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Bowen Greenwood  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

Case Number: DA 22-0194

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Clerk of Supreme Court  
State of Montana

*ATTORNEYS FOR DEFENDANT/APPELLEE*

**IN THE SUPREME COURT OF THE STATE OF MONTANA**

**No. DA 22-0194**

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**SERGIO VALDEZ SALAS,**

Plaintiff and Appellant,

v.

**WENDY'S,**

Defendant and Appellee.

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**WENDY'S MOTION TO DISMISS APPEAL**

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Appellee Wendy's, which is owned and operated by Wentana, LLC ("Wendy's"), respectfully moves the Court, pursuant to M. R. App. P. 6 and 19(2), for an Order dismissing the instant appeal filed by Appellant Sergio Valdez Salas. Consistent with M. R. App. P. 16(1), the undersigned attempted to contact Valdez

Salas to discuss whether he objects to this Motion but was not able to reach him. Based on the relief requested herein, Wendy's assumes he opposes.

### **STATEMENT OF THE ISSUE**

Whether the Court should dismiss Valdez Salas's appeal because he appeals an Order that is not appealable under M. R. App. P. 6.

### **BACKGROUND**

In May 2021, Valdez Salas filed a Complaint against Wendy's in the Thirteenth Judicial District Court, Yellowstone County, Cause. No. DV 21-0594, alleging unlawful discrimination. (Doc. 1.) Wendy's moved to dismiss Valdez Salas's Complaint pursuant to Montana Rule of Civil Procedure 12(b)(1), arguing that the District Court lacked subject matter jurisdiction. (Docs. 5 & 6.) Specifically, Wendy's reasoned that Valdez Salas had not exhausted his administrative remedies under the Montana Human Rights Act, which provides the exclusive remedy for claims of discrimination. (*Id.*) Valdez Salas never responded to Wendy's Motion to Dismiss, which the District Court granted in July 2021. (Doc. 7.) The District Court ordered Valdez Salas's Complaint dismissed without prejudice. (*Id.*)

On April 11, 2022, Valdez Salas filed a Request for Hearing in the dismissed matter. (Doc. 8.) The District Court denied Valdez Salas's request the same day, explaining that the "matter was dismissed without prejudice on July 15, 2021." (Doc. 9.) Valdez Salas appeals that April 11, 2022 Order. (Doc. 10.)

## ARGUMENT

Valdez Salas has appealed an Order that is not appealable under Montana's Rules of Appellate Procedure. A party to a civil case may appeal from a final judgment and from certain final orders. M. R. App. P. 4(1)(a); 6(1), (3). A final judgment "conclusively determines the rights of the parties and settles all claims in controversy." M. R. App. P. 4(1)(a). Rule 6(3) governs appeals from orders in civil cases and enumerates the types of final orders from which an aggrieved party may appeal.

The District Court's April 11, 2022 Order denied Valdez Salas's request for a hearing in a matter that it had dismissed without prejudice almost nine months earlier. (Doc. 9.) The Order served as a reminder that the matter was previously dismissed without prejudice; it is not a final judgment that conclusively determines the parties' rights and settles all claims, and it does not fall into any of the categories of orders listed in Rule 6(3).<sup>1</sup> Accordingly, Valdez Salas has not appealed an order that the Court may consider on appeal.

Further, even if the Court decided to consider whether Valdez Salas intended to appeal the District Court's July 2021 Order granting Wendy's motion to dismiss (Doc. 7), the Court should still dismiss Valdez Salas's current appeal for two reasons. First, an order dismissing a complaint without prejudice is not a final

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<sup>1</sup> The Order is not appealable under M. R. App. P. 6(3)(a) because the District Court's July 2021 Order was not a final judgment, as explained herein.

judgment and cannot be appealed absent special circumstances. *Farmers Union Mut. Ins. Co. v. Bodell*, 2008 MT 363, ¶ 18, 346 Mont. 414, 197 P.3d 913. “Special circumstances may include the running of a statute of limitations, language in the order of dismissal indicating that the complainant will not be permitted to re-plead, or where the practical effect of the order of dismissal terminates the litigation in the complainant’s chosen forum.” *Id.* The District Court dismissed Valdez Salas’s Complaint without prejudice, and there is no indication that special circumstances existed. (Doc. 7.) Accordingly, the July 2021 Order is not a final judgment from which Valdez Salas could have appealed. *See Bodell*, ¶ 18.

Second, a notice of appeal must be filed with the Clerk of the Supreme Court within 30 days from the date of the order from which the appeal is taken. M. R. App. P. 4(5)(a)(i). Valdez Salas filed his notice of appeal in April 2022, almost nine months after the District Court issued its July 2021 Order dismissing the Complaint without prejudice. (*Compare* Doc. 7 with Doc. 10.) Thus, even if Valdez Salas could have appealed the District Court’s July 2021 Order, Valdez Salas’s appeal would not be timely because he filed his notice of appeal well outside of the 30-day appeal window.

Ultimately, the District Court’s Orders in the case below are not dispositive of Valdez Salas’s discrimination claim. If Valdez Salas wished to litigate this matter, he needed to follow proper procedure before, during, and after the mandatory administrative proceedings. Given the record on appeal, dismissal is appropriate

under M. R. App. P. 19(2) because Valdez Salas has not contested an appealable order under Montana's Rules of Appellate Procedure.

### **LIST OF SUPPORTING AUTHORITY**

1. Montana Rules of Appellate Procedure 4 (defining final judgment), 5 (setting time limits to file a notice of appeal), and 6 (enumerating appealable orders).
2. *Farmers Union Mut. Ins. Co. v. Bodell*, 2008 MT 363, 346 Mont. 414, 197 P.3d 913 (holding that an order dismissing a complaint without prejudice is not a final judgment that may be appealed absent special circumstances).

### **STATEMENT OF RELIEF SOUGHT**

Wendy's respectfully requests that the Court dismiss Valdez Salas's appeal pursuant to M. R. App. P. 6 and 19(2).

DATED this 7<sup>th</sup> day of June, 2022.

**CHRISTENSEN & PREZEAU, PLLP**

By:   
**Vicki Bignell**  
*ATTORNEYS FOR DEFENDANT/APPELLEE*

### **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 16(3) of the Montana Rules of Appellate Procedure, I certify that the foregoing **MOTION TO DISMISS** is printed with proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is not more than 1,250 words.

Dated this 7<sup>th</sup> day of June, 2022.

By:   
**Vicki Bignell**  
*ATTORNEYS FOR DEFENDANT/APPELLEE*

### **CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing **MOTION TO DISMISS** was served by U.S. Mail, postage prepaid, on this 7<sup>th</sup> day of June, 2022, to the following:

SERGIO VALDEZ SALAS  
P.O. Box 22722  
Billings, MT 59104  
*PLAINTIFF PRO SE*

By:   
Lukas Illion