

**No. DA 18-0555**

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IN THE  
SUPREME COURT OF THE STATE OF MONTANA

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ESTATE OF ROBERT LESTER SEVERSON,

*Plaintiff/Appellant,*

VS.

LYNN SEVERSON, SEVERSON FAMILY MINERAL TRUST, STOCKMAN BANK OF  
PLENTYWOOD, INC., AND DOES 1 THROUGH 10, INCLUSIVE,

*Defendants/Appellees.*

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ON APPEAL FROM THE MONTANA FIFTEENTH JUDICIAL DISTRICT COURT,  
SHERIDAN COUNTY, HON. KATHERINE BIDEGARAY, CASE No. DV 46-2017-47

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**DEFENDANT/APPELLEE STOCKMAN BANK OF MONTANA'S  
RESPONSE BRIEF**

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## RULES

## Abbreviations

App. = Appendix

DC Dkt = District Court Docket

### **A NOTE REGARDING THE RECORD**

Counsel for Stockman Bank received the record, in the form of a PDF file, from the Clerk of the Supreme Court. The PDF contains a case register report listing all documents filed with the Sheridan County District Court. Scans of some of the documents listed on the case register report are included in the PDF, but others are not. The missing documents were filed with the District Court and appear in the case register – these documents should be part of the record. Nevertheless, the Clerk of the Supreme Court confirmed that the PDF reflects all the District Court records the Supreme Court received.

Counsel for Stockman Bank and Counsel for Defendants Severson contacted the District Court, and are filing a motion with the Supreme Court to request recertification of the record. To avoid confusion, this brief cites to the case register report numbers assigned to the document, regardless of the presence of a scan in the current PDF.

### **STATEMENT OF ISSUES PRESENTED**

Whether the district court properly granted Stockman Bank of Montana's motion for summary judgment because the deposit account agreement between the parties and every applicable statute of limitations (Mont. Code Ann. §§ 27-2-102, 30-4-112, 30-4-406, and 27-2-404), bar the Estate's claims against Stockman Bank



of Montana.

### **STATEMENT OF THE CASE**

The Estate of Robert Lester Severson (“Estate”) filed a Complaint against Stockman Bank of Montana (“Stockman”) on December 4, 2017. The lawsuit alleged that Stockman breached the covenant of good faith and fair dealing for a loan transaction between Robert Lester Severson (“Robert”) and Stockman dated September 17, 2012.

Stockman moved for summary judgment on April 10, 2018. The Estate filed an opposing brief on April 16, 2018. The motions were fully briefed and oral argument was held on June 8, 2018. The District Court entered an Order Granting Stockman Bank of Montana’s Motion for Summary Judgment on June 20, 2018. The Court found that the deposit agreement between the parties and all applicable statute of limitations barred the Estate’s claim. The Court further concluded that the Estate’s claim was not tolled under the discovery rule. The Court entered a judgment on July 13, 2018, and notice of entry of judgment was mailed on the same day.

The Estate filed a notice of appeal on September 21, 2018.

### **STATEMENT OF THE UNDISPUTED FACTS**

Robert Severson (“Robert”) and Lynn Severson (“Lynn”) (collectively, the “Seversons”) held a checking account at Stockman that was titled as joint tenants

with rights of survivorship (“Severson Account”). *Aff. Corinne Simon*, D.C. Doc. 30, ¶ 5. The Severson Account was governed by a deposit agreement (the “Deposit Agreement”) between Stockman and the Seversons. *Aff. Charlene Hoskins*, D.C. Doc. 31, ¶ 5.

