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MONTANA THIRTEENTH JUDICIAL DISTRICT, YELLOWSTONE COUNTY

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GARY McDANIEL, SUSAN McDANIEL, on behalf of themselves and all others similarly situated. Plaintiffs, vs. CITY OF BILLINGS, Defendant.	Cause No. DV 19-1444 **CORRECTED DECISION AND ORDER RE: CITY OF BILLINGS' MOTION FOR SUMMARY JUDGMENT: COUNTS IV AND V** **UNDER MONT. R. CIV. P. 56** **DUE PROCESS**

On February 11, 2022, Defendant City of Billings ("City") filed City of Billings' Motion for Summary Judgment: Counts IV and V Under Mont. R. Civ. P. Due Process ("Motion). Ct. Doc. 104. On February 11, 2022, the City also filed the City of Billings' Brief in Support of its Motion for Summary Judgment: Counts IV and V Under Mont. R. Civ. P. 56 Due Process ("Brief"). Ct. Doc. 105. On March 4, 2022, Plaintiffs Gary McDaniel and Susan McDaniel ("Plaintiffs") filed Plaintiffs' Response to the City's Motion for Summary Judgment on Counts IV and V. Ct. Doc. 107. On March 18, 2022, the City filed City of Billings' Reply Brief in Support of its Motion for Summary Judgment: Counts IV and V Under Mont. R. Civ. P. 56 Due Process ("Reply"). Ct. Doc. 112.

Neither party requested a hearing on the Motion. The Court has decided other pre-certification motions for partial summary judgment. See, Decision and Order Re: City of Billings'

Motion for Partial Summary Judgment (Counts II and III), Ct. Doc. 98; Decision and Order Re: Plaintiffs' Motion for Partial Summary Judgment Regarding the Legality of City Ordinances and SIA Provision Imposing "Franchise -Fees" (Count I), Ct. Doc. 99; Decision and Order Re: City of Billings' Motion for Partial Summary Judgment Pursuant to Mont. R. Civ. P. Re Plaintiffs' Water Contract Claims Under Mont. Code Ann. 30-2-607, Ct. Doc 106; Decision and Order Re: City of Billings' Motion for Partial Summary Judgment: Count II Pursuant to Mont. R. Civ. P. 56 Good Faith and Fair Dealing. Ct. Doc. 126. The Court's approach to deciding those motions before class certification has been accepted by the parties.

The present Motion is in the same posture as those motions. Indeed, this approach has been approved by other courts. See, *Sheehan v. Transit Auth.*, 155 Wn. 2d 790, 807, 123 P.3d 88 (2005) ("...a trial court retains discretion, for purposes of judicial economy, to delay ruling on a motion for class certification until after hearing dispositive motions.") In this case, the Court has not yet addressed Plaintiffs' motion for class certification. The Court points this out because in the related case of *Houser, et al. v. City of Billings,* Montana 13th Judicial Dist. Ct., Cause No. DV 19-0778, the parties agreed that notice should be given to the certified class before the Court decides motions for summary judgment. *Houser* is procedurally distinct from this case because in *Houser* the class was certified. *Houser,* Ct. Doc. 74.

On October 9, 2019, Plaintiffs filed a Class Action Complaint (Subdivision Improvement Agreement Properties) ("Complaint"). Ct. Doc. 1. In Count IV of their Complaint, Plaintiffs allege that the City violated Plaintiffs' rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Specifically, Plaintiffs allege in Count IV that the City violated their due process rights under the Fourteenth Amendment by failing to provide a prepayment resolution of tax disputes between the City and the its residents. Compl., ¶ 118, Ct.

Doc. 1. Plaintiffs also alleged that Due Process requires that the State provide its taxpayers with the opportunity to secure postpayment relief for taxes already paid pursuant to a scheme found to be unconstitutional. Compl., ¶ 116, Doc. 1. In Count V of their Complaint, Plaintiffs allege that the City violated their rights to due process under Article II, § 17 of the Montana Constitution. Specially, Plaintiffs make the same allegation under Montana's Constitution as they do under the Fourteenth Amendment. In their Prayer for relief, Plaintiffs seek a judgment for the "amount of any payments made to the City with interest thereon" and "for reasonable attorney's fees and costs." *Id.*, p. 20.

In its Brief, the City sets forth a Statement of Uncontroverted Facts which are taken from Court documents and affidavits cited in the City's Brief and attached to the Brief. Br., pp. 2-6. Plaintiffs do not dispute that those facts present any genuine issue of a material fact and do not present any contradictory evidence. Plaintiffs simply assert "If the court finds that no genuine issue of material fact exist, it must 'determine whether the moving party is entitled to judgment as a matter of law'" (citing *Xin Xu v. McLaughlin Research Inst. for Biomedical Sci., Inc.*, 2005 MT 209, ¶ 18, 328 Mont. 232, 119 P.3d 100 (2005). Resp., 2. The Court has no reason to conclude that there is any genuine issue of material fact based on the facts presented by the City in the following Statement of Uncontroverted Facts, which would preclude the Court from resolving the City's Motion.

STATEMENT OF UNCONTROVERTED FACTS

On April 13, 1992, the City adopted Resolutions imposing the franchise fees on April 13, 1992 for water and wastewater and on February 23, 2004 for solid waste. Plaintiffs brought suit on October 9, 2019, roughly 27 years after the City adopted and started charging franchise fees to customers of the Public Works Department.

On April 10, 2019, this Court in *Houser* issued an Order Granting Plaintiffs' Motion for Class Certification. In its Order, the Court certified three Plaintiff classes but expressly excluded parties who paid franchise fees under a Subdivision Improvements Agreement. *Id.* The proposed class in this case include the parties that were excluded from the *Houser classes* because they reside in residences subject to an SIA.

