IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

WILLIAM OWENS,	*	
	*	
Plaintiff,	*	
	*	
v.	*	CIVIL ACTION
	*	
LOGAN PROPES, Individually,	*	FILE NO.3:21-cv-00084-CDL
R.V. WATTS, Individually, and	*	
THE CITY OF MONROE,	*	
	*	
Defendants.	*	

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

I. STANDARD OF REVIEW

The Defendants have moved to dismiss in their entirety, all of the Plaintiff's claims. The Defendants have misconstrued the purpose of a Motion to Dismiss and, for the most part, are incorrect in their assessment of the law relating to the Plaintiff's claims.

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that a complaint provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Chaparro v. Carnival Corp., 693 F.3d 1333, 1337 (11th Cir. 2012). This pleading standard does not require "detailed factual allegations," but it does demand "more than labels and conclusions and formulaic recitation of the elements of a cause of action." The case is subject to dismissal if it does not plead "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 547, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). The Supreme Court has explained this standard as follows: "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (cits. omitted). If the factual allegations in the pleading are "enough to raise a right to relief above the speculative level," a claim will survive a motion to dismiss. Twombly, supra at 550 U.S. at 555, 127 S.Ct. 1955.

The Defendants' arguments ignore the fact that this matter is before the Court on a Motion to Dismiss, demanding proof as if it were before the Court on a Motion for Summary Judgment.

When considering a motion to dismiss, the allegations in the pleading must be accepted as true and construed in the light most favorable to the Plaintiff. Almanza v. United Airlines, Inc., 851 F.3d 1060 (11th Cir. 2017). Evaluation of a motion to dismiss requires two steps: (1) eliminate any allegations in the pleading that are merely legal conclusions, and (2) where there are well-pleaded factual allegations, "assume their veracity and ... determine whether they plausibly give rise to an entitlement to relief." Id. at 1950. "The issue to be decided when considering a motion to dismiss is not whether the claimant will ultimately prevail, but 'whether the claimant is entitled to offer evidence to support the claims.' Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by Davis v. Scheuer, 468 U.S. 183 (1984). The factual allegations in a complaint 'must be enough to raise a right to relief above the speculative level' and cannot 'merely create a suspicion of a legally cognizable right of action.'.... Stated differently, the complaint must allege enough facts "to raise a reasonable expectation that discovery will reveal evidence" supporting a claim. Bryant v. Norfolk S. R.R. 5:20-cv-00225-TES, M.D. Ga. December 22, 2020). The claims set out in the Plaintiff's Amended Complaint meet this standard.

II. ARGUMENT AND CITATION OF AUTHORITIES

As several of the arguments in the Defendants' Motion to Dismiss questioned what claims are being made against which Defendant, the Plaintiff filed an Amended Complaint, to clearly set out the claims being made against the City and the individual Defendants. The Amended Complaint also clarifies and explains the public nature of the matters of public concern upon which his First Amendment Speech claim is based and includes a cause of action under the Stored Communications Act.

A. COUNT I SETS OUT A VALID CLAIM UNDER THE GEORGIA WHISTLEBLOWER ACT

As this Court previously noted in Chaney v. Taylor County School District (CASE NO. 4:11-CV-142 (CDL) M.D. Ga. 2014), a Plaintiff may establish a *prima facie* case under the GWA "...by showing that (1) [the Defendant] is a "public employer" within the statutory definition; (2) [The Plaintiff] disclosed "a violation of or noncompliance with a law, rule, or regulation to either a supervisor or government agency;" (3) [The Plaintiff] "was then discharged, suspended, demoted, or suffered some other adverse employment decision by the public employer; and (4) there is some causal relation between (2) and (3)." Id p. 6. [Bracketed matter added]. The Plaintiff has done just that. He alleged in paragraph 30 that he is a "public employee" and in paragraph 31 of the Amended Complaint that the City is a "public employer." He alleged in paragraph 28 of the Amended Complaint that he retained an attorney who disclosed the violation of law to the City, (a "government agency" to whom a complaint can be made by law) and in paragraph 32 of Amended Complaint that he, personally, and his attorney had both advised the City of the violations of law by Defendants Watts and Propes. He alleges that he was discharged ("an adverse action") and alleges that there was a causal connection between the two. The Amended Complaint makes clear that the

GWA claim is only being pursued against the City, and not against the individual Defendants.

