UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

BAY VIEW CHAUTAUQUA INCLUSIVENESS GROUP,

Plaintiff,

vs.

THE BAY VIEW ASSOCIATION OF THE UNITED METHODIST CHURCH, et al.,

Defendants.

CASE NO. 17-cv-0622-PLM-RSK

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PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

1. Defendants' limited, targeted Motion for Partial Judgment asserts that ―Plaintiff lacks *associational* standing to seeking one of the elements of relief prayed for in this matter, monetary damages.
2. However, Plaintiff does not require *associational* standing to seeking monetary damages because it has direct standing in its own right.
3. Plaintiff owns outright the damages claims of the natural persons who make up its membership, because those individuals assigned all rights, titles and interests they had irrevocably to Plaintiff.
4. The pleadings in this matter have been amended, reflecting a clarification that was not part of Defendants' understanding when this motion was filed.

5. Assignment to Plaintiff affords Plaintiff the right to pursue this matter for damages, as established in *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 285 (2008).
6. Under that controlling case, this motion may not be granted; Plaintiff has Article III and prudential standing to proceed and is the proper real party in interest.

WHEREFOR, Plaintiff urges the Court to DENY the pending motion.

Respectfully submitted,
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Dated: February 28, 2018

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2018, I electronically filed the foregoing paper with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

Respectfully submitted,
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PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

TABLE OF CONTENTS

Table of Authorities. iii

Facts Related to the Nature of this Suit. 1

Pleadings as to the Plaintiff. 2

Damages At Issue.. 4

Controlling Law. 4

Legal Argument. 7

Relief Requested. 9

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Certain Interested Underwriters at Lloyd's, London, England v. Layne,

26 F.3d 39, 42–43 (6th Cir. 1994). 4

Gratiot Ctr., LLC v. Lexington Ins. Co., No. 16-CV-14144,

2017 WL 6316909, at *3 fn. 4 (E.D. Mich. Dec. 11, 2017). 4-5

In re Pazdzierz, 459 B.R. 254~~, 260~~ (E.D. Mich. 2011)~~,~~

~~*aff'd and remanded,* 718 F.3d 582 (6th Cir. 2013)~~. 4

Reichhold Chemicals, Inc. v. Travelers Ins. Co., 544 F. Supp. 645~~, 649~~ (E.D. Mich. 1982). . . . 4

Sprint Commc'ns Co., L.P. v. APCC Servs., Inc., 554 U.S. 269~~, 285~~ (2008). 1, 4-5, 8-9

STATUTES

1889 Summer Resort Act.. 1

Federal Fair Housing Act (42 U.S.C. § 3601 *et seq.*). 2

~~Michigan's~~ Elliott-Larsen Civil Rights Act (MCL § 32.2101 *et. seq.*). 2

OTHER AUTHORITIES

6A Charles Alan Wright and Arthur R. Miller, *Application of the Real Party in Interest Rule—Assignments*, Fed. Prac. & Proc. Juris. § 1545 (3d ed.). 5

Federal Rule of Civil Procedure 17(a). 4

Federal Rule of Civil Procedure 23. 6

Federal Rule of Civil Procedure 42. 7

6A Charles Alan Wright and Arthur R. Miller, *Application of the Real Party in Interest Rule—Assignments*, Fed. Prac. & Proc. Juris. § 1545 (3d ed.). 5

Defendants' partial motion for summary judgment argues that the Plaintiff lacks *associational* standing to obtain money damages for its club members. This argument is irrelevant because it does not take into account that the natural persons who are members of the Plaintiff club have assigned Plaintiff their interests. ~~A new,~~ The amended complaint in this matter clarifies that the individual natural persons who make up the Plaintiff club have irrevocably and wholly assigned all interest, ownership and title in their claims to Plaintiff. This places Plaintiff in the direct shoes of its members, and provides it standing to recover all the relief the club members could obtain, per a controlling Supreme Court case, styled *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269~~, 285~~ (2008). In short, Plaintiff is asserting its own first-party rights, not third-party rights, ~~*id.* at 290,~~ and it has standing to do so. *Id.* at 285-290.

MORE ON STATE ACTION

Facts Related to the Nature of this Suit

In this procedural posture, the Court accepts well-pleaded claims as true, as Defendants properly recite in their motion at Docket No. 15, Pg. ID 190. The facts pled in this matter are as follow.

