

APPLICATION FOR DISTRICT COURT JUDGESHIP

A. PERSONAL INFORMATION

1. Full name. **Eric S. Hummel**
2. Birthdate. [REDACTED]
3. Current home address. [REDACTED]
4. Email address. [REDACTED]
5. Preferred phone number. [REDACTED]
6. Judicial position you are applying for: **13th Judicial District, Departments 9 and 10**
7. Date you became a U.S. citizen, if different than birthdate. **Same.**
8. Date you become a Montana resident. [REDACTED] **(Although I resided in Texas from September 2001 to June 20, 2004).**

B. EDUCATIONAL BACKGROUND

9. List the names and location (city, state) of schools attended beginning with high school, and the date and type of degree you received.

Billings West High School (Billings, Montana) -- high school diploma - 1989

University of Montana (Missoula, Montana) -- B.A. Political Science -- 1993

Minor in Spanish

University of Montana School of Law (Missoula, Montana) J.D. - 1996

10. List any significant academic and extracurricular activities, scholarships, awards, or other recognition you received from each college and law school you attended.

University of Montana B.A. with High Honors, Honors College

University of Montana School of Law, with Honors

C. LEGAL AND PROFESSIONAL EXPERIENCE

11. In chronological order (beginning with most recent), state each position you have held since your graduation from law school. Include the dates, names and addresses of law firms, businesses, or governmental agencies with which you have been affiliated, and your position. Include the dates of any periods of self-employment and the name and address of your office.

**Flathead County Justice of the Peace, Dept.1
Kalispell, Montana (January 2017 to present)
920 S. Main and 935 1st Ave. West, Kalispell Montana 59901.**

**Eric Hummel, Attorney at Law, PLLC
705 Main Street, Kalispell Montana (2008 to December 2016)
Self-employed, owner.**

**Kalvig & LeDuc
100 Cooperative Way, Suite 202, Kalispell MT 59901 (2005-2008)
Associate.**

**Johnson, Berg, McEvoy and Bostock
221 1st Ave. East, Kalispell MT 59901 (2004-2005)
Associate.**

**David Black and Associates
1001 Fannin, Ste. 1065, Houston TX 77002 (2001-2004)
Associate.**

**Kalispell Assistant City Attorney
312 1st Ave. East, Kalispell MT 59901 (2001)**

**Deputy Flathead County Attorney
920 S. Main St. Kalispell MT 59901 (1998-2001)**

**Judicial Law Clerk, Montana Supreme Court, Chief Justice Jean Turnage
215 N. Sanders, Helena MT 59601
(May 1996 to February 1998).**

12. In chronological order (beginning with most recent), list your admissions to state and federal courts, state bar associations, and administrative bodies having special admission requirements and the date of admission. If any of your admissions have terminated, indicate the date and reason for termination.

**May 3, 2002 - Supreme Court of Texas (currently inactive)
May 3, 2002 – Texas State Bar (currently inactive)
1998 - United States Ninth Circuit of Appeals
December 18, 1996 - Montana Federal District Court
September 26, 1996 - Montana Supreme Court.
September 26, 1996 - Montana State Bar**

13. Describe your typical legal areas of concentration during the past ten years and the approximate percentage each constitutes of your total practice (i.e., real estate, water rights, civil litigation,

criminal litigation, family law, trusts and estates, contract drafting, corporate law, employment law, alternative dispute resolution, etc).

I have served as Flathead County Justice of the Peace since January 1, 2017.

Approximately 60% of my current caseload is criminal, 40% is civil. I preside over initial appearances and arraignments in felony and misdemeanor cases. I preside over bench trials and jury trials in criminal cases. In civil cases, I preside over evictions, smalls claims, civil matters in which the amount does not exceed \$15,000, and orders of protection. The civil matters over which I president involve contact disputes and negligence.

Prior to becoming a judge, I was a county and city prosecutor, handling both criminal and civil matters, including involuntary commitments, juvenile and dependent neglect. I prosecuted all varieties of criminal matters extending from major felonies to harboring a goat in city limits. While in private practice, I worked as a contract public defender, as well as handling all aspects of civil litigation, both as a plaintiff's attorney and insurance defense. I also represented clients in family law matters. I represented parents or children in dependent neglect cases. As a judge and attorney, I have averaged approximately 5,000 cases a year, including over 40 jury trials to verdict. For the last nine years, I have presided over an average of 200+ orders of protection per year.

14. Describe any unique aspects of your law practice, such as teaching, lobbying, serving as a mediator or arbitrator, etc. (exclude bar activities or public office).

I was an instructor of criminal law and procedure at Flathead Valley Community College in 1999 and 2000.

