UNITED STATES DISTRICT COURT
DISTRICT OF DISTRICT OF COLUMBIA

MAN AGAINST XTINCTION A/K/A M.A.X, Plaintiff, v. Michael Pentony, et. al, Defendants.	Civil Action No.: 21-cv-01131-TJK **Oral Argument Requested**

DEFENDANT ARTHUR SAWYER'S MOTION TO DISMISS

NOW COMES, Defendant, Arthur Sawyer, by and through his undersigned counsel, Simms Showers LLP and Eckland & Blando, LLP, *pro hac vice pending*, and hereby moves the Court to dismiss with prejudice Plaintiff Richard Maximus Strahan (a/k/a Man Against Xtinction / M.A.X.)'s Amended Complaint in the above-captioned matter.

In support of his Motion, Defendant, Arthur Sawyer, refers to this Honorable Court's Docket, his memorandum of law filed herewith, and the oral argument of counsel.

POINTS AND AUTHORITIES

INTRODUCTION

Plaintiff MAN AGAINST XTINCTION A/K/A/ M.A.X. ("Plaintiff") has filed a diatribe against numerous individuals and entities, including Defendant Arthur Sawyer ("Defendant Sawyer") to express his displeasure with fishing practices he alleges harms Northern Black Whales. While Plaintiff's passion for whales is apparent in his Amended Complaint, he has utterly failed to state a claim for which relief can be granted. Therefore, pursuant to Federal Rule

of Civil Procedure 12(b)(1) and 12(b)(6), and for the reasons set forth below, Defendant Sawyer moves this Court to dismiss with prejudice all claims set forth in Plaintiff's Amended Complaint against Defendant Sawyer.

FACTUAL BACKGROUND

Prior to discussing the factual background of Plaintiff's Amended Complaint in the instant Action, this Court must understand the procedural history of a nearly identical complaint Plaintiff filed against Defendant Sawyer in the District of Massachusetts. In 2019, Plaintiff, using the name Richard Max Strahan (with Man Against Xtinction, a/k/a/ "Max" as a pseudonym), sued, among others, Defendant Sawyer in his personal and official capacity as the "chief executive officer" of the Massachusetts Lobstermen Association ("MLA").[1] (Declaration of Arthur Sawyer ("Sawyer Dec."), Ex. A - Pl.'s Dis. Mass. Am. Compl. ¶ 8.) Plaintiff's verified District of Massachusetts Amended Complaint alleged, *inter alia*, that Defendant Sawyer had, though his use of vertical buoy ropes ("VBR") fishing equipment, engaged in takings in violation of the Endangered Species Act ("ESA"), § 1538(a) and (g),[2] and a public nuisance claim under Massachusetts state law. (Pl.'s Dis. Mass. Am. Compl. ¶¶ 64-72, 102-103.) On July 19, 2019, Defendant Sawyer moved the District Court for the District of Massachusetts to dismiss Plaintiff's District of Massachusetts Amended Complaint. (Sawyer Dec., Ex. B - Def. Sawyer's Dis. Mass. Mot. To Dis. Pl.'s Am. Compl. at 1.) On February 3, 2020, the District Court for the

[1] Defendant Sawyer was and is the President of the Massachusetts Lobsterman Association, not its chief executive officer. The Massachusetts Lobsterman Association does not have a chief executive officer position.

[2] Regarding the Amended Complaint at issue in the instant motion, Plaintiff asserts Endangered Species Act ("ESA") § 9 takings against Sawyer. This should be understood to be a takings claim under 16 U.S.C. § 1538(a) and (g), which is an ESA § 9 takings claim. *See* ESA § 9(a)(1), 16 U.S.C. § 1538(a)(1)(B).

District of Massachusetts granted Defendant Sawyer's Motion to Dismiss. (Sawyer Dec., Ex. C - Dis. Mass. Order Dismissing Plaintiff Strahan's Am. Compl. ("Order") at 1).

In its Memorandum accompanying its Order, the District Court for the District of Massachusetts dismissed each claim against Defendant Sawyer. (Order at 1.) Specifically, as to Plaintiff's ESA § 1538(a) and (g) takings claim, the District Court for the District of Massachusetts found that Plaintiff's "allegations in support of [his takings claim] do not provide any allegations related to" Defendant Sawyer. (Order at 5, n. 4.) As to the public nuisance claim under Massachusetts law, the District of Massachusetts found that Plaintiff had failed to "plead [] a unique injury that would entitle him to bring a claim for public nuisance." (Order at 8-9.) Thus, Plaintiff's claims against Defendant Sawyer were dismissed with prejudice. *See generally* (id.); Fed. R. Civ. P. 41(b) ("Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.")

Plaintiff, proceeding *pro se*, has now brought claims against Defendant Sawyer in this District, alleging generally that Defendant Sawyer has violated the anti-taking provision of Section 9 of the Endangered Species Act, 16. U.S.C. § 1538, through the use of VBR fishing equipment lobster fishing in Massachusetts coastal waters. Plaintiff has also alleged that Defendant Sawyer is a public nuisance under Massachusetts law due to the alleged death of whales resulting from Defendant Sawyer's use of VBR fishing equipment.

PROCEDURAL STANDARD

In ruling on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), this Court "must treat the complaint's factual allegations as true and must grant the plaintiff the benefit of all

inferences that can be derived from the facts alleged." *Citizens for Resp. & Ethics in Washington v. U.S. Dep't of Just.*, 436 F. Supp. 3d 354, 357 (D.D.C. 2020) (internal quotations omitted) (citing *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000)). However, the court is not required to accept as true legal conclusions alleged by the plaintiff nor need it accept inferences drawn by the plaintiff if those inferences are unsupported by facts alleged in the complaint.[3] *Id.* (citing *Kowal v. MCI Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994)). Further, a court may ordinarily consider only "the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint, and matters about which the Court may take judicial notice." *Gustave-Schmidt v. Chao*, 226 F. Supp. 2d 191, 196 (D.D.C. 2002); *but see Vance v. Chao*, F.Supp.2d 182, 184 n.1 (D.D.C. 2007) (noting that a court may take judicial notice of public documents, such as court records, without converting a motion to dismiss into a motion for summary judgment).

This Court is only empowered to hear claims over which it has subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). When evaluating a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), the plaintiff "bears the burden of establishing the [c]ourt's jurisdiction" and, "where subject-matter jurisdiction does not exist, the court cannot proceed at all in any cause." *Schmidt v. U.S. Capitol Police Bd.*, 826 F. Supp. 2d 59, 65 (D.D.C. 2011). Further, under Fed. R. Civ. P. 12(b)(1), this Court may "consider materials outside the pleadings in deciding whether to

[3] Contrary to Plaintiff's contention in his Amended Complaint, this Court is not Plaintiff's attorney and is not obligated, under any existing law, to "find *sua sponte* any legal basis to justify the court issuing the relief sought by the pro se petitioner." *See* (Pl.'s Am. Compl. ¶ 9.) Choosing to file his complaint *pro se* does not entitle Plaintiff to a kids glove treatment of the law; he is required to state a claim the basis of which entitles him to relief and his failure to do so authorizes this court to dismiss his complaint. Fed. R. Civ. P. 12(b)(6). Additionally, in his District of Massachusetts action where he brought the same claims against Defendant Sawyer, Plaintiff was in fact represented by counsel – both for ESA purposes and by local counsel. Plaintiff cannot be permitted to take his dismissed claims and bring them here, now without counsel, in the hope that a more lenient standard will allow his futile claims to survive.

grant a motion to dismiss for lack of jurisdiction." *Jerome Stevens Pharms., Inc. v. Food & Drug Admin.*, 402 F.3d 1249, 1253 (D.C. Cir. 2005) (citing *Herbert v. Nat'l Acad. of Sciences,* 974 F.2d 192, 197 (D.C.Cir.1992)). Under Fed. R. Civ. P. 12(b)(1), the court "must accept as true all of the factual allegations of the complaint," and draw all reasonable inferences in favor of the plaintiff but is not required to "accept inferences unsupported by facts or legal conclusions that are cast as factual allegations." *Id.* (citing *Rann v. Chao,* 154 F.Supp.2d 61, 64 (D.D.C. 2001)).

ARGUMENT

This Court should dismiss Plaintiff's Amended Complaint because Plaintiff has already received a final judgment on these exact claims against Defendant Sawyer in the District of Massachusetts and thus the doctrine of res judicata bars his claims. Alternatively, Plaintiff's Amended Complaint should be dismissed because he completely fails to allege any facts against Defendant Sawyer to support his claim of an ESA § 9 taking and that Defendant Sawyer is a public nuisance.

A. THIS COURT IS BOUND BY THE DOCTRINE OF RES JUDICATA TO DISMISS PLAINTIFF'S AMENDED COMPLAINT AGAINST DEFENDANT SAWYER AS IT ARISES FROM THE SAME FACTS AND LEGAL THEORIES AS PLAINTIFF'S PREVIOUSLY DISMISSED COMPLAINT.

Plaintiff has already brought and lost the exact same claims, based on the exact same facts, against Defendant Sawyer in the District of Massachusetts (*see generally* Pl.'s Dis. Mass. Am. Compl.); having failed to find the relief he sought there, he now tries his luck in this District. This Court must reject this improper procedural maneuvering.

Under the doctrine of res judicata, "a subsequent lawsuit will be barred if there has been prior litigation . . . involving the same claims or cause of action . . . between the same parties." *Nat'l Harbor GP, LLC v. Gov't of D.C.*, 121 F. Supp. 3d 11, 20 (D.D.C. 2015) (alterations in

original) (citing *Smalls v. United States*, 471 F.3d 186, 192 (D.C. Cir. 2006)). More concisely, res judicata applies when the prior litigation meets the following four (4) elements: (1) involving the same claims or cause of action, (2) between the same parties or their privities, (3) there has been a final, valid judgment on the merits, (4) by a court of competent jurisdiction. *Porter v. Shah*, 606 F.3d 809, 813–14 (D.C. Cir. 2010) (citing *Capitol Hill Group v. Pillsbury, Winthrop, Shaw, Pittman, LLC,* 569 F.3d 485, 490 (D.C. Cir. 2009)).

The "same claims" element is also known as the "identity" element and is met when "there is an identity of the causes of action when the cases are based on the same nucleus of facts" and not on the particular legal theory the plaintiff choses to elect. *Capitol Hill Group v. Pillsbury, Winthrop, Shaw, Pittman, LLC*, 569 F.3d 485, 490 (D.C.Cir.2009) (internal quotation marks and citations omitted). Here, beyond bringing the exact same claims, Plaintiff's claims are based on the exact same factual allegations as his District of Massachusetts action. Plaintiff is alleging that Defendant Sawyer has captured and killed whales through his use of VBR fishing equipment, and that the loss of those whales has caused public harm and specific harm to him. *Compare* (Pl.'s Am. Compl. ¶¶ 129 - 132) *with* (Pl.'s Dis. Mass. Am. Compl. ¶¶ 102-103.) A reading of the twin complaints further demonstrates that the facts are the same, as Plaintiff repeats almost verbatim various paragraphs in his fact section. *See generally* (Pl.'s Am Compl.); (Pl.'s Dis. Mass. Am. Compl.) Because Plaintiff has brought the same claims based on the exact same facts as his previously dismissed District of Massachusetts Amended Complaint, the same claims element is unquestionably met.

Here, there can be little doubt that the parties are the same. Plaintiff previously sued Defendant Sawyer in the District of Massachusetts. While Defendant Sawyer was sued in his official capacity in that action, he was also sued in his personal capacity and thus, for the

purposes of this present motion, the parties are the same.[4] *See Gresham v. D.C.*, 66 F. Supp. 3d 178, 192 (D.D.C. 2014) (finding same parties for res judicata purposes where the plaintiff had previously sued the District of Columbia in his previous lawsuit).

A dismissal with prejudice is a final, valid judgment on the merits where the plaintiff forgoes the opportunity to appeal. *See Doherty v. Turner Broad. Sys., Inc.*, No. 1:20-CV-00134 (TNM), 2021 WL 326447, at *3 (D.D.C. Feb. 1, 2021) (citing *Burns v. Fincke*, 197 F.2d 165, 166 (D.C. Cir. 1952) ("Since the stipulation provides for dismissal with prejudice, the first action is res judicata of the matters covered by the cause of action and counterclaim therein.")); *cf. Cactus Canyon Quarries, Inc. v. Fed. Mine Safety & Health Rev. Comm'n*, 820 F.3d 12, 19 (D.C. Cir. 2016) ("[d]ismissal without prejudice is a dismissal that does not operate as an adjudication upon the merits and thus does not have a res judicata effect."). Further, a plaintiff is not entitled to discovery or an evidentiary hearing as a matter of right, as a district court has discretion on affording the plaintiff either, and its decision not to do so does not preclude a finding of final, valid judgment on the merits. *Porter*, 606 F.3d 809 at 814 (citing *Ned Chartering & Trading, Inc. v. Republic of Pakistan*, 294 F.3d 148, 151 n. 1 (D.C.Cir.2002)). Here, Plaintiff's District of Massachusetts claims were dismissed with prejudice on February 3, 2020. (Order at 11.) Plaintiff did not appeal this dismissal.[5] The fact that this occurred at a motion to dismiss stage, rather than

[4] Indeed, betraying the fact that Plaintiff essentially re-filed his previous District of Massachusetts Amended Complaint, Plaintiff alleges that Defendant Sawyer is "being sued both as an individual and *as chief executive officer of the Defendant Massachusetts Lobstermen Association*." (Pl.'s Am. Compl. ¶ 33) (emphasis added). However, as demonstrated by the caption and the actual text of Plaintiff's Amended Complaint, the Massachusetts Lobstermen Association has not been named as a party to this action and, correspondingly, Defendant Sawyer has not actually been sued in his official capacity.

[5] Plaintiff's complaint was dismissed on the merits, not on jurisdiction, *see* (Order at 11), and thus res judicata can apply. *Gresham v. D.C.*, 66 F. Supp. 3d 178, 194 (D.D.C. 2014) ("a

at summary judgment, has no bearing on the application of res judicata. *Porter*, 606 F.3d 809 at 814. Thus, Plaintiff's claims have already received a final, valid judgment on the merits.

Finally, there can be no question that the District Court for the District of Massachusetts was a court of competent jurisdiction. *Solomon v. Univ. of S. CA*, No. CIV.07-1811(EGS), 2008 WL 2751335, at *3 (D.D.C. July 15, 2008) (". . . the U.S. District Court for the District of Massachusetts, which is a court of competent jurisdiction."), *aff'd sub nom. Solomon v. Univ. of S. California*, 360 F. App'x 165 (D.C. Cir. 2010), and *aff'd sub nom. Solomon v. Univ. of S. California*, 360 F. App'x 165 (D.C. Cir. 2010).

Accordingly, each element of res judicata is met here and the District Court should deploy the doctrine to dismiss Plaintiff's duplicate litigation against Defendant Sawyer.

B. PLAINTIFF HAS FAILED TO ALLEGE SUFFICIENT FACTS TO STATE A "TAKINGS" CLAIM IN COUNT VII OF HIS COMPLAINT.

Over a measly four (4) paragraphs, Plaintiff, in-between his complaints against VBR fishing equipment, attempts to allege that Defendant Sawyer has engaged in an illegal taking under ESA § 9. (Pl.'s Am. Compl. ¶¶ 127-130.) This claim devotes most of its contentions to decrying the effects of VBR fishing equipment while only obliquely alleging, without providing any facts, that Defendant Sawyer has allegedly caught whales and sea turtles. (*Id.*) These threadbare allegations fail to allege conduct by Defendant Sawyer sufficient to support a Section 9 takings claim.[6]

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dismissal for lack of subject matter jurisdiction does not constitute adjudication on the merits with claim preclusive effect.").

