Case No. 81390

In the Supreme Court of Nevada

TRUDI LEE LYTLE; and JOHN ALLEN LYTLE, as trustees of the Lytle Trust,

Appellants,

vs.

SEPTEMBER TRUST, DATED MARCH 23, 1972; GERRY R. ZOBRIST AND JOLIN G. ZOBRIST, as trustees of the GERRY R. ZOBRIST AND JOLIN G. ZOBRIST FAMILY TRUST; RAYNALDO G. SANDOVAL AND JULIE MARIE SANDOVAL GEGEN, as Trustees of the RAYNALDO G. AND EVELYN A. SANDOVAL JOINT LIVING AND DEVOLUTION TRUST DATED MAY 27, 1992; DENNIS A. GEGEN AND JULIE S. GEGEN, Husband and wife, as joint tenants; ROBERT Z. DISMAN; and YVONNE A. DISMAN,

Respondents.

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable TIMOTHY C. WILLIAMS, District Judge
District Court Case Nos. A-16-747800-C and A-17-765372-C

APPELLANTS' REPLY BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certify that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

Appellants Trudi Lee Lytle and John Allen Lytle, trustees of the Lytle Trust, are individuals.

Richard E. Haskin and Timothy P. Elson at Gibbs Giden Locher Turner Senet & Wittbrodt LLP represented the Lytle Trust in the district court. Joel D. Henriod, Daniel F. Polsenberg, Dan R. Waite, and Kory Koerperich at Lewis Roca Rothgerber Christie LLP represent the Lytle Trust in the district court and before this Court.

Dated this 3rd day of September, 2021.

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The district court's May 2018 order did not, and could not have, enjoined the Lytle Trust from enforcing its judgment against the Association through a receivership. By finding the Lytle Trust in contempt for pursuing a lawful collection remedy, the district court expanded its previous order beyond the court's legal authority and then held the Lytle Trust in contempt ex post facto for violating that new interpretation. The justification for the contempt order appears to rest on the faulty assumption that the Association lacks authority to levy assessments against the Property Owners to pay the Association's obligation to the Lytle Trust. That is not true and, more importantly, the receivership case is the proper place to litigate that issue, not through contempt proceedings. The Lytle Trust therefore asks this Court to vacate the contempt order in this appeal because it unlawfully infringes on its right to collect the judgments against the Association.

I.

THE DISTRICT COURT ABUSED ITS DISCRETION BY HOLDING THE LYTLE TRUST IN CONTEMPT AFTER UNREASONABLY AND UNLAWFULLY EXPANDING THE REACH OF ITS INJUNCTION

The Lytle Trust reasonably believed that it was complying with the district court's May 2018 injunction when it sought a receivership over the Association. The district court's order enjoined the Lytle Trust "from taking any action in the future directly against the [Property Owners[1]] or their properties" based on the judgments against the Association. 3 AA 712. The Lytle Trust understood that the injunction denied it the ability to recover directly from the Property Owners for the judgments previously entered against the Association, so it instead sought a receivership over the Association to allow it to pursue its own

[1] Again, neither the Dismans nor their predecessors the Bouldens were a party to the May 2018 injunction and it was therefore clear error for the district court to find that the Lytle Trust was in contempt as it relates to any action against the Dismans. *See* AOB at 9 n.8. The Dismans had no interest in enforcement of the May 2018 injunction because they were not parties to it, and they should not have been joined in the action and do not have standing in this appeal. *See* NRS 12.130; NRCP 24; NRAP 3a. While the Dismans claim that the finding of contempt for the May 2018 order necessarily implies contempt for the April 2017 order that they were party to, the district court expressly noted it did not find the Lytle Trust in contempt of the April 2017 order. *See* 6 AA 1451; 7 AA 1557.

legal avenues to satisfy the judgments. For this, the district court held the Lytle Trust in contempt, clarifying that when the injunction said "any action" it meant "any action, whether direct or indirect" that could result in the Property Owners paying toward the judgment. 7 AA 1557.

