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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 MOTION TO DISMISS AND MEMORANDUM OF LAW

LR 7-1 STATEMENT

Pursuant to LR 7-1, a good-faith effort was made to confer with plaintiff's counsel, Michael Haglund, by email and telephone asking that plaintiff voluntarily dismiss his claim against the City. Mr. Haglund did not agree, so the Court's assistance is required to resolve this dispute as well as the stay of discovery.

MOTION

Defendant, City of Beaverton ("City") moves the Court pursuant to Fed R Civ P 12(b)(1) and 12(b)(6) to dismiss plaintiff's claim on the grounds that the Court does not have subject matter jurisdiction to hear this claim, and there is no federal claim stated under these facts.

In support of this Motion, the City relies upon the Complaint on file and the Memorandum of Law in Support that accompanies this Motion.

MEMORANDUM OF LAW

INTRODUCTION

Plaintiff Mats Jarlstrom ("Jarlstrom") brings a single claim against defendant City of Beaverton ("City") for the operation of traffic control signals in the City. Because Jarlstrom does not have standing, and because Jarlstrom does not plead a federal question, this Court does not have subject matter jurisdiction and Jarlstrom's Complaint should be dismissed pursuant to FRCP 12(b)(1). Alternatively, because Jarlstrom does not state a claim for relief, the Complaint should be dismissed pursuant to FRCP 12(b)(6).

ARGUMENT

1. There is no Subject Matter Jurisdiction as Plaintiff does not have Standing and there is no Violation of Federal Law Alleged

The Supreme Court has repeatedly cautioned that federal judges "have 'an obligation to assure ourselves' of litigants' standing under Article III." *Nuclear Information and Resource Service v. Nuclear Regulatory Com'n*, 457 F3d 941, 949 (9th Cir. 2006) citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 126 S.Ct. 1854 (2006). "Article III standing is thus a threshold requirement for federal court jurisdiction." *Smith v. U.S. Bank, N.A.*, 2011 WL 2470100, *3 (D.Ore. 2011) (Judge Clarke) adopted by 2011 WL 2469729 (Judge Panner). What is also clear is that Jarlstrom has the burden to establish that this Court has subject-matter jurisdiction of his claim. *Ass'n of American Medical Colleges v. U.S.*, 217 F3d 770, 778 (9th Cir. 2000).

"[T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an injury in fact . . . which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S.

555, 559, 112 S.Ct. 2130 (1992) (internal citations and quotations omitted). Second, such injury must be fairly traceable to the challenged action of the defendant. *NIRS*, 457 F3d at 949. Third, the plaintiff must show that it is likely, and not merely speculative, that the injury will be redressed by a favorable decision. *Id.* These three elements apply even when a plaintiff seeks only injunctive relief, as Jarlstrom does here. *Summers v. Earth Island Institute*, 555 U.S. 488, 493, 129 S.Ct. 1142 (2009).

Jarlstrom takes issue with the duration of the yellow light intervals in the City contending they are too short to allow a safe stopping distance for vehicles. He further contends that the City is issuing tickets from red light cameras, and that drivers, passengers, and pedestrians are at "serious risk of physical injury or death." (Compl. ¶¶ 9, 10, 12). What Jarlstrom fails to allege is any actual injury that he has suffered. Because Jarlstrom has suffered no injury in fact, he is not able to establish any of the three minimum standing requirements. Nowhere does Jarlstrom allege that he has been in an accident, been unable to stop his vehicle in time, or that he has received a traffic ticket for illegally driving through a red light. The Fifth Circuit has held in a challenge to red light cameras that even drivers who *did* receive tickets from red light cameras nevertheless lacked standing to challenge the practice in federal court. *Bell v. Redflex Traffic Systems, Inc.*, 374 Fed Appx 518, 520 (5th Cir. 2010); See also *Trujillo v. Florida*, 481 Fed Appx 598, 599 (11th Cir. 2012) (plaintiff who did not allege he received a citation from red light camera in complaint did not have Article III standing). "Allegations of possible future injury do not satisfy the requirements of Art. III." *Whitmore v. Arkansas*, 495 U.S. 149, 158, 110 S.Ct. 1717 (1990). Here, Jarlstrom does not allege any injury he suffered, he merely hypothesizes about some possible future injury to him or others.

