

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Harrisonburg Division

JEFFREY WILLIAM BAILEY,)	
Plaintiff,)	Civil Action No. 5:14-cv-00059
)	
v.)	
)	<u>REPORT & RECOMMENDATION</u>
WASHINGTON AREA COUNCIL OF)	
ENGINEERING LABORATORIES)	
(WACEL),)	By: Joel C. Hoppe
Defendant.)	United States Magistrate Judge

Plaintiff Jeffrey William Bailey, proceeding *pro se*, filed this action against Defendant Washington Area Council of Engineering Laboratories (“WACEL”) regarding the rescission of his professional certifications. Pending before the Court is WACEL’s Motion to Dismiss The Third Amended Complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. ECF No. 47. The motion is before me by referral under 28 U.S.C. § 636(b)(1)(B). ECF No. 12. Both parties have fully briefed the issue, ECF Nos. 48, 53, 55, neither requested a hearing, and the motion is ripe for decision. After considering the pleadings, the parties’ briefs, and the applicable law, I find that Bailey has failed to state a claim that entitles him to relief on his state law defamation claim, but has sufficiently stated a claim for denial of a common law right of fair procedure. I therefore recommend that the presiding District Judge grant in part and deny in part WACEL’s motion in accordance with the following opinion.

I. Procedural History and Facts

On November 17, 2014, Bailey filed a Complaint against WACEL and its board of directors and employees. ECF No. 2. After WACEL moved to dismiss the Complaint, ECF No. 7, Bailey filed an Amended Complaint, ECF No. 20. WACEL again filed a motion to dismiss, ECF No. 21, and the undersigned Magistrate Judge issued a Report and Recommendation

recommending that the presiding District Judge dismiss the Amended Complaint, ECF No. 32. Bailey objected to the Report and Recommendation and moved for leave to file a second amended complaint. ECF Nos. 35–36. On September 21, 2015, the presiding District Judge issued a Memorandum Opinion, ECF No. 43, and Order, ECF No. 44, overruling Bailey’s objections, adopting the Report and Recommendation, granting WACEL’s motion to dismiss, dismissing Bailey’s federal claims with prejudice, dismissing his state claims without prejudice, and granting Bailey’s motion for leave to amend. Bailey filed his Third Amended Complaint, ECF No. 45, on October 15, 2015, and WACEL moved to dismiss it, ECF No. 47.

When assessing factual allegations on a motion to dismiss, I must view all well-pled facts in the complaint in the light most favorable to the plaintiff. *See Philips v. Pitt Cty. Mem’l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009). In recognition of Bailey’s *pro se* status and my obligation to hold his pleadings to “less stringent standards than formal pleadings drafted by lawyers,” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam), I will also consider facts presented in other relevant documents in the record. *Shomo v. Apple, Inc.*, No. 7:14cv40, 2015 WL 777620, at *2 (W.D. Va. Feb. 24, 2015) (considering “both the complaint and the factual allegations in Shomo’s response to the motion to dismiss in determining whether his claims can survive dismissal”); *Christmas v. Arc of the Piedmont, Inc.*, No. 3:12cv8, 2012 WL 2905584, at *1 (W.D. Va. July 16, 2012) (accepting as true facts from a *pro se* plaintiff’s complaint and brief in opposition to decide a motion to dismiss).

WACEL is a private association of engineering laboratories, inspection agencies, and public building officials that provides certification and accreditation for engineers and engineering firms in the greater Washington, D.C., area. Third Am. Compl. 1–3; Compl. Ex. 4,

at 2, ECF No. 2-4.¹ At the time he filed suit, Bailey was employed by Engineering Consulting Services (“ECS”) as a laboratory technician in its Winchester office (“ECS Winchester”). *Id.* at 1–2; *see also* Pl. Add’l New Devs. Relevant to Case, ECF No. 30 (informing the Court that Plaintiff’s employment with ECS would be terminated effective April 24, 2015). ECS maintains WACEL accreditation for its labs, Third Am. Compl. 2, and requires its employees to have certain WACEL certifications as part of their employment. Pl. Add’l New Devs. Relevant to Case. In spring 2014, the time leading up to the events underlying this dispute, ECS Winchester was accredited by WACEL, and Bailey held five personal WACEL certifications. Third Am. Compl. 2–3; Compl. Ex. 1, at 1, ECF No. 2-1; Compl. Ex. 2, ECF No. 2-2.