Stockman drafted a promissory note for Robert with a principal loan amount of \$15,075 at 6% interest (the “Loan”). *Aff. Lynn Severson*, D.C. Doc. 24, ¶ 6, Ex. E. Stockman received a promissory note purportedly bearing Robert’s signature. *Aff. Charlene Hoskins*, D.C. Doc. 31, ¶ 6, Ex. B. Stockman deposited the Loan proceeds into the Severson Account on September 17, 2012. *Aff. Charlene Hoskins*, D.C. Doc. 31, ¶ 7. The October 5, 2012, statement for the Severson Account shows the deposit of the Loan proceeds. *Aff. Charlene Hoskins*, D.C. Doc. 31, ¶ 8, Ex. C. The Loan was repaid from the Severson Account on December 19, 2012. *Aff. Charlene Hoskins*, D.C. Doc. 31, ¶ 7. The January 5, 2013, statement for the Severson Account shows the repayment of the Loan. *Aff. Charlene Hoskins*, D.C. Doc. 31, ¶ 8, Ex. C. Stockman mailed all of the bank statements to Robert as his address in Saco, Montana. *Aff. Charlene Hoskins*, D.C. Doc. 31, ¶ 8, Ex. C. Robert did not report any unauthorized transactions associated with the Severson Account. *Aff. Charlene Hoskins*, D.C. Doc. 31, ¶ 9.

Robert died on September 21, 2015. *Appellant's Opening Brief*, S.C. pg. 5. Kelly M. Ross, Personal Representative of the Estate, filed a complaint alleging Stockman breached the covenant of good faith and fair dealing on December 4, 2017. *Complaint*, D.C. Doc. 1, ¶¶ 25-28.

### **STANDARD OF REVIEW**

Reviews on summary judgment are performed *de novo*, applying the same criteria of Mont. R. Civ. P. 56 as the district court. *Scentry Biologicals, Inc. v. Mid-Continent Cas. Co.*, 2014 MT 39, ¶¶ 23-24, 374 Mont. 18, 319 P.3d 1260. Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” *Meadow Lake Estates Homeowners Ass'n v. Shoemaker*, 2008 MT 41, ¶ 24, 341 Mont. 345, 352, 178 P.3d 81, 86.

The party moving for summary judgment must establish the absence of any genuine issue of material fact and entitlement to judgment as a matter of law. *Gliko v. Permann*, 2006 MT 30, ¶ 12, 331 Mont. 112, ¶ 12, 130 P.3d 155, ¶ 12. Once the moving party has met its burden, the party opposing summary judgment must present substantial evidence essential to one or more elements of its case to raise a genuine issue of material fact. *Fielder v. Board of County Commissioners*, 2007 MT

118, ¶ 12, 337 Mont. 256, ¶ 12, 162 P.3d 67, ¶ 12.

### **SUMMARY OF THE ARGUMENT**

1. The Deposit Agreement bars the Estate's claim against Stockman because the Seversons did not report any errors on the account within 60 days of receiving the account statement.

2. The Estate's claims are not within the one year statute of limitations provided by Mont. Code Ann. § 30-4-406, which requires account owners to report unauthorized transactions within one year.

3. The Estate's claims against Stockman are tort claims, and are not subject to the eight-year statute of limitations governing written documents. The Estate's tort claims are approximately a year late under the most generous application of the statutes of limitation.

4. Robert ratified the Loan. Montana law permits ratification under these circumstances, and Robert's actions meet the criteria for ratification because Robert accepted the benefits of the Loan, had full knowledge of the facts, and indicated an intention to adopt the arrangement.

5. Stockman did not conceal loan documents, and the statute of limitations was not tolled. The timeline of events does not support the Estate's allegations.

6. The Estate's proposed material facts are irrelevant. The only facts

relevant to the Estate's claim against Stockman Bank are undisputed.

7. The Estate may not raise new arguments on appeal, as it attempts to do in its Opening Brief. The Court should reject these arguments.

## **ARGUMENT**

### **I. The District Court Properly Granted Stockman's Motion for Summary Judgment**

#### **A. The Deposit Agreement Bars the Estate's Claim Against Stockman**

The Appellant's opening brief does not address the Deposit Agreement or its applicability to the Estate's claims against Stockman. *See Appellant's Opening Brief*, S.C. The Deposit Agreement imposed an affirmative duty on the Seversons to report any unauthorized signatures, forgeries, or other errors on the account within 60 days of receiving the statement. *Aff. Charlene Hoskins*, D.C. Doc. 31, ¶ 5, Ex. A. Stockman mailed two bank statements that disclosed the deposit and repayment of the Loan to Robert in Saco, Montana. *Aff. Charlene Hoskins*, D.C. Doc. 31, ¶8, Ex. C. Pursuant to the terms of the Deposit Agreement, Robert had until December 4, 2012, or March 8, 2013, at the latest, to report the Loan as an unauthorized transaction. *See Aff. Charlene Hoskins*, D.C. Doc. 31, ¶ 5, Ex. A. Robert did not report any unauthorized transaction on the Severson Account. *Aff. Charlene*

