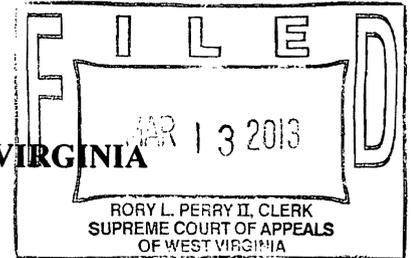


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 12-1072



ON APPEAL FROM THE CIRCUIT COURT OF
MARSHALL COUNTY (Civil Action No. 08-C-102M)

**OHIO POWER COMPANY and
AMERICAN ELECTRIC POWER
SERVICE CORPORATION,**

Petitioners,

v.

DOCKET NUMBER: 12-1072

**BRIAN TIMMONS, Administrator
of the ESTATE OF LEWIS C.
TIMMONS, Deceased,**

Respondents.

PETITIONERS' REPLY BRIEF

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I. INTRODUCTION

A. Clarification of Respondent's Factual Mistatements

Through his brief, Respondent argues that Petitioners failed to properly cite to record evidence to support their arguments. **Resp. Brf., p. 4.** This argument has no merit. Through their assignments of error, Petitioners challenge the Circuit Court's application of legal doctrines and have cited this Court to sufficient facts of record to analyze these legal issues. To the contrary, Respondent's brief is littered with factual inaccuracies and is supported by facts that were specifically excluded from the evidentiary record or never a part of the record below.

As a preliminary matter, Respondent refers to Ohio Power Company ("OPCo") and American Electric Power Service Corporation ("AEPSC") generically as "AEP" throughout his brief. **Resp. Brf., p. 3.** The generic use of AEP creates a substantial amount of confusion in Respondent's brief and does not provide the Court with the proper context to review the evidentiary record when evaluating Petitioners' assignments of error. The Circuit Court specifically recognized that AEPSC and OPCo were distinct legal entities and required the jury to consider Respondent's claims against each of them separately. **Verdict Form and Jury Interrogatories, SCT1194-1200.**

An example of the confusion caused by the generic references to "AEP" occurs when Respondent cites repeatedly to an email message authored by James Beller to support what "AEP" knew. **Resp. Brf. p., 5 (citing SCT599-601).** Mr. Beller was an employee of AEPSC as were each of the recipients of his memorandum. **8/16/11 Trial Transcript, SCT2016-2017.** As such, Mr. Beller's memorandum does not establish that OPCo knew anything; rather it is evidence of the information and knowledge of AEPSC employees.

Respondent also cites to the testimony and memorandum of Jeri Lea Caten to support various arguments about a service contract. **Resp. Brf., p. 5 (citing SCT2303)**. Ms. Caten is likewise an employee of AEPSC and the Circuit Court recognized that her statements could not be used as admissions of OPCo. **8/22/11 Trial Transcript, SCT1245**. It appears that Respondent primarily addresses these statements to rebut Petitioners' *Wellman* argument; however, AEPSC did not raise this issue as it is not a premises owner.

Petitioners have argued that the Circuit Court committed error when it denied OPCo's motion for summary judgment as it pertains to the *Wellman* defense and in directing a verdict on that issue in Respondent's favor. As Petitioners have stated since the outset of this case, the *Wellman* defense pertains to premises owners only. By using the term "AEP" in the generic, however, Respondent effectively erases the line between these two (2) distinct legal entities making it impossible for this Court to determine what information was available to which entity or which entity, if any, exerted control over the contractor or equipment at issue.

More concerning, however, is that in addition to attempting to erase the line between AEPSC and OPCo, Respondent also blatantly misstates the testimonial evidence to this Court. By way of example, Respondent states that, "In light of the [*Wellman*] defense AEP attempted to mount, it is highly significant that AEP controlled these faulty aspects of the hydrogen system and no one else had the right to change them." **Resp. Brf., p. 5 (citing SCT2065-2066)**. Initially, it is clear that Respondent again treats OPCo and AEPSC as a singular entity and Respondent does not delineate which entity allegedly maintained control over the system. Additionally, when the referenced testimony is examined it actually proves the exact opposite point as Respondent makes in his quote above. Specifically, Steve Hehr testified that, "[T]he initiating event was the replacement of that valve. You asked me, do I particularly blame

