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COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss. SUPERIOR COURT DEPARTMENT

DARLENE SMITH as the PERSONAL REPRESENTATIVE OF THE ESTATE OF SANDRA BIRCHMORE,
Plaintiff
v.

MATTHEW FARWELL, WILLIAM FARWELL, ROBERT DEVINE, and JOSHUA HEAL Individually, THE TOWN OF STOUGHTON, and THE STOUGHTON POLICE DEPARTMENT,
Defendants

Docket No.: 2282CV1197

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PLAINTIFF'S AMENDED OPPOSITION TO DEFENDANT JOSHUA HEAL'S MOTION TO DISMISS UNDER RULE 12(b)(6)

Now comes the Plaintiff, Darlene Smith ("Plaintiff" or "Ms. Smith"), as the Personal Representative of the Estate of Sandra Birchmore, and hereby opposes Defendant Joshua Heal's ("Defendant" or "Heal") Motion to Dismiss ("Motion"). In support hereof, the Plaintiff states the following:

INTRODUCTION

Darlene Smith, as the Personal Representative of the Estate of Sandra Birchmore, brings this action against the Defendant Joshua Heal, and defendants Matthew ("M. Farwell") and William Farwell ("W. Farwell"), Robert Devine ("Devine"), the Town of Stoughton ("Stoughton"), and the Stoughton Police Department ("PD") based on their collective actions in the sexual grooming and causal connection to the eventual death of Sandra Birchmore

(hereinafter the "Decedent" or "Ms. Birchmore"). The Plaintiff seeks to recover for the losses suffered as a result of the defendants' actions.

FACTS

The Plaintiff, as Personal Representative of the Estate of Sandra Birchmore, commenced a civil action in December of 2022, against the defendants in Norfolk Superior Court. The Plaintiff, on January 6, 2023, filed an Amended Complaint. Upon new information, Ms. Smith filed a motion to file a Second Amended Complaint on January 23, 2023, which was allowed. The Plaintiff, on February 2, 2023, filed her Second Amended Complaint ("Complaint"), with the addition of Defendant Joshua Heal. The PD produced an Internal Investigation Report ("Report") following Ms. Birchmore's death. The Second Amended Complaint references the Report prepared by the Stoughton Police Department on August 29, 2022. Video surveillance was discovered during the investigation that showed M. Farwell leaving Ms. Birchmore's Canton apartment four days prior to the discovery of her body. The Report further determined that M. Farwell was the last to see the Decedent alive.

The Report states that Devine was the officer in charge of the Stoughton Police Department Explorer Program (hereinafter "the Program"), and that defendants M. Farwell and W. Farwell were his subordinates. The Program's stated goal was to educate school children about police officers and the criminal justice system as well as the duties and responsibilities of police officers.

Ms. Birchmore was, between the age of 13 and 18, an active participant in the Program, through her school. The Report revealed M. Farwell was introduced to the Decedent through the Program. When Ms. Birchmore was a minor, at just 15 years old, M. Farwell began a sexual relationship with her. Defendant Heal's involvement with Ms. Birchmore came to light through

the Report, which references Heal, a Stoughton Animal Control Officer ("ACO") and his misconduct towards Ms. Birchmore while she was suffering abuse by the police defendants. The Report outlines defendants Devine, M. Farwell, and W. Farwell's misconduct and sexual interactions with Ms. Birchmore, both while she was a minor and thereafter.

Upon information and belief, Defendant Heal was employed as an animal control officer by the Town of Stoughton from March 2016 to July 2020. Heal's duties consisted of animal related matters and parking enforcement. Defendant Heal attended a reserve police academy in Foxborough in or about fall 2017. Heal began his work shift as the ACO at the PD at 8 o'clock in the morning. The Defendant would then proceed to the animal control shelter. Defendant Heal met Ms. Birchmore when she approached the Stoughton animal control shelter seeking to adopt a cat. Defendant Heal admitted in one of his interviews that Ms. Birchmore had adopted a cat from him. The investigators concluded in the Report that there were no documents relating to Ms. Birchmore, "I received all available pet adoption files from the ACO that had been previously stored at the Stoughton Animal Control Shelter. Based on the first interview of Officer Heal, I attempted to locate adoption papers where Sandra Birchmore adopted a cat from the shelter 2-3 years ago. I conducted a complete review of the files that were given to me. No such documents were located." *Rep. p. 22.* The Report discovered, and Defendant Heal admitted, he received oral sex from the Decedent on at least one known occasion. In following police interviews, Heal conceded he and Ms. Birchmore were close friends.

