

**UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT**

ALAN PLOFSKY, Plaintiff,	:	CIVIL ACTION NO.
	:	3:06cv789 (JCH)
v.	:	
	:	
ROSEMARY GIULIANO, RICHARD VITARELLI, CHRISTOPHER SMITH, JOHN O'CONNOR, GARY COLLINS, HELEN Z. PEARL, SCOTT STORMS, and HUGH MACGILL, each in their individual capacity,	:	
Defendants	:	
	:	May 15, 2008

**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO  
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

**INTRODUCTION**

This lawsuit arises out of the September 10, 2004 decision of the Connecticut State Ethics Commission ("SEC") to discharge the plaintiff, Alan Plofsky ("Plofsky"), from his position as Executive Director and General Counsel. At the time of his termination, the plaintiff had been employed by the SEC for more than twenty-four (24) years and had served as Executive Director and General Counsel for over sixteen (16) of those years. The defendants were the appointed Commissioners of the SEC who participated in the events and decisions which led to the plaintiff's discharge.

The lawsuit makes two distinct but related claims under 42 U.S.C. § 1983: Count One asserts that the defendants denied Plofsky the pre-disciplinary due process rights mandated by the Supreme Court's decision in Cleveland Board of Education v.

Loudermill, 470 U.S. 532, 541 (1985) (“Loudermill”). This claim is based upon the defendants’ refusal to provide the plaintiff with access to or a summary of the evidence that was being used against him and their failure to afford Plofsky with a meaningful pre-termination opportunity to respond to the employer’s evidence against him. Count Two alleges that the defendants retaliated against Plofsky for exercising rights protected by the First Amendment. This claim is based upon the allegation that the decision to terminate the plaintiff’s employment was motivated by the exercise of his rights under the First Amendment. More specifically, Plofsky contends that the actions he took in July, 2004 in response to the defendants’ announcement that he would be disciplined for comments he made about former Governor John Rowland at a meeting of the Litchfield League of Women Voters (“LWV”) were protected by both the freedom of speech and the right to petition clauses of the First Amendment, and that those protected activities were a motivating factor in the defendants’ decision to terminate Plofsky’s employment.

The critical events started in late 2003 when the SEC became involved in the controversy that ultimately led Governor Rowland to resign from office in disgrace on June 21, 2004 - effective July 1. (Answer, ¶ 24) The LWV speech took place on June 3, 2004, Governor Rowland’s counsel wrote to SEC Chairperson Rosemary Giuliano on June 14 requesting that action be taken against Plofsky because of the speech, and on June 29 - just eight days after Rowland announced he would be resigning - the defendants informed Plofsky that they had decided to impose a two week suspension. Two days later, on July 1, Plofsky advised the defendants that, in response to the proposed disciplinary action, he had retained counsel. (See, Rule 56(a)2 Statement, ¶¶

14-18) After three weeks of extensive and highly critical publicity, on July 23, 2004, a Stipulated Agreement was reached between Plofsky and the SEC pursuant to which the SEC agreed not to proceed with the proposed suspension and the plaintiff agreed to accept a reprimand. (Rule 56(a)2 Statement, ¶¶ 36, 39) Less than a month later, on August 20, 2004, Plofsky was placed on administrative leave while the SEC investigated allegations made against him by three employees. After a closed meeting on September 8, 2004, the defendants voted to issue the plaintiff a Loudermill notice letter, and to conduct a pre-disciplinary public hearing. (See, Rule 56(a)2 Statement, ¶¶ 53-54, 60-62) At the conclusion of the September 10 Loudermill hearing, the defendants voted to terminate the plaintiff's employment effective September 24, 2004. (Rule 56(a)2 Statement, ¶¶ 68, 71)

On June 22, 2005, the Connecticut Freedom of Information Commission ("FOIC") issued a final decision finding that the September 8, 2004 SEC meeting was illegal insofar as the discussion of the plaintiff's employment issues should have been conducted in public rather than in executive session. (Ex. 31)

After his employment was terminated by the defendants, the plaintiff exercised his rights under state law to appeal the SEC decision through a post-discharge due process hearing before the Employees' Review Board ("ERB"). See Conn. Gen. Stat. §5-202. (Ex. 52, p. 27) The ERB conducted twelve (12) days of evidentiary hearings commencing on March 1, 2005 and concluding on November 1, 2005. (Ex. 52, pp. 2-3) On March 31, 2006, the ERB issued a unanimous decision, finding that Plofsky had been dismissed "without reasonable cause," in violation of Conn. Agencies Regs. §5-240-5a(a). (Ex. 52, p. 27)

The instant lawsuit was filed by Plofsky on May 22, 2006. Discovery concluded on February 1, 2008, and the defendants have now moved for summary judgment as to both counts of the plaintiff's complaint.

## FACTS

The plaintiff's Local Rule 56(a)2 Statement of Material Facts in Dispute fully sets forth the genuine issues of fact which require that the motion for summary judgment be denied, and is hereby incorporated by reference. The evidence particularly relevant to the resolution of each of the two claims will be discussed in connection with the respective arguments set forth below.

## ARGUMENT

### I. The Legal Standard for Summary Judgment

Summary judgment is appropriate only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law." See, Fed.R.Civ.P. 56(c). A "material fact" is one whose resolution will affect the ultimate determination of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A "genuine" issue as to such a material fact "only arises if the evidence would allow a reasonable jury to return a verdict for the non-moving party." Dister v. Continental Group, Inc., 859 F.2d 1108, 1114 (2d Cir. 1988); Anderson, 477 U.S. at 248.

The moving party bears the initial burden of showing that no genuine factual dispute exists. Carlton v. Mystic Transportation, Inc., 202 F.3d 129, 133 (2d Cir. 2000) cert denied 530 U.S. 1261 (2000). If the moving party carries its burden, the party

opposing summary judgment may not rest upon “mere allegations or denials,” rather, the opposing party must “set forth specific facts showing that there is a genuine issue for trial.” Fed.R.Civ.P. 56(e); Goenaga v. March of Dimes Birth Defects Foundation, 51 F.3d 14, 18 (2d Cir. 1995). “Assessments of credibility and choices between conflicting versions of events are matters for the jury, not for the court on summary judgment. Any weighing of the evidence is the prerogative of the finder of fact, not an exercise for the court on summary judgment.” Gorman-Bakos v. Cornell Co-op Extension of Schenectady County, 252 F.3d 545, 558 (2d Cir. 2001). Moreover, in assessing the record to determine whether material facts are in dispute, the court must resolve all ambiguities and draw all inferences in the light most favorable to the non-moving party, must eschew credibility assessments, Dawson v. County of Westchester, 373 F.3d 265, 272 (2d Cir. 2004); Carlton, 202 F.3d at 133-134, citing Anderson, 477 U.S. at 255; Weyant v. Okst, 101 F.3d 845, 854 (2d Cir. 1996), and “must disregard all evidence favorable to the moving party that the jury is not required to believe.” Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 151 (2000). As such, the non-movant, in this case the plaintiff, “will have his allegations taken as true, and will receive the benefit of the doubt when his assertions conflict with those of the movant[s].” Dawson, 373 F.3d at 272, citing Samuels v. Mockry, 77 F.3d 34, 36 (2d Cir. 1996).

The trial court’s task at summary judgment “is carefully limited to discerning whether there are any issues of material fact to be tried, not to deciding them.” LaFond v. General Physics Services Corp., 50 F.3d 165, 171 (2d Cir. 1995). “When reasonable persons, applying the proper legal standards, could differ in their responses to the question [raised in the] case on the basis of the evidence presented, the question is

one for a jury and summary judgment therefore would be inappropriate.” Sologub v. City of New York, 202 F.3d 175, 178 (2d Cir. 2000) (internal citation omitted). Summary judgment “is properly granted only when no rational finder of fact could find in favor of the non-moving party.” Carlton, 202 F.3d at 134. Where intent and state of mind are in dispute, summary judgment is ordinarily inappropriate, Gallo v. Prudential Residential Services, 22 F.3d 1219, 1224 (2d Cir. 1994), because as the Second Circuit has emphasized, “careful scrutiny of the factual allegations may reveal circumstantial evidence to support the required inference of discrimination.” Kontis v. Valley Stream Cent. High Sch. Dist., 394 F.3d 121, 124 (2d Cir. 2005).

II. The Defendants’ Motion for Summary Judgment on the Plaintiff’s First Amendment Claim Must Be Denied

A. Elements of Freedom of Speech Retaliation Claim

The First Amendment provides that “Congress shall make no law. . . abridging the freedom of speech . . . and to petition the Government for a redress of grievances.” U.S. Const. amend. I. Because the First Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment, see, e.g., Stromberg v. California, 283 U.S. 359, 368 (1931), a state, as sovereign, is likewise prohibited from abridging an individual’s rights to free speech and to petition. See, Piscottano v. Murphy, 511 F.3d 247, 268 (2d Cir. 2007).

As the Second Circuit and the Supreme Court have made clear, “[p]ublic employees do not surrender their First Amendment rights to comment on matters of public interest by virtue of their acceptance of government employment. Nevertheless,

when playing the role of employer, the state possesses ‘greater leeway to control employees’ speech that threatens to undermine its ability to perform its legitimate functions.’” Cobb v. Pozzi, 363 F.3d 89, 101 (2d Cir. 2004), citing Pickering v. Bd. of Educ. of Township High Sch. Dist. 205, Will County, 391 U.S. 563, 568 (1968) and Lewis v. Cowen, et al., 165 F.3d 154, 161 (2d Cir. 1999). But, “[v]igilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of the employees’ speech.” Rankin v. McPherson, 483 U.S. 378-384 (1987); Ezekwo v. NYC Health & Hospitals Corp., 940 F.2d 775, 781 (2d Cir. 1991), cert. denied, 502 U.S. 1013 (1991).

The First Amendment protects a public employee’s right, in certain circumstances, to speak as a citizen addressing matters of public concern.” Garcetti v. Ceballos, 547 U.S. 410, 417 (2006); Barclay v. Michalsky, 493 F.Supp.2d 269, 273 (D. Conn. 2007). As the Second Circuit has held,

a plaintiff making a First Amendment retaliation claim under §1983 must initially demonstrate by a preponderance of the evidence that: (1) his speech was constitutionally protected, (2) he suffered an adverse employment decision, and (3) a causal connection exists between his speech and the adverse employment determination against him, so that it can be said that his speech was a motivating factor in the determination.

Morris v. Lindau, 196 F.3d 102, 110 (2d Cir. 1999), citing Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 283-287 (1977). See also, Ruotolo v. City of New York, 514 F.3d 184, 188 (2d Cir. 2008), citing Skehan v. Vill. of Mamaroneck, 465 F.3d 96, 106 (2d Cir. 2006) (rephrasing the test for a First Amendment retaliation claims as

requiring plaintiffs to prove: “(1) they engaged in constitutionally protected speech because they spoke as citizens on a matter of public concern; (2) they suffered an adverse employment action; and (3) the speech was a motivating factor in the adverse employment decision.” (internal punctuation and citation omitted)). Since the defendants admit that Plofsky’s discharge was an adverse employment action, he need only establish the first and third elements. (Def. Memo, p. 5) If the evidence supports those elements, then the defendants may escape liability by showing either: (1) that “it would have taken the same adverse action in the absence of the protected speech,” Mandell v. County of Suffolk, 316 F.3d 368, 382 (2d Cir. 2003); or (2) that the plaintiff’s speech was likely to disrupt the workplace and that the potential disruptiveness was enough to outweigh the value of the plaintiff’s speech. Id. at 383-384.

The first inquiry, whether the speech addressed a matter of public concern, involves a preliminary question--whether the plaintiff spoke as a private citizen, or as a public employee pursuant to his official duties. Garcetti, 547 U.S. at 420-421; Eiden v. McCarthy, 531 F.Supp.2d 333, 349 (D. Conn. 2008). The defendants do not contend that Plofsky’s speech or conduct was pursuant to his official duties. Accordingly, the court must determine whether the speech touches on a matter of public concern.<sup>1</sup>

Whether an employee’s speech addresses a matter of public concern is a question of

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<sup>1</sup> The plaintiff does not argue that his June 3, 2004 speech to the LWV was outside the scope of his employment responsibilities, and does not claim that the plaintiff’s comments about Rowland were protected speech under the First Amendment. Although the content of that speech was, as recognized by Attorney General Blumenthal, clearly protected by the First Amendment at the time it was made, the new gloss added by the Supreme Court when it decided Garcetti on May 30, 2006, removed that particular event from the protection of the Constitution.

law for the court to decide, taking into account the “content, form, and context of a given statement, as revealed by the whole record.” Ruotolo, 514 F.3d at 189; Lewis, 165 F.3d at 163, citing Connick v. Myers, 461 U.S. 138, 147-148 (1983). The question of precisely what is a matter of public concern “is not amenable to a simple, definitive answer.” Piscottano, 511 F.3d at 270. Rather, public concern has been defined by both the Supreme Court and the Second Circuit as being “something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication;” Locurto v. Giuliani, 447 F.3d 159, 174 (2d Cir. 2006), citing City of San Francisco v. Roe, 543 U.S. 77, 83-84 (2004), and as speech “relating to any matter of political, social, or other concern to the community.” Piscottano, 511 F.3d at 270, citing Connick, 461 U.S. at 146.

The primary inquiry is whether the employee’s speech was “calculated to redress personal grievances or whether it had a broader public purpose.” Ruotolo, 514 F.3d at 189; Lewis, 165 F.3d at 163-164. While a court should look to the motive of the speaker as “one factor that may be considered,” the Second Circuit has made clear that “the speaker’s motive *alone*” is not dispositive of the public concern issue. Reuland v. Hynes, 460 F.3d 409, 415-417 (2d Cir. 2006), cert. denied, 128 S.Ct. 119 (2007) (gathering cases from other circuits that have considered the role of motive on the question of public concern and agreed with the Second Circuit’s analysis). There the Court found that the jury’s determination that the plaintiff was not motivated by a desire to address a matter of public concern did not resolve the issue, but rather the court was required to consider the “content, form and context” of the statement, as revealed by

the whole record. Id. at 417-418. The mere fact that a plaintiff took a personal interest in the subject matter of the speech,

does not remove the speech from the protection of the First Amendment, nor should it. [M]ixed motivations are involved in most actions we perform every day; we will not hold [plaintiffs] to herculean standards of purity of thought and speech...Accepting the proposition that a matter is not of public concern if it personally and directly affected the speaker would mean that only those persons with the least amount of firsthand knowledge about the subject matter could utter speech without fear of government reprisal. This position is clearly not sustainable.

Johnson v. Ganim, 342 F.3d 105, 114 (2d Cir. 2003) (internal citations omitted).

Notably, “discussion regarding current government policies and activities is perhaps the paradigmatic matter of public concern.” Id. at 113. Likewise, “public corruption or wrongdoing” is almost always a matter of public concern. Id., citing Lewis, 165 F.3d at 164; Glass v. Dachel, 2 F.3d 733, 741 (7<sup>th</sup> Cir. 1993) (“matters of public concern do include speech aimed at uncovering wrongdoing or breaches of public trust”); Casey v. City of Cabool, 12 F.3d 799, 802 (8<sup>th</sup> Cir. 1993) (“criticism, no matter how obnoxious or offensive, of government officials and their policies clearly addresses matters of public concern”). See also, Cotarelo v. Village of Sleepy Hollow Police Dept., 460 F.3d 247, 252 (2d Cir. 2006) (discrimination in a government workplace is a matter of public concern); Feingold v. New York, 366 F.3d 138, 160 (2d Cir. 2004) (same); Mandell v. County of Suffolk, 316 F.3d 368, 383 (2d Cir. 2003) (same).

