BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
1341 "G" STREET NORTHWEST
SUITE 600
WASHINGTON, D.C. 20005

In the Matter of:	
AG-AIR FLYING SERVICES, INC.;	Docket No. : FIFRA-10-2005-0065 (Judge Biro)
Respondent.	Appeal Docket No: TBA
	CERTIFICATE OF SERVICE (RE: NOTICE OF APPEAL AND APPELLANT BRIEF)

CERTIFICATE OF SERVICE

J.J. SANDLIN hereby declares under penalty of perjury as follows:

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1. On Wednesday, March 1, 2006 I caused to be served the original and five true copies of Respondent's Notice of Appeal and Appellant's Brief upon: the Environmental Appeals Board, at 1341 "G" Street Northwest, suite 600, Washington, D.C. 2005 [telephone (202) 233-0122], together with one copy upon the Regional Hearing Clerk at U.S. Environmental Protection Agency, Region 10, 1200 Sixth Avenue, ORC-158, Seattle, Washington 98101, together with one copy to the Presiding Judge, the Honorable Susan L. Biro, Chief Administrative Law Judge, U.S. EPA, Mail Code 1900L, 1200 Pennsylvania Avenue N.W., Washington, D.C. 20460. Fax: 202-565-0044, and together with one copy to Attorney Richard Mednick, Associate Regional Counsel, Office of Regional Counsel, U.S. Environmental Protection Agency, Region 10, 1200 Sixth Avenue, ORC-158, Seattle, Washington 98101.

2. I am legal counsel for Respondent AG AIR FLYING SERVICE, INC., and I am authorized to provide this certificate of service, being a licensed member of the Washington State Bar Association, and admitted to practice before the U.S. District Court, Eastern District of Washington.

3. I served true copies of the above named documents by (a) emailing to all parties of record pursuant to the email addresses as provided this counsel, and by

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	APPELLANT BRIEF, FILED PURSUANT TO 40 C.F.R. Part 22, Subpart F, Sec 22.30

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III. STATEMENT OF THE ISSUES

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3.2 *If so, what should be the appropriate action?*

3.3 *Should this case be reassigned to another presiding judge?*

3.4 *Should a protective order be issued prohibiting extrajudicial discussions between the presiding judge and staff regarding communications with the parties'*

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counsel, and prohibiting communications between the presiding judge and any party regarding the substance of negotiations?

IV. STATEMENT OF THE NATURE OF THE CASE

This is an enforcement action against the Respondent, for ostensibly applying the pesticide *Warrior* in violation of its label, during aerial application on a cornfield, where there are allegations that the aerial application also included application over a vineyard located north of the cornfield. The major evidence to be presented by the EPA is the landowner's testimony, and testimony regarding the claim that an active ingredient in *Warrior* was found upon selected grape plants from the vineyard (there had been a claim that a chicken had been killed, but it was apparently abandoned in trial preparation).

The Respondent, AG AIR FLYING SERVICE INC., an agricultural aerial application crop dusting business, vigorously opposes the claim made by EPA, and in its defense offers (a) the testimony of the crop duster pilot who actually flew the aircraft, and who is knowledgeable about the actual application of the pesticide and the prevailing winds, and the impossibility that any such pesticide was applied to the vineyard located north of the target cornfield, (b) the testimony of the assistant who checked the pesticide loads and the mixtures used, (c) the testimony of an expert witness, Carlton Layne, who is a contracted instructor for enforcement

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issues for EPA, and who is a former EPA enforcement officer, whose testimony refutes any possible claims that there has been a FIFRA violation in this instance, (d) various photographs and other documents that refute the EPA's claims, and (e) a SATLOC aircraft track that utilizes GPS data to record the actual releases of *Warrior* upon the cornfield and that refutes any claim of Warrior release over the vineyard. It is the EPA's follow-up requests for additional data from the SATLOC records, and the delay in providing that information, that prompted the presiding judge to issue a default order. It should be noted that the EPA's original claim was that there was an illegal application of *Warrior* to the off-site vineyard, but after the evidence was exchanged the EPA apparently amended its claims and now claims that the *Warrior* drifted upon the vineyard, which flies in the face of the evidence of the prevailing winds and other supporting defensive evidence.

