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.

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

APPELLEE CAMERON H. BURNS' ANSWER BRIEF

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STATEMENT OF THE ISSUES

The issues presented for appeal are:

1. Did the District Court correctly interpret the H.W. Burns Family, LLC's Operating Agreement as allowing its amendment by a vote of members owning 67% or more of the company?

2. Did the District Court correctly determine the H.W. Burns Family, LLC was converted from a term to a perpetual company based on the undisputed facts?

3. Did the District Court abuse its discretion by requiring joinder of the H.W. Burns Family, LLC as a defendant?

4. Does this Court have jurisdiction to consider the District Court's award of professional and attorneys' fees to a non-party hybrid expert witness when Appellant failed to serve the *Notice of Appeal* and *Opening Brief* on the non-party witness?

5. Did the District Court abuse its discretion by awarding professional and attorneys' fees to a non-party hybrid expert witness?

STATEMENT OF THE CASE

This is Lindsay's second attempt to use the judicial system to undo her late father's express desire to preserve the Burns family's ranching legacy through the continued operation of the H.W. Burns Family, LLC ("LLC").

Lindsay's first attempt was her unsuccessful lawsuit challenging the validity of Horatio W. Burns' ("Horatio") Last Will and Testament executed in 2016 (the "Will"), filed in Sweet Grass County (the "Will Contest Action"). Lindsay alleged Horatio lacked capacity to execute his Will after his stroke in 2013 and her

brother, Cameron and his wife, Alison Burns ("Alison"), exercised undue influence over Horatio. After more than five years of litigation, including a seven-day trial, the jury rejected Lindsay's claims, finding Horatio did not lack testamentary capacity when he executed his Will, nor did Cameron or Alison exert undue influence over Horatio. The jury also rejected Lindsay's oft-repeated claim that Cameron and Alison took advantage of Horatio by causing him to vote to convert the H.W. Burns Family, LLC (the "LLC") from a term to a perpetual entity. Judgment was entered on November 7, 2022, affirming the validity of the Will and ordering Lindsay to pay the Estate's attorneys' fees and costs incurred defending the Will. This Court affirmed. *In re Est. of Burns*, 2023 MT 253, 414 Mont. 365, 540 P.3d 1029.

In December 2021, while the Will Contest Action was pending, Lindsay initiated this second lawsuit challenging the validity of the Cameron and Horatio's November 14, 2015, supermajority vote to convert the LLC to a perpetual company and to force the LLC to dissolve at the end of its original term—December 31, 2024. Dkt. 1. Lindsay filed individually, and on behalf of her then minor, now adult child Solange Barbier, her minor child B.B. (both members of the LLC), and on behalf of the LLC as a purported derivative claim. *Id.* Lindsay asserted claims for declaratory judgment, breach of contract, and specific performance on the

controlling issue in this case — whether the LLC was a term company set to expire and dissolve on December 31, 2024, or was converted to a perpetual company by a supermajority vote of its members (Cameron and Horatio, over Lindsay's objection). *Id.*[1]

The case started intentionally slow while the Will Contest Action was pending. The parties jointly secured numerous extensions, with the final *Order Extending Deadlines* being issued on December 9, 2022, after judgment was entered in the Will Contest Action. Dkts. 6, 11, 21. Likewise, the parties did not initiate the discovery until 2023.

On December 30, 2022, Cameron filed a motion to force Lindsay to join the LLC as a defendant under Mont. R. Civ. P. 19. Dkt. 22. The District Court granted the motion ordering Lindsay to join the LLC as a defendant because "[t]he Company has an interest in the proceedings that will determine if the Company ceases to exist on at the end of 2024." *Order Granting Defendants (sic) Motion to Add Company as Party*, p. 4 (Dkt. 28) (Appx. 23–27). Lindsay appeals this order.

[1] Lindsay alleged Horatio lacked capacity on November 14, 2015, to vote to convert the LLC to a perpetual entity. The District Court dismissed that claim on summary judgment because Lindsay was collaterally estopped from relitigating Horatio's capacity after the Will Contest Action. *Order Regarding Cameron H. Burns' Motion for Partial Summary Judgment Re: Collateral Estoppel* (Dkt. 106). Lindsay does not appeal that order.

Lindsay subsequently filed her *First Amended Verified Complaint*, adding the LLC as a Defendant. Dkt. 29. Cameron and the LLC answered (Dkts. 36, 39), with the LLC asserting a counterclaim for declaratory judgment seeking interpretation of the Operating Agreement's amendment provisions. Dkt. 39.

The parties filed competing motions for summary judgment regarding interpretation of the LLC's Operating Agreement and whether the LLC was properly converted to a perpetual company. Dkts. 60, 70, 73. The District Court granted Cameron and the LLC's motions and denied Lindsay's, holding: 1) the Operating Agreement may be amended by a vote of the LLC's members owning at least 67% of the LLC's Ownership Percentage; and 2) the LLC was properly converted from a term to a perpetual company by a supermajority vote of its members on November 14, 2015. *Order Regarding Motions for Summary Judgment Re: Operating Agreement and Term of H.W. Burns Family, LLC* ("Order") (Dkt. 107) (Appx. 3–14). Lindsay appeals this order.

While the summary judgment motions were pending, Dr. Kim Bennett, a professional real estate appraiser identified as a hybrid expert witness by the parties, appeared through counsel and filed a motion seeking reimbursement of professional and attorneys' fees she incurred related to Lindsay taking Dr. Bennett's deposition. *Kim Bennett's Special Appearance and Request for Professional*

Fees and Attorney's Fees (Dkt. 92). The District Court, exercising its discretion pursuant to M. R. Civ. P. 45(d)(1), ordered Lindsay to pay Dr. Bennett $4,410.00 "to avoid the unfair burden and expense upon Dr. Bennett of having to absorb the burden to her professional time and attorneys' fees attendant to the deposition, without compensation." *Order Imposing Fees for Deposition of Kim Bennett* (Dkt. 102) (Appx. 28–30). Lindsay appeals this order.

