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 PARTRICK 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 THEIR MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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PRELIMINARY STATEMENT

Defendants move for dismissal of both claims contained in Plaintiff's Complaint pursuant to FRCP 12(c), as no plausibly pled facts have been put forward to support the same. The allegations of the Complaint show that Plaintiff has no cognizable claim regarding its de-designation under New York's County Law § 214 for retaliation under the First Amendment via 42 U.S.C. § 1983, and cannot plausibly state a claim of retaliation under the First and Fourteenth Amendments under a theory regarding willing speakers. Plaintiff has failed to sufficiently plead protected conduct by either themselves or particularly identified willing speakers, has failed to sufficiently plead any adverse actions, and did not adequately plead facts that constitute any real "gag order." Moreover, Defendants maintained a rational basis for their actions, continued to do business with Plaintiff, and the Plaintiff's own conduct served as legitimate basis for their de-designation under County Law § 214. Given the specific facts alleged, Plaintiff has not put forward a plausible claim regarding any Defendant under the First or the Fourteenth Amendment and the Complaint should be dismissed.

FACTS

Plaintiff Decker Advertising publishes *The Reporter*, a local newspaper in Delaware County which is distributed both physically and on the internet. Doc. No. 1 at ¶10-11. Defendants are comprised of nearly the entire legislative branch of Delaware County, specifically Tina Molé as the County Executive, Amy Merklen as the County Attorney, and each member of the County Board of Supervisors, 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 Partrick Davis, Allen R. Hinkley, Eric T. Wilson, John S. Kosier, William Layton, and Joseph Cetta. Doc. No. 1 at ¶12-29. On January 5, 2022, *The Reporter* was designated by the County's

Board of Supervisors as an official county paper under the provisions of County Law § 214(2), which permitted *The Reporter* to publish official local law pronouncements and notices and be paid as a third-party contractor for that work. See Doc. No. 1 at ¶33-34.

In February of 2022, it is not disputed that *The Reporter* raised its advertising rates and costs. Doc. No. 1 at ¶44-47. *The Reporter* also changed the manner in which Defendants were required to request publishing of local laws and notices under § 214, forcing its clients to use a new online system to continue to engage in such business. Doc. No. 1 at ¶44-47. *The Reporter's* Complaint also admits that this new on-line requirement forced employees of these municipalities to undergo training to know how to use the system. *See id.* This online software program that *The Reporter* attempted to force Defendants to use, if Defendants wanted to continue to do business with them under County Law § 214, required the creation of local law pronouncements and notices on the internet program itself, which is not alleged to be at all similar to the manner in which the parties previously did business. See Doc. No. 1 at Fn. 2, 3; see generally Doc. No. 1.

The Reporter published articles on March 9, 2022 which the County contended were inaccurate soon thereafter. Doc. No. 1 at ¶34-41. On March 15, 2022, the County notified *The Reporter* by letter that its article was inaccurate and, in their opinion, not sufficiently researched to constitute actual journalism, given the false information in question. *See id*, *see* Exhibit[1] A, B. The County also notified *The Reporter* that its March 9, 2022, article was just the latest in a series of articles that Defendants believed constituted misinformation, improperly characterized as journalism. Doc. No. 1 at ¶35-36. *The Reporter* admitted it only corrected the misinformation in its March 9, 2022 article after receiving Defendants' March 15, 2022 letter giving notice of the

[1] All Exhibit citations herein are to those exhibits submitted by Plaintiff as attached to their Complaint at Doc. No. 1, and follow the same naming convention.

factual impossibilities contained therein, as well as the County's displeasure with *The Reporter's* penchant for misinformation as of late. See Doc. No. 1 at ¶36, 37.

On March 23, 2022, the County's Board of Supervisors, which includes each individual Defendant named save for Ms. Merklen, voted to de-designate *The Reporter* as a newspaper of record under New York's County Law § 214(2). See Doc. No. 1 at ¶40-43. The Supervisors, in their official capacity, voted and passed Resolution No. 68 which dictated that notices and local laws will not be published further in *The Reporter* as a result of their doubling of costs, new technical requirements, new training requirements for County employees, and the budgetary and workload concerns caused by these changes in practices by *The Reporter*. Doc. No. 1 at ¶41. Another newspaper was designated under § 214(2) thereafter, which the Board believed adhered to County Law § 214's confines. Doc. No. 1 at ¶49-50. However, the County continued to do other business with *The Reporter/Decker Advertising*.

Approximately one year later and entirely disconnected both in time and content, on March 8, 2023, Defendants sent a letter to *The Reporter* denouncing what they considered to be misinformation and shoddy reporting, and requesting that it act with journalistic integrity regarding its articles related to the County. See Doc. No. 1 at Ex. G. This letter was signed by all individual Defendants except for James Eisel and Betty Scott. Doc. No. 1 at ¶58, Ex. G thereto. This March 8, 2023, letter stated that misinformation and shoddy reporting concerns also had an impact on the County's March 2022 de-designation of *The Reporter*, but it does not pronounce any action on behalf of the Defendants or cause any effect to Plaintiff. See Ex. G. Plaintiff alleges this March 8, 2023, letter was "leaked" "upon information and belief," without making any particular plausible allegation regarding that leak or the "leaker." Doc. No. 1 at ¶62-63.

Upon receiving this March 8, 2023, letter, *The Reporter* claims to have contacted several signatories of the document for comment on "why they signed it and to address any concerns" the County may have had. Doc. No. 1 at ¶64. In their Complaint, Plaintiff *does not* allege that these individuals refused to speak with *The Reporter* and goes on to attempt to refute the concerns presented with their articles, but each example cited is from after March of 2022 and Plaintiff's de-designation under § 214. See Doc. No. 1 at ¶66-73.

Plaintiff alleges a "gag order" was put in place by Defendants sometime in January of 2023. Doc. No. 1 at ¶74-83. However, the facts put forward to support this allegation only state that the "County Attorney's office issued a directive to County employees requiring that all requests for comment from the Reporter be referred to the County Attorney's Office." Doc. No. 1 at ¶76. Plaintiff only alleges that the County Public Defender would not answer a question about a Facebook page without first having the County Attorney review his statement, but *The Reporter* did receive a response from the County Attorney thereafter. See id at ¶74-83. The public defender *did* respond to another request for comment from *The Reporter*. See id at ¶74-83. *The Reporter* also alleged that a quote from Mr. Wayne Marshfield, a Defendant herein, in the *New York Times* supports their allegation of a "gag order," but this allegation is not well taken as the quote presented shows that Mr. Marshfield spoke freely regarding his rationale for voting to de-designate *The Reporter*. Doc. No. 1 at ¶75.

Plaintiff received national media attention in 2023 regarding their de-designation. *See* Doc. No. 1 at Ex. O. In June of 2023, Delaware County's Democratic contingent put forward a proposed resolution to designate *The Reporter* once more under § 214, this time as one of two papers permissible for publication of certain items for the political parties of the Board under § 214(1). Plaintiff's allegations related to the period from June of 2023 through present and seems to have

no bearing on their claims at all, and only put forward that the Democratic committee's designation proposal was discussed by the Board of Supervisors and was awaiting a final determination at the time of the Complaint's filing (while not relevant here, *The Reporter* has since been so designated under County Law § 214(1)). Doc. No. 1 at ¶84-96.