The Defendants improperly seek to limit by whom whistleblower complaints can be made and to whom they can be made. While the Amended Complaint alleges that both the Plaintiff and his attorney made complaints the Defendants, without any legal support seek to exclude any and all complaints made by an attorney, notwithstanding the general law that attorneys are agents for their clients and can act in their stead. Further, the Defendants argue that the Plaintiff's GWA claim should be dismissed because they were not made to "a supervisor", the explicit language in the code that "no public employer shall retaliate against a public employee for disclosing a violation of or noncompliance with a law rule or regulation to <u>either</u> a supervisor or <u>a government agency</u> ..." [O.C.G.A § 95-1-4 (d) (2) (emphasis added)]. The City of Monroe is a "government agency" as defined in the GWA, and a valid claim has been stated against it.

B. COUNT II SETS OUT A VALID CLAIM UNDER THE FIRST AMENDMENT FOR HIS PROTECTED SPEECH ON MATTERS OF PUBLIC CONCERN

When considering a claim by a public employee as to whether their speech was a motivating factor in their subsequent dismissal, the Court must first determine if the employee spoke as a public citizen on a matter of public concern by employing the balancing test articulated in Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). See also Bryson v. City of Waycross, 888 F.2d 1562 (11th Cir. 1989). The Plaintiff's claims in this regard are more fully set out in paragraphs 38-45 of the Amended Complaint. For a number of years, the Walton County community, including the City of Monroe, supported a program known as "Shop with a Cop." Originally started by the local Board of Realtors, the City of Monroe police department later became a major player in the program's operations. After citizen inquiries as to how the monies in the program were being used, Chief Owens spoke out in favor of, and was a major proponent of, creating a non-profit §501 (c)(3) corporation to run the program. Defendant Propes, on the other hand, strongly opposed this effort and advocated that the program remain under his control within the City. The Plaintiff contends that his efforts regarding the "Shop with a Cop" were a motivating factor in his dismissal because they were contrary to the position of Defendant Propes and adamantly opposed by him. While a fuller and more factual basis will be provided at trial or the summary judgment stage should the Defendants continue to challenge the public nature of the Plaintiff's comments, the Plaintiff submits that the facts as pled in the Amended Complaint are sufficient to state a claim.

The Defendants' reliance on Akins v. Fulton County, 420 F. 3d 1293 (11th Cir. 2005) is very much misplaced. In Akins, the Eleventh Circuit was reviewing the case after the trial court had granted summary judgment to a Defendant. While the case is not at that stage yet, the Akins opinion offers guidance, contrary to the Defendants' positions. The Court recognized that "the Constitution protects speech regarding government misconduct because it 'lies near the core of the First Amendment.' ... Though not an absolute right, ...the right to free speech is a fundamental one that warrants strict scrutiny" [emphasis added; cits omitted]

The Akins court continued:

"For speech to be protected as speech on a matter of public concern, 'it must relate to a matter of political, social, or other concern to the community.' quoting from Watkins v. Bowden, 105 F.3d 1344, 1353 (11th Cir.1997). As "it is well understood that "[a]n employee's speech will rarely be entirely private or entirely public,..." We take into account the content, form, and context of the speech to glean its "main thrust." If the "main thrust" of a public employee's speech is on a matter of public concern, then the speech is protected", quoting from Morgan v. Ford 6 F. 3d 750, 754-755 (11th Cir. 1993).The Plaintiff's comments were in a public meeting. The Plaintiff believes that the claim has been sufficiently set out in the complaint, and that due to the nature of the meeting and the status of the official, a reasonable jury could conclude that the "main thrust" of the meeting was not for private gain, but rather of public concern."

