IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 18-0643
Bremer County Case No. CVCV05656

DENVER SUNSET NURSING HOME,
Appellant/Plaintiff

vs.

CITY OF DENVER, IOWA,
Appellee/Defendant

APPEAL FROM THE IOWA DISTRICT COURT
FOR BREMER COUNTY
The Honorable Chris C. Foy

APPELLANT'S RESISTANCE TO APPELLEE'S APPPLICATION FOR FURTHER REVIEW OF COURT OF APPEALS DECISION FILED OCTOBER 23, 2019

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Rules

COMES NOW Appellant, Denver Sunset Nursing Home ("the Nursing Home"), pursuant to Iowa Rule of Appellate Procedure 6.1103(2) and hereby resists Defendant-Appellee's Application for Further Review in its entirety. Contrary to Appellee's assertions, the decision of the Iowa Court of Appeals was correct and need not be reviewed. The Iowa Court of Appeals correctly applied existing legal principles to conclude that the Nursing Home is entitled to relief for Appellee's actions in overcharging and excessively billing the Nursing Home for electricity usage. The Iowa Supreme Court should therefore deny Appellee's Application on all grounds advanced.

REPLY TO STATEMENT OF FACTS

The facts of this case are sufficiently set forth in the decision of the Iowa Court of Appeals, Denver Sunset Nursing Home v. City of Denver, Iowa, No. 18-0643, 2019 WL 5424919 (Oct. 23, 2019), and in the Nursing Home's Final Brief to the Iowa Court of Appeals. As a result, this Section provides only a short highlight of the most pertinent facts.

The City of Denver ("the City") overcharged the Nursing Home for electricity over a period of nearly 29 years starting in 1985, resulting in a financial gain to the City of $996,194.03. (See Denver Sunset Home Electric

Meter Change, App. 255; see Letter from Steven K. Duggan, C.P.A. (June 1, 2017), App. 59–71.) After the City's electric meter was installed at the Nursing Home and the meter's "multiplier" was misapplied by the City and its personnel, the Nursing Home was billed for 200% of its actual electricity usage from May 22, 1985 until approximately March 24, 2014. (See Electric Meter Replacement Project, App. 212; see App. 210–11.) After learning of the errors during a board of directors meeting on September 19, 2016, the Nursing Home brought the instant suit—filed December 20, 2016. (See Bd. of Dirs. Meeting (Sept. 19, 2016), App. 252; see also App. 7–9.)

Background of the Parties

The Nursing Home is an Iowa nonprofit corporation that owns and operates a licensed nursing home in Denver, Iowa. (See Amended & Substituted Pet. for Declaratory J. at ¶ 1 (June 5, 2017) [hereinafter "Pet."], App. 75; see Answer to Amended & Substituted Pet. for Declaratory J. at ¶ 1 (July 18, 2017) [hereinafter "Answer"], App. 169.) The Nursing Home is a community-based organization formed in 1964 and is governed by a nine-member, volunteer board of directors. (See Stumme Aff. at ¶ 2 (June 5, 2017), App. 72.) The Nursing Home is licensed by the State of Iowa as a "Nursing Facility" and "Skilled Nursing Facility," and it has the capacity for

31 residents. (See Pet. at ¶ 1, App. 75; see Answer at ¶ 1, App. 169; see Stumme Aff. at ¶ 3, App. 72.)

The City owns, operates, and provides utilities, including electricity services, which it sells to its residents. (See Pet. at ¶ 2, App. 75; see Answer at ¶ 2, App. 169.) The City provides the only electric utility service that is available to the Nursing Home. (See Stumme Aff. at ¶ 5, App. 72; see Iowa Util. Bd., "Town Provider List," p. 35 (Apr. 30, 2015), App. 30, available at https://iub.iowa.gov/sites/default/files/files/misc/town-provider-list.pdf.) As part of its arrangement to provide utility services, the City sets the sale price for electricity, and it creates and sends out monthly billing statements for the electricity used by each of its customers. (See, e.g., DenverSunset 4–6, App. 50–52 (summary of monthly electric charges).) In this case, the City admits that it miscalculated the bills for the Nursing Home. (Compare Pet. at ¶ 3, App. 75, with Answer at ¶ 3, App. 169 ("It is admitted that Plaintiff's charges for electrical service have been miscalculated.").)

