No. 23-7490

In the

Supreme Court of the United States

CHANEL E.M. NICHOLSON

PETITIONER,

V.

W.L. YORK, INC., D/B/A COVER GIRLS; D WG FM, INC., D/B/A

SPLENDOR

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

Benjamin W. Allen,
Counsel of Record
Casey T. Wallace
WALLACE & ALLEN, LLP
440 Louisiana Street, Suite 590
Houston, Texas 77002
Tel: (713) 227-1744
ballen@wallaceallen.com
cwallace@wallaceallen.com

ATTORNEYS FOR RESPONDENTS

QUESTION PRESENTED

This Court should not grant certiorari, but if it does, it should answer the following question:

Although Petitioner bases her 42 U.S.C § 1981 claim on discriminatory conduct occurring more than four years before she filed her complaint, can allegations of subsequent discrete acts of discrimination preclude the statute of limitations from barring her action even though she never alleged a hostile work environment claim and the continuing violations doctrine does not apply?

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STATEMENT OF THE CASE

Petitioner filed her Original Complaint on August 12, 2021, alleging various claims for unlawful and intentional race discrimination under 42 U.S.C. § 1981 against A.H.D. Houston, Inc. d/b/a Centerfolds ("Centerfolds"), D WG FM, Inc. d/b/a Splendor ("Splendor"), W.L. York, Inc. d/b/a Cover Girls ("Cover Girls"), and individuals Ali Davari and Hassan Davari, who allegedly owned the clubs. Resp. App. 2a-7a. "After amending her complaint several times, Plaintiff's Third Amended Complaint asserted causes of action for breach of contract and discrimination under § 1981." *Nicholson v. W.L. York, Inc.*, No. 4:21-CV-2624, 2023 WL 3632760 at *5 (S.D. Tex. May 24, 2023); Resp. App. 73a-86a.

I. The Trial Court Dismisses Plaintiff's Claims against Centerfolds and the individual defendants.

At the pleadings stage, the Trial Court dismissed all of Petitioner's claims against Centerfolds and the individual Davari Defendants for failure to state a claim. *See Nicholson v. A.H.D. Houston, Inc.*, No. 4:21-CV-02624, 2022 WL 4543201, *6-9 (S.D. Tex. Sept. 28, 2022); Resp. App. 28a-48a. Although the Trial Court's order on the motion to dismiss is not the subject of this appeal, at the motion to dismiss stage, the Trial Court relied on the same rationale as the summary judgment order Petitioner now challenges in dismissing all of Petitioner's claims against Centerfolds and some of the claims against Splendor.

Specifically, the Trial Court ruled that "the statute of limitations barred all of Plaintiff's § 1981 claims against Centerfolds and Splendor prior to August 2017," applying a four-year statute of limitations from the accrual date of when Plaintiff

began working at the respective clubs. *Nicholson*, 2022 WL 4543201, at *5. The Trial Court held that the continuing violations doctrine did not apply because this is not a hostile work environment case:

> 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.

Nicholson, 2022 WL 4543201, at *7. Accordingly, the Trial 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." *Nicholson*, 2023 WL 3632760, at *2. Following the Trial Court's September 28, 2022 order, only Petitioner's claims against Cover Girls for alleged events in November 2017, for breach of contract and pursuant to 42 U.S.C. § 1981, and against Splendor for an alleged failure to (re)hire in August 2021 pursuant to 42 U.S.C. § 1981 remained pending. *Id*. at *11.

II. The Trial Court grants summary judgment in favor of Splendor and Cover Girls based on the undisputed factual record.

Respondents later moved for summary judgment on the claims that survived

the Trial Court's motion to dismiss—Petitioner's claims of ongoing denial of access on the basis of race directed at Cover Girls and Splendor for alleged failure to 'hire' in 2021. Based on the undisputed evidence, Petitioner's claims accrued against Cover Girls in November of 2016 and against Splendor in 2014, when the same alleged practice Petitioner complained of occurred at those respective clubs. *Nicholson*, 2023 WL 3632760 at *5; Resp. App. 73a-86a. Therefore, the Trial Court granted judgement on Petitioner's remaining claims against both Respondents on summary judgment. *Id.* at *7.

A. Petitioner testifies she was denied access at Cover Girls beginning in November of 2016.

As it relates to Petitioner's live claims against Cover Girls, Petitioner contends that the ongoing 'denial of access' breached her contractual agreement and violated § 1981. Resp. App. 8a-9a. In relevant part, the "License and Access Agreements" ("LAAs"), at both Splendor and Cover Girls provide at paragraph 1 that each club "grants access to the Dancer…to perform entertainment services" at the club, subject to various policies. The parties also agreed in paragraph 3 of the LAAs "[t]he Dancer shall also determine her schedule in performing the services" and that "the Dancer sets her own schedule of when and what hours she works." Resp. App. 61a-66a; Resp. App. 67a-72a.

In her deposition which is included in the summary judgment record, Petitioner confirmed that her signature appears on the LAA that she executed with Cover Girls on November 6, 2016. Resp. App. 53a, 54:10-55:4. Petitioner recalls that she more than likely began performing at Cover Girls that same night, if not shortly

afterwards. *Id.*, Resp. App. 53a, 55:5-20.

Petitioner recounted that the first time someone at Cover Girls told her that she could not perform at the club due to a discriminatory reason occurred "immediately" after signing the LAA, if not "within the first week" of her time there. Resp. App. 53a, 55:21-56:6; Resp. App. 57a, 123:8-124:1. She would appear at Cover Girls an average of six times per week in order to work a shift but was only allowed to actually work a shift about fifty percent of the time. Resp. App. 52a, 50:6-51:23.

The Trial Court held that "[b]ased upon her own deposition testimony, Plaintiff admits that as early as a week after signing her LAA with Cover Girls in November of 2016, she was denied access to the club when she showed up for shifts on the basis of race." *Nicholson*, 2023 WL 3632760, at *6. "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." *Id.* at *6.

B. Petitioner testifies she was denied access at Splendor beginning in November of 2014.

Petitioner's sole claim against Splendor from which she appeals dismissal relate to "a § 1981 failure to hire claim…from 2021." *Nicholson*, 2023 WL 3632760 at *2. Petitioner alleges that upon attempting to sign up as a dancer at Splendor in 2021, she was directed to other clubs on the basis of race. Resp. App. 16a. ("They spoke outside and he told her he would like to hire her but that they were not hiring Black Dancers at SPLENDOR, and that she should try at CENTERFOLDS or at Joy of Houston Men's Club").

During her November 18, 2022 deposition, Petitioner confirmed that her signature appears on the Splendor LAA dated September 29, 2014, and that she likely began performing at the club that same night. Resp. App. 54a, 75:16-76:6 ("Q. Okay. And it appears that this was signed on September—it looks like 29th of 2014. Does that—does that seem right? A. Yes. Q. After you signed this, do you recall working the same day or— A. Yes. Q. You did? A. It was always the same day"). Petitioner further confirmed that her allegations stemmed from conduct arising immediately after she started dancing at Splendor back in 2014. Resp. App. 57a, 124:23-125:10 ("Q. The same questions. Did you experience racial discrimination at Splendor that eliminated your right or impaired your right to access the club like right after signing this? A. Yes. Q. And that continued throughout your time at Splendor, true? A. Yes, my whole—my whole dance career, yes"). Petitioner "admits in her deposition testimony that she was denied access to Splendor as early as a week after signing her LAA in September of 2014—when Plaintiff would be charged with knowledge of the allegedly discriminatory act for accrual of her claim." *Nicholson*, 2023 WL 3632760, at *4.

Petitioner also confirmed that that no one at Splendor ever fired, barred, or terminated her in November 2016. Resp. App. 51a, 22:3:13. Thereafter, Petitioner simply stopped appearing at the club of her own accord. Resp. App. 55a, 78:21-79:6. Petitioner says that the next time she appeared at Splendor was on August 11, 2021. Still under the impression that the LAA she executed in 2014 remained in force, Petitioner did not believe that she needed to re-apply or be 're-hired' because "she

"had already been working there." Resp. App. 57a-58a, 125:23-126:10. She testified: "I knew that I never got like fired, so I didn't think I would have to go through the whole rehiring process again, yeah." Resp. App. 56a, 84:10-85:15.

"Thus, according to Plaintiff's sworn testimony, her remaining § 1981 claim accrued in September 2014 and being turned away from Splendor in 2021 was simply an effect of the alleged initial discriminatory act, which took place in 2014." *Nicholson*, 2023 WL 3632760, at *4. The Trial Court then held "[g]iven 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." *Id.* at *5.

C. Petitioner never plead a hostile work environment claim against Cover Girls or Splendor in this case for the continuing violations doctrine to apply.

Petitioner argued to the Trial Court that the continuing violations doctrine is an exception to Respondents' limitations defense because she plead "a series of related acts, one or more of which falls within the limitations period." *Nicholson*, 2022 WL 4543201, at *7. However, as repeatedly observed by the Trial Court, this is not a hostile work environment claim, and has never been plead as such. The Trial Court therefore held that "[s]ince Plaintiff has failed to meet the threshold requirement of the continuing violations doctrine—to simple plead of cause of action alleging a hostile work environment—[the Trial Court] cannot consider whether the doctrine applies to Plaintiff's claims. *Id.*1F

D. A unanimous Fifth Circuit panel issues a Per Curium opinion applying settled Supreme Court precedent that the continuing violations doctrine does not apply outside of the hostile work environment context.

Based on the undisputed factual record, the Fifth Circuit affirmed. "[A]s the Supreme Court and this court have clarified, the continuing violations doctrine applies only in the context of hostile work environment claims." *Nicholson v. W.L. York, Inc.*, No. 23-20440, 2024 WL 913378, at *4 (5th Cir. Mar. 4, 2024). Nor could Petitioner maintain a claim for the alleged continued failure to hire within the limitations period because it was "merely a continuation of [Respondents'] original act of discrimination…upon which the limitations period has already lapsed." *Id.*

The Fifth Circuit took "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." *Id.* n. 8.

E. Petitioner and other plaintiffs file this case under a hostile work environment theory in parallel litigation, which is currently pending.

In tacit acknowledgment of this pleading deficiency, Petitioner, along with other litigants, have now filed a hostile work environment claim based on the same facts and circumstances as this case. *See* Civil Action No. 4:23-cv-01025, *Nicholson et al. v, AHD Houston, Inc. et al.*, in the Southern District of Texas, Houston Division (*"Nicholson II*"). That case is now pending before the Honorable Al Bennett. Although Petitioner's claim in *Nicholson II* was dismissed as res judicata, the stipulated fact that she was never employed by Defendants would still be fatal to the doctrine's application even in the context of a hostile work environment claim, because she can

never satisfy the employee requirement. Resp. App. 95a. ("Plaintiff was never an employee of any of the defendants."); *West v. City of Houston, Texas* 960 F.3d 736, 741 (5th Cir. 2020) (hostile work environment claims protect *employees* from discriminatory hostile or abusive environments) (emphasis added). Docket call in that case is set for February 7, 2025, and trial is set for February 10, 2025. Resp. App. 117a.

REASONS FOR DENYING THE PETITION

For the continuing violations doctrine to apply, the alleged discriminatory act must be part of a continuing course of conduct creating a hostile work environment. Otherwise, it is simply a discrete act of discrimination which cannot form the basis of a continuing violations theory. *Heath v. Bd. of Supervisors for S. Univ. & Agric. & Mech. Coll.*, 850 F.3d 731, 741 (5th Cir. 2017). Petitioner's claims are based on conduct from 2014 to 2016, making her August 2021 complaint outside of the applicable limitations period for a § 1981 claim arising post-contract formation. 28 U.S.C. § 1658.

I. The Unanimous Fifth Circuit Panel correctly decided that the continuing course of conduct exception does not apply outside of the hostile work environment context and dismissed her claims as time barred.

Petitioner argues that her claims accrued in August of 2021 against Splendor and in November of 2021 against Cover Girls, because on those dates she was allegedly denied access to the clubs on the basis of her race. "In support of this reasoning, she argues that under *National Railroad Passenger Corp. v. Morgan*, []refusal to grant her access to the club []was 'a clear example of a discrete

discriminatory act' that restarted the four-year statute of limitations period applicable to her § 1981 claims." *Nicholson v. W.L. York, Inc.*, No. 23-20440, 2024 WL 913378, at *3 (5th Cir. Mar. 4, 2024) (citing 536 U.S. 101, 113 (2002)).

Her own characterization of her claims being timely based on a discrete act of discrimination defeats her claim. *See Heath v. Bd. of Supervisors for S. Univ. & Agric. & Mech. Coll.*, 850 F.3d 731, 741 (5th Cir. 2017) ("the magistrate judge's summary judgment ruling treated the retaliation claim as one based on discrete acts. Heath does not challenge that characterization on appeal, so we must treat it the same way."). A hostile work environment claim to which the continuing violations doctrine apples "occurs over a series of days or perhaps years and, ***in direct contrast to discrete acts***, a single act of harassment may not be actionable on its own." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115, 122 (2002) (emphasis added).

"It is precisely because the entire hostile work environment encompasses a single unlawful employment practice that we do not hold, as have some of the Circuits, that the plaintiff may not base a suit on individual acts that occurred outside the statute of limitations unless it would have been unreasonable to expect the plaintiff to sue before the statute ran on such conduct." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117-18 (2002). It does not apply to discrete acts, such as "hiring, granting leave, discharging, and compensating." *Hamic v. Harris Cty. W.C. & I.D. No. 36*, 184 Fed.Appx. 442, 447 (5th Cir. 2006). It categorically does not apply to claims for retaliation, because they inherently discrete actions. *Id.* And, as the Fifth Circuit correctly observed in this case:

> 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.*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.").

Nicholson, 2024 WL 913378, at *4 (footnote omitted). The Fifth Circuit correctly analyzed this Court's precedent in *Morgan*, and more specifically, its limitation to continuing courses of conduct rather than alleged discrete acts of discrimination.

II. This Court should not review this decision because Petitioner and other plaintiffs re-filed this case under a hostile work environment theory in *Nicholson II*.

"[A]s the Supreme Court and [the Fifth Circuit] have clarified, the continuing violations doctrine applies only in the context of hostile work environment claims, which Nicholson does not allege in this case." *Nicholson v. W.L. York, Inc.*, No. 23-20440, 2024 WL 913378, at *4 (5th Cir. Mar. 4, 2024) (citing *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 122 (2002)). The Fifth Circuit further explained that "[w]e 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." *Id.*, n. 8.

In *Nicholson II*, Petitioner in this case together with other plaintiffs have alleged hostile work environment claims based on the same facts and circumstances as this case to test application of the continuing violations doctrine when it is brought in the proper context. *See Heath v. Bd. of Supervisors for S. Univ. & Agric. & Mech.*

Coll., 850 F.3d 731, 740-41 (5th Cir. 2017) (disallowing application of the continuing violations doctrine for claims based on discrete acts but allowing them on plaintiff's hostile work environment claims).

Although the trial court in that case dismissed the claims asserted by Petitioner herself under res judicata, summary judgment is now pending before the trial court on the continuing violations as to the other plaintiffs asserting a hostile work environment claim. (*See Nicholson II*; Resp. App. 118a, Resp. App. 135a). Petitioner's stipulated fact that she was never employed by Defendants would be fatal to the doctrine's application even in the context of a hostile work environment claim in *Nicholson II*, because she could never satisfy the employee requirement for such a claim. Resp. App. 95a ("Plaintiff was never an employee of any of the defendants."); *West v. City of Houston, Texas* 960 F.3d 736, 741 (5th Cir. 2020) (hostile work environment claims protect *employees* from discriminatory hostile or abusive environments) (emphasis added). The remaining plaintiffs in *Nicholson II* are similarly situated exotic dancers represented by the same counsel who represented Petitioner in the Trial Court and before the Fifth Circuit. They are likewise not employees who can assert hostile work environment claims.

The trial court may well rule on those plaintiffs' inability to maintain their hostile work environment claims at docket call set for February 7, 2025. Resp. App. 117a. Alternatively, the case is set for trial on February 10, 2025. (*Id.*). Because the same facts and circumstances at issue in this case are currently being litigated under the proper theory to assert the continuing violations doctrine in parallel litigation,

this case presents a poor vehicle to review the question presented.

III. There is no circuit split applying the continuing course of conduct exception outside of the hostile work environment context.

Nor can Petitioner point to a circuit split that this Court need resolve. Federal Courts of Appeals have uniformly applied *Morgan* and the continuing course of conduct doctrine to hostile work environment claims, and never based on discrete acts of discrimination to revive claims based on conduct outside the limitations period.

The cases cited by Petitioner to purportedly evidence a circuit split in fact prove the opposite. The first case relied upon by Petitioner, *Williams*, clearly articulates the rule that the Fifth Circuit applied:

> Williams argues that the continuing violation doctrine extends the ordinary limitations periods. This argument is foreclosed by *National Passenger Railroad Corporation v. Morgan,* 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002), which holds that an employee must file a charge of discrimination within the appropriate limitations period as to each discrete act of discrimination that occurred. Such discrete acts of discrimination "are not actionable if time-barred, even when they are related to acts alleged in timely filed charges."

Williams v. Giant Food Inc., 370 F.3d 423, 429 (4th Cir. 2004); (*See* Petitioner's Brief, p. 20).

The second case at first blush seems to support Petitioner's theory that the alleged failures to hire during the limitations period restarted the limitations clock for these new violations. *See Forsyth v. Federation Employment and Guidance Ser.*, 409 F.3d 565, 573 (2d Cir. 2005); Resp. App. 112a.

However, this Court expressly abrogated *Forsyth* and clarified that, in an unlawful pay practice case, the limitations clock starts when the unlawful pay

practice begins and does not reset each pay period. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 624-25 (2007). Rather, the plaintiff's cause of action accrued when she was allegedly unlawfully passed over for a raise, not when "the effects of prior, uncharged discrimination decisions" were felt with each successive pay check. *Id.* That decision of this Court was subsequently overturned due to legislative amendment, but only as it relates to pay practices, and only pursuant to claims brought under Title VII, which has a 300-day limitations period, rather than the generous four year limitations period applicable to Petitioner's § 1981 claim. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No 111-2, 123 Stat. 5 (2009) (codified as amended at 42 U.S.C. §§ 2000e-5, 2000e-16, 29 U.S.C. §§ 626, 794a).

As it relates to other types of discrimination claims, including Petitioner's, "[a] new violation does not occur, and a new charging period does not commence, upon the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the past discrimination." *Ledbetter*, 550 U.S. at 619 (citing *United Air Lines, Inc. v. Evans,* 431 U.S. 553 (1977), *National Railroad Passenger Corporation v. Morgan,* 536 U.S. 101 (2002)) (cases superseded by statute omitted). This is entirely consistent with the Fifth Circuit's holding that the alleged discriminatory acts within limitations failures to hire were "merely a continuation of [Respondents'] original act of discrimination…upon which the limitations period has already lapsed." 2024 WL 913378, at *4.

The Eight Circuit, like the Fourth and Second, are in accord with the Fifth Circuit's reading of *Morgan*:

> On the other hand, the Supreme Court opined that a hostile work environment claim typically involves a series of separate acts, which together constitute the unlawful employment practice. *Id.* at 2074. Because these acts are part of the same claim, the Court held that an employer may be liable for all of the acts, and in order for the claim to be timely, only one act in the series must have occurred within the limitations period. *Id.*

Mems v. City of St. Paul, Dep't of Fire & Safety Servs., 327 F.3d 771, 785 (8th Cir. 2003); Resp. App. 112a.

This Court reversed the Ninth Circuit opinion Petitioner cites. *Hulteen v. AT & T Corp.*, 498 F.3d 1001, 1002 (9th Cir. 2007, *rev'd*, 556 U.S. 701 (2009); (Petitioner's Brief, p. 22). Furthermore, the law of the Ninth Circuit, like that of the Second, validates the Fifth Circuit's position that the alleged in-limitation period failures to hire were simply consequences of the original allegedly discriminatory act, not new discretely actionable events. *Pouncil v. Tilton*, 704 F.3d 568, 577 (9th Cir. 2012) ("The continuing violation doctrine is inapplicable because Knox has failed to establish that a new violation occurs each time she is denied her visitation or mail privileges. Rather, the CDC's subsequent and repeated denials of Knox's privileges with her clients is merely the continuing effect of the original suspension.").

Petitioner would fare no better under the cases she cites out of the Tenth Circuit. *Davidson* simply confirms that the continuing violation doctrine can only validate claims which are not discrete discriminatory acts. *Davidson v. Am. Online, Inc.*, 337 F.3d 1179, 1185 (10th Cir. 2003) ("By eliminating the continuing violation doctrine for discrete discriminatory acts, *Morgan* attempts to resolve the inconsistent and confusing application of the doctrine by the appellate courts."); Resp. App. 113a.

Lastly, Petitioners cite the Tenth Circuit opinion in *Herrera*, which is a § 1983 action brought against a municipality for failure to provide water services, not a discrimination claim. *Herrera v. City of Espanola*, 32 F.4th 980, 1001 (10th Cir. 2022); Resp. App. 113a . And even in that case, the court holds that when "a plaintiff has an immediate and discrete injury capable of giving rise to a cause of action" that the plaintiffs cause of action accrues on that date and the continuing violation doctrine does not apply. *Id.* at 1000; *see also Semsroth v. City of Wichita*, 304 F. App'x 707, 715 (10th Cir. 2008) ("the continuing violations doctrine is viable *only* for hostile work environment claims") (emphasis in original).

There is no circuit split, and any federal court of appeals would have applied *Morgan* the same way and dismissed Petitioner's claims as time barred.

CONCLUSION

The Court should deny the petition for writ of certiorari.

Respectfully submitted,

/s/
Benjamin W. Allen,
Counsel of Record
Casey T. Wallace
WALLACE & ALLEN, LLP
440 Louisiana Street, Suite 590
Houston, Texas 77002
Tel: (713) 227-1744
ballen@wallaceallen.com
cwallace@wallaceallen.com

January 15, 2025

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHANEL E.M. NICHOLSON, On Behalf of Herself and Other Similarly Situated Plaintiffs,	§	
vs.	§	Case No. _____
A.H.D. HOUSTON, INC. d/b/a CENTERFOLDS HOUSTON, W.L. YORK, INC. d/b/a THE COVER GIRLS, SPLENDOR GENTLEMENS CLUB, SOLID PLATINUM CABARET, ALI DAVARI, HASSAN DAVARI	§	JURY TRIAL DEMAND

PLAINIFFS' ORIGINAL COMPLAINT

Plaintiff CHANEL E.M. NICHOLSON, individually and on behalf of all other African-American dancers/entertainers with the same or similar claims, alleges the following upon information and belief, based upon published documents, reports and personal knowledge.

I. NATURE OF THE ACTION

1. Plaintiff alleges causes of action through violations of 42 U.S.C. § 1981 against Defendants A.H.D. HOUSTON, INC. d/b/a CENTERFOLDS HOUSTON, W.L. YORK, INC. d/b/a THE COVER GIRLS, SPLENDOR GENTLEMENS CLUB, SOLID PLATINUM CABARET (collectively, "Defendant Clubs"), and individuals ALI DAVARI and HASSAN DAVARI (referred to as "Individual Defendants", and with Defendant Clubs, collectively as "Defendants") for damages resulting from Defendants' refusal to hire, unwarranted termination, unwarranted reduction in working hours, and other acts of intentional employment discrimination against Plaintiff and other African-American entertainers at the Defendant Clubs.

2. Individual Defendants own and operate a number of Gentlemen's Clubs featuring female entertainers, including all the Defendant Clubs. The causes of action arise from Defendants' willful and intentional actions: (A) in reducing her working hours while Plaintiff Nicholson was employed by: (i) Defendant W.L. YORK, INC. d/b/a THE COVER GIRLS between about August 2017 and October 2017, and (ii) Defendant SOLID PLATINUM CABARET between about October 2017 and March 2018; and (B) (i) when Plaintiff was refused employment by Defendant A.H.D.

HOUSTON, INC. d/b/a CENTERFOLDS HOUSTON, when she applied on June 24, 2021, and (ii) by SPLENDOR GENTLEMENS CLUB when she applied on August 11, 2021. All acts of reducing Plaintiff's hours and refusing her employment resulted directly from Defendants' policy of limiting the total number of African-American entertainers working the same shift at the same venue; while no corresponding limitations were applied to Caucasian entertainers (hereinafter referred to as "Defendants' Racist Policy").

3. Defendants' Racist Policy violates 42 U.S.C. § 1981 because it violates Plaintiff's right as an African- American to have employment to the same extent "as is enjoyed by white citizens."

4. Plaintiff brings a class action to recover: (i) the monies she and other African-American entertainers would have received but instead who, under Defendants' Racist Policy, were terminated, denied employment by Defendants or had their working hours at Defendant Clubs reduced; (ii) pre- and post-judgment interest on such monies; (iii) punitive damages, and (iv) attorneys' fees. Members of the class are hereinafter referred to as "African-American Class Members."

II. PARTIES

5. Plaintiff was at all relevant times and is a resident of Harris County, Texas. Plaintiff was an employee (not an independent contractor) of Defendant W.L. YORK, INC. d/b/a THE COVER GIRLS and of Defendant SOLID PLATINUM CABARET. Plaintiff applied for employment and was a prospective employee (not a prospective independent contractor) of A.H.D. HOUSTON, INC. d/b/a CENTERFOLDS HOUSTON and of SPLENDOR GENTLEMENS CLUB.

6. The African-American Class Members are all current and former female African-American entertainers who worked at Defendant Clubs and were terminated, had their working hours reduced, or who were denied employment at Defendant Clubs, under Defendants' Racist Policy; starting four (4) years before this Complaint was filed, up to the present.

7. Defendant A.H.D. HOUSTON, INC. is a Texas for-profit corporation doing business as Centerfolds Houston in Houston, Texas at 6166 Richmond Avenue, Houston, Texas 77057, and may be served via its registered agent, Albert T. Van Huff, 1225 North Loop West, Suite 640, Houston, Texas 77008.

8. Defendant W.L. YORK, INC. is a Texas for-profit corporation doing business as THE COVER GIRLS at 10310 W. Little York, P.O. Box 570413, Houston, Texas 77257, and may be served via its registered agent, Albert T. Van Huff, 1225 North Loop West, Suite 640, Houston, Texas 77008.

9. Defendant SPLENDOR GENTLEMENS CLUB has its principal place of business at 7440 W Greens Rd, Houston, Texas 77064, and may be served through either of its owners, who are the Individual Defendants.

10. Defendant SOLID PLATINUM CABARET had its principal place of business at 2732 W T C Jester Blvd., Houston Texas 77018. It is now closed. It may be served through either of its owners, who are the Individual Defendants.

11. Defendant ALI DAVARI is the president and a director of Defendants W.L. YORK, INC. and A.H.D. HOUSTON, INC., and is an owner of Defendant SPLENDOR GENTLEMENS CLUB and Defendant SOLID PLATINUM CABARET, and may be served at his residence at 12 Rivercrest Drive, Houston, Texas 77042.

12. Defendant HASSAN DAVARI is the vice president and a director of Defendants W.L. YORK, INC. and A.H.D. HOUSTON, INC., and is an owner of Defendant SPLENDOR GENTLEMENS CLUB and Defendant SOLID PLATINUM CABARET, and may be served at his residence at 21 E. Rivercrest Drive, Houston, Texas 77042.

13. Individual Defendants and exerted operational and management control over Defendant Clubs, and were frequently present at, directed, controlled and managed all operations and day-to-day affairs at Defendant Clubs, including hiring, firing or reducing working hours of employees, and otherwise executing Defendants' Racist Policy.

14. Individual Defendants were acting as employers at Defendant Clubs and were the alter egos of the corporate entities purporting to own and operate the Defendant Clubs, and are therefore personally liable for actions of the Defendant Clubs, including for executing Defendants' Racist Policy.

III. VENUE AND JURSIDICTION

15. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 because this action arises under 42 U.S.C. § 1981.

16. Venue is proper in this District because all Defendants are located in Harris County, as is Plaintiff.

IV. FACTS

17. As above, Plaintiff was employed by Defendant W.L. YORK, INC. d/b/a THE COVER GIRLS between about August 2017 and October 2017, and by Defendant SOLID PLATINUM CABARET between about October 2017 and March 2018.

18. Plaintiff was also employed by Defendant A.H.D. HOUSTON, INC. d/b/a CENTERFOLDS HOUSTON for several years but before the statutory period. Recently, Plaintiff sought to revive her career as an entertainer and entered CENTERFOLDS HOUSTON on June 24, 2021 during business hours and requested employment, but was told they were not hiring.

