IN THE SUPREME COURT OF THE STATE OF MONTANA
Cause No. DA 25-0149

LINDSAY BURNS BARBIER, individually, and on behalf of the H.W. BURNS FAMILY, LLC; S.B.; and B.B.,

Plaintiffs and Appellants,

v.

CAMERON H. BURNS; and H.W. BURNS FAMILY, LLC, a nominal Defendant,

Defendants and Appellees.

H.W. BURNS FAMILY, LLC,

Counterclaim Plaintiff and Appellee,

v.

LINDSAY BURNS BARBIER; S.B.; and B.B.,

Counterclaim Defendants and Appellants.

On Appeal from the Montana Sixth Judicial District Court,
Sweet Grass County, Cause No. DV 21-49
Hon. Brenda R. Gilbert

APPELLANTS' OPENING BRIEF

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A. STATEMENT OF THE ISSUES

I. Did the District Court correctly grant summary judgment in favor of Appellees Cameron H. Burns and the H.W. Burns Family, LLC regarding the interpretation of the LLC's Operating Agreement and the conversion of the LLC to a perpetual company?

II. Did the District Court properly require Plaintiffs to join the LLC, already a derivative Plaintiff, as a named defendant?

III. Was it proper for the District Court to order Plaintiffs to pay both professional and attorney fees for the deposition of Kim Bennett, a non-party identified as a potential hybrid fact/expert witness in this matter?

B. STATEMENT OF THE CASE

This appeal arose from a dispute between the current members of the H.W. Burns Family, LLC (the "LLC" or "Company") over the proper term duration of the family-owned LLC, which owns and operates a ranch outside of Big Timber.

Plaintiffs Lindsay Burns Barbier ("Lindsay") (who filed claims individually and on behalf of the LLC); her minor child B.B.; and her adult child Solange Barbier (collectively, "Appellants," "Plaintiffs," or the "Barbiers") maintain that the LLC, which was created in 1994 for estate planning and tax purposes to protect the Ranch, is a term company that was to dissolve in 2024, while Lindsay's brother, Cameron

H. Burns ("Cameron")—currently the only other member and now 70.19% owner of the LLC—argues that the LLC is a perpetual company.

Plaintiffs filed their Complaint against Cameron in Montana's Sixth Judicial District Court, Sweet Grass County, to enforce the terms of the LLC's Operating Agreement, requesting a declaratory judgment, claiming breach of contract, and seeking specific performance in December 2021 (Dist. Ct. Docket No. ("Doc.") 1.) Plaintiffs filed these claims while Lindsay and Cameron were also involved in probate litigation over their father Horatio W. Burns' ("Horatio's") estate, which included, as its main asset, Horatio's shares of the LLC. *See generally* Sup. Ct. Cause No. DA 22-0456.

After Cameron filed a partial motion to dismiss Plaintiffs' derivative claims in January 2022 (Doc. 7), which the District Court denied in April 2022 (Doc. 16), Cameron filed his Answer in April 2022 (Doc. 17). The District Court set its Scheduling Order in May 2022, including July 22, 2022, as the deadline for Parties to amend claims or join parties. (Doc. 19.)

Over a year after the case had been filed and over six months after the joinder deadline had passed, on December 30, 2022, Cameron filed a motion to join the LLC as a defendant (Docs. 22-23). Plaintiffs filed their opposition brief in January 2023 (Doc. 24), to which Cameron replied on February 13, 2023. Doc. 27. One day later, on February 14, 2023, the District Court granted Cameron's motion, requiring

Plaintiffs to name the LLC as a defendant. Appellants' Appendix ("Appx.") Ex. G (Doc. 28).

Pursuant to that Order, Lindsay filed an amended complaint in March 2023 (Doc. 29), to which Cameron and the LLC responded (*see* Docs. 36, 39) with the LLC asserting a counterclaim for declaratory judgment, which Plaintiffs answered in May 2023. (Doc. 40.)

After the Parties engaged in discovery, including exchanging expert disclosures relating to the valuation of Plaintiffs' minority shares if the LLC were a perpetual company compared to the value of Plaintiffs' interests if the LLC dissolved in 2024, which Plaintiffs' expert found were several million dollars apart, the Parties filed several cross motions for summary judgment.

On June 28, 2024, Defendant LLC filed a motion for partial summary (Doc. 60), arguing that the LLC's Operating Agreement can be amended by a vote of 67% or more of the membership interests of the LLC. Cameron joined that motion (Doc. 64), which Plaintiffs opposed in a filing on July 19, 2024 (Doc. 75).

Second, in a motion covering related issues, Cameron filed a motion for summary judgment arguing that the LLC was a perpetual company (Docs. 70-71), which Defendant LLC joined (Doc. 72), and which Plaintiffs opposed (Doc. 87).

Third, Plaintiffs filed their own motion for summary judgment (Docs. 73-74), which Cameron and Defendant LLC separately opposed (Docs. 77 and 84).

After the Parties filed all replies, after its September 24, 2024, hearing, and after the Parties filed proposed orders, the Court granted the LLC's motion regarding the threshold to change the LLC's Operating Agreement and Cameron's motion regarding the perpetual term, and it denied Plaintiffs' summary judgment motion related to those issues. Appx. Ex. B, Doc. 107.

Separately, while the Parties were briefing those motions, Kim Bennett ("Bennett"), a non-party individual whom the Parties had hired years ago to appraise the LLC, filed an appearance to request compensation for her professional fees and attorney's fees related to Plaintiffs' having deposed her during the litigation, after Defendant LLC and Cameron had disclosed her as a hybrid witness. (Docs. 92-93.) Both Defendant LLC and Lindsay responded to Bennett's requests, Docs. 94 and 96, but the Court granted Bennett's request for fees in the amount of $4,410. Appx. Ex. H, Doc. 102.

After these Orders, Defendants LLC and Cameron filed memoranda of costs (Docs. 108 and 111) and motions for fees and costs (Docs. 109-110, 111). Plaintiffs filed objections and oppositions (Docs. 113-114, 118-119), but the Court awarded costs to Cameron (Appx. Ex. C, Doc. 116), costs to Defendant LLC (Appx. Ex. D, Doc. 121), fees to Defendant LLC (Appx. Ex. E, Doc. 122), and fees to Cameron (Appx. Ex. F, Doc. 123). After negotiations, and while reserving the right to appeal the awards of fees and costs, Plaintiffs stipulated to the amount of such fees and

costs. The Parties filed a Stipulation (Doc. 132), and the Court entered judgment on January 20, 2025. Appx. Ex. A, Doc. 133. The Parties also agreed on terms to stay judgment pending appeal, which was granted by the Court, *see* Doc. 139, and Plaintiffs filed this appeal on February 20, 2025.

C. STATEMENT OF THE FACTS

I. LLC's Creation in 1994.

The LLC was founded in 1994 by Horatio, Lindsay, Cameron, and Lindsay and Cameron's brother Seth S. Burns ("Seth") (collectively, the "founding members"), with a 30-year term set to expire on December 31, 2024. *See* Supplemental Appendix ("SA") Ex. A; *see also* Appx. Ex. B at 2. The LLC was created as part of the estate planning efforts of Lindsay and Cameron's grandfather, Robert Burns. (*See* Doc. 29 at ¶ 9; Doc. 31 at ¶ 9.)

