STATE OF MAINE
CUMBERLAND, ss.

BUSINESS & CONSUMER DOCKET
LOCATION: PORTLAND
Docket No. BCDWB-CV-2019-042
(cons. w/ BCDWB-CV-2019-041)

TUCKER J. CIANCHETTE

Plaintiff,

v.

ERIC L. CIANCHETTE,
PEGGY A. CIANCHETTE and
PET, LLC,

Defendants.

ERIC L. CIANCHETTE,
PEGGY A. CIANCHETTE and
PET, LLC

Third-Party Plaintiffs

v.

GOODY LLC,
ESPO LLC, and
TLNK LLC,

Third-Party Defendants.

COMBINED ORDER ON MOTIONS FOR SUMMARY JUDGMENT

Before the Court are three motions for summary judgment pursuant to Rule 56 of the Maine Rules of Civil Procedure. First, Defendants PET, LLC ("PET"), Eric L. Cianchette, and Peggy A. Cianchette move for partial summary judgment on Plaintiff Tucker Cianchette's Complaint. Second, Tucker Cianchette and the Third-Party Defendants move for summary judgment on PET, Eric Cianchette, and Peggy Cianchette's counterclaims. The Court will address these motions in order. Tucker Cianchette is represented by Attorneys Timothy Norton

and Jason Rice. Defendants are represented by Attorneys Lee Bals and Trey Milam. The Third-Party Defendants are represented by Attorney David Hirshon.

STANDARD OF REVIEW

Summary judgment is appropriate if, based on the parties' statements of material fact and the cited record, there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. M.R. Civ. P. 56(c); *Levine v. R.B.K. Caly Corp.,* 2001 ME 77, ¶ 4, 770 A.2d 653. It follows, to survive a defendant's motion for summary judgment, the plaintiff must establish a prima facie case for each of their claims and set forth specific facts showing there is a genuine issue of material fact. *Key Trust Co. of Maine v. Nasson College,* 1997 ME 145, ¶ 10, 697 A.2d 408; *see also* M.R. Civ. P. 56(e). A fact is material if it has the potential to affect the outcome of the suit. *Id*. To be considered "genuine", there must be sufficient evidence offered to raise a factual contest requiring a fact finder to choose between competing versions of the truth. *Rainey v. Langden,* 2010 ME 56, ¶ 23, 998 A.2d 342; *Burdzel v. Sobus,* 2000 ME 84, ¶ 6, 750 A.2d 573.

Further, this showing "requires more than effusive rhetoric and optimistic surmise." *Hennessy v. City of Melrose,* 194 F.3d 237, 251 (1st Cir. 1999). The Court must ignore "conclusory allegations, improbable inferences, and unsupported speculation." *Carroll v. Xerox Corp.,* 294 F.3d 231, 237 (1st Cir. 2002). "When a plaintiff has the burden of proof on an issue, a court may properly grant summary judgment in favor of the defendant if it is clear that the defendant would be entitled to a judgment as a matter of law if the plaintiff presented nothing more than was before the court" when the motion was decided. *Reliance Nat'l Indem. v. Knowles Indus. Servs., Corp.,* 2005 ME 29, ¶ 9, 868 A.2d 220.

I. Defendant's PET LLC, Eric Cianchette, and Peggy Cianchette's Motion for Summary Judgment

This action is made up of two consolidated cases. In one case, Peggy and Eric Cianchette (together the "Moving Parties") filed a Complaint seeking a declaratory judgment regarding certain provisions of the PET, LLC Operating Agreement (the "PET Agreement"). In the other case, Tucker Cianchette filed a multi-count complaint seeking various and sundry relief.

On December 16, 2019, the Court issued a *Combined Order on Defendants' Motion for Partial Judgment on the Pleadings and Motion to Dismiss for More Definite Statement* (the "Capital Transaction Order"). The Capital Transaction Order confirmed that the Moving Parties' could complete a Capital Transaction, pursuant to Section 4.4 of the PET Agreement, as a means of achieving a business divorce. However, the Court was clear that it did not "express any opinion about the *execution* of [the] procedure, nor as to any breach of duty by either party that could arise as part of the process." Capital Transaction Order at 8.