*Hoskins*, D.C. Doc. 31, ¶ 9. The complaint was filed on December 4, 2017, which is approximately five years too late. *Complaint*, D.C. Doc. 1, pg. 7.

**B. Montana Law Imposes An Affirmative Duty Upon the Account Owner to Report Unauthorized Transactions Within One Year**

Mont. Code Ann. § 30-4-406 imposes an affirmative duty upon the Seversons to review their account statements and report any unauthorized transactions to Stockman. The two bank statements disclosing the deposit and repayment of the Loan were mailed to Robert in Saco, Montana. *Aff. Charlene Hoskins*, D.C. Doc. 31, ¶8, Ex. C. Robert had until October 5, 2013, or January 7, 2014, at the latest, to report any unauthorized transactions to Stockman. *See* Mont. Code Ann. § 3-4-406, *Aff. Charlene Hoskins*, D.C. Doc. 31, ¶8, Ex. C. Robert did not report any unauthorized transactions on the Severson Account. *Aff. Charlene Hoskins*, D.C. Doc. 31, ¶ 9. The complaint was filed on December 4, 2017, which is approximately four years too late. *Complaint*, D.C. Doc. 1, pg.7.

**C. The Estate's Claim is Time Barred under the Most Generous Statute of Limitations Permitted by Montana Law**

The complaint alleges that Stockman “committed a tortious act in concert with” Lynn by breaching the implied covenant good faith and fair dealing. *Compl.*, ¶ 26. The Estate’s claim against Stockman sounds in tort, so the Appellant’s citations to an eight-year statute of limitations for written instruments are

misleading. *Compare Complaint*, D.C. Doc. 1, ¶ 26 with *Appellant's Opening Brief*, S.C. pg. 21.

The correct statutes of limitations applicable to the Estate's claim are Mont. Code Ann. §§ 30-4-112, 27-2-204. Mont. Code Ann. § 30-4-112 applies a three-year period from the date the cause of action accrues. Mont. Code Ann. § 27-2-404 may extend the limitations period, providing:

If a person entitled to bring an action dies before the expiration of the time limited for the commencement of the action and the cause of action survives, an action may be commenced by the deceased representatives after the expiration of that time and within 1 year from death.

Mont. Code Ann. § 27-2-404.

The earliest date the Estate's alleged claim could have accrued against Stockman was September 17, 2012, the date the Loan was deposited into the Severson Account. *See Aff. Charlene Hoskins*, D.C. Doc. 31, ¶ 6. The latest date the Estate's claim could have accrued was January 7, 2013, the date that the account statement showed the Loan was repaid from the Severson Account. *See Aff. Charlene Hoskins*, D.C. Doc. 31, ¶ 8, Ex. C. Applied to the earliest date, the three-year period expired on September 17, 2015. *See* Mont. Code Ann. §§ 30-4-112, 27-2-204, *Aff. Charlene Hoskins*, D.C. Doc. 31, ¶ 6. Applied to the latest date, the three-year period would expire on January 7, 2016, but, because Robert was deceased as of that date, Mont. Code Ann. § 27-2-404 would extend the statute of limitations

until September 21, 2016. *See Aff. Charlene Hoskins*, D.C. Doc. 31, ¶ 8, Ex. C.; Mont. Code Ann. § 27-2-404; *Appellant's Statement of Position*, S.C. pg. 8. The complaint was filed on December 4, 2017. *Complaint*, D.C. Doc. 1, pg.7. The Estate's claim is approximately one year too late under the most liberal application of the statute of limitations.