#### B. Elements of Right to Petition Retaliation Claim

The right “to petition for a redress of grievances [is] among the most precious of the liberties safeguarded by the Bill of Rights” and is “intimately connected both in origin

and in purpose, with the other First Amendment rights of free speech and free press. 'All these, though not identical, are inseparable.'" United Mine Workers of America, Dist. 12 v. Illinois Bar Assoc., 389 U.S. 217, 222 (1967) quoting, Thomas v. Collins, 323 U.S. 516, 530 (1945). The First Amendment right to petition the government includes the right to access the courts as well as administrative procedures. See California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972); Franco v. Kelly, 143 F.3d 584, 588-589 (2d Cir. 1988). It further includes the "rights to complain to public officials and to seek administrative and judicial relief," Gagliardi v. Villiage of Pawling, 18 F.3d 188, 194-195 (2d Cir. 1994) (internal citations omitted), as well as "to defend oneself against a formal charge without being subjected to retaliation by government officials." Blue v. Koren, 72 F.3d 1075, 1082 n.3 (2d Cir. 1995). As the Second Circuit explained,

the right of a public employee to defend himself against formal charges may be easily derived either from the right to a hearing under the Due Process Clause or from the First Amendment right to petition the government. If those who defend themselves against formal charges may be subjected to harassment by officialdom for doing so, the right to a hearing is clearly of greatly diminished value. Moreover, defending against a formal charge is sufficiently analogous to petitioning the government for retention of the status quo to warrant First Amendment protection against retaliation.

(Id.)

The right to petition the government for a redress of grievances is "an assurance of a particular freedom of expression," McDonald v. Smith, 472 U.S. 479, 482 (1985), and as such it is "generally subject to the same constitutional analysis" as the right to free speech. Wayte v. United States, 470 U.S. 598, 610 n.11 (1985). Thus, retaliation

claims brought pursuant to an individual's right to petition are governed by the above described public concern principles that apply in claims of retaliation based on the right to free speech. Cobb, 363 F.3d at 105.

C. Facts Relevant to Establishing That Plofsky Engaged in First Amendment Protected Speech and Conduct

On Thursday, June 3, 2004, Plofsky delivered the LWV speech during which he made several comments that were highly critical of Governor Rowland. (Ex. AA, pp. 1791-1793, 1821) To Plofsky's surprise, his comments were published in a local newspaper. (Ex. 5) On June 14, 2004, Rowland's lawyer, William F. Dow, III, sent copies of the articles about Plofsky's LWV speech to Chairperson Giuliano, requesting that the SEC take action against Plofsky for having made the remarks about Rowland. (Ex. 6) On June 17, Plofsky sent a memo to defendant Giuliano in which he disputed the accusations that had been made by Dow on behalf of Rowland. (Ex. AA, pp. 1822-1823; Ex. BB, ¶ 4, Attachment 2) One week after Dow's letter to Giuliano, on June 21, Governor Rowland announced that he would resign effective July 1. (Answer, ¶ 24) A few days later, Giuliano called Plofsky and asked to have a confidential, informal discussion with him and some of the commissioners about the LWV speech. (Ex. AA, pp. 1824, 1509-1510)

Plofsky met with Giuliano and four other defendants - Smith, O'Connor, Storms and Collins - at the SEC office on June 29, 2004. (Ex. AA, pp. 1824-1825) This was not an official meeting - the Clerk of the Commission was not present, none of the usual formalities were observed, and there was no quorum as is required by statute. (Ex. AA, pp. 1825, 1507-1508; Ex. A, pp. 35, 66-67) Plofsky answered questions from

the five defendants about the speech for about an hour and the meeting concluded with an agreement that Plofsky would work with the Commissioners to develop a policy governing his public statements. There was no discussion of disciplinary action of any kind while Plofsky was present. (Ex. AA, pp. 1825-1826; Ex. A, p. 67)

Shortly thereafter, Giuliano and Smith - both Rowland appointees - went to Plofsky's office and informed him that a decision had been made to suspend Plofsky for two weeks, and asked if he would accept it. Plofsky was stunned by this turn of events and said he wanted to think about it before responding. (Ex. AA, pp. 1826-1827; Ex. A, pp. 35, 64-65, 68) By letter dated July 1, 2004, Plofsky advised Giuliano that he had retained private counsel to represent him in connection with the SEC's proposed disciplinary action. (Ex. 7) Plofsky elected to hire counsel and to defend himself against the SEC's decision to proceed with disciplinary action for the following reasons: (1) He believed that punishment of the Executive Director of the SEC for making critical comments about corruption and wrongdoing by the highest elected official in the state of Connecticut would have a chilling effect on the state watchdog agencies with responsibility for regulating the conduct of public officials and agencies; (2) He believed that it was important for the public to know that the Commissioners appointed by Governor Rowland were proceeding with this action as requested by Rowland's private counsel even though the Governor had announced his resignation; (3) He felt it was important for the public to know that the agency that was responsible for enforcing the Code of Ethics had decided to proceed with disciplinary action against their Executive Director without regard to the fundamental procedural protections required by the

Constitution and without complying with the state's open meeting laws; and (4) Because Plofsky believed that the attempt to discipline him was unwarranted and unjustified and that to accept it would be to diminish the effectiveness of the SEC in its mission to prevent public corruption. (Ex. BB, ¶ 5)

On July 7, 2004, the Hartford Courant published an article indicating that the SEC intended to suspend Plofsky because of the LWV speech. (Ex. BB, ¶ 6, Attachment 3) That article reported that Plofsky "has retained Gregg Ader, an attorney from a prominent labor and employment law firm, to fight the proposed disciplinary action. . ." The article indicated that Adler asserted that Plofsky had been denied his "due process" rights, citing the SEC's "failure to follow proper legal procedures for the discipline of a member of the state's civil service work force such as Plofsky," and included the following quotation:

At this point he has received no written notification of the disciplinary action or the basis for it, nor has any lawful properly noticed meeting been held, nor has he been given the opportunity to be fully heard and represented.

(Id.) This article appeared on the front page of the state's largest newspaper, and was likely read by each of the defendants. (Ex. BB, ¶ 6; Ex. FF, p. 20; Ex. GG, pp. 33-35; Ex. HH, pp. 32-33)

Later that day, Connecticut's Attorney General, Richard Blumenthal, sent a letter addressed to defendant Giuliano at the SEC office indicating that his office would not represent the SEC in connection with the Plofsky disciplinary matter. (Ex. 8) Blumenthal indicated that the information he had was based upon "published reports,"

then stated:

The proposed disciplinary actions by the Commission raise serious concerns about possible violations of Mr. Plofsky's rights to free speech and due process guaranteed by the First and Fourteenth Amendments to the U.S. Constitution, as well as rights that he has pursuant to the State Personnel Act. The Commission's actions would be ill-advised and almost certainly illegal.

The AG's letter was based on factual information contained in the July 7 Hartford Courant article referred to above, and "was not based on information that may have been conveyed in any potentially attorney-client privileged communication." (Ex. CC, Response Nos. 3 and 4)

The AG's July 7 letter was addressed to Giuliano in her capacity as Chairperson of the SEC and was sent by facsimile to the SEC office at 18-20 Trinity Street. (Ex. 6; Ex. AA, pp.1830-1831, 152-153, 156-157) After its receipt, a conversation took place in Director of Disclosure, Brenda Lou Mathieu's office involving Plofsky, Mathieu and Principal Attorney Brenda Bergeron regarding the global FOI requested made earlier in the day by the Hartford Courant for any and all documents relating to the Plofsky discipline situation, which request encompassed the AG's letter. (Ex. AA, pp. 1832, 153, 160) Bergeron asked Plofsky whether he thought the letter was privileged and therefore not subject to mandatory disclosure under the FOI Act. Plofsky reviewed the letter again and while he was examining it, Mathieu noted that since it's "not marked confidential" it should be disclosed. (Ex. AA, pp. 1833, 154) Plofsky essentially agreed, stating that if the AG had intended the letter to be confidential he would have so indicated on the document, that the letter was declining representation, and that as the letter was sent to the SEC Office by the AG he has in effect made it public. Plofsky

indicated that he thought the letter was not privileged and that disclosure was required by the FOI Act. (Ex. AA, p. 1833) Bergeron agreed with that conclusion. (Ex. AA, pp. 154, 162)

At the conclusion of the conversation, Plofsky handed the letter back to Bergeron and said something to the effect of: “[i]t’s okay to send it to the Courant but I can’t be involved, you make the call,” further stating “but don’t obsess about it, they could be on the evening news talking about it anyway.” (Ex. AA, p. 1834) Later that day, after receiving the AG’s letter, defendant Giuliano wrote to Blumenthal asserting that her communications with representatives of the Office of the Attorney General (“OAG”), including the AG’s July 7 letter, should be considered confidential. (Ex. 11) Blumenthal responded to Giuliano on the following day, July 8, stating that the OAG “neither released nor made public my July 7, 2004 letter,” that “no communications between you and Assistant Attorney General Cobb were disclosed or made public.” Finally, Blumenthal assured Giuliano that his July 7 letter was “based on factual representations contained in published reports and not on facts that [Giuliano] may have discussed with Assistant Attorney General Cobb.” (Ex. 12)

On July 8, 2004, the Hartford Courant published another article about the dispute between Plofsky and the defendants regarding the proposed disciplinary action, quoting from the AG’s July 7 letter, reiterating the fact that Plofsky had retained Adler “to contest the proposed suspension,” and reporting that his counsel said: “Plofsky has not been given due process rights, including proper notice that discipline was being considered, and the chance to argue against it with help from a legal representative.”

(Ex. BB, ¶ 8, Attachment 4; Ex. AA, p. 138) That article also included statements from the Lieutenant Governor calling on Governor Rell to “immediately replace” defendant Giuliano, and suggesting that the attempt to discipline Plofsky was the result of a political vendetta by Rowland campaign supporters.

On the following day, July 9, 2004, the Hartford Courant published another article about the conflict over the defendants’ proposed disciplinary action, the lead paragraph of which read as follows:

Democrats lined up Thursday to hammer the State Ethics Commission over its decision last week to suspend Executive Director Alan S. Plofsky for criticizing ex-Gov. John G. Rowland. . . .”

(Ex. BB, ¶ 9, Attachment 5) That article went on to quote comments by several prominent democrats, the new Governor, Jodi Rell, one prominent republican, and the executive director of the citizen’s action group, Common Cause, on the Plofsky discipline issue. In addition, on that same day the Courant published an editorial on this subject that was entitled, “A Mistake Compounded.” (Ex. BB, ¶ 10, Attachment 6)

Plofsky testified that after the July 7 and July 8 articles “all the members of the commission adopted an attitude that I felt was an expression of animosity toward me,” and that this led to “a very tense” SEC public meeting on the following day (Ex. A, p. 42), July 9, 2004. Defendants Giuliano, Vitarelli, Smith, O’Connor, Collins and MacGill were present at this meeting. (Ex. 13) Because of the recent publicity about the proposed disciplinary action against Plofsky, the meeting was packed with news reporters and was televised on CT-N. (Ex. BB, ¶ 11) Defendant Vitarelli made a motion to amend the agenda to add an item “to discuss strategy and negotiations with

respect to pending claims and litigation...,” and he then followed with another motion that the discussion take place in executive session. (Ex. 13) Plofsky asked if that discussion was to be about him, and, if so, stated that he wanted the meeting to be conducted in public. (Ex. AA, pp. 1836, 1348-1349; Answer ¶ 31) Under Connecticut’s Freedom of Information Act (FOIA), discussion by a state agency concerning the employment or performance of a public employee must be held at an open meeting at the request of the employee. Conn. Gen. Stat. §1-200(6)(A). Principal Attorney Brenda Bergeron then presented to the SEC the information she had obtained from the FOI Commission regarding the requirement that the hiring of an attorney to advise the agency about personnel matters is within the ambit of this provision of the FOI Act. (Ex. AA, p. 1836; Ex. BB, ¶ 12, Attachment 7) The defendants elected to disregard this advice and proceeded to go into executive session. (Ex. 13)

At the conclusion of the executive session, defendant MacGill explained for the public record that the reason for the closed meeting was that “a member of the staff retained counsel with a view to possibly contesting potential action by the Commission...” (Ex. 13; Answer, ¶ 31) It was evident during this meeting that the defendants were surprised and angry that objections were posed to their going into executive session, and that they held Plofsky responsible for their being embarrassed during the public meeting. (See Ex. AA, pp. 1350-1352, 1464-1467, 848-850, 1837; Ex. DD, pp. 54-56)

The animosity that had ensued during the July 9 SEC meeting was reflected in the Hartford Courant’s July 10, 2004 story, which opened with: “In a tense session of icy

exchanges, secret deliberations, and mysteriously missing documents, the Ethics Commission decided Friday to hire a lawyer to handle its controversial decision to discipline its executive director, Alan Plofsky...,” and further reported that “the tension between Plofsky and his commissioners was obvious from the start of Friday’s session.” (Ex. BB, ¶ 13, Attachment 8)

After the meeting on July 9, an agreement was reached between defendant Giuliano and Principal Attorney Maureen Regula that Regula would represent the SEC with respect to the plaintiff’s disciplinary matter and to facilitate communications between the Commissioners and the plaintiff. (Answer, ¶ 32) From that point forward, Regula regularly communicated with Giuliano regarding Plofsky. (Ex. AA, pp. 1471-1481, 1547, 831-833) This occurred just after the close of the SEC meeting, when Giuliano approached Regula and asked for her assistance in guiding the Commission through its issues with the plaintiff. (Ex. DD, pp. 51-52; Ex. 24, Regula Aff., 4(i)) Regula had previously been employed by, and remained a close personal friend of, Governor Rowland’s counsel, William Dow. (Ex. DD, pp. 17, 28) Defendant Giuliano was well-aware that Regula had worked for Dow, and had mentioned to Regula that the two “shared a mutual acquaintance in Mr. Dow.” (Ex. DD, p. 53)

On July 12, Governor Rell sent a letter to Giuliano indicating that she had requested an opinion from the AG regarding the SEC’s proceedings regarding the Plofsky disciplinary matter, a copy of which was attached, urging the Commission to be certain to act in accordance with “all applicable legal requirements, including those of the Freedom of Information Act,” should it decide to continue to pursue disciplinary

action. (Ex. 14, p. 4) The Governor's letter stated that the AG's letter raises several issues, "[most] notably is that the Commission may have failed to provide Mr. Plofsky with the constitutionally mandated notice and a hearing on any potential disciplinary action." (Id.)

