UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

GEORGE WEST, ROBERT JONES, and BRADY FULLER, on behalf of themselves and all others similarly situated, Plaintiffs, v. CITY OF SANTA FE, TEXAS; CARLTON GETTY, Municipal Judge, in his individual capacity; and JEFFREY POWELL, Chief of Police, in his official capacity; Defendants.	Civil Action No. 16-cv-309

PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS

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NATURE AND STAGE OF PROCEEDING

This case concerns a modern-day debtors' prison operated by the City of Santa Fe under policies that prioritize revenue over the fair administration of justice. The City jails people solely for failure to pay their fines, without producing them for a hearing, appointing counsel for their defense, limiting the detention as required by law, or even giving them enough food to eat. Plaintiffs filed this putative class action under 42 U.S.C. § 1983 to vindicate their constitutional rights. Defendants have moved to dismiss under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

ISSUES TO BE RULED UPON BY THE COURT

Defendants have moved to dismiss the complaint on the grounds of standing, statute of limitations, judicial immunity, and failure to state a claim against the City and the Police Chief. The standard of review for each issue is Rule 8 of the Federal Rules of Civil Procedure, which requires only that Plaintiffs state "simply, concisely, and directly events that, they allege[], entitle[] them to damages from the city" and other relief they seek. *Johnson v. City of Shelby*, 135 S. Ct. 346, 347 (2014) (per curiam).

Contrary to Defendants' argument, there is not a "heightened" pleading standard that applies to all claims against public officials. *See, e.g.*, *Hinojosa v. Livingston*, 807 F.3d 657, 664 (5th Cir. 2015) (applying ordinary Rule 8 standard to § 1983 claim). Defendants are correct that the allegations must plausibly overcome any applicable immunity defenses, *id.*, but in this case, there are no immunity defenses applicable to Plaintiffs' claims.

SUMMARY OF ARGUMENT

There is no deficiency in Plaintiffs' complaint. Defendants' motion to dismiss is, in large part, a recitation of legal standards and bare conclusions. Defendants have done little to engage with the facts Plaintiffs actually alleged or analyze the constitutional claims Plaintiffs assert.[1]

Defendants' arguments are in fact refuted by application of the relevant legal standards: Plaintiffs have alleged standing to challenge unconstitutional warrants directed at each of them individually, because no matter how much time has passed since the warrants were issued, there remains a "credible threat of enforcement" under Supreme Court precedent. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2343 (2014). Plaintiffs have alleged injuries that occurred within the limitations period, and thus, the limitations bar is not established on the face of the complaint. *Jones v. Bock*, 548 U.S. 199, 215 (2007). Judicial immunity is not a defense to claims for declaratory relief. *Pulliam v. Allen*, 466 U.S. 522, 542 (1984). And Plaintiffs have alleged violation of four constitutional rights, resulting from policies attributable to the Police Chief and the City under three different theories of liability. *See Woodard v. Andrus*, 419 F.3d 348, 352–54 (5th Cir. 2005) (holding plaintiff stated a claim against municipality for persistently charging excessive court fees).

[1] Should Defendants raise any arguments for the first time in their reply, the Court should either decline to consider these arguments or permit Plaintiffs to file a surreply. *Oldham v. Thompson/Ctr. Arms Co.*, No. 12-cv-2432, 2013 WL 4042010, *7 n.3 (S.D. Tex. Aug. 8, 2013).

ARGUMENT

I. Plaintiffs Have Alleged Standing to Seek Relief from Defendants

Plaintiffs allege that Defendants have subjected each Plaintiff to an individualized, unconstitutional court order, authorizing Santa Fe police to jail Plaintiffs under unconstitutionally cruel conditions. Plaintiffs have thus pleaded standing by alleging (1) an injury in fact, (2) a causal connection between the injury and the defendants' unlawful conduct, and (3) a likelihood that the injury will be redressed by a favorable ruling. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014).[2]

A. Plaintiffs Have Alleged Injury in Fact

Plaintiffs have a "personal stake" in the outcome of this case, which is the focus of the injury-in-fact requirement. *Id.* All that is required to plead injury in fact is to allege injury that is actual, not hypothetical; and injury that is concrete and particularized, not abstract. *See id.*

Plaintiffs West and Jones have pleaded an actual injury by alleging that their daily lives are subject to a credible threat that they will be jailed. Compl. ¶¶ 21, 37. "When an individual is subject to such a threat, an actual arrest . . . is not a prerequisite." *Susan B. Anthony List*, 134 S. Ct. at 2342–43. Nor does it matter how long the threat has been

[2] Plaintiff Fuller contends that, having alleged that he was unconstitutionally jailed by Defendants, he has standing to sue them. Defendants appear to contest Plaintiff Fuller's standing in a header, Defs.' Mot. to Dismiss at 7 (Dkt. No. 16), but their arguments are specific to Plaintiffs West and Jones. Should Defendants raise any arguments about Plaintiff Fuller's standing for the first time in their reply, the Court should either decline to consider these arguments or permit Plaintiffs to file a surreply. *Oldham*, 2013 WL 4042010 at *7 n.3.

pending. Instead, a plaintiff suffers actual injury when he intends to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by the government, and the government has made a credible threat of enforcement against him, rather than a threat that is "imaginary." *Id.* at 2341–43 (describing "substantial risk" in the context of unconstitutional law enforcement). Plaintiffs West and Jones have alleged that they intend to live in and travel around the Santa Fe area: a course of conduct that is affected with the basic constitutional interest in physical liberty. Compl. ¶¶ 21, 37. This course of conduct is proscribed by the capias pro fine warrants issued against Plaintiffs West and Jones, which command their immediate arrest and deprivation of their physical liberty. *Id.* ¶¶ 18, 33, 90, 94.

