STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

PLANNED PARENTHOOD MID AND SOUTH MICHIGAN, a Michigan non-profit corporation, Plaintiff, vs. SHRI SAI-KRISHNA GROUP, L.L.C., a Michigan limited liability company, Defendant.	Civil Action No. 2011-119441-CH Hon. James M. Alexander

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Defendant's Brief in Response to Plaintiff's Motion for Partial Summary Disposition

I. PROCEDURAL BACKGROUND

On May 31, 2011, Plaintiff, Planned Parenthood Mid and South Michigan ("**Plaintiff**"), filed a Complaint for Declaratory Relief against Defendant, Shri Sai-Krishna Group, L.L.C. ("**Defendant**"). In Count I of Plaintiff's complaint (the "**Complaint**"), Plaintiff seeks a declaration that Plaintiff has the right to construct, maintain, use and operate its property for medical office purposes despite a restrictive covenant (the "**Restrictive Covenant**") that limits the land's uses to "restaurant, retail or office usage". Counts II & III of the Complaint are not at issue for this motion.

On July 13, 2011, Defendant moved to dismiss Counts II and III of the Complaint. Defendant also moved that the Factual Background and Count I of the Complaint be struck so

that an amended Complaint that conforms to the court rules could be filed by Plaintiff. On July 21, 2011, Plaintiff moved for summary disposition of Count I pursuant to MCR 2.116(C)(10). On September 7, 2011, this Court held a hearing on these motions. This Court instructed Defendant to answer the Complaint. This Court also stated that the motions could be re-filed after 60 days. On September 20, 2011, Defendant filed an answer (the "**Answer**") to the Complaint. On December 8, 2011, Plaintiff filed a Renewed Motion for Partial Summary Disposition (the "**Planned Parenthood Motion**" or "**PP Motion**") seeking summary disposition on Count I of the Complaint pursuant to MCR 2.116(C)(10).

II. ARGUMENT

The PP Motion raises three important issues for this Court to consider. First, **does "office" include "medical office"** as used in the Restrictive Covenant? Plaintiff answers that question yes and is asking for a judgment that "medical office" is included in the word "office" as used in the Restrictive Covenant. Defendant answers that question no and is now asking for a judgment that "medical office" is not included in the term "office" as used in the restrictive covenant.

Second, **is the alleged waiver by Defendant dispositive**? If this Court concludes that "medical office" is the same as "office", Plaintiff then asserts that the Defendant has waived its right to enforce the Restrictive Covenant. This assertion is based solely upon the letter sent to Defendant by Plaintiff's counsel dated October 8, 2010 (the "**Dykema Letter**") and signed by Defendant. PP Motion Exhibit 4. Defendant asserts that the letter is not sufficient to waive rights held in real property as recorded in the public record. At the very least, Defendant continues to assert that the question of waiver is fact intensive such that summary disposition on waiver (or estoppel) is inappropriate at this time.

Third, **is Plaintiff's proposed use actually "medical office"**? Plaintiff continues to assert that it has not yet determined to what use the property is to be put. Defendant asserts that Plaintiff is likely to use the property as an abortion clinic where thousands of surgical procedures will be performed each year by an itinerate group of surgeons. Even if the court concludes that medical office is an acceptable use under the Restrictive Covenant, any decision by Plaintiff to use the property to perform thousands of surgical procedures each year is a use well beyond that of a "medical office". A surgical facility used by a revolving cast of for-hire doctors is not a medical office. An abortion clinic is not an office.

A. Does "Office" include "Medical Office"?

The motion asserts that "Plaintiff's Proposed Medical Office Use Is Not Prohibited Under the Plain, Unambiguous Language of the Restrictive Covenant." PP Motion page 4. To be properly analyzed, this assertion needs to be broken into its two parts. First, Plaintiff is asserting that the restrictive covenant is unambiguous on this point. Second, Plaintiff is asserting that "medical office" is included in this unambiguous language.

The publicly-recorded, restrictive covenant states that Plaintiff's property may only be used or sold for "restaurant, retail or office usage". As the Michigan Supreme Court stated:

> If a deed restriction is unambiguous, we will enforce that deed restriction as written unless the restriction contravenes law or public policy, or has been waived by acquiescence to prior violations, because enforcement of such restrictions grants the people of Michigan the freedom "freely to arrange their affairs" by the formation of contracts to determine the use of land. (Citations omitted).

Bloomfield Estates Improvement Ass'n, Inc. v City of Birmingham, 479 Mich 206, 214; 737 NW2d 670 (2007).

Plaintiff asserts that "any construction of the Restrictive Covenant that prohibits Plaintiff's proposed use of the Property as a medical office would be entirely unreasonable and inappropriate". PP Motion page 6. Plaintiff claims that it is simply trying to give the word

"office" its usual meaning. Plaintiff has represented to this court that, in keeping with *Casterton v Plotkin*[1], that any meaning of "office" that does not include "medical office" would be "to extend its scope beyond the expressed intention of the parties" (PP Motion page 5 quoting *Casterton* at 338). Yet the distinction between "office" and "medical office" is a common, and reasonable, distinction regularly made by the people of Michigan. This distinction is evidenced by the underlying principles found in: (1) the Auburn Hills Zoning Ordinances (the "**AH Zoning**"); (2) the custom and usage of trade in the commercial real estate industry; and (3) common sense regulatory differences.

1. The Zoning Ordinance Makes a Distinction Between Office and Medical Office.

The AH Zoning, upon which Plaintiff so heavily relies, makes this distinction quite plainly. In Section 700, the AH Zoning permits "1. Office buildings for any of the following occupations: executive, administrative, professional, accounting, writing, clerical, stenographic, drafting and sales". It then goes on to state that the ordinance also permits "2. Medical offices and outpatient clinics." If medical offices are so obviously and reasonably a part of "office", why does the ordinance say anything more? If "medical use" is included in the concept of "professional", then part to is purely, and only, repetitive. It is very interesting to note that the AH Zoning Article VII (O, Office Districts) also includes nursery schools. *See* Section 701 -- Special Land Uses Permitted. Using Plaintiff's reasoning, a nursery school is also an office because it is included in the Office District zoning. Therefore, according to Plaintiff, a nursery school is an office and must be permitted under the restrictive covenant! Such a conclusion is contrary to the facts and the law.

When interpreting statutes, the Michigan Supreme Court has consistently provided that:

[1] *Casterton v Plotkin*, 188 Mich 333; 154 NW 151 (1915). See also *Teagan v Keywell*, 212 Mich 649; 180 NW 454 (1920).

> It is axiomatic that "every word [in the statute] should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory."

Duffy v Michigan Dept. of Natural Resources, 490 Mich 198, --- N.W.2d ---- (July 30, 2011).

If medical uses are so reasonably and consistently thought of as "professional" or "business" uses, then there would be no need for paragraph 2 of Section 700. Because the zoning ordinance itself differentiates between "office" and "medical office" uses, it is clear that office does NOT include medical office. If the restrictive covenant had permitted "all uses authorized as an office under the applicable zoning code", this case would have a different outcome. But that is decidedly not what the restrictive covenant says. It is Plaintiff, not Defendant who seeks to re-write the Restrictive Covenant.

Plaintiff further states that "The Office District zoning classification specifically permits 'medical offices ***and outpatient clinics'*** (emphasis added), and 'clinic' is a defined term in the zoning ordinance". PP Motion page 7. Plaintiff's own argument supports Defendant's position. In order for the AH Zoning to consider a "medical office" or a "clinic" as an office, it must specifically spell out, in a separate provision and with a separate definitions, that such terms are included. To give every word meaning in the AH Zoning, both legally and as a matter of common sense, "medical office" and "clinic" cannot mean "office" or all the zoning ordinance would need to say is office. See *Duffy*, *supra*. The fact that the AH Zoning adds "medical office" and "outpatient clinic" and "nursery school" to its own definition of "office" shows that office does NOT normally include any of those uses.

While it is true that zoning ordinances are not dispositive in these matters[2], the structure of this zoning ordinance supports Defendant's contention that "medical office" is NOT included

[2] The Michigan Supreme Court has affirmed that zoning ordinances do not determine what is, and is not, permitted by a restrictive covenant, saying "it is well settled that zoning statutes do not purport to regulate private restrictive

in the restrictive covenant term "office". Plaintiff's interpretation of the zoning statute renders a significant portion of it nugatory, in contravention of Michigan Supreme Court precedence.

2. The Commercial Real Estate Industry Makes a Distinction Between Office and Medical Office

Plaintiff's interpretation also disregards common practices and common sense which are important concerns when determining the meaning of terms in a restrictive covenant. The Michigan Supreme Court has asserted the importance of this analysis when interpreting restrictive covenants on land:

> The controlling factor in each instance is the intention of the parties as ***indicated by the language of the conveyance or agreement involved***, construed in the light of the general purpose indicated and the circumstances of the case. (Emphasis added).

Buckley v Mooney, 339 Mich 398, 419; 63 NW2d 655 (1954).

When owners lease or sell property to be used for medical offices, it is very common for them to list such properties separate and apart from other, traditional office uses like those described in paragraph 1 of Section 700 of the AH Zoning. For instance, when looking to lease or purchase commercial real estate, the website Loopnet.com (which describes itself as "the largest commercial real estate listing service online") makes a distinction in its search fields for "office building" as opposed to "medical office". Exhibit A attached, websites accessed December 23, 2011.

Further, Officefinder.com has the same distinction for its commercial real estate search fields - as do Cityfeet.com, Spaceforlease.com, Buildingsearch.com, the *Wall Street Journal*, and numerous others. Exhibit A attached, websites accessed December 23, 2011. In fact, there are specific, commercial real estate search providers, like Medicalofficespace.com,

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covenants. 'Zoning laws determine property owners' obligations to the community at large, but do not determine the rights and obligations of parties to a private contract.' Therefore, 'definitions adopted for legislative purposes in housing codes and zoning ordinances [cannot] be employed in interpreting restrictive covenants.'" (Citations omitted). *Terrien v Zwit*, 467 Mich 56, n30; 648 NW2d 602 (2002).

NexCoreGroup.com, Curasalus.com and MedicalandDentalspace.com, the specialize in JUST medical office space. Exhibit B attached, websites accessed December 23, 2011. And while the *Detroit News*, *Detroit Free Press*, and *Oakland County Press* do not provide any sub-classifications for commercial real estate, a quick review of the classified ads in the commercial real estate section show distinctions like "Ideal for Dental or Medical Office" as opposed to "Office/Warehouse Suites".

Further, advertising for office space generally distinguishes between "office" and "medical office". Commercial real estate locations are often advertised as "medical office parks", while medical offices are often not present in other office settings. Builders, realtors, leasors, leasees, sellers and purchasers in the commercial real estate marketplace customarily make a distinction between medical office and office.

3. Regulations Make a Distinction Between Office and Medical Office

Just as Plaintiff seeks to rely upon zoning regulations as relevant to the analysis of the Restrictive Covenant, other regulations controlling medical offices are equally, or even more, relevant.[3] Various regulatory schemes are applied to medical offices that do not apply to other offices. For instance, the Michigan Medical Waste Regulatory Act, Part 138 of Act 368 (MCL 333.13801 *et seq.*) specifically applies to, and regulates, producers of medical waste because there is a societal need to do so. The Federal Occupational Health & Safety Administration ("**OSHA**") has numerous regulations that apply to medical and dental offices that do NOT apply to other offices. See *Medical & Dental Offices, A Guide to Compliance with OSHA Standards*, OSHA 3187-09R (2003). Medical offices produce different types of waste, present different types of risks, and perform different types of services than what people reasonably expect to be

[3] This is especially true considering the difficulties encountered when determinations rested upon only zoning ordinances. See *Terrien* and *Bloomfield Estates*.

part of any office. The vastly different type of services provided in a medical office setting provide the basis for significant governmental regulation. It also provides a compelling reason why medical uses and office uses are customarily differentiated.

4. Medical Office Is Not A Permitted Use Under the Restrictive Covenant As A Matter Of Law

Defendant agrees with the Plaintiff that the language of the restrictive covenant is unambiguous. The restrictive covenant expressly lists the permitted uses of the property – "restaurant, retail or office usage". Use as a medical office is not included on this list and is therefore prohibited – just as nursery schools and race tracks are prohibited because they are not on the list. "If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party." MCR 2.116(I)(2). Defendant hereby requests that this Court enter judgment that a medical office use of the property is barred by the Restrictive Covenant.

