IN THE SUPREME COURT OF THE STATE OF MONTANA

Supreme Court No. DA-23-0647

Lisa L. Swift,

Petitioner/Appellee

vs.

Matthew T. Swift,

Respondent/Appellant

On Appeal from the Eighteenth Judicial District Court, Gallatin County,
Cause No. DR-2023-177D, Hon. Judge Andrew Breuner

Appellant's Opening Brief

APPEARANCES

Robert K. Baldwin
Andrew N. Davis
Baldwin Law, PLLC
P.O. Box 10850
Bozeman, MT 59719
(406) 551-9993
rbaldwin@baldwinlawfirm.com
adavis@baldwinlawfirm.com

Attorneys for Matthew Swift

CJ Cook
Pierce Teeuwen
Cook Phelan Attorneys at Law
389 S. Ferguson Ave., Suite 205
Bozeman, MT 59718
(406) 924-3410
cj@cooklawmt.com
pierce@cooklawmt.com

Attorneys for Lisa L. Swift

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES

This is a divorce matter between Lisa (petitioner/appellee) and Matthew (respondent/appellant). Lisa sought an order of contempt against Matthew for allegedly violating the automatic economic restraining order of M.C.A. § 40-4-126 (the "AERO"). After a hearing, the court entered an order holding Matthew in contempt but providing that he could clear the contempt by taking certain actions.

Matthew presents the following issues:

1. Did the district court err by holding Matthew in contempt for conduct that: pre-dated service of the AERO; was not a violation of a clear prohibition in the AERO; was not described in the statement of the charge; for which there was no substantial evidence; and otherwise?
2. Did the district court err by requiring Matthew to perform certain acts, including acts ancillary to the contempt charges and findings, as a condition of clearing contempt to avoid jail?

STATEMENT OF THE CASE

This is a marital dissolution proceeding between Lisa and Matthew. They have no children in common; custody is not an issue.

At the outset, the clerk entered the required AERO per § 40-4-126. Doc. 3.

Lisa moved for contempt, alleging Matthew violated the AERO. Doc. 20

("Lisa's Motion"). That motion was fully briefed. *See* Docs. 17 (Matthew's opposition brief), 20 (Lisa's motion), and 22 (Lisa's reply).[1]

Matthew filed his own motion to compel compliance with the AERO but styled his as a motion for injunctive relief rather than a motion for contempt. Doc. 34. Lisa opposed. Doc. 36.

The court set both matters for hearing at the same time. Docs. 23 (original contempt warrant setting hearing); 26 and 32 (postponing contempt hearing); 35 (setting injunction hearing at same time).

The court heard the matters on Sept. 8 and 12, 2023. *See* Docs. 39 and 41 (minute entries); *see also* Transcripts of Proceedings.[2]

Ultimately, the court entered its *Order After Hearing on Motion for Contempt and Cross Motion for Injunctive Relief* dated October 5, 2023 (Doc. 44) (the "Order"). Matthew appeals from the Order.

---

[1] Lisa served her motion on May 23, 2023, but did not file it until June 23. *See* ROA; *see also* Doc. 21. Matthew's opposition brief thus precedes the motion in the docket.

[2] This brief refers to the two days of transcripts, i.e., Sept. 8 and Sept. 12, 2023, as "Trans. I" and "Trans. II," respectively.

STATEMENT OF FACTS

This is an appeal from an order holding Matthew in contempt, and requiring him to take certain actions to avoid jail. Much of Matthew's appeal hinges upon a disconnect between the accusations of Lisa's motion, the Statement of Charge contained in the Warrant (App. 3 hereto), the evidence adduced at the hearing, the court's findings of contempt, and the court-ordered remedial measures. Thus, for example, Matthew argues that the court improperly held him in contempt for conduct Lisa never accused him of, which was not alleged in the Statement of Charge, and was not proven. Matthew also contends that the court ordered him to take remedial measures that were disconnected from any finding of contempt.

Because that is the nature of this appeal, it will be more efficient to discuss factual details in the context of each finding of contempt or remedial measure from which Matthew appeals. Here, Matthew will give an overview of the background facts, Lisa's accusations, the district court's charges, and the Order.

I. BACKGROUND.

Matthew and Lisa married on October 15, 2020, and separated just over two years later in January 2023. Doc. 1, ¶¶ 1, 2. On April 10, 2023, Lisa:

1. Obtained an ex parte temporary order of protection ("TOP") prohibiting Matthew from coming home or even going to his place of business, where Lisa claimed to also work. Lisa's Motion, pp. 3-4, ¶¶ 12, 15, 16.
2. Filed the petition in this matter, seeking a divorce from Matthew. *See* Doc. 1; *see also* Lisa's Motion, p. 3, ¶ 12.

Matthew was served with the summons, petition for dissolution, and AERO on April 19, 2023. *See* Doc. 5 (aff. of service); *see also* Lisa's Motion, pp. 1, 5, ¶ 14; Lisa's Declaration,[3] p. 3, ¶ 16. The Warrant of Contempt recounts that the AERO was "served on [Matthew] on April 19, 2023." Doc. 23, p. 1; *see also* Doc. 5.

A. Matthew's pre-marital businesses.

Prior to their marriage, Matthew owned and operated several businesses.

Matthew owned and operated Swift Delivery Services, Inc. ("Swift Delivery"). *See* Lisa's Motion, p. 2, ¶ 3 (listing the businesses owned by the parties, and those in which Lisa claimed a "direct" ownership interest); *see also* Trans. II, p. 7 (Matthew testifying as to ownership). Swift Delivery owned a fleet of vehicles and employed drivers to deliver packages for FedEx Ground.

Matthew also owned MG Logistics, Inc. ("MG Logistics"). *See* Lisa's Motion, p. 2, ¶ 3; Trans. II, p. 6. MG Logistics was also a package delivery service,

[3] Exhibit 1 to her Motion, Doc. 20 ("Lisa's Dec.").

serving a different territory for FedEx Ground.

Matthew also owned the Fleet Shop, LLC ("Fleet Shop"). *See* Lisa's Motion, p. 2, ¶ 3; Trans. II, p. 6. Fleet Shop operates an automotive maintenance and repair facility in a rented shop building, existing primarily to service the vehicles owned by Swift Delivery, MG Logistics and, later, the parties' jointly-owned car rental business, Adventure Bound. Lisa's Motion, p. 2, ¶ 4; Trans. II, p. 6-7.

B. Lisa's pre-marital business.

Prior to the marriage, Lisa operated a cleaning business which she called Consider It Done. Lisa's Motion, p. 2, ¶ 5.

C. Jointly-owned businesses.

During their marriage, the parties started Adventure Bound MT, LLC ("Adventure Bound"). It owned a fleet of vehicles that were rented out to customers through the online platform, Turo. Lisa's Motion, p. 2, ¶¶ 3, 6; Lisa's Dec., p. 3, ¶ 18; Trans. II., pp. 7-8. Turo may be thought of as a car-rental counterpart to VRBO or Airbnb, by which participants, like Adventure Bound, can rent vehicles to customers through Turo's online peer-to-peer platform. *See* Trans. II, pp. 7-8.

The parties also own Ballistic Ammo Co. Lisa's Motion, p. 2, ¶ 3; Lisa's

Dec., p. 2, ¶ 8; Trans. II., pp. 8-9. It does not conduct business and has no employees. *Id.*, pp. 8-9.

