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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

TERRY W. EMMERT sometimes doing
business under the name EMMERT
DEVELOPMENT COMPANY,

No. 3:13-cv-01317-HU

**OPINION AND
ORDER**

Plaintiff,

v.

CLACKAMAS COUNTY,

Defendant.

Hollis K. McMilan
HOLLIS K. MCMILAN, P.C.
805 S.W. Broadway, Suite 1900
Portland, OR 97205

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Attorneys for Defendant

1 HUBEL, Magistrate Judge:

2 Before the Court is Defendant Clackamas County's motion to
3 dismiss Plaintiff Terry Emmert's ("Plaintiff") complaint without
4 prejudice and with leave to amend, pursuant to Federal Rules of
5 Civil Procedure ("Rule") 8(a)(2), 9(b) and 12(b)(6). At oral
6 argument and in his response brief, Plaintiff essentially conceded
7 that his complaint fails to state a claim for fraud in light of the
8 requirements imposed by Rule 9(b).¹ The Court will therefore limit
9 its analysis to Plaintiff's remaining inverse condemnation and
10 equal protection claims. For the reasons that follow, Defendant's
11 motion (Docket No. 9) to dismiss is granted.

12 **I. FACTS AND PROCEDURAL HISTORY**

13 The present action concerns thirteen tracts of land located
14 within Clackamas County that were or are owned by Plaintiff in his
15 individual capacity or as the sole member of Emmert Development
16 Company, an Oregon limited liability company. Those tracts of land
17 are generally referred to by the parties as: (1) the Hubbard Road
18 Properties; (2) the 142nd Avenue East Properties; (3) the 142nd
19 Avenue West Properties; (4) the Morning Way Properties; (5) the Con
20 Battin Road Property; (6) the Sunnyside Road Property; (7) the
21 13171 Property; (8) the 15576 Property; (9) the 14785 Property;
22 (10) the Clear Creek Estates Property; (11) the Emmert View Court
23

24 ¹ For example, at page two of his response brief, Plaintiff
25 states: "The Court can spare much time and aggravation sorting
26 through the [Defendant]'s blunderbuss motion knowing that
27 [Plaintiff] is prepared to file an amended complaint that repleads
28 his allegations where needed, particularly those related to the
fraud claim." (Pl.'s Resp. Br. at 2.) Similarly, at page
nineteen, Plaintiff reiterates that he "will replead the fraud
claim with greater specificity [as required under Rule] 9(b)." (Pl.'s Resp. Br. at 19.)

1 Property; (12) the 11791 Property; and (13) the Southeast 114th
2 Properties.

3 Plaintiff's complaint alleges the following facts, which the
4 Court accepts as true.² In paragraphs ten through fifteen of the
5 complaint, Plaintiff alleges that Defendant broke a verbal promise
6 to purchase the Hubbard Road Properties and the 142nd Avenue East
7 Properties, and then proceeded to discourage buyers from purchasing
8 the 142nd Avenue East Properties and threatened to eliminate
9 certain entries and/or attempt to thwart historic uses on two of
10 the Hubbard Road Properties—one of which sold in November 2009.³

11 In paragraphs sixteen through nineteen of the complaint,
12 Plaintiff alleges that a potential buyer rescinded an offer to
13 purchase the 142nd Avenue West Properties in June 2008, when it
14 became apparent that a zone change approved by Defendant in July
15 2007 would make development of the land "impossible." In
16 paragraphs twenty through twenty-three of the complaint, Plaintiff
17 alleges that Defendant broke a verbal promise to purchase the
18 Morning Way Properties sometime around November 2008, causing him
19 to lose a sale.

20 In paragraphs twenty-four through twenty-seven of the
21 complaint, Plaintiff alleges that a light rail project caused a
22 piece of land formerly owned by Defendant to revert to the State of
23 Oregon at some unspecified time, and as a result, a buyer rescinded
24 his offer to purchase the Con Battin Road Property on January 28,

25 _____

26 ² It must be noted that the facts recited below reflect the
27 lack of specificity in Plaintiff's complaint.