From 1992 to June 2018, the City charged its ratepayers a "franchise fee" for water and wastewater services. The 4% "franchise fee" for wastewater was established by City Resolutions in 1992 and was included until June 30, 2018. The 5% "franchise fee" for solid waste disposal service was included on Solid Waste Customers' bills, as reflected in Resolution 12-19179. These fees appeared on customers' solid waste disposal bills from July 1, 2012 to June 30, 2018. Plaintiff Susan McDaniel has been a ratepayer and has utilized City water, wastewater, and solid waste disposal services since Plaintiffs purchased their home on November 4, 2004. Susan McDaniel opened an account with the Public Works Department in November of 2004. The City has no record of an account in the name of Gary McDaniel for water and wastewater services. Similarly, the City has no record of any account in the name of Gary McDaniel for solid waste disposal services from 2012 to the present.

The "franchise fees" have always been controversial. As the Court noted in its Order Granting Plaintiffs' Motion on their Count I claim for declaratory and injunctive relief, some City Council members and other City officials objected or disagreed with the "franchise fees." Ct. Doc. 99, 7. On April 13, 1992, when the City Council adopted the "franchise fees," Council Member Dan Farmer ("Farmer") denounced the "franchise fees" as a "very regressive sales tax." Ct. Doc. 99, 7. Farmer also wrote a letter to the Editor of the Billings Gazette where he again declared that the franchise fees were an illegal sales tax. Br., Ex. G, Aff. of former Mayor Chuck Tooley, ¶ 12,

Ex. 6 thereto. Farmer's public declarations that the "franchise fees" were a sales tax were a catalyst for 27 years of objections to the "franchise fees" being a sales tax.

Senator Roger Webb testified that he started complaining about the "franchise fees" in 1995 or 1996. He called the Public Utilities Department four or five times a year for 15 or 20 years to complain. Br., E. A, *Houser* Tr. of Proceedings on April 27, 2021, 106:16-107:3. Clayton Fiscus ("Fiscus") testified that he believed that the "franchise fees" were illegal since they were adopted in 1992. Ex. B, Fiscus Dep., 25:7-22. At a City Council meeting on October 23, 2000, Fiscus stated that the "franchise fee" "is a sales tax without representation." Br. Ex. G, Minutes of October 23, 2000 City Council meeting, Ex. 3 to the Affidavit of Chuck Tooley. After the Montana Supreme Court decided *Montana-Dakota Utils. Co. v. City of Billings*, 2003 MT 332, 318 Mont. 407, 80 P.3d 1247, Fiscus appeared at a January 2004 City Council meeting to complain about the "franchise fees" being an illegal tax. Br., Ex. G., 15, Fiscus Dep., Ex. B, 68:18 — 79:3. By January of 2004, Fiscus believed not only that the franchise fees were illegal but also that the City needed to pay the franchise fees back to its customers. Br., Ex. B., Fiscus Dep., 77:5-8. Fiscus frequently appeared at City Council meetings to protest the "franchise fees" as an illegal sales tax, including meetings on January 13, 1992, October 23, 2000, January 12, 2004, and February 23, 2004. Br., Ex. G, Aff. of former Mayor Chuck Tooley, ¶ 9 & ¶ 10, Exs. 1-4.

Mae Woo ("Woo") testified that Fiscus told her that the City was charging an illegal sales tax in 2012. Br., Ex. F, Woo Dep. 48:4-49:11. Woo knew that Fiscus had been fighting the "franchise fees" for a long time - since 1992. *Id.*, 49:3-11.

Tom Zurbuchen ("Zurbuchen") testified that he spent more than a decade trying to hire an attorney over the "franchise fees." He contacted numerous attorneys over the years. Br., Ex. A, *Houser* Tr. of Proceedings on April 27, 2021, 88:11-6. He started contacting attorneys prior to

2010. Br., Ex. C, Zurbuchen Dep., 51:12-57:25. He testified that he waited until 2018 to file suit because he couldn't find a lawyer to take the case. *Id.*, 75:12-18. Zurbuchen testified:

> Q. **...Why did you wait until 2018 to file a lawsuit?**
> A. I couldn't find a layer [sic] to take the case, plain and simple....
> Q. **Any other reason?**
> A. No. I would have filed years ago if I had found a lawyer that would have filed a lawsuit.
> Q. **How long ago?**
> A. Oh, early 2000.
> Q. **Why would you have sued the City of Billings in the early 2000s?**
> A. Because the franchise fee is a sales tax, and it's prohibited by state law, and the City cannot violate state law. The state code is quite clear. Self-governing powers does not give them the power to violate state law.
> Q. **So you wanted to sue the City of Billings in 2006 over the franchise fees?**
> A. Before that.
> Q. **. . . So before 2006, you wanted to sue the City of Billings over the franchise fees; is that correct?**
> A. Yes.
> Q. **And so would it be an accurate statement that you have known that the City of Billings has been acting illegally since before 2006?**
> A. Yes.
> Q. **And you have known that the City of Billings was violating your rights since before 2006?**
> A. Yes.
> Q. **And that you have known that you had legal recourse against the City of Billings since before 2006?**
> A. Yes.
> Q. **And you waited until 2018 to file a lawsuit because you couldn't find a lawyer, correct?**
> A. Yes.
> Q. **And between 2005 and the present, you contacted a number of lawyers trying to find someone to represent you, correct?**
> A. Yes.

Br., Ex. C, Zurbuchen Dep., 75:13-77:7.

Over the years, Terry Houser ("Houser") "called a whole bunch of attorneys" who told her what the City was doing was crooked. Houser testified that virtually everyone she talked to about the "franchise fees" agreed that they were illegal. Br., Ex. D, Houser Dep., 92:17-93:23.

