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

ALLAN R. SERGEANT,	*	
Plaintiff,	*	
v.	*	**Case No.: PWG-15-2233**
ALFIE G. ACOL, *et al.*,	*	
Defendants.	*	

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MEMORANDUM OPINION AND ORDER

After Laurel Police Department Officer Alfie G. Acol stopped Plaintiff Allan R. Sergeant while he was driving on March 9, 2014 and subjected him to a strip search in public—both, according to Plaintiff, without probable cause—, Plaintiff filed suit against Officer Acol and Officer John Doe, who also was present, in their individual and official capacities; as well as Laurel Police Department ("Police Department"); Richard McLaughlin, in his official capacity as chief of the Police Department; and the City of Laurel, Maryland ("Laurel"). ECF No. 1. As amended, his complaint includes two Fourth Amendment claims against Officer Acol pursuant to 42 U.S.C. § 1983 (Counts I and III) and one Fourth Amendment § 1983 claim against Officers Acol and Doe (Count V), Am. Compl., ECF No. 11, all three of which the officers have answered, ECF No. 13. It also includes two claims under state and federal law against McLaughlin, the Police Department, and Laurel (Counts IX and X), and one claim of *respondeat superior* against Laurel and the Police Department (Count XI), Am. Compl., all three of which Plaintiff agrees to dismiss, Pl.'s Opp'n 3–4, ECF No. 14, and which will be dismissed.

The five contested claims that are the subject of this Memorandum Opinion include one First Amendment § 1983 claim against Officers Acol and Doe (Count VII) and four state law claims pursuant to the Maryland Declaration of Rights: three under Article 26, two of which are as to Officer Acol only (Counts II and IV), and one against both officers (Count VI); and one under Articles 24 and 40 against Officer Acol only (Count VIII). Am. Compl. Defendants argue for dismissal of the state law claims for failure to comply with the Local Government Tort Claims Act ("LGTCA"), Md. Code Ann., Cts. & Jud. Proc. §§ 5-301–5-304, and dismissal of the federal claim for failure to state a claim. ECF No. 12.[1]

Sergeant has neither strictly nor substantially complied with the notice requirements of the LGTCA; nor has he shown good cause to proceed with his state law claims, despite lack of compliance, or filed a motion to do so. He has, however, stated a § 1983 claim for violation of his First Amendment rights. Accordingly, I will grant in part and deny in part Defendants' Partial Motion to Dismiss the First Amended Complaint or, in the Alternative, to Bifurcate Certain Claims.

Standard of Review

Federal Rule of Civil Procedure 12(b)(6) provides for "the dismissal of a complaint if it fails to state a claim upon which relief can be granted." *Velencia v. Drezhlo*, No. RDB-12-237, 2012 WL 6562764, at *4 (D. Md. Dec. 13, 2012). This rule's purpose "'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.'" *Id.* (quoting *Presley v. City of Charlottesville*, 464 F.3d 480, 483

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[1] Sergeant filed an Opposition, ECF No. 14, and Defendants filed a Reply, ECF No. 15. A hearing is unnecessary in this case. *See* Loc. R. 105.6. Defendants originally sought, in the alternative, bifurcation of Counts IX, X and XI, but withdrew that request when Plaintiff consented to the dismissal of those counts. *See* Defs.' Reply 1.

(4th Cir. 2006)). To that end, the Court bears in mind the requirements of Fed. R. Civ. P. 8, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), when considering a motion to dismiss pursuant to Rule 12(b)(6). Specifically, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2), and must state "a plausible claim for relief," as "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," *Iqbal*, 556 U.S. at 678–79. *See Velencia*, 2012 WL 6562764, at *4 (discussing standard from *Iqbal* and *Twombly*). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

In this case, Defendants sought leave to file a motion to dismiss to address the deficiencies they perceived in Plaintiff's original Complaint. ECF No. 7. I afforded Plaintiff the opportunity to amend, cautioning that if Defendants then filed a meritorious motion to dismiss on any of the grounds previously disclosed to Plaintiff, any dismissal would be with prejudice. ECF No. 9. Sergeant filed his Amended Complaint, and Defendants filed the pending motion. At this stage of the proceedings, I accept the facts as alleged in Sergeant's Amended Complaint as true. *See Aziz v. Alcolac*, 658 F.3d 388, 390 (4th Cir. 2011).

