CASE NO. 20-

UNITED STATES SUPREME COURT

WARNOCK ENGINEERING, L.L.C.;
RUDOLPH M. WARNOCK, JR.
Petitioner

v.

CANTON MUNICIPAL UTILITIES
Respondent

On Petition for Writ of Certiorari to the
United States Court for Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals' decision affirming the dismissal of Petitioners' quantum meruit claim due to alleged inadequate pleading should be reviewed because it conflicts with federal pleading standards and the Supreme Court's decision in *Johnson v. Shelby, Mississippi*, 574 U.S. 10 (2014).

2. Whether the Court of Appeals' decision affirming the summary judgment dismissal of the Petitioner's First Amendment retaliation claim should be reviewed because it conflicts with the Rule 56 standard and sanctions the imposition of a direct, rather than circumstantial, evidentiary burden.

LIST OF PARTIES

The parties are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

Warnock Engineering, LLC is a Mississippi limited liability company. No publicly traded company owns a 10% interest in the entity or any corporate parents or any affiliated company.

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STATEMENT OF THE BASIS FOR JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254 to consider petitions for certiorari from cases decided by the United States Courts of Appeals.

The United States Court of Appeals for the Fifth Circuit affirmed the dismissal of Petitioner's claims on July 16, 2018. Petitioners timely filed a Petition for Re-Hearing *En Banc* on January 19, 2021, which was denied on February 2, 2021.

The United States District Court for the Southern District of Mississippi had original subject matter jurisdiction pursuant to 28 U.S.C. § 1331 based upon the Petitioners' federal civil rights claim under 42 U.S.C. § 1983 and supplemental jurisdiction of the state law claims.

CONSTIUTIONAL AND STATUTORY PROVISION INVOLVED

1. U.S. Constitution, First Amendment

2. 42 U.S.C. § 1983

STATEMENT OF THE CASE

Petitioner Warnock Engineering, L.L.C. is a Mississippi engineering firm owned and operated by Petitioner Rudolph Warnock, P.E. (collectively "Warnock"). ROA.5777. Respondent Canton Municipal Utilities ("CMU") is a public utility commission within the City of Canton, Mississippi. CMU is managed by a five (5) member board of commissioners appointed by the Canton Mayor and Board of Aldermen. ROA.5777. At all times relevant to this dispute, Cleveland Anderson ("Anderson") served as one of the CMU Commissioners. ROA.5778.

In 2016, Warnock was engaged by CMU to provide engineering services. Warnock and CMU entered into three (3) written contracts: (1) General Engineering Services; (2) Sewer and Water System Improvements; and (3) Five Point Plan Agreement. ROA.5292-5298. These contracts were negotiated with and reviewed by CMU's attorney before they were approved by a majority vote of the CMU Board. ROA.5298.

Commissioner Anderson saw Warnock's projects as an opportunity to enrich himself. In September 2016, Anderson asked Warnock to add $200,000 to CMU's bill and funnel this amount as a kick-back to Anderson. ROA.5778. Alarmed by Anderson's corrupt conduct, Warnock brought this to the attention of various public officials in Canton on December 17, 2016. ROA.5779, 5789, 5796-5797.

At a "special call" meeting held on December 22, 2016, CMU voted to terminate Warnock. ROA.5305, 5789. Anderson made the motion and influenced two (2) other CMU Commissioners, Cleotha Williams ("Williams") and Lanny Slaughter

("Slaughter"), to vote with him as a majority. ROA.5797. These three (3) commissioners, acting in their official capacities on behalf of CMU, carried out the retaliatory firing because Warnock refused to participate in a corrupt scheme and blew the whistle on Anderson. At the time of the ouster, CMU owed Warnock $2,369,477.28 for engineering services rendered, which it refuses to pay. ROA.5285.

Warnock filed a Third Amended Complaint on March 12, 2018. ROA.5285. In lieu of an Answer, CMU filed a Motion to Dismiss followed by a Motion for Summary Judgment. ROA.5286. In response to CMU's motions, Warnock narrowed the claims to: breach of contract, First Amendment retaliation under Section 1983 and wrongful discharge under Mississippi law. ROA.5289.

On December 21, 2018, the District Court entered a Memorandum Opinion denying CMU's Motion for Summary Judgment as to Warnock's § 1983 and wrongful discharge claims. However, the District Court dismissed Warnock's breach of contract claim because the terms of the contracts were not sufficiently "spread upon" CMU's minutes. ROA.5299-300. Although the availability of quantum meruit relief was raised in Warnock's summary judgment response, ROA5165-68, the District Court stated Warnock had not pled this alternative legal theory in the Amended Complaint. ROA.5300-01.

On January 4, 2019, the District Court amended the Case Management Order to allow additional time for discovery and reset the trial for October 7, 2019. ROA.27 (Text-Only Order). On January 18, 2019, Warnock filed a Motion for Reconsideration, or in the alternative, for Leave to Amend. ROA.5783. Warnock asked the District

Court to reconsider the aspect of its summary judgment ruling which seemed to preclude a claim for quantum meruit as an alternative legal theory. Warnock argued the factual basis for this claim was adequately pled in the Amended Complaint and any alleged deficiency could be cured by a simple amendment. ROA.5332-33.

On January 14, 2019, CMU filed its Answer to Warnock's Amended Complaint. ROA.5314. CMU then filed a second Motion for Summary Judgment. ROA.5365.

On August 23, 2019, the District Court entered a *sua sponte* text order which suspended all deadlines pending resolution of the outstanding motions. ROA.31. A month later, the District Court entered a *sua sponte* Order which stayed and "administratively closed" this case. ROA.5770.

In November 2019, Warnock filed a Motion to Lift Stay and return this case to the active docket. ROA.5771. Three (3) months later, the District Court entered an Order lifting the stay. ROA.5775. The District Court then entered a Memorandum Opinion and Order and Final Judgment dismissing Warnock's remaining claims and denying Warnock's Motion for Reconsideration, or in the Alternative, for Leave to Amend. ROA.5776, 5811. On January 8, 2021, the Court of Appeals issued a *per curiam* decision affirming the District Court without opinion. App.B. On February 2, 2021, the Court of Appeals denied Warnock's Petition for Re-Hearing *En Banc*. App.A.

STATEMENT OF FACTS

A. Commissioner Anderson Solicits a Kickback

On September 16, 2016, Anderson and Warnock exchanged text messages about the anticipated costs of certain projects. For budgeting purposes, Warnock informed Anderson that CMU could expect to incur approximately $2.25 million dollars in engineering costs and fees. ROA.5123. During these discussions, Anderson asked Warnock to bill CMU an additional $200,000 so that he could pad his retirement. ROA.5100-02.

Anderson tried to involve Canton Alderman Eric Gilkey in his kickback scheme. According to Gilkey, "[Anderson] stated that the $200,000 would be returned as a kickback and split between [Gilkey], Anderson and an unknown [third] party." ROA.5102, 5105, 5107.

A few weeks later, Anderson apparently became nervous that Warnock might blow the whistle on him. Attempting to create a false narrative, Anderson sent Warnock a text message on December 17, 2016, to the effect that he was merely "testing" him. ROA.5040-43. Anderson rhetorically asked Warnock: "Do you remember when I ask [sic] you about 200,000 to retire [sic]?" Anderson then suggested that this was actually a "test" to see if Warnock was "texting" [sic] him. ROA.5040. Anderson also repeated bizarre and menacing comments to Warnock that he "knew guys in New Orleans" who could fix problems. ROA.5040, 5100-01.

Warnock responded that he felt threatened by Anderson's actions, that Anderson was corrupt and that he was unfit to serve on the CMU Board. ROA.5040-

43. That same day, Warnock forwarded the text exchange with Anderson to various public officials in Canton, including the Mayor, Canton Aldermen and other CMU Commissioners.

When deposed, Anderson admitted he sent this text message to Warnock. However, Anderson testified that he could "not recall" any of the details or surrounding circumstances. Anderson did not deny that he had solicited a $200,000 payment from Warnock. Instead, Anderson provided evasive responses that he could "not recall" anything about this topic "at this time." ROA.5060-63.

B. CMU Terminates Warnock

On December 22, 2016, the CMU board convened a "special call" meeting. ROA.5025-26. During this meeting, Anderson also made a motion to terminate Warnock. ROA.5026. This motion carried with Commissioners Anderson, Williams and Slaughter voting as the majority. ROA.5026. According to the minutes, Anderson recited eight (8) bogus reasons for terminating Warnock.

During their depositions, Commissioners Anderson, Williams and Slaughter could not recall who came up with the list of reasons; nor could they cite a single fact supporting any of them. ROA.5127-28, 5140, 5057. Even though Anderson made the motion, he could not say whether any of the reasons were true or false. ROA.5058. Anderson also gave this damaging testimony:

> Q: Is it true that you made a motion to terminate Mr. Warnock's contracts because he wouldn't go along with a scheme to add $200,000 to a project for your benefit?
>
> A: I don't recall

Q: Well you would recall whether or not that's true or not, wouldn't you?

A: I don't recall

ROA.5060. When asked whether he had met with Williams and Slaughter in advance of the meeting, Anderson testified: "I don't recall." ROA.5056. When asked whether he had any prior discussions with any of the commissioners about plans to terminate Warnock, Anderson likewise testified: "I don't recall that." ROA.5057.

REASONS FOR ALLOWANCE OF THE WRIT

A. The Supreme Court Should Review the Court of Appeals' Decision as to Petitioners' Quantum Meruit Claim Because this Ruling Conflicts with Federal Pleading Standards and Supreme Court Precedent

Warnock's Amended Complaint asserts claims against CMU for breach of contract and contains detailed allegations as to the engineering services performed. App.F. (ROA.3415). The Amended Complaint also contains a short and plain allegation that, at the time CMU terminated the relationship, Warnock was owed "$2,369,477.28 for services performed prior to termination…." ROA.3393 (¶ 62). These allegations are sufficient for purposes of Fed.R.Civ.P. 8 to notify CMU of the factual basis for a quantum meruit claim. Indeed, CMU had already gone to considerable lengths to engage experts to challenge the reasonableness of Warnock's charges. ROA.4385; ROA.4453.

In response to CMU's arguments concerning the minutes requirement, Warnock pointed out that, even if the written contracts were unenforceable, Warnock would be entitled to seek alternative relief for quantum meruit under Mississippi's "good faith vendor" statute. ROA.5165-68. The pertinent portion of this statute provides:

> [A]ny vendor who, in good faith, delivers commodities or printing or performs any services under a contract to or for the agency or governing authority, shall be entitled to recover the fair market value of such commodities, printing or services, notwithstanding some error or failure by the agency or governing authority to follow the law, if the contract was for an object authorized by law and the vendor had no control of, participation in, or actual knowledge of the error or failure by the agency or governing authority.

Miss. Code. Ann. § 31-7-57(2).

In its first summary judgment ruling, the District Court noted the statute "sounds in quantum meruit." ROA. 5300. However, telegraphing that it would not allow Warnock to pursue such a claim, the District Court commented that Warnock's Amended Complaint did not contain the phrase "quantum meruit" or a citation to the statute. ROA.5301.

Warnock promptly requested reconsideration, or alternatively, leave to amend. Warnock argued that such specificity is not required by federal pleading standards, and even if it were, good cause existed to permit a simple amendment. ROA.5332. The District Court extended discovery for a period of several months but did not rule on this motion for over one (1) year. When the District Court finally addressed this issue in its second summary judgment ruling, it stated that Warnock's Amended Complaint "lack[s] sufficient factual allegations to reasonably place the Court or CMU on notice that [Warnock's] allegations fell within the scope of that statute, or that [Warnock was] seeking recovery on a quantum meruit basis for any services purportedly rendered." ROA.5784.

The District Court clearly erred by precluding Warnock from pursuing equitable relief simply because the Amended Complaint did not expressly cite the statute or the phrase "quantum meruit." Such a strict requirement is inconsistent with the federal pleading standards as interpreted by *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) and *Ascroft v. Iqbal,* 556 U.S. 662 (2009). Rule 8 does not require formal labels – it simply requires a short and plain statement of the claim and that

the plaintiff is entitled to relief. *See* Fed.R.Civ.P. 8(a). The Court of Appeals' affirmance of the District Court without explanation conflicts with these pleading standards and the Supreme Court's decision in *Johnson v. City of Shelby, Mississippi,* 574 U.S.10 (2014).

In *Johnson v. City of Shelby, Mississippi*, 743 F.3d 59, 62 (5th Cir. 2013), the Fifth Circuit affirmed the dismissal of the plaintiffs' constitutional claims for failing to cite Section 1983 in the complaint. The Supreme Court summarily reversed, stating that federal pleading rules "do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted." *Johnson*, 574 U.S. at 11. After noting that *Twombly* and *Iqbal* did not affect the result, the Supreme Court further commented: "Having informed the city of the factual basis for their complaint, they were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim." *Id.* at 12. In closing, the Supreme Court instructed that, "[f]or clarification and to ward off further insistence on a punctiliously stated 'theory of the pleadings,'" the plaintiffs, on remand, should be permitted to add to their complaint a citation to Section 1983. *Id.* (citing Fed.R.Civ.P. 15(a)(2)).

Johnson mandates review of the District Court's and the Fifth Circuit's "insistence" that Warnock "punctiliously state" a legal theory for quantum meruit recovery and include a statutory citation.[1] The Amended Complaint contains

[1] Although *Johnson* was cited and discussed in Petitioners' appeal briefs, the Court of Appeals did not address the opinion or this Court's prior admonishment about imposing heightened pleading requirements on plaintiffs.

sufficient factual allegations that Warnock is seeking to recover payment for services rendered. Having informed CMU of the factual basis for this claim, Warnock was "required to do no more to stave off" dismissal based allegedly inadequate pleadings. *See Johnson*, 574 U.S. at 11-12. *Johnson* also makes clear that the District Court abused its discretion by refusing to allow a simple curative amendment to the complaint.[2]

B. The Supreme Court Should Review the Court of Appeals' Decision as to Petitioners' § 1983 Claim Because this Ruling Conflicts with the Rule 56 Summary Judgment Standard and Sanctions the Imposition of a Direct, Rather than Circumstantial, Evidentiary Burden

There is no dispute that CMU is an official governing body which constitutes a policy maker for purposes of municipal liability.[3] There is likewise no dispute that CMU took official action to terminate Warnock and withhold payment of its final invoices. The District Court agreed that these circumstances satisfied the first two prongs of the test utilized to assess CMU's liability under *Monell v. Dept. of Social Services,* 436 U.S. 658 (1978). ROA.5793. The District Court also agreed that Warnock satisfied the *prima facie* elements of a First Amendment retaliation claim.[4] Nevertheless, the District Court dismissed this claim based on its determination

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[2] Because the Court of Appeals did not explain its ruling, it is unclear whether the basis for affirmance was Fed.R.Civ.P. 8 or Fed.R.Civ.P. 15.

[3] *See Bennett v. City of Slidell*, 728 F.2d 762, 767 (5th Cir. 1984)(observing that: "Usually a [city] council or commission will be the governing body of [of the municipality] to which responsibility must be attached.").

