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UNITED STATES DISTRICT
FOR THE STATE OF MONTANA

HARRY BARNES, JOHN MURRAY, ROBERT DESROSIER, KENNETH HOYT, and JUDY WHITE, on behalf of themselves and all those similarly situated,

Plaintiffs,

v.

3 RIVERS TELEPHONE COOPERATIVE, INC, et al.,

Defendants.

**No. 4:21-cv-00118-BMM**

**PLAINTIFFS' RESPONSE BRIEF TO DEFENDANT 3 RIVERS TELEPHONE COOPERATIVE, INC.'S MOTION TO DISMISS FIRST AMENDED COMPLAINT**

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## TABLE OF AUTHORITIES

COME NOW the Plaintiffs, by and through the undersigned attorneys, and file their response in opposition to Defendant's Motion to Dismiss First Amended Complaint, as follows:

## I. LEGAL STANDARD:

When a complaint is challenged under Rule 12(b)(6) Fed.R.Civ.P., the Court accepts as true all well-pleaded factual allegations and disregards unsupported conclusions of law. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* at 678, or "any set of facts that, if proven at trial, would entitle it to recover." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 551 n.8, 103 S. Ct. 897 (1983). More importantly, "When ruling on a motion to dismiss, we accept all factual allegations in the complaint as true and **construe the pleadings in the light most favorable to the nonmoving party.**" *Knievel v. ESPN,* 393 F.3d 1068, 1072 (9th Cir.2005). (emphasis added).

"If a complaint is dismissed for failure to state a claim, leave to amend should be granted 'unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency.'" *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992) (citing *Schreiber Distrib. Co. v. Serv-Well Furniture Co.,* 806 F.2d 1393,

1401 (9th Cir.1986)). Requests for leave to amend "should be granted with 'extreme liberality'." *Moss v. U.S. Secret Service*, 572 F.3d 962, 972 (9th Cir. 2009) (citation omitted).

As more particularly described below, Plaintiffs' First Amended Complaint states sufficient factual matters that must be accepted as true at this juncture and are sufficient to state a claim for relief that is plausible on its face, requiring denial of Defendant's motion to dismiss.

## II. ARGUMENT:

### I. Breach of Fiduciary Duty Claim

In support for its motion to dismiss Plaintiffs' claim for breach of fiduciary duty, Defendant 3 Rivers first submits a lengthy "Background of RETCA" (Doc. 14, pp. 4-8). The Rural Electric and Telephone Cooperative Act (RETCA), codified at Mont. Code Ann. § 35-18-101, *et. seq.*, provides in relevant part that "[t]he board of trustees of a cooperative may, in its discretion, use its business judgment to retire patronage capital allocated on the books of the cooperative when the retirement is consistent with sound business and management practices and the long-term financial stability of the cooperative." Mont. Code Ann. § 35-18-316(5)(b).

But RETCA does not simply give 3 Rivers unrestricted discretion to do whatever it pleases with respect to its members' capital credits. The "business

judgment standard"—i.e., the "business judgment rule"—only protects directors from liability for honest errors or mistakes of judgment made in good faith, and without any corrupt motive. *See Ski Roundtop, Inc. v. Hall*, 202 Mont. 260, 273, 658 P.2d 1071, 1078 (1983) (citation omitted). Furthermore, whether the retirement of patronage capital is "consistent with sound business and management practices and the long-term financial stability of the cooperative" is a question of fact, not a foregone conclusion, as 3 Rivers suggests.

3 Rivers represents that its "alleged decision to not immediately distribute plaintiffs' patronage capital is consistent with industry standards and in line with 3 Rivers' discretionary authority." (Doc. 14, p. 8). But again, these are conclusory statements by 3 Rivers without any factual support. If 3 Rivers wishes to raise the provisions of RETCA as an affirmative defense in its answer, or in support of a motion for summary judgment following the close of discovery, it may do so. But it cannot use RECTA as a shield to avoid responding to Plaintiffs' claims.

