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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Victor Antonio Parsons, et al.,

10 Plaintiffs,

11 v.

12 Charles L Ryan, et al.,

13 Defendants.  
14

No. CV-12-00601-PHX-ROS

**ORDER**

15 In advance of the December 6, 2018, status conference, and to comply with the  
16 Court's own obligation to confirm it has jurisdiction, the Court will address in some detail  
17 an argument Defendants have raised regarding Magistrate Judge Duncan's jurisdiction.

18 **BACKGROUND**

19 When this case was filed in March 2012, it was assigned to District Judge Neil V.  
20 Wake and referred to Magistrate Judge Mark E. Aspey. (Judge Wake subsequently  
21 withdrew that referral.) The case proceeded before Judge Wake with discovery and motion  
22 practice. Trial was set for October 20, 2014. A few months before trial, Judge Wake  
23 referred this case to Magistrate Judge Duncan for a settlement conference. (Doc. 978).  
24 The parties attended that settlement conference, continued to negotiate after the conference,  
25 and simultaneously prepared for trial. On August 11, 2014, the case was reassigned from  
26 Judge Wake to District Judge Diane J. Humetewa. (Doc. 1074). Less than a week before  
27 trial, the parties filed a "Stipulation" indicating that they had agreed to a settlement. Less  
28 than five minutes after filing that stipulation, the parties filed a "Joint Motion to Refer

1 Remainder of Case to Magistrate Judge Duncan and to Refer Case to Magistrate Judge  
2 Buttrick for Mediation.” (Doc. 1186). That motion stated, in relevant part,

3 Pursuant to 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73, the parties hereby  
4 consent to have Magistrate Judge David Duncan conduct all further  
5 proceedings in this case, including proceedings to determine the fairness of  
6 the settlement pursuant to Fed. R. Civ. P. 23(e), and any other proceedings  
7 contemplated by the settlement in this case.

8 The parties explained their motion was based on Magistrate Judge Duncan’s “constructive  
9 participation in the settlement negotiations” which had “provided him with a unique ability  
10 to effectuate the parties’ intent in any future proceedings.” (Doc. 1186 at 2). The request  
11 for a referral to Magistrate Judge Buttrick was based on the parties’ settlement  
12 contemplating the mediation of certain disputes before more formal “enforcement  
13 proceedings” could be initiated. Based on the parties’ filings, Judge Humetewa vacated  
14 the trial.

15 On October 22, 2014, Judge Humetewa granted the parties request for  
16 “reassignment of this case to Magistrate Judge Duncan pursuant to 28 U.S.C. § 636(c) and  
17 Rule 73 of the Federal Rules of Civil Procedure.” In doing so, Judge Humetewa stated  
18 Judge Duncan would “conduct all further proceedings in this case.” (Doc. 1194). Judge  
19 Humetewa denied the request to refer the case to Magistrate Judge Buttrick because “[i]n  
20 light of the reassignment of this matter to Judge Duncan, any requests to refer the matter  
21 to a magistrate judge . . . should be directed to Judge Duncan.” (Doc. 1194). Once the  
22 case was reassigned to Magistrate Judge Duncan, he held the necessary hearings and  
23 formally approved the parties’ settlement. (Doc. 1458). As recounted in prior orders,  
24 Magistrate Judge Duncan then undertook a multi-year effort to have Defendants comply  
25 with their settlement obligations. Magistrate Judge Duncan eventually issued multiple  
26 rulings, prompting multiple appeals. (Doc. 1817). Proceedings continued before  
27 Magistrate Judge Duncan while the appeals were being briefed.