A. The Only Reasonable Interpretation of the May 2018 Injunction is that it Prevented Any Action Directly Against the Property Owners to Collect the Judgment Against the Association

The district court unreasonably expanded the language in its May 2018 injunction to hold the Lytle Trust in contempt. The Property Owners assert that the Lytle Trust focuses too narrowly on the word "directly" instead of the phrase "any action," and fails to read the injunction order as a whole. *See, e.g.*, RAB at 29. But if "any action" really meant "any action, whether direct or indirect," then the injunction would read like this: "[T]he Lytle Trust is permanently enjoined from taking *[any action, whether direct or indirect]* in the future directly against the Plaintiffs or their properties based upon the Rosemere Litigation I, Rosemere Litigation II or Rosemere Litigation III." 3 AA 712. This head-spinning interpretation suggests that the district court's order enjoined the Lytle Trust from taking indirect

action directly against the Property Owners. The Lytle Trust could not have known that when the district court enjoined any action "directly" against the Property Owners that it also meant the opposite, and that any action "indirectly" against the property owners was enjoined as well. *See Div. of Child & Fam. Servs. v. Eighth Jud. Dist. Ct.*, 120 Nev. 445, 454, 92 P.3d 1239, 1245 (2004) ("The need for clarity and lack of ambiguity are especially acute in the contempt context.").

The district court's "direct or indirect" interpretation also ignores that "action" is a term with legal significance, especially in the context of collecting a debt. *See, e.g.*, NRS 40.430(6)(a) (providing, in the context of the one-action rule for collecting on a secured debt, that "an 'action' does not include any act or proceeding . . . [t]o appoint a receiver for, or obtain possession of, any real or personal collateral for the debt"); *see also* NRS 11.190 (setting forth the periods of limitation for various "action[s]"). "An action is a legal prosecution by a party complainant against a party defendant, to obtain the judgment of the court in relation to some rights claimed to be secured, or some remedy claimed to be given by law to the party complaining." *Haley v. Eureka County Bank*, 21 Nev. 127, 26. P. 64, 67 (1891). An "action" requires two

parties in opposing positions seeking adjudication from the court. *See State v. Yellow Jacket Silver Min. Co.*, 14 Nev. 220, 244 (1879) ("Every action is based upon some primary right by the plaintiff, and upon a duty resting upon the defendant corresponding to such right."). The most reasonable interpretation of "action," then, is what the Lytle Trust describes in plain English as seeking "direct" recovery from the Property Owners for the judgment against the Association. In fact, the May 2018 injunction expressly limits the type of action enjoined to those that are "directly against" the Property Owners. 3 AA 712.

If the meaning of "action" was as broad and plain as the district court and the Property Owners now assert, it would not be necessary for the court to explain its meaning by adding modifiers like "direct or indirect," *see* 7 AA 1557 (order denying clarification of contempt order), or to say action is prevented "in any way, shape, or form," *see* 6 AA 1449 (contempt order). In reality, by interpreting "action" to also include steps taken that might *indirectly* affect the Property Owners, the district court changed the legal understanding of "action." It also ignored that the injunction only expressly prohibited actions "directly against" the Property Owners. The May 2018 injunction therefore only

clearly and unambiguously enjoins the Lytle Trust from taking any action directly against the Property Owners to collect the judgments against the Association.

B. The Lytle Trust Did Not Take Any Action Directly Against the Property Owners to Collect the Judgment Against the Association

Put succinctly, the appointment of a receiver over the Association was not an action directly against the Property Owners. To conclude that the Lytle Trust violated the May 2018 order, the district court had to either improperly conflate the Property Owners with the Association, or improperly conflate the Lytle Trust with the receiver, or both. *See* RAB 35-36 (citing to the district court's contempt order, 7 AA 1557, for the proposition that the district court "stripped the Lytle Trust of their ability and right to enforce those judgments vis-à-vis the homeowners in this case"). But each are independent from each other.

To be clear, the Lytle Trust, as judgment creditor, asked a court to appoint a receiver over the Association, as judgment debtor, to enforce the judgment against the Association. *See* NRS Chapter 32. The receiver, acting for the court and on behalf of the Association, then sought to impose and collect assessments against the Property Owners

to satisfy the judgments against the Association. *See* NRS 32.175 (defining "Receiver" as "a person appointed by the court as the court's agent, and subject to the court's direction"). At no point after issuance of the May 2018 Order did the Lytle Trust bring an action against the Property Owners to hold them liable for the Rosemere Judgments.

