IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 24-0531

HOMERIVER GROUP,

Plaintiff and Appellee,

v.

ANDERS BUSINESS SOLUTIONS, LLC,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

On Appeal from the Fourth Judicial District Court, Cause No. DV-32-2024-457,
the Honorable Robert L. Deschamps, III presiding.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

INTRODUCTION

This is a commercial property unlawful detainer case. The owner and lessor of the property and real party in interest is Louis Gingerelli. However, Gingerelli is not a party to this case. Gingerelli's property manager is Summit Property Management. Summit is not a party to this case. Summit's assumed business *name* is "HomeRiver Group." The *name* is the Plaintiff in this case that is seeking to evict the tenant. The name "HomeRiver Group" is not a legal entity, nor the real party in interest.

The original 1996 lease was between Gingerelli and Don Davenport. After Don died, Don's family continued to lease the property from Gingerelli through Don's son Jim and Don's family's trust called "Anderson Trust." Anderson Trust is the tenant of the property and holds the lease between it and Gingerelli. Strangely, however, HomeRiver Group did not bring the detainer case against Anderson Trust. Instead, HomeRiver Group sued Anders Business Solutions, LLC (hereinafter, "LLC"). The LLC is not the tenant. HomeRiver Group has no lease with the LLC. HomeRiver Group does not even state any claim against the LLC in its Complaint. The only claim that HomeRiver Group states is against non-LLC "Anders Business Solutions," which is not even an entity. "Anders Business Solutions" is simply an assumed business name for Aileen Davenport. It is not the same as the Defendant LLC, which *is* an entity.

In summary, the *name* HomeRiver Group sued the non-tenant LLC for unlawful

detainer of commercial property that Anderson Trust and its predecessors had been leasing from the owner and real-party-in-interest Louis Gingerelli for 28 years. HomeRiver Group was not the lessor or real party in interest, nor a legal entity capable of suing, and therefore lacked standing to bring the suit. Furthermore, Defendant LLC was not the lessee—the Anderson Trust was the lessee. Plaintiff HomeRiver Group failed to state any claim against the LLC.

The Justice Court should have dismissed the case for lack of jurisdiction.

The LLC appeared and answered the Complaint through its Trust's Trustees without an attorney in reliance on § 25-31-601, MCA. ("Parties in justice's court may appear and act in person or by attorney…Any person…may act as attorney for a party…a member with a majority interest in a limited liability company [here, the Anderson Trust]…may act as attorney for the limited liability company.")

Despite the statute specifically authorizing non-attorneys to appear for a party in Justice Court, the Justice Court *sua sponte* erroneously demanded that the LLC immediately obtain counsel within a mere 5 days. The Justice Court erroneously relied on the law applicable to non-attorneys in *District Court* cases, not *Justice Court* cases, and completely ignored the statute authorizing non-attorneys to act as attorneys for parties in Justice Court.

The Anderson Trust Trustees diligently tried, but were unable, to obtain counsel and informed the Justice Court of their difficulty. Nevertheless, the Justice Court

struck all of the LLC's filings, entered the LLC's default and issued an Order of Possession and Writ of Assistance to the Sheriff ordering the Sheriff to evict the Anderson Trust tenant's personnel and all their property from the premises.

The Trust was finally able to obtain counsel for the LLC. The LLC appealed the order prohibiting the LLC Trust's Trustees from representing the LLC and the entry of default to the District Court and moved for a stay of the Justice Court proceedings. While the appeal and motion to stay was pending, HomeRiver Group caused the Sheriff to partially execute on the Order of Possession by evicting the Anderson Trust tenant's personnel from the premises, while leaving all of the Trust's hundreds of thousands of dollars of business and personal property on the premises. The Trust cannot properly operate its 62-year old business without that critical property now in the hands of its opponent.

The District Court erroneously believed that the Justice Court had entered a money judgment against the LLC. It therefore mistakenly believed that the appeal was moot because the LLC did not post an undertaking before the Sheriff had partially executed on the Order of Possession by evicting the tenant Trust's personnel. The District Court erred because there was no judgment at all, let alone a money judgment, and therefore, the LLC could not have posted an undertaking at the time it appealed. The Justice Court did not set the undertaking amount until two days after the LLC appealed. The LLC immediately paid the $8,800.00 undertaking. The Justice

Court unconditionally stated that, upon payment, "the Court will issue a stay pursuant to Rule 7(1)(2)," thus restoring the tenant Trust to the leased premises and all its property located therein. U.M.C.R.App. 7(a)(3) provides that, if an execution has been issued, on the filing of the undertaking, the Justice Court must automatically direct the execution officer to stay all proceedings on the same. Such execution officer must relinquish all property levied upon and deliver the same to the debtor (here, the LLC). The Court still retains the LLC's undertaking because the case is still on appeal. Despite the fact that the LLC paid the undertaking, the Justice Court has failed to stay the execution and the tenant Anderson Trust is still deprived of all its leasehold and its property located therein, all of which is causing extensive damages to the Trust's business.