Note that there is no allegation in the Complaint that the County ceased doing other business with *The Reporter*, that business opportunities beyond the discretionary designation under § 214 were chilled, or any other issues. See generally Doc. No. 1. Plaintiff's claims are based on the factual circumstance above. For the reasons herein, these facts are insufficient to plausibly give Plaintiff relief on the claims presented and should be dismissed.

ARGUMENT

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8(a)(2) of the Federal Rules of Civil Procedure (emphasis added). To "show" the pleader is entitled to relief, the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937 (2009) (*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955 (2007)). No longer is a claim permitted to survive simply because the plaintiff might prove some set of facts in support of the claim which would entitle her to relief. *Twombly, supra*, 550 U.S. at 563 (abrogating the former standard set forth in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Where "the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not shown – that the pleader is entitled to relief." *Iqbal*, 556 U.S. at 679 (emphasis added). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *See id*. at 678. Thus, a pleading will be insufficient if it offers only "labels and conclusions" in place of

sufficiently specific factual allegations to state a facially plausible claim for relief. *See id.* Instead, the plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *See id.*

In short, to survive this motion to dismiss for failure to state a claim, Plaintiffs' claims must contain factual allegations establishing a right to relief that is more than speculative. *See Muhammad v. City of Peekskill*, 2008 U.S. Dist. LEXIS 76894, at 10-11 (S.D.N.Y. Sep. 30, 2008)(*citing Twombly*, 127 S. Ct. at 1965). Plaintiffs must assert specific facts that, when read in connection with the claim stated, render Plaintiffs plausibly entitled to the relief demanded. See id. Mere facts that cause the claim to be "conceivable" are not enough, even under the standard that a court must accept as true a plaintiff's allegations when reviewing a motion to dismiss. See id. (*citing Twombly* 550 U.S. at 1974).

I. PLAINTIFF'S FIRST AND SECOND CLAIM BOTH FAIL UNDER ANY THEORY OF FIRST AMENDMENT RETALIATION.

Plaintiff's two claims sound in violation of its right to free speech under the First Amendment to the United States Constitution. Thus, Plaintiff must show that (1) its speech addressed a matter of public concern, (2) that it suffered an adverse action, and (3) that a causal nexus exists between its speech and the adverse action so that it can be considered a motivating factor. *Cioffi v. Averill Park Cent. Sch. Dist. Bd. Of Educ.*, 444 F.3d 158, 162 (2d Cir. 2006). Third party contractors to a municipality, like Plaintiff, are subject to the same standards for protected speech as government employees. *Hayes v. Buffalo Mun. Hous. Auth.*, No. 12-CV-578S, 2013 WL 5347544, at *3 (W.D.N.Y. Sept. 23, 2013). Plaintiff's claims fail regarding all three necessary elements.

A. As to Claims 1 and 2, Plaintiff's Complaint fails to allege any protected conduct resulting in the claimed retaliatory act.

Both Plaintiff's claims require protected conduct if they are to proceed based on First Amendment retaliation. Whether the activity alleged in the Complaint is due protection under the First Amendment is a threshold inquiry, and no further analysis is required if Plaintiff's claims fail the same. Determining if speech is protected is a question of law, not fact. *See Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983). Content, form, and context of the speech is important in evaluating this question. *See Connick*, 461 U.S. at 147-48. Where the speech is by a public third-party contractor, it will only be protected if it is related to a matter a public concern. *Grennan v. Nassau Cty.*, 2007 U.S. Dist. LEXIS 23087, at *22-25 (E.D.N.Y. Mar. 29, 2007) (*citing Johnson v. Ganim*, 342 F.3d 105, 112 (2d Cir. 2003) (*quoting Connick*, 461 U.S. at 146)). Speech by a public contractor is of concern to the community when it relates to politics or social issues. *See id* (*citing Johnson v. Ganim*, 342 F.3d 105, 112 (2d Cir. 2003) (*quoting Connick*, 461 U.S. at 146)). The Supreme Court has provided further guidance, stating that public concern is a matter that is subject of "legitimate news interest" and value or concern to the public. *See City of San Diego v. Roe*, 543 U.S. 77, 83-84 (2004). "The heart of the matter is whether the employee's speech was 'calculated to redress personal grievances or whether it had a broader public purpose.'" *Carpiniello v. Hall*, 2010 U.S. Dist. LEXIS 143558, at *18-19 (S.D.N.Y. Mar. 16, 2010) (*quoting Lewis v. Cowen,* 165 F.3d 154, 163-164 (2d Cir. 1999)).

Where speech is of a personal concern to a contractor, it is not protected. *See Grennan v. Nassau Cty.*, 2007 U.S. Dist. LEXIS 23087, at *22-25 (E.D.N.Y. Mar. 29, 2007). Speech is not protected where the public contractor's "overriding interest" is personal, and not of a public nature. *See id* (*citing McMahon v. N.Y. City Bd. of Educ.*, 2006 U.S. Dist. LEXIS 89627 *8 (E.D.N.Y. 2006) (*quoting Hanig v. Yorktown Cent. Sch. Dist.*, 384 F. Supp. 2d 710, 722 (S.D.N.Y. 2005))).

The motive of the contractor is relevant to making this determination. *Carpiniello v. Hall*, 2010 U.S. Dist. LEXIS 143558, at *18-19 (S.D.N.Y. Mar. 16, 2010). "In analyzing whether speech addresses a matter of public concern, courts must focus on the motive of the speaker and attempt to determine whether the speech was calculated to redress personal grievances or whether it had a broader public purpose." *Illiano v. Mineola Union Free Sch. Dist.*, 585 F. Supp. 2d 341, 354 (E.D.N.Y. 2008)(*citing Lewis v. Cowen*, 165 F.3d 154, 163-64 (2d Cir.1999)(internal quotations omitted)).

A public contractor must speak both as a private citizen *and* on a matter of public concern for its speech to be protected. *Gusler v. City of Long Beach*, 823 F. Supp. 2d 98, 124 (E.D.N.Y. 2011). It is not enough that a public contractor is acting as a citizen when the speech is uttered. *See id*. A public contractor specifically cannot "transform a personal grievance into a matter of public concern by invoking a supposed popular interest." *Ruotolo v. City of N.Y.*, 514 F.3d 184, 190 (2d Cir. 2008)(*citing Boyce v. Andrew*, 510 F.3d 1333, 1343 (11th Cir. 2007) (*quoting Ferrara v. Mills*, 781 F.2d 1508, 1516 (11th Cir. 1986)). Generalized public interest is not enough to classify speech as public in nature. *See id*.

Here, Plaintiff alleges two instances of protected speech pertaining to each claim, respectively. First, Plaintiff claims protected speech in their status as a designated newspaper of record under County Law § 214 was protected, or there was some protected speech in advance of that event. See Doc. No. 1 at ¶102-107. Second, Plaintiff's claim they were deprived of protected speech from willing speakers through a "gag directive," and they had a right to that information under the First Amendment. See Doc. No. 1 at ¶108-113. Neither instances are matters of public concern receiving protection under this standard, nor was any real "gag order" ever in place under the law.

i. No protected speech related to Plaintiff's de-designation is alleged.