The District Court awarded Cameron and the LLC their attorneys' fees and costs under the prevailing party provision of the Operating Agreement and established a procedure for determining reasonableness. Dkts. 116, 121, 122, 123 (Appx. 15–22). Rather than engage in a protracted reasonableness challenge, the parties stipulated to the amounts of the fee awards. Dkt. 132.

Judgment was entered on January 20, 2025. Dkt. 133 (Appx. 1–2). The parties stipulated to stay execution pending appeal. Dkt. 129.

Lindsay timely filed her *Notice of Appeal*. Despite identifying the award of attorneys' fees and costs to Cameron and the LLC as an appealed issue in her *Notice of Appeal*, Lindsay's *Opening Brief* does not address those awards.

STATEMENT OF STATEMENT OF FACTS

The material facts were undisputed. Indeed, all the facts were taken from Lindsay's *First Amended Verified Complaint* ("FAC") (Dkt. 29) and *Declaration of Lindsay Burns Barbier* ("Barbier Dec.") (Dkt. 74-1) (Supp. Appx. 35–93).

The LLC was formed in 1994 as a term company set to dissolve on December 31, 2024. FAC, ¶¶ 2, 10; Order (Appx. 5). The LLC filed Articles of Organization on January 19, 1994. FAC, ¶ 10; Supp. Appx. 1–2; Order (Appx. 5). On January 17, 2004, the LLC's then members, Horatio, Cameron, Lindsay, and Seth Burns ("Seth"), unanimously adopted its current Operating Agreement. FAC, ¶ 11; Supp. Appx. 3–24; Order (Appx. 5).

On July 16, 2015, "Seth decided to withdraw/dissociate from the LLC and provided his written notice to do so." *Plaintiffs' Brief in Support of Motion for Summary Judgment*, p. 5 (Dkt. 74) (emphasis added); Barbier Dec., ¶ 8 (Supp. Appx. 37); Order (Appx. 6). Under Section 9.a.i. of the Operating Agreement:

> a. A Member ceases to be a Member of the Company upon the happening of any of the following events of dissociation:
>
> i. The Company's receiving notice of the Member's express will to withdraw.

Supp. Appx. 14; Order (Appx. 13). Accordingly, when Seth tendered written notice of his election to withdraw from the LLC he ceased being a member of the LLC. *Id.*

"Following Seth's withdrawal notice, the remaining Members elected to continue the business of the Company and have the Company purchase Seth's interest pursuant to Sections 10 and 11 of the Operating Agreement." Barbier Dec., ¶ 9 (Supp. Appx. 37).

Section 6.k. of the Operating Agreement provides:

> Notwithstanding 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 owning at least 67% Ownership Percentage:
>
> i. The amendment of the operating agreement under 35-8-109;
>
> …
>
> iii. An amendment to the articles of organization under 35-8-203.
>
> …
>
> x. Waiver of the right to have the Company's business wound up and the company terminated under 35-8-901….

Supp. Appx. 11–12; Order (Appx. 5).

In addition to Section 6.k., the Operating Agreement offers an alternative, discretionary means of amending the Operating Agreement by unanimous consent:

> The Members may amend this Agreement and Exhibit A upon execution of a written amendment signed by all of the Members.

Supp. Appx. 20.

On November 14, 2015, the LLC's members conducted a meeting during which Cameron and Horatio, over Lindsay's objection and representing 70% of the LLC's ownership interest, voted to amend the LLC from a term company to a perpetual company. FAC, ¶ 13; Order (Appx. 6). The Meeting Minutes of that meeting state, in relevant part:

> A motion was made by Horatio to extend the life of The LLC from 2024 to perpetual with no expiration. Cameron seconded. Horatio voted Yes. Cameron voted Yes. Lindsay voted No.

Supp. Appx. 83; Order (Appx. 6).

After the vote, the LLC filed Articles of Amendment with the Montana Secretary of State changing the term of the LLC to perpetual. Supp. Appx. 84; FAC, ¶ 15; Order (Appx. 6).

* * * * *

Although irrelevant on appeal, Lindsay incorrectly states "Cameron now owns 70.19% of the Company." Opening Br., p. 10. While that was true when Judgment was entered, that is no longer the case. Cameron transferred 15% membership interests to each of his sons, Andrew Burns, Henry Burns, and Mack Burns, leaving Cameron with only 25.19% of the LLC.

STANDARD OF REVIEW

This Court reviews an entry of summary judgment de novo. *Albert v. City of Billings*, 2012 MT 159, ¶ 15, 365 Mont. 454, 282 P.3d 704. Summary judgment is appropriate when the moving party demonstrates the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. M. R. Civ. P. 56(c)(3); *McClue v. Safeco Ins. Co.*, 2015 MT 222, ¶ 8, 380 Mont. 204, 354 P.3d 604.

A district court's decision on joinder is discretionary, reviewed for abuse of discretion. *Mohl v. Johnson*, 275 Mont. 167, 911 P.2d 217, 219 (1996)

Proper service of notice of appeal is jurisdictional. *W. Holding Co. v. Nw. Land & Loan Co.*, 113 Mont. 24, 37, 120 P.2d 557, 563 (1941). Absent notice, this Court lacks jurisdiction to hear the appeal. *Joseph Eve & Co. v. Allen*, 284 Mont. 511, 514, 945 P.2d 897, 899 (1997).

Discretionary rulings under M. R. Civ. P. 45 are reviewed for abuse of discretion. *In re Parenting of F.L.F.L.K.*, 2025 MT 41, ¶ 17, 421 Mont. 1, 564 P.3d 844; *In re Conservatorship of H.D.K.*, 2021 MT 254, ¶ 31, 405 Mont. 479, 497 P.3d 1171.

SUMMARY OF ARGUMENT

In 2015, Horatio and Cameron voted to continue the LLC as a perpetual entity to preserve the Burns family's ranching legacy long after Horatio's death.

Lindsay opposed converting the LLC to a perpetual entity because she wanted the LLC's assets sold or distributed to its members at the end of the company's original term. In reaction to Lindsay's opposition to continuing the LLC into perpetuity, Horatio amended his Will, giving his membership interest in the LLC solely to Cameron. The result was Cameron controlled just over 70% of the LLC's membership interest. Lindsay challenged Horatio's amended Will in her unsuccessful Will Contest Action. *Burns*, ¶ 1.

