IN THE SUPREME COURT OF IOWA

No. 22-1601

HUNTER THREE FARMS, LLC,

Plaintiff-Appellant,

vs.

RICHARD HUNTER,
individually and as member of Hunter Three Farms, LLC,

Defendant-Appellee.

ON APPEAL FROM THE IOWA DISTRICT COURT
FOR GREENE COUNTY
THE HONORABLE DEREK JOHNSON
CASE No. LACV022075

DEFENDANT-APPELLEE'S FINAL BRIEF

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ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court pursuant to Iowa R. App. P. 6.1101(2) as it presents a fundamental issue of broad public importance and a substantial question of enunciating legal principles requiring ultimate determination by the Iowa Supreme Court.

STATEMENT OF THE CASE

A. Nature of the Case

This appeal arises from a dispute between members of a member-managed Iowa limited liability corporation. Boiled down, the dispute on appeal turns on whether Iowa's default statutory framework for the operation of limited liability companies permits majority members of a limited liability company—using the company's identity and resources—to sue a minority member in their personal and member capacity without first obtaining the minority member's consent to the suit.

The undisputed facts demonstrate that Hunter Three Farms, LLC ("Hunter Three") is an Iowa member-managed limited liability company operating without an express operating agreement. (Petition at ¶ 1, Appx. 005). Despite operating without an express operating agreement, Hunter Three does operate under a "Statement of Authority" which provides that:

> A majority of voting membership interests are authorized to make ordinary business decisions. All other decisions, including

> any change to this Statement of Authority, will require consent of all members.

(Statement of Authority at ¶ 4, Appx. 088). The language of the Statement of Authority closely tracks Iowa Code section 489.407(2)(c), Iowa's statutory adoption of the Revised Uniform Limited Liability Company Act ("RULLCA"), which governs the operation of an Iowa limited liability company in the absence of an express operating agreement. Importantly though, "ordinary business decisions" is narrower than RULLCA's "ordinary course of the activities of the company," in effect limiting majority management to "business decisions" which Hunter Three ordinarily must make.

The root of the membership dispute centers on whether Hunter Three's "Statement of Authority" and Iowa's default statutory framework recognizes the decision to file a lawsuit against a minority member of the limited liability company as an "ordinary business decisions" of the limited liability company.

Before the district court and now on appeal, Hunter Three's primary argument in favor of blanket recognition that filing a lawsuit falls within the scope of "ordinary business decisions" of a limited liability company is that an alternative holding would be "illogical and . . . rife for abuse" ultimately resulting in bringing "the gears of business in Iowa to a halt." (Appellant's

Brief at 21; Plaintiff's Resistance to Defendants Motion for Summary Judgment at 5, Appx. 349). Richard Hunter argued, and the district court agreed, that Hunter Three's decision to file a lawsuit—especially against a minority member—was outside Hunter Three's ordinary business and not an ordinary business decision, that derivative action is available for members who believe a limited liability company is failing to adequately pursue its rights, and express authority in an operating agreement or the unanimous consent of all of the member-managers of the company is required to afford limited liability companies standing to bring a lawsuit, especially against a minority member of the limited liability company. (District Court's Order at 8–9, Appx. 531–32).

B. Relevant Events of the Prior Proceedings

On August 23, 2021, Hunter Three filed their Petition initiating this lawsuit against Richard Hunter individually and as a minority member of Hunter Three. (Petition, Appx. 005). Richard Hunter filed his Answer and Affirmative Defenses on November 29, 2021, and the parties proceeded through the discovery process. (Answer, Appx. 011).

On July 14, 2022, Richard Hunter filed his Motion for Summary Judgment. (Defendant's Motion for Summary Judgment, Appx. 034). On July 15, 2022, Hunter Three filed their Motion for Summary Judgment.

Plaintiff's Motion for Summary Judgment, Appx. 242). The parties filed Resistances to Summary Judgment on July 29, 2022. (Defendant's Resistance, Appx. 369; Plaintiff's Resistance, Appx. 345). On August 10, 2022, Richard Hunter filed a Reply in Support of his Motion for Summary Judgment (Defendant's Reply, Appx. 506), and Hunter Three filed their Reply in Support on August 12, 2022. (Plaintiff's Reply, Appx. 514). The district court heard arguments on the dueling motions on August 17, 2022. (District Court's Order, Appx. 524). On September 6, 2022, the district court granted Richard Hunter's Motion for Summary Judgment on standing grounds and dismissed the matter. (District Court's Order, Appx. 532–33). On September 29, 2022, Hunter Three filed their Notice of Appeal from the district court's September 6 Order. (Notice of Appeal, Appx. 535).

C. Disposition in the District Court

The district court granted summary judgment in favor of Richard Hunter and dismissed Appellant's Petition for lack of standing. (District Court's Order, Appx. 532–33).

STATEMENT OF FACTS

Hunter Three is a member-managed Iowa limited liability company based in Jefferson, Greene County, Iowa. (Petition ¶ 1, Appx. 005). Prior to March 3, 2017, Richard and his brothers, Robert and Gary, operated a

general partnership farming operation involving numerous properties across Iowa. (Petition ¶ 7, Appx. 006; Ex. B, Appx. 060). Hunter Farms' properties included farms in Greene County, Iowa, Warren County, Iowa, and Polk County, Iowa. (Ex. B, Appx. 062). Following the 2016 marketing year, Hunter Farms was partitioned and Hunter Three was formed from certain partnership interests that remained in 2017. (Petition ¶ 7, Appx. 006; Ex. E, Appx. 074).

