

08-08050

IN THE SUPREME COURT OF OHIO

OTM INVESTMENTS, INC., et al.,

Appellant,

vs.

INDYMAC FEDERAL BANK, FSB,

Appellee.

SUPREME COURT CASE NO. 2011-1581

APPELLATE CASE NO. 10CA0056-M

**MEMORANDUM IN OPPOSITION OF JURISDICTION OF APPELLEE INDYMAC
FEDERAL BANK, FSB**

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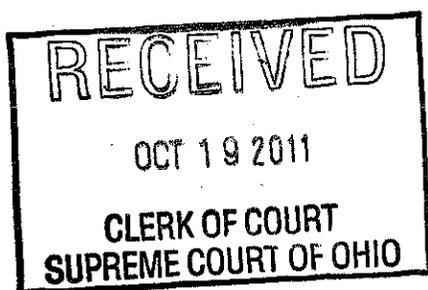


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**EXPLANATION OF WHY THIS CASE IS NOT OF PUBLIC
OR GREAT GENERAL INTEREST**

There is no question that Ohio's foreclosure crisis is a concern to all of Ohio's communities and to those government officials charged with managing and controlling the spread of foreclosures across the State. Nonetheless, the underlying case originated in the Medina County Court of Common Pleas was a foreclosure action based upon the Appellant's monetary default under the provisions of his Promissory Note and Mortgage. A total of only seven payments were ever made on this loan, the unpaid principal balance remains at one million dollars and the subject loan is due for the January 2008 payment. Appellant's arguments against Appellee's motion for summary judgment were procedural – that is, Appellant never accused Appellee of any wrongdoing or predatory lending in making the loan and never denied his obligations to pay under the Note and Mortgage. In fact, Appellant's answer failed to deny any of the allegations of Appellee's Complaint; therefore, all the allegations were admitted under the Ohio Civil Rules. Instead, Appellant made a plethora of convoluted allegations¹ regarding fraud by the Court, disqualification of judges, criminal activity of the court, conspiracy and the law of voids. Additionally, Appellant argued that Appellee did not demonstrate its status as a Real Party in Interest.

Notably, Appellant does not even have title to the subject real property. Shortly before the commencement of this action, Appellant executed a Quit Claim Deed to OTM Investments and it was recorded on September 19, 2008 as Instrument 2008OR020606 in the Medina County Records. Title was transferred again just a few days after the filing of the underlying Complaint. OTM Investments executed a Quit Claim Deed to Eugene Wheeler and the same was recorded on November 14, 2008 as Instrument 2008OR024422 in the Medina County Records. It cannot

¹ Appellant's Brief in Opposition to the Motion for Summary Judgment went on for over forty pages and, at times, was almost indecipherable.

be a matter of great public interest when Appellant doesn't even hold title. Appellant is seeking the discretion of this Court, not because of a great general interest, but rather to continue his long history of hindering and delaying this matter.

As such, the questions before this Honorable Court do not arise from a wrongful foreclosure, or from a broad point of law. To the contrary, Appellant seeks to invoke this Court's jurisdiction on four issues.ⁱⁱ Three of the issues are procedural issues and are well-settled in Ohio law: whether a foreclosure complaint must be verified; whether the defense of failure to join a party under Ohio Civil Procedure Rule 19 (A) was waived; and whether Appellant was prejudiced by the delay in the processing of his Appeal. Under each of these issues, Appellant seeks to expand the Civil Rules past their meaning. These issues, which have been addressed repeatedly by this Honorable Court, need not be revisited and re-briefed here, and are far from the quality of topic which would be of great general or public interest.

Even Appellant's final issue, Appellee's real party in interest status, in this case, is not a matter of great public interest; this Honorable Court already has cases before it with certified conflicts on this very issue and said cases involve actual controversies between lenders and property owners, unlike Appellant, who does not even own the property.ⁱⁱⁱ Again, the subject case is one where the subject Note and Mortgage are due for the January 2008 payment on a million dollar property where Appellant is no longer in title. There is no reason for the Court to take discretion on this Appeal.

