UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

BROOKLYN CLARK,

Plaintiff,

v.

SHELLY DOE, FRANKIE DOE, TIGARD POLICE DEPARTMENT, and MEGAN LINN,

Defendants.

Case No. 19-cv-00769-YY

FINDINGS AND RECOMMENDATIONS

YOU, Magistrate Judge:

Pro se plaintiff Brooklyn Clark has brought an action against defendants Shelly Doe, Frankie Doe, Tigard Police Department, and Megan Linn. *See* First Am. Compl. ("FAC"), ECF #31. Additional defendants (Community Partners for Affordable Housing, Income Property Management, Rachel Duke, Hillary Winslow, and Elena Shayla) were originally named in this suit and have been voluntarily dismissed. ECF #43.

Defendant Shelly Doe, a.k.a. Shelly Forster ("Forster"), and defendant Frankie Doe, a.k.a. Frankie Wiseman ("Wiseman"), have filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure ("F.R.C.P.") 12(b)(5) for insufficient service of process and F.R.C.P 12(b)(6) for failure to state a claim upon which relief can be granted. Mot. Dismiss, ECF #45.

The court finds this matter suitable for decision without oral argument pursuant to L.R. 7-1(d)(1). For the reasons set forth below, the Motion to Dismiss (ECF #45) should be GRANTED.

FINDINGS

I. Plaintiff's Claims

In the First Amended Complaint, plaintiff alleges the following claims:

> First Claim: Claim for "[d]iscrimination in the sale or rental of housing and other prohibited practices" pursuant to 42 U.S.C. § 3604(b) against Community Partners for Affordable Housing, Income Property Management, Rachel Duke, Hillary Winslow, Elena Shayla, Frankie Wiseman, and Shelly Forster;
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> Second Claim: Claim for "[d]iscrimination in the sale or rental of housing and other prohibited practices" pursuant to 42 U.S.C. § 3604(d) against Community Partners for Affordable Housing, Income Property Management, Rachel Duke, Hillary Winslow, and Elena Shayla;
>
> Third Claim: Claim for "[d]iscrimination in the sale or rental of housing and other prohibited practices" pursuant to 42 U.S.C. § 3604(3)(B) against Community Partners for Affordable Housing, Income Property Management, Rachel Duke, Hillary Winslow, and Elena Shayla; and
>
> Fourth Claim: Claim for racial discrimination pursuant to 42 U.S.C. § 1983 against Tigard Police Department and Megan Linn.

FAC ¶¶ 66-82, ECF #31.

Plaintiff, who identifies as a black transgender woman, alleges that Forster and Wiseman were residents at the Greenburg Oaks Apartments ("Greenburg Oaks") where plaintiff also lived. *Id.* ¶¶ 4, 5, 6, 67, ECF #31. Community Partners for Affordable Housing ("CPAH") is the landlord/property owner of Greenburg Oaks, and Income Property Management ("IPM") is the property management company. *Id.* ¶¶ 9, 11. Plaintiff asserts that Forster and Wiseman "aided and abetted Income Property Management and/or Community Partners for Affordable Housing in its violations alleged herein." *Id.* ¶¶ 5, 6.

Plaintiff claims that she and others gained permission to hold a "Tenant's Right's [*sic*] Workshop" in the community room at Greenburg Oaks. *Id.* ¶¶ 17, 31, 65. In the days leading up to the workshop, plaintiff and others posted and reposted flyers advertising the event in the common areas and on each building at Greenburg Oaks. *Id.* ¶ 34.

Against Forster, plaintiff alleges that when she posted a "Renter's Rights Workshop" flyer on April 28, 2018:

- [Forster] walked out of her apartment . . . and shouted, "I am the person taking down your flyers because the landlord told me to"! *Id.* ¶ 36.
- [Plaintiff] attempted to reason with [Forster]; however, [Forster] began assaulting [plaintiff]. *Id.* ¶ 37.
- [Plaintiff] was able to stop [Forster] from assaulting her, finish re-posting the event flyers, and walk back to her apartment . . . . *Id.* ¶ 38.

