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

FRANKLIN SAVAGE et al., *Plaintiffs,* v. **POCOMOKE CITY, et al.,** *Defendants.*	Case No. 1:16-cv-00201-JFM

PLAINTIFFS' CONSOLIDATED MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS' MOTIONS TO BIFURCATE

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I. BIFURCATION OF PLAINTIFFS' CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS FROM THOSE AGAINST ENTITY DEFENDANTS IS NOT APPROPRIATE IN THIS CASE.

At the conclusion of their Motions to Dismiss the Plaintiffs' claims, Defendants Pocomoke City and Worcester County Commissioners (hereafter, "Entity Defendants") alternatively move for bifurcation of Plaintiffs' claims against the individual and Entity Defendants, wholly mischaracterizing Plaintiffs' claims in the process.[1] Defendants treat this case, asserting a conspiracy of employment discrimination and retaliation among the individual and Entity Defendants, as if it were an individualized police brutality matter in which the only claims against the governmental entities were derivative of claims against the individual officers. It is almost impossible to conceive of a case *less* suited for bifurcation. The case relates to a law enforcement task force, run by the County that included then-Detective Savage, a Pocomoke City Police Officer detailed to the task force. The County is alleged to have allowed an environment of racial hostility to continue for over 28 months in a task force operated under its policy-making authority. The City is alleged to have engaged in disparate treatment of African-American police officers in status, pay, overtime, assignment of duties, and other matters. These are not derivative claims, rather they are conduct of the Entity Defendants themselves that is interwoven with the conduct of all the individual Defendants.

Defendants' motions also ignore Plaintiffs' plainly-stated intent to amend the Complaint to bring Title VII claims directly against the Entity Defendants,[2] Plaintiffs' request for injunctive

[1] This brief responds solely to Defendants' bifurcation motions; the motions to dismiss are separately addressed.

[2] Indeed, Plaintiffs filed charges and amended charges against the Pocomoke City Police Department, Pocomoke City, and the Worcester County Sheriff's Office. After reviewing position statements from both sides and documentary evidence and conducting interviews with the Plaintiffs, the EEOC found probable cause that Savage had faced a hostile work environment and retaliation, that Sewell and Green faced retaliation, and that the county sheriff was a joint employer of Officer Savage. Conciliation

relief against the Entity Defendants, such as job reinstatement, and Plaintiffs' claims for violations of the Fair Labor Standards Act. Rather than acknowledge that Plaintiffs' claims will thus include direct claims against the Entity Defendants that are independent of the liability of individual Defendants, their argument and supporting legal authorities rest entirely upon the false premise that any liability by the Entity Defendants is derivative, which is simply not the case that Plaintiffs are pursuing. When evaluated properly, as explained below, it is clear that bifurcation in this case, and at this juncture, would waste judicial resources, unduly burden the parties, and unfairly prejudice the Plaintiffs' interests, and thus be wholly inappropriate.

A. Defendants Bear The Burden Of Showing That Bifurcation Would Be Beneficial In This Case, And Have Failed To Meet That Burden.

Rule 42(b) vests this Court with the discretion to bifurcate claims for discovery and trial where such division would: 1) "be conducive to expedition and economy," 2) "further[] the convenience" of the court and/or the parties, or 3) "avoid[] prejudice." Fed. R. Civ. P. 42(b). But "[j]ust as bifurcation may save judicial resources, it could cause a waste of judicial resources[,]" as it would here. *Devito v. Barrant*, No. 03cv1927, 2005 WL 2033722, at *11 (E.D.N.Y. Aug. 23, 2005) (internal citations omitted). Courts recognize that there is no single 'best' way to structure discovery and trial of a claim arising under Section 1983. "Each case must be considered in light of its particular facts and circumstances." *Marryshow v. Bladensburg*, 139 F.R.D. 318, 319 (D. Md. 1991); *see also Estate of Owensby v. City of Cincinnati*, 385 F. Supp. 2d 626, 665 (S.D. Ohio 2004) ("[A]ny decision ordering or denying bifurcation is dependent on the facts and circumstances of each case."), *aff'd*, 414 F.3d 596 (6th Cir. 2005) (internal

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between the EEOC and the entity defendants has failed, and Ernie Crofoot has publicly stated that Pocomoke City is not interested in conciliating. As such, the charges are now in the hands of the Department of Justice for review. As indicated in their FAC, plaintiffs will amend their complaint to add these Title VII claims as soon as the Department of Justice concludes its review. FAC ¶ 11.

quotations and citations omitted); *see also* 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2388 (3d ed.) ("The major consideration, of course, must be which procedure is more likely to result in a just and expeditious final disposition of the litigation.").

