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IN THE OFFICE OF THE
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MARCH 9, 2022
STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

IN THE INTEREST OF A.C., A CHILD

Leslie Johnson, L.B.S.W., Cass County Human Service Zone and the State of North Dakota,	)	
	)	District Court No.: 09-2021-JV-000383
v.	)	
A.C., a child; L.C. mother; Jennifer Restemayer, Guardian ad Litem; and Turtle Mountain Band of Chippewa Indians, Tribe,	)	Supreme Court No.:
and	)	
A.L., father,	)	
Respondent and Appellant.	)	

BRIEF OF APPELLANT

Appeal from the Juvenile Findings of Fact and Order Terminating Parental Rights, entered by the Juvenile Court, County of Cass, State of North Dakota, the Honorable Stephanie Hayden, Judicial Referee, presiding, on February 7, 2022

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Issue 1: Whether the Juvenile Court erred in finding the agency engaged in active efforts to prevent the breakup of the Indian family, as required by the Indian Child Welfare Act.

Issue 2: Whether evidence beyond a reasonable doubt was provided that continued custody by the Respondent was likely to result in serious emotional or physical damage to the child.

JURISDICTIONAL STATEMENT

[¶1] "Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law." North Dakota Constitution, Article VI, Section 6. "A judgement or order in a civil action may be removed to the Supreme Court by appeal as provided in this chapter." N.D.C.C. § 28-27-01. A final judgment terminating parental rights is appealable. N.D.C.C. § 28-27-02(2). This appeal, filed within thirty days of the lower court's order, is timely under N.D.R.App.P. 2.2 and N.D.R.App.P. 26.

STATEMENT OF THE CASE

[¶2] A.L. (hereinafter "Andy")[1] is the natural father to the child A.C. At the time of the trial, A.C. (hereinafter "Amber") was just over three years of age. The underlying case also involved Amber's brother, K.C., but Andy is not the natural father of K.C., so this appeal does not relate to him, and he will only be referenced as needed throughout this brief.

[¶3] Amber was adjudicated a deprived child on August 5, 2020 and placed in the full custody of the Director of the Cass County Human Service Zone for a period of up to nine months, with authorization to make out of home placement. See District Court File 09-2020-JV-00184.

[¶4] A service plan was put into place with Amber's mother, L.C. (hereinafter "Lauren"), to reunify the mother and child. Andy did not sign a service plan with the Human Service Zone.

[¶5] A petition for termination of parental rights was filed on March 2, 2021. On June 2, 2021, the petition was amended to a review of custody and, according to the affidavit of petitioner, Lauren admitted that the aims and goals of the previous court order had not been

[1] Pseudonyms are used to protect the identify of the children.

met and Amber remained in the custody of the Human Service Zone.

[¶6] A renewed petition for termination of parental rights was filed on August 16, 2021.

[¶7] Lauren, H.P. (father of K.C.), and John Doe were found to be in default on December 28, 2021. The trial held on January 3, 2022, only pertained to Andy's parental rights to Amber. The Juvenile Court of Cass County issued its findings of facts and order terminating parental rights on February 7, 2022. This appeal follows.

STATEMENT OF THE FACTS

[¶8] On April 14, 2020, Amber and her brother, K.C., were removed from the care of Lauren, after Lauren left the children with several caretakers who indicated they could no longer care for the children and had no way to contact Lauren. See Affidavit of Petitioner (R2:3:14). There were other reports that indicated Lauren had left the children for months at a time and was alleged to be using illegal drugs. Id.

