

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

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

v.

CAMERON H. BURNS and H.W. BURNS FAMILY LLC,
Defendants/Appellee

H.W. BURNS FAMILY LLC,
Counterclaim Plaintiff/Appellee

v.

LINDSAY BURNS BARBIER; SOLANGE BARBIER; and B.B.
Counterclaim Defendants/Appellants

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS	5
STANDARD OF REVIEW	9
SUMMARY OF THE ARGUMENT	10
ARGUMENT	12
I. The District Court correctly interpreted the Operating Agreement as allowing amendment upon an affirmative vote of 67% of members.	12
a. The plain language of the Operating Agreement allows amendment upon the affirmative vote of 67% of membership interests.....	13
b. The existence of multiple provisions regarding amendment does not create an ambiguity when the provisions do not conflict and can be read together to give effect to each.....	15
c. Lindsay’s proffered extrinsic evidence does not support that the parties intended to require unanimity in order to amend the Operating Agreement...	19
II. The District Court did not abuse its discretion in determining that the LLC was an indispensable party to this litigation.	21
III. This Court does not have jurisdiction to decide Lindsay’s appeal of the award of fees to a non-party witness and the District Court did not err in awarding such fees.....	23
CONCLUSION	23
CERTIFICATE OF COMPLIANCE.....	25

TABLE OF AUTHORITIES

Cases

<i>Anesthesia Health Consultants, LLC v. Sleep EZ Anesthesia, PLLC</i> , No. 2022-CA-0284-MR, 2022 Ky. App. LEXIS 127 (Mar. 4, 2022)	19
<i>Boyne USA, Inc. v. Lone Moose Meadows, LLC</i> , 2010 MT 133, 356 Mont. 408, 235 P.3d 1269	13
<i>Buckley v. Control Data Corp.</i> , 923 F.2d 96 (8th Cir. 1991)	22
<i>Creveling v. Ingold</i> , 2006 MT 57, 331 Mont. 322, 132 P.3d 531	9
<i>Dover Ranch v. County of Yellowstone</i> , 187 Mont. 276, 609 P.3d 711 (1980).....	15
<i>In re Conservatorship of H.D.K.</i> , 2021 MT 254, 405 Mont. 479, 497 P.3d 1171 ..	10
<i>In re Deadman’s Basin Water Users Ass’n</i> , 2002 MT 15, 308 Mont. 168, 40 P.3d 387	13
<i>In re Parenting of F.L.F.L.K.</i> , 2025 MT 41, 421 Mont. 1, 564 P.3d 844	10
<i>Joseph Eve & Co. v. Allen</i> , 284 Mont. 511, 945 P.2d 897 (1997).....	10
<i>Kageco Orchards, LLC v. Mont. DOT</i> , 2023 MT 71, 412 Mont. 45, 528 P.3d 1097	15
<i>Krajacich v. Great Falls Clinic, LLP</i> , 2012 MT 82, 364 Mont. 455, 276 P.3d 922	16
<i>Lies v. Brown</i> , No. 96,692, 2008 Kan. App. LEXIS 251 (Mar. 28, 2008).....	19
<i>Mary J. Baker Revocable Trust v. Cenex Harvest States, Cooperatives, Inc.</i> , 2007 MT 159, 338 Mont. 41, 164 P.3d 851.....	16
<i>Mohl v. Johnson</i> , 275 Mont. 167, 911 P.2d 217, (1996)	10
<i>Morley v. Morley</i> , 2022 MT 12, 407 Mont. 241, 502 P.3d 666	16
<i>Pastimes, LLC v. Clavin</i> , 2012 MT 29, 364 Mont. 109, 274 P.3d 714	13
<i>Richards v. JTL Group, Inc.</i> , 2009 MT 173, 350 Mont. 516, 212 P.3d 264	16
<i>Ruth v. Home Health Care of Middle Tenn., LLC</i> , 2010 Tenn. App. LEXIS 159 (Mar. 3, 2010)	19
<i>Travelers Cas. v. Ribl Immunochem Research</i> , 2005 MT 50, 326 Mont 174, 108 P.3d 469	10
<i>W. Holding Co. v. Nw. Land & Loan Co.</i> , 113 Mont. 24, 120 P.2d 557, 563 (1941)	10

