No. 100358-7

COA Div. I No. 816420

THE SUPREME COURT
OF THE STATE OF WASHINGTON

PELLCO CONSTRUCTION, INC.,

Petitioner,

v.

CORNERSTONE GENERAL CONTRACTORS, INC., et al.

Respondents.

RESPONDENT CORNERSTONE GENERAL CONTRACTOR'S ANSWER TO PELLCO CONSTRUCTION'S PETITION FOR REVIEW AND MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR REVIEW

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I. INTRODUCTION

Pellco Construction, Inc. ("Pellco") filed a Petition for Review ("Petition") of the Court of Appeals' unpublished decision issued on October 4, 2021. Pellco's petition was filed on November 5, 2021, two days after the deadline for the Petition under RAP 13.4(a). Given that Pellco belatedly filed its Petition, it has also brought a motion for an extension of time requesting that this Court grant additional time to accommodate its late filing. Pellco cites its lateness as the result of a "perfect storm of administrative issues" but argues that its Petition addresses an issue of public importance so significant that the Court should overlook Pellco's tardiness. Moreover, Pellco argues that it has nothing to gain from an extension of time but rather that such an extension will "ultimately be a privilege to the public."

As an initial matter, Pellco's motion for an extension of time must be rejected. Pellco fails to demonstrate the existence of any "extraordinary circumstance" which would permit an extension of time under RAP 18.8(b). Moreover, the supposed

public benefit of its petition is irrelevant to analysis under the RAP, Pellco's tardiness cannot be overlooked simply because it deems its own petition a matter of substantial public importance. Despite Pellco's allegation that rejecting its petition would constitute a "gross miscarriage of justice," in reality, Pellco is far from meeting this standard. Because Pellco fails to meet the stringent standards of RAP 18.8(b), its motion for an extension of time must be denied.

Even if Pellco is granted extra time to excuse its late filing, this Court should deny review of Pellco's Petition. Pellco asks this Court to accept review of a moot appeal because it presents an issue of substantial public significance. However, Pellco, a private party, has not presented any evidence indicating that the issues raised in its appeal are ones that affect the public or public officials. Pellco cannot demonstrate that its appeal is one of significant public importance, and therefore its appeal does not fall within the exception to this Court's rule against advisory

opinions. Accordingly, this Court must deny review of Pellco's Petition.

II. RESTATEMENT OF ISSUES PRESENTED BY PETITION

1) Did the Court of Appeals correctly dismiss Pellco's moot appeal because it failed to meet the substantial public importance exception to this Court's rule against advisory opinions?

III. RESTATEMENT OF CASE

This appeal is based on an unsuccessful bid protest for a contract that has since been awarded on a project that has now been completed. However, Pellco continues to pursue this appeal, which it acknowledges is moot, because it seeks interpretation of RCW 39.10.390, which addresses the general contractor/construction manager ("GC/CM") project delivery system for public works projects in Washington. Pellco asks this Court to adopt a novel interpretation of RCW 39.10.390 that would prohibit a GC/CM from bidding on bid packages for a project it manages unless the GC/CM performs all of the work within the bid package solely with its own forces. However, this

interpretation is contrary to common industry practice and plain language of the statute.

This appeal arises from a public works construction project for the Northshore School District (the "School District"),the Inglemoor High School Concert Hall + Music Building Project (the "Project"). *See* Clerk's Papers ("CP") at 283. The Project was built using the GC/CM delivery method. CP at 283, 355. Under this delivery method, the contractor and project owner collaborate throughout the life cycle of the project, including the design and construction phases. Cornerstone was selected as the GC/CM and awarded the contract for the Project in August 2019. CP at 284, 366.

