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OPINIONS AND ORDERS

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (OCTOBER 16, 2019)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DEJENAY BECKWITH, on her Own Behalf and Others Similarly Situated; BEVERLY FLORES, on her Own Behalf and Others Similarly Situated,

Plaintiffs-Appellants,

v.

CITY OF HOUSTON; MAYOR SYLVESTER TURNER; POLICE CHIEF ART ACEVEDO; HOUSTON FORENSIC SCIENCE CENTER; PETER STOUT; ANNISE PARKER; LEE P. BROWN; KATHY WHITMIRE; CHIEF CHARLES MCCLELLAND; CHIEF CLARENCE BRADFORD; CHIEF SAM NUCHIA,

Defendants-Appellees.

No. 18-20611

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:17-CV-2859

Before: BARKSDALE, STEWART,
and COSTA, Circuit Judges.

PER CURIAM:*

This case is a putative class action based on claims by Plaintiffs Dejenay Beckwith and Beverly Flores that the City of Houston and individual city policy makers failed to test Sexual Assault Kits ("SAKs") following Plaintiffs' sexual assaults by non-party perpetrators. Plaintiffs filed suit against the following Defendants: the City of Houston, Texas; Dr. Peter Stout, the 2017-appointed CEO of the Houston Forensic Science Center; the former Mayors of the City of Houston, Annise Parker (2010-2016), Bill White (2004-2010), Lee P. Brown (1998-2004), and Bob Lanier (deceased) (1992-1998); and former Police Chiefs of the City of Houston, Charles McClelland (2010-2016), Harold Hurtt (2004-2009), Clarence Bradford (1997-2004), Sam Nuchia (1992-1997), and Lee P. Brown (1982-1990). For the reasons stated herein, we AFFIRM.

I. Factual and Procedural Background

Plaintiffs' second amended complaint contains the following allegations:

A. Dejenay Beckwith's Facts

Beckwith was sexually assaulted on April 2, 2011. She immediately notified the Houston Police Department ("HPD") and went to Memorial Hermann Southwest Hospital where the hospital staff collected a SAK. An HPD police officer then transported Beckwith's SAK to HPD for testing. HPD did not contact her

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

again until 2015, when HPD told her that it had a suspect in her sexual assault case. She phoned HPD several months later to talk about the sexual assault but HPD did not call back.

HPD next contacted her in 2016 to tell her the suspect's name. Later that year, the Harris County District Attorney's Office notified her that her SAK had been tested and matched with HPD's suspect, David Lee Cooper ("Cooper"). Cooper had a long history of sexually assaulting women, including a minor child, dating back to 1991. Cooper's DNA had been included in the Combined DNA Index System, a DNA database system that matches DNA profiles of offenders to that of victims, since 1991. Cooper's previous sexual assault cases bear a similar fact pattern to Beckwith's assault. This contact with HPD in late 2016 was the first time she learned that Defendants delayed in testing her SAK. Had the City of Houston entered any of Cooper's victims' genetic evidence from the untested SAKs, Cooper would have been stopped before he had a chance to sexually assault Beckwith. HPD had her identifying information and should have informed her that her SAK had gone untested for many years.

B. Beverly Flores' Facts

On September 20, 2011, Flores was raped by a home intruder. Flores contacted HPD after the perpetrator fled. She insisted that charges be filed against the perpetrator and "a SAKS was done," although she does not provide the name of the facility that administered her SAK. Two weeks after the sexual assault, an HPD detective visited Flores and told her that her SAK would be processed within three months.

Flores' perpetrator, Domeka Donta Turner ("Turner"), had committed a prior sexual assault on September 9, 2011. In August 2014, a routine DNA database run showed that there was a match between Flores' SAK and Turner. Had Houston run the results of her test on the DNA database sooner, Turner would have been apprehended earlier and "Flores would not have spent several years worried and concerned about the threat to herself and her children."

The City of Houston never notified Flores prior to 2017 that her SAK had been delayed in testing or that any other Houston rape victim had their SAKs delayed in testing. HPD had her identifying information and could have easily contacted her about the delay in testing. "The City of Houston, Mayor Annise Parker and her chiefs of police were aware of previous 'failure-to-test-rape-kit' lawsuits throughout the United States and this was a conscious decision by Mayor Parker and the City of Houston, to prevent rape victims from finding out the facts so that they would not make claims and sue the City of Houston and its employees and elected officials."

C. Additional Facts

Prior to April 2014, HPD routed sexual assault reports to two units: an adult investigative unit for victims 17 years of age and older, and a juvenile investigative unit for victims under 17. According to Plaintiffs, both units adopted a practice of submitting all SAKs for testing. In 2010, HPD determined that it held approximately 4,220 SAKs in cold storage that had not been tested by a crime lab. As a result, the City of Houston organized the Houston Forensic Science Center. In 2013, the City of Houston devoted

$2.2 million to test all untested rape kits, but the Houston Forensic Science Center, the City of Houston, and the individually named Defendants decided to test only a fraction of the SAKs. Plaintiffs allege that Defendants, with deliberate indifference, maintained a policy, practice and/or custom for the past 30 years of not submitting SAKs for testing, not reviewing test results, and failing to preserve evidence. Plaintiffs add that this policy has a discriminatory purpose and adverse impact on females.

D. Procedural History

On September 24, 2017, Beckwith filed her original putative class action complaint against Defendants. On December 20, 2017, Beckwith filed her first amended complaint, adding Flores as an additional named plaintiff. In their second amended complaint, Plaintiffs sued all defendants in their individual and official capacities under 42 U.S.C. § 1983 for alleged violations of the Due Process and Equal Protection Clauses. They further asserted alleged violations of substantive due process, the Fourth Amendment, the Fifth Amendment "Takings" Clause, and negligence claims under state law. They also brought claims for conspiracy to interfere with their civil rights under 42 U.S.C. § 1985 and for negligently failing to prevent civil rights violations under 42 U.S.C. § 1986. Plaintiffs seek "damages for violation of civil rights under color of law, injunctive relief requiring Defendants to change the methods used to investigate sexual assault and for the award of attorney fees and cost[s]."

Defendants filed an amended motion to dismiss Plaintiffs' second amended complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), or, in

the alternative, a motion for summary judgment. The district court granted Defendants' Rule 12(b)(1) motion to dismiss Plaintiffs' claims under § 1983 for alleged violations of the Due Process and Equal Protection clauses and Plaintiffs' state law negligence claims. The district court also granted Defendants' Rule 12(b)(6) motion to dismiss Plaintiffs' remaining claims asserting 42 U.S.C. §§ 1985 and 1986 claims along with alleged violations of substantive due process, the Fourth Amendment, and the Fifth Amendment "Takings" Clause. This appeal ensued.

II. Standard of Review

We review de novo the district court's grant of a motion to dismiss under Rule 12(b)(6) for failure to state a claim. *See Copeland v. Wasserstein*, 278 F.3d 472, 477 (5th Cir. 2002). To survive a Rule 12(b)(6) motion, plaintiffs must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). That is, they must "'raise a right to relief above the speculative level.'" *Nationwide Bi-Weekly Admin., Inc. v. Belo Corp.*, 512 F.3d 137, 140 (5th Cir. 2007) (quoting *Twombly*, 550 U.S. at 570).