Next, 3 Rivers claims "[i]t is settled law in Montana that no fiduciary relationship exists between 3 Rivers and plaintiffs." (Doc. 14, p. 10). This is not an accurate statement of Montana law. As 3 Rivers points out, in *Wolfe v. Flathead Elec. Coop.* 2017 WL 8184352, the District Court found there was no fiduciary duty relationship between the cooperative and its members under the facts presented. However, the Court recognized "there could be circumstances

under which a cooperative undertakes to advise a member of certain rights and thereby creates a special relationship." *Wolfe, supra*, 2017 WL 8184352, p. 5. Because there was "no evidence before the Court that FEC made any special effort to advise any particular member," the Court found there was "no genuine issue of material fact that there is no fiduciary relationship between the parties." *Id.*

On appeal, the Montana Supreme Court agreed with the District Court that no fiduciary relationship existed between FEC and its members. *Wolfe v. Flathead Elec. Coop., Inc.*, 2018 MT 276, ¶14. However, the Supreme Court did not hold that no fiduciary duty ever exists between a cooperative and its members--instead, it simply agreed with the District Court's finding that there was no fiduciary relationship in that particular case. The Supreme Court's holding did not disturb settled law in Montana that a fiduciary relationship may exist in cases where one party undertakes to advise the other party in the conduct of its affairs, thus creating a relationship of trust and confidence. *See Morrow v. Bank of America, N.A.*, 2014 MT 117, ¶34 (citing *Deist v. Wachholz*, 208 Mont. 207, 216-17, 678 P.2d 188, 193 (1984).

Whether a fiduciary duty exists between two parties is a question of law which may be resolved on summary judgment in the absence of any dispute over material facts. *Gliko v. Permann*, 2006 MT 30, ¶24. Likewise, whether a "special relationship" exists that would give rise to a fiduciary duty is a question of law. *Id.*

However, "[t]o determine the existence or absence of a special relationship in cases where it normally does not exist—such as between a bank and a customer—a court may be required to make a fact-intensive inquiry. The circumstances of the particular relationship are factual, and disputes over material facts will preclude summary judgment." *Id.*

At this early stage, before an answer has even been filed, Defendant cannot claim that an absence of disputed material facts entitles it to judgment on Plaintiffs' breach of fiduciary duty claim. Instead, Defendant simply argues that Plaintiffs' allegations are deficient because they "do not allege that 3 Rivers made a special effort to advise plaintiffs." (Doc. 14, p. 10). That is true—Plaintiffs did not specifically make such an allegation. However, Plaintiffs alleged that the relationship between 3 Rivers and the Class is a "special relationship" that gives rise to a fiduciary relationship and fiduciary duties on the part of 3 Rivers. (Doc. 9, ¶125). Plaintiffs understand they must establish facts giving rise to a "special relationship" to support their breach of fiduciary duty claim in order to avoid dismissal of the claim on summary judgment. But Plaintiffs should not be held to the same standard at the initial pleading stage.

## II. Unjust Enrichment Claim

Defendant argues that Plaintiffs' unjust enrichment claims must be dismissed because Plaintiffs have an adequate remedy at law, in that 3 Rivers'

Bylaws govern the distribution of Plaintiffs' respective capital accounts. However, while Defendant stipulates to the apparent validity of the contract between the parties, it also argues that the Bylaws do not provide for the distribution of the capital requested and argue against Plaintiffs' entitlement thereto.

If the Bylaws do not allow for the distribution or return of Plaintiffs' capital credits, then Defendant simply gains a windfall of millions of dollars (the capital contribution accounts) that belong to Plaintiffs. That would seem to be the definition of 'unjust enrichment'. "To prevail on a claim of unjust enrichment, the aggrieved party must establish that (1) a benefit was conferred upon the recipient by the claimant; (2) the recipient knew about or appreciated the benefit; and (3) the recipient accepted or retained the benefit under circumstances rendering it inequitable for the recipient to do so." *Montana Digital, LLC v. Trinity Lutheran Church,* 2020 MT 250, 401 Mont. 482, 473 P.3d 1009.

In the instant case, the contract is not one where the parties negotiate their respective terms or agreements setting forth their respective rights and obligations. Instead, this is a one-sided determination by a provider of necessary services to the Plaintiffs, Native Americans in a rural area of the State.

As held in *Montana Digital, supra*:

> "We explained in *Ruff* that "[a] valid contract defines the obligations of the parties as to matters within its scope, displacing to that extent any inquiry into unjust enrichment," and that, "[c]onsequently, **unjust enrichment applies in the contract context only when a**

> **party renders 'a valuable performance' or confers a benefit upon another under a contract that is invalid, voidable, 'or otherwise ineffective to regulate the parties' obligations.' "** [Emphasis added] citing *Associated Mgmt. Servs. v. Ruff,* 2018 MT 182, ¶ 67, 392 Mont. 139, 424 P.3d 571.