The Bay View Association of the United Methodist Church is a community of cottages, lodgings, and multi-purpose buildings situated just northeast of Petoskey, Michigan. Am. Compl. Para. 1. Bay View was organized under a unique Michigan law known as the 1889 Summer Resort Act. *Id.* Para. 2, 25. The Act delegates to summer resort associations substantial government powers, including the power to appoint a board of assessors, levy and collect taxes, create make, amend, and enforce laws and regulations, and deputize a marshal to enforce those

rules including by jail time or fines. *Id.* Paras. 25-32; *see also* MCL § 455.67-71.

Defendant Bay View Association of the United Methodist Church owns all of the land in the community. Through Defendant Bay View Real Estate Management, Inc., Defendants lease plots to qualifying "Members," and those Members in turn individually own permanent dwellings there. *See* Am. Compl. Para. 82-84 & fn. 2. Hence, one must be a Member of Defendant Bay View Association of the United Methodist Church to buy a home in Bay View. *Id.* It is undisputed that the homes in Bay View are individually owned and operated: for example, they are individually maintained and may be rented solely at the owner's discretion. *Id.* Para. 66, 90-92; *see also* Answer, Docket No. 13, Pg. ID 166.

Throughout its history, Bay View required Members to be of "good more character." However, many ~~after~~ decades ~~with no such restrictions~~ after it was settled Bay View's Board adopted a resolution limiting ownership for the first time to persons "of the white race and Christian" in the 1940's. Am. Compl. Para. 43. With time, this was further refined to limit Catholic owners to a small quota as well. *Id.* Para. 46. Eventually the "white race" portion was removed from the Membership requirements; but as of 1986, prospective "Members" have not only had to espouse ~~not only~~ a Christian creed, but they must prove their religiosity with a minister's letter. *Id.* Para. 47.

This suit alleges that the religious test for home ownership in Bay View violates the U.S. and Michigan Constitutions, the Federal Fair Housing Act (42 U.S.C. § 3601 *et seq.*) and Michigan's Elliott-Larsen Civil Rights Act (MCL § 32.2101 *et. seq*.). Am. Compl. Para. 4.

Pleadings as to the Plaintiff

Plaintiff is a club made up of individuals deprived of their legal rights because of ~~the~~ Bay View membership policies, joined in an association to mutually collaborate in methods of

bringing about change while preserving their community's long-term viability. *Id.* Para. 6. Members of Plaintiff include existing owners whose children and grandchildren cannot inherit Bay View cottages because they do not meet the religious test described more fully herein, a situation that interrupts a family tradition of as much as six generations. *Id.* Para. 7. Members of Plaintiff also include individuals who seek to own homes in the community, but who are not practicing Christians and therefore cannot do so. *Id.* Para. 8. For example, one Member of the Plaintiff group converted to Judaism, and for that reason was denied membership and the right to be a co-owner and ultimately inherit her parents' cottage, which has been in the family for four generations. *Id.* Para. 88.

Members of Plaintiff also include existing owners who object to membership requirements and refusing sales to non-practicing Christians. Some Members of Plaintiff are devout Christians who own homes in Bay View and who seek, as part of their expression of their faith, to live in a religiously diverse and free community devoted to encounter, but they cannot do so under the current rules and practices. *Id.* Para. 9. Members of Plaintiff also include existing owners who cannot pass their sizeable, illiquid asset—their Bay View cottage—to their spouses, due to the religious test. *Id.* Para. 10. Finally, Members of Plaintiff include existing Bay View owners who cannot sell their cottage in the open market on commercially reasonable terms, and whose property values are negatively affected (on information and belief) by the challenged religious test, which restricts sales to a small segment of willing buyers. *Id.* Para. 11.

In the ~~first~~ amended complaint, Plaintiff has clarified its standing to represent the above-mentioned individual, natural persons. The amended complaint contains the following true and correct allegation:

> The natural persons who make up the Plaintiff have irrevocably assigned, transferred and set over to the Plaintiff all rights, title and interest he/she/or they hold in the claims, demands and causes of action in this suit. The natural persons who make up the Plaintiff have appointed Plaintiff as his/her/their attorney-in-fact with authority to litigate this matter, and each has agreed to be bound by the results of the litigation. These assignments are non-transferable, and each natural club member has represented that he/she/they have not assigned the matter to any other such assignee.

Id. Para. 12.

Damages At Issue

As Defendants properly recite in their motion, Docket No. 15 Pg. ID 192-193, Plaintiff complains that its members have suffered emotion and financial losses, and it seeks compensatory and punitive damages. It also seeks declaratory and injunctive relief, amounting to an Order to cease and desist enforcing the practice of religious discrimination at Bay View. This latter form of relief was not mentioned in Defendants' motion, and it is understood not to be challenged in this motion for partial judgment.

