IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court Cause No. DA 18-0431

On Appeal from the Montana 16th Judicial District Court, Carter County,
The Honorable Michael B. Hayworth, Presiding

BONNIE BALLOU, Individually as General Partner of
L O Ranch Limited Partnership, and
L O RANCH LIMITED PARTNERSHIP, a Montana Limited Partnership,

Plaintiffs/Appellants,

v.

WILLIAM WALKER, Individually as Former
General Partner of L O Ranch Limited Partnership,

Defendant/Appellee.

APPELLEE WILLIAM WALKER'S ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Rules:

ISSUES PRESENTED

1. Whether the District Court properly identified and applied the Partnership Agreement's method of calculating the value of William Walker's complete interest in L O Ranch Limited Partnership.

2. Whether the District Court properly excluded certain expert witness testimony related to amounts allegedly owed by William to the Partnership.

STATEMENT OF THE CASE

Appellant L O Ranch Limited Partnership (the "Partnership") was established by Eunice Walker ("Eunice") and her youngest son, Appellee William Walker ("William"), in January 2000. Eunice contributed her 8,300-acre ranch to the Partnership in exchange for a 99.5% interest, and William contributed $5,000 cash in exchange for a 0.5% interest. Both Eunice and William served as general partners.

Through lifetime transfers and transfers upon her death in 2009, Eunice distributed her 99.5% interest to William and her other four children, including Appellant Bonnie Ballou ("Bonnie"), although not in equal shares. Following her death, William owned a 25.2% interest in the Partnership, while Eunice's other four children, including Bonnie, each owned an 18.7%

interest in the Partnership. Bonnie and Bill held both limited and general Partnership interests, while their three older brothers remained limited partners.

In 2011, Bonnie and William's three brothers sued Bonnie, William, and the Partnership. Pursuant to a negotiated settlement agreement and release executed by the five siblings in 2013, Bonnie and William purchased their other siblings' interests in the Partnership, which resulted in William owning 53.25% and Bonnie owning 43.75% of the Partnership. The 2013 settlement and release provided for a release of all claims among the parties "arising out of or related to, in any way" the 2011 litigation.

Bonnie then brought the instant litigation in 2014, in an attempt to oust her brother William from the Partnership in exchange for the payment of $1.00. Her efforts to do so were unsuccessful. William countersued for dissolution of the contentious Partnership. The District Court found for William on his counterclaim, but this Court reversed and instead allowed Appellants to purchase William's 53.25% interest. The District Court was directed to conduct a hearing on "the value of [William's] complete interest, subject to the parameters of the Partnership Agreement" and consistent with the Court's opinion.

On remand, the parties conducted discovery, retained experts, and engaged in pre-hearing motion practice. William moved *in limine* for the exclusion of one of Appellants' expert witnesses who was to offer an opinion about amounts that William purportedly owed to the Partnership. The District Court properly granted William's motion *in limine* and excluded the expert's testimony on the basis that the 2013 settlement and release – which by its terms was to be construed as settling *all claims* existing among the parties as of the date of that agreement – prohibited the Partnership from offering evidence that William was indebted to the Partnership as a result of transactions occurring prior to 2013.

On June 5, 2018, the District Court conducted the valuation hearing. As of the valuation date of July 10, 2014, the Partnership had only two assets: cash in the amount of $30,813 and the 8,300-acre ranch. Expert appraiser Scott Griswold opined that the value of the real property as of the valuation date was $2,950,000. The District Court adopted that appraisal, with two noted exceptions: the District Court adjusted the property's value for access issues and for an outbuilding that had not been completed as of July 10, 2014. The District Court then meticulously addressed and applied each valuation factor required to be considered by the Partnership

Agreement in determining fair market value, including discounts for the considerations outlined in the Partnership Agreement.

The District Court rejected the methodology utilized by Bonnie's expert for a variety of reasons, including double-counting of discounts and the application of discounts not contemplated by the Partnership Agreement. The District Court noted that after the purchase of William's interest, the value of Bonnie's interest will be equal to her full percentage share of the Partnership's market value. Accordingly, to prevent an unfair and unlawful windfall to Bonnie, if William's interest is valued at less than his full percentage share, that value must be founded on the provisions of the Partnership Agreement.

Applying the criteria mandated by the Partnership Agreement to determine fair market value, the District Court found William's Partnership interest to be worth $1,421,863. The District Court fairly valued William's interest, and William must be paid that amount pursuant to the terms of the Partnership Agreement. Bonnie and the Partnership disagree and appeal the District Court's determination of the value of William's interest.

STATEMENT OF FACTS

The parties provided the background facts for this case in the briefing of the first appeal in this matter, and those facts were also set forth in this Court's opinion disposing of that appeal. *See Ballou v. Walker*, 2017 MT 197, ¶¶ 3-10, 388 Mont. 283, 285, 400 P.3d 234, 236 (hereafter, "*Ballou I")*. The relevant facts on this second appeal relate to (1) establishing the value of William's interest in the Partnership and (2) the 2013 settlement agreement and release resolving earlier litigation.

A. Facts Relating to Value.

Each party presented expert testimony as to the value of William's 53.25% interest in the Partnership at the hearing on June 5, 2018, as described below.

William's Experts. William hired two experts to establish a value for his Partnership interest: a real estate appraiser and a valuation expert.

Scott Griswold is a real estate appraiser specializing in rural property appraisals. *See* Transcript of June 8, 2018 hearing (hereafter, "*Tr.")* at 121:2 – 121:25. Mr. Griswold described his typical approach in conducting an appraisal of rural property, and testified that he followed that same approach for his appraisal of the Partnership's real property. *Tr.* at 122:5 – 122:24. Mr. Griswold concluded that the value of the Partnership's real property as of July 10, 2014, was $2,950,000. *Tr* at 128:25 – 129:1. Mr. Griswold acknowledged that he did not adjust his determination of value for a lack of legal access to the properties. *Tr.* at 130:3 – 130:12.

