No. 22-4032

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MARK CHRISTOPHER TRACY d/b/a
EMIGRATION CANYON HOME OWNERS ASSOCIATION,

Plaintiff/Appellant,

v.

SIMPLIFI COMPANY, a Utah corporation; JEREMY RAND COOK, an individual; JENNIFER HAWKES, an individual; ERIC HAWKES, an individual; and DAVID M. BENNION, an individual,

Defendants/Appellees.

Appeal from and order dismissing a complaint for lack of jurisdiction under Fed. R. Civ. P. 12(b)(1), in the United States District Court for the District of Utah, No. 2:21-cv-00444-RJS, the Honorable Robert J. Shelby, Chief District Judge, presiding

Appellee David M. Bennion's Opening Brief

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Oral argument not requested

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STATEMENT OF RELATED CASES[1]

In *USA ex rel Mark Christopher Tracy v. Emigration Improvement District, et al.*, 2:14-cv-00701-JNP, filed in the United States District Court for the District of Utah, the court dismissed plaintiff Mark Christopher Tracy's suit under the Federal False Claims Act. That case spawned six appeals in this Court: case numbers 17-4062; 18-4109; 19-4021; 19-4022; 21-4059; and 21-4143. The first four appeals were resolved as follows:

- *United States ex rel. Tracy v. Emigration Improvement District*, 717 F. App'x 778 (10th Cir. 2017) (affirming order disqualifying plaintiff's counsel but reversing and remanding to reconsider order dismissing case)

- *United States ex. rel. Tracy v. Emigration Improvement Dist.*, 804 F. App'x 905 (10th Cir. 2020) (reversing order dismissing complaint on statute of limitations grounds based on intervening decision and reversing accompanying orders (1) awarding defendants attorneys' fees, but (2) declining to hold plaintiff's counsel jointly and severally liable for fees)

Appeal numbers 21-4059 and 21-4143 remain pending in this Court.

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[1] As explained more fully in the Certificate below, Defendant David M. Bennion has filed a separate brief because his involvement is fundamentally different than the other Defendants'. However, to comply with 10th Cir. R. 31.3, sections of the separate briefs that address points that apply equally to all defendants are identical in each brief. These sections include: the Statement of Related Cases, Jurisdiction Statement, Procedural History, and Argument sections I, II, and III.A. The Court therefore need read these sections in only one of the defendant appellees' briefs.

JURISDICTIONAL STATEMENT

The United States District Court for the District of Utah dismissed plaintiff's complaint with prejudice for lack of subject matter jurisdiction and denied plaintiff leave to amend. R.216–32 (Attachment 2). The district court had jurisdiction under 28 U.S.C. § 1331, to determine whether plaintiff had established standing and therefore invoked its subject matter jurisdiction.

The district court entered its order dismissing the complaint on March 24, 2022. R.223. Plaintiff filed a timely notice of appeal on April 21, 2022. R.234–35. This Court therefore has jurisdiction under 28 U.S.C. § 1291.

INTRODUCTION

This case centers on the unsuccessful effort below by plaintiff Mark Christopher Tracy ("Tracy") to assert federal civil rights claims under sections 1983 and 1985 that he acquired by assignment. He alleged generally that defendants had (1) contaminated his assignor's private well that supplied drinking water to her home in Emigration Canyon in Salt Lake County, Utah, and (2) illegitimately charged her and other canyon residents for water services. He further alleged that defendants attempted to collect the illegitimate charges only from canyon residents who were not members

of The Church of Jesus Christ of Latter-day Saints ("LDS Church"). Tracy's assignor is not a member of the LDS Church.

Tracy's only assertion against defendant David M. Bennion ("Bennion") is that Bennion violated the assignor's federal civil rights by allegedly telling members of his church congregation—in the fall of 2015—to pay their water bills, and attempting to shield LDS Church members from collection of illegitimately imposed water service fees.

Upon the magistrate judge's recommendation, the district court dismissed the complaint for lack of subject matter jurisdiction because Tracy, a mere assignee, had not established the first element of standing—an injury in fact. The district court also denied leave to amend because any amendment would have been futile. Tracy failed to establish that he had any valid claims of his own.

Tracy now argues that the district court erroneously (1) dismissed his complaint for lack of standing and (2) denied him leave to amend. He briefs these issues on a single page consisting of a mere six paragraphs. For myriad reasons addressed by the district court, and additional alternative grounds briefed below, this Court should affirm the district court's decision.

STATEMENT OF THE ISSUES

I. Has Appellant forfeited appellate review by inadequately briefing the issues he attempts to raise?

II. Did the district court correctly dismiss the complaint for lack of standing because Appellant attempted to assert civil rights claims he had acquired by assignment?

III(a). Did Appellant waive and/or forfeit any challenge to the district court's order denying leave to amend the complaint by not objecting below and inadequately briefing the issue on appeal?

III(b). Alternatively, did the district court abuse its discretion in denying Appellant leave to amend his complaint where the court correctly concluded that any amendment would have been futile?

IV. Should this Court affirm on the alternative grounds that (a) any claim against defendant Bennion is barred by the statute of limitations; or (b) the complaint failed to state a plausible claim against Bennion?

STATEMENT OF THE CASE

Relevant Facts

As the district court summarized, Tracy generally alleged that Defendants, other than David M. Bennion, "act through the Emigration Improvement District (EID), a special service water district created in 1968

by Salt Lake County." R.217.[2] (Memorandum Decision and Order Adopting Report and Recommendation, attached as Attachment 2). "(1) . . . EID contracts with Defendant Simplifi Corporation to perform management and accounting services, (2) Defendant Jennifer Hawkes is a current officer and director of Simplifi, (3) her spouse, Defendant Erick Lee Hawkes, is the current general manager of EID," and "(4) Defendant Jeremy Cook represents the Hawkes in pending EID-related litigation. R.217. [3] Tracy referred to Simplifi Corporation and Mr. and Mrs. Hawkes "collectively" as the "Simplifi Defendants." R.6. Defendant Bennion, on the other hand, "'is a religious leader and LDS member' with no direct interest in EID or Simplifi." R.217 (quoting R.7, Complaint at ¶ 6).

The Simplifi defendants acted "to unlawfully enrich themselves though the operation of a destructive water system and improper billing of fees and costs collected via Salt Lake County tax-foreclosure proceedings against nonmembers of the Church of Jesus Christ of Latter-Day Saints

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[2] The Court prepared the record on appeal because Appellant is pro se. *See* 10th Cir. R. 10.1. Because the record is one volume of consecutively paginated documents, Appellee will cite directly to the record page. Thus, R.217 cites record page 217.

[3] As the district court observed, "[n]otably, EID is not named as a Defendant in this action." R.217 n.8.

Emigration Canyon Ward." R.217. According to Tracy, the Simplifi defendants "began wrongfully imposing and collecting a 'fire-hydrant rental fee' from Emigration Canyon residents who [we]re not LDS members, including longtime resident Karen Penske, and also demanded past due payment from Penske." R217–18. EID certified to Salt Lake County only delinquent water accounts "belonging to 'LDS Nonmembers.'" R.218.

Tracy claimed that EID's operation of its water system contaminated Penske's private well that provides drinking water to her home. R.12, 218. Penske allegedly has an underground right to water "from Emigration Canyon's Twin Creek Aquifer for her private home." R.218. Tracy further alleged that in September 2018, the Emigration Canyon Stream "suffered total depletion." R.12.

As for defendant Bennion's specific involvement, Tracy asserted that Bennion resides in a housing development that the EID services and is an "LDS religious leader and member." R.14. "[S]ometime in the fall of 2015" "during a[n] LDS religious meeting," Tracy alleges, "Bennion admonished fellow LDS members of their 'moral obligation' to pay fees and costs billed by Simplifi Defendants." R.14. "[S]ince November 2014," the Simplifi Defendants allegedly "have commenced no tax-foreclosure proceedings

against active LDS Members consistent with the instructions of Bishop Bennion." R.14.

Procedural History

This case is the latest in a long series of Tracy's lawsuits over water issues in Emigration Canyon. R.217. Tracy has filed at least one prior action in the federal district court for Utah (2:14-cv-0071), and four prior actions in Utah state court against EID, its officers, and Simplifi. R.19–21, 33–66. The district judge in the prior federal action found Tracy to be a vexatious litigant and ordered him to pay attorney fees and damages for filing a wrongful lien against EID's water rights. R19. The judge in one of Tracy's state cases also found him to be a vexatious litigant and ordered him to pay attorney fees. R61–66.

In this case, Tracy sued through his "'registered dba entity,' the Emigration Canyon Homeowners Association, or ECHO-Association" alleging violations of sections 1983 and 1985 on behalf of Karen Penske. R.5–6. Tracy asserted that Penske "assigned legal right and title to Civil Rights Act claims to The ECHO-Association." R6.

Tracy alleged that the EID contaminated Penske's private well and charged her illegitimate water fees. R.7–15. He further alleged that Simplifi

certified to the Salt Lake County Treasurer delinquent accounts of only individuals who were not members of the LDS Church. R13. His complaint sought damages "for each payment made by Ms. Penske to include any past and future lien placed on her property by Defendants" as well as "punitive damages." R.15.

Bennion moved to dismiss on the grounds that (1) Tracy lacked standing because civil rights cannot be assigned, (2) the statute of limitations barred Tracy's claims, and (3) Tracy failed to state a plausible claim for relief. R.70–79. The Simplifi defendants likewise moved to dismiss on the grounds that (1) Tracy lacked standing based on a purported assignment of civil rights, and (2) he failed to state a claim for relief under rule 12(b)(6) of the Federal Rules of Civil Procedure. R.17–30. All defendants asked for their attorney fees, and the Simplifi defendants asked the court to declare Tracy a vexatious litigant. R.26–30, 78–79.

Tracy opposed the motions to dismiss but did not move to amend his complaint. R.81–95. Rather, he asked in his opposition for leave to amend because he claimed to own a right in the surface water in the Emigration Canyon stream, and the stream "suffered total depletion in August 2018." R.87.

The magistrate recommended dismissing the compliant for lack of subject-matter jurisdiction because Tracy lacked standing. R.161–64. (Report and Recommendation attached as Attachment 1.) Tracy lacked standing because he was asserting section 1983 and 1985 civil rights claims that had been assigned to him. R.161–64. But those claims are personal injury torts which, under Utah law, are not assignable. R.161–64.

The magistrate also recommended denying leave to amend and dismissing the complaint with prejudice because she concluded that any amendment would be futile. R.164–65. In her view, Tracy could not successfully amend, because none of his allegations demonstrated that he had valid claims of his own. R.164–65. Finally, the magistrate recommended denying defendants' claims for attorney fees and to declare Tracy a vexatious litigant. R.166–67.

The district court agreed that civil rights were not assignable under Utah law and Tracy therefore lacked standing to assert another's civil rights. R.223–27 (Attachment 2). The district court thus granted the motions to dismiss for lack of jurisdiction pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure. R.223–27.

The district court also agreed that the dismissal should be with prejudice because Tracy did not properly object to that portion of the report and recommendation, and the court found no clear error in the magistrate's conclusions that amendment would be futile. R.227.

The district court declined to impose any sanctions on Tracy. R.227–32. Tracy timely appeals. R.234–35.

SUMMARY OF THE ARGUMENT

I. Tracy attempts to brief two issues in a mere six paragraphs on one page. He offers no analysis. Rather, he merely concludes that the district court erred. That is inadequate, even for a pro se appellant. Tracy has therefore forfeited any appellate review.

II. Regardless, the district court correctly dismissed the complaint for lack of subject matter jurisdiction because Tracy could not establish standing. State law governs the assignability of federal civil rights claims. Those claims are personal injury torts. And personal injury claims are not assignable in Utah. This rule furthers the purposes of the federal civil rights statutes because those statutes are intended to protect individual rights. Preventing assignment of those claims ensures that the individual whose rights were infringed recovers for that injury.

III. Tracy waived any appellate challenge to the order denying him leave to amend because he did not specifically object to that portion of the magistrate judge's recommendation. He has also inadequately briefed the issue on appeal, forfeiting any appellate review.

Regardless, the district court acted well within its discretion in denying leave to amend because it correctly concluded that any amendment would have been futile, especially as to defendant Bennion. Tracy alleged no facts establishing that Bennion's alleged counsel to church members to pay their water bills, or his alleged attempts to prevent the collection of purportedly illegitimate water fees, somehow caused the canyon stream to dry up. Nor did Tracy allege any facts establishing that Bennion's alleged acts as a religious leader amounted to (1) action under color of law, or (2) a conspiracy to engage in invidious class-based animus. Tracy did not allege that Bennion had any involvement in any attempt to collect fees from individuals who did not belong to his church.

IV. This Court can also affirm on the alternative grounds that (1) any claims against Bennion are barred by the statute of limitations and (2) the complaint failed to state a plausible claim against Bennion. Even if Tracy could assert assigned civil rights claims, he did not file his complaint until

July 2021. Bennion's alleged actions occurred, at the latest, in the fall of 2015. Utah's four-year statute of limitations therefore barred any claims against Bennion.

Tracy's complaint also failed to state any plausible claim against Bennion. Bennion's only alleged involvement was to encourage fellow church members to pay their water bills and to attempt to prevent the collection of allegedly illegitimate fees from fellow church members. Those actions had nothing to do with the alleged contamination of the assignor's private well or any attempt to collect fees from her based on any invidious discrimination.

ARGUMENT

I.

Tracy has forfeited appellate review by his inadequate briefing.

Tracy's brief, consisting entirely of unsupported assertions, is insufficient, even for a pro se litigant, to justify this Court's review. To adequately brief his appellate issues, Tracy had to make an argument consisting of his "contentions *and the reasons for them*, with citations to the authorities and parts of the record" he relies on. Fed. R. App. P. 28(a)(8)(A) (emphasis added). Rule 28 requires all briefs, even from pro se parties, to

contain "more than a generalized assertion of error, with citations to supporting authority." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 841 (10th Cir. 2005) (cleaned up). "When a pro se litigant fails to comply with that rule," this Court "cannot fill the void by crafting arguments and performing the necessary legal research." *Id.* (cleaned up).

A party "forfeits appellate consideration" of arguments he inadequately briefs. *Bronson v. Swensen*, 500 F.3d 1099, 1105 (10th Cir. 2007). "[C]ursory statements, without supporting analysis and case law, fail to constitute the kind of briefing that is necessary to avoid application of the forfeiture doctrine." *Id.* at 1104.

Tracy's brief is inadequate because it consists entirely of unsupported conclusions without any reasoned legal analysis or argument. Br.Aplt. 1–7. He raises two issues and briefs them in a mere five paragraphs, never explaining how the district court erred. Br.Aplt. 5–6.

Tracy challenges the district court's conclusion that he lacked standing to assert assigned civil rights claims. Br.Aplt. 5, 6. He declares that the district court did not apply the standards in *Wilson v. Garcia*, 471 U.S. 261, 267 (1985), in reaching that conclusion. Br.Aplt. 5, 6. But Tracy never explains how the district court's ruling violates *Wilson*. Br.Aplt. 5, 6. Rather, he merely

declares that (1) the district court erred because there is no published decision holding "that the assignment of federal civil rights is determined by state law" and (2) the ruling "is inconsistent with the legislative history of the [Civil Rights] Act." Br.Aplt.6.

Tracy is wrong about the lack of any published decision on this issue, as explained below. But even if he were right, that assertion provides no reasoned analysis of how the district court erred. And Tracy never explains the legislative history of the Civil Rights Act, how the district court's ruling conflicts with that history, or why that legislative history is even relevant. Br.Aplt. 6.