Controlling Law

Federal Rule of Civil Procedure 17(a) requires that "[a]n action must be prosecuted in the name of the real party in interest." However, an action need "not necessarily be brought in the name of the person who ultimately benefits from the recovery." *Reichhold Chemicals, Inc. v. Travelers Ins. Co.*, 544 F. Supp. 645, 649 (E.D. Mich. 1982). The "real party in interest" is simply "the person who is entitled to enforce the right asserted under the governing substantive law." *Certain Interested Underwriters at Lloyd's, London, England v. Layne*, 26 F.3d 39, 42–43 (6th Cir. 1994).

Federal law, rather than Michigan law, applies to determining the ability to assign claims for collections purposes—and, of course, the effect of doing so ~~as regards~~ on Article III standing to sue in this court. *See, e.g., Gratiot Ctr., LLC v. Lexington Ins. Co.*, No. 16-CV-14144, 2017 WL 6316909, at *3 fn. 4 (E.D. Mich. Dec. 11, 2017) (Exhibit A). However, in practice this source-of-law issue is academic, since Michigan law and Federal law equally condone assignments of the right to sue. *See, e.g., In re Pazdzierz*, 459 B.R. 254, 260 (E.D. Mich. 2011), *aff'd and remanded,* 718 F.3d 582 (6th Cir. 2013) (reviewing Michigan's general approval of assignment); *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 285

(2008) (recognizing that "history and precedents ... make clear that courts have long found ways to allow assignees to bring suit" and that "that there is a strong tradition specifically of suits by assignees for collection").

In short, as Judge Ludington recently summarized in *Gratiot Ctr., LLC*, 2017 WL 6316909, at *3 (Exhibit A), "[A]n assignment passes the title to the assignee so that the assignee is the owner of any claim arising from the chose and should be treated as the real party in interest under Rule 17(a)." *See also* 6A Charles Alan Wright and Arthur R. Miller, *Application of the Real Party in Interest Rule—Assignments*, Fed. Prac. & Proc. Juris. § 1545 (3d ed.) (citing *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 284 (2008)).

The effect of assignment is that it transfers standing to sue; the assignee fills the shoes of the assignor(s). *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 285 (2008) so holds, and it is controlling here. In fact, that case answers the very specific question whether assignment of a claim can afford standing to collect money damages.

That case involved almost 1400 payphone providers who owned and operated thousands of pay phones. Federal law allegedly entitled these providers to collect certain fees from long distance carriers for long distance calls dialed on their phones. However, any one pay phone operator was too small to litigate over each unpaid long distance fee. In *Sprint Commc'ns Co., L.P.* the operators assigned their claims to billing and collections firms called aggregators, to bring suit on their behalf. The Court described the assignments as follows:

> [T]he payphone operator "assigns, transfers and sets over to [the aggregator] for purposes of collection all rights, title and interest of the [payphone operator] in the [payphone operator's] claims, demands or causes of action for 'Dial–Around Compensation' ... due the [payphone operator] for periods since October 1, 1997." App. to Pet. for Cert. 114. The Agreement also "appoints" the aggregator as the payphone operator's "true and lawful attorney-in-fact." *Ibid*. The Agreement provides that the aggregator will litigate "in the [payphone operator's] interest." *Id*., at 115. And the Agreement further stipulates

> that the assignment of the claims "may not be revoked without the written consent of the [aggregator]." *Ibid*.

Id. 554 U.S. at 272. In that case, the aggregators later remitted all proceeds of the suit (by separate agreement) back to the payphone operator. *Id.*

~~D~~The defendant long distance carriers moved to dismiss, arguing that the aggregators lacked standing to sue, since they did not directly suffer an injury-in-fact and they failed to meet the redressability requirements for Article III standing, since they had no personal/direct stake in the outcome. Defendants further argued that even if there were constitutional standing, the case should be rejected and dismissed on prudential standing grounds. Defendants finally argued that the assignments were defunct attempts to circumvent class action requirements of Federal Rule of Civil Procedure 23.

