MAURICE M. SUH
ZATHRINA G. PEREZ
GIBSON, DUNN & CRUTCHER LLP
333 S. Grand Avenue
Los Angeles, CA 90071-3197
Telephone: (213) 229-7000

Attorneys for Paul Cayard and William Ruh

IN THE US SAILING REVIEW BOARD

IN THE MATTER OF PAUL CAYARD AND WILLIAM RUH

PAUL CAYARD AND WILLIAM RUH'S RESPONSE PURSUANT TO SECTION 15.03.C.2 OF THE US SAILING REGULATIONS

I. INTRODUCTION

Because it violates multiple Bylaws and Regulations of the United States Sailing Association, Inc. ("USSA), this Disciplinary Proceeding must end here. No further inquiry should be conducted. But it is not just the violation of these governing rules that demonstrate the troubling nature of this proceeding. USSA's prosecution of the alleged discipline violations against Respondents violates New York employment and corporate governance law, and USSA's Bylaw 701's due process mandate. That is because this proceeding involves the improper use of USSA's powers to punish and silence a dissenting former employee and a dissenting former Board member over legitimate concerns that constitute the exercise of their fiduciary duties. This proceeding thus not only violates USSA's own governance rules, but if permitted to go forward, would permit a misuse of USSA's authority, and the proceeding itself would constitute another act of whistleblower retaliation *by USSA against Respondents*.

Mr. Cayard was an employee of USSA, a New York not-for-profit corporation, for nearly two years and served in the role of Executive Director of U.S. Olympic Sailing (the "Olympic Program"). Mr. Cayard's immediate supervisors were USSA's CEO and Board of Directors. The "unnamed Athlete Representative," who Respondents are charged with "disparaging," was, for the entirety of the relevant time period, on the Board of Directors, and therefore an entirely appropriate recipient for criticism about USSA's handling of Mr. Cayard's concerns of potential USSA misconduct and its purported "investigation" of Mr. Cayard after he raised those concerns. To be clear, the alleged grounds for this Disciplinary Proceeding did not come about until after Mr. Cayard raised deeply troubling concerns to the Board and Management about USSA's potential misuse or misallocation of funds contributed to the Olympic Program through donations that were facilitated by Respondents. As a non-profit organization, USSA is

prohibited from using donor and sponsor funds contrary to their designations. Further, the accounts relating to those assets must be kept separate and apart from the accounts of other assets of the corporation. *See* N.Y. Not-For-Profit Corp. L. §513. On numerous occasions, Mr. Cayard expressed concerns to the Board and Management that USSA's requirement that the Olympic Program allocate its donor-designated funds to USSA's G&A Expenses was wrong, contrary to what was represented to the donors, and contrary to the designations by the donors and sponsors that the funds be used for the Olympic efforts.

In response, rather than conduct a formal Board investigation of Mr. Cayard's concerns of potential USSA misconduct, the Board and Management initiated a pretextual investigation of *Mr. Cayard* and then stripped him of his executive authority over the Olympic Program. This forced Mr. Cayard's departure in February 2023, shortly followed by Mr. Ruh, a Board member who also disagreed with USSA's improper actions.

This Disciplinary Proceeding is about these employment and corporate governance issues: The Charge of "retaliation" against each Respondents is based on their alleged *speech*. And the *speech* that is being challenged was directed at employment and corporate governance issues—the Board and Management's improper response to Mr. Cayard's concerns, leading to his forced departure from his role as Executive Director. The Charges assert that Respondents "disparaged" the Athlete Representative for such person's "involvement" in Mr. Cayard's "departure." But the Athlete Representative was a Board member and one of Mr. Cayard's bosses and thus, subject to New York employment and corporate governance law. The Athlete Representative's "involvement" in Mr. Cayard's departure was as a Board member and one of Mr. Cayard's bosses.

These undisputed facts make clear that the Disciplinary Complaint cannot and should not be taken up by the Review Board. The Charges are barred by law from proceeding to a hearing for each of the following separate and independent reasons:

First, this Disciplinary Proceeding separately violates both Bylaw 701 and New York law. Each of the Respondents is protected under New York's whistleblower laws, and so is their speech that is being challenged. The alleged speech related to their inquiries (and USSA's response to those inquiries) into potential USSA misconduct. It is irrelevant under New York whistleblower laws whether USSA self-servingly believes that there was in fact no misconduct (to be clear, Respondents believe there was) because Respondents engaged in the alleged speech at issue pursuant to their reasonable belief that there was misconduct. USSA cannot justify the present attempt to punish Respondents for their legally protected speech, by claiming the speech violated sports regulatory rules, because the Charges are about employment/corporate governance issues. Similarly, USSA cannot justify this Disciplinary Proceeding by relying on the USOPC Report: The USOPC lacks any authority or jurisdiction in the area of New York employment/corporate governance law. Importantly, Bylaw 701's due process requirement cannot be met if USSA is contemporaneously violating well-established New York law.

Second, this Disciplinary Proceeding is barred for lack of jurisdiction because all of the challenged conduct is time-barred as a matter of law. Under the mandatory time limit of Section 15.02, a disciplinary complaint "**must** be filed within 60 days of the occurrence of the alleged incident." Because the Disciplinary Complaint here was filed on December 4, 2023, the complaint can only be timely as to, and the Charges can only be based on, alleged conduct by Respondents occurring within 60 days of that filing—that is, October 5, 2023. The Charges, however, make clear that they are based on alleged conduct by Respondents taking place within

a few weeks of Mr. Cayard's departure in February 2023 and thus, long before the mandatory cut-off date of October 5, 2023. Indeed, despite Respondents' express request for such evidence in their January 5, 2024 letter to USSA, USSA has produced zero evidence to date that the Disciplinary Complaint was timely filed—because it was not.

Third, the Disciplinary Proceeding against Mr. Cayard is barred for lack of jurisdiction because, based on the undisputed facts, all of the alleged conduct that is being challenged took place after he was no longer a member of USSA and thus, was not subject to USSA's rules. Similarly, to the extent that the Charges are based on the USOPC's Speak Up Policy, they are barred against both Respondents because all of the alleged conduct took place after they left their USSA positions and thus, were not governed by that policy.

Fourth, the Disciplinary Proceeding is barred because the Statements of Charges fail to provide Respondents with "specific descriptions" of the alleged misconduct being charged, as required by Section 15.03.D and Bylaw 701's due process mandate. *To be clear, the statement of charges must be legally sufficient on its face, which the entirely summary, one-page Statement of Charges against each Respondent here is patently not.* Yet, even taken together with the documents that accompanied them, the Statements of Charges are textbook examples of legally insufficient notice in violation of due process: The Statements of Charges *do not even name* the alleged accusers and witnesses against Respondents and improperly rely on purported "rumors," "rumor mill," and things heard "on the docks" between *unnamed persons*.

