UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

WACO DIVISION

CITY OF HEARNE, **Plaintiff and Counter-Defendant,**	§	
v.	§	
MILTON JOHNSON **Cross Claimant**	§	**C.A. No. 6:16-CV-00284-RP-JCM**
v.	§	
BRYAN F. RUSS, JR., AND PALMOS, RUSS, MCCULLOUGH & RUSS, L.L.P., **Cross Defendants**	§	

REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE ROBERT PITMAN, UNITED STATES DISTRICT JUDGE

This Report and Recommendation is submitted to the Court pursuant to 28 U.S.C. § 636(b)(1)(c) and Rules 1(h) and 4(b) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrate Judges. Pending before the Court is Bryan F. "Rusty" Russ ("Russ") and Palmos, Russ, McCullough, & Russ, LLP's ("the Firm") Motion to Dismiss pursuant to the Federal Rule of Civil Procedure 12(b)(6). ECF No. 9. As explained in more detail below, the undersigned recommends that Defendants' Motion to Dismiss (ECF No. 9) relating to claims against Defendant Russ be **DENIED.**

I. FACTUAL BACKGROUND

Plaintiff alleges the following events. The City of Hearne contracted with the Firm for legal services. ECF No. 1-2 ¶ 4. At all times relevant to this proceeding, Defendant Russ was the city attorney for the City of Hearne and also a partner at the Firm. This case stems from allegations of the misappropriation of funds by city officials in the City of Hearne. *See id.* at 11. After City of Hearne residents became aware of these misappropriations, as well as of the indictment of the city manager, several City of Hearne residents, including Plaintiff, Milton Johnson ("Plaintiff"), organized an initiative petition to force a forensic audit of city finances. *Id.*

By March 21, 2016, Plaintiff and other City of Hearne residents gathered 517 signatures to support the petition. *Id.* ¶ 5. Plaintiff personally gathered 318 of these signatures. *Id.* ¶ 7. The residents submitted the initiative petition to the county clerk. *Id.* When the county clerk receives initiative petitions, the county clerk normally forwards said petitions to the county elections administrator who then verifies the signatures. *Id.* ¶ 8. However, before the county clerk could send Plaintiff's initiative petition to the county elections administrator, the city attorney, Russ, intercepted it. *Id.* ¶ 7. Russ kept the initiative petition in his private office until April 7, 2016. *Id.* At that time, he gave the county elections administrator only the 318 signatures gathered by Plaintiff, omitting the other signatures. *See id.* ¶ 8.

On April 8, 2016, the county elections administrator hand-delivered a letter to Russ, which acknowledged that there were only 318 signatures on the initiative petition. *Id.* ¶ 7. The number of signatures was insufficient to place the initiative on the ballot. *Id.* Russ informed neither Plaintiff nor any other petition organizer of the administrator's letter, which prevented Plaintiff from correcting the signature number from 318 to 517. *Id.* This in turn prevented the issue raised in the petition from being placed on the election ballot. *Id.* ¶ 8. Plaintiff first learned

of the letter on April 21, 2016, when the county elections administrator shared a copy with Plaintiff's attorney. *Id.*

On April 6, 2016, the City of Hearne sought a declaratory judgment in state court against Plaintiff for various state law claims. Defs.' Mot. Dismiss ¶ 4. Plaintiff answered and added Defendants Russ and the Firm as cross-defendants, asserting 42 U.S.C. § 1983 claims against them.[1] *Id.* ¶ 5. On July 15, 2016, Defendants Russ and the Firm removed the case to federal court. ECF No. 1. The City of Hearne and Plaintiff have since settled their claims. Defs.' Mot. Dismiss ¶ 6. Thus, the only claims remaining in this suit are Plaintiff's 42 U.S.C. § 1983 claims against Defendants Russ and the Firm. *Id.* On September 23, 2016, Defendants Russ and the Firm filed a Motion to Dismiss against Plaintiff for failure to state a claim upon which relief can be granted.[2] ECF No. 9. On October 7, 2016, Plaintiff filed his Response to Defendants' Motion. ECF No. 14. Defendants have not replied.

