannot be held liable for defamation as to this statement."); *Uline*, 437 F. Supp. 2d at 803 (holding that "a prediction of future events can neither be true nor false," and "is therefore not actionable as defamation"); *Caplan*,

[26] *See* Plaintiff's Amended Complaint, ¶ 20.

218 A.D.2d at 151 ("Unlike a statement of fact, a purely hypothetical statement may be incapable of proof of truth or falsity without probing the mind of the communicator."); *Rockgate Mgmt. Co.*, 88 P.3d at 806 (same).

Significantly, however, even if Statement #5 *could* be construed as a statement of fact, rather than a hypothetical prediction about a future event (and it cannot), this statement *still* would not have been made negligently. Simply stated: Intimating that running crosswise with the Mayor of Nashville "*might have* affected funding for the school"[27] is not a false statement and cannot rationally be considered one. Critically, this reality would also remain true even if the two factual allegations stated in Paragraph 20 of Plaintiff's Amended Complaint were accurate (and they are provably false).

Paragraph 20 of Plaintiff's Amended Complaint specifically alleges that: [1] "Nashville State is an institution of the State of Tennessee under the control of the Tennessee Board of Regents," and [2] "It does not receive funding from the Metropolitan Government." *See* Plaintiff's Amended Complaint, ¶ 20. Based on these two supposed facts, the Plaintiff claims—without basis—that "the election of the Mayor could therefore not have affected its budget." *Id.*

Plaintiff's first problem is that his conclusion that Nashville's Mayor "could not" have affected funding for the school does not follow from his first two assertions. For one thing, the supposed fact that the school "*does not* receive funding from the Metropolitan Government" does not remotely lend itself to the conclusion that the school "*could not*" receive funding from the Metropolitan Government at a future time under a different Mayor, as Plaintiff suggests. And because that is the one and only factual claim made in

[27] *See* Plaintiff's Amended Complaint, ¶ 17 (emphasis added).

Statement #5—that "[i]f the election had gone a different way, it might have affected funding for the school"[28]—this statement is not even conceivably false.

Of course, the fact that the school at issue actually *has* received significant funding from Metro Government also does not improve the Plaintiff's position.[29] *See, e.g.*, Joey Garrison, *Mayor Dean proposes pay raise, $520M in new projects*, The Tennessean (Apr. 30, 2015), http://www.tennessean.com/story/news/politics/2015/04/30/mayor-eyes-pay-raises-building-plans-exits/26638945/ ("[Mayor Karl Dean's] plan also calls for $2 million to allow Nashville State Community College to launch planned satellite campuses in Donelson-Hermitage and Madison."). *See also* Nashville State Community College Press Release (Nov. 19, 2016), *available at* https://www.nscc.edu/press-releases/2016/new-madison-campus ("We are grateful to all our community and elected leaders who have helped us move the project forward, especially former Mayor Karl Dean who provided the foundation for the College's Antioch Campus and asked that Madison be given the same consideration. We are fortunate to have the same level of support from Mayor Megan Berry [sic] and look forward to working with her on opening the Madison Campus and hopefully another as well so that no region of Nashville is void of access to public, higher education.").

Regardless, however, for all of these reasons, Plaintiff's Amended Complaint fails to state a claim for defamation as a matter of law.

5. Statements #1-#5 Did Not Injure Plaintiff

The Plaintiff's Amended Complaint does, at least, plead injury. Specifically, the Plaintiff alleges that "[t]he words and conduct of the Defendant caused Plaintiff great

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[28] *See* Plaintiff's Amended Complaint, ¶ 17.
[29] Metro's budget is a public record, and this Court may take judicial notice of its contents.

embarrassment, humiliation and emotional distress. As a direct consequence, Plaintiff has been unable to find comparable work in Nashville, Tennessee." *See* Plaintiff's Amended Complaint, ¶ 22.

Plaintiff's first problem with respect to his claimed injuries is that no person of ordinary intelligence would or even could interpret the Article in the way that his attorneys have construed it—rendering any supposed injury to his reputation resulting from the Article imaginary. *Aegis Scis. Corp.*, 2013 WL 175807, at *6 (holding that any allegedly defamatory statement must "be read as a person of ordinary intelligence would understand it in light of the surrounding circumstances.").

