UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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DAVID T. SILVA,
GERROD T. SMITH, and
JONATHAN K. SMITH,
Members of the Shinnecock Indian Nation,

Plaintiffs,

- against -

BRIAN FARRISH,
JAMIE GREENWOOD,
EVAN LACZI,
BASIL SEGGOS,
NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION,
and SUFFOLK COUNTY DISTRICT ATTORNEY'S OFFICE,

Defendants.
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Case No.: 18-cv-3648 (SJF) (SIL)

**PLAINTIFFS' OBJECTIONS TO MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION**

Plaintiffs, David T. Silva, ("Silva"), Gerrod T. Smith, ("Gerrod"), and Jonathan K. Smith, ("Jonathan"), (collectively, "Plaintiffs"), pursuant to Fed. R. Civ. P. 72(b)(2), respectfully file this their objections to each and every part of Magistrate Judge Steven I. Locke's Report and Recommendation, filed on January 7, 2019, (ECF No. 63), ("the Report"), except: 1) that part recommending that Plaintiffs' supplemental filings be accepted as a sur-reply, (Report, p. 14), and 2) that part recommending Plaintiffs be granted leave to amend their complaint as to their statutory claims for monetary damages against Farrish, Laczi and Seggos in their individual capacities, (Report, p. 52). In the event the Court dismisses the complaint, in whole or in part, Plaintiffs respectfully request an opportunity to amend all parts of the complaint so dismissed, to cure any and all pleading deficiencies.

To update the Court on the State criminal proceeding. The trial of Silva in Southampton Justice Court began - for one day - and has been adjourned twice (due to no fault of the defense), and is now scheduled to continue with the People's Case in Chief, on February 21, 2019. Due to the denial of Defense's request for electronic testimony of Silva's 84 year-old expert witness, Dr. John Strong, (who uses a cane and resides in Maryland), Dr. Strong has travelled round-trip from Maryland, *twice*, at Plaintiffs' expense, without ever reaching the witness stand, and now has to return for a *third time* on February 21.

I. Standard of Review on a motion to dismiss

On a motion to dismiss, the Court must assume that all of the facts alleged in the complaint are true, construe those facts in the light most favorable to the Plaintiff, and draw all reasonable inferences in favor of the Plaintiff. *Abdullahi v. Pfizer, Inc*., 562 F.3d 163, 169 (2d Cir. 2009); *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co*., 517 F.3d 104, 115 (2d Cir.2008); *U.S. Bank Nat. Ass'n v. Ables & Hall Builders*, 582 F. Supp. 2d 605, 606 (S.D.N.Y. 2008).[1]

II. Standard of Review of a magistrate's report and recommendation

A district court reviewing a magistrate judge's recommended ruling "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). With respect to a magistrate judge's recommendations on a dispositive motion, the Court reviews *de novo* those determinations as to which a party has objected. *Id*. ("A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made."); Fed. R. Civ. P. 72 (b)(3) ("The district judge must determine *de novo* any part of the magistrate judge's disposition that

[1] As Plaintiffs point out below, the Court should convert Defendants' motions to one for summary judgment under Rule 56, and deny the motions.

has been properly objected to.") However, "[t]o accept the report and recommendation of a magistrate judge on a dispositive matter as to which no timely objection has been made, the district judge need only be satisfied that there is no clear error on the fact of the record." *Piroleau v. Caserta*, No. 10-cv-5670, 2012 WL 5389931, at *1 (E.D.N.Y. Oct. 29, 2012). "[A]n order is contrary to law when it fails to apply or misapplies relevant statutes, case law or rules of procedure." *E.E.O.C. v. First Wireless Grp., Inc*., 225 F.R.D. 404, 405 (E.D.N.Y. 2004).

In the 54 page Report, the magistrate judge made critical errors of fact and law underpinning the Report's recommendations that the complaint be dismissed in its entirety (Counts I and II).