II. LISA'S CONTEMPT MOTION.

Lisa's Motion accused Matthew of violating the AERO in various ways, including:

- "[P]urposefully and intentionally sabotaging Lisa's ability to operate" Adventure Bound. Lisa's Motion, pp. 7-8.
- Removing Lisa from access to certain business bank accounts. *Id.*, p. 8.
- Selling vehicles. *Id.*, p. 8.
- "[R]efus[ing] to deposit income into the joint account." *Id.*, p. 8.
- Removing her from bank accounts for MG Logistics, the Fleet Shop, and Swift Delivery on April 14—before he was served with the AERO. *Id.*, p. 9.
- Removing her from bank accounts for Adventure Bound, Ballistics Ammo, and Swift Delivery, on May 10, 2023, although she conceded that she had been promptly added back to the Adventure Bound account. *Id.*, p. 9.[4]

[4] Lisa also expressed fear that Matthew would, as some point in the future, improperly divert a tax credit that she asserted was expected, but presented no evidence such a credit was actually due to the parties. Lisa's Motion, pp. 9-10.

- Ceasing payments from Matthew's businesses to her business, Consider It Done, of $3,600 per month as they had previously done in return for some janitorial and other services. *See id.*, p. 2, ¶ 5, p. 5, ¶ 25; Lisa's Dec., p. 1, ¶ 4; p. 3, ¶ 20.[5]

In some ways, Lisa's Motion resembled a motion for interim spousal support (seeking temporary financial payments during the divorce) more than a contempt motion (seeking compliance with an order against hiding or disposing of assets). Thus, for instance, Lisa's Motion complained that, since she filed for divorce, Matthew was no longer depositing his income into the parties' joint account "to cover household expenses." Lisa's Motion, p. 5, ¶ 22; p. 8. She complained that she "is no longer receiving the $3,600 per month" from Swift Delivery Services and "has no sources of income." *Id.*, pp. 5-6, ¶ 25. She complained of uncovered medical bills and pointed out that the parties had been paying for Matthew's appendectomy. *Id.*, p. 5, ¶ 23; Lisa's Dec., p. 3, ¶¶ 23-24. She worried about not being able to pay bills, and the possibility of having her credit ruined. Lisa's Motion, pp. 5-6, ¶ 25; Lisa's Dec., p. 4, ¶ 28. She requested "immediate intervention to prevent … further financial harm to [her] and the businesses."

[5] Lisa peppered her motion with other barbs and accusations. However, Lisa's accusations that did not result in a finding of contempt are irrelevant to this brief.

Lisa's Motion, p. 6, ¶ 27; Lisa's Dec., p. 4, ¶ 29.

Matthew does not concede Lisa's claim to be without funds. Hearing Ex. 1, the bank statements for the parties' joint account, show that in the four months after filing for divorce, Lisa received some $15,000 from Matthew's paychecks, draws on the businesses, and payments through Consider It Done. Plus, she had her own paycheck and the income from Adventure Bound that she was depositing into her own, separate account. Trans. II, pp. 110, 122-23. The point of this appeal is not whether Lisa needed interim spousal support, but that she treated the contempt motion as a vehicle for such payments. More significantly, the court also seemed to consider the contempt motion as a proxy for an order for interim spousal support. *See infra*.

III. THE WARRANT OF CONTEMPT.

Indirect contempt—that "not committed in the immediate view and presence of the court or judge"—requires a warrant to bring the would-be contemnor before the court. M.C.A. § 3-1-513. The warrant must contain an "adequate and specific statement of the charge." *Id.*

Lisa submitted a proposed warrant and statement of charge with her Motion. *See* Lisa's Motion, p. 1 (asking the court to "issue the attached Warrant"). Although her later reply purposed to "supplement" her contempt motion with

new accusations,[6] Doc. 22, Lisa submitted no updated proposed Statement of Charge.

The court issued the warrant, giving Matthew notice of the charges against him, i.e., that he had failed to comply with the AERO in four enumerated (although as to the fourth charge, rather vague) ways:

1. Removing Lisa from business accounts for Adventure Bound, Ballistic Ammo and Swift Delivery on May 10, 2023 (without mentioning the April 14, removal from certain other accounts);
2. Interfering with the "business activities of Adventure Bound" by telling the mechanics "employed by the parties" to not work on the vehicles;
3. Failing to make the $3,600 per month payment to Consider It Done; and
4. "Actively moving, hiding, and selling [unspecified] business assets thereby causing waste to the marital estate."

Warrant (Doc. 23), p. 2.

[6] Raising new matters in a reply is improper. *See Kapor v. RJC Inv., Inc.*, 2019 MT 41, ¶ 29, 394 Mont. 311, 325–26, 434 P.3d 869, 878 ("Reply briefs filed in the district court must be confined to new matters raised in the response brief."). In any event, those new accusations were not included in the Statement of the Charge.

IV. MATTHEW'S MOTION FOR INJUNCTIVE RELIEF.

Separate from Lisa's contempt motion, Matthew sought injunctive relief, requiring Lisa to return certain funds she had taken from the Adventure Bound account and to restore Matthew to the Adventure Bound email and Turo accounts. *See* Doc. 34 ("Matthew's Motion"). Lisa's opposition brief contained an entirely new request for relief: "authority to liquidate Adventure Bound." Doc. 36., pp. 4-7. Lisa did not cross-move or seek issuance of a new Statement of Charge regarding liquidation of Adventure Bound.

V. THE HEARING.

The hearing addressed both Lisa's Motion and Matthew's Motion for injunctive relief. A banker from Opportunity Bank testified as to the bank accounts, Matthew's bookkeeper testified, and Matthew and Lisa testified. The specific evidence regarding the portions of the Order from which Matthew appeals is addressed below, in context. Stated broadly, the evidence showed that Matthew had:

- Removed Lisa from some business accounts on April 13, before being served with the AERO.

- Attempted to add a bookkeeper to the business accounts on May 10 (after the AERO) and, in the process, Lisa had somehow been removed as a signer on one account for two days.
- Also before the divorce and AERO, had ceased making the monthly payments to Consider it Done.
- Used a covered utility trailer owned by Swift Delivery.
- Not instructed any mechanics not to work on Adventure Bound vehicles.
- Like Lisa, been depositing his paycheck into a separate account since the divorce instead of into the parties' joint account.

As alluded to above, the hearing took on tones of a hearing on a motion for temporary spousal support. Lisa's counsel elicited much testimony from her about the parties' expenditures. Trans. II, pp. 98-103. Lisa complained about lack of funds in the joint account, and that her salary is not enough to make ends meet. *Id.*, pp. 109-112. She worried about having to pay rent after the martial home sold. *Id.*, p. 112. Thus, Lisa testified that she wanted to "get access to $3,600 dollars a month" so that she can meet her needs. *Id.*, p. 113.

Her "request to the court today" was that she continue to receive $3,600 per month. *Id.*, pp. 123-124. And, she would like $10,000 to cover attorney's fees. *Id.*, pp. 125, 129. Lisa's attorney even characterized her request in terms of spousal

maintenance: "I think we're requesting if she could just get the $3,600 dollars a month, almost as a kind of spousal maintenance at least if that continues…." *Id.*, p. 165.