Cornerstone recommended that the work for multiple integrated components of the buildings structural system be grouped into a "structures package." CP at 285, 496-504. The structures package included concrete, precast concrete, and steel work. *Id.* On November 14, 2019, Cornerstone provided the School District with the structural bid package plan, and notified

the District that Cornerstone intended to submit a bid for the structures package work. CP at 286, 506. The Bid Manual associated with this bid package disclosed to other prospective bidders that Cornerstone intended to bid on the structures package. *Id.*

After the Bid Manual was published, Pellco reached out to the School District and took issue with the structures package, complaining that it gave an advantage to Cornerstone and that it would be unattractive to bidders. CP at 278, 511-15. In response to Pellco's concerns, the School District issued Addendum 1, which clarified that bidders could submit separate or combined bids for the structures package and that the award would be made based on "the lowest total of individual or combined bids." CP at 287, 517-40. As such, the structures package was split into two separate bid packages, one for concrete and one for steel. *Id.* Interested bidders could submit bids for one package (*i.e.* concrete or steel) or could submit a combined bid for both packages.

The School District opened bids for the structures package on May 11, 2020. CP at 288. Pellco submitted a bid for the concrete work and Evergreen Erectors submitted a bid for the steel work. CP at 288, 557. Their two bids totaled $4,498,759.20. *Id.* However, Cornerstone submitted the low bid of $4,428,000.00 for the combined structures package, $70,759.20 lower than the total of Pellco's concrete bid and Evergreen's steel bid. CP at 288, 557. The School District determined that Cornerstone was the low responsive bidder, and Cornerstone issued a Notice of Award on May 15, 2020. CP at 288-89, 559-61, 563.

Pellco submitted a Notice of Protest on May 15, 2020, four days after bids were due on May 11, 2020. CP at 289, 565-76. Pellco alleged that Cornerstone's bid violated RCW 39.10.390(a)(2), and suggested without evidence that Cornerstone's low bid was the result of bid rigging. CP at 289, 565-76. After consideration, the School District denied Pellco's protest on May 20, 2020. CP at 289, 586-94.

Pellco filed a Complaint for Declaratory and Injunctive Relief in King County Superior Court on May 22, 2020, asking the Court to declare Cornerstone's bid illegal and non-responsive to the solicitation and to enjoin the School District from entering into the structures package with Cornerstone. CP at 1-8. Nearly two weeks later, on June 2, 2020, Pellco moved for a preliminary injunction to prevent the School District and Pellco from entering into the contract. CP at 10-25. Both Cornerstone and the School District opposed the motion. CP at 180-196, 253-271.

The trial court conducted a hearing on Pellco's motion for preliminary injunction on June 12, 2020. Verbatim Report of Proceedings ("VRP") at 1. After hearing oral argument from both parties and considering the written briefs and evidence presented, the trial court denied Pellco's motion. VRP at 47-51. At the conclusion of the hearing, Pellco's counsel asked the trial court to delay entry of the order denying the preliminary injunction to give Pellco an opportunity to seek a stay or other emergency relief from the Court of Appeals. VRP at 53-55.

Pellco's counsel indicated to the court that without such relief from the Court of Appeals, the issues raised in its motion for preliminary injunction would become moot. VRP at 53.

The trial court delayed entry of its order until June 16, 2020. CP at 178. However, Pellco did not seek an emergency stay or any other emergency relief from this Court following the hearing. Without any further action from Pellco, Cornerstone executed the structures package contract with approval from the School District. Nearly a month after the trial court's stay had expired, Pellco filed a Notice of Appeal in what it knew had become a moot case. CP at 173-74.

The crux of Pellco's appeal was the meaning of RCW 39.10.390 and whether the language of this statute precluded a GC/CM like Cornerstone from submitting combined-work bid packages on its projects for work that it customarily performed, regardless of whether it performs work with its own forces or with help from a lower-tier subcontractor.

On October 4, 2021, the Court of Appeals issued an unpublished opinion on Pellco's appeal. The Court of Appeals denied Pellco's appeal because it presented a moot issue and had not demonstrated a substantial and continuing public interest justifying review.

Pellco now seeks this Court's review despite its own acknowledgment and the Court of Appeals finding that its case is moot. Pellco argues that its appeal falls within the exception for advisory opinions because a significant public interest exists in resolution of an issue. Pellco also argues that the Court of Appeals' opinion was based on an incorrect application of the law and that it erroneously concluded that interpretation of RCW 39.10.390(2)(a) was not a "substantial public interest" justifying an exception to the rule against advisory opinions. Despite the Court of Appeals' opinion, Pellco argues that there is in fact a substantial public interest at issue which warrants this Court's review.