19. Plaintiff was also employed by Defendant SPLENDOR GENTLEMENS CLUB for a total of about four (4) years but before the statutory period. In attempting to revive her career as an entertainer, she entered SPLENDOR GENTLEMENS CLUB on August 11, 2021 during business hours and requested employment, but was told they were not hiring.

20. Plaintiff typically was scheduled by the respective Defendant Club to work and did work about up to seven shifts per week and six hours per shift during her employment at A.H.D. HOUSTON, INC. d/b/a CENTERFOLDS HOUSTON and at SPLENDOR GENTLEMENS CLUB. At W.L. YORK, INC. d/b/a THE COVER GIRLS Plaintiff typically was scheduled to and worked four (4) shifts per week and seven (7) hours per shift during her employment there. At SOLID PLATINUM CABARET Plaintiff typically was scheduled to and worked up to six (6) shifts per week and seven (7) hours per shift during her employment there.

21. Notwithstanding any particular Defendant Club's schedule, at each Defendant Club, on at least several occasions, the following took place. Plaintiff would arrive for her scheduled shift at a Defendant Club, after having fully made-up, coiffed, painted her nails and/or applied extensions, shaved and perfumed her entire skin surface, and prepared her clothing so as to be able to remove it attractively and appropriately while entertaining, only to be told by one or more of Defendant Club's acting managers that there were already "too many black girls" working; and that she could not work her shift.

22. At W.L. YORK, INC. d/b/a THE COVER GIRLS Plaintiff was told after having worked there for about three months that she could not perform because of Defendants' Racist Policy. Her employment there was terminated.

23. Plaintiff's income was solely based on charging customers for an individual performance (or table dance) and tips. So in all instances where Plaintiff could not perform (was denied a shift), she received no income.

24. Defendants set prices Plaintiff and other entertainers charged for each performance for a customer, would charge Plaintiff and other entertainers a late fee if they do not arrive for a shift on time, and had the authority to suspend, fine, fire, or otherwise discipline entertainers for non-compliance with their rules regarding dress, performance and sharing of income with other employees in the Defendant Club. Plaintiff had been fired by A.H.D. HOUSTON, INC. d/b/a CENTERFOLDS HOUSTON for not sharing enough of her income with particular employees at that venue.

25. Plaintiff and other entertainers clearly were employees and not independent contractors (as Defendants designated them) for the reasons in paragraphs 13 and 14 and further because: Defendants provided and maintained the venue needed for the entertainers to perform; required entertainers to clock in and out of the venue; apply fines/fees to the entertainers if they failed to follow Defendants' guidelines or directions; and, hired all employees at each venue, including bartenders, waitresses, DJ's, security personnel, managers, and all entertainers.

26. The position of entertainer requires no formal education, degree, certification or license. The amount of skill required is akin to that of an employee rather than an independent contractor.

27. Upon information and belief, more than one hundred (100) female African-American entertainers who have been employed have been denied scheduled shifts, have been terminated, and others have been refused employment at the Defendant Clubs under Defendants' Racist Policy during the four (4) years prior to the filing of this action.

28. Plaintiffs' experience under Defendants' Racist Policy is similar to that of other African-American entertainers at Defendant Clubs, who have the same claims as Plaintiff, and Plaintiff can therefore adequately represent the interests of the class.

29. As such, Plaintiff brings her claims as a class action on behalf of the African-American Class Members.

V. CAUSES OF ACTION

30. The effect of Defendants' Racist Policy has been to deprive Plaintiff and other prospective, current and former African-American female entertainers at Defendant Clubs, as a class, of the same employment treatment as Caucasian female entertainers: who were not subject to any numerical limitation at any Defendant Club based on their race. As such, Defendants' execution of Defendants' Racist Policy is in violation of 42 U.S.C. § 1981.

31. The unlawful employment practices enacted under Defendants' Racist Policy were intentional and when they are established at trial, make punitive damages appropriate as they provide an exemplary penalty for Defendants' intentional and outrageous conduct.

VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court:

32. Immediately grant a preliminary injunction (upon motion by Plaintiff) enjoining the Defendants, their officers, successors, assigns, and all persons in active concert or participation with them, from continuing Defendants' Racist Policy or otherwise executing employment practices which discriminate on the basis of race;

33. Order Defendants to make whole Plaintiff and the class members by providing appropriate back pay, with prejudgment interest in amounts to be determined at trial, and other affirmative relief necessary to eradicate the effects of their unlawful employment practices;

34. Order the reinstatement of Plaintiff and the class members as entertainers, or award them front pay in the amounts to be determined at trial if reinstatement is impractical;

35. Order Defendants to make Plaintiff and the class members whole by providing compensation for past and future pecuniary losses resulting from the unlawful practices described in paragraphs 17-23, including, but not limited to, out-of-pocket expenses such as job search expenses in amounts to be determined at trial;

36. Order Defendants to make Plaintiff and the class members whole by paying compensatory damages for past and future non-pecuniary losses including emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other non-pecuniary losses they suffered as a result of Defendants' Racist Policy and the unlawful employment practices described in paragraphs 17-23 above, in amounts to be determined at trial;

37. Award punitive damages to Plaintiff and the class members for Defendants' intentional and malicious conduct described in paragraphs 17-23 above, in amounts to be determined at trial;

38. Award Attorneys' fees and costs associated with this action;

39. Award pre-judgment and post-judgment interest on all amounts recovered as permitted by law; and

40. Grant such further relief as the Court deems necessary and proper in the public interest.

VII. JURY TRIAL DEMAND

Plaintiff requests a jury trial.

Respectfully Submitted,

By: */s/Eric P. Mirabel 8/12/2021*

Eric P. Mirabel
Texas State Bar No. 14199560
Southern District ID No. 9708
eric@emirabel.com
3783 Darcus St.
Houston, Texas 77005
Tel: 281 772-3794
Fax: 713 667 4234

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHANEL E.M. NICHOLSON, On Behalf of Herself and Other Similarly Situated Plaintiffs,	§	Civil Action 4:21−cv−02624
	§	JURY TRIAL DEMAND
v.	§	
A.H.D. HOUSTON, INC. d/b/a CENTERFOLDS; W.L. YORK, INC. d/b/a COVER GIRLS; D WG FM, INC. d/b/a SPLENDOR; ALI DAVARI; HASSAN DAVARI	§	

PLAINIFF'S THIRD AMENDED COMPLAINT

Plaintiff CHANEL E.M. NICHOLSON, individually and on behalf of all other African-American and Hispanic dancers/entertainers with the same or similar claims, alleges the following based upon personal knowledge, information and belief, a declaration by a long term manager at Defendant Clubs (*see* **Exhibit D** hereto), interviews with another local industry manager, interviews with current and former dancers at the Defendants' places of business; and, published documents.

I. NATURE OF THE ACTION

1. Plaintiff alleges causes of action through violations of 42 U.S.C. § 1981 and breach of contract against Defendants A.H.D. HOUSTON, INC. d/b/a CENTERFOLDS, W.L. YORK, INC. d/b/a COVER GIRLS, D WG FM, Inc. d/b/a SPLENDOR (collectively, "Defendant Clubs"), and individuals ALI DAVARI and HASSAN DAVARI (referred to as "Individual Defendants," and with Defendant Clubs, collectively as "Defendants") for damages, resulting from Defendants' refusal to give access to: (i) Plaintiff and other African-American women ("Black Dancers"), and Hispanic women (collectively referred to as, "Black or Brown Dancers") applying to be entertainers/dancers at the Defendant Clubs during the statutory period, and/or (ii) from termination of access rights to Plaintiff and Black or Brown Dancers at the Defendant Clubs during the statutory period; provided, however, that the class of such Black or Brown Dancers does not include any members

who entered a valid and enforceable agreement with the Defendant Club, and wherein the Court dismisses such Black or Brown Dancers claims under 42 U.S.C. § 1981 and/or for contract breach, or the Court rules that such Black or Brown Dancers cannot be class members because such a valid and enforceable agreement is found by the court to: (a) prohibit collective actions or class actions for asserting the Black or Brown Dancers rights under 42 U.S.C. § 1981 and/or for contract breach; or (b) provide for arbitration as the exclusive forum for resolving the Black or Brown Dancers claims under 42 U.S.C. § 1981 and/or for contract breach.

2. The Individual Defendants own and operate a number of adult entertainment establishments featuring female entertainers (also referred to as "dancers" herein), including all the Defendant Clubs. Individual Defendants are named as the sole officers (President and Vice President) and/or the sole directors of the Defendant Clubs in the state-filed corporate documents for said Defendant Clubs. The causes of action arise from Defendants' willful and intentional actions: (A) in terminating Plaintiff Nicholson's access rights because the Black Dancer limit had been reached, after she had worked at Defendant W.L. YORK, INC. d/b/a COVER GIRLS between about November 2016 and late November 2017; and (B) refusing to honor her existing agreements and rejecting Plaintiff's application for a dancer position at: (i) Defendant A.H.D. HOUSTON, INC. d/b/a CENTERFOLDS, when she applied on June 24, 2021, and (ii) D WG FM, Inc. d/b/a SPLENDOR when she applied on August 11, 2021. The terminating of Plaintiff's access and refusing her access or a dancer position resulted directly from Defendants' policy of limiting the total number of Black or Brown Dancers working the same shift at the same venue; and not providing Black or Brown Dancers dancer positions or access rights in order to enforce such limit, while no corresponding limitations were applied to Caucasian entertainers (hereinafter referred to as "Defendants' Racist Policy").

3. Enforcement by Defendants of Defendants' Racist Policy violates 42 U.S.C. § 1981 because it violates Plaintiff's right as an African-American to make and enforce contracts to the same extent "as is enjoyed by white citizens." It violates the rights of other Black or Brown Dancers, including those who are class members, for the same reason. It is also

a breach of the access rights in the agreements Plaintiff entered and other dancers are required to enter with the Defendants Clubs.

4. Plaintiff brings a class action to recover: (i) the monies she and other Black or Brown Dancers who are class members would have received but instead who, under Defendants' Racist Policy, were terminated or denied access to Defendant Clubs' premises; (ii) pre- and post-judgment interest on such monies; (iii) punitive damages, (iv) attorneys' fees and (v) other related relief including (a) remedying past discrimination by additional hiring of Black or Brown Dancers and (b) declaring unconscionable agreement provisions unenforceable and prohibiting enforcement of unconscionable agreement provisions and prohibiting Defendants from requiring entering of unconscionable agreements by dancers. Members of the class are those Black or Brown Dancers meeting the requirements of paragraph 1(i) or 1(ii) above, and are hereinafter referred to as "Black or Brown Class Members."

II. PARTIES

5. Plaintiff is African-American and was at all relevant times and is a resident of Harris County, Texas. Plaintiff was working at Defendant W.L. YORK, INC. d/b/a COVER GIRLS until her termination of access there. More recently, Plaintiff sought access to perform as a dancer at A.H.D. HOUSTON, INC. d/b/a CENTERFOLDS and at D WG FM, Inc. d/b/a SPLENDOR but was rejected – though she had previously entered agreements granting her access to both establishments.

6. The Black or Brown Class Members are all current and former female Black or Brown Dancers who, under Defendants' Racist Policy (i) applied and were refused positions as dancers at the Defendant Clubs, starting two (2) years before the Original Complaint was filed (Aug. 12, 2021) up to the present, and/or (ii) were terminated or refused access as dancers by one or more of the Defendant Clubs and who did **not** enter valid and enforceable agreements with the Defendant Club(s) prohibiting or waiving collective actions or class actions for asserting their rights under 42 U.S.C. § 1981 or for contract breach, and/or allowing Defendants to have claims for such rights exclusively decided in arbitration rather than in court, and whose claims in court were dismissed as a result of

such agreement(s) or who were ordered excluded from the class by the court; starting four (4) years before the Original Complaint was filed (Aug. 12, 2021), up to the present.

7. Defendant A.H.D. HOUSTON, INC. is a Texas for-profit corporation doing business as CENTERFOLDS, at 6166 Richmond Avenue, Houston, Texas 77057, and was served via its registered agent, Albert T. Van Huff, 1225 North Loop West, Suite 640, Houston, Texas 77008.

8. Defendant W.L. YORK, INC. is a Texas for-profit corporation doing business as COVER GIRLS at 10310 W. Little York, P.O. Box 570413, Houston, Texas 77257, and was served via its registered agent, Albert T. Van Huff, 1225 North Loop West, Suite 640, Houston, Texas 77008.

9. Defendant D WG FM, Inc. d/b/a SPLENDOR has its principal place of business at 7440 W Greens Rd, Houston, Texas 77064, and may be served through its registered agent, Albert T. Van Huff, 1225 North Loop West, Suite 640, Houston, Texas 77008; though it was served by consent on Defendants' current counsel, Casey Wallace et al.

10. Defendant ALI DAVARI is the president and a director of Defendants W.L. YORK, INC., A.H.D. HOUSTON, INC., and D WG FM, Inc. and was served at his residence at 12 Rivercrest Drive, Houston, Texas 77042.

11. Defendant HASSAN DAVARI is the vice president and a director of Defendants W.L. YORK, INC., A.H.D. HOUSTON, INC., and D WG FM, Inc., and was served at his residence at 21 E. Rivercrest Drive, Houston, Texas 77042.

12. One or more of the Individual Defendants, in their positions as sole named officers and directors of the Defendant Clubs, would sometimes visit the Defendant Clubs. During these site visits, they thereby directly observed a paucity of Black or Brown dancers at the Defendant Clubs, and/or exclusion or access denial of Black or Brown dancers. As the sole officers and directors they are charged with exerting operational and management control over Defendant Clubs and managing operations and day-to-day affairs at Defendant Clubs, including the refusal to hire or termination of access to Black or Brown Dancers, and otherwise establishing and enforcing Defendants' Racist Policy.

13. Individual Defendants were thereby the alter egos of the corporate entities that own and operate the Defendant Clubs, or at least are the guiding spirits behind Defendants' Racist Policy, and are therefore personally liable for actions of the Defendant Clubs, including all damaged from establishing and enforcing Defendants' Racist Policy.

III. VENUE AND JURSIDICTION

14. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 because this action arises under 42 U.S.C. § 1981. The Court has pendent jurisdiction over Plaintiff's and other class members' breach of contract claims and claims of unconscionability of provisions in the dancers' agreements with Defendants.

15. Venue is proper in this District because all Defendants are located in Harris County, as is Plaintiff.

16. The Court retains jurisdiction over this class action as Defendants expressly waived: their contractual option (at a hearing on May 12, 2022) to remove claims herein to arbitration; and Defendants also expressly waived contractual prohibitions against Plaintiff bringing certain claims in court, and against Plaintiff pursuing claims in collective or class actions.

IV. FACTS

17. Starting in in about August, 2013, Plaintiff was a dancer at Defendant A.H.D. HOUSTON, INC. d/b/a CENTERFOLDS. She recalls she first applied for a dancer position there in about June 2013, when she and another Caucasian woman applied together. Though the Caucasian applicant had a plump, less attractive figure, and had no front teeth, she was given a position and Plaintiff was not. Plaintiff believes, however, that solely because this Caucasian applicant actively supported it to management, in August 2013 Plaintiff was given a dancer position at CENTERFOLDS.

18. Plaintiff does not recall signing the agreement and attachments (the "Centerfolds Agreement" **Exhibit A** hereto) which she signed with A.H.D. HOUSTON, INC. d/b/a CENTERFOLDS in June and August 2013. She does recall that no one explained any

part of the Centerfolds Agreement to her, she was not told she could have it reviewed by a lawyer before signing, and she was not given a copy of the Centerfolds Agreement.

19. Plaintiff typically worked up to about seven shifts per week at six hours per shift during her time at A.H.D. HOUSTON, INC. d/b/a CENTERFOLDS.

20. All of Plaintiff's income consisted of monies paid to her directly by the customers at CENTERFOLDS, usually in cash. Customers were also her sole income source at all Defendant Clubs.

21. Regularly during her time at CENTERFOLDS, sometimes as often as once or twice per week, Plaintiff would arrive for her shift after having fully made-up, coiffed, painted her nails and/or applied extensions, shaved and perfumed her entire skin surface, and prepared her clothing so as to be able to remove it attractively and appropriately while dancing, only to be told by the door girl upon entering the premises she could not work at that time. When she investigated the cause she would be told that other Black Dancer(s) (identified by name(s)) were already there. When she would investigate with the acting manager, often Chris M. or a manager known as "Reggie" (unknown last name), they would explain that there were too many Black Dancers already working. On several occasions Reggie told Plaintiff that management did not like more than a small number of Black Dancers on the premises at the same time. At other times one of the managers would tell her there were too many Black Dancers working and exclude her, if she encountered them before the door girl. Plaintiff never heard of a Caucasian dancer being excluded in a similar manner.

22. Defendant A.H.D. HOUSTON, INC. d/b/a CENTERFOLDS would charge scaled fees based on time of entry, with evening and late night costing more than earlier times. Managers would often deny access, terminate, and especially fine, Plaintiff and other Black Dancers for non-compliance with unwritten rules regarding dress, performance and sharing of income with managers (and sometimes other employees) in CENTERFOLDS. Plaintiff was often propositioned by Managers to provide sexual favors as *quid pro quo* for continuing working or for withdrawing fines. Plaintiff knows of other Black Dancers who had sex with Managers, though Plaintiff did not. Plaintiff also would need to generously tip the DJ in order to have him play music she wanted. Plaintiff was eventually barred by

CENTERFOLDS for not sharing enough of her income with particular managers and employees.

23. Through Plaintiff's discussions with other dancers at CENTERFOLDS she learned that Black Dancers were nearly always levied larger fines by the management than Caucasian dancers and/or were forced to share a larger percentage of their earnings with managers and other employees for continued access rights to the premises.

24. Plaintiff also saw Reggie trash or destroy applications for employment from Black Dancers.

25. Starting in late September 2014, after she was barred by CENTERFOLDS, Plaintiff became a dancer at Defendant D WG FM, Inc. d/b/a SPLENDOR for several years. Plaintiff typically worked four (4) shifts per week at seven (7) hours per shift.

26. Plaintiff does not recall signing the agreement and attachments (the "Splendor Agreement" **Exhibit B** hereto) which she signed with D WG FM, Inc. d/b/a SPLENDOR in late September, 2014. She does recall however that no one explained any part of the Splendor Agreement to her, she was not told she could have it reviewed by a lawyer before signing, and she was not given a copy of the Splendor Agreement.

27. She recalls two managers at SPLENDOR, Reggie (same person as at CENTERFOLDS) and "Joey" (unknown last name). Reggie would also destroy and/or trash Black Dancers' applications at SPLENDOR regularly.

28. Again, during her time at SPLENDOR, on a number of occasions, the door girl or an acting manager would send her home after Plaintiff arrived for her shift because there were already "too many black girls" working. On some occasions she would see Bob Furey (Director of Operations for all three Defendants) on the premises, and she would be told she could not work because Bob Furey was already there.

29. At SPLENDOR, Joey told Plaintiff that both the Individual Defendants and upper management did not want too many Black Dancers on the premises. At another time Joey forcibly attempted to have intercourse with Plaintiff in his office, but was forcefully rejected by her. Plaintiff knew other Black Dancers who had sex with Joey.

30. At SPLENDOR, managers would often suspend, terminate, and fine Plaintiff and other Black Dancers for non-compliance with unwritten rules regarding dress, performance, and especially for not paying sufficient "tips" to managers (and sometimes other employees). Plaintiff was refused entry to work on multiple occasions unless she paid managers. She also would need to generously tip the DJ in order to have him play music she wanted. At one point she had to pay $1500 for access after being excluded. Thereafter, she was barred at SPLENDOR.

31. After SPLENDOR, in about November 2016, Plaintiff was granted a position as a dancer at Defendant W.L. YORK, INC. d/b/a COVER GIRLS (*see* **Exhibit C**, the "Cover Girls Agreement."). Plaintiff does not recall signing the agreement and attachments in the Cover Girls Agreement. She does recall that no one explained any part of the Cover Girls Agreement to her, she was not told she could have it reviewed by a lawyer before signing, she was not given a copy of the Cover Girls Agreement, and she was not given an opportunity so ask any questions she had pertaining to the Cover Girls Agreement.

32. At COVER GIRLS, Plaintiff would often work six shifts per week, each shift being about six to eleven hours, until late November 2017.

33. The Cover Girls Agreement states that Plaintiff has the right to determine her schedule, including her ability to arrive and leave the premises at any time without penalty. Plaintiff was in fact required to pay a fee to COVER GIRLS varying from $20 to $80 (depending on the shift starting time) every time she came to work. Although the Cover Girls Agreement states there is no mandatory tip sharing arrangement among dancers, management and employees, she was again often forced to tip managers and other employees for access to the premises. She was also sent home on some occasions because there were already "too many" Black Dancers on the premises. She also was excluded on one occasion until she paid management a "fine." She also would need to generously tip the DJ in order to have him play music she wanted.

34. In late November, 2017 Plaintiff arrived for a shift at COVER GIRLS and was told by a manager that she could not perform because there were already "too many black girls." Plaintiff was thereby barred from COVER GIRLS. Caucasian dancers remained at the COVER GIRLS premises that night, continuing to make income. On information and belief,

a large number of Caucasians applied, interviewed and were granted dancer positions at Defendant W.L. YORK, INC. d/b/a COVER GIRLS between November 2017 and the filing of this action.

35. Before being barred from COVER GIRLS, Plaintiff had been concomitantly working as a dancer at Solid Platinum Cabaret, in Houston, and she continued to work at Solid Platinum Cabaret for several months, until pregnancy forced her to stop. She was damaged because in a typical shift at Solid Platinum Cabaret, she would earn less than one-half and often less than one-quarter of what she had been earning per shift at COVER GIRLS.

36. Plaintiff sought to revive her career as a dancer and entered CENTERFOLDS on June 24, 2021 during business hours and requested a position as a dancer, but was told they were not hiring. She was damaged because she could not earn as she had when she had worked at CENTERFOLDS (see paragraphs 17, 19 and 20). After being rejected, Plaintiff stayed at CENTERFOLDS and saw several Caucasian dancers enter the CENTERFOLDS' premises in street clothes, then change and start their shift as dancers.

37. On August 11, 2021 at about 7 PM, Plaintiff entered SPLENDOR and requested a position as a dancer. She was told by the purported manager who was a relative of the Individual Defendants that they were not hiring, and that she would have a better chance of a dancer position at CENTERFOLDS. She also saw Joey at SPLENDOR that day. They spoke outside and he told her he would like to hire her but that they were not hiring Black Dancers at SPLENDOR, and that she should try at CENTERFOLDS or at Joy of Houston Men's Club.

38. While applying for the dancer position at SPLENDOR on August 111, 2021, Plaintiff saw a Caucasian dancer dressed in street clothes enter the SPLENDOR premises and proceed to the change area, apparently to start her shift as a dancer. On information and belief, a number of other Caucasian dancers also started their shifts as dancers at SPLENDOR on August 11, 2021 after Plaintiff applied for a position there, as many dancers who perform in the evenings and to closing time (2 AM) begin their shifts after 7 PM when Plaintiff was there (which was still during daylight hours). When Plaintiff worked there, Splendor often had about fifteen to twenty (20) dancers on premises in the evenings

and the vast majority (except for no more than about two or three Black or Brown Dancers) were Caucasian.

39. Plaintiff was damaged by the rejection at SPLENDOR, because she could not earn as she had when she had worked at SPLENDOR (see paragraph 25).

40. A former manager of The Mile High Club, Humble, Texas (laid off in 2020 due to the pandemic) has stated that all the clubs owned or operated by the Individual Defendants are well-known by those in the local adult entertainment industry as not hiring and/or severely limiting the total number of Black Dancers on their respective premises. This person had also worked at Defendant Clubs and observed Defendants' Racist Policy executed by the then management there.

41. Andrew Skwera was a long-time management employee at establishments owned by the Individual Defendants, and his declaration (**Exhibit D** hereto) describes an incident in 2019 when Bob Furey (Director of Operations for all Defendant Clubs) noted there were a number of Black dancers on the COVER GIRLS premises, and assuming Mr. Skwera was responsible, removed Mr. Skwera's authority to retain dancers on the spot. Mr. Skwera also describes other events surrounding Defendants' Racist Policy and the reputation of the Defendant Clubs in the industry for limiting the numbers of Black or Brown Dancers in the clubs, and generally not providing them with dancer positions.

42. The former manager of The Mile High Club estimates that at least about fifty (50) or more Black or Brown Dancers per month apply at each of the Defendant Clubs; based on her having received applications from ten to fifteen Black or Brown dancers per week who had been recently rejected at one or more of the Defendant Clubs. During their interviews, those rejected Black or Brown Dancers often reported to this manager feeling that their rejection at the Defendant Club(s) was based on their race. A large number of Caucasian dancers would have, of course, exercised their access right in their own License and Access Agreements (see paragraph 44 below), and performed at each such rejecting Defendant Club after each such Black or Brown Dancer was rejected.

43. Even considering that during 2020 Defendant Clubs were shut for a few months, fifty (50) rejected Black or Brown Dancer applicants per month (paragraph 42) would yield

about one thousand (1,000) Black or Brown Dancers applying at each of the three Defendant Club in the two year period before this action was filed; a very few of which were not rejected but were offered and entered a License and Access Agreement.

44. As supported in **Exhibit D** (Declaration of A. Skwera) every dancer at COVER GIRLS, SPLENDOR and CENTERFOLDS (including the Caucasian dancers who entered CENTERFOLDS after Plaintiff did on June 24, 2021 and the Caucasian dancers who entered SPLENDOR after Plaintiff did August 11, 2021) was under a License and Access agreement with the respective club she entered, with terms similar to those in Plaintiff's agreements (**Exhibits A to C**) which are similar to the terms in the sample agreement Mr. Skwera references in his declaration. Counsel for Defendants, Casey Wallace, also stated at the hearing on May 12, 2022 that all dancers are required to sign a License and Access agreement (which is what all **Exhibits A to C** and the sample agreement with the Skwera declaration are entitled) before commencing work. Accordingly, Plaintiff is an adequate representative of other Black or Brown Dancers who entered similar agreements that were similarly breached.

45. Plaintiff's claims stemming from her illegal barring (under Defendants' Racist Policy) from COVER GIRLS and Defendants' illegal (under Defendants' Racist Policy) failure to enter a new agreement with Plaintiff at CENTERFOLDS and SPLENDOR, or to honor their existing agreements (respectively from 2013 and 2014) with her allowing her access, are essentially identical to the claims of all Black or Brown Dancers at Defendant Clubs, who have the same claims for refusal to grant access and refusal to make and honor agreements; and Plaintiff can therefore adequately represent the interests of the class.

46. Defendants' Racist Policy or the agreements entered, tie Plaintiff's and other class members' claims together.

47. There is likely to be over three thousand (3,000) Black or Brown Class Members (see paragraph 43 above). Records in the Defendant Clubs may not reflect the number of Black or Brown Dancers who actually submitted applications at Defendant Clubs, if the destruction of Black or Brown Dancers' applications continued at the Defendant Clubs (see paragraphs 24 and 27 above).

48. As such, Plaintiff brings her claims as a class action on behalf of Black or Brown Class Members because but for Defendants' execution of Defendants' Racist Policy in violation of 42 U.S.C. § 198: Plaintiff and other Black or Brown Dancers would have been given dancer positions or allowed to retain access for dancer positions (as applicable), and Defendants would not have breached agreements and/or refused to enter access agreements with Plaintiff and other Black or Brown Dancers.

49. Because Plaintiff is bringing breach of contract claims for the first time in this Third Amended Complaint for being barred from COVER GIRLS in late November, 2017 (see paragraph 34): Plaintiff asserts that the statute of limitations is tolled at least until filing of this cause of action for breach of the Cover Girls Agreement Defendants had a duty to produce the Cover Girls Agreement to Plaintiff under the Court's INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION by Nov. 3, 2021, and it was not produced until April 5, 2021.

50. Jonathan Edwards, a reporter for the Washington Post, called the undesigned counsel on about August 18, 2021 and stated that he had spoken with Casey Wallace, lead attorney for Defendants, who had told him that no personnel records for Plaintiff had been located by any of Defendants. On October 1, 2021, the undersigned counsel emailed a letter to Defendants' counsel informing him that the Court's INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION was to apply to initial disclosures required in this case, and noting that Defendants' initial disclosures under those rules (which include Plaintiff's complete personnel records and all her agreements with Defendants) were due by November 3, 2021. Plaintiff provided Defendants her initial disclosures on November 3, 2021 but without identifying witnesses, which Plaintiff sought to maintain confidential through a proposed protective order, that Defendants' counsel refused to enter. Defendants did not reciprocate with any initial disclosures at that time; and not until April 5, 2022.

