**IN THE IOWA SUPREME COURT**

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| AMANDA DESOUSA f/k/a AMANDA JOHNSTON,<br><br>Plaintiff,<br><br>vs.<br><br>IOWA REALTY CO., INC., MELISSA FYNAARDT, and MATTHEW FYNAARDT,<br><br>Defendants. | Supreme Court No. _____<br><br>**DEFENDANT IOWA REALTY'S APPLICATION FOR INTERLOCUTORY APPEAL**<br><br>Dallas County Case No. LACV042473<br><br>Trial Date: April 18, 2022 |

Defendant Iowa Realty Co., Inc. ("Iowa Realty") hereby applies for leave to file an interlocutory appeal pursuant to Iowa Rule of Appellate Procedure 1.6104 and respectfully request this Court grant its application and stay the proceedings in the district court.

## Introduction

At first blush, this case may seem nothing more than an ordinary slip-and-fall, a personal injury action arising from the usual hazards inherent in icy Iowa winters. As mundane as the underlying facts may be, however, the district court's order transformed this ordinary case into something extraordinary. Faced with a new duty constituting a dramatic expansion of liability, Iowa's residential real estate industry now finds itself on the precipice of a slippery slope.

Plaintiff Amanda DeSousa contends that because Defendants Matthew and Melissa Fynaardt (the "Fynaardts") hired an agent of Iowa Realty to assist with the sale of their home, Iowa Realty was the "land possessor" of the Fynaardts' property—imposing a novel duty never before recognized by Iowa courts. The practical implications of the district court's denial of summary judgment go well beyond the facts of this case; recognizing such a duty will have a ripple effect on the residential real estate industry. Interlocutory appeal of the order denying summary judgment should be granted to correct the erroneous determination that Iowa Realty owed DeSousa a duty of care and to prevent upheaval in the housing industry.

## Relevant background

The posture of this case is relatively simple, and the underlying facts are undisputed. Searching for her "dream home," DeSousa contacted her realtor to schedule a showing of the Fynaardts' home, which was then listed for sale. (Attachment ("Att.") 005). During a winter storm on the morning of December 28, 2018, DeSousa and her realtor, a buyer's agent not affiliated with Iowa Realty, met at the Fynaardts' property for the showing. *Id.* As she stepped out of her car onto the icy driveway, DeSousa slipped and fell. *Id.* She later sued the Fynaardts and Iowa Realty for injuries she sustained as a result of the fall. (Att. 002-04). Against all defendants, she asserts a single claim sounding in premises liability. *Id.*

Because a realtor does not exercise control over a client's property and Iowa law has never before held realtors owe a duty for purposes of premises liability, Iowa Realty filed a motion for summary on the grounds that it owed DeSousa no duty of care. In resisting summary judgment, DeSousa insisted that Iowa Realty was the "land possessor" but offered no evidence to support her conclusory contentions. On April 17, 2021, the court entered a one-page order denying summary judgment, simply stating that a "reasonable juror" could find a duty existed. (Att. 009 (Supplemental Ruling on Iowa Realty's Motion for Summary Judgment)). Yet the question before the court was a purely legal one: Was Iowa Realty was the "land possessor" owing DeSousa a duty of care under a premises liability theory? The answer, emphatically, is no.

Here, the undisputed facts established that Iowa Realty exercised no control over the Fynaardts' property and therefore owed DeSousa no duty of reasonable care. (Att. 005). To hold the listing realtor to the same standard of care as the homeowners would be a drastic expansion of liability. Listing a house "for sale" is simply not equivalent to owning a home. Because Iowa Realty undisputedly did not exercise control over the property such that it could be considered a "land possessor," and because strong public policy considerations caution against imposing such a duty on realtors, the court erred in its denial of summary judgment. Interlocutory appeal of this ruling is warranted.

### A. The district court's ruling adversely affects Iowa Realty's substantial rights.

There can be no liability for negligence absent a duty of care. *See Lewis v. Howard L. Allen Invs., Inc.*, 956 N.W.2d 489, 490 (Iowa 2021). DeSousa's claim against Iowa Realty stems from a purported duty never before recognized under Iowa law. The district court's order denying summary judgment on this claim dramatically and unnecessarily expands liability for realtors. If the ruling is allowed to stand, Iowa Realty will be forced to litigate this case through trial, notwithstanding the absence of any duty owed under existing law.

