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10 **MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY**
11 *****

12 H L C , L L C and WEST FORK)
13 COMMUNICATIONS,)
14 Plaintiffs/Counterdefendants,)
15 -vs-)
16 THE ASSOCIATION OF UNIT OWNERS OF)
17 FIRELIGHT MEADOWS CONDOMINIUMS,)
18 INC.,)
19 Defendant/Counterclaimant.)

Cause No. DV-10-884C
Hon. John C. Brown

**PLAINTIFFS' PROPOSED ORDER
GRANTING PLAINTIFFS'
MOTIONS FOR SUMMARY
JUDGMENT AND DENYING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

20 This matter comes before the Court on the parties' motions for summary judgment. Also
21 pending before the Court is Plaintiffs' *Motion for Leave to File First Amended Reply to Defendant's*
22 *Counterclaims*. All motions have been fully briefed. Each party submitted a statement of
23 undisputed facts in support of their summary judgment motions. A hearing was held on December
24 5, 2011. The Court issues the following Order on the pending motions for summary judgment.

BACKGROUND

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

1 *Statement of Uncontroverted Facts* (“PSUF”), ¶¶ 1, 2.

2 Firelight Meadows was developed by Firelight Meadows, LLC (“the Developer”). The
3 condominiums were developed in the early 2000s. In order to build the condominiums, water and
4 sewer systems also had to be built. The Developer built the water, sewer, and cable systems for
5 Firelight Meadows. *See PSUF*, ¶¶ 3, 4.

6 Firelight Meadows is a development of condominiums. It is governed by the Declaration
7 and Bylaws for Firelight Meadows Condominiums (“Declarations”). Attached as Exhibit 15 to
8 *PSUF*. The Declarations were filed with the Gallatin County Clerk and Recorder in 2002. *PSUF*,
9 ¶ 6.

10 The Declarations set forth the rights and responsibilities of the Developer, the Unit Owners,
11 and the HOA. With respect to the water, sewer, and cable systems (the “Central Improvement
12 Facilities”), the Declarations require the Developer to provide water, sewer, and cable to each unit.
13 *Declarations*, pp. 33-34. Each Unit Owner must pay for water, sewer, and cable. *Id.* In the event
14 that payment from any unit is more than 90 days overdue, the HOA must pay the overdue amount.
15 *Id.* The HOA may place a lien on the delinquent unit and take steps to collect reimbursement for
16 amounts paid by the HOA. *Id.*

17 The 90-day overdue payment provision is related to the design of the Central Improvement
18 Facilities. Firelight Meadows is made up of an assortment of multiple unit dwellings. The units
19 are contained in condominiums or chalets in buildings that contain twenty (20) units, four (4) units,
20 or two (2) units. The Central Improvement Facilities were designed as community systems such
21 that the facilities are provided to each building within the development. The facilities can be cut
22 off at each building, but cannot be cut off at each unit within the building. For example, there is
23 only one water and sewer valve per building. If a unit does not pay its water and sewer bills, the
24 water and sewer can be cut off to the entire building and all of the units in that building. It is not
25 possible to cut off water and sewer to only the non-paying unit. Cable television services can be
26 cut off to the non-paying unit although it presents practical problems for Westfork. *See PSUF*, ¶¶
27 11, 12.

1 West Fork purchased the Central Improvement Facilities from the Developer on February
2 23, 2007. Pursuant to that agreement, the Developer transferred and assigned to West Fork “all
3 right, title and interest” it had in the water, sewer, and cable systems and businesses at Firelight
4 Meadows. Included in the transfer and assignment from the Developer to West Fork was “all other
5 contracts associated with and necessary to the operation of” the water, sewer, and cable systems.
6 *See PSUF*, ¶¶ 15-20.

7 The Declarations state that “they ‘shall be binding upon and shall enure to the benefit of the
8 Declarant, the Association and each Unit Owner, and the heirs, personal representatives, successors
9 and assigns of each.’” Declarations, p. 35. The HOA admits that West Fork is the Developer’s
10 successor-in-interest. *PSUF*, ¶ 19.

