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CITY OF ANTIOCH, ART ACOSTA, DIMITRI BARAKOS, sued erroneously herein as DEMETREE BARAKOS, and WILLIAM DEE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

AMBER DUTRO, GLENDA STRIPES, SARAH DUTRO, MARTHA McKNELLY, FRANCES SMITH, and CHRISTINA MOORE

Plaintiffs,

v.

COUNTY OF CONTRA COSTA, CALVERY OPEN BIBLE CHURCH, CITY OF ANTIOCH, ART ACOSTA, DEMETREE BARAKOS, WILLIAM DEE, JACK ROGERS, TOM POTTS, MARK WOOD, an individual; ANTHONY LEE, and ROES 11-100,

Defendants.

Case No. CV12-2972 NC

DEFENDANTS CITY OF ANTIOCH, ART ACOSTA, DIMITRI BARAKOS AND WILLIAM DEE'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

Date: August 1, 2012
Time: 9:00 a.m.
Dept.: Courtroom A, 15th Floor
Honorable Nathanael Cousins

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NOTICE

TO PLAINTIFFS AND THEIR ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that on August 1, 2012, at 9:00 a.m. or as soon thereafter as the matter may be heard, in Courtroom A of the above-entitled Court, located at 450 Golden Gate Avenue, 15th Floor, San Francisco, California 94102, defendants CITY OF ANTIOCH, ART ACOSTA, DIMITRI BARAKOS, and WILLIAM DEE ("Antioch Defendants") will and hereby do move this Court for an order granting dismissal of the claims specified below, which are contained in plaintiffs' First Amended Complaint, for failure to state any claim upon which relief can be granted. This motion is brought pursuant to FRCP Rule 12(b)(6), as set forth more fully in the Memorandum of Points and Authorities below, on the grounds that dismissal is appropriate because plaintiffs' First Amended Complaint fails to allege facts sufficient to state any claim upon which relief can be granted against the Antioch Defendants as more particularly set forth below. This motion is based on this notice, the memorandum of points and authorities, request for judicial notice, the papers and pleadings on file herein and on such oral and documentary evidence as may be adduced at the hearing of this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. SUMMARY OF THE ARGUMENT AND STATEMENT OF ISSUES TO BE DECIDED

Plaintiffs AMBER DUTRO, GLENDA STRIPES, SARAH DUTRO, MARTHA MCKNELLY, FRANCIS SMITH, and CHRISTINA MOORE bring this action against defendants CITY OF ANTIOCH and Antioch police officers ART ACOSTA, DIMITRI BARAKOS[1] and WILLIAM DEE for injuries sustained as a result of physical and sexual abuse committed by their parents Glenda and Zion Dutro from 1982 to 2003.[2] Plaintiffs assert claims against the Antioch Defendants for violation of civil rights under 42 U.S.C. §§ 1983, 1985 and 1986, and claims for state law negligence based on allegations that in 1995 the officers inadequately investigated Glenda Stripe's reports of sexual abuse and delayed notifying CPS about the reported abuse for 16 days. Plaintiffs claim that the 16-day delay allowed their parents to brainwash them to lie to investigators to conceal the abuse. The First Amended Complaint is subject to

[1] Erroneously sued as "DEMETREE" BARAKOS.

[2] Plaintiffs assert additional claims against co-defendants who are represented by separate counsel. This motion to dismiss is submitted on behalf of the Antioch Defendants only.

dismissal for the following reasons:

1. The entire action is time-barred by the applicable statutes of limitations;

2. The second claim for relief for civil rights violations under 42 U.S.C. § 1983 fails to state facts showing any civil rights violation or that the officers' conduct violated plaintiffs' federal civil rights, and fails to state a claim for municipal liability;

3. The third claim for relief for civil rights violations under 42 U.S.C. § 1985 fails to state a cause of action because there are no facts to support such claims for conspiracy;

4. The fourth claim for relief for civil rights violations under 42 U.S.C. § 1986 is unsupported by any facts;

5. The sixth claim for relief for state law negligence fails to state a claim against Officer Acosta;

6. The seventh claim for relief for state law negligence fails to state any such claim;

7. The First Amended Complaint improperly relies on contentions, deductions or conclusions of fact or law;

8. The state law claims against Antioch Defendants are barred by plaintiffs' failure to comply with the Tort Claims Act, and those claims are wholly unsupported by facts.

II. PROCEDURAL HISTORY

This action was originally filed as two separate lawsuits. On September 23, 2011, plaintiff Martha McKnelly filed her original complaint (on behalf of herself only) in Contra Costa Superior Court, Case No. C11-02041 (the "McKnelly Action"). *See* Antioch Defendants' Request for Judicial Notice ("RJN"), Ex. A.

Three months later, on December 7, 2011, plaintiffs Amber Dutro, Sarah Dutro, Glenda Stripes, Francis Smith and Christina Moore filed their initial complaint in Contra Costa Superior Court, Case No. MSC11-02801 (the "Dutro Action").[3] *See* RJN Ex. B. The Dutro Plaintiffs did not serve their initial complaint on any of the defendants. On January 17, 2012, Martha McKnelly served the summons and complaint in her action on the Antioch Defendants.

[3] The Dutro plaintiffs filed their original complaint under seal as Jane Does 1 through 5.

On February 2, 2012, the Antioch Defendants demurred to Martha McKnelly's complaint, and that demurrer was set for hearing on March 16, 2012. However, at an initial case management conference in the McKnelly Action held on February 14, 2012, the superior court ordered the McKnelly demurrer off calendar and tentatively designated that lawsuit complex due to the existence of the potentially related lawsuit brought on behalf of the other plaintiffs in the Dutro Action, which had not yet been served.

At a subsequent case management held in the McKnelly Action on March 20, 2012, however, the superior court determined the McKnelly Action was not complex and re-assigned that case to the civil unlimited jurisdiction department. In addition, the superior court issued a scheduling order setting May 8, 2012 as the last day for all plaintiffs to file and serve an amended pleading in both actions. *See* Notice of Court Ordered Scheduling Dates filed by Martha McKnelly, Case No. C11-020411, RJN Ex. C.

On May 7, 2012, the Dutro plaintiffs filed the instant First Amended Complaint, (Superior Court Case No. MSC11-02801), and added Martha McKnelly to the Dutro Action. RJN Ex. D. The Antioch Defendants were served with the Dutro Action on May 15, 2012. *See* Notice and Acknowledgement of Receipt, RJN Ex. E. After the Dutro plaintiffs filed their First Amended Complaint on behalf of Martha McKnelly, plaintiffs subsequently dismissed the McKnelly Action (C11-020411) on May 24, 2012. *See* Minute Order, Case No. 11-02041, RJN Ex. F.

On June 8, 2012, all defendants joined in the removal of the Dutro Action to federal district court under 28 U.S.C. §1331 and 28 U.S.C. §1441(a), (c). The Antioch Defendants now move to dismiss the First Amended Complaint brought on behalf of the Dutro plaintiffs and Martha McKnelly.