Terry Odegard testified that the "franchise fees" had been an issue since 1992 and that the City Council broke state law when it adopted the franchise fees in 1992. Br., Ex. E, Odegard Dep., 36:1-18 & 48:17-49:2.

The City stopped charging "franchise fees" beginning on July l, 2018. The City passed Resolutions 8-10718 and 18-10743 on May 14 and June 25, 2018, respectively, that did not include "franchise fees" with the rates and charges for water, wastewater, and solid waste disposal rates.

On January 5, 2022, the Court issued its Decision and Order on Plaintiffs' Motion for Summary Judgment, finding that the "franchise fees" were illegal sales taxes under § 7-1-112(1), MCA. Ct. Doc. 99.

LEGAL STANDARD

Summary judgment is proper when the movant demonstrates that no genuine issue of material fact exist and that the movant is entitled to judgment as a matter of law. Rule 56(c)(3), Mont. R. Civ. P. The moving party has the burden of establishing the absence of genuine issues of material fact and their entitlement to judgment as a matter of law. *Grizzly Sec. Armored Express, Inc. v. Bancard Servs.*, 2016 MT 287, ¶ 13, 385 Mont. 307, 384 P.3d 68 (citation omitted). Once the moving party has met its burden, the non-moving party must present "material and substantial evidence" that is not merely "conclusory or speculative demonstrating that a genuine issue of material fact exists." *Needham v. Kluver*, 2019 MT 182, ¶ 14, 396 Mont. 500, 446 P.3d 504. A material fact involves elements of the cause of action or defenses at issue to an extent that necessitates resolution of the issue by a trier of fact. *Roe v. City of Missoula*, 2009 MT 417, ¶ 14,

354 Mont. 1, 221 P.3d 1200. Summary judgment may be entered for either all or part of the claim. Rule 56(a), Mont. R. Civ. P.

DISCUSSION

The City seeks summary judgment on Counts IV and V. The City asks the Court to rule that the statute of limitations for the due process claims under Counts IV and V is three years under § 27-2-203(1), MCA. The City asserts that Plaintiffs are barred from asserting a claim for damages under Counts IV and V because they arose prior to August 2, 2015. The City's specific assertions are as follows:

1. The statute of limitations for a claim of violations to Plaintiffs' Fourteenth Amendment Due Process rights under 42 U.S.C. § 1983 is three years.
2. The statute of limitations for claims under Article II, § 17, of the Montana Constitution is three years.
3. Plaintiffs' Due Process rights, as alleged, would have been violated when the Billings City Council adopted "franchise fees" in April 1992 and July 2012 without simultaneously establishing a process for customers to challenge payment of the "franchise fees" either before or after they were paid.
4. Plaintiff Gary McDaniel's claims should be dismissed because he did not have utility accounts with the City.

Concerning Count IV, the federal Due Process claim under the Fourteenth Amendment of the United States Constitution, the City and Plaintiffs agree that Montana's three-year statute of limitations for damages under a personal injury or tort claim applies to 42 U.S.C. § 1983 and that federal law governs the accrual of such a claim. Br., p. 6; Resp. p. 2. The parties also agree that

Count V, the state Due Process claim under Article II, § 17 of the Montana Constitution, is considered a tort claim with a three-year statute of limitations under § 27-2-204(1), MCA. Br., pp. 12-13; Resp. p. 5. However, the parties disagree as to when the claims accrue under both Constitutions.

Plaintiffs contend that the City violated their Fourteenth Amendment Due Process rights and Montana Due Process rights when the City failed to provide Plaintiffs with a prepayment mechanism to challenge the "franchise fees" as a tax or a post payment remedy for relief or refund of the "franchise fees" they paid. The Fourteenth Amendment of the United States Constitution prohibits a state from depriving "any person of life, liberty, or property, without due process of law...". Federal civil claims for damages are subject to 42 U.S.C. § 1983, which provides, "Every person who . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . ."

Plaintiffs filed their Complaint on October 9, 2019. Br., p. 9. The City notes that the parties mutually agreed to toll the statute of limitations under a tolling agreement executed on January 18, 2018. *Id.* The tolling agreement expired on April 30, 2018, 103 days later. *Id.* at 9. The City notes that Plaintiffs were also putative plaintiffs in the *Houser* case from the time the Complaint was filed in *Houser* on May 16, 2018 to April 10, 2019, when the Court certified the *Houser* classes and expressly excluded Plaintiffs. As the City calculates with the times included in the above discussion, August 2, 2015 is three years and 433 days preceding the October 9, 2019 Complaint filing date. The City reasons that it is entitled to partial summary judgment that all of Plaintiffs' Due Process claims under Count IV accrued prior to August 2, 2015 and are barred. *Id.*

The City argues that a Due Process claim under the Fourteenth Amendment accrues when a plaintiff knows or has reason to know of the injury which is the basis of the action. Citing federal case authority, the City argues that Plaintiffs' Due Process claims accrued when the "franchise fees" were imposed upon them as utility customers. *See,* Br., p. 10; *Wallace v. Keto*, 549 U.S. 384, 388, 127 S. Ct. 1091; *Am. Premier Underwriters, Inc. v. Amtrak,* 839 F.3d 458, 461 (6th Cir. 2016); *Abramson v. University of Hawaii*, 594 F.2d 202, 209 (9th Cir. 1979). The City argues that Plaintiffs' claims relating to water and wastewater services accrued in November 2004 when they were first charged "franchise fees" on water and wastewater services and for solid waste services in 2012 when the City instituted a 5% "franchise fee" for those services. The City asserts that Plaintiffs' alleged due process violations occurred when Plaintiffs became subject to the "franchise fees" without the requisite means to challenge the "franchise fees" by way of a prepayment hearing or a post-payment procedure to refund the "franchise fees" that were paid. For purposes of its argument, the City treats Plaintiffs' claims regarding a lack of predeprivation and postdeprivation procedure as undisputed. Br., p. 11, n. 12.