The district court bought into that approach, by which the contempt proceeding was about shifting money from Matthew to Lisa to meet her claimed ongoing financial needs. Thus, when counsel was done questioning Matthew, the court questioned him, raising concerns about Lisa "having access to money resources for her own day-to-day expenses," and questioning about the $3,600 payment and Lisa's "access to business money for purposes of her own spending." *Id.*, pp. 84-85.

The court confessed it was blurring the lines: "I am not couching this as a spousal support or a spousal maintenance or family support. It could become that, in some ways it may be better addressed that way." *Id.*, p. 158.

STANDARD OF REVIEW

Contempt orders in family law cases may be appealed "only when the judgment or order appealed from includes an ancillary order that affects the substantial rights of the parties involved." M.C.A. § 3-1-523(2); *see also* Rule 6(3)(j), M. R. App. P.

This Court reviews such a contempt order "to determine whether the

district court acted within its jurisdiction and whether the evidence supports the contempt." *Marez v. Marshall*, 2014 MT 333, ¶ 23, 377 Mont. 304, 340 P.3d 520 (quoting *Novak v. Novak*, 2014 MT 62, ¶ 37, 374 Mont. 182, 320 P.3d 459).

The "standard of review of a district court's findings is whether substantial evidence supports those findings. Substantial evidence is the amount of relevant evidence which a reasonable mind might accept as adequate to support a conclusion." *Lee v. Lee*, 2000 MT 67, ¶ 20, 299 Mont. 78, 996 P.2d 389 (citing *In re Nevin*, 284 Mont. 468, 945 P.2d 58 (1997)). Although substantial evidence "may be less than a preponderance," it "must be more than a 'mere scintilla.'" *Fish v. Harris*, 2008 MT 302, ¶ 8, 345 Mont. 527, 192 P.3d 238 (quoting *Upky v. Marshall Mountain, LLC*, 2008 MT 90, ¶ 22, 342 Mont. 273, 180 P.3d 651).

"The legal conclusions of a district court receive de novo review by this Court." *Pfeil Acquisitions LLC v. Gallatin Cnty. Conservation Dist.*, 2022 MT 237, ¶ 13, 411 Mont. 18, 521 P.3d 47. That standard, by which this Court asks if the district court "correctly interpreted the law," also applies in a family law contempt appeal. *See Lutes v. Lutes*, 2005 MT 242, ¶ 7, 328 Mont. 490, 121 P.3d 561 (citing *Marriage of Strong v. Strong*, 2000 MT 178, ¶ 11, 300 Mont. 331, 8 P.3d 763).

SUMMARY OF ARGUMENT

Argument I: This appeal is proper because the Order is not a "lone contempt order," but also contained ancillary orders that affected Matthew's substantial rights.

Argument II: One may not be held in contempt for: violation of an order that does not clearly prohibit the conduct; violation of an order of which he is unaware; or conduct not mentioned in the Statement of the Charge.

Argument III: The Order erroneously held Matthew in contempt for conduct that predated his service with the AERO, which the AERO did not clearly prohibit, which was not listed in the Statement of the Charge, which even Lisa had not alleged as a violation, and which were not supported by substantial evidence. It also erred in the remedial measures it required of Matthew to avoid jail.

ARGUMENT

I. THIS APPEAL IS PROPER.

The Order is properly appealable only if it "includes an ancillary order entered as a result of the contemptuous conduct which affects the substantial rights of the parties involved." Rule 6(3)(j), M. R. App. P. The Order does.

In *Lee,* the district court "not only held Johnson in contempt, it also issued ancillary orders" determining the value of the property involved, requiring

compensation, offsetting certain obligations, and denying a motion for an offset. *Id.*, ¶ 38. It was precisely that holding that the Legislature codified in § 3-1-523(2). *See* 2001 Montana Laws Ch. 136 (S.B. 20).

The Order here similarly not only held Matthew in contempt, but required Matthew to: (1) restore Lisa's access to "any and all banking accounts" (not just the ones mentioned in the Statement of the Charge); (2) remove "all impediments to Lisa's operation of Adventure Bound" (including forbidding Matthew from interfering with her "winding down of that business," a form of relief not mentioned at all in Lisa's briefing on the contempt motion or the Statement of Charge); (3) required him to pay $10,800 to Consider It Done; (4) required Matthew to deposit "not less that [sic – than] $10,000 into the parties joint checking account for Lisa's exclusive use" (apparently in response to Lisa's accusation that Matthew had stopped depositing his paycheck into the joint account when he moved out—a complaint again not mentioned in the Statement of Charge); and (5) required him to return certain equipment to the family home. It also adjudicated Matthew's injunction motion. *See In re Marriage of Marez & Marshall*, 2014 MT 333, ¶ 25, 377 Mont. 304, 340 P.3d 520 (order was not a "lone contempt order" because single order decided several motions and adjusted the parties' rights).

The ancillary orders of the district court affected substantial property rights of the parties. The court ordered Matthew to pay tens of thousands of dollars, restore Lisa to bank accounts so she could sweep thousands more, and watch helplessly as Lisa liquidated a profitable company in a most inefficient way. The Order contained, "not only an order of contempt, but also … determine[d] the rights of the parties as a result of the contemptuous conduct." *Lee*, ¶ 37. The "family law exception" exists for just such a situation where the court had jurisdiction but acted arbitrarily. *Lee*, ¶¶ 35-37.

II. ONE CANNOT BE HELD IN CONTEMPT UNLESS THE ORDER IS CLEAR, THE CONTEMNOR KNOWS OF THE ORDER, AND THE STATEMENT OF THE CHARGE GIVES NOTICE OF THE PARTICULAR CONDUCT ALLEGED TO BE CONTEMPTUOUS SO THE ALLEGED CONTEMNOR CAN DEFEND.

A. The order must be clear.

"We have held that a party may not be held in contempt of court for violating an order, unless the terms of the order are definite, certain, and specific." *Sanders v. State*, 1998 MT 62, ¶ 24, 288 Mont. 143, 955 P.2d 1356 (citing *Goodover v. Lindey's Inc.*, 257 Mont. 38, 42, 847 P.2d 699, 701 (1993)).

Goodover, in turn, cited *Mr. Steak, Inc. v. Sanquist Steaks, Inc.*, 245 N.W.2d 837, 838 (Minn. 1976) and *Sellman v. Sellman*, 209 A.2d 61, 62 (Md. 1965). *Mr. Steak* cited a prior case that discussed contempt proceedings in the divorce context, which cautioned that "one essential prerequisite is that the prior decree or order of

a court sought to be enforced by contempt must clearly define the acts to be performed by the alleged contemnor." *Id.* at 838 (citing *Hopp v. Hopp*, 156 N.W.2d 212 (Minn. 1968)). *Sellman* had held that "[b]efore a person may be held in contempt for violation of an order or decree, it must be definite, certain and specific in its terms." *Id.* at 62.

Thus, this court has affirmed a finding of contempt in face of a "clear violation" of an order. *Animal Found. of Great Falls v. Montana Eighth Jud. Dist. Ct.*, 2011 MT 289, ¶ 19, 362 Mont. 485, 265 P.3d 659. On the other hand, violation of a term is not contempt if the court had not "specifically ordered its imposition." *Sanders*, ¶ 24.