Defendant Heal used his position and power as an animal control officer to exploit Ms. Birchmore, while knowing pertinent information of the sexual abuse and misconduct by the other defendants towards Ms. Birchmore. The three police defendants used their positions of power and respect as police officers and instructors in the Program to take advantage of the

emotionally vulnerable Ms. Birchmore. The long-term abuse and grooming[1] Ms. Birchmore suffered as a young adult by Defendant Heal and as a minor by the defendants Devine, M. Farwell, and W. Farwell, and ignored by Stoughton and the PD, exacerbated her underlying mental health issues and ultimately led to her untimely death.

STANDARD OF REVIEW

In Massachusetts, the legal standard of review for a motion to dismiss for failure to state a claim is set forth in Mass. R. Civ. P. 12(b)(6). The standard of review for such a motion is whether the plaintiff's complaint, taken as true, alleges sufficient facts to state a claim upon which relief can be granted. In *Iannacchino v. Ford Motor Co.*, the Massachusetts Supreme Judicial Court (hereinafter "SJC") explained, a court considering a motion to dismiss [for failure to state a claim] must accept as true the factual allegations in the plaintiff's complaint and draw all reasonable inferences in the plaintiff's favor. *See* 451 Mass. 623, 636 (2008). *See also Nader v. Citron*, 372 Mass. 96, 98 (1977).

The Court will then determine whether the facts alleged, together with all reasonable inferences, make out a claim that is legally sufficient. As the SJC further explained in *Iannacchino*, a complaint must do more than allege the bare elements of the cause of action; the "factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true." *Id.* at 636-37 (*citing Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). When deciding on a 12(b)(6) motion, the court will draw

[1] "Grooming is a method used by offenders that involves building trust with a child and the adults around a child in an effort to gain access to and time alone with her/him. In extreme cases, offenders may use threats and physical force to sexually assault or abuse a child. More common, though, are subtle approaches designed to build relationships with families. The offender may assume a caring role, befriend the child or even exploit their position of trust and authority to groom the child and/or the child's family. These individuals intentionally build relationships with the adults around a child or seek out a child who is less supervised by adults in her/his life. This increases the likelihood that the offender's time with the child is welcomed and encouraged."
Understanding Sexual Grooming in Child Abuse Cases (americanbar.org)

every reasonable inference in favor of the plaintiff. *Galiastro v. Mortg. Elec. Registration Sys., Inc.*, 467 Mass. 160, 164 (2014) (citing *Lopez v. Commonwealth*, 463 Mass. 696, 700 (2012)).

ARGUMENT

In Defendant Heal's Motion to Dismiss all claims against him, Heal argues that pursuant to Mass. R. Civ. P. 12(b)(6), the Plaintiff has failed to properly state claims against him. Heal specifically argues in his Motion that the Second Amended Complaint has "no allegations of grooming, sexual exploitation or a pattern of abuse alleged as to the Defendant, Joshua Heal". Further, Defendant Heal is attempting to separate himself from the other defendant officers and the PD in this matter by asserting "Mr. Heal was not employed by the Stoughton Police Department. He was not a police officer." *Motion p.* 6. The Stoughton Animal Control Officer is an integral part of the Stoughton Police Department. The Report revealed that Defendant Heal had a PD-issued phone for his official duties as the ACO. In an interview with investigators, Heal answered that he would begin his shift at 8 o'clock in the morning at the PD, and would then head to the animal control shelter. The PD dispatcher would call the ACO for animal related matters. In the same interview, Heal mentioned the PD tasked him with more than animal related calls, as he was also involved in parking enforcement.

The Report revealed that after the death of the Decedent, Heal had conversations with at least two Stoughton Police Department Officers not named in this matter regarding Ms. Birchmore. Heal revealed that he knew of the other defendants named in the Complaint, and would talk in passing with one another at the PD. This demonstrates that Heal was well connected within the PD, was more than solely an animal control officer and that other officers knew of his involvement with Ms. Birchmore. Defendant Heal had intimate knowledge of all things related to Ms. Birchmore including the defendant officers misconduct and sexual abuse.