The City further argues that charging the "franchise fees" is not, in and of itself, a constitutional violation. Reply, p. 4. The City maintains that if there is a Due Process violation, that violation stems from when the City allegedly failed to provide Plaintiffs with an opportunity to challenge the fees and seek relief at the time of the adoption of the "franchise fees." The City insists that the alleged Due Process violation relates to the City's establishment of the "franchise fees," and not the charging of the fees. *Id.* Thus, the City reasons that the law does not support a recurring constitutional Due Process violation with each monthly payment. If the City's analysis is correct, then Plaintiffs' filing of their Complaint on October 9, 2019, would be outside the period of the statutes of limitation and Plaintiffs' Due Process claims would fail.

Plaintiffs argue that the recent case of *Ellis v. Salt River Project Agric. Improvement & Power Dist.*, 24 F.4th 1262 (9th Cir. 2022) support their position that each monthly "franchise fees" payment they made was not an on-going violation but were recurring constitutional violations with each payment. *Ellis* involved a federal equal protection claim. In *Ellis*, a government-owned utility changed its rate structure in 2015 by imposing higher monthly rates upon solar ratepayers than the rates it imposed upon non-solar ratepayers. Plaintiffs sued the utility. *Ellis,* 24 F.4th at 1266.

In *Ellis,* the equal protection claim was brought under 42 U.S.C. § 1983. *Id.* In this case, the claim is an alleged Due Process violation. The City notes that because the alleged Due Process violation is the failure of the City to provide some form of process to challenge the process fees *Ellis* is distinguishable from this case. Reply, p. 4. The City reasons that Plaintiffs' Due Process claim is not directly implicated by the monthly charging of "franchise fees" and is not a recurring constitutional violation. Reply, p. 5.

Unlike Montana's statute of limitations, the limitations period for personal-injury claims under Arizona law was two years. In *Ellis,* the Ninth Circuit Court said "the period started to run when the claim accrued," citing *Flynt v. Shimazu,* 940 F.3d 457, 462 (9th Cir. 2019). *Ellis,* 24 F.4th at 1271. The Ninth Circuit Court also recognized that "[f]ederal law governs the accrual of a section 1983 claim, and a cause of action accrues 'when the plaintiff knows or has reason to know of the actual injury' that is the basis for the action. *Lukovsky v. City & County. of San Francisco*, 535 F.3d 1044, 1051 (9th Cir. 2008); accord *Belanus v. Clark*, 796 F.3d 1021, 1025 (9th Cir. 2015)." *Id.*

In *Ellis,* the defendant ("SRP") is a political subdivision of Arizona. *Ellis,* F.4th at 1266. SRP controlled the electrical grid and had authority to set prices for the sale and distribution of

electricity to the approximately one million retail customers in its service territory. SRP supplied more than 95 percent of the electricity used by those customers. *Ellis*, F.4th at 1267.

Some of SRP's customers installed solar energy systems, such as rooftop solar panels, thereby reducing the amount of electricity they needed to purchase from SRP. Solar energy was not always available. *Id.* Customers with solar installations also relied on SRP when their solar-energy systems did not produce electricity or produce less electricity than they needed. *Id.*

As discussed in the underlying federal district court case, in the *Ellis* case plaintiffs are four district residential customers in Arizona and self-generate some of their electricity through personal solar energy systems. *Ellis v. Salt River Project Agricultural Improvement and Power District,* 432 F. Supp. 3d 1070, 1077 (D. Ariz. 2020). Three plaintiffs installed their solar energy systems after the District adopted Standard Electrical Price Plans ("SEPP"). *Id.* "Specifically, Ellis, Dill, and Rupprecht [sic] installed solar energy systems in May 2018, July 2018, and November 2016, respectively. Rupprecht bought his home equipped with a solar energy system at an unknown date." *Id.*[1]

In February 2015, SRP adopted a new rate structure for its sale of electricity, which included additional fees and different rates for residential customers who self-generated some of their electricity through solar energy systems. *Id.* In 2014, SRP announced a new pricing scheme that included various SEPPs. *Ellis*, F.4th at 1267. One of those plans, the E-27 price plan, established separate rates for customers who generated their own electricity through solar-energy

[1] For clarification, in the Ninth Circuit Court appellate case, the Court referred to the plaintiffs as "Ellis, Dill and Gustavis [who] all sued within two years of first being charged under the E-27 price plan, so their claims are timely as to all charges incurred. Rupprecht, however, did not sue within two years of becoming subject to the E-27 plan, but was charged under it within the limitations period. His claims, therefore, are timely only as to charges incurred within two years of suing." *Ellis,* F.4th at 1272-1273. (emphasis supplied). There is no explanation for this apparent discrepancy.

systems. *Id.* The E-27 plan applied only to customers who installed solar panels after December 8, 2014; those who had already installed solar panels were grandfathered into the previous pricing scheme. *Id.* Under the E-27 plan, solar customers could be charged up to 65 percent more for SRP electricity than under prior plans for solar customers.