Mr. Griswold also acknowledged that his valuation had included the living quarters, which at the time of his appraisal, he believed had been completed as of the valuation date of July 10, 2014. *Tr.* at 132:7 – 133:1. Ms. Ballou testified at the hearing that the living quarters had not been completed as of that date. *Tr.* at 32:9 – 34:10. Mr. Griswold indicated that his appraisal might be somewhat different if the living quarters were in fact not complete as of the valuation date and that he had assigned a per-acre value to the improvements of $16.00 per acre. *Tr.* at 134:12 – 134:23. With an 8,300-acre ranch, $16.00 per acre could support a change in value of up to $132,800.

Joanne Sheridan is a shareholder with Anderson ZurMuehlen, a Montana-based CPA firm. *Tr.* at 143:10 – 143:14. As a CPA and certified valuation analyst, she was engaged to value William's share of the Partnership interest. Ms. Sheridan explained to the District Court that the term "fair market value" has a very specific definition in the business valuation industry, which is the "price that would be paid by a hypothetical willing buyer and a hypothetical willing seller when neither one is forced to sell or buy and they have reasonable knowledge of the investment." *Tr.* at 159:18 – 160:1. She explained that "fair value" is a different concept, developed in the law, applied "when one of the owners is being forced to sell or is being squeezed out." *Tr.* at 160:2 – 160:8. "[I]n that case there are usually no discounts for control or for marketability. The [owner's] value is the value of the company times the ownership interest." *Id.* Ms. Sheridan acknowledged that "fair market value" and "fair value" are terms of art in her profession are not always understood or applied by laypersons in the same way they are applied in the field of business valuation. *Tr.* at 160:9 – 160:20. She further testified that in reviewing the provisions of the Partnership Agreement, the term "fair market value" described in the Partnership Agreement is similar to what is known as "fair value" in the business valuation industry. *Tr.* at 177:25 – 178:14.

Ms. Sheridan considered three different approaches in preparing a value for William's share of the Partnership: the asset approach, the income approach, and the market approach. *Tr.* at 148:22 – 149:9.

Ms. Sheridan explained that the asset approach to valuation involves taking the market value of the assets of the Partnership, subtracting liabilities, and arriving at a net asset value. *Tr.* at 149:10 – 149:15. Ms. Sheridan further explained that because the Partnership is not an operating entity, but rather more akin to a holding company, and because the income generated by the Partnership and rate of return are so low, the asset approach proved to be the best approach to valuing the Partnership. *Tr.* at 150:20 – 151:7. Moreover, the net value of the assets owned by the Partnership – i.e., the real property and its cash on hand – established at least a minimum value or "floor" of what the Partnership was worth as of July 10, 2014. *Tr*. at 151:8 – 151:19. Using the asset approach, Ms. Sheridan added Mr. Griswold's appraised value of $2,950,000 for the real property to the $30,813 balance in the Partnership's bank account as of the valuation date. *Tr*. at 149:10 – 149:20; 6:18 – 7:9. Using these figures, the asset approach yielded a value for the entire Partnership of **<u>$2,980,800</u>** as of July 10, 2014. *Tr*. at 150:15 – 150:19.

Ms. Sheridan also considered the market approach to determine the value of the Partnership. To utilize the market approach, an analyst looks for comparable sales transactions to determine value. *Tr*. at 152:5 – 152:13. Ms. Sheridan explained, however, that she could find no comparable sales transactions for entities that were similar to the Partnership. *Tr.* at 152:14 – 152:21. Thus, Ms. Sheridan provided no estimate of value for the Partnership based on the market approach.

Finally, Ms. Sheridan considered the income approach to value, which utilizes an entity's cash flows and a capitalization or discount rate. *Tr.* at 153:10 – 153:15. Ms. Sheridan explained to the Court how she calculated a 12% discount rate, and then applied that discount rate to the estimated income of the Partnership using 5-year, 7-year, and 10-year horizons. *Tr*. at 153:16 – 156:9. Ms. Sheridan concluded that the value of the Partnership utilizing the income approach was **<u>$1,837,800</u>**, more than a million dollars lower than the value of its assets. *Tr.* at 156:10 – 156:13. Accordingly, Ms. Sheridan did not ultimately use the income approach to determine the value of the Partnership because the "value of the assets gives you the floor and a reasonable investor would not look towards the income" to determine value. *Tr.* at 156:14 – 156:21.

After considering all three approaches, Ms. Sheridan determined that the value of the whole Partnership was equal to the value of its assets, or $2,980,800.

Ms. Sheridan then testified about the potential discounts that might be applied to a partner's interest that are listed in the Partnership Agreement. Ms. Sheridan applied no discount for the size of the interest, given that William owned a majority 53.25% of the Partnership. *Tr.* at 162:1 – 162:21. She applied no discount for lack of market, "because there is a market and that is Ms. Ballou. So there is a known market." *Tr.* at 162:22 – 163:1. And she applied no discount for inability to exercise any control, concluding that William had "overall umbrella control" of the Partnership, given that as an owner of 53.25% of the Partnership interest, he could prevent the Partnership from doing any act that would change the nature and character of the Partnership. *Tr.* at 148:3 – 148:15; 162:15 – 163:8.

Ms. Sheridan's ultimate conclusion was that the value of William's interest as of July 10, 2014, was **<u>$1,587,200</u>**, or 53.25% of the value of the whole Partnership. *Tr* at 164:12 – 164:15.

Appellants' Expert. Appellants engaged Seth Blades as their valuation expert. Mr. Blades is a certified public accountant specializing in forensic accounting. *Tr.* at 49:10 – 49:16. He was engaged to "provide a fair market valuation" of the Partnership as of July 10, 2014. *Tr.* at 50:11 – 50:16. Mr. Blades testified that his definition of "fair market value," utilized in his conclusions in this case, was based on the IRS's Revenue Ruling 59-60 and The Internal Glossary of Business Valuation Terms. *Tr.* at 105:25 – 106:13. Mr. Blades did not know whether the Partnership Agreement itself defined the term "fair market value" or whether it referred to or incorporated the definition from Revenue Rule 59-60 or the glossary that he had identified. *Tr.* at 106:14 – 106:21.

