

IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 23-0253

JOSHUA T. PATTERSON a/k/a JOSH
PATTERSON, as an individual and d/b/a
PATTERSON ENTERPRISES, INC., also
d/b/a ROCKY MOUNTAIN EQUIPMENT,
INC., p/k/a ROCKY MOUNTAIN JCB,
INC., also d/b/a ROCKY MOUNTAIN
RENTAL SPECIALISTS, LLC, also d/b/a
ROCKY MOUNTAIN EQUIPMENT also
d/b/a ROCKY MOUNTAIN RENTAL, also
d/b/a ROCKY MOUNTAIN EQUIPMENT
OF MISSOULA MONTANA,

Defendants/Appellants,

vs.

ADAM PUMMILL, an individual, and
ADAM PUMMILL and KURTIS
ROBERTSON as a member of Black Gold
Enterprises, LLC, members of, and on
behalf of Black Gold ENTERPRISES, LLC,

Plaintiffs/Appellees.

APPELLANTS' OPENING BRIEF

On Appeal from the Fourth Judicial District Court, Missoula County
Cause No. DV-18-1450
The Honorable John W. Larson, Presiding

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I. STATEMENT OF THE ISSUES

- A. Whether the District Court abused its discretion when it awarded the Court appointed Receiver, James Galipeau’s fees as well as the fees of attorney Don St. Peter.
- B. Whether the District Court abused its discretion when it ordered that the Clerk of Court pay Galipeau and St. Peter’s fees from the interplead funds held by the Clerk of Court.

II. STATEMENT OF THE CASE

Pummill et al. v. Patterson et al. is an action for damages surrounding the dissolution of a business, Black Gold Enterprises, Inc. (“Black Gold”), along with several other claims for damages. This appeal arises from two interrelated orders by the District Court; the Order Allowing Professional Fees (Case Register (“CR”) 373), and the Order Granting Receiver’s Motion for Summary Judgment Regarding Fixture Filing and Denying Defendant’s Motion to Alter or Amend the Court’s March 8, 2023 Order and Stay Dispersal of Funds (CR 387).

III. STATEMENT OF THE FACTS

Black Gold is a limited liability company comprised of co-equal members Adam Pummill (“Pummill”), Kurtis Robertson (“Robertson”), and Joshua T. Patterson (“Patterson”). Black Gold was formulated on March 6, 2013, pursuant to an Operating Agreement of Black Gold. Compl., Nov. 1, 2018 (CR 1), Ex. C: Operating Agrmt. of Black Gold Enter., Mar. 6, 2013 (“Operating Agrmt.”). Black Gold owns real estate located at 3790 Highway 200 East in Missoula, Montana (the “Property”) consisting of a structure and an equipment yard. Compl. ¶ 15.

Patterson owns and operates various business entities, including but not limited to: Josh Patterson as an individual; Patterson Enterprises, Inc. (“PEI”); Rocky Mountain Equipment, Inc.; Rocky Mountain Rental Specialists, LLC; Devil Dog Firearms, LLC; Riley Auto, LLC; and Rocky Mountain JCB, Inc. Findings of Fact, Conclusions of Law & Order ¶ 11, Jan. 25, 2019 (CR 35) (“FFCLO”). Each of these businesses are tenants of the Property owned and operated by Black Gold. FFCLO ¶ 11.

On August 15, 2017, Rocky Mountain Equipment of Missoula Montana (Lender) and Black Gold Enterprises, LLC (Borrower) entered into a loan agreement for the amount of \$236,000.00. Compl. ¶ 57, Ex. B: Loan Agrmt., Aug. 15, 2017 (“Loan Agrmt.”). The Loan Agreement was signed by Josh T. Patterson for Lender and Adam Pummill for Borrower. Loan Agrmt. at 4. Patterson filed the Loan Agreement with the Missoula County Clerk and Recorder to create a lien on the Property. Loan Agrmt. at 1-4. The Loan Agreement was recorded at document 201719914, Book 987, Page 172. Loan Agrmt. at 1. The third member of Black Gold, Robertson, did not sign the Loan Agreement. Loan Agrmt. at 4.