As aptly put by Defendant and indicative of the fact that dismissal of the 'unjust enrichment' claim is not required at this stage if at least adequately pled, is the language in *ACI Construction, LLC v. Elevated Property Investments, LLC*, 2021 MT 246, 405 Mont 456, 455 P.3d 1054, "Though uncommon, an unjust enrichment claim may be available **despite the presence of a contract** if "a party renders a valuable performance or confers a benefit upon another under a contract that is invalid, voidable, or otherwise **ineffective to regulate the parties' obligations**." *Mont. Digital, ¶ 11* (citing *Ruff, ¶ 67)"*

While it is clear that a party cannot recover on both a binding contract and a claim of unjust enrichment for the same loss and the contract controls if effective to regulate the obligations of the parties, dismissal of one is not required merely because a breach of contract is also alleged. Neither does Defendant cite to any authority requiring such dismissal for alternative pleading.

On the contrary, alternative pleading is clearly recognized. As held in *Folsom v. Montana Pub. Employees' Ass'n, Inc.,* 2017 MT 204, 388 Mont. 307, 400 P.3d 706:

> A plaintiff generally has a choice of **any remedy cognizable at law or equity and may generally plead alternative claims even if based on**

> **the same predicate facts.** *Corporate Air v. Edwards Jet Center*, 2008 MT 283, ¶¶ 49-50, 345 Mont. 336, 190 P.3d 1111; *Glacier Campground v. Wild Rivers, Inc.*, 182 Mont. 389, 403, 597 P.2d 689, 696 (1978); M. R. Civ. P. 8(a)(2). … However, a plaintiff "may not recover on more than one theory for the same injury" or damages. *Regions Bank v. Griffin,* 364 Ark. 193, 217 S.W.3d 829, 832 (2005); If alternative remedies are inconsistent, the plaintiff must elect one or the other and cannot obtain judgment on both. *Kaufman Bros. v. Home Value Stores, Inc.*, 2012 MT 121, ¶¶ 17-20, 365 Mont. 196, 279 P.3d 157; *Parsons v. Rice*, 81 Mont. 509, 521, 264 P. 396, 401 (1928).

Plaintiffs believe the Bylaws of the Defendant require the distribution of the Plaintiffs' capital accounts as requested and Defendant's reject such contention. Plaintiffs also acknowledge that the Bylaws may be 'ineffective to regulate the parties obligations' in that regard and therefore and in that event, Plaintiffs are entitled to relief under the equitable doctrine of unjust enrichment.

It is also important to note that Plaintiffs' claim that Defendant's refusal to return their capital accounts at this time is predicated on the denial of Plaintiffs rights under the Federal Communication Act and the Montana Consumer Protection Act as well as the unlawful denial of their civil rights under Title VI. Such bases of Defendant's wrongful retention of Plaintiffs' property lend themselves to the construction of equitable relief for the Plaintiffs, such as that found in the claim of the unjust enrichment of Defendant at the expense of Plaintiffs.

At this stage, Defendant's motion to dismiss on the simple grounds of the existence of a binding contract while concomitantly claiming such contract doesn't

control their distribution must be denied. After discovery and a full opportunity to explore the ultimate facts in this case, Defendant always has the option of seeking relief through a Motion for Summary Judgment if and when the facts are further developed and that relief becomes viable.

**III. Claims for Injunctive Relief**

Plaintiffs agree to dismiss their claim for injunctive relief without prejudice. If Plaintiffs determine through the course of discovery that a preliminary injunction is warranted, they will file an appropriate motion with the court.

**IV. Montana Consumer Protection Act Claim**

Defendant argues for dismissal of Count 3 of Plaintiffs' First Amended Complaint, alleging that Plaintiffs are not "consumers" protected by the Montana Consumer Protection Act ("MCPA"). This is not true. The statute defines "consumer" as "a person who purchases or leases goods, services, real property, or information primarily for personal, family, or household purposes." Mont. Code Ann. § 30-14-102(1). Plaintiffs' claim arises from their **purchase of services** from Defendant **"primarily for personal, family or household purposes."** While Defendant asserts in conclusory fashion that Plaintiffs are not "consumers" under the MCPA, it fails to indicate why or how Plaintiffs do not fit within the statutory definition and cites no authority for its position.

Moreover, the statute makes unlawful any unfair or deceptive act or practice in the conduct of any trade or commerce. Mont. Code Ann. § 30-14-103. There is little doubt that Defendant is engaged in a "trade or commerce" as defined by the statute, which states:

> "Trade" and "commerce" mean the advertising, offering for sale, **sale, or distribution of any services**, any property, tangible or intangible, real, personal, or mixed, or any other article, commodity, or thing of value, wherever located, and **includes any trade or commerce directly or indirectly affecting the people of this state.**
>
> Mont. Code Ann. § 30-14-102(8)(a) (emphasis added).

