UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT LEXINGTON

JEFFREY FARMER	)	
	)	
Plaintiff	)	
	)	**Civil Action No. 5:21-CV-00049-KKC**
v.	)	
	)	**Electronically filed**
KRISTIN GONZALEZ, et al.	)	
	)	
Defendants	)	

DEFENDANTS' MOTION TO DISMISS COMPLAINT

Defendants, Kristin Gonzalez, Valerie Church, Cheyla Bush, Patrick Brennan, and Nathan Goodrich, by counsel, hereby move to dismiss the complaint with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6).

INTRODUCTION

Plaintiff, Jeffrey Farmer, a law enforcement officer in Franklin County, Kentucky, chose to wear an "I am the Militia" sweatshirt and publicize on social media his appreciation for and attendance at an event designed to challenge the democratic certification of a duly-elected President of the United States. He also chose to remain at the steps near the Capitol while other participants, including white supremacists, invaded the United States Capitol, caused death, and waived the flag of the Confederacy. In America, citizens (especially public defenders who dedicate their lives to defending those accused of crimes by law enforcement) have the right to express their views about Farmer's choices. Farmer's claim that he had a right to associate with the events of January 6, 2021, but that the First Amendment does not also permit public comment on his choices, should be rejected by this Court. The Court should dismiss the complaint in its entirety.

STANDARD OF REVIEW

The Federal Rules of Civil Procedure require a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The Supreme Court has made clear that a failure to plead "enough facts to state a claim to relief that is plausible on its face" warrants dismissal of the claim. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions," and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'" *Id.* (quoting *Twombly*, 550 U.S. at 557). Thus, Rule 12(b)(6) "allows the Court to dismiss, on the basis of a dispositive issue of law, meritless cases which would otherwise waste judicial resources and result in unnecessary discovery." *Glassman, Edwards, Wade & Wyatt, P.C. v. Wolf Haldenstein Adler Freeman & Herz, LLP*, 601 F. Supp. 2d 991, 997 (W.D. Tenn. 2009) (citation omitted).

Under the Rule 12(b)(6) standard, the Court may consider "exhibits attached [to the Complaint], public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the Complaint and are central to the claims contained therein." *Bassett v. NCAA*, 528 F.3d 426, 430 (6th Cir. 2008) (citation omitted). Further, "[u]nder certain circumstances . . . a document that is not formally incorporated by reference or attached to a complaint may still be considered part of the pleadings" for the purpose of a 12(b)(6) motion to dismiss. *Greenberg v. Life Ins. Co. of Va.*, 177 F.3d 507, 514 (6th Cir. 1999) (citation omitted). When a document is central to the complaint and is a necessary part

of the plaintiff's claim, the defendant may submit a copy of the document to the court attached to a motion to dismiss without converting the motion to one for summary judgment. *Id.* Additionally, courts may consider "matters of which a court may take judicial notice," and extrinsic materials that "'fill in the contours and details' of a complaint," without converting the motion to one for summary judgment. *Armengau v. Cline*, 7 F. App'x 336, 344 (6th Cir. 2001) (citations omitted).

Both Kentucky and federal courts have recognized the importance in resolving claims that implicate free speech as early as practicable "to avoid the chilling effect on free speech that defamation lawsuits create." *Welch v. Am. Publ. Co. of State*, 3 S.W.3d 724, 724 (Ky. 1999). The *Welch* court noted that, Courts should resolve free speech litigation more expeditiously whenever possible. The perpetuation of meritless actions, with their attendant costs, chills the exercise of press freedom." *Id.* (quoting *Maressa v. N.J. Monthly*, 445 A.2d 376, 387 (N.J. 1982)); *see also New York Times v. Sullivan*, 376 U.S. 254, 279 (1964) ("A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions -- and to do so on pain of libel judgments virtually unlimited in amount -- leads to a comparable 'self-censorship.'").[1]

STATEMENT OF FACTS

On January 5, 2021, Farmer and three others traveled together to Washington, D.C., to attend the rally of then-President Trump the following day. Complaint at ¶ 16. Farmer is a narcotics

[1] While *Welch* and other cases have opined on this principle in the context of summary judgment resolution, *see, e.g.*, *Combs v. Knott County Publishing Co., Inc.*, Case No. 2003-CA-000372-MR, 2004 Ky. App. Unpub. LEXIS 810, at *3-4 (Ky. App. Oct. 29, 2004), other courts have held that the imperative to resolve defamation cases as early as practicable should lead, if possible, to resolution at the pleading stage. *See, e.g.*, *Allstate Ins. Co. v. Shah*, Case No. 2:15-cv-01786-APG-CWH, 2017 U.S. Dist. LEXIS 50543, at *10 n.35 (D. Nev. Mar. 31, 2017) (granting motion to dismiss defamation claim, noting that "Courts have consistently protected every person's First Amendment right to communicate their opinion without fear of being sued for defamation." (citation omitted)); *Adelson v. Harris*, 973 F. Supp. 2d 467, 481 (S.D.N.Y. 2013) ("Because a defamation suit 'may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself,' courts should, where possible, resolve defamation actions at the pleading stage." (citation omitted) (quoting *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966))); *Biro v. Condé Nast*, 883 F. Supp. 2d 441, 457 (S.D.N.Y. 2012) (noting that there "is 'particular value'" in resolving defamation claims at the pleading stage" (citation omitted)).

detective with the Franklin County Sherriff's Office. *Id.* at ¶ 2. Prior to his time in Franklin County, he worked for the Versailles Police Department. *See id.* at ¶ 29, which incorporates Exhibit B to Complaint by reference. Exhibit B to the complaint references Farmer's Versailles Police Department personnel file; excerpts from that file are attached hereto as **Exhibit A** and reflect that Farmer signed a resignation letter that states, "I understand that the City of Versailles/Versailles Police Department will not further pursue internally or criminally the matters listed on the Statement of Charges dated October 3, 2011." Farmer also has a history of publicly injecting himself into matters of public controversy, including posting on social media regarding his disbelief in unconscious bias and systemic racism. *See* Farmer Social Media Screenshots, attached as **Exhibit B** hereto.[2] During his tenure in Frankfort, he has also been involved in cases in which he was accused of racial profiling. *See* examples of court filings, attached as **Exhibit C** hereto. Farmer has even developed a reputation among other local law enforcement officers that Farmer is "shady." Specifically, Plaintiff alleges in the complaint that Gonzalez "has held a grudge against Detective Farmer since 2014" and includes in the Complaint a screenshot of a text message between Gonzalez and a Frankfort police officer. Complaint at ¶¶ 14-15. Defendants include the attached **Exhibit D**, containing the entire text message conversation referenced in the Complaint, including that, when Gonzalez referenced Farmer's history of "racial profiling, intimidation and excessive use of force[,]" Officer Graves stated, "I've heard those things and that's why we work with the SO [Sheriff's Office] on a limited as needed basis." Officer Graves also stated that "[a]ll cops in Frankfort also know how shady Jeff [Farmer] can be so no one is arguing that." **Exhibit D**, Graves-Gonzalez Text Messages.