Mr. Blades conceded on cross-examination that if the meaning of "fair market value" in the Partnership Agreement was different than the meaning of that term in the valuation industry, his analysis should have been different:

> Q. … So if the Court here today decided that the term "fair market value" in [the Partnership Agreement] didn't really mean what it means in the valuation world, it meant something different under this contract, then would your analysis change?
>
> A. Absolutely my analysis would change.

Tr. at 84:21 – 85:1.

Mr. Blades also acknowledged that the concept known in the valuation field as "fair value" is traditionally applied "in a litigation setting [involving] shareholders or shareholder decedents," like in this case. *Tr.* at 54:4 – 54:9. Indeed, on cross-examination, Mr. Blades further explained:

> So in a litigation setting, fair value is more of an appropriate approach to valuing a business because fair market value and other approaches do utilize discounts. Whereas fair value – they omit discounts. So that the remaining shareholder or partner or managing controlling partner cannot receive a financial windfall …"

Tr. at 80:4 – 80:25.

Like Ms. Sheridan, Mr. Blades also considered all three approaches to valuation – asset, income, and market – but his conclusions were quite different. Specifically, Mr. Blades rejected the asset approach, even though the Partnership Agreement lists “value and condition of the property of the Partnership” as the first factor to be considered in valuing a Partnership Interest. *Tr.* at 51:22 – 52:7; 55:24 – 56:1; 56:11 – 56:13 (“the asset approach was not warranted in this situation”). Mr. Blades’ rationale for not incorporating the value of the Partnership’s asset into his analysis was that William’s limited partnership units “have no control” and cannot exercise control over the use of the land. *Tr.* at 55:6 – 55:15.

On cross-examination, however, Mr. Blades conceded that the Partnership Agreement requires a vote of 75% of the Partnership units to change the nature of the business. Thus, Bonnie – the sole general partner since July 10, 2014, but owner of only 43.25% of the Partnership units – could not sell the Partnership’s real property and reinvest that money in apartment buildings or the stock market or gamble the proceeds in Vegas, without the consent of William, who owns a majority 53.25% of the Partnership units. *Tr.* at 88:10 – 89:7; 95:3 – 95:12. Mr. Blades acknowledged that in valuing the interest of a partner with some control, the asset approach “would provide a floor” for the valuation of that partner’s interest. *Tr.* at 96:12 – 96:21.

On direct, Mr. Blades explained that he had used a "combination value of the income approach and market approach" to arrive at the value of William's Partnership interest. *Tr.* at 52:3 – 52:7. Under the income approach, Mr. Blades applied a series of discounts to the Partnership's projected income over the next five and ten years to determine the Partnership's value, including a 3.1% discount tied to the 20-year U.S. Treasury bond rate, a 6.9% discount related to real estate risk premium, and a 5.0% discount that was a company-specific rate. *Tr.* 59:19 – 61:18. Mr. Blades' application of these discounts yielded an initial value for the entire Partnership under the income approach of approximately $1,500,000, or about half of the value of the Partnership's assets. *Id.*

Mr. Blades then applied the market approach to valuation. As he explained, the market approach "makes an attempt to find what other investors had paid [] in similar transactions." *Tr.* at 61:24 – 62:1. The "comparable transactions" that Mr. Blades selected to establish a value for the 8,300-acre southeastern Montana ranch were two sales of farm land in the Chicago metropolitan area. *Tr.* at 92:12 – 92:15. Mr. Blades did not know what they farmed outside of Chicago, whether any ranching was also involved on those properties, or whether the farm leases involved related parties, but he nevertheless concluded that the sales were "a very strong comparison to the L O Ranch limited partnership." *Tr.* at 92:16 – 93:12. Ms. Sheridan disagreed that the transactions selected by Mr. Blades were comparable to the sale of the Partnership or supportive of the market approach to valuation. *Tr.* at 152:17 – 153:9.

Like the income approach, Mr. Blades' application of the market approach also yielded an initial value of approximately $1,500,000 for the entire Partnership. *Tr.* at 61:19 – 63:12. Ms. Sheridan testified that Mr. Blades' conclusion that the value of the Partnership as a whole was only half the value of the Partnership's assets "doesn't make a lot of sense." *Tr*. at 159:1 – 159:11.

To arrive at a value for William's 53.25% interest, Mr. Blades applied an additional 42% discount to the $1.5 million figure for lack of marketability, reducing the value of the entire Partnership to about $870,000. *Tr.* at 64:2 – 64:21.[1] Mr. Blades then multiplied that figure by William's 53.25% interest, reaching his ultimate conclusion that the value of William's Partnership interest as of the valuation date was **<u>$463,300</u>**. *Tr.* at 68:19 – 68:23. In total, Mr. Blades discounted William's interest by

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[1] Mr. Blades later acknowledged that appraisers are "left to their own devices on what discounts like marketabilities they can utilize." *Tr.* at 81:23 – 82:23.

nearly 70%, a discount which – according to Ms. Sheridan – is “unheard of” in the valuation world. *Tr.* at 163:22 – 164:11.

Following the hearing, the District Court determined that William’s interest in the Partnership is valued at **$1,421,863.00**. Bonnie and the Partnership appeal that determination.

B. Facts Relating to the 2013 Release.

This litigation is not the first dispute involving Eunice’s children and the Partnership. William and Bonnie’s older brothers sued William, Bonnie, and the Partnership on April 14, 2011 (the “2011 Litigation”). In the 2011 Litigation, the older brothers sought dissolution of the Partnership and damages for William’s alleged breach of fiduciary duty and negligence in managing the Partnership. *See* Dkt. 285, Exhibit 7 thereto, *Walker v. L O Limited Partnership*, DV-6-2011-3, Complaint (without attachments) (April 14, 2011).