28 ³ The Hubbard Road Properties were purchased at some
unspecified time in 2003.

1 2010. In paragraphs twenty-eight through twenty-nine, Plaintiff
2 alleges that he has been unable to obtain access to the Sunnyside
3 Road Property after a road widening project, which in turn has
4 greatly impaired, if not eliminated, Plaintiff's ability to develop
5 or sell the property.

6 In paragraphs thirty through thirty-two of the complaint,
7 Plaintiff alleges that Defendant broke a verbal promise to purchase
8 the 13171 Property, causing Plaintiff to lose to an unspecified
9 purchaser at an unspecified time. In paragraphs thirty-three
10 through thirty-five of the complaint, Plaintiff generally alleges
11 that Defendant broke a verbal promise to purchase the 15576
12 Property.

13 In paragraph thirty-six of the complaint, Plaintiff generally
14 alleges that potential buyers were given false information by
15 Defendant "regarding the lots making up" the 14785 Property, and an
16 unnamed individual who purchased a lot was given unspecified false
17 information that delayed construction and apparently caused
18 Plaintiff to refund her purchase money. In paragraph thirty-seven
19 of the complaint, Plaintiff alleges that a buyer rescinded his
20 offer to purchase a home at the Clear Creek Estates Property after
21 Defendant repeatedly provided false information regarding the
22 suitability of the septic system.

23 In paragraphs thirty-eight through forty of the complaint,
24 Plaintiff alleges that an unnamed developer refused to purchase the
25 remaining lots at the Emmert View Court Property because Defendant
26 "caused the developer so many problems on the first four lots on
27 which it wanted to build." Plaintiff also alleges that a couple
28 has unsuccessfully tried to obtain a building permit from Defendant

1 after purchasing a lot in 2006. In paragraphs forty-one through
2 forty-two of the complaint, Plaintiff alleges that he lost a sale
3 after Defendant misrepresented the boundary lines of the 11791
4 Property and that Defendant has refused to allow Plaintiff to
5 develop or sell the property prior to completing a "comprehensive
6 plan."

7 In paragraphs forty-three through forty-four of the complaint,
8 Plaintiff alleges that Defendant agreed to allow him to use the
9 Southeast 114th Properties for storage purposes and then proceeded
10 to cite him for "illegal storage." In the process of challenging
11 the citation, presumably at some administrative level, Plaintiff
12 alleges that Defendant's employees lied about whether Plaintiff had
13 received permission to use the Southeast 114th Properties for
14 storage purposes.

15 Based on the foregoing events, Plaintiff filed the present
16 action against Defendant on July 31, 2013, alleging a claim for
17 inverse condemnation under the Oregon and United States
18 Constitutions, a claim under 42 U.S.C. § 1983 for violation of
19 Plaintiff's constitutional right to equal protection under the
20 Fourteenth Amendment, and a claim for common law fraud. On
21 February 19, 2014, the Court heard argument on Defendant's pending
22 motion to dismiss. On April 21, 2014, before this Court issued its
23 opinion, Plaintiff filed an unopposed motion to correct the record,
24 or alternatively, to make roughly 100 pages of exhibits part of the
25 record at the motion to dismiss stage. The following day, April
26 22, 2014, the Court issued a minute order granting Plaintiff's
27 unopposed motion and clarifying that the aforementioned exhibits
28

1 had been "received and admitted as part of the record on
2 Defendant's Motion to Dismiss."⁴

3 II. LEGAL STANDARD

4 A. Rule 8(a)(2)

5 Under Rule 8(a)(2), a pleading must contain "a short and plain
6 statement of the claim showing that the pleader is entitled to
7 relief." FED. R. CIV. P. 8(a)(2). Put another way, the federal
8 notice pleading standard requires that the pleader "give the
9 defendant fair notice of what the claim . . . is and the grounds
10 upon which it rests." *Shannon v. County of Sacramento*, No.
11 2:13-cv-018342013 WL 6564318, at *2 (E.D. Cal. Dec. 13, 2013)
12 (citation omitted).