III. STATEMENT OF FACTUAL ALLEGATIONS

Plaintiffs Amber Dutro, Sarah Dutro, Glenda Stripes, Francis Smith, Christina Moore, and Martha McKnelly allege that from 1982 to 2003, their father Zion Dutro, with the assistance of their mother Glenda Lea Dutro, "repeatedly abused plaintiffs physically, psychologically, verbally, sexually, and failed to otherwise care for them." FAC, ¶¶ 1, 14. Amber Dutro, Sarah Dutro, Glenda Stripes and Martha McKnelly were Zion and Glenda Lea's biological children. FAC, ¶ 14. Francis Smith and Christina Moore were the Dutros' foster children. *Id.* At the time the original Dutro Action was filed on December 7, 2011, Amber Dutro was 32 years old, Glenda Stripes was 31, Sarah Dutro and Francis Smith were 28,

and Christina Moore and Martha McKnelly were 26. *See* Plaintiffs' Tort Claims to City, RJN, Exs. G-L.[4]

Plaintiffs allege that on or about August 2, 1995, Glenda Stripes reported to a youth leader and two pastors at a church youth camp that Zion Dutro had molested her. FAC ¶22. The church pastor, co-defendant MARK WOOD, informed plaintiffs' parents and Antioch Police Officer ART ACOSTA about the abuse allegations. *Id.* Plaintiffs allege that Officer ACOSTA was a church member and that he "failed to follow his mandatory duty to disclose the abuse to CPS." *Id.* Plaintiffs further allege that Officer ACOSTA instead referred the case to Antioch Detective DIMITRI BARAKOS, who "failed to follow his mandatory duty to disclose the abuse" to CPS. *Id.*

On August 8, 1995, Zion, Glenda Lea, Glenda Stripes and Pastor WOOD were interviewed by Antioch Police Officer WILLIAM DEE, who had been instructed by Det. BARAKOS not to arrest Zion Dutro. FAC ¶22. Glenda Stripes and Zion Dutro admitted to Officer DEE that molestations had occurred. *Id.* On August 18, 1995, Antioch Detective Leroy Bloxsom interviewed Zion Dutro, who admitted to molesting Glenda Stripes six times. Zion Dutro was released and was not arrested. Det. Bloxsom reported the molestation to CPS on August 18, 1995. *Id.*

Although the FAC alleges that it was *WOOD* who immediately informed the parents about the abuse, plaintiffs nonetheless contend that Officers ACOSTA, DEE and BARAKOS departed from procedure by "permitting" Zion and Glenda Dutro to learn about the allegations before they were interviewed. FAC ¶ 24.[5] Plaintiffs also allege that the officers departed from mandatory reporting guidelines and standards for criminal investigation by interviewing plaintiffs in the presence of their parents, and that the investigation was a departure from standards the officers typically employed. FAC ¶24. Plaintiffs contend that ACOSTA's involvement with the CHURCH and Det. BARAKOS' order not to arrest Zion Dutro interfered with the investigation by the Antioch Police Department." FAC ¶ 25. According to the FAC, Officer ACOSTA, Det. BARAKOS and Officer DEE's decision not to

[4] Plaintiffs' dates of birth are set forth on the first page of the exhibits to their Tort Claims [Amber Dutro: July 24, 1979; Glenda Stripes: November 13, 1980; Sarah Dutro: October 13, 1983; Francis Smith: October 10, 1983; Christina Moore: January 11, 1985; and Martha McKnelly: September 25, 1985.] *See* RJN, Exs. G-L, p. 1 of exhibit A to Tort Claims.

[5] It is unclear how the officers could have "permitted" Zion and Glenda Lea to learn about the accusations since the officers learned of the accusations *after* Zion and Glenda did. The FAC alleges that WOOD *first* informed Zion and Glenda, and *then* informed Officer Acosta. FAC ¶22.

immediately report the molestation to CPS interfered with the Antioch Police Department's investigation of the case. FAC ¶ 26.

Plaintiffs allege that in the 16 days between Glenda Stripes' initial report of abuse to the CHURCH and when CPS interviewed them on August 18, 1995, they were "were isolated, starved, tortured, sleep deprived, and beaten in order to brainwash them to minimize and deny the abuse." FAC ¶ 27. When they were interviewed by CPS, plaintiffs allege that "contrary to procedures set forth in regulations and DSS directives," Zion Dutro was in the house and their mother sat next to them and squeezed their hand anytime a question was posed that could implicate her or Zion. FAC ¶¶ 28-29. Plaintiffs were fearful and believed worse things would happen if they told the truth, so they lied to CPS about their parents' conduct. FAC ¶ 28.

Zion Dutro pled guilty to child molestation of Glenda Stripes and in November 1995 he was sentenced to three years of probation, registered as a sex offender and ordered to obey all CPS orders. FAC ¶ 31. Zion Dutro moved out of the family home but continued to abuse plaintiffs with Glenda Dutro's assistance. FAC ¶ 31. Plaintiffs claim the Probation Department and CPS failed to do anything to prevent their parents from abusing them. FAC ¶ 32.

In 2002, SARAH DUTRO reported the full history of abuse to co-defendant Pastor ANTHONY LEE, who failed to report the abuse. FAC ¶ 37. In 2003, SARAH DUTRO and CHRISTINA MOORE reported the abuse to the Antioch Police Department and were interviewed by Detective Hooker, but the Police Department allegedly refused to arrest Zion. FAC ¶38. In 2005, AMBER DUTRO called the CHURCH and demanded that CHURCH stop Zion's efforts to adopt children, because she was worried Zion Dutro would abuse them. FAC ¶39.

On April 15, 2011, Zion Dutro was sentenced to 300 years to life in prison, and Glenda Dutro was sentenced to 15 years in prison. FAC ¶45. Plaintiffs allege that until their parents were sentenced they "did not have the psychological or emotional capacity to comprehend, investigate or pursue a claim against the defendants," and they did not understand that anyone other than their parents might be liable for their injuries. FAC ¶¶ 45, 49.

In "late July/early August of 2011, plaintiffs obtained some police reports from the Antioch Police Department" which they had not previously seen. FAC ¶50. Plaintiffs claim that they learned

from these reports that "defendants failed to satisfy mandatory reporting requirements," that Officer ACOSTA knew about Glenda Stripes' accusations, and Det. BARAKOS ordered Officer. DEE not to arrest Zion Dutro despite his confession and Glenda Stripes' statement. *Id.* Plaintiffs contend that until they read the reports, they had no information that defendants violated their mandatory duties, or basis to suspect the wrongdoing by the CITY. FAC ¶¶ 51, 52.

Based upon these allegations, plaintiffs allege the following causes of action against the Antioch Defendants: Second Claim for Relief for civil rights violations under 42 U.S.C. §1983; Third Claim for Relief for civil rights violations under 42 U.S.C. §1985; Fourth Claim for Relief for civil rights violations under 42 U.S.C. §1986; Sixth Claim for Relief for "State Law Claims" (against Officer Acosta); and Seventh Claim for Relief for "State Law Claims" against all Antioch Defendants.