Well after the 2015 vote and after Horatio's passing, Lindsay filed this case alleging, for the very first time, the vote converting the LLC to a perpetual entity was improper and seeking to terminate the LLC, thereby forcing the sale or distribution of the LLC's assets (primarily ranch land). The sole basis for Lindsay's claims against Cameron and the LLC is that Cameron and Horatio violated the Operating Agreement by converting the LLC from a term company to a perpetual entity. However, the undisputed facts, verified by Lindsay in her FAC (Dkt. 29) and Barbier Dec. (Dkt. 74-1) (Supp. Appx. 37), establish the LLC's members conducted a meeting on November 14, 2015, and during that meeting Cameron and Horatio, representing 70% of the LLC's ownership interest, voted to convert the LLC from a term to a perpetual company under Section 6.k. of the Operating Agreement. The District Court correctly interpreted the Operating Agreement and

applied the undisputed facts, as alleged by Lindsay, to determine the LLC was properly converted to a perpetual company.

The other issues raised by Lindsay on appeal—joinder and payment of fees to a third-party witness—are extraneous. Nonetheless, the District Court did not abuse its discretion on either matter. Moreover, Lindsay failed to secure this Court's jurisdiction over her appeal of the District Court's award of fees to Dr. Bennett by failing to properly serve the *Notice of Appeal* on Dr. Bennett.

ARGUMENT

I. Summary judgment standard.

Rule 56(a), M. R. Civ. P., permits a court to enter summary judgment when the moving party proves a complete absence of any genuine issue of material fact, and where the facts entitle the moving party to judgment as a matter of law. *Lone Moose Meadows, LLC v. Boyne USA, Inc.*, 2017 MT 142, ¶ 8, 387 Mont. 507, 396 P.3d 128.

The facts presented to the District Court were taken from Lindsay's sworn statements contained in her FAC and declaration. In Montana, the "allegations, statements, or admissions contained in a pleading are conclusive as against the pleader, and are admissible as against the party making them in the litigation as proof of the facts which they admit." *Meadow Lake Estates Homeowners Ass'n v.*

Shoemaker, 2008 MT 41, ¶ 45, 341 Mont. 345, 178 P.3d 81 (quoting *Anderson v. Mace*, 99 Mont. 421, 427-28, 45 P.2d 771, 773-74 (1935)).

Once the moving party meets its burden, the non-moving party must produce some evidence of a genuine issue of material fact to avoid entry of summary judgment. *Belanus v. Potter*, 2017 MT 95, ¶ 13, 387 Mont. 298, 394 P.3d 906. The non-moving party may not rely upon mere speculation, conjecture, or conclusions. *Id.* The opposing party may not create a genuine issue of material fact simply by putting his own conclusions and interpretations on an otherwise clear set of facts. *Koepplin v. Zortman Mining*, 267 Mont. 53, 61, 881 P.2d 1306 (1994). Further, the opposing party "may not avoid summary judgment by creating factual inconsistencies in the record" through conflicting declarations or deposition testimony. *Meadow Lake*, ¶ 46 (citations omitted).

II. The District Court correctly determined the Operating Agreement may be amended by a vote of its members owning 67% of the LLC.

The Montana Limited Liability Company Act (the "Act"), Mont. Code Ann. § 35-8-101, *et seq.*, governs the formation, operation, and dissolution of limited liability companies. The Act allows members of a limited liability company to enter into an operating agreement to govern the affairs of the company:

> Except as provided in subsection (2), all members of a limited liability company may enter into an operating agreement, which need not be in writing, to regulate the affairs of the company and the conduct of its

> business and to govern relations among the members, managers, and company. To the extent that the operating agreement does not otherwise provide, this chapter governs relations among the members, managers, and company.

Mont. Code Ann. § 35-8-109.

The LLC's Operating Agreement unambiguously established two compatible ways its members may amend the Operating Agreement: (1) Section 6.k.i. permits members owning "at least" 67% of the Ownership Interest to vote to amend the Operating Agreement; and (2) Section 13.j. provides the members "may" amend the Operating Agreement by executing a written amendment. Supp. Appx. 66, 75. Read together, the members could unanimously agree to amend the Operating Agreement, or the members could take a contested vote with a supermajority threshold of 67% to amend the Operating Agreement.

There is nothing conflicting or ambiguous about the Operating Agreement's amendment procedures. It is uncontroversial that a business can act through either a formal meeting based on specified quorum and substantive voting requirements set forth in controlling documents or, alternatively, dispense of formal proceedings if everyone in the company agrees in writing. *Compare* Mont. Code Ann. § 35-8-307(4) (member action by vote) to Mont. Code Ann. § 35-8-307(5) (member action by unanimous consent); *see also, e.g.*, Mont. Code Ann. § 35-15-704 (authorizing corporate action without meeting); Mont. Code Ann. § 35-14-725 (authorizing

corporate action by shareholder vote).

The District Court correctly rejected Lindsay's bald claim that the amendment provisions of the Operating Agreement were ambiguous. Order (Appx. 9–10).

A. The Operating Agreement unambiguously allows for amendment with a supermajority (at least 67%) vote.

Interpretation of the Operating Agreement presents a question of law. *Pastimes, LLC v. Clavin*, 2012 MT 29, ¶ 19, 364 Mont. 109, 274 P.3d 714. Whether an ambiguity exists in the Operating Agreement is also a question of law. *Corp Air v. Edwards Jet Cetr. Mont. Inc.*, 2008 MT 283, ¶ 31, 345 Mont. 336, 190 P.3d 1111; Opening Br., p. 19.

Montana's controlling rules of contract interpretation establish:

1) the whole of a contract is to be taken together so as to give effect to every part if reasonably practicable, each clause helping to interpret the other (Mont. Code Ann. § 28-3-202);

2) a contract must be interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful (Mont. Code Ann. § 28-3-301);

3) when a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone if possible (Mont. Code Ann. § 28-3-303); and

4) where the language of a contract is unambiguous, the duty of the court is to apply the language as written. *Corp. Air*, ¶ 32.