Incorrect information published by a news outlet is not due any protection under the First Amendment. *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 301, 91 S. Ct. 632, 28 L. Ed. 2d 57 (1971). Given that the only instance of news activity alleged with any specificity *before* Plaintiff's 2022 de-designation is an article admitted in the Complaint to have been factually incorrect, they have not alleged any protected activity which could have resulted in its de-designation. In reality, Plaintiff's dispute over de-designation is a personal business.

The matter of designation under § 214 is a matter of business personal concern to *The Reporter*, not to the public at large who is still served under the statute. *The Reporter's* price raises, new procedures, and failure to adhere to the tenets of § 214 were personal, business concerns between it and the County unprotected by any first amendment case law. *Illiano v. Mineola Union Free Sch. Dist.*, 585 F. Supp. 2d 341, 354 (E.D.N.Y. 2008)(*citing Lewis v. Cowen*, 165 F.3d 154, 163-64 (2d Cir.1999). County Law § 214 provides the municipality with the obligation to designate papers of record for certain municipal publications, and does not establish an entitlement to that designation. *See* N.Y. County Law § 214. The matter of concern in question, the publication of municipal notices, is one reserved for public consideration through the implementing statute in § 214. The concerns of the Reporter with its designation under this statute and rates received from that designation, is a personal business concern. *Illiano v. Mineola Union Free Sch. Dist.*, 585 F. Supp. 2d 341, 354 (E.D.N.Y. 2008)(*citing Lewis v. Cowen*, 165 F.3d 154, 163-64 (2d Cir.1999). This statute leaves the choice of designation to the County Board of Supervisors, and is not premised on any other right or entitlement of *The Reporter* a newspaper. See id. *The Reporter*, therefore, cannot claim any public concern in their activity regarding their de-designation, or the misinformation published before that de-designation.

Plaintiff admits that the decision to de-designate it under County Law § 214 came after it published a factually incorrect article to the public, but makes no allegation that something in these factually incorrect articles constituted an instance of protected speech for which the alleged retaliation was based. The Complaint appears to assume instances of misinformation are protected speech, so long as that misinformation is presented by an entity that claims to be a newspaper or journalist in some way. However, under the law, "[m]isinformation has no merit in itself; standing alone it is as antithetical to the purposes of the First Amendment as the calculated lie." *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 301, 91 S. Ct. 632, 28 L. Ed. 2d 57 (1971); *Garrison v. Louisiana*, 379 U.S. 64, 75, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964). In other words, the practice of issuing a quiet correction after publishing misinformation, like *The Reporter* admits to have done here in March of 2022, does not render the speech protected under the First Amendment. *See id*. Defendants were free to formulate an opinion on Plaintiff's work as an independent contractor as a result of their incorrect reporting and need for corrections, and make decisions based on that factor (in combination with others discussed herein) without it being considered retaliatory under the First Amendment.

Plaintiff specifically admits that it made an error in the March of 2022 article then made a "correction" thereafter. *See* Doc. No. 1 at ¶30-33. Plaintiff's further allege that the de-designation was partially motivated by prior instances of misinformation by *The Reporter*, as well as "the dramatic increase in price and the County having to do the work and Lillian."[2] Doc. No. 1 at ¶41-43, Exs. B, D, E. None of these allegations constitute specific instances of protected speech for which retaliation was taken, only misinformation presented to the public in March of 2022 and

[2] "Lillian" refers to a news reporter for the "Reporter Company".

that this March 2022 instance, coupled with past similar instances and price increases, triggered de-designation.

Thus, regarding the only article in question published *before* Defendants' only real alleged discrete act alleged (de-designation), Plaintiff admits their published information was wrong and needed correction, thus not due First Amendment protection. Doc. No. 1 at ¶37. Plaintiff's First claim cannot stand then, as there is no protected activity whatsoever alleged, unless Plaintiff seeks to claim their designation under § 214 was protected.

a. Plaintiff had adequate administrative remedy available, but failed to avail themselves within New York's statute of limitations.

Both Plaintiff's claims should fail, as *The Reporter* failed to have Defendant's decision reviewed by a New York Court under CPLR § 7801. As the decision to de-designate *The Reporter* was of personal concern to *The Reporter* and based on a discretionary legislative act, the proper challenge to that decision would have been pursuant to CPLR § 7801 in New York. *See Myers-Brooks Pub. Co. v. Bd. of Sup'rs of Fulton Cnty.*, 68 Misc. 2d 1033, 1033, 328 N.Y.S.2d 741, 742 (Sup. Ct. 1972). Plaintiff failed to make any petition under New York's Article 78 within four months of being allegedly aggrieved, so any review of that act by such a petition is now barred under the applicable statute of limitations. See, e.g., *Raffaele v. Town of Orangetown*, 224 A.D.2d 430, 431, 637 N.Y.S.2d 755, 756 (1996).

While the issue has not been specifically litigated, the only vehicle for review of a discretionary legislative act that is not adverse is under New York's CPLR § 7801. *New York C.L. Union v. State*, 4 N.Y.3d 175, 184, 824 N.E.2d 947, 953 (2005). Prior challenges to designation under County Law § 214 have appropriately been made through a petition under CPLR § 7801, exhausting the administrative remedies available to the plaintiff. *See, e.g., Myers-Brooks Pub. Co.*

v. Bd. of Sup'rs of Fulton Cnty., 68 Misc. 2d 1033, 1033 (Sup. Ct. 1972); *News-Rev. Pub. Corp. v. Lomenzo*, 53 Misc. 2d 370, 370, 278 N.Y.S.2d 648, 649 (Sup. Ct.), aff'd, 28 A.D.2d 823, 282 N.Y.S.2d 670 (1967).

There is no reason under the law, or in the facts, indicating this standard under CPLR § 7801 should not be applied here, as the act complained of was personal, discretionary, and legislative. Therefore, Plaintiff's exclusive remedy was through a petition under that Article in New York Supreme Court. Plaintiff has failed to exhaust their administrative remedies, and given that over four months have passed since Plaintiff was allegedly aggrieved, any opportunity to engage in such a remedy has elapsed. Accordingly, both Plaintiff's claims should be dismissed.

ii. No protected speech obstructed from willing speakers is alleged in the Complaint.

A willing speaker allegation is "expressly derivative" of an identified speaker being unconditionally obstructed[3] when that speaker otherwise had protected information he was willing to give plaintiff. *See Kirkpatrick v. Vill. of Washingtonville*, N.Y., No. 7:09-CV-2591 WWE, 2011 WL 1330745, at *9 (S.D.N.Y. Mar. 31, 2011)(*citing Spargo v. N.Y. State Comm'n on Judicial Conduct*, 351 F.3d 65, 83–84 (2d Cir.2003)). Without identifying a speaker who has protected information, this claim must fail. See id.