IV. LEGAL ARGUMENT

A. Plaintiffs' First Amended Complaint Is Subject To Dismissal Under Federal Rules Of Civil Procedure, Rule 12(b)(6)

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of the claims stated in the complaint. *Levine v. Diamanthuset*, 950 F.2d 1478, 1483 (9th Cir. 1991). Dismissal is proper where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.* 901 F.2d 696, 699 (9th Cir. 1990). In determining the adequacy of the pleading, the Court must determine whether plaintiffs would be entitled to some form of relief if the facts alleged in the complaint were true. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *De La Cruz v. Tormey*, 582 F.2d 45, 48 (9th Cir. 1978). However, the Court need not accept as true, conclusionary allegations, unreasonable inferences, legal characterizations or unwarranted deductions of fact contained in the complaint. *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-755 (9th Cir. 1994); *Western Mining Council v. Watt*, 643 F.2d 618, 630 (9th Cir. 1981). **A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do**. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), *citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In order to survive a motion to dismiss, the complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' . . . 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. . . . 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. . . . 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.'" *Ashcroft*, 556 U.S. at 678; *see also, Moss v. U.S. Secret Service*, 572 F.3d 962, 969 (9th Cir. 2009).

Further, leave to amend may be denied if amendment of the complaint would be futile. *Albrecht v. Lund*, 845 F.2d 193, 195 (9th Cir. 1988); *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000). If the district court determines that the 'allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency,' then the dismissal without leave to amend is proper." *Id.* As discussed below, plaintiffs' FAC fails to state facts sufficient to state each of the claims asserted against the Antioch Defendants. Defendants' motion to dismiss, therefore, should be granted.

B. Plaintiffs' State Law Claims are Barred by the Statute of Limitations

Plaintiffs allege injuries stemming from childhood abuse that occurred at the hands of their parents and that ended almost a decade ago. The Court may properly dismiss an action on statute of limitations grounds if the running of the statute is apparent on the face of the complaint and from matters subject to judicial notice. *See Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir.1980); *and see, Sims v. Wholers*, No. 092582, 2011 WL 3584455, *2 (E.D.Cal. Aug. 12, 2011)(face of complaint includes matters of which judicial notice may be taken).

California Code of Civil Procedure section 340.1 sets forth deadlines for bringing a lawsuit for childhood sexual abuse. Such actions must be filed within eight years of the date plaintiff obtains the age of majority (i.e., 26). For certain defendants, CCP §340.1 contains a delayed discovery rule, which is three years from the date plaintiff discovers or reasonably should have discovered that her psychological injury occurring after the age of majority was caused by the sexual abuse, which ever period expires later. CCP § 340.1(a). However, the three-year delayed discovery rule articulated in CCP §340.1(a) applies only to actions against the perpetrator, or actions against a person/entity on notice of unlawful sexual conduct by its agent, employee, volunteer, or representative. CCP §340.1(a)(1); (b)(2). As is clear from the plain language of the statute and a recent California Supreme Court decision, actions against any other entity owing a duty may not be filed on or after the plaintiff's 26th birthday. CCP §

340.1(b)(1). Zion Dutro was neither an employee nor agent of the Antioch Police Department. Therefore, pursuant to CCP §340.1(b)(1), plaintiffs' claims against the City and police are absolutely time-barred because plaintiffs were all over 26 at the time they filed this lawsuit.

In *Quarry v. Doe*, 53 Cal.4th 945 (2012), the California Supreme Court recently reiterated the rule that no actions for childhood sexual abuse, aside from those against the perpetrator and the sub-category of third party defendants (who employ or have an agency relationship with the perpetrator), may be brought after the victim turns 26. *Quarry v Doe* involved six brothers who sued the Roman Catholic Bishop of Oakland for sexual abuse committed during the 1970's by a priest then assigned to the Oakland diocese. *Quarry*, 53 Cal.4th at 953. Plaintiffs were in their forties when they filed suit and alleged that in 2006 they discovered for the first time the cause of their adult psychological injuries was the sexual abuse inflicted by the priest when they were children. *Id.*, at 953-954. The issue before the Court was whether the plaintiffs' claims were timely within the limitations period set forth in CCP §340.1. *Id.*, at 952. In reaching its conclusion that the claims had lapsed, the *Quarry* Court reviewed the statutory scheme, amendments and legislative history of CCP §340.1, all of which illustrate why plaintiffs' claims against the Antioch Defendants in this action are time barred.

Section 340.1 was amended in 1990 to extend beyond members of a minor's household to reach any perpetrator of sexual abuse against a child. At that time, the legislature also amended the statute to enlarge the statute of limitations period from three to *eight* years following the age of majority (i.e., to age 26). *Quarry*, at 963. In addition, the 1990 amendment also *created its own statutory delayed discovery rule,* evidencing the legislative intent to provide a new rule that would extend delayed discovery principles beyond what had been recognized in the case law. *Id.*

In a subsequent amendment in 1998, the legislature for the first time included certain third party defendants within the scope of the enlarged limitations period established by the 1990 amendments. *Id.*, at 965. Although the 1998 amendment now included certain third party defendants within the scope of the provision that allowed for delayed discovery, the 1998 amendments also provided a "separate subdivision directing that ***no claim against a third party covered by subdivision (a) could be brought once the plaintiff reached the age of 26***." *Id.* (emphasis added.) "Specifically, the 1998 amendment added a new subdivision (b), providing that '[n]o action described in paragraph (2) or (3) of subdivision

(a) may be commenced on or after the plaintiff's 26th birthday.'" *Id.*, at 965-966. Thus, the 1998 amendment imposed an **absolute bar** against instituting a lawsuit against third party defendants once the plaintiff reached the age of 26. As the Court explained:

> The Legislature made an obvious choice to use language for claims against third party defendants that differed markedly from the language it still used for claims against direct perpetrators.…As to plaintiffs with claims against these third party defendants, the Legislature elected to toll the limitations period to age 26, **but no longer**."

Quarry, at 965. The *Quarry* Court concluded that "[p]laintiffs were 26 years of age or older on the effective date of the 1998 legislation. When the 1998 amendment went into effect, it is certain that their claims had lapsed." *Id.*, at 967.

In 2002, the legislature made further amendments to Section 340.1, enlarging the limitations period, but only for a certain subcategory of third party defendants who "knew or had reason to know, or were otherwise on notice, of any unlawful sexual conduct **by an employee, volunteer, representative, or agent**, and failed to take reasonable steps, and to implement reasonable safeguards, to avoid acts of unlawful sexual conduct in the future by that person, including, but not limited to, preventing or avoiding placement of that person in a function or environment in which contact with children is an inherent part of that function or environment." CCP §340.1(b)(2); *Quarry*, at 968. The Bishop in *Quarry* fell into this narrow sub-category of third party defendants because the priest (abuser) was the agent of the diocese.

The legislative history and amendments to CCP §340.1 reveal that the statute was amended in order to allow sexual abuse victims a longer time period within which to remain eligible to sue their abusers. However, as to third parties such as the Antioch Defendants, the legislature elected to toll the statute of limitations to age 26, but no longer. Applying the statutory scheme of CCP §340.1 to the facts of this case thus establishes that plaintiffs' claims are untimely and plaintiffs may not avail themselves of the extended delayed discovery rule in CCP §340.1(a) because their abuser, Zion Dutro, was not an employee, agent, representative or volunteer of the police.[6] CCP 340.1(b)(2). At the time the Dutro

[6] Curiously, plaintiffs allege that Officer Acosta was an "employee, volunteer, representative or agent" of the Church because of alleged positions he held within the Church, including that of elder and usher. *See* FAC ¶21. It is unclear what plaintiffs seek to accomplish with this allegation because (1) any agency relationship between Officer Acosta and the Church implicates the Church – not the police department; and (2) Officer Acosta was not the abuser so his involvement does not entitle plaintiffs to the benefit of CCP § 340.1's delayed discovery rule against any entity.