Moreover, this Court has consistently held the word "may" is permissive or discretionary, explicitly holding the word "may" does not have a mandatory connotation in its usual meaning. *Dover Ranch v. County of Yellowstone*, 187 Mont. 276, 283, 609 P.3d 711, 714 (1980); *see also Kageco Orchards, LLC v. Mont. DOT*, 2023 MT 71, ¶ 26, 412 Mont. 45, 528 P.3d 1097. "May" is not obligatory. This distinction is crucial in contractual language, as it delineates between actions that are optional and those that are required. *See In re Deadman's Basin Water Users Ass'n*, 2002 MT 15, ¶ 19, 308 Mont. 168, 40 P.3d 387 ("The language of contractual provisions should be interpreted according to its plain, ordinary meaning.").

In summary:

> Language of contractual provisions is interpreted according to its plain, ordinary meaning. When the language of a contract is clear, unambiguous and, as a result, susceptible to only one interpretation, the duty of the court is to apply the language as written. *State v. Asbeck,* 2003 MT 337, ¶ 18, 318 Mont. 431, 80 P.3d 1272. An ambiguity exists where the wording of the contract, taken as a whole, is reasonably subject to two different interpretations. *Asbeck*, ¶ 18; *Ophus v. Fritz*, 2000 MT 251, ¶ 23, 301 Mont. 447, 11 P.3d 1192 (citation omitted). Hence, in interpreting a written contract, the intention of the parties is ascertained "first and foremost" from the writing alone. *Asbeck*, ¶ 18 (citation omitted).

Am. Music Co. v. Higbee, 2004 MT 349, ¶ 17, 324 Mont. 348, 103 P.3d 518.

Lindsay's three out-of-state citations, two of which are unpublished, non-

citable decisions, do not support her claim that the amendment provisions of the Operating Agreement are in conflict. Opening Br., pp. 22–24. The cases are so far afield from the Operating Agreement at issue they provide no guidance whatsoever.

The first case, *Anesthesia Health Consultants, LLC v. Sleep EZ Anesthesia, PLLC*, is an unpublished decision that found two diametrically opposed provisions in an operating agreement — one permitting members to contract with legal counsel without membership approval, and one prohibiting members form contracting with anyone without membership approval — were ambiguous. Those terms were obviously contradictory; as the Kentucky court recognized, "[a] contract is ambiguous if a reasonable person would find it susceptible to two different or inconsistent interpretations." 2022 Ky. App. Unpub. LEXIS 127, * 20 (Ky. App. Mar. 4, 2022) (citation omitted).

The second case, *Ruth v. Home Health Care of Middle Tenn., LLC*, found the operating agreement was "particularly ambiguous in that it requires a vote by Majority Interest to overcome a dissolution and Majority Interest is defined in terms of Membership Interests of Members in relation to Capital Interests, which are in turn defined with reference to Capital Accounts." 2010 Tenn. App. LEXIS 159, *13-14 (Tenn. App., Mar. 3, 2010). Those terms were found ambiguous not because they were contradictory, but because they were immensely confusing. *Id.*

Finally, in *Lies v. Brown*, the Kansas Court of Appeals, in another unpublished decision, found three conflicting mechanisms for amending the company's operating agreement were ambiguous. 2008 Kan. App. Unpub. LEXIS 251, *17-18 (Kan. Ct. App., Mar. 28, 2008). Such finding was required because the operating agreement contained competing, mandatory provisions that both required a majority vote and required unanimous consent for an amendment. *Id.* None of these cases support Lindsay's claim that the Operating Agreement is ambiguous. Here, the intention of the parties may be ascertained "first and foremost" from the writing. *Am. Music Co.*, ¶ 17.

The Operating Agreement allows the parties to unanimously execute a written amendment. Section 13.j. That is precisely what they did in 2004 when they replaced the LLC's old agreement with the current Operating Agreement. However, if the parties cannot agree on a written amendment, the Operating Agreement allows for amendment by a supermajority vote of "at least 67%". Section 6.k.i. There is nothing confusing, contradictory, or ambiguous about the amendment process.

An ambiguity cannot exist unless there are two alternative *reasonable* interpretations of a contract. *Wickland v. Sundheim*, 2016 MT 62, ¶ 21, 383 Mont. 1, 367 P.3d 403). Lindsay's proffered interpretation, that all amendments to the

Operating Agreement require unanimous writing, nullifies Section 6.k. and create surplusage and absurdity. Montana law provides all contract language is presumed to have meaning so any repugnancies in a contract must be interpreted to reconcile them with other provisions and give them some effect, Mont. Code. Ann. § 28-3-204, and the role of the judge in interpreting contracts includes favoring constructions which "will give effect to all" provisions or particulars. Mont. Code Ann. § 1-4-101.

Additionally, the list of authorized acts identified in Section 6.k. of the Operating Agreement, on which a vote of 67% controls, is identical to the list contained in Mont. Code Ann. § 35-8-307(3). It is self-evident the members took the statute, which requires unanimous consent by default, and changed the consent requirement to a 67% supermajority. If they intended to require unanimity, as Lindsay contends, that was already the law and there would be no reason to include Section 6.k. at all. This was plainly the intent on the face of the instrument and the parties' intent in contracting must be deduced, in the first instance, from the writing alone. Mont. Code. Ann. § 28-3-303. Since it can, it is not permissible to resort to extrinsic evidence.

The only way Lindsay's argument makes sense is if the Court inserts language and restates Section 13.j. as follows: "The Members may only amend this

Agreement and Exhibit A upon execution of a written amendment signed by all of the Members." That is not what the Operating Agreement says.

B. Although extrinsic evidence cannot be considered because the Operating Agreement is clear and concise, the extrinsic evidence offered by Lindsay does not support her position.