Even if the Restrictive Covenant is ambiguous, judgment should still be granted to Defendant. The Michigan Supreme Court has laid out the test for interpreting ambiguous language in this context. Discussing restrictive covenants, the Michigan Supreme Court stated that "where a term is not defined in a contract, we will interpret such term in accordance with its 'commonly used meaning.'" *Bloomfield Estates*, *supra* at 215 (citations omitted).

Plaintiff cites dictionary references for the definition of office which are helpful, but which fail to acknowledge important statutory interpretation provisions. As quoted by Plaintiff, Black's Law Dictionary provides that "an 'office' is '[a] place where business is conducted or services are performed.'" PP Motion page 6. But that very broad definition fails to account for the wording of the Restrictive Covenant, the structure of the zoning ordinances, the distinctions made by the commercial real estate industry, or the positions taken by the regulatory authorities.

If "place where business is conducted" is all that matters as Plaintiff asserts, then the Restrictive Covenant and the zoning ordinances have a great deal of redundant, meaningless language. Business is conducted in retail shops and restaurants, so what sense is there in the Restrictive Covenant saying that retail and restaurant uses are also permitted? How do the differences between office in AH Zoning Section 700(1) and medical office in AH Zoning Section 700(2) make sense? How do we distinguish among ANY commercial uses? Business is conducted in hotels, so are hotels also offices? Business is conducted at automotive race tracks (like the Michigan International Speedway). Could a race track be built on this property and called an office?

Plaintiff wants this court to conclude that an abortion clinic, a plastic surgery facility, or a dermatologist office is "just an office". As commonly used, people regularly distinguish between an office, a medical office, a clinic, and an outpatient surgical facility. Plaintiff implicitly acknowledged as much when the Dykema Letter was sent asking Defendant to "confirm that you agree with that interpretation". If Plaintiff had planned on opening an administrative office, a financial planning office, an insurance office, a call center, an accounting office or a law office, would that letter have been sent? Of course not. It is because medial offices are built, bought, sold, leased, maintained and regulated differently that the Dykema Letter was sent. It is also why Plaintiff must so regularly rely on that letter despite the fact that the letter is meaningless if Plaintiff's contention regarding medical office being the same as office is correct.

The reasoning of the Michigan Court of Appeals, affirmed on appeal to the Michigan Supreme Court (*Bloomfield Estates*, *supra*) is very helpful in understanding several of the problems with Plaintiff's arguments.

> In general, restrictive covenants in deeds are grounded in contract. "[R]estrictions, like other legal language, should be interpreted to preserve, if possible, the intention of the restrictor as ascertained from the entire instrument." Unambiguous restrictions are enforced as written. As with any other contract, an undefined term will not make a covenant ambiguous; the term will be given its common meaning. However, the term must be read in context. "Definitions, adopted for legislative purposes in housing codes and zoning ordinances, cannot be employed in interpreting or construing a restrictive covenant running with land."
>
> We first find that the trial court erred as a matter of law by considering defendant's zoning ordinance. The deed restriction contains no language indicating an intent to define residential purposes based on a municipality's permitted uses. "Zoning laws determine property owners' obligations to the community at large but do not determine the rights and obligations of parties to a private contract." Defendant cannot affect the operation of a restrictive covenant through a definition in a zoning ordinance. "To so consider it would be to permit the legislative authority of the city to impair the obligation of the contract entered into between the parties to the conveyance."
>
> The effect of restrictive covenants must be analyzed on a case-by-case basis under the unique circumstances presented. (Citations omitted).

Bloomfield Estates Imp. Ass'n, Inc. v City of Birmingham, No. 255340, 2006 WL 626191 at *2 (Mich Ct App, March 14, 2006), *aff'd* 479 Mich 206. Exhibit C attached.

Regardless of whether the term "office" is clear or ambiguous, this Court should conclude that medical office is not a permitted use under the Restrictive Covenant.

B. Is the Alleged Waiver by Defendant Dispositive?

This Court only needs to consider the waiver (or estoppel) arguments in the PP Motion if it finds in favor of Defendant that "medical office" is a prohibited use. If "medical office" is identical to "office" as a matter of law, then the question of waiver because of the Dykema Letter is moot. However, even if this Court correctly holds that a "medical office" is not an "office" as a matter of law under the Restrictive Covenant, Plaintiff should still be foreclosed from claiming that Defendant waived the Restrictive Covenant's prohibition on medical office for any of four reasons: (1) whether or not waiver has occurred is a question of fact and summary judgment is not appropriate; (2) Plaintiff is barred from using the letter as a waiver based on the principles of

equitable estoppel; (3) the Dykema Letter violated Rule 4.3 of the Michigan Rules of Professional Conduct; or (4) granting summary judgment based upon the Dykema Letter would threaten the role of the public record in real property matters.

1. A Finding Of Waiver, As A Matter of Law, Is Inappropriate

Plaintiff separately asserts that:

> Even If There Was Any Ambiguity In The Meaning Of "Office" Use, Which Ambiguity Would Have To Be Construed Against Defendant, Defendant's Own Admission That A Medical Office Use Was Permissible Is Dispositive.

PP Motion page 9.

As discussed above, it is actually the Plaintiff who asserts that there is an ambiguity in the restrictive covenant. But for Plaintiff to then claim that, even if medical office uses are prohibited, Defendant's rights have been waived AS A MATTER OF LAW is wholly inappropriate. The Michigan Supreme Court has consistently asserted:

> whether or not there has been a waiver of a restrictive covenant or whether those seeking to enforce the same are guilty of laches are questions to be determined on the facts of each case as presented. (Citations omitted).

Bloomfield Estates, *supra* at 218.

Whether Defendant has waived its valuable, publicly-recorded property rights[4], Plaintiff's own case cite shows why its motion is flawed. Plaintiff has stated that:

> As the Michigan Supreme Court has recognized, "[t]he right to enforce a restrictive covenant may be lost by waiver or acquiescence where by failing to act one leads another to believe that he is not going to insist upon the covenant, and another is damaged thereby; or ***where there has been acquiescence***, actual or

[4] The Michigan Supreme Court affirms that "the strong competing public policy, which *is* well-grounded in the common law of Michigan, supporting the right of property owners to create and enforce covenants affecting their own property. It is a fundamental principle, both with regard to our citizens' expectations and in our jurisprudence, that property holders are free to improve their property. We have said that property owners are free to attempt to enhance the value of their 'property in any lawful way, by physical improvement, psychological inducement, *contract*, or otherwise.' (emphasis added). Covenants running with the land are legal instruments utilized to assist in that enhancement. A covenant is a contract created with the intention of enhancing the value of property, and, as such, it is a 'valuable property right.'" (Emphasis in original, citations omitted). *Terrien* at 70-71, *supra n2*.

> passive, equity will ordinarily refuse aid." *Bigham v Winnick*, 288 Mich 620,623; 286 NW2d 102 (1939). (Emphasis added and citations omitted in original).

PP Motion page 10.

But what Plaintiff failed to include in this quote is the very next sentence of the court's opinion which demonstrates why Plaintiff's motion on this point must be denied:

> An all-embracing rule cannot be laid down as to what constitutes waiver, laches or estoppel. Each case must stand on its own facts. (Citations omitted).

Bigham v Winnick, 288 Mich 620, 623; 286 NW2d 102 (1939).

As waiver and estoppel are fact intensive, summary disposition of this matter on this point is not available.

2. Equitable Estoppel Prevents Plaintiff From Using The Dykema Letter As Proof Of Waiver (Or Estoppel) By Defendant

The Dykema letter states: "Our understanding of the Covenant is that use of the building for office purposes would include medical offices". Dykema Letter page 1. Having made that assertion to Defendant so that Defendant would rely upon it, Plaintiff now demands that Defendant lose its rights even if the assertion is found to be incorrect by this Court. If this Court properly concludes that medical office is a prohibited use, Plaintiff wants its own, incorrect assessment to form the basis of a waiver by Defendant.

Plaintiff, having had its counsel present the position that medical office is a permitted use, should now be estopped from asserting any other position. The Michigan Supreme Court has long acknowledged this general position:

> The rule stated in Chicago & Northwestern Ry. Co. v. Auditor General, 53 Mich. 79, 18 N.W. 586, 589, may well be applied in the case at bar. It was there said: "It sometimes becomes an act of simple justice in the law to hold a party to the truth of something he has asserted, and not to suffer him to aver or prove the contrary, because to do so would be to mislead and prejudice some other party who has acted in reliance upon the truth of his assertion. The rule under which this is done is a simple rule of justice."

Kittinger v Kittinger, 319 Mich 145, 151; 29 NW2d 267 (1947).

Having asserted in the Dykema Letter that medical office is a permitted use, Plaintiff should not now be able to use that letter to say, even though medical office is prohibited, Defendant has waived its right to object to a non-conforming use. Equitable estoppel precludes Plaintiff from using the Dykema Letter to obtain a result explicitly contrary to the letter itself.

3. Finding Of Waiver Is Inappropriate Because the Dykema Letter Violates MRPC 4.3 By Providing Legal Advice To An Unrepresented Person

According to Plaintiff, a waiver was obtained by Defendant's signature on the Dykema Letter. However, the letter itself violated Rule 4.3 of Michigan's Rules of Professional Conduct ("**MRPC**") and should not form the basis of denying Defendant its valuable rights in real estate. The comment to MRPC 4.3 states:

> Comment: An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.

In the Dykema Letter, a legal opinion that medical offices are permitted under the Restrictive Covenant is offered to Defendant who was an unrepresented party. Plaintiff could easily have protected itself by advising Defendant to secure counsel regarding rights that Defendant may have. However, they choose not do so. The Michigan Court of Appeals has addressed this question:

> The comment to MRPC 4.3 does not impose an affirmative duty on a lawyer to advise an unrepresented person to consult an attorney; it merely states, "During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel."

Suck v Sullivan, No. 207488, 1999 WL 33437564, *n4 (Mich Ct App, August 27, 1999). Exhibit D attached.

The Michigan Court of Appeals also defined what constitutes legal advice where it considered whether an internal memorandum created by General Motors in-house counsel was protected by the attorney client privilege. The court stated that:

> First, as stated above, this memorandum so clearly constitutes traditional legal advice that attempts to characterize it as factual rather than legal border on sophistry. Opinions, conclusions, and recommendations based on facts are protected by the attorney-client privilege when the facts are confidentially disclosed to an attorney for the purpose of legal advice.

Leibel v General Motors Corp., 250 Mich App 229, 239; 646 NW2d 179 (2002).

Plaintiff may claim that because the Dykema Letter stated that it was made on behalf of a "potential buyer" it was clear to Defendant that the "legal opinion" contained therein would be adverse to Defendant's interests. The United States District Court, Northern District of Illinois, addressed this issue under the Illinois Rules of Professional Conduct, Rule 4.3, which is identical to MPRC 4.3. That court held that a letter send to a debtor by an attorney on behalf of the creditor, which explicitly stated that it was written on behalf of "Our Client: [Creditor]", still may have confused the debtor into believing that the attorney "has offered to represent the consumer's interests." *Miller v Knepper & Moga, P.C.*, 99 C 3183, 1999 WL 977079 (ND IL October 22, 1999). Exhibit E attached.

Here, the Dykema Letter provided the opposing counsel's opinion that medical offices are a permitted use under the restrictive covenant. This opinion constitutes legal advice, which MRPC 4.3 prohibits an attorney from giving to an unrepresented person. Despite stating that the letter was written on behalf of a potential buyer, the Dykema letter violates MRPC 4.3 and Plaintiff should be barred from using the Dykema Letter as evidence of a waiver.

4. Granting Summary Judgment Based Upon The Dykema Letter Would Threaten The Role Of The Public Record In Real Property Matters

Further, if there is to be waiver or estoppel by Defendant in this case, Plaintiff has the burden of establishing such waiver or estoppel. Cases of waiver and estoppel are extremely fact intensive, yet Plaintiff is now asking this court to lay down an all-embracing rule – that a single, private-letter, regardless of how understood or obtained, always amounts to a waiver of a person's valuable property rights.

Plaintiff clearly had questions regarding its ability to use the property for medical offices, or the Dykema Letter would never have been sent. Yet Plaintiff quite easily could have presented Defendant with an amendment to the real property interest Defendant holds through the Restrictive Covenant. Drafting a legal document for filing in the public record would have simply, properly and, in keeping with the very purpose of a public record for real property, eliminated all questions regarding this matter. A formal amendment (or termination) of the Restrictive Covenant would have put all the parties on notice of what rights were or were not subject to revision. Such a filing would have involved the formalities necessary for filings in the public record. And, having fully discussed and negotiated the change of such property rights, a public filing would have been made putting future land purchasers on notice regarding the rights of all parties involved.