A motion for summary judgment was Iowa Realty's only avenue to request that the court dismiss the claim against it. There is no other recourse; Iowa Realty must now prepare to litigate this case through trial. Practically speaking, absent interlocutory review, Iowa Realty will have to expend substantial time, effort, and resources defending itself against claims premised on the breach of an otherwise non-existent duty. Iowa Realty is entitled to judgment as a matter of law on DeSousa's claim. The district court erred in ruling otherwise, and its decision undoubtedly affects Iowa Realty's substantial rights.

### B. The district court's ruling materially affects the final decision, and a determination as to the correctness of the decision before trial will better serve the ends of justice.

The only issue before the district court was the existence of a duty—a narrow legal conclusion flowing from the undisputed facts. The court's ruling that a "reasonable juror" could find that Iowa Realty owed DeSousa a duty of care is contrary to well-established law holding that the existence of a duty is a legal determination. *See Lewis*, 956 N.W.2d at 490. Should the Court deny this application and allow the claim against Iowa Realty to proceed to trial, the jury will be left to decide this question of law. Furthermore, there is no guiding legal authority to assist the district court and the parties in preparing jury instructions for the premises liability claim against Iowa Realty. If this case were to proceed to trial, the risk of erroneous jury instructions is palpable. Resolving this pure legal issue now promotes efficiency, whether the end result is dismissing Iowa Realty on summary judgment or proceeding to trial. The interests of sound and efficient justice are not served by having this case tried twice.

## Argument

### I. Because Iowa Realty owed DeSousa no duty of care, the court erred in denying summary judgment.

"It is hornbook law that in any tort case the threshold question is whether the defendant owed a legal duty to the plaintiff." *J.A.H. ex rel. R.M.H. v. Wadle & Assocs., P.C.*, 589 N.W.2d 256, 258 (Iowa 1999) (citation omitted). "Duty is a question of law for the court to decide." *Morris v. Legends Fieldhouse Bar & Grill, LLC,* No. 19-1449, 2021 WL 1703177, at *3 (Iowa Apr. 30, 2021). "[A] lack of duty may be found if either the relationship between the parties or public considerations warrants such a conclusion." *Id.*

Yet the district court concluded that "a reasonable juror" could find that a legal duty existed and was owed by Iowa Realty here. (Att. 009). The court's conclusion ignored or misunderstood the nature of purely legal question before it. Moreover, its ruling wholly failed to address the strong public policy considerations cautioning against the imposition of the novel duty urged by DeSousa. Interlocutory review of the district court's order is warranted.

#### A. Iowa Realty lacked the requisite control to be considered a "possessor" of land owing a duty of care to DeSousa.

For premises liability claims, Iowa law recognizes a "specific application of the duty to exercise reasonable care based on the circumstance of real-property ownership." *Gries v. Ames Ecumenical Hous., Inc.*, 944 N.W.2d 626, 629

(Iowa 2020) (internal quotation marks omitted) (quoting RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM ("RESTATEMENT (THIRD)") § 51 cmt. b). Because a land possessor "is the only person with the legal authority to eliminate or ameliorate the risks posed," he or she owes a duty to exercise reasonable care with respect to risks arising from natural and artificial conditions on the land. RESTATEMENT (THIRD) § 51 cmt. e.

Iowa Realty was not the "possessor of land" giving rise to a reasonable duty of care owed to DeSousa, an entrant on the land. A "possessor of land" is defined as:

> (a) a person who occupies the land and controls it;
> (b) a person entitled to immediate occupation and control of the land, if no other person is a possessor of the land under Subsection (a); or
> (c) a person who had occupied the land and controlled it, if no other person subsequently became a possessor under Subsection (a) or (b).