#### **D. Robert Ratified the Loan**

In Count VIII of the Complaint, the Estate alleges liability against Stockman for approving the Loan “based upon a forged signature,” echoing the allegations against Lynn in Counts IV, V, and VI. *Complaint*, D.C. Doc. 1, pg. 6. Even assuming that Lynn forged Robert's signature, these Counts provide no basis for liability because Robert ratified the Loan.

Mont. Code Ann. § 30-3-404 deals with unauthorized signatures, and provides:

(1) Unless otherwise provided in this chapter, an unauthorized signature is ineffective except as the signature of the unauthorized signer in favor of a person who in good faith pays the instrument or takes it for value. An unauthorized signature may be ratified for all purposes of this chapter.

...

(3) The civil or criminal liability of a person who makes an unauthorized signature is not affected by any provision of this chapter that makes the unauthorized signature effective for the purposes of this chapter.



Referring to this section, Appellant appears to make two arguments against ratification: first that “Stockman’s [*sic*] Bank did not act in good faith,” and second that it “does not apply as it doesn’t absolve the Defendants from civil or criminal liability.” *Appellant’s Opening Brief*, S.C. pg.13. Appellant’s first argument is flawed because the question of good faith arises only when determining the liability of the unauthorized signor to the bank. Mont. Code Ann. § 30-3-404 (comment 2). Here, Lynn’s liability to Stockman for the Loan is not in question, so Appellant’s first argument is inapplicable. Appellant’s second argument, citing Mont. Code Ann. § 30-3-404(3) does not apply to Stockman because Stockman is not “a person who makes an unauthorized signature.” Appellant’s arguments regarding ratification miss their mark.

Contrary to Appellant’s arguments, Mont. Code Ann. § 30-3-404 permits ratification if the facts meet the case law requirements. Montana has not addressed ratification in the context of a promissory note, but approves of its use in contract cases, generally. *Audit Servs. Inc. v. Francis Tindall Constr.*, 183 Mont. 474, 600 P.2d 811 (1979). Ratification may occur in either an express oral manner or solely by means of personal conduct. *Id.* at 477. Ratification requires three elements: (1) acceptance of the principal of the benefits of the agent’s act, (2) with full knowledge of the facts, and (3) circumstances or an affirmative election indicating an intention

to adopt the unauthorized arrangement. *Scott D. Erler, D.D.S. Profit Sharing Plan v. Creative Fin. & Investments, L.L.C.*, 2009 MT 36, ¶ 27, 349 Mont. 207, 217, 203 P.3d 744, 752 (citing *Safeco Ins. Co. v. Lovely Agency*, 200 Mont. 447, 652 P.2d 1160 (1982)). Ratification results in the ratifying party being bound by the contract, and operates upon the act ratified “precisely as though authority to do the act had been previously given.” *Erler*, 349 Mont. at 217 (citing *Arnold v. Genzberger*, 96 Mont. 358, 31 P.2d 296 (1934)).

Here, Robert ratified the Loan. Robert accepted the benefits of the Loan in September, 2012, when he received the Loan proceeds in his account. *Aff. Charlene Hoskins*, D.C. Doc. 31, ¶ 7. He had full knowledge because he received statements at his Saco, Montana address showing the Loan and its eventual repayment. *Aff. Charlene Hoskins*, D.C. Doc. 31, ¶ 8. Circumstances and Robert’s own conduct show his intention to adopt the Loan: Robert repaid the loan at the same time and with the same check that he used to repay his other loan, and Robert never complained or challenged the enforceability of the Loan before or after repaying it. *Aff. Charlene Hoskins*, D.C. Doc. 31, ¶ 7, 9. Robert’s actions meet the criteria for ratification, and this Court could easily treat the Loan as though it was authorized at the outset. Accordingly, the Loan in itself cannot be a basis for liability against Stockman as the Appellant seems to claim.

