No. 331148

WASHINGTON STATE COURT OF APPEALS
DIVISION III

RICK A. HOLMAN, individually, and on behalf of WOLF CREEK HOLDINGS OF SPOKANE LLC, a Washington Limited Liability Company,

Respondent/Plaintiff,

vs.

BRIAN W. BRADY and MOUNTAIN BROADCASTING, LLC, a Washington Limited Liability Company,

Appellants/Defendants.

RESPONDENT'S RESPONSE BRIEF

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1. Introduction.

It is undisputed that Wolf Creek Holdings of Spokane, LLC (Wolf Creek) has two members: Brian Brady and Rick Holman. Wolf Creek's sole asset is a commercial building uniquely suited and established as a television station, which Mountain Broadcasting, LLC (Mountain) leased; Mountain is wholly controlled by Brian Brady and his other entities. Mountain mailed a purported Notice of Termination of Lease to Brady at one of his other entities, despite all previous correspondence to Wolf Creek regarding the Lease having been transmitted to **both** Brady and Holman, and despite the notice provision which "deemed" delivery of the Notice complete only upon "certified or registered mail."

The Notice of Termination was sent only to Brady **purposefully** by Mountain's CEO (Brady's employee) to deprive Holman of the notice and allow Mountain to negotiate and execute a new lease on terms more favorable to Mountain (Brady's entity) and less favorable to Wolf Creek, without the knowledge of or consent of Holman (the only other member of Wolf Creek). The trial court found that the Lease required certified or registered Notice of Termination be sent to the "Landlord", Wolf Creek, which was not accomplished as a matter of law by sending a letter only to Brady under the undisputed circumstances.

While Appellants seek to focus on what they claim to be a narrow technical reading of the necessity for registered or certified mail, or whether all members of an LLC are always entitled to notice, the trial court properly analyzed the entirety of the undisputed facts **presented here** to find that Mountain's notice was not properly conveyed to the Landlord when Mountain intentionally deprived one member of a two member LLC of the Notice to enable it to secretly negotiate new terms with its own controlling owner. The trial court found that it was undisputed Mountain's actions were designed to deprive the Landlord of Notice by sending it only to Brady.

Moreover, the terms of the LLC Agreement prohibited any one member from independently negotiating a new Lease of the LLC's sole asset, and the Brady negotiated lease is invalid. The trial court properly found that Brady unilaterally accepted a deficient notice of non-renewal of the Lease from Mountain and entered into the new Lease without disclosing the Lease Agreement Terms to Mr. Holman or obtaining his consent, thereby breaching the LLC Agreement.

And contrary to Appellants' claim, the LLC Agreement does **not** establish "fairness" of the individual Brady transaction as a basis for authority to individually deal. While there exists no evidence in the record of the fairness of the rent in the new Lease, it is irrelevant; the Wolf Creek

LLC Agreement does not provide any carte blanche basis for each LLC member to individually negotiate new leases. The standard of fairness in the LLC Agreement is related instead to potential bases to invalidate transactions **after** the LLC agrees to them (by proper authority of **both** members). This provision in no way applied to allow Brady to individually negotiate a new lease of Wolf Creek LLC's only asset.

Procedurally, Appellants' inclusion of the trial court's denial of Appellants' motion to dismiss the Wolf Creek derivative claims brought by Holman is not properly before this court. The Appellants brought the motion based on: (1) the alleged lack of jurisdiction over Brady; and (2) the alleged impropriety of the derivative claims of Wolf Creek because the Complaint was not verified under CR 23.1, and because the claims were combined with Holman's individual claims. The denial of defendants' motion to dismiss was entered over one and one-half years before the partial summary judgment. It was not certified as final in the trial court's CR 54(b) certification, and was not listed in the Notice of Appeal. Now the Appellants glean one of the rulings from the original motion to dismiss - - the propriety of the derivative claims - - and make new arguments along with their original arguments in support of the dismissal. However, the Appellants cannot pick and choose various

interlocutory rulings which they claim "inhere" in the partial summary judgment on unrelated lease issues.

Irrespective, the motion to dismiss was properly denied because Wolf Creek has claims against Mountain for its failed attempt to deprive it of Notice of Termination, and payment of rent at a reduced rate under an invalid new lease, which Brady did not pursue or consent to pursue on behalf of Wolf Creek. Only Holman expended funds to protect the rental value Wolf Creek was entitled to, and Holman was entitled to pursue that derivative claim and to recover the fees he expended in pursuit.

Under the relevant undisputed facts, which Appellants chose to either omit or downplay, there was no legal error committed by the trial court in granting partial summary judgment finding that the Notice of Termination was not properly provided as a matter of law, and that Brady had no authority to negotiate a new lease.

2. Issues Presented.

2.1 Mountain mailed, via Fed. Ex., a Notice of Termination of its lease to its own controlling owner Brian Brady at Northwest Broadcasting, Inc. It did so specifically for the purpose of depriving Rick Holman, the only other member of the Landlord Wolf Creek of notice, so that Mountain could "self deal" with its owner Brady to negotiate a drastically reduced lease price, despite the fact that all previous

correspondence had gone to both Brady and Holman in relation to the Wolf Creek/Mountain lease. The Lease required that notice be sent to the "Landlord" Wolf Creek, which "shall be deemed" received when sent certified or registered. Did the trial court err in ruling that the undisputed facts and law established that Mountain had breached its obligation under the terms of the Lease to provide written notice to the Landlord via certified or registered mail?

2.2 The Wolf Creek, LLC Agreement expressly provided that no member had the exclusive authority to make independent management decisions, and that only "all members" shall have the authority to obligate or bind the Company. Brady independently negotiated a new lease of Wolf Creek's only asset after purposefully insuring the other LLC member, Holman, was not informed of the negotiations or lease. Did Brady breach the LLC Agreement because he lacked authority to negotiate and enter into the new lease?

2.3 The trial court denied defendants' motion to dismiss over a year and a half before a partial summary judgment was granted. The motion to dismiss was based on both alleged lack of jurisdiction over Brady and improper derivative claims. The order on the motion to dismiss was not addressed in the cross-motions for partial summary judgment, nor in the trial court's rulings. The trial court certified as final the partial

summary judgment under CR 54(b), again not mentioning the order denying the motion to dismiss. The Court of Appeals found the trial court's certification on the partial summary judgment proper, and Appellants filed their Notice of Appeal as to the "Summary Judgment" and "all orders that inhere in that judgment"; in their brief Appellants raise new arguments and issues as to the derivative action. Is the portion of the order denying the motion to dismiss the derivative claims included in the appeal of the partial summary judgment?

2.4 LLC member Holman brought this derivative suit on behalf of Wolf Creek, LLC to prevent tenant Mountain from enforcing a new lease negotiated with LLC member Brian Brady, which drastically reduced the rent. Holman paid the necessary attorney fees out of his own account to pursue and prevail on that action. Brady, the other LLC member, participated in the negotiation of the new lease, which was a breach of Mountain's existing lease, and did not contribute to the payment of fees to pursue Mountain's breach. Should attorney fees be awarded individually to Holman to recover the amounts expended on behalf of Wolf Creek?

3. Statement of the Case.

3.1 Undisputed Facts.

Wolf Creek, LLC has two members: Rick Holman and Brian Brady. (CP 37-38) Wolf Creek had no "managing member", and its LLC agreement required joint decision making. (CP 16-38) Wolf Creek's sole asset is a building utilized as a television station, which it leased to Mountain in 1998. (Ex. F to R. Holman Decl. filed 11/7/14, Supp. CP __)[1] Mountain LLC similarly has two members: Northwest Broadcasting, Inc., and Northwest Broadcasting LP, which are both owned and controlled by Brian Brady, and to which he undisputedly serves as the President. (Exs. A, B, C, E to R. Holman Decl. filed 11/7/14, Supp. CP __) (Ex. D to R. Holman Decl. filed 11/7/14, Supp. CP __) (Rand Dep., pp. 1, 12-14, 19-21, 24, 40) By owning and operating these two member companies, Brady effectively owns and controls Mountain.