General Hydrogen for that, and my response was yes, because we did not replace the rupture disk, General Hydrogen did, okay, in a maintenance activity.” **8/16/11 Trial Transcript, SCT2064-65.**

Respondent also routinely cites to “facts” that were specifically excluded from evidence by the Circuit Court. Moreover, Respondent does not appeal the Circuit Court’s evidentiary rulings on these issues. By way of example, Respondent on multiple occasions cites to the Occupational Safety and Health Administration (“OSHA”) citation and resulting proceedings. ***Id.* at p. pp. 9-10.** The Circuit Court granted Respondents’ Motion in Limine on this exact issue and excluded the OSHA citations from the underlying action. Therefore, these citations are not part of the record and are not proper for this Court to consider. **8/22/11 Trial Transcript, SCT1216-1217.** Respondent has not challenged the Circuit Court’s Order excluding the OSHA material.

Respondent also makes reference to the Circuit Court’s denial of Respondent’s motion to treat the disposition of the *McLaughlin* case in Ohio as *res judicata* to this action. **Resp. Brf., p. 12.** Respondent has not challenged this proper ruling of the Circuit Court in his appeal or in his cross-appeal to Petitioner’s brief. Stated another way, Respondent attempts to treat the OSHA citations and the outcome of the *McLaughlin* case as evidence in support of his position for purposes of his appeal; however, he acknowledges that this evidence was excluded by the Circuit Court and he does not challenge these rulings.

In addition to citing facts that were excluded from evidence by the Circuit Court, Respondent also cites to “facts” and documents that were never even presented to the Circuit Court for consideration. Respondent argues that an internet article titled “Lessons Learned from a Hydrogen Explosion” supports his argument that “an AEP safety manager ignores AEP’s

violations in an effort to case blame on CGI.” **Resp. Brf., p. 9.** This document was never introduced into evidence in the underlying action let alone included in the Appendix to this appeal. West Virginia Rule of Appellate Procedure 6(a) states that “The record consists of the papers and exhibits filed in the proceedings in the lower tribunal, the official transcript or recording of proceedings, if any, and the docket entries of the lower tribunal.”

In addition to its lengthy discussion of the excluded OSHA materials, Respondent then attempts to draw parallels to a separate case in which Petitioners were a party, but Respondent was not. **Resp. Brf., p. 11.** Respondent never raised these issues or this argument at the Circuit Court and his reference to this matter here is irrelevant and inappropriate.

As further evidence of Respondent’s attempts to mislead this Court, his recitation of the “facts” related to the prejudgment interest issue is also telling. Respondent’s motion for prejudgment interest and the sworn affidavit of his attorney Geoffrey Brown both state that Respondent’s demand prior to trial was \$22.5 million. **SCT400, SCT523.** Mr. Brown’s May 4, 2011, correspondence to Petitioners, however, clearly establishes that the demand was actually \$25 million and may go up depending on how the Circuit Court ruled on Petitioners’ motion for summary judgment. **SCT506-508.** Clearly, Respondent’s own counsel is unsure of the settlement negotiations in this case. Respondent also stated that “AEP’s internal documentation showed it valued the case at several million dollars but it simply refused to make any seven-figure offers...” **Resp. Brf., p. 22.** Respondent does not cite to any evidence to support this proposition for the plain reason that no evidence of this fact exists in the record. Respondent has acknowledged that it is required to prove that it acted in good faith in its negotiations and further prove that Petitioners did not make an offer in good faith. With no evidence of record to establish how Petitioners valued the claim, Respondent cannot meet is burden on this issue.

In the end, Respondent's Brief contains so many misstatements and irrelevant arguments that Petitioners cannot possibly address them all here. Further, as to some issues, there is nothing more to be said that has not already been said, making additional argument redundant. Petitioners' Reply Brief, then, will only deal with those arguments that merit response.

