UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

GEORGE WEST,
ROBERT JONES, and
BRADY FULLER, on behalf of themselves
And 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. 3:16-cv-00309

DEFENDANTS' OPPOSED MOTION TO DISMISS PLAINTIFFS' CLAIMS

Defendants, City of Santa Fe, Texas, Municipal Judge Carlton Getty, and Chief of Police Jeffrey Powell, move the Court to dismiss this suit in accordance with Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction because Plaintiffs lack standing to bring this suit. In the alternative, Defendants move the Court to dismiss this action under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted.

CERTIFICATE OF CONFERENCE

1. Defendants' counsel conferred with Plaintiffs' counsel and Plaintiffs oppose the relief sought herein.

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DEFENDANTS COMPLIED WITH THE COURT'S ADMINISTRATIVE PROCEDURES REGARDING MOTIONS TO DISMISS

2. Defendants fulfilled the Court's administrative procedures attendant to filing this motion to dismiss. {Docket no. 15}.

BACKGROUND FACTS

3. On December 10, 2005, a police officer issued citations to Plaintiff George West alleging West had operated a motor vehicle with an expired registration, without a driver license or insurance, and while in possession of an open container of alcohol. On that date, West signed a promise to appear in court on December 19, 2005, to address the allegations. On July 25, 2008, an attorney informed the Municipal Court that he represented West and on August 11, 2008, that attorney posted surety bonds for the charges against West. On August 13, 2008, the Court scheduled a Municipal Court hearing for October 15, 2008 to address the charges against West. On November 19, 2008, West pled nolo contendere to the charges he had violated Texas law by operating a motor vehicle with an expired registration and without a driver license or insurance. On April 21, 2009, the Municipal Judge issued Capias Pro Fines after West failed to make the agreed upon payments and failed to seek any modification of the agreed upon payment terms. The capias has been outstanding for *seven years and five months*. West has not served any time in the City of Santa Fe lock-up.[1] {*Exs. D-F*}.

[1] It is appropriate for a District Court to take judicial notice of public records when considering a motion to dismiss and additionally these records are central to Plaintiffs' claims. *See Papasan v. Allain*, 478 U.S. 265, 269, 106 S. Ct. 2932, 2935 n.1 (1986); *R2 Investments LDC v. Phillips*, 401 F.3d 638, 640 n.2 (5th Cir. 2005); *Gray ex rel. Rudd v. Beverly Enterprises-Miss., Inc.*, 390 F.3d 400, 408 n.7 (5th Cir. 2004). Therefore, the factual allegations before the

4. On August 8, 2013, a police officer issued a citation to Plaintiff Robert Jones alleging Jones had driven a vehicle without motor vehicle insurance. On that date, Jones signed a promise to appear in court on September 8, 2013, to address the allegation he had driven without motor vehicle insurance. On September 9, 2013, the Court Clerk sent written correspondence to Jones informing him of a court appearance date on November 13, 2013. At his court appearance on November 13, 2013, Jones entered a plea of nolo contendere to the charge he had violated Texas law by operating a motor vehicle without liability insurance and Jones agreed to, and executed, a fine periodic payment plan which called for an initial payment within one month and periodic payments every two weeks thereafter until the fine was paid. On March 4, 2014, the Municipal Judge issued a Capias Pro Fine after Jones failed to make the agreed upon periodic payments and failed to seek any modification of the agreed upon payment terms. The capias has been outstanding for *two years and nine months*. Jones has not served any time in the City of Santa Fe lock-up. {*Ex. A*}.

5. On May 10, 2014, a police officer issued a citation to Plaintiff Brady Fuller alleging Fuller operated a motor vehicle with expired license plates. On that date, Fuller signed a promise to appear in court on June 10, 2014 to address the allegation. When Fuller failed to do so, on September 29, 2014, the Municipal Judge issued a warrant

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Court consist of Plaintiffs' pleading allegations and relevant public governmental records. *See also Funk v. Stryker Corp.*, 631 F.3d 777, 780 (5th Cir. 20110; *U.S. ex rel. Willard v. Humana Health Plan of Texas, Inc.*, 336 F.3d 375, 379 (5th Cir. 2003); *Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1017-18 (5th Cir. 1996).

authorizing Fuller's arrest. On October 31, 2014, Fuller pled no contest to the charge he had driven with expired license plates and Fuller paid the fine the same day. {*Ex. B*}.

