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IN THE SUPREME COURT OF THE STATE OF MONTANA
CASE NO. DA 16-0745

ZIRKELBACH CONSTRUCTION, INC.	)
	)
Appellant,	)
	)
vs.	)
	)
DOWL, LLC dba DOWL HKM,	)
	)
Appellee.	)

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, Cause No. DV 14-1061
Hon. Michael G. Moses, District Court Judge

APPELLEE'S BRIEF

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I. STATEMENT OF THE ISSUE

Whether the District Court correctly enforced the plain terms of the Limitation of Liability Clause in the contract between DOWL, LLC d/b/a DOWL HKM ("DOWL") and Zirkelbach Construction, Inc. ("Zirkelbach").

II. STATEMENT OF THE CASE

This case arises out of the construction of a new FedEx facility in Billings, Montana. Zirkelbach, a design-build contractor, sued DOWL and numerous other defendants for alleged defects in the project. (Dkt. 86).[1] All of the defendants other than DOWL have settled or been dismissed from this case.

On August 22, 2016, DOWL filed a motion for partial summary judgment asking the District Court to enforce the limitation of liability clause in the contract between DOWL and Zirkelbach. (Dkts. 192 & 193). Zirkbelbach filed a brief opposing DOWL's motion, together with an affidavit of Alan Zirkelbach, on September 14, 2016. (Dkts. 200 & 201). DOWL filed a reply brief in support of its motion on September 27, 2016. (Dkt. 204). DOWL and Zirkelbach filed a stipulation on October 26, 2016 regarding the parties' contract. (Dkt. 211). The District Court held a hearing on pending motions, including DOWL's motion for partial summary judgment, on October 27, 2016. (Dkt. 212).

[1] The District Court's February 19, 2015 order (Dkt. 88) granted Zirkelbach's motion for leave to file the Second Amended Answer and the pleading was "deemed filed" as of that date.

On November 17, 2016, the District Court granted DOWL's motion for partial summary judgment and held that the plain language of the parties' contract limited DOWL's total potential liability to Zirkelbach in this case to $50,000. (Dkt. 233). The District Court granted certification and entered final judgment under Mont. R. Civ. P. 54(b) on December 8, 2016. (Dkt. 236). Zirkelbach filed a notice of appeal on December 16, 2016. (Dkt. 238).

III. STATEMENT OF FACTS

Zirkelbach is a sophisticated and experienced construction company that provides design, construction, and development services on projects throughout the United States. The District Court specifically found that Zirkelbach and DOWL both are "sophisticated business entities with significant experience in the construction business." (Dkt. 233, p. 5; *see also* Appellant's Opening Brief 1, 18 (describing Zirkelbach as "reasonably sophisticated")). Zirkelbach has offices in Florida and South Carolina and will work anywhere in the contiguous United States where its clients have construction projects. (Excerpts of Deposition of Alan Zirkelbach 22:9-14, 22:21-25, 31:4-9 (attached as Ex. H to Dkt. 216) (included as Appendix A) (hereinafter "App. A, Zirkelbach")). Zirkelbach's clients include national and multinational companies such as FedEx, Hendrick Motorsports, and Hard Rock Café, and Zirkelbach has completed multiple projects

for many of these clients. (*Id*. at 22:21-23:6). In fact, the project that gave rise to this dispute was Zirkelbach's 42nd project for FedEx. (*Id*. at 30:16-22).

To facilitate its work, Zirkelbach employs approximately 6 project managers, 20 or 30 project superintendents, and various engineers and other staff. (*Id*. at 18:16-19:14). Zirkelbach's president is licensed as a general contractor in every state in the country that requires general contractors to be licensed. (*Id*. at 29:9-19). Zirkelbach claims to be "one of the country's most stable and successful construction firms." Zirkelbach Construction, http://www.zconstruction.com/ where-we-work.html (last visited Mar. 29, 2017).

As a design-build contractor, Zirkelbach takes responsibility for completing all aspects of an owner's project. (*See* Excerpts of Deposition of Alan Zirkelbach 17:10-18:8, 33:8-34:15 (attached as Ex. B to Dkt. 214) (attached hereto as Appendix B) (hereinafter "App. B, Zirkelbach")). Zirkelbach, in turn, hires design professionals, contractors and subcontractors for any given project. (*Id*. at 33:8-34:15, 63:13-67:2). Zirkelbach attempts to earn a profit by retaining the difference between the owner's contract price and the price Zirkelbach negotiates with the design professionals, contractors and subcontractors it hires. Whether Zirkelbach in fact earns a profit on a particular project depends on how Zirkelbach manages the risks from cost overruns, delays, construction errors, unforeseen conditions, and other such sources. (*See id*. at 34:2-4, 65:12-67:2). For this reason, Zirkelbach

likens itself to a "riverboat gambler." (*See id*. at 61:23-62:5, 65:12-66:1; App. A, Zirkelbach 81:16-82:4).

In early 2013, SunCap Billings, LLC hired Zirkelbach to be the design-build contractor for construction of a FedEx Ground facility in Billings, Montana (hereinafter "the Project"). (Dkt. 21, Ex. 4 at ¶¶ 1-3). Zirkelbach previously had reviewed the Project scope and submitted a bid. (*See* App. B, Zirkelbach 61:17-62:5, 63:6-64:1; App. A, Zirkelbach 31:10-32:11, 108:19-109:9). Once Zirkelbach knew that SunCap had accepted Zirkelbach's bid for the Project and confirmed the amount Zirkelbach would be paid, Zirkelbach negotiated and executed contracts with other parties, including DOWL. Zirkelbach and DOWL negotiated and executed an agreement (hereinafter "the Agreement") defining each party's obligations on the Project, and the parties amended the Agreement several times during the course of the Project. (Dkt. 211, p. 1; App. B, Zirkelbach 63:6-64:1).