II. ARGUMENT

At trial, there were two (2) competing theories of how the hydrogen explosion occurred. According to Respondent, it was the negligent design of the hydrogen system by Petitioners; Petitioners allegedly failed to properly vent and cover the hydrogen system, which they knew or should have known would result in a hydrogen fire due to prior, similar occurrences at some of their other plants. *Id.* at pp. 5-8. Petitioners, on the other hand, argued that the explosion was caused by the negligent maintenance of the system by an independent contractor, General Hydrogen Corporation ("General Hydrogen"). Petitioners hired General Hydrogen to maintain the hydrogen storage system, and it failed to detect or replace the corroded rupture disc in the system, which would have prevented the fire. **8/22/11 Trial Transcript, Testimony of Steve Hehr, pp. 71-74, 78-79, 97, SCT1224-1226, 1231, SCT2064-2065; 8/23/11 Trial Transcript, Testimony of Aaron Jones, pp. 64-65, SCT1282-1283.**

Pursuant to *Wellman v. East Ohio Gas Co.*, 113 N.E.2d 629, 630, Syl. Pt. 1 (Oh. 1953), Petitioners could not be held liable for General Hydrogen's negligence in performing the dangerous task of maintaining the hydrogen system absent some evidence that they controlled its work. The Circuit Court, however, precluded Petitioners from submitting the *Wellman* defense to the jury on the basis that there was no evidence that delivering and maintaining the hydrogen system was dangerous. **8/23/11 Trial Transcript, pp. 125-126, SCT1298.** This was Petitioners' first assignment of error.

In his Brief, Respondent contends that the Circuit Court's decision must be affirmed because Petitioners "never cite[] to relevant testimony or facts of record in support of [their] asserted error." **Resp. Brf., p. 4.** This argument is without merit. For one, Petitioners do not cite to any record evidence because that is, in part, exactly their point: There was no evidence they controlled General Hydrogen's work; hence they could not be held liable for its negligence. Respondent weakly contends that Petitioners controlled the maintenance of the hydrogen system because they denied an additional service contract proposal from General Hydrogen. *Id. at pp. 24-25.* This of course completely ignores that fact that General Hydrogen was already under contract with Petitioners to maintain the system; hence there was no need to enter into an additional contract. **8/22/11 Trial Transcript, Testimony of Steve Hehr, pp. 71-74, 78-79, 97, SCT1224-1226, 1231.** Further, Respondent claims that Petitioners' admission that they owed a duty to maintain the equipment in general establishes they were responsible for maintaining the hydrogen system in particular, **Resp. Brf., p. 25,** even though, again, the record shows they hired General Hydrogen to perform that specific task. **8/22/11 Trial Transcript, Testimony of Steve Hehr, pp. 71-74, 78-79, 97, SCT1224-1226, 1231.**¹

The Circuit Court, however, never even permitted Petitioners to put the issue of control to the jury on the ground that there was no evidence maintaining the hydrogen system was dangerous. Respondent's Brief says this finding should be affirmed, as Petitioners have cited nothing in the record establishing otherwise. Respondent is simply wrong. In their Brief, Petitioners cite the testimony of General Hydrogen employees Gary Fox and Robert Thomas, who were drivers just like Mr. Timmons. **Pet. Brf., p. 16.** Mr. Thomas testified that hydrogen was the "most dangerous thing" he delivered. **8/23/11 Trial Transcript, p. 28, SCT1274**

¹ In addition, the determination of the existence of a legal duty is a question of law for the court, not an issue of fact for a lay witness. Syl. pt. 5, *Aikens v. Debow*, 208 W.Va. 486, 541 S.E.2d 576 (2000).

(Reading into the record deposition testimony of Robert Thomas, pp. 60-61, SCT7276-727²). Likewise, Mr. Fox stated that delivering hydrogen was the “most potentially dangerous activity” he performed as it could ignite. 8/23/11 Trial Transcript, p. 25, SCT1273 (Reading into the record deposition testimony of Gary Fox, pp. 13-16, SCT737). Both of these men performed the same job as Mr. Timmons; certainly, the fact that they considered it dangerous was sufficient to get to the jury on Petitioners’ *Wellman* defense.