As a member of the lobbying committee for the Montana Magistrates Association, I have provided input to the Association's lobbyist.

15. Describe the extent that your legal practice during the past ten years has included participation and appearances in state and federal court proceedings, administrative proceedings, and arbitration proceedings.

For the last nine years, I have been employed as a justice of the peace for Flathead County. I appear in court daily, almost hourly, presiding over multiple civil and criminal matters, sometimes as many as ninety in one afternoon.

The most rewarding part of my position is presiding over weddings. I have performed weddings at the top of a ski hill, on tee boxes, or mountain bridges.

Approximately 60% of my caseload involves criminal cases. I review criminal complaints, conduct bench trials and jury trials and preside over misdemeanor and felony initial appearances. I draft my own legal opinions. Several of my cases have been appealed to the Montana Supreme Court, where I have been affirmed.

16. If you have appeared before the Montana Supreme Court within the last ten years (including submission of amicus briefs), state the citation for a reported case and the case number and caption for any unreported cases.

Pilgeram v. Greenpoint Mortgage Funding, Inc., 2013 MT, 234.

Jackson v. Hon. Eric Hummel, OP-22-0618.

Flathead Class of 1973 v. LaRose, 2025 MT 50N.

17. Describe three of the most important, challenging, or complex legal issues you have dealt with or legal proceedings in which you have participated during your practice.

Every case is important, but the following cases I remember the most:

My first felony jury trial as a prosecutor involved a five-year old assault victim. I prepared her for trial by first establishing her competency as a witness. We talked about the truth and whether in court I was wearing a flowered dress (I was not). She was well-prepared. Shortly after voir dire, the defendant accepted a plea offer for a 40-year prison sentence with 18 years suspended. The defendant was recently paroled. About four years ago, the now 25-year-old contacted me. She asked if I remembered her. I always will. She then asked if I would perform her wedding. The first time I saw her in over twenty years was coming down the aisle in her wedding gown. All cases are important, but she will always be my favorite and most meaningful client. She is the reason I am a judge. The case is State v. Knox (1999).

In 2008, as the height of the Great Recession, I decided it would be a good idea to open my own law practice. There were numerous foreclosures in the Flathead due to homeowners becoming upside down with their loans. I was contacted and agreed to sponsor a *pro hac vice* attorney whose client (and then mine) wanted to sue his lender for an alleged improper foreclosure. Although unfamiliar with the area of law involved, with assistance I researched the law, briefed the issues, and proceeded to trial. Summary judgment was granted in favor of the lender. We appealed to the Montana Supreme Court. I correctly predicted the outcome of the case. It was set for oral argument (my first and only to date). The case was reversed 4-3 and remanded for trial. My client was able to settle with his lender and remain in his home.

Criminal cases can be interesting. I was presiding over a DUI bench trial *in absentia*. The defendant failed to appear, but counsel were present. The Highway Patrol Trooper was sworn and testified. The trooper was on patrol when he was alerted to a vehicle stopped in a borrow pit on Highway 93. This was not concerning to the trooper, but he also observed the defendant in the driver's seat of his vehicle with his feet inverted over his head, almost upside down. Apparently, the driver had caught his toe on a fish hook and line lying on the back seat of his vehicle. He was also incredibly intoxicated. I found particularized suspicion for the stop based on his being caught on a fishing line.

18. If you have authored and published any legal books or articles, provide the name of the article or book, and a citation or publication information.

NA.

19. If you have taught on legal issues at postsecondary educational institutions or continuing legal education seminars during the past ten years, provide the title of the presentation, date, and group to which you spoke.

Instructor of Criminal Law and Procedure, Flathead Valley Community College 1999-2000.

Presenter – Nuts and Bolts, Commission on Courts of Limited Jurisdiction - 2019 to present.

Current training judge for the Montana Commission on Court of Limited Jurisdiction. I have trained approximately seven new judges in the past four years.

20. Describe your pro bono services and the number of pro bono hours of service you have reported to the Montana Bar Association for each of the past five years.

As a justice of the peace, I am unable to provide pro bono services. As the president of the Northwest Montana Bar Association, I previously assisted in a pro bono law clinic from approximately 2008-2014.

21. Describe dates and titles of any offices, committee membership, or other positions of responsibility you have had in the Montana State Bar, other state bars, or other legal professional societies of which you have been a member and the dates of your involvement. These activities are limited to matters related to the legal profession.

**President, Northwest Montana Bar Association 2008
Vice President, Northwest Montana Bar Association 2007
Director, Montana Magistrates Association 2025**

22. Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, and type of discharge received.

NA.