On January 6, 2021, Farmer again injected himself into a matter of public controversy.

[2] Plaintiff's Complaint refers to these social media posts. *See generally* Complaint at ¶ 20, second photo following ¶ 23.

Wearing a sweatshirt proclaiming "I Am the Militia," he attended the President's speech on January 6 and claims that following the conclusion of the President's speech at 1:00 p.m., he and two of the three individuals he traveled with "meandered the National Mall[,] . . . never went into the Capitol [Building], and never committed any criminal activity." Complaint at ¶¶ 3, 17, 23. By 1:50 p.m. on January 6, D.C.'s Metropolitan Police Department had declared the assembly at the Capitol Building to be a riot and, just before 3:00 p.m., "the District issued a citywide Wireless Emergency Alert declaring a curfew in effect" beginning at 6:00 p.m. Testimony of Robert J. Contee, III, Acting Chief of Police before United States Senate Homeland Security & Governmental Affairs Committee Rules and Administration Committee, Feb. 23, 2021, available at https://www.hsgac.senate.gov/imo/media/doc/Testimony-Contee-2021-02-23.pdf; *see also* Criminal Complaint, at 1-1, *United States of America v. John D. Andries*, No. 1:21-cr-00093-RC (D.D.C. Jan. 28, 2021), attached as **Exhibit E** hereto.[3] Farmer's social media posts, referred to in the complaint, indicate that "minutes" before his post at 4:56 p.m., he "was standing at the base of the steps," and Farmer admitted that he was close enough to see the insurrection, referring to "[t]he people I saw 'storm' the capital [sic]." *See* **Exhibit B**, Farmer Social Media Screenshots.

On his way home on January 7, Plaintiff gave an interview to "traditional media" commenting on the events of January 6th. Complaint at ¶¶ 18-19; Leigh Searcy, "Kentuckians who were at the Capitol on Wednesday recall a peaceful event before violence broke out," Jan. 7, 2021, available at https://www.lex18.com/news/covering-kentucky/kentuckians-who-were-at-the-capitol-on-wednesday-recall-a-peaceful-event-before-violence-broke-out. On January 8, Defendants—public defenders working in Franklin County, Kentucky's Department of Public

[3] It is well established that "the Court may take judicial notice of public records and government documents available from reliable sources on the Internet[,]" *see, e.g.*, *Mitchell v. TVA*, No. 3:14-CV-360-TAV-HBG, 2015 U.S. Dist. LEXIS 56527, at *9 n.2 (E.D. Tenn. Apr. 30, 2015) (citations omitted).

Advocacy ("DPA")—penned a letter ("the Letter") to Farmer's employer, Franklin County Sheriff Chris Quire. Complaint at ¶ 19 & Exh. A to Complaint, also attached as **Exhibit F** hereto. Contrary to Farmer's characterization of the statements contained in the Letter, *see* Complaint at ¶ 20, the Letter includes the following:

- Concerns and questions regarding Farmer's participation in events in Washington, D.C., on January 6, including that "[w]e have no indication that Deputy Farmer left the crowd when rioting began, nor do we have any proof that Deputy Farmer was not himself actively involved in treasonous behavior."
- Concerns and questions regarding those with whom Farmer associated while in Washington, D.C. Farmer characterized those people as the "[m]ost diverse group of people I've ever seen in my life." Defendants asked "[h]ow can minorities in Frankfort feel protected and served" by Farmer when he participates in events also attended by "white supremacists waving the flag of confederacy."
- Concerns and questions regarding Farmer's history in law enforcement and biases, including his "resign[ation] from the City of Versailles police department in exchange for no further pursuit of criminal charges against him[,]"[4] prior social media posts regarding "his disbelief in systematic racism and unconscious bias[,]"[5] and history of involvement in "cases which reflect targeting and racial profiling."[6]

[4] *See* **Exhibit A**, Excerpts from Farmer Versailles Police Department Personnel File.
[5] *See* **Exhibit B**, Farmer Social Media Screenshots.
[6] *See* **Exhibit C**, Examples of Court Filings. It is well established that "[a] court may consider public records without converting a Rule 12(b)(6) motion into a Rule 56 motion." *Jones v. City of Cincinnati*, 521 F.3d 555, 561-62 (6th Cir. 2008) (citation omitted); *see also Buck v. Thomas M. Cooley Law Sch.*, 597 F.3d 812, 816 (6th Cir. 2010) ("[A] court may take judicial notice of other court proceedings without converting the motion into one for summary judgment."); *Lynch v. Leis*, 382 F.3d 642, 647 n.5 (6th Cir. 2004) ("[A]s they are court records, this court may take judicial notice of them." (citation omitted)).

Exhibit F, Letter.[7] For the reasons that follow, the complaint should be dismissed.

ARGUMENT

The Plaintiff asserts one claim under 42 U.S.C. § 1983 (Count 1) and three common law tort claims (Counts 2-4) against Defendants. Each of these claims should be dismissed.

I. THE COURT SHOULD DISMISS PLAINTIFF'S SECTION 1983 FIRST AMENDMENT RETALIATION CLAIM (COUNT 1).

The Sixth Circuit has stated that "[a] prima facie case under § 1983 has two elements: (1) the defendant must be acting under the color of state law, and (2) the offending conduct must deprive the plaintiff of rights secured by federal law." *Lambert v. Hartman*, 517 F.3d 433, 439 (6th Cir. 2008). Plaintiff's Section 1983 claim fails because 1) Defendants were not acting under color of state law, 2) Plaintiff has failed to adequately allege that Defendants' actions deprived him of constitutionally-protected rights, and 3) Defendants' statements are themselves protected First Amendment speech which cannot form the basis of an actionable Section 1983 claim. Plaintiff's First Amendment Retaliation claim should therefore be dismissed.

