APPENDIX A

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
March 4, 2024
Lyle W. Cayce
Clerk

No. 23-20440

CHANEL E.M. NICHOLSON, *On Behalf of Herself and Other Similarly Situated Plaintiffs*,

Plaintiff—Appellant,

versus

W.L. YORK, INCORPORATED, *doing business as* COVER GIRLS;
D WG FM, INCORPORATED, *doing business as* SPLENDOR,

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:21-CV-2624

Before STEWART, DUNCAN, and ENGELHARDT, *Circuit Judges*.

PER CURIAM:*

Chanel Nicholson filed this class action lawsuit against various adult entertainment clubs asserting claims under 42 U.S.C. § 1981 for unlawful discrimination and breach of contract. The district court dismissed some of the defendants from the suit and then rendered summary judgment in favor of the remaining defendants on grounds that Nicholson's claims were barred

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

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by the applicable statute of limitations. Nicholson appealed. For the following reasons, we AFFIRM.

I. FACTUAL & PROCEDURAL BACKGROUND

Nicholson is African American and at various times between September 2013 and November 2017, she performed as a dancer at three adult entertainment clubs in Houston: Cover Girls,[1] Splendor,[2] and Centerfolds.[3] At each of these clubs, Nicholson signed a "Licensing and Access Agreement" ("LAA"). The LAAs provided in relevant part that: (1) Nicholson was an independent contractor; (2) each side could terminate the relationship at will; (3) each club would grant Nicholson access to its premises to perform subject to other policies within the agreement; and (4) Nicholson was permitted to set her own hours and shifts. None of the LAAs had expiration dates.

Nicholson began dancing at Centerfolds in August 2013. In late September 2014, she claims she was "barred" from Centerfolds for not complying with its tip-sharing policy, so she became a dancer at Splendor later that month. Soon after she began working at Splendor, Nicholson alleges that she was turned away by club staff when she showed up to work because she was told there were "too many Black girls" already working as dancers on the premises. Eventually, she claims she was "barred" from Splendor after she refused to pay a fine to the club.

After leaving Splendor, Nicholson began working as a dancer at Cover Girls in November 2016. Similarly, she alleges that shortly after she began

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[1] W.L. York, Inc., d/b/a Cover Girls.

[2] D WG FM, Inc., d/b/a Splendor.

[3] A.H.D. Houston, Inc., d/b/a Centerfolds.

working at Cover Girls, she was denied access to the club because she was told there were "too many Black girls" already dancing on the premises. She further alleges that, in late November 2017, she was again denied access to Cover Girls for the same discriminatory reason. She contends that she was then "barred" from dancing at Cover Girls.

Nicholson states that, after she was barred from Cover Girls, she began working at the Solid Platinum Cabaret until "pregnancy forced her to stop." Then on June 24, 2021, she sought to "revive her career as a dancer" and went back to Centerfolds requesting to work but was told they were not hiring. Thereafter, in August 2021, she went back to Splendor requesting to work as a dancer but alleges that she was again turned away because she was Black.

On August 12, 2021, Nicholson filed a class action lawsuit asserting claims of unlawful discrimination under 42 U.S.C. § 1981 against Centerfolds, Cover Girls, Splendor, Ali and Hassan Davari (alleged club owners), and the Solid Platinum Cabaret. A month later, she moved to dismiss Solid Platinum Cabaret from the suit, and the district court granted her motion. In her third amended complaint, Nicholson added claims for breach of contract to her § 1981 claims against the remaining defendants.

In June 2022, the remaining defendants moved to dismiss Nicholson's claims as set forth in her third amended complaint under Federal Rule of Civil Procedure 12(b)(6). The district court granted in part and denied in part the defendants' motion. In its order of partial dismissal, the district court dismissed Nicholson's claims against Centerfolds and the Davaris for failure to state a claim and because her § 1981 claim was barred by the statute of limitations. It allowed, however, Nicholson to proceed with her (1) § 1981 claim against Cover Girls for being barred from the club in November 2017,

(2) breach of contract claim against Cover Girls from November 2017, and (3) § 1981 claim against Splendor for being denied access to the club in 2021.[4]

Both Nicholson and the remaining defendants, Splendor and Cover Girls (collectively, "Defendants"), then cross-moved for summary judgment. The district court granted Defendants' motion, concluding there was no genuine dispute of material fact that Nicholson's three remaining claims against Cover Girls and Splendor were barred by the applicable statute of limitations. It then denied Nicholson's motion for summary judgment. Nicholson filed a motion to alter or amend the judgment pursuant to Federal Rule of Civil Procedure 59(e), which the district court also denied. This appeal ensued.[5]

II. STANDARD OF REVIEW

We conduct a de novo review of a district court's grant of summary judgment. *Sanders v. Christwood*, 970 F.3d 558, 561 (5th Cir. 2020). Summary judgment is proper 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Id.* (citing FED. R. CIV. P. 56(a)). A dispute regarding a material fact

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[4] Although the district court's summary judgment order initially labels this claim as one for "failure to hire" based on Nicholson's pleadings, it subsequently concluded after analyzing the claim that it was not a failure to hire claim but rather an extension of her initial discrimination claim arising from being "refused or denied access."

[5] We note that Nicholson's notice of appeal indicates that she is only appealing the district court's order denying her Rule 59(e) motion to alter or amend its summary judgment in favor of Defendants. However, as we have done in past similar cases, we will liberally construe her notice of appeal to include an appeal of the district court's underlying summary judgment. *See Tr. Co. Bank v. U.S. Gypsum Co.*, 950 F.2d 1144, 1148 (5th Cir. 1992) ("Interpreting notices of appeal liberally, this [c]ourt often has exercised its appellate jurisdiction—despite an improper designation under [Federal Rule of Appellate Procedure] 3(c)—where it is clear that the appealing party intended to appeal the entire case.").

is "genuine" "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (citation omitted). "Conclusional allegations and unsubstantiated assertions may not be relied on as evidence by the nonmoving party." *Carnaby v. City of Houston*, 636 F.3d 183, 187 (5th Cir. 2011); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). "The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his or her claim." *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998). "A panel may affirm summary judgment on any ground supported by the record, even if it is different from that relied on by the district court." *Reed v. Neopost USA, Inc.*, 701 F.3d 434, 438 (5th Cir. 2012) (internal quotation marks and citation omitted).

III. DISCUSSION

On appeal, Nicholson's overarching position is that the district court erred in holding that her claims against Cover Girls and Splendor were barred by the four-year statute of limitations applicable to her § 1981 claims. In support of this argument, she contends that even though she first experienced discrimination from Cover Girls in 2016 and from Splendor in 2014, she was subjected to subsequent discrete acts of discrimination from both entities that reset the four-year statute of limitations. Thus, her claims in this case, which were not filed until August of 2021, were timely.[6] We disagree.

[6] On appeal, Nicholson fails to advance an argument with regard to her breach of contract claim against Cover Girls. Accordingly, we consider any argument as to that issue waived. *See Adams v. Unione Mediterranea Di Sicurta*, 364 F.3d 646, 653 (5th Cir. 2004) ("Issues not raised or inadequately briefed on appeal are waived.").

"Section 1981 provides that '[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts.'" *Body by Cook, Inc. v. State Farm Mut. Auto. Ins.*, 869 F.3d 381, 386 (5th Cir. 2017) (quoting 42 U.S.C. § 1981(a)). Under 1981(b), to "'[m]ake and enforce contracts' is defined as 'the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.'" *Id.* (quoting 42 U.S.C. § 1981(b)). A plaintiff establishes a § 1981 claim for contractual discrimination by alleging "that (1) they are members of a racial minority; (2) Defendants intended to discriminate on the basis of race; and (3) the discrimination concerned one or more of the activities enumerated in the statute[.]" *Id.*

When a § 1981 claim arises post-contract formation, it is subject to a four-year statute of limitations period under 28 U.S.C. § 1658.[7] *See Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382 (2004); *see also Mitchell v. Crescent River Port Pilots Ass'n*, 265 F. App'x 363, 367 (5th Cir. 2008) (per curiam) (unpublished) (observing that "if [the plaintiff's] causes of action arise under a federal statute enacted after December 1, 1990, [the court] must apply a four-year statute of limitations" period). Under § 1981, federal law determines when the limitations period accrues. *In re Monumental Life Ins. Co.*, 365 F.3d 408, 420 (5th Cir. 2004). "It commences when the plaintiff either has actual knowledge of the violation or has knowledge of facts that, in the exercise of due diligence, would have led to actual knowledge." *Id.*

A. Nicholson's Claims Against Splendor

[7] It is undisputed that Nicholson's § 1981 claims in this case arose post-contract formation and are thus subject to the four-year statute of limitations period. The dispute herein centers around when Nicholson's claims accrued.

On appeal, Nicholson first argues that her claims against Splendor accrued on August 11, 2021, because she was denied access to the club on that date on account of her race. Although she alleges that Splendor's first acts of unlawful discrimination against her took place as early as 2014 and continued through 2016, she contends that the four-year statutory limitations period applicable to those claims is not relevant to her August 2021 claim. In support of this reasoning, she argues that under *National Railroad Passenger Corp. v. Morgan*, Splendor's refusal to grant her access to the club on August 11 was "a clear example of a discrete discriminatory act" that restarted the four-year statute of limitations period applicable to her § 1981 claims. 536 U.S. 101, 113 (2002). She further asserts that, although she seeks to apply *Morgan*'s holding to her claims in this case, she is not advancing a hostile work environment claim and she "does not need to rely on the continuing violations doctrine for her claim against Splendor to be viable." Her arguments, however, misconstrue the applicable precedent.

In *Morgan*, the Supreme Court squarely addressed the continuing violations doctrine, distinguishing between claims that are "discrete discriminatory acts" and claims that form one continuing violation, *i.e.*, hostile work environment claims. *Id.* at 115. There, the Court ultimately held that "[a] charge alleging a hostile work environment claim . . . will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period." *Id.* at 122. *Morgan*, however, is inapplicable to Nicholson's claim here. This is because the act of discrimination that she alleges took place in 2021 that forms the basis of her § 1981 claim against Splendor was merely a continuation of Splendor's original act of discrimination that she alleges took place in 2014, upon which the limitations period has already elapsed.