6. On April 10, 2014, a police officer issued another citation to Fuller alleging he operated a motor vehicle with an expired inspection sticker. On that date, Fuller signed a promise to appear in court on May 10, 2014 to address the allegation. After he failed to do so, on September 29, 2014, the Municipal Judge issued a warrant authorizing Fuller's arrest. On October 31, 2014, Fuller pled no contest to the charge he had driven with an expired inspection sticker and Fuller agreed to and executed a fine periodic payment plan which called for an initial payment within one month and period payments every two weeks thereafter until the fine was paid. Fuller failed to make the agreed upon payments and on June 14, 2015, he was arrested and brought before the Municipal Court on June 15, 2015. On June 15, 2015, Fuller reaffirmed his plea of nolo contendere and again executed a fine periodic payment plan which called for periodic monthly payments until the fine was paid. On the payment agreement, Fuller represented to the Court that he was employed by National Technologies. {*Ex. C*}.

7. On October 6, 2015, the Municipal Judge issued Capias Pro Fines after Fuller failed to make the payments he had agreed to make and failed to request any modification of the agreed upon payment terms. On December 11, 2015, Fuller executed a written waiver in which he expressly waived his rights to be released from custody, and affirmatively requested to remain in custody for a sufficient length of time to discharge the fines he had been assessed. {*Ex. C*}.

8. In their Complaint, Plaintiffs West and Jones allege "[t]here is a high risk that Santa Fe police officers will arrest and jail [them] in violation of their right to due process, right to equal protection, right to counsel, and right against cruel and unusual punishment." {Complaint at ¶ 3}. Plaintiffs West and Jones "seek declaratory and injunctive relief [against Defendants] protecting themselves and all other similarly situated people from violation of their constitutional rights." *Id.*

9. Plaintiff Fuller alleges Defendant, City of Santa Fe, jailed him because he could not afford to pay a traffic ticket. *Id*. at ¶¶ 1-4. Fuller claims "[t]he City [of Santa Fe] jailed him in violation of his right to due process, his right to equal protection, his right to counsel, and his right against cruel and unusual punishment." *Id*. at ¶ 4. Plaintiff Fuller "seeks damages [against Defendant City of Santa Fe] on behalf of himself and all other similarly situated people whom the City has already jailed." *Id*. at ¶ 4, p. 68.

10. In addition to the relief identified *supra*, Plaintiffs seek class certification, costs, and attorney's fees.

MOTION TO DISMISS STANDARDS

11. Courts must decide a Rule 12(b)(1) motion before addressing the merits of the case. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). Pursuant to the federal rules, dismissal of an action is appropriate whenever the court lacks subject matter jurisdiction. FED.R.CIV.P. 12(b)(1).

12. "To survive a motion to dismiss [under FED.R.CIV.P. 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009)

(quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 1974 (2007)).

> Determining whether a complaint states a plausible claim for relief will, [], be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.
>
> But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not "shown" – "that the pleader is entitled to relief."

*Id*. at 1950 (quoting FED.R.CIV.P. 8(a)(2)) (internal citation omitted).

13. Although the federal pleading requirements are reasonably low, they are real and the threshold for stating a claim for relief requires factual allegations regarding each material element necessary to sustain recovery under an actionable legal theory. *Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 16 (5th Cir. 1989). "Thread-bare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* A court is not required to accept mere legal conclusions as true, instead, a complaint "must be supported by factual allegations." *Id*.

