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UNITED STATES DISTRICT COURT
FOR THE STATE OF MONTANA

JOHN MURRAY, HARRY BARNES, ROBERT DESROSIER, KENNETH HOYT, AND JUDY WHITE, on behalf of themselves and all those similarly situated, Plaintiff, vs. 3 RIVERS TELEPHONE COOPERATIVE, INC., et al., Defendants.	Cause No. CV-21-118-GF-BMM **DEFENDANT 3 RIVERS TELEPHONE COOPERATIVE, INC.'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS**

INTRODUCTION

Plaintiffs' opposition to 3 Rivers' motion to dismiss fails to recognize the difference between an allegation of fact and an unsupported legal conclusion. In this regard, plaintiffs assert that in considering a motion to dismiss the court must simply accept bare legal conclusions as true. This is directly contrary to controlling Ninth Circuit precedent, which clearly establishes that this court does not have to accept plaintiffs' bare legal conclusions as true. *Depot, Inc. v. Caring for Montanans, Inc.*, 915 F.3d 643, 653 (9th Cir. 2019) (holding that "we do not 'accept as true allegations that are conclusory.'") (quoting *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1051 (9th Cir. 2014)). Plaintiffs' remaining arguments are founded on misreading and misapplication of the law, overly broad and unreasonable interpretations of statutes, misconstruction of pleading standards, and misguided, after-the-fact attempts to force purported factual allegations to fit inappropriate legal claims.

This case concerns plaintiffs' dissatisfaction with 3 Rivers' determination to pay them their patronage capital over time rather than in a single lump sum. Similar disputes between cooperatives and their members regarding the payment of patronage capital have been litigated numerous times in courts across the country, including in Montana and in states with controlling statutes similar to Montana's RETCA. To survive a motion to dismiss such cases require specific factual allegations, none of which have been made here.

Plaintiffs' shotgun approach of asserting nine distinct claims in what is a straightforward contract action governed by the business judgment rule speaks volumes, particularly because plaintiffs – even after amendment – have still failed to allege the single claim that could possibly be cognizable: namely, that 3 Rivers' decision regarding payment of their patronage capital exceeded 3 Rivers' broad discretion under controlling statute, the relevant contract, and/or the common law business judgment rule. *Daniels v. Thomas, Dean & Hoskins, Inc.*, 246 Mont. 125, 139, 804 P.2d 359, 367 (1990) ("Judges are not business experts and therefore should not substitute their judgment for the judgment of the directors.").

Because there are no facts to support such a claim, plaintiffs instead plead nine separate claims based on conclusory allegations, inapplicable laws, and allegations regarding wholly unrelated matters (such as that a single customer in Heart Butte "ran over [a] cable pedestal" and was unhappy with 3 Rivers' response). ECF Doc. 9, p. 16. Simply put, none of the various counts asserted in plaintiffs' amended complaint have anything whatsoever to do with 3 Rivers' decision regarding payment of their patronage capital or its exercise of its discretion and business judgment in making that determination.

LEGAL STANDARD

Plaintiffs suggest that in considering a motion to dismiss, this court is bound to simply accept as true any and all allegations they have made in their complaint.

This is incorrect. In order 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." *Smith v. Ripley*, 446 F. Supp. 3d 683, 686 (D. Mont. 2020) (quoting and citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, (2007)). Construction of a complaint in the light most favorable to the plaintiff does not extend to "allegations that are conclusory", *Depot, Inc.*, 915 F.3d at 653, and "'where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory,' dismissal is proper." *Smith, supra*.

ARGUMENT

A. Plaintiffs' have failed to assert any factual basis for their purported breach of fiduciary duty claim.

It is settled law in Montana that no fiduciary relationship exists between a rural electrical cooperative, such as 3 Rivers, and its members or former members, such as plaintiffs, absent circumstances which give rise to a special relationship, such as where the cooperative "undertakes to advise a member of certain rights." *Wolfe v. Flathead Electric Cooperative, Inc.*, 2017 WL 8184352 (Mont. Dist. Dec. 21, 2017) at *5 (citing *Morrow v. Bank of Am., N.A.*, 2014 MT 117, 375 Mont. 38, 324 P.3d 1167).

Recognizing this, plaintiffs requested and received leave to amend their complaint, presumably for the purpose of providing the necessary factual allegations

to support their claim for breach of fiduciary duty. However, plaintiffs' amended complaint fails to do this. To the contrary, plaintiffs have merely inserted a broad, unsupported conclusory allegation that reads, in its entirety:

> 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.

ECF Doc. 9, ¶ 125.