[4] *See Mt. Healthy City Sch. Dist. Bd. Of Educ. V. Doyle,* 429 U.S. 274, 287 (1977). Speech which discloses "any evidence of corruption, impropriety, or other malfeasance on the part of city officials . . . clearly concerns matters of public import." *Schultea v. Wood*, 27 F.3d 1112, 1119 (5th Cir. 1994).

that there was no "**direct**" evidence imputing retaliatory animus beyond Anderson to a majority of the board. ROA.5798 (emphasis added).

The Court of Appeals' affirmance without explanation condones the District Court's imposition of a "direct" evidence standard contrary to Rule 56 and Supreme Court precedent. The Supreme Court has emphasized that, in civil cases involving the defendant's motive, the plaintiff is not required to present direct evidence to overcome summary judgment. "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003)(quoting *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 508 n. 17 (1957)); *see also Crawford-El v. Britton*, 523 U.S. 574, 594 (1998)(rejecting imposition of heightened burden of proof on § 1983 plaintiffs at the summary judgment or trial stage). The Court of Appeal's decision also conflicts with circuit precedent. *See Fowler v. Smith*, 68 F.3d 124, 127 (5th Cir. 1995)(noting that "direct evidence in proving illegitimate intent is not required to avoid summary judgment in unconstitutional retaliation claims, circumstantial evident will suffice"); *Haverda v. Hays County*, 723 F.3d 586, 594 (5th Cir. 2013)(reiterating that a district court must consider the evidence in a light most favorable to the plaintiff, which includes considering evidence, "circumstantial or direct," that the plaintiff has offered in opposition to a summary judgment).

By applying a "direct" evidence standard on Warnock, the District Court and the Court of Appeals ignored substantial circumstantial evidence in the record that a majority of the CMU board--comprised of Williams, Slaughter and Anderson--

shared and/or ratified Anderson's retaliatory animus. That is, a reasonable juror could infer: (1) that Williams and Slaughter were aware of Warnock's speech when they voted with Anderson; (2) that, based on the close timing, they had prior discussions with Anderson about block voting as a majority to oust Warnock for exposing corruption; (3) that Anderson influenced Williams and Slaughter to help him oust Warnock; (4) that some outside source had "fed" Anderson with the bogus reasons cited for terminating Warnock; and (6) as he attempted to do with Alderman Gilkey, Anderson may have also approached Williams and/or Slaughter about participating in the kick-back scheme. Whether a majority of the CMU board acted with illegitimate motive is simply a fact issue for the jury, not the District Court, to decide.

As an alternative basis for its ruling, the District Court also found as a matter of law that CMU would have terminated Warnock regardless of the protected speech and that Warnock failed to present sufficient evidence of pretext to avoid summary judgment.[5] This ruling also conflicts with the Rule 56 standard because, once again, the District Court and the Court of Appeals refused to consider circumstantial evidence in the record which establishes fact questions as to the genuineness of CMU's stated reasons for firing and refusing to pay Warnock: (1) CMU's minutes do not reflect any problem with any aspect of Warnock's services prior to December 22, 2016; (2) CMU provided no prior warning of any sort to Warnock concerning any of the problems cited as grounds for termination in its December 22 minutes; (3)

[5] Again, because the Court of Appeals did not explain its ruling, the basis for its affirmance of the District Court is unclear.

Warnock was not given prior notice of any problems before the vote; (4) Warnock was given no opportunity to be heard concerning any problems prior to the vote; (5) none of the witnesses could recall who prepared this list of reasons; (6) Slaughter had no problem with Warnock's services prior to vote being taken, ROA.5140; and (7) Williams testified that he did not know why he voted to terminate Warnock, ROA.5129. Whether CMU would have fired and refused to pay Warnock regardless of the protected speech is simply a fact issue for the jury, not the District Court to decide.

CONCLUSION

For these reasons Petitioners respectfully requests this Court grant certiorari to renew the rulings below.

RESPECTFULLY SUBMITTED this the 5th day of March, 2021.

WARNOCK ENGINEERING, LLC AND RUDOLPH M. WARNOCK, JR.

By: */s/ W. Thomas McCraney, III*
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United States Court of Appeals for the Fifth Circuit

No. 20-60238

WARNOCK ENGINEERING, L.L.C.; RUDOLPH M. WARNOCK, JR.,

Plaintiffs—Appellants,

versus

CANTON MUNICIPAL UTILITIES,

Defendant—Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:17-CV-160

ON PETITION FOR REHEARING EN BANC

(Opinion 1/8/21, 5 CIR., _____ , _____ F.3D _____)

Before JONES, SMITH, and ELROD, *Circuit Judges*.

PER CURIAM:

(**XX**) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc

APPENDIX A

(FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED
January 8, 2021

Lyle W. Cayce
Clerk

No. 20-60238

WARNOCK ENGINEERING, L.L.C.; RUDOLPH M. WARNOCK, JR.,

Plaintiffs—Appellants,

versus

CANTON MUNICIPAL UTILITIES,

Defendant—Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:17-CV-160

Before JONES, SMITH, and ELROD, *Circuit Judges*.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

IT IS FURTHER ORDERED that appellants pay to appellee the costs on appeal to be taxed by the Clerk of this Court.

Certified as a true copy and issued as the mandate on Feb 10, 2021

Attest: Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
January 8, 2021
Lyle W. Cayce
Clerk

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WARNOCK ENGINEERING, L.L.C.;
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Defendant—Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC 3:17-CV-160

Before JONES, SMITH, and ELROD, *Circuit Judges*.

PER CURIAM:*

The court has carefully reviewed the briefs, district court opinions and pertinent portions of the record in light of the parties' oral arguments. Having done so, we find no reversible error of fact or law. The judgment is AFFIRMED.

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

WARNOCK ENGINEERING, LLC, and RUDOLPH M. WARNOCK, JR.	§	**PLAINTIFFS**
v.	§	**Civil No. 3:17cv160-HSO-JCG**
CANTON MUNICIPAL UTILITIES	§	**DEFENDANT**

MEMORANDUM OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT CANTON MUNICIPAL UTILITIES' [206] MOTION FOR SUMMARY JUDGMENT, AND DENYING AS MOOT DEFENDANT CANTON MUNICIPAL UTILITIES' [126] MOTION TO DISMISS

BEFORE THE COURT are Defendant Canton Municipal Utilities' Motion [126] to Dismiss and its Motion [206] for Summary Judgment, which both seek dismissal of all claims advanced against it by Plaintiffs Warnock Engineering, LLC, and Rudolph M. Warnock, Jr. After due consideration of the Motions [126], [206], related pleadings, the record, and relevant legal authority, the Court finds that Defendant's Motion [206] for Summary Judgment should be granted in part and denied in part, and that Defendant's Motion [126] to Dismiss should be denied as moot. Plaintiffs' claims for copyright infringement, RICO violations, injunctive relief, negligence, open account, misappropriation, and breach of contract should be dismissed. Plaintiffs' claims for wrongful discharge and for retaliation in violation

of the First Amendment under 42 U.S.C. § 1983 will proceed.[1]

I. BACKGROUND

A. Factual background

According to the Third Amended Complaint [118], which is the operative pleading in this case, Plaintiff Warnock Engineering, LLC ("Warnock Engineering"), is an engineering firm owned by Plaintiff Rudolph M. Warnock, Jr. ("Mr. Warnock").[2] 3d Am. Compl. [118] at 4. Warnock Engineering and Mr. Warnock (collectively, "Plaintiffs" or "Warnock") began providing engineering services to Defendant Canton Municipal Utilities ("CMU") in January 2016 and worked on a number of projects for CMU. *Id.* CMU is a public utility commission within the City of Canton, Mississippi, and is managed by a five-member Board of Commissioners. *See* Pls.' Mem. [212] at 1.

Plaintiffs allege that Warnock Engineering entered into three written contracts with CMU: (1) an agreement for "General Engineering Services," effective January 4, 2016 (the "General Engineering Services Agreement"); (2) an agreement for "Sewer and Water System Improvements" entered into on November 8, 2016 (the "Sewer/Water Agreement"); and (3) an agreement for "Water & Sewer

[1] Several Motions [144], [200], [202], [204], pertaining to expert witnesses are also pending in this case. The Court has reviewed these Motions and related pleadings and finds that they do not affect the Court's resolution of the Motion for Summary Judgment. Therefore, the Court need not resolve them before considering Defendant's Motions to Dismiss and for Summary Judgment.

[2] Some of the exhibits in this case refer to Warnock & Associates, which is not a party to this case. According to Mr. Warnock, Warnock & Associates, LLC, was dissolved November 8, 2017, after the events at issue in this case had occurred, and all of Warnock & Associates' assets were assigned to Warnock Engineering, LLC. Mr. Warnock's Aff. [211-7] at 2.

System Facility Improvements" that was part of a "Five Point Plan" submitted by Warnock Engineering, and which became effective October 7, 2016 (the "Five Point Plan Agreement"). 3d Am. Compl. [118] at 4. Plaintiffs assert that the Board of Commissioners of CMU (the "CMU Board") terminated CMU's arrangements with all engineers other than Plaintiffs in August 2016, making Mr. Warnock the exclusive engineer for CMU. *Id.* at 5. The Third Amended Complaint claims that Cleveland Anderson ("Mr. Anderson") was appointed to the CMU Board on June 7, 2016, and was later removed in June 2017. *Id.* at 4-5. At some point before he was removed, Mr. Anderson became Chairman. *Id.* at 10.

Plaintiffs maintain that during a meeting with Mr. Warnock on September 18, 2016, Mr. Anderson offered to arrange the murder of a journalist in exchange for $10,000.00. Later, on September 25, 2016, Mr. Anderson allegedly offered to arrange the murder of the mayor of Madison, Mississippi, also for $10,000.00. *Id.* at 4-5. Plaintiffs allege that prior to Mr. Warnock proposing the Five Point Plan Agreement to the CMU Board, Mr. Anderson asked Mr. Warnock "if Anderson could get paid for his vote to approve the agreement," a request which Mr. Warnock refused. Mr. Anderson allegedly subsequently requested a $200,000.00 kickback for supporting the Five Point Plan Agreement in a meeting held on October 6, 2016. *Id.* at 6. Mr. Warnock again refused. *Id.* Plaintiffs assert that they did not adjust the price of the proposed $1,474,000.00 Five Point Plan Agreement, and that it was approved by unanimous vote of the CMU Board at its meeting held on October 7, 2016. *Id.* at 7.

In September 2016, the CMU Board unanimously voted to place Mr. Warnock on the CMU Personnel Committee. *Id.* Mr. Anderson also served on this committee. *Id.* According to Plaintiffs, Mr. Anderson was heavily involved in restructuring the CMU, including adding new departments and new positions, and "insisted that CMU hire his wife in a newly created General Counsel Department." *Id.* When outside counsel advised Mr. Anderson that hiring his wife at CMU would be illegal, he withdrew her name from consideration for possible employment. *Id.*

Mr. Warnock asserts that he expressed frustration to City of Canton officials over Mr. Anderson's attempts to solicit kickbacks and other improper benefits. *Id.* at 8. Mr. Anderson allegedly retaliated by influencing other CMU Commissioners and making motions to fire outside counsel and terminate Plaintiffs from all CMU engineering and personnel work. *Id.* at 9. As a result, Mr. Warnock was informed by letters dated December 29, 2016, and January 17, 2017, that the CMU Board had voted to terminate its contracts with Warnock Engineering. *Id.* at 10. Plaintiffs accuse Mr. Anderson, as Chairman of the CMU Board, of orchestrating the termination, *id.* at 10, because Mr. Warnock had "refused to provide bribes and kickbacks, and consent to the illegal and improper hiring of relatives and friends, demanded by [Mr.] Anderson," *id.* at 11.

According to the Third Amended Complaint, after terminating its contracts with Plaintiffs, Mr. Anderson and CMU continued to use and distribute Plaintiffs' work product, even though CMU had not paid invoices for work performed prior to,

and contract fees resulting from, the termination. *Id.* Plaintiffs allege that CMU has no license or other right to use Warnock Engineering's copyrights, work product, or other intellectual property, unless and until all outstanding amounts are paid by CMU. *Id.* At the time CMU terminated the contracts, it purportedly owed Warnock Engineering $2,369,477.28 for services performed prior to the termination, exclusive of interest, costs, and attorneys' fees, and also owed Warnock Engineering fees in accordance with the termination provisions contained in the Agreements. *Id.* at 11.

B. Procedural history

Plaintiffs filed the original Complaint [1] in this case on March 9, 2017, and have amended their Complaint three times. The Third Amended Complaint [118] asserts claims against CMU for copyright infringement, vicarious and contributory infringement, wrongful discharge, breach of contract, open account, negligence, defamation, misappropriation of advertising/commercial materials, and violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962(b), and the First Amendment under 42 U.S.C. § 1983. *See* 3d Am. Compl. [118] at 19-23, 24-26.[3] The Third Amended Complaint [118] seeks a declaratory judgment that

> (i) until full and final payment is made, Warnock and Warnock Engineering are entitled to the full protection and ownership of its work

[3] The Third Amended Complaint [118] also advanced claims against Mr. Anderson alone under RICO, 18 U.S.C. §§ 1962(c) and 1962(d), *see* 3d Am. Compl. [118] at 23-24, 26-27, and the Mississippi Racketeer Influenced and Corrupt Organization Act ("Mississippi RICO"), Mississippi Code §§ 97-43-1 through 11, *see id.* at 27-29, and for tortious interference with contract, *see id.* at 32. However, the parties filed a Stipulation [146] of Dismissal of Mr. Anderson on April 23, 2018, and Mr. Anderson is no longer a party.

> product under United States copyright law, 17 U.S.C. § 101 *et seq*., and (ii) to the extent Warnock and/or Warnock Engineering have licensed any such work product to CMU, such licenses have terminated and expired because of CMU's failure to comply with their payment terms.

Id. at 23.

CMU has filed a Motion [126] to Dismiss, asking the Court to dismiss all of Plaintiffs' claims pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). CMU's Mot. [126] at 1.[4] Although Plaintiffs have opposed this Motion, *see* Pls.' Resp. [150] & Mem. [151], they have dismissed their defamation claim, *see* Notice [134] at 1.

CMU subsequently filed a Motion [206] for Summary Judgment pursuant to Federal Rule of Civil Procedure 56, again seeking dismissal of Plaintiffs' claims. CMU's Mot. [206] at 1-2. CMU states that it filed this Motion "with the understanding that the relief sought in its Motion to Dismiss the Third Amended Complaint is not waived," and it reserves the right to answer the Third Amended Complaint and raise any affirmative or other defenses once the Motion to Dismiss is resolved. *Id.* at 2.

