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

JUAN HERNANDEZ and JAMES DOSSETT, on behalf of themselves And all other similarly situation,	§	**Cause No. 4:16-cv-03577**
Plaintiffs,	§	
vs.	§	
	§	**JURY TRIAL DEMANDED**
CITY OF HOUSTON, TEXAS,	§	
Defendant.	§	

DEFENDANT CITY OF HOUSTON'S AMENDED MOTION TO DISMISS
OR, IN THE ALTERNATIVE,
AMENDED MOTION FOR SUMMARY JUDGMENT

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Pursuant to Federal Rule of Civil Procedure 12(b)(6), and 56, Defendant the City of Houston (the "City") moves to dismiss the claims of Plaintiffs Juan Hernandez and James Dossett (collectively, "Plaintiffs") pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. In the alternative, the City respectfully requests that, pursuant to Rule 12(b)(6), if the Court finds it necessary to consider the evidence attached to this Motion, the Court convert this Motion to Dismiss to a Motion for Summary Judgment. In support thereof, the City would show as follows:

I. NATURE AND STAGE OF THE PROCEEDINGS

Plaintiffs Juan Hernandez and James Dossett have filed a putative class action suit, alleging that the City of Houston violated their constitutional rights by detaining them in the City jail for longer than 48 hours on warrantless arrests, after the Harris County jail refused to accept the transfer of these prisoners. The Plaintiffs contend that detaining arrestees for longer than 48 hours on warrantless arrests without a probable cause hearing is a violation of their constitutional rights. This Motion to Dismiss is the City's initial motion, and the City seeks dismissal of this lawsuit or alternatively, requests that the Court enter summary judgment dismissing Plaintiff's claims.

II. ISSUES TO BE RULED UPON BY THE COURT

1. **Can the City be held liable under *Monell* when Plaintiffs concede that their alleged constitutional deprivations, if any, were caused by the policies of Harris County, which is not the City's agent or subject to the City's control?**

   A Court of Appeals examines a district court's grants of both a motion to dismiss and a motion for summary judgment under a *de novo* standard of review. *See Copeland v. Wasserstein*, 278 F.3d 472, 477 (5th Cir. 2002).

2. **Has Hernandez alleged a viable claim of unconstitutional deprivation based on the 48-hour rule, when he was held in custody by the City for less than 48 hours?**

Court of Appeals examines a district court's grants of both a motion to dismiss and a motion for summary judgment under a *de novo* standard of review. *See Copeland v. Wasserstein*, 278 F.3d 472, 477 (5th Cir. 2002)..

3. **Do Plaintiffs have standing to sue for alleged violations of the Texas Code of Criminal Procedure?**

A Court of Appeals examines a district court's grants of both a motion to dismiss and a motion for summary judgment under a *de novo* standard of review. *See Copeland v. Wasserstein*, 278 F.3d 472, 477 (5th Cir. 2002).

III. SUMMARY OF THE ARGUMENT

The City seeks dismissal of the Plaintiffs' claims because Plaintiffs concede, any custom, policy or practice implicated is that of Harris County, not the City of Houston. Additionally, the City seeks dismissal of Plaintiff's claims because the basis for their claims of constitutional deprivations do not even apply to the Plaintiffs. Plaintiff Hernandez was held in the City of Houston jail less than 48-hours; therefore, the allegations do not apply to him. Furthermore, extraordinary circumstances existed that caused delay in presenting the other plaintiffs for their probable cause hearing within 48-hours. Finally, the City seeks dismissal of the state law claims asserted against it because Plaintiff's have no standing to assert them

IV. ARGUMENT

A. INTRODUCTION

Named Plaintiffs were arrested by the Houston Police Department on January 7, 2016, in two separate incidents. Hernandez, Wheatfall, Kirkwood, and Trevino were all transported to a City of Houston jail until the necessary charges were ready to be filed and the two could be transported to the custody of the Harris County Sheriff's Office for further adjudication. All claim that they were deprived of their Constitutional rights because the City held them in excess of 48 hours without determination of probable cause. The City will show that, factually, neither is correct on their allegations.

