NOT RECOMMENDED FOR PUBLICATION

No. 19-1887

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DUSTIN LEE MACLEOD, Plaintiff-Appellant, v. WILLIAM MORITZ, Director, MI Dept. of Natural Resources, et al., Defendants-Appellees.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

ORDER

Before: GRIFFIN, KETHLEDGE, and STRANCH, Circuit Judges.

Dustin Lee MacLeod, a pro se Michigan prisoner, appeals the district court's judgment dismissing his civil rights action against several employees of the Michigan Department of Natural Resources ("MDNR"). MacLeod also moves for the appointment of counsel. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

According to MacLeod's amended complaint, he is a member of the Sault Ste. Marie Tribe of Chippewa Indians and owns land abutting the Pigeon River State Forest in Otsego County, Michigan. The property line is not clearly defined, and MacLeod "and other tribal members maintained and reconstructed sacred site structures on said property including arbor, alter, and sweat lodges, with a [de minimis] encroachment upon the adjacent state land." They used the "structures for religious purposes," and MacLeod claimed that they had the right to do so through the "'[privileges] of occupancy' contained within Article 13 of the 1836 Treaty of Washington, as agreed to by the state of Michigan in [the] 2007 Inland Consent Decree." The consent decree had

resolved claims brought by several Native American tribes against the State of Michigan under the 1836 Treaty. *See* 1836 Treaty, 7 Stat. 491.

MacLeod alleged that the MDNR "has continuously expressed a desire to acquire the property since at least May, 2012." In October 2014, the MDNR issued MacLeod a civil infraction citation for the structures, citing him for leaving property on state land for more than twenty-four hours and giving him seven days to remove the structures. A magistrate found him responsible and ordered him to pay a $100 fine. In May 2015, MacLeod claimed that the MDNR defendants entered his land and then destroyed the structures. He claimed that they did so as part of a "scheme . . . to obtain and acquire [his] property for themselves or their work related projects." MacLeod also alleged that the defendants were motivated by animus toward his tribe and a desire to burden the exercise of his religious practices. He sued, asserting claims that the MDNR defendants violated the 1836 Treaty and the consent decree, as well as several constitutional provisions and federal and state laws. He sought declaratory, injunctive, and monetary relief.

The MDNR defendants moved to dismiss MacLeod's complaint for failure to state a claim on which relief could be granted. *See* Fed. R. Civ. P. 12(b)(6). MacLeod then filed a motion for summary judgment. *See* Fed. R. Civ. P. 56. The district court granted the defendants' motion to dismiss and denied MacLeod's summary-judgment motion. The district court determined that the 1836 Treaty did not create a private right of action and that MacLeod was not a party to the consent decree and thus lacked standing to enforce it. The district court also rejected MacLeod's other claims. *MacLeod v. Moritz*, No. 18-cv-11653, 2019 WL 3072098 (E.D. Mich. July 15, 2019); *see also MacLeod v. Moritz*, No. 18-cv-11653, 2019 WL 4387344 (E.D. Mich. Mar. 29, 2019) (report and recommendation).

MacLeod appeals. In his opening and reply briefs, MacLeod argues only that the district court erred in dismissing his claims under the 1836 Treaty and the 2007 consent decree. Thus, by failing to present arguments about his other claims, MacLeod has forfeited review of them. *See Grinter v. Knight*, 532 F.3d 567, 574 n.4 (6th Cir. 2008).

We review de novo a district court's grant of a motion to dismiss for failure to state a claim under Rule 12(b)(6). *Doe v. Miami Univ.*, 882 F.3d 579, 588 (6th Cir. 2018). To avoid dismissal, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that

is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Proper interpretation of a treaty presents a question of law that this court reviews de novo." *United States v. Emuegbunam*, 268 F.3d 377, 389 (6th Cir. 2001).

MacLeod first argues that the district court did not apply the correct law when resolving his claim under the 1836 Treaty. He also argues that the court erred in not holding that his right to construct and use a sweat lodge is protected by the Treaty.

"[T]reaties, like some statutes, do not always directly create rights that a private citizen can enforce in court." *Renkel v. United States*, 456 F.3d 640, 643 (6th Cir. 2006) (citing *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring)). "As a general rule, . . . international treaties do not create rights that are privately enforceable in the federal courts." *Emuegbunam*, 268 F.3d at 389. "Absent express language in a treaty providing for particular judicial remedies, the federal courts will not vindicate private rights unless a treaty creates fundamental rights on a par with those protected by the Constitution." *Id.* at 390.

No court has held that the 1836 Treaty created such a private right of action. Indeed, they have held just the opposite. *See United States v. Michigan*, 471 F. Supp. 192, 271 (W.D. Mich. 1979) (holding that "[t]he fishing right reserved by the Indians in 1836 and at issue in this case is the communal property of the tribes which signed the treaty and their modern political successors; it does not belong to the individual tribal members"). Thus, when individual members have sued to enforce the Treaty, courts have held that they lack standing. *See Bellfy v. Creagh*, No. 1:15-cv-282, 2015 WL 5097651, at *3 (W.D. Mich. Aug. 28, 2015). For these reasons, other cases under the Treaty were brought by tribes themselves, not individual members. *See Grand Traverse Band of Ottawa & Chippewa Indians v. Dir., Mich. Dep't of Nat. Res.*, 141 F.3d 635, 640 (6th Cir. 1998); *see also United States v. Michigan*, 424 F.3d 438, 446 (6th Cir. 2005) (denying several tribes' motion to intervene but noting that, "should the scope of the Tribes' usufructuary rights become an issue . . . the proposed intervenors may renew their motion").

