STATE OF INDIANA	) MARION COUNTY SUPERIOR COURT
	) SS: CIVIL DIVISION
COUNTY OF MARION	) CAUSE NO.: 49D01-2309-CT-034614

JAMES ESTES,	)
	)
Plaintiff,	)
	)
vs.	)
	)
MAX SIEGEL, RENEE WASHINGTON, and USA TRACK & FIELD, INC.	)
	)
Defendants.	)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS

I. PROCEDURAL HISTORY

Plaintiff filed his Amended Complaint for Damages December 18, 2023 alleging 1) Defamation *Per Se* by Max Siegel in his capacity as CEO of USATF; 2) Negligence by Renee Washington in her capacity as CFO to USATF; 3) Defamation *Per Se* by USATF through its CEO, Max Siegel; and 4) Negligence by USATF through its COO, Renee Washington. Defendants filed their Motion to Dismiss as to all Counts on January 9, 2024. Defendants specifically allege that the Defamation claims (Counts I and III) fail as matter of law for four reasons: 1) The Amended Complaint does not identify false defamatory statements; 2) Plaintiff cannot establish the requisite elements of defamation *per se*; 3) Plaintiff has not pled and cannot establish as a matter of law that Siegel (or USATF through Siegel) uttered any false defamatory statements with actual malice; and 4) Even if defamation found, Siegel is protected by qualified privilege. Defendants allege that the Negligence claims (Counts II and IV) fail because neither Washington nor USATF owed a duty of care to Plaintiff and their alleged conduct was not the proximate cause of the alleged injuries. Plaintiff filed his Response on February 29, 2024.

Defendants filed their Reply on March 24, 2024. A Hearing was held on April 11, 2024 wherein both parties were present and gave argument.

II. RELEVANT FACTS

Facts Relied on by the Court all come from Plaintiff's Amended Complaint. For the purpose of this Motion to Dismiss they are taken as true:

1. Defendant USA Track & Field, Inc. (USATF) is a Virginia nonprofit corporation with its principal place of business located in Marion County.
2. Plaintiff James Estes was a member of the USATF Board of Directors ("Board").
3. Defendant Max Siegel ("Siegel"), at all times relevant hereto, was employed by USATF as its Chief Executive Officer ("CEO").
4. Defendant Renee Washington ("Washington"), at all times relevant hereto was employed by USATF as its Chief Operating Officer ("COO").
5. Estes was elected to serve as a USATF Board Member, beginning in January 2022, by the Long Distance Running Division of USATF ("LDR")
6. In May of 2022, Estes finalized an agreement to consult the Chattanooga Sports Commission ("Chattanooga") for their 2024 U.S. Olympic Marathon Team Trials bid.
7. Estes' scope of work with Chattanooga included technical, competition and athlete services.
8. On or about May 24, 2022, Estes sent an updated Code of Ethics Conflict Reporting Statement ("COI Disclosure") via email to Washington and Mike Conley, Chair of the USATF Board of Directors ("Conley").

9. Estes never received a reply to his May 24, 2022 email to Washington and Conley, nor did Estes receive any type of follow-up communication from USATF regarding his May 24, 2022 COI disclosure.
10. On or about July 29, 2022, Estes sent an updated COI Disclosure via email to Washington and Conley {which included the conflicts from the May 24, 2022 disclosure}.
11. Estes' July 29, 2022, COI disclosure stated in part, "Chattanooga Sports Commission-Contractor: Counseling for the Chattanooga Sports Commission Olympic Trials Marathon Bid, related to technical, competition and athlete services items."
12. On or about August 7, 2022, a teleconference occurred between Estes, Washington, Wain, and Conley regarding Estes' July 29, 2022, COI Disclosure.
13. At no point during the August 7, 2022, teleconference was Estes advised or admonished that his involvement with Chattanooga was a conflict of interest that could not be managed.
14. At no point during the August 7, 2022, teleconference was Estes advised that his involvement with Chattanooga would or could result in the disqualification of the Chattanooga bid for the 2024 U.S. Olympic Marathon Team Trials.
15. On or about September 26, 2022, USTF staff had concerns about Estes' presence and involvement with Chattanooga during a site visit with USATF.
16. On or about September 26, 2022, Siegel and Washington made the decision that Estes could not be involved with Chattanooga during a site visit with USATF.
17. On or about September 27, 2022, Estes was requested to and immediately departed the Chattanooga site visit with USATF.

