UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DUSTIN LEE MACLEOD,

Plaintiff,

v

WILLIAM MORITZ, *et al.*,

Defendants.

No. 5:18-cv-11653-JEL-MKM

HON. JUDITH E. LEVY

MAG. MONA K. MAJZOUB

Dustin Lee Macleod, Prisoner #956261
Plaintiff in Pro Per
Parnell Correctional Facility
1780 East Parnell Street
Jackson, MI 49201

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_____/

DEFENDANTS' MOTION TO DISMISS

Defendants William Moritz, Wade Hamilton, Steve Milford, Scott Whitcomb, Rick McDonald, Greg Drogowski, Eric Botorff, Lori Burford, and Dennis Knapp move the Court under Fed. R. Civ. P. 12(b)(1) and

12(b)(6) to dismiss Plaintiff's case in its entirety. The Court lacks jurisdiction over Plaintiff's official-capacity claims, Plaintiff has failed to state any claims against Defendants, and Defendants are immune to both the federal and state claims Plaintiff alleges. The attached brief explains the legal basis for Defendants' motion.

Respectfully submitted,

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Dated: September 11, 2018

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DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS

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CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority:

Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993).

Prater v. City of Burnside, Ky., 289 F.3d 417 (6th Cir. 2002).

Livingston Christian Sch. v. Genoa Charter Twp., 858 F.3d 996 (6th Cir. 2017).

Ashcroft v. al-Kidd, 563 U.S. 731 (2011).

Mich. Comp. Laws § 691.1407(2).

STATEMENT OF FACTS

Plaintiff purchased a parcel in the fall of 2012 that borders on land owned by the State of Michigan. (First Amend. Comp., ¶ 16.) Plaintiff then built religious structures not only on his land, but also on the public land. (*Id.*, ¶¶ 22, 47, 70.) In 2014, the Michigan Department of Natural Resources (MDNR) notified Plaintiff that the structures, along with unauthorized wetland fill, were trespassing on public land and would need to be removed. (Exs. 1–3, 7/31/2014, 8/28/2014, 9/11/2014 Letters; First Amend. Comp., Attachment B, pp. 4–10.) MDNR invited Plaintiff to work through his tribe seek a permit if he wished to obtain authorization to use public land on a long-term basis. (Ex. 3, 9/11/2014 Letter.) Defendants are not aware that Plaintiff ever worked through his tribe to seek a permit.

By October 14, 2014, Plaintiff still had not removed the structures from public land. (First Amend. Comp., Attachment B, pp. 14–17.) Defendant Botorff is a conservation officer with MDNR and issued a citation to Plaintiff that day for a civil infraction. (*Id.*) Plaintiff received a full court hearing to defend against that civil infraction. (*Id.*) Plaintiff relied on the 2007 inland consent decree in his defense,

claiming that because he is a tribal member, he could place permanent structures without authorization on any public land within the consent area. (*Id.*, pp. 18–33.) The trial court concluded that Plaintiff was not a signatory to the consent agreement, his tribe was, and there was no evidence that his tribe was involved in Plaintiff's actions. (*Id.*, pp. 33–34.) Accordingly, the court held that Plaintiff had committed a civil infraction, imposed a fine (*id.*), and ultimately required him to remove the items.

Also on October 14, 2014, local police executed search warrants of Plaintiff's residence and grow house in an investigation that led to the convictions for which Plaintiff is currently incarcerated. *People v. MacLeod*, No. 326950, 2016 WL 3767496, at *1 (Mich. Ct. App. July 14, 2016), *appeal denied,* 500 Mich. 946, 890 N.W.2d 368 (2017). Like in the hearing on his trespass citation, Plaintiff relied heavily on the 2007 inland consent decree, but this time to argue that he could cultivate marijuana in a grow house within the ceded area. *Id.* at 2–4. And if that issue were in dispute, he argued, state courts lacked jurisdiction to decide it. *Id.* The Court of Appeals rejected that, and several other

theories presented by Plaintiff, and the Michigan Supreme Court denied his application for leave to appeal.