None of the willing speakers named in the Complaint are contended to have been willing to discuss First Amendment protected information related to public concerns, nor is *The Reporter* contended to have been deprived of any information. Wayne Marshfield is alleged to have given his opinion regarding *The Reporter's* de-designation to the *New York Times*, not *The Reporter*. Doc. No. 1 at ¶74-76. Neither the allegation nor the question regarding Marshfield invokes

[3] Plaintiff's allegations regarding a "gag order" are refuted in detail at (B), infra.

protected public concerns for *The Reporter* or the *Times*, merely *The Reporter's* personal desire to know more about their de-designation, something relevant to *The Reporter's* private position as a third-party contractor. The subject of the *Reporter's* desire for information here is personal and related to their own status under § 214. More importantly, this allegation also indicates Marshfield gave information and was not obstructed by Defendants when speaking to the *Times*.

The Complaint alleges that Joseph Ermeti was asked who administers a social media page, and replied that requests for inquiry related to the Public Defender's Office would be responded to by the County Attorney. Doc. No. 1 at ¶77-80. *The Reporter* admits the County Attorney responded to this inquiry, and even clarified that the reason for this procedure was *The Reporter's* threat of litigation, not an information restriction. *See* Doc. No. 1 at ¶77-80. Nothing in the Complaint alleges the information was not given to *The Reporter* regarding the Facebook page, and Plaintiff admits that Mr. Ermeti did indeed provide comment directly on behalf of the Public Defender's Office to *The Reporter* during the period in question, a fact which directly contradicts any supposed "gag order." Doc. No. 1 at ¶82-83.

It must also be noted that neither Ermeti or Marshfield had an unfettered right to speak on behalf of the County, and each of their alleged "willing speaker" circumstance constitutes situations where the speech would have been directly related to their job duties, and thus not protected. *Garcetti v. Ceballos*, 547 U.S. 410, 421, 126 S. Ct. 1951, 1959, 164 L. Ed. 2d 689 (2006). Both individuals are only alleged to have been "willing speakers" regarding aspects of their job duties, specifically Ermeti's knowledge of who administers a Facebook page for the County, and Marshfield's legislative deliberations on the Reporter's de-designation. See

Therefore, *The Reporter's* March of 2022 misinformation cannot constitute protected speech of a personal nature on a matter of public concern, nor can their de-designation or mere

prior status under § 214(1). None of the "willing speakers" identified in the Complaint are alleged to have been obstructed from providing protected information to *The Reporter*, nor is it alleged that they were even obstructed. In the period after de-designation, nothing alleged in the Complaint constitutes an action against *The Reporter*, as discussed at length *infra*, so statements thereafter are not relevant to consider on this point. Accordingly, Plaintiff has failed to plausibly allege any protected activity in reference to its First cause of action, and therefore it should be dismissed.

B. As to Claims 1 and 2, Plaintiff has failed to plausibly plead an adverse action by Defendants

Both Plaintiff's First and Second claim must fail as a result of their failure to plead an adverse action under the above standard. A municipal entity must take steps to continue its core mission, even where doing so entails circumscribing the free speech rights of its employees to a reasonable degree, and this is particularly true where other conduct would cause the same result. *See, e.g., Pico v. Bd. of Educ*., 638 F.2d 404, 415 (2d Cir. 1980) (*quoting Thomas v. Board of Education*, 607 F.2d 1043, 1051 (1979)). Where other conduct would serve as valid reason to take an action, a party will not be "immunized by the constitutional guarantee of free speech." *See, e.g., Pico v. Bd. of Educ.*, 638 F.2d 404, 415 (2d Cir. 1980) (*Tinker v. Des Moines*, 393 U.S. 503, 513 (1969)).

Regarding Plaintiff's de-designation specifically, where a publication previously designated to be that of record under County Law § 214(1) later advocates for principles not supported by candidates for that party, or fails to support the nominees or office holders of that party, the newspaper has removed itself from eligibility under the statute and may be declared as a matter of law not qualified for designation. *See Burns v. Joyce*, 1962, 33 Misc.2d 1088, 228 N.Y.S.2d 532, *Relihan v. Brink* (3 Dept. 1955) 285 A.D. 729, 140 N.Y.S.2d 659. *People ex rel.*

Bonheur v. Christ, 1913, 208 N.Y. 6, 101 N.E. 846. A paper of record, designated by a political party as such, can be subject to de-designation for failure to adhere to the principles of that party. *See id*. "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." *Relihan v. Brink*, 285 A.D. 729, 730–31, 140 N.Y.S.2d 659, 661 (App. Div. 1955).

Under County Law § 214, designation should only stand where the publication designated "fairly represent[s] the political party" of the designating county. *People ex rel. Guernsey v. Somers*, 130 N.Y.S. 761, 764 (Sup. Ct. 1911), aff'd, 153 A.D. 623, 138 N.Y.S. 1136 (App. Div. 1912), aff'd, 208 N.Y. 621, 102 N.E. 1110 (1913). This includes an inherent duty of fair and *accurate* reporting, and even of support for that party's local, state, and national candidates and governing bodies. *See id* at 764 (emphasis added). Should a paper fail in maintaining these duties, the designation can be appropriately nullified as the publication no longer is eligible for appointment under the statue. *Relihan v. Brink*, 285 A.D. 729, 730–31, 140 N.Y.S.2d 659, 661 (App. Div. 1955).

The action of de-designation under § 214(2) was not adverse. *The Reporter's* journalistic issues, from Defendant's viewpoint, caused its own designation under the Statute to no longer be appropriate. *See Relihan v. Brink*, 285 A.D. 729, 730–31, 140 N.Y.S.2d 659, 661 (App. Div. 1955). Given the nature of the statute itself (a statute permitting a governing political party to designate a paper of record, and then two parties to designate political papers) Plaintiff's allegations that their de-designation was rooted in Defendant's belief they reported misinformation supports this Court finding that their de-designation under New York's particular statute was not adverse. Plaintiff

admits it knew that Defendant's took issue with an individual named "Lilian's[4]" reporting and believed her to unfairly and inaccurately report regarding the County, and Defendants specifically took issue with an article that contained blatant misinformation in March of 2022. Doc. No. 1 at ¶34-41, Exs. A, B. This allegation alone is appropriate rationale for Defendants to de-designate *The Reporter* as a paper of record under § 214(2).[5] *See id*. Accordingly, the act of de-designation itself cannot be found as adverse.

To be sure, the only actual discrete action alleged by Plaintiff as taken "against" them is their de-designation under § 214(2) in 2022. *See generally* Doc. No. 1. When viewed under a careful lens, Plaintiff's allegations relating to the period after their de-designation do not constitute anything at all. After de-designation, Defendants are merely contended to have sent a letter on March 8, 2023 to *The Reporter*, with whom they then had only a transactional relationship, and to have debated *The Reporter's* re-designation as a political paper for 2024 under § 214(1). Doc. No. 1 at ¶46-95. Plaintiff makes much a-do regarding Defendants' March 8, 2023 letter, but there is nothing in the facts to suggest it was improper for Defendants to object to *The Reporter's* continued poor quality reporting.

