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MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT
GALLATIN COUNTY

HLC, LLC and WEST FORK COMMUNICATIONS, Plaintiffs/Counterdefendant, v. THE ASSOCIATION OF UNIT OWNERS OF FIRELIGHT MEADOWS CONDOMINIUMS, INC., Defendant/Counterclaimants)	Cause No: DV-10-884C Hon. John C. Brown **PROPOSED ORDER**

INTRODUCTION

On December 5, 2011, this Court held a hearing on Plaintiffs HLH, LLC and West Fork Communications' Motion for Summary Judgment and Defendant The Association of Unit Owners of Firelight Meadows Condominiums, Inc.'s Cross Motion for Summary Judgment. The motions have been fully briefed and this matter is ripe for adjudication. Upon reviewing the briefs and considering the arguments presented therein and at the hearing, this Court now issues the following Order.

BACKGROUND

Firelight Meadows is a community of 216 chalets and condominiums in Big Sky, Montana. *See* Declaration and Bylaws for Firelight Meadows Condominiums February 27, 2002, recorded as Document No. 2062676, records of Gallatin County, Montana. Firelight Meadows, LLC is identified as the "Declarant" in both the Declaration and Bylaws for Firelight Meadows Condominiums (hereinafter referred to as "Declaration" or "Bylaws"). The Association of Unit Owners of Firelight Meadows Condominiums, Inc.'s Statement of Undisputed Material Facts in Support of its Civil Rule 56 Motion for Summary Judgment ("Association's Statement of Undisputed Facts"), ¶ 1 (Sept. 6, 2011). Paul S. Pariser (the "developer") was managing member of Firelight Meadows, LLC, and signed the Bylaws as chairman of the Association. *Id.* at ¶ 4. The Bylaws also gave Firelight Meadows, LLC the power to appoint a majority of the Board of Directors until 90% of the units had been transferred to third-party purchasers. *Id.* at ¶ 8.

On September 11, 2006, during the time Firelight Meadows, LLC controlled the Board of Directors, Ronald E. Seher, as Chairman of the Association, entered into a Cable Television Contract with Paul S. Pariser as Manager of Firelight Meadows, LLC d/b/a Firelight Meadows Cable Company. *Id.* at ¶ 9. The Cable Television Contract gave Firelight Meadows, LLC the exclusive right to provide cable television services and internet services to members of the Association. *Id.* at ¶ 11. The Cable Television Contract's stated term was for fifteen (15) years *after* the sale of the last unit by the developer (Firelight Meadows, LLC). *Id.* at ¶ 12. Firelight Meadows, LLC, in its sole discretion, could extend the contract by two (2) additional fifteen year terms. *Id.* at ¶ 12. The date of the sale of the last unit by the Developer, Firelight Meadows, LLC, is currently unknown. *Id.* at ¶ 13.

According to the Cable Television Contract "[a]uthority for this Contract, the exclusive right to provide television cable services, and the permanent easement for the

cable facilities is set forth in the Declaration for Firelight Meadows Condominiums and the pertinent paragraphs are set forth on Exhibit C attached." Exhibit C of the Cable Television Contract recites verbatim Article VIII, Part B of the Declaration, which provides as follows:

> VIII. MANAGEMENT SERVICES, MAINTENANCE AND CENTRAL IMPROVEMENT FACILITIES
>
> * * *
>
> B. Central Improvement Facilities
>
> Declarant will install and provide the Central Improvement Facilities (sewer system, water system and cable TV) for the project in the common area designated therefore. ***Each unit shall be hooked up to and use the Central Improvement Facilities***. The Declarant or their successors and assigns shall maintain the facilities. Each Unit Owner shall be charged a fee for the use of the facilities, including a capital facilities fee and maintenance fee. The fees charged for these services shall be in accordance with the rules and regulations of the Montana Public Service Commission.[1] A permanent easement is reserved to Declarant and their successors and assigns in, on and under the common elements and common areas within the condominium project for the construction, installation, repair, maintenance and replacement of the Central Improvement Facilities. ***Any unpaid fee or assessment mor [sic] than ninety (90) days old will be paid by the Association and the Association shall have the right to place a lien on the unit if necessary to collect the unpaid amount***.

Declaration, p. 33; Association's Statement of Undisputed Fact, at ¶ 15; Statement of Uncontroverted Fact, ¶¶ 9-10 (Sept. 6, 2011).

The Cable Television Contract grants Contractor (at that time the developer, Firelight Meadows, LLC) the "*exclusive right* during the term of this Contract and any extension to provide cable television services and Internet Services to the members of the Association." (Emphasis added); Association's Statement of Undisputed Fact, at ¶¶ 11, 26. It then goes on to reserve a "permanent easement" "in, on and under the common elements and common areas within the condominium project for the construction, installation, repair, maintenance and replacement of the cable facilities." *Id.* Despite the

[1]Cable television services are not regulated by the Public Service Commission.

requirement for exclusivity, the contract provides unit owners the option of subscribing (or not subscribing) to its services:

> Members ***may*** subscribe for the cable television services and the Internet Services through the Contractor by execution and delivery of a Cable Service Authorization and/or Internet Service Authorization to the Firelight Meadows Cable Company.