RESTATEMENT (THIRD) § 49; *see also Johnson v. Humboldt Cty.*, 913 N.W.2d 256, 263 (Iowa 2018). Iowa Realty neither occupied nor controlled the Fynaardts' property. Instead, the undisputed record evidence establishes that the Fynaardts both owned and remained in control of the land at the time of the DeSousa's injury. (Att. 005). In other words, neither law nor fact could support a finding that Iowa Realty had the requisite control to impose a duty of reasonable care over the premises. *See Morris*, 2021 WL 1703177, at *7 ("Liability generally follows control"); *Benson v. 13 Assocs., L.L.C.*, No. 14-0132,

2015 WL 582053, at *5 (Iowa Ct. App. Feb. 11, 2015) ("The guiding maxim repeated in our case law is 'liability is premised on control.'") (citation omitted).

Under Iowa law, "control is a prerequisite to imposing liability on a land possessor." *Dahlin v. Archer-Daniels-Midland Co.*, No. 3:14-cv-00085-SMR-HCA, 2016 WL 4435095, at *6 (S.D. Iowa Feb. 4, 2016). The defendant's control of the premises must be shown by "substantial evidence." *Robinson v. Poured Walls of Iowa, Inc.*, 553 N.W.2d 873, 876 (Iowa 1996) ("Only where the record reveals substantial control over the premises has liability been imposed.").[1] Indeed, longstanding premises liability precedent centers around one "common principle: *liability is premised upon control.*" *Van Essen v. McCormick Enterprises Co.*, 599 N.W.2d 716, 720 n.3 (Iowa 1999) (quoting *Allison by Fox v. Page,* 545 N.W.2d 281, 283 (Iowa 1996)) (emphasis added by *Van Essen* court).[2]

[1] *Accord Ludman v. Davenport Assumption High Sch.*, 895 N.W.2d 902, 910 (Iowa 2017); *Brakeman v. Theta Lambda Chapter*, No. 01-0250, 2002 WL 31640619, at *3 (Iowa Ct. App. Nov. 25, 2002) ("There is not substantial evidence in this case to support a finding defendant had the control necessary to be considered a 'possessor of the land.' Whether a person is a possessor of land is a threshold issue to finding liability. If a party is not a 'possessor of land' there can be no liability.") (internal citations omitted); *Downs v. A & H Const., Ltd.*, 481 N.W.2d 520, 524 (Iowa 1992) (stating there must be "substantial" control to hold defendant liable under premises liability theory).

[2] The "control" rule articulated in decisions predating *Thompson v. Kaczinski*, 744 N.W.2d 829 (Iowa 2009) remains good law. *E.g., Gries*, 944 N.W.2d at 629 (reaffirming "the common law control principle on public policy grounds").

This "control principle" is borne out of common sense and sound policy considerations. *Gries*, 944 N.W.2d at 629 (citation omitted). A party who does not have control over the property is not in a position to know of the dangers that entrants may encounter and cannot take any measures to remediate potential dangers. *See Morris*, 2021 WL 1703177, at *7 ("The reason is simple: the party in control … is best positioned to take precautions to identify risks and take measures to improve safety"); *Van Essen*, 599 N.W.2d at 720–21 (explaining a non-possessor "may not enter the property to cure any deficiency"). As the Restatement (Third) explains:

> In premises liability cases, whether a duty is owed depends primarily upon whether the defendant was in control of the premises when the accident occurred. The rationale is to subject to liability the person who could have known of any dangers on the land and therefore could have acted to prevent any foreseeable harm.

RESTATEMENT (THIRD) § 49, cmt. c.

While Iowa appellate courts have not yet squarely addressed this issue, other courts to do so have concluded that a realtor lacks the requisite control to impose a duty of reasonable care over a client's property. *E.g., Purcaro v. Angelicola*, No. CV095014823, 2012 WL 3517614, at *12–16 (Conn. Super. Ct. July 20, 2012) (quoting *Christopher v. McGuire*, 169 P.2d 879, 881 (Or. 1946)). The fact that a realtor agrees to assist in the sale of a home is insufficient to transfer control of the property—and the corresponding duty of care—from

the homeowners to the listing agent. *See Lim v. Gillies*, No. 1 CA-CV 13-0478, 2014 WL 4980379, at *2 (Ariz. Ct. App. Oct. 7, 2014) (affirming summary judgment in favor of listing agent based on lack of duty; agent "did not own, control, occupy, maintain, or manage the property and [agent's] only connection to the property was as a listing agent making it available to prospective buyers"); *Masick v. McColly Realtors, Inc.*, 858 N.E.2d 682, 688 (Ind. Ct. App. 2006) (collecting cases).[3]

