UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DECKER ADVERTISING,

Plaintiff,

v.

DELAWARE COUNTY, NEW YORK; and TINA MOLÉ; ARTHUR MERRILL; MARK TUTHILL; THOMAS AXTELL; JEFFREY TAGGART; WAYNE E. MARSHFIELD; JERRY VERNOLD; JAMES E. EISEL; GEORGE HAYNES JR.; BETTY L. SCOTT; JAMES G. ELLIS; CARL PATRICK DAVIS; ALLEN R. HINKLEY; ERIC T. WILSON; JOHN S. KOSIER; WILLIAM LAYTON; JOSEPH CETTA; and AMY MERKLEN, Individually and in their Official Capacities,

Defendants,

Civil Action No.: 3:23-cv-1531 (AMN/ML)

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Plaintiff Decker Advertising alleges that Delaware County, certain members of the County's 2022 Board of Supervisors ("Board"), and County Attorney Amy Merklen retaliated against them for their First Amendment speech when the Board voted to de-designate Plaintiff's newspaper, The Reporter, as an official county newspaper in March 2022. Defendants Betty Scott, James Eisel, Mark Tuthill, Thomas Axtell, Jeffrey Taggart, Jerry Vernold, George Haynes Jr., James G. Ellis, Carl Patrick Davis, Allen R. Hinkley, Eric T. Wilson, John S. Kosier, William Layton, and Joseph Cetta ("Moving Supervisors") submit this memorandum of law in support of their motion for summary judgment on Plaintiff's First Amendment retaliation claim. As there is no record evidence that their votes to de-designate were motivated by illegal reasons, or that the Moving Supervisors engaged in any other improper activity, these Defendants are not liable for any alleged constitutional violation. The Moving Supervisors are entitled to summary judgment on Plaintiffs' First Amendment claim against them.

In addition, defendants Delaware County ("County") and Delaware County Attorney Amy Merklen ("Ms. Merklen") move for summary judgment on Plaintiff's prior restraint claims, as the record lacks any evidence of causation, chilling effect, or the existence of a willing speaker who spoke in his capacity as a private citizen.

Finally, the Moving Supervisors seek summary judgment on any claims for punitive damages as the record lacks any evidence of malice or reckless disregard on their behalf.

BACKGROUND

Decker Advertising publishes The Reporter, a newspaper distributed in Delaware County and online. Defendant' Statement of Material Facts ("SOMF") 2. New York County Law § 214 provides that "[t]he board of supervisors shall annually designate at least two newspapers

published within the county as official newspapers for the publication of all local laws, notices and other materials required by law to be published." The County designated The Reporter as an official county newspaper for decades, including for the year 2022. SOMF 23.

Since at least 2019 some (but not all) Defendants and other County personnel had concerns over misleading and inaccurate reporting based on various articles published in The Reporter over the years. Merklen Dec. 12; Cetta Dec. 6; Vernold Dec. 5. Despite these concerns, it is undisputed that the Board continued to designate The Reporter year after year. SOMF 24.

In early 2022—and after the Board had already re-designated The Reporter for 2022 in conjunction with its 2022 budget—The Reporter switched to a new system for placing legal notices in the paper. SOMF 28, 29. At the same time, The Reporter raised the rate it charged for placing legal notices, allegedly "to reflect the standard rates reflected on the statewide portal" for legal notices. Complaint 44-45; SOMF 28**.** This new system not only more than doubled the fees the County would pay for legal notices, it required considerable effort on the part of County employees to design and create the actual legal notices. SOMF 28, 29.

This change prompted many Republican Supervisors (who hold the majority of seats on the Board) to consider a change in official papers from The Reporter to The Hancock Herald, another local paper. SOMF 25, 30, 31. On March 23, 2022, the Board passed a Resolution revoking The Reporter's designation as an official county newspaper. SOMF 30. Each of the Board members named as a defendant voted for the de-designation. The official resolution states that The Reporter was de-designated because "the cost of placing a legal notice in the Reporter has doubled since the beginning of 2022, along with the amount of time it takes to successfully place the notices, affecting not only that Department's budget, but also the Department's workload." Dkt 1-4; SOMF 30.

It is alleged in the Complaint that a March 15, 2022 letter from County Attorney Amy Merklen requesting a retraction (Dkt 1- 2) is evidence of a retaliatory motive for the Board's vote to de-designate. However, it is undisputed that this letter was an initiative by the County Attorney's office, not the Board. Merklen Dec. 24, 26. In fact, there is no evidence that the Board was even aware of this letter proximate to their decision to de-designate.

