IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Northern Division

FRANKLIN SAVAGE et al., Plaintiff, v. POCOMOKE CITY, et al., Defendant.	Case No. 1:16-cv-00201-JFM

MEMORANDUM OF LAW IN OPPOSITION TO MARYLAND STATE POLICE DEFENDANTS SERGEANT PATRICIA DONALDSON AND CORPORAL BROOKS PHILLIPS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Page

INTRODUCTION AND SUMMARY OF ARGUMENT 1

FACTS 4

I. SPECIFIC FACTUAL INSTANCES 5

A. Racial Epithets 5

B. "KKK Lane" and Lynchings 6

C. Bloody Deer's Tail 6

D. Fake Food Stamp 7

E. "Body Count" Text Message 7

II. ADDITIONAL FACTS: RETALIATORY ACTS, ALLEGED MARIJUANA USE, AND RESIGNATION 8

STANDARD OF REVIEW 8

III. MOTION TO DISMISS 8

IV. MOTION FOR SUMMARY JUDGMENT 11

ARGUMENT 12

V. OFFICER SAVAGE HAS SUFFICIENTLY PLED FACTS STATING AN UNCONSTITUTIONALLY HOSTILE WORK ENVIRONMENT CLAIM AGAINST THE TWO MSP DEFENDANTS. 12

A. Officer Savage Has Adequately Pled the Necessary Elements of His Claims Against the MSP Defendants. 14

1. *Harassment Because of Officer Savage's Race* 14

2. *Severity of the Harassment* 16

3. *Retaliation* 19

B. Officer Savage Has Adequately Pled Facts to Support Liability for Each MSP Defendant. 22

1. *Individual Liability of Defendant Phillips* 22

2. *Supervisory Liability of Defendant Donaldson* 23

TABLE OF CONTENTS
(*Continued*)

Page

3. *Liability of MSP and Joint Employment* 24

VI. SUMMARY JUDGMENT IS PREMATURE, INAPPROPRIATE, AND UNSUPPORTED BY THE RECORD. 28

VII. THE MSP DEFENDANTS' REMAINING ARGUMENTS ARE UNAVAILING. 34

A. The MSP Defendants Are Not Entitled to Qualified Immunity Because They Violated Clearly Established Constitutional Rights. 34

B. The MSP Defendants Are "Persons" for Official Capacity Claims Within the Meaning of 42 U.S.C. § 1983 and Are Not Entitled to Sovereign Immunity..... 40

C. Section 1981 Provides a Basis for Relief From Racial Discrimination by State Actors That is Independent of That Found in Section 1983. 42

CONCLUSION.....45

TABLE OF AUTHORITIES

Page(s)

Cases

Adams v. City of Montgomery,
No. 2:10 cv 924, 2014 WL 840029 (M.D. Ala. Mar. 4, 2014) 15, 16

Adams v. Univ. of Maryland at Coll. Park,
No. Civ.A. AW-00-3177, 2001 WL 333095 (D. Md. Mar. 6, 2001) 35

Alston v. N. Carolina A & T State Univ.,
304 F. Supp. 2d 774 (M.D.N.C. 2004) 22

Anand v. Ocwen Loan Servicing, LLC,
754 F.3d 195 (4th Cir. 2014) 9

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 9

Ayissi–Etoh v. Fannie Mae,
712 F.3d 572 (D.C. Cir. 2013) 17, 18

Bailey v. Kennedy,
349 F.3d 731 (4th Cir. 2003) 34, 39

Baqir v. Principi,
434 F.3d 733 (4th Cir. 2006) 14

Beardsley v. Webb,
30 F.3d 524 (4th Cir. 1994) 12, 13

Bleeker v. Vilsack,
468 F. App'x 731 (9th Cir. 2012) 20, 21

Boyer-Liberto v. Fontainebleau Corp.,
786 F.3d 264 (4th Cir. 2015) 17, 19

Briggs v. Hannah's Rest., Inc.,
No. 95-C 4315, 1997 WL 269597 (N.D. Ill. May 15, 1997) 17, 37

Brosmore v. City of Covington,
No. 89-156, 1993 WL 762881 (E.D. Ky. Oct. 14, 1993), *aff'd*, 43 F.3d 1471
(6th Cir. 1994) 36, 37

Brown v. Sessoms,
774 F.3d 1016 (D.C. Cir. 2014) 45

Burlington Indus., Inc. v. Ellerth,
524 U.S. 742 (1998) 24

TABLE OF AUTHORITIES
(*Continued*)

Page(s)

Butler v. Drive Auto. Indus. of Am., Inc.,
793 F.3d 404 (4th Cir. 2015) 27, 28, 29

Cantu v. Mich. Dep't of Corrs.,
653 F. Supp. 2d 726 (E.D. Mich. 2009).....36

Carter v. Ball,
33 F.3d 450 (4th Cir. 1994) 21, 22

Causey v. Balog,
162 F.3d 795 (4th Cir. 1998) 13, 14

CBOCS W., Inc. v. Humphries,
553 U.S. 442 (2008).....44

Chika v. Planning Research Corp.,
179 F. Supp. 2d 575 (D. Md. 2002).....20, 21

City of Canton, Ohio v. Harris,
489 U.S. 378 (1989).....24

DeMasters v. Carilion Clinic,
796 F.3d 409 (4th Cir. 2015) 19

Dennis v. Cty. of Fairfax,
55 F.3d 151 (4th Cir. 1995) 43, 44

D.T.M. ex rel. McCartney v. Cansler,
382 F. 334 (4th Cir. 2010) 41

E.E.O.C. v. Cromer Food Servs., Inc.,
414 F. App'x 602 (4th Cir. 2011).....25

E.E.O.C. v. L.A. Pipeline Constr., Inc.,
No. 2:08-cv-840, 2010 WL 2301292 (S.D. Ohio June 8, 2010).....15

Edwards v. City of Goldsboro,
178 F.3d 231 (4th Cir. 1999) 9, 10, 34

Ensko v. Howard Cty., Md.,
423 F. Supp. 2d 502 (D. Md. 2006).....24

Evans v. Wilkinson,
609 F. Supp. 2d 489 (D. Md. 2009).....26

Frasier v. McGinley,
No. WMN-11-1067, 2014 WL 5163056 (D.S.C. Oct. 14, 2014) 35

TABLE OF AUTHORITIES
(*Continued*)

Page(s)

Gairola v. Commonwealth of Va. Dep't of Gen. Servs.,
753 F.2d 1281 (4th Cir. 1985) 13

Gholson v. Benham,
No. 3:14-cv-622, 2015 WL 2403594 (E.D. Va. May 19, 2015).....34

Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore,
721 F.3d 264 (4th Cir. 2013) 11

Greenan v. Bd. of Educ. of Worcester Cty.,
783 F. Supp. 2d 782 (D. Md. 2011).....35, 36

Gresham v. Midland Paint & Body Shop, Inc.,
No. 1:06-3069, 2008 WL 4488898 (D.S.C. Aug. 28, 2008).....15

Haines v. Donahoe,
No. ELH-10-293, 2012 WL 3595965 (D. Md. Aug. 20, 2012) 538 F. 329 (4th Cir. 2013).....20, 21

Hall v. Burney,
454 F. App'x 149 (4th Cir. 2011) 10, 24

Harrods Ltd. v. Sixty Internet Domain Names,
302 F.3d 214 (4th Cir. 2002) 11

Hayat v. Fairely,
No. CIV WMN-08-3029, 2009 WL 2426011 (D. Md. Aug. 5, 2009).....40

Herring v. Cent. State Hosp.,
No. 3:14 cv 378, 2015 WL 4624563 (E.D. Va. July 29, 2015) 35

Hoffman v. Baltimore Police Dep't,
379 F. Supp. 2d 778 (D. Md. 2005).....13

Huri v. Office of the Chief Judge of the Circuit Court of Cook Cty.,
804 F.3d 826 (7th Cir. 2015) 35

Jackson v. State of Maryland,
171 F. Supp. 2d 532 (D. Md. 2001).....13

Jemmott v. Coughlin,
85 F.3d 61 (2d Cir. 1996) 35

Jenkins v. Kurtinitis,
No. CIV.A. ELH-14-01346, 2015 WL 1285355 (D. Md. Mar. 20, 2015) 40

TABLE OF AUTHORITIES
(*Continued*)

Page(s)

Jett v. Dallas Indep. Sch. Dist.,
491 U.S. 701 (1989).....42, 43

Johnson v. City of Shelby, Miss.,
135 S. Ct. 346 (2014).....44, 45

Jones v. GT Contracting Corp.,
No. DKC 14-3539, 2016 WL 704319 (D. Md. Feb. 23, 2016) 14, 15

Kentucky v. Graham,
473 U.S. 159 (1985).....41

Lyle v. ESPN Zone,
292 F. Supp. 2d 758 (D. Md. 2003).....24

Maine v. Thiboutot,
448 U.S. 1 (1980).....44

Maupin v. Howard Cty. Bd. of Educ.,
No. CIV.A. BPG-08-2203, 2010 WL 9460565 (D. Md. July 15, 2010) 12

Monell v. Dep't of Soc. Serv.,
436 U.S. 658 (1978).....43

Nieto v. Kapoor,
61 F. Supp. 2d 1177 (D.N.M. 1999) 268 F.3d 1208 (10th Cir. 2001).....36

Ocheltree v. Scollon Prods., Inc.,
335 F.3d 325 (4th Cir. 2003) 24

Pettis v. Nottoway Cty. Sch. Bd.,
592 F. App'x 158 (4th Cir. 2014) 19

Philips v. Pitt Cty. Mem'l Hosp.,
572 F.3d 176 (4th Cir. 2009) 9

Podberesky v. Kirwan,
764 F. Supp. 364 (D. Md. 1991) 956 F.2d 52 (4th Cir. 1992).....40

Proffitt v. United States,
758 F. Supp. 342 (E.D. Va. 1990) 40

Randall v. Prince George's County, Md.,
302 F.3d 188 (4th Cir. 2002) 22

Raynor v. Pugh,
2016 WL 1056091 (4th Cir. Mar. 17, 2016).....11

TABLE OF AUTHORITIES
(*Continued*)

Page(s)

Riley v. Buckner,
1 F. App'x 130 (4th Cir. 2001) 35

Rodgers v. W.-S. Life Ins. Co.,
12 F.3d 668 (7th Cir. 1993) 17

Royster v. Gahler,
No. ELH-15-1843, 2015 WL 9582977 (D. Md. Dec. 31, 2015) 20

Shank v. Baltimore City Bd. of Sch. Comm'rs,
No. WMN-11-1067, 2014 WL 198343 (D. Md. Jan. 14, 2014) 35, 36

Shaw v. Stroud,
13 F.3d 791 (4th Cir. 1994) 23

Slade v. Hampton Roads Reg'l Jail,
407 F.3d 243 (4th Cir. 2005) 10

Slakan v. Porter,
737 F.2d 368 (4th Cir. 1984) (42 U.S.C. § 1983) 22, 23

Smith v. Town of Hempstead Dep't of Sanitation Sanitary Dist. No. 2,
798 F. Supp. 2d 443 (E.D.N.Y. 2011) 38

Spicer v. Commonwealth of Va. Dep't of Corrs.,
66 F.3d 705 (4th Cir. 1995) 24, 25

Spriggs v. Diamond Auto Glass,
242 F.3d 179 (4th Cir. 2001) 13, 14, 17

Stout v. Reuschling,
2015 U.S. Dist. LEXIS 39997, *14 (D. Md. Mar. 26, 2015).....43

Strothers v. City of Laurel, Md.,
118 F. Supp. 3d 852 (D. Md. 2015) 18

Talbert v. Smith,
No. 7:05cv00736, 2007 WL 773908 (W.D. Va. Mar. 9, 2007) 38

Tawwaab v. Virginia Linen Serv., Inc.,
729 F. Supp. 2d 757 (D. Md. 2010) 18

Testerman v. Procter & Gamble Mfg. Co.,
No. CCB-13-3048, 2015 WL 5719657 (D. Md. Sept. 29, 2015) (Feb. 4, 2016) 19

Tobey v. Jones,
706 F.3d 379 (4th Cir. 2013) 9

TABLE OF AUTHORITIES
(*Continued*)

Page(s)

Trotter v. Kennedy Krieger Inst., Inc.,
No. 11-cv-3422-JKB, 2012 WL 3638778 (D. Md. Aug. 22, 2012).....10