The Complaint in the 2011 Litigation specifically alleged that William used Partnership assets for his personal benefit and failed to compensate the Partnership for such benefit (Dkt. 285, Exhibit 7, ¶ 7), that the Partnership “served to benefit William” (*id.,* Exhibit 7, ¶ 9) and that William used Partnership assets “for his personal use to the detriment of” his brothers (*id.,* Exhibit 7, ¶ 23). William, Bonnie, and the Partnership filed an Answer to the Complaint denying the older brothers' allegations. *See* Dkt. 285, Exhibit 8 thereto, Answer (Dec. 14, 2011). The parties eventually mediated and settled the 2011 Litigation by entering into a Stipulated Global Settlement Agreement and Release of Claims (the "2013 Release"). *See* Dkt. 285, Exhibit 10 thereto, the 2013 Release.

As part of the 2013 Release, the parties released and agreed not to sue "upon any and all claims, debts, rights, causes of actions, and liabilities, whether known or unknown, asserted or unasserted, foreseen or unforeseen, alleged or which could have been alleged" in the 2011 Litigation. *See* Dkt. 285, Exhibit 10, Section 4(a). The 2013 Release was entered into with the "intention of the parties to settle all claims which exist or may exist among them as of the date of this Stipulated Global Settlement Agreement." *See* Dkt. 285, Exhibit 10, Section 4(a). The 2013 Release constituted "a full and final release and discharge by each party of the other party . . . from all claims, demands, and causes of action each party may now have or which may hereafter accrue, arising out of or related to, in any way" the 2011 Litigation. *See* Dkt. 285, Exhibit 10, Section 4(a) (emphasis added).

Leading up to the hearing on valuation in this case, Appellants disclosed Leo O'Brien as a testifying expert who would offer his opinion that William's capital account should be "adjusted" in the amount of

$134,355.89. *See* Dkt. 285, Exhibit 3 thereto at p. 4. The "adjustment" was almost exclusively comprised of Partnership expenses that predated the execution of the 2013 Release. *See* Dkt. 285, Exhibit 3, pp. 6-7. The only exception was a payment made to William on November 6, 2013, in the amount of $56,000. O'Brien treated $39,693.50 of the $56,000 as a distribution for purposes of his opinion. *Id.* at pp. 2-3. This is completely contrary to the District Court's earlier determination that the $56,000 check "was compensation under Sections 9.2 and 12.5 of the Partnership Agreement and ***was not a distribution*** under Section 9.5 or a draw under Section 9.8 of the Partnership Agreement." *See* Dkt. 72, Phase I Findings & Conclusions, p. 16, ¶ 100 (emphasis added).

William moved to exclude Mr. O'Brien's testimony at trial on the basis that the 2013 Release precluded Appellants from making a claim based on transactions pre-dating the execution of that release. The District Court granted the Motion. Appellants have appealed.

STANDARD OF REVIEW

The construction and interpretation of a written agreement are questions of law, and this Court reviews the District Court's conclusions of law to determine whether they are correct. *Eschenbacher v. Anderson*, 2001

MT 206, ¶ 21, 306 Mont. 321, 326, 34 P.3d 87, 91. Valuations are questions of fact which are reviewed under a clearly erroneous standard, determining first whether the finding is supported by substantial credible evidence. *Bank of Baker v. Mikelson Land Co.*, 1999 MT 76, ¶ 25, 294 Mont. 64, 69, 979 P.2d 180, 184. "Substantial credible evidence is evidence that a reasonable mind might accept as adequate to support a conclusion." *Stubblefield v. Town of W. Yellowstone*, 2013 MT 78, ¶ 15, 369 Mont. 322, 326–27, 298 P.3d 419, 423. "This evidence may be less than a preponderance of the evidence, but must be more than a mere scintilla." *Id.* (internal quotations and citations and omitted). "Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility." Mont. R. Civ. P. 52(a)(6)

The authority to grant or deny a motion *in limine* rests in the inherent power of the district court to admit or exclude evidence so as to ensure a fair trial. *Folsom v. City of Livingston*, 2016 MT 238, ¶ 11, 385 Mont. 20, 24, 381 P.3d 539, 543. "Where a decision on a motion *in limine* involves the exercise of discretion, this Court will not overturn the district court absent an abuse of discretion." *Meek v. Mont. Eighth Judicial Dist. Court*, 2015 MT 130, ¶ 9, 379 Mont. 150, 349 P.3d 493 (internal citations omitted). "We review for an abuse of discretion a district court's rulings on the admissibility of expert testimony." *Norris v. Fritz*, 2012 MT 27, ¶ 17, 364 Mont. 63, 270 P.3d 79.

SUMMARY OF THE ARGUMENT

The first appeal in this case reversed the District Court's decision to dissolve the Partnership, and instead allowed Appellants to purchase William's 53.25% Partnership interest following a hearing on the value of that interest. This appeal will determine whether Appellants can meet the high standard of proving that the District Court improperly determined the value of William's interest, contrary to the evidence presented at the valuation hearing and the Partnership Agreement, and instead should have deeply discounted William's interest, thereby allowing Appellants to purchase the interest at pennies on the dollar.

Section 16.6 of the Partnership Agreement provides the mechanism to determine the fair market value of a withdrawing partner's interest. That section provides for a determination of value based on (1) the property owned by the Partnership, (2) projected income and past performance of the Partnership, and (3) discounts for the size of the interest to be purchased, lack of market for the interest, and the inability to exercise any control over the Partnership. The Partnership Agreement does not otherwise define fair market value, nor does it incorporate a definition of fair market value from any other source.