Stated succinctly, the assistance a realtor provides in listing a house "for sale" does not amount to the control exercised by the homeowners. *See Morris*, 2021 WL 1703177, at *7; *Benson,* 2015 WL 582053, at *5. Iowa Realty put forward competent evidence establishing that it lacked any control over the property and that the Fynaardts remained in control of their land. (Att. 005). In resisting summary judgment, DeSousa offered no facts that could support a finding to the contrary. Absent such evidence, her claim against Iowa Realty should not have been allowed to survive summary judgment. *See Butler v. Wells Fargo Fin., Inc.*, No. 19-0554, 2020 WL 4200854, at *4 (Iowa Ct. App. July 22, 2020) (affirming summary judgment where defendant lacked sufficient control

[3] *See also Perez v. Leslie J. Garfield & Co.*, No. 118500/99, 2003 WL 1793057, at *3 (N.Y. Sup. Ct. Mar. 12, 2003) (finding listing agent owed no duty because she "lacked any control of the subject premises"); *Butler v. Re/max New Orleans Properties, Inc.*, 828 So. 2d 43, 47 (La. Ct. App. 2002); *Meyer v. Tyner*, 273 A.D.2d 364, 365 (N.Y. App. Div. 2000).

over the land to owe a duty of care); *accord Ostrem v. Home Opportunities Made Easy, Inc.*, No. 08–1266, 2009 WL 1492306, at *3 (Iowa Ct. App. May 29, 2009).

**B. Strong public policy considerations caution against imposing a duty on the listing real estate agency.**

Sound public policy supports the conclusion that Iowa Realty did not owe DeSousa a duty of care. The district court's ruling failed to consider, or even discuss, these policy considerations. (Att. 009). Proper application of Iowa law and thoughtful evaluation of public policy mandate the conclusion, as a matter of law, that Iowa Realty owed no duty of reasonable care over the premises.

"[W]hen an articulated countervailing principle or [public] policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification." RESTATEMENT (THIRD) § 7(b). This Court has long held that "the existence of a duty depends largely on public policy" [4] and has consistently relied on public policy considerations making no-duty determinations. *E.g., Gries*, 944 N.W.2d at 631-32; *Kolbe*, 661 N.W.2d at 149; *see also Benninghoven v. Hawkeye Hotels, Inc.*, No. 16-1374, 2017 WL 2684351, at *3 (Iowa Ct. App. June 21, 2017).

[4] *Kolbe v. State*, 661 N.W.2d 142, 147 (Iowa 2003).

Iowa courts look to "legislative enactments, prior judicial decisions, and general legal principles as source for the existence of a duty." *Union Cty., IA v. Piper Jaffray & Co.*, 741 F. Supp. 2d 1064, 1108 (S.D. Iowa 2010) (quoting *Van Essen*, 599 N.W.2d at 718-19). Iowa law specifically delineates the obligations and duties owed by real estate agents. *See* Iowa Admin. Code ch. 193E-12. While recognizing that a real estate licensee representing a seller or landlord owes some limited duties to prospective buyers, the rules explicitly provide:

> Duty to a buyer or tenant. A licensee acting as an exclusive seller's or exclusive landlord's agent shall disclose to any customer all material adverse facts actually known by the licensee pursuant to Iowa Code section 543B.56.
> *The licensee owes no duty to conduct an independent inspection of the property for the benefit of the buyer* or tenant and owes no duty to independently verify the accuracy or completeness of any statement made by the seller or landlord or any independent inspector, unless the licensee knows or has reason to believe the information is not accurate.

Iowa Admin. Code r. 193E-12.3(2)(a) (emphasis added). If a listing agent "owes no duty to conduct an independent inspection of the property for the benefit of the buyer," it follows there can be no duty to ferret out and warn buyers of all potentially dangerous conditions. *See id.*

Sound public policy supports this "no duty" provision, whether in the context of pre-sale disclosures or a duty to warn, as recognized by decisions from other jurisdictions discussing the policy considerations cautioning against imposing such a duty on realtors. Of those to consider the issue, only a handful

of courts impose a duty owed to potential homebuyers by the listing agent[5]—and only in limited circumstances, none of which are applicable here.[6] Crucially, these courts have relied on public policy in concluding that no such duty exists.