The next step, as delineated by the Atkins court is to… "Consider whether Plaintiff's speech is protected when measured against the government's interest in the efficient provisions of public services. Because Plaintiffs are public employees, and the government has an interests in preventing speech that is disruptive to the efficient rendering of public services, we balance the employee's and the government's interest as instructed in Pickering v. Board of Education to determine whether the speech merits protection. "See 391 U.S 563, 568, 88 S. Ct. 1731. This Court can and should find, as did the Eleventh Circuit in Akins, that… "Plaintiffs' interest in speech is high. Conversely, The City's interest in preventing this kind of speech is low. "Preventing Plaintiffs' speech would not seem to aid the City's interest in efficiency" in the least, nor did the Plaintiff's speech have any impact, especially or the "paramilitary" organization of the Fire and Police Departments.

C. COUNT III SETS OUT A VALID CLAIM FOR THE PLAINTIFF'S FREEDOM OF ASSOCIATION CLAIM

The Plaintiff had a professional and personal relationship with K.I. (Paragraph 11 of the Amended Complaint.) In response to the Defendants' request that the nature of the relationship be clarified, the Plaintiff has amended his Complaint to aver that the relationship was "intimate." The Defendants are wrong in their suggestion that such a relationship is not protected. In fact, just the opposite is true.

The Court's attention is invited to Judge Godbey's decision in the case of Robinson v. City of Darien, 362 F. Supp. 3d 1345 (S.D. Ga. 2019).

The Plaintiff in Robinson made several claims against his employer, the City of Darien, including a claim that the Defendants had violated his right to intimate association under the First Amendment. In Robinson, the Plaintiff was dating a married co-worker. In denying Summary Judgment to the Defendants, Judge Godbey held: "The right of intimate association ... is the freedom to choose to enter into and maintain certain intimate human relationships, and it is protected from undue government intrusion as a fundamental aspect of personal liberty." Gaines v. Wardynski, 871 F.3d 1203, 1212 (11th Cir. 2017) (citations omitted). This right is grounded in the First Amendment....To show that a public employer has impermissibly burdened or infringed a constitutional right, the employee must first demonstrate that the asserted right is protected by the Constitution—which ... the right to freedom, of intimate association is—and that he or she suffered adverse action for exercising the right." Gaines v. Wardynski, 871 F.3d 1203, 1212-13 (11th Cir. 2017). In a recent unpublished opinion involving a retaliation claim for exercising intimate association rights, the Eleventh Circuit has explained the standard here as requiring the Plaintiff to show that the "associational activity was a substantial or motivating factor in the employer's retaliatory action, and, if so, whether a preponderance of evidence supports the conclusion that the adverse action would not have occurred in the absence of the associational activities." Boudreaux v. McArtor, 681 F. App'x 800, 803 (11th Cir. 2017). The Court will use this characterization of the rule as this case is essentially a retaliation claim for the exercise of Plaintiff's associational rights.... Finally, if the employee makes this initial showing, then, the Court applies the Pickering balancing test from Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), which, "in the public employment context involves the weighing of the employee's interest in the exercise of a constitutional right against the employer's interest in maintaining an efficient workplace." See Shahar v. Bowers, 114 F.3d 1097, 1103, 1112 (11th Cir. 1997) (en banc) (Tjoflat, J., concurring) (applying Pickering in the intimate-association context)." [Bracketed matter added, footnotes omitted]

Judge Godbey continued: "The Eleventh Circuit has recognized a dating relationship as being an intimate association, Wilson v. Taylor, 733 F.2d 1539, 1544 (11th Cir. 1984), abrogated on other grounds as recognized in Scala v. City of Winter Park, 116 F.3d 1396, 1402 n.4 (11th Cir. 1997) ("We conclude that dating is a type of association which must be protected by the first amendment's freedom of association."); see also Moore v. Tolbert, 490 F. App'x 200, 203 (11th

