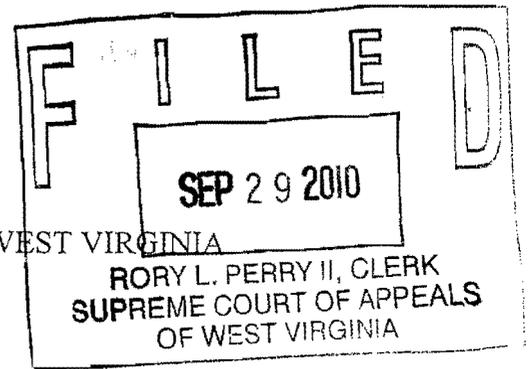


APPEAL NO. 101151

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



SHEILA F. HAYNES, as Administratrix of
the Estate of Elgene Phillips, Jr., Deceased,

Petitioner/ Plaintiff Below,

v.

On Appeal from the Circuit Court of
Kanawha County, Civil Action No.
07-C-493

DAIMLER CHRYSLER CORPORATION,
a foreign corporation; AUTOLIV ASP, INC.,
a foreign corporation; and JOE HOLLAND
CHEVROLET, INC., a West Virginia corporation,

Respondents/ Defendants Below.

AUTOLIV ASP, INC.'S RESPONSE TO PETITION FOR APPEAL

September 29, 2010

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I. INTRODUCTION

Respondent Autoliv ASP, Inc. (“Autoliv” or “Respondent”) files this Response to the Petition for Appeal filed by Petitioner Sheila F. Haynes, as Administratrix of the Estate of Elgene Phillips, Jr., Deceased (“Petitioner”). The Petitioner appeals from the Kanawha County Circuit Court’s “Order Denying Plaintiff’s Motions” entered on May 4, 2010.

Remarkably, the claims made by the Petitioner in her motions and now made in her Petition for Appeal, were made for the first time **after**:

- (1) the underlying case had been settled;
- (2) Petitioner had executed a “Full and Final Release of All Claims;”
- (3) the circuit court had entered an Order approving the settlement;
- (4) Autoliv had paid Petitioner its agreed-upon settlement amount with a cover letter stating that such payment was made “to resolve the . . . matter”;
- (5) Petitioner had accepted and cashed Autoliv’s check; and
- (6) the circuit court had entered a “Stipulated Order of Dismissal With Prejudice.”

In its May 4, 2010 Order, the circuit court denied the Petitioner’s motions on grounds that the Petitioner’s claims were barred by the doctrine of accord and satisfaction as set forth in *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). The Petitioner now appeals from that Order.

In her Petition for Appeal, the Petitioner omits key facts pertaining to the proceedings below. Autoliv accordingly files the following Statement of Facts and Proceedings Below to clarify the underlying facts and proceedings upon which the circuit court based its Order.

II. STATEMENT OF FACTS AND PROCEEDINGS BELOW

One June 22, 2006, the Petitioner's decedent, Elgene Phillips, Jr., drove his truck off the road, rolled it over, and was ejected from the vehicle. Mr. Phillips, who was inebriated at the time, died. The Petitioner filed a wrongful death action in the Circuit Court of Kanawha County alleging that the restraint system in the truck being operated by Mr. Phillips at the time of his death was defective. The truck was a 1999 Dodge Ram pickup and the seatbelt was manufactured by Autoliv.

As directed by the circuit court in its Scheduling Order, the parties participated in a mediation on February 19, 2009, with Webster J. Arceneaux III serving as mediator. At the mediation, the parties reached a settlement of all claims and executed a hand-written Settlement Agreement. (*See* Settlement Agreement, attached as "Exhibit 1" to Petitioner's "Motion to Compel Autoliv to Pay Settlement"). Although the Settlement Agreement sets forth the total settlement amount of \$150,000 and does not break down the agreed-upon allocation between the defendants, Autoliv, in fact, agreed to pay the sum of \$65,000 to settle the claims against it, and Chrysler agreed to pay \$85,000. (*See* Affidavit of Philip J. Combs, attached as "Exhibit B" to "Autoliv ASP, Inc.'s Response in Opposition to Plaintiff's Motions to Sever Claims Against Chrysler and to Compel Autoliv to Pay Settlement"). None of the parties to the settlement believed that the agreement was intended to impose joint and several liability on the three defendants, nor did any party believe that Autoliv, a component parts supplier, would be required to pay the entire settlement. *Id.*

