MONTANA EIGHTEENTH JUDICIAL DISTRICT, GALLATIN COUNTY

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AEROCONTINENTAL, LLC a dissolved Montana Limited Liability Company; GRAEME MACPHERSON; and ERIC BOOTH, Plaintiffs, vs. RYAN HUFF AND LEEWHAY PASEK, Defendants.	Cause No. DV-19-486BX **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**
RYAN HUFF AND LEEWHAY PASEK, Counterclaimants, vs. AEROCONTINENTAL, LLC a dissolved Montana Limited Liability Company; GRAEME MACPHERSON; and ERIC BOOTH, Counter-Defendants.	

BACKGROUND

This matter came before the Court for a judge trial on March 29 through April 2, 2021. The issues before the Court were Plaintiffs' claim for breach of contract, and Defendants' counterclaims for breach of contract, breach of the covenant of good faith and fair dealing, member liability, violation of Montana's Consumer Protection Act, fraud, constructive fraud, tortious interference with business relationships and joint and several member liability.

The Court heard testimony from all four individual parties plus other expert and lay witnesses. The Court weighed the credibility of the witnesses and considered the factual scenarios beginning with how the parties met, how the contract for work was formed, how that work progressed, and then what happened as the relationship between the parties deteriorated to the point where work on the project ceased and eventually reached the point where litigation commenced. Like a jury, the Court as the finder of fact in the trial, is not required to explain in fine detail every thought that has led it to the conclusions it makes in this Decision and Order, but to the extent possible explains to the parties why it has decided this case in the manner it has.

Over the course of the trial the Court was educated in a thorough fashion about the lifestyle of the "Overland" community. Based on the Court's experience, what was previously referred to as "car-camping", where one would roll out a pad and sleeping bag in the back of one's car or truck, has morphed quite significantly into a high-end, even luxurious, form of semi-outdoor living.

The Court heard testimony from witnesses about campers and vans costing well over 6 figures and in one instance $1.2 million. Obviously, a change from a pickup with a topper and, if one was lucky, a raised bed.

FINDINGS OF FACT

The parties in this case met through mutual acquaintances in the overland community. Specifically, Graeme MacPherson met Ryan Huff and LeeWhay Pasek (Defendants) in May 2017 at the Overland Expo West, a trade show and gathering event for overland enthusiasts. They met again in June 2017 in Colorado to discuss the project which is at the heart of this proceeding.

That project involved designing and building a camper unit for a Unimog truck that Huff and Pasek owned. Huff and Pasek wanted to use the Unimog as a living unit so that they could travel around the world in it as part of their overland pursuits. While in Colorado, MacPherson had an opportunity to examine the Unimog, visit with Huff and Pasek, and discuss the goals of the project. Up until that point MacPherson and Booth's experience in designing and building "expedition camper" boxes consisted primarily of working on two projects on their own vehicles. Neither MacPherson nor Booth had prior business experience. Huff and Pasek paid a $3,000 deposit for the design of the camper and the base structure to attach the unit to the Unimog.

After MacPherson, Huff and Pasek met to discuss the camper design, MacPherson and Booth established Aerocontinental, LLC as the entity that would be performing the work on the project. The sole members of the LLC were

Graeme MacPherson and Eric Booth. Aerocontinental was formed on July 31, 2017.

In August 2017 Huff and Pasek brought the Unimog to Montana and dropped it off at the Aerocontinental shop located on Shawnee Way in Bozeman, Montana.

Defendants and MacPherson and Booth had weekly meetings regarding the design of the project through September 2017. Defendants had a key to the shop at Shawnee Way so they could access the project when they liked. Defendant Huff was to perform various tasks for the project including installing a manual levelling bed, the HVAC system for the camper and interior lighting. Plaintiff Booth was the lead designer on the project and Plaintiff MacPherson was liaison for the customers. They both were involved in the physical construction of the unit and communicated frequently with their clients about the development, design, and progress of the project.