The AG's opinion letter, which reached the same conclusions as his July 7 letter but provided a more detailed analysis, as well as the Governor's letter, were released to the press and quoted in yet another Hartford Courant article on July 13. (Ex. BB, ¶ 14, Attachment 9) That article reiterated the criticism of the defendants that had been reported in the July 8, 9 and 10 articles, and noted that the suspension "has not yet been imposed, now that Plofsky has hired a lawyer to challenge it." (Id.) The July 13 article reported that Governor Rell's letter to the SEC "directed the defendants to 'immediately rescind all decisions that did not adhere to the law in all respects,'" and that the Governor had selected a replacement for defendant Giuliano whose term "had expired almost three years ago." On July 14, 2004, the Courant published an article by its political columnist that was again highly critical of the defendants for seeking to discipline Plofsky, and was particularly harsh with regard to defendant Giuliano. (Ex. BB, ¶ 15, Attachment 10) All six of the Hartford Courant articles published between July 7 and July 14 included serious criticism of the defendants, and generally cast the SEC in an extremely negative light with respect to their handling of the discipline matter that arose from Plofsky's LWV speech.

D. The Plaintiff Engaged in Speech and Conduct Protected by The First Amendment

In the simplest and most direct terms, the plaintiff exercised the right to retain counsel, and through that counsel, to defend himself against the charges of improper conduct that had been made against him initially by Governor's Rowland's counsel and then more formally by the SEC when it elected to proceed with disciplinary action to punish Plofsky for the LWV speech. The Second Circuit has recognized that such activities are protected by both the speech and petition clauses of the First Amendment. Blue v. Koren, 72 F.3d 1082, n.3 (2d Cir. 1995). In public statements reported in the Hartford Courant and other news media, Plofsky, through his counsel, opposed the disciplinary action and repeatedly asserted that the SEC had failed to follow the proper legal procedures in disciplining a member of the state's civil service work force - specifically that it had not provided the required "written notification of the disciplinary action or the basis for it," that it did not present him with the "specific allegations" being made against him, that it denied him "the opportunity to be fully heard and represented," and that he had "not been given due process rights, including proper notice that discipline was being considered and the chance to argue against it with help from a legal representative." (Ex. 55, Interrogatory No. 17) All of these comments were part of the process by which the plaintiff defended himself against formal charges and were therefore protected by the First Amendment.

On a broader level, the plaintiff's speech was also protected because its content was directly related to an important issue of public concern. In determining whether speech addresses a matter of public concern, the court must examine all of the

surrounding circumstances and discern whether the issue raised is “a subject of legitimate news interest,” or whether it relates to “a matter of political, social or other concern to the community.” See Locurto, 447 F.3d at 174; Piscottano, 511 F.3d at 270. The fact that the SEC was proposing to discipline its Executive Director and General Counsel within days of the resignation of a corrupt Governor with whom Plofsky had battled over Ethics Code violations, and to do so without observing the requirements of both the U.S. Constitution and Connecticut’s open meeting laws, was itself a matter of public concern. So much so that the proposed disciplinary action generated at least six prominent stories and one biting editorial in the State’s largest newspaper (as well as in other news media) within a one week period. Those articles included criticism and comments from numerous elected officials, including the Attorney General, the Governor, and several state legislators, as well as from public interest “good government” organizations. The plaintiff’s statements about the SEC’s proposed action, the agency’s failure to abide by the procedural rights established by the Due Process Clause of the U.S. Constitution, and the failure to comply with the state’s FOI Act, were published on an almost daily basis, and followed-up by similar published comments by the Attorney General and others. These statements directly related to “current government policies and activities,” and were directed at exposing governmental “wrongdoing or breaches of public trust” by the SEC, and thus constitute fundamental public concerns. See, Johnson, 342 F.3d at 113,114; Lewis, 165 F.3d at 164; Casey, 12 F.3d at 802. Moreover, all of this public discourse arose from the plaintiff’s initial assertion of his right to defend himself against the charges. It is beyond question that, under the particular circumstances of this case, this was not a situation

where an individual employee simply asserts that he is being treated unfairly or is being discriminated against by his employer. The fact that Plofsky had a personal interest in opposing the proposed disciplinary action and in asserting the violation of his Due Process and State law rights, does not remove his statements from First Amendment protection. Put another way, the fact that a statement is made in part in relation to redressing “a personal grievance” does not mean that the subject of the statement does not relate to “a matter of public concern” for First Amendment purposes. See, Reuland, 460 F.3d at 415-417, citing Tripp v. Cole, 425 F.3d 5, 11 (1<sup>st</sup> Cir. 2005) (“Where a public employee speaks out on a matter that is clearly a legitimate matter of inherent concern to the electorate, the court may eschew further inquiry into the employee’s motives....”); Johnson, 342 F.3d at 114.

Finally, even if the court were to examine the issue of personal motive as part of the public concern analysis, the plaintiff’s speech and conduct in this case was in fact generated by a broader public purpose. Plofsky chose to hire counsel and defend himself against the charges not just because he believed the actions of his employer were unjustified and unwarranted, but also because he believed that under the circumstances to accept the disciplinary action would have had a chilling effect on all of the state agencies with responsibility for regulating the conduct of public officials, would have the affect of diminishing the effectiveness of the SEC itself in its mission to prevent public corruption, and in order to expose to the public that the SEC was taking this action against its Executive Director without regard for the fundamental procedural protections required by the Constitution and without complying with the state’s open

meeting law. (Ex. BB, ¶ 19) Because the question of motive is an issue of fact which the Court must view in the light most favorable to the plaintiff, Plofsky's affidavit is plainly sufficient to establish that his speech was motivated by "a broader public purpose," and not limited to redressing "a personal grievance." Accordingly, the Court is compelled to reject the defendants' contrary assertion and must deny the motion for summary judgment on the "public concern" issue.

E. Legal Standard for Establishing Causation

In a First Amendment retaliation claim, the plaintiff must also identify evidence to support a finding that that a causal connection exists between his protected speech/activity and the adverse employment action taken against him. "The causal connection must be sufficient to warrant the inference that the protected speech was a substantial motivating factor in the adverse employment action." Morris, 196 F.3d at 110, citing Mount Healthy, 429 U.S. at 287. A plaintiff can establish causation indirectly, by means of circumstantial evidence—for example, by showing that the protected activity was closely followed in time by the adverse action or through evidence of disparate treatment—or by direct evidence, such as by providing evidence of the defendant's retaliatory animus. Morris, 196 F.3d at 110; Sumner v. United States Postal Serv., 899 F.2d 203, 209 (2d Cir. 1990) (describing the causal connection in the context of Title VII retaliation cases in the same way). See also, Mandell, 316 F.3d at 384 (noting that a "plaintiff need not establish causation through temporal proximity, however, if instead he can offer evidence of retaliatory animus"); Albert v. City of Hartford, 529 F.Supp.2d 311, 338 (D. Conn. 2007) ("as retaliatory motive is rarely

proven by direct evidence, most plaintiffs establish causation through circumstantial evidence”), citing Housing Works Inc. v. City of New York, 72 F.Supp.2d 402, 422 (S.D.N.Y. 1999), appeal dismissed, 203 F.3d 176 (2d Cir. 2000). Recently, the Second Circuit considered such circumstantial evidence and concluded that the plaintiff had made a *prima facie* showing of First Amendment retaliation through indirect evidence of pretext by, (1) establishing that the defendant had departed from its usual employment practices, (2) casting doubt upon the defendant’s credibility because certain statements could be found to be misleading, and (3) noting the conflicting explanations offered by the defendant that could be seen to be post-hoc rationalizations to hide improper motives. Dillon v. Morano, 497 F.3d 247, 252-253 (2d Cir. 2007).

Summary judgment is precluded “where questions regarding an employer’s motive predominate in the inquiry regarding how important a role the protected speech[/activity] played in the adverse employment decision.” Morris, 196 F.3d at 100. “Without a searching inquiry into these motives, those intent on punishing the exercise of constitutional rights could easily mask their behavior behind a complex web of post hoc rationalizations.” Peacock v. Duval, 694 F.2d 644, 646 (2d Cir. 1982) (citations omitted); Piesco v. City of New York, 933 F.2d 1149, 1155 (2d Cir. 1991) (abrogated on other grounds recognized by Jeffries v. Harleston, 52 F.3d 9, 12 (2d Cir. 1995)).

#### F. Facts Relevant to Establishing Causation

Following the swell of adverse publicity over its attempt to discipline the plaintiff for his LWV speech, the SEC abandoned its efforts to hire private counsel, and instead decided to use the services of the Director of the Office of Labor Relations, Linda

Yelmini. (Ex. AA, pp. 846-847) Yelmini and Adler negotiated a resolution of the Plofsky disciplinary dispute, and a Special Meeting was scheduled for July 23 for the purpose of trying to reach a final settlement. (Ex. AA, pp. 1456-1457, 1838) Prior to the meeting, agreement was reached that the SEC would not proceed with the proposed suspension, but that Plofsky would accept a reprimand as part of a stipulation to settle the matter and thereby allow both parties to move forward. It was agreed in advance that Plofsky would consent to the SEC going into executive session to discuss the precise terms of the final stipulated settlement. (Ex. AA, pp. 852-853, 1468, 1838-1839) It is undisputed that the sole purpose of the July 23 meeting was to finalize the settlement of the dispute between Plofsky and the Commissioners over the June 3 LWV speech. (See Ex. AA, pp. 89, 250, 860-861, 1838; Ex. B, p. 36)

The July 23 meeting, which opened in public session with intense media coverage, including live television coverage through CT-N, did not begin as Plofsky and Adler had anticipated. Prior to the meeting, defendant Giuliano had agreed to allow defendant Macgill to make a personal comment at the outset of the meeting while the press was still present. (Ex. AA, pp. 1470-1471, 56) MacGill commented on the AG's decision to decline to represent the SEC in the Plofsky discipline matter, and raised questions about the substantive legal conclusions in the AG's letter as well as about how the letter happened to be released to the press. Adler asked to respond to MacGill's comments, but was initially told by Giuliano that he could not do so. Giuliano explained that Adler had already made "several comments to the press with respect to [the June 29] meeting, and this is the first opportunity the Commission has to respond

to the comments you have made to the press.” It was after Giuliano’s statement, that Adler said that Mr. Plofsky “had no role” in the dissemination of the AG’s July 7 letter. (See Ex. BB, ¶ 16, Attachment 17)

Neither MacGill’s comments, nor the remarks made by Giuliano and Adler in response thereto, were in any sense material to the meeting, nor did the SEC provide Plofsky or his counsel with notice that the meeting would include any commentary or action other than the pre-arranged executive session to finalize the settlement. (Ex. AA, p. 1840) MacGill himself admitted that he was simply expressing his “personal view” because he “wanted to sound off a bit,” and that the dissemination of the AG’s letter “was not the subject matter of the meeting on July 23.” (Ex. AA, pp. 1253, 1256) The purpose of the meeting was to complete settlement negotiations, not to determine who was responsible for releasing the AG’s letter to the press. (Ex. AA, p. 1259)

After this exchange, the defendants went into the pre-arranged executive session, at the conclusion of which they voted unanimously to accept the Stipulated Agreement with Plofsky that had been negotiated through their respective counsel. (Exs. 15, 16; Answer, ¶37) At no time after the conclusion of that meeting did Giuliano nor any other defendant, nor Bergeron nor Sexton, ever speak to Plofsky about the release of the AG’s letter or Adler’s comments at the July 23 meeting. (Ex. AA, pp. 1845, 870, 1426) However, while the SEC was in executive session, Plofsky spoke to Regula about Adler’s comment, since she was acting as an attorney and go-between for the Commission and was relaying information to Giuliano. He told Regula that he “did express an opinion to Brenda Bergeron that I thought [the letter] was disclosable, at

the same time I recused myself..." (Ex. AA, p. 1849) and explained:

I wanted to get this behind us but I just didn't think it appropriate to bring it up at the meeting and make a big deal of it. I didn't see it as a big deal and I just felt I could tell her and she would tell the Commission.

(Ex. AA, p. 1845)

On August 12, 2004, less than three weeks after the very public, often bitter, dispute between Plofsky and the SEC had been resolved, a trap was set for Plofsky, which ultimately resulted in his discharge. The match was actually lit earlier in August when Plofsky was advised by Giuliano that there would be a regular SEC meeting on August 13, even though the SEC generally did not meet in August and there was no urgent need to conduct a meeting. (Ex. AA, pp. 1847, 66-67, 769) It was common knowledge at that time that the terms of the three Rowland appointees - defendants Giuliano, Vitarelli, and Smith - had either expired or were scheduled to expire at the end of September, and that Governor Rell was in the process of selecting replacements for these individuals. (Ex. AA, pp. 1855-1856)

Plofsky, Brenda Lou Mathieu, and the three principal attorneys - Bergeron, Sexton, and Regula, had planned to take the day off on August 12, 2004 to attend an afternoon Red Sox game in Boston. However, the three principal attorneys decided to go to the office in the morning, and at some point decided not to go to the game. (Ex. 24, Sexton Aff., ¶13; Bergeron Aff., ¶17) It is unclear exactly when the decision to forego the game was made, but Regula had advised Bergeron that based on information Regula had received from defendant Giuliano, "it might not be a good idea to go [to the game]" because "there is a possible issue." (Ex. EE, pp. 37-38)

On or about August 10, Giuliano and the other defendants had received copies of an anonymous letter, purportedly written by a parking lot attendant (hereinafter "PLA letter") at their respective offices and homes. (Ex. AA, pp. 1482-1483, 767-768; Ex. 17, p. 2) It was learned during discovery in this litigation that the PLA letter was in fact authored by Maureen Regula, intentionally disguised to appear to have been written by an under-educated parking lot attendant, and allegedly mailed by Regula's then-husband, Attorney Stephen Regula, to each of the Commissioners, except O'Connor, at their private work addresses. (Ex. DD, pp. 39-40, 43-45) Moreover, at least some of the issues listed in the PLA letter had been previously communicated by Regula to defendant Giuliano. (Ex. DD, pp. 42 34-36)

On the morning of August 12, Giuliano took the highly unusual step of hand delivering a copy of the PLA letter to the SEC office in Hartford. Defendant Giuliano's law office is in Woodbury and she had never before visited the Commission office on a day when there was no Commission meeting scheduled. (Ex. AA, pp. 69, 1849) Although Giuliano had Plofsky's home and cell telephone numbers and had called him at home in the past, she elected not to contact him but instead to communicate directly with Plofsky's staff regarding the PLA Letter. (Ex. AA, pp. 66, 1848-1849) Giuliano met with Bergeron for approximately one hour, discussing the anonymous complaint as well as her own concerns about what she said was misinformation Bergeron had received from Plofsky during the dispute over the SEC's attempt to discipline Plofsky because of the LWV speech. (Ex. AA, pp. 70-71, 73-74)

During her conversation with Bergeron, defendant Giuliano suggested that the staff lawyers refer the PLA Letter to the Auditors of Public Accounts so that discussion at the next day's SEC meeting could be held in closed session, thereby saving the SEC and its employees from more bad publicity. (Ex. AA, pp. 48-49, 189) Bergeron then met with Sexton and Regula, and the three agreed, based on Giuliano's advice, that by walking Regula's disguised letter over to the Auditors Office, and adding a cover letter signed by themselves, the three attorneys could obtain what they have described as "whistleblower protection." (Ex. AA, pp. 56, 110, 311; Ex. DD, pp. 11-12; Ex. EE, pp.33-34; Ex. 17) A reasonable jury could find that Giuliano was aware, based on its content, that the PLA Letter had been written by Regula. Additionally, the use of the cover memo to the Auditors to request "whistleblower" status for the three attorneys ostensibly as a means of keeping the PLA Letter secret was plainly the result of Giuliano's suggestion.