B. LEGAL STANDARD FOR DISMISSAL UNDER RULE 12(b)(6)

Pursuant to Fed. R. Civ. P. 12(b)(6), dismissal of an action is appropriate whenever the pleading, on its face, fails to state a claim upon which relief can be granted.[1] Moreover, where it is evident from the factual allegations set forth in a plaintiff's complaint that his claims do not apply to the defendant, the Court must dismiss those claims. See *Kansas Reinsurance Co. v. Cong. Mortg. Corp. of Tex.*, 20 F.3d 1362, 1366 (5th Cir. 1994).

To withstand a Rule 12(b)(6) motion, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. The Supreme Court explained that "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 677. Thus, the plaintiff must "'raise a right to relief above the speculative level.'" *Nationwide Bi-Weekly Admin., Inc. v. Belo Corp.*, 512 F.3d 137 (5th Cir.

[1] In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 677-678 (2009), the Supreme Court confirmed that Rule 12(b)(6) must be read in conjunction with Rule 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." *See* Fed. R. Civ. P. 8(a)(2).

2007) (quoting *Twombly*, 550 U.S. at 570). "While legal conclusions can provide the complaint's framework, they must be supported by factual allegations." *Iqbal* at 1940, quoted in *Petty v. Portofino Council of Coowners, Inc.*, 702 F. Supp. 2d 721 (S.D. Tex. 2010).

Thus, plaintiffs need to plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal* at 1949. Pleading "facts that are merely consistent with a defendant's liability" stops short of defeating a motion to dismiss. *Id.* In reviewing a motion to dismiss under Rule 12(b)(6), the court must accept the well-pleaded facts as true, viewing them in the light most favorable to the plaintiff. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993).

Although a court considers only the pleadings in deciding a motion for judgment on the pleadings,[2] "[d]ocuments that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint ***and are central to her claim***." *See, e.g., Causey v. Sewell Cadillac–Chevrolet, Inc.*, 394 F.3d 285, 288 (5th Cir. 2004) (emphasis supplied); *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007). In addition, "it is clearly proper in deciding a 12(b)(6) motion to take judicial notice of matters of public record." *Norris v. Hearst Trust*, 500 F.3d 454, 461 n. 9 (5th Cir.2007); *Cinel v. Connick*, 15 F.3d 1338, 1343 n. 6 (5th Cir.1994). When a party presents "matters outside the pleading" with a Rule 12(b)(6) motion to dismiss, the Court has "complete discretion" to either accept or exclude the evidence for purposes of the motion to dismiss. *Isquith ex rel. Isquith v. Middle S. Utils., Inc.*, 847 F.2d 186, 196 n. 3 (5th Cir.1988); *Gen. Retail Servs., Inc. v. Wireless Toyz Franchise*, LLC, 255 Fed.Appx. 775, 783 (5th Cir. 2007).

[2] *See Brittan Commc'ns Int'l Corp. v. Sw. Bell Tel. Co.*, 313 F.3d 899, 904 (5th Cir. 2002).

C. PLAINTIFFS HAVE FAILED TO STATE A CLAIM AGAINST THE CITY OF HOUSTON UNDER *MONELL*

1. Section 1983 Imposes an Exceptionally High Burden on Those Who Seek to Impose Liability on Municipalities

42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress …

In *Monell v. New York City Department of Social Services*, 436 U.S. 658, 690 (1978), the United States Supreme Court held that municipalities and other bodies of local government are "persons" within the meaning of § 1983. Such a body may, therefore, be sued directly if it is alleged to have caused a constitutional tort through "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.* The Court pointed out that § 1983 also authorizes suit "for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision-making channels." *Id.* at 690–91. At the same time, however, the Court rejected the use of the doctrine of *respondeat superior* and concluded that municipalities could be held liable only when an injury was inflicted by a government's "lawmakers or by those whose edicts or acts ***may fairly be said to represent official policy***." *Id.* at 694 (quoted in *Praprotnik*, 485 U.S. at 121-22) (emphasis added); *Bd. of Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 403 (1997); *Mason v. Lafayette City-Parish Consol. Gov't*, 806 F.3d 268, 281 (5th Cir. 2015).

