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United States District Court,
E.D. Texas,
Sherman Division.

The **INCLUSIVE COMMUNITIES PROJECT**, INC.
v.
The **CITY** OF **McKINNEY**, **TEXAS** and the Housing Authority of the **City** of **McKinney**, **Texas**.

No. 4:08-CV-434. | Aug. 18, 2009. | As Amended Aug. 20, 2009.

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Opinion

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

MICHAEL H. SCHNEIDER, District Judge.

***1** Came on for consideration the report of the United States Magistrate Judge in this action, this matter having been heretofore referred to the United States Magistrate Judge pursuant to 28 U.S.C. § 636. On July 15, 2009, the report of the Magistrate Judge was entered containing proposed findings of fact and recommendations that Defendant **McKinney** Housing Authority's Motion to Dismiss (Dkt.# 9) and Defendant **City** of **McKinney's** Motion to Dismiss (Dkt.# 13) be DENIED.

On July 29, 2009, Defendant **City** of **McKinney**, **Texas** ("**City**") filed objections to the Magistrate Judge's report. On July 27, 2009, Defendant **McKinney** Housing Authority filed objections to the Magistrate Judge's report. On August 12, 2009, The **Inclusive Communities Project**, Inc. ("ICP") filed a response. Specifically, the **City** asserts that the Magistrate Judge's Report does not address the proper requirements and applicability of the Federal Rule of Civil Procedure 8 pleading standard. While the Magistrate Judge did not address the Rule 8 analysis with the specificity requested by the **City**, the findings and conclusions of the Magistrate Judge did address the appropriate standard provided by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), and the findings and conclusions are correct. [1]

In deciding a Rule 12(b)(6) motion, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Gonzalez v. Kay*, No. 08-20544, 2009 WL 2357015 *2 (5th Cir. Aug.3, 2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). "The Supreme Court recently expounded upon the *Twombly* standard, explaining that '[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* (quoting *Ashcroft v. Iqbal*, --- U.S. ----, ----, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "It follows, that 'where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not 'shown'-'that the pleader is entitled to relief.' " *Id.*

In *Iqbal*, the Supreme Court established a two-step approach for assessing the sufficiency of a complaint in the context of a Rule 12(b)(6) motion. First, the Court identifies conclusory allegations and proceeds to disregard them, for they are "not entitled to the assumption of truth." *Iqbal*, 129 S.Ct. at 1951. Second, the Court "consider[s] the factual allegations in [the complaint] to determine if they plausibly suggest an entitlement to relief." *Id.* "This standard 'simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of' the necessary claims or elements." *Morgan v. Hubert*, No. 08-30388, 2009 WL 1884605 *3 (5th Cir. July 1, 2009). This evaluation will "be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 129 S.Ct. At 1950.

***2** Here, ICP has pleaded facts that "permit the [C]ourt to infer that [ICP] is entitled to relief." *Id.* (quoting Fed. Rule Civ. Proc. 8(a)(2)). ICP alleges that the **City** and MHA are in violation of the Fair Housing Act ("FHA"), 43 U.S.C. § 3604(a), for perpetuating racial segregation by making dwellings unavailable because of race. COMPLAINT at 2. ICP alleged that **McKinney**, **Texas** is racially segregated where East **McKinney**, east of U.S. Highway 75, is 49% white, while West **McKinney**, west of U.S. Highway 75, is 86% white. *Id.* at 4. According to ICP, all of the public housing and most of the landlords willing to accept Section 8 vouchers are located on the east side of **McKinney**. *Id.* ICP alleges that the population of housing procured through such programs is predominantly made up of racial minorities. *Id.* at 6. ICP argues that the **City** and MHA are in violation of the FHA because they are willing to negotiate for and provide low-income housing units in east **McKinney**, but not west **McKinney**, which amounts to illegal racial steering. *Id.* at 10.

In the opinion of the Court, ICP has provided more than "legal conclusions couched as factual allegation." *Iqbal,* 129 S.Ct. at 1950. (quoting *Twombly*, 550 U.S. at 555.). The facts pleaded are not "[t]hreadbare recitals of the elements of a cause of action." *Id.* at 1949. ICP has made "well-pleaded factual allegations," therefore the Court "should assume their veracity and then determine whether they plausibly give rise to entitlement to relief." *Id.* at 1950. Based on the Court's "judicial experience and common sense," ICP's alleged facts give rise to a plausible entitlement to relief under the FHA. *Id.* Taken as true, ICP's allegations of steering low-income housing away from predominantly Caucasian areas and into predominantly minority areas could plausibly entitle ICP to relief under the FHA. Therefore, ICP's complaint should not be dismissed pursuant to Rule 12(b)(6).