Lindsay offers irrelevant "extrinsic evidence" to support her untenable interpretation of the Operating Agreement. First, she offers communications from the LLC's old attorney, Angus Fulton, wherein he stated the Operating Agreement executed in 2004 would not be valid until Seth signed. Opening Br., p. 26. But Lindsay fails to disclose that the LLC's old operating agreement did not permit amendment by a supermajority vote (it did not contain the equivalent to Section 6.k. in the new Operating Agreement). Supp. Appx. 40–51. She also offers an email from the LLC's attorney in 2015, Jennifer Farve, that has no bearing on whether Section 6.k. of the Operating Agreement permits amendment by supermajority vote. Opening Br., p. 26. If anything, Ms. Farve's correspondence supports Cameron and the LLC's interpretation of the Operating Agreement; in response to Lindsay's preposterous allegations of fraud, Ms. Farve aptly stated:

> Since the Operating Agreement states that a "Member ceases to be a Member of the Company upon the happening of ... The Company's receiving notice of the Member's express will to withdraw," I conclude that Seth is no longer a Member. Section 6(k) provides that the articles of organization may be amended by the Members owing at least 67% Ownership Percentages. Not including Seth's shares, I understand

> [Horatio] and Cam[eron] collectively hold 70% of the Ownership Percentages. In my opinion, Seth's Ownership Percentages should not be included because he is no longer a Member. This interpretation would be consistent with Section 8(c) of the Operating Agreement that states the Transferring Member shall not be entitled to vote on the election to continue the operation of Company.

Supp. Appx. 86 (emphasis added). In other words, Ms. Farve told Lindsay in 2015 that the arguments she is making now are wrong.

Lindsay's entire case hinges on her convincing the Court to ignore Section 6.k. and amend Section 13.j. from a permissive provision (using the word "may") to a mandatory provision (imposing the word "must").

It has long been the rule in Montana, when interpreting a contract, the Court is not permitted to amend or alter the agreement under the guise of interpretation. *Union Elec. Co. v. Lovell Livestock Co.*, 101 Mont. 450, 456, 54 P.2d 112, 115 (1936) (citing *Brown* v. *Homestake Exploration Co.*, 98 Mont. 305, 39 P.2d 168, 174 (1934); *McDaniel* v. *Hager-Stevenson Oil Co.*, 75 Mont. 356, 243 P. 582, 584 (1926)). In *Williams v. Ins. Co. of N. Am.*, the Court emphasized that courts have no authority to change a contract or disregard the express language used when the intention of the parties is clear from the contract's language. 150 Mont. 292, 295, 434 P.2d 395, 397 (1967). In *Edwards v. Peavey Co.*, the Court reiterated it is a fundamental principle that a court may not make a new contract for the parties or rewrite their contract under the guise of construction. 170 Mont. 45, 50, 549 P.2d 1082, 1085

(1976) (quoting 17 Am.Jur.2d, Contracts § 242). Instead, the Court must enforce the contract according to the terms employed by the parties. *Id.*; *see also Sullivan v. Marsh*, 124 Mont. 415, 417, 225 P.2d 868, 870 (1950) (noting courts are not empowered to amend and alter a contract by inserting terms or conditions on which there was never a meeting of the minds).

III. The District Court correctly held the LLC was converted from a term to a perpetual company.

There was no dispute that the Operating Agreement regulated the affairs of the LLC and governed the relations among its members. FAC, ¶ 42 (admitting the Operating Agreement controls). As addressed above, the Operating Agreement allowed its members owning at least 67% of the LLC membership interest to amend the Operating Agreement, amend the Articles of Organization, or waive the right to have the LLC's business wound up and the LLC terminated. Operating Agreement, Section 6.k. (Supp. Appx. 11–12). There was no dispute that on November 14, 2015, over Lindsay's objection, Cameron and Horatio, representing 70% of the LLC's ownership interest, voted "to extend the life of The LLC from 2024 to perpetual with no expiration." Supp. Appx. 83; FAC, ¶ 13. Finally, there was no dispute the LLC filed Articles of Amendment with the Montana Secretary of State changing the term of the LLC to perpetual. Supp. Appx. 85; FAC, ¶ 15.

The supermajority vote by Cameron and Horatio on November 14, 2015, to

convert the LLC to a perpetual company was expressly authorized by the Operating Agreement and is controlling. That Lindsay voted against changing the LLC to a perpetual company does not allow her to undo the lawful action taken by the LLC's supermajority by filing a lawsuit many years after-the-fact. Despite her objections long ago, Lindsay is bound by the Operating Agreement and the controlling vote of the LLC's members.

Lindsay makes two arguments to claim the November 14, 2015, vote was insufficient to convert the LLC to a perpetual company. First, contrary to her prior admission under oath in her FAC, she contended Cameron and Horatio did not possess the requisite Ownership Percentage in the LLC as of November 14, 2015, because Seth was still in the process of dissociating at that time. Second, despite Section 6.k. of the Operating Agreement allowing otherwise, she claims the November 14, 2015, vote did not amend the Operating Agreement.

The District Court correctly concluded Lindsay's two arguments misapplied the Operating Agreement and Montana law.

A. Cameron and Horatio controlled more than 67% of the LLC's Ownership Percentage when they voted to convert the LLC to a perpetual company.

1. Lindsay cannot undo her admissions.

Lindsay admitted, under oath, that after Seth dissociated from the LLC

earlier in 2015, Cameron and Horatio represented 70% of the LLC's Ownership Percentage when they voted in favor of converting the LLC to a perpetual company on November 15, 2015:

> **13. In the fall of 2015, certain members of the LLC desired to amend the LLC's original Articles of Organization to replace the 2024 dissolution date with a perpetual term. 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.**

FAC, ¶ 13; Order (Appx. 12–13). She made that admission at the outset of this lawsuit because it was fact.[2] Her only challenge to the supermajority vote was that Cameron unduly influenced Horatio. *Id.* However, once the jury in the Will Contest Action rejected Lindsay's undue influence claim, and she was estopped from making that claim, Lindsay changed her theory, and her testimony, to assert that Seth's dissociated membership interest should have been included in the vote tally.