WACEL’s Bylaws state that any individual who earns a WACEL certification becomes a Certified Member of the association. Compl. Ex. 5, at 3, ECF No. 2-5. They also relate that certification “[m]embership will terminate if a certified member fails to meet the requirements of a WACEL certification program or by reason or violation of other applicable portions of these Bylaws or the Code of Ethics.” *Id.* The Bylaws later state that any membership is terminated if a “member is expelled for actions which the Board of Directors determine are prejudicial to the welfare, interest or character of WACEL, including willful violation of other applicable portions of these Bylaws or the WACEL’s Code of Ethics.” *Id.* at 4.

On May 7, 2014, WACEL employee Steve Ritenour performed an annual audit of ECS Winchester. Third Am. Compl. 1–2. As part of the audit, he reviewed the office’s calibration records. *Id.* A written summation of the records was not available at the time, so Ritenour was given access to a spreadsheet containing the raw calibration data. *Id.* Because of a later-

¹ The Third Amended Complaint references documents that it does not attach, noting that they were submitted with previous iterations of the complaint. *See* Third Am. Compl. 9. As these documents are already in the record and in light of Bailey’s *pro se* status, the Court will reference and consider those documents.

discovered clerical error, the current year's data had not been properly saved in the spreadsheet. *Id.* at 2–3. It thus appeared to Ritenour that the laboratory was claiming calibration numbers identical to the previous year, which Ritenour concluded indicated fraud. *Id.* Falsifying calibration records is grounds for revoking accreditation. *Id.* at 2–3. Following the inspection, Ritenour held a summation meeting with Bailey and other ECS Winchester employees and informed them that the office was in good condition. *Id.* at 1–2.

In July 2014, John Kent, ECS's office manager, informed Bailey and his co-workers that ECS Winchester's WACEL accreditation had been suspended because of fraud by Bailey. *Id.* at 2–3. ECS Winchester explained the clerical error to ECS headquarters and provided accurate calibration records for them to show WACEL. *Id.* at 3. Also in July 2014, an employee of a different engineering firm told Bailey that he had heard Bailey was terminated from WACEL.² *Id.* Bailey sent a letter to WACEL requesting an explanation. *Id.*; Compl. Ex. 1, at 1. Thomas Cohn, Executive Director of WACEL, responded on July 29, 2014, in a letter addressed to Bailey at ECS. Cohn explained that "ECS conducted an internal investigation of the Winchester laboratory and discovered that the calibration records that you submitted to WACEL for the annual audit were fabricated. This is a serious violation of the WACEL Code of Ethics and Bylaws." Compl. Ex. 1, at 2. The letter went on to say that based on ECS's investigation, the Board in a May 22, 2014, meeting "also voted to suspend your WACEL certifications for a period of five years for falsifying laboratory calibration records and submitting fabricated records as a means to meet the requirements of a WACEL accredited laboratory." *Id.*; *see also* Third Am. Compl. 3. The letter stated that Bailey could appeal this decision. *Id.* Bailey explains

² In a September 21, 2014, letter from Bailey to the WACEL board of directors attached to the Complaint, Bailey states that his peer said, "Heard you got kicked out of WACEL for making up numbers." Compl. Ex. 1, at 3.

that he did not pursue an appeal because he believed it would be untimely, as the WACEL’s “Quality Assurance Inspection Agency Audit Program Guide” (“Audit Guide”) stated that an appeal had to be filed within three weeks of the decision. Third Am. Compl. 3.

Bailey asserts that Ritenour’s inspection and the resulting disciplinary actions violated multiple provisions of WACEL’s Audit Guide. Ritenour performed the inspection alone rather than as part of the prescribed two-person team, and he failed to disclose at the summation meeting an issue dispositive of accreditation. *Id.* at 1–2. WACEL then violated the Audit Guide by failing to provide a final audit report or grant ECS Winchester thirty days to correct any identified deficiencies. *Id.* at 2–3. Finally, Bailey did not hear about the termination of his personal certifications before he received the letter from Cohn, in violation of the Audit Guide requirement to inform affected parties of certification terminations. *Id.* at 3.

Without his WACEL certifications, Bailey could not perform field work or handle enough tasks at ECS Winchester to accumulate his normal weekly hours, leading to decreased income and eventually to ECS firing him in April 2015. *Id.* at 8. Bailey also anticipates future costs of replacing his certifications and inability to find new employment because of his tarnished professional image. *Id.* at 8–9. Bailey seeks compensatory damages, punitive damages, legal fees, and reimbursement for ongoing mental health counseling for himself and his family. *Id.* at 8–10.