The ordinary "presumption is that all claims in a case will be resolved in a single trial, and it is only in exceptional instances where there are special and persuasive reasons for departing from this practice that distinct causes of action asserted in the same case may be made the subjects of separate trials."[3] *Martinez v. Robinson*, No. 99civ11911, 2002 WL 424680, at *2 (S.D.N.Y. Mar. 9, 2002) (internal quotations omitted). It is the moving party who bears the burden of proof to justify bifurcation, so as to "overcome the general principle that a single trial tends to lessen the delay, expense and inconvenience to all the parties." *Clements v. Prince George's Cty. Gov't*, No. 90-1878, 1992 WL 165814, at *1 (D. Md. June 30, 1992) (citations omitted); *see also Pavone v. Gibbs*, No. CV 95-0033, 1997 WL 833472, at *2 (E.D.N.Y. Sept. 29, 1997) ("The moving party bears the burden of establishing that separate trials are necessary to prevent prejudice or confusion."). As shown below, the Defendants have not come close to satisfying that burden here.

[3] *See also Deocampo v. City of Vallejo*, No. CIV.S-06-01283, 2007 WL 1614572, at *1 (E.D. Cal. June 4, 2007) ("separation of issues for trial is not to be routinely ordered") (citing the Advisory Committee Notes to the 1966 Amendment to Fed. R. Civ. P. 42(b)); *Rosa v. Town of Hartford*, No. 3:00CV1367, 2005 WL 752206, at *4 (D. Conn. Mar. 31, 2005) (bifurcation "remains the exception rather than the rule"); *Monaghan v. SZS 33 Assocs., L.P.*, 827 F. Supp. 233, 245 (S.D.N.Y. 1993) ("separate trials remain the exception rather than the rule, regardless of the nature of the action") (all denying bifurcation in the § 1983 *Monell* context).

B. The Particular Facts And Claims In This Case Make Bifurcation Entirely Inappropriate.

1. Defendants' Motions Ignore Plaintiffs' Non-Derivative Claims Against The Entity Defendants.

Defendants' Motions to Bifurcate are premised upon the erroneous notion that Plaintiffs' claims against the Entity Defendants are wholly derivative—in other words, if Plaintiffs cannot show that constitutional liability falls upon the individual defendants, then all claims against the Entity Defendants will automatically fail. This is plainly not the case. First, Defendants' motion ignores entirely Plaintiffs' claims for injunctive relief. Like Plaintiffs' intended Title VII claims, the claims for injunctive relief, such as employment reinstatement, front and back pay for unlawful discharge, and forward-looking remedial measures lie only against the Entity Defendants and are in no way derivative.[4] The hiring and employment practices of the Entity Defendants themselves, irrespective of the actions of any individual Defendant, are clearly placed at issue by the allegations and prayer for relief contained in the FAC. *See, e.g.*, FAC ¶¶ 41-52 (discrimination in pay against African-American police officers in Pocomoke); Prayer for Relief ¶¶ 8 & 9 (praying forwarding-looking injunctive relief against all Entity Defendants). The FAC alleges and seeks to remedy a pervasive web of racial bias throughout the law enforcement community on the Eastern Shore of Maryland. *Id.* at ¶ 2.

Defendants' motion seeks to recast Plaintiffs' case as one involving only isolated incidents of misconduct by individual officers. This mistaken depiction ignores the theories of liability actually asserted. Plaintiffs allege a pattern and practice of discrimination, harassment, and retaliation in which all of the Defendants conspired, as well as unlawful demotion and termination claims against the entities, affecting each of the Plaintiffs adversely. The *Monell*

[4] Plaintiffs also have raised claims under the Fair Labor Standards Act, which are in no way derivative. FAC ¶¶ 281-89.

liability analysis requiring a predicate finding of officer liability is inapplicable to such claims.

Second and more importantly, Plaintiffs explicitly state, at FAC ¶ 11, and again at footnote 3, that the Title VII claims referred to there are pending directly against the Entity Defendants[5] and will be pled as soon as the Department of Justice issues right to sue letters.[6] The Entity Defendants are aware of Plaintiffs' plan to add these claims because they have indicated such in their motion, yet they pretend that the claims do not exist in making their argument. Motion to Dismiss, at 23 ("MTD") (Dkt 41-1).

Significantly, other than their erroneous assertion that liability for the Entity Defendants is wholly derivative, Defendants offer no argument nor any authority supporting bifurcation in this case. Rather, every case cited by Defendants in support of bifurcation is a police misconduct case, in which municipal liability is entirely derivative of individual officer liability.