23. If you have had prior judicial or quasi-judicial experience, describe the position, dates, and approximate number and nature of cases you have handled.

Flathead County Justice of the Peace, January 1, 2017 to present. Approximately 5,000 cases per year. 60% criminal, 40% civil.

Acting Kalispell Municipal Judge - 2023

Acting Whitefish Municipal Judge - 2022

Substitute Flathead County Justice of the Peace, 2012 to 2016

Substitute Kalispell Municipal Judge – 2016 to present.

Substitute Columbia Falls City Judge – 2012 to 2016.

Substitute Whitefish Municipal Judge – 2012 to present.

I have also substituted for Lincoln County, Glacier County and Town of Eureka on several occasions.

24. Describe any additional business, agricultural, occupational, or professional experience (other than legal) that could assist you in serving as a judge.

I currently serve as a board member for the Glacier Art Museum in Kalispell.

I currently serve as treasurer for my homeowners association in Whitefish.

D. COMMUNITY AND PUBLIC SERVICE

25. List any civic, charitable, or professional organizations, other than bar associations and legal professional societies, of which you have been a member, officer, or director during the last ten years. State the title and date of any office that you have held in each organization and briefly describe your activities in the organization and include any honors, awards or recognition you have received.

I am a member of Daybreak Rotary, Kalispell since approximately 2016.

I play clarinet in the Flathead Valley Community Band.

26. List chronologically (beginning with the most recent) any public offices you have held, including the terms of service and whether such positions were elected or appointed. Also state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

Flathead Valley Justice of the Peace, January 1, 2017 to present.

Appointed in 2016; ran successfully for re-election in 2018 and 2022. Ran unsuccessfully in 2010 for Flathead Justice of the Peace.

I ran for 11th Judicial District Judge, Dept. 2, in 2025 and was unsuccessful.

E. PROFESSIONAL CONDUCT AND ETHICS

27. Have you ever been publicly disciplined for a breach of ethics or unprofessional conduct (including Rule 11 violations) by any court, administrative agency, bar association, or other professional group? If so, provide the details.

No.

28. Have you ever been found guilty of contempt of court or sanctioned by any court for any reason? If so, provide the details.

No.

29. Have you ever been arrested or convicted of a violation of any federal law, state law, or county or municipal law, regulation or ordinance? If so, provide the details. Do not include traffic violations unless they also included a jail sentence.

No.

30. Have you ever been found liable in any civil proceedings for damages or other legal or equitable relief, other than marriage dissolution proceedings? If so, provide the citation of a reported case or court and case number for any unreported case and the year the proceeding was initiated (if not included in the case number).

No.

31. Is there any circumstance or event in your personal or professional life that, if brought to the attention of the Governor or Montana Supreme Court, would affect adversely your qualifications to serve on the court for which you have applied? If so, provide the details.

No.

F. BUSINESS AND FINANCIAL INFORMATION

32. Are you currently an owner, officer, director, or otherwise engaged in the management of any business other than a law practice? If so, please provide the name and locations of the business and the nature of your affiliation, and state whether you intend to continue the affiliation if you are appointed as a judge.

I am treasurer for my homeowner's association in Whitefish. If I own property in Whitefish and the association is not involved in litigation, I would continue.

33. Have you timely filed appropriate tax returns and paid taxes reported thereon as required by federal, state, local and other government authorities? If not, please explain.

Yes.

34. Have you, your spouse, or any corporation or business entity of which you owned more than 25% ever filed under title 11 of the U.S. Bankruptcy Code? If so, give details.

No.

G. JUDICIAL PHILOSOPHY

35. State the reasons why you are seeking office as a district court judge.

When I was about ten, I liked to argue (mostly with my parents, a civil engineer and high school teacher. My parents encouraged me to aspire to become an attorney. I remember interviewing then District Judge Dianne Barz about a school paper. I then attended the University of Montana where I studied political science. I have always been interested in government. While in college, I interned for a congressman in Billings. I then attended law school, and while in law school, I interned for a law firm in Billings. I then clerked for Chief Justice Turnage. I learned about the law, conflict, and its resolution.

In order for a civil society to exist, people must have faith in their government. Politics aside, people must have an institution where their disputes can be fairly and efficiently resolved according to the law. I am committed to this goal. Nine years ago when I switched from being an attorney to a judge, I thought that being a good attorney would qualify me to be a good judge. That was incorrect. Attorneys are trained to argue the position of their client. An attorney can argue the sky is almost any color – blue, black, gray, yellow, orange (if it is fire season). A judge must first listen and speak last. Litigants, victims, families and law enforcement deserve to be heard according to the law. Judges should follow the law, not make it. I am committed to performing these duties as a district judge.