13 B. Rule 12(b)(6)

14 A court may dismiss a complaint for failure to state a claim
15 upon which relief can be granted pursuant to Rule 12(b)(6). In
16 considering a Rule 12(b)(6) motion to dismiss, the court must
17 accept all of the claimant's material factual allegations as true
18 and view all facts in the light most favorable to the claimant.
19 *Reynolds v. Giusto*, No. 08-CV-6261, 2009 WL 2523727, at *1 (D. Or.
20 Aug. 18, 2009). The Supreme Court addressed the proper pleading
21 standard under Rule 12(b)(6) in *Bell Atlantic Corp. v. Twombly*, 550
22 U.S. 544 (2007). *Twombly* established the need to include facts
23 sufficient in the pleadings to give proper notice of the claim and
24

25 ⁴ "To the extent that [any] factual deficiencies in
26 Plaintiff's claims are cured by facts revealed in his exhibits but
27 not in the body of his complaint, Plaintiff is advised that he
28 should file an amended complaint that specifically alleges those
facts instead of relying exhibits to present those facts." *Eaves*
v. Castro, No. 1:09-cv-01647-SKO, 2010 WL 2817609, at *4 (E.D. Cal.
July 16, 2010).

1 its basis: "While a complaint attacked [under] Rule 12(b)(6) . . .
2 does not need detailed factual allegations, a plaintiff's
3 obligation to provide the grounds of his entitlement to relief
4 requires more than labels and conclusions, and a formulaic
5 recitation of the elements of a cause of action will not do." *Id.*
6 at 555 (brackets omitted).

7 Since *Twombly*, the Supreme Court has clarified that the
8 pleading standard announced therein is generally applicable to
9 cases governed by the Rules, not only to those cases involving
10 antitrust allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct.
11 1937, 1949 (2009). The *Iqbal* court explained that *Twombly* was
12 guided by two specific principles. First, although the court must
13 accept as true all facts asserted in a pleading, it need not accept
14 as true any legal conclusion set forth in a pleading. *Id.* Second,
15 the complaint must set forth facts supporting a plausible claim for
16 relief and not merely a possible claim for relief. *Id.* The court
17 instructed that "[d]etermining whether a complaint states a
18 plausible claim for relief will . . . be a context-specific task
19 that requires the reviewing court to draw on its judicial
20 experience and common sense." *Iqbal*, 129 S. Ct. at 1949-50 (citing
21 *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d Cir. 2007)). The court
22 concluded: "While legal conclusions can provide the framework of a
23 complaint, they must be supported by factual allegations. When
24 there are well-pleaded factual allegations, a court should assume
25 their veracity and then determine whether they plausibly give rise
26 to an entitlement to relief." *Id.* at 1950.

27 The Ninth Circuit further explained the *Twombly-Iqbal* standard
28 in *Moss v. U.S. Secret Service*, 572 F.3d 962 (9th Cir. 2009). The

1 Moss court reaffirmed the *Iqbal* holding that a "claim has facial
2 plausibility when the plaintiff pleads factual content that allows
3 the court to draw the reasonable inference that the defendant is
4 liable for the misconduct alleged." *Moss*, 572 F.3d at 969 (quoting
5 *Iqbal*, 129 S. Ct. at 1949). The court in *Moss* concluded by
6 stating: "In sum, for a complaint to survive a motion to dismiss,
7 the non-conclusory factual content, and reasonable inference from
8 that content must be plausibly suggestive of a claim entitling the
9 plaintiff to relief." *Moss*, 572 F.3d at 969.

10 III. DISCUSSION

11 A. Equal Protection

12 Plaintiff brings a claim against Defendant under § 1983 for
13 violation of his constitutional right to equal protection. The
14 Fourteenth Amendment's Equal Protection Clause provides that no
15 state shall "deny to any person within its jurisdiction the equal
16 protection of the laws." U.S. Const. amend. XIV, § 1. Plaintiff
17 alleges that Defendant, "in its regulatory decisions and its
18 conspiracy to block [him] from developing his land, has singled him
19 out for different treatment from other landowners in [Clackamas]
20 County." (Pl.'s Resp. Br. at 7.) In other words, Plaintiff
21 proceeds under a "class of one" theory of equal protection.