V. FACTS RELEVANT TO THE ISSUES FOR REVIEW

On August 19, 2005 the Respondent delivered its Prehearing Statement, a copy of which is attached in Part IX of this memorandum, in the Appendix. On November 22, 2005 the EPA moved the presiding judge for additional discovery, relating to data for the Respondent's SATLOC evidence provided in August, 2005. The motion was unopposed, and the presiding judge issued an order on December 19, 2005 that required the Respondent to provide additional data regarding the

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SATLOC track not later than January 6, 2006. Pursuant to a previously planned shut-down of the Sandlin Law Firm, the Respondent's counsel closed his law offices for the period December 20, 2005 through January 23, 2006, for vacation and for personal health reasons. The Respondent did not comply with the deadline for the discovery of the additional data requested regarding the SATLOC track. EPA filed a motion for default upon shortened notice, apparently on January 20, 2006, the same date that the Respondent answered the discovery requests regarding the SATLOC computer evidence. The EPA remained silent about the completeness of the requested discovery, and therefore Respondent's counsel engaged EPA's counsel in a telephonic conference regarding what, if any, further discovery was needed. The computer controlling the SATLOC information was in DOS computer language, and the Respondent had experienced difficulty in downloading the information in a readable format, and IT consultants had been retained in order to retrieve that information, but it was not available by January 27, 2006.

On December 19, 2005 Judge Biro ordered EPA as follows: "Complainant shall file a report of the status of settlement efforts on or before **January 20, 2006."** This was in consonance with it previous rulings, all of which called for the EPA to advise the presiding judge as to the status of settlement efforts, in itself a benign request. But EPA took advantage of this invitation to share with the

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presiding judge the EPA's characterization of the status of negotiations, and the differing positions of the parties in those negotiations for settlement, and this was inappropriate and probably contributed to the apparent bias the presiding judge expressed in her formal order of default issued on January 27, 2006.

In the January 27, 2006 order of default, Judge Biro referenced conversations between her legal staff and this counsel, an obvious reference to extrajudicial discussions that should have been discarded and never brought into the presiding judge's default decision, without at least affording the Respondent and this counsel to share with the judge the facts discussed with the judge's legal counsel, Attorney Lisa Knight. Clearly, there has been a difficult personality clash between Attorney Knight and Attorney Sandlin, and none of those discussions should have been shared with Judge Biro, since they did not relate to the material issues before the presiding judge, and were not intended to be shared with Judge Biro, since they related to scheduling and other matters that were not substantive matters in this case. Consider, for example, the following footnote issued by Judge Biro in her default order:

"It is the understanding of this Tribunal that despite Complainant's request, Respondent's counsel has indicated an unwillingness to stipulate to anything in regard to this case. [*Incorrect. Respondent was unwilling to stipulate to material evidentiary matters where the chain of custody of samples, the proper sampling techniques, the proper laboratory testing methods, and other material aspects of*

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the EPA case were unclear and unproved, lacked proper authentication and/or foundation, and were unreliable for admissibility. But none of this was ever considered by Judge Biro, because Judge Biro received these extrajudicial communications from Attorney Lisa Knight, her biased law clerk, and from EPA's counsel, apparently under the guise of reporting upon the status of settlement negotiations.] Furthermore, Respondent has not presented a cooperative attitude in communications with this Tribunal's staff." Order of Default, January 27, 2006, fn. 11 at p. 8. *See*, Appendix at A-38 .

