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

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO SHERIFF MASON, CHIEF DEPUTY SMACK, SERGEANT PASSWATERS AND CORPORAL WELLS' MOTION TO DISMISS FIRST AMENDED COMPLAINT

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INTRODUCTION

The Motion to Dismiss filed by the Worcester County Sheriff's Office ("WCSO")[1] is more significant for what it does not say than for what it does. WCSO does not dispute that a racially hostile work environment pervaded the Worcester Criminal Enforcement Team ("CET"). Nor does the WCSO dispute that the CET was created by the WCSO, originally housed in WCSO space, had a WCSO member as a co-supervisor and that the Sheriff himself chose the members of the CET. First Amended Complaint ("FAC") ¶¶ 5, 28, 53–65. Neither does the WCSO quarrel with the proposition that Officer Savage faced acts of retaliation for complaining to the EEOC regarding his treatment by members of the CET, including racial epithets and rides to "KKK Lane" in which Sergeant Passwaters of the WCSO was a key participant. FAC ¶¶ 5, 67, 71–75.

Rather the WCSO's motion to dismiss is more in the nature of tacit confession and overt avoidance. Defendants presents three narrow and technical questions: (1) whether those Defendants are "persons" for official capacity claims within meaning of 42 U.S.C. § 1983; (2) whether Worcester County (the "County"), which "controls the practices" of the WCSO, was Officer Franklin Savage's joint employer; and (3) whether Defendants may be held liable for retaliation against Officer Savage after he resigned from the CET. In answering these questions, Defendants weave together a crude syllogism, having basis in neither law nor fact, that goes something like this: (i) neither a state nor one of its officials acting in his or her official capacity

[1] The WCSO may not be a suable entity. *See Revene v. Charles Cty. Comm'rs*, 882 F.2d 870, 874 (4th Cir. 1989). As explained below, however, liability against WCSO and CET members should be imputed to Worcester County, which is a suable entity and named in the First Amended Complaint, because it controls the practices of CET members from the WCSO and was Officer Savage's joint employer. As such, the County Commissioners are the named party in the complaint because they are the governing body for the County and thus would be responsible for any unconstitutional or unlawful customs or policies of the sheriff or any deputy sheriffs for purposes of *Monell* liability. *See id.* ("Rightly construed under current doctrine, this comes to a claim that in the realm of county law enforcement, the sheriff was the duly delegated policy-maker for the county, and it is therefore effectively a claim against the governing body of the county.").

qualifies as a "person" subject to suit under § 1983; (ii) Sheriff Mason and his deputies are employees and officers of the State of Maryland; and, therefore (iii) the official capacity claims against the Sheriff and his deputies must be dismissed because they are not "persons" within meaning of § 1983. As explained below, each premise is erroneous and renders the conclusion baseless. Having misconstrued the underlying law, Defendants also are mistaken with respect to its application. The County can have *Monell* liability for the hostile work environment claims alleged against Sheriff Mason and his deputies in Counts I and VII, and the legal rights embodied in 42 U.S.C. § 1981 are a well-established basis for bringing a claim against these Defendants. Furthermore, notwithstanding Defendants' repeated and legally unsubstantiated refrain to the contrary, an employer may be held liable for retaliating against a former employee.

First, Defendants' argument (at 10) that they do not qualify as "persons" under § 1983 is contrary to law. Because Officer Savage seeks prospective relief from Defendants named in their official capacity, it is well-established that they are "persons" within the meaning of § 1983, and that they are not entitled to sovereign immunity. *Jenkins v. Kurtinitis*, No. ELH-14-01346, 2015 WL 1285355, at *10 (D. Md. Mar. 20, 2015).

Second, Defendants' contention (at 13) that the County does not control the practices of CET members from the WCSO and was not Officer Savage's joint employer is inconsistent with how the County operates, state law, and Supreme Court and Fourth Circuit precedents. To tackle illegal drug trafficking and abuse in the County, the County Sheriff in 2008 created the CET, which includes police officers from the WCSO, the Department of Maryland State Police, and local municipalities including Pocomoke City and Ocean Pines. The CET "deputizes" municipal police officers to help implement county policies, is located in buildings provided by the county, uses county equipment, and is subject to county or sheriff's office approval of certain

personnel matters, expenses, and cooperative agreements with municipal governments. The Sheriff himself selects the members of the CET. Three of the seven CET members were employees of the WSCO, including Sergeant Passwaters, who was a co-supervisor of the CET. The CET operates as a subdivision of the WSCO with delegated authority from the WCSO, performing its own investigations, setting priorities based on county-specific narcotics issues, and establishing workplace policies, work assignments, and disciplinary investigations under the control of the WCSO but no other government unit. All seven members of the CET were deputized by the WSCO and enjoyed jurisdiction, including arrest authority, throughout Worcester County based on this deputation. Thus, although state law labels the Sheriff as a state constitutional officer, the County can still be held liable for the control it exerted over the three CET members from the WCSO.

Third, Defendants claim at (20–21) that employers may not be held liable for retaliating against former employees is meritless. The Supreme Court has long held that employer liability for retaliation does not end when an employee leaves the company. *Robinson v. Shell Oil Co.* 519 U.S. 337 (1997). Each of Defendants' other arguments flows from a misunderstanding of the law on these three key points, and their Motion to Dismiss should, therefore, be denied.

FACTS

Formed in 2008 by a previous Worcester County Sheriff, the CET's purpose is to "reduce drug trafficking activities within Worcester County." Worcester County, County Commissioners Meeting Minutes (June 6, 2015) at 2 ("Worcester County Meeting Minutes"), https://www.co.worcester.md.us/departments/commissioners/minutes?page=1.[2] To achieve this

[2] In deciding a motion to dismiss, "[a] court may take judicial notice of information publicly announced on a party's web site." *Jeandron v. Bd. of Regents of Univ. Sys.*, 510 F. App'x 223, 227 (4th Cir. 2013). Despite this public information showing the County's involvement in many CET functions, Defendants maintain in their motion to dismiss that the County does not control the practices of the WCSO. In light of the WCSO Defendants'

purpose, the WCSO cooperates with municipal police departments and has developed cooperative agreements to obtain officers on detail from the municipalities of Pocomoke City and Ocean Pines for the CET. *Id.*; Ocean Pines Association, Fall 2015 Ocean Pines Newsletter at 11, http://oceanpines.org/about-ocean-pines/quarterly-newsletters/ ("Ocean Pines Newsletter"). In some cases, the WCSO has even developed memoranda of understanding with other municipalities to outline their "cooperation and participation" in the CET and sought approval for these memoranda of understanding from the county's governing Board of County Commissioners. *Worcester County Meeting Minutes* at 2. The County Sheriff, deputy sheriffs, including Dale Smack, and deputy sheriffs assigned to the CET, including Nathaniel Passwaters, share a close relationship. The State of Maryland is not a signatory to any of these MOUs.

Ten months after joining the Pocomoke City Police Department ("PCPD") in April 2011, Officer Savage was asked to join the CET in February 2012. FAC ¶ 17. He became the first and only African American person to join the CET. *Id.* Operated out of the same building as the WCSO, the CET consisted of six other members, including five white males and one white female. *Id.* ¶ 61. It was jointly supervised by Passwaters, a Sergeant in the WCSO, and Patricia Donaldson, a Sergeant in the Department of Maryland State Police. *Id.* ¶¶ 28, 32, 63. The CET supervisors were delegated final policymaking authority to determine the duties and priorities of its members, set personnel policies, assign work duties, set investigation priorities, and supervise the use of technology and equipment. *Id.* ¶ 59. As part of the delegation, Passwaters and Donaldson had to prepare an employment evaluation for each member on an annual basis to send back to that member's parent agency. *Id.* ¶ 65.

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unfounded assertion in the face of contrary evidence on the County's own website, the need for discovery in this case is especially apparent.

Officer Savage remained on the CET for 28 months, until he resigned on June 12, 2014. *Id.* ¶ 113. During that time, Officer Savage faced repeated and persistent acts of racial harassment and discrimination by other members of the CET. Passwaters, for instance, regularly referred to African Americans as "niggers," replayed on multiple occasions an arrest video where he emphasized the arrestee's use of the word, developed a synonym of "ninja" to use instead but which was known to carry the same meaning, and refused to take any action to intervene when other CET members, including WCSO Corporal Rodney Wells, drove Officer Savage to so-called "KKK Lane" and when another placed a bloody deer's tail on Officer Savage's car. *Id.* ¶¶ 67, 70, 71, 77–78, 82–83.

Wells' conduct was equally deplorable. "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. Wells also had the gall to ask Officer Savage why African Americans are offended when a White person uses the word "nigger" and it variants. *Id.* ¶ 69. Wells then asked Officer Savage how he would feel if he called him a "nigger." *Id.* Moreover, while at "KKK Lane," Wells engaged in further acts of harassment and intimidation when, for example, he 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, Maryland. *Id.* ¶ 75.

Because supervisors participated in the most egregious acts of racial discrimination, and failed to take any action when others used racially derisive language and streamed racially charged videos, Officer Savage eventually concluded that reporting acts of discrimination to final policymakers on the CET was futile. *Id.* ¶ 84. Left with no other option, Officer Savage

reported further race-based insults outside the CET to Chief Sewell, who was the police chief at Savage's parent agency, the PCPD. The first such report occurred in April 2014, when a fake food stamp upon which a photograph of President Obama had been superimposed—which Officer Savage perceived to ridicule African Americans—was placed in Officer Savage's desk drawer. *Id.* ¶ 86–87. The second was on May 31, 2014, after receiving a text message by CET member Brooks Phillips addressing him as "nigga." *Id.* ¶ 88–90. Because Chief Sewell did not have any policymaking control over the CET, he reported the second incident to the Maryland State Police to investigate; the Maryland State Police eventually determined that the text violated the rules and regulations of the Maryland State Police. *Id.* ¶¶ 89, 117.