Likewise, Jon Rand is the Vice President/COO of all the Brady entities other than Wolf Creek, including Northwest Broadcasting, Inc., Mountain, and other divisions of the company. (Ex. D to R. Holman Decl. filed 11/7/14, Supp. CP __) (Rand Dep., p. 13) Rand has always reported

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[1] Respondent's Supplemental Designation of Clerk's Papers was filed 11/10/15; Respondent will supplement this brief with the designation of Clerks' Papers as soon as it is received.

directly to Brian Brady. (Ex. D to R. Holman Decl. filed 11/7/14, Supp. CP __) (Rand Dep., p. 21) In fact, Rand had to obtain Brady's approval to enter in to any lease on behalf of Mountain, or to terminate a Mountain lease. (Ex. D to R. Holman Decl. filed 11/7/14, Supp. CP __) (Rand Dep., pp. 50-51)

In January 1998, Mountain and Wolf Creek entered into a 15-year Lease; the Lease would automatically renew for 5-year terms unless a Notice of Non-Renewal was properly given. (Ex. F to R. Holman Decl. filed 11/7/14, Supp. CP __) The notice requirement in the Lease states:

> Article XXIII – Notices. All notices or demands of any kind required or desired to be given by Landlord or Tenant hereunder shall be in writing **and** shall be deemed delivered 48 hours after deposition the notice or demand in the United States mail, certified or registered, postage prepaid, **addressed to Landlord** or Tenant respectively at the addresses set forth after their signature at the end of this Lease. (Emphasis added)

(Id., CP 60) The signature block at the end of the Lease identified the Landlord: "Wolf Creek Holdings, LLC," with a "by" signature line which had Brady's name typed under the line; an amendment to the Lease the following year similarly identified the Landlord as "Wolf Creek Holdings, LLC", and had a "by" signature line with Holman's name typed under it. (CP 63, 65-66)

At all times, Rand of Mountain knew that Holman was a member of Wolf Creek. (Ex. D to R. Holman Decl. filed 11/7/14, Supp. CP __)

(Rand Dep., p. 80) As a member of Wolf Creek, Holman was required to be communicated with regarding the Lease Agreement. Although there is no address listed under the Landlord's name at the end of the Lease (or the Amendment), it is undisputed that prior lease related communication and information were regularly sent by Mountain Broadcasting, LLC and its agents to Holman at this address in California, and in turn, that lease communications and information had been sent by Holman (on behalf of Wolf Creek) to Mountain. (Exs. G, H, I to R. Holman Decl. filed 11/7/14, Supp. CP __)

Specifically, on November 8, 2005, and again on March 19, 2009, Rand, COO of Mountain Broadcasting/KAYU, sent letters addressed to **both** Holman in California, and Brady in Michigan. (CP 216-217, 219-220) In fact, Appellants cite these exact letters as proof that Mountain had previously advised Wolf Creek that the lease rate was unacceptable. (See, Appellants' Brief, pp. 7-8)[2] Mountain clearly appreciated and recognized the necessity to apprise "the landlord" through Brady **and** Holman. Both of these letters addressed the Lease Agreement between Mountain and Wolf Creek. However, the November 2005 letter from Rand alleges that

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[2] It should also be noted that despite Appellants' assertion that Mountain advised Wolf Creek that it was unhappy with the rental amount "for years," there were exactly **two letters,** one in 2005 and one in 2009. (See, Appellants' Brief, pp. 7-8)

the reasonable rent for the building would be $14-$16 per square foot (or approximately $12,500 - $14,300 a month), and the March 2009 letter from Rand alleges that the reasonable monthly rent would be between $13,583.25 and $15,373.58.[3] (CP 216-217; 219-220) In the March 2009 letter, Rand specifically requested to "see a written response from both of you prior to March 31, 2009, with a copy to the other partner." (CP 220)

Mountain was also well aware of Holman's continual membership and involvement in Wolf Creek because Holman (on behalf of Wolf Creek and with copies to Brady) sent annual rent calculation and reminder letters to Mountain, including as recently as December 2010 and December 2011. (Ex. I to R. Holman Decl. filed 11/7/14, Supp. CP __) Rand recalls generally seeing these annual rent increase notices from Holman and knowing that he still had an interest in Wolf Creek. (Ex. D to R. Holman Decl. filed 11/7/14, Supp. CP __) (Rand Dep., pp. 116-117) Rand also knew of Holman's continued membership and involvement in Wolf Creek, as he knew that Mountain's attorney Fred Levy (who also drafted the Wolf Creek, LLC Agreement and acts as attorney for the Brady entities) is

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[3] This is important because the new Lease rate negotiated by Brady and Mountain is less than both of these previous proposals by Mountain.

Holman's brother-in-law. (Ex. D to R. Holman Decl. filed 11/7/14, Supp. CP __) (Rand Dep., pp. 42-43)

And yet on September 2012, for the first time Mountain **chose** not to communicate with Holman regarding the Notice of Non-renewal of the Lease Agreement, as well as the ongoing negotiations of a new lease. Instead, Mountain, through Rand, communicated only with Brady (his employer); this notice was not addressed to the Landlord but instead addressed to "Mr. Brian Brady, President, Northwest Broadcasting, Inc." (CP 128) It was not sent registered or certified, but was instead sent via overnight Federal Express. (Id.; Appellants' Brief, p. 10)

Brady then proceeded to negotiate a lease without providing any notice to Holman regarding receipt of the non-renewal or negotiations regarding a new lease term. Under the Wolf Creek, LLC Agreement, Brady did not have the authority to unilaterally act in this manner. (CP 16-38)

Rand and Brady consciously made the decision not to communicate the Lease termination and new lease negotiations with Holman to insure that Brady could unilaterally get his company Mountain a reduced lease rental amount from Wolf Creek; this self-dealing insured the lease reduction went into Brady's pocket as the owner of Mountain as opposed to rent paid to Wolf Creek which Brady had to share 50/50 with

Holman. Rand admitted that he was avoiding notice to Holman to insure that Mountain obtained the reduced rent, not because he believed it to be unnecessary under the terms of the Lease. Rand testified that "as far as I was concerned, communicating with Rick Holman was pointless" (Ex. D to R. Holman Decl. filed 11/7/14, Supp. CP __) (Rand Dep., p. 95), "I was more inclined to not send it to him because he had never chosen to respond or communicate with me on any level, including sending notices and it seemed pointless to me" (CP 274), and that he "had never seen any evidence of Holman...being reasonable about renegotiating the lease." (Ex. D to R. Holman Decl. filed 11/7/14, Supp. CP __) (Rand Dep., p. 151)

Thus, Appellants' assertion that Brady received the Notice of Non-Renewal sent to him (which is not disputed), and that he turned around and confirmed to Mountain (i.e. himself), that he was aware that Mountain (himself) was not extending the terms of the Lease, is neither disputed nor relevant to the court's decision below. The parties thus did not dispute factually what occurred here, (rendering summary judgment proper); they differed on the effect of Mountain/Brady's decision to avoid sending Notice of Termination to Wolf Creek to both Holman and Brady and whether that breached the requirements under the Lease.

