Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS
No. SJC-11490

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR
BEAR STEARNS ASSET-BACKED SECURITIES TRUST 2004-AC4,
PLAINTIFFS-APPELLEE,

v.

EDNA SCHUMACHER AND JOHN SCHUMACHER,
DEFENDANTS-APPELLANTS.

ON APPEAL FROM A FINAL JUDGMENT OF THE HOUSING COURT DEPARTMENT
OF THE TRIAL COURT

**BRIEF FOR PRO SE *AMICUS CURIAE*,
IN SUPPORT OF DEFENDANTS-APPELLANTS,
EDNA SCHUMACHER AND JOHN SCHUMACHER**

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This Brief is submitted in support of the appellants Edna and John Schumacher pursuant to Mass. R. App. P. 17 and the Supreme Judicial Court's Announcement soliciting *amicus* briefs in this appeal. Grace Ross, Coordinator of The Massachusetts Alliance Against Predatory Lending submits this Brief on behalf of the homeowners and former homeowners of Massachusetts in accordance with her employer's mission.

STATEMENT OF INTEREST OF AMICUS CURIAE

Your amicus in this matter is filing a brief as a friend of the court.

Your pro se amicus is the Coordinator of the Mass Alliance Against Predatory Lending and as part of her responsibilities leads the team of advocates on behalf of homeowners across Massachusetts in state and municipal policy assessment and development to address and reverse the ongoing foreclosure crisis. Your amicus is also the lobbyist for the interests of the 70 plus member and supporting organizations of the Mass Alliance Against Predatory Lending and have been since the beginning of the crisis. No one could be more intimate with Commonwealth's statutorial

dependence upon strict legal compliance with our non-judicial foreclosure schema. Otherwise residents would be without basis for reliance on law in this critical area of their lives, their homes.

Your amicus brings over 25 years of policy analysis and development at the municipal, state, federal and international levels of government including in the area of housing and advocacy in Massachusetts District and Housing Courts on housing cases.

Your amicus believes this brief is desirable because of its reflection of your amicus' unique position straddling the ongoing legislative changes and discussions in the Massachusetts legislature and tracking of foreclosure settlements with the largest banks and legal arguments as they develop. This brief therefore the intersection of legislative history and to a more limited extent legal precedent in relation to standing in foreclosure matters in the Commonwealth as well as addresses the changes to Massachusetts' foreclosure statutes that directly impact the basis of the matter before you now.

As a long time policy analyst advocate around housing issues, Coordinator of the Massachusetts Alliance Against Predatory Lending whose mission is to address the foreclosure crisis in partnership with the homeowners, former homeowners and tenants in foreclosed properties, and a former tenant who was directly impacted by a foreclosure, your amicus has an interest in the instant action and therefore your amicus respectfully submits this brief for your review in this matter.

ISSUE TO BE ADDRESSED

Where others have addressed the relationship between the Right to Cure statute, G.L. Chapter 244, §35A and the statutory power of sale, this Brief will address the part of the question posed by the Court on the need for the strict compliance standard in regard to the statutory requirements of G.L. Chapter 244, §35A and the Commonwealth non-judicial statutory scheme.

SUMMARY OF FACTS AND PROCEDURAL HISTORY

This amicus curiae adopts the Statement of Facts set forth in the Appellants' Brief with two facts highlighted.

In compliance with Land Court procedures, the foreclosing entities filed not only a purported copy of the Right to Cure letter with Land Court but a mortgagee affidavit sworn to under pains and penalties of perjury as required by statute G.L. Chapter 244, §35A:

> (j) A copy of the notice required by this section and an affidavit demonstrating compliance with this section shall be filed by the mortgagee, or anyone holding thereunder, in any action or proceeding to foreclose on such residential real property.

According to the foreclosure deed recorded at Book 45537 page 278 at the Worcester Registry of Deeds, the Schumacher's mortgage was purportedly foreclosed by US Bank National Association, as Trustee for Bear Stearns Asset Backed Securities Trust 2004-AC4 and purchased by same, US Bank National Association, as Trustee for Bear Sterns Asset Backed Securities Trust 2004-AC4.