ⁱⁱ In their decision affirming the decision of the lower court, the Ninth District discerned there were four issues raised by Appellant but noted that Appellant's brief was difficult to follow. His Memorandum in Support of Jurisdiction is no exception.

ⁱⁱⁱ The certified conflict cases include *Federal Home Mortgage Corp v. Schwartzwald*, Case Nos 11-1201 and 11-1362, *Washington Mutual Bank v. Wallace*, Case No. 2011-1694, and *U.S Bank National Assoc. v. Duvall*, Case No. 2011-0218 (pending Motion for Reconsideration)

**EXPLANATION OF WHY THIS CASE DOES NOT HAVE A SUBSTANTIAL
CONSTITUTIONAL QUESTION**

Appellant also alleges that there are two “critical” constitutional issues raised with his appeal to this Court: whether the Court “blatantly disregarded and usurped” his due process of law rights and when the “abandon” of any and all jurisdiction, personum, subject matter and territorial, took place in the Court proceedings. His arguments to support these contentions are vague, to say the least, and Appellant certainly has not demonstrated a substantial constitutional question that would require this Honorable Court to take discretion and hear this case.

However, it appears that Appellant is arguing that Appellee did not have standing to bring this matter as it was not the original lender or holder of a recorded assignment of record at the time the underlying foreclosure action was commenced and, therefore, the Trial Court lacked jurisdiction to hear the case or make any ruling-including the ruling that Appellant is appealing. It appears that this is the substantial Constitutional question that Appellant is asserting in this matter. Appellant argues that all of the decisions made by the Trial Court and Ninth District Court of Appeals are a nullity. Appellant even goes as far as to allege the Courts’ rulings “rocked the very core foundation of all jurisdiction” and that the lower Courts disregarded constitutional oaths and committed fraud.

Appellant’s reasoning and attempted logic does not constitute a substantial Constitutional question or any Constitutional question at all. To support his argument, Appellant vaguely refers to the United States Declaration of Independence, the preamble to Ohio’s Constitution on life, liberty and happiness, Article VI, Section 3 of the United States Constitution and to Ohio Constitution, Article 15, Section 7 without supporting his Memorandum with a single instance where the lower Courts strayed from any of these documents and statutes.

Appellant does also cite to various federal statutes and rules, including 28 USC 1331 and Federal Rule 12(h)(3); however, this case was not filed in the United States District Courts nor

did the underlying action arise from the Constitution, laws or treaties of the United States. The underlying action is a foreclosure suit commenced due to Appellant's breach of the contract—the Note and Mortgage.

Additionally, Appellant's conclusions that the lower Court's decision would have an "egregious affect" on individuals who "seek the light of truth and justice through the legal system.." and that the ruling is "sabotage to the integrity of government and interfere with the sovereignty of individuals we the people" is nonsensical. Quoting inapplicable federal statutes, rules and parts of the Constitution does not meet the high standard necessary for this Honorable Court to take discretion and hear this matter as a substantial constitutional question.

The Summary Judgment Standard

The Ninth District Court of Appeals properly reviewed the decision independently and without deference to the trial court's determination. *United States v. Childers* (2003), 152 Ohio App. 3d 622, 789 N.E.2d 691, citing *Midwest Specialties, Inc. v. Firestone Tire & Rubber Co.* (1988), 42 Ohio App.3d 6, 8, 536 N.E.2d 411. The standards for a Motion for Summary Judgment have been set forth in Civ. R. 56, which states, in pertinent part:

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

This Honorable Court encourages the granting of a Motion for Summary Judgment in cases raising no genuine issue of material fact. In *North v. Pennsylvania Rd. Co.* (1967), 9 Ohio St. 2d 169, the Ohio Supreme Court stated:

The summary judgment statute was enacted with a view to eliminating from the backlog of cases which clog our courts awaiting jury trials, those in which no genuine issue of fact exists. The availability of this procedure and the desirability of its aim are so apparent that its use should be encouraged in proper cases.