Later that day, after consulting with each other about their purported ethical obligation to inform the SEC that Adler's July 23 statement that Plofsky had played no role in the release of the AG's July 7 letter was not accurate, Sexton, Bergeron and Regula contacted defendant Giuliano by telephone. The three attorneys told Giuliano that they had reason to believe that Adler's statement was not accurate, that they hoped that Plofsky would "correct the record" when the minutes of the July 23 meeting were approved at the SEC meeting the following day, and that if Plofsky did not do so then the three attorneys would provide Giuliano with a "statement" regarding that matter. (See Ex. AA, pp. 90-92, 215-216; Ex. DD, pp. 63-64; Ex. EE, pp. 36-37; Ex. 24,

Bergeron Aff., ¶¶ 10-11; Regula Aff., ¶ 14 (p); Sexton Aff., ¶¶ 9-10) Although Giuliano testified before the ERB that she did not understand that the “opportunity” to correct the record was to occur at the August 13 meeting, a reasonable jury could easily find that Giuliano’s testimony was false and that she was a knowing participant in the plan to entrap the plaintiff, just as she was the perpetrator of the scheme to use the whistleblower statute as a tool to keep the charges and evidence secret.

The minutes of the July 23 Special Meeting (Ex. 15), which were prepared by Regula and which inexplicably included Adler’s comment about the release of the AG’s letter even though it was entirely immaterial to the purpose of the meeting, were accepted during the public portion of the August 13 meeting. (Ex. 20) Since the minutes were in fact accurate, when Giuliano asked whether there were “any corrections” to the minutes, neither Plofsky nor any one else said anything. (Ex. AA, pp. 1856-1858) However, unbeknownst to Plofsky, by failing to correct the substance of Adler’s July 23 statement at that particular moment, he had fallen into defendant Giuliano’s trap. Because Plofsky did not “correct” the accurate July 23 minutes, the three staff attorneys presented Giuliano with the promised “statements”. (See, Ex. 24; Ex. AA, pp. 68, 120-121, 1364; Ex. EE, p. 43)<sup>2</sup>

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<sup>2</sup> Significantly, prior to the conclusion of the August 13 meeting, Vitarelli met with Sexton, Regula and Bergeron and discussed obtaining whistleblower protection by virtue of having brought the Regula-created PLA letter to the Auditor’s Office with their letter. (Ex. AA, pp. 261-263) Vitarelli further assisted the three attorneys in achieving “whistleblower status” by noting for the record during the public portion of the August 13 SEC meeting that, “the anonymous complaint has been referred to the Auditors of Public Accounts and...that the referring parties are entitled to certain protections under Conn. Gen. Stat. 40-61dd, and then by making a motion that “staff and counsel fully comply with the law concerning the protection of whistleblowers.” (Ex. 20)

Plofsky was in fact given no “opportunity” to correct Adler’s statement. Neither defendant Giuliano nor any of the three attorneys ever discussed the subject with him at any time, and he was not forewarned that his response to a motion to approve the accurate July 23 minutes would be subject to any particular scrutiny. (Ex. AA, pp. 93, 224-225, 229, 1845; Ex. DD, p. 65) The issue was not raised by anyone at the August 13 Commission meeting. (Ex. AA, p. 870, 1856-1857) And, neither Giuliano nor any of the other defendants ever questioned Plofsky about the accuracy of Adler’s July 23 comment. (Ex. AA, pp. 869-870, 1426, 1475, 1845) Moreover, Plofsky had previously advised Regula that Adler’s comment was not accurate, and in so doing had in effect disclosed this fact to the SEC. (See Ex. AA, pp. 1475-1481, 1844-1845)

As promised, the three affidavits were faxed to Giuliano’s office and to the State Auditors on August 18, with a cover letter signed by Eileen Duggan, Maureen Regula’s sister, who was serving as one of their lawyers. (Ex. 24; Ex. AA, p. 119) The affidavits each state, in identical language, that the affiant is not seeking Plofsky’s job, that she is “seeking whistle-blower protection,” and that she expects the SEC to “maintain the confidentiality of this affidavit and its allegations, as well as, my identity, to the fullest extent possible under the law.” (Ex. 24, Bergeron Aff., ¶¶ 52-53; Regula Aff., 11-12; Sexton Aff., ¶¶ 24-25) Duggan’s cover letter repeated these assertions, and instructed the SEC - incorrectly - that her clients’ desire for “confidentiality of [their] identities” trumped any statutory or constitutional rights Plofsky might have to be informed of the charges that had been made against him.

The affidavits described in great detail the central issue about the accuracy of Adler's July 23 statement about the release of the AG's July 7 letter, and claimed that Plofsky had an ethical obligation under the Rules of Professional Conduct applicable to lawyers to correct that statement. In addition, the affidavits contained other allegations, including regarding statements Plofsky is alleged to have made many months earlier to Cindy Cannata about the federal subpoena and the tape, which would later become part of the rationale for Plofsky's discharge. Prior to this time, neither Sexton nor Bergeron had intended to file any complaint regarding these earlier incidents with either the SEC or the Auditors. (Ex. AA, pp. 30, 287-290) Accordingly, had Plofsky, "corrected the record" at the August 13 meeting, the three attorneys would not have filed their statements, and Plofsky would not have been fired.

At the conclusion of the SEC's August 20 special meeting, Plofsky was handed a letter which had been drafted during the executive session, formally advising him that he was being placed on administrative leave "effective immediately" pending the completion of Mazzola's investigation, and instructing Plofsky that, "[d]uring the pendency of the investigation,...not to contact anyone at the agency regarding this matter, access any state records or enter the Ethics Commission Offices...." (Ex. 23)

On September 8, 2004, after a six hour closed meeting that was later found to be illegal under the FOI Act, the plaintiff was issued a Loudermill notice letter which indicated that the defendants had concluded that "it is more likely than not that you engaged in serious misconduct which is just cause for disciplinary action," and then listed the following four specific charges:

- A. Telling a staff member to lie if they were asked questions in response to a federal subpoena;
- B. Instructing a staff member to destroy the tape of a Commission meeting;
- C. Failing to inform the Commission that you directed that a letter from the Attorney General (potentially privileged) be disseminated to the Hartford Courant; and
- D. Accruing compensatory time in violation of state policies governing managerial employees.

The letter further stated that “This is a serious matter that could result in termination of your employment as Executive Director and General Counsel.”<sup>3</sup> (Ex. 32)

The next morning, September 9, the Courant published an article about the SEC’s decision and further disclosed - accurately in some respects and inaccurately in other respects - additional information about the accusations contained in the still-secret whistleblower affidavits. (Ex. BB, ¶ 22, Attachment 14) Cindy Cannata testified that because she was extremely upset when she read the article in the Courant, she met with Giuliano to explain that she was distraught over the possibility that her affidavit might be used to fire Plofsky. (Ex. AA, p. 374-375) In response to a suggestion from Giuliano, Cannata prepared a letter summarizing the concerns she had raised and delivered it to Giuliano prior to the beginning of the Loudermill hearing the following morning. (Ex. AA, pp. 375-378, 1400-1401; See Ex. 39, p. 7) Cannata’s letter concludes as follows:

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<sup>3</sup> The four charges pertained to two events related to the Rowland corruption investigation many months earlier; a practice that had been in existence for eleven years with the knowledge and consent of the SEC; and the failure to correct Adler’s July 23 statement which triggered the filing of the whistleblower statement in the first place. (Ex. BB, ¶ 21)

In summary, it troubles me that my affidavit is being used to potentially remove Mr. Plofsky from his position because it fails to consider our understanding of each other's morals and convictions. It takes statements presented in words not of my choosing, to convey the impression that Mr. Plofsky believed that I would ever destroy tapes or lie. He knew I would never do so. It fails to consider the stress this office has been under throughout this troubling year with the professional lives of many people hanging in the balance. I will not pretend to know what Mr. Plofsky's legal or ethical obligations are but I do not believe he would knowingly do something improper.

(Ex. 39, p. 7)

The Loudermill hearing was conducted on September 10, 2004, was attended by defendants Guiliano, Vitarelli, Smith, O'Connor, Collins and Pearl, was broadcast live on CT-N and was transcribed verbatim. (Ex. 33; Ex. 34) After hearing statements from the plaintiff and his counsel, the defendants took a very brief recess and then voted on two separate motions made by Vitarelli, the end result of which was the decision to terminate Plofsky's employment. The defendants did not engage in any deliberations or consultations as to either motion, the only "discussion" being brief, conclusory, self-serving comments made by defendants Vitarelli, Pearl, and Collins. (Ex. 34, pp. 87-89, 93-98) The decision was based on what the defendants described as "the record" which consisted entirely of Mazzola's oral report provided at the September 8, 2004 illegal Special Meeting along with Plofsky's statement from earlier in the September 10 meeting. (Ex. 34, pp. 87, 89-93, 33-53) Later that day, Giuliano sent a letter to Plofsky confirming that the SEC had "determined that there was reasonable cause to dismiss you from state service," for "engaging in activity which is detrimental to the best interests of the agency or the state," and that the dismissal would be effective at the close of business on September 24, 2004. (Ex. 35)

G. A Reasonable Jury Could Find that the Plaintiff's Protected Activity was a Motivating Factor in the Defendants' Decision to Terminate His Employment

The causation question is an issue of fact for the jury; the question on summary judgment is simply whether the record evidence would permit a reasonable jury to find that the plaintiff's First Amendment-protected speech and conduct was a motivating factor in the defendants' decision to terminate his employment. See, Feingold, 366 F.3d at 160; Mangifico, 358 F.Supp.2d at 28. It is beyond cavil that a jury could find that the defendants had animosity towards Plofsky as a result of his exercise of his First Amendment rights. On July 23, 2004, before finally settling the dispute over the LWV disciplinary matter, the defendants orchestrated a forum to give themselves an opportunity to make public statements in response to the critical comments that had been made by the plaintiff's counsel and others in the press. Indeed, when Adler sought to respond to defendant MacGill's diatribe about the AG's letter, defendant Giuliano made the following telling statement:

May the record reflect Mr. Adler that you have already made several comments to the press with respect to that meeting and this is the first opportunity the Commission has to respond to the comments you have made to the press.

(Ex. BB, ¶ 16) It can be inferred from this statement that, even on the day they were set to settle the dispute over the LWV speech disciplinary issue, the defendants remained perturbed about the plaintiff's decision to defend himself against the charges and the public comments that were made on his behalf and which were reported in the press. The defendants' attitude of animosity toward the plaintiff had begun almost immediately after the July 7, 8 and 9 Hartford Courant articles, and the first public

meeting after those news reports were published was fraught with tension. Conflict which only got worse during the course of that meeting when the plaintiff asserted the requirement that the defendants' discussions about hiring counsel be held in public session, a request that the defendants chose to ignore and in so doing blatantly violated the FOIA. (Ex. A, p 42; BB, ¶¶ 11, 12; Ex. B, pp. 29-30; Ex. 20; Ex. AA, pp. 1863, 1348-1352, 1464-1467)

The causal connection between the plaintiff's First Amendment protected activity can be established in several different ways. First, and most directly, the record evidence establishes that had Plofsky not chosen to retain counsel and defend himself against the LWV speech disciplinary matter, the principal attorneys would not have filed their whistleblower complaints, and there would have been no charges for the defendants to have investigated. Bergeron, Sexton and Regula all testified that their central concern was about Plofsky's failure to correct Adler's statement at the July 23 meeting regarding the dissemination of the AG's July 7 letter to the Hartford Courant, that they made a pact with defendant Giuliano on August 12 to the effect that if Plofsky failed to correct the record when the accurate minutes of the July 23 meeting were submitted for approval on August 13 they would provide statements, and that had he done so, they would not have submitted any statements and thus none of the four charges that provided the basis for Plofsky's discharge would have ever come before the SEC for consideration. (See, Rule 56(a)2 Statement, ¶¶ 46-48, 52) Thus, had the plaintiff not engaged in protected activity, there would have been no exposure of the SEC's unlawful actions, the AG's July 7 letter would never have been written, and there

could not have been any public statement by Adler to be corrected. In the most fundamental sense, the plaintiff's protected speech and conduct literally caused his discharge.

In addition, a reasonable jury could find that the appearance of the whistleblower affidavits on the SEC's door step less than four weeks after the LWV speech controversy had been resolved was not a random act, but was the product of the knowing participation and involvement of defendant Giuliano, and possibly defendant Vitarelli. A jury could find that Giuliano had knowledge that the anonymous PLA letter was written by Regula, that Giuliano encouraged the attorneys to bring that letter to the State Auditors for the purpose of keeping the matter secret, that Giuliano advised the three attorneys that by putting a cover memo in front of the PLA letter they themselves could gain "whistleblower protection," and, most importantly, that Giuliano fully participated and implemented the trap that was laid for Plofsky at the August 13 meeting which inevitably led to the filing of the so-called whistleblower statements. (See, Rule 56(a)1 Statement, ¶¶ 43-48) But for the involvement of Giuliano in the August 13 set up over the absurd failure to correct the accurate minutes of the July 23 meeting, no complaint would ever have been filed over the comments to Cindy Cannata that had occurred months earlier regarding the subpoena for Rowland's SFI and the meeting tape, nor would there ever have been any controversy over Adler's statement if Giuliano or one of the other Commissioners had simply questioned Plofsky directly.

Finally, the record is replete with circumstantial evidence from which a reasonable jury could find that the reasons given by the defendants for their decision to

discharge the plaintiff were pretextual. See Dillon, 497 F.3d at 252-253. For example:

(1) The primary charge - failing to correct Adler's July 23 statement - is based on a fundamentally unfair and deceptive chain of events which deprived the plaintiff of any meaningful opportunity regarding either what had occurred on July 7 or his reasons for not approaching the SEC directly to correct Adler's statement. Plofsky had in fact acknowledged the inaccuracy in Adler's comment to Regula who was acting as an intermediary on behalf of the SEC and who had regular direct communications with Giuliano. Despite knowing of this information prior to August 13, Giuliano elected not to ask Plofsky directly about the subject, but instead stood silently when Plofsky failed to correct the accurate minutes, knowing that statements against Plofsky would then be forthcoming. Moreover, the letter itself was in fact subject to disclosure under the FOI Act, and the legal argument that Plofsky had an obligation under the Rules of Professional Conduct was simply absurd;

(2) With respect to charges 1 and 2 - "telling a staff member to lie if they were asked questions in response to a federal subpoena" and "Instructing a staff member to destroy the tape of a Commission meeting" - these were based on isolated conversations that had occurred many months earlier and were not sufficiently serious to have been brought to the SEC's attention by anyone at the time they had occurred. Neither of these incidents had ever been brought to Plofsky's attention. The recipient of the comments, Cindy Cannata, described them as offhand, hypothetical comments made out of frustration, taken out of context in an affidavit that used words not of her choosing, and said they were not directives or orders. Moreover, Cannata provided a memo to Giuliano explaining that she objected to her affidavit being used to try to fire Plofsky and attesting to the fact that the plaintiff knew she would not

have destroyed a tape or lied, and that she did not believe that Plofsky would knowingly do something improper. Finally, no tape was ever destroyed, no one ever lied under oath, and the defendants failed to take into consideration the highly tense and pressured atmosphere under which the comments were made or the relationships between the individuals involved; (3) Charge No. 4 - "accruing compensation time in violation of state policies governing managerial employees" - was based on a compensation time accrual practice that had been in effect, with the knowledge and consent of the SEC, for 14 years, and as to which the plaintiff was never questioned by any of the defendants prior to using it as a basis for discharging him; and (4) The defendants failed to provide the plaintiff with any of the evidence (or even a summary of that evidence) that it considered, failed to provide him with minimum pre-disciplinary due process protections, and essentially made the decision to proceed with disciplinary action during the course of a meeting that was held in closed session in violation of Connecticut's FOI Act. (See, Rule 56(a)2 Statement, ¶¶ 38, 40, 41-52, 61-65, 67; Ex. 52, pp. 19-26)

For all of the foregoing reasons, it is abundantly clear that a reasonable jury could find that the plaintiff's First Amendment protected speech and conduct was a motivating factor in the defendants' decision to terminate Plofsky's employment.