In addition, throughout his brief, Respondent claims that Petitioners only seek to apply West Virginia law when it is more favorable to them rather than based on any sound choice-of-law principles. **Resp. Brf., pp. 16, 18, 21, 32.** Respondent claims that Petitioners argued below that Ohio law governs all issues, and that they are therefore now estopped from changing that position. ***Id.* at p. 31.** Respondent’s only support for this contention is a sentence in Petitioners’ motion for summary judgment wherein they stated that the Circuit Court “must apply the substantive laws of the state of Ohio whenever a conflict exists between the laws of West Virginia and Ohio.” ***Id.* at pp. 31-32.** Respondent correctly quotes Petitioners’ position, but misunderstands both its meaning as well as basic choice of law concepts.

The key words in the quoted sentence are “conflict” and “substantive.” If there is no conflict between West Virginia and Ohio law, then the law of the forum—West Virginia—controls. 15A C.J.S. *Conflict of Laws*, §§ 27, 41 (2002); 16 Am.Jur.2d *Conflict of Laws* § 85 (1998). Where, however, there is a conflict, then the law of the place of injury—Ohio—governs substantive matters, *Kessel v. Leavitt*, 204 W.Va. 95, 184, 511 S.E.2d 720, 809 (W.Va. 1998), while forum law governs procedural matters. *McKinney v. Fairchild Intern., Inc.*, 199 W.Va.

² The trial transcript only notes that the deposition testimony was read into the record but does not actually transcribe what was specifically read. The deposition transcripts of Mr. Thomas and Mr. Fox that were read into the record at trial on August 23rd are found in the record as exhibits to Petitioners’ Motion for Summary Judgment, SCT712-758.

718, 727, 487 S.E.2d 913, 922 (W.Va.1997). Thus, at no point in this case have Petitioners argued that Ohio law applies “across the board” to all issues in the case. **Resp. Brf., p. 21.** Rather, they have argued that which law applies must be decided on an issue-by-issue basis depending upon first, whether there is a conflict and second, whether the issue is substantive or procedural.

This approach is, of course, consistent with both the law and Respondent’s own position. Indeed, Respondent’s Brief concedes that the blanket application of Ohio law to all issues in the case is “incorrect.” *Id. at p. 21.* In fact, at the same time that Respondent accuses of Petitioners of selectively applying whichever law is better, he argues that West Virginia’s more favorable prejudgment interest law should apply to him without doing any kind of choice-of-law analysis whatsoever. *Id. at pp. 35-37.*

In West Virginia, prejudgment interest is awarded to the prevailing plaintiff as of right. *Grove By and Through Grove v. Myers*, 181 W.Va. 342, 349, 382 S.E.2d 536, 540 (W.Va.1989). In Ohio, on the other hand, prejudgment interest may only be recovered upon demonstrating a lack of good faith effort to settle. *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 658 N.E.2d 331 (Ohio 1994). The two laws thus clearly conflict. Which law controls is therefore determined by whether prejudgment interest is substantive or procedural.

Although this Court has not specifically addressed whether prejudgment interest is substantive or procedural, it has acknowledged that *damages generally* constitute substantive matters. *Arnoldt v. Ashland Oil, Inc.*, 186 W.Va. 394, 402, 412 S.E.2d 795, 803 at n.9 (W.Va.1991). Since damages are substantive, and prejudgment interest is a category of damages, it necessarily follows that prejudgment interest is a substantive area of law. Indeed, while West Virginia has never decided that specific issue, “the majority view...is that

prejudgment interest, like the issue of damages, is substantive, and the state whose laws govern the substantive legal questions also govern the question of prejudgment interest.” *Cooper. v. Ross & Roberts, Inc.*, 505 A.2d 1305, 1307 (Del.Super.1986). *See also Marine Midland Bank v. Kilbane*, 573 F.Supp. 469, 471 (D.Md.1983) *aff’d* 739 F.2d 958 (4th Cir.1984)(“The rate of prejudgment interest is a matter of damages...[D]amages are considered to be a substantive matter” for choice of law purposes). Since prejudgment interest is substantive, the law of the place of the injury—Ohio—governs. Respondent’s unsupported contention that West Virginia’s prejudgment interest law applies thus has no merit.

Under Ohio law, there must be a lack of good faith effort to settle in order to award prejudgment interest. In his attempt to justify the Circuit Court’s award of prejudgment interest, Respondent’s Brief misstates facts about the settlement negotiations between the parties and omits other key facts.