In 2013, Patterson paid rent to Black Gold in the amount of \$5,500.00 per month for all of his businesses. FFCLO ¶ 14. Three years after the formation of Black Gold, disputes began to arise among the members regarding Patterson’s rent reductions from \$5,500.00 per month to \$4,500.00 per month to \$1,000.00 per month. *Id.*

In September of 2018, Pummill and Robertson passed a resolution on behalf of Black Gold to retain Don St. Peter (“St. Peter”) as counsel for Black Gold. Patterson objected. FFCLO ¶ 19. In October of 2018, St. Peter sent written lease agreements to all Black Gold tenants and requested that they execute and return the leases. FFCLO ¶ 20. During this timeframe, Patterson and his businesses had physical possession of the Property. FFCLO ¶ 22. In the summer of 2018, Pummill and Robertson attempted to list the Property for sale. FFCLO ¶ 28. Patterson objected to the sale. *Id.*

On November 2, 2018, Plaintiffs filed an Amended Complaint and removed St. Peter as counsel for Black Gold. Am. Compl. at 1, Nov. 2, 2018 (CR 7). During that same month, Pummill and Robertson, on behalf of Black Gold, sought the appointment of a receiver. Mot. Prelim. Inj. & Appoint. Receiver & Request Hr’g, Nov. 29, 2018 (CR 14). In support of the appointment of a receiver, Plaintiff filed an Affidavit of James Galipeau. The Affidavit identifies Galipeau’s qualifications and indicates, in his opinion, he does not have a conflict of interest and can serve as a receiver. Aff. James Galipeau, May 22, 2019 (CR 58) (“Aff. Galipeau”). Defendant notified the District Court of Galipeau’s conflict and further filed a photo of Galipeau at Pummill’s wedding in Hawaii. Defs.’ Req. Hr’g, June 10, 2019 (CR 64), Ex. A: photo (“Pummill Wedding Photo”). The District Court granted Pummill and Robertson’s Motion for Preliminary Injunction and Appointment of Receiver on January 25, 2019. FFCLO at 23. Jim Galipeau, CPA, CFE, CFF of JCCS Certified

Public Accountants (“Galipeau or Receiver”) was appointed the Receiver. Order, Aug. 22, 2019 (CR 79) (“Receiver Appointment”). On September 9, 2019, Attorney Jim O’Brien filed Galipeau’s Oath of Receivership (CR 82). St. Peter filed a Notice of Appearance as counsel for the Receiver for pursuing claims asserted by Pummill and Robertson as members and on behalf of Black Gold Enterprises, LLC. Notice Appearance at 1-2, Sept. 30, 2019 (CR 84) (“St. Peter” or “Attorney”). St. Peter’s billing records indicate that the firm’s representation began on August 21, 2018. Notice Service Redacted Billing & Privilege Log, Oct. 3, 2022 (CR 347) (“St. Peter billing records”). Among the duties of the Receiver, the District Court ordered the Receiver to prepare a full and complete report, certified to be correct by the Receiver, setting forth all receipts and disbursements, cash flow, activities of Black Gold, and reporting all changes in the Assets in his charge, or claims against the Assets, that have occurred during the period covered by the report. The District Court also instructed the report to be filed by the twentieth day of the month following the reporting period. Receiver Appointment ¶ 10. Defendants moved to remove the Receiver because of his failure to adhere to the District Court’s Order, including not timely filing Quarterly Reports. Defs.’ Mot. Remove Receiver, Feb. 13, 2020 (“Mot. to Remove”) (CR 114). The last Quarterly Report filed by Receiver was for the period of January through June 2022. Notice Filing – Receiver’s Quarterly Rep. at 3-6, July 25, 2022 (CR 333) (“Notice Filing – Qtr. Rep.”).

Upon motion of Plaintiffs, the District Court concluded that as of August 2018, Patterson and his business entities were in default of rent in excess of \$60,000.00 and entered Judgment accordingly. J. in Favor of Pls. at 2-3, Mar. 11, 2019 (CR 39).

