THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

ELIZABETH K. DALY,

Plaintiff,

v. **Case No. 3:14cv250-HEH**

COMMONWEALTH OF VIRGINIA, *et al*.,

Defendants.

BRIEF IN SUPPORT OF MOTION TO DISMISS

This Court should dismiss all of the claims in this matter, with prejudice, pursuant to Rule 12 (b)(6) of the Federal Rules of Civil Procedure, because when the Defendants lawfully approached the Plaintiff to investigate their reasonable suspicion of a misdemeanor offense - underage possession of alcohol - she failed to cooperate and fled the scene in her SUV, giving them probable cause to pursue and arrest her for various felony offenses. Plaintiff's own Complaint shows the probable cause justifying the Defendants' actions, and the complete lack of foundation for the shocking level of damages sought reveals the true nature of this pursuit. Re-pleading by the Plaintiff can neither negate the probable cause she gave the Defendants on the night in question, nor can it substantiate the damages sought. Accordingly, dismissal of all claims with prejudice is appropriate.

FACTUAL AND PROCEDURAL BACKGROUND

This action arises from an encounter between the Plaintiff, Elizabeth Daly ("Daly"), and seven special law enforcement agents ("Agents") of the Commonwealth's Department of

Alcoholic Beverage Control ("ABC"). Compl. ¶¶ 1, 2, 7-15. In her 47-page, 275-paragraph Complaint, Daly alleges that the Agents "seized, arrested, and jailed" her "without probable cause and in violation of Federal Constitutional and Civil Rights and the Common Law of Virginia." *Id.* ¶ 2.

At 10:10 p.m. on April 11, 2013, Daly and two friends, all under the age of 21, exited the Harris Teeter grocery store at the Barracks Road Shopping Center in Charlottesville, Virginia. Compl. ¶ 32. Daly and her friends had purchased several items at the store, including a case of canned LaCroix Sparkling water. *Id.* ¶ 30. As they exited the store, one of Daly's friends carried the case of canned sparkling water openly in her arms. *Id.* ¶ 33. They walked toward Daly's vehicle, a Chevy Trailblazer.[1] *Id.* ¶¶ 21, 36. The parking lot was "well-lit" and "mostly empty" at the time, and Daly's SUV was located near the back of the lot. *Id.* ¶¶ 34, 35.

At or around the same time, seven of the Commonwealth's ABC special law enforcement agents were in the parking lot. Compl. ¶ 36. Special Agents Blanks, Brown, Cielakie, Covey, Pine, Weatherholtz and Taylor were approximately 120 to 150 feet away from where Daly's SUV was parked. *Id.* The Agents were "undercover," "conducting a stationary observation to identify youthful appearing persons, check their identification, and ensure ABC laws were being maintained and enforced." *Id.* ¶¶ 36, 202, 204. Agents Blanks and Brown observed what they suspected to be the underage plaintiff and her friends carrying a case of canned beer. *Id.* ¶¶ 2, 40, 42. To investigate this suspicion, they approached Daly and her friends. *Id.* ¶ 42.

However, before Agents Blanks and Brown reached the vehicle, Daly and her friends had already seated themselves inside and shut the doors. Compl. ¶¶ 43-44. Daly's friend placed the

[1] This Court may take judicial notice, pursuant to Federal Rules of Evidence 201(b)-(c), that a Chevy Trailblazer is a large sports utility vehicle ("SUV").

suspected beer on the passenger side floor where it was not visible to the Agents. *Id.* ¶ 43. After checking her text messages, Daly looked up and noticed Agent Blanks (the only female agent present) and Agent Brown (whom Daly describes as an "African-American man")[2] approaching. *Id.* ¶ 45. With their badges openly displayed on necklaces, Agents Blanks and Brown "began to bang on the [closed] windows" of Daly's SUV. *Id.* ¶¶ 21, 34, 46, 48, 75, 122. Agent Brown then shone his flashlight through the closed passenger window and requested Daly's friend to roll down the passenger side window, specifically directing "roll down this window." *Id.* ¶¶ 47-49.

Daly and her friend attempted to roll down the windows by pressing on the window down buttons, but because the vehicle was turned off, the buttons did not work. Compl. ¶ 51. "In an *effort to comply with Brown's orders* to roll the windows down," Daly's friend told her to "turn the car on." *Id.* ¶ 53 (emphasis added.) Agent Brown apparently heard this statement and shouted through the closed doors and window, "Do not turn on the car." *Id.* ¶ 54. Upon hearing shouting, Agents Covey, Cielakie, Pine, and Weatherholtz approached Daly's SUV. *Id.* ¶¶ 55-60. Once around the vehicle, the Agents shouted (unidentified) commands and orders to Daly and her two friends. *Id.* ¶¶ 62-64. They also banged on the vehicle. *Id.* Daly panicked, reached for her keys, and, despite Agent Brown's order, started her SUV. *Id.* ¶¶ 64, 65, 67, 68.

Agents Covey and Brown then positioned themselves in front of Daly's SUV. Compl. ¶¶ 72, 74. Daly started moving her SUV toward Agents Covey and Brown "in an effort to disperse" them. *Id.* ¶¶ 76, 78. Therefore, Agent Covey jumped on the hood. Observing the movement toward Agents Covey and Brown, Agent Cielakie struck Daly's passenger side window with his flashlight. *Id.* ¶¶ 79-80. Daly then accelerated and fled the scene. *Id.* ¶¶ 81, 86. At 10:13 p.m.,

[2] Daly's reason for highlighting only the race of Agent Brown is unknown.

Agent Taylor pursued and arrested Daly. *Id.* ¶¶ 89-96. Acknowledging her non-compliance, Daly was "very apologetic" upon her arrest. *Id.* ¶¶ 105, 217.

On April 11, 2013, Daly was charged with felonious assault and battery on Agents Brown and Covey, pursuant to Virginia Code § 18.2-57(C), and misdemeanor eluding and disregard of audible or visible signals of law enforcement, pursuant to Virginia Code § 46.2-817. Compl. ¶¶ 111-13. Almost three months later, on June 27, 2013, the Commonwealth's Attorney *nolle prossed* these charges. *Id.* ¶ 123.

Citing the three-minute encounter above, on March 25, 2014, Daly filed a 47-page, 275-paragraph Complaint in the Circuit Court of the City of Richmond, demanding $40,000,000.00 in damages. The Complaint includes twelve federal and state law claims against the seven agents and the Commonwealth. In sum, Daly claims a violation of her Fourth Amendment rights to be free from an unlawful seizure, arrest, prosecution, and assault and battery without probable cause and justification. *See* Compl. ¶¶ 1, 2, 141, 155-57, 159, 167, 172-74, 176, 178-85, 195, 200, 209-10, 212, 221-22, 224, 226, 228, 233, 235, 237, 241, 243, 245, 251, 255, 260, 262, 268, 270.