MacLeod develops no argument that the 1836 Treaty created an individually enforceable right to erect religious structures on state land. He asserts that his right derives from the Treaty's provision stating that "[t]he Indians stipulate for the right of hunting on the lands ceded, with the

other usual privileges of occupancy, until the land is required for settlement." 1836 Treaty, 7 Stat. 491, Art. 13. Yet that provision does not expressly grant a private right of action.

MacLeod also argues that the district court erred in its analysis of the 2007 consent decree. He notes that section 6.2(a)(ii) of the consent decree provides that "[t]ribal members . . . may engage in other historically traditional activities (such as the construction and use of sweat lodges)." The district court rejected MacLeod's claim that the MDNR defendants violated his rights under the consent decree, holding that MacLeod was not a party to the consent decree and thus lacked standing to enforce its terms. *See, e.g.*, *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991) (recognizing that Indians tribes are sovereigns distinct from their members). And "a well-settled line of authority . . . establishes that a consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it even though they were intended to be benefited by it." *SEC v. Dollar Gen. Corp.*, 378 F. App'x 511, 514 (6th Cir. 2010) (alteration in original) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750 (1975)). Because MacLeod was not a party to the 2007 consent decree, he lacks standing to sue to enforce its provisions about sweat lodges.

Finally, MacLeod moves for the appointment of counsel. But there is no constitutional right to be appointed counsel in a civil case, *see Glover v. Johnson*, 75 F.3d 264, 268 (6th Cir. 1996), and MacLeod cites no exceptional circumstances that would justify appointment in his appeal here, *see Lavado v. Keohane*, 992 F.2d 601, 605-06 (6th Cir. 1993).

Accordingly, we **DENY** MacLeod's motion for counsel and **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

No. 19-1887

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
May 29, 2020
DEBORAH S. HUNT, Clerk

DUSTIN LEE MacLEOD,

Plaintiff-Appellant,

v.

WILLIAM MORITZ, DIRECTOR, MI DEPT. OF NATURAL RESOURCES, ET AL.,

Defendants-Appellees.

ORDER

BEFORE: GRIFFIN, KETHLEDGE, and STRANCH, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DUSTIN LEE MACLEOD,

Plaintiff,

v.

DR. WILLIAM MORITZ, et al.,

Defendants.
_____/

Case No. 18-cv-11653

District Judge Judith E. Levy

Magistrate Judge Mona K. Majzoub

REPORT AND RECOMMENDATION

Plaintiff Dustin MacLeod contends that Defendants William Moritz, Wade Hamilton, Steve Milford, Scott Whitcomb, Rick McDonald, Greg Drogowski, Eric Botorff, Lori Buford, and Dennis Knapp violated his rights under the 1836 Treaty of Washington, the First and Fourteenth Amendments to the Constitution of the United States, and various federal and state statutes. (Docket no. 4.)

Before the Court are Defendants' motion to dismiss (docket no. 19) and Plaintiff's motion for summary judgment (docket no. 26). This case has been referred to the undersigned for all pretrial proceedings, including a hearing and determination of all non-dispositive matters pursuant to 28 U.S.C. § 636(b)(1)(A) and/or a report and recommendation on all dispositive matters pursuant to 28 U.S.C. § 636(b)(1)(B). (Docket no. 9.) The Court has reviewed the pleadings and dispenses with oral argument pursuant to Eastern District of Michigan Local Rule 7.1(f)(2).

I. RECOMMENDATION

The undersigned recommends that Defendants' motion to dismiss (docket no. 19) be **GRANTED**, that Plaintiff's motion for summary judgment (docket no. 26) be **DENIED** and that this case be dismissed in its entirety.

II. REPORT

A. Background

The events described in the amended complaint arise from Plaintiff's ownership and use of land abutting the Pigeon River State Forest in Ostego County, Michigan (the "State Forest"). (Docket no. 4, p. 5.) Plaintiff is a member of the Sault Ste. Marie Tribe of Chippewa Indians. (*Id.* at 4.) Defendants are employees of the Michigan Department of National Resources (the "MDNR"). (*Id.* at 4–5.)

Plaintiff owns fifteen acres of land adjacent to the State Forest. (*Id.* at 5.) According to Plaintiff, the MDNR sought to purchase Plaintiff's land and consolidate that tract with the State Park. (*Id.*) Plaintiff asserts that he and other members of his tribe "maintained and reconstructed Sacred Site structures on [his] property including Arbor, alter, and sweat lodges, with a deminimus [*sic*] encroachment upon the adjacent State land." (*Id.*) Plaintiff contends that his use of the State Forest complied with his right to the "privileges of occupancy" on that land as provided by Article 13 of the 1836 Treaty of Washington (the "1836 Treaty"). (*Id.* at 6.)

The contours of the 1836 Treaty were the subject of a lawsuit by several Native American Tribes against the State of Michigan that resulted in a consent decree in 2007 (the "Consent Decree"), which was "intended to resolve conclusively such claims, and to provide for the protection of the resources in the 1836 Ceded Territory." (Docket no. 19-6.)