III. Discussion

A. Motion to Dismiss 42 U.S.C. §§ 1983, 1985, and 1986 Claims and Negligence Claims

Plaintiffs assert that the district court erred by dismissing their claims under § 1983 and negligence claims under state law pursuant to Rule 12(b)(1) as

barred by the statute of limitations.[1] However, because a 12(b)(1) motion based on timeliness invokes Rule 12(b)(6), we evaluate this motion under the more appropriate 12(b)(6) standard. *See Watts v. Graves*, 720 F.2d 1416, 1422-23 (5th Cir. 1983) (per curiam) ("The statute of limitations [in a § 1983 action] may serve as a proper ground for dismissal under Federal Rule of Civil Procedure 12(b)(6) . . . ."); *see also Jones v. Alcoa, Inc.*, 339 F.3d 359, 366 (5th Cir. 2003) ("A statute of limitations may support dismissal under Rule 12(b)(6) . . . ."); *Songbyrd, Inc. v. Bearsville Records, Inc.*, 104 F.3d 773, 775 n.3 (5th Cir. 1997) (stating that the affirmative defense of limitations may properly be asserted in a Rule 12(b)(6) motion); *Triplett v. Heckler*, 767 F.2d 210, 211-12 (5th Cir. 1985) (stating that the defendant's 12(b)(1) motion to dismiss based on timeliness invoked Rule 12(b)(6), not Rule 12(b)(1)); *Carcamo-Lopez v. Does 1 through 20*, No. EP-09-CV-371-KC, 2011 WL 318148, at *2 (W.D. Tex. Jan. 29, 2011) (treating defendant's 12(b)(1) motion to dismiss civil rights claims as a 12(b)(6) motion instead of denying the motion).

1. Applicability of Texas' 2-Year Statute of Limitations

Plaintiffs advance four theories for why the limitations period should not apply to them: (1) a more specific, five-year limitations period applies; (2) the

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[1] Plaintiffs also assert that the district court's summary judgment ruling based on the statute of limitations was premature because the court should have first permitted full discovery on the merits. However, the district court made clear that its ruling on limitations was based on Defendants' Rule 12(b) motions, not summary judgment.

limitations period was tolled for fraudulent concealment; (3) the limitations period was tolled under the discovery rule; and (4) the limitations period was tolled because Defendants' conduct constituted a continuing tort. We address each argument in turn.

First, Plaintiffs argue that the court should apply the five-year limitations period for personal injury claims arising from sexual assault to both their § 1983 and state law claims. *See* Tex. Civ. Prac. & Rem. Code § 16.0045(b). But Texas' general personal injury limitations period is two years. Tex. Civ. Prac. & Rem. Code § 16.003(a); *see also Burrell v. Newsome*, 883 F.2d 416, 418 (5th Cir. 1989). And federal courts use the forum state's general personal injury limitations period to govern claims under § 1983. *Owens v. Okure*, 488 U.S. 235, 240-41 (1989); *King-White v. Humble Indep. Sch. Dist.*, 803 F.3d 754, 759 (5th Cir. 2015); *Moore v. McDonald*, 30 F.3d 616, 620 (5th Cir. 1994).

In *Owens*, the Supreme Court held that "where state law provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow the general or residual statute for personal injury actions." 488 U.S. at 249-50. In *King-White*, we cited *Owens* and rejected essentially the same argument Plaintiffs make here: that the court should apply § 16.0045 to their claims under § 1983 against a school district for claims stemming from sexual assault by a teacher. 803 F.3d at 761 ("[T]o eliminate the 'confusion and inconsistency' that had grown from this 'practice of seeking state-law analogies for particular § 1983 claims,' . . . the [Supreme] Court determined that all § 1983 claims should be subject to 'a simple, broad characterization' as personal injury actions for limitations purposes.").

Further, § 16.0045 has not been extended to civil rights cases or beyond claims against perpetrators of sexual assaults or those who may be directly or vicariously liable for their actions. Plaintiffs have not alleged that Defendants hired or exercised any control over their perpetrators. *Cf. Doe v. Catholic Soc. of Religious & Literary Educ.*, Civ. A. H-09-1059, 2010 WL 345926, at *16 (S.D. Tex. Jan. 22, 2010) (applying five-year limitations period where parishioner brought an action against a diocese and church for alleged negligence in allowing one of its priests to sexually assault the parishioner when she was a minor); *Stephanie M. v. Coptic Orthodox Patriarchate Diocese*, 362 S.W.3d 656, 660 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (applying five-year statute against defendants whose negligence proximately caused the sexual assault). As such, Plaintiffs' claims under § 1983, like their state law negligence claims, are governed by a two-year statute of limitations.

Second, Plaintiffs argue that fraudulent concealment tolls the statute of limitations. "When a federal cause of action borrows a state statute of limitations, 'coordinate tolling rules' are usually borrowed as well." *King-White*, 803 F.3d at 764 (citation omitted). In Texas, tolling of the statute of limitations may occur where a defendant is "under a duty to make disclosure but fraudulently conceals the existence of a cause of action from the party to whom it belongs." *Borderlon v. Peck*, 661 S.W.2d 907, 908 (Tex. 1983). "Fraudulent concealment will not, however, bar limitations when the plaintiff discovers the wrong or could have discovered it through the exercise of reasonable diligence." *Kerlin v. Sauceda*, 263 S.W.3d 920, 925 (Tex. 2008).

Plaintiffs contend that Defendants fraudulently concealed the delay in testing of Plaintiffs' SAKs. On February 13, 2013, the Houston Mayor's Office published a press release detailing the backlog in SAK testing at HPD and the steps that the City of Houston was taking to clear up the backlog. In December 2013, HPD launched a hotline for sexual assault victims to obtain more information about their cases. HPD advertised the hotline through billboards, television, and bilingual pamphlets distributed throughout the city. The backlogged testing of SAKs was public information that Defendants were not hiding. Moreover, had Plaintiffs investigated the status of their SAKs, they would have learned that their SAKs had remained untested. Rather than proactively contact HPD, Plaintiffs waited for HPD to contact them and made no further inquiry even when the circumstances would have led a reasonable person to inquire further. Accordingly, we hold that the doctrine of fraudulent concealment does not apply here.

Third, Plaintiffs argue that the limitations period was tolled under Texas' discovery rule. The discovery rule applies if the "nature of the injury incurred is inherently undiscoverable and the evidence of injury is objectively verifiable." *King-White*, 803 F.3d at 764 (quoting *Childs v. Haussecker*, 974 S.W.2d 31, 36-37 (Tex. 1998)). But a plaintiff seeking to employ the discovery rule must use diligence to investigate the facts establishing the elements of her cause of action. *Willis v. Maverick*, 760 S.W.2d 642, 644 (Tex. 1988). For the reasons discussed above, we agree with the district court that Plaintiffs did not exercise diligence in their cases. Therefore, we hold that the discovery rule does not apply here to toll the statute of limitations.

Finally, Plaintiffs argue that the statute of limitations should be tolled because Defendants' conduct constitutes a continuing tort. "In a continuing-tort case, the wrongful conduct continues to effect additional injury to the plaintiff until that conduct stops." *Gen. Universal Sys. Inc. v. HAL, Inc.*, 500 F.3d 444, 451 (5th Cir. 2007) (quoting *Upjohn Co. v. Freeman*, 885 S.W.2d 538, 542 (Tex. App.—Dallas 1994, writ denied)). "For continuing torts, 'the cause of action is not complete and does not accrue until the tortious acts have ceased.'" *Id.* (quoting *Twyman v. Twyman*, 790 S.W.2d 819, 821 (Tex. App.—Austin 1990), *rev'd on other grounds*, 855 S.W.2d 619 (Tex. 1993)). Plaintiffs have not alleged that Defendants are continually committing a tort against them, nor could they—Defendants tested Plaintiffs' SAKs by 2014. Instead, Plaintiffs rely on Defendants' continual failure to timely test SAKs for other putative class members. However, this argument fails where Plaintiffs can only show one instance of allegedly wrongful conduct that was not repeated against them and that occurred outside the limitations period.

