No. S132814
(Court of Appeal No. B163115)
(Los Angeles County Super. Ct. No. BC 206388)

IN THE SUPREME COURT OF CALIFORNIA

THE OAKLAND RAIDERS,
Plaintiff-Appellant,

vs.

NATIONAL FOOTBALL LEAGUE,
Defendant-Respondent,

and

PAUL TAGLIABUE AND NEIL AUSTRIAN,
Defendants-Respondents.

Appeal from Los Angeles County Superior Court
Honorable Richard C. Hubbell, Judge

SUPPLEMENTAL REPLY BRIEF OF DEFENDANT-RESPONDENT NATIONAL FOOTBALL LEAGUE

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INTRODUCTION

The Raiders acknowledge, as they must, that the deadline for a trial court to specify its reasons for a new trial order is "*jurisdictional* in the sense that any attempt by the trial court to prepare or modify a statement of reasons after the ten day period has expired is a nullity." (Raiders' Supp. Br. at p. 3 [emphasis in original].)

Nonetheless, without regard to the fact that new trials are purely creatures of statute, without addressing the plain meaning of the statutory language, without considering the Legislature's undisputed purposes in imposing the jurisdictional deadline, and without even acknowledging governing principles of *stare decisis,* the Raiders assert that *Mercer v. Perez* (1968) 68 Cal.2d 104 and *Treber v. Superior Court* (1968) 68 Cal.2d 128 "ought to be overruled" to allow an appellate court to "reset[] the clock on the trial court's power to issue a new or corrected statement of reasons." (Raiders' Supp. Br. at p. 7.)

The only "rationale" offered by the Raiders for departing from the plain meaning of the governing statute, ignoring the Legislature's undisputed intent, and overruling nearly four decades of settled statutory interpretation is their assertion that *Mercer*, *Treber*, and their progeny are "logically inconsistent" with decisions that in different circumstances allow remands for additional findings. That "rationale," which simply ignores the

holdings and reasoning of *Mercer* and *Treber*, is entirely unfounded. We demonstrate below (1) that none of the cases upon which the Raiders rely allows an appellate court to "reset the clock" and thereby "trump" a jurisdictional deadline and (2) that the circumstances in which remands are permitted for additional findings are fundamentally different from those presented by an order, unsupported by the required statement of reasons, *granting* a new trial motion and setting aside a jury's verdict.

Even if the Raiders' purported rationale were plausible, it would still be insufficient to outweigh the overwhelming considerations of *stare decisis* discussed in our initial Supplemental Brief. If the Legislature decides to amend the statute -- and, indeed, the Raiders' arguments are more properly addressed to the Legislature than to a court -- that would be one thing. But there is no justification for this Court to overrule nearly forty years of settled precedents -- precedents applying the plain meaning of unambiguous statutory language -- that have never been perceived as problematic or unworkable, have never been questioned by the Legislature, and have never been criticized by the appellate courts, the trial courts, or the organized trial bar.

The authorities from other jurisdictions upon which the Raiders rely make our points for us. Eager to trumpet (at 10) "[t]he benefits of a remand procedure" in Florida, for example, the Raiders fail to mention that Florida appellate courts are *expressly authorized by statute* to remand new trial orders unsupported by the required specification, thereby demonstrating that if

a legislature intends to allow remands in such circumstances, it is fully capable of providing for them. Notwithstanding this Court's explicit holdings that such remands are barred by statute in California, the Legislature has not done so here.

Finally, the Raiders fail to recognize that their purported objective in urging this Court to overrule *Mercer* -- "restor[ing] the pre-appeal *status quo ante*" (*id.* at p. 1) to secure the missing specification of reasons -- simply cannot be achieved in this case. Another judge could not possibly discern the reasons that the now-retired trial judge had in mind when he granted the Raiders' motion more than four years ago. Nor could a remand satisfy either of the policy objectives underlying the specification requirement, i.e., "to permit meaningful appellate review" (*Scala v. Jerry Witt & Sons, Inc.* (1970) 3 Cal.3d 359, 363) and to "promote judicial deliberation before judicial action" (*Mercer v. Perez, supra,* 68 Cal. 2d at p. 113).

