IN THE SUPREME COURT OF THE STATE OF MONTANA
SUPREME COURT NO. DA 23-0294

CREATIVE GAMES STUDIO LLC and
RICARDO BACH CATER,

Plaintiffs and Appellants,

v.

DANIEL ALVES,

Defendant and Appellee.

REPLY BRIEF OF APPELLANTS

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County
The Honorable Jessica T. Fehr, Presiding

APPEARANCES

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INTRODUCTION

Appellants brought their appeal because the District Court erroneously ruled that considerations of due process prevent the Appellee from being required to defend against the Complaint in Montana. As Appellants explained in their Opening Brief, the parties executed an Operating Agreement with a broad forum-selection clause that consents to Montana jurisdiction for any claims related to the Agreement, which all the claims here do. Appellant is a Montana company with a US citizen, Montana resident Managing Member. As Appellants further explained, consent of this sort eliminates due-process considerations and vests Montana courts with personal jurisdiction, according to ample case law devoted to this issue. The District Court ruled that only claims "arising from" the Agreement are covered, a narrow reading that ignores the Agreement's plain language; ignores the Complaint's contractual claims (which arise directly from the Agreement); and ignores case law holding that even such a narrow reading would cover contract claims as well as related tort claims.

The Appellee has filed an Answer Brief that does not refute these points. Instead, the Appellee raises a host of issues that do not withstand scrutiny and that, even if meritorious, would require a remand and an evidentiary hearing rather than affirmance.

ARGUMENT

Appellee makes arguments at odds with both the record facts and the applicable law. At no point does Appellee demonstrate that the District Court correctly interpreted and applied the Operating Agreement, whose forum-selection clause is broad and waives his objections to personal jurisdiction. Even giving Appellee every benefit of the doubt would show merely that additional fact-finding is necessary and requires remand.

1. *The Accuracy Of The English Version Of The Operating Agreement Would Not Justify Dismissal If Disputed, And Its Accuracy Is Confirmed By The Appellee Anyway*

Appellee begins by challenging the English translation of the Operating Agreement, namely by asserting there is no competent evidence to support the translation's accuracy. Answer Brief at 10-17. This is the translation that Appellee himself demanded in his February 2023 motion to dismiss, as follows:

> Alves believes that it is possible that an English translation of the Operating Agreement may exist in CGS's files. Presumably for the purpose of frustrating Alves' defense in this matter, however, CGS has repeatedly refused to share any such English copy of the Operating Agreement or any of the other CGS documents to which Alves would be entitled as a member or former member of CGS.

Alves Brief in Support of Motion to Dismiss at 3 n.1

When the Appellants supplied the November 2022 translation in their opposition brief, Appellee suddenly argued that the translation should be

disregarded as lacking sufficient evidence to support it. *Alves Reply in Support of Motion to Dismiss* at 3-5. Appellee's about-face was so abrupt that it could cause whiplash. Regardless, there is no reason to conclude that the District Court was justified in dismissing the Complaint.

First, if Appellee is correct that the English wording of the Operating Agreement remains a mystery, this proves only that the District Court committed error by treating the translation as valid and by issuing a ruling on that basis without conducting an evidentiary hearing. The Operating Agreement is a highly relevant piece of evidence that affects the District Court's jurisdiction over the parties. Therefore, to the extent Appellee makes a valid point here, this Court should remand the matter for an evidentiary hearing to clear up the Agreement's meaning and thereby enable an accurate and informed ruling. *See Minuteman Aviation v. Swearingen*, 237 Mont. 207, 212, 772 P.2d 305, 308, 309 (1989) (reversing order of dismissal and remanding to resolve disputed facts affecting personal jurisdiction).