Tyndall v. Berlin Fire Co.,
No. ELH-13-02496, 2015 WL 4396529 (D. Md. July 16, 2015).....18

Ugorji v. N.J. Envtl. Infrastructure Tr.,
No. 12-5426, 2014 WL 2777076 (D.N.J. June 19, 2014).....35

United States v. $2,200,000 in U.S. Currency,
No. 12-cv-3501-ELH, 2014 WL 1248663 (D. Md. Mar. 26, 2014).....10

Vanguard Justice Soc'y, Inc. v. Hughes,
471 F. Supp. 670 (1979).....26

Veney v. Wyche,
293 F.3d 726 (4th Cir. 2002).....10

Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.,
535 U.S. 635 (2002).....41

Victors v. Kronmiller,
553 F. Supp. 2d. 533 (D. Md. 2008).....43

Westmoreland v. Prince George's Cty.,
No. TDC-14-0821, 2015 WL 996752 (D. Md. Mar. 4, 2015).....19, 20, 21

Whiteman v. Chesapeake Appalachia, L.L.C.,
729 F.3d 381 (4th Cir. 2013).....11

Will v. Mich. Dep't of State Police,
491 U.S. 58 (1989).....40

Williams v. Grimes Aerospace Co.
988 F. Supp. 925 (D. S.C. 1997).....26, 27, 28

Williams v. Herron,
687 F.3d 971 (8th Cir. 2012).....35

Ex parte Young,
209 U.S. 123 (1908).....40, 41

Statutes and Rules

42 U.S.C. § 1981.....4, 13, 42, 43, 44, 45

42 U.S.C. § 1985.....40

TABLE OF AUTHORITIES
(*Continued*)

Page(s)

42 U.S.C. § 1983 ..... *passim*

Fed. R. Civ. P. 8(a)(1) 30

Fed. R. Civ. P. 8(a)(2) 9

Fed. R. Civ. P. 12(b)(6) 8

Fed. R. Civ. P. 56(d) 11

Legislative Materials

39th Cong., 1st Sess., 2465 (1866) 42

Other Authorities

Joanne Turner-Sadler, *African-American History* 119 (2d ed. 2009) 32

INTRODUCTION AND SUMMARY OF ARGUMENT

The Motion to Dismiss filed on behalf of Defendants Donaldson and Phillips ("MSP Motion") begins by violating two fundamental rules of civil litigation. First, rather than read the allegations of the First Amended Complaint ("FAC") in the light most favorable to the Plaintiffs, drawing all inferences in favor of Plaintiffs' side of the story, the MSP Motion does the opposite. Thus, some evidence of racial discrimination is simply ignored, such as the food stamp with President Obama's picture superimposed, or the playing of racially charged videos in the squad room of the Worcester County Criminal Enforcement Team ("CET"). FAC ¶¶ 68, 86, 87; FAC Exhibit B. The MSP Motion audaciously argues that Officer Savage was not exposed to a hostile work environment at the CET. MSP Motion at 16-20, 23-30. But this is not a case, as the MSP Defendants would have it, of an isolated racial epithet spoken on one ocasion. The FAC alleges that: "Phillips and Passwaters regularly referred to African Americans as 'niggers' in Officer Savage's presence. They repeatedly used the word in a sarcastic or demeaning tone to Officer Savage both orally and in written communications." FAC ¶ 67.

When the MSP Motion does not simply ignore evidence, it attempts to twist that evidence to the point of breaking in an attempt to explain away conduct that is frankly surprising that the Maryland Attorney General's Office would even *try* to defend. The MSP Motion, for example, does not dispute that both Donaldson and Phillips were in the car for the trip to "KKK Lane." FAC ¶¶ 72-75. While in that clearing off of Truitts Landing Road, there was a discussion of the KKK using that location as a meeting place and lynching African Americans. Officer Savage, the only African American in the vehicle, was told to watch out because he might see a noose on the road. The MSP Motion does not deny that the trip was not part of official duties, as Officer Savage alleged. FAC ¶ 74. Rather, incredibly, the MSP Motion attempts to portray this incident as nothing more than a trip to the beach. MSP Motion at 6. It then boldly states: "Nothing

untoward is alleged to have happened on the trip to Truitts Landing Road, even as Savage describes it." *Id.* at 20. The statement strains credulity—that there is nothing untoward about three white officers taking time off from work to show their only African American colleague a lynching spot—all while talking about the KKK and lynching!

The same pattern of violently twisting the evidence to the MSP Defendants' liking is displayed in the retelling of Phillips' insulting "What's ya body count nigga?" text message. By the MSP Motion's telling, this was a chipper exchange over a rap song that Officer Savage liked. MSP Motion at 38-39. But the MSP Motion ignores the fact that the "n-word" is used to *address* Officer Savage himself, and not as part of a song. This is made clear by Phillips then referring to his own "body count"—"*I'm* in double digits" (meaning number of CET arrests). *See id.* at 7 (emphasis added). There is no response from Officer Savage to this text, further indicating that he viewed it as highly offensive.

The second flaw in the MSP Motion is its attempt to prematurely seek summary judgment without any discovery at all. The MSP Motion blithely offers evidence that the Court is asked to take at face value, without Plaintiffs' being allowed to request any documents or depose any of the authors of those documents. Thus, 12 full pages of the MSP Defendants' motion is monopolized by evidence, *viz.* text messages, that are intended to show that Donaldson, Phillips, and Officer Savage were on friendly terms. MSP Motion at 35-47. The motion represents that "[a]ll available texts" between the three relevant parties are attached to the motion. *Id.* at 47. Must Officer Savage and the Court take this representation as true without inquiry? Or are the Plaintiffs allowed to probe areas the Defendants may not have looked—or wanted to look? According to the MSP Motion, these texts establish that Officer Savage was "genuinely liked by Sgt. Donaldson and Cpl. Phillips and that he in turn liked them." *Id.* But it

could be said of many discriminators and harassers that they "genuinely liked" their targets, but that does not mean there was no racial discrimination in their treatment.

The MSP Motion further proceeds as if discovery has already taken place. Attacking the hostile work environment alleged in Count I, Defendants state that "there is not a scintilla of evidence of discriminatory intent." *Id.* at 23. But no evidence at all has been produced or examined in this case. The question of intent is one that is singularly ill-suited for summary judgment prior to any discovery at all.

This flawed understanding infects all of Defendants' arguments. The MSP Motion frames the issues as if the Plaintiffs were obligated to plead their entire case and establish every fact with evidence in the FAC. Plaintiffs did not and were not obligated to do that. Plaintiffs have numerous additional pieces of evidence and witnesses to demonstrate the hostile work environment, with several examples identified in an attached declaration from Officer Savage's counsel. The discrimination against Officer Savage was pervasive and routine, and when combined with particularly egregious incidents—like the visit to "KKK Lane"—it is clear that Officer Savage suffered a hostile work environment.

In fact, the MSP Motion raises numerous factual disputes that require paper discovery and depositions before any prudent fact-finder would even hazard an opinion. The Motion advances facts that directly conflict with Savage's allegations. The Motion also offers facts that conflict with other facts in the motion. Discovery is obviously necessary to explore these conflicts. Basically, as the MSP Motion admits, the test for hostile work environment takes into account the totality of the circumstances and factual context, and is thus not a "mathematically precise test." *Id.* at 25 (citation omitted). To attempt to apply such a test on summary judgment before any discovery at all is putting the cart miles ahead of the horse.

The same fundamental misconceptions permeate the MSP Defendants' discussion of the retaliation claims. The MSP Defendants strip the retaliatory acts of all context. Thus, a deer tail on a windshield or rumors that Officer Savage used marijuana on duty are treated as neutral events. But they were part of a pattern of retaliation after Officer Savage complained to the Maryland Attorney Grievance Commission and the Equal Employment Opportunity Commission ("EEOC"). They must be contrasted with glowing letters of recommendation, including one from Defendant Phillips, written just weeks before Officer Savage resigned from the CET.

Finally, the MSP Defendants' remaining arguments are unavailing. The claim for qualified immunity is frivolous. It is clearly established in both legal precedent and notorious rules of every workplace that racial discrimination in employment and retaliation for the exercise of federal constitutional rights before the EEOC and the courts are strictly prohibited. Similarly, because Officer Savage seeks prospective relief from state officials Phillips and Donaldson in their official capacity, it is well-established that Defendants are "persons" within the meaning of these provisions, and that they are not entitled to sovereign immunity. Finally, Defendants have misread Officer Savage's 42 U.S.C. § 1981 claim contained in the FAC, and the Court should read his claims alleged under 42 U.S.C. § 1981 as brought through 42 U.S.C. § 1983. Defendants thus have provided this Court no basis on which to dismiss Officer Savage's claims against them or grant summary judgment on those claims.

FACTS

As alleged in the FAC, the Defendants committed or condoned numerous racially discriminatory and retaliatory acts that give rise to this suit, each of which are sufficiently pled to show that Officer Savage is entitled to relief as summarized below. Notwithstanding the Defendants' efforts to sugarcoat their pattern of discrimination and retaliation, at this stage of the

case, the Court must accept as true the facts as alleged by the Plaintiffs, and here Officer Savage has amply alleged facts sufficient to support his claims against Defendants Phillips and Donaldson.

I. SPECIFIC FACTUAL INSTANCES

A. Racial Epithets

As stated in the FAC, Defendant Phillips, among others, regularly referred to African Americans as "niggers" in Officer Savage's presence. "They repeatedly used the word in a sarcastic or demeaning tone ***to Officer Savage*** both orally and in written communications." FAC ¶ 67 (emphasis added). Members of the CET watched racially-charged videos that used the word "nigger" on official work computers, and laughed at these videos. *Id.* ¶¶ 68, 70. This racially hostile work environment, including the use of the word "nigger" in writing and orally, was aimed at Officer Savage and continued through his duration of service on the CET. *Id.* ¶ 96. Members of the Task Force were aware of the offensive and discriminatory impact of this language, and in mock concern, referred to African Americans as "ninjas," which became known within the Task Force as a synonym for "nigger" based on a statement made by a suspect during a previous investigation. *Id.* ¶ 71. Officer Savage was insulted and offended by the CET's racially hostile work environment, which includes the conduct of Defendants Phillips and the silent acquiescence of Defendant Donaldson, one of two supervisors of the CET. *Id.* ¶¶ 69, 97. Officer Savage was "further offended by the participation of his supervisors"–which for purposes of responding to MSP's Motion includes Defendant Donaldson – "their ratification of the racial epithets and racially discriminatory conduct, and their failure to intervene to stop the conduct or recommend discipline." *Id.* ¶ 98.

B. "KKK Lane" and Lynchings

In December 2012, several members of the CET repeatedly spoke to Officer Savage about lynchings and the Ku Klux Klan. *Id.* ¶ 72. This inappropriate and racially hostile discussion ultimately led to several members of the CET, including Defendants Phillips and Donaldson, taking Officer Savage to an isolated area in the forest near Stockton, Maryland, known as "KKK Lane." *Id.* ¶ 73. Officer Savage was taken there in his own official covert vehicle provided by the Worcester County Sheriff's Office. *Id.* Both Defendants Phillips and Donaldson were in the vehicle and did not comment or object to this inappropriate detour. *Id.* ¶¶ 73-78. Moreover, while at "KKK Lane," Defendant Wells told Officer Savage about a chest in his attic in which he kept "white sheets and nooses." *Id.* ¶ 76. Wells also told Officer Savage that he might see some KKK members or a noose in Stockton. *Id.* ¶ 75. Defendant Phillips later told Passwaters, one of the CET's two supervisors, that he and other CET members took Officer Savage to "KKK Lane." *Id.* ¶ 77. Passwaters simply replied with "OK" and took no action. *Id.* ¶ 78.

C. Bloody Deer's Tail

On December 17, 2013, Officer Savage discovered that a bloody deer's tail was placed on the windshield of his vehicle, which was parked on a side street by the CET office. *Id.* ¶ 79. When asked about the bloody tail, Defendant Phillips laughed and acknowledged that he had placed the tail on Officer Savage's car. *Id.* ¶¶ 81-82. Based on information and belief, neither Defendant Donaldson, nor any other Defendant, took any action to discipline or punish Phillips for his conduct. *Id.* ¶ 83. Following the bloody deer's tail incident, Officer Savage felt that he could not report the ongoing harassment to Passwaters and Donaldson because Passwaters was actively involved in the harassment and both Passwaters and Donaldson had indicated by their previous inaction that they would not do anything to halt the discriminatory behavior. *Id.* ¶ 84.