Pasek and Huff signed the Agreement to construct the camper box on August 25, 2017, and MacPherson and Booth signed the agreement on September 6, 2017. The Defendants dealt solely with MacPherson and Booth throughout the period of the project. MacPherson and Booth were indistinguishable from AeroContinental with respect to performance of the Agreement. They performed 99% of the work, controlled the pace of the progress on the project, communicated with Defendants about progress, billed Defendants for work, retained those funds, moved those funds into personal

accounts, and strategized between themselves about how to deal with the situation when the contractual relationship began to deteriorate.

Work proceeded on the project through January 2018. MacPherson testified that throughout that time Huff was intimately involved in many details of the design. The Agreement states Huff was to be responsible for elements of the project, such as supplying parts and installation for electrical componentry, including solar panels, wiring, inverter, wiring connections, battery system, electrical panel, interior lighting, and exterior lighting. Huff also was responsible for installation of the heater and camera equipment. Plaintiffs were to complete the remaining requirement of the build. Any changes to the design had to go through a formal change order approved by all the parties. During the trial the Court was not advised of any change orders that were proposed or approved during the project, nor were any exhibits admitted memorializing any change orders.

Defendants averred that the entire design should have been complete when the build began in September. Design of the project through collaboration between the parties was ongoing, and the Court finds the project became in practice a design as you build project through acquiescence of the parties, even if Defendants had originally thought the design was complete at the outset, which the Court is skeptical of.

As time progressed, Plaintiffs billed Defendants for work on the project. In addition to the $3,000 design deposit referenced above, Huff and Pasek made payments to Aerocontinental as follows: August 25, 2017: $25,000, referenced

as "build materials"; September 5, 2017: $8,500 for "month 1"; November 27, 2017: $10,000, "materials"; and November 27, 2017: $9,000, "labor and overhead." Defendants paid a total amount, including the design deposit, of $55,500. There also was an invoice from MacPherson in the amount of $1,191.40 for materials he personally purchased for the project.

Invoice 1001, dated September 27, 2017, stated the status of the project as of that date was, "(c)aught up almost entirely to Benchmark 2, Partial (sic) completion of benchmark 3." Per the contract, Benchmark 2 meant the sheet goods were manufactured, the extruded goods were manufactured, and the subframe was modified for mounting the box. Benchmark 3 meant the mechanical structure of the shell was completed and the box was mounted/installed to the frame of the Unimog.

Over three months later the project appeared to be essentially at the same stage. The box was not permanently mounted to the frame, however, there was the addition of a door and windows. Interior details including electric, cooking, and sleeping were not complete, nor was the unit painted, and it seems myriad items listed on page 1-13 of the contract were not designed for installation or installed.

The Court was provided with limited evidence on the value of the unit at the time the project ground to a halt in January. Defendants' expert, Jason Leveque, estimated the value of the camper box at the time of trial was between $5,000 and $15,000. Plaintiffs' expert, Tyler Tatro, did not provide evidence as to the current value of the box, as he testified the unit would have to be put on

the market to determine its value. Accordingly, if the Court gives Plaintiffs credit for the value of the box based on the evidence received, the difference between what Defendants paid ($55,500) and what they got ($10,000) was approximately $45,500.

A point of contention throughout the trial was who was at fault for delays in production and design of the unit. MacPherson testified that Defendants – particularly Huff - were very detailed in what they wanted, down to the point of how much space a can of soup would take up in a cabinet. Macpherson testified there were many meetings with Defendants and that Huff wanted to be involved with all aspects of the design, which slowed down the pace of the project.

On December 20, 2017, Booth, MacPherson and Pasek exchanged texts. Pasek was in Mexico and asked about progress including whether the box was going to be painted soon, whether the windows, doors and insulation were in, and if pre-wiring had been run. Booth and MacPherson assured Pasek all was well and they did not need to come back from their trip early. MacPherson also told Pasek they did not need anything from Defendants until after January 15, 2018. MacPherson further told Pasek a conservative estimate was that the project would be complete by mid-March. The Court finds if Huff was actually holding up the build, then MacPherson or Booth would have told Pasek in December that they needed more direction or final decisions in order the complete the box. They did not make such a request, nor did they request that Huff and Pasek come back from Mexico early to keep the project on track even after Pasek asked.