Finally, the threat posed by the capias pro fine warrants is "credible," as opposed to "imaginary," no matter when the warrants issued. Plaintiffs allege that Santa Fe jails dozens of people under capias pro fine warrants each year, Compl. ¶ 172, and Santa Fe likely arrests even more people who manage to buy their way out. *See Susan B. Anthony List*, 134 S. Ct. at 2345 (holding credible threat from as few as 20 cases per year statewide); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 16 (2010) (average of 13 cases per year nationwide); *Babbitt v. United Farm Workers Union*, 442 U.S. 289, 302 (1979) (no prior enforcement; still finding credible threat); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (one similar instance of enforcement). The threat of enforcement is also credible because Santa Fe officers want to coerce people into making payments to raise revenue for the City, Compl. ¶¶ 157–69, and other law enforcement officers can earn a financial benefit for capias pro fine arrests from the Southeast Texas Crime Information

Center, *id.* ¶ 100. *See Susan B. Anthony List*, 134 S. Ct. at 2345 (holding incentive for political opponents to enforce statute increases threat). The enforcement threat is credible because arrests can be initiated by the City Marshal, whose main job duty is to enforce capias pro fine warrants, Compl. ¶¶ 98, 167; Santa Fe police officers, who turn their attention away from other public safety tasks to enforce capias pro fine warrants during the upcoming "Great Texas Warrant Round-Up," *id.* ¶ 99, and any other police officer in a participating Southeast Texas Crime Information Center jurisdiction, *id.* ¶ 100. *See Susan B. Anthony List*, 134 S. Ct. at 2345 (holding credible threat where there were no limitations on potential complainants).

Most importantly, the threat is credible because the government "has already acted" against the individual plaintiffs, and "only the effect . . . has yet to occur." *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 837 F.3d 477, 486 (5th Cir. 2016). The fact that police officers have yet to find Plaintiffs West and Jones does not render the threat of enforcement "imaginary"— they represent the lucky class of people who have escaped detection among dozens who are arrested each year. Compl. ¶ 172.[3]

Defendants' invocation of *Lyons* and *Society of Separationists* does nothing to change this analysis. Both cases apply to plaintiffs who cannot demonstrate that they are at any unique risk for future injury, nor that officers are under any "order[] or authoriz[ation]" to engage in misconduct. *City of Los Angeles v. Lyons*, 461 U.S. 95,

[3] Plaintiffs allege that the Police Chief subjects everyone who is arrested under a capias pro fine warrant to the Debtors' Prison Policy and the Hungry Man Policy. Compl. ¶¶ 102, 107–14. The Court must accept these factual allegations as true, and disregard Defendants' argument to the contrary. Defs.' Mot. to Dismiss at 10. Defendants could have filed evidence in support of a fact-based Rule 12(b)(1) motion, but they did not.

105–06 (1983); *see Society of Separationists v. Herman*, 959 F.2d 1283, 1285–1286 (5th Cir. 1992) (noting the judge "was not acting pursuant to any state or local rule or statute, or even some personal policy").[4] In this case, the complaint alleges that police officers throughout the Southeast Texas region are under a continuing order from the Municipal Judge to arrest Plaintiffs West and Jones, with authorization to jail them in violation of their constitutional rights—and the Santa Fe Police Department has a policy of acting on that authorization. Compl. ¶¶ 18, 33, 90, 94, 101–02. Plaintiffs do not allege a general risk, undifferentiated from other residents of the Santa Fe area, that they may encounter an aberrant officer. They allege that they are driving around Southeast Texas with a target on their backs.

Finally, Plaintiffs have alleged an injury that is concrete and particular to them. Defendants cannot realistically contend otherwise. "[I]ncarceration . . . constitutes a concrete injury," *Bond v. United States*, 564 U.S. 211, 217 (2011), as does deprivation of adequate nutrition, *see Brown v. Plata*, 563 U.S. 493, 510–11 (2011) (holding that "courts have a responsibility" to remedy such injuries). Certainly, the Plaintiffs have a personal stake in ensuring they are not jailed and deprived of food.

[4] Defendants also cite *Eccles v. Peoples Bank*, 333 U.S. 426, 431 (1948), for the principle that courts should be wary of issuing declaratory relief "when governmental action is involved." That case concerned proper application of banking regulations, not protection of constitutional rights. *Id.* at 427. Moreover, the Court declined to issue declaratory relief because of issues of proof (irrelevant here), and because the government had "not asserted [the] challenged power." *Id.* at 434–35. Here, Santa Fe asserts the "challenged power" in dozens of cases per year.

B. Plaintiffs Have Alleged That Defendants Caused Plaintiffs' Injuries

Plaintiffs have alleged a direct causal connection between their injuries—jail terms under unconstitutional conditions—and Defendants. *See Gee*, 837 F.3d at 486–87. Plaintiffs need not show that Defendants are the sole contributing factor, or even the last step in the causal chain, resulting in their confinement. *See id.* at 487; *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 558 (5th Cir. 1996) (affirming causation where defendant "*contributes*" to plaintiff's injury). Instead, Plaintiffs have standing because their injury is "fairly traceable" to Defendants' actions. *See Gee*, 837 F.3d at 486–87.