D. Fake Food Stamp

In April 2014, Officer Savage found in his desk drawer a fake food stamp on which a picture of President Obama had been imposed. *Id.* ¶ 86; FAC Exhibit B. Based on information and belief, no other CET member received such a food stamp on their desk, and as the only African American member of the Task Force, the discriminatory and hateful message was clear. *Id.* Officer Savage understood that the intent of this conduct was to ridicule and insult African Americans. *Id.* Officer Savage reported the food stamp incident to Chief Sewell at or around the time of this occurrence in April 2014. *Id.* ¶ 87.

E. "Body Count" Text Message

On May 31, 2014, Defendant Phillips sent Officer Savage a text message that read: "What's ya body count nigga? I'm in double digits." *Id.* ¶ 88; FAC Exhibit C. Shortly thereafter, Phillips sent Officer Savage text messages that read "Where the fuck u at?" and "B[r]ing ur report homeskillet." *Id.* ¶ 89; FAC Exhibit C. Following this offensive text message, Officer Savage reported to Chief Sewell who then wrote a letter to Colonel Marcus L. Brown, the then-Secretary of the Department of Maryland State Police, regarding this incident. *Id.* The Maryland State Police conducted an investigation into the conduct and actions of Defendant Phillips and concluded that he "violated the rules and regulations of the Maryland State Police with Unbecoming Conduct." *Id.* ¶ 117; FAC Exhibit G. On information and belief, despite acknowledging that Officer Savage's allegations against Defendant Phillips were well-founded, the Department of Maryland State Police has taken no disciplinary action of any kind against Phillips to date. *Id.* ¶ 118.

II. ADDITIONAL FACTS: RETALIATORY ACTS, ALLEGED MARIJUANA USE, AND RESIGNATION

After Officer Savage reported the racial harassment outside the CET chain of command, Defendant Phillips spread false rumors about Officer Savage that made it impossible for Officer Savage to perform his job—first in the CET, and later at the Pocomoke City Police Department. *Id.* ¶ 90. In particular, Defendant Phillips falsely told another CET officer that Officer Savage has been improperly smoking marijuana during an undercover drug buy operation, even though Phillips was the one who burned the marijuana. *Id.* ¶ 93; FAC Exhibit D. This led to Officer Savage's superiors questioning whether he was on drugs. *Id.* ¶ 94. The fact that this conduct was indeed retaliatory is demonstrated by the numerous positive reviews Officer Savage received from his coworkers and superiors *prior* to his complaints of racial discrimination. *Id.* ¶ 104; FAC Exhibit E. The persistent offensive and racially discriminatory conduct against Officer Savage led to his resignation from the CET in June 2014. *Id.* ¶ 113. Members of the Worcester County Sheriff's Office, in turn, further retaliated against Officer Savage by spreading false rumors about Officer Savage's resignation, which caused serious damage to Officer Savage's honor and integrity, and interfered with his ability to perform his job. *Id.* ¶ 114. As stated above, Officer Savage was exposed to use of the "N-word" and its variants on a daily basis and this caused him substantial psychological and physical harm. *See e.g.*, FAC ¶¶ 99, 126, 141, 150.

STANDARD OF REVIEW

III. MOTION TO DISMISS

A party seeking dismissal under Fed. R. Civ. P. 12(b)(6) must show that, "after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot

prove any set of facts in support of his claim entitling him to relief." *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999). All complaints must meet the "simplified pleading standard" of Rule 8(a)(2), which requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

To determine whether a complaint meets this standard, a court first must divide genuine factual allegations, which are entitled to deference, from "[t]hreadbare recitals of the elements of a cause of action supported by mere conclusory statements." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), *quoted in, e.g.*, *Tobey v. Jones*, 706 F.3d 379, 387 (4th Cir. 2013). Next, the court must "assume [the] veracity [of the genuine factual allegations] and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679. A complaint will survive when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that defendant is liable for the misconduct alleged." *Id.* at 678. A court must "draw on its judicial experience and common sense" to determine whether a reasonable inference can be made, and thus whether the pleader has stated a plausible claim for relief. *Id*. at 679.

In applying its experience and common sense, however, a court must accept all genuine factual allegations as true and construe the facts and reasonable inferences derived therefrom in the light most favorable to the plaintiff. *See Tobey*, 706 F.3d at 390. A court may not "consider extrinsic evidence" supplementing those allegations, unless that evidence consists of documents that are attached to or incorporated into the complaint, "integral to the complaint," and "authentic." *Anand v. Ocwen Loan Servicing, LLC*, 754 F.3d 195, 198 (4th Cir. 2014); *Philips v. Pitt Cty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009) (citing *Blankenship v. Manchin*, 471 F.3d 523, 526 n. 1 (4th Cir. 2006)). Declarations, affidavits, and other statements are among the evidence excluded from consideration if not attached or incorporated to the complaint or not

integral to the complaint. *See, e.g.*, *United States v. $2,200,000 in U.S. Currency*, No. 12-cv-3501-ELH, 2014 WL 1248663, at *9 (D. Md. Mar. 26, 2014) (declining to consider statements of scientists in motion to dismiss) (also citing cases); *Trotter v. Kennedy Krieger Inst., Inc.*, No. 11-cv-3422-JKB, 2012 WL 3638778, at *5 (D. Md. Aug. 22, 2012) (declining to consider a declaration in deciding a motion to dismiss). This evidence is unreliable at this stage of the proceedings and would be subject to further discovery as to authenticity, meaning, and completeness. For example, the MSP Defendants claim to have produced all text messages and emails between the two MSP Defendants and Officer Savage. MSP Motion at 47. But this statement is untested hearsay and there is no evidence regarding the custodian, how the texts were extracted and whether there was any evidence of deletion of certain texts. More importantly, Defendants produced no communications between themselves, evidence that certainly will be relevant to the joint effort to discredit Officer Savage after his complaints of discrimination in May of 2014.

Finally, if "the motion to dismiss involves 'a civil rights complaint, [a court] must be especially solicitous of the wrongs alleged and must not dismiss the complaint unless it appears to a certainty that the plaintiff would not be entitled to relief under any legal theory which might plausibly be suggested by the facts alleged.'" *Hall v. Burney*, 454 F. App'x 149, 150 (4th Cir. 2011) (quoting *Edwards*, 178 F.3d at 244); *accord Slade v. Hampton Roads Reg'l Jail*, 407 F.3d 243, 248 (4th Cir. 2005) (same); *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002) (same). That context is highly salient in this case. As discussed below, Officer Savage has alleged *more than* sufficient facts in *more than* sufficient detail to establish the plausibility of his claims, and Defendant's Motion to Dismiss should be denied.

IV. MOTION FOR SUMMARY JUDGMENT

When a party moves for dismissal but relies on evidence outside the pleadings, as Defendants do here, Federal Rule of Civil Procedure 12(d) directs courts to treat the motion as one for summary judgment. A motion for summary judgment should not be granted unless the movant can prove, "from the totality of the evidence, including pleadings, depositions, answers to interrogatories, and affidavits, the court believes no genuine issue of material fact exists for trial and the moving party is entitled to judgment as a matter of law." *Whiteman v. Chesapeake Appalachia, L.L.C.*, 729 F.3d 381, 385 (4th Cir. 2013). In evaluating the evidence, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Raynor v. Pugh*, 2016 WL 1056091, at *4 (4th Cir. Mar. 17, 2016) (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986)).

"A district court therefore "must refuse summary judgment 'where the nonmoving party has not had the opportunity to discover information that is essential to [its] opposition."' *Greater Baltimore Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Baltimore*, 721 F.3d 264, 280 (4th Cir. 2013) (quoting *Nader v. Blair*, 549 F.3d 953, 961 (4th Cir. 2008)). It is "especially important" to allow '"sufficient time for discovery . . . when the relevant facts are exclusively in the control of the opposing party."' *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 246-47 (4th Cir. 2002) (quoting 10B Charles A. Wright et al., *Federal Practice & Procedure* § 2741, at 419 (3d ed. 1998)). The same is true when the "case involves complex factual questions about intent and motive." *Greater Baltimore Ctr.*, 721 F.3d at 285.

A non-moving party may file an affidavit explaining that "it cannot present facts essential to justify its opposition" to a summary judgment motion. Fed. R. Civ. P. 56(d). Filed with this opposition brief is the Declaration of Andrew G. McBride, attached hereto as Exhibit A, explaining why certain facts essential to oppose the motions cannot be set forth. Officer Savage

requests that Defendants' motions be denied in their entirety and that Plaintiffs be given the opportunity to engage in all discovery to which they are entitled under the Court's rules.

ARGUMENT

V. OFFICER SAVAGE HAS SUFFICIENTLY PLED FACTS STATING AN UNCONSTITUTIONALLY HOSTILE WORK ENVIRONMENT CLAIM AGAINST THE TWO MSP DEFENDANTS.

Defendants express confusion about whether they are being accused of racial discrimination, retaliation, and/or a hostile work environment, protesting that these claims are "a smorgasbord of causes of action not clearly articulated or adequately developed." MSP Motion at 17. Based on this confusion, Defendants then argue that Officer Savage must meet three distinct standards to establish his Fourteenth Amendment claims. Defendants are incorrect in their mischaracterization and minimization of the allegations of fact in the FAC. They are also mistaken about the governing law regarding hostile work environment. Officer Savage has clearly pled in Count I of the FAC a cause of action of a hostile work environment based on his race and in retaliation for engaging in a protected activity, actionable under the Fourteenth Amendment and 42 U.S.C. §1983.

Under Fourth Circuit precedent, "the Equal Protection Clause of the Fourteenth Amendment confers upon public sector employees a right to be free from employment discrimination on the basis of race and violations of such rights are actionable under § 1983." *Maupin v. Howard Cty. Bd. of Educ.*, No. CIV.A. BPG-08-2203, 2010 WL 9460565, at *10 (D. Md. July 15, 2010) (citing *Keller v. Prince George's County*, 827 F.2d 952 (4th Cir. 1987), *aff'd sub nom. Maupin v. Howard Cty. Pub. Sch. Sys.*, 420 F. App'x 227 (4th Cir. 2011). In addition, retaliatory conduct that "maintain[s] and reinforce[s]" prior acts of discrimination is actionable under 42 U.S.C. § 1983. *Beardsley v. Webb*, 30 F.3d 524, 530 (4th Cir. 1994). In *Beardsley*, a county sheriff initially engaged in "overt sexual harassment" including "sexual innuendos and

proposals" against a female employee. *Id.* at 529-30. After the female employee reported the Sheriff's conduct, his conduct was no longer overtly discriminatory, but the court found that the acts of retaliation by the same supervisor were a "mixture of retaliation and continued sexual harassment." *Id.* at 530. In pleading Count I, Plaintiff similarly pled that Defendants Phillips and Donaldson engaged in racial discrimination and perpetuated that discrimination through retaliation that "maintained and reinforced" the initial discrimination, creating a hostile work environment. *Id.*

To state a hostile work environment claim under § 1983 or Title VII,[1] a plaintiff must allege that: "(1) the harassment was unwelcomed; (2) the harassment was based on his race . . . ; (3) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere; and (4) there is some basis for imposing liability on the employer." *Hoffman v. Baltimore Police Dep't*, 379 F. Supp. 2d 778, 790-91 (D. Md. 2005) (citing *Causey v. Balog*, 162 F.3d 795 (4th Cir. 1998)); *Gairola v. Commonwealth of Va. Dep't of Gen. Servs.*, 753 F.2d 1281, 1285 (4th Cir. 1985) (the elements that establish a prima facie case of discrimination under Title VII and either § 1981 or § 1983 are the same); *Jackson v. State of Maryland*, 171 F. Supp. 2d 532, 541 (D. Md. 2001) (applying same hostile work environment standard to Title VII and §1983 claims). Thus, each Defendant need not have participated in every act that created the hostile environment; allegations of discrimination and allegations of retaliation can be intermixed and support each other. *See Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 184 (4th Cir. 2001) (courts consider "conduct targeted at persons other than [plaintiffs]" because courts are "concerned with the 'environment' of workplace hostility, and

[1] As stated in the FAC and Plaintiffs' other Memoranda of Law in Opposition filed today, Plaintiffs expect to amend the Complaint to include Title VII allegations when all of their EEOC charges have matured for suit. FAC at 37, n.3.

whatever the contours of one's environment, they surely may exceed the individual dynamic between the complainant and his supervisor."). That is precisely the case here.