Tracy next declares that the district court erroneously denied him leave to amend his complaint to assert "his own civil rights." Br.Aplt. 5. But again, he merely concludes, without analysis that, as a pro se litigant, the district court "improper[ly]" held him to "heightened pleading standards." Br.Aplt.6.

Tracy's unsupported declarations that the district court erred are inadequate to avoid forfeiting appellate review. *See Garrett*, 425 F.3d at 841. This Court should therefore refuse to consider his brief at all. *See id.*; *Bronson*, 500 F.3d at 1104; *see also Eagar v. Drake*, 829 F. App'x. 878, 883 (10th Cir. 2020)

("Far more is required, even of a pro se litigant, to disturb the judgment below" than merely declaring that district court erred).

But even if Tracy's brief were adequate to justify this Court's review, he demonstrates no error.

II.

The district court correctly dismissed Tracy's complaint for lack of subject matter jurisdiction given his failure to establish standing.

Tracy failed below to establish standing. A plaintiff must demonstrate that he has standing to bring his case in federal court. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014). To establish standing, a plaintiff must show that he has asserted a "Case" or "Controvers[y]" under Article III of the United States Constitution. *Id.* That showing requires "(1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision." *Id.* at 157–58 (cleaned up).

"This court reviews de novo a district court's grant of a motion to dismiss for lack of subject matter jurisdiction." *Tompkins v. United States Dep't of Veterans Affs.*, 16 F.4th 733, 741 (10th Cir. 2021). The district court correctly concluded that Tracy failed to satisfy the first standing requirement (injury-

in-fact) because he alleged only violations of *another's* civil rights that were purportedly *assigned* to him. R.223–24. Violations of sections 1983 and 1985 are unassignable in Utah because they are personal injury torts. R.223–24.

A. Utah law governs the assignability of civil rights claims.

Utah law determines whether Tracy could assert another's civil rights claims by assignment. When federal civil rights laws do not provide rules of decision on specific points, federal courts must fill the gaps with the forum state's law. *See Wilson v. Garcia*, 471 U.S. 261, 280 (1985) (applying New Mexico statute of limitations for personal injury actions to section 1983 claim given lack of federal limitations period), *superseded on other grounds by statute as recognized in Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004)[4]; 42 U.S.C. § 1988(a). Federal courts are statutorily required to apply the forum state's law to supply necessary rules of decision, provided the state law "is

[4] The district court stated that 42 U.S.C. § 1988(a) superseded *Wilson*. R.225. Actually, 28 U.S.C. § 1658, establishing a four-year limitations period for "a civil action arising under an Act of Congress enacted" after 1 December 1990, is the statute that partially superseded *Wilson*. *See Jones*, 541 U.S. at 377–78; *see also Pony v. County of Los Angeles*, 433 F.3d 1138, 1143 (9th Cir. 2006) (recognizing 28 U.S.C. § 1658 as superseding *Wilson*).

not inconsistent with the Constitution and laws of the United States." *See* 42 U.S.C. § 1988(a).[5]

Neither section 1983, nor section 1985, addresses whether an individual may assign her claims under either provision. *See* 42 U.S.C. §§ 1983, 1985. The district court therefore correctly looked to Utah law to determine the assignability of those claims. *See Wilson*, 471 U.S. at 267; 42 U.S.C. § 1988(a); *Pony v. County of Los Angeles*, 433 F.3d 1138, (9th Cir. 2006) (California law barred successful section 1983 plaintiff from assigning to her attorney her right to seek attorney fees).

B. Section 1983 and 1985 claims are personal injury torts.

Whether a claim is assignable under Utah law depends on the type of claim asserted. *See Westgate Resorts, Ltd. v. Consumer Protection Group, LLC,* 2012 UT 55, ¶¶ 30–35, 285 P.3d 1219 (examining nature of claim to determine

[5] The statute states, "[I]n all cases where [the federal laws] are not adapted to the [goal of protecting all persons in the United States in their civil rights], or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause." 42 U.S.C. § 1988(a).

assignability); *Mayer v. Rankin*, 63 P.2d 611, 616 (Utah 1936) (recognizing that only some causes of action are assignable).

Federal civil rights claims are personal injury torts. "[Section] 1983 claims are best characterized as personal injury actions." *Wilson*, 471 U.S. at 280. "The atrocities that [motivated Congress to enact section 1983] in 1871 plainly sounded in tort." *Id.* at 277. Section 1983 claims are therefore "more analogous to tort claims for personal injury than, for example, to claims for damages to property or breach of contract." *Id.*; *see also City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709 (1999) ("[T]here can be no doubt that claims brought pursuant to § 1983 sound in tort."); *Heck v. Humphrey*, 512 U.S. 477, 483 (1994) (recognizing that section 1983 claims are based on tort liability); *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 305, (1986) ("We have repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability.") (cleaned up); *Baker v. Bd. of Regents of State of Kan.*, 991 F.2d 628, 630 (10th Cir. 1993) ("Section 1983 claims are best characterized as personal injury actions.").

Section 1985 claims are also personal injury torts. In *Haddle v. Garrison,* 525 U.S. 121, 124, 126–27 (1998), for example, the Supreme Court held that a section 1985 claim alleging a conspiracy to induce an employer to terminate

the petitioner's at-will employment was a tort claim. This Court has likewise recognized that because section 1985(3) claims are essentially personal injury torts, the statute of limitations on those claims is the "forum state's personal-injury statute of limitations." *Lyons v. Kyner*, 367 Fed. App'x. 878, 881–82 (10th Cir. 2010). As this Court observed, the Third, Eighth, Ninth, and Eleventh Circuits had reached that same conclusion. *Id.* (citing *Rozar v. Mullis*, 85 F.3d 556, 561 (11th Cir. 1996); *Kaster v. Iowa*, 975 F.2d 1381, 1382 (8th Cir.1992) (per curiam); *McDougal v. County of Imperial*, 942 F.2d 668, 673–74 (9th Cir.1991); *Bougher v. Univ. of Pittsburgh*, 882 F.2d 74, 79 (3d Cir.1989)). The "unifying theme" of the Federal Civil Rights Act of 1871, which enacted sections 1983 and 1985, lies in the Fourteenth Amendment's language "that unequivocally recognizes the equal status of every '*person*' subject to the jurisdiction of any of the several States." *Wilson*, 471 U.S. at 277.

Personal injury actions are not assignable in Utah. The Utah Supreme Court has "affirm[ed] the universal rule of non-assignability of personal injury claims." *State Farm Mut. Ins. Co. v. Farmers Ins. Exch.*, 450 P.2d 458, 459 (Utah 1969); *Am. Charities for Reasonable Fundraising Regul., Inc. v. O'Bannon*, No. 2:08-CV-875, 2016 WL 4775527, at *6 (D. Utah Sept. 13, 2016)

(unpublished) ("Tort claims arising out of personal injury are not assignable under Utah law.").[6]

Other states agree with Utah's rule. "Arizona . . . prohibits assignment of personal injury claims." *CVS Pharmacy, Inc. v. Bostwick*, 494 P.3d 572, 577 (Ariz. 2021). As does California. *Pac. Gas & Elec. Co. v. Nakano*, 87 P.2d 700, 701 (Cal. 1939) ("It is well settled in this jurisdiction that a purely tort claim is not assignable."); *see also Timed Out, LLC v. Youabian, Inc.*, 177 Cal. Rptr. 3d 773, 780 (Cal. App. 2014) ([C]auses of action for personal injuries arising out of a tort are not assignable."). Personal injury claims are not assignable because they seek a remedy for an injury that is *personal* to the injured party. *See Lingel v. Olbin*, 8 P.3d 1163, 1167 (Ariz. App. 2000).

[6] This Court later dismissed as moot an appeal from a separate order in *American Charities*. *See Am. Charities for Reasonable Fundraising Regul., Inc. v. O'Bannon*, 909 F.3d 329, 331 (10th Cir. 2018). The plaintiffs appealed from the grant of summary judgment upholding as constitutional Utah's professional fundraising consultant law. *See id.* But the appeal became moot after "Utah substantially revised its law" so that it no longer applied to the plaintiff. *See id.* This Court therefore remanded with instructions for the district court "to vacate its judgment and dismiss the case." *Id.* at 334. But that decision, of course, had no effect on the district court's unrelated conclusion that plaintiff lacked standing to assert assigned section 1983 claims.

C. Utah law prohibiting assignment of personal injury claims is not inconsistent with federal law.

Tracy did not challenge below the conclusion that personal injury claims are unassignable in Utah. R.184 (Objection to Report and Recommendation). Rather, his objection to this portion of the magistrate's report and recommendation merely declared—without any analysis—that Utah law barring assignment of personal injury claims should not apply because it is inconsistent with "the purpose and nature of the federal right." R.184 (citing *Wilson*, 471 U.S. at 267). Tracy now appears to reassert that same unsupported conclusion on appeal. Br.Aplt. 5.

This Court should reject Tracy's conclusory assertion. As explained, while this Court will "construe liberally" pro se briefs, it will "not craft their legal arguments for them." *Gammons v. City & Cnty. of Denver*, 505 F. App'x 785, 786 (10th Cir. 2012).

Regardless, Tracy demonstrates no error in the district court's application of Utah law barring assignment of personal injury claims. Preventing a third party from asserting another's civil rights furthers, rather than impairs, the goals of federal civil rights laws.

Federal courts "are to apply state law only if it is not 'inconsistent with the Constitution and laws of the United States.'" *Wilson*, 471 U.S. at 267

(quoting 42 U.S.C. § 1988) (additional quotation and citation omitted). Utah's law limiting assignment of personal injury claims furthers the goals of sections 1983 and 1985 because it ensures that the injured party, not an uninterested third party, recovers for inherently personal civil rights violations. As explained, sections 1983 and 1985 are designed to protect *individual* rights. *Wilson*, 471 U.S. at 277. The Supreme Court has "repeatedly emphasized," that "the central objective of the Reconstruction-Era civil rights statutes … is to ensure that *individuals whose federal constitutional or statutory rights are abridged* may recover damages or secure injunctive relief." *Felder v. Casey*, 487 U.S. 131, 139 (1988) (emphasis added).

This Court has therefore recognized the "well-settled principle that a section 1983 claim must be based upon the violation of plaintiff's personal rights, and not the rights of someone else." *Archuleta v. McShan*, 897 F.2d 495, 497 (10th Cir. 1990) (citing *Dohaish v. Tooley*, 670 F.2d 934, 936 (10th Cir. 1982)). The plaintiff in *Archuleta* therefore could not assert a section 1983 claim based merely on his "*observing* allegedly excessive police force which was directed entirely at his father." *Id.* (emphasis added); *see also O'Malley v. Brierley*, 477 F.2d 785, 789 (3d Cir. 1973) ("'[O]ne cannot sue for the

deprivation of another's civil rights.'" (quoting C. Antieau, *Federal Civil Rights Acts, Civil Practice*, § 31 at 50–51).

The bar on assignment of personal injury actions also furthers public policy. "The prohibition against the assignment of personal injury claims is based on public policy, such as avoiding the dangers of maintenance and champerty." *Lingel v. Olbin*, 8 P.3d 1163, 1167 (Ariz. App. 2000) (cleaned up).[7] Those dangers "include multitudinous and useless litigation, speculation and gambling in lawsuits, and the annoyance and harassment of those who are already suffering." *Id.*

Applying Utah's bar on assignment of personal injury claims to the assignment here therefore furthers the purposes of federal civil rights claims. The district court thus correctly held that under Utah law, Tracy lacked standing to assert assigned civil rights claims. R.226.

Tracy incorrectly asserts that "no federal court has ruled in a published decision that the assignment of federal civil rights [claims] is determined by state law," as if the existence of a published decision on this issue were

[7] "'Maintenance' is defined as assisting another in litigation without a personal interest in its outcome. 'Champerty' exists if there is an agreement that the person providing litigation assistance will share in the proceeds of the litigation.'" *Id.* (cleaned up).

dispositive. Br.Aplt. 6. But as explained, the Ninth Circuit has held that California law governed whether a derivative claim for attorney fees arising from a successful section 1983 action could be assigned. *Pony v. County of Los Angeles*, 433 F.3d 1138, 1142–45 (9th Cir. 2006). To reach that holding, the *Pony* court first concluded that the underlying section 1983 claim was unassignable because "[t]he right to sue in tort for personal injury in non-assignable *under California law*." *Id.* at 1143 (emphasis added). Thus, Tracy incorrectly asserts that no published decision supports the district court's dismissal here. Br.Aplt. 6.

Regardless, and contrary to Tracy's suggestion otherwise, the correctness of the district court's ruling does not depend on the existence of a published opinion supporting it. As explained, federal courts are statutorily bound to apply state law to supply missing rules of decision, so long as that law "is not inconsistent with" federal law. 42 U.S.C. § 1988(a); *see also Wilson*, 471 U.S. at 266–69.

Tracy demonstrates no error in the district court's order dismissing his claims for lack of standing based on the unassignability of federal civil rights claims under Utah law. This Court should therefore affirm.

III.

Tracy has both waived and forfeited any challenge to the district court's order denying him leave to amend; alternatively, the district court did not abuse its discretion in denying leave to amend, because the amendment would have been futile.

Tracy further complains, again without any analysis, that the district court erroneously denied him leave to amend his complaint to remedy his lack of standing. Br.Aplt. 6. Tracy has waived this claim by failing to properly object below. He has also forfeited the claim by inadequately briefing it on appeal. Regardless, Tracy has not shown that the district court abused its discretion in denying him leave to amend, because his proposed amendment would have been futile.

A. Tracy waived and forfeited this claim by failing to properly object below and inadequately briefing the issue on appeal.

Tracy has both waived and forfeited his claim that the district court should have granted him leave to amend his complaint under Rule 15. Br.Aplt. 6. Tracy waived appellate review of this claim when he failed to adequately object to the magistrate's recommendation on this point. R227. This Court has "adopted a firm waiver rule providing that the failure to make timely objections to the magistrate judge's findings or recommendations waives appellate review of both factual and legal

questions." *Moore v. Astrue*, 491 F. App'x 921, 923 (10th Cir. 2012) (cleaned up). "To preserve an issue for appellate review, a party's objections to the magistrate judge's report and recommendation must be both timely and specific." *Id.* (cleaned up).

Tracy did not specifically object to the magistrate's judge's recommendation, despite the warning that "[f]ailure to object may constitute a waiver of objections upon subsequent review." R.167; R.227. Tracy's objection to this portion of the magistrate's recommendation was a mere two sentences that declared that he "should be granted leave to assert impairment of his own constitutionally protected property right." R.186. Tracy did not address, or even acknowledge the magistrate's analysis or attempt to explain why this amendment would be proper. R.186. The district court therefore correctly held that his objection was insufficient. R.227. Tracy has thus waived appellate review of this issue. *See Moore*, 491 F. App'x at 923.

As explained above, Tracy has also inadequately briefed any claim that the district court should have granted him leave to amend. *See* Point I, above. His inadequate briefing forfeits any challenge to the order denying him leave

to amend. *See Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007) (holding that inadequately briefed claims are forfeited on appeal).

This Court should therefore hold that Tracy either waived, forfeited, or both waived and forfeited, his claim that the district court erred in denying him leave to amend his complaint. In any event, Tracy could not show any error in the order denying him leave to amend. R.226–27.

B. The district court acted well within its broad discretion in denying leave to amend because the proposed amendment would have been futile.