Holman's first notice of any termination of the old lease, and the new negotiations, came in a letter from Brady on November 30, 2012. (Ex. W to R. Holman Decl. filed 11/7/14, Supp. CP __) Holman immediately responded to Rand at Mountain (and cc'ing Brady), notifying him that the termination notice should have come to both Holman and Brady, and that Brady had no authority to independently negotiate and agree to new Lease terms. Holman's objections were ignored and Mountain and Brady signed the new Lease on or about January 10, 2013.[4] (Exs. V and W to R. Holman Decl. filed 11/7/14, Supp. CP __) This lawsuit followed.

3.2 Procedure.

On March 8, 2013, Wolf Creek and Holman sued Mountain and Brady. (CP 1-66) Wolf Creek's claims were brought derivatively by Holman against Mountain for having improperly terminated its lease with Wolf Creek and to void the "new" lease which provided Mountain (and in turn Wolf Creek) with a significantly reduced rent. (CP 1-11) Holman also brought claims for breach of the Wolf Creek, LLC agreement by Brady based on his conduct in surreptitiously and individually negotiating

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[4] The terms of the Lease in actuality had been agreed to in October. (Ex. D to R. Holman Decl. filed 11/7/14, Supp. CP __) (Rand Dep., p. 128)

and executing the new lease with Mountain. (CP 12-15)

In May of 2013, Mountain and Brady moved to dismiss this action. (CP 79-92) The majority of that motion was dedicated to a claim that there existed no personal jurisdiction over Brady; however, they also asserted that the Wolf Creek derivative claims should be dismissed because the Complaint was not verified, and because the Wolf Creek claims were combined with the individual claims of Holman. (CP 79-89) The trial court denied that motion on July 8, 2013. (CP 153-155)

Both parties cross moved for summary judgment 15 months later on issues unrelated to the motion to dismiss. The trial court analyzed the undisputed facts to determine the express terms of the Lease, in accord with the parties' long term conduct, required notice to the "Landlord", stating: "Who is the Landlord? It is Wolf Creek. Who is Wolf Creek? Mr. Holman and Mr. Brady." (RP dated 12/5/14, p. 33)[5] The trial court noted the clear language of the lease, coupled with the past performance of jointly notifying Holman and Brady as the landlord on any issues regarding the leasehold, established what the provisions meant, and established that notice which purposefully did not include Holman was ineffective; Brady's unilateral negotiation of the new lease terms was

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[5] The court's oral ruling was incorporated into her written order. (CP 372)

similarly unauthorized under the LLC Agreement, and the new lease was void. (RP dated 12/5/14, pp. 33-36)

The trial court's order was entered on December 19, 2014, granting partial summary judgment: (1) in favor of Wolf Creek against Mountain for its failure to properly serve the Notice of Termination; and (2) in favor of Holman against Brady for Brady's breach of the LLC Agreement by negotiating the new lease. (CP 370-372) Holman and Wolf Creek requested a money judgment, and a judgment for fees alone was entered against Mountain on April 20, 2015, in favor of Wolf Creek; the trial court also entered a CR 54(b) Certification of the Partial Summary Judgment, finding no reason to delay appeal on the issues. (CP 379-384) The parties stipulated to a stay of the claims remaining at the trial court level. (CP 399-400) The Court of Appeals confirmed the partial summary judgment as appealable as a matter of right on April 22, 2015.

Appellants filed the Notice of Appeal on April 22, 2015 which properly attached the Partial Summary Judgment as the order to be appealed from, but also claimed to include "all orders inhering in that judgment."

4. Law.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits show

that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). Where both parties move for summary judgment and the facts are truly not in dispute, the court is normally left with only a decision on an issue of law – which party is entitled to judgment, given the undisputed facts and the applicable substantive law. 4 Wash.Prac., Rules Practice CR 56 n. 24 (6th Ed.). Neither party here disagrees on the express terms of the lease, the express terms of the LLC Agreement, or the facts of what occurred here, and for the same reasons the trial court granted summary judgment, this Court's de novo review should reach the same result.

4.1 The motion to dismiss the derivative claims was denied over two years ago and was not certified as a final order for appeal.

Brady and Mountain moved to dismiss the claims against them in May of 2013, claiming that the court lacked personal jurisdiction over Brian Brady, and claiming Holman failed to comply with the technical rules of pleading derivative actions; that motion was denied in July of 2013. The Order granting partial summary judgment against Mountain was based on the lack of proper notice of non-renewal of the Lease to Wolf Creek, and against Brady, based on his breach of the LLC Agreement in negotiating the new Lease. That order was entered on December 19, 2014, with a money Judgment for fees against Mountain

under the terms of the Lease entered on April 20, 2015. (The primary damage relief against Mountain remains pending below.)

Appellants originally tried to seek discretionary review of the partial summary judgment order with no mention made of the denial of the motion to dismiss. (CP 373-375) The trial court certified the partial summary judgment as final pursuant to CR 54(b), which the Court of Appeals accepted in the Commissioner's Ruling dated April 22, 2015. (CP 379-384) The Appellants' filed their Notice of Appeal from "the Judgment against Mountain signed on 4/20/15." (CP 388-392) While they also include "all orders that inhered in that Judgment," neither the parties nor the court ever briefed, ordered or even discussed an immediate appeal of the denial of the motion to dismiss, nor was it certified as appealable as a matter of right under the standards of CR 54(b).

Now, over two years after its denial, the Appellants are apparently claiming that **part** of the order denying the motion to dismiss as to the derivative claims is somehow immediately appealable (although not, apparently, the primary basis of their original motion to dismiss - - personal jurisdiction over Brady). However, there remains pending below the lion's share of the monetary damage claim against Mountain, and no basis exists (or was asserted) to declare a denial of a CR 12(b)(6) motion final for purposes of immediate appeal.

A denial of a motion to dismiss is not immediately appealable without CR 54(b) certification. See, Herrmann v. Cessna, 82 Wn.2d 1, 3, 507 P.2d 144 (1973); Anderson v. Big Apple Consulting, USA Inc., 237 Fed.Appx. 127 (9th Cir. 2006) (order denying motion to dismiss was not final and could not be appealed absent certification). Orders not included in CR 54(b) certification can be passed along to the Court of Appeals if the Commissioner deems them necessary, but here the motion to dismiss was not presented to, nor ruled on, by the Commissioner. See, Ballard v. Popp, 142 Wn.App. 307, 311, 174 P.3d 681 (2007). The Appellants cannot pick and choose the various interlocutory rulings below in the case and declare some of them as "inhering" in the partial summary judgment on appeal. Were this the case, they would also be challenging the personal jurisdiction of Brady, since the partial summary judgment included the ruling that Brady had breached the LLC agreement.[6]

Moreover, Appellants also now assert several bases for dismissal of the derivative claim not raised below. Appellants' claim for the first time here that Wolf Creek also had to plead that the Wolf Creek claims

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[6] Appellants state conclusorily that the personal jurisdiction over Brady fails if the derivative claim fails, and that there is no "judgment" against Brady in the CR 54(b) certification. This is incorrect. The partial summary judgment included a finding that Brady breached the LLC Agreement, which was Holman's Third Cause of Action, and included in the entire partial summary judgment was certified for appeal. (See, CP 12, 377)

were being brought were "not collusive" to confer jurisdiction, and that the derivative claim presented a "conflict of interest". (Appellants' Brief, pp. 24-27) Matters not raised below will not be considered on appeal. Douglas v. Jepson, 88 Wn.App. 342, 347, 945 P.2d 244 (1997) (when reviewing a summary judgment order, only evidence and issues raised below will be considered).