A. Officer Savage Has Adequately Pled the Necessary Elements of His Claims Against the MSP Defendants.

1. *Harassment Because of Officer Savage's Race*

Pursuant to the hostile environment standard, Officer Savage has pled sufficient facts to "show that 'but for' his race . . . he would not have been the victim of the alleged discrimination." *Causey,* 162 F.3d at 801. "Discriminatory animus based on a protected trait can be shown by the employer's differential treatment of similarly situated employees outside of his protected class." *Baqir v. Principi*, 434 F.3d 733, 746 (4th Cir. 2006).

Specifically, the FAC alleges "[a]t the time Officer Savage was a member of the CET, the six other members of the [CET] were all White males, with the exception of Donaldson, a White female." FAC ¶ 61. As the sole African American officer on the Task Force, Officer Savage was treated differently from all of his other colleagues: "Shortly after Officer Savage's appointment to the [CET] in or around May 2012 … the other six [CET] members began discriminating against" him, including by regularly referring "to African Americans as 'niggers' in Officer Savage's presence." *Id.* ¶¶ 66-67. Defendant Phillips, among others, "repeatedly used the word in a sarcastic or demeaning tone to Officer Savage both orally and in written communications … and refer[red] to African American suspects as 'niggers' or variations thereof." *Id.* ¶ 67. "Beginning in 2012, once or twice a week, Wells streamed racially-charged videos that used the word 'nigger' on his official work computer. Members of the [CET] crowded around Wells' computer and watched and laughed about these videos." *Id.* ¶ 68. Contrary to Defendants' assertion, far more than a "mere offensive utterance," the word "nigger" is pure anathema to African Americans. *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 185 (4th

Cir. 2001); *Jones v. GT Contracting Corp.*, No. DKC 14-3539, 2016 WL 704319, at *9 (D. Md. Feb. 23, 2016) ("The evidence of frequent and highly repugnant racial slurs is sufficient to demonstrate a severe or pervasive (or both) hostile work environment for a person of ordinary sensibilities.").

Officer Savage further alleges that several Defendants repeatedly spoke to him about lynchings and the Ku Klux Klan. FAC ¶ 72. *See Gresham v. Midland Paint & Body Shop, Inc.*, No. 1:06-3069, 2008 WL 4488898, at *5 (D.S.C. Aug. 28, 2008) *report and recommendation adopted in part, rejected in part*, 2008 WL 4488890 (D.S.C. Sept. 30, 2008) (finding that racially hostile work environment existed where assistant manager showed plaintiff a newspaper article concerning a reenactment of a lynching that occurred in 1946 and posted it in plaintiff's work area); *E.E.O.C. v. L.A. Pipeline Constr., Inc.*, No. 2:08-cv-840, 2010 WL 2301292, at *8 (S.D. Ohio June 8, 2010) (denying summary judgment for defendant and noting that "[n]ooses are evocative of the lynching of blacks. These nooses, coupled with the comments about hanging, could conjure fears of the most extreme forms of racial prejudice and violence in the mind of a reasonable person.").

This inappropriate and racially hostile discussion ultimately led to several of the Defendants—including Phillips and Donaldson—taking Officer Savage to an isolated area in the forest near Stockton, Maryland, known as "KKK Lane." FAC ¶ 73. While at "KKK Lane," Defendant Wells told Officer Savage about a chest in his attic in which he kept "white sheets and nooses." *Id.* ¶ 76. Defendant Wells also told Officer Savage that he might see some KKK members or a noose in Stockton. *Id.* ¶ 75.

When viewed in this context, the bloody deer's tail incident detailed in the FAC takes on a racially discriminatory and hostile tone. *See generally Adams v. City of Montgomery*, No. 2:10

cv 924, 2014 WL 840029, at *5 (M.D. Ala. Mar. 4, 2014) ("In a racially discriminatory environment, it may be difficult to tease out which aspects of the employment relationship were tainted by discrimination and which were not-especially before the benefit of discovery."). Officer Savage alleged that Defendant Phillips placed a bloody deer's tail on his car, and when questioned about it, began to laugh. *See* FAC ¶¶ 79-83. Defendant Donaldson failed to discipline Defendant Phillips, thereby exacerbating the racial discrimination.

Contrary to Defendant's assertions, these are not "indefinite allegations concerning the use of racial epithets" or other non-specific forms of discrimination. MSP Motion at 19, 28. Officer Savage has alleged specific and repeated instances of CET members intentionally and purposefully using highly offensive racial epithets in a mocking, sarcastic, or demeaning tone. FAC ¶¶ 66-68. Officer Savage has also alleged that several other Defendants "repeatedly spoke to [him] about lynchings and the Ku Klux Klan." *Id.* ¶ 72. When viewed in this context, there is no non-discriminatory explanation for the trip to "KKK Lane," and the allegation that Defendant Wells' comment was meant to express concern for Officer Savage's wellbeing is factually disputed and a poor attempt at excusing a racially hateful comment. Similarly, when considered within the context of this racially hostile environment, the "body count" text message incident—in which Defendant Phillips sent a text message to Officer Savage containing a highly offensive racial slur—is not "isolated," as Defendants contend. *See* MSP Motion at 20, 28. Rather, this racial slur was part of a series of similar highly-offensive racial epithets "repeatedly" used by Defendants. FAC ¶¶ 66-67.

2. *Severity of the Harassment*

In addition, the FAC adequately alleges facts that the racial discrimination was severe and pervasive. A hostile environment exists "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the

conditions of the victim's employment and create an abusive working environment." *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 277 (4th Cir. 2015) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)) (internal quotation marks omitted). The degree of hostility or abuse to which Officer Savage was exposed can only be determined by examining the totality of the circumstances. *See Spriggs*, 242 F.3d at 184 (citing *Harris*, 510 U.S. at 23). Relevant considerations "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.*

First, regarding the regular use of racial epithets and the "body count" text message, it is clear that "[p]erhaps no single act can more quickly 'alter the conditions of employment and create an abusive working environment,' than the use of an unambiguously racial epithet such as 'nigger' by a supervisor in the presence of his subordinates," *Rodgers v. W.-S. Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993) (internal citation omitted); or by co-workers in the presence of a supervisor who declines to stop the racial harassment. *See Briggs v. Hannah's Rest., Inc.*, No. 95-C 4315, 1997 WL 269597, at *1-2 (N.D. Ill. May 15, 1997) (denying summary judgment where plaintiff identified conduct such as other employees referring to blacks as "niggers" to support hostile work environment claim). Indeed, regarding the "body count" text message, the Maryland State Police found that Defendant Phillips conduct violated the rules and regulations of the Maryland State Police with Unbecoming Conduct. FAC ¶ 117; FAC Exhibit G. Officer Savage has sufficiently pled that the use of the word "nigger" was both severe *and* pervasive – occurring regularly – among members of the CET. *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 280 (4th Cir. 2015) (finding genuine issue of material fact existed as to whether apparent supervisor's use of slur towards employee twice was severe conduct); *Ayissi–Etoh v.*

Fannie Mae, 712 F.3d 572, 577 (D.C. Cir. 2013) (acknowledging that, where a supervisor "used a deeply offensive racial epithet ['nigger'] when yelling at Ayissi–Etoh to get out of the office," that "single incident might well have been sufficient to establish a hostile work environment"); *Tawwaab v. Virginia Linen Serv., Inc.*, 729 F. Supp. 2d 757, 774 (D. Md. 2010) (finding plaintiff alleged sufficient facts to support hostile work environment claim where he identified ten actionable incidents of harassment that took place over two year period including several instances where defendant referred to route drivers as his "black Fresh Prince[s] of Bel–Air").[2]

Not only has Officer Savage alleged the regular use of racial epithets aimed at him or in his presence, which meet the severe or pervasive standard, but he has further alleged other highly offensive acts that Defendants were involved in, including the trip to "KKK Lane," talk of lynchings, nooses, and white sheets, a fake food stamp left in his desk drawer, and a bloody deer's tail on his car. The pattern and practice of race discrimination and retaliation alleged by Officer Savage was sufficiently severe or pervasive to cause a person of ordinary sensibilities to perceive that the work environment was racially hostile. In addition, Officer Savage has pled sufficient facts showing he regarded the conduct or inaction of Defendants Phillips and Donaldson as offensive. FAC ¶¶ 97, 98. Officer Savage complained to his supervisors, Defendant Donaldson and Passwaters, about the bloody deer's tail incident, and when they did nothing, went outside the CET command to report the discrimination to Chief Sewell. *Id.* ¶¶ 87, 89, 94. As noted above, Officer Savage suffered both physical and psychological harm, an important factor in assessing a hostile work environment. *See Tyndall v. Berlin Fire Co.*, No. ELH-13-02496, 2015 WL 4396529, at *31 (D. Md. July 16, 2015) (denying summary judgment

[2] Defendants' reliance on *Strothers v. City of Laurel, Md.*, 118 F. Supp. 3d 852 (D. Md. 2015) is misplaced. *Strothers* is distinguishable from this case because there was no claim that the plaintiff's supervisor or anybody else used a racial slur, where here it is alleged that the CET members would regularly refer to African Americans as "niggers or ninjas." FAC ¶ 71.

where plaintiff alleged facts suggesting psychological harm as a result of persistent harassment) (citing *Boyer–Liberto*, 786 F.3d at 281). Officer Savage has further alleged that the persistent offensive and racially discriminatory conduct led to his resignation from the CET in June 2014. *Id.* ¶ 113. It should thus be abundantly clear that the FAC adequately alleges that the harassment was severe and abusive.

3. *Retaliation*

Likewise, Officer Savage has sufficiently pled facts stating a claim of retaliation by MSP Defendants Phillips and Donaldson. "To establish a prima facie case of retaliation, a plaintiff must demonstrate that: (1) he engaged in protected activity; (2) an adverse employment action was taken against him; and (3) there was a causal link between the protected activity and the employment action." *Pettis v. Nottoway Cty. Sch. Bd.*, 592 F. App'x 158, 160 (4th Cir. 2014) (citing *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 218 (4th Cir. 2007)). "Protected activity includes both participation and opposition activity. A complaint is protected as opposition activity if it is a response to an employment practice that is, or that the plaintiff reasonably believes is, unlawfully discriminatory." *Id.* (internal citations omitted). "[The Fourth] Circuit, as well as the other Courts of Appeals, [have] articulated an expansive view of what constitutes oppositional conduct, recognizing that it 'encompasses utilizing informal grievance procedures as well as staging informal protests and voicing one's opinions in order to bring attention to an employer's discriminatory activities." *DeMasters v. Carilion Clinic*, 796 F.3d 409, 417 (4th Cir. 2015). Contrary to Defendants' contention "protected activity includes more than the filing of an EEOC charge." *Testerman v. Procter & Gamble Mfg. Co.*, No. CCB-13-3048, 2015 WL 5719657, at *8 (D. Md. Sept. 29, 2015), *appeal dismissed* (Feb. 4, 2016). Indeed, "[l]odging a complaint with supervisors about allegedly discriminatory practices is also a protected activity." *Westmoreland v. Prince George's Cty.*, No. TDC-14-0821, 2015 WL 996752, at *16 (D. Md.

Mar. 4, 2015) (citing *Bryant v. Aiken Reg'l Med. Ctrs., Inc.*, 333 F.3d 536, 543-44 (4th Cir. 2003)); *see also Royster v. Gahler*, No. ELH-15-1843, 2015 WL 9582977, at *21 (D. Md. Dec. 31, 2015) (citing *Bickford v. Denmark Tech. Coll.*, 479 F. Supp. 2d 551, 568 (D.S.C. 2007) ("[c]omplaints to supervisory or management employees concerning harassment or discriminatory treatment as well as informal complaints, filing of internal grievances, and complaints to an agency are included within the definition of protected activity")).

"To be considered an adverse action under the second prong of the prima facie case, an incident must have 'adversely affected 'the terms, conditions, or benefits' of plaintiff's employment.' Adverse employment actions include retaliatory harassment, but only if that act or harassment results in an adverse effect on the 'terms, conditions, or benefits' of employment." *Chika v. Planning Research Corp.*, 179 F. Supp. 2d 575, 586 (D. Md. 2002). Retaliatory harassment may have an adverse effect on the "terms, conditions, or benefits" of employment in situations where racial epithets are used repeatedly, and management tolerates the epithets. *See id.* (citing cases). "Even inaction—a failure to renew or extend an employment contract—can count as an adverse employment action in some circumstances." *Bleeker v. Vilsack*, 468 F. App'x 731, 732 (9th Cir. 2012); *see also Haines v. Donahoe*, No. ELH-10-293, 2012 WL 3595965, at *16 (D. Md. Aug. 20, 2012) (assuming that a supervisor's "action (or inaction) constituted an adverse employment action"), *aff'd*, 538 F. App'x 329 (4th Cir. 2013).