51. Had the Cover Girls Agreement been produced by Defendants on Nov. 3, 2021 as the rules required, Plaintiff (who did not remember signing it) would have been aware of it in sufficient time to file breach of contract claims within four years of Defendant W.L. YORK, INC. d/b/a COVER GIRLS breach of the Cover Girls Agreement. Plaintiff did not

demand her agreements immediately after Nov. 3, 2021 in separate correspondence or production requests to Defendants' counsel, because the undersigned counsel had been told that no such records had been located (*see* paragraph 50).

52. Plaintiff further alleges that the following sections of her agreements (**Exhibits A to C**) with Defendants are unconscionable and unenforceable, and related provisions in the agreements with Defendant Clubs are also unenforceable:

Cover Girls Agreement (**Exhibit C**) ¶12: THE DANCER SHALL 1NDEMNIFY, HOLD HARMLESS AND PAY FOR COVER GIRLS' DEFENSE FROM AND AGAINST ANY AND ALL CLAIMS, LOSSES OR LIABILITY, INCLUDING ATTORNEYS' FEES, AR1S1NG FROM OR RELATING TO THIS AGREEMENT OR THE DANCER'S RELATIONSHIP WITH COVER GIRLS, INCLUDING LIABILITY ARISING FROM COVER GIRLS' OWN NEGLIGENCE.

Splendor Agreement (**Exhibit B**) ¶12: THE DANCER SHALL INDEMNIFY, HOLD HARMLESS AND PAY FOR SPLENDOR'S DEFENSE FROM AND AGAINST ANY AND ALL CLAIMS, LOSSES OR LIABILITY, INCLUDING ATTORNEYS' FEES, ARISING FROM OR RELATING TO THIS AGREEMENT OR THE DANCER'S RELATIONSHIP WITH SPLENDOR, INCLUDING LIABILITY ARISING FROM SPLENDOR'S OWN NEGLIGENCE.

Centerfolds Agreement (**Exhibit A**) ¶8: THE DANCER SHALL INDEMNIFY, HOLD HARMLESS AND PAY FOR CENTERFOLDS'S DEFENSE FROM AND AGAINST ANY AND ALL CLAIMS, LOSSES OR LIABILITY, INCLUDING ATTORNEYS' FEES, ARISING FROM OR RELATING TO THE DANCER'S RELATIONSHIP WITH CENTERFOLDS, INCLUDING LIABILITY ARISING FROM CENTERFOLDS'S OWN NEGLIGENCE.

Cover Girls Agreement (**Exhibit C**) ¶13(C): ANY AND ALL COVERED DISPUTES, CLAIMS AND CONTROVERSIES SHALL BE SUBMITTED TO THE AMERICAN ARBITRATION ASSOCIATION (THE "AAA") OR ITS SUCCESSOR, INITIALLY FOR MEDIATION.

Splendor Agreement (**Exhibit B**) ¶13(C): ANY AND ALL COVERED DISPUTES, CLAIMS AND CONTROVERSIES SHALL BE SUBMITTED TO THE AMERICAN ARBITRATION ASSOCIATION (THE "AAA") OR ITS SUCCESSOR, INITIALLY FOR MEDIATION.

Centerfolds Agreement (**Exhibit A)** ¶10 [A]ll disputes, claims or controversies arising out of or relating to this Agreement and any matter related to alleged employment independent contractor status, terms or conditions of service or employment, or compliance with the Fair Labor Standards Act (the "FLSA") shall be submitted to the American Arbitration Association (the "AAA"), or its successor, for mediation.

Cover Girls Agreement (**Exhibit C**) ¶13(H): NEITHER COVER GIRLS NOR THE DANCER CAN FILE A CIVIL LAWSUIT IN COURT AGAINST THE OTHER PARTY RELATING TO ANY COVERED DISPUTES, CLAIMS AND CONTROVERSIES.

Splendor Agreement (**Exhibit B**) ¶13(H): NEITHER SPLENDOR NOR THE DANCER CAN FILE A CIVIL LAWSUIT IN COURT AGAINST THE OTHER PARTY RELATING TO ANY COVERED DISPUTES, CLAIMS AND CONTROVERSIES.

Centerfolds Agreement (**Exhibit A)** ¶11: THE DANCER WHOSE NAME APPEARS BELOW KNOWINGLY AND AFFIRMATIVELY WAIVES ANY RIGHT TO PARTICIPATE IN ANY COLLECTIVE ACTION OR CLASS ACTION COMMENCED OR TO BE COMMENCED IN ANY COURT OF LAW CONCERNING ANY CLAIMS RELATED TO THIS AGREEMENT, TO HER RELATIONSHIP TO CENTERFOLDS AS A LICENSEEE, OR OTHERWISE AS TO HER LEGAL RELATIONSHIP WITH CENTERFOLDS.

Cover Girls Agreement (**Exhibit C**) ¶11: In the event any action is commenced to enforce or interpret the terms or conditions of this Agreement, Cover Girls shall, in addition to any costs or other relief, be entitled to recover its reasonable attorneys' fees.

Splendor Agreement (**Exhibit B**): ¶11: In the event any action is commenced to enforce or interpret the terms or conditions of this Agreement, Splendor shall, in addition to any costs or other relief, be entitled to recover its reasonable attorneys' fees.

Centerfolds Agreement (**Exhibit A)** ¶7: In the event any action is commenced to enforce or interpret the terms or conditions of this Agreement, Centerfolds shall, in addition to any costs or other relief, be entitled to recover its reasonable attorneys' fees.

Cover Girls Agreement (**Exhibit C**):¶14. WAIVER OF CLASS OR COLLECTIVE CLAIMS.¶

Splendor Agreement (**Exhibit B**) ¶14. WAIVER OF CLASS OR COLLECTIVE CLAIMS.

Centerfolds Agreement (**Exhibit A)** ¶11: Arbitration sha11 proceed solely on an individual basis without the right for any c1aims to be arbitrated on a collective or c1ass action basis or on bases involving claims brought in a purported representative capacity on behalf of others.

Cover Girls Agreement (**Exhibit C**) ¶15: COVER GIRLS AND THE DANCER AGREE THAT IF, UPON ANY RULING OR DECISION OF AN ARBITRATOR, COURT OR OTHER TRIBUNAL WITH JURISDICTION OVER THE MATTER THAT THE RELATIONSHIP BETWEEN COVER GIRLS AND THE DANCER IS ONE OF EMPLOYER AND EMPLOYEE, THE DANCER SHALL SURRENDER, REIMBURSE AND PAY TO COVER GIRLS ALL MONEY RECEIVED BY THE DANCER AT ANY TIME SHE PERFORMED ON THE PREMISES OF COVER GIRLS - ALL OF WHICH WOULD OTHERWISE HAVE BEEN COLLECTED AND KEPT BY COVER GIRLS HAD THE PARTIES NOT ENTERED INTO THIS LICENSE AGREEMENT, AND THE DANCER SHALL IMMEDIATELY PROVIDE A FULL ACCOUNTING TO COVER GIRLS OF ALL INCOME WHICH SHE RECEIVED DURING THE RELEVANT TIME PERIOD.

Splendor Agreement (**Exhibit B**) ¶15: SPLENDOR AND THE DANCER AGREE THAT IF, UPON ANY RULING OR DECISION OF AN ARBITRATOR, COURT OR OTHER TRIBUNAL WITH JURISDICTION OVER THE MATTER THAT THE RELATIONSHIP BETWEEN SPLENDOR AND THE DANCER IS ONE OF EMPLOYER AND EMPLOYEE, THE DANCER SHALL SURRENDER, REIMBURSE AND PAY TO SPLENDOR ALL MONEY RECEIVED BY THE DANCER AT ANY TIME SHE PERFORMED ON THE PREMISES OF SPLENDOR - ALL OF WHICH WOULD OTHERWISE HAVE BEEN COLLECTED AND KEPT BY SPLENDOR HAD THE PARTIES NOT ENTERED INTO

THIS LICENSE AGREEMENT, AND THE DANCER SHALL IMMEDIATELY PROVIDE A FULL ACCOUNTING TO SPLENDOR OF ALL INCOME WHICH SHE RECEIVED DURING THE RELEVANT TIME PERIOD.

Cover Girls Agreement (**Exhibit C**) ¶16. THE SUBMISSION OF AN APPLICATION, AUDITION AS A DANCER, ACCEPTANCE AS A DANCER OR THE CONTINUED PERFORMANCE AS A DANCER SHALL BE DEEMED TO BE ACCEPTANCE OF THIS ARBITRATION POLICY AND WAIVER OF CLASS OR COLLECTIVE ACTION CLAIMS. NO SIGNATURE SHALL BE REQUIRED FOR THE ARBITRATION POLICY TO BE APPLICABLE.

Splendor Agreement (**Exhibit B**) ¶16. THE SUBMISSION OF AN APPLICATION, AUDITION AS A DANCER, ACCEPTANCE AS A DANCER OR THE CONTINUED PERFORMANCE AS A DANCER SHALL BE DEEMED TO BE ACCEPTANCE OF THIS ARBITRATION POLICY AND WAIVER OF CLASS OR COLLECTIVE ACTION CLAIMS. NO SIGNATURE SHALL BE REQUIRED FOR THE ARBITRATION POLICY TO BE APPLICABLE.

53. As noted in paragraph 44, Andrew Skwera (**Exhibit D)** notes that all dancers are required to enter agreements at the Defendant Clubs similar to the one attached to his declaration. This was confirmed by Defendants' counsel at the hearing on May 12, 2022. The recent exemplary agreement signed by a dancer in 2020 and referenced by Mr. Skwera (**Exhibit D),** includes all of the same or similar unconscionable provisions as the provisions listed in paragraph 52 for the Centerfolds Agreement (**Exhibit A**), the Splendor Agreement (**Exhibit B**), and the Cover Girls Agreement (**Exhibit C),** meaning all the unconscionable portions of **Exhibits A to C** continue to be required to be entered by dancers at Defendant Clubs.

V. CAUSES OF ACTION

54. The effect of Defendants' Racist Policy has been to deprive Plaintiff and other prospective, current and former Black or Brown Dancers, as a class, of the same right to make and enforce contracts as Caucasian female entertainers: who were not subject to any numerical limitation at any Defendant Club based on their race. As such, Defendants'

execution of Defendants' Racist Policy is in violation of 42 U.S.C. § 1981 and but for it, Plaintiff and other Black or Brown Dancers would have been given dancer positions or allowed to retain access for dancer positions (as applicable). Defendants' execution of Defendants' Racist Policy and denial of access to Black or Brown Dancers is also a material breach of the License and Access agreement which all dancers are required to enter.

55. The Individual Defendants are jointly and severally liable with the corporate defendants for all damages cause by Defendants Racist Policy as explained above in paragraphs 12 and 13.

56. Defendant W.L. YORK, INC. d/b/a COVER GIRLS, is liable for numerous material breaches of its License and Access Agreements with Plaintiff (which damaged Plaintiff) including the following breaches:

(i) Cover Girls Agreement (**Exhibit C**): Plaintiff was denied the access right granted in paragraph 1 "to perform entertainment services at Cover Girls."

(ii) Plaintiff was denied the rights granted in the Cover Girls Agreement (**Exhibit C**) paragraph 3 to: (i) "determine her schedule in performing the services," (ii) "to arrive and leave the premises at any time without penalty"; and (iii) to set her "own schedule of when and what hours she works." (*see* paragraphs 17 to 34 above). She was also denied the "right to choose her own music." (*see* paragraphs 22, 30 and 33 above); and

(iii) Defendant W.L. YORK, INC. d/b/a COVER GIRLS also breached its express representation No. 19 in the "Policies Regarding Dancer Conduct" attached to the Cover Girls Agreement (**Exhibit C**): "There is no mandatory tip sharing arrangement among management, dancers, and employees. If you choose to voluntarily tip any manager, dancer, waitress, bus boy, DJ, valet, or any other individual affiliated with Cover Girls, you do so at your sole discretion."

57. D WG FM, INC. d/b/a SPLENDOR materially breached its Splendor Agreement (**Exhibit B**) which damaged Plaintiff, by denying Plaintiff the access right granted in paragraph 1: "to perform entertainment services at Splendor." *See* paragraphs 37-39 above.

58. A.H.D. HOUSTON, INC. d/b/a CENTERFOLDS materially breached its Centerfolds Agreement (**Exhibit A**) which damaged Plaintiff, by denying Plaintiff the access right granted in paragraph 1: "to perform entertainment services at Centerfolds." *See* paragraph 36 above.

59. Plaintiff seeks a declaratory judgment that agreements with provisions the same or similar to the Cover Girls Agreement (**Exhibit C**), the Splendor Agreement (**Exhibit B**) and/or the Centerfolds Agreement (**Exhibit A**) are unconscionable and unenforceable because they include unconscionable provisions (see paragraph 52) and are required to be executed by dancers under circumstances where the unconscionable provisions are not explained, or reviewed, and where even later review is impossible as no copy of the agreement is provided to the dancer (*see* paragraphs 18, 26 and 31).

60. Plaintiff seeks a declaratory judgment that all the provisions listed in paragraph 52 from the Cover Girls Agreement (**Exhibit C**), the Splendor Agreement (**Exhibit B**) and the Centerfolds Agreement (**Exhibit A**) are unconscionable and unenforceable against Plaintiff; and further that all of paragraph 13 of the Cover Girls Agreement (**Exhibit C**) and the Splendor Agreement (**Exhibit B**); and all of paragraphs 8 to 11 of the Centerfolds Agreement (**Exhibit A**) are unconscionable and unenforceable against Plaintiff.

61. The unlawful practices enacted under Defendants' Racist Policy were intentional and when they are established at trial, make punitive damages appropriate as they can provide an exemplary penalty for Defendants' intentional and outrageous conduct.

VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court:

62. Grant a Declaratory Judgment that Cover Girls Agreement (**Exhibit C**), the Splendor Agreement (**Exhibit B**) or the Centerfolds Agreement (**Exhibit A**) are unconscionable and unenforceable against Plaintiff;

63. Grant both a preliminary and a permanent injunction enjoining the Defendants, their officers, successors, assigns, and all persons in active concert or participation with them, from continuing to require dancers to enter agreements similar to any of the Cover Girls

Agreement (**Exhibit C**), the Splendor Agreement (**Exhibit B**) or the Centerfolds Agreement (**Exhibit A**).

64. Grant both a preliminary and a permanent injunction enjoining the Defendants, their officers, successors, assigns, and all persons in active concert or participation with them, from continuing Defendants' Racist Policy or otherwise denying access or executing policies and practices which discriminate against Black or Brown Dancers on the basis of race, and remedying the effects of past discrimination by requiring additional proactive hiring of Black or Brown Dancers at Defendant Clubs (*i.e.*, entering License and Access Agreements with additional Black or Brown Dancers);

65. Order Defendants to make whole Plaintiff and the Black or Brown Class Members by awarding them appropriate back pay, with prejudgment interest in amounts to be determined at trial, and other affirmative relief necessary to eradicate the effects of their unlawful practices;

66. Order the reinstatement of Plaintiff and the Black or Brown Class Members as entertainers/dancers with access, or award them front pay in the amounts to be determined at trial if reinstatement is impractical;

67. Order Defendants to make Plaintiff and the Black or Brown Class Members whole by providing compensation for past and future pecuniary losses resulting from the unlawful practices described above;

68. Award punitive damages to Plaintiff and the Black or Brown Class Members for Defendants' intentional, outrageous and malicious conduct described above, in amounts to be determined at trial;

69. Award Plaintiff's Attorneys' fees and costs associated with this action;

70. Award pre-judgment and post-judgment interest on all amounts recovered as permitted by law; and

71. Grant such further relief as the Court deems necessary and proper in the public interest.

VII. JURY TRIAL DEMAND

Plaintiff requests a jury trial.

Respectfully Submitted,

By: /s/*Eric P. Mirabel*

Eric P. Mirabel
Texas State Bar No. 14199560
Southern District ID No. 9708
eric@emirabel.com
3783 Darcus St.
Houston, Texas 77005
Tel: 281 772-3794
Fax: 713 667 4234

CERTIFICATE OF SERVICE

On this 18th day of May, 2021, I hereby certify that a true and correct copy of the foregoing document was served via the Clerk of the Court through the ECF system.

/s/ Eric Mirabel

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.

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

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

CHANEL E.M. NICHOLSON, on behalf of herself and other similarly situated Plaintiffs, Plaintiff,	)	
VS.	)	CIVIL ACTION NO. 4:21-cv-02624
A.H.D. HOUSTON, INC. d/b/a CENTERFOLDS, et al., Defendants.	)	

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ORAL DEPOSITION OF

CHANEL E.M. NICHOLSON

NOVEMBER 18, 2022

(REPORTED REMOTELY)

****

ORAL DEPOSITION OF CHANEL E.M. NICHOLSON, produced as a witness at the instance of the Defendant, and duly sworn, was taken in the above-styled and numbered cause on November 18, 2022, from 1:00 p.m. to 4:19 p.m., before Donna Wright, CSR in and for the State of Texas, reported by machine shorthand and remotely via Zoom, pursuant to the Federal Rules of Civil Procedure, the 22nd Emergency Order Regarding the COVID-19 State of Disaster, and any stipulations or agreements stated on the record or attached hereto.

Oral Deposition of Chanel E.M. Nicholson

APPEARANCES

FOR THE PLAINTIFF:
Mr. Eric P. Mirabel
ERIC PAUL MIRABEL, JD, LLM
3783 Darcus Street
Houston, Texas 77005
(281) 772-3794
eric@emirabel.com

FOR THE DEFENDANTS A.H.D. HOUSTON, INC. D/B/A CENTERFOLDS, ET AL.:
Mr. William X. King
WALLACE & ALLEN, LLP
440 Louisiana Street
Suite 590
Houston, Texas 77002
(713) 227-1744
wking@wallaceallen.com

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EXHIBITS

CHANEL NICHOLSON,
having been first duly sworn, testified as follows:
EXAMINATION
BY MR. KING:

Q. Good afternoon, Ms. Nicholson. How are you?
A. I'm fine. How are you?
Q. I'm doing all right. My name is William King and I'm one of the attorneys for the defendants in this case. Have you ever been deposed before?
A. No.
Q. Okay. Well, since you have never been deposed before, I'll just give you a couple of etiquette and ground rules.

The first one is during the course of depositions, people start to get into kind of a conversational mode with each other and sometimes people talk over each other a little bit, and that makes it hard for the court reporter to take down what's being said. So if I say, you know, "Hold on" or "Let me finish my question," please don't take that personally.
A. Okay.
Q. The second thing is, sometimes I ask questions that come out like word salad and don't make any sense. So if -- if you don't understand a question that I'm

asking, please ask me for clarification and I'll be happy to do so. Okay?
A. Okay.
Q. All right. The third thing is it's also easy for witnesses to go "uh-huh" or "huh-uh" to give a yes or no. So if I ask you, "Can you give me a yes or no", again, please don't take that personally. All right?
A. Uh-huh.
Q. Okay.
A. Yes.
Q. "Okay" is fine, too.
A. Okay.
Q. All right. What have you done -- excuse me. What have you done to prepare for today's deposition?
A. I just looked over my complaint.
Q. Okay. So you've read the lawsuit that's been filed in this case, right?
A. Yes, the third amended complaint.
Q. Great. Have you done anything else?
A. No.
Q. Did you talk with your lawyer?
A. Yes.
Q. Okay. And I don't want to know what y'all talked about. A "yes" is just fine.

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to Splendor in late 2016?
A. Yes.
Q. Got it. And then when did your time at Splendor permanently come to an end? Was that November of 2016?
A. It came to an end -- I wouldn't -- they didn't really fire me. They just didn't let me in the club. So it was around -- around that time.
Q. That time being somewhere -- November of 2016, somewhere in that month, right?
A. When I stopped or when I started?
Q. When you stopped.
A. Yes, late 2016.
Q. What was the next club that you started working at?
A. After Splendor?
Q. Yes, ma'am.
A. I started working at Glamour Girls and -- yeah, I started working at Glamour Girls.
Q. Approximately when did you start working at Glamour Girls?
A. In 2017.
Q. Do you remember about what month, maybe?
A. No.
Q. Was it in early 2017?

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A. Yes, around early 2017.
Q. Are you able to put that into like a season or maybe an approximate month?
A. No. I don't really remember.
Q. After Glamour Girls, where did you start performing?
A. Cover Girls.
Q. Before we talk about Cover Girls, is there any reason that you left Glamour Girls?
A. The money was just not doing what it was supposed to do.
Q. You just didn't find Glamour Girls to be a particularly lucrative club for yourself, right?
A. No, but I had to work there.
Q. I have got that you began working at Cover Girls at some point in November of 2016; is that accurate?
A. Yes.
Q. Okay. And that your time at Cover Girls came to an end in November of 2017, right?
A. My time at what club?
Q. Cover Girls.
A. November 2017.
Q. Okay. So were you working at both Glamour Girls and Cover Girls kind of at the same time?

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A. Yes.
Q. Got it. All right. Exhibit C also says that you worked at Solid Platinum.
A. Uh-huh.
Q. From about when to when were you working at Solid Platinum?
A. Around the same time. Like I went from Glamour Girls to Cover Girls, and then I started doing Solid Platinum all within that timeframe.
Q. That timeframe being --
A. End of 2017.
Q. End of 2017?
A. Uh-huh.
Q. All right. About how long were you working at Solid Platinum?
A. A few months. I would jump between Solid Platinum and Cover Girls.
Q. How would you decide which club to perform at?
A. As in Davari clubs?
Q. Well, as between Solid Platinum and Cover Girls.
A. Well, when I would walk in they would tell me that I couldn't work there. So I would just -- they didn't allow me access to Cover Girls, so I would just go up the street to Glamour Girls because it was right

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around the corner.
Q. Okay. Is Glamour Girls another club that you would characterize as like a Davari club?
A. No.
Q. No, it's not?
A. No.
Q. You also worked at Sunset Strip?
A. Yes.
Q. Can you give me a rough date range when you were working at Sunset Strip.
A. End of 2017.
Q. So you began working at Sunset Strip somewhere in the latter part of 2017?
A. Yes.
Q. And about how many months were you working there?
A. Not long because I got pregnant with my second child. So I would say about like -- oh, it says it right here, March -- around March 2017.
Q. So you stopped work at -- did you stop work at all clubs in around March of 2017?
A. No. I'm trying to remember. Give me a second.
Q. Sure.
A. I got pregnant. What was the question again?

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A. Yes. Which question are you asking me?
Q. Sorry?
A. Which question are you asking me, how many times did I try or how many times that I actually was able to go in?
Q. Right. We will start with how many times you tried on average per week.
A. Okay. About six -- six days a week. I would like to work Monday through Saturday.
Q. So your preference was to try to work six shifts per week, Monday through Saturday, right?
A. Uh-huh.
Q. Sorry, was that a yes?
A. Yes.
Q. How many shifts on average were you able to actually work at Cover Girls?
A. I would probably get in for my shift, pay my house fee, and then the manager would come tell me I have to go. So it was like -- it was hard to really count it. Does that make sense? I'll get in there and start to work and then I had to go. So --
Q. Okay. How often would that circumstance happen where you pay your house fee, start performing, and then you're told to leave?
A. A lot.

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Q. Are you able to quantify that on like an average basis per week?
A. At least three times a week.
Q. Would you get a refund of your house fee?
A. No.
Q. Average per week, how many times would you be able to complete a shift without being told to go home?
A. Maybe three -- three days.
Q. So in other words, 50 percent of the time that you would go to perform at Cover Girls between November 2016 and November 2017, you would be told to go home?
A. Yes.
Q. And who -- who were the managers telling you to go home?
A. Whatever acting manager was there at the time. I don't remember.
Q. And did you -- did you try to work every week at Cover Girls between November 2016 and November 2017?
A. I tried, but it didn't work out like that.
Q. When you would go to Cover Girls to try to work a shift, how often -- excuse me -- how often would you sign in and then be told you needed to go home?
A. A lot.
Q. A lot? Are you able to put that on like an average basis?

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A. I would get into the club, into the locker room, change, on the floor, and then told to leave.
Q. And was every time that you were told you had to leave because somebody told you that there were already too many black dancers working that shift?
A. Are you asking me a question?
Q. Yes.
A. What's the question?
Q. Sure. On every one of those occasions where you would sign in, you would get on the floor, and a manager would tell you, "You've got to go home," was it because the manager told you there were already too many black dancers working that shift?
A. Yes. This was like not a secret. It wasn't like a -- everybody knew. This was just normal.
Q. Right.
A. Like it was just a thing and you would just have to accept it.
Q. And I know some of my questions are dumb. I've just got to ask them.
A. No. I believe you already know the answers. You know how these clubs are.
Q. So every time that you were told to go home, a manager would say, "We've already got so many black dancers here"?

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A. Not every single time, but most of the time.
Q. More than 50 percent?
A. Yes, more than 50 percent.
THE REPORTER: Did you say 75?
THE WITNESS: 50.
THE REPORTER: Okay, I'm sorry.
THE WITNESS: It's okay.
Q. (BY MR. KING) Did this -- did this circumstance start happening like in November of 2016?
A. Like the racism?
Q. Where you would show up, sign in, and be told to take a hike.
A. No, it started when I was 18 years old.
Q. Oh, I'm just talking about Cover Girls right now.
A. Oh, Cover Girls.
Q. Yes.
A. So did it start from the beginning all of the way to the end?
Q. Yeah.
A. Yes.
Q. It started from the beginning, right?
A. Uh-huh.
Q. Let me do this.
(Exhibit E marked)

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Q. (BY MR. KING) I put into the chat Exhibit E.
A. Okay.
Q. Just let me know when you're able to pull that up.
A. Okay, I've got it. Royce, I haven't seen that name in so long. Okay, I'm looking at it. I've got it.
Q. Have you ever seen Exhibit E before?
A. Yes.
Q. If you would turn to the second page of Exhibit E, is that your signature at the bottom?
A. The second page?
Q. Yeah, where it says Nicholson_AHD_000023.
A. No, it says 000022.
Q. I'm talking about the next page, sorry.
A. Okay. Yes.
Q. All right. You're not denying that you signed this document, right?
A. No, that's my signature. I don't remember signing it, but that's my signature.
Q. Sure, I get it. But you're not saying like somebody forged your signature on this or anything like that, right?
A. No.
Q. Okay. And this shows that you signed it on

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November 6th of 2016.
A. Uh-huh.
Q. Does that sound accurate?
A. Yes.
Q. Okay. So after you signed this Exhibit E, do you recall when you started performing like your first -- your first shift at Cover Girls, do you remember when that was?
In other words, was it like the same day or the next day or a week later?
A. When they started the racist stuff, making me leave?
Q. No. Just when you started working, like your first shift.
A. What are you asking me?
Q. Okay. So you signed this -- sure. You signed this document on November 6th.
A. Okay.
Q. When was your first shift at Cover Girls?
A. More than likely that night.
Q. Okay, got it. 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?
A. Do I recall the first time it happened?

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Q. Yeah. Was it like the next day, the next week?
A. 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.
THE REPORTER: Wait, what was that last part?
THE WITNESS: When they would tell me to leave because there were too many black girls, I would just go to the club up the street, which was Glamour Girls.
Q. (BY MR. KING) Did you ever tell anybody -- well, strike that.
Can you turn to Page 37? It's like 16 pages down.
A. Okay, one second. 37?
Q. Yeah, Nicholson_AHD_000037.
A. 37 or 36?
Q. 37.
A. Okay. Just making sure, 37.
Q. All right. Do you recall Andy Skwera signing this document?
A. Not really, no.
Q. Do you recall working with Andy Skwera at

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Cover Girls?
A. Yes, kind of.
Q. Did he ever tell you that you needed to leave because there were already too many black dancers there?
A. He didn't tell me that. He was kind of nice to me. But we would -- we would talked about like -- this was like not a secret thing. Like this was something that was a little talked about, and he would talk about it all the time.
Q. Okay. So did he ever say, "You've got to go home"?
A. Not that I recall, no.
Q. Did you have any kind of schedule at Cover Girls?
A. Like a time that I had to be there?
Q. Yeah.
A. No, I could come and go as I would choose.
Q. How much income during a shift would you make during your time at Cover Girls?
A. Oh, it ranges. That can range from 300 to 2,000, 3,000.
Q. It depends on a lot of different things, right?
A. Yes. Every day was very different. So when I

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happens sometimes.
A. Oh, it happens.
Q. Yeah. And so no one ever said, "Hey, we think that you're, you know, soliciting prostitution," or something like that, right?
A. No.
Q. Okay.
A. It was encouraged.
Q. But, to your knowledge, at Cover Girls, no managers ever said, "Hey, Chanel, Royce, you can't -- you can't do that with customers"?
A. No.
Q. And you never got in any fights with any other dancers or anything like that?
A. No. I don't fight. Look at this.
Q. Dancer fights happen. Have you ever seen a dancer fight?
A. Yes. That's why I never do it. Oh, no, I'll get in the car and leave. I'll run. I'm a runner. I don't do that. Call me scared all you want to. My hair costs a lot. No.
Q. All right. Let's talk about Splendor. You were there between, roughly, September 2014 and November 2016, true?
A. Okay. So that would be -- I'm trying to

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adjust my seat. Can I go grab one of my pillows to sit on? Is that okay?
Q. Sure. You want to take a five-minute break?
A. No, we're not getting no breaks.
Q. Go for it.
(Recess from 2:40 p.m. to 2:46 p.m.)
THE REPORTER: We're back on the record.
Q. (BY MR. KING) All right. Ms. Nicholson, we're back on the record, and I want to ask you about Splendor. You began working there in roughly September of 2014. I'm going to put in the chat Exhibit F.
(Exhibit F marked)
Q. (BY MR. KING) All right. Let me know when you open that up.
A. Opening it now. Oh, Lordy. Yes, I got it.
Q. Okay. Have you ever seen Exhibit F before?
A. I guess. I don't remember seeing it, but my signature -- is that my signature? Yeah, that's my signature. I don't remember seeing it, no.
Q. But you're not -- you're not denying that's your signature on Nicholson_AHD_000054?
A. Yeah, that's --
Q. Okay. And it appears that this was signed on September -- it looks like 29th of 2014. Does that -- does that seem right?