History of the Electric Meter at the Nursing Home

In 1985, the Nursing Home built an addition to its facility. (See Stumme Aff. at ¶ 9, App. 73.) As part of that addition, a new electric meter was installed at the Nursing Home. (See Record of Watthour Meter, App.

240; see Plaintiff's Answer to Interrogatory No. 2, App. 45.) The Nursing Home did not furnish the meter, install the meter, test the meter, or hire any person to perform any of those tasks on the Nursing Home's behalf; the City did all this. (See Stumme Aff. at ¶¶ 10–11, App. 73; see City's Answer to Interrogatory Nos. 2–4, App. 45–47.) Notably, electric meters within the City of Denver are the property of the City and not of the customer on whose property the meters are affixed. (See, e.g., App. 208–09, 215–19, 233–34, 238–39.) In fact, no customer is allowed to make any changes in the meter; nor does a customer like the Nursing Home read the meter and report its electricity usage to the City. (See id.)

Some years later, in 2014, the City undertook a citywide commercial meter replacement program. (See Farley Aff. at ¶¶ 7–8 (May 19, 2017), App. 54.) On March 24, 2014, the City's Electrical Superintendent, Larry Zars ("Zars"), reviewed the electric meter at the Nursing Home and its wiring. (See id.) Zars determined that the multiplier for the City's meter at the Nursing Home had long been incorrect. (See id.) According to Zars, "the measured electricity should have been subject to a multiplier of 40 rather than 80." (See Zars Aff. at ¶¶ 6–10 (May 19, 2017), App. 56–57.)

"Essentially, the multiplier should have been cut in half due to the chosen method of wiring." (See id.)

The electric meter at the Nursing Home was thereafter replaced on April 22, 2014, with a new meter and multiplier that correctly reflected the Nursing Home's electricity usage. (See App. 210–11; see Electric Meter Replacement Project (Mar. 24, 2014), App. 212; see Timeline, App. 213.) However, as a consequence of the incorrect multiplier, from the period of approximately May 22, 1985 and continuing until 2014, the City overcharged the Nursing Home on its electricity bill. (Compare Pet. at ¶ 3, App. 75; with Answer at ¶ 3, App. 169; see also App. 53–54, 57.) Despite the then-unknown errors with the meter's multiplier, the Nursing Home paid each and every electricity bill issued by the City during this period. (See App. 72.)

Revelation of the Overcharges to the Nursing Home

The Nursing Home did not become aware of the overcharges until 2016. (See Bd. of Dirs. Meeting Minutes (Sept. 19, 2016), App. 31.) Notably, the "80" multiplier that was the root and origin of the excessive bill was not stated anywhere on the physical meter that was installed at the Nursing Home for those nearly three decades. (See App. 234–35.) Nor was

the "80" multiplier stated on the customer bills that were generated by the City and sent to the Nursing Home in the ordinary course. (See App. 237–38; see also Record of Watthour Meter, App. 240 ("Meter card" used by the City); see also Order Granting Summary Judgment at 2 (Nov. 30, 2017), App. 186 ("There is nothing in the summary judgment record to indicate or suggest that either party . . . knew or should have known that [the City] was using an incorrect rate multiplier for the meter or was overcharging [the Nursing Home] . . . at any time between May 22, 1985 and March 24, 2014.") (emphasis added).)

As the Court of Appeals reiterated in its recent decision, the Nursing Home "did not know of those overcharges until 2016." Denver Sunset Nursing Home, 2019 WL 5424919 at *5. That is to say, even though the City determined in March 2014 that the Nursing Home had been excessively billed for decades, see id. at *1 n.1, it did not reveal this fact to the Nursing Home. (See App. 242–45; see Timeline, App. 213; see Dep. of Larry Farley at 53:7–54:1, App. 220–25 ("**Q**. So back in 2014 it was your understanding that the multiplier was wrong and was charging Denver Sunset Nursing Home double for electricity? **A. Yes.**"), 59:9–25, App. 227 (indicating that City Administrator Larry Farley's first contact with the Nursing Home about

the overcharges was on September 20, 2016), 53:7–22, App. 224 (double billing was previously confirmed by Chapman in 2014), 69:13–21, App. 231 (contacting legal counsel).)