From the perspective of certain County employees and members of the Board, the inferior reporting continued, or even got worse, after the de-designation. Specifically, staff from The Reporter began attending committee meetings (not just full Board meetings) and often inaccurately reported on items preliminarily discussed at those meetings. *See* testimony of Shelly Johnson-Bennett (Hazelton Dec. Exh D) at 40. This concern was specifically addressed at a Department Head meeting in February 2023. Id. at 38. Department Heads were particularly concerned that topics brought up as "options" at the committee level erroneously and prematurely ended up in The Reporter, often misleading the public to believe that there had been actual Board action, when in fact the committees were only having preliminary discussions. Id. at 40-42.

On March 8, 2023, the County sent a letter to The Reporter, signed by 39 County officials (the "March 8 Letter" or "Letter"). Dkt 1-7. The Letter was drafted by a Department Head as a collective narrative of the concerns raised at the Department Head meeting. SOMF 36. The majority of the Board, including certain named Defendants, signed the Letter in support of their Department Head colleagues. SOMF 37, 38. However, it is clear the primary intent of the Letter was to express the concerns of the Department Heads. *See* Merklen Exh 8, March 8, 2023 e-mail from Clerk of the Board Penny Bishop to all department heads "…the attached letter has been drafted to address our concerns." *See also* Johnson-Bennett Tr. 44-45.

Of the individual defendants, Betty Scott and James Eisel did not sign the March 8 Letter, though they did vote in favor of the de-designation. Scott and Eisel each aver that their votes were based on the increased costs of purchasing legal ads in The Reporter, as well as the increased burden the new system for placing legal ads placed on those working for the County. *See* Scott Dec. 2, 4, 5, 7; Eisel Dec. 2, 4, 5. The remaining Moving Supervisors Hinkley, Cetta, Vernold, Tuthill, Axtell, Taggart, Haynes Jr., Ellis, Davis, Wilson, Kosier, and Layton also each aver that their votes were informed and motivated solely by the increased costs and increased workload, and that each signed the March 8 Letter simply as a show of support for the County's employees and their colleagues. SOMF 37. None of the moving Supervisors were involved with drafting the letter. SOMF 39.

On March 17, 2023, the issue gained more attention when an article featuring a wholesale reprint of the Letter was published in another local paper. SOMF 40. On or about March 22, 2023, the County received a Freedom of Information Law ("FOIL") request from Cornell Law School First Amendment Clinic, identifying itself as Plaintiff's counsel and alleging that the 2022 de-designation and March 8, 2023 Letter were retaliatory and a violation of Plaintiff's First Amendment Rights. SOMF 45. Complaint Ex. F, Dkt 1-6 at pages 10-12.

The letter from the Clinic's counsel contained an explicit reservation of legal rights and as such, County Attorney Merklen reasonably believed that litigation by The Reporter and/or Decker Advertising was likely. SOMF 46, 47. In the weeks that followed, County employees were asked not to speak directly with reporters or comment on issues potentially pertaining to the litigation. SOMF 51, 52. Rather, requests for information could be directed to the County's Public Information Officer or alternatively, the County Attorney's Office. *Id*.

The Complaint alleges that Attorney Merklen issued a prior restraint or otherwise retaliated against The Reporter for its protected speech (cited in the Complaint as an article that ran in the New York Times on June 18, 2023). Dkt 1-15, Complaint ¶ 76-78. However, the record is undisputed that not only was Merklen's advice a reasonable and permissible reaction to the threat of litigation, it had no "chilling effect" and County employees, including those identified as exemplars in the Complaint, continued to speak with The Reporter and other media on issues unrelated to the litigation – a practice that continues to this day. SOMF 53, 57.

ARGUMENT

Summary judgment is properly granted there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Richardson v. Selsky*, 5 F.3d 616, 621 (2d Cir. 1993). "When analyzing a summary judgment motion, the court 'cannot try issues of fact; it can only determine whether there are issues to be tried.'" *Galeotti v. Cianbro Corp*., No. 5:12-cv-00900 (MAD/TWD), 2013 WL 3207312, at *4 (N.D.N.Y. June 24, 2013) (quoting *Chambers v. TRM Copy Ctrs. Corp*., 43 F.3d 29, 36-37 (2d Cir. 1994)).