Passwaters was aware of Officer Savage's reports of misconduct, and he reacted quickly to Officer Savage's decision to report the racially hostile conduct outside of CET channels. On June 3, 2014, Passwaters created a rumor that Officer Savage was repeatedly tardy and that Savage's debt collectors and wife were calling the WCSO. *Id.* ¶ 91. No such calls were made, and Officer Savage has never been married. *Id.* Passwaters asked Officer Savage if he was on drugs, an accusation that was subsequently made in front of another member of the CET during an undercover drug purchase. *Id.* ¶¶ 92–93.

On June 12, 2014, Officer Savage resigned from the CET. In his resignation letter, he stated that the repeated use of the word "nigger" and other acts of racial discrimination had created an "uncomfortable, demeaning, and unbearable work environment," and that he hoped his resignation might ensure that such acts of racial discrimination never occurred again in the CET. *Id.* ¶ 113. But in fact, his resignation had the opposite effect. Retaliation by Passwaters only intensified, and Passwaters spread a false rumor on July 15, 2014 that Officer Savage had wrongfully used a false identification for personal purposes, on July 29, 2014 that he had falsely

identified himself as a member of the CET, and in late July that he had sold his off-duty weapon. *Id.* ¶¶ 119, 132, 134.

Despite being aware of the allegations of racial harassment and discrimination within the CET and therefore Passwaters' motive to retaliate, the second-in-command at the WCSO, Dale Smack, accepted the rumors regarding Officer Savage at face value and perpetuated the earlier racial harassment against Officer Savage with additional acts of retaliation. *Id.* ¶ 135. On August 14, 2014, Smack informed Chief Sewell that the County would no longer respond to emergency calls or requests for backup from Officer Savage or Lieutenant Green (apparently because of his support for Savage), and Officer Savage was thereafter refused assistance from the County's K-9 unit on multiple occasions, despite the fact that such assistance was routinely provided to the PCPD in other investigations. *Id.* ¶¶ 139-40.

STANDARD OF REVIEW

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*, 178 F.3d at 244. 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, 679 (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. 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*, Civil Action No. ELH-12-3501, 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.*, Civil 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).

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*, No. 11-6566, 2011 WL 5822176,

at *1 (4th Cir. Nov. 18, 2011) (citation omitted); *accord Slade v. Hampton Rds. 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.

ARGUMENT

I. DEFENDANTS ARE "PERSONS" FOR OFFICIAL CAPACITY CLAIMS WITHIN MEANING OF 42 USC § 1983 AND NOT ENTITLED TO SOVEREIGN IMMUNITY.

A. Defendants Are Not Entitled To Eleventh Amendment Immunity Because They Have Not Met Their Burden of Establishing that the WCSO Is an Arm-of-the-State.

Although the Eleventh Amendment's text refers only to the states, sovereign immunity also extends to state officials and agencies that may be considered arms-of-the-state. *See, e.g.*, *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). By contrast, when Sheriff Mason and his deputies act as local officials, the Eleventh Amendment does not immunize them from liability for damages for unconstitutional acts. *Id.*

To determine whether the WCSO is an arm-of-the-state, the Fourth Circuit has long applied a four-factor test. *See Ram Ditta v. Maryland Nat. Capital Park & Planning Comm'n*, 822 F.2d 456, 457–58 (4th Cir. 1987). The Court first looks to "[w]hether the state treasury will be responsible for paying any judgment that might be awarded." *Id.* at 457. The Court then inquires "whether the entity exercises a significant degree of autonomy from the state, whether it is involved with local versus statewide concerns, and how it is treated as a matter of state law." *Id.* at 457–58. Notably, as the parties claiming Eleventh Amendment immunity, Defendants bear the burden of establishing that the WCSO is an arm-of-the-state. *See Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 543 (4th Cir. 2014) ("[S]overeign immunity is akin to an

affirmative defense, which the defendant bears the burden of demonstrating."). They have not done so. Rather than applying *Ram Ditta*, Defendants summarily conclude that the WCSO is not a state actor. WCSO Br. at 11–12. On this basis alone, Defendants' Motion to Dismiss must be denied. *See Hutto*, 773 F.3d at 543; *Pele v. Pennsylvania Higher Educ. Assistance Agency*, 13 F. Supp. 3d 518, 528 (E.D. Va. 2014) (denying motion to dismiss after defendant failed to meet its burden of showing that it was entitled to Eleventh Amendment immunity).

B. Defendants Are "Persons" Under 42 U.S.C. § 1983 and Are Not Entitled To Eleventh Amendment Immunity From Claims For Prospective Relief.

Even assuming the WCSO is an arm-of-the-state, Defendants' argument for dismissal of the official capacity claims against them fails because Eleventh Amendment does not provide any immunity from claims for prospective relief. Local governments and local government officials sued in their official capacity are considered "persons" under 42 U.S.C. § 1983, as long as the alleged unconstitutional injury results from the "execution of a government's policy or custom." *Monell v. Dep't of Soc. Servs. of New York*, 436 U.S. 658, 694 (1978).

To be sure, 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. But such officers are considered "persons" and do not enjoy immunity from claims seeking injunctive relief under § 1983.[3] Because Officer Savage seeks prospective relief[4] from the WCSO Defendants named in their official capacity, it is well-established that they are

[3] The class of "persons" that is 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 § 1983, they are therefore also persons and subject to suit under §§ 1981 and 1985.

[4] "Prospective relief" includes "declaratory and injunctive relief against individual state officers in order to prevent ongoing violations of federal law." *Jenkins*, 2015 WL 1285355, at *8. Here, Officer Savage seeks "any and all injunctive decrees and relief necessary to effectively prevent Defendants from engaging in . . . unlawful racial discrimination in the future." FAC Prayer for Relief ¶ 13.

"persons" within the meaning of these provisions, and that they are not entitled to sovereign immunity. *Jenkins*, 2015 WL 1285355, at *10 ("[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. Michigan 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 violations is not barred by the Eleventh Amendment.").

The Sheriff and his deputies at the WCSO occupy a middle ground: in some job functions, they are local government actors and thus "persons" with respect to prospective relief *and* damages, whereas in other functions, they may be state officials and therefore subject to only prospective relief. *Dotson v. Chester*, 937 F.2d 920, 928 (4th Cir. 1991) ("[T]he Sheriff is not always a state employee or always a county employee. He may, on occasion, be both, or sometimes one and sometimes the other. It all depends on the particular function the Sheriff is performing.").

Certainly, at this stage, taking the allegations of the FAC as true, and drawing all inferences in favor of the non-moving party, both the WCSO and the CET appeared to be aimed at law enforcement problems and issues confined to Worcester County. All that can be said at this early stage of the litigation is that the FAC alleges sufficient facts, if true, to make the WCSO and its creation, the CET, county actors and therefore "persons" for purposes suit under § 1983. The WCSO cannot and has not marshaled any facts to the contrary at this stage, and further litigation of its affirmative defense of sovereign immunity should await the close of discovery at the time the Court sets for summary judgment motions.

See Santos v. Frederick Cty. Bd. of Comm'rs, 725 F.3d 451, 470 (4th Cir. 2013) (requiring district court to determine on remand whether actions were attributable to county policy "or the actions of a final county policymaker"); *Fether v. Frederick Cty., Md.*, No. CIV. CCB 12-1674, 2013 WL 1314190, at *7 (D. Md. Mar. 29, 2013) ("[I]t may be that notwithstanding Sheriff Jenkins's status as a state employee, his actions or inactions could represent Frederick County's policies or customs for which Frederick County will be legally responsible."); *Durham v. Somerset Cty.*, Md., No. WMN-12-2757, 2013 WL 1755372, at *3 (D. Md. Apr. 23, 2013) ("As to Sheriff Jones' status as a state or county policymaker, sheriffs can be either or both, depending on the area in which the policy is being made.").[5] Officer Savage has satisfied his basic pleading burden, and it is far too early for the Court to decide *before discovery* the level of local control over actions taken by the WCSO Defendants. *See, e.g.*, *Knight v. Vernon*, 214 F.3d 544, 552 (4th Cir. 2000) (determining sheriff was state employee after discovery of "informal practices" between the county and sheriff through discovery).

In any event, irrespective of whether they are determined to be state or local officials for the actions in question, the WCSO Defendants are persons for at least some of the requested forms of relief and, on the face of the complaint, for all forms of relief.[6] Therefore, dismissal is not warranted.

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[5] Several of the cases cited by Defendants, *see* WCSO Br. at 11–12, in fact prove that it is premature for this Court to decide whether a county official is a county or state policy maker, or acting in accordance with county or state policy. *See, e.g.*, *Murphy-Taylor v. Hofmann*, 968 F. Supp. 2d 693, 743 (D. Md. 2013) ("Perhaps the underlying facts would support a *Monell* claim directly against the County for harms to Ms. Murphy–Taylor arising from the County's policies with respect to medical leave, or the explicit exemption of deputy sheriffs from County human resources policies regarding workplace harassment.").

[6] The tests for *Monell* liability and Eleventh Amendment immunity are similar but not identical. Even if Sheriff Mason is found to be a state official for the purposes of Eleventh Amendment immunity, such a decision is not necessarily dispositive in the *Monell* context. *See Gray v. Laws*, 51 F.3d 426, 435 (4th Cir. 1995) (holding that a district court erroneously conflated the *Monell* and Eleventh Amendment immunity analysis). For sovereign immunity purposes, the "primary consideration" is "whether the state is liable for a judgment against the employee, not the function performed by the employee." *Id*. By contrast, under a *Monell* analysis, the function performed by an official matters: courts look to whether officials are final policymakers for local government "in a particular area,

II. WORCESTER COUNTY MAY BE HELD LIABLE FOR A FIRST AMENDMENT RETALIATION CLAIM UNDER 42 U.S.C. § 1983 FOR CONDUCT ENGAGED IN BY CET MEMBERS FROM THE WCSO.