Fifth, from the beginning, this Disciplinary Proceeding has been tainted by palpable demonstrations of bias against Respondents and violations of USSA's own rules. Respondents were first made aware that a disciplinary complaint had been filed when, in contravention of all norms, USSA sent a purported "courtesy notice" letter to them on *New Year's Eve*, *a Sunday*,

even though there was no legal authority for the letter and a month had already passed since the filing of the disciplinary complaint. Further, again without any support, the letter ominously cited the SafeSport rules—even though there has been no allegation that Respondents violated any SafeSport rules—and then impermissibly prejudged that Respondents would be ultimately found guilty and prohibited Respondents from participating in US Sailing events despite the complete lack of due process or hearing required by Bylaws 701 and 702.

Finally, the Disciplinary Proceeding is barred because it is based on rules that are impermissibly vague in violation of Bylaw 701's due process requirement. The factual premise of the Charges is that Respondents "disparaged" the Athlete Representative. However, none of the rules on which the Charges rely—USSA's Whistleblower Policy and USOPC's Speak Up Policy—make any reference to, let alone prohibit "disparagement." Further, the Charges do not identify what, if any, element of the applicable rules is actually violated by the challenged speech, none of which facially apply to the undisputed facts. To the extent that the Charges are based on the catch-all provisions in those rules prohibiting "related… action" or "adverse… action," those terms are hopelessly vague and completely fail to specify the exact type of statements, behaviors, or actions that would be deemed retaliatory, in violation of due process.

Each of these violations by USSA of its own Bylaws, Regulations, and New York law involve purely legal questions based on undisputed facts. They do not involve any factual dispute that can be addressed by holding a hearing. In fact, proceeding to a hearing would constitute additional retaliatory actions *against Mr. Cayard and Mr. Ruh* in violation of New York employment and corporate governance law.

The Review Board therefore should not and cannot proceed to a hearing on the Disciplinary Complaint.

II. BACKGROUND

The following background describes how this Disciplinary Proceeding, untimely brought nearly a year after the central events and based on allegations of unnamed accusers, arose from the improper response of USSA, an employer, to an employee's good-faith and legally protected efforts to bring potential misconduct by USSA to light.

A. FACTUAL BACKGROUND

In March 2021, Mr. Cayard accepted USSA's request to serve as the Executive Director of the Olympic Program. Prior to Mr. Cayard being hired, the Olympic Program was in substantial decline and disarray. What had once been the most successful sailing program in the Olympics had embarrassingly failed to medal at all at the 2012 London Olympics and had failed to come close to matching its past successes at subsequent Olympic Games. During this tumultuous time, USSA cycled through three Olympic Program leaders over the span of three quads, each time promising that USSA had a new long-term plan to solve its pre-existing problems—solutions that never materialized.

As a two-time Olympian and world-class professional sailor, Mr. Cayard was saddened by the state of the Olympic Program and had a personal passion to help get American sailor-athletes back on the podium at the Olympic Games. After serving as a volunteer member of the Olympic Sailing Committee and recruiting McKinsey to prepare a professional strategic plan (ultimately resulting in "Project Pinnacle") on a pro bono basis, Mr. Cayard agreed to serve as the Executive Director because USSA leadership wanted him to take on the challenge of turning around the failing Olympic Program, and USSA also represented to Mr. Cayard that it would give him the authority over the program needed to carry out this difficult task. As USSA's offer letter expressly stated, Mr. Cayard's "mission" was "to lead and manage the US Olympic Sailing Team (the

'Team') to consistent success in Olympic Sailing, using the Project Pinnacle recommendations as a starting point."

After becoming the Executive Director, Mr. Cayard implemented a new leadership structure aligned around the Project Pinnacle strategy, and proceeded to achieve milestone after milestone in furtherance of his weighty mission. As an illustration of his many successes, when Mr. Cayard took over in March 2021 (a mere four months before the Tokyo Olympics), the USSA Olympic Program had only three active donors, its contract with its only commercial sponsor had expired, and it had a $2.8 million financial deficit with no idea as to how the program would get the money to cover the gap. Mr. Cayard's leadership effected a turnaround in all of these areas: By the end of 2022, the Olympic Program had 21 donors providing $18 million in commitments, had commercial sponsors, and had achieved a positive cash balance of about $2.3 million. The Olympic Program also expanded from four to 10 coaches, increased the competitive athlete talent, and implemented the "Squad Mentality" identified as a key by Project Pinnacle, for developing that talent into medal contenders. For these and Mr. Cayard's many other successes, Mr. Cayard was consistently given positive annual reviews.

The events giving rise to this Disciplinary Proceeding began when Mr. Cayard, later joined by Mr. Ruh, raised objections to his bosses as to what he believed was unethical and potentially illegal conduct by USSA in its handling of donor and sponsor funds. It is undisputed that Mr. Cayard, as an employee, reported to the USSA CEO and the Board of Directors, who were his bosses. USOPC Rep. at 5. It is also undisputed that the Athlete Representative who Respondents are charged with "disparaging" was a member of the Board and thus one of Mr. Cayard's bosses.[1]

[1] *See* USOPC Rep. at 8 (discussing the Athlete Representative's actions as a Board director leading up to Mr. Cayard's departure); *id.* at 13 (stating that the Athlete had a "role" on the USSA Board); *see also generally id.* at 14 (USSA's "Athlete Representatives . . . also serve on

Mr. Cayard believed that, to transform the Olympic Program into a world-class sailing program, the program needed to both raise funds and utilize those funds in the most impactful way. As a result, Mr. Cayard worked together with Mr. Ruh, who was the Chair of the Foundation at the time, on fundraising and spent a great deal of time and effort cultivating *his and Mr. Ruh's own personal and professional relationships* to build a support structure of new donors and sponsors. *To be clear, these new donors and sponsors were people who Respondents had direct relationships with and who contributed as a result of their direct relationships with Respondents*. USSA had no significant independent relationship with these donors and sponsors. These donors and sponsors were persuaded to contribute because they believed in Mr. Cayard's ability and drive to accomplish the mission for the Olympic Program and the vision of how his new leadership team was going to get there, resulting in $18 million in commitments, both private and corporate. Mr. Cayard also was able to get a large boost ($7.5 million) toward the $100 million endowment for Project Pinnacle.

Importantly, many, if not all, of these donor and sponsor funds were designated for Project Pinnacle or the Olympic Program. Despite these designations, USSA appears to have diverted some of these funds to support activities unrelated to Project Pinnacle or the Olympic Program and/or commingled the accounts for these funds with those of USSA's other assets. The most egregious example of this is when USSA nearly doubled the amount it required the Olympic Program to pay to USSA for alleged General & Administrative ("G&A") Expenses.

Specifically, when Mr. Cayard started as Executive Director in March 2021, USSA required the Olympic Program to pay about $555,000 in G&A Expenses per year. Because the

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the USSA Board of Directors"). Under Bylaw 302, Athlete Representatives on the USSA Board wield the full powers of the Board and thus are equally subject to the duties, responsibilities, and liabilities of other Board members and Mr. Cayard's bosses. *See* Bylaw 302 § 2(2).