#### H. The Pickering Balance Test Does Not Favor the Defendants

If the plaintiff establishes a *prima facie* case of First Amendment retaliation, then the court must determine whether the employer was justified in taking action against the plaintiff. Connick, 461 U.S. at 149. The government, as the employer, bears the

burden of justifying its adverse employment action. Piscottano, 511 F.3d at 271. It may do so by showing by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected speech. Morris, 196 F.3d at 110; Mandell, 316 F.3d at 382. Or in the alternative, the government may show that the plaintiff's speech was likely to disrupt the workplace and that the potential disruption was sufficient to outweigh the First Amendment value of the plaintiff's speech. Locurto, 264 F.3d at 166; Mandell, 316 F.3d at 382-383. If the government relies on the latter showing and the balance of interests tips in favor of the government, a plaintiff may still succeed by proving that the adverse action was in fact motivated by retaliation rather than by fear of disruption. Locurto, 264 F.3d at 166; Mandell, 316 F.3d at 383.

In order to assess the extent to which a state may regulate the speech of its employees, the court<sup>4</sup> must balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Morris, 196 F.3d at 109-110, citing Pickering, 391 U.S. at 568. Moreover, the employer's burden varies depending upon the nature of the employee's expression. Connick, 461 U.S. at 150; Giacalone v. Abrams, 850 F.2d 79, 86 (2d Cir. 1988). "A stronger showing may be necessary if the employee's speech more substantially involved matters of public concern." Connick, 461 U.S. at 152. For instance, "[a]n employee's charge of unlawful conduct...is given far greater weight in the balancing

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<sup>4</sup> Because the inquiry into the protected status of speech is one of law, not of fact, "it is the court's task to apply the [balancing test] to the facts." Lewis, 165 F.3d at 164; Waters v. Churchill, 511 U.S. 661, 668 (1994) (plurality opinion).

exercise than is a complaint as to the fairness of internal office operations.” Vasbinder, 926 F.2d at 1339. The employer does not meet its burden “if there is no demonstrated nexus between the employee’s speech and the employer’s operations. Where there is no such nexus, the state’s interest as an employer is not implicated, and restrictions on the employee’s speech will be subjected to the same scrutiny given to restrictions imposed on citizens’ speech by the state as sovereign.” Piscottano, 511 F.3d at 271, citing United States v. National Treasury Employees Union, 513 U.S. 454, 465-466.

Because the Pickering balancing test is an affirmative defense, the question on summary judgment is whether a reasonable trier of fact would be compelled to find that the adverse employment action was taken because of the likelihood that the plaintiff’s speech would disrupt the workplace and that the potential disruption is so powerful as to outweigh the First Amendment value of the speech. The defendants argue that their “interest in carrying out their duties as members of the SEC greatly outweigh any interest the plaintiff might have in objecting to a proposed suspension.” This argument is both doctrinally and factually flawed. First, the defendants contend that the decision to discharge Plofsky was based solely on the charges made against him by his subordinates, and thus entirely unrelated to the speech and conduct he engaged in while defending himself as to the LWV speech discipline issue. In such circumstances, the defendants cannot contend as a factual matter that they fired him because of the potentially disruptive impact of his speech - the Pickering test is simply inapplicable. See, Pickering, 391 U.S. at 569; Vasbinder v. Ambach, 926 F.2d 1333, 1340 (2d Cir. 1991); Latessa v. New Jersey Racing Comm., 113 F.3d 1313, 1321 (3rd Cir. 1997).

Second, there is simply no record evidence that would require a finding that Plofsky's protected activity caused any disruption to the business of the SEC. The "proceedings" that are cited as being potentially disrupted regarding former Governor Rowland were no longer pending at the time this controversy arose. Rowland had announced his resignation a week before the defendants tried to discipline Plofsky for the LWV speech, and he had left office by the time the plaintiff notified the defendants that he was planning to defend himself against that charge. (Rule 56(a)2 Statement, ¶¶ 16, 18) Moreover, the only adverse impact that occurred as a result of Plofsky's exercise of his First Amendment rights came in the form of highly critical public comments by numerous public figures and the state's largest newspaper about the SEC. To the extent that public outcry was disruptive, it was caused by the improper and unlawful actions of the defendants that were exposed when the plaintiff elected to defend himself, not by Plofsky's protected speech and conduct. Finally, if the defendants' novel theory was adopted, the right of a public employee to defend himself against formal charges would be eviscerated whenever the proposed disciplinary action is itself a matter of public interest.

III. The Defendants' Motion for Summary Judgment on the Plaintiff's Due Process Claim Must Be Denied

A. Elements of the Plaintiff's Due Process Claim

The Due Process Clause of the Fourteenth Amendment provides that certain substantive rights - "life, liberty or property" - cannot be deprived except pursuant to constitutionally adequate procedures. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 541 (1985) (hereinafter "Loudermill"); U.S. Const. amend. XIV. The right to

due process “is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.” Loudermill, 470 U.S. at 541, citing Arnett v. Kennedy, 416 U.S. 134, 167 (Powell, J. and White, J., concurrences).

Where, as here, a public employee alleges a deprivation of property without due process, the court must make two inquiries: (1) whether the plaintiff possessed a protected liberty or property interest, and if so, then (2) whether the plaintiff received the process that was due before being deprived of that interest. Harhay v. Town of Ellington Board of Educ., 323 F.3d 206, 212 (2d Cir. 2003). A public employee who has a right not to be fired without good or just cause has a “property interest in his employment that qualifie[s] for the protections of procedural due process.” Otero v. Bridgeport Housing Authority, 297 F.3d 142, 151 (2d Cir. 2002), citing Loudermill, 470 U.S. at 538-542. The defendants admit that the plaintiff had such a constitutionally protected property interest in his job with the SEC, Def. Memo at 23, and therefore that the Due Process Clause applies before he can be deprived of that interest; “the question [that] remains [then, is] what process is due.” Loudermill, 470 U.S. at 541.

The Supreme Court has described “the root requirement” of the Due Process Clause as being “that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest” and has explained, that principle requires “some kind of a hearing” prior to the discharge of an employee who has a constitutionally protected property interest in his employment. Id. at 542 (internal

citations omitted) (emphasis in original); Ciambriello v. County of Nassau, 292 F.3d 307, 321 (2d Cir. 2002). Under Loudermill, a pre-termination hearing, “though necessary, need not be elaborate...the formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.” 470 U.S. at 545. “[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” Ciambriello, 292 F.3d at 319, citing Matthews v. Eldridge, 424 U.S. 319, 334 (1976). Similarly, a pre-termination hearing “need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions—essentially a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.” Id. at 545-546. See also, O’Connor v. Pierson, 426 F.3d 187, 198 (2d Cir. 2005); Locurto v. Safir, 264 F.3d 154, 173-174 (2d Cir. 2001). While a public employee’s pre-termination hearing under Loudermill need not approach the level of a “full adversarial evidentiary hearing...due process does require that before being terminated such an ‘employee [be given] oral or written notice of the charges against him, *an explanation of the employer’s evidence*, and an opportunity to present his side of the story.’” Otero, 297 F.3d at 151 (emphasis in original), citing Loudermill, 470 U.S. at 546; Saltarella v. Town of Enfield, 427 F.Supp.2d 62, 73 (D. Conn. 2006), aff’d, 227 Fed. Appx. 67 (2d Cir. 2007); Todaro v. Norat, 112 F.3d 598, 599 (2d Cir. 1997); Levesque v. Town of Vernon, 341 F.Supp.2d 126, 134 (D. Conn. 2004).

In Otero, the plaintiff, a former city employee, was terminated for allegedly stealing a toilet and claimed that her due process rights were violated because she had not been provided with any explanation about the “substantial evidence” upon which the employer based its decision prior to her termination. 297 F.3d at 144, 146. In explaining that the district court had not properly applied the principles announced in Loudermill, the Second Circuit reasoned that “rather than noting that Otero was entitled to ‘an explanation of [the defendant’s] evidence...the district court stated only that she must be provided with ‘some semblance’ of the evidence...Merely presenting ‘some semblance’ of the evidence, however, does not necessarily afford the accused an adequate opportunity to present her side of the story.” Id. at 151 (internal citations omitted). The court then cited specific examples of testimony that the plaintiff might have offered, “had she been shown” particular pieces of evidence. Id. at 151-152. As the Second Circuit emphasized, “[m]ere notice of the charge...is not an explanation of the evidence,” it should not be “equated...with disclosure of the evidence” against the accused employee and it “does not necessarily suffice to provide due process.” Id. at 152; Saltarella, 427 F.Supp.2d at 73. The Court of Appeals reversed the District Court’s grant of JMOL, concluding that because the jury could have found that the plaintiff was “given little more than a day to prove a negative, and to do so without being informed of [the defendant’s] evidence of the affirmative,” there was no basis for dismissing the plaintiff’s due process claim. 297 F.3d at 153-154.

In Levesque v. Town of Vernon, the court further recognized that where a plaintiff can establish that a pre-termination hearing is “a sham” because the result was pre-

ordained, then the pre-termination hearing “could run afoul of the Fourteenth Amendment.” 341 F.Supp.2d at 134-135. “Due process requires that, prior to termination, an employee be given the chance to tell her side of the story, and that the agency be willing to listen. Otherwise, the ‘opportunity to respond’ required by Loudermill is no opportunity at all.” Id. at 134, citing Ryan v. Illinois Dept. of Children and Family Services, 185 F.3d 751, 762 (7<sup>th</sup> Cir. 1999) and Wagner v. City of Memphis, 971 F.Supp. 308, 318-319 (W.D. Tenn. 1997) (stating that, where the result of a pre-termination hearing had been predetermined, “the concerns and goals of the pre-termination hearing as set forth in Loudermill have not been met”).

B. Facts Relevant to Due Process Claim

After receiving the affidavits from the three staff attorneys as promised, Giuliano discussed them with Linda Yelmini, and called a special meeting for August 20. (Ex. AA, pp. 1304-1305) At the outset of the meeting, Vitarelli made a motion to go into executive session for the purpose of discussing a whistleblower complaint with Yelmini and the members of the SEC. (Ex. 21) In response to Plofsky’s inquiry as to the subject matter of the complaint, Yelmini stated only that “it was a whistleblower complaint regarding certain misconduct of Commission employees.” Plofsky then requested a copy of “a redacted complaint eliminating the name of the complainant;” and Yelmini indicated that this request would be considered. (Id.; Ex. AA, p. 1867) During the approximately four hour executive session which ensued, defendants Giuliano, Vitarelli, Smith, O’Connor, Collins, Pearl, Storms and MacGill discussed the three affidavits. (Ex. AA, pp, 916-919)

When the SEC returned to public session, three motions made by defendant Vitarelli were passed. First, the so-called “whistleblower complaints” were referred to Alan Mazzola for investigation, with a request that Mazzola prepare a response within 15 days and report his findings to the SEC. Second, Plofsky was put on paid administrative leave for a period of up to 15 days pending the results of Mazzola’s investigation. And, third, Plofsky’s request for a redacted version of the complaint(s) was denied “in view of the fact that the Commission will not be able to redact the document sufficiently to prevent the disclosure of the identity of the individuals” who had brought forward the complaints. (Ex. 21)

By this time, Plofsky was well aware that the three staff attorneys were the source of the complaint that had been made against him to the SEC. (See Ex. AA, pp. 1969-1970) Indeed, given the circumstances that had transpired since August 12, any reasonable person would have surmised that Sexton, Bergeron and Regula were the authors of the so-called whistleblower complaint, a fact that was reluctantly acknowledged by defendant Vitarelli during cross examination before the ERB. (See Ex. AA, pp. 923-927) Accordingly, the defendants’ reliance on a purported need to protect the confidentiality of the whistleblowers as the basis for refusing Plofsky’s request for a copy of the redacted complaint was absurd from the outset.

Then, on August 31, 2004, while Plofsky was still on administrative leave and while Mazzola was conducting his investigation, the Courant published an article which revealed, publically, that Sexton, Begeron and Regula had filed the “confidential statements” that were being investigated by the SEC, and referenced the substance of

the pivotal allegation they had made regarding Adler's July 23 comment about the release of the AG's July 7 letter. (Ex. 26) The three staff attorneys did not deny the accuracy of the Courant's report, but instead, their counsel faxed a letter to Governor Rell, Attorney General Blumenthal, the Chief State's Attorney, the Auditors of Public Accounts, Yelmini and Giuliano, in which they expressed dismay over the release of their identities to the Hartford Courant, and, revealingly, complained that "the release of substantive information directly taken from the statements...only serves to provide the person(s) implicated in those statements the opportunity to prepare a defense prior to being interviewed in any investigation." (Ex. BB, ¶¶ 17, Attachment 11)

After the publication of the identities of Plofsky's accusers on August 31, Adler faxed a letter to Mazzola requesting that Plofsky be provided with "a list of the specific allegations that have been made against him" in advance of their September 2 interview. (Ex. BB, ¶ 19, Attachment 13) After consulting with Yelmini, Mazzola denied Plofsky's request relying entirely on the fact that the "allegations came to light from whistleblower(s) whose identity is protected under C.G.S. Section 4-61dd." (Ex. 27; Ex. AA, p. 515) This was the second time the SEC refused Plofsky's formal request for information related to the substance of the allegations that had been made against him notwithstanding the fact that the true identities of the so-called whistleblowers was known to virtually the entire state of Connecticut.

The defendants assert that in her capacity as counsel to the SEC, Yelmini had "numerous conversations" with top officials at the OAG before August 20 and "was instructed that she could not disclose either a redacted or a full version of the

whistleblower affidavits,” and that she so advised the defendants. (Rule 56(a)1 Statement, ¶ 46) However, according to the OAG, the first communications between representatives of that office and Yelmini regarding this subject did not occur until September 8, 2004, and an in-person meeting to discuss possible disclosure of the statements with Yelmini and top officials from the OAG did not take place until September 23. (Ex. CC, Response No. 12) Moreover, the OAG indicated that “there is no record or recollection of any conversations between [the OAG] and Linda Yelmini concerning the issue of whether Mr. Plofsky was entitled to, or could, obtain copies of the whistleblower complaints prior to the [SEC] making a decision to discipline him and/or subjecting him to a Loudermill hearing,” and that any such conversations “most likely” did not occur prior to the September 10 Loudermill hearing. (Id.)

