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Utah Farm Production Credit association v. Cox,  
Jeffrey J. and Elliott J. A Co-Partnership, Elliott J.  
Cox, Jeffery J. Cox, Yvonne Cox, Blanche. Cox,  
United States of America, Tracy-Collins Bank and  
Trust Company, Bank of Ephraim : Breif In Answer  
To Petition For Rehearing Utah Farm Production  
Credit association : Reply Brief of Appellant Utah  
Farm Production Credit association

Utah Supreme Court

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David B. Boyce; Attorney for Appellant Earl Jay Peck, Ross C. Blackham ; Attorney's for Respondent and Petitioner

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IN THE SUPREME COURT OF THE STATE OF UTAH

UTAH FARM PRODUCTION  
CREDIT ASSOCIATION,

Plaintiff-Appellant,

vs.

Case No. 7588 16885

COX, JEFFREY J. and ELLIOTT J.  
a co-partnership, ELLIOTT J.  
COX, JEFFREY J. COX, YVONNE  
COX, BLANCHE COX, UNITED STATES  
OF AMERICAN, TRACY-COLLINS BANK  
AND TRUST COMPANY, BANK OF  
EPHRAIM

Defendant-Respondents.

REPLY BRIEF OF APPELLANT  
UTAH FARM PRODUCTION CREDIT ASSOCIATION

Appeal from Judgment  
in favor of defendants in the  
District Court of Sanpete County, Utah  
Honorable Don V. Tibbs

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Attorney's for Respondent

FILED

SEP 30 1980

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Defendant-Respondents.

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STATEMENT OF FACTS

In several particulars the respondents' statement of facts is in error and is misstated. These misstatements will be referred to in particular under the appropriate points that follow.

For clarification, appellant will be referred to as PCA (Utah Farm Production Credit Association), and respondents as borrowers.

RESPONDENTS' BRIEF FAILS TO SHOW THAT THEY MITIGATED DAMAGES  
AS REQUIRED BY LAW

Both parties agree that, under the law, lost profits are not recoverable by the borrowers unless they were unable to obtain a loan elsewhere. This is because lost profits represent special damages and only general damages (the increased interest expense) are recoverable when an alternate loan is available. This is because there are no special damages when an alternate loan is obtained.

The borrowers failed to show that they were unable to obtain a loan elsewhere. It is undisputed that alternate financing was available from other sources including the Moroni Feed Company. (Transcript 106, 121, 136 - 138) The borrowers testified that they absolutely could have obtained financing for 1977 from the Moroni Feed Company. (Transcript 136)

One of the borrowers' own witnesses testified that there are other sources of financing besides PCA and that some growers are financed through a finance company such as a bank or a lending company. (Transcript 186) The borrowers borrowed some money for their turkey operation from the Bank of Ephraim in 1977. (Transcript 101 - 102) The party who purchased the turkeys from the borrowers found financing through the 70-30 Program. (Transcript 106 - 107) In 1976 the borrowers got financing from the Moroni Feed Company. (Transcript 64 - 65) So alternate financing was available.

Borrowers would excuse the fact that they did not even attempt to get available alternate financing because they had a prior delinquency with PCA and PCA had threatened to foreclose. That is no excuse because (1) it was entirely the borrowers' fault, rather than PCA, that the borrowers were delinquent and in that position, and they should not be allowed to benefit from their own wrong, and (2) the borrowers could have obtained a loan to finance current operations and to refinance the delinquency, thereby preventing any possibility of a foreclosure. At least they had a duty to make a reasonable attempt to get such financing. But they did not even try even though the Moroni Feed Company

made such loans in the past for current operations and past delinquency. (Transcript 137)

So, the borrowers' conclusion that prospects were poor for obtaining a loan is not supported by the record. In actuality, the record is to the contrary. The testimony was that Moroni Feed Company had made loans in the past for current operations and past delinquencies, but that the borrowers made no application in this case and, therefore, do not know whether such a loan was available. (Transcript 137) Having failed to even make application for the necessary loan, the borrowers are precluded as a matter of law from being awarded any damages for lost profits. This is because there would have been no lost profits if the borrowers had taken advantage of available alternate financing.