SUMMARY OF ARGUMENT

The Massachusetts mortgaging and foreclosure statutory scheme is constructed upon the core foundation of an honor code. As this court stated in *U.S. Bank Nat'l Assoc. v. Ibanez*, 458 Mass. 637 (2011), our non-judicial foreclosure procedure puts "awesome power" in the hands of a mortgagee and simply requires a reciprocity of strict compliance with the non-judicial requirements of our mortgaging and foreclosure process; as stated in the *Roche v. Farnsworth*, 106 Mass. 509 (1871) decision, strict compliance needs to be respected by a foreclosing entity or they ignore it "at their own peril".

In addition to the core reliance on an honor code, our foreclosure statutes also presuppose that (1) each party will act in its own best financial interest, that (2) the mortgagee – with special responsibility in a title theory state – holds their "interest in property" as a trust for the mortgagor and that (3) the natural course of business such as the light of day and accountability created by private third party purchasers will ensure a natural check and balance to protect the interests of all parties in a foreclosure sale.

In fact, where that common sense transparency and protection of the non-judicial foreclosure auction itself is lacking, a judicial theory of our foreclosure process has grown up and been consistently applied: where the mortgagee is also the purchaser and where the lack of arms lengthiness does not provide a measure of accountability and clarity to the foreclosure process itself, the courts have set a much higher bar; this has been expressed as "strictest care and utmost diligence" implying a near perfect crossing of the 't's and dotting of the 'i's for each piece step in the foreclosure process itself.

In the Schumacher case as in the majority of foreclosures since the beginning of this foreclosure crisis the mortgagee is, in fact, the purchaser. Tens of thousands of foreclosures since 2007 in our Commonwealth have relied upon the legality of "strictest" compliance with our foreclosure statutes. Since May of 2008, these have included reliance upon not only Right to Cure letters in accordance with G. L. Chapter 244, §35A but the veracity of the Mortgagee Affidavit in which foreclosing lenders have voluntarily all sworn to compliance with G.L. Chapter 244, §35A under pain and penalties of perjury *and have*

filed as a supposedly non-fraudulent document in every filing in our Land Court since enforcement of G. L. Chapter 244, §35A.

If foreclosing lenders seek to vitiate the underpinnings of the Commonwealth's statutory balancing of not requiring a judicial process in foreclosure in exchange for an adherence to a strict honor code and, in cases where the mortgagee and purchaser are the same party, a "strictest" level of compliance, this would serve as an equitable clarion call for shifting to a judicial foreclosure requirement for our state.

So long as lenders and foreclosing entities seek to avail themselves of a process in which the public's trust is invested in their honorable execution of lending and foreclosure legal requirements, lenders need to respect that and step up to the plate rather than break the expectations of the social contract expressed in a non-judicial process and then ask the courts to ignore their frequent non-compliance with well-thought out and clearly laid out requirements – *with which they have sworn compliance* – in our foreclosure statutes such as G.L. Chapter 244, §35A.

ARGUMENT

I. STRICT COMPLIANCE WITH ALL FORECLOSURE STATUTES IS MASSACHUSETT'S HISTORIC LEGAL RULE AND FUNDAMENTAL TO THE COMMONWEALTH'S NON-JUDICIAL SCHEME AND ITS ABILITY TO PROTECT THE RIGHTS OF HOMEOWNERS

Massachusetts is an honor code state in its treatment of mortgaging and foreclosure. As a non-judicial state, we depend the ethical and legal handling of the mortgage contract and if necessary its foreclosure.

The courts have not only restated once again in *Ibanez* and throughout the decisions related to foreclosures in this crisis that Massachusetts as a non-judicial state places "awesome power" in the hands of the foreclosing entity; for that reason, they must reach a strict level of compliance with our foreclosure laws. These include the statutory power of sale as it is incorporated in the mortgage instrument that forms the basis of the foreclosure.(As restated in *Ibanez*, "we adhere to the familiar rule that 'one who sells under a power [of sale] must follow strictly its terms. If he fails to do so there is no valid execution of the power, and the sale is wholly void.' *Moore v. Dick*, 187 Mass. 207, 211 (1905).)

