

IN THE CIRCUIT COURT OF THE \_\_\_\_\_ JUDICIAL CIRCUIT  
OF FLORIDA, IN AND FOR \_\_\_\_\_ COUNTY

GREEN TREE SERVICING, LLC,

CASE No. 05-2011-CA-0XXXXX

PLAINTIFF,

v.

JOHN DOE, JANE DOE, et. al.,

DEFENDANTS.

\_\_\_\_\_ /

**DEFENDANT JOHN DOE AND JANE DOE'S  
MOTION TO DISMISS**

Comes now, Defendants, John Doe and Jane Doe (hereinafter, "defendants") and pursuant to Rule 2.515 of the Florida Rules of Judicial Administration and Rule 1.140 of the Florida Rules of Civil Procedure, hereby moves the Court to Order the case dismissed due to: lack of proper verification; lack of standing; lack of notice of breach and acceleration; lack of notice of assignment, sale and transfer of servicing; lack of notice of transfer of ownership of mortgage loan and failure to comply with 15 U.S.C. 1641(g)(1); and failure to attach required documents to the complaint. As grounds therefore, Defendants offers the following:

**I  
STANDARD ON MOTION TO DISMISS**

1. Florida Rules of Civil Procedure section 1.140(b) provides in part:

How Presented. Every defense in law or fact to a claim for relief in a pleading shall be asserted in the responsive pleading, if one is required, but the following defenses may be made by motion at the option of the pleader: (1) lack of

jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a cause of action, and (7) failure to join indispensable parties.

2. The function of a motion to dismiss a complaint is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. *Connolly v. Sebco, Inc.*, 89 So. 2d 482 (Fla. 1956). For the purpose of a motion to dismiss, the Court is required to accept as true all well-pleaded allegations of the complaint. *Brown v. First Federal Savings and Loan*, 160 So.2d 556 (Fla. 1st DCA 1964). However, the Court is not required to accept as true allegations that are inconsistent with law. *Brown*, 160 So. 2d at 563. (“Semantics cannot be employed for the purpose of refuting facts clearly shown to exist or used to create a fictional relationship, one that otherwise would have no existence in the law.”) The pleading must be construed against the pleader in determining whether the necessary allegations have been stated. *Matthews v. Matthews*, 122 So. 2d 571 (Fla. 2d DCA 1960).

## II BASIS FOR MOTION TO DISMISS

### A. LACK OF PROPER VERIFICATION

3. The standard for verification of a residential mortgage foreclosure complaint is at a highest standard, requiring truth, whereas verification of a “document” may be made on the lesser standard requiring that it only be “true and correct to the best of my knowledge and belief.”

4. The complaint in this action contains the following statement “Under penalty of perjury, I declare that I have read the foregoing Mortgage Foreclosure Complaint, and the facts alleged

therein are true and correct to the best of my knowledge and belief.” Verification on information or belief is not permitted by law in foreclosure actions on residential real estate. <sup>1</sup>

5. On February 11, 2010 by the Florida Supreme Court, pursuant to In re: Amendments to the Florida Rules of Civil Procedure, No. SC09-1579, (Feb. 11, 2010) attached hereto an incorporated as Exhibit “A”, amended Fla. R. Civ. Pro. 1.110(b) to read

[w]hen filing an action for foreclosure of a mortgage on residential real property **the complaint shall be verified**. When verification of a document is required, the document shall include an oath, affirmation, or the following statement: Under penalty of perjury, I declare that I have read the foregoing, and the facts alleged therein are true and correct to the best of my knowledge and belief. *Bold emphasis added.*

6. On December 9, 2010, the Supreme Court clarified its position in Case No. SC09-1579, “In re: Amendments to the Florida Rules of Civil Procedure-Form (Final Judgment of Foreclosure)” and stated:

Along with the amendments to form 1.996(a), rule 1.110(b) was amended to require verification of mortgage foreclosure complaints involving residential real property. One of the primary purposes of this amendment was to ensure that the allegations in the complaint are accurate. In light of recent reports of alleged document fraud and forgery in mortgage foreclosure cases, this new requirement is particularly important. (At pages 2 and 3)

7. Here, the attempted verification of the complaint fails to meet the strict requirements of Fla. R. Civ. P. 1.110(b). The verification is qualified by the use of the provision: “to the best of my knowledge and belief.” This is the lower standard reserved for documents and not allowed on the Complaint itself.