Fatal to their claim for breach of fiduciary duty, plaintiffs' complaint does not contain any factual allegations setting forth the basis for this bare assertion. Plaintiffs still do not allege that 3 Rivers undertook to advise them of *any* rights regarding the allocation or payment of their patronage capital. Crucially, plaintiffs *admit* that that have not alleged that 3 Rivers advised them of any rights which would create a special relationship. ECF Doc. 20, p. 11 ("That is true – Plaintiffs did not specifically make such an allegation."). Further, plaintiffs acknowledge that "they must establish facts giving rise to a 'special relationship'… to avoid dismissal of the claim on summary judgment. But Plaintiffs should not be held to the same standard at the initial pleading stage." ECF Doc. 20, p. 11.

3 Rivers is not attempting to hold plaintiffs to a summary judgment standard at the pleading stage. The law at this stage is clear: To survive a motion to dismiss, plaintiffs must allege facts *in their complaint* showing that they are entitled to relief. Rule 8(a)(2), FED. R. CIV. P. Here, plaintiffs fail – after amendment – to allege *any*

facts upon which they base their belated, conclusory allegation that there exists a "special relationship" between them and 3 Rivers.

Plaintiffs pled a claim for breach of fiduciary duty. In response, 3 Rivers pointed out that Montana law is clear that there is no fiduciary duty between a rural cooperative and its members unless there are circumstances that create a special relationship. Recognizing the unassailable truth of this argument, plaintiffs have amended their complaint to insert the bare, conclusory statement that there is a "special relationship" between them and 3 Rivers. However, no allegations setting forth the factual basis for that conclusory assertion have been made. Essentially, in a rather desperate attempt to avoid dismissal of their fiduciary duty claim, plaintiffs have amended their complaint to include a mere conclusory allegation that a "special relationship" exists without making any effort whatsoever to articulate the factual basis for that allegation and now urge that, simply because they have made the conclusory allegation that a special relationship exists, the court must accept the existence of that relationship as true and allow their claim for breach of fiduciary duty to proceed (at least until the summary judgment stage). This is not the law. Plaintiffs' claim for breach of fiduciary duty should be dismissed.

B. The existence of a valid and binding contract bars plaintiffs' claim for unjust enrichment.

There is no dispute that 3 Rivers' bylaws constitute a binding contract that governs the parties' obligations regarding payment of patronage capital. Plaintiffs

attempt to avoid dismissal by arguing that their unjust enrichment claim should survive because they disagree with 3 Rivers' interpretation of the governing contract. ECF Doc. 20, pp. 12 – 14. But that is not the law with respect to unjust enrichment claims where a contract exists. Instead, an unjust enrichment claim is only allowed where a contract "'is invalid, voidable, or otherwise ineffective to regulate the parties' obligations.'" *A.C.I. Constr., LLC*, 2021 MT 246, ¶ 23 (quoting *Montana Digital, LLC*, 2020 MT 250, ¶ 11) (quoting *Ruff*) (quoting Restatement (Third) of Restitution and Unjust Enrichment § 2 (2011)).

There are no allegations that suggest that the governing contract is invalid, voidable, or otherwise ineffective to regulate the parties' obligations regarding the allocation and payment of patronage capital. In fact, the opposite is true: plaintiffs and 3 Rivers both acknowledge that the contract governs the distribution of patronage capital. Plaintiffs do so both in their amended complaint and again in their response to 3 Rivers' motion to dismiss. ECF Doc. 20, p. 14 ("Plaintiffs believe the Bylaws of the Defendant require the distribution of the Plaintiffs' capital accounts…"). Plaintiffs' admission that the contract governs the payment of patronage capital requires dismissal of the unjust enrichment claim. *Montana Digital, LLC v. Trinity Lutheran Church*, 2020 MT 250, ¶ 11, 401 Mont. 482, 473 P.3d 1009.

Unjust enrichment is not a claim that is available anytime a party disagrees with another party's interpretation of a contract, or anytime a party loses a breach of contract claim. *Montana Digital, LLC*, 2020 MT 250, ¶ 11 (quoting and citing *Associated Mgmt. Servs., Inc. v. Ruff*, 2018 MT 182, ¶ 67, 392 Mont. 139, 424 P.3d 571). Plaintiffs contend that disagreement regarding interpretation of a contract automatically renders the contract ineffective to regulate the parties' obligations. ECF Doc. 20, p. 14. This is incorrect. In any contract dispute, the interpretation of the contract terms by one party will be determined to be correct while the interpretation offered by the other party will be determined to be incorrect. This does not create a cause of action for unjust enrichment on the part of the party whose position is not accepted.