14. Additionally, to state a claim against a public official performing governmental duties, a plaintiff must satisfy a heightened pleading standard. *Oliver v. Scott*, 276 F.3d 736, 742 (5th Cir. 2002); *Baker v. Putnal*, 75 F.3d 190, 195 (5th Cir. 1996); *Clark v. Amoco Production Company*, 794 F.2d 967, 970 (5th Cir. 1986). "The burden is on the plaintiff to overcome a defendant's defense of qualified immunity." *Burns-Toole v. Byrne*, 11 F.3d 1270, 1274 (5th Cir.), *cert. denied*, 512 U.S. 1207 (1994). *Accord Beck v. Texas State Board of Dental Examiners*, 204 F.3d 629, 633 (5th Cir. 2000); *Salas v. Carpenter*, 980 F.2d 299, 304 (5th Cir. 1992); *Brown v. Glossip*, 878 F.2d 871, 874 (5th

Cir. 1989) and *Whatley v. Philo*, 817 F.2d 19, 20 (5th Cir. 1987).

15. When individual immunity is raised, as here, "the complaint must state with *factual detail and particularity* the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity." *Babb v. Dorman*, 33 F.3d 472, 477 (5th Cir. 1994) (emphasis added); *Accord Zapata v. Melson*, 750 F.3d 481, 484-486 (2014); *Backe*, 691 F.3d at 649; *Schultea v. Wood*, 47 F.3d 1427, 1432-34 (5th Cir. 1985)(en banc). The assertions in the Plaintiffs' Complaint fail to meet the standard required to state a claim upon which relief can be granted.

ARGUMENT AND AUTHORITIES

**I. Since no Plaintiff has alleged facts showing a case or controversy, no Plaintiff has standing to assert a claim.**

16. "Principles of comity and federalism, in addition to Article III's jurisdictional bar, mandate that [federal courts] intervene in the management of state courts only in the extraordinary case." *Society of Separationists v. Herman*, 959 F.2d 1283,1286 (5th Cir. 1992). "Especially where governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative." *Eccles v. Peoples Bank*, 333 U.S. 426, 431, 68 S.Ct. 641 (1948). The federal courts "should be hesitant to inhibit state judges from exercising the discretion that comes with their job by imposing costs solely to protect against a hypothetical risk of future harm. The practical concerns, combined with concerns of equity, comity, and federalism, tip the balance decisively in favor of restraint." *Society of Separationists*, 959 F.2d at 1287. Article III of the Constitution confines the federal courts to deciding actual cases and controversies. *Allen*

*v. Wright*, 468 U.S. 737, 104 S. Ct. 3315, 3324 (1984). The rule that litigants must have standing to invoke the power of the federal courts is perhaps the most important doctrine stemming from the case or controversy requirement. *Id*.

17. "In order to establish a case or controversy sufficient to give a federal court jurisdiction over their claims, plaintiffs must satisfy three criteria." *Id*. (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130 (1992). "First, they must show that they have suffered, or are about to suffer, an 'injury in fact.'" *Id*. To show an injury in fact, a plaintiff must show "an invasion of a legally protected interest" that is both "concrete and particularized" as well as "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal quotation marks omitted). The Supreme Court has "emphasized repeatedly" that an injury "must be concrete in both a qualitative and temporal sense." *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S. Ct. 1717 (1990). Such an injury must be "distinct and palpable, as opposed to merely [a]bstract." *Id*. In other words, "the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Sierra Club v. Morton*, 405 U.S. 727, 734-35, 92 S. Ct. 1361 (1972).

18. "Second, 'there must be a causal connection between the injury and the conduct complained of.'" *Okpalobi*, 244 F.3d at 424 (internal citations omitted). "Third, 'it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Id*. "If any one of these three elements -- injury, causation, and redressability -- is absent, plaintiffs have no standing in federal court under Article III of the Constitution to assert their claim." *Id*. If a named Plaintiff fails to establish standing,

"he or she may not seek relief on behalf of himself or herself or any other member of [a] class." *James v. City of Dallas*, 254 F.3d 551, 563 (5th Cir. 2001) (citing *O'Shea v. Littleton*, 414 U.S. 488, 94 S. Ct. 669 (1974)).