Despite clear case law holding that counties can be liable for some actions of sheriffs and their deputies, Defendants contend (at 11, 13, 34) that this Court should dismiss Count I of Plaintiff's FAC because the WCSO is a State entity and was not Officer Savage's employer. That argument distorts binding case law, and is drastically premature prior to discovery on whether the sheriff and his deputies were implementing state or county policy. It is enough that Officer Savage has alleged that at least some of the acts complained of were caused by a custom or policy of the County. And even if the CET were implementing state policy—which it was not—that determination would not warrant dismissal. The County also faces liability as a joint employer of members of the CET, and Officer Savage has plausibly alleged that the County is the joint employer of CET members.

A. Officer Savage Has Plausibly Alleged that the Final Policymakers on the CET and in the Sheriff's Office Were Acting on Behalf of Worcester County.

Only following discovery will the Court be in a position to properly perform a functional analysis of whether the CET and the WCSO were acting as state employees or county employees when they engaged in the acts that violated Officer Savage's First Amendment rights. For now, it is sufficient that Officer Savage has alleged facts tending to show that the County is liable for (1) the racial discrimination and retaliation by members of the CET; and (2) the unconstitutional acts of retaliation by CET and WCSO both before and after Officer Savage resigned from the CET and returned to the PCPD. If the alleged facts are true—and they must

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or on a particular issue." *McMillian*, 520 U.S. at 785; *see also Dotson*, 937 F.2d at 924. Here, the important point is that at least some claims against all Defendants in their official capacities would survive under either standard.

be assumed to be so on a motion to dismiss—then the County would be subject to *Monell* liability, and therefore dismissal of claims against the WCSO is not warranted.

Under 42 U.S.C. § 1983, every "person" who subjects another person to the deprivation of rights, privileges, or immunities secured by the federal Constitution and laws is subject to liability. The class of persons subject to suit includes "municipalities and other local government units" when "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Monell*, 436 U.S. at 690, 694. It is well-settled that counties are considered "persons," and that a county can be held liable for the actions of sheriffs who implement policies or customs on behalf of the county. *See, e.g.*, *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 n.12 (1986); *Santos*, 725 F.3d at 470.

Defendants' suggestion (at 11-12) that the County may engage in discriminatory acts with impunity must be rejected. Whether Defendants were exercising county or state policymaking authority depends on their conduct in "a particular area, or on a particular issue." *McMillian*, 520 U.S. at 785. The Fourth Circuit has instructed district courts how to perform this analysis. In *Dotson v. Chester*, for example, the Plaintiffs brought suit against county commissioners and the sheriff in Dorchester County, Maryland, based on alleged civil rights violations in the management and operation of the county jail. 937 F.2d 920. At issue in *Dotson* was whether the county or the state was liable for any judgment rendered against the sheriff. The court concluded that the answer depended on the facts: "[c]ounty liability for the Sheriff's operation of the County Jail depends on whether the Sheriff had final policymaking authority for the County over the County jail." *Id.* at 942 Put another way, when the sheriff acted as the final policymaker on an issue of local or county policy, the county—and the county

commissioners as the governing board of the county—would be liable, whereas if the sheriff acted as a state policymaker, recovery for *Monell* liability would be limited to prospective relief. *See id.* at 924 ("The *Praprotnik* test indicates liability relies more on final policymaking authority than on the technical characterization of an official as a state or county employee."); *McMillian*, 520 U.S. at 785–86 ("[W]e are not seeking to make a characterization of Alabama sheriffs that will hold true for every type of official action [but] whether Sheriff Tate represents the State or the county when he acts in a law enforcement capacity."). The court in *Dotson* had no trouble concluding that, when operating the county jail, the sheriff was the final policymaker for the county and that the county was thus subject to *Monell* liability. 937 F.2d at 932 ("[W]e conclude that both state and local law point to the Sheriff as the final policymaker for the County when operating the County Jail, and hold that the County is properly responsible."). This functional analysis remains good law. *Santos*, 725 F.3d at 470 ("[O]n remand, the district court should determine whether the deputies' unconstitutional actions are attributable to an official policy or custom of the county or the actions of a final county policymaker.").

In performing the function-by-function analysis, a court must look at the particular function that caused the alleged constitutional violation and whether that function is a county function under state law. *See McMillian*, 520 U.S. at 786 ("[O]ur inquiry is dependent on an analysis of state law."); *Pembaur*, 475 U.S. at 485 ("In ordering the Deputy Sheriffs to enter petitioner's clinic the County Prosecutor was acting as the final decisionmaker for the county.").

Defendants' blanket assertion that the County is not liable for the actions of the WCSO—including the operation of a task force created by the County to tackle a county problem—ignores this line of cases. This is not surprising since an analysis of the particular functions at issue in Counts I and VII show that, on the facts alleged at this stage of the

litigation, the WCSO and the CET as its instrument were acting exclusively to set county law enforcement priorities to solve a problem of street trafficking of illegal drugs at the county level. The CET members were deputized by the WCSO and had police power only within the county. In no way, did they purport to make policy for the state or supplant the Governor or the Maryland Attorney General in setting law enforcement policies for the entire state. Count IV alleges a race-based discrimination and retaliation in violation of the First Amendment and § 1983 that occurred during the period from February 2012 to June 2014 when Officer Savage was assigned to the CET. FAC ¶¶ 231–53. That retaliation extended past his time at the CET, as the same individuals retaliated against Officer Savage after he left the CET in acts that perpetuated the earlier acts of racial retaliation.[7] *Id.* ¶¶ 250–53.

Whether CET supervisors acted as final policymakers for Worcester County, thereby imputing their actions to the County, presents a fact question for discovery. Nowhere does state law define whether a task force created by a county sheriff to meet county drug enforcement needs is a state or county policymaker, or whether the personnel, disciplinary, and workplace environment within that CET are controlled by final state or county policymakers.

Indeed, all appearances are that the CET is exercising county policymaking authority. The CET was formed to tackle a county drug problem: its goal is "to reduce drug trafficking activities within Worcester County." *Worcester County Meeting Minutes* at 2..[8] It was created by the WCSO in 2008, and the Sheriff himself makes personnel decisions about who should be

[7] Acts of retaliation by the same individuals that previously engaged in racial discrimination can be a "mixture of retaliation and continued sexual harassment" and are actionable under the Fourteenth Amendment. *Beardsley v. Webb*, 30 F.3d 524, 530 (4th Cir. 1994); *see also Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 82 (2d Cir. 2015) (holding that Section 1983 implicitly addresses retaliation claims because "retaliation is a form of discrimination").

[8] As explained in note 2, *supra*, it is appropriate for the Court to take judicial notice of information on the County's website in light of the WCSO's contentions in its motion to dismiss that are inconsistent with such public documents.

on the CET, free from state control. *See* Reggie Mason, Re-Elect Reggie Mason for Worcester County Sheriff, at 3 (2014), http://reelectreggiemasonforsheriff.bravesites.com/your-worcester-county-sheriffs-department. One of the primary ways the CET is effective is by partnering with municipal police departments either on specific projects or by detailing police officers from municipalities to the CET. *Worcester County Meeting Minutes* at 2.; *Ocean Pines Newsletter* at 11.. This cooperation is on at least some occasions incorporated into formal memoranda of understanding with local police departments that must be approved by the Worcester County Commissioners. *Worcester County Meeting Minutes* at 2. Indeed, the County Code contains an explicit provision that any mutual aid agreement for law enforcement activities must be approved by the WCSO and executed by the County, and this provision creates an inference that the CET itself was approved by the County. Worcester Cty., Md. Code, Public Safety, §7-104 (2005). By contrast, there is no indication that these agreements must be approved by the State Police. *Worcester County Meeting Minutes* at 2. In short, although the members of the CET are provided by state, county, and municipal government, the CET appears to be under County's control. This conclusion is supported by the factual allegations in the complaint: the County Sheriff provided the initial location for the CET and continues to provide much of the equipment and many of the vehicles used by the CET. FAC ¶ 57.

The specific functions of the CET implicated by the retaliation claim are also functions over which the County traditionally has policymaking authority, and where the FAC sufficiently alleges control by the County, acting through the County Sheriff. The supervisors on the CET were delegated policymaking authority by the County to determine the duties and priorities of members of the CET, set personnel and technology policies, and conduct disciplinary procedures. FAC ¶¶ 59, 208. It appears that they were given authority to act as the final

policymakers for the WCSO for these functions, without day-to-day oversight. *Id.* But even if they remained under the general control of the County Sheriff, state law also provides that personnel policies are determined by the County rather than the state. Md. Code Cts. & Jud. Proc. § 2-309 ("[T]he personnel rules and regulations of Worcester County as adopted by the County Commissioners shall apply to all employees of the Sheriff of Worcester County . . . .").

This initial information indicating that the CET exercises county policymaking authority is sufficient to state a claim that the County is liable for policies or customs of the CET. The exact nature of the relationship, "informal practices," and degree of delegation between the WCSO and the CET are proper subjects for discovery, not resolution on a motion to dismiss.

Defendants ignore any discussion about specific functions, and place primary emphasis on the fact that courts have held that a county sheriff is a designated state constitutional official for state-law claims. WCSO Br. at 13 (collecting cases). But for purposes of § 1983 liability, a county cannot insulate itself from liability by "simply labeling as a state official an official who clearly makes county policy." *McMillian*, 520 U.S. at 786.

B. Even if the WCSO Had Acted as a State Policy Maker, Officer Savage Has Adequately Alleged that Worcester County Is a Joint Employer.

1. *The Joint Employer Status of Worcester County Requires A Factual Determination.*

Even if Defendants were correct that the CET did not exercise county policymaking authority, it would not resolve the County's potential liability for the conduct of CET members. The County still 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.[9] *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").

[9] As stated in the FAC and the other Memoranda of Law in Opposition filed today, Officer Savage "expect[s] to add further causes of action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), once those claims are administratively exhausted before the EEOC and become ripe for suit." FAC ¶ 11. At this stage, the EEOC has made findings of "reasonable cause" that the WCSO was an employer of then-Detective Savage and that Detective Savage was exposed to a racially hostile work environment and retaliation for which the WSCO could be liable. Those findings have been referred to the Department of Justice for further action.