Although this Court has been sympathetic to the use of bifurcation as a case management tool in police misconduct cases in which the *only* way a plaintiff can prevail against a

[5] The employing entities against which Title VII claims lie directly include Pocomoke City, the Worcester County Sheriff's Department (for which defendants Worcester County Commissioners and Sheriff Reggie Mason bear joint responsibility) and the Worcester County State's Attorney's Office, for which Defendant Beau Oglesby bears responsibility.

[6] Indeed, such claims are arguably already ripe, as more than 180 days have passed since the filing of the Plaintiffs' charges with the EEOC. *See, e.g., Perdue v. Roy Stone Transfer Corp.*, 690 F.2d 1091, 1093 (4th Cir. 1982) ("[I]t is the entitlement to a 'right to sue' notice, rather than its actual issuance or receipt, which is prerequisite to the jurisdiction of the federal courts" under Title VII); *Murphy-Taylor v. Hofmann*, 968 F. Supp. 2d 693, 714-15 (D. Md. 2013) (relying on *Perdue t*o exercise jurisdiction over Plaintiff's suit filed under Title VII more than 180 days after her charges were filed with the EEOC, but prior to issuance of a right to sue letter); *Simms v. D.C.*, 699 F. Supp. 2d 217, 228 (D.D.C. 2010) (finding that plaintiff did not need to wait to obtain right to sue letter from EEOC to proceed with suit because the EEOC failed to act on her complaint within the required 180 days). However, out of deference to the process in this case, Plaintiffs awaited EEOC findings on their Title VII charges beyond the 180-day minimum, and, following the recent EEOC findings in Plaintiffs' favor, are currently waiting to add their Title VII claims to the suit until after the Justice Department issues the requisite notice of right to bring suit for Title VII claims. Plaintiffs expect that the issuance of those letters will be soon because Pocomoke City and the Worcester County's Sherriff's Office have indicated they do not wish to conciliate. As of the date of this opposition, the Worcester County State's Attorney's Office has not indicated to the EEOC its position on conciliation.

municipality is by first prevailing on a constitutional claim against the individual officer, it has rejected bifurcation outright in cases such as this where the plaintiffs state non-derivative claims directly against the municipality. *See, e.g. Treadwell v. Prince George's Cty. Health Dep't,* No. 13-0063, 2014 WL 3534006 (D. Md. July 14, 2014) (denying Prince George's County motion for bifurcation in case raising both constitutional and Title VII claims alleging sex discrimination and retaliation by county and individual officials, on grounds that the county, as the employer, was a necessary party on the Title VII claim, and thus bifurcation of the case between claims against individuals and the county would promote inefficiency and duplication); *Crystal v. Batts*, No. 14-3989, 2015 WL 8137660, at * 1 (D. Md. Dec. 8, 2015) (bifurcation separating trial of plaintiff's claims against police sergeant from trial of his claims against police commissioner and department denied; rather than promoting efficiency, bifurcation would only succeed in drawing out the case). *Accord, Fall v. Indiana Univ. Bd. of Trs.*, 33 F. Supp. 2d 729, 735-36 (N.D. Ind. 1998) (rejecting, three times, defendants' motions for bifurcation as leading to duplication and inefficiency in case combining claims under Title VII, §1983 and state law); *Md. State Conference of NAACP Branches v. Dep't of Md. State Police*, Civil Action No. PWG-98-1098 (D. Md. Oct. 28, 2003) (attached hereto) (rejecting MSP request to bifurcate racial profiling and wrongful detention claims against individual officers from those against supervisors and the department, due to Title VI claim alleging pattern of racial profiling as to which the department itself was the only proper defendant and "involves a distinct basis of asserted liability from §1983").

The Entity Defendants cite no authorities utilizing bifurcation where, as here, one claim is made directly against a governmental entity under Title VII, Title VI or Title IX, while another is made against individual officers and/or supervisors under §1983. Rather, the norm seems to

be unified trial of such cases. *See, e.g., Baynard v. Malone***,** 268 F.3d 228 (4th Cir. 2001) (Title IX claim against School Board tried simultaneously with §1983 claims against school principal and superintendent); *Treadwell,* 2014 WL 3534006 (denying bifurcation in case combining Title VII claims with §1983 claims); *Murphy-Taylor v. Hofmann,* 968 F. Supp. 2d 693 (D. Md. 2013) (allowing sex discrimination case brought by deputy sheriff and U.S. government intervenor against individual and entity defendants to proceed in a unified manner, where case combined claims under Title VII, §1983 and state law, resulting in settlement by all plaintiffs and defendants); *Whittington v. Bd. of Educ.,* No. 94-398, 1995 WL 17002152 (D. Md. June 2, 1995) (denying summary judgment to individual school officials and local board in race discrimination and retaliation case combining Title VII and §1983 claims, after which case went to trial in a unified manner, and jury returned verdict against all defendants).