Here, Officer Savage alleged that he reported the bloody deer's tail incident to his supervisors, Passwaters and Donaldson. In addition, Officer Savage engaged in the protected activity of "reporting the racial harassment outside the Joint Task Force's chain of command." FAC ¶ 90. These types of informal complaints "with supervisors about allegedly discriminatory" conduct is a "protected activity." *Westmoreland*, 2015 WL 996752, at *16.

Following this reporting, Defendant Phillips retaliated against Officer Savage by "spread[ing] false rumors about Officer Savage that made it impossible for Officer Savage to perform his job, first in the Joint Task Force and then at the Pocomoke City Police Department." FAC ¶ 90. Such false rumors included, as it relates to Defendant Phillips, the allegation that Officer Savage had smoked marijuana—when he had never done so. *See id.* ¶ 93. This adverse employment action undermined Officer Savage's credibility and employment as an undercover narcotics officer, and sowed distrust with his colleagues and supervisors. Similarly, in retaliation for Officer Savage's protected internal complaints, members of the CET continued to "use the word 'nigger' orally and in written form aimed at Officer Savage." *Id.* ¶ 96. Further, Defendant Donaldson retaliated against Officer Savage by "ratif[ying] the racial epithets and racially discriminatory conduct" and by "fail[ing] to intervene to stop the conduct or recommend discipline." *Id.* ¶ 98; *Chika*, 179 F. Supp. 2d at 586 (retaliatory harassment through racial epithets that management fails to stop may constitute adverse employment action). Given the egregious racially discriminatory conduct, Defendant Donaldson's inaction is also sufficient to constitute an adverse employment action. *See Bleeker*, 468 F. App'x at 732; *see also Haines*, 2012 WL 3595965, at *16.

The causal link between Officer Savage's protected internal complaint and the Defendants' retaliatory conduct was immediate. As noted in the FAC, Chief Sewell sent a letter to Colonel Marcus L. Brown regarding the May 31, 2014 text message sent by Defendant Phillips. *See* FAC ¶ 89. The retaliatory conduct alleged by Officer Savage took place almost immediately thereafter, starting in the first week of June 2014. *See id.* ¶¶ 91-99. The facts of this case are thus clearly distinguishable from cases whose causal link is attenuated by the passage of months or even years. *See, e.g.*, *Westmoreland*, 2015 WL 996752, at *16 ("Although

a three-year gap between the initial protected activity and the alleged constructive discharge does not fairly allege causation by temporal proximity, courts may look to the intervening period for evidence of 'continuing retaliatory conduct and animus' to support causation"); *see also Carter v. Ball*, 33 F.3d 450, 460 (4th Cir. 1994) (noting that Fourth Circuit held that passage of four months not too attenuated).

B. Officer Savage Has Adequately Pled Facts to Support Liability for Each MSP Defendant.

1. *Individual Liability of Defendant Phillips*

As discussed in Section V.A. *supra*, Officer Savage has sufficiently pled a Fourteenth Amendment claim against Defendant Phillips for intentionally creating a hostile work environment. An individual is subject to liability for unconstitutional conduct if the "official charged acted personally in the deprivation of the plaintiff's rights." *See Alston v. N. Carolina A & T State Univ.*, 304 F. Supp. 2d 774, 781 (M.D.N.C. 2004) (citing *Wright v. Collins*, 766 F.2d 841, 850 (4th Cir. 1985)). An actionable deprivation may occur through the defendant's affirmative misconduct. *See Randall v. Prince George's County, Md.*, 302 F.3d 188, 202 (4th Cir. 2002) (citing *Parratt v. Taylor*, 451 U.S. 527, 535-36 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986)); *Slakan v. Porter*, 737 F.2d 368, 372 (4th Cir. 1984) (finding that unjustified striking or beating of a prisoner by police or correctional officials constitutes cruel and unusual punishment which is actionable under 42 U.S.C. § 1983). Defendant Phillips personally committed or participated in numerous racially discriminatory and hostile acts against Officer Savage which include the use of racial epithets, the trip to "KKK Lane," placing a bloody deer's tail on Officer Savage's car, sending Officer Savage a text message in which he called him a "nigga", and spreading false rumors that Officer Savage had

smoked marijuana. These severe and pervasive acts occurred throughout Officer Savage's over two year tenure with the CET, and were not isolated as Defendants maintain.

2. *Supervisory Liability of Defendant Donaldson*

Likewise, the FAC alleges adequate facts to support a Fourteenth Amendment claim against Defendant Donaldson for her knowledge of the unlawful racially discriminatory acts and inaction to stop them or discipline the offenders. To state a claim for supervisory liability under the Fourteenth Amendment, a plaintiff must demonstrate that: (1) the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed "a pervasive and unreasonable risk" of constitutional injury to citizens like the plaintiff; (2) the supervisor's response to that knowledge was so inadequate as to show "deliberate indifference to or tacit authorization of the alleged offensive practices;" (3) there was an "affirmative causal link" between the supervisor's inaction and the constitutional injury the plaintiff suffered. *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994). A plaintiff may demonstrate a "pervasive and unreasonable risk" under the first prong of the analysis by showing that the conduct at issue is "widespread, or at least has been used on several different occasions." *Id.* A plaintiff may demonstrate "deliberate indifference" by showing the supervisor's "continued inaction in the face of documented widespread abuses." *Slakan*, 737 F.2d at 373.

As discussed in Section V.A. *supra*, Officer Savage has sufficiently pled supervisory liability against Defendant Donaldson for the constitutional wrongs he suffered. Defendant Donaldson had actual knowledge of race discrimination. She actively participated in the trip to "KKK Lane" where Wells told Officer Savage about a chest in his attic in which he kept "white sheets and nooses." FAC ¶¶ 73-76. To their demise, Defendants fail to address Donaldson's participation in the "KKK Lane" trip and focus only on the bloody deer's tail incident. In any event, the bloody deer's tail incident as alleged plausibly shows that Defendant Donaldson's

non-response to Officer Savage's complaint was so inadequate as to constitute tacit authorization and show deliberate indifference. Indeed, Officer Savage alleges that the racially hostile environment continued after that incident, including continued use of racial epithets, the fake food stamp placed in his desk drawer, and the "body count" text message from Defendant Phillips. *See Ensko v. Howard Cty., Md.*, 423 F. Supp. 2d 502, 511 (D. Md. 2006) (finding that genuine issue of material fact existed as to whether police chief's inaction in response to plaintiff's complaints of sexual harassment constituted deliberate indifference which resulted in her continued harassment and precluded summary judgment for police chief on § 1983 claims). Donaldson was present to witness, and indeed became a part of this campaign of harassment. As a Task Force supervisor, she had power to intervene to stop it. Instead, she did nothing, allowing it to spiral out of control, until it became too much for Officer Savage to bear. As a result, even though Donaldson may not have affirmatively participated in every discriminatory act taken against Officer Savage, her deliberate indifference to constitutional violations being perpetrated against Officer Savage gives rise to liability. *See City of Canton, Ohio v. Harris*, 489 U.S. 378, 388 (1989); *Hall v. Burney*, 454 F. App'x 149, 151 (4th Cir. 2011) (finding that it is at least possible that plaintiff can establish deliberate indifference in training its officers, when one officer entered plaintiff's house and shot him).

3. *Liability of MSP and Joint Employment*

An employer may be found vicariously liable for the harassment of an employee by a supervisor. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 334 (4th Cir. 2003). In a case of harassment by a coworker, an employer may be held liable if it "knew or should have known of the harassment, and took no effectual action to correct the situation." *Spicer v. Commonwealth of Va. Dep't of Corrs.*, 66 F.3d 705, 710 (4th Cir. 1995); *see also Ocheltree*, 335 F.3d at 334; *Lyle v. ESPN Zone*, 292 F.

Supp. 2d 758 (D. Md. 2003). Knowledge of workplace harassment may be imputed to an employer by circumstantial evidence if the conduct is so pervasive that a reasonable employer would have been aware of it. *Spicer*, 66 F.3d at 710. As discussed in detail above, Officer Savage has alleged facts sufficient to plausibly show that his hostile work environment claim can be imputed to his employer under a supervisor and coworker theory of liability. Defendant Donaldson participated in the racially hostile work environment by taking part in the "KKK Lane" trip and took no action as a supervisor on the CET to end the repeated discrimination against Officer Savage, such as the use of racial epithets, the discussions of the KKK and lynchings, the fake food stamp, the "circle of trust," to name a few—or to discipline or punish the offenders, thus allowing it to continue unabated. FAC ¶¶ 32, 73-83.

It is clearly alleged that a severe pattern and practice of race discrimination and retaliation existed in the CET for which the employer knew or should have known about and took no effectual action to correct the situation. All inferences must be drawn in favor of the Plaintiffs at this stage. There is a strong inference that Donaldson regularly saw and heard the racially hostile conduct in a CET office with only eight members. The evidence indicates that Donaldson may have been sympathetic, but never did anything as a supervisor to stop on-duty use of racial slurs by white officers. Even Defendants do not suggest that she took any action against Defendant Phillips for the deer tail incident, even though her text message to Savage said she would. *See* Section V.B.2. *supra*; *see also E.E.O.C. v. Cromer Food Servs., Inc.*, 414 F. App'x 602, 607-08 (4th Cir. 2011) ("[A] reasonable person would have known about the harassment given [plaintiff's] vocal and vociferous complaints to practically anyone who would listen.").

Defendants try to disclaim liability by stating that the Maryland State Police is not Officer Savage's employer. MSP Motion at 23-24. However, Defendants ignore the key allegations of the FAC which allege that Officer Savage was a joint employee of the Pocomoke City Police Department, the Worcester County Sheriff's Office, Worcester County, the Maryland State Police, and the CET, for more than two years from April 2012 to June of 2014. FAC ¶¶ 208, 277. As such, Maryland State Police would face potential liability under § 1983 as a joint employer for purposes of Officer Savage's discrimination and retaliation claims, and that determination requires fact-based discovery and resolution outside the context of a motion to dismiss.

The Fourth Circuit has held that "a defendant that does not directly employ the plaintiff may still be considered an employer under [civil rights] statutes." *Hukill v. Auto Care, Inc.*, 192 F.3d 437, 442 (4th Cir.1999). Finding that the remedial goals and language of Title VII support a broad construction of the term "employer" for purpose of Title VII liability, several courts in the Fourth Circuit have determined that a defendant who does not directly employ a plaintiff, but who "control[s] some aspect of an individual's compensation, terms, conditions, or privileges of employment," is considered a joint employer and subject to Title VII liability. *See, e.g.*, *Magnuson v. Peak Tech. Servs.*, 808 F. Supp. 500, 507-08 (E.D. Va. 1992) (broad construction of employer "finds support in the broad, remedial purpose of Title VII which militates against the adoption of a rigid rule strictly limiting 'employer' status under Title VII to an individual's direct or single employer"); *Takacs v. Fiore*, 473 F. Supp. 2d 642,656 (D. Md. 2007); *Evans v. Wilkinson*, 609 F. Supp. 2d 489, 492 n.5 (D. Md. 2009); *Vanguard Justice Soc'y, Inc. v. Hughes*, 471 F. Supp. 670, 696-97 (1979); *Williams v. Grimes Aerospace Co.*, 988 F. Supp. 925, 934–35 (D. S.C. 1997).

Moreover, the determination whether a defendant is a joint employer is a fact-based inquiry, involving an analysis of the totality of the circumstances of the work relationship. *Murphy-Taylor*, 968 F. Supp. 2d at 727 (denying defendant's motion to dismiss and holding that "whether an entity is a plaintiff's 'employer' for purposes of Title VII is a fact-bound question that is not appropriate for resolution as a pure matter of law, before discovery"); *see Magnuson*, 808 F. Supp. at 510; *Williams*, 988 F. Supp. at 935; *see also Graves v. Lowery*, 117 F.3d 723, 729 (3d Cir. 1997) (determination of joint employer status requires a "careful factual inquiry").