As agreed at the mediation, Petitioner executed a Full and Final Release of All Claims against the defendants and filed her Petition and Application for Permission to Settle a Wrongful Death Claim. Although the parties settled the case on February 19, 2009, Petitioner did not file her Petition until April 27, 2009. On April 28, 2009, following a hearing on the Petition, the circuit

court entered an “Order Approving Settlement of a Wrongful Death Claim.” The parties participated in the summary proceeding before the circuit court with the understanding that the total amount of the settlement was \$150,000, with Autoliv paying \$65,000 and defendant Chrysler paying \$85,000. The day following the summary proceeding, April 29, 2009, in accordance with these settlement terms, counsel for Autoliv sent to counsel for Petitioner a check in the amount of \$65,000, along with a cover letter stating that the check was sent “on behalf of Autoliv ASP, Inc., #0521877, to resolve the above-referenced matter.” (*See* letter dated April 29, 2009 and copy of check # 0521877, collectively attached as “Exhibit C” to “Autoliv ASP, Inc.’s Response in Opposition to Plaintiff’s Motions to Sever Claims Against Chrysler and to Compel Autoliv to Pay Settlement”) (emphasis added). Petitioner’s counsel promptly cashed the check tendered by Autoliv and, on May 12, 2009, the circuit court entered a “Stipulated Order of Dismissal with Prejudice,” thereby dismissing the action with no objection by the Petitioner. Prior to cashing the \$65,000 check, **Petitioner never disputed that cashing the check would “resolve the above-referenced matter.”**

Also in accordance with the agreement of the parties, Chrysler issued a check to Petitioner in the amount of \$85,000. Petitioner did not return Chrysler’s check or state at any point that Autoliv owed her the entire amount of the settlement. Rather, Petitioner deposited Chrysler’s check on April 30, 2009. Due to Chrysler’s bankruptcy, the check was returned for insufficient funds. (Motion to Compel Autoliv to Pay Settlement, p. 1).

Although Autoliv fully complied with the terms of the settlement, and Petitioner accepted full payment of its share of the settlement from Autoliv, Petitioner then filed a “Motion to Sever Claims Against Chrysler” and a “Motion to Compel Autoliv to Pay Settlement,” seeking to sever her claims against Chrysler and to collect Chrysler’s share of the settlement from Autoliv. In its

“Response in Opposition to Plaintiff’s Motions to Sever Claims Against Chrysler and to Compel Autoliv to Pay Settlement,” Autoliv asked the court to deny the motions on grounds that, having accepted Autoliv’s settlement check, accompanied by a letter stating that it was sent “to resolve” the case, Petitioner’s efforts to obtain payment of an additional \$85,000 from Autoliv were barred by the doctrine of accord and satisfaction.

At the hearing held on April 5, 2010, Petitioner maintained that accord and satisfaction only applies when a notation written **on the check itself** states that it is tendered in full satisfaction of a disputed claim and that the doctrine does not apply if the accord and satisfaction language is on an accompanying cover letter. Autoliv then filed a Supplemental Response in Opposition to Plaintiff’s Motions showing the court that, contrary to Petitioner’s claims, applicable cases uniformly hold that accord and satisfaction language can be set forth in an accompanying cover letter. Upon consideration of the parties’ positions, the circuit court entered the May 4, 2010 Order denying Petitioner’s Motions. In the Order, the circuit court found:

This wrongful death action was settled at mediation on February 19, 2009. Pursuant to the terms of the settlement, Autoliv agreed to pay the Plaintiff \$65,000 and Chrysler agreed to pay the Plaintiff \$85,000 for a total payment of \$150,000 to Plaintiff. Although the Plaintiff was not aware of the precise division of the settlement between the Defendants, **the Plaintiff was aware that each Defendant would be contributing a specific amount of money and that these two payments combined would constitute the overall settlement amount of \$150,000. . . .**

In accordance with *Painter v. Peavy*, 451 S.E.2d 755 (W. Va. 1994), the Court finds Plaintiff’s claims seeking additional monies from Autoliv are barred by the doctrine of accord and satisfaction. In *Painter*, the West Virginia Supreme Court affirmed summary judgment on grounds of accord and satisfaction against a plaintiff who had accepted and deposited a settlement check stating, “in full settlement of all claims.”