Since the Court issued the Capital Transaction Order, the Moving Parties have initiated a capital transaction, and assert that PET has officially merged with a new entity, Better Way Ford ("BWF"). Defendants bring their Motion for Summary Judgment, asserting that because the business divorce is complete, various of Tucker's claims fail as a matter of law.

FACTS

PET is a Maine limited liability company doing business as Casco Bay Ford, an automobile dealership primarily engaged in the business of selling and servicing Ford cars and trucks. (Def.'s S.M.F. ¶¶ 1-3.) The three members of PET, and the percentage of their ownership interest are as follows: Eric Cianchette (34%), Peggy Cianchette (33%), and Tucker Cianchette (33%). (Def.'s S.M.F. ¶ 4.)

As previously stated, on December 16, 2019, this Court issued the Capital Transaction Order, confirming that Section 4.4 of the PET Agreement allowed the Moving Parties to pursue a business divorce by means of a capital transaction, including a cash out merger. Capital Transaction Order at 8. The Moving Parties proposed a plan whereby PET would be valued, its assets would be transferred via sale or cash-out merger, and cash would be distributed to PET's members. *Id.* The Court confirmed that the proposed process would satisfy Section 4.4, but again, the Court was clear that it did not "express any opinion about the *execution* of [the] procedure, nor as to any breach of duty by either party that could arise as part of the process." Capital Transaction Order at 8.

The Moving Parties eventually voted for, and then adopted, an Emergency Resolution and Amended Plan of Merger (the "Merger Plan") between PET and BWF. The Moving Parties are listed as the sole members of BWF, each owning 50% of the LLC. (Def.'s S.M.F. ¶¶ 5-7.) The Merger Plan contained numerous provisions, including that "as of September 30, 2019, BWF assumed all lawfully due and owing debts and obligations of PET and BWF became vested with title to all of the assets of PET." (Def.'s S.M.F. ¶ 11.) Likewise the Merger Plan stated that "within 15 calendar days of BWF's receipt of the valuation report described in the Emergency Resolution, BWF was required to tender the difference in the fair market value of PET as of September 30, 2019", along with the amount of obligations assumed by BWF, to the members of PET. *Id.* Finally, the Merger Plan states that "all Membership interests in PET were terminated and canceled as of September 30, 2019. *Id.*

After the Merger Plan was approved, both PET and BWF signed a Statement of Merger and delivered it for filing with the office of the Secretary of State on April 3, 2020. (Def.'s

S.M.F. ¶ 12.) The Statement of Merger provides that the "date the merger effective under the governing statute of the surviving organization" is "April 3, 2020." (Def.'s S.M.F. ¶ 12.)

BWF received a valuation report described in the Emergency Resolution on June 8, 2020 and provided it to Tucker, through counsel, on June 9, 2020. (Def.'s S.M.F. ¶¶ 13, 14.) The valuation report concluded that the fair market value of PET as of September 30, 2019 was $3,208,000 (the "Merger Market Value"). *Id.* Pursuant to the Merger Plan, certain distributions allegedly were to be made to the former PET members in the manner proscribed by Section 4.4 of the PET Agreement and based upon the Merger Market Value. (Def.'s S.M.F. ¶¶ 11,16.) Section 4.4 of the PET Agreement provides for distributions to Members in accordance with the positive balance in their respective Capital Accounts, after allocating profits and losses in accordance with Sections 4.1 and 4.2 of the PET Agreement and distributions pursuant to Section 4.2.3 of the PET Agreement. (Def.'s S.M.F. ¶ 4.) If any amounts remain to be distributed after all Capital Accounts have been reduced (or increased) to zero, then they are allocated to Interest Holders in accordance with their Percentages. *Id.*

On June 23, 2020, BWF provided Tucker with a document entitled "Allocation of Value on Merger detailing the allocation of income, expenses, and the Merger Market Value, attempting to follow Section 4.4 of the PET Agreement. (Def.'s S.M.F. ¶ 15.) Defendants have since filed the Motion for Summary Judgment at issue, asking the Court to declare The Merger valid and enforceable, and to grant summary judgment on certain of Tucker's claims.

DISCUSSION

The Defendants bring their Motion for Summary Judgment on the basis that, 1) the Merger is valid and enforceable, 2) that of the nine counts in Tucker's Complaint, three seek relief premised on Tucker's status as a member of PET when judgment is entered, but Tucker is

no longer a Member, and 3) that the Court should enter judgment on their behalf regarding five of the remaining six counts in Tucker's complaint because the Capital Transaction, which took place on April 3, 2020, actually has an effective date of September 30, 2019.