Mazzola presented his investigation report at the SEC’s September 8 Special Meeting which was noticed for the purpose of “consideration and possible action in open and executive session of investigation of confidential complaints pursuant to Connecticut General Statutes Section 4-61dd.” (Ex. 31, ¶ 6) Defendants Giuliano, Vitarelli, Smith, O’Connor, Collins and Pearl as well as Mazzola and Yelmini all attended the meeting. (Ex. 30) The defendants precluded the plaintiff and the public from observing the proceedings of this meeting based upon the purported necessity of protecting the confidentiality of the whistleblowers.

All substantive discussions concerning the allegations against Plofsky took place in closed session and all evidence considered by the defendants remained secret. (Ex. 31, ¶ 18; Ex. BB, ¶ 20) Throughout the six hour meeting, Mazzola explained his

“findings,” handed out various documents to supplement the affidavits which the Commissioners already had, and answered numerous questions from the SEC members. The SEC members accepted Mazzola’s report “substantiating” the four charges considered to be most significant, concluded that serious disciplinary action or perhaps termination was warranted, and with the assistance of Yelmini, they fashioned the exact wording of the charges that would appear in the Loudermill notice. (See Ex. AA, pp. 462-463, 478-486, 489-492, 645-653, 714-719, 782-783, 904, 908)

Immediately thereafter, in open session, the SEC voted to authorize defendant Giuliano to draft a pre-disciplinary Loudermill notice advising Plofsky of the four charges as agreed upon during the executive session. (Ex. 31, ¶¶ 9, 26) As a result, Giuliano and Yelmini prepared the September 8, 2004 Loudermill notice letter that was delivered to Plofsky’s counsel. (Ex. 32)

This September 8, 2004 meeting was subsequently found by the FOIC to be illegal. (Ex. 31) Specifically, the FOIC held that the Whistleblower Act empowers only the Auditors and Attorney General to conduct investigations, and does not authorize investigations of misconduct by the agency that employs the official concerned, that if the employing agency decides to pursue its own investigation for purposes of considering disciplinary action, it must do so in accordance with the applicable personnel policies and procedures and the open meeting laws. The FOIC further found that even if the Whistleblower Act could be read as authorizing investigations by the employing agency, that statute’s confidentiality provisions do not govern the “independent investigation, report and conclusions” of such an investigation because

“[t]o conclude otherwise would be to vitiate the due process required in disciplinary proceedings....” (Ex. 31, ¶¶ 23, 25) In other words, the confidentiality provisions of the Whistleblower Act do not trump an employee’s statutory or constitutional rights. Additionally, the FOIC found that “a public airing” of Mazzola’s oral report would not necessarily have required disclosure of the identities of the persons who filed the complaints under §4-61dd, and that Mazzola’s report did not constitute discussion of complaints brought to the Auditors pursuant to the Whistleblower Act, “but rather constituted discussion of [Plofsky’s] employment and performance within the meaning of §1-200(60(a))” of the FOIA. (Ex. 31, ¶¶ 27, 28) The FOIC thus concluded that the SEC violated Plofsky’s rights under Conn. Gen. Stat. §1-200(6)(A) to require that the discussion of Mazzola’s report be held in open session. (Ex. 31, ¶ 29)

The Loudermill hearing commenced with brief remarks by Giuliano and Yelmini describing the nature of the proceeding, followed by a recitation by Mazzola of the four charges as listed in the September 8 Loudermill notice letter, as well as the potential disciplinary action. (Ex. 34, pp. 1-6) Mazzola concluded as follows:

This is your opportunity to speak to the Commissioners who will be considering the evidence and what you have to say here today. So I will turn the hearing over [to] you to say - - give us your side of the story and anything that you need to say before the Commissioners take action, if they decide to do that at all.

(Ex. 34, pp. 6-7)

After Plofsky’s counsel objected to the defendants’ refusal to provide any information about the evidence relied upon by the SEC, Mazzola clarified one of the four charges because the allegation had been mis-characterized in a Hartford Courant editorial published that morning. (Ex. 34, pp. 7-33) Plofsky then responded to the

formal charges notwithstanding the fact that he had not been provided with any description or explanation of the evidence considered by the defendants despite his having repeatedly requested that information over the course of the previous three weeks. (See Ex. 34, pp. 33-53) Indeed, Plofsky had been denied access to the substance of the allegations and the evidence relied upon for the charges; he was not provided with redacted or unredacted versions of the whistleblower complaints, a summary of the information contained in those statements, or the affidavits that Mazzola obtained during his investigation. (Ex. A, p. 109)

When Plofsky finished, Mazzola indicated that he intended to review his “findings.” (Ex. 34, pp. 53-54) After a brief colloquy between Adler and Mazzola, Yelmini clarified that Mazzola was only noting, in response to Plofsky’s remarks, that there were substantial differences between Plofsky’s statement and the results of Mazzola’s investigation. (Ex. 34, p. 55) The Commissioners then decided to go into their deliberations, at which time defendant Giuliano announced that there would be “a very brief recess ....” (Ex. 34, p. 56)

Upon returning from that recess, in response to two motions made by Vitarelli, the SEC voted to terminate Plofsky’s employment. There were no deliberations or consultations with respect to either motion, the only “discussion” being brief, conclusory, self-serving comments made by defendants Vitarelli, Pearl, and Collins. (Ex. 34, pp. 87-89, 93-98) The decision was based on what the Commissioners described as “the record” which consisted entirely of Mazzola’s oral report provided at the September 8, 2004 illegal Special Meeting along with the statement that Plofsky had presented earlier

in the meeting. (Ex. 34, pp. 87, 89-93, 33-53) A reasonable jury could easily find that the defendants, either collectively or individually, effectively decided to discharge the plaintiff during the course of the September 8 illegal closed session, and that they did not engage in any good faith consideration of the issues raised by Plofsky during his remarks at the September 10 Loudermill hearing. Giuliano later sent Plofsky confirmation that the SEC had “determined that there was reasonable cause to dismiss you from state service,” for “engaging in activity which is detrimental to the best interests of the agency or the state,” and that the dismissal would be effective at the close of business on September 24, 2004. (Ex. 35)

Plofsky testified that had he been provided with access to the whistleblower affidavits prior to his statement to the SEC at the September 10 Loudermill hearing, the presentation that he and his lawyer made would have been completely different. When he appeared before the defendants on September 10, Plofsky did not understand that the lynchpin to the entire proposed disciplinary action was Charge No. 3 - failing to inform the SEC that he had “directed that” the AG’s July 7 letter be disseminated to the Courant, he was not aware that the evidence for this charge involved his “failure to correct Adler’s July 23 statement” when the minutes were approved on August 13, he did not know that this allegation was premised on the Connecticut Supreme Court’s recent decision in Daniels v. Alandar, 268 Conn. 320 (2004), which was clearly inapplicable, and he had no knowledge of the fact that the three staff attorneys and defendant Giuliano had discussed this subject on August 12, during which conversation they had agreed that statements would be submitted in the event Plofsky chose not to

“correct the record” at the August 13 meeting. Plofsky was not aware that the evidence behind this failure to disclose charge comprises about 80 percent of the three statements, nor could he have known that the entire chain of events that led to his discharge was based upon a single remark made by his counsel regarding the public dissemination of the AG’s letter and his alleged failure to correct that statement despite never having been asked to do so and despite the fact that he had disclosed his role in the release of the letter to Attorney Regula who was at that time acting as a representative of the SEC and communicator with Giuliano. (See Ex. A, pp. 114-120) All of this information was contained in the whistleblower affidavits and none of it was disclosed to Plofsky or his counsel at any time before the defendants voted to terminate his employment. In addition, Plofsky had not seen the affidavits Mazzola had prepared for Cannata or Mathieu, the letter that Cannata gave to Mazzola in which she indicated that she felt the affidavit could be misleading, the more detailed letter that Cannata provided to defendant Giuliano prior to the beginning of the Loudermill hearing, nor any of the State Personnel Policy documents that were handed out by Mazzola during the September 8 closed meeting with respect to the compensation time issue. (Ex. 10; Ex. 24, pp. 6-7)

Had Plofsky had access to the information described above, he would have been able to discuss at the September 10 Loudermill hearing a number of issues that he did not raise because he had not been provided with an explanation of the evidence that had been considered by the defendants, including: (1) He could have pointed out that the Commissioners had before them evidence that Plofsky had acknowledged to

Regula, who was acting as a representative of the SEC, that he had played a role in the decision to release the AG's July 7 letter to the Hartford Courant; (2) He could have explained that he did not approach the Commissioners directly regarding Adler's July 23 comment because he felt that the conflict about the LWV speech had been resolved and that further discussion of that issue would not have been productive or useful; (3) He could have explained that he did not address Adler's comment at the August 13 meeting because the minutes were accurate and the only issue raised by Giuliano was whether there were "any corrections to the minutes;" (4) He could have emphasized that none of the defendants ever questioned him about the accuracy of Adler's July 23 comment despite the fact that Giuliano had been made aware prior to August 13 that Adler's statement was not accurate and that Plofsky had admitted that fact to Regula; (5) He could have pointed out to the SEC and the public that Giuliano had conspired with the three whistleblowers on August 12 to set him up on August 13, and that no one let him know that the approval of the minutes had been determined to be his "opportunity" to correct the record; (6) He could have pointed out to Giuliano and to the other Commissioners that other than his conversation with Regula during which he acknowledged that Adler's comment was not accurate, none of the three whistleblowers ever talked with him about the subject or provided any "opportunity" to correct the record; (7) He could have alerted the defendants to the fact that Charge Nos. 1 and 2 related to events that had occurred months earlier that were not considered sufficiently significant for Bergeron or Sexton to have reported either incident to the SEC at the time they occurred; (8) He could have established that the only reason those matters were ever brought forward was that he had failed to "correct the record" when the July

23 minutes were approved at the August 13 meeting; and (9) He could have pointed out that Cannata felt her original affidavit was misleading, that she knew that he knew she would never destroy a tape or lie about a subpoena, and that she did not believe Plofsky would ever knowingly do something improper. (Ex. BB, ¶ 23)

On September 23, 2004, the attorney retained by Cindy Cannata and Brenda Lou Mathieu faxed to Yelmini and Adler copies of new affidavits prepared by his clients. (Ex. 39) The next day, September 24, Adler requested that the SEC reconsider its decision to terminate Plofsky's employment because: 1) The decision was based upon incomplete and misleading information; words taken out of context and without regard to intent or circumstances; 2) Mazzola's investigation was fundamentally flawed; 3) Mazzola's instructions to witnesses that they were precluded from discussing the matter interfered with their First Amendment rights; 4) The September 8 Special Meeting was an illegal meeting because the Ethics Commission failed to comply with Conn. Gen. Stat. § 1-200(6); and 5) The September 10 Loudermill hearing trampled Plofsky's basic due process rights, including the SEC's "failure to deliberate for even one minute" after hearing Plofsky's response to the specific charges. (Ex. 40, p. 3) Adler's letter also requested that Plofsky be reinstated so as to "permit the newly constituted Commission to review this entire matter and make an appropriate determination on whether or not to impose discipline based on a more complete and reliable record," explaining that: "The decision should be made on a clean slate, in public, and without the participation of any Commissioners who may be biased against Mr. Plofsky." (Ex. 40, p. 2)

Giuliano announced that she was resigning from the SEC the same day, and MacGill was selected to replace her as Chairperson, but the SEC's only response to Adler's request for reinstatement, was to schedule a Special Meeting for September 29 - the day before the terms of Vitarelli and Smith were to end. (See Ex. AA, p. 807) The September 29 meeting was attended by defendants Vitarelli, Smith, O'Connor, MacGill, Storms and Pearl, along with the two new Commissioners who had been appointed by Governor Rell - George Springer and Tracy Rich. (Ex. 42)

Although the September 29 meeting was ostensibly scheduled to consider Adler's request for reconsideration, the defendants ignored and thereby implicitly rejected the essential element of the request: That the matter be reconsidered by the "newly constituted Commission" so that the action could be reviewed on a clean slate and without the participation of the three Rowland appointees. The defendants' rationale for denying Plofsky's request that the issues raised in the September 24 letter be addressed by the newly constituted SEC was that delaying the meeting for a few days would be more prejudicial to Plofsky than having the matter considered by the same individuals who had voted to fire him earlier that month. (See Ex. 44, p. 3) As a result, both Vitarelli and Smith participated fully (Ex. 44, pp. 6-8, 16-18), while the two new Commissioners - Tracy Rich and George Springer - abstained from the vote because they had not had sufficient time to study the materials. (Ex. 44, pp. 6-8, 16-18, 95-97)<sup>5</sup> Thus the decision to reaffirm was made by the same group who had previously

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<sup>5</sup> Although formally abstaining, Commissioner Springer did state that based on the information he had seen, he was "not persuaded the way the commissioners were persuaded," and that "right now if I was so inclined [to vote] I would not believe that the

voted to fire Plofsky except that defendants MacGill and Storms, who had not been present on September 10, participated while defendant Giuliano did not.

The sole purpose of the September 29 meeting was to allow an opportunity for Mazzola to describe in public the detailed “findings” which had been discussed in secret for six hours on September 8 in an attempt to restore the SEC’s badly damaged public image. This effort was facilitated by Sexton, Bergeron and Regula who apparently decided to “waive” their purported right to anonymity and agreed that redacted versions of their affidavits could be released to the public. As a result, on September 27, Yelmini provided copies of the redacted affidavits to Plofsky’s counsel, who vigorously disputed Yelmini’s statement that “It is my understanding that this satisfies your request for the statements which you previously forwarded to me.” (Ex. AA, pp. 1852-1854; Ex. 43; Ex. BB, ¶ 25, Attachment 16)

When Adler asked to address those affidavits at the September 29 meeting, defendant MacGill refused because the scope of the reconsideration had been limited “to the bearing of the new affidavits [from Cannata and Mathieu] on” the SEC’s decision “that there was substantial evidence that Mr. Plofsky had committed the acts with which he was charged.” (Ex. 44, pp. 3-6, 63) Accordingly, neither Plofsky nor his counsel was given an opportunity to respond to or otherwise comment upon the factual allegations contained in the three whistleblower statements that had been provided to them for the first time just two days earlier.

