

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF NEW HAMPSHIRE

Leon B. Artus, Gary Brownfield, and  
Steven Lewis,

Plaintiffs,

v.

Town of Atkinson, Philip V. Consentino,  
Jack Sapia, Jr., Paul Sullivan, Fred Childs,  
William Friel, and Francis Polito,

Defendants

CIVIL ACTION No.: 09-CV-87-PB

JURY TRIAL DEMANDED

**ANSWER AND COUNTER CLAIMS OF DEFENDANTS**  
**PHILIP V. CONSENTINO, FRANCIS POLITO AND JACK SAPIA**

**PARTIES**

Caption to complaint: To the extent defendants are required to respond to the “parties” caption above the “Declaration” page, they deny that this lawsuit is asserted or can be asserted on behalf of “all others similarly situated.”

1 - 3. Defendants admit the allegations of Paragraphs 1 - 3.

4. Defendants admit the address of defendant Consentino and admit that he is the Chief of Police and that he is the unpaid Director of Elderly Affairs. Because it is unclear what the reference “at all relevant times” means in the context of this case, defendants deny that allegation. Defendants admit that plaintiffs purport to sue Chief Consentino in his individual and official capacities, but deny that the plaintiffs have any

good faith basis for bringing this lawsuit and deny that the lawsuit states a valid cause of action.

5 – 9. Defendants admit the allegations of Paragraphs 5 - 9 but, as to the allegation that these defendants are sued in their individual and official capacities, defendants deny that the plaintiffs have any good faith basis for bringing this lawsuit and deny that the lawsuit states a valid cause of action. Further, defendants state that defendant Sullivan is no longer a selectman.

10. Admitted.

### **Jurisdiction and Venue**

11-12. Defendants admit that the State Court had proper, non-exclusive jurisdiction over this case, but further state that the case is now properly removed to federal court.

### **Plaintiffs' Purported Factual Claims**

13 – 14. Denied.

Caption A: To the extent that Caption A requires a response, defendants deny it.

15. Defendants admit the allegations of Paragraph 15, except deny that Chief Consentino's volunteer, unpaid position as Director of Elderly Affairs is a "job" (since "job" may be intended to imply a paid position).

16 – 18. Denied.

19. Defendants deny knowledge or information sufficient to form an opinion or belief as to what organizations plaintiffs Artus or Brownfield belong to or what all their motives are and therefore deny the allegations of Paragraph 19. Further, defendants

deny knowledge or information sufficient to form an opinion or belief as to whether these “local” taxpayer associations are, in fact, “local taxpayer organizations” and, therefore, deny those allegations. Some or all of these “local” taxpayer associations share the same Concord, NH address, as the Coalition of New Hampshire Taxpayers (CNHT) that is run by Mr. Ed Naile. All other allegations of paragraph 19 not expressly admitted are denied.

20. Defendants admit that Mr. Artus and Mr. Brownfield had some role in circulating the petitions referred to, but deny knowledge or information sufficient to form an opinion or belief as to the truth or falsity of what, if any, “other members of the Atkinson Tax Payers Committee” were involved or what might have been their role (or what the role Concord based CNHT might have been) and therefore deny those allegations. Defendants further deny knowledge or information sufficient to form an opinion or belief as to the truth or falsity of the implied allegation that the so-called “Atkinson Taxpayer Committee” is a legal entity of any kind or that it actually exists in any legal sense and therefore, deny those allegations. Other than expressly admitted, defendants deny the allegations of paragraph 20.

21. Defendants admit that two of the warrant articles, if passed, would have had an effect on the Chief of Police position and on how the Department of Elderly Affairs was run. Defendants admit that plaintiffs purport to incorporate two formerly proposed warrant articles into paragraph 21, except note that the copies appear to be incomplete. Defendants do not interpret the statements in the petitions to be statements of fact to which they are required to respond, but to the extent they are required to respond, they deny the “allegations.” Other than expressly admitted in this response, the defendants deny the allegations of Paragraph 21.

22. The defendants admit the petitions signed by some citizens were filed with the Town Clerk. Defendants Polito and Sapia deny knowledge or information sufficient to form an opinion or belief of the remaining allegations of Paragraph 22 and therefore deny them. Defendant Consentino admits that he lawfully learned of the petitions and that he went to Town Hall to obtain a copy of the petitions as was his lawful right to do, just as it was the right of any citizen. Consentino admits that he called a few persons who are friends of his, as was his lawful First Amendment right, to politely ask them why they signed the petition and if they understood what they had signed. To the extent plaintiffs are implying that these actions were somehow unlawful, Consentino denies those allegations. The defendants deny any allegations of Paragraph 22 not expressly admitted above.

23. Defendants Polito and Sapia deny knowledge or information sufficient to form an opinion or belief as to the allegations of Paragraph 23 and therefore deny them. Chief Consentino denies the allegations of Paragraph 23.

24. Defendants Polito and Sapia deny knowledge or information sufficient to form an opinion or belief as to the allegations of Paragraph 24 and therefore deny them. Chief Consentino denies that even a single person received an “intimidating or angry phone call” from Chief Consentino and therefore he denies all of the allegations of Paragraph 24. Defendant Consentino further states that to the extent some citizens may have requested that their names be removed, that was not because of any alleged intimidation, but rather, because the plaintiffs or other persons who procured the signatures falsely represented what the petitions stated or the persons signing misunderstood what they were signing. Further, defendants deny any suggestion that

removal of signatures could have any legal effect and, in fact, the petitions were both considered at deliberative session but had virtually no support.

