

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 07-cv-01924-DME-KMT

KENNETH L. SMITH,

Plaintiff,

v.

HONS. MICHAEL L. BENDER,
NATHAN B. COATS,
GREGORY J. HOBBS, JR.,
REBECCA LOVE KOURLIS,
ALEX J. MARTINEZ,
MARY J. MULLARKEY, and
NANCY E. RICE, in their individual capacities only,
HON. JOHN W. SUTHERS, and
FRIEDRICK C. HAINES, in their individual capacities only,
JOHN DOES 1-99, and
THE UNITED STATES OF AMERICA,

Defendants.

**DEFENDANT UNITED STATES OF AMERICA’S RESPONSE TO MOTION FOR
DECLARATORY RELIEF UNDER 28 U.S.C. § 2201(a)**

Plaintiff’s Motion for Declaratory Relief Under 28 U.S.C. § 2201(a) (Motion for Relief) should be denied for the following reasons:

I. PLAINTIFF’S ARGUMENT IS MOOT BECAUSE HE HAS EXERCISED THE RIGHT HE CLAIMS TO HAVE BEEN DENIED

Plaintiff’s Motion for Relief is premised on the legal assertion that Plaintiff “was denied his right of access to the courts.” Motion for Relief, at 3. But that legal assertion is not supported by the allegations in the Complaint, which acknowledge Plaintiff’s recent history of

lawsuits on the topic of this action—his denial of admission into the Colorado Bar. *See* Complaint, at 1-3. As noted by the Colorado Supreme Court in one of Plaintiff’s recent cases, *Smith v. Mullarkey*, 121 P.3d 890 (Colo. 2005), as to which the Court may take judicial notice pursuant to Federal Rule of Evidence 201(b)(2), rather than comply with the procedures of the Bar to assess Plaintiff’s fitness to practice law, “he filed a series of lawsuits, first in federal district court and then in Denver District Court. In those actions, he challenged the denial of his application for admission under 42 U.S.C. section 1983, as a violation of his First, Fourth and Fourteenth Amendment rights.” *Smith*, 121 P.3d at 891; *see also* State Defendants’ Motion to Dismiss, at 2-3. Thus, because Plaintiff has demonstrated that he has had ample access to the courts, his legal assertion that he has been denied access is unsupported and his argument for declaratory relief of the United States’ alleged position on the International Covenant on Civil and Political Rights (ICCPR) is unavailing. *See* Defendant United States of America’s Motion to Dismiss, at 11-12. Accordingly, the Motion for Relief should be denied.

Plaintiff appears to conflate the right of access to the courts with his dissatisfaction with the outcome of his claims in court. But dissatisfaction with legal rulings is not a denial of access to the courts. *See Harrington v. Wilson*, 2006 WL 2724094, at *16 (D.Colo. 2006) (holding, in a case alleging actual denial of access to the courts based on alleged disabilities, that “despite all of the plaintiff’s verbiage and attempted artful pleading, he has not adequately alleged that there has been any impediment to his access to the courts . . . Instead, he is simply dissatisfied with rulings issued by the trial and appellate courts” and denying plaintiff’s motion seeking, *inter alia*, declaratory judgment and injunctive relief as to plaintiff’s right of access to Colorado state

courts) (citation omitted) (attached).

II. PLAINTIFF’S ARGUMENT FAILS BECAUSE THE TENTH CIRCUIT HAS HELD THAT THE ICCPR IS NOT BINDING ON THE FEDERAL COURTS

Plaintiff alleges in his Motion for Relief that Defendant United States of America, in its Motion to Dismiss, has taken a position in violation of its treaty obligations under the ICCPR. *See* Motion for Relief, at 1, 5-16. Nowhere in Plaintiff’s Motion for Relief does Plaintiff clearly state what the ICCPR allegedly requires the United States to do in relation to this action or where in the Motion to Dismiss the United States took the position that is disagreeable to Plaintiff. However, Plaintiff is presumably taking issue with the ruling of the Tenth Circuit in *Hain v. Gibson*, 287 F.3d 1224, 1243 (10th Cir. 2002), cited on pages 10 and 11 of the Motion to Dismiss, for its holding that “it is clear that the ICCPR is not binding on the federal courts.” *Id.* at 1243.