Plaintiffs have alleged more than enough facts tracing their confinement to the Police Chief, as policymaker for the City, and the Municipal Judge. The Police Chief implements the Debtors' Prison Policy and the Hungry Man Policy, which directly cause Plaintiffs to be unconstitutionally jailed and deprived of adequate nutrition. Compl. ¶¶ 95–115, 157–169. Under the Debtors' Prison Policy, Santa Fe police officers choose to jail capias pro fine arrestees, rather than presenting them to a court as required by law and permitted on the face of the warrants. ¶¶ 90, 101–02. These jail terms are fairly traceable to the Municipal Judge, who has designed his warrants as an unlawful mechanism for enforcing fines, and directed his clerks to issue the warrants authorizing unconstitutional jail terms. Compl. ¶¶ 85, 90–93, 95, 124(d), 141(d), 157–169. *See Bennett v. Spear*, 520 U.S. 154, 169–171 (1997) (holding government action fairly traceable to agency's written opinion, notwithstanding the fact that opinion was technically nonbinding and agency could have differed).

Defendants' argument on causation applies the wrong standard. By arguing that Plaintiffs have failed to avail themselves of some unspecified procedure for asserting inability to pay,[5] Defendants imply that Plaintiffs cannot recover for an injury with multiple potential causes.[6] The question here is simply whether Plaintiffs have pleaded facts making their injury fairly traceable to Defendants. Accepting Plaintiffs' allegations as true, there can be no doubt that Plaintiffs' injuries are traceable, in substantial part, to Defendants' unconstitutional actions. *Accord Sierra Club v. Cedar Point Oil Co.*, 73 F.3d at 558 (affirming causation where defendant "*contributes*" to plaintiff's injury).

C. Plaintiffs Have Alleged That Relief from this Court Will Likely Redress Plaintiffs' Injuries

Prospective relief against each Defendant will likely redress the unconstitutional

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[5] In fact, Plaintiffs allege that Defendants persistently refuse to hear assertions of inability to pay. ¶¶ 17, 19, 27, 29, 34, 46, 52, 57, 81, 89, 91, 95–96, 106. Plaintiffs also allege that the Municipal Court's recordkeeping is "insufficient to . . . memorialize communication between the person who owes money and the court." Compl. ¶¶ 86–88 (discussing poor recordkeeping in general). At this stage, the Court must treat that allegation as true.

The Court should not take judicial notice of Municipal Court records as evidence of communication with Plaintiffs. *See* Defs.' Mot. to Dismiss at 11–12 & n.3. Judicial notice of court records is appropriate only for "judicial action" and other matters "not subject to reasonable dispute." *Sepulvado v. Jinal*, 739 F.3d 716, 719 n.3 (5th Cir. 2013) (per curiam). Defendants' own citations specify many limitations on judicial notice of court records, the most relevant one being that it is disfavored for facts that are "disputed by the parties." *Papasan v. Allain*, 478 U.S. 265, 269 n.1 (1986).

[6] Plaintiffs would have standing even if they had contributed to their own injury. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–74 (1982) (affirming causation where plaintiff "fully expected" defendants' unlawful actions); Wright & Miller, 13A Fed. Prac. & Proc. § 3531.5 & nn. 62–63 ("The voluntary choice to suffer the injury that conferred standing was sufficient. Standing also has been permitted to plaintiffs who could avoid an injury with little effort." (footnotes omitted)).

jail terms threatened against Plaintiffs West and Jones.[7] Declaratory relief will likely stop constitutional violations before they occur by clarifying which aspects of Santa Fe's capias pro fine warrants, designed by the Municipal Judge as an unlawful mechanism for enforcing fines, are unconstitutional. *See Hancock Cnty. Bd. of Supervisors v. Ruhr*, 487 F. App'x 189, 196–97 (5th Cir. 2012) (holding declaratory relief likely to redress unconstitutional government action). Injunctive and declaratory relief will likely stop the City, through the Police Chief, from committing future constitutional violations. *See id.*; *Gee*, 837 F.3d at 486 (holding injunctive relief from enforcement redresses unconstitutional government action). And damages—even nominal damages—will vindicate Plaintiff Fuller's constitutional rights. *See Williams v. Kaufman Cnty.*, 352 F.3d 994, 1014 (5th Cir. 2003) (holding any violation of constitutional rights is actionable for nominal damages). The Court should disregard Defendants' conclusory statement to the contrary.

Altogether, Plaintiffs' allegations provide ample support for an inference that Plaintiffs have suffered injury in fact, fairly traceable to Defendants and likely redressable by this Court.

II. Plaintiffs' Complaint Does Not Establish a Limitations Bar on its Face

A motion to dismiss on limitations grounds may be granted only if the limitations bar is established on the face of the complaint. *Jones v. Bock*, 548 U.S. 199, 215 (2007).

[7] Defendants mischaracterize the prospective relief Plaintiffs seek as an injunction against execution of capias fine warrants and a declaration that such execution is unconstitutional. Instead, Plaintiffs seek an injunction against execution of capias pro fine warrants in a manner that violates Plaintiffs' constitutional rights, and a declaration specifying which actions are prohibited by the Constitution.

