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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By:-----

324745
No. 324754

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

Thomas F. Merry,
Appellant,

v.

NORTHWEST TRUSTEE SERVICES, INC.;

and,

NATIONSTAR MORTGAGE LLC.

Respondents.

Brief of Appellant

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I. INTRODUCTION

This appeal involves the enforceability of a deed of trust under which Respondent NATIONSTAR MORTGAGE LLC. (“NATIONSTAR”) claims to be the successor beneficiary. The note (“NOTE”) (CP 11, Exhibit No.1) and deed of trust at issue (“WEIRICH DOT”) (CP 11, Exhibit No. 2) were purportedly executed on April 20, 2007 by Sharon Weirich (“Weirich”) as borrower, with Countrywide Home Loans, Inc. dba America’s Wholesale Lender (“COUNTRYWIDE”) as lender, and Landsafe Title of Washington (“LANDSAFE”) as trustee. The WEIRICH DOT purports to encumber real property commonly known as 8855 Josephine Ave., Dryden, Washington 98821 (“PROPERTY”). Defendant NORTHWEST TRUSTEE SERVICES, INC. (“NWTS”), claiming to have been substituted as trustee of the WEIRICH DOT under Appointment of Successor Trustee (CP 11, Exhibit No. 6), served Weirich with Notice of Default (CP 11, Exhibit No. 5), and recorded its Notice of Trustee’s Sale (CP 11, Exhibit No. 8) initiating non-judicial foreclosure upon Weirich’s default. Thomas F. Merry (“Merry”), Plaintiff, a junior lienholder (CP 11, Exhibit No. 7), brought his Complaint to Declare Lien Priority and Declare Deed of Trust

Void and Promissory Note Unenforceable prior to the consummation of the scheduled trustee's sale. Before answer by either defendant, NWTS held a trustee's sale where NATIONSTAR was the high bidder. NWTS and NATIONSTAR then answered Merry's complaint, and NWTS requested judgment on the pleadings on the grounds that the trustee's sale had occurred and Merry had waived whatever claims he might have had by not enjoining the trustee's sale. The trial court granted NWTS's request and dismissed Merry's claims and causes of action with prejudice (CP 22). Merry made Motion for Reconsideration which the trial court denied. Merry contends the trial court improperly dismissed his claims and causes of action in granting NWTS Motion for Judgment on the Pleadings.

Merry contends that documents of record in the Clerk's Papers establish that NATIONSTAR was an unlawful beneficiary, NWTS was an unlawful trustee, and their actions in regard to non-judicial foreclosure of the PROPERTY by trustee's sale and issuance of trustee's deed fail to meet the mandates of RCW Title 61.24 and are void. Mortgage Electronic Registration Systems, Inc. ("MERS"), while not holding the NOTE or the Weirich DOT, nor holding any interest therein, assigned the WEIRICH DOT, but not

the NOTE, to Bank of America, N.A. (“BOA”), on December 7, 2011, (CP 11, Exhibit 4), thus breaking the chain of title to NATIONSTAR by passing no interest in the NOTE nor WEIRICH DOT to BOA, making BOA an unlawful beneficiary, and any successors in interest to MERS unlawful beneficiaries.

II. ASSIGNMENTS OF ERROR

Merry makes the following assignments of error:

1. The trial court erred by granting NTWS’s request for Judgment on the Pleadings.

Issues related to assignments of error:

1. The standard of review.
2. Whether issues of material fact bar Judgment on the Pleadings for Defendants.
3. Whether the unlawful beneficiary standing of MERS renders any successor in interest to MERS’s an unlawful beneficiary.
4. Whether CP 11, Exhibit 4, transfers any ownership of the NOTE or WEIRICH DOT to BOA.
5. Whether the unlawful beneficiary standing of BOA renders NWTS an unlawful trustee.
6. Whether NWTS trustee’s sale of the PROPERTY was lawful.

7. Was NATIONSTAR a bona fide purchaser of the PROPERTY at the trustee's sale.
8. Whether the Note is a lost or stolen instrument.
9. Whether Merry waived his claims by not enjoining the trustee's sale.
10. The lien priority of the Merry DOT.