While acknowledging that she accepted payment in the amount of \$65,000 from Autoliv, Plaintiff denies that such acceptance constitutes “accord and satisfaction” because the settlement language was not written on the check itself, but in an accompanying letter. Plaintiff’s argument misstates the law of accord and satisfaction. The provision of the West Virginia Uniform Commercial Code dealing with “accord and satisfaction” and pertinent authorities require that a check “or an accompanying written communication” contain language to the effect that the check is tendered as full satisfaction of the claim. *See* W. Va. Code § 46-3-311(b). . . .

In this case, counsel for Autoliv sent the settlement check to Plaintiff’s counsel along with a cover letter stating that the check was sent “to resolve the above-referenced matter.” Without question, all parties understood that Autoliv tendered the \$65,000 check in full settlement of the Plaintiff’s claims against it. Having cashed Autoliv’s check, having taken Autoliv’s money, and having entered into a Stipulated Order of Dismissal With Prejudice, Plaintiff is now bound by the doctrine of accord and satisfaction and barred from pursuing Autoliv for the additional \$85,000 that was to be paid by Chrysler pursuant to the settlement.

(emphasis added).

In her Petition for Appeal, the Petitioner now abandons the frivolous argument made to the circuit court that accord and satisfaction language must appear on the face of a check. Rather, Petitioner now claims that Respondents “committed a fraud against the Petitioner and the court.” (Petition, p. 4). This contention, belatedly made, with no supporting authority, is equally meritless.

III. STANDARD OF REVIEW

As this Court has long held, a circuit court’s final order and ultimate disposition are reviewed under an abuse of discretion standard. *E.g., Burgess v. Porterfield*, 196 W. Va. 178, 469 S.E.2d 114 (1996). Findings of fact are reviewed under a clearly erroneous standard while conclusions of law are reviewed *de novo*. *Id.*; Syl. pt. 1 *Burnside v. Burnside*, 194 W. Va. 263, 460 S.E.2d 264 (1995).

Contrary to the Petition for Appeal, the findings of fact and legal conclusions set forth in the circuit court's May 4, 2010 Order are fully supported by the evidence and applicable law. Applying these standards of review, the Petition should be denied by this Court.

IV. ARGUMENT

A. Applicable Law

Because Petitioner reached a settlement agreement with Autoliv and accepted and cashed the check expressly tendered by Autoliv "to resolve the matter," the circuit court correctly ruled that the doctrine of accord and satisfaction bars Petitioner from now attempting to collect Chrysler's portion of the settlement from Autoliv. The case law cited in the Petition for Appeal, setting forth the elements of accord and satisfaction, does not require reversal of the circuit court's order but, in fact, fully support Autoliv's position and the circuit court's ruling.

1. *Painter v. Peavy*

In denying the Petitioner's Motions, the circuit court relied primarily upon the West Virginia Supreme Court's holding in *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). In *Painter*, this Court upheld a grant of summary judgment against a plaintiff who had accepted and deposited a settlement check on grounds of accord and satisfaction. The Court in *Painter* quoted its prior holding setting forth the elements of accord and satisfaction as follows:

"To show an accord and satisfaction, the person asserting the defense must prove three elements: (1) Consideration to support an accord and satisfaction; (2) an offer of partial payment in full satisfaction of a disputed claim; and (3) acceptance of the partial payment by the creditor with knowledge that the debtor offered it only upon the condition that the creditor accept the payment in full satisfaction of the disputed claim or not at all."

Id. at 759 (quoting Syl. Pt. 1 of *Charleston Urban Renewal Authority v. Stanley*, 176 W. Va. 591, 346 S.E.2d 740 (1985)).