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.*

This inquiry is fact-intensive and courts in this Circuit applying the *Butler* test have looked carefully at all available facts to see if an employee can make out a claim under the hybrid test. In *Porchea v. Google*, for example, the District of South Carolina painstakingly reviewed a sexual harassment complaint of a contractor's employee in a Google plant and found that the plaintiff had alleged enough facts to make out a claim that both Google and her contractor-employer were joint employers under Title VII because of, *inter alia*, the nature of Google's control on her work. *Porchea v. Google, Inc.* No. 2:15-2783-RMG-BM, 2015 WL 7444373, at **6–8 (D.S.C. Nov. 3, 2015), *report and recommendation adopted*, No. 2:15-CV-

2783-RMG, 2015 WL 7454517 (D.S.C. Nov. 23, 2015). Likewise, the Eastern District of Virginia found that the Navy was a contractor's employer as a matter of law after applying all nine of *Butler*'s factors to the facts in the record and finding that the Navy exercised sufficient control over the plaintiff. *Crump*, 2015 WL 5601885, at *17–24. Finally, the Fourth Circuit itself, in *Butler*, looked at the amount of control that an employer had over temporary workers and held that the fact that there was no difference in the work done by the temporary employees and regular employees meant that the company was the employer of the temporary workers as a matter of law. 793 F.3d at 415.

As demonstrated in these cases, the joint employer analysis is a fact-based, totality of the circumstances inquiry that requires discovery and is not amenable to resolution on a motion to dismiss before discovery is conducted. *See Presley v. City of Charlottesville*, 464 F.3d 480, 483 (4th Cir. 2006) ("[T]he purpose of Rule 12(b)(6) is to test the sufficiency of a complaint and not to resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." (internal quotations omitted)); *West v. J.O. Stevenson, Inc.*, Civil Action No. 7:15-CV-87-FL, 2016 WL 740431, at *8 (E.D.N.C. May 22, 2016) ("at the motion to dismiss stage the fact-specific inquiry required to determine whether plaintiff is 'jointly employed' by two or more defendants . . . is all but impossible.").

Discovery has not begun in this case, and Officer Savage should be allowed to examine witnesses and review documents relevant to whether the County was his joint employer before the Court considers the issue for resolution. The discovery would focus on questions related to whether the County 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.

2. *Officer Savage Has Alleged Sufficient Facts In His Complaint To Make a Plausible Claim that Worcester County was His Employer.*

The Federal Rules of Civil Procedure do not require Officer Savage to prove his entire case regarding his employment with the County based only on his First Amended Complaint without the aid of discovery. *See Chao v. Rivendell Woods, Inc.*, 415 F.3d 342, 349 (4th Cir. 2005) (providing that the complaint is not required to "make a case" against a defendant or even "forecast evidence sufficient to prove an element" of the claim). Nevertheless, Officer Savage has alleged sufficient facts regarding the joint employer status of Worcester County to satisfy the legal standards necessary to avoid dismissal under Rule 12(b)(6). *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

Specifically, Officer Savage alleges that "Worcester County controls the practices of the Worcester County Sheriff's Office" and that during his "tenure on the [CET], the Worcester County Sheriff's Office and Defendant Passwaters, a sergeant with the Worcester County Sheriff's Office and one of Officer Savage's assigned supervisors of the [CET], exercised significant control over Officer Savage, supervised his day-to-day activities and furnished his equipment and place of work." FAC ¶ 208. Officer Savage further alleges that Defendant Passwaters had "direct supervision [over him] and the other [CET] members," *id.* ¶ 28, and that Passwaters had "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. Furthermore, Officer Savage alleges that Passwaters was "required to report misconduct by any [CET] member to that member's parent agency," *id.* ¶ 64, and that Passwaters determined his duties and was "responsible for preparing his employment evaluation and forwarding that report to Chief Sewell. That evaluation could affect Officer Savage's rank, pay and future prospects within the Pocomoke City Police Department." *Id.* ¶ 65. These facts

provide a sufficient basis to satisfy applicable pleading requirements and defeat the Defendants' motion to dismiss.[10]

III. OFFICER SAVAGE HAS ADEQUATELY PLED FACTS SHOWING A HOSTILE WORK ENVIRONMENT BASED ON RACE AND IN RETALIATION FOR ENGAGING IN PROTECTED ACTIVITY UNDER 42 U.S.C. § 1983.

A. Defendants Misstate and Misapply The Legal Standard Used To Determine Whether Officer Savage Has Pled Sufficient Facts For A Hostile Work Environment Claim Under the Fourteenth Amendment.

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.*, Civil Action No. BPG-08-2203, 2010 WL 9460565, at *10 (D. Md. July 15, 2010), *aff'd sub nom. Maupin v. Howard Cty. Pub. Sch. Sys.*, 420 F. App'x 227 (4th Cir. 2011), *as amended on denial of reh'g and reh'g en banc* (May 18, 2011) (citing *Keller v. Prince George's County*, 827 F.2d 952 (4th Cir. 1987)). In addition, retaliatory conduct that "maintain[s] and reinforce[s]" prior acts of discrimination is actionable through a hostile work environment claim under 42 U.S.C. § 1983. *Beardsley*, 30 F.3d at 530.

To state a hostile work environment claim under § 1983 or Title VII, 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)

[10] As noted in Plaintiffs' opposition to the Worcester County motion to dismiss, there is a bit of a shell game going on here among the Defendants. Worcester County and the WCSO disclaim any control over the CET and argue that it is a state entity. Yet, the MSP Defendants do not endorse this position; in fact they seem to suggest that Patricia Donaldson, the CET supervisor from the MSP, did not evaluate the performance of then-Detective Savage. The City of Pocomoke also disclaims the CET. This is exactly the situation that the doctrine of joint employer in civil rights law was designed to address. If the Defendants all had their way, no person or entity could be held responsible as Savage's employer during his tenure on the CET—an absurdity the law does not abide.

(*citing Causey v. Balog*, 162 F.3d 795 (4th Cir.1998)) (emphasis added); *Jackson v. State of Maryland*, 171 F. Supp. 2d 532, 541 (D. Md. 2001) (applying same hostile work environment standard to Title VII and Section 1983 claims). 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) (en banc) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993)) (internal quotation marks omitted) (emphasis added). As such Defendants' contention (at 15–19) that harassment may be shown only by demonstrating pervasive conduct is incorrect as a matter of law.

The Fourth Circuit has held time and time again that "an isolated incident, if extremely serious, can create a hostile work environment." *Boyer-Liberto*, 786 F.3d at 285–86. In *Boyer-Liberto*, the Fourth Circuit *en banc*, determined that two instances of a racial slur, though not pervasive, were so severe that a reasonable jury could find a hostile work environment. The court held that "two uses of the 'porch monkey' epithet—whether viewed as a single incident or as a pair of discrete instances of harassment—were severe enough to engender a hostile work environment." *Id.* at 280. The court explained that "perhaps 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." *Id.* Furthermore, the court held that the fact that the party who uttered the epithet was a supervisor of the plaintiff made the conduct all the more severe. *Id.* at 278. Given the identity of the speaker and the content of the epithet, such "harassment, though perhaps 'isolated,' can properly be deemed to be 'extremely serious.'" *Id.* (quoting *Faragher v. City of*

Boca Raton, 524 U.S. 775, 788 (1998)). The court also rejected "any notion that [its] prior decisions . . . were meant to require more than a single incident of harassment in every viable hostile work environment case." *Id.*

Boyer-Liberto is not the only such case from the Fourth Circuit. In *Pryor v. United Air Lines, Inc.*, 791 F.3d 488, 490 (4th Cir. 2015), the plaintiff, an African American flight attendant working at Dulles Airport, "discovered in her company mailbox a paper note claiming to be a 'Nigger Tag—Federal Nigger Hunting License,' declaring that the holder was 'licensed to hunt & kill NIGGERS during the open search hereof in the U.S.' . . . A hand-drawn image of a person hanging from a pole or a tree appeared on one corner of the document, along with the words 'this is for you.'" Before that incident, plaintiff had been asked by an employee about rumors regarding Black flight attendants moonlighting as prostitutes and also found an apartment advertisement with a racist message in the breakroom. *Id.* at 492. The Fourth Circuit "agree[d] with the district court's determination that although the notes may not have been pervasive, 'a reasonable jury could find that [they] were sufficiently severe to alter the conditions of plaintiff's employment' and create a hostile work environment." *Id.* at 496. The Fourth Circuit also agreed that use of the slur "nigger . . . is the kind of insult that can create an abusive working environment in an instant." *Id.* The court held that the violent threat and image of a lynching added to the severity of the note. *Id.* at 497. The fact that the note was left in a mailbox accessible only to employees, and was left after the plaintiff received other threats and harassment, contributed to the court's finding of sufficient severity. *Id.*

Here, Officer Savage recites numerous incidents involving Defendants Passwaters and Wells, any one of which is "extremely serious" enough to create a hostile work environment. Officer Savage alleges, for example, that Defendant Passwaters "regularly referred to African

Americans as 'niggers'" in his presence and "repeatedly used the word in a sarcastic or demeaning tone . . . both orally and in written communications." FAC ¶ 67. As an example of this, the FAC recalls an incident in September 2012 where Passwaters played a video for the CET of a suspect he and Defendant Wells had arrested "us[ing] the word 'nigger' and its variants several times during the arrest." *Id.* ¶ 70. The FAC goes on to allege that "[a]fter viewing the dash camera footage of the arrest, Passwaters played and replayed the footage in front of the entire [CET] because he thought the footage was funny. During this incident, Passwaters informed members of the [CET] that 'he [was] about to drop the n-bomb,' referring to the word 'nigger.' After Passwaters gave this 'warning,' he, himself, proceeded to say the word." *Id.*

Equally egregious conduct occurred in December 2012 when Passwaters "repeatedly spoke to Officer Savage about lynching and the Ku Klux Klan." *Id.* ¶ 72. The FAC alleges that certain members of the CET, for which Passwaters had supervisory responsibility, *id.* ¶ 28, drove Officer Savage to "KKK Lane" in Stockton, Maryland, *id.* ¶ 73. When Officer Savage reported this conduct to Passwaters, his response was a cavalier, "ok." *Id.* ¶ 78. No disciplinary action was meted out. *Id.* These incidents involve precisely the types of "extremely serious" conduct the Fourth Circuit has found sufficient to create a hostile work environment as a matter of law. Thus, Passwaters is not entitled to dismissal of any claims against him in Count I of the FAC.