I. There are genuine issues of material fact regarding whether the Merger of PET and BWF is valid and enforceable.

When Defendants originally asked the Court for a declaratory judgment approving of the cash-out merger process, the question before the Court was, "does the PET LLC Agreement create a mechanism to accomplish a business dissolution?" Capital Transaction Order at 4. In practical terms, the Court noted, "Defendants seek to hire an independent, third party certified public accountant to determine the fair market value of Casco Bay Ford, transfer PET's assets to another LLC in which Peggy and Eric have membership interests, and distribute cash payment to all three members of PET in accordance with Section 4.4 of the LLC Agreement." *Id.*

What the Court was not asked to do, and in fact stated it would not do, was approve of, or determine liability relating to, the actual *execution* of the proposed merger that had not yet occurred. *Id.* However, now that the purported Merger has occurred, the Court has been asked to grant summary judgment in favor of the Defendants.

According to Defendants, PET's merger with BWF was by-the-book. Not only did the Merger comply with the requirements of Section 4.4 of the PET Agreement, but Defendants assert that it also complied with Maine law. The Legislature has proscribed procedural steps to be followed for two limited liability companies to merge. These are codified in §§ 1641- 1644 of the Maine Limited Liability Company Act (31 M.R.S. § 1501, *et seq.*) (the "LLC Act"). Although Defendants, at face value, appear to have complied with the Maine Limited Liability Company Act's procedural requirements, Tucker raises questions of fact regarding Defendants' compliance with Section 4.4 of the PET Agreement.

Defendants' allege that "As of June 23, 2020, the amounts owed to each Member pursuant to the Distribution Allocation were distributed in accordance with Section 4.4 of the PET Agreement. (Def.'s S.M.F. ¶ 16.) Conversely, "Tucker denies that, as of June 23, 2020, the amounts owed to each Member pursuant to the Distribution Allowance were distributed in accordance with Section 4.4. (Pl.'s Opp. S.M.F. ¶ 16.) Tucker directs the Court to the $0 valuation of his membership interest, along with various other alleged inconsistencies in the PET business records, including examples of unapproved insider compensation. (Pl.'s Add. S.M.F. ¶ 9.) According to the Capital Transaction Order, Section 4.4 of the PET Agreement provides a mechanism for a cash-out merger of PET. It follows that, to be valid the Merger must comply with Section 4.4. Because genuine issues of material fact exist regarding the execution of the Merger, the Court declines to grant summary judgment on its validity at this stage.

II. Regardless of the Merger's Validity, Defendants are not entitled to Summary Judgment

The Court has not confirmed the validity of the Merger. Thus, the Court will not grant summary judgment on Tucker's various claims on the basis of a valid Merger. However, even were the Merger held valid and enforceable, Defendants' motion would fail.

First, Defendants move for summary judgment on Counts VI, VII, and VIII, arguing that because Tucker is no longer a Member of PET, he can no longer assert claims relying on his status as a Member. According to Section 1644(1) of the Limited Liability Act, "[a]n action or proceeding pending by or against any constituent organization that ceases to exist may be continued as if the merger had not occurred, and the surviving organization may be, but not need be, substituted in the action." It follows, Tucker may maintain his suit against PET "as if the merger had not occurred."

Likewise, Defendants assert that to the extent Tucker seeks damages arising after September 30, 2019, the purported effective date of the Merger, the Court should grant summary judgment in favor of Defendants.[1] Defendants basis for claiming the Merger took effect on September 30, 2019 is the portion of the Merger Agreement which states as follows:

> as of September 30, 2019, BWF assumed all lawfully due and owing debts and obligations of PET and BWF became vested with title to all of the assets of PET; W]ithin 15 calendar days of BWF's receipt of the valuation report described in the Emergency Resolution, BWF was required to tender the difference in the fair market value of PET as of September 30, 2019; and, [A]ll Membership interests in PET were terminated and canceled as of September 30, 2019.

(Pl.'s S.M.F. ¶ 11.)