Cable Television Contract, p. 1; Association's Statement of Undisputed Fact, at ¶18. Notably, there are no executed Cable Service Authorization forms, as the Cable Television Contract requires, between the unit owners and WFU. Association's Statement of Undisputed Fact, at ¶ Cable Television Contract, p. 1. Although not raised by the parties' briefs, this Court takes note of the Eighth Amendment to the Declaration, which was filed as an exhibit to Plaintiffs' Complaint. The Eighth Amendment, also signed by Paul S. Pariser as Chairman of the Association, similarly recognizes that cable television service fees are the responsibility of the individual subscriber. The Amendment specifically prohibits installation of antennas and/or receivers of any type on any building or common area.

> CABLE TELEVISION SERVICE - *Cable television service is available but is not a part of the Association budget and the fees are paid by each individual subscriber*. Cable television service is provided by Firelight Meadows, LLC d/b/a Firelight Meadows Cable Company pursuant to a contract. A connection fee of $30.00 is presently required prior to starting cable service in your unit. The monthly bill is presently $28.00. *Monthly billing will require prompt payment in order to avoid a disconnect*. Presently, Walking Cross, Inc. (Administrator) handles all billing, collections, delinquence, connects and disconnects. Walking Cross is located at P.O. Box 6204, Bozeman, Montana 59771, telephone 406-587-3258, fax 406-587-2829. The provider reserves the right to change and select the administrator and adjust the fees as shall be reasonable.
>
> Antennas and/or receivers of any type *are not allowed* on any building or common area.

Eighth Amendment to Declaration For Firelight Meadows Condominiums, Exhibit F as Amended and Restated Rules and Regulations for Firelight Meadows Condominiums, para. 7C, p. 6 (Sept. 15, 2005) (Emphasis added).

On February 23, 2007, Leigh Huggins ("Leigh"), Kevin Loustanau ("Kevin") and Matthew Huggins ("Matt") entered an Asset Purchase Agreement which included the water and sewer utilities serving Firelight Meadows Condominiums and an assignment of the Cable Television Contract. Association's Statement of Undisputed Fact, at ¶ 19; Statement of Uncontroverted Facts, ¶ 5. Leigh, Kevin and Matt formed HLH, LLC (HLH") and West Fork Communications ("WFU") for the purpose of holding the assets and managing their business interest at Firelight Meadows. *Id.* at ¶ 20.

On January 14, 2008, title to all the assets pertaining to the water and sewer facilities at Firelight Meadows, the cable television infrastructure and the Cable Television Contract was conveyed by Firelight Meadows, LLC to HLH. *Id.* at ¶ 21. That same day, HLH conveyed to WFU title to all assets pertaining to the cable television infrastructure and assigned the Cable Television Contract to WFU. *Id.* at ¶ 22.

To date, there are no other providers of *cable* television service at Firelight Meadows; however, several unit owners, who oppose WFU's purported authority to provide services exclusively, have notified WFU of their election to cancel cable television service and have subscribed to satellite tv instead. *Id.* at ¶ 24. Despite the fact that there are no executed Cable Service Authorizations between unit owners and WFU, and the fact that the Cable Television Contract provides unit owners *may* subscribe to WFU's services but does not require them to do so, WFU has refused these unit owners' requests for cancellation and continues to charge them a monthly fee for its cable tv service. *Id.* at ¶ 31, 33. The monthly cable tv service fee is $28 per unit. *Id.* at ¶ 28.

Importantly, Plaintiffs do not dispute there is nothing preventing WFU from disconnecting individual unit owners' cable television services and seeking to recover costs for unpaid balances against the unit owners directly. *Id.* at ¶ 34; *see also* Plaintiffs' Response to Defendant's Motion for Summary Judgment (Sept. 28, 2011). Indeed, the

Cable Television Contract not only contemplates such action, it specifically authorizes it. The Cable Television Contract provides:

> The Cable Television Services and the Internet Service are not part of the Association budget. The costs and fees are paid by each individual member subscriber. In the event the member does not timely pay for the service, *the Contractor may disconnect the service and bring legal action for the past due fees.*

Cable Television Contract, p. 2 (Emphasis added).

On or about December 3, 2009, the Association filed the Twelfth Amendment to the Declaration ("Twelfth Amendment") which removed unit owners' purported obligation to hook up to and use the cable television services.

The Twelfth Amendment changes Section VIII, Part B of the Declaration as follows:

> Declarant will install and provide the Central Improvement Facilities (sewer system, water system and cable TV) for the project in the common area designated therefore. Each unit shall be hooked up to and use the **water and sewer system** ~~Central Improvements Facilities~~. The Declarant or their successors and assigns shall maintain the Central Improvement F~~facilities~~. Each Unit Owner shall be charged a fee for the use **and maintenance of the water and sewer system** ~~of the facilities, including a capital facilities fee and maintenance fee~~. The fees charged for these services shall be in accordance with the rules and regulations of the Montana Public Service Commission. A permanent easement is reserved to Declarant and its successors and assigns in, on and under the Common elements and common areas within the condominium project for the construction, installation, repair, maintenance and replacement of the Central Improvement Facilities. Any unpaid fee or assessment more than ninety (90) days old will be paid by the Association and the Association shall have the right to place a lien on the Unit if necessary to collect the unpaid amount.

Association's Statement of Undisputed Fact, ¶ 39. The Association claims the Twelfth Amendment removed the contradictory language from the Declaration by changing the definition of "Central Improvement Facilities" to include only water and sewer services–services which are regulated by the Public Service Commission and which unit owners must hook up to and use. The Association argues Cable television services are excluded from the definition of Central Improvement Facilities because they are not regulated by the Public Service Commission and because unit owners are not required to hook up and use cable television pursuant to the unambiguous language in the Cable Television Contract.