The Lytle Trust is not seeking to hold the Property Owners *liable* for the Association's judgments, which is what the May 2018 injunction prohibited. Rather, the Association itself is now seeking to satisfy its obligations by looking to its members to the extent of its authority to do so. While that may *affect* the Property Owners as members of the Association, it is materially distinct from the Lytle Trust executing their judgments against them—in the same way that piercing a corporate veil to execute a judgment directly against shareholders, members, directors, etc., is different from any internal consequence a judgment may cause those people by way of a capital call, lost dividends, diminishment of share value, etc.

Thus, the receivership is a proper legal remedy that was not foreclosed under a plain reading of the district court's May 2018 order. Accordingly, the district court abused its discretion by holding the Lytle

Trust in contempt despite the Lytle Trust's reasonable interpretation of the May 2018 injunction. Indeed, the Lytle Trust's interpretation was not just reasonable, it was the *only* reasonable interpretation of the injunction, because the district court had no legal authority to prevent the Lytle Trust from exercising lawful remedies to collect the judgments against the Association. *See Cunningham v. Eighth Judicial Dist. Ct.*, 102 Nev. 551, 559, 729 P.2d 1328, 1333 (1986) (finding of contempt must be based on a "lawful order").

C. By Holding the Lytle Trust in Contempt, the District Court is Preventing the Lytle Trust From Pursuing Lawful Remedies to Collect the Judgments That Were Not at Issue in the May 2018 Order

The May 2018 injunction did not clearly and unambiguously limit the manner in which the Lytle Trust could collect the judgments directly from the Association. Nor could it have, because the Association was not a party to the action. Nonetheless, the Property Owners argue that the Lytle Trust relies "on an improperly narrow reading of the May 2018 order, paying too much attention to individual phrases without any analysis of the whole order and history of the case." RAB at 25. The Property Owners argue that the district court

"saw through the Lytle Trust's effort to circumvent the Injunction Orders." RAB at 26.

Notably, the law should provide for skepticism, not deference, when a judge's contempt order is based on something other than a violation of a clear and unambiguous directive in a written order. *Cf., e.g.*, *Detwiler v. Eighth Jud. Dist. Ct.*, 137 Nev. Adv. Op. 18, 486 P.3d 710, 717 (2021) (noting that the peremptory strike statute for contempt "recognizes that there is at least some potential for the appearance of bias when a judge tries an alleged contemnor for contempt of *that very judge*"); *Southwest Gas Corp. v. Flintkote Co.*, 99 Nev. 127, 131, 659 P.2d 861, 864 (1983).

And while the district court and the Property Owners may have been annoyed by the Lytle Trust's attempts to collect on the judgments, the context behind the injunction does not provide the meaning the Property Owners and district court now attribute to it. The litigation underlying the May 2018 injunction was about whether the Rosemere judgments could be enforced directly against the Property Owners based on NRS 116.3117 or other equitable principles involving common interest communities. *See Lytle v. Boulden*, Docket No. 73039 (Order of Affirmance, December 4, 2018) (summarizing the district court's

injunction as "enjoining the Lytles from enforcing the judgment or any related abstracts against the Boulden or Lamothe properties"); *Lytle v. September Trust*¸ Docket No. 76198 (Order of Affirmance, March 2, 2020) (addressing "whether the Lytles could rely on NRS 116.3117 to record abstracts of judgment against the individual properties in Rosemere."). If the district court intended to go a step further and strip the Lytle Trust of all legal remedies against the Association that might ultimately end in the Property Owners indirectly paying for the judgment, it certainly did not do so clearly and unambiguously. If it had, the Lytle Trust would have had the opportunity to challenge that order as unlawful in the previous appeals.