### **E. Stockman Did Not Conceal the Loan Documents**

The Estate wrongfully accuses Stockman of concealing the Loan documents. *Appellant's Statement of Position*, S.C. pg. 8. As a result of its error, the Estate incorrectly believes that statute of limitations was tolled under the discovery rule. *Id.* The statute of limitations is not tolled for the reasons previously briefed by Stockman. *See Stockman Bank of Mont.'s Br. In Res. To Pl.'s Mot. Objecting to Summ. J.*, D.C. Doc. 35, pg. 4-6. Regardless, the timeline of events fails to support the Estate's allegations. Robert died on September 21, 2015. *Appellant's Statement of Position*, S.C. pg. 8. The Personal Representative of the Estate was appointed on October 26, 2015. Letters, *In re Matter of the Estate of Robert Lester Severson* (DP-36-2015-22) in Phillips County District Court. The Estate subpoenaed the records on or around November 12, 2015. *Appellant's Statement of Position*, S.C. pg. 8; Letters and Subpoena Duces tecum: Summons issued to Stockman Bank on 11/12/2015. Stockman produced the documents relied upon by the Estate in its complaint on December 10, 2015. *Appellant's Statement of Position*, S.C. pg. 8. As noted above, the most liberal application of the statute of limitations gave the Estate until September 21, 2016, to file a claim against Stockman. Mont. Code Ann. §§ 30-4-112, 27-2-204, 27-2-404; *Aff. Charlene Hoskins*, D.C. Doc. 31, ¶ 6. The Estate had 283 days to review the Loan documents in its possession and file a timely

Complaint under the most generous application of the statute of limitations. Mont. Code Ann. §§ 30-4-112, 27-2-204, 27-2-404; *Aff. Charlene Hoskins*, D.C. Doc. 31, ¶ 8, Ex. C; Appellant’s Statement of Position, pg. 8. The Complaint was filed on December 4, 2017, approximately one year too late. Compl., pg. 7. The Estate’s claim is barred by the statute of limitations.

**F. The Estate’s Proffered Genuine Issues of Material Fact Are Irrelevant**

The Estate’s Statement of Position attempts to revive its claim against Stockman by creating several genuine issues of material fact. *Appellant’s Statement of Position*, S.C. pg. 4-7. The Estate speculates that Lynn kept Robert “in the dark” regarding his personal finances. *Id.*, pg. 7. The Estate cites to Mr. Nelson’s Affidavit in support of this statement, which shows tax returns with an address for Robert in Reserve, Montana. *Id.* The K-1 (reported on Schedule E) relates to the Severson Family Mineral Trust. *Aff. Gary Nelson*, D.C. Doc. 25, ¶ 3, Exs. B & C. The Loan is in Robert’s name and is entirely unrelated to the trust. *See Aff. Charlene Hoskins*, D.C. Doc. 31, ¶ 6, Ex. B. The affidavit of Mr. Nelson is irrelevant to the Estate’s claim against Stockman. The only evidence relevant to the Loan demonstrates that (i) the account statements were mailed to Robert at his address in Saco, Montana and (ii) he did not report any unauthorized transactions on the Severson Account. *Aff. Charlene Hoskins*, D.C. Doc. 31, ¶¶ 8-9, Ex. C. In sum, the evidence of record is

irreconcilable with the Estate's speculative assertion that Lynn concealed the Loan from Robert.

The Estate continues to dwell on whether Robert signed the Loan. *Appellant's Statement of Position*, S.C. pgs. 4-5. This fact remains irrelevant and immaterial for the reasons cited in the briefs and Severson's Statement of Position. *See Stockman Bank of Mont.'s Br. In Res. To Pl.'s Mot. Objecting to Summ. J.*, D.C. Doc. 35, pg. 2-3; *Def. Severson's Statement of Position*, S.C. pg. 5-6.