A Writ of Execution was issued against Patterson and his business entities. Writ Execution, Mar. 20, 2019 (CR 44). Levying resulted in \$11,303.41 and incurred costs of \$1,165.00. Cert. Costs & Return Execution, July 17, 2019 (CR 73). On July 26, 2019, another Writ of Execution was issued, and levying resulted in \$3,150.60 and incurred costs of \$690.50. Writ Execution & Cert. Costs & Return Execution, Dec. 12, 2019 (CR 98). Another Writ of Execution was issued on December 13, 2019. Writ Execution, Dec. 13, 2019 (CR 99). On January 21, 2020, Receiver filed a Motion for Summary Judgment – Rent Owing and Motion for Hearing on Damages.¹ Order Granting Receiver’s Mot. Summ. J. at 1, Mar. 10, 2020 (CR 138) (“Order Granting Receiver’s Mot. Summ. J. Re Rent Owing”). On January 16, 2020 Receiver filed a Motion for Summary Judgment – Possession. App. at 3; Order Granting Receiver’s Mot. Summ. J. Re Rent Owing at 2. The District Court issued an Amended Judgment ordering Defendants to vacate the Property. Am. J. at 2, Mar. 13, 2020 (CR 145) (“Am. Judgment”).

¹ The summary judgment motions filed by Receiver were filed in a separate case, *Galipeau v. Patterson, et al.*, Missoula County Cause No. DV-19-1353. See attached Appendix with all documents filed in DV-19-1353 and the ROA Listing (“App.”). This case was consolidated with DV-18-1450 on January 27, 2020 (CR 106).

After the District Court ordered the Property to be vacated, Galipeau instructed Pummill and Robertson, with the assistance of a locksmith, to change the locks at the Property (building and work yard) on March 14, 2020. On March 17, 2020 Receiver directed Pummill to enter the Property, secure certain equipment and fix/install a video surveillance system. Receiver's Notice re: Am. J. at 1, Mar. 17, 2020 (CR 147). *See also* Aff. Adam Pummill, Mar. 18, 2020 (CR 149) ("Aff. Pummill").

A Notice of Receiver's Intent to Sell Property was filed on March 19, 2021. Notice Intent Sell Prop., Mar. 19, 2021 (CR 272) ("Receiver's Notice re: Intent to Sell"). The Receiver also notified Pummill, Robertson, and Patterson that he intended to prepare the Property for sale before May of 2021 and requested all personal property be removed by April 30, 2021, or it will be considered abandoned. Receiver's Notice re: Intent to Sell, Ex. A: Galipeau's Ltr. to Parties, Mar. 19, 2021. Patterson and his entities filed an emergency application for a TRO and preliminary injunction to prevent the sale. Emergency App. Defs. for TRO & Prelim. Inj., Apr. 16, 2021 (CR 273). Receiver moved the District Court to approve the sale of the property and enter into an Agreement with Gene Senne. Mot. Ct. Approval, May 1, 2020 (CR 159), Ex. 1: Real Estate Purchase Agrmt., Apr. 24, 2020 ("Purchase Agrmt."). On June 8, 2021, the District Court approved the sale of the Property and denied the TRO. Order, June 8, 2021 (CR 300) ("Order Approving Sale").

On June 1, 2022, Patterson provided the District Court with a Notice and Affidavit of Kevin Dunnigan who offered to purchase the property for \$650,000.00. Notice Ct. About Offer to Purchase, June 1, 2022 (CR 322) (“Notice”); Notice at Ex. A: Aff. Kevin Dunnigan, Apr. 14, 2022 (CR 323) (“Aff. Dunnigan”). The Property was sold to Gene Senne for \$625,000.00 and the closing took place on June 15, 2022. Supp. Proceeding – Compl. Interpleader ¶ 6, June 20, 2022 (CR 324) (“Compl. for Interpleader”).