[2] Prior to Seth's dissociation from the LLC, the respective ownership percentages of the LLC's members were: Horatio—28.58%; Cameron—28.57%; Lindsay—10.10%; Solange—7.08%; B.B.—7.08%; and Seth—18.59%. Barbier Dec., ¶ 8 (Supp. Appx. 37). After Seth's dissociation and the resulting elimination of his 18.59% membership interest, Horatio and Cameron controlled more than 67% of the LLC's Ownership Interest. Additionally, since Solange and B.B. were under the age of 29 at the time of the vote, they did not have the power to vote on any matters of the Company. Operating Agreement, Section 8.b.i. (Supp. Appx. 68).

Montana law is clear, and the District Court was correct: Lindsay's admissions in her FAC "are conclusive … and are admissible [against Lindsay] as proof of the facts which they admit." Order, p. 10 (citing *Meadow Lake*, 2008 MT 41, ¶ 45) (emphasis added)). The District Court also correctly concluded Lindsay "may not avoid summary judgment by creating factual inconsistencies in the record" through conflicting declarations or deposition testimony. *Id.* (citing *Meadow Lake*, ¶ 46) (citations omitted).[3]

Lindsay also claims on appeal that the minutes from the LLC's November 14, 2015, meeting of its members during which Cameron and Horatio voted to convert the LLC to a perpetual entity "do not accurately reflect what was actually voted on at the meeting…." Opening Br., p. 29. But Lindsay verified under oath that "[a] true and correct copy of the LLC's November 14, 2015, Meeting Minutes" was attached to her declaration, without any caveat regarding the substance of the written minutes. Barbier Dec, ¶ 11 (Supp. Appx. 37–38).

The District Court correctly held Lindsay to her initial admissions by

[3] Lindsay strangely argues *Meadow Lake* is inapplicable because she only changed her testimony to support her motion for summary judgment, not to oppose Cameron and the LLC's motions. Opening Br., pp. 34–35. This strained logic is belied by the fact that Lindsay opposed Cameron and the LLC's motions by "incorporating" her arguments from her motion for summary judgment. Dkt. 75, p. 2.

refusing to allow Lindsay to factual assertions after the failed Will Contest Action.

2. Seth lost his voting rights when he announced his withdrawal from the LLC.

When Seth provided his July 16, 2015, written notice of his intent to withdraw he ceased being a member of the LLC. Operating Agreement, Section 9.a.i (Supp. Appx. 69); Mont. Code Ann. § 35-8-803. Even Lindsay conceded: "Pursuant to the Operating Agreement, Seth dissociated from the LLC and ceased to be a "Member" upon the delivery of his withdrawal notice." Dkt. 74, p. 18 (emphasis added). Upon Seth's notice of dissociation, his right to participate in the management of the LLC ended. Mont. Code Ann. § 35-8-805(2). That is the end of the analysis.

Nonetheless, Lindsay relies on Seth being "treated the same as a transferee of a member" under Mont. Code Ann. § 35-8-805(2) after his dissociation to claim Horatio and Cameron did not control at least 67% of the ownership interest. Opening Br., p. 31. While Seth certainly retained a distributional interest in the LLC after his dissociation, Lindsay is wrong about the impact of Seth's distributional interest on the subsequent vote to convert the LLC to a perpetual company. Both the Operating Agreement and Act are clear — Seth's distributional interest had zero bearing on calculating subsequent votes by the LLC's members, including the vote to convert the LLC to a perpetual company.

First, the Operating Agreement defines the term "Member" as "a person who has … not dissociated from the Company." Operating Agreement, Section 2.e. (Supp. Appx. 60) (emphasis added). Likewise, a person who is not a Member cannot have any "Ownership Percentage." Operating Agreement, Section 2.i. (Supp. Appx. 60) ("'Ownership Percentage' shall mean a Member's designated share of the profits, losses and distributions of the Company…." (emphasis added). Since Seth "ceased to be a 'Member,'" as Lindsay admits, it was impossible for him to possess any Ownership Percentage.

Second, the Act provides distributional owners are not entitled to exercise any rights as a member. Mont. Code Ann. § 35-8-707.

Put simply, Seth was no longer a member of the LLC after he submitted written notice of his intent to withdraw from the LLC and, under both the Operating Agreement and the Act, he could not vote his discontinued interest in the company. Therefore, it is undisputed that Horatio and Cameron controlled the requisite Ownership Percentage to vote to convert the LLC to a perpetual entity.

B. The November 14, 2015, vote "extend[ed] the life of the LLC from 2024 to perpetual with no expiration."

Lindsay claims the November 14, 2015, vote did not amend the Operating Agreement and, therefore, the LLC expired on December 31, 2024. She claims the 2015 vote only approved of an amendment of the Articles of Organization, not the

Operating Agreement. Opening Br., pp. 28–29. This argument belies the language of Horatio's motion and the supermajority vote.

> On November 14, 2015:
>
> A motion was made by Horatio to extend the life of The LLC from 2024 to perpetual with no expiration. Cameron seconded. Horatio voted Yes. Cameron voted Yes. Lindsay voted No.

Supp. Appx. 83. There was no limiting condition placed on the vote and the intent of the vote was unequivocal — converting the LLC from a term to a perpetual company.

It is inexplicable for Lindsay to argue the motion and vote to "extend the life of the LLC from 2024 to perpetual with no expiration" somehow authorized the filing of amended Articles of Organization but did not amend the Operating Agreement at the same time.

IV. The District Court correctly required Lindsay to join the LLC as a Defendant.

Lindsay's lawsuit had one purpose — ending the LLC. If successful, Lindsay wanted to force dissolution and distribution or sale of the LLC's assets.

Lindsay claims the LLC was not an indispensable party because she alleged derivative claims "on behalf of" the LLC. She is wrong. The District Court correctly rejected her fox guarding the henhouse argument by requiring Lindsay to join the LLC as a defendant under M. R. Civ. P. 19.