Plaintiffs have filed a Response [211] and Memorandum [212] in opposition to the Motion [206] for Summary Judgment conceding some, but not all, claims. Plaintiffs maintain that the Motion [126] to Dismiss "is essentially mooted and superseded by CMU's Motion for Summary Judgment in that the parties have now

[4] CMU also references Rule 12(b)(2) in its Motion, *see* Mot. [126] at 1, but this appears to be a typographical error, as CMU raises no argument pertaining to Rule 12(b)(2). In a previous Motion to Dismiss, CMU had argued that dismissal was required by Rule 12(b)(2) for insufficient service of process, *see* Mem. [8] at 18-19, but it subsequently conceded that service was effected on March 9, 2017, *see* Reply [11] at 14.

presented materials outside of the pleadings for consideration." Pls.' Mem. [212] at 4 n.2.

II. DISCUSSION

A. CMU's request for hearing

CMU has requested that the Court conduct a hearing on its Motion [206] for Summary Judgment. *See* CMU's Mot. [206] at 1. The Court finds that a hearing would not be helpful in resolving CMU's Motion [206] and is not necessary. Pursuant to Local Uniform Civil Rule 7(b)(3), the Court will deny CMU's request for a hearing on its Motion [206] for Summary Judgment.

B. CMU's Motion [126] to Dismiss

CMU's Motion to Dismiss, filed pursuant to Federal Rule of Civil Procedure 12(b)(1), was premised upon Plaintiffs' purported lack of standing as to the copyright claims and was otherwise based upon Rule 12(b)(6) for failure to state a claim. Plaintiffs have since conceded the copyright and several other claims. As for the remaining claims, the Motions to Dismiss and for Summary Judgment argue substantially the same bases for dismissal. For this reason, CMU's Motion to Dismiss is moot in light of the Court's resolution of the Motion for Summary Judgment.

C. CMU's Motion [206] for Summary Judgment

1. Relevant legal standard

Under Federal Rule of Civil Procedure 56(a), a "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material

fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" if it is one that might affect the outcome of the suit under governing law, and a dispute is "genuine" if a jury could return a verdict for the non-movant based upon the evidence in the record. *Renwick v. PNK Lake Charles, L.L.C.*, 901 F.3d 605, 611 (5th Cir. 2018).

If the party seeking summary judgment shows the non-movant's case lacks support, the non-movant is tasked with coming forward with "specific facts" showing a genuine factual issue for trial. *Id.* A court considering a summary judgment motion must "view the evidence in the light most favorable to the non-moving party, drawing all justifiable inferences in the non-movant's favor." *Id.* (quotation omitted). However, if a non-movant's evidence is "merely colorable" or "not significantly probative," summary judgment remains appropriate. *Certain Underwriters at Lloyd's of London v. Lowen Valley View, L.L.C.*, 892 F.3d 167, 170 (5th Cir. 2018) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

2. Claims conceded by Plaintiffs

On March 27, 2018, Plaintiffs filed a Notice [134] of Dismissal of their defamation claim pursuant to Federal Rules of Civil Procedure 41(a)(1)(A)(i) and 15(a)(2). Because no Defendant had filed an answer or motion for summary judgment at that time, the defamation claim was voluntarily dismissed.

In response to CMU's Motion [206] for Summary Judgment, Plaintiffs have conceded several other claims, including their claims for copyright infringement, RICO violations, injunctive relief, negligence, open account, and misappropriation.

See Pls.' Mem. [212] at 4.[5] CMU's Motion [206] for Summary Judgment will be granted as unopposed as to these claims, which will be dismissed. This leaves for the Court's resolution Plaintiffs' claims under state law for breach of contract and wrongful discharge, and under 42 U.S.C. § 1983 for violation of the First Amendment.

3. Plaintiffs' breach of contract claims under state law

a. The parties' arguments

Plaintiffs assert that CMU breached three contracts with Warnock Engineering for engineering services: (1) the General Engineering Services Agreement; (2) the Sewer/Water Agreement; and (3) the Five Point Plan Agreement. 3d Am. Compl. [118] at 33.

CMU argues that no valid and binding contracts existed between it and Plaintiffs. According to CMU, "[t]he alleged contracts were not attached to the board minutes and . . . were kept in a file that is separate and apart from the minutes. Additionally, there were no terms mentioned in the board minutes. Consequently, a contract or agreement between CMU and Warnock Engineering does not exist." CMU's Mem. [207] at 27. CMU further posits that Plaintiffs cannot establish a breach of these purported contracts because the invoices that were submitted to CMU were for work performed by a different legal entity,

[5] In identifying claims that they do not contest, Plaintiffs do not specifically mention their claim for declaratory judgment. *See* Pls.' Mem. [212] at 4. However, the declaratory judgment claim relates to Plaintiffs' copyright infringement claim, and Plaintiffs appear to concede all of their copyright claims. *See id.* Plaintiffs also do not address the declaratory judgment claim in their Memorandum in support of their remaining claims. As such, the Court concludes that Plaintiffs intended to dismiss the declaratory judgment claim.

Warnock & Associates LLC, as opposed to Warnock Engineering, the Plaintiff in this case. *Id.* at 28.

Plaintiffs dispute CMU's assertion that the three contracts do not sufficiently appear in CMU's minutes, *see* Pl.'s Mem. [212] at 18, 21-23, and insist that they are entitled to recovery for their services under Mississippi Code § 31-7-57(2), *id.* at 18-21. Plaintiffs additionally argue that CMU is equitably estopped from denying the contracts. *Id.* at 23-25.

b. The validity of contracts with public boards

Under Mississippi law, a claim for breach of contract has two elements: "(1) the existence of a valid and binding contract, and (2) a showing that the defendant has broken, or breached it." *Maness v. K & A Enterprises of Mississippi, LLC*, 250 So. 3d 402, 414 (Miss. 2018), *reh'g denied* (Aug. 9, 2018) (quotation omitted).

In Mississippi, "[a] public board 'speaks and acts only through its minutes.'" *Kennedy v. Claiborne Cty. by & through its Bd. of Supervisors*, 233 So. 3d 825, 829 (Miss. Ct. App. 2017), *reh'g denied* (Aug. 15, 2017), *cert. denied*, 230 So. 3d 1023 (Miss. 2017) (quoting *Wellness, Inc. v. Pearl River Cty. Hosp.*, 178 So. 3d 1287, 1290 (Miss. 2015)). "The minutes are the sole and exclusive evidence of what the board did and must be the repository and the evidence of their official acts." *Id.* (quotation omitted).

Contracts awarded by a board or commission consisting of three or more members such as CMU "must be determined or decided upon only in or at a lawfully convened session, and the proceedings must be entered upon the minutes, of the

board or commission." *Lange v. City of Batesville*, 972 So. 2d 11, 18-19 (Miss. Ct. App. 2008) (quoting *Thompson v. Jones Cty. Cmty. Hosp.*, 352 So. 2d 795, 796 (Miss. 1977)).

> The reasons for the requirements aforesaid are: (1) That when authority is conferred upon a board, the public is entitled to the judgment of the board after an examination of a proposal and a discussion of it among the members to the end that the result reached will represent the wisdom of the majority rather than the opinion or preference of some individual member; and (2) that the decision or order when made *shall not be subject to the uncertainties of the recollection of individual witnesses of what transpired, but that the action taken will be evidenced by a written memorial entered upon the minutes at the time*, and to which all the public may have access to see what was actually done.

Id. at 19 (emphasis in original).

Under Mississippi law, it is the responsibility of the entity contracting with a public board, and not of the board itself, to ensure the contract is legal and properly recorded in the minutes. *Wellness, Inc.*, 178 So. 3d at 1291. "[P]lacing a contract in a book other than the minute book or in a person's office is insufficient to meet the minutes requirement." *Dhealthcare Consultants, Inc. v. Jefferson Cty. Hosp.*, 232 So. 3d 192, 194 (Miss. Ct. App. 2017), *reh'g denied* (Aug. 29, 2017), *cert. denied*, 229 So. 3d 714 (Miss. 2017). Moreover, "simply placing a contract . . . in the side pocket of the minute book *at some later date* is insufficient to meet the minutes requirement," as actions taken by a public board must be evidenced by a written memorial entered upon its minutes at the time. *Kennedy*, 233 So. 3d at 829 (emphasis added).

The entirety of a contract, however, need not be reproduced within a board's

minutes. *Lange*, 972 So. 2d at 19. "Plans, specifications and other papers specifically referred to by the board in its minutes have been held to constitute a part of the contract," and if enough terms and conditions of a contract are contained in the minutes to determine the liability of the contracting parties without resorting to other evidence, a contract may be enforced. *Id.* "However, the individual or group contracting with a board carries the responsibility to ensure the contract is properly recorded." *Id.*

c. The three contracts in dispute

(i) General Engineering Services Agreement

CMU has attached as Exhibit "C" [206-3] to its Motion for Summary Judgment what it claims was the General Engineering Services Agreement. According to the text of that Exhibit, the Agreement became effective January 4, 2016. It was executed by Charles Weems, CMU's Chairman, purportedly on behalf of CMU, and by Mr. Warnock for Warnock Engineering, and then notarized. Ex. "C" [206-3] at 1, 15. Warnock has submitted what appears to be a different version of this General Engineering Services Agreement as Exhibit "J" [211-10] to its Response [211], which purportedly became effective September 21, 2016. While this version also appears to be signed by both Mr. Weems and Mr. Warnock, it is attested to by a different individual. *See* Ex. "J" [211-10] at 15. There is no indication what date either of these General Engineering Services Agreements were actually signed. *See id.*; Ex. "C" [206-3] at 15.

During Mr. Warnock's deposition, he testified he could not say with any

certainty on what date Mr. Weems actually signed the General Engineering Services Agreement, and Mr. Warnock has acknowledged that he did not know whether Mr. Weems was authorized by the CMU Board of Commissioners to sign this Agreement. *See* Mr. Warnock's Dep. [206-1] at 37. The parties have attached minutes [206-7], [206-9], [211-1] from various CMU Board meetings to support their positions.

According to the minutes for the August 16, 2016, CMU Board meeting, supplied as Exhibit "A" to Plaintiffs' Response [211], Mr. Anderson moved to hire Mr. Warnock as City Engineer

> to take over engineering services from Waggoner Engineering and to authorize Mr. Warnock to negotiate a transition agreement for all engineering services from Waggoner to Mr. Warnock and to bring back the transition agreement within the next 30 days for our signature.

Ex. "A" [211-1] at 25. The motion carried. *Id.* These minutes do not mention the approval of any General Engineering Services Agreement with either Mr. Warnock or Warnock Engineering. The Court also notes that the copy of these minutes is unsigned. *Id.*

Mr. Warnock has submitted an Affidavit [211-7] in which he avers that "[a]t a CMU Board Meeting on September 13, 2016, Warnock's General Services Agreement signed by Rudy Warnock was handed to members of the CMU Board of Commissioners and other CMU officials present." Mr. Warnock's Aff. [211-7] at 1. According to the minutes from that meeting, a representative from Warnock & Associates "handed out to all the Board members a list of other items needed to complete the transition" from Waggoner Engineering to Warnock & Associates.

Ex. "A" [211-1] at 27. There is no mention of a General Engineering Services Agreement in these minutes. *See id.* at 27-29.

The minutes reflect that during the September 20, 2016, meeting, the Board executed contracts with its attorney and "Rudy Warnock & Associates to spread across the minutes." *Id.* at 42. No specific information is provided about these contracts however, and they do not appear in the minutes. *See id.* In short, it is not clear what contract was executed with Warnock.

During the November 29, 2016, meeting, "Mr. Warnock gave [the Board Attorney] a General Services Contract to review," *id.* at 105, but that contract does not appear in the minutes, and again, no specific terms are mentioned, *see id.* The CMU Board also "voted to approve and pay the outstanding Warnock invoices" at that meeting. *Id.*

At the December 6, 2016, meeting, the CMU Board's general counsel recommended approval of "Warnock's Agreement" with modifications, *id.* at 110, and "the Board approved Warnock's Agreement with necessary modifications," *id.* A copy of the agreement was not attached, and no additional information appears in the minutes. *See id.* The minutes do not indicate to which agreement they refer, nor do they reveal what the terms of this agreement were.[6]

The minutes of the December 22, 2016, CMU Board meeting refer to the

[6] The minutes submitted to the Court for subsequent meetings are devoid of any indication that the December 6, 2016, minutes were ever approved by the CMU Board. *See* Ex. "A" [211-1] at 119-20 (December 20, 2016, meeting minutes); 129-30 (December 22, 2016, meeting minutes); 131-32 (December 29, 2016, meeting minutes).

existence of a "General Services Contract" with Mr. Warnock and state that it "contains a clause which would amount to an illegal gift which violated Mississippi Constitution Article 4, Section 66. (See Warnock contract attached.)." *Id.* at 130. Despite the parenthetical directing the reader to see the attached contract, no contract was attached to the minutes submitted to the Court. At that same meeting, the CMU Board voted "to terminate any and all contracts Warnock & Associates have with CMU . . . ." *Id.*[7]

The parties have submitted excerpts of the deposition of Tammy Moore ("Ms. Moore"), who was an assistant to the CMU general manager. *See* Ms. Moore's Dep. [206-5] at 9; Ms. Moore's Dep. [211-13] at 11. Ms. Moore was in charge of keeping the minutes for the Board from June 21, 2016, until January 17, 2017. *See* Ms. Moore's Dep. [206-5] at 9, 12; Ms. Moore's Dep. [211-13] at 11. Ms. Moore testified that she first saw the General Engineering Services Agreement on December 23 or 24, 2016, when the former Board Attorney brought the Agreement to her office and instructed her to attach the Agreement to the Board minutes. Ms. Moore's Dep. [206-5] at 22-23. Ms. Moore did not do so. *Id.* at 24. Instead, she placed the Agreement in a file folder inside a fireproof vault. *Id.*

(ii) Sewer/Water Agreement

Mr. Warnock claims in his Affidavit [211-7] that "[a]t a CMU Board Meeting on November 8, 2016, Warnock's Sewer & Water System Improvements Agreement

[7] It is unclear from the current record whether the December 22, 2016, meeting minutes were ever approved by the CMU Board. *See* Ex. "A" [211-1] at 131-32 (December 29, 2016, meeting minutes).

signed by Rudy Warnock was handed to members of the CMU Board of Commissioners and other CMU officials present." Mr. Warnock's Aff. [211-7] at 2. According to the November 8, 2016, meeting minutes,

> Warnock presented an agreement for "sewer and water system improvements," including design engineering and construction engineering, for approval. Upon a motion by Commissioner Weems and a second by Commissioner Anderson, with all present voting "aye," the Board approved the contract from Warnock & Associates.

Ex. "A" [211-1] at 87. This Agreement was not attached to the minutes, nor do any terms or other details pertaining to the Agreement appear in the minutes. *See id.*

Plaintiffs have attached as Exhibit "B" to the Third Amended Complaint [118] what they maintain is the Sewer/Water Agreement [118-2] approved by the CMU Board. This Agreement became effective November 8, 2016, and is between CMU and Warnock Engineering, LLC. *See* Ex. "B" [118-2] at 3. It was executed by Charles Weems as Board Chairman for CMU on an unspecified date, and by Mr. Warnock on behalf of Warnock Engineering on November 8, 2016. *Id.* at 11. Ms. Moore testified that she had seen a copy of the Sewer/Water Agreement in December 2016 when she found it in some boxes in the office of the former general manager. Ms. Moore's Dep. [206-5] at 47-48; Ms. Moore's Dep. [211-13] at 31.