The Maine LLC Act establishes the effective date of a merger. 31 M.R.S. § 1643(4) provides that, regarding a merger where both the constituent and the surviving entities are LLC's, a merger becomes effective "*upon the later of*: (1) Compliance with subsection 3 [i.e. filing of the Statement of Merger with the Secretary of State]; and (2) As specified in the statement of merger. . ." (emphasis added). The plain language of the LLC Act states that it is the *later* of the above events that controls the effective date of a merger. Thus, by operation of law, the Merger cannot be effective prior to the filing of the Statement of Merger with the Secretary of State, regardless of the date specified in the Statement of Merger. The Statement of Merger in this case was filed with the Secretary of State on April 3, 2020. (Def.'s S.M.F. ¶ 11.)

[1] Defendants previously requested that the Court acknowledge a retroactive effective date of the Merger in their Motion to Establish Effective Date. Defendants relied on 14 M.R.S. § 5960 which they claimed permitted the Court in a declaratory judgment action to grant "further relief" whenever "necessary or proper". The Court previously declined to acknowledge the 9/30/2019 purported effective date, stating that "the statute relied upon by Defendants does not permit the Court to select the effective date as a remedy under these circumstances." *Order on Motion to Establish Effective Date* at 3.

Accordingly, the Merger cannot be effective prior to April 3, 2020, and the Court declines to grant summary judgment in favor of Defendants for damages occurring after September 30, 2019. Defendants' Motion for Summary Judgment is denied in its entirety.

II. Tucker Cianchette and Third-Party Defendants' Motions for Summary Judgment on Peggy and Eric Cianchette's Counterclaims

FACTS

The Defendants' counterclaim includes the following six claims against Tucker: Counts I and II allege Intentional Infliction of Emotional Distress; Count III alleges Defamation; Count IV asserts a claim for violation of 10 M.R.S. § 1174; Count V asserts a claim for violation of 18 U.S.C. § 1836; and Count VI asserts a claim for violation of the Uniform Trade Secrets Act. Each of these counts arise from three distinct events.

A. Tucker's Letter

Eric and Peggy Cianchette's claims for Intentional Infliction of Emotional Distress arise from a letter Tucker wrote and delivered to Eric and Peggy in or around May 2018. Tucker is Eric's son and Peggy's stepson, and personal disputes and disagreements between them have existed for years, recently resulting in litigation and a 2018 jury verdict against Eric and Peggy. *See Cianchette v. Cianchette,* 2019 ME 87, 209 A.3d 745. Despite said personal disputes, Peggy would occasionally send gifts to Tucker's house for his three children. (Def.'s Countercl. ¶ 21; Pl.'s Ans. ¶ 21.) Tucker wrote Eric and Peggy a letter in or around May 2018 in response to their sending of gifts to his children. (S.M.F. ¶ 11.) The language of the letter is included below in its entirety:

> Eric and Peggy,
>
> Our kids need loving and supportive people in their lives. We do not accept gifts from people who steal with their left hands and give with their right hands.

> As far as Emily, Erica and Kenny's gifts go, although it was a gracious offer, receiving material items from family that has elected to not have meaningful relationships, regardless of their chosen justification, sends a very confusing message to young impressionable children.
>
> Accepting responsibility for your actions is a critical part of being a mature, responsible adult.
>
> Bill Cosby, Joe Paterno, and Harvey Weinstein have cemented their legacy, it appears that outside of your bubble you may have as well.

(Def.'s Countercl. Ex. A.) After drafting the letter, Tucker placed it in an envelope and asked his friend, JJ Lee, to deliver it to Eric and Peggy along with boxes and bags that contained unopened gifts previously sent to Tucker's children. (S.M.F. ¶ 12.)

B. The Penfold Survey

Count III for defamation and in part, Count IV for violation of 10 M.R.S. § 1174 arise from an incident in 2018 involving William Penfold, a former employee of both PET, LLC and Goody LLC. (*See* Def.'s Countercl. ¶¶ 42-48, 51; S.M.F. ¶¶ 14-15.) Penfold worked for PET, LLC at the Casco Bay Ford dealership sometime prior to December 2017 and was "unhappy with [his] employment experience." (S.M.F. ¶¶ 14-15.)