2. Bifurcation At This Stage Would Harm Plaintiffs, Lengthen The Litigation, Duplicate Efforts, And Generally Hinder Efficiency In This Case.

a. Bifurcation At This Stage Would Jeopardize Plaintiffs' Ability To Properly Investigate And Prove Their Claims.

In claims arising under § 1983, courts recognize the "danger that bifurcation may deprive plaintiffs of their legitimate right to place before the jury the circumstances and atmosphere of the entire cause of action which they have brought into the court, replacing it with a sterile or laboratory atmosphere." *Estate of Owensby,* 385 F. Supp. 2d at 666 (quotations and citations omitted); *see also Deocampo,* 2007 WL 1614572, at *1 (denying bifurcation, holding that "[p]laintiffs have a right to sue whichever parties they wish, regardless of whether the defendants, or even the court, may think that the inclusion of some defendants may be of little or no practical economic benefit to plaintiff"); *Cunningham v. Gates,* No. 96-2666, 2006 WL 2294877, at *2 (C.D. Cal. Aug. 2, 2006) (denying bifurcation, finding that "bifurcation would

waste judicial resources and hinder the understanding of Plaintiffs' theory of the case") (citations omitted).

Plaintiffs Savage, Green and Sewell have pled claims, and plan to plead additional claims, against the Entity Defendants that are independent of, yet intertwined with, their claims against the individual defendants. Indeed, plaintiffs *explicitly* state that "[t]hroughout the time period alleged in this Complaint, the racially discriminatory acts of the Defendants were both collective in nature and intertwined." FAC ¶ 193. The heart of this case – and its significance – is the extraordinary extent to which the harmful actions of various Defendants, individual and municipal, were mutually reinforcing in ways that totally isolated the Plaintiffs and deprived them of basic rights. It would be patently unfair to the Plaintiffs to deprive them of the opportunity, through discovery, to uncover evidence of how these Defendants' actions worked together against them. Judicial efficiency is not served by undermining Plaintiffs' ability to investigate and develop evidence about the Defendants' wrongdoing. *Cf. United States v. Private Sanitation Indus. Ass'n of Nassau/Suffolk, Inc.*, 793 F. Supp. 1114, 1154 (E.D.N.Y. 1992) (rejecting bifurcation in federal RICO case as premature at pleadings stage due to need for Court to better understand intricacies of relationships among defendants).

b. Rather Than Avoiding Discovery Disputes, Bifurcation Would Complicate And Prolong Discovery, And Cause Duplication Of Efforts Due To The Extent Of Overlap Among The Plaintiffs' Claims.

Courts granting bifurcation of *Monell* claims in § 1983 actions do so largely to prevent unnecessary discovery against municipal defendants. *See, e.g., Clements,* 1992 WL 165814, at *1 (noting that bifurcation prior to discovery can eliminate the need for discovery as to specific claims or parties). In this case, however, because the Plaintiffs' Title VII claims are not subject to the *Monell* framework, and due to Plaintiffs' injunctive claims, bifurcation would not alleviate

any such burden. Rather, it would result in duplicative discovery efforts, multiple trials, and would unnecessary prolong the litigation. Moreover, given the overlapping nature of the evidence and claims in this case, it is impracticable to bifurcate as to the individual and Entity Defendants except in ways that would be more likely to complicate, rather than simplify, the case.

In *Treadwell*, Judge Deborah Chasanow explained the significance of the distinct claims Defendants fail to acknowledge in this case:

> Unlike the cases cited by the County, here the County is not simply an "inactive defendant," liable only if Plaintiff can first prove that Oladipo violated her constitutional right to be free from discrimination. Plaintiff also seeks to hold the County liable for Oladipo's acts under Title VII, for which it will be liable if Oladipo created a hostile environment because Oladipo was Plaintiff's supervisor.