(iii) Five Point Plan Agreement

The minutes of the September 20, 2016, meeting reflect that the Board approved Warnock & Associates' five-point plan, which consisted of:

1. Sewer Maintenance
2. Sewer Service
3. Fire Protection
4. Facility Maintenance

5. Economic Development.

Ex. "A" [211-1] at 42.

Mr. Warnock avers in his Affidavit [211-7] that "[a]t a CMU Board Meeting on October 7, 2016, Warnock's Water & Sewer Facility Improvements as Part of the 'Five Point Plan' Agreement signed by Rudy Warnock was handed to members of the CMU Board of Commissioners and other CMU officials present." Mr. Warnock's Aff. [211-7] at 2. The minutes of the October 7, 2016, meeting reflect that

> Mr. Warnock presented a professional services agreement between Warnock and CMU to implement Warnock's five-point plan. Upon a motion by Commissioner Anderson and a second by Commissioner Weems, with all present voting "aye," the Board accepted the agreement between Warnock and CMU.

Id. at 63. Mr. Warnock acknowledged in his deposition that anyone who reviewed the October 7, 2016, minutes would not know what the Five Point Plan Agreement was. Mr. Warnock's Dep. [206-1] at 328.

Plaintiffs claim that Exhibit "C" to their Third Amended Complaint [118] is the Five Point Plan Agreement itself [118-3]. This purported Agreement was entered into by CMU and Warnock Engineering, LLC, with an effective date of October 7, 2016. *See* Ex. "C" [118-3] at 3. It bears the signatures of Charles Weems as General Manager of CMU and of Mr. Warnock on behalf of Warnock Engineering. *Id.* at 11. Mr. Weems' signature is dated December 15, 2016, but Mr. Warnock's signature is not dated. *See id.*

d. The validity of the contracts

Based upon the summary judgment record before the Court, there does not appear to be, nor can there be, any serious dispute that none of the three contracts at issue appear in the CMU Board's minute book, nor were the terms of any of these agreements recited in the minutes. Mr. Warnock maintains that he repeatedly requested signed copies of the Agreements and was told by the CMU Board Attorney that they were in the minutes, and the attorney later provided him with an affidavit to that effect. Mr. Warnock's Aff. [211-7] at 2. Plaintiffs have submitted the Board Attorney's Affidavit [211-9], which avers that the Five Point Plan Agreement was approved by the Board and that the attorney provided executed copies of the contracts to Ms. Moore. Ex. "I" [211-9] at 1-2. According to the Board Attorney, he instructed the employee to attach the contracts to the Board minutes corresponding to the meeting at which each contract was approved. *Id.* at 2. However, it is not clear from this Affidavit when this conversation with Ms. Moore occurred, except that it purportedly took place while he was "still the Board Attorney for the Board." *Id.* This is insufficient competent summary judgment evidence from which one can conclude that these contracts were ever actually attached to the minutes.

Plaintiffs maintain that the "sufficiency of whatever may be in the minutes is a question of fact." Pls.' Mem. [212] at 22. However, the record before the Court does not present a jury question. It clear that the contracts were not attached to the minutes, and no terms and conditions of any of the three contracts appear

anywhere in the minutes. It would be impossible for the public to "have access to see what was actually done," *Lange*, 972 So. 2d at 19, or for a person to determine the liabilities and obligations of the contracting parties. This is insufficient under Mississippi law. *See, e.g., Dhealthcare Consultants, Inc.*, 232 So. 3d at 194.

Plaintiffs argue that the CMU Board approved dockets of claims and paid invoices pertaining to work they performed under these Agreements. *See, e.g.,* Pls.' Mem. [212] at 8-11. The Court is not persuaded that CMU's payment for certain services rendered necessarily means that the three specific agreements at issue in Plaintiffs' breach of contract claims were legally and properly entered into by the CMU Board. Indeed, it appears that some, if not all, of these fees were paid to Warnock & Associates, a separate entity that is not a party to this case.[8]

CMU has demonstrated that it is entitled to summary judgment on Plaintiffs' breach of contract claims because there can be no genuine dispute of material fact that the three contracts upon which Plaintiffs ground their claims were not properly entered into and are not legally enforceable under Mississippi law. Nor have Plaintiffs come forward with sufficient competent summary judgment evidence to

[8] As the Court noted earlier, Plaintiff has presented an Affidavit from Mr. Warnock averring that Warnock & Associates, LLC, was dissolved November 8, 2017, and that all of its assets were assigned to Warnock Engineering, LLC. *See* Mr. Warnock's Aff. [211-7] at 2. Plaintiff, however, has not submitted a copy of the actual assignment, has not disclosed what specific assets pertaining to CMU were allegedly assigned to Warnock Engineering, and has not cited controlling authority that would permit such an assignment under Mississippi law. *See, e.g.,* MS AG Op. Brown, 2003 WL 21962325, at *1 (Miss. A.G. July 25, 2003) (opining that, while Mississippi Code § 21-39-13(4) permits the transfer of a claim against a municipality to a third party by assignment, a transfer or assignment of contractual duties to a third party without the knowledge or acquiescence of the board of aldermen would constitute a unilateral amendment to the contract, and such an amendment must appear in the official minutes of the meetings of the governing authority).

create a triable fact question as to the enforceability of the purported Agreements or what the terms of any Agreement were. CMU's Motion for Summary Judgment should be granted as to Plaintiffs' breach of contract claims.

e. Plaintiffs' alternative theory of recovery under Mississippi Code § 31-7-57(2)

As an alternative theory in support of their breach of contract claims, Plaintiffs rely upon Mississippi Code § 31-7-57(2), which provides as follows:

> No individual member, officer, employee or agent of any agency or board of a governing authority shall let contracts or purchase commodities or equipment except in the manner provided by law, including the provisions of Section 25-9-120(3), Mississippi Code of 1972, relating to personal and professional service contracts by state agencies; nor shall any such agency or board of a governing authority ratify any such contract or purchase made by any individual member, officer, employee or agent thereof, or pay for the same out of public funds unless such contract or purchase was made in the manner provided by law; provided, however, that *any vendor who, in good faith, delivers commodities or printing or performs any services under a contract to or for the agency or governing authority, shall be entitled to recover the fair market value of such commodities, printing or services, notwithstanding some error or failure by the agency or governing authority to follow the law, if the contract was for an object authorized by law and the vendor had no control of, participation in, or actual knowledge of the error or failure by the agency or governing authority*.

Miss. Code Ann. § 31-7-57(2) (emphasis added).

The Court questions whether this statute would even apply to Plaintiffs, and they have not attempted to explain how they would qualify as a "vendor" within the meaning of this provision. *See id.* Even if Plaintiffs were able to demonstrate they were entitled to some recovery under this statute, they have not shown that this provision precludes summary judgment on their breach of contract claims.

This statute sounds in quantum meruit recovery, and while Plaintiffs

reference quantum meruit in their Memorandum [212] in opposition to summary judgment, *see* Mem. [212] at 16, they pleaded no such claim in their Third Amended Complaint [118]. Plaintiffs did not cite Mississippi Code § 31-7-57(2) in their Third Amended Complaint and have never sought leave to amend to include such a claim.[9] In the Court's March 9, 2018, Order [115] granting Plaintiffs leave to file the Third Amended Complaint, it cautioned that "**no further amendments to their pleadings will be permitted absent good cause shown**." Order [115] at 2 (emphasis in original). Plaintiffs have not shown any good cause to allow a further amendment, and this alternative claim for relief is not properly before the Court.

f. Plaintiffs' alternative equitable estoppel theory

Relying upon *Community Extended Care Centers, Inc. v. Board of Supervisors for Humphreys County*, 756 So. 2d 798 (Miss. Ct. App. 1999), Plaintiffs attempt to make an end-run around the minutes issue and advance an equitable estoppel argument to sustain their breach of contract claims. *See* Pls.' Mem. [212] at 23-25. Equitable estoppel may only be enforced against the State or its counties under proper circumstances, where the acts of their officers were authorized. *Bd. of Educ. of Lamar Cty. v. Hudson*, 585 So. 2d 683, 688 (Miss. 1991). "[I]n Mississippi there is no estoppel against a public body unless a valid contract is duly entered

[9] *See* L.U. Civ. R. 7(b) ("[a]ny written communication with the court that is intended to be an application for relief or other action by the court must be presented by a motion in the form prescribed by this Rule."); L.U. Civ. R. 7(b)(2) (providing that, if leave of Court is required under Federal Rule of Civil Procedure 15, a proposed amended pleading must be an exhibit to a motion for leave to file the pleading).

upon the minutes, which binds that public body." *Dhealthcare Consultants, Inc.*, 232 So. 3d at 195. Without a writing upon the minutes, there is no valid contract to enforce. *Id.*

The Mississippi Court of Appeals case upon which Plaintiffs rely is distinguishable. *See Cmty. Extended Care Ctrs., Inc.*, 756 So. 2d at 798. At issue in that case was a lease contract. The county's board of supervisors entered a resolution in the minutes authorizing the board president to execute the lease, which was then filed in the chancery clerk's office. *Id.* at 801. "What the board had approved was immediately viewable by the public and was in no way uncertain or hidden." *Id.* at 802.

According to the Mississippi Court of Appeals, the board had affirmatively acknowledged the existence of the lease contract for more than 13 years by accepting the lessee's monthly rent payments, assessing and collecting taxes under the lease contract, and agreeing to two amendments to the lease contract. *Id.* at 800. The Court of Appeals held that the entry of the unanimous resolution authorizing the Board president "to execute in duplicate the original of the lease," the filing of the lease contract in the land records of the chancery clerk's office, the Board's subsequent approval of the amendment to the lease contract, the filing of the amendment in the land records of the chancery clerk's office, and the entry of the amendment in the Board minutes, "were sufficient acts to ensure that no individual member of the Board had bound the Board without the benefit of the consent of the Board as a whole by executing the lease contract . . . ." *Id.* at 803-04.

The Court of Appeals recognized, however, that "no estoppel may be enforced against the state or its counties where the acts of their officers were unauthorized." *Id.* at 804 (quotation omitted).

Here, Plaintiffs have not presented competent summary judgment evidence to demonstrate that Mr. Weems' purported actions of signing the three particular contracts Warnock has submitted as exhibits were authorized by the CMU Board, nor have they shown that these contracts appear anywhere in the minutes or in any other public records. *Community Extended Care Centers* is distinguishable, and Plaintiffs' equitable estoppel argument is unavailing.

4. Plaintiffs' wrongful discharge claim

Plaintiffs advance a state law claim against CMU for wrongful discharge. 3d Am. Compl. [118] at 31-32. Specifically, they assert that as a direct and proximate result of Mr. Warnock's refusal to participate in illegal activity, and due to his reporting of the same to authorities, Mr. Anderson caused CMU to terminate Mr. Warnock from his position as CMU Engineer and to terminate Plaintiffs' contracts with CMU. *Id.* at 31.

CMU takes the position that it is entitled to immunity on this claim and that it is otherwise time-barred under the Mississippi Tort Claims Act, Mississippi Code § 11-46-1, *et seq.* ("MTCA"). CMU's Mem. [207] at 26. In addition, CMU contends that Mr. Warnock, as a former at-will employee, cannot maintain a wrongful discharge claim, and that the alleged termination of Warnock Engineering is not cognizable as a wrongful discharge claim. *Id.* at 24-25. Plaintiffs counter that a

public policy exception to the employment-at-will doctrine applies in this case because Warnock was purportedly fired for "refusing to engage in and/or reporting an unlawful act . . . ." Pls.' Mem. [212] at 30 (citing *McArn v. Allied Bruce-Terminix Co.*, 626 So. 2d 603, 607 (Miss. 1993)).

> The Mississippi Supreme Court
>
> has modified the employment at will doctrine by carving out a narrow public policy exception which allows an employee at-will to sue for wrongful discharge where the employee is terminated because of (1) refusal to participate in illegal activity or (2) reporting the illegal activity of his employer to the employer or anyone else.

Harris v. Miss. Valley State Univ., 873 So. 2d 970, 986 (Miss. 2004). CMU did not address Plaintiffs' arguments with respect to the public-policy exception in its Rebuttal [216], nor has it adequately supported its arguments or cited relevant legal authority in its original Memorandum [207] sufficient to carry its initial burden on its immunity and statute of limitations defenses.[10] With respect to Warnock Engineering's claim, CMU offers only a conclusory assertion that it is not cognizable and cites no legal authority to support its position. *See* Mem. [207] at 25. While CMU's argument as to Warnock Engineering carries logical appeal, CMU has not supported its argument with any legal authority and has not carried its initial summary judgment burden.

In sum, CMU has not shown that it is entitled to judgment as a matter of law on Plaintiffs' wrongful discharge claims. Because CMU did not carry its initial

[10] CMU did not make any substantive arguments pertaining to the wrongful discharge claim in its Rebuttal [216].

summary judgment burden on these claims, the Court will deny this portion of the Motion.

5. Plaintiffs' First Amendment claim

Plaintiffs assert a First Amendment claim under 42 U.S.C. § 1983, alleging that CMU deprived Mr. Warnock of "his rights of freedom of speech and freedom to petition for redress of grievances in violation of the First Amendment of the United States Constitution by terminating his contract with CMU as retaliation for discussing matters of public concern." 3d Am. Compl. [118] at 30. The Third Amended Complaint alleges that these matters of public concern included Mr. Anderson's offer to Mr. Warnock to arrange a murder for hire, his solicitation of a bribe and kickback, and his demands that Mr. Warnock support the hiring of Mr. Anderson's wife and "other unqualified family members." *Id.* Plaintiffs assert that after Mr. Warnock refused to participate in these activities, he reported them to City of Canton officials via text message on December 17, 2016, and discussed them with an investigator with the Madison County District Attorney's office. *Id.* Mr. Anderson and the other CMU Commissioners then allegedly conspired to retaliate against Mr. Warnock by terminating his contracts with CMU. *Id.*

a. First Amendment retaliation

"The First Amendment's guarantee of freedom of speech protects government employees from termination *because* of their speech on matters of public concern." *Bd. of Cty. Comm'rs, Wabaunsee Cty., Kan. v. Umbehr*, 518 U.S. 668, 675 (1996) (emphasis in original). "The First Amendment limits the ability of a public

employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006). Thus, "[s]o long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." *Id.*

"To state a claim for retaliation in violation of the First Amendment, public employees . . . must allege that their employer interfered with their right to speak as a citizen on a matter of public concern." *Heffernan v. City of Paterson, N.J.*, 136 S. Ct. 1412, 1420 (2016). A plaintiff generally establishes a First Amendment retaliation claim by showing that: "(1) he suffered an adverse employment action; (2) he spoke as a citizen on a matter of public concern; (3) his interest in the speech outweighs the government's interest in the efficient provision of public services; and (4) the speech precipitated the adverse employment action." *Moss v. Harris Cty. Constable Precinct One*, 851 F.3d 413, 420-21 (5th Cir. 2017) (quotation omitted). A First Amendment retaliation claim by a contractor against a governmental entity based upon the contractor's speech is analyzed using the same framework as that utilized for claims by public employees. *Culbertson v. Lykos*, 790 F.3d 608, 618 (5th Cir. 2015) (citing *Umbehr*, 518 U.S. at 684-85).

b. The parties' arguments

CMU's Memorandum [207] in support of its Motion for Summary Judgment says very little about Plaintiffs' § 1983 claims. CMU argues without citation to any

legal authority or evidence that termination of Mr. Warnock's contracts did not rise to the level of an abridgment or deprivation of Mr. Warnock's rights, and that the allegation that CMU retaliated against Mr. Warnock for "discussing matters of public concern" is vague and unsupported. CMU's Mem. [207] at 24. CMU also makes a conclusory assertion that it enjoys immunity from this claim and that it is time-barred. *Id.*

Plaintiffs respond that "Warnock's actions in objecting to and voicing concerns about Anderson's illegal and improper conduct clearly qualifies [sic] as protected speech." Pls.' Mem. [212] at 26. According to Plaintiffs, "[w]hether Warnock's protected activity was a motivating factor in CMU's termination decision presents a genuine dispute of fact." *Id.* Plaintiffs also state that CMU does not enjoy immunity from § 1983 liability, and that its liability should be analyzed under the United States Supreme Court's decision in *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978). *Id.* at 28.