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A. Yes.
Q. After you signed this, do you recall working the same day or --
A. Yes.
Q. You did?
A. It was always the same day.
Q. And -- okay. You worked at Splendor through November of 2016, right?
A. Yes.
Q. How often, on average, would you actually work a shift at Splendor on a weekly basis?
A. About four shifts a week, about seven hours.
Q. And how often at Splendor would you be told you can't work a shift?
A. A lot. I've had to hide before because Bob Piers was there.
THE REPORTER: You had to -- I'm sorry, can you say it again?
THE WITNESS: Oh, you're writing it down. I forgot. I said I've had to hide before because Bob Piers was there.
Q. (BY MR. KING) All right. And so you typically worked four shifts a week during your time at Splendor?
A. Yes.

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Q. And how many times would you be told per week, on average, you know, you've got to go home?
A. Two to three.
Q. Okay.
A. The difference was -- with Splendor is -- this is disgusting, but I could have stayed if I would have performed a sexual favor.
Q. My question is a little different. I'm just trying to figure out what like portion of the time -- amount of time would you be told you can't work a shift by a manager?
A. A couple times a week.
Q. Okay. So would you go and try to work a shift at Splendor like five or six times a week or something like that?
A. I would try to go all seven days just because I was told to leave. So I'm like, "Okay, well, I've still got to make some money, so let me keep trying to go and I can get in when I can get in."
I hope that answers your question.
Q. Yeah. And that's what I'm -- I'm just trying to figure out kind of the math a little bit.
A. Okay.
Q. Because in the complaint it says that you typically worked four shifts per week.

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A. Uh-huh.
Q. And so I'm trying to figure out like, okay, well, on an average basis weekly, how many times were you told to go home?
A. Okay. So those four shifts a week were the days I was able to work.
Q. Right.
A. I would try to work the whole week, but it always ended up being like four shifts for this many hours because I was told to leave. Does that make sense?
Q. Yes.
A. Okay.
Q. You went back to Splendor on August 11th of 2021, right?
A. Yes.
Q. And this was a couple years after your last day at Splendor, which was at some point in November of 2016, right?
A. Yes.
Q. Let's -- let's start with your last day at Splendor in November of 2016.
A. Okay.
Q. Were you -- were you permanently barred -- did anyone say you were permanently barred from working

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there in November of 2016?
A. Because I was -- no, I was never told like, "You're fired," no.
Q. You just decided to stop performing there at some point?
A. Right, uh-huh.
Q. Going back to August 11th of 2021, you showed up there at 7:00, right?
A. Uh-huh.
Q. And who did you talk to?
A. First I talked to a relative of the Davaris, some short round guy.
Q. A short brown guy?
A. Uh-huh, he was round. Very round.
Q. Oh, round. I thought you said brown.
A. No, round with black hair. I don't know his name.
Q. You don't know his name?
A. Never seen him before. That was my first time.
Q. And what did he tell you?
A. Oh, he said, "We're not hiring. You've got a better chance trying to get hired at like Joy or something."
Q. Anything else that he told you?

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A. No, not him.
Q. Not him. When he said, "Go try out at Joy -- Joy Men's Club," did he suggest that you go work at Centerfolds?
A. Uh-huh.
Q. He did?
A. Uh-huh. He said, "You should try Centerfolds."
Q. Did you try to go to Centerfolds after that?
A. No, because I talked to Joey right after I talked to him, and Joey walked me outside.
Q. Was Joey a manager on duty at the time?
A. Yes. He usually is the hiring manager, but he said he had his hiring privileges taken from him.
Q. So do you know Joey's last name?
A. No.
Q. Where did you meet Joey?
A. Splendor.
Q. Yes. Was it like inside the club?
A. Oh, are you talking about when did I first meet him or --
Q. I'm sorry, I'm just talking about --
A. Oh, that day?
Q. Yeah, that day.
A. Oh, okay. I asked to speak with Joey. I go,

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"Can I talk to Joey?" And Joey comes out, then he starts to walk with me outside and then -- yeah, he walked me outside.
Q. And what did Joey tell you?
A. He told me he would hire me in a heartbeat, but they're not taking any more black girls at this location, especially since COVID. Those are his exact words.
Q. You broke up there on the last part or got garbled.
A. He said they're not taking any more black girls at this location, especially since COVID, so I should go try Centerfolds or Joy.
Q. Do you know why he said go try Centerfolds?
A. No.
Q. Do you know how many black dancers were at Splendor on August 11th, 2021 when you showed up?
A. I don't think there were any because I was kind of able to look, but I didn't see any. I saw a lot of blonde Spanish women and some white girls, but I did not see one black girl, not one. I didn't see any.
Q. How far into Splendor were you able to get?
A. Have you been inside of Splendor?
Q. No.
A. Okay. So just right -- basically through the

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door. You can kind of see in the club. If you look, you can see inside. So it's not --
Q. But you didn't -- you didn't make it to the locker room, though, right?
A. No.
Q. And did you see white dancers going into the club?
A. Uh-huh.
Q. You did?
A. Uh-huh.
Q. How many?
A. Maybe two.
Q. Out of curiosity, how did you know that they were dancers versus, you know, customers or waitresses or something?
A. Waitresses look completely different than dancers. I have been -- I have been in it a long time. I can see the difference.
Q. So it was your impression that the white women walking by you were -- they were going in to work as dancers?
A. Yes. They had big bags to go change into their dance clothes.
Q. Okay. Do you know if those individuals, those white dancers, were applying for a position or already

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had a position at Splendor?
A. I'm not sure what they were doing. If they were applying or -- I don't know.
Q. You just don't know one way or the other, right?
A. Huh-uh.
Q. Is that a no?
A. Right.
Q. Did you ask anybody if -- well, let me -- let me back up.
This round individual who you say -- who you believe was a relative --
A. Yes, Joey told me he was a relative of the Davaris.
Q. Okay. Joey told you he was a relative?
A. Uh-huh.
Q. Okay. Did that individual say, "You can't work here because you're black"?
A. No.
Q. Joey came out, talked to you, and said, "We're not hiring" --
A. "Because you're black."
Q. Okay. Excuse me.
Did you have any phone calls with Joey after that?

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A. No.
Q. Was there a reason why you asked for Joey to come out?
A. Because I remembered Joey. I don't know if he would remember my face, but I was hoping he would remember my face so I could be -- he could be like, "Oh, okay, I know her, she can work here." I thought, you know, I can pull some strings and get in. So that's why I asked for Joey, but he didn't remember me.
Q. At the time, did you consider the contract that you signed at Splendor, Exhibit F, still enforced?
A. I don't understand your question. Like did I -- did I still work there? Like --
Q. Let me ask it like this.
At every club you've ever worked at, you signed some agreement like Exhibit F, right?
A. Uh-huh.
Q. Like a -- like a dancer agreement, right?
A. Yes.
Q. And you can't work as a dancer unless you sign some kind of agreement with the club, right?
A. Correct.
Q. And you've heard of dancers' contracts being canceled right?
A. No.

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Q. You've never heard of that?
A. Not being canceled, no.
Q. So when you went to Splendor in August of 2021, were you expected to sign a new contract?
A. No.
Q. And is that because you recalled that you had already signed a contract with Splendor --
A. Yes.
Q. -- back in 2014?
A. I knew that I never got like fired, so I didn't think I would have to go through the whole rehiring process again, yeah.
Q. Right. Like giving your license and doing a background check and stuff like that, right?
A. Yes.
Q. Okay. Was there anything in particular that caused you to want to revive your dance career in 2021?
A. Uh-huh.
Q. What was that?
A. By this point, I had two little ones and I wanted to buy my babies a house. That was my -- I'm like, "Okay, we've been renting. I want to buy my kids a house because they deserve a house."
And I want to, you know, now that I'm older, take this money and invest it, do things with it

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normally do. But I'm going to start it back up pretty soon. I've just got to get out of this depression funk and get out of this.

Q. Okay. Do you have any other -- well, strike that.

Do you have any entities?

A. What do you mean?

Q. Like any companies, like a limited liability company or a nonprofit or --

A. No, no, no.

Q. Cover Girls, the race discrimination you experienced happened basically right after you signed that contract with them and started performing, right?

A. Yes.

Q. And it continued throughout your time at Cover Girls, right?

A. Yes.

Q. So in November of 2016, right away the managers were preventing you from performing because of your race, right?

A. Well, I went to try to get hired at Cover Girls a few times before I was actually brought on.

Q. Right.

A. I always found like some kind of a connection with a girl inside that would help me get in because

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they wouldn't let me in until somebody talked to a really cool manager and was like, "Please, let my friend in." So -- but, yes, right away.

Q. Okay. And you signed the Cover Girls agreement on November 16th, 2016, and then you started performing the same day, I think you said, right?

A. Uh-huh.

Q. How soon after you signed this did you first experience any kind of denial of access because of your race?

A. I want to say while I was signing the contract, just about every -- because when -- at first I didn't remember signing the contract, especially after y'all said I didn't. You know, remember when y'all came up and said, "We don't have any records for her, she's crazy." Then y'all found the records and I was like, "Okay, maybe I did sign it."

Then I started to remember how everything went, and usually every time I would sign one I'm always talking with a manager and they would literally tell me, you know, "We really don't like to hire black women here, but you know such and such, so we're going to let you in, blah, blah, blah, sign here, sign here. Go get on the floor," or whatever.

So yeah, immediately.

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Q. It was immediate?

A. Uh-huh.

Q. And after signing Exhibit E, do you recall working the day after signing Exhibit E at all?

A. Which one is Exhibit E?

Q. That's the Cover Girls agreement.

A. Okay. What's the question?

Q. Yes. Did you work the next day, November 7th, 2016? Do you recall that?

A. More than likely I did, but I don't remember the day.

Q. I mean, I don't expect you to --

A. More than likely I worked the next day, but I don't remember like exactly what happened on that particular day.

Q. Sure. But shortly after signing this you encountered racial discrimination at Cover Girls, right?

A. Yes.

Q. That resulted in you not being able to access the club, right?

A. Yes.

Q. At Splendor, you signed the Splendor agreement on September -- what does it say -- it looks like September 27th, 2014, right? That's Exhibit F.

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A. Okay.

Q. The same questions. Did you experience racial discrimination at Splendor that eliminated your right or impaired your right to access the club like right after signing this?

A. Yes.

Q. And that continued throughout your time at Splendor, true?

A. Yes, my whole dance -- my whole dance career, yes.

THE REPORTER: Yes, what? I didn't hear.

THE WITNESS: That was my whole dance career with the Davari clubs.

Q. (BY MR. KING) This wasn't something that, you know -- it wasn't like you started performing at Cover Girls, and then six months after you signed the contract all of a sudden --

A. No.

Q. -- bad things were happening, right?

A. I wish I had a good six months to go in there and make some money like that. But, no, I never had -- I never got a chance to do that, no.

Q. The same issue with Splendor, it wasn't as though you signed this contract, you worked there for six months without a problem, and then all of the

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sudden you got a manager interfering with your --
A. Immediately.
Q. It was immediate? Okay.
You went back to try to work at Splendor. It was your -- you were under the impression that you didn't need to audition all over again because you had already been working there, right?
A. Uh-huh.
Q. That's a yes?
A. Yes, that's a yes.
Q. And at Cover Girls, your last day there was at some point in November of 2017, but you don't remember exactly when, right?
A. I don't know the exact date, no.
Q. All right. And you don't remember whether it was in the first half of November or the last half of November, right?
A. No, I don't remember.
Q. And you don't recall whether your last day at Cover Girls was before or after Thanksgiving, right?
A. It was after. It was a little bit after, like right after Thanksgiving.
Q. Okay. Right after Thanksgiving?
A. Right after, yeah, because I remember going to my mom's house.

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Q. And you don't recall anyone telling you at Cover Girls that you were permanently barred, right?
A. No.
Q. No one ever told -- said, "Hey, you're permanently barred, don't ever come back," right?
A. No.
Q. And the same is true with respect to Splendor; no one at Splendor ever said, "Hey, don't ever come back," right?
A. No.
Q. Okay. At Centerfolds, no one ever told you, "You're permanently barred, you can never come back," right?
A. No.
Q. When you were at Splendor in 2021, were you at all braced for the possibility that you would be told you could not perform because there were too many black girls there?
A. Yeah, I was prepared for it, but I wasn't prepared to not be able to go in there at all.
Q. What do you mean?
A. You know, by this time I know how -- you know, I'm older and I have experience with how this works and what it is. I thought I would be -- yes, I thought I would be able to get a job. I kind of knew how they

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were going to, you know, try to do me. I didn't think it was going to be that bad. I didn't think he was going to come out there and tell me, "We're not hiring anymore black girls, especially since COVID."
Q. It didn't come as a shock to you, though, what happened on August of 2021?
A. It kind of did at the time.
Q. Yeah?
A. At that particular time, yes, because at first I thought Joey would remember me, but he didn't so. I was shocked because he didn't remember me. I was like, "Dude, you sexually assaulted me and everything. How do you not remember me? Look at my face."
So yes, it was kind of a shock at that time because I looked really good, I -- nothing was wrong with me. I was perfectly qualified. And, yeah, I'm too black.
Q. Can you give me the names of the medical professionals that you are seeing for anxiety?
A. Yes. His name is Dr. Kachi at Next Level Psychiatry.
Q. Do you know Dr. Kachi's first name?
A. Oh, no. He is an African man. It's very hard to say. It's really long.
Q. Do you know how to spell Kachi?

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A. I spelled it K-a-c-h-i, but I don't know if that's the right spelling.
Q. Is Dr. Kachi a therapist?
A. No, he is my psychiatrist.
Q. He is -- okay. So he's your psychiatrist. How long have you been seeing Dr. Kachi?
A. About a year with him. No, about seven months with Dr. Kachi. And then I had --
Q. So you --
A. I bounced around for psychiatrists.
Q. Okay. So you began seeing Dr. Kachi after this lawsuit was filed?
A. Uh-huh. After it, I couldn't -- I literally thought the Davari brothers were going to like shoot at my house. Like I swear, I'm not even trying to be funny. I got so many like disturbing calls from other like clients saying like, "Are you really doing this? It's really dangerous."
So I was like terrified to sleep, so that's when I got in touch with Dr. Kachi. So when this first started happening, so I can -- I guess about a little over a year.
Q. Has anyone made any threats against you?
A. No.
Q. No one has made any kind of threatening phone

CHANGES AND SIGNATURE

WITNESS NAME: CHANEL E.M. NICHOLSON

DATE OF DEPOSITION: NOVEMBER 18, 2022

PAGE	LINE	CHANGE	REASON

I, CHANEL E.M. NICHOLSON, have read the foregoing deposition and hereby affix my signature that same is true and correct, except as noted above.

_____
CHANEL E.M. NICHOLSON

THE STATE OF _____)
COUNTY OF _____)

Before me, _____, on this day personally appeared CHANEL E.M. NICHOLSON, known to me (or proved to me under oath or through _____) (description of identity card or other document) to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office, this _____ day of _____, _____.

_____
NOTARY PUBLIC IN AND FOR
THE STATE OF _____

My commission expires: _____

____ No Changes Made ____ Amendment Sheet(s) Attached

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

CHANEL E.M. NICHOLSON, on behalf of herself and other similarly situated Plaintiffs,
Plaintiff,
VS.) CIVIL ACTION NO.) 4:21-cv-02624
A.H.D. HOUSTON, INC. d/b/a CENTERFOLDS, et al.,
Defendants.

REPORTER'S CERTIFICATION OF THE ORAL DEPOSITION OF CHANEL E.M. NICHOLSON
NOVEMBER 18, 2022
(REPORTED REMOTELY)

I, Donna Wright, a Certified Shorthand Reporter and Notary Public in and for the State of Texas, hereby certify to the following:

That the witness, CHANEL E.M. NICHOLSON, was remotely duly sworn by the officer and that the transcript of the oral deposition is a true record of the testimony given by the witness;

That the original deposition was delivered to Mr. William X. King;

That a copy of this certificate was served on all parties and/or the witness shown herein on _____;

I further certify that pursuant to FRCP Rule 30(3) that the signature of the deponent:

__X__ was requested by the deponent or a party before the completion of the deposition and that the signature is to be before any notary public and returned within 30 days from date of receipt of the transcript. If returned, the attached Changes and Signature Page contains any changes and the reasons therefore:

____ was not requested by the deponent or a party before the completion of the deposition.

I further certify that I am neither counsel for, related to, nor employed by any of the parties or attorneys in the action in which this proceeding was taken, and further that I am not financially or otherwise interested in the outcome of the action.

Certified to by me on this, the _____ day of _____, 2022.

_____
DONNA WRIGHT, Texas CSR 1971
Expiration Date: 11/30/24
INFINITY REPORTING GROUP, LLC
11200 Richmond Avenue
Suite 410
Houston, Texas 77082
(832) 930-4484
Firm Registration No. 702

COUNTY OF TRAVIS)
STATE OF TEXAS)

I hereby certify that the witness was notified on _____ that the witness has 30 days or (_____ days per agreement of counsel) after being notified by the officer that the transcript is available for review by the witness and if there are changes in the form or substance to be made, then the witness shall sign a statement reciting such changes and the reasons given by the witness for making them;

That the witness' signature was/was not returned as of _____.

Subscribed and sworn to on this, the _____ day of _____, 2022.

_____
INFINITY REPORTING GROUP, LLC
11200 Richmond Avenue
Suite 410
Houston, Texas 77082
(832) 930-4484
Firm Registration No. 702

D WG FM, INC. D/B/A SPLENDOR
LICENSE AND ACCESS AGREEMENT

1. D WG FM, Inc. d/b/a Splendor ("Splendor") grants access to the Dancer whose name is set forth below (the "Dancer") to perform entertainment services at Splendor, subject to the *Policies Regarding Dancer Conduct* which is attached and incorporated as if fully set forth in this Agreement. In consideration for Splendor allowing the Dancer to perform entertainment services at Splendor, the Dancer enters into this License and Access Agreement (the "Agreement").

2. The Dancer represents to Splendor that she has knowledge and experience in the adult entertainment industry and is familiar with industry standards and practices for a professional adult entertainer. The Dancer further acknowledges that her performances will be in compliance with general industry standards and all applicable laws, ordinances and regulations.

3. The Dancer shall determine the method, details, and means of performing entertainment services at Splendor. 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. It is specifically understood that the Dancer sets her own schedule of when and what hours she works. The Dancer agrees to supply all of her own costumes, beauty aids, and other apparel necessary for her performance as an entertainer, which must comply with all applicable laws, ordinances and regulations. Splendor shall not control in any way the choice of costumes and/or wearing apparel made by the Dancer, although Splendor expects the Dancer to appear at all times in apparel that is consistent with industry standards for a professional adult entertainer. The Dancer has the right to choose her own music. Nothing in this Agreement shall require the Dancer to perform exclusively at Splendor. The Dancer retains the right, and is free, to work or perform at other businesses and at other locations, including Splendor's competitors.

4. The Dancer understands that Splendor will not pay her any hourly wage or overtime pay, advance or reimburse her for any business-related expenses, or provide to her any other employee related benefits. The Dancer acknowledges that she will receive no compensation from Splendor, that her compensation shall be comprised solely of monies received from customers and not Splendor, and that the Dancer assumes both the full risk of loss and reward of profit as a result of services she performs. It is further acknowledged that all equipment and materials required to perform the work shall be provided by the Dancer at her own expense. Since she is not an employee, the Dancer understands that she is not entitled to receive any workers' compensation benefits or unemployment compensation benefits and waives any claim for any employee related benefits.

5. The Dancer acknowledges and agrees that she is not an employee of Splendor. It is the express intention of the parties that the Dancer is, and shall remain during the term of this agreement, a licensee granted access to Splendor and not be deemed an agent, servant, independent contractor, or employee of Splendor for any purpose. Nothing in this Agreement shall be interpreted or construed as creating or establishing the relationship of employer and employee between the Dancer and Splendor. The parties acknowledge that the Dancer is not an agent, servant, independent contractor, or employee of Splendor for purposes of taxation under

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state law (including, but not limited to, the Texas Alcoholic Beverage Code) and federal law (including, but not limited to, the Fair Labor Standards Act) or any other purpose.

6. The Dancer shall maintain accurate records of all income generated using Splendor's facilities and the Dancer is solely responsible for all taxes, fees and assessments for any and all income generated using Splendor's facilities in the operation of her business. The Dancer is responsible for reporting her income and paying her own income taxes and other taxes of every description incidental to her self-employment. The Dancer agrees to indemnify and/or reimburse Splendor if Splendor is required to pay any taxes on the Dancer's behalf.

7. The Dancer shall be solely responsible for obtaining and maintaining, at Dancer's sole cost and expense, all necessary business licenses and permits and insurance including, but not limited to, health and disability insurance, and for paying all federal, state and local taxes and contributions imposed upon any income earned by Dancer at Splendor.

8. Splendor and the Dancer shall have the right to terminate this Agreement at any time and for any reason, or for no reason at all. No party shall have liability for any damages resulting from either party's exercise of its right to terminate this Agreement.

9. This Agreement, and the incorporated *Policies Regarding Dancer Conduct*, represents the entire agreement of the parties as to the matters contained in this Agreement. Any amendment of this Agreement shall be effective only if it is in writing and signed by the parties.

10. This Agreement shall not be assigned by the Dancer. Any attempted assignment of this Agreement by the Dancer shall be null and void and shall result in the immediate suspension and/or termination of this Agreement.

11. In the event any action is commenced to enforce or interpret the terms or conditions of this Agreement, Splendor shall, in addition to any costs or other relief, be entitled to recover its reasonable attorneys' fees.

12. THE DANCER SHALL INDEMNIFY, HOLD HARMLESS AND PAY FOR SPLENDOR'S DEFENSE FROM AND AGAINST ANY AND ALL CLAIMS, LOSSES OR LIABILITY, INCLUDING ATTORNEYS' FEES, ARISING FROM OR RELATING TO THIS AGREEMENT OR THE DANCER'S RELATIONSHIP WITH SPLENDOR, INCLUDING LIABILITY ARISING FROM SPLENDOR'S OWN NEGLIGENCE.

13. ARBITRATION POLICY.

(A) THE PARTIES AGREE THAT ANY AND ALL COVERED DISPUTES, CLAIMS AND CONTROVERSIES ARISING OUT OF OR RELATING TO THIS AGREEMENT AND/OR ANY MATTER RELATED TO ALLEGED EMPLOYMENT, ALLEGED TERMS OR CONDITIONS OF EMPLOYMENT, OR ANY ALLEGED RELATIONSHIP OTHER THAN THAT OF A LICENSEE THAT THE DANCER MAY HAVE AGAINST SPLENDOR, ITS OWNERS, DIRECTORS, OFFICERS, MANAGERS, EMPLOYEES, OR AGENTS (HEREINAFTER, COLLECTIVELY REFERRED TO AS

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"SPLENDOR") OR THAT SPLENDOR MAY HAVE AGAINST THE DANCER SHALL BE SUBMITTED EXCLUSIVELY TO AND DETERMINED EXCLUSIVELY BY BINDING ARBITRATION UNDER THE FEDERAL ARBITRATION ACT, 9 U.S.C. § 1 ET SEQ. ("FAA").

(B) "COVERED DISPUTES, CLAIMS AND CONTROVERSIES" INCLUDE, BUT ARE NOT LIMITED TO, ANY AND ALL DISPUTES, CLAIMS AND CONTROVERSIES THAT AROSE BEFORE AND/OR AFTER THIS ARBITRATION POLICY WENT INTO EFFECT, ARISING UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT ("ADEA"), TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 ("TITLE VII"), THE AMERICANS WITH DISABILITIES ACT ("ADA"), THE FAMILY AND MEDICAL LEAVE ACT ("FMLA"), THE FAIR LABOR STANDARDS ACT ("FLSA"), 42 U.S.C. § 1981, INCLUDING AMENDMENTS TO ALL THE FOREGOING STATUTES, THE EMPLOYEE POLYGRAPH PROTECTION ACT ("EPPA"), THE EMPLOYMENT RETIREMENT INCOME SECURITY ACT ("ERISA"), OCCUPATIONAL SAFETY AND HEALTH ACT ("OSHA"), THE TEXAS COMMISSION ON HUMAN RIGHTS ACT ("TCHRA"), ANY OTHER CLAIMS ARISING UNDER FEDERAL OR TEXAS STATE LAW, AND/OR COMMON LAW CLAIMS REGULATING EMPLOYMENT TERMINATION, MISAPPROPRIATION, THE LAW OF CONTRACT OR THE LAW OF TORT, INCLUDING, BUT NOT LIMITED TO, CLAIMS FOR MALICIOUS PROSECUTION, INTENTIONAL/NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS OR DEFAMATION.

DISPUTES, CLAIMS AND CONTROVERSIES THAT, BY LAW, CANNOT BE SUBJECT TO ARBITRATION ARE NOT COVERED BY THIS ARBITRATION POLICY. CLAIMS THAT ARE NOT COVERED ARE (I) FOR UNEMPLOYMENT COMPENSATION AND WORKERS' COMPENSATION (WHICH THE DANCER AGREES THAT SHE IS NOT ELIGIBLE TO RECEIVE) AND (II) THE RIGHT TO FILE AN UNFAIR LABOR PRACTICE CHARGE UNDER THE NATIONAL LABOR RELATIONS ACT ("NLRA").

NOTHING IN THIS ARBITRATION POLICY PROHIBITS THE DANCER FROM FILING AT ANY TIME A CHARGE OR COMPLAINT WITH A GOVERNMENT AGENCY SUCH AS THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ("EEOC"). HOWEVER, UPON RECEIPT OF A RIGHT TO SUE LETTER OR SIMILAR ADMINISTRATIVE DETERMINATION, THE DANCER'S CLAIMS BECOME SUBJECT TO ARBITRATION.

(C) ANY AND ALL COVERED DISPUTES, CLAIMS AND CONTROVERSIES SHALL BE SUBMITTED TO THE AMERICAN ARBITRATION ASSOCIATION (THE "AAA"), OR ITS SUCCESSOR, INITIALLY FOR MEDIATION, AND IF THE MATTER IS NOT RESOLVED THROUGH MEDIATION, THEN IT SHALL BE SUBMITTED TO THE AAA, OR ITS SUCCESSOR, FOR FINAL AND BINDING ARBITRATION. EITHER PARTY MAY COMMENCE MEDIATION BY PROVIDING TO THE AAA AND THE OTHER PARTY A WRITTEN REQUEST FOR MEDIATION, SETTING

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FORTH THE SUBJECT OF THE DISPUTE, CLAIM OR CONTROVERSY AND THE RELIEF REQUESTED. THE PARTIES WILL COOPERATE WITH THE AAA AND WITH ONE ANOTHER IN SELECTING A MEDIATOR FROM THE AAA PANEL OF NEUTRALS, AND IN SCHEDULING THE MEDIATION PROCEEDING.