On June 20, 2022, Receiver filed a Motion for Leave to Deposit Funds into Court (CR 325) along with the Complaint for Interpleader to interplead \$312,833.63 to satisfy the lien on the Property. Compl. for Interpleader ¶ 17. Patterson answered the Complaint and filed a counterclaim seeking payment of the loan and lien for an amount of at least \$312,833.63; removal of the Receiver; and attorneys’ fees and costs. Supp. Proceeding – Defs.’ Answer Receiver’s Compl. Interpleader & Countercl., July 11, 2022 (CR 326). Prior to the sale of the Property, a fully briefed Motion for Summary Judgment [Regarding Fixture Filing] (CR 157) was pending regarding the validity of lien. Compl. for Interpleader ¶ 16.

On July 13, 2022, the District Court entered an Amended Order Granting Receiver Leave to Deposit Funds, \$312,833.63 - the amount of the lien, with the Clerk of Court. Order, July 13, 2022 (CR 328) (“Order to Deposit Funds”). The Order stated that the funds were to be deposited to satisfy the lien on Black Gold’s real property until the District Court issues a determination on the lien’s validity. *Id.*

On July 25, 2022, Receiver filed a Motion for Court Approval of Professional Fees - \$107,122.81 for Receiver Galipeau and \$150,540.98 for the attorney for Receiver, St. Peter Law Office. Receiver's Mot. Court Approval Prof'l Fees, July 25, 2022 (CR 334) ("Receiver's Motion"). The District Court granted Receiver's Motion on February 21, 2023. Order, Feb. 21, 2023 (CR 370) ("Order Re Fees").

The District Court entered the Order that is the subject of the present appeal, granting Receiver's Motion for Summary Judgment and denying Defendants' Cross Motion for Summary Judgment. Order, May 2, 2023 (CR 380) ("Order Granting Summ. J."). In an Amended Order, the District Court ordered that the Clerk of Court disperse the funds to St. Peter and Galipeau. Am. Order, May 4, 2023 (CR 381). As a result of the Amended Order, the \$312,833.63 (the amount of the lien) of the interplead funds was used to pay Attorney, St. Peter Law Office, P.C., \$146,335.98 and Receiver, Jim Galipeau, \$103,087.81. *Id.* The checks were issued and dispersed on the same date as the Amended Order was entered. Receipt of Galipeau, May 4, 2023 (CR 382); Receipt of St. Peter, May 4, 2023 (CR 383).

Also on May 4, 2023, the undersigned filed a Notice of Substitution of Counsel (CR 384), a Motion to Stay (CR 385) with Brief in Support (CR 386) and a Notice of Appeal (CR 387). An Amended Notice of Appeal was filed on May 18, 2023, appealing the District Court's Amended Order Allowing Professional Fees (CR 392).

IV. STANDARD OF REVIEW

District court orders granting or denying appointments, directing, or refusing to dissolve appointments of receivers are immediately appealable. M. R. App. P. 6(3)(g). The Montana Supreme Court's scope of review under M. R. App. P. 6(3)(g) is limited to the appealable issue and the evidentiary basis, pertinent conclusions or applications of law, and ultimate rationale for the action or ruling of the court. *Gottlob v. DesRosier*, 2020 MT 212, ¶ 7, 401 Mont. 72, 470 P.3d 194 (citing M. R. App. P. 6(3)(g); *Crowley v. Valley W. Water Co.*, 267 Mont. 144, 150, 882 P.2d 1022, 1025 (1994)).

The Montana Supreme Court reviews district court appointments of receivers for an abuse of discretion under the standards of Title 27, Chapter 20, Montana Code Annotated, and related principles of equity upon which those statutes are based. *Id.* (citations omitted). A court abuses its discretion if it exercises granted discretion based on a clearly erroneous finding of material fact, an erroneous conclusion of law, or otherwise acts arbitrarily, without conscientious judgment or in excess of the bounds of reason, resulting in substantial injustice. *Id.* (citations omitted). The Montana Supreme Court reviews conclusions and applications of law de novo for correctness. *Id.* (citations omitted).

V. SUMMARY OF ARGUMENT

The District Court abused its discretion in two distinct areas with regard to its decisions allowing the award of both Receiver and Attorney's fees in this matter.