[¶9] A vast majority of the affidavit from the petitioner, Leslie Johnson, relates to efforts employed to assist Lauren in overcoming barriers to parenting. (R2) The limited references to Andy include the following (summarized):

a. An overview of CPS history that mentions "concerns" regarding Andy using illegal drugs. (R2:4-5).

b. Andy completed a paternity test and was found to be Amber's father in May 2021. (R2:6:25).

c. On June 6, 2021, [Petitioner] attempted a phone call to Andy but wasn't able to reach him or leave a voice mail for him. Id.

d. On July 20, 2021, Andy called Petitioner and reported he had done "everything" he was asked to do in order to allow Amber to be returned to his care and he was reportedly advised by his attorney that Amber should be returned to him. (R2:7:26). Petitioner then informed Andy they needed to meet and discuss a treatment plan. Id. Andy agreed to call Petitioner back to set a time for this meeting. Id.

e. Meetings were set on July 23 and 28, 2021, but Andy called to cancel both. (R2:7:27). Andy indicated he would call back to reschedule, but never did. Id.

[¶10] The Petitioner lists the entirety of Andy's criminal history in North Dakota, which is admittedly lengthy. Petitioner then states this history "proves a pattern of inability to follow social norms and to learn from consequences. Many of these offenses have led to jail time and a recent stay at Centre Inc."

[¶11] Petitioner, in her affidavit, goes on to identify the following as "active efforts" as required under the Indian Child Welfare Act ("ICWA"): YMCA shelter, public housing, Health Tracks, law enforcement involvement, protection orders, case management, foster care, child protection services, contact with relatives, Red Cross, substance abuse treatment, parenting time and parent educational services, early childhood education evaluation for Amber, speech therapy for Amber, and IEP for K.C., drug court and probation services. (R2:10-11:30).

[¶12] The findings of fact signed by the Juvenile Court are also relatively scant in relation to Andy. See Juvenile Findings of Fact and Order (R54). Specifically, the Juvenile Court found the following:

a. Andy took a paternity test with results indicating high probability that he is Amber's father, but he is not listed on Amber's birth certificate. (R54:2:3).

b. Andy failed to establish and maintain contact with his daughter during her 629 days in foster care and attended only 2 visits in that time. (R54:3:11).

c. Andy's criminal records demonstrates an inability to follow social norms and his continued lifestyle results in the constant possibility that he will be incarcerated and not available to care for a child. (R54:3:12). At the time of the trial, Andy was incarcerated. (R54:4:13).

d. Andy failed to establish a legal relationship with Amber. (R54:4:14).

e. The underlying CHIPS file regarding Amber found Andy to have subjected

her to aggravated circumstances. (R54:4:18).

f. Petitioner's testimony indicated Andy "took no constructive action to respond to [her] efforts to create a treatment plan with and for him." (R54:5:19).

[¶13] The findings of fact of the Juvenile Court list the exact same "active efforts." Notably, none of these active efforts specifically relate to engagement with or assistance provided to Andy. They all related to attempts to provide support or resources to Lauren.

[¶14] The Juvenile Court also found that "reasonable efforts" were employed to place the children together, as they were in the same foster home at that time. The Court recognized that this is not a Native American home and reiterates the Petitioner's statement that "such a home could not be located *at the initial time of placement*."

[¶15] The Juvenile Court findings of fact state that ICWA does apply to Amber and that Marilyn Poitra, a "qualified expert witness," provided testimony via affidavit in support of the Termination of Parental Rights of Andy to Amber. (R54:6:12) (see also R29).

[¶16] The Juvenile Court, while it referenced the affidavit of Marilyn Poitra, made no specific findings regarding the requirements of ICWA in termination cases and whether those requirements were met by the Cass County Human Service Zone.

[¶17] The Juvenile Court did find that it was "contrary to welfare" of Amber to "remain in the parental home" and that it was in the best interests of Amber that Andy's parental rights be forever terminated and that Amber be placed in the full care, custody and control of the acting Director(s) of the Cass County Human Service Zone, or her successor, for adoption. (R54:6-7).