[6] Additionally, Plaintiff's ESA § 9 claim should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) because this court lacks subject matter jurisdiction over Plaintiff's claim. Prior to bringing a claim under the ESA, a citizen plaintiff must give at least sixty-day notice of an intent to sue to any alleged violators. 16 U.S.C. § 1540(g)(2)(A)(i). Failure to comply with this

Section 9 of the ESA prohibits any person from "taking" a federally protected species. ESA § 9(a)(1), 16 U.S.C. § 1538(a)(1)(B). The term "person" encompasses individuals as well as partnerships, trusts, associations, and other private entities. ESA § 3(13), 16 U.S.C. § 1532(13). The word "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." ESA § 3(19), 16 U.S.C. § 1532(19). To prevail on his claim against Defendant Sawyer, Plaintiff must show, at minimum, that Defendant Sawyer *actually* harassed, harmed, pursued, hunted, shot, wounded, killed, trapped, captured, or collected (or attempted any of the foregoing) the federally protected Northern Black Whales. *See American Bald Eagle v. Bhatti*, 9 F.3d 163, 166 (1st Cir. 1993); *Strahan v. Diodati*, 755 F. Supp. 2d 318, 324 (D. Mass. 2010) ("To prevail on his claims in chief the plaintiff must show, *inter alia*, that the defendants: 1) actually caused "takings" of federally protected whales in violation of the ESA during the relevant time period and 2) are likely to continue to do so in the future, absent an injunction."). The Plaintiff has made no such allegations. Instead, the Plaintiff has made unsupported allegations that VBR fishing gear is "now a *per se* ESA [§] 9 prohibited

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requirement is an "absolute bar" to bringing suit, divesting a court of jurisdiction. *Conservation Cong. V. Finley*, 774 F.3d 611, 617 (9th Cir. 2014) (internal quotations and citations omitted); *Save the Yaak Comm. V. Block*, 840 F.2d 714, 721 (9th Cir. 1988). In his Amended Complaint, Plaintiff alleges that he provided sufficient notice on June 4, 2018. (Pl.'s Am. Compl. ¶ 35.) This appears to be a reference to his dismissed District of Massachusetts Amended Complaint and is also factually incorrect. In this case, Plaintiff will likely base this contention on a December 21, 2021 email sent to numerous individuals, including Defendant Sawyer, that stated Plaintiff intended to sue the following individuals under ESAS § 11(g): U.S. Department of Commerce Secretary Raimondo; National Marine Fisheries Service Assistant Administrator Janet Coit; National Oceanographic and Atmospheric Agency Administrator Rick Spinrad, and Massachusetts Division of Marine Fisheries Chair Daniel McKiernan. *See* (Sawyer Decl., Ex. D – Pl.'s Dec. 21, 2021 email to Defendant Sawyer at 1.) This cannot be considered sufficient notice to Defendant Sawyer that Plaintiff intended to bring suit; it fails to name him and does not even name the proper section. Thus, Plaintiff has failed to provide sufficient 60-day notice under 16 U.S.C. § 1540(g)(2)(A)(i). Accordingly, Count VII must be dismissed. *Carney Hosp. Transitional Care Unit v. Leavitt*, 549 F.Supp.2d 93, 95 (D.D.C.2008) (holding that plaintiff bears burden of proving subject matter jurisdiction)

activity on its own without any need to actually catch/entangle any animal who is a member of an ESA Listed Species." (Pl.'s Am. Compl. ¶ 129) (emphasis in original). Plaintiff cites no case, statute, or regulation to support this eye-popping claim because there is none. Patently, the use of VBR fishing gear is not a per se ESA § 9 violation. Instead, as explained, for Plaintiff to make a sufficient ESA § 9 takings claim, he must have alleged that Defendant Sawyer *actually* harassed, harmed, pursued, hunted, shot, wounded, killed, trapped, captured, or collected (or attempted any of the foregoing) a Northern Black Whale. Plaintiff did not do so.

Plaintiff alleges that the VBR equipment "deployed by [Defendant] Sawyer routinely catches and entangles ESA Listed Species of whales and sea turtles principally owing to the use of the" VBR equipment. (*Id.*) As is clear from that language, this is not an allegation that Defendant Sawyer has actually engaged in prohibited conduct with regard to a Northern Black Whale. Rather, it is a factually insufficient allegation that the equipment used by Defendant Sawyer generally allegedly catches said animals. By failing to actually allege that Defendant Sawyer has actually engaged in prohibited conduct with regard to the Northern Black Whale (a claim Plaintiff cannot make because this has never happened), Plaintiff's ESA § 9 takings claim must fail. *See Strahan*, 755 F. Supp. 2d at 324.[7]

C. THIS COURT SHOULD DECLINE TO EXERCISE ITS SUPPLEMENTAL JURISDICTION OVER PLAINTIFF'S PUBLIC NUISANCE CLAIM, WHICH PLAINTIFF HAS FAILED TO ESTABLISH HIS ABILITY TO BRING AND HAS FAILED TO STATE CLAIM FOR.

As a preliminary matter, this Court should decline to exercise its supplemental jurisdiction over Count IX because it will have dismissed the only federal claim, Claim VIII,

[7] Despite raising an ESA § 9 claim in his Amended Complaint, Plaintiff's prayer for relief fails to request this Court to issue an order enjoining Defendant Sawyer from taking any actions. (Pl.'s Am. Compl. at 41.)

against Defendant Sawyer. Alternatively, Plaintiff has completely failed to allege any facts against Defendant Sawyer that support a public nuisance claim.

This Court should decline to exercise its supplemental jurisdiction over Plaintiff's Massachusetts common law claim because this Court should have already dismissed Count VIII of Plaintiff's Amended Complaint. When a plaintiff brings a claim under the federal district court's supplemental jurisdiction, the court has "discretion to decline to exercise supplemental jurisdiction over plaintiff's remaining common law claims" when "the claims over which the Court had original jurisdiction has been dismissed." *Strumsky v. Washington Post Co.*, 842 F. Supp. 2d 215, 219 (D.D.C. 2012). Indeed, this Court has followed this legal reasoning before. *See Brown v. Potomac Elec. Power Co.*, No. CV 17-1131 (TJK), 2018 WL 11247165, at *1 (D.D.C. June 7, 2018) (declining to exercise supplemental jurisdiction because "as here, the district court has dismissed all claims over which it has original jurisdiction"). Here, because this Court should dismiss Plaintiff's ESA § 9 takings claim, it should decline to exercise its supplemental jurisdiction over Plaintiff's public nuisance claim. *See Brown*, No. CV 17-1131 (TJK), 2018 WL 11247165 (also noting that "using the resources of the Federal court to try local claims is not in the interest of judicial economy . . . particularly [] here, where discovery has not commenced and the Court has expended little judicial energy.") (citing *Hunter v. District of Columbia*, 905 F. Supp. 2d 364, 383 (D.D.C. 2012), *aff'd*, No. 13-7003, 2013 WL 5610262 (D.C. Cir. Sept. 27, 2013)).

However, if the Court chooses to exercise its supplemental jurisdiction despite dismissing the only federal claim brought against Defendant Sawyer, it still must dismiss Plaintiff's claim because he failed to allege facts sufficient to support a claim upon which relief can be granted. The Supreme Judicial Court of Massachusetts has established that "[a] nuisance is public when it

interferes with the exercise of a public right by directly encroaching on public property or by causing a common injury." *Connerty v. Metropolitan Dist. Comm'n*, 495 N.E.2d 840, 845 (Mass. 1986); *see also* Restatement (Second) of Torts § 821B (1979) ("A public nuisance is an unreasonable interference with a right common to the general public"). Further, when a public nuisance is alleged under Massachusetts law, the normal remedy is for the Massachusetts Attorney General to bring an act in equity "for the abatement of a public nuisance." *Sullivan v. Chief Justice for Admin. & Mgmt. of Trial Court*, 858 N.E.2d 699, 716 (Mass. 2006) (quoting *Mayor of Cambridge v. Dean*, 14 N.E.2d 163 (Mass. 1938)). To derivate from this standard procedure, a private plaintiff may bring a public nuisance action only where the plaintiff can "show that the public nuisance has caused some special injury of a direct and substantial character other than that which the general public shares." *Id.* (quoting *Connerty*, 495 N.E.2d at 845). Here, Plaintiff has utterly failed to make such a showing.

Count IX of Plaintiff's Amended Complaint contains only two (2) paragraphs of new allegations which fail to sufficiently allege any conduct by Defendant Sawyer to support a public nuisance claim. Regurgitating the elements of a public nuisance claim, Plaintiff alleges that numerous Defendants, including Defendant Sawyer, have "adversely injured the property interests and otherwise inflicted tortious injury on the protectable interest of [Plaintiff]." (Pl.'s Am. Compl. ¶ 132.) To support this bare restatement of law, Plaintiff alleges that Defendant Sawyer has "acted in concert to insure [sic] required use of VBR by [] all lobsterpot and gillnet fishers in the northeastern United States coastal waters." (*Id.*) Notably, Plaintiff has not alleged how Defendant Sawyer has supposedly acted in concert to require fishers to use VBR.[8] Further,

[8] Even if Plaintiff had alleged how Defendant Sawyer had acted in concert to require fishers to use VBR, the District of Massachusetts already addressed this contention in its Order,

Plaintiff contends, again without alleging any evidence or factual basis to support his contention, that Defendant Sawyer has "maliciously and negligently destroyed the Northern Black Whale's species ability to thrive and condemned it to an inevitable extinction." (*Id.*) Even if this were true, which it is not, Plaintiff fails to allege how this is a special injury distinct from the general public. (*Id.*) Plaintiff claims that he as a unique status from the general public because he is a commercial fisherman but alleges no facts or evidence to explain why this is the case or why being a commercial fisherman means that his alleged injury (e.g., alleged harm to whales caused by VBR) is different than that of the general public. (*Id.*) Indeed, Plaintiff sabotages his own contention by revealing the true motive of his complaint; he asserts that "Defendants negligence has hurt *all members of the Public and their ability to enjoy the marine environment*." (*Id.* ¶ 133.) This alleged injury to the entire public cannot support a claim of special injury.

With apologies to dead horses, Defendant Sawyer must again note that Plaintiff has utterly failed to allege any facts showing that he has suffered a special injury of a direct and substantial character that is different than the general public. *See Sullivan*, 858 N.E.2d at 716 (holding that not even plaintiffs who suffered the public harm to a greater degree than other individuals could bring a public nuisance claim without a showing that their injury was unique, and not simply greater in magnitude). Here, reading Plaintiff's Amended Complaint generously, he has at best alleged that he cannot watch or study Northern Black Whales. Even accepting this as true, this is an alleged injury suffered by the entire public, as admitted by Plaintiff, and thus cannot form the basis for a public nuisance claim under Massachusetts law. *See Stop & Shop Companies, Inc. v. Fisher*, 444 N.E.2d 368, 371 (Mass. 1983) (holding that an individual

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finding that aiding and abetting a taking would not constitute a violation of ESA § 9. (Order at 6-7.)

plaintiff cannot recover absent a special injury). Accordingly, the Court must dismiss Plaintiff's Count IX against Defendant Sawyer.

CONCLUSION

WHEREFORE, the Defendant, Arthur Sawyer, respectfully request this Court grant his Motion and dismiss with prejudice Plaintiff's Amended Complaint as to Defendant Sawyer and grant such other relief which is just and equitable.[9]

Defendant, Arthur Sawyer, by his attorneys,

SIMMS SHOWERS LLP

Dated: February 21, 2022

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[9] As best Defendant Sawyer can tell, Counts I-VII do not raise allegations against Defendant Sawyer. To the extent this is incorrect, Defendant Sawyer asks this Court to dismiss those counts against Defendant Sawyer with prejudice as well for failure to allege any facts sufficient to support a claim for relief.

CERTIFICATE OF SERVICE

I hereby certify that, on February 22, 2022, the foregoing was filed on this Court's CM/ECF system for service on all counsel of record.

/s/ J. Stephen Simms
J. Stephen Simms

UNITED STATES DISTRICT COURT
DISTRICT OF DISTRICT OF COLUMBIA

MAN AGAINST XTINCTION A/K/A M.A.X, Plaintiff, v. Michael Pentony, et. al, Defendants.	)	Civil Action No.: 21-cv-01131-TJK

DECLARATION OF ARTHUR SAWYER IN SUPPORT OF DEFENDANT ARTHUR SAWYER'S MOTION TO DISMISS

I, Arthur Sawyer, pursuant to 28 U.S.C. §1746, state and declare as follows:

1. I am a defendant in the above-captioned matter. I submit this Declaration in connection with my Motion to Dismiss. This declaration is made upon personal knowledge unless noted otherwise.

2. I was also a defendant in the previous action filed by Plaintiff in the U.S. District Court for the District of Massachusetts, Civil Action No.: 19-cv-10639-IT. A true and correct copy of Plaintiff's Amended Complaint in that action is attached hereto at **Exhibit A.**

3. A true and correct copy of my Motion to Dismiss in Civil Action No.: 19-cv-10639-IT is attached hereto as **Exhibit B**

4. A true and correct copy of the Order Dismissing Plaintiff's District of Massachusetts Amended Complaint in Civil Action No.: 19-cv-10639-IT is attached hereto as **Exhibit C**.

5. A true and correct copy of the email sent by Plaintiff to me and others on December 21, 2021, is attached hereto as **Exhibit D**.

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 21, 2022, in the County of Essex and Commonwealth of Massachusetts.

/s/ ARTHUR SAWYER
Arthur Sawyer

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MAN AGAINST XTINCTION A/K/A "MAX"	)	
	)	
Plaintiff	)	
	)	Civil Action No.
v.	)	
	)	19-CV-10639-IT
SECRETARY, MASSACHUSETTS EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS ("MEOEEA")	)	4 June 2019
DAVID PIERCE and as director, MASSACHUSETTS DIVISION OF MARINE FISHERIES ("MDMF")	)	
ARTHUR SAWYER and as president of the MASSACHUSETTS LOBSTERMEN'S ASSOCIATION AS REPRESENTING ALL IT'S MEMBERS ("MLA")	)	
CENTER FOR COASTAL STUDIES	)	
JOHN HAVILAND	)	
VINEYARD WIND LLC	)	
BAYSTATE WIND LLC	)	
Defendants	)	

VERIFIED AMENDED COMPLAINT FOR DECLARATORY, INJUNCTIVE, AND OTHER RELIEF AND A REQUEST FOR A JURY TRIAL THAT IS SERVING AS PLEADING DOCUMENT NO. 1 TO BE SUPPLEMENTED IN FILING OF ADDITIONAL PLEADING DOCUMENTS CONSISTING OF SCIENTIFIC FACT/DATA

I the Plaintiff — Richard Maximus Strahan — SPEAK:

Plaintiff Man Against Xtinction ("MAX") is a licensed commercial lobster fisherman, an avid whale watcher, a conservation scientist who researches whales and marine wildlife and a professional recovery agent of endangered wildlife species. He is bringing the instant action to stop the Defendants from the further prohibited killing and injuring along the US coastline of Endangered Whales and Sea Turtles. Acting in concert, the Defendants' past and prospective killing of Right Whales incidental to commercial marine fisheries has caused the Right Whale

species to now be functionally extinct. Due to the Defendants and other prohibited killing, the Right Whales have now the irreparably lost the ability to annually give birth to a sufficient number of newborn whales to continue the survival of their species. The Right Whale will be extinct in the near future.

1. The Plaintiff is seeking to obtain in the instant action injunctive relief to legally protect his interests in marine wildlife by making Massachusetts' commercial fisheries a "Green Fishery" employing only Green Fishermen and open to all members of the Public. This is required under current state and federal law. As such the Massachusetts fishing industry will be required to be Whale Safe and no longer devastate Endangered Whales and Sea Turtles population by entangling them in Vertical Buoy Ropes (VBR).

2. The Plaintiff is a "Green Fisherman" seeking protection of his and other members of the Public's equal rights under law to have the opportunity to engage in commercial lobster fishing in Massachusetts state waters in a manner that is Whale Safe. **FN1** He does not want or need to use VBR in his lobsterpot gear in order to sustainably obtain lobsters to sell. He believes his Green Fishing operation should be prioritized to favor the conservation of marine wildlife over any profit making. The Plaintiff is fully cooperative with government agencies, academics, and conservationists to promote scientific management of marine fisheries. He will utilize his fishing operations to conduct research on the environment, to collect field data beneficial to sustainable management, and to report the location of each of his trawls and pots at all times in order to aid the sustainable management of commercial marine fishing.

3. The State Defendants are operating an unlawful commercial fishing operation that seeks to only benefit the profiteering of a small number of specific individuals. They deny the opportunity to access a fishing permit to over 99%of the Public. They refuse to allow the entire Public any equal or competitive opportunity to participate in lobsterpot fishing. The State Defendants regulate marine fisheries only to assist those few individuals they personally favor

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[1] As a "Green Fisherman" the Plaintiff does not want to injure other species of marine wildlife when he attempts to sustainably harvest lobsters. He seeks to conduct his commercial fishing operations to be Whale Safe. The State Defendants have adopted regulations requiring the use of Vertical Buoy Ropes (VBR) or Killing Ropes in lobster/pot and gill net commercial fishing licensed by them. The State Defendant are threatening the Plaintiff with fines and loss of his right to fish if he does not use Killing Ropes that will cause him to "take" endangered marine wildlife in violation of the ESA's Section 9 prohibitions against such.

with fishing permits to add to their profits at the cost of the widespread destruction of marine wildlife. The State Defendants marine fisheries operations only serve the Public Bad. Despite lobsterpot fishing being only a revocable privilege by state statute — with no one possessing any property right to even obtain a renewed fishing permit —the State Defendants restrict access to commercial fishing licenses to a small number of culturally favored individuals. State Defendants licensure of lobsterpot fishermen is unlawfully discriminatory. It only favors individuals related to its chose selected individuals seeking to profit off the unsustainable destruction of marine wildlife. A such, Massachusetts marine fisheries statutes are facially and as applied violative of the Constitution and the Massachusetts state constitution.

4. The Plaintiff is now the object of a vendetta being conducted by disgruntled employees of the State Defendants. Defendant Massachusetts Division of Marine Fisheries employees David Pierce and Daniel McKiernan are preventing the Plaintiff from obtaining MDMF license to do marine fishing in Massachusetts state waters as retribution for his bringing the instant action, his advocacy for eliminating VBR, and for marine mammal conservation. They recently rejected Plaintiff's 29 April 2019 lawful applications for either a recreational or a student commercial fishing permit. The Plaintiff was issued a recreational lobsterpot permit by the MDMF in 2018. This is a retaliation for his suing the State Defendants since 1996 in order to stop their licensing and regulating of fishing gear that entangles, kills and injures Endangered Whales and Sea Turtles. Now they are usurping their employee authority to insure the Plaintiff never gets a fishing license again to insure in part he has no ability to prove the efficacy of Green Fishing. In doing so Defendant Pierce is violating the constitutionally protected rights of the Plaintiff, including the rights of equal treatment under the law, due process and the right to petition the courts.