Based on the foregoing, we hold that the two-year statute of limitations bars Plaintiffs' state law negligence claims and their claims under § 1983.

2. Accrual of Claims Under 42 U.S.C. § 1983 and Negligence Claims

Plaintiffs also contest the accrual date of their § 1983 and negligence claims. Accrual of a § 1983 claim is governed by federal law. "'Under federal law, the [limitations] period begins to run the moment the plaintiff becomes aware that [s]he has suffered an injury or has sufficient information to know that [s]he

has been injured.'" *Walker v. Epps*, 550 F.3d 407, 414 (5th Cir. 2008) (quoting *Russell v. Bd. of Trs. of the Firemen*, 968 F.2d 489, 493 (5th Cir. 1992)). Awareness is found via two elements: "(1) The existence of the injury; and (2) causation, that is, the connection between the injury and the defendant's actions." *Piotrowski v. City of Hous.*, 51 F.3d 512, 516 (5th Cir. 1995).

Plaintiffs claim that their claims under § 1983 accrued on "the date each Plaintiff was notified that her kit had not been previously tested, which for both Beckwith/Flores was in late 2016." Plaintiffs assert that Defendants were required to notify Plaintiffs of the delayed testing of their SAKs. But "[a] plaintiff who has learned of facts which would cause a reasonable person to inquire further must proceed with a reasonable and diligent investigation, [sic] and is charged with the knowledge of all facts such an investigation would have disclosed." *Jensen v. Snellings*, 841 F.2d 600, 607 (5th Cir. 1988).

Flores alleges that two weeks after her assault in September 2011, Defendants told her that her SAK would be processed in three months' time. As the district court noted,

> [e]ven assuming that the relevant injury was Defendants' delay in the testing of her SAK, rather than her sexual assault, Flores' § 1983 claims would have accrued after three months had passed and her SAK remained untested. A reasonable person in Flores' position would have followed up with Defendants regarding the testing of her SAK after three months had passed.

Beckwith v. City of Hous., No. 4:17-CV-02859, 2018 WL 4298345, at *7 (S.D. Tex. July 31, 2018).

Beckwith does not allege that Defendants gave her a timeline for her SAK's testing. However, after Defendants administered her SAK in April 2011, she did nothing for years. As the district court noted, "even after HPD contacted her [in 2015 to notify her that it found a suspect, she] did not follow up until she unsuccessfully phoned HPD several months later and HPD did not return her call." *Id.* Accordingly, Plaintiffs had facts by the end of 2011 to support a § 1983 claim that Defendants had delayed testing of their SAKs, but they did not act on those facts within the two-year statute of limitations.

As to Plaintiffs' state law claim, accrual of a personal injury cause of action under Texas law generally "occurs on the date 'the plaintiff first becomes entitled to sue the defendant based upon a legal wrong attributed to the latter', even if the plaintiff is unaware of the injury." *Vaught v. Showa Denko K.K.*, 107 F.3d 1137, 1140 (5th Cir. 1997) (quoting *Zidell v. Bird*, 692 S.W.2d 550, 554 (Tex. App.—Austin 1985, no writ); *see also S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996) ("As a rule, we have held that a cause of action accrues when a wrongful act causes some legal injury, even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred.").

Plaintiffs' second amended complaint alleges that Defendants should have tested Plaintiffs' SAKs within 30 days of collection. *See* Tex. Gov't Code § 420.042(a) ("A law enforcement agency that receives evidence of a sexual assault or other sex offense . . . shall submit that evidence to a public accredited crime laboratory for analysis not later than the 30th day after the date

on which that evidence was received."). Beckwith's SAK was collected on April 2, 2011. Flores' SAK was collected on or about September 20, 2011. Therefore, Beckwith's claim would have accrued in May 2011 and Flores' in October 2011, regardless of when Defendants notified them of the delay in testing. Because Plaintiffs brought their state law causes of action approximately six years later, on September 24, 2017, the two-year statute of limitations bars Plaintiffs' state law causes of action.

3. Plaintiffs' Claims Under 42 U.S.C. §§ 1985, 1986

Plaintiffs also claim that Defendants conspired to interfere with Plaintiffs' civil rights in violation of 42 U.S.C. § 1985 and negligently failed to prevent a known conspiracy to interfere with Plaintiffs' civil rights in violation of § 1986. "Because there is no federal statute of limitations for actions brought pursuant to 42 U.S.C. §§ 1983 and 1985, federal courts borrow the forum state's general personal injury limitations period." *Balawajder v. Carpenter*, 1993 WL 152087, at *1 (5th Cir. 1993) (per curiam) (citing *Helton v. Clements*, 832 F.2d 332, 334 (5th Cir. 1987)). In a § 1985 claim, "the actionable civil injury to a plaintiff results from the overt acts of the defendants, not from the mere continuation of a conspiracy." *Helton*, 832 F.2d at 335. Thus, "any cause of action against the defendants accrued as soon as [the plaintiffs] knew or should have known of the overt acts involved in the alleged conspiracy." *Id.* For the reasons already stated regarding Plaintiffs' claims under § 1983, Plaintiffs' claims brought under § 1985 are also dismissed.

A § 1986 cause of action is dependent on a claimant's successful pleading of a § 1985 claim first. *See Hamilton v. Chaffin*, 506 F.2d 904, 914 (5th Cir. 1975) ("Because of th[e] failure to state a claim cognizable under Section 1985(3), appellant may not recover under the interrelated, dependent cause of action under Section 1986 . . . for neglecting to prevent a known conspiracy under Section 1985"); *see generally McVea v. Swan*, No. SA:14-CV-73-DAE, 2014 WL 4471529, at *5 (W.D. Tex. Sept. 10, 2014) ("As stated in the statute itself, in order to establish a violation of § 1986, a plaintiff must first establish a violation of § 1985."). Claims under § 1986 are governed by a statute of limitations of one year. *See Balawajder*, 1993 WL 152087, at *3 (5th Cir. 1993) (per curiam) ("Unlike §§ 1983 and 1985, § 1986 has its own statute of limitations which requires commencement of a suit within one year after the cause of action accrues."). Since Plaintiffs' § 1985 claims are time-barred, their § 1986 claims necessarily fail.

B. Motion to Dismiss Remaining Claims

Plaintiffs aver that the district court erred in its Rule 12(b)(6) dismissal of their remaining claims for violations of substantive due process, the Fourth Amendment, and the Fifth Amendment Takings Clause. Plaintiffs brought these claims separate and apart from their other constitutional claims under 42 U.S.C. § 1983. However, we must consider these claims under 42 U.S.C. § 1983 because a private right of action is needed to assert a constitutional claim. We have already held that the § 1983 claims are subject to the applicable statute of limitations. Likewise, we hold that these claims are also subject to the applicable two-year statute of limitations and are therefore

time-barred for all of the reasons already stated in our foregoing analysis. Accordingly, these remaining constitutional claims are dismissed.

IV. Conclusion

The district court's judgment is AFFIRMED.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS (JULY 31, 2018)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DEJENAY BECKWITH and BEVERLY FLORES,
Individually and on Behalf of
All Others Similarly Situated,

Plaintiffs,

v.

CITY OF HOUSTON, TEXAS, ET AL.,

Defendants.

Case No. 4:17-CV-02859

Before: Vanessa D. GILMORE,
United States District Judge.

Pending before the Court is Defendants' Motion to Dismiss under Rules 12(b)(1) and 12(b)(6) or, in the alternative, Motion for Summary Judgment. (Instrument No. 33).

I.