State Law Claims

Under the LGTCA, local governmental entities can be held liable for state constitutional torts and common law torts. *See Martino v. Bell*, 40 F. Supp. 2d 719, 723 (D. Md. 1999); *DiPino v. Davis*, 729 A.2d 354, 370–71 (Md. 1999). Defendants argue that the Court should dismiss Sergeant's state law claims (Counts II, IV, VI, VIII) because Plaintiff failed to comply with the

notice requirement of the LGTCA, plead satisfaction of the requirement, seek leave to have the requirement waived, or show good cause for his failure to comply. Defs.' Mem. 8.

Notice Requirement

To sue a local government or its employees for unliquidated damages based on an injury that, like Sergeant's, occurred prior to October 1, 2015, a plaintiff must provide written notice of the claim within 180 days after the injury giving rise to the suit.[2] Cts. & Jud. Proc. § 5-304(b). Further, the notice must be provided "to the corporate authorities of the defendant local government," *id.* § 5-304(c)(4). "Corporate authorities are the political officials of a municipal corporation - the mayor and city council - not the administrators charged with carrying out the day-to-day business of the local government." *Hansen v. City of Laurel*, 996 A.2d 882, 890 (Md. Ct. Spec. App. 2010) (reasoning that the Mayor and City Council of Laurel were its corporate authorities because "Section 301 of the City of Laurel Code ('Laurel Code') vests the government of the City in the Mayor and City Council[;] [t]he City Council has the power '[t]o pass all such ordinances, resolutions or regulations not contrary to the constitution and laws of the State of Maryland or this Charter as it may deem necessary for the good government of the city[]'; [and] [t]he Mayor is the 'executive officer . . . clothed with all the powers necessary to secure the enforcement of all ordinances and resolutions passed by the city council'" (citations to Laurel Code omitted)), *aff'd*, 25 A.3d 122 (Md. 2011). Additionally, "the LGTCA creates a procedural obligation that a plaintiff must meet in filing a tort action," and therefore, to state a claim, "[a] plaintiff must not only satisfy the notice requirement strictly or substantially, but also plead such satisfaction in his/her complaint." *Hansen v. City of Laurel*, 25 A.3d 122, 137 (Md.

[2] The Maryland Legislature extended the notice period from 180 days to one year for cases accruing on October 1, 2015 or later. *See* 2015 Md. Laws Ch. 131 (H.B. 113) (amending § 5-304(b)(1) to provide that notice must be "given within 1 year after the injury").

2011); *see Bibum v. Prince Geroge's Cnty.*, 85 F. Supp. 2d 557, 564 (D. Md. 2000) ("[C]ompliance with the notice provision should be alleged in the complaint as a substantive element of the cause of action."). Contrary to Plaintiff's assertions, *see* Pl.'s Opp'n 9, "the LGTCA [including its notice requirement] may be properly applied to claims seeking redress for government violations of the state constitution where unliquidated damages are sought." *Rounds v. Md.-Nat'l Capital Park & Planning Comm'n*, 109 A.3d 639, 651 (Md. 2015), *recons. denied* (Mar. 27, 2015).

Here, the incident underlying the state constitutional claims occurred on March 9, 2014. Sergeant completed and submitted "an official form entitled 'Laurel Police Department Complaint Against Police Practices'" on March 10, 2014, Am. Compl. ¶¶ 57–60, well within the 180-day period. But, he does not plead that he timely notified Laurel's "corporate authorities." Moreover, I note that, in his original Complaint, he alleged that, after securing counsel, on January 13, 2015, he "mailed *via* certified mail with return receipt requested the substantive information required by LGTCA Section 5-304 to Robert Manzi, Solicitor, City of Laurel," which Laurel received on January 16, 2015, Compl. ¶¶ 88–89, well after the 180 day period ended on September 5, 2014. Thus, Sergeant did not strictly comply with the LGTCA's notice requirement. *See* Cts. & Jud. Proc. § 5-304(c)(4).