Olympic Program ran on donations, *all of the amount being allocated were donor-designated funds*. Mr. Cayard raised concerns to USSA about this over-half-million dollar allocation because the Olympic Program was largely self-sufficient from USSA and did not share in any of USSA's member-due revenues. Indeed, it was the *only* USSA department not to receive any such revenues. As a result, the Olympic Program operated using its own staff and generated its own revenue through corporate sponsorships, annual USOPC contributions, and mostly through donor and sponsor funds. Prior to Mr. Cayard, the Olympic Program had a long history of overspending, and under Mr. Cayard's leadership, the program stayed within its own self-funded budget throughout his employment at USSA. While the Olympic Program used some shared services, such use was minimal. In response to Mr. Cayard's concerns, however, USSA repeatedly assured him that the allocations were legal and proper.

Mr. Cayard's ongoing concerns about potential financial misconduct by USSA, however, reached new heights in the fall of 2022. On or about November 21, 2022, USSA CEO Alan Ostfield told Mr. Cayard that the Olympic Program would be required to pay $976,000 in general and administrative (G&A) expenses for 2023. This unilateral, dramatic increase appears to have been without legitimate justification, as the Olympic Program's minimal use of USSA's shared services did not come close to this amount.

Mr. Cayard was deeply troubled by USSA's allocation of nearly $1 million of donor-designated funds away from the Olympic Program, because it meant that donor-designated funds that were intended by the donors to go directly to supporting the athletes was instead going to administrative overhead. Mr. Cayard and others on his team couldn't help but feel that USSA was taking advantage of its position as an NGB, and the strong funding performance achieved by the Olympic Program. During the same timeframe, Mr. Cayard saw a presentation that USSA's global

budget projection showed a positive P&L of a mere $56,000. Mr. Cayard understood that, if USSA did not get the additional money from the Olympic Program and its donors and sponsors, USSA would be deeply under water.

Mr. Cayard first asked questions about the doubling of the Olympic Program's allocation to G&A, but USSA refused to answer all his questions. In one meeting, with Mr. Cayard and other Olympic staff members, the CFO abruptly ended the meeting after she said what she wanted to say, and took no questions. As Mr. Cayard's suspicions grew, he actively objected to the Board and Management for the purpose of attempting to convince USSA to change course. Instead, however, members of the Board and Management not only dismissed and shut down his complaints, but also began building, through a purported "investigation," a pretextual case to strip Mr. Cayard of the very responsibilities that would allow him to continue his objections.

USSA's retaliatory actions against Mr. Cayard culminated on February 14, 2023 when it presented Mr. Cayard with a piece of paper that told him that he would no longer be in charge of operations at the Olympic Program, but asked him to stay in a role limited to raising money. In other words, USSA intended to have Mr. Cayard continue to ask his personal and professional networks for money to support the Olympic effort (which was actually supporting USSA's member services business) while, at the same time, taking away his executive authority over the Olympic Program. It is not disputed that Mr. Cayard was given no notice of this change and was given no opportunity to respond. Instead, the Board made the decision to restructure his role in Mr. Cayard's absence and it was only after the fact that Mr. Cayard was made aware of that decision by being told that the decision had already been voted on and approved by the Board. This of course was not a meaningful choice, and as such Mr. Cayard was forced to resign.

The Athlete Representative participated in these retaliatory actions against Mr. Cayard *in her capacity as a Board member*. This was despite the fact that, based on the undisputed facts, the Athlete Representative had a conflict of interest and was biased under New York corporate governance and employment law and the USSA's own policies. The USOPC Report admits that—despite the Athlete Representative wielding hiring, firing, and supervisory authority over Mr. Cayard—the Athlete Representative "had separate disagreements with Cayard's programmatic decisions." USOPC Rep. at 5. Specifically, the Athlete Representative "was a currently competing athlete" and, together with their teammate, was actively competing with the other sailor-athlete teams in Mr. Cayard's Olympic Program for "resources allocations" and, ultimately, for a spot on the US Team for the Olympics. *See id.* at 5, 15. However, pursuant to Project Pinnacle, Mr. Cayard implemented a "squad training approach," which increased the number of sailor-athlete teams that competed with the Athlete Representative's team and had the teams train together in squads so that they could better develop by training against their competitors. The Athlete Representative "object[ed]" to this approach and the "resource allocations to a competing team." USOPC Rep. 15; *see also id.* at 16. Nonetheless, the Athlete Representative failed to declare this conflict of interest and failed to recuse or refrain from voting on matters involving this conflict of interest. Members of the Board, in turn, failed to take action with respect to this conflict of interest despite being made aware of it and, instead, empowered the Athlete Representative as one of its representatives in the retaliatory actions against Mr. Cayard.

On the other hand, Mr. Ruh, also a USSA Board member, dissented from the Board's retaliatory actions against Mr. Cayard, and due to the reasons cited above, Mr. Ruh actively requested a legal investigation. Mr. Ruh also objected to the Athlete Representative's participation

in the Board's "investigation" and decisions relating to Mr. Cayard's job duties due to the Athlete Representative's conflict of interest.

Further, both before and after Mr. Cayard's departure, pursuant to his fiduciary duties, Mr. Ruh made his own inquiries into Mr. Cayard's concerns about how USSA used and intended to use the Olympic donor and sponsor funds. USSA, however, did not provide the documents Mr. Ruh requested and did not satisfy the questions he raised. Accordingly, when two other Foundation Board members brought a motion to cease providing the Olympic donor and sponsor funds to USSA, as Chairman, Mr. Ruh was required to hold a Board vote on the motion, and he voted in favor of the motion. When the motion did not pass in a 5-to-4 vote, out of concern for the donors and sponsors, and in accordance with his fiduciary duties, Mr. Ruh resigned his USSA Board and Foundation positions in March 2023.

B. PROCEDURAL BACKGROUND

This Disciplinary Proceeding against Respondents was not initiated until 10 months later when, on December 4, 2023, the US Sailing Ethics Committee ("Complainant") filed a US Sailing Grievance and Administrative Proceedings Report against Respondents ("Disciplinary Complaint").

The Disciplinary Complaint itself lacked any description of what it was based on. Instead, it referred to and relied on a US Sailing Ethics Committee Report bearing the same date ("Ethics Committee Report"), which accused Respondents of "violat[ing] the US Sailing Code of Conduct and the US Sailing Whistleblower and Anti-Retaliation Policy" based on allegations in an earlier confidential report issued by the USOPC on October 6, 2023 ("USOPC Report"). Disc. Compl. at 1; Ethics Ctte. Rep. at 1.

This culminated with Justin Sterk, acting on behalf of USSA, sending both Respondents a letter informing them of this Disciplinary Proceeding on *New Year's Eve*, *a Sunday night.* . They had no previous notice of this disciplinary proceeding. The December 31 Letter purported to provide a "courtesy" notice that the Complainant had initiated the Disciplinary Complaint with the Review Board, and then sought to impose a "prohibit[ion]" on Respondents "from being on-site at any US Sailing organized events." USSA's Dec. 31 Ltr. at 1. The December 31 Letter was not preceded by any notice or process, and the letter itself did not offer Respondents any means by which to respond to its contents.