A. Plaintiffs object to dismissal of Count I

Plaintiffs object to the Report's finding that the *Ex parte Young* exception does not apply to Eleventh Amendment immunity. The Report fundamentally misread and misunderstood the fact of a limited, and non-exclusive, **use right** plainly asserted in the complaint's prayer for relief, in contrast to a title right, and consequently misapplied *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 117 S. Ct. 2028 (1997), and *Western Mohegan Tribe & Nation v. Orange County,* 395 F.3d 18 (2d Cir. 2004). (Report, pp. 26-30)

> Accordingly, the *Young* exception to Eleventh Amendment sovereign immunity does not apply to Plaintiffs' claims against Farrish, Laczi and Seggos in their official capacities.
>
> Based on the foregoing analysis, the Court respectfully recommends that Plaintiffs' claims against the NYDEC, along with those against Farrish, Laczi and Seggos in their official capacities, be dismissed as barred by the Eleventh Amendment.
> (Report, p. 30)

Plaintiffs object to the Report's finding that the bad faith and harassment exception under the *Younger* abstention doctrine does not apply relating to subject matter jurisdiction.

> Accordingly, the Court recommends that Plaintiffs' claims seeking to enjoin Silva's criminal prosecution in the Justice Court be dismissed on the alternative basis that this Court lacks subject matter jurisdiction under *Younger*.
> (Report, p. 36)

Plaintiffs object to the Report's find that Plaintiffs Jonathan and Gerrod lack standing.

> Judge Feuerstein previously determined, in her Memorandum and Order dated July 31, 2018, that Gerrod and Jonathan lacked standing because, according to the allegations in the Complaint, their prior prosecutions for violating State fishing laws were dismissed years ago and they are not currently facing criminal charges.
> …
> Accordingly, as Gerrod and Jonathan have failed to establish a concrete and particularized injury that can be redressed by a decision in their favor, the Court respectfully recommends that their claims for declaratory and injunctive relief be dismissed for lack of standing.
> (Report, pp. 38-39)

As discussed below, in particular the DEC email indicating that the Shinnecock people as a racial group are profiled for prosecution, the facts show Silva, Jonathan and Gerrod were and are targets because they are Shinnecock.

B. Plaintiffs object to dismissal of Count II.

> Accordingly, the Court respectfully recommends that Plaintiffs' claims against the SCDA be dismissed.
> (Report p. 51)

> Accordingly, the Court recommends that Plaintiffs' cause of action under 42 U.S.C. §§ 1981 and 1982 against Farrish, Laczi and Seggos in their individual capacities be dismissed for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6)
> (Report, p. 43)

The fact that internal DEC emails show the Shinnecock people were racially profiled and targeted for prosecution, even though the DEC admits the Plaintiffs may have the fishing rights

they assert here, shows how important the discovery phase is to the ability of obtaining proof of illegal discrimination.

> But even assuming, *arguendo*, that the State Defendants had enforced State fishing laws in a discriminatory manner, even the most liberal reading of Plaintiffs' allegations does not suggest that Farrish, Laczi or Seggos were motivated by racial animus.
> (Report, p. 42)

Plaintiffs object to the dismissal of Count II as to the County Defendants.

> The Court agrees with the County Defendants that Greenwood is entitled to absolute prosecutorial immunity, that the SCDA is not an entity susceptible to suit, and that Plaintiffs' claims should not be construed as against the County.
> (Report, 45)

Plaintiffs object to the complaint being interpreted as bringing a claim against Greenwood under 1983, which it does not.

> For the reasons explained above, Plaintiffs' claims under § 1981 against Greenwood in her individual capacity are improper under *Duplan*. Yet, as with those § 1981 claims asserted against Farrish, Laczi and Seggos in their individual capacities, the Court recommends, in the interest of judicial economy, that such claims against Greenwood be construed as having been brought under § 1983 so that the Court may address their merits, and because doing so does not impact any other recommendation herein.
> (Report, p. 47, fn. 24)

Plaintiffs object to dismissal of the Suffolk County Prosecutor's Office.

> Absent authority suggesting otherwise, this Court will apply the uniformly-recognized principle that district attorneys' offices in New York are not subject to suit. Accordingly, the Court respectfully recommends that Plaintiffs' claims against the SCDA be dismissed.
> (Report, p. 51)

Plaintiffs object to the Report's finding that the SCDA is an "administrative arm" of Suffolk County and not a suable entity. (Report, p. 50)

III. Errors of Fact

A. The Report makes a plain and fundamental error and misunderstanding of fact, repeated throughout the Report, of the relief sought by Plaintiffs. The Relevant Facts section of the Report, pp. 2-5, makes no mention of the limited, and very specific, relief plead in the complaint. The lack of a factual finding in this section resulted in plain error application of the facts to the law in the Report.