The actual final judgment will be entered upon the conclusion of this appeal of the narrow issues relating to the notice of non-renewal, and Brady's unauthorized and invalid negotiation of the new lease. The time for appeal of **all** the attendant issues will be upon final judgment against Mountain and Brady.

4.2 And although not properly addressed in this appeal, Holman's derivative claims were properly pursued.

Utilizing court rules and case law inapplicable to Washington LLCs, Appellants assert that the derivative claims brought by Holman on behalf of Wolf Creek are barred. Even if the general procedures for making corporate derivative claims are applicable by analogy, Holman properly pursued the interests of the Wolf Creek, LLC, in maintaining the valid lease with Mountain instead of allowing Mountain to invalidly issue a non-renewal notice and negotiate a new lease at a significantly reduced rent. Whether the procedural requirements of CR 23.1 will be excused or

are met is within the trial court's discretion, and will be reversed only for manifest abuse of that discretion. 3A Wash. Prac., Rules Practice CR 23.1 (6th Ed.); see also, Haberman v. WPPSS, 109 Wn.2d 107, 744 P.2d 1032 (1987). Appellants demonstrate no abuse of discretion here.

a. Plaintiff's derivative claim meets the requirements applicable to LLCs under RCW 25.15.370-385, and CR 23.1 requiring verification of the Complaint is inapplicable by its express terms.

Washington's Limited Liability Companies statute grants LLC members the right to bring an action on behalf of the LLC "to recover a judgment in its favor if managers or members with authority to do so have refused to bring the action or if an effort to cause those managers or members to bring the action is not likely to succeed." RCW 25.15.370. The statute itself specifically provides for complaint requirements:

> In a derivative action, the complaint shall set forth with particularity the effort, if any, of the plaintiff to secure initiation of the action by a manager or member or the reasons for not making the effort.

RCW 25.15.380.

However, the statute does not require that the complaint be verified. Although the LLC statute bears close resemblance to the Business Corporation Act, the statutes differ in this requirement. See, RCW 23B.07.400(2) ("A complaint in a proceeding brought in the right of a corporation must be verified..."). Tracking the Business Corporation

Act, CR 23.1 by its express terms requires verification of a Complaint by "shareholders" or "unincorporated associations." Washington courts have recognized that CR 23.1 applies to derivative actions by shareholders, and not to LLCs, other than for guidance by analogy. See e.g., Stokes v. Anesthesia Ass. of Monroe, PLLC, 2008 WL 2174419 (Wash.App. 2008); Mills v. Baugher, 2003 WL 21761817 (Wn.App. 2003).[7] Case law from other jurisdictions applying their Rule 23.1 to LLCs are simply not applicable.

And contrary to Appellants' assertion, CR 23.1 and RCW 25.15 do not conflict, and thus do not require any analysis of which "trumps" the other. As noted, CR 23.1 has never been amended to include LLCs,[8] and is in harmony with the procedural rules contained in the Business Corporation Act; both the Rule and the statute require similar things for

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[7] Even were Wolf Creek's derivative claims defective for want of verification, the proper course of action would have been to grant Wolf Creek and Holman leave to amend the complaint, not dismissal of the claim altogether. RCL Northwest v. Colorado Resources, Inc., 72 Wn.App. 265, 271, 864 P.2d 12 (1993); 3A Wash. Prac., Rules Practice in CR 23.1 (6th Ed.) (verification requirement is not "rigorously" enforced). This is the relief requested by Holman/Mountain below, however, the trial court found it unnecessary. (CP 120; RP dated 6/28/13, pp. 18, 29-30)

[8] Appellants cite RCW 1.16.080, which generally defines unincorporated associations as LLCs, but is applicable only to the Code; that provision was added in 1996, after the LLC Act was enacted in 1994. The Court Rules have no such definition, and were enacted in 1967; Rule 23.1's use of "unincorporated association" pre-dates the LLC Act.

shareholders or unincorporated associations' derivative claims. The Rule utilizes distinct and different terms of art, and addresses different entities; neither the statute or the Rule controls over the other - - RCW 25.15 is the only law relative to the filing of a claim by an LLC member on behalf of the LLC, and Holman/Wolf Creek were in compliance with those requirements.

b. The "lack of collusion" requirement is inapplicable here.

While "lack of collusion" again only applies to shareholder derivative actions under CR 23.1, the undisputed facts establish that the claims against Mountain were not brought to "collude" to create jurisdiction. Wolf Creek's claims against Mountain were necessitated because Wolf Creek and Mountain are the parties to the lease, not Brady and Holman. Mountain is the entity that issued the invalid notice of non-renewal and who claimed the right to enforce a new lease with significantly reduced rent, and Mountain is the entity against whom Wolf Creek could recover damages, including fees. Only Wolf Creek could pursue the claims against Mountain, and no "collusive" pleading occurred.

Moreover, the trial court ruled that it had jurisdiction over Brady, and the pursuit of the action against Mountain to "collude" was unnecessary to create jurisdiction of this action. In fact, the requirement to

show the action is not collusive to confer jurisdiction was a holdover requirement from the federal rule; it existed to avoid the possibility of using Rule 23.1 to "create federal diversity jurisdiction where it would not otherwise exist," which is not an issue in Washington Supreme Courts, "which are courts of general jurisdiction." 3A Wash. Prac., Rules Practices CR 23.1 (6th Ed). "Collusive" pleading simply is irrelevant and non-existent here.

c. Wolf Creek's action against Mountain to maintain their current lease at the higher rent was certainly in its best interests, and the fact it is also in Mr. Holman's interest does not vitiate the propriety of the suit.

Appellants' machinations to argue that this action is in Holman's interest alone fails on the undisputed facts.[9] While only a two-member LLC, as the trial court noted, it is presumed that both Holman and Brady – Wolf Creek – have as a single goal to maximize profits for Wolf Creek. (RP dated 6/28/13, p. 26) ("the LLC, presumably, was put together to make a profit and lease this building"). The fact that Brady developed a plan with other of his entities to maximize his individual profits by acting

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[9] Whether a plaintiff has established he fairly represents the interests of an entity in a derivative action under Rule 23.1 is "firmly committed" to the discretion of the trial court and will be reviewed only for an abuse of that discretion. Larson v. Dumke 900 F.2d 1363, 1364 (9th Cir. 1990). A party challenging the plaintiff's right to pursue a derivative action bears the burden of proving the plaintiff does not fairly represent the entity fairly. 13 Fletcher Cyc. Corp., §5981.42.

in the interest of other entities' interests and not the interest of Wolf Creek's, does not mean that Holman's preservation of Wolf Creek interests has no merit. It can be presumed that if Brady kept his "Wolf Creek" hat on, he would benefit by the action of Wolf Creek in pursuing this claim. While Brady pays less rent to Wolf Creek through his Mountain entity under the new invalid lease, it is undisputed that Wolf Creek receives less rent under the invalid new lease, which is shared between Holman and Brady. Thus, while Brady with his "Mountain hat" may not wish to pursue the invalidity of Mountain's termination of lease, Wolf Creek has every interest in pursuing the entitlement to the original lease amount, and no evidence exists that it is "over-market" or "unfair".

