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DEBBIE A. REUTER

September 27<sup>th</sup>, 2021

Keith Toczek  
263 Kniest Ave  
Yankton, SD 57078

*RE: Lake Madison Sanitary District- Excavation Damage*

Dear Mr. Toczek,

This letter is a follow-up to our phone conversation on September 23<sup>rd</sup>, 2021, which followed a special meeting with the Board of Trustees ("Board") of the Lake Madison Sanitary District ("District") regarding certain damages caused during excavation by you and/or your company as a subcontractor for Midcontinent within the Lake Madison Sanitary District boundaries. This response is a continuation of our conversations of settlement negotiation and in response to your most recent demands.

I conveyed to the Board your demands that the Lake Madison Sanitary District pay 100% of the bills for damages done to properties (Pacliks and Arshems) after sewage backups following excavation on their properties. In addition, you demanded that the District pay an additional \$1,000 to each of the these families for aggravation, pain and suffering, and loss of use of their sewer system. As part of your demand, you also requested that you hear back from the Board of the District by September 24<sup>th</sup>, 2021, at noon and that the Board contact the two families by September 30<sup>th</sup>, 2021, to pay or advise of date of anticipated payment. Finally, you also demanded that the Board write letters to both Midcontinent and to your company, as subcontractor of Midcontinent, admitting and taking responsibility for all lots in which you did work within the District and claiming liability for any and all damages stemming from said work.

All of the above demands were being made with the offer of the following consideration. That the contractor and/or subcontractor would not be filing any complaints with 811 One Call

for the damages that occurred to the two families' properties nor for any of the other lots in which the subcontractor did excavation work within the boundaries of the District.

It was your estimation that there was at least thirty (30) or so additional lots and complaints that you would be filing and alleging that the District intentionally violated the policies of 811 One Call.

In no way does this letter admit any fault, accept liability, nor does this letter admit, acknowledge, or stipulate to any alleged fault, sequence of events, facts, guilt, liability, negligence, or fault. The Board and the District specifically deny any fault, liability, and allegations made by you, your company, and Midcontinent and specifically hold alleging parties to the strict burden of proof thereof.

Provided below are some points of legal contention that you should consider and note:

As it pertains to your request for letters to both Midcontinent and the subcontractor where the District would admit liability and accept all responsibility for any damages in the future for work done by your company, that is inconsistent with the purpose of 811 One Call and would be requesting that the District accept additional liability that the District would never be under for subpar workmanship and neglect by Midcontinent and agents of Midcontinent, including you and your company as a subcontractor. 811 One Call was set up with the purpose of preventing damage to underground facilities by excavators by putting in place processes for excavators to notify a central service which would trigger various procedures resulting in marking of known underground facilities. Keep in mind that the main goal is to prevent damage by excavators to underground facilities. What you are requesting is that the District become liable for damages that would occur down the line well after any excavation has been completed. These damages most certainly would be unlikely a direct result of the excavation, but rather other negligent and subpar workmanship done following the initial excavation. These damages would never fall on the operator of an underground facility and rather would create civil liability in the negligent workmanship of an excavator, contractor, or subcontractor.

It has also been alleged that the District did not comply with 811 One Call and failed to mark facilities that they are responsible for marking pursuant to an excavation ticket put in with 811 One Call. If this was true, pursuant to SDCL 49-7A-9 "any excavator damaging or injuring underground facilities is not liable for such damage or injury *except on proof of negligence.*" Furthermore, pursuant to SDCL 49-7A-10 "[c]ompliance with this chapter and the rules promulgated pursuant thereto does not excuse a person from acting in a careful and prudent manner [.]"

Considering your history, work experience, skills, and knowledge of digging ditches and other excavation work, it is fairly clear that continuing to begin excavation work within a zone in which "NO" was not marked indicating that there was no utilities there for an operator consistent with the color of the lettering, as well as other observations such as lack of outhouses, absence of septic tank lids, manhole covers, lift stations, and the general appearance of a developed neighborhood, no reasonable person would continue excavation believing that there was no

running water or sewage lines in the excavation area. To continue excavating in said area, in light of all observations and the alleged absence of proper markings, would be negligent on the behalf of an excavator. Additionally, as said excavator continues from lot to lot, especially after damaging an underground water or sewer facility, or even seeing one without damaging it, there actions would be increasingly more negligent to continue excavating the subsequent lots without notifying 811 One Call and/or the operator of the underground facility that the underground facilities have not been properly marked and that they need to be. Additionally, a reasonably prudent person would continue any excavation by hand tools as the proper method to continue in a careful and prudent manner absent proper markings.

Proof of such negligence by an excavator places liability back on said excavator away from the operator, or at the very least, makes the excavator contributorily negligent and liable for any damages that may have been caused even if the District did, or failed to do, some action in violation of South Dakota's Administrative Rules or South Dakota Codified Law.

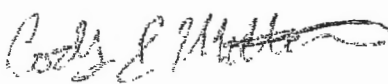
Regarding the penalties that you have threatened upon the District for the complaints that you threatened to file with 811 One Call, any violation by the District was certainly not an intentional violation, if any. The District has talked with the City of Madison, Big Sioux out of Sioux Falls, and other operators who have indicated that they conduct their markings the same as the District does. Additionally, The District has been conducting their marking procedures in the same manner for a number of years consistent with multiple other operators' methods. The District was only advised of the Attorney General's opinion regarding operator responsibility to mark private lines during communications with you and was certainly not operating in the face of such opinion. As a side note, an Attorney General's opinion is not law but rather persuasive; the District, as an operator, is governed by the Administrative Rules of South Dakota as well as the South Dakota Codified Laws.

All that being said, and reiterating that the District does not admit any liability or fault involved in this matter, the Board has approved the payment of the amounts in which they have received receipts for as a cost to resolve this situation and make the home owners within the District whole and pay for their damages caused by your companies excavation on their property. Said checks will be cut on September 30<sup>th</sup>, 2021, and be sent in the mail shortly thereafter. No other condition of your demands listed earlier in this letter will be accommodated by the District.

If you have any questions regarding any of this, please let me know and I can forward your response to the Board for any clarification or their position.

Sincerely Yours,

LAMMERS, KLEIBACKER & DAWSON, LLP

By 

Cody J. Miller