Within a few days into the New Year, on January 4, 2024, the Review Board sent a Notice and Statement of Charges to each of the Respondents. The Statements of Charges make a claim of retaliation against each Respondent based on alleged "disparagement" of the Athlete Representative ("Charges"): The Statement of Charges against Mr. Cayard, relying on the USOPC Report, vaguely alleges that he "disparaged" the Athlete Representative to their donor "for their involvement in his departure." The Statement of Charges against Mr. Ruh, similarly relying on the USOPC Report, vaguely alleges that he "disparaged" the Athlete Representative to Foundation directors, donors, and others about their involvement in Mr. Cayard's departure.

On January 5, 2024, Respondents sent a joint letter to the Review Board, asserting that they vigorously contest the charges, stating that they will be issuing a response pursuant to Section 15.03.C.1 of the Regulations, exercising their right to receive "all evidentiary materials," and demanding that the USSA and the Foundation preserve documents, among other things.

This Response pursuant to Section 15.03.C.1 followed.

III. ARGUMENT

A. THE CHARGES ARE BARRED BY LAW BECAUSE THEY ATTEMPT TO PUNISH RESPONDENTS FOR ENGAGING IN LEGALLY PROTECTED ACTIVITIES

This Disciplinary Proceeding must be brought to an end here. They are based on Charges that impermissibly attempt to punish Respondents for engaging in legally protected activities in violation of New York law, and thereby also and separately violate Bylaw 701's due process requirement. Bylaw 701, which is legally binding and enforceable on USSA, mandates that the USSA Board must provide Respondents with a "fair hearing" and "due process" in this Disciplinary Proceeding. *See Stony Brook Shores Prop. Owners Ass'n, Inc. v. Liscia*, 564 N.Y.S.2d 192, 193 (1991) (bylaws were enforceable against association); *Stile v. Antico*, 707 N.Y.S.2d 227, 228-29 (2000) (holding that actions taken in violation of the corporation's bylaws were "invalid"); *see also, e.g.*, *M'Baye v. World Boxing Ass'nEyeglasses*, 429 F.Supp.2d 660, 667-70 (S.D.N.Y. 2006) (holding that courts may intervene in a sports association's decision-making in response to "allegations of bad faith and illegality," and on that basis issuing a preliminary injunction to a boxing association based on allegations that the association violated its own rules); *Nason v. American Canadian Tour, Ltd.*, 942 F.Supp. 220 (D. Vermont 1996) (denying sports association's motion for summary judgment where there was a an issue of material fact as to whether the association acted in bad faith). This requirement of a fair hearing and due process is violated by USSA's present attempt, through this Disciplinary Proceeding, to misuse sports rules to punish a dissenting former employee, Mr. Cayard, and a dissenting former Board member, Mr. Ruh, for speaking out about potential employer misconduct.

New York Labor Law § 740 ("§ 740"), also known as the "whistleblower statute" prohibits New York organized employers like USSA from taking any retaliatory personnel action

against an employee because the employee engaged in a protective activity by disclosing, or threatening to disclose, an employer's practice that an "employee *reasonably believes* is in violation of law, rule or regulation" N.Y. Lab. L. § 740 (emphasis added). The types of protective activity are broad and include, among other things, an employee objecting to, or refusing to participate in an activity, policy, or practice of the employer that the employee *reasonably believes* is in violation of law, rules, or regulations. N.Y. Lab. L. § 740(2) (emphasis added); *see also* 2021 New York Senate Bill No. 4394, New York Two Hundred Forty-Fourth Legislative Session (confirming that § 740 as amended encompasses an employee's reasonable belief of a violation, regardless of whether there is in fact a violation). In addition, the types of prohibited retaliatory actions are also broad and include, among other things, discharge, suspension or demotion of an employee, or other adverse employment action taken against an employee in terms and conditions of employment, or actions that would adversely impact a former employee's current or future employment. N.Y. Lab. L. § 740(1)(e).[2]

Similarly, Not-for-Profit Corporation Law § 715-b ("§ 715-b"), also known as the "not-for-profit whistleblower statute," requires New York not-for-profit corporations like USSA to adopt a policy that provides that "no director, officer, key person, employee or volunteer of a corporation who *in good faith* reports any action or suspected action taken by or within the corporation that is illegal, fraudulent or in violation of any adopted policy of the corporation shall suffer *intimidation, harassment, discrimination or other retaliation* or, in the case of employees, adverse employment consequence." Not-for-Profit Corp. Law § 715-b.

[2] Aggrieved plaintiffs are entitled to jury trials and the law allows the recovery of front pay, civil penalties not to exceed $10,000, and punitive damages. Prevailing plaintiffs are also entitled injunctive relief, reinstatement, compensation for lost wages, benefits, and other remuneration, and reasonable costs, disbursements, and attorneys' fees. N.Y. Lab. L. § 740 (4), (5).

Here, Mr. Cayard, as a former employee of USSA, qualifies for the protections of §§ 740 and 715-b. Mr. Ruh, as a former Board member, also qualifies for the protections of § 715-b. In addition, all of their actions taken in good faith and exercising due care are privileged under New York corporate governance law. *Cf. Owen v. Hamilton*, 843 N.Y.S.2d 298, 302 (2007) (actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes are not subject to judicial inquiry) (internal citations omitted).

On its face, this Disciplinary Proceeding seeks to misuse the USSA's and USOPC's anti-retaliation policies to punish Mr. Cayard as a dissenting former employee and Mr. Ruh as a dissenting former Board member for speech that is protected by the above New York laws. On their face, the Statements of Charges against Respondents are limited solely to charges for "retaliation" for their alleged "disparagement" of the Athlete Representative.[3] Thus, the Charges are solely based on their alleged *speech*. And all of the *speech* that is being challenged was directed at what Respondents believed to be misconduct by Mr. Cayard's employer—namely, USSA's retaliatory response to Mr. Cayard raising concerns that USSA was misusing or misallocating Olympic donor and sponsor funds, and how these retaliatory actions led to his forced departure.

The factual premise of the Statement of Charges against each Respondent is that they "disparaged" the Athlete Representative for such person's "involvement" in Mr. Cayard's

[3] As detailed below, Section 15.03.D of the Regulations requires a statement of charges in a disciplinary proceeding to "specifically describ[e] the alleged misconduct to the party or parties involved." Reg. § 15.03.D. Because, on their face, the Statements of Charges are limited solely to charges for "retaliation" for alleged "disparagement" of the Athlete Representative, this Disciplinary Proceeding is limited solely to those charges and cannot proceed based on any other charge as a matter of law under USSA's own rules and Bylaw 701's due process mandate.

"departure" from his role as Executive Director. Stat. of Charges against Cayard at 1; Stat. of Charges against Ruh at 1. But the Athlete Representative was a Board member and one of Mr. Cayard's bosses. All of the "involvement" that the Athlete Representative had in Mr. Cayard's departure was in these capacities.

Specifically, as even the USOPC Report admits, Mr. Cayard had honestly believed concerns about USSA's nearly $1 million allocation of Olympic donor-designated funds. USOPC Rep. at 7. According to the USOPC Report, "in December 2022"—a mere few months after Mr. Cayard repeatedly raised his concerns—"the USSA Board established a working group." USOPC Rep. at 8. Rather than investigate Mr. Cayard's reporting of potential financial misconduct, the USSA Board "tasked" the working group "with evaluating Cayard's role" and "tasked" the Athlete Representative, as a member of the Board and the working group, and several others with preparing an "informal survey" of athlete concerns (a "survey" that undisputedly was done without any adherence to survey principles). *Id.* The USSA Board then used the improvised "survey" as a pretense and voted to strip Mr. Cayard of any authority over the Olympic Program.