STATEMENT OF THE ISSUES

Whether the Justice Court erred in acting without jurisdiction.

Whether the Justice Court erred in entering default against Defendant LLC.

STATEMENT OF THE CASE

An assumed business *name*—HomeRiver Group(a non-legal entity)—sued Defendant LLC for alleged unlawful detainer of commercial property that Louis Gingerelli (the actual lessor) owns and which the LLC's majority member/manager the Anderson family Trust (the actual tenant) and the Davenport family has leased from Gingerelli for 28 years. The LLC, acting through its Trust's Trustees, entered an

appearance, paid the appearance fee, filed motions, an Answer, etc. The Court recognized the legitimacy of the Trust's acts, sent court orders to the Trustees, etc. Later, without any warning or due process opportunity to be heard, the Justice Court *sua sponte* struck all of the LLC's filings on the grounds that the LLC's majority member/manager (Anderson Trust) could only file documents through an attorney. The Justice Court arbitrarily and capriciously ordered the Trustees to cause an attorney to appear for the LLC within a mere 5 days. That order was punitive, since it is practically impossible to retain an attorney in such a short time period. The Justice Court did not identify any attorney whom the Trustees could retain. Despite diligent effort by the Trustees, they were unable to retain an attorney by the deadline. To punish the Trust even further, the Justice Court therefore entered a default against the LLC and ordered the Sheriff to take possession of the premises. The Sheriff ousted the tenant Anderson Trust from the premises, but refused to let it take any of its property on the premises. Its hundreds of thousands of dollars of property is still on the premises.

The LLC appealed the Justice Court's entry of default, and other orders to the District Court. Although there was no judgment, the Justice Court set an undertaking of $8,800, which the Trust immediately paid. Despite the fact that the Trust paid the undertaking, the Justice Court refused to order the Sheriff to "relinquish all property levied upon and deliver the same to the judgment debtor," as required by Rule 7(a)(3),

U.M.C.R.App. and in compliance with its own representation that it would do so, causing massive and ongoing damages to the Lessee Trust.

STATEMENT OF RELEVANT FACTS

1. Louis Gingerelli owns the premises that are the subject of this suit. In 1996, Gingerelli and Don Davenport entered into a Lease of the property; *D. C. Doc. 12*.

2. Don Davenport and, after Don's death, his successor—Jim Davenport and the Davenport family's Trust (Anderson Trust)—signed several extensions of that Lease with Gingerelli; *Id.*

3. In 2018, Gingerelli's former property manager (Summit Property Management, Inc.) made an offer to Jim Davenport ("Jim") to personally renew the lease of the property. It said that if Jim wanted to continue the tenancy with Gingerelli, Jim should acknowledge his desire by returning a copy of the proposal with his signature. The offer stated that, upon Jim's returning of the signed proposal, "we will draw up a new lease;" *Id.*

4. In response to the offer, the Anderson Trust made a counteroffer to Gingerelli regarding the terms of the referenced "new lease." Jim signed the proposal in his capacity as Trustee and gave it to Gingerelli, along with Anderson Trust's proposed lease terms; *Id.*

5. Louis Gingerelli and Anderson Trust executed the referenced "new lease" in December, 2018; *Id.*

6. The Lease is non-assignable; Gingerelli could not assign it to HomeRiver Group and HomeRiver Group does not allege that Gingerelli assigned it to HomeRiver Group; *Id.*

7. At no time did the named Defendant—Anders Business Solutions, LLC—ever enter into any lease of the premises; *Id.*

8. The Lessee of the premises is Anderson Trust, not the LLC; *Id.*

9. When HomeRiver Group's representative threatened to sue the LLC, the Anderson Trust Trustee told her that the real party in interest—Lessor, Louis Gingerelli—should sue the Lessee, Anderson Trust. HomeRiver also knew from the Secretary of State records that Anderson Trust was the manager of the LLC; *Id.*

10. HomeRiver refused, and in bad faith, it, rather than the Lessor Gingerelli, sued the LLC, despite the fact that the LLC has never leased the premises from anyone; *Id.*

11. On April 30, 2024 the Justice Court issued an Order striking the Trust's Court filings because the Court *sua sponte* erroneously held that the LLC had to be represented by counsel in Justice Court. *D. C. Doc. 19.10*.