In *Ellis*, plaintiffs filed their lawsuit on February 22, 2019. *Ellis,* 432 F. Supp. 3d at 1087. In *Ellis,* the district court held that the claims were untimely because they accrued—and thus the statute of limitations began to run—when the agency approved the plan in February 2015. *Ellis*, F.4th at 1271. The Ninth Circuit Court noted the plan had not yet caused plaintiffs any injury, so they could not have "know[n] or ha[d] reason to know of the actual injury" (*citing Lukovsky*, 535 F.3d at 1051). *Id.*, at 1271-1272. The injury occurred only when Plaintiffs received a bill under the new rate structure. *Id.* Plaintiffs suffered a new injury with each monthly bill, which means that a new claim arose each month. *Id.*

In concluding that all of the claims were untimely, the district court in *Ellis* relied on *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1058 (9th Cir. 2002). In *RK Ventures,* the Ninth Circuit Court held that the statute of limitations runs from the "operative decision" and not from its "inevitable consequences that are not separately actionable." (*quoting Chardon v. Fernandez*, 454 U.S. 6, 8, 102 S. Ct. 28, 70 L. Ed. 2d 6 (1981)). That case involved a challenge to an abatement proceeding brought by a city; although the commencement of the action was outside the statute of limitations, the plaintiff argued that later events in the proceeding, such as holding a hearing, had restarted the limitations period. *Id.* The Ninth Circuit Court rejected that argument because those later events, although injurious, were not themselves actionable. *Id.* The Ninth Circuit Court held that holding a hearing in a proceeding that had already begun "was not a separately unconstitutional act." *Id.*

The Ninth Circuit noted that the cases on which SRP relied are similar to *RK Ventures. Ellis,* F.4th at 1272. "They involved challenges not to new wrongful acts, but rather to the inevitable—and not independently unlawful—consequences of the operative, time-barred decision. See *Knox v. Davis*, 260 F.3d 1009, 1013 (9th Cir. 2001) (holding that subsequent denials of client visits based on the permanent suspension of attorney's visitation rights did not restart the limitations period); *Pace Industries, Inc. v. Three Phoenix Co.,* 813 F.2d 234, 239 (9th Cir. 1987) (holding that each phase of a single enforcement action does not give rise to new, actionable overt acts)." *Id.* However, the Ninth Circuit Court rejected that analysis in *Ellis.*

In the present case, the City argues that the *Ellis* analysis does not apply to this case because this case involves a Due Process violation, whereas *Ellis* involved a violation of equal protection. This Court fails to recognize this distinction. In *Ellis,* when the SRP adopted its new rate structure in February 2015, the alleged equal protection violation occurred. The tolling of the statute of limitations for three of the plaintiffs in *Ellis* began when they were charged with the new rates. Without detailed explanation, the Ninth Circuit Court found that the fourth plaintiff (Rupprecht) filed his lawsuit within the statute of limitations. In *Ellis*, the plaintiffs "suffered a new injury with each monthly bill, which means that a new claim arose each month." 24 F.4th at 1272.

In this case, the City argues that the alleged violation of Due Process was created when the City originally adopted the "franchise fee" resolutions. There is no dispute that when the City originally adopted the resolution the City did not provide Plaintiffs with either a predeprivaton procedure to challenge the "franchise fees" as an illegal sales tax or a postpayment remedy for its collection of the unlawful sales taxes. Again, the City maintains that Plaintiffs' claims accrued at the time they were first charged franchise fees in 2004 (for water and waste water) and 2012 (for

solid waste). There is no dispute that the City failed to make predeprivaton or postpayment remedies with any payment made by Plaintiffs.

The City also illustrates that this Court has entered judgment in favor of the City on Plaintiffs' Breach of Contract and Restitution claims, which, according to the City, prevents Plaintiffs from establishing a claim for damages that is triggered by each recurring monthly invoice charging the "franchise fees." The City's reference to the judgement is misplaced. In its Decision and Order granting the City's motion for partial summary judgment on Counts II and III of Plaintiffs' Complaint, the Court held that Plaintiffs failed to present their claim to the City Council within the time prescribed by Section 7-6-4301(1), MCA, which was one year. Ct. Doc. 98. There is no parallel between that decision and the issue in this case. As discussed earlier, the Due Process claims are tort claims. Section 7-6-4301(1), MCA, does not involve demands arising out of tort claims. *Dawes v. Great Falls*, 31 Mont. 9, 13-14, 77 P. 309, 310 (1904).

In *Ellis*, the Ninth Circuit Court looked to cases involving Title VII. Specifically, the Court cited *Bazemore v. Friday*, 478 U.S. 385, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (1986). *Ellis,* F. 4th at 1272. In *Bazemore,* the United States Supreme Court held that each paycheck issued under a racially discriminatory pay structure is an independent violation of Title VII that supports an independent claim and starts the running of the limitations period for that claim. *Id.* at 395-96 (Brennan, J., joined by all other Members of the Court, concurring in part). *Id.* The Ninth Circuit Court applied the *Bazemore* principle to the facts of the *Ellis* case. The Ninth Circuit Court noted that the difference in rates between solar customers and other customers violated the Equal Protection Clause, and therefore, it is charging the rates—not merely announcing them—that constitutes the constitutional violation. *Id.* The dates on which customers were charged rates under the plan are significant in determining the timeliness of their claims. As discussed in

Footnote 1, Ellis, Dill, and Gustavis all sued within two years of first being charged under the E-27 price plan. Theirs claims were timely as to all charges incurred. *Id.* Rupprecht did not sue within two years of becoming subject to the E-27 plan, but he was charged under it within the limitations period. Rupprecht's claims were timely only as to charges incurred within two years of suing. *Ellis,* F.4th at 1273.

Ellis suggested that all of the named plaintiffs' claims were timely because SRP's conduct constituted a "continuing violation." *Ellis*, F.4th at 1273. The Ninth Circuit Court held that plaintiffs alleged a series of repeated violations each of which gave rise to a new cause of action with a new statute of limitations period as to that event. *Id.* In this case, Plaintiffs allege that the illegal "franchise fees" were added to their monthly water bills. Compl., Ct. Doc. 1, ¶ 3. The City collected the "franchise fees" on Plaintiffs' monthly invoices. Compl., Ct. Doc. 1, ¶ 62. Plaintiffs allege that under the Fourteenth Amendment the City must provide Plaintiffs (the City's taxpayers) with a fair opportunity to challenge the accuracy and legal validity of their tax obligation and a clear remedy for an erroneous or unlawful tax collection (*citing McKesson v. Florida Div. of Alcoholic Bev.,* 496 U.S. 18 (1990)). Compl., Ct. Doc. 1, ¶ 115. Each "franchise fee" which was charged in Plaintiffs' monthly invoices was an illegal sales tax. Dec. & Or. Re: Pls.' Mot. for Partial S.J. Regarding the Legality of City Ordins. and SIA Provisions Imposing "Franchise-Fees," Ct. Doc. 99.

