MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

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HLC, LLC and WEST FORK COMMUNICATIONS, Plaintiffs/Counterdefendants, -vs- THE ASSOCIATION OF UNIT OWNERS OF FIRELIGHT MEADOWS CONDOMINIUMS, INC., Defendant/Counterclaimant.	Cause No. DV-10-884C Hon. John C. Brown **ORDER RE: PENDING MOTIONS FOR SUMMARY JUDGMENT**

INTRODUCTION

Pending before this Court are the following motions:

1. Plaintiffs' Motion for Leave to File First Amended Reply to Defendant's Counterclaims, filed on August 24, 2011;
2. Defendant's Civil Rule 56 Motion For Summary Judgment;
3. Plaintiffs' Motion For Partial Summary Judgment Regarding 90-Day Past-Due Water and Sewer Bills;
4. Plaintiffs' Motion For Partial Summary Judgment that the Twelfth Amendment of the Declarations and Bylaws is Void; and
5. Plaintiff's Motion For Partial Summary Judgment on Defendant's Claim For Unfair Trade Practices.

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The above summary judgment motions were each filed on September 6, 2011. Oral arguments were heard on December 5, 2011. Upon this Court's request, the parties filed proposed orders on January 9, 2011. The motions have been fully briefed and are ripe for consideration. Having considered the pending motions and briefing, and having reviewed the court file, this Court now issues the following rulings.

BACKGROUND

Plaintiffs HLH, LLC, and West Fork Communications (collectively "West Fork") own and operate water, sewer, and cable systems at Firelight Meadows Condominiums ("Firelight Meadows") in Big Sky, Montana. Defendant Association of Unit Owners of Firelight Meadows Condominiums, Inc. ("HOA") is the homeowners' association for Firelight Meadows.

Firelight Meadows is a condominium community of 216 chalets and condominiums in Big Sky, developed by Firelight Meadows, LLC ("Developer") in the early 2000s. Paul Pariser is the managing member of Firelight Meadows, LLC. Firelight Meadows is governed by the Declaration and Bylaws for Firelight Meadows Condominiums ("Declarations"), which were recorded in 2002. The Bylaws gave the Developer the power to appoint a majority of the Board of Directors of the Association until 90% of the units had been transferred to third-party purchasers.

In order to build the condominiums, water and sewer systems also had to be built. The Developer built the water, sewer, and cable systems for Firelight Meadows.

On September 11, 2006, while the Developer still controlled the Board of Directors, Ronald E. Seher, as Chairman of the Association, entered into a Cable Television Contract ("cable contract") with Paul Pariser as Manager of Firelight Meadows, LLC d/b/a Firelight

Meadows Cable Company. The cable contract gave Firelight Meadows, LLC the exclusive right to provide cable television services and internet services to members of the Association. Under the Eighth Amendment to the Declaration, antennas and receivers of any kind are not allowed on any condominium building or common area. The term of the cable contract is 15 years after the sale of the last unit by the Developer, which the Developer, in its sole discretion, could extend by two additional 15-year terms.

The Declarations set forth the rights and responsibilities of the Developer, the Unit Owners, and the HOA. With respect to the water, sewer, and cable systems ("Central Improvement Facilities"), the Declarations require the Developer to provide water, sewer, and cable to each unit. Each Unit Owner must pay for water, sewer, and cable. In the event that payment from any unit is more than 90 days overdue, the HOA must pay the overdue amount. The HOA may place a lien on the delinquent unit and take steps to collect reimbursement for amounts paid by the HOA.

The 90-day overdue payment provision is related to the design of the Central Improvement Facilities. Firelight Meadows is made up of an assortment of multiple unit dwellings. The units are contained in condominiums or chalets in buildings that contain twenty (20) units, four (4) units, or two (2) units. The Central Improvement Facilities were designed as community systems such that the facilities are provided to each building within the development. The facilities were designed to be cut off at each building (instead of being cut off at each unit within the building).