In *Piotrowski v. City of Houston*, 237 F.3d 567 (5th Cir. 2001), the Fifth Circuit's seminal case on the question of municipal liability under § 1983, this Court held that, under the decisions of the Supreme Court and this Court, "municipal liability under section 1983 requires proof of

three elements: a policymaker; an official policy; and a violation of constitutional rights whose 'moving force' is the policy or custom." *Id.* at 578. Thus, the allegedly unconstitutional conduct must be ***directly attributable*** to the municipality "[t]hrough some sort of official action or imprimatur; isolated unconstitutional actions by municipal employees will almost never trigger liability." *Piotrowski*, 237 F.3d at 578 (quoting *Bennett v. City of Slidell*, 728 F.2d 762, 768 n.3 (5th Cir.1984) The court explained the reasons for requiring these elements:

> The three attribution principles identified here—a policymaker, an official policy and the 'moving force' of the policy—are necessary to distinguish individual violations perpetrated by local government employees from those that can be fairly identified as actions of the government itself. Mistakes in analyzing section 1983 municipal liability cases frequently begin with a failure to separate the three attribution principles and to consider each in light of relevant case law.

Piotrowski, 237 F.3d at 578.

2. Plaintiffs Have Failed to Show A City Policy That is the "Moving Force" of a Constitutional Deprivation

In *Piotrowski*, 237 F.3d at 580, the court explained that[3]

> *Bryan County* underscores the need for *Monell* plaintiffs to establish both the causal link ("moving force") and the City's degree of culpability ("deliberate indifference" to federally protected rights). These requirements must not be diluted, for '[w]here a court fails to adhere to rigorous requirements of culpability and causation, municipal liability collapses into *respondeat superior* liability.'

Thus, a plaintiff must show a "***direct causal connection*** ... between the policy and the alleged constitutional deprivation." *Id*. (emphasis added). The "moving force" inquiry thus imposes a causation standard higher than the "but for" causation standard used in most civil cases. *Mason*, 806 F.3d at 280 (citing *Fraire*, 957 F.3d at 1281). As the United States Supreme Court explained:

[3] *Fraire v. City of Angleton*, 957 F.2d 1268, 1281 (5th Cir. 1992).

> To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under § 1983; would result in *de facto respondeat superior* liability, a result rejected in *Monell*; would engage federal courts in an endless exercise of second-guessing municipal employee-training programs, a task that they are ill suited to undertake; and would implicate serious questions of federalism.[4]

Monell's "moving force" inquiry mandates dismissal of Plaintiffs' claims.

a. Plaintiffs May Not Aggregate the City's Alleged Policies or Customs, and Particularly Not with Those of Harris County

It is well-settled that is not enough, in cases like this one, for a plaintiff simply to aggregate several purported customs or policies to show that they, ***collectively***, caused the plaintiff's injury. *Bryan County*, 520 U.S. at 398. Indeed, a similar effort to aggregate allegedly unconstitutional policies was expressly rejected by this court in *Piotrowski*. The court explained:

> Taken together, [the purported customs] express no single municipal policy but only a series of adversarial conclusions by Piotrowski (*e.g.*, 'the Houston Police Department was up for sale in 1980') relating to her individual case. 'Isolated violations are not the persistent, often repeated, constant violations, that constitute custom and policy as required for municipal section 1983 liability.'[5]

As in *Piotrowski,* Plaintiffs here attempt to aggregate individual police department decisions or areas of decision-making. These include alleged policies and practices relating to transferring arrrestees to the Harrias County jail and those relating to alleged failure to transfer arrestees to outlying counties. Plaintiffs, however, cannot satisfy *Monell* by lumping numerous alleged policies together and claiming that they ***collectively*** caused an alleged constitutional injury. Instead, each alleged policy must have had a distinct impact as the alleged "moving force" of Plaintiffs' claim. *Piotrowski*, 237 F.3d at 581. For these reasons, Plaintiffs must meet the high causation standards for ***each and every*** policy alleged to have violated the Constitution here. As

[4] *City of Canton v. Harris*, 489 U.S. at 379.

[5] *Id.* (quoting *Bennett*, 728 F.2d at 768 n.3).

this court explained in *Piotrowski*, "it follows that ***each and any policy*** which allegedly caused constitutional violations must be ***specifically identified*** by a plaintiff, and it must be ***determined whether each one*** is facially constitutional or unconstitutional." *Id.* at 579-80 (emphasis added). Plaintiffs have completed failed to satisfy this requirement.