On or about March 3, 2017, Hunter Farms was certified as Hunter Three Farms, LP, an Iowa limited partnership. (Petition ¶ 7, Appx. 006; Ex. C, Appx. 067). On or about March 8, 2017, Hunter Farms L.P. was converted into Hunter Three, LLC, an Iowa limited liability company. (Petition ¶ 7, Appx. 006; Ex. D, Appx. 073). As part of this partition, the land operated by Hunter Farms was split between multiple entities. (Ex. E, Appx. 074). Hunter Three retained only one of the properties, the Grimes property. (Statement of Authority, Appx. 088). On April 27, 2017, the members of Hunter Three Farms—at the time, Robert Hunter, Gary Hunter, and Richard Hunter individually, and Hunter of Iowa, Inc.—unanimously signed a "Consent Action of the Members of Hunter Three Farms, LLC" agreeing to establish a bank account for Hunter Three and entitling all

members to receive monthly bank statements from said bank account. (Ex. F, Appx. 078–79).

For purposes of this lawsuit, Hunter Three now includes three voting members—the Robert P. Hunter Revocable Trust, the Gary G. Hunter Revocable Trust, and Richard—who each individually own 20 voting units, or the equivalent of one-third of the limited liability company's 60 total outstanding voting units. (Petition ¶ 8, Appx. 006; Ex. D, Appx. 073). On March 9, 2017, Hunter of Iowa, Inc., an Iowa corporation, was issued 40 non-voting units of Hunter Three. (Petition ¶ 9, Appx. 006).

Sometime before October 12, 2018, Richard became aware of public information concerning a Syngenta Corn Seed Settlement (the "Notification"), a Court approved claims administration program arising from a class action lawsuit brought against Syngenta for the marketing and sale of Agrisure Viptera and Agrisure Duracade corn seeds. (*See* CORN SEED SETTLEMENT, https://www.cornseedsettlement.com/Index.aspx (last visited June 9, 2022) (noting the last day to file a claim was October 12, 2018), Ex. J, Appx. 107). The Notification informed Richard that he was personally eligible to file a claim for settlement proceeds. (Petition ¶ 11, Appx. 006; *See* Corn Seed Settlement Program, Frequently Asked Questions, https://www.cornseedsettlement.com/docs/faqs.pdf (last visited June 9,

2022) (hereinafter "Syngenta FAQs) at 3–4, Ex. J, Appx. 110–11). Per Syngenta FAQs, a claim should be filed for each FSA-578 filed by a corn producer, grain handling facility, or ethanol production facility. (*Id.* at 20–21, Ex. J, Appx. 127–28). A "corn producer" is defined by the settlement agreement as "any owner, operator, landlord, waterlord, tenant, or sharecropper who shares in the risk of producing Corn and who is entitled to share in the Corn crop available for marketing between September 15, 2013 and April 10, 2018." (*Id.* at 3, Ex. J, Appx. 110).

Believing that he qualified as a "corn producer," Richard submitted an application for his one-third share of interest in the corn marketed by Hunter Farms between the marketing years of 2013 to 2016. (Ex. I, Appx. 089; District Court's Order at 2, Appx. 525). Richard eventually received and deposited a check from the settlement agreement in the amount of $62,467.91 (the "Settlement Payment"). (District Court's Order at 2, Appx. 525). Richard believed and still believes the Settlement Payment reflects his one-third share of Hunter Farms' marketable corn crop that was subject to the Syngenta settlement program. (Petition ¶ 15, Appx. 007).

On April 7, 2021, Robert P. Hunter as "President Hunter Three and Hunter of Iowa," acting through a power of attorney, and Gary Hunter as "Shareholder," sent a letter to "Richard Hunter and Associated entities"

alleging the funds Richard received from the Syngenta Settlement Program were the rightful property of Hunter Three. (Ex. Q, Appx. 231). In a letter dated April 14, 2021, Steven Hunter (Richard's son) responded to the April 7 Letter and notified Robert and Gary Hunter that Richard had only applied for his third of the Settlement Payment, and if Hunter Three had any reason to believe Syngenta's payment was incorrect, to provide support for that claim and Richard would respond accordingly. (Ex. R, Appx. 237). No evidence of error has been provided by Hunter Three to date, much less that Richard as opposed to Syngenta would be the liable party for any error.

On August 23, 2021, Hunter Three filed a Petition at Law in the Iowa District Court for Greene County against Richard individually and in his capacity as a member of Hunter Three. (Petition, Appx. 005). The Petition alleged four separate counts: (1) Breach of Fiduciary Duty; (2) Breach of the Duty of Good Faith and Fair Dealing; (3) Conversion; and (4) Unjust Enrichment. (Petition, Appx. 008–10). On November 29, 2021, Richard filed his Answer and Affirmative Defenses. (Defendant's Answer, Appx. 011).