8. Here, the verification fails as the verifying individual is not employed by Federal National Mortgage Association (hereafter “FannieMae”) and therefore lacks capacity to verify

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<sup>1</sup> Henry Trawick makes clear that “verification” means that the verifying party attests that the facts alleged in the complaint are true. Trawicks Florida Practice and Procedure Sec. 6:14 (Verification). *Beverette v. Graham*, 131 So. 826, 827 (Fla. 1931); *Burns v. Burns*, 174 So.2d 432, 434 (Fla. 2d DCA 1965).

when or if FannieMae purchased or owns the subject note and mortgage. The Plaintiff claims that FannieMae (hereinafter “FannieMae”) is the owner of the note and that default occurred on April 1, 2010. (Complaint, paragraphs 5 & 9) The Plaintiff is entirely incapable of verifying the date, time, location, purpose, or duration of the ownership interest in the subject note and mortgage as by its own admission, it does not own the subject note. Therefore, this Complaint must require a verification of both the alleged owner of the note - FannieMae - and the alleged servicer - the Plaintiff. Wherefore, the verification must be struck and the complaint dismissed.

9. Another reason this verification should be struck and the complaint dismissed is that the plaintiff claims that it is the servicer of the loan and the holder of the note yet fails to file a copy of any document evidencing any servicing relationship with FannieMae . Plaintiff does not even attach to its complaint any document supporting its claim that FannieMae owns the subject note and mortgage. In fact, the Plaintiff fails to allege that either it or FannieMae owns the mortgage. There is no evidence before this court in support of the Plaintiff’s conclusory allegation that it is the servicer and authorized to either act on behalf of FannieMae or or even authorized to verify this complaint on behalf of FannieMae. <sup>2</sup>

## **B. LACK OF STANDING**

10. When exhibits are inconsistent with the Plaintiff’s allegations of material fact as to who the real party in interest is, such allegations cancel each other out. Fladell v. Palm Beach County

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<sup>2</sup> This case is a clear example of why why strict verification is important in residential foreclosure actions and why this case must be dismissed. That’s demonstrated by the two assignments of mortgage in the official records of XXXXX County relating to this mortgage loan which plaintiff did not attach to its complaint. (Exhibit 1 and 2) These assignments show that Plaintiff does not own the mortgage. Without verification, defendants right of redemption of the mortgage is illegally impaired. “If the conveyance is a mortgage, the right of redemption is an inseparable incident, which cannot be restrained or clogged by agreement.” MacArthur v. North Palm Beach Utilities, Inc. 202 So.2d 181, 188 (Fla. 1967) (Ervin, J., dissenting) (citation omitted). See generally 37 Fla.Jur.2d Mortgages and Deeds of Trust section 111 (1982). “The doctrine against clogging the equity of redemption of a mortgage estate is an old English doctrine brought forward in this Country to prevent lenders taking an inequitable advantage of distraught borrowers. The doctrine would prevent the mortgagee from taking through any trick, scheme or contrivance the equity of redemption from the borrower.” *id.* at 202 So.2d at 185-86.

Canvassing Board, 772 So.2d 1240 (Fla. 2000); Greenwald v. Triple D Properties, Inc., 424 So. 2d 185, 187 (Fla. 4th DCA 1983); Costa Bella Development Corp. v. Costa Development Corp., 441 So. 2d 1114 (Fla. 3rd DCA 1983). Florida Rule of Civil Procedure 1.130(b) provides in pertinent part: “Any exhibit attached to a pleading shall be considered a part thereof for all purposes.”