The entire purpose of this lawsuit is to preserve Wolf Creek's original lease properly negotiated with Mountain for a profitable rental rate; it is difficult to comprehend Appellants' argument that such a claim is "dubious on its face", or that its purpose was to "gain advantage over Brady". (Appellants' Brief, p. 27) The new lease is unfair to Wolf Creek because the old lease, with its higher rental rate, was never properly terminated, or renegotiated, and Wolf Creek is owed the original lease amounts from Mountain. Only Wolf Creek has that claim against Mountain, with the attendant right to attorney fees. The trial court properly found that the best interests of the LLC was to rent its property at

a good rate, and that a derivative action was appropriate. (RP dated 6/28/13, pp. 26-28)

And irrespective of whether Holman individually benefitted by being a member of an LLC whose profit would be maximized by enforcing Mountain's original Lease, the derivative claim of Wolf Creek was still properly pursued under the law. Appellants cite a very old rule that "a plaintiff cannot join in the same suit a claim on behalf of the corporation and an individual, personal claim against the defendants." 3A Wash. Prac., Rules Practice at 518 (5th ed. 2006) (citing Hames v. Spokane-Benton County Nat. Gas Co., 118 Wash. 156, 203 P. 18 (1922)). First, there is no suggestion that this concept applies to LLCs, or that the concept survives the current liberal pleading rules. And even as to corporations, an exception exists for minority shareholders of a closely-held corporation. Interlake Porsche & Audi, Inc. v. Bucholz, 45 Wn.App. 502, 519-20, 728 P.2d 597 (1986), review denied, 107 Wn.2d 1022 (1987).

Moreover, the rule on non-joinder in Hames does not apply to this case because the stockholder plaintiffs in Hames brought two causes of action that were entirely unrelated as to each other. 118 Wash. at 159. The first claim derivatively alleged that officers and trustees of the corporation contracted with themselves for the payment of unreasonable

expenses, salaries, and commissions on the sale of stock. Id. at 157. The second alleged that individual defendants induced the plaintiffs, through misrepresentations, to make loans to the corporation in exchange for stock, such that the defendants received a commission on the "sale" of stock. Id. Since the stockholders of the corporation had no interest in the second claim, joinder was improper under the old rule.

In this case, Wolf Creek is a closely-held LLC, having only two members. Since Holman has experienced special injuries that result directly from Brady's breach of the LLC Agreement, namely the loss of income derived from the LLC due to Brady's ultra vires negotiation with Mountain, joinder of the individual and derivative claims is appropriate and in the interest of judicial economy. See also, CR 1 (in all civil actions, the rules shall be construed and administered to secure the just, speedy, and inexpensive determination of every action).

The non-joinder rule in Hames is also outdated and no longer applies:

> At one time, distinct and multifarious matters, such as derivative and individual causes of action, could not be joined in one count or complaint, unless it was to avoid multiplicity or where one cause was merely a subsidiary of the other. If there were multiple causes of action, the plaintiff had to plead each one separately. **The joinder of such claims is now liberally permitted in both federal courts and state courts with similar rules of procedure.** (emphasis added)

Fletcher, Cyc Corp, §6011. Current joinder rules in Washington allow liberal joinder of all claims and remedies, whether independent or alternate. CR 18. And all parties may join or be joined as plaintiffs or defendants if there is a right to relief asserted arising out of the same transaction or occurrence. CR 20. There exists no basis under the rules of pleading to require separate suits here, and Wolf Creek's derivative claim was properly pursued.

Similarly irrelevant is Appellants' assertion that bringing the derivative claim along with Holman's underlying claims creates "conflict of interest". The claims being pursued in this action, unlike those in the cases cited by Appellants, are not " mirror images", and do not deal with shareholders who are both suing **on behalf of** a corporation, while making individual requests for damages **against** a corporation. Generally, conflicts which preclude both individual and derivative claims arise when the relief sought is "incompatible"; however where damages payable would be paid to all members of an LLC, no such incompatibility exists. See, Angel Investors, LLC v. Garrity, 216 P.3d 944, 954-54 (Utah 2009); see also, DeMott & Cavers, Shareholder Derivative Actions & Prac., §4.4, "Conflicts of Interest" (2015-2016).

Here, the Wolf Creek derivative action is against its tenant Mountain for the invalid Notice of Termination of the Lease; Holman's

claim is against Brady for the breach of the LLC Agreement for his role in renegotiating an invalid new lease. Judgment for the correct lease amount will be entered against **Mountain** in favor of Wolf Creek, and both Brady and Holman will be entitled to their share. The only person with a conflict here is Brady, because he would rather save dollar for dollar rent through his entity Mountain in a rent reduction, than recover the same dollar for Wolf Creek in the proper rent amount which he must share with Holman. Brady's Mountain conflict does not render Holman an inadequate representative for Wolf Creek.

4.3 Mountain's Non-Renewal Notice was invalid because it was given in a manner to purposefully deprive the Landlord of it.

Wolf Creek properly sued Mountain because Mountain's Notice of Termination was not properly given, entitling Wolf Creek to enforce the original Lease. The Notice was surreptitiously sent in a manner purposefully different than all past correspondence on lease issues, and in a manner purposefully to deprive both members of Wolf Creek, i.e. "the Landlord" of the notice, so that Brady would be able to negotiate a new lease at a reduced amount for Mountain, an entity he owned and controlled. The trial court's finding was not the hyper-technical narrow interpretation of the requirements for notice as framed by the Appellants,

but a proper construction of the Lease terms under the parties' past conduct, and the undisputed circumstances of deceit.

a. It is undisputed that Mountain's Notice of Termination did not go to the landlord, nor was it intended to provide notice to Wolf Creek.

The express terms of the lease identify Wolf Creek as the landlord, and provide that all notices of any kind "shall be in writing and shall be deemed delivered" 48 hours after depositing the notice or demand in the United States mail, "certified or registered" and "addressed to landlord...at the addresses set forth after their signature in the Lease." (CP 208) A notice of intent to exercise an option contained in a lease must be definite, and given strictly in conformance with the terms of the lease. Wharf Restaurant, Inc. v. Port of Seattle, 24 Wn.App. 601, 605 P.2d 334 (1979). Leases are contracts and are to be interpreted first in accordance with the objectively expressed intent of the parties. City of Puyallup v. Hogan, 168 Wn.App. 406, 277 P.3d 49 (2012). The interpretation of a lease is a question of law; similarly, the adequacy of a termination notice is a question of law subject to de novo review. Duvall Highlands LLC v. Elwell, 104 Wn.App. 763, 771, 19 P.3d 1051 (2001); Tacoma Rescue Mission v. Stewart, 155 Wn.App. 250, 254, 228 P.3d 1289 (2010). The interpretation of this lease term demands very specific performance by Mountain, with which it failed to comply as a matter of law.

Irrespective of **how** the Notice of Termination was physically sent, it is undisputed it was not sent to, nor ever intended to be sent to Wolf Creek, or to Holman. While there was no address set forth for Wolf Creek at the end of the lease, neither was there an address for Brady, yet that is where Mountain chose to send it. Nor is there any dispute that Mountain had Wolf Creek, Brady, and Holman's actual addresses and utilized them throughout the term of the original Lease. And Mountain's reliance on the fact that Brady's name was typed under the signature line does not establish that Brady was the "Landlord" for the purposes of notice; that argument overlooks the fact that Holman's name was similarly typed under the signature line on the Lease Amendment, not to mention the parties' clear course of conduct in previous communication with "the landlord".[10]

Mountain had consistently sent correspondence and necessary business information to not only Brady, but also to Holman. In fact, Mountain admits it had expressed its unhappiness with the rental amount

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[10] And contrary to Appellants' argument that it "makes sense" that only Brady was entitled to notice based on the terms of Wolf Creek's LLC Agreement not only ignores the fact notice was strategically withheld from Holman, but also misinterprets the terms of the LLC. (See, infra. Sec. 4.4) Under Appellants' interpretation, apparently both Holman and Brady could have been negotiating separate individual deals for the Wolf Creek building simultaneously, while insuring their co-member had no knowledge of each other's conduct. This "makes no sense."

directly to Holman on two occasions, but in 2012 conveniently did not send him the Notice of Termination. (Exs. G and H to R. Holman Decl. filed 11/7/14, Supp. CP __; ¶¶9, 10 to R. Holman Decl. filed 11/7/14, Supp. CP __) That notice went **only** to Brady at his entity that owned Mountain. Other business dealings by the defendants regarding the lease had always included Holman. (Exs G, H, K and L to R. Holman Decl. filed 11/7/14, Supp. CP __; ¶¶9, 10 to R. Holman Decl. filed 11/7/14, Supp. CP___)

Prior conduct of the parties is relevant to determine the proper construction of an express term of a contract. Eagle Ins. Co. v. Albright, 3 Wn.App. 256, 266, 474 P.2d 920 (1970). Courts will treat the terms of a contract as the parties did, so as not to destroy the interpretation the parties have put on their own transaction. Blue Mountain Convalescent Center v. Dept. of Social and Health Serv., 21 Wn.App. 593, 599, 585 P.2d 832 (1978).