After reviewing Defendants' objections regarding the Rule 8 pleading standard and having made a *de novo* review of all other objections raised by Defendants, the Court is of the opinion that the findings and conclusions of the Magistrate Judge are correct, and the objections are without merit. Therefore, the Court hereby adopts the findings and conclusions of the Magistrate Judge as the findings and conclusions of this Court, and Defendant **McKinney** Housing Authority's Motion to Dismiss (Dkt.# 9) and Defendant **City** of **McKinney's** Motion to Dismiss (Dkt.# 13) are DENIED.

It is, therefore, **ORDERED** that Defendant **McKinney** Housing Authority's Motion to Dismiss (Dkt.# 9) and Defendant **City** of **McKinney's** Motion to Dismiss (Dkt. # 13) are DENIED.

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

AMOS L. MAZZANT, United States Magistrate Judge.

Pending before the Court are Defendant The Housing Authority of the **City** of **McKinney**, **Texas**' Motion to Dismiss (Dkt.# 9) and Defendant **City** of **McKinney**, **Texas**' Motion to Dismiss (Dkt.# 13). Having considered the relevant pleadings, the Court is of the opinion that Defendants' motions should be denied.

BACKGROUND

***3** The **Inclusive Communities Project**, Inc. ("ICP") made offers of financial assistance to the **City** of **McKinney**, **Texas** ("**City**") and to the Housing Authority of **McKinney**, **Texas** ("MHA") in order to encourage the development of desegregated, affordable rental housing in west **McKinney**, west of U.S. Highway 75. COMPLAINT AT 1. In exchange for the funding, ICP would obtain the ability to place its clients or other Section 8 voucher recipients in approximately thirty percent (30%) of any housing units developed with ICP's funds in west **McKinney**. *Id.* ICP alleges that both the **City** and MHA refused to negotiate for or participate in an ICP program for the development of housing in west **McKinney**, which is predominantly white, but participate in similar programs and are willing to negotiate for housing located in east **McKinney**, which is a low-income area and racially segregated. *Id.*

ICP filed its complaint on November 11, 2008, alleging that the **City** and MHA are in violation of the Fair Housing Act ("FHA"), 43 U.S.C. § 3604(a), for perpetuating racial segregation by making dwellings unavailable because of race. *Id.* at 2. ICP seeks an injunction requiring the **City** to either participate in ICP's program or provide an equivalent program that will also make units available in west **McKinney** for ICP's clients and other low-income tenants participating in the Section 8 voucher program. *Id.* at 12. MHA filed a motion to dismiss ICP's claims on December 16, 2008. The **City** filed a motion to dismiss on December 22, 2008. ICP filed a response to MHA's motion on December 31, 2008 and a response to the **City's** motion on January 7, 2009. MHA filed a reply on January 15, 2009. ICP filed a sur-reply on January 20, 2009.

The City filed a reply on January 21, 2009. ICP filed a sur-reply on January 27, 2009.

ANALYSIS

The Defendants argue that ICP's claims should be dismissed under Federal Rule of Civil Procedure 12(b)(1) because ICP lacks standing and because the alleged violation is not ripe. The Defendants also argue that ICP's claims should be dismissed under Federal Rule of Civil Procedure 12(b)(6) because ICP has not stated a claim upon which relief can be granted.

Standing

The Defendants argue that the Court does not have subject matter jurisdiction over ICP's claims because ICP lacks standing. *See Raines v. Byrd*, 521 U.S. 811, 818, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997) (federal courts have jurisdiction only if the case or controversy requirement of standing is met). The FHA makes it unlawful to "refuse to sell or rent ... or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a). Standing under the FHA extends to the full limits of Article III of the Constitution, and is not restricted by any of the doctrines of prudential standing. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982). Thus, a party has standing to file suit if it can demonstrate (1) an "injury in fact" (i.e., harm that is concrete and actual or imminent, not merely conjectural or hypothetical); (2) causation (i.e., a fairly traceable connection between the plaintiff's injury and the defendant's alleged conduct); and (3) redressability (i.e., likelihood that the requested relief will remedy the alleged injury). *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998); *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Initially, the plaintiff may meet its burden of establishing standing by alleging in its complaint the nature of its injury resulting from the defendant's conduct. [1] *Lujan*, 504 U.S. at 561. However, whether on motion for summary judgment or at trial, the plaintiff ultimately will have to set forth specific facts necessary to support the claim. *Id.*

Injury in Fact

***4** The Defendants allege that ICP's injury is hypothetical and based on a series of future events that may not occur, rather than on a concrete harm, which does not amount to an "injury in fact." The City alleges that ICP's claims are an attempt to assert the injuries of others and must be dismissed for lack of standing. ICP argues that the Defendants' refusal to participate in ICP's housing program directly injures ICP by denying it one way to use its funds to assist in the development of housing units for its clients. ICP only asserts standing on its own behalf as an organization and not on behalf of its clients. COMP. AT 11.