22 "The Supreme Court has recognized that 'an equal protection
23 claim can in some circumstances be sustained even if the plaintiff
24 has not alleged class-based discrimination, but instead claims that
25 she has been irrationally singled out as a so-called 'class of
26 one.'" *Gerhart v. Lake County*, 637 F.3d 1013 (9th Cir. 2011)
27 (citation omitted). To state a plausible class-of-one claim, "a
28 plaintiff must allege that (1) the defendant treated him

1 differently from others similarly situated, (2) the defendant did
2 so intentionally, and (3) there was no rational basis for the
3 difference in treatment." *Cooper v. Menges*, 541 F. App'x 228, 233
4 (3d Cir. 2013) (emphasis added); see also *Village v. Willowbrook v.*
5 *Olech*, 528 U.S. 562, 564 (2000) ("Our cases have recognized
6 successful equal protection claims brought by a 'class of one,'
7 where the plaintiff alleges that she has been intentionally treated
8 differently from others similarly situated and that there is no
9 rational basis for the difference in treatment.").

10 In *Scocca v. Smith*, No. C-11-1318 EMC, 2012 WL 2375203 (N.D.
11 Cal. June 22, 2012), the district court expounded on the pleading
12 requirement in a class-of-one equal protection case, stating:

13 [w]here a plaintiff is making a class-of-one claim, the
14 essence of the claim is that only the plaintiff has been
15 discriminated against, and therefore the basis for the
16 differential treatment might well have been because the
17 plaintiff was unique; thus, there is a higher premium for
18 a plaintiff to identify how he or she is similarly
19 situated to others. As the Second Circuit noted in [a
20 2010 decision], class-of-one plaintiffs must show an
21 extremely high degree of similarity between themselves
22 and the persons to whom they compare themselves. Several
23 [other] courts have [also] indicated that there needs to
24 be specificity in a class-of-one case.

25 *Id.* at *5 (internal citations, quotation marks and brackets
26 omitted).

27 In *Perano v. Township of Tilden*, 423 F. App'x 234 (3d Cir.
28 2011), for example, the Third Circuit stated:

29 [Plaintiff] has simply alleged that he was treated
30 differently from other similarly situated residential and
31 commercial developers. Without more specific factual
32 allegations as to the allegedly similarly situated
33 parties, he has not made plausible the conclusion that
34 those parties exist and that they are like him in all
35 relevant aspects. Accordingly, [Plaintiff] has failed to
36 state a[] [plausible class-of-one] Equal Protection
37 claim.

1 *Id.* at 238-39 (internal citation and quotation marks omitted); see
2 also *Scocca*, 2012 WL 2375203, at *6 (concluding that the plaintiff
3 failed to state a plausible class-of-one Equal Protection claim
4 because he only alleged in conclusory terms that he was similarly
5 situated with seventy other people who were apparently treated
6 differently).

7 Here, the Court agrees with Defendant that Plaintiff has
8 failed to state a plausible class-of-one claim under the Equal
9 Protection Clause. The complaint alleges “[t]here are no other
10 similarly situated property owners and/or developers within
11 Clackamas County known to [Plaintiff] who have been subjected to
12 the same and/or similar interference with their efforts to sell
13 and/or develop their properties.” (Compl. ¶ 56.) Plaintiff has
14 the test backwards. It is not the **absence** of similarly situated
15 property owners who have had the same or similar treatment by
16 Defendant that supports this type of claim. It is the **existence** of
17 such similarly situated property owners who weren’t treated in the
18 alleged manner that gives rise to the claim. Plaintiff must allege
19 with particularity who these “others” are. See *Vinatieri v.*
20 *Mosley*, 787 F. Supp. 2d 1022, 1031 (N.D. Cal. 2011) (“Vinatieri has
21 not explained to *whom* he was similarly situated. . . . The equal
22 protection claim must be dismissed, although Vinatieri may amend
23 the FAC if he can do so.”); *Shapiro v. Suvorov*, No. SACV
24 14-0286-UA, 2014 WL 1347180, at *7 (C.D. Cal. Apr. 4, 2014) (“While
25 Plaintiff claims that he was treated differently than the other
26 subtenants at the premises, Plaintiff has not alleged that his
27 circumstances were similar to those of any other subtenant in all
28 relevant respects.”).