For these same reasons, Defendant Wells is not entitled to dismissal. Officer Savage alleges that beginning in 2012, Wells "streamed racially charged videos that used the word 'nigger' on his official work computer and that "[m]embers of the [CET] crowded around Wells' computer and watched and laughed about these videos." *Id.* ¶ 68. This conduct occurred once or twice a week. *Id.* The FAC also alleges that, "Wells asked Officer Savage why African Americans are offended when a White person uses the word 'nigger' and its variants." *Id.* ¶ 69.

Wells also queried how Officer Savage would feel if he called him a "nigger." *Id.* Furthermore, Wells was in attendance during the trip to "KKK Lane" and sought to intimidate Officer Savage by telling him that he "might see some Klan members or a noose in Stockton," *id.* ¶ 75, and that Wells had a chest in his attic with "white sheets and nooses," *id.* ¶ 76. Courts have found that a racially hostile work environment existed where the plaintiff alleged similar incidents involving the KKK. *See Gresham v. Midland Paint & Body Shop, Inc.*, No. 1:06-3069-RBH-JRM, 2008 WL 4488898, at *5 (D.S.C. Aug. 28, 2008), *report and recommendation adopted in part, rejected in part,* No. 1:06-CV-3069RBH, 2008 WL 4488890 (D.S.C. Sept. 30, 2008) (finding that racially hostile work environment existed where assistant manager Compton showed plaintiff a newspaper article concerning a reenactment of a lynching which occurred in 1946, including photographs placed in plaintiff's work area that appear with handwritten notations of the names of two African-Americans with nooses around their necks); *see also Taylor v. Cty. of Pulaski*, Civil Action No. 7:06CV00467, 2008 WL 4533977, at *1 (W.D. Va. Oct. 8, 2008) (finding that genuine issues of material fact exist regarding whether a defendants' behavior were "sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere" where among other things one defendant carved the initials "KKK" into the trailer porch where employees clocked in and received their work assignments for the day). For these reasons, Wells is not entitled to dismissal of the Count I hostile environment claim against him.

B. Defendants Are Liable For Unconstitutional Retaliation Even If It Occurred After Officer Savage Resigned From The CET.

1. *Employer Liability for Retaliation Does Not End When the Employee Leaves the Company.*

Defendants argue (at 20–21) that, even if the WCSO were a Joint Employer, the County cannot be held liable for retaliation that took place after Officer Savage resigned from CET and returned full-time to the PCPD. This argument has no basis in law.

In the past two decades, the Supreme Court has decided two cases holding that an "employer," as defined in Title VII of the Civil Rights Act and similar statutes, may still be held liable for retaliation after an employee leaves the company. First, in *Robinson v. Shell Oil Company*, 519 U.S. 337 (1997), the Supreme Court unanimously held that the term "employees" as used in Title VII's anti-retaliation provision should be read broadly to extend protection to former employees. *Robinson* involved a claim by an ex-employee asserting that his former employer gave him a negative job reference in retaliation for his having previously filed an EEOC charge. *Id.* at 339-40. The Supreme Court began its reasoning by concluding that the term "employees" in Title VII is ambiguous because it contains no temporal qualifier and several provisions in Title VII use the term "employees" to mean something more inclusive than "current employees." *Id.* at 341–42. Concluding that the term "employee" was unclear, the Court was left to resolve the ambiguity. *Id.* According to the Court, both the broader context provided by other sections of the statute and Congress' intent when it passed the anti-retaliation provision supported an inclusive interpretation of the protected class of "employees." *Id.* at 345-46. In fact, the statute plainly contemplates that "former employees will make use of the remedial mechanisms of Title VII" when asserting claims for retaliatory discharge, which inherently must be brought by former employees. *Id.* at 345. Furthermore, the exclusion of former employees from protection would "undermine the effectiveness of Title VII by allowing the threat of post-employment retaliation to deter victims of discrimination from complaining to the EEOC, and would provide a perverse incentive for employers to fire employees who might bring Title VII claims." *Id.* at 346.

In 2006, the Supreme Court issued a second opinion, which further expanded the scope of post-employment retaliation claims. In *Burlington Northern & Santa Fe Railway Co. v. White*,

548 U.S. 53 (2006), the Court held that Title VII retaliation claims are not limited to discriminatory actions that affect the terms or conditions of employment. Instead, addressing a claim involving reassignment to an equal paying, but less desirable job, the court concluded that the act's anti-retaliation provision covers any employer action that would be "materially adverse" to a reasonable employee or applicant, i.e., one which "might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington*, 548 U.S. at 68 (quotation marks and citations omitted).

The protections afforded by the U.S. Constitution are not limited to employees in any way. And unlike Title VII, § 1983 is not confined to employment claims. Section 1983 is intended to protect a broad group of people from unconstitutional action. Even where statutes are limited to employees, former employees are covered. Courts have routinely extended the Supreme Court's reasoning in *Robinson* and *Burlington Northern* to analogous anti-retaliation provisions in other civil rights statutes. For example, noting almost identical statutory language and intent, courts have held that the anti-retaliation provisions of both the Family and Medical Leave Act and the Fair Labor Standards Act protect former employees. *See, e.g.*, *Darveau v. Detecon Inc.*, 515 F.3d 334, 342 (4th Cir. 2008) (concluding that the FLSA protects former employees from retaliation); *Smith v. Bellsouth Telecomms. Inc.*, 273 F.3d 1303, 1307 (11th Cir. 2001) (holding that a former employee who was denied re-employment because he previously took FMLA leave could proceed on his FMLA retaliation claim); *Fitzsimmons v. Cardiology Assocs. of Fredericksburg Ltd.*, No. 3:15cv72, 2015 WL 4937461, at *7 (E.D. Va. Aug. 18, 2015) (holding that a former employee may be able to state a claim for retaliation under the False Claims Act where he was denied post-termination payments due under his employment agreement, which set the "terms and conditions" of his employment); *Shukh v. Seagate Tech.*,

LLC, Civil No. 10-404 JRT JJK, 2011 WL 1258510, at *14 (D. Minn. Mar. 30, 2011) (denying defendant's motion to dismiss where the plaintiff had alleged that his former employer had spread derogatory and negative rumors about him after his termination because he had filed a complaint with the EEOC alleging national-origin discrimination); *Coles v. Deltaville Boatyard, LLC*, No. 3:10cv491, 2011 WL 666050, at *3–4, *9 (E.D. Va. Feb. 14, 2011) (holding that plaintiff's allegations that his former employer engaged in an outright campaign to ensure that the plaintiff never worked in the town again constituted a prima facie case of retaliation under both Title VII and 42 USC. § 1981). In light of these precedents, extending the Supreme Court's reasoning in *Robinson* and *Burlington Northern* to retaliation claims brought under § 1983 is eminently reasonable. *See, e.g.*, *Vega*, 801 F.3d at 82.

2. *The FAC Establishes a Prima Facie Case of Retaliation Against Officer Savage by His Former Employer.*

To establish a prima facie case of retaliation, Officer Savage was required to plead that he: (1) engaged in a protected activity; (2) his employer acted adversely against him; and (3) the protected activity and the adverse action were causally connected. *Foster v. Univ. of Maryland-E. Shore*, 787 F.3d 243, 253 (4th Cir. 2015). The FAC adequately pleads each element of a Fourteenth Amendment retaliation claim under § 1983.

First, the FAC establishes that Officer Savage engaged in protected activity both before and after he resigned from the CET. Contrary to Defendants' myopic view (at 21–22) that only the filing of an EEOC complaint constitutes protected activity, the law affords much broader protection. "Protected activity" includes "utilizing informal grievance procedures ... staging informal protests, [or] voicing one's opinions in order to bring attention to an employer's discriminatory activities." *Laughlin v. Metro. Washington Airports Auth.*, 149 F.3d 253, 258-59 (4th Cir. 1998). Officer Savage easily meets this standard:

> In April 2014, Officer Savage reported racial discrimination outside the [CET] after a fake food stamp was left near his desk. On May 31, 2014, he reported a second incident of a racially discriminatory text message, which Chief Sewell then described in a letter to the Department of Maryland State Police. Finally, in his June 12, 2014, resignation letter, he raised the racial discrimination and hostility within the [CET] for a third time.
>
> ….
>
> As a result of past overt racial harassment and its perpetuation through false rumors, on July 21, 2014, Officer Savage filed a complaint against the [WCSO] with the EEOC.

FAC ¶¶ 123, 236.