This Court reviews "the denial of a motion to amend for abuse of discretion."[8] *Sanders v. Anoatubby*, 631 F. App'x 618, 621 (10th Cir. 2015). "When, as here, the denial of a motion to amend is based on a determination that amendment would be futile," this Court's "review for abuse of discretion includes de novo review of the legal basis for the finding of futility." *Id.* (cleaned up). This is because "[t]he futility question is functionally equivalent to the question whether a complaint may be

[8] Tracy never filed a motion to amend. Rather, he merely asserted in both his opposition to defendants' motions to dismiss, and his objection to the magistrate's report and recommendation, that he should have leave to amend. R.83, 87, 95, 186. As explained, the magistrate judge nevertheless recommended denying leave to amend, and the district court adopted that recommendation, ruling that it was not clearly erroneous. R.165, 226–27.

dismissed for failure to state a claim." *Adams v. C3 Pipeline Const., Inc.*, 30 F.4th 943, 972 (10th Cir. 2021) (cleaned up).

The district court correctly concluded that the magistrate judge did not clearly err in concluding that Tracy's proposed amendment would be futile. R.227. "A proposed amendment is futile if the complaint, as amended, would be subject to dismissal." *Sanders*, 631 F. App'x at 621. Tracy's proposed amendments were subject to dismissal, at least as to Bennion, because they alleged only that Tracy owns a right to the canyon stream's surface water, and the stream suffered total depletion in 2018. Tracy alleged no connection between Bennion and the stream running dry. Nor did Tracy allege how Bennion acted under color of law.

To survive dismissal for failure to state a claim, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Adams*, 30 F.4th at 972 (cleaned up). A court must be able "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

In conducting this analysis, a court must take as true "all well-pleaded *facts*, as distinguished from conclusory allegations, . . . and liberally construe the pleadings and make all reasonable inferences in favor of the non-moving

party." *Id.* Tracy's proposed amended facts and the reasonable inferences drawn therefrom, even liberally construed, did not state any plausible claim against Bennion, because Tracy's additional facts addressed exclusively the alleged depletion of the canyon stream.

1. Tracy's amendment could not have stated a valid section 1983 claim against Bennion, because Tracy did not allege that Bennion caused Tracy's supposed deprivation.

A section 1983 claim generally requires two primary elements. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999). A plaintiff must show that she (1) was "deprived of a right secured by the Constitution or laws of the United States," and (2) "that the alleged deprivation was committed under color of state law." *Id.* Tracy's proposed amended allegations, even liberally construed, could not prove either element as to Bennion.

Tracy appears to claim that defendants' actions somehow violated his own federal civil rights by depriving him of his personal water rights to the surface water of the Emigration Canyon stream. Br.Aplt. 6; R.87, 186. But even if Tracy possessed a constitutionally protected property right in the stream's surface water, and was somehow deprived of that right, Tracy alleged no facts that should establish that Bennion caused that deprivation.

As generally summarized above, Tracy's complaint alleged that in June 1984, asserting an improperly obtained water right, a real estate development company drilled a well in Emigration Canyon's Twin Creek Aquifer to provide water to a luxury housing development in the canyon. R.8–9. Tracy calls this well the "Boyer Water System." R.8. In August 1998, the Emigration Improvement District ("EID") allegedly "assumed legal title and liability of the Boyer Water System" despite knowing that the system's well "would interfere with artesian pressure supporting surface water flow of the Canyon Stream" for decades. R.8–9.

"Sometime in 2013, EID transferred operation of the Boyer Water System" from its original operators to defendant Simplifi Company. R.6, 9. Tracy alleged that the individuals who originally drilled and operated the Boyer Water System's well were all members of the LDS Church, as are the individuals who operate the EID, including Simplifi's current director, manager, and legal counsel. R.8, 9.

Tracy further alleged that in September 2018, "the Emigration Canyon Stream suffered total depletion." R.12.

As noted, Bennion merely resides in a residence serviced by the EID and "is a religious leader and LDS member." R.7, 14. Tracy does not allege

that Bennion has any "direct interest in EID or Simplifi." R.6–7, 217. Tracy asserted that "sometime in the fall of 2015" "during a[n] LDS religious meeting," "Bennion admonished fellow LDS members of their 'moral obligation' to pay fees and costs billed by Simplifi Defendants." R.14. Tracy further alleged that "since November 2014," the Simplifi Defendants "have commenced no tax-foreclosure proceedings against active LDS Members consistent with the instructions of Bishop Bennion." R.14.

In opposing defendants' motions to dismiss and objecting to the magistrate's report and recommendation, Tracy asserted that he should be allowed to amend his complaint only because he owns a "senior perfected surface water right," and the canyon stream "suffered total depletion" in 2018. R.87, 186. But Tracy never detailed the specific rights his alleged surface-water right conferred on him. R87, 186. In fact, he did not even allege that his water right pertained to the surface water of the Emigration Canyon Stream.[9] R87, 186.

Tracy's pleadings, even liberally construed, fail to allege that Bennion deprived him of any right. Even if Tracy has a right to the surface water of

[9] Tracy lives in the city of Sandy, Utah, not in the Emigration Canyon Township. R.1.

the canyon stream, he does not allege that Bennion's actions impaired that right in any way. According to Tracy, Bennion merely exhorted his fellow LDS Church members to pay their water bills. R.14. As the magistrate judge observed, Tracy did not allege that Bennion had any "direct interest in EID or Simplifi."[10] R.159 (citing Complaint at 3 (R.7)).

Tracy also makes the vague assertion that Bennion gave some unspecified "instructions" that resulted in no tax foreclosure proceedings being instituted "against active LDS members." R.14. But if Bennion's alleged "instructions" were for LDS members to pay their water bills, and those individuals followed his instructions, then there would be no past-due water bills to collect from, and hence no tax foreclosure proceedings to bring against, LDS members.

Even if Bennion's instructions pertained to something else, Tracy still fails to allege any tie between Bennion's words and the stream running dry. Tracy does not allege that Bennion is a modern-day Moses at the Red Sea, or Joshua at the River Jordan. Rather, even assuming that Bennion's

[10] Tracy did not object to the magistrate's observation. R.177–86. He therefore waived any claim that he had alleged any connection between Bennion and the EID or Simplifi. *See Moore v. Astrue*, 491 F. App'x 921, 923 (10th Cir. 2012) (holding that failure to object to magistrate's report waives appellate review).

instructions were somehow part of a plot to seek to collect past due water bills only from individuals who did not belong to his religious congregation, Tracy offers no basis to connect those instructions about collecting water bills to the stream drying up.

And even if Tracy had tried to connect some vague instruction from Bennion about collecting past-due water bills to the stream running dry, Tracy did not allege a sufficient causal connection between Bennion's statements and the stream's evaporation. While "direct participation" in the deprivation of federal civil rights is unnecessary, a "causal connection" between a defendant's actions and the alleged deprivation is still required. *Snell v. Tunnel*, 920 F.2d 673, 700 (10th Cir. 1990) (cleaned up). To show the requisite connection, a plaintiff's allegations must show that "the defendant set in motion a series of events that the defendant knew or reasonably should have known would cause others to deprive the plaintiff of her constitutional rights." *Id.* (cleaned up).

Tracy made no attempt to plead such a connection. He alleged nothing that could establish how Bennion "knew or reasonably should have known" that a statement about past-due water bills would "set in motion a series of events that . . . would cause others" to make the stream dry up. *Id.*

Tracy's allegations against Bennion relate, if at all, only to the alleged attempt to collect past-due water bills from individuals who did not belong to the LDS Church. And those allegations pertain only to Penske, Tracy's assignee. Tracy does not live in Emigration Canyon and does not allege that he has ever received a water bill from the EID or that any tax foreclosure proceedings have been commenced against him based on an EID bill. Tracy therefore alleged nothing that could tie Bennion to Tracy's supposed personal deprivation of the stream running dry.

2. Tracy did not allege that Bennion acted under color of law in causing any alleged deprivation.

Even if Tracy had alleged a basis for concluding that Bennion's counsel to his congregants to pay their water bills somehow caused the stream to dry up, Tracy alleged nothing to show that Bennion acted under color of law when he gave that counsel.

While a private actor can be held accountable as a state actor under various tests for establishing the requisite relationship, none could apply here. *See Barnett v. Hall*, 956 F.3d 1228, 1235 (10th Cir. 2020) (describing "the 'nexus test,' the 'public function test,' the 'joint action test,' and the 'symbiotic relationship test'"). "At the heart of each test is whether the

conduct allegedly causing the deprivation of a federal right is fairly attributable to the State." *Id.* (cleaned up).

Tracy alleged nothing that could connect Bennion's alleged statements to any government action. Again, Tracy alleged that Bennion acted only as "a religious leader and LDS Member," R.7, and that he instructed his flock to pay their water bills "during a[n] LDS religious meeting," R.14. Tracy's allegations therefore could not have established any cause of action under section 1983. The magistrate therefore correctly concluded that any amendment to state a section 1983 claim would be futile.

3. Tracy did not allege any cause of action under section 1985 against Bennion.

Nor could Tracy's allegations have established a cause of action under section 1985(3), because he did not allege that Bennion's actions deprived him of any federally protected right, let alone that Bennion did so through a conspiracy designed to further non-economic class-based discrimination.[11] "The essential elements of a section 1985(3) claim are: (1) a conspiracy; (2) to deprive plaintiff of equal protection or equal privileges and immunities; (3)

[11] Section 1985's other subsections are inapplicable here because they address conspiracies to (1) prevent federal officers from performing their duties, 42 U.S.C. § 1985(1), or (2) to interfere with court proceedings, *id.* § 1985(2).

an act in furtherance of the conspiracy; and (4) an injury or deprivation resulting therefrom." *Tilton v. Richardson*, 6 F.3d 683, 686 (10th Cir. 1993)). But section 1985(3) does not "apply to all tortious, conspiratorial interferences" with other's rights. *Griffin v. Breckenridge*, 403 U.S. 88, 101 (1971). Rather, it applies only those motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus." *Id* at 102.

Moreover, "[t]he other 'class-based animus' language of this requirement has been narrowly construed and does not, for example, reach conspiracies motivated by an economic or commercial bias." *Tilton*, 6 F.3d at 686 (citing *United Bhd. Of Carpenters & Joiners of America, Local 610, AFL-CIO v. Scott*, 463 U.S. 825, 837 (1983)). In fact, "it is a close question whether section 1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause." *United Bhd.* 463 U.S. at 836.

Tracy's allegations fail to state a section 1985(3) claim because, as explained, he did not allege that Bennion's actions caused the stream to run dry and thus deprive Tracy of any right to its surface water. Nor did Tracy allege how Bennion conspired with anyone to cause that to happen. And he certainly did not allege any conspiracy directed towards class-based

discrimination motivated by something other than "an economic or commercial bias." *Tilton*, 6 F.3d at 686. The magistrate judge therefore also correctly concluded that Tracy's proposed amendment could not state a viable claim under section 1985(3).

In sum, Tracy's additional allegations would not have stated a claim that Bennion deprived Tracy himself of any right under sections 1983 or 1985(3). The district court therefore correctly concluded that any amendment would be futile and denied leave to amend on that basis.[12]

[12] There is authority that dismissal on jurisdictional grounds should be without prejudice. *See Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1216 (10th Cir. 2006) ("A longstanding line of cases from this circuit holds that where the district court dismisses an action for lack of jurisdiction, as it did here, the dismissal must be without prejudice."). Nonetheless, Tracy has twice waived any challenge to the district court's with-prejudice dismissal. He does not raise the issue now, nor did he sufficiently object below to that portion of the magistrate judge's report. R.177–86. Tracy has also waived any appellate review because he has not argued that his complaint should not have been dismissed with prejudice. Br.Aplt.5–6. *Holmes v. Town of Silver City*, 826 F. App'x 678, 680 (10th Cir. 2020) (holding that pro se appellant waived unbriefed claim). Moreover, even evaluating the with-prejudice dismissal on the merits, this Court should still affirm the denial of leave to amend based on the alternative grounds for dismissal with prejudice addressed in Point IV, below, which were well briefed below.

IV.

This Court should affirm on alternative grounds because Tracy's assigned claims against Bennion are barred by the statute of limitations and the complaint failed to state any plausible claim against Bennion.

Even if Tracy had standing to assert Penske's civil rights claims against Bennion, this Court should nevertheless affirm the dismissal of those claims on two alternative grounds. First, the statute of limitations for any claims against Bennion has expired. Second, the complaint failed to state any plausible claims against Bennion.

This Court will "consider three factors when deciding whether to affirm on an alternative ground: 'whether the ground was fully briefed and argued here and below, whether the parties have had a fair opportunity to develop the factual record, and whether, in light of . . . [the] uncontested facts, our decision would involve only questions of law.'" *United States v. Hall*, 798 F. App'x 215, 220 (10th Cir. 2019) (quoting *United States v. Watson*, 766 F.3d 1219, 1236 (10th Cir. 2014)). All three grounds are satisfied with respect to the alternative grounds Bennion asserts.

A. Any claims against Bennion are barred by the statute of limitations.

Even if Penske's assignment were valid to give Tracy standing, the statute of limitations applicable to civil rights claims bars Tracy's claims.

Federal courts apply the forum state's statute of limitations to Section 1983 and 1985 claims. *See Wilson v. Garcia*, 471 U.S. 261, 275 (1985) (applying statute for personal injury action). Federal courts in Utah apply a four-year statute of limitations based on Utah's "catch-all" statute of limitations in Utah Code § 78B-2-307(3). *See Loard v. Sorenson*, 561 F. App'x 703, 705 (10th Cir. 2014) (assuming without discussion that Utah's four-year statute of limitations applied); *Arnold v. Duchesne Cnty.*, 26 F.3d 982, 987 (10th Cir.1994) (rejecting application of two-year statute of limitations).

Tracy filed his complaint on July 22, 2021. Utah's four-year statute of limitations therefore barred claims for any conduct that occurred before July 22, 2017. Yet, the latest act that Tracy alleges Bennion committed was Bennion's alleged statement to LDS Church members in fall 2015 to pay their water bills. R.14. Even if such a statement were actionable (which it is not, as detailed below), and even if it were made, any claim based on the statement is beyond the statute of limitations. Tracy's claims against Bennion are therefore untimely and should be dismissed on this independent, alternative basis.

Tracy's only response to this argument below was that Penske's claims could not have accrued until June 2021, when she discovered that the

operation of the EID's water system had allegedly contaminated her well. R87–89. But Tracy pleaded no facts that logically connected the alleged contamination of Penske's well to Bennion's alleged statement during a 2015 religious meeting that LDS Church members should pay their water bills, or his alleged "instructions" in 2014 to unspecified defendants regarding not commencing tax foreclosure proceedings. R.14. Thus, Tracy's 2021 complaint is time barred as to Bennion.

This Court should affirm on this alternative ground because all three requirements for doing so are satisfied here. *See Hall*, 798 F. App'x at 220. This ground has been fully briefed both below and now on appeal. R.74–75, 87–89, 150–51. Tracy had the opportunity to develop the factual record below and, in fact, alleged additional facts trying to avoid the statute of limitations. R.87–89. Finally, "[w]hether a court properly applied a statute of limitations and the date a statute of limitations accrues under undisputed facts are questions of law we review de novo." *Nelson v. State Farm Mut. Auto. Ins. Co.*, 419 F.3d 1117, 1119 (10th Cir. 2005). This Court can therefore affirm on this alternative ground. *See Hall*, 798 F. App'x at 220.

B. The complaint also fails to state a claim that Bennion violated the assignor's civil rights.

Even if Tracy had timely asserted Penske's civil rights claims, he nevertheless failed to state a plausible claim that Bennion's alleged actions violated Penske's civil rights. Tracy's allegations failed to establish any plausible claim that Bennion acted under color of law or any plausible tie between Bennion and the Simplifi defendants' efforts to collect purportedly illegitimate water bills from individuals who were not members of the LDS Church. Under the plausibility standards of *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), Tracy failed to state a claim against Bennion.