In *Painter*, a personal injury action resulting from an automobile collision, the defendant's insurance company, Colonial, sent a check to the plaintiff in the amount of \$750. The check stated "for full settlement of all claims" and was, according to the claims examiner, intended to settle the plaintiff's personal injury claim. *Id.* at 757. Thereafter, the attorney for the plaintiff notified the claims examiner that the plaintiff was rejecting the settlement offer of \$750. Despite this communication, the attorney endorsed the check and deposited it into his account, stating on the back of the check "deposited under protest." *Id.* In the ensuing civil action, the defendant moved for summary judgment based on the defense of accord and satisfaction, which motion was granted by the circuit court. Affirming the grant of summary judgment, this Court found that "the record supports the defendant's contention that the plaintiff understood Colonial offered the check upon the condition that it would be accepted in full satisfaction of the claim." *Id.* at 759. The Court held that although the plaintiff's attorney had rejected the offer of \$750, "the plaintiff clearly did not have the legal option to ignore the condition written on the check and use the cash proceeds." *Id.* at 760.

The Court in *Painter* found it significant that the plaintiff had not personally deposited the check but, rather, it was deposited in her **attorney's account**, reasoning that cashing the check was thus not a case where a "wary person, ignorant of the law, made a mistake." *Id.* fn. 9. The Court reasoned that if a check bears the words "payment in full" **or some other words of similar purport**, the payee may either accept the check and thereby be bound by accord and satisfaction or return the check to the payor. *Id.* (emphasis added). Only where the payee chooses the latter course, may he continue to dispute the underlying claim. *Id.* at 760 (quoting *Charleston Urban Renewal Authority*,

346 S.E.2d at 743.) On the facts before it, the Court in *Painter* found that the plaintiff's cashing of the check constituted accord and satisfaction and barred the plaintiff from proceeding further with her personal injury action.

2. Uniform Commercial Code/ Contract Law

While the Court in *Painter* was “not convinced” that the Uniform Commercial Code (“UCC”) applied to the situation before it, the Court noted that the result “would not be different under the UCC.” *Id.* at 759, n.8.¹ In fact, § 46-3-311 of the West Virginia UCC deals with “accord and satisfaction by use of instrument.” The section “follows the common law rule with some minor variations to reflect modern business conditions” (Official Comment 3) and provides:

(a) If a person against whom a claim is asserted proved that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute and (iii) the claimant obtained payment of the instrument, the following subsections apply.

(b) . . . the claim is discharged if the person against whom the claim is asserted proves that **the instrument or an accompanying written communication** contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.

(emphasis added).² Interpreting the analogous provision of Minnesota's UCC, the court in *Webb Business Promotions, Inc. v. American Electronics & Entertainment Corp.*, 617 N.W.2d 67, 73 (Minn. 2000), held that:

An enforceable accord and satisfaction arises when a party . . . proves that (1) the party, in good faith, tendered an instrument to the

¹The Court further noted that “where W. Va. Code 46-3-311, does not apply, ‘the issue of whether an accord and satisfaction has been effected is determined by the law of contract.’ *See Official Comments to W. Va. Code § 46-1-207.*” *Id.*

²Section (c) deals with exceptions to discharge not applicable here.

claimant as full satisfaction of the claim; (2) the instrument **or an accompanying written communication** contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim; (3) the amount of the claim was unliquidated or subject to a bona fide dispute; and (4) the claimant obtained payment of the instrument. *See* Minn. Stat. § 336.3-311(a)-(b).

(emphasis added).

Applying state UCC provisions and general contract law dealing with accord and satisfaction, courts uniformly hold that either the tendered check or the accompanying communication must convey that the amount is tendered in full satisfaction of the claim. In *E.S. Herrick Co. v. Maine Wild Blueberry Co.*, 670 A.2d 944 (Me. 1996), for example, the court held that a valid accord and satisfaction was created by a seller's cashing of a check accompanied by a letter stating that the check represented final settlement of the claim. *Accord Seward v. U. S. Dept. of Agriculture*, 229 F.Supp.2d 557, 570-71 (S.D. Miss. 2002) ("Under Mississippi law the basic elements of accord and satisfaction are that if something of value is offered in full satisfaction of a demand, **accompanied by acts and declarations** which amount to a condition that if the thing offered is accepted, it is accepted in satisfaction of the debt, acceptance of such offer, constitutes an accord and satisfaction.") (emphasis added); *Habachy v. Georgia Health Group*, 207 Ga. App. 288, 427 S.E.2d 808 (1993) (holding that a doctor's cashing of a check tendered by her former employer constituted accord and satisfaction of the doctor's claims against the employer where the check was accompanied by a letter stating that it was tendered as full and complete payment of all claims pertaining to her employment); *U. S. Bank National Ass'n v. Whitney*, 119 Wash. App. 339, 81 P.3d 135, 142 (2003) (to accomplish accord, the "tender must be accompanied by conduct and declarations by the debtor from which the creditor cannot fail to understand that the money is tendered on the condition that