CMU's Rebuttal counters that the matters on which Mr. Warnock spoke were not ones of public concern and instead constituted his own attempt to "take down Anderson before Anderson took Warnock down." CMU's Rebuttal [216] at 11. CMU contends that Mr. Warnock was not employed by CMU, and that the alleged contracts between CMU and Mr. Warnock's engineering firm(s) were void under Mississippi law. *Id.* at 3. CMU asserts that it had "multiple reasons for terminating Plaintiffs' void contracts – any one of which was sufficient to justify CMU's termination of Plaintiffs' void contracts." *Id.* at 5.

The vast majority of CMU's arguments with respect to the § 1983 claim were improperly raised for the first time in its Rebuttal [216]. *Compare* CMU's Mem. [207] at 23-24, *with* CMU's Rebuttal [216] at 2-13; *see also, e.g., United States v. Jackson*, 426 F.3d 301, 304 n.2 (5th Cir. 2005) ("Arguments raised for the first time in a reply brief . . . are waived."). As to this claim, CMU's original Memorandum [207] contained only conclusory assertions, unsupported by citation to evidence, as follows:

> CMU is not liable for Plaintiff Warnock's claims made pursuant to 42 U.S.C. Section 1983 as Warnock is unable to support how Warnock's First Amendment rights were deprived by CMU's termination of the alleged contracts with Warnock Engineering . . . .
>
> . . . Termination of Warnock's purported contracts, even under the facts espoused by Warnock, does not show an abridgment or deprivation of Warnock's rights, and Warnock merely posits his conclusion without any factual support related to CMU. Warnock's conjecture that CMU retaliated for "discussing matters of public concern" is vague and unsupported, and cannot stand to support a claim under 42 U.S.C. § 1983.
>
> Despite the complete lack of specificity and clarity of Plaintiffs' claim, CMU would also maintain that it enjoys immunity from such charge and simultaneously maintains that the MTCA would act to time-bar this action. Consequently, CMU is entitled to summary judgment.

CMU's Mem. [207] at 23-24. The Court will not consider additional arguments raised for the first time in the Rebuttal [216], which Plaintiffs have not had the opportunity to address. Moreover, these arguments are not adequately briefed.

c. CMU's immunity argument

CMU makes a conclusory assertion that "it enjoys immunity" from Plaintiffs' § 1983 claim, without any elaboration as to what type of immunity might apply to it under these circumstances. CMU's Mem. [207] at 24. CMU has not carried its

initial burden of showing that it is entitled to summary judgment on this basis.

d. CMU's statute of limitations defense

CMU posits that Plaintiffs' § 1983 claim is time-barred under the MTCA. CMU's Mem. [207] at 24. "Because no specified federal statute of limitations exists for § 1983 suits, federal courts borrow the forum state's general or residual personal-injury limitations period, . . . which in Mississippi is three years." *Edmonds v. Oktibbeha Cty., Miss.*, 675 F.3d 911, 916 (5th Cir. 2012) (citing *Owens v. Okure*, 488 U.S. 235, 249-50 (1989); Miss. Code Ann. § 15-1-49). The parties do not appear to dispute that the actions which are the subject of this case occurred in 2016, less than three years ago. *See, e.g.,* CMU's Mem. [207] at 3; 3d Am. Compl. [118] at 5. CMU has not shown that Plaintiff's First Amendment retaliation claim is time-barred.

With respect to the merits of Plaintiffs' § 1983 claim, CMU's original Memorandum [207] in support of its Motion offered only conclusory assertions, unsupported by citation to evidence or pertinent legal authority supporting the specific arguments raised. *See* CMU's Mem. [207] at 23-24. CMU did not carry its initial burden of showing that there is no genuine dispute of material fact or that it is entitled to judgment as a matter of law on this claim. Because CMU has not carried its initial burden on this claim, summary judgment should be denied.

e. Plaintiffs' due process assertions

In response to CMU's request for summary judgment, Plaintiffs assert that CMU's purported failure to provide any notice or opportunity to be heard prior to

any termination constituted a separate, actionable due process violation. Pls.' Mem. [212] at 27. However, Plaintiffs did not raise any due process claim in their Third Amended Complaint.[11]

If a party cannot amend its pleading as a matter of course, it may amend the pleading "only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). In this case, Plaintiffs have not requested leave to amend their Third Amended Complaint, nor have they obtained CMU's written consent to such an amendment.

The Court's March 9, 2018, Order [115], which granted Plaintiffs leave to file their Third Amended Complaint, cautioned Plaintiffs that "**no further amendments to their pleadings will be permitted absent good cause shown**." Order [115] at 2 (emphasis in original). Plaintiffs have not shown any such good cause. Any claim for an alleged due process violation is not properly before the Court.

III. CONCLUSION

To the extent the Court has not addressed any of the parties' arguments, it has considered them and determined that they would not alter the result. CMU's Motion [206] for Summary Judgment will be granted in part and denied in part, and Plaintiffs' claims against CMU for copyright infringement, RICO violations,

[11] It appears that Plaintiffs first alleged a due process violation under 42 U.S.C. § 1983 in their Memorandum [151] in opposition to CMU's Motion [126] to Dismiss. *See* Pls.' Mem. [151] at 20. However, they never raised such a claim in their original Complaint [1], First Amended Complaint [9], Second Amended Complaint [65], or Third Amended Complaint [118].

injunctive relief, negligence, open account, misappropriation, declaratory judgment, and breach of contract will be dismissed.[12] Plaintiffs' claims for wrongful discharge and for First Amendment retaliation under 42 U.S.C. § 1983 will proceed. CMU's Motion [126] to Dismiss is moot.

IT IS, THEREFORE, ORDERED AND ADJUDGED that, Defendant Canton Municipal Utilities' request for a hearing on its Motion [206] for Summary Judgment is **DENIED**.

IT IS, FURTHER, ORDERED AND ADJUDGED that, Defendant Canton Municipal Utilities' Motion [206] for Summary Judgment is **GRANTED IN PART and DENIED IN PART**, and Plaintiffs' claims against Defendant Canton Municipal Utilities for copyright infringement, RICO violations, injunctive relief, negligence, open account, misappropriation, declaratory judgment, and breach of contract are **DISMISSED WITH PREJUDICE**. Plaintiffs' claims for wrongful discharge and for retaliation in violation of the First Amendment under 42 U.S.C. § 1983 will proceed.

IT IS, FURTHER, ORDERED AND ADJUDGED that, the Motion [126] to Dismiss filed by Defendant Canton Municipal Utilities is **DENIED AS MOOT**.

SO ORDERED AND ADJUDGED, this the 21st day of December, 2018.

s/ Halil Suleyman Ozerden
HALIL SULEYMAN OZERDEN
UNITED STATES DISTRICT JUDGE

[12] As noted earlier, Plaintiffs previously dismissed their defamation claim pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i). *See* Notice [134] at 1.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

WARNOCK ENGINEERING, LLC, and RUDOLPH M. WARNOCK, JR.	§	**PLAINTIFFS**
v.	§	**Civil No. 3:17cv160-HSO-JCG**
CANTON MUNICIPAL UTILITIES	§	**DEFENDANT**

MEMORANDUM OPINION AND ORDER DENYING PLAINTIFFS' MOTION [221] FOR RECONSIDERATION OR, IN THE ALTERNATIVE, FOR LEAVE TO AMEND COMPLAINT; DENYING AS MOOT PLAINTIFFS' MOTION [230] FOR LEAVE TO FILE AMENDED REPLY BRIEF; GRANTING DEFENDANT CANTON MUNICIPAL UTILITIES' MOTION [228] FOR SUMMARY JUDGMENT; FINDING MOOT PLAINTIFFS' MOTIONS [237], [239], [243] TO EXCLUDE; AND FINDING MOOT DEFENDANT'S MOTION [241] TO STRIKE

BEFORE THE COURT are the following Motions: (1) a Motion [221] for Reconsideration or, in the Alternative, for Leave to Amend Complaint filed by Plaintiffs Warnock Engineering, LLC, and Rudolph M. Warnock, Jr.; (2) a Motion [228] for Summary Judgment filed by Defendant Canton Municipal Utilities; (3) a Motion [230] for Leave to File Amended Reply Brief filed by Plaintiffs Warnock Engineering, LLC, and Rudolph M. Warnock, Jr.; (4) a Motion [237] to Exclude Testimony of Defendant's Expert Joseph E. Hines filed by Plaintiffs Warnock Engineering, LLC, and Rudolph M. Warnock, Jr.; (5) a Motion [239] to Exclude Testimony of Defendant's Expert John M. Wallace filed by Plaintiffs Warnock Engineering, LLC, and Rudolph M. Warnock, Jr.; (6) a Motion [241] to Strike

Plaintiffs' Expert Designations filed by Defendant Canton Municipal Utilities; and (7) Motion [243] to Exclude or Limit Opinions of Defendant's Proposed Expert Dax Alexander, P.E., filed by Plaintiffs Warnock Engineering, LLC, and Rudolph M. Warnock, Jr.

After due consideration of the Motions [221], [228], [230], [237], [239], [241], [243], related pleadings, the record, and relevant legal authority, the Court finds that Plaintiffs' Motion [221] for Reconsideration or, in the Alternative, for Leave to Amend Complaint should be denied, that Plaintiffs' Motion [230] for Leave to File Amended Reply Brief is moot, and that Defendant's Motion [228] for Summary Judgment should be granted. Plaintiffs' remaining claims should be dismissed. The remaining Motions [237], [239], [241], [243], are rendered moot.

I. BACKGROUND

A. Factual background

According to the Third Amended Complaint [118], which is the operative pleading in this case, Plaintiff Warnock Engineering, LLC ("Warnock Engineering"), is an engineering firm owned by Plaintiff Rudolph M. Warnock, Jr. ("Mr. Warnock"). 3d Am. Compl. [118] at 4. Warnock Engineering and Mr. Warnock (collectively, "Plaintiffs") began providing engineering services to Defendant Canton Municipal Utilities ("CMU") in January 2016 and worked on a number of projects for CMU. *Id.* CMU is a public utility commission within the City of Canton, Mississippi, and is managed by a five-member Board of Commissioners. *See* Pls.' Mem. [212] at 1.

Plaintiffs allege that Warnock Engineering entered into three written

contracts with CMU, and the Board of Commissioners of CMU (the "CMU Board") terminated CMU's arrangements with all engineers other than Plaintiffs in August 2016, making Mr. Warnock the exclusive engineer for CMU. 3d Am. Compl. [118] at 4-5. The Third Amended Complaint claims that Cleveland Anderson ("Mr. Anderson") was appointed to the CMU Board on June 7, 2016, and was later removed in June 2017. *Id.* at 4-5. At some point before he was removed, Mr. Anderson became Chairman. *Id.* at 10.

Plaintiffs maintain that during a meeting with Mr. Warnock on September 18, 2016, Mr. Anderson offered to arrange the murder of a journalist in exchange for $10,000.00. Later, on September 25, 2016, Mr. Anderson allegedly offered to arrange the murder of the mayor of Madison, Mississippi, also for $10,000.00. *Id.* at 4-5. Plaintiffs allege that prior to Mr. Warnock proposing what is known as the "Five Point Plan Agreement" to the CMU Board, Mr. Anderson asked Mr. Warnock "if Anderson could get paid for his vote to approve the agreement," a request which Mr. Warnock refused. Mr. Anderson allegedly subsequently requested a $200,000.00 kickback in a meeting held on October 6, 2016. *Id.* at 6. Mr. Warnock again refused. *Id.* Plaintiffs assert that they did not adjust the price of the proposed $1,474,000.00 Five Point Plan Agreement, and that it was approved by unanimous vote of the CMU Board at its meeting held on October 7, 2016. *Id.* at 7.

In September 2016, the CMU Board unanimously voted to place Mr. Warnock on the CMU Personnel Committee. *Id.* Mr. Anderson also served on this Committee. *Id.* According to Plaintiffs, Mr. Anderson was heavily involved in

restructuring the CMU, including adding new departments and new positions, and "insisted that CMU hire his wife in a newly created General Counsel Department." *Id.* When outside counsel advised Mr. Anderson that hiring his wife at CMU would be illegal, he withdrew her name from consideration for possible employment. *Id.*

Mr. Warnock asserts that he expressed frustration to City of Canton officials over Mr. Anderson's attempts to solicit kickbacks and other improper benefits. *Id.* at 8. Mr. Anderson allegedly retaliated by influencing other CMU Commissioners and making motions to fire outside counsel and terminate Plaintiffs from all CMU engineering and personnel work. *Id.* at 9. As a result, Mr. Warnock was informed by letters dated December 29, 2016, and January 17, 2017, that the CMU Board had voted to terminate its contracts with Warnock Engineering. *Id.* at 10. Plaintiffs accuse Mr. Anderson, as Chairman of the CMU Board, of orchestrating the termination, *id.* at 10, because Mr. Warnock had "refused to provide bribes and kickbacks, and consent to the illegal and improper hiring of relatives and friends, demanded by [Mr.] Anderson," *id.* at 11.

B. Procedural history

Plaintiffs filed the original Complaint [1] in this case on March 9, 2017, and have amended their Complaint three times. The Third Amended Complaint [118], which is the operative pleading, asserted claims against CMU for copyright infringement, vicarious and contributory infringement, wrongful discharge, breach of contract, open account, negligence, defamation, misappropriation of advertising/commercial materials, and violations of the Racketeer Influenced and

Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962(b), and the First Amendment under 42 U.S.C. § 1983. *See* 3d Am. Compl. [118] at 19-23, 24-26.[1] After resolving CMU's Motion [126] to Dismiss and its Motion [206] for Summary Judgment, the only of Plaintiffs' claims that remain for resolution by the Court are those for wrongful discharge under state law and for retaliation in violation of the First Amendment under 42 U.S.C. § 1983.