Second, the FAC contains allegations that Defendants acted adversely against Officer Savage after he engaged in constitutionally protected activity. Because "government retaliation tends to chill" an individual's constitutional rights, "public officials may not, as a general rule, respond to an individual's protected activity with conduct or speech even though that conduct or speech would otherwise be a lawful exercise of public authority." *Baltimore Sun Co. v. Ehrlich*, 437 F.3d 410, 415 (4th Cir. 2006). Thus, "[a] retaliation claim under 42 U.S.C. § 1983 must establish that the government responded to the plaintiff's constitutionally protected activity with conduct or speech that would chill or adversely affect his protected activity." *Id.* at 416. To determine whether government conduct or speech has a chilling or adverse impact, the Fourth Circuit applies an objective test that can be resolved as a matter of law: "[W]e determine whether a similarly situated person of 'ordinary firmness' reasonably would be chilled by the government conduct in light of the circumstances presented in the particular case." *Id.*

An employer's assertion of false accusations against a former employee has a chilling or adverse impact as a matter of law. *Robinson*, 519 U.S. at 339 (holding that negative employment reference of a former employee was a prohibited retaliatory material adverse action); *Shukh*, 2011 WL 1258510, at *14 (holding that plaintiff "stated a claim for relief for retaliation that is

plausible on its face" where plaintiff's former employer spread rumors about him). Officer Savage has pled facts satisfying this standard. After he reported discrimination in April and May of 2014, Passwaters began to retaliate against him by (1) falsely accusing him of tardiness; (2) falsely accusing him of using drugs; and (3) baselessly claiming that his debt collectors and "wife" were repeatedly calling the WCSO. FAC ¶ 244. Passwaters intensified his acts of retaliation after the submission of Officer Savage's June 2014 resignation letter by spreading rumors to Defendants Blake and Smack. *Id.* ¶ 245. Passwaters continued to spread rumors about Officer Savage post-resignation. On July 15, 2014, for example, Passwaters spread a rumor to Defendants Morrison and Blake that "Officer Savage used the false identification he had been issued for undercover work to secure multiple fraudulent loans." *Id.*¶ 119. Chief Deputy Smack also engaged in retaliation against Officer Savage. "Smack wrote a letter accusing Officer Savage of using false identification and stating that the [WCSO] would not send any backup for Officer Savage." *Id.* ¶ 250. These retaliatory acts had an adverse impact on Officer Savage because "a similarly situated person of 'ordinary firmness' reasonably would be chilled by the government conduct in light of the circumstances presented in th[is] particular case." *The Baltimore Sun Co.*, 437 F.3d at 416; *Burlington*, 548 U.S. at 68 (holding that adverse impact shown where retaliatory conduct "might have dissuaded a reasonable worker from making or supporting a charge of discrimination").

Third, Officer Savage has sufficiently pled that a causal link exists between his protected activity and Defendants' retaliatory conduct. "[T]he presence of a 'close' temporal relationship between the protected activity and the alleged adverse action can be sufficient to establish a causal connection at the pleading stage." *Bowman v. Baltimore City Bd. of Sch. Commissioners*, No. CV RDB-15-01282, 2016 WL 1159259, at *5 (D. Md. Mar. 24, 2016) (citing *Clark County*

Sch. Dist. v. Breeden, 532 U.S. 268, 273, (2001) (holding that alleged "temporal proximity" must be "very close" to satisfy this third element)). Where temporal proximity is close and the employer knew the employee engaged in protected activity, a causal inference is established. *See Price v. Thompson*, 380 F.3d 209, 213 (4th Cir. 2004). "Courts have found very close temporal proximity when the protected activity and adverse action were six weeks apart." *Westmoreland v. Prince George's Cty.*, Civil Action No. TDC-14-0821, 2015 WL 996752, at *16 (D. Md. Mar. 4, 2015); *See Webb v. Maryland Dep't of Health & Mental Hygiene*, Civil Action No. RBD 04–387, 2006 WL 2700748, at *9 (D. Md. Sept. 14, 2006).

Here, the temporal relationship between Officer Savage's protected activity and Defendants' adverse action falls well within recognized parameters. At a minimum, Officer Savage engaged in protected activity in April 2014, on March 31, 2014, June 12, 2014, and July 21, 2014. FAC ¶¶ 123, 236. Defendants' adverse actions occurred on at least three occasions: June 3, 2014, July 15, 2014, and July 29, 2014. *Id.* ¶¶ 91-92, 119, 134. Defendants' contention (at 21) that "the timeline of events simply fails to allow for an inference of causation" is therefore baseless. [11]

C. Officer Savage Adequately Pled That Defendants Passwaters and Smack Unlawfully Retaliated Against Him For Exercising His First Amendment Rights.

To survive a motion to dismiss a First Amendment retaliation claim brought by a public employee under §1983, a plaintiff must adequately plead that (1) he spoke as (i) a citizen on a (ii) matter of public concern; (2) his and the public's interests in the First Amendment expression outweigh the employer's legitimate interest in the efficient operation of the workplace, if that interest was infringed by the communication, and (3) the protected speech was a substantial factor in the decision to take adverse employment action. *Smith v. Gilchrist*, 749 F.3d 302, 308

[11] Plaintiff agrees that Defendant Wells should be dismissed from the retaliation claims in Count I.

(4th Cir. 2014); *Love–Lane v. Martin*, 355 F.3d 766, 776 (4th Cir. 2004). Officer Savage adequately pled each element of this test.

First, there can be no dispute that Officer Savage spoke as a citizen when he exercised his First Amendment rights. "It is clearly established that a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech." *Rankin v. McPherson*, 483 U.S. 378, 383 (1987). The Supreme Court has stated that "a citizen who works for the government is nonetheless a citizen. The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006). Indeed, "public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Id.* at 417.

Nor can there be any dispute that Officer Savage spoke out about matters of public concern. "Speech involves a matter of public concern when it involves an issue of social, political, or other interest to a community." *Kirby v. City of Elizabeth City, N.C.*, 388 F.3d 440, 446 (4th Cir. 2004). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 147–48 (1983). "This is a highly fact-intensive inquiry, which may be influenced by any variety of factors." *Stickley v. Sutherly*, 416 F. App'x. 268, 272 (4th Cir. 2011). It is well established that complaints involving allegations of discrimination against others generally constitute speech of a public concern. *Givhan v. Western Line Consol. Sch. Dist.*, 439 U.S. 410 (1979); *Love-Lane*, 355 F.3d at 776; *Arvinger v. Mayor of*

Baltimore, 862 F.2d 75, 79 (4th Cir. 1988) ("Speech given in the course of an official investigation of discrimination unquestionably qualifies as a 'matter of public concern'"); *Robinson v. Balog*, 160 F.3d 183, 188 (4th Cir. 1998) (speech seeking to bring to light "actual or potential wrongdoing or breach of public trust" is speech on a matter of public concern); *Cromer v. Brown*, 88 F.3d 1315, 1326 (4th Cir. 1996) (allegations of racial discrimination within a law enforcement agency are matters of "serious public import"). Importantly, the Fourth Circuit eschews an all-or-nothing approach and has held that even if only part of the communication touched on a matter of public concern, the first element of the above-defined standard is still satisfied. *See Connick*, 461 U.S. at 149 ("Because *one of the questions* in Myers' survey touched upon a matter of public concern, and contributed to her discharge[,] we must determine whether Connick was justified in discharging Myers.") (emphasis added); *see also Stroman v. Colleton Cty. Sch. Dist.*, 981 F.2d 152, 158 (4th Cir.1992) (treating as a matter of public concern a letter that was in large part a discussion of personal grievances but also mentioned a matter that could have been of public concern). Furthermore, that Officer Savage spoke out about matters of public concern is underscored by the extensive media coverage and public outcry in the local press.[12]

[12] *See, e.g.*, Sheryl Gay Stolberg, Fired Police Chief and 2 Others Sue, Charging Racial Bias in Maryland, N.Y. Times (Jan. 21, 2016), http://www.nytimes.com/2016/01/22/us/maryland-pokomoke-city-police-racial-discrimination-suit.html?_r=0; DeNeen L. Brown, Three Black Officers File Suit Against Pocomoke City, Md., Alleging Racial Discrimination, Washington Post (Jan. 21, 2016), https://www.washingtonpost.com/news/local/wp/2016/01/21/three-black-officers-file-suit-against-pocomoke-city-md-alleging-racial-discrimination/; DeNeen L. Brown, Black Officer in Pocomoke City, Md., Says 'N-Word' Complaint Led to Firing, Washington Post (Nov. 5, 2015), https://www.washingtonpost.com/local/black-officer-in-pocomoke-city-md-says-n-word-complaint-led-to-firing/2015/11/04/b320a43a-831a-11e5-9afb-0c971f713d0c_story.html; *Pocomoke City Officer Claims Harassment*, WBOC16, (Aug. 14, 2014), http://www.wboc.com/story/26285681/pocomoke-city-officer-claims-harassment; Scott Broom and Vanessa Judkins, *Federal Investigators to Probe Racism Claims in Pocomoke City*, WUSA9 and DelmarvaNow (July 21, 2015), http://phxux.wusa9.com/story/news/local/maryland/2015/07/20/pocomoke-city-investigation-over-police-chief-firing/30433099/; Randall Chase, *Firing of Pocomoke City's First Black Police Chief Leads to Turmoil*, THE ASSOCIATED PRESS (Aug. 4, 2015), http://www.baltimoresun.com/news/maryland/eastern-shore/bs-md-es-police-chief-fired-20150803-story.html.

The Fourth Circuit's decisions in *Cutts v. Peed*, 17 F. App'x 132 (4th Cir. 2001) and *Campbell v. Galloway*, 483 F.3d 258 (4th Cir. 2007) are particularly instructive. In *Cutts*, three African-American deputy sheriffs filed an employment discrimination suit that included allegations of retaliation for speech they made concerning racial discrimination in the sheriff's office. The discriminatory conduct alleged in *Cutts* bears some similarity to Defendants' conduct in this case:

> The record brims with evidence of a racially hostile work environment in the Fairfax Sheriff's Office. Employees felt free to, and frequently did, use the word "NIGGER," Shabazz found in his locker a crude drawing of KKK insignia and a note that ordered him to "Stop snitching Nigger." Cutts was given a primitive drawing/photograph of a "black face" and told it was a photograph of himself. A "complaint" that Cutts had a "white wife" stayed for years in Cutts' personnel file. Employees boasted of their affinity with the "Aryan Nation." In a throwback to the Jim Crow era, Shabazz was twice denied equal access to a bathroom to which white deputies had full access, resulting in extreme emotional pain. (JA pp. 60-61, 493-494). The list of racial incidents is endless.