Cir. 2012), and it has assumed for the sake of argument, without expressly deciding the issue, that an extramarital affair is protected under the First Amendment right to intimate association, see Starling v. Bd. Of Cty. Comm'rs, 602 F.3d 1257, 1261 (11th Cir. 2010). [footnotes omitted]

Here, the Associational right is a Constitutional right that is clearly established. The Plaintiff suffered an adverse action when he was terminated for the exercise of that right, which the Defendants cannot in good faith dispute, as Defendant Propes had first demanded Chief Owens' resignation because of the Plaintiff's association with K.I., which Propes characterized as "conduct unbecoming." (See Paragraph 22 of the Amended Complaint.) Prior to his termination while the Plaintiff in Robinson was having an affair with a co-worker, K.I. was not a co-worker, nor employed by the City and hence, less likely to negatively affect the workplace. Plaintiff has met his burden in asserting this cause of action and it is not subject to dismissal at this stage of the litigation.

D. COUNT IV STATES A CLAIM

The Stored Communications Act (hereinafter "SCA"), 18 U.S.C § § 2701 et seq, provides a private cause of action for accessing electronic communications without the legal authorization to do so. It does not pertain to, and is not limited to a physical building or structure a "facility" as the Defendants suggest. While most of the case law under the SCA pertains to the use of stored electronic communications in criminal cases, a private cause of action is specifically provided for in that act. In David A. Bodino, P.C v. MacMillan, 28 F. Supp. 3d 1170 (D. Colo. 2014), the suit centered on access to emails, with the Plaintiff alleging that the Defendant has violated the SCA by accessing to emails without authorization. In reviewing the claim, the Court gave the history of the SCA: The SCA was enacted, in part, 'to protect privacy interests in personal and proprietary information and to address the growing problem of unauthorized persons deliberately gaining access to… [private] electronic or wire communications." Gen Bd. of Global Ministries of the United Methodist Church v. Cablevision Lightpath, Inc., 2006 WL 3479332, at *3 (E.D.N.Y Nov. 30, 2006)… Although the Tenth Circuit has not addressed the boundaries of authorized access under the SCA, other jurisdictions interpret the SCA with reference to the common law doctrine of trespass. See Theofel v. Farey-Jones, 359 F.3d 1066, 1072-73 (9th Cir. 2004) ("Just as trespass protects those who rent space from commercial storages facility to hold sensitive documents, the Act protects users whose electronic communications are in electronic storage"); Cablevision Lightpath, 2006 WL 3479332, at *3 ("Computer hackers are defined as electronic trespassers.") "Such is the case with the claims against Defendants for their actions as "electronic trespassers." A claim under the SCA has been sufficiently pled.

E. COUNT V STATES A CLAIM AGAINST THE INDIVIDUAL DEFENDANTS

Count V is based on the violation of Georgia Law by Defendants Propes and Watts, as alleged in paragraph 32 of the Amended Complaint. The violation of O.C.G.A § 16-11-64, was also specifically complained of by the Plaintiff and his attorney.

The Defendants' suggestion that those two individuals are entitled to official immunity is specious. The acts alleged are intentional acts. They are not ministerial acts negligently performed. There are not acts done within the scope of their discretionary authority. The acts by Defendants Propes and Watts are malicious, a deliberate wrong. Official immunity provides no cloak under which the Defendants may hide.

F. COUNT VI ILLEGAL SEARCH AND SEIZURE

In Count VI, the Plaintiff has asserted a claim under 42 U.S.C. § 1983 for the Defendants actions in conducting an illegal search and seizure of the Apple watch to seize electronic messages to and from the Plaintiff that were contained in it. The Defendants have moved to dismiss the cause of action claiming that because the Plaintiff did not own the Apple watch, he does not have standing to challenge the search and seizure. On the contrary, he does have standing to challenge the illegality of this search and seizure, which was done without a warrant or Court Order and which violates the Plaintiff's Constitutional rights under the United States and Georgia Constitutions.