Plaintiff's second problem with respect to his claimed injuries is that no matter how liberally the Plaintiff's Amended Complaint is construed, his supposed injuries cannot even theoretically bear a connection to the statements that supposedly caused them. Statements #1-#3, for example (which do not concern Plaintiff at all), and Statement #4 (referencing Plaintiff's termination) all concern matters of public record that were in the public domain long before the Article was published. In fact, that Plaintiff himself concedes as much, noting that "Tennessean reporter Jim Myers [was] present" at the public meeting in February 2015 following which Plaintiff was terminated.[30] *See* Plaintiff's Amended Complaint, ¶ 7. Consequently, whatever injuries Plaintiff has experienced, they had been in the public domain for well over a year and could not realistically have been attributable to the Article.

As for Statement #5, it is not at all clear from the Plaintiff's Amended Complaint how a statement that concerned *Plaintiff's* brother-in-law could have affected *the*

[30] Further, with respect to Statement #4, the Plaintiff himself states that "Plaintiff chose to resign." *See* Plaintiff's Amended Complaint, ¶ 8.

Plaintiff's reputation.[31] Plaintiff's Amended Complaint suggests that this statement "impugned the integrity of Mr. Loftis as well as Mr. Freeman," *see* Plaintiff's Amended Complaint, ¶ 20, but it does not offer any clues as to why or how. The only plausible explanation is that Plaintiff has inferred some meaning from this statement that would not have been understood by any reasonable member of the public, *contra Aegis Scis. Corp.*, 2013 WL 175807, at *6 (holding that a statement alleged to be defamatory "should be read as a person of ordinary intelligence would understand it in light of the surrounding circumstances"). Given that Statement #5 is not reasonably capable of producing the injury that Plaintiff ascribes to it, however, this allegation should be dismissed as well. *Cf. Moman*, 1997 WL 167210, at *3.

6. Statements #1-#5 Were Not False

Mr. Rayburn respectfully reincorporates the arguments presented in Sections V-3 and V-4 for purposes of this section, but he reemphasizes the following critical omissions for clarity:

First, with respect to Statement #1 (regarding the need for qualified line cooks),[32] the Plaintiff does not contend that this statement is false. Further, whether there was a need for qualified line cooks in Nashville is an opinion that is not capable of being proven false, and this statement represents mere commentary upon true and nondefamatory published facts that is not actionable.

Second, with respect to Statement #2 (regarding whether building a culinary program was easy),[33] the Plaintiff does not contend that this statement is false, either.

[31] *See* Plaintiff's Amended Complaint, ¶ 17.
[32] *See* Plaintiff's Amended Complaint, ¶ 14.
[33] *See* Plaintiff's Amended Complaint, ¶ 15.

Further, whether building the culinary arts program at Nashville Tech "ha[d]n't been easy" is an opinion that is not capable of being proven false, and this statement represents mere commentary upon true and nondefamatory published facts that also is not actionable.

Third, with respect to Statement #3 (receipt of unflattering reports),[34] the Plaintiff does not contend that this statement is false, either. The Plaintiff also affirmatively admits that this statement is true, *see* Plaintiff's Amended Complaint, ¶ 6 (pleading that: "In October, 2014, Dean Karen Stevenson and the director from the Southeast campus claimed to have been contacted by local chefs with concerns regarding the qualifications of program graduates"), and whether the reports that Mr. Rayburn received were not "flattering" represents both an opinion that is not capable of being proven false and commentary upon a true and nondefamatory published fact that similarly is not actionable.

Fourth, with respect to Statement #4 (Loftis' removal as program director),[35] the Plaintiff certainly does not contend that he was not removed as director, and, in fact, he affirmatively admits that he was so removed. *See* Plaintiff's Amended Complaint, ¶ 8 (pleading that: "In March, 2015, Plaintiff was informed that a decision had been made not to renew his contract at the conclusion of the academic year."). Further, whether the Plaintiff's removal was "a politically inexpedient move" is an opinion that is not capable of being proven false, and it also represents commentary upon a true and nondefamatory published fact that is not actionable.