Pellco's Petition was filed on November 5, 2021, two days after the deadline set forth in RAP 13.4(a). Ten days after Pellco's Petition was filed, it filed a Motion for Extension of Time to File Petition (the "Motion"). The Motion requested an extension of time so that its Petition would be timely. In its Motion, Pellco explains its lateness as the result of "a perfect storm of administrative issues" but still asks this Court to grant it additional time, arguing that failure to consider its Petition would result in a gross miscarriage of justice. In its Motion, Pellco argues that "there is no real privilege that Pellco personally obtains from being granted an extension of time" but that an extension of time will ultimately benefit the public.

IV. ARGUMENT

As an initial matter, Pellco should not be granted an extension of time to remedy the late filing of its Petition. RAP 18.8 and related case law create a stringent standard for granting an extension of time, and Pellco has not even come close to meeting this standard. Instead, Pellco asks this Court to utilize a

novel interpretation of the RAP because of its insistence on the public significance of its appeal. However, the RAP does not allow for additional time for this reason and Pellco cannot demonstrate an "extra ordinary circumstance" or "gross miscarriage of justice" as is required by RAP 18.8. Accordingly, Pellco should not be granted additional time to submit its Petition and its Petition must be dismissed as untimely.

However, even in the event this Court decides to consider Pellco's Petition, it must still deny review because Pellco's Petition does not present any issues that would prompt this Court to accept review of the Court of Appeals' decision. The Court of Appeals correctly identified that Pellco's appeal is moot and does not present a substantial and continuing public interest. Accordingly, this Court should decline review of Pellco's Petition.

A. Pellco Is Not Entitled to an Extension of Time Under RAP 18.8

RAP 18.8(b) provides that the Court will "only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a . . . petition for review." Generally, the standard set by RAP 18.8(b) is a stringent one. *State v. Moon*, 130 Wn. App. 256, 260, 122 P.3d 256 (2005). "[T]here are very few instances in which Washington appellate courts have found that this test was satisfied." *Id.* However, the only instances where an appellate court has allowed an extension of time, have been limited to cases where a moving party actually filed within the thirty-day period, but some aspect of the filing was defective. *Bostwick v. Ballard Marine, Inc.,* 127 Wn. App. 762, 112 P.3d 571 (2005); *Reichelt v. Raymark Industries, Inc.,* 52 Wn. App. 763, 765, 764 P.2d 653 (1988); *see e.g. Weeks v. Chief of State Patrol,* 96 Wn.2d 893, 895–96, 639 P.2d 732 (1982) (extension granted when notice of appeal was timely filed, but was filed in the wrong court). In these few cases where an appellate court has

granted an extension of time, it has been because the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party's control. *Reichelt*, 52 Wn. App. at 765-766; *see also Scannell v. State*, 128 Wn.2d 829, 912 P.2d 489 (1996) (granting extension of time to pro se petitioner who followed prior version of appellate rules shortly after rules were amended). Accordingly, it is only when a party loses the opportunity to appeal due to excusable error or circumstances beyond the party's control that such a "lost opportunity to appeal would constitute a gross miscarriage of justice." *Reichelt*, 52 Wn. App. at 765-766.

Pellco's motion must denied because it does not meet the stringent standard of RAP 18.8(b). Pellco's lateness was not caused by an "extraordinary circumstance." Unlike the limited instances where appellate courts have granted an extension of time, this is not a situation where Pellco filed a timely Petition for Review within the thirty-day period that was ultimately found to be defective. Here, Pellco simply missed the deadline set by

RAP 13.4(a) for filing its Petition for Review. Moreover, Pellco's only explanation for its lateness is "a perfect storm of administrative issues." The Washington Court of Appeals has previously held that similar administrative issues do not rise to the "extraordinary circumstances" standard required by RAP 18.8. *Reichelt,* 52 Wn. App. at 766 (holding that one of the trial attorneys leaving the firm during the thirty days following entry of judgment was not an "extraordinary circumstance" under RAP 18.8). Pellco has failed to demonstrate any "extraordinary circumstance" or any reason why its Petition was late due to excusable error or circumstances beyond Pellco's control. Accordingly, Pellco cannot meet the stringent standard set forth in RAP 18.8.