25. Denied.

Caption B: To the extent Caption B requires defendants to respond, they deny the allegations of Caption B.

26. Denied.

27. Defendants deny the first sentence of Paragraph 27.

a - h Subparagraphs a - h are plaintiffs' versions of various purported claims or actions and the plaintiffs' stated purpose of listing those claims or actions is to give examples of the purported "decades old record" of the Chief engaging in abuses of power and the Town purportedly "allowing" abuses of power. Accordingly, defendants deny the allegations of Paragraph 27, subparagraphs a – h and deny the allegations of any document incorporated into those subparagraphs. By not responding further to these subparagraphs, defendants are not admitting that plaintiffs' characterization of the events alleged in subparagraphs a - h is fair, true or accurate. Defendants do not believe that they are required to respond further to the allegations of subparagraphs a - h, but to the extent they are required to respond, they deny the allegations as stated. Other than to the extent expressly admitted above, the defendants deny the allegations of Paragraph 27, including 27 a – h and deny all other materials incorporated into or referred to in Paragraph 27.

28. Defendants deny knowledge or information sufficient to form an opinion or belief of the allegations of Paragraph 28, and therefore deny them.

29-32. Denied, except admitted that Chief Consentino's wife and son lawfully work for the police department..

Caption C: To the extent that the defendants are required to respond to the allegations of Caption C, they deny those allegations.

33. Defendants admit that the deliberative session for the Atkinson Town Meeting was held on January 31, 2009. Defendants admit that Mr. Brownfield attended the meeting, but deny knowledge or information sufficient to form an opinion or belief as to the capacity in which he attended, other than as a private citizen and therefore deny the remaining allegations of Paragraph 33.

34. Denied that Mr. Brownfield sat at or near the back of the room but admit that he appeared to be taking photographs without using a flash. Defendants deny that Mr. Brownfield did not stand to take any of his photographs – he did. Defendants deny knowledge or information sufficient to form an opinion or belief as to the number of photographs he took and therefore, deny those allegations. The remainder of the allegations are denied and, in fact, Mr. Brownfield attempted to draw attention to himself in various ways. For example, instead of using the chairs in the room he brought in a high back chair of his own and sat in the section designated for non-voters. When one of the supervisors of the checklist told Mr. Brownfield he was in the wrong section, Brownfield responded, "I can sit wherever I want." He made a commotion, sitting down, standing up, moving his chair around and at least one elderly woman complained that Mr. Brownfield was being disruptive. Mr. Brownfield eventually even went so far as covering up the public video camera that was recording and broadcasting the proceeding

and that improper and shameful conduct was clearly disruptive, and upon information and belief, intended to be so.

35. Defendants deny that Mr. Polito spoke “loudly” and deny he directly “ordered” Mr. Brownfield not to take photographs while Mr. Polito was at the podium. Rather, Mr. Polito told Mr. Brownfield that he did not want Mr. Brownfield to take his (Polito’s) photo and Polito said he was making that request as a private citizen not as moderator. One townspeople made a motion to overrule Mr. Polito’s request that Mr. Brownfield not photograph the moderator and that motion failed. In response to a request of one or more townspeople, the moderator asked that anyone who affirmatively wanted his or her photo taken, to raise his or her hand. Few, if any persons raised their hands. However, at no time was Mr. Brownfield prohibited from taking photos of townspeople at the meeting, or taking photographs, generally. Admitted Mr. Brownfield went to the microphone multiple times. The first time Mr. Brownfield came to the podium was after few, if any, persons raised their hands that they wanted their photograph taken, and he was calm, did not protest in the slightest, and volunteered that he was a professional wedding photographer and that if anyone there that day wanted his or her photo taken, he would do it for free and do a nice job. Later, possibly at the instigation of out-of-Towner, Ed Naile, Mr. Brownfield tried to disrupt the meeting by covering up a public video camera lens and then after that shameful and disruptive conduct, protested at the microphone. Except as expressly admitted in this paragraph, the defendants deny the allegations of paragraph 35.

36. Defendants admit that, presumably, one or more of the plaintiffs or the person, or entity, funding this litigation for them, may have posted pieces of video

footage to U-tube. In fact, rather than posting the entire portions of the video recording related to Mr. Brownfield's picture taking which would have shown that Mr. Polito acted professionally and calmly and that Mr. Brownfield's conduct was outrageous, the persons who posted the Utube video conveniently left out the portion where Mr. Brownfield created an outrageous, intentional disturbance by covering up the lens of one of the public video recording cameras. Thus, the Utube posting was intentionally designed to create a false impression of what happened at the meeting. At no time was Mr. Brownfield prohibited from taking photographs, generally. Defendants deny that Mr. Polito acted out of "anger" but admit that, as a private citizen, he asked Mr. Brownfield not to take his (Polito's) photo. Defendants admit that the meeting was recorded on video and presumably was visible to those Townspeople watching on the local cable access network other than perhaps when Mr. Brownfield unlawfully blocked the lens of the video camera. Admitted that Mr. Polito believed Mr. Brownfield did not have a right to take his (Polito's) photo and that he asked Mr. Brownfield to delete the photos of Polito, which, upon information belief, Mr. Brownfield did not delete. At one point Mr. Brownfield came to the microphone and asked what the moderator's opinion was about what Mr. Brownfield should do with the photos he had taken of other persons. The moderator, Polito, stated that he had no opinion on that at all. Other than as expressly admitted above, the defendants deny the allegations of Paragraph 36.