While we can, at this point, only speculate on Plaintiff's reasons for taking the Dykema Letter approach rather than a straight-forward negotiation of interests between proper parties, we can certainly know how other will interpret a finding in favor of Plaintiff on this point. Granting the PP Motion on this ground would encourage anonymous and under-handed dealings to strip unsuspecting property owners of their valuable, negotiated, publicly-recorded, real property rights. Subterfuge by potential purchasers and their counsel would be encouraged because public

records will be called into question. In the arena of real property law, it would be disastrous to hold that private letters, ***as a matter of law***, are supreme over the public record. If plaintiff would like to alter the Restrictive Covenant by providing for medical office as a permitted use, Plaintiff should have done that. Then the proper parties, ***and the general public***, could have been fully informed that legal rights were being altered.

Further, Plaintiff has consistently, and incorrectly, asserted the "fact" that Defendant has waived any objection to anything Plaintiff might do upon the property. Defendant denies that any waiver or estoppel has occurred. In particular, Defendant disputes that Plaintiff's (and Plaintiff counsel's) subterfuge in obtaining Defendant's signature on a letter altered Defendant's rights in the property. The factual and legal problems raised by the Dykema Letter are legion with only some being discussed above. But the legal issues and consequences of the Dykema Letter need to be addressed separately from the language of the restrictive covenant itself. As the Dykema Letter is ONLY relevant if Dykema's assertion to the Defendant is WRONG, the letter must be disregarded in its entirety. Permitting the use of the Dykema Letter would certainly encourage others to disregard the public record and instead attempt to obtain their desired, contradictory result through private means. This Court should consider whether it seeks to encourage sly, anonymous dealings that prevent future owners from knowing what the public record means, or whether full disclosure should remain the rule for recorded interests in land.

C. Is Plaintiff's Proposed Use Actually A "Medical Office"?

The proposed use by Plaintiff may not be for a "medical office". Plaintiff has not disclosed to Defendant or this Court the very basic fact of how they will actually be using the property. Plaintiff has now asserted that the word "office" in the restrictive covenant would include:

> "medical offices ***and outpatient clinics***" ... Thus, even if Plaintiff decides to offer outpatient surgical procedures at its medical offices on the Property, it would be a use specifically permitted under Auburn Hills' "office" zoning classification, and it would be permitted under the Restrictive Covenant.

PP Motion page 7 (emphasis in the original).

It now appears clear that Plaintiff does intend to operate an abortion clinic on the Property and to contend that the word office, as used in the Restrictive Covenant, permits this.

Despite assertions that Plaintiff should be able to do anything it pleases, the Restrictive Covenant gives Defendant a valuable property right in the land purchased by Plaintiff. There are inherent differences between an administrate office, a medical office, a clinic, and an outpatient surgical facility – significant differences between the commonly used meanings of those terms.

An abortion clinic is not an office, any more than a plastic surgery facility is an office. The fact that some zoning ordinances choose to lump those separate uses together in one zone, along with nursery schools as discussed above, is not dispositive and cannot form the main basis for a decision by this Court. See *Bloomfield Estates* supra.

For example, private practice offices for doctors are defined and regulated quite differently from freestanding outpatient surgical facilities under Michigan law. Michigan's Public Health Code (MCL 333.120101 *et al.*) specifically defines "freestanding surgical outpatient facility" (MCL 333.2014(5)) and then states that "The department shall promulgate rules to differentiate a freestanding surgical outpatient facility from a private office of a physician, dentist, podiatrist, or other health professional" (MCL 333.20115(2)). The department has so promulgated such rules. *Compare* Department of Consumer and Industry Services Bureau of Health Systems Division of Health Facilities and Services Regulation 325.6002 with Regulation 325.6001. Exhibit F attached. Rule 6002 state (in its entirety):

> 325.6002 Private practice offices; characteristics. Rule 2. Characteristics of a private practice office of a physician, dentist, podiatrist, or other provider,

> include, but are not limited to, the following: (a) Patients are limited to those of the individual licensed professional maintaining and operating the office or the combined patients of individually licensed professionals practicing together in a legally constituted professional corporation, association, or partnership, and sharing office space. (b) The office is maintained and operated by the licensed professional in accord with usual practice patterns according to the type of practice. Patient encounters in the office are for the purpose of diagnosis and treatment and are not limited primarily to the performance of surgical procedures and related care.

Plaintiff is not a licensed physician and it appears that no licensed physician is an owner of nor employed full-time by the Plaintiff. As a surgical facility that contracts out for its surgeons, Plaintiff cannot comply with the definition of private office under the regulations and would thereby fail to operate a "medical office". Plaintiff is looking to establish a surgical facility where various surgeons from various places will come to perform surgery, but Plaintiff demands that this Court call it an "office" as a matter of law. A facility with no medical doctor ownership that performs thousands of surgeries a year is not a "medical office", and it is certainly not an "office". The decision that Plaintiff seeks is not supported by the law or the facts of this case.

Even if this Court incorrectly approves "medical office" as a permitted use under the Restrictive Covenant, Defendant will still be able to prevent Plaintiff from conducting any use of the property that does not conform with the Restrictive Covenant. As Plaintiff is neither an "individual licensed professional" nor a "legally constituted professional corporation, association, or partnership", it is impossible for any medical or surgical use by this Plaintiff to constitute a medical office.

Of course, Plaintiff does have many needs for which the Property may be used. Administrative offices, executive offices, call centers, fund raising center, information distribution, etc. may all be performed by Plaintiff in accordance with the Restrictive Covenant. Plaintiff itself continues to assert that "no decision has been made regarding the specific

procedures or services that would be offered" at the Property. PP Motion page 4. Many, non-medical, uses remain for Plaintiff. All that Defendant requests is that Plaintiff act within the publicly-recorded restrictions that Plaintiff had notice of when Plaintiff purchased the Property.

III. CONCLUSION

For the reasons discussed in this brief, Defendant requests that Plaintiff's motion for a declaratory judgment that "medical office" uses are permitted by the Restrictive Covenant be denied. In accordance with MCR 2.116(I)(2), Defendant requests that this Court enter a judgment in favor of Defendant that medical office uses for the property are prohibited by the Restrictive Covenant.

Defendant also requests that this Court deny Plaintiff's motion that Defendant has waived any rights under the Restrictive Covenant, and that Plaintiff should be estopped in any way from so asserting.

Respectfully Submitted,

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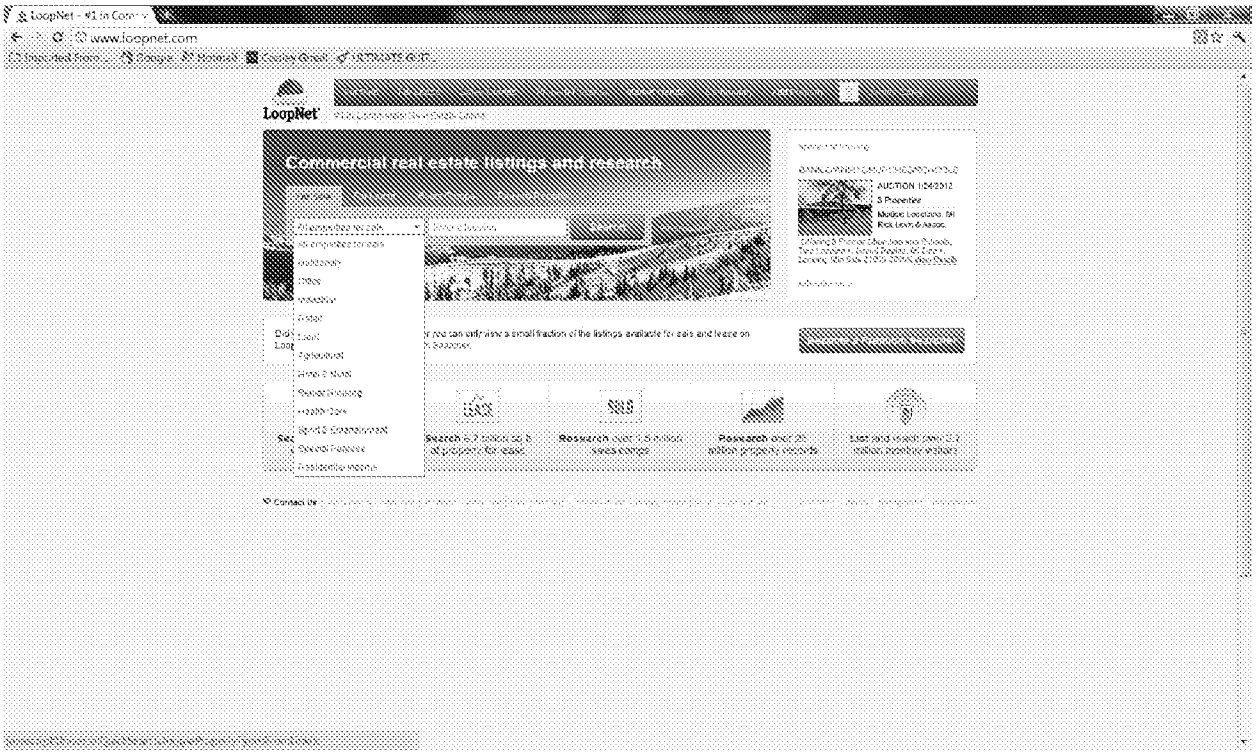
Date: December 23, 2011

Exhibit A

Loopnet.com



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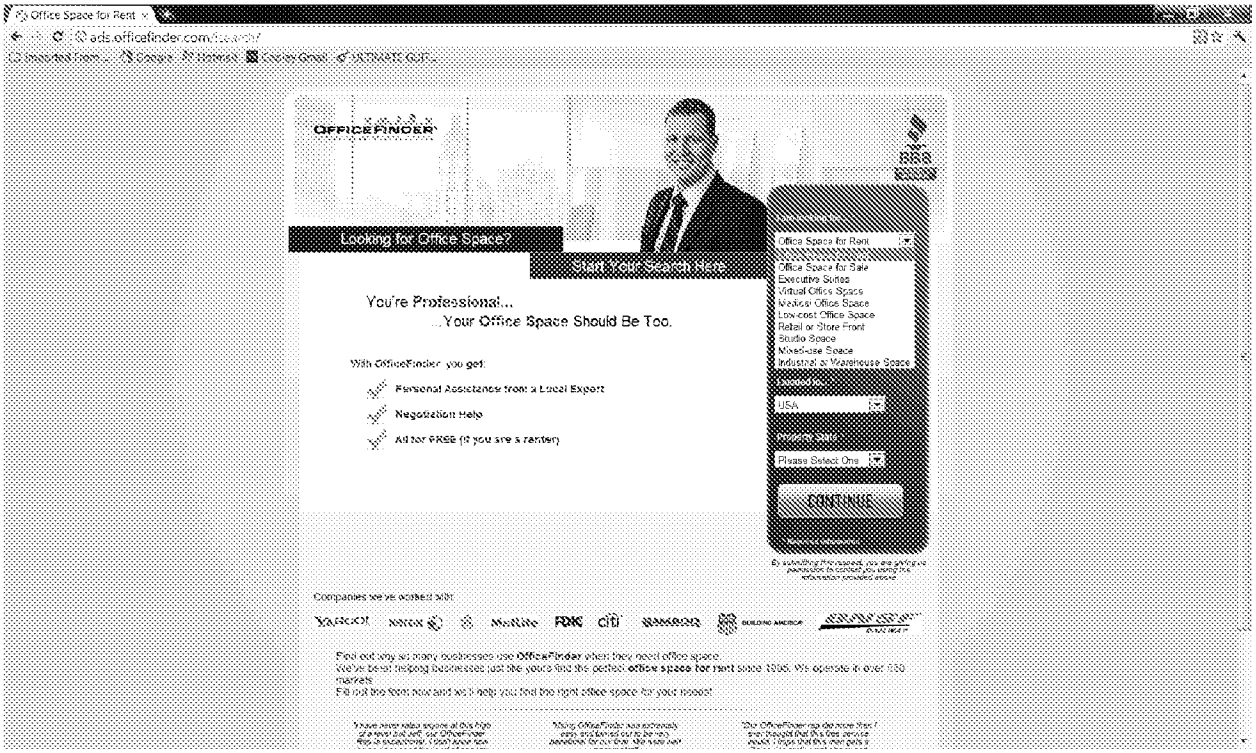