On April 7, 2014, Defendants filed a Joint Notice of Removal to this Court from the Circuit Court of the City of Richmond, Virginia. For the reasons stated below, this Court should dismiss this action in its entirety with prejudice.

ARGUMENT

I. Standard of Review

For purposes of ruling on a Motion to Dismiss brought pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, this Court must accept, solely for the purposes of deciding the Motion, the truth of all well-pleaded factual allegations and fair inferences arising therefrom. *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). This Court, however, is under

no obligation to accept conclusory allegations regarding the legal effect of the facts alleged. *Labram v. Havel*, 43 F.3d 918, 921 (4th Cir. 1995). This Court is also not required to conjure up allegations which have not been pled, or to accept as true allegations which are inconsistent with the facts that are pled. Similarly, this Court is not required to accept as true allegations which are inconsistent with judicially noticed facts. 5A Wright & Miller, Federal Practice and Procedure § 1357, pp. 311-20 (1990).[3]

In *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), the Supreme Court rejected the "no set of facts" test that has long been the standard for dismissal under Rule 12(b)(6). Now, courts must examine the complaint to determine whether the plaintiff has alleged sufficient facts to make a particular cause of action "plausible." The complaint must provide more than "a blanket assertion of entitlement to relief." *Id*. at 556 n.3. And while the "plausibility" standard is not a "probability requirement," it requires more than a mere possibility that the defendant has acted unlawfully. *Id*. at 556. This plausibility standard applies to "all civil actions and proceedings in the United States district courts." *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009).

II. The Commonwealth is not a "person" under § 1983.

The Commonwealth is not a "person" within the meaning of 42 U.S.C. § 1983. Titled "Civil action for deprivation of rights," 42 U.S.C. § 1983 provides, in part:

> Every ***person*** who, under color of [law], subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

[3] Generally, a motion brought under Rule 12(b)(6) tests the legal sufficiency of the complaint. However, in ruling upon a 12(b)(6) motion to dismiss, the Court may take judicial notice of certain facts, including documents referred to on the face of the complaint which are central to the claims. *Gasner v. County of Dinwiddie*, 162 F.R.D. 280 (E.D. Va. 1995), *aff'd on other grounds*, 103 F.3d 351 (4th Cir. 1996); 5A Wright & Miller, Federal Practice and Procedure § 1363, pp. 477-81 (1990).

(Emphasis added.) The Supreme Court has concluded that "[a] plaintiff seeking damages against the State . . . cannot use § 1983 as a vehicle for redress because a State is not a 'person' under § 1983." *Haywood v. Drown*, 556 U.S. 729, 734 n.4 (2009) (citing W*ill v. Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989) (holding that "a State is not a person within the meaning of § 1983.") This Court has also concluded that, "[i]t is well-settled that 'a State is not a person within the meaning of § 1983.'" *Newbrough v. Piedmont Reg'l Jail Auth.*, 822 F. Supp. 2d 558, 571 (E.D. Va. 2011) (quoting W*ill, supra.*)); *Bey v. Commonwealth*, No. 1:13-cv-176, 2014 U.S. Dist. LEXIS 39636, at *28-29 (E.D. Va. Mar. 20, 2014) (Hudson, J.) (dismissing a 42 U.S.C. § 1983 action with prejudice and holding that the Commonwealth is "not a 'person' and so is not amenable to suit under § 1983 . . . ."). This conclusion primarily derives from the Supreme Court's determination that a State does not fall within the "common usage" of the term "person" for the purposes of 42 U.S.C. § 1983 liability. *Will*, 491 U.S. at 64.

In Counts V and VI, Daly asserts that the Commonwealth is liable under § 1983 for claims of an "unlawful custom or practice" and "failure to train." Compl. ¶¶ 200-223. Specifically, she argues that the Commonwealth's "numerous policies and/or customs" and "failure to . . . properly train its agents" "violated [her] rights under the Fourth Amendment . . . ." *Id.* ¶¶ 209, 222. However, as the authority above expressly and plainly provides, the Commonwealth is not a "person" within the meaning of 42 U.S.C. § 1983. It is a State. As a State, the Commonwealth is not subject to Daly's claims under 42 U.S.C. § 1983. Accordingly, this Court should dismiss Counts V and VI with prejudice.

III. Plaintiff fails to state a claim for malicious prosecution.

In Count I, Daly asserts a claim for malicious prosecution under 42 U.S.C. § 1983 against Defendants Blanks, Brown, Covey and Taylor. Compl. ¶¶ 139-156. To state a claim under §

1983, Daly must allege that the Defendants (1) acted under color of state law and (2) deprived her of a constitutional right, privilege or immunity. *West v. Atkins*, 487 U.S. 42, 48 (1988). Daly claims deprivations of her Fourth Amendment rights. Compl. ¶ 141. However, as explained below, her Complaint does not state a plausible or sufficient claim of a violation of this right.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. It guarantees a person the right not to be arrested, or prosecuted, unless probable cause justifies the arrest. For this reason, the inquiry in a § 1983 case based upon malicious prosecution is not whether the person charged actually committed the offense, but whether the charging officer had probable cause to believe the person charged had committed the offense. *Street v. Surdyka*, 492 F.2d 368, 371 (4th Cir. 1974); *Dowling v. City of Philadelphia*, 855 F.2d 136, 141 (3rd Cir. 1988); *Mark v. Furay*, 769 F.2d 1266, 1269 (7th Cir. 1985).

In determining whether an officer has probable cause to charge a suspect, “the test is whether a police officer acting under the circumstances at issue reasonably *could have* believed that he had probable cause to arrest, i.e., to believe that the arrestee was committing or had committed a criminal offense.” *Sevigny v. Dicksey*, 846 F.2d 953, 956 (4th Cir. 1988) (emphasis added). Significantly, "[w]hether a Fourth Amendment violation has occurred turns on an objective assessment of the officer’s actions in light of the facts and circumstances confronting him at the time, . . . not on the officer’s actual state of mind at the time the challenged action is taken.” *Maryland v. Macon*, 472 U.S. 463, 470-71 (1985) (citation omitted). Accordingly, the existence of probable cause for an arrest precludes any § 1983 claim for unlawful arrest or malicious prosecution. *See, e.g., Mark*, 769 F.2d at 1269.