37. Defendants admit that plaintiffs have accurately quoted RSA 91-A:2 II, in this lawsuit paragraph 37, but to the extent plaintiffs are trying to falsely suggest to the Court that Mr. Brownfield quoted that section at the meeting, that allegation is denied. If Mr. Brownfield was aware of the specific content (wording) of the statute, he concealed

that information (upon information belief, trying to set up a purported 91-A violation rather than resolve the issue at the meeting). Further, Mr. Brownfield was present with out-of-Towner, Ed Naile who heads the Concord based, CNHT, and who claims to be an expert in 91-A issues. Mr. Naile could, if he had chosen to, have provided the exact language of 91-A to Mr. Brownfield to share with the moderator and the legislator/voters. Mr. Polito further states that as to his understanding that there was no 91-A entitlement to use still photography, he was relying on his memory of an Attorney's General memorandum of the New Hampshire Right to Know Law and his recall of that memo was that video filming and audio recording were expressly allowed, but that 91-A did not provide a right to still photography. That memo, which Mr. Polito did not have in hand, read in part:

From the New Hampshire Department of Justice February 8, 2007  
ATTORNEY GENERAL'S MEMORANDUM ON NEW  
HAMPSHIRE'S RIGHT-TO-KNOW LAW, RSA CHAPTER 91-A:

c. Any person may record, film, or videotape an open meeting. See WMUR v. N.H. Dept. of Fish and Game, No 2005-787, slip. op. (N.H. August 3, 2006) (prohibiting television cameras at hearing on issuance of a hunting and fishing license because the presence of the cameras would impair the applicants ability to present his case violated the Right-to-Know Law where the applicant had not established that he had a due process right to a hearing without cameras present).

Thus, while Mr. Polito's understanding of 91-A was incorrect, his position was taken in complete good faith. Other than as expressly admitted above, the remaining allegations of Paragraph 37 are denied.

38. Defendants deny that Polito "shouted" Mr. Brownfield "down." Defendants admit that at one point Mr. Brownfield was interrupting the moderator speaking and that Mr. Polito told Mr. Brownfield that he was being disruptive. He may

have additionally told Mr. Brownfield that he was being disruptive when Mr. Brownfield outrageously and deliberately covered the lens of the video camera operating in the room and broadcasting the proceeding to Atkinson residents. Mr. Polito on those occasions may have told Mr. Brownfield that if such conduct continued, he would eject him from the proceedings; however, that did not occur until after Mr. Brownfield's deliberate and outrageous blocking of the lens of the public video camera. Denied that Mr. Polito put it to a vote to prohibit Mr. Brownfield from taking other photos. At no time was Mr. Brownfield prohibited from taking photographs other than Mr. Polito's request that Mr. Brownfield not take Mr. Polito's picture. At one point, immediately following Mr. Brownfield's outrageous conduct of covering the lens of the public access video camera, Mr. Brownfield, not Mr. Polito, made a motion to allow photography (note, however, that it had never been prohibited). That motion was seconded and townspeople voted not to approve Mr. Brownfield's motion. Nevertheless, there was never any order prohibiting Mr. Brownfield from taking photos. Other than as admitted above, the defendants deny the allegations of Paragraph 38.

39. Nothing said or done could reasonably have caused Mr. Brownfield to refrain from speaking to the issue(s) of the warrant articles and clearly, as the record shows, Mr. Brownfield was not intimidated about speaking up or even intentionally trying to disrupt the meeting. All allegations of paragraph 39 are denied.

40. Defendant Sapia admits that he, a private citizen at that meeting, asked (not demanded) Mr. Brownfield to either delete any pictures that Mr. Brownfield had taken of Mr. Sapia or not publish them. Such a request was not unlawful and Mr. Brownfield, upon information and belief, declined the request. Sapia admits that he

brought a witness with him to the discussion so that Mr. Brownfield could not later distort the discussion. Mr. Polito admits that over lunch he politely asked Mr. Brownfield to delete the photo or photos, if any, of Polito and that he was accompanied by a witness, Assistant Town Moderator Richard Margoan. Polito denies that he “loudly” demanded or even that he “demanded” that Brownfield delete the photo(s) of Polito. Mr. Polito admits that at one point Brownfield asked him to put the request in writing and Polito responded that he would consider having his lawyer do it. Polito did not threaten that Brownfield would be hearing from his lawyer. Polito denies knowledge or information sufficient to form an opinion or belief regarding the allegations against Mr. Sapia and therefore, denies them. Defendant Consentino denies knowledge or information sufficient to form a belief or opinion as to the truth or falsity of the allegations of paragraph 40 related to the Polito or Sapia conversations with Brownfield or Artus and therefore, denies them. The remaining allegations of paragraph 40 are denied.