First, the imposition of this duty would come at an enormous cost. In declining to impose on realtors "a duty to inspect properties for sale and to warn prospective buyers of dangerous conditions," the Indiana Court of Appeals reasoned:

> [T]he duty to inspect amounts to an unjustifiable economic burden on the residential real-estate industry but offers little or no added benefit to society. Real estate agents would not only have to develop an expertise in home inspection but would be saddled with the additional costs of liability insurance and accident-prevention measures, which would presumably be passed on to the consumer in one form or another. This imposes an expansive, ambiguous, and vague liability on real-estate brokers for injuries sustained by an open-house visitor.

*Masick,* 858 N.E.2d at 690 (internal quotation marks omitted);[7] *see also Kolbe*, 625 N.W.2d at 730 (observing Iowa's public policy would not be furthered by

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[5] Courts have universally rejected attempts to impose a duty of care on buyers' agents. *See Purcaro*, 2012 WL 3517614, at *12–16 (collecting cases).

[6] The courts to impose a duty on a listing agent have done so only when the injury occurred during an open house hosted by the listing agent and only when the agent had actual knowledge of the latent defect causing injury. *E.g., Purcaro*, 2012 WL 3517614, at *16 (collecting cases); *accord Schwalb v. Kulaski*, 29 A.D.3d 563, 564 (N.Y. App. Div. 2006); *Jarr v. Seeco Const. Co.*, 666 P.2d 392, 395 (Wash. App. 1983). The record here fails to establish any comparable facts.

[7] In refusing to recognize a duty owed by realtors, several courts have relied on a dissenting opinion in a case from the New Jersey Supreme Court, which

"a drastic expansion of liability"). Echoing that rationale, another court emphasized concerns over the impact the imposition of such a duty would have on the housing market:

> As has become crystal clear in these economic times, the status of the housing market is crucial to the state of our economy. The last thing that market needs is for our courts to impose upon realtors the duty of care suggested by the plaintiffs, which would result in substantial economic and social costs to all of the parties involved. Brokers would add the inevitable increase in their liability insurance premiums to their commissions and would insert strong indemnification language into their listing agreements, thus resulting in homeowners increasing the sales price, making it more expensive for prospective buyers to own a home, which in turn would eliminate some of those buyers from the market.

*Purcaro*, 2012 WL 3517614, at *20.

At the same time, the residential real estate industry would find itself in additional upheaval as realtors struggled to determine what steps they needed to take to discharge this newfound duty.[8] For the first time, a listing agent

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discussed the increasing costs and shifting liability that would result from imposing such a duty. *See Purcaro*, 2012 WL 3517614, at *12 (internal alterations omitted) (quoting *Masick*, 625 A.2d at 691-92) (in turn quoting *Hopkins v. Fox & Lazo Realtors,* 625 A.2d 1110, 1123 (N.J. 1993) (Garibaldi, J., dissenting)).

[8] Justice Garibaldi exemplified this point in positing the following questions:

> How can a broker know what constitutes a "dangerous condition?" If a jury can find that a step "camouflaged" with the same color linoleum as the surrounding area is a "dangerous condition" then what other common features in a house will be considered perilous to the unsuspecting open-house attendee? What exactly must a broker do?

would be held to the same standard of care as his or her clients, the homeowners, without any guidance as to the parameters of this new duty and without any way to make changes to the land. *Masick*, 625 A.2d at 690 (describing such a duty as imposing "expansive, ambiguous, and vague liability"); *Purcaroa*, 2012 WL 3517614, at *15 (same).