II. Discussion

WACEL argues that Bailey’s Third Amended Complaint is procedurally deficient and fails to state a claim upon which relief can be granted.

A. *Procedural Defects*

The presiding District Judge's September 21, 2015, Order granted Bailey's motion for leave to amend. ECF No. 44. WACEL argues that the scope of this leave to amend was limited to "deleting as named defendants the board of directors and employees," as is stated in the accompanying Memorandum Opinion. Memo. Op. at 8–9; *see* Mem. of P. & A. in Supp. of Def. WACEL's Mot. to Dismiss the Third Am. Compl. ("Def.'s Mem. in Supp.") 1–2, ECF No. 48. The Memorandum Opinion and Order, however, do not expressly limit the allowable amendments to this type. Moreover, considering Plaintiff's *pro se* status, the liberal amendment standard of Rule 15, and the limited scope of the allegations added to the Third Amended Complaint that were not in the Second Amended Complaint, the Court finds that the Third Amended Complaint substantially complies with the September 21 Order.

WACEL further argues that the Third Amended Complaint was not timely filed and contains numerous procedural flaws, including failure to number the paragraphs or include attachments of referenced documents. Def.'s Mem. in Supp. 2. The cited procedural deficiencies have little practical significance. WACEL correctly notes that Bailey filed the Third Amended Complaint two days after the deadline, but WACEL has not claimed any prejudice from this late filing. Moreover, a two-day delay does not demonstrate a lack of diligence sufficient to extinguish this action. The Court will address the Third Amended Complaint on its merits.

As a separate matter, although the Third Amended Complaint asserts that Bailey is entitled to relief only under causes of action for defamation and breach of fiduciary duty, Third Am. Compl. 5, it also presents facts and accusations related to various federal law claims, *see id.* at 4–5. Bailey's federal law claims were dismissed with prejudice by the September 21 Order, and to the extent that the Third Amended Complaint reasserts those claims, they should be struck under Rule 12(f) of the Federal Rules of Civil Procedure.

B. *Failure to State a Claim*

WACEL also challenges the Third Amended Complaint under Rule 12(b)(6), arguing that its allegations of defamation and breach of fiduciary duty fail to state a claim upon which relief can be granted. Def.'s Mem. in Supp. 2–7. A complaint must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). A plaintiff must “state[] a plausible claim for relief” that “permit[s] the court to infer more than the mere possibility of misconduct” based upon its “judicial experience and common sense.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). The court accepts as true all well-pled facts and construes those facts in the light most favorable to the plaintiff. *Philips*, 572 F.3d at 180. However, “legal conclusions, formulaic recitation of the elements of a cause of action, or bare assertions devoid of further factual enhancements fail to constitute well-pled facts for Rule 12(b)(6) purposes.” *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009) (citing *Iqbal*, 556 U.S. at 678).

Plaintiffs must plead enough facts to “nudge[] their claims across the line from conceivable to plausible,” and the court should dismiss a complaint that is not “plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Determining whether a complaint states a plausible claim for relief is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Iqbal*, 556 U.S. at 679. Federal courts have an obligation to construe *pro se* pleadings liberally, so that any potentially valid claim can be fairly decided by its merits rather than the *pro se* litigant’s legal acumen. *Rankin v. Appalachian Power Co.*, No. 6:14cv 47, 2015 WL 412850, at *1 (W.D. Va. Jan. 30, 2015) (citing *Boag v. MacDougall*, 454 U.S. 364, 365 (1982)). Nevertheless, “a *pro se* plaintiff must . . . allege facts that state a cause of action, and district courts are not required ‘to conjure up questions never

squarely presented to them.” *Consider v. Medicare*, No. 3:09cv49, 2009 WL 9052195, at *1 (W.D. Va. Aug. 3, 2009) (quoting *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985)), *aff’d*, 373 F. App’x 341 (4th Cir. 2010).