Plaintiffs have filed a Motion [221] for Reconsideration or, in the Alternative, for Leave to Amend Complaint. While the focus of this Motion [221] appears to be the Court's dismissal of Plaintiffs' breach of contract claims, Plaintiffs do not specifically request that the Court reconsider its ruling that the three written agreements with CMU were unenforceable. Instead, Plaintiffs argue that the Court improperly disposed of an alternative theory of equitable relief which they maintain is available to them under Mississippi Code § 31-7-57(2). *See* Pl.'s Mem. [222] at 1-4. Plaintiffs ask that, in the event they have not adequately pled this theory, the Court permit them to amend the current Third Amended Complaint "for the limited purpose of adding an alternative label to the Breach of Contract count of the Complaint." *Id.* at 4.

Plaintiffs have also filed a Motion [230] for Leave to File Amended Reply Brief in support of their Motion [221] for Reconsideration or, in the Alternative, for

[1] The Third Amended Complaint [118] also advanced claims against Mr. Anderson alone under RICO, 18 U.S.C. §§ 1962(c) and 1962(d), *see* 3d Am. Compl. [118] at 23-24, 26-27, and the Mississippi Racketeer Influenced and Corrupt Organization Act ("Mississippi RICO"), Mississippi Code §§ 97-43-1 through 11, *see id.* at 27-29, and for tortious interference with contract, *see id.* at 32. However, the parties filed a Stipulation [146] of Dismissal of Mr. Anderson on April 23, 2018, and he is no longer a Defendant.

Leave to Amend Complaint. Plaintiffs do not attach a proposed amended Reply to their Motion [230]. Instead, they relay that the primary purpose of this Motion [230] is "to include a brief but important point about the case of *Southland Enterprises, Inc. v. Newton County*, 940 So. 2d 937 (Miss. Ct. App. 2006)." Pls.' Mot. [230] at 1. According to Plaintiffs, the Mississippi Court of Appeals ruled in that case that "[a] remedy by statute will not fail if the pleading states sufficient allegations which notify the court and the opposing party that the allegations fall within the statute, even though the statute is not named in the pleadings." *Id.* at 1-2 (quoting *Southland Enterprises*, 940 So. 2d at 944). According to Plaintiffs, this ruling "is consistent with the federal notice pleading standards which allow for a short and plain statement of the claim and a general prayer for relief." *Id.* at 2.

CMU has filed a Motion [228] for Summary Judgment, asking the Court to dismiss Plaintiffs' two remaining claims. CMU argues that Eleventh Amendment immunity mandates dismissal of the § 1983 claim, *see* CMU's Mem. [229] at 6-7, and that Plaintiffs have failed to identify or allege an official policy or custom causing constitutional injury and that, as a municipality, it cannot be held vicariously liable for the unconstitutional torts of its employees or agents, *id.* at 7-9. CMU also contends that Plaintiffs cannot establish the elements of a First Amendment retaliation claim. *See id.* at 9-11.

With respect to the state law wrongful discharge claim, CMU argues that it enjoys immunity from this claim under the Mississippi Tort Claims Act, Mississippi Code § 11-46-1, *et seq.* ("MTCA"), and that it should otherwise be dismissed as time-

barred, for failure to provide proper notice, and for failure to exhaust administrative remedies. *Id.* at 11-13. CMU further asserts that Plaintiffs' allegation that Anderson acted outside the scope of his employment with CMU bars the wrongful discharge claim as against CMU. *Id.* at 13-14.

Finally, after all the Motions discussed above were fully briefed, the parties filed four Motions pertaining to expert witnesses. Plaintiffs filed Motions [237], [239] to Exclude Testimony of Defendant's Experts Joseph E. Hines and John M. Wallace, as well as a Motion [243] to Exclude or Limit Opinions of Defendant's Proposed Expert Dax Alexander, P.E. Defendant filed a Motion [241] to Strike Plaintiffs' Expert Designations. These four Motions relating to experts do not impact the Court's resolution of Plaintiffs' Motion [221] for Reconsideration or, in the Alternative, for Leave to Amend Complaint and Motion [230] for Leave to File Amended Reply Brief, or its resolution of Defendant's Motion [228] for Summary Judgment.

II. DISCUSSION

A. Plaintiffs' Motion [230] for Leave to File Amended Reply Brief

Plaintiffs did not attach a proposed amended Reply brief with their Motion [230] for Leave to File Amended Reply Brief. While the title of Plaintiffs' Motion [230] indicates that they wish to file an amended Reply brief, a plain reading of the Motion [230] itself makes clear that Plaintiffs merely seek to bring the Court's attention to the 2006 Mississippi Court of Appeals decision, *Southland Enterprises, Inc. v. Newton County*, 940 So. 2d 937 (Miss. Ct. App. 2006), and argue how it

applies to the present case. Even though this case was clearly available to Plaintiffs before they filed their Motion [221] for Reconsideration and supporting Reply, the Court will consider all of the parties' arguments and all relevant legal authority in rendering its decision on the pending Motions. Plaintiffs' Motion [230] for Leave to File Amended Reply Brief is therefore moot.

B. Plaintiffs' Motion [221] for Reconsideration or, in the Alternative, for Leave to Amend Complaint

This Motion [221] focuses on Plaintiffs' breach of contract claims, which the Court dismissed in its Order [218] entered on December 21, 2018. Plaintiffs do not ask the Court to reconsider its ruling that the three written agreements with CMU were unenforceable. Instead, they posit that the Court improperly disposed of an alternative theory of equitable relief which they maintain is available to them under Mississippi Code § 31-7-57(2). *See* Pl.'s Mot. [221] at 1-2; Pl.'s Mem. [222] at 1-4. Plaintiffs seek leave to amend their Third Amended Complaint "for the limited purpose of adding an alternative label to the Breach of Contract count of the Complaint." Pl.'s Mem. [222] at 4. However, Plaintiffs have not attached a proposed Fourth Amended Complaint to their Motion [221].

1. Plaintiffs' Request for Reconsideration

Plaintiffs seek reconsideration of an interlocutory ruling. Federal Rule of Civil Procedure 54(b) provides that

> any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

Fed. R. Civ. P. 54(b). "Under Rule 54(b), the trial court is free to reconsider and reverse its decision for any reason it deems sufficient, even in the absence of new evidence or an intervening change in or clarification of the substantive law." *Austin v. Kroger Texas, L.P.*, 864 F.3d 326, 336 (5th Cir. 2017) (quotation omitted).

In opposition to CMU's earlier Motion [206] for Summary Judgment, Plaintiffs argued in their brief that CMU had improperly ignored the effects of Mississippi statutory law, specifically Mississippi Code § 31-7-57(2), in seeking summary judgment on Plaintiffs' breach of contract claims. *See* Pls.' Mem. [212] at 18. This statute sounds in quantum meruit recovery, *see* Miss. Code Ann. § 31-7-57(2), and the Court determined that Plaintiffs had pleaded no such claim in their Third Amended Complaint, *see* Order [218] at 20-21.

The Court found that, even construing Plaintiffs' pleadings "so as to do justice" under Federal Rule of Civil Procedure 8(e), they did not plead enough to sufficiently state a claim under Mississippi Code § 31-7-57(2). Plaintiffs did not raise quantum meruit as a theory of recovery in their Third Amended Complaint, nor did they cite Mississippi Code § 31-7-57(2). The Third Amended Complaint further lacked sufficient factual allegations to reasonably place the Court or CMU on notice that Plaintiffs' allegations fell within the scope of the statute, or that Plaintiffs were seeking recovery on a quantum meruit basis for any services purportedly rendered.[2] Moreover, the Court questioned whether this statute would

[2] Plaintiffs did not make any alternative statements of the breach of contract claims, even though they could have. *See* Fed. R. Civ. P. 8(d)(2) ("A party may set out 2 or more

even apply to Plaintiffs in this case. *See* Order [218] at 20.

Plaintiffs' reliance upon *Southland Enterprises, Inc. v. Newton County*, 940 So. 2d 937 (Miss. Ct. App. 2006), to seek reconsideration is unavailing. The question is whether the Third Amended Complaint contained sufficient factual detail to state a claim under Mississippi Code § 31-7-57(2) according to federal procedural law.

Moreover, *Southland Enterprises* is factually distinguishable, as it involved a prejudgment interest award under a different statute, Mississippi Code § 31-5-25, which deals with interest on sums due contractors. *See Southland Enterprises*, 940 So. 2d at 944 (citing Miss. Code Ann. § 31-5-25). While plaintiffs there had not "plead[ed] for relief under this particular statute," the Mississippi Court of Appeals held that "[a] remedy by statute will not fail if the pleading states sufficient allegations which notify the court and the opposing party that the allegations fall within the statute, even though the statute is not named in the pleadings." *Id.* There is no indication in that case that the plaintiffs had not requested prejudgment interest in their complaint, only that they did not plead the "particular statute." *See id.* Here, as the Court has already stated, the Third Amended Complaint did not contain sufficient factual allegations to place either the Court or CMU on notice that Plaintiffs' claims fell within the scope of Mississippi Code § 31-

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statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient."); Fed. R. Civ. P. 8(d)(3) ("A party may state as many separate claims or defenses as it has, regardless of consistency.").

7-57(2), or that Plaintiffs were seeking recovery for any services on a theory of quantum meruit.

In sum, Plaintiffs have not shown a sufficient reason under Rule 54(b) for the Court to reconsider its ruling on the breach of contract claims. Plaintiffs' request for reconsideration is not well taken and will be denied.

2. Alternative Request for Leave to File Fourth Amended Complaint

Plaintiffs alternatively seek leave to amend their pleadings, for the fourth time in this litigation, to assert a claim for relief under Mississippi Code § 31-7-57(2). Pursuant to Federal Rule of Civil Procedure 15(a)(2), Plaintiffs may amend their pleading "only with the opposing party's consent or the court's leave." Fed. R. Civ. P. 15(a)(2). CMU opposes Plaintiffs' request to amend, so leave of Court is required. *See id.*

Local Uniform Civil Rule 15 provides that "[i]f leave of court is required under Fed. R. Civ. P. 15, a proposed amended pleading must be an exhibit to a motion for leave to file the pleading . . . ." L.U. Civ. R. 15. Plaintiffs have not attached a proposed amended pleading to their Motion and have not complied with the Court's Local Rules in seeking leave to amend. *See id.* The request to amend should be denied for this reason alone.

In addition, Plaintiffs have already amended their Complaint three times in this case, which has been pending for over two years, and the Court has previously cautioned Plaintiffs that "**no further amendments to their pleadings will be permitted absent good cause shown**." Order [115] at 2 (emphasis in original).

Plaintiffs have not shown any good cause to allow a further amendment at this late date.

"Permissible reasons for denying a motion for leave to amend include undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, futility of amendment, etc." *Matter of Life Partners Holdings, Inc.*, 926 F.3d 103, 125 (5th Cir. 2019) (quotation omitted). As the Court noted in its earlier Order [218], Plaintiffs have not shown how Mississippi Code § 31-7-57(2) would even apply in this case, making their proposed amendment futile. In addition, at this advanced stage of litigation, allowing yet another amendment to add a new claim would cause undue prejudice to CMU, and the record reflects that Plaintiffs have repeatedly failed to cure deficiencies with prior amendments to their pleadings. *See id.* In sum, Plaintiffs' request to file a Fourth Amended Complaint is not well taken and will be denied.

C. CMU's Motion for Summary Judgment

1. Relevant legal standard

Under Federal Rule of Civil Procedure 56(a), a "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" if it is one that might affect the outcome of the suit under governing law, and a dispute is "genuine" if a jury could return a verdict for the non-movant based upon the evidence in the record. *Renwick v. PNK Lake*

Charles, L.L.C., 901 F.3d 605, 611 (5th Cir. 2018).

If the party seeking summary judgment shows the non-movant's case lacks support, the non-movant is tasked with coming forward with "specific facts" showing a genuine factual issue for trial. *Id.* A court considering a summary judgment motion must "view the evidence in the light most favorable to the non-moving party, drawing all justifiable inferences in the non-movant's favor." *Id.* (quotation omitted). However, if a non-movant's evidence is "merely colorable" or "not significantly probative," summary judgment remains appropriate. *Certain Underwriters at Lloyd's of London v. Lowen Valley View, L.L.C.*, 892 F.3d 167, 170 (5th Cir. 2018) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

2. Plaintiffs' First Amendment retaliation claim

The Third Amended Complaint advances a First Amendment retaliation claim under 42 U.S.C. § 1983, alleging that CMU deprived Mr. Warnock of "his rights of freedom of speech and freedom to petition for redress of grievances in violation of the First Amendment of the United States Constitution by terminating his contract with CMU as retaliation for discussing matters of public concern." 3d Am. Compl. [118] at 30. Plaintiffs allege that these matters of public concern included Mr. Anderson's offer to Mr. Warnock to arrange a murder for hire, his solicitation of a bribe and kickback, and his demands that Mr. Warnock support the hiring of Mr. Anderson's wife and "other unqualified family members." *Id.*

Plaintiffs assert that after Mr. Warnock refused to participate in these activities, he reported them to City of Canton officials via text message on

December 17, 2016, and discussed them with an investigator with the Madison County District Attorney's office. *Id.* According to the pleadings, Mr. Anderson and the other CMU Commissioners then purportedly conspired to retaliate against Mr. Warnock by terminating his contracts with CMU. *Id.*

a. The parties' arguments

CMU argues that it enjoys Eleventh Amendment immunity from the § 1983 claim. *See* CMU's Mot. [229] at 6-7. In the alternative, CMU asserts that dismissal is appropriate because Plaintiffs have not stated a claim for relief. Even if they have, Plaintiffs have not identified or alleged an official policy or custom that purportedly caused them constitutional injury. *Id.* at 7-11.

Plaintiffs respond that CMU's Eleventh Amendment immunity argument is "meritless," because this is a suit against the subdivision of a municipality, not the State, Pl.'s Mem. [234] at 15, and because CMU's official actions are actionable under § 1983 by virtue of the action taken by the Commission itself, *id.* at 16-19. Plaintiffs claim that "Warnock's actions in objecting to and voicing concerns about Anderson's illegal and improper conduct clearly qualify as protected speech." *Id.* at 19. The speech consisted of "publicly revealed texts from Anderson wherein he admitted soliciting an illegal kickback from Warnock." *Id.* at 18-19. Without citation to the record, Plaintiffs claim that Anderson then "orchestrated Warnock's ouster from CMU." *Id.* at 19.

CMU's Rebuttal [235] maintains that Eleventh Amendment immunity applies because "Plaintiffs' suit implicates a burden upon the treasury of the State

of Mississippi." CMU's Rebuttal [235] at 9. According to CMU, "if Plaintiffs are successful in achieving the total depletion of CMU's reserves that Warnock has thus far sought, then the State of Mississippi would necessarily be burdened if CMU, a public utility, were bankrupted by recovery in the instant litigation," *id.* at 10, and "Eleventh Amendment immunity should bar suit here due to the likelihood that Plaintiffs' suit will economically cripple CMU and will require State intervention," *id.* at 11.