DOWL, like Zirkelbach, has significant construction and business experience, and the Agreement was the product of the parties' bargaining, rather than any economic, social, or practical duress. Indeed, the parties exchanged numerous communications regarding the Agreement. (*See* Letter from Zirkelbach to DOWL (Feb. 14, 2013) (attached as Ex. E to Dkt. 204) (initially stating Zirkelbach's form contract would be used); Email from DOWL to Zirkelbach (Feb. 21, 2013) (attached as Ex. F to Dkt. 204); Dkt. 211, pp. 1, 13-15, 24, 26). After

negotiations, the parties ultimately based the Agreement on DOWL's form contract, which they amended numerous times. The District Court explicitly found that "**there was no economic, social, or practical duress compelling either party to execute the agreements and the addendums**." (Dkt. 218, p. 5) (emphasis added).

One of the outcomes of the parties' bargaining was a clause containing a mutual waiver of consequential damages and a limitation on DOWL's liability to Zirkelbach:

> **D. Consequential Damages/Limitation of Liability**
> To the fullest extent permitted by law, DOWL HKM and [Zirkelbach] waive against each other, and the other's employees, officers, directors, agents, insurers, partners and consultants, any and all claims for or entitlement to special, incidental, indirect or consequential damages arising out of, resulting from, or in any way related to the Project, and **agree that DOWL HKM's total liability to Client under this Agreement shall be limited to $50,000**.

(Dkt. 211, p. 3, § 5.D. (emphasis added) (attached to Appellant's Opening Brief at App. 22) (hereinafter "App. 22, Limitation of Liability Clause")).

After the Project was completed, Zirkelbach sued DOWL and several other

defendants for alleged construction defects.[2] The District Court gave effect to the plain meaning of the Limitation of Liability Clause and held that Zirkelbach's damages, if any, are limited to $50,000. (Dkt. 233). Zirkelbach appeals that decision.

IV. STANDARD OF REVIEW

This Court reviews a District Court's summary judgment ruling de novo, applying the same rule, M. R. Civ. P. 56(c)(3), that a District Court applies when making a summary judgment ruling. *Bennett v. Hill*, 2015 MT 30, ¶ 9, 378 Mont. 141, 342 P.3d 691. This Court reviews a District Court's conclusions of law for correctness. *Id*. at ¶ 10.

V. SUMMARY OF ARGUMENT

The District Court correctly enforced the plain language of the parties' Agreement by limiting DOWL's potential liability to Zirkelbach to $50,000. Zirkelbach and DOWL each are sophisticated parties with extensive business and construction experience. The parties freely negotiated all aspects of their contractual relationship, assessed their respective risks and benefits from

[2] This lawsuit is one of several lawsuits involving Zirkelbach arising out of this project. (*See* Dkt. 225). Despite Zirkelbach's recitation in its brief of particular defects for which it claims DOWL is liable, those alleged defects are not relevant to this appeal. As the District Court noted, "DOWL disputes Zirkelbach's claims and has defended vigorously." (Dkt. 233, p. 5). The trier of fact has not determined the alleged existence of the defects, Zirkelbach's claimed damages, or DOWL's alleged liability for Zirkelbach's damages. This appeal concerns only whether, as a matter of law, the Limitation of Liability Clause is enforceable.

proceeding, and ultimately executed the Agreement, including the Limitation of Liability Clause.

Nonetheless, Zirkelbach seeks to evade the consequences of its bargain by arguing that the Clause is contrary to Montana policy and, in an argument that is new on appeal, that the Clause is ambiguous. The Court should reject these arguments. First, Zirkelbach's attempt to manufacture an ambiguity is betrayed by the plain language of the Clause, Zirkelbach's nonsensical interpretation of the Clause, and the fact Zirkelbach had no problem understanding the Clause until this appeal. Second, Zirkelbach's arguments disregard the difference between exculpatory clauses and limitations of liability. Although Montana law precludes exculpatory clauses—contract terms that completely immunize a party from liability for its own negligence—clauses that merely limit liability to a certain amount are valid and enforceable.

VI. ARGUMENT

A. The District Court correctly held that the Limitation of Liability Clause clearly and unambiguously limits DOWL's potential liability in this case to $50,000.

The "fundamental tenant" of Montana contract law "is freedom of contract; parties are free to mutually agree to terms governing their private conduct as long as those terms do not conflict with public laws." *Winter v. State Farm Mut. Auto. Ins. Co.*, 2014 MT 168, ¶ 26, 375 Mont. 351, 328 P.3d 665; *Arrowhead School*

Dist. No. 75 v. Klyap, 2003 MT 294, ¶ 20, 318 Mont. 103, 79 P.3d 250. Parties generally are presumed to be "in the best position to make decisions in their own interest" and the Court should not second-guess or rewrite a contract simply to ease the effects of a burdensome term. *Arrowhead School Dist. No. 75*, ¶ 20; *see* Mont. Code Ann. § 1-4-101; *see also Monroe v. Cogswell Agency*, 2010 MT 134, ¶ 15, 356 Mont. 417, 234 P.3d 79; *Marco & Co., LLC v. Deaconess/Billings Clinic Health Sys.*, 1998 MT 26, ¶ 16, 287 Mont. 293, 954 P.2d 1116 ("To permit avoidance of a written contract because the terms of the contract now appear burdensome or unreasonable would defeat the very purpose of placing a contract into writing.").