(D) THE PARTIES AGREE THAT THEY WILL PARTICIPATE IN ANY MEDIATION CONDUCTED BY THE AAA IN GOOD FAITH. ALL OFFERS, PROMISES, CONDUCT AND STATEMENTS, WHETHER ORAL OR WRITTEN, MADE IN THE COURSE OF THE MEDIATION BY ANY OF THE PARTIES, THEIR AGENTS, EMPLOYEES, EXPERTS, AND ATTORNEYS, AND BY THE MEDIATOR OR ANY OF THE PARTIES, THEIR AGENTS, EMPLOYEES, EXPERTS AND ATTORNEYS, AND BY THE MEDIATOR OR ANY AAA EMPLOYEES, ARE CONFIDENTIAL, PRIVILEGED AND INADMISSIBLE FOR ANY PURPOSE, INCLUDING IMPEACHMENT, IN ANY ARBITRATION OR OTHER PROCEEDING INVOLVING THE PARTIES, PROVIDED THAT EVIDENCE THAT IS OTHERWISE ADMISSIBLE OR DISCOVERABLE SHALL NOT BE RENDERED INADMISSIBLE OR NON-DISCOVERABLE AS A RESULT OF ITS USE IN THE MEDIATION.

(E) EITHER PARTY MAY INITIATE ARBITRATION WITH RESPECT TO THE MATTERS SUBMITTED TO MEDIATION BY FILING A WRITTEN DEMAND FOR ARBITRATION AT ANY TIME FOLLOWING THE INITIAL MEDIATION SESSION OR 45 DAYS AFTER THE DATE OF FILING THE WRITTEN REQUEST FOR MEDIATION, WHICHEVER OCCURS FIRST. THE PARTIES MAY SETTLE THEIR DISPUTE AT ANY TIME WITHOUT INVOLVEMENT OF THE ARBITRATOR, AND THE MEDIATION MAY CONTINUE AFTER THE COMMENCEMENT OF ARBITRATION IF THE PARTIES SO DESIRE. UNLESS OTHERWISE AGREED BY THE PARTIES, THE MEDIATOR SHALL BE DISQUALIFIED FROM SERVING AS THE ARBITRATOR IN THE CASE. THERE SHALL BE ONE ARBITRATOR, NAMED IN ACCORDANCE WITH THE AAA, AND THE ARBITRATOR SHALL DECIDE THE DISPUTE IN ACCORDANCE WITH APPLICABLE FEDERAL AND STATE LAW. ANY COVERED DISPUTES, CLAIMS AND CONTROVERSIES NOT ASSERTED DURING ARBITRATION SHALL BE DEEMED WAIVED AND PRECLUDED. THE ARBITRATOR SHALL HAVE THE POWER TO HEAR AND CONSIDER AS MANY CLAIMS AS THE DANCER OR SPLENDOR MAY HAVE AGAINST EACH OTHER CONSISTENT WITH THE TERMS OF THIS AGREEMENT.

(F) ARBITRATION MUST BE INITIATED IN ACCORDANCE WITH THE TIME LIMITS CONTAINED IN THE APPLICABLE SUBSTANTIVE LAW'S STATUTE OF LIMITATIONS.

(G) THE PARTIES AGREE THAT THE AAA, AS WELL AS ANY MEDIATOR OR ARBITRATOR APPOINTED BY THE AAA OR AGREED TO BY THE PARTIES, HAS NO AUTHORITY TO AND SHALL NOT CONSOLIDATE CLAIMS OF DIFFERENT EMPLOYEES INTO ONE PROCEEDING, NOR SHALL THE ARBITRATOR HAVE THE POWER TO HEAR AN ARBITRATION AS A CLASS OR

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COLLECTIVE ACTION (A CLASS OR COLLECTIVE ACTION INVOLVES AN ARBITRATION OR LAWSUIT WHERE REPRESENTATIVE MEMBERS OF A GROUP WHO CLAIM TO SHARE A COMMON INTEREST SEEK CLASS OR COLLECTIVE RELIEF). THE DANCER AGREES THAT SHE SHALL NOT BE ALLOWED TO SUBMIT ANY DISPUTE(S), CLAIM(S) OR CONTROVERSY(IES) AGAINST SPLENDOR TO ARBITRATION AS A REPRESENTATIVE OF OR PARTICIPANT IN A CLASS OR COLLECTIVE ACTION OR A CLAIM SEEKING CLASS OR COLLECTIVE RELIEF. IF THERE ARE ANY DIFFERENCES BETWEEN THIS AGREEMENT AND THE AAA'S RULES AND MEDIATION PROCEDURES, THIS AGREEMENT SHALL APPLY.

(H) NEITHER SPLENDOR NOR THE DANCER CAN FILE A CIVIL LAWSUIT IN COURT AGAINST THE OTHER PARTY RELATING TO ANY COVERED DISPUTES, CLAIMS AND CONTROVERSIES. IF A PARTY FILES A LAWSUIT IN COURT TO RESOLVE DISPUTES, CLAIMS AND CONTROVERSIES SUBJECT TO ARBITRATION, BOTH PARTIES AGREE THAT THE COURT SHALL DISMISS THE LAWSUIT AND REQUIRE THE DISPUTES, CLAIMS AND CONTROVERSIES TO BE RESOLVED THROUGH ARBITRATION.

(I) THE PROVISIONS OF THIS ARBITRATION POLICY MAY BE ENFORCED BY ANY COURT OF COMPETENT JURISDICTION. IF ANY TERM OR PROVISION, OR PORTION OF THIS ARBITRATION POLICY IS DECLARED VOID OR UNENFORCEABLE, IT SHALL BE SEVERED AND THE REMAINDER OF THIS ARBITRATION POLICY SHALL BE ENFORCEABLE. THIS ARBITRATION POLICY MAY BE MODIFIED, IN WHOLE OR IN PART, OR TERMINATED BY SPLENDOR ONLY AFTER SPLENDOR PROVIDES AT LEAST 30 DAYS WRITTEN NOTICE OF SUCH MODIFICATION OR TERMINATION TO THE DANCER, AND ONLY WITH RESPECT TO CLAIMS SUBMITTED UNDER THE POLICY WHICH ARE RECEIVED AFTER THE EFFECTIVE DATE OF SUCH MODIFICATION OR TERMINATION.

(J) ANY MEDIATION OR ARBITRATION WILL BE CONDUCTED IN THE CITY OF HOUSTON, TEXAS, IN ACCORDANCE WITH THE FAA. THE ARBITRATION POLICY DOES NOT INFRINGE ON EITHER PARTY'S RIGHT TO CONSULT WITH AN ATTORNEY AT ANY TIME. EACH PARTY SHALL BEAR THEIR OWN ATTORNEY'S FEES, COSTS AND FILING FEES, EXCEPT AS MAY BE ORDERED BY THE ARBITRATOR PURSUANT TO THE ARBITRATION RULES.

(K) THIS ARBITRATION POLICY AMENDS AND MODIFIES ANY PRIOR ABRITRATION AGREEMENTS IN EFFECT BETWEEN THE PARTIES.

14. WAIVER OF CLASS OR COLLECTIVE CLAIMS.

ARBITRATION SHALL PROCEED SOLELY ON AN INDIVIDUAL BASIS WITHOUT THE RIGHT FOR ANY COVERED DISPUTES, CLAIMS AND CONTROVERSIES TO BE ARBITRATED ON A COLLECTIVE OR CLASS ACTION BASIS OR ON BASES

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INVOLVING CLAIMS BROUGHT IN A PURPORTED REPRESENTATIVE CAPACITY ON BEHALF OF OTHERS. THE ARBITRATOR'S AUTHORITY TO RESOLVE AND MAKE WRITTEN AWARDS IS LIMITED TO CLAIMS BETWEEN THE DANCER AND SPLENDOR ALONE. NO ARBITRATION AWARDS OR DECISION WILL HAVE ANY PRECLUSIVE EFFECT AS TO ISSUES OR CLAIMS IN ANY DISPUTE WITH ANYONE WHO IS NOT A NAMED PARTY TO THE ARBITRATION.

15. SPLENDOR AND THE DANCER AGREE THAT IF, UPON ANY RULING OR DECISION OF AN ARBITRATOR, COURT OR OTHER TRIBUNAL WITH JURISDICTION OVER THE MATTER THAT THE RELATIONSHIP BETWEEN SPLENDOR AND THE DANCER IS ONE OF EMPLOYER AND EMPLOYEE, THE DANCER SHALL SURRENDER, REIMBURSE AND PAY TO SPLENDOR ALL MONEY RECEIVED BY THE DANCER AT ANY TIME SHE PERFORMED ON THE PREMISES OF SPLENDOR – ALL OF WHICH WOULD OTHERWISE HAVE BEEN COLLECTED AND KEPT BY SPLENDOR HAD THE PARTIES NOT ENTERED INTO THIS LICENSE AGREEMENT, AND THE DANCER SHALL IMMEDIATELY PROVIDE A FULL ACCOUNTING TO SPLENDOR OF ALL INCOME WHICH SHE RECEIVED DURING THE RELEVANT TIME PERIOD. IN THE EVENT THAT THE DANCER FAILS TO REPAY SPLENDOR AS PROVIDED IN THIS PARAGRAPH, SPLENDOR SHALL BE ENTITLED TO OFFSET ANY WAGE OBLIGATION BY ANY AMOUNT NOT RETURNED BY THE DANCER.

16. THE SUBMISSION OF AN APPLICATION, AUDITION AS A DANCER, ACCEPTANCE AS A DANCER OR THE CONTINUED PERFORMANCE AS A DANCER SHALL BE DEEMED TO BE ACCEPTANCE OF THIS ARBITRATION POLICY AND WAIVER OF CLASS OR COLLECTIVE ACTION CLAIMS. NO SIGNATURE SHALL BE REQUIRED FOR THE ARBITRATION POLICY TO BE APPLICABLE. THE MUTUAL OBLIGATIONS SET FORTH IN THE ARBITRATION POLICY SHALL CONSTITUTE A CONTRACT BETWEEN THE DANCER AND SPLENDOR, BUT SHALL NOT CHANGE THE RIGHT OF EITHER PARTY TO TERMINATE THE LICENSE AGREEMENT AT WILL BY EITHER PARTY, WITH OR WITHOUT NOTICE TO THE OTHER PARTY.

DATE: 9/27/19

Dancer Signature – **Legal Name**

D WG FM, Inc. d/b/a Splendor
by its Manager

Chiana Nicholson

Printed **Legal Name** of Dancer

Printed Name of Manager

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WL YORK, INC. D/B/A COVER GIRLS
LICENSE AND ACCESS AGREEMENT

1. WL York, Inc. d/b/a Cover Girls ("Cover Girls") grants access to the Dancer whose name is set forth below (the "Dancer") to perform entertainment services at Cover Girls, subject to the *Policies Regarding Dancer Conduct* which is attached and incorporated as if fully set forth in this Agreement. In consideration for Cover Girls allowing the Dancer to perform entertainment services at Cover Girls, the Dancer enters into this License and Access Agreement (the "Agreement").

2. The Dancer represents to Cover Girls that she has knowledge and experience in the adult entertainment industry and is familiar with industry standards and practices for a professional adult entertainer. The Dancer further acknowledges that her performances will be in compliance with general industry standards and all applicable laws, ordinances and regulations.

3. The Dancer shall determine the method, details, and means of performing entertainment services at Cover Girls. 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. It is specifically understood that the Dancer sets her own schedule of when and what hours she works. The Dancer agrees to supply all of her own costumes, beauty aids, and other apparel necessary for her performance as an entertainer, which must comply with all applicable laws, ordinances and regulations. Cover Girls shall not control in any way the choice of costumes and/or wearing apparel made by the Dancer, although Cover Girls expects the Dancer to appear at all times in apparel that is consistent with industry standards for a professional adult entertainer. The Dancer has the right to choose her own music. Nothing in this Agreement shall require the Dancer to perform exclusively at Cover Girls. The Dancer retains the right, and is free, to work or perform at other businesses and at other locations, including Cover Girls' competitors.

4. The Dancer understands that Cover Girls will not pay her any hourly wage or overtime pay, advance or reimburse her for any business-related expenses, or provide to her any other employee related benefits. The Dancer acknowledges that she will receive no compensation from Cover Girls, that her compensation shall be comprised solely of monies received from customers and not Cover Girls, and that the Dancer assumes both the full risk of loss and reward of profit as a result of services she performs. It is further acknowledged that all equipment and materials required to perform the work shall be provided by the Dancer at her own expense. Since she is not an employee, the Dancer understands that she is not entitled to receive any workers' compensation benefits or unemployment compensation benefits and waives any claim for any employee related benefits.

5. The Dancer acknowledges and agrees that she is not an employee of Cover Girls. It is the express intention of the parties that the Dancer is, and shall remain during the term of this agreement, a licensee granted access to Cover Girls and not be deemed an agent, servant, independent contractor, or employee of Cover Girls for any purpose. Nothing in this Agreement shall be interpreted or construed as creating or establishing the relationship of employer and employee between the Dancer and Cover Girls. The parties acknowledge that the Dancer is not an agent, servant, independent contractor, or employee of Cover Girls for purposes of taxation

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under state law (including, but not limited to, the Texas Alcoholic Beverage Code) and federal law (including, but not limited to, the Fair Labor Standards Act) or any other purpose.

6. The Dancer shall maintain accurate records of all income generated using Cover Girls' facilities and the Dancer is solely responsible for all taxes, fees and assessments for any and all income generated using Cover Girls' facilities in the operation of her business. The Dancer is responsible for reporting her income and paying her own income taxes and other taxes of every description incidental to her self-employment. The Dancer agrees to indemnify and/or reimburse Cover Girls if Cover Girls is required to pay any taxes on the Dancer's behalf.

7. The Dancer shall be solely responsible for obtaining and maintaining, at Dancer's sole cost and expense, all necessary business licenses and permits and insurance including, but not limited to, health and disability insurance, and for paying all federal, state and local taxes and contributions imposed upon any income earned by Dancer at Cover Girls.

8. Cover Girls and the Dancer shall have the right to terminate this Agreement at any time and for any reason, or for no reason at all. No party shall have liability for any damages resulting from either party's exercise of its right to terminate this Agreement.

9. This Agreement, and the incorporated *Policies Regarding Dancer Conduct*, represents the entire agreement of the parties as to the matters contained in this Agreement. Any amendment of this Agreement shall be effective only if it is in writing and signed by the parties.

10. This Agreement shall not be assigned by the Dancer. Any attempted assignment of this Agreement by the Dancer shall be null and void and shall result in the immediate suspension and/or termination of this Agreement.

11. In the event any action is commenced to enforce or interpret the terms or conditions of this Agreement, Cover Girls shall, in addition to any costs or other relief, be entitled to recover its reasonable attorneys' fees.

12. THE DANCER SHALL INDEMNIFY, HOLD HARMLESS AND PAY FOR COVER GIRLS' DEFENSE FROM AND AGAINST ANY AND ALL CLAIMS, LOSSES OR LIABILITY, INCLUDING ATTORNEYS' FEES, ARISING FROM OR RELATING TO THIS AGREEMENT OR THE DANCER'S RELATIONSHIP WITH COVER GIRLS, INCLUDING LIABILITY ARISING FROM COVER GIRLS' OWN NEGLIGENCE.

13. ARBITRATION POLICY.

(A) THE PARTIES AGREE THAT ANY AND ALL COVERED DISPUTES, CLAIMS AND CONTROVERSIES ARISING OUT OF OR RELATING TO THIS AGREEMENT AND/OR ANY MATTER RELATED TO ALLEGED EMPLOYMENT, ALLEGED TERMS OR CONDITIONS OF EMPLOYMENT, OR ANY ALLEGED RELATIONSHIP OTHER THAN THAT OF A LICENSEE THAT THE DANCER MAY HAVE AGAINST COVER GIRLS, ITS OWNERS, DIRECTORS, OFFICERS, MANAGERS, EMPLOYEES, OR AGENTS (HEREINAFTER, COLLECTIVELY

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REFERRED TO AS "COVER GIRLS") OR THAT COVER GIRLS MAY HAVE AGAINST THE DANCER SHALL BE SUBMITTED EXCLUSIVELY TO AND DETERMINED EXCLUSIVELY BY BINDING ARBITRATION UNDER THE FEDERAL ARBITRATION ACT, 9 U.S.C. § 1 ET SEQ. ("FAA").

(B) "COVERED DISPUTES, CLAIMS AND CONTROVERSIES" INCLUDE, BUT ARE NOT LIMITED TO, ANY AND ALL DISPUTES, CLAIMS AND CONTROVERSIES THAT AROSE BEFORE AND/OR AFTER THIS ARBITRATION POLICY WENT INTO EFFECT, ARISING UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT ("ADEA"), TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 ("TITLE VII"), THE AMERICANS WITH DISABILITIES ACT ("ADA"), THE FAMILY AND MEDICAL LEAVE ACT ("FMLA"), THE FAIR LABOR STANDARDS ACT ("FLSA"), 42 U.S.C. § 1981, INCLUDING AMENDMENTS TO ALL THE FOREGOING STATUTES, THE EMPLOYEE POLYGRAPH PROTECTION ACT ("EPPA"), THE EMPLOYMENT RETIREMENT INCOME SECURITY ACT ("ERISA"), OCCUPATIONAL SAFETY AND HEALTH ACT ("OSHA"), THE TEXAS COMMISSION ON HUMAN RIGHTS ACT ("TCHRA"), ANY OTHER CLAIMS ARISING UNDER FEDERAL OR TEXAS STATE LAW, AND/OR COMMON LAW CLAIMS REGULATING EMPLOYMENT TERMINATION, MISAPPROPRIATION, THE LAW OF CONTRACT OR THE LAW OF TORT, INCLUDING, BUT NOT LIMITED TO, CLAIMS FOR MALICIOUS PROSECUTION, INTENTIONAL/NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS OR DEFAMATION.

DISPUTES, CLAIMS AND CONTROVERSIES THAT, BY LAW, CANNOT BE SUBJECT TO ARBITRATION ARE NOT COVERED BY THIS ARBITRATION POLICY. CLAIMS THAT ARE NOT COVERED ARE (I) FOR UNEMPLOYMENT COMPENSATION AND WORKERS' COMPENSATION (WHICH THE DANCER AGREES THAT SHE IS NOT ELIGIBLE TO RECEIVE) AND (II) THE RIGHT TO FILE AN UNFAIR LABOR PRACTICE CHARGE UNDER THE NATIONAL LABOR RELATIONS ACT ("NLRA").

NOTHING IN THIS ARBITRATION POLICY PROHIBITS THE DANCER FROM FILING AT ANY TIME A CHARGE OR COMPLAINT WITH A GOVERNMENT AGENCY SUCH AS THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ("EEOC"). HOWEVER, UPON RECEIPT OF A RIGHT TO SUE LETTER OR SIMILAR ADMINISTRATIVE DETERMINATION, THE DANCER'S CLAIMS BECOME SUBJECT TO ARBITRATION.

(C) ANY AND ALL COVERED DISPUTES, CLAIMS AND CONTROVERSIES SHALL BE SUBMITTED TO THE AMERICAN ARBITRATION ASSOCIATION (THE "AAA"), OR ITS SUCCESSOR, INITIALLY FOR MEDIATION, AND IF THE MATTER IS NOT RESOLVED THROUGH MEDIATION, THEN IT SHALL BE SUBMITTED TO THE AAA, OR ITS SUCCESSOR, FOR FINAL AND BINDING ARBITRATION. EITHER PARTY MAY COMMENCE MEDIATION BY PROVIDING TO THE AAA AND THE OTHER PARTY A WRITTEN REQUEST FOR MEDIATION, SETTING FORTH THE SUBJECT OF THE DISPUTE, CLAIM OR CONTROVERSY AND THE RELIEF REQUESTED. THE PARTIES WILL COOPERATE WITH THE AAA AND WITH ONE

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ANOTHER IN SELECTING A MEDIATOR FROM THE AAA PANEL OF NEUTRALS, AND IN SCHEDULING THE MEDIATION PROCEEDING.

(D) THE PARTIES AGREE THAT THEY WILL PARTICIPATE IN ANY MEDIATION CONDUCTED BY THE AAA IN GOOD FAITH. ALL OFFERS, PROMISES, CONDUCT AND STATEMENTS, WHETHER ORAL OR WRITTEN, MADE IN THE COURSE OF THE MEDIATION BY ANY OF THE PARTIES, THEIR AGENTS, EMPLOYEES, EXPERTS, AND ATTORNEYS, AND BY THE MEDIATOR OR ANY OF THE PARTIES, THEIR AGENTS, EMPLOYEES, EXPERTS AND ATTORNEYS, AND BY THE MEDIATOR OR ANY AAA EMPLOYEES, ARE CONFIDENTIAL, PRIVILEGED AND INADMISSIBLE FOR ANY PURPOSE, INCLUDING IMPEACHMENT, IN ANY ARBITRATION OR OTHER PROCEEDING INVOLVING THE PARTIES, PROVIDED THAT EVIDENCE THAT IS OTHERWISE ADMISSIBLE OR DISCOVERABLE SHALL NOT BE RENDERED INADMISSIBLE OR NON-DISCOVERABLE AS A RESULT OF ITS USE IN THE MEDIATION.

(E) EITHER PARTY MAY INITIATE ARBITRATION WITH RESPECT TO THE MATTERS SUBMITTED TO MEDIATION BY FILING A WRITTEN DEMAND FOR ARBITRATION AT ANY TIME FOLLOWING THE INITIAL MEDIATION SESSION OR 45 DAYS AFTER THE DATE OF FILING THE WRITTEN REQUEST FOR MEDIATION, WHICHEVER OCCURS FIRST. THE PARTIES MAY SETTLE THEIR DISPUTE AT ANY TIME WITHOUT INVOLVEMENT OF THE ARBITRATOR, AND THE MEDIATION MAY CONTINUE AFTER THE COMMENCEMENT OF ARBITRATION IF THE PARTIES SO DESIRE. UNLESS OTHERWISE AGREED BY THE PARTIES, THE MEDIATOR SHALL BE DISQUALIFIED FROM SERVING AS THE ARBITRATOR IN THE CASE. THERE SHALL BE ONE ARBITRATOR, NAMED IN ACCORDANCE WITH THE AAA, AND THE ARBITRATOR SHALL DECIDE THE DISPUTE IN ACCORDANCE WITH APPLICABLE FEDERAL AND STATE LAW. ANY COVERED DISPUTES, CLAIMS AND CONTROVERSIES NOT ASSERTED DURING ARBITRATION SHALL BE DEEMED WAIVED AND PRECLUDED. THE ARBITRATOR SHALL HAVE THE POWER TO HEAR AND CONSIDER AS MANY CLAIMS AS THE DANCER OR COVER GIRLS MAY HAVE AGAINST EACH OTHER CONSISTENT WITH THE TERMS OF THIS AGREEMENT.

(F) ARBITRATION MUST BE INITIATED IN ACCORDANCE WITH THE TIME LIMITS CONTAINED IN THE APPLICABLE SUBSTANTIVE LAW'S STATUTE OF LIMITATIONS.

(G) THE PARTIES AGREE THAT THE AAA, AS WELL AS ANY MEDIATOR OR ARBITRATOR APPOINTED BY THE AAA OR AGREED TO BY THE PARTIES, HAS NO AUTHORITY TO AND SHALL NOT CONSOLIDATE CLAIMS OF DIFFERENT EMPLOYEES INTO ONE PROCEEDING, NOR SHALL THE ARBITRATOR HAVE THE POWER TO HEAR AN ARBITRATION AS A CLASS OR COLLECTIVE ACTION (A CLASS OR COLLECTIVE ACTION INVOLVES AN ARBITRATION OR LAWSUIT WHERE REPRESENTATIVE MEMBERS OF A GROUP WHO CLAIM TO SHARE A COMMON INTEREST SEEK CLASS OR COLLECTIVE

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RELIEF). THE DANCER AGREES THAT SHE SHALL NOT BE ALLOWED TO SUBMIT ANY DISPUTE(S), CLAIM(S) OR CONTROVERSY(IES) AGAINST COVER GIRLS TO ARBITRATION AS A REPRESENTATIVE OF OR PARTICIPANT IN A CLASS OR COLLECTIVE ACTION OR A CLAIM SEEKING CLASS OR COLLECTIVE RELIEF. IF THERE ARE ANY DIFFERENCES BETWEEN THIS AGREEMENT AND THE AAA'S RULES AND MEDIATION PROCEDURES, THIS AGREEMENT SHALL APPLY.

(H) NEITHER COVER GIRLS NOR THE DANCER CAN FILE A CIVIL LAWSUIT IN COURT AGAINST THE OTHER PARTY RELATING TO ANY COVERED DISPUTES, CLAIMS AND CONTROVERSIES. IF A PARTY FILES A LAWSUIT IN COURT TO RESOLVE DISPUTES, CLAIMS AND CONTROVERSIES SUBJECT TO ARBITRATION, BOTH PARTIES AGREE THAT THE COURT SHALL DISMISS THE LAWSUIT AND REQUIRE THE DISPUTES, CLAIMS AND CONTROVERSIES TO BE RESOLVED THROUGH ARBITRATION.

(I) THE PROVISIONS OF THIS ARBITRATION POLICY MAY BE ENFORCED BY ANY COURT OF COMPETENT JURISDICTION. IF ANY TERM OR PROVISION, OR PORTION OF THIS ARBITRATION POLICY IS DECLARED VOID OR UNENFORCEABLE, IT SHALL BE SEVERED AND THE REMAINDER OF THIS ARBITRATION POLICY SHALL BE ENFORCEABLE. THIS ARBITRATION POLICY MAY BE MODIFIED, IN WHOLE OR IN PART, OR TERMINATED BY COVER GIRLS ONLY AFTER COVER GIRLS PROVIDES AT LEAST 30 DAYS WRITTEN NOTICE OF SUCH MODIFICATION OR TERMINATION TO THE DANCER, AND ONLY WITH RESPECT TO CLAIMS SUBMITTED UNDER THE POLICY WHICH ARE RECEIVED AFTER THE EFFECTIVE DATE OF SUCH MODIFICATION OR TERMINATION.

(J) ANY MEDIATION OR ARBITRATION WILL BE CONDUCTED IN THE CITY OF HOUSTON, TEXAS, IN ACCORDANCE WITH THE FAA. THE ARBITRATION POLICY DOES NOT INFRINGE ON EITHER PARTY'S RIGHT TO CONSULT WITH AN ATTORNEY AT ANY TIME. EACH PARTY SHALL BEAR THEIR OWN ATTORNEY'S FEES, COSTS AND FILING FEES, EXCEPT AS MAY BE ORDERED BY THE ARBITRATOR PURSUANT TO THE ARBITRATION RULES.

(K) THIS ARBITRATION POLICY AMENDS AND MODIFIES ANY PRIOR ABRITRATION AGREEMENTS IN EFFECT BETWEEN THE PARTIES.

14. WAIVER OF CLASS OR COLLECTIVE CLAIMS.

ARBITRATION SHALL PROCEED SOLELY ON AN INDIVIDUAL BASIS WITHOUT THE RIGHT FOR ANY COVERED DISPUTES, CLAIMS AND CONTROVERSIES TO BE ARBITRATED ON A COLLECTIVE OR CLASS ACTION BASIS OR ON BASES INVOLVING CLAIMS BROUGHT IN A PURPORTED REPRESENTATIVE CAPACITY ON BEHALF OF OTHERS. THE ARBITRATOR'S AUTHORITY TO RESOLVE AND MAKE WRITTEN AWARDS IS LIMITED TO CLAIMS BETWEEN THE DANCER AND COVER GIRLS ALONE. NO ARBITRATION AWARDS OR DECISION WILL HAVE

Dancer's Initials

ANY PRECLUSIVE EFFECT AS TO ISSUES OR CLAIMS IN ANY DISPUTE WITH ANYONE WHO IS NOT A NAMED PARTY TO THE ARBITRATION.

15. COVER GIRLS AND THE DANCER AGREE THAT IF, UPON ANY RULING OR DECISION OF AN ARBITRATOR, COURT OR OTHER TRIBUNAL WITH JURISDICTION OVER THE MATTER THAT THE RELATIONSHIP BETWEEN COVER GIRLS AND THE DANCER IS ONE OF EMPLOYER AND EMPLOYEE, THE DANCER SHALL SURRENDER, REIMBURSE AND PAY TO COVER GIRLS ALL MONEY RECEIVED BY THE DANCER AT ANY TIME SHE PERFORMED ON THE PREMISES OF COVER GIRLS – ALL OF WHICH WOULD OTHERWISE HAVE BEEN COLLECTED AND KEPT BY COVER GIRLS HAD THE PARTIES NOT ENTERED INTO THIS LICENSE AGREEMENT, AND THE DANCER SHALL IMMEDIATELY PROVIDE A FULL ACCOUNTING TO COVER GIRLS OF ALL INCOME WHICH SHE RECEIVED DURING THE RELEVANT TIME PERIOD. IN THE EVENT THAT THE DANCER FAILS TO REPAY COVER GIRLS AS PROVIDED IN THIS PARAGRAPH, COVER GIRLS SHALL BE ENTITLED TO OFFSET ANY WAGE OBLIGATION BY ANY AMOUNT NOT RETURNED BY THE DANCER.