11 West Fork has provided water, sewer, and cable pursuant to the Declarations since it
12 purchased the Central Improvement Facilities. It sends invoices to each Unit Owner for these
13 services on a monthly basis. *PSUF*, ¶ 21. The water and sewer rates charged by West Fork are set
14 by the Montana Public Service Commission.

15 Presently, there are numerous units that have not paid all or part of their bills for more than
16 90 days. West Fork requested the HOA to pay past-due amounts pursuant to the Declarations. The
17 HOA has refused to pay past-due amounts. *PSUF*, ¶ 27.

18 Before West Fork purchased the Central Improvement Facilities, Firelight Meadows entered
19 into a cable television contract. The cable television contract provides the exclusive right during
20 the term of the contract to provide cable television services and internet services to Firelight
21 Meadows. *See HOA SOF*, ¶ 11. The term of the cable contract is 15 years after the sale of the last
22 unit. *Id.*, at ¶ 12. The contract provides the right to renew for two additional 15-year periods. *Id.*

23 West Fork has offered to allow other cable providers to utilize the existing cable and cable
24 boxes to run alternative services. *See Matt Huggins Second Affidavit* (September 22, 2011). West
25 Fork has also offered to reduce the length of the cable television contract to five years. *Id.*

26 On December 3, 2009, the HOA filed the Twelfth Amendment to the Declarations and
27 Bylaws (“Twelfth Amendment”). The Twelfth Amendment purports to change the section of the
28 Declarations regarding cable. It changes the requirement that each unit use cable television. The

1 Twelfth Amendment also limits HOA's obligation to pay for unpaid fees to only water and sewer.
2 *PSUF*, ¶¶ 23-26.

3 In order to amend the Declarations, 75% of the Unit Owners must vote in favor of
4 amendment. Declarations, p. 25. The HOA first decided to amend the Declarations to remove the
5 cable requirement April 14, 2009. *See PSUF*, ¶ 34. Eventually, the HOA decided to proceed with
6 a mail ballot with a deadline. *PSUF*, ¶¶ 35-37. The ballots were mailed out to Unit Owners, with
7 a return date of September 10, 2009.

8 The HOA did not collect enough "yes" votes to pass the amendment by the September
9 10, deadline. *PSUF*, ¶ 40. The day before the deadline, less than 50% of the votes needed to pass
10 the amendment had been received. *Id.* On that day, the HOA decided to extend the deadline to
11 October 24, 2009.

12 The new October 24, 2009 deadline coincided with the annual meeting of the HOA. *PSUF*,
13 ¶ 47. By the time of that meeting, there were still not enough votes to pass the Twelfth
14 Amendment. *PSUF*, ¶ 48. The HOA Board decided to go out and get the remainder of the votes.
15 *PSUF*, ¶ 49. This effort included several attendees voting for non-attendees via proxy, even though
16 many of the Unit Owners who were not present at the annual meeting had given a general proxy to
17 an attendee (i.e., not a proxy for the specific purpose of voting on the amendment).

18 Even with the proxy votes, there was still not enough votes to approve the Twelfth
19 Amendment. After the close of the annual meeting, several board members called Unit Owners
20 around the country to get necessary votes by telephone. *PSUF*, ¶ 51. On the evening of October
21 24, 2009, the HOA Board received votes, by telephone, confirming that there would be enough
22 votes to pass the Twelfth Amendment. These votes were not physically received by the HOA until
23 after the October 24, 2009 deadline.

24 DISCUSSION

25 West Fork filed suit on August 20, 2010, seeking a declaratory judgment that, among other
26 things, the HOA is obligated to pay all accounts more than 90 days past due. West Fork has also
27 asked the Court to find that the Twelfth Amendment is invalid. The HOA filed counterclaims for
28 declaratory relief, alleging that, among other things, it was not required to pay for 90-day past-due

1 bills. The HOA also claimed that West Fork has engaged in an unlawful restraint of trade.

2 The parties filed motions for summary judgment on September 6, 2011. The motions
3 overlap to some extent. West Fork filed three motions for summary judgment contending: (1) that
4 the HOA is required to pay 90-day past-due water and sewer bills; (2) the HOA's claim for unfair
5 trade practices regarding cable must be dismissed; and (3) the Twelfth Amendment which changed
6 the obligations of the Unit Owners and HOA regarding cable is void.