STANDARD OF REVIEW

On appeal from the district court's review of the justice court decision, this Court examines the record independently to determine whether the justice court's findings of fact meet the clearly erroneous standard, whether its discretionary rulings were an

abuse of discretion, and whether its legal conclusions were correct. *State v. Eystad*, 2017 MT 29, 389 P. 3d 1014.

SUMMARY OF ARGUMENT

The Justice Court erred in failing to dismiss the Complaint and exercising jurisdiction over this case because HomeRiver Group fails to state a cognizable legal claim against Anders Business Solutions, LLC.

The Court erred in refusing to allow the Trustees of the Trust that is the real party in interest and the manager/majority member of the LLC to represent the LLC and in striking the LLC's filings and entering its default despite the fact that it had appeared and paid the appearance fee.

The Court erred failing to afford the LLC due process of law before imposing the sanction of default.

The Court erred in failing to dismiss the Complaint and exercising jurisdiction over this case because 1) Plaintiff HomeRiver Group is not a "person," nor does it exist, and therefore, lacks standing to assert any claim against Defendant LLC;
2) Plaintiff HomeRiver Group is not the owner of the premises, and therefore lacks standing to assert any claim against the LLC for rent or possession of the premises.

ARGUMENT

I. The Court Erred in Not Dismissing the Complaint because it fails to state a cognizable legal claim against the LLC.

Nowhere in the Complaint does HomeRiver Group ever state a claim against the limited liability company known as "Anders Business Solutions, LLC." The name "Anders Business Solutions, LLC" appears nowhere in the body of the Complaint.

The only reference in the Complaint is to "Anders Business Solutions." However, "Anders Business Solutions" is not the Defendant LLC. "Anders Business Solutions, LLC" is a limited liability company. "Anders Business Solutions" on the other hand is merely an assumed business name for an individual named Aileen Davenport and is not an entity. HomeRiver Group never entered into any lease with non-entity Anders Business Solutions and does not even allege such a lease ever existed.

HomeRiver Group appears to base its claim on *Exhibit D* to the Complaint titled "Commercial Lease Renewal Offer." The "Offer" does not refer to Anders Business Solutions, LLC. It is signed by Jim Davenport in his individual capacity. It was not signed by Jim Davenport on behalf of the LLC. The name "Anders Business Solutions, LLC" appears nowhere on that document nor on any other document upon which HomeRiver Group relies.

Section 35-8-301(2)(b), MCA states that an LLC is not bound by any instrument unless the instrument is signed by a LLC's manager in the name of the limited liability

company. ("[T]he act of a manager, including…the execution of any instrument in the name of the limited liability company…binds the limited liability company.") The Secretary of State's office shows that the manager of the LLC is Anderson Trust and HomeRiver Group is charged with that knowledge. Plaintiff HomeRiver Group's failure to produce any instrument in the name of the LLC executed by its manager, Anderson Trust, bars the court from entering judgment against the LLC.

It is critical to distinguish between Jim's alleged failure to pay his own obligations on the one hand, and the LLC's alleged failure to pay Jim's obligations, on the other, when the LLC had no contractual obligation to HomeRiver *et al* to do so. Conflating the two would eviscerate the protection afforded by Montana's Limited Liability Company Act and render the LLC business form superfluous. There is no basis on which to hold the LLC liable for the Jim's alleged obligations to HomeRiver *et al.* Because the LLC is not identified in the Commercial Lease Renewal Offer document, and the signature of the LLC's manager (Anderson Trust) is not contained therein, the LLC is not liable on the instrument.

The court can acquire jurisdiction of any particular civil case only if the complaint discloses a claim from the facts stated, upon which the court may grant redress. *Crawford v. Pierse* (1919), 56 Mont. 371, 373, 185 P. 315, 317. The Complaint herein fails to state a claim against the Defendant LLC. Nowhere in the Complaint does HomeRiver Group ever allege that it entered into any lease with the LLC or that the

LLC is the lessee. The Complaint is facially insufficient to state a cognizable legal claim entitling the claimant to relief on the facts pled. *Stowe v. Big Sky,* 2019 MT 288, ¶ 1, 454 P.3d 655, ¶ 1.