II. LEGAL STANDARD

Rule 12(b)(6) states that courts can grant dismissals premised on a failure to state a claim. FED. R. CIV. P. 12(b)(6). When conducting this analysis, courts look at the well-pleaded facts in the light most favorable to the plaintiff. *Hale v. King*, 642 F.3d 492, 498 (5th Cir. 2011). The plaintiff's factual allegations are accepted as true. *Id.* at 499. The factual allegations must illustrate a reasonable inference that the defendant is liable for the alleged misconduct. *Id.* Such a reasonable inference is created when the plaintiff has stated a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). A stated claim is plausible on its face

[1] Although Plaintiff mentions that the Firm contracted with the City of Hearne to provide legal services, he only alleges that the Firm ratified Russ' actions. *See* ECF No. 1-2 at 11-13.

[2] As stated above, the only remaining claims are Johnson's 42 U.S.C. § 1983 claims against Russ and the Firm. For purposes of this Report and Recommendation, Johnson, the party asserting the remaining claims, will be referred to as Plaintiff. Russ and the Firm will be referred to as Defendants.

"when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

III. DISCUSSION

A. Defendant Russ

Defendants argue that Plaintiff's claims against Russ should be dismissed for failure to state a claim upon which relief can be granted. *See* Defs.' Mot. Dismiss. Specifically, Defendants first argue that Plaintiff has wholly failed to allege any facts (or conclusions) that his equal protection rights were implicated, much less violated. *Id.* ¶ 13. Second, Defendants assert that even if Plaintiff alleges that his equal protection rights were violated, his claims still fail because Plaintiff fails to allege that Russ acted under color of law when he intercepted the initiative petition. *Id.* ¶ 15. Finally, Defendants assert that even if Plaintiff both properly alleges a constitutional violation and properly alleges that Russ acted under color of state law, Plaintiff's claims still fail because Russ is entitled to qualified immunity. *Id.* ¶ 20.

1. Plaintiff properly alleges both the implication and the violation of his Equal Protection Rights.

Plaintiff alleges that Russ violated his Fourteenth Amendment Right to Equal Protection. ECF No. 1-2 at 13. In their Motion to Dismiss, Defendants assert that Plaintiff fails to allege that his equal protection rights were implicated, much less violated. Defs.' Mot. Dismiss ¶ 13. In support of their argument, Defendants cite to case law holding that in order to bring a § 1983 claim "based on a violation of equal protection, [p]laintiffs are required . . . to demonstrate intentional discrimination; mere disparate impact will not suffice." *Id.* (*quoting Nat'l Ass'n of Gov't Employees v. City Pubn. Serv. Bd. of San Antonio, Tex.*, 40 F.3d 698, 714-15 (5th Cir. 1994)). However, equal protection claims can be brought by a class of one. *Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). The Fifth Circuit has recognized three types of "class of one"

equal protection claims: (1) selective enforcement; (2) personal vindictiveness; and (3) adverse zoning permit decisions. *Lindquist v. City of Pasadena*, 656 F. Supp. 2d 662, 685 (S.D. Tex. Sept. 10, 2009); *see Lindquist v. City of Pasadena*, 525 F.3d 383, 387 (5th Cir. 2008). Selective enforcement and personal vindictiveness claims are subject to higher burdens of proof. *Lindquist* 525 F.3d at 387. For all class of one claims, the plaintiff must prove; (1) "[he] has been intentionally treated differently from others similarly situated"; and (2) "that there is no rational basis for the difference in treatment." *Willowbrook*, 528 U.S. at 564. Additionally, for selective enforcement and personal vindictiveness claims, the plaintiff must show that the defendant acted with an improper motive. *Bryan v. City of Madison, Miss.* 213 F.3d 267, 276 (5th Cir. 2000). An improper motive can be based on "race, religion, the desire to prevent the exercise of a constitutional right, or personal vindictiveness by the decision-maker." *Id.*