According to Respondent, Petitioners did not make a good faith effort to settle the case because their “internal documentation showed [they] valued the case at several million dollars” but they “never offered more than \$550,000.00.” **Resp. Brf., pp. 18, 22.** This narrative is misleading. First, and most obviously, as stated above, there is no evidence in the record of how Petitioners valued the case. Respondent failed to proffer any evidence showing the value placed on the case by Petitioners. The only fact of record regarding Petitioners’ valuation of the case was their opening and initial offer to Respondent of \$550,000. Ultimately, the jury awarded Respondent \$1,998,940.00 in compensatory damages and \$5 million in punitive damages, which was subsequently and properly reduced to \$550.00, as requested in Petitioners’ motion for summary judgment to apply of Ohio R.C. § 2315.21. Thus, Petitioners’ initial offer of \$550,000 was a substantial opening offer given the less than two (2) million dollar compensatory award in

this case. Respondent, meanwhile, never demanded a sum less than \$25 million. **Correspondence of Respondent’s Counsel Geoffrey Brown, SCT506-508.** Petitioners thus realistically valued the case, whereas Respondents sought to extort a king’s ransom.

Second, Respondent neglects to explain why Petitioners never offered more than \$550,000.00. At mediation, Respondents demanded \$25 million, Petitioners made an initial offer of \$550,000.00, and in response Respondents *increased* their demand by an additional \$550,000.00. ***Id at ¶ 6, SCT523.*** To the extent anyone failed to negotiate in good faith, then, it was Respondent, and the Circuit Court therefore plainly erred in awarding him prejudgment interest under Ohio law.

Respondent also accuses Petitioners of “choice-of-law” shopping in arguing that West Virginia, not Ohio, law governs the issue of setting off the verdict amount by the settlement amounts received from settling defendants. **Resp. Brf., p. 31.** Again, Petitioners have never argued that Ohio law governs all issues in the case; only that it governs *substantive* issues. Further, Respondent’s argument that Petitioners are estopped from arguing that West Virginia law governs set-offs because they argued Ohio law governs punitive damages fails to appreciate the distinction between compensatory and punitive damages. The purpose of compensatory damages is to make the plaintiff whole, and the set-off rule exists to ensure that plaintiff does not receive a double recovery. The purpose of punitive damages, on the other hand, is to punish the defendant. Thus, Respondent’s claim that this Court must choose who between Petitioners and Respondent will receive a “windfall” presents a false choice: The answer is neither. A plaintiff should not receive more than is necessary to be made whole, which is why the set-off exists. And to the extent applying a set-off results in the defendant not having to pay any compensatory damages, the mechanism for still punishing that defendant is the imposition of punitive damages.

The answer is not, however, to do what the Circuit Court did in this case, which was to impose punitive damages but not apply the set-off.

III. RESPONDENT'S CROSS-APPEAL

Lastly, Respondent cross-appeals on the multiplier used by the Circuit Court in awarding attorneys' fees. Respondent claims the court below should have applied a multiplier of 2.0 instead of 1.25. There is no basis for this contention. In fact, a review of the record and the applicable law shows that the Circuit Court should not have employed any multiplier whatsoever, much less the 1.25 it ended up using or the 2.0 Respondent insists upon.

Under Ohio law, if the trial court determines attorneys' fees are warranted, it then calculates the amount under the "lodestar" method. The lodestar is the number of hours expended times a reasonable hourly rate. *TCF Natl. Bank v. Jackson Property Mgt. Group, LLC*, 2010 WL 1235608, 1 (Ohio App. 5th Dist.2010)(citations omitted). Once the trial court calculates the lodestar figure, the court may then enhance that amount by a "multiplier" to account for the costs and risks involved in the litigation as well as complexities of the case and the size of the recovery. In determining whether a multiplier is warranted, the court should consider the factors listed in DR 2-106(B), now, Ohio Rules of Professional Conduct 1.5. *Bittner v. Tri-County Toyota, Inc.*, 58 Ohio St.3d 143, 145, 569 N.E.2d 464 (Ohio 1991). These factors are: the time and labor involved in maintaining the litigation; the novelty and difficulty of the questions involved; the professional skill required to perform the necessary legal services; the attorney's inability to accept other cases; the fee customarily charged; the amount involved and the results obtained; any necessary time limitations; the nature and length of the attorney/client relationship; the experience, reputation, and ability of the attorney; and whether the fee is fixed or contingent. All factors may not be applicable in all cases and the trial court has the discretion

to determine which factors to apply, and in what manner that application will affect the initial calculation. *Id.*