The District Court heard testimony from a real property appraiser who offered an opinion on the value of the Partnership's primary asset – an 8,300-acre ranch – as of the valuation date of July 10, 2014. Each side also presented testimony from their own valuation experts, who together provided the District Court with a range of values for William's Partnership interest from $463,300 to $1,587,200. The District Court analyzed and addressed each factor set forth in § 16.6 of the Partnership Agreement, and concluded that the value of William's 53.25% interest in the Partnership was $1,421,863. As this Court has repeatedly held, the determination of property value is a factual issue which is within the province of the trial court to decide. There is simply no question here that substantial credible evidence in the record supports the District Court determination based on the evidence presented at the hearing. Accordingly, that determination should be upheld.

Appellants also seek to reduce the amount owed to William for his interest in the Partnership, claiming that certain Partnership expenses booked prior to 2013 were personal in nature and should not have been charged to the Partnership. Appellants and William were parties to a release agreement dated March 26, 2013, wherein they released one another for "any and all claims, debts, rights, causes of actions, and liabilities, whether known or unknown, asserted or unasserted, foreseen or unforeseen, alleged or which could have been alleged" in a lawsuit filed in 2011. As determined by the District Court, that release language precludes the Appellants in this action from asking the courts to reduce the amount owed to William for his interest in the Partnership based on pre-2013 transactions.

The District Court properly excluded the testimony of Appellants' expert witness who would have offered his opinion as to those pre-2013 transactions. Appellants have not met their burden on appeal of demonstrating that the District Court abused its discretion in excluding Mr. O'Brien's testimony. The District Court should be affirmed.

ARGUMENT

I. THE DISTRICT COURT PROPERLY ADDRESSED AND APPLIED THE VALUATION METHODOLOGY REQUIRED BY THE PARTNERSHIP AGREEMENT.

Following the first appeal, this Court remanded this case to the District Court for a hearing on the value of William's complete interest in the Partnership. Following a day-long hearing, which included testimony from three experts and one of the parties, the District Court found that the value of William's interest in the Partnership "is 53.25% of the value of the Partnership's assets as of July 10, 2014," or $1,421,863.00. *See* Appendix to Appellants' Brief ("Appx."), A17 at ¶ 81. The District Court calculated this figure by "[a]pplying the Section 16.6 criteria" set forth in the Partnership Agreement. *Id.* The District Court's valuation is supported by the terms of the Partnership Agreement and by far more than a "mere scintilla" of evidence in the record. Appellants have failed to meet their burden on appeal of demonstrating the District Court erred in its determination of value.

This Court has repeatedly held in a variety of circumstances that "the determination of property valuation is a factual issue which is within the province of the trial court to decide." *In re Marriage of Meeks* (1996), 276 Mont. 237, 247, 915 P.2d 831, 838, *quoting Trustees of Washington–Idaho–Montana Carpenters–Employers Retirement Trust Fund v. Galleria Partnership* (1991), 250 Mont. 175, 184, 819 P.2d 158, 163. A district court "may adopt any reasonable valuation of property supported by the record." *Hutchins v. Hutchins*, 2018 MT 275, ¶ 50, 393 Mont. 283, 303, 430 P.3d 502, 517. "A district court may assign any value to an item of property that is within the range of values offered into evidence." *Hutchins*, *citing In re*

Marriage of Hochhalter, 2001 MT 268, ¶ 33, 307 Mont. 261, 37 P.3d 665; *In re Marriage of Edwards*, 2015 MT 9, ¶ 25, 378 Mont. 45, 52, 340 P.3d 1237, 1242 (reasoning that it is the province of the district court to weigh the evidence before it and emphasizing that the district court's valuation will not be disturbed if there is evidence in the record to support its decision).

At the valuation hearing, the parties' experts offered their opinions on the value of William's Partnership interest ranging from a low of $463,300 to a high of $1,587,200. *See* Tr. at 68:19 – 68:23; 164:12 – 164:15. The District Court's value of $1,421,863 is within the range of values offered into evidence and is supported by substantial credible evidence. The District Court's finding of value was not clearly erroneous and should be upheld.

Appellants argue that the District Court "appears to have arbitrarily determined a value, without stating how it developed this number." *See* App. Br. at p.16. Appellants also advocate for the application of the term "fair market value" as defined by IRS Revenue Ruling 59-60. *Id.* at p.17. Appellant's arguments are unsupported. As fully set forth in the District Court's Findings and Conclusions and as discussed below, the Partnership Agreement itself establishes the factors to determine "fair market value."

The District Court properly applied those factors to the evidence introduced at the hearing.

A. The Partnership Agreement Provides the Factors to Be Considered in Determining the "Fair Market Value" of William's Partnership Interest.

Appellants frame the question presented before this Court as whether the District Court erred in using "fair value" rather than "fair market value." *See* App.Br. at p.1. In fact, the District Court plainly valued William's partnership interest at "fair market value" as that term is supplied by the Partnership Agreement. *See* Appx., A8 at ¶ 33; A17 at ¶ 79. The argument that Appellants are actually advancing is that the District Court and this Court should look beyond the language of the Partnership Agreement and adopt a *different* manner of calculating "fair market value" than the one supplied by the Partnership Agreement. Appellants' argument is not supported by the law. As this Court noted in the first appeal of this matter:

> An existing partnership agreement controls the rights and duties of partners in a partnership. *In re Estate of Bolinger*, 1998 MT 303, ¶ 50, 292 Mont. 97, 971 P.2d 767; *see also* § 35-10-106, MCA. "A partnership agreement is essentially a contract between the partners ... to be interpreted and applied in accordance with principles of contract law." *Bolinger*, ¶ 54. A contract must be interpreted in such a way that it is lawful, operative, definite, reasonable, and practicably effectual without contravening the intention of the parties.
> Section 28-3-201, MCA. The language of a contract

> governs its interpretation when the language is clear, explicit, and without absurdity. *Whary v. Plum Creek Timberlands, L.P.*, 2014 MT 71, ¶ 10, 374 Mont. 266, 320 P.3d 973.

Ballou I, ¶ 15.