On October 14, 2014, the MDNR issued a citation to Plaintiff for "leav[ing] property on State land [for more than] 24 hours," a violation of MDNR State Land Rule R 299.922. (Docket no. 30-3, p. 4.) The MDNR informed Plaintiff that he had "7 days to remove [the] structure." (*Id.*) On November 18, 2014, Plaintiff appeared for a hearing on the civil infraction, was found to be responsible and was fined $100. (*Id.* at 6.) Plaintiff appealed that decision, contending that the court lacked jurisdiction because the Consent Decree mandated that the dispute be heard in a "tribal forum." (*Id.* at 10–11.) After a hearing on December 18, 2014, Judge Maria Barton upheld the citation. (Docket no. 4-1, p. 5.)

Plaintiff asserts that on May 13, 2015, Defendants "destroyed a Sacred Sundance Arbor, sweat lodges, and alter [*sic*] located on Plaintiff's land and adjacent State land" and "[e]ntered upon Plaintiff's land to deposit the debris of the Arbor, sweat lodges, and alters [*sic*] . . . onto Plaintiff's real property." (Docket no. 1, pp. 13–15.)

On May 24, 2018, Plaintiff filed his amended complaint, alleging that Defendants violated the 1836 Treaty, the Consent Decree, the First and Fourteenth Amendments of the U.S. Constitution, the Religious Land Use and Institutionalized Persons Act, the Michigan Constitution and Michigan common law. (*See generally* docket no. 4.)

On September 11, 2018, Defendants filed a motion to dismiss Plaintiff's amended complaint. (Docket no. 19.) In an order dated February 5, 2019, the undersigned directed the parties to file supplemental briefing regarding the 1836 Treaty. (Docket no. 36.) Defendants filed their supplemental brief on March 7, 2019. (Docket no. 39.) Plaintiff filed his supplemental brief on March 18, 2019. (Docket no. 41.)

B. Standard of Review

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the sufficiency of a complaint. The court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007); *Inge v. Rock Fin. Corp.*, 281 F.3d 613, 619 (6th Cir. 2002). To survive a Rule 12(b)(6) motion to dismiss, the complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations and emphasis omitted). *See also Ass'n of Cleveland Fire Fighters v. City of Cleveland, Ohio*, 502 F.3d 545, 548 (6th Cir. 2007).

This acceptance of factual allegations as true, however, is inapplicable to legal conclusions: "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Thus, the court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* (internal quotations and citations omitted). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* at 679. "Determining whether a complaint states a plausible claim for relief [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* To make this determination, a court may apply the following two-part test: (1) "identify[] pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth;" and (2) "assume [the] veracity [of the remaining allegations] and then determine whether they plausibly give rise to an entitlement to relief." *Id.*

In addressing motions under Rule 12(b)(6), the Sixth Circuit recognizes that, in addition to the allegations of the complaint, the court "may also consider other materials that are integral to

the complaint, are public records, or are otherwise appropriate for the taking of judicial notice." *Ley v. Visteon Corp.*, 543 F.3d 801, 805 (6th Cir. 2008).

C. Analysis

Defendants contend that Plaintiff's amended complaint fails to state a claim on which relief may be granted. (Docket no. 19.) Plaintiff filed a response to Defendants' motion (docket no. 27) as well as a summary judgment motion of his own (docket no. 26). Below, the undersigned will address the various bases for relief cited in Plaintiff's amended complaint.

1. The Treaty Itself

Plaintiff alleges that Defendants' actions violated the 1836 Treaty, which provides that the Ottawa and Chippewa tribes "stipulate for the . . . usual privileges of occupancy [on the ceded land] until the land is required for settlement." (Docket no. 4, p. 12; docket no. 19-5, p. 7.)

International treaties entered into by the United States become part of the "supreme Law of the Land." U.S. Const. art. VI, cl. 2. But treaties do not always directly create rights that a private citizen can enforce in court. *Renkel v. United States*, 456 F.3d 640, 642–43 (6th Cir. 2006). "In fact, courts presume that the rights created by an international treaty belong to a state and that a private individual cannot enforce them." *Id.* (citing *United States v. Emuegbunam*, 268 F.3d 377, 389 (6th Cir. 2001)). In the context of treaties involving Native Americans, courts should focus upon the historical context in which the treaty was written and signed and should "see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council." *Tulee v. State of Washington*, 315 U.S. 681, 684, 62 S. Ct. 862, 864, 86 L. Ed. 1115 (1942). *See also United States v. Winans*, 198 U.S. 371, 380, 25 S. Ct. 662, 664, 49 L. Ed. 1089 (1905).

To support a claim under 42 U.S.C. § 1983, a treaty must create "individual rights," that are "unambiguously conferred" by "unmistakable" language. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 283–84 (2002). Courts should consider whether the treaty uses "rights-creating language" and "individually focused terminology," as opposed to "aggregate focus" language. *Harris v. Olszewski*, 442 F.3d 456, 461 (6th Cir. 2006) (citations omitted). Such language should not be "broad and nonspecific" in a way that is "ill-suited to judicial remedy." *Westside Mothers v. Olszewski*, 454 F.3d 532, 543 (6th Cir. 2006). *See also Jogi v. Voges*, 480 F.3d 822 (7th Cir. 2007); *Cornejo v. Cty. of San Diego*, 504 F.3d 853 (9th Cir. 2007); *Mora v. New York*, 524 F.3d 183 (2d Cir. 2008); *Gandara v. Bennett*, 528 F.3d 823 (11th Cir. 2008).