Without an agreement between the LLC and the owner Louis Gingerelli (or HomeRiver) regarding the leasing of the property, liability against the LLC for possession of the property and rent does not lie. The Court thus erred in failing to dismiss the Complaint for lack of jurisdiction.

II. The Court Erred in Refusing to Allow the Trustees of the Trust that is the Majority Member of the LLC to Represent the LLC.

Anderson Trust is the member with a majority interest in the Defendant LLC. Section 25-31-601, MCA, states that "a member with a majority interest in a limited liability company…may act as attorney for the limited liability company" in Justice Court. In reliance on that statute, Anderson Trust, through its Trustees, filed an *Answer* and other papers with the Justice Court on behalf of the LLC. *D. C. Doc. 19.10*.

On April 30, 2024 the Court issued an Order striking the Trust's filings because the Court *sua sponte* erroneously held that the Trust's Trustees had to be represented by an attorney.

Contrary to the Court's assertion, a trust is not an entity distinct from its trustees. 76 Am. Jur. 2d *Trusts* § 3 (2005) (citing *Roberts v. Lomanto*, 5 Cal. Rptr. 3d 866 (Ct. App.

2003); *Stevens Family Trust v. Huthsing*, 81 S.W.3d 664 (Mo. Ct. App. 2002); *Dennett v. Kuenzli*, 936 P.2d 219 (Idaho Ct. App. 1997)). A trustee is the functional equivalent of the trust for the purpose of conducting litigation. *In re Ace Sec. Corp. RMBS Litig.*, No. 13-cv-1869 (AJN), 2015 U.S. Dist. Lexis 39523 (S.D.N.Y.). Rule 17, M.R.Civ.P., gives the Trustee the right to litigate as the real party in interest on behalf of the Trust. It authorizes a trustee to appear in court pro se without the trust. ("The trustee of an express trust" may sue in his "own name without joining the [trust] for whose benefit the action is brought.") Rule 17 conclusively proves that trustees of a trust are merely appearing pro se and are just the alter ego of the trust. Section 72-38-816(6), MCA, provides that, "with respect to the Trust's interest in an LLC, the Trustees can take any action that may be taken by members of the LLC." Section 72-38-816(24), MCA, provides that "a trustee of a trust can defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property." For these reasons, this Court allowed the Anderson Trust's non-attorney Trustee to appear pro se before the Court in OP 24-0310. Since this Court allows a non-attorney trustee to appear on behalf of its trust, the Justice Court clearly erred in holding that the Trustees needed a lawyer to represent the LLC in Justice Court.

Additionally, any person may act as attorney for a party in Justice Court and small claims court (§§ 25-31-601(2); 25-35-505, MCA). Therefore, the Trustees could litigate *pro se* for the LLC or their Trust. The Trustees also relied on this provision in

acting as an attorney for the LLC and their Trust. Thus, the Justice Court clearly erred in holding that the Trustees could not represent the LLC in Justice Court and in striking all the documents they filed in the Court on behalf of the LLC.

III. The Court Erred in Defaulting the Defendant LLC.

This action was for unlawful detainer. Section 70-27-109, MCA, says the provisions of Title 25 are applicable to and constitute the rules of practice mentioned in unlawful detainer actions. Rule 55(a), M.R.Civ.P., says that a default may only be entered when a party has failed to plead or otherwise defend. Here, Defendant LLC pleaded, otherwise defended and appeared through its Trustees in open court. Nevertheless, the Court defaulted the Defendant LLC because the Court struck all of the LLC's pleadings and the Trustees were unable to retain counsel for the LLC within the 5-day period arbitrarily set by the Court.

Entry of default was prohibited because the LLC was defending itself via its Trust's Trustees. The LLC showed, through its actions, an interest in defending against the lawsuit and had a meritorious defense. The Court accepted the LLC's appearance fee, filed its Motion to Dismiss, filed its Answer, issued and sent orders to the LLC, etc. *D. C. Doc. 19.10*. The LLC had defended itself within the meaning of Rule 55. Any act that demonstrates a clear intent to defend a lawsuit, even if not fully compliant with procedural rules, should prevent the entry of a default against a defendant, as courts typically interpret "otherwise defend" in rules governing default judgments to

include such actions signifying a desire to contest the claim. Here, the LLC demonstrated a clear intent to defend the lawsuit, even though its manager Trustees did not originally retain counsel under the reasonable belief that the LLC's Trust's Trustees could act as its attorney. The threat of entry of default is a deterrent to defendants who choose delay as part of their litigation strategy. However, the LLC did not choose delay as part of its litigation strategy. To the contrary, the LLC diligently participated in the litigation in good faith reliance on the statute allowing unlicensed persons to act as attorneys for LLC's in Justice Court. The Justice Court itself prevented the LLC from proceeding further in its defense on hyper-technical grounds that it had to act through a licensed attorney.