CMU also argues that it cannot be held liable under §1983 because no CMU official is a party to the lawsuit, Plaintiffs' claims rest upon "'out of scope acts' of an illegal nature," and their "claims attempt to meld liability for officials from two distinct governmental entities, namely City Aldermen and the CMU Board . . . ." *Id.* at 2. According to CMU, Plaintiffs have failed to identify an official CMU policy that is connected to an identifiable harm and that, instead, they have identified only an isolated or single alleged violation based upon "out of scope actions of Anderson." *Id.* at 5. Finally, CMU contends that Plaintiffs have not "overcome CMU's stated and well-founded reasons for termination." *Id.* at 9.

b. Eleventh Amendment immunity

States enjoy sovereign immunity from suit, and when a state agency or an arm of the state is the named defendant, the Eleventh Amendment bars suits in federal court unless the state has waived its immunity. *Sissom v. Univ. of Texas High Sch.*, 927 F.3d 343, 347 (5th Cir. 2019) (quotation omitted). This immunity does not extend to units of local government. *Id.*

In order to determine whether a unit of local government is an arm of the state entitled to Eleventh Amendment immunity, the United States Court of Appeals for the Fifth Circuit employs the following six-factor test: 1) whether the state statutes and case law view the agency as an arm of the state; 2) the source of the entity's funding; 3) the entity's degree of local autonomy; 4) whether the entity is concerned primarily with local as opposed to statewide problems; 5) whether the entity has the authority to sue and be sued in its own name; and 6) whether the entity has the right to hold and use property. *See Delahoussaye v. City of New Iberia*, 937 F.2d 144, 147-48 (5th Cir. 1991). The most significant of these factors is whether a judgment against the entity will be paid with state funds. *See id.*; *see also Edelman v. Jordan*, 415 U.S. 651, 663 (1974) ("When the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.") (quotation omitted).

In this case, it is beyond dispute that the first, third, fourth, fifth, and sixth factors do not weigh in favor of finding CMU an arm of the State of Mississippi. Nor does CMU argue in favor of such a finding. CMU instead states that it "is a public utility commission created by the City of Canton, Mississippi, pursuant to Mississippi Code Annotated Section 21-27-13 *et seq*." CMU's Mem. [229] at 7. In advancing its immunity theory, CMU relies solely upon the fact that a large judgment may burden the treasury of the State of Mississippi. *See* CMU's Rebuttal [235] at 10-11.

CMU has not identified any direct burden on the State's treasury, nor has it cited legal authority to identify the source of its funding. Instead, CMU offers a convoluted and highly conjectural potential scenario regarding how the State's treasury might be burdened by a judgment against it: (1) Plaintiffs' fees for services and the contract upon which they predicate their claims "were set at the amount of CMU's emergency reserves, and actually contemplated securing debt on CMU's behalf to exceed those amounts"; (2) "CMU's emergency reserves exist to fund emergencies related to water, sewer, gas and electric utilities, were comprised of customers' deposit monies, and the funds involved the Public Services Commission"; (3) if Plaintiffs were successful in this lawsuit, CMU's emergency reserves may be depleted and CMU "economically cripple[d]"; and (4) if "CMU, a public entity, were bankrupted by recovery in the instant litigation," then the State of Mississippi would be burdened, as State intervention would be required. *Id.*[3]

CMU's argument essentially piles conjecture upon conjecture in an attempt to show how the treasury of the State of Mississippi might be impacted by a judgment, without adequate citation to legal authority supporting its assertions. CMU has not shown that any of the factors delineated by the Fifth Circuit weigh in favor of finding it immune from suit under the Eleventh Amendment. *See Delahoussaye*, 937 F.2d at 147-48.

[3] CMU did not make these arguments in its original Memorandum, but only generally alleged Eleventh Amendment immunity. *See* CMU's Mem. [229] at 6-7. In CMU's Rebuttal, it raises these new assertions, without citation to legal authority, relying only on portions of Mr. Warnock's deposition.

c. Claims for retaliation under the First Amendment

A local governmental entity faces liability under 42 U.S.C. § 1983 only if action pursuant to official policy of some nature caused a constitutional tort. *Griggs v. Chickasaw Cty.*, 930 F.3d 696, 704 (5th Cir. 2019) (quoting *Monell v. Dep't of Soc. Servs. of New York*, 436 U.S. 658, 691 (1978)). In order to succeed on a § 1983 claim against a local governmental entity, a plaintiff must generally prove the following: (1) the existence of an official policy; (2) promulgated by the unit's policymaker; (3) that was the moving force behind a violation of a constitutional right. *See id.*; *see also Young v. Bd. of Supervisors of Humphreys Cty.,* 927 F.3d 898, 903 (5th Cir. 2019). "[I]t is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances," as "a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body . . . because even a single decision by such a body unquestionably constitutes an act of official government policy." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986).

In this case, Plaintiffs contend CMU retaliated against them for exercising their First Amendment rights by taking action at a CMU Commissioners' meeting to terminate CMU's business relationship with Plaintiffs. This is sufficient to satisfy the first two prongs of the test. The question remains whether the official action by CMU was the moving force behind the violation of any constitutional right.

"The First Amendment's guarantee of freedom of speech protects government

employees from termination *because* of their speech on matters of public concern." *Bd. of Cty. Comm'rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668, 675 (1996) (emphasis in original). "The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006). This means that, as long as employees are speaking as citizens about matters of public concern, their speech may only be burdened to the extent such restrictions are necessary for their employers to operate efficiently and effectively. *See id.*

"To state a claim for retaliation in violation of the First Amendment, public employees . . . must allege that their employer interfered with their right to speak as a citizen on a matter of public concern." *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1420 (2016). A plaintiff generally establishes a First Amendment retaliation claim by showing that: "(1) he suffered an adverse employment action; (2) he spoke as a citizen on a matter of public concern; (3) his interest in the speech outweighs the government's interest in the efficient provision of public services; and (4) the speech precipitated the adverse employment action." *Moss v. Harris Cty. Constable Precinct One*, 851 F.3d 413, 420-21 (5th Cir. 2017) (quotation omitted). A First Amendment retaliation claim by a contractor against a governmental entity based upon the contractor's speech is analyzed using the same framework as that utilized for claims by public employees. *Culbertson v. Lykos*, 790 F.3d 608, 618 (5th Cir. 2015) (citing *Umbehr*, 518 U.S. at 684-85).

In assessing causation, a plaintiff bears the initial burden "to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor' or to put it in other words, that it was a 'motivating factor'" in the employer's decision. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *see also Haverda v. Hays Cty.*, 723 F.3d 586, 592 (5th Cir. 2013). Temporal proximity between an employee's protected activity and any adverse action is not always sufficient to show First Amendment retaliation. *See Cripps v. Louisiana Dep't of Agric. & Forestry*, 819 F.3d 221, 230 (5th Cir. 2016). Even at the prima facie stage, a plaintiff cannot establish that protected activity was a motivating factor in his termination by temporal proximity alone, but only if there is also evidence of the decisionmaker's knowledge of the protected activity. *See Dearman v. Stone Cty. Sch. Dist.*, 832 F.3d 577, 582 (5th Cir. 2016).

If a plaintiff carries his or her burden, the defendant must show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. *Mt. Healthy City Sch. Dist. Bd. of Educ.*, 429 U.S. at 287; *see also Dearman*, 832 F.3d at 581. However, an employee may "refute that showing by presenting evidence that his employer's ostensible explanation for the discharge is merely pretextual." *Haverda*, 723 F.3d at 592 (quotation omitted).

Under § 1983, "[w]hen the municipality's policymaker is a multimember board, the separate actions of individual members of the Board are not sufficient to bind the Board as an entity." *Griggs*, 930 F.3d at 704 (quotation omitted). In order to charge retaliatory animus to the entity itself, a plaintiff is "required to

show that a majority of the Board had retaliatory animus." *Id.*

d. Plaintiffs' claim

Mississippi Code § 21-27-13 permits the governing authority of a municipality to create a commission that "shall consist of not less than three (3) nor more than five (5) commissioners, to be elected by the governing authorities of such municipality." Miss. Code Ann. § 21-27-13. "Such commissioners shall have the power, authority and duty to manage and control said system or systems and the supply of the facilities and services thereof, both within and without the limits of the municipality." *Id.*

While the parties have not explained how CMU was formed, it appears from the record as a whole that the City of Canton's Board of Aldermen created CMU pursuant to Mississippi Code § 21-27-13, and that the CMU Board of Commissioners consisted of five commissioners. *See, e.g.,* Oct. 7, 2016, Minutes [206-7] at 1; *see also* Pl.'s Mem. [234] at 1 ("CMU is managed by a five (5) member board of commissioners who are appointed by the Canton Mayor and Board of Aldermen.").

Plaintiffs support their retaliation claim by referring to text messages that Mr. Warnock sent on December 17, 2016, "to various public officials expressing concern that Anderson was corrupt and unfit to serve on the CMU Board." Pl.'s Mem. [234] at 2. The conduct referenced was that of Mr. Anderson, but not that of any of the other Commissioners. *See* Text Messages [211-3] at 1-4. While it appears that the telephone numbers of some City Aldermen and CMU

Commissioners may have been included on at least some of the text messages between Mr. Anderson and Mr. Warnock, no one else copied on the group text messages appears to have responded to any of Mr. Warnock's messages. *See id.*

On December 22, 2016, a special "emergency meeting" of the Board of the Mayor and Board of Aldermen of Canton, Mississippi, was held. Canton Mayor Arnel D. Bolden was not in attendance, but four City Aldermen were present – Les Penn, Andrew Grant, Eric Gilkey, and Olivia Harrell. *See* Mayor's Veto [211-1] at 133. A motion was made and seconded to replace Mr. Anderson as a CMU Commissioner with Bob Winstead, and it passed by a unanimous vote. *Id.* However, Mayor Bolden objected to and vetoed the replacement, asserting that this meeting did not constitute a legal meeting. *Id.* None of this conceivably constituted any action against Plaintiffs.

Also on December 22, 2016, Mr. Anderson made a motion at a CMU Board of Commissioners meeting to terminate Mr. Warnock's services, listing eight reasons as grounds for his termination. *See* Dec. 22, 2016, Minutes [211-1] at 130. CMU Commissioner L.C. Slaughter seconded the motion. *Id.* Mr. Anderson and two other Commissioners, L.C. Slaughter and Cleotha Williams, voted in favor of the motion, and two Commissioners, Chairman Charles Weems and Charlie Morgan, abstained. *Id.*

At a subsequent CMU Board of Commissioners meeting held on December 29, 2016, only Commissioners Anderson, Slaughter, and Williams were present. *See* Dec. 29, 2016, Minutes [211-1] at 131. These three Commissioners voted to

replace Chairman Weems with Mr. Anderson as Chairman of the Board for CMU and confirmed the removal of Warnock & Associates as CMU Engineer. *See id.* at 131-32; *see also* Mr. Warnock's Dep. [229-1] at 205.

Given the foregoing facts, while Plaintiffs may have created a fact question as to Mr. Anderson's purported retaliatory animus against them, they have not presented any direct evidence that any of the other CMU Commissioners held such animus. Even assuming Plaintiffs can establish the other elements of a First Amendment retaliation claim, the pertinent question is whether they have presented competent summary judgment evidence tending to show that a majority of the CMU Commissioners held a retaliatory animus against them, or that Mr. Warnock's purported speech as a citizen on a matter of public concern precipitated the adverse employment actions taken by the CMU as a whole. *See Griggs*, 930 F.3d at 704; *Moss*, 851 F.3d at 420-21. Plaintiffs appear to rely solely upon the temporal proximity of the "publicly revealed text from Anderson wherein he admitted to soliciting an illegal kickback from Warnock," and "Warnock's ouster from CMU" a few days later. Pls.' Mem. [234] at 18-19.

Plaintiffs offer nothing more than conclusory assertions regarding the other CMU Commissioners' motives, and they have not cited any competent summary judgment evidence tending to show that the other two CMU Commissioners who voted in favor of terminating Plaintiffs even received Mr. Warnock's text messages. While the text messages were purportedly sent to CMU Commissioners "Lanny Slaughter" and "Cleotha Rev. Williams," among others, there is no evidence that

any of the Commissioners actually received the text messages, nor is there any evidence confirming that whatever telephone numbers were associated with their names in Mr. Warnock's telephone were in fact these two individuals' correct numbers. *See* Text Messages [211-3] at 3.

During Mr. Williams's deposition, he was asked about certain text messages exchanged around December 17 and 18, 2016, and whether he had received them. *See* Dep. of Cleotha Williams [211-18] at 15-16. Mr. Williams testified "I never got it. It was never sent to me. I see my name up there, but that's it. It was never sent to me." *Id.* at 16. Both Mr. Slaughter and Mr. Williams testified that they had not spoken to Mr. Anderson, or with each other, regarding how they would vote prior to the vote to remove Plaintiffs. Dep. of Cleotha Williams [211-18] at 19; Dep. of Lanny Slaughter [211-19] at 9. In sum, based upon the record, Plaintiffs have not offered sufficient competent summary judgment evidence to create a fact question on whether any of the other CMU Commissioners were aware of Plaintiffs' protected speech when they voted.

Because Plaintiffs have not shown knowledge of Mr. Warnock's alleged protected activity by a majority of the CMU Commissioners, Plaintiffs are left with mere temporal proximity to support their claim. This is not sufficient, even at the initial prima facie stage, to establish the required causal link between the protected activity and termination. *See, e.g., Dearman*, 832 F.3d at 582. CMU's Motion for Summary Judgment on the First Amendment retaliation claim should be granted.

Even if Plaintiffs had presented sufficient evidence to demonstrate that Mr.

Warnock's speech was a motivating factor in Plaintiffs' termination, CMU has supplied evidence that it would have taken the same action regardless of Mr. Warnock's speech. CMU essentially relies upon these reasons in their request for summary judgment. *See* CMU's Mem. [229] at 9-10. According to CMU's December 22, 2016, Minutes, Mr. Anderson moved to terminate the services of Mr. Warnock for eight specified reasons, including that Mr. Warnock had "acted beyond the scope of his capacity as engineer and his assigned contractual duties," that his action had "caused dissent and interfered with the orderly operation of CMU," and that his actions had "interfered with the day to day operations of CMU." Dec. 22, 2016, Minutes [211-1] at 130.

Mr. Slaughter's and Mr. Williams' deposition testimony corroborates at least some of these stated reasons for Plaintiffs' termination. Both testified regarding Mr. Warnock's creation of a personnel chart to organize the employees for CMU and that neither believed this was within Mr. Warnock's duties. *See* Dep. of Lanny Slaughter [229-3] at 15-16; Dep. of Cleotha Williams [211-18] at 32-33, 41. Mr. Slaughter also stated that Mr. Warnock was "causing dissent among individuals within the CMU working group." Dep. of Lanny Slaughter [229-3] at 16. According to Mr. Slaughter, "some of the individuals were kind of disgusted with what was going on, and it was interfering with some of the operations of their work." *Id.* Mr. Williams testified that Mr. Warnock "involved himself" in the personnel matters of CMU, and this was not a duty that would fall within the realm of responsibility for an engineer for CMU. Dep. of Cleotha Williams [211-18] at 30.