The Nursing Home actually learned of the overcharge from a part-time maintenance man, Ron Milius ("Milius"), who also happened to be the former mayor of Denver and a personal friend of Zars, the City Electrician. (See Dep. of Ron Milius at 14:17–16:2, App. 242–44; see Bd. of Dirs. Meeting Minutes (Sept. 19, 2016), App. 31.) Milius overheard Zars and his coworker discussing the meter at the Nursing Home. (See App. 242–43.) Zars informed Milius that the Nursing Home had been paying double bills for a long period of time. (See id.)

Upon learning about the excessive charges in a September 2016 meeting, the board of the Nursing Home decided to pursue legal action. On December 20, 2016, the instant lawsuit was filed in Bremer County District Court seeking the full amount of the overcharge for electricity from 1985 to 2014. (See Letter from the Nursing Home to the City (Oct. 19, 2016), App. 257; see Pet. for Declaratory J. and Jury Demand (Dec. 20, 2016), App. 32–34.) Thus, the Nursing Home filed its action against the City within 3 months and 1 day of learning about the overcharges. (Compare Bd. of Dirs.

Meeting Minutes (Sept. 19, 2016), App. 31 with Pet. for Declaratory J. and Jury Demand (Dec. 20, 2016), App. 32–34.) The Iowa Court of Appeals determined in its October 23, 2019 ruling that the Nursing Home's suit for damages was timely filed and that the Nursing Home was therefore entitled to recovery in this matter for the past overcharges. See Denver Sunset Nursing Home, 2019 WL 5424919 at *5.

REPLY TO ARGUMENT

The Iowa Supreme Court should decline further review in this case for two reasons. First, despite the City's claims to the contrary, the Court of Appeals duly considered the City's argument that tangentially-related "resolutions" applied to this dispute, and the Court of Appeals correctly found against the City on this argument. Second, the City is not entitled to further review on its "no contract" argument because, among other things, the City urged this very analysis before the Court of Appeals and also because the City offers no alternative grounds that would take this dispute out of a section 614.1(4) analysis. Thus, further review is not warranted in this case, and the Court should deny the City's Application.

As a threshold matter, the City has offered several bases in support of its Application, including its claim that this case involves "an important

question of law that has not been, but should be, settled by the supreme court." (See Appellee's Application at 5.) However, in the City's Final Brief, filed August 15, 2018, the City expressly agreed that this appeal should be transferred to the court of appeals because it involves "application of existing legal principles" as stated in Iowa Rule of Appellate Procedure 6.1101(3). (See Appellant's Br. at 9; see Appellee's Br. at 7 ("The City of Denver, Iowa . . . agrees with the Routing Statement found in [the Nursing Home's] brief.").) The parties were in accord on this point, with both sides indicating that transfer to the Court of Appeals was appropriate. (See Appellant's Br. at 9; see Appellee's Br. at 7.) The case was so transferred.

Now, after the Court of Appeals has reversed the district court's ruling and found in the Nursing Home's favor, the City has changed its position and, in seeking further review, claims this is a case involves "an important question of changing legal principles." (See Appellee's Application at 5.) The City, disappointed with the adverse ruling, now attempts to ignore its prior admission and requests that the Iowa Supreme Court decide the case again. See Denver Sunset Nursing Home, 2019 WL 5424919 at *5. This is not an adequate basis for further review, and the Court should deny the City's Application accordingly.

I. THE COURT OF APPEALS DULY CONSIDERED THE CITY'S ARGUMENT ABOUT ITS "RESOLUTIONS" AND CORRECTLY FOUND AGAINST THE CITY.

The Court should deny the City's Application because the Court of Appeals correctly determined that the City's claimed "resolutions" were not dispositive for the instant dispute. To review, the City's primary basis for its request for further review is that the City believes the Court of Appeals "[e]rroneously disregarded" two city council resolutions[1] contained in the Appendix. (See Appellee's Application at 8.) According to the City, the Iowa Supreme Court should review and re-decide this case because, if the Court of Appeals had considered that part of the record, then the outcome of this case would somehow be different. (See id. at 8–9.)

