

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 22-0625

ROBERT L. ALLUM
Petitioner and Appellant,

v.

MONTANA STATE FUND, STATE OF MONTANA, ON BEHALF OF GREG
GIANFORTE, GOVERNOR, and AUSTIN KNUDSEN, ATTORNEY
GENERAL,
Respondents and Appellees.

APPEAL FROM: Montana Workers' Compensation Court, WCC No. 2022-5873
Honorable David M. Sandler, Presiding Judge

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Appellant's Reply Brief

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PREFACE.

The term, "Sandler," will be used throughout this reply to refer to both the decisions of the entity, "Workers' Compensation Court (WCC)," and the actions of David M. Sandler, as the claimed "Judge of WCC". The term, the "office of workers' compensation judge," will be used to refer to the entity, created by the Legislature, in 1975, in HB100.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW.

Plaintiff/Appellant Robert Allum (Allum) presented the following three issues for review (Opening Brief (OB) p 1:

1. Whether the "Workers' Compensation Court," is a legislatively enacted "court," pursuant to the Montana Constitution, Article VII, §1?
2. Whether David M. Sandler, as "Workers' Compensation Court Judge," is *coram non judice*? and
3. Whether §39-71-2904 MCA violates the Montana Constitution, Article VII, §4(2)?

Respondent/Appellee Montana State Fund (State Fund), instead of directly addressing and refuting Allum's issues, above, presented three alternate issues (Answering Brief (AB) p. 7):

1. Allum's claims should be dismissed based on *res judicata*.
2. Dismissal is also appropriate because Allum failed to serve Attorney General Knudsen with a Notice of Constitutional Challenge, as required by M.R.Civ.P. 5.1(a). and

3. Neither the WCC's existence and judicial function, nor the current Judge's role as the workers' compensation judge, nor any of the statutes cited by Allum in this appeal, violate Montana's constitution.

STATEMENT OF THE CASE.

State Fund's claim, "[t]he WCC further indicated that it lacked subject matter jurisdiction to address Allum's constitutional claims" (AB p. 2), puts State Fund's legal position directly in contradiction to this Court's Opinion in *Allum v. Montana State Fund*, 2020 MT 159N, 400 Mont. 561, 464 P.3d 1012 (*Allum I*) ¶ 4, to wit:

By failing to first raise the [constitutional] issue in the WCC, Allum has waived any consideration of the issue on appeal. We decline to address the constitutionality of the WCC under the guise of subject matter jurisdiction (emphasis added).

STATEMENT OF THE FACTS, RELEVANT TO THE ISSUES, PRESENTED FOR REVIEW

1. WCC Docket 4 contained the following statements:

¶2 ...*First*, Allum's claim that there is no judicial court in Montana to decide disputes over workers' compensation benefits is entirely without merit. The Montana Constitution specifically allows the Legislature to create courts. [Fn 1 Article VII, section 1 of the Montana Constitution states, "The judicial power of the state is vested in one supreme court, district courts, justice courts, and *such other courts as may be provided by law*." (Emphasis added).] It has long been recognized that in 1975, when the Legislature established the Office of the Workers' Compensation Judge, [Fn 2 1975 Mont. Laws ch 537.] it intended to create a judicial court to decide disputes over workers' compensation benefits. [Fn 3 See, e.g. 38 Op. Att'y Gen No. 27 (1979) ...] Indeed, the Legislature itself calls the entity in which the

workers' compensation judge presides the "workers' compensation court" [Fn 4 §39-71-2901, MCA (setting forth powers ...)] and has expressly made it a court of record. [Fn 5 §3-1-102, MCA.] The Legislature has also decreed that, unlike appeals from administrative contested cases, which initially go to Montana's district courts, [Fn 6 §2-4-702(2), MCA.] "an appeal from a final decision of the workers' compensation **JUDGE** shall be filed directly with the supreme court of Montana in the manner provided by law for appeals from the district court in civil cases." [FN 7 §39-71-2904, MCA.] Thus, "[a] full reading of the Workers' Compensation Act reveals that the Court is not simply an administrative law court functioning under the executive branch of government but is a special court created pursuant to Article 7, section 1 of the 1972 Montana Constitution. [Fn 8 *Seeger v. Magnum Oil, Inc.* 1999 MTWCC 67, ¶ 8.]