III. STATEMENT OF THE CASE

NATIONSTAR, NWTS, and Merry agree on many of the events underlying this dispute, and agree that the documents of record speak for themselves. The undisputed material facts in this matter include the following:

1. The NOTE was executed on April 20, 2007 by Weirich as borrower, and COUNTRYWIDE as lender, (CP 11, Exhibit No.1).
2. The WEIRICH DOT was executed on the same day as the NOTE and lists LANDSAFE as trustee and MERS as beneficiary "under this security instrument", (CP 11, Exhibit No. 2).
3. On December 7, 2011 MERS assigned the WEIRICH DOT to BOA. This assignment does not reference nor assign the NOTE, (CP 11, Exhibit 4).

4. Weirich defaulted on the NOTE, and on or about October 31, 2012, NWTS issued a Notice of Default to her in its capacity as agent for BOA, (CP 11, Exhibit No. 5).
5. This Notice of Default lists Federal National Mortgage Association (FANNIE MAE”) as owner of the NOTE, and BOA as service provider.
6. On November 14, 2012, BOA substituted NWTS as trustee of the WEIRICH DOT for LANDSAFE, (CP 11, Exhibit No 6).
7. On December 3, 2012, Merry recorded his deed of trust against the PROPERTY, (CP 11, Exhibit No. 7).
8. On December 14, 2012 NWTS recorded a Notice of Trustee’s Sale (CP 11, Exhibit No. 8) (“Trustee’s Sale No. 1”). The scheduled sale date was set at April 19, 2013, however this sale was not completed, the 120 day period for consummating a trustee’s sale under this notice of trustee’s sale expired. CP 11, pg. 3, Lines 9-11.
9. On June 6, 2013, after the expiration of the sale date for Trustee’s Sale No. 1, and while Weirich was still in default, BOA assigned its interest in the NOTE and WEIRICH DOT to NATIONSTAR, (CP 11, Exhibit No. 9).
10. On October 8, 2013, NWTS recorded an Amended Notice of Trustee’s Sale (CP 11, Exhibit No. 10) (“Trustee’s Sale No. 2”),

continuing the sale date well beyond the 120 statutory limit, from April 19, 2013 to November 15, 2013.

11. Merry served NWTS with summons and complaint on October 31, 2013, and NATIONSTAR with summons and complaint on November 8, 2013. Merry filed his summons and complaint on December 13, 2013.
12. The scheduled sale date for Trustee's Sale No. 2 was set at November 15, 2013. This sale date was continued to January 3, 2014, when the sale was consummated and a trustee's deed was recorded with the Chelan County Auditor, (CP 11, Exhibit No. 11). The named purchaser on this trustee's deed is NATIONSTAR, who directed NWTS to issue this trustee's deed directly to FANNIE MAE.
13. NWTS made its answer on January 8, 2014, 5 days after the conclusion of Trustee's Sale No. 2. NATIONSTAR made its answer on January 22, 2014.
14. On February 18, 2014 NWTS filed its CR12(c) Motion for Judgment on the Pleadings. Relying on *Frizzel v Murray*, 313 P.3d 1171 (2013), NWTS argued that since the trustee's sale had taken place and Merry had not restrained the sale, Merry waived

any claims he might have had, and thus lacked standing to bring his action.

15. The trial court granted Judgment on the Pleadings, dismissing Merry's claims and causes of action with prejudice, (CP 21). The court noted the *Frizzel* case made clear to the court that the Washington Supreme Court has interpreted the applicable laws to require a requisite to continuing or maintaining any suit to challenge non-judicial foreclosure the plaintiff must seek and obtain an order to restrain the sale. The order was entered on March 28, 2014.

16. Merry made Motion for Reconsideration with Brief in Support on April 7, 2014, arguing that *Frizzel* is distinguished from his case in that the defendants failed to follow the statutes, making his case more closely aligned to *Albice v. Premier Mortgage Services of Washington, Inc.*, 174 Wn.2d 560, 569, 276 P.3d 1277 (2012).

17. NWTS recorded a Response to Plaintiff's Motion for Reconsideration on April 14, 2014.

18. NATIONSTAR recorded its Opposition to Plaintiff's Motion for Reconsideration on April 16, 2014.

19. On May 1, 2014, the court denied Merry's Motion for Reconsideration. Because he failed to challenge the trustee's sale in a timely manner, the court found his arguments now were moot.