With respect to Count I, Plaintiffs plead:

> **As to Count I:**
>
> 1) Pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 and Fed.R.Civ.P. 65, the Plaintiffs request the Court to issue a declaratory judgment, and preliminary and permanent injunctive relief in favor of Plaintiffs and against the Defendants, enjoining the Defendants from enforcing the laws of the State of New York *against Plaintiff Silva* in Southampton Town Justice Court in Case No. 17-7008, and from otherwise *interfering with Plaintiffs' use* of the waters, fishing, *taking* fish, and *holding* fish and shellfish in Shinnecock Bay and its estuary and other usual and customary Shinnecock fishing waters; [emphasis added]

A plain reading of the relief requested, in particular the language emphasized above, "against," "interfering," "use," "taking," and "holding," show Plaintiffs seek protection of a **use right** of the waters. This aboriginal right is common relief in Indian fishing rights cases, which has been practicable in the West and Midwest. Among other things, tribal members can simply show Tribal Identification to exercise their rights. See, e.g. *U.S. v. Washington*, 384 F. Supp. 312, 408 (W.D. Wash. 1974)(Boldt, J.) It is a plainly incorrect, strained, and fearful reading of the relief plead in this case that Plaintiffs seek right, title, and ownership of the waters to the exclusion of non-Indians. See for example, at pages 27-29, which underpins the Report's erroneous application of immunity law:

> Plaintiffs' assertion that they do not seek "relief defining ownership or its equivalent," Pls.' Opp. to State Defs.' Mtn. at 9, is therefore unconvincing.

> To the contrary, as the State Defendants correctly point out, a ruling in Plaintiffs' favor would unquestionably "affect the [S]tate's sovereign interest and regulatory authority over its waters, along with its ability to regulate and protect its wildlife." State Defs.' Mem. at 5.

And at Report, page 29:

> As a result, if Plaintiffs were to prevail on their claim for a declaratory judgment, "substantially all benefits of ownership and control [of the waters at issue] would shift from the State to the [t]ribe," *id.*, and the State's "sovereign interest in its . . . waters would be affected in a degree fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury," [citations omitted]

In effect, the Magistrate Judge adopted the State Defendants' rewriting of Plaintiffs' complaint, and is plain error.

This reading is unfounded. It is well documented that the Shinnecock Indian Tribe has historically shared these waters. The Report fails to acknowledge the significant, historic and contemporary exertion of regulatory and jurisdictional powers of the Shinnecock Indian Nation over the same contested waterways. See, the supporting documentation by the BIA, annexed as Exhibit 1,[2] as part of the BIA's "Proposed Finding for Federal Acknowledgement of the Shinnecock Indian Nation," December 21, 2009. 74 FR 67895. The PF was finalized on June 18, 2010, which "affirms the reasoning, analysis, and conclusions in the [Shinnecock Indian Nation] Proposed Finding (PF)." 75 FR 34760.

Federal acknowledgments of the Shinnecock Indian Nation's use and regulatory authority in the PF and over the contested waters include:

- A 1977 report from the U.S. Department of Commerce, "Aquaculture, Fisheries, and Food Processing as a Combined Economic Development Option for Indian Communities," has a chapter entitled, "Designing a Food Processing Industry for the

[2] Excerpts from "Summary under the Criteria and Evidence for the Proposed Finding for Acknowledgment of the Shinnecock Indian Nation (Petitioner #4)" approved on December 14, 2009. ("the BIA Summary")

Shinnecock Tribe." The chapter states that the "Shinnecock Indian Tribe . . . is presently engaged in the production of shellfish." BIA Summary, p. 26.