Action was filed in December of 2011, all of the plaintiffs were 26 or older. RJN Exs. G-L. Therefore, their claims are absolutely time-barred under CCP §340.1(b)(1).[7]

Nor may plaintiffs circumvent the absolute bar to bringing stale actions by relying on other delayed discovery rules. It is well-established that common law delayed discovery principles no longer apply to cases governed by sexual abuse statutes. *Quarry*, at 984; *and see* Witkin, Actions (2011 Supp.) § 597, p. 87 ("The only applicable discovery rule is the one provided by [CCP §340.1].") Indeed, when the legislature amended §340.1, it provided a new discovery rule that extended delayed discovery principles beyond what had been recognized in the case law, giving victims of sexual abuse a longer time period in which to become aware of their psychological injuries and remain eligible to bring suits against their abusers. But, as explained above, as to third parties such as the Antioch Defendants, the statute imposes an absolute bar against bringing a lawsuit once a plaintiff reaches the age 26 cut-off.

C. Plaintiffs' Federal Claims Are Barred by the Statute of Limitations

Like their state law claims, plaintiffs' federal civil rights claims are time-barred. In determining the proper statute of limitations for actions brought under 42 U.S.C. §§ 1983 and 1985, courts look to the statute of limitations for personal injury actions in the forum state. *See Maldonado v. Harris*, 370 F.3d 945, 954 (9th Cir. 2004); *Mathis v. Indemnity Ins. Co. of North America*, 588 F.Supp. 489, 490-491 (S.D.Miss. 1983) (in considering section 1985 and 1983 claims, federal courts look to applicable state statute of limitations); *Garland v. Shapiro*, 579 F.Supp. 858, 859 (E.D. Mich. 1984) (in actions brought under section 1985 or 1983, federal courts must apply state period of limitations most analogous to the asserted claim.) Further, "[i]n actions where the federal court borrows the state statute of limitation, the court should also borrow all applicable provisions for tolling the limitations period found in state law." *Mistriel v. Kern County*, No. 036922, 2007 WL 2695626, *1 (E.D.Cal. Sept.11, 2007). In the instant

[7] Plaintiffs may argue that Martha McKnelly's claims are timely because she filed her initial action two days before her 26th birthday. RJN Exs. A & J. However, Martha McKnelly *dismissed* that action on May 24, 2012. RJN Ex. F. Therefore, her current claims relate back to the original complaint in *this* action, i.e., the initial Dutro Complaint filed on December 7, 2011 after she turned 26. *See Bartalo v. Superior Court (Rosman)* (1975) 51 Cal.App.3d 526, 533 (new plaintiff cannot be joined after the statute of limitations has run where he or she seeks to enforce an independent right). Moreover, even if McKnelly's September 2011 complaint is somehow operative for the purposes of a statute of limitations analysis, the remaining Dutro plaintiffs are still time-barred because there can be no dispute their action was filed on December 7, 2011, when each of those plaintiffs was 26 or older.

action, the gravamen of plaintiffs' case is childhood sexual abuse; therefore, the applicable statute of limitations is found in CCP § 340.1. *See Mistriel v. Kern County*, at *1-2 (applying statute of limitations in CCP 340.1 to section 1983 claim); *Burke v. City of El Cajon*, No. 071618, 2007 WL 2915067, *3 (S.D.Cal. Oct. 4, 2007) (statute of limitations depends on the nature of the right sued upon, not by the form of the action or the relief demanded); *but see, Warren v. City of Grass Valley*, No. 101650, 2010 WL 5170317 (E.D.Cal. 2010) (dismissing section 1983 claim under California's general two-year personal injury statute of limitations, but noting that plaintiff also failed to meet requirements of CCP § 340.1). Therefore, plaintiffs' federal claims brought under §§1983 and 1985 are time-barred because all of the plaintiffs were over 26 when they filed the Dutro Action.

Notwithstanding CCP §340.1's age 26-cutoff, plaintiffs' claims are untimely even if the Court applies California's two-year statute of limitations for personal injury actions. Federal law determines when a civil rights claim accrues. *See Elliott v. City of Union City*, 25 F.3d 800, 801-802 (9th Cir.1994). Under federal law, a claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action. *United States v. Kubrick*, 444 U.S. 111, 122 (1979); *Kimes v. Stone*, 84 F.3d 1121, 1128 (9th Cir.1996). According to the allegations of the FAC, plaintiffs were aware that Antioch officers investigated reports of abuse by their father back in 1995; they were aware that Zion Dutro was not immediately arrested; and they were aware that a CPS worker did not interview them for approximately two weeks after Glenda Stripes reported the abuse. Therefore, even using the general two year statute of limitations, plaintiffs had sufficient information as early as 1995 that CITY police officers investigated reports of abuse and that plaintiffs had continued contact with Dutro notwithstanding the police involvement. Plaintiffs' claims against the Antioch defendants, therefore, accrued in 1995. Moreover, even if the statute of limitations was tolled until they each reached the age of majority, the two year statute of limitations for the §§ 1983 and 1985 claims expired *at the very latest* in 2005, two years after the youngest plaintiff (Martha McKnelly) turned 18. Accordingly, whether analyzed under CCP §340.1 or California's two year personal injury statute, plaintiffs section 1983 and 1985 claims are stale.

As for plaintiffs' section 1986 cause of action, that claim is equally untimely. 42 U.S.C. § 1986 contains its own statute of limitations:

> Every person who, having knowledge that any of the wrongs conspired to be done, **and mentioned in section 1985 of this title**, are about to be committed, and having power to

> prevent or aid in preventing the commission of the same, neglects or refuses so to do, … shall be liable to the party injured … which such person by reasonable diligence could have prevented; … But no action under the provisions of this section shall be sustained which is not commenced **within one year** after the cause of action has accrued.

Plaintiffs' claim for violation of Section 1986 was not brought "within one year after" the cause of action accrued in 1995 and the youngest plaintiff (Martha) reached the age of majority in 2003. The one-year statute of limitations for plaintiff's § 1986 claim has long since expired.

D. Plaintiffs' Second Claim For Violation Of 42 U.S.C. § 1983 Also Fails To State Facts Sufficient To State A Cause Of Action

In addition to plaintiffs' action being time-barred, the FAC also fails to state facts sufficient to state any of the claims asserted. 42 U.S.C. § 1983 "provides a cause of action for the 'deprivation of any rights, privileges, or immunities secured by the Constitution and laws' of the United States." *Wilder v. Virginia Hosp. Ass'n,* 496 U.S. 498, 508 (1990). Section 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred. *Graham v. Connor*, 490 U.S. 386, 393-94 (1989). To state a claim under § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated and (2) that the alleged violation was committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988).