[¶18] During the trial on this matter, Petitioner Leslie Johnson made the following relevant statements during her testimony (paraphrased):

a. She had attempted to reach Andy on the telephone and in writing to schedule a meeting with him, but he had cancelled the 1-2 meetings they did schedule. (Audio 11:08 – 12:30). [2]

b. Because she had never met with him, she did not form a case plan with Andy. (Audio 15:12). However, when Andy was at the Cass County Jail and readily available to Johnson, she did not make any effort to meet with him there. (Trial Audio 23:55 – 24:37).

c. While she observed that Amber was "standoffish and nervous" during visitation with Andy (Trial Audio 18:58), there was only one vague "concern" regarding Andy's drug use (Audio 21:22), and no reports of Andy ever harming Amber. Audio 28:31-42).

d. Johnson did not believe Andy had ever "seriously" been considered as a placement option for Amber, when Amber was removed from Lauren's custody, mostly based on Andy's legal history. (Audio 20:15-25).

e. Johnson made a "couple contacts" with relatives of Lauren's, but they were ruled out as placement options. (Audio 24:50). Johnson remembers speaking with Andy's mother but does not recall if she was considered as a placement option. (Audio 25:29-45).

f. Regarding efforts made to connect with the Turtle Mountain Band of Chippewa Indians, Johnson stated she had made "quite a few efforts" to connect with Marilyn [Poitra, the identified ICWA representative], and that Poitra had participated in hearings early on. (Audio 26:09-47). Poitra had been made aware of the trial and had submitted an affidavit but was not present to testify. (Audio 26:52-55 and 34:10-59) see also (R29 – Affidavit of Marilyn Poitra). Johnson stated that Poitra was her only contact with the tribe, so she did not make any other attempts to contact any other individuals with the tribe or with the Bureau of Indian Affairs. (Audio 27:00 – 28:21).

g. After being recalled to the witness stand following Andy's testimony, Johnson did recall that she had received a message from Centre, Inc., regarding Andy's chemical dependency evaluation and that the evaluator did not recommend any treatment. (Audio 1:07-50-57).

[¶19] During trial, Andy also testified to the following:

a. After the children were placed into the custody of Cass County Human Service Zone, Andy went home to the reservation and rented a home, so he and his mother could care for Amber there. (Audio 46:36 and 57:20).

[2] At the time of this Brief, only an audio recording of the trial is available, captured on one compact disc. All citations to "audio" throughout the brief refer to this disc.

b. When directed to by Johnson, Andy completed a chemical dependency evaluation at Centre, Inc., and signed a release of information so Johnson could get the results. (Audio 47:33 – 48:26). The evaluator did not recommend that Andy engage in any services or treatment. Id. Andy informed Johnson that he completed the evaluation. Id.

c. Andy felt like he had done everything Johnson had asked of him, but also felt like he was given the run around every time he talked to her. (Audio 50:55 – 52:27). He did not understand what was required of him. Id. Andy obtained his own apartment and a full-time job and took the paternity test that Johnson scheduled for him (Audio 54:55 – 57:20).

[¶20] The testimony illuminated the lack of active efforts that were employed in this case and the failure of Cass County Human Service Zone to follow the requirements of the Indian Child Welfare Act before terminating Respondent's parental rights.

STANDARD OF REVIEW

[¶21] The Supreme Court, on appeal, reviews the juvenile court's decision regarding termination of parental rights and examine the evidence in a manner similar to a trial de novo. In re A.M., 1999 ND 195, ¶ 7, 601 N.W.2d 253. The Supreme Court is not bound by the juvenile court's findings, but gives them appreciable weight and gives deference to the juvenile court's decision, because the juvenile court had an opportunity to observe the candor and demeanor of the witnesses. Id.

[¶22] Rule 52(a) N.D.R.Civ.P provides that the findings of fact in juvenile matters shall not be set aside unless they are clearly erroneous. In the Interest of T.F., 2004 ND 126, ¶ 8, 681 N.W.2d 786. The juvenile court's conclusions of law are fully reviewable. Id.

LAW AND ARGUMENT

[¶23] The state and federal law provisions that govern the termination of parental rights involving Indian children create a dual burden of proof for the party seeking parental termination of rights of the Indian parent.