- "Elected Trustees allocated residential sites, fields for cultivation and grazing, wood, *seafood*, and other resources connected to the land *and tidal areas under the group's control*." [emphasis added] BIA Summary, p. 35.
- "These leaders *consistently controlled access to resources* not only to group members but also to non-Indian short-term leaseholders. Leases of common lands to outsiders produced income, which the group used for their common benefit." [emphasis added] BIA Summary, p. 35.
- "In addition, through consensual decision-making and joint actions, the group has protected the land and resource base from trespass by non-Indians or encroachments by unauthorized persons building on its lands or taking wood, *seaweed, and other resources without permission*. They have *regulated hunting and fishing there*. [emphasis added] BIA Summary, p. 35.
- "Finally, the group has *significantly influenced economic activities by its members* by controlling access to agricultural fields, woodlots, *seafood collection areas*, allotments with access from Montauk Highway, where individual Shinnecock operate businesses, *and other resources*." [emphasis added] BIA Summary, p. 35.
- "On occasion, they rented piers to non-Indian summer residents and leased *rights to harvest oysters and seaweed.*" [emphasis added] BIA Summary, p. 37.
- "In two other actions before 1853, Luther Bunn and Oliver Kellis, leasehold residents, *sued non-Indians for 'taking and carrying away sea weed' from the 'shores of Shinnecock Bay.* (New York Court of Appeals 3/-/1860).' " BIA Summary, p. 56.

- "The Trustees also *auctioned seaweed privileges* "for the good of the tribe," and "the pasture field" (Indian Records book 5/11/1880; 4/11/1881). Trustees made administrative decisions involving fences and gates. The Shinnecock electorate voted on matters, *such as the number of seaweed lots to rent to outsiders*." [emphasis added] BIA Summary, p. 60.
- "The Trustees sent a message by way of the newsletter warning people about trespassers—defined as anyone not a blood Shinnecock or their spouse— and handling fire arms *and hunting and fishing rules*." [emphasis added] BIA Summary, p. 70.
- "Trustees preserve the peace on the Shinnecock Reservation and are responsible for contacting State police in emergency situations. They enforce restrictions on reservation hunting and fishing by outsiders." BIA Summary, p. 87.

The PF serves a dual function here. Firstly, it categorically substantiates the fact that when the United States recognized the Shinnecock Indian Nation as an Indian Tribe, it also acknowledged its water resource jurisdiction and usage. Secondly, it proves that even when the Shinnecock Indian Nation has absolute and uncontested control of a resource, it shares it with non-Indian neighbors thereby emphatically disproving the notion that the Plaintiffs have unstated or implied intentions of exclusion of others.

The Federal government also recognizes Shinnecock fishing rights in publications. The 1977 report from the U.S. Department of Commerce, "Aquaculture, Fisheries, and Food Processing as a Combined Economic Development Option for Indian Communities," U.S. Department of Commerce, Office of Minority Enterprise, 1977, annexed hereto as Exhibit 2, ("the DOC Handbook") reveals undoubtable federal acknowledgement of the retained and unextinguished aboriginal Shinnecock Indian Nation water rights, combined with *direct federal*

*financial support for the then State Recognized Tribe* for developing those water rights into a mechanism for economic development.

The DOC Handbook is essentially a feasibility study using the Shinnecock Indian Nation as a model for other water rights possessing tribes to follow. The Executive Summary of the DOC Handbook states, "(t)he model development scheme in Figure 14 which shows the time and kind of work which were required to create an industry based on *Shinnecock's most abundant resources, shellfish and underutilized fish species*." [emphasis added] DOC Handbook, p. v.

It further states, "Indian communities over the years have historically developed their own specific resource utilization systems based on experience and need." DOC Handbook, 2. This cannot be overstated as it corroborates both historical, aboriginal Shinnecock water resource usage as outlined in the PR and also rationally explains the relatively new glass eel fishery developed by the Plaintiffs in a cultural context and as a natural response to ever-evolving, culturally appropriate, economic development opportunities.

The DOC Handbook adds, "AIDA (Department of Commerce agent, American Indian Development Association) personnel visited over 20 Indian reservations, mostly in the northern tier of States across the United States (Fig. 1). Specific studies and interviews were conducted at nine reservations having water resources which were felt to be typical of reservations within the region." DOC Handbook, p. 2. Shinnecock was indeed one of the nine reservations visited and was listed as being most likely to cultivate a salmon ranching or salmon cultivation in containment system of aquaculture.