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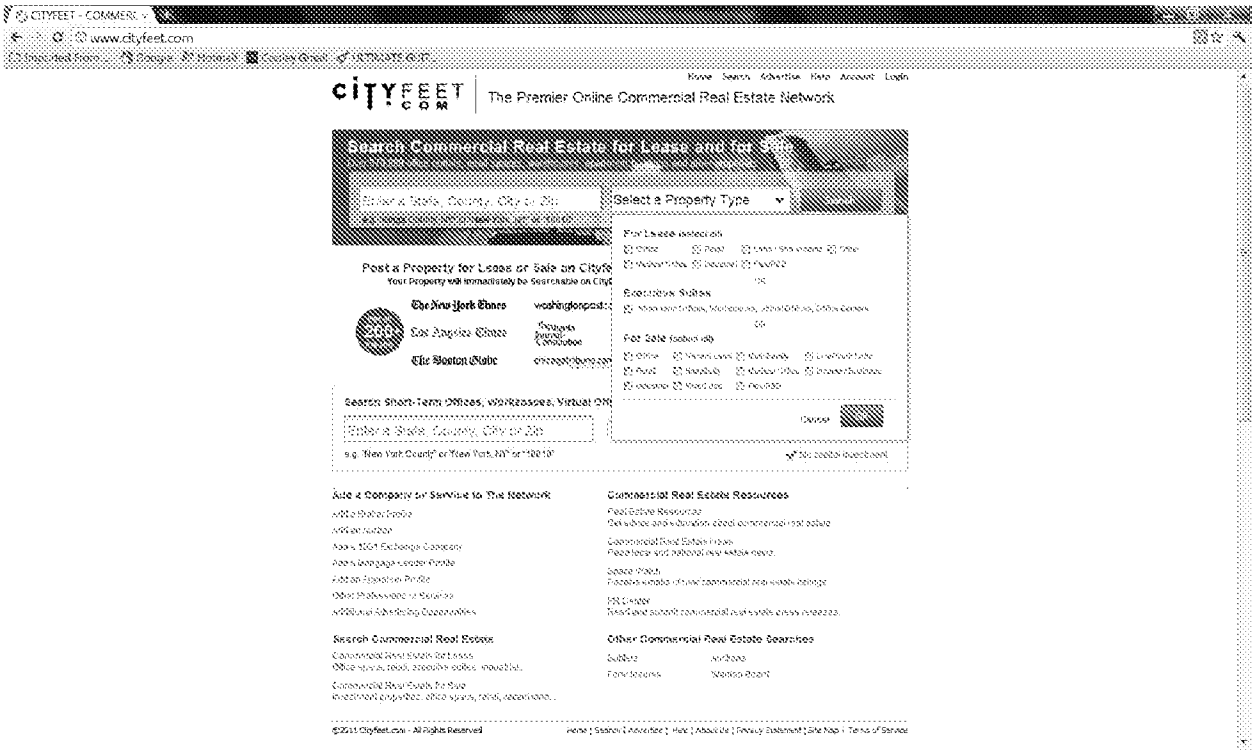

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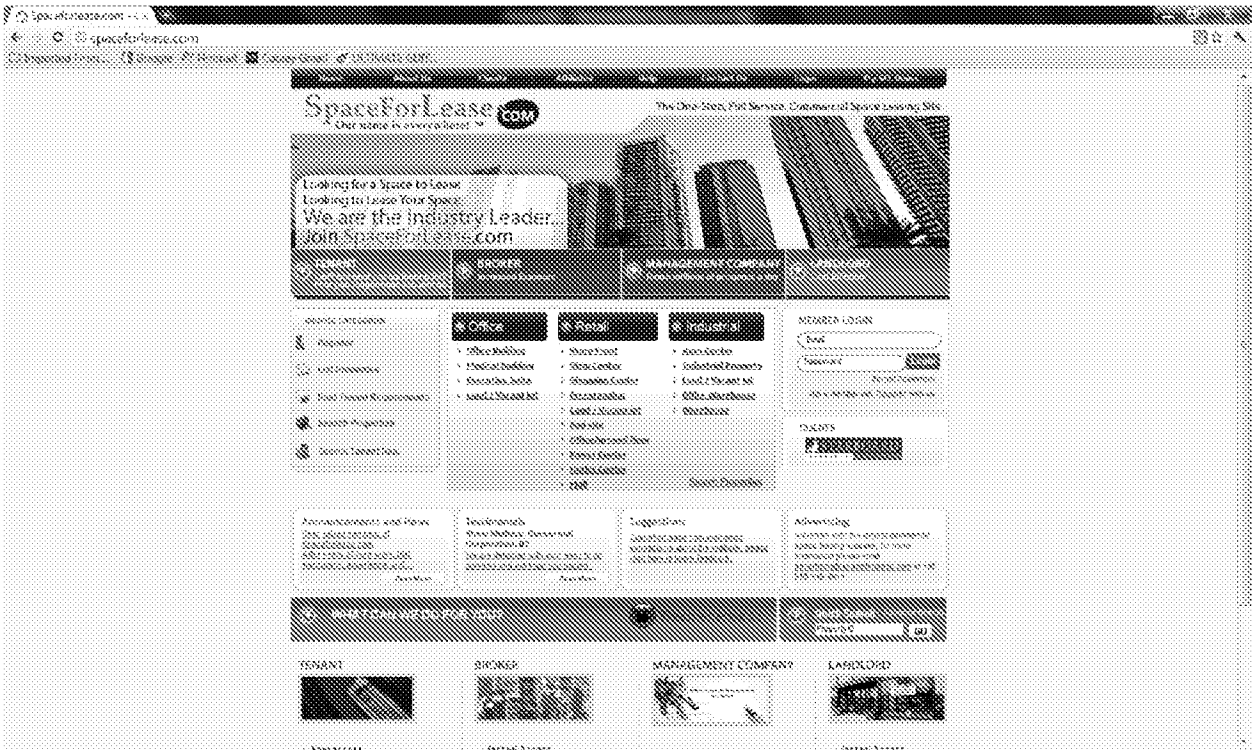

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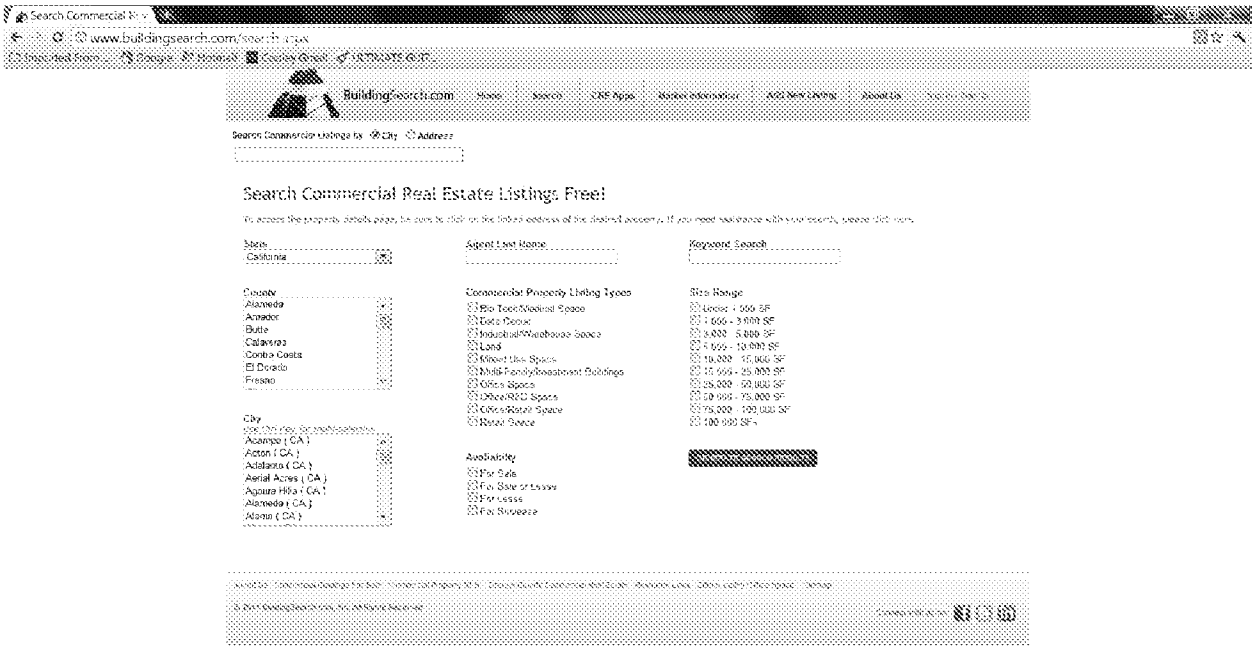

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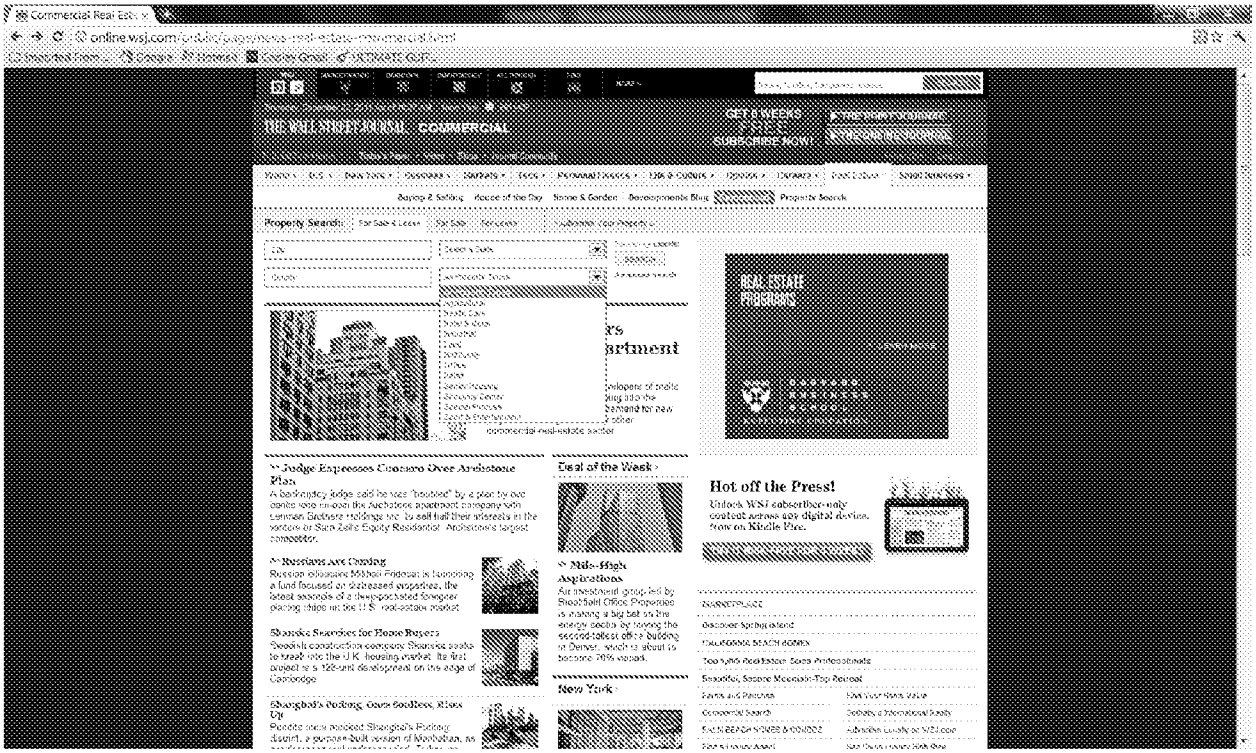