West Fork purchased the Central Improvement Facilities from the Developer on February 23, 2007. Pursuant to that agreement, the Developer transferred and assigned to West Fork "all

right, title and interest" it had in the water, sewer, and cable systems and businesses at Firelight Meadows. Included in the transfer and assignment from the Developer to West Fork was "all other contracts associated with and necessary to the operation of" the water, sewer, and cable systems. *See* Plaintiff's Statement of Undisputed Facts ("SUF"), ¶¶ 15-20. On January 14, 2008, title to all assets pertaining to the water and sewer facilities at Firelight Meadows, the cable television infrastructure and the cable contract transferred to HLH. That same day, HLH conveyed to West Fork the title to all assets pertaining to the cable television infrastructure and assigned the cable contract to West Fork.

The Declarations state that they "shall be binding upon and shall inure to the benefit of the Declarant, the Association and each Unit Owner, and the heirs, personal representatives, successors and assigns of each." Declarations, p. 35. West Fork is the Developer's successor-in-interest.

West Fork has provided water, sewer, and cable pursuant to the Declarations since it purchased the Central Improvement Facilities. It sends invoices to each Unit Owner for these services on a monthly basis, regardless of whether each Unit Owner actually utilizes the cable services. The water and sewer rates charged by West Fork are set by the Montana Public Service Commission.

Presently, there are numerous units that have not paid all or part of their bills for more than 90 days. West Fork has requested the HOA to pay past-due amounts pursuant to the Declarations, but the HOA has refused.

To date, there are no other providers of cable television service at Firelight Meadows. But, several unit owners, who oppose West Fork's purported authority to provide exclusive cable

services, have notified West Fork of their election to cancel cable television service and have subscribed to satellite television instead. West Fork has refused these unit owners' requests for cancellation and continues to charge them the $28 monthly fee for its cable television service.

On December 3, 2009, the HOA filed the Twelfth Amendment to the Declarations and Bylaws ("Twelfth Amendment"), which changes the section of the Declarations requiring that each unit use cable television. The Twelfth Amendment also purports to remove the HOA's obligation to pay for past-due cable bills, and instead limits the HOA's obligation to only unpaid water and sewer bills.

POSITIONS OF THE PARTIES

West Fork filed suit on August 20, 2010, seeking a declaratory judgment that, among other things, the HOA is obligated to pay all accounts more than 90 days past due. West Fork has also asked the Court to find that the Twelfth Amendment is invalid. The HOA filed counterclaims for declaratory relief, alleging that, among other things, it was not required to pay for 90-day past-due bills. The HOA also claimed that West Fork has engaged in an unlawful restraint of trade.

The parties filed what are essentially cross-motions for summary judgment on September 6, 2011. West Fork makes three primary arguments in its motions: (1) the HOA is required to pay 90-day past-due water and sewer bills; (2) the HOA's claim for unfair trade practices regarding cable must be dismissed; and (3) the Twelfth Amendment which changed the obligations of the Unit Owners and HOA regarding cable is void.

The HOA's motion for summary judgment contends that (1) the requirement that each Unit Owner receive cable television constitutes an unlawful restraint of trade; (2) the provision requiring each Unit Owner to pay for cable television and the provision obligating the HOA to pay

for past water, sewer, and cable bills are unenforceable because they constitute a contract of adhesion; (3) the contracts that violate the Unfair Trade Practices Act are unconscionable or may not be enforced; (4) the provision requiring the Association to pay past-due bills is invalid for lack of consideration; and (5) the Twelfth Amendment to the Declarations is valid.

This Order first addresses the arguments that pertain to water and sewer and then turns to the arguments that apply to cable.[1]

ANALYSIS

I. STANDARD FOR SUMMARY JUDGMENT.

Summary judgment is appropriate only when there is a complete absence of genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* Rule 56(c)(3), M.R.Civ.P.; *see Saucier v. McDonald's Rests. of Mont., Inc.*, 2008 MT 63, ¶ 33, 342 Mont. 29, 179 P.3d 481. To determine whether genuine issues of material fact exist, the court considers "the pleadings, the discovery and disclosure materials on file, and any affidavits." Rule 56(c)(3), M.R.Civ.P. All evidence must be viewed in the light most favorable to the non-moving party, and all reasonable inferences that may be drawn from the evidence must be drawn in favor of the opposing party. *Saucier*, ¶ 33 (citing *LaTray v. City of Havre*, 2000 MT 119, ¶ 15, 299 Mont. 449, 999 P.2d 1010).