This Court's objective in construing and interpreting a contract is to ascertain and to give effect to the parties' intention. Mont. Code Ann. § 28-3-301; *see also A.M. Welles, Inc. v. Montana Materials, Inc.*, 2015 MT 38, ¶ 8, 378 Mont. 173, 342 P.3d 987. If possible, the Court should ascertain the parties' intent from the terms of the contract alone, and when a contract's terms are clear and unambiguous the Court must apply the language as written. Mont. Code Ann. § 28-3-401; *A.M. Welles, Inc.*, ¶ 8; *Ophus v. Fritz*, 2000 MT 251, ¶ 23, 301 Mont. 447, 11 P.3d 1192.

In this case, the intent of DOWL and Zirkelbach is clear from the terms of their Agreement: "DOWL HKM and [Zirkelbach]…agree that DOWL HKM's

total liability to [Zirkelbach] under this Agreement shall be limited to $50,000." The language is plain and simple and susceptible to only one interpretation. DOWL and Zirkelbach agreed to cap DOWL's liability to Zirkelbach to a fixed sum of $50,000. Nevertheless, Zirkelbach claims for the first time on appeal that the Clause is internally ambiguous and also argues that the subsequent addendums to the Agreement implicitly modified the terms of the Clause. The Court should reject these arguments.

1. Zirkelbach did not argue to the District Court that the meaning of the Limitation of Liability Clause was ambiguous.

As a threshold matter, the Court should decline to address Zirkelbach's claim of internal ambiguity because it is new on appeal. Before the District Court, Zirkelbach only argued that because the Limitation of Liability Clause failed to specifically mention "negligence," the Clause was not "unambiguous enough" to effectively limit DOWL's liability for negligence. (Dkt. 200, pp. 15-17 (emphasis added)). Zirkelbach does not repeat this argument on appeal and instead now claims that it is not clear whether the Limitation of Liability Clause limits DOWL's total liability or just its liability for consequential damages.

Although, as discussed below, this argument clearly is incorrect and contradicts well-established rules of contract construction, the Court should refuse to address it because Zirkelbach did not articulate it to the District Court. *See Wicklund v. Sundheim*, 2016 MT 62, ¶ 26, 383 Mont. 1, 367 P.3d 403. This Court

will not "address either an issue raised for the first time on appeal or a party's change in legal theory." *Mountain West Bank, N.A. v. Glacier Kitchens, Inc.*, 2012 MT 132, ¶ 13, 365 Mont. 276, 281 P.3d 600; *Becker v. Rosebud Operating Serv., Inc.*, 2008 MT 285, ¶ 17, 345 Mont. 368, 191 P.3d 435.

2. The Limitation of Liability Clause is clear and unambiguous and subject only to one interpretation.

A contract is ambiguous only if its language is susceptible to at least two reasonable but conflicting meanings in light of the ordinary meaning of words and the ordinary rules of grammar. *See, e.g.*, *Mary J. Baker Revocable Trust v. Cenex Harvest States, Cooperatives, Inc.*, 2007 MT 159, ¶ 20, 338 Mont. 41, 164 P.3d 851; *Ophus*, ¶ 23; *Winter*, ¶ 13; *cf. Bates v. Neva*, 2014 MT 336, ¶ 15, 377 Mont. 350, 339 P.3d 1265 (stating that this Court has "long adhered to ordinary rules of grammar" in ascertaining plain meaning of statutes). In this case, the clause at issue addresses two related, but different, concepts. The title of the clause clearly and unambiguously states that it addresses both "Consequential Damages" and "Limitation of Liability." It can only reasonably be read to mean that DOWL and Zirkelbach (1) waived all claims against one another, regardless of amount, for special, incidental, indirect or consequential damages and (2) agreed that DOWL's total liability to Zirkelbach is limited to $50,000. The Clause could not be simpler.

Zirkelbach's belated attempt to manufacture an ambiguity in the Clause patently disregards the "ordinary rules of grammar." *See Bates*, ¶ 15. The Clause

addresses two different concepts in separate grammatical clauses constructed in parallel and separated by a conjunction and a comma. Each clause contains a verb and an object for the verb:

> To the fullest extent permitted by law, DOWL HKM and [Zirkelbach:]
>
> [1] <u>waive</u> against each other, and the other's employees, officers, directors, agents, insurers, partners and consultants, any and all claims for or entitlement to special, incidental, indirect or consequential damages arising out of, resulting from, or in any way related to the Project, <u>and</u>
>
> [2] <u>agree</u> that DOWL HKM's total liability to Client under this Agreement shall be limited to $50,000.

(App. 22, Limitation of Liability Clause (emphasis added and format altered to emphasize meaning)). In the first clause, DOWL and Zirkelbach "waive" claims against each other for "special, incidental, indirect or consequential damages." In the second clause, which is set off from the first by a comma and an "and," DOWL and Zirkelbach "agree" to limit DOWL's "total liability" to $50,000.

Adopting Zirkelbach's proffered interpretation—that the $50,000 limitation applies to consequential damages only—would require the Court to disregard the comma and conjunction that separate the clauses, merge the two clauses into one, leave the verb "agree" without an object, strike out the words "total liability," and/or disregard the second clause entirely. Such an approach not only is unreasonable, it more importantly violates the requirement that this Court must

give effect to all of the words according to their ordinary meaning and grammar. *See Bates*, ¶ 15.

The Clause is clear, explicit and susceptible to only one interpretation: Zirkelbach unambiguously agreed to limit DOWL's "total liability" to $50,000. The Court should enforce the Clause as written.