its acceptance constitutes satisfaction”); *Smith v. Grand Canyon Expeditions Co.*, 84 P.3d 1154 (Utah 2003) (holding that the plain language of a separation agreement demonstrated that the severance pay and release constituted payment in full settlement of the employment dispute). *See generally* Vitauts M. Gulbis, J.D., *Modern status of rule that acceptance of check purporting to be final settlement of disputed amount constitutes accord and satisfaction*, 42 ALR 4th 12 (1985) (Cumm. Supp. 2009).

B. Petitioner’s Claims Are Barred By Accord and Satisfaction

In her Petition for Appeal, Petitioner states that the doctrine of accord and satisfaction requires full performance of the terms of a compromise and that once the parties have complied with the terms of the agreement, the doctrine “acts as a bar to all actions upon the same agreement.” (Petition, p. 5) (citing *Summers v. Summers*, 186 W. Va. 635, 413 S.E.2d 692 (1991)).³ Autoliv agrees with this position. As found by the circuit court, “all parties understood that Autoliv tendered the \$65,000 check in full settlement of the plaintiff’s claims against it.” The Petitioner accepted and cashed the check. The parties complied with the agreement and, in accordance with West Virginia law as set forth in *Summers* and the other cases cited in the Petition, this appeal and any further actions by the Petitioner against Autoliv on the same claim are barred by the doctrine of accord and satisfaction.

The Petitioner can point to nothing in the settlement documents that would require Autoliv to pay the full amount of the settlement on behalf of the other Respondents or to pay any amount

³In *Summers*, the Court held that the doctrine of accord and satisfaction did not prevent a former wife from raising the issue of a settlement agreement’s enforceability where the former husband admitted that the wife had not performed “all or part” of the agreement and thus “satisfaction” never occurred.

beyond \$65,000. As found by the circuit court, in accordance with the agreed-upon settlement terms, counsel for Autoliv tendered the \$65,000 check in **full settlement** of the Petitioner's claims against it to counsel for Petitioner. The check was accompanied by a cover letter stating that it was sent "on behalf of Autoliv ASP, Inc. # 0521877, to resolve the above-referenced matter." Petitioner's counsel cashed the check and, in fact, entered into a Stipulated Order of Dismissal With Prejudice. Petitioner's current position, attempting to compel Autoliv to pay the entire settlement rather than Autoliv's agreed-upon share, contravenes the law of accord and satisfaction, equity, and good faith.

Pursuant to *Painter* and applicable West Virginia law, once Autoliv tendered the \$65,000 check accompanied by a transmittal letter stating that the check was sent "to resolve the above-referenced matter," Petitioner had a choice – to accept the check and be bound by accord and satisfaction or to return the check to Autoliv. Having chosen the former course, the Petitioner cannot further pursue a claim against Autoliv. Like the plaintiff in *Painter*, Petitioner did not have the legal option to ignore the transmittal letter and the agreement of the parties while cashing the settlement check and retaining the money. To date, the Petitioner has never returned the money paid by Autoliv.