Against Wiseman, plaintiff alleges that when she was finishing posting the event flyers:

- [Wiseman] walked out of her apartment and began making accusations against [plaintiff] and used numerous racial and/or trans-phobic slurs against [plaintiff]. Those slurs were made known to [plaintiff] by another resident who was witnessing the entire controversy from the playground area directly in front of the common area where [plaintiff] was re-posting the event flyers. *Id.* ¶ 41.
- [Wiseman] gave false witness to the Tigard PD and/or Officer Megan Linn because [Wiseman and Forster] share the same views of white supremacy, as well as trans/homo-phobia. *Id.* ¶ 61.

On May 1, 2018, plaintiff received a criminal citation for the alleged assault against Forster, which plaintiff alleges that CPAH, IPM, and other defendants used as an opportunity to evict plaintiff from her Greenburg Oaks apartment. *Id.* ¶¶ 46, 47, 59. Plaintiff contends that Forster and Wiseman are friends and "cigarette smoking buddies" with Elena Shayla, who was the property manager. *Id.* ¶¶ 13, 62. Plaintiff alleges that the eviction was a pretext to unlawful housing discrimination. *Id.* ¶ 63. Plaintiff contends that Forster and Wiseman's actions were

criminal and motivated by their hatred for nonwhite and LGBT people, and plaintiff's race and gender identity factored into their assault and discrimination. *Id.* ¶¶ 65, 67.

II. Motion to Dismiss Pursuant to Rule 12(b)(5)

A. Facts Regarding Service of Process

Plaintiff filed the original Complaint on May 15, 2019, and the court granted plaintiff's application to proceed *in forma pauperis* on May, 16, 2019. Compl., ECF #2; Order, ECF #5. On July 23, 2019, the court ordered plaintiff to show cause why the complaint should not be dismissed for failure to state a claim. Order Show Cause, ECF #24. In response to the Order to Show Cause, plaintiff filed the First Amended Complaint on August 13, 2019. ECF #31. At the time the First Amended Complaint was filed, all defendants, except Forster and Wiseman, had been served and had entered appearances in this action. Order (Aug. 15, 2019), ECF #32. Regarding Forster and Wiseman, the court instructed plaintiff to "prepare and submit new summonses, USM-285 forms, and provide service copies of the first amended complaint to the court," and indicated it would direct the U.S. Marshals Service to attempt to serve Forster and Wiseman. *Id.*

On September 3, 2019, the court issued summonses for Forster and Wiseman, and forwarded the summonses, USM-285 form, and copies of the First Amended Complaint to the U.S. Marshals Service. ECF #38. The U.S. Marshals Service attempted to serve Forster and Wiseman on nine separate occasions, after which it asked the court to be relieved of any further obligation to serve these defendants because "additional attempts to effect service would be unduly burdensome." Order (Sept. 9, 2019), ECF #41. The court instructed the U.S. Marshals Service that it "need not make further attempts to effectuate service" on Forster and Wiseman,

and noted "[t]his does not preclude plaintiff from herself finding another legally permissible way to serve these defendants on her own." *Id.*

To date, no proof of service has been filed with the court. *See* F.R.C.P. 4(l)(1) ("Unless service is waived, proof of service must be made to the court."). In support of the motion to dismiss, Forster has submitted a declaration stating:

> 3. On September 21, 2019, Defendant Frankie Wiseman gave me a copy of the summons and complaint in this case. I was told it was posted on the exterior of our building. I do not know who put it there or how long it was there prior to being discovered.
>
> 4. I was not aware of any lawsuit prior to being handed the documents on September 21, 2019.
>
> 5. I have not received any documents related to this case by first class mail.
>
> 6. To my knowledge, no one at my dwelling has signed for any documents related to this case, and I have not received any other than the documents given to me by Defendant Wiseman.

Forster Decl. ¶¶ 3-6, ECF #45-1.