18. The United States Olympic Committee ("USOPC") opened an investigation into Estes's involvement with Chattanooga immediately following USATF's site visit with Chattanooga.
19. On or about October 25, 2022, USATF made the final decision to disqualify the Chattanooga bid due to Estes' involvement.
20. On or about November 8, 2022, Chattanooga received a letter from Siegel disqualifying Chattanooga's bid for the 2024 U.S. Olympic Marathon Team Trials due to Estes' involvement.
21. On or about late-November/early-December 2022, Siegel informed Tracy Sundlun, an Event Manager at Competitor Group, that Estes had failed to disclose his involvement with Chattanooga.
22. On or about June 12, 2023, the LDR Division Chair notified Conley that the LDR Executive Committee voted unanimously that Estes should remain on the USATF Board of Directors as the LDR representative.

III. STANDARD OF REVIEW

Under Indiana law, a motion to dismiss for failure to state a claim "tests the legal sufficiency of the [plaintiff's] claim, not the facts supporting it." *Thornton v. State*, 43 N.E.3d 585, 587 (Ind. 2015) (citation omitted). In reviewing a Rule 12(B)(6) motion to dismiss, "a court is required to take as true all allegations upon the face of the complaint and may only dismiss if the plaintiff would not be entitled to recover under any set of facts admissible under the allegations of the complaint." *Huffman v. Ind. Office of Envtl. Adjudication*, 811 N.E.2d 806, 814 (Ind. 2004). Under notice pleading, all that is required for a complaint to defeat a 12(B)(6)

motion to dismiss is a clear and concise statement that will put the defendants on 'notice' as to what has taken place and the theory that the plaintiffs plan to pursue in their attempt for recovery." *Lincoln Nat'l Bank v. Mundinger*, 528 N.E.2d 829, 836 (Ind. Ct. App. 1988) (citations omitted).

Although courts "accept the facts alleged in the complaint as true and draw every reasonable inference in the plaintiff's favor," they "need not accept as true allegations that are contradicted by other allegations or exhibits attached to or incorporated into the pleading." *Trustees of Indiana Univ. v. Spiegel*, 186 N.E. 3d 1151, 1157 (Ind. Ct. App. 2022). Courts "also need not accept as true conclusory, nonfactual assertions or legal conclusions." *Id.*

IV. DISCUSSION

A. Defamation

As a preliminary matter, court would note that Plaintiff alleges two separate instances of defamation under each of Counts I and III: The November 8, 2022 letter to Chattanooga ("Letter") and the alleged statement to Tracy Sundlun of Orlando ("Statement"). The Court need not conclude that both the Letter and the Statement are defamation *per se* for Plaintiff's Counts to survive.

A plaintiff claiming defamation must plausibly allege a statement: (1) with defamatory imputation; (2) made with malice; (3) published to third parties; and (4) causing damages. Dugan v. Mittal Steel USA Inc., 929 N.E.2d 184, 186 (Ind. 2010). The alleged defamatory statement may be either defamation *per se* or defamation *per quod*. *Carson v. Palombo*, 18 N.E.3d 1036, 1042 (Ind. Ct. App. 2014).

A communication is defamatory *per se* if it imputes: (1) criminal conduct; (2) a loathsome disease; (3) misconduct in a person's trade, profession, office, or occupation; or (4) sexual misconduct. *Id.* (citing cases). All other defamatory communications are defamatory *per quod. Rambo v. Cohen*, 587 N.E.2d 140, 146 (Ind. Ct. App. 1992). Furthermore, the statement must be defamatory on its face without the need to resort to extrinsic evidence to ascertain the defamatory nature of the statement. *Moore v. Univ. of Notre Dame*, 968 F.Supp. 1330, 1334 (N.D. Ind. 1997). "All other factual communications, even if they are defamatory in that they tend to harm a person's reputation by lowering the person in the community's estimation or deterring third persons from dealing or associating with the person . . . are, at most, defamatory *per quod*." *Rambo* at 146, abrogated on other grounds by *Williams v. Tharp*, 889 N.E.2d 870, 879 n.6 (Ind. Ct. App. 2008). While a defamation per se claim is entitled to a presumption of damages, a defamatory *per quod* statement is only actionable if the plaintiff alleges "pecuniary harm as a result of the defamatory statement." Id.

To show actual malice, the plaintiff must allege that the defendants made the claimed defamatory statement "with knowledge it was false or with reckless disregard of whether it was false." *Taylor v. Antisdel*, 185 N.E.3d 867 (Ind. Ct. App. 2022)

i. <u>The Letter</u>

November 8, 2022

Chattanooga Bid Committee
U.S. Olympic Team Trials – Marathon
Via email

Tim,

I write to inform you that the bid submitted by the Chattanooga Local Organizing Committee for the 2024 U.S.Olympic Team Trials- Marathon has been disqualified. The facts known to USATF as of this writing represent a conflict material in nature. It is not

disputed that Jim Estes, a sitting member of the USATF Board of Directors was a paid consultant of your local organizing committee with obligations specific to this bid. That fact on its face impacts the credibility of your submission to such a degree that consideration of it as a viable bid risks the integrity of the process.