"If there is no command, there is no disobedience." *Id.* (quoting *Goodover*, 257 Mont. at 42, 847 P.2d at 701). "[A]mbiguities in the underlying order should be resolved in favor of the alleged contemnor." *Teamsters Loc. Union No. 96 v. Washington Gas Light Co.*, 466 F. Supp. 2d 360, 362 (D.D.C. 2006) (citing *Common Cause v. Nuclear Regul. Comm'n*, 674 F.2d 921, 927-28 & n. 13 (D.C. Cir. 1982)).

As one court has explained:

> Whether an order is sufficiently clear and unambiguous is a necessary prerequisite for a finding of contempt because the contempt remedy is particularly harsh ... and may be founded solely upon some clear and express direction of the court.... One cannot be placed in contempt for failure to read the court's mind. This is a longstanding tenet of

the law of contempt.

In re Leah S., 935 A.2d 1021, 1028 (Conn. 2007) (internal citations and quotations omitted).

B. The contemnor must know of the order.

An AERO does not bind a respondent (like Matthew) until he is served. *See* § 40-4-126(1)(8). By itself, that statute invalidates any order of contempt for violation of the AERO before service on Matthew.

That dovetails with the law of contempt. "In a constructive contempt, the essence of whether the court's order has been abused is whether the party accused had knowledge of the order." *In re Graveley*, 188 Mont. 546, 556, 614 P.2d 1033, 1039 (1980) (*citing Hand v. Hand*, 131 Mont. 571, 312 P.2d 990 (1957)); *see also State ex rel. Foss v. Dist. Ct.*, 216 Mont. 327, 332, 701 P.2d 342, 346 (1985) (affirming contempt finding against one who "had notice of his obligation and willfully violated it").

Hand had explained that it "is generally held that in order to punish for constructive contempt, it must appear that the order on which the contempt proceeding is based was served on the accused." 131 Mont. at 579, 312 P.2d at 994.

C. The Statement of the Charge must inform the contemnor of the alleged violation.

Contempt outside the immediate view and presence of the court or judge is "indirect or constructive contempt." M.C.A. § 3-1-512. In such a case, a warrant may issue, as it did in this case. § 3-1-513. The warrant "must be accompanied by an adequate and specific statement of the charge." *Id.* "This Court has consistently held that the procedures found in § 3–1–512, MCA, must be followed in cases of indirect contempt." *Malee v. Dist. Ct.*, 275 Mont. 72, 75, 911 P.2d 831, 832-33 (1996). *Malee* explained that notice of what conduct "the court views … to be contemptuous" is essential to give effect to the contemnor's right of allocution. 275 Mont. at 79, 911 P.2d at 835.

Adequate notice to the alleged indirect contemnor of the charges against him is constitutionally required. "[D]ue process requires … 'that one charged with contempt of court be advised of the charges against him….'" *Lilienthal v. Dist. Ct.*, 200 Mont. 236, 242, 650 P.2d 779, 782 (1982) (quoting *In re Green*, 369 U.S. 689, 691 (1962)).

As one court succinctly stated, an accused contemnor is "entitled to notice of the exact charges against him." *Ross v. Coleman Co.*, 761 P.2d 1169, 1190 (Idaho 1988), *aff'd*, 804 P.2d 325 (1991).

III. THE ORDER IS ERRONEOUS BOTH IN THE CONDUCT IT FOUND CONTEMPTUOUS AND IN THE ACTIONS IT REQUIRED OF MATTHEW TO CLEAR THE CONTEMPT.

The Order found Matthew had violated the AERO in four specific ways.[7] Order, p. 6, COL ¶¶ 9-10. It then ordered Matthew to jail unless he took five actions. *Id.*, pp. 7-8, Order ¶ 3. Each such finding and order is erroneous.

A. Bank accounts.

1. Lisa's Motion.

In her motion, Lisa claimed that, before Matthew's alleged violation of the AERO, she "had access to and was a signatory on" many different bank accounts. Lisa's Motion, p. 3, ¶¶ 9-10. Her affidavit contains no corresponding comprehensive listing of bank accounts. The language surrounding the comprehensive list in her Motion ambiguously claims that, "[u]ntil Matthew violated" the AERO, she "had access to … the following … accounts" but does not state which ones she can no longer access. While she clearly invites an inference that she was removed from all of them, her actual accusation was

[7] The Order also listed some ways in which the court believed Matthew's conduct "[b]etween April and August 2023" were "departures from the ordinary business activities while the parties were together." *Id.*, p. 5. Of course, that is not a finding that those actions were contemptuous. And the referenced time frame includes both time before the AERO was served on Matthew and after the Statement of Charge had already framed the contempt accusations.

narrower, claiming that:

- On April 14 (before he was served with the summons and AERO), Matthew removed her from the "business accounts for MG Logistics, The Fleet Shop, and Swift Delivery Services (Bank of Bozeman)." Lisa's Motion, p. 3, ¶ 13; Lisa's Dec., p. 2, ¶ 15.
- On May 10 (after Matthew had been served), he caused her to be removed from "the business accounts for: Adventure Bound MT, Ballistic Ammo Co., and Swift Delivery Services." Lisa's Motion, p. 4, ¶ 17; *see also* Lisa's Dec., p. 3, ¶ 17 (but giving date of May 12).

Lisa did not provide the account numbers for the accounts from which she claims she was wrongfully removed. She did not state whether she claimed to have been removed from ***all***, or only ***some***, of the bank accounts for those entities and, if only some, which ones.

2. Statement of Charge.

The Statement of Charge was confined to alleged changes to only three accounts (for Adventure Bound, Ballistic Ammo, and Swift Delivery) on May 10, 2023, although it does not identify the accounts by number or even by financial institution. Doc. 23, p. 2, ¶ 1.

3. The Hearing.

The hearing, however, was wide open, addressing many different accounts and alleged changes both before[8] and after Matthew was served with the AERO.

i. The April 13 changes.

Matthew had removed Lisa from some business accounts on April 13, prior to being served with the AERO. *See* Lisa's Reply re: Motion for Contempt, Doc. 22, Exhibit 1 (On April 13, Matthew had Lisa removed from accounts for businesses of which he was the sole owner); 7 and 8 (showing, respectively, that on April 13, Matthew had signed Account Change Authorization Forms to remove Lisa as a signer on two Fleet Shop accounts (xxx6931 and xxx 6182) and on two MG Logistics accounts (xxx6966 and xxx6662)). The testimony confirmed that Matthew's removal of Lisa from these business accounts occurred on April 13, before he received the AERO.[9] *See, e.g.*, Trans. I, pp. 23-24; Trans. II, pp. 53-54, 64. Matthew explained that he removed Lisa to protect the funds so he could run the businesses.

Ultimately, the court recognized that these actions, before Matthew received

[8] Matthew objected to evidence of his changes to the accounts prior to being served with the AERO, but the court overruled that objection. Trans. I, pp. 28-29.

[9] Matthew was not aware that he would be served with an AERO. Trans. II, p. 56.

the AERO, were irrelevant.

> [L]et me stop you there. Essentially, your motion for contempt was alleging violation of the economic restraining order. All I've heard so far is Ms. Swift was removed as a signatory from a number of accounts prior to him being served with the restraining order. They're not covered by that.