The parties do not dispute HLH and WFU knew about the proposal to adopt the Twelfth Amendment to the Declaration prior to its enactment. *Id.* at ¶ 40. Nor have Plaintiffs disputed that neither HLH or WFU have any voting rights in the Association. Notably, the Twelfth Amendment does not prevent a unit owner from contracting with WFU for cable services. Nor does it remove the alleged requirement that individual units be hooked up to and use the water and sewer services or that the Association pay the 90-day past due amounts for water and sewer. The Association argues, however, that the purported obligation to pay the past due amounts for water and sewer is unenforceable in any event because it is not supported by adequate consideration. The Association further contends the alleged obligation is unreasonable and unconscionable.

PROCEDURAL HISTORY

On August 20, 2010 Plaintiffs filed their Complaint alleging five counts: (1) declaratory relief that the Twelfth Amendment is ineffective, that the Association does not have the right or power to amend the Declaration, and that the Association is required to pay all accounts more than ninety (90) days past due; (2) that the Twelfth Amendment should be cancelled; (3) breach of contract and covenant of good faith; (4) tortious interference with prospective economic advantage; and (5) attorney's fees and costs. The Association answered and counterclaimed requesting declaratory judgment (First Claim for Relief), relief from Plaintiffs' unlawful restraint on trade pursuant to Mont. Code Ann. § 30-14-222 (Second Claim for Relief), and attorney's fees and costs (Third Claim for Relief).

On August 24, 2011 Plaintiffs filed their Motion for Leave to File First Amended Reply to Defendant's Counterclaims. On August 29, 2011, this Court amended its January 11, 2011 Scheduling Order clarifying the deadline for filing all pretrial motions of September 6, 2011. On September 6, 2011, Plaintiffs filed their Statement of Undisputed Facts, and three Civil Rule 56 motions for summary judgment re the Association's Unfair Trade Practices Claim, the Twelfth Amendment is void, and 90-day past due water and

sewer bills. The Association filed its Statement of Undisputed Facts and its motion for summary judgment requesting dismissal of all Plaintiffs' claims against the Association and awarding judgment in favor of the Association on its claims for declaratory judgment (first Claim for Relief), unlawful restraint of trade (Second Claim for Relief) and attorneys' fees (Third Claim for Relief).

This Court held a hearing on the summary judgment motions on December 5, 2011. Plaintiffs were represented by Ben Alke of Goetz, Gallik & Baldwin, P.C. The Association was represented by Jennifer Farve of Moore, O'Connell & Refling, P.C.

ISSUES

The issues germane to the parties' Motions are:

1. Whether the Declaration and the Cable Television Contract violate Mont. Code Ann. § 30-14-205(2)(g).
2. Whether the Declaration's provision requiring the Association to pay the 90-day past due bills of its unit owners' for water, sewer and cable tv services is enforceable.
3. Whether the Association's Twelfth Amendment to the Declaration is valid.

ANALYSIS

1. Standard of Review.

Summary judgment is appropriate when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), M.R.Civ.P. The moving party bears the burden of establishing entitlement of summary judgment as a matter of law. *Hi-Tech Motors, Inc. v. Bombardier Motor Corp. of America*, 2005 MT 187, ¶ 32, 328 Mont. 66, 117 P.3d 159. 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. Cummings*, 2006 MT 239, ¶ 11, 333 Mont. 522, 144 P. 3d 82. The non-moving party must prove, by more than mere denial or speculation, that a genuine issue of material facts does exist. *Id.* If there are no genuine issues of material fact, the Court then determines whether the moving party is entitled to judgment as a matter of law. *Stutzman v. Safeco Ins. Co. of America*, 284 Mont. 372, 376, 945 P.2d 32, 34 (1997).

2. The Association has Demonstrated that Plaintiffs have Unlawfully Restrained Trade for Cable Television Services.

The proclaimed purpose of Montana's unfair trade practices statutes is to "safeguard the public against the creation or perpetuation of monopolies and foster and encourage competition by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented." Mont. Code Ann. § 30-14-201; *see also* Mont. Code Ann. 30-14-101, et al. The beneficial purposes of the unfair trade practices statutes are to be "liberally construed so that its beneficial purposes may be accomplished." *Id.*

Mont. Code Ann. § 30-14-205(2) provides that it is unlawful for a person or group of persons, directly or indirectly:

...

(2) for the purpose of creating or carrying out any restriction in trade to:

...

(g) create a monopoly in the manufacture, sale or transportation of an article of commerce.

(Emphasis added).

The United States Supreme Court has defined "monopoly" as "the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391, 76 S.Ct. 994, 100 L.Ed. 1264 (1956). The relevant market for an antitrust claim has been defined as "the narrowest market which is wide enough so that products from

adjacent areas or from other producers in the same area cannot compete on substantial parity with those included in the market.'" *Int'l Wood Processors v. Power Dry, Inc.*, 792 F.2d 416, 430 (4th Cir.1986) (quoting L. Sullivan, Handbook of the Law of Antitrust § 12, at 41 (1977)).