7 The HOA's motion for summary judgment contends that (1) the requirement that each Unit
8 Owner receive cable television constitutes an unlawful restraint of trade; (2) the provision requiring
9 each Unit Owner to pay for cable television and the provision obligating the HOA to pay for past
10 water, sewer, and cable bills are unenforceable because they constitute a contract of adhesion; (3)
11 the contracts that violate the Unfair Trade Practices Act are unconscionable or may not be enforced;
12 (4) the provision requiring the Association to pay past-due bills is invalid for lack of consideration;
13 and (5) the Twelfth Amendment to the Declarations is valid.

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

16 **I. STANDARD FOR SUMMARY JUDGMENT**

17 Summary judgment is appropriate when the movant demonstrates that there is no
18 genuine issue of material fact, and that the movant is entitled to summary judgment as a matter of
19 law. M. R. Civ. P. 56(c); *Park County Concerned Citizens v. Depuy*, 2008 MT 246, ¶ 15, 344
20 Mont. 504, 190 P.3d 293.

21 **II. WATER AND SEWER**

22 West Fork moved for summary judgment on the 90 day payment provision regarding
23 water and sewer. There is no dispute over the meaning of the language in the Declarations. The
24 Declarations state that the HOA must pay amounts that are more than 90 days overdue. The
25 HOA acknowledges that the language of the Declarations states that it must pay West Fork
26

27 ¹Some arguments that apply to cable do not apply to water and sewer. The HOA's claim
28 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.

1 overdue amounts for water and sewer. HOA contends that it is not required to pay, however,
2 because: (1) West Fork does not have standing to enforce the Declarations; and (2) that
3 provision of the Declarations is unenforceable.

4 **A. STANDING**

5 The HOA contends that West Fork does not have standing to enforce the Declarations
6 because it is not a Unit Owner in Firelight Meadows.

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

13 Rights arising under a contract are assignable unless the contract prohibits an
14 assignment. "We recognize that rights arising under a contract are generally assignable unless
15 the contract prohibits assignment." *Somont Oil Co., Inc. v. Nutter*, 228 Mont. 467, 474, 743
16 P.2d 1016, 1020 (1987). The Restatement of Contracts (Second) agrees with Montana law, and
17 sets forth only a few instances where transfer is not allowed, none of which are applicable here.
18 *See* Restatement (Second) of Contracts § 317 (1981).

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

23 The Declarations were written such that the Developer or its successors and assigns are
24 required to install and maintain the utilities. The Declarations explicitly state that both the
25 Developer and the Developer's successors and assigns are beneficiaries under the Declarations.
26 The Declarations state: "Except as otherwise provided herein, this Declaration shall be binding
27 upon and shall inure to the benefit of the Declarant, the Association and each Unit Owner, and
28 the heirs, personal representatives, successors and assigns of each." *Declarations*, p. 35.

1 In addition, there is no dispute that the Asset Purchase Agreement (Exhibit 4 to the
2 *PSUF*) assigned to West Fork all of its rights in the Central Improvement Facilities. West Fork
3 was also an intended third-party beneficiary to the Declarations. *Harman v. MIA Serv.*
4 *Contracts*, 260 Mont. 67, 72, 858 P.2d 19, 22 (Mont. 1993); Restatement (Second) of Contracts
5 § 302 (1981).

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

8 B. ENFORCEABILITY OF 90-DAY PAYMENT PROVISION

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

13 “A contract of adhesion is a contract whose terms are dictated by one contracting party
14 to another who has no voice in its formulation.” *Kloss v. Edward D. Jones & Co.*, 2002 MT
15 129, ¶ 24, 310 Mont. 123, 54 P.3d 1. A contract of adhesion “will not be enforced as against a
16 weaker party when it is: (1) not within the reasonable expectations of said party or (2) within the
17 reasonable expectations of the party, but, when considered in its context, is unduly oppressive,
18 unconscionable, or against public policy.” *Passage v. Prudential-Bache Securities, Inc.*, 223
19 Mont. 60, 66, 727 P.2d 1298, 1301-02 (1986).