Cutts v. Peed, 2000 WL 33990086, at *26 (4th Cir. Apr. 28, 2000) (Appellees' Opening Brief).

In deciding whether the deputy sheriffs' complaints about these and other incidents of discrimination were matters of public concern, the Fourth Circuit explained that "[a]lthough internal employment matters are not matters of public concern, statements to the public, like those at issue here, involving purported fraud and racial discrimination in a law enforcement agency, indisputably do constitute matters of public concern." *Cutts*, 17 F. App'x at 135.

Similarly, in *Campbell*, a former police officer sued the Town of Southern Pines, the police department, and several town employees, alleging, *inter alia*, First Amendment retaliation when she was fired after filing several complaints of sexual harassment with the police chief, as well as gender discrimination and retaliation charges with the EEOC. 483 F.3d at 262–64. In reviewing the district court's grant of summary judgment for the defendants, the Fourth Circuit noted that, although "not every statement about sexual discrimination involves a matter of public

concern, . . . [t]o conclude, as the defendants would have us do, that a personal complaint about discrimination affecting only the complaining employee can *never* amount to an issue of public concern could improperly limit the range of speech that is protected by the First Amendment." *Id.* at 269 (emphasis in original). Shifting to the facts in that matter, the Fourth Circuit concluded that Campbell had met her burden under *Connick* because she made complaints as to matters of both public safety, such as "that male officers did not back her up on dangerous calls," *id.* at 269, and "complaints about inappropriate conduct directed towards other female [officers]," *id.*

Here, contrary to Defendants' arguments (at 25) that Officer Savage's complaints "related entirely to his own employment grievances," the FAC makes clear that his speech involved matters of public concern, such as racial harassment in the CET, FAC ¶¶ 123, 236, and public safety, *see id*. ¶¶139–140 (complaining about Defendant Smack's pledge to "not respond to any future emergency call or request for backup made by Officer Savage" and noting that on at least two occasions, he could not secure the assistance of a K-9 unit from WCSO).

Second, because Defendants have not posited ***any*** government interest in managing internal affairs, Count IV is not subject to dismissal. That is, to determine whether the Defendants' conduct in chilling Officer Savage's speech was justified, this court must weigh the "interests of [Officer Savage], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Bd. of Educ.of Twp. High School District*, 391 U.S. 563 (1968). Defendants cite no such interest in their motion to dismiss. Nor would there be any legitimate interest in a governmental employer silencing allegations of racial hostility,

retaliation and the failure to provide back-up to a law enforcement officer based on race or in retaliation for complaints of racial discrimination.

Third, as explained in Section III.B.2 *supra*, Officer Savage has adequately pled and demonstrated a close temporal relationship between his protected activity and Defendants' adverse actions. There is, therefore, no basis upon which to dismiss Defendants Smack or Passwaters from Count IV.

IV. OFFICER SAVAGE ADEQUATELY PLED A CIVIL CONSPIRACY CHARGE UNDER 42 U.S.C. § 1985.

Officer Savage adequately pled a civil conspiracy charge, and Defendants' arguments for dismissal of Count VI should be denied because Defendants misread both the law and Officer Savage's allegations. Section 2 of the Civil Rights Act of 1871 (codified at 42 U.S.C. § 1985), also known as the Ku Klux Klan Act, prohibits two or more people from conspiring to deprive a person or class of persons of the equal protection of the law. To establish a civil conspiracy claim, a plaintiff must show:

> (1) a conspiracy of two or more persons, (2) who are motivated by a specific class-based, invidiously discriminatory animus to (3) deprive the plaintiff of the equal enjoyment of rights secured by the law to all, (4) and which results in injury to the plaintiff as (5) a consequence of an overt act committed by the defendants in connection with the conspiracy.

Simmons v. Poe, 47 F.3d 1370, 1376 (4th Cir. 1995) (citing *Buchi v. Kirven*, 775 F.2d 1240, 1257 (4th Cir. 1985)).

The Reconstruction-era Congress that created § 1985 stated that it was a mechanism to fight discrimination rather than a "general federal tort law." *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). The Supreme Court has not clarified which federal statutory rights are protected under § 1985. Yet the Court has held that § 1985 cannot be used as a remedy for violations of Title VII of the 1964 Civil Rights Act because Title VII provides an extensive remedial scheme

of administrative exhaustion. Authorizing suits under § 1985 would bypass that exhaustion requirement, thus hurting the purpose of Title VII. *Great Am. Fed. Savs. & Loan Ass'n v. Novotny*, 442 U.S. 366, 377-378 (1979). The holding in *Novotny* was narrow: "The Court's specific holding is that 42 U.S.C. § 1985(3) may not be invoked to redress violations of Title VII." *Id*. at 379 (Powell, J., concurring). Therefore, the *Novotny* Court did not do what Defendants suggest: close the door for the use of § 1985 as a remedy for victims of discrimination by public employers.

Several courts have distinguished *Novotny* and held that the substantive rights created by 42 U.S.C. § 1981 can satisfy elements three and four of a § 1985 claim.[13] Section 1981 prohibits racial discrimination in the making and enforcement of contracts, including employment as well as retaliation for complaining about violations of § 1981. *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 457 (2008). Courts are divided as to whether rights arising under § 1981 can be enforced through § 1985, *compare Johnson v. Greater Se. Community Hosp. Corp.*, 903 F. Supp. 140, 153 (D.D.C. 1995) ("a violation of federal rights secured by § 1981 may serve as the basis of § 1985 claim" (citing *Alder v. Columbia Historical Soc'y*, 690 F. Supp. 9 (D.D.C. 1988)) *with Brown v. Philip Morris, Inc.*, 250 F.3d 789, 806 (3d Cir. 2001) (recognizing differing views but not ultimately reaching a conclusion of whether § 1981 claims could be brought under § 1985). Notably, the Fourth Circuit has not yet addressed the issue.

Nearly two decades ago, Judge Miller of this Court authored a thorough analysis concluding that *Novotny* did not preclude § 1985 as a remedial vehicle for § 1981 claims. *Witten v. A.H. Smith & Co.*, 567 F. Supp. 1063 (D. Md. 1983). The *Witten* opinion first explained that the *Novotny* Court based its ruling on the remedial scheme of Title VII, not on the substantive

[13] Section 1981, contained in Section 1 of the Civil Rights Act of 1866, was enacted in a precursor to the 1871 Act. *Jett*, 491 U.S. at 713–14 (1989).

rights embodied in Title VII. *Id.* at 1067. Next, it noted that *Notovny*'s holding was limited to Title VII itself and not all federal statutes; the majority opinion did not join Justice Stevens' concurrence, which stated that § 1985 could not be used to enforce any statutory rights. *Id.* (citing *Novotny*, 442 U.S. at 385 (Stevens, J., concurring)). The *Witten* opinion provided a lengthy legislative history of § 1985, which was passed as a way to combat the rise of the Klu Klux Klan activity in the Reconstruction Era South. *Id.* at 1068-69. The court concluded that the 42nd Congress intentionally did not limit the rights that § 1985(3) could protect, but rather found that the overall purpose was in harmony with that of § 1981: the eradication of racism and the promotion of equal citizenship in the wake of the ratification of the Thirteenth and Fourteenth Amendments. *Id.* at 1071-72. The opinion ultimately concludes that § 1981 was a bedrock component of the statutory scheme created along with and under the Constitutional authority of Reconstruction Amendments and thus it is a "proper substantive basis for a claim of redress under § 1985(3)." *Id.* at 1072. *Cf. Hodgin v. Jefferson*, 447 F. Supp. 804, 808 (D. Md. 1978) (equal pay act a substantive basis for a § 1985 claim).

Witten is persuasive because it focuses on the clear legislative history reflecting that Congress intended § 1985 to be a tool for the enforcement of the rights that were created and declared in § 1981. It is also similar to legislative analysis used by the Supreme Court in *Jett*, which held that § 1983—enacted in the same 1877 Civil Rights Act—is a remedial tool for use by public employees to vindicate the rights created by § 1981. Therefore, this Court should find that because Congress enacted § 1985 to redress the discrimination that § 1981 prohibits, the violation of § 1981 by persons acting in concert may be pled as a conspiracy under § 1985.

An additional source of rights enforceable under § 1985 is the Constitution itself, specifically the Fourteenth Amendment. "No state . . . shall deny any person within its

jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV § 1. One such denial of equal protection occurs when a public employer denies equal terms and conditions of employment to an individual on the basis of his race. The Fourth Circuit has made very clear that—in spite of the *Novotny* decision—Title VII does not pre-empt state and municipal employees from bringing employment discrimination claims under the Fourteenth Amendment and the statutory vehicle of 42 U.S.C. § 1983. *Keller*, 827 F.2d at 963.

As described above, § 1983 is part of the same 1871 Civil Rights Act that created § 1985. Like § 1985, § 1983 is a statutory vehicle through which victims of discrimination can seek redress for violations for the Constitution. Accordingly, as an individual claim alleging discrimination in violation of the Fourteenth Amendment is actionable under § 1985, the same form of claim against defendants who allegedly acted in concert is actionable under § 1985. Here, Officer Savage alleged conspiracy claims for violations of both § 1981 and the Fourteenth Amendment, and thus he has alleged elements three and four of a viable § 1985 claim.

Defendants' arguments that Officer Savage has not adequately alleged a conspiracy are equally erroneous. In order to make out the first element of a § 1985 claim, a plaintiff must allege a "meeting of the minds" among defendants to violate the plaintiff's rights. *Poe*, 47 F.3d at 1377 (citing *Caldeira v. County of Kauai*, 866 F.2d 1175, 1181 (9th Cir. 1989)).