Statutes

Mont. Code Ann. § 1-4-10113
Mont. Code Ann. § 28-3-30313
Mont. Code Ann. § 35-8-10913
Mont. Code Ann. § 35-8-30422
Mont. Code Ann. § 35-8-307 14, 20

Other Authorities

3B Moore’s Federal Practice ¶ 23.1.21[1] at 23.1-100 (1987).....22

Rules

M. R. Civ. P. 4510
M. R. Civ. P. 569

STATEMENT OF THE ISSUES

Appellee H.W. Burns Family LLC (the “LLC”) restates the issues for appeal as follows.

1. Did the District Court correctly interpret the LLC’s Operating Agreement as allowing amendment by a vote of 67% of membership interests?
2. Did the District Court abuse its discretion by requiring joinder of the LLC as a defendant?
3. Whether this Court may 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, and, if so, whether the District Court abused its discretion in awarding professional and attorney’s fees to a non-party hybrid expert witness.

Appellants Lindsay Burns Barbier, Solange Barbier, and B.B (“collectively “Lindsay”) also appeal the District Court’s Order granting Appellee Cameron H. Burns’s (“Cameron’s”) Motion for Summary Judgment on the issue of whether the LLC’s November 14, 2015 vote effectively made the LLC a perpetual company. At the District Court, the LLC only moved for summary judgment on the narrow issue of interpretation of the LLC’s Operating Agreement’s required amendment threshold. As such, the LLC does not specifically address the arguments related to

whether the District Court correctly determined that the LLC was converted from a term to a perpetual company based on the 2015 vote of LLC members. This argument is addressed by Cameron. The LLC joined Cameron’s Motions for Summary Judgment at the District Court and likewise joins the arguments raised by Cameron on appeal at this Court.

STATEMENT OF THE CASE

This matter concerns the future of a long-standing family ranch held by the LLC. Through this action, Lindsay challenges the validity of a November 14, 2015 vote to convert the LLC from a term company to a perpetual company. Lindsay purported to bring the action on behalf of the LLC as a derivative action, arguing that under the governing 2004 Operating Agreement (the “Operating Agreement”) that the LLC was a term company set to expire in 2024.

Lindsay argued that the 2015 vote was invalid for two reasons—(1) because it was not a unanimous vote as she contends is required under the Operating Agreement; and (2) because her father, Horatio Burns (the managing member of

the LLC at the time) lacked capacity at the time of the vote and was unduly influenced by Cameron, her brother.¹

The LLC was added to this action following the District Court's Order granting Cameron's request that Lindsay add the LLC as an interested party. Dkt. 28. Appx. 23-27. Lindsay appeals this decision by the District Court. Once joined, the LLC answered and brought a counterclaim seeking a declaration that, by its plain language, the Operating Agreement could be amended by the affirmative vote of 67% of the members of the LLC. Dkt. 39.

The LLC moved for summary judgment on its request for declaratory relief against Lindsay regarding interpretation of the Operating Agreement's voting threshold. Dkt. 60. Separately, Cameron moved for summary judgment contending that the LLC had been properly converted from a term company to a perpetual company based on a November 14, 2015 vote of the members.² Dkt. 70. Lindsay

¹ The District Court ultimately determined that Lindsay was collaterally estopped from litigating the argument that Horatio lacked capacity or was unduly influenced given the outcome of a will contest action where Lindsay challenged the will of Horatio and raised these arguments. Dkt. 106. Lindsay does not appeal that Order.

² The LLC moved only on the narrow issue raised by its request for declaratory relief because a declaration of the appropriate voting threshold would allow the LLC to make decisions about its future prior to the alleged December 31, 2024 term date. But, the LLC agrees with Cameron's position that the 2015 vote was effective to convert the LLC from a term company to a perpetual company because over 67% of members voted for such an action.

filed a cross-motion for summary judgment against the LLC and Cameron, arguing that any amendment to the Operating Agreement requires unanimous approval and that the 2015 vote failed to convert the LLC to a perpetual company. Dkt. 73.