[¶24] Under state law, a juvenile court may terminate parental rights, provided that: (1) the parent has abandoned the child, (2) the child has been subjected to aggravated circumstances, (3) the child is a child in need of protection, (4) the parent consents in writing before the court, (5) or the parents has pled guilty or nolo contendere to, or has been found guilty of engaging in a sexual act under section 12.1-20-03 or 12.1-20-04, the sexual act led to the birth of the parent's child, and termination of the parental rights of the parent is in the best interests of the child. N.D.C.C. § 27-20.3-20.

[¶25] If the termination is brought because the child is a child in need of protection, the court must also find: (1) the conditions and causes of the need for protection are likely to continue or will not be remedied and for that reason the child is suffering or will probably suffer serious physical, mental, moral, or emotional harm; or (2) the child has been in foster care, in the care, custody, and control of the department or human service zone for at least four hundred fifty out of the previous six hundred sixty nights. Id. The state law provisions must be proven by *clear and convincing evidence*. See In re C.R., 1999 ND 221, ¶ 4, 602 N.W.2d 520 (emphasis added).

[¶26] ICWA, at 25 U.S.C. § 1912(f), provides:

> No termination of parental rights may be ordered in such proceeding in the absence of a determination, *supported by evidence beyond a reasonable doubt*, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. (emphasis added).

[¶27] In addition to the above, under ICWA, the party seeking termination of parental rights must also demonstrate by clear and convincing evidence that active efforts were made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that those efforts were unsuccessful. See 25 U.S.C §

1912(d); 25 C.F.R. § 23.120.

[¶28] Finally, in any case regarding the foster care placement of an Indian child, the agency holding custody must attempt to meet the preferences set forth under ICWA. That is, "in the absence of good cause to the contrary," the agency shall attempt to make a placement with: (1) a member of the Indian child's extended family; (2) a foster home licensed, approved, or specified by the Indian child's tribe; (3) an Indian foster home licensed or approved by an authorize non-Indian licensing authority; or (4) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs. See U.S.C. § 1915(b).

[¶29] Here, Appellant argues (1) that active efforts *were not* employed to prevent the breakup of the Indian family; (2) that Petitioner *did not* demonstrate by evidence beyond a reasonable doubt that continued custody of the child by Appellant would be likely to result in serious emotional or physical damage to the child; and (3) Cass County Human Service Zone did not show good cause to break from ICWA's foster care placement preferences. Therefore, the Juvenile Court did not fulfill the requirements of ICWA and its order terminating Andy's parental rights cannot stand.

THE JUVENILE COURT ERRED IN FINDING THE AGENCY ENGAGED IN ACTIVE EFFORTS TO PREVENT THE BREAKUP OF THE INDIAN FAMILY AS REQUIRED BY ICWA

[¶30] While this Court is certainly familiar with the history of ICWA, it bears reiterating that ICWA was enacted because of the large numbers of Native American children who were being removed from their parents, extended families, and communities. See www.nicwa.org/about-icwa/. Specifically, research at the time showed that of the Native American children being removed from their homes, 85% of them were placed outside of

their families and communities – even when fit and willing relatives were available. Id.

[¶31] ICWA, at Public Law 95-608, reads:

> The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of *minimum Federal standards* for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs. (emphasis added).

Accordingly, ICWA requires agencies involved in the placement of Indian children to engage in "active efforts" to place the child with extended family, a tribal member, or at least in an Indian foster home. Id. Again, ICWA sets forth only *minimum* standards.

[¶32] North Dakota Century Code codified the "active efforts and procedures" standards that are set forth in ICWA, as well. See N.D.C.C. § 27-20.3-19. Active efforts are defined as "affirmative, active, thorough, and timely efforts intended primarily to maintain or reunite an Indian child with the child's family." Id. This section goes on to say:

> The court may not order the removal unless evidence of active efforts shows there has been a vigorous and concerted level of casework beyond the level that would constitute reasonable efforts under section 27-20.3-26.

N.D.C.C. § 27-20.3-19(2).

[¶33] Here, that history is particularly relevant considering the negligible efforts made by the Cass County Human Service Zone to engage Andy and *his* extended family in this process or to consider his family as a placement option, prior to terminating his rights.