¶ 3 *Second*, Allum's allegation that the undersigned is not currently **the workers' compensation judge** is demonstrably false. In 2014, then-Governor Steve Bullock appointed the undersigned to serve the remainder of then-Judge James Jeremiah Shea's term as **workers' compensation judge**, which ran until September, 2017. On March 10, 2015, the Senate confirmed the undersigned. [Fn 9 64th Legislature, SR0015.] In 2017, then-Governor Bullock appointed the undersigned to a full six-year term as **workers' compensation judge**. On November 14, 2017, during the November 2017 Special Session, the Senate Confirmed the undersigned. [Fn 10 65th Legislature, Special Session, SR0001.] Thus, the undersigned is currently the **workers' compensation judge** (emphasis added).

...

DATED this 24th day of February, 2022.

(SEAL)

[Workers' Compensation Court] David M. Sandler
[State of Montana] JUDGE

STATEMENT OF THE STANDARD OF REVIEW

1. Is *United States v. Clark*, 25 F. Cas. 441, 1 Gallison 497 (1813), currently a valid precedent, in the State of Montana?

Sandler and State Fund continually interchange the legal terms, "judge," and "court," therefore, the current Justices need to affirm or supersede *Clark*, and the definitions given by Mr. Justice Story:

" . . . A court is not a judge, nor a judge a court. A judge is a public officer who, by virtue of his office, is clothed with judicial authorities. A court is defined to be a place in which justice is judicially administered. It is the exercise of judicial power by the proper officer or officers at a time and place appointed by law (emphasis added)."

2. Are *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514, 126 S. Ct. 1235, 1244 (2006); *Stanley v. Lemire*, 2006 MT 304, ¶ 52, 334 Mont. 489, ¶ 52, 148 P.3d 643; *Folden v. United States*, 379 F.3d 1344, 1354 (Fed. Cir. 2004) (citing *Fanning, Phillips & Molnar v. West*, 160 F.3d 717, 720 (Fed. Cir. 1998)), reh'g and reh'g en banc denied (Fed. Cir. 2004), cert. denied, 545 U.S. 1127, 125 S.Ct. 2935, 162 L.Ed.2d 865 (2005); see also *Int'l Elec. Tech. Corp. v. Hughes Aircraft Co.*, 476 F.3d 1329, 1330 (Fed. Cir. 2007) valid precedent, after *Allum I*, in 2020?

The Justices required, as a legal requirement, that Allum file, the constitutional challenges and lack of jurisdiction, of the Supreme Court, before Sandler, before the Justices would entertain the constitutional challenges, to the jurisdiction, of the Montana Supreme Court, thus, the Justices, *de facto*, superseded the above, existing jurisdiction precedents, in the State of Montana, or on a one case basis, denied Allum the equal protection of the precedents.

SUMMARY OF THE ARGUMENTS

I.

Allum's Arguments in Opening Brief.

State Fund did not directly oppose, or address Allum's Arguments in the Opening Brief, therefore, the Arguments stand, as presented.

II.

State Fund's Arguments are easily disposed of with statutes, facts, and case law.

ARGUMENTS

I.

***Res judicata* is not applicable to the case at bar.**

The Justices, in *Allum I* ¶4 (OB p. 4-5, RB p. 2), refused to address the issue of the constitutionality, of Sandler, until the issue was raised, in a case, before Sandler. The specific facts of the case, at bar, make the argument, of *res judicata*, specious, especially in light of § 26-3-102, MCA, which states:

That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged or which was actually and necessarily included therein or thereto.

If the Justices, invoke *res judicata*, in the case at bar, after refusing to address the Sandler constitution challenges, in *Allum I*, and specifically requiring Allum, to bring a case, containing the constitutional challenge issues to Sandler, both as a "court," and "judge of the workers' compensation court," before Sandler,

as a prerequisite, for an appeal, of the constitutional challenges, to the Montana Supreme Court; the Justices will have demonstrated a total abuse of power and denial of Allum's due process rights under Montana and U.S. Constitutions.

II.

M.R.Civ.P. 5.1(a) does not apply to the case at bar.