The 1836 Treaty was concluded between the United States and the Ottawa and Chippewa nations of Native Americans. (Docket no. 19-5, pp. 2–3.) In Article 13 of the Treaty, "[t]he Indians stipulate[d] for the right of hunting on the lands ceded, with the other usual privileges of occupancy, until the land is required for settlement." (*Id.* at 7.) This language is both vague and "aggregate focused." Accordingly, it does not create "individual rights" enforceable under § 1983. *See United States v. State of Mich.*, 471 F. Supp. 192, 271 (W.D. Mich. 1979) ("The fishing right reserved by the Indians in 1836 and at issue in this case is the communal property of the tribes which signed the treaty and their modern political successors; it does not belong to individual tribal members."). Therefore, the Court should dismiss Plaintiff's claim under the 1836 Treaty.

2. The Consent Decree

Alternately, Plaintiff contends that Defendants violated the terms of the Consent Decree, which was concluded by the parties to a 1973 dispute regarding the effect of the 1836 Treaty. (Docket no. 4, p. 12; docket no. 19-6.) Plaintiff was not a party to the 1973 case and was not a signatory to the Consent Decree.

"[T]hird parties to a consent decree lack standing to enforce their understanding of its terms." *Aiken v. City of Memphis*, 37 F.3d 1155, 1167 (6th Cir. 1994). *See also Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975); *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992). Even intended third-party beneficiaries of a consent decree lack standing to enforce its terms. *Id.* at 1168.

Plaintiff contends that he is a party to the consent decree because he is a member of the Sault Ste. Marie Tribe of Chippewa Indians. (Docket no. 27, p. 4.) But Native American tribal organizations are sovereign entities distinct from their individual members. *See* 13 Mich. Civ. Jur. Indians § 4 ("While tribes possess sovereign immunity from suit absent explicit congressional or tribal consent, their officers, agents and members do not.") (citing *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 514, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991)).

Accordingly, the Court should find that Plaintiff lacks standing to enforce the Consent Decree.

3. Due Process

Plaintiff contends that Defendants' actions violated the Due Process Clause of the Fourteenth Amendment. (Docket no. 4, p. 11.) The undersigned will analyze the procedural and substantive aspects of this claim separately below.

a. Procedural Due Process

No State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1. Those who seek to invoke the procedural protection of the Due Process Clause must establish that a life, liberty, or property interest is at stake. *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005).

Plaintiff contends that the Consent Decree gives him a property interest in the State Forest. (Docket no. 4, p. 10.) But even if he were a signatory to the consent decree, Plaintiff would not have a property interest in the injunctive relief contained therein. *See Hadix v. Johnson*, 133 F.3d 940, 943 (6th Cir. 1998) ("A consent decree in which the relief is provided subject to future modification cannot create a vested property right in that relief for due process purposes.") (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274, 114 S. Ct. 1483, 1501–02, 128 L.Ed.2d 229 (1994)).

As a result of the civil infraction issued by Defendants, Plaintiff was fined $100 and was thus deprived of property. However, Plaintiff received notice, a hearing, and an appellate process before the state deprived him of that property. Accordingly, Defendants did not violate Plaintiff's right to procedural due process. *See Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976) ("[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.")

b. Substantive Due Process

Substantive due process is "[t]he doctrine that governmental deprivations of life, liberty or property are subject to limitations regardless of the adequacy of the procedures employed." *Range v. Douglas*, 763 F.3d 573, 588 (6th Cir. 2014) (citing *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1216 (6th Cir. 1992)). It protects a narrow class of interests, including those enumerated in the Constitution, those so rooted in the traditions of the people as to be ranked fundamental, and

the interest in freedom from government actions that "shock the conscience." *Id.* (citing *Bell v. Ohio State Univ.*, 351 F.3d 240, 249–50 (6th Cir. 2003)). It also protects the right to be free from "arbitrary and capricious" governmental actions, which is another formulation of the right to be free from conscience-shocking actions. *Id.* (citing *Bowers v. City of Flint*, 325 F.3d 758, 763 (6th Cir. 2003) and *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1216 (6th Cir. 1992)).

The facts alleged in Plaintiff's amended complaint do not support a substantive due process claim. Defendants' actions were not arbitrary, capricious or conscience-shocking. To the extent that Plaintiff contends that Defendants violated his right to exercise his religious practices, that claim is addressed separately below. *See Thaddeus-X v. Blatter*, 175 F.3d 378, 387 (6th Cir. 1999) (noting that "[w]here a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims'") (quoting *Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 1871, 104 L. Ed. 2d 443 (1989)).

4. Equal Protection

Plaintiff alleges that Defendants violated the Equal Protection Clause of the Fourteenth Amendment by removing his sundance arbors and sweat lodges while permitting hunters to leave ground blinds and tree stands on public land. (Docket no. 4, p. 11.)

The Equal Protection Clause of the Fourteenth Amendment commands that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. To state an equal protection claim, a plaintiff must adequately plead that the government treated the plaintiff "disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis." *Club Italia Soccer & Sports Org., Inc. v. Charter Twp. of Shelby, Mich.*, 470 F.3d 286, 299 (6th

Cir.2006). The "threshold element of an equal protection claim is disparate treatment; once disparate treatment is shown, the equal protection analysis to be applied is determined by the classification used by government decision-makers." *Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 260 (6th Cir.2006).