19. In *City of Los Angeles v. Lyons*, 461 U.S. 95, 103 S. Ct. 1660 (1983), the Supreme Court made clear that plaintiffs may lack standing to seek prospective relief even though they have standing to sue for damages (which is not to say Plaintiff Fuller, who is the only Plaintiff here who seeks damages, has standing to sue). Lyons was a Los Angeles area resident who was subjected to a chokehold by city police officers when he was stopped for a traffic violation. He obtained a preliminary injunction which prohibited the police department from using the chokehold unless death or serious bodily injury were threatened. The Court reversed. It observed that "past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *Lyons*, 103 S. Ct. at 1665 (quoting *O'Shea*, 414 U.S. at 495-96). To obtain equitable relief for past wrongs, quite like the equitable relief Plaintiffs seek here, a plaintiff must demonstrate either continuing harm or a real and immediate threat of repeated injury in the future. *Soc'y of Separationists, Inc. v. Herman*, 959 F.2d 1283, 1285 (5th Cir. 1992). Similar reasoning has been applied to suits for declaratory judgments. *Id*. (citing *Ashcroft v. Mattis*, 431 U.S. 171, 97 S. Ct. 1739 (1977).

20. Plaintiffs West and Jones seek injunctive relief asking the Court to prohibit the City of Santa Fe and Chief Powell from executing capias pro fine warrants against members of a putative class. {Complaint, at p. 67}. West and Jones also seek a

declaration that the City, Judge Getty and Chief Powell, by authorizing or carrying out a putative class member's arrest or detention for failure to pay a judgment issued by the Santa Fe Municipal Court, will be in violation of a putative class member's Sixth, Eighth and Fourteenth's Amendments. Complaint, at pp. 67-68. However, much like Lyons in *City of Los Angeles*, Plaintiffs West and Jones lack standing to obtain the prospective equitable relief they seek because neither of them suffers, nor has either alleged he suffers, continuing harm as a result of the alleged violations of the Defendants. Nor have Plaintiffs West or Jones alleged a real and immediate threat that either of them will be arrested and subjected to the alleged violations of which they complain. Throughout West's and Jones' Complaint, the only hint of any type of threat to West or Jones is the conclusory line, unsupported by any factual allegations, that "[t]here is a high risk that Santa Fe police officers will arrest and jail Mr. West and Mr. Jones." {Complaint, at ¶ 3}. However, Court records show that both have had arrest warrants for many years but have never been arrested and placed in the City lock-up. {*Exs. A, D-F*}. It is entirely too speculative that, even if West or Jones was arrested, either would be subjected to the governmental treatment of which they complain, particularly since no Plaintiff has ever sought and been denied access to the Court to address any claimed indigence, much less established indigency. "Especially where governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative." *Society of Separationists*, 959 F.2d at 1287 (quoting *Eccles v. Peoples Bank*, 333 U.S. 426, 431, 68 S. Ct. 641 (1948).

21. As a matter of law, the City and Chief of Police Powell lack the power to order the detainment of any Plaintiff who is indigent for failure to pay a judicially imposed fine, and Municipal Judge Getty is immune from a claim based on such action. *See id*. Furthermore, Plaintiffs have failed to "show (1) how these impotent defendants play a causal role in the plaintiffs' [asserted] injury and (2) how these defendants can redress their alleged or threatened injury." *See Okpalobi*, 244 F.3d at 426. Furthermore, as in *Johnson v. Moore*, 958 F.2d 92, 94 (5th Cir. 1992), the Plaintiffs "can show only a distantly speculative possibility that [they] will [ever][2] be subjected to the practice [they] complain[] of."

22. Plaintiffs West and Jones have not even been detained in the City lock-up, have been provided with accommodations in paying the fines assessed against them over time through periodic payments, have not sought to avoid detainment in the lockup by claiming they are indigent, and have not alleged facts which show they are in fact indigent under the law. Public records of the Municipal Court of the City of Santa Fe establish that Plaintiffs West and Jones pleaded no contest to several charges knowing the amount of the fines, were given opportunities to pay the fines over time through periodic payment plans, but failed to pay the fines or inform the Municipal Court or Municipal Judge that their claimed indigence prevented them from making the agreed payments. Additionally, Plaintiff West was represented in Municipal Court by retained counsel who posted bonds on West's behalf. Moreover, West and Jones *have not even been detained*

[2] In *Johnson*, unlike the instant case, the plaintiff had previously been subjected to the deprivation alleged.