<u>Substantial Compliance</u>

Failure to give actual notice is not fatal to a claim if a plaintiff substantially complies with the notice requirements. *Huggins v. Prince George's Cnty., Md.*, 683 F.3d 525, 538 (4th Cir. 2012). Substantial compliance is a narrow exception to the LGTCA notice requirement; "substantial compliance will occur when the local government receives actual notice such that it is given the opportunity to properly investigate the potential tort claim." *Id.* (quoting *Hansen*,

996 A.2d at 891 (alteration, citation, and internal quotation marks omitted)). Notably, "substantial compliance has no application to an outright failure to comply." *Moore v. Norouzi*, 807 A.2d 632, 643 (Md. 2002) (citing *Blundon v. Taylor*, 770 A.2d 658, 670 (Md. 2001)). Therefore, "[t]here must be some effort to provide the requisite notice and, in fact, it must be provided, albeit not in strict compliance with the statutory provision." *Id.*

In addition to showing "substantial compliance as to the content of the notice within the 180-day period," a plaintiff must show substantial compliance "as to the statutory recipient." *Huggins*, 683 F.3d at 538. In that regard, "'the relationship between the person or entity in fact notified and the person or entity that the statute requires be notified'" must be "'so close, with respect to the handling of tort claims, that notice to one effectively constituted notice to the other.'" *Hansen*, 996 A.2d at 891 (quoting *Ransom v. Leopold*, 962 A.2d 1025, 1033 (Md. Ct. Spec. App. 2008)). Thus, there is substantial compliance with the requirement to provide notice to the local government if "'the tort claimant provides … the unit or division with the responsibility for investigating tort claims against that local government, or the company with whom the local government or unit has contracted for that function, the information required by § 5-304[(b)](3) to be supplied.'" *Id.* (quoting *Faulk v. Ewing*, 808 A.2d 1262, 1274 (Md. 2002) (citation omitted)).

In *Hansen*, the Maryland Court of Special Appeals concluded that "Hansen did not substantially comply with [Cts. & Jud. Proc. §] 5-304" by "notif[ying] the City Administrator, who occupie[d] a position that is not charged with investigating tort claims against the City." 996 A.2d at 892. It relied on *White v. Prince George's County*, 877 A.2d 1129 (Md. Ct. Spec. App. 2005), and *Wilbon v. Hunsicker*, 913 A.2d 678 (Md. Ct. Spec. App. 2006), where it also had "concluded that there had not been substantial compliance with the LGTCA notice

requirement." *Id.* at 891–92. In *White* and *Wilbon*, as in the case before me, the claimants had "fil[ed] complaints of police brutality with the internal affairs divisions of the local police departments." *Id.* at 892. The appellate court concluded that the complaints did not constitute substantial compliance "because '[the claimants] did not provide notice to an entity with responsibility for investigating tort claims'"; rather, they notified the internal affairs departments, and "'[t]he content of that complaint pertained to [the claimants'] allegation[s] of police brutality, not to tort claims arising from such conduct.'" *Id.* (quoting *Wilbon*, 913 A.2d at 689 (quoting *White*, 877 A.2d at 1139)). The *Hansen* Court observed:

> While the internal affairs divisions had conducted investigations into the police brutality claims, those "investigations" were vastly different from an investigation of a tort claim for damages. The purpose of the internal affairs departments' investigations were to determine "whether the officers had violated departmental rules and standards of behavior." By contrast, an investigation into a tort claim might include inquiries into "legal defenses, the nature and extent of the actual injuries sustained, the causal relationship of the injuries to the alleged misconduct, the likelihood of an award of compensatory and/or punitive damages, the necessity and cost of expert testimony, and litigation strategy."

Id. (quoting *Wilbon*, 913 A.2d at 692).

In Plaintiff's view, he pleaded substantial compliance. Pl.'s Opp'n 5. But, what Plaintiff claims is that he provided notice to the Police Department's Internal Affairs Division, through the form that he provided to the Police Department. *See* Am. Compl. ¶¶ 56–64. As the Maryland Court of Special Appeals has held repeatedly, notice to a police department does not constitute notice to the Mayor and City Council. *See Hansen*, 996 A.2d at 892; *Wilbon*, 913 A.2d at 692; *White*, 877 A.2d at 1139–40. Further, in his Amended Complaint, he does not claim that he provided any notice to the statutory recipient, that is, "the corporate authorities of the defendant local government." *See* Cts. & Jud. Proc. § 5-304(c)(4). While, in his original Complaint, Sergeant claimed that he provided notice to Laurel's City Solicitor on January 13,

2015, Compl. ¶¶ 88–89, and notice to the City Solicitor would comply with the statutory requirement as the City Solicitor would be "charged with investigating tort claims against the City," *see Hansen*, 996 A.2d at 892, Sergeant's notice to the City Solicitor was not timely but rather more than four months after the 180 day period ended on September 5, 2014, *see* Cts. & Jud. Proc. § 5-304(b). Therefore, Sergeant did not substantially comply with the notice requirement. *Huggins*, 683 F.3d at 538; *Hansen*, 996 A.2d at 891; *Moore*, 807 A.2d at 643.