11. The Florida Supreme Court stated that the "determination of standing to sue concerns a court's exercise of [subject matter] jurisdiction to hear and decide the cause pled by the parties." Rogers & Ford Constr. Corp. v. Carlandia Corp., 626 So.2d 1350, 1352 (Fla.1993) The jurisdictional question can be raised at any time and can never be time-barred. DeClaire v. Yohanan, 453 So. 2d 375 (Fla. 1984).

12. “Standing has been equated with jurisdiction of the subject matter of litigation and has been held subject to the same rules, one of which is that jurisdiction of the subject matter (thus standing to bring suit) cannot be conferred by consent.” Askew v. Hold the Bulkhead Save Our Bays, Inc., 269 So.2d 696, 698 (Fla. 2d DCA 1972); (See also Silver Star Citizen's Committee v. City Council of Orlando, 194 So.2d 681, 682 (Fla.4th DCA1967).) Standing requires that the party prosecuting the action have a sufficient stake in the outcome and that the party bringing the claim be recognized in the law as being a real party in interest entitled to bring the claim.

13. In Kahn v. Bank of America, N.A., 5D10-3288 (5th DCA, April 8, 2011), the Court stated: The proper party with standing to foreclose a note and mortgage is the holder of the note and mortgage or the holder’s representative. See Taylor v. Deutsche Bank Nat. Trust. Co., 44 So. 3d 618, 622 (Fla. 5th DCA 2010); BAC Funding Consortium Inc. ISAOA/ATIMA v. Jean-Jacques, 28 So. 3d 936, 938 (Fla. 2d DCA 2010).

14. Florida Rule of Civil Procedure 1.210(a) provides in pertinent part:

Every action may be prosecuted in the name of the real party in interest, but a personal representative, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute may sue in that person’s own name without joining the party for whose benefit the action is brought.

15. The Plaintiff asserts it is entitled to enforce the note as a holder. Official Records of the XXXXX County Clerk of Courts tells a different story.

16. Plaintiff attached to its complaint a copy of a note which contains two undated, unauthenticated indorsements. The uppermost indorsement is from the original lender, Suntrust Mortgage, Inc. (hereinafter "Suntrust") and is signed by Deborah P. Ellis, Vice President of Suntrust. This indorsement contains a stamp made in different typeface making the note specifically payable to Litton Loan Servicing, L.P. (hereinafter "Litton").

17. The bottom-most indorsement - purportedly from Litton - is indorsed in blank, and is signed by Elizabeth Willard as AVP for Litton.

18. On January 31, 2011, an Assignment of Mortgage (AOM) was recorded in BOOK XXXX, PAGE XXXX in the Official Records of XXXXX County, Florida. This AOM, executed on January 26, 2011 by Regina Monts, alleged Secretary of Litton, evidences an attempt to sell the subject mortgage to the Plaintiff, Green Tree Servicing, LLC. However, on January 26, 2011 no AOM was either executed or recorded assigning the Mortgage to Litton from Mortgage Electronic Registration System Inc. (MERS). In fact, no AOM existed purporting to assign any interest in the subject mortgage to Litton until May 27, 2011. That AOM was purportedly executed on May 27, 2011 by the same Elizabeth Willard acting as an Assistant Secretary for MERS assigning said mortgage to her own employer, Litton. This document was backdated to January 15, 2011 and recorded on June 27, 2011 in BOOK XXXX, PAGE XXXX in the Official Records of XXXXX County, Florida.

19. The Plaintiff used Ms. Willard to assign the mortgage to itself from Litton in January 2011. Having realized that Litton had no ownership interest in either the note or mortgage in January 2011, the Plaintiff attempted to use Ms. Willard in June of 2011 to assign MERS' interest

in the mortgage to her own employer - Litton - long after Litton attempted to assign away its imaginary interest.