Exhibit B

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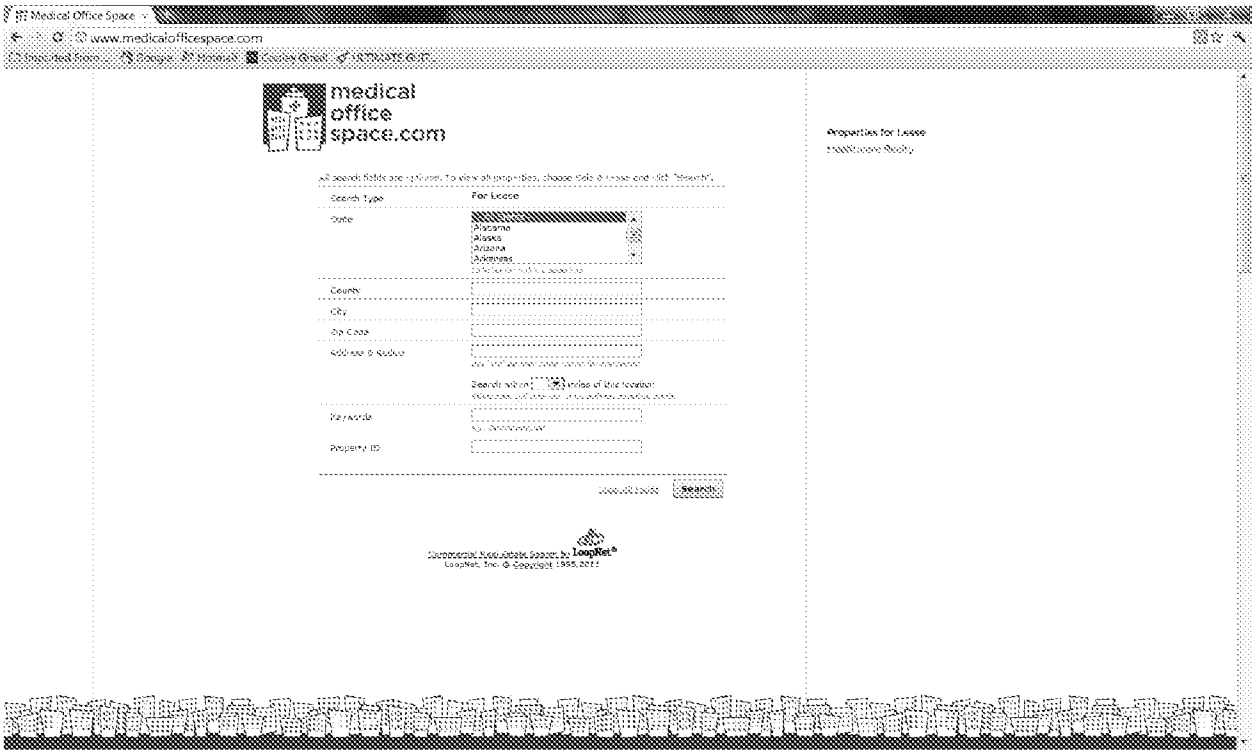

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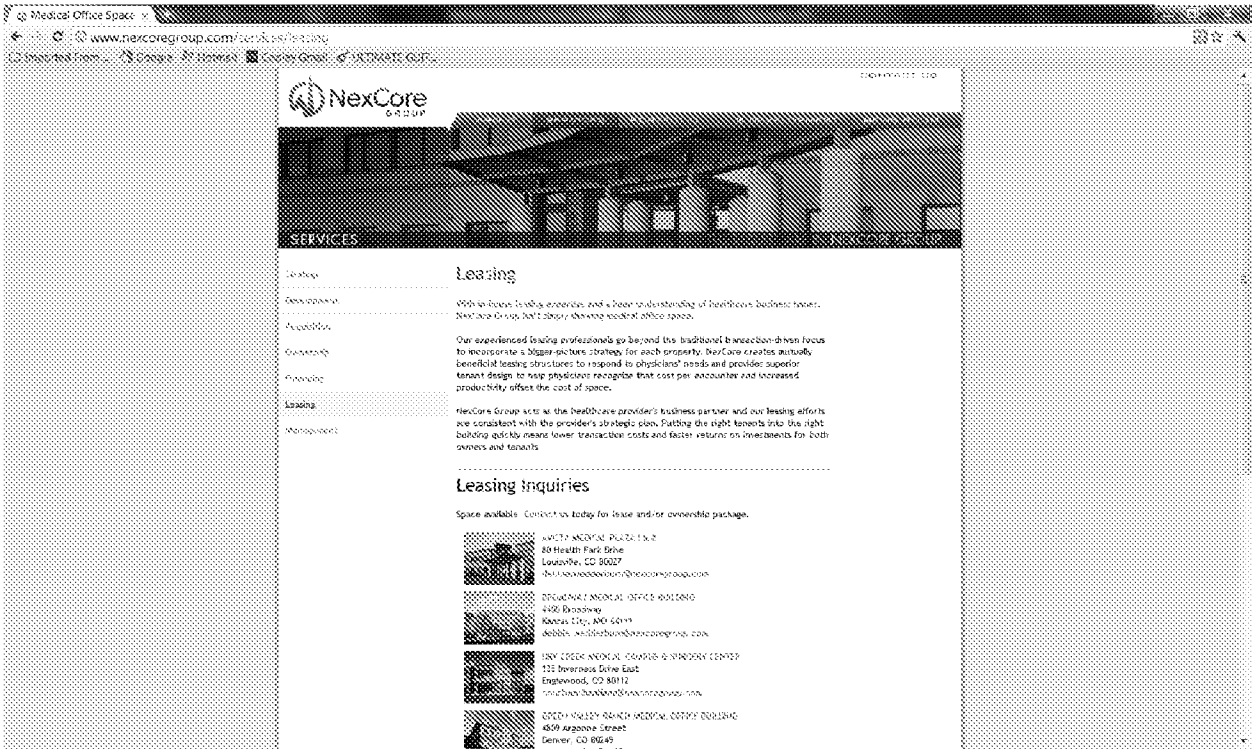

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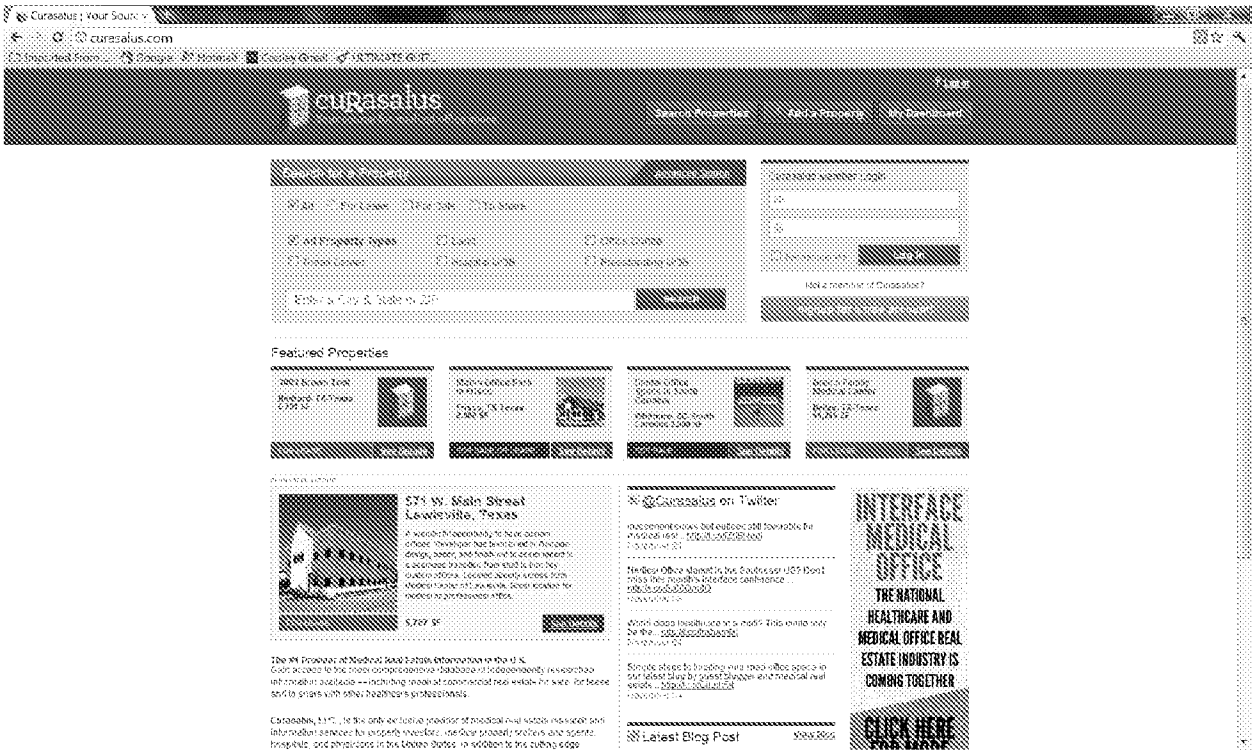

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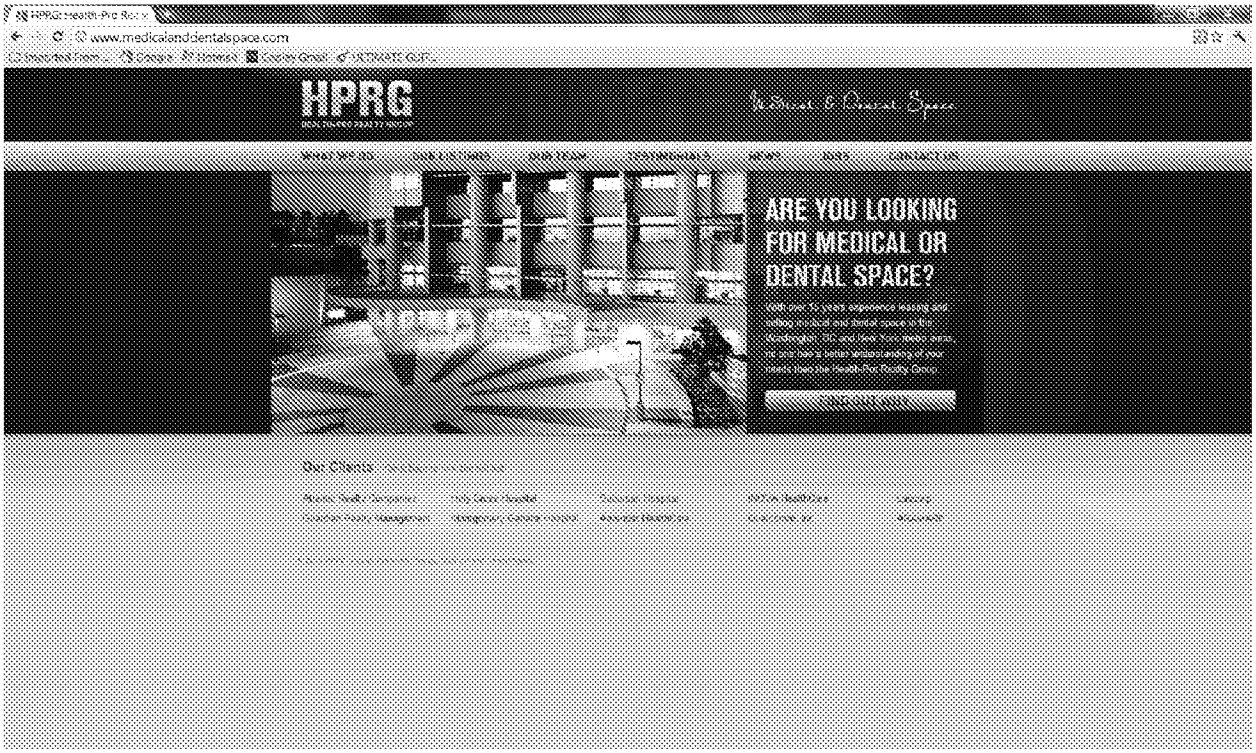

Exhibit C

2006 WL 626191
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

BLOOMFIELD ESTATES IMPROVEMENT ASSOCIATION, INC., Plaintiff-Appellant,
v.
CITY OF BIRMINGHAM, Defendant-Appellee.

No. 255340. | March 14, 2006.

Synopsis

Background: Property association brought action against city to enforce deed restriction, alleging that city's plan to build dog park violated residential use restriction. The Oakland Circuit Court granted city's motion for summary disposition. Plaintiff appealed.

Holdings: The Court of Appeals held that:
1 city's zoning ordinance did not affect operation of restrictive covenant;
2 use of property as a municipal park or dog park violated restrictive covenant;
3 deed restrictions were not enforceable against use of the lot as part of a municipal park; and (4)property association was not estopped from challenging use of the lot as a dog park.

Reversed and remanded.

Borrello, J., dissented and filed an opinion.

Before: DONOFRIO, P.J., and BORRELLO and DAVIS, JJ.

Opinion

[UNPUBLISHED]

PER CURIAM.

*1 Plaintiff appeals as of right an order granting summary disposition to defendant and denying it to plaintiff. We reverse and remand.

This case arose out defendant's proposed use of Lot 52 in the Bloomfield Estates Subdivision (BES) as an off-leash dog recreation area (dog park) that would be fenced but accessible by the public on payment of a user fee to defray operational expenses. Plaintiff sought to enjoin the dog park as a violation of a deed restriction recorded in 1915 by the Bloomfield Estates Company, as the BES owner, for the benefit of future owners of lots in the BES. The relevant language stated in part that "[e]ach lot or lots shall be used for strictly residence purposes only, and no buildings except a single dwelling house and the necessary out-buildings shall be erected or moved upon any lot or lots." The restriction included numerous other provisions that are not relevant here.