Before working for PET, LLC, Penfold worked for a separate Ford dealership in Wiscasset when he was involved in a truck sale that did not go "particularly well." (S.M.F. ¶¶ 16-17.) Because Penfold was concerned that the sale would lead to a negative customer survey, he listed his own personal email address in place of the customer's (without the customer's knowledge) so that any Ford Motor Company communications to the customer would instead be sent to Penfold. (S.M.F. ¶ 17.) Penfold eventually went on to work for PET, LLC, and after that was hired as a sales manager for Goody LLC on or around September 1, 2018. (S.M.F. ¶ 18.)

Shortly thereafter, in the fall of 2018, Penfold received a customer survey regarding services provided by PET, LLC. (S.M.F. ¶ 19.) Penfold received the customer survey in the personal email account he used in place of the Wiscasset customer's email account some years earlier. (S.M.F. ¶ 19.) While watching television at home, Penfold completed and submitted an unfavorable survey about PET, LLC. (S.M.F. ¶¶ 19-20.) Penfold has stated that his decision to submit the unfavorable survey was motivated by grievances with his former employer, PET, LLC. (S.M.F. ¶¶ 20, 22.) Despite working with Tucker at Goody LLC when the unfavorable survey was submitted, Penfold never told Tucker about the survey. (S.M.F. ¶ 22.) Tucker learned of the survey later that fall, when Melissa Sullivan of Ford Motor Company informed him of it. (S.M.F. ¶ 23.) At that time Tucker was employed as Penfold's superior, and reprimanded Penfold for his conduct. (S.M.F. ¶ 24.)

C. The "Red Letter" Promotion

Finally, the remaining counts of Eric and Peggy's counterclaim relate to a sales promotion (the "Red Letter" promotion) put on by Goody LLC in or around October 2019. (Def.'s Counterclaim ¶¶ 49-61.) At the time of the Red Letter promotion, Tucker was not an employee of Goody LLC. (S.M.F. ¶ 36.)

The promotion involved mailing 2,500 letters in red envelopes to individuals residing within twenty miles of 04011 (the zip code associated with Goody LLC's Brunswick Ford location) that had purchased a Ford vehicle with model years of 2009-2017 prior to October 2017.[2] The promotion was conducted by Axiom Marketing Services, who identified the individuals to include in the promotion through publicly available information, including the

[2] The Red Letter promotion extended to customers who purchased a car matching the criteria from any dealership in the applicable radius. (*See* S.M.F. ¶ 28.) Customers who fit the criteria but had previously purchased a vehicle from any of the Third-Party Defendants were removed from the Red Letter mailing. (S.M.F. ¶ 29.)

Maine Bureau of Motor Vehicles. (S.M.F. ¶ 30.) Tucker was not involved in the promotion and did not communicate with Goody LLC or any employees of Axiom Marketing Survey about it.

DISCUSSION

Counts I and II: Intentional Infliction of Emotional Distress

Counts I and II of Eric and Peggy Cianchette's counterclaim alleges Intentional Infliction of Emotional Distress ("IIED"), against Tucker for writing the letter, and against Third-Party Defendants on a theory of vicarious liability because an employee (J.J. Lee) delivered the letter. Tucker and Third-Party Defendants both move for summary judgment on Counts I and II. Eric and Peggy have failed to establish the elements of an IIED claim, as Tucker's conduct was not "extreme and outrageous" as defined by Maine law. Therefore, both Tucker and Third-Party Defendants are entitled to summary judgment on Counts I and II.

A party is subject to liability for IIED when he "engages in extreme or outrageous conduct that intentionally or recklessly inflicts severe emotional distress upon another." *Vicnire v. Ford Motor Credit Co.,* 401 A.2d 148, 155 (Me. 1979). To survive summary judgment, a prima facie case for IIED must be established with the following four elements:

> (1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from [his] conduct; (2) the conduct was so extreme and outrageous as to exceed all possible bounds of decency and must be regarded as atrocious, utterly intolerable in a civilized community; (3) the actions of the defendant caused the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.

Argerow v. Weisberg, 2018 ME 140, ¶ 27, 195 A.3d 1210 (quoting *Curtis v. Porter,* 2001 ME 158, ¶ 10, 784 A.2d 18). "[I]n the context of summary judgment for a claim for intentional inflection of emotion distress, 'it is for the court to determine in the first instance whether the defendant's conduct may reasonably regarded as so extreme and outrageous to permit

recovery.'" *Lougee Conservancy v. CitiMorgage, Inc.,* 2012 ME 103, ¶ 26, 48 A.3d 774 (quoting *Champagne v. Mid-Me. Med. Ctr.,* 1998 ME 87, ¶ 16, 711 A.2d 1086, 1090 (Me. 1995).