Wiseman also has submitted a declaration stating:

> 3. On September 21, 2019, a neighbor gave me a set of documents that I was told were posted on the exterior of the building. The documents included a summons and complaint for myself, and a set for Shelly Forster. I gave Defendant Forster her copy. I do not know who posted the documents, or how long they had been there.
>
> 4. I was not aware of any lawsuit prior to being handed the documents on September 21, 2019.
>
> 5. I have not received any documents related to this case by first class mail.
>
> 6. I signed for and returned a set of documents related to this case by registered mail.

Wiseman Decl. ¶¶ 3-6, ECF #45-2.

B. Legal Standards—Rule 12(b)(5)

Rule 12(b)(5) permits the filing of a motion to dismiss for "insufficient service of process." "A federal court does not have jurisdiction over a defendant unless the defendant has been served properly under" Rule 4. *Direct Mail Specialists, Inc. v. Eclat Computerized Technologies, Inc.*, 840 F.2d 685, 688 (9th Cir. 1988); *see also Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999) ("In the absence of service of process . . . a court ordinarily may not exercise power over a party the complaint names as defendant.") (citations omitted); *Strong v. Countrywide Home Loans, Inc.*, 700 F. App'x 664, 667 (9th Cir. 2017) (citing *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987)) ("Before a . . . court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied.") (cited pursuant to Ninth Circuit Rule 36-3). "Rule 4 is a flexible rule that should be liberally construed so long as a party receives sufficient notice of the complaint." *Direct Mail Specialists*, 840 F.2d at 688 (citation and internal quotation marks omitted). "Nonetheless, without substantial compliance with Rule 4 neither actual notice nor simply naming the defendant in the complaint will provide personal jurisdiction." *Id.*

When a defendant challenges service, the plaintiff bears the burden of establishing the validity of service. *Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir. 2004). If service of process is insufficient, the court has discretion either to dismiss the action or quash service. *S.J. v. Issaquah Sch. Dist. No. 411*, 470 F.3d 1288, 1293 (9th Cir. 2006).

C. Applicable Rules Regarding Service of Individuals

Pursuant to Rule 4(e), a plaintiff may complete service on an individual defendant by:

> (1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or

> (2) doing any of the following:
>
> > (A) delivering a copy of the summons and of the complaint to the individual personally;
> >
> > (B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or
> >
> > (C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

F.R.C.P. 4(e).

Oregon Rule of Civil Procedure ("O.R.C.P.") 7 D(1) "sets forth a 'reasonable notice' standard for determining adequate service of summons: 'Summons shall be served . . . *in any manner reasonably calculated*, under all the circumstances, to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend. . . .'" *Baker v. Foy*, 310 Or. 221, 224-25 (1990) (emphasis in original). "Rather than requiring a particular manner of service to satisfy the standard of adequate service, the rule endorses the process of examining the totality of the circumstances, to determine if the service of summons was reasonably calculated to provide defendant with notice of the action and reasonable opportunity to appear and defend." *Id.* at 225.

O.R.C.P. 7 D(2) provides a non-exclusive list of methods of service that "*may* be used." *Id*. (emphasis in original). They include:

> (a) **Personal service.** Personal service may be made by delivery of a true copy of the summons and a true copy of the complaint to the person to be served.
>
> (b) **Substituted service.** Substituted service may be made by delivering true copies of the summons and the complaint at the dwelling house or usual place of abode of the person to be served to any person 14 years of age or older residing in the dwelling house or usual place of abode of the person to be served. Where substituted service is used, the plaintiff, as soon as reasonably possible, shall cause to be mailed by first class mail true copies of the summons and the complaint to the defendant at defendant's dwelling house or usual place of abode, together with a statement of the date, time, and place at which substituted service

> was made. . . .
>
> (c) **Office service.** If the person to be served maintains an office for the conduct of business, office service may be made . . . by leaving true copies of the summons and the complaint at that office during normal working hours with the person who is apparently in charge. . . .
>
> (d) **Service by mail.**
>
> > (i) **Generally.** When service by mail is required or allowed by this rule or by statute, except as otherwise permitted, service by mail shall be made by mailing true copies of the summons and the complaint to the defendant by first class mail and by any of the following: certified, registered, or express mail with return receipt requested or any other form of mail that may delay or hinder actual delivery of mail to the addressee.