Bloomfield Township purchased several BES lots, including Lot 52, in approximately 1928, pursuant to a voter approval of a plan to include the property in its parkland. At its June 4, 1929 regular meeting, the Bloomfield Township Board of Trustees approved the filing of a complaint "on behalf of the Township of Bloomfield to remove from lots52-53-54 [sic] and 58 of Bloomfield Estates Subdivision, the restrictions on said lots against the use of said lots for park purposes." Apparently, the complaint was filed, but it was voluntarily dismissed for unknown reasons. The park opened later that year. Several years later, Bloomfield Township, the City of Bloomfield Hills, and defendant entered into a settlement agreement that included annexation of Lot 52 and certain other property by defendant. In 1938, Bloomfield Township and the City of Bloomfield Hills gave to defendant quitclaim deeds that included Lot 52, "subject to the building and use restrictions of record." In 1941, plaintiff was formed for, among other things, the purpose of enforcing BES deed restrictions, and it notes that it has been active in doing so. On December 8, 1947, plaintiff's president wrote a letter to defendant's city manager regarding a road expansion south of the park, requesting, among other things, that "the restrictions" on Lot 52 "should be condemned." Defendant referred the request to its city attorney, but no other action was taken. In 1955, the Bloomfield Estates Company quitclaimed its rights to plaintiff. There is no evidence in the record that the deed restrictions were ever formally removed.

Lot 52 has been a part of a publicly accessible municipal park since it was acquired by Bloomfield Township. There is no evidence that it was ever put to any specific use within that general function until 2004, when defendant fenced off

a portion of Lot 52 pursuant to the dog park project. Plaintiff filed suit to enforce the deed restriction. Defendant moved for summary disposition under MCR 2.116(C)(10), alleging that plaintiff waived its right to enforce the deed restriction through acquiescence. Alternatively, defendant argued that the dog park did not violate the deed restriction. The trial court rejected defendant's waiver claim, but determined that the deed restriction was not violated because a dog park was consistent with both a residential use and defendant's zoning ordinance.

*2 Plaintiff argues that it, rather than defendant, was entitled to summary disposition on the question whether the deed restriction was violated. We review de novo a trial court's grant or denial of summary disposition de novo. *Nastal v. Henderson & Associates Investigations, Inc.*, 471 Mich. 712, 720, 691 N.W.2d 1 (2005). We agree with plaintiff.

In general, restrictive covenants in deeds are grounded in contract. *Mable Cleary Trust v. Edward-Marlah Muzyl Trust*, 262 Mich.App. 485, 491, 686 N.W.2d 770 (2004). "[R]estrictions, like other legal language, should be interpreted to preserve, if possible, the intention of the restrictor as ascertained from the entire instrument." *Bastendorf v. Arndt*, 290 Mich. 423, 426, 287 N.W. 579 (1939). Unambiguous restrictions are enforced as written. *Hill v. Rabinowitch*, 210 Mich. 220, 224, 177 N.W. 719 (1920). As with any other contract, an undefined term will not make a covenant ambiguous; the term will be given its common meaning. *Terrien v. Zwit*, 467 Mich. 56, 76, 648 N.W.2d 602 (2002). However, the term must be read in context. *Seeley v. Phi Sigma Delta House Corp.*, 245 Mich. 252, 253-254, 222 N.W. 180 (1928). "Definitions, adopted for legislative purposes in housing codes and zoning ordinances, cannot be employed in interpreting or construing a restrictive covenant running with land." *Id.*, 255-256, 222 N.W. 180.

1 We first find that the trial court erred as a matter of law by considering defendant's zoning ordinance. The deed restriction contains no language indicating an intent to define residential purposes based on a municipality's permitted uses. "Zoning laws determine property owners' obligations to the community at large but do not determine the rights and obligations of parties to a private contract." *Rofe v. Robinson*, 415 Mich. 345, 351, 329 N.W.2d 704 (1982). Defendant cannot affect the operation of a restrictive covenant through a definition in a zoning ordinance. "To so consider it would be to permit the legislative authority of the city to impair the obligation of the contract entered into between the parties to the conveyance." *Phillips v. Lawler*, 259 Mich. 567, 570, 244 N.W. 165 (1932).

2 The effect of restrictive covenants must be analyzed on a case-by-case basis under the unique circumstances presented. *O'Connor v. Resort Custom Builders, Inc.*, 459 Mich. 335, 343, 591 N.W.2d 216 (1999). "No clear and definite line can be drawn as to residential use of premises." *Wood v. Blancke*, 304 Mich. 283, 288, 8 N.W.2d 67 (1943). "A restriction allowing residential uses permits a wider variety of uses than a restriction prohibiting commercial or business uses." *Beverly Island Ass'n v. Zinger*, 113 Mich.App. 322, 326, 317 N.W.2d 611 (1982). [1] However, reference to dictionary definitions shows that the restriction did not contemplate using the property as a park. [2]

1 We note that the restriction here does not contain the additional express prohibitions against commercial, industrial, or business uses that distinguished the restriction in *Terrien* from the restriction in *Beverly Island Ass'n*. See *Terrien v. Zwit*, 467 Mich. 56, 61-64, n. 4, 648 N.W.2d 602 (2002).

2 The Bloomfield Township Board of Trustees' authorization to seek removal of "the restrictions on said lots against the use of said lots for park purposes," and plaintiffs' suggestion that the restrictions should be condemned, also constitute evidence that the parties understood the restriction as a facial prohibition against using Lot 52 as a publicly accessible park.

"Residential" was at the time of the deed restriction, and still is, commonly defined as pertaining to residence. *Random House Webster's College Dictionary* (2001); *Webster's Revised Unabridged Dictionary* (1913). "Residence" referred to "[t]he act or fact of residing, abiding, or dwelling in a place for some continuance of time" or "[t]he place where one resides; an abode; a dwelling or habitation; esp., a settled or permanent home or domicile" or "[t]he place where anything rests permanently." *Webster's Revised Unabridged Dictionary* (1913). The definition has not materially changed in nearly a century. See "reside" and "residence," *Random House Webster's College Dictionary* (2001). A contemporary legal dictionary emphasized that "residence" entails some degree of permanence of personal presence in a fixed abode. *Bouvier's Law Dictionary and Concise Encyclopedia*

(8th ed, 1914). Indeed, the same deed restriction notes that the only permissible building on the property is "a single dwelling house and the necessary out-buildings." A restrictive covenant limiting construction to a dwelling house has been defined as meaning a building designed as a single dwelling for use by one family. *Nerreter v. Little*, 258 Mich. 462, 465-466, 243 N.W. 25 (1932). The restriction goes to the use of the premises and the building's character. *Id.*, 466, 243 N.W. 25.

*3 When read in context and as a whole, the intent of the deed restriction was to ensure that Lot 52 would be used only for a single family to live on. Some amount of deviation from this use is permissible where it is primarily being used for residential purposes and the deviation is incidental and harmless. *Wood, supra* at 289, 8 N.W.2d 67, citing *Moore v. Stevens*, 90 Fla. 879, 887, 106 So. 901, 904 (1925). Here, Lot 52 is part of a municipal park that apparently includes or included such features as a golf course, a baseball diamond, and other recreational activities where the public is invited to come on the property for relatively short-lived entertainment purposes and then return home. This is not a residential purpose. It is irrelevant whether any other lots or lot owners in the subdivision have been harmed thereby. *Webb v. Smith (After Second Remand)*, 224 Mich.App. 203, 211, 568 N.W.2d 378 (1997). Use of Lot 52 as part of a municipal park violates the deed restriction irrespective of whether part of it is fenced off as a dog park. Further, the deed restrictions apply to defendant as they would to any other private property owner, irrespective of defendant's status as a public authority. *Allen v. City of Detroit*, 167 Mich. 464, 473, 133 N.W. 317 (1911).

3 However, finding the deed restrictions applicable and finding defendant in violation thereof does not end our inquiry. The record unambiguously shows that it was public knowledge even before Bloomfield Township purchased the lots that they would be used as a park. Indeed, they were acquired pursuant to voter approval of a park project. Lot 52 has been used for a non-residential purpose for at least 75 years. All involved parties were aware of this use, and they were apparently also aware that it violated the deed restriction. The parties have for several generations clearly acquiesced in defendant's use of Lot 52 as part of a municipal park. To that extent, equity will no longer permit plaintiff to seek enforcement of the deed restriction against that use. See *Cherry v. Bd. of Home Missions of Reformed Church in US*, 254 Mich. 496, 504, 236 N.W. 841 (1931).

4 However, plaintiff is only estopped from challenging the use to which it has acquiesced, because "estoppel can go no farther than the consent." *Davison v. Taylor*, 196 Mich. 605, 616, 162 N.W. 1033 (1917). Plaintiff may challenge more serious or more extensive violations. *Boston-Edison Protective Ass'n v. Goodlove*, 248 Mich. 625, 629-630, 227 N.W. 772 (1929). In *Boston-Edison Protective Ass'n*, our Supreme Court presumed that the lot owners in a residence-only subdivision had acquiesced to another owner's long-running practice of using his home as a doctor's office. However, although they might be estopped from challenging that practice, they could still challenge the doctor's construction of an additional office building attached to the rear of his residence for the purpose of accommodating his increasing business. We find the situation analogous. A publicly-accessible, fee-supported, fenced-in area for off-leash dog recreation, which common sense and everyday experience suggests will generate more predictable noise and traffic than merely being a component of a larger park, is a more serious violation of the deed restrictions for residential use. Plaintiff may not challenge the general use of Lot 52 as a park. Plaintiff may challenge the use of Lot 52 as a dog park.

*4 Because the dog park is a violation of the deed restriction, and plaintiff is not precluded from challenging it, the trial court's order granting summary disposition to defendant and denying it to plaintiff must be reversed. We remand this case to the trial court for entry of an order of summary disposition in favor of plaintiff under MCR 2.116(I)(2) with respect to defendant's violation of the deed restriction. However, we do not now decide what remedy might be appropriate. Deed restrictions may generally be enforced by injunctions, *Webb, supra* at 211, but injunctive relief is an extraordinary remedy that we review for an abuse of discretion. *Kernen v. Homestead Development Co.*, 232 Mich.App. 503, 509-510, 591 N.W.2d 369 (1998). The trial court has not yet had the opportunity to consider whether injunctive or other relief is appropriate. Therefore, the trial court should do so on remand.

Reversed and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

BORRELLO, J. (dissenting).

BORRELLO, J.

I respectfully dissent from my brother jurists' opinion in this matter for the reason that plaintiff is barred by the doctrine of laches from bringing suit to enforce the Association's restrictive building covenant.

While restrictive covenants are enforceable in general, sometimes enforcement would not be fair to the violating party. It would appear inequitable to allow someone who knew that defendant was in the wrong in engaging in construction or a particular use, but did nothing for a time and allowed defendant's expenses to mount before instituting suit. 171 Wis. 594, 177 N.W. 881, 25 ALR 5th 233 (1994). That is exactly what plaintiff did in this case.

There are three equitable exceptions to the general enforcement rule: (1) technical violations and absence of substantial injury, (2) changed conditions, and (3) limitations and laches. *Rofe v. Robinson (On Second Remand)*, 126 Mich.App. 151, 157, 336 N.W.2d 778 (1983). Defendant contends, and I would hold, that the third exception applies to the facts of this case.

It is not contested that defendant and their predecessors in interest have used this parcel of land as a park for over seventy-five years. And while my brother jurists readily acknowledge this fact, they rely on *Boston-Edison Protective Ass'n v. Goodlove*, 248 Mich. 625, 227 N.W. 772 (1929) to stand for the proposition that even though plaintiff failed to object to a continuous breach of seventy-five years to the restrictive building covenants, plaintiff still retains a right to challenge another breach to the restrictive covenant. The majority's reliance on *Boston-Edison, supra,* is misplaced and thereby causes them to render the wrong decision in this case.

Boston-Edison dealt with a 1920's neighborhood in Detroit, Michigan. Plaintiffs had enacted restrictive building covenants similar to the ones cited in this case. Defendant was a physician who operated an office out of his home. Plaintiffs did not object to such use, however, when the defendant attempted to build a one-story office building in the rear of his residence, which was slated to contain an x-ray room, medical library, waiting room, and doctor's office, plaintiff's did object. Our Supreme Court ruled in pertinent part:

> *5 While it is true that there has been no objection made to the defendant's practicing medicine at his home and using it as a doctor's office ... the defendant should not be able to violate further rights of plaintiffs on account of his heretofore *slight* breach of the restrictive covenants in his deed. Plaintiffs are not estopped from preventing a most flagrant violation of the restriction on account of their theretofore failure to stop a *slight* deviation from the strict letter of such restrictions. 248 Mich. at 629, 227 N.W. 772. (Emphasis added).