On July 14, 2022, Richard filed a Motion for Summary Judgment arguing in particular that Hunter Three lacked standing to bring the lawsuit, entitling Richard to judgment as a matter of law on all of the claims. (Defendant's Motion for Summary Judgment, Appx. 034). Hunter Three

filed its own Motion for Summary Judgment on July 15, 2022. (Plaintiff's Motion for Summary Judgment, Appx. 242). On September 6, 2022, the district court entered an Order finding as a matter of law that Hunter Three lacked standing to bring the lawsuit against Richard and entering summary judgment in favor of Richard on all of Hunter Three's claims. (District Court's Order, Appx. 524). Hunter Three filed their Notice of Appeal from the district court's September 6, 2022 Order on September 29, 2022. (Notice of Appeal, Appx. 535).

ARGUMENT

The undisputed facts demonstrate Hunter Three did not seek, much less obtain, unanimous consent of its membership before filing a lawsuit against a member. (Ex. S at ¶¶ 8–9, Appx. 240–41). As the district court recognized, the failure to obtain the necessary unanimous membership approval to make an extraordinary business decision deprived Hunter Three of standing to file and pursue the lawsuit against Richard Hunter.

Hunter Three's argument that Iowa's limited liability companies are able to sue their own members purely on the basis of obtaining the consent of all "disinterested members" ignores the plain words of Iowa Code section 489 and is logically inconsistent.

Further, adopting Hunter Three's position would grant unfettered and blanket authority to majority members to utilize legal action and the threat of legal action to oppress and freeze-out minority members, especially in closely held companies, for any internal dispute which may arise between members, no matter how minor or insignificant the perceived liability may be.

Finally, the Iowa legislature anticipated Hunter Three's concerns regarding the potential for commercial intransigence and provided a remedy by allowing dissatisfied members to bring derivative actions on behalf of the limited liability company. Hunter Three's argument that derivative lawsuits are complex and overly complicated does not address the issue at the root of this dispute—what authority must a member-managed limited liability company obtain to file a lawsuit against its own member—and minimizes or outright ignores Richard Hunter's statutory authority to participate and be heard in the operation of Hunter Three.

For all these reasons, the district court's grant of summary judgment in favor of Richard Hunter and dismissal of Hunter Three's lawsuit must be affirmed.

Hunter Three's Decision to File a Lawsuit Against its Own Member Absent Unanimous Consent of Member-Managers was Not an Ordinary Business Decision, and Pursuing Litigation Against a Member is Outside Hunter Three's Ordinary Course of Activity.

A. Preservation of Error and Standard of Review

Richard Hunter agrees with Hunter Three's statement on preservation of error and standard of review.

Appellate courts review the district court's grant of summary judgment for correction of errors at law. *Winger Contracting Co. v. Cargill, Inc.*, 926 N.W.2d 526, 535 (Iowa 2019). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Green v. Racing Ass'n of Cent. Iowa*, 713 N.W.2d 234, 238 (Iowa 2006).

B. Argument

The issue presented to the District Court, and at the heart of this appeal, is whether Hunter Three had member authority thus affording it standing to pursue a lawsuit against an active, participating member of the limited liability company. Iowa Code section 489.105(1) provides that "a limited liability company has the capacity to sue and be sued in its own name and the power to do all things necessary or convenient to carry on its

activities." "Capacity to sue" and "standing to sue" are two closely related but distinct legal principles. *See Iowa Coal Min. Co., Inc. v. Monroe Cty.*, 555 N.W.2d 418, 428 (Iowa 1996) (quoting 59 Am. Jur.2d *Parties* § 24 (1987)). "Capacity relates to a party's personal or official right to litigate the issues presented by the pleadings." *Id.* "Standing to sue" requires that a party have "sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." *Alons v. Iowa Dist. Ct. for Woodbury Cty.*, 698 N.W.2d 858, 863 (Iowa 2005). The doctrine of standing requires that a party: (1) have a specific personal or legal interest in the litigation; and (2) be injuriously affected. *Id.* at 864. "[H]aving a legal interest in the litigation and being injuriously affected are separate requirements for standing, both of which must be satisfied." *Citizens for Responsible Choices v. City of Shenandoah*, 686 N.W.2d 470, 475 (Iowa 2004). "Even if the claim could be meritorious, the court will not hear the claim if the party bringing it lacks standing." *Alons*, 698 N.W.2d at 864.

As the plaintiff, it is Hunter Three's burden to establish its standing to pursue claims against Richard Hunter. *See Citizens for Comm. Improvement v. State*, 962 N.W.2d 780, 791 (Iowa 2021). While caselaw makes clear a limited liability company can have standing to pursue a lawsuit in the abstract, because Hunter Three can only act through its members, standing—

in the form of a recognized legal interest in the litigation—can only be obtained via authority to act as conveyed by the members. *See Metropolitan Prop. And Cas. Ins. Co. v. Auto-Owners Mut. Ins. Co.*, 924 N.W.2d 833, 842 (Iowa 2019).

