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

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

DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Comes now Defendant Randy Rayburn, by and through undersigned counsel, and respectfully replies to the Plaintiff's Response to his Motion to Dismiss the Plaintiff's Amended Complaint. The Plaintiff misconstrues the arguments raised in Defendant's Motion to Dismiss in several significant regards, and his Response fails to overcome any of the eight (8) separate deficiencies that warrant dismissing the Plaintiff's Amended Complaint. Accordingly, for the reasons provided herein, Mr. Rayburn's Motion to Dismiss Plaintiff's Amended Complaint should be GRANTED, and Mr. Rayburn should be awarded the costs and fees that he has incurred to defend this action pursuant to Tenn. Code Ann. § 29-20-113(d).

I. Applicable Standard of Review

As a threshold matter, the Plaintiff is correct that the facts pleaded in his Amended Complaint must be taken as true for purposes of Defendant's Motion to Dismiss.[1]

[1] *See Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 426 (Tenn. 2011).

However, in defamation cases, the Plaintiff's *interpretation* of those facts enjoys no deference at all, because binding precedent dictates that "whether a communication is capable of conveying a defamatory meaning is a question of law for the court to decide in the first instance."[2] Additionally, "[t]o make this determination, courts 'must look to the words themselves and are not bound by the plaintiff's interpretation of them.'"[3] Of note, "[t]he facts pleaded, and the inferences reasonably drawn from these facts, must [also] raise the pleader's right to relief beyond the speculative level."[4]

Moreover, "courts are not required to accept as true assertions that are merely legal arguments or 'legal conclusions' couched as facts."[5] The Plaintiff's erroneous "factual" assertion that he does not qualify as a public figure (a matter that is, instead, a question of law[6]) easily falls within this category, as does his assertion that Mr. Rayburn does not qualify for immunity.[7] Additionally, notwithstanding the traditional requirement that factual allegations in a Complaint must be taken as true for purposes of a motion to dismiss, a recognized exception to this rule "lies with allegations that are sufficiently fantastic to defy reality as we know it . . . ."[8]

II. Facial Deficiencies in Plaintiff's Amended Complaint that Are Not Seriously in Dispute

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[2] *Brown v. Mapco Exp., Inc.*, 393 S.W.3d 696, 708–09 (Tenn. Ct. App. 2012).
[3] *Id.*
[4] *Abshure v. Methodist Healthcare-Memphis Hosps.*, 325 S.W.3d 98, 104 (Tenn. 2010).
[5] *Webb*, 346 S.W.3d at 427. *See also, Moses v. Dirghangi*, 430 S.W.3d 371, 376 (Tenn. Ct. App. 2013) ("we are not required to accept as true factual inferences or conclusions of law.").
[6] Plaintiff asserts—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, 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, 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.*
[7] *King v. Betts*, 354 S.W.3d 691, 710 (Tenn. 2011).
[8] *Harris v. LNV Corp.*, No. 3-12-0552, 2014 WL 3015293, at *5 (M.D. Tenn. July 2, 2014).

Mr. Rayburn respectfully calls this Court's attention to the following issues that do not seriously appear to be in dispute, all of which are sufficient to resolve this case:

A. Statements #1, #2, #3, and #5 do not refer to the Plaintiff.

Mr. Rayburn has moved to dismiss the Plaintiff's Amended Complaint in part on the basis that four of the five statements complained of do not even mention the Plaintiff.[9] Specifically, Mr. Rayburn argued that the following four statements do not refer to the Plaintiff in any regard:

> **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."[10]
>
> **Statement #2**. "Rayburn will tell you [that helping build the culinary arts program at Nashville Tech] hasn't been easy."[11]
>
> **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."[12]
>
> **Statement #5**. "If the election had gone a different way, it might have affected funding for the school.'"[13]

In support of his claim that these statements do not refer to the Plaintiff, Mr. Rayburn noted, among other things, that these statements never mention the Plaintiff, and that the Plaintiff had not even been mentioned in the Article at all at the time that Statements #1-#3 were made.[14] In response, the Plaintiff does not seriously contest that