*in the City's lock-up*, been denied an opportunity to establish their indigence before the Municipal Judge or, much less, held after establishing their indigence.[3]

23. Therefore, no Plaintiff has alleged facts showing a case or controversy, so no Plaintiff has standing to assert any claim. No Plaintiff has suffered, or is about to suffer, any injury in fact. There is no causal connection between any injury a Plaintiff has sustained, or is about to suffer, and any complained of conduct by a Defendant. No Plaintiff has alleged facts showing a likely deprivation of his rights. *See Okpalobi*, 244 F.3d at 426.

## II. Limitations bar any claim premised on alleged unlawful acts that occurred before November 3, 2014.

24. It appears Plaintiffs seek to assert claims based upon conduct that occurred before November 3, 2014, even though such a claim would be barred by limitations. "Because there is no specified federal statute of limitations for section 1983 suits, federal courts borrow the forum state's general personal injury limitations period." *Burrell v. Newsome*, 883 F.2d 416, 418 (5th Cir. 1989). "In Texas, the applicable limitations period is two years." *Gartrell v. Gaylor*, 981 F.2d 254, 256 (5th Cir. 1993) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a)). "A statute of limitations may support dismissal under

[3] It is appropriate for a District Court to take judicial notice of public records when considering a motion to dismiss and these records are central to Plaintiff's claims. *See Papasan v. Allain*, 478 U.S. 265, 269, 106 S. Ct. 2932, 2935 n.1 (1986); *R2 Investments LDC v. Phillips*, 401 F.3d 638, 640 n.2 (5th Cir. 2005); *Gray ex rel. Rudd v. Beverly Enterprises-Miss., Inc*., 390 F.3d 400, 408 n.7 (5th Cir. 2004). Therefore, the factual allegations before the Court consist of Plaintiff's pleading allegations and relevant public governmental records pertaining to Plaintiff's pleading allegations which show she was convicted of committing the crime of driving while intoxicated. *See also Funk v. Stryker Corp*., 631 F.3d 777, 780 (5th Cir. 20110; *U.S. ex rel. Willard v. Humana Health Plan of Texas, Inc*., 336 F.3d 375, 379 (5th Cir. 2003); *Lovelace v. Software Spectrum Inc*., 78 F.3d 1015, 1017-18 (5th Cir. 1996).

Rule 12(b)(6) where it is evident from the plaintiff's pleadings that the action is barred and the pleadings fail to raise some basis for tolling or the like." *Jones v. Alcoa, Inc.*, 339 F.3d 359, 366 (5th Cir. 2003); *see also Taylor v. Books A Million*, 296 F.3d 376, 378-79 (5th Cir. 2002); *Kansa Reinsurance v. Congressional Mortgage Corp.*, 20 F.3d 1362, 1366-70 (5th Cir. 1994); *Cross v. Lucius*, 713 F.2d 153, 56 (5th Cir. 1983); 5B CHARLES ALAN WRIGHT 7 ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357 n. 69 (3d ed. 2004).

25. While state law identifies the applicable limitation period, "the accrual date of a § 1983 cause of action is a question of federal law that is *not* resolved by reference to state law." *Wallace v. Kato*, 549 U.S. 384, 388, 127 S. Ct. 1091, 1095 (2007); *see also Jackson v. Johnson*, 950 F.2d 263, 265 (5th Cir. 1992); *Burrell*, 883 F.2d at 418. Generally, a cause of action pursuant to § 1983 accrues "the moment the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured." *Helton v. Clements*, 832 F.2d 332, 335 (5th Cir. 1987), *cert. denied*, 507 U.S. 914, 113 S. Ct. 1266 (1993); accord *Piotrowski v. City of Houston*, 237 F.3d 567, 576 (5th Cir. 2001). Accordingly, Plaintiffs' claims premised upon alleged unconstitutional acts that occurred before November 3, 2014, are time barred, as a matter of law, under FED.R.CIV.P. 12(b)(6). *See Jones*, 339 F.3d at 366.