The Law Court has adopted the rule of liability for IIED stated in the Restatement (Second) of Torts § 46. *Vicnire v. Ford Motor Credit Co.,* 401 A.2d 148, 154 (Me. 1979). According to the Restatement, "liability has been found only where the conduct has been so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Restatement (Second) of Torts § 46, cmt. d. Additionally, the liability "clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." *Id.* At times, individuals ". . . must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind." *Id.*

There are no genuine issues of material fact relating to the letter at issue. It is undisputed that Tucker wrote the letter and had it delivered to Eric and Peggy, along with unopened gifts they had previously sent to Tucker's children. (S.M.F. ¶¶ 11-12.) However, the Court concludes that Tucker's conduct in this instance does not reach the established standard for extreme and outrageous conduct. Although the contents of the letter and the refusal of gifts may be insulting and upsetting, Tucker's conduct is not so "outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."[3] Restatement (Second) of Torts § 46, cmt. d.

[3] For instance, in *Botka v. S.C. Noyes & Co.,* the Court upheld summary judgment in favor of the defendant where the conduct at issue included interfering with the plaintiffs' business activities, frequently interrupting, berating, insulting, and harassing the plaintiffs alone or in front of others, initiating a physical confrontation with one plaintiff, and threatening plaintiffs with eviction. 2003 ME 128, ¶¶ 10, 19. Conversely, the Law Court denied a defendant's motion for summary judgment when the conduct at issue included the defendant's set up a nighttime robbery of a delivery person, which actually resulted in severe emotional distress. *Curtis v. Porter,* 2001 ME 158, ¶ 15, 784 A.2d 18.

Even if the Court were to find Tucker's conduct "extreme and outrageous", to make out a prima facie case of IIED a plaintiff must also show that they suffered emotional distress "so severe that no reasonable person could be expected to endure it." *Agerow,* 2018 ME 140, ¶ 27, 195 A.3d 1210. Peggy Cianchette asserts that, due to letter at issue, she had physical symptoms resulting from the stress which she tried to address by increasing the dosages of her medications and seeking alternative treatments. (S.A.M.F. ¶ 78.) Likewise, Peggy Cianchette states that she continues to struggle with high blood pressure, depression, and sleeplessness as a result of the letter. (S.A.M.F. ¶ 77.)

Despite Peggy Cianchette's alleged symptoms, "Stress, humiliation, loss of sleep, and anxiety occasioned by the events of everyday life are endurable." *Schelling v. Lindell,* 2008 ME 59, ¶ 26, 942 A.2d 1226. Distress, irritation, and emotional upset "will rarely constitute the kinds of damages that are 'so severe' that a reasonable person could not be expected to carry on." *Id.* "Even if the distress that [a plaintiff] claims he suffered was, in actuality, severe, he must still show that 'the harm alleged *reasonably* could have been expected to befall the ordinarily sensitive person.'" *Holland v. Sebunya,* 2000 ME 160, ¶ 18, 759 A.2d 205 (quoting *Theriault v. Swan,* 558 A.2d 369, 372 (Me. 1989) (emphasis added). The type of distress an ordinarily sensitive plaintiff would experience from receiving Tucker's letter and returned gifts would not be of the severity that no reasonable person could be expected to endure it. Because Eric and Peggy Cianchette's counterclaim does not establish a prima facie case for IIED, Tucker's motion for summary judgment on Counts I and II is granted.

Additionally, the Court grants the Third-Party Defendants' motion for summary judgment with respect to Counts I and II. Because the underlying letter, and Third-Party Defendants' employee JJ Lee's delivery thereof, does not meet the high bar for extreme and

outrageous conduct, the Third-Party Defendants cannot be held vicariously liable for Intentional Infliction of Emotional Distress.