Plaintiff fails to plausibly allege that the State permits another class of individuals to build the type of structures he built on state land. Plaintiff contends that the arbor and lodges he constructed are the equivalent of a "brush blind," which is permitted to remain on state land for more than twenty-four hours. (Docket no. 4, p. 11.) According to the public materials provided by Defendants, a "dead natural materials ground blind" must be "must be constructed exclusively of dead and natural materials found on the ground in the area of the blind" and cannot be "fastened in any permanent manner." (Docket no. 19-8.) The structures erected by Plaintiff do not meet these criteria. (*See* docket no. 30-2 (photographs of structures referred to in amended complaint)). Accordingly, the Court should dismiss Plaintiff's equal protection claim.

5. Free Exercise

Plaintiff contends that Defendants improperly burdened his religious exercise. (Docket no. 4, p. 10.)

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I. However, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532, 113 S. Ct. 2217, 2226, 124 L. Ed. 2d 472 (1993) (citing *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L.Ed.2d 876 (1990)).

The law at issue in this case, MDNR State Land Rule R 299.922, is neutral and of general applicability. It does not "target[] religious conduct for distinctive treatment." *See Lukumi*, 508 U.S. at 534. Instead, it seeks to prevent individuals from leaving property on state land for excessive periods. For the reasons set forth above, the MDNR's different treatment of brush blinds is rational, and Plaintiff does not plausibly allege that the different treatment masks a religious animus. Therefore, the Court should dismiss Plaintiff's free-exercise claim.

6. Laws Not Privately Enforceable

Plaintiff seeks relief under 18 U.S.C. § 241 (criminal conspiracy), § 242 (deprivation of rights under color of law), and § 247 (obstruction of religious exercise). (Docket no. 4, p. 13.) Plaintiff also seeks relief under 42 U.S.C. § 1996 ("[I]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian . . . .") and the Northwest Ordinance. Those statutes are either invalid or not enforceable by Plaintiff. Accordingly, the Court should dismiss these claims.

7. RLUIPA

Plaintiff contends that Defendants violated the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc ("RLUIPA"). (Docket no. 4, p. 13.)

RLUIPA directs that "[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest."

However, Congress expressly defined "land use regulation" as "a zoning or landmarking law," and a claimant must have "an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest." 42 U.S.C. § 2000cc-5(5).

Because State Land Rule R 299.922 is not "a zoning or landmarking law" and because Plaintiff does not have a legally cognizable interest in the State Forest, the Court should dismiss this claim.

8. State-law Claims

If the Court adopts the undersigned's recommendation to dismiss all of Plaintiff's federal-law claims, the Court should decline to exercise supplemental jurisdiction over Plaintiff's state-law claims. *See* 28 U.S.C. § 1367 ("The district courts may decline to exercise supplemental jurisdiction over a claim [forming a part of the same case or controversy] if . . . the district court has dismissed all claims over which it has original jurisdiction.").

D. Conclusion

For the reasons stated herein, it is recommended that Defendants' motion to dismiss (docket no. 19) be **GRANTED**, that Plaintiff's motion for summary judgment (docket no. 26) be **DENIED** and that this case be dismissed in its entirety.

III. NOTICE TO PARTIES REGARDING OBJECTIONS

The parties to this action may object to and seek review of this Report and Recommendation, but are required to act within fourteen (14) days of service of a copy hereof as provided for in 28 U.S.C. § 636(b)(1) and Eastern District of Michigan Local Rule 72.1(d). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *Howard v. Sec'y of Health & Human Servs.*, 932 F.2d 505 (6th Cir. 1991);

U.S. v. Walters, 638 F.2d 947, 949-50 (6th Cir. 1981). Filing of objections which raise some issues but fail to raise others with specificity will not preserve all the objections a party might have to this Report and Recommendation. *Willis v. Sec'y of Health & Human Servs.*, 931 F.2d 390, 401 (6th Cir. 1991); *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

Any objections must be labeled as "Objection #1," "Objection #2," etc. Any objection must recite *precisely* the provision of this Report and Recommendation to which it pertains. Not later than fourteen days after service of an objection, the opposing party must file a concise response proportionate to the objections in length and complexity. The response must specifically address each issue raised in the objections, in the same order and labeled as "Response to Objection #1," "Response to Objection #2," etc.

Dated: March 29, 2019

s/ Mona K. Majzoub
MONA K. MAJZOUB
UNITED STATES MAGISTRATE JUDGE

PROOF OF SERVICE

I hereby certify that a copy of this Report and Recommendation was served upon Plaintiff Dustin MacLeod and Counsel of Record on this date.

Dated: March 29, 2019

s/ Leanne Hosking
Case Manager

Appendix L – Order Adopting Report and Recommendation.
Docket #55.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Dustin Lee MacLeod,

Plaintiff,

v.

William Moritz, *et al.*,

Defendants.

_____/

Case No. 18-cv-11653

Judith E. Levy
United States District Judge

Mag. Judge Mona K. Majzoub

ORDER ADOPTING REPORT AND RECOMMENDATION [43]

Before the Court is Magistrate Judge Mona K. Majzoub's Report and Recommendation ("R&R") recommending that the Court grant defendants William Moritz, Wade Hamilton, Steve Milford, Scott Whitcomb, Rick McDonald, Greg Drogowski, Eric Botorff, Lori Burford, and Dennis Knapp's motion to dismiss (ECF No. 19) and deny plaintiff Dustin MacLeod's motion for summary judgment (ECF No. 26). The R&R recommends granting defendants' motion to dismiss because the complaint does not state a claim for which relief can be granted. Plaintiff submitted eight objections to the R&R, one of which has two sub-parts (ECF No. 46, 49), and defendants responded. (ECF No. 48.) For the

reasons set forth below, plaintiff's objections are overruled, and the R&R is adopted in full.