Defendant's only argument of the inapplicability of the MCPA is that Plaintiffs' claims are related to their status as members or owners of the cooperative, not consumers. Defendant can maneuver around labels, but it cannot change the fact that Plaintiffs purchased "consumer" services (i.e., telecommunications and related services) from and offered by Defendant for personal and household purposes. But for their purchase of Defendant's consumer services, Plaintiffs would not be members of the cooperative. Their purchase was in part dependent upon representations of Defendant by way of its Bylaws that represented the manner in which Plaintiffs' capital contributions would be used and returned to them. It is the violation of these representations (false and deceptive trade practices), that are at the heart of Plaintiffs' claims.

In particular, as alleged in paragraph 28 of Plaintiffs' First Amended Complaint (Doc. 9), Defendant clearly marketed the cooperative as one where its members (the consumer purchasers of it services) would reap the benefits of their investment by the "return" of capital earned. 3 Rivers states the following on its website, with respect to capital credits:

> 3 Rivers is a telephone cooperative and as a cooperative member, you will be allocated capital credits based on your patronage. This allocation will be a percentage of our annual earnings over and above expenses.
> Although 3 Rivers no longer requires an investment for membership, we're still working for you and treating you as an investor. **So when 3 Rivers makes a profit the money is returned to our members through capital credits.**

(Doc. 9, ¶28) (emphasis added).

This is clearly a deceptive practice to lure customers by the promise of return of the company's profits to its members—a promise which became false and misleading when it came to actually returning such profits and capital credits to the Browning Exchange members.

This is not unlike a utility company requiring a security deposit, under false or misleading representations of the need for the deposit, to be returned after termination of service, and then having the utility company change its rules or other regulations so as to deny the return of the security deposit. While the suit involves the contractual relationship between the parties, the claim nevertheless

arose from the purchase of consumer services and was based on false or deceptive practices and representations.

**V. Plaintiffs' Claims Under Title VI of the Civil Rights Act of 1964**

Defendant alleges that Plaintiffs' claims for violation of Title VI of the Civil Rights Act of 1964 should be dismissed because their allegations of racial discrimination have not been made "with particularity." (Doc. 14, p. 17). In support of this allegation, Defendant cites a Second Circuit Court of Appeals case, *Rivera-Powell v. New York City Bd. Of Elections, 270 F.3d 458* (2d Cir. 2006), and three United States District Court cases from New York, all of which are within the jurisdiction of the Second Circuit Court of Appeals.

The Second Circuit appears to be alone in requiring that allegations of racial animus be pled with particularity in the context of a Title VI discrimination claim. The Ninth Circuit Court of Appeals has no such requirement. *In Fobbs v. Holy Cross Health Sys. Corp.*, 29 F.3d 1439 (9th Cir. 1994) (overruled on other grounds by *Daviton v. Columbia/HCA Healthcare Corp.*, 241 F.3d 1131 (9th Cir. 2001)), the Ninth Circuit Court of Appeals held that to state a claim for damages under Title VI, a plaintiff must allege that "(1) the entity involved is engaging in racial discrimination; and (2) the entity involved is receiving financial assistance." *Fobbs*, 29 F.3d at 1447 (citing *Wrenn v. Kansas*, 561 F.Supp. 1216, 1221 (D.C.

Kan. 1983) (internal citation omitted). Intent to discriminate need not be pled in the complaint, but must be proved at trial. *Id.*

In *Johnson v. Dodson Pub. Schools*, 2006 WL 8435827 (D. Mont., Great Falls Div.) this Court, applying the *Fobbs v. Holy Cross Health Sys. Corp.* standard, held that the plaintiffs adequately pled a claim for damages under Title IV by alleging that "Defendant Dodson School District #2A(C) . . . is a recipient of federal funds" and that "Defendants 'intentionally discriminated' against Plaintiffs because they are Native American." *Johnson v. Dodson Pub. Schools, supra,* at p. 5. Although the plaintiffs alleged intentional discrimination on the part of Dodson School District, the Court made it clear that a showing of intent is only required at trial, not at the pleading stage. *Id.*

In this case, Plaintiffs have alleged that Defendant 3 Rivers is a recipient of federal funds (Doc. 9, ¶97), and that it is engaging in racial discrimination (Doc. 9, ¶¶98-99). This is all that *Fobbs v. Holy Cross Health Sys. Corp.* requires. However, because *Fobbs* was decided prior to the U.S. Supreme Court decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), Plaintiffs' Title VI discrimination claims presumably are subject to the "plausibility" standard of *Twombly* and *Iqbal*. In other words, such claims must state "a plausible claim for relief," the determination of which is "a context-

specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. at 679.