As even the facts alleged in the USOPC Report admit, this purported "investigation" of Mr. Cayard was a pretext: "the USSA Board began reconsidering Cayard's role within USSA" only after "the dispute over the allocation grew"; the "informal survey" was patently flawed and failed to capture the athletes' positive comments about Mr. Cayard and his changes to the Olympic Program; and, *most egregious*, "at least two members of the USSA Board reported that . . . the USSA Board decided it was going to restructure Cayard's role <u>regardless</u> *[of the "survey"] due to* <u>his conflicts with the USSA Board</u> and other staff and organizational issues within the Olympic Operations program." USOPC Rep. at 8, 15 (emphasis added). The only

material conflict and issue between Mr. Cayard and the USSA Board at the time was the dispute over the allocation. USSA also took all of these actions behind Mr. Cayard's back—despite Mr. Cayard's entitlement to be present at Board meetings—and only notified him after the Board had already voted and it was a done deal. *See* USOPC Rep. at 9.

Following these retaliatory actions by USSA, Mr. Cayard was forced to leave USSA. Thereafter, according to the USOPC Report and the Charges, Respondents allegedly criticized the Athlete Representative for such person's "involvement" in Mr. Cayard's "departure."

Based on these undisputed facts, the alleged speech by Respondents that is being challenged was employment/corporate governance related. The speech also was directed at the Athlete Representative in their capacity as a Board member and as Mr. Cayard's boss, and is therefore protected by the New York laws discussed above. Respondents had a legal right to criticize the Athlete Representative, just as they had a legal right to criticize any other full voting member of the USSA Board. This is particularly true of Respondents' alleged statements to donors and sponsors. Respondents reasonably believed that USSA was potentially misusing or misallocating Olympic donor and sponsor funds and that USSA stripped Mr. Cayard of his authority over the Olympic Program for raising such concerns. They had a legal right to "blow the whistle" on this potential misconduct to the donors and sponsors. The Disciplinary Complaint must be rejected as a violation of New York law and Bylaw 701.

USSA cannot justify the present attempt to punish Respondents for engaging in legally protected speech, by claiming that Respondents' speech violated *sports regulatory rules*, because the Charges are about *employment/corporate governance issues*. Indeed, even the USOPC Report recognized that the Athlete Representative's involvement in Mr. Cayard's departure was wrapped up in "employment-related issues" within USSA. USOPC Rep. 16. **Sports rules**

cannot immunize an athlete *who is acting as an employer and board member* from their legal duties, responsibilities, and liabilities in those capacities. *See, e.g.*, *Crouch v. Nat'l Assoc. for Stock Car Auto Racing, Inc.*, 845 F.2d 397, 403 (2d Cir. 1988) (recognizing that courts may intervene in a sports association's decision-making when there is an allegation that the association "acted in bad faith or in violation of any local, state or federal laws"); *Singh v. PGA Tour, Inc.*, 42 Misc.3d 1225(A) (2014) (denying motion to dismiss claims against sports association where the plaintiff alleged that the association violated state law).

Similarly, USSA cannot justify this Disciplinary Proceeding by relying on the USOPC Report. The USOPC Report was concerned about its own sports regulatory rules and viewed the Athlete Representative through the lens of their capacity as a sailor athlete. The USOPC Report did not evaluate the circumstances in light of the fact that the Athlete Representative had legal duties, responsibilities, and liabilities as Mr. Cayard's boss and a Board member, and Respondents had a legal right to engage in speech regarding the same. And the USOPC Report could not have done such an evaluation given USOPC's complete lack of authority and jurisdiction in the area of New York employment/corporate governance law. This is in contrast to the Review Board here: The Review Board is an extension of USSA, the employer here, and therefore its actions and decisions are subject to New York employment and corporate governance law.

Because the Charges violate New York law, they are barred by Bylaw 701 and cannot proceed to a hearing. Indeed, continuing to a hearing, let alone imposing a penalty on Respondents, would constitute further violations of Bylaw 701 and New York law, creating further potential liabilities for USSA as an employer.

B. THE CHARGES ARE BARRED DUE TO LACK OF JURISDICTION BECAUSE THEY ARE BASED ON A TIME-BARRED DISCIPLINARY COMPLAINT.

This Disciplinary Proceeding also violates Bylaw 701, and therefore is legally barred, because it fails to comply with the "due process" required by that Bylaw and USSA's own regulation promulgated under that bylaw—Section 15 of the Regulations.

It is fundamental that USSA must abide by its own rules and regulations. *See Weber v. Sidney*, 244 N.Y.S.2d 228, 231 (1963), aff'd, 14 N.Y.2d 929 (1964) (resolutions adopted pursuant to Bylaws were "binding" and "enforceable" against the corporation); *Allen v. Blum*, 448 N.Y.S.2d 163 (1982) (holding that an entity that was subject to due process obligations "is bound by its own rules and regulations" and the failure to follow the regulations "violates . . . due process"); *see also, e.g.*, *M'Baye*, 429 F.Supp.2d at 667-70 (issuing a preliminary injunction to a boxing association based on allegations that the association violated its own rules). The Charges here, however, violate the mandatory time limits of Section 15.02 of the Regulations because they are based on a time-barred Disciplinary Complaint.

Section 15.02 is titled "Filing Requirements" and requires that a "disciplinary complaint . . . ***must*** be filed *within 60 days* of the occurrence of the alleged incident." Reg. § 15.02.D (emphasis added). The Regulations contain no exceptions to this mandatory and jurisdictional time limit for the filing of disciplinary complaints. *See Griggs v. Provident Consumer Discount Co.*, 459 US 56, 61 (1982) (holding that use of the phrase "must be filed" in a timing rule indicated that the timing rule was mandatory, jurisdictional, and could not be waived).

Here, the Disciplinary Complaint was filed on December 4, 2023, and 60 days prior to that was October 5, 2023. Therefore, the Disciplinary Complaint can only be based on alleged

conduct by Respondents taking place after October 5, 2023. *See Matter of Ufland v. New York State Div. of Human Rights*, 90 N.Y.S.3d 768 (2018) (holding that, due to a mandatory time limit on the filing of an administrative complaint, the complaint was only timely as to those actions that occurred within the time limit; all other claims were untimely and barred). On its face, the Disciplinary Complaint challenges conduct taking place before October 5, 2023, in violation of Section 15.02. Specifically, the Disciplinary Complaint is a filled-out copy of USSA's "Grievance and Administrative Proceedings Report Form," which has a line for "Date of Incident Occurrence (if applicable)." Discpl. Compl. at 1. The Complainant here responded to that line by stating: "***February 2022*** – Present". *Id.* (emphasis added). But anything between February 2022 to October 5, 2023 is time-barred as a matter of law.