Even though it would still not give Jarlstrom sufficient standing, he does not even allege any actual injury for some other person regarding his alleged concerns. Jarlstrom merely alleges that there is a "danger" to drivers, passengers, and pedestrians generally. (Compl. ¶ 12). "[T]he Court's general rule [is] 'Ordinarily, one may not claim standing in this Court to vindicate the constitutional rights of some third party." *Singleton v. Wulff*, 428 U.S. 106, 114, 96 S.Ct. 2868 (1976) quoting *Barrows v. Jackson*, 346 U.S. 249, 255, 73 S.Ct. 1031 (1953).

Should Jarlstrom's claim be limited to asserting only rights on his own behalf he still alleges only conjectural injury. Hypothesizing that yellow light durations are "unsafe" without any demonstrable injury is neither actual nor imminent. Jarlstrom alleges that the City operates numerous traffic lights throughout its jurisdiction, yet not one factual incidence of injury from yellow light intervals is provided. (Compl. ¶ 6). Consequently, Jarlstrom has failed to establish the first of the three standing requirements, and that failure also eliminates his ability to prove the other two elements.

Even a general interest in compliance with the law, as Jarlstrom contends the City has violated here, does not confer standing. See *Robins v. Spokeo, Inc.*, 742 F3d 409, 413 (9th Cir. 2014).

> "[A] 'generalized grievance,' no matter how sincere, is insufficient to confer standing. A litigant 'raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy.'"

Hollingsworth v. Perry, __ U.S. __, 133 S.Ct. 2652, 2662 (2013) quoting *Lujan*, 504 U.S. at 573-74. Jarlstrom alleges light intervals are in violation of Oregon law and that the City unlawfully generates revenue through red light cameras. At no time is there any allegation that he has been harmed by either action. Jarlstrom's alleged interest in the lawful application of the Oregon

Vehicle Code is a "generalized grievance," at best benefiting the public at large, but that interest is insufficient to confer standing.

Nor does Jarlstrom satisfy statutory subject matter jurisdiction requirements. He alleges that there is subject matter jurisdiction pursuant to 42 USC § 1983. (Compl. ¶ 2). But § 1983 is only a vehicle to enforce rights found elsewhere. "To succeed on a § 1983 claim, a plaintiff must show that (1) the conduct complained of was committed by a person acting under color of state law; and (2) the conduct deprived the plaintiff of a *federal* constitutional or statutory right." *Patel v. Kent School Dist.*, 648 F3d 965, 971 (9th Cir. 2011) (emphasis added). Jarlstrom contends the City's red light cameras operate "in violation of the Oregon Vehicle Code." (Compl. ¶¶ 7-8, 11). To the extent that a § 1983 claim may properly be brought in federal court pursuant to 28 USC § 1331, subject matter jurisdiction is improper as Jarlstrom only alleges violation of Oregon law, and under these circumstances, this state law is insufficient to establish a claim under § 1983.

Jarlstrom fails to establish subject matter jurisdiction on either constitutional standing or any statutory federal question grounds. Accordingly, Court does not have subject matter jurisdiction and should dismiss the Complaint pursuant to FRCP 12(b)(1).

2. Plaintiff's Complaint Also Fails to State a Claim for Relief

Alternatively, Jarlstrom's claim should be dismissed for his failure to state a claim. FRCP 12(b)(6). A complaint must state "enough facts to state a claim for relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547, 127 S.Ct. 1955 (2007). "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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937 (2009) quoting *Twombly*, 550 U.S. at 556. To meet the pleading standards of FRCP 8

"the Supreme Court has held that an 'entitlement to relief' requires more than labels and conclusions. Factual allegations must be enough to raise a right to relief above a speculative level." *Eclectic Properties East, LLC v. Marcus & Millichap Co.*, __ F3d __, 2014 WL 1797676, *2 (9th Cir. 2014) quoting *Twombly*, 550 U.S. at 555.