Dismissal is appropriate when a complaint does not contain sufficient facts to "'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). Under this standard, courts employ a two-part analysis in handling a motion to dismiss pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure: (1) after accepting as true all facts alleged in the complaint, but not conclusory allegations; a court asks (2) whether the factual allegations in the complaint "states a plausible claim for relief." *Id.* at 678–79.

Under the first step, courts are "not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* at 678 (cleaned up). Likewise, mere "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements" do not suffice. *Id.* (citing *Twombly*, 550 U.S. at 555).

To state a "plausible" claim for relief, the supporting factual allegations in the complaint must rise above speculation. *Hall v. Witteman*, 584 F.3d 859, 863 (10th Cir. 2009) (upholding dismissal of pro se plaintiff's section 1983 and 1985 claims under Rule 12(b)(6)). A pleading that offers only "labels and conclusions" or mere "naked assertion[s]" without "further factual enhancement" cannot survive a motion to dismiss. *Iqbal*, 556 U.S. at 678 (cleaned up). Tracy's complaint does not satisfy these standards.

As demonstrated above, Tracy alleged no plausible basis for concluding that Bennion was a state actor, or in conspiracy with a state actor. The only specific allegation against Bennion is that during an LDS Church meeting, he encouraged members to pay their water bills. R.14. That, without more, does not constitute state action, nor does it support any plausible agreement or in-concert action with any state actor.

Nor did the complaint allege a plausible basis to conclude that Bennion conspired to commence foreclosure sales based on illegitimate past-due water bills against only individuals who were not members of the LDS Church. Rather, the complaint alleged only that Bennion somehow shielded members of his congregation from the Simplifi defendants' collection efforts. R.14. As explained, the complaint merely concludes that the Simplifi "Defendants have commenced no tax-foreclosure proceedings against active LDS Members consistent with the instructions of Bishop Bennion." R.14. That allegation does not tie Bennion to the collection efforts against individuals like Penske who were not members of the LDS Church.

Moreover, under Utah Code § 17B-1-902, only a local tax district may certify past due amounts. Bennion is not a local tax district. There are no factual allegations describing contact between him and the local district or any management role he occupied for the EID. Rather, as explained, Bennion had "no direct interest in EID or Simplifi." R.217. Likewise, under Utah Code § 17B-1-902(3), the county treasurer provides notices to delinquent property owners. The county treasurer is charged with compiling records of delinquent amounts owed (Utah Code § 59-2-1339), preparing for tax sales (Utah Code § 59-2-1343), and issuing certificates of redemption (Utah Code

§ 59-2-1348). Bennion is not, and never has been, a county treasurer. There are no facts describing contact between him and the Salt Lake County treasurer. Tracy therefore provided no well-pled non-speculative facts establishing Tracy's right to relief against Bennion.

Tracy's claim against Bennion is also illogical and inherently contradictory. Instructing fellow LDS Church members to pay their water bills and attempting to shield them from allegedly improper collection efforts does not infringe anyone's civil rights. The allegation that Bennion counseled LDS Church members to pay water bills also contradicts the allegation that Bennion actively conspired with the Simplifi defendants to devise a scheme that would allow LDS Church members to not pay those same fees. Regardless, the allegations of the complaint do not even set forth the facts to support such a scenario, even if it were plausible. Tracy's complaint against Bennion does not meet the plausibility standard.

Tracy's response to these arguments below failed to establish how he had stated any plausible claim against Bennion. Tracy made no attempt to explain how he had alleged a plausible section 1983 claim against Bennion. R.81–95. And his only argument that he had properly alleged a section 1985 claim was that he had alleged that Bennion instructed church members to

pay their water bills so that the EID would have the money it needed to continue operating and providing water to Bennion's home. R.89–95. But that allegation does not establish that Bennion had any discriminatory animus against individuals who were not members of the LDS Church, let alone Penske in particular. *See Tilton v. Richardson*, 6 F.3d 683, 686 (10th Cir. 1993) (holding that section 1985(3) "does not . . . reach conspiracies motivated by an economic or commercial bias").

As with the statute of limitations issue, this basis for dismissal has been fully briefed both below and now on appeal. R.75–78, 89–95, 152–54. Tracy also had the opportunity to develop the factual record below and, in fact, alleged additional facts to attempt to avoid dismissal under Rule 12(b)(6). R.89–95. Finally, "[t]he legal sufficiency of a complaint is a question of law . . . reviewed de novo." *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009). This Court can therefore affirm on this alternative ground. *See Hall*, 798 F. App'x at 220.

CERTIFICATE EXPLAINING NECESSITY OF SEPARATE BRIEF OF APPELLEE

Bennion has filed a separate brief because his alleged involvement in this case is fundamentally different than that of the Simplifi defendants. While the Simplifi defendants operate the EID and are responsible for

collecting fees levied on its behalf, Bennion has "no direct interest in EID or Simplifi." R.217. Bennion acted only as a "'religious leader and LDS member.'" R.217.

Bennion's distinct involvement provides independent bases for dismissing the complaint as to him and for affirming the district court's order denying leave to amend any claims against Bennion. Bennion also possesses his own statute of limitations defense. He has therefore filed a separate brief to address these distinct grounds for affirming the judgment as to him.

CONCLUSION

For the foregoing reasons, this Court should affirm both the dismissal of the complaint for lack of subject matter jurisdiction and the order denying leave to amend.

Respectfully submitted on July 1, 2022.

/s/ Christopher D. Ballard
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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

This brief of 9587 words, excluding the sections exempted by Fed. R. App. P. 32(f), complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). Having been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in 14-point Book Antiqua font, the brief also complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6).

/s/ Christopher D. Ballard

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that: (1) all required privacy redactions have been made in compliance with 10th Cir. R. 25.5; (2) the ECF submission is an exact copy of the hard copies submitted to the court; and (3) the digital submission has been scanned for viruses with the most recent version of Malwearbytes Premium 4.5.9.198, last updated on July 1, 2022, and according to the program is free of viruses.

/s/ Christopher D. Ballard

CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2022, I electronically filed the foregoing Brief of Appellee David M. Bennion using the court's CM/ECF system, which sent notification of the filing to

Jeremy R. Cook
Bradley M. Strassberg

Attorneys for defendants
Simplifi Company
Jennifer Hawkes
Eric Lee Hawkes
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I further certify that on July 1, 2022, I emailed a copy of the foregoing Brief of Appellee David M. Bennion to the following non-ECF participant at

Mark Christopher Tracy
m.tracy@echo-association.com

/s/ Christopher D. Ballard

ATTACHMENTS

Attachment 1

Attachment 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

MARK CHRISTOPHER TRACY, d/b/a/ Emigration Canyon Home Owners Association, Plaintiff, v. SIMPLIFI ET AL., Defendants.	**REPORT AND RECOMMENDATION** Case No. 2:21-cv-0444-RJS-CMR District Judge Robert J. Shelby Magistrate Judge Cecilia M. Romero

Before the court is (1) Defendants' Simplifi Company, Jennifer Hawkes, Eric Hawkes, and Jeremy R. Cook's (collectively Simplifi or Simplifi Defendants) Motion to Dismiss (ECF 6) and Defendant David M. Bennion's (Bennion) Motion to Dismiss (ECF 7) (collectively Motions) referred to the undersigned pursuant to 28 U.S.C. § 636 (b)(1)(B) (ECF 5). Pursuant to Rule 7-1(f) of the Rules of Practice for the United States District Court for the District of Utah (Local Rules), the court concludes that oral argument is not necessary and will determine the pending Motions based on the written memoranda. For the reasons discussed herein, the court recommends the Motions be granted.

I. BACKGROUND

The Complaint indicates the suit is brought by "Mark Christopher Tracy" (Mr. Tracy) "d/b/a Emigration Canyon Home Owners Association" also referred to throughout the Complaint as "ECHO-Association" (collectively Plaintiff) (ECF 1). ECHO-Association alleges it was assigned "legal right and title to Civil Rights Act Claims" by a canyon property owner, Karen Penski (ECF 1 at 2). As alleged in Plaintiff's Complaint, the Emigration Improvement District (EID) is a special service water district created in 1968 by Salt Lake County (ECF 1 at 3). EID

was created to provide water and sewer services to the residents of Emigration Canyon, a township in Salt Lake County, Utah (ECF 1 at 2). EID contracts with Defendant Eric Hawkes' account services provider and Simplifi, to perform management and accounting services for EID (ECF 1 at 2). Defendant Jeremy R. Cook is legal counsel for EID (*Id.*). Defendant Jennifer Hawkes is alleged to be an officer or director of Simplifi (*Id.*). According to Plaintiff's Complaint, Defendant David Bennion has no direct interest in EID or Simplifi (ECF 1 at 3).

Plaintiff filed its Complaint against Defendants on behalf of Emigration Canyon resident Karen Penske (Penske) alleging violations of 42 U.S.C. §§ 1983 and 1985 (ECF 1). Specifically, Plaintiff alleges that EID began wrongfully imposing/collecting a "fire-hydrant rental fee" from Emigration Canyon residents and wrongfully demanded payment for past dues from Penske (ECF 1 at 9). EID however is not a named defendant in this action. The Complaint seeks damages for each payment Penske has made to EID including "any past and future lien placed on Penske's' property by Defendants," punitive damages, and an award to Mr. Tracy for legal fees and costs (ECF 1 at 11).

Defendants seeks dismissal of Plaintiff's claims against them pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) (ECF 6). Specifically, Simplifi Defendants argue Plaintiff lacks standing to assign a claim under 42 U.S.C. §§ 1983 or 1985 and that Plaintiff has failed to state a claim for which relief can be granted (ECF 6). Simplifi Defendants also seek an award of attorney fees and costs in accordance with 42 U.S.C. § 1988, a finding that Mr. Tracy is a vexatious litigant and subject to pre-filing restrictions and asks the court to issue an order to show cause requiring Mr. Tracy to establish his factual basis for the allegations in the Verified Complaint. Defendant Bennion incorporates by reference Simplifi's grounds for dismissal and,

in addition, argues Plaintiff's claim should be dismissed as untimely (ECF 7).[1] In its Memorandum in Opposition to Defendants' Motions to Dismiss (Opposition) (ECF 8), Plaintiff asserts Mr. Tracy has legal standing to assert assigned and his own civil rights claims, that the instant action accrued within the statute of limitation period, and that Mr. Tracy has sufficiently plead a section 1985 claim (ECF 8).

Upon review of the Motions, Plaintiff's Opposition, and Defendants' respective reply memoranda in support of the Motions (ECF 9, 10), the undersigned finds Defendants' arguments for dismissal based on lack of jurisdiction pursuant to Rule 12(b)(1) dispositive. Accordingly, the court will only address this dispositive issue.

II. LEGAL STANDARDS

As an initial matter, because Plaintiff is proceeding *pro se*, the court construes its pleadings liberally and holds them to a less stringent standard than formal pleadings drafted by lawyers. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, it is not the court's function to assume the role of advocate on behalf of pro se litigants. *See id.* The court "will not supply additional factual allegations to round out a plaintiff's complaint or construct a legal theory on a plaintiff's behalf." *Whitney v. New Mexico*, 113 F.3d 1170, 1173–74 (10th Cir. 1997). The court reviews the pleadings in light of these standards.

Rule 12(b)(1) of the Federal Rules of Civil Procedure allows a party to raise the defense that the court lacks jurisdiction over the subject matter. Fed. R. Civ. P. 12(b)(1). The Tenth Circuit has held that motions to dismiss for lack of subject matter jurisdiction take two forms, facial and factual. *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995), *abrogated on other grounds by Cent. Green Co. v. United States*, 531 U.S. 425, 437 (2001). A facial attack on

[1] For ease of reference, the court will refer to Bennion and the Simplifi Defendants generally as Defendants when addressing their arguments collectively.

the complaint's allegations as to subject matter jurisdiction questions the sufficiency of the complaint. *Id*. (citing *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990). In reviewing a facial attack on the complaint, the court must accept the allegations in the complaint as true. *Id*. Defendants' Motions constitute a facial challenge.

In evaluating a motion under Rule 12(b)(1), the court is charged with evaluating the allegations of fact as alleged in the complaint to determine whether it has jurisdiction over the matter, without regard to conclusory allegations of jurisdiction. *Montanez v. Future Vision Brain Bank, LLC,* 536 F. Supp. 3d 828, 832 (D. Colo. 2021). Plaintiff bears the burden of establishing subject matter jurisdiction. *Id*. A dismissal pursuant to Rule 12(b)(1) is "not a judgment on the merits of a plaintiff's case, but only a determination that the court lacks authority to adjudicate the matter." *Id*. If a party lacks standing to bring a particular legal challenge, the court lacks jurisdiction to resolve the claim's merits. *Yeager v. Fort Knox Sec. Prod.*, 672 F. App'x 826, 829 (10th Cir. 2016).

III. DISCUSSION

A. Plaintiff lacks standing.

The federal constitutional standing requirements of Article III of the United States Constitution requires a plaintiff seeking judicial relief to establish: "(1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision." *United Food & Commercial Workers Union Local 751 v. Brown Grp.*, Inc., 517 U.S. 544, 551 (1996). The injury-in-fact requirement ensures that the plaintiff has a personal stake in the outcome of the controversy. *Susan B. Anthony v. Driehaus*, 573 U.S. 149, 158 (2014) (citation omitted).

The question of standing focuses on the party filing the complaint rather than the issue asserted, and focuses on whether the party alleges "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends. . . ." *Baker v. Carr*, 369 U.S. 186, 204 (1962). A plaintiff is generally required to assert his own legal rights and interests, and not those of third parties. *Warth v. Seldin*, 422 U.S. 490, 499 (1975). However, an assignee may satisfy the case and controversy requirement through a valid assignment. *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 285 (2008) (finding lawsuits by assignees, with legal title to bring suit, are "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process"). Notwithstanding, claims under Sections 42 U.S.C. §§ 1983 and 1985 are not assignable.

1. Section 1983 claims are not assignable in Utah.

42 U.S.C. § 1983 was designed to provide means of redress for individuals to deter state actors from depriving them of their federal civil rights. *Richardson v. McKnight*, 521 U.S. 399, 403 (1997). Section 1983 claims cannot be assigned under Utah law, which law is applied to actions in this Court. *See American Charities for Reasonable Fundraising Regulation, Inc. v. O'Bannon*, No. 2:08-cv-875-RJS, 2016 WL 4775527, at *6 (D. Utah Sept. 13, 2016) (unpublished) (because section 1983 provides no direct guidance on whether an individual may transfer right to sue under the provision, court considered application of state law in determining section 1983 claims are best characterized as tort claims and not assignable under Utah law).[2]

[2] In his Opposition, Plaintiff challenges the validity of the *American Charities* case based on the Tenth Circuit's subsequent opinion dismissing the appeal as moot and instructing the district court to vacate its judgment and dismiss the case. *See American Charities for Reasonable Fundraising Regulation, Inc. v. O'Bannon*, 909 F.3d 329 (10th Cir. 2019) (ECF 8 at 4). However, the Tenth Circuit has not overruled or overturned the relevant analysis applied by the court, rather, it evaluated a change in Utah law regarding the underlying dispute in *American Charites* rendered the appeal moot which warranted dismissal of the matter.

The purpose of these civil rights claims is to ensure that individuals whose rights are abridged may recover damages or secure injunctive relief. *Id*. Those goals are not met when claims are assigned to disinterested third parties. *Id*.