First, the District Court abused its discretion and committed several erroneous conclusions of law by failing to analyze the facts under the appropriate legal standards set forth by this Court to assess the reasonableness of the subject fees. Second, the District Court abused its discretion by allowing the Clerk of Court to pay the subject fees to both the Receiver and Attorney from the proceeds of the sale of the Property despite the fact that Appellants have a legitimate legal claim to a portion of the proceeds. Due to the District Court's abuses of discretion, the Court should reverse the Orders on appeal.

VI. ARGUMENT

A. The District Court abused its discretion when it awarded fees to both the Receiver and Attorney.

The District Court's award of fees totaling \$249,423.79 is unreasonable and the Court should vacate the Amended Order Allowing Professional Fees (CR 392). The amount of compensation paid to a receiver must be what is "reasonable for the services required of and rendered by a person of ordinary ability and competent for such duties and services." *Hickey v. Parrot Silver & Copper Co.*, 32 Mont. 143, 79 P. 698, 701 (1905). As for the Receiver's Attorneys' fees, "[w]hile a receiver may employ counsel, he cannot make any contract of hiring or agreement for compensation binding upon the court, whose function it is to determine the necessity for counsel and the compensation to be allowed." *State ex rel. Rankin v. Farmers' State Bank of Wilsall*, 88 Mont. 233, 292 P. 575, 577 (1930).

Both the Receiver's and Attorney's fees in this matter are unreasonable and the District Court abused its discretion when it allowed them. This Court has established that the District Court should consider the following four factors in determining whether a receiver's fees are reasonable:

1. The value of the property in controversy;
2. the practical benefits derived from the receiver's efforts and attention;
3. time, labor, and skill needed or expended in the proper performance of the duties imposed, and their fair value, measured by the common business standards;
4. the degree of activity, integrity, and dispatch with which the work of the receivership is conducted.

Hickey, 79 P. at 701.

The District Court abused its discretion by failing to sufficiently apply and consider the above factors in making its determination as to whether the fees at issue were reasonable. While the District Court did acknowledge the *Hickey* factors in its Order, it did not give due consideration to each of these factors in reaching its decision. *See* Order Re Fees at 4-5.

- 1. The District Court failed to properly consider the fact that the value of the Property is significantly inconsistent with the award of fees.**

The District Court failed to properly consider the first *Hickey* factor and give due consideration to the value of the Property in relation to the award of fees in this matter. The primary "property in controversy," which the Receiver contends was "virtually the sole asset of Black Gold," was the Property. Receiver's Motion at 2.

The Receiver sold the Property for \$625,000.00 through a private sale, which was \$43,000 less than its appraisal value. Compl. for Interpleader ¶ 16. In fact, the sale price the Receiver accepted was substantially less than another bona fide purchase offer. *See* Aff. Dunnigan ¶¶ 7-9. The Receiver also reported that the balance of the mortgage at the time was \$284,482.16, the Property was used to secure other lines of credit, and there were other incidental costs to the sale, implying net proceeds of approximately \$317,336.21. Order Approving Sale at 3.

The total fees awarded of \$249,423.79 account for approximately 40% of the overall sale price of the Property, or 78% of Black Gold's net proceeds of \$317,336.21. As noted in the underlying briefing on this issue, there is scant recent case law on the subject of reasonableness of receiver's fees in Montana. However, other jurisdictions applying similar factors as those established in *Hickey* have found an abuse of discretion where the lower court allowed excessive fees to the detriment of the parties. *See United States v. Code Prods. Corp.*, 362 F.2d 669, 673 (3d Cir. 1966) (holding that the District Court abused its discretion when it allowed additional compensation to the Receiver and his counsel when appellant suffered monetary losses as a result of Receiver's actions and the "receivership was seriously detrimental to the appellant").

The District Court failed to properly consider the first *Hickey* factor in reaching its decision on whether the subject fees should be denied or reduced. *See generally* Order Re Fees. The District Court did not discuss, nor did it give any

indication in the Order as to how it weighed this critical factor, despite Appellants presenting the District Court with the above facts and legal arguments. By allowing this extravagant amount of fees without giving due consideration to the relevant legal standards, the District Court made an erroneous conclusion of law, acted arbitrarily, without conscientious judgment, and in excess of the bounds of reason, resulting in substantial injustice to Appellants.