While they have mentioned numerous other alleged City policies and practices in their complaint, the only one they actual claim has caused a constitutional injury here is the City's continuing to detain arrestees "***after they failed to receive a prompt probable cause determination***..." (Dkt. 19, p. 11, ¶ 38) (emphasis supplied). They do not allege that the City's continuing to detain an arrestee after he or she has received a probable cause hearing violates anyone's constitutional rights.

On its face then, Plaintiff's amended complaint concedes that the "moving force" behind the alleged constitutional deprivations, if any, is the alleged failure to provide a timely probable cause hearing, something they they concede the City does ***not*** conduct itself or control and that they have ***not*** alleged as a constitutional violation committed by the City. Under *Piotrowski*, Plaintiffs camnot aggregate alleged customs and policies of the City ***and Harris County*** to obtain some seamless constitutional deprivation. Instead, they must meet *Monell's* standards individually for each and every alleged City policy and practice.

b. Plaintiffs Once Again Concede that the "Moving Force" Behind the Alleged Constitutional Deprivations Here, if Any, Were Caused By the Policies *of Harris County*, Which They Concede is Not the City's Agent or Subject to the City's Control

As discussed above, Plaintiffs concede that the moving force behind Plaintiffs' alleged constitutional deprivations was the failure to provide a timely probable cause hearing. In their amended complaint, however, Plaintiffs admit that "judicial determinations of probable cause for warrantless arrests ***are not conducted while an individual is in the City of Houston's***

custody. They take place only after the arrestee has been transferred ***to the Harris County Jail***." (Dkt. 19, p. 6, ¶ 20) (emphasis supplied).

This is because a "district attorney is an agent of the state, not of the county in which the criminal case happens to be prosecuted." *Esteves v. Brock*, 106 F.3d 674, 678 (5th Cir. 1997). He or she certainly is not the agent of a city found within the county. Moreover, the district and county courts, the only ones that have jurisdiction over crimes punishable by imprisonment,[6] are creatures of counties, not the City of Houston. There is simply no City structure, nor is one alleged in this case, that would enable the City to conduct probable cause hearings on its own while arrestees are in City custody.

Instead, the City must transfer the arrestees to Harris County in order for them to receive a probable cause hearing. Indeed, Plaintiffs' complaints here are directed to the ***county's*** inefficiency in conducting such hearings. (Dkt. 19, ¶¶ 24-26, 28). In fact, Plaintiffs concede that the City would have to transfer its arrestees to some other county jail in order for them to receive a probable cause hearing. (*Id.* at p. 10-11, ¶ 36).

Plaintiff has not alleged any agency relationship between the City and Harris County, as agent. Moreover, none can be inferred because Plaintiff has not alleged that the City exercises any control over the county's actions or inaction. The import of *Monell* is in its holding that governmental entities are not liable under section 1983 on grounds of *respondeat superior*. The same rationale, however, would apply to any kind of vicarious liability, including liability for an agent. Indeed, in a footnote in *Monell*, the Court rejected the argument for *respondeat superior* liability based on the contention that "liability follows the right to control the actions of a

[6] The jurisdiction of the municipal courts does not extend to criminal cases involving offenses punishable by imprisonment. *See* Tex. Gov't Code Ann. § 29.003 (Vernon 1988 & Supp.2003).

tortfeasor." *Monell v. New York City Department of Social Services*, 436 US at 694, n. 58. It explained that, "[b]y our decision in *Rizzo v. Goode*, [423 U.S. 362 (1976)], we would appear to have decided that the mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support § 1983 liability." That principle should govern here. It is little wonder then that Plaintiffs have not made any such allegation.

Nevertheless, Plaintiffs still attempt to tar the City for the actions of the county by claiming that they should not hold arrestees until the county will take them if the time exceeds 48 hours. In *Jones v. Lowndes County*, the Fifth Circuit addressed this issue and found in favor of the governmental entity. *Jones v. Lowndes County*, 678 F.3d 344 (5th Cir. 2012).

In *Jones*, the court was faced with almost exactly the same kind of claim this court faces here: a challenge, under § 1983, brought by arrestees for alleged constitutional violations due to alleged delay in bringing them before a judicial officer for probable cause determination following their warrantless arrests. In that case, the county had a policy of taking arrestees before a magistrate within 48 hours, but never more than 72. Nevertheless, the arrestees complained about having not had probable cause hearing until 48 hours had passed.

