

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 OPPOSITION
TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

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PRELIMINARY STATEMENT

Plaintiff Decker Advertising alleges, inter alia, 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. In its Motion for Partial Summary Judgment (Dkt 246), Plaintiff seeks summary judgment on its First Amendment retaliation claim, an injunction ordering Delaware County to reinstate *The Reporter* as an official county newspaper and a declaration that Defendants County and Board violated *The Reporter's* First Amendment Rights. Plaintiff does not move with respect to its second cause of action alleging a prior restraint.

Summary judgment is inappropriate at this stage as there are material issues of fact as to whether the Board's vote to de-designate was motivated by an illegal reason – as opposed to the very legal reasons of increased cost and burden. For these same reasons, a declaration that there has been a violation of First Amendment Rights is inappropriate. An injunction is not warranted because Plaintiff can obtain adequate relief in the form of monetary damages for its claims of lost advertising revenue.

RELEVANT BACKGROUND FACTS

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.

Since at least 2019 some (but not all) Defendant Supervisors and other County personnel had concerns over misleading and inaccurate reporting based on various articles published in *The Reporter* over the years. Despite these concerns, the Board continued to designate *The Reporter* year after year. Molé Tr. Dkt. 246-13 at pp. 54-57.

So what changed? 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 its paper. Shephard Dec. 10. This new system not only more than doubled the fees the County would pay for legal notices, but it now also required considerable effort on the part of County employees to design and create the actual legal notices -- work the paper had historically provided. Merklen Tr. Dkt. 246-14 at pp 54-55. *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; Shepard Dec. 11. While the actual rates – old and new – are not part of this Record, it appears undisputed that *The Reporter* was and continues to be, the most expensive option. Merklen Opp. Dec. ¶10

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. On March 23, 2022, the Board passed a Resolution revoking *The Reporter*’s designation as an official county newspaper, stating 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 246-23.

While the Record in this case may contain evidence that, at least for some Supervisors, adverse reporting may have been a topic of concern, there is no evidence that this was the substantial or motivating factor for the Board as a whole to vote to de-designate.

The March 15, 2022 letter from County Attorney Amy Merklen requesting a retraction (Dkt 246-33) cannot serve as evidence of a retaliatory motive for the Board's vote to de-designate because it is undisputed that this letter was an initiative by the County Attorney's Office, not the Board. Dkt. 245-20, Merklen Dec. ¶24, 26; Molé Tr. 38-39. In fact, there is no evidence that the Board was even aware of this letter proximate to their decision to de-designate. There are no "carbon copies" on the Letter indicating it was shared with anyone but the intended recipients.

The March 23, 2023 Letter is a similar red herring. The Letter was drafted by a Department Head as a collective narrative of the concerns raised at the Department Head meeting. Dkt. 246-17, Merrill Dep. 40-43; Dkt. 246-19 Bennett Johnson Dep. 44-45; and Merklen Dec. 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." Two named Defendants did not even sign the Letter. To the extent others did, the record is clear that they did so in support of their Department Head colleagues. Their signature lines were added to the Letter after the fact, and there is certainly no evidence they played any role in its drafting.

ARGUMENT

I. Legal Standard

Rule 56(a) of the Federal Rules of Civil Procedure instructs courts to grant summary judgment only if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" if it "might affect the outcome of the suit under the governing law," and a dispute is "'genuine' ... if the evidence is such

that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “The burden of showing that no genuine factual dispute exists rests on the party seeking summary judgment, and in assessing the record to determine whether there is a genuine issue as to any material fact, the court is required to resolve all ambiguities and draw all factual inferences in favor of the party against whom summary judgment is sought.” *Cronin v. Aetna Life Ins. Co.*, 46 F.3d 196, 202 (2d Cir.1995).

At this stage, the trial court’s task is “carefully limited to discerning whether there are any genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined at this point to issue-finding; it does not extend to issue-resolution.” *Gallo v. Prudential Residential Servs., Ltd. P’ship*, 22 F.3d 1219, 1224 (2d Cir. 1994). This simple, but important premise illustrates precisely why Plaintiff is not entitled to summary judgment at this stage in the case. It is not for the Court to decide what the actual basis was, and continues to be, for the County’s choice in newspapers. This is a question for the trier of fact.

I. There are Material Issues of Fact as to Why *The Reporter* Was De-designated, Making Summary Judgment Inappropriate.

“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). There are material issues of fact as to the motivating factor(s) for the vote to de-designate *The Reporter* and select *The Hancock Herald* that invalidate Plaintiff’s entitlement to summary judgment on its First Amendment retaliation claim.