2. The District Court abused its discretion because it failed to consider that the Black Gold members have derived almost no practical benefit from Receiver's work.

The District Court failed to give due consideration to the second *Hickey* factor despite significant evidence showing that Black Gold members derived almost no practical benefit from Receiver's work. As noted in briefing, the Receiver was appointed to "marshal, preserve, protect, maintain, manage and safeguard the Assets of Black Gold Enterprises, LLC in a reasonable, prudent, diligent, and efficient manner." Receiver Appointment at 3. He did none of those things. Receiver could have maintained or improved Black Gold's revenue stream by continuing to lease the Property to the several tenants who occupied the building, instead he evicted all tenants and sold the Property. *See* Am. Judgment; *see also* Purchase Agrmt. (showing Receiver evicted Patterson tenants March 13, 2020, then executed the Purchase Agreement on April 24, 2020). Additionally, Receiver sold the Property for below appraisal value and for less than the best offer received. Mot. Ct. Approval; Aff. Dunnigan.

The above facts demonstrate that the Receiver's actions with respect to the Property did not give substantial benefit to Black Gold or its members. Once again, similar to the first *Hickey* factor, the District Court failed to adequately consider this factor in awarding the subject fees. As such, by allowing this extravagant amount of fees without giving due consideration to the relevant legal standards, the District Court made an erroneous conclusion of law, acted arbitrarily, without conscientious judgment, and in excess of the bounds of reason, resulting in substantial injustice to Appellants.

3. The District Court abused its discretion because the Receiver's fees were far beyond the scope of the time, labor, and skill needed to perform his duties.

The District Court abused its discretion when it determined that the Receiver's fees were reasonable. The Receiver's fees are nearly eleven (11) times more than the initial \$10,000.00 retainer the District Court authorized Plaintiffs to pay him "in order for him to faithfully discharge his duties, and subsequent directives by the Court, and applicable law." Receiver Appointment ¶ 3. Although the District Court never appointed St. Peter as an attorney for Receiver, together, Galipeau and St. Peter's fees are over twenty-five (25) times the Court ordered retainer. *Id.* Although a retainer does not necessarily reflect the total amount of fees a project may cost, it is still a relevant measure, and fees twenty-five times greater than the retainer are inherently questionable. While the District Court did make some reductions to the subject fees based on the time spent, the District Court did not go nearly far enough

in doing so and failed to give meaningful weight to this factor. By allowing this extravagant amount of fees for both Galipeau and St. Peter, without giving due consideration to the relevant legal standards, the District Court made an erroneous conclusion of law, acted arbitrarily, without conscientious judgment, and in excess of the bounds of reason, resulting in substantial injustice to Appellants.

4. The District Court abused its discretion when it allowed the fees at issue because the Receiver has repeatedly shown a lack of integrity in the performance of his work and has not employed dispatch in performing his work.

The District Court abused its discretion in failing to adequately weigh the gravity of the facts that tend to show that the Receiver and his Attorney possessed a conflict of interest in this matter. At the outset, Pummill selected for the Receiver a friend so close that he was among a small and intimate group that attended Pummill's destination wedding, a fact the Receiver withheld from the District Court in alleging a lack of conflict. *See* Aff. Galipeau ¶¶ 6-9 (claiming no conflict of interest and minimizing disclosure of the relationship with Pummill); Pummill Wedding Photo (showing Receiver at Pummill's wedding). The Receiver retained St. Peter Law Offices, P.C., to represent him, notwithstanding the fact St. Peter Law Offices, P.C. previously represented the Plaintiff (Compl.). The Receiver instructed Pummill and Robertson to assist him in his duties, effectively resulting in Plaintiffs appointing themselves as the Receiver. *See* Receiver's Notice re: Am. J.; Aff. Pummill.

The Receiver's conduct demonstrates a lack of the integrity required to be a neutral agent of the court. While the District Court did consider this factor in its fees

analysis, it did not give due consideration to the above facts. Order Re Fees at 5-7. In reaching its conclusion that no conflict existed, the District Court placed far too much weight on the fact that “St. Peter Law Office was inadvertently included on the initial caption . . . and was initially consulted for a representation of Black Gold, the entity, not the members of the entity.” in the underlying case. *Id.* at 5-6.