3. The addendums, amendments to the Agreement, and emails between the parties do not modify the Limitation of Liability Clause or create any ambiguity.

Zirkelbach next argues that addendums the parties added to the Agreement, and emails discussing those addendums, create an ambiguity regarding the Limitation of Liability Clause or modified the amount of the limited liability. The District Court correctly rejected this argument (Dkt. 233, pp. 10-11) and this Court should do so as well.

After execution of the Agreement, including the Limitation of Liability Clause, the parties added two versions of an otherwise identical addendum to the Agreement. (*See* Dkt. 211, p. 3 at § 4.E, pp. 15-16 at §§ B.8 & B.9, pp. 18-19 at §§ B.8 & B.9). Both versions discussed the various insurance policies DOWL had to carry and required DOWL to name Zirkelbach as an additional insured (although one excluded DOWL's professional liability policy from this requirement). (*Id*., pp. 15-16 at § B.3, pp. 18-19 at § B.3). The provisions did not

discuss, much less alter, the parties' agreement to limit DOWL's liability to Zirkelbach to $50,000. As the District Court correctly noted:

> There is no specific language contained within the addendum that specifically amends or eliminates the limit of liability contained within the original contract. It simply is a matter of insurance, and that insurance could apply to any claim whether it is a claim between these parties or other third parties.

(Dkt. 233, p. 10).

Indeed, provisions requiring insurance address potential liability to third parties not in privity of contract with DOWL and thus not subject to any liability limit. Montana law permits third parties to potentially assert negligence claims against DOWL directly. *See, e.g., Jim's Excavating Service v. HKM Assoc.*, 265 Mont. 494, 501-02, 878 P.2d 248, 252-53 (1994). Similarly, third parties not in privity of contract with Zirkelbach or DOWL could in certain circumstances attempt to sue Zirkelbach for DOWL's actions as an independent contractor. *See, e.g., Pearson v. McPhillips*, 2016 MT 257, ¶ 15, 385 Mont. 171, 381 P.3d 579 (recognizing circumstances under which a person may be liable for the torts of its independent contractors); *Gurnsey v. Conklin Co., Inc.*, 230 Mont. 42, 54, 751 P.2d 151, 157 (1988) (recognizing cause of action for negligent selection of contractor). Zirkelbach presumably bargained for the provisions requiring DOWL to carry insurance and to name Zirkelbach as an additional insured to provide Zirkelbach with protection from such potential claims. As the District Court correctly noted,

however, the insurance requirements did not discuss, conflict with, invalidate or change the Limitation of Liability Clause.

This conclusion is highlighted by the fact that the parties did address consequential and liquidated damages in both versions of the Addendum. Specifically, the parties reiterated the consequential damages waiver but carved out an exception to the waiver for liquidated damages. (Dkt. 211, pp. 15-16 at §§ B.8 & B.9, pp. 18-19 at §§ B.8 & B.9). Obviously, the parties knew how to amend specific portions of the original Agreement if they chose, and, tellingly, they did not even address, much less modify, the provision limiting DOWL's total liability to Zirkelbach to $50,000.

The emails sent by Zirkelbach also do not create an ambiguity or limit the effect of the Limitation of Liability Clause. Zirkelbach's use of the word "indemnification" <u>referred to the fee that Zirkelbach promised to pay DOWL</u> in exchange for DOWL's services:

> Please be advised that your fee proposal…in the amount of [$122,967][3] to perform the Final Design…for the above referenced project has been conditionally accepted. The intent of this letter is to <u>indemnify DOWL HKM for the amount listed above</u>. Zirkelbach Construction, Inc. intends, conditioned only upon your agreement with and the execution of our standard form contract agreement and our executed owner contract, to award the balance of the proposed work referenced in the proposal.

[3] In the original document a typed "$135,012" has been crossed out and replaced with a handwritten "$122,967."

(Letter from Zirkelbach to DOWL (Feb. 14, 2013) (attached as Ex. E to Dkt. 204) (attached to Appellant's Opening Brief as App. 32) (emphasis added)).

The follow-up email from Zirkelbach used the word indemnification in the same way. That email expanded DOWL's approved scope of work and increased the approved fee, and instructed DOWL to "resume with all phases of work agreed upon in the previous LOI. The amount of indemnification needs to be revised to reflect our final agreement." (*Id*.). The "amount of indemnification" again referred to the amount Zirkelbach was agreeing to pay DOWL. That language did not change the Limitation of Liability Clause or make it ambiguous in any way. Moreover, even if the email somehow could be construed as a request to change the amount of the liability limit, it is undisputed that DOWL did not change the limit and Zirkelbach knowingly executed the Agreement anyway.

B. The Limitation of Liability Clause complies with Montana law and public policy.

Zirkelbach devotes much of its brief to a Montana statute and cases addressing exculpatory clauses—clauses that attempt to completely immunize a party from all liability. In doing so, Zirkelbach fails to recognize that the Limitation of Liability Clause is not an exculpatory clause and that the authorities Zirkelbach cites are inapplicable.

1. The Limitation of Liability Clause is enforceable because it is not an exculpatory agreement.

Limitation of liability clauses—clauses that limit, but do not completely eliminate, liability—comply with Montana law and Montana public policy. Such clauses are a recognized "way of allocating unknown or undetermined risk" and are a "fact of every-day business and commercial life." *Valhal Corp. v. Sullivan Assocs., Inc.*, 44 F.3d 195, 204 (3d Cir. 1995). Accordingly, this Court previously has enforced clauses that, like the Limitation of Liability Clause, limit but do not wholly exculpate a party from all liability. This Court's previous decisions, and a recent decision from Magistrate Judge Lynch applying Montana law, demonstrate that the Limitation of Liability Clause at issue in this case is valid and enforceable.