A. Defendants did not act under color of state law.

Plaintiff alleges that the Defendants were acting under the color of law for the purposes of Section 1983. Complaint at ¶¶ 19, 32-33. "[M]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken under color of state law. . . ." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929 (1982) (internal alteration, quotation marks, and citation omitted). The "under the color of law" element is

[7] The complaint attaches an investigator's report, claiming that it "concluded that each and every one of the Defamatory Statements in the Defamatory Letter was false and, further, demonstrated and set forth facts leading to the conclusion that the Defamatory Statements were made knowingly and/or with reckless disregard of the truth." Complaint at ¶¶ 28-29 & Exhibit B to Complaint. This report, which contains one individual's views and opinions concerning questions of law for the Court to decide, is irrelevant, inadmissible, and should not be considered by the Court. *See* Fed. R. Evidence 401-403, 801-802.

dependent on the totality of the circumstances. *See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295-96 (2001).

Specifically as to public defenders, the Supreme Court has severely limited the application of "acting under the color of law." *See Polk Cnty. v. Dodson*, 454 U.S. 312, 324-25 (1981). The Court reasoned in *Polk County* that the duties of public defenders are to their clients, not the state. *Id.* at 318. In fact, public defenders characteristically oppose the state, and their representation of clients is "essentially a private function, traditionally filled by retained counsel, for which state office and authority are not needed." *Id.* at 319 (footnote omitted). Being merely paid by the state is not enough to turn the public defenders' functions into state actions. *Id.* at 321.[8] Rather, the Court held:

> In concluding that Shepard did not act under color of state law in exercising her independent professional judgment in a criminal proceeding, we do not suggest that a public defender never acts in that role. In *Branti v. Finkel*, 445 U.S. 507 (1980), for example, we found that a public defender so acted when making hiring and firing decisions on behalf of the State. It may be—although the question is not present in this case—that a public defender also would act under color of state law while performing certain administrative and possibly investigative functions. (. . .) With respect to Dodson's § 1983 claims against Shepard, we decide only that a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding.

Id. at 324-25 (internal citations omitted); *see also Jacobi v. Holbert*, 553 S.W.3d 246, 253 (Ky. 2018) (discussing historical independence of Kentucky's DPA).

The Sixth Circuit has discussed the boundaries of *Polk County*, emphasizing the distinction between actions or policies consistent with "the adversarial relationship between the State and the Public Defender"—which is not "under color of law"—and actions or policies where "the Public Defender is serving the State's interest in exacting punishment, rather than the interests of its

[8] The Supreme Court also noted that public defenders are not amenable to administrative direction in the same sense as other employees of a State. Rather, their decisions are dictated by individual ethical duties and independent judgment on behalf of their clients. *Id.* at 321-22.

clients, or society's interest in fair judicial proceedings." *Powers v. Hamilton Cnty. Pub. Def. Comm'n*, 501 F.3d 592, 611-13 (6th Cir. 2007).[9]

Applying this case law, it is first clear that when Defendants wrote the Letter, they did not act "under the color of law." Defendants did not write the Letter to further the state's interest; they did so in accordance with the public defender's traditional adversarial relationship with the state and commitment to their "clients [and] society's interest in fair judicial proceedings." *Id.* at 613.[10] Defendants were not performing administrative actions for the Commonwealth of Kentucky; they were fulfilling the role that our judicial system depends on them to fulfill: to challenge state actors, not to act in furtherance of the interest of the state.

B. Plaintiff fails to adequately allege that Defendants' conduct deprived him of rights secured by federal law.

In Count 1, Farmer claims that the Defendants "retaliated" against him for what he did on January 6, 2021, by writing the Letter and publicizing their views. As a matter of law, this fails to state a claim for First Amendment Retaliation.

For First Amendment retaliation to constitute a deprivation of a right secured by federal law, a plaintiff must establish that (1) he engaged in constitutionally protected conduct; (2) an adverse action was taken against him that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) the adverse action was motivated at least in part by his protected conduct. *Mezibov v. Allen*, 411 F.3d 712, 717 (6th Cir. 2005) (citing *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (en banc)). In *Thaddeus-X*, the Sixth Circuit noted that, because Section 1983 is a tort statute, courts must be careful to ensure that real injury is involved,

[9] *See also Miranda v. Clark Cnty., Nev.*, 319 F.3d 465, 468 (9th Cir. 2003) (holding conduct actionable as "under the color of law" where policy was instituted to polygraph all clients and do nothing for clients who fail the polygraph).
[10] *See also Bennett v. Metro. Gov't of Nashville & Davidson Cnty.*, 977 F.3d 530, 539 (6th Cir. 2020) ("Central to the concept of protecting the speech of government employees is the idea that public employees are the most likely to be informed of the operations of public employers and that the operation of such entities is 'of substantial concern to the public.'" (citations omitted)).

lest they trivialize the First Amendment by sanctioning a retaliation claim even if it is unlikely that the exercise of First Amendment rights was actually deterred. 175 F.3d at 397. Likewise, the Court held in *Mattox v. City of Forest Park*, 183 F.3d 51 (6th Cir. 1999) that "concrete injuries" were a "constitutional threshold" for a First Amendment retaliation claim to proceed. 183 F.3d at 523.

The Court is required to "tailor" its analysis under the "adverse action" prong to the circumstances of the specific retaliation claim. *Mezibov*, 411 F.2d at 721 (citation omitted). Thus, in *Mezibov*, which involved a claim that a defense attorney was verbally retaliated against by a prosecutor, the Sixth Circuit held that "the appropriate formulation of the 'adverse action' prong . . . is whether the alleged defamation would deter a criminal defense attorney of ordinary firmness from continuing to file motions and vigorously defend his client." *Id.* (citation omitted). Here, the "appropriate formulation" is whether criticism by criminal defense lawyers would deter a law enforcement officer of ordinary firmness from participating in protected political activity. The answer is "no" as a matter of law.