The District Court ruled that the LLC and Cameron were entitled to summary judgment, holding that (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 vote of the members on November 14, 2015. Dkt. 107; Appx. 3-14. Lindsay appeals this Order.

Separately, during the litigation, the Court granted a non-party hybrid expert witness, Kim Bennett, an award of professional fees and attorney's fees for having to prepare and appear for a deposition noticed by Lindsay. Dkt. 102; Appx. 28-30. While Lindsay appeals this Order, she did not serve her *Notice of Appeal* or *Opening Brief* on Kim Bennett or her counsel.

Following the District Court's orders on summary judgment, the LLC and Cameron moved for and were awarded attorney's fees and costs by the District Court. Dkts. 116, 121, 122, 123; Appx. 15-22. While Lindsay purports to appeal the District Court's award of fees and costs to the LLC and Cameron in her *Notice of Appeal*, Lindsay's *Opening Brief* does not address any grounds for appealing

these awards separate from her argument that the District Court erred in allowing the addition of the LLC as a Defendant and in awarding summary judgment to the LLC and Cameron.

STATEMENT OF THE FACTS

The material facts were undisputed at the District Court, with all parties moving for summary judgment.

The LLC was created by the filing of Articles of Organization on January 19, 1994, with the Montana Secretary of State (the “Original Articles”). Plf.s’ First Amend. Ver. Compl., (“FAC”) ¶ 10, Dkt. 29.

The LLC was set up as a term company with the Original Articles stating that “[t]he latest date upon which the limited liability company is to dissolve is December 31, 2024.” FAC, Ex. A, Dkt. 29; Supp. Appx. 1-2.

The Operating Agreement was signed by all the members in 2004, including by Plaintiff Lindsay Burns Barbier. FAC, Dkt. 29. The Operating Agreement is the current, written operating agreement for the Company. FAC, ¶ 11, Ex. B, Dkt. 29; Supp. Appx. 3-24.

The Operating Agreement begins with Section 1 titled “General Information,” describing the LLC. Much of the information in this section is copied directly from the Original Articles, including the statement that “the latest date upon which the

limited liability company is to dissolve is December 31, 2024.” FAC, Ex. B, Dkt. 29; Supp. Appx. 2.

Section 6 of the Operating Agreement, titled “Management,” addresses decision-making and governance of the LLC. FAC, Ex. B, Dkt. 29; Supp. Appx. 9-12. Section 6 provides that the members may appoint a “Managing Member” to manage the LLC’s day-to-day affairs, and names Horatio Burns as the initial Managing Member.

Section 6.k. of the Operating Agreement limits the power of the Managing Member, stating that the Managing Member cannot take certain acts, “*without the approval of Members ow[n]ing at least 67% Ownership Percentages.*” (emphasis added). These acts include: “The amendment of the operating agreement under 35-8-109,” Section 6.k.i, and “An amendment to the articles of organization under 35-8-203.” Section 6.k.iii.

6. Management. The Company shall be managed by its Members pursuant to the following provisions:

[text continues on the following page]

- k. 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 Percentages:
- i. The amendment of the operating agreement under 35-8-109;
 - ii. The authorization or ratification of acts or transactions under 35-8-109(3)(b)(ii) that would otherwise violate the duty of loyalty;
 - iii. An amendment to the articles of organization under 35-8-203;
 - iv. The compromise of an obligation to make a contribution under 35-8-502;
 - v. The compromise, as among members, of an obligation to make a contribution or return money or other property paid or distributed in violation of this chapter;
 - vi. The redemption or repurchase of an interest;
 - vii. The admission of a new member;
 - viii. The use of the Company's property to redeem an interest subject to a charging order;

FAC, Ex. B, Dkt. 29; Supp. Appx. 9, 11.