The moving party bears the initial burden of providing to the trial court a basis for the motion and is required to identify portions of the record demonstrating the absence of material issues of fact pertaining to the non-moving party's claim. *Welch v. Welch* (December 22, 2006), Lake App. No. 2005-L-147, 2006 Ohio 6862, citing *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264. The burden then shifts to the non-moving party to set forth specific facts that would establish a genuine issue for trial. *Id.* However, the non-moving party may not rest on bald allegations or denials contained in the pleadings; rather, he or she must submit evidentiary material sufficient to create a genuine dispute over material facts at issue. *Id.*

By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of *material fact*. *Smith v. Transworld Systems, Inc.*, 953 F.2d 1025 (6th Cir. 1992), citing *Anderson v. Liberty Lobby, Inc.* (1986), 477 U.S. 242, 247-48, 106 S. Ct. 2505 (emphasis in original). The dispute must be genuine and the facts must be such that if they were proven at trial a reasonable jury could return a verdict for the nonmoving party. *60 Ivy St. Corp v. Alexander*, 822 F.2d at 1435 (6th Circuit 1987). If the disputed evidence “is merely colorable, or is not significantly probative, summary judgment may be granted.” *Anderson*, at 249-50 (citations omitted).

Because the Ninth District’s Decision complies with this Honorable Court’s summary judgment, this case requires no further review and is not of such great general or public interest as to merit the invocation of this Honorable Court’s jurisdiction.

Verification of the Complaint

Civ.R. 11 states, in pertinent part, that: “except where otherwise specifically provided by these rules, pleadings need not be verified or accompanied by affidavit.” The Ninth District

properly held that Appellee's complaint in foreclosure did not need to be verified as discussed in more detail below.

Civ. R. 11, cited above, is clear that the rules will specifically provide when a pleading must be verified. Civ. R. 10(D)(2) requires that "a complaint that contains a medical claim, dental claim, optometric claim, or chiropractic claim...shall include one or more affidavits of merit..." The subject foreclosure action does not relate in any way to any of these claims and therefore no requirement of an affidavit of merit, or other verification, is required. Therefore, again, the Ninth District Decision holding that Appellee's foreclosure complaint need not be verified was correct and this finding clearly does not meet the level needed to consider this matter one of great general or public interest.

Failure to Join Eugene Wheeler

The Ninth District's Decision was based on a specific application of Ohio Civil Procedure Rule 19 and the 1970 Advisory Committee Notes to Civ. R. 19. Through the Court's thorough review of the language and meaning of the Rule, the Court properly held that Appellant had forfeited his right to raise the defense that a necessary party, Eugene Wheeler, to the underlying foreclosure action was not joined to the case. Appellee's argument below will discuss this further.

Civ. R. 19 provides that parties with interest in an action may be joined, if feasible. Joinder is a waivable defense and, as the Court's detailed analysis demonstrates, Appellant did not timely assert this defense in either his answer or any pre-answer motion and, thus, it was waived.

Ohio Revised Code § 2703.26 addresses the doctrine of *lis pendens*. O.R.C § 2703.26 states:

Lis pendens in general: When a complaint is filed, the action is pending so as to charge a third persons with notice of its pendency. While pending, no interest can

be acquired by third persons in the subject of the action, as against the plaintiff's title.

As discussed below, the Ninth District properly held that Eugene Wheeler was not a necessary party to this case and took an interest in the subject real property after the filing of the foreclosure complaint. Thus, Mr. Wheeler's interest is *lis pendens*. The applicability of this doctrine to the facts of this case does not meet the high level required to review this matter as a great public interest.

STATEMENT OF THE CASE AND FACTS

On April 6, 2007, Appellant Robert D. Anthony executed a note in favor of All State Home Mortgage, and Appellant Robert D. Anthony and Michelle Anthony^{iv}, executed a mortgage in favor of Mortgage Electronic Registration Systems, Inc., solely as nominee for All State Home Mortgage, for one million dollars (\$1,000,000.00) (Complaint Exs. A, B). The Mortgage was recorded in the Medina County Official Records on April 12, 2007 as Instrument 2007OR009681 (Preliminary Judicial Report p. 2). An Assignment of the Mortgage to Appellee was executed on November 14, 2008 and recorded in the Medina County Official Records on November 26, 2008 as Instrument 2008OR025086.