"The party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists and that the undisputed facts establish her right to judgment as a matter of law." *Rodriguez v. City of New York*, 72 F.3d 1051, 1060-61 (2d Cir. 1995) (citation omitted). "To determine whether a genuine issue of material fact exists, a court must resolve all ambiguities and draw all reasonable inferences against the moving party." *Ferrando-Dehtiar v. Anesthesia Grp. of Albany, P.C*., 727 F. Supp. 3d 165, 178 (N.D.N.Y. 2024) (citation omitted). Facts are material when they would "affect the outcome of the suit under the governing law," meaning there is a dispute over a material fact when "a reasonable [factfinder] could return a

verdict for the nonmoving party." *Id.* (citation omitted) However, "where the nonmovant's evidence is merely colorable, conclusory, speculative or not significantly probative," the court should "grant summary judgment" *Id.* (citation omitted).

I. The Record Lacks Evidence Demonstrating the Moving Supervisors' Participation in the Alleged Constitutional Violation.

"To state a First Amendment retaliation claim, a plaintiff must plausibly allege that: (1) [her] speech or conduct was protected by the First Amendment; (2) the defendant took an adverse action against [her]; and (3) there was a causal connection between [the] adverse action and the protected speech." *Long v. Byrne*, 146 F.4th 282, 291 (2d Cir. 2025) (internal quotation marks and citation omitted). For the purposes of this motion only, defendants will not contest that Plaintiff engaged in protected speech and suffered an adverse action. But the record does not support finding a causal connection between the protected speech and the adverse action, and that is fatal to Plaintiff's First Amendment retaliation claim.

A plaintiff may demonstrate a causal connection by demonstrating that "the protected speech was a substantial motivating factor in the adverse [] action." *Cioffi v. Averill Park Cent. Sch. Dist. Bd. of Educ.*, 444 F.3d 158, 167 (2d Cir. 2006) (internal quotation marks omitted). Causal connection may be established either directly or indirectly. *Morris v. Lindau,* 196 F.3d 102, 110 (2d Cir. 1999), *abrogated on other grounds by Lore v. City of Syracuse*, 670 F.3d 127 (2d Cir. 2012). A direct causal connection requires plaintiff to set forth evidence of retaliatory animus, while an indirect causal connection requires plaintiff to demonstrate the connection through circumstantial evidence, such as temporal proximity. *Id.*

Here, Plaintiff cannot make the required showing under either standard. First, County Law Section 214 provides that the Board of Supervisors, representing each of the two principal political parties the County, must annually designate newspapers to publish certain official acts

and resolutions. N.Y. County Law § 214(1). In making such designations, the Board of Supervisors must consider (1) newspapers advocating the principles of such political party, (2) the newspaper's support of the political parties' nominees, and (3) the extent of circulation in the county. An independent newspaper is not disqualified from consideration. *Id.* Prior to the statute's amendment, the fact that a newspaper was independent of a political viewpoint barred its ability to be designated. *See, e.g., Relihan v. Brink* 285 A.D. 729, 730-31 (3 Dep't 1955) ("If a newspaper has given no support to the principles of a party and does not bring itself at all within the standards of the statute, it may be held by the court as a matter of law not qualified for designation"). In *Relihan*, the sole Democratic member of the Tioga County Board of Supervisors brought an Article 78 proceeding challenging the de-designation of the Candor Courier as the Democratic newspaper designated pursuant to Section 214. *Id.* at 730. The Appellate Division affirmed the trial court's dismissal of the petition. It held that "in a debatable field of qualification and in areas where reasonable men might differ, a court will not undertake to do more perfectly an act which a statute delegates to a public officer both the authority to do and the discretion how best to do it." *Id*. at 731.

The fact that County Law § 214 was amended to allow consideration of politically independent papers does not change *Relihan*'s central holding: that the decision as to which newspaper to designate "is not vested in the court, but in the elected officials named in the statute." *Id.* at 731. Thus, "in the absence of an abuse of the power, which in the end means an act so unreasonable no sensible man could reach the same result, a court will not interfere. What we see here is merely a debatable issue of judgment in the exercise of public power." *Id.* In *Relihan*, the decision to designate a different newspaper was made based on the paper's lack of support for a political party. *Id.* Given that the Board was free to consider The Reporter's

political viewpoints when selecting an official paper, Plaintiff cannot make out the necessary causal connection between the protected speech and the adverse action.