In *Hain*, the Tenth Circuit noted that in ratifying the ICCPR, the United States Senate maintained various reservations in its ratification, including that the provisions of the ICCPR were “not self-executing.” *See id.* (quoting 138 Cong. Rec. S4784). As such, the Court in *Hain* found that the ICCPR is not binding on the federal courts because a “non-self-executing” agreement will not be given effect as law in the absence of necessary authority.” *Id.* (citing *Buell v. Mitchell*, 274 F.3d 337, 372 (6th Cir. 2001) and quoting Restatement (Third) of Foreign Relations Law § 111 (1987)). At the time of the Court’s ruling in *Hain*, Congress had not enacted implementing legislation for the ICCPR. *See id.* Plaintiff’s Motion for Relief does not assert that any implementing legislation has since been enacted; in fact, it acknowledges that the

United States maintains that the ICCPR is non-self-executing. *See* Motion for Relief, at 5-13.

Thus, Plaintiff's argument on the availability of the ICCPR to compel the United States to act on his behalf is not with Defendant United States, but with the Tenth Circuit's binding precedent in *Hain*. For that reason, Plaintiff's argument for declaratory relief fails as a matter of law.¹

CONCLUSION

For the reasons stated above, Plaintiff's Motion for Relief must be denied.

¹ In Plaintiff's Response to Defendant's Motion to Dismiss, filed contemporaneously with his Motion for Relief, Plaintiff asserts that the Tenth Circuit's ruling in *Hain* on the ICCPR was dicta. *See* Response, at 17. This argument should be rejected because the Tenth Circuit ruled on the applicability of the ICCPR as an alternate holding based upon due consideration of legal authorities, which is not dicta. *See Woods v. Interstate Realty Co.*, 337 U.S. 535, 537, 69 S.Ct. 1235, 93 L.Ed. 1524 (1949) (“[W]here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum.”); *United States v. Rohde*, 159 F.3d 1298, 1302 (10th Cir.1998) (holding that the court's thorough analysis of alternate grounds for the outcome of the case resulted in that analysis being considered a holding, not dicta). In any event, Plaintiff bases his attempt to minimize the Court's ruling only on his assumptions about what questions should have been before the Court. *See* Response, at 17. But, it is apparent from the text and analysis in *Hain* that the Court, after due consideration, held that “it is clear that the ICCPR is not binding on the federal courts.” *Hain*, 287 F.3d at 1243. And even if that statement were dicta (which it was not), it is correct. The Tenth Circuit based its ruling on an analysis of precedent from the Fifth and Sixth Circuits, the Congressional Record, and the Restatement of Foreign Relations, all of which support the Court's conclusion. *See id.* (citing *Beazley v. Johnson*, 242 F.3d 248, 263 (5th Cir. 2001); *Buell*, 274 F.3d at 372; 138 Cong. Rec. S4784; Restatement (Third) of Foreign Relations Law § 111 (1987)).

DATED this 16th day of January, 2008.

Respectfully Submitted,

TROY A. EID
United States Attorney

s/Marc A. Bonora

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
CERTIFICATE OF SERVICE (CM/ECF)**

I hereby certify that on January 16, 2008, I electronically filed the foregoing with the Clerk of Court using the ECF system which will send notification of such filing to the following e-mail address:

Christine K. Wilkinson
christine.wilkinson@state.co.us, steve.morrow@state.co.us

and I hereby certify that I have mailed or served the document or paper to the following non CM/ECF participant(s) in the manner (mail, hand delivery, etc.) indicated by the nonparticipant's name:

Kenneth L. Smith
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Golden, CO 80401

s/ Marc A. Bonora
For the United States Attorney's Office