Appellee filed its foreclosure action in the Medina County Court of Common Pleas on November 5, 2008 seeking judgment on its note and to foreclose on its mortgage securing certain real property after Appellant failed to make timely mortgage payments as required. Service was issued to all parties on November 7, 2008. Service was obtained on Appellant through publication. Appellant filed an Answer to Complaint in foreclosure with Conditional Acceptance for Value for Proof of Claim, Affidavit and Exhibit on January 5, 2009.

^{iv} Michelle Anthony was dismissed from this case on February 12, 2008 as she no longer has an interest in the subject real property and is not a necessary party. A divorce decree between Michelle Anthony and Appellant was filed on April 10, 2008 and Michelle Anthony filed a quit claim deed to Appellant on January 18, 2008 as Instrument 2008OR001367.

Appellee then proceeded to file its Motion for Summary Judgment on February 17, 2009, which addressed each affirmative defense raised by Appellant^v and demonstrated an absence of genuine issue of material fact as to its Complaint. Appellee also filed a Motion for Default Judgment on February 27, 2009 against the non-answering Defendants. On March 2, 2009, Appellant filed a Response to the Motion for Summary Judgment, as well as a Notice of Fraud of Agent and Violation of Directors Oath and Legal Notice of Fraud and Defraud.^{vi} Appellee filed a Reply Brief in Support of its Motion for Summary Judgment on April 6, 2009.^{vii}

The Trial Court granted to Appellee a Decree in Foreclosure on June 17, 2009, finding an absence of a single genuine issue of material fact, and that, when considering the evidence in a light most favorable to Appellant, reasonable minds could come to but one conclusion: Appellee is entitled to Judgment as a matter of law. Appellee ordered sale on the property. Appellant then filed his Notice of Appeal to the Ninth District Court of Appeals on July 17, 2009.^{viii}

Following the Notice of Appeal, this case was stayed on three separate occasions due to bankruptcy filings by Appellant. Appellant filed a Chapter 13 bankruptcy, Case No. 09-54217, on September 17, 2009. Appellee's order of sale was returned unexecuted. The bankruptcy stay

^v Appellee notes that Appellant's Answer also contained over twenty pages of demands for "proofs of claim", "caveats" and an affidavit signed by Appellant as "Secured Party Creditor." Appellee filed a Motion to Strike this portion of Appellant's Answer.

^{vi} Appellee moved to strike these filings from the Court record as they were more of the nonsensical documents filed by Appellant. Appellee is not certain what Appellant was hoping to achieve by filing said documents but wanted to advise this Honorable Court of the same.

^{vii} Appellee also notes that a third party, Eugene Wheeler, filed many different documents with the Court including "Judicial Notices" (May 29, 2009) and Motion to Void Judgment (July 21, 2009). The Trial Court consistently struck these filings from the Court record as Eugene Wheeler is not a party to this action. Eugene Wheeler is in title on the subject real property. However, the transfer of title to Mr. Wheeler was *lis pendens* and, therefore, he is not a party to this action.

^{viii} This appeal was not processed at that time. It was not until Appellant filed a Motion to Stay and Notice of Appeal on May 27, 2010 that the Clerk's error from July 2009 was discovered and the appeal allowed.

was lifted in the Trial Court on December 3, 2009 after the bankruptcy case was dismissed. Appellee reordered sale and a sale date was set for March 11, 2010. The day before the sale, Appellant filed a second Chapter 13 Bankruptcy, Case No. 10-51032, and Appellee's sale was again stayed. The bankruptcy stay was lifted in the Trial Court on April 30, 2010 after that bankruptcy case was dismissed as well. Appellee reordered sale and a sale was set for August 19, 2010. Again, the day before the sale, Appellant filed a third Chapter 13 Bankruptcy, Case No. 10-53928, and Appellee's sale was stayed. The bankruptcy stay was lifted by the Trial Court on October 27, 2010 as Appellee obtained an order from the bankruptcy court that granted Appellee's Motion for an Order Confirming Inapplicability of the Automatic Stay.