Considerable testimony was provided regarding who would install the cabinets in the unit. The contract states, "AeroContinental will be responsible for manufacturing the interior furniture and all systems not mentioned in the first paragraph." The list of material costs includes line items for Overhead Cabinetry and Lower Cabinetry. Based on the language of the contract and the reference in the materials list, AeroContinental contracted to manufacture the cabinetry for the project.

However, as of December 2017, MacPherson was working with a company called Goose Gear to design and build the cabinets. Goose Gear is a California company that focuses on storage solutions for overland vehicles, including cabinetry. All the parties were familiar with Goose Gear as it is a well-known manufacturer in the overland community. Huff was concerned about using Goose Gear for the build because he knew their products were expensive and that the cabinets could cost more than $5,000. The Court notes the line items for materials for the cabinetry in the contract total $2,000. Huff also was worried that Goose Gear would not be able to build the cabinets in a timely manner as the contract contained an estimated completion date of February 15, 2018, and discussions regarding Goose Gear were ongoing through the end of December. On December 21, 2017, Booth texted MacPherson saying, "I know that you've got a side deal with goose gear, but let's maybe set February 1 as a deadline for the cabinets. If we can't have them by then, I'll build them out of aluminum." AeroContinental never provided a price and delivery date for the

Goose Gear cabinetry. Ultimately, the parties abandoned the idea of using Goose Gear to construct the cabinets, and no cabinets were built for the camper.

MacPherson testified that, in late November and into December 2017, he had been having "motivation problems" with Booth and that Booth required "unique motivation." Macpherson further testified he told Defendants, "If you're mean to Eric he will not work."

Huff testified that in mid-December MacPherson told him he was having motivation problems with Booth and that Huff and Pasek should call Booth to motivate him. MacPherson relayed to Huff that Booth was more interested in skiing and working on his own project and had a trip planned to Ecuador. In response to MacPherson's comments, Huff and Pasek called Booth in mid to late December and Booth responded that they were going to "crush" it on the project that week. Booth did travel to Ecuador for a little over two weeks, albeit in late February/early March.

Defendants' Exhibit 552 is a text chain between MacPherson and Booth beginning in early November 2017 continuing to March 2018 and beyond. Throughout the conversation MacPherson and Booth candidly exchanged their thoughts about the project and other aspects of their lives. With this level of unvarnished dialogue, the Court would expect if there were substantial challenges with Huff's involvement in the project - to the point of causing benchmarks to be missed and the project to essentially stall - mention of that fact would have come out in the texts. In fact, the texts contain no such messages with words such as, "Huff is slowing down the build", or "Huff is changing his

mind so much we will not be able to get this done on time." Because there were no such comments, which the Court as the finder of fact certainly would have expected to see if Huff was the problem, the Court as the finder of fact does not find sufficient facts in the record to conclude Huff was the reason the project was so behind schedule.

In fact, as noted above, MacPherson by his own words acknowledged that his partner Booth was having motivation problems. This fact is buttressed by the text messages exchanged between the two.

MacPherson also testified that he was working anywhere from 40 to 60 hours per week on the project for months on end. However, the texts from the limited time period of early November 2017 to late January 2018 indicate there were activities other than work on the project that took place during the workweek, when one would expect a person who was putting in that much time on a project would be busy attempting to reach the benchmarks they agreed to.

For example, MacPherson testified that the week of November 5 he put in 70 hours on the project. However, on November 8 after 9:00 a.m. MacPherson texts Booth that he is having breakfast with a friend and headed to the shop "in a bit." Towards the end of the week on a Saturday MacPherson advises he is not at the shop and "hanging" with a friend, and also "might enjoy outside for a minute." This Court is well-aware of what a 70-hour work week requires, and it involves no free time.

