IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

TOWNSHIP TRUSTEES OF SCHOOLS TOWNSHIP 38 NORTH, RANGE 12 EAST,	)	
Plaintiff,	)	No. 13 CH 23386
vs.	)	Judge Sophia H. Hall
LYONS TOWNSHIP HIGH SCHOOL DISTRICT NO. 204	)	Calendar 14
Defendants	)	

NOTICE OF FILING

TO: Charles A. LeMoine; Rosa A. Tumialán; Stephen M. Mahieu
Dykema Gossett PLLC
10 S. Wacker Drive, Suite 2300
Chicago, IL 60606

PLEASE TAKE NOTICE that on February 26, 2014, I have filed with the Clerk of the Circuit Court of Cook County, Illinois, the following: **Plaintiff's Response to Defendant's Motion to Dismiss**, a copy of which is hereby attached and served on you.

Respectfully submitted,

TOWNSHIP TRUSTEES OF SCHOOLS
TOWNSHIP 38 NORTH, RANGE 12 EAST

By: _____
One of its attorneys.

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PROOF OF SERVICE

The undersigned, an attorney, certifies that copies of the following documents:

Plaintiff's Response to Defendant's Motion to Dismiss

has been served upon:

Charles A. LeMoine
Rosa A. Tumialán
Stephen M. Mahieu
Dykema Gossett PLLC
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Chicago, IL 60606

as follows:

☐ by personal service on February 26, 2014 before 4:00 p.m.

X by U.S. mail, by placing the same in an envelope addressed to them at the above address with proper postage prepaid and depositing the same in the U.S. Postal Service collection box at 20 S. Clark Street, Chicago, Illinois, on February 26, 2014 before 4:00 p.m.

☐ by facsimile transmission from 20 S. Clark Street, Suite 2900, Chicago, Illinois to the [above stated fax number/their respective fax numbers] from my facsimile number (312) 630-7939, consisting of ____ pages on February 26, 2014 before 4:00 p.m., the served [party/parties] having consented to such service.

☐ by Federal Express or other similar commercial carrier by depositing the same in the carrier's pick-up box or drop off with the carrier's designated contractor on February 26, 2014 before the pickup/drop-off deadline for next-day delivery, enclosed in a package, plainly addressed to the above identified individual[s] at [his/her/their] above-stated address[es], with the delivery charge fully prepaid.

☐ by _____, on February 26, 2014 before 4:00 p.m., the served [party/parties] having consented to such service.

Douglass G. Hewitt, attorney

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Plaintiff,	)	
	)	Judge Sophia H. Hall
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LYONS TOWNSHIP HIGH SCHOOL DISTRICT NO. 204	)	
	)	
Defendants	)	

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

Plaintiff, Township Trustees of Schools Township 38 North, Range 12 East ("Trustees"), submit the following response to Defendant, Lyons Township High School District No. 204's ("District 204"), Motion to Dismiss.

I. INTRODUCTION

District 204 argues that the Trustee's Verified Complaint for Declaratory Relief ("Complaint") is barred by the doctrine of *laches* and/or the statute of limitations and, therefore, should be dismissed pursuant to 735 ILCS 5/2-615 and 2-619 respectively. District 204 further contends that the Complaint should be dismissed pursuant to 735 ILCS 5/2-606 for failure to attach invoices submitted to District 204 and/or dismissed pursuant to 735 ILCS 5/2-615(a) for failure to plead various evidentiary facts. Each of Defendant's arguments, however, ignore controlling precedent and specific allegations contained within the Complaint. Under substantial Illinois authority, including Supreme Court decisions, *laches* does not apply to suits brought by a governmental entity, such as the Trustees, except in extraordinary circumstances that are not found here. Similarly, the statute of limitations does not bar the Trustees' claim because it is an

action brought by a public entity seeking to enforce "public rights." §2-606 does not require that invoices submitted to District 204 be attached to the Complaint, because the claims asserted are not "founded upon" a written instrument, rather they are founded upon a statute: the Illinois School Code, 105 ILCS 5/1-1 *et seq*. Finally, the Complaint provides more than sufficient detail to enable District 204 to frame an Answer and, therefore, a more definite statement of the Trustees' claim is unnecessary.[1]

II. FACTUAL ALLEGATIONS

Pursuant to the School Code, 105/ ILCS 5/8-7, the Lyons Township Treasurer (the "Treasurer") is appointed by the Trustees to act as the sole custodian of public funds held on behalf of the school districts located within Lyons Township (the "Districts"), as well as two additional cooperatives and a medical self-insurance cooperative (Complaint, ¶ 4).