[9] *See* Defendant's Motion to Dismiss Plaintiff's Amended Complaint, pp. 12–13.
[10] *See* Plaintiff's Amended Complaint, ¶ 14.
[11] *See* Plaintiff's Amended Complaint, ¶ 15.
[12] *See* Plaintiff's Amended Complaint, ¶ 15.
[13] *See* Plaintiff's Amended Complaint, ¶ 17.
[14] Defendant's Motion to Dismiss Plaintiff's Amended Complaint, p. 12.

these statements do not refer to him. Instead, his response to this claim, in full, is merely as follows:

> Defendant says that four of the five statements complained of "did not concern Plaintiff. "The essence of what is often referred to as the "sting" of these comments was that the program ran by Mr. Loftis was "turning out unqualified students". FAC Paragraph 15, and Mr. Rayburn had decided to get more involved. FAC Paragraph 16. The solution? The intrepid Mr. Rayburn's involvement began with "cleaning house from the top by removing director Tom Loftis". FAC Paragraph 17, despite few of attribution [sic] from Plaintiff's brother in law. To who [sic] these than [sic] Mr. Loftis did these comments pertain?[15]

Regrettably, the intended meaning of Plaintiff's above-quoted response is largely unintelligible. What Plaintiff's Response plainly lacks, however, is even so much as a reference to the four statements listed above. By any objective reading, however, the above-described statements neither mention the Plaintiff nor concern him.

In defamation cases, "courts must look to the words themselves and are not bound by the plaintiff's interpretation of them."[16] Applying this requirement to the instant case—and looking to the statements themselves, rather than to Plaintiff's interpretation of them—Statements #1, #2, #3 and #5 do not concern the Plaintiff as a matter of law. They cannot form the basis for liability as a result.

> *B. Plaintiff's Amended Complaint is premised upon his belief that he was characterized as "incompetent" and someone who "might unethically retaliate" if his brother-in-law had been elected Mayor. These interpretations are unreasonable, and they also cannot be considered tortious as a matter of law.*

Under the subsection of his Response entitled "Allegation of Facts," the Plaintiff clarifies that his specific claims for liability in this case are premised upon his belief that

[15] Plaintiff's Response, p. 11.
[16] *Brown*, 393 S.W.3d at 708–09.

the Article implied: [1] that he was "incompetent," and [2] that he "might unethically retaliate" if his brother-in-law had been elected Mayor.[17] Specifically, the Plaintiff claims:

> 1. "The Defendant has portrayed [Plaintiff] as incompetent in his life's work to the extent that the alleged shortage of capable line cooks in Nashville was directly attributable to him."[18] And:
>
> * * * *
>
> 2. "Mr. Rayburn then implied that Mr. Loftis might unethically retaliate by punishing the school with a loss of funding from the Metropolitan Government, should Mr. Freeman become Mayor."[19]

Crucially, however, even (and perhaps especially) as the Plaintiff has clarified his claims, the Plaintiff has failed to state any legally cognizable claim for relief as a matter of law for each of the following four reasons:

First, an objective reading of the statements in the Article reveals that they do not even remotely lend themselves to Plaintiff's unreasonable interpretations of them. This Court is also entirely unbound by Plaintiff's unreasonable interpretations.[20] Instead, as a gatekeeper against frivolous defamation claims that serve to chill constitutionally protected speech, this Court is tasked with conducting its own independent review of Plaintiff's claimed interpretations.[21]

Here, Plaintiff's interpretation of the statements contained in the Article at issue cannot survive such a review, because the statements themselves bear no plausible connection to the fantastical conclusions that the Plaintiff purports to draw from them.

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[17] *See* Plaintiff's Response, pp. 8–10.
[18] *See* Plaintiff's Response, p. 8.
[19] *See* Plaintiff's Response, p. 10.
[20] *Brown*, 393 S.W.3d at 708–09. *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.").
[21] *Pendleton v. Newsome*, 772 S.E.2d 759, 763 (Va. 2015) ("ensuring that defamation actions proceed only upon statements which may actually defame a plaintiff is an essential gatekeeping function of the court.") (internal quotation omitted).