IV. LEGAL ARGUMENT

1. Standard for review.

This court reviews de novo a trial court's order for judgment on the pleadings. *Walker v Quality Loan Service Corp.*, Wn Apps, Div I, No. 65975-8-1 (Aug. 2013). "We examine the pleadings to determine whether the claimant can prove any set of facts, consistent with the complaint, which would entitle the claimant to relief. ...In making this determination, we presume the plaintiff's allegations are true and may consider hypothetical facts not included in the record." *Walker*.

2. Issues of material fact barring Judgment on the Pleadings for Defendants.

Merry, NWTs, and NATIONSTAR agree that the recorded public documents speak for themselves (CP 2, CP 8, CP 9). The parties disagree on what these documents say. These documents are attached to CP 11 and CP 15. Merry reads them to say:

1. MERS was never a lawful beneficiary holding the NOTE with authority to assign either the NOTE or WEIRICH DOT. See CP 11, Exhibit No. 2, and *Bain v. Metro Mortg. Grp., Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012);
2. CP 11, Exhibit 4 did not assign the NOTE to BOA, it only attempted to assign the WEIRICH DOT;
3. BOA was not assigned the promissory note and was thus never a lawful beneficiary, and thus lacked authority to appoint NWTS as substitute trustee. CP 11, Exhibit No 6 failed to substitute NWTS as trustee. “[T]he beneficiary shall appoint a trustee or a successor trustee. Only upon recording the appointment of a successor trustee in each county in which the deed of trust is recorded, the successor trustee shall be vested with all powers of an original trustee.” RCW 61.24.010(2); and see *Bain*.
4. NWTS was and is an unlawful trustee because it was appointed by BOA, an unlawful beneficiary. “[W]hen an unlawful beneficiary appoints a successor trustee, the putative trustee lacks the legal authority to record and serve a notice of trustee’s sale.” *Walker*.
5. NATIONSTAR received its interest in the NOTE from BOA while the NOTE was in default and a recorded notice of trustee’s sale,

Trustee's Sale No. 1, was pending, but had gone beyond the 120 day limit for conducting a trustee's sale, CP 11, pg 8, lines 9-11. RCW 61.24. 040(6). NATIONSTAR was under a duty of inquiry to know about this publicly recorded notice of trustee's sale and the Weirich's default at the time it took the instrument and is therefore not a "holder in due course": "[H]older in due course" means the holder of an instrument if:... The holder took the instrument... without notice that the instrument is overdue...". RCW 62A.3-302(a)(2)(iii). "[W]hile many defenses would not run against a holder in due course, they could against a holder who was not in due course." *Bain* ;

6. NATIONSTAR - the alleged beneficiary, had knowledge that would give it notice of defects in the trustee's sale and defects in title, had knowledge that it was not holder in due course of the NOTE, had knowledge that NWTS was not a lawful trustee, or at very least had information or knowledge sufficient to put it on inquiry notice and find that NWTS was not a lawful trustee - was the successful bidder at Trustee's Sale No. 2, see CP 11, Exhibit No. 11, and thus is not a bona fide purchaser without knowledge.

"A bona fide purchaser" is one who purchases property without actual or constructive knowledge of another's claim of right to, or equity in, the property, and who pays

valuable consideration." *Albice v. Premier Mortg. Servs. of Wash., Inc.*, 174 Wn.2d 560, 573, 276 P.3d 1277 (2012). If the purchaser has knowledge or information that would cause an ordinarily prudent person to inquire further, and if such inquiry, reasonably diligently pursued, would lead to discovery of title defects or of equitable rights of others regarding the property, then the purchaser has constructive knowledge of everything the inquiry would have revealed. *Albice*, 276 P.3d at 1284. In considering whether a person is a bona fide purchaser, we ask whether the surrounding events created a duty of inquiry and, if so, whether the purchaser satisfied that duty. *Albice*, 276 P.3d at 1284. In this determination, the purchaser's knowledge and experience with real estate is to be considered. *Albice*, 276 P.3d at 1284." *Collings v City First Mortg. Servs., LLC.*, 175 Wn. App. 589 (2013);