<u>Waiver of Notice Requirement</u>

The LGTCA provides "an exception to the notice requirement" in Cts. & Jud. Proc. § 5-304(d), which states that, "notwithstanding the other provisions of [§ 5-304], unless the defendant can affirmatively show that its defense has been prejudiced by lack of the required notice, *upon motion and for good cause shown* the court may entertain the suit even though the required notice was not given." But, Sergeant has not filed a motion pursuant to § 5-304(d) for the Court to waive the notice requirement, and his Opposition does not incorporate such a motion. *Contra Best v. Tossou*, No. PWG-15-2515, 2016 WL 3257825, at *3 (D. Md. June 14, 2016) (granting plaintiff's "Motion to Permit Claims for Good Cause Shown," incorporated into his opposition, in which he argued that "he diligently prosecuted his claim 'by . . . filing . . . a complaint with the Internal Affairs Division less than three mo[nt]hs after the incident'" and, more significantly, that his December 3, 2012 "notice to the County Attorney's Office by certified mail . . . only one . . . day[] after the 180-day deadline," was "a good faith attempt to comply with the notice requirement and it was reasonable under the circumstances," given that his attorney "'mistakenly believed that December 3, 2012 was 180 days after June 3, 2012,' either 'due to a mathematical computation or because [he] conflated 180 days with six calendar months'"). Nor does he seek leave to amend to cure this deficiency. *Contra Butler v. Windsor*,

No. PWG-13-883, 2014 WL 2584468, at *7 (D. Md. June 9, 2014) (granting plaintiff's unopposed motion to amend "'to cure the deficiency alleged by the Defendants'" with regard to the notice requirement). Indeed, Sergeant had the opportunity to amend to cure the deficiencies Defendants identified in his original Complaint, including with regard to his substantial compliance with the LGTCA, ECF No. 9, but the deficiencies remain in his Amended Complaint. Thus, without a motion or filing that could be construed as a motion, there is no basis for waiving the notice requirements. *See* Cts. & Jud. Proc. § 5-304(d).

Good Cause

Sergeant nonetheless contends that he has shown good cause and that Defendants have not suffered prejudice. Pl.'s Opp'n 6–8. Yet, even if I construed his Opposition to incorporate a § 5-304(d) motion (which it plainly does not), he has not shown cause to proceed with his case as to the state law claims. "The test for good cause shown 'is that of ordinary prudence . . . whether the claimant prosecuted his claim with that degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances.'" *Hayat v. Fairely*, No. WMN-08-3029, 2009 WL 2426011, at *6 (D. Md. Aug. 5, 2009) (quoting *Bibum v. Prince George's County*, 85 F. Supp. 2d 557, 565 (D. Md. 2000)). In 2000, the Maryland Court of Appeals identified "circumstances that [other courts] have . . . found to constitute good cause," including (1) "excusable neglect or mistake (generally determined in reference to a reasonably prudent person standard)," (2) "serious physical or mental injury and/or location out-of-state," (3) "the inability to retain counsel in cases involving complex litigation," and (4) "ignorance of the statutory notice requirement." *Heron v. Strader*, 761 A.2d 56, 63–64 (Md. 2000) (footnotes omitted). Courts also consider "(5) misleading representations made by representative of the local government." *Wilbon*, 913 A.2d at 693.

Although this Court and the Maryland Court of Special Appeals often cite the first four factors (which include ignorance of the law requiring the filing of notice), *e.g.*, *Wilbon*, 913 A.2d at 693; *White*, 877 A.2d at 1142; *Johnson v. Baltimore Cnty., Md.*, No. 11-CV-3616, 2012 WL 2577783, at *22 (D. Md. July 3, 2012), it is noteworthy that in *Heron*, the Court of Appeals, which was considering case law from other jurisdictions, observed that "[t]he Court of Special Appeals has specifically rejected ignorance of the law requiring notice as good cause." *Heron*, 761 A.2d at 64 n.13 (citing *Williams v. Montgomery Cnty.*, 716 A.2d 1100 (Md. Ct. Spec. App. 1998)); *see White*, 877 A.2d at 1144 (noting *Heron* footnote and that "in *Rios* [*v. Montgomery Cnty.*, 872 A.2d 1, 23 n.18 (Md. 2005)], the Court reaffirmed that the question remains open as to whether ignorance of the statutory notice requirement constitutes good cause"). Indeed, in *Williams*, 716 A.2d at 1107, which the Court of Appeals affirmed *sub nom. Williams v. Maynard* on other grounds, 754 A.2d 379, the Court of Special Appeals held that "ignorance of the law is no excuse when a party, represented by counsel, fails to give notice because he was unaware that notice was required." This Court has stated that "[i]gnorance of the statutory requirement does not constitute good cause," even when the claimant delays in retaining counsel. *Bibum*, 85 F. Supp. 2d at 565 (citing *Williams*); *Johnson*, 2012 WL 2577783, at *9 (same); *Hayat*, 2009 WL 2426011, at *6 ("[I]gnorance of the notice requirement is not good cause . . . .").