28 In May 2018, Magistrate Judge Duncan informed the parties he would be retiring in  
June 2018. That announcement prompted defense counsel to research the “legal

1 ramifications” of Magistrate Judge Duncan’s retirement. (Doc. 2825 at 2). Defense  
2 counsel discovered a 2003 case from the Seventh Circuit that prompted them to conclude  
3 Magistrate Judge Duncan never had “subject matter jurisdiction to conduct any  
4 proceedings in this case.” (Doc. 2825 at 2). On May 18, 2018, Defendants filed a motion  
5 asking Judge Humetewa “to vacate the referral of this matter to Magistrate Judge  
6 [Duncan].” (Doc. 2825). Defendants’ motion prompted Magistrate Judge Duncan to issue  
7 an Order stating:

8 Defendants have filed a motion seeking the return of the case to Judge  
9 Humetewa pursuant to 28 U.S.C. § 636(c)(4) based upon the extraordinary  
10 circumstances of the undersigned’s disability retirement. This text only order  
11 does not address that issue which is properly before the District Judge. This  
12 Order addresses the Defendants’ jurisdictional argument and the request to  
13 stay matters presently before the undersigned. *Hatcher v. Consolidated City*  
14 *of Indianapolis*, 323 F.3d 513 (7th Cir. 2003), is neither controlling authority  
15 and, in any event, is not persuasive given that it does not address the factual  
16 scenario presented here. This action was referred to the undersigned to  
17 conduct a settlement conference (Docs. 961, [978]). After that referral, and  
18 successful negotiation of the Stipulation, the parties explicitly consented to  
19 the undersigned continuing to exercise jurisdiction over this action pursuant  
20 to 28 U.S.C. § 636(c) to promote the interests of judicial economy and  
21 efficiency (Doc. 1186). Moreover, there is no statutory or Ninth Circuit  
22 authority precluding such assignment. Accordingly, the undersigned rejects  
23 Defendants’ jurisdictional argument and affirms all rulings, briefing  
24 schedules, and pending matters set for hearing until an order to the contrary  
25 issues.

26 (Doc. 2826).

27 On June 5, 2018, Judge Humetewa issued a similar order. Judge Humetewa ruled,  
28 in relevant part,

29 Citing 28 U.S.C. § 636(c)(4) and Federal Rule of Civil Procedure 73(b)(3),  
30 Defendants attack Judge Duncan’s subject matter jurisdiction over this action  
31 and request that the referral of this action be vacated for extraordinary  
32 circumstances. Defendants allege that under *Hatcher v. Consolidated City*  
33 *of Indianapolis*, 323 F.3d 513 (7th Cir. 2003), their explicit agreement to  
34 Judge Duncan’s jurisdiction in October 2014 is invalid. Judge Duncan has  
35 addressed this argument, but the undersigned agrees that *Hatcher* is factually  
36 and legally distinguishable from this case. Defendants’ position is also  
37 foreclosed by the Supreme Court’s decision in *Roell v. Withrow*, 538 U.S.

1 580, 587 (2003), because while there does not appear to be any defect in the  
2 process by which Judge Duncan became involved in this case, and even if  
3 there was one, it was cured by the parties' explicit consent to his jurisdiction  
4 in their standalone joint motion at Doc. 1186 ("Pursuant to 28 U.S.C. §  
5 636(c) and Fed. R. Civ. P. 73, the parties hereby consent to have Magistrate  
6 Judge David Duncan conduct all further proceedings in this case[.]").

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8 As a consequence, the transfer of this case consistent with the parties'  
9 consent extinguished this Court's jurisdiction over this matter. The motion  
10 to vacate the Magistrate Judge referral is therefore denied.

11 (Doc. 2856 at 1-2).

12 After not obtaining relief from Judge Humetewa, Defendants turned to the Ninth Circuit.

13 In one of their pending appeals, Defendants filed a "Motion to Dismiss Appeals for  
14 Lack of Magistrate Judge Jurisdiction." That motion presented the same arguments and  
15 requested the Ninth Circuit "vacate [Magistrate Judge Duncan's] rulings and dismiss the  
16 appeals for lack of magistrate-judge jurisdiction." (16-17282, Doc. 110). The Ninth  
17 Circuit has not ruled on that motion.

### 18 ANALYSIS

19 Although there is no pending motion regarding jurisdiction, the Court has an  
20 obligation to confirm jurisdiction exists. *See, e.g., WMX Techs., Inc. v. Miller*, 104 F.3d  
21 1133, 1135 (9th Cir. 1997) (jurisdiction "must" be raised sua sponte). The Court has read  
22 Defendants' prior filings on the jurisdictional issue and those filings are based on a single  
23 opinion from the Seventh Circuit, *Hatcher v. Consolidated City of Indianapolis*, 323 F.3d  
24 513 (7th Cir. 2003). A careful analysis of that case shows it has no application to the  
25 present situation and that Magistrate Judge Duncan had jurisdiction.