By April 28, 2015, Plaintiff still had not removed the structures from public land, and Defendants Burford, Whitcomb, Botorff, and Drogowski allegedly "organized plans in detail regarding the destruction of [P]laintiff's sacred religious structures." (First Amend. Comp., ¶ 40.) On May 13, 2015, Plaintiff alleges that Defendants "or any combination of them" removed the structures Plaintiff had built on public land and placed them onto his land. (*Id.*, ¶ 43.) Plaintiff also alleges that Defendants "and/or any combination of them, tore down and removed trees, trail cameras, and a permanent gate." (*Id.*, ¶ 44.) Plaintiff further alleges that Defendants "and/or any combination of them, were engaged in a plan, scheme, devise, or otherwise to obtain and acquire [P]laintiff's property for themselves or their work related projects." (*Id.*, ¶ 48.)

Plaintiff then filed the current lawsuit with the Court on May 25, 2018—more than three years after Defendants allegedly removed Plaintiff's structures from public land.

ARGUMENT

I. The Court lacks subject-matter jurisdiction over Plaintiff's official capacity claims.

Plaintiff sues six of the nine Defendants in their official capacities: William Moritz, Wade Hamilton, Steve Milford, Scott Whitcomb, Rick McDonald, and Dennis Knapp. (First Amend. Compl., ¶¶ 3–7, 11.) But in federal court, suits against state employees in their "official capacity" are the equivalent of a suit against the State, itself. *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 71 (1989). The Eleventh Amendment bars all such claims unless the State has waived its immunity or Congress has abrogated it. *Boler v. Earley*, 865 F.3d 391, 410 (6th Cir. 2017); see also *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 119–121 (1984) (Eleventh Amendment also bars official-capacity claims based on state law). Neither exception applies here.

The only other possible exception is where a plaintiff alleges an ongoing violation of federal law and seeks purely prospective relief to end the ongoing violation. *Ex Parte Young*, 209 U.S. 123 (1908). But Plaintiff alleges no ongoing violation of federal law, he alleges only a past violation. (First Amend. Compl., ¶¶ 14–51.) For this reason, not only does the *Ex Parte Young* exception not apply, but Plaintiff's request

for a declaratory judgment against Defendants in their official capacities is also barred by the Eleventh Amendment because it would be the equivalent of an award for money damages. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). Accordingly, the Court must dismiss all of Plaintiff's claims against Defendants in their official capacities because it lacks jurisdiction over those claims.

II. Plaintiff has not stated a claim under either federal or state law.

Plaintiff proposes several potential legal bases for his cause of action, including the 2007 inland consent decree, the Constitution, federal statutes, the Northwest Ordinance, and state statutes. Most of the bases Plaintiff identifies do not provide a private cause of action. Where they do, Plaintiff's complaint does not comply with Rule 8(a) because it lacks sufficient factual content to push the complaint over the line separating "plausible" from merely "possible." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), *citing Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

A. The 2007 inland consent decree does not provide Plaintiff with a cause of action.

All persons in Michigan have an equal right to the use of the State's public lands. Where permitted, all persons can hunt, fish, camp, gather, and otherwise recreate on and utilize public land. But certain federally-recognized tribes in Michigan also have usufructuary rights in addition to those enjoyed by the general public. Those usufructuary rights stem from the 1836 Treaty of Washington, in which those tribes ceded much of the State of Michigan to the United States but retained the right to continue using the land under certain conditions. (Ex. 4, Treaty.) A dispute about the extent to which the treaty continued to provide modern tribes enhanced usufructuary rights lead to the entry of a judicial consent decree in 2007. (Ex. 5, Inland Consent Decree.) The decree "resolve[d] conclusively" what the tribes' enhanced usufructuary rights were, and was executed by the State, the United States, and the modern successor tribes to the tribes that entered into the 1836 treaty, including the Sault Ste. Marie Tribe of Chippewa Indians—of which Plaintiff is a member. (*Id.*, ¶ C.)

The decree "defines the extent" of the tribes' usufructuary rights "and imposes certain limitations on where, when, and how the Tribes may exercise those rights." (Ex. 5, Inland Consent Decree, ¶ 6.1.) Essentially, tribes, instead of the State, regulate the way tribal members use the tribes' usufructuary rights. (*Id.*, ¶ 6.2.) Those rights include the right to "Hunt, Fish, Trap . . . Gather natural resources . . . [and] engage in other historically traditional activities (such as the construction and use of sweat lodges)." (*Id.*) If tribal members wish to construct a sweat lodge, they may do so on state forest lands, but they must obtain a permit from their tribe, otherwise comply with state land-use rules, and cannot leave the lodge or structure in place for more than 15 days without approval from MDNR. (*Id.*, ¶¶ 20.2(b), 20.3.)