Plaintiffs' FAC in this case fails to state facts showing a violation of any civil right. The FAC alleges the following facts about the Antioch Police:

- the officers failed to follow a duty to report to CPS (FAC ¶22);
- officer Barakos instructed officer Dee not to arrest Zion (FAC ¶22);
- officer Bloxom reported the abuse to CPS 16 days after the initial report (FAC ¶22);
- the officers departed from their mandatory reporting guidelines and basic standards of criminal investigation by permitting Zion to learn about the abuse before being interviewed (FAC ¶24);
- the officers interviewed plaintiffs in the presence of their parents (FAC ¶24); and
- officer Acosta's involvement in his church and Barakos' order not to arrest Zion interfered with the investigation (FAC ¶25).

From these facts, plaintiffs leap to the conclusion that this conduct "shocks the conscience and

violates due process." FAC ¶ 67. Plaintiffs assert additional conclusions that the officers "aided and abetted" pastor MARK WOOD in concealing the abuse; that the officers "entered into a conspiracy with defendant MARK WOOD with the intent of violating the constitutional rights of plaintiffs;" and that the CITY "failed to maintain adequate policies or conduct adequate training to prevent violations of the due process rights of citizens." FAC ¶¶ 68-70. However, plaintiffs fail to state any facts at all showing what *due process* or other *constitutional right* was violated by the officers' handling of the investigation, or that plaintiffs have any constitutional right to police protection from third party criminal conduct. Indeed, as the Supreme Court has recognized:

> [T]here is no constitutional due process right to have child witnesses in a child sexual abuse investigation interviewed in a particular manner, or to have the investigation carried out in a particular way. Interviewers of child witnesses of suspected sexual abuse must be given some latitude in determining when to credit witnesses' denials and when to discount them, and we are not aware of any federal law-constitutional, decisional, or statutory-that indicates precisely where the line must be drawn. … Consequently, mere allegations that **Defendants used interviewing techniques that were in some sense improper, or that violated state regulations, without more, cannot serve as the basis for a claim under § 1983**.

Devereaux v. Abbey, 263 F.3d 1070, 1075 (9th Cir. 2001) (emphasis added). Despite its length, the FAC is devoid of any facts showing a violation of any civil right secured by the constitution or federal laws, and therefore fails to state a claim for violation of § 1983 against any of the Antioch Defendants.

Moreover, the FAC fails to state facts sufficient to state a cause of action for § 1983 municipal liability against the CITY. Public entities cannot be held vicariously liable for the tortious acts of their employees under 42 U.S.C. § 1983. *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978). The local government unit "itself must cause the constitutional deprivation." *Gillette v. Delmore*, 979 F.2d 1342, 1346 (9th Cir. 1992), cert. denied, 510 U.S. 932, 114 S.Ct. 345, 126 L.Ed.2d 310 (1993). Local governing bodies can be sued directly under Section 1983 only where the alleged unconstitutional conduct is the result of an official policy, pattern or practice. *Monell*, 436 U.S. at 690. "[A] plaintiff must show that the municipal action was taken with the requisite degree of culpability and **must demonstrate a direct causal link between the municipal action and the deprivation of federal rights**." *Board of the County Commissioners of Bryan County v. Brown*, 520 U.S. 397, 404 (1997) (emphasis added); *City of Canton v. Harris*, 489 U.S. 378, 385 (1988). "Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of

culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employees." *Brown*, at 405.

> There are three ways to show a policy or custom of a municipality:
>
> (1) By showing a longstanding practice or custom which constitutes the standard operating procedure of the local government entity;
>
> (2) By showing that the decision-making official was, as a matter of state law, a final policymaking authority whose edicts or acts may fairly be said to represent official policy in the area of decision or
>
> (3) By showing that an official with final policymaking authority either delegated that authority to, or ratified the decision of, a subordinate.

Menotti v. City of Seattle, 409 F.3d 1113, 1147 (9th Cir. 2005). Plaintiffs' FAC fails to state *facts* showing any policy of the CITY, or any causal connection between an official policy and the deprivation of any federal right. To the contrary, plaintiffs allege that the officers' investigation was a "complete departure from the standards typically employed." FAC ¶24. The conclusory assertions that a vague, unspecified policy existed and constituted deliberate indifference are plainly insufficient. As such, the FAC fails to state facts showing the deprivation of any federal right, and fails to state facts sufficient to state a § 1983 claim against the defendant officers or a *Monell* claim against the CITY.

E. Plaintiffs' Third Claim For Conspiracy In Violation Of 42 U.S.C. § 1985 Is Wholly Unsupported By Any Facts

The FAC fails to state facts to state a claim for conspiracy under any of the discrete substantive clauses of 42 U.S.C. § 1985. *Bretz v. Kelman*, 773 F.2d 1026, 1028, fn.3 (9th Cir. 1984) "Section 1985 contains discrete substantive clauses.") The Supreme Court has identified five broad categories of conspiratorial activity that are proscribed by Section 1985: (1) interference with federal officers, (2) interference with the administration of justice in federal court, (3) interference with the administration of justice in state courts with intent to deny any citizen *due and equal protection* of the laws, (4) interference with private enjoyment of *equal protection* of the law and equal privileges and immunities, and (5) interference with the right to support candidates in federal elections. *Kush v. Rutledge*, 460 U.S. 719, 724 (1983). Plaintiffs fail to specify under which subsection of Section 1985 their conspiracy claim is based. Nevertheless, the FAC establishes that there is no basis for a conspiracy claim against defendants under *any* part of Section 1985.

First, the complaint fails to state any facts showing that the Antioch police officers conspired together or with anyone else to violate plaintiff's civil rights. "Section 1985 proscribes conspiracies to interfere with certain civil rights. A claim under this section must allege facts to support the allegation that defendants conspired together. A mere allegation of conspiracy without factual specificity is insufficient." *Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 626 (9th Cir. 1988). There are precise pleading requirements for Section 1985 conspiracy claims. Indeed, "[m]uch more than vague and conclusionary allegations are required. A plaintiff must allege with particularity facts in the form of specific overt acts." *Taylor v. Mitzel*, 82 Cal.App.3d 665, 673 (1978). Plaintiffs' FAC merely concludes that ACOSTA, BARAKOS, DEE and WOOD "conspired for the purpose of depriving plaintiffs of equal protection of the laws, or equal privileges and immunities under the law." FAC ¶ 73. These unsupported allegations of conspiracy, without any factual specificity, are patently insufficient to state a cause of action for conspiracy under § 1985.

Second, § 1985(1) requires federal interest or involvement with the alleged conspiracy, and plaintiffs cannot state a claim for relief under Section 1985(1) absent any allegations of federal involvement. *Bretz*, 773 F.2d at 1028. The complaint plainly establishes the absence of any federal interest or involvement, and thus fails to state any claim for relief under § 1985(1).

Third, plaintiffs fail to state a claim under either part of § 1985(2). The first part of subsection (2) proscribes conspiracies to interfere with participation in the federal courts. The complaint contains no facts regarding interference with any federal court action, and the first part of subsection (2) is wholly inapplicable. The second part of subsection (2) proscribes conspiracies aimed at violating equal protection rights, and thus requires "racial, or perhaps otherwise class-based invidiously discriminatory animus behind the conspirators' action." *Kush*, 460 U.S. at 725. Section 1985(2) provides:

> (2) Obstructing justice; intimidating party, witness or juror. . . . [I]f two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner the due course of justice in any State or Territory, **with intent to deny any citizen the equal protection of the laws**, . . .; [Emphasis added.]