This case is a putative class action based on the claims by Plaintiffs Dejenay Beckwith and Beverly

Flores that the City of Houston and individual city policy makers failed to test Sexual Assault Kits following Plaintiffs' sexual assaults by non-party perpetrators. (Instrument No. 27 at 3-4). Plaintiffs filed suit against the following Defendants: the City of Houston, Texas, Dr. Peter Stout, the 2017 appointed CEO of the Houston Forensic Science Center; the former Mayors of the City of Houston Annise Parker (2010-2016), Bill White (2004-2010), Lee P. Brown (Mayor 1998-2004, Police Chief 1982-1990), and Bob Lanier (now deceased) (1992-1998); former Police Chiefs of the City of Houston Charles McClelland (2010-2016), Harold Hurtt (2004-2009), Clarence Bradford (1997-2004), Sam Nuchia (1992-1997), and Lee P. Brown in his position as former Houston Police Chief (1982-1990). (Instruments No. 27 at 1; No. 33 at 27-28 n.7).

1.

Plaintiff Dejenay Beckwith ("Beckwith") alleges that on April 2, 2011, she was sexually assaulted by David Lee Cooper. (Instrument No. 27 at 11-12). Beckwith alleges that she immediately notified the Houston Police Department ("HPD") and went to Memorial Hermann Southwest Hospital where the hospital staff collected a sexual assault kit ("SAK"). *Id.* at 12. A HPD police officer then transported Beckwith's SAK to HPD for testing. *Id.* at 12-13. Beckwith alleges that over the next five years, the City of Houston never submitted her SAK for testing.

Beckwith alleges that at some unspecified date a HPD detective called her and asked why Beckwith "was on Bissonnet," allegedly implying that she was a prostitute. (Instrument No. 27 at 13). Beckwith alleges that the HPD detective implied that Beckwith's

rape was her fault and discouraged her from filing a report as it was unlikely the suspect would be caught and that "these things happen to these types of women." *Id.*

HPD allegedly did not contact her again until 2015, when HPD told her that it had a suspect in her sexual assault case. (Instrument No. 27 at 13). Beckwith alleges that she phoned HPD several months later to talk about the sexual assault but that HPD did not call back. *Id.*

Beckwith alleges that HPD contacted her next in 2016 to notify her of the suspect's name. (Instrument No. 27 at 13). Later that year, Beckwith alleges that the Harris County District Attorney's Office notified her that her SAK had been tested and matched with HPD's suspect, David Lee Cooper ("Cooper"). *Id.* at 14. Cooper allegedly had a long history of sexually assaulting women, including a minor child, beginning in 1991. *Id.* Beckwith alleges that Cooper's DNA had been included in the Combined DNA Index System since 1991 (a DNA database system that matches DNA profiles of offenders to that of victims). *Id.* at 14, 21-22. Beckwith alleges that Cooper's previous sexual assault cases bear a similar fact pattern to Beckwith's assault. *Id.* at 14. Beckwith alleges that this contact with HPD in late 2016 was the first time she learned that Defendants delayed in testing her SAK. *Id.* Beckwith alleges that had the City of Houston entered any of Cooper's victims' genetic evidence from the untested SAKs, Cooper would have been stopped before he had a chance to sexually assault Beckwith. *Id.* at 15. Beckwith further alleges that HPD had her identifying information and should have informed her that her SAK had gone untested for many years.

Id. at 16. In December 2016, Cooper pleaded guilty to the 2011 sexual assault of Beckwith. *Id.* at 15.

2.

Plaintiff Beverly Flores ("Flores") alleges that she was raped on September 20, 2011, by a home intruder. (Instrument No. 27 at 18). Flores contacted HPD after the perpetrator fled. *Id.* Flores alleges that when HPD finally arrived, it treated Flores with disrespect, saying that it was probably her boyfriend who had sex with her and that HPD acted with disdain "as if they did not believe her." *Id.* Flores further alleges that the police tried to dissuade her from filing charges. *Id.* Flores alleges that she insisted that charges be filed against the perpetrator and "a SAKS was done," although she does not provide the name of the facility that took her SAK. *Id.* Flores further alleges that two weeks after the sexual assault, a HPD detective visited Flores and told her that her SAK would be processed within three months. *Id.*

Flores also alleges that her perpetrator, Domeka Donta Turner ("Turner"), had committed a prior sexual assault on September 9, 2011. (Instrument No. 27 at 18). Flores alleges that in August 2014, a routine DNA database run showed that there was a match between Flores' SAK and Turner. *Id.* at 19.

Although Flores alleges that Turner was charged with aggravated sexual assault in December 2016, Flores alleges that had Houston run the results of her test on the DNA database sooner, Turner would have been earlier apprehended and "Flores would not have spent several years worried and concerned about the threat to herself and her children." (Instrument No. 27 at 19).

Flores alleges that the City of Houston never notified her prior to 2017 that her SAK had been delayed in testing or that any other Houston rape victim had their SAKs delayed in testing. (Instrument No. 27 at 19-20). Flores alleges that HPD had her identifying information and could have easily contacted her about the delay in testing. *Id.* at 20. Flores alleges that "[t]he City of Houston, Mayor Annise Parker and her chiefs of police were aware of previous 'failure-to-test-rape-kit' lawsuits throughout the United States and this was a conscious decision by Mayor Parker and the City of Houston, to prevent rape victims from finding out the facts so that they would not make claims and sue the City of Houston and its employees and elected officials." *Id.*

3.

Plaintiffs allege that prior to April 2014, HPD routed sexual assault reports to two units: an adult investigative unit for victims 17 years of age and older, and a juvenile investigative unit for victims under 17. (Instrument No. 27 at 25). According to Plaintiffs, both units adopted a practice of submitting all SAKs for testing. *Id.* Plaintiff further alleges that in 2010, HPD determined that it held approximately 4,220 SAKs in cold storage that had not been tested by a crime lab. *Id.* at 24. As a result, the City of Houston organized the Houston Forensic Science Center. *Id.* at 24-25. In 2013, the City of Houston devoted $2.2 million to test all untested rape kits, but allegedly the Houston Forensic Science Center, the City of Houston, and the individually named Defendants decided to test only a fraction of the SAKs. *Id.* Plaintiffs allege that Defendants have maintained a practice for the past 30 years of not

submitting SAKs for testing, not reviewing test results, and failing to preserve evidence. *Id.* at 26-29.

II.

Plaintiff Beckwith filed her Original Class Action Complaint on September 24, 2017, against Defendants the City of Houston, Texas, Mayor Sylvester Turner, Police Chief Art Acevedo, the Houston Forensic Science Center, the CEO of the Houston Forensic Science Center Dr. Peter Stout, as well as Former Mayors of the City of Houston Annise Parker, Bill White, Lee P. Brown, Bob Lanier (deceased), and Kathy Whitmire in addition to Former Houston Police Chiefs Charles McClelland, Harold Hurtt, Clarence Bradford, Sam Nuchia, Elizabeth Watson, and Lee P. Brown. (Instrument No. 1).

On December 20, 2017, Beckwith filed her First Amended Complaint, adding Beverly Flores as an additional named Plaintiff. (Instrument No. 7). Plaintiffs assert that although Defendants informed Beckwith and Flores that their SAKs had been tested, the putative class members have never been informed that their rape kits have not been tested and are instead warehoused indefinitely. (Instrument No. 7 at 22-23). Plaintiffs therefore request that the putative subclasses of similarly situated Plaintiffs consist of the following:

A. All women and children who were sexually assaulted in Houston, Harris County, Texas, as the result of an offender not being previously identified due to the rape kit (sexual assault evidence kit) of a prior victim not being submitted for timely testing by the City of Houston, Harris County, Texas.