There is no such bar here: Plaintiffs West and Jones seek protection from future unlawful imprisonment, Compl. ¶¶ 21, 37, and their claims will not accrue until they are jailed and released. *Wallace v. Kato*, 549 U.S. 384, 389 (2007). Plaintiff Fuller's claims accrued when he was released from jail, which was within the two-year limitations period. Compl. ¶¶ 41, 56–57. Plaintiffs' allegations do not establish a limitations bar; instead, they demonstrate that Plaintiffs' claims were all brought within the limitations period.

III. Judicial Immunity Is Not a Defense to Plaintiffs' Claims

"Judicial immunity is not a bar to prospective injunctive relief against a judicial officer acting in her judicial capacity." *Pulliam v. Allen*, 466 U.S. 522, 542 (1984); *see Davis v. Bayless*, 70 F.3d 367, 376 (5th Cir. 1995) (reversing dismissal of prospective claim and directing attention to *Pulliam v. Allen* "for purposes of remand"); *e.g.*, *Callahan v. Wallace*, 466 F.2d 59 (5th Cir. 1972) (granting prospective relief against class of justices of the peace).[8] Plaintiffs seek only declaratory relief against the Municipal Judge. Compl. ¶ 69, 249–63. Defendants' arguments fail to engage whatsoever with *Pulliam v. Allen* or the principle that judicial immunity is inapplicable to claims for

[8] *See also Allen v. Burke*, 690 F.2d 376, 379 (4th Cir. 1982) (holding prospective relief "properly awarded" against magistrate who incarcerated defendant for a non-jailable offense and violated his right to counsel); *Doss v. Long*, 629 F. Supp. 127 (N.D. Ga. 1985) (granting prospective relief against class of judges for same violation); *Johnson v. Zurz*, 596 F. Supp. 39 (N.D. Ohio 1984) (granting declaratory relief against judge for failure to appoint counsel); *Lake v. Speziale*, 580 F. Supp. 1318 (D. Conn. 1984) (granting classwide prospective relief against judges for failure to appoint counsel); *Karr v. Blay*, 413 F. Supp. 579, 585–86 (N.D. Ohio 1976) (granting declaratory relief against judge for unconstitutionally jailing defendants for failure to pay).

declaratory relief. Defendants' motion to dismiss on the ground of judicial immunity should be denied.

IV. Plaintiffs Have Stated a Claim Against the Santa Fe Police Chief in his Official Capacity

"Official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978). Defendant Police Chief is an agent of the City of Santa Fe. Compl. ¶ 70. Plaintiffs have stated an official-capacity claim against the Chief for the reasons stated below.[9]

V. Plaintiffs Have Stated a Claim Against the City of Santa Fe

A municipality is liable under § 1983 when its "official policy" causes a constitutional violation. *Woodard v. Andrus*, 419 F.3d 348, 352–54 (5th Cir. 2005) (holding plaintiff stated a claim against municipality for persistently charging excessive court fees). "Official policy" can result from action or inaction by a municipal policymaker: as described below, Plaintiffs have alleged that Santa Fe's policymaker knew of customary unconstitutional practices, exhibited deliberate indifference to the risk of constitutional violations, and conspired to violate constitutional rights, all of which incur liability for the City of Santa Fe.

[9] Plaintiffs named the Police Chief as a Defendant to avoid disputes over enforcement of whatever prospective relief may be granted in this case. Plaintiffs have no interest in holding the Chief personally liable for damages. If the Court agrees that prospective relief against the City would bind the Police Chief and his employees under Rule 65(d)(2)(B) of the Federal Rules of Civil Procedure, Plaintiffs consent to dismissal of the official-capacity claims against the Police Chief.

A. The Santa Fe Police Chief is the City Policymaker for Jail Operations

Plaintiffs contend, and Defendants do not contest, that the Santa Fe Police Chief is the City's policymaker with respect to jail operations, and the Santa Fe City Council is the City's policymaker with respect to rules of practice and procedure in the Municipal Court.[10] Compl. ¶¶ 137–39. Should Defendants raise arguments about the identity of Santa Fe's policymakers for the first time in their reply, the Court should either decline to consider these arguments or permit Plaintiffs to file a surreply. *Oldham v. Thompson/Ctr. Arms Co.*, No. 12-cv-2432, 2013 WL 4042010, *7 n.3 (S.D. Tex. Aug. 8, 2013).

B. Plaintiffs Have Alleged That the City of Santa Fe is Liable for Two Unconstitutional Policies

Plaintiffs allege that the City of Santa Fe is liable for two official policies: the Debtors' Prison Policy, under which the Police Chief jails people for failure to pay without a hearing, a lawyer, or lawful authority; and the Hungry Man Policy, under which the Police Chief deprives people in his custody of adequate food. A plaintiff can demonstrate an "official policy" under many different legal theories. In this case, Plaintiffs contend that the City is liable under theories of custom liability, failure to supervise and train, and conspiracy liability.

[10] Plaintiffs agree that binding authority including *Johnson v. Moore*, 958 F.2d 92, 94 (5th Cir. 1992), precludes this Court from finding that the Municipal Judge is a municipal policymaker, and persuasive authority including *Harris v. City of Austin*, No. 15-cv-956, 2016 WL 1070863, *9 (W.D. Tex. Mar. 16, 2016), suggests that a municipality cannot be held liable for constitutional violations resulting from a municipal judge's judicial acts or omissions. Plaintiffs wish to preserve the argument that the Municipal Judge is a policymaker for the City of Santa Fe, and in the alternative, that the City of Santa Fe is liable for its policymakers' deliberate indifference to the Municipal Judge's common and well-settled practice of authorizing jail terms in violation of the right to an ability to pay hearing, right to counsel, and right against arbitrary detention.