Plaintiff's own complaint admits that he did not follow these procedures. He did not obtain a permit from his tribe and he left the structures on state forest land much longer than 15 days without MDNR authorization. (First Amend. Compl., ¶¶ 22, 27, 36, Attachment B, pp. 33–34.)

Moreover, Plaintiff is not a signatory to the consent decree, his tribe is. Plaintiff lacks standing to enforce a consent decree of which he is not a signatory so his complaint must be dismissed for lack of subject-matter jurisdiction. See *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (to achieve standing, litigants—among several other things—must demonstrate that they are not resting their "claim to relief on the legal rights or interests of third parties"). That is the precise result reached by Judge Maloney in the Western District of Michigan when an individual tribal member attempted to file suit under the same consent decree. (Ex. 6, 08/28/2015 Opinion.)

Additionally, the decree has detailed and mandatory dispute resolution procedures that Plaintiff's tribe has not invoked. (Ex. 5, Inland Consent Decree, ¶ 27.1.) By its own terms, the consent decree cannot be the basis of litigation if those procedures were not followed. (*Id.*, ¶ 27.4(b).)

In short, Plaintiff did not comply with the consent decree—which conclusively resolved what usufructuary rights the 1836 treaty gave his tribe; Plaintiff lacks standing to enforce the consent decree because he

is not a party to it; and Plaintiff's tribe has never invoked the mandatory dispute resolution procedures contained in the consent decree. All of Plaintiff's claims allegedly based on the consent decree must be dismissed.

B. None of Plaintiff's constitutional claims are viable.

Plaintiff alleges that the removal of structures he placed on public land violated equal protection, his procedural and substantive due process rights, and the Free Exercise Clause. None of these claims have any merit.

As for equal protection, Plaintiff must allege sufficient facts to make it plausible that Defendants "treated the plaintiff disparately as compared to similarly situated persons." *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 379 (6th Cir. 2011) (internal quotation marks omitted). Plaintiff makes no such allegation. Indeed, Plaintiff's allegations show that MDNR officials followed their typical procedure to address trespass: they investigated, notified, negotiated, ticketed, waited, referred for prosecution, and eventually removed the trespassing structures when Plaintiff refused to do so. (*See*, e.g., First Amend Compl., ¶¶ 33, 36.) Plaintiff alleges no circumstance in which

Defendants treated someone else differently, let alone someone "similarly situated [to Plaintiff] in all material respects." *TriHealth, Inc. v. Bd. of Comm'rs*, 430 F.3d 783, 790 (6th Cir. 2005). Plaintiff's failure to allege facts supporting an equal protection claim means that he both violated Rule 8(a) and failed to state a claim. See *Twombly*, 550 U.S. at 557.

Similarly, Plaintiff fails to support his allegations of due process violations with sufficient facts to make them plausible. Plaintiff alleges that he has a "property interest" in the public land where he built structures (First Amend. Compl., ¶ 55), but as explained above, Plaintiff's interest, if any, is governed by the 2007 consent decree, which he did not follow. Not even the consent decree gave Plaintiff an "interest" in *permanently* placing structures on public land, and Plaintiff identifies no basis by which he otherwise obtained such an interest within the meaning of the Fourteenth Amendment. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 571–572 (1972) (explaining how to identify the types of interests protected by the Constitution's due process requirements). Moreover, when Plaintiff was cited for trespassing, his own complaint shows that he received a full

hearing, and Defendants did not remove Plaintiff's structure from public land until the conclusion of that hearing. (First Amend. Compl., Attachment B.)