> B. All women and children who were sexually assaulted in Houston, Harris County, Texas, and underwent invasive testing in the preparation of a rape kit (sexual assault evidence kit), but whose rape kit was not submitted for testing by the City of Houston, Harris County, Texas in a timely manner.

(Instruments No. 7 at 6; No. 27 at 6).

On February 14, 2018, Defendants brought a Motion to Dismiss Plaintiffs' Complaints under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), or in the alternative Motion for Summary Judgment. (Instrument No. 17).

Plaintiffs filed their Second Amended Complaint on March 7, 2018, (Instrument No. 27), removing Defendants Sylvester Turner, Houston Police Chief Art Acevedo, Former Mayor Kathy Whitmire, and Former Houston Police Chief Elizabeth Watson. *Id.* Plaintiffs also removed the Houston Forensic Science Center as a named Defendant, although its CEO, Dr. Peter Stout, remains a named Defendant. *Id.* Plaintiffs bring a cause of action against all Defendants in their individual and official capacities under 42 U.S.C. § 1983 for violations of the Equal Protection Clause, Due Process Clause, and failure to train. *Id.* at 30-35. Plaintiffs further bring a cause of action for violations of their substantive Due Process rights, violations of the Fourth Amendment, Fifth Amendment Takings Clause, and for negligence under state law. *Id.* at 38-2. Plaintiffs also bring a cause of action for conspiracy to interfere with Plaintiffs' civil rights under 42 U.S.C. § 1985, and for negligently failing to prevent Plaintiffs' alleged civil rights violations under

42 U.S.C. § 1986. *Id.* at 45-46. Plaintiffs seek monetary damages and injunctive relief. *Id.* at 47-49.

On March 21, 2018, Defendants filed an Amended Motion to Dismiss Plaintiffs' Second Amended Complaint under Rules 12(b)(1) and 12(b)(6), or in the alternative Motion for Summary Judgment. (Instrument No. 33). Plaintiffs filed their Response in Opposition to the Amended Motion to Dismiss on April 11, 2018. (Instrument No. 36). On April 13, 2018, Defendants filed their Amended Reply in Support of their Motion to Dismiss. (Instrument No. 37).

III.

"A case is properly dismissed for lack of subject matter jurisdiction when the court lacks the statutory or constitutional power to adjudicate the case." *Home Builders Ass'n of Miss., Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1010 (5th Cir. 1998) (internal quotation omitted). A district court may dismiss an action for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) on any one of three separate bases: (1) the complaint alone, (2) the complaint supplemented by undisputed facts evidenced in the record, or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (citing *Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir. 1996)).

In examining a Rule 12(b)(1) motion, courts are empowered to consider matters of fact which are in dispute. *See Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981) (when determining jurisdiction, district court may hear conflicting written and oral evidence and decide for itself the factual issues). Any uncontro-

verted facts in the complaint must, however, be accepted as true. *See Gaubert v. United States*, 885 F.2d 1284, 1285 (5th Cir. 1989), *rev'd on other grounds*, 499 U.S. 315 (1991). The court must also construe the complaint broadly and liberally, although argumentative inferences favorable to the pleader will not be drawn. *Id.* When the court's subject matter jurisdiction is challenged, the party asserting jurisdiction bears the burden of establishing it. *Life Partners Inc. v. United States*, 650 F.3d 1026, 1029 (5th Cir. 2011).

When a Rule 12(b)(1) is filed in conjunction with other Rule 12 motions, the court should usually consider the Rule 12(b)(1) jurisdictional issues before addressing any attack on the merits. *Ramming*, 281 F.3d at 161. This prevents a court without jurisdiction from prematurely dismissing a case with prejudice. *Id.* The court's dismissal of a plaintiff's case because of lack of subject matter jurisdiction is not a determination of the merits and does not prevent the plaintiff from pursuing a claim in a court that does have proper jurisdiction. *Id.*

A motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction should be granted only if it appears that the plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief. *Ramming*, 281 F.3d at 161.

IV.

Under Rule 8 of the Federal Rules of Civil Procedure, a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The complaint need not contain "detailed factual allegations," but it must include "more than an unadorned, the-defendant-

unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

"Motions to dismiss under Rule 12(b)(6) are viewed with disfavor and are rarely granted." *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 232 (5th Cir. 2009) (internal quotation omitted). That said, when a complaint does not meet the pleading requirements of Rule 8, Rule 12(b)(6) authorizes dismissal of a civil action for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, the complaint must articulate "the plaintiff's grounds for entitlement to relief—including factual allegations that when assumed to be true raise a right to relief above the speculative level." *Cuvillier v. Taylor*, 503 F.3d 397, 401 (5th Cir. 2007) (quoting *Twombly*, 550 U.S. at 555). Stated otherwise, in order to withstand a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570); *Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir. 2011). A claim for relief is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678; *Montoya v. FedEx Ground Package Sys., Inc.*, 614 F.3d 145, 148 (5th Cir. 2010).

Under this rubric, dismissal is proper only if the plaintiff's complaint: (1) does not include a cognizable legal theory, *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001), or (2) includes a cognizable legal theory but fails to plead enough facts to state a claim to relief that is plausible on its face. *Pleasant*, 663

F.3d at 775; *see also Frith v. Guardian Life Ins. Co.*, 9 F. Supp. 2d 734, 737-38 (S.D. Tex. 1998) (Gilmore, J.) (holding that dismissal pursuant to Rule 12(b)(6) "can be based either on a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory").

When ruling on a 12(b)(6) motion, the Court may consider "the complaint, its proper attachments, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice."[1] *Wolcott v. Sebelius*, 635 F.3d 757, 763 (5th Cir. 2011) (internal citations and quotations omitted); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). The Court does not resolve any disputed fact issues. *Davis v. Monroe City Bd. of Educ.*, 526 U.S. 629, 633 (1999). Instead, the Court assumes all well-pleaded facts contained in the complaint are true. *Wolcott*, 635 F.3d at 763. The Court will not, however "accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions." *In re Great Lakes Dredge & Dock Co.*, 624 F.3d 201, 210 (5th Cir. 2010) (internal quotation omitted). Similarly, legal conclusions masquerading as factual conclusions need not be treated as true. *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995); *see also Iqbal*, 556 U.S. at 678. Although all well-pleaded facts are viewed in the light most favorable to the plaintiff, *Turner*, 663 F.3d at 775; *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009), the Court "will not strain to find inferences favorable to the plaintiff." *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338

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[1] Matters of which a court may take judicial notice include, for example, matters of public record. *See Fin. Acquisition Partners LP v. Blackwell*, 440 F.3d 278, 286 (5th Cir. 2006).

(5th Cir. 2008) (internal quotation omitted). Therefore, "to avoid a dismissal for failure to state a claim, a plaintiff must plead specific facts." *Dorsey*, 540 F.3d at 338 (internal quotation omitted).

V.

Defendants have filed a Motion to Dismiss pursuant to Rule 12(b)(1) and Rule 12(b)(6), and alternatively a Motion for Summary Judgment pursuant to Rule 56(c) in one single document. (Instrument No. 33). Because Defendants have filed their Rule 12(b)(1) Motion, requesting dismissal of Plaintiffs' § 1983 and state law negligence claims, in conjunction with their Rule 12(b)(6) Motion, seeking dismissal of all of Plaintiffs' claims, the Court will consider the jurisdictional issues before considering Plaintiffs' claims on the merits.

A.