As pertaining to Hunter Three, the issue of member authority can be broken down into two parts: whether the instigation of a lawsuit against a member-manager falls within the express authority as conveyed in a company's operating agreement—in this case whether Hunter Three's Statement of Authority provides filing a lawsuit against a member falls within the ordinary course of Hunter Three's business; or alternatively, whether absent direction in an operating agreement, whether the decision to file a lawsuit against a member-manager is an ordinary business decision of Hunter Three as defined by Iowa Code. Richard Hunter maintains, and the District Court held, that Hunter Three's filing of a lawsuit against a member is not an ordinary business decision and constitutes an act outside what the undisputed material facts demonstrate was Hunter Three's ordinary course of business.

Applying the governance guidance afforded by Hunter Three's Statement of Authority and section 489.407 together, Hunter Three was required to seek and obtain the unanimous consent of all of its members

prior to filing a lawsuit seeking monetary damages against one of its own members. Hunter Three, absent the unanimous consent of its voting members to act outside the course of its ordinary business activities, did not have membership authority and thus lacked a legal interest in bringing a lawsuit against Richard Hunter, and the district court correctly determined Richard Hunter was entitled to summary judgment. *See Birkhofer ex rel. Johannsen v. Birkhofer*, 610 N.W.2d 844, 847 (Iowa 2000) (recognizing that a party's lack of an affected legal right terminates their standing to seek redress).

1) Filing a Lawsuit Against a Member-Manager Was Not an Ordinary Business Decision

Filing a lawsuit is not an ordinary business decision or activity of Hunter Three, and Hunter Three's failure to satisfy the necessary precondition of unanimous consent deprived Hunter Three of standing to pursue this lawsuit against its own member, Richard Hunter. It is undisputed that Richard did not authorize, vote for, or otherwise consent to Hunter Three's filing of this lawsuit. (Ex. S at ¶ 8, Appx. 240). It is further undisputed that absent Richard's consent, Hunter Three's filing of the present lawsuit was undertaken without the consent of all of its voting members. (Ex. S at ¶ 9, Appx. 241). Obtaining all voting members consent is a necessary prerequisite for Hunter Three to perform an act outside the

ordinary course of its business. Iowa Code § 489.407(2)(d). Therefore, unanimous consent operates as a precondition to Hunter Three acting outside the ordinary course of Hunter Three's business. The absence of unanimous consent of all voting members deprived Hunter Three of standing or authority to act and file a lawsuit against its own minority member.

"Iowa law dictates that an LLC is bound by its operating agreement." *Homeland Energy Solutions, LLC v. Retterath*, 983 N.W.2d 664, 687 (Iowa 2020); *see* Iowa code § 489.111(1). "The cardinal rule of contract interpretation is the determination of the intent of the parties at the time they entered into the contract." *Id.* (quoting *C & J Vantage Leasing Co. v. Wolfe*, 795 N.W.2d 65, 77 (Iowa 2011)). The language used by the parties is the most important evidence of their intentions regarding what constitutes "ordinary business decisions" or "ordinary course of activities" in an LLC's operating agreement. *See id.* "Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight." *Id.*

The undisputed facts of this appeal demonstrate that Hunter Three operates under a "Statement of Authority" governing certain decision-making requirements of Hunter Three's members, in combination with the default statutory guidelines of Iowa Code section 489. (Ex. H, Appx. 088).

On March 15, 2017, the members of Hunter Three filed with the Iowa Secretary of State the "Statement of Authority" purporting to formally organize Hunter Three into an Iowa limited liability company. (Ex. H, Appx. 087–88). The Statement of Authority can be separated into five distinct parts: (1) identifying Hunter Three as an Iowa limited liability company and providing the mailing address of its registered office; (2) identifying real property in Grimes, Iowa that Hunter Three was the titleholder of; (3) specific designation of member authority for the sale or divestment of the Grimes, Iowa real property; (4) designation of voting membership authority which provides, "A majority of the voting membership interests are authorized to make ordinary business decisions. All other decisions, including any change to this Statement of Authority, will require the consent of all members"; and (5) the principal address of Hunter Three. (Ex. H, Appx. 088).

As it relates to "ordinary business decisions" of Hunter Three, while the statement of authority does not contain a specific "purpose and character provision" describing the overarching intent for the operation of Hunter Three, the specific inclusion of description of the Grimes Property and limitations on the sale of the Grimes Property makes clear the plain intent and purpose of Hunter Three was to develop, farm, market and maximize the

sale of the Grimes Property. *See Urbandale Best, LLC v. R & R Realty Group, LLC*, 2017 WL 363239 at *7 (Iowa Ct. App., Jan. 25, 2017). Paragraph three of the statement of authority provides express conditions regarding the sale of the Grimes Property, including the percentage of voting membership interest required to approve a sale at pre-determined dollar amounts. (Ex. H at 3, Appx. 088). It is reasonable to assume then, that "ordinary business decisions" encompasses the operation and preservation of the Grimes Property in furtherance of a commercial sale. Decisions dealing with the planting, harvesting, marketing, and investment into the Grimes Property, as well as the general management and operations of the Grimes Property would therefore be within the scope of ordinary business decisions, allowing individual members to bind the company.

Just as clearly, instituting a lawsuit and using company resources to bring suit against a minority member is not a part of Hunter Three's customary routine or the ordinary course of the company's commercial business operations. This is supported by the fact that the members found it necessary to unanimously consent to the establishment of a bank account for the operation of Hunter Three shortly after its formation. (Ex. F, Appx. 078).