Importantly, there is no allegation that Defendants ceased doing business with Plaintiff after their de-designation or the issuance of the March 8, 2023 letter. The March 8, 2023 letter did not compel any retaliatory action. Such an allegation should not be inferred to exist in the Complaint because it is not written in the document, and it is not true. The March 8, 2023 letter should not be transformed into anything more than what it is, as it resulted in no action by Defendants and no effect on Plaintiff. The letter is self-explanatory, and overviews Defendants'

[4] Lillian Brown, https://muckrack.com/lillian-browne-1
[5] The Reporter also presented other legitimate reason for discharge, discussed *infra*.

displeasure with what they viewed as poor journalism. *See* Doc. No. 1 at Ex. G. It does not fine *The Reporter*, restrict them, use a police power, or anything of the sort. The communication only asks that *The Reporter* perform its core mission with more thoroughness. *See* Doc. No. 1 at Ex. G. *The Reporter* fails to allege that Defendants ceased doing business with them, treated them unfairly in business, or the like because it would be false, as nothing of the sort occurred. But, without the presence of such specific allegations, the only discrete action taken against *The Reporter* alleged in the Complaint is their de-designation in 2022, and that action is not adverse for the reason analyzed *supra*.

The Complaint does not put forward that *The Reporter* was treated differently in any way, as the March 8, 2023 letter dictates nothing except an expression of displeasure at poor reporting from Defendants. Doc. No. 1 at ¶56-95. The March 8, 2023 letter requires *The Reporter* to do nothing, imposes no sanctions on *The Reporter*, did not end other business with *The Reporter*. *See* id; *see* Doc. No. 1 at Ex. G. *The Reporter's* status as a newspaper does not make it sacrosanct, with a constitutional claim any time displeasure is expressed with its work product. Some kind of adverse action must be taken against it for a viable claim under the standard of law to exist.

Plaintiff's allegations regarding the County's deliberations as to *The Reporter's* re-designation under Counter Law § 214(1) similarly fail, as that is not an action against *The Reporter* in any real way. Legislative immunity would apply as well to the act of those deliberations, as discussed below. These deliberations are also not alleged to have come to a conclusion by the time of the Complaint's filing. The County is obligated to decide who meets the standards under both subdivisions of § 214, and *The Reporter's* consideration as a political paper by the Democratic Party in the County was appropriate under that law. Nothing about the facts set forth in the Complaint as to *The Reporter's* consideration for appointment as a political paper for 2024

represents an adverse action, as designation under the political subdivision is both discretionary and not alleged to have been denied. In fact, Plaintiff was appointed under § 214(1) by the democratic contingent of the Board, in the manner intended by the statute, for 2024. Like the March 8, 2023 letter, this is not an adverse action.

As Plaintiff has failed to plead any adverse action here, their First Amendment retaliation claim should be dismissed.

i. *As to Claim 1 and 2, there is no temporal proximity between the Reporter's de-designation and the March 2023 letter*.

As discussed at length, supra, the March 2023 letter had no effect and cannot be considered and adverse action of any kind. In reality, the March 8, 2023 letter constitutes nothing save for a note of displeasure at poor reporting by the Reporter. Doc. No. 1 at ¶56-95. Thus, the March 2023 letter would only be relevant to the extent it shows unconstitutional motivation in temporal proximity to an adverse action. Without any indication of temporal proximity between the March 8, 2023 letter and the March of 2022 de-designation approximately one year prior, the letter is meaningless to the claims presented.

Temporal proximity between an expression of unconstitutional motivation and an adverse act alleged to be wrought from that impermissible motivation is necessary to establish causation on a motion to dismiss, when presented with a first amendment retaliation claim. *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 272, 121 S. Ct. 1508, 1510, 149 L. Ed. 2d 509 (2001). Where there is a logical disconnect between the time of an adverse action and the date upon which retaliatory motive was supposedly evidenced, temporal proximity cannot exist. *Figueroa v. Garland*, No. 1:21-CV-7849-GHW, 2023 WL 4865831, at *12 (S.D.N.Y. July 31, 2023). Even where the adverse action precedes the alleged retaliatory evidence by a single day, temporal proximity has

been found to not logically exist. *Holmes v. Long Island R.R. Co*., No. 96 CV 6196 (NG), 2001 WL 797951, at *7 (E.D.N.Y. June 4, 2001).

Plaintiff's receipt of a letter expressing displeasure with their reporting in March of 2023 has no logical bearing on their de-designation in March of 2022, a year prior, which is the subject of Claim 1. The action they claim is adverse, the de-designation, had already taken place for legitimate legislative reasons approximately a year prior to any receipt of a letter in March of 2023, completely removing the two events from jurisprudence regarding temporal proximity. Plaintiff's retaliation claim, as it involves their de-designation and the March of 2023 letter, is specifically pled in a manner that precludes finding a showing of temporal proximity, given that the events are reversed from logical order and approximately one year apart.

Regarding the "gag order" at the center of Claim 2 which is alleged to have occurred in June of 2023, while no real gag order is plausibly stated in the Complaint, even if it were, no causal connection exists between a permissible restriction on the speech of government employees and an expression of displeasure with Plaintiff's reporting nearly 4 months prior. *See Dixon v. Int'l Fed'n of Accts*., 416 F. App'x 107, 110 (2d Cir. 2011) (4 months between retaliatory motivation allegation and contended adverse action insufficient, without more, to show temporal proximity in first amendment retaliation claim); *Clark County School Dist. v. Breeden*, 532 U.S. 268, 273–74, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001)(citing cases dismissing retaliation claims with temporal proximity of 3 and 4 months alleged, with nothing more). Almost 100 days had lapsed since the County's expression of displeasure with *The Reporter* in March of 2023, and any claimed gag order in June of 2023. There is not a single allegation, outside of those stated in a conclusory way, which would buttress a finding of causation based on temporal proximity between the March of

2022 letter and the subject of Claim 2, as was the case in *Dixon,* supra. *See also Clark County School Dist. v. Breeden*, 532 U.S. 268, 273–74, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001).

Accordingly, Plaintiff cannot make out a prima facie claim of retaliation regarding either claim, and the Complaint should be dismissed.

C. As to Claim 2, Plaintiff has not alleged any specific willing speakers who possessed protected information.

Plaintiff's second claim is premised on protected first amendment information by willing speakers being obstructed by Defendants, and fails as no obstruction is alleged. A claim premised on the right to receive information can only exist where it is alleged that the flow of information, which a plaintiff has a right to, was obstructed by government action. *Pen Am. Ctr., Inc. v. Trump*, 448 F. Supp. 3d 309, 323 (S.D.N.Y. 2020). Plaintiff must plausibly allege that, but for the obstruction by a municipality, they would have received information protected by the First Amendment from a specific source. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976); *Student Members of Same v. Rumsfeld*, 321 F. Supp. 2d 388, 394–95 (D. Conn. 2004).