The statements in the Article simply do not support the Plaintiff's belief that "the alleged shortage of capable line cooks in Nashville was directly attribut[ed] to him" or that "Mr. Loftis might unethically retaliate by punishing the school with a loss of funding."[22] The Plaintiff has failed to state a legally cognizable claim for relief as a result.

Second, even if the Article *had* implied that Plaintiff was "incompetent" (and it did not), such an implication would not be actionable in tort as a matter of law, because it would represent a constitutionally-protected opinion.[23] Whether or not a person was "incompetent" at his job is an inherently subjective opinion that is not capable of being proven false—a threshold requirement for any defamation or false light claim.[24] In fact, **court after court has held that calling someone "incompetent" can *never* be actionable as defamation.**[25] Consequently, any claim premised upon Plaintiff's supposedly implied "incompetence" cannot lawfully form the basis for liability.[26]

Third, as a categorical matter, a wealth of directly applicable precedent dictates

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[22] *See* Plaintiff's Response, pp. 8–10.
[23] *Stones River Motors*, 651 S.W.2d at 722.
[24] *See Grant v. Commercial Appeal*, No. W201500208COAR3CV, 2015 WL 5772524, at *9 (Tenn. Ct. App. Sept. 18, 2015) ("Only false statements are actionable . . . ."); *Compuware Corp. v. Moody's Inv'rs Servs., Inc.*, 499 F.3d 520, 529 (6th Cir. 2007) ("Even if we could draw any fact-based inferences from this rating, such inferences could not be proven false because of the inherently subjective nature of Moody's ratings calculation. For the foregoing reasons, we affirm the district court's dismissal of Compuware's defamation claim.").
[25] *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.").
[26] *Id.*

that **predictive commentary about a hypothetical future event cannot be actionable in tort**, either.[27] In this case, what Plaintiff "*might*" have done "*should* Mr. Freeman become Mayor"[28]—easily qualifies for this proscription. Thus, this statement cannot form the basis for any defamation or false light claim.[29]

Fourth, no reasonable reader would actually impute the implications that the Plaintiff alleges, and any allegedly defamatory statement must "be read as a person of ordinary intelligence would understand it in light of the surrounding circumstances."[30] Simply put: the connection between the objectively innocuous statements in the Article and the downright insidious implications that the Plaintiff ascribes to them is so tenuous as to be non-existent. When evaluated on an objective basis as "a person of ordinary intelligence would understand" the Article, however, the statements at issue are not capable of any defamatory meaning as a matter of law, and the Plaintiff's Amended Complaint must be dismissed as a result.[31]

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[27] *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"); *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).

[28] *See* Plaintiff's Response, p. 10 (emphasis added).

[29] *See supra* n. 27.

[30] *Aegis Scis. Corp.*, 2013 WL 175807, at *6.

[31] *Id. See also 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.").

For each of these reasons, Plaintiff's Amended Complaint fails to state any legally cognizable claim as a matter of law. Accordingly, this Court should dismiss it with prejudice.

III. The Plaintiff's Additional Responses Are Without Merit

The Plaintiff makes several contrary arguments regarding the many additional deficiencies noted in his Amended Complaint. Each is without merit.

First, the Plaintiff complains that "the Defendant's memorandum remarkably does not even discuss the only two theories raised in the Complaint"[32] and "nowhere mentions the legal theories of the complaint and FAC."[33] The Plaintiff is clearly mistaken. In reality, Mr. Rayburn's Motion to Dismiss thoroughly addresses both theories of liability and exhaustively details their overlapping nature.[34] Specifically, on pages 6–7 of his Motion to Dismiss the Plaintiff's Amended Complaint—under a section conveniently titled "**Threshold Elements of Defamation by Implication/False Light Claims**"—Mr. Rayburn explained:

> 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 to defamation, requiring a Plaintiff

[32] *See* Plaintiff's Response, p. 1.
[33] *See* Plaintiff's Response, p. 11.
[34] *See* Defendant's Motion to Dismiss Plaintiff's Amended Complaint, pp. 6–7.