5. The Plaintiff is seeking injunctive relief to do three things. First to compel the State Defendants to issue him a commercial lobsterpot permit as a "Green Fisherman" requiring members of the Public by regulation to use fishing gear in Massachusetts coastal waters that does not use VBR and does not entangle Endangered Whales and Sea Turtles. The Second is to stop the State Defendants from licensing any fishing gear in a manner that requires the licensed fishermen to use vertical buoy ropes. Third, the Plaintiff is seeking an injunction to enjoin the State Defendants from further licensing marine fisheries activities until they have applied for and receive from the federal government an incidental take permit under Section Ten of the

Endangered Species Act that authorizes them to license and regulate marine fisheries in United States coastal waters. **FN2** The Plaintiff is claiming that the State Defendants current licensing and regulating of marine fisheries activities in US coastal waters under the concurrent jurisdiction of Massachusetts is in violation of the ESA's Section 9 prohibitions against the "taking" of ESA listed species of whales and sea turtles. **FN3** The State Defendants requiring the use of VBR in lobster pot gear and gill nets violates the ESA's Section 9 prohibitions against "taking" ESA listed species of whales and sea turtles.

6. The State Defendants have every year since 1973 killed and injured Right Whales and other endangered species of whales and of turtles listed as protected under the Endangered Species Act. **FN4** They have done so incidental to their licensing of Lobster Pot and Gill Net fishing by requiring the use of VBR by their licensed agents.

7. In 1996, this Court thoroughly reviewed the State Defendant and the Defendant MLA's commercial fishing activities and ruled that endangered whales are routinely entangled in VBR used in the Massachusetts state lobster pot fisheries in violation of the ESA Section 9 prohibition. **FN5** The Court also ruled that the State Defendants were liable for each and every entanglement of an endangered whales by the fishing gear deployed by their licensed agents. The Court deemed it fitting to order the State Defendants to apply for an obtain an ESA Section 10

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[2] ESA Section 10 at 16 USC § 1539.

[3] See 322 CMR § 4.13(c): "Surface Identification of Traps. 1. Single Traps. Single traps shall each be marked with a single buoy measuring at least seven inches by seven inches or five inches by 11 inches. Sticks are optional, but if used, shall not have a flag attached. 2. Trawls. The east end of a trawl shall be marked with a double buoy, consisting of any combination of two buoys measuring at least seven inches by seven inches or five inches by 11 inches and one or more three foot sticks. The west end of a trawl shall be marked with a single buoy measuring at least seven inches by seven inches or five inches by 11 inches buoy with a three foot stick and a flag."

[4] 16 USC § 1538(a and g). Section 9 of the Endangered Species Act "prohibits" the incidental killing and/or injuring of any species listed as endangered under the Act: ESA: "It is unlawful for any person subject to the jurisdiction of the United States to— (A) import any such species into, or export any such species from the United States; (B) take any such species within the United States or the territorial sea of the United States; (C) take any such species upon the high seas."

[5] See *Strahan v. Coxe*, 939 F. Supp. 963 (Dist. Mass. 1996) and 127 F. 3d 155 (1st Circuit, 1997) (Massachusetts marine fishing agency liable under ESA Section 9(a) for unlawful taking of ESA listed species of endangered whales by entanglements of endangered whales in fishing gear licensed and regulated this agency).

Incidental Take Permit from the federal government to authorize its commercial fisheries activities so they no longer would violate the ESA.

8. The Defendant Sawyer is a Massachusetts state actor and CEO of Defendant Massachusetts Lobstermen's Association. Sawyer has been appointed to the Massachusetts Marine Fisheries Advisory Commission ("MFAC") which has exclusive state regulatory authority over commercial fishing in Massachusetts waters. Sawyer conspires with all the other voting members of the Defendant MLA to conduct commercial fishing operation that use VBR and which violate the ESA's Section 9 prohibitions by "taking" of ESA listed species of whales and sea turtles. Sawyer and the MLA conspire with the State Defendants o insure that only their members can obtain fishing licenses from the State Defendants. Sawyer and the MLA oppose Green Fishermen from fishing in Massachusetts waters by also using threats of violence against them and the destruction of their fishing gear. The Plaintiff has been coerced by Sawyer and the MLA to not openly practice Green Fishing and by their intimidation and use threats of violence and theft of his property.

9. The Defendant Center for Coastal Studies is being sued as a state actor acting in concert with the State Defendants to insure that they can continue to license fishing gear that employs VBR and entangles and otherwise unlawfully "takes" ESA listed species of whales and sea turtles. Defendant CCS has been paid millions of dollars as an agent and co-conspirator the State Defendants since 1989 to serve has its agents to spread propaganda to promote the State Defendants and Defendant MLA's unlawful activities to the Public. Defendant CCS has been given exclusive access to entangled wildlife and actively prevents the Public from getting access to MDMF's information about entangled whales and sea turtles in Massachusetts coastal waters. This is deliberately done to impede the Public from obtaining evidence of the entanglement of marine wildlife. Defendant conspires with the other Defendants to do this to insure that the unlawful *status quo* is maintained and that the Plaintiff and the Public will be prevented from being able to fully document the unlawful killing of marine wildlife from the other Defendants licensing and practice of gill netting and lobster pot fishing in Massachusetts coastal waters.

10. The Court is mandated by the ESA and the Public Interest to FINALLY permanently enjoin the State Defendants from requiring any further deployment of Vertical Buoy Ropes for use with Pot Gear and Gill Nets into US coastal waters. These Killing Ropes are the single most significant cause for the fishing gear licensed and regulated by the State Defendants

routinely entangling Endangered Whales and Sea Turtles. The simple deployment of Killing Ropes must be considered a categorical violation of the ESA's Section 9 prohibitions against taking Endangered Whale and Sea Turtles.

11. The Plaintiff is also bringing supplemental claims against the Commercial Defendants (i. e. MLA, Sawyer, Haviland and CCS for tortious injuries inflicted on him and the Public by their being a public nuisance and for violations of the Massachusetts Civil Rights Act by using threats of killing endangered wildlife to interfere with MAX's enjoyment of the his protected right under the Massachusetts Constitution to enjoy the environment.

12A. The Plaintiff is Petitioning the Court for —

A. A Declaratory Judgment from the Court declaring that the deployment of any VBR in the marine habitat historically used by Endangered Whales and Sea Turtles is a categorical violation of the ESA's Section 9 prohibitions against taking any of its listed species of wildlife and Requires the Defendants to obtain an ESA Section 10 permit.

B. A Declaratory Judgment that the State Defendants requiring the use of VBR's in fishing gear deployed in US coastal waters is also a violation of the ESA's Section 9 prohibitions against taking.

C. A permanent injunction banning the State Defendants from requiring the Plaintiff and other licensed fishermen to use VBRs on their fishing gear.

D. An order requiring that the State Defendants apply for an ESA Section 10 Incidental Take Permit from the federal government that authorizes them to deploy fishing gear in US coastal waters that might harm endangered wildlife.

E. The Plaintiff is also seeking appropriate award of compensatory and punitive damages against each of the Commercial Defendants.

12B. The Plaintiff is seeking a Jury Trial against each of the Defendants.

The Parties

13. Plaintiff Richard Maximus Strahan in 2016 graduated *magnum cum laude* with a Bachelor of Arts degree in Classics Studies from the University of Massachusetts in Boston MA. He is licensed by the State Defendants to do lobster pot fishing in Massachusetts State waters. He is also licensed as a commercial lobster pot fisherman by the State of New Hampshire. He is

also an avid whale watcher and researcher on sea turtles. He is the Chief Science Officer of Whale Safe USA, a campaign to make the US coastline environmentally safe for endangered species of coastal whales and sea turtles. His business mailing address is P. O. Box 82, Peterborough NH 03458.

14. Defendant Director of the Massachusetts Division of Marine Fisheries is being sued in its official capacity as a violator of the ESA Section 9 prohibitions on taking ESA listed species. The Director of the MDMF official business address the Office of the Director, Division of Marine Fisheries, 251 Causeway Street, Suite 400, Boston, MA 02114.

15. Defendant Secretary of the Executive Office of Energy and Environmental Affairs is being sued in its official capacity as a violator of the ESA Section 9 prohibitions on taking ESA listed species. This Defendants' official business address.

16. Defendant Massachusetts Lobstermen's Association Inc. and its members are being sued as violators of the ESA Section 9 prohibitions on taking ESA listed species. The MLA'S official business address is 8 Otis Place Scituate, MA 02066-1323.

17. Defendant Arthur Sawyer is being sued in his official capacity as the executive officer of the Massachusetts Lobstermen's Association and in his official capacity as a member of the Massachusetts' Marine Fisheries Advisory Commission. He is also being sued as an individual. His business mailing address is Arthur Sawyer, 368 Concord Street, Gloucester, MA 01930. His official address as a member of the MMFAC is % Marine Fisheries Advisory Commission, 251 Causeway Street, Suite 400, Boston, MA 02114.

18. Defendant John Haviland is being sued as an individual in his personal capacity. His business mailing address is John Haviland % PO Box 543, Green Harbor, MA 02041.

19. Defendant Center for Coastal Studies is a Massachusetts corporation doing business in many states. Its business address is Center for Coastal Studies, 5 Holway Avenue, Provincetown. MA 02657.

20. Defendant Massachusetts Lobstermen Association is a register corporation operating in Massachusetts and other states. Its official agent's address is Massachusetts Lobstermen Association, 8 Otis Place, Scituate, MA 02066

21. Defendant Vineyard Winds LLC has a business address at 700 Pleasant Street, Suite 510, New Bedford, Ma 02740. Its registered agent in Massachusetts address is Registered Agents Inc., 82 Wendell Ave, Suite 100, Pittsfield, Ma 01201.

22. Defendant Baystate Winds LLC is being sued as a corporation whose business address is CEO, Baystate Wind LLC, One International Place, Suite 2610, 100 Oliver Street Boston MA 02110. The address of its registered agent is % James Avery, Pierce, Atwood LLP, 100 Summer Street, Boston MA 02110.

Jurisdiction and Standing

23. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question) under the ESA, APA, 5 U.S.C. § 701 et seq. (APA), 28 U.S.C. § 1361 (mandamus) and may issue a declaratory judgment and further relief pursuant to 28 U.S.C. § 2201, 2202 (declaratory and injunctive relief). An actual, justiciable controversy now exists between Plaintiff and Defendants, and the requested relief is proper under 28 U.S.C. §§ 2201-2202 and 5 U.S.C. §§ 701–706. The ESA — 16 U.S.C. § 1540(g) — only grants jurisdiction to hear his ESA Section 9 claims to enforce the take prohibitions and does not provide the Court any jurisdiction to knowingly tolerate or ignore the prohibited taking of ESA listed wildlife species.

24. Venue in this judicial district is proper under 16 USC § 1540(g) and 42 USC § 1983.

25. The Plaintiff has Article III standing pursuant to his living and working in the habitats of Endangered Whales and Sea Turtles. These species are migratory. And their being killed and injured by the Defendants in Massachusetts adversely affects their appearance and presence in New Hampshire, Maine and in other coastal states. The Plaintiff has previously served the requisite notice under 16 USC § 1540(g) in a timely manner on each of the Defendants of his intent to bring the instant claims against them under the ESA.

26. The Plaintiff has Article III standing because he is personally being injured by the Defendants unlawful activities —

A. The Plaintiff conducts research on endangered species of whales and sea turtles off the US northeast Atlantic coast. and These species decline and extinction is adversely affecting his scientific research interests in these species. As an enthusiastic “whale watcher” off the coastline of Massachusetts, New Hampshire and Maine he has a vested interest in protecting the abundance of whales for his viewing activities and to have more personal access to these whales by having them delisted as ESA protected species.

B. As a licensed commercial fishermen in New Hampshire, the plaintiff is being injured by the Defendants by their requiring him pursuant to to his licensure to use vertical buoy ropes on his lobster pot gear. This requirement unlawfully exposes him to violate the ESA by causing the entanglement of EFA listed species of endangered whales and sea turtles in his fishing gear. Also, the Plaintiff seeks to increase the number of ESA listed species off the US coastline and this interest is adversely affected by his having to use VBR that kills and injures ESA listed species. Additionally, the Plaintiff is attempting to operate a "Whale Safe" business offering Lobsters for sale that were harvested in an environmentally safe manner. The Defendants requirement that he use VBR is antithetical to his commercial interests in operating a business to provide "Whale Safe" caught Lobsters for sale.

C. The Plaintiff operates a business in New Hampshire, Massachusetts and Maine to protect and recover ESA listed species. His customers pay him money to stop the killing of whales and sea turtles and increase their numbers. The Defendants continued unlawful killing and injuring ESA listed species antithetical to the business interests of the Plaintiff.

D. The enjoys the consumption of Lobsters. However, he cannot eat Lobsters as long as they are harvested in a manner that kills or injures ESA listed species.

The Regulatory Scheme for the Protection of Endangered Species of Plants and Animals

27. In enacting the ESA, Congress recognized that certain species "have been so depleted in numbers that they are in danger of or threatened with extinction" and that these species are "of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people." 16 U.S.C. § 1531(a) (2) and (3).

28. The ESA protects imperiled species by listing them as "endangered" or "threatened." A species is "endangered" if it "is in danger of extinction throughout all or a significant portion of its range." *Id*. § 1532(6). A species is "threatened" if it "is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." Id. § 1532(20). The Secretary of Commerce is charged with administering and enforcing the ESA for most marine species, including North Atlantic right whales, and has delegated this responsibility to NOAA. 50 C.F.R. § 402.01(b).

29. The ESA seeks "to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved, [and] to provide a program for the conservation of such . . . species." 16 U.S.C. § 1531(b). The ESA defines conservation as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary." Id. § 1532(3). Accordingly, the ultimate goal of the ESA is not only to prevent listed species from going extinct, but also to recover these species to the point where they no longer require ESA protection.

30. To accomplish these goals, Section 9 of the ESA generally makes it unlawful for "any person" to "take" an endangered species. Id. § 1538(a)(1). A "person" includes private parties as well as local, state, and federal agencies. Id. § 1532(13). "Take" is defined broadly under the ESA to include harassing, harming, wounding, killing, or capturing a protected species (or attempting to engage in such conduct), either directly or by degrading its habitat enough to impair essential behavior patterns. Id. § 1532(19); 50 C.F.R. § 222.102. The ESA prohibits the acts of parties directly causing a take as well as the acts of third parties, such as governmental agencies, whose acts cause such taking to occur. 16 U.S.C. § 1538(g).

31. Additionally, Section 7(a)(2) of the ESA requires federal agencies to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any" endangered or threatened species. Id. § 1536(a)(2).

32. To comply with Section 7(a)(2)'s substantive mandate, federal agencies must consult with NMFS when their actions "may affect" a listed marine species. 16 U.S.C. § 1536(a)(2). NMFS and the action agency must utilize the "best scientific and commercial data available" during the consultation process. Id.; 50 C.F.R. § 402.14(a).

33. Where, as here, NOAA is the action agency as well as the expert consulting agency, NOAA must undertake intra-agency consultation. At the completion of consultation, the consulting branch of NOAA issues a biological opinion that describes the expected impact of the agency action on listed species. 16 U.S.C. § 1536(b); 50 C.F.R. § 402.14.

34. The biological opinion must include a summary of the information upon which the opinion is based, an evaluation of "the current status of the listed species," the "effects of the action," and the "cumulative effects." 50 C.F.R. § 402.14(g)(2), (g)(3).

35. "Effects of the action" include both direct and indirect effects of an action "that will be added to the environmental baseline." Id. § 402.02. The "environmental baseline" includes "the past and present impacts of all Federal, State or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process." Id. "Cumulative effects" include "future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area." Id.

36. Thus, in issuing a biological opinion, NOAA must consider not just the isolated share of responsibility for impacts to the species traceable to the activity that is the subject of the biological opinion, but also the effects of that action when added to all other activities and influences that affect the status of that species.

37. After NOAA has added the direct and indirect effects of the action to the environmental baseline and cumulative effects, it must make its determination of "whether the action is likely to jeopardize the continued existence of a listed species." 16 U.S.C. § 1536(b)(3), (b)(4); 50 C.F.R. § 402.14(h). A likelihood of jeopardy is found when "an action [] reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02. Recovery is defined as "improvement in the status of listed species to the point at which listing is no longer appropriate." Id.

38. A biological opinion that concludes that the agency action is not likely to jeopardize the continued existence of a listed species but will result in take incidental to the agency action must include an incidental take statement. 16 U.S.C. § 1536(b)(4).

39. The incidental take statement must specify the amount or extent of incidental taking on such listed species, "reasonable and prudent measures" that NMFS considers necessary or appropriate to minimize such impact, and set forth "terms and conditions" that must be complied with by the action agency to implement the reasonable and prudent measures. Id.; 50 C.F.R. § 402.14(i). Additionally, when the listed species to be incidentally taken are marine mammals, the take must first be authorized by NMFS pursuant to the MMPA, and the incidental take statement must include any additional measures necessary to comply with the MMPA take authorization. Id.