Trans. II, pp. 76-77; *see also, id.*, p. 78 (court saying that while the April 13 removals "may have been violations of the [AERO] after he was served with notice of it, they don't appear to have been when he did it.").

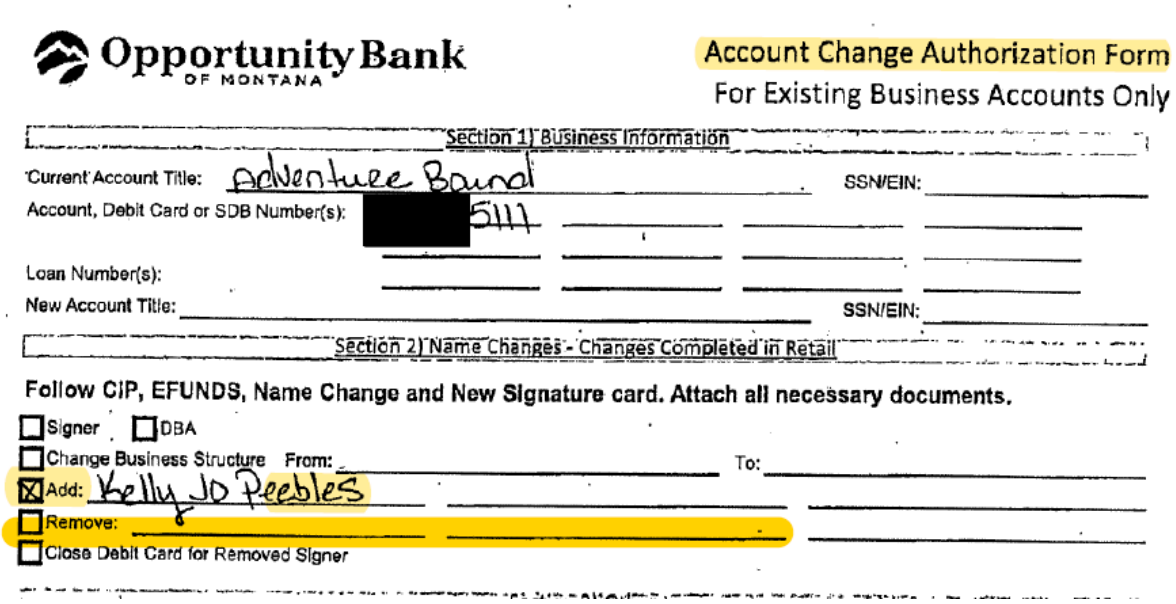
ii. The May 10 changes.

The evidence about the changes in May shows that Matthew tried to add his bookkeeper to some accounts to assist him in running the businesses, but that Lisa was accidentally removed as a signer on one account for a period of two days.

A banker testified she had helped Matthew manage the Adventure Bond account in May. Trans. I, p. 15, 17. Nobody was removed from the Adventure Bound account at that time. *Id.*, p. 19. But in the process of updating the signature card to add the bookkeeper, "Lisa's signatory access was removed… [f]or a short period of time." *Id.*, p. 20. Within two hours of Lisa being removed, Matthew notified the bank, and the bank ultimately fixed it. *Id.*, pp. 20-21; Trans. II, pp. 16-19. During the brief time frame where Lisa had been removed, her debit card remained active, and she was able to make any transaction she wanted in the bank.

Her technical removal as a signatory lasted "just a couple of days." Trans. I, p. 21; *see also* Lisa's Dec., p. 3, ¶22 (she was notified on May 15 that she had been reinstated).

Matthew did not "direct the bank to make any changes to Adventure Bound." Trans. II, p. 18. The documents Matthew signed on May 10, 2023, to make his requested changes, show only that he sought to ***add*** his bookkeeper; the box to "remove" an authorized signer remained blank:



Opportunity Bank
OF MONTANA

Account Change Authorization Form
For Existing Business Accounts Only

Section 1) Business Information

Current Account Title: Adventure Bound SSN/EIN:

Account, Debit Card or SDB Number(s): [redacted] 5117

Loan Number(s):

New Account Title: SSN/EIN:

Section 2) Name Changes - Changes Completed in Retail

Follow CIP, EFUNDS, Name Change and New Signature card. Attach all necessary documents.

☐ Signer ☐ DBA

☐ Change Business Structure From: To:

☒ Add: Kelly JO Peebles

☐ Remove:

☐ Close Debit Card for Removed Signer

See App. 4, p. 1 (exhibit 3 to Lisa's Reply re: Motion for Contempt (Doc. 22)) (highlighting added); *see also* App. 4, pp. 2-4 (showing like information pertaining to accounts for Swift Delivery, MG Logistics, and Fleet Shop).

Matthew likewise did not instruct the bank to remove Lisa from either the Ballistic Ammo account or the Swift Delivery account. Trans. II, pp. 18-19.

Matthew again explained the "brief accidental removal"; he "didn't request it." *Id.*, p. 51.

The district court commented:

> I don't know where we're going with respect to the issues of contempt… so far, I haven't heard anything with the possible exception of the removal from the Adventure Bound account, the signatory authority there which was rectified, I haven't heard anything contemptuous.

Id., p. 77.

4. The Order.

Notwithstanding that the evidence failed to show any intentional removal of Lisa from any account after the AERO was served on him, the district court held Matthew in contempt for having "blocked Lisa's access to one or more business accounts." Order, p. 6, ¶ 10. The district court did not say which account(s) or when.

The district court also required that, as a condition of avoiding jail, Matthew had to "[r]estore[] Lisa's access to ***any and all*** banking accounts to which he took action to block her access." *Id.*, p. 7, ¶ 3.a (emphasis added). The court did not state which accounts or limit it to accounts from which Lisa was removed after the AERO. To avoid spending Thanksgiving Day in jail, Matthew restored Lisa's access to the business accounts from which he had removed her even prior to

service of the AERO.

5. The Order is erroneous.

The Statement of the Charge identified only conduct on May 10, pertaining to three accounts. The contempt finding is not clearly limited to conduct after service of the AERO, and the remedial action required of Matthew to avoid incarceration was to "restore Lisa's access to any and all banking accounts to which he took action to block her access." Order, p. 7, ¶ 3.a. That clearly reaches back to Matthew's conduct prior to service of the AERO. That is error both because it: presumes the AERO bound Matthew before he was served, in violation of § 40-4-126(8); and punishes Matthew for conduct taken before he had notice of the AERO. It ignores the court's own recognition during the hearing that Matthew's actions before being served with the AERO could not be a violation.

Even were the Orders' treatment of this issue confined to the May 10 events, the evidence does not support a finding of contempt. The documents and testimony, including from the neutral third-party banker, established that Matthew did not seek or direct Lisa's removal from any account and that it was a mere accidental glitch from Matthew's attempt to add his bookkeeper. When Matthew discovered the problem, he fixed it in two hours. Lisa was de-listed as a signer on one account for two days, during which she still had her debit card and could

perform transactions in the bank. The evidence does not satisfy even the low "substantial evidence" test—there is not even a scintilla of evidence that Matthew caused Lisa to be removed.