All contracts that completely "exempt" a party from liability for its actions are void as against public policy. Mont. Code Ann. § 28-2-702; *see also Miller v. Fallon Cnty.*, 222 Mont. 214, 221, 721 P.2d 342, 346-47 (1986); *Haynes v. Missoula Cnty.*, 163 Mont. 270, 279-80, 517 P.2d 370, 376 (1973). Terms that "exempt" a party from liability or terms by which a party attempts to "deny" all liability are called "exculpatory clauses." *Miller*, 222 Mont. at 221, 721 P.2d at 346; *Haynes*, 163 Mont. at 280, 517 P.2d at 376.

Exculpatory clauses are distinguished from contractual terms that, like the Limitation of Liability Clause, merely limit a party's exposure without wholly immunizing that party from liability. *Keeney Const. v. James Talcott Const., Co.*,

2002 MT 69, ¶¶ 19-22, 309 Mont. 226, 45 P.3d 19 (distinguishing *Miller* because the term at issue, which effectively barred damages for delay, did not "exculpate [the defendant] from all liability" (emphasis added)); *Five U's, Inc. v. Burger King Corp.*, 1998 MT 216, ¶¶ 20-26, 290 Mont. 452, 962 P.2d 1218 (distinguishing *Miller* because the rent abatement clause at issue did not "exculpate [the tenant] from all liability for negligence" (emphasis added)); *see also* Findings and Recommendation, *Baldwin Lynch Energy Corp. v. Schlumberger Tech. Corp.*, 2013 WL 12130400 at *10-11 (D. Mont. Nov. 12, 2013).

Accordingly, this Court repeatedly has enforced contractual provisions that limit one party's liability in some fashion. For example, in *Haines Pipeline Const., Inc. v. Montana Power Co.*, 251 Mont. 422, 830 P.2d 1230 (1991),[4] and *State ex. rel. Mountain States Tele. & Telegraph Co. v. Dist. Ct. of Second Jud. Dist.*, 160 Mont. 443, 503 P.2d 526 (1972), this Court limited the categories and amounts of damages available to the parties based on the plain language of the parties' contracts.

[4] The *Haines* case was overruled on other grounds by *Porter v. Galarneau*, 275 Mont. 174, 183, 911 P.2d 1142, 1149 (1996) (holding that the general rule that courts must apply the law in effect at the time it renders its decision applies only to the application of judicial decisions, rather than to situations involving the retroactive application of state statutes, ordinances, or regulations). However, the portion of the *Haines* opinion addressing contractual limits on recoverable damages remains good law.

In *Haines*, a contractor sued Montana Power Company for breaching the parties' contract with respect to the construction of a natural gas pipeline. The contractor alleged that Montana Power Company prematurely terminated the contract and thereby caused the contractor damages, including lost profits. *Haines*, 251 Mont. at 425-26, 830 P.2d at 1232-22. Both the trial court and this Court enforced the plain language of a clause in the parties' contract precluding recovery for lost profits and limited the contractor's recovery. *Id*. at 426, 437, 830 P.2d at 1233, 1240. This Court reasoned that the parties' contract "clearly state[d] that there will be no claims for anticipated profits." *Id*. at 437, 830 P.2d at 1240.

Zirkelbach's attempt to distinguish *Haines* raises a distinction without a difference. The critical holding in *Haines* was the enforceability of a limitation on the contractor's liability. Like the contractor in *Haines*, DOWL's liability here is limited because the contract "clearly states" that DOWL is not liable for more than $50,000.

Similarly, in *Mountain States* this Court again enforced a limitation of liability clause. The Court was addressed "the provision in the [parties'] advertising contract which limits the liability of Mountain States for the omission of classified advertising." *Mountain States*, 160 Mont. at 448, 503 P.2d at 529. The Court determined that, like the Limitation of Liability Clause in Zirkelbach's

contract with DOWL, the provision "provide[d] for a maximum recovery." *Id*. The Court enforced the provision, stating:

> Without a demonstration of bad faith, fraud, or willful or wanton conduct by Mountain States, a limitation of liability for errors and omissions in its advertising expressed in a written and signed contract is reasonable and nowise against public policy and it is within the power of the company and subscribers to its directory to make such contracts and they become a valid and binding limitation.

Id. at 451, 503 P.2d at 531.

In an effort to distinguish *Mountain States*, Zirkelbach limits its analysis to, and quotes exclusively from, the portion of the *Mountain States* opinion discussing the regulatory authority of the Public Service Commission. (Appellant's Opening Brief at 10-11; *Mountain States*, 160 Mont. at 446-47, 503 P.2d at 528-29). Zirkelbach completely ignores this Court's analysis and enforcement of the limitation of liability provision, which is directly on point.

Relying on this Court's decisions, Magistrate Judge Lynch specifically determined that a limitation of liability clause like the one at issue in this case was valid and enforceable under Montana law. *Baldwin Lynch Energy Corp*, 2013 WL 12130400 at *10-11. Magistrate Judge Lynch expressly confirmed that, under this Court's clear precedent, Mont. Code Ann. § 28-2-702 does not apply to a situation "where two business entities contract with one another to limit, rather than eliminate, one party's liability." *Id.* at *10.