"The party seeking summary judgment bears the initial burden of establishing a complete absence of genuine issues of material fact." *Saucier*, ¶ 34 (citing *LaTray*, ¶ 14). To satisfy this

[1]Some arguments that apply to cable do not apply to water and sewer. The HOA's claim for unlawful restraint is limited to cable. (Water and sewer are services provided by a public utility and are therefore excluded from the Unfair Trade Practices Act by § 30-14-202(1)(b), MCA.) Further, the Twelfth Amendment only affected the obligations relating to cable.

initial burden, the moving party must "exclude any real doubt as to the existence of any genuine issue of material fact" by making a "clear showing as to what the truth is." *Toombs v. Getter Trucking, Inc.*, 256 Mont. 282, 284, 846 P.2d 265, 266 (1993). When the moving party alleges there are no genuine issues of material fact and that he is entitled to judgment as a matter of law, the burden shifts to the non-moving party to demonstrate that there are genuine issues of material fact. *Gwynn v. Cummins*, 2006 MT 239, ¶ 11, 333 Mont. 522, 144 P. 3d 82. The non-moving party must prove, by more than mere denials, speculation or conclusory statements, that a genuine issue of material fact does exist. *See* Rule 56(e)(2), M.R.Civ.P.; *see Gwynn*, ¶ 11; *see Saucier*, ¶ 34 (citing *LaTray*, ¶ 14). "Finally, if no genuine issues of material fact exist, it must then be determined whether the facts actually entitle the moving party to judgment as a matter of law." *Saucier*, ¶ 34 (citing Rule 56(c), M.R.Civ.P.).

II. WATER AND SEWER

A. Introduction.

West Fork moved for summary judgment on the 90 day payment provision regarding water and sewer. There is no dispute over the meaning of the language in the Declarations. The Declarations state that the HOA must pay amounts that are more than 90 days overdue. The HOA acknowledges that the language of the Declarations states that it must pay West Fork overdue amounts for water and sewer. The HOA contends that it is not required to pay, however, because: (1) West Fork does not have standing to enforce the Declarations; and (2) that provision of the Declarations is unenforceable.

B. Standing.

The HOA contends that West Fork does not have standing to enforce the Declarations

because it is not a Unit Owner in Firelight Meadows. This Court disagrees.

West Fork purchased the Central Improvement Facilities from the Developer in 2008. When West Fork purchased the Central Improvement Facilities, it acquired all of the Developer's rights and obligations vis-a-vis the water, sewer, and cable TV systems. The Declarations impose rights and duties on the Developer, Units Owners, and HOA regarding water and sewer. The Declarations require West Fork to provide water and sewer services. The Declarations also require Unit Owners to pay for these services and for the HOA to pay overdue amounts.

Rights arising under a contract are assignable unless the contract prohibits an assignment. "We recognize that rights arising under a contract are generally assignable unless the contract prohibits assignment." *Somont Oil Co., Inc. v. Nutter*, 228 Mont. 467, 474, 743 P.2d 1016, 1020 (1987). The Restatement of Contracts (Second) agrees with Montana law, and sets forth only a few instances where transfer is not allowed, none of which are applicable here.

See Restatement (Second) of Contracts § 317 (1981).

The Developer properly and effectively assigned its rights to West Fork. There is no dispute that West Fork purchased the Central Improvement Facilities from the Developer, and that West Fork is the Developer's successor. West Fork stepped into the Developer's shoes, and as the Developer's successor-in-interest, has standing to enforce the Declarations.

The Declarations were written such that the Developer or its successors and assigns are required to install and maintain the utilities. The Declarations explicitly state that both the Developer and the Developer's successors and assigns are beneficiaries under the Declarations. The Declarations state: "Except as otherwise provided herein, this Declaration shall be binding upon and shall inure to the benefit of the Declarant, the Association and each Unit Owner, and the

heirs, personal representatives, successors and assigns of each." Declarations, p. 35.

In addition, there is no dispute that the Asset Purchase Agreement assigned to West Fork all of its rights in the Central Improvement Facilities. West Fork was also an intended third-party beneficiary to the Declarations. *Harman v. MIA Serv. Contracts*, 260 Mont. 67, 72, 858 P.2d 19, 22 (1993); Restatement (Second) of Contracts § 302 (1981).