Jarlstrom does not offer any factual allegations, and indeed, not one factual incident is alleged. Rather, the Complaint contains only conclusory allegations such as the City is "illegally issuing tickets," and that yellow light intervals are "unlawful." (Compl. ¶¶ 10, 12). Jarlstrom does not even plead a higher incidence of accidents at any alleged intersections, only the specter of danger from these supposed "unsafe" intersections.

As stated above, a § 1983 plaintiff must allege a violation of *federal* law. *Patel*, 648 F3d at 971. While Jarlstrom appears to be using § 1983 to allege only a state law violation, he may contend that he is asserting a federal due process claim although he does not mention the Fourteenth Amendment, nor any amendment for that matter. Jarlstrom's Complaint might liberally be interpreted to be asserting a substantive due process claim under a "state-created danger" theory based upon the "serious risk of injury or death" language he alleges exists at intersections controlled with yellow lights. (Compl. ¶¶ 1, 14). Although it does not appear that the Ninth Circuit has reviewed the constitutionality of red light camera programs, several other circuits have and found no substantive due process claim is presented. See *Idris v. City of Chicago, Ill.*, 552 F3d 564, 566 (7th Cir. 2009) (revenue generated from red light cameras does not condemn the ordinance under substantive due process); *Shavitz v. Guilford Cnty Bd. of Educ.*, 100 Fed Appx 146, 150-51 (4th Cir. 2004) (defendant entitled to summary judgment on plaintiff's due process and equal protection claims against red-light camera program). In

addition, as noted in § 1, *supra*, the Fifth and Eleventh Circuits have held plaintiffs lack standing to challenge red light camera programs in federal court.

If Jarlstrom is relying upon a substantive due process theory, the due process clause does not guarantee an affirmative right to life, liberty, or property interests. *DeShaney v. Winnebago Cnty Dept. of Social Services*, 489 U.S. 189, 195, 109 S.Ct. 998 (1989). Rather, it is merely a limitation on the government's power to act. *Id.* It is possible to allege a substantive due process violation under one exception known as the "state-created danger" doctrine. *Morgan v. Gonzales*, 495 F3d 1084, 1090 (9th Cir. 2007). However, the standard for such a substantive due process violation is high, and Jarlstrom's Complaint here does not plausibly state a claim for relief under such a theory.

"To violate substantive due process, the alleged conduct must 'shock the conscience' and 'offend the community's sense of fair play and decency.'" *Marsh v. Cnty of San Diego*, 680 F3d 1148, 1154 (9th Cir. 2012) quoting *Rochin v. California*, 342 U.S. 165, 172-73, 72 S.Ct. 205 (1952). The "shocks the conscience" standard is met by a mental state of either deliberate indifference or purpose cause to harm. *Porter v. Osborn*, 546 F3d 1131, 1137 (9th Cir. 2008). "The state-created danger exception creates the potential for § 1983 liability where a state actor 'creates or exposes an individual to a danger which he or she would not have otherwise faced.'" *Campbell v. State of Washington Dept. of Social and Health Services*, 671 F3d 837, 845 (9th Cir. 2011) quoting *Kennedy v. City of Ridgefield*, 439 F3d 1055, 1061 (9th Cir. 2006). In addition, the state actor must be deliberately indifferent to a known or obvious danger. *Henry A. v. Willden*, 678 F3d 991, 1002 (9th Cir. 2012).

Here, there is no City-created danger, as the City has not exposed Jarlstrom to any danger he would not otherwise face. Although red light cameras may be unpopular, their existence

certainly does not "shock the conscience." The alleged danger is conjectural, as previously discussed in § 1 of this Memorandum. Jarlstrom alleges that the City's yellow light timing does not allow a driver to drive through an intersection safely. (Compl. ¶ 13). However, nowhere is there any factual support of the danger other than conclusory language. The sheer possibility that there is "danger in the air" is insufficient to state a claim. The complete absence of any factual allegations of danger demonstrates that that there is no substantive due process violation and Jarlstrom's Complaint fails.