The Sixth Circuit found that this element was not met in *Mattox*, in which a city council member claimed that defendants, in retaliation for her speech on matters of public concern, released embarrassing information about her that contributed to her losing the next election. 183 F.3d 515. The court noted that, as an elected public official, Mattox voluntarily opened herself to criticism of her actions and political stances. *Id.* at 522. The court also emphasized that she was merely criticized—not fired—for her views. *Id.* The court wrote that "public officials may need to have thicker skin than the ordinary citizen" and found that Mattox's alleged injury did not meet the "adverse action" requirement for retaliation. *Id.* Further, the second plaintiff in *Mattox*, a firefighter,

> [o]ffer[ed] only generalized statements about the effect on her character and reputation, about being held up to "ridicule, contempt, shame, and disgrace,"

> and . . . about the effect on her respectability, comfort, and position in society. Nowhere d[id] she attempt to concretize her personal injury. Without anything more specific, we cannot say that this meets the constitutional threshold required for her claim of First Amendment retaliation to proceed.

Id. at 523.

The Sixth Circuit reiterated this "thicker skin" requirement in *Mezibov*: "Mezibov, as an attorney taking on a high profile case, 'voluntarily placed [himself] open to criticism of [his] actions.' . . . As such, Mezibov must have a 'thicker skin than the ordinary citizen' when it comes to enduring criticism for his behavior, even if it is protected speech under the First Amendment." *Mezibov*, 411 F.3d at 722 (*quoting Mattox*, 183 F.3d at 522). The Court also noted that Mezibov "failed to allege a 'specific' or 'concrete' personal injury" and instead "merely claims 'damage to his professional reputation and emotional anguish and distress,' the very same kind of harms we found insufficient in *Mattox*." *Id.* (citation omitted).

Like Mattox and Mezibov, who were criticized but not fired[11] for their actions, Plaintiff was not terminated due to Defendants' Letter, nor were Defendants' actions directly responsible for *any* retaliation against Plaintiff. And like Mezibov and the firefighter-plaintiff in *Mattox*, Plaintiff has not alleged a concrete personal injury or "the type of threatening or intimidating"[12] behavior that would induce such chilling effect upon a law enforcement officer of ordinary firmness.

[11] It is particularly curious that Farmer seeks remuneration from Defendants, who do not have the power to fire Farmer in the first place, nor the power to directly impact his job assignment or the policies of the Franklin County Sheriff's Office as to the private speech of its employees.

[12] Retaliation that the Sixth Circuit has held sufficient to meet this standard arose in *McBride v. Village of Michiana*, 100 F.3d 457 (6th Cir. 1996). There, an officer called a newspaper and asked that McBride, a reporter, "not be assigned to cover council proceedings, saying that he could not ensure her safety if she appeared before that body." *Id.* at 459. On another occasion, a city official "hurled a chair at McBride and other members of the press at a public meeting." *Id.* Such physically threatening conduct is "severe enough to chill a person of ordinary firmness from continuing to publish unfavorable articles about city officials." *Davidian v. O'Mara*, Case No. 99-5423, 2000 U.S. App. LEXIS 6767, at *13-14 (6th Cir. Apr. 7, 2000). A letter from criminal defense attorneys raising criticisms of a law enforcement official who chose to participate in and positively comment on the events of January 6, 2021, does not rise to the *McBride* level of chilling, physical intimidation.

Numerous other courts have found claims of this sort to be insufficient. *See, e.g.*, *Atlanta Cmty. Sch. v. Alpena-Montmorency-Alcona Educ. Serv. Dist.*, Case No. 11-14361, 2012 U.S. Dist. LEXIS 133004, at *46-48 (E.D. Mich. Sept. 18, 2012) (holding that disparaging public statements about plaintiff were not an adverse action for purposes of a First Amendment retaliation claim); *X–Men Sec., Inc. v. Pataki*, 196 F.3d 56, 70-72 (2d Cir. 1999) (holding that, in the absence of threats, intimidation, or coercion, "disparaging, accusatory, or untrue statements" fail to state a claim for violation of constitutional rights); *Colson v. Grohman*, 174 F.3d 498, 512 (5th Cir. 1999) (holding that, where plaintiff "alleged only that she was the victim of criticism, an investigation (or an attempt to start one), and false accusations" the same were "all harms that, while they may chill speech, are not actionable under our First Amendment retaliation jurisprudence."); *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 687 (4th Cir. 2000) ("[W]here a public official's alleged retaliation is in the nature of speech, in the absence of threat, coercion, or intimidation intimating that punishment, sanction or adverse regulatory action will imminently follow, such speech does not adversely affect a citizen's First Amendment rights, even if defamatory." (footnote and citations omitted)); *Bondar v. D'Amato*, Case No. 06-C-109, 2007 U.S. Dist. LEXIS 42301, at *21-23 (E.D. Wis. June 11, 2007) (finding no adverse action where public official's statements could be considered "accusatory, disparaging, or even untrue" because the statements did "not assert, or even imply, that he would utilize his governmental power to attempt to silence the Bondars."); *Curley v. Vill. of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001) ("Where a party can show no change in his behavior, he has quite plainly shown no chilling of his First Amendment right to free speech." (citations omitted)).

Plaintiff cannot establish his First Amendment retaliation claim. Therefore, his Section 1983 claim in Count 1 must be dismissed.

C. Defendants' statements are themselves protected First Amendment speech which cannot form the basis of a retaliation claim.

The Sixth Circuit has stated that "only improper acts of retaliation . . . are forbidden by our First Amendment jurisprudence" such that "[t]he proper exercise by the defendants of their own free speech rights cannot serve as the basis for imposition of liability. . . ." *McBride*, 100 F.3d at 462. The Sixth Circuit has also specifically held that "[s]tatements exposing possible corruption in a police department are exactly the type of statements that demand strong First Amendment protections." *See v. City of Elyria*, 502 F.3d 484, 493 (6th Cir. 2007) (citations omitted).

Other district courts in the Sixth Circuit have held that "a public official may exercise his own rights as long as he does not engage in unconstitutional retaliation." *Butler v. McMahan*, Case No. 2:07-CV-88, 2009 U.S. Dist. LEXIS 53392, at *11 (E.D. Tenn. June 18, 2009) (citing *McBride*, 100 F.3d at 462). In that case, a newspaper reporter alleged that a mayor approached a representative of the paper's owner and tried to get the reporter fired in retaliation for stories that the mayor saw as "biased and unfair," but the court "could not find that a constitutional violation occurred." *Id.* at *10-11. The court noted that, "[e]ven assuming that the plaintiff presented evidence that Defendant McMahan requested his termination, this request is merely one in which Defendant McMahan exercised his free speech rights in complaining to the newspaper about one of its employees." *Id.* at *11.