In the totality of the circumstances analysis, there are numerous factors courts consider to determine whether a defendant is a joint employer. The Fourth Circuit recently adopted a new test for determining whether an entity is a joint employer. In *Butler v. Drive Automotive Industries of America, Inc.*, the court held that a "'hybrid' test, which considers both the common law of agency and the economic realities of employment, is the correct means to apply the joint employment doctrine to the facts of a case." 793 F.3d 404, 406 (4th Cir. 2015). The court then set out nine factors that trial courts must analyze under this "hybrid" test:

> (1) authority to hire and fire the individual; (2) day-to-day supervision of the individual, including employee discipline; (3) whether the putative employer furnishes the equipment used and the place of work; (4) possession of and responsibility over the individual's employment records, including payroll, insurance, and taxes; (5) the length of time during which the individual has worked for the putative employer; (6) whether the putative employer provides the individual with formal or informal training; (7) whether the individual's duties are akin to a regular employee's duties; (8) whether the individual is assigned solely to the putative employer; and (9) whether the individual and putative employer intended to enter into an employment relationship.

Id. at 414. Of these nine factors, the first three "are the most important" because they directly address the level of control the entity has over the plaintiff. *Id.* Control over the complaining employee is "the 'principal guidepost' in the analysis." *Id.*

Here, Officer Savage has plausibly pled the existence of a joint employment relationship between the Maryland State Police, Worcester County Sheriff's Office, and Worcester County in Paragraphs 54 through 60 of the FAC. Most critical to this doctrine, the FAC alleges that "[t]he Department of Maryland State Police and the Worcester County Sheriff's Office each designated one member from each unit to serve as supervisors of the [CET]." *Id.* ¶ 58. "Upon information and belief, these supervisors were delegated policymaking authority to determine the duties and priorities of the [CET], set personnel policies within the [CET], and supervise the use of technology and use of [CET] equipment." *Id.* ¶ 59. "By both action and omission, the Joint Task Force supervisors also established customs and practices within the Joint Task Force." *Id.* ¶ 60. For these reasons, Officer Savage has stated a claim under the joint employment doctrine, which prevents those who effectively employ a worker from evading liability by hiding behind another entity. *Butler*, 793 F.3d at 410.[3]

VI. SUMMARY JUDGMENT IS PREMATURE, INAPPROPRIATE, AND UNSUPPORTED BY THE RECORD.

Regarding all the new facts averred in the MSP Motion, it bears repeating that the Court may not consider such evidence for the MSP Defendants' motion to dismiss. The evidence can be considered only in support of the MSP Defendants' alternative motion for summary judgment. The new alleged facts offer zero basis for awarding the MSP Defendants judgment as a matter of law, however. Instead, the MSP Motion offers an incomplete record, conflicting facts, and evidentiary demands that are premature for a case yet to proceed to initial disclosures, much less

[3] As noted in the Introduction, MSP Defendants' own motion has created a conflict over some of the facts bearing on the application of the joint employer doctrine, including performance evaluations. For this reason alone summary judgment is inappropriate on this issue. Discovery has not begun in this case, and Officer Savage should be allowed to examine witnesses and review documents relevant to whether MSP was his joint employer before the Court considers the issue for resolution. The discovery would focus on questions related to whether the MSP furnished equipment and the place of work and controlled aspects of Officer Savage's compensation, terms, conditions, or privileges of employment. *See Butler*, 793 F.3d at 408; *Magnuson*, 808 F. Supp. at 510; *Williams*, 988 F. Supp. at 935.

proceed to discovery. Thus, this Court should deny the MSP Defendants' motion for summary judgment.

At the outset, the MSP Defendants ask for summary judgment on an incomplete record. This Court has only the following to consider: Officer Savage's allegations in the FAC; attachments to the FAC; the MSP Defendants' factual assertions made in their Motion; and the MSP Defendants' attachments to their Motion. Within that set of information, the MSP Defendants represent that they have provided "[a]ll available texts" between Officer Savage and either Donaldson or Phillips. *See* MSP Motion at 47. More is required. Officer Savage should be allowed to discover all relevant communications and documents, not just those hand-selected by the MSP Defendants for their use in advocacy. The attached declaration of Andrew G. McBride, lead counsel for Officer Savage, identifies with specificity some of the communications and other documents needed for discovery. *See* Ex. A ¶¶ 4-6. These categories of evidence, and others identified in the McBride Declaration, are not available to Officer Savage. Officer Savage thus must be permitted to discover them—and thus, to complete the record before this Court—before opposing summary judgment.

The MSP Defendants compound their reliance on an incomplete record by applying an inappropriately high standard of review. Regarding Count I, the Defendants assert that "there is not a scintilla of evidence of discriminatory intent." MSP Motion at 23. That is not true. Officer Savage attached evidence of Phillip's racially charged text message to the FAC, among other allegations. *See* FAC Ex. C. Officer Savage also attached a letter from the Maryland State Police reporting that it had found Phillips "violated the rules and regulations of the Maryland State Police with Unbecoming Conduct." *Id*. Ex. G. In addition, the entire trip to KKK Lane is evidence of discriminatory intent. *See* FAC ¶¶ 73-78. But even if these examples of evidence

could properly be ignored, the MSP Defendants still cannot rely on there not being a "scintilla" of evidence because evidence has not yet been exchanged. Again, no discovery has started, so Officer Savage has not yet been able to pursue testimony and contemporaneous documentation of discriminatory intent—as reflected in text messages and other issues. *See* Exhibit A ¶¶ 4-11. Discovery will provide more than a "scintilla."

Not only does Officer Savage expect to discover evidence of the MSP Defendants' discriminatory intent, and/or their indifference to discrimination and harassment by others, but Officer Savage also plans to offer additional evidence of his own. (Officer Savage is permitted to do so because Fed. R. Civ. P. 8(a)(1) requires only a "short and plain statement" in a complaint, not an exhaustive record of evidence.) For example, another African American Pocomoke City police officer (a non-plaintiff witness) could provide evidence supporting both the hostile work environment and retaliation claims. *See id.* ¶ 13. Officer Savage can also call a witness who will establish that there was a "circle of trust" on a CET bulletin board with the pictures of every member but Officer Savage placed within the "circle of trust." *See id.* ¶ 14. There was also a picture of Officer Savage eating a watermelon prominently displayed in the CET offices. *See id.* ¶ 15. Needless to say, Officer Savage did not take the picture or post it.

Defendants Donaldson and Phillips could not have missed these signs of discrimination and exclusion—they likely heard them and walked by them every day. The MSP Defendants also ignore the evidence of substantial physical and psychological injury to Officer Savage caused by confronting that pernicious environment every day. *See e.g.*, FAC ¶¶ 99, 126, 141, 150. So between discovery of the MSP Defendants (and other defendants) and Savage's own affirmative submissions, the record will be filled with more than enough evidence to support Savage's claims against Defendants Donaldson and Phillips.

The Defendants also rely on facts that are inconsistent with Officer Savage's allegations and, notably, inconsistent internally. Conflicts with the FAC are palpable. For example, the briefs disagree on what precipitated the trip to KKK Lane. *Compare* FAC ¶ 74 (no official duties) *with* MSP Motion Ex. 1 ¶ 11 *and* MSP Motion Ex. 2 ¶ 16 (both stating official duties). The briefs also paint a very different picture of what happened at KKK Lane. *Compare* FAC ¶¶ 75-76 (several defendants discussed nooses and white sheets with Officer Savage) *with* MSP Motion at 6; Ex. 1 ¶ 14 (describing a trip to the beach where Officer Savage skipped clam shells with Defendant Phillips). As another example, Defendant Phillips asserts that the "body count" text message was followed by other messages, which, in total, purported to express Phillips' "concern" for his "friend." *See* MSP Motion at 6-7; *see id.* at 39-40 (Following the "body count" text message, Defendant Phillips sent several other messages, to which he received no response from Officer Savage, including "Where the [f---] u at?"; "B[r]ing ur report homeskillet"; "Yooo frank. U still alive?"; and "Dude u good? For real."). It is equally plausible to read those text messages and conclude, as Officer Savage did at the time he received them, that Defendant Phillips had realized he had crossed a line by calling Officer Savage a racial epithet, and was trying to assess how badly he had upset Officer Savage. Given that the Court must take the factual evidence in the light most favorable to Plaintiff, these messages are hardly undisputed evidence of a buddy-buddy relationship instead of a racially hostile environment.

As an example of internal inconsistency, the FAC alleges that Defendants "Passwaters and Donaldson . . . were responsible for preparing [Officer Savage's] employment evaluation and forwarding that report to Chief Sewell." FAC ¶ 65. The MSP Motion, for its part, admits that "Sgt. Patricia Donaldson was assigned to the CET in a supervisory capacity," MSP Motion at 2, but later states that she did not "prepare or even review" any of Officer Savage's

evaluations. *Id.* at 24 n.11. These statements all bear on Savage's status as a joint employee, yet the statements cannot all be correct. No litigant should assert that a (partial) record with these types of factual conflicts allows for summary judgment, yet that is just what the MSP Defendants have done.

Then the MSP Defendants misapply the summary judgment standard to these conflicting facts and other facts present in the partial record. A factfinder must draw all inferences in favor of the nonmoving party in these circumstances. The MSP Defendants have done the opposite, drawing inferences in their favor. They do so principally with alleged screen shots of text messages to and from Officer Savage. The MSP Defendants allege that these messages show a friendly tone and jocular banter. *E.g.*, MSP Motion at 34 ("The text was a communication to a friend."); *id.* at 35 ("The environment was anything but hostile, it was one of friendship."). The Defendants therefore could not have been discriminatory or harassing towards Officer Savage, the argument goes. *See id.* Wrong. The MSP Defendants fail to grapple with the context of these text messages. Consider the circumstances. Officer Savage was the only African American on the CET, in a county where African Americans make up less than 15% of the population.[4] One very reasonable inference is that Officer Savage perceived his only prospects for advancement, or even just continued employment, as depending on his adopting a "go along to get along" attitude towards the racism permeating the CET. *See* Joanne Turner-Sadler, *African-American History* 119 (2d ed. 2009) (describing refusal of some African American activists to a "go along to get along" approach). Indeed, the FAC details exactly what happened when Officer Savage decided to speak out: retribution and railroading. So friendly or not, "genuinely liked" or

[4] *See* Ex. B, U.S. Census Bureau, American FactFinder, DP-1, Profile of General Population and Housing Characteristics, Worcester County, Maryland, at 2 (accessed June 1, 2016).

not, the MSP Defendants have failed to draw inferences in Officer Savage's favor, further undermining their arguments about the hostile work environment.

The Defendants also assert facts that are inconsistent with the facts in the FAC giving rise to the retaliation claim. For example, with regard to the deer tail incident, Defendants repeatedly describe the tail as "clean, not bloody, furry and about 8-10 inches long." MSP Motion at 3. This squarely contradicts both with Officer Savage's depiction of the organ as "bloody," FAC ¶ 4, 79, 82, and common sense, which strongly suggests that a severed animal part that was concededly obtained during hunting season would not be "clean" and not "bloody." *See* MSP Motion Ex. 1 ¶ 16. Similarly, with respect to Defendant Phillips' false allegation that Officer Savage smoked marijuana while working undercover, FAC ¶¶ 92-95, Defendant Phillips' declaration provides inconsistent details that attempt to minimize the conduct. In particular, Defendant Phillips states that he "may have made some joking comments, [but] I do not recall any specifically . . . as far as I know, no one took them seriously." MSP Motion Ex. 1 ¶ 36. Further, Defendant Phillips asserts that the marijuana was in fact an imitation substance known as "wizard weed" that had the look and smell of marijuana and was used in undercover operations. MSP Motion Ex. 1 ¶ 37. Officer Savage and this Court should not have to take these untested and contradictory facts as true prior to discovery. Indeed, Officer Savage intends to demonstrate that members of the CET were never authorized to use any such "wizard weed" substance, nor did they ever in fact use it while operating undercover, and that the substance burned by Defendant Phillips was indeed marijuana. These acts, taken in retaliation against Officer Savage for his complaints, must be contrasted with the glowing letters of recommendation, including one from Defendant Phillips, written just weeks before Officer Savage resigned from the CET.

This record of conflicting facts, inconsistent and untested declarations, and assertions that require the suspension of common sense all reflect the necessity of discovery and the premature nature of a motion for summary judgment. Defendants' motion for summary judgment should be denied.

VII. THE MSP DEFENDANTS' REMAINING ARGUMENTS ARE UNAVAILING.

A. The MSP Defendants Are Not Entitled to Qualified Immunity Because They Violated Clearly Established Constitutional Rights.