As the Court pointed out in its 1977 decision in

Seppala & Aho Construction Co., Inc. V. Petersen, 373 Mass. 316, 367 N.E.2d 613 (1977) as part of a clear historic tradition:

> We have frequently stated that the basic rule of law applicable to the foreclosure of real estate mortgages is that "a mortgagee in exercising a power of sale in a mortgage must act in good faith and must use reasonable diligence to protect the interests of the mortgagor." *West-Roxbury Co-op. Bank v. Bowser*, 324 Mass. 489, 492, 87 N.E.2d 113, 115 (1949). *Manoog v. Miele*, 350 Mass. 204, 206, 213 N.E.2d 917 (1966). *Union Mkt. Nat'l Bank v. Derderian*, 318 Mass. 578, 581-582, 62 N.E.2d 661 (1945). *Sandler v. Silk*, 292 Mass. 493, 496, 198 N.E. 749 (1935). *Cambridge Sav. Bank v. Cronin*, 289 Mass. 379, 382, 194 N.E. 289 (1935).

The 2007 Right to Cure law, G.L. Chapter 244 §35A, is one of a series of laws passed in the last decade by the Commonwealth's legislature to try to protect homeowners in the present mortgage and foreclosure crisis. With its requirement of an affidavit under pain and penalties of perjury to prove compliance and the requirement that it be filed in the "first proceeding to foreclosure", it sought the clearest message to and strongest enforcement possible in a non-judicial foreclosure on the part of lenders. The Right to Cure law like other legislative efforts towards responsible lending and commercially reasonable avoidance of foreclosure is meaningless if the strongest non-

judicial compliance requirements fail to receive enforcement.

It has been held that the mortgagee holds the title in "trust" for the mortgagor. As the trustee, the lender is expected to care not only for its own interests but for the interests of the homeowner and, in fact, the surrounding communities and others impacted by the mortgagor-mortgagee relationship.

Massachusetts laws have all pointed in this direction from our incredibly powerful 93A Consumer Statute to more specific laws such as the Predatory Home Loan Practices Act. In this context, the Fremont decision pointed to the fundamental issue of predatory lending which was not only about subprime mortgages, but about lending money to make significant profits upfront and then expecting to make back the investment by foreclosing on the loan[1]. This is line with 93A

[1] From the *Fremont* preliminary injunction order, "It is noteworthy that the issuance of such a loan is deemed to be unfair under Chapter 93A even if the lender provides fair and complete disclosure of the terms of the loan and the borrower is fully informed of the risks he faces in accepting the loan. The unfairness, therefore, does not rest in deception but in the equities between the parties. See Swanson v. Bankers Life Co., 389 Mass. 345, 349 (1983) ("In Suffolk Civil Action -17- No. 07-4373 determining whether an act or practice is unfair, as opposed to deceptive, we must evaluate the equities between the parties").

Consumer protections that allow up to triple violations for misleading borrowers into signing contracts against their own interest. As stated in the preliminary Fremont order: "the unfairness of these loans rests in their vulnerability to foreclosure, not in the rate of interest charged or their lending terms."

Similarly, in its role as trustee of the mortgagor's interests and a commitment to non-predatory lending practices, the bank's reluctance to strictly comply with 244-35A seems counterproductive; the lender as well as the homeowner incurs fewer losses by avoiding foreclosure. The interests of the lender as well as the homeowner lie in the strict compliance with Massachusetts mortgaging and foreclosure laws.

Here the lender explicitly states that they did not comply with Massachusetts law. Instead of seeking to repair the relationship to which they have committed they seek to undermine the fundamental thrust of our honor code basis of our laws.

While the full impact on the honor code nature of our non-judicial foreclosure laws caused by a decision of this court not to enforce strict compliance is hard

to even imagine, the present foreclosure crisis provides a dangerous glimpse.

To provide just one example. With just the already acknowledged widespread violations of some legal requirements (such the predatory lending characteristics of subprime loans or non-compliance with HAMP loan modification procedures), Massachusetts homeowners are confronted with a dizzying array of possible venues for protective action.

Initial efforts of some focused on the Land Court active military service hearings; others attempted bankruptcy court or pre-foreclosure suits in Superior court, often finding their cases taken out of their hands and transferred to federal court; others have awaited action in Housing Court. Now simultaneous or sequential actions may take place in two or more venues at once with lack of clarity about where one action ends and another begins; confusing counterclaims of res judicata plague our courts.