When public defenders raise questions about the conduct of law enforcement personnel, they are exercising their own First Amendment rights to engage with public officials about the propriety of their conduct. Such statements cannot, under Sixth Circuit precedent, form the basis of liability, and Plaintiff's Section 1983 claim should therefore be dismissed.

II. THE COURT SHOULD DISMISS PLAINTIFF'S SECTION 1983 FIRST AMENDMENT RETALIATION CLAIM BECAUSE DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY (COUNT 1).[13]

The Kentucky Supreme Court has held that "the DPA is clearly a state agency to which governmental immunity is extended. Because the agency is sheltered by the defense of immunity, its employees performing discretionary acts are also able to claim the defense of immunity." *Jacobi*, 553 S.W.3d at 254. The Court highlighted the critical role of public defenders, writing that "[w]hile most of the public officials in our great Commonwealth are hard-working, justice-seeking, and ethical, the public defender is ever-present to ward off the dangers of those who would seek to turn justice asunder. They are guardians of liberty and this safe-keeping task cannot be treated lightly." *Id.* at 255. The Court held that the public defender in *Jacobi* was entitled to qualified immunity from the malpractice suit in that case. *Id.* at 261-62.

Under the qualified immunity doctrine, "'government officials performing discretionary functions . . . are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Feathers v. Aey*, 319 F.3d 843, 847-48 (6th Cir. 2003) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). For its three-step inquiry, the Court 1) determines whether a constitutional violation occurred, 2) "consider[s] whether the violation involved a clearly established constitutional right of which a reasonable person would have known[,]" and 3) "determine[s[whether the plaintiff has offered sufficient evidence 'to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights.'" *Id.* at 848 (quoting *Williams v. Mehra*, 186 F.3d 685, 691 (6th Cir. 1999) (en banc)).

[13] If the Court disagrees that Plaintiff has failed to state a cognizable Section 1983 claim as discussed in Section I, *supra*, Defendants raise the defense of qualified immunity in the alternative. *See Caruth v. Geddes*, 443 F. Supp. 1295, 1296 (N.D. Ill. 1978) (bringing motion to dismiss Section 1983 claim under alternative arguments for qualified immunity of public defenders and that public defenders do not act under color of state law).

The Letter, penned by the five DPA employees named as Defendants was consistent with the critical systemic function undertaken by public defenders, and highlighted the role of Farmer in initiating criminal charges. In fact, Plaintiff alleges that "[Defendants acted] at least in part in their capacities as DPA employees. . . ." Complaint at ¶ 19. As noted recently by the Sixth Circuit, "despite the general preference to save qualified immunity for summary judgment, sometimes it's best resolved in a motion to dismiss. This happens when the *complaint* establishes the defense." *Siefert v. Hamilton Cnty.*, 951 F.3d 753, 762 (6th Cir. 2020) (emphasis in original) (citations omitted).[14] Here, Plaintiff alleges that Defendants were acting as public defenders in penning the Letter and, as discussed in Section I.B., *supra*, fails to establish that *Defendants'* actions deprived Plaintiff of any clearly-established constitutional right. Further, the precedent cited by Plaintiff for his purportedly clearly-established right fails to support his argument, as *Mezibov* in fact affirmed the dismissal of a First Amendment retaliation claim. *See generally* 411 F.3d 712. Plaintiff's Section 1983 claim should be dismissed, as Defendants are entitled to qualified immunity.

III. PLAINTIFF FAILS TO STATE A COGNIZABLE DEFAMATION CLAIM (COUNT 2).

Plaintiff fails to state a defamation claim for which relief can be granted because he does not identify any provably false defamatory language about the Plaintiff and cannot establish constitutional actual malice.

Under Kentucky law, a *prima facie* case of defamation requires four elements:

[14] *See also Pearson v. Callahan*, 555 U.S. 223, 231-32 (2009) ("[W]e have made clear that the driving force behind creation of the qualified immunity doctrine was a desire to ensure that insubstantial claims against government officials [will] be resolved prior to discovery." (second alteration in original) (internal quotation marks and citation omitted)); *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) ("[B]ecause the entitlement [to qualified immunity] is an *immunity from suit* rather than a mere defense to liability, we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation." (emphasis in original) (internal quotation marks and citations omitted)).

(1) defamatory language;[15] (2) about the plaintiff; (3) which is published; and (4) which causes injury to reputation. *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781, 793 (Ky. 2004). A statement is not actionable unless it is false: "Truth is a complete defense." *Stringer*, 151 S.W.3d at 795; *Welch*, 3 S.W.3d at 730 ("[A]lthough many of the allegedly defamatory statements that Welch complains of are disparaging, they are not so definite or precise as to be branded as false." (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19-20 (1990))). Furthermore, the First Amendment imposes a significantly heightened burden for a defamation plaintiff who is a public official, such as Farmer: he must establish by clear and convincing proof that the statement was made with actual malice, "that is, that it was false or with reckless disregard of whether it was false or not." *New York Times*, 376 U.S. at 279-80.[16] Reckless disregard requires that "the defendant in fact entertained serious doubts as to the truth of his publication"; failing to investigate or verify, alone, will not support a finding of actual malice. *Harte-Hanks*, 491 U.S. at 688, 692 (citation omitted).

Courts around the country have found that law enforcement officers are public officials for purposes of defamation claims.[17] As a public official by virtue of his position as a deputy sheriff,

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[15] A statement is defamatory "if it tends to (1) bring a person into public hatred, contempt or ridicule; (2) cause him to be shunned or avoided; or, (3) injure him in his business or occupation." *McCall v. Courier-Journal & Louisville Times*, 623 S.W.2d 882 (Ky. 1981).

[16] *See also, e.g., Harte-Hanks Comm'ns, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989); *Falls v. Sporting News Pub. Co.*, 899 F.2d 1221 (6th Cir. 1990).