Second, the record conclusively demonstrates that the motivation for voting to de-designate was to avoid the increased costs for placing legal ads and the increased burden the new ad placement system imposed on County employees. Although County Attorney Merklen did send a letter to The Reporter a few weeks before the vote requesting a retraction, it is undisputed that it was a singular act by the County Attorney's Office. Merklen Dec. 24-26. There is no evidence that any Moving Supervisor played a role in the drafting or issuance of the letter sent by Merklen. The Moving Supervisors each aver that cost and effort were the only reasons for their vote, and the record is devoid of any evidence to raise a question of material fact on that issue. Cetta Dec. 2, 9; Hinkley Dec. 2, 5, 10; Vernold Dec. 2, 8; Axtell Dec. 2,5,8; Davis Dec. 2, 5, 8; Ellis Dec. 2,5, 8; Haynes. Jr. Dec. 2,5,8; Kosier Dec. 2, 5, 7; Layton Dec. 2, 5, 8; Taggart Dec. 2, 5, 8; Tuthill Dec. 2, 5, 8; Wilson Dec. 2, 4, 8. There is no record evidence that the Moving Supervisors did anything but vote to change papers based on what they believed to be a legally permissible reason. Defendants recognize, for purposes of this motion only, the Court has opined that the March 8 Letter may be evidence of retaliatory motive. Dkt 116, MDO at p. 19. Notably, defendants Scott and Eisel did not sign the Letter, such that the Letter does not provide any evidence as to their motivations. The remaining Moving Supervisors each aver that they were uninvolved in the drafting of the March 8 Letter, and signed simply in a show of solidarity with their colleagues. Such scant evidence does not demonstrate a substantially motivating illegal factor. The record evidence is clear that the Department Heads were the genesis for the Letter , and the Letter was solely motivated by the concerns of the Department Heads, not the concerns of the Board or its members. *See* Bennett-Johnson Tr. at 44-45, 61-62, 89-90.

Even assuming *arguendo* plaintiff makes out a prima facie case for First Amendment retaliation, a government defendant "may still receive summary judgment if it establishes its entitlement to a relevant defense," such as the one set forth by the Supreme Court in *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977); *Anemone v. Metro. Transp. Auth*., 629 F.3d 97, 114-15 (2d Cir. 2011). Under *Mount Healthy*, "even if there is evidence that the adverse employment action was motivated in part by protected speech, the government can avoid liability if it can show that it would have taken the same adverse action in the absence of the protected speech." *Id.* at 114 (citation omitted). The Second Circuit has noted that "although the language in *Mt. Healthy* refers to the plaintiff's *conduct,* the [Supreme] Court's analysis, properly understood, attempts to weigh the impact of the defendant's *impermissible reason* on the defendant's decision to act," such that a defendant can "avoid liability by showing that it would have taken the same action in the absence of the impermissible reason." *Id.* at 115 (citation omitted). Thus, a defendant is entitled to summary judgment based on a *Mount Healthy* defense if it demonstrates "by a preponderance of the evidence that it would have taken the same adverse employment action even in the absence of the protected conduct." *Morris*, 196 F.3d at 110 (internal quotation marks omitted); *see also Anemone*, 629 F.3d at 117-20 (dismissing First Amendment retaliation claim where defendants established that plaintiff would have been dismissed even absent his protected speech).

The Moving Supervisors each aver that their votes to de-designate were made solely on the basis of increased costs and workload, and there is no evidence in the record to the contrary. Defendants Axtell, Davis, Ellis, Haynes, Jr., Kosier, Layton, Taggart, Tuthill, Wilson, Eisel and Scott were not deposed. Defendants Cetta, Hinkley, and Vernold were deposed, and each testified consistently that the cost and burden was the motivating factor behind their votes. There is no

evidence that any Moving Supervisor was the subject of a contentious article that required a request for retraction. There is no evidence of any Moving Supervisor having anything to do with the March 15, 2022 letter to The Reporter. There is no evidence of the Moving Supervisors discussing The Reporter's reporting in the Board meetings proximate to the vote to de-designate. There is no evidence of any Moving Supervisor having any personal animus against The Reporter's editor, Lillian Browne or its owners, Kim and Randy Shepard. The mere fact that some of the Moving Supervisors signed the March 8 Letter, a letter they did not draft or otherwise provide input for, does not raise a question of material fact to refute their sworn statements. On this record, then, the Moving Supervisors are entitled to summary judgment on Plaintiff's First Amendment retaliation claim.