At the outset, it is important to remember the admonition by the Supreme Court in Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)—"Over and again this Court has emphasized that the mandate of the (Fourth) Amendment requires adherence to judicial processes,' and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." Katz at 357.

A possessory interest is not the deciding factor. The crucial question in making this determination is whether the person challenging the search and seizure had an expectation of privacy-- "The 'capacity to claim the protection of the Fourth Amendment depends on whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.' " United States v. Merricks, 572 Fed. Appx. 753, 756 (11th Cir. 2014) (unpublished decision) (quoting Minnesota v. Carter, 525 U.S. 83, 88 (1998)). "Accordingly, a defendant has standing to challenge a search and seizure only if the defendant 'had a legitimate expectation of privacy in the property when it was searched.' " Id. (quoting United States v. Gibson, 708 F.3d 1256, 1276 (11th Cir. 2013)). "The defendant bears the burden of establishing a legitimate expectation of privacy in the area searched." Id. at 757. "Making this determination involves a two-part inquiry: (1) 'whether the individual has manifested "a subjective expectation of privacy in the object of the challenged search[,]" . . . [and (2)] whether society is willing to recognize the individual's expectation of privacy as legitimate.' " United States v. Vega-Cervantes, No. 1:14-CR-00234-WSD-JFK, 2015 U.S. Dist. LEXIS 106602, at *18-19 (N.D. Ga. Apr. 17, 2015) (quoting United States v. Hastamorir, 881 F.2d 1551, 1559 (11th Cir. 1989)), adopted by 2015 U.S. Dist. LEXIS 106705 (N.D. Ga. Aug. 13, 2015).) (quoting Minnesota v. Carter, 525 U.S. 83, 88 (1998)). United States v. Dukes (Report and Recommendation CR -031-RWS-JCF, August 1, 2017 N.D. Ga. 2017). The Court in Dukes continued: "Courts assess on a case-by case basis the 'standing' of a particular person to challenge an intrusion by government officials into an area over which that person lacked primary control," as was the situation here. United States v. Bendelladj, No. 1:11-CR-557-AT-AJB, 2014 U.S. Dist. LEXIS 184100, at *14 (N.D. Ga. Dec. 29, 2014), adopted by 2015 U.S. Dist. LEXIS 75370 (N.D. Ga. June 10, 2015). "No one circumstance is talismanic to this inquiry." Id. And " '[w]hile property ownership is clearly a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated, property rights are neither the beginning nor the end of . . . [the] inquiry.' " Id. (quoting United States v. Salvucci, 448 U.S. 83, 92 (1980)).

It is important to note that the electronic devices that Chief Owens and K.I used were their personal devices. Chief Owens did not use his city-issued cell phone for their communications and recognizes that if he had used his city-issued cell phone he would not have a legitimate expectation of privacy. The Court should also recognize the consideration of cell phones and the privacy of electronic communications by the United States Supreme Court in <u>Carpenter v. United States,</u> 585 U.S. _____ (2018), the adoption by Congress of the Electronic Communications Privacy Act (ECPA), and the provisions of the Stored Communications Act (18 USC § § 2701 et seq. upon which Count IV is based. The cases cited by the Defendants are inapposite, and none even mention the protections afforded by the ECPA, by which Congress confirmed that the user has a legitimate expectation of privacy in their electronic communications.

The actions of the Defendants in illegally accessing the K.I 's Apple watch to obtain the text messages between the Plaintiff and K.I. constitute an illegal search and seizure in violation of the United States and Georgia Constitutions for which the Plaintiff may recover under § 1983.