[34] *See* Plaintiff's Amended Complaint, ¶ 15.
[35] *See* Plaintiff's Amended Complaint, ¶ 17.

Fifth, with respect to Statement #5 (how funding might have been affected if Bill Freeman had won the Mayoral election),[36] the contention that "[i]f the election had gone a different way, it might have affected funding for the school" is an opinion about a hypothetical future event that is not capable of being proven false; represents commentary upon a true and nondefamatory published fact; and, as noted above, is also demonstrably true.

For each of these reasons, none of the statements complained of can be proven false, and all of the statements that form the basis of Plaintiff's Amended Complaint fail to state a claim upon which relief can be granted. The Plaintiff's Amended Complaint should be dismissed with prejudice accordingly.

VI. Mr. Rayburn Is a Public Official Who Is Immune from Defamation Claims Regarding Statements Made in His Official Capacity

Claims of immunity are properly raised in a motion to dismiss. *See, e.g., Smith v. Tennessee Nat. Guard*, 387 S.W.3d 570 (Tenn. Ct. App. 2012) (affirming the grant of a defendant's Tenn. R. Civ. P. 12.02(6) motion to dismiss based on sovereign immunity). Additionally, in Tennessee, "the question of qualified immunity remains a question of law for the court to resolve." *King v. Betts*, 354 S.W.3d 691, 710 (Tenn. 2011). As such, Plaintiff's legal conclusions regarding Mr. Rayburn's status as a public official are not entitled to any deference whatsoever,[37] because "courts are not required to accept as true assertions that are merely legal arguments or 'legal conclusions' couched as facts." *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 427 (Tenn. 2011).

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[36] *See* Plaintiff's Amended Complaint, ¶ 17.
[37] *See* Plaintiff's Amended Complaint, ¶ 23.

A. *The Nashville State Community College Foundation is a Public Entity.*

As a member of the Board of Trustees of a public college foundation that is under the purview of the Tennessee Board of Regents, Mr. Rayburn is a public official with respect to his Board activities on behalf of the Nashville State Community College Foundation. The Nashville State Community College Foundation was established pursuant to Tenn. Code Ann. § 49-7-107, which provides that:

> The state university and community college system and the board of trustees of the University of Tennessee are authorized and empowered to take such steps, to enter into such agreements and to do whatever they deem necessary to the establishment of foundations for the state colleges and universities under their control.

Id.

Further, members of the Board of Trustees of the Nashville State Community College Foundation have a fiduciary responsibility to the public consistent with established Board policy, which provides that:

> Members of the Foundation Board of Trustees serve the public trust and have a clear obligation to fulfill their responsibilities in a manner consistent with this fact. All decisions of the Board are to be made with the best interests of the College, the Foundation and the public trust clearly in mind.

See **Exhibit B**.[38]

Notably, despite the Plaintiff's recently-developed protestations that Mr. Rayburn was *not* acting in his capacity as a public official (an assertion which he has previously decried as "oddly argued"), it is worth emphasizing that the Plaintiff previously adopted the position that Mr. Rayburn *was* acting as a public official with respect to the Article at

[38] Exhibit B is a public record accessible at: https://nsccf.org/wp-content/uploads/2014/11/Foundation-Code-of-Ethics.pdf.

issue *just months before filing the instant lawsuit*. *See* **Exhibit C**. Specifically, in a demand letter to the Board of Regents, the Plaintiff stated:

> The circumstances and context of these remarks ***strongly suggest that [Mr. Rayburn] was speaking on behalf of the college, and he served on the Board at the time[.]***"

See Exhibit C (emphasis added).[39]

In this regard, the Plaintiff is correct.