Despite Daly's lengthy recitation of events, interpreted and recounted through her eyes, with many of the allegations lacking any nexus to the claims asserted, the sole task for this Court is to evaluate the facts as alleged through the eyes of a reasonable officer. *Sevigny*, 846 F.2d at 956; *see also Maryland*, 472 U.S. at 470-71. The fact that Daly may have had an affirmative defense to the criminal charges brought against her, or whether a prosecutor could establish every element of the offense(s) charged, has no bearing on the relevant probable cause inquiry under § 1983. *Id*. Simply put, it is irrelevant what Daly knew or believed on April 11, 2013. Instead, the appropriate inquiry is what a reasonable officer could have believed at the time. *Id*. Daly's characterization of the Defendants' actions as "outrageous" is implausible. There is simply nothing outrageous or unreasonable about ABC agents, performing undercover surveillance to enforce underage drinking laws, observing three underage UVA students exiting a local Charlottesville grocery store after 10:00 at night, carrying what appears to be a case of beer, and approaching them to investigate.

In sum, the facts and circumstances as alleged demonstrate an objectively reasonable and lawful encounter on April 11, 2013. Agents Blanks, Brown, Cielakie, Covey, Pine, Weatherholtz and Taylor were working undercover to enforce the drinking age laws. Compl. ¶¶ 36, 202, 204. From about 40-50 yards away from where Daly parked her SUV, Agents Blanks and Brown observed what they believed to be three underage females (Daly and her two friends) carrying a case of canned beer. *Id*. ¶¶ 2, 40, 42. Underage possession of alcohol is a Class 1 misdemeanor offense in Virginia. Va. Code § 4.1-305. Accordingly, Agents Blanks and Brown were authorized to approach Daly and dispel the suspicion, or arrest her if their investigation confirmed the suspicion. Va. Code §§ 4.1-105, 19.2-81(A)(10) and (B); *see Illinois v. Wardlow*, 528 U.S. 119, 123-26 (2000) (observing that law enforcement may approach an individual

without probable cause when they suspect that criminal activity is afoot); *United States v. Weaver*, 282 F.3d 302, 309 (4th Cir. 1983) (declaring, moreover, that "[i]t is axiomatic that police may approach an individual on a public street and ask questions without implicating the Fourth Amendment's protections.").

Pursuant to their lawful authority, Agents Blanks and Brown approached to investigate their suspicion,[4] but before they reached them, Daly and her friends were already inside Daly's SUV with the doors shut. Compl. ¶¶ 21, 34, 42-45. With their badges openly displayed on lanyards around their necks, in what Daly describes as a "well-lit" parking lot, Agents Blanks and Brown "began to bang on the windows" of Daly's SUV and directed her to roll down the window.[5] *Id.* ¶¶ 21, 34, 45-49, 75, 122. By so doing, they provided Daly with a reason to believe that they were law enforcement. *See* Va. Code § 46.2-817 (A) (mandating that "[a]ny person who, having received a visible or audible signal from any law-enforcement officer to bring his motor vehicle to a stop, drives such motor vehicle in a willful and wanton disregard of such signal or who attempts to escape or elude such law-enforcement officer whether on foot, in the vehicle, or by any other means, is guilty of a Class 2 misdemeanor."). In fact, Daly concedes that she subsequently turned her vehicle on, despite Agent Brown's orders not to do so, "*in an effort to comply with [Agent] Brown's orders to roll down the window*." *Id.* ¶¶ 53, 54 (emphasis added.) Unfortunately, Daly did not roll down the window. Instead, she fled the scene.

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[4] Notably, the Complaint alleges *no other reason* for the approach of Agents Blanks and Brown.

[5] In an apparent attempt to suggest that the Agents should not have mistaken the case of canned sparkling water for a case of canned beer, Daly alleges that the parking lot was well-lit. Compl. ¶ 34. In stark contrast, once the Agents were positioned just outside her SUV in this well-lit parking lot, Daly suggests that the Agents' badges, openly displayed on lanyards around their necks "were not clearly visible or readable." *Id.* ¶48. Despite the implausibility of Daly's conflicting statements, and as explained more fully below, it is irrelevant whether Daly actually saw the Agents' badges or believed them to be authentic.

Daly's actions, including her non-compliance, elevated the nature of the investigation. Agents Blanks and Brown began "banging" on the windows and shouting orders at Daly, in part, telling her to roll down her windows and keep her vehicle off. *See e.g.*, Compl. ¶¶ 46, 49, 52, 54. However, Daly turned her car on and did *not* roll her window down. *Id.* ¶¶ 67-78. It was only at this point that Agents Covey, Cielakie, Pine, and Weatherholtz overheard the shouting from the vehicle and came over. *Id.* ¶ 55. As the agents surrounded Daly's SUV, and although Agents Covey and Brown were positioned in front of her SUV, Daly began moving it toward the agents. She then accelerated with Agent Covey on the hood of her vehicle, and fled the scene. *Id.* ¶¶ 72, 76-82, 86. Agent Taylor pursued Daly's fleeing SUV and, less than three minutes after the encounter began, arrested Daly. *Id.* ¶¶ 89-96. Daly, acknowledging her non-compliance with the agents, was "very apologetic" upon her arrest. *Id.* ¶¶ 105, 217.

Mere compliance by Daly with the Agents' reasonable requests could have prevented this encounter from ending with her arrest. Instead, Daly's non-compliance objectively transformed a lawful approach and suspicion of a misdemeanor offense into probable cause for an arrest on various felony offenses. *See* Va. Code §§ 18.2-57 (assault and battery on law enforcement) and 46.2-817 (disregarding law enforcement's visible and audible commands to stop).

A reasonable officer, under these facts, could believe that Daly knew they were law enforcement officers, as she saw them and heard them, and the officers saw and heard Daly and her friends. Daly even responded to the Agents' requests by attempting to roll down her windows. Yet, for reasons unknown to the Agents, Daly disobeyed their orders not to start her vehicle. Instead, she started it and, despite knowing Agents were positioned on and beside her vehicle, she accelerated and fled the scene. *Id.* ¶¶ 64, 65, 67, 68. A reasonable officer could

believe that Daly violated the law under these facts and circumstances. This is the essence of probable cause.

In addition, Daly's claim that Agents withheld facts from the magistrate does not prove an absence of probable cause, nor that a reasonable officer could not have concluded that she violated the law, even assuming arguendo the legitimacy of such claims. Any facts not provided to the magistrate might be relevant to an affirmative defense, or might have some bearing on whether there is sufficient evidence for a conviction, but such is not the inquiry here, since "[f]or probable cause to exist, there need only be enough evidence to warrant the belief of a reasonable officer that an offense has been or is being committed; evidence sufficient to convict is not required." *Brown v. Gilmore*, 278 F.3d 362, 367 (4th Cir. 2002).

To the extent Daly asserts liability for any testimony by the Agents during her criminal prosecution, the law is well-settled that a law enforcement officer who testifies in a criminal proceeding enjoys absolute immunity from § 1983 damages liability for his testimony. *Briscoe v. LaHue*, 460 U.S. 325, 336 (1983). This immunity applies in pre-trial proceedings, *Daloia v. Rose*, 849 F.2d 74 (2nd Cir. 1988), or to any activities associated with the judicial phase of the criminal process. *Malachowski v. City of Keene*, 787 F.2d 704, 712 (1st Cir. 1986).