7. NATIONSTAR directed NWTS to issue the trustee's deed to FANNIE MAE as grantee, (CP 11, Exhibit 11). FANNIE MAE was previously identified as the owner of the NOTE in NWTS Notice of Default (CP 11, Exhibit No. 5), which would disqualify FANNIE MAE as a bona fide purchaser by reason of knowledge that NATIONSTAR was not a bona fide purchaser. *Collings*;

The above referenced documents in evidence, speaking for themselves, leave disputed issues of material fact, which, presuming they are true, and consistent with Merry's complaint, if proven, would entitle Merry to relief and preclude dismissal of his claims by judgment on the pleadings.

3. The unlawful beneficiary standing of MERS renders any successor in interest to MERS's an unlawful beneficiary.

As noted above, no documents in evidence show MERS to be a bona fide encumbrancer or purchaser of the NOTE and WEIRICH DOT. Documents in evidence show MERS was an unlawful beneficiary when it assigned the DOT to BOA. MERS did not assign the NOTE to BOA. Successors in interest to MERS did not acquire bona fide encumbrancer or purchaser status even if they hold the original note because they are on public notice that MERS had no interest in the NOTE or WEIRICH DOT. *Collings*.

4. CP 11, Exhibit 4, does not transfer any ownership of the NOTE or WEIRICH DOT to BOA.

This public document does not reference the NOTE, does not assign the NOTE to BOA, and because MERS is not a lawful beneficiary per *Bain*, does not transfer title of the NOTE or WEIRICH DOT to BOA.

5. The unlawful beneficiary standing of BOA renders NWTS an unlawful trustee.

The Notice of Default, CP 11, Exhibit No. 5, lists FANNIE MAE as the owner of the NOTE and BOA as the service provider. This document makes it obvious that BOA was not authorized to assign the NOTE or foreclose on the WEIRICH DOT. BOA was thus without standing or authority to substitute NWTS as trustee making NWTS an unlawful trustee. *Walker*.

6. NWTS trustee's sale of the PROPERTY was unlawful.

Merry alleges in his complaint that the recorded public documents in the chain of title between COUNTRYWIDE and NATIONSTAR establish NATIONSTAR to be an unlawful beneficiary and NWTS an unlawful trustee, making Trustee's Sale No. 2 void. "[W]hen an unlawful beneficiary appoints a successor trustee, the putative trustee lacks the legal authority to record and service a notice of trustee's sale." *Rucker v. Novastar Mortgage, Inc.*, Wash. App. No. 67770-5-I (2013), citing *Walker*. "...[V]acation of a foreclosure sale is required where a trustee has conducted the sale without statutory authority." *Walker*. The recorded public documents in evidence support this finding.

Merry further alleges that NWTS violated the Deed of Trust Act by recording Trustee's Sale No. 1 then, without continuing nor

discontinuing said sale within the statutory limits, completing the sale 259 days past the maximum set forth by RCW 61.24.040(6), thus divesting the trustee of statutory authority, rendering the Trustee's Sale No. 2 invalid and voiding the trustee's deed (CP 11, Exhibit No. 11). *Walker*.

Even if NATIONSTAR was a holder in due course of the note, NWTS exceeded its statutory authority to conduct a trustee's sale beyond the scheduled sale date of Trustee's Sale No. 1 by not discontinuing or continuing said trustee's sale prior to or on the day of the date set by the notice, thus making Trustee's Sale No. 2 unlawful. The proper remedy is vacation of the sale and trustee's deed. *Rucker, Albice*. If the nonjudicial foreclosure does not follow the statute, "...[T]he nonjudicial foreclosure sale shall be vacated." *Schroeder v. Excelsior Management Group, LLC.*, 177 Wn.2d 94, 297 P.3d 677 (2013).

7. NATIONSTAR was NOT a bona fide purchaser of the PROPERTY at the Trustee's Sale No. 2.

See IV.2.6 above.