St. Peter appeared on the Complaint (CR 1) and did not appear on the Amended Complaint (CR 7). St. Peter did not file a Notice to Withdraw as Counsel of Record. On September 30, 2019 St. Peter filed a Notice of Appearance as counsel for Receiver, James Galipeau (CR 84). St. Peter’s billing records indicate that the firm’s representation began on August 21, 2018, 405 days prior to the Notice of Appearance (CR 84 & 347). St. Peter’s billing records also indicate that the invoices were submitted to Jim Galipeau. The records clearly show that St. Peter (and likely Galipeau) were involved with Plaintiffs before the Court appointed Galipeau and before St. Peter filed a Notice of Appearance. St. Peter met with Black Gold members prior to the Receiver being appointed and prior to his appearance in this litigation. Therefore, St. Peter has a conflict representing the Receiver and Black Gold in this litigation. M. R. Prof. Conduct 1.7.

Despite Appellants presenting the above facts in their briefing, the District Court disregarded these facts in reaching its conclusion, and instead stated several times that Defendants have not produced evidence of a conflict of interest in order for the District Court to evaluate. Order Re Fees at 5-7. Contrary to the District

Court's assertion, the above facts are evidence of a conflict of interest, and the District Court failed to adequately consider these facts in reaching its decision. As such, the District Court abused its discretion and made its decision with regard to this issue based on an erroneous conclusion of material fact.

The Receiver has not employed "dispatch" in conducting his work. As explained in Patterson's Motion to Remove Receiver and Brief in Support, among other things, the Receiver failed to file a Quarterly Report, as was needed to "allow Defendants and Plaintiffs to understand Black Gold's financial position and could help substantiate the continuation of the Receivership and any actions he pursues both legally and business related." Mot. to Remove at 5. Since then, the Receiver has filed untimely and deficient Quarterly Reports. The last Quarterly Report filed was for the period ending June 2022. Only 9 Quarterly Reports have been filed since the Receiver's appointment in 2019. *See generally* Quarterly Reports filed in the underlying matter.

These repeated failures by the Receiver cannot go unnoticed, and the District Court abused its discretion when it allowed Receiver's full fees despite these facts. Once again, while Appellants did present the above facts in briefing, the District Court did not sufficiently consider the Receiver's repeated failure to file the Court ordered Quarterly Reports in reaching its decision on fees. This factor should have been given more weight.

In sum, the above factors demonstrate that the fees at issue are unreasonable and should have been significantly reduced by the District Court. Over the course of his service, the Receiver has repeatedly caused issues to the detriment of Appellants and the other Black Gold members. When weighed against the *Hickey* factors, the Receiver's actions show an utter divergence from his established duties and responsibilities. The District Court allowed Receiver to recover an unreasonable amount of both Receiver and Attorney fees totaling \$249,423.79 without due consideration of the *Hickey* factors. This is nothing short of a windfall for the Receiver and Attorney. In reaching its conclusions on these issues, the District Court acted arbitrarily, without conscientious judgment, and in excess of the bounds of reason, and not in the best financial interest of Black Gold, resulting in substantial injustice to Appellants.

B. The District Court abused its discretion when it ordered the Clerk of Court disperse the funds to Galipeau and St. Peter.

Patterson suffered a manifest injustice when the District Court arbitrarily ordered that nearly \$250,000.00 in professional fees be dispersed from the \$312,833.63 in funds that represent the proceeds from the sale of the Property. "A court abuses its discretion if it exercises granted discretion based on a clearly erroneous finding of material fact, an erroneous conclusion of law, or otherwise acts arbitrarily, without conscientious judgment or in excess of the bounds of reason, resulting in substantial injustice." *Gottlob*, ¶ 7. After the District Court entered its March 7, 2023, Order Allowing Receiver's Professional Fees, Patterson requested

the Court alter or amend the same Order to remove the portion of the Order directing Galipeau and St. Peter's fees be paid from the funds deposited with the Court as a result of the sale of the Property. The Court should not have allowed dispersal of these funds prior to a final disposition of this matter, which has not yet occurred. This premature dispersal of funds amounts to an abuse of discretion by the District Court.