The Montana Supreme Court has cited the Restatement (Third) of Restitution and Unjust Enrichment favorably on this issue. The restatement explains:

> Properly interpreted, however, the same statement acknowledges an important limit to liability in unjust enrichment. Contract is superior to restitution as a means of regulating voluntary transfers because it eliminates, or minimizes, the fundamental difficulty of valuation. Considerations of both justice and efficiency require that private transfers be made pursuant to contract whenever reasonably possible, and that the parties' own definition of their respective obligations – assuming the validity of their agreement by all pertinent tests – take precedence over the obligations that the law would impose in the absence of agreement. Restitution is accordingly subordinate to contract as an organizing principle of private relationships, and the terms of an enforceable agreement normally displace any claim of unjust enrichment within their reach.

Restatement (Third) of Restitution and Unjust Enrichment § 2 (2011)) (cited in *Ruff*, 2018 MT 182, ¶ 67).

Plaintiffs incorrectly state that 3 Rivers is "concomitantly claiming such contract doesn't control" the payment of patronage capital. ECF Doc. 20, pp. 14 – 15. This is simply not true and ignores 3 Rivers' stipulation on this point: "Furthermore, plaintiffs allege, and 3 Rivers stipulates, that the bylaws (as well as Montana statute) govern the parties' obligations with respect to patronage capital." ECF Doc. 14, p. 18. Given that both parties agree that the payment of patronage capital is governed by contract, there is no cognizable claim for unjust enrichment.

C. The MCPA does not apply.

A claim for violation of the MCPA must involve false or misleading statements *about the good or service* purchased by the consumer. *See* MONT. ADMIN. R. 23.19.101. This case does not involve false or misleading statements by 3 Rivers regarding the telecommunication services that it provides. Indeed, plaintiffs themselves assert that they are pursuing a contract right, namely that 3 Rivers' bylaws required the immediate, lump sum payment of their allocated patronage capital upon sale of the Browning Exchange. Their claim is based on their status as parties to the contract, not on their status as consumers of 3 Rivers' services.

"The Act defines 'trade' and 'commerce' as '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.'" *Hein v. Sott*, 2015 MT 196, ¶ 19, 380 Mont. 85, 91–92, 353 P.3d 494, 499 (quoting MONT. CODE ANN. § 30-14-102(8)). Patronage capital does not meet this definition because it is not for sale.

Likewise, plaintiffs are not "consumers" with respect to their entitlement to patronage capital. Plaintiffs are consumers with respect to telecommunication services provided by 3 Rivers, which are not at issue.

Plaintiffs argue that 3 Rivers is engaged in "trade or commerce". ECF Doc. 20, p. 16. That's true with respect to telecommunications services. It is not true with respect to the allocation or payment of patronage capital. 3 Rivers is not "offering" patronage capital "for sale" or "distribution." *Hein*, 2015 MT ¶ 19. There is no claim under the MCPA.

D. Plaintiffs' Title VI Claim Rests on Conclusory Allegations

Regarding their Title VI claim, plaintiffs take issue with 3 Rivers' reliance on Second Circuit cases but ignore the fact that the cases cited are consistent with Ninth Circuit law. In *AE ex rel. Hernandez v. Cty. of Tulare*, 666 F.3d 631, 637 (9th Cir. 2012) the Ninth Circuit held that "allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively."

The elements of a claim for discrimination under Title VI are that "(1) the entity involved is engaging in racial discrimination; and (2) the entity involved is receiving federal financial assistance." *Scutt v. Maui Fam. Life Ctr.*, No. CV 20-00375 JAO-KJM, 2021 WL 1794597, at *5 (D. Haw. May 5, 2021) (quoting *Fobbs v. Holy Cross Health Sys. Corp.*, 29 F.3d 1439, 1447 (9th Cir. 1994), *overruled on other grounds by Daviton v. Columbia/HCA Healthcare Corp.*, 241 F.3d 1131 (9th Cir. 2001)). However, *AE ex rel. Hernandez* makes it clear that plaintiffs cannot state a Title VI claim by simply asserting, in bare conclusory fashion, that 3 Rivers is engaged in racial discrimination. To the contrary, a claim for discrimination *must* be supported by allegations of actual facts. Under binding Ninth Circuit precedent, plaintiffs cannot survive a motion to dismiss by simply reciting elements. That much is clear. *AE ex rel. Hernandez*, 666 F.3d at 637.