Obviously the facts of *Boston-Edison* and the case before us are so incongruous as to preclude adoption of *Boston-Edison* as any type of precedent for this case. Here, defendant did not engage in a slight variation of the restrictive building covenant. Seventy-five years ago, defendant made a parcel of land, which was subject to the restrictive building covenant, into a park. For seventy-five years it has been used as a park. While the majority contends that when defendants turn the park property into a dog park "... common sense and everyday experience suggests [it] will generate more predictable noise and traffic than merely being a component of a larger park ..." it would seem that common sense would also suggest that while it has been a park for the past seventy-five years, people have brought their dogs to this park. Thus, I cannot accept the majority's contention that when defendants make this parcel of land, which has been used as a public park for seventy-five years, into a "dog park" that by such action defendant has committed a "more serious violation of the deed restrictions for residential use." Because this parcel of land has been used by people and dogs for over seventy-five years, and because defendants had a reasonable right to rely on the acquiescence of plaintiff in objecting to such a use and have made expenditures to turn the parcel into a "dog park", I respectfully dissent.

End of Document

Exhibit D

1999 WL 33437564
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

F. Charles SUCK, Trustee of the Anne M. Wilson Suck Trust, Plaintiff-Appellant,
v.
Michael P. SULLIVAN, Defendant-Appellee.

No. 207488. | Aug. 27, 1999.

Before: McDONALD, P.J., and KELLY and CAVANAGH, JJ.

Opinion

PER CURIAM.

***1** Plaintiff, as trustee of the Anne Suck Trust, appeals as of right the trial court order finding the option agreement between Anne Suck and defendant to be valid and enforceable.[1] We affirm.

1 Anne Suck died while this appeal was pending.

When reviewing equitable actions, this Court employs review de novo of the decision and review for clear error of the findings of fact in support of the equitable decision rendered. *LaFond v. Rumler*, 226 Mich.App 447, 450; 574 NW2d 40 (1997). A trial court's findings of fact are considered clearly erroneous where this Court is left with a definite and firm conviction that a mistake has been made. *Id.*

I

Plaintiff first contends that the option agreement is void for lack of consideration. An option to purchase must be supported by consideration to be enforceable. *Bd of Control of Eastern Michigan Univ v Burgess*, 45 Mich.App 183, 185; 206 NW2d 256 (1973). An option agreement becomes binding only when the grantor has actually received consideration for the agreement. See *Bailey v. Grover*, 237 Mich. 548, 554; 213 NW 137 (1927).

The trial court found that the consideration for the option agreement was defendant's assumption of the obligation to order a survey of the property.[2] Under the agreement, defendant was required to obtain a survey of the property regardless whether the option was exercised. Although the agreement provided that Suck was to reimburse defendant for the cost of the survey, payment would only occur if and when defendant exercised the option. The record establishes that defendant had already obtained the survey, at a cost of $2,800, when Suck attempted to repudiate the option agreement.

2 The agreement in this case contained a paragraph entitled "Consideration," which provided that Anne Suck would receive a life estate in the property. However, the trial court correctly held that the life estate cannot serve as consideration for the agreement. The holder of an option to purchase land has no interest in the land before exercising the option. *Oshtemo Twp v. Kalamazoo*, 77 Mich.App 33, 38; 257 NW2d 260 (1977).

Plaintiff argues that the survey cannot serve as consideration for the option agreement because it was not regarded as such by the parties. We disagree. Consideration for an agreement exists where there has a benefit on one side or a detriment suffered, or services done, on the other. *Dep't of Natural Resources v Bd of Trustees of Westminster Church of Detroit*, 114 Mich.App 99, 104; 318 NW2d 830 (1982). The essence of consideration is legal detriment that has been bargained for and exchanged for the promise. *Higgins v. Monroe Evening News*, 404 Mich. 1, 20; 272 NW2d 537 (1978). The record reveals that the parties bargained over who would bear the initial cost of the survey: Suck told defendant she did not want to spend any money up front, so defendant structured the agreement so that she would not have to pay until the time of closing. Thus, under the agreement, Suck obtained the benefit of having her property surveyed, while defendant suffered a detriment by arranging and paying for the survey. Accordingly, the trial court did not err in finding that defendant's obligation with regard to the survey was the consideration for the option agreement.

Plaintiff contends that the contract was ambiguous regarding which party was responsible for obtaining the survey. However, uncertainty in a contractual provision can be removed by the subsequent acts of the parties. *Waites v. Miller*, 244 Mich. 267, 272; 221 NW 171 (1928); see also

Brotman v. Roelofs, 70 Mich.App 719, 727; 246 NW2d 368 (1976) ("Written provisions which are indefinite may be clarified by extrinsic factors."). The trial court found that the facts presented at trial demonstrate that defendant was responsible for ordering and paying for the survey. This finding is not clearly erroneous.

II

***2** Plaintiff next contends that the agreement is unenforceable because it does not state the purchase price with sufficient certainty and definiteness, and the trial court erred in "rewriting" the contract for the parties. Plaintiff maintains that because the agreement does not specify the number of lots in the parcel, defendant could buy the property for as little as $60,000 or as much as $525,000.

The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. *Amtower v William C Roney & Co (On Remand)*, 232 Mich.App 226, 234; 590 NW2d 580 (1998). The trial court specifically found that the parties intended that the property would be divided into eight lots. Defendant testified at trial that he expected to divide the property into seven or eight lots. Suck testified at her deposition that defendant had told her that the property would be split into eight parcels. Considering the above testimony, the trial court's finding is not clearly erroneous.

Furthermore, contrary to plaintiff's argument, the purchase price for the property is set forth with sufficient certainty. The agreement provides that the price for the entire parcel is $525,000. Pursuant to the agreement, defendant may exercise the option by purchasing one lot at a time; the price of the first three lots purchased is $60,000, with the remainder to be apportioned equally among the remaining lots.

Plaintiff maintains that the trial court exceeded its authority in ruling that the requirement that the property would be divided into a minimum of eight lots was part of the option agreement. We disagree. Where a contract is open to construction, the court must determine, if possible, the parties' true intent by considering the contract language, its subject matter, and the circumstances surrounding its making. *Sands Appliance Services v. Wilson*, 231 Mich.App 405, 412, 587 NW2d 814 (1998). As already discussed, the trial court's finding that the parties intended that the property would be divided into eight lots is not clearly erroneous. Moreover, in Suck's first amended complaint, she requested as alternative relief reformation of the agreement. Plaintiff cannot now complain because the court complied with Suck's request.

III

In his final issue, plaintiff contends that the option agreement should not be enforced because of defendant's alleged ethical breaches. In support of this assertion, plaintiff raises a number of arguments.

Plaintiff contends that defendant, who is an attorney, violated MRPC 4.3 by failing to advise Suck to consult an attorney. We disagree. First, MRPC 4.3 is not implicated because defendant was not dealing on behalf of a client.[3] In addition, MRPC 4.3 does not impose a duty on an attorney to recommend that a person who is not represented by counsel confer with an attorney under any circumstances.[4] In the present case, Suck testified that she never thought that defendant was acting as her attorney, and there is nothing in the record to indicate that she misunderstood his role in the transaction. Accordingly, defendant was not required by MRPC 4.3 to take any particular action.

3 MRPC 4.3 provides:
In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

4 The comment to MRPC 4.3 does not impose an affirmative duty on a lawyer to advise an unrepresented person to consult an attorney; it merely states, "During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel."

***3** Plaintiff also claims that the agreement is unfair because it permits defendant to purchase only the most desirable parcels while allowing the option on the remaining lots to lapse. Reasonableness is the primary consideration in determining whether a contract is unenforceable as unconscionable. *Hubscher & Son, Inc v. Storey*, 228 Mich.App 478, 481; 578 NW2d 701 (1998). The record establishes that the parties negotiated the terms of the

option agreement. There is no evidence of any disparity in the relative bargaining power of the parties that would indicate Suck's options were limited when the agreement was executed. See *id.* The fact that defendant may choose not to purchase all the lots does not render the agreement unfair.

In addition, plaintiff maintains that the agreement is unfair because the purchase price is "wholly inadequate." The trial court found that the value of the property was between $880,000 and $1,300,000. The record shows that Suck rejected the initial figure offered by defendant, and the final contract price of $525,000 was calculated using a formula suggested by Suck's husband. Under these facts, we cannot find that the trial court erred in concluding that the purchase price, while below the value of the property, was not so inadequate as to shock the conscience. See *Moffit v. Sederlund*, 145 Mich.App 1, 11; 378 NW2d 491 (1985).

With regard to plaintiff's remaining claims of inequity, the trial court found that Suck was mentally competent, she was not unduly influenced or coerced into entering the agreement, and she was not defrauded by defendant. Plaintiff has made no showing that these findings are clearly erroneous.

Affirmed.

KELLY, J. (dissenting).

***3** I respectfully dissent.

I have a definite and firm conviction that a mistake has been made. The stated consideration for the option was that Mrs. Suck would have a limited life estate in the part of the property on which her summer cottage is located. That life estate could not come into being unless and until the option was exercised with regard to that portion of the property that was subject to the life estate. The trial court correctly found that the life estate was not consideration for the option. The trial court incorrectly found that the survey which Mr. Sullivan ordered and presumably paid for constituted sufficient legal consideration to support the agreement. I believe the facts clearly show that Mr. Sullivan merely ordered the survey for his own purposes in determining the feasibility of division of the property into building sites. The contract itself in section six, entitled "Consideration," makes no reference whatever to the payment for the survey. The payment for the survey was not relied on by the parties to supply the necessary sufficient legal consideration. Section eight of the contract entitled "Survey" provides in its entirety:

Upon execution of this Option Agreement, the Grantee shall order a boundary and improvements survey of the property to be prepared by a registered surveyor. The survey shall show no encroachments on the property to be conveyed. The Grantor shall pay the invoice for the survey at the Closing of the sale of the first parcel purchases by the Grantee. The survey shall be certified to the Grantee.

***4** I believe the trial was incorrect and the majority is incorrect in saying that the facts presented at trial demonstrate that defendant was responsible for ordering and paying for the survey. I believe that finding is clearly erroneous. There is no ambiguity in the above quoted clause which states, "The Grantor shall pay the invoice for the survey ..."

On this basis alone I would reverse. However, I also believe plaintiff's contention that the agreement was uncertain and indefinite in that it did not obligate Mr. Sullivan to divide the property into seven or eight parcels. Defendant admitted the option contract did not obligate him to purchase any particular number of the resulting parcels. Defendant conceded that the option contract, which he drafted, permitted him to purchase the bulk of the property for $60,000, this on a $525,000 contract. The contract did not specify how defendant was to divide the property, where the lot-lines were to be placed, and how many lots he was obligated to purchase. Defendant has also noted that the contract did not cover other terms important to plaintiff such as the park benches, gazebo, dock, garden, interior roads, private access, access to the newer garage, protection against increased property taxes and location and placing of excavated or plowed dirt. Thus, I believe the agreement was uncertain and unenforceable.

I would reverse.

End of Document

Exhibit E

1999 WL 977079
Only the Westlaw citation is currently available.
United States District Court,
N.D. Illinois, Eastern Division.

Jimmie MILLER, Plaintiff,
v.
KNEPPER & MOGA, P.C.; James A. Knepper; and Greg M. Moga, III, Defendants.

No. 99 C 3183. | Oct. 22, 1999.

Opinion

MEMORANDUM OPINION AND ORDER

PALLMEYER, J.

***1** Plaintiff Jimmie Miller ("Miller") brings this action as a class representative [1] against Defendants Knepper & Moga, P.C. ("K & M"), a debt collector, James A. Knepper ("Knepper"), and Greg M. Moga, III ("Moga"), licensed attorneys as well as officers and equity owners of K & M. On May 13, 1999, Plaintiff filed his complaint alleging that Defendants employed misleading and deceptive debt collection practices in violation of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* ("FDCPA"). Now before the court is Defendants' motion to dismiss for failure to state a claim for relief pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons set forth below, Defendants' motion is denied.

1 Plaintiff and Defendants have previously stipulated to class certification in this lawsuit. *See Miller v. Knepper & Moga,* No. 99 C 3183 (N.D.Ill. Oct. 14, 1999) (minute order granting Plaintiff's motion for class certification pursuant to stipulation).