The Justice Court unjustly struck all of the LLC's filings.

The LLC was unable to immediately retain an attorney within 5 days. Inability to immediately retain an attorney is not grounds to enter default. The Justice Court should have stayed the proceedings until the LLC was able to retain an attorney. Entry of default was prohibited.

The Court essentially entered default against the LLC as a sanction for its Trustees' inability to retain counsel in five days. The Court failed to afford the LLC due process of law in imposing the sanction of default because it failed to afford the LLC an opportunity to explain why it had been unable to retain counsel after the Court struck all its filings. The Trustees had diligently, but unsuccessfully, attempted to

retain counsel from receiving notice from the Court that it demanded they retain an attorney to represent the LLC. By defaulting the LLC without giving the Trustees an opportunity to explain their difficulty in obtaining counsel after the Court struck the LLC's filings, the Court acted arbitrarily and capriciously, without conscientious judgment and in excess of the bounds of reason, resulting in substantial injustice. An abuse of discretion occurs when a court exercises granted discretion based on an erroneous conclusion or application of law, or otherwise acts arbitrarily, without conscientious judgment or in excess of the bounds of reason, resulting in substantial injustice. *Breuer v. State*, 2023 MT 242, ¶ 17, 539 P.3d 1147, ¶ 17. There is no question but that it is nearly impossible to retain an attorney within a mere five days, especially to assist in a case that is already in progress. The Court's demand that the LLC retain an attorney in such a short time period was punitive and constituted a denial of due process. Even the Court could not think of a possible attorney whom the LLC could retain. Based on its arbitrary and unjust act in striking all the LLC's filings, the Court punished the LLC based on the complete fiction that the LLC had defaulted.

The Trustees acted in good faith reliance on § 25-31-601, MCA, etc. and their interpretation of the statute was reasonable. Even if the Trustees were legally incorrect in their interpretation of the statute, the harsh sanction of default violated due process of law because the Court failed to give the LLC an opportunity to be heard on the matter of its diligence in attempting to retain counsel. This Court holds

that a difficulty obtaining counsel is relevant in determining whether a party is diligent. *See, e.g., Thos. F. Mietzel, LLC v. Creative Wealth Acquisitions, LLC*, 2023 MT 171N, ¶ 27, 534 P.3d 977, ¶ 27. This Court's policy favors trial on the merits and disfavors decision by default. *Lords v. Newman*, 212 Mont. 359, 688 P. 2d 290. The Court's failure to hold a hearing on the issue of the Defendant LLC's Trustees' diligence in attempting to retain counsel constituted a denial of due process of law. A judgment is void if the court acted in a manner inconsistent with due process of law. *Greater Msla Area Fed'n v. Child Start, Inc.*, 2009 MT 362, ¶ 21, 219 P.3d 881, ¶ 21.

"For good cause shown the court may set aside an entry of default." Rule 55(c), M.R.Civ.P. The Court should consider the following factors when determining if a defendant has shown good cause for setting aside an entry of default and these factors equally apply in considering whether the Court properly entered the Defendant LLC's default in this case: Whether (1) the defaulting party proceeded with diligence; (2) the defaulting party's neglect was excusable; (3) the defaulting party has a meritorious defense to the claim; and (4) the judgment would injuriously affect the defaulting party. *Detienne v. Sandrock*, 2017 MT 181, 400 P.3d 682. Here, Defendant LLC proceeded with diligence, the LLC did not neglect to defend, the LLC has a meritorious defense to the claim and any judgment would injuriously affect the LLC. The LLC did not default in fact. It presented a meritorious defense. The so-called

"default" is completely based on the complete fiction that the LLC did not present a defense.