26 Plaintiff Lee Hatcher obtained a jury verdict of approximately \$19,000 against the  
27 City of Indianapolis and several individuals. *Id.* at 514. That verdict prompted cross-  
28 appeals by the parties as well as a motion for attorneys' fees by Hatcher. The District Judge  
did not immediately rule on that motion. While the cross-appeals were pending, the parties  
settled. The parties' settlement agreement provided "for a \$100,000 payment to Hatcher

1 and his attorneys” but went on to state the “legal fees claimed by [various lawyers] . . .  
2 would be referred to Magistrate V. Sue Shields for mediation and resolution.” *Id.* at 514.  
3 The parties “advised” the District Judge of their settlement and the District Judge “seemed  
4 to endorse the referral to a named magistrate judge.” *Id.* at 515. The Magistrate Judge set  
5 a briefing schedule but, without any explanation, the District Judge ruled on the motion for  
6 attorneys’ fees and awarded Hatcher some, but not all, of his requested costs and fees. *Id.*  
7 Neither side was pleased with the District Judge’s order and the previously filed cross-  
8 appeals became solely about the awards of costs and fees.

9 Hatcher presented two arguments on appeal. First, Hatcher believed the District  
10 Judge had erred by ruling on the motion for fees given the language in the parties’  
11 settlement agreement designating the Magistrate Judge would decide that issue. Second,  
12 Hatcher argued even if the District Judge had been authorized to resolve the fees issue, the  
13 amount awarded was too low. The Seventh Circuit concluded it did not need to “delve too  
14 deeply into the merits of the [amount of the] award” because “the district court never should  
15 have ruled on the fee petitions in the first place.” *Id.* To explain that conclusion, the  
16 Seventh Circuit went into great detail about the parties’ ill-fated attempt to have a particular  
17 judicial officer resolve the fees issue.

18 The Seventh Circuit began its analysis by holding the parties had validly consented  
19 to referring the case to a Magistrate Judge. The written settlement agreement was sufficient  
20 evidence of the parties’ consent to the Magistrate Judge hearing the case and “the district  
21 court acknowledged that the reference was being made when he told the parties that he  
22 would give Magistrate Judge Shields a ‘heads up’ on the matter.” *Id.* at 516. Thus, the  
23 Seventh Circuit believed there had been a valid referral to the Magistrate Judge. Despite  
24 the existence of that valid referral, the Seventh Circuit reasoned there was a “problem”  
25 with the parties “consenting only to referral to a specific named magistrate judge whom  
26 the parties have handpicked.” *Id.*

27 The “problem” with the parties’ attempt to have a specific Magistrate Judge resolve  
28 the fees motion was that “parties are not permitted to select their own judges in cases in

1 federal court.” *Id.* at 517. And “the degree of specificity the parties sought in this case is  
2 inconsistent with the role of magistrate judges as federal judicial officers.” *Id.* at 516. The  
3 Seventh Circuit believed “the parties [had] attempted to override the district court’s  
4 assignment protocol and [] substitute their own chosen magistrate.” *Id.* at 518. The  
5 governing statutes allegedly indicated “that magistrate judge assignment is a matter for the  
6 court to decide, not the parties.” *Id.* Thus, only “the court, and not the parties, [] has the  
7 power to confer general or specific duties upon an individual magistrate judge.” *Id.*

8       Based on the parties’ allegedly improper attempt to select Magistrate Judge Shields,  
9 the Seventh Circuit remanded for the district court to determine if the parties’ settlement  
10 agreement had meant to allow any Magistrate Judge resolve their remaining disputes. In  
11 that situation, the reference would be permissible and a Magistrate Judge, presumably  
12 selected at random, could resolve the issues. If, however, the parties’ intent had been to  
13 select only Magistrate Judge Shields, their “consent” was “ineffective” and the district  
14 court would have to “reconsider its award of fees and costs.” *Id.* at 520.