Plaintiffs argue they state a claim under Title VI because they have made the bare allegation that 3 Rivers "is engaging in racial discrimination". ECF Doc. 20, p. 13. This is insufficient to state a cause of action under Title VI because, "To survive a motion to dismiss, the complaint must contain *sufficient factual matter*, accepted as true, to state a claim to relief that is plausible on its face." *Depot, Inc.,* 9015 F.3d at 652 (Quotations and citations omitted). "A plaintiff must allege facts, not simply conclusions, that show that an individual was personally involved in the deprivation of his civil rights." *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998).

"Dismissal of a § 1983 claim following a Rule 12(b)(6) motion is proper if the complaint is devoid of factual allegations that give rise to a plausible inference of either element." *Naffe v. Frey*, 789 F.3d 1030, 1036 (9th Cir. 2015).

The amended complaint contains no factual allegation that 3 Rivers' determination regarding payment of plaintiffs' patronage capital was racially motivated or discriminatory. There is no allegation that 3 Rivers has paid the patronage capital of other, non-Native members or former members in a lump sum or treated them any differently than any other member(s) regarding payment of patronage capital.

Plaintiffs cite *Johnson v. Dodson Pub. Sch.*, No. CV-05-39-GF-CSO, 2006 WL 8435827 (D. Mont. May 4, 2006) for the proposition that conclusory allegations of racial discrimination ae sufficient to survive dismissal of their Title VI claim. Plaintiffs misread *Johnson*. In that case, the complaint clearly contained factual allegations in support of plaintiff's claim, to-wit: "Newby had taped and bound other Native American students," *id.* at *2, and that the defendant had discriminated "by favoring Misty Newby, by treating Johnson and D. Doe differently and less favorably than similarly situated others who were white or Caucasian". *Id* at *4.

Plaintiffs reiterate their "examples" of customer complaints about 3 Rivers' service. ECF Doc. 20, p. 20. These, however, are merely examples of customer complaints which have nothing whatsoever to do with 3 Rivers' contractual

obligation regarding the allocation and/or payment of patronage capital. Notably absent from the complaint is any allegation of any fact that could even tangentially support a claim of racial animus concerning the payment of patronage capital.

D. There are no allegations of fact supporting plaintiffs' claim for breach of the implied covenant of good faith and fair dealing.

Plaintiffs contend that their amended complaint states a claim for breach of the covenant of good faith because they "assert the elements" of such claim. ECF Doc. 20, p. 24. However, plaintiffs admit they "omit one of the… elements". *Id.* As discussed, merely "asserting the elements" is insufficient to state a claim. *AE ex rel. Hernandez*, 666 F.3d at 637 (holding that "allegations in a complaint or counterclaim may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively.").

E. The FCA does not apply.

Plaintiffs argue that 3 Rivers' alleged decision concerning payment of their patronage capital is a "practice" under the FCA. There is nothing in 47 U.S.C. § 201(b) which purports to govern a rural cooperative's payment of patronage capital. A "practice" under the FCA must relate to the furnishing of communication services. *AT & T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899 (9th Cir. 2002) is inapposite because, as plaintiffs admit, that case involved the provision of telecommunication services, not payment of patronage capital.

F. Plaintiffs' have not alleged that the Browning Exchange constituted 20% of 3 Rivers' net book value.

Plaintiffs base their breach of contract claim on an allegation that the contract between 3 Rivers and its members provides that "3 Rivers may not sell or otherwise dispose of all or any substantial portion of its property unless such sale or other disposition is authorized by the affirmative vote of not less than two-thirds (2/3) of all members at a duly held meeting of the members." ECF Doc. 9, ¶ 114. As noted by 3 Rivers, plaintiffs pointedly fail to allege that the Browning Exchange constituted a substantial portion of 3 Rivers' business.

In response, plaintiffs argue that 3 Rivers' bylaws do not contain a definition of "substantial portion". Plaintiffs' argument ignores the fact that "substantial portion" in defined by Montana law. RETCA provides:

> For the purposes of this section, as the term applies to a telephone cooperative, 'substantial portion' means 20% or more of the net book value of the telephone cooperative as disclosed in its audited financial statements as of the close of its most recent fiscal year.

MONT. CODE ANN. § 35-18-317(1)(b). Plaintiffs have not alleged that the Browning Exchange represented 20% or more of 3 Rivers' net book value.

CONCLUSION

For all the above-stated reasons, the court should dismiss the first amended class action complaint and demand for jury trial.

Dated this 17th day of May, 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 3,170 words excluding caption, certificate of compliance, and table of contents and authorities.

DATED this 17th day of May, 2022.

By: __/s/ David F. Knobel _____
CROWLEY FLECK PLLP