I. THE CALIFORNIA CASES UPON WHICH THE RAIDERS RELY PROVIDE NO BASIS FOR OVERRULING *MERCER* OR *TREBER.*

In the introduction to their Supplemental Brief, the Raiders assert that *Mercer* "was *incorrect* to the extent that it found a jurisdictional impediment to a remand" for the purpose of allowing a trial court belatedly to prepare a specification of reasons supporting a new trial order. (Raiders' Supp. Br. at p. 1 [emphasis added].) Given that the issue is one of statutory interpretation, one would have expected the Raiders to support their assertion

of error by discussing the statutory language, or reassessing the legislative history, or identifying some constitutional limitation that precludes the choice made by the Legislature. But no such arguments appear in their brief.

Indeed, the Raiders' Supplemental Brief offers no reason whatsoever to believe that *Mercer* (or *Treber*) was *wrongly decided.* Instead, premised on their continuing assumption that a failure to specify reasons is a "formal insufficiency" (*id.* at p. 3) that can readily be "cured," the Raiders simply take issue with the policy decision made by the Legislature in section 657 -- a decision requiring *contemporaneous* and *personal* deliberation, as well as written *proof* of such deliberation, *before* nullifying the result of a jury trial.

In doing so, the Raiders do little more than compare the choice made by the Legislature with respect to orders granting new trial motions to choices made by the Legislature in fundamentally different circumstances. Their efforts to characterize the holdings of *Mercer* and *Treber* as "odd" or "an anomaly" (*id.* at pp. 3, 4) reflect nothing more than their refusal to recognize the differences in those statutory schemes.

"If a statutory period in which a court might act is jurisdictional, it is manifest that the statute should not be defeated by the simple device of a *nunc pro tunc* order." (*Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 904 [citation and quotation marks omitted].) The same is, always has been, and should continue to be true of the "simple device" of a remand. In

"specifying procedural steps for new trials," the judiciary "may not usurp the legislative function by substituting its own ideas for those expressed by the Legislature." (*Id.* at p. 905 n.5.)

A. Cases Addressing Orders *Denying* New Trial Motions

The Raiders cite several cases in which this Court and the Courts of Appeal remanded orders *denying* new trial motions, arguing that "there is no meaningful distinction . . . between remand for reconsideration of an order granting a new trial and an order denying one." (Raiders' Supp. Br. at p. 6 n.4.) That distinction, however, is more than meaningful; it is *fundamental* to the statutory scheme in multiple respects.

The Legislature justifiably assumes that judges deliberate carefully before making rulings of any kind; accordingly, courts ordinarily are not required by statute to give reasons for their decisions. But some rulings -- like the decision of a single trial judge to set aside a jury verdict -- are so significant and so profound that the Legislature requires judges to *demonstrate* their careful, thoughtful, and contemporaneous deliberation by promptly documenting their reasons.

Reflecting precisely such a legislative choice, section 657 subjects orders *granting* new trial motions to exacting procedural requirements fundamentally different from those that apply to orders denying such motions. The specification requirement itself, the requirement that the specification be in writing, the requirement that the specification be prepared personally by the

trial judge (without delegation to counsel), the ten-day jurisdictional limit for specifying reasons, and the right of immediate appellate review apply *only* to orders *granting* new trial motions; none applies to orders *denying* new trial motions. These differences are neither surprising nor irrational given that the former nullify the results of a jury trial and impose substantial burdens on the court system and the parties, while the latter do neither.

The Legislature was fully within its rights in prescribing substantive and procedural requirements that differ depending upon whether a new trial motion is granted or denied:

> The power of the legislature in specifying procedural steps for new trials is exclusive and unlimited. The wisdom of or necessity for certain requirements are matters for legislative and not judicial consideration and the judiciary, in its interpretation of legislative enactments may not usurp the legislative function by substituting its own ideas for those expressed by the legislature.

(*Sanchez-Corea v. Bank of America*, *supra,* 38 Cal.3d at p. 905 n.5 [quoting *Mercer*; internal punctuation and citations omitted].)