Second, and more important, the record facts show that the wording of the Operating Agreement is no mystery, but rather that Appellee knows exactly what it says and that the English translation indeed is accurate. In his affidavit supporting his motion to dismiss, Appellee confirmed that he understands both English and Portuguese; that he had read, signed, and attached the Portuguese

version of the Agreement; and that he translated the official title of the Agreement to English for the District Court's benefit. *Alves Affidavit* ¶¶ 7, 8, 10, 15. Appellee thus admits his knowledge of the Agreement's terms, and he possesses such knowledge as a matter of law anyway. *See Stowers v. Cmty. Med. Ctr., Inc.*, 2007 MT 309, ¶ 12, 340 Mont. 116, 172 P.3d 1252 ("[I]t is well established in Montana that one who executes a written contract is presumed to know the contract's contents."). **Despite his knowledge of the Agreement's terms in Portuguese and English, Appellee never disputed the accuracy of the English translation.** This silence is deafening and constitutes a waiver of objections to the authenticity of the English translation. *See, e.g.*, *Siebken v. Voderberg*, 2015 MT 296, ¶ 18, 381 Mont. 256, 359 P.3d 1073 (holding that authenticity objections can be waived); *Lindblom v. Employers' Liability Assurance Corp.*, 88 Mont. 488, 493, 295 P. 1007, 1008 (holding that a party makes an admission "by his silence when he ought to speak out"). This same silence defeats objections based on hearsay, as follows:

> (d) Statements which are not hearsay. A statement is not hearsay if:
> . . .
> (2) Admission by party-opponent. The statement is offered against a party and is . . . (B) a statement of which the party has manifested an adoption or belief in its truth.

Mont. R. Evid. 801(d)(2)(B).

Appellee manifested a belief in the truth of the English translation when,

upon receiving it from Appellants, he failed to dispute its accuracy despite having the ability to do so. Silence under such circumstances constitutes an admission that defeats a hearsay objection. *See United States v. Schaff*, 948 F.2d 501, 505 (9th Cir. 1991) ("Silence in response to the statement of another is an adoptive admission under Rule 801(d)(2)(B) if the district court makes a determination that, under the circumstances, an innocent defendant normally would respond to the statement.") (citations omitted).

Third, the translation is self-authenticating as a foreign public document per Mont. R. Evid. 902(3). As shown in the attachments to Appellant's opposition to the motion to dismiss, the translator (Leonardo Pinto Andrade De Abreu) avers being authorized by the laws of Brazil to give the official translation of the Operating Agreement. Moreover, all parties had a reasonable opportunity to investigate the authenticity and accuracy of the translation, so the Court may for good cause treat the translation as authentic without final certification by a diplomatic official. There is good cause here, in light of how the District Court already treated the translation as accurate in making its ruling, and how Appellee never disputed the translation's accuracy despite being able to do so.

Fourth, the translation is of a document whose language has legal effect and governs the parties' legal rights, so it is not hearsay. *See United States v. Pang*, 362 F.3d 1187, 1192 (9th Cir. 2004); *Rhodes v. Rhodes Music Corp.*, 35 Fed.

Appx. 686, 687 (9th Cir. 2002).

Fifth, even if all of the foregoing points are incorrect, Appellants meet the applicable burden of proof as stated in Appellee's own cited authority. Appellee cites a decision that reverses a dismissal because plaintiffs are "entitled to have their allegations viewed as true and have disputed facts construed in their favor" when no evidentiary hearing is held, as is the case here. *Metcalfe v. Renaissance Marine, Inc.*, 566 F.3d 324, 330-32 (3d Cir. 2009). Appellee cites two other decisions holding that even if a defendant presents conflicting evidence regarding personal jurisdiction, such conflicts should be interpreted in the plaintiff's favor if no evidentiary hearing is held (again the case here). *AMA Multimedia, LLC v. Wanat*, 970 F.3d 1201, 1207 (9th Cir. 2020); *Diamond Crystal Brands, Inc. v. Food Movers Int'l*, 593 F.3d 1249, 1257 (11th Cir. 2010). Appellee did not offer a conflicting English translation of the Operating Agreement, so the District Court was correct to treat the existing translation as accurate. Where the District Court went wrong was interpreting and applying that language in a narrower manner than allowed by applicable law, as discussed in more detail below.

To summarize, Appellee's qualms about the evidence supporting the English version of the Operating Agreement are hollow; they are contradicted by Appellee's own conduct; and they do not justify dismissal of the Complaint.