40. The take of a listed species in compliance with the terms of a valid incidental take statement is not prohibited under Section 9 of the ESA. 16 U.S.C. § 1536(b)(4), (o)(2); 50 C.F.R. § 402.14(i)(5).

41. If NMFS determines in its biological opinion that the action is likely to jeopardize the continued existence of a listed species, the biological opinion must include "reasonable and prudent alternatives" to the action that will avoid jeopardy. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h)(3).

42. Regardless of the conclusion reached in the biological opinion, the agency undertaking the federal action has an independent duty to ensure that its actions are not likely to jeopardize the continued existence of listed species. 16 U.S.C. § 1536(a)(2). An agency's reliance on a legally flawed biological opinion to authorize an action does not satisfy its substantive duty to ensure against jeopardy.

43. Moreover, the ESA's implementing regulations further require an agency to reinitiate Section 7 consultation when: (a) the amount of take specified in the incidental take statement is exceeded; (b) new information reveals that the action may have effects not previously considered; (c) the action is modified in a way that was not previously considered; or (d) a new species is listed or critical habitat designated that may be affected by the identified action. 50 C.F.R. § 402.16.

44. The ESA specifies that Section 7 consultation must typically be completed within ninety days after initiation. 16 U.S.C. § 1536(b)(1); 50 C.F.R. § 402.14(e). The substantive duty to ensure against jeopardy of listed species remains in effect regardless of the status of the consultation.

45. Non-federal actors are similarly mandated and prohibited from taking listed species without authorization and review by the designated federal wildlife agency enforcing the ESA. The ESA Section 9 prohibitions are interpreted as broadly and to be as all encompassing as necessary so as to achieve the purposes of this Act in insuring that listed endangered species are not to be threatened by extinction and will be able to recover their populations to a non-endangered status.

46. The ESA imposes a non-discretionary obligation on state and private actors to apply for an ESA Section 10 incidental take permit if they engage in any activity that will physically interact or affect a member of an ESA listed endangered species. This is triggered by the fact that a taking is broadly interpreted by ESA Section 9 to be any level of unintended physical interaction with a listed endangered species. The ESA supervising federal agency will first informally review whether or not there is any need for the applicant to seek and be issued an ITP. If it determines that the activity in question poses a significant threat to take a listed species, it will order the initiation of a formal ITP process by the applicant.

47. It is an incontrovertible fact that VBR required for use by the State Defendants in the marine fisheries they license repeatedly entangle, kill and injure Right Whales and all other Endangered Whales. The ESA pursuant to Sections 9 & 10 requires that state governments — whose licensing activities that reasonably threaten to routinely incidentally take listed species of wildlife — apply for an incidental take permit before continuing to engage in those activities from federal wildlife agencies that are tasked to oversee enforcement of the ESA.

Background on Examples of ESA Listed Endangered Species of Whales and Sea Turtles that are Adversely Affected by Commercial Fishing

48. Killing VBR Ropes are responsible for virtually all the historical entanglements of endangered whales and sea turtles by lobster/crab pot gear deployed along the US coastline. The Court has previously ruled that the State Defendants licensing of lobster pot gear entangles endangered whales and incidentally takes these listed species in violation of the ESA's Section 9 take prohibitions. *Strahan v. Coxe* has since been repeatedly cited by federal courts as controlling precedent. It is being used as controlling precedent by parties in a current federal lawsuit against the California state-licensed Dungeness Crab pot fishery. This commercial marine fishery also requires the use of VBR. It is also violating the ESA's Section 9 by entangling endangered whales in California state waters.

49. It is incontrovertible that the deployment of Killing Ropes in the coastal marine habitat of whales and sea turtles is on its own a categorical violation of the ESA's Section 9 prohibitions on the taking of these listed species. Over a hundred thousand Killing Ropes are annually deployed by fishermen licensed by the State Defendants for months at a time off the Massachusetts coast. These killing ropes are deployed in the coastal marine habitat of large whales and sea turtles. Every year, many Endangered Whales and Sea Turtles are routinely

entangled, killed and/or injured from their encounter with VBR deployed in Massachusetts waters. Each of the Killing Ropes required to be deployed by the State Defendants' possess a significant risk to entangle, kill, and otherwise seriously injure large whales and sea turtles on any day of the year in Massachusetts coastal waters.

50. MAX refuses to use VBR in his lobster pot fishing equipment anymore. He is refusing to use Killing Ropes in order to prevent the entanglement of any Endangered Whale or Sea Turtle in his deployed lobster pot gear. Upon information and belief, he knows that every VBR in Massachusetts waters poses a significant risk to entangle and Endangered Whale or Sea Turtle inhabiting the area on any given day of the year.

51. The Right Whale as a species is now effectively EXTINCT. Right Whales no longer give birth in the numbers required to support the survival of their species. Last year, there was zero births from all Right Whales. This is a result of female Right Whales being repeatedly and unrelenting killed and seriously injury by the said Killing Ropes deployed under permit from the State Defendants. Only an immediate cessation of any further entanglement of Right Whales in Massachusetts waters will provide any reasonable chance for the Right Whale species continued survival on the Earth.

52. MAX is a conservation scientist petitioning the Court to ruthlessly enforce the "take prohibitions" imposed by Section 9 the Endangered Species Act against all the Defendants to stop their killing and injuring any more Endangered Whales and Sea Turtles from their deployment of killing ropes in Massachusetts coastal waters. Endangered Whale species include the Northern Right Whales and other species of whales **FN6.** Endangered Sea Turtles species includes Green Turtles and other species of Sea Turtles. **FN7** All of these Endangered Species are recognized as native resident species of Massachusetts. Endangered Whales and Sea Turtles are year round inhabitants of US coastal waters under the concurrent jurisdiction of Massachusetts.

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[6] The Endangered Whales includes: (1) The Sei Whale, *Balaenoptera borealis*; (2) The Northern Right Whale, *Eubalaena glacialis*: (3) The Humpback Whale *Megaptera novaeangliae*; (4) The Fin Whale *Balaenoptera physalus*: and (5) The Blue Whale, *Balaenoptera musculus*.

7 The Endangered Sea Turtles include: (1) The Green turtle, *Chelonia mydas*,; (2) Loggerhead turtle, *Caretta caretta*,; (3) The Olive Ridley turtle, *Lepidochelys olivacea*; (4) The Hawksbill turtle, *Eretmochelys imbricate*; (5) The Kemp's Ridley turtle, *Lepidochelys kempii*; and (6) The Leatherback turtle, *Dermochelys coriacea*.

53. The State Defendant are categorically violating the ESA's Section 9 take prohibitions by requiring that thousand plus fishermen that they license to use VBR when they go lobster pot fishing in United States coastal waters. Massachusetts' own endangered species Act ("MESA") prohibits the State Defendants from killing or injuring these endangered animals by requiring the use of VBR.

54. Endangered Whales and Sea Turtles are resident species of the "Urban Sea" that exists along the northeast coastline of the United States. The Urban Sea consists of the harbors, bays, and inlets of the peri-urban coastal waters under the concurrent state jurisdiction of Maine, New Hampshire, Massachusetts and the other New England states and all federal waters out to the 200-mile ECZ boundary. In the Urban Sea, the Endangered Whales and Sea Turtles are routine killed, injured and their reproduction impaired by commercial and recreational anthropogenic activities. These anthropogenic activities include in part commercial fishing, vessel traffic and harbor operations, chemical pollution, disposal of plastic debris, and noise pollution ("Anthropogenic Threats").

55. The Right Whales viability as a species has been eviscerated by the Anthropogenic Threats occurring in the Urban Sea of the United States and especially by the commercial activities licensed and regulated by the Defendants MDMF and its supra agency MEOEEA ("State Defendants"). The State Defendants are acting in concert with Defendant Center for Coastal Studies and the other commercial defendants to annually cause the deployment of veritable "mine fields" constituting thousands of Vertical Buoy Ropes ("Killing Rope Fields") that act like "fly paper" to entangle and kill and Right Whale, Sea Turtles and members of other species of whales — especially Humpback Whales — that come to swim through them. Individual Right Whales are repeatedly entangled by the Defendants licensed fishing gear in the Killing Fields of lobster/crab pots and gill nets. As a result they are seriously injured and killed as a result of these entanglements. Additionally, the ability of female Right Whales to breed is being adversely impaired from the repeated injuries inflicted on them by these entanglements and the adverse impact of the establishing of Killing Fields off the Massachusetts coast by the commercial defendants.

56. The Right Whale's remaining population is no longer viable. Right Whales reproduction capability as a species has collapsed under the burden of the Anthropogenic Threats. Right Whales did not give birth to any young in 2018. Over the last ten years, Right

Whales births have not replaced the Right Whales killed by Anthropogenic Threats and natural mortality. The Right Whales are effectively extinct unless all VBR Fields are eliminated and pro-active efforts commenced to increase their annual production of newborn calves.

57. The Defendants are now conspiring to commit "Whale Fraud." The Defendants are maliciously acting in concert to deliberately prevent the enforcement of federal and state environmental laws at the intensity necessary to protect Right Whales and other endangered marine wildlife from being routinely killed and otherwise injured by VBR. They want as a categorical imperative to prevent any environmental laws from being enforced against the commercial fishing industry. Amazingly the Defendants have adopted a strategic practice to encourage the extinction of the Right Whale as its resolution to the legal conflict of its VBRs killing Endangered Whales and Sea Turtles.

58. The fact of the Defendants Whale Fraud is factually supported by the fact that the State Defendants were found liable by the Court in 1996 for violating the ESA's Section 9 prohibitions by their killing and injuring Endangered Whale Species through their licensing and regulating commercial fishing using VBR Fields. Instead of changing their ways after the Court's ruling, the Defendants chose to double-down on their illegal activities by use of fraud and force. They solicited the services of non-profit companies (e. g. the Center for Coastal Studies in Provincetown MA) to feign ineffective alterations of their illicit activities as reducing the incidents of Right Whales and Humpback Whales being killed and injured by their commercial fishing activities on Right Whale survival

59. The Northern Right Whale is the world's most critically endangered large whale species and also one of the world's most endangered mammals. Northern Right Whale's essential marine habitat is within the 200 mile ECZ of mostly the US but extends northwards into Canada. They live in the "urban sea" of the United States. Their coastal marine habitat is no longer marine wilderness from having so hugely been adversely impact from commercial development of area within 100 miles inland of the US coast that spills outward to the Ocean. The Northern Right Whale living along the US coastline is more akin to a moose trying to live in a suburb of an eastern city like Boston or Concord NH. Not a good situation.

60. Right whales migrate annually from their summer feeding grounds off the Northeast coast of the United States to their winter breeding grounds off the Southeast coast. Females typically reach sexually majority at age nine or ten and give birth to a single calf. The gestation period lasts roughly one year. From 2005 to 2014, the average right whale calving interval (i.e. the amount of time between the birth of a right whale calf and a subsequent calf from the same mother) ranged from three to five years. The average right whale calving interval has increased every year since 2014, to a high of 10 years in 2017.

61. Right whales have raised patches of roughened skin on their heads, known as callosities. These callosities are found only on right whales and, like human fingerprints, have distinctive patterns that enable scientists to individually identify right whales. The callosities are covered by barnacles and tiny crustaceans known as whale lice.

62. Upon information and belief, in recent years the incidents of entanglements in the Defendants lobster pot gear and gill nets have increased for Endangered Whales and Sea Turtles. This is because there has been an explosion in the population of Amerikan Lobsters off the US northeastern coast coincident with an increase in the consumer market for lobster. Now more commercial fishermen are deploying more commercial fishing gear due to the greater market demand and the larger lobster population that can meet this demand. It is important to note that there are more lobsters because their main predator — the Cod fish — was recently wiped out by overfishing authorized and encouraged by the State Defendants.

63. The bottom line is that the Right Whale is now functionally EXTINCT. This is largely due to its being killed and injured by unlawful takings incidental to the lobster pot and gill net fisheries licensed and regulated by the State Defendants.

Plaintiff's Claims Against the Defendants

COUNT I: *Defendants Violation of 16 USC § 1538(a and g): The Fishing Defendants Violation of the ESA Section 9(a) Prohibitions Against the Incidental Taking of Endangered Species of Whales and Sea Turtles Occurring as a Direct Result of their Respective Individual Commercial Fishing Operations* **FN8** (State Defendants, CCS, MLA, Sawyer and Haviland)

64. The Plaintiff re-alleges his claims of fact and law asserted in paragraphs 1 – 63.

65. Endangered Whales and Sea Turtles are resident species of wildlife in US coastal waters under the concurrent state jurisdiction of Massachusetts. Right Whales are reside in every month of the year in Massachusetts coastal waters. Right Whales are known to give birth in Cape Cod Bay, other bays and inlets along the Massachusetts coastline. All Endangered Whales and Sea Turtles are listed by Massachusetts as resident species of Massachusetts and protected as endangered species under the Massachusetts Endangered Species Act.

66. The State Defendants are licensing and regulating all commercial fishing operation off the Atlantic coastline in waters under the concurrent state jurisdiction of the state of Massachusetts. These Defendants — require only by regulation and not by statute — that the Public it licenses to do lobster/crab pot fishing must use VBR on their pot gear. The State Defendants license about 1,000 private individuals to do commercial lobster pot fishing in Massachusetts. The State Defendants also license hundreds of other individuals to conduct recreational lobster pot fishing in state waters. The State Defendants also license full time high school and college students to do limited commercial lobsterpot fishing in state waters during the Summer months each year.

67. Since 1973, Massachusetts resident Endangered Whales and Sea Turtles are routinely entangled in their encounters with VBR deployed in Massachusetts state waters. In Massachusetts state waters VBR are responsible for nearly all the entanglements of Endangered

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[8] **ESA Section 9(a)**:[I]t is unlawful for any person subject to the jurisdiction of the United States to— (A) import any such species into, or export any such species from the United States; (B) take any such species within the United States or the territorial sea of the United States; (C) take any such species upon the high seas; (D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C); … or (G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 4 of this Act and promulgated by the Secretary pursuant to authority provided by this Act.

Whales and Sea Turtles in fishing gear licensed and regulated by the State Defendants. In prior lawsuits against the State Defendants, the Plaintiff subpoenaed from NOAA entanglement records of Endangered Whales and Sea Turtles. In these records NOAA reported that VBR was the apparent cause in all these reported entanglements of Endangered Whales and Sea Turtles.

68. The State Defendants have required the use of VBR in lobsterpot hear from 1973 to the present day. From 1973 to the present day. Endangered Whales and Sea Turtles have been entangled, killed and injured by their encounters with VBR deployed in Massachusetts state waters. Endangered Whales and Sea Turtles are attracted to VBR. Whales enjoy rubbing up against them and this phenomena results in their becoming entangled in the VBR.

69. In 1996, the Court ruled a finding of fact that Endangered Whales were routinely being entangled in VBR on lobsterpot gear deployed in state waters. The Court then ruled the State Defendants are violating the ESA's Section 9 prohibitions against taking Endangered Whales requiring the use of VBR by the fishermen that they license to deploy lobsterpot gear in state waters made them liable This is after the Court first ruled in *Strahan v, Coxe* that these said entanglements by the State Defendants were a violation of the ESA Section 9 prohibition against taking ESA listed endangered species of wildlife.

70. Based on the Court's *Strahan v. Coxe* ruling, there is no doubt that since 1973 the State Defendants annually have violated the ESA's Section 9 prohibitions by requiring the use of VBR on the fishing gear that they license and regulate for deployment in Massachusetts state waters. Since 1996, the State Defendants chose to continue requiring the use of VBR by its licensed lobsterpot fishermen. In fact, since 1996 the State Defendants have allowed an increased in the number of VBR deployed in Massachusetts state waters. At a minimum the State Defendants are currently responsible for the annual deployment over 100,000 VBR in Massachusetts state waters. There is no question that the State Defendants licensing and regulation of lobsterpot fishing is responsible for many of annual reported entanglements of Right Whales and other Endangered Whales in VBR in US coastal waters.

71. In 2019 NOAA produced a draft "stock assessment report" assessing the number of annually killings and serious injuring of Right Whale in lobsterpot gear. It claims there are annually about five reported killings/injuring of Right Whales in recent years. The report also claims that NOAA has determined that the killing/injuring of a single Right Whale threatens their species with imminent extinction. Since Massachusetts accounts for almost half of all

lobsterpot fishing activity along the US coastline, there is no question that the State Defendants are liable for several killings/injuring of Right Whale in the VBR used in lobsterpot gear.

72. At the April 2019 meeting of the NOAA's Atlantic Large Whale Take Reduction Team, the State Defendants voluntarily agreed to reduce by thirty percent or more the deployment the risk it currently poses to annually kill/injure Right Whales in its state lobsterpot fishery. This constitutes incontrovertible admission by the State Defendants that its lobsterpot fishery poses a clear and present danger to kill/injure annually several Right Whales. Since NOAA has determined that the continued killing of just one Right Whale annually condemns the Right Whale species to extinction, the State Defendants' lobsterpot fishery also poses a clear and present danger to extirpate the Right Whale species in the near future.