Finally, once Daly was charged, the prosecution was out of the Agents' hands. Only the Commonwealth's Attorney, who has absolute immunity and is not a party to this suit, *Imbler v. Pachtman*, 424 U.S. 409 (1976), had authority to terminate the case. Recovery against the Defendants would be dependent upon Daly's proof that the Agents controlled the decision making process of the prosecutor. *See McCarthy v. Mayo*, 827 F.2d 1310, 1316 (9th Cir. 1987). Such was not the case here, there has been no such allegation, and there would be no such

evidence. Counts I and IV[6] should be dismissed with prejudice against the four named Agents because Daly gave them probable cause to pursue, arrest and charge her.

IV. The individual defendants are entitled to qualified immunity.

The Fourth Circuit has emphasized that claims of qualified immunity are especially appropriate for expedited review, because immunity is an "entitlement not to stand trial or face the other burdens of litigation." *Mitchell v. Forsythe*, 472 U.S. 511, 530 (1985). The doctrine of qualified immunity provides that "government officials performing discretionary functions, generally 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." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

In *Anderson v. Creighton*, 483 U.S. 635 (1987), the Supreme Court reaffirmed the principle that police officers are entitled to qualified immunity from civil damages in Fourth Amendment cases where it is established that a reasonable officer *could have* believed his action was lawful, even if it was not. *See also Sevigny v. Dicksey*, 846 F.2d 953 (4th Cir. 1988) (emphasis added). Police officers are shielded from liability "as long as their actions *could reasonably have been* thought consistent with the rights they are alleged to have violated." *Anderson*, 483 U.S. at 638 (emphasis added). Objective legal reasonableness has been defined by the Court; thus, "the contours of the right must be sufficiently clear that a reasonable officer would understand that what he is doing violates the law." *Anderson*, 483 U.S. at 640. In other words, "in light of the pre-existing law, the unlawfulness must be apparent." *Id*.

[6] *See Lewis v. Kei*, 281 Va. 715, 722-23, 708 S.E.2d 884, 889-90 (2011) (affirming dismissal of state law malicious prosecution claim where plaintiff failed to allege requisite lack of probable cause).

"[I]t is precisely the function of qualified immunity in this context to excuse reasonable mistakes in making the composite factual and legal judgments leading to an arrest." *Sevigny*, 846 F.2d at 957. In fact, the "qualified immunity standard gives ample room for mistaken judgments." *Henry v. Purnell*, 652 F.3d 524, 534 (4th Cir. 2011) (internal quotation marks omitted). And qualified immunity protects public officials from "bad guesses in gray areas." *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992).

Even though the Agents mistakenly believed the case of canned sparkling water was beer, and even if the Agents mistakenly believed Daly knew they were law enforcement officers, such mistakes do not amount to a constitutional deprivation. Instead, and as previously explained, the facts alleged prove that the Agents lawfully approached Daly, had a reasonable suspicion of an underage alcohol possession violation to investigate, and had probable cause to ultimately arrest and charge Daly with assault and evading arrest. Plaintiff's own pleading supports the Agents' actions under the circumstances. For these reasons, all claims against Agents Blanks, Brown, Cielakie, Covey, Pine, Taylor and Weatherholtz should be dismissed with prejudice.

V. Plaintiff fails to state a claim for false arrest under § 1983.

In Count III, Daly asserts a claim for false arrest under 42 U.S.C. § 1983 against Covey and Taylor. Like malicious prosecution, to state a claim for false arrest, Daly must show that the Defendants arrested her without probable cause. *Dunaway v. New York*, 442 U.S. 200, 213 (1979); *see also Taylor v. Waters*, 81 F.3d 429, 434 (4th Cir. 1996); *United States v. Al-Talib*, 55 F.3d 923, 931 (4th Cir. 1995). Again, "[f]or probable cause to exist, there need only be enough evidence to warrant the belief of a reasonable officer that an offense has been or is being committed; evidence sufficient to convict is not required." *Brown*, 278 F.3d at 367 (analyzing §

1983 false arrest claim under Fourth Amendment's unreasonable seizure framework); *see also Wong Sun v. United States*, 371 U.S. 471, 479 (1963).

"In assessing the existence of probable cause, courts examine the totality of the circumstances known to the officer at the time of the arrest." *Taylor*, 81 F.3d at 434. An officer has probable cause to conduct a warrantless arrest when "the facts and circumstances within the officer's knowledge . . . are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979). "Whether probable cause exists in a particular situation . . . always turns on two factors in combination: the suspect's conduct as known to the officer, and the contours of the offense thought to be committed by that conduct." *Pritchett v. Alford*, 973 F.2d 307, 314 (4th Cir. 1992).

Here, there was ample evidence for a reasonable law enforcement officer to believe that Daly violated the law. Suspecting that she possessed alcohol underage, the Agents approached Daly, displaying their badges. Although she saw them and heard their requests, she refused to cooperate and instead fled the scene in her SUV, despite knowing Agents were positioned on or near her vehicle. Under the facts alleged, the existence of probable cause is not a close question.[7]

Daly contends that when the Agents approached, they displayed their badges and began yelling and pounding on her vehicle, but she did not know they were law enforcement officers. "However, the mere fact that [Daly] claims she did not [know the agents were law enforcement officers] does not require [this Court] to conclude that her arrest violated the Fourth Amendment

[7] Even if the existence of probable cause were a close question, the "qualified immunity standard gives ample room for mistaken judgments." *Henry*, 652 F.3d at 534 (internal quotation marks omitted). Indeed, as explained more fully above, qualified immunity protects public officials from "bad guesses in gray areas." *Maciariello*, 973 F.2d at 298.

or even that this dispute needs to be resolved by a jury. Rather, the question is whether a reasonable officer would be justified in the belief that a citizen" saw his badge, knew him to be a law enforcement officer, and heard his request to roll down her window. *Brown*, 278 F.3d at 368. As previously explained, Daly's actions and allegations indicate that she heard and saw the Agents, and at first attempted to comply with their request by trying to roll her window down. Then, for reasons unknown to the Agents, she started her vehicle against their instructions, put it into gear, and fled the scene.

Daly does not claim that she could not see or hear the Agents. To the contrary, she repeatedly references their shouting just outside her vehicle, which was parked in a well-lit lot. Compl. ¶¶ 34-35. She admits that the Agents openly displayed their badges around their necks. *Id*. ¶ 48. And she alleges that, as two of them approached her SUV, she saw them and heard what they said. *Id*. ¶ 64. Yet, she disobeyed their orders and fled, with at least two Agents on or near her vehicle and ultimately apologized for not following their orders. *Id*. ¶¶ 77, 79, 105.