The LLC's inability to retain counsel is excusable because, although it diligently attempted to retain counsel, it was unable. *Declaration*, *D. C. Doc. 9*. The LLC's Trustees searched far and wide for an attorney. They contacted hundreds of attorneys all over the State without success. Those attorneys were either too busy to take on new cases, had a conflict of interest, do not practice the law involved in the case, did not want to take a case where the Justice Court was threatening to immediately default the Defendant LLC, etc. The LLC's Trustees asked the Montana State Bar, Montana Supreme Court's Access to Justice Commission, and Western Montana Bar for referrals to attorneys who are seeking clients, all without success. There were only eight law firms in the entire State of Montana who were seeking clients through the State Bar. The LLC's Trustee contacted all eight firms without success. The LLC's Trustees did not know of any attorney who could take this case within the 5-day period allotted by the Court. Although they know that the LLC was unable to find an attorney to represent the LLC in the Justice Court, neither the Justice of the Peace nor opposing counsel ever told the LLC's Trustees of an attorney willing to take this case in the 5-day period that the Justice Court required.

The LLC could not force an attorney to represent it and should not have been punished due to that inability. A person is not responsible for that which a person cannot control. The law never requires impossibilities. §§1- 3-217; 1-3-222, MCA.

The LLC has a meritorious defense to the complaint. The default has seriously injuriously affected LLC *et al* because the LLC and its Trust (the tenant) have been evicted from the leasehold property and ability to conduct their business.

There is a strong public policy in favor of resolving disputes on the merits. *Hoyt v. Eklund* (1991), 249 Mont. 307, 311, 815 P.2d 1140, 1142. Courts do not favor defaults, and any doubts should be resolved in favor of the defaulting party.

Indeed, the Justice of the Peace himself apparently believed he had erred in entering the default. In his May 22, 2024 *Order* he said that "hoped" Defendant LLC's counsel would have moved to set aside the default and that there were "probably arguments for good cause" to set aside the default, but "alas," he no longer had "jurisdiction to entertain such a motion." The Justice ignored the fact that the LLC's counsel could not have moved to set aside the default because the case was already under appeal to the District Court when counsel appeared. The Justice Court's puzzling act in entering the default is repeated by his puzzling refusal to obey the clear law requiring him to direct the Sheriff to stay all proceedings during this appeal. Rule 7(a)(3), U.M.C.R.App., says "If an execution be issued, on the filing of the undertaking, the…judge ***MUST*** direct the execution officer to stay all proceedings on

the same." It is baffling why the Justice of the Peace would intentionally disobey the statute, especially when he knows that depriving Anderson Trust of it leasehold during the appeal is going to damage it. Counsel even provided the Justice of the Peace with a proposed order to stay the proceedings months ago, and it is still sitting on his desk.

For all these reasons, the Justice Court erred in defaulting the Defendant LLC.

IV. The Court Erred in Not Dismissing the Complaint because Plaintiff HomeRiver Group is not a "Person," nor does it have a Legal Existence, and therefore, Lacks Standing to assert any Claim against the Defendant LLC.

This appeal raises two dispositive issues of threshold justiciability and of Plaintiff HomeRiver Group's legal standing: A) Plaintiff HomeRiver Group does not exist, and B) Plaintiff HomeRiver Group does not have any legal rights that the Court can enforce. Subject matter jurisdiction is the threshold power of a court to consider and adjudicate particular types of cases and controversies. Justiciability is a mandatory prerequisite to the initial and continued exercise of jurisdiction. *Larson v. State*, 2019 MT 28, 434 P.3d 241.

A claim is not justiciable if the plaintiff lacks standing to assert the claim. Jurisprudential standing is one of several threshold justiciability prerequisites to the exercise of independently existing subject matter jurisdiction. *Hanson v. Town of Fort Peck*, 2023 MT 208, ¶ 22, 538 P.3d 404, ¶ 22.

A court lacks jurisdiction until a party is before it who is a legally-existent "person" and is a distinct legal entity capable of suing. *AP v. Mont. Senate Republican Caucus* (1997), 286 Mont. 172, 178-79, 951 P.2d 65, 69; *Decker Coal Co. v. Commonwealth Edison Co.* (1986), 220 Mont. 251, 255, 714 P.2d 155, 157; *Yamamoto v. Santa Cruz Cty.*, 606 P.2d 28, 29 (Ariz. App. 1979).

In determining whether the court has jurisdiction, the court must thus first determine whether "HomeRiver Group" is a "person" within the meaning of Rule 4(b)(1), M.R.Civ.P. IT IS NOT. "HomeRiver Group" is a mere fictitious trade "name." A "name" is not listed in Rule 4(b)(1)'s definitions of a "person." Therefore, "HomeRiver Group" is not a "person." Because "HomeRiver Group" is not a "person," the court lacks jurisdiction over this case.