The policies and legislative purposes underlying the holdings of *Mercer* and *Treber* -- reflected in the jurisdictional deadline for the trial court personally and contemporaneously to *document* its reasons for any new trial order -- apply squarely to orders (like the order here) *granting* new trial motions, but have little, if any, application to orders denying such motions. (See, e.g., *Mercer v. Perez*, *supra*, 68 Cal.2d at pp. 123-124 ["the legislative

intent to promote a *more effective review of new trial orders* would be substantially thwarted if the judge failed to make an adequate specification of grounds or reasons *in the first instance*"; "the statutory incentive to careful *judicial deliberation before awarding a new trial* would be weakened . . ."; allowing remands for belated specifications of reasons would remove the "incentive for the moving party to take steps to insure that the judge complied with [the specification requirement applicable to orders awarding a new trial] *at the time of ruling*"] [emphasis added].)

All of these objectives, which the Raiders ignore, would be undermined if an appellate court could later -- in this case, more than four years later -- "reset[] the clock on the trial court's power to issue a new or corrected statement or reasons." (Raiders' Supp. Br. at p. 7.) There is no "logical inconsistency" (*id.*) in recognizing that fact.

* * *

But there is more. The cases upon which the Raiders rely arose in a procedural posture fundamentally different from the posture of this case. (See Raiders' Supp. Br. at pp. 4-6 [citing, e.g., *Krouse v. Graham* (1977) 19 Cal.3d 59; *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798].) *Krouse, Richards*, and the other cases cited by the Raiders (cases in which motions for new trial were denied) were appeals from *judgments.* This case is an appeal from an *order*. That difference dictates fundamentally different outcomes if an appellate court remands for reconsideration.

After a *judgment* is reversed, the case upon remand is completely at large; the judgment and all that followed in the trial court are vacated (including, if the appeal concerned a new trial motion, the 60-day deadline triggered by entry of the vacated judgment for ruling on any new trial motion (see Code Civ. Proc., § 660)), and the case is in a posture as if it had never been tried. After further proceedings on remand, a *new* judgment is entered, after which *new* time periods for filing post-judgment motions and appeal begin to run *as to the new judgment*.

After a *new trial order* is reversed, the situation is fundamentally different. The judgment that had been set aside is "automatically reinstated." (E.g., *Stevens v. Parke, Davis & Co.* (1973) 9 Cal.3d 51, 63; *Mercer v. Perez, supra*, 68 Cal.2d at pp. 118-124.) Absent a pending cross-appeal from the judgment, the judgment cannot be attacked by motion or appeal because the jurisdictional deadline for such attacks has passed. (E.g., *Miller v. Los Angeles County Flood Control. Dist.* (1973) 8 Cal.3d 689, 699; see generally B.E. Witkin, *New California Rules on Appeal* (1944) 17 So. Cal. L. Rev. 80, 94-96 ["it is too late to appeal; the 60-day period after entry of judgment is long past"].)

In cases involving remand without reversal of an order, *the order remains in place*. Any expired jurisdictional deadlines associated with entry of that order -- here, the ten-day deadline for specifying reasons -- also remain in place. If, as here, those jurisdictional deadlines have passed, they cannot be

resurrected without doing violence to the plain meaning of the statute and the statutory scheme. To paraphrase Witkin: "it is too late to [specify reasons]; the [10]-day period after entry of [the new trial order] is long past." (*Id.*)

Thus, the Raiders are completely mistaken in assuming that after remand, the *status quo ante* for cases involving appeals of judgments would be the same as the *status quo ante* if this Court were to change settled law "to enable the trial court to file a statement of reasons in support of its order." In the former situation, the case is returned to a pre-judgment *status quo ante*; the jurisdictional deadlines triggered by the vacated judgment are a nullity; there is no "resetting of the clock." In the latter, the Court anticipates a post-order *status quo ante*; because the order remains in place, so do the related jurisdictional deadlines; and because those deadlines have long passed, it is "too late" to specify reasons (unless this Court, by judicial fiat, were to abrogate the jurisdictional deadline in a manner directly contrary to the plain meaning of the statute).