The borrowers knew any foreclosure action could be prevented through refinancing with another lender. They also knew that even if refinancing proved unavailable that any foreclosure could not be completed during the growing year with the borrowers' rights of redemption and other rights. When the threat of foreclosure was made, the response of the borrowers was that they would bring suit to prevent the foreclosure. (Transcript 105) So borrowers' excuse for not even attempting to get alternate financing (imminent foreclosure) is only an excuse.

The borrowers had plenty of time to obtain alternate financing. Even if that had failed, all the borrowers had to do to get the loan from PCA was pledge the stock of Elliott Cox, one of the respondents, in the Moroni Coal Company. (Transcript 102 - 103)

Even if not obligated contractually to do so, that was their duty under the doctrine of mitigation. It was a duty that created no burden because Elliott Cox was already personally liable on the note and thus his stock was already indirectly pledged. (Transcript 288) Consequently, it would have been reasonable for the borrowers to have mitigated damages by pledging the stock. Having failed to mitigate in this regard and more particularly in regard to obtaining alternate financing, the damages must be denied as a matter of law.

The borrowers claim to have mitigated damages by selling the 20,000 turkeys and canceling the order for 40,000 and not incurring further expense. However, PCA did not get credit for that claimed mitigation nor for the 20 cents per poult that borrowers received when they sold the poults. Furthermore, the law states what mitigation is required in the case of loan commitments and the mitigation must take the form of an attempt to get an alternate loan. Cox Corp. v. Duggar, 583 P.2d 196 (Utah 1978). Therefore, the borrowers failed to mitigate as required by law.

Borrowers' brief does not even attempt to counter the argument by PCA that the work by one of the borrowers at Moroni Coal Company, after financing with PCA failed, resulted in profits to that company and the borrowers because they owned at least 47% of that company. PCA was not credited with that benefit. (Transcript 163) Consequently, the borrowers are getting a benefit which they would not have received if they had remained in the turkey business because Jeff Cox, one of the borrowers, would have been running the turkey operation rather than generating profits for PCA.

Company. PCA was not credited with that benefit.

Even the limited credit that PCA was given was inaccurately calculated. Cox testified that he went to work for the Moroni Coal Company in the beginning of April, 1977, for the sum of \$200.00 per week (in addition to the profit to the borrowers' stock in Moroni Coal Company as a result of his work). (Transcript 139, 141) Accordingly, the trial court gave PCA credit for \$7200.00 representing 36 weeks at \$200.00 per week.

Borrowers claim that the calculation was correct because the first of April was a Friday and, therefore, Cox went to work at the coal company on Monday, April 4. Borrowers claim that this meant that he worked 36 weeks plus 3 days if holidays were not considered. That is incorrect. There was nothing in the record to show that Cox did not get \$200.00 in a week where there was a holiday. Furthermore, there were 13 weeks prior to Monday, April 4. This leaves 39 weeks for the rest of the year. At \$200.00 per week, for 39 weeks ( $\$200 \times 39 = \$8,000.00$ ), the credit should have been \$8,000.00, rather than \$7200.00 representing an \$800.00 error.

RESPONDENTS' BRIEF FAILS TO SHOW ANY CONDUCT ON THE PART  
OF THE APPELLANT CREATING APPARENT AUTHORITY IN THE LOAN OFFICER

Both the parties agree that the loan officer did not have express or implied authority to make a loan commitment. The loan was never approved by the loan committee as required. The borrowers claim that PCA's loan officer had apparent authority. The theory of the borrowers is that PCA failed to act where there was a duty to act, such that it led the borrowers to believe that the agent had authority to make the loan commitment.

Borrowers fail to show what the inaction was or that there was a duty. Borrowers reference to the record to support the conclusion that the loan officer had authority is Finding of Fact 18, which is nothing more than a conclusory statement that the agent had authority. There is nothing in the record to support that finding.

The only suggestion by the borrowers of PCA's failure to act when it had a duty to act was that (1) the borrowers were not aware that the loan officer had no authority and thought his commitment was final, (2) borrowers past experience was that the loan officer approved the loan, and (3) PCA was aware of its agent's practices of committing loans before final approval and never informed the borrowers that such approvals were not binding.