[17] *See, e.g., Time Inc. v. Pape*, 401 U.S. 279, 283-84 (1971) (holding deputy chief of detectives of a metropolitan police force was a "public official" for purposes of his defamation claim); *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968) (same as to a deputy sheriff); *Rattray v. City of National City*, 51 F.3d 793, 800 (9th Cir. 1994) (same as to a police officer), *cert. denied*, 516 U.S. 820 (1995); *McKinley v. Baden*, 777 F.2d 1017 (5th Cir. 1985) (same as to a city police officer); *Gray v. Udevitz*, 656 F.2d 588, 591 (10th Cir. 1981) ("Street level policemen, as well as high ranking officers, qualify as public officials" because "[t]he strong public interest in ensuring open discussion and criticism of his qualifications and job performance warrant the conclusion that he is a public official. Police officials have uniformly been treated as public officials within the meaning of *New York Times*." (citations omitted)); *Barge v. Ransom*, 30 S.W.3d 889, 891 (Mo. Ct. App. 2000) ("Police officers are considered public officials within the meaning of the *New York Times Co.* decision." (citation omitted)); *Rotkiewicz v. Sadowsky*, 730 N.E.2d 282, 287 (Mass. 2000) ("We conclude, because of the broad powers vested in police officers and the great potential for abuse of those powers, as well as police officers' high visibility within and impact on a community, that police officers, even patrol-level police officers such as the plaintiff, are 'public officials' for purposes of defamation.").

Farmer must establish by clear and convincing proof that the Letter contains a false statement of fact that was made with actual malice.[18] Farmer cannot meet this standard.

As a necessary prerequisite to proving that a statement is false, the statement must assert actual facts about the plaintiff. *Milkovich*, 497 U.S. at 16-17, 19-20; *see also Welch*, 3 S.W.3d at 730. "[A]n expression of opinion, as opposed to a defamatory statement of fact, is entitled to an absolute privilege" and cannot form the basis of a defamation claim. *Biber v. Duplicator Sales & Serv.*, 155 S.W.3d 732, 737 (Ky. App. 2004); *Yancey v. Hamilton*, 786 S.W.2d 854, 857 (Ky. 1989).[19] True statements of fact cannot form the basis of a defamation claim merely because a plaintiff contends they imply an unfavorable opinion. *See Williams*, 487 S.W.3d at 454. Stated another way, "in order for an allegedly defamatory statement to be actionable, the statement must be sufficiently factual to be provable [as] false, or the statement must imply underlying facts which can be provable as false." *Id.* (citing *Milkovich*, 497 U.S. at 20). Likewise, statements of "rhetorical hyperbole" and other language that defies precise definition are not actionable. *Welch*, 3 S.W.3d at 730. Federal courts have noted that, "[g]iven the importance of the First Amendment principles at stake, '[w]here the question of truth or falsity is a close one, a court should err on the side of non-actionability.'" *Adelson*, 973 F. Supp. 2d at 487 (quoting *Celle v. Filipino Reporter Enters. Inc.*, 209 F.3d 163, 188 (2d Cir. 2000)).

[18] Further, Farmer would also be a limited-purpose public figure for the purposes of this case. The Kentucky Supreme Court has recognized that where "an individual voluntarily injects himself or is drawn into a particular public controversy [he] thereby becomes a public figure for a limited range of issues." *Warford v. Lexington Herald-Leader Co.*, 789 S.W.2d 758, 763-74 (Ky. 1990) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)). Here, Farmer injected himself into a particular public controversy surrounding the events in Washington, D.C. on January 6, 2021, the Defendants' Letter, and questions regarding Farmer's conduct as a law enforcement officer, given his voluntary participation in a news article regarding his presence in Washington, D.C. and his publicly-shared opinions regarding the activities that took place there. Complaint at ¶ 18. Thus, Farmer is a public figure for the purposes of his defamation claim. *Warford*, 789 S.W.2d at 763-74.

[19] *See also Williams v. Blackwell*, 487 S.W.3d 451, 454 (Ky. 2016) (holding that a statement of opinion can form the basis of a defamation claim "only if it implies the allegation of undisclosed defamatory fact as the basis for the opinion." (internal quotation marks omitted) (quoting *Yancey*, 786 S.W.2d at 857)).

Farmer claims that seven statements contained in the Letter are defamatory but mischaracterizes the majority of the statements:

"Defamatory Statement" in Complaint	**Defendants' Statement in Letter**
"Jeff Farmer failed to leave the crowd when rioting began"	"We have no indication that Deputy Farmer left the crowd when rioting began. . . ."
"Jeff Farmer was involved with treasonous behavior"	". . . nor do we have any proof that Deputy Farmer was not himself actively involved in treasonous behavior."
"Jeff Farmer fraternizes with racists and white supremacists who waved the confederate flag"	"The fact is that a substantial number of individuals who attended this event are white supremacists waving the flag of confederacy. How can minorities in Frankfort feel protected and served by an individual who so clearly flaunts his fraternization with racists?"
"Jeff Farmer was involved with racial targeting and racial profiling and harassment based on race in his capacity as a detective"	"In the past, Deputy Farmer has posted publicly about his disbelief in systematic racism and unconscious bias. He has been involved in many cases which reflect targeting and racial profiling."
"Jeff Farmer took part in a treasonous riot that showed a disregard for the rule of law"	"We ask you whether taking part in a treasonous riot is the sort of good decision making necessary for the title of deputy sheriff? At a minimum, it shows a disregard for the rule of law and constitutional process he swore to uphold."

Compare Complaint at ¶ 20 *with* **Exhibit F**, Letter.

In this case, the Kentucky Supreme Court's decision in *Welch* is instructive. *See* 3 S.W.3d at 730. In *Welch*, the Court held that accusations that a mayor had "squandered" millions of dollars, leaving the city "broke," defied precise definition and could therefore not support a libel claim. *Id.* at 730. The decision followed the U.S. Supreme Court's holding in *Greenbelt Cooperative Pub. Ass'n v. Bresler*, 398 U.S. 6, 14 (1970), in which the Court held that the term "blackmail" to describe an extremely unreasonable position was non-actionable "rhetorical hyperbole." Here, the statements at issue contain similar language which defies precise definition and which cannot be

said to assert provably false facts about Farmer. Defendants will address each allegedly-defamatory statement—utilizing the actual language from the Letter rather than Plaintiff's characterizations—in turn.

The Letter stated that "Jeff Farmer attended the events in Washington D.C. on January 6th which resulted in the storming of our nation's Capitol Building. . . ." **Exhibit F**, Letter. This is not false. Farmer admits he attended the events in Washington, D.C., on January 6th and admits that the Capitol was stormed, even using the term "storm" in his own social media post regarding the event. **Exhibit B**, Farmer Social Media Screenshots. Further, Plaintiff cannot demonstrate actual malice, i.e., that Defendants knew the statement to be false or entertained serious doubts as to its truth.