The allegations in the Complaint center on EID's collection of fees and speculative enforcement actions against residents of Emigration Canyon, specifically Penske —not Plaintiff. While Plaintiff's Complaint alleges that Penske assigned present and future civil rights claims to Plaintiff (ECF 1 at ¶ 46), Plaintiff has no personal stake in this case. The law does not recognize Penske's assigning her section 1983 civil rights claims to Plaintiff, a disinterested third-party. Plaintiff therefore has no standing to assert Penske's Section 1983 claims against Defendants. Plaintiff has not presented any valid legal authority to the contrary.

Plaintiff cites to *Wilson v. Garcia*, 471 U.S. 261 (1985), arguing the claims at issue are properly characterized as property claims as opposed to a tort claim. Nothing in *Wilson* supports this position. The court in *Wilson* approved of characterizing a Section 1983 claim as a personal injury tort action. 471 U.S. at 280 (holding that § 1983 claims are best characterized as personal injury actions).

2. Section 1985 claims are not assignable in Utah

42 U.S.C. § 1985 provides a civil remedy for conspiracies to interfere with constitutionally or federally protected rights when motivated by a discriminatory animus. *See Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971). In *American Charities v. O'Bannon*, the court likened 1983 claims to personal injury tort actions in finding section 1983 claims are not assignable under Utah Law. 2016 WL 4775527, at *6. The Tenth Circuit, looking to state law where the federal civil rights law does not provide the rules of decision, has also characterized Section 1983 and 1981 claims as personal injury actions. *See Baker v. Bd. Of Regents of State of*

Kan., 991 F.2d 628, 630 (10th Cir. 1993). Following this line of reasoning, courts in this district have held claims made pursuant to 42 U.S.C. § 1985 are similar to civil rights actions under Sections 1983 and 1981 in that they are analogous to a personal injury action. *See Desai v. Garfield Cty. Gov't*, No. 2:17-cv-00024-JNP-EJF, 2018 WL 1627205, at *3 (D. Utah Feb. 16, 2018), *report and recommendation adopted*, 2018 WL 1626521 (D. Utah Mar. 30, 2018) (applying Utah's statute of limitations for personal injury actions to plaintiff's section 1981, 1983, and 1985 claims). Tort claims arising out of personal injury are not assignable under Utah law. *Gilbert v. DHC Dev., LLC*, 2013 WL 4881492, at *11 (D. Utah Sept. 12, 2013). Therefore, Plaintiff lacks standing as Penske could not assign her tort claim under section 1985 to Plaintiff, a disinterested third-party.

In its Opposition, Plaintiff asserts "[a]ssignment of claims for willful damage to private property under the color of state law are lawful, and Mr. Tracy has timely filed and sufficiently pled the requirements of an unlawful conspiracy of private persons under 42 U.S.C. § 1985(3)" citing to *Griffin v. Breckenridge* (ECF 8 at 3). Nothing in the Supreme Court's decision in *Griffin v Breckenridge*, 403 U.S. 88, stands for the proposition that section 1985 claims are assignable, and the court is not persuaded by Plaintiff's argument to find otherwise.

Because Penske could not legally assign her civil rights claims to Plaintiff, Plaintiff has failed to demonstrate a personal stake in the outcome of the controversy as required to establish standing. Thus, the court lacks jurisdiction to resolve the merits of the claim and must dismiss the Complaint.

B. Amendment would be futile.

In the Opposition, Plaintiff requests the court deny Defendants' Motions, or "in the alternative grant leave to file amendment to incorporate additional factual information" and

argues the court should grant Mr. Tracy "leave to assert impairment of his own constitutionally protected property right" (ECF 8).[3] While the preferred practice is to afford a *pro se* plaintiff notice and an opportunity to be amend the complaint, a court may dismiss a case when it is "'obvious that the plaintiff cannot prevail on the fact he has alleged and it would be futile to give him an opportunity to amend.'" *Curley v. Perry*, 246 F.3d 1278, 1281 (10thCir. 2001)(internal citations omitted). Here it is clear Mr. Tracy could not prevail based on the facts alleged. The court therefore finds it would be futile to allow him an opportunity to amend.

Mr. Tracy, neither on behalf of himself nor ECHO-Association, offers anything to support he may have claims of his own. Moreover, the Complaint itself is devoid of any supporting facts to suggest Mr. Tracy has standing to assert his own claim against the Defendants. Rather, the Complaint makes it clear that only ECHO-Association was "assigned legal right and title to Civil Rights Act claims" (ECF 1 at 2).

Additionally, taking the allegation at face value, Mr. Tracy cannot represent ECHO-Association. *See* Local Rule 83-1.3(c) (any corporation, association, partnership, or any other artificial entity must be represented by an attorney who is admitted to practice in this court). Mr. Tracy is not licensed to practice in the state of Utah and is proceeding without the assistance of an attorney who is admitted to practice in this court. ECHO, as an association or other fictional entity, must be represented by counsel admitted to practice in this court. Thus, the undersigned recommends dismissing the Complaint with prejudice.

[3] Though the court need not consider any relief sought in a response or opposition, in liberally construing Plaintiff's pleadings, the court considered Plaintiff's request. *See* DUCivR 7-1(b) (motions are not to be made in response or reply memorandum).

C. The court declines to impose any sanctions.

Defendants seek an award of attorney fees and costs against Mr. Tracy in accordance with 42 U.S.C. § 1988 (ECF 6 and 7). Simplifi also requests a finding that Mr. Tracy is a vexatious litigant and a show cause hearing to address Mr. Tracy's factual basis for the allegations in the Verified Complaint (ECF 6). The court declines these requests at present.

Rarely will a case be sufficiently frivolous to justify imposing attorneys' fees on the plaintiff. *Thorpe v. Ancell*, 367 F. App'x 914, 924 (10th Cir. 2010) (quoting *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1581 (10th Cir.1995) (only in "rare circumstances" will "a suit [be] truly frivolous so as to warrant an award of attorneys' fees to the defendant")). The purpose of an award of fees in a §1983 case is not merely to provide some compensation to the defendants for costs incurred in defending a suit but to deter a plaintiff from filing patently frivolous and groundless suits. *Thorpe v. Ancell*, 367 F. App'x at 920. While there is not a legal basis for Plaintiff's claim, the court is not able to find fees are justified here.

With respect to the request to label Mr. Tracy as a vexatious litigant, the court takes judicial notice of the six additional lawsuits Mr. Tracy has filed against Simplifi and/or people or entities associated with the Simplifi Defendants,[4] including the District of Utah case in which Mr. Tracy sued EID, among others, and Judge Parrish found Mr. Tracy's behavior was vexatious and his suit was brought primarily for the purposes of harassment. *USA ex rel Mark Christopher Tracy v. Emigration Improvement District et al*, Case No. 2:14-cv-00701-JNP, ECF 243, 342, United States District Court, District of Utah (February 5, 2019). While the court acknowledges

[4] *Emigration Canyon Home Owners v. Emigration Improvement District*, Case No. 190901675, Third District of Utah (Feb. 25, 2019); *Emigration Canyon Home Owners v. Emigration Improvement District*, Case No. 190904621, Third District of Utah (June 11, 2019); *Mark Christopher Tracy v. Simplifi Company, et al.*, Case No. 200905074, Third District of Utah (Aug. 10, 2020); *Mark Christopher Tracy v. Simplifi Company, et al.*, Case No. 200905123, Third District of Utah (Aug. 10, 2020).

the Simplifi Defendants' frustration with Mr. Tracy and finds it curious that EID is noticeably absent as a named party in this matter, with the information presented, the undersigned cannot find Mr. Tracy's other suit in federal court demonstrates an abusive lengthy history of litigation in this court which would warrant imposition of filing restrictions. *See Blaylock v. Tinner*, 543 F. App'x 834, 836 (10th Cir. 2013) ("[i]njunctions that assist the district court in curbing a litigant's abusive behavior are proper where the litigant's abusive and lengthy history is properly set forth") (internal citations omitted). The court however acknowledges this is a close call. The court also finds issuing an order to show cause unnecessary given the recommendation of a dismissal with prejudice.

RECOMMENDATION

As outlined above, the undersigned RECOMMENDS:

(1) Simplifi Defendant's Motion to Dismiss (ECF 6) be GRANTED; and

(2) Defendant Bennion's Motion to Dismiss (ECF 7) be GRANTED and the Complaint be dismissed with prejudice.

NOTICE

Copies of the foregoing Report and Recommendation are being sent to all parties who are hereby notified of their right to object. Within fourteen (14) days of being served with a copy, any party may serve and file written objections. *See* Fed. R. Civ. P. 72(b)(2). Failure to object may constitute a waiver of objections upon subsequent review.

DATED this 18 January 2022.

Cecilia M. Romero

Magistrate Judge Cecilia M. Romero
United States District Court for the District of Utah

Attachment 2

Attachment 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

MARK CHRISTOPHER TRACY, Plaintiff, v. SIMPLIFI COMPANY, a Utah Corporation; JENNIFER HAWKES, an individual; ERIC LEE HAWKES, an individual; JEREMY R. COOK, an individual; DAVID M. BENNION, an individual; and DOES 1-46, Defendants.	**MEMORANDUM DECISION AND ORDER ADOPTING REPORT AND RECOMMENDATION** Case No. 2:21-cv-00444-RJS-CMR Chief District Judge Robert J. Shelby Magistrate Judge Cecilia M. Romero

Before the court are the parties' Objections[1] to Magistrate Judge Cecilia M. Romero's Report and Recommendation,[2] in which Judge Romero recommends that the Defendants' Motions to Dismiss[3] be granted but denies Defendants' request for attorneys' fees. For the reasons stated below, the Objections are overruled, the Report and Recommendation is adopted in its entirety, the Defendants' Motions to Dismiss are granted, and the Complaint[4] is dismissed with prejudice.

[1] Dkt. 13 (Defendants Cook, Hawkes, Hawkes, and Simplifi's Objection to Report and Recommendation); Dkt. 14 (Defendant Bennion's Objection to Report and Recommendation); Dkt. 15 (Plaintiff Tracy's Objection to Report and Recommendation).

[2] Dkt. 12 (Report and Recommendation).

[3] Dkt. 6 (Motion to Dismiss filed by Defendants Cook, Hawkes, Hawkes, and Simplifi); Dkt. 7 (Motion to Dismiss filed by Defendant Bennion).

[4] Dkt. 2 (Complaint).

FACTUAL BACKGROUND[5]

The suit is brought by Plaintiff Mark Christopher Tracy, along with his "registered dba entity," the Emigration Canyon Homeowners Association, or ECHO-Association.[6] Tracy alleges that "from sometime in 2013 to the present day," the Defendants "knowingly conspired to impair a constitutionally protected property right to safe drinking water and thus the use and enjoyment of a private home in Emigration Canyon" which is in Salt Lake County, Utah.[7]

Specifically, Tracy alleges the Defendants act through the Emigration Improvement District (EID), a special service water district created in 1968 by Salt Lake County.[8] Tracy alleges: (1) that EID contracts with Defendant Simplifi Corporation to perform management and accounting services, (2) Defendant Jennifer Hawkes is a current officer and director of Simplifi, (3) her spouse, Defendant Eric Lee Hawkes, is the current general manager of EID, (4) Defendant Jeremy Cook represents the Hawkes in pending EID-related litigation, and (5) Defendant Bennion "is a religious leader and LDS member" with no direct interest in EID or Simplifi.[9] Tracy alleges that together, Defendants act "to unlawfully enrich themselves through the operation of a destructive water system and improper billing of fees and costs collected via Salt Lake County tax-foreclosure proceedings against nonmembers of the Church of Jesus Christ of Latter-Day Saints Emigration Canyon Ward."[10] Tracy specifically alleges the Defendants began wrongfully imposing and collecting a "fire-hydrant rental fee" from Emigration Canyon

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[5] Because Judge Romero's Report and Recommendation concerns a Motion to Dismiss, the well-pleaded allegations in the Complaint are assumed to be true and viewed in the light most favorable to the non-moving party, Tracy. *See Beedle v. Wilson*, 422 F.3d 1059, 1063 (citation omitted).

[6] Complaint (Dkt. 1) ¶ 1.

[7] *Id.* at 2 (Introduction).

[8] *Id.* ¶¶ 10–11. Notably, EID is not named as a Defendant in this action. *See id.* ¶¶ 2–6 (naming Defendants).

[9] *Id.* ¶¶ 3–6.

[10] *Id.* at 2 (Introduction).

residents who are not LDS members, including longtime resident Karen Penske, and also demanded past due payment from Penske.[11]

PROCEDURAL HISTORY

On July 22, 2021, Tracy filed his Complaint pro se against Simplifi, Jennifer and Eric Lee Hawkes, Cook, and Bennion.[12] Tracy brings the action under 42 U.S.C. § 1983 and § 1985 on behalf of Karen Penske.[13] Specifically, the Complaint states that "[f]or good and valuable consideration, Canyon property owner and LDS non-member [Penske] assigned legal right and title to Civil Rights Act claims to [ECHO]."[14] The Complaint alleges Penske acquired the perfected underground water right 57-8582 to water attained from Emigration Canyon's Twin Creek Aquifer to serve her private home, EID acquired the Boyer Water System[15] and caused contamination in Penske's private well, and Defendants (collectively) began to charge Penske a "fire hydrant rental fee."[16] The Complaint further alleges that Defendants only certified "delinquent accounts" to the city of Salt Lake, including Penske's, belonging to "LDS Nonmembers."[17] The Complaint seeks damages against the Defendants "for each payment made by Ms. Penske to include any past and future lien placed on her property by Defendants to include monetary renumeration for economic damage and loss" as well as "punitive damages for malicious and/or reckless conduct" as alleged in the Complaint.[18]

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[11] *Id.* ¶¶ 34–40.

[12] *See id.* at 1 (Caption).

[13] *Id.*

[14] *Id.* at 2 (Introduction).

[15] Tracy alleges the Boyer Water System has contaminated the aquifer due to the actions of Defendants. *Id.* ¶¶ 18, 24.

[16] *Id.* ¶¶ 10–46.

[17] *Id.* ¶ 37.

[18] *Id.* at 11 (Request for Relief).

On August 9, 2021, the case was assigned to the undersigned.[19] On August 11, 2021, the case was referred to Judge Romero pursuant to 28 U.S.C. § 636(b)(1)(B).[20]

On August 27, 2021, Defendants Simplifi, Jennifer Hawkes, Eric Hawkes, and Jeremy Cook (Defendants) filed a Motion to Dismiss pursuant to Rule 12(b)(1) and 12(b)(6), Federal Rules of Civil Procedure.[21] These Defendants argued the Complaint should be dismissed pursuant to Rule 12(b)(1) because Penske's § 1983 and § 1985 claims cannot be assigned, and therefore Tracy lacked standing to bring the suit.[22] The Defendants further argued the Complaint should be dismissed pursuant to Rule 12(b)(6) because Tracy failed to allege sufficient facts to support his theory of § 1983 and § 1985 claims based on discrimination against LDS nonmembers.[23] The Defendants additionally sought an award of attorneys' fees pursuant to 42 U.S.C. § 1988,[24] a determination Tracy is a vexatious litigant so that a pre-filing order may be imposed on him,[25] and finally, for a show cause order to issue requiring Tracy to provide the basis for the allegations made in the Complaint.[26]

On September 22, 2021, Defendant Bennion filed his own Motion to Dismiss.[27] In it, he argued: (1) Tracy lacked standing to bring the claim due to the unassignability of § 1983 and § 1985 claims, (2) the statute of limitations barred Tracy's claims as brought against Bennion, and

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[19] Dkt. 4 (Docket Text Order).