Nicholson alleges that she was turned away or denied access from Splendor's premises in 2021 because she was Black. Yet, she also alleges that

she was turned away or denied access from Splendor's premises in 2014 for the exact same reason. Nothing changed between the instance of discrimination that she alleges took place in 2014 and the instance of discrimination that she alleges took place in 2021. If anything, her allegation is simply that she was first turned away by Splendor for a discriminatory reason in 2014 and, when she checked back in with Splendor in 2021, nothing had changed. Splendor's position remained the same: Nicholson was refused access to the premises because she was Black. Accordingly, these are not "discrete discriminatory acts" that are "independently discriminatory" as contemplated in *Morgan*. *Id.* at 113. Thus, in order for the limitations period to be potentially extended under *Morgan*, her claims would have to fall under the continuing violations doctrine. *Id.* at 122. But as the Supreme Court and this court have clarified, the continuing violations doctrine applies only in the context of hostile work environment claims, which Nicholson does not allege in this case.[8] *Id.*; *see also Heath v. Bd. of Supervisors for S. Univ. & Agric. & Mech. Coll.*, 850 F.3d 731, 737 (5th Cir. 2017) ("Claims alleging discrete acts are not subject to the continuing violation doctrine; hostile workplace claims are. Hostile environment claims are 'continuing' because they involve repeated conduct, so the 'unlawful employment practice' cannot be said to occur on any particular day.").

As the district court accurately observed in the proceedings below, Nicholson alleged in her deposition testimony that she was first denied access to Splendor's premises as early as a week after signing her LAA in September 2014 and that the alleged discrimination continued until she left the club in

[8] We take no position on whether Nicholson's claims would succeed under *Morgan* if she had alleged a hostile work environment claim against Splendor or Cover Girls.

2016.[9] Thus, her claims of unlawful discrimination began to accrue in 2014. *In re Monumental Life Ins. Co.*, 365 F.3d at 420 (noting that the accrual period "commences when the plaintiff either has actual knowledge of the violation or has knowledge of facts that, in the exercise of due diligence, would have led to actual knowledge"). Moreover, Nicholson conceded in her deposition testimony that she returned to Splendor in August 2021 believing that her LAA was still in effect and the record does not reflect that the LAA ever expired.[10] This further supports the conclusion that her denial of access to the club on that date on account of her race was merely a continued effect of the first alleged discriminatory act that took place in 2014. Indeed, as the district court pointed out, Nicholson indicated in her opposition to Defendants' motion for summary judgment that her claims against Splendor were more properly categorized as being "refused or denied access" as opposed to a "refusal to hire." Consequently, because she did not file her § 1981 claim of unlawful discrimination against Splendor until August 2021, we agree with the district court that her claim was barred by the applicable four-year statute of limitations period. *Id.*

B. Nicholson's Claims Against Cover Girls

Nicholson's second argument with respect to Cover Girls is nearly identical to her first with respect to Splendor. She claims that her denial of

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[9] According to Nicholson's deposition testimony, she confirmed that she signed the LAA with Splendor on September 27, 2014. She was then asked by counsel for Defendants, "Did you experience racial discrimination at Splendor that eliminated your right or impaired your right to access the club like right after signing this?" Nicholson replied, "Yes," explaining that the discrimination continued throughout her "whole dance career" at Splendor.

[10] During her deposition, counsel for Defendants asked Nicholson, "So when you went to Splendor in August of 2021, were you expected to sign a new contract?" Nicholson replied, "No." Counsel responded, "And that is because you recalled that you had already signed a contract with Splendor . . . back in 2014?" Nicholson replied, "Yes."

access to Cover Girls in November 2017 "was simply one more discrete, discriminatory act," which under *Morgan*, reset the four-year limitations period for her § 1981 unlawful discrimination claim.

Again, Nicholson makes no progress under *Morgan*. Similar to her allegations against Splendor, Nicholson's deposition testimony confirms that as early as her first week after signing the LAA with Cover Girls in November 2016, she was denied access to the club on account of her race.[11] Here, her claim is that nothing changed when she returned to Cover Girls in November 2017—she was again denied access on account of her race. Thus, Cover Girls' first act of discrimination that Nicholson alleges took place in 2016 merely remained ongoing when she returned in 2017. Consequently, her § 1981 claim against Cover Girls began to accrue when she signed the LAA with the club in November 2016. *In re Monumental Life Ins. Co.*, 365 F.3d at 420. Because she did not file her § 1981 claim of unlawful discrimination against Cover Girls until August 2021, we agree with the district court that her claims were barred by the applicable four-year statute of limitations. *Id.*

In sum, the district court did not err in granting summary judgment in favor of Splendor and Cover Girls on grounds that Nicholson's § 1981 claims of unlawful discrimination were time-barred. *See Sanders*, 970 F.3d at 561; FED. R. CIV. P. 56(a).

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[11] According to Nicholson's deposition testimony, after confirming that she signed the LAA with Cover Girls on November 6, 2016, she was asked by counsel for Defendants, "And do you recall after November 6th, roughly, when, you know, your first—the first time somebody told you you've got to leave for a racist reason?" Nicholson responded, "It was within the first week, but I was kind of used to it. It wasn't like—I don't know. I would just leave and go to the freaking club up the street."

IV. CONCLUSION

For the aforementioned reasons, we AFFIRM the district court's summary judgment in favor of Defendants as well as its order denying Nicholson's Rule 59(e) motion to alter or amend the judgment.

APPENDIX B

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

CHANEL E.M. NICHOLSON, *Plaintiff,* v. W.L. YORK, INC. d/b/a COVER GIRLS, *et al.*, *Defendants.*	§ § § § § § § §	CIVIL ACTION NO. 4:21-cv-2624

ORDER

Pending before the Court is Plaintiff Chanel E.M. Nicholson's ("Nicholson" or "Plaintiff") Motion to Alter or Amend the Court's Grant of Defendants' Motion for Summary Judgment (Doc. No. 71). Defendants D WG FM, Inc., d/b/a Splendor ("Splendor") and W.L. York, Inc., d/b/a Cover Girls' ("Cover Girls") (collectively, "Defendants") responded in opposition (Doc. No. 72). Having considered the briefs and applicable law, the Court hereby **DENIES** Plaintiff's motion.

I. Background

This case primarily involves alleged violations of 42 U.S.C. § 1981 based on racial discrimination. Plaintiff is African American and was a dancer who performed at adult entertainment clubs Centerfolds, Splendor, Cover Girls for varying periods of time between September 2013 and November 2017. Plaintiff filed this lawsuit on August 12, 2021, asserting various claims for unlawful and intentional racial discrimination under § 1981 against Centerfolds, Splendor, Cover Girls, and individuals Ali Davari and Hassan Davari, who allegedly owned the clubs. After amending her complaint several times, Plaintiff's Third Amended Complaint asserted causes of action for breach of contract and discrimination under § 1981. In response to Plaintiff's Third Amended Complaint, Defendants filed their Fourth Motion to Dismiss (Doc. No. 48).

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This Court granted in part and denied in part Defendants' motion (Doc. No. 51). In that Order, the Court dismissed all of Plaintiff's claims as they pertained to Centerfolds, Ali Davari, and Hassan Davari for failure to state a claim and her § 1981 claims because they were barred by the applicable statute of limitations. (*Id.*). Of Plaintiff's remaining claims, the Court found that Plaintiff plausibly alleged: (1) a § 1981 claim against Cover Girls from when she was "barred" from the club in November 2017, (2) a breach of contract claim against Cover Girls from November 2017, and (3) a § 1981 failure to hire claim against Splendor from 2021. (*Id.* at 21).

Defendants then filed a Motion for Summary Judgment as to Plaintiff's three remaining claims that survived their Motion to Dismiss. (Doc. No. 61). Specifically, Defendants contended that all three of Plaintiff's claims are time barred or fail on the merits. (*Id.*). The Court granted Defendants' Motion for Summary Judgment in its entirety, dismissed the case with prejudice, and entered a Final Judgment (Doc. Nos. 68, 69).

Plaintiff subsequently filed this Motion to Alter or Amend the Court's Grant of Defendants' Motion for Summary Judgment under Rule 59(e). (Doc. No. 72). Defendants responded in opposition (Doc. No.73).

II. Legal Standard

Rule 59(e) motions call into question the correctness of a judgment. *In re Transtexas Gas Corp.*, 303 F.3d 571, 581 (5th Cir.2002). The Fifth Circuit has repeatedly held that Rule 59(e) motions are "not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment." *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004); *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir.1990). Instead, such motions "serve the narrow purpose of allowing a party to correct manifest errors of law or

fact or to present newly discovered evidence." *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 473 (5th Cir.1989) (internal quotations omitted).

III. Analysis

Plaintiff has raised insufficient grounds for reconsideration. Plaintiff does not even attempt to bring new arguments or to argue that she has newly discovered evidence that warrants reconsideration from this Court. Instead, in her motion, she attempts to relitigate two issues already decided by this Court: (1) whether her § 1981 claims against Splendor and Cover Girls are barred by the statute of limitations; and (2) whether her breach of contract claim against Cover Girls is barred by the statute of limitations.

As to her § 1981 claims, Plaintiff rehashes—for the third time—identical arguments that this Court already rejected in its Order on Defendants' Motion to Dismiss (Doc. No. 51 at 4) and in its Order on Defendants' Motion for Summary Judgment (Doc. No. 68 at 9). Specifically, Plaintiff cites *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002) and contends that her claims against Splendor and Cover Girls are not barred by the statute of limitations because "discrete acts of discrimination" occurred within the limitations period. This Court, as stated already, has already rejected Plaintiff's exact argument twice, most recently in its Order on Defendants' Motion for Summary Judgment. It held:

> Plaintiff also argues that her claim against Splendor is not time barred under because being turned away in 2021 tolls the statute of limitations constitutes a "discrete and egregious discriminatory act" under the continuing violations doctrine, which would start a new limitations clock for filing charges alleging that act. (Doc. No. 62 at 3); *Nat'l R. R. Passenger Corp.*, 536 U.S. at 11. Plaintiff, however, is recycling arguments that this Court already found inapplicable in its Order on the Motion to Dismiss. As discussed in that Order, the continuing violations doctrine "has since been limited by the United States Supreme Court to apply only to § 1981 claims alleging a hostile work environment." (Doc. No. 51 at 14). Since Plaintiff has not pleaded a cause of action alleging a hostile work environment, this doctrine does not apply to Plaintiff's

> remaining claim against Splendor. Moreover, given that Plaintiff avers that she was never terminated from Splendor and the original LAA remained in force when she revisited the club in 2021, being turned away in 2021 was no different than the first time she was denied access in September 2014—when Plaintiff could be charged with knowledge of the allegedly discriminatory act. Thus, her § 1981 claim against Splendor accrued in approximately September 2014 and is time barred.