41. Defendants deny knowledge or information sufficient to form an opinion or belief as the truth or falsity as to whether CNHT has a newspaper but state upon information and belief, that Mr. Naile is or was the chairperson of the Concord based CNHT and that that entity may be actively involved in supporting, perhaps instigating, this lawsuit. Sapia admits that he was outside at the same time Mr. Artus was and at the same time Mr. Naile was but at the time did not know who Naile was. He denies that he demanded anything of Mr. Artus but, rather, asked him to either delete the photo, if any of Mr. Sapia, or else not to publish it. At that point, Mr. Naile, clearly trying to provoke an incident which he could then direct be included in this lawsuit, waived in Mr. Sapia’s

face what appeared to be a camera memory chip and said something to the effect, “This is mine. Is this what you are looking for? Why don’t you try to take it?” Mr. Sapia refused to take Mr. Naile’s bait and then asked Lt. Baldwin to come over and be a witness to the conversation. Sapia then again politely asked them to either not publish a photo of Sapia (a private citizen at that meeting) or to delete any Sapia photo. Artus/Naile declined the request. Polito and Consentino were not immediately present for that exchange and therefore deny knowledge or information sufficient to form an opinion or belief as the truth or falsity of the allegations of paragraph 41 and therefore deny them. All remaining allegations of paragraph 41 are denied.

42. Denied.

43. The allegations of paragraph 43 are denied except admitted that Mr. Artus had published, to a public blog (two days before the letter was delivered to the Town), a full copy (and a partial copy on another public Blog) of a defamatory letter from Attorney Douglas stating an intent to sue Polito and Sapia before the deliberative session mentioned in this lawsuit had even occurred. The letter contained no purported factual basis for suing either Sapia or Polito. The defendants do not believe they are required here to respond to specific allegation in the attachment at Tab L (the defamatory letter) but to the extent they are required to respond, denied.

44. Denied. In fact, Mr. Brownfield was intentionally attempting to call attention to himself and his conduct in deliberately covering up the public video camera lens was outrageous and shameful and to the extent there was any negative publicity, it was caused by his wrongful conduct, not by the actions or comments of others.

D. To the extent the defendants are required to respond to the statement in Caption D, denied.

45. Denied.

46. Denied except admitted that Polito may have commented on the fact that few people who signed the petitions seemed to be present. There is nothing unlawful in a person, or even moderator, noticing that fact or commenting on it. Plaintiffs are taking the quote completely out of context. Other than as expressly admitted, defendants deny the allegations of paragraph 46.

47 - 50. Denied.

#### **Purported Count I**

Caption to Count I: To the extent defendants are required to respond to the caption to Count I, denied.

51. Defendants incorporate their responses to paragraphs 1 – 50 as their response to paragraph 51.

52 – 54 Denied.

55. Denied that Consentino berated or harassed citizens and therefore deny all allegations of paragraph 55.

56. Denied.

57. Denied. These defendants further state that at the time of the alleged phone calls, none of them were selectmen and Mr. Consentino states that the phone calls he did make, were limited, not threatening in any way, and that neither Sapia nor Polito (nor any other defendant) had anything to do with those calls.

58 – 59 Denied.

60. This paragraph contains argument of law to which the defendants are not required to respond to but if required, they deny the statements as alleged or their applicability to this case. To the extent paragraph 60 contains statements of fact, denied.

61 – 63 Denied.

64. Defendants admit plaintiffs seek this relief but deny that they are entitled to it.

### **Count II**

Caption to Count II: Defendants do not believe they are required to respond to the caption of Count II (both because it is a caption and because it calls for conclusions of law, not fact). However, to the extent that they are required to respond, they state that if 91-A was violated it was very limited, unintentional and there was absolutely no need for plaintiffs to bring the 91-A claim.

65. Defendants incorporate their answers to paragraphs 1 – 64 as their answer to this paragraph 65.

66. Denied as alleged. At no time was Mr. Brownfield stopped from taking photographs, generally. Mr. Polito made a request to Mr. Brownfield that he not take photos of Polito only. Denied that Mr. Polito used “intimidation.” Denied that Polito caused public humiliation of Mr. Brownfield or anyone else. If Mr. Brownfield felt humiliated, it was more likely a result of his shameful, outrageous and deliberate covering up the lens of the public video camera that was broadcasting the meeting to townspeople. Mr. Brownfield deliberately brought attention to himself and to his disgraceful conduct. However, Mr. Polito admits that he has since learned that RSA 91-A:2, II does provide that persons attending certain public meetings are allowed to use still

photography cameras. That does not mean, however, that they can be disruptive in that use or otherwise. He did not know about that provision of RSA 91-A:2, II before or during the meeting and thought, mistakenly, that the right was limited to sound recordings and video or movie cameras. In spite of Mr. Polito's misunderstanding about the use of still photography cameras, at no time was Brownfield prohibited from using his camera at the meeting. Brownfield repeatedly tried to get Polito to put to a vote whether Brownfield was required to delete all his photos and, upon information and belief, Brownfield was hoping Polito would demand that all photos be deleted. Polito had never given such an instruction and told Mr. Brownfield that unless Mr. Brownfield was asking for a vote on that point, Polito had no intention of requesting such a vote and repeated that all he (Polito) was asking Mr. Brownfield to do was to delete any photo of Polito. Other than as expressly admitted, all allegations of paragraph 66 are denied.