Despite this knowledge, Heal failed to report the officers' extreme misconduct to the appropriate authorities. The actions and inactions of Defendant Heal regarding the sexual abuse and misconduct towards Ms. Birchmore were a significant factor in leading to her alleged suicide.

I. Wrongful Death

To establish a wrongful death claim, the Plaintiff must prove the following: (1) the defendant owed a duty of care to the deceased person; (2) the defendant's acts or omissions fell short of what a reasonable person would have done under similar circumstances; (3) the defendant's breach of duty was the cause of the deceased person's death; and (4) the death of the deceased person resulted in damages. *See Framingham Tel. Answering Serv. v. At&T*, 1994 Mass. Super. LEXIS 119, 8 (*citing* Nolan & Santorio, Tort Law 467, at 225 (1989)).

Here, the Second Amended Complaint states that Ms. Birchmore went to the Stoughton Animal Control Shelter to adopt a cat. The Complaint references the Report, which determined that Defendant Heal had sexual relations on at least one occasion with the Decedent at the Stoughton Animal Control Shelter, located at 499 West Street, Stoughton MA. Ms. Birchmore had adopted a cat from the Stoughton Animal Control Shelter and Defendant Heal admitted in an interview "She adopted a cat from me. That's when I first met her" (*Heal second interview p. 38).* The investigators concluded in the Report, "I attempted to locate adoption papers where Sandra Birchmore adopted a cat from the shelter 2-3 years ago. I conducted a complete review of the files that were given to me. No such documents were located." *Rep. p. 22.* The Report also concluded that Heal had intimate knowledge of the sexual abuse and misconduct Ms. Birchmore was suffering, as Heal revealed in an answer when questioned, "Yeah, She was struggling. Like I said, she talked to me a lot." (*Heal first Interview pg. 358).* Heal further stated, "Actually, I

believe our first interaction about it was in person, right before she was going to adopt a cat." *(Heal second interview pg. 385).*

Defendant Heal owed a duty to Ms. Birchmore as the ACO within Stoughton to act professionally and within his power as an ACO. Heal breached his duty when he befriended Ms. Birchmore, established trust with her, and exploited her for sexual activity. The Defendant asserts "There are no specific allegations based upon personal knowledge that Mr. Heal solicited a sexual act from Ms. Birchmore" *Motion pg. 6.* Defendant Heal, reluctantly admitted to investigators, after first denying such behavior, to having oral sex with Ms. Birchmore. This is not how a transaction of adopting a cat from an animal control shelter would proceed, in which an individual inquiries about an animal adoption and the ACO taking advantage of said individual for sexual activity. Further, this is not how a reasonable person would act under the circumstances. This breach of duty created and exacerbated the underlying trauma, mental, and emotional distress suffered by Ms. Birchmore that ultimately overwhelmed her will to live, and in turn, caused her death. These allegations, taken as true, state sufficient facts on which relief can be granted and therefore should survive a 12(b)(6) motion.

II. Negligence

The elements for negligence are similar to those of wrongful death: (1) the defendant had a legal duty to exercise reasonable care; (2) defendant breached that duty by failing to act as a reasonable person would under the circumstances; (3) the defendant's breach caused harmed to the person owed the duty: and (4) that person suffered damaged. *See Palsgraf v. Long Island Railroad Co.,* 248 N.Y. 399 (1928).

As stated above and in the Second Amended Complaint, Heal had a duty to protect Ms. Birchmore. Defendant Heal, the ACO with the Town of Stoughton failed to protect Ms.

Birchmore. He breached this duty when he admitted to having intimate knowledge of the sexual abuse and misconduct from the other defendant officers and not acting upon the information and reporting the misconduct of the officers to the PD or Stoughton. The inaction of not reporting was this breach by Defendant Heal, and the further breach by the other defendants, that ultimately led to the death of Ms. Birchmore.