[¶34] First, in reviewing findings and order of the Juvenile Court, the Court only makes a rote reference to active efforts by reiterating the same list of services identified by the Petitioner in her affidavit. As noted above, these services were not specific to Andy, but rather describes efforts to engage Lauren in services and support.

[¶35] During her testimony, Petitioner Johnson stated she did not make any effort to even meet with Andy while he was incarcerated in Cass County. She first explained this lack of effort was because they "didn't know for sure whether he was the father." (Audio 23:55-24:07). However, even after he had taken the paternity test, Johnson stated it was "already established that there was going to be a termination of parental rights" so she did not make any further efforts to visit him while he was incarcerated and available to meet with her. (Audio 23:55 - 24:37). Johnson did state they did have a meeting scheduled on one or two occasions in July of 2021, but that Andy had cancelled these meetings. (Audio 18:13).

[¶36] Beyond that, Johnson recalled speaking with Andy's mother on the phone, but did not recall if they discussed family placement options for Amber. (Audio 25:29-45).

[¶37] In regard to engaging Andy's tribe, Johnson stated there had been "quite a few efforts to connect with Marilyn [Poitra]" and that when Poitra was not responsive, Johnson did not think of reaching out to the BIA or any other tribal resources to attempt to establish a connection with the tribe. (Audio 27:00 – 28:21). Johnson did indicate she spoke with several of Lauren's family members early on in the case. (Audio 24:50 – 25:07).

[¶38] Petitioner is seemingly arguing that it would have been futile to engage in active efforts with Andy to allow reunification. However, even though Andy did not meet with Johnson one-on-one, Andy testified he took the steps Johnson asked of him. Specifically, Andy provided unrebutted testimony that he took a paternity test to establish that he was, in fact, Amber's father; he completed a chemical dependency evaluation which recommended no treatment; he found a place to live; and he had secured full-time employment [prior to his most recent incarceration]. (Audio 54:40 – 57:20 and 1:03:01 – 1:03-50).

[¶39] On the other hand, Andy also seemed to believe that engaging with Cass County Human Service Zone would have been a futile effort for him. He was often given the run around and told to call his [previous] attorney, who in turn told him no services had been required for him so he should contact his case manager . . . and so on. (Trial Audio 50:55 – 52:27). He testified multiple times that he believed he had completed everything that Johnson had asked him to do. (Audio 1:03:01-50).

[¶40] Under ICWA, a parent's incarceration does not eliminate the requirement to show that active efforts were made to prevent the breakup of an Indian family. See 25 U.S.C § 1912(d); see also In re D.G., 2004 SD 54, 679 N.W.2d 497. Further, even when "aggravated circumstances" apply, as argued in this case, the state is not relieved of its obligation to provide *active efforts*, like it might be in a case not involving an Indian child that only requires reasonable efforts to reunite a family. See In re J.S.B., Jr., 2005 SD 3, 691 N.W.2d 611.

[¶41] The Petitioner did not prove that active efforts had been employed to prevent the breakup of the Indian family in the case of Andy and Amber, and the Juvenile Court did not make appropriate findings to the same effect. The Order terminating Respondent's parental rights must be overturned.

[¶42] Finally, Respondent, while not a stand-alone issue but still relevant to compliance with ICWA, argues that the Cass County Human Service Zone has not provided evidence of "good cause" to show why the placement preferences were not followed under ICWA.

[¶43] Cass County Human Service Zone did attempt to engage with Andy's tribe but made only minimal efforts to engage with Andy's extended family. Petitioner Johnson could not recall if she even talked with Andy's mother about family placement options.

(Audio 25:29-45). Under ICWA, Cass County was required to attempt to place Amber with extended family, an Indian foster home, or an institution approved by the tribe that would meet the child's needs, absent good cause to the contrary. See U.S.C. § 1915(b). Cass County has not provided evidence of good cause for why they did not make reasonable efforts here to place Amber in a preferred placement. Again, this is not a standalone issue on appeal, but is further evidence of the Petitioner's failure to abide by the letter and spirit of ICWA.