67. Denied. There was no reason or need for plaintiffs to bring this claim under 91-A.

68. Admitted that Plaintiffs seek these remedies but denied that they are entitled to them. There was absolutely no need to bring this claim and since Mr. Polito now realizes that the statute allows persons to use still photography cameras in addition to video and sound recording, he has no intention of prohibiting someone from using a camera at public meetings he controls provided they are not otherwise being disruptive. There is no justification for attorney's fees, costs, or injunctive (or any other) relief. A letter to Mr. Polito quoting the specific language of the statute would have accomplished all that was needed without a lawsuit under 91-A. Notwithstanding this response, Mr. Brownfield was not prohibited from using his camera at the meeting and Mr. Polito's

request to Mr. Brownfield was limited to asking Mr. Brownfield not to take Polito's photo.

Any other documents attached to the complaint: To the extent that defendants are required to respond to any of the documents that are attached to the complaint but have not responded to each one, the allegations of each such attached document is denied for the purposes used in this case.

### **AFFIRMATIVE DEFENSES**

1. Plaintiffs fail to state a cause of action.
2. Plaintiffs lack standing to assert the claims in this lawsuit and thus the court lacks subject matter jurisdiction over the claims.
3. Plaintiffs have no legal authority to assert this lawsuit on behalf of others.
4. The claims asserted against the defendants in their "official capacities" are duplicative of the claims against the Town of Atkinson, inasmuch as claims against individuals in their "official capacities" is simply another way of asserting a claim against the Town.
5. The actions of the defendants are subject to official immunity, legislative immunity, discretionary function immunity, absolute and/or qualified immunity or privilege and/or conditional privilege.
6. As to plaintiff Bownfield's RSA 91-A claim, neither he, nor any of the other plaintiffs, is entitled to relief. Mr. Polito honestly, but mistakenly, was unaware that 91-A expressly allowed citizens to use still photography cameras (as opposed to video, movie and sound recording), and he based that understanding on his recollection

of information from a memorandum from the Attorney's General office. He has since learned that the statute expressly allows persons to use still photography cameras. Thus, there is no need for injunctive relief and there was no need to file a lawsuit based on 91-A. Further, Mr. Brownfield was never prohibited from using his camera other than Mr. Polito's request that Mr. Brownfield not take his (Polito's) photo. Therefore, none of the plaintiffs is entitled to attorney's fees or costs.

7. Any claims of plaintiffs under state law are subject to statutory caps or damages and liability limits of RSA 507-B, if applicable, however, it does not appear plaintiffs have asserted any 507-B claims..

8. To the extent applicable, some or all of the defendants have immunity, pursuant to RSA 31:104.

9. Plaintiffs have asserted various events that are outside the statutes of limitations applicable to those events. To the extent that any of plaintiffs' liability claims or damages are based on these past events, those claims or damages may be barred, in whole or in part, by applicable statutes of limitation and/or laches, if applicable.

10. To the extent applicable, some or all claims against individual defendants may be barred by the volunteer immunity statute (applicable to volunteers of governmental entities), RSA 508:17.

11. To the extent Mr. Brownfield is claiming emotional distress, humiliation, etc. it was caused in whole or in part by his own disgraceful conduct at deliberative session.

12. To the extent there are applicable federal statutory caps on damages or on the types of damages, plaintiffs' claims are limited by those statutory restrictions.

13. Defendants reserve the right to assert other defenses as investigation and discovery proceed.

### **COUNTERCLAIMS**

#### **Parties (and potential parties)**

1. Counter-plaintiff, Philip v. Consentino, is an individual who resides at 140 Main Street, Atkinson, NH.

2. Counter-plaintiff, Jack Sapia, Jr., is an individual who resides at 5 Crystal Hill Road, Atkinson, NH.

3. Counter-plaintiff, Francis Polito, is an individual who resides at 14 Coventry Road, Atkinson, NH.

4. Leon Artus is an individual who resides at 114 Maple Avenue, Atkinson, NH. He is a counter-defendant in this counterclaim.

5. Gary Brownfield is an individual who resides at 19 Chase Island Road, Atkinson, NH. Mr. Brownfield is a counter-defendant in Count II. If the facts later demonstrate Mr. Brownfield was involved directly or as part of a conspiracy regarding the events at issue in Count I of this counterclaim, counter plaintiffs may seek to amend to make him a defendant in Count I.

6. Steven Lewis is an individual who resides at 95 Main Street, Atkinson, NH. He is a counter-defendant in Count II. If the facts later demonstrate Mr. Lewis was involved directly or as part of a conspiracy regarding the events at issue in Count I of this counterclaim, counter plaintiffs may seek to amend to make him a defendant in Count I and to expand that count.

### **Jurisdiction and Venue**

7. This Court has jurisdiction over these counterclaims pursuant to Federal Rule of Civil Procedure 13 and 28 U.S.C. Section 1367. Venue over this action and the counterclaims is proper pursuant to 28 U.S.C. Section 1391 in that all parties reside in this judicial district.

### **Factual Allegations**

8. In the last few years, a very small group of people in the Town of Atkinson have begun and participated at one point or another in a nasty and personal series of attacks against Mr. Consentino and against those who have, at one time or another, spoken in support of him. Upon information and belief, this hostility began several years back when Mr. Consentino was a selectman and there was a dispute over where a Vietnam memorial in the Town would be placed.