There is therefore nothing "odd" or "anomalous" about *Mercer* or *Treber*; the jurisprudence in this area, dictated by statute, is entirely rational, consistent, and coherent. Accordingly, the Raiders are simply wrong in asserting that "if *Mercer* were to be sustained, *Krouse*, *Richards* [and various Court of Appeals decisions] would have to be disapproved." (Raiders' Supp. Br. at p. 6). To the contrary, if *Mercer* and *Treber* were "reconsidered,"

the result would be inconsistent not only with an express statutory mandate, but also with broader principles governing new trial procedure in California.[1]

B. Cases Arising Under Statutes Other Than Section 657

The Raiders argue that reconsideration of *Mercer* and *Treber* is warranted by cases in which reviewing courts, in other circumstances and under other statutes, remanded with instructions to prepare statements of decision or to supply missing findings. But the cases on which the Raiders rely arise under statutes that contain statutory language and serve legislative purposes fundamentally different from those of section 657.

The Raiders rely on cases that permit remand (a) to correct deficient statements of reasons after a bench trial, and (b) to prepare findings supporting an award of attorneys' fees and costs for frivolous or unreasonable claims. (See *id.* at pp. 7-9.) *But none of the statutory provisions at issue in*

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[1] The only California case cited by the Raiders in which an appellate court remanded an order *granting* a new trial was *Orange Grove Terrace Owners Association v. Bryant Properties, Inc.* (1986) 176 Cal.App.3d 1217, where the Court of Appeal remanded *not* because of an inadequate specification of reasons but rather because of a pure error of law in the jury instructions.

The Raiders' assertion (at 4) that "this Court and other California appellate courts have often reversed orders granting a new trial, and remanded with directions to reconsider the motion," is flatly incorrect. Indeed, the California appellate courts have recognized the fundamental distinction between orders that deny and orders that grant a new trial motion. Typical is a case upon which the Raiders rely: *Clemens v. Regents of the University of California* (1970) 8 Cal.App.3d 1, 20 [cited in Raiders' Supp. Br. at p. 5] [remanding order *denying* new trial motion but noting that where "the trial court has failed adequately to specify its reasons for *granting* a new trial . . . an appellate court is without power to remand"] [emphasis added].)

those cases contains a time limit within which findings must be prepared. (See Code Civ. Proc., §§ 128.5, 632; Gov't Code, § 12965.)

A written statement of reasons is not even required after a bench trial unless a party so requests (a fact concealed by the Raiders' truncated quotation (at 7) from section 634 of the Code of Civil Procedure); indeed, no requirement of findings or reasons even appears in the portion of the Government Code authorizing the award of attorney's fees. (See Gov't Code, § 12965(b).) In addition, none of the statutes on which the Raiders rely *requires* the trial judge personally to prepare the statement or findings; section 632 of the Code of Civil Procedure expressly permits the parties "to make proposals as to the content." None requires the personal signature of the trial judge; in certain circumstances, statements of decision need not even be in writing. (Code Civ. Proc., § 632.)

In short, in contrast to section 657, which explicitly provides that the trial court "must, within 10 days after filing [the new trial] order, [personally] prepare, sign and file such [a] specification of reasons in writing with the clerk" (Code Civ. Proc., § 657), there is nothing in the language or legislative history of any of the statutes upon which the Raiders rely -- or in the cases that they cite -- to suggest that in those circumstances, the Legislature *insisted upon contemporaneous, personal* deliberation, or upon *proof* of such deliberation, by the trial judge.

That is not surprising; none of those statutes deals with the constitutionally protected right to trial by jury, the burdens on the court system and the parties of repeating a jury trial, or the need to assure the public that a jury verdict will not be set aside by a single judge except for defensible, contemporaneous, and publicly articulated reasons. (See *Mercer v. Perez*, *supra*, 68 Cal.2d at p. 113 [recognizing society's "manifest interest in avoiding needless retrials[, which] cause hardship to litigants, delay the administration of justice, and result in social and economic waste"].)

The Raiders argue (at 9) that there is "no principled reason" for permitting remands under some statutes but not under section 657. The "principled reason" is simply this: New trial procedure is purely a creature of statute. The Legislature, for entirely understandable and rational reasons, imposed requirements for new trial orders, including a fixed deadline to specify reasons for such orders, that differ from requirements that apply under other statutes. That should be the end of the matter.