[20] Dkt. 5 (Docket Text Order Referring Case). Under 28 U.S.C. § 636(b)(1)(B), the magistrate judge handles all matters in a case up to a Report and Recommendation on a dispositive motion.

[21] Dkt. 6 (Defendants' Motion to Dismiss).

[22] *Id.* at 6–7.

[23] *Id.* at 7–10.

[24] *Id.* at 10–12.

[25] *Id.* at 12.

[26] *Id.* at 13–14.

[27] Dkt. 7 (Defendant Bennion's Motion to Dismiss).

(3) Tracy's claim lacked specific factual allegations concerning Bennion, and thus failed to satisfy pleading standards in Rule 8, Federal Rules of Civil Procedure.[28] Bennion also incorporated by reference the arguments for dismissal in the Defendants' Motion.[29]

On September 24, 2021, Tracy filed a Memorandum in Opposition to the Motions to Dismiss, arguing he had standing to bring Penske's § 1983 and § 1985 claims or in the alternative, "should be granted leave to assert impairment of his own constitutionally protected property right." Tracy further argued the action was timely and the claims were sufficiently pleaded.[30] On October 7 and 8, 2021, the Defendants and Defendant Bennion each filed a Reply in support of their Motions to Dismiss.[31]

On January 19, 2022, Judge Romero issued a Report and Recommendation (the Report), recommending the Motion to Dismiss be granted pursuant to Rule 12(b)(1).[32] Because Judge Romero found the Rule 12(b)(1) argument dispositive, she did not consider the Defendants' Rule 12(b)(6) arguments.[33] She also determined an award of attorneys' fees was not warranted, and did not recommend imposing a pre-filing restriction or issuing a show-cause order.[34]

On February 2, 2022, the parties filed three Objections to the Report.[35] The court turns to the parties' arguments.

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[28] *Id.* at 1 (summarizing argument).

[29] *Id.* at 1–2.

[30] Dkt. 8 (Memorandum in Opposition to Motion to Dismiss).

[31] Dkt. 9 (Defendants' Reply in Support of Motion to Dismiss); Dkt. 10 (Defendant Bennion's Reply in Support of Motion to Dismiss).

[32] Dkt. 12 (Report and Recommendation).

[33] *Id.* at 3.

[34] *Id.* at 9–10.

[35] Dkt. 13 (Defendants' Objection to Report and Recommendation); Dkt. 14 (Defendant Bennion's Objection to Report and Recommendation); Dkt. 15 (Plaintiff Tracy's Objection to Report and Recommendation).

LEGAL STANDARDS

Tracy proceeds pro se. While the court "liberally construe[s] pro se pleadings," "pro se status does not excuse the obligation of any litigant to comply with the fundamental requirements of the Federal Rules of Civil . . . Procedure."[36]

The applicable standard of review in considering objections to a magistrate judge's report and recommendation depends on whether a party lodges an objection to it.[37] When assessing unobjected-to portions of a report and recommendation, the Supreme Court has suggested no further review by the district court is required, but neither is it precluded.[38] This court generally reviews unobjected-to portions of a report and recommendation for clear error.[39]

However, Federal Rule of Civil Procedure 72(b)(2) allows parties to file "specific written objections to the proposed findings and recommendations."[40] In those instances, "[t]he district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to."[41] To qualify as a proper objection that triggers de novo review, the

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[36] *Ogden v. San Juan Cty.*, 32 F.3d 452, 455 (10th Cir. 1994) (citation omitted).

[37] *See* Fed. R. Civ. P. 72(b)(3) ("The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to.").

[38] *See Thomas v. Arn*, 474 U.S. 140, 149 (1985) ("The [Federal Magistrate's Act] does not on its face require any review at all, by either the district court or the court of appeals, of any issue that is not the subject of an objection."); *id.* at 153–54 (noting that "it is the district court, not the court of appeals, that must exercise supervision over the magistrate," so that "while the statute does not require the judge to review an issue *de novo* if no objections are filed, it does not preclude further review by the district judge, *sua sponte* or at the request of a party, under a *de novo* or any other standard").

[39] *See, e.g., Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 739 (7th Cir. 1999) ("If no objection or only partial objection is made [to a magistrate judge's report and recommendation], the district court judge reviews those unobjected portions for clear error.") (citations omitted); *see also* Fed. R. Civ. P. 72(b) Advisory Committee's note to 1983 amendment ("When no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.") (citing *Campbell v. U.S. Dist. Court for N. Dist. of Cal.*, 501 F.2d 196, 206 (9th Cir. 1974), *cert. denied*, 419 U.S. 879).

[40] Fed R. Civ. P. 72(b).

[41] *Id.* 72(b)(3); *see also Summers v. Utah*, 927 F.2d 1165, 1167 (10th Cir. 1991) ("De novo review is statutorily and constitutionally required when written objections to a magistrate's report are timely filed with the district court.") (citations omitted).

objection must be both timely—that is, made within fourteen days—and "sufficiently specific to focus the district court's attention on the factual and legal issues that are truly in dispute."[42] Thus, de novo review is not required where a party advances objections to a magistrate judge's disposition that are either indecipherable or overly general.[43]

A defendant may move to dismiss a complaint under Rule 12(b)(1) on the ground that the court lacks subject matter jurisdiction.[44] Motions to dismiss for lack of subject matter jurisdiction take two forms: facial and factual.[45] Defendants' Motions constitute a facial challenge. A facial attack on subject matter jurisdiction challenges the sufficiency of the allegations in the complaint, accepting as true the allegations therein.[46]

A plaintiff bears the burden of establishing subject matter jurisdiction.[47] The subject matter jurisdiction of federal courts is limited to cases in which the plaintiff can demonstrate he or she has met the case or controversy requirement of Article III, namely, that: "(1) he or she has suffered an injury in fact; (2) there is a causal connection between the injury and the conduct complained of; and (3) it is likely that the injury will be redressed by a favorable decision."[48] These three elements of Article III standing—injury, causation, and redressability—are

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[42] *United States v. One Parcel of Real Prop.*, 73 F.3d 1057, 1060 (10th Cir. 1996) ("[W]e hold that a party's objections to the magistrate judge's report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review.").

[43] *See id.* ("Just as a complaint stating only 'I complain' states no claim, an objection stating only 'I object' preserves no issue for review.") (citation omitted); *see also Moore v. Astrue*, 491 F. App'x 921, 922 (10th Cir. 2012) (upholding district court's clear error review of magistrate judge's report and recommendation because Plaintiffs objected only "generally to every finding" in the report).

[44] Fed. R. Civ. P. 12(b)(1).

[45] *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995), *abrogated on other grounds by Cent Green Co. v. United States*, 531 U.S. 425, 437 (2001).

[46] *Id.* (citation omitted).

[47] *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974).

[48] *Winsness v. Yocom*, 433 F.3d 727, 731–32 (10th Cir. 2006) (citation omitted).

necessary for the court to exercise subject matter jurisdiction.[49] To demonstrate injury, a plaintiff must show they have a personal stake in the outcome of the case.[50]

ANALYSIS

As a threshold issue, all three Objections are timely because they were each filed on February 2, 2022, within fourteen days of the Report.[51] The court considers each Objection in turn.

I. Tracy's Objection to Judge Romero's Report is Overruled

For the reasons explained below, Tracy's Objection to the Report is overruled. First, the court summarizes Judge Romero's analysis of the parties' Rule 12(b)(1) arguments before turning to Tracy's objection.

In the Report, Judge Romero explained that while "[a] plaintiff is generally required to assert his own legal rights and interests, and not those of third parties,"[52] "an assignee may satisfy the case and controversy requirement through a valid assignment."[53] Judge Romero then determined that claims brought under 42 U.S.C. §§ 1983 and 1985 are not assignable, and accordingly recommended dismissing the Complaint for lack of subject matter jurisdiction. As to § 1983 claims, Judge Romero noted this court previously decided in *American Charities for Reasonable Fundraising Regulation, Inc. v. O'Bannon* that § 1983 claims are not assignable under Utah law.[54] That case explained that under Supreme Court precedent and federal law, because § 1983 provides no guidance on whether an individual may transfer the right to sue,

[49] *Schutz v. Thorne*, 415 F.3d 1128, 1133 (10th Cir. 2005).

[50] *See, e.g.*, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (citation omitted).

[51] *See* Defendants' Objection; Defendant Bennion's Objection; Tracy's Objection.

[52] Report (Dkt. 12) at 5 (citing *Warth v. Seldin*, 422 U.S. 490, 499 (1975)).

[53] *Id.* (citing *Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 285 (2008)).

[54] *Id.* at 5 (citing No. 2:08-cv-875, 2016 WL 4775527, at *6 (D. Utah Sept. 13, 2016).

courts must look to state law to determine whether such a claim can be assigned.[55] Because § 1983 claims are characterized as personal injury torts,[56] and under Utah law, such personal injury tort claims cannot be assigned, § 1983 claims cannot be assigned.[57] The *American Charities* court observed that this result accords with the purpose of § 1983, which is to allow individuals to assert their own civil rights, a purpose that is not met by assigning those rights to disinterested third parties.[58] Guided by *American Charities*, Judge Romero determined that Penske could not assign her to § 1983 claim to Tracy, a disinterested third party.[59] Judge Romero further observed that Tracy's argument in Opposition that *American Charities* had been abrogated by a later Tenth Circuit decision was incorrect, because the Tenth Circuit dismissed the appeal as moot based on a change in the underlying Utah law in the dispute but did not overturn or even address the analysis concerning § 1983.[60] As to the § 1985 claims, Judge Romero found that because "courts in this district" have also characterized § 1985 claims as personal injury claims, under the same logic, those claims also may not be assigned in Utah because Utah law forbids the assignment of personal injury claims.[61]

First, the court determines whether Tracy's objection is specific enough to trigger de novo review of any section of the Report. Most of Tracy's Objection is spent enumerating the general facts of the case, including a history of the water rights in Emigration Canyon.[62]

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[55] 2016 WL 4775527, at *5 n.57 (citing *Wilson v. Garcia*, 471 U.S. 261, 267 (1985); 42 U.S.C. § 1988(a)).

[56] *Id.* (citing *Wilson*, 471 at 280).

[57] *Id.* at *6 (citing *State Farm Mut. Ins Co. v. Farmers Ins. Exch.*, 450 P.2d 458, 459 (Utah 1969)).

[58] *Id.*

[59] Report (Dkt. 12) at 5.

[60] *Id.* at 5 n.2 (citing *American Charities for Reasonable Fundraising Regulation, Inc. v. O'Bannon*, 909 F.3d 329 (10th Cir. 2019)).

[61] *Id.* at 7 (citing *Desai v. Garfield Cty. Gov't*, No. 2:17-cv-00024-JNP-EJF, 2018 WL 1627205, at *3 (D. Utah Feb. 16, 2018), *report and recommendation adopted*, 2018 WL 1626521 (D. Utah Mar. 30, 2018)).

[62] *See* Tracy's Objection (Dkt. 15) at 1–7.

However, he does lodge a specific objection to Judge Romero's determination that under a previous decision of this court, § 1983 and § 1985 claims are not assignable in Utah.[63] Specifically, Tracy contends that the decision was "vacated," and that under the Supreme Court's decision in *Wilson v. Garcia*, "the present case specially address a constitutional right to the use and enjoyment of private property in the form of a senior perfected water right and should be evaluated as such when deciding if the assignment of statutory federal civil right must be determined by state law."[64] Accordingly, the court will determine de novo whether § 1983 and § 1985 claims are assignable.

As to § 1983 claims, Judge Romero correctly determined that such claims are not assignable. Judge Romero was correct that the later Tenth Circuit decision vacating an appeal of *American Charities* did not address or overturn the analysis of assignability. Rather, that later decision recognized that a change in Utah law concerning charitable organizations rendered the appeal moot.[65] The Tenth Circuit did not address the lower court's analysis of assignability.[66]

Additionally, *Wilson v. Garcia* does not change this analysis, as Tracy contends. In fact, *Wilson v. Garcia* was superseded by a statute,[67] which recognizes "in all cases where [the federal laws] are not adapted to the [goal of protecting all persons in the United States in their civil rights], or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as

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[63] *Id.* at 7–10.

[64] *Id.* at 8–9 (citing *Wilson*, 471 U.S. at 267).

[65] *American Charities*, 909 F.3d at 331–32 (explaining appeal was rendered moot by change in Utah law).

[66] *See id.*

[67] *See Jones v. R. R. Donnelley & Sons Co.*, 541 U.S. 369, 380–81 (2004) (recognizing abrogation of *Wilson* by statute).

the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause."[68] Accordingly, when a federal statute is silent on the assignability of claims, as § 1983 is, the court must determine whether such a claim would be assignable in the state where it sits.[69] Because § 1983 claims are characterized as personal injury torts, and such claims are not assignable under Utah law, § 1983 claims are not assignable.[70]

For the same reason, Judge Romero was correct that § 1985 claims are not assignable. The Tenth Circuit has recognized that § 1985 claims are treated as personal-injury claims, and accordingly, the state law of personal injury has been applied to § 1985 claims to determine issues including the applicable statute of limitations.[71] Therefore, such claims would also not be assignable under Utah law as Utah law prohibits the assignment of personal injury claims.[72]

Accordingly, the court agrees with Judge Romero's determination that both § 1983 claims and § 1985 claims are not assignable under Utah law, and accordingly, Tracy lacks standing to bring the suit. Judge Romero correctly determined that, having failed to demonstrate standing, Tracy's Complaint must be dismissed pursuant to Rule 12(b)(1).[73]

Finally, the court must determine whether dismissal is with or without prejudice. Judge Romero's report determined that amendment would be futile in light of the unassignability of §

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[68] 42 U.S.C. § 1988(a); see also American Charities, 2016 WL 4775527, at *5 n.57 (citing *Wilson*, 471 U.S. at 267; 42 U.S.C. § 1988(a)).

[69] *American Charities*, 2016 WL 4775527, at *6.

[70] *Id.*

[71] *Lyons v. Kyner*, 367 F. App'x 878, 881–82 (10th Cir. 2010) (unpublished) (collecting cases); *see also Buck v. Utah Labor Com'n*, 73 Fed. App'x 345, 348 (10th Cir. 2003) (unpublished) (upholding district court's application of Utah's statute of limitations to § 1983 and § 1985 claims).

[72] *See American Charities*, 2016 WL 4775527, at *6.

[73] Judge Romero did not reach the Defendants' Rule 12(b)(6) arguments because the 12(b)(1) arguments were dispositive. The court agrees with Judge Romero's determination, and accordingly does not reach the Defendants' Rule 12(b)(6) arguments.

1983 and § 1985 claims, and that dismissal should be with prejudice.[74] Tracy did not lodge a specific objection to this section of Report, only generally stating he "should be granted leave to assert his own constitutionally protected water right."[75] Because objections that are overly general are not sufficient to trigger de novo review,[76] and Tracy does not address Judge Romero's analysis as to why amendment would be futile, this section of the Report is reviewed only for clear error. Finding no clear error in Judge Romero's determination,[77] the court concurs and dismisses Tracy's Complaint with prejudice.

II. Defendants' Objections to Judge Romero's Report are Overruled

For the reasons explained below, Defendants' Objections to the Report are overruled. First, the court summarizes Judge Romero's recommendations concerning attorneys' fees and a show-cause order before turning to Defendants' Objections.