When the LLC was established, its founding members each owned 25% of the Company, and they entered into written contracts to govern the LLC's business—specifically the Articles and an Operating Agreement. (*See* Doc. 29 at ¶ 2; Doc. 31 at ¶ 2; Doc. 36 at ¶ 2.) In its Articles, the LLC was designated as a term company, specifying that "[t]he latest date upon which the limited liability company is to dissolve is December 31, 2024." (SA Ex. A at Art. II; *see also* Doc. 107 at 2, ¶ 1.)

II. 2004 Changes to the Company.

The Members adopted the current Operating Agreement (or "OA") on January 17, 2004 (SA Ex. B; *see also* Doc. 107 at 2, ¶ 3.)[1] Like the Articles, the OA states that the LLC "is a term company and the latest date upon which the [LLC] is to dissolve is December 31, 2024." *Id.* at § 1.d. Further, Section 13.j. of the OA provides that: the "Members may amend this Agreement and Exhibit A [initial capital contributions] upon execution of a written amendment **signed by all of the Members**." *Id.*at § 13.j. (emphasis added).

The LLC's attorney at the time, Angus Fulton, drafted the OA. (SA Ex. C at 19:12-20.) Fulton provided his first draft of a new, amended operating agreement to the LLC's Members in February 2002. (*See* SA Ex. C at 21:15-24; Ex. 2 to SA Ex. D.) According to his cover letter, Fulton recommended amending the original Operating Agreement to reflect recent changes to Montana's LLC statutes. (*See* Ex. 2 to SA Ex. D at ¶ 1.) The Legislature had amended those statutes in 1999 to comprehensively adopt the Uniform LLC Act. *See* 1999 Montana Laws Ch. 302 (S.B. 435). Fulton explained that the amendments allowed for greater restrictions to be placed on LLC ownership interests, and, considering the LLC's estate planning purpose, that would provide a greater reduction in the value of an LLC interest for

[1] The 2004 Agreement voided and replaced the original agreement dated February 28, 1994. (*See* Doc. 74, Ex. B at § 1.g.)

federal estate tax purposes. (*See* Ex. 2 to SA Ex. D at ¶ 1; *see also* SA Ex. C at 20:2-17.) Fulton also emphasized the importance of the Company's limited term duration as part of the equation to lower the value of any owner's interest. (*See* Ex. 2 to SA Ex. D at ¶ 1.C.)

Importantly, the 1999 amendments to the LLC Act also newly allowed for perpetual terms for LLCs in Montana.[2] *See* 1999 Montana Laws Ch. 302 (S.B. 435); Mont. Code Ann. § 35-8-202(1)(b). However, the 2004 OA adopted by the LLC Members *nonetheless maintained* the Company's term and the December 31, 2024, dissolution date. (*See* SA Ex. B at § 1.d.)

More importantly, after Fulton provided the final draft of the new OA to the Members in early 2004, he informed Cameron via email that both the original agreement and new OA required unanimous, written approval from all the Members before any changes to the OA could become effective. (*See* Ex. 3 to SA Ex. D, p. 1; *see also* Ex. 1 to SA Ex. D, at § 12.4). Lindsay was copied on the final email in the discussion, so she also received Fulton's email regarding the need for all the Members to approve an amendment to the OA. (SA Ex. D, ¶¶ 5-6.)

[2] When the Legislature first adopted the statutory framework in 1993, there was no allowance for perpetual LLCs—all LLCs were required to set a specific term. *See* 1993 Montana Laws Ch. 120, § 9 (S.B. 146).

III. 2015-2016 Actions.

In the summer of 2015, Seth decided to withdraw and dissociate from the LLC, and he provided his written notice to do so. (SA Ex. E at 25:2-13.) Prior to Seth's withdrawal notice, the respective ownership percentages of LLC Members were as follows: Horatio—28.58%; Cameron—28.57%; Lindsay—10.10%; Solange—7.08%; B.B.—7.08%; and Seth—18.59%. (SA Ex. D, ¶ 8; SA Ex. E, 47:20-48:19.)

Following Seth's withdrawal notice, the remaining Members elected to continue the Company's business and have the Company purchase Seth's interest pursuant to OA Sections 10 and 11. (*See* SA Ex. E, 26:24-27:25; SA Ex. D, ¶ 9.) Seth and the remaining Members then needed to determine a purchase price for Seth's interest and complete the purchase of his units. (*See* SA Ex. E, 33:2-35:25; SA Ex. D, ¶ 9.) However, that process lasted through the fall and into February 2016 before the purchase of Seth's interest was completed. (*See* SA Ex. F at RFA No. 104; SA Ex. D at ¶ 9.) The closing date for the LLC's redemption of Seth's interest did not occur until February 1, 2016, when Seth delivered an Assignment of Membership Interest to the Company. (Ex. 5 to SA Ex. D.)

While Seth's purchase transaction was being negotiated in the fall of 2015, and Horatio's will was being revised, Cameron and Horatio proposed to amend the LLC's original Articles of Organization to replace the 2024 dissolution date with a

perpetual term. (SA Ex. C, 55:25-56:15; SA Ex. D, ¶ 11.) According to the OA, the Articles may be amended with the approval of Members owning at least 67% Ownership Percentages. (*See* SA Ex. B, § 6.k.iii.) Over Lindsay's objection, which she clarified was not an objection to perpetuity for the Ranch but for the then-operative ownership structure, Cameron and Horatio, who claimed to represent a combined 70% of the LLC, voted in favor of such amendment on November 14, 2015. (SA Ex. C, 55:25-58:12; SA Ex. D, ¶ 11.) After the vote, the LLC's then-attorney Jennifer Farve, filed Articles of Amendment reflecting the perpetual vote with the Secretary of State on November 17, 2015, which certified the filing that day. (SA Ex. D, ¶ 12; Ex. 7 to SA Ex. D.)

The LLC members, however, *failed to likewise amend the OA's term provision*, which still provides that the Company shall dissolve on or before December 31, 2024. (*See* SA Ex. C, 69:7-70:1; SA Ex. F at RFA Nos. 34-35; *see also* SA Ex. B, § 1.d.) In an email exchange following the filing of the Articles of Amendment, Ms. Farve confirmed that the OA was not amended by the November 2015 vote. (*See* SA Ex. D at ¶ 13; Ex. 8 to SA Ex. D, at BARBIER 1755-1756.) Ms. Farve explained that the vote to amend the Articles was conducted pursuant to Section 6.k. of the OA, which requires approval by at least 67% of the LLC's ownership percentages. (*Id.*) Notably, she then went on to say that "Section 13(j) relates to amending the Operating Agreement and Exhibit A. It states that the

Agreement may be amended by a written amendment signed by all of the Members." (*Id.*)

IV. Events from 2018 through the Present.

Following Horatio's death in August 2018 and the distribution of his LLC ownership to Cameron (and considering several other small transfers amongst family since 2004), Cameron now owns 70.19% of the Company. (*See* Doc. 29 at ¶ 5; Doc. 31 at ¶ 5; Doc. 36 at ¶ 5; SA Ex. F at RFA No. 19.) Lindsay currently holds 12.41%, while her children, Solange and B.B., each own 8.7%, for a total of 29.81% interest that the Barbiers own. (*See* SA Ex. F at RFA Nos. 9-14.) There are no other current members, owners, officers, or directors of the LLC, such that all LLC members are also Parties in this litigation.