Pellco also argues that this Court must grant it an extension of time because dismissal of its Petition would constitute "a gross miscarriage of justice" because this Court would not have an opportunity to address the substantive merits of its case. However, Pellco misinterprets the meaning of this

term under RAP 18.8(b). As discussed in *Reichelt,* a "gross miscarriage of justice" occurs when, despite a party's reasonable diligence, the opportunity to appeal is lost only because of excusable error or circumstances beyond a party's control. *Reichelt,* 52 Wn. App. at 765-766. Pellco makes absolutely no effort to demonstrate that its tardiness was due to excusable error or circumstances beyond its control, and instead acknowledges that its late filing was due to its counsel's own errors. Pellco's tardiness in filing its Petition was caused solely by its own error, accordingly, enforcing this Court's rules comes far from constituting a "gross miscarriage of justice."

Pellco essentially asks this Court to overlook its own errors solely because it believes its appeal constitutes an issue of continuing and substantial public importance. However, the RAP does not provide an exception simply because of an issue of alleged public importance. Pellco's own brief shows that it is unable to meet the stringent test under RAP 18.8(b) for granting extra time to file a petition for review. This Court must deny

Pellco's motion for additional time, and determine its Petition to be untimely.

B. The Court Must Decline Review of Pellco's Petition Because There Is No Public Interest in Interpreting RCW 39.10.390(2)(a)

Although Pellco readily admits that this case is moot, Pellco's Petition argues that this Court must accept review of this matter anyway because interpretation of RCW 39.10.390(2) is a matter of significant public importance. Pellco argues that review by this Court is necessary "to resolve the intent of this statute so public owners are accurately guided in the direction the legislature intended." Petition for Review at 5.

1. Pellco's Appeal Is Moot and Does Not Present an Issue of Substantial Public Interest

Generally, this court only reviews justiciable cases and controversies, which must, *inter alia*, present "an actual, present and existing dispute, or the mature seeds of one, as distinguished from a . . . moot disagreement." *Walker v. Munro*, 124 Wn.2d 402, 411, 879 P.2d 920 (1994) (quoting *Nollette v. Christianson,* 115 Wn.2d 594, 599, 800 P.2d 359 (1990)). This justiciability

requirement prevents the Court from venturing into "the prohibited area of advisory opinions." *Walker*, 124 Wn.2d at 412 (quoting *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973)). Accordingly, "[i]t is a general rule that, where only moot questions or abstract propositions are involved, . . . the appeal . . . should be dismissed." *Hart v. Dep't of Soc. & Health Servs*., 111 Wn.2d 445, 447, 759 P.2d 1206, 1207 (1988) (quoting *Sorenson v. Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972)).

As the Court of Appeals held, and Pellco readily agrees, this case is moot. As a disappointed bidder, Pellco long ago lost its standing in relation to the current contract. *Dick Enterprises, Inc. v. Metro. King Cty.*, 83 Wn. App. 566, 571, 922 P.2d 184, 186 (1996) (holding that a disappointed bidder has standing until the point of contract formation). What Pellco seeks now is in essence an advisory opinion from this Court on a matter which is likely to affect its *future* business. As a general rule, "Washington courts are prohibited from rendering advisory

opinions." *To-Ro Trade Shows v. Collins*, 100 Wn. App. 483, 490, 997 P.2d 960, 963 (2000), *aff'd,* 144 Wn.2d 403, 27 P.3d 1149 (2001). This Court will issue such opinions "only 'on those rare occasions where *the interest of the public in the resolution of an issue is overwhelming*'" *To-Ro Trade Shows v. Collins*, 144 Wn.2d at 416 (quoting concurrence in *In re Disciplinary Proceeding Against Deming*, 108 Wn.2d 82, 122–23, 736 P.2d 639, 744 P.2d 340 (1987)) (emphasis added). These exceptions are rare and limited to cases involving issues of "broad overriding public import." *Id*. (quoting *Diversified Indus. Dev. Corp*., 82 Wn.2d 811, 814, 514 P.2d 137). The Court of Appeals determined that Pellco's appeal presents no such issue.