B. *Public Officials Are Absolutely or Conditionally Immune from Defamation Suits.*

In *Jones v. State*, 426 S.W.3d 50, 58 (Tenn. 2013), the Tennessee Supreme Court held that "cabinet-level executive officials 'have an absolute privilege to publish defamatory matter concerning another in communications made in the performance of his official duties.'" *Id.* This holding was adopted directly from the position set forth in the Second Restatement of Torts. *See id.* at 56 ("[W]e adopt the position taken by the Restatement (Second) of Torts that cabinet-level executive officers are entitled to an absolute privilege from defamation claims arising out of comments made within the scope of their official duties."). The Court's holding also followed from the State of Tennessee's recognized and profound interests in promoting the following two public policies: (1) the premise that "[u]ninhibited communication with the public about governmental affairs is essential and must be protected," and (2) the premise that "officials must have the flexibility to make important decisions free from fear that they will have to defend themselves from lawsuits." *Id.* The Plaintiff's Amended Complaint overtly threatens

[39] Like Exhibit B, Plaintiff's letter to the Tennessee Board of Regents may properly be considered at this stage in proceedings as a public record obtained via the Tennessee Public Records Act. *See, e.g., Wyser-Pratte Mgmt. Co. v. Telxon Corp.*, 413 F.3d 553, 560 (6th Cir. 2005) ("In addition to the allegations in the complaint, [in ruling on a motion to dismiss,] the court may also consider other materials that are integral to the complaint, ***are public records***, or are otherwise appropriate for the taking of judicial notice.") (emphasis added).

these interests by indicating his desire to "punish" and "discourage" further commentary regarding the statements that gave rise to his Complaint "in the future" through the threat of—and the imposition of—a whopping one-and-one-half-million-dollar ($1,500,000.00) judgment against Mr. Rayburn. *See* Plaintiff's Amended Complaint, p. 7.

The Tennessee Supreme Court has not yet had occasion to consider whether an absolute privilege or a qualified privilege applies to public officials, like Mr. Rayburn, who are sued for statements allegedly made pursuant to their role as administrative officers. However, there is strong reason to believe that an absolute privilege would be so extended. For one thing, the two public policies described above apply with full force to public proceedings aimed—as the Plaintiff himself describes it—at providing the public with "an update on the status of [a publicly funded] program."[40] For another, the Tennessee Supreme Court has previously analogized statements made during the course of administrative proceedings to judicial and legislative proceedings, which it has already clothed with absolute privilege. *See Lambdin Funeral Serv., Inc. v. Griffith*, 559 S.W.2d 791, 792 (Tenn. 1978) ("[I]t is generally recognized that statements made in the course of a judicial proceeding that are relevant and pertinent to the issues involved are absolutely privileged and cannot be the predicate for liability in an action for libel, slander, or invasion of privacy. This absolute privilege holds true even in those situations where the statements are made maliciously and corruptly. It also holds true in administrative proceedings before boards or commissions. . . .") (internal citations omitted). And the Court has further recognized that "[t]he underlying basis for the grant of the privilege is the public's interest in and need for a judicial process free from the fear of a suit for

[40] *See* Plaintiff's Amended Complaint, ¶ 7.

damages for defamation or invasion of privacy based on statements made in the course of a judicial or quasi-judicial proceeding." *Id.*

If parties appearing before an administrative agency are protected by absolute privilege, then it stands to reason that members of that agency are similarly protected by absolute privilege for both statements made during—and subsequent commentary offered to news media about—official proceedings as well. *Id.* Even if a mere qualified privilege applied, however, the Second Restatement provides that Mr. Rayburn would still be "clothed with a conditional privilege in making a defamatory communication . . . permitted in the performance of his official duties." *Thomas v. Nicholson*, No. CIV. 51/1984, 1985 WL 1177632, at *2 (V.I. Sept. 20, 1985).

Certainly, comments made about Plaintiff during or regarding a public proceeding—at least one of which the Plaintiff himself acknowledges that "Tennessean Reporter Jim Myers [was] present" for[41]—would so qualify. *Id.* As a result, whether the privilege that Mr. Rayburn enjoys is absolute or merely conditional, Mr. Rayburn at least qualifies for immunity against defamation liability, and under the circumstances pleaded, he is immune from the claims stated in the Plaintiff's lawsuit. Plaintiff's Amended Complaint should be dismissed accordingly, and he should be awarded fees and costs pursuant to Tenn. Code Ann. § 29-20-113(d) as a result.