Though Defendants have not bothered to engage in any analysis whatsoever of the facts Plaintiffs allege in support of an official policy, Defs.' Mot. to Dismiss at 17–19, Plaintiffs outline their three independent theories of liability below. Should Defendants raise any more specific arguments for the first time in their reply, the Court should either decline to consider the argument or permit Plaintiffs to file a surreply. *Oldham*, 2013 WL 4042010 at *7 n.3.

1. Plaintiffs Have Alleged That the Debtors' Prison and Hungry Man Policies Are City Customs

Plaintiffs allege that the City is liable for the Debtors' Prison Policy and the Hungry Man Policy as "customs": the "persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy." *Lawson v. Dallas Cnty.*, 286 F.3d 257, 263 (5th Cir. 2002) (quotation omitted).

The complaint contains ample allegations supporting the inference that the Debtors' Prison Policy is a "custom." Compl. ¶¶ 95–106 (describing common and well-settled practice of Santa Fe Police Department jailing people without a hearing, a lawyer, or lawful authority). In addition to factual allegations that these practices are common and well-settled, Plaintiffs have alleged that the Police Department has written procedures posted in the jail booking area requiring jail time for arrestees who cannot pay, without any corresponding procedure for producing the arrestee for a hearing, advising him of his right to counsel, or observing any independent time limit on his detention. *Id.* ¶ 123. And the Department does not arrange for hearings for capias

arrestees when the Municipal Judge goes out of town. *Id.* ¶ 120. *See Williams v. Kaufman Cnty.*, 352 F.3d at 1014 (holding custom liability where officers conducted extended detentions under sheriff's "unwritten policy"). Plaintiffs have also alleged that the Police Department has technological infrastructure to clear warrants without consulting a judge, Compl. ¶ 121, and Police Department paperwork only allows for two possibilities for a capias arrestee: payment or jail time, *id.* ¶ 119. *See Lawson*, 286 F.3d at 263 (holding custom liability where jail lacked infrastructure to provide paraplegics appropriate medical care). Plaintiffs allege that dozens of people are jailed each year, without waiver of fines or fees, written ability to pay determinations, or orders of commitment in any case, Compl. ¶¶ 122, 124, showing that the Debtors' Prison Policy is persistent and widespread. *See, e.g.*, *Matthias v. Bingley*, 906 F.2d 1047, 1054 (5th Cir. 1990) (holding custom where officer remembered following constitutional prescription only "once or twice"); *Flanagan v. City of Dallas*, 48 F. Supp. 3d 941, 953–55 (N.D. Tex. 2014) (60 unarmed African-American men killed by Dallas police within 13 years); *Oporto v. City of El Paso*, No. 10-cv-110, 2010 WL 3503457, *6 (W.D. Tex. Sept. 2, 2010) (32 uses of excessive deadly force by El Paso police within 15 years); *Rivera v. City of San Antonio*, No. 06-cv-235, 2006 WL 3340908, *12 (W.D. Tex. Nov. 15, 2006) (0 disciplinary actions in response to hundreds of excessive force complaints).

Plaintiffs have alleged that the Police Chief actually knows of the Debtors' Prison Policy from his August 2016 briefing. Compl. ¶ 143. Even if the Chief did not actually know of the policy, the frequency and flagrancy of the policy's application (tailor-made interdepartmental forms, procedures posted in the booking area), severity and

obviousness of the resulting constitutional violations (liberty deprivations resulting in jail overcrowding), and notoriety of the debtors' prison issue (investigative reporting in national outlets; advisories by the Department of Justice) all give the Police Chief constructive knowledge, *id.* ¶¶ 144–45. *See Lawson*, 286 F. 3d at 264. "In short, the Debtors' Prison Policy is not a hush-hush agreement among low-level Police Department staff, nor is it a policy that the Police Department applies on rare occasions. The constitutional violations the Police Department causes under this policy are not trivial, and they are not highly technical or obscure. The Police Department is openly jailing people, with no legal recourse, just because they are poor." *Id.* ¶ 145. Constructive knowledge is attributable to the Police Chief because these practices "occurred for so long or so frequently that the course of conduct warrants the attribution to the governing body of knowledge that the objectionable conduct is the expected, accepted practice of city employees." *Oporto*, 2010 WL 3503457 at *9.

Plaintiffs have also pleaded ample factual allegations permitting the Court to infer that the Hungry Man Policy is a municipal custom. Compl. ¶¶ 107–115 (describing common and well-settled practice of Santa Fe Police Department jailing people without adequate food). Plaintiffs have alleged a common and well-settled practice of feeding prisoners one Pop Tart for breakfast, one Pop Tart for lunch, and a frozen meal, such as a Hungry Man meal, for dinner, *id.* ¶ 118. Plaintiffs further allege a normalized, unwritten policy that prisoners will be completely deprived of food: officers engaged in a pattern of repeated failure to feed prisoners, *id.* ¶ 126, the Lieutenant reacted to recent reports of failure to feed a prisoner as "nitpick[ing]", *id.* ¶ 127–29, and the Police Chief failed to act

on a warning that no one had been assigned responsibility to feed prisoners jailed for failure to pay, *id.* ¶ 130. *See Williams v. Kaufman Cnty.*, 352 F.3d at 1014 (holding custom liability where officers conducted extended detentions under sheriff's "unwritten policy"). Plaintiffs also allege a lack of disciplinary action in response to jail records indicating officers persistently forget to feed prisoners, and a lack of infrastructure for monitoring those records, *id.* ¶ 125, further supporting the inference to an unwritten policy that depriving prisoners of food is acceptable. *See Lawson*, 286 F.3d at 263 (holding custom liability where jail lacked infrastructure to provide paraplegics appropriate medical care); *Rivera*, 2006 WL 3340908, *12 (inferring custom from lack of disciplinary action in response to hundreds of excessive force complaints).

