

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK**

DECKER ADVERTISING INC.,

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, in their
individual and official capacities,

Defendants.

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

**PLAINTIFF'S REPLY MEMORANDUM OF LAW
IN FURTHER SUPPORT OF PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

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PRELIMINARY STATEMENT

Defendants' Opposition (Dkt. No. 253) doubles down on their argument that the Delaware County Board of Supervisors was supposedly "free to consider *The Reporter's*" so-called "political viewpoints when selecting an official paper," without running afoul of the First Amendment. Opp. at 5. Under their theory, "[a] jury could find that a Board comprised of primarily Republican supervisors could find issue with a newspaper that continually portrayed its predominantly Republican County in a poor light." *Id.* Plaintiff agrees that the jury here could find exactly that given the overwhelming evidence in the record, but disagrees that the jury's finding would help Defendants escape liability. To the contrary, because the County punished an independent newspaper for its adverse reporting, without fear or favor, it committed textbook First Amendment retaliation. Defendants' argument on this point only reinforces *The Reporter's* entitlement to summary judgment based on its de-designation as an official County newspaper.

Defendants next argue that there are material issues of fact that preclude summary judgment—in effect conceding that their Motion for Partial Summary Judgment on the de-designation claim should be denied—because their self-serving affidavits accompanying their motion "demonstrate[] that for most, if not all, of the Board members, 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." *Id.* at 6. But Defendants fail to support their argument with any contemporaneous evidence and ignore significant record evidence to the contrary, including a smoking-gun March 8, 2023, letter (the "Letter") signed by all but one of the Defendants on the Board at the time. In the Letter, Defendants not only admit that unfavorable reporting was a reason for the de-designation, but also claim that it should have sparked an "immediate change" in the reporting while demanding that the newspaper's co-owners make changes in *The Reporter's* news coverage going forward. Defendants' *Mount Healthy* defense

likewise fails because they haven't met the high bar for it to be granted at summary judgment. To the contrary, no reasonable juror could infer that unfavorable news coverage was not a substantial motivating factor for the de-designation. In the face of that evidence, Defendants cannot even bring themselves to argue that they would have made the same de-designation decision in the absence of the reporting they deemed objectionable, as required to establish a *Mt. Healthy* defense. Instead, they resort to the tepid claim that de-designation was based, "at least in substantial part" (Opp. at 8), on cost and workload factors. That is not enough to avoid summary judgment.

For this same reason, Defendants' claim that they cannot be held liable as a group or individually because no evidence demonstrates that a majority of the Board acted with an improper motive fails. To the extent Defendants are additionally arguing that the Court should impermissibly heighten Plaintiff's burden at summary judgment, the Court should follow Second Circuit precedent that declines to do so.

Finally, this is precisely the type of case implicating fundamental constitutional free speech rights where Courts exercise their equitable discretion to award much-needed injunctive relief.

For all these reasons, this Court should grant summary judgment on the claim that the County retaliated against *The Reporter* for its First Amendment-protected speech by withdrawing legal notice advertising from the newspaper.

ARGUMENT

I. NO MATERIAL FACTS ARE IN DISPUTE

After Plaintiff supported its motion for partial summary judgment with abundant evidence demonstrating Defendants de-designated *The Reporter* as punishment for its reporting, the burden shifted to Defendants to "come forward with 'specific facts showing that there is a *genuine issue for trial*.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citing Fed. R. Civ. P. 56(e)) (emphasis in original). "The mere existence of a scintilla of evidence"

Defendants point to in their own self-serving declarations is plainly “insufficient” where a jury could not reasonably find for Defendants based on the evidence proffered. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).¹