15       The Seventh Circuit’s analysis is contradictory. The Seventh Circuit claimed the  
16 parties had “commandeer[ed]” the judge selection process by designating Magistrate Judge  
17 Shields. *Id.* at 518. But the Seventh Circuit’s own recitation of the facts proves it was the  
18 District Judge, not the parties, who decided the case should be referred to Magistrate Judge  
19 Shields. At the start of its analysis, the Seventh Circuit ruled the parties had validly  
20 consented to Magistrate Judge jurisdiction and that the District Judge properly made the  
21 referral to the Magistrate Judge. *Id.* at 515. Accepting that it was the District Judge, not  
22 the parties, who made the referral, the remainder of the Seventh Circuit’s analysis falls  
23 apart. Assuming the parties attempted to pick Magistrate Judge Shields to hear the fees  
24 motion, that attempt would not have come to anything if the District Judge had not  
25 consented. In other words, the District Judge could have rejected the parties’ attempt to  
26 designate Magistrate Judge Shields. But instead of rejecting the parties’ allegedly improper  
27 request for Magistrate Judge Shields, the District Judge ratified it and, in so doing, made it  
28 the Court’s determination. Thus, the Seventh Circuit’s conclusion that it was the parties,

1 not the District Judge, who made the important decision is not accurate.

2 Ignoring the contradictory nature of the Seventh Circuit’s analysis, Defendants  
3 focus on the portions of that decision remarking it is improper for parties to try and pick  
4 the judicial officer to resolve their disputes. Relying on those portions, Defendants argue  
5 the referral of this case to Magistrate Judge Duncan was ineffective such that he lacked  
6 “subject matter jurisdiction” to take any actions in this case. Defendants’ argument is  
7 premised on a misreading of the record.

8 Defendants’ filings argue the joint motion requesting Judge Humetewa refer the  
9 case to Magistrate Judge Duncan was equivalent to what occurred in *Hatcher*. But similar  
10 to the analysis by the Seventh Circuit, Defendants have not explained why it is their joint  
11 motion—and not Judge Humetewa’s decision—that is important. It is undisputed that Judge  
12 Humetewa could have denied the parties’ request to refer the case to Magistrate Judge  
13 Duncan. In fact, Judge Humetewa denied a portion of the motion regarding which other  
14 judge would handle mediations with the parties. Thus, it is inaccurate to describe the  
15 referral to Magistrate Judge Duncan as taking place *because of* the parties’ selection of  
16 him. The more accurate view is that the referral occurred *because of* Judge Humetewa’s  
17 order.<sup>1</sup> And Defendants have not identified any flaw in Judge Humetewa’s order. That is,  
18 Defendants have not explained how Judge Humetewa’s direct assignment of this matter to  
19 Magistrate Judge Duncan conflicts with the statement in *Hatcher* “that magistrate judge  
20 assignment is a matter for the court to decide, not the parties.” 323 F.3d at 518. In short,  
21 Defendants’ reliance on *Hatcher* is based on a simple misunderstanding of how the referral  
22 to Magistrate Judge Duncan actually occurred.

23 Finally, even assuming there were some flaw in the way in which the case ended up  
24 before Magistrate Judge Duncan, Defendants have not explained how that flaw meant

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26 <sup>1</sup> By way of example, parties routinely file joint motions seeking extensions of time  
27 regarding discovery deadlines. When presented with such a joint motion, a judge must  
28 decide whether to grant or deny the extension. If a judge grants the motion, it would be  
quite strange to complain the parties have “commandeered” the judicial scheduling  
process. Yet that seems to be how the Seventh Circuit would view things given its concern  
that an attempt to designate a particular Magistrate Judge, subject to approval by the  
District Judge, constituted an inappropriate invasion of the judicial role.

1 Magistrate Judge Duncan was proceeding without subject matter jurisdiction. The facts in  
2 *Hatcher* did not involve any actions by the designated Magistrate Judge. Thus, even if this  
3 Court were to accept *Hatcher* entirely, it does not follow that Magistrate Judge Duncan  
4 lacked jurisdiction. *Hatcher* simply does not address what should occur when a Magistrate  
5 Judge takes actions despite some flaw in the way in which the case came before him. There  
6 is no authority suggesting that the necessary or appropriate result would be to vacate  
7 Magistrate Judge Duncan’s nearly four years of rulings. And available Supreme Court  
8 authority indicates Defendants waited far too long to complain.