The Letter said that, regarding Farmer's activities in Washington, D.C., "[w]e have no indication that Deputy Farmer left the crowd when rioting began. . . ." **Exhibit F**, Letter. Farmer's own social media posts—e.g., stating, "Literally minutes ago I was standing at the base of the steps" at approximately 4:56 p.m., more than three hours after D.C. police declared the activities at the Capitol Building to be a riot, and discussing "[t]he people I saw 'storm' the capital [sic]"[20]—demonstrates that Defendants' statements that they had "no indication that Deputy Farmer left the crowd when rioting began" were true. According to Farmer's posts, he was in the crowd, and even at the steps of the Capitol, throughout the entire time of the rioting. Further, Plaintiff cannot demonstrate actual malice, i.e., that Defendants knew the statement to be false or entertained serious doubts as to its truth.

The Letter said that "we [do not] have any proof that Deputy Farmer was not himself actively involved in treasonous behavior" and asked "whether taking part in a treasonous riot is

[20] **Exhibit B**, Farmer Social Media Screenshots.

the sort of good decision making necessary for the title of deputy sheriff[,]" noting that "[a]t a minimum, it shows a disregard for the rule of law and constitutional process he swore to uphold." **Exhibit F**, Letter. This is all fair commentary and protected opinion not sufficiently factual to be provable as false. In light of the public information disseminated by Farmer, to characterize Farmer's choices—namely to 1) attend an event designed to "Stop the Steal" and prevent the proper certification of the election results, 2) wear an "I Am the Militia" sweatshirt, 3) praise a crowd which included white supremacists and loyalists to the Confederacy, and 4) admit to being at the foot of the steps long after the insurrection occurred in a place where he could watch it occur[21]—as treasonous was protected speech. It certainly is not based on provably false facts, and Plaintiff cannot demonstrate actual malice, i.e., that Defendants knew the statements to be false or entertained serious doubts as to their truth.

The Letter stated that "[t]he fact is that a substantial number of individuals who attended this event are white supremacists waving the flag of confederacy" and, noting Farmer's social media posts about attending the event, asked how "minorities in Frankfort [can] feel protected and served by an individual who so clearly flaunts his fraternization with racists?" **Exhibit F**, Letter. The question presented by Defendants regarding the propriety of Farmer's "fraternization with racists" defies precise definition and is reasonable "rhetorical hyperbole" to describe Farmer's social media activity and association with the kind of persons who attended the event that resulted in the insurrection at the Capitol. *Welch*, 3 S.W.3d at 730; **Exhibit B**, Farmer Social Media Screenshots. It certainly is not provably false, and Plaintiff cannot demonstrate actual malice, i.e., that Defendants knew the statements to be false or entertained serious doubts as to their truth.

The Letter stated that "[i]n the past, Deputy Farmer has posted publicly about his disbelief

[21] **Exhibit B**, Farmer Social Media Screenshots.

in systematic racism and unconscious bias. He has been involved in many cases which reflect targeting and racial profiling." **Exhibit F**, Letter. Such statements accurately reflect Plaintiff's prior social media posts, *see* **Exhibit B**, Farmer Social Media Screenshots, involvement in legal cases which include allegations that Farmer's law enforcement tactics involve racial profiling, *see* **Exhibit C**, Examples of Court Filings, and even belief by fellow Frankfort law enforcement officers that they had "heard" about Farmer's history of "racial profiling," and that "[a]ll cops in Frankfort also know how shady Jeff [Farmer] can be so no one is arguing that[,]" *see* **Exhibit D**, Graves-Gonzalez Text Messages. These statements are not provably false, and Plaintiff cannot establish actual malice, i.e., that Defendants knew the statements were false or entertained serious doubts as to their truth.

The Letter said that Plaintiff "resign[ed] from the City of Versailles police department in exchange for no further pursuit of criminal charges against him." This accurately reflects Plaintiff's resignation letter, which is publicly available under the Kentucky Open Records Act. Farmer stated in his resignation that "I understand that the City of Versailles/Versailles Police Department will not further pursue internally or criminally the matters listed on the Statement of Charges dated October 3, 2011." **Exhibit A**, Excerpts from Farmer Versailles Police Department Personnel File. The statement in the Letter was not provably false, and Plaintiff cannot establish actual malice, i.e., that Defendants knew the statements were false or entertained serious doubts as to their truth.

Farmer cannot prove any of the allegedly defamatory statements to be factually false. None of these statements asserts a false statement of fact about Farmer sufficient to form the basis of a defamation claim, several are absolutely privileged opinions, and, even if such determinations were close, the "court should err on the side of non-actionability." *Adelson*, 973 F. Supp. 2d at 487

(internal quotation marks and citation omitted). Likewise, Farmer's bare conclusory allegation that Defendants' statements "were made maliciously, and were knowingly false, and/or were made recklessly in callous disregard of the truth," Complaint at ¶ 43, cannot be supported under the heightened clear-and-convincing-evidence standard; to suggest that Defendants knew the statements to be false but made them anyway or that they entertained serious doubts as to the truth of such statements is simply not supportable by *any* rational logic.[22] Therefore, Farmer's Complaint fails to state a cognizable defamation claim.

IV. PLAINTIFF FAILS TO STATE A COGNIZABLE FALSE LIGHT INVASION OF PRIVACY CLAIM (COUNT 3).

The Plaintiff alleges in the Complaint that unspecified statements of the Defendants have placed the Plaintiff in a "false light." Complaint at ¶ 46. However, the Plaintiff's claim of false light invasion of privacy fails for the same reasons his defamation claim fails: Farmer has not alleged and cannot prove that any of the statements in the Letter are false or defamatory.