Tellingly, Defendants chose not to argue first and foremost in their brief that they have proffered sufficient evidence supporting their position; instead, they claim the Court should adopt an interpretation of County Law § 214 that would sanction their unlawful conduct. By arguing that the Board “could find issue with a newspaper that continually portrayed its predominantly Republican County in a poor light” without violating the Constitution, Opp. at 5, Defendants give away the game on the First Amendment retaliation issue. Further, they again ignore that this Court has already rejected Defendants’ reliance on cases like *Relihan v. Brink* that “predate the 1973 amendment to § 214, which ensures that politically independent newspapers are eligible” for designation, in recognizing that Defendants’ position is divorced from the statutory text. Dkt. No. 116 at 18 n.6 (citing *Relihan v. Brink*, 285 A.D. 729 (3d Dep’t 1955)). The amendment’s safeguarding of independent newspapers’ eligibility for designation makes sense because “a statute cannot override a constitutional right[.]” *In re N.Y. Times Co.*, 828 F.2d 110, 115 (2d Cir. 1987), despite Defendants’ urging to the contrary, by permitting County officials to “deny[] [a newspaper] business in retaliation for its protected speech.” *N. Mississippi Commc’ns, Inc. v. Jones*, 792 F.2d 1330, 1337 (5th Cir. 1986).

Supervisors’ self-serving declarations claiming that the only reasons they voted to de-designate *The Reporter* were because of an increase in the cost of legal notices and the switch to a statewide online portal are contradicted by overwhelming evidence in the record. All but two

¹ See also *BanxCorp v. Costco Wholesale Corp.*, 978 F. Supp. 2d 280, 296, 299 (S.D.N.Y. 2013) (finding no disputed issue of material fact when the “only evidence that might contradict” otherwise undisputed facts was a “self-serving declaration” “directly contradicted by a variety of documentary evidence” (citations and quotations omitted)).

Defendants² signed the Letter, where they openly admitted that “the manner in which your paper reports County business was one of the reasons the Board decided to switch papers[.]” Grygiel Decl., Ex. 28. Defendants ask the Court to discount this *prima facie* evidence, reasoning that just because they signed the Letter, this doesn’t mean they “reviewed, affirmed or accepted every representation,” Opp. at 6-7. Putting aside the implausibility of that assertion, Supervisors who were deposed in this case conceded under oath, as they must, that they agreed with the statements in the Letter that they voluntarily signed concerning the de-designation—including objections to *The Reporter*’s unflattering news coverage of County government.³

Defendants’ argument that the Letter should be disregarded because it “was solely motivated by the concerns of the Department Heads, not the concerns of the Board or its members” also misses the mark. Opp. at 6. Even if that were true—and it is not—that doesn’t save Defendants because the Department Heads’ “concerns” revolved around *The Reporter*’s First Amendment-protected newsgathering. Grygiel Decl., Ex. 15 at 40:3-23 (testifying Department Heads had issues with meeting coverage, where “there had never been a reporter” before and departments had to navigate how much to share publicly “without it ending up in the newspaper prematurely”).

In addition to the Letter, considerable other evidence exists demonstrating Defendants’ retaliatory animus. *See, e.g.*, Dkt. No. 246-11 (“Grygiel Decl.”) Ex. 21; *id.*, Ex. 29; *id.* Ex. 18; *id.* Ex. 20; *id.* Ex. 22; *id.* Exs. 25-28; *id.*, Ex. 9 at 55:21-57:17; *id.* Ex. 14 at 60:16-23; *id.*, Ex. 17 at

² Supervisor Betty Scott missed the meeting where the Letter was signed, but “probably would have signed over the top of all of [the other] people” because “she disagreed with the news coverage of the department heads and County Government Affairs,” according to Defendant Merklen. Grygiel Reply Decl. ¶ 15; Grygiel Decl., Ex. 10 at 139:23-141:5. Supervisor James Eisel’s successor Lisa Driscoll signed the Letter. Grygiel Decl., Ex. 28.

³ *See, e.g.*, Grygiel Suppl. Decl., dated Jan. 20, 2026, Ex. 48 at 103:10-19; Grygiel Decl., Ex. 16 at 70:15-71:3; Ex. 14 at 69:23-70:14; Ex. 9 at 98:6-8, *id.*, 107:21-108:9; Ex. 13 at 59:16-24. The only deposed Supervisor who disagreed with certain statements, Mr. Marshfield, has broken ranks with Defendants to request that the Board re-designate *The Reporter* after this lawsuit was filed. Grygiel Decl., Ex. 11 at 23:1-13; *see* Lillian Browne, *Supervisors Split on Official Paper as Lawsuit Looms*, THE REPORTER (Jan. 7, 2026), <https://www.the-reporter.net/stories/supervisors-split-on-official-paper-as-lawsuit-looms,230663>.