Defendant Heal asserts in his Motion, "The Complaint certainly does not contain any statements or allegations of fact which could plausibly show that Mr. Heal had actual knowledge of the abuse behavior or Ms. Birchmore's suicidal intentions." *Motion pg. 8.* The Defendant fails to recall that in an interview with investigators he answered the following "we started talking, and she had a rough life. And we just got to talking, and I became a person that she came to and talked to a lot. I know a lot of what was going on in her life. And we talked, I'd say, very frequently; sometimes on a daily basis." *(Heal first interview pg. 353).* Heal further stated, "Yeah, She was struggling. Like I said, she talked to me a lot." *(Heal first Interview pg. 358)* and described the conversations with Ms. Birchmore, "I would say they were pretty graphic." *(Heal first Interview pg. 360).* Heal had significant knowledge of Ms. Birchmore's life, including admitting in his interview "I know she was sectioned a few times for suicidal ideology. And she told me she was on medication, but sometimes didn't take it" *(Heal first interview pg. 354).* Defendant Heal, in his second interview, when asked about M. Farwell's relationship with Ms. Birchmore answered "I think just through text. She just said she was having relationships with people in the department, and I think it just came through that's the first name that she told me." *(Heal second interview pg. 384).* The Defendant was well aware of Ms. Birchmore's mental health struggles and the ongoing relationships with officers within the PD. The Defendant

neglected the severity of the abuse and the need to report the misconduct. These facts, taken as true, are sufficient to state a claim and survive Defendant Heal's motion to dismiss.

III. Assault and Battery

Assault is the intentional causation of apprehension of harmful or offensive contact and battery is the intentional causation of harmful or offensive contact. Mass. Gen. Laws ch. 265, §13A. As alleged in the Complaint and *infra*, Defendant Heal intentionally caused harmful and offensive contact with Ms. Birchmore. Heal knew "She was struggling. Like I said, she talked to me a lot" (*Heal first interview pg. 358)*, therefore Heal was aware of the inappropriate conduct and sexual abuse with other defendants and Heal knowingly furthered the sexual misconduct which caused severe mental trauma and ultimately contributed to her alleged suicide. He acted deliberately and wantonly to engage in such sexual contact. Therefore, the Complaint alleges sufficient facts which, taken as true, state a claim on which relief can be granted and should survive Defendant Heal's motion to dismiss.

IV. Negligent Infliction of Emotional Distress

To state a claim for negligent infliction of emotional distress, it must be shown that: "(1) the defendant owed a duty of care; (2) the defendant breached that duty; (3) the person owed the duty suffered emotional distress as a result of the breach; and (4) the emotional distress was severe and could be anticipated by a reasonable person." *Payton v. Abbott Labs, 383 Mass. 540 (1982).*

The Defendant owed a duty of care to Ms. Birchmore which was breached by Heal's inaction to report the other defendant officers misconduct. This inaction led to the continued misconduct and sexual abuse, that continued to the very end, as it was discovered in the Report, that M. Farwell was at the Decedent's Canton apartment four days prior to the discovery of her

body. The Second Amended Complaint asserts that Ms. Birchmore suffered sexual abuse and significant emotional and psychological distress caused by the negligence of the defendants. A minor and young adult suffering severe emotional distress as a result of a years long period of sexual abuse at the hands of her authority figures could certainly be anticipated by a reasonable person.

In a press release on September 23, 2022, Chief McNamara stated, "What I am here to talk about today is her life and how she was failed by, manipulated by and used by people of authority that she admired and trusted right up until her final days" and further asserted "Birchmore's death was the culmination of a near decade-long scheme of grooming and repeated sexual assaults from a young age by certain police officers." Heal, rather than aiding this emotionally damaged young women, simply took advantage of his "close relationship" with her to have sex with her on at least one occasion, making Heal a contributing factor to Ms. Birchmore's severe emotional trauma.

The Defendant asserts in his Motion that the Plaintiff is not entitled to relief due to not being Ms. Birchmore's family. The Plaintiff, Darlene Smith, as the Personal Representative of the Estate of Sandra Birchmore is entitled to relief set forth in the Complaint. Ms. Smith was appointed the Personal Representative of Ms. Birchmore's estate, is Ms. Birchmore's aunt, and is a beneficiary of the estate. Ms. Smith represents the immediate family of Ms. Birchmore, as her mother and grandmother are deceased. Defendant Heal answered in an interview with investigators "She was at home. Stayed at home with her aunt most of the time." (*Heal second interview p. 391).* The Defendant *knew* Ms. Birchmore's aunt, Ms. Smith, was an active participant in her life and is where Ms. Birchmore lived for some time. This inartful argument

the Defendant is orchestrating is baseless as Ms. Birchmore's direct family filed the Complaint and is seeking relief and damages.