Considering that the Barbiers have alleged that the value of their interests in the Ranch was significantly reduced by the change to a perpetual term, *see* Doc. 29, ¶¶ 25-26, they retained and disclosed James P. Winchell as an expert witness in the areas of accounting, corporate/LLC, and ranch entity valuations on January 13, 2023. (*See* SA Ex. H, 1-2.) In addition to Mr. Winchell, out of an abundance of caution, Plaintiffs also listed Kim Colvin Bennett as both a fact witness and potential "hybrid expert" witness, as she was an appraiser that had provided services for the LLC on multiple occasions in the past relating to property valuations. (*See* SA Ex. H, 2-3; *see also* SA Ex. G at 11:5-12:9.)

As this litigation progressed, both Cameron and Defendant LLC also disclosed Bennett as a potential hybrid expert witness, including as someone who may provide testimony to rebut the testimony and opinions of the Barbiers' experts. *See* SA Ex. I at 1-2; SA Ex. J at 2-3.) Cameron's Disclosure specifically stated that "Ms. Bennett may provide testimony to rebut the expert testimony presented by Jim Winchell." (SA Ex. I at 2.)

Based on Cameron's and Defendant LLC's rebuttal designations, the Barbiers felt compelled to arrange for and conduct a deposition of Bennett to establish in advance of trial whether she would, in fact, be offering testimony and opinions that were contrary to those of the Barbiers' retained expert, Mr. Winchell. (*See e.g.,* SA Ex. G at 8:12-22, 86:7-88:14.) To that end, in May 2024, Appellants' counsel contacted Steve Woodruff, an attorney who had represented Bennett previously, to request that Bennett appear for a deposition in this case. SA Ex. K at 3-4.) In her email, Barbiers' counsel explained the basis for requesting the deposition and asked for dates when Bennett would be available. (*See id.*) Barbiers' counsel then selected a date that worked for Bennett and arranged for the deposition to be taken in Big Timber, which was Bennett's preferred location. (*See id.,* 1-3.) The Barbiers' counsel also answered questions from Bennett's attorney regarding the planned scope of the deposition and clarified that Plaintiffs were not retaining Bennett as an expert. (*See id.,* at 5-8.) On June 7, 2024, Plaintiffs served a Deposition Subpoena

on Bennett's attorney, along with a $10.00 check for the statutorily required witness fee, and issued a deposition notice to opposing counsel. The Deposition Subpoena included the mandatory language from Mont. R. Civ. P. 45(d) and (e) regarding the protections available to a person subject to a subpoena, including for quashing or modifying a subpoena. (*See* SA Ex. L at 5-7.)

Critically, at no point during the planning process for her deposition did Bennett or her attorney request or demand compensation beyond the standard witness fee for her appearance and testimony. (*See generally* SA Ex. K.) Nor did Bennett file a motion to quash or modify the deposition subpoena.

Accordingly, the parties conducted Bennett's deposition as scheduled on June 27, 2024, in Big Timber, Montana, where she appeared with her attorney Woodruff. (*See* SA Ex. G.) Bennett's deposition lasted less than three hours, which included occasional breaks. (*See id.* at 2:1-10, 119:2-3.) During that time, Bennett primarily testified about the appraisal and valuation services she had previously provided to the LLC and its members. (*See id.*, 25:18-40:3, 43:17-62:7, 77:22-80:25.) She also answered questions relating to the expert disclosures made in this case, specifically including the report by the Barbiers' retained expert, Mr. Winchell. (*See id.*, 82:21-110:5.) Bennett's testimony was confrontational at times, especially in relation to her being identified as a hybrid fact/expert witness by the Parties. (*See id.*, 7:7-16:11.)

Almost immediately following the deposition, attorney Woodruff emailed the Barbiers' counsel about compensating Bennett for attending the deposition, as well as for her related attorney fees. (SA Ex. M.) After Woodruff clarified the amount of compensation and fees that Bennett was requesting, Barbiers' counsel declined her request and explained their reasoning. (SA Ex. N at 1-3.) In response, Bennett then filed her request for fees on September 5, 2024, Doc. 92-93, and the District Court awarded those fees in the amount of $4, 410.

D. STANDARDS OF REVIEW

Two different standards of review apply to the different issues raised in this appeal, with both standards applying to the third issue.

First, this Court reviews "a district court's ruling on summary judgment de novo, to determine whether it is correct, using the same standards as the district court under M. R. Civ. P. 56." *Depositors Ins. Co. v. Sandidge*, 2022 MT 33, ¶ 5, 407 Mont. 385, 504 P.3d 477 (quoting *Warrington v. Great Falls Clinic*, LLP, 2019 MT 111, ¶ 8, 395 Mont. 432, 443 P.3d 369).

Second, a district court's ruling on joinder of other Parties is reviewed for abuse of discretion, which is based upon "[t]he facts and circumstances of each case." *John Alexander Ethen Trust Agreement v. River Res. Outfitters, LLC*, 2011 MT 143, ¶ 49, 361 Mont. 57, 256 P.3d 913. "An abuse of discretion occurs when the district court acts arbitrarily without the employment of conscientious judgment

or exceeds the bounds of reason, in view of all the circumstances, ignoring recognized principles resulting in substantial injustice." *Rysewyk v. Mont. Opticom, LLC*, 2023 MT 111, ¶ 15, 412 Mont. 420, 530 P.3d 839 (citing *Schuff v. A.T. Klemens & Son*, 2000 MT 357, ¶ 27, 303 Mont. 274, 16 P.3d 1002).

Third, regarding the award of fees, the Court applies a two-part standard of review. To begin, the Court examines a district court's decision as to whether any legal authority exists to award attorney fees for correctness as a conclusion of law. *Mungas v. Great Falls Clinic, LLP*, 2009 MT 426, ¶ 42, 354 Mont. 50, 221 P.3d 1230 (citations omitted). Next, the Court considers whether the district court's grant or denial of attorney fees under that authority, which is a discretionary ruling, to determine if the district court abused its discretion in connection with the order. *Id.* An abuse of discretion occurs when the district court acts arbitrarily without employment of conscientious judgment or exceeds the bounds of reason resulting in substantial injustice. *Renville v. Farmers Ins. Exch.*, 2004 MT 366, ¶ 24, 324 Mont. 509, 105 P.3d 280.

E. SUMMARY OF ARGUMENT

The District Court committed reversible errors on three issues, as explained below: (1) by granting summary judgment in favor of Cameron and Defendant LLC regarding the interpretation of the OA and conversion of the LLC to a perpetual company; (2) by requiring the Barbiers to add the LLC as a named defendant; and

(3) by awarding both professional and attorney fees to Kim Bennett, a hybrid fact/expert witness, relating to her deposition in this matter.

