THE CITY OF NEW YORK
LAW DEPARTMENT
100 CHURCH STREET
NEW YORK, NY 10007

ZACHARY W. CARTER
Corporation Counsel

Jessica Giambrone
Phone: (212) 356-2460
jgiambro@law.nyc.gov

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BY ECF and Electronic Mail
Hon. LaShann DeArcy Hall
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Portelos v. City of New York, et al. 12-CV-3141 (LDH) (VMS)

Dear Judge DeArcy Hall:

Defendants submit this letter in further support of their argument that the following e-mails authored by plaintiff, and the speech associated with those e-mails about which plaintiff testified at trial, do not constitute speech protected by the First Amendment: (1) an e-mail dated January 27, 2012 that was sent by plaintiff to the entire staff of I.S. 49 and forwarded by Richard Candia to defendant Hill, which is Defendants' Exhibit "DD," see also Trial Transcript pages 272-73, 546; and (2) an e-mail dated April 18, 2012 sent by plaintiff to all staff of I.S.49, which is Defendants' Exhibit "HH," see also Trial Transcript pages 577, 671-72. Today, as the trial of this action nears its end, plaintiff, for the first time since the commencement of this action in 2012, asserted that these e-mails and, and his statements at the meeting of UFT members to which he refers to in Defendants' Exhibit "DD," are "union activity" that is protected by the First Amendment. As defendants argued earlier today, the Court has already ruled that the speech at issue in this case does not include union activity. For the Court to reverse its ruling and permit plaintiff to now assert that he engaged in union activity that is protected by the First Amendment, and for which he alleges he was subjected to retaliation, is extraordinarily prejudicial to defendants. Moreover, as a matter of law, this speech is not union activity that is protected by the First Amendment.

"There is no doubt that retaliation against public employees solely for their union activities violates the First Amendment. Clue v. Johnson, 179 F.3d 57, 60 (2d Cir. 1999). See also Pekowsky v. Yonkers Board of Education, 23 F.Supp. 3d 269, 277 (S.D.N.Y. 2014) ("Here, Pekowsky's advocacy on behalf of the teachers' union, and on behalf of other teachers in his capacity as representative of the union, is protected speech."). However, as the Second Circuit observed in Clue, even speech made as part of an employee's union activities must address a

matter of public concern: "There may well be intraunion disputes that to not raise enough of a public concern to trigger First Amendment protection. Clue, 179 F.3d at 61. See also Pekowsky, 23 F.Supp. 3d at 277 (analyzing the substance of the plaintiff's speech in connection with his union activities and finding that it was a matter of public concern.

Plaintiff's statements at the UFT meeting on January 27, 2012, and his e-mail to Richard Candia of the same date in which plaintiff expressed his dismay about what occurred at that meeting, cannot be considered protected speech. Plaintiff's whining about what occurred at the meeting is merely an intraunion dispute between him and Mr. Candia that in no way addressed a matter of public concern. Thus, plaintiff cannot base a First Amendment claim on his January 27, 2012 speech.

Plaintiff's e-mail of April 18, 2012 is not union activity protected by the First Amendment as it is not advocacy on behalf of union members at I.S. 49. Indeed, instead of championing the rights of union members in that e-mail, plaintiff complains about alleged mistreatment of him and issues an unmistakable threat to what are supposedly his compatriots in the cause of the union:

> My name has been dragged through the mud and I bet they never expected resistance like this. Today, I am fighting one letter at in my with the above I am going to fight the second that shows false statements have been made and you know I have the proof. *I suggest anyone who has made false statements find a way to rectify or retract them very, very quickly and I may show mercy. I hope I am clear on that.*

See Defendants' Exhibit "HH." (emphasis added). A threat by plaintiff to other union members and his offer to be merciful to them if they heed his warning about making false statements about him cannot be considered to address a matter of public concern. Plaintiff is not advocating for union members - - to the contrary, he warns them of the potential harm that he may inflict on them. Accordingly, plaintiff also cannot base a First Amendment claim on this e-mail.

As neither plaintiff's January 27, 2012 speech nor his April 18, 2012 are union activity that address a matter of public concern, plaintiff's First Amendment claim based on that speech should be dismissed.

Respectfully submitted,

Jessica Giambrone
Assistant Corporation Counsel

cc: Bryan Glass (by ECF and electronic mail)