B. Adventure Bound.

1. Lisa's Motion.

Lisa's Motion alleged that Matthew had "directed" employees not to speak to her, follow her orders, or work on Adventure Bound vehicles. Lisa's Motion, p. 4, ¶ 19. This is obviously double hearsay—what the employees allegedly told her about what Matthew allegedly told them. It was unsupported by any evidence in Lisa's declaration.

2. Statement of Charge.

Nonetheless, the Statement of Charge accused Matthew of "actively interfering with the business activities of Adventure Bound MT by directing the mechanics … to cease any and all work on the Adventure Bound MT vehicles … thereby depriving Petitioner of business income." Doc. 23, p. 2, ¶ 2.

3. The Hearing.

There was no evidence introduced at the hearing that Matthew had given the mechanics any such instructions. The closest Lisa came was that "I had to find a mechanic." Trans. II, p. 116. That is not saying that Matthew told the mechanics not to help her. To the contrary, Matthew had never instructed anyone, "at any

time," to not service Adventure Bound vehicles. *Id.*, pp. 32-33. In fact, the Fleet Shop had serviced Adventure Bound vehicles since the divorce was filed. *Id.*, p. 33. Lisa has not directly reached out to attempt to arrange any such service, and Matthew never told Lisa he would not provide service to the Adventure Bound vehicles. *Id.*, p. 34. He has never instructed any employees to bar Lisa from the shop. *Id.*, pp. 83-84. The proof at the hearing failed to establish the charge against Matthew.[10]

The hearing, however, went in a two other directions. First, Lisa testified about her belief that the locks on the doors had been changed. *Id.*, pp. 114-15, 143-44. That was not something that had been mentioned in the original motion, affidavit, or Statement of Charge. Matthew had testified before Lisa and, having not seen this accusation in the motion or statement of charge, had no opportunity to refute it.

Second, Lisa's counsel steered discussion toward the dissolution and liquidation of Adventure Bound. Trans. I, pp. 8-9. In response to the court's observation that the parties seemed to have difficulty operating a business together,

[10] Lisa did admit, however, that she had changed the password on Adventure Bound's Turo account, depriving Matthew of access to it. Trans. II, p. 150. In fact, she also deprived Matthew of access to the Adventure Bound email account. *Id.*, pp. 35-38.

Lisa's counsel raised the issue of "selling the Turo cars.", *see* Trans. I, pp. 8-9. Although counsel attributed that idea to "our reply," it actually did not appear in the briefing on the contempt motion at all, but in Lisa's response in opposition to Matthew's Motion for Injunctive Relief. Doc. 36, pp. 4-7. Matthew's counsel indicated openness to the idea, but wanted input into the process, specifically mentioning segregating the funds and "the auction process compared to the basic sale process." Trans. I, pp. 10-11.

Lisa, however, wanted to sell the Adventure Bound vehicles other than at an auction. Trans. II, pp. 126-127. She just wanted to "reach [] out to other people who… would be potentially interested in purchase these vehicles." *Id.*, p. 127. "Her request to the Court" was that she be allowed to sell the vehicles her way. *Id.*, p. 127.

In discussion between counsel and the court, Lisa's attorney again raised the issue of selling the rental cars. The court responded to that "you're talking about winding down Turo," to which Lisa's attorney conceded that "I know we're outside the scope of the motion for contempt." *Id.*, p. 156.

Lisa did not introduce any evidence pertaining to the statutory requirements for a judicial order of dissolution. *See* M.C.A. § 35-8-902. She did not introduce any evidence regarding Matthew's governance rights during dissolution. *See*

M.C.A. § 35-8-307.

4. The Order.

The Order found Matthew in contempt for having "interfered with her operation of Adventure Bound." *Id.*, p. 6, ¶ 10. It did not say how, and certainly found no contempt regarding dissolution of Adventure Bound. Nonetheless, the district court sentenced Matthew to jail unless he refrained from interfering with Lisa's chosen method of winding down Adventure Bound. *Id.*, p. 7-8, ¶ 3.b.

5. The Order is erroneous.

First, no substantial evidence supports a finding of contempt as alleged in the Statement of Charge, which was based on Matthew supposedly telling the mechanics not to work on Adventure Bound vehicles. The undisputed evidence at the hearing showed that Matthew gave no such directive. By itself, this failure of proof requires reversal.

Moreover, the court's remedial order—to not interfere in Lisa's chosen method of liquidating Adventure Bound—was totally arbitrary. The dissolution or liquidation of Adventure Bound was not mentioned in any briefing on the motion for contempt. Lisa first mentioned it in her response to Matthew's Motion. *See* Doc. 36, pp. 4-6. Lisa never urged it as a basis for contempt, instead acknowledging the topic was beyond the scope of contempt. There is no conceivable construction

of the AERO that requires Adventure Bound's liquidation, much less in any particular fashion.

With no prior order on the topic to be violated, no such accusation, and no proof that Matthew was interfering in any liquidation, the court just summarily decreed the end of Adventure Bound on whatever terms Lisa might decide. The court's ancillary Order violated Matthew's substantial rights as a member of Adventure Bound under the LLC statutes and the operating agreement to participate in its management and dissolution.

C. Payments to Consider It Done.

For some time prior to 2023, the parties had a practice of transferring approximately $3,600 per month[11] from Swift Delivery or MG Logistics to a bank account Lisa maintained for her Consider It Done business. Trans. II, pp. 105-106. That payment was for Lisa's janitorial and clerical services. *Id.*, p. 64. Lisa would then transfer some lesser, net, amount, to the parties' joint account. *Id.*, pp. 105-106.

Matthew did not write those checks. *Id.*, p. 34. Instead, Lisa paid herself from Matthew's businesses. *Id.*, pp. 58, 71.

[11] Lisa's lawyer agreed that the amount might actually be more like $3000 per month. Trans. Vol. II, p. 111.

On April 7, 2023, *see id.*, pp. 55-56, before the divorce was even filed, Matthew texted Lisa that he was removing her from the business bank accounts and that the businesses would no longer pay Consider it Done $3,600 per month, Lisa's Motion, p. 3, ¶ 11; Lisa's Dec., p. 2, ¶ 13. In that text (exhibit 5 to Lisa's Motion), Matthew (the grey text boxes) informs Lisa that:

- She no longer has permission to sign checks on behalf of the businesses; and
- "[C]onsider it done no longer gets payed (sic) by any company."

Id.

1. Lisa's Motion.

Lisa complained that Matthew had "stopped paying me the $3,600 per month for closing my personal business." Lisa's Dec., p. 3, ¶ 20. She included the pre-divorce filing text where Matthew had ceased those payments. Lisa's Motion, Ex. 5.

2. Statement of Charge.

The Statement of Charge says Matthew "failed to compensate Petitioner her monthly payment of $3,600 for her duties managing and operating the businesses." Doc. 23, p. 2, ¶ 3.

3. The Hearing.

Although Lisa's Motion was premised on a claim that Matthew had ceased making the payments, the evidence showed she kept receiving those payments even after the divorce. For instance, according to Lisa, she was able transfer the following amounts from her Consider It Done account to the joint account, evidencing that Consider It Done had received its payment:[12]

- $3,000 on January 24, 2023, Trans. II, p. 105; Hearing Exhibit 1, p. 7;
- $3,000 on March 24, 2023, Trans. II, p. 106; Hearing Exhibit 1, p. 17;
- $3,300 on April 25, 2023, Trans. II, p. 107; Hearing Exhibit 1, p. 21;
- $3,000 on May 16, 2023, Trans. II, p. 108; Hearing Exhibit 1, p. 23; and
- $3,000 on June 2, 2023, Trans. II, p. 109; Hearing Exhibit 1, p. 27.