Counts III and IV: Defamation

Tucker and the Third-Party Defendants also move for summary judgment on Counts III and IV of Eric and Peggy Cianchette's counterclaim in which they allege defamation in connection with the Penfold survey, and that the defamation was in violation of 10 M.R.S. § 1174. In their counterclaim, Eric and Peggy allege that Tucker was "acting in his capacity as General Manager" when he directed the publication and communication of the Penfold survey. (Def.'s Countercl. ¶¶ 44, 48.)

Despite Eric and Peggy's allegations, there is no genuine dispute as to the material fact that Tucker was not involved in the Penfold survey in any capacity. When Penfold originally recorded his personal email address in place of the potentially dissatisfied customer he was an employee at Wiscasset Ford. (S.M.F. ¶ 17.) Penfold then worked for PET, LLC, followed by Goody LLC. (S.M.F. ¶ 18.) Penfold completed the false survey at his home while watching television. (S.M.F. ¶¶ 19-20.) Penfold never told Tucker about the survey, until Tucker learned of it from a Ford representative. (S.M.F. ¶ 23.) After Tucker learned of the false survey, Penfold was reprimanded. (S.M.F. ¶ 24.) Eric and Peggy provide no contradictory evidence indicating that Tucker was involved in the survey at any point, or in any capacity.

Additionally, Peggy and Eric argue on a theory of vicarious liability that Tucker, as Penfold's supervisor at the time the false survey was completed, is liable for Penfold's conduct. "[A] prerequisite to imposing vicarious liability is the existence of an employer-employee relationship." *Rainey v. Langen,* 2010 ME 56, ¶ 14, 998 A.2d 342. It is undisputed that Tucker was Penfold's supervisor, but both Tucker and Penfold were employees of Goody LLC. (S.M.F.

¶ 18, Def.'s Countercl. ¶ 24.) Tucker's role as general manager of Goody LLC is not enough to transform his employer-employee relationship with Penfold into an employer-employee relationship. *See* Restatement (Third) of Agency § 3.15 (2006) ("Coagents, although they may occupy dominant and subordinate positions within an organizational hierarchy, share a common principal.") Because the imposition of vicarious liability depends on the existence of an employer-employee relationship between Tucker and Penfold, and none exists, Tucker cannot be held vicariously liable.

Finally, Eric and Peggy contend that Tucker made a separate defamatory statement in response to Ford's email asking him what steps he had taken to prevent a recurrence of Penfold's submission of a survey for a Casco Bay Ford customer. Eric and Peggy did not include this allegation in the Third-Party Complaint and detailed this allegation too late to amend said complaint, as the deadline for amending the pleadings was February 21, 2020. *See* Order on Plaintiff's Motion to Amend Scheduling Order Deadlines dated July 16, 2020. Nevertheless, Eric and Peggy's claim would likewise fail on the merits. A claim for defamation requires a statement that is both defamatory, *i.e.,* tending "to so 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," and false. *Morgan v. Kooistra,* 2008 ME 26, ¶ 26, 941 A.2d 447; *Rippett v. Bemis,* 672 A.2d 82, 86 (Me. 1996).

The statement at issue, which Tucker wrote in an email to Ford's Regional Manager, reads as follows:

> I do think it warrants noting that any onus regarding a violation be spread equally, if not more, to Wiscasset and Casco Bay Ford. My employee had only been employed here for a matter of weeks when he filled out the survey, his private email was listed incorrectly when he was employed by Wiscasset, and Casco Bay…submitted false information that prompted a survey.

(S.A.M.F. ¶ 107.) In the above statement, Tucker describes the short length of time Penfold had been working for Goody, LLC, points out that Penfold had incorrectly listed his private email when he was employed by Wiscasset, and that Casco Bay Ford's customer file was submitted without being updated, prompting the survey which was emailed to Penfold. The statement aligns with the undisputed facts of the case and cannot be reasonably construed as false. Thus, the Court grants Tucker's motion for summary judgment with respect to Count III.

In addition to Tucker, Eric and Peggy bring Count III against the Third-Party Defendants. Here, Eric and Peggy's claims are based entirely on vicarious liability. However, unlike Tucker, Goody LLC was Penfold's employer at the time he submitted the false survey. It follows, Eric and Peggy's claim against the Third-Party Defendants satisfies the first prerequisite of imposing vicarious liability: the existence of an employer-employee relationship. *Rainey,* 2010 ME 56, ¶ 14, 998 A.2d 342.