Under Sections 1985(2) and (3), "**Each of these portions of the statute contains language requiring that the conspirators' actions be motivated by an intent to deprive their victims of the equal protection of the laws**." *Kush*, 460 U.S. at 725 [emphasis added.] The language regarding "*equal*

protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all." *Kush*, at 725-736, *citing Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). "Otherwise, the court explained, § 1985 would become a generalized federal tort law to be invoked for any private tortious conspiracy." *Bretz*, 773 F.2d at 1028, *citing Griffin*, 403 U.S. at 101-102.

The FAC in the instant action fails to allege that plaintiffs belong to a racial group or other protected class of persons, and notably, fails to allege any facts suggesting that the acts against them were the result of any racial animus or class-based invidious discriminatory animus. The FAC thus fails to state a cognizable conspiracy claim under § 1985(2).

Fourth, the FAC fails to state any claim under § 1985(3), which also applies only to conspiracies that violate equal protection rights. *See Bartling v. Glendale*, 184 Cal.App.3d 961, 972 (1986). Section 1985(3) provides in relevant part:

> (3) If two or more persons in any State or Territory conspire . . . for the purpose of depriving . . . any person or class of persons of **the equal protection of the laws, or of equal privileges and immunities under the laws** . . . the party so injured may have an action for the recovery of damages . . . against any one or more of the conspirators. [Emphasis added.]

"[T]he language of § 1985(3) requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class based, invidiously discriminatory animus behind the conspirators' action." [Original italics.] *Bray v. Alexandria Women's Health Clini*, 506 U.S. 263, 269 (1993). "Whatever may be the precise meaning of a 'class' for purposes of . . . speculative extension of § 1985(3) beyond race, the term unquestionably connotes something more than a group of individuals who share a desire to engage in conduct that the § 1985(3) defendant disfavors. Otherwise . . . [t]his definitional ploy would convert the statute into the 'general federal tort law' it was the very purpose of the animus requirement to avoid. . . [**T]he class 'cannot be defined simply as the group of victims of the tortious action**." *Id*. [emphasis added.] The Supreme Court has "extended § 1985(3) to protect non-racial groups only if 'the courts have designated the class in question a suspect or quasi-suspect classification requiring more exacting scrutiny or . . . Congress has indicated through legislation that the class requires special protection." *Holgate v. Baldwin*, 425 F.3d 671, 676 (9th

Cir. 2005); *see also Butler v. Elle,* 281 F.3d 1014, 1028 (9th Cir. 2002) ("§1985(3) should not be extended to every class which the artful pleader can contrive."); *Gillespie v. Civiletti,* 629 F.2d 637, 641 (9th Cir. 1980) (failure to plead Section 1985(3) claim where complaint contained no allegations of racial, or class-based, invidious discriminatory animus.)

Moreover, § 1985(3) is limited to the equal protection right and does not provide liability for any conspiracy relating to deprivations of any other federally protected rights, such as deprivation of due process. *Taylor,* 82 Cal.App.3d at 675, *citing Jennings v. Nester,* 217 F.2d 153, 154 (7th Cir. 1995) ("Therefore, the Act creates a cause of action for conspiracy to deny equal protection **but not for a conspiracy to deny due process.**") (Emphasis added.)

Plaintiffs in the instant case do not allege anywhere in the FAC that they belong to any racial group or other protected class of persons, or that the defendants' acts were the result of racial animus or class-based discrimination. Nor are there any factual allegations showing a conspiracy between the defendants. Accordingly, the FAC's conclusory assertions that a conspiracy existed are inadequate. The FAC thus fails to state any facts to support a cause of action under § 1985(3).

F. Plaintiffs' Fourth Claim For Civil Rights Violations Under 42 U.S.C. § 1986 Fails To State A Cause Of Action

The FAC also fails to state a cause of action for violation of Section 1986 because claims under § 1986 are dependent on a valid claim under § 1985, and the complaint fails to state any valid claim under § 1985. "Section 1986 imposes liability on every person who knows of an impending violation of section 1985 but neglects or refuses to prevent the violation." *Karim-Panahi*, 839 F.2d at 626. A claim can be stated under section 1986 only if the complaint contains a valid claim under section 1985. *Trerice v. Pedersen,* 769 F.2d 1398, 1403 (9th Cir. 1985); *see also Taylor,* 82 Cal.App.3d at 674 ("Section 1986 applies to someone (with the power to prevent it neglecting to prevent a violation of section 1985 **and is wholly dependent upon the existence of a cause of action under section 1985**.") (emphasis added). As detailed above, the FAC fails to state a cause of action under section 1985, and therefore the claim for violation of § 1986 also must fail.

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G. Plaintiffs' State Law Claims Are Untimely And Barred By Their Failure To Comply With the Tort Claims Act

1. Plaintiffs Failed to Comply With The Presentation Requirements of the Tort Claims Act.

Before suing a public entity, a plaintiff must present a timely written claim for damages to the entity. Gov. Code, § 911.2; *State of California v. Superior Court* (*Bodde*), 32 Cal.4th 1234, 1237 (2004). A timely tort claim is a prerequisite to maintaining an action against a public entity arising out of childhood sexual abuse, notwithstanding the provisions of CCP §340.1. *See Shirk v. Vista Unified School Dist.*, 42 Cal.4th 201, 209-214 (2007); Gov. Code § 905(m).[8] It is well established that failure to comply with the claim presentation requirements of the Tort Claims Act precludes any civil action against a public entity. *Fall River Joint Unified School Dist. v. Sup. Court*, 206 Cal.App.3d 431, 434 (1998); *State of Cal. Ex Rel. Dept. of Trans. v. Sup. Court*, 159 Cal.App.3d 331, 334 (1984). "Compliance with the claims statute is mandatory and failure to file a claim is fatal to the cause of action." *Pacific Tel. & Tel. Co. v. County of Riverside*, 106 Cal.App.3d 183, 188 (1980); *Nguyen v. Los Angeles County/UCLA Medical Center*, 8 Cal.App.4th 729, 732 (1992).

A claim for injury to person must be presented to the government entity no later than six months after the cause of action accrues. Gov. Code, § 911.2. Accrual of the cause of action for purposes of the government claims statute is the date of accrual that would pertain under the statute of limitations applicable to a dispute between private litigants. Gov. Code, § 901.

Timely claim presentation is not merely a procedural requirement, but is a condition precedent to plaintiff's maintaining an action against defendant and thus an element of the plaintiff's cause of action. *Bodde*, 32 Cal.4th at 1240. Complaints that do not allege facts demonstrating either that a claim was timely presented or that compliance with the claims statute is excused are subject to dismissal for not stating facts sufficient to constitute a cause of action. *Bodde*, at 1245; *Bohrer v. County of San Diego* 104 Cal.App.3d 155, 160 (1980) ("plaintiffs have the burden of pleading and proving compliance with the

[8] Government Code §905 states that all claims against public entities for money or damages must be presented according to the Tort Claims Act, except for claims made pursuant to CCP §340.1 for the recovery of damages suffered as a result of childhood sexual abuse that occurred on or after January 1, 2009. Govt. Code §905(m). Accordingly, plaintiffs' claims are not exempt from the claims presentation requirements because the alleged conduct occurred prior to January 2009.

claim presentation requirement. Failure to satisfy this burden is ordinarily fatal . . .") Further, **only after the public entity has acted upon or is deemed to have rejected** the claim may the injured person bring a lawsuit alleging a cause of action in tort against the public entity. Gov. Code §§ 912.4, 945.4; *Shirk*, 42 Cal.4th at 209. Where a timely claim is not presented, the claimant must apply for leave to present a late claim. Gov. Code, § 946.6(a).