36. What three qualities do you believe to be most important in a good district court judge?

A judge must be patient, efficient and respectful. A judge must follow the Constitution. I am reminded of the following when I became a justice of the peace and I asked other district judges for advice. This is what I remember:

All cases are important. This may be another day at work for you. It could be the most important day in the lives of the people before you. BE PATIENT. They are just people. People may not remember what your decision was, but they will remember how they felt and how they were treated.

I try and remember this advice whenever I am in court.

I recall the best qualities of the judges I appeared before in over twenty years of practicing law. In addition to what I have discussed above, I am reminded to make timely decisions. I have not delayed a decision for more than thirty days in nine years as a judge. A judge should give attorneys and parties time to negotiate. I once appeared before a judge. He anticipated the parties needed to talk. He took a recess, and the case settled. This saved the parties and court several days.

A judge needs to decide the case based on the facts and law presented. There may be a reason an attorney does not object to evidence or hearsay. A judge should not legislate from the bench or create law that is already clear. Laws are presumed to be constitutional.

37. What is your philosophy regarding the interpretation and application of statutes and the Constitution?

I am a believer in judicial restraint. It is not the duty of a court to insert words into a statute which have been omitted or omit words which have been inserted. Our Framers (whether in 1789 in Philadelphia or 1972 in Helena) created a working document for the framework of the United States and Montana. These documents work with the three branches having separate, but co-equal powers. Ultimately, it falls on the courts to resolve disputes between the three branches, or when individuals have a dispute with another or their government. Laws should be interpreted according to their plain meaning, and when possible, according to precedent. As an attorney and now judge, I have taken the oath of office to support and protect the Constitutions of the United States and the State of Montana, with fidelity. Fidelity means the office of judge is done with a position of trust. As an elected official, I am ultimately accountable not only to the Montana Supreme Court, but to the people who have appointed and/or elected me. I hope I have done this over the last nine years, and would be honored to return to my hometown of Billings to continue this effort.

H. MISCELLANEOUS

38. Attach a writing sample authored entirely by you, **not to exceed 20 pages**. Acceptable samples include briefs, legal memoranda, legal opinions, and journal articles addressing legal topics.

Please see attached.

39. Please provide the names and contact information for three attorneys and/or judges (or a combination thereof) who are in a position to comment upon your abilities.

**Tom Esch
P.O. Box 2943
Kalispell, MT 59903
(406)-250-5311**

**Sean Hinchey
Hinchey and Hinchey
705 S. Main St.
Kalispell MT 59901
(406) 756-7004**

**Hon. Robert Olsen (ret.)
c/o Glacier County Clerk of Court
510 E. Main St.
Cut Bank, MT 59427
(406) 391-2263**

CERTIFICATE OF APPLICANT

I hereby state that to the best of my knowledge the answers to all questions contained in my application are true. By submitting this application I am consenting to investigation and verification of any information listed in my application and I authorize a state bar association or any of its committees, any professional disciplinary office or committee, educational institutions I have attended, any references furnished by me, employers, business and professional associates, law enforcement agencies, all governmental agencies and instrumentalities and all other public or private agencies or persons maintaining records pertaining to my citizenship, residency, age, credit, taxes, education, employment, civil litigation, criminal litigation, law enforcement investigation, admission to the practice of law, service in the U. S. Armed Forces, or disciplinary history to release to the Office of the Governor of Montana or its agent(s) any information, files, records, or reports requested in connection with any consideration of me as a possible nominee for appointment to judicial office.

I further understand that the submission of this application expresses my willingness to accept appointment as District Court Judge if tendered by the Governor, and my willingness to abide by the Montana Code of Judicial Conduct and other applicable Montana laws (including the financial disclosure requirements of MCA § 2-2-106).

8 - 22 - 20 25

(Date)



(Signature of Applicant)

A signed original and an electronic copy of your application and writing sample must be submitted by
5:00 p.m. on Tuesday, August 26, 2025.

Mail the signed original to:

Hannah Slusser
Governor's Office
P.O. Box 200801
Helena, MT 59620-0801

Send the electronic copy to: hannah.slusser@mt.gov

Justice Court, Dept. 1
Flathead County Justice Center
920 South Main, Suite 210
Kalispell, MT 59901
(406) 758-5643

**IN THE JUSTICE COURT
FLATHEAD COUNTY, STATE OF MONTANA**

BC ATM SERVICES, LLC and
RUSSELL PANDINA, SR. d/b/a
BANCARD SYSTEMS,

Plaintiffs.,

V.