1. Breach of Fiduciary Duty and Denial of Fair Procedure

Bailey alleges that WACEL failed to follow its own guidelines or provide him an opportunity to defend himself when it audited ECS Winchester, investigated the calibration records, and suspended his certifications. Though Bailey terms his claim breach of fiduciary duty, what he alleges is a denial of his common law right to fair procedure as a member of a nonprofit corporation.³ As he is a pro se plaintiff, the Court will not hold Bailey’s confusion about the nature of his claim against him.⁴

As an initial matter, there is some question of whether Virginia or Maryland law applies to this claim. “[T]he law of the state of incorporation normally determines issues related to the internal affairs of a corporation.” *First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 621 (1983); *see In re LandAmerica Fin. Grp., Inc.*, 470 B.R. 759, 778 (Bankr. E.D. Va. 2012) (applying Maryland law to breach of fiduciary duty claims against officers and directors of a Maryland corporation). The Third Amended Complaint asserts that WACEL is a nonprofit corporation incorporated in Maryland. *Id.* at 1. This particular cause of action, however, does not arise directly from the corporation’s articles of incorporation and statutes governing it, but exists in the common law of both Virginia and Maryland courts. Under Virginia conflict-of-laws rules, the nature of the dispute determines which state’s law applies,

³ This cause of action bears some resemblance to a due process claim. Though Bailey’s Federal due process allegations were dismissed by the presiding District Judge’s September 21, 2015, Order, his state law claims were not previously addressed because the Court lacked jurisdiction.

⁴ WACEL addresses this issue entirely under Virginia fiduciary duty law, arguing that Bailey’s claims must fail because he does not bring them derivatively. Def.’s Mem. in Supp. 3–4. These arguments are inapposite.

Buchanan v. Doe, 431 S.E.2d 289, 291 (Va. 1993), and the nature of a claim for denial of fair procedure by a nonprofit corporation is not entirely clear. Regardless, the Court need not decide the issue because Bailey's allegations survive dismissal in either forum.

Maryland follows "a general rule [that] courts will not interfere in the internal affairs of a voluntary membership organization." *N.A.A.C.P. v. Golding*, 679 A.2d 554, 558 (Md. 1996). If the organization is incorporated in Maryland, courts apply the business judgment rule, *id.* at 559, and will not intervene in an organization's decision absent "fraud, arbitrariness, or bad faith," *id.* at 563. Nevertheless,

the policy of minimizing judicial involvement in private organizations does not mean that members have no guarantee of procedural fairness. [Maryland courts] have historically taken the view that members in a private organization are entitled to at least rudimentary procedural protections, such as notice and an opportunity to be heard, before they may be expelled or deprived of other important membership rights. If the organization's adjudicatory procedure does not afford the member these minimal protections, or if the organization provides no avenue for internal review or appeal, then judicial intervention may be appropriate.

Tackney v. U.S. Naval Acad. Alumni Ass'n, Inc., 971 A.2d 309, 317 (Md. 2009) (quoting *Golding*, 679 A.2d at 561–62).

Bailey asserts that in conducting an annual audit of ECS Winchester, Ritenour and WACEL repeatedly violated WACEL's Audit Guide. These alleged violations do not implicate any personal right Bailey possesses. The Audit Guide sets out procedures for audits of laboratories, which they must undergo yearly to maintain WACEL membership; it does not address an individual's membership rights. WACEL's Bylaws do mention individual membership, although Bailey does not allege that WACEL violated them, and, on the allegations before the Court, it appears WACEL acted in accord with them. The Bylaws allow for rescission

of individual membership for violations of the Code of Ethics and do not mandate any procedure for effectuating that termination beyond a determination of the Board of Directors.

Nevertheless, Bailey's allegations show that he was not afforded any process before losing his WACEL membership. According to Bailey, he did not know that there were charges against him, that his certifications were in danger, or even that he had lost them until he contacted WACEL months later. He was not provided an opportunity to present a defense, call witnesses, or offer evidence. Although adhering to corporate bylaws can entitle directors to the deference of the business judgment rule, *see Chisholm v. Hyattstown Volunteer Fire Dep't, Inc.*, 691 A.2d 776, 784–85 (Md. Ct. Spec. App. 1997), those bylaws must be sufficient to “protect a member’s right to fundamental fairness,” *id.* at 784 n.7, in order to shield directors’ conduct. *See id.* at 777–78, 784 (finding that “the fundamental fairness due appellant” was preserved by a procedure, as outlined in the bylaws, requiring a hearing before a board of other members where the accused could present a defense and call witnesses). Because the Third Amended Complaint sufficiently alleges that WACEL terminated Bailey’s membership without any form of process, I cannot conclude at this stage that it deserves the protection of the business judgment rule under Maryland law.