The District Court's decision on summary judgment was incorrect as a matter of law. It erred first in concluding that the Operating Agreement's amendment provisions unambiguously allowed for its amendment with the approval of just 67% of the LLC's ownership percentages, instead of unanimous approval. The lower court then erred further in holding that the November 2015 vote of the members wholly converted the LLC to a perpetual company, considering the vote contemplated only the amendment of the Articles of Organization, and because Cameron and Horatio did not actually hold 67% of the Ownership Percentages at the time.

The District Court also erred in requiring the joinder of the LLC as a defendant in this case under Rule 19. Specifically, the LLC was not an indispensable party to this matter, especially considering that the Plaintiffs had asserted derivative claims on behalf of the LLC, such that the LLC was already a party. Moreover, the LLC has no managers or directors, other than its members, all of whom were already parties to the case.

Finally, the District Court abused its discretion in requiring the Barbiers to pay non-party Kim Bennett her claimed professional and attorney fees related to her

deposition, as she failed to properly invoke Rule 45's protections prior to her deposition, and she failed to provide any adequate legal grounds to justify relief.

F. ARGUMENT

I. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN GRANTING SUMMARY JUDGMENT TO APPELLEES REGARDING THE OPERATING AGREEMENT AND CONVERSION OF THE LLC TO A PERPETUAL COMPANY.

In its Order (Appx. Ex. B, Doc. 107) on the Parties' cross-motions for summary judgment (Doc. 60, 70, 73), the District Court granted summary judgment for Cameron and Defendant LLC regarding the interpretation of the OA and the conversion of the LLC from a term company to a perpetual entity. Specifically, the District Court held that the OA may be amended by just 67% of the membership interests (*see id.*, 6-8) and that the LLC was wholly converted to a perpetual company through the November 14, 2015, vote by Cameron and Horatio (*see id.* at 9-11). Both holdings are incorrect as a matter of law.

First, there are two potentially conflicting provisions in the OA regarding the voting threshold that is required to amend the OA. In the OA's paragraph or section on "Management" (§ 6), the OA provides that "[n]otwithstanding the authority granted to the Managing Member(s) by this Agreement, no Member, including a Managing Member shall, singularly or together, take any of the following enumerated actions **without the approval of Members ow[n]ing at least 67%**

Ownership Percentages: i. The amendment of the operating agreement under 35-8-109…" SA Ex. B, § 6.k.i (emphasis added).

However, a later provision at § 13.j. provides that: "[t]he Members may amend this Agreement and Exhibit A [initial capital contributions] upon execution of a written amendment **signed by all of the Members**." *Id.*, § 13.j. (emphasis added).

While Cameron and Defendant LLC contend (and the district court concluded) that Sections 6.k and 13.j are merely alternative provisions, *see Appx. Ex. B, 6,* Appellants contended that there are two other plausible readings of the OA (and that Cameron and Defendant LLC's reading is incorrect)—either that § 13.j is the controlling provision because it is specific to amending the OA and that § 13.j does not conflict with § 6.k.i because 100% is clearly greater than 67%—or that § 6.k.i and § 13.j conflict with one another, creating an ambiguity. Given that the Parties offered three possible ways to read the OA's provisions (and the Appellees did not contest that the OA controlled over the Articles in the event of a conflict), the OA is ambiguous as a matter of law, or it should be read in adherence with the more specific and higher 100% standard provided in § 13.j.

Second, the LLC's original term provision further remains enforceable because the Parties had not amended the OA and because the November 2015 vote to amend the Articles failed even to meet a 67% voting threshold of "Ownership

Percentages" in the Company (even if that threshold were sufficient). Namely, according to the applicable defined terms of the OA, Cameron and Horatio did not possess a combined 67% "share of the profits, losses and distributions of the Company" because, at the time of the vote, Seth still held a right to 18.59% of the LLC's distributions.

As such, the District Court's ruling on summary judgment should be reversed. Further, the cause should be remanded for the District Court to grant summary judgment to the Barbiers on their counts regarding the interpretation of the OA and the enforceability of the LLC's term provision and to order that the LLC be dissolved, with its assets distributed to the LLC's members in proportion to their ownership interests, such that the Parties will be free to create new agreements and arrangements to operate the family Ranch.

A. THE DISTRICT COURT INCORRECTLY INTERPRETED THE OPERATING AGREEMENT TO ALLOW FOR ITS AMENDMENT BY A 67% VOTE.

In its summary judgment Order, the District Court first concluded that "the Operating Agreement is unambiguous on its face," allowing "two different, but complementary provisions for amendment of its terms." (Appx. Ex. B, 6.) The District Court's finding on this issue fails as a matter of law. To summarize, either § 13.j. and § 6.k. are compatible in that 100% of the LLC members amending the Operating Agreement is over the "at least 67%" threshold required for members to

take the various actions set out in Section 6, or the plain language of the two different Operating Agreement sections regarding amendments directly conflict with each other, meaning that the Agreement is facially ambiguous relating to the amendment requirements. One section references not being able to make amendments without at least 67% approval (*id.*, § 6.k.i.), while another states that unanimous written agreement is required by all Members to amend the OA (*id.*, § 13.j.). If those sections are at odds with one another, Montana law provides for how any such ambiguity should be interpreted.

Montana's principles of contract interpretation combined with direct evidence regarding the circumstances under which the Operating Agreement was made and adopted lead to only one appropriate conclusion: each and every Member of the LLC must consent in writing before the Operating Agreement may be amended.

1. THE OPERATING AGREEMENT'S DIFFERING AMENDMENT PROVISIONS CREATE AN AMBIGUITY IN THE CONTRACT.

Whether an ambiguity exists in a contract is a question of law. *Corp. Air v. Edwards Jet Ctr. Mont. Inc.*, 2008 MT 283, ¶ 31, 345 Mont. 336, 190 P.3d 1111 (citation omitted). "The existence of an ambiguity must be determined on an objective basis, and an ambiguity exists only if the language is susceptible to at least two reasonable but conflicting meanings." *Performance Mach. Co. v. Yellowstone Mt. Club, LLC*, 2007 MT 250, ¶ 39, 339 Mont. 259, 169 P.3d 394 (citation omitted).

"Mere disagreement as to the interpretation of a written instrument does not create an ambiguity." *Corp. Air*, ¶ 31 (citation omitted).

The District Court's interpretation of the OA as unambiguous (and its two applicable provisions are merely alternatives) fails to acknowledge the OA's plain language *while also adding language to the contract that does not exist*. The District Court's role is limited: it must interpret the text to determine what the parties originally intended, and it may not "insert what has been omitted or [] omit what has been inserted." *Lewis & Clark Cnty. V. Wirth*, 2022 MT 105, ¶ 17, 409 Mont. 1, 510 P.3d 1206 (citation omitted). There is no qualifying language or cross-referencing in either section to suggest the two amendment provisions are independent of one another, nor to categorize them as alternative methods to amend the Agreement. Such an interpretation would require the Court to insert language into the Agreement that does not exist, which would be counter to Montana law. *See* Mont. Code Ann. § 1-4-101 ("In the construction of an instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted."). The District Court's interpretation of § 13.j. as only a convenient option to forego a formal vote where the Members are unanimous (*see* Appx. Ex. B, 6) would also render that language meaningless, as the OA already has a separate provision for taking actions through unanimous resolutions in lieu of a meeting. (*See* SA Ex. B, § 7.b.)