Section 5/8-4 of the School Code, 105 ILCS 5/8-4 provides, in part, "Each...township high school district...shall pay a proportionate share of the compensation of the township treasurer serving such district or districts and a proportionate share of the expense of the treasurer's office, which compensation and expenses shall be determined by dividing the total amount of all school funds handled by the township treasurer by such amount of the funds as belong to each such elementary school district or high school district" (Complaint, ¶ 5).

Under §5/8-4 of the School Code, each of the participating members, including District 204, is required to pay their proportionate share of the Treasurer's compensation and expenses of the Lyons Township School Treasurer's Office ("TTO") (Complaint, ¶ 6).

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[1] District 204's Motion to Dismiss contains several "facts" that are neither alleged in the Complaint nor supported by an affidavit or other evidentiary material. These "facts" are not properly considered in connection with District 204's *laches* argument, as that portion of the Motion to Dismiss is brought under §2-615. Many, if not all, of the "facts" are utterly irrelevant to the arguments advanced in the Motion to Dismiss and have apparently been included for some other purpose.

In fiscal years June 30, 2000 through June 20, 2002, the TTO office submitted annual invoices to District 204 for its pro rata billings that totaled $538,430.74 and District 204 paid the TTO a total of $98,185.75 (Complaint, ¶ 10).

Between fiscal year June 30, 2003 and fiscal year June 30, 2011, the TTO submitted annual invoices to District 204 for its pro rata billings that total $1,835,083.40 (Complaint, ¶ 11). Between fiscal year June 30, 2003 and the present, District 204 failed to pay any portion of its share of its pro rata billings (Complaint, ¶12).

The duties of the Treasurer include allocation of interest earned on investment of funds held on behalf of the districts. During the period including the fiscal year of June 30, 1995 through the fiscal year ended June 30, 2012, District 204 was allocated and paid $1,380,496.53 in principal and interest on investments that it was not entitled to receive (Complaint, ¶ 14).

During the fiscal years ended June 30, 2007 through June 30, 2012, Baker Tilly and/or its predecessor-in-interest were engaged to provide audit and other professional services to District 204 (Complaint, ¶ 15). Between 1993 and 2011 and at District 204's request, the TTO paid Baker Tilly $473,174.85 for audit services rendered to District 204 that was owed by District 204 and not the TTO (Complaint,¶16).

III. ARGUMENT

A. The Doctrine of *Laches* Does Not Apply to the Trustee's Claims.

District 204's contention that the Trustees' claims are barred by *laches* ignores substantial precedent, including Supreme Court decisions, holding that *laches* only bars actions brought by governmental entities under compelling circumstances. The TTO is a governmental entity. As noted by the Supreme Court, "There is considerable reluctance to impose the doctrine of *laches* to actions of public entities unless unusual or extraordinary circumstances are shown." *Van Milligan v. Board of Fire and Police Comm'rs*, 158 Ill. 2d 85, 90 (1994). The reasoning

behind the courts' "consistent reluctance" to impose *laches* on a governmental entity, *City of Chicago v Alessia,* 348 Ill. App. 3d 218, 229 (1st Dist. 2004) is that "*laches* may impair the functioning of the [governmental body] in the discharge of its government functions, and valuable public interests may be jeopardized or lost by negligence, mistakes, or inattention of public officials." *Van Milligan,* 158 Ill. 2d at 90. As a consequence, *laches* does not apply to the exercise of government powers except under "unusual", "compelling" or "extraordinary circumstances." *Id.*; *Madigan ex rel. Dep't of Healthcare & Family Servs. v. Yballe*, 397 Ill. App. 3d 481, 493 (1st Dist. 2009).