An employer may be held vicariously liable for actions of its employee when the employee's conduct was within the scope of employment. *See Mahar v. StoneWood Transport,* 2003 ME 63, ¶ 13, 823 A.2d 540. Maine applies the Restatement (Second) of Agency to determine the limits of imposing vicarious liability on an employer. *Id.* The Restatement provides:

> (1) Conduct of a servant is within the scope of employment if, but only if:
> (a) it is of the kind he is employed to perform;
> (b) it occurs substantially within the authorized time and space limits;
> (c) it is actuated, at least in part, by purpose to serve the master, and
> (d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.
>
> (2) Conduct of a servant is not within the scope of employment if it's different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

Id. ¶¶ 13-14 (quoting Restatement (Second) of Agency § 228). "Actions that are done with a private, rather than a work-related, purpose to commit wrongdoing are outside of the scope of employment . . ." *Id.* ¶ 14 (quoting *Nichols v. Land Transp. Corp.,* 103 F.Supp.2d. 25, 27 (D. Me. 1999), *aff'd,* 223 F.3d 21 (1st Cir. 2000).

Penfold did not submit the false survey in the scope of his employment. First, the writing and submission of customer surveys, whether truthful or not, is not conduct Penfold performed as sales manager. Second, Penfold's conduct took place during non-work hours, while watching television in his own home, using his personal email address. (S.M.F. ¶¶ 19-20.) Penfold stated that his actions were motivated by his negative personal feelings about his prior employer, PET, LLC, and had nothing to do with his employment with Goody LLC, nor his relationship with Tucker. (S.M.F. ¶¶ 17-21.) The fact that Penfold was employed by Goody LLC at the time he submitted the false survey is legally insufficient to establish vicarious liability. The Court grants summary judgment in favor of the Third-Party Defendants on Count III of the counterclaim.

Relatedly, Count IV of Eric and Peggy's counterclaim alleges a violation of 10 M.R.S. § 1174 (1), which provides in pertinent part, that is unlawful for any motor vehicle dealer to engage in any action which is "arbitrary, in bad faith or unconscionable" which causes damage to, among others, another dealer. Because neither Tucker, nor the Third-Party Defendants made directly defamatory statements, nor are vicariously liable for the submission of the false survey, a jury could not find either party liable for violating 11 M.R.S. § 1174(1). Tucker Cianchette and the Third-Pary Defendants' Motion for Summary Judgment is granted on this count.

Counts V and VI: Violations of 18 U.S.C § 1836, and the Uniform Trade Secrets Act

The final two counts of Eric and Peggy's counterclaim allege violations of 18 U.S.C. § 1836, and the Uniform Trade Secrets Act in connection with the "Red Letter" promotion. The

Third-Party Complaint alleges that Tucker and the Third-Party Defendants used confidential information obtained from PET, LLC for the purpose of the promotion. However, Eric and Peggy's claims are not supported by sufficient evidence, and therefore do not survive Tucker or the Third-Party Defendants' Motions for Summary Judgment. Eric and Peggy also concede this point.

Tucker and the Third-Party Defendants both assert that the information used to target customers for the promotion was publicly available and ascertained through proper means.[4] In their Opposition to the Third-Party Defendants' Motion for Summary Judgment, Eric and Peggy state that they "do not oppose the Yankee Group Motion insofar as the Red Letter is concerned. Accordingly, the Court grants Tucker and the Third-Party Defendants' motions for summary judgment regarding Counts V and VI.

CONCLUSION

For the foregoing reasons, Defendants Eric and Peggy Cianchette's Motion for Summary Judgment is denied. Genuine issues of material fact remain regarding the validity of the Merger and its compliance with Section 4.4 of the PET Agreement. Because there are no genuine issues of material fact regarding Defendants' counterclaim, the Court grants both Tucker Cianchette and Third-Party Defendants' Motions for Summary Judgment on all counts.

The Clerk is requested to enter this Order on the docket for this case by incorporating it by reference. M.R. Civ. P. 79(a).

Dated: 6/28/2021

M. Michaela Murphy, Justice
Business and Consumer Court

[4] Specifically, Tucker and the Third-Party Defendants assert they relied on the Maine Bureau of Motor Vehicles to access publicly available information. (S.M.F. ¶ 30.)