In Sergeant's view, he has shown good cause because he "made more than reasonable efforts to inform Defendants." Pl.'s Opp'n 6. But, all he has established are his efforts to inform the Police Department. *See* Am. Compl. ¶¶ 57–64. As discussed, this Court and the Maryland Court of Special Appeals already have held that efforts to inform the police department are not tantamount to efforts to inform the local government. *See Bibum*, 85 F. Supp. 2d at 565; *Hansen*, 996 A.2d at 892; *Wilbon*, 913 A.2d at 692; *White*, 877 A.2d at 1139–40.

Sergeant also argues (disingenuously, as it turns out) that he "was ignorant of the statutory notice requirement, in part because he was actively misled by representatives of the Laurel Police Department" who "actively informed [him] that the police were investigating his claims." Pl.'s Opp'n 7, 8. It is true that he pleaded that the Police Department informed him that it would investigate his claims, met with him, and told him the investigation would take a few months. *See* Am. Compl. ¶¶ 60–62. Plaintiff insists that, when the police informed him that they "were investigating his claim," that statement "was precisely the kind of 'affirmative misrepresentation by police department employees' the *Bibum* court said *would* justify waiver." Pl.'s Opp'n 8. Yet the *Bibum* Court did not indicate what "affirmative misrepresentation" would justify waiver. Rather, it observed that, in that case, "[t]here [was] no allegation of an affirmative *misrepresentation* by police department employees," from which one could infer that "an affirmative *misrepresentation*" could excuse a plaintiff's failure to provide timely notice. *See Bibum*, 85 F. Supp. 2d at 565 (emphasis added). The statement here simply was not a misrepresentation, as the Police Department *was* investigating Sergeant's claims.

Additionally, the Police Department's statement was unlike in *White*, where the police department "advised [the plaintiff] to *take no action* while the matter was being investigated." 877 A.2d at 1133 (emphasis added). Here, Sergeant makes no such claim. This Court has rejected the argument that a police department's failure to "advise[] [a citizen] that separate action would be required to preserve his right to sue the county or its employees" establishes good cause for the citizen's failure to comply with the statutory notice requirements. *See Bibum*, 85 F. Supp. 2d at 565. To the contrary, there is no "affirmative duty on the part of the police department to provide unsolicited advice (or solicited advice for that matter) to complainants

regarding the steps they must take to preserve a claim against the county or one of its employees." *Id.*

And, while the Maryland Court of Special Appeals has stated that "an *ongoing* police investigation" may "warrant excusing [a claimant's] lack of diligence," *White*, 877 A.2d at 1134 (emphasis added), it more recently has held that "the presence of an ongoing police investigation into [a claimant's] complaint of police wrongdoing cannot constitute 'excusable neglect' for failing to comply with the notice requirement of the LGTCA," *Wilbon*, 913 A.2d at 696. In any event, the investigation into Sergeant's complaint only was "ongoing" until June 16, 2014, when the Police Department informed Sergeant that it had investigated the incident, disciplined Officer Acol, and "closed" its investigation. Am. Compl. ¶ 64. Therefore, even under the law as stated in *White*, the ongoing investigation could not justify Sergeant's failure to pursue his claims after that date but before the statutory period ended on September 5, 2014, as an ordinarily prudent person would work diligently to pursue his claim during the 180-day period. *See Wilbon*, 913 A.2d at 696.