Based on the above, the Court finds that West Fork has standing to enforce the Declarations.

C. Enforceability of 90-Day Payment Provision.

1) Introduction.

The HOA contends that even if West Fork has standing, the provisions of the Declarations that require payment of overdue water and sewer bills are unenforceable. The HOA argues that the 90-day payment provision represents an unenforceable contract of adhesion and is not supported by consideration.

At the outset, West Fork argued in its briefing that the HOA is prohibited from arguing its contract of adhesion theory because it was not raised as an affirmative defense in the HOA's answer. But, this Court is unaware of any legal authority in Rule 8, M.R.Civ.P., or elsewhere requiring that the defense of contract of adhesion be affirmatively pled. Under Rule 8, M.R.Civ.P., and the liberal pleading standards, it is not necessary to set out the legal theory under which a claim is based, and the parties shall be granted any relief to which they are entitled even though they have not demanded it. *See Castillo v. Franks*, 213 Mont. 232, 239, 690 P.2d 425, 428 (1984). Further, the HOA has put Plaintiffs on sufficient notice through discovery that it would challenge the Declarations on the related defenses of unenforceability and as violating public

policy. Therefore, this Court considers the HOA's contract of adhesion argument.

2) Whether the Provision is an Adhesion Contract and/or Fails on Policy Grounds.

"An adhesion contract is a standard form contract prepared by one party, to be signed by the party in a weaker position (usually a consumer), who adheres to the contract with little or no choice about its terms." *Graziano v. Stock Farm Homeowners Ass'n, Inc.*, 2011 MT 194, ¶ 18, 361 Mont. 332, 258 P.3d 999 (citing *Woodruff v. Bretz, Inc.*, 2009 MT 329, ¶ 8, 353 Mont. 6, 218 P.3d 486). "The weaker party can either accept or reject the contract without the opportunity to negotiate its terms." *Id.*; *see also Kloss v. Edward D. Jones & Co.*, 2002 MT 129, ¶ 24, 310 Mont. 123, 54 P.3d 1 ("A contract of adhesion is a contract whose terms are dictated by one contracting party to another who has no voice in its formulation."). A contract of adhesion "will not be enforced as against a weaker party when it is: (1) not within the reasonable expectations of said party or (2) within the reasonable expectations of the party, but, when considered in its context, is unduly oppressive, unconscionable, or against public policy." *Passage v. Prudential-Bache Securities, Inc.*, 223 Mont. 60, 66, 727 P.2d 1298, 1301-02 (1986).

The first issue is whether the Declarations pertaining to water and sewer service, and the 90-day payment provision therefor, represent a contract of adhesion. The Montana Supreme Court addressed whether a particular set of subdivision covenants constituted a contract of adhesion in *Graziano v. Stock Farm Homeowners Ass'n, Inc., supra*. The Montana Supreme Court concluded that the covenants did not constitute a contract of adhesion:

> The CCRs here are not a contract of adhesion. First, the CCRs are not a standard form contract without negotiable terms. The CCRs were drafted specifically for the benefit of the *land* within Stock Farm, run with the land, and bind all successive landowners. Sections 70-17-201 to -204, MCA. Further, Graziano has the ability to change the terms of the CCRs. Graziano may not have had the ability to negotiate

> the terms of the original CCRs, but it is within his power to change and amend the CCRs in accordance with the amendment provisions in Section XVII of the CCRs.

Id., ¶ 19 (emphasis in original). *Graziano* did not foreclose the possibility, however, of land use covenants being adhesive. In this vein, *Graziano* limited its holding to the adhesive nature of the particular covenants at issue. *Id.*, ¶ 19.

The reasoning in *Graziano* applies here. The Declarations binding the HOA and individual unit owners were drafted to run with the land and to bind all successive landowners. *See id.* The provision of water and sewer services is a necessary benefit to the Unit Owners and thus, indirectly, to the Association. Compelling the Association to pay for delinquent services prevents utilities from being shut off without further capital expenditures to allow for shut off valves for each individual unit. The Declarations also contain a provision for the amendment of the Declarations. *See id.* Thus, the Declarations – as far as they pertain to the provision of water and sewer services and the 90-day payment provision - are not a contract of adhesion.