(Order on Defendants' Motion for Summary Judgment, Doc. No. 68 at 9).

Plaintiff has no new legal arguments and no new evidence to challenge the correctness of the Court's judgment as to her § 1981 claims. Given that the Court has already addressed these exact arguments not once, but twice, the Court rejects Plaintiff's attempt to relitigate the issue for a third time in the absence of any reason to reconsider its previous findings.

Plaintiff also has no new legal arguments, no new evidence, and makes no attempt to adhere to the Rule 59(e) standard challenging the correctness of the Court's finding that her breach of contract claim against Cover Girls is time barred. This Court already held that Plaintiff's breach of contract claim was barred by the applicable statute of limitations. (Doc. No. 68 at 10-13). In short, Plaintiff, without any new evidence or legal arguments, is attempting to relitigate another argument that has already been decided—and rejected—by this Court. Thus, the Court sees no need to address Plaintiff's arguments again.

Accordingly, Plaintiff has failed to show that she has newly discovered evidence and failed to assert any grounds that would challenge the correctness of the judgment under Rule 59(e). Thus, Plaintiff's Motion for Reconsideration is hereby denied.

IV. Conclusion

For the foregoing reasons, the Court **DENIES** Plaintiff's Motion for Reconsideration. (Doc. No. 71).

Signed this 17th day of August, 2023.

Andrew S. Hanen
United States District Judge

APPENDIX C

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

CHANEL E.M. NICHOLSON, *Plaintiff,* v. W.L. YORK, INC. d/b/a COVER GIRLS, *et al.*, *Defendants.*	§ § § § § § § §	CIVIL ACTION NO. 4:21-cv-2624

ORDER

Pending before the Court are Defendants D WG FM, Inc., d/b/a Splendor ("Splendor") and W.L. York, Inc., d/b/a Cover Girls' ("Cover Girls") (collectively, "Defendants") Motion for Summary Judgment (Doc. No. 61). Plaintiff Chanel E.M. Nicholson ("Nicholson" or "Plaintiff") responded in opposition (Doc. No. 62), and Defendants replied (Doc. No. 64). Having considered the briefings and applicable law, the Court hereby **GRANTS** Defendants' Motion for Summary Judgment.

I. Factual Background

This case primarily involves alleged violations of 42 U.S.C. § 1981 based on racial discrimination. Plaintiff is African American and was a dancer who performed at adult entertainment clubs Centerfolds, Splendor, Cover Girls for varying periods of time between September 2013 and November 2017.

At all three clubs, Plaintiff signed a "Licensing and Access Agreement" ("LAA").[1] These agreements established, among other things, that (1) Plaintiff was an independent contractor, (2) each side could terminate the relationship at will, (3) each club would grant access to its premises

[1] While similar in verbiage, each of these agreements were club-specific. None of these agreements appear to have expiration dates.

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for the dancer to perform subject to other policies within the agreement, and (4) Plaintiff was permitted to set her own hours and shifts.

Plaintiff began dancing at Centerfolds in August 2013. In late September 2014, Plaintiff contends she was "barred" from Centerfolds. After Centerfolds "barred" her, Plaintiff began dancing at Splendor in November 2014. While Plaintiff was a dancer at Splendor, she alleges that she was turned away from club staff who stated, among other claims, that "too many Black girls" were working. Although Plaintiff did not specify when she left Splendor, she pleaded that it was before she began working at Cover Girls in November 2016 and her departure was apparently triggered when Splendor "barred" her from performing after she refused to pay the club a fine.

In November of 2016, Plaintiff began dancing at Cover Girls after entering into an LAA with that club. While at Cover Girls, Plaintiff alleges that she was frequently turned away from performing when she showed up to work, similar to her experience at Splendor. In late November 2017, Plaintiff claims she arrived to dance at Cover Girls and was "barred" after being informed that there were "too many Black girls" working already.

Subsequently, Plaintiff did not dance for several years because she became pregnant. In August 2021, Plaintiff went to Splendor in hopes of "reviv[ing] her career as a dancer" but Splendor informed Plaintiff that they were not hiring.

Plaintiff filed this lawsuit on August 12, 2021, asserting various claims for unlawful and intentional racial discrimination under 42 U.S.C. § 1981 against Centerfolds, Splendor, Cover Girls, and individuals Ali Davari and Hassan Davari, who allegedly owned the clubs. After amending her complaint several times, Plaintiff's Third Amended Complaint asserted causes of action for breach of contract and discrimination under § 1981. In response to Plaintiff's Third Amended Complaint, Defendants filed their Motion to Dismiss (Doc. No. 48).

This Court granted in part and denied in part Defendants' motion (Doc. No. 51). In that Order, the Court dismissed all of Plaintiff's claims as they pertained to Centerfolds, Ali Davari, and Hassan Davari for failure to state a claim and because her § 1981 claims were barred by the applicable statute of limitations. (*Id.*). Of Plaintiff's remaining claims, the Court found that Plaintiff plausibly alleged: (1) a § 1981 claim against Cover Girls from when she was "barred" from the club in November 2017, (2) a breach of contract claim against Cover Girls from November 2017, and (3) a § 1981 failure to hire claim against Splendor from 2021. (*Id.* at 21).

Defendants now move for summary judgment on Plaintiff's three remaining claims that survived their Motion to Dismiss. (Doc. No. 61). Specifically, Defendants contend that all three of Plaintiff's claims are time barred or fail on the merits. (*Id.*). Plaintiff responded in opposition (Doc. No. 62) and Defendants replied (Doc. No. 64).

II. Legal Standards

Summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "The movant bears the burden of identifying those portions of the record it believes demonstrate the absence of a genuine issue of material fact." *Triple Tee Golf, Inc. v. Nike, Inc.*, 485 F.3d 253, 261 (5th Cir. 2007) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–25 (1986)).

Once a movant submits a properly supported motion, the burden shifts to the non-movant to show that the court should not grant the motion. *Celotex*, 477 U.S. at 321–25. The non-movant then must provide specific facts showing that there is a genuine dispute. *Id.* at 324; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). A dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The court must draw all

reasonable inferences in the light most favorable to the nonmoving party in deciding a summary judgment motion. *Id.* at 255. The key question on summary judgment is whether there is evidence raising an issue of material fact upon which a hypothetical, reasonable factfinder could find in favor of the nonmoving party. *Id.* at 248. It is the responsibility of the parties to specifically point the Court to the pertinent evidence, and its location, in the record that the party thinks are relevant. *Malacara v. Garber*, 353 F.3d 393, 405 (5th Cir. 2003). It is not the duty of the Court to search the record for evidence that might establish an issue of material fact. *Id.*

III. Analysis

A. Section 1981 Claim Against Splendor

Defendants argue that summary judgment must be granted as to Plaintiff's § 1981 failure to hire claim against Splendor because it (1) accrued outside the applicable statute of limitations and (2) Plaintiff lacks evidence showing that race was the "but for" reason she was turned away from Splendor in August 2021. (Doc. No. 61 at 3).

First, according to Defendants, Plaintiff's "failure to hire" claim against Splendor is time barred because it was miscategorized as a failure to hire claim and is actually an intentional discrimination claim. Defendants maintain that Plaintiff was never fired, barred, or terminated from the club in November 2016. When Plaintiff requested a position from Splendor in August 2021 following her pregnancy, Defendants argue that Plaintiff was still under the impression that the LAA she executed in 2014 with Splendor remained in force and she did not believe she needed to apply again or be re-hired. Thus, according to Defendants, Plaintiff's remaining claim against Splendor is not a § 1981 failure to hire claim, but rather a § 1981 unlawful discrimination claim, and time barred because it began accruing in September 2014 and the statute of limitations expired in September 2018. To support these contentions, Defendants cite to Plaintiff's deposition, where

she states that her employment at Splendor "came to an end" in September 2016 but "[Splendor] didn't really fire me. They just didn't let me in the club." (Nicholson Deposition, Doc. No. 61-1 at 22:3-13, 127:7-10). Plaintiff also testified that she knew she never got fired, so she did not think she needed "to go through the whole rehiring process again" when she went to Splendor in 2021. (*Id.* at 84:10-85:15). Now having the benefit of Plaintiff's testimony, Defendants contend that Plaintiff's § 1981 unlawful discrimination claim was mischaracterized as a "failure to hire" claim, and thus time barred.

Second, Defendants argue that even if Plaintiff's claim is timely, she lacks evidence to raise a genuine dispute of material fact that race was the but-for reason she was turned away from Splendor in 2021. To support this contention, Defendants cite to Plaintiff's deposition testimony, where she admits no one at Splendor told her they were not hiring her because of her race. (*Id.* at 83:17-19). Without more, Defendants maintain that Plaintiff's claim against Splendor fails on the merits.

In response, Plaintiff advances several arguments. (Doc. No. 62). First, Plaintiff invokes what she calls "the law of the case" doctrine, without any supporting case law or explanation as to how this theory applies to her arguments. Second, Plaintiff argues that since this Court "has already implicitly ruled that claims against Splendor from excluding Plaintiff on August 11, 2021 are not time barred, as they were not dismissed along with the other Section 1981 claims against Splendor relating to events prior to 2017 that were time-barred in the Order." (*Id.* at 3). Third, Plaintiff maintains that Splendor turning her away in 2021 qualifies as a discrete discriminatory act under the U.S. Supreme Court's holding in *Nat'l R.R. Passenger Corp. v. Morgan*, which states that each discrete act of discrimination "starts a new clock for filing charges alleging that act." 536 U.S. 101, 113 (2002); (*Id.*).

Finally, Plaintiff maintains that she has evidence to create a genuine dispute of material fact that Splendor refused to hire her because of her race. (*Id.* at 4). She states in her declaration that when she visited Splendor in August 2021, an unnamed manager informed her they were not hiring. (Nicholson Declaration, Doc. No. 60-2 at 3). After speaking with this unnamed manager, Plaintiff avers that she spoke to "Joey" (LNU) who informed her that "he would hire [her] in a heartbeat, but they're not taking any more black girls at this location, especially since COVID," and that he had "had his hiring privileges taken from him." (Nicholson Deposition, Doc. No. 61-1 at 80:12-14; 81:1-13). Plaintiff also refers to her deposition testimony, where she reiterates that Joey stated that Splendor was not hiring black girls and that he informed her that staff "above him" told him that he was not permitted to allow more black dancers on the premises. (*Id.* at 90:16-25). Plaintiff also argues that Splendor's "long-standing policy of discriminatory practices" are corroborated by the deposition testimony of Andy Skwera ("Skwera"), who allegedly worked as a "long-time manager of various Davari' brothers' adult entertainment businesses in the Houston area," including Cover Girls and Splendor. (Skwera Deposition, Doc. No. 60-5 at 5:8-14). Specifically, Plaintiff notes portions of Skwera's testimony where he discussed the "reputation" of clubs owned and operated by the Davari brothers not offering positions to Black women, other managers allegedly refusing to hire dark skinned women, and actions of others supposedly in management positions at other clubs, such as Cover Girls and Gold Cup, who upheld a "long-established racist policy" that resulted in Plaintiff's exclusion from Splendor. (*Id.* at 42:3-11; 48:18-21).