A. The LLC was an indispensable party.

Lindsay's appeal presents a straightforward issue based on black-letter law. *Ross v. Bernhard*, 396 U.S. 531, 538, 90 S.Ct. 733 (1970). "It is well established that an entity on whose behalf a derivative suit is asserted is a necessary defendant in the derivative action." *Buckley v. Control Data Corp.*, 923 F.2d 96, 98 (8th Cir. 1991) (citing 3B Moore's Federal Practice, ¶ 23.1.21[1] at 23.1-100 (1987) (the corporation, in a derivative suit, "must be made a defendant, since it is indispensable"); *Liddy v. Urbanek*, 707 F.2d 1222, 1224 (11th Cir. 1983) ("There is no question that a corporation is an indispensable party in a derivative action brought by one of its shareholders."); *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 522-23 & n. 2, 67 S.Ct. 828 (1947) (holding a corporation is a necessary party in a derivative suit). "Characterizing a cause of action as derivative has consequences. 'Pertinently, it means that the corporation is an indispensable party within the meaning of Fed.R.Civ.P. 19 (which requires the joinder of parties 'needed for just adjudication')". *TC Investments Corp. v. Becker*, 733 F.Supp.2d 266, 283 (D. PR. 2010) (citing *Gabriel v. Preble*, 396 F.3d 10, 13 (1st Cir. 2005)); *see also Tuscano v. Tuscano*, 403 F.Supp.2d 214, 225 (E.D.NY. 2005) ("It is well settled that a shareholder derivative action brought pursuant to Fed.R.Civ.P. 23.1 cannot proceed in the absence of the corporations whose rights are being asserted.");

Buckley, 923 F.2d at 98.

More than a century ago, the United States Supreme Court held that when the corporation is adverse to a derivative suit, the corporation must be a party defendant. *Doctor v. Harrington*, 196 U.S. 579, 587, 25 S.Ct. 355 (1905). "A corporation is deemed adverse to a derivative suit when, regardless of the reason, the corporation's management opposes the maintenance of the action." *Gabriel*, 396 F.3d at 14 (citing *Smith v. Sperling*, 354 U.S. 91, 96-97, 77 S.Ct. 1112 (1957); *see also Swanson v. Traer*, 354 U.S. 114, 116, 77 S.Ct. 1116 (1957) (corporation should be defendant when its management is definitely opposed to litigation); *Bagdon v. Bridgestone/Firestone, Inc.*, 916 F.2d 379, 382 (7th Cir. 1990) (corporation's opposition to derivative suit required that it be aligned as defendant).

The United States Supreme Court has admonished courts to determine whether the corporation is adverse from the face of the pleadings. *Gabriel*, 396 F.3d at 15 (citing *Sperling*, 354 U.S. at 95-97, 77 S.Ct. 1112). In this case, Lindsay specifically alleged she had standing to bring a derivative suit because the Company was adverse to her claim. FAC, ¶ 31 (alleging the LLC has no interest in correcting the alleged breach or in bringing an action against Cameron to enforce its term). Accordingly, the LLC was required to be a defendant.

Lindsay attempts to avoid clear application of governing precedent by

contending Cameron did not cite any Montana authority below for the proposition that a corporation should be aligned as a defendant in a derivative suit. Opening Br., pp. 36–37. That is only because no Montana case had addressed this specific issue. Nevertheless, "Montana's Rule 19 is modeled on Rule 19 of the Federal Rules of Civil Procedure, thus, we look to interpretation of the Federal Rules for guidance." *Mohl v. Johnson*, 275 Mont. 167, 171, 911 P.2d 217, 220 (1996).

Lindsay's claim that the authority cited by Cameron below was "outdated" is specious. Opening Br., p. 37. She cannot avoid more than 100 years of governing precedent by claiming that precedent is now too old. Lindsay does not claim those cases were overruled and does not present any valid legal authority to the Court which would allow it to depart from the well-established principle "an entity on whose behalf a derivative suit is asserted is a necessary defendant in the derivative action." *Buckley*, 923 F.2d at 98.

B. Cameron's motion to require joinder of the LLC was timely.

Lindsay's claim that Cameron's motion was untimely is misplaced. Cameron could have waited until trial and then moved to dismiss based on Lindsay's failure to join the LLC as a defendant. M. R. Civ. P. 12(h)(2). Instead, Cameron sought to correct a problem created by Lindsay so the case could proceed efficiently in accordance with well-established law. *Ross*, 396 U.S. at 538.

The "absence of an indispensable party is considered to be so significant a defect that most courts have indicated that it may be raised for the first time subsequent to the trial and on appeal." *Bartfield v. Murphy*, 578 F.Supp.2d 638, 645 (S.D.N.Y. 2008) (quoting Wright and Miller, 7 Fed.Prac.Proc.Civ. § 1609 (3d ed.2008). "Further, 'the issue of indispensability is one that courts have an independent duty to consider *sua sponte*, if there is reason to believe dismissal on such grounds may be warranted." *Bartfield*, 578 F.Supp.2d at 645 (quoting *Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F.Supp.2d 295, 312 (W.D.N.Y. 2007).

Rule 19(a)(2), M. R. Civ. P., provides that if "a person has not been joined as required, the court must order that the person be made a party." "If the court finds an absentee is needed for a just adjudication (that is, a necessary or 'required' party), and if the court finds that joinder of the absentee is feasible, it will usually give the plaintiff an opportunity to add the absentee. If the plaintiff fails to do so, the court may dismiss the action because of plaintiff's non-compliance." 8 Moore's Federal Practice, § 19.04[4][a] (2025).

Finally, Lindsay's complaints about timeliness are unfounded as the parties put this case on hold while the Will Contest Action was pending. Dkts. 6, 11, 21.

V. The Court lacks jurisdiction to consider Lindsay's appeal of the District Court's award of professional and attorneys' fees because Lindsay failed to provide notice to Dr. Bennett.

The District Court ordered Lindsay to pay $4,410.00 in professional and attorneys' fees to Kim Bennett, a disclosed hybrid expert witness, for the burden of being deposed. *Order Imposing Fees for Deposition of Kim* Bennett (Dkt. 102) (Appx. 28–30). Lindsay purports to appeal this award in her *Notice of Appeal* and *Opening Brief*. However, the certificates of service for both her *Notice of Appeal* and *Opening Brief* omit Dr. Bennett and her attorney, thus depriving Dr. Bennett the opportunity to participate and defend her interest in the award.