Lisa explained that, as of June 27, she was "still… able to access funds from the other businesses to put it in your Consider It Done account." Trans. Vol. II, p. 109; *see also* pp. 84-85 (Since April 19, Lisa had paid Consider It Done for two months).

[12] Indeed, Lisa testified that her Consider It Done account was "a shell, kind of." Trans. II., p. 109. It did not carry a balance in the thousands. *Id.*, *see also* p. 147 (the Consider It Done account was a "shell account that money" from the businesses "would flow through.").

4. The Order.

The Order found Matthew in contempt because he had "stopped making monthly payment to Consider It Done," and required that, to avoid jail, Matthew must pay "$10,800 to Consider It Done." Order, pp. 6, ¶¶ 9 and 8, ¶ 3.c.

5. The Order is erroneous.

The order is erroneous with respect to the Consider It Done payments for the following reasons.

First, the decision to terminate the payments to Consider It Done predated the divorce filing and issuance and service of the AERO. Lisa's own allegations showed this was a business transaction by which Swift Deliver was paying for services. As their relationship deteriorated and Lisa stopped providing these services for which the payment was consideration, Matthew decided that his businesses would no longer pay for services they were no longer receiving. On April 7, he notified Lisa that the payments would cease, canceling any prior oral contract. The court's Order held Matthew in contempt for a decision he made before the divorce action was filed (April 10) and the AERO served (April 19).

Second, it was not a violation of the AERO. The AERO contains no provisions requiring Matthew to cause his businesses to resume payments they had made in the past, but which they had discontinued even prior to issuance of the

AERO. As evidenced by the court's comments at the hearing, cited and quoted above, the court has attributed some broad significance to the AERO that prohibits parties from changing the status quo in any way, as a "guardrail" on human nature. The court also recognized that its Order looked rather like a temporary support order. Indeed. That is precisely what the court did. It tried to provide for interim spousal support via a contempt order. That is not the purpose of contempt, and it is wholly erroneous to threaten to send someone to jail as a means to force a support payment in this manner.

The court's Order is also entirely arbitrary. The court ordered Matthew to pay $10,800, with no rationale. That is three times the $3600 monthly amount. Where did that come from? There is no evidence from which one could conclude that Matthew had wrongfully withheld three months' worth of payments. Instead, as described above, Lisa continued to receive payments, even after the divorce was filed. As of the date of her contempt motion, and in spite of Matthew's April 7 text, she had not missed paying herself this amount from Matthew's businesses for a single month.

Which brings us to another aspect of the court's error. The court certainly did not find that Lisa had been deprived of three months' payments, wrongfully or otherwise. The evidence would not support any such finding anyway.

Nor would the evidence support a finding that Matthew caused non-payment of these amounts by any post-AERO conduct. He had announced prior to the divorce that his business would no longer pay. That's all. That is not a violation of the later-issued AERO. He was not the one making the payments in any event—it was Lisa.

D. Deposits into the joint account.

1. Lisa's Motion.

Lisa's Motion mentioned that Matthew had not deposited his paycheck into the parties' joint checking account since he had been served with the divorce papers, *id.* p. 5, ¶ 22, calling that a violation of the AERO, *id.*, p. 8. Lisa's supporting affidavit did not mention it.

2. Statement of Charge.

The Statement of Charge does not mention the deposits into the joint account as one of the ways in which the district court was considering holding Matthew in contempt. Doc. 23, p. 2.

3. The Hearing.

At the hearing, Lisa testified that she has a separate checking account into which she deposits her paycheck. Trans. II, pp. 109-110. Also, she admitted to diverting all of the earnings of Adventure Bound away from the accounts to which Matthew had access and, instead, depositing them into a separate account. *Id.*, pp.

116-118. Nonetheless, she complained about Matthew having ceased depositing his paycheck into the joint account since approximately a week after being served with the divorce papers. *Id.* pp. 108-109.

The court seized upon this accusation—not mentioned in the Statement of the Charge—to launch into its own line of questioning asking, for instance whether Lisa "could have written checks on that account for nonbusiness things like groceries or a new pair of shoes." *Id.*, p. 85; *see also* p. 93 (more questioning by the court). Matthew explained that he had stopped depositing his funds into the joint account after an incident in which he had done so, intending to use the money to pay the mortgage on the family home, but Lisa had then drained $6,800 from the account. *Id.*, pp. 85-86. That statement was not refuted.

The court returned to the topic at the end of the hearing, explaining its theory that not depositing money into the joint account is a violation of the AERO. *Id.*, p. 157. The court recognized that this was getting into the area of a temporary support order: "I am not couching this as a spousal support or a spousal maintenance or family support. It could become that, in some ways it may be better addressed that way." *Id.*, p. 158.

The court viewed it as "contrary to the purpose of what the restraining order is about" if Matthew's earnings were no longer deposited in the parties' joint

account. *Id.*, p. 158. The court continued that "if you are taking money that needs to go into the joint, aren't you transferring away from the joint account?" *Id.*, p. 159.

The court was concerned that Matthew had "stopped doing that." *Id.*, pp. 161-162. Even though there was likely "not enough to go around," the court still thought it did not justify depositing the money into an individual account. *Id.*, p. 162-163 (judge opining that the AERO existed to serve as "the guardrail to human nature"); p. 166 (the court stating that the AERO "requires … that we avoid exceptional changes … like not depositing money where you used to").

In the meantime, Matthew was homeless, living in the shop. *Id.*, p. 87. All of his businesses, save one, were in a negative cash flow situation, going further into debt each week. *Id.*, p. 89.

4. The Order.

Ultimately, the district court held Matthew in contempt for having "stopped depositing monies in the parties' joint account as Matthew had customarily done before." Order, p. 6, ¶ 10. Apparently to rectify that situation, the court ordered Matthew to "deposit[] not less than $10,000 into the parties joint checking account for Lisa's exclusive use." *Id.*, p. 8, ¶ 3.d. Although the court did not explain how it derived that number, it was the precise amount Lisa requested at the hearing for

attorney fees. Trans. II, pp. 125, 129.

The court did not address Lisa's maintenance of her own separate accounts into which she deposits her paycheck and all of the earnings from Adventure Bound.

The court also did not address the statute's recognition that "additional living expenses arising out of a party obtaining a second household and current available income" might require expenditure of funds. *See* § 40-4-126(1)(1)(a).

5. The Order is erroneous.

This theory is not mentioned in the Statement of Charge. Matthew did not have notice that it was a potential basis on which he might be held in contempt until the court's seemingly prosecutorial questioning and comments near the end of the hearing. For this reason alone, the Order must be reversed.

Moreover, it was not a violation of the AERO. The AERO prohibits many things, but a separate account to allow one to live separately, is not one of them. If it were, Lisa is also in contempt. Both parties showed by their conduct that they did not understand the AERO to require them to continue to commingle their post-filing earnings.