County Law Section 214 provides that the Board of Supervisors, representing each of the two principal political parties of the County, must annually designate newspapers to publish certain official acts and resolutions. N.Y. County Law § 214(1) and (2). 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.*

The decision as to which newspaper to designate “is not vested in the court, but in the elected officials named in the statute.” *Relihan v. Brink*, 285 A.D. 729, 730-31 (3 Dep’t 1955). 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 definitively establish the necessary causal connection between the protected speech and the adverse action. Plaintiff essentially makes this argument for Defendants when citing to the deposition testimony of County Attorney Amy Merklen wherein she explained her understanding that a designated paper's change in political slant could be a permissible reason to consider a change in designated papers. Dkt. 246-10 at pp. 215, 219. At page 13 of their Memorandum of Law, Plaintiff specifically cites evidence that certain Supervisors perceived *The Reporter* to be “left leaning” or “anti-government.” 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.

More importantly though, this record conclusively demonstrates 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. Not any protected speech. The fact that County Attorney Merklen did send a letter to *The Reporter* a few weeks before the vote requesting a retraction is irrelevant to the analysis. First, Attorney Merklen is not a voting member of the Board of Supervisors. Similarly, there is no evidence in the record that she attempted to influence or interfere with the Board's vote. Her letter was a singular act by the County Attorney's Office. Dkt. 245-20 Merklen Dec. 24-26. Similarly, her March 16, 2022 memorandum to the Republican Supervisors (Dkt. 246-34) refers only to her opinion as to whether a change in designations would be legally permissible and further refers to the increased cost.

Moreover, the vast majority of Supervisors have declared under oath that cost and effort were the reasons for their votes to de-designate. 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.

Defendants recognize, for purposes of this motion only, the Court has opined that the March 8, 2023 Letter *may* be evidence of retaliatory motive. Dkt 116, MDO at p. 19. However, Defendants Scott and Eisel did not sign the Letter, and as such, the Letter cannot provide any evidence as to their motivations. The Record evidence is also well established 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* Dkt 236-18, Bennett-Johnson Tr. at 44-45, 61-62, 89-90. The mere fact that Defendant Supervisors' signatures appear on the Letter, a hearsay document, does not conclusively establish that the signatories

reviewed, affirmed or accepted every representation. In fact, the Record evidence is to the contrary. The Supervisors have declared that they were uninvolved in the drafting of the March 8 Letter, and signed simply in a showing of solidarity with their colleagues. See Declarations in Dkt. 245 (Hinkley ¶ 9, Cetta ¶ 8, Vernold ¶ 7, Tuthill ¶ 7, Axtell ¶ 7, Taggart ¶ 7, Haynes Jr. ¶ 7, Ellis ¶ 7, Davis ¶ 7, Wilson ¶ 7, Kosier ¶ 6, Layton ¶ 7.) Taking all these facts in a light most favorable to Defendants, a reasonable jury could find that merely signing on to a letter in solidarity is not evidence of malice or retaliatory intent.

Summary judgment is equally inappropriate in light of *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). 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 *Mount 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 will not be found liable 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 v. Metro. Transp. Auth.*, 629 F.3d 97, 114-15, 117-20 (2d Cir. 2011) (dismissing First Amendment retaliation claim where defendants established that plaintiff would have been dismissed even absent his protected speech).

The facts, when viewed in a light most favorable to Defendants, illustrate the decision to de-designate was made, at least in substantial part, on the basis of increased costs and workload. These disputed material facts render summary judgment on the issue of causation improper.

II. Causation is Lacking as there is no Evidence that a Majority of the Board Acted with an Improper Motive

The decision to designate or de-designate an official County newspaper cannot be made by one person. It must be accomplished by a majority vote of the Board of Supervisors. No matter how Plaintiff attempts to twist and characterize the alleged motivations of Board Chair Tina Molé, it is undisputed that the Board Chair does not dictate or control the designation process. Moreover, the Record as a whole lacks any evidence that the majority of the Board of Supervisors voted to de-designate *The Reporter* based on any sort of tainted motive. Even assuming it could be shown that one or two of the Board members' vote was "substantially motivated" by an improper motive, there is no evidence that the majority of the votes on the Board were motivated by any other concerns other than the increased cost and workload. *See Coogan v. Smyers*, 134 F.3d 479, 485-86 (2d Cir. 1998) ("if a majority of defendants prove that their individual votes against the plaintiff would have been the same irrespective of the plaintiff's protected conduct, then the defendants as a group cannot be held liable, and no individual defendant, even one whose proof falls short, can be so held because causation is absent").