Magistrate Judge Lynch explained:

> The issue here…is whether a provision that limits the liability of one contracting party to the other is impermissibly exculpatory under Mont. Code Ann. § 28-2-702. The Montana Supreme Court interpreted this statute for the first time in *Miller v. Fallon County*, 721 P.2d 342 (Mont. 1986)…[and] held that the waiver marked an impermissible attempt on the part of the company to "contractually exculpate itself from liability" and thus violated Mont. Code Ann. § 28–2–702. *Miller*, 721 P.2d at 347.
>
> In the years since *Miller*, however, the Montana Supreme Court has found no such statutory violation where two business entities contract with one another to limit, rather than entirely eliminate, one party's liability. *See Keeney Constr. v. James Talcott Constr. Co., Inc.*, 45 P.3d 19, 23–24 (Mont. 2002) (holding that although construction contract authorizing the general contractor to direct the timing for completion meant that the subcontractor could not recover delay damages, the contract was enforceable because it did not exculpate the general contractor from all liability); *Five U's, Inc., v. Burger King Corp.*, 962 P.2d 1218, 1221–22 (Mont. 1998) (holding that rent abatement clause in a commercial lease agreement did not seek to exculpate corporate defendant from all liability for negligence, and so did not violate the policy of the law).
>
> * * *
>
> Here, as in *Keeney* and *Five U's*, the limitation of liability provisions do not operate to exculpate Schlumberger from all liability. While those provisions certainly limit Baldwin Lynch's potential recovery, Mont. Code Ann. § 28-2-702 does not preclude two business entities with equal bargaining power from contracting to limit their respective remedies and liabilities.

Id. at *10. Montana law permits parties to a commercial contract to allocate their respective risks and agree to limit one party's liability.

The Limitation of Liability Clause is enforceable because it was the product of actual negotiation between two sophisticated commercial entities and merely limited the liabilities of those parties rather than exculpating either one. As the District Court specifically found: "[B]oth parties are sophisticated business entities with significant experience in the construction business; there was no economic, social or practical duress compelling either party to execute the agreements and addendums." (Dkt. 233, p. 5).

Zirkelbach does not identify any error in the District Court's finding, which is well-supported by the record. Zirkelbach was a sophisticated entity with extensive construction and contracting experience around the country. (App. A, Zirkelbach 22:9-14, 22:21-25, 30:16-22, 31:4-9; Appellant's Opening Brief 18). Prior to beginning the Project and contracting with DOWL, Zirkelbach had completed 41 similar projects for FedEx. (App. A, Zirkelbach 30:16-22). Consequently, Zirkelbach was aware of the risks and rewards the Project presented, and it was focused on balancing those risks and rewards so that it could turn a profit. (*See* App. B, Zirkelbach 34:2-3, 61:23-62:5, 65:12-66:1).

Zirkelbach extensively negotiated the Agreement with the Project risks and rewards in mind. Both DOWL and Zirkelbach suggested and made changes to the Agreement prior to execution. (*See* Letter from Zirkelbach to DOWL (Feb. 14, 2013) (attached as Ex. E to Dkt. 204) (attached to Appellant's Opening Brief as

App. 32) (stating Zirkelbach's form contract would be used); Email from DOWL to Zirkelbach (Feb. 21, 2013) (attached as Ex. F to Dkt. 204) (attached to Appellant's Opening Brief as App. 33); Dkt. 211, pp. 1, 13-15, 24, 26 (attached to Appellant's Opening Brief as App. 20, 32-34, 43, 45). After negotiations, the parties ultimately based the Agreement on DOWL's form contract, which they amended numerous times. Like the other contract terms, the $50,000 Limitation of Liability Clause was formulated based on the risks, rewards, and potential for profit that the Project presented to each party.

Zirkelbach attempts to undercut these undisputed facts by erroneously arguing that the SunCap-Zirkelbach contract obligated Zirkelbach to hire DOWL for this Project. However, that contract explicitly allowed Zirkelbach to engage <u>any</u> duly licensed professional and only mentioned DOWL as a consultant SunCap previously had engaged. (Agreement Between SunCap and Zirkelbach at §§ 7.1 & 7.2 (attached to Appellant's Opening Brief as App. 87)). Zirkelbach's argument also contradicts common sense—Zirkelbach was the party deciding which design professionals and subcontractors to hire, and Zirkelbach has not, and cannot, show that DOWL was the only possible engineering firm that Zirkelbach could have hired.

Zirkelbach cannot credibly argue that it had no choice but to accept whatever terms DOWL offered. Instead, the undisputed evidence, as found by the

District Court, demonstrates that the Agreement was the product of an arm's length negotiation between two sophisticated commercial entities. Consequently, the Court should enforce the Limitation of Liability Clause as written.

2. Enforcing the Limitation of Liability Clause comports with the overwhelming trend in other jurisdictions.

Zirkelbach, citing *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441 (Cal. 1963), argues that "many" jurisdictions invalidate limitation of liability clauses, and that other courts would consider the $50,000 limit too "nominal" to enforce because it impermissibly eliminates the incentive to exercise due care. Neither argument is correct.

