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UNITED STATES DISTRICT COURT

THE DISTRICT OF OREGON

PORTLAND DIVISION

D. JEANETTE FINICUM; THARA TENNEY;
TIERRA COLLIER; ROBERT FINICUM;
TAWNY CRANE; ARIANNA BROWN;
BRITTNEY BECK; MITCH FINICUM;
THOMAS KINNE; CHALLICE FINCH;
JAMES FINICUM; DANIELLE FINICUM;
TEAN FINICUM; and the ESTATE OF
ROBERT LAVOY FINICUM,

Plaintiffs,

v.

UNITED STATES OF AMERICA; FBI;
BLM; DANIEL P. LOVE; SALVATORE
LAURO; HARRY MASON REID; GREG T.
BRETZING; W. JOSEPH ASTARITA;
STATE OF OREGON; OREGON STATE
POLICE; KATHERINE BROWN;
RONALD LEE WYDEN; HARNEY
COUNTY; DAVID M. WARD;
STEVEN E. GRASY; THE CENTER
FOR BIOLOGICAL DIVERSITY;
and JOHN DOES 1-100,

Defendants.

Case No. 2:18-cv-00160-MO

**DEFENDANT HARNEY COUNTY'S
MOTION TO DISMISS PLAINTIFFS'
THIRD AMENDED COMPLAINT FOR
FAILURE TO STATE A CLAIM**

Oral Argument Requested

LR 7.1 CERTIFICATION

The undersigned counsel for Harney County certifies that he contacted Plaintiffs' counsel to confer regarding the subject matter of this motion initially by letter on October 21, 2021, and followed on October 28, 2021 by email and a phone message at 3:43 p.m. PDT, with no response received.

MOTION TO DISMISS

This Court adopted the Findings & Recommendation of The Honorable Patricia Sullivan to dismiss with leave to replead the claims for *Monell* liability, conspiracy, negligence, and assault and battery against Harney County. Plaintiffs have now filed a Third Amended Complaint, but again, the Third Amended Complaint fails to state facts to satisfy the pleading standards.

Pursuant to FRCP 12(b)(6), Defendant Harney County moves to dismiss Plaintiffs' Third Amended Complaint. This motion is supported by the Court record, the Argument below, and the Declaration of Thomas F. Armosino, filed concurrently herewith.

ARGUMENT

I. Harney County is entitled to dismissal because the Third Amended Complaint fails to satisfy basic pleading standards.

A. Factually unsupported conclusory allegations must be disregarded.

Under federal pleading standards, as argued in Defendants Harney County, David M. Ward, and Steven E. Grasty's Reply in Support of Motions to Dismiss, ECF Doc. 148, incorporated herein by reference, threadbare allegations of wrongdoing, supported by mere conclusory statements, are not entitled to credit and will not suffice. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2008). As required by *Iqbal*, "to be entitled to the presumption of truth, allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). Dismissal pursuant to Fed. R. Civ. P. 12(b)(6) is appropriate if the complaint fails to plead a plausible claim for relief.

The allegations in the Third Amended Complaint, which is Plaintiffs' fourth attempt at pleading, are simply "bald" and "conclusory" allegations as noted in *Iqbal* and stand in marked contrast to the detailed factual allegations in *Starr*. *Iqbal*, 556 U.S. at 681; *Starr*, 652 F.3d at 1216. In *Starr*, the complaint contained sufficient facts to plausibly suggest the sheriff had knowledge of and acquiesced in unconstitutional conduct of subordinate jail staff by describing specific events to substantiate a theory of culpability. The Ninth Circuit declined to dismiss because the complaint was detailed in describing the contents and timing of numerous reports concerning inmate violence caused by deputy conduct.

In contrast, the Third Amended Complaint is devoid of any detail, and what is most alarming is that it **does not allege any new allegations against Harney County**. Plaintiffs have merely asserted that the Harney County Defendants conspired and furthered an assassination plot targeting Finicum for his political beliefs. These allegations, without any factual support, are insufficient, warranting dismissal under FRCP 12(b)(6).

To further illustrate this fact, attached as Exhibits 1 and 2 to the Declaration of Thomas F. Armosino are excerpts of the Third Amended Complaint and Second Amended Complaint, respectively.

The Second Cause of Action against Harney County, under 42 U.S.C. § 1983 *Monell* theory, is found at paragraphs 304-314 of the Third Amended Complaint. Comparing these to the allegations of the Second Amended Complaint, Fifth Cause of Action, at paragraphs 345-355, show the same allegations without passing or substantive additions.

The Third Cause of Action, which alleges Conspiracy against all defendants, is found at paragraphs 315-319 of the Third Amended Complaint. Comparing this with the Second Amended Complaint, Sixth Cause of Action, at paragraphs 356-360, show the same assertions.

The Fourth Cause of Action, which alleges Negligence against all defendants, is found at paragraphs 320-328 of the Third Amended Complaint. Again, comparing these with the Negligence claims in the Second Amended Complaint, Seventh Cause of Action, at paragraphs 361-369, show that Plaintiffs simply cut and pasted these allegations.

The Fifth (and final) Cause of Action, Assault and Battery – Common Law, against all defendants, is found at paragraphs 329-333 of the Third Amended Complaint. Comparing these with the Assault and Battery allegations in the Second Amended Complaint, Eighth Cause of Action, at paragraphs 370-374, they are the same result.

Plaintiffs have continually been given the opportunity to allege conduct with sufficient facts to plausibly suggest that Harney County had knowledge of and acquiesced to unconstitutional conduct. Plaintiffs have once again not done so, and given the courtesy of the ability to reassert and amend their complaint, they have simply repeated the previous allegations through “bald” and “conclusory” allegations.

Defendant Harney County respectfully requests that this Court dismiss the allegations against this defendant and enter judgment with prejudice with no ability to amend. Clearly, after all of the time that has transpired, if Plaintiffs had plausible allegations against Harney County that could be pled, they would have been pled.

DATED this 29th day of October, 2021.

FROHNMAYER, DEATHERAGE, JAMIESON,
MOORE, ARMOSINO & McGOVERN, P.C.

s/ Thomas F. Armosino

Thomas F. Armosino, OSB #911954

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Of Attorneys for Defendant Harney County

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **DEFENDANT HARNEY COUNTY'S MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM** upon:

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By automatic electronic transmission via the Court's Case Management/Electronic Case Files system.

DATED this 29th day of October, 2021.

FROHNMAYER, DEATHERAGE, JAMIESON,
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