A "precondition of this right to receive, however, is the existence of a willing speaker." *Bank v. New York State Dep't of Agric. & Markets*, No. 521CV642MADATB, 2022 WL 293812, at *4 (N.D.N.Y. Feb. 1, 2022), *reconsideration denied*, No. 521CV642MADATB, 2022 WL 1224327 (N.D.N.Y. Apr. 26, 2022) (*citing Pa. Family Inst., Inc. v. Black*, 489 F.3d 156, 165 (3d Cir. 2007) (*quoting Va. State Bd. of Pharmacy*, 425 U.S. at 756-57))(internal quotations omitted). Without specifically alleging an informational source which the listener is being deprived of, in violation of his own rights, a Complaint based on a 'listener' theory of First Amendment retaliation cannot stand. *Bank v. New York State Dep't of Agric. & Markets*, No. 521CV642MADATB, 2022

WL 293812, at *4 (N.D.N.Y. Feb. 1, 2022)(*citing Bond v. Utreras*, 585 F.3d 1061, 1078 (7th Cir. 2009)). Nor does the mere existence of a challenged rule or regulation suffice even where it is alleged that rule or regulation deprives a listener of information from a willing speaker, if the speaker is not specifically alleged. *See Price v. Saugerties Cent. Sch. Dist*., 305 Fed. Appx. 715, 716 (2d Cir. 2009). The existence of a willing speaker is never presumed from a pleading, and must be expressly identified. *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 351 F.3d 65, 83–84 (2d Cir.2003).

Where the allegation of a "gag order" serves as the basis for a claim based on willing speakers, the claim is derivative of the specifically identified speaker being improperly subject to a challenged "gag order." *See Kirkpatrick v. Vill. of Washingtonville*, N.Y., No. 7:09-CV-2591 WWE, 2011 WL 1330745, at *9 (S.D.N.Y. Mar. 31, 2011)(*citing Spargo v. N.Y. State Comm'n on Judicial Conduct*, 351 F.3d 65, 83–84 (2d Cir.2003)). Stated another way, the particular speaker identified in the Complaint must also have the First Amendment right to freely speak on the topic which the listener alleges they had a right to receive information regarding. *See id.*

There is no real gag order alleged here. The willing speakers identified in the Complaint all spoke or the information sought was conveyed, when one carefully considers the allegations at bar. The claim of a "gag order" is merely a linguistic device used by Plaintiff to attempt to trigger liability, or at least discovery. The allegations relating to the gag order specifically state that Wayne Marshfield spoke his mind. Doc. No. 1 at ¶74-76. The Complaint alleges that Joseph Ermeti merely stated that requests for inquiry related to the Public Defender's Office would be responded to by the County Attorney, who responded and clarified the reason for this was *The Reporter's* threat of litigation, not an information restriction. *See* Doc. No. 1 at ¶77-80.

Further, Plaintiff admits that Mr. Ermeti did indeed provide comment directly on behalf of the Public Defender's Office to *The Reporter* during the period in question on a different occasion, a fact which directly contradicts any supposed "gag order." Doc. No. 1 at ¶82-83. Plaintiff's allegation that Ermeti had to "run it by" the County Attorney regarding his first comment is insufficient to plausibly plead obstruction of protected information, as there is nothing at all improper about ensuring a comment given will not incur liability when a party has expressed a desire to litigate such comments. The County attorney had a rational basis for that content neutral directive, and it resulted in no restriction to Plaintiff as discussed below.

Therefore, neither information from Marshfield or Ermeti was plausibly alleged to have been obstructed by Defendants when speaking with *The Reporter*. However, presupposing the existence of willing speakers, or finding a First Amendment violation even were a "gag order" in place *without* the existence of a willing speaker, does not form a First Amendment violation. See, e.g., *Spargo v. N.Y. State Comm'n on Judicial Conduct*, 351 F.3d 65, 83–84 (2d Cir.2003).

The only individuals identified in the Complaint are admitted to have spoken freely, and any other "willing speaker" is speculative. The pleading requirement regarding a claim premised on willing speakers or a listener theory is firm, and supposition of more behind-the-scenes is insufficient. Accordingly, Plaintiff's second claim should be dismissed.

D. <u>As to Claim 2, restrictions on the flow of information by Defendants, if any, were permissible under the law.</u>

Plaintiff's second claim may only stand if information protected by the First Amendment was restricted in an improper way by Defendants. The right to equal access to information by the media is not absolute. *See Am. Broad. Cos. v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977). Unequal treatment of media outlets seeking information is permissible where the restriction is content

neutral, and serves a legitimate government objective which has benefits that outweigh any detriments to plaintiff. *McKenna v. Nassau Cnty*., No. 223CV4286ARRST, 2023 WL 8455670, at *11–12 (E.D.N.Y. Dec. 6, 2023)(*citing Nicholas v. Bratton*, 376 F. Supp. 3d 232, 260 (S.D.N.Y. 2019)).

A policy should be found as content neutral where the regulation is not adopted because of the specific content it seeks to restrict. *Hobbs v. Cnty. of Westchester*, 397 F.3d 133, 149 (2d Cir. 2005) (*quoting Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). A restriction based on a specific media outlet's identity should only be found as a constitutional violation where the restriction put in place on that entity itself is also not content neutral, seeking to obstruct information regarding a certain source, topic, fact, or other content based matter. *See Nicholas v. Bratton*, 376 F.Supp.3d 232, 260 (S.D.N.Y. 2019)(restriction to a particular incident area impermissible, even though motivated as restriction to particular media outlet and not to suppress information regarding the scene). Even where a Plaintiff shows a restriction was not content neutral, he still must show that restriction was motivated by protected activity. *See Stevens v. N.Y. Racing Ass'n*, 665 F. Supp. 164, 175 (E.D.N.Y. 1987).

Plaintiff admits that Defendants' stated reason for any restrictions found to exist in the flow of information to *The Reporter* was related to their expressed and well documented desire to engage in litigation pertaining to their de-designation. Doc. No. 1 at ¶52-55, 79-81, 84, 97-101, Exs. P, R. It is only logical that municipalities counsel would want to review communications to known potential litigants and ensure that those communications would not cause liability. Such a practice would not only be an appropriate function of a County Attorney, but wise practice for the entity that attorney is required to represent. Given the absolute plethora of communication exhibits attached to the Complaint in an effort to obfuscate the issues, prior to this matter even entering

discovery, the County Attorney's efforts seem wise indeed. There is therefore a rational basis for any restriction found to have neem put in place.

Any restriction is also expressly alleged by Plaintiff as content neutral, since *The Reporter* claims the directive sought for *all* communications to *The Reporter* be reviewed by the County Attorney, not only those related to a certain subject matter or incident. Doc. No. 1 at ¶78-83. Ermeti is claimed to have told *The Reporter* that departments were to refer "all" communications to the County Attorney, not just those related to Facebook, or a specific incident, or the Public Defender. *See id*. In the follow up conversations alleged to have occurred, Plaintiff even clarifies they were informed that the claimed restriction was not pertaining to any specific reporter, subject, content, incident, or anything else, but merely because they had obtained counsel with the expressed desire to litigate past issues. *See id*. Plaintiff does not allege they failed to receive the information from the County Attorney in the admitted follow up conversation had, after the Public Defender noted he had to "run it by" her. Doc. No. 1 at ¶78-83.

The legitimate governmental objective obtained through the claimed policy of the County Attorney reviewing statements to *The Reporter* is also expressly alleged in the Complaint: ensuring legal standards are followed and thus limiting liability, a proper function of a County Attorney as discussed *supra*. The County certainly has a duty to its taxpayers to not unintentionally trigger legal liability through its statements, particularly when it has been expressly made aware that a claim will become pending by a party it is forced to communicate with. Such a restriction would benefit *The Reporter* if it were real, not harm it, as it allows the County to provide *The Reporter* the same information during the pendency of disputes and litigation. The interests of *The Reporter* which could plausibly be claimed to weigh in their favor are light, as the policy alleged does not

actually obstruct the flow of information or do anything aside from require a review for potential liability before speaking to this (then-impending) litigant.