Although DOWL has not exhaustively canvassed the law in every state, and it does not appear that all jurisdictions have addressed the issue, most of the courts that have done so enforce limitation of liability clauses where, as here, they are knowingly made between sophisticated parties or design professionals. Similarly, these courts consistently reject arguments that limitations similar to, or less than,

the amount in the Agreement are "too nominal" to be enforced. [5]

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[5] DOWL's research reveals that, for those courts that have addressed the issue, at least 28 jurisdictions generally enforce limitation of liability clauses. Of these, at least 15 courts specifically enforce limitation of liability clauses in construction or design contexts. *See, e.g., 1800 Ocotillo, LLC v. WLB Grp., Inc.*, 196 P.3d 222 (Ariz. 2008); *W. William Graham, Inc. v. City of Cave City*, 709 S.W.2d 94, 95 (Ark. 1986); *Markborough Calif., Inc. v. Superior Ct.*, 277 Cal. Rptr. 919, 925-26 (App. Ct. 1991); *RHA Constr., Inc. v. Scott Eng'g, Inc.*, 2013 WL 3884937, at *8 (Del. Super. Ct. July 24, 2013); *RSN Props., Inc. v. Engineering Consulting Svcs., Ltd.*, 686 S.E.2d 853, 854-55 (Ga. App. Ct. 2009); *SAMS Hotel Group, LLC v. Environs, Inc.*, 716 F.3d 432, 434-35 (7th Cir. 2013) (applying Indiana law); *Thrash Commercial Contractors, Inc. v. Terracon Consultants, Inc.*, 889 F. Supp. 2d 868, 882 (S.D. Miss. 2012); *Marbro, Inc. v. Borough of Tinton Falls*, 688 A.2d 159, 162-63 (N.J. 1996); *Fort Knox Self Storage, Inc. v. Western Technologies, Inc.*, 142 P.3d 1, 5-8 (N.M. App. Ct. 2006); *Soja v. Keystone Trozze, LLC*, 106 A.D.3d 1168, 1169–70 (N.Y. App. Ct. 2013); *Blaylock Grading Co., LLP v. Smith*, 658 S.E.2d 680, 681, 684 (N.C. App. Ct. 2008); *Valhal Corp.*, 44 F.3d at 200, 202, 204 (applying Pennsylvania law); *Wellman, Inc. v. Fluor Facility & Plant Services, Inc.*, 2007 WL 5614061 (S.C. Ct. Common Pleas Dec. 27, 2007); *CBI NA-CON, Inc. v. UOP Inc.*, 961 S.W.2d 336, 337, 342 (Tex. App. Ct. 1997); *Kelly v. Heron Ridge, Inc.*, 16 F. App'x 695, 697–98 (9th Cir. 2001) (applying Washington law).

Cases enforcing such clauses generally include *Saia Food Distributors & Club, Inc. v. SecurityLink from Ameritech, Inc.*, 902 So.2d 46, 57-58 (Ala. 2004); *Zerjal v. Daech & Bauer Const., Inc.*, 939 N.E.2d 1067, 1072 (Ill. App. Ct. 2010); *Santana v. Olguin*, 208 P.3d 328, 333 (Kan. App. Ct. 2009); *Rohtstein Corp. v. KPMG, LLP*, 2007 WL 4416840, at *2 (Mass. Super. Dec. 10, 2007); *St. Paul Fire & Marine Ins. Co. v. Guardian Alarm Co. of Michigan*, 320 N.W.2d 244, 247 (Mich. 1982); *Purcell Tire & Rubber Co. v. Exec. Beechcraft, Inc.*, 59 S.W.3d 505, 509 (Mo. 2001); *Ray Tucker & Sons, Inc. v. GTE Directories Sales Corp.*, 571 N.W.2d 64, 70 (Neb. 1997); *Shaer Shoe Corp. v. Granite State Alarm, Inc.*, 262 A.2d 285, 287 (N.H. 1970); *Elsken v. Network Multi-Family Sec. Corp.*, 838 P.2d 1007, 1008-11 (Okla. 1992); *Brondes Ford, Inc. v. Habitec Security*, 38 N.E. 3d 1056, 1081-1082 (Ohio App. Ct. 2015); *Star-Shadow Productions, Inc. v. Super 8 Sync Sound System*, 730 A.2d 1081, 1082-1085 (R.I. 1999); *University Hills Beauty Academy, Inc. v. Mt. States Tel. & Tel. Co.*, 554 P.2d 723, 724-726 (Colo. App. Ct. 1976); and *Advance Service, Inc. v. General Tel. Co. of Fla.*, 187 So. 2d 660, 660 (Fla. App. Ct. 1966).

For example, in *Valhal Corp.* the Third Circuit Court of Appeals applied Pennsylvania law to uphold a limitation of liability provision in an owner-architect contract. The Third Circuit enforced the limitation of liability clause in the contract, limited the architect's liability to $50,000, and rejected the owner's argument that the damages cap was too low compared to the jury's $1,000,000 damage award. *Valhal Corp*., 44 F.3d at 200, 202, 204. The court explained:

> Limitation of liability clauses are a way of allocating "unknown or undeterminable risks"…and are a fact of everyday business and commercial life. So long as the limitation which is established is reasonable and not so drastic as to remove the incentive to perform with due care, Pennsylvania courts uphold the limitation.

Id. at p. 204 (internal citation omitted). Ultimately, the Third Circuit decided that the clause was not void because it did not "bar any cause of action." *Id*. at 202. Instead, the clause was enforceable because "[the architect] remain[ed] liable for its own negligence and continue[d] to be exposed to liability up to a $50,000 ceiling." *Id*. "[T]he amount of liability [wa]s capped, but [the architect] still b[ore] substantial responsibility for its actions." *Id*.

Likewise, in *1800 Ocotillo, LLC*, the Arizona Supreme Court enforced a limitation of liability provision in a professional services contract between a real estate developer and a surveying and engineering firm. Applying the contractual limitation of liability, the Arizona Supreme Court affirmed the trial court's summary judgment decision to limit the firm's liability to $14,242.00. *1800*

Ocotillo, 196 P.3d at 224-26. The court explained: "Our law generally presumes, especially in commercial contexts, that private parties are best able to determine if particular contractual terms serve their interests. Society also broadly benefits from the prospect that bargains struck between competent parties will be enforced." *Id*. at 224.