I have no doubt that your team worked hard and planned to deliver an exceptional athlete centric event. In the end, ***while the circumstances were neither created by USATF nor condoned by USATF***, the reputational damage to USATF and ultimately our athletes will be costly if we don't disqualify the CLOC bid. USATF considers it the outcome necessary to begin to move forward.

Warm regards,
Max Siegel
USATF CEO

Highlighted in the letter above is the defamation allegation at issue "***while the circumstances were neither created by USATF nor condoned by USATF.***" Plaintiff alleges the Letter "lays all the blame for the decision to disqualify Chattanooga's bid on Mr. Estes." While court is not sure that is the only reading of the Letter, there is sufficient ambiguity for an ordinary person to conclude that USATF was wholly unaware of the conflict with the Chattanooga bid until right before the decision to disqualify them, which would be false. Plaintiff could assert that in fact USATF did condone the conflict since they never acted on the disclosure. Taken in the light most favorable to Plaintiff, on its face, the Letter does offer a false allegation and Siegel knew it to be false at the time it was written, which meets the requirement for malice. Because the Letter was about Estes's alleged failures in his professional life (i.e , "misconduct in a person's trade, profession, office, or occupation") the court finds that, as alleged, it qualifies as defamation *per se*. Although parties differ on the meaning of the Letter, at the notice stage of these proceedings, the Letter could be deemed false and, as noticed, qualifies as defamation *per se*, which is sufficient to find it has defamatory imputation.

The parties do not argue that the Letter was not published. Because the court finds that at this notice stage there is sufficient evidence to show defamation *per se*, damages are presumed by law.

ii. The Statement

Defendants argue that the Statement is not plead with sufficient specificity. Court notes that while the complaint appears to be a very general recitation of a conversation, it does allege that Mr. Siegel communicated a false statement, namely that Estes did not disclose his conflict of interest. While each party has a different take on precisely what was meant by this and the timing, form and substance of the disclosure, there is sufficient evidence that Estes did in fact disclose the conflict in the ordinarily understood meaning of the word. On its face, the Statement does offer a false allegation and Siegel knew it to be false at the time it was allegedly communicated, which meets the requirement for malice. Because the alleged false Statement was about Estes's alleged failures in his professional life (i.e , "misconduct in a person's trade, profession, office, or occupation") the court finds that, as alleged, it qualifies as defamation *per se*. Further, although parties differ on the intent of this alleged statement, the alleged statement is false and, as noticed, qualifies as defamation *per se*, which is sufficient to find it has defamatory imputation.

The parties do not argue that the Statement was not published. Because the court finds that at this notice stage there is sufficient evidence to show defamation *per se*, damages are presumed by law.

Count I (Defamation by Max Siegel)

Defendant claims that Siegel would be subject to a qualified privilege for the Letter and the Statement. Qualified privilege may be overcome when the plaintiff demonstrates an abuse of the privilege. A claimant can do this by proving an absence of good faith, or excessive publication, or that the statement was made without belief or grounds for belief in its truth. *Trail v. Boys & Girls Clubs*, 845 N.E.2d 130, at 136. The Complaint does not allege any of these things**,** however, the Court notes that "[d]ismissal under Rule 12(B)(6) is rarely appropriate when the asserted ground for dismissal is an affirmative defense." *Payne-Elliott v. Roman Catholic Archdiocese of Indianapolis*, 193 N.E.3d 1009, 1013 (Ind. 2022) (quoting *Bellwether Props., LLC v. Duke Energy Ind., Inc.*, 87 N.E.3d 462, 464 (Ind. 2017).

The Complaint alleges under Count I that "Defendant, Max Siegel, was within the course and scope of his employment at USATF when he made repeated, verbal and written, false statements about Plaintiff's professional misconduct". Plaintiff does not make a separate allegation that Mr. Siegel defamed Estes in his personal capacity, separate from his role with USATF. Plaintiff makes a point of noting the relationship with USATF in his Count for Defamation against Siegel personally. Court agrees that Siegel was solely acting in his capacity as CEO with USATF when he wrote the Letter (signed by him as CEO of USATF) and made the Statement (to the Event Manager of the winning bid). There is nothing in the Amended Complaint or record to find otherwise.

The Court finds that Count I is DISMISSED.

Count III (Defamation by USATF through Max Siegel)

The court has already found that Plaintiff has properly alleged defamation. The Plaintiff alleges and the Defense agrees that Max Siegel was within the course and scope of his

employment at USATF when he wrote the Letter and made the alleged Statement. At this stage of litigation, Count III should proceed to Discovery. The disputes as to precise meaning and intention are ripe for continued discovery.