The complexity of venues, jurisdictions and differing procedural opportunities is confusing long time legal practitioners let alone the homeowners seeking their fundamental right to their property.

To not enforce strict compliance will make the increasing number and complexity of cases now a walk in the park compared to undermining the enforceability of our entire non-judicial process. The only alternative which the lenders' associations have vigorously lobbied against will be judicial foreclosure. Perhaps, they should consider that alternative when they ask this court to ignore strict compliance and remove the check that balances our non-judicial foreclosure system.

II. EQUALLY THE HISTORIC LEGAL RULE OF THE COMMONWEALTH IS A HIGHTENED STANDARD OF STRICTEST COMPLIANCE WHEN MORTGAGEE AND PURCHASER ARE THE SAME PARTY THAT IS ALSO NECESSARY TO ENSURE THE RIGHTS OF HOMEOWNERS

In the Schumacher case as in so many foreclosures since this crisis began, questions about the validity of the foreclosure and exercising of the statutory power of sale (or foreclosure by entry) must reach an especially high bar in our non-judicial procedures as the property was sold and purchased by the same party.

As the seller and purchaser are the same party, the presumptive light of day shown on a normal transaction where the parties are arms length such as

if there is a third party purchaser at a foreclosure is lacking.

In the *Ibanez* decision, this Court also noted that there is a far higher standard that must be met when a foreclosure is instituted by the same entity that claims to be the purchaser according to procedures identified in the notices of auctions and claims to be the highest bidder at the auction itself. The Court clarified in *Note 16* that:

> "We recognize that a mortgage holder must not only act in strict compliance with its power of sale but must also "act in good faith and . . . use reasonable diligence to protect the interests of the mortgagor," and this responsibility is "more exacting" where the mortgage holder becomes the buyer at the foreclosure sale, as occurred here. See *Williams v. Resolution GGF Oy*, 417 Mass. 377, 382-383 (1994), quoting *Seppala & Aho Constr. Co. v. Petersen,* 373 Mass. 316, 320 (1977)."

Where the Plaintiff is the bank that buys for itself the property back at a foreclosure sale on which it claims to hold the mortgage - that is, where it claims to be the mortgagee - the Plaintiff has a duty of the "strictest good faith and the utmost diligence" to the borrower in conducting the foreclosure sale. In other words, the Plaintiff must do each and every thing in strict compliance with the

law in order to accomplish the foreclosure sale in order to protect the rights of the borrowers.

> "The mortgagee's duty is more exacting when it becomes the buyer of the property. "When a party who is intrusted with a power to sell attempts also to become the purchaser, he will be held to the strictest good faith and the utmost diligence for the protection of the rights of his principal." *Williams v. Resolution*, 417 Mass. at 383. Citing *Union Market Nat'l Bank of Watertown v. Derderian*, 318 Mass. 578, 582, 62N.E.2d 661 (1945), quoting *Montague v. Dawes*, 14 Allen 369, 373 (1867).

As the law recognizes that a third party will in the normal course of business defend its own interests, where the foreclosure sale includes no such light of day and no agent to defend the propriety of a sale or contract, the court requires a far higher and most exacting standard in the exercise of the "awesome power" to foreclose provided by our non-judicial scheme. See also *Sandler v. Silk*, 292 Mass. 493 (1935); *Union Market Nat. Bank of Watertown v. Derderian*, 318 Mass. 578 (1945); *Antonellis v. Weinstein*, 258 Mass. 323 (1927); *Feuer v. Capilowich*, 242 Mass. 560 (1922).

In *Roche v. Farnsworth*, 106 Mass. 509 (1871), the Court was even more explicit:

> The mortgagee sells under a power. The form used in the mortgage does not require him to

> notify the holder of the equity of the intended sale; but it is not an unreasonable strictness to require him to state what property he proposes to sell, and who proposes to make the sale, and who advertises it for sale. The general doctrine is, that a power must be executed in strict compliance with its terms. 4 Kent Com.(6th ed.) 377.
>
> This court has applied this doctrine to powers of sale contained in mortgages, and held that a bare literal compliance is not enough. *Montague v. Dawes*, 14 Allen, 369. There is the more reason for this, where the power is made to a mortgagee, who is interested merely for himself, and has opportunities for collusion and for taking unfair advantage of the mortgagor. In this case, the advertisement brought no bidders to the auction... It could hardly be called a sale at public auction.