FACTUAL BACKGROUND

On or about January 20, 1999, K & M mailed Miller a standard form collection letter attempting to collect an alleged debt owed to Loyola Medical Center for professional health care services. (Compl.Ex. A.) The letter constituted K & M's initial communication with Miller regarding the subject debt. This letter read as follows:

RE: Our Client: Loyola Medical Center

Dear MILLER JIMMIE

Your insurance carrier has failed to pay benefits billed for the above captioned hospital care. The hospital has referred this account to our firm to assist you in obtaining the maximum benefits payable under your policy. Please provide us with a copy of any correspondence, explanation of benefits or information request which you have received from your insurance carrier. We will resubmit your claim and advise you if the amount owing is your responsibility.

Please provide us with this documentation as soon as possible. If you have any questions, please contact your account representative with our firm.

Unless you dispute the validity of this debt, or any portion thereof, within 30 days of receipt of this letter, we will assume the debt to be valid. If you notify us in writing within the 30–day period that you dispute the debt, we will obtain verification of the debt and mail you a copy. Please understand that any information we obtain will be used for the purpose of collecting the debt.

(Compl.Ex. A.) Plaintiff's complaint alleges that the letter's statements amount to a misleading or deceptive attempt to collect a debt and therefore violate the FDCPA. [2] (Compl.¶ 16.) Defendants now move to dismiss Miller's Complaint.

2 In his complaint, Plaintiff also appears to allege that the above-referenced letter evidences that Knepper and Moga, both licensed attorneys, have violated Illinois Rule of Professional Conduct 4.3. (Com pl.¶¶ 21–22.) Defendants address this argument at length in their brief in support of their motion to dismiss. In his response brief, however, Plaintiff suggests that he is not alleging an independent violation of the Illinois Rules of Professional Conduct, but rather is using K & M's alleged breach of those rules as evidence for his FDCPA claim "because [the same conduct] is misleading to laypersons." (Pl.'s Resp. Br., at 5). The court is unclear about whether or not Plaintiff is attempting to allege a violation of the Illinois Rules of Professional Conduct. Because such a violation cannot sustain an independent basis for civil liability, *see e.g. Nagy v. Beckley,* 218 Ill.App.3d 875, 879–81, 578 N.E.2d 1134, 1136–38 (Ill.App.Ct. 1st Dist.1991), to the extent that Plaintiff

is attempting to allege a violation of the state code of ethics, that portion of the complaint is dismissed.

DISCUSSION

A. Standard of Review

In deciding a motion to dismiss for failure to state a claim, the court considers the allegations in the complaint to be true and views all well-pleaded facts and any reasonable inferences drawn from the facts in the light most favorable to the plaintiff. *See Maple Lanes, Inc. v. Messer,* 186 F.3d 823, 824–5 (7th Cir.1999). The court should grant the motion to dismiss only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *See id.* at 825 (quoting *Conley v. Gibson,* 355 U.S. 41, 45–6 (1957)). While it is not necessary for a plaintiff to specify particular legal theories in his complaint in order to survive a Rule 12(b)(6) motion, the facts alleged must give adequate notice to the defendants of the basis of the lawsuit. *See Wudtke v. Davel,* 128 F.3d 1057, 1061 (7th Cir.1997).

B. FDCPA Claim

***2** First, Defendants argue that in his complaint, Plaintiff fails to specifically identify which section of the FDCPA Defendants allegedly violated with their debt-collection letter. Next, Defendants argue that if Plaintiff has alleged facts adequate to support a legal theory of a FDCPA violation, their letter is not misleading under the "unsophisticated consumer" standard.

It is true that Plaintiff did not cite the section of the FDCPA that Defendants allegedly violated. In his brief, however, Plaintiff responds to Defendants' argument by specifically alleging that Defendants violated Section 1692e(10) of the FDCPA, which prohibits false or misleading representations or deceptive means to collect a debt or to obtain information concerning a consumer. (Pl.'s Resp. Br. at 1.) 15 U.S.C. § 1692e(10). The Seventh Circuit has recognized that a complaint need not specifically identify the applicable statute or law in order to properly raise a claim for relief under the notice-pleading standard embodied in Federal Rule of Civil Procedure 8(a). *See Tolle v. Carroll Touch, Inc.,* 977 F.2d 1129, 1134 (7th Cir.1992) (citing *Bartholet v. Reishauer A.G.,* 953 F.2d 1073, 1078 (7th Cir.1992)). Indeed, a complaint sufficiently raises a claim for relief, and therefore survives a motion to dismiss under Rule 12(b)(6), "even if it points to no legal theory or even if it points to the wrong legal theory" as long as the facts alleged adequately support a claim which would entitle Plaintiff to relief. *See id.; Drennan v. Van Ru Credit Corp.,* 950 F.Supp. 858, 861 (N.D.Ill.1996) (identification of a wrong legal theory did not affect the sustainability of a complaint alleging violations of several sections of the FDCPA). A contention that a debt-collecting letter is misleading under Section 1692e(10) is a well-recognized claim. *See e.g. Nielsen v. United Creditors Alliance Corp.,* No. 98 C 5910, 1999 WL 674740, at *2 (N.D.Ill. Aug. 23, 1999); *Pope v. Vogel,* No. 97 C 1835, 1998 WL 111576, at *5 (N.D.Ill. March 5, 1998); *Blum v. Fisher & Fisher,* 961 F.Supp. 1218, 1227 (N.D.Ill.1997). As long as Miller has alleged facts sufficient to support a claim of relief under the section of the FDCPA that prohibits misleading representations and deceptive collection practices, his claim for relief will withstand Defendants' motion to dismiss under Rule 12(b)(6).

The language in the letter sent by K & M to Miller forms the basis for Plaintiff's cause of action.[3] The gist of Plaintiff's claim is that while K & M sought to collect a debt on behalf of the hospital, Defendants purported to represent Plaintiff's own best interests. In determining whether a debt-collection letter violates Section 1692e, the Seventh Circuit applies the objective "unsophisticated consumer" standard. *See Johnson v. Revenue Management Corp.,* 169 F.3d 1057, 1059 (7th Cir.1999) (citing *Gammon v. GC Svcs. Ltd. Partnership,* 27 F.3d 1254 (7th Cir.1994)). The unsophisticated consumer standard "protects the consumer who is uninformed, naive, or trusting, yet it ... shields complying debt collectors from liability for unrealistic or peculiar interpretations of collection letters." *Gammon,* 27 F.3d at 1257. Plaintiff alleges that the letter's statements are misleading in that they "suggest[ ] to the unsophisticated consumer that K & M will represent the consumer's interests, provide advice in the consumer's interest, and establish an attorney-client relationship with the consumer" and therefore violate the FDCPA. (Compl.¶ 16.) Plaintiff alleges that by purporting to give assistance to the debtor and provide advice in his interest, the K & M letter suggests that K & M is undertaking to represent both the creditor and the debtor in violation of the FDCPA.

3 Under Federal Rule of Civil Procedure 10(c), "[a] copy of any written instrument which is an exhibit to a

> pleading is a part thereof for all purposes," and can therefore be considered by the court.

***3** Applying the unsophisticated consumer standard, the question becomes "whether the unsophisticated consumer would understand that the law firm sending the letter is interested only in collecting the debt on behalf of the lender when it simultaneously offers concerned counsel to the debtors." *See Blum,* 961 F.Supp. at 1227 (denying a motion for summary judgment where a debt collection letter purported to give disinterested advice to debtors unrepresented by counsel). Under this standard, the court concludes that the language of the letter supports a claim for relief under the FDCPA. First, K & M suggests that it is sending the letter in order to provide assistance to the debtor. Specifically, the letter states, "[t]he hospital has referred this account to our firm to assist you[.]" (Compl.Ex. A.) The letter asks Plaintiff to provide additional information and sets forth K & M's offer to "resubmit your claim." Once the debtor responds with the requested information, K & M suggests it will then "advise you" as to Plaintiff's responsibility for the debt. Further stressing its purported intention to assist Plaintiff, K & M represents that it has specifically assigned him an "account representative" and encourages him to contact that person with any questions he may have.

Plaintiff also alleges that the letter is a standard form letter to be used as the initial notice to the debtor with respect to the subject debt. This fact, if true, makes the letter even more misleading because no adverse legal action has yet been taken against the debtor, thereby making the debtor more susceptible to providing the confidential and potentially adverse information sought by the creditor without seeking disinterested legal advice. Finally, to support his argument that the letter is misleading to the unsophisticated consumer, Plaintiff points to Illinois Rule of Professional Conduct 4.3 which prescribes the manner in which an attorney must deal with persons unrepresented by counsel. Specifically, the rule provides that when an attorney "knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding." ILCS S. CT. RULES OF PROFESSIONAL CONDUCT, RPC 4.3. Although Illinois State courts have held that a violation of the rules of professional conduct do not provide an independent basis for civil liability, *see e.g. Nagy v. Beckley,* 218 Ill.App.3d 875, 879–81, 578 N.E.2d 1134, 1136–38 (Ill.App.Ct. 1st Dist.1991), such a violation may be relevant to whether or not K & M attempted to deceive debtors with the letter at issue.

Defendants counter Plaintiff's assertions by arguing that only "a fool or an idiot" could believe that K & M represented any interest other than the hospital's interests. Specifically, pointing to the caption of the letter which reads, "Our client: Loyola Medical Center," Defendants argue that even the unsophisticated consumer would understand that the letter was sent on behalf of the hospital. Further, Defendants argue, the validation language required by Section 1692g of the FDCPA [4] and found at the bottom of the letter also weighs against "the peculiar" interpretation of the letter suggested by Plaintiff. While it is true that Defendants complied with Section 1692g of the FDCPA by providing specific information in the notice of debt, that does not automatically absolve K & M from allegations that the other language in the letter violates Section 1692e(10). *See Blum,* 961 F.Supp. at 1227 (finding that the defendant's inclusion of the information required by Section 1692g in its debt collection letter had "no bearing on whether, once the collector decides to render legal advice, it is deceptive in violation of [Section] 1692e for the collector to purport to represent the best interests of the debtor").

4 Section 1692g requires that:

> within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing-
>
> (1) the amount of the debt;
>
> (2) the name of the creditor to whom the debt is owed;
>
> (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
>
> (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

> (5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor. 15 U.S.C. § 1692g.

***4** Combining the language in the letter with the fact that this is the first contact K & M makes with debtors, it is certainly possible that an unsophisticated consumer would believe that K & M has offered to represent the consumer's interests. The thrust of the letter suggests the goal is mutually beneficial to Loyola and Plaintiff: an effort to enhance recovery against Plaintiff's insurer. In this context, K & M's identification of Loyola Medical Center as "our client" does not by itself eliminate the possibility that an unsophisticated consumer might be misled into believing that K & M is also looking out for him. The objective reasonableness of this belief should not be decided on a Rule 12(b)(6) motion to dismiss. Plaintiff's allegations, despite never specifically mentioning Section 1692e(10) in the complaint, sufficiently raise a claim for relief under this Section.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss for failure to state a claim upon which relief can be granted is denied.

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Exhibit F

DEPARTMENT OF CONSUMER AND INDUSTRY SERVICES

BUREAU OF HEALTH SYSTEMS

DIVISION OF HEALTH FACILITIES AND SERVICES

FREESTANDING SURGICAL OUTPATIENT FACILITIES DIFFERENTIATED FROM PRIVATE PRACTICE OFFICES

(By authority conferred on the department of public health by section 20115(2) of Act No. 368 of the Public Acts of 1978, as amended, being S333.20115(2) of the Michigan Compiled Laws)

R 325.6001 Freestanding surgical outpatient facilities; characteristics.

Rule 1. Characteristics of a freestanding surgical outpatient facility include, but are not limited to, the following:

(a) Patient encounters with a physician, dentist, podiatrist, or other provider are primarily for the purpose of performing surgical procedures or related diagnosis, consultation, observation, and postoperative care.

(b) The owner or operator makes the facility available to other physicians, dentists, podiatrists, or providers who comprise its professional staff.

History: 1980 AACS.

R 325.6002 Private practice offices; characteristics.

Rule 2. Characteristics of a private practice office of a physician, dentist, podiatrist, or other provider, include, but are not limited to, the following:

(a) Patients are limited to those of the individual licensed professional maintaining and operating the office or the combined patients of individually licensed professionals practicing together in a legally constituted professional corporation, association, or partnership, and sharing office space.

(b) The office is maintained and operated by the licensed professional in accord with usual practice patterns according to the type of practice. Patient encounters in the office are for the purpose of diagnosis and treatment and are not limited primarily to the performance of surgical procedures and related care.

History: 1980 AACS.