Bailey’s allegations play out similarly in Virginia. The Supreme Court of Virginia has held that “in reviewing the expulsion of a member of a corporation, a court ‘may inquire whether the member was given reasonable notice of the hearing of the charge against him, whether he was afforded an opportunity to be heard, and whether the hearing and expulsion were in good faith.’” *Gibson v. Boy Scouts of Am.*, 359 F. Supp. 2d 462, 466 (E.D. Va. 2005), (quoting *Gottlieb v. Econ. Stores, Inc.*, 102 S.E.2d 345, 352 (Va. 1958)), *aff’d*, 163 F. App’x 206 (4th Cir. 2006). The lack of process afforded Bailey is as problematic under Virginia law as it is under

Maryland law, and I cannot find that judicial intervention is unwarranted under these facts. Accordingly, I find that Bailey has stated a claim for denial of a common law right of fair procedure.

2. Defamation

For torts, Virginia applies the law of “the place the last event necessary to make an [actor] liable for an alleged tort takes place.” *Ford Motor Co. v. Nat’l Indem. Co.*, 972 F. Supp. 2d 850, 856 (E.D. Va. 2013) (alteration in original) (internal quotation marks omitted). Bailey alleges two instances of defamation. The first is a fellow engineer’s comment to Bailey that he “[h]eard you got thrown out of WACEL for making up numbers.” Compl. Ex. 1, at 3; *see* Third Am. Compl. at 3. Bailey concludes from this comment that someone at WACEL spread information about his loss of certifications. The second is Cohn’s letter, which stated, “ECS conducted an internal investigation of the Winchester laboratory and discovered that the calibration records that you submitted to WACEL for the annual audit were fabricated. This is a serious violation of the WACEL Code of Ethics and Bylaws.”⁵ Compl. Ex. 1, at 2; *see also* Third Am. Compl. at 3, 7–8. Bailey does not allege where the comment to his colleague occurred, but Bailey is a Virginia resident and the letter was sent to him at ECS’s Virginia address. The Court will therefore evaluate his claim under Virginia law.

⁵ WACEL argues that Bailey’s defamation claim is time-barred because the Third Amended Complaint was filed on October 15, 2015—more than a year after the July 2014 comment and letter that underlie Bailey’s claim. WACEL Br. in Supp. 5 (citing Va. Code Ann. § 8.01-247.1), ECF No. 48. Although Bailey did not expressly plead defamation until the Third Amended Complaint, allegations and argument conveying such a claim existed in the Complaint and First Amended Complaint, ECF No. 20, which were both filed within a year of the alleged incidents. *See* Compl. 1 (alleging that Bailey has had his “professional reputation compromised” by WACEL’s actions); *id.* Ex. 1, at 2 (attaching Mr. Cohn’s letter); *id.* at 3 (attaching letter to WACEL describing Bailey’s colleague’s statement); Apr. 28, 2015 R. & R. 5, ECF No. 32 (“Liberally construing Bailey’s claims, [the Amended Complaint] brings causes of action . . . under state law for breach of contract and defamation.”). Considering Bailey’s *pro se* status, the Court will consider his defamation allegations sufficiently raised by the earlier complaints to defeat WACEL’s statute of limitations defense. *See* Fed. R. Civ. P. 15(c)(1)(B) (allowing relation back of amendments “assert[ing] a claim or defense that arose out of the conduct, transaction, or occurrence set out . . . in the original pleading”).

Defamation requires publication of a false and defamatory statement with the requisite intent. *Nigro v. Va. Commonwealth Univ./Med. Coll. of Va.*, 492 F. App'x 347, 355 (4th Cir. 2012) (quoting *Jordan v. Kollman*, 612 S.E.2d 203, 206 (Va. 2005)). Publication is simply communication of a statement to a third party and can take the form of speech or writing. *Jafari v. Old Dominion Transit Mgmt. Co.*, 462 F. App'x 385, 390 (4th Cir. 2012) (citing *Thalhimer Bros. v. Shaw*, 159 S.E. 87, 90 (Va. 1931)). To be defamatory, a statement must be false and “tend[] so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1092 (4th Cir. 1993) (alteration in original) (internal quotation marks omitted). A negative factual statement that relates to the character required to carry out a person’s occupation prejudices him in his profession and is considered defamation per se. *JTH Tax, Inc. v. Grabert*, 8 F. Supp. 3d 731, 740 (E.D. Va. 2014). A defendant has the requisite intent if it knew the statement was false or “negligently failed to ascertain” whether the statement was false. *Tharpe v. Lawidjaja*, 8 F. Supp. 3d 743, 786 (W.D. Va. 2014). In Virginia, a plaintiff must set out exactly the allegedly defamatory speech or writing. *Snyder v. Home Depot U.S.A., Inc.*, No. 5:11cv70336, 2011 WL 4344577, at *2 (W.D. Va. Sept. 14, 2011) (citing *Fuste v. Riverside Healthcare Ass’n, Inc.*, 575 S.E.2d 858, 862 (Va. 2003)).