M.R.Civ.P. 5.1(a) is a Montana Supreme Court Rule, as disclosed by the Rule's history,

Rule 5.1. Constitutional Challenge to a Statute -- Notice and Intervention.

History: En. Sup. Ct. Ord. No. AF 07-0157, April 26, 2011, eff. Oct. 1, 2011.

§ 39-71-2903 MCA directly disproves Stater Fund's foregoing argument, that M.R.Civ.P. 5.1(a) applies to the case at bar. To wit:

Administrative procedure act and rules of evidence applicable. All proceedings and hearings before the workers' compensation judge shall be in accordance with the appropriate provisions of the Montana Administrative Procedure Act.

The second sentence of § 39-71-2903 MCA is discussed here, because of the attempt, by Sandler and State Fund, to claim the Legislature's creation, of the "office of the workers' compensation judge," (HB100, Ch. 537, L. 1975), was pursuant to Montana Constitution Article VII, § 1,

The judicial power of the state is vested in one supreme court, district courts, justice courts, and such other courts as may be provided by law.

Sandler and State Fund MUST pervert the original enacting legislation (HB 100, Ch. 537, L. 1975) or their attempt to subvert the entire Montana Workers' Compensation Act laws into a mirror image of the pre-1915 WCA legislation, disfavoring the injured worker and employer fails, because the Montana Supreme Court, only has supervisory authority, over Montana Constitution, Article VII, § 2(2) courts; no "court or judge," not authorized by Article VII, may constitutionally be mandated to follow the Supreme Court enacted "Montana Rules," for applications to proceedings, before them.

Any reliance on the second sentence of § 39-71-2903 MCA,

The workers' compensation judge is bound by common law and statutory rules of evidence.

is misplaced. The Montana Administrative Procedures Act (MAPA) and the statutes of Montana have virtually eliminated "common law," and "statutory rules of evidence." § 1-1-108 MCA states

Common law -- applicability of. In this state there is no common law in any case where the law is declared by statute.

There are no "statutory rules of evidence," in MCA. The Revised Code of Montana (R.C.M.) 1947 was converted, by Legislative Council Services, at the direction of the Legislature, in 1975-8, to the Montana Code Annotated (MCA). The Legislature formally adopted the MCA in Chapter 1, L.1979, but specifically, in § 2 of Chapter 1, L. 1979, acknowledged that MCA contained "supreme court

rules," and the Legislature was not "readopting or promulgating the supreme court rules:"

Section 2. Effect of publishing supreme court rules. (1) The legislature recognizes the supreme court's authority pursuant to Article VII, section 2, of the Montana constitution to make rules governing procedure and practice before the courts. (2) The legislature also recognizes that the practice of printing such rules with the Montana statutes is of benefit to code users and facilitates implementation of Article VII, section 2(3), of the Montana constitution concerning disapproval by the legislature. (3) Therefore, the **Montana Rules of Civil Procedure, printed as chapter 20, Title 25, MCA; the Montana Rules of Appellate Civil Procedure, printed as chapter 21, Title 25, MCA; and the Montana Rules of Evidence, printed as chapter 10, Title 26, MCA, appear only for the purpose of facilitating use of the code. Neither this act nor publication of the rules may be construed as an attempt to readopt or promulgate the rules** (emphasis added).

Therefore, the § 39-71-2903 MCA, second sentence, without the "office of workers' compensation judge," being adjudicated, an Article VII "judge," the judicially burdensome rules, sought to be eliminated by the original 1915 WCA legislation, could not have been unilaterally imposed through administrative and judicial interpretation.

Specifically M.R.Civ.P. 5.1(a) is superseded, by the statute, § 25-1-502(2) MCA:

Notice of appeal to be served on attorney general when state is party to judicial review. (2) If a notice of appeal or petition for a writ seeking review in any

appellate court is served upon the state or a department, officer, or board of the state, the party serving the notice or petition shall serve a copy on the attorney general as well as on any other counsel required by law to be served.