The decision to apply *laches* is discretionary and "depends on the facts and circumstances of each case", *Wabash County v. Ill. Mun. Ret. Fund*, 408 Ill. App. 3d 924, 933 (2d Dist. 2011). In general, mere non action of government official does not support a claim of *laches, Alessia,* 348 Ill. App. 3d at 229; *In re Sharena H.*, 366 Ill. App. 3d 405, 413 (1st Dist. 2006). Rather, *laches* will apply only if the government officials initiated an affirmative act that induced the opposing party to act, making it inequitable to permit the government entity to retract what the government officials have done., *Id.* at 413-414; *Alessia,* 348 Ill. App. 3d at 229.

To establish a defense of *laches*, the defendant must show that the delay caused him prejudice. *Id.; Van Milligan,* 158 Ill. 2d at 90-91. The mere passage of time does not constitute *laches. Kay v. Prolix Packaging, Inc.*, 2013 IL App (1st) 112455, ¶77. The defendant must show that it has been misled or prejudiced or has taken a course different from what it would have otherwise taken, *Dept. of Natural Res. v. Waide*, 2013 IL App (5th) 120340, ¶19. Further, a defendant's mere speculation that it would have asserted its rights differently will not support a *laches* defense, *Madigan,* 397 Ill. App. 3d at 532, *Alessia,* 348 Ill. App. 3d at 229.

The Complaint alleges merely non-action on the part of the TTO. There is no allegation that the TTO engaged in any affirmative act that induced District 204 to take any action to its detriment. Rather, the Complaint alleges that: 1) the TTO billed District 204 for its pro rata share of the TTO's expenses, in accordance with the provisions of the School Code, but that District 204 failed to pay its pro rata share; 2) District 204 was credited with principal and interests on investments held in trust for other Districts that District 204 was not entitled to receive; and 3) the TTO paid for audit services rendered to District 204 that were owed by District 204 and not the TTO.

The Complaint did not contain any facts demonstrating that District 204 was induced to change its position to its detriment by an action of the Trustees or otherwise prejudiced by the alleged delay. Rather, accepting the allegations of the Complaint as true, District 204 has been substantially benefitted by not paying its pro rata share of TTO expenses, receiving credit for investment income belonging to other districts and payment of District 204's auditors. District 204's claim of prejudice, conversely, is conclusory and speculative. District 204 has not pointed to any allegation in the Complaint demonstrating that it changed its position to its detriment in reliance upon any action by a representative of the Trustees. The fact that District 204 may be required to pay monies that it should have previously paid or ordered to reimburse the TTO for funds District 204 should never have received does not constitute prejudice.

The cases cited by Plaintiff are readily distinguishable from this case. *Tarin v. Pellonari*, 253 Ill. App. 3d 542 (1st Dist. 1993); *Lozman v. Putnam*, 379 Ill. App. 3d 807 (1st Dist. 2008); and *Senese v. Climatemp, Inc.*, 222 Ill. App. 3d 302 (1st Dist. 1991), did not involve claims asserted by governmental entities and, therefore, did not involve the issue before this court. Furthermore, *Tarin* and *Lozman* were not decided on motions to dismiss, but rather were decided

after trial. *Lincoln-Way Community High School Dist. v. Frankfort*, 51 Ill. App. 3d 602 (3d Dist. 1977) also was not based on a motion to dismiss and did not consider the authorities that limit the applicability of *laches* to governmental entities.

B. The Statute of Limitations is Inapplicable to the Trustees Claims.

District 204 contends that the statute of limitations bars the Trustees' claims arising from actions or omission occurring prior to October 17, 2008. District 204's contention ignores substantial authority, including Supreme Court decisions, holding that the statute of limitations does not apply to an action brought by a governmental entity asserting "public rights." For the reasons noted below, the Complaint asserts public rather than private rights and, therefore, the statute of limitations is inapplicable to the Trustee's claims.