1 In short, the Court grants Defendant's motion to dismiss
2 Plaintiff's class-of-one equal protection claim with leave to
3 replead in accordance with the authorities cited in this Opinion
4 and Order.

5 **B. Inverse Condemnation**

6 Plaintiff also brings a claim against Defendant for inverse
7 condemnation. Though styled as a single claim for relief, in
8 paragraph fifty of his complaint, Plaintiff alleges a taking of
9 property without payment of just compensation in violation of
10 Article I, section 18, of the Oregon Constitution, as well as the
11 Fifth Amendment to the United States Constitution. In his
12 briefing, Plaintiff focuses his arguments on the viability of a
13 state law claim for inverse condemnation, and at one point,
14 seemingly suggests that the Court should disregard Defendant's
15 reliance on a federal takings case. (Pl.'s Resp. at 16) ("But the
16 federal constitution does not become relevant until the Oregon
17 constitutional claim is resolved . . ."). But Plaintiff also
18 characterizes his inverse condemnation claim as "claims [pleaded]
19 under both the Oregon and federal constitutions," citing paragraph
20 fifty of his complaint. (Pl.'s Resp. at 9.)

21 "Inverse condemnation is simply a popular term for a takings
22 claim in which the government has taken property without formal
23 condemnation proceedings." *W. Linn Corporate Park, LLC v. City of*
24 *W. Linn*, 428 F. App'x 700, 701 n.2 (9th Cir. 2011). The criteria
25 for an unconstitutional taking are not necessarily identical under
26 the provisions of the state and federal constitutions, however.
27 *Ferguson v. City of Mill City*, 120 Or. App. 210, 213 (1993).
28 Indeed,

1 [t]he Oregon Supreme Court has observed that the 'basic
2 thrust' of the two constitutional provisions 'is
3 generally the same' but has cautioned that the 'criteria'
4 used to determine if a 'taking for public use' has
5 occurred within the meaning of the Oregon Constitution
'are not necessarily identical to those pronounced from
time to time by the United States Supreme Court under the
fifth amendment.'

6 *Schoonover v. Klamath County*, 105 Or. App. 611, 614 (1991) (citing
7 *Suess Builders v. City of Beaverton*, 294 Or. 254, 259 n.5 (1982)).

8 An example that illustrates the importance of the distinction
9 is *David Hill Development, LLC v. City of Forest Grove*, 688 F.
10 Supp. 2d 1193 (D. Or. 2010), where Judge Acosta undertook separate
11 state and federal takings analyses and ultimately granted summary
12 judgment on the plaintiff's state law inverse condemnation claim
13 and denied summary judgment on the plaintiff's federal inverse
14 condemnation claim. *Id.* at 1197 & 1209-11. Later in his opinion,
15 Judge Acosta also noted that state law takings claims are subject
16 to a six-year statute of limitations under ORS 12.080(4), while
17 federal takings claims brought under § 1983 are governed by
18 Oregon's two-year statute of limitations for personal injury
19 claims. *Id.* at 1223.

20 In the Ninth Circuit, "[t]aking claims must be brought under
21 § 1983." *Hacienda Valley Mobile Estates v. City of Morgan Hill*,
22 353 F.3d 651, 655 (9th Cir. 2003); *Golden Gate Hotel Ass'n v. City*
23 *& County of San Francisco*, 18 F.3d 1482, 1486 (9th Cir. 1994)
24 ("[A]ll claims of unjust taking ha[ve] to be brought pursuant to
25 Section 1983" (citing *Azul-Pacifico, Inc. v. City of Los Angeles*,
26 973 F.2d 704, 705 (9th Cir. 1992))). "To state a claim under §
27 1983, a plaintiff must allege two essential elements—that a right
28 secured by the Constitution or laws of the United States was

1 violated; and that the alleged violation was committed by a person
2 acting under the color of state law." *Taylor v. Fields*, No. C
3 14-0411 PJH, 2014 WL 644557, at *4 (N.D. Cal. Feb. 19, 2014)
4 (citing *West v. Atkins*, 487 U.S. 42, 48 (1988)).