As for his substantive due process claim, Plaintiff fails to allege sufficient facts to make out a claim in that famously "uncharted" area of law. *See Collins v. City of Harker Hts., Tex.*, 503 U.S. 115, 128 (1992). As noted above, Plaintiff does not identify any fundamental interest at stake, nor does he allege any facts that could plausibly be considered conscience-shocking. *See*, *e.g.*, *Braley v. City of Pontiac,* 906 F.3d 220, 225 (6th Cir. 1990) ("We doubt the utility of [the shocks the conscience] standard outside the realm of physical abuse . . . ."). Plaintiff does allege that MDNR's land-use regulations lack a rational basis (First Amend. Compl., ¶¶ 68, 71), but those bare conclusions fall short of making out a claim that Defendants' alleged actions enforcing those regulations were "arbitrary in the constitutional sense"—a designation reserved for "only the most egregious official conduct." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).

Plaintiff compared his structures to a ground blind, but the two are very different. Ground blinds are "placed on the ground to assist in concealing or disguising" a hunter "for the purpose of taking an animal." (Ex. 7, 2018 Michigan Hunting Digest, p. 23.) Blinds can be made entirely of natural materials found on-site. (*Id.*) If Plaintiff had placed such a ground blind on public land, MDNR likely would not have had reason to demand its removal. But as Plaintiff alleges, he placed an "arbor, alter, and sweat lodges" on public land (First Amend. Compl., ¶¶ 22), and as explained above, he did it in violation of both state law and the consent decree.

Plaintiff's Free Exercise Clause allegations also fall short. (First Amend. Compl., ¶¶ 56, 57, 64, 72.) Plaintiff has a large parcel of land on which he can exercise his religious beliefs and does not allege that Defendants have somehow interfered with Plaintiff's ability do so on his own land. Nor does Plaintiff demonstrate that the state law forbidding the permanent erection of unauthorized structures on public land, Mich. Admin. Code r. 299.922(f), is not "neutral and of general applicability," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). Plaintiff's bare conclusions that Defendants' enforcement of

state law was animated by a "desire to harm" him because of his religious beliefs (First Amend. Compl., ¶¶ 69, 90), do not carry his complaint over the plausibility threshold put in place by Rule 8(a). *Iqbal*, 556 U.S. at 678 ("A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do.") (citations omitted).

Plaintiff also cites the religious freedom provision from Michigan's constitution but does not allege how that provision provides any greater protection than the federal Free Exercise Clause. *See People v. DeJonge*, 442 Mich. 266, 273 n. 9 (1993) ("The Michigan Constitution is at least as protective of religious liberty as the United States Constitution.") If anything, the relief Plaintiff seeks—the right to permanently use public land for his personal religious purposes—violates Michigan's constitution. Mich. Const. art. I, § 4 (no "property belonging to the state" can be "appropriated . . . for the benefit of an religious sect or society").

C. None of the federal statutes Plaintiff cites provide him with a cause of action.

Plaintiff cites the federal criminal code, the American Indian Religious Freedom Act, the Northwest Ordinance, and the Religious Land Use and Institutionalized Persons Act in support of his claim. But none of those laws authorize the relief he seeks here.

Plaintiff cites 18 U.S.C. §§ 241–241 and 247 of the federal criminal code. (First Amend. Compl., ¶ 78(d).) But those sections are the "criminal analogue" of 28 U.S.C. §§ 1983 and 1985, and do not provide a private cause of action. See *Powell v. Kopman*, 511 F. Supp. 700, 704 (S.D.N.Y. 1981).

Plaintiff also cites the American Indian Religious Freedom Act, 42 U.S.C. § 1996. (First Amend. Compl., ¶ 78(j).) But that law is "simply a policy statement and does not create a cause of action or any judicially enforceable individual rights." *United States v. Mitchell*, 502 F.3d 931, 949 (9th Cir. 2007) (citation omitted).

Plaintiff also cites the Northwest Ordinance. (First Amend. Compl., ¶ 78(d).) But the Supreme Court held that Michigan's constitution superseded the ordinance when Michigan joined the United States. *Sands v. Manistee River Imp. Co.*, 123 U.S. 288, 296 (1887).