The Court rejected each of these arguments in turn, to hold that indeed the plaintiff aggregator stood in the shoes of the individual assignors and could collect money damages. Citing the language of the assignment, the Court considered the claims to be transferred to and owned by the plaintiff/assignee, "lock stock and barrel," meaning that the transfer of the injury and resulting claim was complete. *Id.* at 286. In short, the assignees *became* the injured parties because of the assignments; they were asserting "legal rights of their own," rather than derivative rights of others. *Id.* at 290. Moreover, for purposes of assessing Article III standing redressability, the fact that the assignment was for collection purposes only was not controlling. What the plaintiff did or planned to do with the proceeds was legally irrelevant: "a legal victory would unquestionably redress the injuries for which the aggregators bring suit…whether the aggregators remit the litigation proceeds to the payphone operators, donate them to charity or use them to build new corporate headquarters." *Id.* at 287. Finally, the Court rejected the notion that

this sort of aggregations of claims improperly "circumvented" class action rules. Assignment simply offers a parallel method of bringing suit.[1] The Court held, "Because the federal system permits aggregation by other means, we do not think that the aggregators should be denied standing simply because the payphone operators chose one aggregation method over another." *Id.* at 291 (also cataloguing the ways joinder rules, consolidation under Federal Rule of Civil Procedure 42 and similar tools afford alternatives to class actions, ~~i.e.,~~ such that in fact there are "several methods by which multiple similarly situated parties get similar claims resolved at one time and in one federal forum").

In sum, "Lawsuits by assignees, including assignees for collection only, are 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process,'" as is required to afford standing. *Id.* at 286~~; *see also id.* at 286-87.~~-287.

Legal Argument

I. Plaintiff Has Standing to Sue

A. As Assignee of Claims of its Individual Members, Plaintiff has Standing *In Its Own Right* to Sue Here, and It Does Not Require Associational Standing

In assessing this motion, it is first worth noting what Defendants do *not* argue. First, Defendants do *not* argue that the human individuals who are members of Plaintiff lack standing in their own right to sue to correct the alleged unlawful practices at issue in this suit.[2] Second,

[1] The Court also noted that, "federal courts routinely entertain suits which will result in relief for parties that are not themselves directly bringing suit. Trustees bring suits to benefit their trusts; guardians ad litem bring suits to benefit their wards; receivers bring suit to benefit their receiverships; assignees in bankruptcy bring suit to benefit bankrupt estates; executors bring suit to benefit testator estates; and so forth." *Id.* at 287-288.

[2] The owner individuals who are part of Plaintiff are directly injured (in addition to emotionally) by having the value of their properties artificially depressed due to the religious test restricting the pool of ready buyers and preventing descent and devise to non-Christian children, grandchildren and spouses. Non-owner individuals who are part of Plaintiff include ready and

Defendants do *not* argue that Plaintiff lacks associational standing to sue for injunctive and declaratory relief, such as an order compelling Defendant to discontinue imposing its religious test for ownership within Bay View. Rather, per Defendants, "The Plaintiff lacks standing to assert a claim ***for damages*** on behalf of its individual members." Docket No. ~~15~~37, Pg. ID ~~193~~525 (Header, emphasis added, capitalization removed). The theory of the motion is that, "associations do not have standing to assert ***damages claims*** on behalf of individual members…." *Id.* Pg. ID ~~198~~530 (emphasis added). In short, the only alleged standing issue here is standing to obtain monetary relief.

Plaintiff need not ~~win the point~~establish that associations can sue for money for others, however, because ~~it is~~ that is not ~~irrelevant~~Plaintiff's theory. This Plaintiff is not suing on behalf of anyone or seeking money that belongs to anyone else but it. Rather, Plaintiff has been assigned operative, live damages claims and therefore has standing in its own right, filling the shoes of the individual assignors.

The cases Defendants rely on cannot aid this Court because they do not involve facts like those presented now. Rather, they involve suits by would-be parties with no direct injury seeking to sue only ***on behalf of*** someone else. The best example is *Warth v. Seldon*, where, in Defendants' own excerpt at Mot. p. 10, Pg. ID 528, the Supreme Court noted, the would-be association plaintiff "alleges no monetary injury to itself, ***nor any assignment of the damages claims of its members***. No award therefore can be made to the association as such." 422 U.S. 490, 515-516 (1975) (emphasis added). Because that case did not involve the assignments this case involves, there was no standing. But that does not equate to disallowing assignments or finding no standing where assignment has occurred. If anything, the "therefore" in the quote

willing buyers who cannot purchase a home in Bay View due to the unlawful religious test. Removal of the religious test would redress these injuries directly and meaningfully, and Defendants do not dispute as much.

indicates that standing would have obtained, if an assignment were in place. Defendants' other cited case purporting to establish lack of standing to sue for damages, *Neighborhood Action Coal*, likewise involved no assignments and simply cannot be useful here to speak to the effect of assignments on standing. No case Defendants cite contend that assignments here are not sufficient to afford standing.