Instead, the earlier litigation focused on the Lytle Trust's ability to collect the Rosemere judgments against the Association directly from the Property Owners. This Court agreed with the district court that there was no legal basis to do so. *See Lytle v. Boulden*, Docket No. 73039 (Order of Affirmance, December 4, 2018); *Lytle v. September Trust*¸ Docket No. 76198 (Order of Affirmance, March 2, 2020). In this case before the Court now, however, there is a legal basis for the Lytle Trust to collect its judgments against the Association from the

Association, through a receivership. Specifically, Nevada statutes authorize a receiver to force the Association to act within its authority to collect assessments to pay the judgment. *See infra Section D.* Requiring the Association to act within its authority to collect from the Property Owners is not the type of action directly against the Property Owners that the parties and this Court previously contemplated when litigating the May 2018 injunction. So even though the courts have found that the Lytle Trust has no authority to collect the Rosemere judgments directly from the Property Owners, the Lytle Trust maintains the ability to collect the judgments from the Association, and the Association certainly retains the authority to call on the Property Owners to contribute to the Association's obligations.

D. A Receivership is a Lawful Manner to Collect the Judgment Against the Association

The Property Owners' defense of the contempt order relies on the faulty assumption that the Lytle Trust circumvented the injunction because there is no legal basis for a receiver to impose and collect assessments against them in the name of the Association. *See* RAB at 20. In reality, the Order Appointing Receiver simply authorized the

receiver to exercise powers the Association already possesses and has a long history of exercising (by some of these very property owners when they controlled the Association as board members).

1. The Lytle Trust Reasonably Believes That the Association Has the Power to Make Assessments Under NRS Chapter 82 as a Nonprofit Corporation

The Property Owners refer to the "property owners' committee" and suggest that the Association's powers are no broader than those originally vested in the committee. RAB at 4-5. However, what started as an informal "property owners' committee" under the CC&Rs in 1994, became a formal nonprofit corporation under NRS Chapter 82 in 1997. The Property Owners' arguments ignore that the Association is an NRS 82 nonprofit corporation.

In 1997, the property owners unanimously approved formalizing the committee as an NRS 82 nonprofit corporation, named the Rosemere Estates Property Owners Association ("Association"). *See* 2 AA 391. Like the property owners' committee, the Association has been deemed "a limited purpose association under NRS 116.1201." *Id.*; *Lytle v. September Trust*¸ Docket No. 76198 (Order of Affirmance, March 2,

2020). Thus, while the Association has all the powers vested in the property owners' committee under the CC&Rs, and all the powers vested in limited purpose associations by NRS 116, its powers do not end there. Whether intended or not, the Association also has all the duties, rights, powers, and privileges of an NRS 82 nonprofit corporation.

NRS 82.131 sets forth various powers vested in all NRS 82 nonprofit corporations, including the power of assessment: "Subject to such limitations, if any, as may be contained in its articles, . . . every [nonprofit] corporation may: . . . 5. *Levy dues, assessments, and fees*." NRS 82.131(5) (emphasis added). The Association's articles do not limit the power to assess. 2 AA 391. Thus, the Association has possessed the power of assessment since its incorporation in 1997. It also possessed that power since 1994 under the CC&Rs.

2. The Lytle Trust Reasonably Believes That the Association Also Has the Power to Assess Under the Original CC&Rs

The Property Owners wrongly suggest that the Association had no assessment power under the CC&Rs. The CC&Rs provide: "A breach or violation of these CC&R's . . . *or any liens established hereunder* shall

not defeat or render invalid or modify in any way the lien of any mortgage or deed of trust . . . ." 1 AA 165 (CC&Rs, last preamble paragraph before §1) (emphasis added). Although the Property Owners have (and may again) argue that the reference to "liens established hereunder" regards a lender's mortgage or deed of trust, common sense leads to the conclusion that a lien "established hereunder"—meaning under the CC&Rs—is different than the independently referenced "lien of any mortgage of deed of trust." By definition, a lien of a mortgage or deed of trust is created by the mortgage or deed of trust, not the CC&Rs.