And, even if the Declarations constituted a contract of adhesion, they are enforceable with respect to water and sewer. A contract is not unenforceable just because it may be a contract of adhesion. *See, e.g. Passage*, 223 Mont. at 66, 727 P.2d at 1301-02. In order for the Declarations to be invalid, they have to be (1) not within the reasonable expectations of the HOA, or (2) within reasonable expectations, but, when considered in their context, unduly oppressive, unconscionable, or against public policy. *See Graziano*, ¶ 20.

The Declarations, with respect to water and sewer services, are not outside of reasonable expectations. The Declarations were recorded pursuant to the Unit Ownership Act, §§ 70-23-101, *et seq.*, MCA. At the very least, the unit owners that now comprise the Association had constructive notice of the recorded Declarations, including the requirement to purchase water and sewer and of the 90-day past-due provision. *See Kosel v. Stone*, 146 Mont. 218, 222, 404 P.2d 894, 896-97 (1965) (followed by *Graziano*, ¶ 22). Further, condominiums typically have assessments. In fact, the Unit Ownership Act specifically provides for a method to place liens on units that do not pay assessments, as well as methods to recover reimbursement for unpaid fees. *See id.* The Declarations utilize those provisions by authorizing the HOA to place a lien on

non-paying units.

Nor is the 90-day past-due payment arrangement unconscionable, unduly oppressive, or violative of public policy. The 90-day payment provision is reasonably related to the water and sewer systems. Those systems can be shut off at each building, but not each unit (as currently constructed). Water and sewer are necessary utility services for the condominium residents. Further, the appropriate water and sewer rates are set by the Montana Public Service Commission, which provides some assurance that unit owners are not price gauged.

The 90-day provision allows the community system to work by giving West Fork the ability to collect past-due amounts from the HOA since it cannot cut off the utilities to any particular unit (unless new infrastructure is added, which would likely drive up cost). The Declarations protect the HOA and its paying members by giving the HOA the ability to lien the units for which it has to pay the 90-day past-due amounts. As such, the 90- day provision protects West Fork by guaranteeing payment, while at the same time protecting the HOA and the paying Unit Owners by giving them a method of recouping the payments made to West Fork. Thus, the 90-day past-due payment arrangement should be upheld.

3) Consideration.

The HOA also contends the 90-day provision fails for lack of consideration. This Court disagrees.

The existence of a valid contract is a question of law. *See Lockhead v. Weinstein*, 2003 MT 360, ¶ 7, 319 Mont. 62, 81 P.2d 1284. Good consideration consists of:

> Any benefit conferred or agreed to be conferred upon the promisor by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered or agreed to be suffered by the person, other than prejudice that the person is at the

> time of consent lawfully bound to suffer, as an inducement to the promisor is a good consideration for a promise.

§ 28-2-801, MCA. The burden of demonstrating a lack of consideration falls on the party seeking to invalidate the contract. *Nordwick v. Berg*, 223 Mont. 337, 340, 725 P.2d 1195, 1197 (1986) (citing § 28-2-805, MCA). A written instrument is presumptive evidence of good consideration. § 28-2-804, MCA.

The HOA has failed to demonstrate that the 90-day provision is invalid for lack of consideration. *See Nordwick, supra.* Instead, there is good consideration because the HOA, through the individual unit owners, receive the benefit of water and sewer service. In exchange, they promise to pay their monthly bills, and if there is a delinquency, the HOA pays it so that water and sewer service is not shut off to an entire condominium building. The HOA is made up of unit owners, so any benefits to individual unit owners inure to the HOA. In this respect, each unit benefits by receiving water and sewer service, which in turn benefit the HOA.

Further, restrictive covenants in the form of assessments (such as the 90-day payment provision) on condominiums are common. The 90-day payment provision is directly related to the water and sewer systems at Firelight Meadows. And, the Declarations as a written instrument is "presumptive evidence of good consideration." § 28-2-804, MCA. Therefore, the 90-day provision of the Declarations does not fail for lack of good consideration.