As an initial matter, in Plaintiff's Third Amended Complaint, it was far from clear what specific grounds Plaintiff was asserting her § 1981 claims against Splendor. Given these significant ambiguities in Plaintiff's pleadings and given the fact that the Court was evaluating a motion to

dismiss, this Court read, as it is require to, Plaintiff's contentions against Splendor in the light most favorable to her. It evaluated Plaintiff's claims against Splendor accordingly based on the scant facts in the pleadings. Thus, it appeared from the Third Amended Complaint that Plaintiff had pleaded three causes of action against Splendor: two § 1981 intentional discrimination claims—being "barred" at the club due to its allegedly racist policy, and intentional discrimination due to Splendor's alleged mandatory tip sharing policy; and a separate § 1981 failure to hire claim from when she was turned away from the club in 2021 after requesting a position as a dancer.

In its Order on the Motion to Dismiss, this Court dismissed the § 1981 intentional discrimination claims against Splendor because they were time barred by a four year statute of limitations. (Doc. No. 51 at 6-9). The Court found that since Plaintiff had danced at Splendor from September 2014 to November 2016, these claims expired some time between September 2018 and November 2020 (at the latest) and were long expired by the time Plaintiff filed this lawsuit in August 2021. (*Id.* at 9). Plaintiff's remaining § 1981 failure to hire claim against Splendor only survived Defendants' Motion to Dismiss because although Splendor had moved to dismiss Plaintiff's two intentional discrimination claims under § 1981, the club did not file a motion to dismiss this failure to hire claim under Rule 12(b)(6). (*Id.* at 11, n. 6). Since Splendor did not move to dismiss this failure to hire claim, the Court did not consider it in its Order on Defendants' Motion to Dismiss. It explicitly noted that its Order was based upon the fact that Splendor had failed to move on this particular cause of action. (*Id.*).

This Court now finds, as a matter of law, based on the summary judgment evidence presented (which includes Plaintiff's own testimony), that Plaintiff's remaining § 1981 claim against Splendor is time barred by the statute of limitations. Accrual of a claim under § 1981 commences when the plaintiff has actual knowledge of the violation or has knowledge of facts

that, in the exercise of due diligence, would have led to actual knowledge. *In re Monumental Life Ins. Co.*, 365 F.3d 408, 420 (5th Cir. 2004). Plaintiff's remaining claim against Splendor accrued in September 2014. Plaintiff admits in her deposition testimony that she was denied access to Splendor as early as a week after signing her LAA in September 2014—when Plaintiff would be charged with knowledge of the allegedly discriminatory act for accrual of her claim. Plaintiff also admitted in her deposition testimony she experienced discrimination that "eliminated [her] right or impaired [her] right to access to club" right after she signed her LAA with Splendor in September 2014 and that the alleged discrimination continued throughout her dance career presumably until she departed the club in November 2016.

Moreover, contrary to Plaintiff's arguments, being turned away from Splendor in August 2021 does not toll or restart the statute of limitations. The only way that Plaintiff being turned away in August 2021 would toll the statute of limitations is if the alleged discriminatory act was based upon Splendor's failure to hire Plaintiff. That was not the case here. Plaintiff herself admits this in her Response in opposition, where she states that her claims against Splendor were "more accurately characterized as being "excluded," "barred," or "refused or denied access" than as a "refusal to hire." (Doc. No. 62 at 3, n. 2). She also testified that when she revisited Splendor in August 2021, she considered her original LAA to still be in force, she was not terminated from Splendor because she voluntarily ceased performing at the club in November 2016, and thus had no expectation of entering into a new contract or being rehired in 2021. Thus, according to Plaintiff's sworn testimony, her remaining § 1981 claim accrued in September 2014 and being turned away from Splendor in August 2021 was simply an effect of the alleged initial discriminatory act, which took place in 2014.

Plaintiff's attempt to apply the so-called "law of the case" doctrine among her other initial arguments, also does not remedy her statute of limitations problem. First, Plaintiff's arguments mischaracterize this Court's findings in its Order on Defendants' Motion to Dismiss. As explained in detail, Plaintiff's remaining claim against Splendor only survived Defendants' Motion to Dismiss because Defendants failed to move on that particular claim. (Doc. No. 51 at 11, n. 6). The Court, by dismissing Plaintiff's § 1981 intentional discrimination claims against Splendor in that Order, but not her remaining claim, did not implicitly or explicitly rule that the claim was not time barred, as Plaintiff suggests. The Court did not even address the merits on that particular claim because Defendants did not move on it. (*Id.*).

Plaintiff also argues that her claim against Splendor is not time barred under because being turned away in 2021 tolls the statute of limitations constitutes a "discrete and egregious discriminatory act" under the continuing violations doctrine, which would start a new limitations clock for filing charges alleging that act. (Doc. No. 62 at 3); *Nat'l R. R. Passenger Corp.*, 536 U.S. at 11. Plaintiff, however, is recycling arguments that this Court already found inapplicable in its Order on the Motion to Dismiss. As discussed in that Order, the continuing violations doctrine "has since been limited by the United States Supreme Court to apply only to § 1981 claims alleging a hostile work environment." (Doc. No. 51 at 14). Since Plaintiff has not pleaded a cause of action alleging a hostile work environment, this doctrine does not apply to Plaintiff's remaining claim against Splendor. Moreover, given that Plaintiff avers that she was never terminated from Splendor and the original LAA remained in force when she revisited the club in 2021, being turned away in 2021 was no different than the first time she was denied access in September 2014—when Plaintiff could be charged with knowledge of the allegedly discriminatory act. Thus, her § 1981 claim against Splendor accrued in approximately September 2014 and is time barred.

Accordingly, this Court finds that Plaintiff's remaining claim against Splendor arising from visiting the club in 2021 is not a failure to hire claim under § 1981, but rather an extension of her § 1981 intentional discrimination claims. Given that this claim began accruing in September 2014 and has a four year statute of limitations and Plaintiff filed this lawsuit in August 2021, it is time barred.[2] Accordingly, Defendants' Motion for Summary Judgment as to Plaintiff's claim against Splendor is hereby granted.

B. Cover Girls Breach of Contract Claim

Defendants argue that Plaintiff's breach of contract claim against Cover Girls is time barred by the four year statute of limitations under Texas law. (Doc. No. 61 at 11). Under Texas law, the cause of action in a breach of contract accrues when the contract is breached or when the breaching party has notice of facts sufficient to place them on notice of the breach. *Taub v. Houston Pipeline Co.*, 75 S.W.3d 606, 618 (Tex. App.—Texarkana 2002, pet. denied).

In Plaintiff's Third Amended Complaint, she pleaded that Cover Girls' alleged breach of contract occurred in November 2017 when she was "barred" from the club. (Doc. No. 47 at 8-9). Viewing Plaintiff's pleadings in a light most favorable to her, this Court found in the motion to dismiss context that because the alleged breach occurred in late November 2017, it survived the four year statute of limitations under Texas law because Plaintiff's lawsuit was filed on August 12, 2021. (Doc. No. 51 at 17-20). In her Third Amended Complaint, Plaintiff did not allege or even mention that she had been "barred" at Cover Girls prior to November 2017.

[2] This Court does not need to address Plaintiff's § 1981 claim against Splendor substantively on the merits because it is time barred. Nevertheless, without addressing the various hearsay and evidentiary issues Plaintiff's alleged evidence implicates, and even if Plaintiff's claims are not time barred or being turned away in August 2021 qualifies as a distinct adverse employment action, she fails to raise an issue of material fact that her race was the but-for cause of Splendor's alleged refusal to grant her a position as a dancer.

Defendants advance two arguments. First, that the alleged breach—Plaintiff being "barred" from the club—accrued in November 2016 immediately after Plaintiff executed her LAA with Cover Girls; and second, that Plaintiff's claim fails on the merits because she testified that she was not "barred" from Cover Girls, but rather "denied access" only, no breach took place.

Under Defendants' first argument, they argue that if the alleged breach commenced in November 2016, rather than November 2017 as Plaintiff previously alleged, then Plaintiff's breach of contract claims are barred by the four year statute of limitations since this lawsuit was filed in August 2021. To support this contention, Defendants demonstrate that Plaintiff testified that she was "denied access" on account of her race almost immediately after executing her LAA with Cover Girls in November 2016. (Doc. No. 6 at 11). Plaintiff testified that as early as the first week after signing her LAA at Cover Girls, she lost access to the club and was told she could not dance at the club because of her race. (Nicholson Deposition, Doc. No. 61-1 at 55:21-56:12). Plaintiff also testified that she would appear at Cover Girls an average of six times per week to work a shift, but was only allowed to enter the premises to work about 50 percent of the time. (*Id.* at 50:6-51:23). Defendants also refer to Plaintiff's cross Motion for Summary Judgment for support, where she states that "[t]here were numerous prior breaches of the Cover Girls Agreement, starting from the day it was entered, which are relevant to support the existence of the breach and the illegal discrimination by denial of access to [Plaintiff] in late November 2017." (Doc. No. 60 at 4). According to Defendants, since the alleged breach took place in November 2016, Plaintiff's denial of access to Cover Girls in November 2017 was "simply the effect of the same discriminatory act that Cover Girls had allegedly implemented and made known to her as early as November 2016—that her access to the club would be limited based on the number of Black entertainers already

present." (Doc. No. 61 at 12). Thus, Defendants argue Plaintiff's breach of contract claim is time barred.