Here, Plaintiff does not allege that he has experienced adverse zoning permit decisions. *See* ECF No. 1-2 at 13. Thus, Plaintiff's class of one equal protection claim is subject to the higher burden of proof and he must show an improper motive in addition to intentional differential treatment with no rational basis. *See Bryan*, 213 F.3d. at 276. Plaintiff alleges that Russ treated him differently. ECF No. 1-2 ¶ 6. In his Complaint, Plaintiff alleges that normally, initiative petitions are sent to the county elections administrator. *Id.* This time, however, Russ intercepted the initiative petition and omitted many signatures. *Id.* Russ' interception of the initiative petition sufficiently meets the definition of an intentional act designed to treat Plaintiff differently than others that have filed initiative petitions. This intentional disparity in treatment is even more pronounced when considering the signatures on the initiative petition. The county elections administrator stated in a letter that Plaintiff's petition lacked the requisite amount of signatures. *Id.* ¶ 7. Normally, those who organized the initiative petition are promptly notified of

any shortage of signatures. *Id.* ¶ 8. In this situation, Russ withheld the notice. *Id.* Withholding notice, coupled with the interception of the initiative petition, illustrates a detour from the normal avenue of handling initiative petitions. *Id.* Thus, it demonstrates that Plaintiff was treated differently than others who filed initiative petitions.

There is no rational basis for the differential in treatment. A plaintiff bringing an equal protection claim bears "the heavy burden of negating any reasonably conceivable set of facts that could provide a rational basis for their differential treatment." *Lindquist*, 525 F.3d at 387. Here, Plaintiff sufficiently alleges that no rational basis for the differential in treatment exists. Although Plaintiff does not explicitly negate sets of facts that could be a rational basis, he does provide an obvious, irrational motive for the differential in treatment: to keep the initiative off of the ballot. ECF No. 1-2 ¶ 8. Moreover, the undersigned fails to see, and Defendants do not advance, a rational basis for: (1) keeping a petition from the county elections administrator; (2) only providing a portion of the signatures to the county elections administrator; and (3) failing to provide the petition organizer with the letter of notice describing the shortage of the signatures. Thus, this disparity in treatment lacks a rational basis.

Plaintiff can also show that Russ allegedly acted with an improper motive. The apparent motive was to prevent Plaintiff from exercising his constitutional right to petition the government. *See id.*; U.S. Const. Amend. I. The Supreme Court has held that initiative petitions are an exercise of the First Amendment. *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988). Thus, any interference with an initiative petition is an interference with an individual's constitutional right. *Id.* Here, Plaintiff alleges that Russ intercepted Plaintiff's initiative petition and prevented it from being certified. ECF No. 1-2 ¶ 6. Plaintiff further alleges that Russ inhibited Plaintiff's right to petition by only providing the county elections administrator with a portion of the signatures

actually gathered. *Id.* ¶ 7. Therefore, Plaintiff sufficiently alleged that Russ violated Plaintiff's constitutional right to petition.

2. Russ Acted Under the Color of Law.

Next, Defendants assert that Plaintiff fails to allege Russ acted under color of law when he intercepted the initiative petition. Defs.' Mot. Dismiss ¶ 15. For § 1983 claims, a plaintiff must prove that the actor was acting under color of law. This excludes private conduct, no matter how wrongful. *Richard v. Hoechst Celanese Chem. Grp., Inc.*, 355 F.3d 345, 352 (5th Cir. 2003). A person acts under color of law when "he misuses 'power' possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Bustos v. Martini Club*, 599 F.3d 458, 464 (5th Cir. 2010). An actor cannot be said to have acted under color of law if the actor's motivation was personal and did not invoke or use any official authority. *Rodarte v. Ben. Tex. Inc.*, No. SA-16-CA-71-RP, 2016 U.S. Dist. LEXIS 45074, at *21 (W.D. Tex. April 4, 2016).