A separate provision at the end of the Operating Agreement, under the heading "Miscellaneous," states that the Members "may" amend the Operating Agreement by the signature of an amendment by all of the Members. FAC, Ex. B, Dkt. 29; Supp. Appx. 19-20.

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13. Miscellaneous. The parties agree to the following miscellaneous provisions:

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

This “Miscellaneous” provision at Section 13.j. does not purport to limit the ability for an amendment under Section 6.k. Rather, Section 13.j. reads as a permissive ability for the LLC Members to circulate and sign an amendment in lieu of a formal meeting and vote of members. FAC, Ex. B, Dkt. 29; FAC, Ex. B, Dkt. 29; Supp. Appx. 20.

At a meeting of the LLC on November 14, 2015, Managing Member Horatio Burns made a motion to extend the life of the LLC from expiring at the end of 2024 to perpetual with no expiration. FAC, ¶ 13, Dkt. 29. Horatio and Cameron voted “yes,” and Lindsay voted “no” on this motion. FAC, ¶ 13, Dkt. 29; Supp. Appx. 83.

At the time of the vote on November 14, 2015, Horatio and Cameron represented greater than 67% of the LLC’s ownership interests. FAC, ¶ 13, Dkt. 29.

Amended Articles of Organization reflecting the change in the term of the LLC were executed by Horatio as Managing Member of the LLC and filed with the Montana Secretary of State on November 17, 2015. FAC, Ex. C, Dkt. 29.

Prior to the filing of this action, the members of the LLC had never formally updated the 2004 Operating Agreement in writing despite several changes to the

contents of the Agreement since its inception, including the removal of Seth Burns as a member following his election to withdraw from the LLC, the dissociation of Horatio Burns as a member following his death, a change in the principal place of business of the LLC, and the change in the LLC's term to be of perpetual duration, to name a few of the outdated provisions. FAC, ¶ 16, Dkt. 29.

To the extent that the 2015 vote to change the duration of the LLC to perpetual did not serve to amend the same provision in the 2004 Operating Agreement, the LLC could formally amend the 2004 Operating Agreement to make the Articles of Organization and Operating Agreement consistent and ratify the 2015 vote.³ Lindsay seeks to prevent the effectiveness of any such vote by arguing that the Section 13.j. of the Operating Agreement prohibits an amendment of the Operating Agreement without unanimous consent. FAC, ¶¶ 18, 44. Dkt. 29.

STANDARD OF REVIEW

The Court reviews a district court's summary judgment ruling *de novo*, applying the same Rule 56, M. R.Civ.P. criteria applied by the district court. *Creveling v. Ingold*, 2006 MT 57, ¶ 5, 331 Mont. 322, 132 P.3d 531. Where material facts are not in dispute, the Court limits the review to questions of law. *Id.* (citing

³ Though not before this Court, following the District Court's Order interpreting the voting threshold for amendment, the LLC did in fact vote and execute a First Amendment to the LLC Operating Agreement that, in part, ratified the November 14, 2015 decision by a vote of greater than 67% of members.

Travelers Cas. v. Ribl Immunochem Research, 2005 MT 50, ¶ 14, 326 Mont 174, 108 P.3d 469).

A district court's decision on joinder is discretionary, reviewed for abuse of discretion. *Mohl v. Johnson*, 275 Mont. 167, 169-170, 911 P.2d 217, 219 (1996).

Proper service of a 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 an 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 THE ARGUMENT

Though Lindsay attempts to fabricate an ambiguity in the Operating Agreement, this case presents a straightforward interpretation of contractual terms that can be resolved within the four corners of the agreement.

Lindsay contends that the LLC should have terminated on December 31, 2024, because the Operating Agreement was never properly amended to make the LLC a perpetual company. Lindsay takes the position that the Operating Agreement

may only be amended through signature of all of the Members pursuant to Section 13.j.

Lindsay's argument relies on interpreting a permissive ability to amend via a writing signed by all parties as contradicting an express allowance for amendment upon a vote of more than 67% of members. Such reading strains reasoning.