Allum, in the original petition, herein, and *Allum I*, has contended that Sandler has no constitutional jurisdiction, as a judge or as WCC; therefore, no issue was made of Sandler's Order (WCC Docket 4) dismissing State of Montana, Greg Gianforte, Austin Knudsen, and Christi Sorensen, as defendants, since Sandler was without jurisdiction, and any order, void, or a nullity. Allum has continued to serve State, Gianforte, and Knudsen throughout the Sandler proceeding and pursuant to § 25-1-502(2) MCA served a, Notice of Constitutional Challenge on State, when the Appeal was filed. It should be noted, State was the defendant, on behalf of Gianforte, Knudsen, and Sorensen, and was therefore, fully aware of the Sandler proceedings.

III.

§39-71-2904 MCA violates the Montana Constitution, Article VII, §4(2)?

State Fund argues, in their Answering Brief, on pages 23-24:

The WCC was properly established by the legislature; acts as a judicial court; does not function as part of the executive branch and is not an administrative agency. A decision by the WCC need not first be reviewed by a district court and an appeal from the WCC is properly filed directly with the Montana supreme court.

While State Fund's false conclusory remarks are addressed, in the Opening

Brief, pages 9-21, the irrefutable response is found, in Montana's statutes.

First, § 1-2-107 MCA defeats State Fund's conclusion, "[t]he WCC was properly established by the legislature" when the statute states:

Applicability of definitions. Whenever the meaning of a word or phrase is defined in any part of this code, such definition is applicable to the same word or phrase wherever it occurs, except where a contrary intention plainly appears.

Clearly, the 1975 law created the "office of workers' compensation judge." The 1987 amendment, adding § 39-71-2901(2) MCA, adding the words, "workers' compensation court" violated § 1-2-107 MCA, since there is no legislative enabling act creating "WCC," or legislation repealing the "office of workers' compensation judge." Additionally, powers listed in subsection 2 violate the "separation of powers clause" (Mont. Const. Art. III, § 1), by giving Article VII judicial powers to an Article VI executive agency.

§ 1-2-102 MCA requires that when a particular provision and a general provision are in conflict, the particular provision will control:

Intention of the legislature -- particular and general provisions. In the construction of a statute, the intention of the legislature is to be pursued if possible. When a general and particular provision are inconsistent, the latter is paramount to the former, so a particular intent will control a general one that is inconsistent with it.

The creation of the "office of workers' compensation judge," is very particular, and well defined, while the arguments for the 1975 Law creating

"WCC," are very generalized and requires violating multiple statutory rules of construction and interpretation. Any attempt to argue, that the 1975 Legislature intended to create an Article VII § 1 "court," instead of the "office of workers' compensation judge," requires arguing the Legislature intentionally violated Mont. Const. Article VII § 6:

Judicial districts. (1) The legislature shall divide the state into judicial districts and provide for the number of judges in each district. Each district shall be formed of compact territory and be bounded by county lines.

and Mont. Const. Article VII, § 8:

Selection. (1) Supreme court justices and district court judges shall be elected by the qualified electors as provided by law.

by providing for the appointment, instead of the election, of the "office of workers' compensation judge," with jurisdiction of the entire state, instead of one county.

§ 1-1-202 MCA defeats State Fund's conclusion, "[WCC] acts as a judicial court," when the statute states:

Terms relating to procedure and the judiciary. Unless the context requires otherwise, the following definitions apply in the Montana Code Annotated:

(2) "Judicial officers" means justices of the supreme court, judges of the district courts, justices of the peace, municipal judges, and city judges.

Contrary to all of the convoluted and circular arguments, unsupported by statutes or constitutional provisions, Sandler and State Fund fail, to have the "judge

of WCC," included in the statutory definition, of "judicial officers." Clearly WCC does not exist, let alone, exist as an Article VII court.

State Fund's conclusion, "[WCC] does not function as part of the executive branch and is not an administrative agency," is defeated by following statutes: (1) § 2-15-1707 MCA, which states:

Office of workers' compensation judge -- allocation -- appointment -- salary. (1) There is the office of workers' compensation judge. The office is allocated to the department of labor and industry for administrative purposes only as prescribed in 2-15-121.

(2) The **governor shall appoint the workers' compensation judge ...**

(4) The workers' compensation judge is entitled to the same salary and other emoluments as that of a district judge but **must be accorded retirement benefits under the public employees' retirement system** (emphasis added).