Here, it is undeniable that Defendant Russ acted under the color of authority. Defendant Russ, as city attorney, was a state official at all times relevant to this case. ECF No. 1-2 ¶ 3. It is inconceivable that Russ would be able to intercept the petitions if he were not the city attorney. As Plaintiff recognizes in his Response to Defendants' Motion to Dismiss, Russ is not simply a private attorney who convinced the city clerk to give him the initiative petition and the county elections administrator to give him the letter. Pl.'s Resp. Defs.' Mot. Dismiss at 3. Plaintiff alleges that Russ was only able to intercept the initiative petition and letter by virtue of his position as a city attorney. ECF No. 1. Therefore, Russ acted under color of authority when intercepting the initiative petition. This is true even if Russ' motivation was personal because Russ invoked official authority when he allegedly intercepted. *See Rodarte*, 2016 U.S. Dist.

LEXIS 45074 at *21. Therefore, the undersigned recommends that Defendants' Russ and the Firm's Motion to Dismiss be denied concerning Plaintiff's ability to meet the first element of his § 1983 cause of action.

3. Russ is not Entitled to Qualified Immunity.

The doctrine of qualified immunity protects government officials from civil liability. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). The doctrine is more than simply a defense against liability. *Id.* It provides government officials with complete immunity to the suit. *Id.* The Supreme Court has mandated a two-step analysis when considering whether qualified immunity applies. *Id.* at 232. First, the plaintiff must have alleged a violation of a constitutional right. *Id.* Second, the constitutional right allegedly violated must be clearly established at the time of the violation. *Id.* Defendants challenge both steps of this analysis. Defs.' Mot. Dismiss 9-13.

a. Johnson Alleges a Constitutional Right.

The Supreme Court has long acknowledged that the circulation of initiative petitions is protected by the First Amendment. *Meyer*, 486 U.S. at 421-22; *see also Voting for Am., Inc. v. Andrade*, 488 F. App'x 890, 898 n.13 (5th Cir. 2012). The Supreme Court has described initiative petitions as core political speech. *Meyer*, 486 U.S. at 422. The right to petition is also protected from any abridgment from the States. *Id.* at 420.

Defendants first argue that the interception of an initiative petition is not a violation of a constitutional right. Defs.' Mot. Dismiss ¶ 27. However, the First Amendment prohibits "direct limits on individual speech." *Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002). Here, the interception of the initiative petition delayed discussion of a political topic. *See* ECF No. 1-2 at 12. It also prevented an issue from being placed on a ballot. *Id.* Thus, Defendants' interception of the petition, if proven, interfered with Plaintiff's protected political speech by directly limiting it.

Therefore, the alleged interception of the initiative petition constitutes a violation of Plaintiff's First Amendment rights.

Defendants also argue that Plaintiff has not been "completely deprived of his right to petition." Defs.' Mot. Dismiss ¶ 28. Specifically, Defendants argue that Plaintiff could have addressed the issue at "a city council meeting or written letter[s] to city council members." *Id.* "The First Amendment protects [a citizen's] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer*, 486 U.S. at 424. Moreover, the existence of more burdensome avenues for communication does not mean that a violation of First Amendment rights has not occurred. *See id.* Here, Plaintiff selected to start an initiative petition to force a forensic audit of city finances. ECF No.1-2 ¶ 5. That Plaintiff could have gone to the city council itself (as Defendants suggest) is immaterial. Plaintiff alleges that he sought to force an audit because he suspected the city council and other city officials were misappropriating funds. *Id.* Not only would going to the city council be more burdensome than circulating a petition, it would likely be an unsuccessful venture. The fact that Plaintiff had other avenues to communicate does not undermine his First Amendment claim.