20 The first issue is whether the Declarations represent a contract of adhesion. The
21 Montana Supreme Court addressed whether subdivision covenants constitute contracts of
22 adhesion in *Graziano v. Stock Farm Homeowners Ass'n, Inc.*, 2011 MT 194, 361 Mont. 332,
23 258 P.3d 999. The Montana Supreme Court concluded that the covenants did not constitute a
24 contract of adhesion.

25 The CCRs here are not a contract of adhesion. First, the CCRs are not a standard
26 form contract without negotiable terms. The CCRs were drafted specifically for
27 the benefit of the *land* within Stock Farm, run with the land, and bind all
28 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.

1 *Id.* at ¶ 19 (emphasis in original).

2 The reasoning in *Graziano* applies here. The undisputed facts show that the
3 Declarations do not constitute a contract of adhesion. The Declarations were recorded and
4 provided Unit Owners with notice of the requirement to purchase water, and sewer and of the
5 90-day past-due provision. The Declarations here were drafted to run with the land and to bind
6 all successive landowners. *See id.* They also contain a provision for the amendment of the
7 Declarations. *See id.*

8 Even if the Declarations constituted a contract of adhesion, they are enforceable. A
9 contract is not unenforceable just because it may be a contract of adhesion. *See e.g. Passage*,
10 223 Mont. at 66, 727 P.2d at 1301-02. In order for the Declarations to be invalid, they have to
11 be (1) not within the reasonable expectations of the HOA or (2) within reasonable expectations,
12 but, when considered in their context, unduly oppressive, unconscionable, or against public
13 policy. *See Graziano*, ¶ 20.

14 The Declarations are not outside of reasonable expectations. All Unit Owners had notice
15 of the Declarations when they purchased their property. The Declarations were recorded
16 pursuant to the Unit Ownership Act, §§ 70-23-101, *et seq*, MCA. Condominiums typically
17 have assessments. In fact, the Unit Ownership Act specifically provides for a method to place
18 liens on units that do not pay assessments, as well as methods to recover reimbursement for
19 unpaid fees. *See id.* The Declarations even take advantage of those provisions by authorizing
20 the HOA to place a lien on non-paying units.

21 Nor is the 90-day past-due payment arrangement unconscionable, unduly oppressive, or
22 violative of public policy. The 90-day payment provision is reasonably related to the water and
23 sewer systems. Those systems can be shut off at each building, but not each unit, which means
24 they were cheaper to build and install. The appropriate water and sewer rates are set by the
25 Montana Public Service Commission. Nevertheless, for the purposes of this argument, the
26 Court observes that a system which is cheaper to install should cause the Unit Owners to pay
27 less per month for the services.

28 The 90-day provision allows the community system to work by giving West Fork the

1 ability to collect past-due amounts from the HOA since it cannot cut off the utilities to any
2 particular unit. The Declarations protect the HOA and its paying members by giving the HOA
3 the ability to lien the units for which it has to pay the 90-day past-due amounts. As such, the 90-
4 day provision protects West Fork by guaranteeing payment, while at the same time protecting
5 the HOA and the paying Unit Owners by giving them a method of recouping the payments made
6 to West Fork. The 90-day past-due payment arrangement is not unconscionable and does not
7 violate public policy.

8 The HOA also contends the 90-day provision fails for lack of consideration. The
9 existence of a valid contract is a question of law. *See Lockheed v. Weinstein*, 2003 MT 360, ¶ 7,
10 319 Mont. 62, 81 P.2d 1284. The 90-day provision is valid. The Declarations set out the
11 covenants that run with the property in Firelight Meadows. The requirement that unit owners
12 pay an assessment is a restrictive covenant. It is common for property to have restrictive
13 covenants and for condominiums to have assessments. The Unit Owners were on notice of the
14 restrictions at the time they purchased their property at Big Sky (which could not have been built
15 without water and sewer systems). The 90-day payment provision is directly related to the
16 water and sewer systems on their property.

17 The HOA benefits from the 90-day provision. Each unit gets water and sewer at a
18 cheaper rate than it otherwise would. Installing meters at each unit and reading those meters
19 would involve significant costs. Again, the Court recognizes that water and sewer rates are
20 determined by the Montana Public Service Commission, but for the purposes of the
21 consideration analysis, the Court determines that a lower cost water and sewer system confers a
22 recognizable benefit upon unit owners.