[1] On August 19, 2002, the City adopted Resolution No. 50-2002, the Fiscal Policy for the City, which the City claims is proof it "adopted a five-year limitation period for refunds of any overcharges." (See App. 117–34.) The Fiscal Policy states that it should "be used to guide the decision-making process of elected officials and guide staff in performing their daily tasks pertaining to the accounting and financial practices and policies of the City of Denver." (See App. 120 (emphasis added).) As such, the resolution does not appear to be (or even purport to be) a firm and fixed rule about electricity rates. See, e.g., Iowa Code § 384.84(1) (requiring utility rates to be "published in the same manner as an ordinance"). That is, the statements expressed here are "guidelines, not tramlines" and do not govern this dispute.

The City's argument is unavailing for several reasons. Foremost and as a preliminary matter, the Court of Appeals emphatically did not "disregard[]" the resolution, as the City repeatedly claims. (See id. at 8–11.) To the contrary, the Court of Appeals dedicated several paragraphs of its October 23, 2019 opinion to analyzing precisely this argument from the City. See Denver Sunset Nursing Home, 2019 WL 5424919 at *4. That analysis is evident in the record; the City simply does not like the conclusion reached. This is not a basis for an application for further review under the Rules of Appellate Procedure. See Iowa R. App. P. 6.1103(1).

Pursuant to its assessment of the City's claims, the Court of Appeals also noted—and correctly so—the rather strained reading of the record urged by the City: At no point in the roughly 80 pages of material cited by the City does the resolution ever actually state that the City is adopting the refund rule set forth in Iowa Administrative Code rule 199-20.4(14)(e), as the City claims. (See Appellant's Br. at 10; see also App. 87–168 (cited by the City).) The Court of Appeals observed:

> The ordinance purportedly conferring authority upon the City to collect debts and issue refunds as it saw fit was neither cited nor admitted in the district court. The City simply introduced "resolutions" containing the following sentence: "The electric utility is regulated by the Iowa Utilities Board." The

> resolutions, in turn, did not cite or quote the Iowa Utilities Board regulation upon which the City now relies.

Denver Sunset Nursing Home, 2019 WL 5424919 at *4. The consequence here is that the resolution urged by the City does not actually do what the City argues it does, namely, incorporate a set of some (or perhaps all) of the regulations in the 199 Iowa Administrative Code chapter 20 (but also perhaps some other chapters, as well). Rather than expressly stating any rule, chapter, or provision, the resolution instead broadly declares that the City's utility is "regulated by the Iowa Utilities Board." See id. Notably, that declaration is incorrect and is itself at odds with Iowa Code section 476.1B, which specifically exempts a municipally-owned utility from regulation by the Iowa Utilities Board in these circumstances[2]. See Iowa Code § 476.1B.

So as a preliminary matter, the Court of Appeals did not erroneously disregard a portion of the Appendix. While the City suggests that the Court of Appeals wrongfully ignored a resolution (due to the City's technical lack of compliance with Iowa Code sections 622.62 and 384.84(1)), the Court of

[2] To be sure, the City previously argued and conceded that the Iowa Utility Board's refund authority does not extend to Denver under this very statute. (See Memo. of Law in Support of City's Mot. for Summ. J. at 4 (May 19, 2017) ("[T]he Board's authority over refunds . . . does not extend to Denver, which is a municipally-owned utility. See Iowa Code § 476.1B.").)

Appeals simply did not commit the "offense" it is now accused of. (See Appellee's Application at 8–9 (inferring that the Court of Appeals did not decide the City's resolution-based argument on the merits).) To the contrary, the Court of Appeals fully considered the City's resolutions and the interpretation the City urged on appeal. See id. Therefore, there is no merit to this contention, and it is not a tenable basis for further review.

More fundamental is the fact that the City's resolution-based argument simply does not aid the City's cause. Despite all the above *prima facie* impediments to the City's argument, the Court of Appeals nevertheless fully analyzed the administrative rule urged by the City, and it did so on the merits. The Court of Appeals effectively set aside the technical lack a comprehensive record on this point, and continued:

> In any event, the IUB regulation cited by the City does not limit Denver Sunset's recovery to "five years," as the City contends. The regulation states, "The time period for which the utility is required to adjust, refund, or credit the customer's bill shall not exceed five years unless otherwise ordered by the board." See Iowa Admin. Code r. 199-20.4(14)(e). The regulation permits the board to order a refund for a period greater than five years.