The court lacks jurisdiction over a plaintiff that is a mere "name," rather than a "person." Rule 4(b)(1) states that "All *persons* found within the state of Montana are subject to the jurisdiction of Montana courts." It is well settled that a suit brought in a mere "name" instead of brought by a "person," is a mere nullity; and, in such a case, the whole action fails for lack of jurisdiction.

Furthermore, a fictitious name has no independent legal existence. *Osmo Tec Co. v. Crane Envtl., Inc.*, 884 So. 2d 324, 327 (Fla. 2d DCA 2004). Because a trade "name" does not have a legal or juridical existence, a plaintiff bringing an action solely in a trade name cannot confer jurisdiction on the court. *Decker, supra.* "[T]he most

elemental requirement of adversary litigation is that there be two or more parties," meaning that "[a]bsent a plaintiff with legal existence," there can be no case or controversy. *House v. Mitra*, 796 F. App'x 783, 787 (4th Cir. 2019) (quoting Wright & Miller § 3530). Legal existence is a basic threshold; it serves as a prerequisite for having capacity to sue. *Adelsberger v. U. S.* (2003), 58 Fed. Cl. 616. In other words, for Plaintiff Home River Group to sue, "HomeRiver Group" must have a legal existence. As noted, "HomeRiver Group" is a mere fictitious trade "name" and does not have a legal existence. Thus, "HomeRiver Group" is not a sui juris legal entity that has capacity to sue. "Names" cannot act on their own. Because this action lacks adverse parties, the Court lacks subject matter jurisdiction.

In *Just Rests. v. Thames Rest. Grp., LLC* (2017), 172 Conn. App. 103, 107-08, 158 A.3d 845, 848, the Court explained: "It is elemental that in order to confer jurisdiction on the court the plaintiff must have an actual legal existence, that is he or it must be a person in law or a legal entity with legal capacity to sue…Although a corporation is a legal entity with legal capacity to sue, a fictitious or assumed business name, [or] a trade name, is not a legal entity; rather, it is merely a description of the person or corporation doing business under that name…*Because the trade name of a legal entity does not have a separate legal existence, a plaintiff bringing an action solely in a trade name cannot confer jurisdiction on the court*"…*America's Wholesale Lender v. Pagano*, 87 Conn. App. 474, 477, 866 A.2d 698 (2005); see also *Greco Construction v. Edelman*, 137 Conn. App.

514, 518-20, 49 A.3d 256 (2012); *Coldwell Banker Manning Realty, Inc. v. Cushman & Wakefield of Connecticut, Inc.*, supra, 136 Conn. App. 687-91; *America's Wholesale Lender v. Silberstein*, 87 Conn. App. 485, 486, 866 A.2d 695 (2005). In the present case, it is undisputed that the named plaintiff was a trade name or assumed business name of John Russo, doing business as Just Restaurants Business Brokers. Pursuant to our law, the initiation of the action solely by the named plaintiff, which is not a legal entity and does not have a separate legal existence, cannot confer jurisdiction on the court; a dismissal, therefore, is required."

Likewise, the court in *Patterson v. V & M Auto Body* (1992), 63 Ohio St. 3d 573, 574, 589 N.E.2d 1306, 1308, stated "It is well established that both plaintiff and defendant in a lawsuit must be legal entities with the capacity to sue or be sued. Cf. Civ.R. 17(B); *Barnhart v. Schultz* (1978), 53 Ohio St.2d 59, 61, 7 O.O.3d 142, 143, 372 N.E.2d 589, 591; *Baker v. McKnight* (1983), 4 Ohio St.3d 125, 4 OBR 371, 447 N.E.2d 104."

It is well-established that a trade name cannot sue. *Diesel Machinery, Inc. v. Manitowoc Crane Group*, 777 F.Supp.2d 1198, (D.S.D. 2011) (collecting cases); *Habibian v Sudmann's Serv.*, 57 Misc. 3d 770, 775 ("A trade name has no separate legal existence from the person doing business under that name."); *Jordan v. Grace Living Ctrs.* No. CIV-19-654-G (W.D. Okla., 2020) ("A trade name is not a separate legal entity."); *Gen. Ins. Co. of Am. v. Clark Mall, Corp.* (N.D. Ill. 2009), 631 F. Supp. 2d 968; *Gulisano*

v. Cohen (11th Cir. 2022), 34 F.4th 935, 943; *Kahn v. Imperial Airport, L.P.*, 308 S.W.3d 432, 438 (Tex. App. 2010) ("[a] DBA is no more than an assumed or trade name. And it is well-settled that a trade name has no legal existence."); *Steer Wealth Mgmt., LLC v. Denson* (Tex. App. 2017), 537 S.W.3d 558, 567.