In *Jeffries v. Harleston*, plaintiff, an African-American professor at the City University of New York ("CUNY") and chair of CUNY's Black Studies department, made anti-Semitic comments during a speech. 52 F.3d 9, 11 (2d Cir. 1995). Nine of the fourteen members of CUNY's Board of Trustees later voted to limit Jeffries' term as chair to one year. *See id.* Jeffries sued, alleging First Amendment retaliation. *See id.* The Second Circuit held that "elementary principles of causation compel the conclusion that Jeffries' First Amendment rights were not violated," as

“[t]he jury found that at least nine of the defendants, a clear majority, limited Jeffries’ term because they expected his speech would harm CUNY (and not for invidious motives), and that this expectation was reasonable.” *Id.* at 14. “[T]he nine votes based on legitimate grounds constitute a superseding cause breaking the causal chain between the tainted motives [] and the decision to limit Jeffries’ term.” *Id.*; see also, e.g., *Couch v. Bd. of Trustees of Mem’l Hosp. of Carbon Cty.*, 587 F.3d 1223, 1241 (10th Cir. 2009) (In a First Amendment retaliation case where the alleged adverse action was undertaken by a committee, plaintiff needed “to establish that a majority of the members who voted on action were biased or that a biased member was a substantial influence over the committee’s ultimate action in order to satisfy his burden to establish causation.”).

Similarly, in *Goodmaster v. Town of Seymour*, plaintiff alleged that the defendants, including the town’s Board of Selectmen, wrongfully refused to extend his employment as a police officer in the Town of Seymour based, in relevant part, on his public criticism of actions taken by the police department. No. 18-cv-00756-PAB-CVC, 2016 WL 10452427, at *13 (D. Conn. Feb. 8, 2016). At summary judgment, defendants argued that there was no evidence of retaliatory animus among the majority of those who voted against Goodmaster’s request to extend his term of employment:

When the request was eventually brought before the board of selectman, it was denied by a vote of five to one. The defendants maintain that at least three of the members of the board of selectman who voted to deny Goodmaster’s request [] were unaware of his previous age discrimination complaint. They further aver that [two board members] voted against the extension because they were of the opinion that officers should be retired at age sixty-five as contemplated by Conn. Gen. Stat. § 7-430, and [one of those members] did not want to set a precedent of granting extensions. [Three other board members], and [one] denied the request based on the fact that Goodmaster had refused an offer of a special assignment that would have allowed him to work for an additional twelve months after his sixty-fifth birthday.

Id. at *7. The court, noting that Goodmaster’s evidence that the proffered reasons were pretextual were primarily based on his own speculation, granted defendants’ motion for summary judgment. *See id.* at *12 (“a plaintiff may not solely ‘rely on conclusory assertions of retaliatory motive to satisfy the causal link’”) (citation omitted). The court noted that “if a majority of defendants prove that their individual votes against the plaintiff would have been the same irrespective of the plaintiff’s protected conduct, then the defendants as a group cannot be held liable, and no individual defendant, even one whose proof falls short, can be so held because causation is absent.” *Id.* (quoting *Coogan v. Smyers*, 134 F.3d 479, 485 (2d Cir. 1998)). “Thus, ‘even if some defendants based their decision solely on impermissible grounds, a finding that a majority of defendants acted adversely to the plaintiff on legitimate grounds is sufficient for all to escape liability.’” *Id.* (citation omitted). The court concluded that even if it “were to presume that [the one defendant] voted . . . based on a retaliatory animus, there still would have been four votes denying the request on permissible grounds. As such, [defendants] as a whole escape liability.” *Id.* at *13.

The aforementioned cases compel a similar outcome in this matter. Even assuming arguendo that Tina Molé’s vote was made with an illegal motive, no such evidence indicates that the remaining members of the Board were so influenced, let alone motivated. Indeed, the Record evidence establishes that the overwhelming majority of the Board voted to de-designate based on two entirely permissible grounds: the increased cost and workload associated with placing legal notices in *The Reporter*. See Declarations by Individual Defendants submitted at Dkt. 245; Marshfield Deposition (Dkt. 246-15) at p. 13 and Dkt. 246-21 at pp 20-23, 45; Merrill Deposition (Dkt. 246-17) at pp 16-17, 20, 22-24, 59, 89.