By contrast, Plaintiff has not only *precedent*, but *directly controlling Supreme Court* precedent approving the use of assignments seen here. Indeed, ~~T~~the assignments ~~set forth~~ to the Plaintiff (as recounted at Am. Compl. Para. 12) ~~in the pleadings copy the exact wording from the assignments made to this Plaintiff and that in turn copies the~~ copy exactly the ~~precise~~ approved ~~verbiage~~ language of assignment from *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 285 (2008)—and not by accident.

As in that case, the instrument used here transferred to Plaintiff full and exclusive ownership of the claims of the assignors and all rights to recover for them.

Put another way, this Plaintiff is asserting its ***own*** legal rights here, not associational rights. Just as the aggregators in *Sprint Commc'ns Co., L.P.* had constitutional and prudential standing and were permitted to pursue claims standing in the shoes of their assignors, this Plaintiff is entitled to collect—it owns outright—the damages claims of its club members and assignees.

The Supreme Court explained:

> It is, of course, true that the aggregators did not originally suffer any injury caused by the long-distance carriers; the payphone operators did. But the payphone operators assigned their claims to the aggregators lock, stock, and barrel. And within the past decade we have expressly held that an assignee can sue based on his assignor's injuries. In *Vermont Agency, supra,* we considered whether a *qui tam* relator possesses Article III standing to bring suit under the False Claims Act, which authorizes a private party to bring suit to remedy an injury (fraud) that the United States, not the private party, suffered. We held that such a relator does possess standing. And we said that is because the Act "effect[s] a

> partial assignment of the Government's damages claim" and that assignment of the "United States' injury in fact suffices to confer standing on [the relator]." Indeed, in *Vermont Agency* we stated quite unequivocally that "the assignee of a claim has standing to assert the injury in fact suffered by the assignor."
>
> ***
>
> Finally, we note, as a practical matter, that it would be particularly unwise for us to abandon history and precedent in resolving the question before us. Were we to agree with petitioners that the aggregators lack standing, our holding could easily be overcome. For example, the Agreement could be rewritten to give the aggregator a tiny portion of the assigned claim itself, perhaps only a dollar or two. Or the payphone operators might assign all of their claims to a "Dial–Around Compensation Trust" and then pay a trustee (perhaps the aggregator) to bring suit on behalf of the trust. Accordingly, the far more sensible course is to abide by the history and tradition of assignee suits and find that the aggregators possess Article III standing.

Sprint Commc'ns Co. L.P., 554 U.S. at 286, 289 (internal citations omitted). ~~Plaintiff respectfully urges that t~~This analysis is controlling here.

B. Defendants' Other Standing Arguments Do Not Justify Dismissal of Plaintiff's Prayer for Money Damages

I. Defendants Do Not Even Attempt to Show a Lack of Standing to Secure Money Damages After *Sprint Common. Co.* Based on the FHA and ELCRA

Albeit without devoting significant argument to *Sprint,* Defendants imply that this Court might sidestep its controlling rule because Plaintiff sues here under 42 U.S.C. § 1983. Namely, Defendants urge that § 1983 renders a wrongdoer liable "to the party injured," and this somehow implies *Sprint* might not apply. *See* Mot. p. 14, Pg. ID 532.

An initial fatal problem with this is that Defendants only consider §1983 when disputing standing to obtain money damages--ignoring the Plaintiff's pleadings under the FHA and ELCRA. Whatever the wording of § 1983 means for standing to collect money, that says nothing about Plaintiff's standing under these other, operative statutes. Even if Defendants were correct, Plaintiff could have standing under § 1983 only to secure injunctive and declaratory relief and attorney fees and costs, while relying on the FHA or ELCRA for monetary and punitive relief.

Defendants' present § 1983 argument could not even debatably apply by analogy to ELCRA or the FHA. For example, ELCRA affords a damages remedy by forbidding religious discrimination and then stating, "A person alleging a violation of this act may bring a civil action for appropriate injunctive relief or damages, or both." The words that Defendants rely on to argue about 42 U.S.C. § 1983 (being liable "to the party injured") are not a part of ELCRA. The same is true of the Fair Housing Act. *See* 42 U.S.C.A. § 3613 (affording liability by providing "if the court finds that a discriminatory housing practice has occurred or is about to occur, the court may award to the plaintiff

actual and punitive damages"). *Trafficante v. Metro – CITE* – makes clear that "use actual quote about how Congress wanted standing under this statute is the broadest possible under Art. III"

In sum, Defendants do not even attempt to argue that there is a lack of standing under all of the statutes at issue for money damages. Since their argument is specific to the language of § 1983, whatever the merits of that position, it simply does not justify the relief requested, which is outright dismissal of any claims for money damages.