The circuit court affirmed the summary judgment the trial court had granted in favor of the county and it employee. In so doing, the court explained: "That the policy recognizes that determinations of probable cause may sometimes occur after the 48–hour benchmark does not, in of itself, violate *McLaughlin*, and has not been shown in this case to have been a moving force behind the delay. It therefore cannot serve as the basis for plaintiffs' Section 1983 claim." *Id.* at 350.

Unlike this case, in *Jones*, the judges before whom arrestees had to appear were at least employees of the county that was sued. Nevertheless, the court held:

> Jones and Nance agree with defendants that the delay was due to the lack of available judges on Saturday evening, Sunday, and Monday afternoon. Defendants have repeatedly contended that the county, sheriff's department, sheriff, and deputy sheriff ***have no authority to set the judges' schedule***. They therefore cannot be held liable either for the judges' decision to be unavailable that weekend or that Monday afternoon, or for a judge's decision to refuse to conduct plaintiffs' determination of probable cause and initial appearance on the same day. ***Plaintiffs do not contest this. They do not allege, much less present evidence, that these judges were policymakers whose every decision is policy for which the county is liable, or that the county could and should have required the judges to be available at certain times.*** Because the judges' actions caused the complained-of delay and plaintiffs failed to show that defendants were liable for those judges' actions, summary judgment was appropriate.
>
> *Id*. at 350-51 (emphasis supplied).

Because even Plaintiffs concede that the City cannot conduct its own probable cause hearings and is at the mercy of Harris County, Plaintiff should not be permitted to plead or prove essential causation under *Monell*, by making the City somehow liable for the actions or inaction of Harris County. Plaintiffs' claims should, therefore, be dismissed because they have not pleaded direct causation.

c. Plaintiffs Have Failed to Plead a Constitutional Violation in Alleging that the City Should Have Transferred Arrestees to Outlying Counties.

Without any support at all, Plaintiffs allege that the City could obtain for its arrestees timely probable cause hearings in outlying counties. (Dkt. 19, p. 10-11, ¶ 36). As is the case with Harris County, however, the City has no control over those counties' procedures or practices and, therefore, cannot ensure a timely hearing even if a timely transfer to them is accomplished. (**Exhibit A, C**) Therefore, the City cannot necessarily transport prisoners to another county to adjudicate them within the 48-hour time period; however, the City's failure to transfer to another

county cannot provide the plaintiffs a foothold for their federal claims. A mere failure to comply with state statutory provisions does not, without more, give rise to a § 1983 claim. *Hick v. Bexar County, Tex.*, 973 F. Supp. 653, 671 (W.D. Tex. 1997), *aff'd sub nom. Hicks v. Bexar County*, 137 F.3d 1352 (5th Cir. 1998); *Murphy v. Collins*, 26 F.3d 541, 543 (5th Cir. 1994), (holding that a state's failure to follow its own procedural regulations does not constitute a violation of due process if constitutional minima are met); *Murray v. Mississippi Department of Corrections,* 911 F.2d 1167,1168, (5th Cir. 1990) (holding that alleged violations of a state statute did not give rise to federal constitutional claims).

D. PLAINTIFF'S INDIVIDUAL CLAIMS FAIL, AS ALLEGED

1. Plaintiff Hernandez's Claims are Barred Because He Was Not Held by the City for More Than 48 Hours.

The gist of Plaintiffs' claims are that their constitutional rights were violated because the City held them more than 48 hours without providing them with a probable cause hearing. That is demonstrably untrue.

Plaintiffs have carefully avoided mentioning in their complaint that Mr. Hernandez was "booked" at the City Jail 6:08 PM on January 7, 2016, ***and released to Harris County*** at 11:32 AM on January 9, 2016, a time period far less than 48 hours. (**Exhibit B**) As a result, it is simply untrue that the City held him for longer than 48 hours. That there may have been a delay in ***Harris County's*** providing him with a hearing is not the fault of, and is not actionable against the City. In fact, Plaintiffs' amended complaint concedes, it was the duty of the County, *not the City*, to provide a probable cause hearing within 48 hours as Mr. Hernandez was in their custody prior to the expiration of the 48 hour period according to the Code of Criminal Procedure. Tex. Code Crim. Proc. § 15.17(a).