For the foregoing reasons, the 90-day payment provision for water and sewer is enforceable. West Fork's motion for summary judgment regarding the 90-day provision for water and sewer is GRANTED. The HOA's motion for summary judgment is DENIED to the extent it applies to water and sewer.

III. CABLE TELEVISION

A. Introduction.

West Fork moved for summary judgment to dismiss the HOA's claim of unlawful restraint of trade. It also moved for summary judgment that the Twelfth Amendment is void, which changes the obligations of the HOA and Unit Owners regarding cable television. The HOA moved for summary judgment contending that the provisions of the Declaration regarding cable television are invalid as an unlawful restraint of trade, as well as based on the same arguments regarding the unenforceability of the water/sewer 90-day payment provision addressed above. Each argument is addressed separately, below.

B. Contract of Adhesion.

The HOA's contract of adhesion argument also applies to cable. In addition to the HOA's contract of adhesion arguments regarding water and sewer, the HOA argues that the provisions regarding cable are unconscionable because cable is not necessary and because of the length of the cable contract. This Court agrees with the HOA that the Declarations, as they pertain to imposing the Developer's exclusive cable services upon all Unit Owners, is an unenforceable contract of adhesion.

Graziano also applies here, albeit with a different result. While the Declarations, as a whole, run with the land, the provision of the Developer's exclusive cable services is not a necessary benefit to the Unit Owners. Instead, the Declaration provisions at issue were designed to primarily benefit the Developer by creating a scheme whereby the unit owners would be forced to purchase Developer's exclusive cable services and the Association would guarantee payment.

Further, unlike the water and sewer services, Plaintiffs have the practical ability to shut off cable services to each individual condominium unit. And, importantly, while the Declarations contain a provision for the amendment, Plaintiffs have now sued the HOA, in part, for amending the Declarations to remove the obligation to use West Fork's cable services and to remove the 90-day payment provision for cable services. Plaintiffs' Count I requests a declaratory judgment "that the HOA does not have the right or power to amend the Declarations so as to prohibit or usurp the right of West Fork to collect 90 day past due amounts for the use of the Central Improvement Facilities from the HOA." Complaint, ¶ 44B. Plaintiffs cannot legitimately claim that there is no contract of adhesion because the HOA can always amend the Declarations (*see* Plaintiffs' Response to Defendant's Motion For Summary Judgment, p. 10), but then simultaneously request this Court to declare that the HOA is prohibited from amending portions of the Declarations. In effect, the Plaintiffs contend that the HOA cannot amend the Declarations. *See, c.f. Graziano*, ¶ 19 (Graziano had the ability to change and amend terms of the CCRs). Further, the Unit Owners had no opportunity to negotiate the terms of the Declarations because the Developer unilaterally drafted and recorded the Declarations upon all future owners before the Unit Owners purchased their properties. *See Graziano,* ¶¶ 37-39 (J. Nelson, special concurrence). These facts are analogous, in part, to the unconscionable nature of the Declarations at issue in *Villa Milano Homeowners Ass'n v. Il Davorge*, 84 Cal.App.4th 819, 102 Cal.Rptr.2d 1 (Cal.App.4.Dist. 2000), as discussed in the HOA's briefing. Further, the term of the cable contract (up to 45 years, in the Developer's sole discretion), the lack of regulation on price or quality of services, the prohibition against use of antennae or other equipment so as to allow for satellite television or internet, and the exclusive nature of the cable contract which prohibits competition are all indicative of unconscionable and unduly oppressive contract terms.

Therefore, the Declarations – as far as they pertain to the exclusive provision of cable services and the 90-day payment provision – are an unconscionable and unduly oppressive contract of adhesion. The HOA's Motion For Summary Judgment is GRANTED to the extent the

Declaration provisions requiring each Unit Owner to pay for cable television and the provision obligating the HOA to pay for past cable bills are unenforceable because they constitute an unconscionable and unduly oppressive contract of adhesion.

C. Consideration.

In light of the Court's ruling declaring the Declaration provisions regarding cable television unenforceable, this Court declines to address the HOA's request for summary judgment declaring the same provisions unenforceable for lack of consideration.