Even if this Court gives Daly the benefit of the doubt as to whether she knew they were real law enforcement officers, that "does not strip the officers of an objectively reasonable belief that she [did]." *Brown*, 278 F.3d at 368. Instead, "a reasonable officer in this situation would have been warranted in the belief that [Daly] knew" that they were law enforcement officers. *Id.* When law enforcement officers convey their status as law enforcement officers to citizens, the Fourth Circuit empowers the officers to assume their status is understood by the citizens. When Daly attempted to flee the scene in her vehicle after visibly hearing and responding to the Agents' commands, by her own admission, a reasonable officer could conclude that she was evading arrest. And a reasonable officer could believe that there was probable cause to pursue her and arrest her under the circumstances.

"A warrantless arrest of an individual in a public place for [even] a . . . misdemeanor committed in the officer's presence, is consistent with the Fourth Amendment if the arrest is supported by probable cause." *Maryland v. Pringle*, 540 U.S. 366, 370 (2003); *see Atwater* v. *Lago Vista*, 532 U.S. 318, 354 (2001) (stating that "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."). Under the totality of the alleged facts and circumstances, Defendants had probable cause to believe that Daly committed offenses in their presence and, as a result, lawfully arrested her. Thus, no Fourth Amendment violation occurred. Because she has not shown the essential constitutional violation underlying a § 1983 claim, Count III of her Complaint, for false arrest, should be dismissed with prejudice.

VI. Plaintiff has not stated a § 1983 claim for an unlawful custom or practice.

In Count V, Daly asserts a claim under § 1983 for an "unlawful custom or practice" against the Commonwealth. Again, this claim fails because the Commonwealth is not a "person" for purposes of § 1983. *Will*, 491 U.S. at 64. In addition, under the facts and circumstances alleged, Daly has not plausibly or sufficiently demonstrated an underlying violation of her Fourth Amendment rights nor an unlawful custom or practice by the Commonwealth. Thus, and as explained more fully below, Count V should be dismissed with prejudice.

A. Daly has not alleged a violation of her Fourth Amendment rights.

"A governmental employer may not be held liable under § 1983 if there is no underlying constitutional violation by an employee." *Trull v. Smolka*, No. 3:08-cv-460, 2009 U.S. Dist. LEXIS 2901, at *9-10 (E.D. Va. Jan. 14, 2009) (Hudson, J.) *(citing Young v. City of Mount Ranier*, 238 F.3d 567, 579 (4th Cir. 2000)), *aff'd*, 411 Fed. Appx. 651 (4th Cir. 2011)). The

Defendants who approached Daly, in their role as agents of the Commonwealth, had been given probable cause by Daly to pursue, arrest and charge her.

As previously argued, a reasonable officer, under the facts and circumstances as alleged by Daly in her 275-paragraph Complaint, could believe that Daly knew they were law enforcement officers, as she saw and heard them, and the Agents clearly saw and heard Daly and her friends. Daly even responded to the Agents' requests by attempting to roll down her windows. Yet, for reasons unknown to them, Daly disobeyed their orders not to start her vehicle. Instead, she started it and, despite knowing Agents were positioned beside her vehicle, she accelerated and fled the scene. Compl. ¶¶ 64, 65, 67, 68. A reasonable officer could believe that Daly violated the law under these facts and circumstances, and the existence of probable cause defeats any alleged constitutional deprivation.

Further, because Daly fails to allege a plausible claim of an underlying violation of her Fourth Amendment rights, her claim of an unlawful custom or practice premised upon the same encounter also fails. *See Ware v. James City County*, 652 F. Supp. 2d 693, 710-11 (E.D. Va. 2009) (stating that "if there is no constitutional deprivation of [a plaintiff's] rights, it follows that the County could not have undertaken a policy that caused any such non-existent deprivation.")

B. Daly has not stated a § 1983 claim for unlawful custom or practice.

Assuming, *arguendo*, that Daly has alleged a plausible claim of an underlying violation of her constitutional rights, her allegations are insufficient to show an unlawful custom or practice. "[N]ot every deprivation of a constitutional right will lead to . . . liability." *Lytle v. Doyle*, 326 F.3d 463, 471 (4th Cir. 2003). Liability attaches "only" where a custom or practice actually "causes the deprivation." *Id.* (citing *Carter v. Morris*, 164 F.3d 215, 218 (4th Cir. 1999)).

To state a claim under § 1983, Daly must show that a custom or practice exists in: (1) "written ordinances and regulations;" (2) "certain affirmative decisions of individual policymaking officials;" (3) "certain omissions on the part of policymaking officials that manifest deliberate indifference to the rights of citizens;" or (4) "outside of such formal decisionmaking channels," when a practice is "so persistent and widespread" and "so permanent and well-settled as to constitute a "custom or usage with the force of law." *Carter*, 164 F.3d at 218 (internal citations omitted). "It is well-settled that 'isolated incidents' of unconstitutional conduct by subordinate employees are not sufficient to establish a custom or practice for § 1983 purposes." *Lytle*, 326 F.3d at 471 (citing *Carter*, 164 F.3d at 220). "Rather, there must be 'numerous particular instances' of unconstitutional conduct in order to establish a custom or practice." *Id.* (citing *Kopf v. Wing*, 942 F.2d 265, 269 (4th Cir. 1991)).

While it is not entirely clear from her Complaint, Daly appears to allege the existence of an "unlawful custom or practice" through the third and fourth ways above. She claims culpable conduct through general omissions and an unspecified, yet well-settled and pervasive, practice. In support, Daly relies only on the isolated incident of April 11, 2013 and the (inadmissible and irrelevant) remedial measures the Commonwealth put in place following the incident.[8]

The remedial measures allegedly include, but are not limited to, the changed requirements that: (1) a uniformed law enforcement officer should be present during an undercover or sting

[8] This Court should not consider subsequent remedial measures to show a prior unlawful custom or practice, as they are inadmissible as evidence and irrelevant. *See* FED. R. EVID. 407 ("When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the remedial measures is not admissible to prove . . . negligence [or] culpable conduct."); *see e.g., Fain v. Rappahannock Reg'l Jail*, No. 3:12-cv-293, 2013 U.S. Dist. LEXIS 86384, at *16 (E.D. Va. June 19, 2013) (Gibney, J.) (declaring in a § 1983 action that, under FRE 407 "subsequent remedial measures **. . .** are irrelevant to prove culpable conduct," and that "defendants changed their approach does not [show] their initial policy violated the [law].")

operation to limit a suspect's confusion as to the identity of law enforcement, *see* Compl. ¶¶ 128 (c), (e) and (f), 202, 204; (2) an encounter with a person suspected of underage possession of alcohol should occur inside or closer to the location of the underage purchase of the alcohol, *id.* ¶¶ 128(d), 203; (3) law enforcement should stand down when it appears that a suspect is confused as to its identity, *id.* ¶¶ 128(h), 205; (4) law enforcement should prepare operational plans and conduct preoperational briefings of policies prior to undercover operations and stings, *id.* ¶¶ 128(i), (j), 206-07; and (5) a system be in place in which one agent of a group working together will be the primary point of contact with a suspect, *id.* ¶¶ 128(l), 208.