2. Defendants' Old, Superseded Case Law Cannot Alter *Sprint Comm. Co.*; Plaintiff has Standing to Obtain Money Damages under 42 U.S.C. § 1983

The above explains why, even if correct, Defendants' arguments about § 1983 cannot justify dismissal of Plaintiff's damages claims. But the fact is that Defendants are wrong about assignment-based standing to collect damages under § 1983 as well.

To begin with the obvious, *Sprint* contains no exceptions for § 1983. Indeed, *no case anywhere* supports Defendants' position. Defendants are asking this Court to create new law.

The problem is that they do so based on old, pre-*Sprint Comm.* cases, namely *Quarles* and *Carter*, cited at Mot. p. 14-15, Pg. ID 532-533. Defendants do not even argue that these cases survive *Sprint Comm.* They leave it to the Court to divine how they could continue to control. As seen below, this Court's only path is to recognize that these cases are ***not*** good law at this point.

The thrust of both *Quarles* and *Carter* is that 42 U.S.C. § 1983 uniquely bars assignment. Naturally, the statute does no such thing on its face--it never mentions assignment. However, the statute does state that persons shall be liable for injuries "to the party injured." This is the key phrase upon which *Quarles* and *Carter* hinge. Per their reckoning, *only* the party injured can recover under § 1983, because of these words.

A serious problem with this reasoning is that parties other than the original, one, immediate victim *can* and do regularly recover monetary relief under 42 U.S.C. § 1983 in a variety of contexts--as controlling precedent has recognized. For example, § 1983 claims survive the death of the plaintiff or litigant, allowing the estate to recover through an appointed administrator. ASHLEY CITE. As another example, parents and next friends can recover damages for the one immediate party injured, under § 1983. ASHLEY CITE. Such damages can also be afforded through class representatives under § 1983. ASHLEY CITE. It is simply not the case that only the one immediate party injured may recover damages under § 1983. In none of the above instances is § 1983 treated differently than any other statute.

Another problem with these cases is that the Supreme Court itself has endorsed flat out assignment of § 1983 damages. In *Venegas v. Mitchell,* 495 U.S. 82 (1990), the Court addressed the issue of whether statutory attorney fees under § 1983 limited the compensation attorneys could receive from civil rights plaintiffs. The Court concluded that litigants could "assign part of their recovery to an attorney if they believe that the contingency arrangement will increase their likelihood of recovery." *Id.* at 88. This was true, although the litigants in that case directly argued that § 1983 allowed recovery only

"to the party injured" and while the Court recognized that the claim belonged to him or her. In other words, assignment is ***not*** in tension with the statutory wording of § 1983.

When presented with a question about how to enforce a federal statute such as § 1983 in the face of a gap in the law, this Court has the benefit of a specific, dictated path dictated to follow. -- ASHLEY FILL IN ABOUT 1988 from my email forward -- explain that feds use 1988 and it says to look to state law; we know state law here permits assignment as quoted above. The Sixth Circuit has concluded that executors may stand in to recover for decedent injured parties under § 1983 following the path described above.

Putting aside these many ways *Quarles* and *Carter* have been shown to be incorrect, perhaps the most important point is that they simply cannot be reconciled with *Sprint Comm. Co.* To see why, one must understand the statute that was at issue there. Just as § 1983 makes a certain class of wrongdoer liable "to the person injured," the statute involved in that case stated:

> In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable ***to the person or persons injured*** thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

47 U.S.C.A. § 206 (emphasis added). The bold language did not prevent the assignments in that case; per the Supreme Court, the assignments were permissible and afforded standing. *Sprint Comm. Co.* could not have been decided as it was, if Defendants are correct and such bold language thwarts assignment and transferred standing. This Court simply cannot rule as Defendants urge, after careful review of the substance of *Sprint Comm. Co.*

Nor should it. The ruling Defendants seek would equate to reducing the options for enforcing central civil rights, as compared to all other claims, including where aggregation is a necessary, practical means of allowing those with small claims to join forces to bring suit. Most obviously, Defendants are seeking a rule that those wishing to enforce anti-discrimination laws have fewer avenues open than those seeking to enforce billing practices for long distance carriers. That is contrary to this Court's general obligation to XX. Moreover, Federal Rule of Civil Procedure 1 requires this Court to seek and implement speedy and efficient procedures.