Montana law provides that the only time a plaintiff can designate a party by a fictitious name is in fictitiously naming a defendant when the plaintiff does not know the defendant's true name at the time the original complaint is filed and is thus compelled to use a fictitious name for the defendant. § 25-5-103, MCA. However, the law never allows a plaintiff to use a fictitious name for itself, as Plaintiff HomeRiver Group has done in this case.

A case initiated in the name of a plaintiff that lacks standing is an incurable nullity. *Zurich Insurance Co. v. Logitrans, Inc.*, 297 F.3d 528 (6th Cir. 2002). 67A C.J.S. Parties § 9 ("In every action, there must be a real plaintiff who is a person in law and is possessed of a legal entity or existence as a natural, artificial, or quasi-artificial person. A suit brought in the name of that which is not a legal entity is a mere nullity.") No "action" exists where the original complaint is filed by a nonexistent plaintiff. Such complaints are null and void from the outset.

For these reasons, HomeRiver Group does not have standing to bring this suit and the Court erred in failing to dismiss the Complaint for lack of jurisdiction.

V. The Court Erred in Not Dismissing the Complaint because Plaintiff HomeRiver Group is not the Owner of the Premises, and therefore Lacks Standing to Assert any Claim against the Defendant LLC for Rent or Possession of the Premises.

The owner of the premises that is the subject of this suit is Louis Gingerelli. HomeRiver Group is not the owner of the premises. As owner, Gingerelli is the person who is entitled to the rent from the lessee of the premises and possession of the premises. HomeRiver Group is not entitled to the rent or possession. Thus, HomeRiver Group lacks standing to bring this action for this reason as well.

Courts lack "power to resolve a case brought by a party without standing—i.e., a personal stake in the outcome—because such a party presents no actual case or controversy." *Heffernan v. Missoula City Council*, 2011 MT 91, ¶ 29, 255 P.3d 80.

In *Kageco Orchards, Ltd. Liab. Co. v. Mont. DOT*, 2023 MT 71, 528 P.3d 1097, 1103 this Court stated:

> There are two elements to standing: the case-or controversy requirement imposed by the Montana Constitution, and judicially created prudential limitations imposed for reasons of policy"…Under the case-or-controversy requirement, a plaintiff must show, "at an irreducible minimum," that it "has suffered a past, present, or threatened injury to a property or civil right, and that the injury would be alleviated by successfully maintaining the action.

In *Hanson, supra*, this Court stated that "jurisprudential standing requires, *inter alia*, assertion of a substantively cognizable claim for relief 'based on an alleged wrong or illegality that has in fact caused, or is likely to cause, the [claimant] to personally suffer specific, definite, and direct harm to person, property, or exercise of right.' " In *Sayler*

v. Yan Sun, 2023 MT 175, ¶ 39, 536 P.3d 399, ¶ 39 this Court noted that standing requires a substantively cognizable claim involving "an alleged wrong or illegality that has in fact caused, or is likely to cause, [claimant] to personally suffer specific, definite, and direct harm" or interference "to person, property, or exercise of right."

Because HomeRiver Group is not the owner of the property, nor entitled to rent from the property nor its possession, it has not suffered a past, present or threatened injury to a property right. It has no standing because it has no personal stake in the outcome of this case and presents no actual case or controversy. The Justice Court thus lacks power to resolve the case brought by HomeRiver Group.

For these reasons as well, HomeRiver Group does not have standing to bring this suit and dismissal is required. The Justice Court erred in failing to dismiss the suit.

CONCLUSION

For any of the above-stated reasons, the Court should remand the case to the Justice Court with direction to either render judgment dismissing Plaintiff HomeRiver Group's Complaint or order reversal of the entry of default, allow the Trustees to defend the Defendant LLC and order the Court to hear the case on its merits.

Respectfully submitted this 12th day of December, 2024.

/s/ Charles H. Carpenter
Attorney for Appellant

Certificate of Compliance

I certify that the foregoing Brief is proportionally-spaced typeface of 14 points and does not exceed 10,000 words.

/s/ Charles H. Carpenter

Certificate of Service

I hereby certify that on December 12, 2024 I served a copy of the foregoing upon the Clerk of the Supreme Court and counsel of record using the Court's electronic filing system.

/s/ Charles H. Carpenter

CERTIFICATE OF SERVICE

I, Charles H. Carpenter, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 12-12-2024:

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