As the purported policy serves a legitimate governmental purpose, is content neutral, and weighs in favor of Defendants, Plaintiff's second claim should be dismissed.

E. Regarding Claims 1 and 2, Plaintiff has failed to allege any chilling effect as a result of the circumstance in question.

Both Plaintiff's first and second claim require a chilling effect to be plausibly alleged, but none is even put forward in a conclusory manner in the Complaint. A media outlet's claim of First Amendment retaliation should fail where the Complaint fails to plausibly allege any chilling effect on that Plaintiff. *See Guan v. Mayorkas*, 530 F. Supp. 3d 237, 258–59 (E.D.N.Y. 2021); *Podlach v. Vill. of Southampton*, No. 14-CV-6954 (SJF) (SIL), 2017 WL 4350433, at *11 (E.D.N.Y. May 11, 2017), *Colombo v. O'Connell*, 310 F.3d 115, 117 (2d Cir. 2002). Without an adequately pled chilling effect, a claim of first amendment retaliation in this context cannot stand. *McKenna v. Nassau Cnty.*, No. 223CV4286ARRST, 2023 WL 8455670, at *9 (E.D.N.Y. Dec. 6, 2023). The chilling effect alleged must be actual and realized, not merely prospective or speculative. *Kilcher v. Albany Cnty.*, No. 119CV158BKSATB, 2019 WL 911192, at *4–5 (N.D.N.Y. Feb. 25, 2019), report and recommendation adopted sub nom. *Kilcher v. Craig Apple/Albany Cnty. Sheriffs Dep't*, No. 119CV00158BKSATB, 2019 WL 1516933 (N.D.N.Y. Apr. 8, 2019).

As noted *supra*, the Complaint does not allege that the County ceased doing business with it, or that any other entity did either. *See generally* Doc. No. 1. The County's adherence to § 214 is not alleged to have been relevant to anything beyond *The Reporter* no longer posting local laws or notices for the County of Delaware itself. *See id*. Also as discussed *supra* regarding willing speakers, the Complaint does not specifically allege that any individuals were chilled from giving

information to *The Reporter*, rather alleging that such individuals could possibly exist. Doc. No. 1 at ¶74-83. Supposition as to chilled speakers based on a "listener" theory will not suffice to state a claim for first amendment retaliation. *Spargo v. N.Y.* State Comm'n on Judicial Conduct, 351 F.3d 65, 83–84 (2d Cir.2003).

Accordingly, no chilling effect is plausibly alleged in the Complaint and both claims should be dismissed to the extent they allege First Amendment retaliation.

II. PLAINTIFF'S FIRST CLAIM SHOULD BE DISMISSED, AS THE COUNTY MAINTAINED PERMISSIBLE REASONS FOR DE-DESIGNATION EVEN IN LIGHT OF ANY ALLEGED CONSTITUTIONAL VIOLATION.

While *The Reporter* may have been within their rights to raise rates in the manner described, the County is not required to do business with them at any cost. Moreover, the County's initial designation of *The Reporter* under County Law § 214 does not entitle it to any right to continued service as a third-party contractor if it no longer meets the political requirements of the statute and case law. It is an affirmative defense that, if a public employee, and therefore a third-party contractor, could be terminated for unprotected conduct, the fact that the employee may have also engaged in protected speech will not render the termination a violation of law. *See Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977).

If the unprotected conduct would have prompted the termination anyway, a public employee cannot prevail upon a claim that the termination was retaliation in violation of the First Amendment. *Smith v. Cty. of Suffolk*, 776 F.3d 114, 123 (2d Cir. 2015). Regarding the activity of newsgathering, improper conduct will "snuff out" the protected activity of newsgathering in a circumstance. *McKenna v. Nassau Cnty.*, No. 223CV4286ARRST, 2023 WL 8455670, at *9 (E.D.N.Y. Dec. 6, 2023).

The same standard should apply here. There are two instances of relevant conduct by the Reporter which made its de-designation an appropriate action even despite any First Amendment concerns alleged, under the *Mount Healthy* standard. First, in February of 2022, *The Reporter* raised costs in a manner it had not done in decades. Doc. No. 1 at ¶44-47. *The Reporter* then changed the manner in which municipalities were required to request publishing of local laws and notices under § 214, forcing its clients to use an online system to continue to engage in such business. Doc. No. 1 at ¶44-47. This new requirement forced Defendants' employees to undergo further training in order to use the new system. *See id*. The online software program which *The Reporter* forced Defendants to use, if Defendants wanted to continue to do business with them under County Law § 214, required the creation of local law pronouncements and notices on the internet program itself, which is not alleged to be at all similar to the manner in which the parties previously did business. *See* Doc. No. 1 at Fn. 2, 3; see generally Doc. No. 1. Both the costs and the raising of rates serves as a rational, legitimate basis for the County to seek to designate another paper of record under County Law § 214 and the *Mount Healthy* standard.

Second, the allegations surrounding March of 2022, shows a lack of support for the candidates and office holders of the designating party. Given the nature of New York's specific County Law, Defendants were within their rights to seek de-designation of the paper as a matter of law, since *The Reporter* can no longer avail itself of eligibility under § 214 in any event. *Relihan v. Brink*, 285 A.D. 729, 730–31, 140 N.Y.S.2d 659, 661 (App. Div. 1955). It is undisputed that The Reporter published articles on March 9, 2022 which the County contended was inaccurate. Doc. No. 1 at ¶34-41. In fact, on March 15, 2022, Defendants notified *The Reporter* by letter that its article was considered misinformation. *See id*, *see* Exs. A, B. These communications, made part of the record on this motion through their incorporation into the Complaint as exhibits, show

Defendants believe *The Reporter* had developed a pattern and practice of bad reporting, either intentionally or through lax practices Doc. No. 1 at ¶35-36, Exs. A, B.

The Reporter's former designation under County Law § 214(2) was the result of their appropriateness for the role at the time, regarding price of services, quality of services, and opinion held of the paper by the designating County. The raising of their rates was a personal, business activity that resulted in their de-designation. The allegations of the Complaint show that Plaintiff raised prices and caused Defendants increased costs, while engaging in what Defendants considered poor quality reporting. Plaintiff would have been removed from their position as paper of record because of these factors after March of 2022, notwithstanding any protected activity pled in the Complaint.

Accordingly, Plaintiff's first claim should be dismissed under the affirmative defense stated in *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977).

III. PLAINTIFF'S "FOURTEENTH AMENDMENT RIGHTS" CLAIM SHOULD BE DISMISSED.

Plaintiff's due process claim is undefined, and seems an afterthought. This claim is expressly stated by Plaintiff in Claim 2 as based on the same facts as his First Amendment retaliation claim under a theory of obstruction to willing speakers. *See* Doc. No. 1 at ¶108-113. "In the Second Circuit, if an equal protection claim merely restate[s] a First Amendment retaliation claim, courts have dismissed [the] equal-protection claim as duplicative. *McKenna v. Nassau Cnty.*, No. 223CV4286ARRST, 2023 WL 8455670, at *11–12 (E.D.N.Y. Dec. 6, 2023)(*quoting Best Payphones, Inc. v. Dobrin*, 410 F. Supp. 3d 457, 484 (E.D.N.Y. 2019)(internal quotation marks omitted).