Or as stated in *Duclersaint V. Federal National Mortgage Association*. 427 Mass. 809, 696 N.E.2d 536, "Mortgagee who purchases at foreclosure has no more rights than a third-party purchaser, and is bound to exercise the utmost good faith in making the foreclosure sale." And "That mortgagee was both buyer and seller of the property at foreclosure sale had no effect on its obligation to conform to its statutory duty....". Also *Boyajian v. Hart*, 292 Mass. 447 (1935); *Guarino v. Farley*, 360 Mass. 873 (1972).

In fact in the often quoted decision in *Moore v. Dick*, 187 Mass. 207 (1905), the Court made an admonishment that still stands and the Amicus – on behalf of the hundreds of stories of foreclosure she

has heard – believes is only more critical to uphold for the present homeowners in this crisis:

> "In *Smith v. Provin*, 4 Allen, 516, ... the sale was treated as a nullity. The manner in which the notice of the proposed sale shall be given is one of the important terms of the power, and a strict compliance with it is essential to the valid exercise of the power. It follows that the sale was not valid. The case stands as though there had been no attempt to foreclose, and the right of redemption is still outstanding. ... This is not a case where there has been a literal compliance with the power, so that the legal title to the land passed to the purchaser, but for some reason – as, for instance, a failure to act with due fidelity to the trust imposed by the power – there are equitable reasons why the sale should be set aside. ... In the present case there has been no valid sale in law, and the title to the land subject to the mortgages has not passed from the plaintiffs. They are still the owners of the fee.
> *A purchaser under a power of sale must see to it at his peril that there has been a compliance with the legal and essential terms of the power. If there has not been, then he is not protected, whether acting in good faith or not.* [emphasis added]

Not only strict compliance but in cases such as Schumacher's to not require the even higher standard of strictest compliance would be a dramatic departure from Massachusetts long standing and consistent legal position. This standard lays out a requirement that each and every legal requirement, essentially every 't' and 'i' must be crossed and dotted properly for such a foreclosure to overcome any possible

imperfections that would make it void as a matter of law. Without judicial oversight and not even the light of day provided by an arms-length purchaser at auction, only the strictest level of compliance protects the rights of the homeowner.

III. COMPLIANCE WITH G.L. C.244 §35A IS ALREADY SWORN TO BY FORECLOSING LENDERS AS PART OF G.L. C.244 §35A AND AFFIRMED IN THIS COURT'S RULING IN THE MATT CASE

In this court's first and, amicus believes, only reference to date to compliance with G. L. Chapter 244, § 35A, in its decision in *HSBC Bank USA, National Association v. Matt*, 464 Mass. 193 (2013), this Court stated in Footnote 7 and affirmed the plain language of the statute that:

> "The Land Court requires all parties filing a servicemember complaint to submit a mortgagee's affidavit. ... In the form affidavit required b the Land Court, plaintiffs must attest to being (1) the mortgagee, (2) one who holds under the mortgagee, or (3) one who is authorized to act by and on behalf of either the mortgagee or one holding under the mortgagee. Plaintiffs must also affirm that they have provided the mortgagor with notice of their right to cure a default, as required by G.L. c. 244, §35A. That statute, in turn provides that the right to cure notice must be filed by the mortgagee, or anyone holding thereunder. G.L. c. 244, 53A (j)."

Land Court and in all proceedings thereafter, parties need to be able to rely upon the

veracity of a sworn affidavit – especially, one explicitly by statute required to be made under pains and penalty of perjury.