3. There is no Timing Issue Here; Plaintiff's Operative Complaint is the Amended Complaint

Defendants briefly argue at Mot. XX that Plaintiff could not achieve standing by assignment post-filing. Standing is typically determined at the outset of litigation, as Defendants state. But the law does not require futile acts. ASHLEY CITE. Dismissal for lack of standing is granted without prejudice. ASHLEY CITE. Therefore, if the Court

were to dismiss this case for lack of standing, a new case, post-assignment, would be filed and sent right back to this Court.

Futility is just one reason that Courts have repeatedly held that assignment post filing does affording standing. Another reason is that the alternative would elevate form over substance:

> A rule that would turn on the label attached to a pleading is difficult for us to accept. As the Eleventh Circuit has observed in a case in which an amended complaint contained jurisdictional allegations that were based on post-complaint events, "[e]xcept for the technical distinction between filing a new complaint and filing an amended complaint, the case would have been properly filed.... We therefore hold that we have jurisdiction over this appeal and we will reach the merits." *M.G.B. Homes, Inc. v. Ameron Homes, Inc.,* 903 F.2d 1486 (11th Cir.1990).

Northstar Fin. Advisors Inc. v. Schwab Investments, 779 F.3d 1036, 1047 (9th Cir. 2015), *as amended on denial of reh'g and reh'g en banc* (Apr. 28, 2015).

This refusal to elevate form over substance finds a procedural home in Federal Rule of Civil Procedure 15. It both allows for amendment 15(a) and permits such supplemental pleadings be considered to correct initial pleading deficiencies 15(d). The very purpose of this is to circumvent "the needless formality and expense of instituting a new action when events occurring after the original filing indicated a right to relief." Wright, Miller, & Kane, Federal Practice and Procedure: Civil 3d § 1505, pgs. 262–63. Even though Rule 15(d) "is phrased in terms of correcting a deficient statement of 'claim' or a 'defense,' a lack of subject-matter jurisdiction should be treated like any other defect for purposes of defining the proper scope of supplemental pleading." *Id.* at § 1507, pg. 273.

The Supreme Court has endorsed the use of this Rule to avoid needless dismissal-then-refiling in *Mathews v. Diaz,* 426 U.S. 67, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976). In that case, an applicant for Medicare had never filed an application until after an amended complaint was filed purporting to join him. This was a jurisdictional defect:

> Although 42 U.S.C. § 405(g) establishes filing of an application as a nonwaivable condition of jurisdiction, Espinosa satisfied this condition while the case was pending in the District Court. A supplemental complaint in the District Court would have eliminated this jurisdictional issue; since the record discloses, both by affidavit and stipulation, that the jurisdictional condition was satisfied, it is not too late, even now, to supplement the complaint to allege this fact.

Id. at 75, 96 S.Ct. 1883 (internal citations omitted).

This holding has spawned a whole line of cases holding that after a court has allowed a voluntary amendment, as here, the amended document determines the case's viability. This is a form of relation back of the amendment. In short, the focus in determining jurisdiction are "the facts existing at the time the complaint *under consideration* was filed." *GAF Bldg. Materials Corp. v. Elk Corp.,* 90 F.3d 479, 483 (Fed.Cir.1996) (emphasis added) (quoting *Arrowhead Indus. Water, *1045 Inc. v.*

Ecolochem Inc., 846 F.2d 731, 734 n. 2 (Fed.Cir.1988)); *see also Rockwell Int'l Corp. v. United States,* 549 U.S. 457, 127 S.Ct. 1397, 1409, 167 L.Ed.2d 190 (2007) ("[W]hen a plaintiff files a complaint in federal court and then voluntarily amends the complaint, courts look to the amended complaint to determine jurisdiction."); *Connectu LLC v. Zuckerberg,* 522 F.3d 82 (1st Cir.2008); Northstar Fin. Advisors Inc. v. Schwab Investments, 779 F.3d 1036, 1044–45 (9th Cir. 2015), as amended on denial of reh'g and reh'g en banc (Apr. 28, 2015) ("[I]t is the Amended Complaint that is currently under consideration, and it is the facts alleged in this complaint that form the basis for our review" of standing).