These terms can be interpreted together in a way that gives meaning to both provisions and makes practical sense. If the LLC members hold a vote on amending the Operating Agreement, there is a voting threshold of 67% for such an action to pass if the Members do not agree. However, an amended agreement signed by all parties would also be effective, forgoing the need for a vote. Either option works under the terms of the Operating Agreement and no ambiguity exists.

But, even assuming *arguendo* there was an ambiguity, the extrinsic evidence relied on by Lindsay does not support her position. The inclusion of language allowing amendment upon an affirmative vote of 67% (altering the statutory default that such an action requires unanimity) demonstrates the parties' intention to allow amendment with approval of 67% of members.

The other issues appealed by Lindsay—joinder of the LLC as a party and award of fees to Kim Bennett—are ancillary and non-dispositive to the central issue regarding interpretation of the Operating Agreement. In any event, the District Court did not abuse its discretion on either of these decisions. Further, Lindsay failed to

secure this Court’s jurisdiction over an appeal of the award of fees to Kim Bennett by neglecting to serve Kim Bennet with her *Notice of Appeal* or *Opening Brief*.

ARGUMENT

I. The District Court correctly interpreted the Operating Agreement as allowing amendment upon an affirmative vote of 67% of members.

The Operating Agreement expressly permits amendment of its terms with approval of 67% of membership interests. Yet, Lindsay asks this Court to ignore this specific provision and determine that amendment requires unanimous consent. To do so, she first argues that Section 6.k.’s language of requiring “at least 67%” means that it could require *more* than 67% and that Section 13.j. provides the actual required threshold of 100%. This argument should be rejected as it asks the Court to insert a mandatory unanimity provision that the Operating Agreement does not have. Lindsay alternatively contends that the two provisions are conflicting and create an ambiguity that must be resolved by looking to extrinsic evidence. This argument also fails because the provisions are complementary and can be read together.

The District Court correctly determined that the plain language of the Operating Agreement does not require unanimous consent to amend. This Court need not look to extrinsic evidence. But, even if this Court were to determine there was an ambiguity, the extrinsic evidence relied on by Lindsay fails to support the

interpretation she seeks. The LLC would still be entitled to judgment as a matter of law.

a. The plain language of the Operating Agreement allows amendment upon the affirmative vote of 67% of membership interests.

“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. “The language of contractual provisions should be interpreted according to its plain, ordinary meaning.” *In re Deadman’s Basin Water Users Ass’n*, 2002 MT 15, ¶ 19, 308 Mont. 168, 40 P.3d 387. In interpreting contracts, it is a court’s job “to ascertain and declare what is in terms or in substance contained in the contract, not to insert what has been omitted or to omit what has been inserted.” *Boyne USA, Inc. v. Lone Moose Meadows, LLC*, 2010 MT 133, ¶ 17, 356 Mont. 408, 235 P.3d 1269; § 1-4-101, M.C.A.

An operating agreement is the essential contract that governs the affairs of a limited liability company. Mont. Code Ann. § 35-8-109, Official Comments. As such, general rules of contract interpretation apply to interpretation of the Operating Agreement. 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.

Here, Section 6.k. specifically enumerates “the amendment of the operating agreement,” as an action that can be taken upon a vote of at least 67% of members.

Lindsay contends that the language of Section 6.k. has to be read in conjunction with Section 13.j., positing that the voting threshold of “*at least 67%*” contained in Section 6.k. is further defined by Section 13.j. and the requirement for Section 6.k. is actually 100%.

Lindsay provides no legal support for interpreting a voting threshold as requiring a greater minimum than explicitly stated. Section 6.k. establishes the voting threshold for the actions listed, including amendment of the Operating Agreement, at 67%. The plain reading of this is that so long as that threshold is reached (at least), the action passes. If a higher threshold were required, it would say so. There is no reference to any higher voting threshold in Section 6.k.