Under the FHA, "the Supreme Court held that an organization has suffered injury in fact if the defendant's actions impaired the organization's ability to provide counseling and referral services." *La. ACORN Fair Housing v. LeBlanc*, 211 F.3d 298, 304 (5th Cir.2000) (citing *Havens*, 455 U.S. at 379). "Such concrete and demonstrable injury to the organization's activities, with the consequent drain on the organization's resources, constitutes far more than simply a setback to the organization's abstract social interests." *Id.* "The mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization." *Assoc. for Retarded Citizens of Dallas v. Dallas County Mental Health & Mental Retardation Ctr. Bd. Of Trustees*, 19 F.3d 241, 244 (5th Cir.1994). "An organization can have standing if it proves a drain on its resources resulting from counteracting the effects of the defendant's actions." *La. ACORN*, 211 F.3d at 305. "The Supreme Court in *Havens* noted that an organization must *demonstrate at trial* that it suffered some sort of impairment in facilitating open housing before receiving judicial relief." *Id.*

"At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Meadowbriar Home for Children, Inc.*, 81 F.3d 521, 529 (5th Cir.1996) (citing *Lujan*, 504 U.S. at 561). "[W]hen the plaintiff is himself an object of the action (or foregone action) at issue ... there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it." *Id.* On a motion to dismiss for lack of standing, "general factual allegations of injury resulting from the defendant's conduct may suffice because the court presumes that general allegations embrace those specific facts that are necessary to

support the claim." *Bennet v. Spear*, 520 U.S. 154, 168, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (quoting *Lujan*, 504 U.S. at 561).

At this pleading stage, ICP's complaint sufficiently alleges a redressable injury in fact that is causally connected to the alleged conduct of the Defendants. ICP alleges that few rental units are available for ICP clients in west **McKinney**. COMP. AT 11. Because the **City** and MHA refuse to negotiate or participate in ICP's program, or a similar program, ICP's clients are barred from finding Section 8 housing in west **McKinney**. *Id.* The **City** and MHA are willing to negotiate for and participate in similar programs in east **McKinney**. COMP. AT 10. ICP argues that these practices by the Defendants maintain racial segregation of **McKinney**, which violates the FHA. COMP. AT 10-11. The Court considers ICP's allegations to support an injury in fact because, if taken as true, the facts alleged show that the **City's** and MHA's non-participation in ICP's program or a similar program impairs ICP's ability to provide housing in west **McKinney** for its clients.

***5** ICP's allegations are similar to those in *Havens Realty*. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982). Like the *Havens Realty* organization, ICP alleges that the conduct of the Defendants has a segregative effect that frustrates its mission of promoting equal housing opportunities and requires it to spend more time and money in performing its activities than it otherwise would. ICP pleads specific facts that support its claim: higher rents and reluctant landlords make it more difficult to place its Section 8 clients in low-income housing units in west **McKinney**. *See* COMP. AT 11. ICP's pleaded injuries are more concrete allegations than a mere intangible setback to ICP's general interest in desegregation of **McKinney**, **Texas**. Therefore, ICP has established an injury in fact at the pleadings stage.

Also, the Defendants argue that ICP's alleged injury is insufficient to establish standing because it is indirect. The Defendants allege that ICP's injury is indirect in that the Defendants' alleged discrimination is not directed at ICP, but against racial minorities, such as ICP's clients. Congress has abrogated the prudential standing rules in FHA cases, so ICP "may have standing to seek relief on the basis of the legal rights and interests of others." *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); *see also Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 103 n. 9, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979) (under the FHA, "as long as the plaintiff suffers actual injury as a result of the defendant's conduct, he is permitted to prove that the rights of another were infringed"); *Havens Realty*, 455 U.S. at 375-78 (holding individual plaintiffs had standing under FHA based on alleged indirect injury of being deprived of living in an integrated **community** due to defendant's racial steering of other persons). "The distinction" between third-party and first-party standing is of "little significance" under the FHA. *Havens Realty*, 455 U.S. at 375.