This rule has been used specifically in cases like this one, where an assignment occurs post-filing: the post-filing assignment affords standing, with amendment of the complaint interpreted as a corrective supplemental pleading under Federal Rule 15(d). *See id.* (providing a long explanation for permitting the cure to relate back); *Bowers v. Estate of MoungerEyeglasses*, --- S.W.3d ---- (Tenn.Ct.App. June 2017) (finding standing cured by post-filing assignment); *Silicon Graphics, Inc. v. ATI Techs., Inc.*, No. 06-C-611-C, 2007 WL 5595952, at *10 (W.D. Wis. June 14, 2007) (holding that after-filing assignment affords standing and drawing comparison to amendments that allow addition of a party with standing to cure deficiency); *Bushnell, Inc. v. Brunton Co.,* 659 F.Supp.2d 1150, 1159–60 (D.Kan.2009) (granting motion to amend in patent infringement suit where plaintiff lacked ownership in patent, and hence standing, as of the date of the original complaint, but was subsequently assigned all right, title and interest in patent); *Randolph–Rand Corp. of N.Y. v. Shafmaster Co., Inc.,* No. CIV. 97–44, 1999 WL 814367, at *2 (D.N.H. Apr. 8, 1999) (denying motion for partial summary judgment, which asserted that plaintiff in patent infringement suit lacked standing when the original complaint was filed, where plaintiff had standing as of the date of the amended complaint); *Informatics Applications Grp., Inc. v. Shkolnikov*, 836 F. Supp. 2d 400, 412 (E.D. Va. 2011) ("It would be wasteful and inefficient to require TIAG to go through the formality and expense of instituting a new action solely because the assignment agreement was executed after the filing of the original Complaint.").

At Mot. p. 15, Pg ID 533, Defendants argue that the Supreme Court "relied" on the fact that the assignments in *Sprint* were "for ordinary business purposes." However, there is no explanation in the case about what would make assignments for purposes of claim aggregation non-ordinary. Since the current assignments were made for the same purposes of aggregation as were approved in *Sprint*, there is nothing whatever before this Court suggesting the cases should be decided differently. Nor is this a situation in which civil rights claims have been "bought and sold," as is implied by Defendants. They have not been bought or sold, and that concept is simply not at issue.

I. Defendants Are State Actors

In general, Plaintiff will rely on their briefing to address why these Defendants engaged in state action and are liable. Here, Plaintiff will simply explain why Defendants' points and briefing is inapposite or incorrect. First, at Mot. 15-16 Defendants imply that Plaintiff is confused or misleading about what Bay View is. Plaintiff is relieved that Defendants are focused so carefully on Bay View's enabling Act, the Summer Resort & Assembly Association Act of 1889. They wish this Court to carefully distinguish it from other Acts, including one created 40 years later, in 1929. If Bay View attended a little more carefully to corporate form, perhaps this suit would not be necessary: After all, it is Bay View's vision of itself as an Ecclesiastic entity that leads it astray here. No one is or should be confused. Bay View was not created under state law as an Ecclesiastic entity under MCL XX, nor under the Summer Resort Owner's Association. Everyone now agrees, and it has never been pled otherwise, that Bay View came into being under the 1889 Act.

Defendants urge that Bay View cannot be endowed with municipal powers because the 1929 Summer Resort Owners Act devolves more power—that is *"all the general powers"*—of a municipality to entities created under it, than the 1889 Act gave Bay View. But this conflates what is *sufficient* and what is *necessary* to create state action. There may be no question that the 1929 act's delegation is *sufficient* to create state action. However, that does not mean that such a delegation of "*all*" the general powers of government is *necessary* to create state action. Certainly Defendants cite no case requiring that "*all the general powers*" of government be invested in an entity, in order to create state action. Nor could they. If that were the test, then the Supreme Court's public *function* test (a test that asks whether an entity "has been delegated a public function") would not exist at all.

Defendants next argue about the nexus between a challenged act and the state's delegation of powers to a private entity at length. Mot. 18-19. What this ignores is that Bay View is not a private entity delegated a single function (say running a prison). It is a political,

public entity as argued in Plaintiff's papers. To discern its liability one looks to *Monnell* and whether the action is its own act, or that of an agent.

Relief Requested

Plaintiff urges the Court to DENY the pending motion on the basis of the above analysis.

Respectfully submitted,
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Dated: February 28, 2018

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2018, I electronically filed the foregoing paper with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

Respectfully submitted,
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