The State Defendants Since 1996 At Least Are in Violation of the ESA's Section 9 **Prohibitions Against Taking Endangered Whales and Sea Turtles.**

73. Since the Court in 1996 determined that the State Defendants lobsterpot fishery violated the ESA's Section 9 prohibition, its still requiring that VBRs be used on its licensed lobsterpot gear continues to the present day and it's a continuing violation until it is cured. The ESA Section 9 prohibitions is a core requirement of the ESA statute, regulations, ESA case law and NOAA policy. Any individual's activities once determined to have violated the ESA Section 9 prohibitions retains its violator status until it is purged by either a Court or by NOAA's making a formal determination — pursuant to an application under ESA Section 10 for an Incidental Take Permit — that the violator's said activity is unlikely to take a ESA listed species in the future.

74. It is also now a categorical violation of the ESA's Section 9 take prohibitions for anyone to deploy VBR and gill nets in marine habitat historically used by Endangered Whales and Sea Turtles. Only when the deployment can be guaranteed to occur without the presence of Endangered Whales and Sea Turtles is it possible to construe the use of VBR as not categorically violating ESA Section 9 take prohibitions. Putting Killing Ropes in habitat occupied by whales is just like pouring cyanide in the water. Since it cannot be removed immediately when an endangered whale or sea turtle shows up, the deployment cannot be lawfully done in the first place. This reality is enforced by two incontrovertible facts. If a whale touches a VBR this is a prohibited entanglement. Endangered Whales and Sea Turtles are attracted to and readily interact with VBR.

75. Once an individual engages in an activity that constitutes ESA Section 9 prohibited conduct, then the burden of proof shifts to that individual to PROVE that its continuing activity will not violate the ESA Section 9 prohibitions in the future. The only way it can lawfully do that is by applying to NOAA for an Incidental Take Permit pursuant to ESA Section 10. It is incontrovertible that the State Defendants bear the burden now of proving that their continuing deployment annually of over 100,000 VBR in Right Whale habitat will not result in the entanglement of a single Right Whale or any other Endangered Whale or Se Turtle. As stated, it is incontrovertible that the State Defendants — annually licensing the deployment of over 100,000 VBR in state waters — cannot prove that at least one further incident of an entanglement of a Right Whale in their licensed lobsterpot gear.

76. The ESA requires that anyone engaging in an activity that is known to kill or injure ESA listed must apply for a ESA Section 10 Incidental Take Permit in order that NOAA can review the activity and issue a ruling on whether or not it is prohibited under the ESA. Courts have no jurisdiction to tolerate any taking of an ESA listed species. Confronted by a defendant accused of engaging in ESA Section 9 prohibited conduct in the past, the Court at a minimum can only order the said defendant to apply for an ESA ITP or rule that the alleged prohibited conduct did not occur in the past and is not likely to occur in the future. The Court has no jurisdiction under the ESA to openly tolerate ANY ESA prohibited conduct by a defendant out of sympathy for any possible adverse impact on the defendant for having the ESA enforced against it.

The State Defendants Will Never Eliminate the Use of VBR Absent a Coercive Order

77. In 1996 and continuing today, the State Defendants, their employees, and the other Defendants are part of a culture that opposes and fights to prevent any environmental laws from being enforced against the Massachusetts commercial fishing industry. For example, the Massachusetts Environmental Policy Act requires a review of all commercial activities for their impact on the environment. Yet, the State Defendants have refused to do a MEPA review on the state's commercial fishing industry.

78. Since 1996 and to the current day, the State Defendants still refuse to admit that their requiring the use of VBR in the fishing gear is not an ESA Section 9 prohibition or that their requiring the use of VBR is a threat to entangle whales. Instead they maliciously lie to the Court in an attempt to evade enforcement of the ESA by it. They are now maliciously claiming

to the Court that they are "managing the conservation" of Right Whales as their authority under state law and pursuant to a ESA Section 6 "state cooperative agreement" that they entered into with NOAA for the Right Whale. Both statements are categorical lies on their part.

79. FIRST, Massachusetts statute imposes no authority on the State Defendants to authorize the taking of ESA listed species. Any possible such authority is categorically is prohibited by the ESA and the Supremacy Clause of the Constitution. Further, the Marine Mammal Protection Act prohibits the "fishing" for marine mammals. State statute only authorizes the MDMF to regulate fishing. It does not authorize it to "conserve" any marine species that is not subject to being fished under state permit. This means that all the MDMF regulations to "conserve" Right Whales are facially invalid since the MDMF has no statutory authority to either to tell boaters to stay away from Right Whales or to even stop anyone from killing any marine mammal in state waters. The state agency responsible for protecting and conserving wildlife is the Massachusetts Division of Fish and Wildlife. The Massachusetts Endangered Species Act exclusively assigns to the MDFW exclusive supervisory and enforcement authority to protect state listed endangered species of wildlife — which inciudes Endagered Whales and Sea Turtles.

80. SECOND, the MDFW itself — and not the MDMF — entered into an ESA Section 6 cooperative agreement for the Right Whale. This cooperative agreement angered commercial fishermen and the State Defendants. So they coerced the then director of the MDFW against his written opposition to enter into a unlawful memorandum of understanding with MDMF to "transfer" its supervisory authority under MESA for Endagered Whales and Sea Turtles for Right Whales to the MDMF. The MDFW had no authority under statute to give away its MESA responsibilities and duties for protecting marine endangered species to the MDMF. As a result, to this day MDFW and the Office of the Attorney General has never enforced the MESA prohibitions against the killing of Right Whales against the MDMF as the MESA statute requires it to do. In fact, it now does nothing for Endangered Whales and Sea Turtles which effectively nullifies its ESA Section 6 agreement with NOAA under the terms of the ESA.

81. The above is blatant and incontrovertible evidence of the ongoing malicious and unlawful efforts of the State Defendants to evade any enforcement of the ESA and all other environmental laws against the Massachusetts commercial fishing industry. In Massachusetts the governance culture surrounding the commercial marine fishing industry is facially and as applied

in violation of the Constitution and the Massachusetts Constitution. The Massachusetts statutes and regulations that controls the MDMF, and the ESA violations by the Defendants only serves the Public Bad and not the Public Interest.

82. The State Defendants will never on their own stop their killing/injuring of Endangered Whales and Sea Turtles incidental to its licensing and regulation of marine commercial fisheries unless ordered to do so by the Court.

The Malicious Conspiracy to Conceal and Evade Liability for the Continuing Entanglement of Endangered Whales in VBR after 1996

. 83. The Defendants Center for Coastal Studies and Massachusetts Lobstermen Association act in concert with the State Defendants to support their continued requirement for the use of VBR by its licensed fishermen. They also act in concert to assist the State Defendants to maliciously conceal the entanglement of Endangered Whales and Sea Turtles from the Public scrutiny. The Defendants are "partners in ESA crime" with the State Defendants. They assist the State Defendants in evading the enforcement of state and federal wildlife laws against the Massachusetts commercial fishing industry. The support of Defendants MLA/CCS has been key in allowing the State Defendants to maintain the *status quo* required use of VBR since 1973 and for being able to maintain traditional, environmentally destructive commercial lobsterpot fishing practices using VBR. Therefore these Defendants are also liable for the violation of ESA Section 9 prohibitions arising from the continued entanglement of Endangered Whales and Sea Turtles in the lobsterpot gear licnesed and regulated by the State Defendants.

84. The Plaintiff personally witnessed the beginning and the continuing development of the conspiracy between these Defendants to evade the lawful consequences of the Court's 1996 Finding & Order. These Defendants are all maliciously acting in concert contributing their unique and separate capacities to insure that environmental laws will not be enforced against lobsterpot fishing and that the use of VBR will continue unabated. The conspiracy started during the pendency of the *Strahan v, Coxe* lawsuit. As a result of the Court's order requiring the State Defendants to obtain an ESA Section 10 Incidental Take Permit offered, the State Defendants offered funding to CCS if its employees would never testify after 1996 that Endangered Whales were being entangled in Massachusetts or that there was now any threat of entanglement. Upon information and belief, no CCS employee will now admit that VBR offers an entanglement threat to Endangered Whales in Massachusetts waters.

85. Since 1996, the number of VBR deployed in Massachusetts coastal waters has steadily increased. This means that the quantifiable threat factor for entanglement has risen — and not decreased — for VBR to entangle Endangered Whales and Sea Turtles in Massachusetts waters. Also since 1996, Strahan v. Coxe has set a precedent for Federal courts to repeatedly hold federal and state agencies liable for violating the ESA's Section 9 prohibitions when their licensing actions results in the unlawful taking of these species in violation of the ESA Section 9(a) prohibitions. **FN9**

86. Defendant MLA's individual members are violating the ESA Sections 9 prohibitions by deploying lobster pot gear in US coastal waters that incidentally entangles Endangered Whales and Sea Turtles in a routine and continuous manner since 1973. The MLA and its members are actually "hunting" whales when they deploy lobsterpot gear with VBR. These fishermen are hunting whales in a similar manner as when a fishermen thows dynamite in the water to kill fish and it also kills a whale. Just because the ESA/MMPA prohibits his keeping the whale, it still hunted the whale as evidenced by the dead whale's body.

There is no question that the Defendant MLA and its members know that they will entangle whales when they deploy VBR with their lobsterpot gear. These VBR are deployed in large numbers over a small area. They literally form a "minefield" of certain injury for any large whale attempting to swim through them. A fishermen will deploy 80 Killing Ropes in a small area. Right Whales and Endangered Turtles are attracted to these Killing Ropes and their attached buoys. In fact all manner of marine wildlife are attracted to the Killing Ropes and their attached buoys which are basically seen by marine wildlife as flotsam and jetsam to be used as shelter and play. Many Endangered Sea Turtles routinely become entangled in Killing Ropes licensed and regulated by the State defendants and Deployed by the Commercial Defendants.

87. The Defendants have never been issued any ESA Section 10 incidental take permit to authorize any incidental taking by them of Endangered Whales and Sea Turtles in the commercial fishing gear that they license and regulate to be deployed in US coastal waters under the concurrent state jurisdiction of Massachusetts..

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[9] See also *Florida Key Deer v. Paulison*, 522 F.3d 1133 (11th Cir. 2008) and *Florida Key Deer v. Stickney*, 864 F. Supp. 1222 (Dist. FL 1994) (Federal Emergency Management Agency violates ESA §§ 9 and 7 for its authorizing, regulating, and funding commercial development in habitat of ESA listed endangered deer species).

88. The Defendant CCS and its employees are acting in concert with both the State Defendants and Defendant MLA to maliciously aid them in unlawfully evading the enforcement of the ESA's Section 9 taking prohibitions so as to be able to continue using VBR and therefore to continue entangling, killing and injuring Endangered Whales and Sea Turtles. The CCS is employed by the State Defendants and is their official agent in its criminal and malicious attempts to evade enforcement of the ESA prohibitions and to unlawfully continue to use of VBR. They were hired to maliciously fabricate evidence and expert opinion to fraudulently deflect Public opinion and the courts from holding the Defendants liable for the killing and injuring of Endangered Whales and Sea Turtles in Killing Ropes. For this and more the Defendant CCS is in violation of the ESA Section 9 prohibitions for taking Endangered Whales and Sea Turtles.

89. The Defendants will continue their said ESA Section 9(a) prohibited taking of Endangered Species of Whales and Sea Turtles into the future unless ordered to stop by the Court.

COUNT II: *Defendants Violation of 16 USC § 1538(a): The Defendants Violation of the ESA Section 9(a) Prohibitions Against the Adverse Alteration of Designated Critical Habitat for the Right Whale.*

90. The Plaintiff re-alleges his claims of fact and law asserted in paragraphs 1 – 89.

91. The NOAA listed Cape Cod Bay and other areas subject to the State Defendants lobsterpot fishing activities as ESA listed designated critical habitat for the Northern Right Whale FN[10] The State Defendants (i. e. MEOEEA, and the MDMF) are licensing and regulating commercial fishing operation off the Atlantic coastline in waters under the concurrent state jurisdiction of the state of Massachusetts. The deployment of VBR in listed ESA designated critical habitat for the Right Whale in Cape Cod Bay an off the Massachusetts coastline. The deployment of many tons of plastic fishing and the resultant "ghost gear" left behind adversely alters the marine habitat of the Right Whales critical habitat. Right Whales have been know to give birth in Cape Cod Bay and other areas of its designated critical habitat.

[10] 50 CFR 226.203 and *Federal Register*, Vol. 81, No. 17, 27 January 2016

92. The Defendants will continue their said ESA Section 9(a) prohibited taking and unlawful alteration of the listed designated critical habitat of the Right Whale unless ordered not to do so by the Court.

COUNT III: *Defendants Violation of 42 USC § 1983: The Defendants Violation of the Civil Rights Act: The Retaliation Against the Plaintiff for Petitioning the Courts by Refusing me Access to Public Information, Gagging State Employees for Talking to Me, and Refusing to Accept My Petitions for Regulatory Reform.*

93. The Plaintiff re-alleges his claims of fact and law asserted in paragraphs 1 – 92.

94. The State Defendants and Defendant CCS as a state actor are violating the Plaintiff's First Amendment protected right to petition the Court and Free Speech. These Defendants have intimidated and coerced state employees from talking and otherwise communicating with the Plaintiff on any issue. They have deliberately and maliciously denied the Plaintiff access to Public records in order to deter him from being able to petition the Court and prosecute them and others who have violated the provisions of the ESA.

95. In 2019, Defendant Pierce ordered MDMF employees do deny the Plaintiff any opportunity to apply for a commercial or recreational lobsterpot fishing license. On 4 April 2019 and on 29 April 2019, MDMF attempted to get either a recreational and/or a commercial lobsterpot permit for students. FN The Plaintiff is a citizen of Massachusetts and a full time graduate student at the University of New Hampshire. As such he is entitled to obtain either lobsterpot fishing permit. On both these dates the MDMF employees departed from their routine practice of issuing a permit to anyone appearing in person at its office and offering to pay for the permit. Instead, the Plaintiff was not allowed to purchase a permit and was expelled from the office physically by police under the threat of trespass arrest. The Plaintiff was then trespassed from the MDMF office under the orders of Defendant Pierce.

96. Defendant Pierce and MDMF are unlawfully retaliating against the Plaintiff for bringing the instant action against the State Defendants. MDMF employees told the Plaintiff that they are refusing to issue him any lobsterpot permit so he will not have the standing to ask the Court to allow him to go fishing without using VBR in his gear. They do not want anyone to be able to show that lobsterpot fishing be successfully done with VBR. The State Defendants are violating

the Plaintiff First Amendment protected right for Free Speech, his 14th Amendment protected right of due process and equal treatment under the law.

97. The Massachusetts marine fishing statutes as applied to Green Fishermen and the Plaintiff operates as a Public Bad and does not serve the Public Interest. They discriminate agent 99.9 percent of the Public and deny them and the Plaintiff from any opportunity to get a commercial lobsterpot permit. This violated the Plaintiff's constitutional protected right of due process and equal treatment under the law.

98. The Plaintiff as a Green Fishermen has a preferred right rooted in the Public Interest to obtain a commercial lobsterpot permit over that is possessed by any current holders of a State Defendants lobster pot permit.

COUNT IV: *Defendants Violation of 16 USC § 1538(a and g):* (Defendants Vineyard Wind LLC and Baystate Wind LLC)

99. The Plaintiff re-alleges his claims of fact and law asserted in paragraphs 1 – 98.

100. The Defendants Vineyard Wind LLC and Baystate Wind LLC are intending to spend billions of dollars to build a energy generating complex in the marine habitat that Endangered Whales and Sea Turtles occupy every month of the year. The construction and operation will subject endangered wildlife to extreme noise and ship traffic that will kill and injure this endangered wildlife in violation of the ESA Section 9 take prohibitions.

101. These Defendants will kill and injure endangered wildlife in the future by the construction and operation of their said energy generating facility unless ordered not to do so by the Court.

The Plaintiff's Supplemental Claims Against the Defend

COUNT V: *Defendants Sawyer, Haviland, MLA and CCS are Public Nuisances and Have Caused Millions of Dollars of Injury to the Plaintiff Apart from How They Injured Other Members of the Public*. **FN11**

102. The Plaintiff re-alleges his claims of fact and law asserted in paragraphs 1 – 101.

103. The said Defendants have for decades conducted themselves to deliberately and negligently injure the interests of the Plaintiff in his enjoyment and efforts to continue the survival of the Northern Right Whale. It will take millions of dollars for the Plaintiff to accomplish the return the Right Whale to the biological status that it would have if it were not repeatedly killed, injured and entangled by the actions of the Defendants. These Defendants have conducted themselves as a Public nuisance.

COUNT VI: *Violation of the Massachusetts Civil Rights Act*. (David Pierce) **FN12**

104. The Plaintiff re-alleges his claims of fact and law asserted in paragraphs 1 – 103.

105. The Defendant Pierce's repeated threats to deny the Plaintiff a commercial and recreational lobsterpot license to intimidate and coerce him from suing the State Defendants and otherwise attempting to become a Green Fishermen is a facial violation of the Massachusetts Civil Rights Act. His issuing a trespass notice from entering ever again the MDMF office and order all MDMF employees to not speak with the Plaintiff, provide him any services, and to not allow him access to any public records MDMF possession is a threat to intimidate the Plaintiff and to coerce him from protecting endangered wildlife, bringing lawsuits against the State Defendants and commercial fishermen, and conducting political advocacy.