Indeed, the District Court reversed the logic provided by the Barbiers in their summary judgment briefing. Namely, the lower court ruled that § 7.b. would not be rendered meaningless, when the Barbiers had argued that *it was § 13.j. that would be nullified*, which is a critical distinction here. (*Compare* Appx. Ex. B, 7-8 *with* Doc. 75, 11-12.)

Section 7.b. states in relevant part that: "**Any action which requires a vote** of the Members, including any action to be taken at the annual meeting of Members, may be taken ***without a meeting***, by resolutions **unanimously approved and signed by the Members**." (SA Ex. B, § 7.b. (emphasis added).) In other words, § 7.b. already accomplishes what the Appellees so strenuously proclaim the purpose of § 13.j. to be.

As such, the District Court's interpretation would render § 13.j. meaningless, which cannot be done under Montana's rules for contract interpretation. *See* Mont. Code Ann. §§ 28-3-202, 1-4-101; *see also Whary v. Plum Creek Timberlands, L.P.*, 2014 MT 71, ¶ 15, 374 Mont. 266, 320 P.3d 973 (holding the district court erred when it failed to give meaning to the phrase "or any segment thereof" in an easement, as required by Mont. Code Ann. § 28-3-202). It is black letter law that contracts are interpreted "as a whole 'so as to give effect to every part if reasonably practicable, each clause helping to interpret the other.'" *K&R P'ship v. City of Whitefish*, 2008 MT 228, ¶ 26, 344 Mont. 336, 189 P.3d 593 (citation omitted). Section 13.j has

only one purpose—to set forth how the members may amend the OA—and the District Court failed to give that provision any effect.

The District Court also emphasized the use of the word "may" in § 13.j. to conclude that provision is merely one of the options to amend the OA. (*See* Appx. Ex. B, 7.) However, a plain reading of § 13.j. shows that "may" is used simply to provide that the Members *have the ability* to amend the Operating Agreement if they all approve in writing, and not to indicate that the provision is somehow permissive in conjunction with some other unreferenced section in the Agreement. (*See* SA Ex. B, § 13.j.) Thus, the word "may" merely establishes that the Members are able to amend the Agreement and nothing more.

While there appears to be no Montana precedent directly on point, courts in other jurisdictions have analyzed similar, potentially conflicting provisions in operating agreements, and they have found such conflicting provisions to create an ambiguity in the contract. *See, e.g., Anesthesia Health Consultants, LLC v. Sleep EZ Anesthesia, PLLC*, No. 2020-CA-0284-MR, 2022 Ky. App. Unpub. LEXIS 127, at *20-22 (Ct. App. Mar. 4, 2022) (operating agreement was ambiguous where it contained a general provision prohibiting members from entering into contractual relationships for the company with unanimous approval, but other provisions provided each member individually the authority to obtain legal services for the company); *Ruth v. Home Health Care of Middle Tenn., LLC*, No. E2009-00845-

COA-R3-CV, 2010 Tenn. App. LEXIS 159, at *13-15 (Ct. App. Mar. 3, 2010) (finding operating agreement ambiguous where its definitions were "convoluted, inextricably intertwined, and subject to fairly being understood in more than one way").

The Kansas Court of Appeals analyzed a particularly analogous situation in *Lies v. Brown*, 179 P.3d 480, 2008 Kan. App. Unpub. LEXIS 251, at *17-18 (Kan. Ct. App. 2008). There, the court was faced with an operating agreement that contained **three separate amendment provisions**:

> In Section 7.03(A), it states: "Except as otherwise expressly provided herein, this Agreement shall not be amended unless said amendment is approved by a Majority Vote of the Members."
>
> In Section 7.06(A), it states: "Notwithstanding the foregoing, the following actions require the unanimous consent of the Members: (1) any amendment to this agreement."
>
> In Section 14.01(b), it states: "Except as otherwise expressly provided herein, all amendments to this Agreement shall be made if, but only if, the Members approve the amendment either by unanimous consent in writing or by Majority Vote of the Members at a meeting of such Members."

Id. In arguing against finding ambiguity, one of the Parties advocated that "if the separate provisions 'are read in harmony' under the rules of construction, Section 14.01(b) 'reconciles' the unanimous consent requirement of Section 7.06(A)(1) with Section 7.03(A) to mean unanimous consent in writing or majority vote at a meeting." *Id.* at *18. The court rejected this argument, as it "essentially concedes

that the Agreement is ambiguous, because without ambiguity no construction is necessary." *Id.* The District Court dismissed this extra-jurisdictional caselaw with little to no analysis. (*See* Appx. Ex. B, 7.)

In sum, there is simply nothing to indicate that the OA unambiguously allows for two different methods to amend its provisions. To the contrary, there is evidentiary support that establishes that unanimous written approval is required for amendments to the OA. *See* infra, § F.I.A.2.

Alternatively, to the extent that these two OA provisions (§ 6.k and § 13.j) could be read together as not creating an ambiguity, the proper way to do that is to consider the purpose and context of these provisions and read them in their entirety. The purpose of § 6.k is informative. Section 6.k's purpose is to set forth ***limits on*** what members, individually or together with other members, ***can do***. Amending the OA is simply listed there in § 6.k.i as one of many things that members cannot do individually or together with other members unless the member or members have "***at least*** 67% Ownership Percentages." (emphasis added.) Additionally, when "amendment of the operating agreement" in that provision is listed as one of the many things that members cannot do unless they have "at least 67%" support, the Operating Agreement also references that any such amendment would be done "under 35-8-109." Indeed, the *default rule under Mont. Code Ann. § 35-8-109 is the unanimous consent threshold, unless varied by the parties, which they did not choose*

to do, as clarified in Section 13.j. Then later in § 13.j., the OA sets for the exact percentage that is required to amend the OA in a ***provision whose sole purpose is to set forth how to amend the Operating Agreement***. Section 13.j provides, in its entirety, that "[t]he Members may amend this Agreement and Exhibit A upon execution of a written amendment signed by all of the Members."

Indeed, it possible to read § 6.k and § 13.j together consistently and unambiguously because § 13.j's requirement of unanimous consent (or 100%) for amending the OA does satisfy the requirement of § 6.k that such actions could not be taken without "at least 67%" support.

2. THE UNCONTESTED EXTRINSIC EVIDENCE ESTABLISHES AS A MATTER OF LAW THAT THE OPERATING AGREEMENT MAY BE AMENDED ONLY WITH THE UNANIMOUS WRITTEN APPROVAL OF ALL THE MEMBERS.

To the extent that the OA's amendment provisions are ambiguous, there is compelling extrinsic evidence that the Members must all unanimously consent in writing to amend the OA. "It is a fundamental rule that in the construction of contracts the courts may look not only to the language employed, but to the subject-matter and the surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made." *Kintner v. Harr*, 146 Mont. 461, 408 P.2d 487 (1965) (citation omitted).

Specifically, when the 2004 OA was being considered, the LLC's attorney who drafted it, Angus Fulton, informed them that unanimous, written consent from all Members was required before any changes to the Agreement could become effective, just as the LLC's original 1994 operating agreement had required. (Ex. 3 to SA Ex. D, ¶¶ 4-6; *see also* Ex. 1 to SA Ex. D (1994 OA), § 12.4.