G. DEFENDANTS PROPES AND WATTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY

The individual Defendants have laid claim to an entitlement to Qualified Immunity, which they hope to use to shield themselves from liability from the Plaintiff's § 1983 claims. As this court has previously noted, "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." Id. "When properly applied, it protects 'all but the plainly incompetent or those who knowingly violate the law.'" Ashcroft v. al-Kidd, 563 U.S. 731, 743 (2011) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)). Qualified immunity does not protect an officer who knew or reasonably should have known that his actions would violate the plaintiff's constitutional rights. Carter v. Butts Cty., 821 F.3d 1310, 1319 (11th Cir. 2016). Jones v. Barrett (Case No. 3:17-CV-13 (CDL) M.D. Ga. 2018). With no factual basis to do so, they claim that they were acting within the scope of their discretionary authority when they engaged in the acts alleged.

The Plaintiff disputes this claim. While acting under color of law, they were not acting within the scope of their authority. For instance, the evidence is expected to show that Defendants Watts and Propes were not acting within the scope of their discretionary authority when they traveled outside the city limits to assist in breaking into an Apple Watch belonging to a private individual. They claim, for instance that the laws involving the First Amendment freedom of speech and freedom of intimate association are not "clearly established," when they are. Watts especially knew or at least should have known that breaking into a private citizen's Apple watch to access electronic communications stored in it without a warrant or court order violated the Fourth Amendment. As Qualified Immunity protects "all but the plainly incompetent or those who intentionally violate the law," Ashcroft, supra, Qualified Immunity would not be provided to them under what the evidence is expected to show as to their intentional actions towards Chief Owens. "'The defense does not protect an official who "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury." Wood v. Strickland, 420 U.S. 308, 322 (1975)." Johnson v. Boyd (Civil Action No. 7:11-CV-88 (HL) M.D. Ga. 2019). When viewed in the light most favorable to the Plaintiff, the Defendants have not proven their entitlement to Qualified Immunity.

H. MONELL DOES NOT REQUIRE DISMISSAL

The Defendants argument about Monell would be more appropriate if the Motion was one for Summary Judgment. Under Monell v. Department of Social Services, 436 U.S 658 (1978), a municipality may be held liable under § 1983 when execution or implementation of a "policy or custom" causes the injury to the Plaintiff. Municipal liability may arise in the context of a termination when "the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered." Quinn v. Monroe County, 330 F 3d 1320 (11th Cir. 2003) Defendant Propes is both "decisionmaker" and "policymaker" and as such, his actions can form the basis for both his individual liability and the liability of the City of Monroe. In order to establish Propes' status, the Plaintiff submits that it would require, at a minimum, documents, or both documents and testimony by deposition to establish that Defendant Propes is both "decisionmaker and policymaker." This would be inappropriate in the context of a Motion to Dismiss and would require that Motion to be converted to be a Motion for Partial Summary Judgment. So that his status may be established, the Plaintiff requests that the Court deny the Motion to Dismiss, defer the Monell decision until the close of discovery when it can be considered on Motion for Summary Judgment or allow limited discovery on the issue (if the Defendants have a good faith basis for disputing Propes' status) and convert the Defendants Motion to Dismiss to a Motion for Partial Summary Judgment.

III. CONCLUSION

Based on the foregoing argument and authorities, the Plaintiff respectfully suggests that the Court deny the Defendants' Motion to Dismiss and that it lift the Stay of Discovery and allow the case to proceed.

Respectfully submitted, this 28th day of September, 2021.

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THE CITY OF MONROE,	*	
	*	
Defendants,	*	

CERTIFICATE OF SERVICE

This is to certify that I have this, 28th day of September, 2021 served a true and correct copy of the within and foregoing **Plaintiff's Brief in Opposition to Defendants' Motion to Dismiss Plaintiff's Amended Complaint** upon all parties and/or counsel of record via the Court's designated e-filling system and/or by placing a copy of same in the United States Mail with sufficient postage affixed thereon to:

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This 28th day of September, 2021.

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