II. Summary Judgment is Appropriate on Plaintiff's Prior Restraint Claims, as There is No Evidence in the Record to Support Plaintiff's Allegation that The Directive Was Imposed in Retaliation for its Protected Speech.

The Complaint alleges, based on comment in an e-mail made by Public Defender Joe Ermeti on June 23, 2023 that Ms. Merklen's advice to County employees to refrain from press communications following the publication of the New York Times article was imposed in retaliation for its protected speech. Complaint 76-79. However, as set forth more fully below, the Complaint's allegations are thoroughly refuted by the undisputed evidence adduced during discovery.

A private actor alleging a First Amendment claim must prove that "(1) [it] has a right protected by the First Amendment; (2) the [defendants'] actions were motivated or substantially caused by [Plaintiff's] exercise of that right; and (3) the [defendants'] actions caused him some injury." *Dorsett v. Cnty. of Nassau*, 732 F.3d 157, 160 (2d Cir. 2013); *A.S. v. City Sch. Dist. of Albany*, 585 F. Supp. 3d 246, 269 (N.D.N.Y. 2022) (same). For the purposes of this motion only,

defendants agree that the speech at issue—speaking with The New York Times regarding The Reporter's de-designation—is protected by the First Amendment.

However, there is no evidence in the record to find a causal connection between the issuance of the advice and The Reporter's participation in the New York Times story. To survive summary judgment, plaintiff must point to sufficient evidence in the record raising a material question of fact as to whether the causal connection is "sufficient to warrant the inference that the protected speech was a substantial motivating factor in the adverse employment action." *Cotarelo v. Vill. of Sleepy Hollow Police Dep't*, 460 F.3d 247, 251 (2d Cir. 2006) (citation omitted); *Morrison v. Johnson*, 429 F.3d 48, 51 (2d Cir. 2005) (to demonstrate causation, plaintiff must show that "the speech was at least a substantial or motivating factor in the adverse []action")(citation omitted).

Here, the record establishes that the sole motivation for Ms. Merklen issuing any directive was to protect against litigation risk. The County was on notice as early as March 22, 2023, that The Reporter had secured legal counsel and was challenging the legitimacy of the 2022 de-designation and the motivation of the March 8 Letter. Merklen Dec. 28, 31. Any advice or directives that followed were "caused" by, and flowed from, this legitimate fear of litigation. The County was wary of potential claims long before the article appeared in the Times on June 18, 2023, although the Times article certainly served to reinforce that concern, as it contained a reference to similar litigation brought by a different publisher against a different county. But there is simply no evidence in the record to show any legitimate temporal proximity between The Reporter's participation in the Times article and any alleged retaliatory act that followed. Because Plaintiff cannot demonstrate causation, the First Amendment retaliation claim based on any directive to channel press inquiries should be dismissed.

Nor was The Reporter's speech actually chilled. The record reflects that notwithstanding any cautionary advice, County employees regularly spoke with The Reporter. Specifically, Public Defender Joe Ermeti avers that even after Ms. Merklen issued her advice, he spoke with Ms. Browne about the Public Defender's Facebook page. Ermeti Dec. 7. Town of Hamden Supervisor Wayne Marshfield is quoted in the New York Times article. District Attorney Shawn Smith was clear in his intent to continue to provide The Reporter with information regarding his department's activities. *See*, Ermeti Dec. Exh. B, May 18, 2023 e-mail quoting Mr. Smith ("I do press releases on most of my cases, so I get a lot of press inquiries which I respond to. I think that is part of my obligation to update the public on cases?"). Supervisors Vernold and Cetta affirmatively stated that neither would follow such a directive unless they personally deemed it appropriate. Vernold Dec. 9; Cetta Dec 9. Other than self-serving hearsay, Plaintiff has proffered no actual evidence to support a finding that Plaintiff's speech was, in fact, chilled. *See, e.g., Colombo v. O'Connell*, 310 F.3d 115, 117 (2d Cir. 2002) (plaintiff's speech not chilled after receiving letter threatening litigation because she testified in deposition that the letter did not restrict her speech); *Guan v. Mayorkas*, 530 F. Supp. 3d 237, 258-59 (E.D.N.Y. 2021) (First Amendment rights not chilled where plaintiffs alleged border officials subjected them to "secondary inspection and questioning" at the border based on their reporting).