8. FANNIE MAE is not a bona fide purchaser of the PROPERTY.

“A “bona fide purchaser” is one who purchases property without actual or constructive knowledge of another's claim of right to, or equity in, the property, and who pays valuable consideration...If the purchaser has knowledge or information that would cause an ordinarily prudent person to inquire further, and if such inquiry, reasonably diligently pursued, would lead to discovery of title defects or of equitable rights of others regarding the property, then the purchaser has constructive knowledge of everything the inquiry would have revealed... In considering whether a person is a bona fide purchaser, we ask whether the surrounding events created a duty of inquiry and, if so, whether the purchaser satisfied that duty.” *Collings*.

FANNIE MAE is listed on the Notice of Default, CP 11, Exhibit No. 5, as “owner of the note” and thus had knowledge of the default and had inquiry duty that would have revealed the unlawful events leading up to NWTS’s issuing its trustee’s deed, CP 11, Exhibit 11, not to high bidder NATIONSTAR, but to FANNIE MAE, the owner of the NOTE. FANNIE MAE does not fall within the legal definition of a bona fide purchaser of the PROPERTY.

9. The Note is a lost or stolen instrument.

The NOTE copy, CP 11, Exhibit No. 1, is not alleged in a declaration or affidavit to be a certified copy of the original in the possession of anyone, including NATIONSTAR. There is no evidence in the record that the original NOTE is held by anyone, including NATIONSTAR. Merry has asserted in his complaint that

NATIONSTAR is not a holder in due course of the NOTE and that the note copy contains an illegible indorsement. This illegible endorsement makes the endorsement defective because any party to whom it is presented would have to resort to facts extrinsic of the instrument to ascertain whether the purported endorsement of the instrument was made by the named corporate payee.

“[Note holder] Appellant has failed to sustain his burden of proof on the vital issue of whether the note was endorsed by the payee so as to constitute the transferee a holder in due course. A holder in due course of negotiable paper enjoys certain privileges and immunities which the transferee of an unendorsed order instrument does not have. A holder in due course of such paper need look no further than the instrument itself to ascertain how much, when, and from whom a sum can be demanded. On the note involved in this case, however, any party to whom it is presented would have to resort to facts extrinsic of the instrument to ascertain whether the purported endorsement of the instrument was made by the named corporate payee. In our opinion, the endorsement is defective as a corporate endorsement, and since a proper endorsement is lacking, appellant is not a holder in due course.” *Glaser v. Connell*, 47 Wn.2d 622 (1955).

“[W]hile many defenses would not run against a holder in due course, they could against a holder who was not in due course.” *Bain*.

NATIONSTAR lacks standing as a holder in due course to foreclose on the NOTE because of an insufficient endorsement on the NOTE. The endorsement thereon is blurred so that the identity of the

corporate officer signing cannot be deciphered. The undecipherable endorsement creates question as to the authenticity of the endorsement, and transfer alone, without proper endorsement, leaves the instrument unnegotiated.

"One who is the holder of negotiable paper payable to his order and who transfers it for value without indorsing it, vests in the transferee such title as he had, and in addition to this, the transferee acquires the right to have the transferor's indorsement. Thus such an instrument payable to the order of A may be effectually transferred by mere delivery, and the assignee takes the legal title and may sue in his own name subject to defenses of prior parties. The negotiation takes effect as of the time when the indorsement is actually made when it is necessary to determine whether the transferee is a holder in due course, thus the indorsement is required to constitute the transferee a holder in due course. And an intention by both parties to have the paper indorsed is not sufficient, as it is the act of indorsement, not the intention, which negotiates the instrument." *Glaser*.

NATIONSTAR's actions in foreclosing the NOTE non-judicially have exceeded its statutory authority and are invalid. *Walker*. NATIONSTAR has not introduced evidence beyond that it is the holder of a photocopy of the NOTE. COUNTRYWIDE is no longer an active artificial person. NATIONSTAR has no one to approach for a valid endorsement on the NOTE, if NATIONSTAR in fact holds the defectively endorsed NOTE. If NATIONSTAR does hold the NOTE it is unenforceable by NATIONSTAR without sufficient endorsement, and NATIONSTAR cannot show a clear chain

of title to it. The NOTE is a lost or stolen instrument in the hands of NATIONSTAR, and the maker is not obliged to pay:

“An obligor is not obliged to pay the instrument if the person seeking enforcement of the instrument does not have rights of a holder in due course and the obligor proves that the instrument is a lost or stolen instrument.” RCW 62A.3-305(c)

However, this issue may be moot in the face of the unlawful trustee’s sale and trustee’s deed to FANNIE MAE.