As for Sergeant's argument that he "simply did not know about the formal notice requirement of the LGTCA," *see Bibum*, 85 F. Supp. 2d at 565, while the Maryland Court of Appeals has left "ignorance of the statutory notice requirement" as an open issue, *Rios*, 872 A.2d at 23 n.18, this Court has held that it "does not constitute good cause for [a claimant's] failure to comply," *Bibum*, 85 F. Supp. 2d at 565 (noting that in *Olshonsky v. Md. Nat'l Capital Park & Planning Comm'n*, 1995 WL 479845, at *4 (4th Cir. Aug 15, 1995), the Fourth Circuit concluded that "plaintiff who believed his statement in accident report detailing time, place, and cause of injury was sufficient to preserve right to sue was not entitled to waiver of notice provision because he 'made no effort whatsoever to verify the relevant Maryland law or to

preserve his claim,' and 'ignorance of the statutory requirement does not constitute good cause'"). The *Bibum* Court concluded that "[a]n ordinarily prudent person in a similar situation would have made his own investigation into the existence of any formal notice requirements or consulted an attorney on the matter." *Id*. Thus, Sergeant has not shown good cause based on his unawareness of the law or any statements that the Police Department made to him. *See id.*; *Wilbon*, 913 A.2d at 696; *White*, 877 A.2d at 1134.

He also contends that his pleading of "serious mental injury," Pl.'s Opp'n 6, satisfies the good cause showing. Additionally, he asserts that he "has always lived out-of-state," *id.*, such that he had good cause for failing to file the required notice. I agree with Defendants that Plaintiff's "serious mental injury" is not good cause:

> Plaintiff's alleged serious mental injury did not preclude his telephone call to the Laurel Police Department on the same evening as the incident, nor his appearance in person to file a written administrative complaint the following day, nor his participation in that investigation on March 20, 2014 by way of interview at the Laurel Police Department offices. Amended Complaint, ¶¶56, 57, & 62. There simply is no way to reasonably reconcile the concept that Plaintiff was too debilitated by his experience to manage the notice requirement while he was entirely able to lodge an administrative complaint.

Defs.' Reply 10. *See Madore v. Baltimore Cnty.*, 367 A.2d 54, 56 (Md. Ct. Spec. App. 1976) (concluding that there was no good cause based on serious injury where the plaintiff was unconscious for a week, spent more than a month in the hospital and then more than a month in a wheelchair or in bed, had to return to the hospital twice over the next half year, and "all he was worried about was getting his legs back," not filing suit; reasoning that the plaintiff "could use the telephone" and "[a]bout a week after the accident, he was aware of what was going on around him," and he "could have contacted a lawyer earlier if it had occurred to him"). Further, while Plaintiff claims he has been "living in Washington, DC, since 1990," his Complaint,

originally and as amended, provides a Hyattsville, Maryland address for him. *Compare* Compl. ¶ 12 *and* Am. Compl. ¶ 12, *with* Compl. 1 *and* Am. Compl. 1.

In sum, by filing a Complaint Form with the Police Department the day after the incident but not providing any notice to the Mayor and City Council until more than four months after the 180-day deadline, Sergeant has neither complied with the statutory notice requirement nor exhibited "that degree of diligent that an ordinarily prudent person would have exercised under the same or similar circumstances." *Hayat*, 2009 WL 2426011, at *6. Additionally, Defendants need not show prejudice because Plaintiff has not shown good cause, and "[t]he burden of a local government to show that its defense has been prejudiced, however, only arises 'when a claimant has shown good cause to waive the notice provision.'" *3-D, Inc. v. Town of Grantsville*, No. GLR-13-2867, 2014 WL 11411854, at *2 (D. Md. June 4, 2014) (quoting *Halloran v. Montgomery Cnty. Dep't of Pub. Works*, 968 A.2d 1104, 1115 (Md. Ct. Spec. App. 2009)). Therefore, Sergeant's state law claims will be dismissed for failure to comply with the LGTCA's notice requirements. *See* Cts. & Jud. Proc. § 5-304(c)(4), (d); *Huggins*, 683 F.3d at 538; *Hayat*, 2009 WL 2426011, at *6; *Hansen*, 996 A.2d at 891; *Moore*, 807 A.2d at 643.