O.R.C.P. 7 D(2)(a)-(d)(i).

O.R.C.P. 7 D(3)(a)(i) specifically provides that individuals may be served

> by personal delivery of true copies of the summons and the complaint to the defendant or other person authorized by appointment or law to receive service of summons on behalf of the defendant, by substituted service, or by office service. Service may also be made upon an individual defendant or other person authorized to receive service . . . by a mailing made in accordance with paragraph D(2)(d) of this rule provided the defendant or other person authorized to receive service signs a receipt for the certified, registered, or express mailing, in which case service shall be complete on the date on which the defendant signs a receipt for the mailing.

When evaluating the adequacy of service in Oregon, the court applies the two-step methodology set forth in *Baker*:

> First, the court must determine if the method in which service of summons was made was one of those methods described in ORCP 7 D(2), specifically permitted for use upon the particular defendant by ORCP 7 D(3), and accomplished in accordance with ORCP 7 D(2). If so, the service is presumptively adequate and, unless the defendant overcomes the presumption, service will be deemed effective.
>
> If, however, presumptively adequate service is not effected, or if the defendant rebuts the presumption of valid service, the court must then consider whether the manner of service employed by plaintiff satisfies the 'reasonable notice' standard of adequate service set forth in ORCP 7 D(1). Only if that inquiry is answered in the affirmative will service be deemed valid.

Davis Wright Tremaine, LLP v. Menken, 181 Or. App. 332, 337 (2002) (citing *Baker*, 310 Or. at 228-29) (citations, quotations marks, and brackets omitted).

D. Analysis

Here, according to Forster and Wiseman, the summons and complaint were posted on the exterior of a building of the apartment complex in which they were tenants. This is not one of the methods authorized by Rule 4(e): The summons and complaint were not delivered to defendants personally, not left at defendants' dwelling with a resident of suitable age and discretion, and not delivered an authorized agent. F.R.C.P. 4(e)(2)-(4). Further, this method does not comply with Oregon law because it was not personal, substituted, office, or mail delivery. O.R.C.P. 7 D(2)(a)-(d). Thus, the posting was not presumptively adequate service. *Baker*, 310 Or. at 226.

The remaining question, then, is whether this method of service can be viewed as "reasonably calculated to apprise" defendants of the existence and pendency of the action. The "adequacy of service is determined by examining the circumstances known to the plaintiff at the time of service." *Murphy v. Price*, 131 Or. App. 693, 698 (1994); *see also Baker*, 310 Or. at 225 n.6 ("In determining whether notice is adequate, most courts, including this one, usually look at the totality of the circumstances *retrospectively*.") (emphasis in original). Thus, "actual notice by the defendant of the action does not make service adequate." *Roller v. Herrera*, No. 3:18-CV-00057-HZ, 2018 WL 2946395, at *6 (D. Or. June 11, 2018) (quoting *Baker*, 310 Or. at 230).

In *Baker*, the plaintiff filed a negligence claim against a 17-year-old defendant and his mother following an accident in which the defendant was operating his mother's vehicle. 310 Or. at 223. A process server served a copy of the summons and complaint on the defendant's mother at her residence and also handed her a copy of the summons and complaint directed to

the defendant. *Id.* Although the defendant had told investigating officers at the scene of the accident that he lived at his mother's residence, he had not lived there for over two years. *Id.* The Oregon Supreme Court held that the defendant's "happenstance reading of the complaint that had been left with his mother while he was making a fortuitous visit to her home is not service in 'a manner reasonably calculated' by plaintiff or plaintiff's attorney to apprise defendant of the existence and pendency of the action against him." *Id.* at 230. Similarly, here, defendants' "happenstance reading" of a complaint posted on the outside of a building at their apartment complex is not service in a manner reasonably calculated to apprise them of the existence and pendency of the action against them.