Numerous courts similarly have enforced limitation of liability provisions in contracts concerning construction and design professionals. *E.g.*, *SAMS Hotel Group, LLC*, 716 F.3d 432 at 434-35 (applying Indiana law to enforce limitation of liability provision between owner and architect); *Thrash Commercial Contractors, Inc.*, 889 F. Supp. 2d at 882 (applying Mississippi law to enforce a $50,000 limitation of liability provision in a construction contract between a professional geotechnical consulting firm and a contractor); *RSN Props., Inc.*, 686 S.E.2d at 854-55 (enforcing provision limiting engineer's liability); *Blaylock Grading Co., LLP*, 658 S.E.2d at 681, 684 (enforcing limitation of liability provision capping engineering company's liability); *Fort Knox Self Storage, Inc.*, 142 P.3d at 5-8 (enforcing limitation of liability provision capping geotechnical company's liability at $50,000); *Marbro, Inc.*, 688 A.2d at 162-63 (enforcing limitation of liability provision capping engineer's liability at $32,500); *Markborough Calif., Inc.*, 277 Cal. Rptr. at 925-26 (enforcing limitation of liability provision capping engineer's liability); *see also* Findings and Recommendation, *Baldwin Lynch*

Energy Corp. v. Schlumberger Tech. Corp., 2013 WL 12130400 at *10-11 (Nov. 12, 2013)(enforcing a $15,215.91 limitation of liability although the plaintiff claimed to have suffered "multiple millions of dollars in damages").

The $50,000 liability limit is not "nominal" nor does it eliminate DOWL's incentive to exercise due care. DOWL remains exposed to damages of a significant amount. Additionally, DOWL has numerous other incentives to exercise due care including avoiding the time and expense associated with defending against allegations of negligence; avoiding claims by third parties not subject to a liability limit; protecting its business reputation and ability to secure future work, whether from an existing client or a new client; and ensuring that its professionals adhere to the professional requirements set forth by the Montana Board of Engineers.

3. *Tunkl* is neither relevant nor applicable

In an effort to avoid the result dictated by applicable Montana law and the plethora of cases from other jurisdictions, Zirkelbach relies heavily, if not entirely, on the California Supreme Court's decision more than 50 years ago in *Tunkl*. *Tunkl* has no bearing on this case.

Tunkl involved a contract between a patient and a hospital that contained the following release:

> [T]he patient or his legal representative agrees to and hereby releases The Regents of the University of California, and the hospital from <u>any</u>

> and all liability for the negligent or wrongful acts or omissions of its employees, if the hospital has used due care in selecting its employees.

Tunkl, 383 P.2d at 442 (emphasis added). The California Supreme Court invalidated the release based on its exculpatory nature and the unique medical services context. *Id*. at 446-47. The court explained:

> The would-be patient is in no position to reject the proffered agreement, to bargain with the hospital, or in lieu of agreement to find another hospital. The admission room of a hospital contains no bargaining table where, as in a private business transaction, the parties can debate the terms of their contract.
>
> * * *
>
> The hospital, under such circumstances, occupied a status different than a mere private party; its contract with the patient affected the public interest.

Id. at 447.

The California Supreme Court noted, however, that the result would have been different if it involved a "private, voluntary transaction[] in which one party, for a consideration, agree[d] to shoulder a risk which the law would otherwise have placed upon the other party." *Id*. at 446. *Tunkl* does not apply to this case, which involves a limitation of liability clause rather than an exculpatory clause and a private, voluntary commercial transaction rather than an adhesive transaction on a matter involving the provision of medical services to the public. The Ninth Circuit has emphasized the limitations of *Tunkl*, holding that it makes "little sense" to

apply the *Tunkl* factors, which are essentially rooted in the unconscionability doctrine, to an agreement between two sophisticated commercial entities. *See Continental Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1527 (9th Cir. 1987).

In fact, since *Tunkl*, California has distinguished limitation of liability clauses from exculpatory clauses. *See Philippine Airlines, Inc. v. McDonnel Douglas Corp.*, 234 Cal. Rptr. 423, 424 (App. Ct. 1987). Like Montana and like the cases from other jurisdictions cited above, California enforces limitation of liability clauses where, as here, sophisticated commercial entities are the parties involved. *Markborough California, Inc.*, 277 Cal. Rptr. at 925-26 (enforcing a $67,640 limitation of liability clause between a developer and a design professional); *Philippine Airlines, Inc.*, 234 Cal. Rptr. at 424 ("Commercial entities . . . are entitled to contract to limit the liability of one to the other, or otherwise allocate the risk of doing business.").

The Limitation of Liability Clause in the Agreement complies with Montana law and public policy and the great weight of authority in other jurisdictions. Zirkelbach, a sophisticated party with significant experience in large construction projects, should not be allowed to reallocate this project's risks and escape the consequences of its bargained-for exchange.

VII. CONCLUSION

DOWL respectfully requests that this Court affirm the District Court's Order granting DOWL's motion for partial summary judgment and enforce the Limitation of Liability Clause in the parties' Agreement.

DATED this 29th day of March, 2017.

CROWLEY FLECK PLLP

By *<u>/s/Matthew F. McLean</u>*

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CERTIFICATE OF COMPLIANCE

Pursuant to M. R. App. P. 11(4)(e), I certify that Appellee's Answer Brief is typed in 14-point Times New Roman Font, a proportionally spaced typeface, and contains 6,962 words, as calculated by Microsoft Office Word.

/s/Matthew F. McLean
Matthew F. McLean

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March, 2017, a true and correct copy of the foregoing document was served, in the manner indicated, upon the following:

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I, Matthew F. McLean, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 03-29-2017:

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