In this case, each monthly invoice was provided to Plaintiffs without a predeprivation or postdeprivation procedure. Thus, each monthly charge contained an alleged constitutional Due Process violation. The City argues that charging the "franchise fees" is not, in and of itself, a constitutional violation. Reply, p. 4. The City contends that if there is a Due Process violation in this case, it stems from the City's alleged failure to provide Plaintiffs with an opportunity to

challenge the "franchise fees" and seek relief. *Id.* The City contends that the alleged violation relates to the City's establishment of the "franchise fees," not the charging of the fees. *Id.*

The City argues that *Ellis* does not control whether Plaintiffs' Due Process claim is barred by the statute of limitations. Instead, the City relies on *Knox v. Davis*, 260 F.3d 1009 (9th Cir. 2001). In *Knox*, plaintiff was an attorney who is licensed to practice law in California. *Knox*, 260 F.3d at 1011. *She* had been a criminal defense attorney for over 19 years and worked in the Office of the Federal Public Defender for the Central District of California. *Id.*

Knox began representing an inmate in a California Department of Corrections ("CDC") facility, in January 1993. *Knox*, 260 F. 3d at 1011. In July 1995, Knox married the inmate, and continued to serve as the inmate's public defense attorney. *Id.* Throughout the course of their professional and personal relationships, Knox and the inmate exchanged confidential and general correspondence through the CDC prison system. *Id.* In addition, Knox visited the inmate in prison, both as a general visitor and as a legal visitor on numerous occasions. *Id.*

After the inmate was placed in a prison segregation facility, Knox made several unsuccessful attempts to visit the inmate. On November 18, 1994, Knox received a letter from the warden advising Knox that her visitation privileges were suspended "pending the completion of an investigation concerning violations of the attorney/client privilege." *Id.* "The suspension applied to both Knox's personal and legal visitation privileges and was premised upon the fact that a "preliminary investigation revealed that [Knox's] conduct and relationship with Inmate Packer deems [Knox] a risk to the safety and security of the [CDC] institution." *Id.* Knox was not permitted to visit the inmate from November 18, 1994 through January 19, 1995. *Id.* Meanwhile, Knox's personal attorney made repeated attempts with prison officials to ascertain the reason for Knox's suspension, but none of the correspondence was answered by the prison. *Id.*

On November 22, 1994, the warden sent a letter to Knox's superior in the Federal Public Defender's office, advising her of Knox's suspension and the reasons underlying the suspension (i.e. violations of the attorney/client privilege, "unethical conduct," and the risk posed by Knox "to the safety and security of the institution"). *Id.* On December 22, 1994, the superior spoke with the Litigation Coordinator at CSP-LAC, who stated that the only reason for Knox's suspension was "the alleged misuse of legal mail or visitation for personal issues." *Id.* The litigation coordinator denied the allegation that Knox's suspension was due to any concern about potential security breaches or the passing of any inappropriate items. *Id.* On December 5, 1995, Knox's personal attorney attempted to telephone the litigation coordinator concerning the suspension, but the litigation coordinator refused to discuss the matter. *Id.*

On January 18, 1995, the warden sent a letter to Knox's personal attorney reinstating Knox's regular visitation privileges. *Id.* The letter also indicated, however, that Knox's legal visitation rights would not be reinstated because the investigation was undergoing administrative review. *Id.* The warden sent another letter to Knox's personal attorney on March 24, 1995, advising him that Knox's suspension would extend to legal mail and that no further legal mail between the inmate and Knox would be processed by the prison. *Id.* In accordance with the warden's letter, CSP-LAC's staff stopped processing all of the inmate's legal mail to or from Knox. *Id.* On September 26, 1995, the warden sent a letter to Knox's personal attorney stating that Knox's attorney rights, both her visiting and mail privileges, were "permanently suspended." *Id.*

After receiving the warden's letters setting forth the terms of Knox's suspension, Knox and her attorney began communicating with the CDC Institutions Division. *Knox,* 260 F.3d at 1012. On November 21, 1995, Knox spoke with an assistant from the Southern Regional Administrator's Office in the CDC Institutions Division, who advised Knox that it is was problematic for her to

serve as both the inmate's spouse and attorney. *Id.* In response to a letter written by Knox, Deputy Director of the Institutions Division of the CDC, wrote a letter to Knox on January 20, 1996, stating that an internal investigation had revealed that Knox had misrepresented the type of mail she was sending to the inmate. *Id.* The letter also specifically stated that observations by CDC staff and her "indisputable personal relationship with [the inmate]" led to the conclusion that Knox posed "a significant threat to the safe and secure operations of CDC facilities." *Id.* The Deputy Director's letter revoked all of Knox's legal mail and visitation rights at all CDC institutions and with all CDC inmates. Although Knox alleged that she was denied notice and a hearing several times, she provided no dates for these denials in her complaint. *Id.*

On July 3, 2016, Knox's suspension was modified allowing her limited and restricted attorney-client visitation and mail rights as an assistant public defender with Knox's client on death row. *Id.* The ban, as modified with regards to the death row inmate, continued and had not been revoked or modified by the CDC in any way after July 30, 1996. *Id.* There were several instances in which the CDC, in reliance on the suspension, denied Knox either legal visitation or correspondence privileges with CDC inmates. *Id.* Each referenced CDC action occurred within one year of the filing of Knox's civil complaint, which Knox brought on July 21, 1997. *Id.*