Defendants Donaldson and Phillips are not entitled to qualified immunity under the two-step inquiry utilized by courts. *Bailey v. Kennedy*, 349 F.3d 731, 739 (4th Cir. 2003). First, courts "identify the specific right that the plaintiff asserts was infringed by the challenged conduct at a high level of particularity." *Edwards v. City of Goldsboro*, 178 F.3d 231, 251 (4th Cir. 1999). Courts then "consider whether at the time of the claimed violation that right was clearly established," *id.*, "such that it would be clear to an ***objectively reasonable*** officer that his conduct violated that right." *Bailey*, 349 F.3d at 739 (emphasis added) (internal quotations omitted). This second "inquiry is an objective one, dependent not on the subjective beliefs of the particular officer …, but instead on what an objectively reasonable officer would have understood in those circumstances." *Id.* at 741. "Notably, however, the nonexistence of a case holding the defendant's identical conduct to be unlawful does not prevent the denial of qualified immunity." *Edwards*, 178 F.3d at 251.

At the motion to dismiss stage, courts regularly deny qualified immunity based solely on a complaint's factual allegations, which must be read in the light most favorable to the plaintiff. *See e.g.*, *Gholson v. Benham*, No. 3:14-cv-622, 2015 WL 2403594, at *7 (E.D. Va. May 19, 2015) (denying qualified immunity at the motion to dismiss stage where plaintiff alleged facts to establish that she received harsher treatment and ultimately was terminated due to her race, color,

and gender); *Adams v. Univ. of Maryland at Coll. Park*, No. Civ.A. AW-00-3177, 2001 WL 333095, at *3 (D. Md. Mar. 6, 2001) ("assuming the truth of [P]laintiff's allegations . . . [Defendant's] actions would not be protected by qualified immunity.").

"If any 'right' under federal law is 'clearly established,' it is the constitutional right to be free from racial discrimination.'" *Frasier v. McGinley*, No. WMN-11-1067, 2014 WL 5163056, at *6 (D.S.C. Oct. 14, 2014) (internal citations omitted). "There is no ambiguity surrounding the constitutional right to be free from discrimination on the basis of gender or race, or the laws preventing an employer from terminating an employee on these grounds. If [Defendants] did so, as the Complaint alleges, they are not entitled to qualified immunity." *Greenan v. Bd. of Educ. of Worcester Cty.*, 783 F. Supp. 2d 782, 791 (D. Md. 2011); *see also Shank v. Baltimore City Bd. of Sch. Comm'rs*, No. WMN-11-1067, 2014 WL 198343, at *2 (D. Md. Jan. 14, 2014) ("Certainly, the unlawfulness of discriminating against an employee because of his race was clearly established and any reasonable person would have known that the alleged conduct was unlawful."); *Herring v. Cent. State Hosp.*, No. 3:14 cv 378, 2015 WL 4624563, at *4 (E.D. Va. July 29, 2015) ("No one in their right mind could possibly think that the government can discriminate based on race. Qualified immunity does not protect the defendants. . . .").

Similarly, the constitutional right to be free from a hostile work environment under the Fourteenth Amendment Equal Protection Clause is "clearly established." *See Riley v. Buckner*, 1 F. App'x 130, 134 (4th Cir. 2001); *see also Huri v. Office of the Chief Judge of the Circuit Court of Cook Cty.*, 804 F.3d 826, 835 (7th Cir. 2015); *Williams v. Herron*, 687 F.3d 971, 978 (8th Cir. 2012); *Jemmott v. Coughlin*, 85 F.3d 61, 67 (2d Cir. 1996). Courts find that defendants are not entitled to qualified immunity when claims of hostile work environment involve specific racial slurs or similar derogatory comments. *Ugorji v. N.J. Envtl. Infrastructure Tr.*, No. 12-5426,

2014 WL 2777076, at *1 (D.N.J. June 19, 2014) (denying qualified immunity where supervisor described employee of African descent as "'uppity,' which Plaintiff interpreted as a derogatory race-based comment"); *Cantu v. Mich. Dep't of Corrs.*, 653 F. Supp. 2d 726, 746 (E.D. Mich. 2009) (denying qualified immunity where Caucasian plaintiff was target of racial slurs); *Brosmore v. City of Covington*, No. 89-156, 1993 WL 762881, at *7 (E.D. Ky. Oct. 14, 1993) (denying qualified immunity where defendants used numerous racial slurs to describe Caucasian plaintiff and his African American wife), *aff'd*, 43 F.3d 1471 (6th Cir. 1994); *Nieto v. Kapoor*, 61 F. Supp. 2d 1177, 1183 (D.N.M. 1999) (denying qualified immunity to defendant physician who made numerous racially offensive comments and "freely distributed ethnic slurs" to nurses and patients), *aff'd*, 268 F.3d 1208 (10th Cir. 2001).

In their discussion of the qualified immunity defense, Defendants dutifully cite and quote the law of qualified immunity, but give no real argument supporting its application to the present case. Nor can they. Applying the legal standards to the facts alleged by Officer Savage, it is clear that qualified immunity does not apply in this case.

First, Officer Savage alleges the right to be free from hostile work environment based on race and retaliation, as guaranteed by the Equal Protection clause of the Fourteenth Amendment. FAC ¶ 205. At the time of the claimed violations, it was beyond question that this right was clearly established, and has been for numerous decades. *See Greenan*, 783 F. Supp. 2d at 791; *see also Shank*, 2014 WL 198343, at *2 ("Certainly, the unlawfulness of discriminating against an employee because of his race was clearly established and any reasonable person would have known that the alleged conduct was unlawful.").

Second, it would be abundantly clear to an ***objectively*** reasonable officer that the conduct at issue here violated that right. To reiterate the detailed allegations contained within the FAC,

Officer Savage alleges that Defendants used or condoned "racial epithets directed toward or in the presence of Officer Savage regularly." FAC ¶ 209. These racial epithets were "both severe and pervasive, especially given that the racial epithets were either spoken or condoned by Officer Savage's supervisors." *Id.* ¶ 279. Defendant Phillips, among others, regularly referred to African Americans as "niggers" in Officer Savage's presence. "They repeatedly used the word in a sarcastic or demeaning tone to Officer Savage both orally and in written communications." *Id.* ¶ 67. In particular, Officer Savage provided evidence that Defendant Phillips sent Plaintiff a text message containing a particularly derogatory racial slur. *Id.* ¶ 88 ("What's ya body count nigga? I'm in double digits."). Defendant Donaldson "took no action as a supervisor of the [CET] to end the discrimination against Officer Savage or to discipline or punish the offenders, thus allowing it to continue unabated." *Id.* ¶ 32.

Indeed, "[p]erhaps no single act can more quickly 'alter the conditions of employment and create an abusive working environment,' than the use of an unambiguously racial epithet such as 'nigger' by a supervisor in the presence of his subordinates," *W.-S. Life Ins. Co.*, 12 F.3d at 675 (internal citation omitted); or by co-workers in the presence of a supervisor who declines to stop the racial harassment. *See Briggs, Inc.*, 1997 WL 269597, at *4; *see also Brosmore*, 1993 WL 762881, at *7 (denying qualified immunity where defendants used numerous racial slurs to describe Caucasian plaintiff and his African American wife). Given these pervasive and specific allegations, it is clear that an objectively reasonable officer would be aware that using or condoning such racial epithets violated Officer Savage's constitutional rights, and the Defendants are thus not entitled to qualified immunity for the persistent use and tacit endorsement of such malicious racial slurs.

Likewise, Officer Savage alleges that several Defendants "repeatedly spoke to [him] about lynchings and the Ku Klux Klan." *Id.* ¶ 72. This racially hostile discussion is highlighted by several of the Defendants—including Phillips and Donaldson—taking Officer Savage to an isolated area known as "KKK Lane." *Id.* ¶ 73-78. It is beyond a doubt that repeated discussion of lynchings and the Ku Klux Klan, followed by taking Officer Savage to "KKK Lane"—where Defendant Wells told Officer Savage about his own "white sheets and nooses"—clearly rises to the level of racially hostile conduct that precludes any fair-minded consideration of qualified immunity. Defendants Phillips and Donaldson were complicit in this conduct, both for taking Officer Savage to "KKK Lane," and, as a supervisor and co-worker, for failing to address the racially hateful comments of Defendant Wells and other defendants. *See Smith v. Town of Hempstead Dep't of Sanitation Sanitary Dist. No. 2*, 798 F. Supp. 2d 443, 456 (E.D.N.Y. 2011) (denying qualified immunity where factual question existed as to whether supervisor adequately responded to noose that was displayed in workplace); *Briggs*, 914 F. Supp. at 250 (denying qualified immunity where defendant was alleged to have "hung a likeness of a black child by a noose in the office for months"); *see also Talbert v. Smith*, No. 7:05cv00736, 2007 WL 773908, at *5 (W.D. Va. Mar. 9, 2007) (denying qualified immunity where defendant correction officers allegedly used racial slurs and "produced a rope and bragged of hanging and killing 'niggers'" while physically assaulting plaintiff inmate). Plainly stated, any objectively reasonable officer would be aware that discussions of nooses, white sheets, lynchings, all combined with a trip to "KKK Lane," violate constitutional rights and are thus not protected by qualified immunity. Indeed, discovery of the Department of Maryland State Police Training Academy and depositions of the two MSP Defendants themselves will go a long way to showing they were specifically trained on hostile work environment and retaliation principles.

In this highly racially-hostile environment, the bloody deer's tail incident takes on a racially discriminatory tone. *See* FAC ¶¶ 79-83. Although a bloody deer's tail may not specifically invoke any commonly-used racial imagery, in light of the specific allegations contained within the FAC and the highly unusual and hostile act of putting a bloody animal part on the windshield of Officer Savage's car, there is, at the least, a factual question as to Phillips' purpose for putting it there, and the remaining Defendants' reasons for failing to discipline Phillips.[5] Once again, any objectively reasonable officer would be aware that placing a bloody deer's tail on the vehicle of another is well outside the bounds of acceptable conduct such that qualified immunity is inappropriate. Indeed, even Defendants' counsel calls this conduct ill-advised. MSP Motion at 27.

Ultimately, the question of Defendants' alleged friendship with Officer Savage, and who was "genuinely liked" by whom is a red herring. *See* MSP Motion at 47. In determining whether a defendant is entitled to qualified immunity, the relevant inquiry is not subjective, but rather objective, and thus the individual intent that may have existed with respect to some of these incidents is irrelevant. *Bailey*, 349 F.3d at 741 (the second "inquiry is an objective one, dependent not on the subjective beliefs of the particular officer at the scene, but instead on what an objectively reasonable officer would have understood in those circumstances."). As stated, an

[5] Defendant's Motion to Dismiss inaccurately states that Officer Savage "fail[ed] to complain" and as a result his "silence serves to support the MSP Defendants' entitlement to qualified immunity in that the unlawfulness of the currently complained of actions could not have been apparent to Sgt. Donaldson or Cpl. Phillips." MSP Motion at 34. The FAC states that Officer Savage "reported the incident to Passwaters. Passwaters, as a supervisor who is responsible for investigating workplace conditions, went to Officer Savage's car to see the deer tail. Upon returning to the [CET] office, Passwaters asked the other [CET] members if they had any knowledge of the incident. Immediately after Passwaters' inquiry, Phillips began laughing." FAC ¶¶ 80-81. Officer Savage was thus not silent, and the CET was fully aware of the impropriety of this act.

With respect to Phillips and Donaldson's other conduct, it is particularly disturbing that Defendants maintain that the "unlawfulness [of Defendant's conduct] was not apparent" because it was Officer Savage's responsibility to alert his supervisors that persistent and discriminatory racial epithets were offensive and inappropriate, and it was Officer Savage's responsibility to object to his co-workers and supervisors taking him to "KKK Lane" and talking about "nooses and white sheets"—because without such objections, it would not be "apparent" to Defendants that such conduct is racially offensive and violative of constitutional protections. *See* MSP Motion at 34-35.

objectively reasonable officer would know that it is inappropriate to persistently call a colleague or subordinate a racial epithet or take him to a secluded meeting area for the Ku Klux Klan and talk about or condone discussions about lynchings, a noose, and set of white sheets. To argue otherwise defies not only clearly established rights, but also common sense, and this Court should conclude that Defendants are not entitled to qualified immunity.

B. The MSP Defendants Are "Persons" for Official Capacity Claims Within the Meaning of 42 U.S.C. § 1983 and Are Not Entitled to Sovereign Immunity.