To hold otherwise would not make sense because Section 6.k. is identical to a list contained in the Montana Limited Liability Company Act of actions that must be taken by unanimous consent, “[u]nless the articles of organization or the operation agreement provide otherwise.” § 35-8-307(3), M.C.A. (emphasis added). If unanimity were the intended threshold, there would be no need to include amendment as an action that could be taken by a vote of at least 67% as unanimity would be the statutory default.

Finally, Lindsay’s interpretation would require the Court to impermissibly “insert what has been omitted,” by changing the permissive language in Section 13.j.

(the Operating Agreement may be amended by a writing signed by all members) to a mandatory threshold (the Operating Agreement may be amended *only* by a writing signed by all members). Lindsay attempts to argue that the word “may” is not permissive in this context, or that it only modifies the parties’ ability to amend, not to achieve unanimity. But, the inclusion of the word “may” in Section 13.j. is instructive because it does not limit the ability of a separate procedure for amendment, such as the procedure outlined in Section 6.k. This Court has repeatedly held the word “may” is permissive or discretionary and does not have a mandatory connotation in its usual meaning. *Dover Ranch v. County of Yellowstone*, 187 Mont. 276, 284, 609 P.3d 711, 716 (1980); see also *Kageco Orchards, LLC v. Mont. DOT*, 2023 MT 71, ¶ 23, 412 Mont. 45, 528 P.3d 1097.

b. The existence of multiple provisions regarding amendment does not create an ambiguity when the provisions do not conflict and can be read together to give effect to each.

Lindsay’s contention that the terms of Section 6.k. and 13.j. create an ambiguity should be rejected because the terms can be read in conjunction and are not susceptible to two reasonable but conflicting interpretations.

When interpreting a contract, “[t]he 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.” *Krajacich v. Great Falls Clinic, LLP*, 2012 MT 82, ¶ 13, 364

Mont. 455, 276 P.3d 922 (quoting *Richards v. JTL Group, Inc.*, 2009 MT 173, ¶ 14, 350 Mont. 516, 212 P.3d 264).

Whether an ambiguity exists in a contract is a matter of law. *Morley v. Morley*, 2022 MT 12, ¶ 24, 407 Mont. 241, 502 P.3d 666. 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.” *Id.* When the language of a contract is clear and unambiguous, “...the contract does not require the application of the rules of construction, and it is the court’s duty to enforce the contract as made by the parties.” *Id.* ¶ 26. While a court may look to extrinsic evidence for the purpose of determining whether there is an ambiguity, if no ambiguity exists, extrinsic evidence of the parties’ intentions should not be considered any further. *Mary J. Baker Revocable Trust v. Cenex Harvest States, Cooperatives, Inc.*, 2007 MT 159, ¶ 55, 338 Mont. 41, 164 P.3d 851.

Here, Lindsay has failed to establish that there are two reasonable but conflicting interpretations of the Operating Agreement. As established above, it is not reasonable to insert a requirement of unanimity in Section 6.k.’s allowance for amendment by a 67% threshold.

Rather, by its terms, the Operating Agreement provides two different means for its amendment. These provisions are clear, unambiguous, and do not conflict.

First, pursuant to the “Management” Section at paragraph 6.k.i., the Operating Agreement specifically and unambiguously allows members owning at least 67% of the Ownership Percentages to amend the Operating Agreement by a vote.

k. 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 Percentages:

i. The amendment of the operating agreement under 35-8-109;

This specific section provides the Manager or Members with a mechanism to call a meeting, hold a vote, and amend the Operating Agreement with 67% or greater of the Ownership Percentages. This section directly provides a way for the Members to amend the Operating Agreement in the absence of unanimity regarding the amendment.

Second, as an alternative method of amendment, if the Members are unanimous, the “Miscellaneous” Section at paragraph 13.j. of the Operating Agreement plainly states:

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

This general provision unambiguously provides that the Members “*may*” also execute a written amendment signed by all Members, allowing Members to forego

a meeting and vote and simply circulate the amendment for signature if there is agreement.