While this line in the Disciplinary Complaint also generically refers to alleged conduct taking place up to the "Present," it is clear from the factual allegations of the Charges that none of the alleged conduct at issue took place after October 5, 2023. Respondents resigned their USSA positions nearly a year ago, in February and March 2023. USOPC Rep. at 9. According to the Statements of Charges and its accompanying documents, all of the alleged "disparagement" of the Athlete Representative at issue took place shortly after Respondents' departure from USSA and well before October 5, 2023. *See, e.g.*, Stat. of Charges to Ruh at 2 (referring to alleged statements by Ruh "in the week after Cayard resigned"); USOPC Rep. at 10 (referring to alleged statements by Cayard "in the weeks after his departure"); *id.* at 10 & n.16-19 (referring to Mr. Cayard's "public statements to Scuttlebutt News" which were published in February and March 2023); *id.* at 11 (referring to alleged statements by Ruh "in the week after Cayard resigned").

Indeed, the Charges rely upon the USOPC Report, but that report was issued on October 6, 2023 – a mere day after the cut-off – meaning that it is improbable for the report to have been based on Respondents' conduct after October 5, 2023. While the USOPC Report vaguely refers to the "rumor mill contin[ing] within the USSA community," USOPC Rep. at 12, this is irrelevant to the mandatory time limits of Section 15.02: Whether or not *other people* are continuing to talk, after the October 5, 2023 cut-off date, about Respondents' departure from USSA and issues surrounding that departure, there is zero evidence that *Respondents*' challenged actions took place after that date. *See Bray Terminals, Inc. v. Transp. Oil Co. Inc.*, 580 N.Y.S.2d 498, 499 (1992) (finding that in "an action for breach of contract, the Statute of Limitations starts to run from the time when the breach occur"); *Goldsmith v. Howmedica, Inc.*, 67 N.Y.2d 120, 122 (1986) ("The general rule is that an action accrues and the Statute of Limitations begins to run at the time of the commission").

Reinforcing the untimeliness of the Disciplinary Complaint, in their January 5 Letter to USSA, Respondents specifically demanded that USSA provide any and all evidence that the Disciplinary Complaint was timely filed. Resps.' Jan. 5 Ltr. at 2. Unsurprisingly, USSA has produced nothing to date – because the Disciplinary Complaint was not timely filed.

Because the Charges are based on a time-barred Disciplinary Complaint in violation of Section 15.02 of the Regulations, they are barred by Bylaw 701 and cannot proceed to a hearing.

C. THE CHARGES ARE BARRED DUE TO LACK OF JURISDICTION BECAUSE THEY ARE BASED ON ALLEGED CONDUCT OUTSIDE OF USSA'S AUTHORITY.

The Disciplinary Proceeding against Mr. Cayard is barred in its totality for the simple fact that all of the alleged conduct that is being challenged took place after he was no longer a member of USSA. Similarly, to the extent that the Disciplinary Proceeding is based on a

violation of the USOPC's Speak Up Policy, these Disciplinary Proceedings are barred against both Respondents because all of the alleged conduct that is being challenged took place when they were no longer governed by that policy.

Section 15.01 of the Regulations, titled "AUTHORITY," limits the "jurisdiction" of "disciplinary proceedings." Specifically, Subpart A.3 provides: "Proceedings arising under Racing Rule 69.2 or based on a report that the conduct of ***any member of the Association*** is alleged to have injured the good name of the Association or to be prejudicial to the welfare and reputation of the Association or complaints against *an Association member* alleging a violation of any Code of Conduct provisions *applicable to the member*." Reg. 15.01.A.3 (emphasis added). Similarly, USSA's Whistleblower Policy, which is cited in the Statement of Charges, and USSA's Code of Conduct, which is cited in the Ethics Committee Report, apply only to USSA members.

Here, the Statement of Charges' claim of "retaliation" against Mr. Cayard is based on alleged "disparaging" statements he made about the Athlete Representative after he was forced to resign his USSA position. As of 2023, however, Mr. Cayard's membership with USSA was tied solely to his employment with USSA and, as such, ended in its entirety when he resigned in February 2023. Accordingly, he was not a member of USSA at the time of the challenged conduct and thus, was not covered by the above rules. There is no authority or jurisdiction over him in this proceeding.

The Statement of Charges also relies on the anti-retaliation provision in the USOPC's Speak Up Policy for its claim of "retaliation." However, that provision only applies to "staff, Board/Committee member[s], or volunteer[s]" of "USOPC or [an] NGB." Speak Up Policy at 3. Again, here, the Statement of Charges' claim of "retaliation" against each of Respondents is

based on alleged "disparaging" statements they made about the Athlete Representative after they left their USSA positions. Accordingly, when they made these alleged statements, they did not qualify under any of the categories of the Speak Up Policy.

D. THE CHARGES ARE BARRED BY LAW BECAUSE THE STATEMENT OF CHARGES FAILS TO PROVIDE THE LEGALLY REQUIRED NOTICE OF THE CONDUCT AT ISSUE.

The violations of the Bylaws and Regulations do not end there. This Disciplinary Proceeding is plagued by a myriad of defects, which, taken separately and together, work to deny Respondents the fairness and process mandated by Bylaw 701—and reinforce that this proceeding is a sham and an improper attempt to punish a dissenting former employee and former Board member. To begin, the Statement of Charges fails to provide even the bare minimum level of notice required by Section 15.03.D of the Regulations.

Section 15.03.D requires a statement of charges in a disciplinary proceeding to "***specifically describ[e]*** the alleged misconduct to the party or parties involved." Reg. § 15.03.D (emphasis added). It is fundamental that the failure to provide sufficient notice of charges being brought is a violation of due process. *See People v. Van Boom*, 831 N.Y.S.2d 361, 361 (2006) ("As required by the Federal and State Constitutions, the function of an accusatory instrument…is to give a defendant sufficient information regarding the nature of the charges against him, to set forth an outline of the accusations, and to allow a defendant to prepare a defense to the charges.").

Despite this clear mandate, the Statements of Charges, each of which spans less than a page, are entirely summary and devoid of any specificity. Even taken together with the documents that accompanied them, in a Kafkaesque manner, *the Statements of Charges fail to*

even identify the alleged accusers and witnesses against Respondents, instead simply referring to them by such generic terms as "Athlete Representative," "member" or "members" of the "Foundation Board," and "athlete" or "several athletes," among others. *See Van Boom*, 831 N.Y.S.2d at 361 (holding that the charging instrument was legally insufficient because it "failed to identify the 'victim' as to each of the counts, and failed to specify the conduct of the defendant with respect to each 'victim' and with respect to each count"). And the only three people who are named—Sally Barkow, Kate Drummey, and John Kilroy—are all persons whose statements actually ***contradict*** these alleged accusers and witnesses. *See* USOPC Rep. at 2 (criticizing Barkow and Drummey for being supportive of Mr. Cayard); *id.* at 9-10 (acknowledging that there is "conflict evidence as to what Cayard said" to Kilroy). Even worse, the USOPC Report repeatedly relies on "*rumors*," "*rumor mill*," and things heard "*on the docks*" *between unnamed persons*. *Id.* at 11-12. This is the very definition of insufficient notice in violation of due process. *See Van Boom*, 831 N.Y.S.2d at 361.