The DOC Handbook accurately and presciently observes, "virtually every reservation visited had underdeveloped resources from two standpoints. First, water resources were totally

unused or were managed by outside influences for the sole benefit for the outside persons." Reasons for the underutilization of the resource included, "White prejudice" and "White religious and economic exploitation". DOC Handbook, p. 4.

In its Guide (to other tribes) for Investigating Your Water Resources With Your Own Planners and Management, the top long-range consideration is, "(h)as the tribe established water rights?" DOC Handbook, p. 8. The implication is clear, tribes lacking aboriginal water rights should not consider this method of economic development. Alternatively, it must follow that Shinnecock inherently possesses water rights to have been considered for the program and the assertion is that the Shinnecock Indian *Nation must possess a high level of water rights* to become the model tribe.

B. The Relevant Facts section fails to include the blatant discriminatory language of the internal DEC emails indicating the racial profiling of Shinnecock people for enforcement as a racial group. The internal DEC email from DEC Captain Dallas Bengel of March 28, 2017, (ECF 60-1), to Farrish, Gilmore, Laczi, and others, states in pertinent part:

> Word is out that the *Shinnecocks* are actively seeking a shipper for glass eels. Apparently they have been in contact with the *Unkachaugs* and the *Passamaquoddys* (Maine).
> …
> Lt. Carbone – your thoughts on the creek adjacent to the east side of the reservation?
> Lts – please put together a elver patrol/detail plan for your Zones.
> …
> Thanks and good luck. [emphasis added]

Besides this documented evidence of racial profiling, the adage "Where there is smoke, there is fire" applies here. Hypothetically, consider if another race, such as "Black" is substituted for the word "Shinnecock" above. Would there be any question of racial profiling?

Rather than including this email as an important fact in the Relevant Facts section, this email is instead diminished as unimportant to a footnote as part of analysis. The Report states at p. 43, fn. 22:

> The Court would reach the same result even if it were to consider Plaintiffs' supplemental submissions in evaluating the Fed. R. Civ. P. 12(b)(6) component of the State Defendants' motion. No inference that Farrish, Laczi or Seggos acted with discriminatory intent can be drawn from either the allegedly inaccurate statements in the Gilmore Declaration or the two emails involving Gilmore. *See* DEs [59], [60].

The Magistrate Judge's failure to include this email in the Relevant Facts section shows a lack of recognition of it as evidence of bad faith under Count I, and racial discrimination under Count II.

C. The Relevant Facts section fails to include an important internal DEC email from Monica Kreshic on April 25, 2017 to Gilmore and Bengel, among others (ECF No. 60-2), which provides in pertinent part:

> The Shinnecock assert that they have a treaty right to exercise their aboriginal fishing practices. *This may be true.* [emphasis added]

This email is obviously part of the same racial profiling email trail as above, but is also diminished by the Report to the same footnote. However, this email shows a factual, plain and pointed internal DEC recognition of precisely the fishing rights Plaintiffs are asserting in this case. Further evidence of bad faith in Count I, and racial discrimination in Count II, and unrecognized as such in the Report.

D. The Relevant Facts section fails to include the critical factual connection that the non-Indian fisherman in *Ruggiero* was fishing together with Plaintiff Gerrod when both were ticketed together on the same fishing vessel at the same time, and both asserted Gerrod's rights.

> Around the same time, the State prosecuted Salvatore Ruggiero ("Ruggiero"), a non-Indian who was fishing with Gerrod, for possession of undersized flounder, undersized blackfish and undersized porgy in violation of New York law. *See* Compl. ¶ 17. (Report, p. 4)
>
> Insofar as Silva attempts to demonstrate bad faith by alleging selective prosecution, that theory also lacks factual support—such as, for instance, examples of preferential treatment of non-Indians who violated the same laws—and is undermined by Plaintiffs' reference in the Complaint to the prior prosecution of Ruggiero, a non-Indian, for violations of State fishing laws similar to those at issue here. *See* Compl. ¶ 17. (Report, pp. 34-35)

IV. Errors of Law

A. Plaintiffs object to the recommendation that Defendants' motions not be converted to one for summary judgment. (Report, p. 15) The Report recommended that Plaintiff's sur-reply be accepted, which contained factual exhibits which were not available at the time when Defendant's Gilmore so-called fact based affidavit was submitted by the State Defendants. Clearly the Defendants and the Plaintiffs have submitted fact documents which conflict on material issues of fact under both Counts I and Counts II, and the motions should be converted. *Friedl v. City of N.Y.*, 210 F.3d 79, 83 (2d Cir. 2000) ("When matters outside the pleadings are presented in response to a 12(b)(6) motion, a district court must either exclude the additional material and decide the motion on the complaint alone or convert the motion to one for summary judgment under Fed. R. Civ. P. 56 and afford all parties the opportunity to present supporting material." (citation, internal quotation marks and alterations omitted)).