22:22-23:10; *id.*, Ex. 13 at 39:16-20; *Id.*, Ex. 12 at 23:13-24:3. For example, Defendant Merrill testified that he told *The Reporter*'s co-owner Randy Shepard that the County de-designated *The Reporter* because of the "inaccurate reporting." Grygiel Decl., Ex. 13 at 39:16-20. For Defendant Molé, "almost four years" of "negative . . . nonfactual, slanted articles" "was the straw that broke the camel's back" and led to the de-designation. *Id.*, Ex. 9 at 55:21-57:17. Supervisor Wayland Gladstone testified that one of the reasons for the Board de-designating *The Reporter* was because "some are dissatisfied with the coverage of some of the articles[.]" *Id.*, Ex. 12 at 23:13-24:3.

Perhaps for this reason, in their declarations none of the Supervisors deny that the Board and Defendant Merklen discussed issues concerning the content of *The Reporter*'s reporting prior to the de-designation. *See* CSUMF ¶¶ 77-78. Nor could they credibly do so. Defendant Mole's email to the Republican Supervisors requesting that they support de-designating *The Reporter* focuses on coverage the County didn't like, stating: "The Reporter, continues to disparage and write non-factual articles about the County . . . I believe the County deserves better than what the Reporter gives us." Grygiel Decl., Ex. 22. Defendant Mole's request to switch papers follows a series of text exchanges she had, starting with Defendant Cetta in November of 2021 and continuing with Defendant Merklen through March of 2022, regarding de-designating *The Reporter*; none mentioned the purported cost of *The Reporter*'s legal notices, as Defendants now claim, as distinct from the newspaper's coverage of County government. *See, e.g.*, Grygiel Decl., Exs. 18, 20-21, 24. In a glaring omission, there is no contemporaneous documentary evidence in the record indicating that the County analyzed the cost increase.

Defendants improperly asserted executive session privilege in depositions in an apparent attempt to suppress testimony regarding de-designation deliberations, with the Court ultimately issuing a ruling, based on settled law in the Second Circuit, declaring that "there is no federally

recognized executive session privilege applicable in this case and the Court declines to recognize an executive session privilege.” Dkt. No. 224; *see also* Dkt. No. 217. Two days after this ruling, Defendant Marshfield testified regarding a 2022 email, which memorializes a conversation he had with Randy Shepard. That email indicates that another reason was proposed in executive session for the de-designation aside from cost and labor. Shepard Decl., ¶ 19 and Ex. 3. After Defendant Marshfield testified that he didn’t “recall having any conversation with Randy,” Grygiel Decl., Ex. 17 at 44:5-9, Defendants’ counsel interrupted Plaintiff’s deposition questioning to email Plaintiff’s counsel a Declaration signed by Mr. Marshfield that contradicted his live testimony by disputing the veracity of the 2022 email.⁴ Dkt. No. 252 (“Grygiel Rep. Decl.”) ¶¶ 24-27, Ex. 46. Evidence demonstrates that the Declaration stemmed from an investigative interview Defendants’ counsel conducted of Defendant Marshfield weeks prior to his deposition regarding his communications with *The Reporter*.⁵ Grygiel Decl., Ex. 10 at 289:19-294:10; Grygiel Decl., Ex. 17, at 115:8-15.

Despite this clear attempt by counsel to influence his testimony, Defendant Marshfield nonetheless testified that “inaccuracies in the reporting of *The Reporter*” was indeed a reason for

⁴ The Declaration also incorrectly stated that New York’s Open Meeting Law “requires information, documents, and communications obtained from or derived from topics discussed in executive session . . . to be kept confidential,” *id.* ¶ 2, effectively serving to erroneously advise Mr. Marshfield that admitting to any discussion with Mr. Shepard would be a violation of the law. New York’s Open Meeting Law permits, but does not require, executive sessions to be closed for eight enumerated reasons. N.Y. Pub. Off. Law § 105. And, as the Committee on Open Government has opined, executive session deliberations are not generally considered confidential. To the contrary, “[s]ince a public body may choose to conduct an executive session or discuss an issue in public, information expressed during an executive session is not ‘confidential.’” *See, e.g.,* Comm. on Open Gov’t Advisory Op. OML-AO-4192 (May 10, 2006).