The following Monday Booth, after 9:00 a.m., advises he needs to take someone to the airport and order some parts and would not be into the shop until

later in the afternoon. He also suggests MacPherson should work on his truck that day, not the project, leading the Court to find MacPherson and Booth were engaged in other endeavors at the time. MacPherson demurs and says he has other things he can do on the Unimog project. The same week neither Booth nor MacPherson are in the shop as of 11:25 a.m. on a Tuesday. On November 16 MacPherson advises he has food poisoning. During the trial MacPherson testified he worked 70 hours this week. On November 23 Plaintiffs again refer to MacPherson working on his truck.

On December 4, a week when MacPherson testified he worked 50 hours, the parties met at the shop at 10:00 a.m. after getting coffee and Booth advising he would spend most of the day doing work not associated with the project. The afternoon of December 5 – a Tuesday – Booth advises he would be at the shop in the evening as he had been skate skiing and having dinner with a friend. On December 6 at 2:22 p.m. Booth asks MacPherson when he would be at the shop and MacPherson advises he was on his way, the next day he says he would be there in the afternoon.

MacPherson testified he worked 60 hours on the project the week of December 10. On December 10 he let Booth know he would be at the shop after 12:15 p.m. On December 15 Booth stated he was "not feeling super urgent" and "I kinda don't care that much. The fucker will be done when it's done." On December 17 Booth asks MacPherson if they should delay the project. He states he is "pretty confident we could finish by mid to late February" but not sure they "want to work that hard." MacPherson emphatically rejected Booth's proposal

and was clear he wanted to get the project done in a timely manner. Based on Booth's comments, the Court finds he was not of a similar mind.

The week of December 17 MacPherson testified he worked 40 hours. The first day of the workweek - December 18 - he texted he was at the coffee shop until noon. The second day of the workweek - December 19 - he texted he was running errands all morning. On December 20 Booth discussed starting the Espar Airtronic heater in the Ford – once again leading the Court to find Plaintiffs were involved with other projects during the time they were building the unit for Defendants. On January 11, 2018, they discussed doing a fitting and design for MacPherson's truck. MacPherson testified he worked 50 hours that week on the project.

During cross-examination MacPherson admitted he did not keep daily or weekly time records of how many hours he spent working on the project. He also admitted he could not provide details about the hours he claimed he worked. Given the absence of contemporaneous timesheets or any other record-keeping system, the fact Plaintiffs were working on other projects when they were also working on the Unimog box, and that MacPherson testified he worked extremely long hours during weeks when he also engaged in other non-Unimog related projects, the Court is not persuaded he worked the hours testified to at trial. Booth did not present, and the Court finds that he could not testify with any degree of accuracy, the hours he put into the project.

The text messages from January 18, 2018 onward demonstrate the deterioration of the relationship between the parties, beginning with Booth's

comment, "We should send them on their way ..."; and MacPherson's response, "My dad will take care of us." Later MacPherson and Booth agreed between themselves to get the project to Benchmark 4, and beyond that they could not confirm a schedule because there were "too many unknowns." MacPherson explains the need for that approach to have been: Booth needs to travel, MacPherson needs to keep working, they were not being appreciated, MacPherson was "not cool with that", and it was a "respect thing." The Court finds none of those circumstances justify not completing the project or delaying completion of the same.

Two days later, on January 20, Booth tells MacPherson, "And we both know we cut them loose in the very near future." However, before Plaintiffs cut the Defendants loose, Pasek sent an email to MacPherson on January 22 stating: "In an attempt to make it crystal clear, suspend all work on our Unimog Camper project. Do not purchase any materials for our Unimog Camper. Do not spend money out of our materials account."

Huff testified that he and Pasek returned to Bozeman on January 7 to put "eyes on the project." When they got back the unit was an aluminum box. He testified that they asked MacPherson for detailed assurances about who was going to do what and when so they could be sure the project would get done by a firm date with a detailed schedule and plan. They did not get a timeline with the schedule and plan they asked for, thus prompting the January 22 directive from Pasek.

On January 23 MacPherson asked Booth, "At this point would you be willing to finish it as agreed in the contract?" Booth responds, "Like finish it to the end? Fuck no!" On February 1, 2018, Booth told MacPherson, "Yessir. That is the play. Back to the original plan. Force them into breaching the contract." The Court finds these statements and the ones from January 18 show Booth and MacPherson were seeking to terminate, not complete the contract, which makes their claim that Defendants breached the contract by anticipatory repudiation ring hollow.