D. Unfair Trade Practices & Plaintiffs' Motion for Leave.

The HOA contends that West Fork violated the Unfair Trade Practices Act ("UTPA") because the cable television contract provides West Fork with the exclusive right to provide cable television services to Firelight Meadows. The HOA further alleges that West Fork may raise prices at will. West Fork argues that the HOA's UTPA claim must be dismissed because there is no evidence that West Fork has done anything to unlawfully restrain trade.

After discovering during depositions that the HOA's unlawful trade practices claim is based on conduct that occurred several years ago, West Fork sought leave to file an amended reply to the HOA's Counterclaims to add an affirmative defense of statute of limitations. The HOA opposes West Fork's motion for leave to amend.

Rule 15(a), M. R. Civ. P., states that "leave [to amend] shall be freely given when justice so requires." It is "almost a legal maxim that the trial judge has broad discretionary power to grant leave to amend pleadings and that granting the leave is the rule rather than the exception." *State Highway Comm'n v. Schmidt*, 143 Mont. 505, 420 P.2d 153, 155 (1963). The Montana Supreme Court emphasized that "the rule [15(a)] has been construed broadly." *Lien v. Murphy Corp.*, 201 Mont. 488, 656 P.2d 804 (1982). It "is the rule to allow amendments and the exception to deny them." *Id.*, 201 Mont. at 492, 656 P.2d at 806 (quoting *Union Interchange, Inc. v. Parker*, 138

Mont. 348, 354, 357 P.2d 339, 342 (1960)).

It is unclear whether West Fork was required to affirmatively plead the statute of limitations defense to the HOA's UTPA claim. Compare *Castillo*, 213 Mont. at 239, 690 P.2d at 428 with *Turk v. Turk*, 2008 MT 45, ¶ 28, 341 Mont. 386, 177 P.3d 1013 (citing Rule 8(c), M.R.Civ.P.). Regardless, under the circumstances of this case, justice requires that West Fork's motion for leave to amend be granted. West Fork acted in good faith and did not discover the basis for the statute of limitations defense until engaging in discovery. The amendment does not delay the proceedings. Indeed, a trial date has not yet been set.

As such, this Court first considers West Fork's statute of limitations defense, as it is dispositive of the UTPA claim.

The statute of limitations for UTPA claims is two years. § 27-2-211, MCA; *Osterman v. Sears, Roebuck & Co.*, 2003 MT 327, ¶¶ 21-22, 24, 80 P.3d 435, 318 Mont. 342. It is undisputed that the HOA complains of conduct that occurred more than two years before the filing of the Complaint. The HOA's UTPA claim pertains to the Declarations and the cable contract that was signed in 2006. SUF ¶¶ 57, 61, Exhibit 23. The efforts by the Developer to prevent competition for cable television service occurred prior to West Fork purchasing the system. Even if West Fork continued such unfair trade practices after taking over the cable contract, the HOA indisputably was aware of such practices when West Fork took over the cable contract on January 14, 2008 – more than two years before West Fork filed the lawsuit in this case in August 2010. *See* § 27-2-408, MCA.[2] The HOA argues that the Plaintiffs' UTPA violations are continuing, but fails to cite any legal authority that tolls the statute of limitations for ongoing UTPA violations. Nor does the HOA argue any exception to the statute of limitations defense, such as the discovery rule or equitable tolling, and this Court finds that no such exception applies. For these reasons, the HOA's claim for unfair trade practices is barred by the two-year statute of limitations.

[2] Rather than calculate the time limit from the filing of the HOA's counterclaim on October 28, 2010, this Court applies the August 20, 2010 filing date of the Complaint pursuant to this statute.

The Court GRANTS summary judgment in West Fork's favor on Count II of the HOA's counterclaim for UTPA violations based solely upon West Fork's statute of limitations defense. The Court also DENIES the HOA's motion for summary judgment regarding its UTPA claim.

E. Validity of Twelfth Amendment.

1) Introduction.

Before the enactment of the Twelfth Amendment, the Declarations required homeowners to purchase cable and required the HOA to pay for overdue amounts. *See* Declarations, pp. 33-34. When the HOA adopted the Twelfth Amendment, it changed those requirements.