23 The 90-day provision of the Declarations is enforceable. West Fork's motion for
24 summary judgment regarding the 90-day provision for water and sewer is granted. The HOA's
25 motion for summary judgment is denied to the extent it applies to water and sewer.

26 **III. CABLE TELEVISION**

27 West Fork moved for summary judgment to dismiss the HOA's claim of unlawful
28 restraint of trade. It also moved for summary judgment that the Twelfth Amendment is void,

1 which changes the obligations of the HOA and Unit Owners regarding cable television. The
2 HOA moved for summary judgment contending that the provisions of the Declaration regarding
3 cable television are invalid based on arguments that the Court will now address in turn.

4 **A. CONTRACT OF ADHESION**

5 The HOA's contract of adhesion argument also applies to cable. In addition to the
6 HOA's contract of adhesion arguments regarding water and sewer, the HOA argues that the
7 provisions regarding cable are unconscionable because cable is not necessary and because of the
8 length of the cable contract.

9 At the outset, the Court reiterates that, based on the reasoning in *Graziano*, the
10 Declarations do not constitute a contract of adhesion.

11 Further, the provisions regarding cable are within reasonable expectations and are not
12 unconscionable. Each unit owner purchased his unit with knowledge that cable was provided.
13 This was an amenity provided by the Developer/West Fork, and simply a part of living in
14 Firelight Meadows. There is no substantive difference between the cable TV and any other
15 amenity provided at any other subdivision. Many condominium associations have swimming
16 pools, tennis courts, or weight rooms. These amenities require constant maintenance, and unit
17 owners must pay monthly fees for the amenities, either separate from or as a part of their HOA
18 dues. Any unit owner could claim that he does not want the amenity because he is a member of
19 a health club, and that since he does not use it, he should not have to pay for it. Such an
20 argument would fail because having the pool, tennis court, or weight room is just a part of living
21 in the subdivision. The mere fact that a unit owner does not use the service, does not mean that
22 the requirement of paying for the service is an unconscionable contract of adhesion. Instead, of
23 not being within a unit owner's reasonable expectations, community systems and programs such
24 as the cable TV system, or the hypothetical pool, tennis court, weight room scenario, are normal,
25 reasonable, and not out of the normal realm of a condominium association.

26 This Court has not been presented with evidence that indicates that the amount charged
27 by West Fork for cable is unreasonable. In fact, the evidence indicates that West Fork has been

1 willing to negotiate with the HOA. *See Matt Huggins Second Affidavit.*

2 The provisions of the Declaration regarding cable do not constitute an unenforceable
3 contract of adhesion.

4 **B. UNFAIR TRADE PRACTICES**

5 The HOA contends that West Fork violated the Unfair Trade Practices Act because the
6 cable television contract provides West Fork with the exclusive right to provide cable television
7 services to Firelight Meadows. The HOA further alleges that West Fork may raise prices at its
8 will. West Fork argues that the HOA's claim for unfair trade practices must be dismissed
9 because there is no evidence that West Fork has done anything to unlawfully restrain trade. It
10 contends that all it did was purchase the cable system years ago, and that it has been willing to
11 negotiate with the HOA (despite the contract terms in its favor) on issues such as length of
12 contract, price, and service from other television providers.

13 During depositions, West Fork discovered that the HOA's unlawful trade practices claim
14 is based on conduct that occurred several years ago. It sought leave to amend to add the
15 affirmative defense of statute of limitations.

16 Rule 15(a), M. R. Civ. P., states that "leave [to amend] shall be freely given when justice
17 so requires." It is "almost a legal maxim that the trial judge has broad discretionary power to
18 grant leave to amend pleadings and that granting the leave is the rule rather than the exception."
19 *State Highway Comm'n v. Schmidt*, 143 Mont. 505, 420 P.2d 153, 155 (1963). The Montana
20 Supreme Court emphasized that "the rule [15(a)] has been construed broadly." *Lien v. Murphy*
21 *Corp.*, 201 Mont. 488, 656 P.2d 804 (1982). It "is the rule to allow amendments and the
22 exception to deny them." 565 P.2d at 806, *quoting Union Interchange v. Parker*, 357 P.2d 339,
23 342 (1960); *see also* 3 Moore's Federal Practice § 15.02[1], § 15.08[4]; *Ward v. Fibrasonic*
24 *Laboratories, Inc.*, 236 Mont. 314, 318, 769 P.2d 1229 (1989).