First Amendment § 1983 Claim

To state a claim under § 1983 "on the ground that he experienced government retaliation for his First Amendment-protected speech," a plaintiff "must establish three elements: (1) his speech was protected, (2) the 'alleged retaliatory action adversely affected' his protected speech, and (3) a causal relationship between the protected speech and the retaliation." *Raub v. Campbell*, 785 F.3d 876, 885 (4th Cir.) (quoting *Suarez Corp. Indus. v. McGraw,* 202 F.3d 676, 685–86 (4th Cir. 2000)), *cert. denied*, 136 S. Ct. 503 (2015). Sergeant claims that after Officers Acol and Doe "instructed Sergeant to depart" following the March 9, 2014 traffic stop and he

persisted in questioning their conduct during the initial stop, they violated his First Amendment rights when, in response, the officers took his "driver's license and registration and issue[d] the written warning ticket." Am. Compl. ¶ 111; *see id.* ¶¶ 47–53. Officer Acol also threatened to "issue him a ticket" or arrest him "if he did not sign the warning." *Id.* ¶ 55. In Sergeant's view, "[t]he written warning was pretextual, an attempt to retaliate against Sergeant for questioning the officers, protesting the patently unlawful strip search, or exercising his right to file a complaint, and an attempt to frighten him out of doing so." *Id.* ¶ 112.

Defendants challenge Sergeant's pleading of the second element only.[3] *See* Defs.' Mem. 19. In their view, the retaliation was limited to the issuance of a written warning, which does not "rise[] to the level of a retaliatory act such that a reasonable person would find her or his speech chilled by the act." *Id.* However, as noted, Sergeant also alleges that, to issue that written warning, the officers detained him beyond the initial traffic stop, already having "instructed Sergeant to depart," and threatened to ticket or arrest him. Am. Compl. ¶¶ 55, 111; *see id.* ¶ 47. When Officer Acol asked for Sergeant's license and registration after having told him he could go, it constituted to a second stop. *See Ferris v. State*, 355 Md. 356, 372, 735 A.2d 491, 499 (1999) ("[T]he officer's purpose in an ordinary traffic stop is to enforce the laws of the roadway, and ordinarily to investigate the manner of driving with the intent to issue a citation or warning. Once the purpose of that stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention. *See Royer,* 460 U.S. at 500, 103 S.Ct. at 1325–26.").

[3] In their Reply, Defendants raise the defense of qualified immunity for the first time. Defs.' Reply 15. I need not consider this argument. *See United States v. Williams*, 445 F.3d 724, 736 n.6 (4th Cir. 2006) (declining to address argument raised for first time in reply brief because it "comes far too late in the day").

"In considering whether an action adversely affected First Amendment rights, courts evaluate whether the conduct would 'deter a person of ordinary firmness from the exercise of [his] First Amendment rights.'" *Mathis v. McDonough*, No. ELH-13-2597, 2015 WL 3853087, at *29 (D. Md. June 19, 2015) (quoting *Constantine v. Rectors & Visitors of George Mason Univ.,* 411 F.3d 474, 500 (4th Cir. 2005) (internal quotations omitted); citing *Benham v. City of Charlotte, N.C.,* 635 F.3d 129, 135 (4th Cir. 2011); *Smith v. Frye,* 488 F.3d 263, 272 (4th Cir. 2007)). "The test is not whether [the plaintiff's] First Amendment rights were chilled, but whether a person of reasonable firmness in [the plaintiff's] situation would have been chilled." *Ruttenberg v. Jones*, 283 F. App'x 121, 130 (4th Cir. 2008). "Nonetheless, 'the plaintiff's actual response to the retaliatory conduct provides some evidence of the tendency of that conduct to chill First Amendment activity.'" *Baltimore Sun Co. v. Ehrlich,* 437 F.3d 410, 419 (4th Cir. 2006) (quoting *Constantine*, 411 F.3d at 500).

The analysis is "a 'fact intensive inquiry that focuses on the status of the speaker, the relationship between the speaker and the retaliator, and the nature of the retaliatory acts.'" *Mathis*, 2015 WL 3853087, at *30 (quoting *Suarez*, 202 F.3d at 686). "'A chilling effect need not result in a total freeze of the targeted party's speech.'" *Id.* (quoting *Blankenship v. Manchin,* 471 F.3d 523, 532 (4th Cir. 2006)). Indeed, "'[t]he effect on freedom of speech may be small,'" as "'there is no justification for harassing people for exercising their constitutional rights,'" although the incident must be more than a "'trivial matter.'" *Id.* at *29 (citations omitted). Notably, "'activating the punitive machinery of the government' against an individual in retribution for his or her exercise of free speech may constitute an action adversely affecting First Amendment rights and satisfy the second element." *Id.* at *30 (quoting *Blankenship,* 471 F.3d at 529).