LUCKY CHARM CASINO 2, INC.
d/b/a LUCHY CHARM CASINO 2,

Defendant.

BC ATM SERVICES, LLC, and
BANCARD SERVICES, INC.

Plaintiffs,

v.

ROYAL FLUSH CASINO, LLC,
d/b/a ROYAL FLUSH CASINO

Defendant.

BC ATM SERVICES, LLC and
RUSSELL PANDINA, SR. d/b/a
BANCARD SYSTEMS,

Plaintiffs,

v.

RENO CASINO, INC. d/b/a
RENO CLASSIC CASINO

Docket No. CV-2017-1371 through -1378

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

)
Defendant.)
)
BC ATM SERVICES, LLC and)
RUSSELL PANDINA, SR. d/b/a)
BANCARD SYSTEMS,)
Plaintiffs.,)
)
v.)
)
NAT'S CASINO, INC. D/B/A)
NICKEL NATS CASINO OF)
GREAT FALLS, LLC,)
)
Defendant.)
)
BC ATM SERVICES, LLC, and)
BANCARD SERVICES, INC.)
)
Plaintiffs,)
)
v.)
)
LUCKY CHARM, INC.)
d/b/a LUCKY CHARM CASINO,)
INC.)
)
BC ATM SERVICES, LLC and)
RUSSELL PANDINA, SR. d/b/a)
BANCARD SYSTEMS,)
)
Plaintiffs,)
)
v.)
)
BO BO'S INC. d/b/a)
BO BO'S CASINO,)
)
Defendant.)
)
BC ATM SERVICES, LLC and)
RUSSELL PANDINA, SR. d/b/a)
BANCARD SYSTEMS,)
)
Plaintiffs.,)

v.

RBQ CORPORATION, d/b/a
RIVERBOAT QUEEN CASINO,

Defendant.

BC ATM SERVICES, LLC and
RUSSELL PANDINA, SR. d/b/a
BANCARD SYSTEMS,

Plaintiffs,

v.

BUFFALO NICKEL, INC. d/b/a
BUFFALO NICKEL CASINO, and
BUFFALO NICKEL CASINO, INC.

Defendants

This matter was tried to the Court on February 26, 2018, and June 8, 2018. Plaintiffs were present with counsel, Doug Scotti. Defendants appeared through counsel, Steven Potts and Peter Carroll. Based upon the evidence admitted, the Court makes the following

FINDINGS OF FACT

1. Plaintiffs (hereinafter "Bancard") doing business in Flathead County, Montana, provided ATM processing services for Defendants, pursuant to a written Processing Service and Maintenance Agreement (PSMA) attached to the complaint in this action.

2. BC ATM Services, LLC, is the contractual successor in interest to Bancard Services, Inc. and Bancard Systems.

3. Buffalo Nickel Casino, Inc. is owned by Steven Potts.

4. The remaining defendants (Defendants) do business in Great Falls, Cascade

County, Montana.

5. The transactions processed for Defendants occurred when customers used debit or credit cards in Defendants' ATM machine located on casino premises. If a customer obtained money from the ATM, Bancard presented the transaction to the customer's financial institution and obtained settlement of the transaction, together with any fees charged, and then deposited the transaction or settlement proceeds into Defendants' bank account.

6. At the time of the events in question, Bancard had much of the processing performed by Columbus Data Processing (CDS), a company not a party in this action.

7. At all times relevant to this action, Defendants had executed, and had in place, an ACH Authorization and Release by which it authorized CDS to deposit and withdraw money into and from Defendants' bank account.

8. On April 20, 2017, Defendants' attorney Steven Potts mailed Bancard and Pueblo Bank & Trust a letter notifying them that on the following Monday, April 24, 2017, Defendants intended to terminate their services in connection with ATM machines operated on Defendants' premises.

9. On April 24, 2017, Bancard's attorney Doug Scotti mailed Mr. Potts a letter, Exhibit 2 (page 2), stating that "breaches have occurred" and demanding that "[i]n order to avoid claims of breach of contract," Defendants "must switch back to Bancard's processing immediately" and claimed that if Defendants did not do so, "then Bancard will file suit in Flathead County and require the full repayment of attorney fees as part of any settlement." (Ex. 2, Scotti ltr to Potts, 4/24/2017, p. 1)

10. Defendants did not terminate Bancard's services or switch to another processor on

April 24, 2017. Mr. Scotti acknowledged this in an e-mail on April 26, 2017. (Defendants' Ex. 2, Scotti e-mail, 4/25/2017, at 12:34 p.m.) ("To recap our conversation from yesterday: all of the locations we discussed were still processing with Bancard as of yesterday, except Buffalo Nickel") (See also testimony of Russell Pandina, 2/26/2017, disc 1, 25:20 – 25:31)

11. The parties' attorneys corresponded. On April 27, 2017, Mr. Potts e-mailed Mr. Scotti and stated, "My clients are withdrawing their request to terminate the ATM services set forth in my letter of April 20, 2017." (Defendants' Ex. 4)

12. Mr. Scotti replied the same day, stating in relevant part, "Steve, understood, thanks." (Defendants' Ex. 4, Potts and Scotti emails, 4/27/2017, 3:41 a.m. and 9:15 a.m.)