In *Knox,* the plaintiff argued that after she was originally denied visitation privileges by letter each subsequent denial of visitation rights created a new cause of action under the continuing violation theory. *Knox*, 260 F.3rd at 1014. The Ninth Circuit Court disagreed and found that subsequent and repeated denials of Knox's visitation privileges was "merely the continuing effect of the original suspension." *Id.* at 1013. The City argues that the present case is more similar to *Knox* because the alleged deprivation of Due Process rights stems from the underlying resolutions that established the "franchise fees." The City contends that the ongoing monthly charging of the

"franchise fees" is merely the continuing impact from the past violation – enacting a resolution that included improper "franchise fee" charges without any opportunity for "process" to seek relief. Reply, p. 5.

The City also claims that a pre- or post-deprivation remedy is a legislative action that could be performed by the City Council. Reply, p. 6. The City then reasons that assuming that Plaintiffs' allegations are true and their Due Process rights were violated, then the violation occurred at the legislative level when the City Council created the "franchise fees." *Id.*

However, the City's argument skirts the principle that "[T]he statute of limitations runs separately from each discrete act." *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1061 (9th Cir 2002). Therefore, any claim based on a discrete act is untimely unless that discrete act—or discrete failure to act—took place within the limitations period. *Wolf v. Idaho State Bd. of Corr.*, No. 1:20-cv-00025-BLW, 2020 U.S. Dist. LEXIS 83487, at *12-13 (D. Idaho May 12, 2020) (*citing Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 113 (2002)). (emphasis supplied).

Del Rosario v. Saade involved the liability of a medical provider who claimed that a decision on treatment made long ago cuts off a prisoner's claim that, years later, the provider's decision to continue that course of treatment is an inevitable consequence of the initial decision. *Del Rosario v. Saade*, No. 1:14-cv-00155-REB, 2015 U.S. Dist. LEXIS 93416, at *12 (D. Idaho July 17, 2015). The Federal Court in *Del Rosario* distinguished *Knox*. The District Court noted that in *Knox* the plaintiff's claim accrued when she was informed of a policy restricting her future visitation rather than several months later when she again submitted a request for visitation. *Id.* The Federal Court said "[E]ach time a prison medical provider makes a discrete decision on how to treat an inmate going forward—whether to continue the current course of treatment or to try something different—that medical provider engages in a discrete action, triggering a new statute

of limitations period. A conscious and discrete decision not to act is, after all, still a conscious and discrete decision." *Id.* (emphasis added). The City suggests that only the City Council could create a pre- or postdeprivation process and not the Public Works Department. Although that may be the case, the City's decision not to act with any of the monthly bills is a "conscious and discrete decision."

In this case, the statute of limitations is three years prior to July 1, 2018, when the City discontinued the imposition of the illegal "franchise fees." This calculation takes into account the 433 days which transpired during the tolling agreement expired on April 30, 2018, 103 days later and the time during which Plaintiffs were putative plaintiffs in the *Houser* case from the time the Complaint was filed in *Houser* on May 16, 2018 to April 10, 2019, when the Court certified the *Houser* classes and expressly excluded Plaintiffs.

The Court agrees with Plaintiffs that *Ellis* applies in this case. In this case, Plaintiffs suffered from a new federal Due Process constitutional violation with each monthly payment. Each monthly payment constituted a new cause of action. As the Ninth Circuit Court held in *Ellis,* a new statute of limitations would begin for each monthly payment. The facts are undisputed that the City did not create a predeprivation or postdeprivation process for recovery of the illegal "franchise fees." The City correctly points out that Plaintiffs' Due Process claims arose in 2004 and 2012. However, the City's contention that the statute of limitations expired long before they filed their Complaint on May 16, 2018, is not supported by the application of the *Ellis* analysis to the claims which arose within the statute of limitations period prior to the filing of Plaintiffs' Complaint on October 9, 2019. Reply, p. 12.[2]

[2] The City's reference to May 16, 2018, is obviously to the Complaint filed in *Houser.*

Consequently, under Plaintiffs' federal Due Process claims monthly payments made within the statute of limitation of three years and 433 days prior to the filing of Plaintiffs' Complaint on October 9, 2019, are not barred by the statute of limitations. The City is not entitled to a partial summary judgment for the relief requested under Count IV of Plaintiffs' Complaint.

The City argues that Plaintiffs' state Due Process claims are also barred by the three-year statute of limitations. Article II, § 17 Constitution of Montana provides "no person shall be deprived of life, liberty, or property without due process of law." Under Montana law, parties can assert a direct cause of action for money damages for a violation of a party's Due Process rights under Montana's Constitution. *Dorwart v. Caraway*, 2002 MT 240, ¶ 48, 312 Mont. 1, 58 P.3d 128 (2002). The City applies the same analysis it did under the federal constitutional claims and argues that Plaintiff's claims accrued when they first paid franchise fees without the opportunity to challenge the fees as taxes in November 2004 and 2012. The City further argues that Montana has not adopted the continuing tort doctrine, which according to the City, applies only in nuisance and trespass cases.

Plaintiffs cites three Montana Supreme Court cases to support their argument that each monthly charge of "franchise fees" resulted in the accrual of state due process violations. Reply, p. 6. In *Graveley Ranch v. Scherping*, 240 Mont. 20, 25, 782 P.2d 371, 375 (1989), lead from batteries placed on defendant's property that leaked onto the plaintiff's adjacent property and repeatedly killed plaintiffs' cattle resulted in the accrual of a new cause of action each time that cattle died from lead poisoning. In *Shors v. Branch,* 221 Mont. 390, 397, 720 P.2d 239, 243-244 (1986), defendants use of a gate to block plaintiff's river access constituted a continuing tort which accrued each day the gate was in place. In *Gomez v. State,* 1999 MT 67, ¶ 20, 293 Mont. 531, 975 P.2d 1258, the Montana Supreme Court explained:

> In both *Graveley Ranch* and *Shors*, although the nuisance was a continuing presence on the property, the injuries resulting from the nuisance were discrete incidents – the death of a cow or the inability to access the river each time the plaintiffs desired to do so – with each injury creating a new cause of action.