Appellants' assertion regarding Brady's position as a member and agent of Wolf Creek does not establish the propriety of the notice. The lease did not provide that notice could be given to any agent or member of Wolf Creek; that would have been an easily written and understood term, but it is absent from the lease. The landlord to whom notice had to be

given was Wolf Creek, and notice given only to Brady alone--at another of his entities--was insufficient, and the trial court so properly ruled.

The notice provision of the lease also cannot be read in a vacuum without consideration of Brady and Mountain's interrelationship. Mountain's conduct here in sending the notice only to Brady was intentionally secretive; Mountain's Vice President admits that he purposefully chose not to send the notice to Holman, despite his previous practice because he thought it was "pointless" and because he believed Holman would be unreasonable and Mountain would get a better deal from Brady. (Ex. D to R. Holman Decl. filed 11/7/14, Supp. CP __) (Rand Dep., pp. 96, 151) Clearly, Mountain was not analyzing the express terms of the lease to determine the appropriate method of service of the Notice of Termination, and its analysis of what the lease required now, post-notice, is disingenuous. The trial court noted the fact that "one party...has their own interest in the lease" rendered the past performance critical in interpreting the meaning of the lease. (RP dated 12/5/14, p. 33)

The same unambiguous interpretation applies to whom the notice must be sent. Appellants did not dispute the notice had to be sent to the Landlord; nor did they dispute that Wolf Creek, LLC is the Landlord. Appellants did not dispute that Mountain's notice went only to Brady. Appellants did not dispute that Mountain did not send it to Holman, nor

did Mountain even assert that it believed the notice would be passed on to Holman. Instead, Mountain and Brady freely admit they purposefully did not want notice to go to Holman because they believed he would have interfered with the better deal for Mountain by being "unreasonable." Appellants did not dispute that previous correspondence about the rent and the Lease was sent to both Brady and Holman, with an admonition that Mountain be notified that both LLC members had been advised of the information, and a request that they both respond. These facts establish that the Landlord, Wolf Creek, was not given notice as required by the Lease as a matter of law and the trial court was correct in finding that the Notice was in fact sent only to Brady to prevent Wolf Creek (Brady **and Holman**) from receiving the Notice.

Contract interpretation is a matter of law, and a court can utilize context to determine the parties' intent at the time they entered into the contract. International Marine Under Writers v. ABCD Marine, LLC, 179 Wn.2d 274, 282, 313 P.3d 395 (2013). Even when using the "context" evidence allowed by Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990), it remains the duty of the court to search out the intent of the parties, and resolve any ambiguities. Id. Thus, the meaning of a contract is still an issue of law, particularly where there are no disputed issues of fact. Id. Contrary to Appellants' assertion, the trial court did not

improperly utilize extrinsic evidence to "vary or contradict" the terms of the Lease Agreement.

The parties here simply did not disagree about what happened, nor did they disagree about the express terms of the contract. The issue was whether under the contract, the notice of non-renewal was properly given to the Landlord, when it was not addressed to Wolf Creek, was not sent to Mr. Holman, and in fact was purposefully withheld from Mr. Holman contrary to all previous practice. The context evidence includes the fact that the notice was not given to both members of Wolf Creek, LLC, in order to accomplish exactly what happened here: so that Brady/Mountain could unilaterally accept the non-renewal notice and proceed to unilaterally negotiate a new Lease purportedly on behalf of Wolf Creek, LLC with himself/Mountain. The purpose of a notice provision is to provide actual notice of an event; these parties intended to give notice only to Mr. Brady, and not the Landlord Wolf Creek, LLC. The trial court properly ruled it was thus ineffective as a matter of law, which was not in error.

b. The court properly interpreted the requirement of the written contract regarding method of service of Notice of Termination by registered or certified mail.

The notice provision of the lease required that "all notices....shall be in writing **and** shall be deemed delivered 48 hours after depositing the

notice...in the United states mail, certified or registered, postage prepaid, addressed to Landlord." The sentence structure of the notice provision specifies that notice "shall be in writing" **and** "shall be" deemed delivered after sending it certified or registered. The word "and" is conjunctive, joining two elements, so that the second logically qualifies the first, requiring both portions of a phrase which it connects. American Legion Post #149 v. Washington State Dept. of Health, 164 Wn.2d 570, 619, 192 P.2d 306 (2008). Moreover, when an act "shall be" done, it is mandatory and non-discretionary. Rudolph v. Empirical Research Sys., Inc., 107 Wn.App. 861, 866, 28 P.3d 813 (2001) ("shall" and "will" are mandatory as opposed to "may" which is discretionary). Had the parties intended to simply outline one circumstance in which notice would be deemed delivered, they would have said the notice "may" be deemed delivered when sent certified or registered. The Appellants' argument that certified or registered mail was not required but would be deemed effectuated "if" such methods were used inserts a concept that is not present - - there is no "if" in the express requirement.

As a result, the trial court ruled that this language, when properly construed, gave no other option but to send the notice of termination both in writing, and registered or certified. It was undisputed that was not accomplished here, and the trial court properly granted a summary

determination that the Notice of Termination was not effective.

Courts recognize that when state law requires "strict compliance" with a lease termination provision, a requirement for registered or certified mail will be enforced irrespective of actual notice. See, In re Clubhouse Investments, Inc., 451 B.R. 626, 634 (Bkrptcy. S.D. Ga. 2010). There, the court found that a termination notice sent via Federal Express was insufficient when the lease contemplated certified mail, despite the fact it was admittedly received. The court refused to speculate on the number of reasons why the parties might have agreed to certified mail, but found "it is not this court's responsibility to inquire as to the reasoning behind the notice provision, but rather to uphold it." Id.

And Appellants' argument that delivery of notice was "independently established," and thus the method of delivery is irrelevant is incorrect, ignores the undisputed facts (and basis for this suit, and ignores the trial court's ruling) that the Landlord **did not** receive the notice; it was sent only to Brady at another of his entities that controlled Mountain. (See, Appellants' Brief, p. 32) It is instead undisputed that notice to Brady was **not** received by Wolf Creek.

And because the Appellants recognize the lack of appropriately sent notice, they argue regular mail has been accepted as "substantially complying" with more onerous delivery methods. However, they do not

cite any cases in which similar language is interpreted under similar facts. Instead, they cite to authorities in which the courts determined that when there exists a required mode of service, but service is admitted, and notice is received, it may be unfair to enforce a required type of service. Those cases neither address the necessity for strict compliance required by Washington law, or the lack of actual notice and resulting prejudice which is present here.