The Association contends the Declaration's purported requirement that each unit owner hook up to and pay for cable television services is unlawful when combined with the Cable Television Contract because it gives WFU the "exclusive right" to provide cable television services at Firelight Meadows and results in a monopoly on cable tv. See Cable Television Contract, p. 1 ("Contractor shall have the exclusive right . . . to provide cable television services and Internet Services to the members of the Association). The Association claims this contractual arrangement was entered into by the developer for the purpose of monopolizing cable tv services at Firelight Meadows. The Association calls attention to the fact, which was not disputed by Plaintiffs, that the Cable Television Contract was entered into by Paul S. Pariser as Manager of Firelight Meadows, LLC during a time when he controlled a majority of the Association's Board of Directors. Essentially, the developer contracted with himself for a permanent exclusive easement for the cable television infrastructure and attempted to obligate each unit to use the services. The Association argues this is, by definition, a monopoly because it gives the developer, and subsequently WFU, the power to both control prices and exclude competition.

WFU concedes the Cable Television Contract gives the developer, and now WFU, the exclusive right to provide cable tv at Firelight Meadows; however, it argues this does not violate fair trade because it has never sought to enforce the exclusivity of the Contract. WFU also claims it attempted to resolve its differences with the Association by renegotiating the Cable Television Contract and refers to several e-mails exchanged with Association board members in support.

At the outset, this Court notes that the email correspondence between the Association and Plaintiffs is inadmissible. Rule 408, M. R. Evid., provides in relevant part:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

For example, in *Treutel v. Jacobs*, 240 Mont. 405, 407-08, 784 P.2d 915, 917 (1989), the plaintiff sought to admit statements and a memo evidencing settlement negotiations which had proved unsuccessful. In upholding the grant of defendant's summary judgment motion, the Montana Supreme Court explained that as evidence, the statement and memo are inadmissible as a matter of law. *Id.* at 408. The court discarded the inadmissible memo and statement explaining that such evidence could not be considered at the summary judgment stage or at trial. *Id.* See also *Carelli v. Hall*, 279 Mont. 202, 209, 926 P.2d 756, 760 (1996) (recognizing representations could only be considered on summary judgment if admissible at trial).

Here, Plaintiffs rely on email correspondence and offers to compromise in order to dispute the validity of the Association's unfair trade practices claim. Rule 408, M. R. Evid., specifically prohibits such evidence. The unsuccessful settlement negotiations between the Association and Plaintiffs constitute offers to compromise and may not be considered either at the summary judgment stage or during a trial. Accordingly, this Court will not consider them.

This Court is similarly unpersuaded that WFU has not violated the Unfair Trade Practices Act simply because it has not sought to enforce the exclusivity provisions of the Cable Television Contract. Mont. Code Ann. § 30-14-205(g) provides that

> It is unlawful for a person or group of persons, directly or indirectly;
> (2) for the purpose of creating or carrying out any restriction in trade, to:
> ...
> (g) create a monopoly in the manufacture, sale, or transportation of an article of commerce.

(Emphasis added).

In these proceedings, WFU has not disputed that it has a permanent exclusive easement for cable infrastructure at Firelight Meadows, or that the developer, and subsequently Plaintiffs, are the only ones who have ever supplied cable television services at Firelight Meadows. WFU also has not disputed that, despite several unit owners' requests to be disconnected, WFU has refused to cancel their services and continues to bill them for cable tv on a monthly basis thereby allowing monthly charges to continually accrue. WFU's actions are particularly egregious given that these unit owners never signed Cable Service Authorization forms as expressly required by the Cable Television Contract. Cable Television Contract, p. 1. WFU is refusing to disconnect unit owners who never even authorized its services. Finally, WFU apparently does not disagree that it can, if it wishes to do so, disconnect individual units from the cable tv service. Indeed, the Cable Television Contract, drafted by the developer who installed the cable television infrastructure, specifically authorizes the contractor to disconnect service to non-paying subscribers. Cable Television Contract, p. 2; Eight Amendment to Declaration, para. 7C.

The Declaration and the Cable Television Contract were clearly drafted with a bent for the developer and his assigns. By granting the developer exclusive rights to provide cable television services at Firelight Meadows and then attempting to obligate unit owners to use those services, the developer not only captured the market but ensured the absence of future competition. This exclusivity in favor of the developer is belied by the Eighth Amendment's prohibition of antennas or receivers of *any type* on buildings or common elements. *Id.* Although WFU may not have taken legal action to enjoin unit owners from subscribing to alternate services, neither has it recognized their requests for cancellation of WFU's services. Instead, WFU continues to bill unit owners for cable tv, despite their requests for cancellation. Statement of Uncontroverted Fact. ¶ 21. After 90-days of non-payment, WFU turns these amounts over to the Association for payment and continues to

bill delinquent unit owners thereby continually amounting more fees. *See* Statement of Uncontroverted Fact. ¶ 21.

Although this arrangement was crafted by the developer, WFU admittedly assumed it and seeks to benefit from it as evident by its action to invalidate the Twelfth Amendment to the Declaration, which would eliminate the unit owners' obligation to subscribe to WFU's cable television services. *Id.* ¶¶ 16-20. The contractual provisions of the Declaration and Cable Television Contract were clearly entered into for the purpose of creating or carrying out a restriction in trade to create a monopoly in the sale of an article of commerce. The exclusivity requirements were r einforced by the Eighth Amendment's prohibition of antennas or receivers of any type. This Court notes the Eighth Amendment was executed by Paul S. Pariser as Chairman of the Association and approved by the declarant. *See* Eighth Amendment to Declaration, pp. 1-2. WFU's act of continuing the established practice of requiring subscription and excluding competition restrict trade in violation Mont. Code Ann. § 30-14-205(2)(g).