Appellee issued a fourth order of sale and a sale was set for January 20, 2011. However, the sale did not go forward as, the day before the sale, a third party, Eugene Wheeler, filed a Judicial Notice to Intervene and Stay all Proceedings due to Federal Bankruptcy. Eugene Wheeler filed a Chapter 13 Bankruptcy, Case No. 11-50169. The case was later converted to a Chapter 7. Based upon this bankruptcy filed, Appellee's sale was stayed. While, Eugene Wheeler is in title on the subject real property, the transfer of title to Mr. Wheeler was *lis pendens* to the underlying foreclosure and therefore, he is not a party to this action. Another sale was set for May 12, 2011 but was stayed by order of the Ninth District Court of Appeals upon Motion of Appellant.

On August 4, 2011, the Ninth District Court of Appeals affirmed the Trial Court's Judgment, with one Judge dissenting on only one assignment of error, and overruled Appellant's four assignments of error, including holding that Appellee was the real party in interest for the purposes of filing the foreclosure action, and that the Summary Judgment was properly awarded in Appellee's favor. It is from this Decision that the Appellant seeks review of this Court.

The Trial Court lifted the bankruptcy stay on September 15, 2011 as Appellee obtained an order from the bankruptcy court that granted Appellee's Motion for Relief and order that no stay shall be imposed by any future bankruptcy proceeding as it relates to an in rem action against the subject real property for a period of two years from February 23, 2011. Appellee ordered sale for the fifth time and a sale is set for November 17, 2011. On October 3, 2011, Appellant filed a second appeal to the Ninth District Court of Appeals, Case 11CA 0096-M, appealing the entry that vacated the bankruptcy stay.

ARGUMENT IN OPPOSITION TO APPELLANT'S PROPOSITIONS OF LAW

Appellant's Proposition of Law No. I: Promotions are a mandatory subject of the Ohio Const. art. 15 section 7 and the Ohio Revised Codes. Validity of Acts of Intruder or Usurper; Criminal Liability

Appellant's only proposition of law is nonsensical and is not even a proposition of law. His allegations have nothing to do with the subject foreclosure action. He again refers to the Ohio Constitutional section regarding judicial offices supporting the Constitution. Appellant also references Ohio Revised Code §2919.17 which is a code section that discusses terminating human pregnancy and is repealed as of October 20, 2011. Appellant also includes vague references to the entire Ohio Revised Code, an office discharging its duties and criminal liability. He refers to intruder or usurpers and promotions but does not give those words, or any of the other statutes or rules he cites, any application to the present case. Defendant also cites to two cases: *State v. Gardner*, 54 Ohio St. 24, which involves taking a bribe from an official, and *Kridler v. State*, 24 Ohio St. 22^{ix}, which is a case involving a police officer acting as the first lieutenant without the authority to do so. Neither of these cases have any applicability to the subject foreclosure action nor does Appellant even attempt to make the connection.

^{ix} Appellee does not use any case citation other than the case name. Appellant is under the belief, upon its own search, that this is the case Appellant is referring to in his Proposition.

Given the issues detailed above with Appellant's proposition and given the analysis contained within the Ninth District Court of Appeals' Opinion, the Appeals Court reached the proper conclusion upholding the Trial Court's judgment granting Appellee's motion for default judgment, summary judgment and issuing a decree in foreclosure. As indicated above, the Ninth District discerned four issues raised on appeal by Appellant: (1) whether a foreclosure complaint must be verified when filed; (2) whether the defense of failure to join a party under Ohio Civil Procedure Rule 19 (A) was waived; (3) whether Appellant was prejudiced by the delay in processing of his Appeal and (4) whether Appellee was the real party in interest at the time the underlying case was filed.

1. A verified complaint is not required for foreclosure actions

The Ninth District properly held that Appellee's complaint did not need to be verified. The Court notes that Appellee did not cite to any authority to support his argument. The Court cited to Civ. R. 11 to support its decision. Civ. R. 11 not only expressly states that no "verification" or affidavit need to be part of a complaint, but it attaches a certain understanding and expectation to the signature of the party (or its attorney) who is signing the document. Based on the straightforward provisions of Civ. R. 11 on this topic, it is evident that the Ninth District made the proper determination.