Daly's reliance on these measures is misplaced and does not support a plausible or sufficient claim of an unlawful custom or practice against the Commonwealth under § 1983. Despite having the opportunity in 275 paragraphs to do so, Daly has identified no deliberate action by any identifiable policymaking official of the Commonwealth. *Doe v. Broderick*, 225 F.3d 440, 456 (4th Cir. 2000) (observing that "the Supreme Court has rejected the notion that 'a § 1983 plaintiff [can] . . . establish municipal liability without submitting proof of a single action taken by a municipal policymaker.'") (quoting *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 821 (1985)); *see also Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978) (holding that a municipality "cannot be held liable under § 1983 on a *respondeat superior* theory.") Nor has Daly alleged facts to show that the (unidentified) policymaking officials of the Commonwealth had notice of an unlawful custom or practice and, nevertheless, chose to omit the specified subsequent remedial measures.[9] Finally, the single, isolated incident of April 11, 2013, is insufficient to create liability for an unlawful custom or practice. *See Lytle*, 326 F.3d at 473

[9] The Complaint shows the Commonwealth *changed* its procedure after April 11, 2013, further negating an inference of deliberate indifference. *See e.g.*, Compl. ¶¶ 128(a)-(q).

(holding a single incident insufficient to allege liability); *Doe*, 225 F.3d at 456 (holding that "[i]solated, unprecedented incidents . . . are insufficient to create . . . liability."). Because the facts do not show an unlawful custom or practice by deliberate omission or by well-settled and pervasive conduct which caused her alleged injuries, Count V should be dismissed with prejudice.

VII. Daly cannot show that any alleged failure to train amounts to deliberate indifference.

In Count VI, Daly asserts a claim against the Commonwealth under § 1983 for failure to train. However, the Supreme Court has declared that the "inadequacy of police training may serve as the basis for § 1983 liability," "only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come in contact." *City of Canton v. Harris*, 489 U.S. 378, 388 (1989). Further, "'liability under § 1983 attaches where -- and only where -- a deliberate choice to follow a course of action is made from among various alternatives' by state policymakers." *Id.* (quoting *Pembaur* v. *Cincinnati*, 475 U.S. 469, 483-484 (1986)); *see also Connick v. Thompson*, 131 S. Ct. 1350, 1354 (2011) (observing that deliberate indifference "is a stringent standard of fault," and "[w]ithout notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights.") Indeed, deliberate indifference must be "the result of an affirmative, conscious decision." *Doe*, 225 F.3d at 456. And, that decision must be the "moving force behind" the alleged deprivation of a federal right. *Carter*, 164 F.3d at 218. Moreover, a failure to train claim based upon a single incident does not reveal a "plainly obvious" need for training. *Doe*, 225 F.3d at 456 (affirming the dismissal of an unlawful custom

and practice and failure to train claim where the plaintiff cited only a single incident and alleged no affirmative, conscious decision of a policymaking official).

As previously argued, Daly has alleged no plausible, underlying violation of her constitutional rights under the Fourth Amendment. To the contrary, the allegations in the Complaint demonstrate a lawful approach, a reasonable suspicion, and probable cause. For this initial reason, Daly cannot allege a failure to train claim premised upon the same incident.

In any event, Daly has not otherwise alleged a plausible and sufficient claim of a failure to train. Under the applicable stringent standard, the allegations in the Complaint do not show an affirmative, conscious decision or deliberate choice on the part of any identifiable policymaking official to follow a particular course of action from among the various alternatives. Nor has the plaintiff alleged notice of an unconstitutional deficiency in a program by the Commonwealth's unidentified policymaking officials. Furthermore, Daly's reliance upon the single, isolated incident of April 11, 2013, does not demonstrate that the need for training was so plainly obvious as to show deliberate indifference on the part of the policymaking official. *Lytle*, 326 F.3d at 474 (declaring that "a failure to train can only form a basis for liability if 'it can be shown that policymakers were aware of, and acquiesced in, a pattern of constitutional violations.'") (quoting *City of Canton*, 489 U.S. at 397 (O'Connor, J., concurring in part and dissenting in part)).

Finally, the Complaint shows positive examples of conduct which *negate* a claim of a failure to train. For example, Daly alleges that Agents Blanks and Brown approached her and *displayed their badges* in order to identify themselves. Compl. ¶¶ 45, 75, 122. The Agents approached Daly and identified themselves as law enforcement in a "well-lit" public parking lot. *Id.* ¶ 34. Then, in order to be heard through her running car's closed windows and doors, the Agents shouted for Daly to roll her window down and keep her vehicle off. *Id.* ¶¶ 46, 54, 59.

And, the Commonwealth, as Daly alleges, had General Order 05 in place at the time, which instructed its Agents on the brandishing of firearms and use of flashlights. *Id.* ¶¶ 126-27. While these examples are not exhaustive, they further demonstrate that Daly's Complaint shows the antithesis of deliberate indifference and a failure to train.[10] Count VI should be dismissed with prejudice because Daly has not alleged and cannot allege how the Commonwealth's alleged failure to train its Agents amounts to a deliberate indifference to her rights.

VIII. Plaintiff fails to state a claim for conspiracy to commit malicious prosecution under 42 U.S.C. § 1985.

In Count II, Daly asserts that Defendants Covey, Brown, Blanks and Taylor conspired to make a false and/or incomplete presentation to the magistrate to secure felony arrest warrants against her. Compl. ¶¶ 157-173. To state such a claim under § 1985, Daly must prove: (1) a conspiracy of two or more persons, (2) who are motivated by a specific class-based, invidiously discriminatory animus to (3) deprive the plaintiff of the equal enjoyment of rights secured by the law to all, (4) and which results in injury to the plaintiff as (5) a consequence of an overt act committed by the defendants in connection with the conspiracy. *Simmons v. Poe*, 47 F.3d 1370, 1376 (4th Cir. 1995). Furthermore, Daly must show that Defendants had a "meeting of the minds." *Id.* at 1377 (internal quotation omitted). In evaluating Daly's conspiracy claim, this Court must carefully examine whether Daly has "set forth sufficient facts to establish a section 1985 conspiracy." *Simmons*, 47 F.3d at 1377. The Fourth Circuit consistently rejects such claims when "the purported conspiracy is alleged in a merely conclusory manner, in the absence

[10] Daly cannot have it both ways. She cannot, on one hand, allege that the Commonwealth should be liable for *omitting* the subsequent remedial measures before April 11, 2013, and also allege that the Commonwealth's agents should be liable for an assault and battery for failing to follow the Commonwealth's *existing* "General Order No. 5." *See e.g.*, Compl. ¶¶ 125, 126, 229, 256. This contradiction further illustrates the implausible nature of this claim.

of concrete supporting facts." *Id.* Because of the high threshold that plaintiffs must meet, courts often grant motions of dismissal. *Id*. at 1376-77.