Under the common law doctrine of "*nullum tempus occurit regi,*" "the statute of limitations may not be asserted against the State or its county or municipal subdivisions as plaintiffs in actions involving 'public rights," *Shelbyville v. Shelbyville Restorium, Inc.* 96 Ill. 2d 457, 459 (1983). The rationale for the doctrine is similar to the reasoning underlying the general inapplicability of *laches* to governmental entities: the policy that the public should not suffer because of the negligence of its officers and agents in failing to promptly assert causes of action belonging to the public, *Id.* at 461; *Board of Education v. A, C & S, Inc.*, 131 Ill. 2d 428, 472 (1989).

In *Shelbyville* and *A, C & S,* the Supreme Court affirmed the doctrine and delineated the distinction between private and public rights. Through these cases and their progeny three factors have emerged to determine whether a governmental entity is asserting a public or private right: (1) the interest of the public; (2) the obligation of the governmental entity to act on behalf of the

public; and (3) the extent to which public funds must be expended. *Shelbyville,* 96 Ill. 2d at 464–65; *A, C & S*, 131 Ill. 2d at 476.[2]

The claim asserted by the Trustees has a direct and obvious impact on the public. The Trustees through the TTO hold public funds, including property taxes, received for the benefit of public entities charged with educating children which is an inherently public function. 105 ILCS 5/8-17. District 204's failure to pay its pro rata share of the TTO's expenses, its receipt of credit for principal and interest owed to other districts and the payment of District 204's debts with funds belonging to other districts has a direct and negative financial impact on the TTO, the other 12 Districts, and their respective students, employees and taxpayers. As noted by the Court in *Shelbyville*, "The inability of the city of Shelbyville to enforce its annexation agreement or compel payment by the defendant will affect the city's finances and may impair its ability to build or oversee the construction or maintenance of streets within its jurisdiction in the future." *Shelbyville,* 96 Ill. 2d at 464. District 204's failure to pay its pro rata share of TTO expenses, and its receipt of credits and funds to which it was not entitled, reduced the total amount of funds held by the TTO and diminished the funds that would otherwise have been available to be distributed among the other 12 Districts. Funds held in trust by the TTO are not held solely for

[2] In *Shelbyville*, the Court considered the first factor, the effects of the interests on the public, and concluded that a city's interest in bringing the lawsuit was sufficiently "public" when it filed suit against a subdivision builder to recover money it spent to complete construction of streets that the builder failed to construct. The Court ruled concluded that construction and maintenance of the city streets directly affected the safety of the general public and, thus, the city acted in its public capacity in bringing this suit. *Shelbyville,* 96 Ill. 2d at 463-64. Similarly, in *A, C & S*, the Court found that the interests of 34 school districts were sufficiently "public" to qualify as a public right when The Board of Education filed suit against the manufacturers and distributors of asbestos-containing materials in their public buildings for recovery of costs expended to remove or repair the materials. *A, C & S.,* 131 Ill. 2d at 473. The fact that only 34 school districts and not the entire State were affected did not preclude a finding that the suit sought to protect a public right. *Id.* at 474. The Court stated, "the governmental body need not be asserting an interest affecting everyone in the State in order to qualify as a public right." *Id.*

the benefit of the TTO – they are for the benefit of the students, employees and other members of all the 13 Districts.

The Trustees' claim clearly satisfies the second factor: whether the governmental entity obligated to act on behalf of the public.[3] Pursuant to the School Code, the TTO had a mandatory duty to act. The Treasurer is the, "only lawful custodian of all school funds and shall demand receipt for and safely keep, according to law, all bonds, mortgages, notes, moneys, effects, books and papers belonging to any school district or township, as the case may be, which he serves as treasurer." 105 ILCS 5/8-7. The TTO is required to collect from each district the proportionate share of the TTO's compensation and expenses which, "shall be determined by dividing the total amount of all school funds handled by the township treasurer by such amount of the funds as belongs to each such...district." 105 ILCS 5/8-4. The fact that the TTO waited to file suit to perform its ministerial duty will not bar recovery. As the Supreme Court has stated, "It would be a pernicious doctrine to establish that public rights of municipalities could be cut off by the neglect of the appointed officers for an unreasonable time to enforce them." *Board of Supervisors v. City of Lincoln,* 81 Ill. 156, 159 (1876).