No reason exists why this clearly articulated maxim should not apply here. The only basis for Plaintiff's Fourteenth Amendment claim is their alleged protected activity and retaliation for the same, which is a claim of First Amendment retaliation. *See id*. This is true both of Plaintiff's first claim regarding de-designation, as it is based on their apparent claim of protected misinformation in March of 2022, and their second claim based on a willing speakers theory. There is no other interpretation present in the alleged facts, or in the presented claim. *See* Doc. No. 1 at ¶108-113.

Because Plaintiff's claim for a Fourteenth Amendment violation is founded on their claims of retaliation for First Amendment activity, this claim should be dismissed as duplicative.

Even if this claim were not dismissed as duplicative, it would fail on the merits under any variation. Regarding a procedural due process claim, failure of a Plaintiff to identify a liberty or property interest protected by the Constitution's due process clause should cause that claim to fail. *Anemone v. Metro. Transp. Auth.*, 410 F. Supp. 2d 255, 268 (S.D.N.Y. 2006). Specific identification of a property or substantive right protected under the due process clause is a firm condition precedent for a claim to proceed under. *Patterson v. City of Utica*, 370 F.3d 322, 329–30 (2d Cir.2004). No suggestion is made in the Complaint that a property right to designation under § 214 exists here, nor could there be, as that statute proscribes a discretionary function to the executive.

As to any substantive due process claim, the "touchstone" is accountability for government conduct that shocks the conscience as a result of its lack of foundation in public betterment. *See Natale v. Town of Ridgefield*, 170 F.3d 258, 262 (2d Cir. 1999)(*citing County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 1716, 140 L.Ed.2d 1043 (1998). As discussed *supra*, Defendants all of the few real actions pled regarding Plaintiff had a rational basis and were

grounded in legal entitlement. Even if these matters were arguable, which Defendants submit they are not given the pleadings, the allegations of the Complaint fail to meet the outrageous or egregious standard.

Accordingly, any Fourteenth Amendment claim presented in the Complaint should be dismissed.

IV. ATTORNEY MERKLEN HAD NO SUFFICIENT PERSONAL INVOLVEMENT IN PLAINTIFF'S CLAIMS.

A plaintiff must show personal involvement of a defendant to advance a § 1983 claim against that individual. *See Zdziebloski v. Town of E. Greenbush*, 336 F. Supp. 2d 194, 201-02 (N.D.N.Y. 2004). Plaintiff only makes their first claim against the individual Board of Supervisor Defendants. When confronted with a claim of First Amendment Retaliation, "the question of the personal involvement of the individual defendants will merge with the question of whether the adverse actions plaintiff alleges they took, and the motivation for those actions, plausibly state a retaliation claim." Gordon v. Niagara Wheatfield Cent. Sch. Dist., No. 122CV00172JLSMJR, 2023 WL 6520216, at *12 (W.D.N.Y. Aug. 22, 2023), report and recommendation adopted, No. 22CV172JLSMJR, 2023 WL 6227616 (W.D.N.Y. Sept. 26, 2023)(citing A.S. v. City Sch. Dist. of Albany, 585 F. Supp. 3d 246, 287 (N.D.N.Y. 2022)).

Regarding Defendant Merklen named in Claim 2, no adverse actions are alleged to have occurred with her personal involvement. Defendant Merklen is colloquially said to have issued a "gag order" on behalf of the County, but as discussed extensively herein, no true gag order is alleged in the facts nor were any willing speakers prevented from sharing unfettered views. Defendant Merklen is alleged to have taken part in the March 2023 letter to Plaintiff, but that too was not any sort of action against Plaintiff itself, only an expression of displeasure with what

Defendants collectively believed was poor quality reporting. Elsewise, Defendant Merklen is not alleged to have any discretionary power relevant to these facts, such as the ability to de-designate a paper under County Law § 214 unilaterally.

Therefore, given that no true "gag order" is alleged in this Complaint for the reasons stated herein, Defendant Merklen cannot be said to have personal involvement in any claims presented for § 1983 purposes.

V. THE INDIVIDUAL MEMBERS OF THE BOARD OF SUPERVISORS ARE ENTITLED TO LEGISLATIVE IMMUNITY

As to Defendants 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 Partrick Davis, Allen R. Hinkley, Eric T. Wilson, John S. Kosier, William Layton, and Joseph Cetta, in their individual and official capacities, are alleged to have only made a vote to de-designate *The Reporter* in 2022. Legislative immunity shields legislatures from civil liability regarding actions or omissions related to their position. *Zdziebloski v. Town of E. Greenbush*, N.Y., 336 F. Supp. 2d 194, 203 (N.D.N.Y. 2004)(*citing Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951)); *Harhay v. Town of Ellington Bd. of Educ.*, 323 F.3d 206, 210 (2d Cir.2003). "The act of voting is 'quintessentially legislative.' " *Morris v. Lindau*, 196 F.3d 102, 111 (2d Cir.1999) *Zdziebloski v. Town of E. Greenbush*, N.Y., 336 F. Supp. 2d 194, 203 (N.D.N.Y. 2004). Therefore, the votes of these individual Supervisors in their capacity as members of the Board, or their deliberations in that capacity for votes or discretionary actions like those under § 214, cannot serve as a plausible basis for liability. Absent that vote, not a single action which could be considered tortious or violative of any constitutional right has been ascribed to these individual Defendants in the Complaint.

As discussed above related to the failure of Plaintiff to plead an adverse action, there are no other relevant events set forth in the Complaint related to these individual Defendants. The March 8, 2023 letter caused Plaintiff to do nothing, required them to do nothing, was not a published communication by either party to this litigation, is not contended to have had an effect on the business relationships of Plaintiff. After their immune vote in 2022, these Defendants are merely contended to have sent a letter on March 8, 2023 to *The Reporter*, with whom they then had only a transactional relationship, and to have debated *The Reporter's* re-designation as a political paper for 2024 under § 214(1). Doc. No. 1 at ¶46-95.

Thus, Defendants 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 Partrick Davis, Allen R. Hinkley, Eric T. Wilson, John S. Kosier, William Layton, and Joseph Cetta are not plausibly alleged to have had personal involvement in any constitutional violations put forward, and the claim against them should be dismissed.

VI. PLAINTIFF'S "OFFICIAL CAPACITY" CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS SHOULD BE DISMISSED AS DUPLICATIVE.

Where an official capacity suit also brings the same claims against a municipal entity, those claims should be dismissed as duplicative. *Monell v. Department of Soc. Servs. of City of New York*, 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Here, all individual Defendants are sued in their official capacity, and Plaintiff brings those claims also against Delaware County, their employer. Accordingly, should Plaintiff's Complaint not be dismissed in full, those official capacity claims should be dismissed as duplicative.

CONCLUSION

For the reasons stated herein, Plaintiff's Complaint should be dismissed.

Date: May 2, 2024

Respectfully submitted,

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