**III. Absolute Judicial Immunity bars any claim against Judge Getty.**

26. Although Plaintiffs claim to assert claims against Municipal Judge Getty in his individual capacity "for declarative relief only," his absolute immunity bars such claims.

"Absolute judicial immunity extends to all judicial acts which are not performed in the clear absence of all jurisdiction." *Adams v. McIlhany*, 764 F.2d 294, 297 (5th Cir. 1985). "The factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e., whether they dealt with the judge in his official capacity.'" *Stump v. Sparkman*, 435 U.S. 349, 98 S. Ct. 1099, 1107 (1978). "That [Municipal Judge Getty] may have been wholly motivated by personal malice does not in the least turn a judicial act into a nonjudicial act." *Adams*, 764 F.2d at 297. "The four factors generally relied upon [in the Fifth Circuit] in determining whether an act is 'judicial' [] are (1) whether the precise act complained of is a normal judicial function; (2) whether the acts occurred in the courtroom or appropriate adjunct spaces such as the judge's chambers; (3) whether the controversy centered around a case pending before the court; and (4) whether the acts arose directly out of a visit to the judge in his official capacity." *Adams*, 764 F.2d at 297 (citing *McAlester v. Brown*, 469 F.2d 1280, 1282 (5th Cir. 1972)). "[T]he test factors should be broadly construed in favor of immunity." *Id.*

27. Texas law clearly provided Judge Getty with jurisdiction to take the judicial actions the Plaintiffs complain of. *See* TEX.CODE CRIM.PROC. 43.015; 43.05: 43.045; *Howard v. State*, 2007 WL 4260525 (Tex. App.—Waco 2007, pet. ref'd). Judge Getty's acts that Plaintiffs complain of are normal judicial functions, that occurred in the courtroom or adjunct spaces, regarding cases the Judge presided over, and the Judge's acts arose directly out of visits to the judge in his judicial capacity so he is immune. *See*

*Mireless v. Waco*, 502 U.S. 9, 112 S.Ct. 286 (1991); *Adams*, 764 F.2d at 297; *Krueger v. Reimer*, 66 F.3d 75, 77 (5th Cir. 1995).

## IV. Plaintiffs fail to allege facts which state a claim against Police Chief Powell in his official capacity.

28. A claim asserted against a governmental public servant in his official capacity is a claim against the officer's office and is **no different than a claim against the city which employs the officer**. *Will v. Michigan Department of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312 (1989); *Anderson v. Pasadena Independent School District*, 184 F.3d 439, 443 (5th Cir. 1999). Supreme Court, as well as, Fifth Circuit precedent clearly establishes that "[o]fficial-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent…" *Monell v. New York City Department of Social Services*, 436 U.S. 658, 690, 98 S. Ct. 2018, 2035 n. 55 (1978); *accord Turner v. Houma Municipal Fire and Police Civil Service Board*, 229 F.3d 478, 483 (5th Cir. 2000). Therefore, Plaintiff's claims against City Chief of Police Powell, in his official capacity, must be treated as a claim against the City. *See Hafer v. Melo*, 502 U.S. 21, 25, 112 S. Ct. 358, 361 (1991); *Kentucky v. Graham*, 473 U.S. 159, 167, 105 S. Ct. 3099, 3106 (1985); *Flores v. Cameron County*, 92 F.3d 258, 261 (5th Cir. 1996); *Bennet v. Pippin*, 74 F.3d 578, 584 (5th Cir. 1996); *Young v. City of Kileen*, 775 F.2d 1349, 1351 (5th Cir. 1985). Therefore, the redundant claim against Chief Powell should be dismissed since the City has been sued directly. Additionally, the claim against Chief Powell fails for the same reasons Plaintiffs' claims against the City fail as discussed fully *infra*.