2. *The Operating Agreement Gives A Clear And Unambiguous Waiver Of Personal Jurisdiction*

Appellee argues that certain words in the Operating Agreement's forum-selection clause are ambiguous and do not demonstrate a clear waiver of objections to personal jurisdiction in Montana, at least according to his idiosyncratic reading. *Answer Brief* at 17-22.

First, Appellee takes aim at the word "settle" to argue that its ordinary usage does not connote a court's power to "adjudicate" a dispute between the parties. *Answer Brief* at 19. Yet it is common for forum-selection clauses to use the word "settle" in this manner, which is to mean that the court has been granted authority to resolve the dispute in favor of one party versus another. *See Monarch Nut Co., LLC v. Goodnature Prods.*, No. 1:14-CV-01461 AWI SKO, 2014 U.S. Dist. LEXIS 168276, at *4 (E.D. Cal. Dec. 3, 2014); *Richards v. Lloyd's of London*, 135 F.3d 1289, 1292 (9th Cir. 1998); *Seagal v. Vorderwuhlbecke*, 162 Fed. Appx. 746, 747, 748 (9th Cir. 2006). Decisions cited by Appellants and Appellee also show that the word "adjudicate" does not appear or is not required to appear in a forum-selection clause. *Yankeecub, LLC v. Fendley*, No. CV-21-42-BU-BMM, 2021 U.S. Dist. LEXIS 153110, at *7 (D. Mont. Aug. 10, 2021); *Milanovich v. Schnibben*, 2007 MT 128, ¶ 4, 337 Mont. 334, 160 P.3d 562. The mere fact that Appellee has a unique, subjective understanding of "settle" does

not create an ambiguity or control the effect of the Agreement's standard language. *See, e.g.*, *Mary J. Baker Revocable Trust v. Cenex Harvest States, Coops., Inc.*, 2007 MT 159, ¶¶ 19-21, 338 Mont. 41, 164 P.3d 851; *Meine v. Hren Ranches, Inc.*, 2020 MT 284, ¶ 23, 402 Mont. 92, 475 P.3d 748.

Second, Appellee takes aim at the final phrase of the forum-selection clause, "with the exception of any other, however privileged it may be." Answer Brief at 21, 22. This language *removes* any putative ambiguity by emphasizing that all other courts have been excepted as forums for resolving a covered dispute, regardless of what power those courts might ordinarily have, a type of wording that this Court has found to be unambiguous. *See State ex rel. Polaris Indus. v. District Court*, 215 Mont. 110, 111, 695 P.2d 471, 472 (finding no ambiguity in a clause that "provides that no action on claims arising from the Agreement may be maintained . . . in any court except in Hennepin County, Minnesota District Court, or in the United States District Court in Minneapolis, Minnesota."). A similar clause was treated as crystal clear in another decision, as follows:

> The agreements executed by the individual Plaintiffs also contain a forum selection clause, which states, in relevant part:
>
> > Governing Law; Consent to Jurisdiction. . . . The parties hereto hereby irrevocably and unconditionally consent to the sole and exclusive jurisdiction of the courts of Massachusetts and the United States District Court located in Massachusetts for any action, suit or proceedings arising out of or relating to this agreement or

> the Proposed Transaction, and agree not to commence any action, suit or proceedings related thereto **except in such courts.**
>
> . . .
>
> The Court finds that the mandatory language of the forum selection clause makes it clear that the parties agreed that venue lies exclusively in the courts of Massachusetts.

Universal Operations Risk Mgmt., LLC v. Global Rescue LLC, No: C 11-5969 SBA, 2012 U.S. Dist. LEXIS 94740, at *5, *12 (N.D. Cal. July 6, 2012) (emphasis added).

Appellee, however, reads this emphatic language as somehow contradicting the remainder of the forum-selection clause, thereby flouting the rudimentary norm to avoid repugnancies whenever possible. Mont. Code Ann. § 28-3-204.

Even if Appellee's strained interpretation of the forum-selection clause could support an ambiguity, this would mean once again that the District Court needs to gather and analyze more evidence to resolve the ambiguity. *See Mary J. Baker Revocable Trust*, 2007 MT 159 at ¶ 21. Appellee's argument does not support affirmance of the dismissal, which the District Court granted without an evidentiary hearing and on the basis of a belief that the forum-selection clause is unambiguous.