20. One cannot sell what one does not own. Thus the January 2011 AOM was ineffective to pass any interest in the Mortgage from Litton to the Plaintiff. However, assuming *arguendo* that the AOM executed by Ms. Willard in June of 2011 is not a fraudulent assignment of another corporation's asset to her own employer, then the Plaintiff lacks standing as the interest in the mortgage remains with Litton until a proper AOM is executed.

21. Therefore, this Plaintiff lacks standing to bring this action, the complaint must be dismissed, the action dismissed and attorneys fees awarded to the Defendant.

### **C. LACK OF NOTICE OF BREACH AND ACCELERATION**

22. Based on section 22 of the Mortgage and the definition of "lender" set forth on page I of the Mortgage, a default notice from the "lender" along with the opportunity to cure is a condition precedent prior to filing this complaint. *Wroblewski v American Home Mortgage Servicing, Inc.*, 68 So.3d. 431, (5th DCA Sept. 9, 2011); *Konsulian v. Busey Bank N.A.*, No. 2D10-2163 (Fla. 2nd DCA June 1, 2011) *Amedas v. Brown*, 505 So.2d 1091 (Fla. 2nd DCA 1987); *Dykes v Trustbank Savings. F.S.B.*, 567 So.2d 958 (Fla. 2nd DCA 1990); *Gomez v. American Savings and Loan Ass'n*, 515 So.2d 301 (Fla, 4th DCA 1987); *Rashid v. Newberry Federal Savings and Loan Association*, 502 So.2d 1316 (Fla. 3rd DCA 1987); *Rashid v. Newberry Federal Savings and Loan Association*, 526 So.2d 772 (Fla. 3rd DCA 1988).

23. The Plaintiff claims that all conditions precedent to the acceleration of the Note have occurred. (Complaint, p. 2, para. 6). The Plaintiff failed to allege any factual allegations in support of this legal conclusion. Again, a party does not state a cause of action by merely reciting legal conclusions or tracking statutory language, but must include factual allegations. *Ginsberg v. Lennar Fla. Holdings, Inc.*, 645 So. 2D 490, 501 (Fla. 3d DCA 1994); *Becerra v. Equity Imports*, 551 So.2d 486, 487-88 (Fla. 3d DCA 1989).

24. Paragraph 6 of the note provides that acceleration may not occur prior to the defendant receiving written notice:

If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal which has not been paid and all the interest that I owe on that amount. **That date must be at least 30 days after the date on which the notice is mailed to me** or delivered by other means. (Emphasis added)

25. Paragraph 15 of the mortgage attached to the complaint provides that “All notices given by Borrower or Lender in connection with this Security Instrument must be in writing.” “. . . given to Borrower when mailed by first class mail or when actually delivered to Borrower’s notice address if sent by other means.” Paragraph 18 of the mortgage provides that if the Lender chooses to accelerate the loan, “. . . Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument.” Paragraph 20 of the mortgage provides:

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party’s actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action.

26. Paragraph 22 of the mortgage attached to the complaint provides in relevant part:

Lender shall give notice to Borrower prior to acceleration following Borrower’s breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify (a) the default, (b) the action required to cure the default, (c) **a date, not less than 30 days from the date the notice is given to Borrower**, by which the default must be cured, and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument, foreclosure by judicial proceeding and sale of the property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in

the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. [emphasis added]

27. The mortgage provides that before a foreclosure action can be commenced, the defendant is entitled to 30 days prior written notice of both breach and acceleration. The plaintiff failed to allege that it provided notice of breach and notice of acceleration, nor did it attach copies of that written notice to its complaint.

28. Plaintiff utterly failed to comply with the express terms of the mortgage and Note which require notice of breach and acceleration be provided prior to the institution of suit, wherefore, the complaint should be dismissed.