13. Shortly after receiving Mr. Potts's April 20, 2017 letter, Bancard continued processing Defendants' ATM transactions, but stopped transferring the proceeds of those transactions to Bancard. Before the April 20, 2017 letter was issued, there were no reported problems or issues with respect to processing or servicing the Defendants' ATM's.

14. Bancard asserts "[t]he ACT agreements on file were found to be of the old style which is no longer accepted by CDS." (Defendants' Ex. 3, e-mail from Shaun Pandina to Doug Scotti, 4/25/2017, 10:49 a.m.)

15. The Court finds this assertion is false, and finds Mr. Potts' testimony is more credible than Bancard's.

16. At trial, Russell Pandina testified that the ACH form had been cancelled. (testimony of Russell Pandina, 2/26/2017, disc 1, 25:31 – 25:55)

17. The Court does not find this testimony to be credible. The Court did not receive sufficient credible evidence from Plaintiffs to support this assertion.

18. The ACH form applicable to Defendants states in relevant part: “This Authorization shall remain in effect unless cancelled by Customer [defendant] by providing written notice of cancellation to BSI and after such time as all settlements and adjustments have been processed/cleared through the account.” (Plaintiff’s Ex. 9)

19. Defendants never provided written notice of cancellation to CDS.

20. Even if Defendants had provided such a notice of cancellation to CDS, the express terms of the ACH Authorization Release provide that the cancellation would only occur “after such time as all settlements and adjustments have been processed/cleared through the account.”

21. Transactions, settlements, and adjustments were processed until May 3, 2017, but Defendants did not receive the proceeds of any such transaction or settlement for months after negotiations and demands from Defendants’ attorney.

22. Bancard obtained the proceeds of the transactions and settlements, but failed and refused to remit them to Defendants.

23. During the week from April 24, 2017, until May 3, 2017, the cash in Defendants’ ATM was depleted. Defendants did not receive the proceeds of transactions until months later.

24. Mr. Potts issued an e-mail at 3:41 am on April 27, 2017 notifying Bancard of Lucky Charm 2’s wish to “withdraw” the request to terminate ATM services set forth in the April 20 letter. The email requested an “accounting information for the ATMs a monthly basis for the past year.” (Defendants’ Ex. 4, Potts e-mail to Scotti, 4/27/2017, 3:41 a.m.)

25. Bancard responded “[t]hey will get you the accounting info.” (Defendants’ Ex. 4, Scotti e-mail to Potts, 4/27/2017, 9:15 a.m.)

26. On April 28, 2017, however, when Defendants asked questions about new ACH forms that Bancard had requested be signed, Mr. Scotti told Mr. Potts, “Regarding accounting: every ATM terminal contains journal records showing disbursements and closing reports that match the merchant customer’s bank deposits. Thus, the locations have what they need to account for funds being dispensed.” (Defendants’ Ex. 6, Scotti e-mail to Potts, 4/28/2017, 2:57 p.m.)

27. Plaintiffs did not provide the accounting information requested, and during the week in question there were no bank deposits to “match” the journal records referred to in the 4/28/2017 e-mail.

28. Because Defendants did not receive the proceeds due to them or any accounting of transactions, and in order to mitigate damages arising from Bancard’s refusal to perform their obligations, Defendants began having their ATM transactions processed by another firm which did provide Defendants with the proceeds of transactions processed and accountings.

29. Defendants filed a complaint on May 5, 2017, against Cardtronics USA, as successor to CDS, and against Bancard, in Eighth Judicial District Court, Cascade County, Montana. The lawsuit alleged that Bancard and CDS failed to perform fiduciary duties with respect to the ATM, and alleged that CDS and Bancard refused to remit thousands of dollars owed to Lucky Charm 2. Further, Bancard counterclaimed alleging Defendants breached the implied covenant of good faith and fair dealing in the Processing Service and Maintenance Agreement.

30. Defendants amended, dismissed, and re-filed the complaint as a separate cause of action in Cascade County, specifically by Mr. Potts acting as counsel and as the representative of

Lucky Charm 2. The litigation remains pending. Rather than counterclaim for breach of contract in Cascade County, Bancard filed the instant action in this court.