9. One of the persons who promoted the Viet Nam memorial (the “Memorial Supporter”) was upset as to where the selectmen were planning to place it. She and a few others brought litigation over that placement and ultimately that was resolved. Unfortunately, that resolution did not end some of the animosity that apparently was created by that dispute.

10. The Memorial Supporter then brought suit in Superior Court to remove the selectmen from office (Sapia, Childs and Consentino). She lost that lawsuit.

11. The Memorial Supporter then sued the Town of Atkinson, Mr. Consentino, and then selectpersons Childs and Sapia and Town Moderator Polito for damages in various purported claims. Rather than continue spending significant amounts

defending that action, the defendants settled that case in a federal court mediation for a relatively small amount of money (compared to anticipated defense costs), mutual exchange of apologies, and establishment of various alternatives (mediation and then arbitration) to resolve any further disputes.

12. Certain persons, including upon information and belief, Mr. Artus and Mr. Brownfield, were behind two unsuccessful warrant articles in 2008 and 2009 to prevent the Town from paying legal fees of Town officials when sued. The 2008 version was amended by Townspeople at deliberative session to require the Town to “vigorously pursue” counterclaims against those persons who bring frivolous actions against the Town or its officials. The attorney’s fees provision was removed. That amended version was passed at the annual meeting in 2008. The 2009 warrant article to prevent the Town from paying legal fees for individuals sued, was amended at deliberative session to completely eliminate the provision prohibiting the Town from paying legal fees.

13. As stated above, on information and belief, Mr. Brownfield and Mr. Artus were movers behind the defeated warrant articles to prevent the Town from paying legal fees of claims against Town officials. The role of the out-of-Town (Concord based) CNHT run by Ed Naile with whom Artus and Brownfield have associated, is uncertain at this time, but may be established in discovery. The counter plaintiffs surmise that the real purpose of the proposed warrant articles was to inflict as much pain as possible on individuals who might be sued (such as Consentino, Polito, Sapia or anyone else who might try to support Chief Consentino) and to dissuade anyone who might tend to disagree with Artus or Brownfield from seeking or remaining in office.

14. Additionally, during these last couple of years, public internet blog sites were created or converted primarily for the purpose of making cowardly, defamatory attacks on Consentino, Sapia and Polito. The anonymous attacks include, for example, placing a clear likeness of Mr. Consentino into a Nazi uniform and showing a swastika, suggesting one or more of these persons are “on the take” and encouraging persons to stalk Consentino, Sapia, Polito and others.

15. They have referred to Consentino, Sapia and Polito as being in the mafia and have referred to Mr. Polito as “Consigliere” as an obvious reference to a well-known position in the American mafia. The posts suggest posting Mr. Polito’s picture over-imposed with a Nazi thug image as they did with Chief Consentino and referred to Polito as a “Nazi.” One commentator who is assisting Mr. Artus with the lawsuit has insinuated Mr. Polito is a homosexual and suffers from mental illness.

16. As explained below, some evidence suggests that Mr. Artus is involved with, or has some control over, two of these blogs and perhaps others.

17. On or about January 28, 2009, Attorney Charles Douglas, on behalf of counter defendant Leon Artus, wrote a letter purportedly for the purpose of giving notice to the selectmen of the Town of Atkinson pursuant to NH RSA 507-B:7 of intent to file a federal civil rights claim against the Town of Atkinson, then current selectmen (Friel, Sullivan, and Childs) and against Philip Consentino, Jack Sapia and Francis Polito, none of whom, of these latter three defendants, were or are current selectmen or, as to Polito and Sapia, had any responsibility over Chief Consentino.(the “Douglas Letter”). The timing of the letter, signed just days before Town Deliberative Session, upon information and belief, was done for political, rather than legal, purposes.

18. However, on January 28, 2009, two days prior to when the Douglas Letter was delivered to the Town on Friday, January 30, 2009, a portion of the January 28, 2009 Douglas Letter was posted on the Atkinsonfactor.blogspot.com (the “Factor Blog”) at 6:50 pm and a full copy of the unsigned defamatory Douglas Letter was published to at least one other publicly accessible internet blog site: Atkinsonreporter2.blogspot.com (the “Blog”) at 8:47 pm. Presumably, as of that date, only Mr. Artus would have had a copy of that letter and thus, it is reasonable to infer that he caused the letter to be posted/published.

19. Attorney Douglas has denied having any advanced knowledge that the letter would be posted to the Blog (and presumably on the Factor Blog) and therefore, upon information and belief, the person who presumably was responsible (directly or with the assistance of others) for the Douglas Letter being posted to the Factor Blog and to the Blog, was Attorney Douglas’ client, Leon Artus. Presumably Mr. Artus would have been the only person Mr. Douglas’ office would have had any valid reason to provide an advance copy of the letter. That Mr. Artus was able to have the letter posted (published) so quickly to the Factor Blog and to the Blog (two days before the letter was received by the Town) suggests (but it is uncertain) that Mr. Artus may directly or indirectly have control over the content of the Factor Blog and the Blog (perhaps including as to what other posts, including defamatory anonymous postings, are allowed to remain on each of the two blogs).