The membership's belief and understanding that a unanimous vote was necessary to open a bank account in Hunter Three's name—besides

demonstrating the parties' intent in adopting the Statement of Authority—belies Hunter Three's expressed argument that "ordinary business decisions" encompassed any decision necessary to operate Hunter Three. The decision to open a bank account in the name of the corporation is a sporadic but ordinary commercial act. If sporadic but ordinary commercial acts require unanimous consent of the members pursuant to Hunter Three's Statement of Authority, the decision to retain counsel and expend company resources affirmatively litigating a claim in Iowa's courts surely also requires unanimous approval. *See Crouse v. Mineo,* 658 S.E.2d 33, 37–38 (N.C. App. 2008) (holding a law firm's decision to bring a lawsuit against a co-manager is "not carrying on in the usual way of the business" of the company despite a determination the usual way of business is the provision of legal services to clients).

In response, Hunter Three argues the question before this Court is "whether an Iowa limited liability company has standing to sue when a unanimous vote of the disinterested members authorized the lawsuit." Appellate Brief at 17. Hunter Three advocates that only "disinterested members" are required to vote to authorize an Iowa limited liability company to file suit against its own member without any citation to controlling authority, while citing persuasive authority which actually

supports Richard's position. *See* 2 Ribstein & Keatinge on Limited Liability Companies § 13.2 (2010) ("Thus, for many small [member-managed] firms, most suits may be characterized as extraordinary. It follows that there is something to be said for a statutory default rule that requires, in the absence of contrary agreement, the same vote for litigation by member-managed firms that is required for extraordinary decisions.").

Facially, Hunter Three's espoused position suffers from the legal deficiency that the "disinterested member" requirement is not found anywhere in Hunter Three's statement of authority, or Iowa's default statutory framework. Instead, Iowa Code section 489.902 explicitly acknowledges that a derivative suit is the appropriate method for a member to "enforce a right of a limited liability company" that "other members" of the limited liability company refuse to enforce. The inclusion of a derivative action right in Iowa's RULLCA presupposes that individual members in closely held limited liability companies have the authority to refuse to enforce certain rights of the company pursuant to their authority to manage the company. *See* Iowa Code § 489.902; Iowa Code § 489.407(2)(b) ("Each member has equal rights in the management and conduct of the company's activities.").

Hunter Three attempts to bypass the plain text of section 489.902 in support of its atextual position by posing several irrelevant hypotheticals, including questioning how Richard can fulfill his duty of loyalty to Hunter Three by refusing to vote for a lawsuit to "pursue legitimate claims to recover money it is owed." Appellate Brief at 22. Putting aside Hunter Three's incorrect presupposition it is "owed" money, a plethora of reasons could support the refusal to pursue otherwise available claims, including the fairness of the alleged "self-dealing" (*see Cookies Food Prods., Inc. v. Lakes Warehouse Dist., Inc.*, 430 N.W.2d 447, 453–54 (Iowa 1988)), that the company suffered no harm from the transaction (*see Midwest Janitorial Supply Corp. v. Greenwood*, 629 N.W.2d 371, 376 (Iowa 2001)), disagreements over whether the funds actually belonged to Hunter Three (*see Erwin v. Erwin*, 2021 WL 359496 at *4 (Iowa Ct. App. Feb. 3, 2021) (recognizing the performance of a potentially self-serving act undertaken in good faith on behalf of the company does not violate the duty of loyalty), or that Syngenta erred in its payments to Richard and the only suit which should be brought would be against the administrators of the Syngenta Settlement Fund. In sum, an honest member dispute may arise as to the viability or advisability of bringing a lawsuit which may place the assets or existence of the limited liability company in jeopardy.

Hunter Three also questions the unanimity requirement in the context of *defending* a lawsuit, a factual situation which has no bearing on the legal question posed by this case, and which Iowa law and the Iowa Rules of Civil Procedure adequately guard against. *See Lakes Gas Co. v. Terminal Properties, Inc.*, 2006 WL 1229934 at *4–*5 (Iowa Ct. App. Apr. 26, 2006) (analyzing and allowing member intervention under Iowa's prior limited liability statutory framework pursuant to Iowa R. Civ. P. 1.407(1)(b) in the context of a member intervening to defend a suit brought against a limited liability company, and recognizing a member's right—under certain circumstances—to defend the company against the claim of a third-party).

Hunter Three rests the remainder of its argument on the policy position that requiring majority members to bring derivative suits in the absence of an express statement of authority or unanimous consent is "unnecessarily complex and costly" and only a "majority of disinterested members" are necessary to pursue a "certain course of action." Appellate's Brief at 25. This argument implies that—in the absence of express authorization contained in an operating agreement—minority members of Iowa's limited liability companies are afforded less protection and less management authority than what Iowa's statutory framework explicitly provides. *See* Iowa Code § 489.407(2)(b). Hunter Three's position would

effectively deprive—absent consent—statutory protection minority members enjoy regarding management authority over "extraordinary" business activities. In contrast, the obligation to bring a suit derivatively may be burdensome but is clearly not insurmountable and is supported by Iowa precedent and practice. *See Batinich v. Renander*, 2017 WL 1086220 at *5–*7 (Iowa Ct. App. Mar. 22, 2017) (disassociating members of a limited liability company through a derivative action based on their repeated violation of fiduciary duties).