In response to number (1), just because the borrowers mistakingly concluded that the loan officer had authority does not mean that he had authority or that PCA had a duty to inform the borrowers of their mistaken conclusion. There is nothing in the record to show that PCA knew that the borrowers were acting under erroneous information. In fact, the record is to the contrary. Borrowers knew that loan committee approval was required.

(Transcript 118 -119)

The same is true in response to (2). The borrowers just assumed that it was the loan officer himself who had approved loans in the past. Such was not the case. The loan officer was merely telling the borrowers what the loan committee had done. Again, the borrowers had mistakingly concluded something but they failed to

show that PCA caused their mistaken conclusion and thereby had a duty to correct it for them.

The only reason for the borrowers' conclusion was that in the past when the loan officer made his commitment, the borrowers eventually got the loan. That was only because it had been previously approved by the loan committee.

Actually, it is apparent that the borrowers knew that loan committee approval was required because their testimony was that in the past the loan officer had told them that the loan committee had already approved the loan. (Transcript 118) Later on they testified that they had been told that a prior loan had been approved by the loan committee. (Transcript 119) So borrowers did not really believe that the loan officer had authority to approve the loan.

The borrowers said that in prior loans that when the loan officer had told them that something would be done, it was always done and that the loan officer's commitment was good enough for them. (Transcript 119) That did not mean that it did not require loan committee approval or that they did not know of such. The borrowers admitted that they did not know whether the loan officer actually had authority. (Transcript 119 -120)

In response to (3), the borrowers cite the transcript at pages 252, 308 and 322 in support of the conclusion that PCA was aware of the loan officer's practices of committing loans before final approval. Page 252 does not say that. It says that loan committee approval was necessary and that there may have been cases

where the loan officer took it upon himself to do certain things, but they were not complying with company policy. The witness did not say what those certain things were and he only said that may have been the case. He did not say that PCA knew of any such practice, assuming such was the practice. Nor did he say that these borrowers had been misled by any such practice. In fact, the borrowers own witness testified that the borrowers were not told of approval until the loan committee had approved a loan. (Transcript 320)

Page 308 only says that loans are committed before all the paper work was done. It does not say that loan officers were committing loans to borrowers before the loan committees' approval. A loan can be given final approval by the loan committee before all the paper work is done. (Transcript 250, 285)

Even if a loan officer was giving a commitment before loan committee approval, there is nothing in the record to indicate that these borrowers were misled. In the instance referred to, involving a different party, that party may have been misinformed, but that had no bearing on the respondents. Even in that unrelated instance, the application had been taken to the loan committee before a commitment was given and the loan officer knew that the loan committee had verbally approved the loan, even though all the paper work had not been completed. (Transcript 310) In that case the loan officer thought that the loan committee had signed the papers before telling the borrower of approval. (Transcript 311, 312)

Page 322 only says that some growers were allowed to take delivery of their poults while the loan application was pending. It says nothing in support of the conclusion that PCA was aware of an agent's practice of committing loans before final approval. So there was no inaction by PCA where there was a duty to act and consequently no apparent authority.

The law requires that PCA, rather than the loan officer, give the borrowers the mistaken impression they had. Malia v. Giles, 114 P.2d 208; (Utah 1941); Bank of Salt Lake v. Corporation of President of Church of Jesus Christ of Latter Day Saints, 534 P.2d 887 (Utah 1975). The borrowers did not show any way in which PCA created any such situation, thereby giving a duty to correct the borrowers' mistaken conclusion. Furthermore, it does not appear from the record that the borrowers were honestly mistaken. They knew loan committee approval was required. (Transcript 118-119)

The other authority of law cited by the borrowers in support of their conclusion that the loan officer had apparent authority is the Restatement of Agency to the effect that third persons who are aware of what a continuously employed agent has done, are normally entitled to believe that he will continue to have such authority until the third person has been notified that the agent is no longer authorized. In the case at bar, the borrowers did not even believe that the loan officer could make a commitment without loan committee approval. (Transcript 118 - 119) Consequently, the borrowers could not have believed that the loan

officer would continue to have authority that they never believed he had. Nor could authority continue that the officer never actually had.