Plaintiff contends that she served Forster and Wiseman by certified mail, and attaches receipts dated September 20, 2019, for certified mail, return receipt requested, sent to two addresses: 11855 SW 91st Ave., #61, and 11855 SW 91st Ave., #67, in Tigard, Oregon. ECF #46, at 9. Notably, however, these certified mail receipts contain only addresses and do not name either defendant as the intended recipient. Moreover, plaintiff sent the certified mail with unrestricted delivery. Oregon courts have repeatedly held that service is invalid where a plaintiff sends a summons and complaint by certified mail with unrestricted delivery. *See Davis Wright Tremaine*, 181 Or. App. at 341 ("[A]s a general rule, service by mail on an individual must be by restricted delivery—i.e., only the person being served can either accept or refuse the mailing—to satisfy the reasonable notice standard of ORCP 7 D(1)."); *Murphy*, 131 Or. App. at 697 (finding service invalid where the plaintiff sent certified mail, return receipt requested, but by unrestricted delivery); *Lonsdale v. Swart*, 143 Or. App. 331, 337 (1996) (same). That is because "anyone at that address—a roommate, a neighbor, defendant's landlord—could have signed for the receipt of the summons and complaint, with no assurances that defendant would ever see the papers."

Murphy, 131 Or. App. at 697. "In other words, plaintiff did not know who would actually receive the summons and complaint once they were delivered to the location. . . ." *Id.* "Under the circumstances, the attempted service did not comport with the reasonable notice requirement of ORCP 7D(1)." *Id.*

Plaintiff argues that "defendants acknowledge that they were made aware of the Amended Complaint sometime in September 2019" when Wiseman "found the amended complaints attached to their building and [Wiseman] shared it with [Forster]." Resp. 3, ECF #46. However, whether a defendant "actually received a copy of the summons and complaint" does not allow the court to "disregard any errors in the service." *Lonsdale*, 143 Or. App. at 337; *see also Roller*, 2018 WL 2946395, at *6 ("[A]ctual notice by the defendant of the action does not make service adequate.") (quoting *Baker*, 310 Or. at 230).

"[L]egally, under Oregon's sufficiency of service rules and related jurisprudence, actual notice is, essentially, irrelevant." *Davis Wright Tremaine*, 181 Or. App. at 338–39. "[A]dequacy of service is determined by examining the circumstances known to the plaintiff at the time of service." *Murphy*, 131 Or. App. at 698; *see also Roller*, 2018 WL 2946395, at *6. "ORCP 7 D(1) focuses not on the defendant's subjective notice but, instead, on whether the plaintiff's conduct was objectively, reasonably calculated to achieve the necessary end. That is, regardless of whether the defendant ever actually received notice, were the plaintiff's efforts to effect service reasonably calculated, under the totality of the circumstances then known to the plaintiff, to apprise the defendant of the pendency of the action?" *Davis Wright Tremaine*, 181 Or. App. at 339.

Here, sending certified mail to unnamed recipients with unrestricted delivery was not objectively, reasonably calculated to apprise the defendants in this action of the existence and

pendency of the action. *See Murphy*, 131 Or. App. at 697; *Lonsdale*, 143 Or. App. at 337. That Forster and Wiseman had actual notice is "essentially, irrelevant."[1] *Davis Wright Tremaine*, 181 Or. App. at 338-39. Finally, while "ORCP 7G directs the court to 'disregard any error in the . . . service of the summons that does not materially prejudice the substantive rights of the party against whom summons was issued[,] . . . [a]dequate service . . . 'is, itself, a prerequisite to disregarding errors in the content or service of a summons under the authority of the second sentence of ORCP 7G.'" *Murphy*, 131 Or. App. at 699 (citations omitted). "[A]ctual notice is not enough to trigger the application of ORCP 7G." *Id.* (quoting *Levens v. Koser*, 126 Or. App. 399, 404 (1994)).