Additionally, the fact that the members did not try to amend the 1994 OA with a vote of a percentage over 67%, but instead amended the OA with the 2004 OA through unanimous, written consent signed by all members is also persuasive evidence. That evidence is not even extrinsic, but rather is evident on the very face of the 2004 OA. *See* SA Ex. B, pp. 19-22 (signature pages of all four members).

Further, the LLC's attorney at the time of the November 2015 vote to amend the Articles of Organization also told the members that "Section 13(j) relates to amending the Operating Agreement." (*See* Ex. 8 to SA Ex. D (Jennifer Farve Email forwarded by Alison Burns to Cameron.)

As such, the members understood or should have understood, at the time of adopting the OA in 1994, at the time they amended the OA with unanimous written consent in 2004, and at the time of the vote to amend the Articles in 2015, that any OA amendments require their unanimous written approval pursuant to § 13.j., and that the OA may not be amended only with the arguably conflicting, lesser threshold referenced in § 6.k.i. *See* Mont. Code Ann. § 28-3-306(1) ("If the terms of a promise

are in any respect ambiguous or uncertain, the promise must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it."); *Monte Vista Co. v. Anaconda Co.*, 231 Mont. 522, 530, 755 P.2d 1358, 1363 (1988) ("the conduct of the parties is often the best indication of the parties' intentions and the true meaning of the contract"); *see also ATC Co. v. Myatt*, 435 S.W.3d 135, 143 (Mo. Ct. App. 2014) (in resolving ambiguous provision in buy-sell regarding the existence of contingencies for closing, letters from the seller's counsel established that seller believed the purchaser did have contingencies for closing).

The District Court did not appropriately analyze the foregoing extrinsic evidence in ruling that such evidence was not contrary to its interpretation of the OA. (*See* Appx. Ex. B, 8.) And its interpretation of the OA and its amendment threshold should be reversed.

B. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE NOVEMBER 2015 VOTE WHOLLY CONVERTED THE LLC TO A PERPETUAL COMPANY.

The District Court further erred in holding that the members' November 2015 vote fully transitioned the LLC to a perpetual entity. (*See* Appx. Ex. B, 9-11.) The available record before the District Court demonstrated that the vote was to amend the LLC's Articles only and the members were not then even attempting to vote to likewise amend the OA. Moreover, the November 2015 vote to amend the Articles

failed even to meet a 67% voting threshold of "Ownership Percentages" in the Company, had that been sufficient. As such, the District Court's summary judgment ruling should also be reversed on these grounds.

1. CAMERON AND HORATIO VOTED ONLY TO AMEND THE LLC'S ARTICLES OF ORGANIZATION IN NOVEMBER 2015, NOT THE OPERATING AGREEMENT.

The District Court held that the November 2015 vote by Horatio and Cameron simply and categorically amended the LLC from a term to a perpetual company. (*See* Appx. Ex. B, 9-11.) The District Court's decision on this point fails as a matter of law, however, based upon the clear and supported fact that the November 2015 vote was only to amend the LLC's Articles to replace the term date with language regarding perpetuity; the vote **did not contemplate an amendment to the Operating Agreement's term provision**. The LLC Members' vote did not include or contemplate an amendment to the OA's term provision. (*See* SA Ex. C (Cameron Depo.) at 69:7-70:1; SA Ex. F at RFA Nos. 34-35.) Indeed, in an email exchange following the vote and filing of the Articles of Amendment, attorney Farve explicitly confirmed to the members that the OA was not amended by the November vote when she stated that, "[h]ere, it was the Articles of Organization that was amended, not the Operating Agreement." (*See* Ex. 8 to SA Ex. D.)

While the District Court seemingly ignored these undisputed facts, *see generally* Appx. Ex. B, 9-11, it noted generic language in the text of LLC meeting

minutes from November 14, 2015, which stated that the motion at issue was "to extend the life of The LLC from 2024 to perpetual with no expiration." (*See* Appx. Ex. B, 9; *see also* Ex. 6 to SA Ex. D at ¶ 11.) However, there is certainly no language in the minutes that the Members specifically intended to amend the OA as part of the vote. Moreover, it is possible that the moving members would have tried to amend the OA after that vote, if the vote had been unanimous. As such, referencing neither the OA nor the Articles, the vote language is not dispositive in any way as to what document was being amended.

More importantly, the text of the minutes does not accurately reflect what was actually voted on at the meeting based on the other overwhelming and sworn evidence in the record. (*See* SA Ex. D, ¶ 11; Ex. 8 to SA Ex. D; SA Ex. C, 69:7-70:1; and SA Ex. F at RFA Nos. 34-35.) There has also been no evidence presented that the minutes were subsequently presented to or approved by the Members. As such, the meeting minutes fail to qualify as "substantial evidence" sufficient to establish that the Barbiers were "not entitled to judgment as a matter of law" on this issue. *See Junkermier, Clark, Campanella, Stevens, P.C. v. Alborn, Uithoven, Riekenberg, P.C.*, 2016 MT 218, ¶ 16, 384 Mont. 464, 380 P.3d 747 (citation omitted).

2. ISSUES REGARDING THE VALIDITY OF THE NOVEMBER 2015 VOTE TO AMEND THE ARTICLES OF ORGANIZATION.

The Barbiers also argued before the District Court that the LLC's original term provision further remains enforceable because the November 2015 vote to amend the Articles failed even to meet a 67% voting threshold of "Ownership Percentages" in the Company, if that threshold were sufficient. Namely, according to the applicable defined terms of the OA, Cameron and Horatio did not possess a combined 67% "share of the profits, losses and distributions of the Company" because, at the time of the vote, Seth Burns still held a right to 18.59% of the LLC's distributions, even though he had dissociated from the Company.

The District Court raised two points to counter that claim: (1) an allegation in the Barbiers' First Amended Complaint ("AC") conclusively established that Cameron and Horatio had 70% of the LLC's ownership interests at the time of the vote; and (2) Seth was not a voting member of the LLC on November 14, 2015, so Cameron and Horatio held sufficient membership interests to pass the vote. (*See* Appx. Ex. B, at 9.) However, both of those findings were incorrect as a matter of law.

i. THE BARBIERS' ARGUMENT RELATING TO THE VALIDITY OF THE NOVEMBER 2015 VOTE CENTERED ON THE REQUIRED

"OWNERSHIP PERCENTAGES" HELD BY CAMERON AND HORATIO, NOT THE ABILITY OF SETH TO VOTE HIS DISSOCIATED INTEREST.

The District Court concluded that the Barbiers' claim regarding the Vote's validity failed because Seth had dissociated and, thus, was no longer a voting Member. (*See* Appx. Ex. B, 10-11.) This conclusion, however, misses the mark regarding the substance of the Barbiers' claim. Namely, the District Court focused on Seth's inability to vote on his membership interest following his dissociation. (*See* Appx. Ex. B, 10-11.) The crux of this issue, however, lies in the Ownership Percentages actually held by Cameron and Horatio at the time of the vote, not the ability of Seth to vote on anything.