Causation

In order to satisfy the causation element of standing, ICP must establish that its alleged injury is fairly traceable to the Defendants' actions. The injury must not be the result of the independent action of some third party not before the court. *Lujan*, 504 U.S. at 560. ICP alleges that the Defendants are not willing to consider low-income housing developments in predominantly Caucasian areas, which causes a scarcity of available units and makes it more difficult for ICP to secure integrated housing for its clients. ICP cites numerous statistics related to the location and occupancy of low-income housing developments that purportedly demonstrate that the developments are disproportionately located in east **McKinney**, which has an above-average minority population. *See* COMP. AT 4-6.

Taking ICP's allegations as true, the Court can make a reasonable inference that, absent the Defendants' choice to only participate in low-income housing programs in east **McKinney**, there is a substantial probability that more low-income housing units would be available in the predominantly Caucasian areas of west **McKinney**, making it easier for ICP to secure housing for its clients in west **McKinney**. *Cf. Warth*, 422 U.S. at 504. ("Petitioners must allege facts from which it reasonably could be inferred that, absent the respondents' restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease in Penfield"). "Because no facts alleged ... suggest race-neutral reasons" why the Defendants would support low-income housing in east **McKinney** and not in west **McKinney**, "it is fair and not merely speculative to trace this imbalance to the alleged consideration of race." *See* ***Inclusive*** *Comm.* ***Project***, *Inc. v.* ***Tex***. *Dept. of Housing and Comm. Affairs*, 2008 WL 5191935 *5 (N.D.Tex. Dec.11, 2008) (holding it was fair to trace disproportionate denial of tax credits for proposed developments in Caucasian neighborhoods to an alleged consideration of race). Although participation and negotiation by the Defendants may not guarantee that

low-income housing will be developed in west **McKinney**, the Court may reasonably infer that participation, or at least negotiation, by the Defendants in ICP's programs, or similar programs, would over time increase the number of low-income housing units available in west **McKinney**. Therefore, ICP has sufficiently alleged the causation element of standing.

Redressability

***6** Also, ICP must establish that it is likely, and not merely speculative, that its injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 561. ICP requests relief in the form of an injunction requiring the **City** and MHA to either participate in ICP's program or provide an equivalent program that makes units available in west **McKinney** for ICP's clients. Such broad relief would redress ICP's alleged injuries. Therefore, ICP has established the redressability element of standing.

Ripeness

Having determined that ICP has standing under the FHA, the Court now considers the **City's** argument that ICP's case is not ripe for review by the Court. "A court should dismiss a case for lack of 'ripeness' when the case is abstract or hypothetical." *Groome Resources LTD., LLC v. Parish of Jefferson*, 234 F.3d 192, 199 (5th Cir.2000) (citing *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 833 F.2d 583, 586-87 (5th Cir.1987) (citations omitted)). "The key considerations are the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* "A case is generally ripe if any remaining questions are purely legal ones; conversely, a case is not ripe if further factual development is required." *Id.*

ICP's claim under the FHA is an alleged violation of 42 U.S.C. § 3604(a). This section makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, *or otherwise make unavailable or deny*, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a) (2006) (emphasis added). ICP contends that the Defendants' refusal to negotiate with ICP, or to participate in low-income housing programs, has the discriminatory effect of making dwellings in west **McKinney** unavailable to ICP's clients and maintains racial segregation in **McKinney** neighborhoods.

ICP's claim under § 3604(a) is ripe for adjudication. The actions challenged are not speculative; rather, ICP challenges actions that the Defendants have already taken. While never formally denying ICP's request to negotiate, the Defendants' indeterminate delay in responding to ICP's letter has the same effect as declining to negotiate or participate. *See Groome*, 234 F.3d at 200 ("This denial can be actual or constructive, as an indeterminate delay has the same effect as an outright denial"). At this time, there is no evidence that the Defendants have revisited ICP's request, or intend to do so, as ICP sent its request to Defendants in mid November 2008. It is reasonable for the Court to conclude that the Defendants have no intention of negotiating for, or participating in, ICP's low-income housing programs or similar programs, because there is no evidence that the Defendants have responded to ICP approximately nine months since ICP first made its requests.[2] The alleged conduct that is the basis for ICP's claim has already occurred. Therefore, "the remaining issues are purely legal ones," and are ripe for review. *Id.* at 199.