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punishment was justified.” (Ex. 44, pp. 96-97)

C. A Reasonable Jury Could Find that the Defendants Violated the Plaintiff's Pre-Disciplinary Due Process Rights

There are three fundamental elements required for a pre-disciplinary due process hearing to be adequate under Loudermill: (1) Notice of the charges being made against him; (2) An explanation of the employer's evidence; and (3) An opportunity to present his side of the story. 470 U.S. at 546; Otero, 297 F.3d at 151. It is axiomatic that to be meaningful, each of these rights must be afforded to the employee before the employer makes a decision to proceed with disciplinary action. See, Loudermill, 470 U.S. at 542; Ciambriello, 292 F. 3d at 321; Levesque, 341 F.Supp.2d at 134-135. On September 8, 2004, the plaintiff did receive a letter notifying him of the four charges that the SEC was considering as a potential basis for disciplinary action. It is undisputed that this letter did not include any summary of the evidence that the defendants had been considering. It is further undisputed that the plaintiff was aware that three of his subordinates had provided the SEC with affidavits which constituted the primary evidence considered by the SEC, that Plofsky had repeatedly requested either redacted copies of those statements, or a summary of the evidence contained therein for three full weeks prior to the September 10, 2004 Loudermill hearing, and that the plaintiff's requests for that information had been repeatedly and unequivocally refused. It is also beyond dispute that the defendants also considered affidavits obtained from two other SEC employees, Mathieu and Cannata, along with documents relating to State Personnel Policies, and that the plaintiff was also not provided with any summary of that evidence. The record also supports a finding that the evidence against the plaintiff was considered in great detail

during the six hour September 8, 2004, meeting which was later found to have been illegal, having been conducted in a closed session instead of in public. Finally, it is undisputed that as of the time the plaintiff was permitted his opportunity to present his side of the story at the September 10 Loudermill hearing, he had not been given access to the evidence. As a result, the defendant made sure that his opportunity to respond was anything but “meaningful.” There could not be any clearer violation of a public employee’s pre-disciplinary due process rights. The defendants’ motion for summary judgment must therefore be denied.

The primary defense raised in response to the due process claim is the assertion that the defendants did not disclose the whistleblower affidavits to the plaintiff because the three authors of those statements were entitled to confidentiality pursuant to the Whistleblower Act, Conn. Gen. Stat. §4-61dd. (Def Memo, pp. 24-25) However, this claim cannot be a defense to liability because a state law that denies a citizen a Constitutional right would obviously run afoul of the Supremacy Clause. Thus, even if the defendants’ interpretation of State law were correct, which it is not, that statute cannot trump Plofsky’s due process right under the U.S. Constitution. Moreover, all but one of the defendants are experienced lawyers who should have been aware of this basic tenet of law. Moreover, the use of the State Whistleblower Act as a sword to deny Plofsky access to the evidence being used against him was simply incorrect as a matter of State law as subsequently and definitely determined by the Connecticut Freedom of Information Commission. (Ex.31)

Finally, a jury could easily find that the defendants' decision to simply accept the interpretation of the whistleblower as statute propounded by the lawyer representing the three whistleblowers in her cover letter to defendant Giuliano was in no way required, and in fact could be found to be nothing more than a disingenuous excuse to deny Plofsky the ability to defend himself. The July 24, 2002, Attorney General's Opinion attached to that letter was not determinative of Plofsky's due process rights because it addressed an entirely different set of circumstances - a request - for a whistleblower complaint or report at the investigatory stage, prior to any decision to consider proceeding with disciplinary action, so that the employee's pre-disciplinary due process rights were not yet implicated. (See Ex. 24) Moreover, the sole basis for this decision was that releasing the report would disclose the identity of the whistleblowers, but the letter indicated that the agency could release its report in redacted form if it was satisfied that to do so would not reveal the identity of the whistleblower. In the instant case, the identities of the whistleblowers had been published in the Courant a full ten days before the Loudermill hearing and was common knowledge to Plofsky and everyone else in the State of Connecticut who watched the evening news or read a newspaper. Thus, the refusal to provide Plofsky with the evidence being used against him prior to the Loudermill hearing purportedly in order to maintain the confidentiality of the identities of the three whistleblowers was absurd and a reasonable jury could readily conclude that the defendants' use of that reason to deny Plofsky access to the evidence being used against him was not made in good faith.<sup>6</sup>

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<sup>6</sup> Similarly, a reasonable jury could find that the contention that the defendants based their refusal to provide Plofsky with the evidence being used against him was

The other issues raised by the defendants in their memorandum are undoubtedly questions of fact which cannot be resolved on a motion for summary judgment. First, the defendants argue that Plofsky's remarks at the September 10 Loudermill hearing "demonstrate that he had ample notice of the charges against him." (Def. Mem, p. 26) The plaintiff did have notice of the four charges - the conclusions of the SEC's deliberations on September 8. What he had not been given is a summary of the evidence. Indeed, Plofsky has testified that he would have approached the Loudermill hearing presentation completely differently had he been provided access to the evidence that had been relied upon by the SEC. (Ex. A, pp. 114-120; Ex. BB, ¶ 23) Second, the defendants claim that during the September 10 hearing Plofsky turned down the defendants' offer to provide "a more detailed explanation of the evidence that was contained in the affidavits." (Def. Mem, p. 27) However, the record reveals that this "offer," came only after Plofsky and Adler had completed their presentations in response to the charges, that no such offer of a summary of the evidence had ever been made prior to Plofsky having to respond in public to the charges, and that the offer was merely a transparent attempt by the SEC to repair its damaged public image by allowing Mazzola a chance to state publically that Plofsky's version of the facts was in conflict with the affidavits. One can only wonder what had changed in ten days to now permit Mazzola to provide a summary of the evidence without compromising the confidentiality of the whistleblowers when that had been the sole reason for refusing to provide such information to Plofsky and his counsel before they presented Plofsky's

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based on directives that their lawyer, Linda Yelmini, had received from the Office of the Attorney General was simply not true. (Ex. CC, Response No. 12)

side of the story. A jury could easily find that this was not a genuine offer and that the irreparable harm to Plofsky's ability to respond had already been done by the time it was made. Finally, a reasonable jury could find that Adler did not in fact prevent Mazzola or the SEC from giving a summary of the evidence, but rather that he simply complained about the timing and requested that the other employees who were present in the room be given an opportunity to speak and/or be questioned in public. Third, the defendants argue that any violation of Plofsky's pre-disciplinary due process rights was somehow cured at the September 29 "reconsideration" hearing. (Def. Mem, p. 27)

Again this claim raises genuine issues of disputed facts. First of all, the plaintiff had already been fired, so this was not, as suggested by the defendants, a pre-termination hearing under Loudermill. Moreover, while the defendants did give Plofsky a redacted copy of the whistleblower affidavits on September 27, when Adler attempted to comment on the significance of some of the evidence contained in those affidavits he was cut off by defendant MacGill and told that the sole purpose of the meeting was to consider whether the new affidavits submitted by Cannata and Mathieu would persuade the Commissioners to change their minds. Thus Plofsky was again denied an opportunity to respond to the evidence he had finally been provided with, more than two weeks after his Loudermill hearing. Moreover, a reasonable jury could easily find that the September 29 meeting was not conducted in good faith, but rather that it was a sham to counteract the adverse publicity the defendants had suffered as a result of their rush to judgment on September 10.

Ultimately, a jury could find that Plofsky was simply never provided with a true, good faith, meaningful opportunity “to present his side of the story.” Both because he was not provided with access to any of the evidence that was being used against him, and because, in reality, the defendants had made their decision during the extended closed meeting that took place two days before the Loudermill hearing. Due process requires that the pre-termination hearing not be a sham, that the result not be pre-ordained, and that the agency be willing to listen to the plaintiff’s side of the story with an open mind. See Levesque, 341 F.Supp. 2d at 134-135. There was absolutely no deliberation or serious consideration of the evidence by the defendants at the September 10 Loudermill hearing. Instead, it was clear from the comments that were made that the defendants had in fact made up their minds based upon the secret discussion that had taken place on September 8. This fact standing alone would be a sufficient basis for a jury to find that the plaintiff was deprived of a property interest without due process.<sup>7</sup>

D. A Reasonable Jury Could Find that the Defendants Do Not Have Qualified Immunity With Respect to Either of the Plaintiff’s Claims

The defendants are not entitled to qualified immunity because they violated the

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<sup>7</sup> The record also contains evidence that the post-termination due process hearing the plaintiff had before the ERB did not cure the violation of his rights to pre-disciplinary due process. Had the plaintiff been provided with the evidence being considered by the defendants before he was fired, he could have made many persuasive arguments at the Loudermill hearing which might have convinced at least some of the defendants that they were making a mistake. (See, Rule 56(c)2 Statement, ¶ 73) In addition, the plaintiff suffered substantial damages from the denial of his pre-disciplinary right to due process that simply was not cured when he eventually prevailed before the ERB and was assigned to a position in the OAG twenty (20) months after he had been discharged by the defendants. (Rule 56(c)2 Statement, ¶¶ 80-82)

plaintiff's clearly established rights under the First and Fourteenth Amendments by retaliating against him because of his constitutionally protected speech and activities and by violating his pre-disciplinary due process rights and because it was not objectively reasonable for them to do so. Public officials who perform discretionary functions, such as the Commissioners of the SEC, are generally entitled to qualified immunity "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." Anderson v. Creighton, 483 U.S. 635, 638 (1982). The defendants are entitled to qualified immunity "if either (a) the defendant[s]' action did not violate clearly established law, or (b) it was objectively reasonable for the defendant[s] to believe that his[/her] action did not violate such law." Almonte v. City of Long Beach, 478 F.3d 100, 109 (2d Cir. 2007), citing Harhay, 323 F.3d at 211-212.

A right is clearly established if "(1) the law is defined with reasonable clarity, (2) the Supreme Court or the Second Circuit has recognized the right, and (3) 'a reasonable defendant [would] have understood from the existing law that his conduct was unlawful.'" Anderson v. Recore, 317 F.3d 194, 197 (2d Cir. 2003). The matter of whether a right is clearly established at the pertinent time is a question of law. Kerman v. City of New York, 374 F.3d 93, 108 (2d Cir. 2004) (citations omitted). However, the court must be "mindful that the right at issue in a qualified immunity case need not be limited to the specific factual situation in which that right was articulated. Indeed, the 'Supreme Court has declined to say that 'an official action is protected by qualified immunity unless the very action in question has previously been held unlawful,' and has, instead, chosen a standard that excludes such immunity if 'in the light of pre-

existing law the unlawfulness [is] apparent.” Jones v. Parmley, 465 F.3d 46, (2d Cir. 2006), citing Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3D 107, 129 (2d Cir. 2004) and Hope v. Pelzer, 536 U.S. 730, 739 (2002); Anderson, 483 U.S. at 640.

Where the federal constitutional right at issue is clearly established, qualified immunity “protects a government actor if it was ‘objectively reasonable’ for him to believe that his actions were lawful at the time of the challenged act.” Lennon v. Miller, 66 F.3d 416, 420 (2d Cir. 1995), citing Anderson 483 U.S. at 641. That test is met if “officers of reasonable competence could disagree on the legality of the defendant’s actions.” Id.; Arlio v. Lively, 474 F.3d 46, 51 (2d Cir. 2007). The question is “what a reasonable person in the defendants’ position should know about the constitutionality of the conduct.” Anderson, 317 F.3d at 197, citing McCullough v. Wyandanch Union Free Sch., 187 F.3d 272, 278 (2d Cir. 1999). “Whether a defendant official’s conduct was objectively reasonable, i.e., whether a reasonable official would reasonably believe his conduct did not violate a clearly established right, is a mixed question of law and fact. Kerman, 374 F.3d at 109, citing as examples, Lennon, 66 F.3d at 422 and Oliveira v. Mayer, 23 F.3d 642, 649-650 (2d Cir. 1994), cert. denied, 513 U.S. 1076 (1995).

Therefore,

[a]lthough a conclusion that the defendant officials conduct was objectively reasonable as a matter of law may be appropriate where there is no dispute as to the material historical facts...if there is such a dispute, the factual questions must be resolved by the factfinder....Though ‘[i]mmunity ordinarily should be decided by the court,’...that is true only in those cases where the facts concerning the availability of the defense are undisputed; otherwise jury consideration is normally required...After receiving ‘the jury[’s]...deci[sion as to] what the facts were that the officer faced or perceived,’ the court then may make the ultimate legal determination of whether qualified immunity attaches . . . .

Kerman, 374 F.3d at 109 (internal citations and quotations omitted). See, Oliveira, 23 F.3d at 649; Taravella v. Town of Wolcott, 2008 WL 1821507 at \*2 (D. Conn. 2008). See also, Mandell v. County of Suffolk, 316 F.3d 368, 385 (2d Cir. 2003) (“Where specific intent of a defendant is an element of plaintiff’s claim under clearly established law, and plaintiff has adduced sufficient evidence of that intent to defeat summary judgment, summary judgment on qualified immunity grounds is inappropriate”).

1. Plofsky’s First Amendment Claims

The defendants are not entitled to qualified immunity on Plofsky’s First Amendment retaliation claims. At the time of Plofsky’s termination, the law of this circuit clearly established that a public employee is protected from retaliation for engaging in protected activities under the First Amendment, including speaking out as a citizen on matters of public concern as well as petitioning the government for redress of grievances. An “employee’s right to be free from such retaliation has been clearly established since at least 1968.” Rapkin v. Rocque, 228 F.Supp.2d 142, 146 (D. Conn. 2002), citing Munafa v. Metropolitan Transp. Auth., 285 F.3d 201, 211 (2d Cir. 2002) (citing Pickering, 391 U.S. at 568). As discussed in detail above, contrary to the defendants’ suggestions, Plofsky’s speech/activities included more than “object[ing] to the SEC’s proposed disciplinary action, hiring of an attorney to defend him in the disciplinary process and making public statements regarding the proposed discipline,” constituted First Amendment-protected speech/conduct and were directed at matters of public concern not simply at the plaintiff’s personal motivations. See Sections II A-D supra. Furthermore, given the significant press and public attention that resulted from

the plaintiff's speech and conduct, a jury could conclude that the defendant Commissioners did not have an objectively reasonable belief in the lawfulness of their conduct, but rather that they were motivated by an unlawful and retaliatory animus against Plofsky which would preclude this court from finding that they are entitled to qualified immunity on the retaliation claims. See Rapkin, 2228 F.Supp.2d at 148. See Sections II E-G supra.

## 2. Plofsky's Due Process Claims

The defendants are not entitled to qualified immunity on the plaintiff's due process claim. Here, it is beyond question that the due process rights that plaintiff has alleged were violated were clearly established at the time the defendants acted. More specifically, Plofsky asserts that the defendants' failure to provide him with an explanation of the evidence against him as required by Loudermill constitutes a plain violation of due process. See Section III supra. The defendants claim that it was not clearly established that they were required to provide the plaintiff with the evidence against him despite his constitutional right to due process and despite the explicit directives of Loudermill, in particular that it was not clear that they were obligated to provide Plofsky with the whistleblower affidavits, essentially because they had a conflicting obligation under state law to protect the confidentiality of the whistleblowers. (Def. Memo, p. 30) However, both the Supreme Court and the Second Circuit have recognized that federal law, including the Constitution, not state law sources, dictate what process is due to a plaintiff such as Plofsky. Harhay, 323 F.3d at 213; Ciambriello, 292 F.3d at 319, citing Vitek v. Jones, 445 U.S. 480, 491 (1980);

Loudermill, 470 U.S. at 541 (“minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action”). Contrary to the defendants’ claims that they were in “unchartered waters,” it is one of the most basic tenets of constitutional law, that where the requirements of a state law conflicts with the mandates of what is required under federal law, the doctrine of federal preemption under the Supremacy Clause mandates that the federal law controls. U.S. Const. art. VI, cl. 2

As to the second part of the qualified immunity inquiry, since a jury could readily conclude that the defendants’ conduct was not objectively reasonable, the defendants are not entitled to summary judgment on the basis of qualified immunity on this claim. First, the defendants attempt to justify the decision not to release the whistleblower affidavits to the plaintiff, allegedly because they relied upon Attorney Yelmini’s representations that officials from the OAG had warned her that such disclosure was not permitted. (Def. Memo, p. 30) However, because this is a heavily disputed issue of material fact (Rule 56(a)2 Statement, Responses to Defendants’ Rule 56(a)1 Statement at ¶ 79 and Disputed Issues of Material Fact at ¶ 59; Ex. CC, Response No. 12), it would be inappropriate for the court to make a determination as to qualified immunity until the jury makes its factual findings. Additionally, the defendants’ reliance upon the 2002 Attorney General Opinion is misplaced since in that opinion the Attorney General did not address the question at issue here and explicitly stated, “If the whistleblower investigation results in the termination or suspension of an employee...the Due Process

clauses of the federal and state Constitutions may then require disclosure to the extent necessary to inform the accused of the charges against him or her and allow for a proper defense.” (Ex. 24)

In addition, when the defendants attempted to discipline the plaintiff over the LWV speech, the AG issued an Opinion Letter at the request of the Governor, copies of which were provided to the defendants in mid-July 2004, which very clearly stated the importance of pre-disciplinary due process:

The purpose of ‘Loudermill hearing’ is to provide an employee an opportunity to present his side of the story before the employer makes a decision on discipline. Prior to the hearing, the employee must be given specific written notice of the charges and **an explanation of the employer’s evidence so that the employee can provide a meaningful response and an opportunity to correct factual mistakes in the investigations** and to address the type of discipline being considered.