Under Rule 8(a), Fed.R.Civ.P., "a plaintiff need only provide "enough facts to state a claim for relief that is plausible on its face." *Austin v. Univ. of Oregon*, 925 F.3d 1133, 1137 (9th Cir. 2019) (citing *Bell Atlantic Corp. v. Twombly, supra,* 550 U.S. at 570). "All factual allegations are accepted as true, and all reasonable inferences must be drawn in favor of the plaintiff." Id. (citing *Ashcroft v. Iqbal, supra*, 556 U.S. at 678). The "plausibility" standard "provides for liberal treatment of a plaintiff's complaint at the pleading stage." *Id.* The Court does not weigh the facts at this stage, "but merely assesses the sufficiency of Plaintiff's allegations." *Cole v. Mont. Univ. Sys.*, 2022 WL 278935, p. 1 (D. Mont., Missoula Div.) (citing *Bell Atlantic Corp. v. Twombly, supra,* 550 U.S. at 556).

The Court recognizes that "perpetrators of discrimination rarely leave 'smoking gun' evidence attesting to discriminatory intent." *Doe v. Mont. State Univ.*, 2020 WL 7493128, p. 7 (D. Mont., Butte Div.) (citing *Rosen v. Thornburgh*, 928 F.2d 528, 533 (2d Cir. 1991)). Instead, "discrimination most often arises through 'discreet manipulations,' usually 'hidden under a veil of self-declared innocence.'" *Id.* For this reason, victims of discrimination "usually find themselves constrained to the cumulative weight of circumstantial evidence." *Id. See also Thomas v. Eastman Kodak Co.*, 183 F.3d 38, 61 (1st Cir. 1999) (holding

that because discrimination is "rarely explicit and thus rarely the subject of direct evidence," it "may be proven through the elimination of other non-discriminatory reasons until the most plausible reason remaining is discrimination.").

Here, Plaintiffs have alleged facts which support a reasonable inference that Defendant 3 Rivers discriminated against them on the basis of race in violation of Title VI. Plaintiff Harry Barnes was the only Native American member of the 3 Rivers Board of Trustees and the only member of the Board representing the interests of the Browning Exchange members. (Doc. 9, ¶64). Plaintiff Barnes repeatedly informed the Board that the capital credits belonging to the Browning Exchange members should be retired to those members if the Browning Exchange were to be sold to SiyCom. (Doc. 9, ¶65). However, the Board of Trustees decided to remove Plaintiff Barnes as a board member—on the stated ground that he was "no longer a bona fide resident of the area served or to be served by the Cooperative"--before voting on and approving a policy not to retire the capital credits belonging to the Browning Exchange members. (Doc. 9, ¶66). By removing Plaintiff Barnes from the Board, 3 Rivers ensured that the Browning Exchange members would have no voice with respect to how their capital credits in 3 Rivers would be treated in connection with the sale to SiyCom. (Doc. 9, ¶66).

3 Rivers did not obtain the authorization of its members prior to selling the Browning Exchange to SiyCom, as required by its Bylaws. Consequently, the

members of the Browning Exchange had no voice in the sale to SiyCom, or as to how their capital credits would be handled by 3 Rivers in connection with the sale. (Doc. 9, ¶68). As a result of 3 Rivers' decision to sell the Browning Exchange and retain the capital credits belonging to the former Browning Exchange members, these former members have been compelled to remain owners of 3 Rivers, even though they no longer have any interest in 3 Rivers other than an expectation that their capital credits will eventually be retired (believed to be over a period of approximately 25 years), and they no longer have any right to vote in elections or on any matter submitted to the membership of 3 Rivers. (Doc. 9, ¶35, ¶69). The former Browning Exchange members have been effectively deprived of any meaningful benefit of the capital they invested in 3 Rivers. (Doc. 9, ¶71)

3 Rivers' decision to retain the capital credits belonging to the Browning Exchange members for the benefit of 3 Rivers and its remaining members (believed to total approximately 8.8 million dollars (Doc. 9, ¶35)) following the sale to SiyCom is consistent with 3 Rivers' history of treating Native American members of the Browning Exchange differently, and much less favorably, than its other members.