The City argues that in these cases the Montana Supreme Court expressly declined to extend the continuing tort doctrine beyond negligence or trespass actions. Although the City's argument may appear to have some merit, it should be noted that in the above-cited cases the Supreme Court was not asked to consider the application of the statute of limitations to a claim based upon an alleged violation of Due Process. The City also asserts that all of the necessary information was publicly available to Plaintiffs in 2004 when they were first charged the "franchise fees." Plaintiffs respond by contending that the City does not explain how charges imposed upon Plaintiffs in the three years preceding their lawsuit in 2019 could somehow have accrued back in 2004. The Court agrees with Plaintiffs. As with the federal constitutional Due Process violation, the state constitutional Due Process violation would have accrued with each monthly bill prior to the filing of Plaintiffs' Complaint on October 9, 2019.

The City argues that Plaintiff Gary McDaniel cannot have a Due Process claim because he was never assessed or charged the "franchise fees." The City contends that because Gary McDaniel did not suffer any deprivation of property the City did not have any obligation to provide him with a predeprivation process. The City also claims that because Gary McDaniel was never assessed the "franchise fee" he cannot seek refund relief. The facts are undisputed that the accounts for utility services for Plaintiffs' property were only in the name of Plaintiff Susan McDaniel.

Plaintiffs argue that Gary and Susan McDaniel have jointly owned the home in which they have resided since 2004. That fact is undisputed. Plaintiffs cite to City rules and ordinances which

obligated both Gary and Susan to pay the "franchise fees." Ct. Doc 88, Ex. 1, § 14-7 ("if the one in whose name the account stands fails, refuses, or is unable to pay such bill, the remaining owners shall be responsible for the unpaid municipal water/wastewater charges"); Ct. Doc 88, Ex. 2, (Billings Municipal Code § 21-226) (assessing the cost of solid waste disposal "against the real estate from which such refuse is produced or collected.").

In its Reply, the City points out that there is no evidence that Susan McDaniel ever failed to pay her Public Works Department bills. Susan McDaniel confirmed that she always paid her bills. Gary McDaniel did not have a Public Works Department account with the City and was never assessed, and never paid, the "franchise fees." Other than Plaintiffs' citation to the City's rules and regulations, Plaintiffs did not cite any authority for the proposition that a homeowner who was not assessed fees and did not pay fees to a municipality may have a claim for violation of Due Process.

In its Motion, the City asked the Court to dismiss Gary McDaniel's claims. Mot., p. 2. In its Brief, the City asks the Court to dismiss Gary McDaniel's due process claims. Br., p. 19. In its Reply, the City argues that Gary McDaniel's claims fail and that he should be dismissed as a Plaintiff in this action. What the City seeks in its Reply exceeds the relief it seeks in its Brief. The focus of the City's argument in its Motion is the statute of limitations applicable to Counts IV and V, not whether Gary McDaniel should be dismissed as a Plaintiff.

DECISION

There is no genuine issue as to any material fact.

The City is not entitled to summary judgment as a matter of law that the statute of limitations under Counts IV and V is only three years in light of the tolling agreement executed on January 18, 2018, expiring 103 days later, and the time that Plaintiffs were putative plaintiffs in

the *Houser* case from May 16, 2018 to April 10, 2019, which totaled 433 days. Consequently, the City is entitled to partial summary judgment as a matter of law that all of Plaintiffs' Due Process claims which accrued prior to August 2, 2015, are barred. Those claims which came into existence after August 2, 2015, until the "franchise fees" were discontinued are not barred.

The City is entitled to summary judgment that Plaintiff Gary McDaniel's Due Process claims are barred and those claims should be dismissed.

ORDER

IT IS HEREBY ORDERED:

1. The City of Billings' Motion for Summary Judgment: Counts IV and V Under Mont. R. Civ. P. Due Process is **GRANTED in part** and **DENIED in part.**

2. The City's Motion that the statute of limitations for a claim of violations to Plaintiffs' Fourteen Amendment Due Process rights under 42 U.S.C. is three years is **GRANTED**. The City's Motion that the statute of limitations for claims made under Mont. Const. Art. II § 17 is three years is **GRANTED**.

3. The City's Motion for Summary Judgment that Plaintiffs' Due Process rights were violated when the "franchise fees" were adopted by City Council resolutions in April 1992 and July 2012 is **DENIED.** However, the City's Motion for Summary Judgment that Plaintiffs' claims that accrued prior to August 2, 2015 is **GRANTED**.

4. The City's Motion that Plaintiff Gary McDaniel's claims under Counts IV and V should be dismissed is **GRANTED.**

5. On or before July 29, 2022, the City's counsel shall prepare a Proposed Summary Judgment on Counts IV and V of Plaintiffs' Complaint and Order of Dismissal of Plaintiff Gary McDaniel as to Counts IV and V consistent with this Decision and Order and submit it to the Court

in Word format directly to the Court at its personal email for the Court's consideration for issuance by the Court. Counsel shall file the original Proposed Summary Judgment with the Clerk of the District Court and provide a copy to Plaintiffs' counsel.

Dated July 20, 2022.

Mike Salvagni

Hon. Mike Salvagni
Presiding Judge

cc: Matthew G Monforton
Doug James
Bryce Burke