Further with respect to getting the project to Benchmark 4, the contract stated that benchmark was estimated to be reached by December 1, 2017. However, at the time MacPherson was communicating about reaching Benchmark 4, neither he nor Booth had fully completed Benchmark 3. This is because Benchmark 3 required that the "box be installed to frame." While Booth had placed the box on the Unimog to do a test drive, the evidence does not show the box was installed to the frame. The fact the box continues to sit in a storage unit detached from the Unimog to this date further supports this finding.

The agreement contains a schedule where each benchmark would take a month to complete. MacPherson acknowledged in his January 23, 2018 texts they needed to figure out how to get the project to Benchmark 4 and then get Defendants "out the door." Benchmark 4 was supposed to be done by December 1, 2017. Based on this fact and the Court's finding MacPherson and Booth were also behind on Benchmark 3, it is clear it was taking them almost

twice as long to reach the benchmarks compared to the schedule set forth in the agreement.

To his credit, MacPherson attempted to reach a resolution with Defendants. After Pasek sent the January 22, 2018 email directing that work on the project cease, MacPherson met with Pasek in late January to remedy the situation, but to no avail. In an email dated February 11, 2018, MacPherson proposed 3 options for resolving the impasse. Option 2 entailed the Plaintiffs "committing to a delivery date of April 7th delivering your Unimog Camper up through Benchmark #4." If that had transpired Benchmark 4 would have been completed more than 5 months behind schedule on a contract that was supposed to be done in 5 months – in excess of a 100% delay. The parties were not able to find an acceptable solution. MacPherson placed the box in storage where it sits today.

Based on the Court's findings of fact, including but not limited to the substantial delay in progress getting the box to the benchmarks on the agreed upon dates, the finding that even if they missed the February 15, 2018 completion date MacPherson and Booth had no reliable date for when they would actually get the project done, that the lead designer on the project – Booth – had motivation problems that continued despite efforts to remedy the same by both MacPherson and Defendants, completing the project by mid-March was not realistic given it was taking approximately two months to complete each benchmark and there were still more than two benchmarks to go in mid to late January, Defendants were under no obligation to wait indefinitely for Plaintiffs to

complete the project, and Defendants made timely, complete payments per the terms of the Agreement, the Court finds Plaintiffs were in breach of the agreement to build a custom expedition cabin for the 1990 Unimog U1300/L.

There was an issue as to whether overhead expenses for rent, utilities or insurance were paid by Aerocontinental as set forth in the contract. The Court finds the payment or non-payment of those expenses did not result in ascertainable damages to the Defendants. However, given the Courts finding in favor of Defendants on the breach of contract claim, those expenses will be reimbursed at least in part through the judgment of the Court.

With respect to the purchase of the Mercedes Sprinter van, the Court finds Defendants could have proceeded with completion of the camper with another builder and that purchase of the Sprinter van was not a replacement for the Unimog camper cabin but was rather a replacement for the Lexis that could also serve Defendants' needs to pursue their trip overseas. Pasek testified to as much when she agreed the Sprinter was a replacement for the Lexis which was "getting tired." Defendant Huff also testified that Defendants still owned the Unimog, thus the Court finds if the Defendants really want to have a camper unit on that vehicle they could take possession of the shell, finish the interior, have it mounted on the Unimog and be ready to overland with that setup. Thus, the breach of the agreement by MacPherson and Booth was not the proximate cause of damages Defendants claim with respect to the purchase of the Mercedes Sprinter.

Similarly, Defendant Pasek testified about a broad array of incidentals for which she sought damages. For the same reason the Court declines to award damages for the purchase of the Sprinter, the Court does not award damages for these incidentals. Also, on cross-examination Pasek admitted many of the items listed in the exhibits supporting the claim for these damages had no connection to the Unimog project or the purchase of the Sprinter van. The Court finds and concludes the breach of the agreement by MacPherson and Booth was not the proximate cause of damages Defendants claim with respect to these incidental purchases.