Denver Sunset Nursing Home, 2019 WL 5424919 at *4.

The Court of Appeals thus fully considered the City's resolution-based argument, and it reached the appropriate conclusion. This is because

Iowa Administrative Code rule 199-20.4(14)(e) both (i) requires refunds for up to five years' worth of overcharges and (ii) grants the Iowa Utility Board discretion to "otherwise order[]" an additional, corrective refund or credit for overcharges—refunds that may be unlimited by either the passage of time or the duration of the overcharges. See Iowa Administrative Code r. 199-20.4(14)(e); see Mid-Iowa Cmty. Action, Inc. v. Iowa State Commerce Comm'n, 421 N.W.2d 899, 901 (Iowa 1988) ("[W]e interpret this rule as not only allowing but compelling the board to order the refund of overcharges and illegally collected revenue.").

To put it another way, the regulation admits of circumstances where the Iowa Utility Board might "otherwise order[]" a refund well beyond a five-year horizon. Moreover, the regulation itself bases its restitution period on the erroneous overcharge itself, not on the date an aggrieved customer petitioned for relief from the erroneous bill. See Iowa Admin. Code r. 199-20.4(14)(e) These facts further underscore the conclusion reached by the Court of Appeals: Even if the regulation did apply to this dispute[3], the regulation does not "limit" an aggrieved customer's recovery to "five years," as the City contends. The regulation is broader than that by its plain

[3] It does not. See Iowa Code § 476.1B(1).

language, and there was no error in the analysis by the Court of Appeals on this point.

The Iowa Supreme Court should therefore deny the City's Application. All of these contentions were squarely placed before the Court of Appeals, and the Court of Appeals appropriately ruled against the City. Importantly, the Court of Appeals so ruled after fully considering the claimed regulation on the merits—not by "erroneously disregarding" the City's resolutions.

The Court of Appeals correctly concluded that the administrative rule urged by the City (i) did not apply to this overbilling dispute and (ii) in any event, simply did not aid the City's cause. Denver Sunset Nursing Home, 2019 WL 5424919 at *4 (observing that "[t]he regulation permits the board to order a refund for a period greater than five years"), *5 (considering the argument again in its review of the amicus briefing, and again concluding "the Iowa Utilities Board regulation on which amicus relies . . . is broader than that"). Thus, further review need not be granted.

II. THE CITY PREVIOUSLY URGED ON APPEAL THAT THIS CASE IS "PROPERLY PREMISED" ON THE "CONTRACTUAL NATURE" OF THE PARTIES' RELATIONSHIP, SO FURTHER REVIEW TO CONTEST THAT VERY FINDING IS NOT WARRANTED.

The Court should also deny the City's Application for Further Review because its Application attempts to wholly controvert the very arguments the City urged before the Court of Appeals. To review, the City's secondary basis for its Application is that the Court of Appeals incorrectly concluded that there was a "contractual relationship" between the City and the Nursing Home. (See Appellee's Application at 11–13.) According to the City, this conclusion is unsound because, among other things, there is "no 'bargained for' exchange" or negotiation between the City and the Nursing Home that would warrant a contract-based analysis of the instant dispute. (See id.)

This argument is inapt for further review because it requires the Court to ignore many of the City's prior contentions in this case. For example, the City initially moved for summary judgment on the basis of the statute of limitations, and the City made its argument in express reliance on Iowa Code section 614.1(4), which governs claims for unwritten contracts and for "all other actions not otherwise provided for." (See, e.g., Memo. of Law in Support of City's Mot. for Summ. J. at 7–8 (May 19, 2017) (citing Iowa

Code section 614.1(4) in support of its claim that the Nursing Home's cause of action "should be limited to five years").) Similarly, the City argued in this very appeal that the district court decision should remain in force and effect because the district court "properly premised the limitation period upon the contractual nature of the relationship" between the City and the Nursing Home. (See Appellee's Br. at 22 (emphasis added).) The City cannot have it both ways.