EVIDENCE BEYOND A REASONABLE DOUBT WAS NOT PROVIDED THAT CONTINUED CUSTODY BY THE RESPONDENT WAS LIKELY TO RESULT IN SERIOUS EMOTIONAL OR PHYSICAL DAMAGE TO THE CHILD

[¶44] In relevant part, ICWA states:

> No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C. 1912(f).

[¶45] Here, simply put, the Juvenile Court did not make *any* findings regarding evidence that "the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." The Juvenile Court did reference the affidavit of Marilyn Poitra, as the Qualified Expert Witness, supporting the termination of Andy's parental rights. However, the Juvenile Court did not make any further findings that would meet this requirement under ICWA.

[¶46] The Century Code sets forth considerations enumerated under ICWA. Specifically, the evidence presented to the court must show

> causal relationship between the particular conditions in the home and the

> likelihood that continued custody of the child will result in serious emotional or physical damage to the particular child who is the subject of the proceedings."

N.D.C.C. § 27-20.3-19(3). This section also makes clear that

> Poverty, isolation, custodian age, crowded or inadequate housing, substance use, or nonconforming social behavior does not by itself constitute clear and convincing evidence of imminent serious emotional or physical damage to the child."

Id.

[¶47] In the case before us, there is a distinct lack of evidence showing the "serious emotional or physical damage" that was imminent to Amber, as it relates to Andy.

[¶48] There was only a vague reference to a one-time concern of Andy's drug use around Amber. (Audio 21:22). Andy completed a chemical dependency evaluation that indicated no need for treatment or services. (Audio 1:07:57). There were no reported concerns of Andy ever harming Amber. (Audio 28:31 – 29:05).

[¶49] In addition, there were only minimal efforts to engage Andy's extended family in the case planning process or to consider them as placement options. (Audio 25:45).

[¶50] Without relevant testimony or evidence of the serious harm that Amber was at risk of, and without *any* relevant findings in the Juvenile Court's order, this order of termination of parental rights must be overturned.

CONCLUSION

[¶51] The requirements of the Indian Child Welfare Act were not met by the Petitioner or the Juvenile Court. The Findings of Fact and Order Terminating Parental Rights of Respondent A.L. must be reversed.

[¶52] DATED this 9th day of March, 2022.

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CERTIFICATE OF COMPLIANCE

[¶1] Kylie Oversen hereby certifies that she is the Attorney for the Respondent/Appellant in the above-entitled matter and certifies that the Brief of the Appellant complies with the page limitation rules. The Brief contains 18 pages, excluding the Certificate of Compliance.

Dated this 9th day of March 2022.

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Leslie Johnson, L.B.S.W., Cass County Human Service Zone and the State of North Dakota,	)	
	)	District Court No.: 09-2021-JV-000383
v.	)	
A.C., a child; L.C. mother; Jennifer Restemayer, Guardian ad Litem; and Turtle Mountain Band of Chippewa Indians, Tribe,	)	Supreme Court No.:
and	)	
	)	**AFFIDAVIT OF SERVICE**
A.L., father,	)	
Respondent and Appellant.	)	

[¶1] Kylie Oversen hereby certifies that she is the attorney for the Respondent/Appellant in the above-entitled matter and declares that on March 9, 2022, the following documents:

Notice of Appeal

Order for Transcripts

Brief of Appellant

were served electronically on the following parties:

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Assistant State's Attorney
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and by mail upon the following parties:

Turtle Mountain Band of Chippewa P.O. Box 900 Belcourt, ND 58316	A.L., Respondent/Appellant 3100 E Railroad Avenue Bismarck, ND 58506

[¶ 2] To the best of the declarant's knowledge the above addresses are the actual addresses of

the party intended to be served.

[¶ 3] I declare under penalty of perjury of the law of North Dakota that the foregoing is true

and correct.

Dated this 9th day of March 2022.

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