The Court finds MacPherson and Booth did not engage in fraudulent conduct during the course of their dealings with Defendants. Based on the evidence presented to it the Court finds the differences between the parties arose from a breakdown in the relationship and a delay in production that ended in a breach of the contract.

The Court finds MacPherson and Booth did not engage in constructive fraud during the course of their dealings with Defendants. Based on the evidence presented to it the Court finds the differences between the parties arose from a breakdown in the relationship and a delay in production that ended in a breach of the contract.

The Court finds MacPherson and Booth did not engage in behavior that violated public policy during the course of their dealings with Defendants. The Court also finds the Plaintiffs did not engage in unfair or deceptive acts or practices during the course of their dealings with Defendants. Based on the

evidence presented to it the Court finds the differences between the parties arose from a breakdown in the relationship and a delay in production that resulted in a breach of the contract.

Based on the evidence presented to the Court in the 5-day judge trial, the Court finds the overwhelming amount of evidence presented by both parties directly addressed issues concerning breach of the agreement, thus the Court finds the amount of time and effort expended on issues related to the Consumer Protection Act were minimal. Section 30-14-133(3), MCA, states the Court "may award the prevailing part attorney fees incurred in prosecuting or defending the action." Because so little of the case revolved around allegations of unfair or deceptive acts or practices in the conduct of trade or commerce, and the Court did not find evidence of such act, the Court finds and concludes this case was a breach of contract proceeding and declines to award attorney fees to either party. Moreover, as the Act references an award of attorney fees to "the prevailing party", and ostensibly Booth and MacPherson prevailed in the Consumer Protection Act claim, it does not make sense to award fees to them since they in fact did not prevail in the case in chief.

The Court finds Plaintiffs did not engage in behavior that constituted tortious interference with business relations during the course of their dealings with Defendants. Based on the evidence presented to it the Court finds the differences between the parties arose from a breakdown in the relationship which ultimately culminated in a breach of the contract.

Plaintiffs MacPherson and Booth organized AeroContinental, LLC, a Montana limited liability company, on July 31, 2017. Its principal place of business was in Gallatin County. The Defendants were AeroContinental's only clients. Plaintiff dissolved AeroContinental, LLC on October 11, 2018.

Between January 17-22, 2018, MacPherson and Booth exchanged many comments about the contract and AeroContinental, LLC. The Court finds the following to be illustrative of their approach to the situation: On the 17th Booth said, "I'm going through the contract looking for things to cut." On the January 18 MacPherson said, "We are gonna take care of this, let's keep them in the dark until Saturday." On January 22 Booth suggests, "If you want to insulate ourselves from the liability of this Mog thing, we could always dissolve the entity that has the liability ..." MacPherson asks, "Is that legit?" Booth replies, "Cash out R+L, tell them to pick up their shit, business closed. Done deal."

Any findings of fact contained in the below Conclusions of Law are hereby incorporated into these Findings of Fact.

CONCLUSIONS OF LAW

Any legal conclusions contained in the foregoing Findings of Fact are hereby incorporated into these Conclusions of Law.

The Court concludes Plaintiffs breached the contract entered into between the parties and are liable for the damages resulting to Defendants from that breach. The Court further concludes Plaintiffs did not commit tortious interference with business relations, fraud, constructive fraud, or violate the

Montana Consumer Protection Act, and are not liable to Defendants on those claims. Nor have Plaintiffs committed any conduct warranting an award of punitive damages to Defendants. Defendants did not breach the contract between the parties.

Count III of Defendants' Amended Counterclaim alleges MacPherson and Booth are personally liable to Defendants for damages in an amount to be proven at trial. MacPherson and Booth deny such liability, citing their membership in the LLC, AeroContinental.