20. The Douglas Letter is four pages long and is clearly intended to be critical and disparaging of Mr. Consentino and served no legally required or legally justified purpose.

21. The Douglas Letter as published on a public blog site is not privileged from defamation or other claims as it was not required to be published on a blog in order to make a NH RSA 507-B:7 notice of claim even if such a notice had been legally required at all, which it was not.

22. Further, the Douglas Letter is not privileged in any sense because it was not sent to the Town to comply with the requirements of NH RSA 507-B:7.

23. Specifically, that statute only requires giving written notice to the Town Clerk *of any claim under NH RSA 507-B*. The letter did not state that there was any claim that would be asserted under NH RSA 507-B (instead, it referred solely to intent to file a “civil rights action” under the First Amendment – a federal claim).

24. The claims that Mr. Artus’ counsel would assert shortly thereafter in the lawsuit contained no NH RSA 507-B claims. There was a federal civil rights claim under 42 U.S.C. §1983 and there was a claim for injunctive relief and attorney’s fees under NH RSA 91-A for alleged violation of the Right to Know Law (alleged refusal to allow a Mr. Brownfield to continue taking still photographs).

25. The NH RSA 91-A claim is not a NH RSA 507-B claim and thus, the Douglas Letter was not sent for the purpose of giving notice of that claim. Moreover, the NH RSA 91-A claim (Count II) relates to events that occurred after the date of the Douglas Letter. Therefore the Douglas Letter could not have been drafted for the purpose of giving notice of the NH RSA 91-A claim, even if that claim did somehow fall under NH RSA 507-B. However, since the date of the letter was just a few days before the Town’s Deliberative Session, it is highly likely that the purpose of the letter was purely political.

26. While the Douglas Letter states many things critical of and false about Mr. Consentino, there is one comment that is especially defamatory. Specifically, a paragraph in the letter discussing one Mr. Kaye states, in part, that:

Chief Consentino then followed up by sending Mr. Kaye two threatening letters, on police department stationary, demanding that Mr. Kaye provide him copies of his prepared statement. This is yet another example of the Chief abusing his position to intimidate a citizen who dared speak out against him. After a death threat Mr. Kaye moved to Maine.  
emphasis added.

27. The statement clearly and falsely states or implies that the death threat was either made by Chief Consentino or made by someone on Mr. Consentino's behalf. Otherwise, there was absolutely no justified purpose in including that statement.

28. Making a death threat is a serious crime. Especially since Mr. Consentino is in the law enforcement business, the statement is defamatory per se. It is made worse in the context of the overall letter.

**Count I Defamation (Consentino against Artus)**

29. Consentino incorporates the allegations of paragraphs 1 – 28 as paragraph 29 of this counterclaim.

30. The statements in the Douglas Letter that Mr. Consentino had made a death threat, upon information and belief, must have been made by Mr. Artus and published by or for him on one or more public blogs. Further, Mr. Artus must have approved the Douglas law firm sending (publishing) the Douglas Letter to the selectmen knowing and intending that it would then become a public document and thereby cause as much damage as possible, all, not coincidentally, just before Deliberative Session of the Town.

31. For the reasons stated above, the Douglas Letter was not privileged from defamation, or other claims, when published by, or on behalf of, Mr. Artus to the Town (and hence to the general public) in letter form or when published days earlier on one or more internet public blogs.

32. The statements in the non-privileged Douglas Letter contains a false and defamatory per se statement of fact, as outlined above.

33. Mr. Artus caused the Douglas Letter to be published.

34. Because the statement is defamatory per se, Mr. Consentino is entitled to damages without proof of injury.

35. Mr. Artus is the only named defendant in Count I because the Douglas Letter appears to be written on behalf of Mr. Artus. Mr. Consentino reserves the right to seek the Court's permission to add Mr. Lewis and Mr. Brownfield as defendants in Count I if discovery later shows that they were responsible directly, or as part of a conspiracy, to defame Mr. Consentino.

36. Additionally, that Mr. Artus was able to have the Douglas Letter posted so quickly to at least two public internet blogs suggests that he may be one of the persons (moderators) who control the content of the Factor Blog and the Blog, including deciding what anonymous defamatory posts are allowed to be made or remain part of those blogs. These blogs and others to which they have cross links, contain certain statements that are defamatory of Consentino, Polito and Sapia. If through discovery it is established that Mr. Artus, Mr. Lewis, or Mr. Brownfield have control over these blogs or various others that have contained defamatory (typically anonymous) posts, Consentino, Polito and Sapia reserve the right to seek to amend the counterclaims to add further defamation

counts against Artus, Lewis and/or Brownfield as applicable and possibly to others responsible for those sites including for all defamatory statements made hiding behind the “anonymous” label.

37. That this Count I focuses only on the false statement which constitutes defamation per se is not intended to suggest that other statements in the Douglas Letter are true and, in fact, other statements are denied.