Through the Cable Television Contract and the Declaration, the developer and subsequently WFU, have succeeded in preventing competition for cable television services at Firelight Meadows. WFU has carried out a restriction in trade that excludes competition and allows it to control prices. By definition, this is a monopoly. Accordingly, the contractual arrangement at Firelight Meadows for cable television services to unit owners violates Mont. Code Ann. § 30-14-205(2)(g).

Pursuant to Mont. Code Ann. § 30-14-222(1), if "the court finds that the defendant is violating or has violated any of the provisions of 30-14-205 ... the court shall enjoin the defendant. It is not necessary to allege or prove actual damages to the plaintiff." Because the Court finds that the above discussed provisions of Article VIII of the Declaration and the Cable Television Contract violate Mont. Code Ann. § 30-14-205(2)(g), the Court hereby enjoins Plaintiffs from enforcing the Contract or any of the Declaration's provisions

purportedly requiring unit owners to hook up to, use or otherwise subscribe and pay for the Plaintiffs' cable tv services or allegedly providing Plaintiffs exclusive rights to easements on the Firelight Meadows common elements or exclusive rights to sell their cable tv services at Firelight Meadows.

Furthermore, a contract which expressly or impliedly violates Mont. Code Ann. 30-14-205 is an illegal contract and recovery based on the contract may not be had. *See* § 30-14-219, MCA. As the Montana Supreme Court reiterated:

> No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out, nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim.... The law, in short, will not aid either party to an illegal agreement. It leaves the parties where it finds them. Therefore, neither a court of law nor a court of equity will aid the one in enforcing it, or give damages for a breach of it, or set it aside at the suit of the other . . .

Portable Embryonics, Inc. v. J.P. Genetics, Inc., 248 Mont. 242, 246, 810 P.2d 1197, 1199 (citations omitted).

The Declaration's provision purportedly obligating unit owners to hook to and use WFU's cable television services violates Mont. Code Ann. § 30-14-205(g). Under Mont. Code Ann. § 30-14-219, Plaintiffs are forbidden from enforcing or recovering upon these illegal contracts. Rather, the Association, as the prevailing party, is entitled to attorney's fees and costs. Mont. Code Ann. § 30-14-222(4). Summary judgment is granted in favor of the Association on its Second Claim for Relief – Unlawful Restraint of Trade and Third Claim for Relief – Attorney's Fees. Plaintiffs' Motion for Partial Summary Judgment on Defendant's Claim for Unfair Trade Practices is denied.

3. <u>There is No Consideration for the Association's Purported Promise to Pay Delinquent Unit Owners' Past Due Water and Sewer Bills.</u>

Plaintiffs argue that, under Article VIII, Section B of the Declaration, the Association is obligated to pay any unpaid fee or assessment for water and sewer that is more than 90-days old. Plaintiffs contend the Association's remedy is to place a lien on the non-paying unit if necessary to collect the unpaid amount. Plaintiffs request summary judgment in their

favor that the Association is obligated to pay the 90-day past due fees for water and sewer. Of note, WFU has not brought any claim against the Association for payment of the past due fees for *cable television*. Based on this Court's ruling above – that the Cable Television Contract and the provision in the Declaration purportedly obligating unit owners to hook up to and use Plaintiffs cable television services violate Montana's Unfair Trade Practices Act and constitute an illegal contract under which recovery may not be had – this Court holds Plaintiffs are not entitled to collect past due amounts for cable television from the Association in any event. Therefore, for purposes of now deciding Plaintiffs' Motion for Partial Summary Judgment, this Court focuses solely on whether Plaintiffs are entitled to recover from the Association those 90-day past due amounts for *water and sewer*.

The Association contends the alleged requirement to pay 90-day past due amounts for the water and sewer services received by its unit owners is unlawful and unenforceable because it is not supported by adequate consideration. The Association further claims the provision is unconscionable and a contract of adhesion.

The existence of a valid contract is a question of law for the court to decide. See *Lockhead v. Weinstein*, 2003 MT 360, ¶ 7, 319 Mont. 62, 81 P.3d 1284 and *Larson v. Green Tree Financial Corp.*, 1999 MT 157, ¶ 17, 295 Mont. 110, 983 P.2d 357. Montana requires four essential elements in every contract: "(1) identifiable parties capable of contracting; (2) their consent; (3) a lawful object; and (4) a sufficient cause or consideration." § 28-2-102, MCA. A contract that lacks good consideration is unenforceable. *Carroccia v. Todd*, 189 Mont. 172, 177, 615 P.2d 225, 228 (1980) (refusing to enforce contract). 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.

In this case, the Association meets its burden that there is inadequate consideration for its purported promise to pay past due fees and assessments. 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.

Mont. Code Ann. § 28-2-801. It is not essential that the consideration impose a gain or loss to either party, rather, consideration is sufficient where the party in whose favor the contract is made foregoes some advantage or parts with a right he might otherwise exert. See *Nordwick v. Berg,* 223 Mont. 337, 341, 725 P.2d 1195, 1198 (1986).