Lindsay next attempts to create an ambiguity by pointing to Section 7.b. of the Agreement. She contends that Section 7.b., regarding resolutions of the LLC, would render the LLC's interpretation of Section 13.j. meaningless. But, there is actually no conflict between these provisions, and, contrary to Lindsay's position, they can be read together to provide effect to each provision.⁴ Section 7.b. allows the LLC to act without a meeting by adoption of resolutions signed by all members. In practice, such a provision might be used to execute management decisions of the LLC, such as the entering into a lease or contract. In contrast, Section 13.j. does not require a resolution, but allows the LLC to amend the Operating Agreement upon execution of a written amendment to the Operating Agreement. These provisions can be read together to provide effect to each of them. The existence of Section 7.b. does not create an ambiguity in the allowance for amendment by a vote of at least 67% contained in Section 6.k. or the ability to unanimously sign a written amendment to the Operating Agreement contained in Section 13.j.

⁴ Lindsay also argues that the District Court erred by ruling that Section 7.b. would not be rendered meaningless, not Section 13.j. as she argued, but this is a distinction without a difference and was not material to the Court's ruling. These sections can each stand on their own under an interpretation of Section 13.j. as a permissive ability to unanimously sign an amended agreement.

Finally, Lindsay's citations to out-of-state case law do not support her position that an ambiguity exists. Two of these cases concerned provisions in operating agreements that were directly in conflict. See *Anesthesia Health Consultants, LLC v. Sleep EZ Anesthesia, PLLC*, No. 2022-CA-0284-MR, 2022 Ky. App. LEXIS 127, at *20 (Mar. 4, 2022) (citation omitted); *Lies v. Brown*, No. 96,692, 2008 Kan. App. LEXIS 251, at *17-18 (Mar. 28, 2008). For example, the court in *Lies v. Brown* determined that an ambiguity existed when an operating agreement both *required* a majority vote and *required* unanimous consent for an amendment. That is distinct from the Operating Agreement at issue here that contains two complementary provisions. The other case cited involved the finding of an ambiguity because of the confusion over references to various defined terms in an operating agreement and how they operated to interpret a provision. *Ruth v. Home Health Care of Middle Tenn., LLC*, 2010 Tenn. App. LEXIS 159, at *13-14 (Mar. 3, 2010). In contrast, the applicable provisions here can be read and interpreted from the agreement itself.

c. Lindsay's proffered extrinsic evidence does not support that the parties intended to require unanimity in order to amend the Operating Agreement.

Because the Operating Agreement is unambiguous and can be resolved within the four corners of the document, this Court need not look to the extrinsic evidence Lindsay cites to support her interpretation of the Operating Agreement in the form of emails from former LLC counsel, Angus Fulton and Jennifer Farve. But, even if

the Court did find an ambiguity, such extrinsic evidence does not support that the parties intended to only allow amendment with a writing signed by all parties.

Lindsay first points to communications from the LLC's attorney from 2004, Angus Fulton, wherein he stated the Operating Agreement executed in 2004 would not be valid until all members signed. But, this is immaterial as the LLC's previous operating agreement did not permit amendment by a vote of 67% (it did not contain the equivalent to Section 6.k. in the new Operating Agreement). Supp. Appx. 40–51. His message does not purport to speak to or interpret Section 6.k.'s explicit provision of an additional way of amending the new agreement if the parties did not agree.

Lindsay next offers an email from the LLC's attorney in 2015, Jennifer Farve. Supp. Appx. 40–51. In this message, Ms. Farve discusses the 2015 vote to change the LLC to perpetual, but she does not interpret Section 6.k. Further, this message has no bearing on the parties' intentions at the time of contracting in 2004. Lindsay's claimed understanding of the requirements of the Operating Agreement is not controlling over the language in the Operating Agreement itself.

Rather, the LLC's decision to specifically alter the statutory default for the items listed in § 35-8-307(3), M.C.A. demonstrates the intention of the members to allow for amendment without unanimity. In adopting the new Operating Agreement, the members changed the statutory default of requiring unanimous consent of all

members to a supermajority of 67%. Lindsay has not offered extrinsic evidence to overcome this evidence of the parties' intention. Even if this Court determined an ambiguity exists, the LLC is still entitled to judgment as a matter of law on its declaratory judgment action. The District Court's Order on the LLC's Motion for Summary Judgment should be affirmed.