Moreover, to attempt to show some liability on the City's part for keeping him less than 48 hours, Plaintiff Hernandez would have had to have pleaded and proved that his probable cause hearing was delayed unreasonably ***by the City***. "Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake." *County of Riverside v. McLaughlin*, 500 U.S. 44, 56–57 (1991). There is no such allegation here.

Equally important, the Supreme Court has explained that, "In evaluating whether the delay in a particular case is unreasonable, however, courts must allow a substantial degree of flexibility. ***Courts cannot ignore the often unavoidable delays in transporting arrested persons from one facility to another*** ... ***and other practical realities***." *Id.* (emphasis supplied). This court should not do so here. Plaintiff Hernandez's claims should be dismissed.

2. Additional Plaintiffs Delay Was Due to Extraordinary Circumstances

Plaintiffs Wheatfall, Kirkwood, and Trevino were in the custody of the City for over 48 hours, and therefore, not presented for a probable cause determination within the period prescribed under McLaughlin. However, their delay in presentment was due to extraordinary circumstances.

Plaintiffs' counsel points this court to *Waganfeald v. Gusman*, 674 F.3d 475, 482 (5th Cir. 2012) to show an example of extraordinary circumstances that would excuse the 48 hour window. However, the court in that case showed that the delay was excused due to a bona fide emergency, namely, Hurricane Katrina. Extraordinary circumstances can include the delay of the availability of a judge. *Brown v. Sudduth*, 675 F.3d. 472, 478 (5th Cir. 2012). In the case of Wheatfall, Kirkwood, and Trevino, extraordinary circumsntaces, like those in *Brown*, existed in

their cases. The County's cancellation of drags for prisoner transport made magistrates unavailable to adjudicate probable cause for these plaintiffs; however, the intentional act to delay the presentment was due to acts by the County, not the City. (**Exhibit A, C**)

Therefore, the City asks that this court find that, as a matter of law, there were extraordinary circumstances faced by the City that delayed the plaiintiff's presentment for a probable cause determination and dismiss the allegations of Plaintiffs Wheatfall, Kirkwood, and Trevino.

E. THIS COURT HAS NO JURISDICTION TO HEAR PLAINTIFFS' STATE LAW CLAIMS

In addition to asserting constitutional claims under § 1983, Plaintiffs have also asserted claims for damages under the Texas Code of Criminal Procedure. (Dkt. 19, p. 22, ¶ 101). Under Texas law, however, there is no private civil claim under the Code of Criminal Procedure.[7] As a result, Plaintiffs have no standing to assert a claim for alleged violations of Tex. Code of Crim. Pro. §§ 14.06(a); 15.17(a), and 17.033(a-1) and/or (b).

[7] *See, e.g., Lang v. Texas*, 1:10CV700, 2010 WL 5600204, at *2 (E.D. Tex. Nov. 12, 2010), *report and recommendation adopted in part*, 1:10-CV-700, 2011 WL 166977 (E.D. Tex. Jan. 19, 2011) ("[g]enerally, criminal statutes do not create civil liability… In this regard, the Texas Penal Code and the Texas Code of Criminal Procedure do not create a private right of action"); *Houston-Hines v. Houston Indep. Sch. Dist*., CIV.A. H-04-3539, 2006 WL 870459, at *5, n. 6 (S.D. Tex. Apr. 5, 2006) ("Plaintiff has cited no legal authority for a claim in a civil lawsuit based on a violation of the Texas Code of Criminal Procedure, and this Court's research has revealed none"). Moreover, because Texas has no equivalent to § 1983, "historically Texas common law has not provided a cause of action for damages for the violation of constitutional rights." *City of Beaumont v. Bouillion*, 896 S.W.2d 143, 150 (Tex. 1995). As a result, Plaintiffs' claims for damages for alleged state law violations are barred.

CONLCUSION AND PRAYER FOR RELIEF

For the reasons stated above, the City of Houston respectfully requests that Plaintiffs' claims be dismissed pursuant to Rule 12(b)(6), or alternatively, that the Court grant the City summary judgment dismissing all of Plaintiffs' claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 15, 2017, a copy of Defendant City of Houston's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment was served upon the below-listed counsel of record via CM/ECF.

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