31. Bancard issued a second notice of breach of contract letter, dated May 17, 2017.

32. On or about July 13, 2017 Bancard issued to Defendants checks for settlement cash, and a breakdown of the payments, and monthly transaction statements.

33. The payments were tendered by check to Defendants c/o Steven Potts. Mr. Potts indicated that the check(s) were not cashed because the following statement was contained in the cover letter accompanying the check: "In light of the enclosed payments and provision of information, my clients consider your claims to be rendered completely moot."

34. Mr. Potts believed that this could have effected a release of his (ie, Defendants') claim to legal interest or to an "additional accounting."

35. Defendants did not cash the check(s).

36. On August 22, 2017, payment for legal interest was issued to Defendants, c/o Steven Potts. These payment(s) were subject to Defendants signing an enclosed mutual release of claims. The stated mutual release sought to dismiss the Cascade County district court litigation while maintaining this case, which had begun on July 14, 2017.

37. Defendants refused to sign the release unless it included a release of the claims in this court.

38. Settlement was not reached. The settlement and interest checks were not cashed, and Defendants did not request that the payments be issued again.

39. Mr. Potts testified the reason Defendants terminated ATM processing was because they "could no longer afford" to continue ATM processing with Bancard, and that

Defendants chose to mitigate their damages by going with a competitor.

40. Defendants did not breach their contracts with Bancard and have not caused any damages to Bancard. Bancard improperly withheld ATM payments from Defendants.

41. Bancard has not filed an undertaking in this action.

42. To the extent any of the foregoing findings of fact should be construed as conclusions of law, they shall be so construed.

CONCLUSIONS OF LAW

1. This court has jurisdiction over the issues and parties.

2. Venue is appropriate in Flathead County pursuant to the terms of the PSMA.

3. Bancard has sued Defendants for allegedly switching ATM data processors. (Complaint, ¶ 7) The PSMA imposes certain duties upon Defendants, but it discloses no requirement that Defendants use Bancard to provide data processing services.

4. Bancard drafted the PSMA. Paragraph 7 required Bancard to provide such services, but there is no requirement that Defendants use those services. This contrasts with other forms Bancard used with other customers which did require the customer to use the services. For example, the PSMA attached to Bancard's complaint in Cause No. CV17-1371 contains a provision providing that "Merchant shall not permit the reprogramming of the ATM to another processing service other than what is provided for by Company"

5. The construction and interpretation of a contract is a question of law. State ex rel. Bullock v. Phillip Morris, Inc., 2009 MT 261, ¶ 16, 352 Mont. 30, 217 P.3d 475. "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone if possible." Section 28-3-303, MCA. Courts are obligated to apply what is contained in

a contract rather than to insert what has been omitted or to omit what has been inserted. Section 1-4-101, MCA, (2015) provides as follows:

Role of the judge – preference to construction giving each provision meaning.
In the construction of an instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

Bancard inserted an exclusivity provision with respect to their data processing into some PSMA contracts, but not into the contract at issue. Without such a provision, Defendants were not obligated to continue having their ATM transactions processed by Bancard. Defendants breached no contract by switching processors because the contract never required them to use Bancard as the processors.

6. In this case, Bancard timely failed to remit funds to Defendants and failed to provide an accounting after agreeing to do so. Defendants were entitled to suspend and terminate the PSMA in order to mitigate their damages. Through subsequent negotiations, although Bancard attempted to return the disputed funds, and then with interest, qualified the returned funds and interest with a unilateral release which Defendants were not obligated to accept.

7. “[A] party who has brought about a breach of contract may not insist upon its performance, and thus, a breach of contract caused solely by one party’s behavior is generally excused as to the other party.” 17A Am. Jur. 2d Contracts § 669 (2018). Bancard could not insist upon performance by Defendants while withholding the proceeds of the transactions they were processing.

8. Rule 13 of the Montana Rules of Civil Procedure states in relevant part:

(a) Compulsory Counterclaim.

(1) In General. A pleading must state as a counterclaim any claim that – at the time of its service – the pleader has against an opposing party if the claim:

(A) arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and

(B) does not require adding another party over whom the court cannot acquire jurisdiction.