> 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.[35]

Consequently, the Plaintiff's baseless contention that "[t]he Defendant's memorandum remarkably does not even discuss the only two theories raised in the Complaint"[36] is farcical. Further, for the reasons detailed in Mr. Rayburn in his Motion to Dismiss, the Plaintiff's Amended Complaint cannot satisfy all (or even most) of the elements of either one of his overlapping causes of action. The Plaintiff's Amended Complaint should be dismissed as a result.

Second, the Plaintiff argues that his assertion that Mr. Rayburn communicated the statements written by Jim Myers in *The Tennessean*'s Article must be taken as true because "[t]he FAC alleges that the [sic] did."[37] The problem with this response, however, is that the Plaintiff's allegation in this regard is disproven within the four corners of his own Complaint. Specifically, "Exhibit A" to the Plaintiff's Amended Complaint demonstrates without any serious question that the Article was written by Jim Myers, published by *The Tennessean*, and that Mr. Rayburn was never so much as quoted in it.[38]

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[35] Defendant's Motion to Dismiss Plaintiff's Amended Complaint, pp. 6–7.
[36] *See* Plaintiff's Response, p. 1.
[37] *See* Plaintiff's Response, p. 11.
[38] *See* Plaintiff's Amended Complaint, Exhibit A.

"Allegations that are sufficiently fantastic to defy reality as we know it" are not entitled to factual deference.[39] Further, as Mr. Rayburn has previously explained:

> [N]o matter how favorable the light in which Plaintiff's allegations are cast, he cannot transform an article that he acknowledges was written by Jim Myers and which never quoted Mr. Rayburn into a publication authored by Mr. Rayburn himself. Simply put: Even construed in the light most favorable to the Plaintiff, it strains credulity to suggest that "the words in the article" at issue—which the Plaintiff himself pleads was published by *The Tennessean* under the byline of Jim Myers, and which was written exclusively from Mr. Myers' perspective—were actually Mr. Rayburn's.[40]

Thus, both the Plaintiff's response and his futile attempt to remedy the deficiency by amendment fail as well.

Third, the Plaintiff complains that "[t]o state [] that allegations of incompetence and unethical retaliation motives are not offensive to a normal person is simply absurd."[41] Once again, however, Plaintiff's response is utterly devoid of substance and fails to address the serious deficiencies contained in his Amended Complaint. As detailed in the preceding section, whether a person is "incompetent" (an assertion—it should be emphasized again—that is never actually made anywhere in the Article) represents a purely subjective opinion <u>*that can never be actionable as defamation*</u>. *See supra* p. 6, n 25. Similarly, hypothetical commentary upon future events that did not transpire—in this case, what "might have" happened "should" Plaintiff's brother-in-law have become Mayor—can never be actionable as defamation, either. *See supra* pp. 6–7, n. 27. Moreover, the Plaintiff's response conspicuously ignores Mr. Rayburn's additional observation that the subject of the Article's supposedly-implied "unethical retaliation

[39] *Harris*, 2014 WL 3015293, at *5.
[40] *See* Defendant's Response in Opposition to Plaintiff's Motion to Amend, p. 8.
[41] Plaintiff's Response, p. 11.

motives" is *the Plaintiff's brother-in-law*, who is not a party to this case.

Fourth, the Plaintiff argues that "blaming the alleged incompetence of hundreds of line cooks on a single man without even identifying who these people are or whether they even attended Nashville State" constitutes actual malice.[42] There are, however, several independent problems with this response. To begin, the Article does not actually say what Plaintiff claims it says. Instead, the Article merely states—accurately—that Mr. Rayburn *received* unflattering reports about the quality of NSCC students from others.[43] The Plaintiff himself acknowledges the reality of those reports. *See* Plaintiff's Amended Complaint, ¶ 6 ("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."). Consequently, this deficiency, too, is fatal to Plaintiff's Amended Complaint, because "comments upon true and nondefamatory published facts are not actionable . . . .'"[44]

Fifth, Plaintiff complains that Mr. Rayburn's Motion to Dismiss "remarkably argues that statements maligning his competence and placing blame for every ill of an entire industry in a city of hundreds of thousands 'did not and could not' injure this man in his life's work."[45] Plaintiff's problem, however, is that no person of ordinary intelligence would or even could interpret the Article in this manner, which says absolutely nothing of the sort. *See Aegis Scis. Corp.*, 2013 WL 175807, at *6 (holding that any allegedly defamatory statement must "be read as a person of ordinary intelligence