⁵ Supervisor Maya Boukai was also subjected to an investigative interview by the County’s counsel on August 14, 2025, because of communications she had with *The Reporter*, with Attorney Facciponte claiming in correspondence that documents produced in discovery showed she “violated executive session privilege and other provisions of New York’s open meetings law on at least one occasion, when it suited your personal opinions over that of the County” and “provided a plaintiff themselves [*sic*] evidence which may benefit them [*sic*] in an ongoing litigation.” Grygiel Supp. Decl. ¶ 3(b), Ex. 47. Ms. Boukai disputed the claim in a response email. *Id.* The County’s heavy-handed attempt to ferret out and pressure Supervisors suspected of speaking to *The Reporter* under the guise of an inapplicable privilege betrays its preoccupation with Plaintiff’s news coverage and supplies further evidence of retaliatory animus.

the de-designation that the Board discussed prior to its vote. Grygiel Decl., Ex. 17 at 23:5-6. Because no genuine material facts are in dispute, the Court should grant Plaintiff's motion.

II. DEFENDANTS ARE NOT ENTITLED TO THE *MOUNT HEALTHY* DEFENSE

Defendants' *Mount Healthy* defense fails as a matter of law because no reasonable jury could find by a preponderance of the evidence that the County "would have reached the same decision as to [de-designation] even in the absence of the protected [First Amendment] conduct." *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977). To the contrary, as discussed above substantial evidence confirms that *The Reporter's* news coverage of Delaware County was the primary reason that the Board de-designated *The Reporter*. See Dkt. No. 246-2 at 12–18; *supra* at Section I; *Persaud v. City of N.Y.*, 2024 WL 2159852, at *5-6 (rejecting *Mount Healthy* defense where evidence "reveal[s] mixed motives[,] and defendants "rel[ied] largely on their own statements" in a "not exactly showstopping" attempt to "break that tie").

Defendants' self-serving and implausible declarations are insufficient to raise a material issue of fact as to Defendants' motives. And if the Board had de-designated the newspaper due to "increased cost and workload," Opp. at 8, and not because of coverage, evidence in the record would demonstrate that officials had compared costs and the circulation of competing newspapers in determining that the County should not pay *The Reporter* the statutory legal notice rate. The evidence demonstrates the opposite.⁶ Defendants therefore cannot establish a *Mount Healthy* defense as to the de-designation claim, on which Plaintiff should be granted summary judgment.

⁶ See, e.g., Grygiel Rep. Decl. ¶ 16, Ex. 11 at 13:17-21 (testifying that he didn't know how much higher *The Reporter's* cost was than other newspapers because "I never got any sort of document with comparable figures on it").

III. EACH OF THE DEFENDANTS VIOLATED THE REPORTER'S FIRST AMENDMENT RIGHTS BY DE-DESIGNATING IT IN RETALIATION FOR UNFAVORABLE NEWS COVERAGE

As a threshold point, the Second Circuit has expressly declined to require “that a plaintiff must demonstrate that a majority of a public body acted . . . in an . . . unconstitutional manner in order for that plaintiff to hold the municipality liable for constitutional violations.” *Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778, 785–86 (2d Cir. 2007). Requiring such a showing would “impermissibly heighten[] [Plaintiff’s] burden at summary judgment.” *Bierce v. Town of Fishkill*, 656 F. App’x 550, 552 (2d Cir. 2016). Instead, the Court adopted a burden-shifting framework, reasoning that requiring a plaintiff to prove a majority animus would be “overly mechanistic” given “the ease with which public officials motivated by . . . unconstitutional purposes can hide their true intentions.” *Id.* at 786. Under this framework, “a plaintiff seeking to hold a municipality or public officials liable . . . may prevail—and, at the very least, should survive summary judgment . . . if he proffers evidence that strongly indicates that discrimination was a significant reason for a public body’s actions and the defendant body, or its members, fails to counter that evidence with its own clear evidence that a majority acted with permissible motives.” *Id.*

Here, the evidence establishes that a substantial motivating factor for the majority of the Board to de-designate *The Reporter* was its unfavorable coverage. *See supra* at Section I. The evidence further establishes that “the unconstitutional intentions” of Defendants Mole and Merklen – the existence of which Defendants do not dispute – “taint[ed] the ultimate outcome” and led to the de-designation. *Cine SK8, Inc.*, 507 F.3d at 786. Defendants’ assertion that Defendant Mole does not “dictate or control the designation process” does not contradict the uncontroverted facts that she urged the Board to switch papers because of *The Reporter*’s “articles about the County” and her belief that “the County deserves better[.]” Grygiel Decl., Ex. 22. Nine Defendants

responded agreeing with Mole’s proposal, Grygiel Rep. Decl., Ex. 32, and the majority of the Board signed the Letter, admitting that unfavorable reporting was a reason for the de-designation.