CMU has shown by a preponderance of the evidence that it would have reached the same decision regarding Plaintiffs, even in the absence of the protected conduct. *See Mt. Healthy City Sch. Dist. Bd. of Educ.*, 429 U.S. at 287. The burden therefore shifts back to Plaintiffs to refute that showing by presenting evidence that CMU's ostensible explanation for the discharge is merely pretextual. *See Haverda*, 723 F.3d at 592 (quotation omitted).

While Plaintiffs conclude that they have "presented substantial evidence which refutes the truthfulness of these reasons and strongly suggests they were contrived as a cover-up for [CMU's] retaliating actions," Pls.' Mem. [234] at 19, Plaintiffs have not directed the Court to any competent summary-judgment evidence disputing that CMU could terminate Plaintiffs for the reasons given in the CMU minutes, or tending to show that CMU's explanation for the discharge was merely pretextual, *see id.* "Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment." *Malacara v. Garber*, 353 F.3d 393, 405 (5th Cir. 2003).

The Factual Background section of Plaintiffs' Memorandum [234] does reference Mr. Anderson's June 5, 2018, deposition testimony and points out that he could not recall why Plaintiffs were terminated in December 2016, or whether the reasons listed in the Minutes were true or false. *See* Pls.' Mem. [234] at 13-14. It appears that Plaintiffs may be attempting to show that the proffered reasons set forth in the December 22, 2016, Minutes, were not actually true. Plaintiffs state that during Mr. Anderson's deposition, he "responded verbatim 'I don't recall at this

time' 32 times and 'I don't recall' another 38 times." *Id.* at 14. To the extent Plaintiffs are seeking to draw a negative inference against CMU based upon Mr. Anderson's responses, Plaintiffs do not explicitly articulate such an argument, nor do they cite any legal authority to support a position that such responses are somehow to be construed against CMU as an entity, particularly since Mr. Anderson was no longer a Commissioner by the time these responses were given. Plaintiffs' conclusory allegations are insufficient to show pretext.

In sum, CMU is entitled to summary judgment on Plaintiffs' First Amendment retaliation claim.

3. State law wrongful discharge claim

Plaintiffs also advance a state law claim against CMU for wrongful discharge. 3d Am. Compl. [118] at 31-32. Specifically, they assert that as a direct and proximate result of Mr. Warnock's refusal to participate in illegal activity, and due to his reporting of the same to authorities, Mr. Anderson caused CMU to terminate Mr. Warnock from his position as CMU Engineer and to terminate Plaintiffs' contracts with CMU. *Id.* at 31.

a. The parties' arguments

CMU asserts that dismissal of Plaintiffs' state law wrongful discharge claim is appropriate under several provisions of the Mississippi Tort Claims Act, Mississippi Code § 11-46-1, *et seq.* ("MTCA"). *See* CMU's Mem. [229] at 11-14. According to CMU, the wrongful discharge claim is time-barred by Mississippi Code § 11-46-11(3), and is further barred based upon Plaintiffs' failure to provide a

sufficient notice of claim under the MTCA. *Id.* CMU also argues that Plaintiffs' own assertions that Mr. Anderson acted criminally and outside the scope of his employment preclude recovery against CMU under Mississippi Code §§ 11-46-5 and 11-46-7(2), and that the MTCA's "discretionary function exemption pursuant to § 11-46-9(1)(d)" would also apply. *Id.*

Plaintiffs counter that whether Mr. Anderson was acting within the course and scope of his employment is "simply irrelevant" because their "wrongful discharge claim is based on a tort committed by CMU acting as an official governing entity; it is not based on a tort committed by a mere employee." Pls.' Mem. [234] at 20. Plaintiffs also maintain that they provided sufficient pre-suit notice under the MTCA by purportedly "hand deliver[ing] a pre-suit notification letter to CMU on May 24, 2017," and filing their Second Amended Complaint within the required one-year period. *Id.* at 21. Plaintiffs do not address CMU's argument about Mississippi Code § 11-46-9(1)(d).

In its Rebuttal [235], CMU maintains that Plaintiffs failed to comply with the MTCA's pre-suit notice requirements, *see* CMU'S Rebuttal [235] at 11-15, and that the notice itself was woefully inadequate, improperly served, and never received by CMU, *id.*

b. The MTCA

The MTCA waives immunity "from claims for money damages arising out of the torts of such governmental entities and the torts of their employees while acting within the course and scope of their employment . . . ." Miss. Code. Ann. § 11-46-

5(1). To the extent Plaintiffs' wrongful discharge claim is based upon any conduct by Mr. Anderson that constituted malice or any criminal offense other than a traffic violation, such a claim falls outside the scope of MTCA's waiver of immunity and cannot be pursued against CMU. *See* Miss. Code Ann. § 11-46-5; *Zumwalt v. Jones Cty. Bd. of Sup'rs*, 19 So. 3d 672, 688 (Miss. 2009). Under such a scenario, Mr. Anderson is not considered to have been acting within the course and scope of his employment, and CMU cannot be considered to have waived its immunity. *See* Miss. Code Ann. § 11-46-7(2) ("a governmental entity shall not be liable or be considered to have waived immunity for any conduct of its employee if the employee's conduct constituted fraud, malice, libel, slander, defamation or any criminal offense").

To the extent Plaintiffs' wrongful discharge claim is a tort, the MTCA applies, including its pre-suit notice requirements. *See id.*; *see also* Miss. Code Ann. § 11-6-11.[4] According to Mississippi Code § 11-46-11(1),

> [a]fter all procedures within a governmental entity have been exhausted, any person having a claim under this chapter shall proceed as he might in any action at law or in equity, except that at least ninety (90) days *before* instituting suit, the person must file a notice of claim with the chief executive officer of the governmental entity.

[4] Because a plaintiff is master of the complaint, the Mississippi Court of Appeals has recognized that when a plaintiff pleads that an existing contract was wrongfully terminated, the claim sounds in contract, such that it is not a tort claim within the purview of the MTCA. *See Mississippi State Port Auth. at Gulfport v. S. Indus. Contractors LLC*, 271 So. 3d 742, 751-52 (Miss. Ct. App. 2018). In the present case, Plaintiffs advanced both breach of contract and wrongful discharge tort claims against CMU. To the extent Plaintiffs' wrongful discharge claim is another way of pleading their breach of contract claim, the Court has previously determined that no valid contract existed between the parties, such that the claim would fail on that basis. Assuming it was a tort, the MTCA bars the claim for the reasons discussed here.

Miss. Code Ann. § 11-46-11(1) (emphasis added). Service of the notice of claim for a political subdivision other than a county or municipality "shall be had only upon that entity's or political subdivision's chief executive officer." Miss. Code Ann. § 11-46(2)(a)(ii).

The 90-day notice requirement is a "hard-edged, mandatory rule" that the Mississippi Supreme Court "strictly enforces." *Gorton v. Rance*, 52 So. 3d 351, 358 (Miss. 2011) (quotation omitted). This mandatory requirement cannot be cured by serving notice-of-claim letters after a complaint is filed. Miss. Code Ann. § 11-46-11(1); *Jones v. Mississippi Insts. of Higher Learning*, 264 So. 3d 9, 27 (Miss. Ct. App. 2018), *reh'g denied* (Nov. 20, 2018), *cert. denied*, 263 So. 3d 666 (Miss. 2019) (quoting *Price v. Clark*, 21 So. 3d 509, 518 (Miss. 2009)). When a proper pre-suit notice is not provided, the case should be dismissed without prejudice. *Id.*

The MTCA additionally provides that the notice of claim shall:

> (i) Be in writing;
> (ii) Be delivered in person or by registered or certified United States mail; and
> (iii) Contain a short and plain statement of the facts upon which the claim is based, including the circumstances which brought about the injury, the extent of the injury, the time and place the injury occurred, the names of all persons known to be involved, the amount of money damages sought, and the residence of the person making the claim at the time of the injury and at the time of filing the notice.

Miss. Code Ann. § 11-46-11(2)(b)(i)-(iii). Mississippi law "requires substantial compliance with the notice requirements of Section 11-46-11(2)." *Lee v. Mem'l Hosp. at Gulfport*, 999 So. 2d 1263, 1266 (Miss. 2008). "The purpose of pre-suit notice is to ensure that the governmental entity is informed of any claims against

it." *Jones*, 264 So. 3d at 27.

c. Plaintiffs' Notice of Claim

Plaintiffs initiated this lawsuit on March 9, 2017, but they first advanced a wrongful discharge claim against CMU in their Second Amended Complaint [65], which was filed on December 11, 2017. Plaintiffs have presented evidence of the existence of what they contend was a Notice of Claim [233-2] from their counsel, dated May 24, 2017. *See* Notice [233-2] at 1. While this notice post-dated the institution of the litigation, it is dated more than 90 days prior to the date Plaintiffs filed their Second Amended Complaint [65]. The Notice stated "RE: Tort Claims Act Notice of Claim against Cleveland Anderson" and was marked "VIA HAND DELIVERY." *Id.* (emphasis in original).

The Notice was addressed to the City Clerk for the City of Canton, Mississippi, and to Mr. Kenny Wayne Jones, General Manager of CMU. *Id.* According to the Notice, the drafting attorney's law firm represented Mr. Warnock and Warnock Engineering

> in relation to certain causes of action against Mr. Cleveland Anderson ("Anderson"), Chairmen [sic] of the Board of Commissioners of Canton Municipal Utilities ("CMU"). While we maintain that the acts giving rise to said causes of action were not performed within the course and scope of Mr. Anderson's employment with CMU and are otherwise exempt from the requirements of the Mississippi Tort Claims Act, out of an abundance of caution please consider this Warnock's Notice of Claim pursuant to Mississippi Code Annotated § 11-46-11.

Id. The Notice referred to, and attached, the Second Amended Complaint in this case. *Id.*

Even assuming Plaintiffs properly exhausted any administrative procedures

within CMU, which CMU disputes, there is no competent summary judgment evidence to demonstrate whether, or when, the Notice of Claim was received by either addressee. Even if the Notice of Claim was in fact delivered to the individuals to whom it was addressed, Plaintiffs have not shown that it was received by CMU's "chief executive officer." *See* Miss. Code Ann. §§ 11-46-11(1) & 11-46-11(2)(a)(ii). For this reason alone, Plaintiffs' wrongful discharge claim should be dismissed without prejudice for failure to comply with the MTCA's pre-suit notice requirements.

Turning to the substance of the Notice of Claim, it references claims against Mr. Anderson only, and not against the CMU, and clearly states Plaintiffs' position that Mr. Anderson's acts were not performed within the course and scope of his employment with CMU. *See* Notice [233-2] at 1. There is no indication that any Notice of Claim was ever provided to CMU referencing Plaintiffs' claims against it as an entity.

Nor did the Notice of Claim ensure that CMU was informed of Plaintiffs' claims against it. The Notice was in fact misleading, as the assertions contained in the Notice of Claim, if true, would seemingly preclude any recovery against CMU because Plaintiffs asserted that Mr. Anderson was acting outside the course and scope of his employment, and he is no longer a Defendant in this case. *See id.*; *see also, e.g.,* Miss. Code Ann. § 11-46-5(1) (waiving immunity for claims arising out of the torts of governmental entities' employees while acting within the course and scope of their employment); Miss. Code Ann. § 11-46-7(2) ("an employee shall not be

considered as acting within the course and scope of his employment and a governmental entity shall not be liable or be considered to have waived immunity for any conduct of its employee if the employee's conduct constituted fraud, malice, libel, slander, defamation or any criminal offense."); *Univ. of Miss. Med. Ctr. v. Oliver*, 235 So. 3d 75, 82 (Miss. 2017) (holding that any legal action against a governmental employee for the intentional torts in section 11-46-5(2) must proceed against the employee as an individual, as the governmental entity has not waived sovereign immunity and cannot be liable).

In sum, Plaintiffs have not shown that they complied with the MTCA's pre-suit notice-of-claim requirements. Plaintiffs' wrongful discharge claim against CMU should be dismissed without prejudice. *See* Miss. Code Ann. § 11-46-11.

D. Parties' expert Motions

In light of the Court's resolution of the foregoing Motions, Plaintiffs' Motions [237], [239] to Exclude Testimony of Defendant's Experts Joseph E. Hines and John M. Wallace, Plaintiffs' Motion [243] to Exclude or Limit Opinions of Defendant's Proposed Expert Dax Alexander, P.E., and Defendant's Motion [241] to Strike Plaintiffs' Expert Designations are all moot, and they need not be addressed.

III. CONCLUSION

To the extent the Court has not addressed any of the parties' arguments, it has considered them and determined that they would not alter the result. Plaintiffs' Motion [230] for Leave to File Amended Reply Brief is moot, Plaintiffs' Motion [221] for Reconsideration or, in the Alternative, for Leave to Amend

Complaint will be denied, and Defendant's Motion [228] for Summary Judgment will be granted. Plaintiffs' claim for First Amendment retaliation will be dismissed with prejudice, and their claim under state law for wrongful discharge will be dismissed without prejudice for failure to comply with the MTCA's pre-suit notice requirements. The remaining, later-filed Motions [237], [239], [241], [243], pertaining to experts are moot.

IT IS, THEREFORE, ORDERED AND ADJUDGED that, Plaintiffs' Motion [230] for Leave to File Amended Reply Brief is **MOOT**, and Plaintiffs' Motion [221] for Reconsideration or, in the Alternative, for Leave to Amend Complaint is **DENIED**.

IT IS, FURTHER, ORDERED AND ADJUDGED that, Defendant Canton Municipal Utilities' Motion [228] for Summary Judgment is **GRANTED**.

IT IS, FURTHER, ORDERED AND ADJUDGED that, Plaintiffs' claim for retaliation in violation of the First Amendment under 42 U.S.C. § 1983 is **DISMISSED WITH PREJUDICE**.

IT IS, FURTHER, ORDERED AND ADJUDGED that, Plaintiffs' claim under state law for wrongful discharge is **DISMISSED WITHOUT PREJUDICE** for failure to comply with Mississippi Code § 11-46-11.

IT IS, FURTHER, ORDERED AND ADJUDGED that, Plaintiffs' Motion [237] to Exclude Testimony of Defendant's Expert Joseph E. Hines, Motion [239] to Exclude Testimony of Defendant's Expert John M. Wallace, and Motion [243] to

Exclude or Limit Opinions of Defendant's Proposed Expert Dax Alexander, P.E, and Defendant's Motion [241] to Strike Plaintiffs' Expert Designations are all **MOOT**.

SO ORDERED AND ADJUDGED, this the 2nd day of March, 2020.

s/ Halil Suleyman Ozerden
HALIL SULEYMAN OZERDEN
UNITED STATES DISTRICT JUDGE