Finally, Plaintiff relies on the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc. (First Amend. Compl., ¶¶ 55–60, 78(k).) That statute prohibits the government from implementing "a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person" unless it "demonstrates that imposition of the burden" is both "in furtherance of a compelling governmental interest" and it "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc(a)(1). Congress narrowly defined "land use regulation" as "a zoning or landmarking law." 42 U.S.C. § 2000cc-5(5). MDNR's land-use regulation is not a zoning law, nor is it a law governing the creation of landmarks, so RLUIPA does not apply here. *See Prater v. City of Burnside, Ky.*, 289 F.3d 417, 434 (6th Cir. 2002) (RLUIPA does not apply to all government action, only to actions taken "pursuant to a zoning or landmarking law"). Additionally, RLUIPA would only apply if Plaintiff had a "property interest" in the public land, and as explained above, while his tribe arguably may have an interest, he personally does not. 42 U.S.C. § 2000cc-5(5). Regardless, Plaintiff has plenty of his own land adjacent to the public land on which he can exercise his religion, so

forbidding him from building a permanent structure on public land cannot possibly be considered a "substantial" burden on his exercise. 42 U.S.C. § 2000cc(a)(1). *See Livingston Christian Sch. v. Genoa Charter Twp.*, 858 F.3d 996, 1006 (6th Cir. 2017), *cert. denied,* 138 S. Ct. 1696 (2018) (burden is not substantial when adequate alternative locations are available).

D. None of the state statutes Plaintiff cites provide him with a cause of action.

Plaintiff cites Michigan's harassment law, ethnic intimidation law, and civil rights law in support of his claim. But none of those laws justify the relief he seeks here.

Michigan's harassment law authorizes a person to seek damages against an individual who "target[s]" the person with "a willful course of conduct involving repeated or continuing harassment." Mich. Comp. Laws §§ 600.2554, 750.411h(1)(f). Harassment consists of "repeated or continuing unconsented contact that would cause a reasonable individual" to experience "significant mental suffering." Mich. Comp. Laws §§ 750.411h(1)(b) and (c). Harassment does not include "conduct that serves a legitimate purpose." Mich. Comp. Laws § 750.411h(1)(c).

Plaintiff's allegations about his harassment claim satisfy neither Rule 8(a) nor the plain language of the statute. Plaintiff's "conclusions" and "formulaic recitation of the elements of a cause of action" found in paragraphs 88–91 are not the types of allegations the Court can accept as true. *Twombly*, 550 U.S. at 555. The purely factual allegations in Plaintiff's complaint, taken as true, show that MDNR officials both tried to persuade Plaintiff to remove his structures from public land, and showed interest in purchasing the land that Plaintiff had purchased on land contract. But these facts are "in line with a wide swath" of "rational" government action. *Id*. at 554. Indeed, MDNR's stated policy considers consolidating public land ownership "critical" to fulfilling MDNR's mission. Managed Public Land Strategy Appendices, p 54.[1] That is because "private land holdings" sprinkled within a state forest or other managed area increase the likelihood of trespass problems, decrease recreational access, and require more staff time, along with a host of additional issues. *Id*.

[1] This is a widely available public record of which the Court should take judicial notice. Fed. R. Evid. 201. An excerpted copy is attached as Exhibit 8. https://www.michigan.gov/documents/dnr/Public_Land_Mgt_Strategy_Appendices_422382_7.pdf

Within the Pigeon River Country State Forest, there are approximately 114 privately owned parcels. And keeping with MDNR's general policy, staff who manage the Pigeon River Country "will continue to actively pursue acquisition of available private parcels" from willing landowners. A Concept of Management for the Pigeon River Country, p 35.[2] Indeed, Plaintiff's own allegations show that MDNR staff showed an interest in the parcel before Plaintiff acquired it. (First Amend. Compl., ¶ 18.) So the few facts Plaintiff alleges on this issue show that MDNR officials were interested in the parcel *despite* Plaintiff's later ownership interest, not *because* of it.

Plaintiff's conclusory statements that Defendants carried out MDNR's stated policy of trying to resolve trespass problems and consolidate the ownership of public land within management areas because they were "motivated by a desire to harm and/or burden a politically unpopular group" do not satisfy the plausibility threshold required by Rule 8(a). (First Amend. Compl., ¶ 90.) Instead, they fall

[2] This is a widely available public record of which the Court should take judicial notice. Fed. R. Evid. 201. An excepted copy is attached as Exhibit 9.
https://www.michigan.gov/documents/dnr/ConceptOfMgtFinal-111407_216611_7.pdf

short of that threshold for the same reason similar allegations of "parallel conduct" fell short of that threshold in *Twombly*. 550 U.S. at 556–557 ("[A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice."). When the facts alleged in the complaint are taken as true, it shows MDNR officials took action "that serves a legitimate purpose." Mich. Comp. Laws § 750.411h(1)(c).

