Gerald L. Warren, OSB #814146
gwarren@geraldwarrenlaw.com
Nicholas J. Naumes, OSB #134380
nnaumes@geraldwarrenlaw.com
901 Capitol St. NE
Salem, OR 97301
Telephone: (503) 480-7252
Fax: (503) 779-2716
Attorneys for Defendant

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

MATS JARLSTROM, an individual,

Plaintiff,

v.

CITY OF BEAVERTON, an Oregon municipal corporation,

Defendant.

Case No. 3:14-cv-00783-AC

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

Defendant objects to allowing an Amended Complaint in this case. Jarlstrom requires leave of the Court to amend his Complaint. FRCP 15(a)(2). Whether to grant leave is within the trial court's discretion. *In re Morris*, 363 F3d 891, 894 (9th Cir. 2004). Considerations that should guide the Court include "bad faith, undue delay, prejudice to the opposing party, futility of the amendment, and whether the party has previously amended his pleadings." *Bonin v. Calderon*, 59 F3d 815, 845 (9th Cir. 1995). "These factors, however, are not given equal weight." *U.S. ex rel. Lee v. SmithKline Beecham, Inc.*, 245 F3d 1038, 1052 (9th Cir. 2001). "Futility of an amendment can, by itself, justify the denial of a motion for leave to amend."

Bonin, 59 F3d at 845. In absence of any of those reasons, the leave to amend should be freely given. *Hall v. City of Los Angeles*, 697 F3d 1059, 1073 (9th Cir. 2012). Here, the Court should reject Jarlstrom's request to amend because the amendment would be futile, his request is made in questionable, if not bad, faith, and the City would be prejudiced by having to file another Motion to Dismiss for a pleading that still fails to state a claim.

1. Jarlstrom's Proposed Amended Complaint is Futile

"[A] proposed amendment is futile only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." *Miller v. Rykoff-Sexton, Inc.*, 845 F2d 209, 214 (9th Cir. 1988). Jarlstrom's proposed Amended Complaint alleges a single claim for relief. That claim for relief is now clarified to be for an alleged violation of his Fourteenth Amendment substantive due process rights. (Proposed Am. Compl. ¶ 24). Jarlstrom still alleges no injury in fact and still fails to state a valid claim under the Fourteenth Amendment. Because the proposed amendment would be futile, Jarlstrom's request should be denied.

(a) Jarlstrom has Suffered no Injury in Fact and Therefore Lacks Standing

A federal court's authority to hear a case is defined by subject matter jurisdiction. *Carlsbad Technology, Inc. v. HIP Bio, Inc.*, 556 U.S. 635, 639, 129 S.Ct. 1862 (2009). "Standing doctrine involves 'both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.'" *Fleck and Associates, Inc. v. City of Phoenix*, 471 F3d 1100, 1103 (9th Cir. 2006). Where a party lacks standing, a federal court lacks subject matter jurisdiction. *Id.* at 1106. There are three elements to standing.

> "First, the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the

> challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative that the injury will be redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130 (1992) (internal quotations and alterations omitted). Jarlstrom does not establish any of these three minimums so he still lacks standing based on this revised version.

As with his original Complaint, Jarlstrom provides no allegations that cure the jurisdictional defect. There is still no specific factual context within which to analyze his claim - - despite his apparent 19 years of driving through town, he can only hypothesize about some possible injury he *might* suffer some day. (Proposed Am. Compl. ¶¶ 7, 9-10). Indeed, the distinctions between Jarlstrom's original Complaint and his proposed Amended Complaint is only his insertion of the amount of time he has driven through the City, and his specific omission of any allegations regarding red light cameras. (Compl; ¶ 10; Proposed Am. Compl. ¶¶ 7, 9-10) These amendments do not cure the standing issues raised in the City's Motion to Dismiss. There is simply no injury in fact, no ability to trace a hypothetical injury to any affirmative act of the City, and no decision by this Court could redress his conjectural injury.

Because Jarlstrom lacks standing, and because there is no set of facts where he could establish standing, his Motion for leave to amend his Complaint should be denied.

(b) Jarlstrom Fails to State a Claim Under the Fourteenth Amendment

The proposed Amended Complaint now clarifies plaintiff's legal theory, but that is not enough. "Federal courts have 'always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open ended." *Brittain v. Hansen*, 451 F3d 982, 990 (9th Cir. 2006). Jarlstrom seeks to bring traffic yellow light intervals into the realm of substantive due process protections. (Proposed

Am. Compl. ¶¶ 17, 19). The City has not found a single instance of such a claim arising under the U.S. Constitution.

Jarlstrom sole claim for relief is actually brought under an *exception* to the general rule. (Proposed Am. Compl. ¶ 24). That is, the state created danger exception "applies only where there is affirmative conduct on the part of the state in placing the plaintiff in danger. Second, the exception only applies where the state acts with deliberate indifference to a known or obvious danger." *Patel*, 648 F3d at 974. This exception does not apply where the plaintiff is put in no worse position by the City's failure to act. *Johnson v. City of Seattle*, 474 F3d 634, 641 (9th Cir. 2007) (a plaintiff must show affirmative conduct that enhances a danger not already faced).

Jarlstrom has been in the City for 19 years, and regularly drives through the City. (Proposed Am. Compl. ¶¶ 7, 9). His position for driving risks has not changed. He has not been in a traffic accident as a result of light intervals, nor does he even claim to have *seen* an accident. *Id.* There is no affirmative conduct here - - indeed, Jarlstrom alleges an omission that the City has not acted to protect him. (*Id.* at ¶ 21-22). The City is not liable for omissions, and the "state created danger" exception still requires affirmative conduct.

Jarlstrom does not state a claim under the Fourteenth Amendment so his Motion for leave to amend should be denied.

2. Jarlstrom has Acted in Bad Faith in Necessitating Motion Practice

Jarlstrom shows bad faith by necessitating needless motion practice. After filing his Complaint, the City moved to dismiss the Complaint on various grounds. Having reviewed the City's Motion to Dismiss, Jarlstrom filed a Motion for leave to amend his Complaint. (Warren Decl.) However, he continues to contest the City's Motion to Dismiss. The City offered to consent to Jarlstrom's filing an Amended Complaint if Jarlstrom simply conceded that the City's

Motion was well taken. (Warren Decl.). Jarlstrom refused the City's offer, and this position has necessitated the current motion practice.

3. The City is Prejudiced by Duplicitous Motions

For similar reasons, the City is prejudiced by Jarlstrom's Motion for leave to amend. A need to delay proceedings, including additional discovery, can support a finding of prejudice to a party. *See Lockheed Martin Corp. v. Network Solutions, Inc.,* 194 F3d 980, 986 (9th Cir. 1999). The City moved to dismiss Jarlstrom's original Complaint on the grounds of lack of standing, no federal question jurisdiction, and his failure to state a claim. As noted, Jarlstrom's proposed Amended Complaint still suffers from the same flaws, although he appears to have cured the vagueness of his federal question issue by now at least specifying a Fourteenth Amendment claim. However, should Jarlstrom's Motion for leave be granted, the City will once again have to file another Motion to Dismiss for a claim that is no claim at all. This is a waste of City and Court resources.

CONCLUSION

Plaintiff's deficiencies are not cured by the proposed Amended Complaint. For the foregoing reasons, under the circumstances, the Court should deny plaintiff's Motion for Leave to File an Amended Complaint.

DATED this 17th day of July, 2014.

/s/ Gerald L. Warren
Gerald L. Warren, OSB #814146
Nicholas J. Naumes, OSB #134380
Attorneys for Defendant City of Beaverton