Judge Romero explained that under Tenth Circuit precedent, "[r]arely will a case be sufficiently frivolous to justify imposing attorneys' fees on the plaintiff,"[78] the purpose of awarding fees is to "deter a plaintiff from filing patently frivolous and groundless suits," and that this case was not sufficiently frivolous to support an award of attorneys' fees.[79] As to filing restrictions, Judge Romero took judicial notice of six other lawsuits Tracy has filed against Defendants associated with EID or Simplifi, including one in federal court,[80] but explained that

[74] Report (Dkt. 12) at 7–8.

[75] Tracy's Objection (Dkt. 15) at 10 (citing Complaint ¶ 29).

[76] *One Parcel of Real Prop.*, 73 F.3d at 1060.

[77] *See* Report (Dkt. 12) at 8 (noting the Complaint contains no supporting facts suggesting Tracy has standing to assert a claim on his own, and that the Complaint is based on asserting the assignability of Penske's rights).

[78] *Id.* at 9 (citing *Thorpe v. Ancell*, 367 F. App'x 914, 924 (10th Cir. 2010) (quoting *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1581 (10th Cir. 1995)).

[79] *Id.*

[80] *Id.* at 9–10.

one other suit filed in federal court did not "demonstrate[] an abusive lengthy history of litigation in this court which would warrant imposition of filing restrictions."[81] Finally, Judge Romero concluded that issuing a show-case order was unnecessary given the recommendation of dismissal with prejudice.[82]

Defendants Simplifi, Jennifer Hawkes, Eric Hawkes, and Cook object first to Judge Romero's determination an award of attorneys' fees is not merited,[83] and second to her determination a show-cause order is not necessary following dismissal of Tracy's Complaint with prejudice.[84] As to the first objection concerning attorneys' fees, Defendants contend that "it is hard to imagine a more frivolous and unreasonable case," especially since most of the allegations in the Complaint concern the EID, but the EID is not named as a Defendant.[85] Defendants emphasize that Tracy has been found a vexatious litigant in Utah state court and that the claims concerning religious discrimination had "absolutely no factual support" to argue attorneys' fees are merited.[86] In short, the Defendants argue that Judge Romero's application of the law of attorneys' fees to the facts of this case was not correct, but do not disagree with her characterization of the relevant law. The court will review this objection de novo.

As to the second objection, Defendants argue that because Judge Jill Parrish of this court cautioned Tracy in a related case he "began taking liberty with facts," and that certain facts in

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[81] *Id.* at 10 (citing *Blaylock v. Tinner*, 543 F. App'x 834, 836 (10th Cir. 2013)).

[82] *Id.*

[83] Defendant Bennion joins in this first objection alone and incorporates the other Defendants' argument by reference. *See* Bennion's Objection (Dkt. 14) at 1–2.

[84] *See* Defendants' Objection (Dkt. 13). Defendants do not object to Judge Romero's determination that Tracy's Complaint should be dismissed with prejudice, *id.* at 1, nor do they object to her determination that Tracy should not be found to be a vexatious litigant in federal court, *id.* at 1–2 ("Defendants object to the recommendation that attorney's fees should not be awarded to Defendants, and that an Order to Show Cause is unnecessary given the recommendation of dismissal.").

[85] *Id.* at 2.

[86] *Id.* at 3.

this Complaint were untrue, a show-cause order is necessary to deter Tracy from continuing to file lawsuits.[87] Again, the Defendants do not disagree with Judge Romero's explication of the relevant law, but rather, her application of the law to this case's facts. The court will also review this objection de novo.

As to the first objection, Defendants claim Judge Romero said the attorneys' fees issue was a "close call,"[88] however, Judge Romero made this observation in connection to her recommendation to not to impose filing restrictions, a section of the Report to which Defendants did not object.[89] The court agrees with Judge Romero that an award of attorneys' fees is not justified in this case.

Under 42 U.S.C. § 1988(b), "the court, in its discretion, may allow the prevailing party" to seek an award of attorney's fees.[90] While this provision is applied "liberally" to prevailing plaintiffs, prevailing defendants may not be awarded attorneys' fees unless the court determines the claim was "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so."[91] A frivolous suit is "based on an indisputably meritless legal theory" or one whose "factual contentions are clearly baseless."[92] Judge Romero correctly observed it is the rare case in which imposing attorneys' fees is justified, and that the purpose for imposing attorneys' fees against plaintiffs in § 1983 cases is to deter baseless filings in the

[87] *Id.* at 4–5. Defendants also state that Tracy "has consistently taken the position he has no assets to satisfy the current attorneys' fee judgments against him," and imply that a show-cause order is necessary to deter him since awards of attorney's fees have not done so in the past. See id.

[88] *Id.* at 2.

[89] Report (Dkt. 12) at 10.

[90] 42 U.S.C. § 1988(b).

[91] *Thorpe v. Ancell*, 367 F. App'x 914, 919 (10th Cir. 2010) (citing *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 417 (1978)).

[92] *Id.* (citing *Neitzke v. Williams*, 490 U.S. 319, 327 (1989)).

future.[93] Indeed, the Supreme Court has cautioned that in determining whether a claim is frivolous, unreasonable, or groundless, courts must avoid "post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation."[94]

Here, Tracy's Complaint focused on Penske's grievances with the EID and Simplifi, including fees assessed against her, collection proceedings, and the contamination of her personal well. Tracy's legal theory was that Penske could assign § 1983 and § 1985 claims arising out of these alleged facts to him. While the court determined that those claims are not assignable, that determination required an analysis of binding precedent concerning § 1985 claims as applied to the law of assignability under Utah law, an issue not yet determined by this court. Accordingly, while Tracy's claims ultimately fail, the claims were not "indisputably meritless" at the time they were brought. Moreover, the Defendants have not shown that the factual contentions concerning Penske's well and fees assessed against her are "clearly baseless." While the court agrees with Judge Romero it is "curious" EID was not named as a Defendant in this suit, because the Supreme Court cautions against "post hoc" reasoning and awards of attorneys' fees are the exception, and not the rule,[95] the court agrees with Judge Romero an award of attorneys' fees is not merited.

As to the second objection, the court first notes Judge Romero's analysis of this issue is quite brief, stating without citation to law that because the court recommends dismissal with

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[93] Report (Dkt. 12) at 10 (citing *Thorpe*, 367 F. App'x at 920).

[94] *Christiansburg*, 434 U.S. at 421–22.

[95] See *Kornfeld v. Kornfeld*, 393 F. App'x 575, 578 (10th Cir. 2010) (citing *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 243 (2010) (noting that under the "bedrock principle known as the 'American Rule,'" "[e]ach litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise.")).

prejudice, an order to show cause is unnecessary.[96] Similarly, Defendants do not provide any citations to law in objecting to this conclusion, but instead assert that based on the Tracy's past litigation history, a show-cause order is necessary to deter him from baseless future filings.

Under Rule 11, a party certifies that by presenting any filing to the court, the "legal contentions are warranted by existing law," "the factual contentions have evidentiary support" or will likely have evidentiary support after further investigation, and the filing is not presented for an "improper purpose," such as to harass.[97] A party may motion for sanctions to be imposed under Rule 11, but such a motion must be filed separately from any other motion and specifically describe the conduct at issue.[98] The defendants have not filed a separate Rule 11 motion.[99] The parties instead ask the court to exercise its own inherent authority under the Rule to issue a show-cause order to Tracy as to why conduct in the suit has not violated Rule 11(b).[100]

While the court would have jurisdiction to issue a show-cause order following a dismissal with prejudice,[101] the court declines to issue a show-cause order in these circumstances. In declining to issue such an order, the court notes as discussed above, Defendants have not demonstrated the claims in this case were "entirely meritless" or the facts asserted had no basis. Additionally, this case was resolved on the pleadings without "substantially burden[ing]" the

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[96] Report (Dkt. 12) at 10.

[97] Fed. R. Civ. P. 11.

[98] *Id.* 11(c)(2).

[99] *See* Defendants' Motion to Dismiss (Dkt. 6) at 13–14 (asking the court to issue an Order to Show Cause).

[100] Fed. R. Civ. P. 11(b)(3).

[101] *See Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 395 (1990) (holding a court may enforce Rule 11 after voluntary dismissal and observing: "It is well established that a federal court may consider collateral issues after an action is no longer pending.").

court.[102] Accordingly, the court agrees with Judge Romero that issuing a show-cause order is not necessary.

III. The Report and Recommendation is Adopted

Finding no clear error in the remainder of the Report, the court adopts it in its entirety, and accordingly grants the Motions to Dismiss, dismisses Tracy's Complaint with prejudice, and declines to impose attorneys' fees, determine that Tracy is a vexatious litigant, or issue an order to show cause.

CONCLUSION

For the reasons stated above, the Parties' Objections[103] are OVERRULED, the Report and Recommendation[104] is ADOPTED in its entirety, the Motions to Dismiss[105] are GRANTED, and the Complaint[106] is DISMISSED WITH PREJUDICE. The clerk of court is directed to close the case.

SO ORDERED this 24th day of March, 2022.

BY THE COURT:

ROBERT J. SHELBY
United States Chief District Judge

[102] *See Dodds Ins. Servs. Inc. v. Royal Ins. Co. of Am.*, 935 F.2d 1152, 1158–59 (10th Cir. 1991).

[103] Dkt. 13; Dkt. 14; Dkt. 15.

[104] Dkt. 12.

[105] Dkt. 6; Dkt. 7.

[106] Dkt. 1.

Attachment 3

Attachment 3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

MARK CHRISTOPHER TRACY, Plaintiff, v. SIMPLIFI COMPANY, a Utah Corporation; JENNIFER HAWKES, an individual; ERIC LEE HAWKES, an individual; JEREMY R. COOK, an individual; DAVID M. BENNION, an individual; and DOES 1-46, Defendants.	**JUDGMENT IN A CIVIL CASE** Case No. 2:21-cv-00444-RJS-CMR Chief District Judge Robert J. Shelby Magistrate Judge Cecilia M. Romero

It is ORDERED AND ADJUDGED that judgment is hereby entered in favor of the Defendants.

SO ORDERED this 24th day of March, 2022.

BY THE COURT:

ROBERT J. SHELBY
United States Chief District Judge

Attachment 4

Attachment 4

2016 WL 4775527
Only the Westlaw citation
is currently available.
United States District Court,
D. Utah, Central Division.

AMERICAN CHARITIES FOR REASONABLE FUNDRAISING REGULATION, INC., and Rainbow Direct Marketing, LLC, Plaintiffs,
v.
Daniel O'BANNON, Director of the Utah Division of Consumer Protection, Department of Commerce for the State of Utah, Defendant.

Case No. 2:08–cv–875
|
Signed 09/13/2016

MEMORANDUM DECISION AND ORDER

ROBERT J. SHELBY United States District Judge

***1** This case is about the legislative jurisdiction of Utah's Charitable Solicitations Act. Plaintiffs American Charities for Reasonable Fundraising Regulation, Inc. and Rainbow Direct Marketing, LLC sued Defendant Daniel O'Bannon in his official capacity as the Director of the Utah Division of Consumer Protection. Plaintiffs seek declarative and injunctive relief, alleging that the Act as applied to them violates their constitutional rights.

The parties now cross-move for summary judgment on whether Plaintiffs have Article III standing to litigate this case. Pursuant to Civil Rule 7–1(f) of the United States District Court for the District of Utah Rules of Practice, the court elects to decide the motions on the basis of the written memoranda and finds that oral argument would not be helpful or necessary. For the reasons stated below, the court grants in part and denies in part each Motion.

BACKGROUND [1]

Utah regulates through the Charitable Solicitations Act the solicitation of charitable contributions in the State. [2] The Act requires all professional fundraising consultants (PFCs) that contractually assist charitable organizations to register with and obtain a permit from the Utah Division of Consumer Protection before performing services for their clients. [3] PFCs do not solicit contributions, but instead assist and consult with charities that conduct solicitations themselves. [4]

American Charities is a Delaware charitable and educational organization that represents nonprofits and PFCs concerning charitable and fundraising regulations. [5] It acts on behalf of its members by "instituting legal actions as ... deemed appropriate or necessary by the Board of Directors." [6]

American Charities appears here as a representative of PFCs who have been subject to the Act. It seeks to represent its PFC members that "have no contact with Utah," and "have been injured by Defendant's policy of

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requiring PFCs to register even though these consultants have no contact with Utah and who do not target or direct their clients to solicit in Utah as opposed to nationally." [7] American Charities also appears as the purported assignee of a claim originally belonging to New River Direct, Inc. New River is a Florida Corporation that assists its nonprofit ***2** clients with nationwide charitable solicitation campaigns. [8] In 2005, New River entered into a settlement agreement with the Division after the Division determined that New River provided consulting services for a charitable client while it was not registered with the Division. [9] Even though New River believed its constitutional rights were being infringed upon by the Division, New River entered into the settlement agreement to avoid defending against an administrative enforcement action. [10] New River has registered with the Division every year since 2008 under protest. [11] And because New River has no intention of initiating litigation to vindicate its rights, it executed a written agreement with American Charities purporting to assign its claim against the Division to American Charities. [12]

Rainbow Direct, an American Charities member since spring 2008, [13] appears here on its own behalf. Rainbow Direct is a New York limited liability corporation formed to provide fundraising consulting services to charitable organizations that advocate for gays, lesbians, and bisexuals. [14] In late 2007, Rainbow Direct entered into a fundraising consulting contract with Straight Women in Support of Homos, Inc. (SWiSH). [15] After SWiSH began registering with states to solicit charitable contributions, SWiSH received a letter from the Division saying, "It is unlawful for any charitable organization to utilize the services of a ... professional fund raising counsel or consultant that is not in compliance with the Charitable Solicitations Act. According to our records, Rainbow Direct Marketing is not currently registered in the State of Utah." [16]

In spring 2008, Rainbow Direct's President, Amy Tripi, spoke on the telephone with a licensor for the Division. Tripi asked the licensor whether the Division would require Rainbow Direct to register. [17] The licensor responded that the Division would require Rainbow Direct to register and pay a fee. [18] Tripi told the licensor that Rainbow Direct has no clients in Utah, has no office locations in Utah, does not solicit business or contributions in Utah, and has no other contacts with Utah. [19] But the licensor maintained that Rainbow Direct must register with the Division. [20] And the licensor stated that the Division would take administrative action against Rainbow Direct if it did not register by the time SWiSH renewed its registration. [21] Rainbow Direct has since refrained from performing any services for SWiSH under their contract.

American Charities and Rainbow Direct initiated this lawsuit under 42 U.S.C. § 1983 in late 2008, asserting that the Act is facially unconstitutional under the Commerce Clause and the First Amendment. They also allege that the Act is unconstitutional as applied to PFCs under the First Amendment and the Due Process Clause.

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Defendant moved in 2009 to dismiss the claims asserted against him, arguing in part that American Charities has neither associational standing nor standing under the New River assignment. Judge Dale A. Kimball, the judge to whom this case was assigned at the time, concluded that Plaintiffs sufficiently alleged that American Charities has associational standing to litigate the case.[22] As a result, Judge Kimball declined to address whether Plaintiffs adequately alleged that American Charities also enjoys standing under the New River assignment.[23]

***3** Defendant later moved in 2011 for summary judgment on Plaintiffs' claims. At a hearing held in early 2012, Judge Clark Waddoups, the judge to whom this case was assigned at the time, granted summary judgment in Defendant's favor on each of Plaintiffs' facial challenges to the Act.[24] Judge Waddoups also concluded that Plaintiffs' as-applied challenges to the Act could go forward, but he declined to rule on them then because the record was insufficiently developed.[25] Finally, Judge Waddoups concluded that Rainbow Direct has standing to assert the as-applied challenges to the Act based on the threat of agency action.[26] Judge Waddoups did not rule on American Charities' asserted associational standing.[27]

After engaging in additional discovery and motion practice, the parties filed the current cross-motions for summary judgment on whether Plaintiffs have standing to litigate this case.