**D. LACK OF NOTICE OF ASSIGNMENT, SALE AND TRANSFER**

29. If plaintiff's complaint is to be taken as true, Litton sold its servicing interests to Green Tree Servicing, LLC. Plaintiff does not allege compliance with 24 C.F.R. 3500.21 (d), which requires that written notice of a change in the servicer be provided to the defendant as follows:

Notices of Transfer; loan servicing. (1) Requirement for notice. (i) Except as provided in this paragraph (d)(1)(i) or paragraph (d)(1)(ii) of this section, each transferor servicer and transferee servicer of any mortgage servicing loan shall deliver to the borrower a written Notice of Transfer, containing the information described in paragraph (d)(3) of this section, of any assignment, sale, or transfer of the servicing of the loan. The following transfers are not considered an assignment, sale, or transfer of mortgage loan servicing for purposes of this requirement if there is no change in the payee, address to which payment must be delivered, account number, or amount of payment due: (A) Transfers between affiliates; (B) Transfers resulting from mergers or acquisitions of servicers or subservicers; and (C) Transfers between master servicers, where the subservicer remains the same.

.....  
(2) Time of notice. (i) Except as provided in paragraph (d)(2)(ii) of this section: (A) The transferor servicer shall deliver the Notice of Transfer to the borrower not less than 15 days before the effective date of the transfer of the servicing of the mortgage servicing loan; (B) The transferee servicer shall deliver the Notice of Transfer to the borrower not more than 15 days after the effective date of the transfer; and (C) The transferor and transferee servicers may combine their notices into one notice, which shall be delivered to the borrower not less than 15

days before the effective date of the transfer of the servicing of the mortgage servicing loan. (ii) The Notice of Transfer shall be delivered to the borrower by the transferor servicer or the transferee servicer not more than 30 days after the effective date of the transfer of the servicing of the mortgage servicing loan in any case in which the transfer of servicing is preceded by:(A) Termination of the contract for servicing the loan for cause; (B) Commencement of proceedings for bankruptcy of the servicer; or (C) Commencement of proceedings by the Federal Deposit Insurance . . .

30. Failure to comply with the provisions of 24 C.F.R. 3500.21 (d) requires the complaint be dismissed.

**E. FAILURE OF CREDITOR TO COMPLY WITH NOTICE OF TRANSFER OF OWNERSHIP OF THE SUBJECT PROMISSORY NOTE IN VIOLATION OF 15 U.S.C. 1641(g)(1)**

31. United States law provides:

[N]ot later than 30 days after the date on which a mortgage loan is sold or otherwise transferred or assigned to a third party, the creditor that is the new owner or assignee of the debt shall notify the borrower in writing of such transfer.” 15 U.S.C. 1641(g)(1).

32. The Plaintiff failed to allege that it complied with the provisions of 15 U.S.C. 1641(g)(1), wherefore, the complaint must be dismissed.

**F. FAILURE TO ATTACH DOCUMENTS TO COMPLAINT**

33. Florida Rule of Civil Procedure 1.130(a) provides in pertinent part: “All bonds, notes, bills of exchange, contracts, accounts, or documents upon which action may be brought or defense made, or a copy thereof or a copy of the portions thereof material to the pleadings, shall be incorporated in or attached to the pleading.”

34. A motion to dismiss for failure to state a cause of action must be granted if the document on which the complaint is based is not attached. See Walters v. Ocean Gate Phase I Condo, 925 So 2d 440, 443-44 (Fla 5th DCA 2006); Safeco Ins. Co. of America v. Ware, 401 So.2d 1129 (Fla. 4th DCA 1981). A party who makes a claim or defense based on a written instrument must

attach a copy of the instrument to the pleading in which the claim or defense is raised. Jeff-Ray Corp. v. Jacobson, 566 So.2d 885 (Fla. 4th DCA 1990).