**G. The Estate is Prohibited from Raising New Issues on Appeal for the Court's Consideration**

The Montana Supreme Court does not address new arguments or changes of argument on appeal. "The rule is well established that this Court will not address an issue raised for the first time on appeal." *State v. McCaslin*, 2004 MT 212, ¶ 49, 322 Mont. 350, ¶ 49, 96 P.3d 722, ¶ 49. *See also State v. Bar-Jonah*, 2004 MT 344, ¶ 124, 324 Mont. 278, ¶ 124, 102 P.3d 1229, ¶ 124; *State v. Heath*, 2004 MT 58, ¶ 39, 320 Mont. 211, ¶ 39, 89 P.3d 947, ¶ 39; *State v. Peterson*, 2002 MT 65, ¶ 24, 309 Mont. 199, ¶ 24, 44 P.3d 499, ¶ 24; *State v. Weaselboy*, 1999 MT 274, ¶ 16, 296 Mont. 503, ¶ 16, 989 P.2d 836, ¶ 16; *State v. Lucero*, 2004 MT 248, ¶ 20, 323 Mont. 42, ¶ 20, 97 P.3d 1106, ¶ 20; *Ellenburg v. Chase*, 2004 MT 66, ¶ 18, 320 Mont. 315, ¶ 18, 87 P.3d 473, ¶ 18; *State v. Martinez*, 2003 MT 65, ¶ 17, 314 Mont. 434, ¶ 17, 67 P.3d 207, ¶ 17; *State v. Minez*, 2003 MT 344, ¶ 19, 318 Mont. 478, ¶ 19, 82 P.3d

1, ¶ 19; *Schlemmer v. N. Cent. Life Ins. Co.*, 2001 MT 256, ¶ 22, 307 Mont. 203, ¶ 22, 37 P.3d 63, ¶ 22; *Unified Industries, Inc. v. Easley*, 1998 MT 145, ¶ 15, 289 Mont. 255, ¶ 15, 961 P.2d 100, ¶ 15. As this partial list of recent cases illustrates, this rule is firm. As the Court reasoned in *State v. Adgerson*, 2003 MT 284, ¶ 12, 318 Mont. 22, ¶ 12, 78 P.3d 850, ¶ 12, “[t]he rule is well established that this Court will not address an issue raised for the first time on appeal.... A party may not raise new arguments or change its legal theory on appeal, because it is fundamentally unfair to fault the trial court for failing to rule on an issue it was never given the opportunity to consider.” *Adgerson*, ¶ 12 (citations omitted).

Here, the Appellant cites Mont. Code Ann. § 27-2-213 for the first time. The trial court had no opportunity to rule on the relevance or applicability of Mont. Code Ann. § 27-2-213, so this Court should reject any argument relying on it advanced by Appellant.

The above notwithstanding, Mont. Code Ann. § 27-2-213 would bar Appellant’s claims even if the Court applied it. Appellant characterizes the Loan as being “based upon a forged signature.” *Complaint*, D.C. Doc. 1, ¶ 26. Mont. Code Ann. § 27-2-213 applies a three-year period of limitations to actions based upon payment by a bank of a “forged, raised, or otherwise altered . . . promissory note out

of the deposit, money, or property of the plaintiff.” Mont. Code Ann. § 27-2-213(2). This period begins on the date the plaintiff was notified of payment. *Id.*

Here, Stockman notified Robert of payment on January 7, 2013, by mailing him an account statement. As such, the three-year period would elapse January 7, 2016. Because Robert was dead at that time, Mont. Code Ann. § 27-2-404 may operate to extend the claim until September 21, 2016. See *supra* I, (c). The Complaint was filed on December 4, 2017, approximately one year too late. *Complaint*, D.C. Doc. 1, pg. 7. Even if applied, Mont. Code Ann. § 27-2-213 bars the claim.

#### **H. Rule 11 Sanctions are Appropriate**

Stockman supports the order of sanctions entered by the District Court, and adopts the arguments of Defendants Severson.

#### **CONCLUSION**

The district court properly granted Stockman’s motion for summary judgment because the Estate’s claim is time barred. As a result, the District Court should be affirmed.

WHEREFORE, Defendant/Appellee Stockman Bank of Montana respectfully request this Court to enter judgment affirming the District Court's ruling.

Dated this 22<sup>nd</sup> day of March, 2019.

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing document was served upon the following counsel of record, through the Montana Supreme Court's e-filing system this 22<sup>nd</sup> day of March, 2019:

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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word is less than 10000 words, excluding Table of Contents, Table of Authorities, Certificate of Compliance and Certificate of Service.

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I, Dylan Delbert Crouse, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 03-22-2019:

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