Plaintiffs have alleged that the Police Chief actually knows of the Hungry Man Policy from his August 2016 briefing and another specific warning about the problem. *Id.* ¶¶ 130, 152. Even if the Chief did not actually know of the policy, the frequency and flagrancy of the policy's application (applied multiple times a day to every person in the jail; "meals" stored and prepared in employee break area; description of missed meals as "nitpicking"), and the severity and obviousness of the resulting constitutional violations (prisoners complain that they are hungry; less than half the required nutrients for an adult of any age or sex; spending on jail food barely exceeds spending for police dogs), give him constructive knowledge. *Id.* ¶¶ 63–65, 127–29, 153–55. *See Lawson*, 286 F. 3d at 264. In short, "the Hungry Man Policy is not a hush-hush agreement among lower-level Police Department staff, nor is it a policy that the Police Department imposes on rare occasions. The constitutional violations the Police Department causes under this policy

are not trivial, and they are not highly technical or obscure. The Police Chief is not giving people in his custody enough food to stay healthy." Compl. ¶ 155. Constructive knowledge is attributable to the Police Chief because these practices "occurred for so long or so frequently that the course of conduct warrants the attribution to the governing body of knowledge that the objectionable conduct is the expected, accepted practice of city employees." *Oporto*, 2010 WL 3503457 at *9.

These substantial factual allegations support the inference that both the Debtors' Prison Policy and the Hungry Man Policy are practices so common and well settled as to constitute customs attributable to the City of Santa Fe.

2. Plaintiffs Have Alleged That the Police Chief's Failure to Train and Supervise Officers Constitutes Deliberate Indifference to Constitutional Rights

Plaintiffs also allege that the City is liable for the Police Chief's failure to train and supervise officers, amounting to deliberate indifference to the rights of people jailed by the Santa Fe Police Department. *See Brown v. Bryan Cnty.*, 219 F.3d 450, 457 (5th Cir. 2000). The focus of a failure to train or supervise claim is on the adequacy of the training or supervision in relation to the tasks the officer must perform; here, those tasks are deciding whether to release people under capias pro fine warrants from jail, and ensuring that prisoners are fed. *See id.* at 459. Plaintiffs have stated a claim against the Police Chief because the risk of a constitutional violation was obvious to him, considering "not only what the [Chief] actually knew, but what he should have known, given the facts and circumstances surrounding the official policy and its impact on the plaintiff's rights." *Lawson*, 286 F.3d at 264. The facts available to the Police Chief put

him on notice that his failure to train officers about execution of capias pro fine warrants, or supervise their feeding of prisoners, was likely to lead to a constitutional violation. *See Brown v. Bryan Cnty.*, 219 F.3d at 460.

Plaintiffs allege that employees of the Santa Fe Police Department, as well as the Santa Fe City Marshal, were completely untrained on lawful execution of capias pro fine warrants. Specifically, officers received no training on the right to an ability to pay hearing, the right to counsel, or the scope of the liberty deprivation a capias pro fine warrant authorizes under Texas law. Compl. ¶¶ 117, 123–24, 188, 196, 205, 222, 225, 229, 237. Officers are also completely unsupervised with respect to whether they feed prisoners in the custody of the Police Chief: the Chief fails to ensure that officers consistently monitor jail cells, *id.* ¶ 108, that officers inform one another about prisoners admitted to the jail, *id.* ¶ 113, or that prisoners are actually fed, either by assigning responsibility for feeding prisoners or assigning responsibility to check jail records of "feedings," *id.* ¶¶ 114, 125, 130.

As discussed above in the custom liability section, Plaintiffs allege that there were ample facts available to the Police Chief indicating that officers were committing constitutional violations in complete ignorance or disregard of the law. *Id.* ¶¶ 143–45 (notice of constitutional violations under Debtors' Prison Policy), ¶¶ 130, 152–55 (notice of constitutional violations under Hungry Man Policy); *supra* Section V.B.1. The Chief "knew that all [Santa Fe] law enforcement officers, unless expressly restricted, will face situations calling for" execution of capias pro fine warrants, and ensuring prisoners are fed. *Brown v. Bryan Cnty.*, 219 F.3d at 463. Moreover, because the Chief was aware that

constitutional violations were occurring on a regular basis under the Debtors' Prison and Hungry Man Policies, there was "an even greater magnitude of obviousness of the need for training and predictability of the consequences without training." *Id.* Yet despite knowing of these risks, and having the power to implement training or supervision requirements, the Chief failed to do so. Compl. ¶¶ 143, 152. The Police Chief's policy decision not to require training on capias pro fine warrants, and his decision not to supervise distribution of food to prisoners, can thus be said to constitute deliberate indifference to the rights of people arrested under capias pro fine warrants. *See Brown v. Bryan Cnty.*, 219 F.3d at 463.