LEGAL STANDARD

The court grants summary judgment when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[28] The court "view[s] the evidence and make[s] all reasonable inferences in the light most favorable to the nonmoving party."[29]

ANALYSIS

The court's analysis proceeds in three parts. The court first addresses whether Rainbow Direct has standing to litigate this case. Second, the court examines whether American Charities has associational standing to litigate on behalf of its members. And finally, the court discusses whether American Charities has standing as an assignee of New River's claim. In the end, the court concludes that Rainbow Direct has standing, but that American Charities does not.

I. Rainbow Direct's Standing

The "case" or "controversy" requirement of Article III of the United States Constitution requires a plaintiff seeking judicial relief to establish three elements: "(1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision."[30] The injury-in-fact requirement "ensure[s] that the plaintiff has a personal stake in the outcome of the controversy."[31] A plaintiff seeking injunctive relief must show that the injury is "concrete and particularized,"

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and that any threat is "actual and imminent, not conjectural or hypothetical."[32] The plaintiff must show that standing existed at the time it filed suit.[33]

Here, Judge Waddoups concluded in 2012, when evaluating Defendant's earlier motion for summary judgment, that Rainbow Direct has standing to litigate its as-applied challenges to the Act.[34] The court declines to revisit this legal ruling under the law-of-the-case doctrine.[35] The doctrine "generally provides that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case."[36] The doctrine is subject to three narrow exceptions: "(1) when the evidence in a subsequent trial is substantially different; (2) when controlling authority has subsequently made a contrary decision of the law applicable to such issues; or (3) when the decision was clearly erroneous and would work a manifest injustice."[37] None of the exceptions apply here: the evidence currently before the court is not substantially different than the evidence that was before Judge Waddoups when he ruled; controlling authority has not changed; and Judge Waddoups's ruling was not clearly erroneous. Rainbow Direct has standing to pursue its as-applied challenges to the Act.

II. American Charities' Associational Standing

***4** The court now turns to whether American Charities has associational standing to litigate the as-applied challenges to the Act on behalf of its PFC members. While a "plaintiff generally must assert his own legal rights and interests,"[38] it is well settled "that even in the absence of injury to itself, an association may have standing solely as the representative of its members."[39]

American Charities must satisfy three elements to have associational standing: "(a) its members [must] otherwise have standing to sue in their own right; (b) the interests it seeks to protect [must be] germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[40] "This test takes into account both the constitutional dimension of standing and also the concern that the association properly represent its members in the particular suit."[41]

Here, American Charities lacks associational standing because it cannot satisfy the test's third requirement. Plaintiffs argue that individual participation is usually unnecessary where, as here, "the association seeks a declaration, injunction, or some other form of prospective relief."[42] But "the relief sought is only half of the story."[43] And an association has standing on behalf of its members only if the *claims* asserted do not require the participation of individual members.[44] This means the court must examine whether Plaintiffs' as-applied constitutional challenges to the Act "will require individualized participation by the members" of American Charities.[45] In undertaking this analysis, the court expresses no opinion on the merits of Plaintiffs' claims.

Plaintiffs contend in part that Defendant applies the Act to confer legislative jurisdiction in a manner inconsistent with due process. In

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circumscribing the limits on a state's legislative jurisdiction, "the Supreme Court has employed language reminiscent of that used in the personal jurisdiction caselaw."[46] The Court has stated that "[t]here must be at least some minimal contact between a State and the regulated subject before it can, consistently with the requirements of due process, exercise legislative jurisdiction."[47] In the personal jurisdiction context, a party has "minimum contacts" with the jurisdiction if its conduct "create[s] a substantial connection with the forum State."[48] Courts often ask whether the party " 'purposefully directed' its activities at the forum state," or whether it " 'purposefully availed' itself of the privilege of conducting activities or consummating a transaction in the forum state."[49]

***5** Because "[t]his analysis is fact specific,"[50] and because Plaintiffs here assert as-applied challenges to the Act, the court must review evidence concerning each affected PFC members' contacts with Utah. For example, the court must examine the specific actions each member has taken in its consulting work, and then determine whether those actions are sufficient to bring the member within the legislative jurisdiction of the Act.[51] The court cannot determine whether the Act as applied violates those PFC members' due process rights "without delving into individual circumstances."[52] Plaintiffs' claim that American Charities' members have insufficient contacts with Utah for Defendant to exercise legislative jurisdiction over them "will necessarily require individual participation of [American Charities'] members."[53]

To be sure, the individual participation element of the associational standing test articulated above arises out of prudential considerations, not Article III's case or controversy requirement.[54] And it "is best seen as focusing on ... matters of administrative convenience and efficiency."[55] But in view of the fact-specific nature of the as-applied claims here asserted, the court concludes that administrative convenience and efficiency are best served by requiring each affected PFC member to participate in this suit so the court can adequately assess the individual contacts of each with the State.

American Charities lacks associational standing to assert its PFC members' as-applied challenges to the Act.[56]

III. American Charities' Standing as an Assignee of New River's Claim

Having concluded that American Charities does not have associational standing, the court now turns to whether American Charities has standing as the purported assignee of New River's § 1983 claim.

As an initial matter, Defendant maintains that § 1983 claims are not assignable. Section 1983 provides no direct guidance on whether an individual may transfer her right to sue under the provision. Where the federal civil rights laws do not provide rules of decision on specific points, courts are instructed to consider the application of "state common law, as modified and changed by the constitution and statutes of the forum state."[57] Courts are further instructed to apply state law if it is not

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inconsistent with the goals of the civil rights laws.[58] Accordingly, the court must look to Utah state law for guidance.

***6** "[Section] 1983 claims are best characterized as personal injury [tort] actions."[59] Tort claims arising out of personal injury are not assignable under Utah law.[60] Applying this rule of non-assignability to § 1983 claims is not inconsistent with "the central objective of the ... civil rights statutes ... to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief."[61] While an individual whose federal constitutional or statutory rights have been abridged may not assign her § 1983 claim to someone else, she may still personally recover damages or secure injunctive relief on her own behalf.

Section 1983 claims are not assignable in Utah, and American Charities does not have standing under the assignment to pursue its PFC members' as-applied challenges to the Act.[62]

CONCLUSION

For the reasons stated, the court concludes that Rainbow Direct has standing to pursue its as-applied challenges to the Act. American Charities, however, does not have standing to pursue those claims. Plaintiffs' Motion for Summary Judgment (Dkt. 365) and Defendant's Motion for Summary Judgment (Dkt. 373) are GRANTED IN PART and DENIED IN PART.

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2016 WL 4775527

Footnotes

1 Even though the court is evaluating cross-motions for summary judgment, the court treats the cross-motions as if they are two distinct, independent motions. *Cannon v. State Farm Mut. Auto. Ins. Co.*, 2013 WL 5563303, at *1 (D. Utah Oct. 7, 2013). Accordingly, the court views the evidence and draws all reasonable inferences in the light most favorable to the nonmoving party in each motion. *Loundsv. Lincare, Inc.*, 812 F.3d 1208, 1220 (10th Cir. 2015).

2 The court recites the facts here to provide context for the court's analysis of the parties' motions for summary judgment. These facts, however, are not material to

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the court's analysis of the issues raised in the motions. As a result, Defendant's objections to Plaintiffs' evidentiary submissions are moot. *See* Dkt. 389–395.

3 *See* Utah Code § 13–22–9.

4 *See id.* § 13–22–2(12)(a).

5 Certificate of Amendment to the Certificate of Incorporation (Dkt. 365, Ex. 1).

6 *Id.*

7 Dkt. 365 at 5.

8 Decl. of Rod Taylor (Dkt. 365, Ex. 30), ¶ 4.

9 New River Direct Settlement Agreement (Dkt. 365, Ex. 22).

10 Decl. of Rod Taylor (Dkt. 365, Ex. 19), ¶¶ 2–3.

11 Supplemented Responses to Defendant's Interrogatories on Standing (Dkt. 365, Ex. 35).

12 *See* Assignment Agreement Between New River and American Charities (Dkt. 365, Ex. 8).

13 *See* Decl. of Xenia Boone (Dkt. 365, Ex. 32), ¶ 2.

14 Decl. of Amy Tripi (Dkt. 365, Ex. 10), ¶ 2.

15 Affidavit of Amy Tripi (Dkt. 365, Ex. 9), ¶ 2.

16 March 18, 2008 Letter from Utah Division of Consumer Protection to SWiSH (Dkt. 365, Ex. 7).

17 Affidavit of Amy Tripi (Dkt. 365, Ex. 9), ¶ 8.

18 *Id.* ¶ 9.

19 *Id.* ¶ 10.

20 *Id.* ¶ 11.

21 *Id.* ¶ 12.

22 Dkt. 59.

23 *Id*.

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24 February 2, 2012 Hearing Tr. (Dkt. 158), at 5–6; *see also* Dkt. 151, ¶ 1 ("The court grants summary judgment in favor of Defendant on each of Plaintiffs' facial challenges.").

25 Dkt. 151, ¶ 3.

26 February 2, 2012 Hearing Tr. (Dkt. 158), at 56:7–11; *see also* Dkt. 151, ¶ 2 ("The court finds that the threat of agency action against Rainbow Direct Marketing, LLC ('Rainbow Direct') is sufficient to afford Rainbow Direct standing to challenge the Charitable Solicitations Act.").

27 *See* February 2, 2012 Hearing Tr. (Dkt. 158), at 57:2–5 (stating that "I think it has been acknowledged that American Charities has only associationalstanding on behalf of its members and no separate standing").

28 Fed. R. Civ. P. 56(a).

29 *N. Natural Gas Co. v. Nash Oil & Gas, Inc.*, 526 F.3d 626, 629 (10th Cir. 2008).

30 *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 551 (1996).

31 *Susan B. Anthony v. Driehaus,* 134 S. Ct. 2334, 2341 (2014) (citation omitted) (internal quotation marks omitted).

32 *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009).

33 *Brown v. Buhman,* 822 F.3d 1151, 1164 (10th Cir. 2016).

34 Dkt. 151, ¶ 2.

35 *See* *Stewart v. Kempthorne,* 554 F.3d 1245, 1254 (10th Cir. 2009) (recognizing that standing is a legal question the court of appeals reviews de novo).

36 *Musacchio v. United States,* 136 S. Ct. 709, 716 (2016) (citation omitted) (internal quotation marks omitted).

37 *Wessel v. City of Albuquerque*, 463 F.3d 1138, 1143 (10th Cir. 2006) (citation omitted) (internal quotation marks omitted).

38 *Kan. Health Care v. Kan. Dep't of Soc. & Rehab. Servs.*, 958 F.2d 1018, 1021 (10th Cir. 1992) (quoting *Warth v. Seldin,* 422 U.S. 490, 499 (1975)).

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39 *Int'l Union, UAW v. Brock,* 477 U.S. 274, 281 (1986) (citation omitted) (internal quotation marks omitted).

40 *Hunt v. Wash. State Apple Adver. Comm'n,* 432 U.S. 333, 343 (1977).

41 *Kan. Health Care*, 958 F.2d at 1021.

42 *Warth*, 422 U.S. at 515.

43 *Rent Stabilization Ass'n of New York v. Dinkins,* 5 F.3d 591, 596 (2d Cir. 1993).

44 *Hunt*, 432 U.S. at 343.

45 *Kan. Health Care*, 958 F.2d at 1022.

46 *Am. Target Adver., Inc. v. Giani,* 199 F.3d 1241, 1255 (10th Cir. 2000).

47 *Id*. (quoting *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 315 n.2 (1970) (Harlan, J., dissenting)); *accord* *Am. Charities for Reasonable Fundrasing Regulation, Inc. v. Pinellas Cnty*., 221 F.3d 1211, 1216 (11th Cir. 2000); *Adventure Commc'ns Inc. v. Ky. Registry of Election Fin*., 191 F.3d 429, 436 (4th Cir. 1999).

48 *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014).

49 *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.,* 514 F.3d 1063, 1071 (10th Cir. 2008).

50 *ClearOne Commc'ns, Inc. v. Bowers,* 643 F.3d 735, 763 (10th Cir. 2011) (citation omitted) (internal quotation marks omitted).

51 *See* Dkt. 151, ¶ 5 (stating that because Plaintiffs' " 'as-applied' challenges are necessarily specific to the member that is challenging the Act," Plaintiffs must "detail what actions each member has taken in its consulting work and [explain] why those actions are insufficient to bring the member within the legislative jurisdiction of the Act").

52 *Dinkins,* 5 F.3d at 597.

53 *Kan. Health Care,* 958 F.2d at 1023. *Compare* *Brock,* 477 U.S. at 287 (holding that the association's claims did not require individual participation by its members because "[t]he suit raise[d] a pure question of law"), *with* *Dinkins,* 5 F.3d at 596 (concluding that the association's takings claims required individual participation because the court "would have to engage in an *ad hoc* factual inquiry for *each*

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landlord [member] who alleges that he has suffered a taking"), *and* *Kan. Health Care,* 958 F.2d at 1022–23 (holding that an association of nursing homes did not have standing because the necessary determination of whether certain rates were "reasonable and adequate" would require the court "to examine evidence particular to individual providers").

54 *United Food & Commercial Workers Union,* 517 U.S. at 555.

55 *Id.* at 557.

56 Because the court concludes that individual participation is required, the court does not address the first two requirements of the three-part associational standing test.

57 *Wilson v. Garcia,* 471 U.S. 261, 267 (1985) (citation omitted) (internal quotation marks omitted); *see also* 42 U.S.C. § 1988(a) (stating that "in all cases where [the federal laws] are not adapted to the [goal of protecting all persons in the United States in their civil rights], or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause"); *Pony v. Cnty. of Los Angeles,* 433 F.3d 1138, 1143 (9th Cir. 2006) ("Section 1988 also provides that courts should resolve ambiguities in the federal civil rights laws by looking to the common law, as modified by the laws of the state in which they sit.").

58 *Wilson,* 471 U.S. at 267; *see also* *Felder v. Casey,* 487 U.S. 131, 139 (1988) ("Any assessment of the applicability of a state law to federal civil rights litigation ... must be made in light of the purpose and nature of the federal right.").

59 *Wilson,* 471 U.S. at 280; *see also* *City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 687, 709 (1999) (stating that "there can be no doubt that claims brought pursuant to § 1983 sound in tort"); *id.* at 729 (Scalia, J., concurring) ("In *Wilson v. Garcia,* we explicitly identified § 1983 as a personal-injury tort, stating that a violation of § 1983 is an injury to the individual rights of the person, and that Congress unquestionably would have considered the remedies established in the Civil Rights Act of 1871 to be more analogous to tort claims for personal injury than, for example, to claims for damages to property or breach of contract." (citation omitted) (internal quotation marks omitted)); *Baker v. Bd. of*

Regents of Kan., 991 F.2d 628, 630 (10th Cir. 1993) ("Section 1983 claims are best characterized as personal injury actions.").

60 *State Farm Mut. Ins. Co. v. Farmers Ins. Exch.*, 450 P.2d 458, 459 (Utah 1969); *see Gilbert v. DHC Dev., LLC,* 2013 WL 4881492, at *11 (D. Utah Sept. 12, 2013).

61 *Felder,* 487 U.S. at 139 (citation omitted) (internal quotation marks omitted).

62 *See Pony,* 433 F.3d at 1143 (recognizing that a "plaintiff cannot assign her Section 1983 action").

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