Despite the Court of Appeals' opinion, Pellco argues that this Court should apply a discretionary exception to the rule that moot appeals should not be heard and advisory opinions should not be issued. Under this exception, the Court "may, in its discretion, retain and decide an appeal which has otherwise become moot when it can be said that matters of continuing and

substantial public interest are involved." *Sorenson*, 80 Wn.2d at 558. In determining whether a matter is of substantial public interest, criteria to be considered include "the public or private nature of the question presented, the desirability of an authoritative determination for the future guidance of public officers, and the likelihood of future recurrence of the question." *Id*. (quoting *Nat'l Elec. Contractors Ass'n v. Seattle Sch. Dist. No. 1*, 66 Wn.2d 14, 20, 400 P.2d 778 (1965)).

Despite its argument that it no longer has a personal interest in the resolution of this matter, Pellco clearly is vindicating its own private interest in competing for public construction contracts rather than any public interest. Pellco asserts that there is a "substantial public interest" in its appeal because RCW 39.10.390 is "indispensable to public owners determining the extent to which GC/CMs can compete for and perform the many millions of dollars in public subcontract work performed each year in their projects." Petition for Review at 3. Pellco stresses that this statute has never been interpreted by an

appeals court and that RCW 39.10.390 remains subject to "widely varying applications by Washington public owners." However, Pellco does not articulate why it would be of great *public* interest whether a contract for portions of a school construction project goes to the GC/CM rather than a subcontractor like Pellco nor does it provide any example of the "widely varying applications" of RCW 39.10.390 from public owners. In short, Pellco continues to argue that this Court's review of RCW 39.10.390 is a matter of public interest, but does not offer any concrete evidence demonstrating that public owners need guidance or that the general public has been harmed by the current industry practice.

The actual public interest in public works projects, lies in procuring the construction for the lowest possible price from a qualified contractor. *See, e.g.*, *Dick Enterprises, Inc. v. Metro. King Cty.*, 83 Wn. App. 566, 569, 922 P.2d 184, 185 (1996). Where, as here, the GC/CM presents the lowest-cost bid among qualified contractors for a bid package, the public interest is

served by awarding the contract to the GC/CM. It is only in Pellco's private interest as a competing bidder that motivates its desire to exclude the GC/CM from bidding in such a scenario. Accordingly, the issues presented here are not of "broad overriding public import."

2. The Lack of a Public Sponsor Demonstrates a Lack of Substantial Public Interest

Pellco asserts that the Court of Appeals was incorrect in considering the lack of a government sponsor in determining the public interest in interpreting RCW 39.10.390. Pellco argues that this is not a recognized factor in deciding whether a moot appeal meets the recognized public interest exception and that government sponsorship is not a requirement for establishing public interest. Petition for Review at 12.

Pellco attempts to narrowly construe the public interest criteria in order to overcome its mootness. As discussed above, one criterion for determining whether an appeal presents a substantial public interest is "the desirability of an authoritative determination for the future guidance of public officers."

Sorenson, 80 Wn.2d at 558. Although Pellco argues that a government sponsor is not a requirement in determining a substantial public interest, what it fails to acknowledge is that there is no indication that any public officials seek guidance or interpterion of this statute. Based on the record before this Court, there is simply no evidence presented to indicate that the issue Pellco presents is one that plagues public officials or even that any public officials seek interpretation or guidance regarding RCW 39.10.390. In fact, the public owner directly involved in this dispute, the School District, has not indicated that it seeks, or has ever sought, guidance regarding RCW 39.10.390.

Pellco argues that there is a public interest in "providing public owners an authoritative decision on RCW 39.10.390(2)(a)'s intent," however it has provided no evidence of any public owner desirous of such an interpretation. Essentially, Pellco argues that a government sponsor is not needed to show public interest, however, its lack of a government sponsor only shows that there are not public officials seeking

interpretation of the issue presented by Pellco. This only adds to Pellco's inability to demonstrate a "substantial public interest" in deciding its moot appeal.

3. The Issue Presented by Pellco's Appeal Is Not Likely to Evade Review

In its decision, the Court of Appeals held that the issue presented by Pellco was not one that was capable of repetition and would evade review. The Court of Appeals noted that Pellco failed to pursue emergency relief and did not file its Notice of Appeal until after its appeal became moot. Pellco somehow interprets this to mean that the Court of Appeals *required* Pellco to have attempted to obtain injunctive relief as part of the criteria for the substantial public interest exception.