16. THE SUBMISSION OF AN APPLICATION, AUDITION AS A DANCER, ACCEPTANCE AS A DANCER OR THE CONTINUED PERFORMANCE AS A DANCER SHALL BE DEEMED TO BE ACCEPTANCE OF THIS ARBITRATION POLICY AND WAIVER OF CLASS OR COLLECTIVE ACTION CLAIMS. NO SIGNATURE SHALL BE REQUIRED FOR THE ARBITRATION POLICY TO BE APPLICABLE. THE MUTUAL OBLIGATIONS SET FORTH IN THE ARBITRATION POLICY SHALL CONSTITUTE A CONTRACT BETWEEN THE DANCER AND COVER GIRLS, BUT SHALL NOT CHANGE THE RIGHT OF EITHER PARTY TO TERMINATE THE LICENSE AGREEMENT AT WILL BY EITHER PARTY, WITH OR WITHOUT NOTICE TO THE OTHER PARTY.

DATE: 11/06/16

Dancer Signature – **Legal Name**

WL York, Inc. d/b/a Cover Girls
by its Manager

Chanel Nicholson

Printed **Legal Name** of Dancer

Andy Shvarts

Printed Name of Manager

Dancer's Initials

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.

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 B

No. 23-20440

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Chanel E.M. Nicholson, On Behalf of Herself and Other Similarly Situated Plaintiffs,

Plaintiff - Appellant

v.

W.L. York, Incorporated, doing business as Cover Girls; D WG FM, Incorporated, doing business as Splendor,

Defendants - Appellees

On Appeal from
United States District Court for the Southern District of Texas

4:21-CV-2624

BRIEF OF APPELLANT CHANEL NICHOLSON

SUBMITTED BY:

Eric Paul Mirabel
(281) 772-3794
3783 Darcus Street
Houston, TX 77005

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th CIR Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Appellees:	**Counsel for Appellees:**
D WG FM, Incorporated	William King of McDowell Hetherington, L.L.P. Houston, TX
D WG FM, Incorporated	Casey Wallace of Wallace & Allen, L.L.P. Houston, TX
D WG FM, Incorporated	Benjamin Allen of Wallace & Allen, L.L.P. Houston, TX
W.L. York, Incorporated	William King of McDowell Hetherington, L.L.P. Houston, TX
W.L. York, Incorporated	Casey Wallace of Wallace & Allen, L.L.P. Houston, TX
W.L. York, Incorporated	Benjamin Allen of Wallace & Allen, L.L.P. Houston, TX
Appellants:	**Counsel for Appellants:**
Chanel Nicholson	Eric Mirabel Houston, TX
Other Interested Parties:	**Counsel for Interested Parties:**
Oasis Financial	Nicholas Ventola, OASIS FINANCIAL 9525 Bryn Mawr Avenue Rosemont, IL 60018

S/Eric Paul Mirabel
Attorney of record for Appellant,
Chanel E.M. Nicholson

STATEMENT REGARDING ORAL ARGUMENT

Appellant waives oral argument.

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JURISDICTIONAL STATEMENT

(A) The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because this action arises under 42 U.S.C. § 1981. This is a case of intentional discrimination in contracting where Plaintiff, an African-American, was not granted the same right to contract as white citizens;

(B) This, the court of appeals' jurisdiction is under 28 U.S.C. § 1291, because the district court issued a final order and judgment on 6.19.2023 (ROA 1642-1646) refusing to grant Appellant's motion under Fed. R. Civ. P. 59 to amend or alter the summary judgment (ROA.1541-1556) entered in favor of defendants;

(C) the notice of appeal was filed on 9.7.2023 and the record was certified on 10.23.2023, making filing of this Appellant's Brief within the 40 day time period in FRAP 31(a)(1); and

(D) This appeal is from a final order and judgment on 6.19.2023 (ROA 1642-1646) denying Appellant's motion amend or alter the summary judgment, and establishing the court of appeals' jurisdiction.

STATEMENT OF THE ISSUES

The sole issues for review are:

1. Was Defendant WL York dba Cover Girls ("Cover Girls") refusing access to its premises to Plaintiff Nicholson in late November 2017, because she is

Black, a discrete act of discrimination commencing a new four-year statute of limitations clock (to file an action) whereby the statutory period did not accrue from denials of access to her at Cover Girls prior to the statutory period?

2. Was D WG FM, INC. d/b/a SPLENDOR's ("Splendor") refusing access to its premises to Plaintiff Nicholson on August 11, 2021, because she is Black, a discrete act of discrimination commencing a new statute of limitations clock (to file an action) whereby the statutory period did not accrue from denials of access to her at Splendor prior to the statutory period?

STATEMENT OF THE CASE

1. Every Time Plaintiff Came to Work Was a Discrete Event Requiring Payment and Often Resulting in Denial of Access, in Violation of the Terms of Plaintiff's L&A Agreements.

Plaintiff was never an employee of any of the defendants. Each time she had a dancer/entertainer position she was party to a License & Access ("L&A") Agreement, the provisions of which are discussed in more detail in Section 1.D below. The L&A Agreements with Splendor and Cover Girls granted Plaintiff unlimited access to defendants' premises, did not mention that any fee was required for access, and granted her the right to choose her own hours and to leave without

penalty.[1] The L&A Agreements provide that she receives no compensation with Splendor or Cover Girls, and that all her compensation is solely from customers.[2]

The L&A Agreements also provide that there is no mandatory tipping of managers or staff.[3] The L&A Agreements had no automatic termination or time-triggered termination,[4] and were never terminated by either party. Thus, the L&A Agreements with Splendor and Cover Girls remained in effect in 2021 when this case was filed in the district court.

A. Prior Work Experience and Work Experience at Centerfolds and Splendor

Plaintiff Nicholson began working as a dancer/entertainer at age 18 (in 2013) at A.H.D. Houston, Inc. d/b/a Centerfolds (hereinafter "Centerfolds").[5] She worked there for about one year until she was denied access by one of the managers for not paying a large enough "tip" to a particular manager and to one of the bartenders.[6] She was required to pay the hostess at the door a fee every time she came to work.

[1] ROA.1190-1216; ROA.1223-1248, respectively.
[2] ROA.1190; ROA.1223.
[3] ROA.1190-1216; ROA.1223-1248, respectively
[4] ROA.1191; ROA.1229, respectively.
[5] ROA.713. A.H.D. Houston, Inc. d/b/a Centerfolds was a defendant in this case until dismissed by the Order of Sept. 28, 2022 (ROA.1075-1095).
[6] *See* ROA.1180, Plaintiff's Declaration to Plaintiff's Motion for Summary Judgment. Note that this Declaration by Plaintiff is also cited in Plaintiff's Opposition and Response to Defendants' Motion for Summary Judgment, ROA.1428-1435.

The fee varied depending on her shift starting time.[7] Her sole compensation was from customers, none came from Centerfolds.[8]

After she was denied access at Centerfolds, Plaintiff Nicholson started working at Splendor, near the end of September, 2014.[9] She worked there until about November 2016, when she was refused access at Splendor because she refused to pay a particular manager a substantial "fine."[10] As at Centerfolds, Plaintiff was required to pay the hostess at the door at Splendor a fee every time she came to work. The fee varied depending on her shift starting time.[11] Her sole compensation was from customers, none came from Splendor.[12]

On multiple occasions Plaintiff was refused entry to work at Centerfolds and at Splendor, unless she paid certain managers additional requested monies.[13] At Splendor, managers would often also deny access to Plaintiff and to other Black dancers for non-compliance with unwritten rules regarding dress, performance, or for leaving a shift early.[14] At Splendor and Centerfolds, Plaintiff and other Black dancers were also usually forced to tip managers and other employees at the end of

[7] *See* ROA.1180; ROA.714.
[8] ROA.714.
[9] *See* ROA.1180; ROA.715.
[10] *See* ROA.1182; ROA.716.
[11] *See* ROA.1180; ROA.716.
[12] ROA.714.
[13] *See* ROA.1180-1181; ROA.714-716.
[14] *See* ROA.1181; ROA.716.

their shifts, or they would not be allowed future access.[15] At one point, Plaintiff had to pay $1500 for access at Splendor, after being excluded.[16] In about November 2016, Plaintiff was barred at Splendor for refusing to pay a particular manager a substantial "fine."[17]

There were times when Plaintiff would arrive for a shift at Splendor, only to be refused entry at the door. If she investigated, she was told it was because there were too many Black dancers already on the premises, or sometimes, because Bob Furey (who is designated as one of the two managers in Plaintiff's L&A agreements with both Splendor and Cover Girls) was there.[18]

B. Work Experience at Cover Girls

After being denied access at Splendor in about November 2016, Plaintiff entered an L&A agreement with Cover Girls on November 6, 2016 and began working there.[19] She was required to pay a fee to the hostess at the door at Cover Girls varying from $20 to $80 (depending on the shift starting time) every time she

[15] *See* ROA.1180-1181; ROA.714-716.
[16] *See* ROA.1181; ROA.716.
[17]. *See* ROA.1182; ROA.716.
[18] *See* ROA.1181; ROA.715.
[19] *See* ROA.1183; ROA.716.

came to work.[20] Her sole compensation was from customers, none came from Cover Girls.[21]

She was also often forced to tip managers and other employees at the end of her shift, or she would not be allowed future access to Cover Girls. She was also was excluded once until she paid a manager a "fine."[22]

Plaintiff was often denied access (up to several times per week) because there were already "too many" Black dancers on the Cover Girls premises, or because Bob Furey was on the premises.[23] In late November 2017, Plaintiff was denied access when she was told by a manager that there were already "too many Black" dancers on the premises.[24]

Bob Furey is designated as a manager in Plaintiff's License & Access agreements with both Splendor and Cover Girls.[25] He once removed a day manager's hiring authority for retaining a black dancer, after demanding identification of him as the person who retained her.[26] Cover Girls' general manager Hal Naumann, who reported to Bob Furey, almost never hired non-Caucasian dancers and was observed

[20] *See* ROA.1183; ROA.716.
[21] ROA.714.
[22] *See* ROA.1183; ROA.716.
[23] *See* ROA.1183; ROA.716.
[24] *See* ROA.1184; ROA.716.
[25] ROA.1380-1381; ROA.1411.
[26] Skwera deposition, ROA.1259:13-20.

refusing to hire unidentified dancers seeking positions, once he learned they were Black.[27] Bob Furey is also reported to have instructed managers to support a policy of limiting the number of black dancers on the premises because he believed they would attract police attention to drug dealing and sex slavery on the premises.[28]

Plaintiff did not return to try to work at Cover Girls after she was denied access in November 2017. She was working as a dancer/entertainer at other venues, and continued to do so.[29] She became pregnant with a second child a few months later.[30]

On June 24, 2021, after the pregnancy and after working at some other positions, Plaintiff sought to resume dancing and went to apply for a dancer position at Centerfolds.[31] She was refused. Several Caucasian dancers were observed by her on the premises.[32]

C. Another Application and Rejection at Splendor

After her rejection at Centerfolds, on Aug. 11, 2021 Plaintiff arrived at Splendor to audition for a dancer position. She was told by a manager who is believed to be a relative of the owners that they were not hiring and she should try

[27] ROA.1258-1259; ROA.1259:15-18; ROA.1285:2-23.
[28] ROA.1181-1182.
[29] ROA.1313; ROA.717.
[30] ROA.1313-1314; ROA.717.
[31] ROA.1313-1314; ROA.717.
[32] ROA.717.

at Centerfolds.[33] She was told by a different manager she knew from having worked there that he would like to hire her but they were not hiring Black Dancers at Splendor.[34]

She did not assert her rights to access the Splendor premises from her Splendor L&A Agreement, or mention that she had such an agreement, as she did not recall entering the L&A Agreement.[35] Whether Splendor had honored Plaintiff's existing L&A agreement, or had granted Plaintiff a position and then entered a new L&A agreement with Plaintiff on Aug. 11, 2021, she would have been required to pay the "tip-out" (entry) fee that time and each time she came there to work.[36]

2. Plaintiff's License and Access Agreements with Cover Girls and Splendor Are Not Employment Agreements

Plaintiff's License and Access Agreements ("L&A Agreements") with Defendant Cover Girls (ROA.1223-1248) and with Defendant Splendor (ROA**.**1190-1216) are substantially identical, but for the first party name. Each agreement emphasizes throughout that Plaintiff is not an employee, and that Defendants will provide no compensation or other benefit of any kind to Plaintiff, as illustrated by the following agreement excerpts.

The L&A Agreements (ROA.1223; ROA**.**1190) state in para. 3:

[33] ROA.717; ROA 1182.
[34] ROA.717; ROA 1182.
[35] ROA.1326:8-19 ROA.715.
[36] ROA.1251:2-20; ROA.1180; ROA.716.

> 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.*** It is specifically understood that the Dancer sets her own schedule of when and what bours she works. [emphasis added]

The L&A Agreements state in para. 4 (ROA.1223; ROA**.**1190):

> The Dancer understands that [Defendant] will not pay her any hourly wage or overtime pay, advance or reimburse her for any business-related expenses, or provide to her any other employee related benefits. The Dancer acknowledges that she will receive no compensation from [Defendant], that her compensation shall be comprised solely of monies received from customers and not [Defendant] …

The L&A Agreements state in para. 5 (ROA.1223-1224; ROA**.**1190-1191):

> The Dancer acknowledges and agrees that she is not an employee of [Defendant]. It is the express intention of the parties that the Dancer is, and shall remain during the term of this agreement, a licensee granted access to [Defendant] and not be deemed an agent, servant, independent contractor, or employee of [Defendant] for any purpose. Nothing in this Agreement shall be interpreted or construed as creating or establishing the relationship of employer and employee between the Dancer and [Defendant]. The parties acknowledge that the Dancer is not an agent, servant, independent contractor, or employee of [Defendant] for purposes of taxation ….

The L&A Agreements state in para. 6 (ROA.1224; ROA**.**1191):

> The Dancer shall maintain accurate records of all income generated using [Defendant's] facilities and the Dancer is solely responsible for all taxes, fees and assessments for any and all income generated using [Defendant's] facilities in the operation of her business. The Dancer is responsible for reporting her income and paying her own income taxes and other taxes of every description incidental to her self-employment. The Dancer agrees to indemnify and/or reimburse [Defendant] if [Defendant] is required to pay any taxes on the Dancer' s behalf.

The L&A Agreements state in para. 12 (ROA.1224; ROA**.**1191, capitalization in original):

> THE DANCER SHALL INDEMNIFY, HOLD HARMLESS AND PAY FOR [Defendant's] DEFENSE FROM AND AGAINST ANY AND ALL

> CLAIMS, LOSSES OR LIABILITY, INCLUDING ATTORNEYS' FEES, ARISING FROM OR RELATING TO THIS AGREEMENT OR THE DANCER'S RELATIONSHIP WITH [Defendant], INCLUDING LIABILITY ARISING FROM [Defendant's] OWN NEGLIGENCE.

The L&A Agreements state in para. 15 (ROA.1228; ROA**.**1195, capitalization in original):

> [Defendant] AND THE DANCER AGREE THAT IF, UPON ANY RULING OR DECISION OF AN ARBITRATOR, COURT OR OTHER TRIBUNAL WITH JURISDICTION OVER THE MATTER THAT THE RELATIONSHIP BETWEEN [Defendant] AND THE DANCER IS ONE OF EMPLOYER AND EMPLOYEE, THE DANCER SHALL SURRENDER, REIMBURSE AND PAY TO [Defendant] ALL MONEY RECEIVED BY THE DANCER AT ANY T1ME SHE PERFORMED ON THE PREMISES OF [Defendant] - ALL OF WHICH WOULD OTHERWISE HAVE BEEN COLLECTED AND KEPT BY [Defendant] HAD THE PARTIES NOT ENTERED INTO THIS LICENSE AGREEMENT, AND THE DANCER SHALL IMMEDIATELY PROVIDE A FULL ACCOUNTING TO SPLENDOR OF ALL INCOME WHICH SHE RECEIVED DURING THE RELEVANT T1ME PERIOD. IN THE EVENT THAT THE DANCER FAILS TO REPAY [Defendant] AS PROVIDED IN THIS PARAGRAPH, [Defendant] SHALL BE ENTITLED TO OFFSET ANY WAGE OBLIGATION BY ANY AMOUNT NOT RETURNED BY THE DANCER.

3. Plaintiff's License and Access Agreements with Cover Girls and Splendor Imposed Ongoing Obligations on Defendants and Were Never Terminated by Either Party

In paragraph 3, the L&A Agreements with Defendant Cover Girls (ROA.1223) and with Defendant Splendor (ROA**.**1190) both provide: "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***. It is specifically understood that the Dancer sets her own schedule of when and what bours she works." (emphasis added)

In paragraph 8, the L&A Agreements with Defendant Cover Girls (ROA.1224) and with Defendant Splendor (ROA.1191) both provide: "[Defendant] and the Dancer shall have the right to terminate this Agreement at any time and for any reason, or for no reason at all." Defendants have never presented any evidence that they exercised their termination right or otherwise terminated either of these L&A Agreements. Moreover, Plaintiff: testified that when she revisited Splendor on August, 11 2021, she had not been fired from Splendor and did not think she would have to go through the hiring process again. ROA.1328.

SUMMARY OF THE ARGUMENT

The Court erred in entering summary judgment for Defendant Cover Girls (ROA.1541-1556), holding Plaintiff Nicholson's denial of access to Defendant's premises for work because she is Black, in late November 2017, was barred by the statute of limitations. In fact, this denial of access was a discrete act of discrimination commencing a new four-year statute of limitations clock (to file an action) whereby the statutory period did not accrue from denials of access to her at Cover Girls prior to the statutory period.

The Court erred in entering summary judgment for Defendant Splendor (ROA.1541-1556), holding Plaintiff Nicholson's denial of access to Defendant's premises for work because she is Black, on August 11, 2021, was barred by the statute of limitations. In fact, this denial of access was a discrete act of discrimination

commencing a new statute of limitations clock (to file an action) whereby the statutory period did not accrue from denials of access to her at Splendor prior to the statutory period.

The Supreme Court's holding in *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101,113 (2002) that each discrete act of discrimination "starts a new clock for filing charges alleging that act," establishes a rule which the facts of the case at bar conform to with near exactitude. Plaintiff had no employment agreement and no ongoing employee relationship with Defendants, and received no compensation from Defendants. Plaintiff had a "License and Access Agreement" which provided that she could freely access Defendants' premises. In fact, however, every time Plaintiff came to work (at both Splendor and Cover Girls) she had to pay a "tip out" fee – effectively new consideration for each entry to the premises for work. She also was periodically denied entry for not paying additional fees to managers or employees, or because there were already "too many" Black dancers on the premises.

Plaintiff, therefore, unquestionably was subject to series of discrete acts of discrimination. Her rejection at Splendor on August 11, 2021 started a new statute of limitations clock. The statute of limitations did not accrue from any of her prior work at Splendor (which was all before the statutory period) under the holding of *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. at 113.

Similarly, Plaintiff's denial of access to Cover Girls in late November 2017 started a new statute of limitations clock. The statute of limitations did not accrue from her prior work at Cover Girls (some of which was before the statutory period) under the holding of *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. at 113.

ARGUMENT

A. Standard of Review

The Fifth Circuit in *Valley Const. Co. v. Marsh*, 984 F.2d 133 (5th Cir. 1993) noted the standard of appellate review of a summary judgment grant (which applies to the issues here):

> In reviewing the summary judgment, we apply the same standard of review as did the district court. *Waltman v. International Paper Co*., 875 F.2d 468, 474 (5th Cir.1989); *Moore v. Mississippi Valley State Univ*., 871 F.2d 545, 548 (5th Cir.1989). We must "review the facts drawing all inferences most favorable to the party opposing the motion." *Reid v. State Farm Mut. Auto. Ins. Co*., 784 F.2d 577, 578 (5th Cir.1986). If the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); see *Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir.1969) (en banc).

The fact that Plaintiff filed a Motion to Alter or Amend the Judgment does not affect the standard of review. *See, e.g., Cibolo Waste, Inc. v. City of San Antonio*, 718 F.3d 469, 473 (5th Cir. 2013).

B. Where There Are Discrete Discriminatory Acts, As Here, the Statutory Clock for Section 1981 Claims Begins Anew with Each Such Discrete Discriminatory Acts

1. **The Statute of Limitations for the Section 1981 Claim Against Splendor Commenced on August 11, 2021**

In granting summary judgment (ROA.1541-1556), the Court ruled that Plaintiffs remaining § 1981 claim against Splendor is time barred by the statute of limitations, because: "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)." (ROA.1547-1548), Plaintiff asserts that the actual holding in *In re Monumental Life Ins. Co.*, *id*., is not inconsistent with the holding in *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002), which held that each discrete act of discrimination "starts a new clock for filing charges alleging that act." Plaintiff further asserts that the holding in *Nat'l R.R. Passenger Corp. v. Morgan*, *ibid.,* closely fits the facts of this case and should govern its decision; and that the holding in *In re Monumental Life Ins. Co.*, 365 F.3d at 420 is inapposite.

In *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. at 113, the Court announced that the continuing violations doctrine does not bar hostile work environment claims for acts prior to the statutory period and otherwise barred by the statute of limitations, if such acts occurred prior to other acts evidencing a hostile

work environment and where such other acts took place within the statutory period, and provided all the acts together form a series constituting a continuing violation.

Plaintiff is not asserting (or trying to revive) hostile work environment claims otherwise outside the statutory period. Plaintiff is not asserting that the continuing violations doctrine applies to her exclusion from Splendor on Aug. 11, 2021, as Plaintiff does not need to rely on the continuing violations doctrine for her claim against Splendor to be viable.

Instead, Plaintiff is relying on *Nat'l R.R. Passenger Corp.*, 536 U.S. at 113 where the Court reviewed the precedent (including *Delaware State College v. Ricks*, 449 U. S. 250 (1980)), and concluded: “Each discrete discriminatory act starts a new clock for filing charges alleging that act.” The Supreme Court also held, consistently with the foregoing statement, that only older acts outside the statutory period were barred by the statute of limitations (*see Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. at 114-115):

> Morgan can only file a charge to cover discrete acts that "occurred" within the appropriate time period. While Morgan alleged that he suffered from numerous discriminatory and retaliatory acts from the date that he was hired through March 3, 1995, the date that he was fired, only incidents that took place within the timely filing period are actionable. Because Morgan first filed his charge with an appropriate state agency, only those acts that occurred 300 days before February 27, 1995, the day that Morgan filed his charge, are actionable. During that time period, Morgan contends that he was wrongfully suspended and charged with a violation of Amtrak's "Rule L" for insubordination while failing to complete work assigned to him, denied

> training, and falsely accused of threatening a manager. [footnote discussion omitted]

Turning to *In re Monumental Life Ins. Co.*, 365 F.3d 408 (5th Cir. 2004) (cited by the District Court, ROA.1547-1548), no applicable rules can be drawn from it. The plaintiffs there sought to certify a class comprised of "'[a]ll African-Americans who own, or owned at the time of policy termination, an industrial life insurance policy that was issued as a substandard plan or at a substandard rate.'" The issue was when the statute for that ownership event accrued with respect to each potential class member, and the Fifth Circuit concluded that in that case: "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." *In re Monumental Life Ins. Co.*, 365 F.3d at 420. This Court did not consider whether there was a series of discrete discriminatory actions affecting each potential class member and thus, did not in any way modify or affect the prior holding in *Morgan*, 536 U.S. at 113 that: "Each discrete discriminatory act starts a new clock for filing charges alleging that act."

The District Court also concluded in its decision that: "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." (ROA.1548) The District Court similarly noted that because of Plaintiff's failure to call her denial of access a "refusal to hire," and further because in August 2021,

Plaintiff considered her original LAA to still be in force, and because she had no expectation of entering into a new contract or being rehired in 2021, the statute of limitations could not be tolled. (ROA.1548)

The Court in *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. at 113 clearly stated that "refusal to hire" is but one example of a discrete discriminatory act which starts the running of a new statute of limitations:[37]

> Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Each incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable "unlawful employment practice." Morgan can only file a charge to cover discrete acts that "occurred" within the appropriate time period.

Similarly, Plaintiff in the case at bar is only claiming for the discrete event: denial of her access to Splendor on August 11, 2021. There is no need to classify it as a "refusal to hire" to fall within the rule of *Morgan*, id., because denial of access is a clear example of a discrete discriminatory act. Moreover, there cannot be a "refusal to hire" in this case, because if she would have been granted a dancer position and offered a new L&A Agreement, she still would not have an employment agreement with a defendant, would have received no compensation

[37] Note that, however, the Morgan Court also held that the "refusal to hire" claims there in issue did not fall within the continuing violations doctrine, and therefore such claims occurring before the statutory period could not stand.

from either defendant, and still would have had to pay a defendant each time she came to work.

Plaintiff also notes that the holding in *Delaware State College v. Ricks*, 449 U. S. 250 (1980) (cited in Defendants' Motion for Summary Judgment, ROA.1299) was summarized by *Morgan* Court as limiting the continuing violations doctrine and limiting the re-starting of the limitations clock at each allegedly discriminatory action, to cases where (as here) there is at least one allegedly discrete discriminatory act within the limitations period. The plaintiff/professor in *Ricks* was under an employment agreement. He was first offered tenure, then he was offered a one year "terminal" contract, then he was terminated at the terminal contract's expiration. The *Morgan* Court quoted the *Ricks* Court's reason for not finding a continuing violation in that case: "'Mere continuity of employment, without more is insufficient to prolong the life of a cause of action for employment discrimination.'" *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. at 112-13. The *Morgan* Court then further quoted the *Ricks* Court's reason for not finding why plaintiff's termination following the one year "terminal" contract's expiration did not start a new clock on the statute of limitations: "In order for the time period to commence with the discharge, 'he should have identified the alleged discriminatory acts that continued until, or occurred at the time of, the actual termination of his employment.'" *Ibid*.

In the case at bar, in contrast, Plaintiff has identified the discriminatory act which occurred when she was refused a dancer position on Aug. 11, 2021. She was refused because she was black. And, unlike the plaintiff in *Ricks*, Plaintiff never had an employment contract or an ongoing employment relationship. She paid for entry each time she came to work, effectively making each entry a discrete contract with Defendant, with new consideration. She was also often forced to pay additional monies to managers or employees for access. And sometimes she was denied access because the manager Bob Furey, known for actively excluding Black dancers, was present, or for the blatantly discriminatory reason that there were "already too many" Black dancers on the premises. Had she been allowed access on August 11, 2021, she did not expect to enter any agreement at all, as she thought the prior arrangement she had while dancing there was still in effect. ROA.1326:8-19; ROA.715.

Plaintiff's denial of access to Splendor on August 11, 2021 was simply one more discrete, discriminatory event. As such, under *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. at 114-115 the limitations clock restarted on August 11, 2021 for Plaintiff's Section 1981 claims against Splendor. Note that with the start of the new limitations clock, she had at least two years from that to file an action (*Teamah v. Applied Materials, Inc.,* 715 Fed. Appx. 343, 346 (5th Cir. 2017)) and she did so the next day on August 12, 2021, when this action was filed in the District Court. ROA.10-16.

2. **The Four Year Statute of Limitations for the Section 1981 Claim Against Cover Girls Commenced in Late November 2017**

The District Court held Plaintiff's § 1981 claims against Cover Girls accrued in 2016 before the statutory period and were time barred. ROA.1553. The District Court correctly noted that Plaintiff's claim against Cover Girls is under a four year statute of limitations. ROA.1550. *See Hackett v. United Parcel Serv.,* No. 17-20581 *6 (5th Cir. 2018) ("Claims brought under section 1981 have a four-year statute of limitations—the default period applicable to most federal claims. *See Johnson v. Crown Enters., Inc*., 398 F.3d 339, 341 (5th Cir. 2005)").

The Cover Girls agreement (ROA**.**1190-1216) is essentially identical to the Splendor agreement (ROA.1223-1248) but for the Defendants' names. It was not an employment agreement. As at Splendor, she was paid no compensation by Splendor, and had to pay $20 to $80 for entry each time she came to work,[38] effectively making each entry a discrete contract with Defendant, with new consideration. She was also often forced to pay additional monies to managers or employees for access.[39] And sometimes she was denied access because Bob Furey was there; or, she was sometimes denied access for the blatantly discriminatory reason that there were "already too many" Black dancers on the premises.[40] Plaintiff's denial of access to

[38] ROA.1180; ROA.716.
[39] ROA.1180-1181; ROA.714-716.
[40] ROA.1181; ROA.715.