5 In *White v. Valley County*, No. 1:09-cv-494-EJL-CWD, 2011 WL
6 4583846 (D. Idaho Sept. 30, 2011), for example, the plaintiffs
7 filed objections to the magistrate judge's report and
8 recommendation, arguing, among other things, that "they should be
9 allowed to bring a direct action under the Takings Clause without
10 pleading it under § 1983." *Id.* at *7. The district judge
11 acknowledged that the plaintiffs were "not alone in their view,"
12 *id.* (citing *Lawyer v. Hilton Head Pub. Serv. Dist. No. 1*, 220 F.3d
13 298, 303 n.4 (4th Cir. 2000)), but nonetheless concluded that he
14 was bound by Ninth Circuit precedent requiring that taking claims
15 be brought pursuant to § 1983. *Id.* Borrowing Idaho's two-year
16 statute of limitations for personal injury actions, the Court went
17 on to conclude that one of the plaintiff's federal constitutional
18 claims (including a federal takings claim) were barred. *Id.* at *8.

19 Here, Plaintiff explicitly invokes § 1983 with respect to his
20 class-of-one equal protection claim, in addition to asserting that
21 the alleged equal protection violation was "done under color of
22 laws, ordinances, and regulations of the State of Oregon and
23 Clackamas County." (Compl. ¶ 54.) Yet, Plaintiff fails to do
24 either with respect to his inverse condemnation claim. The Court
25 cannot overlook these deficiencies because subject-matter
26 jurisdiction in this case "is wholly based upon Plaintiff's § 1983
27 claims. Consequently, if Plaintiff's complaint fails to state
28 plausible § 1983 claims, this Court would lack federal question

1 jurisdiction." *Miller v. Kashani*, No. CV 12-5649 CAS (AN), 2012 WL
2 4088689, at *2 (C.D. Cal. Aug. 17, 2012).

3 In summary, the Court concludes that Plaintiff has failed to
4 state a plausible takings claim under § 1983, or a plausible class-
5 of-one equal protection claim under § 1983. The Court grants
6 Plaintiff leave to amend his complaint, but declines to address any
7 state law claim at this time. See *Bean v. Shapiro*, No. C
8 06-201(RS), 2006 WL 3411875, at *3 (N.D. Cal. Nov. 27, 2006)
9 ("[T]he Court concludes that Bean has failed to allege a cognizable
10 federal claim against Shapiro or Villasenor, and thus has failed to
11 allege a basis for subject matter jurisdiction in this Court.
12 Because the Court concludes that Bean has failed to allege a
13 cognizable federal claim, the Court need not address Bean's state
14 law claims. . . . [T]he Court will grant Bean one final opportunity
15 to attempt to allege a viable federal claim."); see also *Wiley v.*
16 *Dep't of Children & Family Servs.*, No. CV 12-04334 GHK (AJW), 2013
17 WL 5775187, at *7 (C.D. Cal. Oct. 25, 2013) ("The complaint fails
18 to state a federal claim, and no diversity jurisdiction exists
19 against the County. Accordingly, the Court should decline to
20 exercise supplemental jurisdiction over plaintiff's state law
21 claims.").

22 IV. CONCLUSION

23 For the reasons stated, Defendant's motion (Docket No. 9) to
24 dismiss is granted. Plaintiff is granted thirty days (30) leave to
25 replead in accordance with this Opinion and Order. The parties are
26 expected to confer about the form of the amended complaint before
27 it is filed to attempt to eliminate another round of motions to
28

1 dismiss. Once filed, Defendant will have forty-five (45) days to
2 respond to the amended complaint.

3 IT IS SO ORDERED.

4 Dated this 24th day of June, 2014.

5 /s/ Dennis J. Hubel

6 _____
7 DENNIS J. HUBEL
8 United States Magistrate Judge
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