The Browning Exchange was one of 3 Rivers' largest exchanges, consisting of approximately 2,000 members. (Doc. 9, ¶26, ¶44). Despite the Browning Exchange's size and proximity to 3 Rivers' headquarters in Fairfield, Montana, 3

Rivers chose to exclude the Browning Exchange from its ten-year plan to upgrade customers from copper cable to fiber optic cable. (Doc. 9, ¶42). As a result, 95% of the former Browning Exchange members are still served by old copper cable equipment, some of which is approximately 40 years old, resulting in dramatically deficient and poor internet service. (Doc. 9, ¶48). Plaintiff Barnes wrote a letter to the Board of Trustees expressing his concern about the disparate treatment of the Browning Exchange compared to 3 Rivers' other exchanges, but 3 Rivers nevertheless failed to furnish the Browning Exchange with fiber optic cable, as it did for members of its other exchanges. (Doc. 9, ¶43).

Before the sale of the Browning Exchange to SiyCom was completed, 3 Rivers took advantage of new FCC rules pertaining to accounting for consumer broadband-only loops (CBOLs), resulting in 3 Rivers receiving a windfall of excess revenue totaling 18 to 20 million dollars. (Doc. 9, ¶62). Although 3 Rivers utilized the Browning Exchange members in its accounting calculations for purposes of obtaining this excess revenue, 3 Rivers never actually used any of the revenue to provide CBOL service to the Browning Exchange. (Doc. 9, ¶63).

In their Amended Complaint, Plaintiffs also include several examples of how 3 Rivers neglected or refused to fix problems with service involving members of the Browning Exchange on the Blackfeet Reservation. (Doc. 9, ¶¶52-61). Although these examples may not have any direct connection to 3 Rivers' decision

to retain the capital credits belonging to the Browning Exchange members, they further illustrate 3 Rivers' history of disparate treatment of its Native American members.

Taken as a whole, Plaintiffs' factual allegations are sufficient to state a plausible claim for relief under Title VI. Plaintiffs are not required to allege specific examples of racial animus on the part of Defendant 3 Rivers. "The Supreme Court has long recognized that unlawful discrimination can stem from stereotypes and other types of cognitive biases, as well as from conscious animus." *Thomas v. Eastman Kodak Co., supra,* 183 F.3d at 59 (citing *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993)). Moreover, "unwitting or ingrained bias is no less injurious or worthy of eradication than blatant or calculated discrimination." *Id.* at 60 (quoting *Hopkins v. Price Waterhouse*, 825 F.2d 458, 469 (D.C. Cir. 1987)).

## VI. Claim for Breach of Implied Covenant of Good Faith and Fair Dealing

Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing is not premised solely on the existence of a fiduciary relationship between the parties, as Defendant 3 Rivers claims. (Doc. 14, pp. 21-22). Instead, Plaintiffs assert the elements of a "special relationship" giving rise to tort damages for breach of the implied covenant of good faith and fair dealing, pursuant to *Warrington v. Great Falls Clinic, LLP*, 2019 MT 111, ¶15. Although Plaintiffs' First Amended Complaint does omit one of the "special relationship" elements—that "ordinary

contract damages" would not allow adequate recovery—this is an element of *proof*, not pleading. See *Warrington, supra*, 2019 MT 111 at ¶15 ("To demonstrate the existence of a contract involving a 'special relationship,' a party must *prove* five elements . . .") (emphasis added).

Defendant argues that none of Plaintiffs' allegations support a claim for breach of the implied covenant of good faith and fair dealing. (Doc. 14, p. 23). But 3 Rivers' argument relies entirely on its interpretation of the facts underlying Plaintiffs' allegations. For example, 3 Rivers represents that the contract here "was not for a non-profit motive" because it was for "telecommunication and related services." (Doc. 14, p. 23). Similarly, 3 Rivers concludes that "contract damages are adequate" because "they would require 3 Rivers to account for its actions, and contract damages would make plaintiffs whole." (Doc. 14, p. 23-24). But adopting 3 Rivers' conclusions would require the Court to weigh the facts at the initial pleading stage, which is not the Court's obligation. Instead, the Court need "merely assesses the sufficiency of Plaintiff's allegations." See *Cole v. Mont. Univ. Sys. supra*, 2022 WL 278935, p. 1.

Finally, 3 Rivers claims that Plaintiffs fail to even state a claim for breach of contract, because Plaintiffs did not specifically allege that 3 Rivers "did not meet the business judgment standard" or that "3 Rivers' alleged decision was inconsistent with sound business practices," or that "3 Rivers has such strong long-

term financial stability and excess profits that no reasonable cooperative could make the decision 3 Rivers allegedly made . . .” (Doc. 14, p. 23). If anything, these are matters that 3 Rivers may choose to raise as affirmative defenses in its Answer, and for which it bears the burden of proof. See *Speaks v. Mazda Motor Corp.*, 118 F.Supp.3d 1212, 1223-24 (Dist. Mont. 2015) (holding that a defendant bears the burden of proving an affirmative defense). But they are not required elements of *pleading*, as Defendant suggests.