The Statement of Charges and accompanying documents also fail to provide basic details regarding the alleged violative conduct. With respect to the claims that Respondents made disparaging statements, the documents do not provide fundamental information, such as *what* exactly was said, *how* it was said, *where* it was said, *when* it was said, *who* said it and *to whom*, and if anyone else was present. Nor do the documents provide any factual basis for its assertion that the statements were "disparaging" or that Respondents made the statements as "retaliation" against the Athlete Representative. Conclusory assertions that Respondents "said something bad" about the Athlete Representative are legally insufficient. *See Reilly v. Natwest Markets Grp., Inc.*, 181 F.3d 253, 271 (2d Cir.1999) (affirming dismissal of plaintiff's unsupported claim that defendant "said 'something bad' about him to a client"); *Vaughan Co. v. Global Bio-Fuels*

Technology, LLC, 2013 WL 5755389, at *8 (N.D.N.Y., Oct. 23, 2013) (noting that "[m]ere conclusory allegations that a person was disparaged by false statements" are legally insufficient).

The legal insufficiency of the Statements of Charges under Section 15.03.D violates Bylaw 701 and bars the Charges from moving forward as a matter of law.[4]

E. THE CHARGES ARE BARRED BY LAW BECAUSE USSA HAS PREJUDGED THE MATTER AND IS ALREADY IMPROPERLY PUNISHING RESPONDENTS FOR THE ALLEGED VIOLATIONS.

This Disciplinary Proceeding was barred due to multiple violations of the Bylaws and the Regulations from the outset. As described above, in contravention of all norms, USSA sent a letter to Respondents on *New Year's Eve*, *a Sunday,* purporting to "writ[e] as a courtesy to notify" them that the Complainant had "initiated a complaint with the US Sailing Review Board"—even though nearly a month had already passed since the Disciplinary Complaint had been filed. USSA's Dec. 31 Ltr. at 1. Far from being a "courtesy," however, the issuance of this letter in the midst of the winter holiday season and during a holiday weekend was both without legal need and an affront to common decency: Nothing in Section 15 of the Regulations, which governs disciplinary proceedings, authorized the letter and the only possible purpose for the letter and its timing was to vindictively cause Respondents' and their families distress.

More significantly, however, the December 31 Letter put the cart before the horse and purported to punish Respondents at the outset, even though there was no authority for such a punishment. Despite being styled as a mere "courtesy" notice, the December 31 Letter

[4] Section 15.02 of the Regulations also requires that the complainant "exhausted all available US Sailing remedies prior to filing unless it can be shown that those remedies would have resulted in unnecessary delay." Reg. § 15.02.A. However, there is no indication here that the Complainant exhausted all available US Sailing remedies, such as seeking a resolution of the issues with Respondents outside of a Disciplinary Proceeding.

impermissibly prejudged that Respondents would be ultimately found guilty of the allegations of the Disciplinary Complaint and stated that "this letter also serves as notice that *you are prohibited from being on-site at any US Sailing organized events, including the 2024 Olympic Trials venue*," before then interjecting as an afterthought at the end *"at least pending the outcome of any US Sailing Review Board proceeding*." USSA's Dec. 31 Ltr. at 1. This violates both Bylaws 701 and 702.

As already discussed above, Respondents have a legally enforceable right to a "fair hearing" and to the "provi[sion]" and "complet[ion]" of "due process" under Bylaw 701. But neither right had been "provided," let alone "completed," at the time the December 31 Letter was sent and its purported suspension of Respondents was imposed; indeed, it was not until January 4, 2024, that Respondents even received the Notices and Statements of Charges. *See Leader v. Adduci*, 544 N.Y.S. 2d 414 (1989) (finding that an individual's due process rights were violated when the individual had "no notice whatsoever, nor any opportunity for a factfinding hearing"); *Chant v. Dep't of State*, 400 N.Y.S.2d 49, 50 (1977) ("The failure to give notice of the charges and offer an opportunity to these individuals to be heard was violative of administrative due process").

Further, the December 31 Letter evidences that USSA has improperly prejudged the matter, and that USSA's bias infects this proceeding in violation of due process. For example, Mr. Sterk sent the letter on behalf of USSA, but he also serves as the staff liaison to both the Ethics Committee that is the Complainant here and the Review Board that will be making a decision on the Charges. *See Botsford v. Bertoni*, 977 N.Y.S.2d 497, 500 (2013) (finding that when "there is evidence indicating that the administrative decision maker may have prejudged the matter at issue, disqualification is required").

In addition, the December 31 Letter violates Respondents' legally enforceable rights with respect to participating in US Sailing events under Bylaw 702.

Section 1 of Bylaw 702, which governs participation in amateur competitions, including US Sailing amateur athletic competitions, provides that "*[f]air notice and an opportunity for a hearing shall be accorded to any* amateur athlete, *coach, trainer, manager, administrator*, or official *before US Sailing may declare such individual ineligible to participate in any amateur athletic competition*. Any hearing conducted hereunder shall be conducted in accordance with the provisions established in accordance with Bylaw 701." Bylaw 702 § 1.

Section 2 of Bylaw 702, which governs participation in Olympic competitions, provides that "*[n]either US Sailing* nor any member of US Sailing *may deny* or threaten to deny *any* amateur athlete, *coach, trainer, manager, administrator*, or official *the opportunity to compete in the Olympic or Pan American Games, World Championship competitions or such other 'protected competition'* as defined in the USOPC Bylaws [which includes the 2024 Olympic Trials]; nor may US Sailing, or any member [of] US Sailing, subsequent to such competition, censure or otherwise penalize any such athlete who participates in any such competition." Bylaw 702 § 1.

Respondents qualify as "amateur" participants under Bylaw 702. Yet, as described above, the December 31 Letter purported to suspend them from participating in US Sailing events, both amateur and Olympic, in any capacity without providing them with any prior notice or process.

Bylaw 702 is clear, paramount, and makes no exceptions for disciplinary proceedings such as this one. *See Walsh v. Scanlon*, 776 N.Y.S.2d 184, 188 (Sup. Ct. 2004) ("The Board is required to follow the mandate of the bylaws"). Yet, even looking at the Regulations, nothing

allows the imposition of a suspension in disciplinary proceedings without the requisite hearing and due process.

The December 31, 2023 notices indicate that the suspensions may be provisional and may later be lifted (i.e., "you are prohibited . . . *at least* pending the outcome of any US Sailing Review Board proceeding"), but this does not correct the violations of Bylaws 701 and 702. First, it is notable that this "at least" language appears to merely be an afterthought, supporting that, as discussed above, USSA has already impermissibly prejudged the matter, in violation of Respondents' due process rights. Regardless, neither the Bylaws nor the Regulations make any exception for a provisional or temporary suspension in disciplinary proceedings.