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[3] In *Board of Supervisors v. City of Lincoln*, the court stated, "Among the duties imposed upon the county judge and the mayor of the city by this section of the statute is, to ascertain the proportion of taxes to be paid to the city under its provisions. Such duties are ministerial, and the omission to perform them ought not to prejudice the rights of the injured party." 81 Ill. 156, 159 (1876). Similarly in holding the government entity immune from the statute of limitations, the court in *Trustees of Schools v. Arnold* stated: "The law provides...'That the township board shall cause all moneys for the use of the township and districts to be paid over to the township treasurer, who is hereby constituted and declared to be the only lawful depositary and custodian of all township and district school funds.' This language indicates the purpose to charge him with a specific fund...It is a trust fund...It is appropriated to a specific purpose by law and until so devoted there is no authority to divert it." 58 Ill. App. 104, 107-8 (4th Dist. 1895).

The Trustees claim also easily satisfies the third factor in determining whether an action asserts public rights: the extent to which public funds must be expended. [4] In this case, the amount of District 204's unpaid pro rata billings total in excess of $2,500,000 and District 204 has received credit for $1,380,496.53 in principal and interest on investments that it was not entitled to receive. Additionally, District 204 failed to reimburse the TTO $473,174.85 in auditing expenses that the TTO paid on District 204's behalf. District 204's failure to pay its fair share of pro rata expenses and its retention of benefits to which it is not entitled has reduced the amount of funds available to the 12 other Districts.

District 204 cites *School Directors of Dist. v. School Directors Of Dist.*, 105 Ill. 653 (1883) in support of the application of the five-year statute of limitations. In that case, it was alleged that the township treasurer paid certain taxes it collected to one school district instead of another school district. While the court found the statute of limitations barred recovery, the decision was based on the fact that the money had already been paid out by the treasurer to the school district and was no longer considered public trust funds. The court stated, "as long as [the township treasurer] held the money, it was a trust fund in his hands, but when he paid it out to appellee, or on its orders, it was not a trust fund in appellee's hands which would exclude the operation of the Statute of Limitations." *Id.* at 656.

School Directors makes it clear that the taxes, when in the hands of the township treasurer are public trust funds. *City of Lincoln* makes it clear that a municipality attempting to

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[4] In *Shelbyville*, the public expenditure was the cost to the city for street construction and repair. In *A, C & S*, it was the cost to remove asbestos from the school buildings of 34 school districts. The court stated, "We are not dealing here with small sums of money; rather, the cost of these abatement projects will run into the millions. This cost will be shouldered by the local school districts, appropriations from the State, Federal funds, or this litigation." *A, C & S*, 131 Ill. 2d at 476. In both cases, the court focused upon the amount of money that was needed and the burden placed on the public treasury.

recover public trust funds is exempt from a statute of limitations. In that case, a city sought to recover certain taxes collected by the county that under a public law should have been paid to the city. The court held that the statute of limitation did not apply as the funds involved were in the nature of trust funds. It stated, "As respects public rights or property held for a public use, upon trusts, municipal corporations are not within the operation of the statute of limitations." *City of Lincoln*, 81 Ill. at 158. The court further clarified the doctrine in *Clare v. Bell*, 378 Ill. 128, 130-31 (1941) by saying, "Unless the terms of a Statute of Limitations expressly include the State, county, municipality or other governmental agencies, the statute, so far as public rights are concerned, as distinguished from private and local rights, is inapplicable to them."

Trustees of Schools v. Arnold, 58 Ill. App. 103 (4th Dist. 1895) is on point. In this case, the township trustees filed suit on a bond that a treasurer had executed in 1863 alleging that he had mishandled school funds. The treasurer pled the statute of limitations as a defense. The court likened the funds to the public funds in *City of Lincoln* and held that as to any school funds in the hands of the treasurer, the statute of limitations was not a defense available as "public funds" were involved. *Id.* at 108.