**Count II Abuse of Process/Civil Malicious Prosecution (Polito and Sapia versus Artus, Lewis and Brownfield)**

38. The allegations of paragraphs 1 – 37 are incorporated as paragraph 38 of this Counterclaim.

39. The supposed event that triggered the Douglas Letter and resultant lawsuit was Chief Consentino calling a few people in January 2009 who had signed a certain petition. At that time, Mr. Polito was not a selectman, nor was Mr. Sapia. Plaintiff Artus had no good faith factual basis to claim that Sapia or Polito had any involvement with the alleged phone calls made by Chief Consentino because, in fact, Sapia and Polito did not have any advance knowledge of those phone calls and lacked any legal authority thereafter to address the alleged conduct as they were not selectmen.

40. Despite the fact that Mr. Sapia and Mr. Polito had no role in the Consentino phone calls, or even advanced knowledge of them, the Douglas Letter said that “Mr. Artus’ lawsuit will name Chief Consentino, the Town of Atkinson, the current sitting selectmen and former selectmen Jack Sapia and Francis Polito.

41. The Douglas Letter did not threaten to sue other past selectmen and provided no basis for naming selectmen Polito or Sapia as former selectmen.

42. Despite any lack of factual foundation, the resulting lawsuit named Polito and Sapia as defendants and referred to Polito as Town Moderator (not selectman or former selectman) and Sapia as Chair of the Town's Conflict of Interest Committee (which he is not) and mentions he was a former selectman. The suit contains no allegation against Polito as a selectman or against Sapia as a Conflict of Interest Committee Chair (which he was not) or member.

43. Instead, the plaintiffs allege that all the defendants are part of an "organized conspiracy" to suppress the views of the plaintiffs.

44. If the Artus plaintiffs' intent in the Douglas Letter and in the Artus lawsuit was to suggest that all past selectmen are liable because they did not constrain or remove Chief Consentino from office, what good faith factual basis could the Artus plaintiffs have had for suing two past selectmen, Polito and Sapia, out of all the many years of past selectmen? None.

45. To the extent the Artus plaintiffs were suing Polito and Sapia in their capacity as past selectmen, neither one would have had any authority to act independently of the then Board of Selectmen as a whole. Thus, the claims against Polito and Sapia must be based on some other ground than that they were past selectmen (and Polito served only one three-year term as selectman starting in 1987).

46. That the Douglas Letter contains no facts related to Sapia or Polito and no facts to show that Polito or Sapia acted as part of a conspiracy, reveals that Mr. Artus had no good faith basis for threatening in the Douglas Letter to sue Sapia and Polito and no good faith basis for suing them.

47. As the Douglas Letter demonstrates, Mr. Artus had no factual basis for suing Mr. Polito and Mr. Sapia unless he was intending to sue every current and past selectman for the last 30 years (and, there would be no good faith basis for doing that, either). Mr. Artus also lacked any factual basis, because there is none, for implying in any way that Mr. Sapia or Mr. Polito had any advance knowledge of the calls Mr. Consentino is alleged to have made in January 2009, or that they somehow participated in a conspiracy.

48. Thus, upon information and belief, Mr. Artus had some ulterior motive for threatening to sue, and ultimately suing, Mr. Polito and Mr. Sapia. Upon information and belief, Mr. Artus is using this lawsuit for political reasons (his and/or those of Concord based CNHT run by Ed Naile), to accomplish what he or a few others apparently are unable to accomplish through the ballot box.

49. Threatening to sue and then suing Polito and Sapia as the only former selectmen among all the past thirty years of selectmen, suggests that the purpose of suing them is to silence anyone in the Town who might speak out in support of Chief Consentino. That use of litigation by Mr. Artus, Mr. Lewis and Mr. Brownfield is an abuse of process or civil malicious prosecution.

50. Lewis and Brownfield joined into the lawsuit with Mr. Artus and thus, their conduct, too, constitutes abuse of process or civil malicious prosecution.

51. Wrongly naming persons in a lawsuit, especially for purposes of silencing them, to use civil litigation as a method of intimidation, has and will injure those wrongly named persons. Further, the Artus-Brownfield-Lewis litigation may have the effect, and presumably is intended to have the effect, of discouraging Sapia, Polito or

others who might disagree with the small minority in Town (including Mr. Artus, Mr. Brownfield and Mr. Lewis) from running for office or from speaking out.

52. The Artus plaintiffs cannot claim that the events at the Town deliberative session, which occurred after the Douglas Letter was written and published, was the reason that they sued Polito and Sapia. The Douglas Letter made it very clear that Mr. Artus intended to sue Sapia and Polito before the events at the deliberative session had even occurred.

**Relief Requested**

53. Under Counts I (Consentino) and II (Sapia and Polito), Consentino, Polito and Sapia seek all remedies available to them, including, but not limited to, damages, costs and attorney's fees and such additional relief as justice may allow.

Respectfully submitted,

**PHILIP V. CONSENTINO, JOHN  
SAPIA AND FRANCIS POLITO**

By Their Attorneys,

RANSMEIER & SPELLMAN  
PROFESSIONAL CORPORATION

Dated: May 22, 2009

By: /s/ Garry R. Lane  
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**CERTIFICATE OF SERVICE**

I certify that copies of the foregoing Answer, Affirmative Defenses and Counterclaims was delivered electronically to Charles G. Douglas, III, Esquire, Jason R.L. Major, Esquire, Charles P. Bauer, Esquire, Elizabeth Deragon, Esquire and James G. Walker, Esquire by ECF.

Dated: May 22, 2009

/s/ Garry R. Lane  
Garry R. Lane

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