B. Plaintiffs object to the non-application of the federal consultation executive order, and even if the order does not apply, the DEC is bound by its own similar mandated consultation requirement. New York State DEC has a similar guidance and policy document entitled, "Commissioner's Policy 42 / Contact, Cooperation, and Consultation with Indian Nations," issued by then DEC Commissioner Alexander B. Grannis on March 27, 2009,

annexed hereto as Exhibit 3. ("CP-42"). "It is the policy of the Department that relations with the Indian Nations shall be conducted on a government-to-government basis." CP-42, p. 1. The protocol of CP-42 includes, but is not limited to "Contact" and "Consultation," (CP-42, p. 4), including on the subjects of "Hunting, Fishing, and Gathering, (CP-42, p. 5).

The CP-42 protocol includes:

- The Department recognizes the unique political relations based on treaties and history, between the Indian Nation governments and the federal and state governments. In keeping with this overarching principle, *Department staff will consult with appropriate representatives of Indian Nations on a government-to government basis on environmental and cultural resource issues of mutual concern.*
- Where appropriate and productive, will *seek to develop cooperative agreements* with Indian Nations on such issues.
- The Department interacts with Indian Nations in two critical areas of mutual importance: the environment and cultural resources. It does so in several capacities, including, but not limited to, permit application review, site remediation, *hunting and fishing regulation, and the development, implementation, and enforcement of regulations.*
- Additionally, mutually beneficial cooperation and the appropriate resolution of occasional disagreements or misunderstandings can best be achieved if there is a commitment to *regular consultation on environmental and cultural resource issues of mutual concern.*
- The Department and Indian Nations share key roles in protecting and preserving natural and cultural resources important to all citizens, and *early consultation and cooperation*

between the Department and Indian Nations will foster more comprehensive protection and preservation of those resources.

- "Consultation" means open and effective communication in a cooperative process that, to the extent practicable and permitted by law, works toward a consensus *before a decision is made or an action is taken.*

  [emphasis added]

The State Defendants failed to meet *even a single* obligation under Executive Order No. 13175 and CP 42 and have met the good faith intentions of these documents with indifference. The triggers for consultation with the Shinnecock are clear. On March 28, 2017, internal emails reveal DEC Captain Dallas Bengel calling attention to Shinnecock fishing activities. Recipients include Defendants Farrish, Laczi as well as Mr. James Gilmore. "Word is out that Shinnecocks are actively seeking a shipper for glass eels", he states. "(Lieutenants), please put together a (sic) elver patrol/detail plan for your Zones", he adds.

This incident should have *immediately* triggered a consultation with the Shinnecock Indian Nation, yet none took place. The intent to target Shinnecock specific fishermen is absolutely clear and is consistent with previous actions against the Plaintiffs. The State Defendant's zeal overshadowed and completely overrode any responsibility for cooperation and consultation the State Defendant has for the Indian Nations of its State.

This is evidence of bad faith and of the discrimination alleged by Plaintiffs. The DEC prosecutions of Plaintiffs occurred *after* the issuance of CP-42.

V. Conclusion

For the foregoing reasons, Plaintiffs object to each and every part of Magistrate Judge Steven I. Locke's Report and Recommendation, except: 1) that part recommending that Plaintiffs' supplemental filings be accepted as a sur-reply, and 2) that part recommending Plaintiffs be granted leave to amend their complaint as to their statutory claims for monetary damages against Farrish, Laczi and Seggos in their individual capacities. In the event the Court dismisses the complaint, in whole or in part, Plaintiffs respectfully request an opportunity to amend all parts of the complaint so dismissed, to cure any and all pleading deficiencies.

Dated: January 21, 2019
New York, New York

Respectfully submitted,

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