The Court finds that Count III is NOT DISMISSED.

B. Negligence

To state a claim of negligence "the plaintiff must show: (1) duty owed to plaintiff by defendant; (2) breach of duty by allowing conduct to fall below the applicable standard of care; and (3) compensable injury proximately caused by defendant's breach of duty." *Goodwin v. Yeakle's Sports Bar and Grill, Inc*., 62 N.E.3d 384 (Ind. 2016).

i. Duty

In their Memorandum in Support of their Motion to Dismiss, Defendants write: "USATF's relationship with Estes is that of a nonprofit organization with a member of its board of directors. This relationship is fiduciary, statutory, and contractual in nature, but the duties imposed by all three legal frameworks run from the director to the corporation not vice-versa. This relationship, without more, cannot create a duty by the nonprofit corporation to the director." The court agrees.

Plaintiff asks the court to find a duty exists under Ind. Code § 23-17-14-2 which states "An officer shall perform the duties set forth in bylaws or, to the extent consistent with bylaws, the duties prescribed: (1) In a resolution of the board of directors; or (2) By direction of an officer authorized by the board of directors to prescribe the duties of other officers." A duty does exist for Ms. Washington and other officers at USATF under this statute, however, that duty

flows from Ms. Washington and the officers to USATF. To the extent a duty was owed, a duty was breached and an injury occurred, USATF would be the aggrieved party, not Mr. Estes.

Plaintiff also asks the court to find a duty under Common Law. He writes in his opposition: "'Courts will generally find a duty where reasonable persons would agree that one exists. 'A duty, when found to exist, is the duty to exercise reasonable care under the circumstances.'*Kerr v. City of South Bend*, 48 N.E.3d 348, 352 (Ind. Ct. App. 2015) (quoting *City of Muncie ex rel. Muncie Fire Dep't. v. Weidner*, 831 N.E.2d 206, 211 (Ind. Ct. App. 2005)). '[I]n order to determine whether a duty exists, [courts] employ a three-part balancing test: (1) the relationship between the parties; (2) the foreseeability of harm; and (3) public policy concerns.' *Goodwin* at 387 (Ind. 2016)."

The relationship between the parties does not create a duty to one another. The officers and Board members owe a duty to USATF. The Code of Ethics does not create a duty that otherwise did not exist, it simply emphasizes the duties each owe to USATF. The court declines to find otherwise as that would create public policy concerns for a non-profit organization to take on duties otherwise not owed, and subject themselves to litigation that could ultimately undermine their mission. As to "the foreseeability of harm", there is simply insufficient facts, all taken as true, to find that the failure to properly address the conflict created by Plaintiff could cause the harm alleged, which is almost entirely emotional.

ii. Breach of Duty

The Court does not find that a duty exists so a breach is impossible.

iii. Injury

Neither the original complaint nor the amended complaint allege cognizable damages. The modified impact rule provides that "when [plaintiff] sustains a direct impact by the negligence of another and, by virtue of that direct involvement sustains an emotional trauma which is serious in nature and of a kind and extent normally expected to occur in a reasonable person, . . . such a plaintiff is entitled to maintain an action to recover for that emotional trauma without regard to whether the emotional trauma arises out of or accompanies any physical injury to the plaintiff. *Shuamber v. Henderson* (1991), Ind., 579 N.E.2d 452. at 456; *J.L. & R.L. v. Mortell* (1994), Ind.App., 633 N.E.2d 300, 304. This modified impact rule maintains the requirement that Estes demonstrate that he suffered a direct physical impact. No such impact has been alleged.

Count II (Negligence by Renee Washington)
and Count IV (Negligence by USATF)

Both Count II: Negligence by Renee Washington and Count IV: Negligence by USATF, rely on the premise that the officers of USATF (and therefore USATF as an organization) owe a duty of care to Estes. The court can not find such a duty exists. Even if court were to find a duty exists, Plaintiff has not properly alleged injury beyond reputational harm and emotional harm which is not cognizable, a result of a direct physical impact or foreseeable under the facts alleged.

The Court finds that Count II and Count IV are DISMISSED.

V. CONCLSION

Based on the foregoing, the Court **GRANTS t**he Defendants Motion to Dismiss with prejudice Counts I, III and IV. Court does not find an amendment could cure the defects of law. Court **DENIES** Defendant's Motion to Dismiss Count II.

SO ORDERED, ADJUDGED AND DECREED this 4/22/2024.

Honorable Christina Klineman
Judge, Marion Superior Court D01

Distribution: All Counsel of Record