Instead of valuing William's interest consistent with the Partnership Agreement, Appellants promote the application of the term "fair market value" utilized in Revenue Ruling 59-60. *See* App. Br. at p.17. Appellants rely on and discuss at length a federal tax court decision involving the valuation of a limited partnership interest of a deceased partner for estate tax purposes. *Id.*, *citing Estate of Giustina v. Comm'r of Internal Revenue,* 111 T.C.M. (CCH) 1551 (T.C. 2016). But the *Giustina* case is not applicable here – in litigation involving the forced sale of an interest – where the value of William's Partnership interest is not intended to be calculated under the Internal Revenue Code, but rather, pursuant to the Partnership Agreement.[2]

[2] Certainly, the parties could have incorporated the Internal Revenue Code's definition of "fair market value" into the Partnership Agreement had they wanted, like the parties did in the case of *Huffman v. Cohen*, 2009 WL 1227648, at *3 (N.D. Okla. Apr. 29, 2009) (wherein the parties agreed the term "fair market value" was as "defined in the Code and the Treasury Regulations thereunder"). In fact, the Partnership Agreement references the Internal Revenue Code in other sections of the Partnership Agreement, but not with respect to the definition and determination of fair market value, indicating an intent to *not* utilize the Code's definition of fair market value.

This Court has addressed the propriety of discounts to value when the owner of an interest in an entity is selling the interest to another owner or back to the entity, as is the case here. In *Hansen v. 75 Ranch Co.*, 1998 MT 77, 288 Mont. 310, 957 P.2d 32, the issue presented was whether a discount should be applied when a shareholder sells shares to a majority shareholder or back to the corporation. With a sale to a third party, the value of the interest to the third-party purchaser "is either the same as or less than it was in the hands" of the seller, because the third party "gains no right to control or manage the corporation." *Id.* at ¶ 41. "However, a sale to a majority shareholder or to the corporation simply consolidates or increases the interests of those already in control. Therefore, requiring the application of a minority discount when selling to an 'insider' ***would result in a windfall*** to the transferee." *Id.* (emphasis added). This court concluded that because there is no "market" involved in the transfer of shares back to the entity itself, "the minority discount should not be applied." *Id.*

Even Appellants' own expert agreed that utilizing the definition of fair market value found in Revenue Ruling 59-60 could result in a financial windfall for the remaining shareholders. *Tr.* at 80:4 – 80:25. For that reason, Mr. Blades explained, the concept known in the valuation field as "fair value" is traditionally applied "in a litigation setting [involving] shareholders or shareholder decedents," which is what we have here. *Tr.* at 54:4 – 54:9.

The District Court declined to adopt the definition of fair market value from any other source, instead correctly holding that the purchase price for William's shares is the fair market value "as guided by the considerations set forth in the Partnership Agreement." *See* Appx., A7 at ¶ 31, *citing* § 16.6 of the Partnership Agreement. Section 16.6 provides that in establishing fair market value of a withdrawing partner's interest, the following factors must be considered:

- Value and condition of the property of the Partnership;
- Projected income of the Partnership;
- Past performance of the Partnership;
- Discounts for the size of the interest, lack of market for the interest, and the inability of the interest to exercise any control over the Partnership; and other things that would reasonably affect the value of the interest;
- Any unpaid Capital Contributions of the withdrawing Partner; and
- Any damages occurring to the Partnership as a result of the Withdrawal Event shall be taken into account in determining the net amount due the withdrawing Partner.

See Appx., A8-A9 at ¶¶ 34 and 36. The District Court addressed each of the above factors in turn before deciding on an appropriate value for William's partnership interest.

B. The Court Considered the Value and Condition of the Property as of July 10, 2014.

Scott Griswold conducted an appraisal of the real property with an effective date of July 10, 2014, the valuation date for William's interest. While Appellants' valuation expert relied on appraisals dated before and after the valuation date, Mr. Griswold's was the only appraisal offered as of the valuation date and the only appraisal supported by testimony and subject to cross examination at the hearing. *See* Appx., A10 at ¶¶ 42-43. In fact, Mr. Griswold testified that his valuation of the real property included an outbuilding (which Bonnie testified was not completed until after the valuation date) and that he did not adjust the value for access issues. *Id.*, A11 at ¶¶ 48-49. Given the evidence before it, the District Court accordingly adjusted Mr. Griswold's value of the real property for these issues before issuing its final determination of the value of William's interest. *Id.*

C. The Court Considered the Projected Income and Past Performance of the Partnership.

With a valuation date of July 10, 2014, the District Court knew the actual income for the Partnership for the years both preceding and following that date. *See* Appx., A12 at ¶¶ 53-54. The Court noted the "significant" income swings from year to year (e.g., the Partnership reported net income of $108,633 in 2016 versus $6,142 in 2017) and the fact that the only sources of revenue were income from the grazing and crop share leases with related party Ballou Angus Ranch, an entity owned by Bonnie Ballou and her husband. *Id.,* A12-A13 at ¶¶ 54-55. The Court also noted that following the purchase of William's interest, "Bonnie will have no incentive to maximize the profits of L O Ranch (at the expense of Ballou Angus Ranch), as both L O Ranch and Ballou Angus Ranch will be under Bonnie's control." *Id.* at ¶ 55. Accordingly, the District Court properly gave these two factors little weight in making its determination of value.

D. The Court Applied the Discounts to Be Considered as Required by the Partnership Agreement.

The Partnership Agreement instructs a valuator to consider discounts for the size of the interest, lack of market for the interest, the inability of the interest to exercise any control over the Partnership, and other things that would reasonable affect the value of the interest. *See* Dkt. 1, Complaint, Exhibit A thereto, p.17 at § 16.6. The Court considered every single one of these factors and relied on testimony elicited during the hearing concerning each factor.