With all due respect to Judge Biro, this counsel is dumbfounded that any judge would issue such conclusions without at least having given the accused attorney an opportunity to be heard. Frankly, the personality clash between Attorney Lisa Knight and this counsel was obviously quite severe, but this counsel believed both of us could be professional and work around that clash. Obviously not. I consider Ms. Lisa Knight to be over-bearing, officious, and frustrated that she is a law clerk and not a trial lawyer or a judge, and very dangerous because of the potential for her abuse of her position where she can influence a presiding judge upon the outcome of a case, without allowing the victimized litigant or attorney an opportunity to be heard. Judge Biro's statements in her default order prove this counsel's assertions that extrajudicial conversations materially influenced the outcome of this case, and this appellant Tribunal should reverse Judge Biro's decision and reassign this case for evidentiary hearing upon the

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EPA's original complaint[1].

Also, Judge Biro referenced an email from Respondent's counsel to EPA's counsel, and concluded from the text of that message between counsel that Respondent's counsel evidenced "a disrespect as well as a disregard for the procedural rules of this Tribunal.[2]" *See* fn. 8 of order of default at p. 6. This is simply more evidence of the apparent bias Judge Biro has developed against the Respondent's counsel. Note, also, that Judge Biro ordered that Respondent's answer to the motion for default, issued on January 24, 2006, be filed on January 26, 2006. Respondent exercised good faith and diligence, but could not comply with such a short timeline (Judge Biro noted that even though the Respondent's objections to default were *mailed* on January 26, 2006 the documents were not received on that date, and that the email of those documents on January 27, 2006

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[1] "Drift" was not an issue in the original EPA complaint, which has not been amended, and therefore the SATLOC track, although helpful to prove the Respondent is innocent of these claimed violations, is not necessary for a complete adjudication in this instance. If required, the SATLOC evidence proposed by the Respondent could be stricken from the record. This would have been a reasonable solution for Judge Biro to use in balancing the parties' litigation interests.

[2] Perhaps the most frustrating part of this entire matter is Judge Biro's conclusion that this counsel either disrespects or disregards the Tribunal's procedural rules. This counsel has never met Judge Biro, has never had an opportunity to present a case in a contested hearing before her, and she obviously has been adversely influenced by her conversations with the one-sided reports from Attorney Lisa Knight, her law clerk, and the prejudicial settlement status reports issued to her by EPA's counsel, without ever having a hearing on such a serious issue.

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was insufficient). Based upon Judge Biro's analysis, this counsel would have had to receive the January 24, 2006 order for shortened time and compliance with the January 26, 2006 with virtually no time to respond. But EPA and the Respondent had stipulated to a continuance of the February 14, 2006 contested hearing date, so what was the rush for the filing of the Respondent's objections to default? Judge Biro simply was cleaning her docket, and her failure to grant the stipulated continuance (after Attorney Lisa Knight had suggested that such a stipulation should be filed by the parties) played into her decision to cut off any reasonable response time for the Respondent to file and serve its objections to default in this instance.

Judge Biro had before her a signed stipulation for a continuance of the February 14, 2006, while she was considering the EPA's motion for default during the week of January 23, 2006. This counsel was just returning to full-time legal practice on January 23, 2006, and was engaged in various hearings that week. There was a window of time of less than one day to respond to the EPA's motion for default, during a hectic, heavily scheduled work week, and there simply was insufficient time to adequately respond, and this shortened timeline was unnecessary since the parties had stipulated to a continuance of the contested evidentiary hearing scheduled for February 14, 2006.

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VI. ARGUMENT ON ISSUES PRESENTED

6.1 **The proper sanction:** The appropriate sanction, if any, was to either grant an extension of time for both parties to develop the technical evidence available from the SATLOC computer, after it has been retrieved from the DOS software, or alternatively simply strike the SATLOC evidence that was being offered by the Respondent. There was no factual basis, free from bias or other unfair influences, that fairly supports the extraordinary sanction of default and dismissal of the Respondent's defenses in this action.