Finally, Government Code § 950.2 provides that "a cause of action against a public employee or former public employee for injury resulting from an act or omission in the scope of his employment as a public employee **is barred if an action against the employing public entity for such injury is barred**…" [emphasis added.] *See Fowler v. Howell*, 42 Cal.App.4th 1746, 1750 (1996); *Harman v. Mono General Hosp.*, 131 Cal.App.3d 607, 613 (1982).

The intent of the Tort Claims Act is not to expand the rights of plaintiffs against governmental entities. Rather, the intent of the act is to confine potential governmental liability to rigidly delineated circumstances. *Williams v. Horvath*, 16 Cal. 3d 834, 838 (1976). "As that language indicates, the intent of the Tort Claims Act is to confine potential governmental liability, not expand it." *Eastburn v. Regional Fire Protection Agency*, 31 Cal.4th 1175, 1179-80 (2003), *citing Zelig v. County of Los Angeles*, 27 Cal.4th 1112, 1127 (2002). Requiring a plaintiff to present a timely claim before filing suit permits the public entity to investigate while tangible evidence is still available, memories are fresh, and witnesses can be located. *Shirk*, 42 Cal.4th at 213. As the Court in *Shirk* explained, "[f]resh notice of a claim permits early assessment by the by the public entity, allows its governing board to settle meritorious disputes without incurring the added cost of litigation, and gives it time to engage in appropriate budgetary planning." *Id.* Implicit in the claims requirement is the fact that public entities are afforded greater protection than non-public entities, because unlike private entities, the costs attributed to a public entity's alleged acts or omissions are ultimately borne by the tax payers. *Id.*

Contrary to plaintiffs' allegations that they have complied with the Tort Claims Act (*see* FAC ¶86) the original pleadings in both the Dutro and McKnelly lawsuits and matters subject to judicial notice demonstrate unequivocally that plaintiffs failed to comply with the claim presentation requirement. In the initial McKnelly Complaint (filed on September 23, 2011) Martha McKnelly alleged that "time constraints on filing this action have prevented the plaintiff from filing a tort claim against the CITY OF

ANTIOCH. The tort claim against the CTY OF ANTIOCH will be filed." *See* RJN, Ex. A, (McKnelly Complaint, 13:28-14:2.) Indeed, McKnelly failed to present her Tort Claim to the CITY until October of 2011, ***after*** she filed her original lawsuit. Therefore, Martha McKnelly clearly failed to comply with the claim presentation requirements before bringing her action.

Moreover, despite plaintiffs' contention that the CITY "failed to act…thereby rejecting the claim" (FAC ¶86), in fact, the CITY did not reject the claims, but ***returned all of the claims as untimely*** on October 18, 2011. See Notices of Untimely Claims, RJN Ex. M. A plain reading of the notices establishes that the CITY informed plaintiffs their claims were being returned as untimely and that no action was being taken. See RJN Ex. M. The City's notices further advised plaintiffs that their only recourse was to apply without delay for leave to present a late claim pursuant to Government Code sections 911.4 to 912.1, inclusive, and section 946.6. Contrary to the FAC allegations, the notice to plaintiffs did not constitute a rejection of plaintiffs' claim, but rather notice that their claims were untimely pursuant to Gov. Code §§ 911.3, 911.4. Plaintiffs' recourse upon receiving such notice was to file a request with the public entity for permission to file a late claim under Government Code Section 911.4. Plaintiffs have not (and cannot) allege they applied for late claim relief or obtained a court order for relief from the requirements of the Tort Claims Act before they filed the instant action as required by Government Code § 946.6. Failure to allege facts demonstrating or excusing compliance with these claims presentation requirements subjects a complaint to dismissal for failure to state a cause of action. *State of California v. Superior Court*, 32 Cal.4th 1234, 1239 (2004). Because none of the plaintiffs applied for late claim relief and Martha McKnelly presented her tort claim only after filing her initial lawsuit, all of the plaintiffs' state law claims against Antioch Defendants are subject to dismissal without leave to amend.

2. Plaintiffs' State Law Claims are Untimely Under The Tort Claims Act

Under the Tort Claims Act, the time to present a claim to a government entity is no later than six months after the cause of action accrues. Gov. Code. §911.2. As explained above, for the purposes of the Government Claims Act, accrual of a cause of action is the date of accrual that would pertain under the statute of limitations applicable to a dispute between private litigations. Gov. Code § 901. A cause of action for childhood sexual molestation generally accrues at the time of molestation. *Shirk*, 42. Cal.4th at

210. The FAC in the instant action alleges Zion's abuse ended in 2003. FAC ¶14. Therefore, based on the allegations, plaintiffs were required to present a claim to the CITY six months after the abuse ended in 2003. However, they did not submit the tort claims to the CITY until October 12, 2011, eight years after the last act of abuse.

In some situations, accrual of a cause of action may be postponed or delayed until the plaintiff discovers, or has reason to discover, the cause of action. *K.J. v. Arcadia Unified School Dist.,* 172 Cal.App.4th 1229, 1233 (2009).[9] "A plaintiff has reason to discover a cause of action when he or she has reason to at least suspect a factual basis for its elements. Suspicion of one or more of the elements, coupled with knowledge of any remaining elements, will generally trigger the applicable limitations period. This refers to the generic elements of wrongdoing, causation, and harm and does not require a hypertechnical approach. Instead, [the court looks] to whether the plaintiffs have reason to at least suspect that a type of wrongdoing has injured them." *S.M v. Los Angeles Unified Sch. Dist.,* 184 Cal. App. 4th 712, 717 (2010).

In *Fox v. Ethicon Endo-Surgery, Inc.,* 35 Cal. 4th 797, 808 (2005), the California Supreme Court defined the pleading requirements for delayed accrual. In order to rely on the discovery rule for delayed accrual of a cause of action, a plaintiff **must specifically plead facts** to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence. *Fox,* 35 Cal. 4th at 808. The court places the burden on the plaintiff to show diligence; conclusory allegations will not withstand dismissal. *Id.* The plaintiff must plead that, despite diligent investigation of the circumstances of the injury, she could not have reasonably discovered facts supporting the cause of action within the applicable statute of limitations period. *Id.* at 809.

