MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

TERRY HOUSER, CLAYTON FISCUS, TERRY ODEGARD, MAE WOO, THOMAS ZURBUCHEN, KATHRYN ZURBUCHEN, ROGER WEBB, on behalf of themselves and all other similarly situated, Plaintiffs, vs. CITY OF BILLINGS, Defendant.	Cause No. DV-18-0778 Montana Supreme Court: DA-19-277 **ORDER RE: PLAINTIFFS' MOTION TO AMEND CLASS DEFINITION**

This case is before the Court on Plaintiffs' Motion to Amend Class Definition filed on June 27, 2019. Defendant City of Billings responded on July 1, 2019. Plaintiffs replied on August 19, 2019. Neither party requested oral argument.

This Court certified the class action on April 10, 2019. The City appealed the certification order on May 9, 2019. This Court retains jurisdiction on the class definition. All other litigation matters are stayed pending the appeal.

The Court incorporates the factual background and legal standards from its class certification order. A district court may alter or amend the class definition before final judgment. *See* Mont. R. Civ. P. 23(c)(1)(C); *Rolan v. New W. Hlth. Servs.*, 2013 MT 220, ¶ 15, 371 Mont. 228, 307 P.3d 291. The decision to alter or amend a class definition is reviewed for an abuse of discretion. A district court abuses its discretion when it acts arbitrarily without conscientious

judgment or exceeds the bounds of reason. *See Billings Gazette v. City of Billings*, 2013 MT 334, ¶ 10, 372 Mont. 409, 313 P.3d 129.

In its class definition, the Court excluded any person or entity who paid the alleged unlawful franchise fees under a written contract or under a Subdivision Improvement Agreement (SIA). Plaintiffs argue the "written contract" exclusion is vague because all franchise fees were purportedly paid under a written contract. This was addressed at oral argument in the context of commercial contracts where a party contractually agreed to pay the fee. The same rationale applied to SIAs.

Plaintiffs move to amend the class definition to include entities with commercial contracts and those subject to Subdivision Improvement Agreements (SIAs) in the class definition. The City mostly disputed class certification on including these groups in the class definition. Legal and factual differences led the Court to exclude these individuals and entities from the class, but the Court noted the possibility of creating subclasses if necessitated by discovery.

Montana Rule of Civil Procedure 23(5) allows a court to divide a class into subclasses. Subclasses must meet the Rule 23 certification requirements.

Commercial Contract Subclass

Under the proposed commercial contract subclasses for water and wastewater services, the City negotiated four commercial contracts for water services[1] and seven commercial contracts for wastewater services that include a contractual franchise fee[2].

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[1] County Water District of Billings Heights, Lockwood Area/Yellowstone County Water and Sewer District, Phillips 66 Refinery, and Meadowlark Capital, LLC.

[2] City of Powell, WY; City of Laurel; Mackenzie Disposal, Inc.; Republic Services of Montana; Stillwater County; Two Tough Guy Services, LLC; and Yellowstone County Solid Waste Disposal District.

Numerosity is not met, because joinder is not impracticable for this proposed commercial contract subclass.

These commercial contract claims are not common with the class. While there is a common question on the legality of the franchise fee, the legal analysis is complicated by factual differences, applicability of statutes to those varying facts, differences between the existing class and this proposed subclass, differences between and among the proposed subclass members themselves, and differences in the status of a sophisticated commercial entity that negotiated a specific rate versus an individual citizen presented with a non-negotiable utility rate.

Typicality is also not met because the legal claims for this proposed subclass emanate from an arm's length commercial contract. While the franchise fee may implicate the same statutes, the legality is affected by the sophistication of these 11 sophisticated commercial customers who bargained for a rate conditioned on payment of certain fees, including a franchise fee. That circumstance differs from the individual consumers who lacked similar bargaining power. The risk of inconsistent adjudication is significant. For example, it is possible for the franchise fee to violate a statute while the franchise fees charged to this proposed subclass are legal under contract principles.

The named plaintiffs not similarly situated with these commercial contractual entities. Unlike the over 30,000 individual class members, it is feasible for these sophisticated commercial, industrial, and governmental entitles to prosecute their own legal claims, based on their specific contracts and unique circumstances.

To avoid ambiguity in the existing class definition, the Court amends the class definition to expressly exclude the 11 commercial contract entities identified below. *See*, *infra* fns. 1-2.

Subdivision Improvement Agreement Subclass

As for the SIA subclass, since 1995, the City has entered 277 SIAs. The SIAs are agreements between the City and developers for property annexation. The SIAs include contested franchise fees on water and waste water services. The City claims the SIAs bind future subdivision residents. The SIAs are recorded and available for property buyers to review before acquiring real estate. The City acknowledges that each SIA is based on a template with minor variances, but experienced developers negotiate the specific terms, which vary.

Although there are 277 SIA, it is unclear how many property owners are affected. Regardless, the numerosity requirement is met with at least 277 subclass members.

The SIA subclass does not have typical legal or factual allegations, however, nor is there commonality between the SIA subclass with the over 30,000 individual class members. The over 30,000 individual class members simply signed up for utility service and they were charged an allegedly illegal franchise fee. Residential utility customers cannot negotiate utility rates or contractual conditions; if a customer wants water service, he or she either pays the stated rate applicable to all customers generally or the customer does not get water. There is no arm's length negotiation for municipal utility service.

The SIAs involve a different analysis. In an SIA, like the commercial contracts above, the developers negotiate the terms of annexation, which include developer requirements, monetary obligations, construction specifications, and other terms reached through bargaining and negotiation between sophisticated commercial and governmental parties. Much like other covenants and encumbrances that run with the property, SIAs are available for inspection before an owner purchases the real estate. Again, this differs from the homeowner who simply calls the City for water service and is charged an allegedly unlawful franchise fee. The differences in

contract law, real estate law, applicable statutes, and notice generally make the SIA claims uncommon and untypical. Determining the legality of the franchise fee for the over 30,000 existing class members requires a different legal and factual analysis than those affected under an SIA.

The proposed commercial contract and SIA subclasses do not satisfy the Rule 23 requirements.

Based on the foregoing,

IT IS HEREBY ORDERED, Plaintiff's Motion to Amend Class Definition is **GRANTED,** in part, to clarify these entities are excluded from the class definition: County Water District of Billings Heights; Lockwood Area/Yellowstone County Water and Sewer District, Phillips 66 Refinery; Meadowlark Capital, LLC; City of Powell, WY; City of Laurel; Mackenzie Disposal, Inc.; Republic Services of Montana; Stillwater County; Two Tough Guy Services, LLC; and Yellowstone County Solid Waste Disposal District.

IT IS FURTHER ORDERED, Plaintiff's Motion to Amend Class Definition is **DENIED,** in all other respects.

DATED this 17 day of September, 2019.

GREGORY G. PINSKI
DISTRICT JUDGE

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