Here the question is not the one well-addressed and answered in *HSBC Bank USA, National Association v. Galebach*, 2012 WL 3580281 (Mass.App.Div.)[2] that an affidavit must be based upon personal knowledge or covered by the business exemption, here the affidavit is clearly erroneous. US Bank has admitted as an uncontested fact that the Schumacher Right to Cure letter is not compliant with G.L. Chapter 244, § 35A and, therefore, whoever signed the affidavit accompanying this letter for submission at the Land Court either outright lied or had no personal

[2] A Rule 56 motion's supporting affidavit must "be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Mass. R. Civ. P. 56(e). " 'A useful rough test for evaluating the evidentiary sufficiency of any affidavit is simple: If the affiant were in court, testifying word-for-word in accordance with the contents of the affidavit, would the judge sustain an objection on any ground whatsoever? If the answer is "Yes" or even "Probably," the affidavit is at risk.' J.W. Smith & H.B. Zobel, Rules Practice § 56.6, at 281 (2d ed.2007). Another way to examine the admissibility of an affidavit is to ask whether the testimonial competency of the affiant is established through the circumstances. *T & S Wholesale, Inc. v. Kavlakian*, 1998 Mass. App. Div. 99, 100, citing *Stanton Indus., Inc. v. Columbus Mills, Inc.*, 4 Mass.App.Ct. 793, 794 (1976)."

knowledge. If, in fact, it was signed in the "normal course of business" as part of US Bank's standard procedures then the only possible conclusion is that US Bank consistently and regularly signs these required Mortgagee Affidavits in contravention of our state laws.

In terms of these affidavits, lowering the standard of compliance for the content of the Right to Cure letters as a basis for legitimate access to the power of sale would leave these affidavits still false. Literally tens of thousands who have depended upon the veracity of an affidavit legally required by our state and each submitted to our courts will have been misguided that affidavits in our honor-code process should not have been relied upon even when required to have been sworn to under pains and penalties of perjury.

If indeed laws are to be read in harmony, surely the legislative intent of requiring an affidavit explicitly to be signed under pains and penalties of perjury and filed in a court of law could not have more clearly underscored the critical nature of compliance with G.L. Chapter 244, § 35A.

CONCLUSION

In this case, the combination of the standard of "utmost diligence and strictest care" in a foreclosure initiated, bid and purchased at foreclosure by the same entity in combination with the centrality of compliance with statutes "relating to foreclosure" as a necessary component of the statutory power of sale, clearly undermine US Bank's request to ignore their non-compliance with G.L. Chapter 244, § 35A especially given the key role of identifying the mortgagee *and their own affidavit swearing compliance*.

In this case therefore and those like it, the residents of our state and our non-judicial foreclosure statutory scheme depends upon this Court's continuing requirement of strict compliance with our foreclosure statutes, including G.L. Chapter 244, § 35A. Without requiring compliance with the plain language of our state statutes, the people's representatives in our state government cannot fulfill their responsibility to represent and protect the interests of our state's residents.

In fact, the traditionally highest standard of "strictest care" should be upheld in cases like these where not only the honor code nature of our laws

require it so that foreclosing lenders can continue to be allowed to avail themselves of foreclosure without judicial oversight but the lack of the light of day provided by a third party purchaser is additionally lacking.

These challenges to the standing claimed by the bank for the purposes of bringing the foreclosure action must be assessed with the finest judicial lens. If the foreclosing entity cannot show "utmost diligence and strictest care" in complying with every step in the foreclosure process and every element of their right to exercise the power of sale then they should not be held to have sufficient standing to bring an action in Housing Court to evict the defendants.

Respectfully submitted,

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Dated: October 31, 2013

CERTIFICATE OF SERVICE

I hereby certify that I have served by hand a copy of the attached Amicus Brief, upon Attorneys Jeffrey S. Patterson and Morgan Nickerson at Morgan, Lewis, ~~Bockius~~, Offices, PC., Riley Scarborough 225 Franklin Street, 16th Fl, Boston, MA 02110; Elizabeth Benton and Max Weinstein of Harvard Legal Aide Bureau, 122 Boylston St. Jamaica Plain, MA 02130, Geoffry Walsh of National Consumer Law Center, 7 Winthrop Sq, 4th fl., Boston, ma 02110, and Allen Acosta, Sora J.Kim, Uri Y. Strauss of Community Legal Aid. Inc., 405 Main St, Worcester, MA 01608 on this 31st day of October, 2013.

As well as electronically upon Attorneys Elizabeth Benton, Max Weinstein, Jeffrey S. Patterson and Morgan Nickerson of Morgan, Lewis, Bockius, Geoffry Walsh, Allen Acosta, Sora J.Kim, Uri Y. Strauss

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