First the District Court noted that William's interest represented 53.25% of the total Partnership interest, or more than half of the Partnership. *See* Appx., A13 at ¶ 56. The District Court also noted that there was no "lack of market" for William's interest, since Bonnie repeatedly represented that she desired to purchase William's interest. *See* Appx., A14 at ¶ 62. Neither of these factors was a basis "for significant discount." *Id.*

Second, the District Court fully addressed whether William had the ability to "exercise any control" with his 53.25% interest, concluding that he did. *See* Appx., A13 at ¶ 57. The Partnership Agreement provides that at least 75% of the Partnership units must consent for certain actions to be taken, such as changing the nature of the business. *Id.* The District Court further noted this Court's finding that William, as a "majority limited partner with standing to further litigate his grievance" was an "impediment to the partnership's operations and management." *Id.* at ¶ 59, *quoting Ballou I,* ¶ 19. William's interest holds some control because – as the District Court noted – "[a]s long as William or anyone but the Partnership or Bonnie holds William's 53.25% interest, Bonnie cannot exercise complete control over the Partnership." *See* Appx., A14 at ¶ 60.

After a thorough analysis, the District Court found that a discount for the size of William's interest, the lack of market for the interest, or the inability to exercise any control over the Partnership is a "far less significant percentage than argued by Bonnie." *See* Appx., A14 at ¶ 63. Nevertheless, the Court acknowledged that "fair market value" as that term

is expressed in the Partnership Agreement contemplates discounts for those considerations, and the District Court "applied discounts for these considerations." *See* Appx., A17 at ¶ 79. Contrary to what Appellant has argued, the District Court plainly considered the evidence presented to it and applied the Partnership Agreement's discounts to arrive at the fair market value for William's interest. The District Court has broad discretion in determining value. While Appellants disagree, they offer nothing that can possibly meet their difficult burden of demonstrating that the District Court's decision is not supported by substantial credible evidence in the record. The District Court's determination of value must be upheld.
See Mont. R. Civ. P. 52(a)(6) (Findings of fact "must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility").

E. The Court Made No Adjustment for Unpaid Capital Contributions.

Finding no evidence that unpaid capital contributions existed as of July 10, 2014, the Court made no adjustments for this consideration. Whether the Court properly excluded expert testimony related to William's capital account is the subject of Section II, below.

F. The Court Made No Adjustment for Damages Resulting from the Withdrawal Event.

The final consideration of value identified by the Partnership Agreement is whether any damages occurred to the Partnership as a result of the withdrawal event. *See* Appx., A8 at ¶ 34. The District Court found that William had already fully paid the judgment entered against him in this case for damages to the Partnership resulting from the withdrawal event. *See* Appx., A15 at ¶ 69. No adjustment was made by the District Court for this consideration. *Id.* at ¶ 74. Appellants do not dispute this factor on appeal.

G. The District Court's Determination of the Value of William's Interest Is Correct.

Having taken all of the factors identified by the Partnership Agreement into consideration, the District Court addressed the expert testimony submitted by the parties.

Appellants' expert opined that the value of William's interest in the Partnership was $463,000. *See* Appx., A16 at ¶ 75. The District Court found that the discounts taken by Mr. Blades "appeared to overlap, or double-count, the considerations set forth in § 16.6" or were not contemplated by § 16.6. *Id.* at ¶ 76. The same held true for the "fair market value" figure calculated by William's expert as that term is used in the valuation industry, i.e., discounts were applied that "were not always encapsulated in § 16.6

considerations.” *Id.* at ¶ 78. The Court recognized that this was why William’s expert advocated for the application of a “fair value” calculation of $1,587,200. *Id.*

Adopting neither expert’s ultimate opinion, the District Court instead recognized that “the ‘fair market value’ as directed in § 16.6, does contemplate discounts for specific considerations. The District Court has applied discounts for these considerations.” *See* Appx., A17 at ¶ 79. The District Court found that the value of William’s Partnership Interest is 53.25% of the value of the Partnership’s assets as of July 10, 2014: **$1,421,863.** Applying this Court’s decision in *Hansen, supra*, the District Court found that valuing William’s interest at less than his proportionate share of the Partnership’s value would produce a transfer of wealth from William to Bonnie. *See* Appx., A21 at ¶¶ 12-13. Such a transfer of wealth is not only disfavored under Montana law, it would be inconsistent with the intent of the Partnership Agreement. *Id.* at ¶ 13. The District Court’s determination of value is firmly based on substantial credible evidence in the record and should be upheld.

II. THE DISTRICT COURT PROPERLY EXCLUDED EXPERT TESTIMONY FROM LEO O’BRIEN.

In their efforts to further reduce the amount to be paid to William for his Partnership interest, Appellants disclosed an expert to offer testimony that William's capital account had a negative balance as of July 10, 2004. According to Appellants, that should result in a dollar-for-dollar reduction in the amount William will be paid for his interest in the Partnership. William moved *in limine* for the exclusion of the expert's testimony, and that motion was granted by the District Court.

William's purported capital account deficit was calculated by one of Appellants' experts, CPA Leo O'Brien. Appellants represent that if Mr. O'Brien had been allowed to testify, he would have concluded based on his review of "receipts and additional documents" that William's capital account "should be adjusted by a deduction of $136,650.89." *See* Dkt. 312, Offer of Proof at p. 4. Mr. O'Brien had identified multiple transactions that he believed related to automobiles not owned by the Partnership, which should be reclassified as draws or distributions to William instead of Partnership expenses.[3] *Id.*, Exhibit C thereto. Appellants asked the District Court and now ask this Court to deduct that same amount from the amount due to William for his share of the Partnership interest. *See* App. Br. at 22.

[3] Because Mr. O'Brien's testimony was excluded at trial for the reasons discussed herein, his conclusions were not subjected to cross-examination and evidence contradicting his conclusions was not offered at trial.

William moved the District Court *in limine* to exclude Mr. O'Brien's testimony at trial on several grounds. The District Court analyzed each of William's arguments, and excluded Mr. O'Brien's testimony on the basis that the 2013 Release barred the Appellants from "advancing certain positions in this litigation." *See* Appx., B5. The District Court's conclusion was not only correct, but plainly does not constitute an abuse of its discretion to admit or exclude evidence. A close examination of the "receipts and other documents" relied on by Mr. O'Brien reveals that all but one of the "adjustments" advocated by Mr. O'Brien were for expenditures that predated March 26, 2013, the date of the 2013 Release.