Here, Sergeant was driving his car when Officer Acol stopped him, told him "he would tell him [why he stopped him] only after Sergeant had surrendered his driver's license and vehicle registration," and then "never told Sergeant why he had stopped him." Am. Compl. ¶¶ 13–14, 19–20. When Sergeant asked again, "Acol raised his voice to a yell, drew his face close to Sergeant's and demanded that he be allowed to search the car. Acol placed his hand on or near his gun and repeated his demand," and Sergeant exited the car, but no one "actually search[ed] Sergeant's vehicle." *Id.* ¶¶ 25–28. Acol then "patted down" Sergeant twice and subjected him to a "highly intrusive, humiliating, degrading, abusive, terrifying and traumatizing" strip search "in front of the customer entrance to CVS." *Id. ¶¶* 31–35. Then, "[a]fter some time had passed following the visual inspection Sergeant's private areas, Acol told Sergeant he could leave." *Id.* ¶ 47. "Sergeant continued to verbally protest his mistreatment and to ask questions of both Acol and Doe, such as why he had been pulled over and why he had been searched" and "stated that he was going to file a complaint." *Id.* ¶ 48. Acol then detained him a second time and issued him a written warning that he made Sergeant sign under threat of a ticket or arrest. *Id.* ¶¶ 52–55.

Thus, the facts involve a citizen stopped and strip-searched in public by a police officer who did not provide any explanation to the citizen for his actions before or after the search. The First Amendment protected speech includes the citizen's questioning of the officer's actions and statement that he was going to file a complaint. The facts also involve the second detention of the citizen and issuance of a written warning that the citizen was forced to sign under threat of a ticket or arrest. Certainly, Sergeant was not deterred from "call[ing] LDP [the Police Department] that night to lodge a complaint," *id.* ¶ 56, and his "'actual response to the retaliatory conduct provides some evidence of the tendency of that conduct to chill First Amendment

activity,'" *Baltimore Sun Co.,* 437 F.3d at 419 (quoting *Constantine,* 411 F.3d at 500). But, the fact that he filed a complaint does not mean that he would not be deterred from questioning an officer if he were stopped again by the police. Moreover, the question is whether the officers' conduct "would chill 'a *similarly situated person* of ordinary firmness.'" *Mathis*, 2015 WL 3853087, at *30 (emphasis added) (citations and quotation marks omitted).

Notably, in detaining Sergeant, issuing a written warrant, and threatening a ticket or arrest, the officers "activat[ed] the punitive machinery of the government." *See Blankenship*, 471 F.3d at 529 (concluding that plaintiff sufficiently pleaded adverse effects based on threats of increased regulatory oversight); *see also Garcia v. City of Trenton*, 348 F.3d 726 (8th Cir. 2003) (holding that "the evidence in th[e] case was sufficient to go to the jury" because, by issuing parking tickets for a legitimate violation, but one routinely unenforced previously, the mayor "engaged the punitive machinery of government in order to punish Ms. Garcia for her speaking out"). Indeed, the purpose of a warning issued by the police is to deter the recipient's conduct at the time of the warning. *See Pall v. State*, 699 A.2d 565, 568 (Md. Ct. Spec. App. 1997) ("A reasonable warning is one in which the defendant knows or has reason to know that his conduct is unwanted and is warned to stop."). Although the written warning ostensibly was "for a municipal violation, for 'causing vehicle to obstruct other vehicles passing,'" Am. Compl. ¶ 53, it was not issued during the initial traffic stop; it was issued after Plaintiff continued to exercise his First Amendment rights. Under these circumstances, the detention, the written warning, and the threats of a ticket or arrest likely would discourage a similarly situated person from questioning police officers' actions in the future. Sergeant sufficiently states a § 1983 claim for violation of his First Amendment rights. *See Ruttenberg*, 283 F. App'x at 130; *Mathis*, 2015 WL 3853087, at *29.

ORDER

Accordingly, it is, this 15th day of August, 2016, hereby ORDERED that

1. Defendants' Partial Motion to Dismiss Plaintiff's Complaint or, in the Alternative, for Summary Judgment, ECF No. 12, IS GRANTED IN PART AND DENIED IN PART as follows:
    a. Counts II, IV, VI, VIII, IX, X, and XI of the Amended Complaint ARE DISMISSED WITH PREJUDICE; and
    b. The Motion IS DENIED as to Count VII of the Amended Complaint; and
2. Defendants SHALL FILE AN ANSWER as to Count VII by August 29, 2016.

/S/
Paul W. Grimm
United States District Judge

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