In response, Defendants offer no credible evidence to support its argument that “the overwhelming majority of the Board voted to de-designate based on . . . the increased cost and workload associated with placing legal notices in *The Reporter*.” Opp. at 10. As discussed above, Defendants’ self-serving declarations are insufficient to raise an issue of fact. Similarly unavailing is the cherry-picked testimony from Defendants Merrill and Marshfield. *Id.* These excerpts fail to support Defendants’ position because Merrill admitted in his deposition that he told *The Reporter*’s co-owner that it was the “inaccurate reporting” that caused him to vote to de-designate and to sign the Letter. Grygiel Decl., Ex. 13 at 39:8-20. And Marshfield likewise testified that “inaccuracies in the reporting of The Reporter” was a reason for its de-designation. *Id.*, Ex. 17 at 23:5-6. For these reasons, Defendants have utterly failed to counter Plaintiff’s evidence, as they must, with evidence that unfavorable news coverage was not a substantial motivating factor for a majority of the Board to de-designate *The Reporter*.⁷

IV. THE COURT SHOULD GRANT PLAINTIFF INJUNCTIVE RELIEF

Because Plaintiff has demonstrated Defendants violated its First Amendment rights, the Court should issue a permanent injunction. Permanent injunctive relief is warranted in the Court’s equitable discretion when the Plaintiff shows “(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in

⁷ Defendants misplace reliance on *Goodmaster v. Town of Seymour*, where plaintiff “provided no evidence—apart from his own speculations and hearsay” of a causal connection. Plaintiff has adduced copious direct and indirect evidence of Defendants’ retaliatory animus. No. 3:14-CV-00060(AVC), 2016 WL 10452427, at *13 (D. Conn. Feb. 8, 2016). *Jeffries v. Harleston* is also inapposite because in that case, unlike here, the evidence demonstrated that a majority of the defendants had a permissible motive for the adverse action, namely, that they believed that the speech “would disrupt . . . operations” and therefore “outweigh[ed] the value of the speech.” 52 F.3d 9, 13 (2d Cir. 1995).

equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.” *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). “Plaintiffs may satisfy the first two factors by demonstrating that they are likely to be deprived of their constitutional rights in the future by the acts they seek to have enjoined.” *Floyd v. City of New York*, 959 F. Supp. 2d 668, 672 (S.D.N.Y. 2013).

Plaintiff has demonstrated that Defendants violated its First Amendment rights, “[t]he loss of” which, “for even minimal periods . . . unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976). The Board’s repeated refusal to re-designate *The Reporter* as an official newspaper since 2022 creates an ongoing injury and a likelihood of future injury. Plaintiff has thus satisfied the first two requirements for obtaining permanent injunctive relief. *Id.*

The balance of hardships and public interest tip strongly in favor of granting a permanent injunction because the public interest is served by placing legal notices in a newspaper with significantly more readership and because “securing First Amendment rights”—including the ability to conduct First Amendment-protected newsgathering without government retaliation—“is in the public interest[.]” *New York Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013). Defendants argue that “it is not in the public’s interest to tie the hands of future Boards in deciding which paper to designate.” Opp. at 13. Unlike the cases Defendants rely on for this proposition, where the Court rejected plaintiffs’ constitutional claims, it is very much in the public’s interest to ensure First Amendment rights are protected in this case by reinstating Plaintiff through the calendar year following this Court’s order and by ordering the Board of Supervisors to award future designations to newspapers only upon articulable and content-neutral coverage criteria, thus helping “secur[e] First Amendment rights.” *Walsh*, 733 F.3d at 488.

CONCLUSION

For all these reasons, the Court should grant Plaintiff's Motion for Partial Summary Judgment and whatever additional relief the Court deems necessary.

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