As the record lacks evidence demonstrating a causal connection between the protected speech and the issuance of any advice by Ms. Merklen or any evidence that Plaintiff's speech was actually chilled, the claim for First Amendment retaliation based on any press directive should be dismissed.

III. Plaintiff's Prior Restraint Claim Fails Because The Speech at Issue was Not Protected by the First Amendment

"While it is well-established that the First Amendment protects not only the right to engage in protected speech, but also the right to receive such speech," *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 351 F.3d 65, 83 (2d Cir. 2003), "it remains true that the rights of the recipients of speech [] derive in the first instance from the primary rights of the speaker." *Id.* [T]he press' right to receive speech does not enlarge the rights of those directly subject" to the order at issue, such that "[s]uccess on the merits for [plaintiff] is entirely derivative of the rights of [the government employees] to speak." *Application of Dow Jones & Co.*, 842 F.2d 603, 608 (2d Cir. 1988).

To implicate the First Amendment rights of a government employee, the employee must be speaking in their role as a private citizen, not as part of their official duties. *Garcetti v. Ceballos*, 547 U.S. 410, 421-22 (2006) ("[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."); *see also Schoolcraft v. City of New York*, No. 10 Civ. 6005(RWS), 2012 WL 3960118, at *5 (S.D.N.Y. Sept. 10, 2012) ("[I]n order to invoke First Amendment protections, a government official [] must demonstrate not only that the subject of his speech was a matter of public concern, but also that when he spoke on the subject, he spoke as a citizen rather than as a government employee.") (internal quotation marks omitted). "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe on any liberties the employee might have enjoyed as a private citizen" because "[i]t simply reflect[s] the exercise of employer control over what the employer itself has commissioned or created." *Garcetti*, 547 U.S. at 411. When government employees speak pursuant to their official duties, that speech is

not protected by the First Amendment. *See id.* at 421-22 (plaintiff "did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings."). That is because the First Amendment only protects a government employee's right "to speak as a citizen addressing matters of public concern." *Id.* at 417.

Here, the record is devoid of any evidence indicating that Ermeti or Marshfield—or any other public employee—spoke as a private citizen. Nothing in the record supports an inference that absent the requirements of their jobs as government employees, either spoke or even sought to speak as a private citizen. Part of the duties of a public defender is to speak to the press when necessary. Ermeti Dec. 3. And that is what occurred here. Ermeti *did* speak to Ms. Browne about the Public Defender's Facebook page. Ermeti Dec. 7. Supervisor Wayne Marshfield *did* give a comment to the New York Times explaining his position as a Supervisor and signatory to the Letter, not as a private citizen. Given that there is no evidence demonstrating any public employee spoke as a private citizen, the prior restraint claim must be dismissed.

Further, there is no evidence of a willing speaker. The Reporter's right to receive information rises and falls on the existence of a speaker willing to provide information. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756(1976) ("Freedom of speech presupposes a willing speaker."); *Student Members of Same v. Rumsfeld*, 321 F. Supp. 2d 388, 395 (D. Conn. 2004) ("To demonstrate an injury to their First Amendment rights sufficient to confer jurisdiction, [the organization] must demonstrate that, but for the challenged order, [the speaker] is willing to share information prohibited by the [challenged] order."). To avoid summary judgment on its prior restraint claim, then, Plaintiff must show that there was a willing speaker. No such showing may be made on this record. As set

forth above, there is no evidence that any public employee spoke in any capacity other than pursuant to their official duties, such that their First Amendment rights were not implicated. It follows that there is no evidence that any such employee was a willing speaker. As Plaintiff cannot demonstrate the existence of a willing speaker, its prior restraint claims must be dismissed. *See, e.g., Price v. Saugerties Central Sch. Dist.*, 305 F. App'x 715, 716 (2d Cir. Jan. 5, 2009) ("Plaintiffs' failure to identify a willing speaker subject to the challenged policy from whom they may derive Article III standing is fatal to their claim.") (internal quotation marks omitted) (collecting cases).