I. Background

The Court has carefully reviewed the R&R and is satisfied that it is a thorough account of the relevant portions of the record. The Court incorporates the factual background from the R&R as if set forth herein.

II. Legal Standard

A party may object to a magistrate judge's report and recommendation on dispositive motions, and a district judge must resolve proper objections under a de novo standard of review. 28 U.S.C. § 636(b)(1)(B)–(C); Fed. R. Civ. P. 72(b)(1)–(3). "For an objection to be proper, Eastern District of Michigan Local Rule 72.1(d)(1) requires parties to 'specify the part of the order, proposed findings, recommendations, or report to which [the party] objects' and to 'state the basis for the objection.'" *Pearce v. Chrysler Group LLC Pension Plan*, 893 F.3d 339, 346 (6th Cir. 2018). Objections that restate arguments already presented to the magistrate judge are improper, *Coleman-Bey v. Bouchard*, 287 F. App'x 420, 422 (6th Cir. 2008) (citing *Brumley v. Wingard*, 269 F.3d 629, 647 (6th Cir. 2001)), as are those that dispute the

general correctness of the report and recommendation. *Miller v. Currie*, 50 F.3d 373, 380 (6th Cir. 1995).

Moreover, objections must be clear so that the district court can "discern those issues that are dispositive and contentious." *Id.* (citing *Howard v. Sec'y of Health and Human Servs.*, 932 F.2d 505, 509 (6th Cir. 1991)); *see also Thomas v. Arn*, 474 U.S. 140, 147 (1985) (explaining that objections must go to "factual and legal" issues "at the heart of the parties' dispute"). In sum, plaintiff's objections must be clear and specific enough that the Court can squarely address them on the merits. *See Pearce*, 893 F. 3d at 346.

Although most of plaintiff's objections are difficult to comprehend, the Court will construe them liberally and in favor of the self-represented[1] plaintiff.

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[1] Plaintiff moved for appointment of counsel twice, and both motions were denied. (ECF No. 16, PageID.214; ECF No. 42, PageID.718). Mr. Phil Bellfy, having lost his motion to intervene (ECF No. 42, PageID.716-717), filed a paper purporting to be a notice of appearance of counsel on plaintiff's behalf. (ECF No. 53, PageID.780.) Bellfy then filed a paper entitled "Second Motion to Deny Defendants' Motion to Dismiss and to Schedule Discovery and a Date for Trial," (ECF No. 54 PageID.784) where he states he is "Counsel for Plaintiff." (*Id.* at PageID784, 788.) Mr. Bellfy's filings do not comply with the Eastern District of Michigan Local Rules, specifically E.D.Mich. LR 83.20.

Only persons who are "admitted to practice in a court of record in a state, territory, commonwealth, or possession of the United States... and who is in good standing [are] eligible for admission to the bar of this court..." *Id.* Mr. Bellfy is not admitted to the

III. Analysis

A. Objection 1

In his first objection, plaintiff disputes the R&R's finding that he has not stated a claim under 42 U.S.C. § 1983. (ECF No. 49 PageID.760–61.) Plaintiff argues that an 1836 Treaty confers a right to bring an individual case of this nature under § 1983.

For a treaty to create an individual right that is enforceable by a private litigant under § 1983, it must "unambiguously confer[]" the right to do so with "unmistakable" language. *See Gonzaga Univ. v. Doe*, 536 U.S. 273, 283–84 (2002). The private rights of action created by a treaty cannot be "broad" or "nonspecific." *Westside Mothers v. Olszewski*, 454 F.3d 456, 461 (6th Cir. 2006). Here, there is no specific language in the Treaty conferring the right for an individual to bring an action to enforce its terms. In *United States v. Michigan*, 471 F. Supp. 192, 271–72 (W.D. Mich. 1979), which analyzed the same 1836 Treaty, the court also held that the Treaty did not confer individually enforceable rights on the

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State Bar of Michigan or the Eastern District of Michigan. He provides a certificate from the Sault Ste. Marie Chippewa Tribal Court, which states that he was admitted and qualified to practice "as a Lay Advocate in Sault Ste. Marie Chippewa Tribal Court," which, on its own, does not confer his admission or authority to practice law (or hold himself out as practicing law) in this Court. Accordingly, plaintiff is treated as a self-represented party in this case.

members of the tribe: "[t]he fishing right reserved by the Indians in 1836 and at issue in this case is the communal property of the tribes which signed the treaty and their modern political successors; *it does not belong to the individual tribal members.*" *Id.* (emphasis added); *see also Bellfy v. Creagh*, No. 15-282, 2015 U.S. Dist. LEXIS 114342, at *3 (W.D. Mich. Aug. 28, 2015) ("[W]hile it is true that individual members of the tribes that are parties to the Consent Decree enjoy usufructuary rights– those rights are 'communal property of the tribes which signed the treaty and their modern political successors,' and do 'not belong to individual tribal members.'") (quoting *Michigan*, 471 F. Supp. at 261). The Treaty does not confer a private right of action.