This is not a case where there is no explanation as to why the discovery was not sufficiently completed, it is not a case where there was blatant refusal to participate in discovery, and it should be noted that there was never a conference initiated by the EPA counsel for discussion of the needed items to satisfy the discovery request. EPA simply filed its motion for default, upon shortened timelines. Consider the Ninth Circuit's extraordinary sanction imposed upon Ferdinand and Imelda Marcos:

"Even if we assume, without deciding, that Appellants have appealed the discovery sanction,[*fn5] the district court did not abuse its discretion. The sanction imposed is one explicitly authorized by Rule 37 for failure to appear at a deposition, and Appellants do not contest their failure to appear. For a sanction this severe, we have required that the party's failure must have been willful or in bad faith. *Commodity Futures Trading Comm'n*, 67 F.3d at 771. *The fact that Appellants have made no attempt to explain or excuse their failure to appear*

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suggests that the failure was deliberate. We conclude that the district court did not err in deeming the allegations of Hilao's motions for contempt to be established." *Hilao v. Estate of Ferdinand Marcos*, 103 F.3d 762, 763 (9th Cir. 12/17/1996) (emphasis added).

But even with the egregious discovery violations in the *Marcos* case, the federal court did not grant the extraordinary sanction of dismissal of the defendant's case in chief, but simply ruled that the "designated facts shall be taken as established." This in itself was a severe sanction, but it is far overshadowed by the oppressive sanction issued in the instant case before this Tribunal, *where there is no evidence of deliberate, bad faith violation of discovery orders.*

6.2 **The proper sanction:** The SATLOC GPS track was offered as evidence by the Respondent. The EPA really has no defense against this evidence, and the allegations that expert witness Bird could somehow turn the evidence around to be favorable to EPA is speculation, and would be based upon a "drift" analysis that was not part of the original complaint, and for which the prevailing winds shall out trump any speculative conclusions offered by EPA. The EPA moved for default based upon the delay of receipt of the technical data from the SATLOC computer; thus, if there must be a sanction it should be either the extension of time for submission of the technical data (which must be retrieved by computer technicians at great expense to the Respondent), or alternatively, the SATLOC evidence should

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simply be stricken from the record, and the matter should proceed to trial upon the merits.

6.3 **Reassignment is appropriate:** By examination of the order of default, it is clear that Judge Biro is biased against the Respondent and/or its counsel:

a. Judge Biro has encouraged the Respondent to sue its counsel for legal malpractice. *Order of Default*, at pages 9-10 ("*If an attorney's conduct falls substantially below what is reasonable in the circumstances, the client's remedy against the attorney is a suit for malpractice*").

b. Judge Biro, through her staff law clerk, Attorney Lisa Knight, encouraged the parties to stipulate to a continuance of the February 14, 2006 contested hearing. But after receipt of the signed stipulation for the continuance, Judge Biro elected to ignore the stipulation for continuance and used the impending contested hearing date of February 14, 2006 as a basis to implement the severe sanction of dismissal of the Respondent's case in chief.

c. Taking Respondent's written arguments against default out of context, Judge Biro concluded Respondent's counsel disrespected and disregarded the procedural rules of her Tribunal. But see the comments, within context:

"...Based upon all of the above, the EPA should not be granted a default order, and if there is additional evidence needed to reach the substance of these claims and defenses, then Judge Biro should grant both parties the opportunity to

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discover the evidence. Thus far, the respondent has been working the laboring oar, here, and has been encumbered with procedural hocus-pocus when the parties simply need to settle down and try this case on the facts. The facts support a claim that there is no violation of FIFRA here. Respondent should NOT be found liable for the violation alleged in the *Complaint*, and this Court should dismiss these claims against the Respondent, *sui generis*.

The EPA has had this discovery, and still seeks a default order, obviously because the EPA understands its substantive evidence shall not support a finding there was a FIFRA violation here..." *Respondent's Memorandum, Opposing Default*, dated January 26, 2006.