***7** Regarding the hardship to the parties if court consideration is withheld, "[n]umerous courts have stressed that housing discrimination causes a uniquely immediate injury." *Id.* (citation omitted). According to ICP, further delay in obtaining judicial resolution of this issue will allow the Defendants to continue the alleged racial steering in the location of low-income housing. ICP alleges that participation by local political subdivisions creates a "selection priority" on tax credit applications to build low-income housing developments. COMP. AT 7-8. The Defendants' refusal to participate or negotiate with ICP makes it less likely that an application for tax credits will be approved, leading to a lack of available housing for ICP's clients in west **McKinney**. *Id.* Therefore, ICP has shown a hardship, and the issue is ripe for review.

Failure to State a Claim Upon Which Relief Can Be Granted

Rule 12(b) (6) of the Federal Rules of Civil Procedure provides that a party may move for dismissal of an action for failure to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6). The Court must accept as true all well-pleaded facts contained in the plaintiff's complaint and view them in the light most favorable to the plaintiff. *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir.1996). In addition, all reasonable inferences are to be drawn in favor of the plaintiff's claims. *Lowrey v. **Texas** A & M Univ. Sys.*, 117 F.3d 242,

247 (5th Cir.1997). However, dismissal for failure to state a claim does not require the appearance that, beyond a doubt, the plaintiff can prove no set of facts in support of its claim that would entitle it to relief. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 1968, 167 L.Ed.2d 929 (2007). Rather, to survive a 12(b)(6) motion to dismiss, a plaintiff must show, after adequately stating its claim, that the claim "may be supported by showing any set of facts consistent with the allegations in the complaint." *Id.* at 1969.

ICP alleges that Defendants violated the FHA under the "otherwise make unavailable" clause of 42 U.S.C. § 3604(a), because Defendants considered race in deciding not to locate low-income housing units in west **McKinney**. By its terms, the FHA prohibits discrimination in housing "because of race." Allegations of steering low-income housing away from predominantly Caucasian areas and into predominantly minority areas has been held to violate the FHA. For example, the FHA was held to cover a segregated housing pattern that was caused or exacerbated by a **city's** practice of racial discrimination in its decisions on the location of subsidized housing. *See U.S. v. Yonkers Bd. of Educ.,* 837 F.2d 1181 (2nd Cir.1987). Also, a zoning ordinance that restricted private construction of multi-family housing to a largely minority urban area was held to violate the FHA because the ordinance impeded racial integration by restricting low-income housing needed by minorities to an area already more than fifty-percent minority. *See Huntington Branch, N.A.A. C.P. v. Town of Huntington,* 844 F.2d 926 (2nd Cir.1988).

***8** Accepting as true all the well-pleaded facts contained in ICP's complaint, and viewing them in the light most favorable to ICP, the Court is of the opinion that ICP's claims may be supported by some set of facts consistent with the allegations stated in the complaint. Absent a claim which is obviously insufficient, the Court should not grant a Rule 12(b)(6) motion to dismiss, thereby denying ICP an opportunity to develop facts to support its complaint. Moreover, sufficient procedures are available to a defendant to seek summary disposition of a lawsuit after a plaintiff has been afforded some opportunity to develop facts to support his complaint. *See Reeves v. **City** of Jackson,* 532 F.2d 491, 494 (5th Cir.1976). A review of Defendants' motions and the complaint demonstrates that Defendants have not met their burden with respect to a Rule 12(b) (6) motion. The proper avenue to address this claim is under Fed.R.Civ.P. 56. Accordingly, the Defendants' motions to dismiss should be denied.

RECOMMENDATION

Based upon the findings and legal analysis discussed above, the Court RECOMMENDS that Defendants' motions to dismiss be DENIED.

Within ten (10) days after service of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations of the magistrate judge. 28 U.S.C. § 636(b)(1)(C).

Failure to file written objections to the proposed findings and recommendations contained in this report within ten days after service shall bar an aggrieved party from *de novo* review by the district court of the proposed findings and recommendations and from appellate review of factual findings accepted or adopted by the district court except on grounds of plain error or manifest injustice. *Thomas v. Arn,* 474 U.S. 140, 148, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); *Rodriguez v. Bowen,* 857 F.2d 275, 276-77 (5th Cir.1988).

SIGNED this 15th day of July, 2009.

Footnotes

1 See Magistrate Judge's Report and Recommendation at 10.

1 The Court will consider the motions to dismiss based solely on ICP's complaint.

2 In its answer, MHA acknowledges that it received ICP's letter dated September 19, 2008. ICP filed its complaint on November 19, 2008. At this time, neither Defendant has responded to ICP, whose letters to Defendants were sent more than 120 days ago.