The FAC alleges plaintiffs were molested between 1982 and 2003, but that their claims against the CITY did not accrue until July/early August of 2011 when they obtained police reports and allegedly

[9] In *K.J. v. Arcadia Unified School District*, the court analyzed accrual for tort claim purposes using the delayed discovery rule articulated in CCP §340.1, i.e., "the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the date of majority was caused by the sexual abuse." But this extended delayed discovery principle is only available where the entity employs or maintains an agency relationship with the abuser, as was the case in *K.J. v. Arcadia* where the District employed the abuser-teacher.

discovered a mandatory reporting requirement and learned for the first time about any wrongdoing by the police. FAC, ¶ 44. The FAC, however, reveals that plaintiffs were aware that officers were informed of abuse in 1995 and interviewed their parents (FAC ¶22), and Dutro was not immediately arrested by police officers. *Id.* Plaintiffs are not required to obtain specific technical knowledge of the elements of a cause of action against the CITY for their claims to accrue. They merely needed an awareness that what the CITY did was allegedly wrong. *S.M.*, 184 Cal.App.4th at 720. Plaintiffs were aware long before July 2011 that Dutro was not immediately arrested in 1995 and that they were allegedly not interviewed alone, or removed from the home despite the police officers' involvement. Not only were plaintiffs aware that Zion was not arrested in 1995, they went back to the police in 2003 to report him. FAC ¶38. Further, plaintiffs allege they contacted the CHURCH in 2005 to get the CHURCH to prevent Zion from adopting children. FAC ¶39. The FAC alleges that in 2005, Amber printed out 200 copies of Zion's Megan's Law registration and distributed them to the CHURCH congregants. Any argument that plaintiffs were prevented from learning of police wrongdoing until they obtained the police reports is belied by the allegations of the FAC. Plaintiffs reported the abuse in 1995 (FAC ¶22) and 2003. FAC ¶38. They certainly did not need the police reports to alert them to the fact that Zion was not removed from the home or arrested. Therefore, complaint fails to show that plaintiffs were unable to discover their claims earlier, or that they exercised reasonable diligence, and fails to establish delayed accrual.

H. Plaintiffs Fail to State Facts Sufficient to State any Cause of Action Under State Law

In addition to being fatally flawed for failure to comply with the Tort Claims Act, plaintiffs' state law claims are also defective because the FAC does not identify any statutory basis for liability against the City or Officers. "Except as otherwise provided by statute, a public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person." Government Code § 815(a). Governmental immunity is the rule unless liability is imposed by statute. *Guzman v. County of Monterey*, 46 Cal.4th 887, 897 (2009); *Eastburn,* 31 Cal.4th at 1179-80, *Dominguez v. Solano Irrigation Dist.*, 228 Cal. App. 3d 1098, 1102 (1991). "Section 815 'abolishes all common law or judicially declared forms of liability for public entities, except for such liability as may be required by the state or federal constitution,'" *Forbes v. County of San Bernardino,* 101 Cal.App.4th

48, 53 (2002), *citing Creason v. State Dept. of Health Svcs.*, 18 Cal.4th 623, 630 (1998). "**Thus, in California, 'all government tort liability must be based on statute** . . .'" [Emphasis added.] *Hoff v. Vacaville Unified School Dist.*, 19 Cal.4th 925, 932 (1998); *Lopez v. Southern Cal. Rapid Transit Dist.*, 40 Cal.3d 780, 785, fn. 2 (1985); *Brown v. Poway Unified School Dist.*, 4 Cal.4th 820, 829 (1993). The rule of liberal construction in pleadings does not apply to public entities, and every material fact to the existence of public entity liability must be pleaded with particularity. *Mittenhuber v. City of Redondo Beach*, 142 Cal.App. 3d 1, 5 (1983)(plaintiff must set forth facts "sufficiently detailed and specific to support an inference that each of the statutory elements of liability is satisfied. General allegations are regarded as inadequate"); *Lopez*, 40 Cal. 3d at 795 (statutory claims must be pleaded with particularity). Here, plaintiffs do not identify any state statute and merely conclude that "[t]he conduct of the CITY OF ANTIOCH breached duties owed to plaintiffs and was a substantial factor in causing damage to plaintiffs." FAC ¶ 85. Plaintiffs' direct liability claim against the CITY for purported negligence, therefore, fails as a matter of law and the motion to dismiss this claim should be sustained without leave to amend.

To the extent plaintiffs are attempting to assert a claim for breach of a mandatory duty, the FAC utterly fails to state facts sufficient to state any such claim. "A private cause of action lies against a public entity only if the underlying enactment sets forth the elements of liability set out in section 815.6." *Guzman*, 46 Cal.4th at 897. First, §815.6 requires that the enactment at issue be *obligatory*, rather than "merely discretionary or permissive." The statute must *require*, rather than merely authorize or permit, that a particular action be taken or not taken. "It is not enough, moreover, that the public entity or officer have been under an obligation to perform a function if the function itself involves the exercise of discretion. . . . Whether an enactment creates a mandatory duty is a question of law . . . [it] is a question of statutory interpretation for the courts." *Haggis v. City of Los Angeles*, 22 Cal.4th 490, 498-499 (2000). "Courts have construed this first prong rather strictly, finding a mandatory duty only if the enactment "affirmatively imposes the duty and provides implementing guidelines." *Guzman*, 46 Cal.4th at 898. Second, section 815.6 requires that the mandatory duty be designed to protect against the particular kind of injury the plaintiff suffered. Thus, a plaintiff must show the injury is "'one of the consequences which the enacting body sought to prevent through imposing the alleged mandatory duty. . . . Our inquiry in this

regard goes to the legislative purpose of imposing the duty. That the enactment 'confers some benefit' on the class to which plaintiff belongs is not enough; if the benefit is incidental to the enactment's protective purpose, the enactment cannot serve as a predicate for liability under section 815.6." *Haggis*, 22 Cal.4th at 499.

Plaintiffs' FAC in the instant case fails to identify any statutory basis for their breach of mandatory duties claim. The Antioch Defendants cannot determine what, if any, mandatory duty even existed in this case in 1995, or how they could have breached an unspecified mandatory duty. The conclusory assertions regarding mandatory duty are plainly insufficient.

The FAC also fails to state any cause of action for general negligence against the officers or respondeat superior liability. There are no factual allegations establishing any duty of care owed to plaintiffs to protect them from the criminal acts of their father. In addition, the sixth claim for relief for negligence lumps Officer Acosta in with the Church and its pastors, even though plaintiffs have sued Officer Acosta in his capacity as an employee of the City of Antioch. FAC ¶5. Although plaintiff allege that Officer Acosta was a Church elder and therefore an "employee, agent, volunteer, or representative" of the Church (FAC ¶ 21), there are no factual allegations establishing a duty of care officer Acosta owed to plaintiffs, or, how any of his actions or omissions as a Church elder can be imputed to the Antioch police department under any theory.

Accordingly, in addition to being untimely and barred for failure to comply with the Tort Claims Act, the FAC fails to state facts sufficient to state any claim under state law. Therefore, the motion to dismiss the sixth and seventh causes of action against Antioch Defendants should be sustained without leave to amend.

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V. CONCLUSION

For all of the foregoing reasons, the Antioch Defendants respectfully request the Court grant the instant motion to dismiss the second, third, fourth, sixth, and seventh claims for relief against the Antioch Defendants.

Dated: June 14, 2012

BERTRAND, FOX & ELLIOT

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CITY OF ANTIOCH, ART ACOSTA, DIMITRI BARAKOS, sued erroneously herein as DEMETREE BARAKOS, and WILLIAM DEE