Defendants also cite several cases in which courts have held that the plaintiff was not completely deprived of the right to petition because alternative means existed to exercise the plaintiff's First Amendment rights. *See* Defs.' Mot. Dismiss. However, these citations are misleading. In each case that Defendants cite, the restricted avenue of speech was supported by a compelling government interest. *See Galena v. Leone*, 638 F.3d 186, 212 (3rd Cir. 2011) (First Amendment did not protect a citizen's interruption during a city council meeting when the citizen could have expressed his grievances in a portion of the meeting specifically set aside so the city council could legislate without interruptions.); *see also Griffin v. Berghuis*, 563 Fed.

Appx. 411, 417 (6th Cir. 2014) (Prisoner's petition clause rights were not violated because his chosen form of petition presented a disruptive threat to the prison guards). Here, Defendants identify no compelling government interest, nor is any apparent in intercepting Plaintiff's position. Therefore, even though Plaintiff had alternative means to exercise his right to petition, the alternative means do not bar his claims.

b. The Constitutional Right Alleged was Clearly Established.

Defendants argue that the constitutional right allegedly violated was not clearly established. Defs.' Mot. Dismiss ¶ 29. In particular, Defendants focus on the alleged conduct. *Id.* at 12. Specifically, Defendants note that Plaintiff failed to cite any case where an intercepted petition constituted a violation of the First Amendment. *Id.* ¶ 33. As mentioned previously, the Supreme Court has clearly held that the circulation of initiative petitions is protected by the First Amendment. *Meyer*, 486 U.S. at 421-22. In *Meyer*, the state of Colorado had a statute that made it a felony to pay petition circulators. *Id.* at 417. The Court held that the statute restricted political discourse. *Id.* at 424. It ultimately struck down the statute after Colorado could not present a compelling reason to justify the statute's continuance. *Id.* at 428. Here, the restriction on political discourse is much more egregious. Where the statute in Colorado only made the petition process more burdensome, Defendant Russ' actions directly interfered with Plaintiff's First Amendment rights. As Defendants point out, the inquiry is whether a reasonable official would have understood that his conduct violates a constitutional right. Defs.' Mot. to Dismiss ¶ 30 (citing *Saucier v. Katz*, 533 U.S. 202 (2001)). Undoubtedly, a reasonable city attorney would have known that the interception of an initiative petition constituted a violation of First Amendment rights. Thus, the constitutional right allegedly violated by Defendant Russ was clearly established.

Defendants again argue that other avenues existed for Plaintiff to exercise his right to petition and therefore his rights were not violated. Defs.' Mot. Dismiss at 13. Again, this argument is unpersuasive. Alternative avenues to exercise a constitutional right do not remedy a violation of that right. *Meyer*, 486 U.S. at 424. Further, the alternative avenues proposed by Defendants are unreasonable. Plaintiff's purpose behind the initiative petition was to investigate misconduct on behalf of the city council and other city officials. ECF No.1-2 ¶ 5. Providing Plaintiff an opportunity to take his suspicions to the members of the city council as an alternative means for political discourse is insufficient to show that his constitutional rights were not violated.

B. Johnson's Claim Against the Firm.

The only claim that Plaintiff asserts against the Firm is a § 1983 claim. ECF No.1 ¶ 9. The doctrine of respondeat superior does not apply to § 1983 claims. *See Goodarzi v. Hartzog*, No. H-12-2870, 2013 U.S. Dist. LEXIS 85727, at *15 (S.D. Tex. 2013). Plaintiff argues that he does not assert claims based on respondeat superior. Resp. to Defs.' Mot. Dismiss at 5. Instead, Plaintiff asserts that his claim against the Firm is premised on partnership liability. In Texas, a partnership is liable for actions of a partner if the partner's actions were in the ordinary course of business or with the authority of the partnership. Tex. Bus. Orgs. Code Ann. § 152.303(a). The Texas Supreme Court has noted that this liability is a type of vicarious liability. *Doctors Hosp. at Renaissance, Ltd. v. Andrade*, 493 S.W.3d 545 (Tex. 2016). Much like respondeat superior, vicarious liability does not apply to § 1983 claims. *Hicks v. Bexar Cnty.*, 973 F. Supp. 653, 674 (W.D. Tex. June 13, 1997).