The undisputed evidence in this case demonstrates the lack of benefit derived by the Association in exchange for its alleged obligation to pay. For instance, the Central Improvement Facilities are owned and operated by a third party whose interest in Firelight Meadows is limited to its investment in the water, sewer and cable tv infrastructure. Plaintiffs bill the *unit owners* directly for the services on a monthly basis. The Association has no part in owning, operating or maintaining the Central Improvement Facilities and does not receive any of Plaintiffs' services. The Association does not budget for or collect annual assessments for payment of the delinquent water and sewer bills. In fact, the only time the Association becomes involved with the Central Improvement Facilities is when it is asked to pay the 90-day past due bills of its unit owners.

Plaintiffs contend, without support, that the Association benefits indirectly from a system where Plaintiffs can collect their unpaid fees through the Association, rather than pursuing collections against individuals, because it keeps water and sewer rates from further increasing. According to Plaintiffs, they are unable to disconnect individual units from the water and sewer service without disconnecting service to the whole building. They claim that if they were to install infrastructure to shut off service to individual units,

these costs would be passed on to the unit owners in the form of a rate increase. Plaintiffs contend it makes sense that they should be allowed to turn to the Association for payment of delinquent accounts rather than install additional or different infrastructure that would enable them to terminate service to non-paying units or incur costs associated with collection.

However, Plaintiffs have provided absolutely no support for their contention that rates will increase if changes are made to the existing system or that water and sewer rates are less because delinquent accounts are paid by the Association. To the contrary, the Association's Chairman, Jack Eakman, states in his affidavit that the rates for water and sewer at Firelight Meadows are currently three times more than the Big Sky Water and Sewer District. Plaintiffs have not provided any evidence to refute Mr. Eakman's statement or shown how the *Association*, an entity legally distinct from the individual unit owners who receive Plaintiffs' services, benefits from having to pay past-due water and sewer bills.

Furthermore, Plaintiffs are not left without a remedy should they incur additional costs as a result of collection efforts. As a public utility, Plaintiff HLH, LLC is regulated by the Montana Public Service Commission ("PSC"). *See* Mont. Code Ann. §§ 69-1-101 et. seq. The rate-making rules set by the PSC include provisions for determining rates and applying for rate increases. Admin. R. Mont. 38.5.505 and 38.5.606. The Montana legislature has endowed the PSC with full power of supervision, regulation, and control of public utilities in matters related to rates and service. *See* Mont. Code Ann. § 69-3-101, et. seq.; *Montana-Dakota Utilities Co. v. Montana Department of Public Service Regulation*, 243 Mont. 492, 497, 795 P.2d 473, 477. If HLH's costs of service rise because of collection efforts, HLH may file an application for rate increase before the PSC. Indeed, this Court takes notice of the fact that HLH, LLC has filed an application for rate increase that is currently pending before the PSC. *See In The Matter of the Application of HLH, LLC, to Implement Increased Rates for Water Service in its Big Sky, Montana, Service*

Area, Docket No. D2008.10.123. The PSC is the appropriate body to review and scrutinize the operating expenses of the utility to prevent unreasonable costs from being passed to the customer. *Montana-Dakota Utilities Co.*, 243 Mont. at 498, 795 P.2d at 477. If Plaintiffs cost of service rise with collections, the PSC, not this Court, is the appropriate forum to address this.

Furthermore, the benefit of collecting through the Association, if any exists, is enjoyed *by the unit owners individually and not the Association*. "Consideration requires that the contracting parties, each as to the other, confer some legal benefit and/or incur some detriment as an inducement to performance." *Montana Public Employee's Ass'n v. Office of Governor*, 271 Mont. 450, 455, 898 P.2d 675, 678 (1995). Importantly, Plaintiffs' argument only includes *unit owners*– any purported benefit to unit owners does not inure to the Association which is a legally distinct entity. Likewise, Plaintiffs incur no detriment for the Association's promise to pay past due bills. Although they provide water and sewer services, these services benefit unit owners, not the Association. The only time the Association becomes involved in this arrangement is when Plaintiffs request payment for past-due bills. The proper recipient of Plaintiffs' bills are the people that receive the service–individual unit owners–not the Association which is a legally distinct business entity.

4. The Provisions in the Declaration Requiring Each Unit Owner Hook Up to and Pay for the Cable Television Services and Obligating the Association to Pay Past Due Water, Sewer and Cable TV Bills of Its Unit Owners are Further Unenforceable Because These Provisions Constitute a Contract of Adhesion.

WFU maintains the Association should be prohibited from arguing contract of adhesion because this legal theory was not raised as an affirmative defense in its answer. However, this Court finds the Association has complied with Civil Rule 8. Civil Rule 8(c) lists nineteen (19) affirmative defenses which must be pled affirmatively or they will be waived. "Contract of adhesion" is not listed as such a defense. Plaintiffs have not

provided a single citation to any authority which requires "contract of adhesion" to be affirmatively pled. Accordingly, this Court may consider the Association's argument.