Defendants move to dismiss Plaintiffs' § 1983 and negligence claims on the grounds that that they are barred by the statute of limitations. (Instrument No. 33 at 12-18). Defendants specifically note that throughout the 2000s there was national news of backlogs of testing of SAKs throughout the United States and that on February 13, 2013, the Houston Mayor's Office published a press release detailing the backlog. *Id.* at 13-14. Defendants contend that based on the press release, Plaintiffs' causes of action accrued at the latest in 2013. *Id.* Defendants further assert that there is no tolling of the statute of limitations because Plaintiffs' own evidence supports the fact that information was publicly available regarding the backlog of the test kits starting in 2013. *Id.* at 17-18.

In their Response, Plaintiffs contend that they had no reason to know or suspect that Defendants were allowing their individual SAKs to remain untested until Plaintiffs were informed in 2016. (Instrument No. 36 at 17). Plaintiffs further contend that this Court should find that the statute of limitations is five years because Plaintiffs' injuries arose from sexual assault. *Id.* at 17-18. Plaintiffs also contend that the statute of limitations is tolled because of fraudulent concealment, the discovery rule, and because this case involves the continuous tort doctrine, which delays the accrual date until a defendant's tortious acts cease. *Id.* at 17-22.

1.

Plaintiffs' negligence claims are subject to a two-year statute of limitations after the cause of action accrues. Tex. Civ. Prac. & Rem. Code Ann. § 16.003(a) (Vernon 1986). Accrual of a personal injury cause of action under Texas law generally "occurs on the date 'the plaintiff first becomes entitled to sue the defendant based upon a legal wrong attributed to the latter', even if the plaintiff is unaware of the injury." *Vaught v. Showa Denko K.K.*, 107 F.3d 1137, 1140 (5th Cir. 1997) (quoting *Zidell v. Bird*, 692 S.W.2d 550, 554 (Tex. App.—Austin 1985, no writ)). *See also S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996) ("As a rule, we have held that a cause of action accrues when a wrongful act causes some legal injury, even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred.").

Plaintiffs' Second Amended Complaint alleges that Defendants should have tested Plaintiffs' SAKs within 30 days of collection. (Instrument No. 27 at 17, 18);

see Tex. Gov't Code § 420.042(a) ("A law enforcement agency that receives sexual assault evidence . . . shall submit that evidence to a public accredited crime laboratory for analysis not later than the 30th day after the date on which that evidence was received."). Beckwith's SAK was collected on April 2, 2011. *Id.* at 11-12. Beckwith's state law causes of action for failure to timely test her SAK, therefore, would have accrued 30 days later, in May 2011, regardless of when Defendants notified her of the delay in testing. Flores' SAK was collected on or about September 20, 2011. *Id.* at 18. Flores' state law causes of action for failure to timely test her SAK similarly would have accrued 30 days later, in late October 2011, regardless of when Defendants notified her of the delay in testing. Because Plaintiffs brought their state law causes of action approximately six years later, on September 24, 2017, the two-year statute of limitations bars Plaintiffs' state law causes of action.

2.

In determining the statute of limitations for a § 1983 claim, district courts use the forum state's personal injury limitations period. *Moore v. McDonald*, 30 F.3d 616, 620 (5th Cir. 1994); *see also Owens v. Okure*, 488 U.S. 235, 240-41 (1989) ("Because '§ 1983 claims are best characterized as personal injury actions,' we held that a State's personal injury statute of limitations should be applied to all § 1983 claims." (citing *Wilson v. Garcia*, 471 U.S. 261, 280 (1985))). Because the Texas general personal injury limitations period is two years, Plaintiffs' § 1983 claims, as with Plaintiffs' state law negligence claims, are governed by a two-year statute of limitations. *See King-White v. Humble Indep. Sch. Dist.*, 803 F.3d 754, 761 (5th

Cir. 2015) (rejecting plaintiffs' argument that the court should extend the general personal injury limitations period for their § 1983 claims against the school district for claims stemming from sexual assault or abuse by a teacher).

While the statute of limitations is determined by state law, accrual of a § 1983 claim is governed by federal law. *Moore*, 30 F.3d at 620-21. "Under federal law, the [limitations] period begins to run 'the moment the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured.'" *Russell v. Bd. of Trs. of the Firemen*, 968 F.2d 489, 493 (5th Cir. 1992) (quoting *Helton v. Clements*, 832 F.2d 332, 335 (5th Cir. 1987)). A plaintiff's awareness encompasses two elements: "(1) The existence of the injury; and (2) causation, that is, the connection between the injury and the defendant's actions." *Piotrowski v. City of Houston*, 51 F.3d 512, 516 (5th Cir. 1995). A plaintiff need not realize that a legal cause of action exists. *Id.* The requisite knowledge that a plaintiff must have to begin the running of the limitations period "is merely that of the 'facts forming the basis of his cause of action,' . . . not that of the existence of the cause of action itself." *Vigman v. Cmty. Nat'l Bank & Trust Co.*, 635 F.2d 455, 459 (5th Cir. 1981) (quoting *Azalea Meats, Inc. v. Muscat*, 386 F.2d 5, 9 (5th Cir. 1967)). In other words, for awareness of causation, a plaintiff "must have knowledge of facts that would lead a reasonable person (a) to conclude that there was a causal connection . . . or (b) to seek professional advice, and then, with that advice, to conclude that there was a causal connection between the [defendant's acts] and injury." *Harrison v. United States*, 708 F.2d 1023, 1027 (5th Cir. 1983).

Despite the nationwide news of backlogs of testing of SAKs kits throughout the United States and the City of Houston's press releases on the backlog in testing, Plaintiffs assert that they had no reason to know that Defendants had not promptly tested their SAKs. Plaintiffs assert that Defendants had the affirmative duty to notify Plaintiffs of the delay in the testing of their SAKs. Plaintiffs' assertion, however, is contrary to the law. "A plaintiff who has learned of facts which would cause a reasonable person to inquire further must proceed with a reasonable and diligent investigation, and is charged with the knowledge of all facts such an investigation would have disclosed." *Jensen v. Snellings*, 841 F.2d 600, 606 (5th Cir. 1988).

In Flores' situation, Plaintiffs allege that two weeks after her assault, Defendants told Flores that her SAK would be processed in three months' time. Even assuming that the relevant injury was Defendants' delay in the testing of her SAK, rather than her sexual assault, Flores' § 1983 claims would have accrued after three months had passed and her SAK remained untested. A reasonable person in Flores' position would have followed up with Defendants regarding the testing of her SAK after three months had passed. Flores did not investigate the status of her SAK testing. Flores did not file a claim against Defendants until 2017, which was approximately six years after her SAK was taken. By failing to conduct a diligent inquiry about the testing of her SAK, Flores allowed her claim to slumber and become stale.

Similarly, Beckwith allowed her claim to slumber. Although Beckwith does not allege that Defendants gave her a timeline when her SAK would be tested,

the circumstances alleged in Plaintiffs' Complaint would undoubtedly have prompted a reasonable person to investigate Defendants' conduct further. Defendants took Beckwith's SAK on April 2, 2011. Subsequently, a HPD detective allegedly called Beckwith and made it seem like Beckwith's rape was her fault and discouraged her from filing a report as it was unlikely the suspect would be caught. Beckwith alleges that this was the last time she heard from HPD for many years. The HPD detective's allegedly deliberate indifference to her case and discouragement against filing a report along with Defendants' silence would have prompted a reasonable person to inquire further. "The requirement of diligent inquiry imposes an affirmative duty on the potential plaintiff to proceed with a reasonable investigation in response to an adverse event." *Pacheco v. Rice*, 966 F.2d 904, 907 (5th Cir. 1992). Beckwith did nothing for years. Then in 2015, HPD contacted her to notify her that it had found a suspect. Even after HPD contacted her, Beckwith did not follow up until she unsuccessfully phoned HPD several months later and HPD did not return her call. The question is not when Plaintiffs knew that they had a legal cause of action, but when they knew of "the facts that would ultimately support a claim." *King-White*, 803 F.3d at 762. Both Plaintiffs here had the facts by the end of 2011 that would ultimately support a claim that Defendants had delayed testing of their SAKs. Because they did not file suit until September 2017, the two-year statute of limitations bars their claims.