25 In *Keller v. Dooling*, 248 Mont. 535, 813 P.2d 437, the Montana Supreme Court upheld
26 the trial court's ruling, which allowed the Dooling defendants to amend their answer to raise the
27 statute of limitations defense at the end of the trial. While noting that the statute of limitations

1 is a defense which should be pled under Rule 8(c), the Supreme Court held, “Rule 8(c) does not
2 preclude the District Court from allowing the parties to amend the pleadings to conform to the
3 evidence under Rule 15(b), M.R.Civ.P.” *Dooling*, at 542 (quoting *Butte Teachers’ Union v. Bd.*
4 *of Trustees*, 2001 Mont. 482, 487, 655 P.2d 146, 149 (1982).

5 The Court grants West Fork’s motion to amend. West Fork acted in good faith, and
6 there is no delay of trial or prejudice to the Defendant. The affirmative defense added by the
7 amendment is a legal defense that does not require additional discovery.

8 The statute of limitations for claims based on unfair trade practices is two years. Section
9 27-2-211, MCA; *Osterman v. Sears, Roebuck & Co.*, 80 P.3d 435, 318 Mont. 342 (2003). The
10 HOA complains of conduct that occurred more than two years ago. The HOA’s unfair trade
11 practices complaint pertains to the Cable Contract that was signed in 2006. SUF ¶ 61, Exhibit
12 23. Further, any alleged effort to prevent competition for cable TV service occurred prior to
13 West Fork purchasing the system. The HOA cannot identify any actions taken by West Work
14 which constitutes an unfair trade practice. For these reasons, the HOA’s claim for unfair trade
15 practices is barred by the two-year statute of limitations.

16 In the alternative, summary judgment is appropriate because the HOA has not presented
17 any evidence that West Fork took any action to restrain trade. An exclusive cable contract is
18 not an unlawful restraint of trade per se. There are legitimate reasons to enter into such
19 agreements (an exclusive contract can provide a necessary incentive for a cable provider to
20 install a cable system). All West Fork did was purchase the cable system created by the
21 Developer. There is evidence that Unit Owners have satellite television. There is also evidence
22 that West Fork has offered to negotiate with the HOA regarding the cable contract and allow
23 other cable companies to access units. *See Matt Huggins Second Affidavit*.

24 The Court grants summary judgment in West Fork’s favor on Count II of the HOA’s
25 counterclaim. The Court also denies the HOA’s motion for summary judgment regarding
26 unlawful trade practices. The provisions of the Declarations regarding cable are enforceable
27 and valid.

1 **B. THE TWELFTH AMENDMENT**

2 1. VALIDITY OF TWELFTH AMENDMENT

3 Before the enactment of the Twelfth Amendment, the Declarations require homeowners
4 to purchase cable and required the HOA to pay for overdue amounts. It stated:

5 Central Improvement Facilities

6 Declarant will install and provide the Central Improvement
7 Facilities (sewer system, water system and cable TV) for the
8 project in the common area designated therefore. Each unit shall
9 be hooked up to and use the Central Improvement Facilities. The
10 . Each Unit Owner shall be charged a fee for the use of the
11 facilities, including a capital facilities fee and maintenance fee.
12 The fees charged for these services shall be in accordance with the
13 rules and regulations of the Montana Public Service Commission.
14 A permanent easement is reserved to Declarant and their
15 successors and assigns in, on and under the common elements and
16 common areas within the condominium project for the
17 construction, installation, repair, maintenance and replacement of
18 the Central Improvement Facilities. Any unpaid fee or assessment
19 mor [sic] than ninety (90) days old will be paid by the Association
20 and the Association shall have the right to place a lien on the unit
21 if necessary to collect the unpaid amount.