Notices of appeal are jurisdictional. *W. Holding*, 113 Mont. 24, 37, 120 P.2d 557, 563 (1941); *Joseph Eve*, 284 Mont. 511, 514, 945 P.2d 897, 899. This Court does not acquire jurisdiction of an appeal if notice is not appropriately given. *W. Holding*, 113 Mont. at 37, 120 P.2d at 563. Specifically, "[t]he notice must be served upon the adverse party which means all parties to the action who may be adversely affected by a reversal or modification of the judgment from which the appeal is taken. *Id.* (citations omitted).

An appellate has a duty to perfect her appeal. *Joseph*, 284 Mont. at 514, 945 P.2d at 899; *In re Malick's Estate*, 124 Mont. 585, 589, 228 P.2d 963, 965 (1951) (citations omitted). "Absent such compliance, this Court lacks jurisdiction to hear

the appeal." *Joseph*, 284 Mont. at 514, 945 P.2d at 899; *Seiffert v. Police Comm'n*, 144 Mont. 52, 55, 3694 P.2d 172 (1964); *McLeod v. McLeod*, 124 Mont. 590, 593, 228 P.2d 965, 968 (1951). Because Lindsay failed to serve her *Notice of Appeal* (or her *Opening Brief*) on Dr. Bennett, this Court is without jurisdiction to entertain Lindsay's appeal on this issue, and it must be dismissed.

VI. The District Court did not abuse its discretion by awarding professional and attorneys' fees to a third-party witness.

Rule 45(d)(3)(C)(ii), M. R. Civ. P., authorizes district courts, in their discretion, to condition a third-party subpoena on reimbursement to the deponent for time and expenses. Such discretionary rulings under M. R. Civ. P. 45 are reviewed for abuse of that discretion. *In re Parenting of F.L.F.L.K.*, ¶ 17; *In re Conservatorship of H.D.K.*, ¶ 31. "The abuse of discretion question is not whether this Court would have reached the same decision, but, whether the district court acted arbitrarily without conscientious judgment or exceeded the bounds of reason." *Chipman v. Northwest Healthcare Corp.*, 2012 MT 242, ¶ 17, 366 Mont. 450, 288 P.3d 193 (citations and quotations omitted). Here, even if the issue of the award of fees to Dr. Bennett was properly appealed, Lindsay fails to demonstrate that the District Court abused its discretion.

First, Lindsay asserts Dr. Bennett's request for reimbursement was untimely as Mont. R. Civ. P. 45 required her to file a motion before attending the deposition

Id. The District Court disposed of Lindsay's timeliness objection because the time between service of the subpoena and the deposition did not allow for full briefing under the applicable rules, and the attorney serving the subpoena had a duty to take reasonable steps to avoid undue burden or expense on Dr. Bennett. Appx., p. 2. This duty, the court noted, was entirely apart from the rules concerning motions to quash or modify and was not time-bound. *Id.* Lindsay's *Opening Brief* provides no analysis or rebuttal to the District Court's reasoning, and the Court may affirm on these unchallenged grounds alone.

Lindsay also argues, to merit compensation, the subpoena must have required disclosing the unretained expert's opinion aside from "specific occurrences in dispute[.]" Opening Br., pp. 40–41. But Lindsay misreads the Rule. Entitlement to additional compensation is not defeated if the deponent gives *any* fact testimony. The language of the Rule enables awarding additional compensation to the deponent who must disclose *any* opinion or information that does not describe specific occurrences in dispute and results from the expert's unsolicited study. M. R. Civ. P. 45(d)(3)(B)(ii). In other words, it is only the opinion evidence that must be free from fact testimony within the deponent's knowledge; if one nonfactual expert opinion is provided, the deponent may be entitled to compensation.

Below, Dr. Bennett was asked (and provided extensive expert testimony) about documents and hypotheticals to which she did not have factual knowledge. *See generally* Dkt. 96, Exhibit A, pp. 27–31 (general processes for appraising a fractional interest), 40–42, 46–49, 56, 62–64 (valuation of present-day value of real estate), 66–67 (reviewing documents she did not produce), 68–69 (general appraisal data for other real estate). She was also asked about her opinions regarding Lindsay's disclosed expert report and the current value of the members' LLC interests. *Id.*, pp. 87–100, 108–111. These questions pertained to opinions resulting from Dr. Bennett's unsolicited study of the market conditions, as well as documents newly introduced to Dr. Bennett.

The District Court's discretionary determination that the subpoena and the topics of the deposition caused Dr. Bennett to incur costs beyond that of a normal fact witness was not without conscientious judgment, and did not exceed the bounds of reason. *Chipman*, ¶ 17. This Court should affirm the District Court's award of professional and attorneys' fees to Dr. Bennett.

CONCLUSION

The District Court correctly interpreted and applied the Operating Agreement when it determined, based on the unambiguous Operating Agreement and undisputed facts, the LLC was converted to a perpetual entity on November

14, 2015. Likewise, the District Court did not abuse its discretion by requiring Lindsay to join the LLC as a defendant. Finally, this Court lacks jurisdiction to consider Lindsay's appeal of the District Court's award of professional and attorneys' fees to Dr. Bennett and, even if it does have jurisdiction, the District Court did not abuse its discretion.

Respectfully submitted, this 2nd day of June, 2025.

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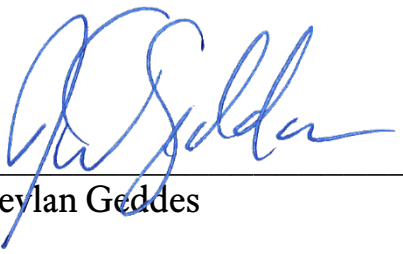
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Equity Text A text typeface of 14 points; is double spaced (except that footnotes and quoted and indented material are single spaced); with left, right, top and bottom margins of 1 inch; and that the word count calculated by Microsoft Word does not exceed 10,000 (8,080) words, excluding the Table of Contents, Table of Authorities, Certificate of Service, and Certificate of Compliance.

DATED this 2nd day of June, 2025.

By: 

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CERTIFICATE OF SERVICE

I, J. Devlan Geddes, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 06-02-2025:

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