## V. Plaintiffs have not alleged facts which show that any City policy caused a constitutional violation.

### A. The City cannot be held liable because no Plaintiff was deprived of a protected right.

29. The City cannot be liable because no Plaintiff was deprived of a constitutional right. When a plaintiff is not the victim of a deprivation, it is irrelevant whether a City policy would have authorized the alleged conduct. *City of Los Angeles v. Heller*, 475 U.S. 797, 811, 106 S. Ct. 1571, 1573 (1986); *Rios v. City of Del Rio*, 444 F.3d 417, 426 (5th Cir. 2006); *McKee v. City of Rockwall*, 877 F.2d 409, 414 (5th Cir.), *cert. den'd*, 493 U.S. 1023 (1990). Plaintiffs' allegations and the governmental records refute the assertion any fine was automatically converted into a jail term because every Plaintiff was provided accommodations permitting addressing the fines in accordance with *Tate v. Short*, 401 U.S. 395 (1971); *Burks v. Price*, 654 Fed.Appx. 670, 671-672 (5th Cir. 2016); *Jackson v. Herklotz*, 1998 U. S. App. LEXIS 40931 (5th Cir. 1998); *Sorrells v. Warner*, 1994 U.S. App. LEXIS 41508 *10-11 (5th Cir. 1994) (**a claimed indigent is obligated to appear and assert his indigence**); *Howard-Barrows v. City of Haltom City*, 106 Fed.Appx. 912, 914 (5th Cir. 2004); *Pederson v. City of Haltom City*, 108 Fed.Appx. 845, 848 (5th Cir. 2004)(**person is not entitled to indigency hearing before being detained**), or that the identified meals failed to meet constitutional standards. *See Green v. Ferrell*, 801 F.2d 765, 770-771 (5th Cir. 1986); *Doe v. City of Haltom City*, 106 FED.APPX. 906, 908 (5th Cir. 2004); *Pederson*, 108 Fed.Appx. at 848; *Carcia Guevara v. Haltom City*, 106 Fed.Appx. 900, 903 (5th Cir. 2004).

**B. The City cannot be held responsible for Municipal Judge Getty's actions.**

30. "[A] municipal judge acting in his or her judicial capacity to enforce state law does not act as a municipal official or lawmaker." *Johnson*, 958 F.2d at 94; accord *Krueger*, 66 F.3d at 77; *Harris v. City of Austin*, 2016 U.S. LEXIS 33694 *11-25 (5th Cir. 2016); *Doe*, 106 FED.APPX. at 908; *Carcia Guevara*, 106 Fed.Appx. at 902. The Fifth Circuit "[C]ourt has repeatedly rejected this argument [otherwise] in analogous cases." *Cunningham v. City of West Point*, 380 FED.APPX. 419, 421 (5th Cir. 2010).

**C. Plaintiff's have failed to allege facts showing any unconstitutional City policy.**

31. A city may only be liable under § 1983 if the execution of an unconstitutional policy authorized by the governmental unit's policymaker caused a constitutional deprivation. *Board of County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 403, 117 S. Ct. 1382, 1388 (1997). "[U]nder § 1983, local governments are responsible only for '*their own* illegal acts.'" *Connick v. Thompson*, 560 U.S. 51, 60, 131 S.Ct. 1350, 1359 (2011). More simply, a city is not vicariously liable for its employees' actions, *even if their acts are unconstitutional*. *Id*. Therefore, in order to support a claim against the City, Plaintiffs must allege facts showing: (1) an unconstitutional City policy which actually existed at the time of the incident; (2) an actual connection between the identified existing policy to the City through its policymaker; and (3) that a Plaintiff was subjected to constitutional deprivation *because of* the execution of the particular City policy identified. *Id*.; *Bennett v. City of Slidell*, 728 F.2d 762, 767 (5th Cir.) (en banc), *cert. denied*, 472 U.S. 1016 (1985).

32. To avoid dismissal for failure to state a claim, "[t]he description of a policy or custom and its relationship to the underlying constitutional violation, moreover, cannot be conclusory; it must contain specific facts." *Spiller v. City of Texas City*, 130 F.3d 162, 167 (5th Cir.1997). The City is entitled to insist that Plaintiffs clearly identify a specific unconstitutional policy for which the City's policymaker could be held liable, *Piotrowski v. City of Houston*, 237 F.3d 567, 578-581 (5th Cir. 2001), and the Plaintiffs have certainly failed to do so here.