Plaintiff's "ethnic intimidation" claim fails for the same reason. Michigan law allows a person to seek damages from an individual if the individual "maliciously, and with specific intent to intimidate or harass another person because of that person's race, color, religion, gender, or national origin . . . [d]amages, destroys, or defaces any real or personal property of another person." Mich. Comp. Laws § 750.147b(1)(b). But Plaintiff makes only conclusory statements that recite the elements of this claim, without factual allegations to support them. (First Amend. Compl.,¶ 97.) So Plaintiff's ethnic intimidation claim should be dismissed for the same reason Plaintiff's harassment claim should be dismissed: it merely alleges "parallel conduct" coupled with a conclusory legal conclusion. *See Twombly*, 550 U.S. at 556–557.

As for Plaintiff's civil rights act claim, Plaintiff simply cites to the Elliott-Larsen Civil Rights Act several times. (First Amend. Compl., ¶¶ 78(h), 83, 91.) That statute contains distinct chapters, covering employment, housing, education, and public services. Plaintiff does not connect any of the facts he alleges to any particular chapter of the law or otherwise explain how that law applies to his case. Presumably, Plaintiff considers the Pigeon River Country State Forest to be the provision of a "public service" to which he was denied access. Mich. Comp. Laws § 37.2302(a). But Plaintiff does not allege that he was denied the ability to use and recreate on public land just as any other member of the public. What Plaintiff alleges is that he was denied the ability to place permanent structures on public land without a permit. As explained above, Plaintiff had no right to do so. What Plaintiff seeks is special treatment afforded no one else, including tribes party to the 2007 inland consent decree, which is precisely what the Elliott-Larsen Civil Rights Act forbids.

III. Defendants are immune to Plaintiff's claims.

As for Plaintiff's federal claims, he has the burden of establishing that Defendants are not entitled to qualified immunity. *Cartwright v.*

Marine City, 336 F.3d 487, 490–491 (6th Cir. 2003). As explained above, Plaintiff did not plead "facts showing" that Defendants "violated a [federal] statutory or constitutional right." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). And even if he did, Plaintiff cannot show that "the right was clearly established at the time of the challenged conduct." *Id.* (citation omitted). Therefore, Defendants are entitled to qualified immunity to Plaintiff's federal claims.

Plaintiff also has the burden to plead in avoidance of Defendants' immunity to his state law tort claims. *Mack v. City of Detroit*, 649 N.W.2d 47, 54 (Mich. 2002). Defendants are immune to "tort liability for an injury" or "damage to property" if they were (1) "acting within the scope of [their] authority;" (2) the "governmental agency" they worked for was "engaged in the exercise or discharge of a governmental function;" and (3) their "conduct does not amount to gross negligence that is the proximate cause of the injury or damage." Mich. Comp. Laws § 691.1407(2). Plaintiff alleges no facts to show that Defendants would *not* be immune under state law. Plaintiff's complaint indicates that Defendants acted in the course of their employment on behalf of MDNR to effectuate MDNR policies. (See, e.g., First Amend. Compl., ¶

13.) While Plaintiff identifies some of the *types* of facts he would need to demonstrate to potentially avoid Defendants' immunity, his statements are only legal conclusions—not facts. (*Id.* at ¶ 51(g).) Therefore, Plaintiff fails to plead in compliance with Rule 8(a), let alone plead in avoidance of Defendants' immunity. *See Iqbal*, 556 U.S. at 678 ("A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do.") (citations omitted).

CONCLUSION AND RELIEF REQUESTED

Defendants request that the Court dismiss Plaintiff's complaint in its entirety, with prejudice and without costs.

Respectfully submitted,

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Dated: September 11, 2018

CERTIFICATE OF SERVICE (E-FILE)

I hereby certify that on September 11, 2018, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record. A copy of the above document(s) was also served via First Class Mail upon Plaintiff at Parnell Correctional Facility, 1780 East Parnell Street. Jackson, MI 49201.

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LF: MacLeod, Dustin Lee v Moritz (DNR)/AG# 2018-0225090-A/Motion – to Dismiss with Brief in Support 2018-09-11