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FILED

NOV 10 2022

ANGIE SPARKS, Clerk of District Court
By- **K KRESGE** Deputy Clerk

**MONTANA FIRST JUDICIAL DISTRICT COURT
LEWIS AND CLARK COUNTY**

FIRST TRUST COMPANY, LLC,
Plaintiff,

v.

MONTANA DEPARTMENT OF
ADMINISTRATION, DIVISION OF
BANKING AND FINANCIAL
INSTITUTIONS,
Defendant.

Cause No.: DDV-2021-1256

**OPINION AND ORDER ON
MOTION FOR SUMMARY
JUDGMENT**

Before the Court are cross-motions for summary judgment in this declaratory judgment action. Plaintiff First Trust Company, LLC (First Trust) is represented by Jeffrey J. Oven (argued), Michael Tennant, and Pamela Garman. Defendant Montana Department of Administration, Division of Banking and Financial Institutions (the Division) is represented by Kelly M. O'Sullivan (argued). The motions are fully briefed, oral argument was heard November

1 1, 2022, and the motions are now ready for decision. For the reasons that follow,
2 First Trust's motion for summary judgment will be granted and the Division's
3 motion for summary judgment will be denied.

4 BACKGROUND

5 The Division is responsible for regulating state-chartered banking
6 within the State of Montana. Admin. R. Mont. 2.1.101(2)(b). First Trust is a
7 limited liability company organized under the laws of the State of South Dakota
8 as a trust company and regulated by the South Dakota Division of Banking. In
9 South Dakota, unlike Montana, businesses organized as trust companies are not
10 banks and may not accept deposits. *See* S.D. Codified Laws §§ 51A-6A-1(13) (a
11 trust company is a "*nondepository* trust company incorporated or organized
12 under the laws of this state engaged in the trust company business" (emphasis
13 added)); 51A-6A-1(14) ("Trust company business does not constitute banking");
14 and 51A-1-2(4) (banking is "the business of receiving deposits, discounting
15 commercial paper, or buying and selling exchange, and any other activity
16 authorized by this title").

17 First Trust desires to conduct business in Montana. To that end, on
18 May 21, 2021, it applied to the Division for appointment as a fiduciary foreign
19 trust company. The Division, however, denied the application, contending that
20 because it is a non-depository institution, it is not eligible for appointment as a
21 foreign trust company. Accordingly, First Trust brought this action for a
22 declaratory judgment.

23 STANDARDS

24 Summary judgment should be "rendered if the pleadings, the
25 discovery and disclosure materials on file, and any affidavits show that there is

1 no genuine issue as to any material fact and that the movant is entitled to
2 judgment as a matter of law.” Mont. R. Civ. P. 56(c)(3). The construction of a
3 statute is a question of law amenable to resolution on summary judgment. *Boyne*
4 *USA, Inc. v. Dep’t of Revenue*, 2021 MT 155, ¶ 12, 404 Mont. 347, 490 P.3d
5 1240.

6 Statutory construction is a “holistic endeavor,” and it must
7 “account for the statute’s text, language, structure, and object.” *City of Missoula*
8 *v. Fox*, 2019 MT 250, ¶ 18, 397 Mont. 388, 450 P.3d 898. The Court interprets a
9 statute “first by looking to its plain language. . . reading and interpreting the
10 statute as a whole, without isolating specific terms from the context in which they
11 are used by the Legislature.” *Fox*, ¶ 18 (quoting *Mont. Shooting Sports Ass’n v.*
12 *State*, 2008 MT 190, ¶ 11, 344 Mont. 1, 185 P.3d 1003) (internal quotation marks
13 omitted). The Court applies “ordinary rules of grammar” when attempting to
14 determine a statute’s plain meaning. *Thompson v. J.C. Billion*, 2013 MT 20, ¶ 22
15 n.5, 368 Mont. 299, 294 P.3d 397 (quoting *Jay v. Sch. Dist. No. 1 of Cascade*
16 *County*, 24 Mont. 219, 224–225, 61 P. 250, 252 (1900)). If the plain language is
17 “clear and unambiguous,” the Court “need not engage in further construction.”
18 *Mont. Indep. Living Project v. City of Helena*, 2021 MT 14, ¶ 14, 403 Mont. 81,
19 479 P.3d 961.