(Ex. 14, emphasis added) With this direction having been provided to the defendants just two months earlier, a reasonable jury could easily determine that it was not objectively reasonable for any of the defendants to believe that their refusal to provide the plaintiff with an explanation of the evidence used against him and/or the denial of a meaningful opportunity to respond to that evidence was lawful.

Finally, a jury could readily conclude that the defendants, all but one of whom are experienced attorneys, could not have reasonably believed that it was lawful, contrary to the due process requirements set forth in Loudermill, to refuse to provide Plofsky with any explanation of the evidence against him—whether by providing him with the whistleblower affidavits, in either a redacted or unredacted format, or even by giving

him a summary of the evidence against him—and therefore determine that the defendants’ conduct was not objectively reasonable given the facts of this case.

E. Plofsky is Entitled to an Adverse Evidentiary Inference as a Result of Spoliation of Evidence by Four of the Eight Defendants

Spoliation of evidence has been defined by this court and by the Second Circuit as “the destruction or significant alteration of evidence, or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.” Doe v. Norwalk Community Colleges, et al, 2007 WL 2066497 at \*1 (D. Conn. 2007), citing Byrnie v. Town of Cromwell, Bd. of Educ., 243 F.3d 93, 107 (2d Cir. 2001); West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999). “It is a well-established and long-standing principle of law that a party’s intentional destruction of evidence relevant to proof of an issue at trial can support an inference that the evidence would have been unfavorable to the party responsible for its destruction.” Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998). See also, Doe, 2007 WL 2066497 at \*1, citing Byrnie, 243 F.3d at 107. Because several of the defendants intentionally destroyed and/or recklessly failed to preserve documents that they knew or should have known there was a duty to preserve as detailed below, the plaintiff is entitled to an adverse evidentiary inference due to the spoliation of relevant evidence. This sanction serves a threefold purpose of (1) deterring parties from destroying evidence; (2) placing the risk of an erroneous evaluation of the content of the destroyed evidence upon the defendants; and (3) restoring Plofsky, as the party harmed by the loss of evidence that may have been helpful to his case to where he would have been in the absence of the defendants’ spoliation. West, 167 F.3d at 779; Doe, 2007 WL 2066497 at \*1.

The defendants each admitted receiving Adler's September 24 letter (Ex. 40) around the time it was sent or at least by the date of the reconsideration meeting on September 29, 2004. (Ex. II, Interrogatory No. 5; Ex. AA, pp 812-813; Ex. HH, pp. 17-18; Ex. GG, pp. 56-57; Ex. JJ, Interrogatory No. 5; Ex. KK, Interrogatory No. 5; Ex. FF, pp. 41-43; Ex. LL, Interrogatory No. 5). That letter specifically stated in relevant part,

We ask that the termination be rescinded and that Mr. Plofsky be reinstated now so that the State of Connecticut may be spared further legal action over these recent events. If this situation is not rectified by this Commission, Mr. Plofsky will have to consider various legal options available to challenge his termination; a post-termination hearing before the Employee Review Board, a complaint with the FOIA Commission seeking to have the September 8 meeting declared null and void, and/or a lawsuit in federal court challenging his termination on First Amendment and Due Process grounds.

(Ex. 40) Notwithstanding the fact that they were aware that Plofsky intended to commence litigation and/or was considering his legal options, four of the defendants engaged in spoliation.

Smith admitted that he "took notes during the meetings," "very often on an agenda sheet or something like that" and "on a regular basis." (Ex. HH, pp. 14) Although he did not recall taking such notes during either the September 8 or 10, 2004 SEC meetings, he stated that he "probably did" take notes with respect to the SEC's discussions about Plofsky, that it was his practice to take notes of things that occurred at the meetings that were of significance to him and that he kept documents that he "accumulate[d] over the course of time" in a "redweld" folder. (Id. pp. 14-15) Despite those practices, Smith was not able to produce his notes or other documents of any kind regarding the events that occurred between June and September 2004 involving

Plofsky because “within a very short period of time after [the expiration of his term he] threw everything away; anything that [he] had with the Commission.” (Id. pp. 14-15) He explained that he emptied the redweld folder he kept “on a regular basis” and, presumably in accordance with his practice, that he destroyed any notes and any other documents he had kept regarding the Plofsky matter shortly after his term ended—just one day after Plofsky’s reconsideration request was denied on September 29, 2004. (Id. p. 15) He also admitted, that having received and read Adler’s reconsideration request letter, at the time he destroyed these documents he understood that Plofsky was considering legal recourse as listed in the letter including pursuing litigation to challenge his termination. (Id. p. 21)

O’Connor similarly admitted that he kept documents handed out to the Commissioners in a notebook, that sometimes he would write in the margins of such documents if there was “anything that was controversial or [that he would] need to remember,” that he sometimes kept his own notes and that he indeed did keep notes as to the issues involving Plofsky’s employment in 2004. (Ex. GG, pp. 21-22) He also admitted that he “shredded everything [he] had,” which he described as “a lot of stuff,” after the expiration of his term on or about September 30, 2005. (Id. pp. 20-22)

O’Connor acknowledged that among the records he shredded were notes and documents about Plofsky, even though he was aware at the time he destroyed these records that Plofsky was challenging his discharge in front of the ERB. (Id. pp. 22)

Like their co-defendants, Collins and MacGill each admitted that at some point they also had documents or notes in their respective possessions that they had each

made regarding Plofsky and/or that relate to claims that the plaintiff has raised in this lawsuit, but that such documents and notes are no longer in his possession, custody or control and are unavailable. (Ex. JJ, Interrogatory Nos. 1 and 2, and Request No. 1; Ex. LL, Interrogatory Nos. 1 and 2, and Request No. 1) More specifically, in response to written interrogatories about the present location and availability of such documents and the circumstances as to when and how such documents became unavailable to him, Collins stated that he “has no specific recollection of documents that he may have had in his possession at some time but are no longer available,” and MacGill said he has “no specific recollection of when any such documents were in his possession, custody or control” nor “of when such documents became unavailable.” (Ex. JJ, Interrogatory Nos. 3 and 4; Ex. LL, Interrogatory Nos. 3 and 4)

Not surprisingly given the above detailed admissions that they each knowingly destroyed and/or totally failed to preserve relevant evidence, neither Smith, nor O’Connor, nor Collins, nor MacGill, has produced even a single page of the notes or documents that each admittedly kept or took during the relevant period in 2004 and that are unquestionably material to Plofsky’s claims here.

Where a plaintiff seeks an adverse inference based on spoliation of evidence, he must show the following:

- (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed;
- (2) that the records were destroyed ‘with a culpable state of mind;’ and
- (3) that the destroyed evidence was ‘relevant’ to the party’s claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

Residential Funding Corp. v. Degeorge Fin. Corp., 306 F.3d 99, 107 (2d Cir. 2002);

Doe, 2007 WL 2066497 at \*2. Here, there is little doubt that there is sufficient evidence for the court to conclude that Plofsky has established all three of these elements with regard to the conduct of defendants Smith, O'Connor, Collins and MacGill.

First, it is beyond dispute that all eight of the defendants had an obligation to preserve documents or notes of any kind that they created and/or received that related to Plofsky, his potential legal claims and his termination from the SEC. The obligation to preserve evidence "usually arises when a party has notice that the evidence is relevant to litigation...but also on occasion in other circumstances, as for example when a party should have known that the evidence may be relevant to future litigation." Byrnie, 243 F.3d at 107; Doe, 2007 WL 2066497 at \*3. At the absolute latest, the obligation to preserve evidence in this matter arose when the defendants received the September 24, 2004 letter from plaintiff's counsel in which he requested that they reconsider the termination decision and which explicitly advised the defendants that Plofsky would "consider various legal options available to challenge his termination; a post-termination hearing before the Employee Review Board, a complaint with the FOIA Commission seeking to have the September 8 meeting declared null and void, and/or a lawsuit in federal court challenging his termination on First Amendment and Due Process grounds." (Ex. 10) Defendants Smith, O'Connor, Collins, and MacGill each admitted that they read this letter and were aware of possible litigation by Plofsky, thus they should have realized no later than the reconsideration meeting on September 29, 2004, that any documents related to Plofsky could potentially be relevant to that

litigation.<sup>8</sup> (Ex. HH, pp. 17-18; Ex. GG, pp. 56-57; Ex. JJ, Interrogatory No. 5; Ex. KK, Interrogatory No. 5) “The duty to preserve attached at the time that litigation was reasonably anticipated. At that time, the defendants ‘must suspend their routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.’” Doe, 2007 WL 2066497 at \*4, citing Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 217-218 (S.D.N.Y. 2003). Accordingly, defendants Smith, O’Connor, Collins and MacGill each breached their respective duty to preserve when they intentionally destroyed documents relevant to Plofsky’s foreseeable litigation (Smith and O’Connor) and/or when such documents inexplicably became “unavailable” to them (Collins and MacGill). (Ex. HH, pp. 14-15; Ex. GG, pp. 21-22; Ex. JJ; Ex. LL)

Likewise, the record is more than sufficient to establish the second prong of a spoliation claim, a culpable state of mind, which is established by “ordinary negligence.” Doe, 2007 WL 2066497 at \*5, citing Residential Funding Corp., 306 F.3d at 108. “Once the duty to preserve attaches, any destruction of documents is, at a minimum, negligent.” Id. Here though, these defendants acted at least “grossly negligent, if not reckless,” since “the utter failure to establish any form of litigation hold at the outset of litigation is grossly negligent.” Id. at \* 5 (internal citation omitted). In addition, two of the four acted *intentionally*: Smith, “threw everything away,” including documents that would

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<sup>8</sup> Moreover, given that the Courant reported in a front page article published on July 7, 2004 that Plofsky intended to challenge his suspension over the LWV speech, that he had claimed a denial of statutory and constitutional rights, and that he had alleged that the SEC had failed to adhere to proper legal procedures in suspending him, the defendants’ duty to preserve arguably arose as early as that same date since that article was very likely read by each of the defendants. (Ex. BB, ¶ 6, Attachment 3; Ex. FF, p. 20; Ex. GG, pp. 33-35; Ex. HH, pp. 32-33)

almost certainly have been relevant to Plofsky's legal claims, within days of the SEC's decision to affirm Plofsky's termination; and O'Connor, "shredded everything," including notes and documents about Plofsky despite his knowing full-well that Plofsky was in the midst of challenging his termination at the ERB. (Ex. HH, pp. 14-15; Ex. GG, pp. 20-22) The fact that three of the defendants who engaged in this spoliation—Smith, Collins and MacGill—are attorneys admitted to practice law in Connecticut should weigh heavily in the court's consideration as to their state of mind and supports finding that they acted at least knowingly, if not in bad faith. (Ex. 34, p. 65; Def. Rule 56(a)1 Statement, ¶¶ 2-9) It is simply inconceivable that an experienced, licensed attorney would not have realized that, by destroying and/or failing to preserve these documents at a time when he admittedly was aware that Plofsky was contemplating litigation, he was engaging in blatant spoliation for which he could be sanctioned by a court.

The same evidence that shows that Smith, O'Connor, Collins and MacGill, each had a "culpable state of mind" is more than sufficient to establish the third prong of the plaintiff's spoliation claim. This showing requires that Plofsky demonstrate "that the destroyed evidence is 'relevant' to [his] claim, [he] 'must adduce sufficient evidence from which a reasonable trier of fact could infer that 'the destroyed or unavailable evidence would have been of the nature alleged by the party affected by its destruction.'" Doe, 2007 WL 2066497 at \*7, citing Residential Funding Corp., 306 F.3d at 109. However, as this court and the Second Circuit have repeatedly emphasized,

holding the prejudiced party to too strict a standard of proof regarding the likely contents of the destroyed evidence would subvert the prophylactic and punitive purposes of the adverse inference, and would allow parties who have intentionally destroyed evidence to profit from that destruction. Certainly, the

level of proof that will suffice to support an inference in favor of the innocent party on a particular issue must be less than the amount that would suffice to survive summary judgment on that issue.

Kronisch, 150 F.3d at 128. See also, Residential Funding Corp., 306 F.3d at 109;

Byrnie, 243 F.3d at 110; Doe, 2007 WL 2066497 at \*7. Rather, where,

a party destroys evidence in bad faith, that bad faith alone is sufficient circumstantial evidence from which a reasonable fact finder could conclude that the missing evidence was unfavorable to that party...Similarly, a showing of gross negligence in the destruction or untimely production of evidence will in some circumstances suffice, standing alone, to support a finding that the evidence was unfavorable to the grossly negligent party...Accordingly, where a party seeking an adverse inference adduces evidence that its opponent destroyed potential evidence (or otherwise rendered it unavailable) in bad faith or through gross negligence (satisfying the “culpable state of mind” factor), that same evidence of the opponent's state of mind will frequently also be sufficient to permit a jury to conclude that the missing evidence is favorable to the party (satisfying the “relevance” factor).

Residential Funding Corp., 306 F.3d at 109 (citations omitted); Doe, 2007 WL 2066497

at \*7. Just as this court held in Doe, since Plofsky has shown that defendants Smith, O'Connor, Collins, and MacGill's failure to preserve documents and notes “was at a minimum grossly negligent...no other proof of relevance is necessary, and [Plofsky] is entitled to an adverse inference instruction.” 2007 WL 2066497 at \*7.

Furthermore, and perhaps most significantly for the purposes of the defendants' instant motion, “an inference of spoliation, in combination with ‘some (not insubstantial) evidence’ for the plaintiff's cause of action, can allow the plaintiff to survive summary judgment.” Kronisch, 150 F.3d at 138; Byrnie, 243 F.3d at 107 and 110; Doe, 2007 WL 2066497 at \*1; Doe v. Norwalk Community College, 2007 WL 2066496 at \*5, n.10 (D. Conn. 2007). Thus, because the plaintiff has established a claim of spoliation such that he is entitled to an adverse inference, and has presented significant (and by no means