35. As servicer, plaintiff is acting as the attorney-in-fact for FannieMae. This status requires a written power of attorney and compliance with Florida Statutes section 709.08(2), which provides:

WHO MAY SERVE AS ATTORNEY IN FACT.--The attorney in fact must be a natural person who is 18 years of age or older and is of sound mind, or a financial institution, as defined in chapter 655, with trust powers, having a place of business in this state and authorized to conduct trust business in this state. A not-for-profit corporation, organized for charitable or religious purposes in this state, which has qualified as a court-appointed guardian prior to January 1, 1996, and which is a tax-exempt organization under 26 U.S.C. s. 501(c)(3), may also act as an attorney in fact. Notwithstanding any contrary clause in the written power of attorney, no assets of the principal may be used for the benefit of the corporate attorney in fact, or its officers or directors.

36. The plaintiff failed to attach to the complaint the following required documents showing:

- i. it is the servicer for FannieMae (Kahn case and F.S. 709.08(2));
- ii. that FannieMae owns and holds the note (Kahn case);
- iii. that FannieMae owns and holds the mortgage (Kahn case);
- iv. that plaintiff sent written notice of breach to defendant (per mortgage);
- v. that plaintiff sent written notice of acceleration to defendant (per note and mortgage);
- vi. that transfer of servicing occurred (24 C.F.R. 3500.21(d));
- vii. that a sale of the mortgage loan occurred (15 U.S.C. 1641(g)(1)).

37. The failure to attach these documents to the complaint requires dismissal of the complaint.

### III

#### **DEBT VALIDATION DEMAND AND CEASE CONTACT DEMAND PURSUANT TO 15 U.S.C. §1692, ET. SEQ. AND FLORIDA STATUTES 559.55, ET. SEQ.**

38. Defendants demand that Plaintiff validate the debt pursuant to federal and state law and cease contacting defendants except through the undersigned counsel.

## IV

### DEFENDANT'S ALTERNATIVE MOTION FOR MORE DEFINITE STATEMENT

39. Florida Rules of Civil Procedure 1.140(e) states:

Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, that party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just. "Unlike the pleading requirements in the federal courts where notice pleading is the prevailing standard, the Florida Rules of Civil Procedure require fact pleading." Ranger Contru. v. Martin Cos., 881 So. 2d 677, 680 (Fla. 5th DCA 2004).

40. "In order to state a cause of action, a complaint must allege sufficient ultimate facts to show that the pleader is entitled to relief." Med. & Benefits Plan v. Lago, 867 So. 2d 1184 (Fla. 5th DCA 2004).

41. "At the outset of a suit, litigants must state their pleadings with sufficient particularity for a defense to be prepared." Horowitz v. Laske, 885 So. 2d 169, 173 (Fla. 5th DCA 2003) (citing Arky, Freed, Stearns, Watson, Greer Weaver & Harris, P.A. v. Bowmar Instrument Corp., 537 So. 2d 561 (Fla. 1988)).

42. The Plaintiff's complaint is merely the recitation of legal conclusion and statutory language. Defendants respectfully pray this Court strike the Plaintiff's pleading, require the Plaintiff to plead sufficient facts in support of its legal conclusions that: 1) it is the servicer for FannieMae, 2) it is authorized to verify the purchase of the subject note and mortgage by FannieMae, 3) when, where and for what purpose FannieMae purchased an ownership interest in the subject note and mortgage, 4) and that all conditions precedent to the filing of this foreclosure action were fulfilled. Further, the Defendants pray this court order the Plaintiff to file documents with its Amended Complaint which could evidence the Plaintiff's assertion that it

is entitled and authorized to bring this action on behalf of the true owner and holder of the note and mortgage as well as copies of all documents evidencing compliance with all conditions precedent.

**V  
CONCLUSION**

43. WHEREFORE, defendants hereby move the Court to Order the Complaint dismissed, the action dismissed without prejudice and award reasonable attorneys fees to the defendant.

Respectfully Submitted,

December 2, 2011

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XXXXXXXXXXXXXXXXXX

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing is being furnished by U.S. mail on the 2nd day of December, 2011, to XXXXXXXXXXXXX.

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