Defendants' second argument maintains that because Plaintiff testified that she was only "denied access" from Cover Girls, rather than "barred," Plaintiff's breach of contract claim fails on the merits. According to Defendants, new theories of contractual liability not already present in the pleadings cannot be considered by this Court. Defendants argue that Plaintiff's breach of contract claim against Cover Girls only survived the Motion to Dismiss on the premise that she was "barred" from Cover Girls. Since Plaintiff testified she was not "barred" but rather "denied access" to Cover Girls, Defendants argue that Plaintiff is bringing a new theory of contractual liability and that she was thus never "barred" from the club in a way that would result in a breach of contract. (Doc. No. 61 at 11). To support this contention, Defendants cite to Plaintiff's deposition testimony, where, when asked if she was "barred from working at Cover Girls" in November 2017, responded, "I wouldn't necessarily say barred. I would say I was denied access to the club." When asked to clarify what she meant by "denied access," she stated that it meant "[she] wasn't allowed to go to work even though [she] worked there, even though [her] contract said I can go to work." (Doc. No. 61-1 at 43:12-44:3). According to Defendants, being "denied access" is a distinct theory of contractual liability from being "barred," so Plaintiff's breach of contract claim thus fails on the merits.

In response, Plaintiff counters that she has not advanced a new theory of contractual liability and that Defendants' arguments are focused on form over substance. Specifically, Plaintiff contends that Defendants are erroneously arguing that because Plaintiff testified she was "denied access" to Cover Girls rather than "barred" from the club as pleaded in her Third Amended Complaint, that Plaintiff has taken a new position not within the scope of her pleadings. Plaintiff

argues that being "barred" and being "denied access" are the same.[3] Accordingly, Plaintiff's deposition testimony that she was "denied access" maintains that Defendants breached the portion of her LAA which states, "The Dancer shall also determine her schedule in performing the services, including but not limited to, her ability to arrive and leave the premises at any time without penalty" (Cover Girls LAA, Doc. No. 60-4 at 7).

Based on the evidence, the Court finds that Plaintiff's breach of contract claim against Cover Girls is time barred because it accrued in approximately November 2016. Based upon her own deposition testimony, Plaintiff admits that as early as a week after signing her LAA with Cover Girls in November 2016, she was denied access to the club when she showed up for shifts on the basis of race. Since a breach of contract claim accrues when the contract is breached, Plaintiff's testimony demonstrates that the alleged breach took place in approximately November 2016, rather than November 2017, as Plaintiff previously alleged in her Third Amended Complaint. Therefore, the statute of limitations expired in approximately November 2020 months before Plaintiff filed this dispute in August 2021. Given that the claim is time barred, the Court does not find a need to substantively address the merits of Plaintiff's breach of contract claim. Accordingly, Defendants' Motion for Summary Judgment as to Plaintiff's breach of contract claim against Cover Girls is hereby granted.

C. Cover Girls § 1981 Claim

Defendants argue that Plaintiff's § 1981 intentional discrimination claim against Cover Girls when she was "barred" from the club accrued in November 2016, rather than November

[3] Although this Court will not address Plaintiff's breach of contract claim against Cover Girls substantively on the merits because it is time barred, it generally agrees that "denied access to" versus "barred" in describing not being allowed to dance at Cover Girls in November 2017 is a distinction without a difference. Regardless, it is a topic about which Plaintiff cannot complain, as it was Plaintiff, herself, in her deposition testimony, that attempted to draw this distinction.

2017, and should be dismissed as a matter of law it is time barred. The parties draw from the same sources of evidence as Plaintiff's breach of contract claim.

This Court finds that Plaintiff's § 1981 intentional discrimination claim is time barred. This claim originally survived Defendants' Motion to Dismiss because Plaintiff pleaded an approximate date she was "barred" from Cover Girls—November 2017, as pleaded in her Third Amended Complaint—and satisfied § 1981's but-for requirement by plausibly alleging that she was "barred" because of her race. (Doc. No. 51 at 15). Following discovery, however, Plaintiff admitted in her deposition testimony that she was "barred" or "denied access" to Cover Girls as early as the week following her signing her LAA with the club in November 2016. Since the limitations period for a § 1981 claim commences when the plaintiff knows or reasonably should know that the discriminatory act occurred—and this act occurred in approximately November 2016—Plaintiff's claim expired in November 2020. Accordingly, Defendants' Motion for Summary Judgment a to Plaintiff's § 1981 intentional discrimination claim against Cover Girls is hereby granted.

IV. Conclusion

For the foregoing reasons, this Court hereby **GRANTS** Defendants' Motion for Summary Judgment (Doc. No. 61).

Signed at Houston, Texas, this 24th day of May, 2023.

Andrew S. Hanen
United States District Judge

APPENDIX D

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

CHANEL E.M. NICHOLSON, *Plaintiff,* v. A.H.D. HOUSTON, INC. d/b/a CENTERFOLDS, *et al.*, *Defendants.*	§ § § § § § § § § §	CIVIL ACTION NO. 4:21-cv-02624

ORDER

Pending before the Court is the Fourth Motion to Dismiss (Doc. No. 48) filed by Defendants A.H.D. Houston, Inc., d/b/a Centerfolds ("Centerfolds"), W.L. York, Inc., d/b/a Cover Girls ("Cover Girls"), D WG FM, Inc. d/b/a Splendor ("Splendor"), Ali Davari, and Hassan Davari ("Individual Defendants") against Plaintiff Chanel Nicholson's Third Amended Complaint.[1] (Doc. No. 47). Plaintiff filed a response in opposition (Doc. No. 49) and Defendants replied. (Doc. No. 50). Having considered Plaintiff's Third Amended Complaint, the parties' briefs, and the applicable law, the Court hereby **GRANTS** in part and **DENIES** in part Defendants' Fourth Motion to Dismiss.

I. Factual Background

According to the Third Amended Complaint, Plaintiff is African American and was a dancer who performed at adult entertainment clubs Centerfolds, Splendor, and Cover Girls for varying periods of time between September 2013 and November 2017. (Doc. No. 47 at 3). These

[1] Plaintiff has filed an initial Complaint, Amended Complaint, Second Amended Complaint, and Third Amended Complaint. (Doc. Nos. 1, 9, 15, 47). In response, Defendants filed an initial Motion to Dismiss, a First Motion to Dismiss, Second Motion to Dismiss, and Third Motion to Dismiss. Thus, the *Fourth* Motion to Dismiss attacks the *Third* Amended Complaint.

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clubs are separate corporate entities and each is named as a Defendant. (*Id.* at 4). Individual Defendants Ali Davari and Hassan Davari currently serve as president and vice president, respectively, of all three clubs. (*Id.*).

Plaintiff became a dancer at Centerfolds in August 2013 after signing an agreement with the club. (Doc. No. 47-1). This agreement was entitled "Licensing and Access Agreement." (Doc. Nos. 47-1, 47-2, 47-3). The agreements established that Plaintiff was an independent contractor and that either side could terminate the relationship at will. (*Id.*). Under the terms of this agreement, and agreements subsequently signed with Splendor and Cover Girls, Plaintiff was permitted to set her own hours and shifts. (Doc. Nos. 47-1, 47-2, 47-3). Plaintiff alleges that at Centerfolds, she was regularly turned away by the club's door staff when she showed up to dance because "too many Black dancers were already working" and "management did not like more than a small number of Black dancers on the premises at the same time." (Doc. No. 47 at 6). In addition to being turned away when she was ready to work, Plaintiff alleges that managers at Centerfolds would regularly fine her and other dancers for breaking "unwritten" rules. She contends African American dancers regularly received larger fines than white dancers. (*Id.*) In late September 2014, Plaintiff claims she was "barred" from Centerfolds. (*Id.* at 6-7).

After Centerfolds "barred" her, Plaintiff became a dancer at Splendor, where she signed an agreement similar to the one she signed at Centerfolds. (Doc. No. 47-2). Like her experience at Centerfolds, Plaintiff alleges she was often turned away by club staff who claimed "too many Black girls" were working. (Doc. No. 47 at 7). Plaintiff also claims that managers at Splendor would similarly fine her and other Black dancers and penalize them for paying insufficient "tips" to the staff. (*Id.*). Plaintiff does not specify in her Third Amended Complaint a date when she left Splendor, but it was before she began work at Cover Girls and was apparently triggered when the

club "barred" her after she refused to pay a fine in exchange for access to the premises. (*Id.* at 7-8).

Around November 2016, Plaintiff began dancing at Cover Girls and entered into an agreement with the club. (Doc. No. 47-3). While at Cover Girls, Plaintiff alleges she was required to pay a fee every time she performed and was forced to tip managers and other employees for access to the premises and to play her desired music. (Doc. No. 47 at 8). In late November 2017, Plaintiff claims she arrived to dance at Cover Girls and was "barred" after being informed again that there were "too many Black girls" working already. She also alleges this had happened previously.

Subsequently, she did not dance for an extended time period because she became pregnant. (*Id.* at 9). In June 2021, Plaintiff went back to Centerfolds in hopes of "reviv[ing] her career as a dancer" and requested a position. (*Id.*). Centerfolds informed Plaintiff that they were not hiring. (*Id.*). After being rejected, Plaintiff saw several white dancers enter the club to change and begin their shifts. (*Id.*). Similarly, on August 11, 2021, Plaintiff went to Splendor, requested a position and was told they were not hiring. (*Id.*). While at Splendor, Plaintiff again saw white dancers enter the club to begin their shifts. (*Id.*).

II. Procedural History

On August 12, 2021, Plaintiff filed this action, which initially appeared to only assert various claims for unlawful and intentional discrimination under 42 U.S.C. § 1981. This Court then provided leave for Plaintiff to amend her initial pleadings, and Plaintiff filed an Amended Complaint on September 20, 2021 (Doc. No. 9) and a Second Amended Complaint on October 5, 2021 (Doc. No. 15). Prior to filing her Third Amended Complaint on June 24, 2022, Defendants filed three separate 12(b)(6) motions to dismiss. (Doc. Nos. 6, 14, 20). These are denied as moot.

Despite multiple prior attempts, Plaintiff's Third Amended Complaint (Doc. No. 47) still has significant omissions and ambiguities regarding the precise causes of action Plaintiff is trying to plead.[2] Plaintiff's Third Amended Complaint now appears to assert two causes of action: (1) breach of contract and (2) unlawful and intentional discrimination under 42 U.S.C. § 1981.[3] In addition, Plaintiff is also requesting declaratory relief from this Court by deeming certain provisions of the agreements she entered into with Centerfolds, Splendor, and Cover Girls unconscionable and unenforceable.[4] In response to Plaintiff's Third Amended Complaint, Defendants collectively filed a motion to dismiss based on lack of subject matter jurisdiction under 12(b)(1) and failure to state a claim under 12(b)(6). (Doc. No. 48). Plaintiff responded (Doc. No. 49) and Defendant replied (Doc. No. 50).