The intent of the limited liability company, or LLC, form of organization is to provide a corporate-style liability shield with the pass-through tax benefits of a partnership. *White v. Longley*, 2010 MT 254, ¶ 34, 358 Mont. 268, 244 P.3d 753 (citing the Official Comments to § 35-8-101, MCA). While LLCs may provide a shield to members, the protection is not absolute and individual members of an LLC can be subject to personal liability. *White*, ¶ 35. Whether such liability exists depends on the individual facts of the case at hand.

Section 35-8-304, MCA, reflects the liability language of the 1996 Uniform Limited Liability Act, and provides, in part:

> A person who is a member or manager, or both, of a limited liability company is not liable, *solely by reason of being a member or manager*, or both, under a judgment, decree or order of a court, or in any other manner, for a debt, obligation, or liability of the limited liability company, whether arising in contract, tort, or otherwise or for the acts or omissions of any other member, manager, agent, or employee of the limited liability company.

(emphasis added). In *White,* the Montana Supreme Court interpreted this section to allow personal liability against a member or manager of an LLC based

upon contract or tort if the member would be liable if acting in an individual capacity. *White*, ¶ 37. The Supreme Court held the individual defendant in *White*, who was a member or manager of the defendant LLC, was subject to personal liability for plaintiff's claims because his own actions in the construction of plaintiff's home caused damage and were actionable against him in both contract and tort. *White*, ¶ 38.

In contrast, in *Weaver v. Tri-County Implement, Inc.*, 2013 MT 309, 372 Mont. 267, 311 P.3d 808, the Montana Supreme Court held an LLC member was not jointly and severally liable for obligations incurred on behalf of an LLC of which he was a member. In that case, Weaver claimed he was not personally liable, either in tort or contract, for the LLC's failure to pay an obligation under a service contract because the contract was entered into by the LLC, not Weaver personally, and Weaver never assumed personal responsibility for payment of the contract. *Weaver*, ¶ 11. The Montana Supreme Court agreed, determining that Weaver was not personally obligated for the debts of the LLC and had not committed any wrongful conduct which could have subjected him to individual liability. *White*, ¶¶ 17-18.

The Court concludes the present case is more like *White* than *Weaver*. Here, the contract at issue was signed by both MacPherson and Booth, MacPherson and Booth met with Defendants and personally discussed and negotiated the agreement, and MacPherson and Booth were both directly and intimately involved in the project throughout its existence. Moreover, unlike *Weaver* where the member seeking liability protection via the LLC had not made

"any other promises" related to the performance or non-performance of the contract (*Weaver*, ¶ 17), here the Court has found both individual members of AeroContinental made representations and promises throughout the period of performance of the contract, including, but not limited to, details of the build, when the project would be complete, and ways to modify the agreement.

Both Booth and MacPherson communicated directly with Defendants throughout the course of the build. The communications included representations related to the contract. Defendants relied upon these representations. The representations included development of the design, exchange of ideas, progress towards timelines, motivation for Booth when there was concern he was losing interest in the project, an offer of resolution by Booth with respect to buying out Defendants, and efforts by MacPherson and Booth whereby they directly communicated with Defendants to satisfy elements of the agreement when the situation soured. The Court concludes this course of conduct by Booth and MacPherson demonstrates they were personally engaged in acts or omissions that would be actionable against them individually in contract. The Court concludes this is the type of conduct that would cause one to be exposed to liability if they were acting in an individual capacity. Consistent with *White* and *Weaver* the Court concludes Booth and MacPherson are individually liable for the contract counterclaims asserted by Defendants.

The essential elements of a contract, whether written or oral, are: (1) identifiable parties capable of contracting; (2) their consent; (3) a lawful object; and (4) a sufficient cause or consideration. Section 28-2-102, MCA.

If a contract does not specify a time of performance, then a reasonable time is allowed under § 28-3-601, MCA, and to determine what constitutes a reasonable time can be a question of fact or a question of law. If the facts are clearly established or undisputed, then it is a question of law solely for the courts to decide. *First Sec. Bank v. Vander Pas*, 250 Mont. 148, 818 P.2d 384 (1991).