3. Plaintiffs Have Alleged That the Debtors' Prison and Hungry Man Policies Result from a Conspiracy to Violate Constitutional Rights

Finally, Plaintiffs contend that the City is liable for the Debtors' Prison Policy because it results from a conspiracy among City policymakers and the Municipal Judge. Plaintiffs have stated a § 1983 conspiracy claim by alleging an agreement with state actors to do an illegal act causing a constitutional deprivation.[11] *See Whisenant v. City of Haltom City*, 106 F. App'x 915, 917 (5th Cir. 2004) (citing *Cinel v. Connick*, 15 F.3d 1338, 1343 (5th Cir. 1994)). In this case, Plaintiffs have alleged facts supporting an inference to the same type of conspiracy between Santa Fe policymakers (including the Police Chief, the City Manager, the City Council) and the Municipal Judge. Compl. ¶¶ 157–169. City policymakers and the Municipal Judge have formed an agreement to

[11] Plaintiffs address causation below in Section V.C.

use the Santa Fe criminal justice system to raise revenue. *Id.* ¶¶ 157–59, 162–63. Among other aspects of this agreement, City policymakers have agreed to commit constitutional violations under the Debtors' Prison Policy to coerce people into making payments they cannot afford. *Id.* ¶¶ 157, 160–65, 167–69.

A conspiracy with a municipal policymaker, in his area of policymaking authority, makes the municipality party to the conspiracy: "[W]hen the official representing the ultimate repository of law enforcement power in the [municipality] makes a deliberate decision to abuse that power to the detriment of its citizens, [municipal] liability under section 1983 must attach . . . ." *Turner v. Upton Cnty.*, 915 F.2d 133, 137–38 (1990)). The Fifth Circuit has held that allegations about city policymakers and a municipal judge conspiring to raise revenue by operating a debtors' prison should survive a motion to dismiss. *Whisenant*, 106 F. App'x at 917. Because the conspiracy to implement the Debtors' Prison Policy is an agreement with the Police Chief, in the area of the Police Chief's policymaking authority, the City of Santa Fe is party to this conspiracy and liable for the resulting constitutional violations.

Plaintiffs have thus pled two municipal policies under three theories of liability: custom liability (both policies), failure to train (Debtors' Prison Policy) and supervise (Hungry Man Policy), and conspiracy liability (Debtors' Prison Policy).

C. Plaintiffs Have Alleged That the City's Unconstitutional Policies Cause Four Constitutional Violations

The City of Santa Fe is liable for constitutional violations resulting from its official policies. Plaintiffs have satisfied this standard by alleging "a direct causal link between the official policy and the constitutional violation." *Lawson*, 286 F.3d at 263.[12]

1. Plaintiffs Have Alleged That the Debtors' Prison Policy Violates the Right to an Ability to Pay Hearing

Plaintiffs allege that the Debtors' Prison Policy violates their right to an ability to pay hearing. In *Bearden v. Georgia*, the Supreme Court held that the Constitution requires courts to hold an ability to pay hearing before incarcerating a person for failure to pay a fine. 461 U.S. 660 (1983). The Court held that it is "fundamentally unfair" to jail someone solely because they cannot afford to pay a fine, and prescribed specific procedures for determining whether a jail term would be constitutional. *Id.* at 672–73. First, the court must hold a hearing inquiring into the reasons for failure to pay. *Id.* at 672. If the failure to pay was not willful, the court must consider alternative punishments, such as tailoring the fine to the person's limited resources. *Id*. Jail is permissible only if

[12] Defendants mention in the Background section of their brief that Mr. Fuller signed a waiver when he was jailed by the Police Department. Defs.' Mot. to Dismiss at 4 & Ex. C (Fuller case file no. 059197) at 15. Defendants do not raise any arguments about the waiver. Should Defendants raise any such argument for the first time in their reply, the Court should either decline to consider the argument or permit Plaintiffs to file a surreply. *Oldham*, 2013 WL 4042010 at *7 n.3.

the court concludes, after an ability to pay hearing, that all available alternatives are inadequate to satisfy the state's interest in punishment and deterrence.[13] *Id.*

Bearden applies to imprisonment for failure to pay a fine under Texas's capias scheme: "Nothing in the language of the Bearden opinion prevents its application to any given enforcement mechanism." *United States v. Payan*, 992 F.2d 1387, 1396 (5th Cir. 1993); *Doe v. Angelina Cnty.*, 733 F. Supp. 245 (E.D. Tex. 1990) (holding sheriff violated *Bearden* by summarily jailing defendant under capias warrant). The Fifth Circuit has held that *Bearden* requires the court make an affirmative inquiry into the reasons for failure to pay. *United States v. Scales*, 639 F. App'x 233, 240 (5th Cir. 2016) (citing *Payan*, 992 F.2d at 1396). "No court has held that indigent debtors are required to initiate proceedings to request a modification of their financial obligations or otherwise risk imprisonment for nonpayment." *Cain v. City of New Orleans*, No. 15-cv-4479, 2016 WL 2962912, *5 (E.D. La. May 23, 2016) (rejecting argument to the contrary[14] and citing *Scales* and *Payan*); *Angelina Cnty.*, 733 F. Supp. at 245 (holding defendant could not waive his rights under *Bearden* if he was not informed of those rights).

[13] Notably, the Texas legislature has specified that the State has no interest in jailing someone who is unable to pay her Class C misdemeanor fine. Tex. Code Crim. Proc. Art. 45.046(a) (prohibiting jail unless failure to pay is "willful"). Therefore, under *Bearden*, Texas courts never have a legitimate reason to jail someone under that circumstance.