Further, the "theme" Hunter Three identifies in Iowa Code section 489.407(2)(c)—describing a non-exhaustive subset of acts the Iowa legislature identifies as requiring unanimous consent—does not contradict Richard's position. Specifically, Hunter Three identifies that the "theme of the items . . . involves a transfer of interest to 'all, or substantially all' of the corporate assets." Appellate Brief at 27. The decision to institute litigation on behalf of a company inherently includes the potential transfer of interest of all or substantially all of a company's assets—through multiple means too numerous to list—and closely aligns with the non-exhaustive list of activities the legislature explicitly identified as requiring unanimous consent. *See Batinich*, 2017 WL 1086220 at *7 (disassociating members of a limited

liability company and judicially transferring all interest in the company and its assets as a result of the litigation).

Finally, it is important to note that Richard's position, that unanimous consent of all members must be obtained prior to filing suit against a member, is only necessary in the absence of an express operating agreement to the contrary agreed to and unanimously voted on by the limited liability company's members. *See Homeland Energy Solutions, LLC*, 983 N.W.2d at 687; Iowa code § 489.111(1). The parade of hypothetical horrors Hunter Three cautions against which could result from the recognition of minority members rights in this case are only relevant—if at all—to the extent that a limited liability company's member's fail to unanimously agree on an express operating agreement.

In light of the undisputed facts, the plain text of Iowa Code and Hunter Three's Statement of Authority do not support the creation of a "majority disinterested vote" threshold to institute or defend legal action in a limited liability company's management or operation. Such a clause—consented to and adopted by the members of a limited liability company in an operating agreement—may be advisable in light of a company's size or management structure. Nevertheless, in the absence of such a clause, majority members of a limited liability company must be required to obtain

unanimous consent of all member-managers to file suit against a minority member. Absent unanimous consent, members of a company are afforded the option of pursuing an action via the derivative authority granted by Iowa statute.

Absent the clear and express consent of minority members, allowing majority members to ignore Iowa law and a company's operating agreement to file lawsuits in the name of the limited liability company would deprive minority members of their statutory right and authority to participate in management decisions, and open the door to judicially sanctioned oppression of minority members anytime a disagreement arose amongst the members regarding the proposed action of a majority.

For all of these reasons, this Court should affirm the district court and that court's summary judgment holding that Hunter Three lacked standing to sue its own minority member absent the unanimous consent of all of Hunter Three's member-managers.

2) Filing a Lawsuit Against a Member-Manager is Not an Ordinary Course of Hunter Three's Activities

While it is Richard Hunter's position that "ordinary business decision" controls the legal issue on appeal, even under the broader statutory threshold found in Iowa Code section 489 of "ordinary course of activities,"

Hunter Three's decision to sue its own minority manager-member is outside the ordinary course of Hunter Three's activities.

Statutory provisions govern an LLC's operations when the company's operating agreement does not otherwise provide guidance. *See* Iowa Code § 489.1410(1)–(2). Located within RULLCA under Article 4 titled "Relations of Members to Each Other and to Limited Liability Company," Iowa Code section 489.407 provides general guidelines for the "Management of Limited Liability Company." Importantly, section 489.407 places limitations on member-managed LLCs by providing "An act outside the ordinary course of the activities of the company . . . may be undertaken only with the consent of all members." Iowa Code § 489.407(2)(d). Implicit in this limitation is the principle that even a majority of the voting membership of Hunter Three does not have authority over all matters which may require Hunter Three's attention. For instance, a member's status as a member in a limited liability company by itself does not convey standing on that member to bring a lawsuit on behalf of the limited liability company. *See In re Sobol*, 545 B.R. 477, 494–95 (M.D. Penn. 2016).

Included next to the limitations on the authority of limited liability company members to act, Iowa Code § 489.407(2)(b) and (c) provide, "[e]ach member has equal rights in the management and conduct of the

company's activities[, and a] difference arising among the members as to the matter in the ordinary course of the activities of [Hunter Three] may be decided by a majority of the members."

Hunter Three's Statement of Authority does not expressly distinguish between matters within and outside the scope of Hunter Three's ordinary course of activities. (Ex. H, Appx. 088). In light of this omission, the District Court reviewed the plain meaning of Section 498.407(2) in accordance with Hunter Three's Statement of Authority, canvassed persuasive authority and the past behavior of Hunter Three's members, and concluded filing a lawsuit against a minority member was outside any reasonably understood ordinary course of activity which would be expected of Hunter Three. (District Court's Order at 6, Appx. 529 (citing *Crouse*, 658 S.E.2d at 37–38); *see Homeland Energy Solutions, LLC*, 938 N.W.2d at 689–90; *Fischer v. People's United Bank, N.A.*, 285 A.3d 421, 433 (Conn. App. Ct. 2022) (recognizing a limited liability company's commencement of litigation against its mortgage lender was not an act within the scope of its ordinary course of business)).