By agreeing to an "estimated completion date" of February 15, 2018, the parties did not agree to a specific time of performance. Given the facts of the case, however, the Court concludes a reasonable time for performance would have been within a few weeks to a month of the estimated completion date. At trial it was clearly established and undisputed that MacPherson and Booth could not provide a firm date for when the project would be finished, and never provided a revised completion date. In fact, Booth explicitly stated he had no intention of completing the build, and MacPherson could only guarantee a completion of Benchmark 4 by April 7, 2018. The Court concludes no time for performance is not a reasonable time for performance. Accordingly, Booth and MacPherson did not finish the project in a reasonable time as required by the Agreement and § 28-3-601, MCA.

In a breach of contract action, the proper measure of damages "is the amount which will compensate the party aggrieved for all the detriment which was proximately caused thereby or in the ordinary course of things would be likely to result therefrom." Section 27-1-311, MCA; *Tin Cup County Water v. Garden City Plumbing & Heating, Inc.*, 2008 MT 434, ¶ 40, 347 Mont. 468, 200

P.3d 60 (a party may recover all damages likely resulting and/or proximately caused by the breach).

The Court concludes Defendants had a duty to pay Plaintiffs – or AeroContinental, MacPherson and Booth – certain sums when Plaintiffs reached benchmarks per the Agreement. Defendants made payments to Plaintiffs per the agreement in the amount of $25,000, $8,500, $10,000, and $9,000 for a total of $52,500. This amount corresponds to complete payment on the build through Benchmark 3, plus an additional $1,000. Defendants previously paid Plaintiffs a design deposit of $3,000. In total Defendants paid Plaintiffs $55,500 for an aluminum box that currently is worth approximately $10,000. Plaintiffs' breach of the agreement by not fulfilling the obligation to build a custom expedition cabin caused Defendants damages in the amount of $45,500, the difference between what they paid and what they got.

Plaintiffs, through counsel, also offered Defendants $7,447.16, the amount of unspent funds from the project. To the Courts knowledge those funds remain in counsel for Plaintiffs' trust account. The $7,447.16 shall be awarded to Defendants as part of and included in the total sum of $45,500.

The Court understands that this product was a custom design for a unique vehicle and thus the intended value was specific to the needs of Defendants. However, by not following through with their promise to "facilitate all processes needed to finish the cabin" ... "and ensure they are performed to a high standard," and particularly given MacPherson's and Booth's repeated statements about either simply not wanting to finish the build or trying to get out of the

contract, the Court is left with no choice but to Order that Defendants be reimbursed for the investment they made in a product whose value is almost entirely dependent on it being finished.

Defendants have requested an award of their attorney's fees incurred in litigating this case. "A court may award attorney fees only where a statute or contract provides for their recovery." *Blue Ridge Homes, Inc. v. Thein*, 2008 MT 264, ¶ 78, 345 Mont. 125, 191 P.3d 374. The Court concludes there is no applicable statutory or contractual provision in this case which would authorize an award of attorney's fees to either party. However, as the prevailing party in this matter, Defendants are entitled to an award of their costs of suit as provided by Rule 54(d), M.R.Civ.P., and § 25-10-101, MCA.

ORDER

Based on the foregoing Findings of Fact and Conclusion of Law, the Court enters the following ORDER:

1) Plaintiffs breached the contract between the parties and are liable, jointly and severally, for damages to Defendants in the amount of $45,500. All other claims asserted by any of the parties are denied.

2) Defendants shall have 90 days from the date of this Order to retrieve the box. If they decide not to take possession of the box, then they forfeit the $10,000 in value the Court assigned to the same. That is their decision. If they want the box they can make arrangements through counsel, or the parties can work directly with each other, to make arrangements for its retrieval. If the Defendants do not take possession of the box within 90 days of

the date of this order, they forfeit possession of the box and it becomes the sole possession of Graeme MacPherson.

3) No party is entitled to attorney's fees incurred in litigating this matter.

4) Defendant are awarded their costs of suit as provided in Rule 54(d), M.R.Civ.P., and § 25-10-101, MCA.

DATED this 14th day of June 2021.

Peter B. Ohman
District Court Judge

Cc: James Kommers
Gary Walton

Emailed 6/14/21