**VII. Federal Communications Act Claim**

Defendant argues the Federal Communications Act (the “FCA”) is limited to a showing of unjust or unreasonable “rates and charges”. This is incorrect. The FCA provides that “All charges, ***practices,*** classifications, and regulations for and ***in connection with such communication service,*** shall be just and reasonable, and any such charge, ***practice***, classification, or regulation that is unjust or unreasonable is declared to be ***unlawful***.” 42 USC § 201(b) (emphasis added).

Defendant’s argument that the FCA fails to cover any racial discrimination also is misplaced. Section 202 of the FCA provides:

> (a)Charges, services, etc.
> It shall be unlawful for any common carrier to make any **unjust or unreasonable discrimination** in charges, **practices,** classifications, regulations, facilities, or services for or **in connection with like communication service**, directly or indirectly, by any means or device, **or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any**

**undue or unreasonable prejudice or disadvantage.** 47 USC §202(a) [Emphasis added]

In the case of *AT&T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899 (9th Cir. 2002) the Coeur d'Alene Tribe sued AT&T under the FCA for its failure to provide telephone services it claimed it had a right to receive. The case did not involve rates or charges, but the providing of service. The case turned on the provisions of Sections 201(a) and the antidiscrimination purposes of Section 202 as in the instant case. The Court in *Coeur d'Alene Tribe, supra*, found the FCA provided jurisdiction over the tribe's allegations for lack of service by AT&T.

Any argument that the FCA does not cover discrimination on the basis of race is unsupported by the language of the statute itself and is purely conclusory and without merit. Even a cursory reading of the statute reveals it serves to prohibit unreasonable practices based on racial prejudice or to subject any person to undue preference, advantage or disadvantage. The issue in this case and as clearly and specifically alleged in the Complaint is the unreasonable and unjust treatment the Plaintiffs and others similarly situated in the Browning Exchange and Blackfeet Indian tribe were subjected to by Defendant. Issues regarding the providing of services by Defendant as alleged in the Complaint are cognizable under the FCA. *Id.* These allegations are specifically pled.

Plaintiffs' First Amended Complaint alleges many "unjust or unreasonable" **practices** on the part of Defendant in "connection with its communication service"

that must not only be accepted as true (*Ashcroft, supra*.) but which must be construed in the light most favorable to Plaintiffs. (*Knievel, supra*.) In particular, Plaintiffs allege Defendant engaged in the following "unjust or unreasonable" practices:

1. Glacier County, encompassing the Blackfeet Indian Reservation is one of the poorest counties in the United States where 39% of the population lives in poverty. Defendant provides its communication services to them. [Doc. 9, ¶¶23,24]

2. The Defendant's Bylaws provide that upon the termination of a member, their capital contribution would be retired if the cooperative's financial condition would not be impaired. [Doc. 9, ¶29]

3. The Browning Exchange (Blackfeet tribe's service) was sold and Defendant failed to retire the substantial capital account held on behalf of the effected members but kept it instead without sufficient justification. [Doc. 9, ¶35]

4. Despite Defendant receiving federal funds for new broadband construction for unserved areas, none was used for the Plaintiffs services. [Doc. 9, ¶40] Instead, the funding was used to upgrade the service for other members not including the Plaintiffs services. [Doc. 9, ¶41]

5. Defendant devised a 10 year plan for upgrading of services which excluded Plaintiffs from the upgrade. [Doc. 9, ¶42]

6. 95% of the Browning Exchange members (Plaintiffs' service) live without the upgraded fiber optic cable resulting in deficient and poor internet performance and are relegated to using cable approximately 40 years old. [Doc. 9, ¶¶47, 48]

7. Defendant offered free internet service to many members, but those in the Browning Exchange were unable to get any internet service at all due to the disparately poor service and equipment. [Doc. 9, ¶50]

8. Defendant only offered the upgraded fiber optic cable service to the Blackfeet tribe new homes where the homeowner paid for the installation, unlike its other members. [Doc. 9, ¶51]

9. Further, paragraphs 56 – 61 of the First Amended Complaint contain more specific disparate treatment and unjust and unreasonable practices of Defendant as to individuals.

These allegations clearly allege **practices** of the Defendant as it related to its communication **services** provided to Plaintiffs. While such disparate, unjust, and unreasonable practices do not necessarily relate to rates or charges, that is unnecessary and irrelevant to the merits of the claim. These allegations construed in the light most favorable to Plaintiffs and taken as true entitle Plaintiffs to relief if proven at trial.