Black's Law Dictionary defines "ordinary course of business" and "course of business" as "the normal routine in managing a trade or business." BLACK'S LAW DICTIONARY (11th ed. 2019). A leading

treatise provides "[t]he legal term of art 'ordinary course' of business, in a statute governing the managers and members of a limited liability company as agents of the company, when describing the powers of the members, is intended to encompass transactions that are part of the normal or customary routine, even if only occasional, of the commercial world generally, or of businesses of the same kind, or of a particular business. Whether any particular transaction is in the ordinary course of business is necessarily a fact-intensive inquiry that will turn on the nature of the transaction and the broader context in which the transaction occurred." 54 C.J.S. *Limited Liability Companies* § 12 (2022). As the plaintiff, Hunter Three bears the burden of proving commencing a lawsuit is a "normal or customary routine" of the commercial world generally, businesses of the same kind, or of Hunter Three itself. Hunter Three has failed to carry this burden.

Instituting a lawsuit and using LLC resources to bring suit against a minority member is not a part of Hunter Three's customary routine or the ordinary course of Hunter Three's commercial operations. This is supported by the fact that Hunter Three members found it necessary to unanimously consent to the establishment of a bank account for the operation of the LLC at the LLC's inception *after* the Statement of Authority had been unanimously adopted. (Ex. F, Appx. 078). As discussed previously, Hunter

Three's prior pattern and practice in obtaining unanimous consent to act supports the District Court's determination that Hunter Three must first obtain unanimous consent of its members before it could sue Richard Hunter.

As pertaining to businesses of the same kind, Hunter Three has not even attempted to show similarly situated closely held limited liability companies normally or customarily commence litigation against their own members, or that limited liability companies generally are normally or customarily in the business of commencing litigation against their own members. In fact, the great weight of authority from courts around the country recognizes the opposite; that a company's decision to bring a lawsuit against its own manager, partner, or member is "not carrying on in the usual way of the business." *See Crouse*, 658 S.E.2d at 37–38; *Fischer*, 285 A.3D at 433; *Lujan v. Smith*, D076526, 2020 WL 5625487 at *4 (Cal. Ct. App. Sep. 21, 2020) (act of hiring outside counsel to represent the limited liability company "in an intra-company squabble over the ownership and management of the company . . . appears to be *outside* [the] ordinary course of business." (emphasis in original)); *Street Star Designs, LLC v. Gregory*, No. H-11-0915, 2011 WL 3925070 at *3 (S.D. Tex. Sep. 7, 2011) (acknowledging that under Texas law two members of a four-member

limited liability company operating under Texas' version of RULLCA lacked "authority to direct the filing and prosecution" of a lawsuit in the limited liability company's name "because such activity is not within the ordinary course of . . . business."); *Heritage Co. of Massena v. La Valle*, 199 A.D.2d 1036, 1037 (N.Y. App. Div. 1993) (recognizing a partnership's suit against a partner was barred because it was "not commenced in the ordinary course of business," and refusing to "rewrite the agreement to disqualify defendant from voting on this partnership decision."); *Casey Ranch Ltd. P'ship v. Casey*, 773 N.W.2d 816, 822–23, fn. 4 (S.D. 2009) (recognizing a partnership's lawsuit against a third-party non-partner was within the ordinary course of business because the complaint did not seek relief from the intervening partner); *Great Northern Capital Mgmt. v. IAI Capital Mgmt. Corp.*, 1995 WL 352857 at *3 (Minn. Ct. App. June 13, 1995) (rejecting a partnership's argument that its decision to sue a partner "was an ordinary, routine decision" because "the commencement of a suit against another partner is not 'ordinary.'" (citations omitted)).

In sum, Hunter Three has not carried its burden of showing commencing litigation against its own member-manager is a customary or normal operation of a limited liability company. In light of the express provisions of Iowa Code § 489.407(2) and the great weight of persuasive

authority, this court must affirm the District Court and hold that the act of filing a lawsuit in the name of a limited liability company against a member-manager is not within the ordinary course of that company's business; or alternatively and pursuant to the undisputed material facts of this case, Hunter Three's commencement of litigation against its own member was not within the ordinary course of Hunter Three's business. Therefore, Hunter Three lacked standing to commence a lawsuit against Richard Hunter and the District Court's ultimate dismissal of Hunter Three's claims must be affirmed.

3) Public Policy and the Protection of Minority Member's Right's in Closely-held Limited Liability Companies Necessitates Finding Hunter Three Lacked Standing to Sue a Member-Manager Absent Unanimous Consent of All Members

Richard Hunter is undisputedly an active member-manager in Hunter Three. (Petition at ¶ 10, Appx. 006). Despite his undisputed statutory right to have a say in the management decisions of Hunter Three, Richard Hunter has been foreclosed from participating in or having his opinion heard regarding substantial commercial operations and expenditures incurred by Hunter Three during the pendency of this litigation. Hunter Three maintains that because Richard Hunter is an adverse party to Hunter Three in a lawsuit—a status Richard Hunter did not cause or consent to—Hunter Three is within their rights to withhold records, documents, and information from

Richard Hunter. In effect, Hunter Three has used its unilateral decision making to commence litigation against its own member-manager as legal cover for the freezing out and oppression of a minority member. Hunter Three's unilateral and non-consensual freezing out of a limited liability company member should raise alarm bells regarding the potential for future abuse, and warrants affirming the District Court's ultimate conclusion that unanimous consent of all member-managers must be obtained before a limited liability company can sue its own member-manager under the circumstances presented in this appeal.