Finally, if the unambiguous jurisdictional deadline of section 657 were subject to amendment by judicial fiat, there would be no "principled reason" for not "trumping" by judicial fiat other jurisdictional deadlines, such as the deadline for filing a notice of appeal. Accordingly, the inevitable consequence of reconsidering *Terber* and *Mercer* would be to put in doubt the viability and stability of a plethora of jurisdictional deadlines upon which courts and litigants rely every day. The confusion and uncertainty created by

such a course are reason enough for declining to abrogate the plain meaning of section 657 or to disturb the settled precedents of this Court.

II. THE RAIDERS FAILED TO DO THEIR HOMEWORK IN RELYING ON OTHER JURISDICTIONS' CASES, WHICH REINFORCE THE CONCLUSION THAT RECONSIDERATION OF *MERCER* AND *TREBER* IS NOT WARRANTED HERE.

The Raiders assert (at 9) that "[o]ther jurisdictions permit an appellate court to remand with directions to prepare a statement of reasons for the grant of a new trial." True. But the Raiders fail to appreciate the significance and relevance of the law on which they rely.

The Raiders devote nearly a page of their supplemental brief to Florida law, but fail to acknowledge that the legislature there has *expressly authorized* -- indeed, has *expressly required* -- remand if a new trial order does not contain the required specification. Thus, the Florida Rules of Civil Procedure provide:

> All orders granting a new trial shall specify the specific grounds therefor. *If such an order is appealed and does not state the specific grounds, the appellate court shall relinquish its jurisdiction to the trial court for entry of an order specifying the grounds for granting the new trial.*

(Fla. R. Civ. Proc. 1.530(f) [emphasis added].) In the nearly four decades since *Mercer* and *Treber* were decided, the California Legislature was surely capable of enacting a similar provision if it believed that this Court's interpretation of section 657 was incorrect or led to unanticipated consequences. That the Legislature did not do so speaks loudly about its

intent, especially in light of its modification in the interim of *other* provisions of the Code of Civil Procedure relating to new trial motions.

The Raiders also rely on a 1963 decision from an Indiana intermediate appellate court that purportedly permitted a "temporar[y] remand" to allow a trial court to specify its reasons for a new trial. (Raiders' Supp. Br. at p. 10 [citing *Bailey v. Kain* (Ind. Ct. App. 1963) 187 N.E.2d 366].). But the Raiders fail to acknowledge more recent authority from the Indiana *Supreme Court* squarely holding, for reasons similar to those articulated by this Court in *Mercer*, exactly the opposite.

In July 2006, the Indiana Supreme Court held that when a trial court orders a new trial "but fails to make the required special findings, the proper remedy is *reinstatement of the jury verdict.*" (*Weida v. Kegaris* (Ind. 2006) 849 N.E.2d 1147, 1153 [emphasis added].) The Court noted that compliance with the specification requirement

> is necessary to assure the public that the justice system is safe not only from capricious or malicious juries, but also from usurpation by unrestrained judges. *Explanations crafted after appellate remand -- six months or a year after the trial court heard the evidence (or in this instance, two years) -- represent an inadequate exercise of this obligation.*

(*Id.* [emphasis added].) The same principle is reflected in California's statutory scheme, which requires explanations within ten days of entry of the new trial order.

The Indiana Supreme Court recognized in *Weida* that, especially because the "moving party could legitimately take any number of steps to protect his interest in securing" the necessary specification, "an injustice" would result from the "delay [that] any other remedy would necessitate." (*Id.* at pp. 1153, 1152.)

In so holding, the Court flatly rejected the notion -- advanced by the Raiders here -- that the burden of securing an adequate specification of reasons should rest with the party *opposing* the new trial motion. (See *id.* at p. 1153 [to "reassign" this responsibility from moving party to non-moving party "makes the party who won the jury's verdict pay for the cost of [securing] findings (findings whose function is to vitiate the very verdict that party already won)"].)

The law is the same in California. Indeed, there is no basis whatsoever for the Raiders' disingenuous assertions (at 15, 16) that, under California law, *the NFL* should have taken steps to ensure the trial court's compliance with section 657's specification requirement. (See *Zhadan v. Downtown L.A. Motors* (1976) 66 Cal.App.3d 481, 494 ["Defendant's contention that plaintiff was under 'a duty to make a timely jurisdictional challenge to the sufficiency of the court's specification of reasons' is wholly unsupported by the authorities . . . or by any logical reasons. . . . [No case] suggests that the party against whom the motion is granted should take steps to

cause adequate reasons to be stated (which would be contrary to his interests)."].)