Treadwell, 2014 WL 3534006, at *5. As in *Treadwell*, the Entity Defendants in this case are "active" defendants because of Plaintiffs' Title VII claims against them. Bifurcation provides no efficiency gain where, as here, there are direct claims against the entity itself. *See, e.g.*, *Crystal*, 2015 WL 8137660, at *1 ("The Court is well aware of the usefulness of the bifurcation procedure when a municipality's liability is derived wholly from a named defendant's liability, and if this were such a case, then the Court would grant the motion. …Crystal's case, however, is not such a case."). Rather, in this scenario, even "if the claim[s] against [individual defendants] were decided in [their] favor, … a substantial part of the case would remain unresolved." *Id.* at *2. Thus, "[b]ifurcation would only succeed in drawing out the case instead of efficiently disposing of it. The result would be duplication of discovery efforts and unwise use of judicial resources, not to mention increasing the amount of time and money invested by the parties." *Id.*

In rejecting the defendants' bifurcation request in *Batts*, Judge Bredar highlighted the plaintiff's allegations of involvement of non-defendant employees/agents of the entity defendant as reflecting claims that were not purely derivative of individual liability, but also "plausibly

demonstrate[ing] consistent, department-wide maltreatment." *Id.* at * 1. The same is true here, as Plaintiffs' claims involve far more than just the isolated acts of the individual named defendants. For example, Chief Sewell's claims against Pocomoke City for retaliatory harassment and termination, while involving individual defendants Bruce Morrison and Russell Blake, also involve the actions of various unnamed City Council members, and the communications between individual defendants and City Council members, as well as other unnamed Worcester County law enforcement officials. (*See* FAC ¶¶ 157-169, involved Chief Sewell's compelled testimony before the City Council and subsequent follow up).

Part of the inefficiency that would be created by bifurcation in this case, particularly prior to any discovery, arises from the significant overlap between evidence that would be offered in support of the *Monell* claims and the other claims, such as those under Title VII. *See, e.g., Schoolcraft v City of New York,* No. 10 civ. 6005, 2015 WL 5542770 (S.D.N.Y. Sept. 18, 2015) (where there will be significant overlap between the evidence plaintiff would offer in support of his *Monell* claims and in support of the other claims, bifurcation is not warranted).

For example, the allegations concerning the wrongful termination of Franklin Savage demonstrate how inextricably intertwined the claims and the evidence underlying the claims are. There, it is alleged that individuals and officials, named and unnamed, with the CET subjected Officer Savage to a racially hostile work environment, about which he lodged complaints with local officials, the EEOC and the Attorney Grievance Commission. Thereafter, those same individuals and officials undertook a pattern of retaliation against Officer Savage because he had complained about the discrimination. This retaliation included: 1) restriction of his duties by the Pocomoke City Manager and City officials, at the urging of individual defendants and others; 2) demotion from his position as a detective; 3) a bar – initiated by State's Attorney Beau Oglesby

– against allowing him to make arrests alone or testify in cases he investigated; 4) spreading of blatantly false rumors throughout the community and with his employers that he was untrustworthy, had unpaid bank loans, and used illegal drugs, among others; and 5) blackballing him from employment with law enforcement agencies outside Worcester County, where he sought to go to escape the harassment. Finally, based on this combined harassment and retaliation, Pocomoke City fired him from his job, claiming that he was useless to the police department because he was not able to fulfill his job duties due to the myriad restrictions the Defendants had placed upon him. There is simply no way to efficiently bifurcate the claims against the individual defendants from those against the entity defendants in view of their intertwined nature. It is not practicable.

Defendants' proposal would have Plaintiffs conduct discovery sufficient to address the questions of individual liability, but not the interrelated questions of how the individual defendants' actions contributed to the broader chain of events. Such an approach is unworkable. It would mean trying to determine which evidence is related to Title VII claims against the Entity Defendants versus individual constitutional claims, even though all pertain to the same subject matter. Rather than limiting discovery disputes, in this case Defendants' proposed approach invites duplication of effort—two searches of email systems, phone logs, policies and procedures, officer performance evaluations, multiple depositions of the same witnesses etc.—all while trying to draw nonexistent lines between which evidence is related to claims against individual versus Entity Defendants.[7] Where as here, there is a pattern of racial discrimination

[7] For simplicity and to avoid confusion of issues, defendants' multiple motions to bifurcate are consolidated in this single response. To the extent that the Court prefers an opposition to relate to a specific motion, this consolidated response may be considered part of the opposition to the County Commissioner's motion, and those two oppositions together would remain under page limits specified in the local rules.

and retaliation (and reckless indifference to same) among governmental entities in the areas of compensation, work environment, work assignments, rank, and eventual termination, bifurcation would affirmatively disserve the search for truth.

II. CONCLUSION

Rule 42(b) places the burden on the Defendants, as the moving parties, to demonstrate that the goals of efficiency, convenience, and prevention of prejudice will be accomplished in order to warrant bifurcation. As demonstrated above, Defendants have not met and cannot meet this burden. Therefore, Plaintiffs respectfully request that this Court deny Defendants' Motions to bifurcate.

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