THE RESPONDENTS' BRIEF FAILS TO SHOW THAT THE AGREEMENT  
IS NOT VOID UNDER THE STATUTE OF FRAUDS

The trial court made no finding as to the time within which the loan was to be repaid. The borrowers claim that it was not necessarily more than a year because of some generalizations made by their witness at the trial that it was to be paid approximately a year after the note would have been executed because it had been done that way in the past. Even the borrowers' testimony leaves it within the Statute. That testimony was that the note would have been written from January 1 to January 1. (Transcript 128) That is a contract that by its terms would not be performed within one year. January 1 to January 1 is more than one year by one day and hence within the Statute of Frauds.

In reality the loans had never been paid one year after the note was executed. They had always matured on the sixth day of the next month after the anniversary of the note. The only party that really knew when repayment would have been required testified that if the loan was committed in January of 1977, which the borrowers claim it was, then it would have been due by its terms on February 6, 1978. (Transcript 122-3, 127, 130, 270-271A)

Actually the evidence was that there were to be two loans. These included the one just referred to and another loan for seven

years payable in seven installments. (Transcript 129 - 130, 234, 240, 249) The second loan was to refinance the past delinquency and the other loan was for 1977 operating expenses. There was more than a dicussion about the seven year loan. It was the way the past delinquency was going to be refinanced. (Transcript 129-130, 249) So both the alleged commitments are void under the Statute.

Even if only one of the loans is unenforceable under the Statute of Frauds, that would defeat borrowers' entire case because they needed both loans.

Borrowers claim that if an oral contract that is otherwise within the Statute of Frauds can be performed within one year, that takes the contract out of the Statute of Frauds. The authorities cited by the borrowers are not on point. They do not involve cases where the terms of the contract provide for payment in excess of one year. Where the terms of the contract provide for payment over a period that exceeds one year, then it must be in writing. The Statute says:

"In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof, is in writing subscribed by the party to be charged therewith:

(1) Every agreement that by its terms is not to be performed within one year from the making thereof." (Emphasis added)

In the case at bar, the terms of the verbal contract provided for payment to be made more than one year after the loan. That was true of both loans.

Promissory Estoppel does not take the case out of the Statute of Frauds because the promise was not as to an existing

fact as required under the case of Ravarino v. Price cited by the borrowers. If there was a promise, it was to make a loan in the future and therefore the doctrine of promissory estoppel is inapplicable under the law of that case.

RESPONDENTS BRIEF FAILS TO SHOW THAT THEY DID PROVE DAMAGES WITH  
REASONABLE CERTAINTY

Respondents Failed to Show That it Was Reasonably Certain That  
They Could Have Acquired the Last 40,000 Poults

It is not reasonably certain that the borrowers could have acquired the last 40,000 poults. Just because PCA figured the budget on the assumption that the poults could be delivered does not mean that it was proven with reasonable certainty that the poults would have been delivered as claimed by borrowers.

Borrowers misstate the evidence on page 12 of their brief when they say that the hatchery manager stated that the 40,000 poults would have been delivered. The answer was that they "probably" could have been delivered. (Transcript 176) The law requires more than probability. It requires reasonable certainty and the answer of probability is insufficient to meet their burden of proof. The manager testified that respondents would have been a second priority customer because they were not paying cash and, therefore, whether the poults would have been available would have been at the option of the Board of Directors. (Transcript 177) Therefore, it was not reasonably certain as required by law.

Borrowers said that no evidence was introduced to the effect that the seller would not have been able to deliver the poults. The borrowers seek to shift the burden of proof by making

such a statement. It was the borrowers' burden to prove that they could have acquired the 40,000 poults from which to make a profit. They failed to show reasonable certainty as required by law. This error, in and of itself, reduces the lost profit award by two-thirds since 40,000 poults represents two-thirds of the turkeys.

Respondents Failed to Sustain Their Burden in Proving That  
a Dividend From the Moroni Feed Company Was Not Speculative

Borrowers say that the testimony at trial made it clear that the receipt of the retains was not speculative, citing pages 88-90 of the transcript. That portion of the transcript does not support the borrowers' conclusion. It merely says that the borrowers had a buyer for the retains. That does not mean that it is reasonably certain that the Moroni Feed Company will be able to pay the dividend in 1982.