Moreover, the Board operates with proportional, weighted voting based on population size for each Town. See Merklen Opposition Dec. and exhibits thereto. As Supervisor for the Town of

Bovina, Ms. Molé has the least number of weighted votes – both during 2022-23 and currently. Merklen Opp. Dec 8. There is no evidence in the Record of Ms. Molé intimidating, badgering or otherwise using improper tactics to influence other Supervisors' votes.

Also telling is the undisputed fact that, at least in Ms. Molé's opinion, *The Reporter* has run false and misleading articles *for years*. Molé Dep. Dkt. 246-13 at pp 54-57. It stands to reason then if unsatisfactory reporting were her primary basis for wanting to change newspapers, it would have been initiated years prior. What changed, undisputedly, materially and significantly in 2022, was the price and burden. *Id* at 58-61.

III. Plaintiff's Request for an Injunction Ordering Re-designation of *The Reporter* Should be Denied.

Part of the relief sought by Plaintiff is an injunction ordering Delaware County to reinstate *The Reporter* as an official county newspaper for the purpose of publishing legal notices. Such relief is both improper and unwarranted. "An injunction is a matter of equitable discretion[.]" such that "it does not follow from success on the merits as matter of course." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008). To obtain a permanent injunction, a plaintiff must demonstrate: "(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 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); *see also Salinger v. Colting*, 607 F.3d 68, 77-78 (2d Cir. 2010). Injunctions are an "extraordinary remedy," and "courts of equity should pay particular regard for the public consequences in employing [them]." *Winter*, 555 U.S. at 2 (citation omitted). "[I]njunctive relief where an adequate remedy at law exists is inappropriate." *Petereit v. S.B. Thomas, Inc.*, 63 F.3d 1169, 1185 (2d Cir. 1995).

None of the criteria weigh in favor of issuing an injunction here. First and foremost, any injury suffered by Plaintiff is completely compensable by money damages. *See, e.g., Gym Door Repairs, Inc. v. N.Y. City Dep't of Educ.*, No. 12 civ. 7387, 2014 WL 5569970, at *8 (S.D.N.Y. Nov. 3, 2014) (denying injunction in relevant part because “[i]n the absence of the requested equitable relief, Plaintiffs may still sell their services to other[s]”). There is no evidence in the record that the de-designation affected *The Reporter* in any way other than the loss of advertising revenue. Even if there is an eventual determination that the Board improperly de-designated *The Reporter* in 2022, the Board subsequently changed composition with the election of new Town Supervisors and has the potential to do so every year. There is nothing in the Record that would allow a jury to conclude that the current Board shared the same motivations in voting not to designate *The Reporter*. This is especially true when *The Reporter* remains the costliest newspaper to advertise with. There is nothing in the Record to indicate that *The Reporter* suffered from any loss other than a monetary one.

Nor do the equities favor the Plaintiff. Regardless of the motivations for the former Board not designating *The Reporter*, there is nothing in the Record to indicate that the Board as it existed in 2024, or the current Board, made any decisions regarding designation based on improper motives. Nothing in Section 214 requires the Board to designate *The Reporter*. Circulation is not the only criteria the Board may consider. See County Law § Section 214(2) (“In making such designation, consideration shall be given to the newspapers advocating the principles of such political party, the support of its nominees and the extent of the circulation in the county.”).

Finally, it is not in the public interest to force the Board to designate *The Reporter*. There are legitimate reasons the Board might vote to designate a different publication, including cost and the work imposed on the County’s staff. In *Carlos v. Santos*, the district court declined to enter a

permanent injunction prohibiting a municipality from abolishing its police force. 123 F.3d 61, 67 (2d Cir. 1997). In a decision affirmed by the Second Circuit, the district court found plaintiffs could “look to the damages trial for redress,” and had adequate remedies at law, concluding “it would be absurd to require a municipality to continue indefinitely and fund and [sic] activity which it wishes to abandon, simply on the ground that the decision to do so was a product of mixed motives.” *Id.* As in *Carlos*, here is not in the public’s interest to tie the hands of future Boards in deciding which paper to designate. *See, e.g., Gym Door Repairs*, 2014 WL 5569970, at *8 (finding injunction not in the public interest “as it would foreclose the possibility of competitive bidding for” the services at issue). There is no basis for granting the permanent injunctive relief Plaintiff seeks.

CONCLUSION

For the reasons given above, Defendants respectfully request this Court find that there are material issues of fact as to the motivating reasons behind the Board’s vote to de-designate *The Reporter* and DENY Plaintiff’s Partial Motion for Summary Judgment.

Dated: January 6, 2026

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