Additionally, for a state-created danger theory, the City must take some affirmative action. The state-created danger exception "necessarily involves affirmative conduct on the part of the state in placing the plaintiff in danger." *L.W. v. Grubbs*, 974 F2d 119, 121 (9th Cir. 1992). Jarlstrom claims that the light intervals expose people to a risk of injury. (Compl. ¶ 12). However, he does not identify a single instance of danger that he himself was exposed to, nor does he identify a danger he witnessed. Jarlstrom simply concludes that light timing exposes people to danger. As noted in his Complaint, Oregon law requires a driver facing a yellow light to stop, not proceed through an intersection. (Compl. ¶ 7). Only if a driver cannot safely stop, may the driver proceed through an intersection on a yellow light. *Id.* Jarlstrom does not claim he has driven too fast to safely stop, he merely provides an exhibit that purports to demonstrate that possibility. (*Id.* ¶ 13.) Indeed, the exhibit attached to the Complaint reinforces the conclusion that Jarlstrom does not have standing as his Complaint states that "the [hypothetical] driver of an automobile" could not stop, not that he was unable to stop. (Compl. ¶ 13).

Jarlstrom also alleges an example of a driver traveling the posted speed who could not reasonably stop within the available time. However, a person is violating Oregon's basic speed rule, notwithstanding the posted speed, if he is driving faster than is prudent with regard for

hazards at intersections. ORS 811.100(1)(c). Any danger Jarlstrom faces by failing to stop at a yellow light is caused by his own actions or omissions, and not by any affirmative governmental actions. Jarlstrom's allegations as to potential for red light camera traffic tickets are obviously not a danger addressable on substantive due process grounds. (Compl. ¶¶ 11, 14-15).

The deliberate indifference standard requires the danger to which Jarlstrom is allegedly exposed must be known or obvious. *Willden,* 678 F3d at 1002. Traffic accidents may be fairly common, yet Jarlstrom has to include an exhibit to demonstrate his calculations for the alleged danger at issue. The numerous factors involved in Jarlstrom's Exhibit A, illustrate how obscure the alleged danger is. Indeed, as vehicles all have varying stopping times and distances based on innumerable factors such as weight of the vehicle, condition of the brakes, and speed, Jarlstrom's exhibit fails to list all of the potential variables, further obscuring the alleged danger from being "known and obvious."

Finally, deliberate indifference is a stringent standard of fault, requiring culpable conduct greater than gross negligence - - i.e., it is a standard "requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Patel*, 648 F3d at 974 (citations omitted). "[D]eliberate indifference requires a culpable mental state. The state actor must recognize an unreasonable risk and actually intend to expose the plaintiff to such risks without regard to the consequences to the plaintiff." *Id.* (citations and alterations omitted). "In other words, the defendant 'knows that something *is* going to happen but ignores the risk and exposes the plaintiff to it.'" *Id.* (emphasis in original) quoting *Grubbs*, 92 F3d at 900. Jarlstrom pleads no facts showing the City has acted with deliberate indifference. No risk has been ignored by the City to intentionally expose Jarlstrom to it. Traffic control lights are installed for precisely the opposite reason, *i.e.* to minimize traffic risks. Moreover, red light cameras are installed for the

same reason, to minimize risk and ensure compliance with the law. See *Krieger v. City of Rochester*, 978 NYS2d 588, 596 (Sup. Ct. N.Y. 2013) (red light camera program fosters public safety). Jarlstrom's failure to plead any factual incident where some injury or accident was caused by yellow light intervals bolsters City's position that it has not been deliberately indifferent in this matter.

CONCLUSION

For all of the above reasons, Jarlstrom's Complaint should be dismissed.

DATED this 16th day of June, 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 MOTION TO DISMISS AND MEMORANDUM OF LAW 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 16th day of June, 2014.

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