In making those assertions, the Raiders ignore the holdings of *Mercer* and *La Manna v. Stewart* (1975) 13 Cal.3d 413, which we discuss in our initial Supplemental Brief at pages 21-22, as well as *LaBorne v. Mulvany* (1974) 43 Cal.App.3d 905, 916-917 [holding, contrary to the Raiders' very misleading implication (at 15), that it is the responsibility of the *moving party* to take steps to secure the required specification].)

The authorities from other jurisdictions upon which the Raiders rely reinforce the conclusion that *Mercer* and *Treber* reflect sensible, thoughtful, and correct constructions of the governing statutory language, and demonstrate that if the Legislature had disagreed with *Mercer* or *Treber* at any time during the last four decades, it was fully capable of amending the statute to overrule those precedents. In the absence of such action by the Legislature, there is no justification for this Court to change the statutory scheme.

III. IT WOULD BE IMPOSSIBLE TO "RESTORE THE PRE-APPEAL *STATUS QUO ANTE*" HERE.

The Raiders acknowledge that if the law were different, "the Court of Appeal could have remanded the matter to Judge Hubbell in time for him to prepare the statement of reasons while the issues were fresh in his mind." (Raiders' Supp. Br. at p. 16.) The law did not -- and does not -- permit such a remand. But even if it did, the Raiders' objective would no longer be

achievable both because of the passage of time and because of Judge Hubbell's retirement years ago.

It is simply impossible now to determine the reasons underlying the trial court's new trial order; it is impossible now to determine whether the trial court relied on "reasons" that could not, as a matter of law, justify a new trial; it is impossible now to know whether the trial court's "reasons" were based on evidence that, as a matter of law, should not have been considered. That history, as well as the trial judge's assessments of the juror-declarants' credibility, are lost forever. Accordingly, the Raiders are simply wrong in asserting that "reversal of the new trial order coupled with a remand [would] restore[] the pre-appeal *status quo ante*" in this eleven year-old case. (*Id.* at p. 1.)

Because all of the Raiders' allegations of jury misconduct were directly contradicted by one or more juror declarations submitted in opposition to the new trial motion, it would also be impossible for a different judge to decide the motion anew. Credibility determinations would be necessary to resolve the factual disputes created by the conflicting declarations, but an evidentiary hearing that might allow such determinations is barred by statute. (See, e.g., *People v. Hedgecock* (1990) 51 Cal.3d 395, 414 ["a motion for a new trial based on allegations of jury misconduct must be presented solely by affidavit without the testimony of witnesses"] [citing Code Civ. Proc., § 658].)

As outlined in our initial Supplemental Brief, these circumstances make this case a particularly inappropriate vehicle for reconsidering the holdings of *Mercer* and *Treber*, and they offer compelling grounds, if the Court is nonetheless inclined to reconsider those holdings, to do so only prospectively or in another case.[2]

CONCLUSION

For the foregoing reasons and those stated in our initial Supplemental Brief, the Court should not reconsider either *Mercer* or *Treber*, which bar an appellate court from resurrecting expired trial court authority to file a statement of reasons in support of an order granting a new trial.

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[2] We demonstrated in our Answer Brief that it is literally impossible to determine, among other things, which juror or jurors and what conduct the trial judge had in mind when he ordered a new trial on the ground of jury misconduct. Nonetheless, and despite this Court's explicit rejection in *Mercer* of efforts to premise review on an "implied specification of findings," the Raiders devote substantial portions of their Supplemental Brief to (a) urging the Court to adopt a purported "implied findings principle" as the standard of review and (b) reiterating the factual allegations from which they hope the Court will imply findings that the trial court failed to make. (See *Mercer v. Perez, supra,* 68 Cal.2d at p. 117 ["one of the fundamental purposes of the recent amendments to section 657 was to put an end to this kind of speculation"]; accord, *Scala v. Jerry Witt & Sons, supra,* 3 Cal.3d at pp. 368-370.) Those rehashed arguments, which are plainly outside the scope of the supplemental briefing permitted by the Court, are fully addressed in our Answer Brief and do not warrant additional response.

Respectfully submitted,

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