"RULLCA's default rule is that the management power is vested in the members of a limited liability company [and] each member shares equal management rights with respect to ordinary business matters [while] decisions outside the ordinary course of business . . . require unanimous member consent." 5 Matthew G. Dore, *Iowa Practice Series: Business Organizations* § 13:18 (2022 ed.). "A member's rights in a limited liability company are bifurcated into economic rights (the transferable interest) and governance rights (including management rights, consent rights, rights to information, rights to seek judicial intervention)." *Wells Fargo Bank, Nat'l Ass'n v. Continuous Control Solutions, Inc.*, 2012 WL 3195759 at *3 n. 3

(Iowa Ct. App. Aug. 8, 2012) (quoting RULLCA § 502, 6B U.L.A. 497 cmt.).

In accordance with a member's non-transferable governance rights, Iowa Code section 489.410 identifies a number of categories of information that a "company shall furnish to each member . . . without demand, [including] information concerning the company's activities, financial condition, and other circumstances which the company knows and is material to the *proper exercise of the member's rights and duties under the operating agreement or this chapter*, except to the extent the company can establish that it reasonably believes the member already knows the information." Iowa Code § 489.410(1)(b)(1) (emphasis added).

Pursuant to these statutory requirements, Hunter Three is required to furnish to Richard Hunter *without demand* information concerning Hunter Three's activities, financial condition, and other circumstances which Hunter Three knows are material to Richard Hunter's ability to participate in and exercise his management rights and duties under Hunter Three's Statement of Authority and Iowa Code. Very clearly, information pertaining to litigation involving Hunter Three—including the expenditure of company funds via the retention of legal counsel impacting the company's financial

condition[1] and the ability to direct or manage litigation strategy—necessarily impacts Richard Hunter's ability to participate in and exercise his management rights and duties. Yet, Hunter Three has effectively voided or vetoed Richard Hunter's non-transferable management rights, and by implication his right to obtain necessary information relevant to his own duties of management under the guise that he is an adverse litigant, a condition he has been relegated to without his consent.

In addition to the blatant vetoing of Richard Hunter's management rights, the absence of Richard Hunter's consent to this lawsuit within the context of management rights is important because a member-manager's failure to appropriately exercise their management rights necessarily implicates fiduciary duties owed by Richard Hunter to Hunter Three. *See* Iowa Code § 489.409; *Batinich*, 2017 WL 1086220 at *7 (Iowa Ct. App. Mar. 22, 2017). In effect then, Hunter Three has unilaterally and without Richard Hunter's consent or action, placed Richard Hunter in an adverse litigation position to Hunter Three, forcing Richard Hunter to expend his own resources and time to assert his own interests against and in direct conflict with Hunter Three despite still owing Hunter Three fiduciary duties.

[1] "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." Iowa R. Prof'l Conduct 32:1.13(a), *accord Liquor Bike, LLC v. Iowa Dist. Ct. for Polk Cty*, 959 N.W.2d 693, 697 (Iowa 2021).

By the letter of Hunter Three's Statement of Authority and Iowa Code then, Richard Hunter could arguably be alleged to have breached various fiduciary duties merely by resisting and litigating his own rights in this lawsuit. Iowa law and public policy should not and must not countenance the non-consensual and the possible fiduciary breach which would arise if Hunter Three were permitted to place its own member in a Catch-22 of choosing between liability arising from a lawsuit they didn't consent to, or defending his rights and potentially violating his fiduciary duties to Hunter Three.

Thus, through no act or intent of his own, Richard Hunter has been deprived of his otherwise non-transferable management rights over Hunter Three, and has been placed in an adverse position to an entity that he owes statutory fiduciary duties. All of this in direct conflict with Iowa Code and the traditionally recognized operation of Iowa limited liability companies. In light of these public policy concerns and the immediate harm to minority members of limited liability companies if Iowa courts were to permit suits against minority members absent their consent, this Court should affirm the District Court and find Hunter Three lacks standing to commence and pursue a lawsuit against its own member-manager, Richard Hunter.

CONCLUSION

For the reasons stated herein, Appellee requests that the District Court's grant of summary judgment in favor of Richard Hunter be affirmed.

CONTINGENT REQUEST FOR ORAL ARGUMENT

Appellee requests to be heard in oral argument if Appellant is granted oral argument.

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CERTIFICATE OF COST

I hereby certify that the costs of printing the Appellee's brief was $0.00, exclusive of sales tax, delivery, and postage.

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CERTIFICATE OF COMPLIANCE

This Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 7,275 words, excluding the parts of the Brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point, Times New Roman.

By: */s/ Benjamin J. Kenkel*

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies a copy of Defendant-Appellee's Final Brief was filed with the Clerk of the Iowa Supreme Court via EDMS and served upon the parties to this appeal by EDMS on the 15th day of March, 2023:

By: */s/ Benjamin J. Kenkel*