The Montana Supreme Court has defined a contract of adhesion as "a contract whose terms are dictated by one contracting party to another who has no voice in its formulation." *Kloss v. Edward D. Jones & Co.*, 2002 MT 129, ¶ 24, 310 Mont. 123, 54 P.3d 1 citing Corbin on Contracts, § 1.4 at 13 (1993). "Contracts of adhesion arise when a standardized form of agreement, usually drafted by the party having superior bargaining power, is presented to a party, whose choice is either to accept or reject the contract without the opportunity to negotiate its terms." *Id.* citing *Passage v. Prudential-Bache Securities, Inc.*, 223 Mont. 60, 66, 727 P.2d 1298, 1301-02 (1986). See also *Woodruff v. Bretz, Inc.*, 2009 MT 329, ¶ 21, 353 Mont. 6, 218 P.3d 486 ("The relevant question, rather, is whether the other party had bargaining power, realistic options, a meaningful opportunity to negotiate the terms of the contract, and a voice in the formulation of the contract's terms."). A contract of adhesion "will not be enforced as against the 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 Montana Supreme Court has only examined whether a provision in the declaration of a development is a contract of adhesion on one occasion. See *Graziano v. Stock Farm Homeowners Ass'n, Inc.*, 2011 MT 194, 361 Mont. 332, 258 P.3d 999. In *Graziano* the Court determined the subdivision's covenants, conditions, and restrictions ("CCRs") were not a contract of adhesion because they were drafted to benefit the landowner and because the plaintiff had the ability to change and amend the CCRs pursuant to the CCRs' amendment provision. *Id.* at ¶ 19. The Montana Supreme Court

specifically noted their opinion did not foreclose a finding of a contract of adhesion under different facts. *Id.*

This case presents such different facts. The provisions at issue in the Declaration were obviously drafted to benefit the developer by attempting to create a scheme whereby the unit owners would be forced to purchase developer's services and the Association would guarantee payment. Logically, the services and infrastructure owned and controlled by the developer would be attractive to a third party buyer because the income stream is backed by the Association. The Association's only recourse to recoup these funds is to file liens against the units and then attempt to foreclose those liens through expensive and time-consuming legal proceedings. Unlike in *Graziano*, these provisions clearly were not drafted for the benefit of the unit owner, but rather, the developer and his assigns.

Also unlike *Graziano*, where the landowners had the ability to change and amend the CCRs, here, Plaintiffs contend unit owners may not amend the Declaration as is evident by their claim to invalidate the Twelfth Amendment to the Declaration. If anything, *Graziano* militates in favor of a finding that the relevant provision is a contract of adhesion.

Other courts have examined declarations which are more factually akin to the Declaration and facts of this case. For example, the California Court of Appeal determined that a provision requiring the association/unit owners to arbitrate construction defect claims was a contract of adhesion and unenforceable. See *Villa Milano Homeowners Ass'n v. Il Davorge*, 84 Cal.App.4th 819, 102 Cal.Rptr.2d 1 (Cal.App.4.Dist. 2000). California requires a provision to be unconscionable to invalidate it. *Id.* at 5. The California Court of Appeal explained that the covenants, conditions and restrictions ("CC & R's) were a take it or leave it proposition with no opportunity to negotiate the provisions. *Id.* at 6. Additionally, it explained that the developer prevented the amendment of the CC & R provision requiring arbitration because the developer included a provision which only allowed amendment with developer approval. *Id.* at 6. The court further explained that the CC&R's were

procedurally unconscionable because they were drafted and recorded by the developer years before the purchasers ever bought units, thus there was no opportunity to negotiate. *Id.* at 7. Additionally, the court found that giving up the right to jury trial was substantively unconscionable and refused to enforce the provision.

In this case, the Declaration's provision requiring the Association to pay the past due bills of its unit owners likewise constitutes a contract of adhesion and is unconscionable. As in *Villa Milano Homeowners Association*, neither the unit owners or the Association, which was controlled by the developer, had any opportunity to negotiate the terms of the Declaration. The purpose of a home owner's association is not to safeguard the interests of the developer at the expense of the unit owners. Plaintiffs ask this Court to enforce a provision that was specifically designed to protect their interests at the expense of the Association . These practices are recognized as unconscionable and against public policy.

In sum, this Court agrees with the Association that the Declaration's alleged requirement to pay the 90-day past due water and sewer bills of unit owners is unenforceable because it constitutes a contract of adhesion, is unconscionable and against public policy, and lacks consideration. The developer declarant created a self-serving system intended to protect itself and its successors and assigns to the detriment of unit owners at Firelight Meadows. Plaintiffs' claim that unit owners cannot amend their own Declaration adds further support that these provisions constitute a contract of adhesion. See *Villa Milano Homeowners Ass'n, supra.* Therefore, Plaintiffs' motion for partial summary judgment as to payment of the 90-day past due amounts for water and sewer is denied. The Declaration's provisions purportedly obligating the Association to pay any 90-day past due amounts for water and sewer services, as well as cable tv, are void and unenforceable. The Association's Motion for Summary Judgment is granted as to this issue.

5. The Twelfth Amendment to the Declaration is Valid.

Plaintiffs request a ruling that the Twelfth Amendment to the Declaration is void, that in amending the Declaration the Association has breached the Declaration, or alternatively violated the covenant of good faith and fair dealing, and that it interfered with Plaintiffs' prospective economic advantage. As set forth above, requiring the Association to pay past due fees for cable tv based on the unit owners' underlying unlawful purported requirement to purchase cable television from Plaintiffs may not be enforced by this Court and accordingly, the Association's motion for summary judgment is granted in that respect.