The issue on appeal is inextricably connected to the Court's summary judgment ruling, which centers on the Loan Agreement between Rocky Mountain Equipment of Missoula Montana (Lender) and Black Gold Enterprises, LLC (Borrower) for the amount of \$236,000.00. The Loan Agreement was signed by Patterson as Lender and Pummill as Borrower. Patterson recorded the Loan Agreement with the Missoula County Clerk and Recorder to create a lien on the Property. The third member of Black Gold, Robertson, did not sign the Loan Agreement, nor was it required. Operating Agrmt. Sec. 10.

Patterson argued, and still maintains, that the subject lien is a valid lien. The District Court erred in finding otherwise. Patterson established, and the facts show, that the loan is not subject to Section 10.2 of the LLC's Operating Agreement. The loan is not subject to Section 10.2 because that section only applies to encumbrances of assets outside the ordinary course of business of Black Gold. The Loan Agreement was well within the ordinary course of business of Black Gold as an LLC. *See Lynes v. Helm*, 2007 MT 226, ¶¶ 23-24, 339 Mont. 120, 168 P.3d 651. The Loan

Agreement was entered into to fund improvements to the Property which is well within the ordinary course of business for Black Gold. At the very least, genuine issues of material fact exist regarding whether the Loan Agreement was outside the ordinary course of Black Gold's business.

Robertson was not required to sign the Loan Agreement to express consent. The Black Gold Operating Agreement does not require that a member's consent be expressed in writing. Additionally, Robertson voluntarily accepted the contributions to the Property that were brought about as a result of the Loan Agreement, which constitutes acceptance under Montana law. Mont. Code Ann. § 28-2-503(2).

The District Court, in one sentence, determined that "encumbering the asset of the LLC was undertaken outside the ordinary course of Black Gold's business, and unanimous consent of all Black Gold's members was required." Order Granting Summ. J. at 6. The Court failed to consider the above points in its ruling. It did not provide any meaningful or substantive explanation for how it arrived at its decision. Instead, it made what is effectively a one-sentence conclusory opinion in favor of the Appellees. The Receiver was directed to "deposit the \$312,833.63 necessary to satisfy the lien" with the Clerk of Court for the explicit purpose of holding them until the Court issued a determination with regard to the lien. Order to Deposit Funds. As such, the issue on appeal is closely tied to the District Court's ruling on summary judgment.

The District Court should not have dispersed the funds without first entering a final Judgment in this matter. By doing so, the District Court acted arbitrarily and committed a substantial injustice against Patterson. Patterson has a valid claim to these funds based on the subject lien, and that issue has not been fully adjudicated. Patterson still has a right to appeal the summary judgment ruling, and this right has been infringed upon by the Court's Order dispersing the funds. Patterson has strong arguments that the District Court erred when it granted summary judgment in favor of Plaintiffs on this issue. Justice requires Patterson be given a full opportunity to see his claims through. As such, the Supreme Court must overturn the District Court's Order dispersing the funds to pay the Receiver and Attorney fees.

VII. CONCLUSION

The District Court abused its discretion when it awarded professional fees to the Receiver and Receiver's Attorney. The District Court failed to adequately assess the reasonableness of the requested fees under the appropriate legal standard and failed to consider all relevant facts in reaching its conclusions. Further, the District Court abused its discretion when it ordered that the Clerk of Court disperse the funds to Galipeau and St. Peter. For the reasons contained herein, the Court should reverse

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and/or vacate the orders on appeal.

DATED this 31st day of August, 2023.

BROWN LAW FIRM, P.C.

/s/ Shane A. MacIntyre
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Robert L. Sterup
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CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11(4)(e), I certify that this Appellants' Opening Brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double-spaced; and the word count, calculated by Microsoft Word for Microsoft 365 is 5,386 words, excluding the Certificate of Compliance.

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CERTIFICATE OF SERVICE

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