Defendants' argument for dismissal of the official capacity claims against them fails and the Eleventh Amendment does not provide them immunity. Although employees and officers of the State of Maryland and its agencies cannot be sued ***for damages*** in their official capacity and enjoy Eleventh Amendment immunity from such claims, such officers are considered "persons" and do not enjoy immunity from claims ***for declaratory and injunctive relief*** under 42 U.S.C. § 1983.[6] Because Officer Savage seeks prospective relief from state officials Phillips and Donaldson in their official capacity it is well-established that Defendants are "persons" within the meaning of these provisions, and that they are not entitled to sovereign immunity. *Jenkins v. Kurtinitis*, No. CIV.A. ELH-14-01346, 2015 WL 1285355, at *10 (D. Md. Mar. 20, 2015) ("[D]efendants in their official capacities are 'persons' within the meaning of § 1983 with respect to plaintiff's request for prospective relief") (citing *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 n.10 (1989)); *Hayat v. Fairely*, No. CIV WMN-08-3029, 2009 WL 2426011, at *10 (D. Md. Aug. 5, 2009) ("Under the *Ex parte Young* doctrine, prospective relief against a state official in his official capacity to prevent future federal constitutional or federal statutory

[6] The class of "persons" that are subject to suit is the same under 42 U.S.C. §§ 1981, 1985. *See Proffitt v. United States*, 758 F. Supp. 342, 345 (E.D. Va. 1990) ("[A] person within the meaning of § 1985 is subject to the same analysis used to interpret person within the meaning of § 1983."); *Podberesky v. Kirwan*, 764 F. Supp. 364, 370 (D. Md. 1991), *rev'd on other grounds*, 956 F.2d 52 (4th Cir. 1992) ("Podberesky's § 1981 claim can give rise only to prospective injunctive relief."). Because Defendants are "persons" under 42 U.S.C. § 1983, they are therefore also persons and subject to suit under these other provisions.

violations is not barred by the Eleventh Amendment.").[7] Defendants' motion neglects this important distinction, known as the *Ex parte Young* doctrine, which is "commonplace in sovereign immunity doctrine." *Will*, 491 U.S. at 71 n.10 (citation omitted).[8]

In determining whether the doctrine of *Ex parte Young* avoids the Eleventh Amendment's bar to suit, a court need only conduct a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (citation and internal quotation marks omitted). Here, the Complaint clearly meets the requirements in *Ex parte Young* as to the alleged Fourteenth Amendment Equal Protection Clause and § 1983 violations by Defendants Phillips and Donaldson (discussed in detail in Sections V *supra*) when acting in their official capacities. In addition, the Complaint seeks injunctive and regulatory relief, *see e.g.*, FAC, Prayer for Relief ¶¶ 2-8, which are prospective forms of relief. *See Verizon Md., Inc*., 535 U.S. at 646 (finding that the doctrine of *Ex parte Young* permits plaintiff's suit seeking a declaratory judgment and injunction to go forward against state commissioners in their official capacities); *see also D.T.M. ex rel. McCartney v. Cansler*, 382 F. App'x 334, 337 (4th Cir. 2010) (finding that *Ex parte Young* doctrine permitted suit against state agency). For these reasons, dismissal of the official capacity claims against Defendants is not warranted.

[7] Monetary relief that is "ancillary" to injunctive relief is also not barred by the Eleventh Amendment. *Kentucky v. Graham*, 473 U.S. 159, 169 n.18 (1985) (citing *Edelman v. Jordan*, 415 U.S. 651, 667-668 (1974)).

[8] Defendants' arguments regarding the need to show that the alleged constitutional deprivation must be caused by an official policy are misplaced. Official capacity actions for prospective relief are not treated as actions against the State. *See Will*, 491 U.S. at 71 n.10 (1989) (citing *Kentucky v. Graham*, 473 U.S. at 167, n.14 *and Ex parte Young*, 209 U.S. at 159-160). Nonetheless, as discussed in the Memoranda of Law in Opposition to Worcester County Sheriff's Office (Section I) and Municipal Defendants' Motions to Dismiss (Section IIA), Officer Savage has sufficiently pled facts stating a claim that the racially hostile work environment he endured was because of an official policy of the CET, Worcester County, and Pocomoke City, carried out by CET supervisors as final policy making officials, including Defendant Donaldson. *See* FAC ¶¶ 207-211, 277-279.

C. Section 1981 Provides a Basis for Relief From Racial Discrimination by State Actors That is Independent of That Found in Section 1983.

Defendants misread the law related to Officer Savage's 42 U.S.C. § 1981 claim and accordingly this Court should not dismiss Count VII of his FAC. Section 1 of the Civil Rights Act of 1866 prohibits, *inter alia*, racial discrimination in the making and enforcement of contracts. 42 U.S.C. § 1981(a). Passed in the wake of the ratification of the Thirteenth Amendment of the United States Constitution, it was intended as a declaration of equal rights for newly freed slaves. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 713-14 (1989). The rights declared in § 1981 were shortly "constitutionaliz[ed]" through the passage and ratification of the Fourteenth Amendment. *Id.* at 721 (citing Cong. Globe, 39th Cong., 1st Sess., 2465 (1866) (Rep. Thayer). Section 1981 was amended through the 1991 Civil Rights Act to expand the definition of the enforcement of contracts and to clarify that the rights of § 1981 were "protected against impairment by nongovernmental discrimination and impairment under color of State law." 42 U.S.C. § 1981(b)-(c).

A few short years after § 1981 came into existence, Congress passed the Civil Rights Act of 1871 in order to combat the rising violence that the Ku Klux Klan posed in the Reconstruction South and provide an enforcement mechanism for the newly ratified Fourteenth Amendment. *Jett*, 491 U.S. at 722. Section 1 of that Act ("1983") provided a civil damages remedy in Federal Court against state actors who had violated a person's federal or statutory constitutional rights. 42 U.S.C. § 1983.

In light of this legislative history, which is only briefly recounted here, the Supreme Court declared that unlike against private entities, Congress did not intend for § 1981 to create a private cause of action against state actors. *Jett*, 491 U.S. at 731-32 (holding that a school district could not be held liable for a racially motivated termination under § 1981 using the

respondeat superior theory of liability). The Fourth Circuit has also that held the 1991 Civil Rights Act did not create that cause of action or change the result of *Jett*. *Dennis v. Cty. of Fairfax*, 55 F.3d 151, 156 (4th Cir. 1995). The Fourth Circuit has not clarified whether its *Dennis* holding precludes § 1981 actions against state actors in their individual capacities, and courts within this District have held inconsistent rulings on the issue. *Compare Victors v. Kronmiller*, 553 F. Supp. 2d. 533, 543 (D. Md. 2008) (finding that § 1981 suits could not be brought against state actors regardless if they were sued in their individual or official capacities) *with Stout v. Reuschling*, 2015 U.S. Dist. LEXIS 39997, 14-cv-01555-TDC, at *14 (D. Md. Mar. 26, 2015) (finding that *Dennis* only applied to suits against municipal entities and not individuals).

Defendants' argument that *Dennis* requires a dismissal of Officer Savage's § 1981 claims misreads the text and thrust of the law. Both *Jett* and *Dennis* limited a Plaintiff's ability to seek vicarious liability against municipal entities under § 1981 to cases where he can prove that the discriminatory act was a "custom or policy" of the entity as defined in *Monell v. Dep't of Soc. Serv.*, 436 U.S. 658 (1978) and its progeny because that is what is required under § 1983. *Dennis*, 55 F.3d at 156 (citing *Jett*, 491 U.S. at 735-36). What *Jett* and *Dennis* did not do is limit the rights that § 1981 created: "We think the history of the 1866 Act and 1871 Act recounted above indicates that Congress intended that the explicit remedial provisions of § 1983 be controlling in the context of damages actions brought against state actors alleging violation of the rights declared in § 1981." *Jett*, 491 U.S. at 731. Therefore, *Jett* explicitly states that *rights* created by § 1981 still exist for public employees, it is only the *remedies* for those rights that must be enforced through § 1983.[9]

[9] Officer Savage also brings Section 1983 claims for violations of his First and Fourteenth Amendment rights, but that should not foreclose his ability to plead Section 1981 claims because those rights differ. For example, the right

The text of § 1983 also supports this proposition because it creates a cause of action for violations of both the "Constitution *and* laws" of the United States. 42 U.S.C. § 1983 (emphasis added). Using § 1983 as a remedial vehicle for § 1981 is consistent with other federal laws that do not provide their own remedial scheme. *E.g. Maine v. Thiboutot*, 448 U.S. 1 (1980) (allowing suits under § 1983 for a deprivation of welfare benefits under the Social Security Act). Further, this Court should allow Officer Savage's § 1981 to survive even though he did not expressly invoke § 1983 as the remedial vehicle because that is not grounds for dismissal of a claim. *Johnson v. City of Shelby, Miss.*, 135 S. Ct. 346, 346 (2014) (per curiam) (reversing dismissal of a constitutional claim that pled adequate facts but did not expressly cite § 1983). Recently the D.C. Circuit read the *Johnson* decision to mean that it could not dismiss a § 1981 employment discrimination claim against a public university that did not expressly plead that it was being brought under the remedial scheme of § 1983, but instead reviewed the merits of whether the Complaint alleged sufficient facts to make out a claim under § 1981. *Brown v. Sessoms*, 774 F.3d 1016, 1022 (D.C. Cir. 2014) (reversing dismissal of 1981 claims).

Therefore Officer Savage respectfully requests that this Court deny Defendants' motion to dismiss Count VII of Officer Savage's FAC and read his claims alleged under 42 U.S.C. § 1981 as brought through 42 U.S.C. § 1983. In the alternative, Officer Savage respectfully requests leave to amend the Complaint to clarify this reading pursuant to *Johnson*, 135 S. Ct. 346.

---

to be free from retaliation for complaining about Section 1981 rights is clearly established. *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 457 (2008).

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court deny Defendants' Motion to Dismiss or, in the alternative, Motion for Summary Judgment.

/s/ Dennis A. Corkery
Dennis A. Corkery (D. Md. Bar No. 19076)
Matthew Handley (D. Md. Bar No. 18636)
WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS
11 Dupont Circle, NW
Suite 400
Washington, DC 20036
TEL: 202.319.1000
FAX: 202.319.1010
EMAIL: dennie_corkery@washlaw.org

/s/ Deborah A. Jeon
Deborah A. Jeon (D. Md. Bar No. 06905)
Sonia Kumar (D. Md. Bar No. 07196)
ACLU of Maryland
3600 Clipper Mill Road, Suite 350
Baltimore, MD 21211
TEL: 410.889.8555
FAX: 410.366.7838
EMAIL: jeon@aclu-md.org

/s/ Andrew G. McBride
Andrew G. McBride (D. Md. Bar No. 27858
Christen B. Glenn (D. Md. Bar No. 14945)
Dwayne D. Sam (D. Md. Bar No. 29947)
Brian G. Walsh (*pro hac vice*)
Craig Smith (D. Md. Bar No. 17938)
Craig G. Fansler (D. Md. Bar No. 19442)
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006
TEL: 202.719.7000
FAX: 202.719.7049
EMAIL: amcbride@wileyrein.com

Dated: June 1, 2016

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on all registered defendants through their counsel of record through the CM/ECF system:

Ronald M. Levitan
Counsel
Maryland Department of State of Police
1201 Reisterstown Road
Pikesville, MD 21208-3899
Phone: (410) 653-4224
Counsel for Department of Maryland State Police, Brooks Phillips, Patricia Donaldson, and Beau Oglesby

Daniel Karp
Karpinski, Colaresi & Karp
Suite 1850
120 E. Baltimore Street
Baltimore, Maryland 21202
410-727-5000
410-727-0861 (facsimile)
brunokarp@bkcklaw.com
Counsel for Pocomoke City, Pocomoke City Police Department, Bruce Morrison, Russell Blake, Ernie Crofoot and Dale Trotter

Jason L. Levine
Assistant Attorney General
Maryland State Treasurer's Office
80 Calvert Street, 4th Floor
Annapolis, MD 21401
(410) 260-7412
jlevine@treasurer.state.md.us
Counsel for Worcester County Sheriff's Office, Nathaniel Passwaters, Dale Smack, and Rodney Wells

/s/ Andrew G. McBride
Andrew G. McBride (D. Md. No. 27858)
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006
TEL: (202) 719-7000
FAX: (202) 719-7049
EMAIL: amcbride@wileyrein.com