3.

Plaintiffs allege that the discovery rule and fraudulent concealment toll the statute of limitations.

(Instrument No. 27 at 46-47). "When a federal cause of action borrows a state statute of limitations, 'coordinate tolling rules' are usually borrowed as well." *King-White*, 803 F.3d at 764. Tolling of the statute of limitations can occur in two types of cases. *Id.* In the first type, tolling of the statute of limitations may occur under Texas law from the "discovery rule." *Id.* The discovery rule applies if the "nature of the injury incurred is inherently undiscoverable and the evidence of injury is objectively verifiable." *Id.* (quoting *Childs v. Haussecker*, 974 S.W.2d 31, 36-37 (Tex. 1988). However, the discovery rule does not allow a plaintiff to idly sit on her hands. A plaintiff seeking to employ the discovery rule must use diligence to investigate the facts establishing the elements of her cause of action. *Willis v. Maverick*, 760 S.W.2d 642, 644 (Tex. 1988). Neither of the Plaintiffs did so in this case. They simply allowed their claims to slumber for years, although the facts regarding their claims were readily available to them. Accordingly, the Court finds that the discovery rule does not apply here to toll the statute of limitations.

An additional scenario supporting tolling of the statute of limitations is where a defendant is "under a duty to make disclosure but fraudulently conceals the existence of a cause of action from the party to whom it belongs." *Borderlon v. Peck*, 661 S.W.2d 907, 908 (Tex. 1983). "Fraudulent concealment will not, however, bar limitations when the plaintiff discovers the wrong or could have discovered it through the exercise of reasonable diligence." *Kerlin v. Sauceda*, 263 S.W.3d 920, 925 (Tex. 2008).

Plaintiffs conclude that Defendants fraudulently concealed the delay in testing of Plaintiffs' SAKs.

The evidence attached to the parties' motions refutes this conclusory assertion. On February 13, 2013, the Houston Mayor's Office published a press release detailing the backlog in testing of sexual assault kits at HPD and the steps that the City of Houston was taking to clear up the backlog. (*See* Instrument No. 33-2). In December 2013, HPD launched a hotline for sexual assault victims to contact HPD and to obtain more information about their cases. (*See* Instrument No. 33-9 at 12). HPD advertised the hotline through billboards, television, and bilingual pamphlets distributed throughout the city. *Id.* The backlogged testing of SAKs was public information that Defendants were not hiding. Moreover, had Plaintiffs investigated the status of their SAKs, they would have learned that their SAKs had remained untested. Rather than contact HPD, Plaintiffs waited for HPD to contact them while they made no further inquiry even when the circumstances would have led a reasonable person to inquire further. Accordingly, the Court finds that the doctrine of fraudulent concealment does not apply here.

Plaintiffs also contend that the statute of limitations should be tolled because Defendants' conduct constitutes a continuing tort. (Instrument No. 36 at 20-21). "In a continuing-tort case, the wrongful conduct continues to effect additional injury to the plaintiff until that conduct stops." *Gen. Universal Sys. Inc. v. HAL, Inc.*, 500 F.3d 444, 451 (5th Cir. 2007) (quoting *Upjohn Co. v. Freeman*, 885 S.W.2d 538, 542 (Tex. App. —Dallas 1994, writ denied)). "For continuing torts, 'the cause of action is not complete and does not accrue until the tortious acts have ceased.'" *Id.* (quoting *Twyman v. Twyman*, 790 S.W.2d 819, 821 (Tex.

App.—Austin 1990), *rev'd on other grounds*, 855 S.W.2d 619 (Tex. 1993)). Plaintiffs have not alleged that Defendants are continually committing a tort on them, nor could they because Defendants actually tested Plaintiffs' SAKs by 2014. (*See* Instrument No. 33 at 14-15). Instead, Plaintiffs rely on Defendants' continual failure to timely test SAKs for other putative class members to overcome the staleness of their own claims. Each individual potential class member is free to bring their own claim if it is not stale. However, where Plaintiffs can only show one instance of allegedly wrongful conduct that was not repeated to them and that occurred outside the limitations period, Plaintiffs cannot seek to revive their claims by tacking onto another, unidentified individual's potential claims.

Accordingly, the Court GRANTS Defendants' 12 (b)(1) Motion to Dismiss and finds that the two-year statute of limitations bars Plaintiffs' state law negligence claims and Plaintiffs' claims under § 1983. (Instrument No. 33).

B.

The Court has already addressed Defendants' Rule 12(b)(1) Motion to Dismiss Plaintiffs' § 1983 and state law negligence claims. *See* Section V.A. Defendants also seek dismissal under Rule 12(b)(6) of Plaintiffs' remaining claims for violations of Due Process, the Fourth Amendment, Fifth Amendment, and for conspiracy to violate Plaintiffs' civil rights under 42 U.S.C. §§ 1985 and 1986. (Instrument No. 33 at 18-25).

1.

Plaintiffs' Second Amended Compliant brings a cause of action for "active due process violations" without specifying if they are brought pursuant to § 1983. (Instrument No. 27 at 36-37). Plaintiffs specify that they and the putative class members have the fundamental right to control their genetic information and that Defendants have violated their substantive due process rights. *Id.* at 38. Plaintiffs do not specify if they are also bringing a claim for violations of procedural due process rights. Defendants move to dismiss Plaintiffs' Due Process claims, arguing that Plaintiffs cannot show that they were deprived of their lives, liberty, or property as their SAKs were sent for testing. (Instrument No. 33 at 19-20).

To prevail on a § 1983 action asserting a due process violation, "a plaintiff must first identify a life, liberty or property interest protected by the Fourteenth Amendment and then identify a state action that resulted in a deprivation of that interest." *Blackburn v. City of Marshall*, 42 F.3d 925, 935 (5th Cir. 1995). Although the parties do not dispute that Plaintiffs may have a property interest in their DNA samples, the issue here is whether Defendants deprived them of that interest by delaying to test their SAKs. Plaintiffs voluntarily provided their SAKs to Defendants. Defendants investigated Plaintiffs' sexual assaults and charged the perpetrators after discovering their identities. Despite Plaintiffs' hypothetical assertion that prompt testing of their SAKs would have resulted in a quicker apprehension of their perpetrators, it is well settled law that, for purposes of the Due Process Clause, state actors have no duty to investigate crimes. *See Town of Castle Rock v.*

Gonzales, 545 U.S. 748, 768 (2005) ("the benefit that a third party may receive from having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its 'substantive' manifestations."); *Lisa R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) ("a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another."); *see also Mitchell v. McNeil*, 487 F.3d 374, 378 (6th Cir. 2007) ("There is no statutory or common law right, much less constitutional right, to an investigation."). Here, there is no dispute that Defendants investigated the sexual assaults and actually found and charged the perpetrators. Plaintiffs' contention, however, is that Defendants failed to test the SAKs promptly to identify the perpetrators sooner. Because the Due Process clause does not require state actors to carry out timely police investigations, any claims of procedural and substantive due process violations fail.

Accordingly, the Court GRANTS Defendants' Rule 12(b)(6) Motion to Dismiss Plaintiffs' claims of active due process violations. (Instrument No. 33).

2.

Plaintiffs allege that Defendants unreasonably searched and seized their SAKs and led Plaintiffs to believe that their SAKs would be tested in a timely manner. (Instrument No. 29-32). Defendants move to dismiss Plaintiffs' Fourth Amendment search and seizure claims because Plaintiffs consented to the collection of the SAKs. (Instrument No. 33 at 21).