Plaintiffs' remaining claims fail because nothing in the Declaration prevents the Association from amending it. Importantly, the Twelfth Amendment merely aligns the Declaration with the Cable Television Contract. As discussed above, the Cable Television Contract *allows* but *does not require* unit owners to hook up to and use WFU's television services. Cable Television Contract, p. 1. The Cable Television Contract also provides a procedure for WFU to collect against delinquent unit owners. Cable Television Contract, p. 2. Further, it specifically states cable television and internet services are not part of the Association's budget. Cable Television Contract, p. 2. The Twelfth Amendment aligned the Declaration with the Cable Television Contract. In purchasing Firelight Meadows utilities, Plaintiffs had notice and took subject to the Cable Television Contract which clearly states that subscription is optional. The Association was within its rights in amending its own Declaration to be consistent with the Cable Television Contract.

Nor does the Twelfth Amendment to the Declaration meet the elements of a claim for tortious interference with prospective economic advantage. In order to state a claim for tortious interference with prospective economic advantage, a plaintiff must prove all four of the following elements: "(1) intentional and willful, (2) calculated to cause damage to the plaintiff in his business, (3) done with the unlawful purpose of causing damage or loss, without right or justifiable cause on the part of the actor, and (4) that actual damages and loss resulted." *Hughes v. Lynch*, ¶ 25, 2007 MT 177, 338 Mont. 214, 164 P.3d 913

(citations omitted). "Thus, in order to establish a cause of action, it must be shown that the actor intentionally committed a wrongful act without justification or excuse." *Farrington v. Buttrey Food and Drug Stores Co.*, 272 Mont. 140, 143, 900 P.2d 277, 279 (1995) (citation omitted).

Passing and recording the Twelfth Amendment to the Declaration did not interfere with Plaintiffs' business. Notably, Plaintiffs have admitted there is nothing in the Twelfth Amendment that prevents a unit owner from contracting with WFU to provide cable television services. Dep. Matt Huggins, 82:1-9. While the Declaration removes the unlawful alleged *requirement* for unit owners to pay for WFU's cable television services and for the Association to pay unit owners' past due cable tv bills, it does not prevent unit owners from freely contracting with WFU for their cable television services. The purported requirement for the Association to pay past due fees is not set forth in the Cable Television Contract. Rather, both the Eighth Amendment to the Declaration and the Cable Television Contract unambiguously place the obligation to collect against individual unit owners for past due fees with the Contractor, now WFU. Cable Television Contract, p. 2; Eighth Amendment, para. 7C. The Twelfth Amendment merely clarifies the Association's duties, bringing them into conformity with the Television Contract. Moreover, there is no evidence that the Association had any intent to interfere with Plaintiffs' ability to provide cable television services to unit owners. Accordingly, the very premise for such a claim: the interference with economic advantage, is lacking in this case. Thus, Plaintiffs' claim for tortious interference with prospective economic advantage fails.

Additionally, there is nothing in the Declaration to support the contention that the Association committed a wrongful act. Importantly, there is no provision in the Declaration which prevents the Association from amending it. *See* Declaration and Bylaws. Furthermore, contrary to Plaintiffs' contentions in their Complaint, Plaintiffs knew about the

proposal to adopt the Twelfth Amendment to the Declaration prior to its enactment. Dep. Matt Huggins, 73:15-25; 74:1-6.

Moreover, the Court finds it noteworthy that the Cable Television Contract does not obligate the Association to pay past due fees. Indeed, just the opposite is true, it provides that television and internet costs are to be paid directly by unit owners and gives the Contractor or his assigns the right to disconnect services and bring legal action for past due fees in the event of unit owners' nonpayment. Cable Television Contract, p. 2. The Television Contract expressly acknowledges that television and internet services are not part of the Association's budget. *Id.* Likewise, the Cable Television Contract sets forth the procedure for unit owners to subscribe to services– a Cable Service Authorization form. *Id.* at p. 1. Subscription to cable television services is *optional*. If anything, the Twelfth Amendment brought the Declaration into alignment with the Cable Television Contract. Therefore, because the Association has not committed a wrongful act, Plaintiffs' claim fails. Plaintiffs also contend the voting procedures utilized by the Association to enact the Twelfth Amendment were flawed. However, because this Court finds the Association did not commit a wrongful act in passing the Twelfth Amendment, the voting procedures utilized by the Association in adopting the Twelfth Amendment are irrelevant. Accordingly, Plaintiffs' Motion for Partial Summary Judgment that the Twelfth Amendment of the Declarations and Bylaws is Void is denied. Summary judgment is granted in favor of the Association on all counts of Plaintiffs' Complaint.

ORDER

For the reasons described above, it is hereby ordered that Plaintiffs' Motions for Summary Judgment are Denied. It is further ordered that the Association's Cross-Motion for Summary Judgment is granted. Plaintiffs, their successors or assigns, are enjoined from:

(1) Attempting to enforce any provision of the Cable Television Contract or Declaration which purports to give them the exclusive right to provide cable television services at Firelight Meadows;

(2) Requiring unit owners to hook up to and use Plaintiffs' cable television services without an executed Cable Service Authorization Form;

(3) Demanding the Association pay for delinquent unit owners' past due cable, and water and sewer services.

As the prevailing party, the Association is entitled to its attorneys fees and costs pursuant to Mont. Code Ann. § 30-14-222(4). Because the Association's Motion for Summary Judgment is granted and each of Plaintiffs' Motions for Partial Summary Judgment are denied, Plaintiffs' Moti on for Leave to File First Amendment Reply to Defendant's Counterclaims is moot and therefore denied.

DATED this _____ day of _____, 2012.

_____
John C. Brown, District Judge

cc: Ben Alke
Jennifer Farve