10. Merry did not waive his claims by not restraining the trustee’s sale.

Merry did not waive his claims by not restraining the trustee’s sale because the beneficiary and trustee failed to follow statutory procedures and/or have no authority under the statute. “A trustee in a nonjudicial foreclosure may not exceed the authority vested by that statute. As we have recently held, the borrower may not grant a trustee powers the trustee does not have by contracting around provisions in the deed of trust statute.” *Schoeder*. The proper remedy is vacation of the trustee’s sale. *Rucker, Albice, Schroeder*.

NWTS and NATIONSTAR contend, outside the pleadings, that Merry waived his claims by not restraining the trustee’s sale. The trial court agreed, relying on *Frizzel* to grant NWTS’s Motion for

Judgment on the Pleadings. However, *Frizzel* cites *Albice* and reaffirms there is no waiver when, as Merry claims, the statute is violated:

“Following Plein [*Plien v. Lackey*, 149 Wn.2d 214, 229, 67 P.3d 1061 (2003)], this court considered in *Albice* whether the respondent waived claims relating to the sale where presale remedies were not pursued. We distinguished Plein and held there was no waiver (in *Albice*). ...[T]he sale took place outside the statutory time period.” *Frizzel*

11. Merry’s lien priority moves into first position.

The trial court stated: “[The] Court did not grant plaintiff’s motion in the first place because plaintiff’s lien did not have first priority.” CP 31. This is in error. When the WEIRICH DOT is ruled unenforceable or invalid for any reason, Merry’s deed of trust moves into first position and has priority.

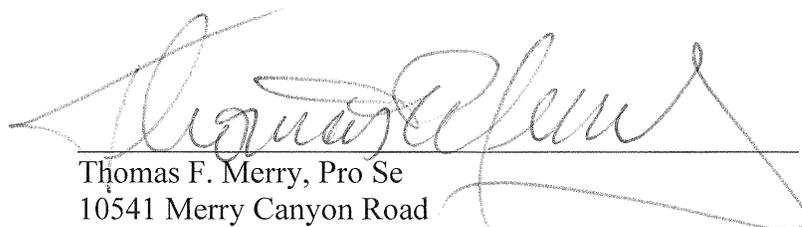
“When a party's authority to act is prescribed by a statute and the statute includes time limits, as under RCW 61.24.040(6), failure to act within that time violates the statute and divests the party of statutory authority. **Without statutory authority, any action taken is invalid.**” *Albice*, cited with approval in *Walker*. (bold added)

V. CONCLUSION

For the reasons stated above, Merry requests that the trial court’s grant of judgment on the pleadings be reversed and that this

matter be remanded to the trial court for further action consistent with that ruling.

RESPECTFULLY SUBMITTED this 22st day of July, 2014.

A handwritten signature in cursive script, appearing to read "Thomas F. Merry", is written over a horizontal line. The signature is fluid and extends slightly above and below the line.

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DECLARATION OF SERVICE

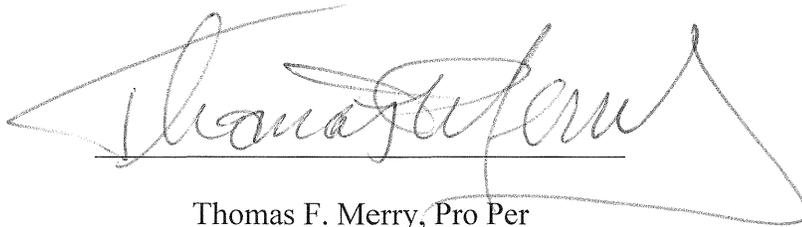
Thomas F. Merry, under penalty of perjury states:

That on July 22, 2014 I placed in the US Mail a copy of Brief of Appellant, Postage Prepaid, with sufficient first class postage affixed thereto to ensure delivery to the parties listed below. Also on this date I sent a copy of same by facsimile to the same parties at the corresponding numbers listed under their address.

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Signed this 22th day of July, 2014 at Peshastin, Washington.



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