However, Pellco again misses the point of the Court of Appeals' opinion. The Court of Appeals' discussion of Pellco's failure to seek injunctive at the Court of Appeals demonstrates that although Pellco's appeal was moot, future litigants will still have the option of seeking appellate review of an active dispute.

By failing to appeal the trial court's decision on Pellco's motion for a preliminary injunction before the contract was awarded, Pellco lost its standing. Had Pellco filed its appeal during the stay issued by the trial court, it would not be pursuing a moot appeal. Pellco's failure to seek injunctive relief is relevant not because it is a requirement for the substantial public interest exception, but because it demonstrates that this issue is not one that is capable of repetition yet will evade review. There are many other disappointed bidders who could bring a similar challenge to RCW 39.10.390, but as Pellco notes, this statute has not been addressed by this court in its 24-year history. Petition for Review at 1. The fact that RCW 39.10.390 has not previously been interpreted by this Court shows that that Pellco does not bring its appeal to address a burning desire from the public, but rather to pursue its own interest as a private party bidding on public contracts.

4. The Capital Projects Advisory Review Board Has the Ability to Advise and Evaluate the Use of Alternative Contracting Methods

Pellco's Petition suggests that the Court of Appeals improperly suggested that the Capital Projects Advisory Review Board ("CPARB") has the ability to interpret statutes. The Court of Appeals' decision notes that the CPARB was created to advise the legislature on policies related to public works delivery methods and that Pellco has the option to pursue its questions and concerns about RCW 39.10.390 through the CPARB.

Pellco again misses the point of the Court of Appeals' opinion. As discussed in Cornerstone's Brief, CPARB was created to "provide an evaluation of public capital projects construction processes, including the impact of contracting methods on project outcomes, and advise the legislature on polices related to public works methods." RCW 39.10.220. The Court of Appeals does not suggest that CPARB has the power to interpret RCW 39.10.390, but rather that CPARB is the proper forum for Pellco to direct its concerns regarding interpretation

RCW 39.10.390. Pellco's president, Mike Pelitteri, is even a member of CPARB.[1] CPARB could choose to recommend revisions to RCW 39.10.390 or elect to provide guidance regarding how it should be interpreted. But CPARB has not done so – belying the claim by Pellco that this is an issue of important public interest.

Further, it is telling that despite the existence of CPARB, the issues raised by Pellco with RCW 39.10.390 have not affected the reauthorization of this statute—without any changes to the language of RCW 39.10.390(2)—in spring of 2021. Despite the existence of a forum designed to offer insight and evaluation of public works contracting from industry stake holders, CPARB has declined to address any of the issues raised by Pellco. This further demonstrates that Pellco's appeal is based

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[1] Although Pellco's Petition notes that Mr. Pelliteri is not a CPARB member, he is a CPARB member and sits on the Project Review Committee. *See* Project Review Committee Member List, Capital Projects Advisory Review Board; Washington Dept. of Enterprise Services, (accessed December 17, 2021 at 10:11AM) https://des.wa.gov/sites/default/files/public/documents/About/CPARB/PRC/Members/PRC_Members_11-2021.pdf?=17d6f.

on its own personal interest rather than that of the general public or public officers generally.

V. CONCLUSION

For the reasons stated herein, the Court should deny Pellco's Motion for Extension of Time and decline review of Pellco's Petition for Review. First, Pellco's Petition was late, and it was unable to demonstrate any of the standards set forth in RAP 18.8(b) which would allow for an extension of time. Pellco's Petition for Review was submitted untimely due to its own inexcusable errors and its Motion for an Extension of Time must be denied. Second, this Court should deny review of Pellco's Petition for Review. Pellco's appeal is moot, and it does not offer any evidence to demonstrate that it meets the substantial public interest exception.

I certify that this memorandum contains 4,542 words, in compliance with RAP 18.17(c).

DATED this 20th day of November, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a true and correct copy of the foregoing document on the counsel of record listed below, via the method indicated:

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DATED this 20th day of December, 2021, at Seattle, Washington.

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