To summarize, the OA provides that the Articles of Organization may be amended with "the approval of Members owing [sic] at least 67% Ownership Percentages." (SA Ex. B, § 6.k.iii.) "Ownership Percentage" is defined as "a Member's **designated share of the profits, losses and distributions** of the Company which share shall be subject to change only by written agreement of the Members." (SA Ex. B, § 2.i. (emphasis added).) The closing date for the LLC's purchase of Seth's interest was not until February 1, 2016. As such, Seth retained his distributional interest until then, and the District Court's reliance on Seth not being a member was error.

In other words, even though he could not vote those shares, Seth still held the right to 18.59% of the "profits, losses and distributions" when the amendment vote took place on November 14, 2015. More importantly, that 18.59% remained outstanding and could not be voted on or designated to the remaining members for calculating the ownership percentages required to amend the Articles. Horatio and Cameron held the same 57.15% combined "share of the profits, losses and distributions"—*i.e.,* 57.15% combined ownership percentages—as they did prior to Seth's dissociation. As a result, the November 2015 vote was legally deficient to amend the Articles' term provision to perpetual.

Consequently, the District Court's ruling on this issue was incorrect as a matter of law, and its decision should be reversed.

ii. THE DISTRICT COURT MISCHARACTERIZED THE NOW-CORRECTED ALLEGATION CONTAINED IN THE BARBIERS' FIRST AMENDED COMPLAINT REGARDING CAMERON AND HORATIO'S LLC INTERESTS AT THE TIME OF THE NOVEMBER 2015 VOTE.

The District Court also cited to an allegation included in the Barbiers' AC to conclude that Cameron and Horatio had "70% of the LLC's ownership interests" at the time of the vote, despite the significant legal and factual support for the Barbiers' position that her original statements on that point were mistaken. (*See* Appx. Ex. B, 9-10.) Namely, the District Court focused on Paragraph 13 of the AC, which alleged in part:

> Over Lindsay's objection, Cameron and Horatio (individually, though Cameron had his power of attorney at the time and was influencing Horatio at that time), **representing** 70% of the LLC's **ownership interests**, voted in favor of such an amendment at a meeting on November 14, 2015.

(Doc. 29 at ¶ 13 (emphasis added).)

There are three problems with the court's ruling on this, however. First, the District Court misconstrued the foregoing allegation in a pleading as a conclusive "admission" of much more than the actual language provides. Paragraph 13 alleged that Horatio and Cameron **represented** to have enough interest to pass the vote based on subsequent representations made by the LLC's attorney, Jennifer Farve. (*See* Ex. 8 to SA Ex. D.) It does not, however, provide that they conclusively held the required amount. But more importantly, Paragraph 13's use of "ownership interests," as opposed to "Ownership Percentages," further erodes the District Court's conclusion, which, as explained in § F.I.B.2.i, *supra*, represents the determinative factor in calculating and meeting the voting requirements. Second, Lindsay explained in her deposition that she had been mistaken in her pleading. (*See* SA Ex. E, 59:4-62:2.) Lindsay explained "I will say that when I verified this, I took 70 percent as what he owns -- what they own now. But I realized later doing math that they had 57 percent. So that is inaccurate, but when I signed to verify, I believed that it was accurate." (*Id.* at 60:23-61:3; *see also* SA Ex. D, ¶¶ 8-9, 11-13.) Relatedly, even if Lindsay's later statements made to clarify and correct her

mistaken earlier statement were ineffective, that would simply have created a disputed material fact on that issue, preventing summary judgment.

Given the timing of this clarification from Lindsay (late in the discovery process), the undersigned counsel had planned to address that factual issue in any necessary Final Pretrial Order, rather than seeking leave to amend Plaintiffs' prior pleadings. Plaintiffs' later clarification of their claims is precisely how discovery is intended to work. *See Regains v. Horrocks*, 2023 U.S. Dist. LEXIS 138840, at * 8 (W.D. Mich. June 27, 2023) ("When faced with a verified complaint that contradicts later deposition testimony, this Court credits the deposition testimony").

In support of its ruling, the District Court cited to *Meadow Lake Estates Homeowners Ass'n v. Shoemaker*, 2008 MT 41, 341 Mont. 345, 178 P.3d 81. In that case, this Court did state that when "statements in an affidavit submitted pursuant to Rule 56(e), M.R.Civ.P., are repudiated in a later deposition, the affidavit statements do not raise a genuine issue of material fact." *Id.*, ¶ 46 (quoting *Herron v. Columbus Hosp.*, 284 Mont. 190, 195, 943 P.2d 1272, 1275 (1997)). However, the Court specifically made this statement in considering what kind of evidence *a non-movant can offer in opposing summary judgment*. As the Court stated, "a party may not avoid summary judgment by creating factual inconsistencies in the record," all in an effort to demonstrate the existence of genuine issues of material fact that would preclude summary judgment. *Id.*, ¶ 45. Here, the Barbiers did not try to create

"factual inconsistencies" in the record to avoid summary judgment. Rather, Lindsay offered her own sworn deposition testimony in support of her own summary judgment motion, noting that a single line in her First Amended Complaint was predicated on a simple mathematical mistake, which she has clarified after further legal analysis and discovery in this case. Her sworn deposition testimony—which is wholly consistent with the testimony Lindsay also provided in her declaration—should not be disregarded to hold that a pleading carries more evidentiary weight than sworn testimony provided as part of the discovery process, especially considering the nuanced language of Paragraph 13 of the pleading discussed above.

Third, how many shares of the LLC were owned by Cameron and Horatio at the time of the November 2015 vote is a matter of fact, which cannot be changed by a party's statement during the pendency of this lawsuit. That is, until the LLC redeemed Seth's shares in February 2016, Cameron, Horatio, Lindsay, and Seth were still the record owners of a certain percentages of the LLC's interests—specifically with Horatio then owning 28.58%; Cameron owning 28.57%; Lindsay owning 10.10%; Solange owning 7.08%; B.B., Lindsay's second child, then owning 7.08%; and Seth owning 18.59%. SA Ex. D, ¶ 8.

II. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN REQUIRING THE JOINDER OF THE LLC AS A DEFENDANT.

The District Court's decision (Appx. Ex. G (Doc. 28)) on Cameron's motion (Docs. 22-23) requiring Plaintiffs to join the LLC as a defendant, when the LLC was already a Plaintiff through Lindsay's derivative claims and when the LLC is owned and operated exclusively by the people who were already parties to the case, was an abuse of discretion and was not based on good cause.

As explained by Plaintiffs during briefing, *see* Doc. 24, forcing Plaintiffs to join the LLC was not required by Mont. R. Civ. P. 19 or by Mont. Code Ann. § 27-8-301, and the facts and circumstances of the case did not require the family LLC to be added as a defendant.

Significantly, while the Court relied on Rule 19 for its reasoning that the LLC must be joined as a Defendant because "the court cannot [order] complete relief" in the LLC's absence, that decision was based on a significant error of fact—namely it ignored that the LLC was already a party, as it was a plaintiff through Lindsay's derivative claims. Further, as Cameron was the 70.19% owner of the LLC's shares, together with Plaintiffs who own the nearly 30% of the remaining shares, the Parties are more than capable of adequately representing the LLC's interests.