Cover Girls in late November 2017 was simply one more discrete, discriminatory act. As such, under *Nat'l R.R. Passenger Corp. v. Morgan*, the limitations clock started in late November 2017 (within four years from when this lawsuit was filed) for Plaintiff's Section 1981 claim against Cover Girls, for all the same reasons noted above that the limitations clock for her claim against Splendor started on Aug. 11, 2021 when she was refused access.

CONCLUSION

In view of the misapplication of the law to the facts in this case, Plaintiff requests the grant of Defendants' motion for summary judgment (ROA.1541-1556) be vacated and the case be remanded for trial.

SUBMITTED BY:
S/Eric Paul Mirabel
Eric Paul Mirabel
3783 Darcus Street
Houston, TX 77005
(281) 772-3794

CERTIFICATE OF SERVICE

I certify that on Oct. 30, 2023, the foregoing document was forwarded via U.S. Mail on today's date to the following parties/counsel:

Casey Wallace,
WALLACE & ALLEN, LLP,

440 Louisiana St Ste 590,

Houston, TX 77002-1054

S/Eric Paul Mirabel

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of FED. R. APP. P. 32(a)(7)(B) because, excluding the parts of the document exempted by FED. R. APP. P. 32(f) and 5th CIR. R. 32.1: this document contains 5,607 words.

2. This document complies with the typeface requirements of FED. R. APP. P. 32(a)(5), and 5th CIR. R. 32.1 and the type-style requirements of FED. R. APP. P. 32(a)(6) because: this document has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14 point Times New Roman font with all footnotes in 12 point Times New Roman font.

S/Eric Paul Mirabel

APPENDIX C

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

CHANEL E.M. NICHOLSON, et al. *Plaintiffs,* v. A.H.D. HOUSTON, INC. d/b/a CENTERFOLDS; W.L. YORK, INC. d/b/a THE COVER GIRLS; D WG FM, INC d/b/a SPLENDOR, D. TEXAS INVESTMENTS INC / AHD HOUSTON d/b/a TREASURES GENTLEMENS CLUB; ALI DAVARI and HASSAN DAVARI, *Defendants.*	§	CIVIL ACTION NO. 4:23-cv-01025 JURY TRIAL DEMANDED

ORDER GRANTING PLAINTIFFS' MOTION FOR CONTINUANCE

The Court, having considered the briefs and arguments of the parties, has determined that Plaintiffs' motion for continuance should be granted. It is ORDERED that docket call, currently set for November 15, 2024 be reset to February, 7 2025, and the trial, currently set for November 18, 2024 be reset to February, 10 2025. at 9:00 a.m.

DATED THIS 11/12/24 DAY OF ____, 2024.

The Honorable Alfred H. Bennett
United States District Judge

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

CHANEL E.M. NICHOLSON, on behalf of herself and other similarly situated Plaintiffs, *Plaintiff,* v. A.H.D. HOUSTON, INC. d/b/a CENTERFOLDS; W.L. YORK, INC. d/b/a THE COVER GIRLS; D WG FM, INC d/b/a SPLENDOR, D. TEXAS INVESTMENTS INC / AHD HOUSTON d/b/a TREASURES GENTLEMENS CLUB; ALI DAVARI and HASSAN DAVARI, *Defendants.*	§	**APPENDIX D** CIVIL ACTION NO. 4:23-cv-01025 JURY TRIAL DEMANDED

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants A.H.D. Houston, Inc., W.L. York, Inc., D WG FM, Inc., and D. Texas Investments, Inc., (collectively "Defendants") file this motion for summary judgment against Plaintiffs Liosha Williams ("Williams"), Destiny Ilori ("Ilori"), Jalaycia Declouet ("Declouet"), Lindsey Smith ("Smith"), and Corina Castro ("Castro") (collectively "Plaintiffs").

INTRODUCTION & SUMMARY OF THE ARGUMENT

This is an action for violation of 42 U.S.C. § 1981 and breach of contract. Plaintiffs filed their Original Complaint on March 21, 2023, which alleged various claims for unlawful discrimination under 42 U.S.C. § 1981 and breach of contract. Eventually, Plaintiffs filed their First Amended Complaint ("FAC") on August 1, 2023. (Dkt No. 23).

On March 15, 2024, this Court entered its order granting in part and denying in part Defendants' Rule 12(b)(6) motion to dismiss the FAC. (Dkt. No. 31). The Court dismissed all of Chanel Nicholson's and Tabitha Vann's claims, along with all the claims against the Individual

Defendants, Ali Davari and Hassan Davari. (*Id.*). As a result, the only live claims in this case are as follows: "(1) Williams' § 1981 hostile work environment claim against Treasures Gentlemen's Club ("Treasures"), (2) Williams' breach of contract claim against Treasures, (3) Williams' § 1981 failure-to-hire claim against Centerfolds, (4) Ilori's § 1981 failure-to-hire claims against Splendor and Centerfolds, (5) Declouet's § 1981 failure-to hire claims against Centerfolds, (6) Smith's § 1981 failure-to-hire claims against Treasures, and (7) Castro's § 1981 failure-to-hire claims against Splendor and The Cover Girls ("Cover Girls"). (*Id.*).

Defendants now move for summary judgment on the grounds that Plaintiffs' remaining § 1981 hostile work environment, breach of contract, and § 1981 failure-to-hire claims fail as a matter of law and because Plaintiffs' allegations have never developed into claims supported by evidence. Based on the record at hand, there is a complete absence of evidence to support the essential elements of Plaintiffs' claims. Defendants seek summary judgment on the claims asserted against them by Plaintiffs in Plaintiffs' FAC. Defendants are entitled to the relief sought by this motion because no evidence exists to support the necessary elements required for Plaintiffs to succeed on their claims.

STANDARD

Rule 56 of the Federal Rules of Civil Procedure mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a sufficient showing of the existence of an element essential to the party's case for which that party will bear the burden at trial. *See* FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); *Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir. 1994). 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." Fed. R. Civ. P. 56(a). A fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby Inc*., 477 U.S. 242, 248

(1986). A dispute is genuine if the "evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

Rule 56 allows a movant to "merely point to an absence of evidence, thus shifting to the non-movant the burden of demonstrating by competent summary judgment proof that there is an issue of material fact warranting trial." *Lyons v. Katy Indep. Sch. Dist*., 964 F.3d 298, 301-02 (5th Cir. 2020) (citation and quotation marks omitted); *see also Austin v. Kroger Tex., L.P*., 864 F.3d 326, 335 (5th Cir. 2017) (per curiam). Revealing a lack of evidence may be accomplished by deposing the nonmovant, or "establishing the inadequacy of documentary evidence." *Celotex Corp. v. Catrett*, 477 U.S. 317, 332 (1986). But "[i]f there is literally no evidence in the record, the moving party may demonstrate this by reviewing for the court the admissions, interrogatories, and other exchanges between the parties that are in the record." *Id*.

Once the burden has shifted, a non-movant "cannot survive a summary judgment motion by resting on the mere allegations of its pleadings." *Duffie v. United States*, 600 F.3d 362, 371 (5th Cir. 2010). Plaintiffs must identify *specific* evidence in the record and articulate how that evidence supports their claims. FED. R. CIV. P. 56(c); *Willis v. Cleco Corp*., 749 F.3d 314, 317 (5th Cir. 2014). A fact issue does not exist simply because a non-movant points to "some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence." *Boudreaux v. Swift Transp. Co., Inc*., 402 F.3d 536, 540 (5th Cir. 2005) (citation and quotation marks omitted).

Once the moving party has made an initial showing that there is no evidence to support the nonmoving party's case (or establishes an affirmative defense), the party opposing the motion must come forward with competent summary judgment evidence demonstrating the existence of a genuine dispute of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986). "The court views facts and inferences in the light most favorable to the non-moving party,

but ignores '[c]onclusional allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation.'" *Odubela v. Exxon Mobil Corp.,* 736 Fed. Appx. 437, 441 (5th Cir. 2018) (citation omitted). "If the burden at trial rests on the non-movant, the movant must merely demonstrate an absence of evidentiary support in the record for the non-movant's case. If the non-movant does not show a genuine issue of material fact on an element essential to his case, summary judgment is appropriate." *Id.* (internal citations omitted).

ARGUMENT

This case asserts 42 U.S.C. § 1981 claims on behalf of Plaintiffs Williams, Ilori, Declouet, Smith, and Castro and breach of contract claims on behalf of Williams. Notably, other than Williams hostile work environment allegations, Plaintiffs' other § 1981 claims are ambiguous and generally asserted. However, according to this Court's Order on Defendants' Motion to Dismiss, when looking at the suggested facts, the other § 1981 claims by Plaintiffs are claims for failure to hire. (Dkt. No. 31). Plaintiffs have failed to establish at least one element of each of their claims as a matter of law and there is no evidence to support their claims.

I. William's § 1981 claims and breach of contract claim fails as a matter of law.

Williams brings § 1981 hostile work environment and breach of contract claims against Treasures and § 1981 failure-to-hire claims against Centerfolds. Williams' claims fail as a matter of law because she has failed to establish key elements of each claim. Further, there is zero evidence to support each claim.

a. Williams' § 1981 hostile work environment claim against Treasures fails as a matter of law because there is no evidentiary support to establish the required elements of her claim.

Williams alleges that during the four years she performed at Treasures, from 2018 to 2022, that Treasures subjected her to a hostile work environment by (1) requiring her to pay the managers tips under the threat of denial of access, and targeting her and other Black dancers for more money

more often than other races of dancers, (2) by the training in extortion of Black dancers provided in materials from management which are incorporated in her agreement with Treasures, and (3) comments from managers like "she is too dark-skinned" and "they don't hire Black girls" or they don't "hire too many Black girls." (Dkt. No. 23 at ¶ 10).

To establish a prima facie case of a hostile work environment a plaintiff must show: "(1) [she] belongs to a protected group; (2) [she] was subjected to unwelcomed harassment; (3) the harassment complained of was based on race; (4) the harassment complained of affected a term, condition, or privilege of employment; [and] (5) the employer knew or should have known of the harassment in question and failed to take prompt remedial action." *Mendoza v. Helicopter,* 548 F. App'x 127, 128–29 (5th Cir. 2013). In determining whether a workplace constitutes a hostile work environment, courts must consider the "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance*." Lyles v. Texas Alcohol Beverage Comm'n*, 379 F. App'x 380, 384 (5th Cir. 2010) (citing *Ramsey v. Henderson*, 286 F.3d 264, 268 (5th Cir.2002). (internal quotations omitted).

Here, Williams' allegations that she was required to tip managers and that managers made racial comments like she was "too dark-skinned" are conclusory allegations and unsubstantiated assertions which are insufficient to survive a motion for summary judgment. Further, Williams has provided no evidence in support of these allegations. Defendants have attached evidence hereto proving a hostile work environment does not exist. (*See* Exhibit A, Declaration of Crystal Cowart).

Treasures' policies regarding dancer conduct incorporated in the Dancer License and Access Agreement ("DLAA") attached to Plaintiffs' FAC as Exhibit B, prohibits harassment of any type, including, but not limited to, harassment or discrimination based on race. (*Id*. at ¶ 5). Further, at no point in time has Treasures ever adopted, condoned, or permitted any sort of racially

discriminatory policy or practice, let alone any sort of quota system that limits the number of Black dancers who are allowed to perform at Treasures during any given year, month, week, or day. (*Id.* at ¶ 6). Treasures does not deny dancers an application based on their race, nor require a Black dancer to pay in order to receive access to the Club other than the standard fees that are applicable to all dancers. (*Id.* at ¶ 7). If any employee, agent, or personnel affiliated with Treasures is found to have engaged in any racially discriminatory or criminal conduct at all, he or she would be subject to disciplinary measures, including immediate termination. (*Id.* at ¶ 8). Also pursuant to Treasures' policies regarding dancer conduct, dancers are not required or forced to tip managers, waitresses, bus boys, DJs, valets, or any other individual affiliated with Treasures. (*Id.* at ¶ 9).

Williams has failed as a matter of law to establish that she was subjected to unwelcomed harassment, that the harassment complained of was based on race, that the harassment complained of affected a term, condition, or privilege of employment, and that Treasures knew or should have known of the harassment in question and failed to take prompt remedial action. Moreover, Williams has failed to proffer any evidence that she was required to tip managers, or that any managers made racial comments like she was "too dark-skinned" and "they don't hire Black girls" or they don't "hire too many Black girls." As such, Williams' § 1981 hostile work environment claim fails.

b. Williams' breach of contract claim against Treasures fails as a matter of law because there is no evidentiary support to establish the required elements of her claim.

Williams alleges Treasures breached their DLAA by forcing her to tip the managers. To prevail on a breach of contract claims, Plaintiffs must prove: "(1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained by the plaintiff as a result of the breach." *Smith Int'l, Inc. v. Egle Grp., LLC*, 490 F.3d 380, 387 (5th Cir. 2007).

Here, it is undisputed that a contract exists between Willaims and Treasures, and that Williams performed under the contract. However, Willaims has failed to prove elements three and four of a breach of contract claim.

Williams alleges Treasures breached representation No. 19 in the "Policies Regarding Dancer Conduct" attached to the DLAA between Treasures and Williams. Representation No. 19 states "[t]here is no mandatory tip sharing arrangement among management, dancers, and employees. If you choose to voluntarily tip any manager, dancer, waitress, bus boy, DJ, valet, or any other individual affiliated with Treasures, you do so at your sole discretion." Dkt. No. 23 at ¶ 25). Williams further asserts Treasures forced her to tip managers otherwise she would be denied access to the establishment in breach of paragraph three of her DLAA. Paragraph three concerns a dancer's ability to determine her schedule and the ability to arrive and leave the premises at any time without penalty and a dancer's agreement to supply her own costumes and other necessary apparel. (*Id.*).

Williams has provided no evidence that she was ever required to tip a manager. Instead, Williams only makes conclusory statements regarding her DLAA being breached for being forced to tip. Courts have "cautioned that conclusory allegations, speculation, and unsubstantiated assertions are inadequate to satisfy the nonmovant's burden in a motion for summary judgment." *Lyles v. Texas Alcohol Beverage Comm'n,* 379 F. App'x 380, 384 (5th Cir. 2010).

Defendants have attached evidence that Williams was never required to tip and managers, DJs, waitresses, or any employees. (Exhibit A at ¶ 9). Because Williams has failed as a matter of law to establish the existence of a breach of the contract between Plaintiff and Treasures, Williams' breach of contract claim fails.

c. Williams has no standing to seek declaratory relief setting aside the terms of her DLAA with Treasures.

Williams seeks a declaratory judgment that certain provisions of the "Treasures

Agreement" are unconscionable and unenforceable. (Dkt. No. 23 at ¶ 83). A Court's decision to issue a declaratory judgment is a three-step inquiry:

> "(1) whether an 'actual controversy' exists between the parties in the case; (2) whether it has authority to grant declaratory relief; and (3) whether "to exercise its broad discretion to decide or dismiss a declaratory judgment action." *Orix Credit All., Inc. v. Wolfe,* 212 F.3d 891, 895 (5th Cir. 2000). The "actual case or controversy" requirement refers to an Article III case or controversy. *MedImmune, Inc.*, 549 U.S. 118, 127 (2007). Therefore, if there is no actual case or controversy, the Court lacks subject matter jurisdiction. The Court has broad discretion as to whether an exercise of its power to grant declaratory relief is necessary and appropriate.

In re Sanchez Energy Corp., 648 B.R. 592, 616-17 (Bankr. S.D. Tex. 2023) (full citation added and parallel citation omitted). This Court need not move past the first inquiry, however, because Williams simply challenges the enforceability of contractual provisions not at issue or relevant to her § 1981 or breach of contract claims. Williams' request for declaratory relief therefore "presents no ripe case or controversy." *Walmart Inc. v. U.S. Dep't of Just.*, 21 F.4th 300, 311 (5th Cir. 2021). Like her more traditional requests for relief, this Court should deny Williams' request for declaratory relief.

d. Williams' claims against Treasures are time-barred.

Alternatively, Williams' claims are likely barred by the statute of limitations. Section 1981 provides that all persons "shall have the same right … to make and enforce contracts…." 42 U.S.C. § 1981(a). As originally enacted, § 1981 claims were limited to 'pre-formation' discriminatory conduct such that the statute did not extend to "conduct by the employer *after* the contract relation has been established." *Patterson v McLean Credit Union*, 491 US 164, 177 (1989) (emphasis added). In the early 1990s, Congress amended § 1981 to include 'post-formation' claims within the statute's ambit by adding a definition of "make and enforce contracts," *i.e.*, "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." *Id*., § 1981(b).

A 'pre-formation' § 1981 claim is subject to the two-year statute of limitations supplied by state law. *See Johnson v Crown Enterprises Inc*., 398 F3d 339, 341-42 (5th Cir 2005); *Fonteneaux v. Shell Oil Co*., 289 Fed. Appx. 695, 699 (5th Cir. 2008). A 'post-formation' § 1981 claim is subject to a four-year limitations period supplied by federal law. 28 U.S.C. § 1658; *see Jones v R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382 (2004). These "limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers from the burden of defending claims arising from employment decisions that are long past." *Delaware State Coll. v. Ricks*, 449 U.S. 250, 256-57 (1980).

As this Court wrote, in the context of a § 1981 claim, "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." *Nicholson v. A.H.D. Houston, Inc.*, No. 4:21-CV-02624, 2022 WL 4543201, at *7 (S.D. Tex. Sept. 28, 2022) (citing *Ricks*, 449 U.S. at 257).

Under state law, breach of contract claims are subject to a four year limitations period. Tex. Civ. Prac. & Rem. Code § 16.051. "A breach of contract occurs when a party fails or refuses to do something he has promised to do." *Intermedics, Inc. v. Grady*, 683 S.W.2d 842, 845 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). "If the parties' agreement contemplates a continuing contract for performance, the limitations period does not usually commence until the contract is fully performed, unless one party refuses to fulfill the contract or prevents the other party from performing." *Id*.

Williams began working for Treasures on May 16, 2018 and claims Treasures had a practice of requiring Black dancers to tip managers and pay for access in breach of the contract. (*See* Exhibit B, Williams DLAA) (*See also* Dkt. No. 23 at ¶ 10). However, this lawsuit was not filed until March 21, 2023 – four years and 10 months after she began working and the alleged

breaches would have begun occurring. As such, Williams claims against Treasures are time-barred and should be dismissed.

e. Williams' § 1981 failure-to-hire claim against Centerfolds fails as a matter of law because there is no evidentiary support to establish the required elements of her claim.

Williams also asserts a § 1981 failure-to-hire claim against Centerfolds. To survive summary judgment, Plaintiffs bear the burden of proving that "(1) [she] is a member 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." *Body by Cook, Inc. v. State Farm Mut. Auto. Ins.*, 869 F.3d 381, 386 (5th Cir. 2017). A § 1981 claim also requires proof that "but for race" the plaintiff "would not have suffered the loss of a legally protected right." *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1019 (2020).

Defendants now move for summary judgment on Williams' failure to hire claim against Centerfold because the record shows that there is zero evidence that Centerfolds intended to discriminate on the basis of race. Further, the record has zero evidence that but for race Williams would not have been refused access to Centerfolds.

Williams alleges she went to Centerfolds in February 2022 and in April 2022 to apply for a dancer position but was denied due to her race. Specifically, William alleges a manager at Centerfolds told her that she would have had to pay to get hired, and that she was "too dark" to work there. (Dkt. No. 23 at ¶ 10). She further alleges that the same manager accepted an application from a Caucasian dancer. (*Id.*). Short of her conclusory allegations and unsubstantiated assertions, there is no evidence on the record that Williams visited Centerfolds to apply for a dancer position, much less evidence that a manager told her she would have to pay, told her that her skin was too dark, or deny her application. Without such evidence, the Court must grant summary judgment. Defendants have attached evidence hereto proving that Defendants never intended and never have

discriminated against someone on the basis of race. (*See* Exhibit A, Declaration of Crystal Cowart). Centerfolds does not deny dancers an application based on their race, nor require a Black dancer to pay in order to receive access to the Club other than the standard fees that are applicable to all dancers. (*Id.* at ¶ 7).

Williams has failed as a matter of law to establish Centerfolds intentionally did not contract her to perform on the basis of her race. As such, Williams' § 1981 failure-to-hire claim fails.

II. Plaintiffs Ilori, Declouet, Smith, and Castros' § 1981 Claim Against Defendants Fails on the Merits.

Similarly, Plaintiffs Ilori, Declouet, Smith, and Castro assert § 1981 failure-to-hire claims against Defendants. Again, to survive summary judgment, Plaintiffs bear the burden of proving that "(1) [they are] a member 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." *Body by Cook, Inc. v. State Farm Mut. Auto. Ins*., 869 F.3d 381, 386 (5th Cir. 2017). A § 1981 claim also requires proof that "but for race" the plaintiff "would not have suffered the loss of a legally protected right." *Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1019 (2020).

Plaintiffs Ilori, Declouet, Smith, and Castro have failed as a matter of law to establish the second element required to sustain a § 1981 claim for failure to hire against Defendants. Plaintiffs have not and cannot establish that Defendants intended to discriminate against Plaintiffs on the basis of race. Specifically, Plaintiffs have failed to establish that but for their race, they would not have been contracted by Defendants.

a. Ilori's § 1981 failure-to-hire claims against Centerfolds and Splendor fail as a matter of law because there is no evidentiary support to establish the required elements for her claims.

Defendants now move for summary judgment on Ilori's failure to hire claim against Centerfolds and Splendor because the record shows that she lacks either direct evidence that race

was the "but for" reason for the denial, or sufficient circumstantial evidence to support a *prima facie* case of discrimination. *See Odubela*, 736 Fed. Appx. at 443 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

Ilori alleges she went to Splendor three times to apply for a dancer position and that when she visited Splendor for the third time, the "hostess at the front of the premises told her that they had enough ebony dancers." (Dkt No. 23 at ¶ 13A). She further alleges she saw Caucasian dancers entering Splendor "in street clothes, apparently to start their shifts." (*Id.*). Ilori has provided zero evidence to support these conclusory statements and assumptions.

Ilori further alleges that between late 2021 and May 20, 2022, she applied for a dancer position at Centerfolds approximately eight times. (Dkt No. 23 at ¶ 13B). Ilori fails to give detail as to why she was not contracted at Centerfolds for the first seven times she applied. Instead, Ilori merely alleges that the last time she attempted to apply for a dancer position, on May 20, 2022, the hostess informed her "that they were not going to be hiring for a while." (*Id.*). Then, allegedly, the hostess immediately after gave a female Caucasian applicant for a dancer position an application form and allowed her to speak with the hiring manager. (*Id.*). Apparently, an unnamed employee, at some unknown time and unknown place, told Ilori that they only offer dancer positions to a limited number of Black dancers. (*Id.*). Again, Ilori has provided zero evidence to support these conclusory statements and assumptions.

These alleged encounters do not create a fact issue. That is because, hostesses do not have hiring privileges. (*See* Exhibit A at ¶ 3). As a result, "the record does not contain evidence that would permit a reasonable fact finder to conclude that [hostess] had management and final decision making authority with [Splendor and Centerfolds] at a level that would permit [hostess's] alleged statements to be attributed to [Splendor and Centerfolds] for the purpose of a § 1981 claim." *Duhall v. Lennar Family of Builders*, 645 F. Supp. 2d 965, 968 (D. Colo. 2009); *DuHall v. Lennar Family*

of Builders, 382 Fed. Appx. 751, 755 (10th Cir. 2010) (affirming lower court's finding). Without more, Ilori's § 1981 claim against Splendor and Centerfold fails as a matter of law because there is no evidence that Splendor or Centerfolds did not contract her as a dancer due to her race.

Furthermore, Splendor and Centerfolds' policies regarding dancer conduct prohibits harassment of any type, including, but not limited to, harassment or discrimination based on race. (*See* Exhibit A at ¶ 5). Further, at no point in time has Splendor and Centerfolds ever adopted, condoned, or permitted any sort of racially discriminatory policy or practice, let alone any sort of quota system that limits the number of Black dancers who are allowed to perform at the clubs during any given year, month, week, or day. (*Id.* at ¶ 6). Splendor and Centerfolds do not deny a dancer an application based on her race, nor require a Black dancer to pay in order to receive access to the Club other than the standard fees that are applicable to all dancers. (*Id.* at ¶ 7).

As Ilori has failed as a matter of law to establish Splendor or Centerfolds intentionally did not contract her to perform on the basis of her race, her § 1981 failure-to-hire claims fail.

b. Declouet's § 1981 failure-to-hire claim against Centerfold fails as a matter of law because there is no evidentiary support to establish the required elements of her claim.

Defendants now move for summary judgment on Declouet's failure to hire claim against Centerfold because the record shows that she lacks either direct evidence that race was the "but for" reason for the denial, or sufficient circumstantial evidence to support a *prima facie* case of discrimination. *See Odubela*, 736 Fed. Appx. at 443 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

Declouet alleges she went to Centerfolds to apply for a dancer position with a Caucasian acquaintance and that the acquaintance was given an audition and a dancer position, while Declouet was not, even though allegedly Declouet had been told on the phone earlier that day by someone at Centerfolds that they were hiring. (Dkt No. 23 at ¶ 15). Declouet claims she returned

to Centerfolds the next day and spoke with the front desk hostess who said they were not auditioning that day. (*Id.* at ¶ 16). Declouet then claims she returned the day after that, spoke with the hostess and a manager, and was given an application. (*Id.*). However, she alleged that after the manager and the hostess spoke privately, the hostess informed Declouet that the club had a limit on how many Black women they could hire, and they were all full. (*Id.*).

Here, Declouet's allegations that she was denied from Centerfolds multiple times and that she was told by a manager that the club had a limit on how many Black women they could hire, and they were all full are conclusory allegations and unsubstantiated assertions which are insufficient to survive a motion for summary judgment. Further, Declouet has provided no evidence in support of these allegations.

Centerfolds does not deny a dancer an application based on her race. (*See* Exhibit A, Declaration of Crystal Cowart). At no point in time has Centerfolds ever adopted, condoned, or permitted any sort of racially discriminatory policy or practice, let alone any sort of quota system that limits the number of Black dancers who are allowed to perform at the Centerfolds. (*Id.* at ¶ 6).

Declouet has failed as a matter of law to establish Centerfolds intentionally did not contract her to perform on the basis of her race. As such, her § 1981 failure-to-hire claims fail.

c. Smith's § 1981 failure-to-hire claim against Treasures fails as a matter of law because there is no evidentiary support to establish the required elements of her claim.

Smith merely alleges she applied for a dancer position at Treasures one afternoon in July 2022, but the manager said there were "too many Black girls" on day shift and to come for night shift if she wanted to be given a dancer position. (Dkt. No. 23 at ¶ 18). She also alleged she saw Caucasian dancers inside Treasures at the time. (*Id.*).

Once again, these allegations are conclusory allegations and unsubstantiated assertions which are insufficient to survive a motion for summary judgment. Further, Smith has provided no

evidence in support of these allegations.

As explained above, Treasures does not deny a dancer an application based on her race (*See* Exhibit A, Declaration of Crystal Cowart). Further, at no point in time has Treasures ever adopted, condoned, or permitted any sort of racially discriminatory policy or practice, let alone any sort of quota system that limits the number of Black dancers who are allowed to perform at Treasures. (*Id.* at ¶ 6).

As Smith has failed as a matter of law to establish Treasures intentionally did not contract her to perform on the basis of her race, her § 1981 failure-to-hire claim fails.

d. Castro's § 1981 failure-to-hire claims against Splendor and Cover Girls fail as a matter of law because there is no evidentiary support to establish the required elements of her claims.

Lastly, Castro alleges she applied at both Splendor and Cover Girls in April 2021 for a dancer position but was told by both the manager and/or the hostess near the front that because she was not white, they wouldn't hire her. (Dkt. No. 23 at ¶ 22). She also alleges she saw Caucasian dancers inside the premises on both occasions. (*Id.*).

Castro's allegations are conclusory allegations and unsubstantiated assertions which are insufficient to survive a motion for summary judgment. Castro has also provided no evidence in support of these allegations.