9 In *Roell v. Withrow*, two defendants had never explicitly consented to proceeding  
10 before a Magistrate Judge. 538 U.S. 580 (2003). Nor had the two defendants ever objected.  
11 Instead, they participated in the litigation before the Magistrate Judge, all the way up  
12 through a jury trial and verdict. *Id.* at 583. It was only on appeal that the defendants’ lack  
13 of explicit consent was noticed. *Id.* The Fifth Circuit eventually ruled consent to  
14 Magistrate Judge jurisdiction “cannot be implied by the parties’ conduct.” *Id.* at 585. Thus,  
15 the litigation had to start anew. The issue for the Supreme Court was whether the Fifth  
16 Circuit was correct.

17 The Supreme Court’s analysis turned, in large part, on the language of the statute  
18 governing Magistrate Judge jurisdiction and how parties consent to proceeding before a  
19 Magistrate Judge. Under 28 U.S.C. § 636(c)(1), “[u]pon the consent of the parties,” a  
20 Magistrate Judge “may conduct any or all proceedings in a jury or nonjury civil matter and  
21 order the entry of judgment in the case.” Under 28 U.S.C. § 636(c)(2), the decision of the  
22 parties whether to proceed before a Magistrate Judge “shall be communicated to the clerk  
23 of court.” The Supreme Court interpreted these provisions as “envision[ing] advance,  
24 written consent communicated to the clerk.” *Roell*, 538 U.S. at 586. But the Supreme  
25 Court believed a party might “signal[] consent to the magistrate judge’s authority through  
26 actions rather than words.” *Id.* at 589. And that type of consent is no less valid than the  
27 preferred “advance, written consent.” According to the Supreme Court, “a defect in the  
28 referral to a full-time magistrate judge under § 636(c)(2) does not eliminate that magistrate



1 judge's 'civil jurisdiction' under § 636(c)(1) so long as the parties have in fact voluntarily  
2 consented." *Id.* at 587. The Supreme Court noted that any other conclusion would create  
3 a serious risk of "gamesmanship" where a party could sit back and await "the outcome  
4 before denying the magistrate judge's authority." *Id.* at 590. Accordingly, the actions by  
5 the two defendants constituted implicit consent and they were bound by the verdict  
6 obtained before the Magistrate Judge.

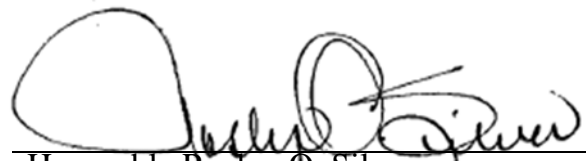
7 Based on *Roell*, Defendants had years and years to object to Magistrate Judge  
8 Duncan's exercise of jurisdiction. They did nothing. Only after compliance proceedings  
9 did not evolve as they hoped did Defendants discover and assert their jurisdictional  
10 argument. Defendants appear to be engaged in the type of "gamesmanship" the Supreme  
11 Court identified and discouraged. Defendants long ago waived any objection to Magistrate  
12 Judge Duncan's exercise of jurisdiction. Accordingly, Magistrate Judge Duncan had  
13 jurisdiction and this case will proceed based on his rulings remaining in place.

14 Notwithstanding the foregoing, and to avoid any future disputes, the parties should  
15 be prepared to discuss at the December 6, 2018, status hearing their current positions  
16 regarding jurisdiction. In particular, Defendants should be prepared to explain how this  
17 case would proceed if the Ninth Circuit were to agree with their position regarding  
18 Magistrate Judge Duncan's jurisdiction. Defendants should also be prepared to explain  
19 whether they have any objection to the manner in which this case was reassigned to the  
20 undersigned upon Magistrate Judge Duncan's retirement.

21 **IT IS SO ORDERED.**

22 Dated this 6th day of December, 2018.

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Honorable Roslyn O. Silver  
Senior United States District Judge