106. Unless the Court orders Pierce to do otherwise, Pierce will continue to threaten and intimidate the Plaintiff to coerce him from enjoying his statutory and constitutionally protected rights.

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[11] See *Sullivan v. Chief Justice for Admin. & Mgmt. of the Trial Court*, 448 Mass. at 34–35 & *Planned Parenthood League of Mass., Inc. v. Operation Rescue*, 406 Mass. 701, 707 (1990) (valid case for public nuisance where the defendant had interfered with the rights of the plaintiff's patients to obtain abortion).

[12] GL Chapter 12 § 11H

PRAYER FOR RELIEF

I. For a Declaratory Judgment that the Plaintiff has a right as a Green Fisherman to obtain a commercial lobsterpot permit from the State Defendants and to not have to use Vertical Buoy Ropes in his fishing gear.

II. For a Declaratory Judgment that the Defendants are violating the ESA's Section 9(a and g) prohibitions by taking members of Endangered Species of Whales and Sea Turtles off the US coast pursuant to their respective commercial fishing operations owing to their requiring the use of Vertical Buoy Ropes in lobsterpot fishing gear and in Gill nets.

III. For an order, enjoining the Defendants from licensing or engaging in further Lobster Pot and Gill Net commercial fisheries operations that could result in the entanglement of any Endangered Whale and Sea Turtle and enjoining the Government Defendants from licensing said commercial fisheries operations unless they can scientifically demonstrate that these acts will not result in the killing and/or injuring of individuals of said endangered species.

IV. For an order, ordering the Defendants Vineyard Wind LLC and Baystate Wind LLC to not build or operate any windfarm without first obtaining an ESA Section 10 Incidental Take Permit.

V. For an award of 1,000,000 in compensatory relief from Defendants Sawyer, MLA, Pierce and CCS.

VI. For an award of $1,000,000 in punitive damages from Defendants Sawyer, MLA, Pierce and CCS.

VII. For an award of the Plaintiff's direct costs of his prosecution against the Defendants.

VIII. For any further relief that the Court deems appropriate.

BY:

/s/ Richard Maximus Strahan

_____

Richard Maximus Strahan
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Durham NH
esistoo@yahoo.com
617-817-4402

Pro Se and Proud!

VERIFICATION OF THE COMPLAINT

I Richard Maximus Strahan CLAIMS that the about document consists solely of claims of scientific fact, argument and data. While it supplies an outline of rudimentary claims of law and legal characterization of the Defendants actions to assist the Court in granting him his requested relief against them, these claims are merely inclusive and not exclusive. The Plaintiff is not an attorney and petitions the Court to supply through its experience and training in law ANY legal theory and interpretation of the Defendants actions that allow it to issue the relief that is sought in the his entitled "Prayers for Relief" section of the above document. t

The Plaintiff verify under the pains and penalties of perjury that all the facts alleged in the above complaint are known to the best of my ability to be scientifically true. All allegations of facts against the Defendants are the result of the Plaintiff's scientific evaluation of their activities over several decades. The Plaintiff will provide supplemental filings of pleading to the instant document in the record of facts and data in support of his claims of fact and law against the Defendants made in the above document. Signed under the pains and penalties of perjury this 4th day of June in the year 2019.

_____

/s/ Richard Maximus Strahan

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

RICHARD MAXIMUS STRAHAN, Man Against Xtinction, a/k/a "Max", Plaintiff, v. SECRETARY, MASSACHUSETTS EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS ("MEOEEA"); DIRECTOR, MASSACHUSETTS DIVISION OF MARINE FISHERIES ("MDMF"); ARTHUR SAWYER, as President of the MASSACHUSETTS LOBSTERMEN'S ASSOCIATION as Representing All Its Members ("MLA"); CENTER FOR COASTAL STUDIES; JOHN HAVILAND, VINEYARD WIND LLC, and BAYSTATE WIND, LLC, Defendants.	Civil Action No. 1:19-cv-10639-IT

MEMORANDUM IN SUPPORT OF DEFENDANT ARTHUR SAWYER'S MOTION TO DISMISS THE PLAINTIFF'S AMENDED COMPLAINT

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), the Defendant Arthur Sawyer, Individually and as President of the Massachusetts Lobstermen's Association as Representing All its Members ("MLA"), moves this Court to dismiss all claims set forth in Plaintiff Richard Maximus Strahan's ("Strahan") / Man Against Xtinction's Amended Complaint filed on June 16, 2019 (Doc. 68) (the "Complaint"). In support of the motion, Arthur Sawyer and the MLA state as follows:

FACTS AND BACKGROUND

The *pro se* Plaintiff has generally alleged that the defendants have violated the anti-taking provision of Section 9 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1538, through the

licensing and use of vertical buoy ropes ("VBR") in the course of lobster pot fishing in Massachusetts coastal waters. Through the allegations set forth in his Complaint, the Plaintiff has sought injunctive relief so as to make Massachusetts' commercial fisheries a "Green Fishery" which would preclude the use of VBR and which would require the application for incidental take permits under Section 10 of the ESA before further marine fisheries activity could continue. See Complaint, ¶¶ 1, 5; p. 29. The Plaintiff's Complaint further seeks a Declaratory Judgment from the Court declaring that the use of VBR constitutes a "taking" under Section 9 of the ESA. Id. at ¶ 12. Finally, the Plaintiff seeks monetary damages from defendants Sawyer, the MLA, Pierce and the Center for Coastal Studies ("CCS"). Id. at p. 29.

The Complaint has identified Arthur Sawyer in both his individual capacity and in his representational capacity with the MLA. See Complaint, ¶ 8. The MLA is organized as a Massachusetts non-profit, member-driven organization. See Affidavit of Elizabeth Casoni ("Casoni Affidavit"), appended hereto as *Exhibit A*, at ¶ 2. It is a voluntary trade association whose membership is not limited to active Massachusetts-licensed lobstermen and, additionally, membership is not required for Massachusetts-licensed lobstermen. Id. at ¶¶ 4-6. The MLA does not – and cannot – exert control over how members (or non-members) choose to operate their independent business as commercial fishermen. Id. at ¶ 10. As an organization, the MLA itself does not engage in lobster fishing. Id. at ¶ 11.

The Plaintiff has affirmatively asserted causes of action against Sawyer and the MLA in Counts I and V of the Complaint. There is an ambiguity as to whom the Plaintiff has asserted claims against in Counts II and III as the Complaint does not identify the defendants in question; however, Counts II and III make no specific reference to Sawyer or the MLA. Finally, Count IV of the Complaint is not directed to Sawyer or the MLA and, instead, has asserted claims only as

to the defendants Vineyard Wind LLC and Baystate Wind LLC. The Plaintiff's Complaint should be dismissed because (1) Strahan did not satisfy the ESA's mandatory notice requirement and, as a result, this Court lacks jurisdiction to entertain his claims; and, (2) Strahan has not alleged conduct by Sawyer and the MLA sufficient to state a claim in Counts I, II, III, and V.

LEGAL STANDARD

When faced with a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, it is the Plaintiff's burden to demonstrate that the court has jurisdiction. Aversa v. United States, 99 F.3d 1200, 1209 (1st Cir.1996) (citing Murphy v. United States, 45 F.3d 520, 522 (1st Cir. 1995)) ("[T]he party invoking the jurisdiction of a federal court carries the burden of proving its existence."). In considering such a motion, the Court must treat all well-pleaded facts as true and indulge all reasonable inferences in favor of the plaintiff. See Carroll v. United States, 661 F.3d 87, 94 (1st Cir. 2011). Under Rule 12(b)(1), the Court is not restricted to the pleadings but may consider extra-pleading materials such as affidavits and testimony to resolve factual disputes concerning the existence of jurisdiction. Id.; Martinez-Rivera v. Commonwealth of Puerto Rico. 812 F.3d 69, 74 (1st Cir. 2016).

Federal Rule of Civil Procedure 12(b)(6) provides for dismissal of causes of action that fail to state a claim upon which relief may be granted. To survive a motion to dismiss, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim is plausible "when the Plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Although the court "need not give weight to legal conclusions contained in the complaint, '[n]on-conclusory factual allegations ... must [ ] be treated as true.'" Freeman v. Town of Hudson, 714 F.3d 29, 35 (1st Cir. 2013) (citing Ocasio–Hernández v. Fortuño–Burset, 640 F.3d 1, 12 (1st Cir. 2011)).

"[T]he pleading must contain something more… than… a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." Twombly, 550 U.S. at 555 (quoting Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-36 (3d ed. 2004)). "The plausibility inquiry necessitates a two-step pavane." Garcia–Catalan v. United States, 734 F.3d 100, 103 (1st Cir. 2013). "First, the court must distinguish 'the complaint's factual allegations (which must be accepted as true) from its conclusory legal allegations (which need not be credited).'" Id. (quoting Morales–Cruz v. Univ. of P.R., 676 F.3d 220, 224 (1st Cir. 2012)). "Second, the court must determine whether the factual allegations are sufficient to support 'the reasonable inference that the defendant is liable for the misconduct alleged.'" Id. (quoting Haley v. City of Boston, 657 F.3d 39, 46 (1st Cir. 2011)). This second step requires the reviewing court to "draw on its judicial experience and common sense." Id. (quoting Ashcroft, 556 U.S. at 679)).

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER PLAINTIFF'S CLAIMS BECAUSE STRAHAN FAILED TO COMPLY WITH THE ESA'S MANDATORY NOTICE REQUIREMENT

The ESA permits citizens to sue to enforce compliance with the act. 16 U.S.C. § 1540(g). However, before a citizen can file an action, the citizen must give the Secretary of the Interior or the Secretary of Commerce and any alleged violators written notice of intent to sue at least sixty days prior to filing. 16 U.S.C. § 1540(g)(2)(A)(i). Failure to comply with this requirement divests a court of jurisdiction to entertain any claims under the ESA and acts as an "absolute bar" to bringing suit. Conservation Cong. v. Finley, 774 F.3d 611, 617 (9th Cir. 2014) (internal quotations and citations omitted); Save the Yaak Comm. v. Block, 840 F.2d 714, 721 (9th Cir. 1988) ("Because of the failure to give written notice timely, we lack jurisdiction to reach the ESA claim. Therefore, we dismiss the appeal with regard only to the ESA issue."). See also Hallstrom v. Tillamook County, 493 U.S. 20, 26-28 (1989) (holding that the citizen suit notice

requirements cannot be avoided by employing a flexible or pragmatic construction).

It is Strahan's burden to prove jurisdiction. Aversa, 99 F.3d at 1209; Murphy, 45 F.3d at 522. Here, Strahan has not demonstrated that he satisfied the ESA's statutory 60-day notice requirement with respect to Arthur Sawyer or the MLA, nor neither received the required 60-day notice. Cassoni Affidavit, ¶12. For this reason alone, Strahan's claims against Arthur Sawyer and the MLA must be dismissed.

II. THE PLAINTIFF HAS NOT ALLEGED FACTS SUFFICIENT TO STATE A "TAKINGS" CLAIM IN COUNT I OF THE COMPLAINT

Over the course of 25 paragraphs which are filled with conclusory statements and exaggerated rhetoric[1], Count I of the Plaintiff's Complaint has alleged that the defendants have violated Section 9 of the ESA through the unlawful "taking" of a federally protected species. The count fails to allege conduct by Arthur Sawyer or the MLA sufficient to support such a claim.

Section 9 of the ESA prohibits any person from "taking" a federally protected species. ESA § 9(a)(1), 16 U.S.C. § 1538(a)(1)(B). The term "person" encompasses individuals as well as partnerships, trusts, associations, and other private entities. ESA § 3(13), 16 U.S.C. § 1532(13). The word "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. ESA § 3(19), 16 U.S.C. § 1532(19). To prevail on his claim against Arthur Sawyer and the MLA, Strahan must show, at minimum, that Sawyer and the MLA *actually* harassed, harmed, pursued, hunted, shot, wounded, killed, trapped, captured, or collected (or attempted any of the foregoing) the federally protected Right Whales. See American Bald Eagle v. Bhatti, 9 F.3d 163, 166 (1st Cir. 1993); Strahan v. Diodati, 755 F. Supp. 2d 318, 324 (D. Mass. 2010) ("To prevail on his claims in chief the plaintiff must

[1] For example, repeated reference to VBR as "Killing Ropes" or that such use of VBR "literally form[s] a 'minefield'".

show, *inter alia*, that the defendants: 1) actually caused "takings" of federally protected whales in violation of the ESA during the relevant time period and 2) are likely to continue to do so in the future, absent an injunction."). The Plaintiff has made no such allegations. Instead, the Plaintiff has made unsupported allegations that the MLA "acts in concert to assist the State Defendants" in concealing whale entanglements as "partners in ESA crime." See Complaint ¶ 83. The blanket assertion that MLA members deploy lobster pot gear is not sufficient to demonstrate a violation of the ESA; the Plaintiff fails to demonstrate that such conduct has led to an *actual* occurrence of harassment, harm, pursuit, hunting, killing, trapping, capturing or collection of the Right Whale so as to constitute a "taking". As the Plaintiff cannot demonstrate an alleged injury specifically traceable to the actions of Sawyer and/or the MLA, he cannot satisfy the proximate cause analysis in which to demonstrate a violate under Section 9. See Strahan, 755 F. Supp. 2d at 324.

The Plaintiff has not alleged, and cannot allege, that the MLA itself has engaged in activity prohibited by the ESA. As noted, above, the MLA is merely a non-profit trade association and it does not itself "deploy lobster gear" in any coastal waters. The MLA does not issue lobster fishing permits, it does not authorize any fishing activity, and most saliently, it does not, nor has it ever purported to, control the fishing activities of its individual members. Thus, Strahan has failed to allege any particular facts demonstrating that the MLA itself has violated the ESA. Assuming, *arguendo*, that individual members of the MLA had engaged in such conduct (and there is no such specific allegation in the Complaint) the MLA cannot be held liable for those acts. Moreover, this Court is not obliged to accept any generalized or conclusory allegations of wrongdoing by the MLA or its members. See Aulson v. Blanchard, 83 F.3d 1, 3 (1st Cir. 1996) (the Court need not consider "bald assertions, unsupportable conclusions,

periphrastic circumlocutions, and the like.).

The Plaintiff's Complaint has not sufficiently pled facts in which to establish a claim under Section 9 of the ESA and, as such, Count I of the Complaint should be dismissed.

III. THE PLAINTIFF HAS FAILED TO STATE A CLAIM FOR ADVERSE ALTERATION OF A DESIGNATED CRITICAL HABITAT IN COUNT II OF THE COMPLAINT

The Plaintiff's Complaint makes a general allegation that the defendants violated 16 USC § 1538(a) through the adverse alteration of designated critical habitat for the Right Whale; however, the Plaintiff has failed to articulate to whom Count II is directed and has failed to plead with any specificity allegations in which to support this claim. The count consists of three paragraphs which contain conclusory statements that a critical habitat has been adversely altered but fails to allege how *any* defendant has specifically caused such an adverse alteration. Further, while the count generally references the State Defendants with respect to the licensing and regulating of commercial fishing operations off the Atlantic coastline waters it does not directly address Arthur Sawyer and/or the MLA. The Plaintiff has failed to allege that Sawyer and/or the MLA caused any such alleged adverse alteration to the designate habitat and, as such, the Court should dismiss Count II of the Complaint.

IV. THE PLAINTIFF HAS FAILED TO STATE A CLAIM FOR VIOLATION OF THE CIVIL RIGHTS ACT, 42 USC § 1983, IN COUNT III OF THE COMPLAINT

As with Count II, the Plaintiff's Complaint fails to articulate to whom the allegations have been made. The count refers to the actions of the State Defendants, Defendant CCS, and Defendant Pierce in alleging that the Plaintiff has been denied access to public records, has been denied the issuance of a lobsterpot permit, and his petition for regulatory reform has not been accepted. The count does not contain a specific allegation raised as to Sawyer or the MLA.

To the extent that Count III of the Complaint may be read as to make unspecified allegations as to Sawyer and the MLA, the claims must be dismissed. Section 1983 creates a private right of action through which a plaintiff may recover against *state* actors for constitutional violations. Goldstein v. Galvin, 719 F.3d 16, 24 (1st Cir. 2013) (citing Rehberg v. Paulk, 566 U.S. 356, 360 (2012)). The purpose of § 1983 is to "deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." Wyatt v. Cole, 504 U.S. 158, 161 (1992). The MLA is a private organization that does not act "under the color of state law"; an assertion unchallenged by the Plaintiff's Complaint. There has been no claim that the MLA, as a private entity, has exercised a function that is "traditionally exclusively reserved to the State." See Manhattan Cmty. Access Corp. v. Halleck, No. 17-1702, 2019 WL 2493920, at *2 (U.S. June 17, 2019) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974)). As such, the Plaintiff's Complaint has failed to state a claim against Arthur Sawyer and the MLA in claiming that his civil rights were violated under § 1983 and Count III should be dismissed.