[14] The one *Bearden* case cited to the contrary was *Garcia v. City of Abilene*, 890 F.2d 773 (5th Cir. 1989) (per curiam). *Garcia* concerned a court that repeatedly attempted to schedule ability to pay hearings, and a plaintiff who persistently refused to appear. *Id.* at 774–75. *Garcia* did not create a duty for the debtor to initiate legal proceedings in order to avoid a jail term. *Accord Cain*, 2016 WL 2962912 at *5.

In this case, Plaintiffs have clearly alleged that the Debtors' Prison Policy violates their right to an ability to pay hearing. Under that policy, the Santa Fe Police Department jails people who fail to pay their fines, without presenting them to a court for an ability to pay hearing. Compl. ¶¶ 1–2, 101–03, 106, 117, 119–124. The Plaintiffs thus face a jail term for failure to pay, without any judicial inquiry into their reasons for failure to pay or consideration of alternatives to jail time. This is a violation of the Plaintiffs' right to an ability to pay hearing under *Bearden v. Georgia*.

Defendants make three summary and mistaken arguments to the contrary on page 16 of their brief. First, Defendants argue that they do not violate *Tate v. Short*, 401 U.S. 395 (1971), a case prohibiting automatic conversion of a fine into jail time without alternatives to immediate payment. Plaintiffs do not assert violation of their rights under *Tate v. Short*. Second, Defendants argue "a claimed indigent is obligated to appear and assert his indigence," citing *Sorrells v. Warner*, 21 F.3d 1109 (5th Cir. 1994), a case discussing rights under *Tate v. Short*. Again, Plaintiffs do not assert violation of their rights under *Tate v. Short*. Third, Defendants argue that a "person is not entitled to indigency hearing before being detained," citing *Pederson v. City of Haltom City*, 108 F. App'x 845, 848 (5th Cir. 2004). *Pederson* does not stand for that proposition. Instead, the court merely observed in dicta that the plaintiff had "not directed us to any cases holding that a person is entitled to an indigency hearing." *Id.*

In sum, Plaintiffs have alleged that the Debtors' Prison Policy directly violates their right to an ability to pay hearing under *Bearden v. Georgia*.

2. Plaintiffs Have Alleged That the Debtors' Prison Policy and the Hungry Man Policy Cause Additional Constitutional Violations

Plaintiffs claim that the Debtors' Prison Policy violates their right to counsel under the Sixth and Fourteenth Amendments, and their right against arbitrary detention under the Fourteenth Amendment. Compl. ¶¶ 194–211, 227–242. Defendants have not made any argument to the contrary. Should Defendants raise these arguments for the first time in their reply, the Court should either decline to consider these arguments or permit Plaintiffs to file a surreply. *Oldham*, 2013 WL 4042010 at *7 n.3.

3. Plaintiffs Have Alleged That the Hungry Man Policy Violates the Right Against Cruel and Unusual Punishment

Finally, Plaintiffs claim that the Hungry Man Policy violates their right against cruel and unusual punishment. Plaintiffs allege that the Police Chief knowingly deprives his prisoners of more than half the calories and protein they require for basic sustenance, with deliberate indifference to the resulting harm and indignity. Compl. ¶¶ 110–13, 125–31, 152; *supra* Section V.B.1 (discussing allegations supporting the Police Chief's knowledge of Hungry Man Policy, power to change the policy, and failure to do so). These allegations are sufficient to state an Eighth Amendment claim. *See Brown v. Plata*, 563 U.S. 493, 511 (2011) ("A prison that deprives prisoners of basic sustenance . . . is incompatible with the concept of human dignity and has no place in civilized society."); *Gates v. Cook*, 376 F.3d 323, 332 (5th Cir. 2004) (describing Eighth Amendment standard and holding: "Prison officials must provide humane conditions of confinement; they must ensure that inmates receive adequate food").

Defendants' one sentence of argument to the contrary is the following: "Plaintiffs' allegations and the governmental records refute the assertion . . . that the identified meals failed to meet constitutional standards." Defs.' Mot. to Dismiss at 16. Defendants then cite four cases that have no bearing on Plaintiffs' allegations: *Pederson v. City of Haltom City*, 108 F. App'x 845, 848 (5th Cir. 2004) (summarily affirming dismissal of jail conditions claim without describing claim); *Doe v. City of Haltom City*, 106 F. App'x 906, 908 (5th Cir. 2004) (same); *Garcia Guevara v. City of Haltom City*, 106 F. App'x 900, 903 (5th Cir. 2004) (same); *Green v. Ferrell*, 801 F.2d 765, 770–71 (5th Cir. 1986) (holding no Eighth Amendment violation where "the menus were nutritionally adequate in all areas except Vitamin D"). Should Defendants raise any more substantive arguments for the first time in their reply, the Court should either decline to consider these arguments or permit Plaintiffs to file a surreply. *Oldham*, 2013 WL 4042010 at *7 n.3.

CONCLUSION

For the foregoing reasons, the Court should deny the Defendants' motion to dismiss in its entirety. In the alternative, Plaintiffs seek leave to amend their complaint.

Respectfully Submitted,

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CERTIFCATE OF SERVICE

I hereby certify that on February 10, 2017, I served a copy of PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS via this Court's Electronic Case Filing System upon counsel for Defendants listed below:

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