II. The District Court did not abuse its discretion in determining that the LLC was an indispensable party to this litigation.

Lindsay attempted to leave the LLC out of this action, naming only Cameron as a Defendant initially. Cameron sought to add the LLC as a necessary party and the District Court ordered that the LLC was an indispensable party. In objecting to that request, and on appeal, Lindsay contends that the LLC's interests were protected by her as she brought her suit as a declaratory judgment action purportedly on behalf of the LLC. While the LLC was not a party to the case at the time this motion was made, it responds to this argument on appeal given its interest in appearing in this action and to support its award of summary judgment and attorney's fees in this action. The LLC also incorporates and adopts the arguments made by Cameron on this point.

Lindsay's position is contrary to law. While she states that the District Court's decision was based on "outdated and distinguishable out-of-state precedent," it is telling that she does not provide any precedent for her position or seek to distinguish

any cases cited by Cameron or the District Court. “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.”) A decision based on such clear and long-standing precedent cannot constitute an abuse of discretion by the District Court.

Contrary to Lindsay’s assertion, the LLC’s interests were not protected by her. Rather, Lindsay’s position is that the LLC should have terminated on or by December 31, 2024 despite a membership vote and amendment of the Articles to change the LLC to a perpetual company.

Lindsay’s argument that the LLC need not be a party because the LLC’s members were all parties to the litigation is similarly unsupported. Such an argument ignores that the LLC is a separate legal entity than its members and its interests cannot simply be represented by members. *See* § 35-8-304, M.C.A.

The District Court’s decision to join the LLC was not an abuse of discretion and should be affirmed.

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III. This Court does not have jurisdiction to decide Lindsay's appeal of the award of fees to a non-party witness and the District Court did not err in awarding such fees.

The LLC incorporates and adopts the arguments made by Cameron regarding an award of profession and attorney's fees to Kim Bennett, a non-party disclosed hybrid expert witness, including the lack of jurisdiction this Court has given Lindsay's failure to serve Dr. Bennett with any notice of this appeal.

In summary, this Court should decline to address this issue given Lindsay's failure to serve Dr. Bennett. If this Court chooses to address this issue, the District Court did not abuse its discretion by awarding such fees to Dr. Bennett given the allowance for an award to compensate witnesses under Rule 45. As argued by the LLC at the District Court, the party subpoenaing a witness bears the costs of expense for such a witness. An award of fees against Lindsay, the noticing party, is appropriate.

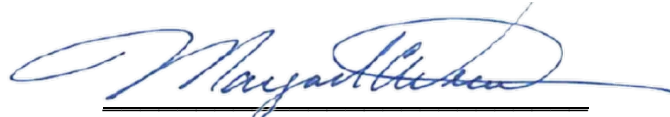
CONCLUSION

The District Court correctly determined that the Operating Agreement can be amended upon a vote of 67% of members because this reading is supported by the plain language of the Operating Agreement and harmonizes all applicable terms of the Operating Agreement. No ambiguity exists and the Court need not look to the irrelevant and immaterial extrinsic evidence proffered by Lindsay. The District Court also did not abuse its discretion in determining that the LLC is a

necessary party and awarding fees to a non-party expert witness. This Court should affirm the District Court.

DATED this 2nd day of June, 2025.

Respectfully submitted,

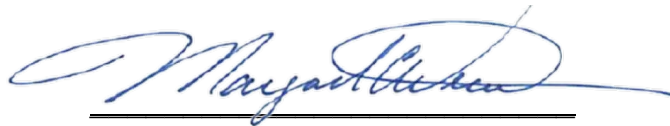


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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced (except that 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 words, excluding the Table of Contents, Table of Citations, Certificate of Service and Certificate of Compliance.

Dated this 2nd day of June, 2025.



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CERTIFICATE OF SERVICE

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