22 *Declarations*, pp. 33-34.

23 When the HOA adopted the Twelfth Amendment, it changed those requirements.
24 Nevertheless, it maintains the requirement that West Fork must provide and maintain the cable
25 service. The Amendment states, in relevant part:

26 Declarant will install and provide the Central Improvement
27 Facilities (sewer system, water system and cable TV) for the
28 project in the common area designated therefore. Each unit shall
be hooked up to and use the **water and sewer system Central
Improvement Facilities**. The Declarant or their successors and
assigns shall maintain the **Central Improvement 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 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

1 Association shall have the right to place a lien on the unit if
2 necessary to collect the unpaid amount.

3 *Declarations, Twelfth Amendment.*

4 West Fork contends that the Twelfth Amendment improperly deprives West Fork of the
5 benefit of the bargain. It argues that the provisions in the Declarations regarding cable were part
6 of the agreement to install cable. West Fork contends that the Declarations cannot be amended
7 to remove the obligations of Unit Owners and the HOA after they have already received the
8 benefit of West Fork's performance.

9 In *Armstrong v. Ledges Homeowners Ass'n, Inc.* 633 S.E.2d 78, 87 (N.C. 2006), the
10 court noted the "serious question" raised by amendment of covenants, given that the majority
11 could change the original nature of the bargain. The court then recited the principles that
12 amendments must be consistent with the original declaration and must be reasonable. *Id.*
13 Ultimately, the court concluded that the disputed amendment in that case was invalid and
14 unenforceable because it was used "as a vehicle for imposing a new and different set of
15 covenants, thereby substituting a new obligation for the original bargain of the covenanting
16 parties." *Armstrong*, 633 S.E.2d at 89 (emphasis added). See also *Meresse v. Stelma*, 999 P.2d
17 1267, 1273 (Wash. App. 2000); *Boyles v. Hausmann*, 517 N.W.2d 610, 617 (Neb. 1994):

18 The Unit Owners at Firelight Meadows purchased their units with notice that cable
19 would be provided to each unit, that they were required to pay for that service, that the HOA
20 would pay 90-day past-due amounts, and could lien the defaulting unit in the event such
21 payment was necessary. Similarly, the Developer installed the cable system that West Fork
22 purchased understanding and relying upon this same arrangement. The law does not allow the
23 HOA to simply change the Declarations to West Fork's detriment. Especially if there is no
24 evidence that West Fork has done anything improper (i.e., charge an unreasonable price for
25 cable).

26 An amendment may "not exceed the purpose of the original declaration." *Armstrong*,
27 633 SE.2d at 87; see also *McMillan v. Iserman*, 327 N.W.2d 559 (Mich. App. 1983). In *Shafer*
28 *v. Board of Trustees of Sandy Hook Yacht Club Estates, Inc.*, 883 P.2d 1387, 1392 (Wash. App.

1 1994), the court held that an amendment provision authorizing less than all owners to adopt new
2 restrictions is valid, “provided that such power is exercised in a reasonable manner consistent
3 with the general plan of the development.” *Id.*; see also *Wright v. Cypress Shores Dev. Co.*, 413
4 So.2d 1115, 1124 (Ala. 1982) (express right to amend covenants must be exercised “in a
5 reasonable manner” and consistent with the original plan).

6 The rationale from these cases applies in this case. While the Declarations can certainly
7 be amended, they cannot be amended to the detriment of West Fork after the Developer/West
8 Fork have performed their obligations under the Declarations and in reliance on the Declarations
9 as they apply to Unit Owners and the HOA.