Judge Biro's focus upon Respondent's counsel, and her determination that this counsel is disrespectful, is of great concern to this counsel on several levels: (1) it is an affront to this counsel's professional reputation, and is not supported by the years of professional reputation developed in trial practice, and it is certainly not this counsel's intention to disrespect Judge Biro or this legal process; (2) it causes the Respondent to be concerned that the Appearance of Fairness Doctrine is being violated here, and that the Respondent shall not be afforded a fair hearing before Judge Biro because of her disdain for Respondent's counsel; (3) it places Respondent and its counsel in a potential conflict of interest position, that requires independent legal advice for the Respondent before continued litigation representation may occur.

d. Judge Biro's willingness to accept the *ex parte* allegations of her staff law clerk, Attorney Lisa Knight, concerning conversations between Ms. Knight

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and this counsel, without affording this counsel an opportunity to be heard and to confront Ms. Knight's accusations against him. *See*, Order of Default, fn. 11. (Just what does Judge Biro mean when she suggests that this counsel "has not presented a cooperative attitude in communications with this Tribunal's staff?" What is she referring to? What recourse does the Respondent have, and what recourse does this counsel have, when these types of extrajudicial conversations become part of a dispositive judicial order?)

e. Judge Biro has accepted extrajudicial communications from EPA's counsel or some other third party, unknown to this counsel and undisclosed by Judge Biro, and based upon those extrajudicial communications has determined that "despite [EPA's] request, Respondent's counsel has indicated an unwillingness to stipulate anything in regard to this case." There has been no judicial inquiry to this counsel, nor has there been any hearing or status conference that supports Judge Biro's findings, and yet Judge Biro has included these findings as factual support to impose the extraordinary sanction of dismissal of the Respondent's case in chief, and the entry of a default order, in the face of meritorious, persuasive evidence calling for the dismissal of the EPA claim that a FIFRA violation occurred in this case.

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6.4 **Proper remedy for abuse:** The above facts all support a reassignment of this case for trial before a different presiding judge. Also, the facts clearly support an order of this Tribunal prohibiting any party from revealing or otherwise discussing the negotiating positions of either the EPA or the Respondent in this action (this should not have to be stated, but unfortunately the abuses evidenced in this case require a protective order to prevent further abuse by EPA).

VII. CONCLUSION AND RELIEF REQUESTED

The Respondent has provided clear and compelling arguments for *reversal* of the presiding judge's order of default. The evidence before the Tribunal, as presented by the Respondent, strongly suggests that a contested hearing is not required, and that the presiding judge should dismiss the action on its own motion. The Respondent has not acted in bad faith, nor has there been a deliberate violation of the presiding judge's discovery orders. The evidence to be presented without the SATLOC track documentation is more than sufficient to defend against the EPA claim of FIFRA violation. Thus, the proper discovery sanction should be either (a) the grant of an extension of time for both the EPA and Respondent to fully develop the SATLOC computer information (especially since *both parties* had stipulated to a continuance of the contested hearing), or alternatively, (b) simply strike the

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SATLOC evidence altogether, and proceed to trial on the merits of the parties' claims.

In either case, the presiding judge in this matter should be removed and an alternate presiding judge should be assigned to hear the contested matters to be presented by EPA and the Respondent. The Appearance of Fairness Doctrine supports this relief, and out of respect for the judicial process and to Judge Biro, this counsel encourages Judge Biro to join in such a suggestion, as being in the interests of justice and proper resolution of these most difficult issues.

Finally, a protective order prohibiting the types of extrajudicial communications that have occurred thus far in this case should be issued, with this appellate Tribunal retaining jurisdiction to enforce the protective orders.

Respectfully submitted this 1st day of March, 2006.