Borrowers say that the dividend will be paid in 1982 because the feed company is on firm financial standing. There is nothing in the transcript to support that conclusion.

Borrowers say that no evidence was introduced that Moroni Feed Company had ever failed to pay the retains in the past. Again the borrowers seek to shift the burden of proof by making such a statement. It was the borrowers' burden to prove with reasonable certainty that the feed company will be able to pay the dividend in 1982. Again, they failed. That error, in and of itself, amounts to \$28,940.40. (Transcript 330)

Respondents Fail to Show That They Proved They Were Average  
Turkey Growers

There is absolutely nothing in the record to support the claim by the borrowers that they proved that they were average and that, therefore, their damage would have been the same as an average grower. The only testimony at trial was not what the borrowers would have earned if given the loan, but what the average grower would have earned. In fact, at the trial the Court sustained appellants' objection as to what these particular borrowers would have earned in 1977. The witness was only allowed to testify as to what the average grower earned and not as to these borrowers because there was no link in the evidence that they were average. (Transcript 200)

The fact that borrowers were in the business for eleven years does not mean that they were average. The fact that there may have been some profits in some prior years does not mean that they were average. The average grower may have made much greater profits of these borrowers, assuming there were any. Furthermore, the borrowers testified that they really did not know what profits there were. (Transcript 152 - 153)

Again the borrowers seek to shift the burden of proof by saying that there was no evidence that borrowers lost money during any year that another grower made money. It was the borrowers' burden to prove that they were average. They failed to do so. The only evidence in the record was the tax returns which showed

nothing but losses. (Exhibits 31-34 and Transcript 158, 166-167).

The borrowers claim they were at least average because they grew heavier turkeys than average. That proves nothing because it costs more to grow heavier turkeys. The borrowers were not awarded damages for heavier turkeys because they failed to prove the extra cost. (Transcript 204, 209) Without knowing the extra costs that would be spent by the borrowers, compared to the extra cost for the average grower, it cannot be determined if the borrowers were average.

RESPONDENTS' BRIEF FAILS TO SHOW THAT THEY HAD A BUSINESS HISTORY THAT  
WOULD JUSTIFY DAMAGES

Borrowers say that there was no evidence as to what amount of money the turkey operation lost during previous years and, therefore, the business history does not preclude an award of damages. That conclusion is erroneous. The issue is not how much was lost, but whether there had been losses and whether there was a history of successful operation. Since there was no evidence of successful business operation, the damages must be denied. That was their burden. The only evidence was the testimony and tax returns of the borrowers which show only losses. (Exhibits 31-34, Transcript 158, 166-167)

The record at page 219 and 322, does not support the conclusion of the borrowers that if they had done poorly during the previous four years it was because the industry did poorly.

Again borrowers seek to shift the burden of proof by stating that there is no evidence that other growers made a profit during those years. It is not PCA's burden to show that other growers made a profit and only borrowers had a loss, nor is it PCA's burden to offer evidence to indicate that the borrowers' operation would not have realized the profits found by the Court as suggested by the borrowers in their brief. Furthermore, that is not the issue. The law requires proof of successful business history. The borrowers have failed to show a successful business history because such was not the case, and their damages must also fail.

#### ATTORNEY'S FEES SHOULD BE ALLOWED FOR THE APPEAL

Even if the case is not reversed, appellant is entitled to \$10,998.50 in attorney's fees. If the case is reversed, the fee should be \$15,000.00, plus an additonal \$5,000.00 for the appeal.

#### CONCLUSION

It would be unjust to allow the \$44,927.60 counterclaim to be affirmed. That award reduced the amount which PCA was repaid on a loan made to the borrowers and, therefore, it represents a loss of real money actually delivered to the borrowers in connection with a previous loan.

It is necessary to examine what both parties did or failed to do that entitles the borrowers to save \$44,927.60. All PCA did was make a promise to loan money. (PCA denies that any such

promise was made, but that finding is not challenged on appeal because there is the testimony of the borrowers claiming a verbal loan commitment). That is all PCA did to lose \$44,927.60. All the borrowers did to receive \$44,927.60, was to implicitly agree to repay the loan. (Actually there was nothing in the record to show that they ever promised to repay it, but apparently the Court has assumed such). They did nothing else.

