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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

MATS JARLSTROM, an individual,

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

Plaintiff,

v.

**DEFENDANT'S LIMITED
OBJECTION TO MAGISTRATE'S
FINDINGS AND RECOMMENDATION**

CITY OF BEAVERTON, an Oregon municipal
corporation,

Defendant.

Defendant City of Beaverton ("City") does not object to the conclusion regarding lack of standing reached by Magistrate Judge John Acosta in his Findings and Recommendation ("F&R") dated August 26, 2014. However, in the interest of preservation and judicial economy, the City objects to the F&R to the extent that it did not address the City's alternative argument under FRCP 12(b)(6) that plaintiff failed to state a claim for relief.

As the Court is aware, *de novo* review is as to any portion of the F&R to which an objection is made. 28 USC § 636 (b)(1)(C). "The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate

judge with instructions.” FRCP 72(b)(3). When a party “objects to *any portion* of the Magistrate Judge’s Findings and Recommendation, the district court must make a *de novo* determination of that portion of the Magistrate Judge’s report.” *Barnes v. Chase Home Finance, LLC*, 825 FSupp2d 1057, 1059 (D.Ore. 2011). *De novo* review “is required if, but *only* if, one or both parties file objections to the findings and recommendations.” *U.S. v. Reyna-Tapia*, 328 F3d 1114, 1116 (9th Cir. 2003).

Having concluded that plaintiff lacked standing and, therefore, that the Court lacked jurisdiction, the F&R did not address the City’s alternative argument that even if plaintiff did have standing, he nevertheless failed to state a claim upon which relief could be granted. (F&R p. 15). Since any failure to object to the Magistrate’s Report may waive the right to appeal the district court’s judgment, the City files this objection. *Thomas v. Arn*, 474 U.S. 140, 142, 106 S.Ct. 466 (1985). The requirement of objecting to the F&R “is supported by sound considerations of judicial economy . . . the same rationale that prevents a party from raising an issue before a circuit court of appeals that was not raised before the district court applies here.” *Id.* at 147-48 (alterations omitted).

Accordingly, the Court should review *de novo* the City’s argument that plaintiff has failed to state a claim upon which relief can be granted. (F&R p. 15). While plaintiff is entitled to certain reasonable inferences in a Motion to Dismiss, his factual allegations must still be sufficient to “raise a right to relief above the speculative level....” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In assessing sufficiency, the court can disregard legal conclusions that are couched as factual allegations. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009). In *Iqbal*, the Court explained that two principles must be followed when ruling on a Rule 12(b)(6) Motion. First, although the Court must accept as true all facts set forth in the Complaint, it need not

accept legal conclusions and "threadbare recitals of the elements of a cause of action to suffice." *Id.* At 678. Second, the Complaint must set forth facts that support a plausible claim for relief. *Id.* At 679. The plausibility standard is not a probability requirement but "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 678.

Plaintiff specified in his Memorandum in Opposition and proposed Amended Complaint that he was relying upon a substantive due process deprivation. Neither his factual allegations nor his proposed allegations fell within the bounds of any prior recognized due process claim. The Supreme Court has been "reluctant to expand the concept of substantive due process" outside of identified claims because substantive due process is a vague, open-ended area. *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S.Ct. 2258 (1997). Plaintiff's allegations of yellow lights too short for his satisfaction are certainly not within any established due process right, thus he failed to state a claim upon which relief can be granted. FRCP 12(b)(6).

CONCLUSION

The reviewing judge is respectfully requested to adopt Magistrate Acosta's F&R conclusions as to plaintiff's lack of standing but with the additional finding that plaintiff also failed to state a claim for relief.

DATED this 10th day of September, 2014.

/s/ Gerald L. Warren
Gerald L. Warren, OSB #814146
Attorney for Defendant City of Beaverton

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing DEFENDANT'S LIMITED OBJECTION TO MAGISTRATE'S FINDINGS AND RECOMMENDATION on:

Michael E. Haglund
Haglund Kelley LLP
200 Market Street, Ste. 1777
Portland, OR 97201
Attorney for Plaintiff

by the following indicated method or methods:

- by **electronic means through the Court's Case Management/Electronic Case File system** on the date set forth below;
- by **faxing** a copy thereof to each attorney at each attorney's last-known facsimile number on the date set forth below;
- by **mailing** a full, true, and correct copy thereof in a sealed, first-class postage-prepaid envelope, addressed to each attorney's last-known office address listed above and depositing it in the U.S. mail at Salem, Oregon on the date set forth below;
- by causing a copy thereof to be **hand-delivered** to said attorney at each attorney's last-known office address listed above on the date set forth below;
- by sending a copy thereof via **overnight courier** in a sealed, prepaid enveloped, addressed to each attorney's last-known address on the date set forth below.

DATED this 10th day of September, 2014.

/s/ Gerald L. Warren
Gerald L. Warren, OSB #814146
Attorney for Defendant City of Beaverton

CERTIFICATE OF SERVICE