The court has discretion to dismiss this case for lack of proper service. *S.J.*, 470 F.3d at 1293. Although plaintiff is proceeding *pro se* in this case, "*[p]ro se* litigants must follow the same rules of procedure that govern other litigants." *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). "Challenges to the manner of service are interpreted strictly, even for *pro se* litigants." *Rosado v. Roman*, No. 16-cv-784-SI, 2017 WL 3473177, at *3 (D. Or. Aug. 11, 2017).

Plaintiff filed the First Amended Complaint in August 2019, and has been given four months to perfect service but has failed to do so.[2] *See* Order (Sept. 9, 2019), ECF #41 (advising

[1] It also appears that Wiseman signed for one of the September 2019 mailings. *See* ECF #46, at 10. However, in her declaration, Wiseman states, "I have not received any documents related to this case by first class mail. . . I signed for and returned a set of documents related to this case by registered mail." Wiseman Decl. ¶¶ 5, 6, ECF #45-2. "The fact that defendant actually received, but refused, the certified mailing is legally immaterial . . . ORCP 7 D(1) focuses on the reasonableness of the plaintiff's conduct, under the totality of circumstances known to the plaintiff at the time it mailed the summons and complaint." *Davis Wright Tremaine*, 181 Or. App. at 343. When plaintiff attempted service by certified mail with unrestricted delivery, it was inadequate under Oregon law. *See Murphy*, 131 Or. App. at 697; *Lonsdale*, 143 Or. App. at 337.

[2] Additionally, the court has referred plaintiff to the Federal Law Clinic for assistance, ECF #30, and attempted to find *pro bono* counsel for her. *See* ECF ## 9, 11, 27, 28 (terminating

plaintiff that although service would not be made by U.S. Marshal, it did not preclude plaintiff from finding another legally permissible way to serve defendants). Nor has plaintiff demonstrated good cause for her failure to properly serve defendants. *See* F.R.C.P. 4(m). Under these circumstances, it is well within the court's discretion to dismiss the claims against Forster and Wiseman for lack of service.

IV. Motion to Dismiss Pursuant to Rule 12(b)(6)

Even if this court gave plaintiff leave to properly serve Forster and Wiseman, it would be futile, as the aiding and abetting claim that plaintiff alleges against them fails to state a valid claim for relief.

A. Legal Standards—Rule 12(b)(6)

To state a claim for relief, a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." F.R.C.P. 8(a)(2). This standard "does not require 'detailed factual allegations,'" but does demand "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting Twombly, 550 U.S. at 555).

A Rule 12(b)(6) motion tests whether there is a cognizable legal theory or sufficient facts to support a cognizable legal theory. *Taylor v. Yee*, 780 F. 3d 928, 935 (9th Cir. 2015). To survive a Rule 12(b)(6) motion, "the complaint must allege 'enough facts to state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570). In evaluating a

representation by attorney Timothy S. DeJong because plaintiff informed Stoll Berne that she did not accept representation by that firm and asked the firm to withdraw immediately).

motion to dismiss, the court must accept "all allegations of material fact as true and construe them in the light most favorable to the non-moving party." *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995).

Federal courts hold a *pro se* litigant's pleadings to "'less stringent standards than formal pleadings drafted by lawyers.'" *Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir. 1987) (quoting *Haines v. Kerner*, 404 U.S. 519, 520 (1972)); *see Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007) (per curiam) (holding that a document filed pro se "is to be liberally construed"; a plaintiff "need only give the defendant fair notice of the claim and the grounds on which it rests") (citations and internal quotation marks omitted).