V. THE PLAINTIFF HAS FAILED TO STATE A PUBLIC NUISANCE CLAIM IN COUNT V OF THE COMPLAINT AND CANNOT RAISE SUCH A CLAIM AS A PRIVATE PLAINTIFF

The Supreme Judicial Court has stated that "[a] nuisance is public when it interferes with the exercise of a public right by directly encroaching on public property or by causing a common injury." Connerty v. Metropolitan Dist. Comm'n, 398 Mass. 140, 148(1986). See Restatement (Second) of Torts § 821B (1979) ("A public nuisance is an unreasonable interference with a right common to the general public"). Not just any plaintiff can bring a public nuisance action; instead, "[a]n information in equity by the Attorney General is the normal remedy for the abatement of a public nuisance." Sullivan v. Chief Justice for Admin. & Mgmt. of Trial Court,

448 Mass. 15, 34 (2006) (quoting Mayor of Cambridge v. Dean, 300 Mass. 174, 175 (1938)). A private plaintiff is only allowed to maintain a public nuisance action where that plaintiff can "show that the public nuisance has caused some special injury of a direct and substantial character other than that which the general public shares." Sullivan, 448 Mass. at 34 (quoting Connerty, 398 Mass. at 148). The Plaintiff has failed to make such a showing.

Count V of the Plaintiff's Complaint contains two paragraphs which fail to allege any conduct by the Defendants to support a public nuisance claim. Instead, the Plaintiff merely states that "said Defendants have for decades conducted themselves to deliberately and negligently injury the interests of the Plaintiff." See Complaint at ¶ 103. The count fails to set forth any evidence or factual basis in which to support the alleged deliberate and negligent conduct of the defendant. The two paragraphs of Count V further fail to plead, with any specificity, the "special injury…other than which the general public shares" in which to allow the Plaintiff to bring a private action and, absent such a special injury, an individual may not recover. Connerty, 398 Mass. at 148; see Stop & Shop Companies, Inc. v. Fisher, 387 Mass. 889, 894 (1983). As the Plaintiff has failed to allege any conduct by the defendants in which to create a public nuisance and has failed to plead sufficient facts in which to bring a claim as a private plaintiff, he has failed to state a claim for public nuisance as to Arthur Sawyer and the MLA. As such, Count V of the Complaint should be dismissed.

CONCLUSION

For the reasons set forth above, Arthur Sawyer, Individually and as President of the Massachusetts Lobstermen's Association as Representing All its Members, respectfully requests that the Court dismiss all of the claims as set forth in the Plaintiff's Complaint.

Respectfully submitted,

ARTHUR SAWYER, Individually and as President of the MASSACHUSETTS LOBSTERMEN'S ASSOCIATION as Representing All its Members,
By their attorneys,

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CERTIFICATE OF SERVICE

I, Eric M. Apjohn, hereby certify that on July 19, 2019, the foregoing was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system, in particular the counsel listed below. Parties and their counsel may access this filing through the court's CM/ECF system.

/s/ Eric M. Apjohn

EXHIBIT C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

RICHARD MAX STRAHAN, Plaintiff, v. SECRETARY, MASSACHUSETTS EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS ("MEOEEA"), et al., Defendants.	*	Civil Action No. 19-cv-10639-IT

MEMORANDUM & ORDER
February 3, 2020

TALWANI, D.J.

Plaintiff Richard Strahan's Second Amended Complaint [#68] ("Complaint") alleges, inter alia, that Massachusetts has promulgated regulations that require fishermen to use equipment that can and do injure and kill right whales, in violation of the Endangered Species Act. Plaintiff has sued the Massachusetts Executive Office of Energy and Environmental Affairs ("MEOEEA") and David Pierce, director of the Massachusetts Division of Marine Fisheries ("Fisheries Division"). Plaintiff has also sued non-state defendants, namely the Center for Coastal Studies ("Coastal Studies"), John Haviland, Arthur Sawyer, and the Massachusetts Lobstermen Association ("MLA") (collectively, the non-State Defendants). Because the pleadings against the non-State Defendants fail to state a claim, Defendants Center for Coastal Studies, John Haviland, and Arthur Sawyer's Motions to Dismiss [#107], [#111], [#113] are ALLOWED. The court will address the remaining claims against the State Defendants in a separate memorandum and order.

I. Factual Allegations as Set Forth in the Complaint[1]

The Complaint [#68] alleges as follows:

Plaintiff Richard Strahan is an avid whale watcher and researcher on sea turtles. Compl. ¶ 13 [#68]. He is the Chief Science Officer of Whale Safe USA, a campaign to make the United States coastline environmentally safe for endangered species of coastal whales and sea turtles. Id.

Defendant MEOEEA oversees the Fisheries Division, which has authority under Massachusetts law to "administer all the laws relating to marine fisheries" in the Commonwealth; Defendant David Pierce is the director of the Fisheries Division (Mr. Pierce and the MEOEEA are together referred to as the State Defendants). Mass. Gen. Laws ch. 130, §1A (2019); Compl. ¶ 14 [#68]. Plaintiff alleges that MEOEEA and Mr. Pierce are violating the Endangered Species Act, 16 U.S.C. § 1538, by requiring Massachusetts lobster fishermen to use Vertical Buoy Ropes ("VBRs") to identify and retrieve lobster traps. Compl. ¶¶ 64-89 [#68]. These ropes "repeatedly entangle, kill and injure right whales," which are protected by the Endangered Species Act. Id. ¶ 47 [#68]; 50 C.F.R. § 17.11. The State Defendants allegedly are responsible for the annual deployment of over 100,000 VBRs in Massachusetts state waters. Id. ¶ 70.

Defendant Coastal Studies is a Massachusetts corporation. Id. ¶¶ 19, 58. Plaintiff alleges that Coastal Studies is working with the State to impede the public from obtaining evidence about the entanglement of marine wildlife in three ways. Id. ¶ 9. First, Plaintiff alleges that the State Defendants provide Coastal Studies with exclusive access to the entangled whales once the State Defendants are notified of a possible entanglement. Id. Coastal Studies allegedly uses this

[1] For the purposes of this motion to dismiss, the court accepts the complaint's factual allegations as true. Cardigan Mountain Sch. v. N.H. Ins. Co., 787 F.3d. 82, 84 (1st Cir. 2015).

early access to remove evidence associating the entanglement to state-licensed VBRs. Id. ¶ 88. Second, Plaintiff alleges that Coastal Studies worked with State Defendants to give the public the false impression that the State Defendants were reducing deaths and injuries to the right whale through new regulations and procedures. Id. ¶ 58. Finally, Plaintiff alleges that as part of Coastal Studies' contract with the State Defendants, Coastal Studies agreed that its employees would never testify to the entanglement or threat of entanglement of endangered whales in Massachusetts waters. Id. ¶ 84.

Defendant Arthur Sawyer is the chief executive officer of the MLA and is also an appointed member of the Massachusetts Marine Fisheries Advisory Commission ("MFAC").[2] The complaint alleges that MLA's support of the State Defendants has been key in allowing them "to maintain the *status quo* required use of VBR since 1973." Id. ¶ 83. The complaint also alleges that the MLA's individual members are violating § 1538 of the Endangered Species Act "by deploying lobster pot gear in US coastal waters that incidentally entangles Endangered Whales and Sea Turtles in a routine and continuous manner." Id. ¶ 86.

The only factual allegation in the Complaint [#68] regarding Defendant Haviland is a business address. See id. ¶ 18.

II. Relevant Procedural Background

The Second Amended Complaint includes six counts:

- Counts I and II allege that the State Defendants, Coastal Studies, MLA, Sawyer, and Haviland violated § 1538(a) of the Endangered Species Act, 16 U.S.C. § 1538;

[2] Plaintiff alleges that MFAC has "exclusive state regulatory authority over commercial fishing in Massachusetts waters." Compl. ¶ 8. However, MFAC is not otherwise mentioned in the complaint and therefore is not further discussed in this memorandum.

- Count III alleges that the State Defendants and Coastal Studies have violated Plaintiff's rights under the First Amendment of the federal Constitution and seeks redress under the Civil Rights Act, 42 U.S.C. § 1983;
- Count IV alleges violations of the Endangered Species Act by Vineyard Wind LLC and Baystate Wind LLC;[3]
- Count V alleges that Defendants Sawyer, Haviland, MLA, and Coastal Studies have engaged in conduct constituting a public nuisance under Massachusetts common law;
- Count VI alleges that Defendant Pierce has violated the Massachusetts Civil Rights Act, Mass. Gen. Laws ch. 12, § 11H.

Compl. ¶¶ 64-106 [#68].

Defendants Coastal Studies, Haviland, Sawyer, and the State Defendants filed Motions to Dismiss [#107], [#111], [#113], [#117]. After Plaintiff failed to timely respond to any of these motions, the court issued an Order to Show Cause [#127] for why Plaintiff's Complaint [#68] should not be dismissed given the lack of opposition to Defendants' motions.

Following the Order to Show Cause [#127], Plaintiff submitted eight filings in short succession. These filings included a Notice [#128] that he would be moving for leave to file an amended complaint; Oppositions [#129], [#130], [#133], [#134] to the pending motions to dismiss; a Response [#131] to the show cause order; a Motion for Hearing [#132] on the pending motions to dismiss; and a Motion for Discovery [#137] of Coastal Studies. Despite his Notice [#128] that he would be moving for leave to file an amended complaint, Plaintiff filed no such

[3] Vineyard Wind LLC and Baystate Wind LLC have not been summoned or served and the claims against them are thus not discussed as part of this memorandum and order.

motion.

On January 31, 2020, Plaintiff filed an Emergency Motion for Temporary Restraining Order [#145], seeking an order directing the State Defendants and Coastal Studies to produce all records relating to an entangled whale off the Massachusetts coast and a pod of whales in the vicinity. At the court's direction, see Elect. Order [#147], Plaintiff filed an amended version of the motion on February 2, 2020. See Pl's. Emerg. Mot. Temp. Restr. Order [#148].

III. The Non-State Defendants' Motions to Dismiss

To survive a motion to dismiss, the well-pleaded facts in a plaintiff's complaint must "state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). In reviewing a complaint under a Fed. R. Civ. P. 12 motion to dismiss, the court "must distinguish the complaint's factual allegations (which must be accepted as true) from its conclusory legal allegations (which need not be credited)." Cardigan Mountain Sch., 787 F.3d at 84 (internal citations omitted). The plausible factual allegations, taken as true, must ultimately be able to support the legal conclusion that underlies each claim for relief. Id.

1. Count I: Violation of Endangered Species Act Sections 1538(a) and (g) by Coastal Studies and the MLA

Count I includes two related sets of allegations. First, Count I alleges that the State Defendants violated §§ 1538(a) and (g) of the Act because licensing Massachusetts fishermen caused a taking of right whales. Second, and relevant to the discussion here, Count I alleges that Coastal Studies and MLA are acting in concert with the State Defendants to maliciously aid their evasion of the Act.[4]

[4] Although Defendants Haviland and Sawyer are listed in the header for Count I, see Compl. 18 [#68], the allegations in support of Count I do not provide any allegations related to these Defendants. See id. ¶¶ 64-89. In the absence of factual allegations supporting the claim,

Plaintiff claims that Coastal Studies and the MLA acted in concert with the State Defendants to violate the Act in different ways. Plaintiff alleges that Coastal Studies supported the State Defendants in "maintain[ing] the status quo required use of VBR since 1973" by "fabricat[ing] evidence and expert opinion to fraudulently deflect Public opinion and the courts from holding the Defendants liable for the killing and injuring of Endangered Whales . . . ." Compl. ¶¶ 83, 88 [#68]. As for MLA, Plaintiff alleges that its individual members are violating the Act by continuing to deploy lobsterpot gear using VBRs. Id. ¶ 86.

Taking Plaintiff's allegations against Coastal Studies as true, the activities that Plaintiff describes amount, at most, to acts in support or assistance of the State Defendants, the party actually alleged to be causing a prohibited "take" under the Act. While any person who "cause[s] [a taking] to be committed" may be liable under the Act, liability does not extend to those who aid or abet a taking. 16 U.S.C. § 1538(g). In Strahan v. Coxe, the First Circuit interpreted the causality language of § 1538(g) to be coterminous with the common law principles of causation: the Act "not only prohibits the acts of those parties that directly exact the taking, but also bans those acts of a third party that bring about the acts exacting a taking." Strahan v. Coxe, 127 F.3d 155, 163 (1st Cir. 1997). The court does not find that aiding and abetting or otherwise giving assistance to those who have exacted a taking falls within the bounds of the common law concept of causation. The Supreme Court's decision in Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994), is instructive on this point. In Cent. Bank of Denver, the Supreme Court examined the reach of § 10(b) of the Securities Exchange Act of 1934, which makes it unlawful for any person to "directly or indirectly" engage in prohibited

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Plaintiff's claims under Count I against Defendants Haviland and Sawyer must be dismissed for failure to state a claim.

securities transactions. The Court found that aiding and abetting a prohibited transaction did not fall under the "directly or indirectly" scope of § 10(b), because "aiding and abetting liability extends beyond persons who engage, even indirectly, in a proscribed activity," and "reaches persons who do not engage in the proscribed activities at all, but who give a degree of aid to those who do." Id. at 176. Furthermore, the Court noted, "if . . . Congress intended to impose aiding and abetting liability, we presume it would have used the words 'aid' and 'abet' in the statutory text. But it did not." Id. at 177. Here, the court similarly does not construe the Act as reaching beyond those who cause a taking to include those who merely provide aid. Accordingly, even taking the factual allegations as true, Plaintiff has failed to state a claim against Defendants Coastal Studies arising under the Act.

Plaintiff also claims that MLA is subject to liability under § 1538(g) based on the actions of its individual members. Compl. ¶ 86 [#68]. Taking as true Plaintiff's claims that "defendant MLA's individual members are violating the Act's § 1538 prohibitions," Plaintiff does not explain how the conduct of individual members creates liability for MLA under the Act. To the extent that Plaintiff relies on Strahan v. Coxe for the conclusion that state regulators may be liable under the Act, this rationale does not extend liability to MLA. As noted earlier, the First Circuit interprets the Act to extend to "governmental third parties pursuant to whose authority an actor directly exacts a taking of an endangered species." Strahan v. Coxe, 127 F.3d at 163. However, Plaintiff does not allege any facts that support the conclusion that the MLA, a non-governmental entity, has any regulatory authority over its members. Accordingly, the factual allegations related to MLA's conduct, even taken as true, do not support Plaintiff's legal conclusion that MLA has violated the Act. Thus, this claim is subject to dismissal.

2. Count III: Violation of 42 U.S.C. § 1983

Count III alleges that the "State Defendants and Defendant Coastal Studies as a state actor" have violated Plaintiff's federal Constitutional rights. However, all non-conclusory factual allegations relate to the conduct of the State Defendants, not Coastal Studies. See Compl. ¶¶ 93-98 [#68]. Accordingly, Plaintiff has failed to sufficiently plead a claim as to Coastal Studies in Count III.

3. Count V: Public Nuisance

Count V alleges that Defendants Sawyer, Haviland, MLA, and Coastal Studies are public nuisances under Massachusetts state law. The Massachusetts Supreme Judicial Court has stated that "[a] nuisance is public when it interferes with the exercise of a public right by directly encroaching on public property or by causing a common injury." Sullivan v. Chief Justice for Admin. & Mgmt. of Trial Court, 448 Mass. 15, 34 (2006). However, "[a]n information in equity *by the Attorney General* is the normal remedy for the abatement of a public nuisance." Mayor of Cambridge v. Dean, 300 Mass. 174, 175 (1938) (emphasis added). Massachusetts law permits an exception to this general rule by allowing private plaintiffs to bring public nuisance claims in the rare circumstance where "the public nuisance has caused some special injury of a direct and substantial character other than that which the general public shares." Sullivan, 448 Mass. at 35 (internal citation omitted). In Sullivan, even plaintiffs who suffered the public harm to a greater degree than other individuals could not bring a public nuisance claim without a showing that their injury was unique, and not simply greater in magnitude. Id. at 36.

Taking all the plausible factual allegations as true, Plaintiff has not sufficiently pleaded a unique injury that would entitle him to bring a claim for public nuisance. While Plaintiff certainly has a particular interest in the enforcement of the Act, see Compl. ¶ 2, 13 [#68], this

special interest does not support the conclusion that Plaintiff has or will suffer "a special injury of a direct and substantial character" as required by Sullivan. 448 Mass. at 35. Instead, Plaintiff is equally situated to other Massachusetts residents who have an interest in the continued existence of the right whale and the enforcement of federal law. Without more, Plaintiff cannot proceed on a public nuisance claim.

Plaintiff's public nuisance claim also fails because an enterprise is generally not liable under a theory of public nuisance where it acts "in conformity with the licenses granted to it." Strachan v. Beacon Oil Co., 251 Mass. 479, 487 (1925). In Beacon Oil Co., neighbors of an oil refinery sued Beacon Oil due to odors and noise emanating from Beacon Oil's refinery. The court noted that the oil refinery was operating pursuant to an annual license and permit issued by state authorities. Citing extensive authority, the SJC wrote that it "is settled that under statutes similar to those under which the defendant was granted the licenses, if the licensee has complied in all respects with the terms, what he does thereunder cannot be considered a nuisance or be restrained, even if without such licenses the acts done would be a nuisance." Id. at 487. Plaintiff has made no allegations that Defendants have not "complied in all respects with the terms" of the licenses and permits they receive from the state. Id. Indeed, Plaintiff's complaint against the State Defendants is founded on the premise that lobstermen are being compelled to use VBRs by Massachusetts regulation. See Compl. ¶¶ 49, 53, 68. As a result, Plaintiff's public nuisance claim cannot prevail as a matter of law.