There is no heightened pleading standard for § 1985 claims beyond that prescribed by Rule 8 of the Federal Rules of Civil Procedure. *Poe*, 47 F.3d at 1376. Even when the plaintiff's burden is higher at the summary-judgment phase, a plaintiff may defeat summary judgment on a § 1985 conspiracy claim with either direct or circumstantial evidence as long as the evidence "reasonably lead[s] to the inference that [Defendants] positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan." *Hinkle v. City of Clarksburg*,

81 F.3d 416, 421 (4th Cir. 1996) (citing *Hafner v. Brown*, 983 F.2d, 570, 576-77 (4th Cir. 1992)). If such circumstantial evidence can be used to prove a claim, a plaintiff should not be required to plead with absolute certainty the nature of every detail of the conspiracy. Therefore, Officer Savage has alleged sufficient, non-conclusory allegations that Defendants plausibly had a meeting of the minds to deprive him of equal employment. In particular, Defendant Smack acted on rumors created by Passwaters about Officer Savage. ¶¶ 134–38, 245–47. Although Officer Savage cannot know the exact details of communications among Defendants without discovery, he has alleged specific times in which they worked in together to violate his rights to equal employment.

Further, the FAC is replete with allegation of racial animus, *Facey v. Dae Sung Corp.*, 992 F. Supp. 2d 536, 541-42 (D. Md. 2014), including on the part of Passwaters and other Defendants named in the FAC, who were all central to the alleged conspiracy. *E.g.* FAC ¶¶ 66–104 (Passwaters); *id.* ¶¶ 106–112 (Oglesby); *id.* ¶¶ 143–167 (Blake). Accordingly Officer Savage respectfully requests that this Court deny Defendants' motions to dismiss Count VI of his First Amended Complaint.[14]

V. 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 racial discrimination in the making and enforcement of contracts. 42 U.S.C. § 1981. Passed in the wake of the Thirteenth Amendment's ratification, it was intended as a declaration of equal rights for newly freed slaves.

[14] In the alternative, if this Court finds that Officer Savage has not adequately pled sufficient facts to make out a claim under 42 U.S.C. § 1985(3), he respectfully requests that this Court allows him leave to amend just as this Court did for the § 1985 count in *Hejrika v. Md. Div. of Corr.*, 264 F. Supp. 2d 341, 343 (D. Md. 2003).

Jett, 491 U.S. at 713-14. The rights declared in § 1981 were, shortly thereafter, "constitutionalized" 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 engaged in by the Ku Klux Klan in the Reconstruction South and to provide an enforcement mechanism for the newly ratified Fourteenth Amendment. *Jett*, 491 U.S. at 722. Section 1 of that Act (codified at 42 U.S.C. § 1983) provided a civil damages remedy in federal court against state actors who had violated a person's federal or statutory constitutional rights.

In light of this legislative history—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 held that the 1991 Civil Rights Act did not create a new cause of action or change the result of *Jett*. *Dennis v. Cty. of Fairfax*, 55 F.3d 151, 156 (4th Cir. 1995).[15] However, the Fourth Circuit has not clarified

[15] The Ninth Circuit has taken the opposite position and held that the 1991 Civil Rights Act created an implied right of action against state actors. *Fed'n of African Am. Contractors v. City of Oakland*, 96 F.3d 1204, 1214 (9th Cir. 1996). Fourth Circuit cases also are not entirely consistent after *Dennis*, and Fourth Circuit caselaw is "somewhat murkier than that of other circuits" on whether § 1981 creates an implied right of action against state actors. *James v. Univ. of Maryland, Univ. Coll.*, No. CIV. PJM 12-2830, 2013 WL 3863943, at *2 (D. Md. July 23, 2013).

whether its *Dennis* holding precludes § 1981 actions against municipal officials in their individual capacities, and courts within this District have reached inconsistent conclusions 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 of whether they were sued in their individual or official capacities) *with Stout v. Reuschling*, Civil Action No. TDC-14-1555, 2015 WL 1461366, at *6 (D. Md. Mar. 27, 2015) (finding that *Dennis* is limited 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, however. Both *Jett* and *Dennis* limited a Plaintiff's ability to recover against municipal entities under § 1981 to cases where he can prove that the discriminatory act was a custom or policy of the city. *Dennis*, 151 F.3d at 156 (citing *Jett*, 491 U.S. at 735-36). But *Jett* and *Dennis* did not limit the rights created by § 1981: "We think that 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.[16]

That holding is supported by the text of § 1983, which creates a cause of action for violations of the "laws" of the United States, 42 U.S.C. § 1983. And the use of § 1983 as a remedial vehicle for § 1981 enforcement is consistent with the interpretation of other federal laws that do not include their own remedial scheme. *See, e.g.*, *Maine v. Thiboutot*, 448 U.S. 1 (1980) (allowing suits under § 1983 for a deprivation of welfare benefits under the Social

[16] Officer Savage also brings § 1983 claims for violations of his First and Fourteenth Amendment rights, but that should not foreclose his ability to plead § 1981 claims because those rights differ. For example, the right to be free from certain forms of retaliation is clearly established § 1981. *CBOCS*, 553 U.S. at 457.

Security Act). Even if this Court decides that § 1981 does not provide an implied right of action, failure to invoke § 1983 would not warrant dismissal where Defendants have full notice of the claims against them. As the Supreme Court recently declared, "no heightened pleading rule requires plaintiffs seeking damages for violations of constitutional rights to invoke § 1983 expressly in order to state a claim." *Johnson v. City of Shelby, Miss.*, 135 S. Ct. 346, 347 (2014); *see also Brown v. Sessoms*, 774 F.3d 1016 (D.C. Cir. 2007) (holding that *Johnson* also applies to § 1981 claims that do not invoke § 1983). Contrary to Defendants' suggestion (at 30–31), the federal pleading rules "do not countenance dismissal of a complaint for an imperfect statement of the legal theory supporting the claim asserted." *Johnson*, 135 S. Ct. at 346.

VI. DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY BECAUSE THEY VIOLATED CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS.

When determining whether a state officer is entitled to qualified immunity, courts engage in a two-step inquiry. *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 Md. at Coll. Park*, No. Civ. AW-00-317, 2001 WL 333095, at *3 (D. Md. Mar. 6, 2001) ("assuming the truth of Plaintiff's allegations . . . [Defendant's] actions would not be protected by qualified immunity.").

There can be no question that any reasonable officer would know that racial discrimination of the nature alleged by Officer Savage in this lawsuit is unconstitutional. "If any 'right' under federal law is 'clearly established,' it is the constitutional right to be free from racial discrimination.'" *Frasier v. McGinley*, No. 2:13-CV-02986, 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-738, 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, 133 (4th Cir. 2001) (citing *Beardsley v. Webb*, 30 F.3d 524, 529 (4th Cir. 1994)); *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).[17]

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. New Jersey Envtl. Infrastructure Trust*, Civil Action 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, 1186 (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 possible application to

[17] Law is clearly established for qualified immunity purposes if there is precedent from the United States Supreme Court, the Fourth Circuit, or "a consensus of cases from other circuits." *Altman v. City of High Point*, 330 F.3d 194, 210 (4th Cir. 2003) (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1992)).

the present case. Nor can they. Applying the legal standards to the facts alleged by Officer Savage, it is clear that qualified immunity cannot apply here.

*Firs*t, 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 violation, it is 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 Defendants' conduct alleged by Officer Savage violated that right. 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 Passwaters, 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. Wells streamed racially-charged videos that used the word "nigger" on his official work computer, and asked Officer Savage why and whether he would be offended if he were called a "nigger." *Id.* ¶¶ 68–69.

"Perhaps no single act can more quickly 'alter the conditions of employment and create an abusive working environment,' than the use of an unambiguous racial epithet such as 'nigger' by a supervisor in the presence of his subordinates," *Spriggs v. Diamond Auto Glass*, 242 F.3d

179, 185 (4th Cir. 2001) (quoting *Rodgers v. W.-S. Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993)); 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 *4 (N.D. Ill. May 15, 1997); *see also Brosmore*, 1993 WL 762881, at *7. Given these specific and pervasive allegations, it is clear that an objectively reasonable officer would be aware that using or condoning such racist conduct violated Officer Savage's constitutional rights. Defendants are not entitled to qualified immunity for the persistent use and condoning of such malicious racial slurs.

Likewise, Officer Savage alleges that several Defendants repeatedly spoke to him about lynchings and the Ku Klux Klan. FAC ¶ 72. This discussion involving racially-hostile subject matter is highlighted by several of the Defendants—including Wells—driving 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 collection of "white sheets and nooses"—clearly rises to the level of racially hostile harassment that precludes any fair-minded consideration of qualified immunity. Defendant Passwaters was complicit in this conduct 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 2013) (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*, 2007 WL 773908, at *5 (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.

Finally, Defendants' contention (at 34) that spreading rumors and engaging in retaliation against a former employer do not violate clearly established rights is baseless. Supreme Court precedent makes abundantly clear that retaliating against a former employee is unlawful. *Robinson*, 519 U.S. at 339; *Burlington Northern*, 548 U.S. at 68. Furthermore, any reasonable officer would know that defaming a fellow officer by making false claims of illicit drug use, fraud, and financial delinquency is sufficiently "embarrassing, humiliating, or emotionally distressful" so as to be violative of the complaining officer's First Amendment rights. *See Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 688 (4th Cir. 2000); *see also Baltimore Sun*, 437 F.3d at 415 ("[P]ublic officials may not, as a general rule, respond to an individual's protected activity with conduct or speech."); *Crawford–El v. Britton*, 523 U.S. 574, 590–91 (1998) (describing the "general rule" that "the First Amendment bars retaliation for protected speech" as one that "has long been clearly established"); *Crystal v. Batts*, No. CV JKB-14-3989, 2015 WL 5698534, at *8 (D. Md. Sept. 25, 2015) (noting that it has been clearly established since at least 2009 that "an employee's speech about serious governmental misconduct, and certainly not least of all serious misconduct in a law enforcement agency, is protected").

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss should be denied.

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CERTIFCATE OF SERVICE

I hereby certify that on June 1, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Maryland by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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