20 DISCUSSION

21 This case concerns a discrete question of statutory construction:
22 may a trust company be denied appointment as a foreign trust company in
23 Montana merely because it is organized under the laws of another state that does
24 not permit trust companies to accept deposits? The Court holds that it may not.

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1 Under Montana law, “a foreign trust company from a state offering
2 reciprocity. . . may accept appointment and act” with certain trust powers,
3 including acting as a trustee, guardian, or conservator. Mont. Code Ann. § 32-1-
4 1002. Neither party disputes whether South Dakota is a state that offers
5 reciprocity. Thus, if First Trust is a “foreign trust company,” then it may be
6 appointed to act for these specified purposes within Montana.

7 A “foreign trust company” is defined in statute as follows:

8
9 For the purposes of this part, the term "foreign trust company"
10 includes each banking and trust association or corporation organized
11 under the laws of any state other than Montana that has the power to
12 act as trustee, guardian, or conservator and each [federally-chartered
foreign banking association with trust powers].

13 Mont. Code Ann. § 32-1-1002. The Division maintains that a “foreign trust
14 company” cannot include a non-depository trust company because such
15 companies are not “banking and trust association or corporations.” The
16 Division’s argument leans heavily on the and/or construction—“the ‘term foreign
17 trust company’ includes each banking and trust association or corporation”—to
18 argue that there must be intentional meaning behind this syntax. According to the
19 Division, this must mean the legislature intended that foreign trust companies be
20 both banking *and* trust associations, implying that foreign trust companies must
21 be depository institutions. As the Division puts it, the “ability to receive deposits
22 of money is the hallmark of a bank.” (Br. in Supp. of Mtn. for Summ. J., Dkt. 7 at
23 3.)

24 The Division’s description of a bank certainly comports with the
25 common understanding of the term “bank.” But this Court must concern itself not

1 with what an ordinary person would understand a “bank” to be, but what the
2 legislature has defined a “bank” to be. And under the statute, the ability to accept
3 money on deposit does not define the difference between “banking” and “trust”
4 companies. Statute says that the term “bank” extends to “any corporation that has
5 been incorporated to conduct the business of receiving money on deposit *or*
6 *transacting a trust* or investment business, as defined in this chapter.” Mont.
7 Code Ann. § 32-1-102(1) (emphasis added). Indeed, trust companies are but a
8 subset of banks, as the statute expressly delineates them as but one specific class
9 of bank, alongside commercial banks, savings banks, and investment companies.
10 *Id.* § 32-1-102(4). Moreover, trust companies are banks under Montana law
11 whether they accept deposits or not: trust companies are defined by statute as
12 corporations incorporated for “any *one or more* of” several purposes, including
13 “to accept, receive, and hold money on deposit, payable, either on time or on
14 demand, with or without interest, as may be agreed upon with the depositors.” *Id.*
15 § 32-1-107(9). Thus, trust companies that are organized and chartered to accept
16 deposits are banks; while trust companies that are not chartered to accept deposits
17 are also banks.

18 Moreover, there are places in statute where Montana law
19 distinguishes between depository and non-depository institutions. Investment
20 companies established before 1927 “not accepting, receiving, or holding money
21 on deposit” are not banks, *id.* § 32-1-102(5)(a).¹ Additionally, the Subsidiary
22 Trust Company Act, under which subsidiary trusts are considered banks but,
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24 ¹ The Division cites the Subsidiary Trust Company Act. But this simply shows that where the legislature intended to
25 carve out a *sui generis* depository-based distinction for subsidiary trusts—making them banks but also, unlike
regular trust companies, unable to accept deposits—they did so expressly. *See* Mont. Code Ann. § 32-1-802(5).

1 unlike regular trust, companies, expressly prohibited from accepting deposits. *See*
2 Mont. Code Ann. § 32-1-802(5). Thus, the legislature has demonstrated that it
3 knows how to exclude non-depository institutions when it wishes to do so. In the
4 fiduciary foreign trust company statutes, it has drawn no such distinction.