The only transaction occurring after the date of the release was a November 6, 2013 payment to William of $56,000. *See* Dkt. 312, Exhibit 3 thereto, at pp. 2-3. In his report, Mr. O'Brien treated part of that payment – $39,693.50 – as a distribution for purposes of his opinion. *Id.* at p.3. But the District Court already had determined that the payment "was compensation under Sections 9.2 and 12.5 of the Partnership Agreement and ***was not a distribution*** under Section 9.5". *See* Dkt. 72, p. 16 at ¶ 100 (emphasis added). Given that Mr. O'Brien's report was at odds with the District Court's previous ruling as to the $56,000 payment, testimony on that issue was properly excluded by the District Court.

The District Court further determined that testimony relating to the transactions predating the 2013 Release should also be excluded. "[B]y advancing an argument supported by Mr. O'Brien's testimony and report, [Appellants] take a position (make a 'demand') in an adversarial setting to litigate concerns arising out of (or related to) the claims in the 2011 Litigation that were, or could have been raised." *See* Appx, B5.

The District Court properly construed the 2013 Release and granted William's Motion *in Limine*. "A release is a contract, governed by contract law." *Jacobsen v. Allstate Ins. Co.*, 2009 MT 248, ¶ 51, 351 Mont. 464, 478, 215 P.3d 649, 661. Like any other contract, where the language of a release is "clear and unambiguous, and as a result, susceptible to only one interpretation, the court's duty is to apply the language as written." *Rich v. Ellingson*, 2007 MT 346, ¶ 15, 340 Mont. 285, 291, 174 P.3d 491, 495. Moreover, a release agreement must be considered "as a whole, giving effect to each part in interpreting it." *Id.* at ¶ 16. In *Rich*, the plaintiff disputed the scope of a release agreement between the parties, claiming that it only covered claims "alleged" prior to the execution of the release. *Rich*, ¶ 10. This Court, citing to the clear and unambiguous bar of future claims, disagreed:

> From beginning to end, the Release consistently demonstrates the intent of the parties to resolve all

> disputes arising from Ellingson's representation of Rich, known or unknown, anticipated or unanticipated, regardless of the particular complaint alleged. … Rich's present allegation of her past intent, without more, cannot change the unambiguous intent of the Release, as indicated through its express terms. The District Court correctly concluded that the terms of the agreement and Release were clear and unambiguous and that Rich was bound by those terms.

Rich, at ¶ 19.

The same holds true here. Appellants argue that the capital accounts were not covered by the 2013 Release because they were not set up as of the date of the Release. *See* App. Br. at 21. But Appellants' argument misses the mark. In 2018, Mr. O'Brien was engaged by Appellants to set up capital accounts using tax returns and bank statements that dated back to 2000 and 2003, respectively. *See* Dkt. 312, Exhibit C thereto. Those documents existed and could have been used to create capital accounts in 2013 or earlier. Had Bonnie or the Partnership been concerned about Eunice's or William's neglect in establishing capital accounts, that issue could have been raised in the 2011 Litigation or even sooner. It was not. This is particularly true since Bonnie's three older brothers claimed in the 2011 Litigation that William allegedly had used Partnership assets for personal benefit and sought damages based on those allegations.

For these reasons, the 2013 Release prohibits Appellants from now claiming that William is indebted to the Partnership for transactions that pre-date the 2013 Release. Appellants and William were parties to the 2013 Release. As the District Court noted, the 2013 Release was "broadly drafted" and by its terms is to be "broadly construed 'to settle all claims' as of the date of its execution, March 26, 2013." *See* Appx., B4. The 2013 Release applies to "all claims, debts, rights, causes of actions and liabilities" that "could have been alleged in the proceeding," and releases each party to the agreement "from all claims, demands, and causes of action each party may now have or which may hereafter accrue, arising out of or related to, in any way the [2011 Litigation]." *See* Dkt. 285, Exhibit 10 thereto, at p. 5.

Here, again, the District Court plainly got this right. The 2013 Release constituted "a full and final release and discharge by each party of the other party . . ." *See* Dkt. 285, Exhibit 10 thereto, at Section 4(a). Appellants' claims that the amount owed to William for his interest in the Partnership should be reduced because of transactions that occurred prior to the execution of the 2013 Release are barred. The District Court properly excluded Mr. O'Brien's testimony and did not abuse its broad discretion. Its decision must be affirmed.

CONCLUSION

Appellants successfully prevented the dissolution of the Partnership during the first appeal in this matter, convincing this Court to allow them to purchase William's interest in the Partnership after a determination of value. The District Court conducted a day-long hearing on the matter, taking evidence from experts on each side, and then meticulously applied that evidence to the provisions of the Partnership Agreement that provide the mechanism for determining value. The result was a well-developed set of findings and conclusions from the District Court that provided for a value of $1,421,863 for William's share of the Partnership. Appellants failed to meet their burden to demonstrate a lack of substantial credible evidence to support the District Court's decision. Indeed, its decision is fully supported by the evidence and should not be disturbed.

The District Court also rejected Appellants' attempt to circumvent the terms of the 2013 Release by offering expert testimony regarding transactions occurring prior to the execution of that release. The District Court's decision to exclude that testimony was proper and in no way an abuse of discretion. As such, it should be upheld.

In sum, William asks this Court to affirm the District Court on all issues presented on appeal and finally bring this long ordeal to a close.

DATED this 1st day of March, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced, except for quoted and indented material; and the word count calculated by Microsoft Word is 8,445 words, excluding table of contents, table of authorities, caption, certificate of service and certificate of compliance.

/s/ Michelle M. Sullivan
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CERTIFICATE OF SERVICE

I, Michelle Sullivan, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 03-01-2019:

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