The Defendant asserts no physical harm manifested by objective symptomatology. The Plaintiff has demonstrated objective evidence of the harm caused to Ms. Birchmore by Defendant Heal and the other defendants. In *Shea v. Cameron,* for negligent infliction of emotional distress, the Court ruled, the "Plaintiffs must corroborate their mental distress claims with enough objective evidence of harm to convince a judge that their claims are likely genuine." *Shea v. Cameron*, 92 Mass. App. Ct. 731, 732 (2018). Defendant Heal was aware of the mental health challenges Ms. Birchmore was experiencing due to the highly inappropriate sexual abuse and misconduct when he answered in an interview, "I know she was sectioned a few times for suicidal ideology. And she told me she was on medication, but sometimes didn't take it" (*Heal first interview p. 354).* For the foregoing reasons the Complaint alleges sufficient facts to survive Heal's Motion to Dismiss for failure to state a claim, in addition to illustrating that the decedent's family is party to the case by and through the Estate as represented by Ms. Smith and as a result has standing to bring such an action, and the Court, subject matter jurisdiction over the claim.

V. 42 U.S.C. Sec. 1983

To state a claim under Section 1983 of the Civil Rights Act of 1871, the Plaintiff must show: (1) the defendant was acting under the color of law; (2) the defendant's actions deprived the plaintiff [or the person the plaintiff is acting on behalf of] of a right, privilege, or immunity secured by the laws of the United States; and (3) the defendant's action caused damages. *See Monroe v. Pape*, 365 U.S. 167 (1961). As was stated in the Complaint, at all relevant times, the defendants Devine, M. Farwell, and W. Farwell, were police officers employed by Stoughton and acting under the color of law. The Defendant asserts that the Complaint is bereft of any

allegations that implicate Defendant Heal in any constitutional violations that occurred against Ms. Birchmore. As asserted in the Complaint, at all relevant times, Defendant Heal was the animal control officer employed within Stoughton and acting under the color of law. Pointedly, the Complaint cites to *Almand v. Dekalb County*, (citing to *Parker v. Williams*, 862 F.2d 1471) (11th Cir. 1989), wherein the Court found that instances of rape and sexual assault by state actors or officials can be violative of the Constitution and serve as the basis of a § 1983 claim. "The fact that rape is not a legitimate law enforcement goal does not prevent the Sheriff's act from falling within his law enforcement function." *Bennett v. Pippin,* 74 F.3d 578, 586 (5th Cir. 1996).

The Defendant fails to recognize that he had significant and verifiable knowledge of the defendant officers sexual abuse and misconduct towards Ms. Birchmore. For instance, Heal knew the location of the sexual abuse and misconduct on behalf of the other defendant officers, "she said they would meet down at the shelter soccer field" (*Heal second interview p. 387)* and "She said that she'd meet them in the cruiser, and she sit in it and from there they'd interact and have a sexual encounter." *Id.* The tremendous depth of Heal's knowledge of the sexual abuse and misconduct was discovered when he revealed to investigators that M. Farwell had some sort of tracking application on Ms. Birchmore's phone, "She said someone she was seeing could track her phone" (*Heal second interview p. 393)* and further agreed with the investigator that it was "Life360 type software." *Id.* Heal's inactions, having knowledge of alleged sexual abuse and his failure to report this abuse, led to further violations of Ms. Birchmore's constitutional rights by the other defendant officers. Heal, as an ACO, was acting under the color of law and directly deprived Ms. Birchmore of her constitutional rights. Defendant Heal, an integral adjunct of the PD, has a duty to inform Stoughton and the PD of misconduct of officers. No such action was taken on the part of Heal and thus demonstrates a custom of acquiescence by Heal. Moreover, by

having a sexual relationship with Ms. Birchmore, Heal became a link in the chain of sexual abuse which began when Ms. Birchmore was a minor and ultimately and tragically led to her death.