III. Legal Standard: 12(b)(6) Motions

A defendant may file a motion to dismiss a complaint for "failure to state a claim upon which relief may be granted." Fed. R. Civ. P. 12(b)(6). To defeat a motion to dismiss under Rule 12(b)(6), a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (citing

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[2] To the extent Plaintiff intended to plead a cause of action not addressed by this Order, the Court dismisses those claims for failure to state enough facts to state a claim to relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

[3] Although the Third Amended Complaint repeatedly fails to specifically and clearly address what grounds most of Plaintiff's § 1981 claims are proceeding under (i.e. failure to hire, wrongful termination, etc.) and is often ambiguous or appears to plead as one vast, general § 1981 claim, this Court has chosen to read the complaint in the light most favorable to the Plaintiff and addresses the claims separately where the facts would suggest a claim is applicable.

[4] The Court acknowledges that Defendants moved to dismiss under 12(b)(1) concerning Plaintiff's request for declaratory relief. The Court, however, will not be addressing this part of Plaintiff's Third Amended Complaint in this Order because the contractual provisions Plaintiff is contesting are irrelevant to this dispute since enforcement of the arbitration clause was waived by the parties in open court. The only other provisions raised in the declaratory judgment section of the Third Amended Complaint are the indemnity provisions that are clearly inapplicable here. *Baugh v. A.H.D. Houston, Inc.*, 2020 WL 2771251 (S.D. Tex. 2020).

Twombly, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557).

In reviewing a Rule 12(b)(6) motion, the court must accept all well-pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. *Sonnier v. State Farm Mut. Auto. Ins. Co.*, 509 F.3d 673, 675 (5th Cir. 2007). The Court is not bound to accept factual assumptions or legal conclusions as true, and only a complaint that states a plausible claim for relief survives a motion to dismiss. *Iqbal*, 556 U.S. at 678–79. When there are well-pleaded factual allegations, the court assumes their veracity and then determines whether they plausibly give rise to an entitlement to relief. *Id.*

To determine whether to grant a Rule 12(b)(6) motion, a court may look only to allegations in a complaint to determine their sufficiency. *Santerre v. Agip Petroleum Co., Inc.*, 45 F.Supp.2d 558, 568 (S.D. Tex. 1999); *Atwater Partners of Texas LLC v. AT & T, Inc.*, 2011 WL 1004880 (E.D. Tex. 2011). A court may, however, also consider matters outside the four corners of a complaint if they are incorporated by reference, items subject to judicial notice, matters of public record, orders, items appearing in the record of a case, and exhibits attached to a complaint whose authenticity is unquestioned. *See Chawla v. Shell Oil Co.*, 75 F.Supp.2d 626, 633 (S.D. Tex. 1999); *Brock v. Baskin-Robbins USA Co.*, 113 F.Supp.2d 1078, 1092 (E.D. Tex. 2000) (at motion to dismiss for failure to state a claim, a court may consider an indisputably authentic document that is attached as an exhibit, if plaintiff's claims are based on the document).

IV. Analysis - § 1981 Claims

A. Section 1981 Claims Against Centerfolds and Splendor Prior to 2021

Defendants first contend that this Court should dismiss Plaintiff's intentional discrimination claims against Centerfolds and Splendor because they are time barred by the applicable statute of limitations. Under Rule 12(b)(6), a statute of limitations defense supports dismissal if "it is evident from the plaintiff's pleadings that the action is barred." *Jones v. Alcoa, Inc.*, 339 F.3d 359, 366 (5th Cir. 2003).

42 U.S.C. § 1981 specifically applies to and prohibits intentional racial discrimination in the making and enforcing of contracts. 42 U.S.C. § 1981(a). As enacted, § 1981 does not have an explicit statute of limitations. *See* 42 U.S.C. § 1981. Initially, § 1981 claims only applied to causes of action arising out of the formation of a contract. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1976) (overruled by Civil Rights Act of 1991 and *Jones v. R.R. Donnelley & Sons Co.*). The enactment of the Civil Rights Act of 1991, however, expanded the scope of § 1981 claims to also include "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b).

Following the enactment of the Civil Rights Act of 1991, the United States Supreme Court in *Jones v. R.R. Donnelley & Sons Co.* held that a general four-year statute of limitations applies in § 1981 claims "if the plaintiff's claim against the defendant was made possible" by the 1991 statutory changes or a later statute. *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382 (2004). Based on the 1991 statutory changes and the Supreme Court's holding in *Jones*, causes of action involving intentional discrimination after contract formation are subject to a four-year statute of limitations. *Id.* at 383.

If a § 1981 cause of action was already available to plaintiffs prior to the enactment of the Civil Rights Act of 1991, courts apply the most analogous state statute of limitations. *Id.* Failure to hire claims, for example, were available to plaintiffs prior to the 1991 statutory amendments because the cause of action arises before a contract is formed between the parties.[5] Thus, the analogous state law applies. Under Texas law, the Texas Commission on Human Rights Act ("TCHRA") is the most analogous, since it was enacted to serve as a framework for employment discrimination claims and a complement to federal anti-discrimination statutes designed to protect employees. Tex. Lab. Code Ann. § 21.001(4); *see Gorman v. Verizon Wireless Texas, L.L.C.*, 753 F.3d 165 (5th Cir. 2014) (applying Texas law and holding that substantive law governing Title VII and related claims and the TCHRA are identical). Although the TCHRA does not specifically enumerate a cause of action based on a failure to hire, these claims are most analogous to general employment discrimination causes of action brought under the TCHRA—which are subject to a two-year statute of limitations. V.T.C.A., Lab. Code § 21.256; *see generally Welsh v. Fort Bend Independent School District*, 860 F.3d 762, 764 (5th Cir. 2017) (affirming the lower court's dismissal of a TCHRA lawsuit filed past the two-year statute of limitations); *see generally In re United Services Auto. Ass'n*, 307 S.W.3d 299, 310 (Tex. 2010).

Furthermore, although the analogous state law largely supplies the applicable statute of limitations period in § 1981 claims, federal law determines when the cause of action period accrues. *Perez v. Laredo Junior Coll.*, 706 F.2d. 731, 733 (5th Cir. 1983). Accrual of a claim under § 1981 commences when the plaintiff first has actual knowledge of the violation or has knowledge of facts that, in the exercise of due diligence, would have led to actual knowledge. *In re Monumental Life Ins. Co.*, 365 F.3d 408, 420 (5th Cir. 2004). Determining the accrual date thus

[5] Failure to promote is also included in this list as being subject to a two-year statute of limitations but is omitted from this analysis because it is not applicable to the facts in this case based on Plaintiff's Third Amended Complaint.

requires this Court to "identify precisely the 'unlawful employment practice' of which the plaintiff complains." *Delaware State College v. Ricks*, 449 U.S. 250, 257 (1980). After identifying the relevant discriminatory act, the court must identify the point when plaintiff can be charged with knowledge of the act. *Ramirez v. City of San Antonio*, 312 F.3d 178, 182 (5th Cir. 2002) ("An employee's claim accrues at the moment the employee believes (or has reason to believe) that he is a victim of discrimination").

Plaintiff argues at length in her response to the Fourth Motion to Dismiss that her § 1981 claims against Centerfolds and Splendor are not time barred. In particular, Plaintiff repeatedly claims that she was not actually "terminated" by either club in 2014 and 2016 and contends that there is a distinction between being "barred" and being "terminated." Plaintiff further argues that because she experienced "continuous extortion for her continued access" to Centerfolds and Splendor, the accrual of the relevant statute of limitations should reset and start over each time a new violation takes place. Under this framework, Plaintiff is asking the Court to consider the accrual date of her claims against Centerfolds and Splendor to begin in June and August of 2021, rather than September 2014 and November 2016, respectively, when she was initially "barred."

Plaintiff's interpretations of these facts were made in her response to the Fourth Motion to Dismiss. (Doc. No. 49). No mention of the proposed distinction between being "barred" and "terminated" or her experience of "continuous extortion" was included in her Third Amended Complaint. Since these factual arguments were made in the response to the Fourth Motion to Dismiss instead of within Plaintiff's Third Amended Complaint, this Court, while able to evaluate these contentions as arguments, is unable to consider them as pleaded facts. *See Santerre v. Agip Petroleum Co., Inc.*, 45 F.Supp.2d 558, 568 (S.D. Tex. 1999); *Atwater Partners of Texas LLC v. AT & T, Inc.*, 2011 WL 1004880 (E.D. Tex. 2011). As such, this Court is limited to construing and

analyzing only the facts pled in the Third Amended Complaint using the Rule 12 presumption of truth accorded to Plaintiff. *Id.*

Although it is far from clear from the Third Amended Complaint what specific grounds Plaintiff is asserting her § 1981 claims against Centerfolds and Splendor under, the facts suggest that Plaintiff has lodged at least two claims subject to the four-year statute of limitations: (1) being "barred" at the clubs due to "Defendants' racist policy," and (2) intentional discrimination due to the clubs' alleged mandatory tip sharing policy.

Here, the statute of limitations bars all of Plaintiff's § 1981 claims against Centerfolds and Splendor prior to August 2017. Plaintiff danced at Centerfolds from approximately August 2013 to September 2014 and at Splendor from September 2014 to November 2016. Regardless, her claims against Centerfolds and Splendor expired sometime in the period between September 2018 and November 2020 (at the latest) and were long expired by the time Plaintiff filed this action in August 2021.

B. Section 1981 Failure to Hire Claim Against Centerfolds in 2021

Plaintiff alleges that in June 2021, Centerfolds unlawfully turned her away when she was seeking a dancer position. The same ambiguities concerning the manner in which these causes of action were pleaded applies here as well. Nevertheless, the Court, reading the Third Amended Complaint in the light most favorable to the Plaintiff, interprets her complaint to allege a failure to hire claim under § 1981. Defendants argue that this claim is barred both by the applicable statute of limitations under § 1981 and by her failure to state a claim under 12(b)(6).

To adequately assert a violation of § 1981, a plaintiff must first show that: (1) she is a member of a racial minority, (2) there was an intent to discriminate on the basis of race by the defendant, and (3) the discrimination concerned one or more of the activities enumerated in the

statute. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 347 (2013); *Green v. State Bar of Texas*, 27 F.3d 1083, 1086 (5th Cir. 1994). Furthermore, the plaintiff must plead and prove that race was the but-for cause of the discrimination and loss of plaintiff's legally protected right. *Comcast Corporation v. Nat'l Ass'n. of African American-Owned Media*, 140 S.Ct. 1009, 1019 (2020). Under the TCHRA—the analogous Texas state law governing the statute of limitations for a failure to hire claim—discrimination-based failure to hire claims are subject to a two-year statute of limitations. *In re United Services Auto. Ass'n*, 307 S.W.3d 299 at 310; *see also Welsh*, 860 F.3d at 763.