The remaining cases cited by District 204, *Rohter v. Passarella*, 246 Ill. App. 3d 860 (1st Dist. 1993) and *Trustees of Schools v. Chicago*, 308 Ill. App. 391 (1st Dist. 1941) are distinguishable. *Rohter* involved an accountant trying to recover compensation from a company to which he had provided accounting services after the statute of limitations period had passed. It was a private suit in equity and did not involve a governmental entity seeking public trust funds. *Trustees of Schools* did involve school trustees seeking to recover funds a city failed to pay for annexed property. However, it did not involve a delay in filing suit as the annexation occurred in 1915 the suit was filed in 1916. *Trustees of Schools*, 308 Ill. App. at 392-3. Instead,

the case was dismissed because the trustees were greatly negligent in prosecuting their suit and the case was twice dismissed for want of prosecution in the intervening twenty four years. *Id.* at 3934. Although the trustees were allowed to file a second-amended and supplemental position, the First District determined that the trustees were barred because of the great delay in prosecuting the suit. *Trustees of Schools*, 308 Ill. App. at 400-1.

C. The Verified Complaint is Not Founded Upon Invoices Submitted to District 204 and, Therefore, The Invoices Need Not Be Attached to the Complaint Pursuant to Section 2-606.

Section 2-606 of the Code of Civil Procedures provides, in pertinent part:

> If a claim or defense is founded upon a written instrument, a copy thereof, or so much of the same as is relevant, must be attached to the pleading as an exhibit . . .

735 ILCS 5/2-606.

A claim is "founded upon an instrument" within §2-606 only if the claim is "based on" the instrument or if the plaintiff is "suing upon" the instrument. *Kahn v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 580 (4th Dist. 2011). When the exhibit is not an instrument upon which the claim or defense is founded, but rather, is merely evidence supporting the pleader's allegations, §2-606 is inapplicable. *Id.* The exhibits to which §2-606 applies generally consists of instruments being sued upon, such as contracts or agreements. *Garrison v. Choh,* 308 Ill. App. 3d 48, 53 (1st Dist. 1999). The obligation to attach a written instrument to a complaint is limited to documents upon which a claim or defense is based. When the exhibit is not an instrument upon which the claim or defense is founded, but is merely evidence that supports the pleader's allegations, § 2-606 is inapplicable. *Id.* It is not necessary to attach a document to a complaint where a cause of action is not founded upon the document and the document is merely evidentiary. *Claude Southern Corp. v. Henry's Drive-In, Inc.*, 51 Ill. App. 2d 289, 297 (1st Dist. 1964).

In the instant case, the Verified Complaint is not based upon the invoices submitted to District 204. Rather, the Trustees' claims are based upon the provisions of the School Code which oblige District 204 to pay its proportionate share of the Treasurer's compensation and expenses. 105 ILCS 5/8-4. The invoices submitted to District 204 reflecting the pro rata share owed by District 204 constitute mere evidence and, therefore, the Trustees were not required to attach the invoices to the Verified Complaint. Similarly, the Trustees' request for declaratory relief regarding District 204's receipt of credit for principal and interest on investments that it was not entitled to receive and its failure to repay the TTO the monies paid to District 204's CPA's services rendered to District 204 are not based upon a written instrument.

District 204's halfhearted arguments concerns §2-606 and its motion for a more definite statement pursuant to §2-615(a) are not supported by any case law. Indeed, District 204 fails to cite the standard applicable to Motions for A More Definite Statement. Based on the face of the Complaint, District 204 can frame an answer to the Verified Complaint and, therefore, a more definite statement is not necessary. Many of the rhetorical questions reflected on page 9 of District 204's Motion relate to evidentiary facts that are either already within District 204's control (i.e., "who engaged Baker Tilly to perform audit services", "what audit services that firm performed for District 204", and "how the amount that District 204 allegedly owes to Baker Tilly was calculated") or can be obtained through discovery. The evidentiary facts are not necessary to state a claim and the Complaint as a whole adequately apprises District 204 of the nature of the claim being asserted.

WHEREFORE, Plaintiff, Township Trustees of Schools Township 38 North, Ranger 12 East, respectfully request that his Court enter an Order Denying Defendant, Lyons Township High School District 204's Motion to Dismiss and grant it such other and further relief as is just under the circumstances.

Respectfully submitted,

TOWNSHIP TRUSTEES OF SCHOOLS
TOWNSHIP 38 NORTH, RANGE 12 EAST

By: _____
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