3. *The Operating Agreement's Waiver Of Personal Jurisdiction Is Reasonable According To Appellee's Own Cited Authority*

Appellee argues that enforcing the forum-selection clause would be "unreasonable" because Montana is a "seriously inconvenient forum" for him to defend against the Complaint. *Answer Brief* at 22-27.

This first problem with this argument is that it mischaracterizes what "unreasonable" means in this context, as shown in Appellee's own cited authority of *Milanovich*, 2007 MT 128 at ¶ 11: "A forum-selection clause will be found to be unreasonable and unenforceable if the agreement is not 'deliberately and understandingly made,' and if the contractual language does not 'clearly, unequivocally and unambiguously express a waiver' of personal jurisdiction." Matters of personal convenience have no relevance to this test. For reasons already stated above and in Appellants' initial brief, the record shows that Appellee admits understanding and signing the Operating Agreement, whose waiver of personal jurisdiction is clear and covers the claims at issue here. Under these circumstances and the test set forth in *Milanovich*, enforcement of the forum-selection clause is reasonable.

Appellee goes on to cite federal case law holding that matters of convenience might still play a role here. Answer Brief at 22 (citing *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *Burger King Corp. v. Rudzewicz*, 471

U.S. 462 (1985)). But modern jurisprudence still rejects considerations of convenience when deciding whether to enforce a clear forum-selection clause. *See Rattler Holdings, LLC v. UPS*, 505 F. Supp. 3d 1076, 1085 (D. Mont. 2020) ("The federal test for the enforcement of a valid forum selection clause does not permit a court to consider the private inconvenience to the parties, . . . **and the Montana Supreme Court's articulation of its public policy has never hinged on any distinction between a foreign or domestic choice of forum**.") (emphasis added). It is also worth noting that *The Bremen* concerns a narrow question of "the correct doctrine to be followed by federal district courts sitting in admiralty" (*Id.* at 10), and *Burger King* does not even concern a forum-selection clause. There is no discernible reason to rely on those decisions to expand the test of reasonableness employed by this Court.

Finally, even if this Court were now to expand its test of reasonableness to include considerations of personal convenience, this would once again mean that the matter should be remanded to the District Court for fact-finding and an evidentiary hearing. This is what happened in *The Bremen*, so to the extent *The Bremen* applies here, the same should occur rather than the immediate dismissal issued by the District Court.

4. *The Operating Agreement's Waiver Of Personal Jurisdiction Applies To All Claims Asserted By The Appellants*

As Appellants explained with ample legal citations in their opening brief, the forum-selection clause in the Operating Agreement is broad and grants the District Court jurisdiction over all of the claims appearing in the Complaint, *even if* the Operating Agreement had used the "arising from" rather than the "related to" wording as erroneously asserted by the District Court. *Opening Brief* at 11-15 (citations omitted).

Appellee ignores almost all of the legal authorities cited by Appellants and does not bother to address or distinguish them. Instead, the Appellee asserts (without citing legal authority) that the distinction between "arising from" and "related to" is insignificant. *Answer Brief* at 27-29. Not only is the distinction highly significant for reasons Appellants already made clear, but Appellee completely ignores how dismissal would be improper even if the clause instead had used the phrase "arising from."

The only decision cited by Appellants that Appellee attempts to distinguish is *Peeler v. Rocky Mt. Log Homes Can., Inc.*, 2018 MT 297, 393 Mont. 396, 431 P.3d 911. *Answer Brief* at 29 n.5. Specifically, Appellee argues that *Peeler* concerns an arbitration clause and cannot be analogized to a forum-selection clause. Yet an arbitration clause ***is*** a type of forum-selection clause. *See*

Polimaster Ltd. v. RAE Sys., 623 F.3d 832, 837 (9th Cir. 2010) ("The requirement of arbitration at the defendant's site is effectively a forum selection clause[.]"). This is why courts rely upon arbitration-clause cases when interpreting and applying generic forum-selection clauses. *See, e.g.*, *Seagal*, 162 Fed. Appx. at 747, 748. And this is why *Peeler*'s holding is highly relevant here: "[C]ontract language broadly requiring arbitration of all disputes 'arising hereunder' or 'out of' the larger contract extend to and encompass arbitration of all claims predicated on alleged facts that relate to the contract object or duties regardless of whether technically based on legal duties that arise from the contract or those that arise independently as a matter of law." This holding is consistent with the other decisions cited by Appellant, and which Appellee has not bothered to discuss.