Mountain (owned and controlled by Brady) instructed counsel who had helped negotiate this lease on behalf of all the parties (Mountain, Wolf Creek, Brady, and Holman) to Fed Ex a notice to only "Brian Brady, President, Northwest Broadcasting, Inc.," and Brady agrees he received it. This is not a situation of arm's length dealing in which actual notice was admittedly received in an arm's length transaction. It is undisputed that Holman never received notice nor was he made aware that notice was received until months later, and the persons giving and getting notice are so intertwined that assumption of fairness, based on actual notice, and the lack of necessity of formality in the notice, does not arise. The trial court in fact distinguished the authorities cited by the Appellants, as instances in which there was actual notice, and thus a "no-harm-no-foul" circumstance, which was "not the case" here:

> This case has the additional factor of the relationship between the two parties. The fact they are in dispute about the only asset of Wolf Creek and they are in dispute about what is a fair rental value for one of the party's specific business, KAYU. This is not a no-harm-no-foul situation.

(RP dated 12/5/15, p. 32)

This is not a result of formality over substance, but is part and parcel of the in-house self-dealing that renders the notice ineffective as a matter of law.

4.4 Summary judgment was properly entered ruling that Brady was not authorized to execute the new lease with Mountain.

a. Management decisions were expressly required to be made by both Brady and Holman to be effective.

The express terms of the LLC agreement, contrary to the Appellants' assertion, gave Brady no authority to individually and independently negotiate and reach agreement on a new lease with Mountain as a matter of law. Instead, the agreement merely allows either member to sign and execute documents on behalf of the entity once the decisions are jointly made:

> ARTICLE V
> Management
>
> Section 1. **Management.** The company will be operated by the members and no manager will be appointed. **No member, nor any group of members not including all the members of the company, shall have continuing exclusive authority to make independent management decisions.**

> Section 2. **Authority of members to bind company**. **All members** of the company shall have the authority to obligate or bind the company in connection with any matter. (Emphasis added)

(CP 369)

The Management provisions in the LLC Agreement (appropriately set out in a section headed "Management") provide two things: no member has the "continuing exclusive authority to make independent management decisions" (Section 1), and "all members shall have the authority to obligate or bind the Company" in relation to transactions with others. (Section 2) Contrary to Appellants' assertion, these are not redundant to one another, nor superfluous when read together. The clauses require both joint management and joint authority to bind the Company in its relations with others; the clauses specify different management authorities, but in each case do not give such authority to a single member. (Not an unlikely scenario when there are only two members to an LLC, and they have chosen to self-manage.)

Thus, these terms unambiguously provide that no single member can make an independent management decision; the defendants misread the term "all members" to mean "each member." The phrase "all members" means exactly what it says: all--both Brady and Holman--and not "each member." "All" is legally defined as "the whole of," an

aggregate, "every member of individual component"; it refers to "the aggregate under which individuals are subsumed, not to the individuals themselves." Black's Law Dictionary (5th ed.). Contract terms are to be given their ordinary meaning. Storti v. Univ. of Washington, 181 Wn. 2d 28, 39, 330 P.3d 159 (2014).[11] Courts will not "torture" contract terms to create an ambiguity where an ordinary reading leaves no room for uncertainty. Moeller v. Farmers' Ins. Co., 173 Wn. 2d 264, 288, 267 P.3d 998 (2011).

In fact, the provision that the Appellants cite regarding execution of documents further establishes the difference between "all members" and "any member." "All members" had the authority to obligate or bind the Company, but "any member" had the power to execute documents, including leases. (Compare Article V, §2 with Article XIII, §1) (CP 33) The parties understood the difference between the term "any member" and "all members," and used them differently when formulating the lease terms. Appellants' theory that "all members" and "any members" can be used interchangeably ignores the difference in language utilized. When different words are used, they are presumed to mean different things. See,

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[11] LLC operating agreements are contracts and will be interpreted under the same rules of construction. 51 Am.Jur.2d, Limited Liability Companies, §4.

State v. Roggenkamp, 153 Wn.2d 614, 625, 106 P.3d 196 (2005) (fundamental rule of construction is that drafter is deemed to intend different meanings when using different terms in statute); Markel American Ins. Co. v. Dagmar's Marina, L.L.C., 2007 WL 1464412 (Wash. App. 2007) (contract drafter who employs different terms is presumed to purposefully change the usage to have different meanings). The parties chose to use "all members" in one place, and "any member" (non-plural) in another; these words have different meaning.

Moreover, the right to **execute** documents also means something different than the **authority to bind** a company to an agreement. "To execute" means "to complete; to make; to sign"; "to perform all necessary formalities, as to make and sign a contract." Black's Law Dictionary (5th ed.) "Authority" means the "right to exercise powers." Id.

And the ability to "execute" a contract, as opposed to the authority to bind and obligate the LLC to a lease are two independent concepts, intermingled without authority by the Appellants. Brady may have had the right to **sign** the lease, a convenience that eliminates the necessity to send documents partially executed from one party to another, but nothing suggests that the term "execution" means the ability to unilaterally **decide** on the management and business of the LLC without disclosure to the other member in direct contradiction to the Article V, Section 1 provisions

detailing management authority.

All provisions of a contract must be read together as a whole, and harmonized in a way that will not render any of them superfluous. Nishikawa v. U.S. Eagle High, LLC, 138 Wn. App. 841, 849, 158 P.3d 1265 (2007). If the power to execute (as contained in the "General Provisions" section of the LLC Agreement) in reality constituted the power to bind, it would be superfluous, since such power is allegedly established under the Management provisions, an interpretation the court should not assign it. Analyzing the LLC terms together in common sense fashion to render them all meaningful is that no single member has the authority to make management decisions (Article V, §1); the aggregate of all members (not individuals) will have the authority to bind the LLC (Article V, §2); and for convenience "any member" can execute and deliver contracts which have been authorized by the LLC by all members. (Article XIII, §1)

Moreover, the parties' repeated prior conduct establishes that they treated their obligation consistently as necessitating joint decision making on management issues. A party's conduct in interpreting a contract is relevant and admissible to establish the appropriate construction of terms of the contract. See, Blue Mountain, supra; Official Comment to Unif. Limited Liability Company Act, §103 (course of dealing and course of

performance relevant to determine the meaning of an LLC operating agreement).

As a result, Brady had no authority to enter into the lease, and while the Notice of Termination as outlined above was ineffective to void the previously existing lease, Brady's negotiation and execution of the lease without knowledge or disclosure to Holman let alone consent, establishes that he breached the LLC Agreement.

Appellants also do not (and cannot) explain why Brady's conduct did not violate the prohibition from any individual member having "continuing exclusive authority to make independent management decisions." (Article V, §1)

Similarly, the Appellants' assertion that Article IV (Voting) is the only provision which lists circumstances under which both members would need to expressly agree is not only incorrect, it ignores the terms of each provision and the undisputed facts here. Article IV allows the members to vote on certain conduct by the members, such as amending the LLC Agreement, requiring additional capital contributions, eliminating contributions, issuing new memberships, and authorizing a specific member or group of members to do any act on behalf of the Company that contravenes the LLC Agreement. (Article IV, §2(b)) This provision is not in conflict with the Management provisions of Section V, but in fact is in

accord with them. A majority vote could potentially give a specific member (or group of members) the right to act alone, in contravention of the other terms of the LLC Agreement, but it is undisputed that no such majority vote ever occurred. (When there are two members a majority consists of two votes.) Brady is not asserting that he and Holman ever made the conscious decision to vote that Brady could authorize the new Lease alone. Instead, he is asserting the LLC Agreement gave him that right; however, he has to ignore the express language of the Agreement over and over again to reach this conclusion.