Once the promise was made to loan the money and to repay it, the borrowers, after not receiving the loan, engaged in other business ventures including the Moroni Coal Company. That company was owned by the borrowers, at least to the extent of forty-seven percent (47%). One of the borrowers, Jeff Cox, went to work full time for the coal company after the loan failed, and he testified that his return was likely to have been the cause for a significant increase in profits from the prior year. If there had been a loan, he would not have been able to work for the coal company. So the borrowers are getting the best of both worlds. They are allowed to liquidate their turkey business without crediting PCA and they are awarded \$44,927.60 for doing nothing and they are allowed to pursue other ventures and are not required to give PCA credit for profit in that enterprise. Such a result is totally inequitable and contrary to the law of mitigation.

For the borrowers to be entitled to the \$44,927.60, they must have made a reasonable attempt to get alternate financing.

Other financing was available. Since the borrowers failed to even attempt to get other financing, they failed to mitigate damages and the award of the trial court must be reversed. The fact that PCA may have initiated foreclosure proceedings is no excuse because the borrowers had a duty to make a reasonable attempt to get financing that would have prevented the foreclosure. This had been done in the past and there is nothing in the record to show that it could not have been done this time.

It is apparent that the borrowers did not want to stay in the turkey business enough to pledge the stock of one of the borrowers even though that borrower was already personally obligated on the note. This shows their confidence in making profits that year. That is another way in which damages could have and should have been mitigated.

Not only is PCA being charged \$44,927.60 for simply making a promise to loan money, but said promise was by an agent without authority. There is no dispute that the loan application exceeded the agent's authority. Both parties agree that he had no express or implied authority. There is nothing in the record to justify any conclusion that he had apparent authority because the borrowers knew that loan committee approval was required and because there is nothing in the record to show that PCA caused the borrowers to believe that the agent had authority.

To prevent problems presented when opposing parties claim opposite facts, such as whether a loan commitment was made, the law

has created a policy in the form of the Statute of Frauds to prevent one party from binding another unless the commitment was in writing. Under the Statute of this state, the promise to make a loan had to be in writing because neither of the loans would have been payable under their terms within one year. Without any question, one of the loans would have been payable in seven years. Without that portion of the loan, the borrowers could not have remained in business. The award of \$44,927.60 should be reversed because it was based on the alleged promise of an unauthorized agent and there is no evidence in writing to show that the promise was actually made.

Even if a promise had been made by an authorized agent in writing, it is not reasonably certain, as required by law, that these borrowers would have been able to net a profit of \$44,927.60 or any amount. This is because:

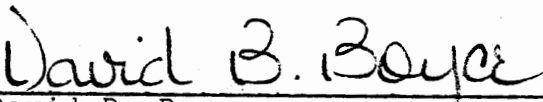
1. It was only probable and not reasonably certain that the borrowers could have even acquired the last 40,000 poultts from which to make two-thirds (2/3) of the profit.
2. It is not reasonably certain that Moroni Feed Company will be financially able to pay a dividend in 1982 which represents \$28,940.48 of the \$44,927.60.
3. It is not reasonably certain that these particular borrowers would have made the same profit as other borrowers if they had received the loan. There is absolutely nothing in the transcript to support the inference made by the trial court that

because the average borrower made a certain net profit, these borrowers would have made the same profit.

To prevent awards of lost profits that would be inequitable, in situations similar to this case, the law has another policy against awarding them where the claimant fails to show a prior business history of success. Since the prior business history of these borrowers showed nothing but losses, it would only be fair to deny the award in this case and such a reversal would be in conformity with law.

The ruling of the trial court must be reversed as to the counterclaim and PCA should, as a matter of law, be awarded \$5,000.00 in attorney's fees for this appeal, together with attorney's fees at the trial level as requested.

Respectfully submitted,

  
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David B. Boyce

CERTIFICATE OF MAILING

This is to certify that two copies of the within Brief of Appellant were serve this 29<sup>th</sup> day of September, 1980, be mailing them in a sealed envelope, postage prepaid, addressed as follows:

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