Appellee goes on to repeat the District Court's view that the "thrust" of the Complaint concerns alleged torts rather than alleged breaches of the Operating Agreement. *Answer Brief* at 30. This ignores that Counts I and II of the Complaint (i.e., half of the claims) concern direct breaches of the Operating Agreement's express and implied duties. This also ignores that the tort claims in Counts III and IV most certainly relate to those duties as well, since Appellee is alleged to have violated his duty not to compete with Creative Games Studio LLC. It is rudimentary that a tort claim can stem from malfeasance that also violates a contractual duty. *See Plakorus v. Univ. of Mont.*, 2020 MT 312, ¶¶ 15, 16, 402

Mont. 263, 477 P.3d 311. All claims in the Complaint clearly relate to the Operating Agreement in some way, which is all that is necessary to enforce the broad forum-selection clause here.

In short, Appellee has not offered a meaningful argument to show that the claims fall outside the scope of the forum-selection clause, but rather merely repeats the District Court's erroneous conclusions without providing any legal authority to offset or refute the ample authority cited by Appellants.

5. *The Doctrine Of Forum Non Conveniens Is Not Applicable And Would Not Justify Dismissal Even If It Were*

For his final argument, Appellee again asserts that matters of personal convenience outweigh enforcement of the forum-selection clause and justify the District Court's dismissal. *Answer Brief* at 31-36.

As already explained above herein, matters of convenience do not influence whether a forum-selection clause is clear, applicable, and enforceable. *See Rattler Holdings*, 505 F. Supp. 3d at 1085. This conclusion is supported by Appellee's own cited decision of *San Diego Gas & Elec. Co. v. Ninth Judicial Dist. Court*, 2014 MT 191, ¶¶ 22-26, 375 Mont. 517, 329 P.3d 1264, **where this Court rejected a convenience argument because the forum-selection clause required litigation in the allegedly inconvenient forum**. Contrary to Appellee's assertion, *San Diego Gas* does not apply the doctrine of forum non conveniens to override a

forum-selection clause.

Also as explained above herein, a remand would be necessary even if Appellee is correct that matters of his convenience should be weighed, since the District Court would need to conduct thorough fact-finding as stated in Appellee's other cited decision of *The Bremen*, 407 U.S. at 15. Although Appellee now argues that the current record is sufficient to support dismissal for forum non conveniens, he cites decisions that do not concern forum-selection clauses. Answer Brief at 32 n.6. (citing *Harrington v. Energy West, Inc.*, 2017 MT 141, 387 Mont. 497, 396 P.3d 114; *North Star Dev., LLC v. Mont. Pub. Serv. Comm'n*, 2022 MT 103, 408 Mont. 498, 510 P.3d 1232; *Nelson v. State*, 2008 MT 336, 346 Mont. 206, 195 P.3d 293). *North Star* and *Nelson* also do not concern the doctrine of forum non conveniens.

CONCLUSION

For the foregoing reasons, Appellants repeat their request that the Court enter an Order reversing the District Court's dismissal of the Complaint and remanding the case to the District Court for further proceedings.

Respectfully submitted, this 25th day of January, 2024.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with Rule 11(4)(e) of the Montana Rules of Appellate Procedure. The document is double-spaced and printed in Times New Roman, proportionately spaced, in 14-point typeface. The total word count does not exceed 5,000 words, as calculated by this party's word processing system, excluding the tables and certificates.

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CERTIFICATE OF SERVICE

I hereby certify that, on the 25th Day of January, 2024, a true and correct copy of the foregoing REPLY BRIEF OF APPELLANTS was duly served upon the following named person(s):

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I, Matthew I. Sack, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 01-25-2024:

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