Although Plaintiff's cause of action may not be time barred, the Court finds that, after multiple complaints, she still fails to plausibly state a claim under Rule 12(b)(6). Plaintiff asserts that Centerfolds failed to hire her on June 24, 2021. Plaintiff is African American and thus a member of a racial minority and appears to be arguing that racial discrimination prohibited by § 1981 took place. Plaintiff fails, however, to plausibly plead that race was the but-for cause of Centerfolds' failure to hire. According to the Third Amended Complaint, Plaintiff entered Centerfolds, requested a position as a dancer, and was told they were not hiring. (Doc. No. 47 at 9). After she was rejected, Plaintiff claims she saw several white dancers enter the premises in their street clothes, change, and then start their shifts. (*Id.*). Plaintiff also asks the Court to consider the declaration of Andrew Skwera ("Skwera"), who worked as a manager at Cover Girls from 2015 to 2020 and several other clubs owned by Individual Defendants for approximately 20 years. (Doc. No. 47-4).

Even if the alleged facts are presumed true and viewed in the light most favorable to Plaintiff, the Plaintiff has not pled sufficient facts to support that race was the but-for cause of Centerfolds' failure to hire her. Being told by Centerfolds that they were not hiring, after all, does

not automatically lead one to plausibly infer that the failure to hire was motivated by intentional discrimination. Seeing white dancers enter the premises to begin their shifts also does not point to a plausible inference that Defendants chose to hire these individuals instead of Plaintiff. Instead, the facts might equally suggest that these dancers may already have been hired at the club, since they entered the premises, changed their clothes, and began their shifts—and simply put, that Defendants were not hiring at the time. Skwera's declaration does not remedy the insufficiency of Plaintiff's pleadings. Skwera was never a manager at Centerfolds, the club at issue in this specific claim. In addition, Skwera stopped working for any clubs owned by Individual Defendants by 2020, and Plaintiff's rejection took place in 2021.

None of the allegations Plaintiff has pleaded (even when considering the Skwera affidavit) suggest to this Court that Plaintiff has carried her burden of plausibly pleading that her race was the but-for reason Centerfolds failed to hire her. Thus, this Court finds that Defendant's motion to dismiss Plaintiff's 2021 § 1981 failure to hire claim against Centerfolds should be granted.[6]

C. Section 1981 Claims Against Cover Girls

Defendants also argue that Plaintiff's claims against Cover Girls are barred both by the applicable statute of limitations under § 1981 and Plaintiff's failure to state a claim under Rule 12(b)(6). Specifically, Defendants argue that Plaintiff has failed to "plead plausible facts demonstrating that her § 1981 claim against Cover Girls first accrued within the four-year limitations period, on or after August 12, 2017." (Doc. No. 48 at 14).

[6] Although Plaintiff's 2021 failure to hire claim against Splendor pleads nearly identical facts from as those she pleaded against Centerfolds on June 24th, Defendant Splendor did not file a motion to dismiss claim under 12(b)(6). (Doc. No. 48 at 16). In fact, Defendants only argue in their Fourth Motion to Dismiss that claims against Splendor are time barred (*Id.* at 11) and that Plaintiff has failed to state a § 1981 claim against Centerfolds and Individual Defendants. (*Id.* at 16). Since Defendants have not included Splendor in moving to dismiss the failure to hire claims from 2021, the claim survives the Fourth Motion to Dismiss.

Although it is, again, far from clear precisely what grounds Plaintiff is relying on in her Third Amended Complaint, viewing the pleaded facts in the most favorable light, Plaintiff's § 1981 claims against Cover Girls include: (1) intentional discrimination because of the mandatory tip sharing regime and Plaintiff's inability to play music, and (2) being "barred" from Cover Girls in November of 2017 because too many Black dancers were already working. (Doc. No. 47 at 8). Both § 1981 claims are subject to a four-year statute of limitations.

1. Mandatory Tip Sharing & Music Claims

According to the Third Amended Complaint, Plaintiff worked six shifts per week from November 2016 until "late" November 2017. (Doc. No. 47 at 8). In their Fourth Motion to Dismiss, Defendants note that Plaintiff failed to provide any facts "that would lead one to believe that the very first time Plaintiff faced a discriminatory act of exclusion at Cover Girls (and that her claim accrued) [was] at some point between August 12, 2017 and November 30, 2017." (Doc. No. 48 at 15). In Plaintiff's response, she argues that Defendants' statement only proves that "it is possible that the very first time Plaintiff faced a discriminatory act of exclusion at Cover Girls...was at some point between August 12, 2017 and November 30, 2017." (Doc. No. 49 at 9).

This Court finds Plaintiff's argument lacking substance. First, this response ignores the fact that Plaintiff pleaded that she was discriminated against "every time she came to work" and she started work at Cover Girls in November 2016. Thus, even if the facts pled within the Third Amended Complaint are read in a light most favorable to Plaintiff and presumed true, Plaintiff has still failed to plead enough facts to *plausibly* suggest that the first instance of discriminatory conduct occurred after August 12, 2017, and thus fall within the statute of limitations. Moreover, the very fact that Plaintiff responds to Defendants' statement by nakedly claiming "it is possible" that the first time Plaintiff experienced a discriminatory act of exclusion was after August 2017

only emphasizes this point. Under Rule 12(b)(6), "the plausibility standard is not akin to a 'probability requirement,'" and requires this Court to draw a reasonable inference between what Plaintiff has pled in her complaint and Defendants' alleged misconduct. *Ashcroft*, 556 U.S. at 663 (citing *Twombly*, 550 U.S. at 556). On its face, and without more, Plaintiff's Third Amended Complaint does not suggest that the first instance of discrimination Plaintiff experienced was after August 12, 2017.

Plaintiff further argues that her claim is within the statute of limitations because accrual should begin in late November 2017, when she was allegedly "barred" from Cover Girls. As discussed previously, accrual of the applicable limitations period requires a court to take two steps: (1) identify the specific unlawful employment practice alleged, and (2) determine the moment when a plaintiff can be charged with knowledge of the act. *Delaware State College v. Ricks*, 449 U.S. 250, 257; *Ramirez v. City of San Antonio*, 312 F.3d 178, 182 (5th Cir. 2002). Knowledge commences when the plaintiff has actual knowledge of the act, or has knowledge of facts that, with due diligence, would have led to actual knowledge. *In re Monumental Life Ins. Co.*, 365 F.3d at 420. Furthermore, the accrual date should begin from the time of the discriminatory act, "not upon the time at which the consequences of the act become most painful." *Ricks*, 449 U.S. at 258.

Here, Plaintiff has done nothing more than claim that she experienced discriminatory actions—the alleged mandatory tip sharing arrangement or the refusal to play her chosen music—at some point between when she started dancing at Cover Girls in November 2016 and when she was "barred" in November 2017. Given that Plaintiff states in the Third Amended Complaint that during this time period she worked "six shifts per week with each shift being about six to eleven hours" and was "required to pay a fee to Cover Girls varying from $20 to $80...every time she came to work," (Doc. No. 47 at 8) the first instances of discriminatory conduct giving rise to

accrual of the limitations period could have occurred as early as November 2016. If Plaintiff's allegations are presumed true, she potentially would have been on notice of the discriminatory act as early as her first shift, since she states she was forced to pay a fee "every time she came to work." (*Id.*). Thus, the disparity in treatment was evident from the first time she came to work in 2016.

Finally, Plaintiff argues that the expiration of the statute of limitations can be averted by applying the continuing violations doctrine. Under the continuing violations doctrine, a plaintiff is relieved from establishing that the discriminatory conduct she experienced occurred within a specified time period if she can show a series of related acts, one or more of which falls within the limitations period. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113, 122 (2004). This doctrine, however, has since been limited by the United States Supreme Court to apply only to § 1981 claims alleging a hostile work environment. *Id.*; *see also Heath v. Board of Supervisors for the Southern University and Agricultural and Mechanical College*, 850 F.3d 731, 737 (5th Cir. 2017) (holding that claims alleging discrete acts of discrimination are not subject to the continuing violation doctrine, but hostile workplace claims are). Since Plaintiff has failed to meet the threshold requirement of the continuing violations doctrine—to simply plead a cause of action alleging a hostile work environment—this Court cannot consider whether the doctrine applies to Plaintiff's claims.

This Court finds that Plaintiff has failed to plead sufficiently plausible facts to support that her claim accrued within the statute of limitations. The Court thus concludes that Plaintiff's § 1981 claims against Cover Girls alleging intentional discrimination from being repeatedly fined and unable to play the music of her choice are time barred and should be dismissed.

2. Being "Barred" Because of Race

Plaintiff claims that in late November 2017, she arrived at Cover Girls wanting to dance but was told by the manager that she could not perform because there were already "too many Black girls" and was subsequently barred from the club. (Doc. No. 47 at 8). Plaintiff also alleges that white dancers remained at the club following Plaintiff's departure that night and were free to continue working their shifts. (*Id.* at 9).

If Plaintiff's facts are presumed true and viewed in the light most favorable to her, Plaintiff has plausibly alleged sufficient facts to establish that race was a but-for cause of her being "barred" from Cover Girls. This allegation differs from Plaintiff's previous § 1981 allegations in several ways. First, although Plaintiff only provides an approximate date that she was "barred" from Cover Girls, it is within the four-year statute of limitations. Second, Plaintiff satisfied § 1981's but-for requirement by alleging that she was told directly that but-for the presence of "too many Black girls" working that evening already, Plaintiff would have been allowed to perform at Centerfolds. Third, based on the additional facts Plaintiff provides about white dancers remaining at the club and being allowed to work their shifts—presumably because they were not subject to the same allegedly discriminatory actions as Plaintiff—this Court finds that Plaintiff has carried her burden under 12(b)(6). These allegations are sufficient to allow one to draw a reasonable inference that race was, as Plaintiff described, a but-for cause as to why she was "barred" from the Cover Girls.

Since Plaintiff has pled sufficient facts to satisfy the required elements of her § 1981 claim against Cover Girls from late November 2017, Plaintiff's claim survives Defendants' Fourth Motion to Dismiss.