Plaintiff disagrees with the law. In support, he cites to the 1905 case, *United States v. Winans*, 198 U.S. 371, 381 (1905), which states: "Reservations were not of particular parcels of land, and could not be expressed in deeds, as dealings between private individuals. The reservations were in large areas of territory, and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein." (ECF No. 49, PageID.761.) *Winans* analyzes an 1859 fishing treaty between the Yakima Nation of Indians in the state

of Washington, which is not the same treaty at issue in this case. Plaintiff's argument that *Winans* confers a private right of action in this case is incorrect. Plaintiff's first objection is overruled.

B. Objection 2

Plaintiff's second objection relates to his allegation that he has "standing as a right of user [sic] in tribal property derived from the legal or equitable property right of the Tribe of which he is a member." (ECF No. 49, PageID.761.) Specifically, it appears plaintiff alleges that he has standing to enforce the terms of a 2007 judicial consent decree between, among others, the United States, the Sault Ste. Marie Tribe of Chippewa Indians, and the State of Michigan, because he is a member of the Sault Ste. Marie Tribe of Chippewa Indians. (ECF No. 26, PageID.509.)

However, the law is well settled that, first, Indian tribal organizations are sovereign entities, and are distinct from the status of their individual members. *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 514 (1991). And second, third-parties to a consent decree—even those who are the intended third-party beneficiaries—lack standing to enforce a consent decree's terms. "'[A] well-settled line of authority from this Court

establishes that a consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it even though they were intended to be benefited by it.'" *Aiken v. City of Memphis*, 37 F.3d 1155, 1167 (6th Cir. 1994) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750 (1975)).

Plaintiff therefore does not have standing to enforce the 2007 consent decree, even though he is a member of the Sault Ste. Marie Tribe of Chippewa Indians, which was a party to the Decree. Accordingly, plaintiff's second objection is overruled.

C. Objection 3a

Plaintiff's objection 3(a) is not a proper objection. Plaintiff states that he believes the Magistrate Judge "confused" plaintiff's property interest in the $100 civil infraction fine with his allegation that he has a property interest in the state forest. (ECF No. 49 PageID.761.) However, there is no indication that the Magistrate Judge was confused, and this Court's review leads to the same outcome.

In *Hadix v. Johnson*, 133 F.3d 940 (6th Cir. 1998), the plaintiffs in a class action entered into a consent agreement regarding the conditions of their confinement. *Id.* The plaintiffs challenged certain provisions of

the consent judgment on due process and equal protection grounds, which the court did not permit, stating, "[a] consent decree in which the relief is provided subject to future modification cannot create a vested property right in that relief for due process purposes." *Id.* at 943 n.3. (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994) (injunctions operate prospectively and litigants have no vested rights in them)).

Further, regarding plaintiff's civil infraction fine of $100, a review of the record reveals that plaintiff received adequate procedural due process when he received notice, a hearing, and an appellate process after receiving the fine. Plaintiff's objection is overruled.

D. Objection 3b

Plaintiff's objection 3(b) appears to address the Magistrate Judge's finding that the facts alleged in plaintiff's amended complaint do not support a substantive due process claim. (ECF No. 49 at 761–62.) Specifically, plaintiff argues that the facts in his amended complaint are "conscience shocking" in the constitutional sense. (*Id.*) However, "conscience shocking" behavior that is actionable under the United States Constitution must involve egregious circumstances. *See Cty. of Sacramento v. Lewis*, 523 U.S. 833, 850–51 (1998).

Plaintiff's objection here, that "[d]amage to religious property and/or the obstruction of persons in the free exercise of their religious beliefs" by its very nature shocks the conscience "of even the most disinterested person," and his cite to 18 U.S.C. § 247, do not meet the legal standard for substantive due process. Therefore, plaintiff's objection 3b is overruled.

E. Objection 4

Plaintiff's fourth objection involves his allegation that defendants would not have removed his structures if they had believed the structures were mere brush blinds, but instead targeted the structures because defendants knew they were sweat lodges. (ECF No. 49, PageID.762.) He argues that this "is an issue for the trier of fact to determine." (*Id.*) But this argument is not supported by the facts.

According to the Michigan Hunting Digest rules supplied by defendants,[2] ground blinds must be "constructed exclusively of dead and

[2] When a court is presented with a Rule 12(b)(6) motion testing the sufficiency of a complaint, "it may consider the Complaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the Complaint and are central to the claims contained therein." *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008). The Treaty of Washington, Inland Consent Decree, 2018 Michigan Hunting Digest, the MDNR State Land Rules referenced in the

natural materials found on the ground in the area of the blind" and cannot be "fastened in any permanent manner." (ECF No. 19-8, PageID.4.) They must also be "clearly portable and removed at the end of each day's hunt." (*Id.*) Plaintiff has not pleaded any facts that would indicate that his structures were destroyed because of their religious character. Accordingly, plaintiff's fourth objection is overruled.

F. Objection 5

Plaintiff's fifth objection appears to involve his argument that Michigan Department of Natural Resources ("MDNR") State Land Rule 299.222 violates plaintiff's religious practice. On the contrary, the law is settled that, unless that MDNR State Land Rule 229.922 "targets religious conduct for distinctive treatment," it does not violate the law. (ECF No. 49, PageID. 762.) *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). MDNR State Land Rule 299.922 is neutral, generally applicable, and does not even "subtl[y] depart[] from neutrality." *Id.* (quoting *Gillette v. United States*, 401 U.S.