Further, the remaining authorities offered by Defendant Cameron and cited by the District Court for its conclusions that the LLC needed to be added as a defendant

on the derivative claims, rather than a plaintiff, were based on outdated and distinguishable out-of-state precedent. Doc. 28 (Order), 2-3; Doc. 24, 11-16 (distinguishing those cases and authorities). To summarize, the authorities Cameron cited included cases that did not involve derivative claims, stood only for the proposition that the company needed to be added—on either side of the litigation,[3] or were based on guidance that no longer exists in secondary sources.

Moreover, requiring Plaintiffs to add the LLC as a defendant was unduly burdensome and punitive to Plaintiffs. The Court's requirement of adding the LLC as a defendant resulted in Plaintiffs having to pay personally for 30% of the LLC's costs to defend against Plaintiffs' own claims (*see* Doc. 24, p. 8), in Cameron (the 70.19% owner of the LLC) effectively having two sets of attorneys to defend against Plaintiffs' claims (*id.*), and in Plaintiffs being ordered to reimburse Defendant LLC's costs and fees entirely, including, as Plaintiffs pointed out in briefing, *see* Docs. 113, 119, the 30% they already contributed to the LLC's fees as the case progressed (unless the LLC were to reimburse Plaintiffs for those). *See* Docs. 121-122.

Cameron's request that Plaintiffs be forced to add the LLC as defendant was also untimely. *See* Doc. 19 (Scheduling Order). Under Mont. R. Civ. P. 16(b)(3)(A), scheduling orders must "limit the time to join other parties, amend pleadings,

[3] Four such cases were relied on by the District Court in its decision that the LLC should be joined as a defendant. Doc. 28, pp. 2-3.

complete discovery, and file motions." "A scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril…." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 610 (9th Cir. 1992). While indispensable parties may be added at any time, the LLC was already a party, making *its presence as a defendant not indispensable*. Cameron knew well about the LLC's interest in the underlying matters, and the Court's decision denying Cameron's motion to dismiss Plaintiffs' derivative claims had been issued in April (*see* Doc. 16), approximately eight months before Plaintiffs' motion.

Regarding the facts and circumstances of the case, Plaintiffs did not claim that the LLC breached any obligation to them and did not accuse the LLC of any wrongdoing. *See generally* Docs. 1, 24. Rather, Plaintiffs alleged that Cameron breached the LLC's operative contract documents and sought actions that the members themselves could take regarding the LLC's term duration.

For these reasons, the Court's decision to require Plaintiffs to join the LLC as a defendant was an abuse of discretion.

III. THE DISTRICT COURT'S DECISION TO AWARD PROFESSIONAL AND ATTORNEY FEES FOR KIM BENNETT'S DEPOSITION WAS INCORRECT AS A MATTER OF LAW.

Finally, the District Court also erred as a matter of law and abused its discretion in requiring the Barbiers to pay $4,410 for the professional and attorney fees requested by Bennett, a named hybrid fact/expert witness in this case. *See*

Appx. Ex. H. The District Court's award was based on Mont. R. Civ. P. 45(d)(1) "to avoid the unfair burden and expense upon Ms. Bennett of having to absorb the burden of her professional time and attorneys' fees attendant to the deposition, without compensation. *Id.* at 2. However, the District Court did not have sufficient grounds to order such relief under the circumstances.

To begin, there was no factual basis to justify the trial court's involvement on the issue. Bennett had been identified as a potential hybrid fact/expert witness by each of the parties, including as a potential rebuttal expert witness by both Cameron and Defendant LLC. There was no dispute that Bennett had knowledge of underlying facts relevant to certain disputed legal issues in this action. And while Bennett proclaimed that she was essentially "asked no questions about the facts or circumstances regarding the Burns Family ranch" (*see* Doc. 92 at 2), a review of the transcript defeats that assertion. (*See* SA Ex. G, 25:18-40:3, 43:17-62:7, 77:22-80:25.)

More importantly, Bennett failed to invoke any viable legal authority to advance her fee requests. First, Bennett failed to timely utilize the protections of Mont. R. Civ. P. 45 before she appeared for and completed the deposition. Even if she had timely requested relief under Rule 45, her testimony failed to include any substance that would have entitled her to any compensation beyond the statutory witness fee.

Rule 45 governs, among other things, how a person may be subpoenaed to provide testimony for a deposition, including the requirement to provide the statutorily established attendance fee and mileage allowed by law. Mont. R. Civ. P. 45(b); *see also* Mont. Code Ann. § 26-2-507. And, pursuant to Mont. Code Ann. § 26-2-501(1), the statutory witness fee for attending a deposition is $10.

Rule 45 also provides safeguards for how a person may be protected against such a subpoena, including to avoid undue burden or expense under subsection (d)(1) and when a subpoena may be quashed or modified under subsection (d)(3). While Rule 45 does provide a potential avenue for additional compensation (*see* Rule 45(d)(3)(C)(ii)), such a request must be made to the court before the deposition occurs via a motion to quash or modify the subpoena. *See* 9 Moore's Federal Practice - Civil § 45.50 (2024). Moreover, the subpoena would need to require "disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party." *See* Rule 45(d)(3)(B)(ii).

Here, the Barbiers provided the required witness fee with the deposition subpoena, which contained the applicable language for quashing or modifying a subpoena. Bennett, however, failed either to request compensation prior to her deposition or to move the court to modify the subpoena to provide additional compensation. Any request by Bennett under Rule 45 would fail nonetheless, as she

testified extensively on the factual knowledge she possessed of the underlying issues and the services she provided the LLC. Consequently, Bennett failed to comply with the procedural established by Mont. R. Civ. P. 45 and, therefore, the District Court abused its discretion in awarding her fees related to her deposition.

Due to her failure to follow the procedures set by Mont. R. Civ. P. 45, there was no other sufficient legal authority to support Bennett's fee requests. The Barbiers cannot locate any Montana authority establishing that a named hybrid expert witness is entitled to compensation beyond the statutory witness fee in Mont. Code Ann. §26-2-501(1). In fact, this Court has affirmatively ruled that experts are not entitled to anything beyond that fee unless the parties agree to further compensate the witness. *See Goodover v. Lindey's*, 255 Mont. 430, 443, 843 P.2d 765, 773 (1992) ("A party may pay an expert witness any fee he or she chooses, but a district court cannot award costs in excess of $10 per day per witness.") (citation omitted).

Consequently, the District Court's decision to impose the fees requested by Bennett against the Barbiers should be reversed for an order consistent with this decision.

G. CONCLUSION

For the foregoing reasons, the applicable rulings below should be reversed and this matter remanded to the District Court to enter summary judgment in favor of the Appellants regarding the interpretation of the Operating Agreement and the

continued enforceability of the LLC's limited term provision and to require the members to dissolve the LLC and distribute the Parties Ranch interests in proportion to their ownership percentages.

RESPECTFULLY SUBMITTED this 2nd day of May, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Montana Rule of Appellate Procedure 11, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced, with left, right, top, and bottom margins of one inch; and that the word count calculated by Microsoft Word is 9,970 words, excluding the Caption, Table of Contents, Table of Authorities, and Certificate of Compliance.

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CERTIFICATE OF SERVICE

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