To calculate the lodestar, the party requesting the award of attorney fees “should submit evidence supporting the hours worked...” *TCF Natl. Bank v. Williams*, 2010 WL 1256218, 4, 2010-Ohio-1487 (Ohio App. 5th Dist. 2010)(citing *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983)). However, merely submitting an attorney’s time sheet and hourly rate, without more, is insufficient. Rather, the party claiming fees must demonstrate that its rate and hours worked are reasonable from an objective standpoint. With regard to hourly rate, “the burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.” *TCF, supra*. In terms of hours, the hours worked should be necessary to the action and should not include “hours that are excessive, redundant, or otherwise unnecessary.” *Id.* Indeed, “[i]t does not follow that the amount of time *actually* expended is the amount of time *reasonably* expended.” *Freeman v. Crown City Mining, Inc.*, 90 Ohio App.3d 546, 553, 630 N.E.2d 19, 23-24 (Ohio App. 4th Dist. 1993)(emphasis in original). Obviously, hours that are not properly billed to one’s *client* are not properly billed to one’s *adversary*; thus, a party can only recover for those hours that “would properly be billed *to the client*.” *TCF, supra* at *4 (emphasis supplied). Further, the hours expended must be documented in an organized manner, i.e. the requesting party “should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims.” *Southeast Land Dev., Ltd. v. Primrose Mgt. L.L.C.*, - - N.E.2d ----, 2011 WL 1944307, 7, 2011-Ohio-2341 (Ohio App. 3rd Dist.2011)(citing *Hensley*).

A review of the *Bittner* factors necessitates the conclusion that even if fees were awarded, that amount should not have been increased by a multiplier. This case was a typical personal injury action that did not involve unusual facts or legal issues. Nor did Respondent's counsel submit any evidence that taking on this case limited its ability to accept other cases, or that accepting handling of this case presented any risks other than those typically associated with all contingency cases. Further, Respondent submitted a fee amount to the Circuit Court which it believed was reasonable. That number was not negotiated prior to the representation, but rather was arrived at only after a verdict was rendered and the case was completed. As such, Respondent's counsel had the benefit of hindsight in arriving at its "reasonable" hourly rate. That being so, there was no reason to increase that amount by a multiplier. Assuming *arguendo* that Respondent's requested fees are reasonable, there would be no basis to increase them by a multiplier, as that would give Respondent a windfall, and the fees would therefore be *unreasonable*, and thus contrary to law. Thus, should this Court agree to consider Respondent's cross-appeal, it must reduce the Circuit Court's 1.25 multiplier to zero.

IV. CONCLUSION

Rather than focus on the seven (7) discrete appellate issues raised in Petitioners' appeal, Respondent's 40-page brief mostly recites a litany of complaints not at issue in this appeal or even in his own. Moreover, in those few instances where his brief purports to address those matters actually at issue here, he relies on inflammatory statements unsubstantiated by the record instead of reaching the merits. What is more, Respondent now cross-appeals on an entirely new issue, as his own separate appeal was apparently not enough. The reason Respondent brings up all these superfluous issues is obvious: He has no legitimate arguments against those matters

really in dispute. The Petitioners accordingly request that their appeal be granted and their requested relief given.

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of the ESTATE OF LEWIS C.
TIMMONS, Deceased,**

Respondents.

CERTIFICATE OF SERVICE

I, Brian R. Swiger, counsel for Petitioners Ohio Power Company and American Electric Power Service Corporation, do hereby certify that on this 13th day of March, 2013, I served **PETITIONERS OHIO POWER COMPANY and AMERICAN ELECTRIC POWER SERVICE CORPORATION'S REPLY BRIEF** upon all counsel and parties of record, via United States mail, postage prepaid, addressed as follows:

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