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defendants' motion to dismiss, and in their joint reply in support of their motion to dismiss, fall within these categories of documents. (ECF Nos. 19-2 – 19-10.)

437, 452 (1971)). Plaintiff's argument is therefore unsupported by the facts or law.

He also argues that the 1836 Treaty of Washington and its attendant Consent Decree is "the Supreme Law of the Land," which supersedes MDNR State Land Rule 299.922. This is an incorrect understanding of the law, and unsupported by any facts. (ECF No. 49 PageID. 762.) Plaintiff's fifth objection is overruled.

G. Objection 6

Plaintiff's sixth objection regards the R&R's recommendation that the Court dismiss plaintiff's claims for relief under 18 U.S.C. § 241 (criminal conspiracy), § 242 (deprivation of rights under color of law), and § 247 (obstruction of religious exercise). (*See* ECF No. 43, PageID.731.) 18 U.S.C. §§ 241, 242, and 247 are criminal statutes. "[T]he general rule is that a private right of action is not maintainable under a criminal statute." *American Postal Worker's Union AFL–CIO, Detroit Local v. Independent Postal Sys. of America*, 481 F.2d 90, 93 (6th Cir. 1973). "Equally important is the firmly established principle that criminal statutes can only be enforced by the proper authorities of the United States Government and a private party has no right to enforce these

sanctions." *Id.* (internal quotation marks and citation omitted). "[W]here there is a 'bare criminal statute, with absolutely no indication that civil enforcement of any kind was available to anyone,' a private cause of action will not be inferred." *Marx v. Centran Corp.*, 747 F.2d 1536, 1549 (6th Cir. 1984) (quoting *Cort v. Ash*, 422 U.S. 66, 80 (1975)); *see also Adams v. CitiGroup Global Market Realty Corp.*, No. 11-10178, 2011 U.S. Dist. LEXIS 6402 at *3–4 (E.D. Mich. Jan. 24, 2011). Plaintiff cannot privately enforce a criminal statute through this civil action. Accordingly, his sixth objection is overruled.

H. Objection 7

Plaintiff's seventh objection regards the Magistrate Judge's recommendation that plaintiff does not have the type of cognizable ownership interest in the state forest land that would be required for the Religious Land Use and Institutionalized Persons Act ("RLUIPA") to apply. (ECF No. 49 PageID.763.) Plaintiff again cites to *Winans*, 198 U.S. 371, which was decided in 1905 and is inapplicable to a statute enacted nearly 100 years later.

Section 3 of RLUIPA, 42 U.S.C. § 2000cc-1(a)(1), provides in part:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial

> burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution--
> (A) is in furtherance of a compelling governmental interest; and
> (B) is the least restrictive means of furthering that compelling governmental interest.

Although RLUIPA protects individuals in their religious exercise, the statute's language indicates that it is not intended to operate as "an outright exemption from land-use regulations." *Living Water Church of God v. Charter Twp. of Meridian*, 258 F. App'x 729, 737 (6th Cir. 2007) (quoting *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d at 752, 762 (7th Cir. 2003)).

Here, plaintiff believes that MDNR State Land Rule 299.922 is a land use regulation—a "zoning or landmarking law"—that infringes on his use of state land. However, as set forth above, MDNR State Land Rule is neutral, generally applicable, and does not even "subtl[y] depart[] from neutrality." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). It does not impose a substantial burden under RULIPA. Accordingly, plaintiff's seventh objection is overruled.

I. Objection 8

Plaintiff's eighth objection is not a proper objection. Plaintiff objects to the word "if" in the R&R, where it states, "*If* the Court adopts the recommendation to dismiss all of Plaintiff's federal-law claims." (ECF No. 49, PageID. 763 (emphasis added).) The objection is not a cognizable objection under Federal Rule Civil Procedure 72(b)(1)–(3), even when liberally construed, and it is overruled.

IV. Conclusion

The Court agrees with the analysis and recommendation set forth in the R&R. Accordingly:

The Report and Recommendation (ECF No. 43) is **ADOPTED**;

Defendants' motion to dismiss (ECF No. 19) is **GRANTED;** and

Plaintiff's motion for summary judgment (ECF No. 26) is **DENIED.**

Furthermore, since the R&R is adopted in full, the case is dismissed in full and plaintiff's and Mr. Bellfy's remaining unresolved motions on the docket (ECF Nos. 44, 51, and 54) are **DENIED** as moot.

IT IS SO ORDERED.

Dated: July 15, 2019
Ann Arbor, Michigan

s/Judith E. Levy
JUDITH E. LEVY
United States District Judge

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served upon counsel of record and any unrepresented parties via the Court's ECF System to their respective email or First Class U.S. mail addresses disclosed on the Notice of Electronic Filing on July 15, 2019.

s/Shawna Burns
SHAWNA BURNS
Case Manager

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Dustin Lee MacLeod,

Plaintiff,

v.

William Moritz, *et al.*,

Defendants.

_____/

Case No. 18-cv-11653

Judith E. Levy
United States District Judge

Mag. Judge Mona K. Majzoub

JUDGMENT

For the reasons stated in the opinion and order entered on today's date, it is ordered and adjudged that the case is dismissed with prejudice.

DAVID J. WEAVER
CLERK OF THE COURT

By: s/Shawna Burns
DEPUTY COURT CLERK

APPROVED:

s/Judith E. Levy
JUDITH E. LEVY
UNITED STATES DISTRICT JUDGE

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