VII. The Statute of Limitations Has Expired On Plaintiff's Claims Pursuant to the Single Publication Rule

"Under the single publication rule, any mass communication that is made at approximately one time . . . is construed as a single publication of the statements it

[41] *See* Plaintiff's Amended Complaint, ¶ 7.

contains, thereby giving rise to only one cause of action as of the moment of initial publication, no matter how many copies are later distributed." *Clark*, 617 F. App'x at 502–03 (citing *Applewhite v. Memphis State Univ.*, 495 S.W.2d 190, 193–94 (Tenn. 1973), and Restatement (Second) of Torts § 577A, cmt. c (1977)). The statute of limitations for claims governed by the single publication rule "accrues at the time of the original publication, and that the statute of limitations runs from that date." *Applewhite*, 495 S.W.2d at 193. Additionally, "Tennessee requires that defamation claims be brought within one year after 'the date the alleged defamatory language was published.'" *Clark*, 617 F. App'x at 500 (quoting *Riley v. Dun & Bradstreet, Inc.*, 172 F.2d 303, 308 (6th Cir. 1949) and Tenn. Code § 28–3–104(a)(1)).

Tennessee has expressly adopted the single publication rule. *See Applewhite*, 495 S.W.2d at 194. Additionally, although our Supreme Court has only had occasion to do so for mass print communications such as "a book, newspaper, or magazine" to date, *id.*, the reasoning that underlies the rule applies with equal force to any mass communication, and it has been extended to other contexts by courts interpreting Tennessee law as a result. *See Clark*, 617 F. App'x at 503 ("[Plaintiffs] nevertheless assert that Tennessee would instead apply the multiple publication rule to statements that are posted to publicly accessible, online websites. We disagree. Given the policy considerations driving Tennessee's adoption of the single publication rule in the context of print-based mass communications, it would be highly unusual if Tennessee resuscitated *Duke of Brunswick*'s regime in the online context."). Thus, communications made during public meetings that are subsequently codified in publicly accessible meeting minutes logically come within the ambit of the single publication rule as well. *Id.*

The single publication rule carries profound significance in the instant case because—as the Plaintiff's own Complaint acknowledges—most of the statements that the Plaintiff claims are defamatory first reached the public domain long before the Article was published. *See, e.g.*, Plaintiff's Amended Complaint, ¶ 6 (stating that the complaints about program graduates were first aired "[i]n October 2014"); Plaintiff's Amended Complaint, ¶ 7 (describing public meeting that took place "[i]n February 2015"); Plaintiff's Amended Complaint, ¶ 8 (noting that "[i]n March, 2015, Plaintiff was informed that a decision had been made not to renew his contract . . .", and intimating that his termination was tortious because "[n]o specific reasons were given, and Mr. Loftis was given no opportunity to respond.").

Thus, based on the single publication rule, the one-year statute of limitations regarding these matters has long since elapsed. *See id.* Plaintiff's claims based upon previously communicated public statements must all be dismissed accordingly.

Conclusion

For the foregoing reasons, the Defendant's Motion to Dismiss should be **GRANTED**, and each of the claims presented in the Plaintiff's Amended Complaint should be **DISMISSED** with prejudice for failure to state a claim upon which relief can be granted. An order dismissing the instant case with prejudice should issue as a result, and Mr. Rayburn should be awarded the costs and fees associated with defending this action pursuant to Tenn. Code Ann. § 29-20-113(d).

Respectfully submitted,

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NOTICE OF HEARING ON MOTION

Unless considered on the briefs pursuant to Defendant's contemporaneous motion, a hearing on the above motion will be held on July 28, 2017, at 9:00 AM CST at the Davidson County Courthouse, 1 Public Square, Nashville, TN. Failure to appear or respond to this motion may result in this motion being granted.

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of June, 2017, a copy of the foregoing was sent via USPS, postage prepaid, and/or by email to the following:

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By: _____
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