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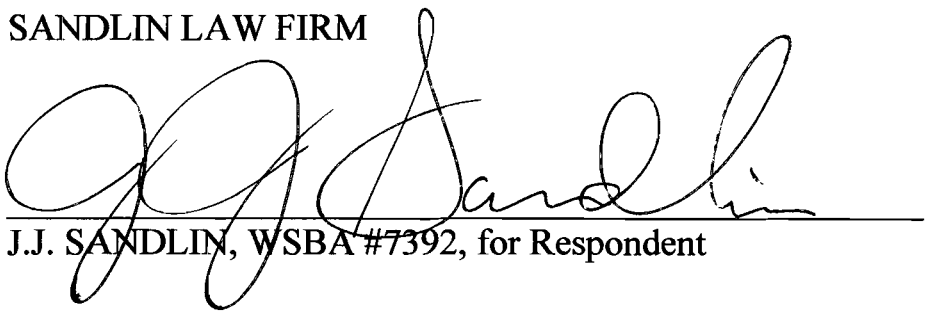

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VIII. PROPOSED ALTERNATIVE FINDINGS OF FACT, CONCLUSIONS OF LAW OR DISCRETION

The Respondent proposes that the following findings of fact be incorporated into alternative findings of fact in this matter:

1. The Respondent's counsel reported he was suffering from an extended illness and that his office was closed from December 20, 2005 through January 23, 2006. This evidence is unrefuted.

2. The Respondent did supply SATLOC data to EPA, in response to the December 19, 2006 discovery order, before the presiding judge ruled upon the motion to default in January, 2006.

3. The Respondent had retained computer specialists to retrieve the DOS language data from the SATLOC computer, but that evidence was not yet available at the time of the default consideration in January, 2006.

4. The EPA and the Respondent had stipulated to a continuance of the scheduled contested hearing of February 14, 2006, before the presiding judge ruled upon the EPA motion for default in January, 2006.

5. The presiding judge had extrajudicial or *ex parte* communications with EPA and her staff law clerk that affected the presiding judge's deliberations concerning the appropriate sanction for EPA's claims of discovery violations.

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Based upon the above proposed findings of fact, the Respondent proposes the following conclusions of law or discretion:

1. The EPA motion for default is denied.

2. The Respondent is ordered to supplement the Respondent's discovery regarding the SATLOC evidence within 60 days; or ALTERNATIVELY, The Respondent's SATLOC evidence is stricken and shall not be considered at the time of trial in this case.

3. The contested hearing upon the EPA complaint shall be scheduled for a reasonable period of time, not less than six days.

4. The case shall be reassigned to another presiding judge.

5. No person shall have extrajudicial or *ex parte* communications with the presiding judge concerning this action, nor shall any person discuss the parties' negotiating positions with the presiding judge.

Respectfully submitted this 1st day of March, 2006.

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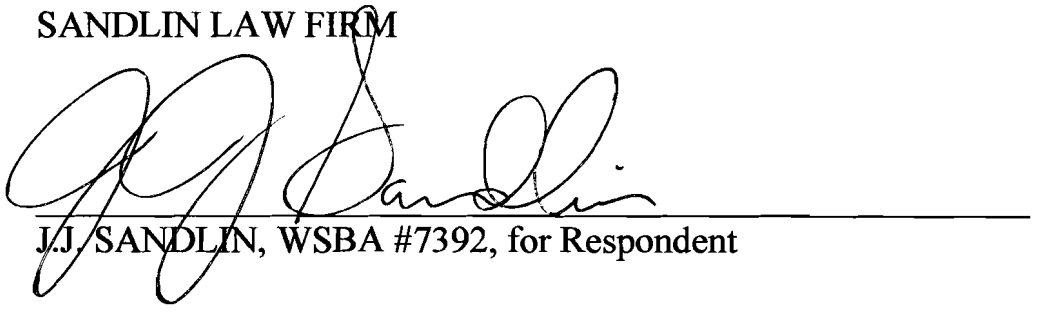

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IX. APPENDIX

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