Plaintiff also asserts that the Firm can be held liable for § 1983 claims because it ratified Defendant Russ' actions. ECF No. 1-2 ¶ 6. However, a supervisory official cannot be held liable

for its subordinates unless: (1) the official participated in the acts; or (2) a causal connection exists between the official's actions and the alleged violation. *Barksdale v. King*, 699 F.2d 744, 746 (5th Cir. 1983). Here, Plaintiff does not allege that the Firm actually helped Defendant Russ intercept the initiative petition. *See* ECF No. 1-2 at 12. Thus, Plaintiff must show that a causal connection exists between the Firm's ratification and Defendant Russ' alleged conduct. *See Barksdale*, 699 F.2d at 746. A causal connection only exists if the official breaches a duty imposed by law and this duty leads to the constitutional violation. *Id.* Plaintiff alleges that the Firm ratified Russ' actions, but fails to show that the Firm breached any duty imposed on it by law when it did so. ECF No. 1-2 ¶ 6. By the time the Firm allegedly ratified Defendant Russ' actions, the constitutional right had already been violated.

Plaintiff further contends that he will gladly amend his pleadings to elaborate on the ratification element of his claims against the Firm. Pl.'s Resp. to Def.'s Mot. Dismiss at 6. Plaintiff notes that his Complaint was originally filed in state court and therefore was not intended to meet federal pleading standards. Plaintiff cites the rule that "'[c]ourts generally allow one chance to amend a deficient pleading before dismissing with prejudice.'" *Id.* (*citing Doe v. United States*, CV H-15-02414, 2016 WL 3919666, at *5 (S.D. Tex. June 30, 2016), *citing Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002)). However, according to the local rules of the Western District of Texas Rule CV-7(b), when a motion for leave to file a pleading, motion, or other submission is required, an executed copy of the proposed pleading, motion, or other submission shall be filed as an exhibit to the motion for leave. Loc. R. CV-7(b). Here, Plaintiff fails to attach his proposed amended complaint to his request for leave to file an amended complaint. Furthermore, the Court cannot envision a fact scenario under the facts as alleged that support his claims against the Firm. Accordingly, it is

ORDERED that on or before November 9, 2016, Plaintiff shall file his supplemental complaint pertaining to his claims against the Firm. A failure to do so will result in this Court's recommending that Defendant's Motion to Dismiss concerning Plaintiff's claims against the Firm be granted.

IV. RECOMMENDATION

After thoroughly reviewing the record, the undersigned **RECOMMENDS** that Defendant's Motion to Dismiss (ECF No. 9) should be **DENIED** as to Plaintiff's claims against Defendant Russ. It is **ORDERED** that on or before November 9, 2016, Plaintiff shall file his supplemental complaint concerning his claims against the Firm. A failure to do so will result in this Court's recommending that Defendant's Motion to Dismiss concerning Plaintiff's claims against the Firm be granted and Plaintiff's suit as it pertains to the Firm be dismissed in its entirety.

V. OBJECTIONS

The parties may wish to file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. *See Battle v. United States Parole Comm'n*, 834 F.2d 419, 421 (5th Cir. 1987).

A party's failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the District Court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted

by the District Court. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v Arn*, 474 U.S. 140, 150-53 (1985); *Douglass v. United Services Automobile Association*, 79 F.3d 1415 (5th Cir. 1996) (en banc).

SIGNED this 1st day of November, 2016.

JEFFREY C. MANSKE
UNITED STATES MAGISTRATE JUDGE