Splendor and Cover Girls' policies regarding dancer conduct prohibit harassment of any type, including, but not limited to, harassment or discrimination based on race. (*Id.* at ¶ 5). Further, at no point in time has Splendor and Cover Girls ever adopted, condoned, or permitted any sort of racially discriminatory policy or practice, let alone any sort of quota system that limits the number of Black dancers who are allowed to perform at the clubs during any given year, month, week, or day. (*Id.* at ¶ 6). Splendor and Cover Girls do not deny a dancer an application based on her race, nor require a Black dancer to pay in order to receive access to the Club other than the standard fees

that are applicable to all dancers. (*Id.* at ¶ 7). If any employee, agent, or personnel affiliated with the clubs is found to have engaged in any racially discriminatory or criminal conduct at all, he or she would be subject to disciplinary measures, including immediate termination. (*Id.* at ¶ 8).

As Castro has failed as a matter of law to establish either Splendor or Cover Girls intentionally did not contract her to perform on the basis of her race, her § 1981 failure-to-hire claims fail.

CONCLUSION

Defendants A.H.D. Houston, Inc., W.L. York, Inc., D WG FM, Inc., and D. Texas Investments, Inc., pray that the Court grant summary judgment against Plaintiffs Liosha Williams, Destiny Ilori, Jalaycia Declouet, Lindsey Smith, and Corina Castros' claims and be granted all relief, at law and in equity, to which they are entitled.

Respectfully submitted,

WALLACE & ALLEN, LLP

/s/ Casey T. Wallace

Casey T. Wallace
State Bar No. 00795827
SDTX Bar. No. 20117
440 Louisiana, Ste. 590
Houston, Texas 77002
Telephone: (713) 227-1744
Facsimile: (713) 600-0034
cwallace@wallaceallen.com
ATTORNEY IN CHARGE FOR DEFENDANTS

OF COUNSEL FOR DEFENDANTS:
Benjamin W. Allen
State Bar No. 24069288
SDTX Bar No. 1058996
440 Louisiana, Ste. 590
Houston, Texas 77002
Telephone: (713) 227-1744
Facsimile: (713) 600-0034
ballen@wallaceallen.com

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this pleading has been served on the following attorneys of record in accordance with the Federal Rules of Civil Procedure on May 16, 2024.

Eric P. Mirabel
3783 Darcus St.
Houston, Texas 77005
Tel: 281-772-3794
Fax: 713-667 4234
eric@emirabel.com

ATTORNEY FOR PLAINTIFFS

/s/ Casey T. Wallace
Casey T. Wallace

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LIOSHA WILLIAMS, et al., Plaintiffs	§	Civil Action No. 4:23-cv-01025
v.	§	
A.H.D. HOUSTON, INC. d/b/a CENTERFOLDS; W.L. YORK, INC. d/b/a COVER GIRLS; D WG FM, INC. d/b/a SPLENDOR; D TEXAS INVESTMENTS INC / AHD HOUSTON d/b/a TREASURES GENTLEMENS CLUB; ALI DAVARI; HASSAN DAVARI, Defendants	§	

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs oppose Defendants' motion for summary judgment (Dkt. 33) on the grounds set forth below.

I. Summary of Argument

Plaintiffs oppose Defendants' motion for summary judgment (Dkt. 33), to the extent it relies on the declaration by Crystal Cowart (Dkt. 33-1). Ms. Cowart's declaration fails to carry the burden under Fed. R. Civ. P. 56 to show an absence of a genuine issue of material fact regarding Plaintiff Williams' hostile work environment claims vs. Treasures, her breach of contact claims vs. Treasures, or her "failure to hire" claims[1] vs. Centerfolds. The failure is because the declarant, Crystal Cowart:

[1] The claims are referred to as "failure to hire" by the Court. But in fact, Ms. Williams would not have been "hired" at Centerfolds, had they not discriminated against her; in the same way she was never "hired" at Treasures. Her agreement with Treasures (Dkt. 33-2) provides that she is paid no compensation or benefits, and the only real right it provides her is access to the premises, upon payment of the entry fee (see Facts Section, para. 16, *infra*).

has no personal knowledge of any plaintiff's claims, as she does not claim to have ever met or spoken with any Plaintiff, or observed any of the Plaintiffs at work;

has made a number of false and/or misleading statements in her Declaration (Dkt. 33-1) filed to support summary judgment;

cites provisions of agreements to support her conclusions that there was no discrimination, harassment or forced tipping at Defendants, and those provisions do not do so;

is a long-time employee of Treasures who frequently works to prepare cases with the law firm representing Defendants, and her relationship with lead counsel here is such that about ten years ago, he granted her permission to purport that she worked for his firm – when she did not. **Exhibit G**, Cowart Deposition, p. 10 ll. 7-28; and

alleges Defendants discipline or terminate those found conducting illegal activity on the premises,[2] when there is ample evidence that sex and drug trafficking are tolerated by management.

Defendants Managements' policy of not generally not engaging Black dancers and their policy of discriminating against Black dancers, including by not allowing those they did engage access to Defendant's premises if: (i) other Black dancers were already present; or (ii) if a regional manager was present (where that regional manager had removed a night manager's hiring authority, because the night manager had engaged a Black dancer), is supported by: (a) the deposition[3] of a long-time manager at Defendant Cover Girls, who also worked at Defendant Splendor, and had decades of experience working at those and other adult-entertainment establishments with the same ownership and upper management as Defendants; (b) the declaration of Chanel Nicholson (**Exhibit A**), the named plaintiff in a prior related case, *Nicholson v. AHD Houston Inc. et al*., Cause No. 4:21-cv-2624, in this District and Division[4]; and (c) the declarations of Plaintiffs Ilori, Declouet, Smith and Castro filed herewith, regarding the discriminatory events

[2] Cowart Declaration, Dkt. 33-1 ¶8.
[3] This deposition by A. Skwera, **Exhibit B**, was taken in a prior related case, *Nicholson v. AHD Houston Inc. et al.*, Cause No. 4:21-cv-2624, in this District and Division, filed against three of the four Defendants here, and with the same counsel representing those three defendants as here.
[4] Ms. Nicholson was originally the first-named plaintiff in this case, but her claims were dismissed. *See* Dkt. 31.

surrounding their respective "failure to hire" claims.[5] All the foregoing evidence supports plaintiff Williams' claims for hostile work environment, harassment, discriminatory exclusion, and forced tipping, at Treasures, and her failure to hire claims against Centerfolds (as both Treasures and Centerfolds have the same ownership and management as the other Defendants).

The declaration of Chanel Nicholson (**Exhibit A**), also establishes that there was forced tipping at related establishments with the same ownership and management as Treasures, and thus supports plaintiff Williams' claims for breach of contract against Treasures.

Defendants' position on the other claims by Plaintiff Williams (*i.e.*, Defendants allege there is no standing or ripe controversy for Williams' contract unenforceability claims, and that her hostile work environment claims are time-barred) are addressed in the Argument Section below.

II. Facts

1. The Davari brothers (David and George) are, on information and belief, the sole directors and officers of the corporate entity dba Treasures;[6] and it has been established that they are the sole directors and officers of the corporate entities dba Cover Girls, Splendor and Centerfolds. The Davari brothers are reputedly the owners of all four of these businesses. **Exhibit B** Skwera Deposition, p. 5, l. 8 to p. 6, l. 8; **Exhibit A** Nicholson Declaration ¶¶2; 18; **Exhibits C, D, E, F,** are respectively, Centerfolds, Cover Girls, Splendor and Treasures, Certificates of Incorporation (showing the sole directors and officers of the three corporate entities dba Centerfolds, Cover Girls, and Splendor, are the Davari brothers; Dkt. 33-1, Cowart Declaration, states that she provides services for all four corporate entities).

2. Another figure in the upper management of Cover Girls was Bob Furey, who was regional manager for Treasures, Cover Girls, Splendor, and Centerfolds. **Exhibit G,** Cowart Deposition, p. 17 l. 22 to p. 18 l. 2. Bob Furey was also Director of Operations at Gold Cup, which had been another adult entertainment establishment owned by the Davari brothers, which closed in 2015.

[5] The declarations by these four plaintiffs conclusively establish all elements of a *prima facie* case of discrimination against each of them; forcing the conclusion that summary judgment against them should be denied.

[6] "Treasures" is Defendant AHD HOUSTON d/b/a TREASURES GENTLEMENS CLUB. The other corporate Defendants, *i.e.,* Centerfolds, Splendor, and Cover Girls in the Table, are similarly the dba names for these Defendants. The Defendants' dba names only are used throughout this document.

Exhibit B Skwera Deposition, p. 17, l. 24 to p. 18 l. 7; p. 6, l. 25 to p. 7, l. 5. He was frequently present at Splendor as well (**Exhibit A**, Nicholson Declaration ¶2).

3. Management at Centerfolds, Treasures, Cover Girls and Splendor was fully overlapping. Bob Furey and Jere Gibbons are indicated as being the Managers at all three establishments, and the contacts for dancers, if "[Y]ou are the victim of trafficking or human trafficking…" in Ms. Williams agreement with Treasures (Dkt. 33-2, p. 13, top); and in the agreements of Ms. Nicholson with Splendor and Cover Girls. **Exhibit 1** (p.11-12); **Exhibit 2** (p.11) to **Exhibit A**. Jere Gibbons is related to David Davari. **Exhibit B** Skwera Deposition, p. 15 ll. 20-25. Crystal Cowart stated that Bob Furey is regional manager covering Centerfolds, Treasures, Cover Girls and Splendor. **Exhibit G**, Cowart Deposition, p. 17 ll. 22 to p. 18 l. 4.

4. Jere Gibbons had been at Gold Cup since about 2000 (Skwera Deposition, p. 27, l. 1-8 – 22; p. 31, ll. 4-5) and was present at Cover Girls as well. **Exhibit B** Skwera Deposition, p. 17 ll. 8-10. Hal Naumann was General Manager at Cover Girls (**Exhibit B** Skwera Deposition p. 40, l. 15 to p. 41, l. 1) was also a manager at Gold Cup for at least several years. **Exhibit B** Skwera Deposition p. 27, ll. 21-22. Jere Gibbons and Hal Naumann frequently communicated during their tenure at Cover Girls, and at Gold Cup. **Exhibit B** Skwera Deposition. 17, ll. 8-22. Bob Furey also frequently communicated with Hal Naumann at Cover Girls, **Exhibit B** Skwera Deposition p. 45, ll. 7-9. Andy Skwera was a long-term manager of Davari owned entertainment establishments (**Exhibit B** Skwera Deposition p. 5, l. 8 to p. 8, l. 1). He started as early as 1996 and continued with one interruption of less than two year (p. 31 l. 1-24). He was a manager at night at Cover Girls until about 2020. **Exhibit B** Skwera Deposition p. 53, l. 24 to p. 54, l. 1; p. 10, l. 13-17. Mr. Skwera reported to both Hal Naumann and Bob Furey at Cover Girls. **Exhibit B** Skwera Deposition p. 47, ll. 21-21.

5. Declarant Chanel Nicholson worked for extended periods at Splendor, Centerfolds and Cover Girls. **Exbibit A.** On multiple occasions at each establishment, she would arrive for work and be told that she could not enter because other Black dancer(s) were already there. (**Exhibit A** Nicholson Declaration ¶¶7, 20). Managers at Splendor and Centerfolds would, on her request, confirm that denial of entry because there were already "too many" Black dancers on the premises. **Exhibit A** Nicholson Declaration ¶¶7.

6. Defendants have a reputation for not providing dancer positions to Black women. **Exhibit B**, Skwera Deposition, p. 41, l. 21 to p. 43, l. 18. Qualified Black dancers were rejected at Cover Girls and Gold Cup. **Exhibit B**, Skwera Deposition, p. 50 ll. 4-18. At Cover Girls, Hal Naumann (General Manager), didn't like to hire dark skinned women. **Exhibit B**, Skwera Deposition, p. 41, ll. 18-21. At least twice, on being asked by the hostess about retaining a dancer candidate, Hal Naumann determined that she was Black from the hostess, and then instructed the hostess not to offer her a position. **Exhibit B**, Skwera Deposition, p. 148 ll. 2-23.

7. At Cover Girls, on one occasion, Bob Furey asked "who hired her" referring to a Black dancer, said there's "too many black girls," and removed Mr. Skwera's hiring authority after it was determined that Mr. Skwera was responsible. **Exhibit B**, Skwera Deposition, p. 44, ll. 13-20; p. 49, ll. 8-11; p. 78 l. 20 to p. 79. l. 8. Mr. Skwera justified his actions to Mr. Furey, stating that the Black dancer in question was "good looking." **Exhibit B**, Skwera Deposition, p. 79, ll. 7-8.

8. At Splendor and Cover Girls, Ms. Nicholson would sometimes be refused access because Bob Furey was already there (**Exhibit A** Plaintiff's Declaration ¶¶7; 20).

9. Mr. Skwera stated that Hal Naumann's preferred Caucasian dancers to such an extent he would hire unattractive ones, hurt business and cause customer complaints. **Exhibit B**, Skwera Deposition, p. 45 ll. 10 to p. 46, l. 5. 20.

10. At Cover Girls, a wide variety of illegal activity on the premises was reported to management by Mr. Skwera, but the illegal activity was allowed to continue. Mr. Skwera reported drug sales on the premises to Hal Naumann and Bob Furey (**Exhibit B**, Skwera Deposition, p. 47, ll. 12-23) and reported underage drinking to them (**Exhibit B**, Skwera Deposition, p. 47, l. 24 to p. 48, l. 12), but they took no action. Ms. Nicholson also states that a number of dealers, employees, dancers and managers were selling illegal drugs to dancers at Cover Girls, and illegal drugs, condoms and non-prescription Viagra to customers. **Exhibit A**, Nicholson Declaration ¶24.

11. Ms. Nicholson states that notorious pimps were often on the Cover Girls premises. **Exhibit A**, Nicholson Declaration ¶23. Other Davari clubs had similar tolerance for sex-trafficking activity. When Mr. Skwera reported to Bob Furey and Hal Naumann that a known pimp was on the premises at Gold Cup, the pimp was allowed to remain. **Exhibit B**, Skwera Deposition, p. 150, l. 23 to p. 151, l. 23. Pimps were also allowed to operate at Splendor so freely that Plaintiff once saw a pimp

allowed to enter and beat a dancer (who was his sex-slave) in full view. **Exhibit A**, Nicholson Declaration ¶¶ 11-12.

12. Ms. Nicholson states that the manager "Joey" at Splendor once explained to her that it was the policy of the Davari brothers and upper management to limit the number of Black dancers on the premises at any one time. Joey added that Bob Furey and he both followed the policy because they believed Black dancers would attract more police attention to the business, and they believed that might reduce his income, because: it was income from giving pimps access to the premises, and from sales of illegal drugs on the premises. **Exhibit A**, Nicholson Declaration ¶10. Limiting the number of Black dancers actually reduced the establishment's revenue (**Exhibit B**, Skwera Deposition, p. 9, ll. 21-24) and damaged business by elevating unprofessional Caucasian women to dancer positions. **Exhibit B**, Skwera Deposition, p. 45, ll. 10-20.

13. The declarant relied on to support Defendants' motion for summary judgment (Dkt. 33), Crystal Cowart, is a long-time employee of Treasures. **Exhibit G**, Cowart Deposition, p. 8 ll. 10-19. The declarant has worked for over a decade in preparing cases with the lead counsel representing Defendants. **Exhibit G**, Cowart Deposition, p. 10 ll. 7-10; p. 11 ll. 7-10. About ten years ago, lead counsel for Defendants granted her permission to purport that she worked for his firm – when she did not. **Exhibit G**, Cowart Deposition, p. 10 ll. 7-28.

14. Crystal Cowart's declaration, Dkt. 33-1, relies on the "anti-harassment provision" in Ms. Williams' agreement (Dkt. 33-2, p. 10¶8) to support Ms. Cowart's conclusion that there was no race-based discrimination by Defendants against any Plaintiffs. But this provision does not prohibit discrimination in hiring by management. It only prohibits harassment by the contracting party, *i.e.,* Ms. Williams, and further provides that she is to report harassment to management. There is no provision in Ms. Williams' agreement (Dkt. 33-2) allowing her to prevent her race-based exclusion from the premises,[7] or even to report it. Accordingly, the statement in Ms. Cowart's declaration, Dkt. 33-1¶5, that Ms. Williams' agreement (Dkt. 33-2, p. 10¶8) prohibits "harassment **or discrimination** based on race" is false.

15. Crystal Cowart's declaration, Dkt. 33-1¶6, provides that Defendants have never "adopted, condoned, or permitted any sort of racially discriminatory policy or practice…" She does not

[7] She alleges such race-based exclusion took place, Dkt.23, Amended Complaint ¶¶10, 11.

mention existence of any written anti-discrimination policy by Defendants (other than anti-harassment, as in ¶14, *supra*).

16. Crystal Cowart's declaration, Dkt. 33-1¶7, states that Defendants do not require "an African American dancer to pay in order to receive access to the club **other than standard fees that are applicable to all dancers.**" (emphasis added) Ms. Williams' agreement (Dkt. 33-2, p. 1¶3) provides that she has the "ability to arrive and leave the premises at any time without penalty," meaning, there should not be *any* entry fees. Thus, Ms. Cowart admits to breaches of Ms. Williams' agreement, in that such entry fees were applied to Ms. Williams.

17. Ms. Nicholson states that she would often be refused access to work at Splendor and Centerfolds, unless she paid certain managers additional requested monies, and that she was also usually forced to tip managers and other employees, or face being denied future access. **Exhibit A**, Nicholson Declaration ¶3-4. She once, at Splendor, had to pay $1500 for access. **Exhibit A**, Nicholson Declaration ¶5. Similarly, at Cover Girls she was often forced to tip managers and other employees at the end of her shift, or face being denied future access. At Cover Girls, she was once excluded until she paid a manager a "fine." **Exhibit A**, Nicholson Declaration ¶19.

18. Plaintiff Declouet's declaration (**Exhibit H)** supports her failure to hire claims against Centerfolds: that they refused her a dancer position and told her that Centerfolds had a limit on how many black women they could hire, and they were "all full." Plaintiff Ilori's declaration (**Exhibit I**) supports her failure to hire claims against Splendor: that they refused her a dancer position and told her that they had enough ebony dancers. Plaintiff Ilori's declaration (**Exhibit I**) supports her failure to hire claims against Centerfolds: that they refused her a dancer position and she was told that that they only grant dancer positions to a limited number of Black dancers. Plaintiff Smith's declaration (**Exhibit J**) supports her failure to hire claims against Treasures: that when she went there, a manager said there were "too many Black girls" on day shift and to come for night shift if she wanted to work there. Plaintiff Castro's declaration (**Exhibit K**) supports her failure to hire claims against Splendor and Cover Girls: that she was told that because she was not white, they wouldn't hire her.

III. Argument

A. There Was a Hostile Work Environment at Treasures; Summary Judgment Against Ms. Williams Is Precluded

Crystal Cowart does not claim to have personal knowledge of incidents surrounding the claims of Ms. Williams or any other plaintiff. She is a long-time employee of Treasures who has worked for over a decade to prepare cases with the lead counsel representing Defendants. **Facts** ¶13. At one point, Ms. Cowart was permitted by lead counsel to falsely purport that she worked for him; indicating a very close relationship. **Facts** ¶13. The statement in Ms. Cowart's declaration, Dkt. 33-1¶5, that Ms. Williams' agreement (Dkt. 33-2, p. 10¶8) prohibits "harassment **or discrimination** based on race" is false. **Facts** ¶14. Ms. Williams' agreement merely prohibits her from harassing others, and does not mention racial discrimination at all. Defendants apparently have no written anti-discrimination policy. **Facts** ¶15. Accordingly, Ms. Cowart's declaration, Dkt. 33-1, fails to "demonstrate the absence of a genuine issue of material fact …" and as Defendants have failed to meet this initial burden, their motion must be denied. *See Little v. Liquid Air Corp*., 37 F.3d 1069, 1074 (5th Cir. 1994).

But however the burden-shifting under the applicable law is construed in this case, the evidence establishes that there was an active practice and policy of racial discrimination by all Defendants. The regional manager (Bob Furey) responsible for Treasures and all other Defendants (**Facts** ¶2), had removed all hiring authority from a manager under him, because the latter manager had once allowed a Black dancer to work at Cover Girls. **Facts** ¶7. The General Manager at Cover Girls (Hal Naumann) had on two occasions refused to meet Black applicants for dancer positions, upon learning they were Black. **Facts** ¶6. Bob Furey frequently communicated with Hal Naumann. **Facts** ¶4. All the Defendants had a reputation for not granting dancer positions to Black applicants. **Facts** ¶6; 1. And, all the Defendants (as they are all owned by the Davaris, **Facts** ¶1) had a policy of not granting dancer positions to Black applicants. **Facts** ¶12. The policy was reportedly for the purpose to not attract police attention to sex and drug trafficking at Defendants' premises, which management profited from. **Facts** ¶12.

In addition, Ms. Nicholson, who worked for extended periods at Centerfolds, Splendor and Cover Girls, was denied access for work multiple times, because there were already other Black dancers on the premises; or, at Splendor and Cover Girls, because Bob Furey was there. **Facts**

¶¶5&8. Similarly, four of the five plaintiffs have submitted evidence of "refusal to hire" at Treasures and at other Defendants, for discriminatory reasons. **Facts** ¶18. There was the same ownership and management at Treasures as at Centerfolds, Splendor and Cover Girl, where race-based denial of access was a common practice.

Accordingly, there is a genuine issue of fact on Williams' hostile work place claims at Treasures, and Defendants' motion for summary judgment on these claims should be denied.

B. Ms. Williams Was Required to Tip Managers in Breach of her Agreement

The Cowart Declaration, Dkt. 33-1¶9, states: "Pursuant to the 'Policies Regarding Dancer Conduct' incorporated in [Ms. Williams' agreement, Dkt. 33-2], dancers are not required or forced to tip managers, waitresses, bus boys, DJs, valets, or any other individual affiliated with Centerfolds, Splendor, Treasures Gentlemen's Club, or Cover Girls." The applicable portion of Ms. Williams' agreement, Dkt. 33-2, ¶19, does not prohibit managers from requiring tips for her access, as she alleges took place. This portion of her agreement merely provides there is no mandatory tip sharing policy, as follows: "There is no mandatory tip sharing arrangement among management, dancers, and employees. If you choose to voluntarily tip any manager, dancer, waitress, bus boy, DJ, valet, or any other individual affiliated with Treasures, you do so at your sole discretion." Ms. Cowart is again shown to not be credible, and her declaration again fails to demonstrate the absence of a genuine issue of material fact. As Defendants have failed to meet this initial burden, their motion must be denied regarding Ms. Williams' forced tipping (breach of contract) claims. *Little v. Liquid Air Corp*., 37 F.3d 1069, 1074 (5th Cir. 1994).

Moreover, Plaintiff Williams has introduced evidence of forced tipping at other Davari clubs (which all have the same ownership and upper management as Treasures, **Facts** ¶1&2). The Declaration of Chanel Nicholson, **Exhibit A**, establishes that there was forced tipping at Centerfolds, Splendor and Cover Girls. **Facts** ¶9. Because the other Defendants all have the same ownership and upper management as Treasures, this is sufficient evidence to create an issue of fact regarding forced tipping. Further, Ms. Cowart has admitted to an additional breach of Plaintiff Williams' Agreement, noting that she was required to pay an entry fee, though the Williams' Agreement specifies that she can "arrive and leave the premises at any time without penalty." **Facts** ¶16. Thus, there is a genuine issue of material fact regarding her breach of contract claims against Treasures, and Defendants' motion for summary judgment on these claims should be denied.

C. The Unconscionability of Ms. Williams' Agreement is Ripe for Review

Defendants Ms. Williams' declaratory relief request, that her agreement be declared unconscionable, "presents no ripe case or controversy."" This declaratory relief requested is pertinent to Defendants' Affirmative Defense (Dkt. 32) at para. 111, which states:

> Defendants assert that Plaintiffs are not entitled to pursue a class action or any other aggregate form of litigation against Defendants because any and all putative class members have executed binding agreements with Defendants that contain arbitration agreements and/or class action waivers. Accordingly, Plaintiffs lack standing, capacity, and/or authority to bring, participate in, or maintain a class action, or represent the interests of others against Defendants **in any aggregate proceeding**.[emphasis added]

There is therefore a "case or controversy" here because this action is an "aggregate proceeding" with several plaintiffs. *See Riley v. Hous. Nw. Operating Co*., No. H-19-2496*9 (S.D. Tex. 2020) ("And a party to a contract generally has Article III standing to bring claims for declaratory relief related to that contract. *BroadStar Wind Systems Group Limited Liability Co. v. Stephens*, 459 F. App'x 351, 356 (5th Cir. 2012)"); *TNT Crane & Rigging Inc. v. Atkinson*, No. 2:14-cv-265 *4 (S.D. Tex. 2015): (The enforceability of a non-compete agreement in a breach of contract case provides standing such that it was held properly asserted in a motion for summary judgment, because "the issue is presented for a clear and proper purpose in this case—to defeat the claim for breach of contract."). *See Meyer v. T–Mobile USA Inc.*, 836 F.Supp.2d 994, 1003 (E.D. Cal. 2011) (An imminent threat of future harm is sufficient to confer standing, citing *Lee v. Am. Express Travel Related Servs., Inc*., 348 Fed. Appx. 205, 207 (9th Cir. 2009)).

D. Under the Continuing Violations Doctrine, Ms. Williams' Hostile Work Environment Claims Are Not Time-Barred

Defendants claim that Williams' claims are "likely barred by the statute of limitations" because: "Williams began working for Treasures on May 16, 2018 and this lawsuit was not filed until March 21, 2023 – four years and 10 months after she began working and the alleged breaches would have begun occurring." However, Williams Section 1981 claims for hostile work environment are not time-barred. *See e.g., Miranda v. Lumpkin*, Civil Action 2:21-CV-00271*5 (S.D. Tex. Oct 28, 2022) ("Claims alleging discrete acts are not subject to the continuing violation doctrine. *Heath v. Board of Supervisors for Southern University and Agricultural and Mechanical College*, 850 F.3d 731, 737 (5th Cir. 2017). Conversely, hostile environment claims are subject this doctrine because they involve repeated conduct, which means that the 'unlawful employment

practice' cannot be said to occur on any particular day.'" Citing *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 115-17 (2002)).

E. Williams' Failure-to-Hire Claim Against Centerfolds

Support for Ms. Williams' § 1981 failure-to-hire claim against Centerfolds, includes the descriptions and examples of discrimination, and the support of it by upper management as set forth in **Exhibit A**, Nicholson Declaration (see **Facts** ¶¶5, 11&12); the examples of Defendants' management discriminatory actions and Defendants' racist reputation as described by long-term manager Andrew Skwera (see **Facts** ¶¶4, 6-12); the description of discriminatory actions by other Plaintiffs of discrimination against them by other Defendants **Exhibits H to K**), and especially the declarations by Plaintiffs Declouet and Ilori (**Exhibits H & I**), who also, like Ms. Williams, state that Centerfolds discriminated against them. Because the other Defendants all have the same ownership and upper management as Centerfolds, these collective sworn statements (**Exhibits H to K**), demonstrate that there is a genuine issue of material fact regarding Ms. Williams' failure to hire claims.

F. Other Plaintiff's Failure-to-Hire Claims Are Independently Supported

Defendants' Motion to Dismiss Plaintiffs Declouet, Ilori, Smith, and Castros' § 1981 claims fails on the merits because of the declarations by those plaintiffs filed herewith. (**Exhibits H to K**). Plaintiff's declarations meet all parts of the four-part test that the Court in *McDonnell Douglas Corporation v. Green,* 411 U.S. 792, 802-*04 (1973)* stated was sufficient to show violation of Section 1981 -- even though, it should be noted, satisfaction of the four-part test is not required to prevail on summary judgment. *See Wesley v. Gen. Drivers*, 660 F.3d 211, 213 (5th Cir. 2011) ("The Supreme Court also noted, however, that cases of racial discrimination are fact-specific, stating that the *McDonnell Douglas* four-part test would not necessarily be applicable to all fact situations. 411 U.S. at 802 n. 13, 93 S.Ct. 1817."). There is a genuine issue of material fact with respect to these and all the remaining claims of all parties. Summary judgment should be denied in all respects.

VIII. Conclusion

Defendants' motion for summary judgment should be denied in all respects.

Respectfully Submitted,

By: */s/Eric P. Mirabel*

Eric P. Mirabel
Texas State Bar No. 14199560
Southern District ID No. 9708
eric@emirabel.com
3783 Darcus St.
Houston, Texas 77005
Tel: 281 772-3794
Fax: 713 667 4234
ATTORNEY FOR PLAINTIFFS

CERTIFICATE OF SERVICE

On this 31st day of May, 2024, I hereby certify that a true and correct copy of the foregoing document was served on opposing counsel via the Clerk of the Court through the ECF system.