Notably, however, the CC&Rs do not otherwise reference the creation of a lien. That power is implied. For example, the CC&Rs expressly obligate all property owners to equally share the costs for things like maintaining the landscaping, exterior perimeter wall, and entrance gate. 1 AA 167 (§ 21(a), (b), (c)). Logically, the revenue to pay these and the Association's other debts must be generated through an owner assessment and, if an owner does not pay the assessment, the power to lien is implied. Otherwise, the CC&R's reference to "liens established hereunder" is meaningless. *See Solid v. Eighth Judicial*

Dist. Ct., 133 Nev. 118, 124, 393 P.3d 666, 672 (2017) ("A basic rule of contract interpretation is that every word must be given effect if at all possible.") (quoting *Bielar v. Washoe Health Sys. Inc.*, 129 Nev. 459, 465, 306 P.3d 360, 364 (2013)).

In short, the Association's power to impose assessments is not just expressed in NRS 82.131(5), it is also implied in the CC&Rs. And, even if not implied in the CC&Rs, the assessment power is implied as a matter of law by necessity.

This Court has repeatedly relied on Section 6 ("Common-Interest Communities")[2] of the RESTATEMENT (THIRD) OF PROPERTIES: SERVITUDES (2000) ("Restatement Servitudes"), including to find implied powers when not expressed by either NRS 116 or the CC&Rs. *See e.g.*, *Artemis Exploration Co. v. Ruby Lake Estate HOA*, 135 Nev. 366, 449 P.3d 1256, 1260 (2019) (applying Restatement Servitudes § 6.2); *Double Diamond v. Second Judicial Dist. Ct.*, 131 Nev. 557, 354 P.3d 641 (2015) (relying upon Restatement Servitudes § 6.19); *Beazer Homes Holding*

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[2] "[A] limited-purpose association [is] a type of common-interest community." *Bank of New York Mellon v. Imagination North Landscaping Maintenance Ass'n*, 2019 WL 1383261, at *4 (D. Nev. 2019).

Corp. v. Eighth Judicial Dist. Ct., 128 Nev. 723, 291 P.3d 128 (2012) (quoting Restatement Servitudes § 6.11 cmt. a with approval); *D.R. Horton, Inc. v. Eighth Judicial Dist. Ct.*, 125 Nev. 449, 215 P.3d 697 (2009) (quoting Restatement Servitudes § 6.11 with approval).

Artemis Exploration, *supra,* is instructive. There, one issue was whether the subject common-interest community could assess its members when the governing document "did not expressly state that [the association's] residents would be responsible for paying assessments . . . ." 135 Nev. at 367, 449 P.3d at 1257. This Court resolved the issue by relying on the Restatement Servitudes § 6.2: "An implied obligation may be also be found where the declaration . . . fails to include a mechanism for providing the funds necessary to carry out [the association's] functions." *Artemis*, 135 Nev. at 372, 449 P.3d at 1260. Based on the Restatement, this Court found "an implied payment obligation." *Id.*

Similarly, here, the assessment power is necessary to provide funds to the Association to carry out its functions—the Association has no other source of revenue since it does not sell a product or a service. Therefore, even if the Court does not find the assessment power is

implied in the CC&Rs, the power is implied as a matter of necessity under the Restatement Servitudes.[3]

Ultimately, the Association does not just have the power to impose assessments, it also has a history of imposing and collecting assessments, recording liens against those who did not pay the assessments, and threatening foreclosure. The Property Owners' suggestion that the Association lacked the power to assess its members and enforce those assessments through liens disregards this history. *See* 4 AA 864-868 (describing the history). The Association therefore has always possessed the power to impose assessments, first by

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[3] *See also,* Restatement Servitudes § 6.4 ("In addition to the powers granted by statute [NRS 116] and the governing documents [CC&Rs], a common-interest community has the powers reasonably necessary to manage the common property, administer the servitude regime, and carry out other functions set forth in the declaration."); § 6.5(1) ("(a) a common-interest community has the power to raise the funds reasonably necessary to carry out its functions by levying assessments against the individually owned property in the community . . . .; (b) assessments . . . are secured by a lien against the individually owned properties."); § 6.5, cmt a ("The rules stated in this section supplement the powers granted to the association by statute and the governing documents."). Indeed, "[u]nder the rule stated in this section, the power to raise funds reasonably necessary to carry out the functions of a common-interest community will be implied if not expressly granted by the declaration or by statute." *Id.* at § 6.5 cmt b.

implication when the CC&Rs were recorded in 1994, and then by NRS 82.131(5) when the Association incorporated in 1997. This power is confirmed through the Association's history of imposing and collecting assessments.