D. Section 1981 Claims Against Individual Defendants

Plaintiff also brings § 1981 claims against Individual Defendants as the "sole named officers and directors" of Centerfolds, Splendor, and Cover Girls. (Doc. No. 47 at 4). In her Third Amended Complaint, Plaintiff argues that Individual Defendants would "sometimes visit the Defendant Clubs," so they observed the exclusion of Black dancers and enforced the alleged discriminatory policies taking place. (*Id.*). Plaintiff further alleges that Individual Defendants are "at least guiding spirits" behind the enforcement of the alleged discriminatory policies and therefore personally liable. (*Id.*). Defendants argue that Plaintiff has failed to state a claim because she does not allege that either of the Individual Defendants directly employed, contracted with, or ordered any of the alleged discrimination that she experienced. (Doc. No. 48 at 17).

The law on individual liability in § 1981 claims is unsettled in the Fifth Circuit. *See Felton v. Polles,* 315 F.3d 470 (5th Cir. 2002) (holding that "individual liability under Section 1981...is not as established under Fifth Circuit jurisprudence"). The Fifth Circuit has held, however, that § 1981 liability is possible against an individual defendant if that individual is "essentially the same" as the State for the purposes of the complained-of conduct." *Felton v. Polles*, 315 F.3d 470, 481 (5th Cir. 2002) (quoting *Bellows v. Amoco Oil Co.*, 118 F.3d 268, 274 (5th Cir. 1997)). There appears to be no Fifth Circuit case that recognizes § 1981 claims to "third parties who are not in some form of employment relationship with the plaintiff as employer, coworker, or supervisor." *McIntyre v. Roly's Trucking, Inc.*, No. 4:14-CV-193-A, 2014 WL 1692782, at *2 (N.D. Tex. 2014). Other courts have held, however, that employees who did not exercise supervisory authority over a coworker could not be held individually liable under § 1981. *Miller v. Wachovia Bank, N.A.*, 541 F.Supp.2d 858 (N.D. Tex. 2008) (applying to a hostile work environment claim).

This Court does not find that Plaintiff has pled sufficient facts against Individual Defendants to plausibly support a claim to survive a motion to dismiss. Although the Fifth Circuit is unsettled in deciding whether individual liability exists under in § 1981 claims, it appears that Plaintiff must, at minimum, allege that Individual Defendants exercised supervisory or managerial authority over her specifically. She pleads the actual individuals who turned her away were the door staff, not Individual Defendants. Even if Plaintiff's allegations are viewed in the light most favorable to her, Plaintiff does not attribute any of the alleged facts of discriminatory conduct to these individuals. (Doc. No. 47 at 4). Plaintiff fails to allege that Individual Defendants are functionally the same as the clubs. Furthermore, the allegations Plaintiff makes against Individual Defendants are not facts, but speculation or legal conclusions. Without more, it appears that Plaintiff does not even assert that Individual Defendants caused injury to her specifically, which suggests that Plaintiff lacks the standing to bring a claim against Individual Defendants at all.

Since Plaintiff falls short of pleading enough facts to even suggest that she has standing to assert a § 1981 claim against Individual Defendants in the first place, or that there is a causal connection between the discrimination she experienced while working at the clubs and Individual Defendants' behavior. There is no Fifth Circuit authority that holds individuals liable for being "guiding spirits." Thus, the Court grants the Individual Defendants' motion to dismiss this claim.

V. Analysis – Breach of Contract Claims

General breach of contract claims are governed by state law, so the applicable Texas statute of limitations is four years. *Pagosa Oil and Gas, L.L.C. v. Marrs and Smith Partnership*, 323 S.W.3d 203, 217 (Tex. App.—El Paso 2010, pet. denied). In Plaintiff's Third Amended Complaint, she brings breach of contract claims against Centerfolds, Splendor, and Cover Girls. (Doc. No. 47

at 12). Plaintiff's breach of contract claims against Centerfolds and Splendor, however, are time barred by the statute of limitations. (Doc. Nos. 47-1, 47-2).[7]

A. Relation-Back of Cover Girls Agreement

Plaintiff alleges that Cover Girls breached its contract with Plaintiff when it "barred" her from the club in late November 2017. (*Id.*). In their Fourth Motion to Dismiss, Defendants argue that Plaintiff's breach of contract claim against Cover Girls is time barred because she failed to bring the cause of action before the statute of limitations expired in approximately late November 2021. According to Defendants, because Plaintiff's breach of contract claim was first raised on June 15th, 2022, when the Third Amended Complaint was filed, it is time barred.[8]

Plaintiff argues that the basis of her breach of contract claim is valid because the agreement should relate-back to August 12, 2021, the date that she filed this lawsuit. (Doc. No. 47 at 12). In her Third Amended Complaint, Plaintiff specifically alleges that she: (1) had no knowledge of the existence of the Cover Girls contract because she did not remember signing a contract with any of the three clubs, (2) would have brought a breach of contract claim against Cover Girls within the statute of limitations had the contract been produced by the Defendants in November 2021 as required by this Court's initial discovery disclosures deadline, and (3) did not demand the

[7] Even if Plaintiff's allegations are viewed in the light most favorable to her and the alleged breach of contract took place when she was "barred" from the clubs in September 2014 and November 2016, her claim against Centerfolds expired in September of 2018 and her claim against Splendor expired in November 2020. The Plaintiff at points contends that "barring her" from dancing was not a breach of contract. If this is true, the result would still be a dismissal of the claim because if barring her was not a contractual breach, then she has not pleaded an act that was a breach of either the Centerfolds or Splendor contract.

[8] The contract between Plaintiff and Cover Girls was not made available to Plaintiff until Defendants produced it on April 5, 2022, after the statute of limitations had expired. Based on this Court's initial discovery protocols in employment disputes, both parties were required to produce all personnel records by an agreed upon deadline of November 3, 2021. Defendants claimed that they were unable to locate any personnel records for Plaintiff, and thus did not produce any documents by the deadline. On April 5, 2022, Defendants produced the contract between Plaintiff and Cover Girls. Defendants also produced contracts between Plaintiff and Centerfolds and Splendor, but those contracts are omitted from this analysis because claims under those contracts are clearly time barred by the four-year statute of limitations.

personnel records be produced after the November 2021 deadline because she had been told by Defendants that no such records could be located. (Doc. No. 47 at 12, 13).

Defendants claim that because Plaintiff failed to plead a breach of contract claim in her initial complaint, that the Cover Girls contract does not arise from the same transaction or occurrence. Plaintiff's new cause of action is not based on a wholly new, distinct, or different transaction. Her allegations are rooted in her original § 1981 claims against Cover Girls and the alleged discrimination she experienced.

Under federal law, an amendment to a pleading relates back to the date of the original pleading when "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed: R. Civ. P. 15(c)(1)(B). Under Texas's relation-back law, if an amended pleading adds a new cause of action arising from the same transaction or occurrence forming the basis of the claims made in the original pleading, then the amended pleading relates back to the original filing. Tex. Civ. Prac. Rem. Code § 16.068; *Delhomme v. Commission for Lawyer Discipline*, 113 S.W.3d 616, 621 (Tex. App.—Dallas 2003, no pet.); *TV Azteca, S.A.B. de C.V. v. Trevino* Ruiz, 611 S.W.3d 24, 32 (Tex. App.—Corpus Christi-Edinburg 2020, no pet.); Tex. Civ. Prac. & Rem. Code Ann. § 16.068 (Vernon 1997). "A transaction is defined as a set of facts that gives rise to the cause of action premised thereon." *980 *Brewster v. Columbia Medical Center of McKinney Subsidiary, L.P.*, 269 S.W.3d 314, 317–18 (Tex.App.—Dallas 2008, no pet.) (internal quotations omitted).

The Court concludes that, under either Texas or federal law, Plaintiff's breach of contract claim against Cover Girls does in fact relate back to her initial pleadings. "The federal rule allows relation back if the proposed amendment arose out of the same 'conduct, transaction, or occurrence' as the claim asserted in the original petition. Texas law provides that the amendment

relates back unless it 'is wholly based on a new, distinct, or different transaction or occurrence.'" *Id.* Furthermore, "'[a] transaction is defined as a set of facts that gives rise to the cause of action premised thereon.'" *Brewster*, 269 S.W.3d at 317-318 (quoting *Texas Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc.*, 219 S.W.3d 563, 587 (Tex. App.—Austin 2007, pet. denied)). "Thus, an amended pleading alleging a new cause of action relates back to the original filing and is not subject to a limitations defense if the original pleading was filed within the limitations period and if the amendment is not based on a wholly new, distinct, or different transaction." *J.K. and Susie L. Wadley Research Institute & Blood Bank v. Beeson*, 835 S.W.2d 689, 698 (Tex. App.—Dallas 1992, writ denied).

The Court finds that Plaintiff's breach of contract claim also shares the same actors and the same underlying operative facts. *White v. Baylor All Saints Medical Center*, No. 07-08-0023-CV, 2009 WL 1361612, at *2 (Tex. App.—Amarillo 2009, pet. denied). Furthermore, since both federal rule 15(c) and § 16.068 are remedial statutes designed to protect litigants from losing their claims to a limitations period in cases where it would otherwise occur, "it should be liberally construed and applied to effect that purpose." *Milestone Properties, Inc. v. Federated Metals Corp.*, 867 S.W.2d 113, 116 (Tex. App.—Austin 1993, writ ref'd); *see Williams v. U.S.*, 405 F.2d 234, 236 (5th Cir. 1968). By applying the relation-back doctrine liberally, as it is required to do, this Court finds that Plaintiff's breach of contract claim relates back to her original pleadings. Since the only ground alleged by Defendants as the basis for dismissal has been rendered inapplicable by this Court's application of the relation-back doctrine, Defendants' motion to dismiss Plaintiff's breach of contract claim against Cover Girls is denied.

VI. Conclusion

For the foregoing reasons, the Court holds that Plaintiff has plausibly alleged: (1) a § 1981 claim against Cover Girls when she was "barred" from the club in November 2017, (2) breach of contract claims against Cover Girls from late November 2017, and (3) a § 1981 failure to hire claim against Splendor from 2021. Accordingly, the Court **DENIES** the Defendants' Fourth Motion to Dismiss as to those claims. It does, however, **GRANT** Defendants' Fourth Motion to Dismiss on all other grounds and dismisses those claims with prejudice.

Signed at Houston, Texas, this 28th day of September, 2022.

Andrew S. Hanen
United States District Judge