A Fourth Amendment "search" occurs when an official infringes "an expectation of privacy that society

is prepared to consider reasonable." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). A Four Amendment "seizure" of property occurs when an official meaningfully interferes with an individual's possessory interests in that property. *Id.* Consent to either search or seizure, so long as it is voluntary, however, renders the official's actions reasonable and lawful under the Fourth Amendment. *United States v. Zavala*, 541 F.3d 562, 576 (5th Cir. 2008); *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973) ("a search authorized by consent is wholly valid."). Even assuming, as Plaintiffs request, that the hospitals that took Plaintiffs' SAKs are government actors, Plaintiffs' Fourth Amendment claims lack merit because they consented to Defendants collecting their genetic material. Plaintiffs recognize in their Second Amended Complaint that Defendants collected the SAKs and eventually tested them with the consent of Plaintiffs. While Plaintiffs now contend that the consent was based on their belief that Defendants would test their SAKs promptly, their contention does not meet the standard for showing involuntary consent. Consent is involuntary if it was "coerced, by explicit or implicit means, by implied threat or covert force." *Schneckloth*, 412 U.S. at 228. Plaintiffs have not alleged any facts that would meet the definition of involuntary consent.

Accordingly, the Court GRANTS Defendants' Rule 12(b)(6) Motion to Dismiss Plaintiffs' Fourth Amendment claims. (Instrument No. 33).

3.

Plaintiffs also bring a claim under the Fifth Amendment Takings Clause, alleging that "[b]ecause the City of Houston has and is retaining the SAKS,

Plaintiff's and Putative Class Members' genetic material contained in the SAKS constitutes a *per se* taking." (Instrument No. 27 at 41). Defendants move to dismiss the claim because Plaintiffs cannot show that Defendants collected the SAKs for a "public purpose." (Instrument No. 33 at 22-23).

The Fifth Amendment Takings Clause "requires payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is a result of a condemnation proceeding or a physical appropriation." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321 (2002) (emphasis added); *E. Enters. v. Apfel*, 524 U.S. 498, 522 (1998) ("The aim of the [Takings] Clause is to prevent the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." (internal quotation omitted)). Plaintiffs' Second Amended Complaint sets forth how they voluntarily submitted their SAKs for testing to serve their own private interests to feel secure and seek justice against their perpetrators. Plaintiffs' allegations that Defendants failed to timely investigate their assaults and failed to promptly test their SAKs should be remedied through tort law. They do not pertain to a governmental taking.

Accordingly, the Court GRANTS Defendants' Rule 12(b)(6) Motion to Dismiss Plaintiffs' claims under the Fifth Amendment Takings Clause. (Instrument No. 33).

4.

Plaintiffs also allege that Defendants conspired to interfere with Plaintiffs' civil rights in violation of

42 U.S.C. § 1985, and negligently failed to prevent a known conspiracy to interfere Plaintiffs' civil rights in violation of § 1986. (Instrument No. 27 at 45-46). Defendants move to dismiss Plaintiffs' claims, contending that Plaintiffs have not alleged any facts that show a conspiracy between more than a single entity. (Instrument No. 33 at 23-24).

42 U.S.C. § 1985 provides three bases for relief, of which Plaintiffs seek relief for deprivation of their rights and privileges. (*See* Instrument No. 36 at 32); 42 U.S.C. § 1985(3). To state a claim under § 1985(3), a plaintiff must allege facts that demonstrate (1) a conspiracy; (2) for the purpose of depriving a person of the equal protection of the laws; and (3) an act in furtherance of the conspiracy; (4) which causes injury to a person or a deprivation of any right or privilege of a citizen of the United States. 42 U.S.C. § 1985(3); *Lockett v. New Orleans City*, 607 F.3d 992, 1002 (5th Cir. 2010). A conspiracy requires an agreement to commit an unlawful act between or among two or more separate persons. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867 (2017). Generally, a single entity cannot conspire with itself. *See id.* at 1866-68 (suggesting that officials employed by the same governmental department do not conspire when they speak to one another and work together in their official capacities, but declining to so hold); *Hilliard v. Ferguson*, 30 F.3d 649, 653 (5th Cir. 1994) (rejecting plaintiff's § 1985(3) claims by applying the "single entity" analysis to the defendant school board).

Plaintiffs' Second Amended Complaint alleges a conspiracy between departments of the City of Houston, which is a single entity. Other than naming the individual Defendants, Plaintiffs have provided no

factual allegations to show that the members were not acting as a collective entity. While Plaintiffs have also named Dr. Peter Stout of the Houston Forensic Science Center as a Defendant, who is not an employee of the City of Houston, Plaintiffs have not alleged any facts establishing a conspiracy between the City of Houston and Dr. Stout, nor can they establish that the failure to promptly test the SAKs and investigate the sexual assaults is a violation of a clearly established constitutional right.

A § 1986 cause of action is dependent on successfully pleading a § 1985 claim first. *Hamilton v. Chaffin*, 506 F.2d 904, 914 (5th Cir. 1975) ("Because of th[e] failure to state a claim cognizable under Section 1985(3), appellant may not recover under the interrelated, dependent cause of action under Section 1986, action for neglecting to prevent a known conspiracy under Section 1985"); *see e.g., McVea v. Swan*, No. SA:14-CV-73-DAE, 2014 WL 4471529 at *5 (W.D. Tex. Sept. 10, 2014) ("As stated in the statute itself, in order to establish a violation of § 1986, a plaintiff must first establish a violation of § 1985."). Because Plaintiffs' § 1985 claims fail, their § 1986 claims must also fail.

Accordingly, the Court GRANTS Defendants' Rule 12(b)(6) Motion to Dismiss Plaintiffs' §§ 1985 and 1986 claims. (Instrument No. 33).

VI.

For the foregoing reasons, IT IS HEREBY ORDERED that Defendant's Rule 12(b)(1) Motion to Dismiss Plaintiffs' § 1983 and state law negligence claims is GRANTED. (Instrument No. 33). Defendants Rule 12(b)(6) Motion to Dismiss Plaintiffs' remaining

claims is GRANTED. (Instrument No. 33). Plaintiffs' claims are DISMISSED with prejudice.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on this the 31st day of July, 2018, at Houston, Texas.

/s/ Vanessa D. Gilmore
United States District Judge

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS GRANTING MOTION FOR A STAY (MARCH 2, 2018)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DEJENAY BECKWITH and BEVERLY FLORES, on their Own Behalf and Others Similarly Situated,

Plaintiffs,

v.

CITY OF HOUSTON, TEXAS, ET AL.,

Defendants.

Civil Action No. 4:17-CV-02859

Before: Vanessa D. GILMORE, United States District Judge.

On this day, the Court considered the Motion of Defendants the City of Houston, Mayor Sylvester Turner, Police Chief Art Acevedo, the Houston Forensic Science Center, Peter Stout, Annise Parker, Kathy Whitmire, Clarence Bradford, Sam Nuchia, Charles McClelland, and Lee P. Brown To Stay Discovery (the "Motion") pending disposition of the pending Motion to Dismiss or, in the alternative, Motion for

Summary Judgment. Having considered the Motion, the response, if any, and the papers on file, the Court is of the opinion that the Motion has merit and should be granted. It is, therefore,

ORDERED that the Defendants' Motion to Stay Discovery is hereby

GRANTED. It is further

ORDERED that discovery is stayed until the Court rules on the motion to dismiss.

It is so ORDERED.

SIGNED this 2nd day of March, 2018.

/s/ Vanessa D. Gilmore
United States District Judge