The court recognized it was veering into the issue of temporary maintenance, but forged ahead, apparently picking $10,000 as a remedy for

conduct not mentioned in the statement of charge and which did not violate the AERO. The only logical underpinning for that amount is Lisa's "request" (one requests spousal maintenance, not contempt payments) for $10,000 for attorney fees. That is entirely arbitrary as a "remedy" for contempt.

E. Equipment removed from the marital residence.

This issue was barely raised in Lisa's Motion, mentioned obliquely in the Statement of Charge, unproven at the hearing, and not a basis of contempt. But the court ordered that, to avoid a stint in jail, Matthew had to return equipment that ***Lisa had hidden***.

1. Lisa's Motion.

Lisa's Motion stated that Lisa "believes that Matt has sold a 2022 Chevrolet Trailblazer." Lisa's Motion, p. 5, ¶ 24. Her affidavit said she "found out" that Matthew "has been selling and/or hiding some of our marital property, including a Chevrolet Corvette" and the Trailblazer. Lisa's Dec., p. 4, ¶ 25. She also suggested improper removal of vehicle parts and tools. Lisa's Motion, p. 5, ¶ 24; Lisa's Dec., p. 4, ¶ 26.

2. Statement of Charge.

The Statement of Charge imprecisely accused Matthew of "actively moving, hiding, and selling business assets." Doc. 23, p. 2, ¶ 4. It did not suggest which

business or what assets it meant.

3. The Hearing.

At the hearing there was no mention of the Corvette, vehicle parts, or tools. As to the Trailblazer, Swift Delivery had purchased it in 2022. Matthew had removed it from Turo in September 2022 because it was no longer being rented, and took it to auction at Peak Cars in January 2023, where it was sold at auction. Matthew had sold a dozen or more cars through Peak Cars over the last five years. Trans. II, pp. 19-23. Lisa was with him when he used a Swift Delivery check to purchase the Blazer. *Id.*, p. 25. Lisa consented to the sale of the Trailblazer. *Id.*, p. 120.

As of the hearing, Matthew had not sold any business assets since the commencement of the divorce. *Id.*, pp. 48-49. That testimony was unrebutted.

One would think that such an utter failure of proof might have ended this accusation. Not so.

Lisa testified about various pieces of equipment—a covered trailer, a mini excavator, a tractor, and a Chevy Duramax truck—that, according to her, had previously been kept at the marital home. Tellingly, neither her motion nor supporting declaration mention any of those pieces of equipment. Doc. 20. Nor does her reply. Doc. 22. Nor does the Statement of Charge. Doc. 23. This whole

issue sprang up at the hearing.

Even when eliciting this testimony at the hearing, Lisa's counsel clarified that it pertained to Matthew's defense that Lisa was acting with unclean hands.

> And opposing counsel is going to ask you some questions about your hands not being clean in this proceeding, there's an excavator that ***you're hiding***. Can you inform the Court about that so we can get to the point?

Trans. II, p. 129 (emphasis added). Lisa's counsel elicited this testimony, not as a theory upon which to hold Matthew in contempt, but to preempt questioning about the assets Lisa was "hiding."

Lisa testified that Matthew had taken a covered trailer that was titled in the name of one of the businesses. *Id.*, pp. 129-130. In response, and out of her alleged fear that Matthew might take other equipment, ***Lisa*** had the excavator, tractor, and the truck removed from the property to an off-site location. "Q: They're at an undisclosed location because you're worried he's going to come on the property… and just take them. A: Yes." *Id.*, pp. 131-132. Lisa reiterated that "I had them removed." *Id.*, p. 131.

4. The Order.

Even the district court did not find that Matthew had violated the AERO by concealing or selling any equipment. Order, p. 6, ¶¶ 9-10. Nonetheless, to purge the contempt, the court ordered Matthew to "return[] any equipment to the

parties' residential property … that was customarily kept at the residence." *Id.*, p. 8, ¶ 3.e. Of course, Matthew had no way to return equipment that Lisa had "hidden" at an "undisclosed location."

5. The Order is erroneous.

The worst that Matthew can be accused of on this record is that he took the trailer—a business-owned asset—to use. Covered trailers can prove quite handy for a delivery business. No one ever suggested that was a violation of the AERO until the district court so found in its Order. Lisa had not made that accusation in her motion, affidavit, or reply. The statement of charge obviously does not mention the trailer, and its non-specific reference to moving business assets can only be understood as referring to the accusations in Lisa's Motion, none of which were proven and none of which concerned the trailer. Even at the hearing, the context shows Lisa introduced this evidence to draw the sting on her own unclean hands, never urging it as a violation of the AERO. And even the district court did not find any contempt by moving or hiding equipment (or any other assets), but it, nonetheless, ordered Matthew to go to jail if he did not "return" what he did not have.

The AERO did not prohibit Matthew from using the business-owned trailer for the business. *See* Doc. 3. Thus, the district court correctly found no contempt

for this conduct. There was no substantial proof, note even a scintilla, to support such a finding.

That should have been the end of the issue. Instead, the district court arbitrarily imposed a coercive civil sanction—jail. That capriciousness, by itself, requires reversal.

And the Order was not specific as to ***what*** equipment required return. To "clear contempt," the Order required Matthew to guess what the Court meant; a difficulty exacerbated by the fact that Lisa had hidden much of the equipment that could be construed as "customarily kept at the marital home."

Moreover, it was manifestly beyond Matthew's power to return the equipment that Lisa had hidden at an undisclosed location. *See* M.C.A. § 3-1-520 (court can impose sanction to compel contemnor to perform an act "that is in the power of the contemnor to perform"); *VanSkyock v. Twentieth Jud. Dist. Ct.*, 2017 MT 99, ¶ 13, 387 Mont. 307, 393 P.3d 1068 (quoting § 3-1-520) ("a cognizable claim for civil contempt must seek to compel performance of 'an act that is in the power of the contemnor to perform.'").

Even where the contemnor fails to carry the burden to prove his inability to perform, a finding of contempt based on an erroneous factual assumption that he can perform is reversible error. *See, e.g., Fouts v. Montana Eighth Jud. Dist. Ct.*,

2022 MT 9, ¶ 15, 407 Mont. 166, 502 P.3d 689.

CONCLUSION

For the foregoing reasons, the Court should reverse the Order, remanding with instructions for the district court to order return of the funds Matthew was forced to pay under threat of incarceration.

February 26, 2024.

Baldwin Law, PLLC

By: /s/ Robert K. Baldwin

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Rule 11(4), M. R. App. P., that the foregoing brief is proportionally spaced, printed in a 14-point Equity Text A (a Roman-style, non script) type-face, is double spaced, and is not more than 10,000 words including the inserted text image (containing 74 words) and excluding the Caption, Table of Contents, Table of Authorities, and this Certificate of Compliance.

Baldwin Law, PLLC

By: /s/ Robert K. Baldwin

CERTIFICATE OF SERVICE

I, Robert K. Baldwin, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 02-26-2024:

Charles J. Cook (Attorney)
389 S. Ferguson Ave.
Suite 205
Bozeman MT 59718
Representing: Lisa L. Swift
Service Method: eService

Andrew Noel Davis (Attorney)
P.O. Box 10850
Bozeman MT 59719
Representing: Matthew T. Swift
Service Method: eService

Electronically signed by Samantha Walker on behalf of Robert K. Baldwin
Dated: 02-26-2024