5 As used in the statute, “bank” and “trust company” are words with
6 a peculiar meaning assigned by law. When words “have acquired a peculiar and
7 appropriate meaning in law. . . [they] are to be construed according to such
8 peculiar and appropriate meaning.” Mont. Code Ann. § 1-2-106. Montana law
9 does not define “banking” to exclude non-depository financial institutions, and so
10 the Court has no basis for assuming that by using the phrase “banking and trust
11 association or corporation,” the legislature intended to exclude non-depository
12 trust companies. Indeed, this distinction would risk an absurd result: Under the
13 Division’s interpretation, a non-depository foreign trust company domiciled in a
14 reciprocating state that (like Montana) permits but does not require trust
15 companies to accept deposits could be appointed as a foreign trust; by contrast,
16 the identical non-depository trust company, this time bearing the misfortune of
17 being domiciled in a reciprocating state (like South Dakota) that does not permit
18 trust companies to accept deposits, cannot. Likewise, a domestic trust company
19 organized as a non-depository institution can act as a trust company, but the same
20 institution, organized under the laws of a state like South Dakota, cannot. The
21 Court cannot discern any reason why the legislature would allow non-depository
22 trust companies to operate in Montana so long as they are not organized in a state
23 where they *must* be non-depository. This conundrum further suggests the
24 legislature had no such intention.

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1 True, courts read statutes, when possible, to avoid superfluity. *See*
2 Mont. Code Ann. § 1-2-101 (“Where there are several provisions or particulars,
3 such a construction is, *if possible*, to be adopted as will give effect to all.”
4 (emphasis added)). This rule, however, is not absolute. The “legal doublet”—the
5 reflexive joining of two substantively identical words where one would do²—is a
6 common habit of lawyers, and an affliction from which legislative drafting
7 attorneys are not immune. *See, e.g., Milwaukee Dist. Council 48 v. Milwaukee*
8 *County*, 924 N.W.2d 153, 163 (Wisc. 2019). Thus, “[t]hough one might wish it
9 were otherwise, drafters. . . often (out of a misplaced pursuit of stylistic elegance)
10 use different words to denote the same concept.” *Id.* (quoting Antonin Scalia &
11 Bryan A. Garner, *Reading Law: the Interpretation of Legal Texts* 176 (2012)). As
12 a result, “sometimes drafters do repeat themselves and do include words that add
13 nothing of substance.” *Id.* at 162–163 (quoting Scalia & Garner at 176)
14 (emphasis in original). In this context the canon against surplusage principally
15 applies only where the coupled words “are susceptible to two different
16 interpretations, one of which will result in surplusage while the other [will] not.”
17 *Id.* at 161. Because a “trust company” is merely a subset of “bank” under
18 Montana law, there is no principled way to read the term “banking” as used in
19 Mont. Code Ann. § 32-1-1001 as anything more than a redundant reiteration of
20 the more specific term “trust.” The Court cannot ascribe the terms independent
21 meanings contrary to their statutory definitions merely to avoid superfluity.

22 Additionally, “and/or” constructions in a series are not always
23 interpreted as straightforwardly as the Division asserts. “I like apples and oranges
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25 ² E.g., “cease and desist” or “null and void.”

1 and pears” is generally understood as carrying the same meaning as “I like apples
2 or oranges or pears.” Nobody would understand the former to mean that a person
3 only likes all three fruits when consumed in tandem. Similarly, although
4 awkwardly constructed, “I like apples and oranges or pears” carries the same
5 meaning—that a person likes eating any of the three fruits, not that a person only
6 likes apples and oranges when consumed together, but pears when consumed
7 alone. Thus, “banking and trust associations or corporations” does not necessarily
8 carry any different meaning than “banking and trust associations and
9 corporations” or “banking or trust associations or corporations.”

10 Finally, First Trust persuasively argues that the verb in the
11 operative clause of Mont. Code Ann. § 32-1-1001 must also be considered: “the
12 term ‘foreign trust company’ includes each banking and trust association or
13 corporation.” The term “include” defines the contents of a set. Black’s Law
14 Dictionary 912 (11th ed. 2019 (“include” means “[t]o contain as part of
15 something.” When one describes the different elements within the set following
16 the word “includes,” one generally joins those items with an “and”—e.g., “The
17 fruits I like include apples and oranges and pears,” not “The fruits I like include
18 apples or oranges or pears.” Thus, the use of “and” is best read in conjunction
19 with “includes” to mean that these are simply the different types of entities that
20 comprise the set of foreign trust companies: banking associations, banking
21 corporations, trust associations, and trust corporations. The “includes....and”
22 recognizes that regardless of the precise form, entities that are banks or trusts,
23 whether considered “corporations” or “associations,” can be “foreign trust
24 companies” if they are organized to have trust powers in the reciprocating state of
25 domicile.