10 An amendment must be reasonable in light of the party’s original intent. *Armstrong*, 633
11 S.E.2d at 87; see also *Hutchens v. Bella Vista Village Property Owners’ Assoc., Inc.*, 110
12 S.W.3d 325, 330 (Ark. App. 2003); see also *Holiday Pines Prop. Owners Ass’n v.*
13 *Wetherington*, 596 So.2d 84, 87 (Fla. App.1992) (“In determining the enforceability of an
14 amendment to restrictive covenants, the test is one of reasonableness,” invalidating amendments
15 imposing new restrictions); *Zito v. Gerken*, 587 N.E.2d 1048, 1050 (Ill. App. 1992) (amended
16 covenant enforceable if “clear, unambiguous and reasonable”); *Shafer*, 883 P.2d at 1392
17 (amendment valid, “provided that such power is exercised in a reasonable manner . . .”); *Wright*,
18 413 So.2d at 1124 (express right to amend must be exercised “in a reasonable manner” and
19 consistent with the original plan); *Flamingo Ranch Estates, Inc. v. Sunshine Ranches*
20 *Homeowners, Inc.*, 303 S.2d 665 (Fla. App. 1974) (amendment provision is valid “so long as it
21 is exercised in a reasonable manner . . .”).

22 The Twelfth Amendment was not reasonable. Accordingly, West Fork’s motion for
23 summary judgment regarding the Twelfth Amendment is granted. The HOA’s motion for
24 summary judgment is denied.

25 2. VOTING ON THE TWELFTH AMENDMENT

26 Alternatively, the Court finds that the undisputed facts show that voting on the Twelfth
27 Amendment violated the Declarations and is therefore void. The Declarations govern how

1 amendments must occur. For purposes of the Twelfth Amendment, the Declarations require:
2 “the proposed amendment shall be made a subject for consideration at a special meeting or the
3 next succeeding regular or annual meeting of the Owners of the Association, with notice thereof,
4 together with a copy of the proposed amendment to be furnished to each Unit Owner at least ten
5 days in advance of such meeting.” *Declarations*, p. 25. They also require “[a] written ballot for
6 the amendment may be mailed to each Unit Owner or delivered personally and shall set forth the
7 amendment, the time when the written ballot must be returned to be counted as a vote, and
8 allow the Unit Owner to vote for or against the amendment by checking or otherwise indicating
9 his or her choice and return the ballot to the Association.” *Id.*

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

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

17 Since the Twelfth Amendment is invalid, the HOA’s obligations to pay 90-day past-due
18 amounts for cable is identical to its obligations with regard to water and sewer. Accordingly,
19 the Court orders that the Declarations require the HOA to pay all 90-day past-due amounts for
20 cable. West Fork’s motion for summary judgment regarding the Twelfth Amendment is
21 granted. The HOA’s motion for summary judgment is denied.

22 **ORDER**

23 Based on the foregoing, IT IS HEREBY ORDERED THAT:

- 24 1. Plaintiffs’ *Motion for Leave to File First Amended Reply to Defendant’s*
25 *Counterclaims and Brief in Support* is GRANTED;
26 2. Plaintiffs’ *Motion for Partial Summary Judgment Regarding 90-day Past-due*
27 *Water and Sewer Bills and Brief in Support* is GRANTED;

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- 3. Plaintiffs' *Motion for Partial Summary Judgment That the Twelfth Amendment of the Declarations and Bylaws is Void, and Brief in Support* is GRANTED;
- 4. Plaintiffs' *Motion for Partial Summary Judgment on Defendant's Counterclaim for Unfair Trade Practices and Brief in Support* is GRANTED; and
- 5. *The Association of Unit Owners of Firelight Meadows Condominiums, Inc.'s Civil Rule 56 Motion for Summary Judgment and Brief in Support* is DENIED.

DATED this _____ day of _____, 2012.

HONORABLE JOHN C. BROWN
District Court Judge

cc: Benjamin J. Alke
Jennifer Farve

RESPECTFULLY SUBMITTED this 9th day of January, 2012.

GOETZ, GALLIK & BALDWIN, P.C.

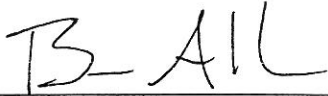
By: B - ALK
Benjamin J. Alke

ATTORNEYS FOR PLAINTIFFS

1 CERTIFICATE OF SERVICE

2 The undersigned hereby certifies that the foregoing document was served upon the
3 following counsel of record, by U.S. First Class Mail, postage prepaid, on the 9th day of January,
2012, addressed as follows:

4 Jennifer Farve
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12 
13 Benjamin J. Alke

14 cc: Clients
15 Law Clerk Katie Baker DeLong via e-mail (*WordPerfect version*)
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