Despite the settlement and dismissal of the action and the absence of any pending claims against Autoliv, Petitioner asked the lower court to sever her "claims against the solvent co-defendants" from her claims against Chrysler and to allow "those claims to move forward to resolution." (Motion to Sever, p. 6). Further, despite knowledge of the agreed-upon settlement allocation, as evidenced by the amount of the Respondents' payments, Petitioner disingenuously informed the circuit court that "defendants collectively agreed to pay One-Hundred Fifty Thousand Dollars (\$150,000.00) for the settlement of the claims." (Motion to Compel Autoliv to Pay

Settlement, p. 2). The circuit court properly rejected these untenable positions in its May 4, 2010 Order, finding, instead, that: (1) Autoliv tendered the \$65,000 in full settlement of the claims against it; (2) counsel for the Petitioner accepted and cashed the check with the understanding that Autoliv tendered the money “to resolve the claims against it”; and (3) Petitioner’s claims are thus barred by the doctrine of accord and satisfaction. These findings, far from being clearly erroneous, are fully supported by the evidence and applicable law and the Petition for Appeal should be denied by this Court.

C. Petitioner’s Fraud Claim Lacks Factual and Legal Support and is Barred by Judicial Estoppel

As noted, the Petitioner has now abandoned the frivolous argument, made to the circuit court, that accord and satisfaction language must appear on the face of the check. Petitioner now claims, for the first time, with no supporting authority, that the defendants “committed a fraud against the Petitioner and the court.” (Petition, p. 4). Any argument that Autoliv committed fraud by paying the full amount it owed via a check accepted and cashed by **counsel** for the Petitioner, is equally meritless.

Contrary to the established facts, Petitioner claims to have been “duped” by “defendants’ misrepresentations.” (Petition, p. 7). This fraud claim is made for the first time on appeal and Autoliv had no opportunity to contest it below. Likewise, because the Petitioner did not raise any fraud claim in the circuit court, the court had no chance to address it in its May 4, 2010 Order.

In the first place, the Petitioner is judicially estopped from raising on appeal a theory never argued below. *Cf. Riggs v. W. Va. Univ. Hosp., Inc.*, 221 W. Va. 646, 656 S.E.2d 91, 99 (2007)

(applying judicial estoppel to prevent plaintiffs' attempts "to re-define their claims" on appeal). As Chief Justice Davis wrote in *Riggs*:

Rule 8(e)(2) [of the West Virginia Rules of Civil Procedure] does not sanction sandbagging a party by asserting a post-trial legal theory of recovery that was never raised in the pleadings, nor expressly or impliedly consented to by the parties. This situation is an affront to the integrity of the judicial process, not just the adversely affected party. Consequently, it is appropriate to reaffirm the integrity of the court by applying the doctrine of judicial estoppel to such conduct.

Id. at 674, 656 S.E.2d at 119 (Davis, C.J., concurring). In this circumstance, the Petitioner's new theory should not be considered by this Court.

Secondly, the Petitioner's belated fraud claim lacks any factual or legal support. Petitioner cites no case law dealing with fraud and certainly no cases finding fraud in such circumstances. Rather, Petitioner cites West Virginia case law on accord and satisfaction, which, as demonstrated herein, supports Autoliv's position. There is no authority, and Petitioner has not cited a single case, which supports Petitioner's incredulous contention that a complete settlement, including an accord and satisfaction, should be unraveled by a court where a defendant, such as Autoliv, has fully complied with its obligations in connection with the settlement.

The fraud claim has no factual support in the record as the Petitioner can point to no fraudulent representations. Petitioner cites no misrepresentations by Autoliv and conveniently fails to inform the Court that: (1) Autoliv tendered the check in full settlement of the claims against it with the express notation that it was sent "to resolve the above-referenced matter;" and (2) Petitioner's counsel knowingly accepted and cashed the check in full satisfaction of Autoliv's portion of the settlement.

V. CONCLUSION

The Circuit Court's May 4, 2010 Order denying the Petitioner's post-settlement motions is fully supported by applicable law and the undisputed facts. Accordingly, Autoliv requests that this Court deny the Petition for Appeal.

AUTOLIV ASP, INC.,

Respondent/Defendant,

BY COUNSEL:



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CHEVROLET, INC., a West Virginia corporation,

Respondents/ Defendants Below.

CERTIFICATE OF SERVICE

I, Debra C. Price, counsel for Respondent/Defendant Autoliv ASP, Inc., hereby certify that I have served a true and correct copy of the foregoing “**Autoliv ASP, Inc.’s Motion to Supplement the Record**” on counsel of record, this 29th day of September, 2010, by placing a true copy in the regular course of the United States mail, postage prepaid, addressed as follows:

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