[42] *See* Plaintiff's Response, p. 11.
[43] *See* Plaintiff's Amended Complaint, Exhibit A ("When [Mr. 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.") (emphasis added).
[44] *Stones River Motors, Inc.*, 651 S.W.2d at 720.
[45] *See* Plaintiff's Response, p. 11.

would understand it in light of the surrounding circumstances."). Consequently, this error remains fatal as well.

Sixth, the Plaintiff responds to the glaring deficiency that the statements underlying his lawsuit are not even *alleged* to be false by stating: "[Claim] Number 6 merely speculates at what the Plaintiff may prove and ignores the facial absurdity of Mr. Rayburn's words."[46] Plaintiff's response in this regard, too, is extraordinarily deficient. As the Sixth Circuit has noted, "[r]egardless of which party must ultimately prove falsity, any defamation plaintiff must allege it."[47] "In this unusual case," however, the Plaintiff has "failed to do so."[48]

In fact—rather than claiming that the statements at issue are false—in this possibly unprecedented lawsuit, the Plaintiff himself actually pleads that several of the statements that form the basis for his Complaint are *true*. *See* Plaintiff's Amended Complaint, ¶ 6 (admitting 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"); Plaintiff's Amended Complaint, ¶ 8 (admitting that "[i]n March 2015, Plaintiff was informed that a decision had been made not to renew his contract at the conclusion of the academic year."). Consequently, Plaintiff's response in this regard is similarly meritless.

Seventh, the Plaintiff insists that for purposes of resolving Mr. Rayburn's immunity claim, he is entitled to factual deference regarding his allegation that Mr. Rayburn was neither speaking on behalf of Nashville State Community College nor

[46] *See* Plaintiff's Response, p. 11.
[47] *Clark v. Viacom Int'l Inc.*, 617 F. App'x 495, 509 (6th Cir. 2015) (internal citation omitted).
[48] *Id.*

speaking as a board member of a public institution in the context of the Article.[49] Yet again, however, Plaintiff mistakes a factual allegation for a legal conclusion. In Tennessee, "the question of qualified immunity remains a question of law for the court to resolve."[50] As such, Plaintiff's "factual" assertions regarding Mr. Rayburn's immunity claim are not entitled to any deference at all, because "courts are not required to accept as true assertions that are merely legal arguments or 'legal conclusions' couched as facts."[51]

Significantly, claims of immunity are also properly raised in a motion to dismiss.[52] As such, the Plaintiff is not entitled to any deference regarding his allegation that Mr. Rayburn is not immune from this lawsuit, and Mr. Rayburn's immunity claim has been properly presented at this stage in the proceedings.[53] Moreover, notwithstanding the Plaintiff's characterization of Mr. Rayburn's immunity claim as "oddly argue[d],"[54] it is worth emphasizing again that barely four months before this lawsuit was filed, the Plaintiff himself expressed the following conflicting position to the Tennessee Board of Regents:

> "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. . .***"[55]

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[49] *See* Plaintiff's Response, p. 11.
[50] *King*, 354 S.W.3d at 710.
[51] *Webb*, 346 S.W.3d at 427.
[52] *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).
[53] *Id.*
[54] Plaintiff's Response, p. 11,
[55] *See* **Exhibit A to Defendant's Reply** (emphasis added). 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).

Thus, the Plaintiff's mock surprise at Mr. Rayburn's identical claim that he was speaking on behalf of the college and served on the Board at the time may similarly be disregarded as meritless. *Id.*

Eighth and finally, the Plaintiff responds to the incontrovertible existence of the single publication rule merely by stating: "The statute of limitations argument is difficult [for the Plaintiff] to fathom."[56] That may well be the case. Nonetheless, the single publication rule is very much a real doctrine, and it has been formally adopted in Tennessee whether the Plaintiff can fathom it or not.[57]

"[U]nder the single publication rule, any mass communication that is made at approximately one time . . . is construed as a single publication of the statements it contains, thereby giving rise to only one cause of action as of the moment of initial publication, no matter how many copies are later [published]."[58] Pursuant to this rule, the statute of limitations also "accrues at the time of the original publication" and "runs from that date."[59] Consequently, for the reasons previously presented in Defendant's Motion to Dismiss Plaintiff's Amended Complaint,[60] Plaintiff's claims are long since time-barred.