This Court finds that the flawed voting procedures used by the HOA invalidates the Twelfth Amendment and thus limits the discussion to this issue. As such, this Court declines to discuss West Fork's argument that the Twelfth Amendment is invalid because it unreasonably deprives West Fork of the benefit of its bargain.

2) Voting Procedure on Twelfth Amendment.

The following facts regarding the HOA's voting procedures are undisputed. In order to amend the Declarations, 75% of the Unit Owners must vote in favor of amendment. Declarations, p. 25. The HOA first decided to amend the Declarations to remove the cable requirement in April 14, 2009. Eventually, the HOA decided to proceed with a mail ballot with a deadline. The ballots were mailed out to Unit Owners, with a return date of September 10, 2009. The HOA did not collected enough "yes" votes to pass the amendment by the September 10, deadline. The day before the deadline, less than 50% of the votes needed to pass the amendment had been received. On that day, the HOA decided to extend the deadline to October 24, 2009.

The new October 24, 2009 deadline coincided with the annual meeting of the HOA. By the time of that meeting, there were still not enough votes to pass the Twelfth Amendment. The HOA Board decided to go out and get the remainder of the votes. This effort included several attendees voting for non-attendees via proxy, even though many of the Unit Owners who were not present at the annual meeting had given a general proxy to an attendee (i.e., not a proxy for the

specific purpose of voting on the amendment).

Even with the proxy votes, there were still not enough votes to approve the Twelfth Amendment. After the close of the annual meeting, several board members called Unit Owners around the country to get necessary votes by telephone. On the evening of October 24, 2009, the HOA Board received votes, by telephone, confirming that there would be enough votes to pass the Twelfth Amendment. These votes were not physically received by the HOA until after the October 24, 2009 deadline.

Based upon the foregoing undisputed facts, voting on the Twelfth Amendment violated the Declarations and is therefore void. The Declarations govern how amendments must occur. For purposes of the Twelfth Amendment, the Declarations require: "the proposed amendment shall be made a subject for consideration at a special meeting or the next succeeding regular or annual meeting of the Owners of the Association, with notice thereof, together with a copy of the proposed amendment to be furnished to each Unit Owner at least ten days in advance of such meeting." Declarations, p. 25. They also require "[a] written ballot for the amendment may be mailed to each Unit Owner or delivered personally and shall set forth the amendment, the time when the written ballot must be returned to be counted as a vote, and allow the Unit Owner to vote for or against the amendment by checking or otherwise indicating his or her choice and return the ballot to the Association." *Id.*

The Declarations require that the ballots have a date for the close of voting. While the ballots had a date for the close of voting, the HOA ignored the date when it became clear that the vote would not pass, and extended the date by a month and a half.

The Declarations require that there be a meeting, with 10 days' notice, to discuss the specifics of the amendment. The notice must have the specific language of the amendment attached. It does not appear that such a meeting occurred. Even assuming the October 24, 2009 deadline is proper, the HOA did not receive enough ballots by that date to pass the Amendment.

Therefore, the Twelfth Amendment is invalid for failure to follow proper voting procedures. West Fork's motion for partial summary judgment regarding the Twelfth Amendment is GRANTED IN PART based upon the invalid voting procedures used by the HOA. The HOA's motion for summary judgment on this issue is DENIED.

ORDER

THEREFORE, IT IS HEREBY ORDERED:

1. Plaintiffs' Motion for Leave to File First Amended Reply to Defendant's Counterclaims; filed on August 24, 2011, is GRANTED.

2. Defendant's Civil Rule 56 Motion For Summary Judgment is GRANTED IN PART and DENIED IN PART as set forth above.

3. Plaintiffs' Motion For Partial Summary Judgment Regarding 90-Day Past-Due Water and Sewer Bills is GRANTED.

4. Plaintiffs' Motion For Partial Summary Judgment that the Twelfth Amendment of the Declarations and Bylaws is Void is GRANTED IN PART as set forth above.

5. Plaintiff's Motion For Partial Summary Judgment on Defendant's Claim For Unfair Trade Practices is GRANTED IN PART as set forth above.

DATED this 17th day of July, 2012.

HONORABLE JOHN C. BROWN
District Court Judge

cc: Benjamin J. Alke
Jennifer Farve
7/18/12 email