Thus, contrary to Appellants' assertion, the only cohesive reading of all of the provisions is to require joint management between both Brady, and Holman, and consent and approve by both members to validate the new Lease.

b. Appellants incorrectly interpret a portion of the LLC Agreement regarding each member's financial interest; that provision does not give each member the right to individually bind the LLC so long as the proposed transaction is "fair."

Appellants incorrectly assert that unilateral negotiation of the Lease with/for/by/between both Mountain and Wolf Creek was authorized by Article VI of the LLC Agreement regarding financial self-interest of the LLC members. While it is unnecessary to apply Article VI, because management decisions had to be made by both Holman and Brady under

Article V, the terms of Article VI on self-dealing based on the financial interest of one member simply bolsters (and does not contradict) the necessity for Holman's consent to the new Lease. The existence of a "fair" result does not empower each individual member to bind the company. The provision, **not** contained in the Management clauses of the LLC Agreement, provides:

> ARTICLE VI
> Interested Members
>
> Section 1. No contract or transaction between the Company and one or more of its members, or between the Company and any other company...in which one or more of its members are shareholders, members, directors or have a financial interest, shall be void or voidable solely for this reason, or solely because the member is present at or participates in the meeting of the members or a committee thereof which authorizes the contract or transaction, or solely because his, her or their vote counted for such purposes, if:
>
> (a) The material facts as to his...relationship or interest and as to the contract or transaction are disclosed or are known to the member ...**and the members in good faith authorize the contract or transaction by the affirmative votes of a majority of the disinterested members**...or;
>
> (b) The contract or transaction is fair as to the company **as of the time it is authorized, approved or ratified by the members**...

(CP 20-21)

Article VI of the LLC Agreement contemplates that a contract can be made between Wolf Creek, LLC, and an entity in which one of Wolf

Creek's members has a financial interest. It does not contemplate that it can be made unilaterally by the financially interested member so long as it is "fair," an argument to which Appellants return over and over again. Nothing in Article VI says this. Instead, Article VI provides protection from a disinterested member's later claim that a contract is void because one member was self-interested. Thus, once a contract or transaction is consummated, (by Holman and Brady), such contract was not void or voidable solely because Brady had a financial self-interest, if: (1) the material facts were disclosed as to the financial interest and as to the contract, and "**the members** in good faith authorize the contract by affirmative votes of the majority of disinterested members"; or (2) the contract is fair "as of the time it is authorized, approved or ratified by **the members**."

Thus, Holman, once he consented to the contract, could not thereafter "cry foul" if he had agreed after being fully informed (Article VI(1)(a)), or if he had agreed and the contract was fair. (Article VI(1)(b)) Here, it is undisputed Holman was deprived of the opportunity to form the new lease contract, was unaware of the material facts surrounding the contract, and did not authorize, approve or ratify it thereafter. All of the terms of Article VI continue to require that the "members" (plural) authorize the contract. There is not a single portion of

a sentence that says that the financially self-interested member has the unilateral authority to form the contract, or can defend the contract from a claim of invalidity based on his own authorization.

As with the other terms of the contract, the court can analyze the express terms, and the context of those terms to find that the contract was breached as a matter of law. See, International Marine, supra. The terms expressly include authorization by the members, but moreover, the context establishes the impropriety of Appellants' interpretation. The Appellants' reading of this clause would result in what happened here: Brady, the self-interested member of the LLC, gets to unilaterally determine whether the contract into which his company, Mountain, is entering into with his LLC is "fair,"[12] to the exclusion of any input from the other member, Holman. The Appellants claim that since the 2013 Lease was fair to Wolf Creek, it would also not matter that Holman objected to it or that he was not involved in the lease negotiations. The LLC Agreement neither says this, nor allows this. The trial court did not "impermissibly rewrite" the

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[12] While not relevant to the propriety of the trial court's summary judgment, Wolf Creek and Holman have consistently disputed that the new Lease was "fair," and there is no evidence in the record that the market rental rates and market survey orchestrated by Brady and Mountain without Holman's knowledge were accurate, or that Lease rental was "150% over market rate." (See, Appellants' Brief, pp. 10, 14).

LLC Agreement, as Appellants' claim, but properly interpreted it in its entirety.

4.5 Holman paid the attorneys fees necessary to pursue the derivative action by Wolf Creek and is entitled to judgment for their recovery individually.

Under Washington's LLC Act, "a member" may bring an action, and the "plaintiff" bringing such action must be a member at the time of suit. RCW 25.15.370, .380. If the derivative action is successful, the court may award the **plaintiff** its attorney fees. RCW 25.15.385. A member authorized to sue on behalf of the LLC in a derivative matter is entitled to indemnification for the reasonable expenses individually incurred. 1 Robstein and Keating on Ltd. Liab. Cos. §10:3. This is based on interpretation of the Uniform LLC Act on which Washington's LLC Act is modeled. See, Chadwick Farms Owners Ass'n v. FHC LLC, 166 Wn.2d 178, n.2, 207 P.3d 1251 (2009).

Holman was the member/plaintiff pursuing this action and paid the fees himself. (Decl. of R. Holman filed 2/5/15, Supp. CP ___) He obviously had no choice, since Brady would not have agreed to pursue it utilizing Wolf Creek assets. Not only is a judgment for Holman to recover these fees appropriate under the LLC Act, it also would be wholly inequitable to award fees to Wolf Creek, meaning that Brady would share half, and force Holman to sue again to recover reimbursement. Neither

the law nor common sense dictate such a result, and the court's award of fees individually to the plaintiff/member Holman was proper.

4.6 Respondents are entitled to attorney fees on appeal.

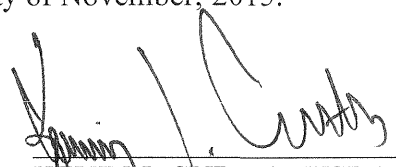
The Lease Agreement between Wolf Creek and Mountain provided attorney fees appropriate to the prevailing party in any litigation. (CP 60-61) Such a provision makes an award of attorney's fees to the prevailing party under RCW 4.84.330. Transpac Devel., Inc. v. Oh, 132 Wn.App. 212, 217, 130 P.3d 892 (2006). Moreover, RCW 25.15.385 provides for fees and expenses in a successful derivative LLC suit to the member/plaintiff.

When a party is entitled to fees on the underlying action based on a statutory or contractual provision, they are similarly entitled to fees on appeal. See, Renfro v Kaur, 156 Wn.App. 655, 667, 235 P.3d 800 (2010). Wolf Creek/Holman prevailed below, they are also entitled to an award of attorneys fees incurred in this appeal, and such fees are requested pursuant to RAP 18.1.

5. Conclusion.

For the foregoing reasons, the trial court's partial summary judgment should be affirmed.

DATED this 16th day of November, 2015.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 16th day of November, 2015, the foregoing was caused to be served on the following person(s) in the manner indicated:

Leslie R. Weatherhead Lee & Hayes, PLLC 601 W. Riverside, Suite 1400 Spokane, WA 99201 Attorney for Defendants	**VIA REGULAR MAIL** ☐ **VIA CERTIFIED MAIL** ☐ **HAND DELIVERED** ☒ **BY FACSIMILE** ☐ **VIA FEDERAL EXPRESS** ☐
Court of Appeals State of Washington Division III 500 N. Cedar St. Spokane, WA 99201	**VIA REGULAR MAIL** ☐ **VIA CERTIFIED MAIL** ☐ **HAND DELIVERED** ☒ **BY FACSIMILE** ☐ **VIA FEDERAL EXPRESS** ☐

Kevin J. Curtis, WSBA #12085
Attorney for Respondent

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