As stated by the federal district court in Owens v. Blue Tee Corp., 177 F.R.D. 673 (M. D. Ala. 1998):

Where a party fails to plead a counterclaim, it is precluded from asserting that claim in future litigation. Clekner v. Republic Van and Storage Co., 556 F.2d 766, 769 n. 3 (5th Cir. 1977); 6 Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane Federal Practice and Procedure § 1411 at 79. As the United States Supreme Court has clearly stated, the purpose behind Rule 13(a) is to prevent multiplicity of lawsuits. “The requirement that counterclaims arising out of the same transaction or occurrence as the opposing party's claim ‘shall’ be stated in the pleadings was designed to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters. The Rule was particularly directed against one who failed to assert a counterclaim in one action in which that counterclaim became the basis of the complaint.” Southern Construction Co., Inc. v. Pickard, 371 U.S. 57, 60, 83 S.Ct. 108, 110, 9 L.Ed.2d 31 (1962). The instant case provides a clear example of the exact situation that Rule 13(a) was intended to prevent. Accordingly, the court finds that Mid-America's claims against Gefco are due to be dismissed for lack of subject matter jurisdiction.

Id. at 682.

The Montana Supreme Court applies “the basic rule that all logically related claims, legal and equitable, arising out of a transaction must be pled in the first suit so as to avoid multiplicity of suits and insure only one judicial proceeding to settle all matters.” Deschamps v. Treasure State Trailer Court, Ltd., 2011 MT 115, ¶ 16, 360 Mont. 437, 441, 254 P.3d 566, 570.

9. Plaintiffs' lawsuit violates this rule. Its claim is a dispute arising out of the same contract and same facts which is pending in the Montana Eighth Judicial District Court.

Pursuant to Rule 13, it should be dismissed.

10. The policy of the courts is clearly to prohibit what plaintiffs seek to do: to split their claims between this case and the Eighth Judicial District Court case pending in Cascade County. As stated by the Montana Supreme Court and the United States Supreme Court:

The whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He cannot even split up his claim, [citing cases] and, *a fortiori*, he cannot divide the grounds of recovery.

Baertsch v. Lewis & Clark County, 223 Mont. 206, 727 P.2d 504 (1986) (quoting United States v. California and Oregon Land Co., 192 U.S. 355, 358 (1904)). As stated by the court in Katz v. Gerardi, 655 F.3d 1212:

The rule against claim-splitting requires a plaintiff to assert all of its causes of action arising from a common set of facts in one lawsuit. By spreading claims around in multiple lawsuits in other courts or before other judges, parties waste “scarce judicial resources” and undermine “the efficient and comprehensive disposition of cases.”

Id. at 1217 (quoting Hartsel Springs Ranch of Colo., Inc. v. Bluegreen Corp., 296 F.3d 982, 985 (10th Cir. 2002)). A final judgment is not a necessary component of the claim-splitting analysis, as stated by the court in Hartsel Springs Ranch of Colo., Inc. v. Bluegreen Corp., 296 F.3d 982, 985 (10th Cir. 2002):

It is clear that a motion to dismiss based on improper claim-splitting need not—indeed, often cannot—wait until the first suit reaches final judgment.... Thus, in the claim-splitting context, the appropriate inquiry is whether, assuming that the first suit were already final, the second suit could be precluded pursuant to claim preclusion.

Id. at 987 n. 1 (emphasis added) (quoted in Katz, 655 F.3d at 1218). Otherwise, a defendant could “lie in wait silently until one of the two actions is brought to judgment to ambush the plaintiff and defeat the other action.” Id.; see also Brady v. UBS Fin. Svc., Inc., 538 F.3d 1319,

1327 n.10 (10th Cir. 2008) (“The first suit need not reach final judgment before a motion to dismiss based on improper claim-splitting can be granted”); Wright & Miller, § 4406 (“In dealing with simultaneous actions on related theories, courts at times express principles of ‘claim splitting’ that are similar to claim preclusion, but that do not require a prior judgment”).

11. Bancard is a foreign corporation subject to the provisions of §§ 25-10-601 and -602, MCA, which requires foreign corporations to file undertakings securing their obligations to pay costs in this action. (See Complaint, ¶¶ 1-2) In September 2017, Defendants demanded that Bancard post security. (Answer, Twelfth Defense) No such undertaking has been filed. Therefore, pursuant to § 25-10-602, MCA, this action should be dismissed.

12. To the extent any of the following conclusions of law should be construed as findings of fact, they shall be so construed.

From the foregoing findings of fact and conclusions of law, the Court makes the following:

JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Bancard shall take nothing by its complaints and/or counterclaims.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants are entitled to recover their reasonable attorney fees and costs, and the Court shall conduct a hearing if requested in writing by either party. Within 15 days of the date of this order, Defendants shall submit an affidavit of fees and costs for consideration by the Court in entry of final judgment. Bancard shall have 15 days to respond.

DATED this 19th day of July, 2018.