This point was not lost on the Court of Appeals, which noted that the City was "equivocal" regarding its simultaneous criticism of and support for a contract-based analysis in the instant dispute. See Denver Sunset Nursing Home, 2019 WL 5424919 at *2. ("On the one hand, the City asserts it 'does not necessarily agree the relationship between a municipal utility and its ratepayers is purely contractual.' On the other hand, it contends 'the district court properly premised the limitation period upon the contractual nature of the relationship.'").

The Nursing Home acknowledges that litigants are entitled to present their arguments in the alternative. But even setting aside the City's equivocation on this point, the City's Application still remains unfounded because the City does not actually propose an alternative chapter 614

provision that would somehow be more apt in these circumstances. To review, the City correctly identifies that "the appropriate statute of limitations is to be ascertained by characterizing the actual nature of the action." See Sandbulte v. Farm Bureau Mut. Ins. Co., 343 N.W.2d 457, 462 (Iowa 1984) overruled on other grounds by Langwith v. Am. Nat'l Gen. Ins. Co., 793 N.W.2d 215 (Iowa 2010). As this Court has previously stated, the statute of limitations analysis requires the courts to "look to the foundation of the action." See id.

While the City argues, at some length, that the foundation of this dispute cannot be contract-based (see Appellee's Application at 11–13), the City also does not affirmatively state what alternative chapter 614 provision better captures the nature of the Nursing Home's grievance. This is important because even if Iowa Code section 614.1(4) is inapt here (on the premise that an "unwritten contract" is unsupported by the record or by the relationship of the parties), then the suitable alternative is still the catch-all provision for "all other actions," which is contained in the very same code section. Under Iowa Code section 614.1(4), both unwritten contract disputes and "all other" disputes are subject to the same, five-year statute of limitations.

To put it another way, if the dispute here does not sound in contract, then, at the very least, the dispute is embraced by Iowa Code section 614.1(4) as an "other" action. See, e.g., State, Dept. of Human Servs. ex rel. Palmer v. Unisys Corp., 637 N.W.2d 142, 149–50 (Iowa 2001) (describing the claim of unjust enrichment); Dolezal v. City of Cedar Rapids, 326 N.W.2d 355, 360 (Iowa 1982) (permitting unjust enrichment recovery against municipal corporation and noting that claims for unjust enrichment are subject to a five-year statute of limitation under Iowa Code chapter 614); see also Iowa Code § 614.1(4). Thus, the Nursing Home's claim against the City—whether sounding in contract, or in unjust enrichment, or otherwise—necessarily invokes Iowa Code section 614.1(4).

The Court of Appeals therefore correctly applied Iowa Supreme Court precedent to determine the "foundation" or proper "nature" of the instant dispute. See Denver Sunset Nursing Home, 2019 WL 5424919 at *2, *5. The Court of Appeals found that Iowa Code section 614.1(4) captures the Nursing Home's essential grievance, whether it is a contract-focused dispute or an "other action." See id. (noting that, regardless of whether or not the contact analysis is most fitting, "section 614.1(1) also applies to 'other actions.'").) As the Court of Appeals aptly remarked, "At the very least,

Denver Sunset's lawsuit fell within the "other actions" category." See id. As a result, the Court of Appeals did not err in its conclusion, and further review is not warranted. The Court should therefore deny the City's Application on all points.

CONCLUSION

For these reasons, Denver Sunset Nursing Home respectfully requests that the Court **deny** the City of Denver, Iowa's Application for Further Review.

CERTIFICATE OF COMPLIANCE

1. This Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this Brief contains 4,530 words, excluding the parts of the Brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This Brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this Brief has been prepared in a proportionally-spaced typeface using Microsoft Word in Times New Roman size 14 font.

Respectfully submitted,

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CERTIFICATE OF FILING

The undersigned certifies that on the 22nd day of November, 2019, the undersigned electronically filed this document using the Electronic Document Management System.

/s/ Erich Priebe

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PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon the Clerk of the Supreme Court and upon all parties to the above cause, to each of the attorneys of record herein at their respective addresses disclosed on the pleadings, on the 22nd day of November, 2019.

By: ____ U.S. Mail ____ FAX
____ Hand Delivered ____ UPS
____ Federal Express ____ E-mail
__X__ EDMS Participant (Electronic Service)

Signature /s/ Erich D. Priebe