The December 31, 2023 notices attempt to justify the improper suspensions by referring to the "SafeSport Code for the U.S. Olympic and Paralympic Movement." Yet nothing in the Statement of Charges or any of its accompanying documents, including the Disciplinary Complaint and the USOPC Report, refer to any violation of the SafeSport Code, because there is none. Indeed, the December 31 Letter seems to acknowledge that this is not a SafeSport case, saying that the prohibitions are merely "*consistent with* US Sailing's adoption of athlete safety measures" under the SafeSport Code. USSA's Dec. 31 Ltr. at 1. In other words, the December 31 Letter is just fabricating a connection between the improper suspensions and the SafeSport Code.

These multiple violations of the Bylaws and Regulations further support that the Disciplinary Complaint cannot proceed to a hearing.

F. THE CHARGES ARE BARRED BY LAW BECAUSE THE USOPC AND USSA RULES ALLEGED TO HAVE BEEN VIOLATED ARE IMPERMISSIBLY VAGUE.

A fundamental aspect of due process, which is required by Bylaw 701, is the provision of fair notice or warning to individuals before punishing them. *See Ulster Home Care, Inc. v. Vacco,* 96 N.Y. 2d 505, 509 (2001) (internal citations omitted); *see also Matter of Kaur v. New York State Urban Dev. Corp.,* 15 N.Y.3d 235, 256 (2010) ("It has long been settled that civil as well as penal statutes can be tested for vagueness under the due process clause") (internal quotation marks omitted).

Here, the Charges, in a conclusory manner, assert that Respondents' purported "disparagement" of the Athlete Representative constituted retaliation in violation of USOPC's Speak Up Policy and US Sailing's Whistleblower Policy. *See* Stat. of Charges against Cayard at 1; Stat. of Charges against Ruh at 1. However, none of the cited rules prohibit "disparagement."

The USOPC Speak Up policy provides that "no USOPC or NGB staff, Board/Committee member, or volunteer may threaten, harass, discriminate against, or take any negative employment or related action" against a protected person. Speak Up Policy at 3. Similarly, the USSA Whistleblower Policy prohibits "harassment, intimidation, adverse employment or livelihood consequences, or any other form of retaliation" against a protected person, and then defines "retaliation" as "any adverse or discriminatory action, or the threat of an adverse or discriminatory action, including removal from a training facility, reduced coaching or training, reduced meals or housing, and removal from competition" against a protected person. Whistleblower Policy at 1-2. Neither policy refers to, let alone prohibits, "disparagement." And neither the Statements of Charges nor the accompanying documents make any effort to identify what element of these policies ("threaten," "harass," "discriminate," etc.) Respondents' alleged

speech violated. Nor could they because all of these terms have well-established meanings in the law that do not apply here, particularly given that Mr. Cayard worked for the Athlete Representative and not the other way around.

While the USOPC Speak Up policy and the USSA Whistleblower Policy also broadly prohibit "related… action" and "adverse… action," respectively, these terms are impermissibly vague in violation of due process. *Cf. People v. Geel*, 690 N.Y.S.2d 827 (J. Ct. 1999) (an ordinance barring "loud or raucous" noises "likely" to annoy or disturb was unconstitutionally vague and in violation of due process because there was no objective standard or understanding of how to determine whether a noise was unlawful).

For a rule or regulation to survive a vagueness challenge under due process, the rule must be "sufficiently definite to give a person of ordinary intelligence fair notice that [the person's] contemplated conduct is forbidden." *People v. Stuart*, 100 N.Y.2d 412, 420 (2003); *see also Ulster Home Care*, 96 N.Y.2d at 509. The rule "must be informative on its face." *People v. New York Trap Rock Corp*, 57 N.Y. 2d 371, 378 (1982). In other words, the rule must "clearly and unequivocally put the defendant on notice of the proscribed activity." *People v. Pethick*, 864 N.Y.S. 2d 901, 903 (2008). The rule also must provide "clear standards for enforcement." *People v. Stephens*, 28 N.Y.3d 307, 312 (2016).

Here, there is no guidance as to what types of actions would qualify under these phrases or even if they apply to *speech*, as opposed to action. Rather, the rules place "unfettered discretion" in the hands of those seeking to enforce the rules against Respondents, without an "objective standard" as to what constitutes "related" or "adverse" actions. *Id.*

Even if they apply to speech, there is no indication as to what types of speech would qualify. Due process requires a "reasonable" degree of certainty so that individuals are not

"forced to guess" the meaning of a term. *People v. Donato*, 684 N.Y.S. 2d 394, 396 (1998). The policies completely fail to specify the exact type of statements, behaviors, or actions that would be deemed retaliatory. *See Bakery Salvage Corp. v. City of Buffalo*, 573 N.Y.S. 2d 788, 790 (finding an ordinance unconstitutional because it contained "no objective standards by which one can determine" the meaning).

In addition, although the Statements of Charges do not refer to the rule, the Ethics Committee Report and the USOPC Report refer to USSA's Code of Conduct ["Code," "Code of Conduct"]. Ethics Ctte. Rep. at 1; USOPC Rep. at 4. To begin, because the Statements of Charges do not rely on this rule, it cannot serve as a basis for the Charges or any punishment of Respondents. *See* Reg. § 15.03.D (requiring the statement of charges to "specifically describ[e]" the charges being made). Further, the Code fails the vagueness test.

The Code generally requires Affiliated Individuals to "refrain from any other material and intentional wrongful act, conduct, or failure to act… which is detrimental to the image or reputation of US Sailing." Code of Conduct at 4. Rather than clearly defining the type of behavior that would be considered retaliatory, the Code lists out a number of responsibilities Affiliated Individuals have, such as to "be knowledgeable of, understand, and follow US Sailing rules and policies… maintain respect for the competition… refrain from using obscene language or gestures... refrain from any other material and intentional wrongful act, conduct, or failure to act not provided above, which is detrimental to the image or reputation of US Sailing." The Code fails to specify the type of actions and behavior that would indicate retaliation against a member of the Board, especially regarding actions undertaken *after* individuals have left USSA. The Code also fails to provide clear standards for enforcement, resulting in USSA's present

misuse of the rule to punish Respondents for simply speaking out in a way that the USOPC and USSA find unflattering.

These vague rules are detrimental to Respondents' due process rights and policy. When vague "content-based" regulations are enforced, they "raise[]" "concerns because of its obvious chilling effect on free speech." *Reno v. ACLU*, 521 U.S. 844, 871 (1997). Other individuals similar to Respondents may be deterred from coming forward with honest, important, and justifiable criticisms of USSA and its Board members out of fear of prosecution and retaliation. *Calderon v. City of Buffalo*, 397 N.Y.S. 2d 655, 661 (1997) (where a statutory interpretation is vague, "fear of prosecution regardless of outcome casts a chilling effect on expression").

IV. CONCLUSION

The Charges violate New York law, Respondents' due process rights, and other provisions of the USSA's Bylaws and Regulations. As a matter of law, this Disciplinary Proceeding must be dismissed or else USSA would be committing further violations of its rules and the law.

Respondents, and each of them, reserve all rights with respect to the violations that USSA have committed to date, including taking any and all available legal action arising from those violations.

Dated: January 14, 2024

Respectfully Submitted,
Gibson, Dunn & Crutcher LLP

Maurice M. Suh

Attorneys for Paul Cayard and William Ruh