2. Appellant waived the defense of failure to join a party under Civ. R. 19(A)

Appellant argued that the lower court improperly did not allow third party, Eugene Wheeler, in as a party to the case. Eugene Wheeler obtained title interest in the property when OTM Investments executed a Quit Claim Deed to Eugene Wheeler and the same was recorded on November 14, 2008 as Instrument 2008OR024422 in the Medina County Records. However, the Quit Claim Deed was recorded AFTER the Complaint was filed. Thus, Mr. Wheeler's

interest was *lis pendens* under O.R.C. §2703.26 and, therefore, Appellee did not name him as a party to the action.

The Ninth District properly held that Appellant forfeited his right to join Mr. Wheeler by not raising the defense under Civ. R. 19(A) in his answer or pre-answer motion. The Court went through a very detailed analysis, including reviewing each section of Civ. R. 19. The Court noted that Appellant did not cite to any authority to support his argument. Based on this analysis, it is evident that the Ninth District made the proper determination.

3. Appellant was not prejudiced by the delay in the processing of his appeal

Appellant timely filed his Notice of Appeal on June 17, 2009. However, the appeal was not processed timely, perhaps due to Appellant's bankruptcy filings. Appellant did not bring the matter to the attention of the Court until almost a year after Judgment had been entered. However, the appeal was heard and, therefore, the Clerk's failure to process Appellant's Notice of Appeal timely did not result in any damage to Appellee nor does he allege any damages. The Ninth District properly held that the delay did not prejudice Appellant in any way. The Court again noted the deficiency in authority in Appellant's Brief used to support his arguments. Appellant relied on O.R.C. ¶ 2945.71 which the Ninth District pointed out only applies to the right to a speedy trial in criminal matters in the lower court.

4. Appellee is the real party in interest

The crux of Appellant's argument on appeal is that Appellee is not the real party in interest because its Assignment of Mortgage was executed after the filing of the Complaint. To the contrary, Appellee demonstrated at the Trial Court level that it was the real party in interest and had standing to file the action.

Since 2007, the Ninth District Court of Appeals has held the position that a foreclosure plaintiff need not prove its standing and real party in interest status at the time the complaint is

filed. *Bank of New York, et al., v. Stuart* (March 30, 2007), Lorain App. No. 06CA008953, 2007 Ohio 1483 at paragraphs 8-13 (citing multiple instances of precedent in which a reviewing court held that an assignment executed subsequent to the filing of a complaint was sufficient to satisfy the “real party in interest” requirement of Rule 17(A)). That precedent was upheld by the Ninth District Court of Appeals as recently as August 23, 2010 with *Deutsche Bank Natl. Trust Co. v. Traxler* (August 23, 2010), Lorain App. No. 09CA009739, 2010 Ohio 3940, in which the Court again found that “a bank need not possess a valid assignment at the time of filing suit so long as the bank procures the assignment in sufficient time to apprise the litigants and the court that the bank is the real party in interest.” *Id.* at 5. The Ninth District properly held that Appellee was the real party in interest and cited to these very cases as reasoning for their decision.

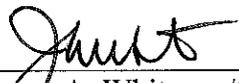
In this case, Appellee was in complete compliance with the Ninth District precedent. The Assignment of Mortgage was filed prior to the entry of Judgment, and possession of the Note was established at the time the Complaint was filed. Summary Judgment was appropriate entered in Appellee’s favor. Just like in *Traxler*, Appellant has “failed to set forth any argument as to why this Court should abandon its own timely precedent,” and the Ninth District properly affirmed the decision.

CONCLUSION

Based on the foregoing, this Honorable Court should not invoke jurisdiction over this case. While the broad topic of foreclosure may be of interest to those Ohioans faced with the loss of their homes, this specific case does not involve any matter of great or public interest or substantial constitutional issue. The Appellate Court correctly applied the summary judgment standard to its underlying review and properly reviewed the record in making its Opinion. As such, Appellee requests that this Court declines jurisdiction over this case and allows the Appellate Court Decision affirming the Trial Court's Judgment to stand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of MEMORANDUM IN OPPOSITION TO JURISDICTION OF APPELLEE was mailed by regular U.S. mail this 18th day of October, 2011 to the following:

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Respectfully submitted,

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