**VIII. Breach of Contract Claim**

Defendant 3 Rivers does not dispute that its Bylaws require an affirmative vote of at least 2/3 of its members before selling or otherwise disposing of a substantial portion of its property. (Doc. 14, pp. 26-27). Nor does 3 Rivers claim that it allowed its members to vote on the sale of the Browning Exchange to SiyCom. Instead, 3 Rivers simply states that Plaintiffs' breach of contract claim must be dismissed because they failed to "state how the bylaws define 'substantial

portion' and fail to allege that the Browning Exchange met the definition." (Doc. 14, p. 27). However, 3 Rivers does not claim the Bylaws actually provide any definition of "substantial portion." Absent such a definition in the Bylaws, Plaintiffs cannot be faulted for failing to include such an allegation in their First Amended Complaint. 3 Rivers drafted the Bylaws, not Plaintiffs. It is not Plaintiffs' obligation to supply a definition for a term that 3 Rivers chose not to define in its own Bylaws.

3 Rivers also faults Plaintiffs for failing to allege that 3 Rivers abused its business judgment, or to allege facts "that would show that 3 Rivers was required by contract to immediately retire patronage capital." (Doc. 14, p. 27). 3 Rivers also claims that none of Plaintiffs' allegations suggest that 3 Rivers abused its discretion under the Bylaws and Montana law "with regard to its decision regarding payment of their patronage capital." (Doc. 14, p. 27).

In their First Amended Complaint, Plaintiffs recited the provisions of the Bylaws pertaining to capital credits (Doc. 9, ¶29) and 3 Rivers' policy for retirement of capital credits (Doc. 9, ¶30). The Bylaws provide:

> If, at any time prior to dissolution or liquidation the Board shall determine that the financial condition of the Cooperative will not be impaired thereby, and in conformance with the concept of "non-profit" operation, the capital credited to members' accounts may be retired in full or in part, provided that any such retirement of capital shall be made in accordance with the capital credits policy of the Cooperative and in such amounts and upon such terms as shall be determined by the Board,

> provided that such policy shall be adopted by the Board prior to any retirement of capital.

(Doc. 9, ¶29). In accordance with the Bylaws, it is 3 Rivers' stated policy to retire capital credits. (Doc. 9, ¶30).

Plaintiffs allege that 3 Rivers has capital reserves in excess of operating costs and expenses sufficient to retire the capital credits of the former Browning Exchange members without impairing the financial condition of 3 Rivers. (Doc. 9, ¶36). Plaintiffs further allege that 3 Rivers recently received a windfall of excess revenue totaling 18-20 million dollars by taking advantage of new FCC rules governing accounting for consumer broadband-only loops (CBOLs), which windfall was reaped in part by utilizing the Browning Exchange members in its accounting calculations despite 3 Rivers never furnishing any CBOL service to the Browning Exchange members. (Doc. 9, ¶¶62, 63). These alleged facts are inconsistent with 3 Rivers' duty under its own Bylaws to act "in conformance with the concept of 'non-profit' operation" and call into question whether 3 Rivers' decision not to retire the capital credits of the former Browning Exchange members was an appropriate exercise of its discretion and judgment.

The Bylaws also include a Statement of Nondiscrimination, whereby 3 Rivers assures that it "will comply fully with all requirements of Title VI of the Civil Rights Act of 1964 . . . to the end that no person in the United States shall on the ground of race, color, sex, age, or national origin . . . be otherwise subjected to discrimination in

the conduct of its program . . . .” (Doc. 9, ¶37). Because the Statement of Nondiscrimination is contained in the Bylaws, which 3 Rivers acknowledges to be a valid and binding contract between itself and its members (Doc. 14, p. 11), any breach of the Statement of Nondiscrimination on the part of 3 Rivers with respect to its members is also a breach of its contract with the members affected thereby. As discussed previously, Plaintiffs allege that 3 Rivers has discriminated against them on the basis of race in violation of Title VI. Such allegations, if proved, would also constitute a breach of contract by 3 Rivers.

**CONCLUSION:**

For the reasons discussed above, Defendant’s motion to dismiss should be denied. Alternatively, if Plaintiffs’ First Amended Complaint is found lacking in any respect, Plaintiffs respectfully request the opportunity to amend their Complaint.

DATED this 21st day of April, 2022.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count, calculated by Microsoft Word, is 6,285 words excluding caption, table of contents and authorities, certificate of compliance and certificate of service.

DATED this 21st day of April, 2022.

By: */s/ Jeffrey G. Winter*
DUROCHER & WINTER, PC

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing was duly served upon the following by mail, hand delivery, Federal Express or facsimile transmission:

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