Defendant Heal argues in his Motion "there are no allegations in the Complaint alleging the power Mr. Heal exercised under state law when he is alleged to have engaged in oral sex with Mrs. Birchmore." *Motion p. 13.* The alleged sex was admitted by Heal when interviewed, "Yes Sir. On one occasion" (*Heal second interview p. 369)* and he further described the place and time of the encounter, "after work hours" and "it was inside the building" (*Heal second interview p. 370)* with the building being the animal control shelter. When asked about a note found in the animal control shelter, Heal answered "I don't think it was Sandra's note, because she didn't have access to that building." (*Heal second interview p. 381).* The Defendant exercised his power as the ACO within Stoughton to open and unlock the door to the shelter. Ms. Birchmore had no key or ability to enter the shelter without Heal in his role as the ACO. Although the sexual encounter allegedly happened after work hours, it was within Heal's place of work, and where he exercises power within the building as his duties as the animal control officer. The Plaintiff has alleged sufficient facts to illustrate violations of rights under Section 1983 on behalf of Heal and should survive Defendant Heal's Motion to Dismiss.

VI. Civil Conspiracy

Civil conspiracy is a combination of two or more persons to accomplish an unlawful purpose and involves: (1) an agreement between two or more persons, (2) the specific intent to accomplish an unlawful purpose; (3) an overt act in furtherance of the conspiracy; and (4) damages suffered as a result. *See Bartle v. Berry*, 80 Mass. App. Ct. 372, 383-384 (2011) (*citing Kurker v. Hill*, 44 Mass. App. Ct. at 188-189).

As stated in the Complaint, during their employment by the Town of Stoughton, Defendant Heal, and defendants Devine, M. Farwell and W. Farwell worked in concert with each other to coerce and manipulate Ms. Birchmore into engaging in illicit sexual activities. Their actions were particularly coercive due to their positions within the Town of Stoughton as the animal control officer and police officers respectively. The Complaint alleges that the Defendant not only knew of the unlawful conduct, but worked together to engage with the other defendant officers in misconduct towards Ms. Birchmore. Heal stated in his interview "According to Sandra in her text messages, she said that she was also having relations with Billy Farwell, and she also stated that she was having relations with Officer Devine." (*Heal second interview p. 386).* Defendant Heal has admitted to conversations and text messages with the Decedent on numerous occasions regarding the misconduct and sexual abuse. The deliberate nonintervention on the part of Defendant Heal further allowed the defendant officers to continue the sexual abuse and misconduct.

Defendant Heal argues in his Motion that "Mr. Heal was not a police officer, Mr. Heal was not involved in the Program. Mr. Heal was not employed by the Stoughton Police Department nor was his office in the police station." *Motion p. 15.* The defendant officers continued their misconduct and sexual abuse after Ms. Birchmore was no longer part of the Program, and Defendant Heal conspired and assisted the other defendant officers by allowing them to continue their highly inappropriate behaviors undetected and without repercussions from the PD or Stoughton. The Stoughton Animal Control Officer is fully integrated into the Stoughton Police Department, as the PD dispatched the ACO to calls, provided a department issued phone, and is the location at which the ACO begins his shift. Taken as true, these

allegations are sufficient to state a claim on which relief could be granted and should survive Defendant Heal's motion to dismiss.

CONCLUSION

For the foregoing reasons, the Plaintiff, Darlene Smith, as Personal Representative of the Estate of Sandra Birchmore, respectfully requests that this Court DENY Defendant Joshua Heal's Motion to Dismiss and for such further relief as is just and equitable.

Date: December 14, 2023

Respectfully Submitted,

DARLENE SMITH, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SANDRA BIRCHMORE,

By her Counsel,



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CERTIFICATE OF SERVICE

I, Steven J. Marullo, Plaintiff's counsel herein, hereby certify that on this 14th day of December, 2023, I served the foregoing **Plaintiff's Amended Opposition to Defendant Joshua Heal's Motion to Dismiss** to Defendant's counsel and to all other parties listed below by sending same to counsel of record for each Defendant via email and/or priority U.S. Mail, postage prepaid, as indicated below.

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