**D. Plaintiffs' have failed to allege facts showing the City's policymaker deliberately maintained a known unconstitutional policy.**

33. When "a plaintiff seeking to establish [governmental] liability on the theory that a facially lawful [governmental] action has led an employee to violate a plaintiff's rights must demonstrate that the [governmental] action was taken with 'deliberate indifference' as to its known or obvious consequences." *Board of County Commissioners of Bryan County, Oklahoma v. Brown*, 520 U.S. 397, 407, 117 S. Ct. 1382, 1390 (1997). "[P]roof of an inadequate policy, without more, is insufficient to meet the threshold requirements of § 1983." *Gonzalez v. Ysleta Independent School District*, 996 F.2d 745, 757 (5th Cir. 1993). "[M]unicipal liability must be predicated upon a showing of 'fault,' not merely 'responsibility.'" *Id*. Equally, negligence is insufficient to establish a constitutional deprivation. *Daniels v. Williams*, 474 U.S. 327, 328, 106 S. Ct. 662, 663 (1986); *Campbell v. City of San Antonio*, 43 F.3d 973, 977 (5th Cir.1995).

34. "'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a [governmental] actor disregarded a known or obvious consequence of his action." *Brown*,

520 U.S. at 410, 117 S. Ct. at 1391. To establish a claim here, Plaintiffs must allege facts which show not only an unconstitutional decision, but a decision by the City's policymaker to violate the Constitution. *See Gonzalez*, 996 F.2d at 759. Plaintiffs' allegations do not meet these requirements so their complaint fails to state a claim against the City. The Constitution provides protections from a governmental agency *causing a constitutional deprivation* but it does not, and could not, effectively require a governmental entity to enact a transcendent policy that prevents law enforcement officers from using excessive force. *See Roberts v. City of Shreveport*, 397 F.3d 287, 293 (5th Cir. 2005); *Pineda v. City of Houston*, 291 F.3d 325, 333 (5th Cir. 2002).

**E. Plaintiffs have failed to allege facts showing that a City policy caused a Plaintiff to suffer a Constitutional deprivation.**

35. Plaintiffs have failed to allege facts which show that the City policymaker's conduct was a moving force that caused a Plaintiff to suffer a constitutional injury. *See James v. Harris County*, 577 F.3d 612, 618-619 (5th Cir. 2009). Even if an unconstitutional City policy existed, liability inures to the City under § 1983 only when the execution of the City's government's policy actually *causes* a Constitutional violation, *Piotrowski*, 237 F.3d at 581, and there is no allegation in this case. "[I]t is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must also demonstrate that, through its deliberate conduct, the municipality was the moving force behind the injury alleged." *Brown*, 520 U.S. at 404, 117 S. Ct. at 1388. To hold otherwise would be a clear departure from controlling precedent regarding municipal liability in a § 1983 claim; therefore, to subject a municipality to liability under

§ 1983, "[i]n addition to culpability, there must be a direct causal link between the municipal policy and the constitutional deprivation." *Piotrowski*, 237 F.3d at 579. It is crucial that the requirements of governmental culpability and governmental causation "not be diluted, for '[w]here a court fails to adhere to rigorous requirements of culpability and causation, municipal liability collapses into respondeat superior liability." *Piotrowski*, 237 F.3d at 579 (quoting *Snyder*, 142 F.3d at 798). Therefore, Plaintiffs' claims against the City should be dismissed for this reason, in addition to the several other reasons identified in this motion.

## CONCLUSION AND PRAYER

36. Since Plaintiffs fail to allege facts which state a claim for relief against any Defendant, the Defendants move the Court to grant this motion to dismiss this lawsuit, and afford the Defendants all relief to which they are justly entitled in law and equity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served via hand delivery, electronic submission, facsimile, U.S. Mail, and/or certified mail, return receipt requested, on this the 20th day of January, 2017, to the following:

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