Conclusion

For the foregoing reasons, the Defendant's Motion to Dismiss should be **GRANTED**, and 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

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[56] Plaintiff's Response, p. 11.
[57] *See Clark*, 617 F. App'x at 502–03 (citing *Applewhite v. Memphis State Univ.*, 495 S.W.2d 190, 193–94 (Tenn. 1973).
[58] *Id.*
[59] *Applewhite*, 495 S.W.2d at 193.
[60] *See* Defendant's Motion to Dismiss Plaintiff's Amended Complaint, pp. 35–37.

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,

By: _____

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NOTICE OF HEARING ON MOTION

A hearing on the above motion will be held on July 10, 2017, at 1:00PM 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 7th day of July, 2017, a copy of the foregoing was sent via USPS, postage prepaid, and/or by email to the following:

W. Gary Blackburn
Bryant Kroll
213 Fifth Avenue North, Suite 300
Nashville, TN 37219
gblackburn@wgaryblackburn.com
bkroll@wgaryblackburn.com

By: _____
Daniel A. Horwitz, Esq.

Exhibit A

THE BLACKBURN FIRM, PLLC

213 FIFTH AVENUE NORTH, SUITE 300 • NASHVILLE, TN 37219
P (615) 254-7770 • F (866) 895-7272

W. GARY BLACKBURN
RULE 31 MEDIATOR

BRYANT KROLL

September 27, 2016

Sent via email Donald.Ungurait@tbr.edu & U.S. Mail

Donald R. Ungurait
Associate General Counsel
Tennessee Board of Regents
1415 Murfreesboro Road
Nashville, TN 37217

Re: Tom Loftis – The Nashville State Community College

Dear Don:

I was a little confused by your last message indicating that I should state more fully the purpose of the meeting I suggested. I believe I have been very clear about that, but I will be happy to reiterate it.

The language in the Tennessean article is defamatory and places Mr. Loftis in a false light. The words appear to be those of Randy Rayburn. The circumstances and context of these remarks strongly suggest that he was speaking on behalf of the college, and he served on the Board at the time of these unfortunate and ill-advised comments.

My specific suggestion has been, and remains, that a meeting be scheduled specifically to include both President Van Allen and Mr. Rayburn. A lawsuit would reflect badly upon both Mr. Rayburn and the college.

I received a phone call from Mr. Rayburn who claimed that President Van Allen had told him that Bill Freeman intended to sue him. I disabused him of this notion, but the greater part of the conversation concerned obvious personal antagonisms between them.

Mr. Rayburn also told me that some meeting had been held at some unidentified time in which criticisms of the program and/or Mr. Loftis were conveyed. I told him that there is no record of such a meeting, and that such a meeting, if it concerned public business and included deliberations, would be in violation of the Sunshine Law.

We wish to discuss alternatives to a lawsuit acceptable to Mr. Loftis. Some sort of public honoring of Mr. Loftis, an expression of gratitude to him for his years of service in a program he originated, would be a relatively inexpensive and easy way to begin to remedy the situation. The creation of positive references is always a topic of discussion in employment matters.

We can also discuss some reasonable financial compensation to Mr. Loftis.

Mr. Loftis was gracious in his departure. It is inappropriate and unseemly that the college and Mr. Rayburn did not reciprocate and in fact publicly communicated wholly gratuitous and unnecessary comments.

I should note that this discussion is going to be had, one way or another. I think it would be prudent to have such discussions prior to the initiation of litigation rather than after.

If that is not sufficiently clear, please let me know.

Very truly yours,
THE BLACKBURN FIRM, PLLC

W. Gary Blackburn

WGB/kd
cc: Tom Loftis