Daly fails to allege the requisite facts showing Defendants shared a common design to injure her, including based on her class. *See American Tobacco Co. v. United States,* 328 U.S. 781, 810 (1946). To the contrary, Daly concedes that the Agents were working undercover to enforce underage drinking laws when they observed Daly and her two friends, who were under the age of 21, exit a local grocery store after 10:00 at night, in a college town, with what appeared to be a case of beer. Compl. ¶ 36. There is simply nothing unreasonable, outrageous or conspiratorial about the Agents then investigating the suspected underage possession of alcohol.

Furthermore, and as explained previously, Daly could have prevented this encounter from ending with her arrest if she had merely complied with the Agents' investigation. Instead, Daly transformed a lawful approach and suspicion of a misdemeanor offense (underage possession of alcohol) into probable cause for an arrest on various felony offenses. *See* Va. Code §§ 18.2-57 (assault and battery on law enforcement) and 46.2-817 (disregarding law enforcement's visible and audible commands to stop).

Finally, the Agents are immune from Daly's unsupported conspiracy claim by virtue of the intracorporate conspiracy doctrine, which provides that a corporation cannot conspire with its agents because the agents' acts are considered the acts of the corporation itself. *Painter's Mill Grille, LLC v. Brown,* 716 F.3d 342, 352-53 (4th Cir. 2013). In fact, "corporate employees cannot conspire with each other or with the corporation." *ePlus Tech., Inc. v. Aboud,* 313 F.3d 166, 179 (4th Cir. 2002). Thus, suing the Agents individually does not destroy "the immunity granted under the doctrine." *Painter's Mill Grille,* 716 F.3d at 353 (citing *Buschi v. Kirven,* 775 F.2d 1240, 1252 (4th Cir. 1985)).

There are just two exceptions to the doctrine, neither applicable to the facts of this case. First, the immunity is not available where one conspirator has a personal stake independent of his relationship to the corporation. Second, it does not shield an agent whose acts were not authorized by the corporation. *Painter's Mill Grille,* 716 F.3d at 353 (internal citations omitted).

In this matter, all of the individual Defendants were ABC agents. For this reason, and because Daly has not and cannot demonstrate facts triggering one of the recognized exceptions, the intracorporate conspiracy doctrine applies. Accordingly, the Defendants are immune from Plaintiff's conspiracy claims and Count II of her Complaint should be dismissed with prejudice .

IX. Daly fails to state a claim for assault and battery.

Finally, in a scattershot approach, Daly asserts a claim of assault and battery against each of the six Agents who were present at her vehicle during the evening of April 11, 2013. *See* Compl. ¶¶ 224-275, Counts VII-XII. For the reasons that follow, this Court should dismiss Counts VII-XII with prejudice.

"The tort of assault consists of an act intended to cause either harmful or offensive contact with another person or apprehension of such contact, and that creates in that other person's mind a reasonable apprehension of an imminent battery." *Koffman v. Garnett*, 265 Va. 12, 16, 574 S.E.2d 258, 261 (2003). "A person cannot be convicted of assault . . . 'without an intention to do bodily harm - either an actual intention or an intention imputed by law.'" *Gilbert v. Commonwealth*, 45 Va. App. 67, 71, 608 S.E.2d 509, 511 (2005) (quoting *Davis v. Commonwealth*, 150 Va. 611, 617, 143 S.E. 641, 643 (1928)). Additionally, "[t]he tort of battery is an unwanted touching which is neither consented to, excused, nor justified." *Koffman*, 265 Va. at 16, 574 S.E.2d at 261. With respect to an assault and battery claim, a plaintiff is "required to prove both a 'wrongful act' and resultant physical injury." *McLenagan v. Karnes*, 27 F.3d 1002,

1009 (4th Cir. 1994) (citing *Pike v. Eubank*, 197 Va. 692, 90 S.E.2d 821 (1956)); *Corbin v. Woolums*, No. 3:08-cv-173, 2008 U.S. Dist. LEXIS 95977, at *29 (E.D. Va. Nov. 25, 2008) (Lauck, J.) (stating that "[i]n order for a plaintiff to prevail on state law claims of assault and battery, she must prove both a 'wrongful act' and resultant physical injury.") (internal citations omitted).

Not every assault and battery leads to liability. That is,"[a] legal justification for the act being complained of will defeat an assault or battery claim." *Unus v. Kane*, 565 F.3d 103, 117 (4th Cir. 2009) (citing *Koffman, supra*). "Virginia recognizes that police officers are legally justified in using reasonable force to execute their lawful duties." *Id.* (citing *Pike, supra*); *Gnadt v. Commonwealth*, 27 Va. App. 148, 151, 497 S.E.2d 887, 888 (1998) (observing that a "police officer does not commit a battery when he touches someone appropriately to make an arrest"); *see Tatum v. Shoemaker*, No. 7:10-cv-00296, 2012 U.S. Dist. LEXIS 35475, at *15 (W.D. Va. Mar. 16, 2012) (Kiser, J.) (recognizing Virginia's "special protection" of police officers, and dismissing an assault claim by a plaintiff, who had been forcibly subdued and shackled with cast-iron after attempting to walk out of an interview room); *Amon v. Stubbs*, No. 3:11-cv-491, 2011 U.S. Dist. LEXIS 140563, at *16-17 (E.D. Va. December 7, 2011) (Hudson, J.) (granting a motion to dismiss for assault and battery claims against various police officers who drew their weapons during an arrest and where the plaintiff sustained no physical injury).

A. Daly fails to state a claim for assault and battery against Agents Blanks, Pine and Weatherholtz.

Daly's claims for assault and battery against Agents Blanks, Pine, and Weatherholtz are implausible and insufficient. Compl. ¶¶ 233-40 (Count VIII), 260-67 (Count XI), 268-75 (Count XII). Daly alleges that, during the encounter, Agents Blanks, Pine, and Weatherholtz surrounded

her SUV, banged on the windows, and shouted at her through her running vehicle's closed doors and windows. Compl. ¶¶ 237-39, 264-66, 272-74.