(2) § 2-15-121 MCA, which states:

Allocation for administrative purposes only. (1) **An agency allocated to a department for administrative purposes only in this chapter shall:**

(a) (i) exercise its **quasi-judicial**, quasi-legislative, licensing, and policymaking **functions independently of the department and without approval or control of the department except as provided in subsection (1)(a)(ii);**

(ii) accede, if the agency is a licensing board regulated by the department of labor and industry under Title 37, to the active supervision required by 37-1-121(1)(d);

(b) submit its budgetary requests through the department; and

(c) submit reports required of it by law or by the governor through the department.

(2) **The department to which an agency is allocated for administrative purposes only in this title shall:**

- (a) direct and supervise the budgeting, recordkeeping, reporting, and related administrative and clerical functions of the agency;
- (b) include the agency's budgetary requests in the departmental budget;
- (c) collect all revenues for the agency and deposit them in the proper fund or account. Except as provided in 37-1-101, the department may not use or divert the revenues from the fund or account for purposes other than provided by law.
- (d) provide staff for the agency. Unless otherwise indicated in this chapter, the agency may not hire its own personnel.
- (e) print and disseminate for the agency any required notices, rules, or orders adopted, amended, or repealed by the agency.

(3) The department head of a department to which any agency is allocated for administrative purposes only in this chapter shall:

- (a) represent the agency in communications with the governor;
- (b) allocate office space to the agency as necessary, subject to the approval of the department of administration.

and (3) § 2-15-102 MCA provides the statutory definition of "quasi-judicial":

Definitions. As used in this chapter, the following definitions apply:

(10) **"Quasi-judicial function" means an adjudicatory function exercised by an agency, involving the exercise of judgment and discretion in making determinations in controversies.** The term includes but is not limited to the functions of:

- (a) interpreting, applying, and enforcing existing rules and laws;
- (b) granting or denying privileges, rights, or benefits;

- (c) issuing, suspending, or revoking licenses, permits, and certificates;
- (d) determining rights and interests of adverse parties;
- (e) evaluating and passing on facts;
- (f) awarding compensation;
- (g) fixing prices;
- (h) ordering action or abatement of action;
- (i) adopting procedural rules;
- (j) holding hearings; and
- (k) any other act necessary to the performance of a quasi-judicial function (emphasis added).

The "office of workers' compensation judge," and its duties, falls squarely within the foregoing legislative scheme, without constitutional controversy (except the appeal directly to the Montana Supreme Court). Sandler is awash in controversy, because the 1975 Law, establishing the "office workers' compensation judge" never envisioned, the later attempts, to aggrandize the executive agency's quasi-judicial activities, into Article VII judicial activities, with additional Article VII legalistic procedure requirements and standards.

State Fund misquotes Mont. Const. Article VII, § 4(2) in the Answering Brief, page 23, where they state:

Article VII, § 4 of Montana's Constitution provides: The district court shall hear appeals from inferior courts as trials anew unless otherwise provided by law. The legislature may provide for direct review by the district court of decisions of administrative agencies." **The mere fact that the Montana Constitution does not specifically mention the WCC or authorize direct appeals to the Montana Supreme Court does not render § 39-71-2904 MCA, constitutionally infirm.**

The highlighted (bold) section does not appear in the Constitution section. The highlighted section, not only, does not appear in the Constitution, the section reaches an unconstitutional conclusion. § 4(2) constitutionally precluded appeals, from the "office of workers' compensation judge," directly to the Montana Supreme Court.

State Fund continued this misguided line of reasoning on page 23 of their Answering Brief:

Section 39-71-2904, MCA, entitled "Direct Appeal to Supreme Court" provides, "Notwithstanding 2-4-701 through 2-4-704, an appeal from a final decision of the workers' compensation judge shall be filed directly with the supreme court of Montana in the manner provided by law for appeals from the district court in civil cases." The plain language and practical application of § 39-71-2904, MCA, defeats Allum's argument.

State Fund's use of statutes, in an attempt to overcome constitutional requirements, is not new, the 1975 Legislature, in HB100 § 6(2) included the provision:

Notwithstanding section 82-4216, R.C.M. 1947, an appeal from a decision of the workers' compensation judge shall be filed directly with the supreme court of Montana in the manner provided by law for appeals from district court in civil cases.