Essentially, realtors would be required to act as home inspectors, charged with ferreting out any potentially dangerous conditions so as to warn prospective buyers and avoid liability. *See Masick*, 625 A.2d at 690 (stating realtors would need "to develop an expertise in home inspection"); *see also Rogers v. Bree*, 747 A.2d 299, 303 (N.J. Super. Ct. 2000) ("Home inspectors are more qualified than realtors to identify and locate defects in the property, and are more familiar with the potential dangers associated with the defects, and the cost of remedying them."). Their anxious warnings would inevitably deter prospective homebuyers and make the actual process of selling a house much

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> Must a broker arrive at the site early, inspect the premises and then post warning signs on all steps, low ceilings, railings, hanging plants, newly-waxed floors, and other potential "dangerous conditions?" Must the broker tidy up the house and pick up errant skateboards or banana peels? Or must the broker escort people who might prefer to look at the home without an eager salesperson hovering around, so that the broker can point out all potential safety hazards? Or should the broker greet the potential purchasers at the door with a list of conceivable hazards?

*Hopkins,* 625 A.2d at 1123 (Garibaldi, J., dissenting) (internal citations and alterations omitted).

more difficult. This, in turn, would sour the relationship between the listing agent and the homeowners. *See Hopkins*, 625 A.2d at 1123 (questioning how a realtor's compliance with such a duty would impact "the salability of the property and the [realtor's] relationship with the principal, the seller"); *see also Pitts v. Farm Bureau Life Ins. Co.*, 818 N.W.2d 91, 104 (Iowa 2012) (considering the "potential threat to the professional relationship" among other public policy considerations in analyzing existence of duty); *Kolbe*, 661 N.W.2d at 149.

While adding costs, complexity, and confusion, this newly-imposed duty would offer "little or no added benefit to society." *Masick,* 858 N.E.2d at 290. An injured prospective homebuyer already has readily available recourse—a cause of action against the homeowner selling the property. *Purcaro*, at *15 ("All this for a simple slip-and-fall accident in which the injured party already has readily available redress against the homeowner, the broker's principal who has control and possession of the property and the knowledge and authority to make the necessary repairs.") (citation omitted); *Hopkins*, 625 A.2d at 1123 ("Neither the law nor public policy require the creation of further needless litigation when the injured party already has adequate redress for her injuries.").

Weighing the significant burdens against the minimal benefit, many courts have declined to impose this duty on realtors based on public policy concerns. *E.g., Purcaro*, 2012 WL 3517614, at *20 (concluding such a duty "would be inconsistent with public policy by creating additional expense to all

involved, adversely affecting the housing market and increasing litigation in our courts"); *Masic*, 858 N.E.2d at 691 (citing public policy concerns in declining to impose a duty on real estate agents "who do not have sufficient control over the premises to independently give rise to a duty to warn under recognized premises liability principles"); *Rogers*, 747 A.2d at 302 ("[W]e fail to see how the public interest would be furthered by imposing a duty upon [a realtor] to search every nook and cranny of the rental premises to discover latent defects.").

The same rationale applies with equal force here. The Fynaardts were not just the record property owners; they were in the process of selling the house they had made their home. Iowa Realty's agent, Mr. Goettsch, had no more control over the Fynaardts' property than he does over any other of the number of given houses he lists as part of his routine business as a realtor. To allow this case to proceed to trial and let a jury consider whether to hold Iowa Realty liable under this novel theory would have a ripple effect on the residential real estate industry. The newly-created duty would open a floodgate of litigation, resulting in rising home costs and complicating the home-buying process. And all this for what? DeSousa already has recourse against the true land possessors—as is made clear by her naming Matthew and Melissa Fynaardt as defendants in this lawsuit.

Simply put, allowing the claim against Iowa Realty to proceed to trial will only "increase litigation by clogging the dockets with new parties for plaintiffs

to sue." *Hopkins,* 625 A.2d at 1123. Under Iowa law, "a lack of duty may be found if either the relationship between the parties or public considerations warrants such a conclusion." *Morris*, 2021 WL 1703177, at *3. Sound public policy undeniably warrants the conclusion that Iowa Realty owed no duty of care to DeSousa. Interlocutory review of the district court's order to the contrary is both appropriate and warranted.

## Conclusion

For these reasons, Defendant Iowa Realty Co., Inc. respectfully requests that the Court grant this Application for Leave to File Interlocutory Appeal and stay the district court case until resolution of the appeal.

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**Certificate of service**

I hereby certify that on May 17, 2021, I electronically filed the foregoing with the Clerk of Court using the Iowa Electronic Document Management System, which will send notification of such filing to the counsel below:

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