As to the claim of assault, Daly has not alleged facts to show that Agents Blanks, Pine, and Weatherholtz acted with the requisite intent to cause her either harmful or offensive bodily contact or to create in her an apprehension of such contact. Agents Blanks, Pine, and Weatherholtz approached and surrounded Daly's SUV, banged on its windows, and shouted through its closed doors and windows. This encounter, standing alone, is not an assault. In addition, any words these Agents allegedly shouted are entirely missing from the Complaint, lending no support for a finding of intent. *But see* Compl. ¶¶ 49 (alleging that Agent Brown shouted, "Roll down this window.") Thus, Daly fails to allege sufficient facts to demonstrate the necessary intent for the claims of assault.

Daly's battery claim against these Agents fares no better. Agents Blanks, Pine, and Weatherholtz never touched Daly or anything sufficiently connected to her person. Under the circumstances of this case, banging on the windows of the non-compliant plaintiff's running vehicle, without more, does not support a claim for battery. *See e.g.*, *Clark v. State*, 783 So. 2d 967, 969 (Fla. 2001) (holding that "the circumstances of the case will determine whether a vehicle is sufficiently closely connected to a person so that the striking of the vehicle would constitute a battery on the person," and deciding that "[t]here is sufficient connection between a vehicle and a person where there is evidence of the touching required for a battery, such as the impact of the vehicle contact 'spun' the occupant of the vehicle.") Daly does not allege that her SUV was touched in such a way that, for example, spun or jostled her. Furthermore, to the extent Daly must allege a physical injury as a result of these Agents' actions, she alleges none.

B. Daly fails to state a claim for assault and battery against Agents Brown, Covey and Cielakie.

Similarly, Daly's claims of assault and battery against Agents Brown, Covey, and Cielakie fail. Compl. ¶¶ 224-32 (Count VII), 241-50 (Count IX), 251-59 (Count X). Daly alleges that Agent Brown banged on her passenger side window, *id.* ¶ 47, requested Daly to roll her window down, *id.* ¶¶ 47, 49, ordered Daly not to turn on her car, *id.* ¶¶ 53-54, and drew his weapon and pointed it toward the ground after Daly turned on her vehicle with Agents around it, *id.* ¶¶ 67, 68, 72, 74, 228, 229, 231. Daly alleges that Agent Covey banged on the driver's hood of her SUV after she started her car with the Agents around it, *id.* ¶¶ 76, 77, 245, jumped on the hood and struck the windshield after Daly accelerated the vehicle directly toward him, *id.* ¶¶ 78-79, 246, chased Daly when she fled, *id.* ¶¶ 82, 247, and otherwise banged on the vehicle, *id.* ¶¶ 63, 249. Finally, Daly alleges that Agent Cielakie banged on her SUV and shouted at her, *id.* ¶¶ 62, 255, used his flashlight to strike the passenger's side window of Daly's SUV after she had already started moving her vehicle toward several Agents, *id.* ¶¶ 78, 80, 256, and otherwise shouted and made contact with Daly's SUV, *id.* ¶¶ 62, 258.

Again, these alleged facts and circumstances do not demonstrate the requisite intent to inflict bodily harm upon Daly. Rather, they show no more than an intent to have Daly cooperate with their lawful orders. Further, Daly alleges no specific words used by Covey and Cielakie, and the words of Agent Brown were lawful orders to roll her window down and keep her vehicle off. Finally, Agents Brown, Covey, and Cielakie never unlawfully touched Daly.[11] "Banging" on Daly's running SUV alone does not support a claim for battery under the circumstances

[11] Daly alleges that Covey handcuffed her, but she does not appear to include that touching as a component of her battery claim. *See* Compl. ¶¶ 101, 241-250.

alleged. *See Clark*, 783 So. at 969. Finally, to the extent a physical injury is required to result from the touching alleged, Daly has alleged none.

C. A legal justification existed for the acts of which Daly complains.

Assuming *arguendo* that Daly has alleged sufficient claims of assault and battery against the Agents, their acts were legally justified. Agents Blanks and Brown lawfully approached Daly's SUV to investigate a suspicion that she was in underage possession of alcohol. They approached Daly in a well-lit parking lot and displayed their badges, identifying themselves as law enforcement officers. Daly simply panicked and failed to comply with their investigation and orders. It was only upon her non-compliance that four other Agents approached Daly's SUV. Daly became increasingly non-compliant, turned her vehicle on, and started to flee the scene. In response, the Agents reasonably used minimal force to secure Daly. Nevertheless, Daly accelerated and fled, striking at least one Agent in the process (Agent Covey).

While the encounter was unfortunate, it was nonetheless lawful. And it was entirely avoidable. Had Daly simply complied with the Agents' requests by rolling her window down or opening her car door instead of fleeing the scene, the Agents' would not have been forced to pursue and arrest her. Because the facts and circumstances demonstrate that the Agents' actions were legally justified, this Court should dismiss all Counts for assault and battery with prejudice.

CONCLUSION

This Court should dismiss the Complaint with prejudice. Plaintiff has failed to plausibly and sufficiently allege a violation of her rights under the Fourth Amendment. The Agents permissibly approached the underage plaintiff, suspected her of misdemeanor possession of alcohol, and were met with a resistance and non-compliance which provided more than probable cause to arrest and charge her with the felony offenses alleged. The Agents' response under the

circumstances was not only legally justified, but it is also protected by qualified immunity. Thus, Counts I-IV and VII-XII should be dismissed with prejudice.

Counts V and VI should also be dismissed with prejudice. The Commonwealth is not a "person" subject to suit under 42 U.S.C. § 1983. In any event, Plaintiff has failed to allege an underlying violation of her Fourth Amendment rights. And, nothing in the Complaint, including Daly's reliance upon the sole incident of April 11, 2013, states a plausible claim of an unlawful custom or policy, a failure to train, or deliberate indifference. Therefore, this Court should dismiss Counts V and VI with prejudice.

Again, this situation was entirely avoidable. Had Plaintiff complied, either by merely rolling her window down or opening the door to her SUV, the encounter would have concluded without event. Unfortunately, however, Plaintiff resisted instead of complying with the Agents' lawful instructions. For all of these reasons, this Court should dismiss all of Plaintiff's claims, including her requests for compensatory and punitive damages, with prejudice.

WHEREFORE, Defendants respectfully request this Court to grant their Motion to Dismiss and grant any other relief deemed necessary.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April 2014, I filed the foregoing document with the Clerk of Court using the CM/ECF system, which will automatically send a notice of electronic filing (NEF) to James Broome Thorsen, Esquire and John K. Honey, Jr., Marchant, Thorsen, Honey, Baldwin & Meyer, LLP, 5600 Grove Avenue, Richmond, Virginia 23226, Counsel for Plaintiff. I hereby certify that I also served the foregoing by hand delivery to Counsel for Plaintiff.

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