IV. Plaintiff's Motions Relating to the Non-State Defendants

Plaintiff requests a hearing on the pending motions to dismiss. See Pl.'s Mot. [#132]. The decision of whether to hold a hearing on a pending motion is within the discretion of the court. See Local Rule 7(e); see also Puerto Rico Mar. Shipping Auth. v. Leith, 668 F.2d 46, 51 (1st Cir.

1981) ("A district judge does not abuse his discretion in granting a motion to dismiss without first holding a hearing if he is familiar with the relevant issues and if the defendants have adequate notice and opportunity to be heard on the plaintiff's motion to dismiss") (internal citation omitted). Here, the court concludes that it has sufficient familiarity with the issues at bar and that Plaintiff's position has been thoroughly presented in the written briefs and denies the request.

Plaintiff's Motion for Discovery [#137] requests leave to perform discovery "in order to improve the pleadings by making more specific and detailed factual allegations against Defendant CCS." Pl.'s Mot. Disc. 3 [#137]. The court's resolution of Defendant Coastal Studies' Motion to Dismiss [#107] does not turn on questions of fact that may be buttressed by additional discovery. Instead, as discussed above, the court allows Defendant Coastal Studies' Motion to Dismiss [#107] because, even taking the factual allegations in Plaintiff's complaint as true, Plaintiff failed to state a claim. Because Plaintiff failed to state a claim for relief, "he is not entitled to discovery, cabined or otherwise." Ashcroft v. Iqbal, 556 U.S. 662, 686 (2009). Thus, Plaintiff's Motion for Discovery [#137] is denied.

Plaintiff has filed two motions for preliminary injunctive relief against the non-State Defendants: Plaintiff's Motion for Preliminary Injunction [#92] to compel Defendants Sawyer and Haviland to apply for an incidental take permit under the Act and submit certain fishing plans to the court, and Plaintiff's Renewed Application for a Temporary Restraining Order [#148], which requests that both the State Defendants and Coastal Studies be ordered to produce information concerning an ongoing entanglement. Preliminary injunctive relief is not available without a claim for relief in an underlying complaint. See CMM Cable Rep. v. Ocean Coast Prop., 48 F.3d 618, 620 (1st Cir. 1995) ("The purpose of a preliminary injunction is to preserve

the status quo, freezing an existing situation so as to permit the trial court, upon full adjudication of the case's merits, more effectively to remedy discerned wrongs"). Because no claims remain against the non-State Defendants, Plaintiff's Motion for Preliminary Injunction [#92] against Defendants Sawyer and Haviland is denied and Plaintiff's Renewed Application for a Temporary Restraining Order [#148] is denied to the extent it seeks relief from Coastal Studies.

V. Conclusion

For the reasons set forth above:

1. Plaintiff's Motion for Preliminary Injunction against Defendants Sawyer and Haviland [#92] is DENIED.

2. Defendant Coastal Studies' Motion to Dismiss [#107] is ALLOWED.

3. Defendant Haviland's Motion to Dismiss [#111] is ALLOWED.

4. Defendant Sawyer and Defendant Massachusetts Lobstermen's Association's Motion to Dismiss [#113] is ALLOWED.

5. Plaintiff's Motion for Hearing [#132] is DENIED.

6. Plaintiff's Motion for Discovery [#137] is DENIED.

7. Plaintiff's Emergency Motion for Temporary Restraining Order [#145] is DENIED in light of Plaintiff's Renewed Motion for Temporary Restraining Order [#148].

8. Plaintiff's Renewed Motion for Temporary Restraining Order [#148] is DENIED as to Defendant Coastal Studies but remains pending as to the State Defendants.

IT IS SO ORDERED.

Date: February 3, 2020

/s/ Indira Talwani
United States District Judge

EXHIBIT D

From: Sam Blatchley
To: Robert Dube
Subject: FW: 60 Day Notice to Bring Suit Under Endangered Species Act
Date: Thursday, February 17, 2022 1:44:10 PM
Attachments: image001.png

Samuel P. Blatchley*

Attorney at Law / Proctor In Admiralty

Eckland & Blando LLP

22 Boston Wharf Road | 7th Floor | Boston, MA | office 617 217 6936 | mobile 401 330 7417 | email sblatchley@ecklandblando.com

https://www.ecklandblando.com/admiralty-and-maritime-law/

*Admitted to Practice in MA, ME, NY, & RI

==========

From: Beth Casoni <beth.casoni@lobstermen.com>
Date: Thursday, February 17, 2022 at 1:13 PM
To:
Cc: Apjohn, Eric M. <eapjohn@Campbell-trial-lawyers.com>, Arthur "Sooky" Sawyer <sooky55@aol.com>, Sam Blatchley <sblatchley@ecklandblando.com>
Subject: FW: 60 Day Notice to Bring Suit Under Endangered Species Act

FYI

Kind regards,
Beth Casoni
Executive Director
Massachusetts Lobstermen's Association
8 Otis Place
Scituate, MA 02066
781.545.6984 xt. 1
www.lobstermen.com

From: sooky55@aol.com [mailto:sooky55@aol.com]
Sent: Thursday, February 17, 2022 12:46 PM
To: Beth Casoni <beth.casoni@lobstermen.com>
Subject: Fwd: 60 Day Notice to Bring Suit Under Endangered Species Act

-----Original Message-----
From: Beth Casoni <beth.casoni@lobstermen.com>
To: sooky55@aol.com <sooky55@aol.com>
Sent: Tue, Dec 21, 2021 10:35 am
Subject: RE: 60 Day Notice to Bring Suit Under Endangered Species Act

WOW he is still at it…. I didn't see your name on this one…. That is a good thing.

Kind regards,
Beth Casoni
Executive Director
Massachusetts Lobstermen's Association
8 Otis Place
Scituate, MA 02066
781.545.6984 xt. 1
www.lobstermen.com

This electronic message and its contents are intended solely for the use of the addressee(s) and may be confidential or otherwise protected from disclosure. If you are not the intended recipient of the message, any dissemination, distribution, copying, or action taken in relation to this message and its contents is strictly prohibited and may be unlawful. If you have received this electronic message in error, please notify the sender immediately and destroy the original message and all copies.

From: sooky55@aol.com [mailto:sooky55@aol.com]
Sent: Tuesday, December 21, 2021 10:02 AM
To: Beth Casoni <beth.casoni@lobstermen.com>
Subject: Fw: 60 Day Notice to Bring Suit Under Endangered Species Act

----- Forwarded Message -----
From: esistoo@yahoo.com <esistoo@yahoo.com>
To: rick.spinrad@noaa.gov <rick.spinrad@noaa.gov>; Dan McKiernan <dan.mckiernan@state.ma.us>; secyraimondo@doc.gov <secyraimondo@doc.gov>; janet.coit@noaa.gov <janet.coit@noaa.gov>
Cc: Erica Fuller <efuller@clf.org>; Reynolds Maryanne (AGO) <maryanne.reynolds@state.ma.us>; Healey Maura (AGO) <maura.healey@state.ma.us>; Matthew Ireland <matthew.ireland@state.ma.us>; Arthur Sooky Sawyer <sooky55@aol.com>; Patrick Parenteau <pparenteau@vermontlaw.edu>; Zygmunt Plater <plater@bc.edu>
Sent: Monday, December 20, 2021, 04:59:37 PM EST
Subject: 60 Day Notice to Bring Suit Under Endangered Species Act

Whale Safe USA
83 Main Street, 6080 GSS
Durham NH 03824

Served VIA USPS First Class **20 December 2021**

To: Secretary, Office of the Secretary
US Department of Commerce
1401 Constitution Avenue, N.W.
Washington, D.C. 20230
secyraimondo@doc.gov

Assistant Administrator
National Marine Fisheries Service
1335 East-West Highway
Silver Spring MD 20910
janet.coit@noaa.gov

Administrator
National Oceanographic and Atmospheric Agency, Suite 51030
1401 Constitution Avenue, NW
Washington DC 20230
rick.spinrad@noaa.gov

Daniel McKiernan, Chair
Massachusetts Division of Marine Fisheries
% Division of Marine Fisheries
1 Causeway Street, Suite 400
Boston MA 02114
dan.mckiernan@state.ma.us

Re: Notice of Intent to Bring Suit Pursuant to Section 11(g) of the Endangered Species Act

To the Above Parties:

This is a notice by me, Whale Safe USA, and our affiliates of our continuing intent to bring suit against you and each of you — especially after the next sixty days — for your current and prospective violations of the Section 9 prohibitions of the Endangered Species Act and to prevent future said violations. See 16 U. S. C. §

1538(a and g). You are violating the ESA Section 9 prohibitions by your issuing fishing permits and enforcing regulations that require the individuals that you license to use vertical buoy ropes on the pot and gillnet fishing gear that they deploy in US coastal waters off the coast of Massachusetts and in the Gulf of Maine ("Fishing Activity"). The said deployed VBR laden fishing gear catches, entangles, kills, and/ or injures and otherwise takes all endangered species of whales and sea turtles currently listed as protected under the ESA (ESA Listed Species).

Additionally, NMFS/NOAA is engaging in ESA9 prohibited taking by issuing regulations under the Marine Mammal Protection Act (i. e. Atlantic Large Whale Take Reduction Plan) that requires Maine & Massachusetts state licensed recreational and commercial fishermen to use VBR laden pot and gillnet fisher gear. Additionally NMF/NOAA is violating its non-discretionary and mandatory ESA7 duties by refusing to conduct an internal ESA7 consultation on the likelihood of the ALWTRP jeopardizing the continued survival of ESA Listed Species of whales and sea turtles. The appointment and operation of the Atlantic Large Whale Take Reduction Team is wholly unlawful for the same failure to first obtain the required MMPA Section 101(a)(5)(E) incidental take permit before issuing ALWTRP regulations that requires the use of ESA9 prohibited whale entangling VBR. The ALWTRP is also MMPA & ESA9 prohibited since it attempts to immunize the taking of non-endangered marine mammals while still requiring the use of VBR that entangled ESA Listed Species of whales and sea turtles.

You are acting in concert with individual fishermen, their associations, state marine fishing agencies as cited above, and the Atlantic States Marine Fisheries Commission and its commissioners to violate the ESA Section 9 prohibitions in regards to your killing, injuring and otherwise by your Fishing Activity's prohibited taking of ESA listed Species endangered whales and sea turtles.

The Fishing Activity's said prohibited takings of ESA Listed Species is neither accidental nor incidental to any otherwise lawful activity. Your Fishing Activity constitutes the deliberate and direct taking of ESA Listed Species of whales an sea turtles. VBR fishing gear used in your Fishing Activity routinely and expectedly catches ESA Listed Species of whales and sea turtles. Therefore you and your licensed agents know and rely on that fact that your Fishing Activity will routinely take ESA Listed Species. In the fishing industry "fish" caught in fishing gear without authorization to do so is referred to as "illegal bycatch." Under federal and state law whales are still defined as "fish." Entangled whales by the Fishing Activity constitute "caught fish" as bycatch without a fishing license to do so. Like a hook deployed off a line attached to a fishing pole, all fish (i. e. whales) caught by the Fishing Activity is prohibited and you are simply "fishing for whales without a license" and directly engaging in ESA9 prohibited conduct by the simple act of deploying VBR laden fishing gear in known whale habitat.

The act of deploying lobsterpot and gillnet fishing gear with attached Vertical Buoy Ropes in the ESA listed designated critical habitat for Northern Right Whales is in itself a *per se* prohibited conduct pursuant to ESA9 prohibitions against taking of ESA Listed Species of whales and sea turtles. Such a prohibited taking does not require the person deploying said fishing gear with attached VBR to in itself result in the immediate or eventual catching or entanglement of any ESA Listed Species to now constitute an ESA9 prohibited taking.

The simple deployment of fishing gear regulated NMFS and the DMF is prohibited under the ESA Section 9 prohibitions by "harm" owing to your adversely altering and otherwise destroying the ESA listed designated critical habitat of Right Whales in the Gulf of Maine that kill and interrupts the feeding and reproduction of Northern Right Whales.

Currently the Massachusetts Division of Marine Fisheries is seeking an ESA Section 10 Incidental Take Permit from NMFS to authorize its prospective catching, entangling, injuring and/or killing of Northern Right Whales and other ESA Listed Species of Whales. Currently and for the next ten years at least, the issuing of any such permit is prohibited by the ESA9 take prohibitions. NMFS has never issued itself the required MMPA 101(a)(5)(E) that is a prerequisite to its issuing any ESA10 ITP. NMFS is therefore engaging in prohibited conduct under ESA9 — and violating its ESA7 mandatory and non-discretionary duties — by aiding the MDMF obtaining an incidental take permit to unlawfully engage in the ESA9 prohibited taking of ESA Listed Species of Whales. Instead, NMFS is mandated by the ESA7 to develop and implement a plan/policy to effectively enforce ESA S9 take prohibitions against the MDMF and the State of Maine's Fishing Activity.

NMFS has violated its ESA7 mandatory and non-discretionary duty by having adopted and conduct an ESA9 enforcement policy that immunizes all recreational and commercial pot and gillnet fishermen from their deploying VBR laden fishing gear that then entangles and member of an ESA Listed Species of whale and sea turtle. Since 1973, NMFS has not even issued a single civil citation against any state or federal licensed fisher whose fishing gear entangled, kill, and/or injures any ESA Listed Species of whale or sea turtle. NMFS has never entered into the required ESA7 consultation with itself on whether current policy of immunizing all licensed fishermen from ESA9 enforcement will not likely jeopardize the survival of ESA Listed Species of whales and sea turtles.

NMFS also violates its ESA7 mandatory and non-discretionary duties by failing to engage in the required ESA7 consultation with itself over issuing an individual a license to engage in pot and/or gillnet fishing in US coastal waters off the coasts of Maine, Massachusetts & RI. Its historical practice of only doing a ESA7 consultation of its policy of issuing said fishing permits fails to satisfy the

ESA7 imposed mandatory and non-discretionary requirements to conduct the requisite ESA7 consultation on each and every annual permit application for a fishing license it receives from any individual. Individual conduct determines the difference between one licensed fisher catching an ESA Listed Species of whale or sea turtle and another not.

In 60 days or later, we will prosecute each of you in a USDC of our choice for you said ESA & MMPA prohibited crimes against the the Public interests undless you comply with the following non-negotiable demands –

1. You immediately cease requiring the use Vertical Buoy Ropes by your Fishing Activity and cease licensing any individual that uses VBR.

2. Ban the use of VBR by the states of Maine & Massachusetts.

3. Agree to enforce the ESA & MMPA take prohibitions against all pot & gillnet fishers whose fishing gear entangles ESA Listed Species of whales and sea turtles.

4. Agree to enforce the ESA & MMPA take prohibitions against any state or federal licensed recreational or commercial pot and gillnet licensed fishers to stop them deploying any VBR laden fishing gear un Right Whale critical habitat.

5. Disband your ALWTRT and retract all ALWTRP regulations.

6. Enforce the ESA & MMPA against the state of Maine & Massachusetts to stop their licensing the deployment of VBR laden fishing gear in US coastal waters.

7. Engage in an ESA7 consultation on each annual application to NMFS by an individual fisher for a license to engage in recreational or commercial pot and gillnet fishery in the Gulf of Maine.

8. Adopt a policy of imposing a moratorium for the issuing of ESA Section 10 incidental take permits to states and individuals to allow them to use VBR in their fishing gear off the northeastern US Atlantic coastline.

Of course, I am willing to discuss our COMMANDS for you to obey the ESA and not further harm ESA Listed Species of vertebrate wildlife.

In Peace,

/s/ Richard Maximus Strahan

_____

Richard Maximus Strahan

Chief Science Officer
Whale Safe USA
esistoo@yahoo.com

UNITED STATES DISTRICT COURT
DISTRICT OF DISTRICT OF COLUMBIA

MAN AGAINST XTINCTION A/K/A M.A.X, Plaintiff, v. Michael Pentony, et. al, Defendants.	Civil Action No.: **1:21-cv-01131-TJK**

ORDER

The above-entitled matter came on for hearing before the undersigned Judge of U.S. District Court on Defendant Arthur Sawyer's Motion to Dismiss the Amended Complaint. Plaintiff Richard Maximus Strahan (a/k/a Man Against Xtinction / M.A.X.) was represented *pro se*, and Defendant Arthur Sawyer was represented by Samuel Blatchley, Esq.

Based upon the files, records and proceedings herein, the Court, being duly advised in the premises, makes the following:

ORDER

1. IT IS HEREBY ORDERED that Defendant Arthur Sawyer's Motion to Dismiss be, and the same is, **GRANTED**.

2. IT IS HEREBY FURTHER ORDERED that the Complaint against Arthur Sawyer be, and the same is, **DISMISSED WITH PREJUDICE**.

LET JUDGMENT BE ENTERED ACCORDINGLY

Dated: _____

_____
The Honorable Timothy J. Kelly
United States District Court Judge