WACEL argues that the allegedly defamatory statements were not published, were not false, and were protected by qualified privilege. Def.’s Mem. in Supp. 4–6. The allegations about Bailey’s colleague’s statement do not meet the pleading standard for defamation. Defamatory statements must be alleged exactly, and the Third Amended Complaint does not identify who informed Bailey’s colleague of his loss of accreditation or when that statement was made. *See Skillstorm, Inc. v. Elec. Data Sys., LLC*, 666 F. Supp. 2d 610, 620 (E.D. Va. 2009) (dismissing

claim when plaintiff failed to “identify a speaker, the substance of the statement, when the statement was made, and why the statement is defamatory”). Bailey’s vague allegation also fails to show that his colleague’s knowledge came from a publication by WACEL. Bailey learned of his lost certifications by checking a website, Compl. Ex. 1, at 1, and ECS performed an internal investigation into the calibration records and concluded that they were fabricated, *id.* at 2. Sources other than WACEL had information about ECS’s investigation and Bailey’s suspension, and Bailey has not identified the source of his colleague’s knowledge.

Cohn’s letter likewise does not satisfy the element of publication. Publication requires communication to a third party. *See Verrinder v. Rite Aid Corp.*, No. 3:06cv24, 2007 WL 4357595, at *19–20 (W.D. Va. Dec. 11, 2007). The letter is a communication from WACEL to Bailey, and Bailey has not alleged that WACEL sent it to anyone else. *See Katz v. Odin, Feldman & Pittleman, P.C.*, 332 F. Supp. 2d 909, 915–16 (E.D. Va. 2004) (finding letter sealed and sent by mail is published when opened and read by a third party). Thus, the letter cannot form the basis of a defamation claim absent evidence that WACEL published it to others.

Furthermore, Bailey does not allege that WACEL had the requisite intent. To recover compensatory damages for defamation, Bailey must demonstrate “that the defendant either knew [the statement] to be false, or believing it to be true, lacked reasonable grounds for such belief, or acted negligently in failing to ascertain the facts on which the publication was based.” *Gazette, Inc. v. Harris*, 325 S.E.2d 713, 725 (Va. 1985); *see also id.* at 726–27 (holding that this standard applies to both media and non-media defendants). Bailey does not allege that WACEL affirmatively knew that he did not commit fraud and thus knew that its statements were false. Instead, he pleads multiple deficiencies with Ritenour’s audit and argues that WACEL negligently failed to ascertain the truth of his report by failing to follow their own guidelines or

redress those deficiencies. Cohn's letter, however, relates that WACEL contacted ECS about the audit findings and ECS conducted an internal investigation into their veracity. It was only after ECS's investigation, which was separate from Ritenour's audit, determined the calibration results were fabricated that WACEL took action, including suspending Bailey's certifications and writing the letter cited by Bailey as defamation. Regardless of any deficiencies in their own process, Bailey's allegations do not show that WACEL was negligent in relying on Bailey's employer's internal investigation or unreasonable in believing its conclusion. Accordingly, I recommend that Bailey's defamation claim be dismissed.

III. Conclusion

For the foregoing reasons, I recommend that the presiding District Judge **GRANT IN PART** and **DENY IN PART** the Defendant's Motion to Dismiss Third Amended Complaint, ECF No. 47, **DISMISS** Bailey's defamation claim, and **REJECT** the Defendant's arguments as to the procedural defects of the Third Amended Complaint, but **STRIKE** the federal claims that were previously dismissed with prejudice.

Notice to Parties

Notice is hereby given to the parties of the provisions of 28 U.S.C. § 636(b)(1)(C):

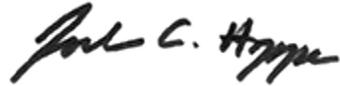
Within fourteen days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

Failure to file timely written objections to these proposed findings and recommendations within 14 days could waive appellate review. At the conclusion of the 14 day period, the Clerk is

directed to transmit the record in this matter to the Honorable Elizabeth K. Dillon, United States District Judge.

The Clerk shall send certified copies of this Report and Recommendation to all counsel of record and unrepresented parties.

ENTER: July 28, 2016

A handwritten signature in black ink that reads "Joel C. Hoppe". The signature is written in a cursive, slightly slanted style.

Joel C. Hoppe
United States Magistrate Judge