Significantly, the advice to refrain from speaking from reporters was motivated by, and directed to, the real risk of litigation. A municipality "may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large." *See United States v. National Treasury Employees Union*, 513 U.S. 454, 465 (1995) ("NTEU"). As the Court acknowledged in its earlier decision, "the risk of litigation against the County is a 'real, not merely conjectural' harm." (Dkt. 116 at 31). Moreover, as the record now stands, there is no question that the restriction on speech was justified. *See Piscottano v. Murphy*, 511 F.3d 247, 271 (2d Cir. 2007) ("If it is determined that the employee's expressive conduct as a citizen involved a matter of public concern, the government bears the burden of justifying its adverse []action."). "Justifications may include such considerations as maintaining efficiency, discipline, and integrity, preventing disruption of operations, and avoiding having the judgment and professionalism of the agency brought into serious disrepute." *Id.* "Evidence that such harms or disruptions have in fact occurred is not necessary. The employer need only make a reasonable determination that the employee's speech creates the potential for such harms." *Id.* The record clearly established an intent to protect the County's interest in avoiding litigation—a real risk.

Specifically, Ms. Merklen said on May 18, 2023 "As some of you may be aware, a reporter from the NY Times is calling asking for comments on the issues between the County and the Walton Reporter. Since the Walton Reporter has retained counsel, I am considering this an issue for potential litigation. I am advising that you do not talk to any reporters or comment on this issue." Merklen Dep. Exh 16. Just the day prior, the Clerk of the Board reminded County staff "to please not respond to any press inquiry. Those requests should be directed to Amy or to Shelly who is our Public Information Officer." Ermeti Dec. Exh B.

There can be no question that the March 22, 2023 letter from Plaintiff's counsel brought with it the very real threat of litigation—and the risk of stray comments doing harm to the County's position—justified a request that any questions regarding the dispute regarding de-designation and the subsequent lawsuit go through the County Attorney or Public Information Officer. The directives may have been inartfully worded at times, but there can be no meaningful debate as to what prompted them.

IV. The Claim for Punitive Damages as Against the Moving Supervisors Must be Dismissed

If the Court allows the claims to proceed to trial as against any of the Moving Supervisors, it should still dismiss the claims for punitive damages against them. "Punitive damages are meant to punish the defendant for his willful or malicious conduct and to deter others from similar behavior." *Milfort v. Prevete*, 3 F. Supp. 3d 14, 23 (E.D.N.Y. 2014) (internal quotations omitted). "To be entitled to an award of punitive damages, a claimant must show a 'positive element of conscious wrongdoing.' " *New Windsor Volunteer Ambulance Corps, Inc. v. Meyers*, 442 F.3d 101, 121 (2d Cir. 2006) (quoting *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 538 (1999)). Nothing in the record supports such an inference—there is no evidence that any of the Moving Supervisors acted with malice or with "conscious wrongdoing." All of the Moving

Supervisors averred that their votes for de-designation were based on increased cost and burden. As Supervisor Vernold stated, " if we have a way to obtain the same service for less money, we should do that." Vernold Dec. 4. The Moving Supervisors generally did not even recall the reporting being discussed at during the meetings that pertained to the vote. Vernold Dec. 6, Cetta Dec. 7; Hinkley Dec. 7; Vernold Dec. 2, 8; Axtell Dec. 6; Davis Dec. 6; Ellis Dec. 6; Haynes. Jr. Dec. 6; Kosier Dec. 5; Layton Dec. 5; Taggart Dec. 6; Tuthill Dec. 6; Wilson Dec. 6; Scott Dec. 5; Eisel Dec. 5. Even it were discussed, simply mentioning a topic does not provide grounds for finding "conscious wrongdoing." Indeed, the record reflects that the Moving Supervisors believed increased cost to be a legally permissible basis to change papers. Vernold Dec. 10, Cetta Dec. 11; Hinkley Dec. 16; Davis Dec. 8; Haynes. Jr. Dec. 8; Kosier Dec. 5; Layton Dec. 5; Scott Dec. 7. Supervisor Hinkley does not even read The Reporter. Hinkley Dec. 6-7. Supervisor Cetta only subscribes because his wife likes to read it. Cetta Dec. 6. There is no evidence that any Moving Supervisor was the subject of a contentious article that required a request for retraction. There is no evidence of any Moving Supervisor having any personal animus against The Reporter's editor, Lillian Browne or its owners, Kim and Randy Shepard, or any other member of The Reporter's staff. On this record, then, an award of punitive damages is unwarranted.

CONCLUSION

For the reasons given above, Defendants respectfully request this Court grant its motion for summary judgment dismissing the First Amendment retaliation claims against the Moving

Supervisors, as well as their motion for summary judgment dismissing the prior restraint claim against Delaware County and County Attorney Amy Merklen.

Dated: December 1, 2025

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