The unconstitutionality of § 39-71-2904 MCA is currently placed before the Justices, by § 1-3-230 MCA, "[t]ime does not confirm a void act." HB100 § 6(2) was just as unconstitutional, in 1975, as § 39-71-2904 MCA is today.

IV.
David M. Sandler, as "Workers' Compensation
Court Judge," is *coram non judice*.

State Fund, in their Answering Brief, page 22, make the following unsupported false assertions, in an attempt to prove Sandler is not *coram non judice*:

As noted above, Allum's argument that the WCC and the office of the workers' compensation judge are in the executive branch is based on a false premise. Pursuant to § 2-15-1707, MCA, the office of the workers' compensation judge is "allocated to the department of labor and industry for administrative purposes only as prescribed in 2-15-121" and functions "independently" of the DLI. (WCC Docket 49, ¶ 10). Allum's arguments that the Montana Constitution and statutes applicable to the WCC violate the separation of powers clause and that, therefore, the WCC judge is not a proper judge of the WCC, are contrary to overwhelming statutory authority and case law.

All of State Fund's unsupported assertions, made here, have been disproved herein, above; and all of the "overwhelming statutory authority and case law" have failed to identify the enabling legislation for WCC and have not addressed the violation of the Montana Constitution, Article V, § 11(3), by the nomination and confirmation procedure for Sandler. Additionally, the "official actions" of Sandler as "WCC Judge," in signing official documents, containing the WCC caption and stamped with the seal of the "Workers' Compensation Court State of Montana," near the live signature of Sandler as "Judge," gives the false impression, of a

legitimate State of Montana "court," functioning, pursuant to the Mont. Cont. Article VII Judicial Branch. Sandler's *coram non judice* status, is evidenced by § 1-4-201 MCA:

Seal defined. (1) A "seal" is a particular sign made to attest in the most formal manner the execution of an instrument.

(2) A public seal in this state is a stamp or impression made by a public officer with an instrument provided by law to attest the execution of an official or public document.

and § 3-1-201 MCA:

What courts have seals. Each of the following courts shall have a seal:

- (1) the supreme court;
- (2) the district courts;
- (3) the municipal courts.

Thus, Sandler was appointed and confirmed to a non-existent unconstitutional "court," with a nomination and confirmation process which violated the Montana Constitution.

CONCLUSION

State Fund did not address directly address Allum's arguments concerning the interpretation of the 1975 enabling act, so those arguments stand unopposed. The balance of State Fund's arguments, were assertion, which were opposed, and disproved, by Montana statutes.

The clear intent of the Legislature, in 1975, was to create the "office of

workers' compensation judge," in the executive branch, with "quasi-judicial powers," whose procedures were governed by MAPA, with appeals, from the decisions, of the "workers' compensation judge," directly to the Montana Supreme Court. The 1975 Law was very specific, and has not been repealed by any subsequent Legislatures.

The direct violation of § 4(2) of Article VII of the Mont. Const. by § 39-71-1904 MCA is established herein.

State Fund never provided evidence, that WCC and Sandler, as WCC Judge, were established, by legislative action; instead, WCC and Sandler have been fraudulently representing themselves, as legitimate State of Montana entities, to the detriment of Allum and all injured Montana workers.

Wherefore, Allum prays for the following:

1. § 39-71-1904 MCA be declared unconstitutional.
2. Workers' Compensation Court be declared unconstitutional.
3. David M. Sandler, as WCC Judge be declared *coram non judice*.
4. For such other relief as the Court deems just and proper, under the circumstances.

Respectfully submitted this 20th day of February, 2023.

ROBERT L. ALLUM
In Proper Person

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(d) M.R.App.P., I certify that this Appellant's Opening Brief is printed with proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word 2010, is not more than 4,170 words, excluding table of contents and authorities, certificate of compliance, and exhibit index.

Dated this 20th day of February, 2023.

ROBERT L. ALLUM

CERTIFICATE OF SERVICE

I hereby certify that, this date, a true and accurate copy of the foregoing, **APPELLANT'S REPLY BRIEF**, was hand delivered to the following:

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Dated this 20th day of February, 2023.

ROBERT L. ALLUM