B. Analysis

Plaintiff has named Forster and Wiseman only in the First Claim, a claim asserted under 42 U.S.C. § 3604(b) of the Fair Housing Act. FAC, First Claim, ECF #31. Section 3604 pertains to "[d]iscrimination in the sale or rental of housing and other prohibited places." 42 U.S.C. § 3604. Section 3604(b) provides that it is unlawful:

> To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

42 U.S.C. § 3604(b); *see Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521, 531 (5th Cir. 1996) (noting that Section 3604 "proscribes housing discrimination in two contexts: (1) the selling or renting of a dwelling, and (2) the otherwise making unavailable or denying of a dwelling"). Plaintiff alleges that Forster and Wiseman are residents of Greenburg Oaks, and

"aided and abetted Income Property Management and/or Community Partners for Affordable Housing in its alleged violations herein."[3] FAC ¶¶ 5, 6, ECF #31.

The First Amended Complaint sufficiently pleads that plaintiff is part of a protected class: (1) race (African-American), and (2) sex (transgender,[4] female). *Id.* ¶ 18. The First Amended Complaint also alleges that CPAH and IPM discriminated against plaintiff in the rental of a dwelling, i.e., an apartment. The issue, then, is whether plaintiff has asserted a viable claim by alleging that Forster and Wiseman "aided and abetted" CPAH and IPM in violation of 42 U.S.C. § 3604(b).

"Congress has not enacted a general civil aiding and abetting statute—either for suits by the Government (when the Government sues for civil penalties or injunctive relief) or for suits by private parties." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 177 (1994). "Thus, when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors." *Id.* "Congress instead has taken a statute-by-statute approach to civil aiding and abetting liability." *Id.*

[3] Both Forster and Wiseman assert that they are residents, not staff members, of the apartment complex and do not have any influence on any decision made by the apartment complex. Forster Decl. ¶ 7, ECF #45-1; Wiseman Decl. ¶ 7, ECF #45-2.

[4] "A claim of discrimination based on nonconformity with gender stereotypes may be investigated and enforced under the Fair Housing Act as sex discrimination[.]" Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5662, 5671 (Feb. 3, 2012) (codified at 24 C.F.R. §§ 5, 200, 203, 236, 400, 570, 574, 882, 891, and 982).

Section 3604(b) provides for a civil cause of action, and its plain language sets forth who is liable: one who "discriminate[s] against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith. . . ." The statute does not provide for aiding and abetting liability. *See Moreno-Morante v. Gonzales*, 490 F.3d 1172, 1175 (9th Cir. 2007) (stating that the court's "starting point" for statutory construction is the statute's plain language, and if it is unambiguous, the court's inquiry is at an end). Had Congress intended for aiding and abetting civil liability to apply, it could and would have said so. *Cent. Bank of Denver*, 511 U.S. at 183 (1994) ("[N]othing in the text or history of § 10(b) [of the Securities and Exchange Act of 1934] even implies that aiding and abetting was covered by the statutory prohibition on manipulative and deceptive conduct."); *Freeman v. DirecTV, Inc*., 457 F.3d 1001, 1006 (9th Cir. 2006) (reaching a similar conclusion with respect to 18 U.S.C. §§ 2702, 2707). Because aiding and abetting does not exist as a matter of law under Section 3604(b), the claim against Forster and Wiseman must be dismissed with prejudice.

RECOMMENDATIONS

The Motion to Dismiss (ECF #45) filed by defendants Forster and Wiseman should be GRANTED because plaintiff has failed to effect service of process under Rule 12(b)(5) and failed to state a claim under Rule 12(b)(6). Because plaintiff cannot allege a viable claim of aiding and abetting under 42 U.S.C. 3604(b), plaintiff's First Claim against Forster and Wiseman should be DISMISSED WITH PREJUDICE.

SCHEDULING ORDER

These Findings and Recommendations will be referred to a district judge. Objections, if any, are due Friday, January 31, 2020. If no objections are filed, then the Findings and Recommendations will go under advisement on that date.

If objections are filed, then a response is due within 14 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendations will go under advisement.

NOTICE

These Findings and Recommendations are not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any Notice of Appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of a judgment.

DATED January 14, 2020.

/s/ Youlee Yim You
Youlee Yim You
United States Magistrate Judge