So when the Lytle Trust sought and obtained an Order Appointing Receiver over the Association and the order expressly vested the Receiver with the power to impose assessments, it did not—as the Property Owners' argue—"enable the Receiver to do what the Association could not do on its own." RAB at 20. To the contrary, the Association can and did exercise the assessment power as a matter of contract (the CC&Rs), statute (NRS 82), and implied right (Restatement Servitudes). The Order Appointing Receiver merely identified powers already available to the Association, which were also available to the Receiver.

Accordingly, the district court abused its discretion by holding the Lytle Trust in contempt for seeking and obtaining an order that expressly enabled the Receiver to do what the Association itself could do, and for years had done. Moreover, even if the Lytle Trust were incorrect about the scope of the Receiver's power or if the Property

Owners are otherwise challenging the Association's authority to impose and collect assessments, the receivership action would be the appropriate forum to make those arguments. Not a contempt order.[4]

E. An Appeal is An Appropriate Remedy Because the District Court's Contempt Order Substantively Alters the Rights of the Parties Under the May 2018 Order

The contempt order is appealable because it alters the Lytle Trust's rights under the district court's May 2018 order, which was a final judgment. *See Gumm v. Mainor*, 118 Nev. 912, 920, 59 P.3d 1220, 1225 (2002) ("A special order made after final judgment, to be appealable under NRAP 3A(b)(2), must be an order affecting the rights of some party to the action, growing out of the judgment previously entered."). On its face, the May 2018 order does not enjoin the Lytle Trust from pursuing any remedy against the Association to collect the judgments. But, setting the merits of the contempt issue aside, the district court

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[4] The contempt order was especially inappropriate in a proceeding where the judgment-debtor Association was not even a party. The district court's order indirectly diminishes the Association's rights and privileges vis-à-vis its members to satisfy its obligation to the judgment-creditor Lytle Trust. Yet the district court had no jurisdiction over the Association. *Cf. Young v. Nevada Title Co.*, 103 Nev. 436, 442, 744 P.2d 902, 905 (1987) ("A court does not have jurisdiction to enter judgment for or against one who is not a party to the action.").

and the Property Owners now interpret the May 2018 injunction to prospectively limit any collection remedy against the Association that could ultimately lead to payment toward the judgment by the Property Owners. If the district court had explicitly done that in its original May 2018 order, it could be appealed. The district court's contempt order, which now effectively expands the original order to have the same effect, must then also be appealable under NRAP 3(b)(8).

A court determines the appealability of an order by what it "actually does, not what it is called." *Valley Bank of Nevada v. Ginsburg*, 110 Nev. 440, 445, 874 P.2d 729, 733 (1994). While the district court's order is labeled a contempt order, which is not appealable, what it actually does is expand the Property Owners' rights and diminish the Lytle Trust's rights under the May 2018 order. It does so in a way that was not reasonably contemplated by the Lytle Trust in the previous actions and appeal. And it does so without any legal authority. Then, based on that new formulation of rights, the district court found the Lytle Trust in contempt. Under these circumstances, NRAP 3(b)(8) authorizes the Lytle Trust to appeal and ask this Court to vacate the special order, which includes the finding of contempt.

CONCLUSION

For the foregoing reasons, the contempt order substantively limiting the Lytle Trust's right to collect the judgment against the Association must be vacated, as must the awards of attorney fees predicated on that contempt order.

Dated this 3rd day of September, 2021.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Microsoft Word 2010 with a proportionally spaced typeface in 14-point, double-spaced Century Schoolbook font.

2. I certify that this brief complies with the type-volume limitations of NRAP 29(e) because it contains 4,222 words.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure, including NRAP 28(e). I understand that if it does not, I may be subject to sanctions.

Dated this 3rd day of September, 2021.

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CERTIFICATE OF SERVICE

I certify that on September 3, 2021, I submitted the foregoing "Appellants' Reply Brief" for filing *via* the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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