To sustain an action for false light invasion of privacy, a plaintiff must show that: "(1) the false light in which the other was placed would be highly offensive to a reasonable person, and (2) the publisher had knowledge of, or acted in reckless disregard as to, the falsity of the publicized matter and the false light in which the other was placed." *McCall*, 623 S.W.2d at 888 (citing Restatement (Second) of Torts, Sec. 652E (1976)). Similar to the tort of defamation, the tort of false light requires a threshold showing that the defendant publicly attributed to the plaintiff

[22] Defendants reiterate that, as of the time of the Letter's release on January 8, Farmer had confirmed he was "one of the thousands walking toward the Capitol [Building]" when the rioting broke out, that he believed the entry into the Capitol Building was by "a small group of people that influenced some weaker-minded people to follow their lead," and that he had made it to "the base of the steps" and "saw" people "'storm' the capital [sic]. . . ." Searcy, "Kentuckians who were at the Capitol"; **Exhibit B**, Farmer Social Media Screenshots. Likewise, the concerns raised in the Letter regarding Farmer's involvement in law enforcement cases "which reflect targeting and racial profiling" and resignation from the Versailles police force fairly summarize public records (and other available information). *See, e.g.*, **Exhibit A**, Excerpts from Farmer Versailles Police Department Personnel File at p. 2; **Exhibit D**, Graves-Gonzalez Text Messages.

"characteristics, conduct or beliefs that are false." *Id.*; *see also Hays v. Clear Channel Comm'ns, Inc.*, Case No. 2005-CA-001490-MR, 2006 Ky. App. Unpub. LEXIS 378, at *13 (Ky. App. Nov. 3, 2006) ("The requirement that the plaintiff be placed in a false light necessarily requires that the defendant alleged or implied facts about the plaintiff which are not true.").

Here, Plaintiff fails to state a claim for false light for the same reasons he fails to state a claim for defamation. Plaintiff does not allege, and cannot prove, that the Defendants publicly attributed to him any "characteristics, conduct or beliefs that are false." *McCall*, 623 S.W.2d at 888. The Letter simply raised concerns regarding Farmer in light of his position as a law enforcement officer, which were supported by the information Defendants possessed at the time the Letter was released. The Letter does not state anything false about the Plaintiff.

In addition, Plaintiff's false light claim fails because he cannot prove that the Letter was published with "actual malice." Under Kentucky law, a plaintiff must plead and prove actual malice in order to recover for false light invasion of privacy. *See Yancey*, 786 S.W.2d at 860; *McCall*, 623 S.W.2d at 888. To show actual malice, a plaintiff must prove that the defendant "either knew of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which movant was placed." *Yancey*, 786 S.W.2d at 860. Here, Plaintiff cannot possibly meet this standard. The statements in the Letter were valid and reasonable concerns regarding a public official and were based on the information publicly available at the time. As discussed above, none of the particular statements is false, so it is impossible for the Plaintiff to show that the Defendants somehow knew that they were false or entertained doubt as to the statements' truth.

Because Plaintiff cannot plausibly allege that any of the statements contained in the Letter are false, defamatory, or was made with actual malice, the Plaintiff's claim of false light invasion of privacy should be dismissed.

V. PLAINTIFF FAILS TO STATE A COGNIZABLE INVASION OF PRIVACY CLAIM (COUNT 4).

Plaintiff alleges in the Complaint that Defendants' "falsehoods" have invaded Plaintiff's privacy by violating Farmer's "right of seclusion and right against unreasonable publicity." Complaint at ¶¶ 49-50. However, many of Defendants' concerns as published in the Letter were regarding matters which Plaintiff himself had opened to the public through his own actions. Plaintiff's invasion of privacy claim should be dismissed.

To state a claim for intrusion upon seclusion, a plaintiff must plead "1) an intentional intrusion by the defendant, (2) into a matter the plaintiff has a right to keep private, (3) which is highly offensive to a reasonable person." *Smith v. Bob Smith Chevrolet, Inc.*, 275 F. Supp. 2d 808, 822 (W.D. Ky. 2003) (citing Restatement (Second) of Torts § 652B); *see also McKenzie v. Allconnect, Inc.*, 369 F. Supp. 3d 810, 819 (E.D. Ky. 2019). To state a claim for giving publicity to a matter concerning private life, a plaintiff must plead that: (1) there is publicity; (2) the facts disclosed concern the private life of an individual; (3) the matter publicized is highly offensive and objectionable to a reasonable person of ordinary sensibilities; (4) the publication must have been made intentionally, not negligently; and (5) the matter publicized must not be a legitimate concern to the public. *See Patrick v. Cleveland Scene Pub. LLC*, 582 F. Supp. 2d 939, 955 (N.D. Ohio 2008), *aff'd*, 360 F. App'x 592 (6th Cir. 2009) (citing Restatement (Second) of Torts § 652D (1977)); *see also McCall*, 623 S.W.2d at 887 (adopting "principles of [tort of invasion of privacy] as enunciated in the Restatement (Second) of Torts").

The Complaint fails to plausibly allege that Defendants intruded into private matters of the Plaintiff, given that Plaintiff himself attended public events in Washington, D.C., and voluntarily participated in a news interview regarding the same events.[23] *See Pearce v. Whitenack*, 440 S.W.3d

[23] Searcy, "Kentuckians who were at the Capitol".

392, 401 (Ky. App. 2014) ("The defendant is subject to liability under the rule stated in this Section only when he has intruded into a private place, or has otherwise invaded a private seclusion that the plaintiff has thrown about his person or affairs" (quoting Restatement (Second) of Torts § 652B cmt. c (1977))); *Dukes v. Mid-E. Ath. Conf.*, 213 F. Supp. 3d 887, 892 (W.D. Ky. 2016) ("A plaintiff cannot show that the defendant intruded into his or her private affairs for events that occurred while he or she appeared in public and expected to interact with others." (citation omitted)). Likewise, Plaintiff made public comments on his own social media regarding his activities in Washington, as well as those past posts which prompted Defendants to raise concerns as to "his disbelief in systematic racism and unconscious bias." *See* **Exhibit B**, Farmer Social Media Screenshots. Finally, as to the claim regarding publicity as to matters concerning Farmer's private life, Farmer has not—and indeed cannot plausibly—allege that the matter publicized was not of legitimate concern to the public, given that the entire basis for Defendants' Letter was to raise concerns regarding Farmer's ability to fairly perform his duties as a law enforcement officer, and for "minorities in Frankfort feel[ing] protected and served" by Farmer. *See* **Exhibit F**, Letter.

Because Plaintiff cannot plausibly claim that Defendants intruded into private matters of the Plaintiff or that such matters were of no legitimate concern to the public, the Plaintiff's claim of invasion of privacy should be dismissed.

CONCLUSION

Plaintiff has failed to state cognizable claims as to all counts. For the reasons explained above, the Court should dismiss Plaintiff's Complaint with prejudice in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ R. Kenyon Meyer
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