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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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Applied for Mark	MANWEAR
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Serial No. 77/370,042
Mark: MANWEAR

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Applicant:	Webid Consulting Ltd.)	
)	
Serial No:	77/370,042)	Trademark Law Office: 114
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Mark:	MANWEAR)	

APPLICANT'S APPEAL BRIEF

TABLE OF CONTENTS

I.	INTRODUCTION.....	5
II.	RELEVANT FACTS.....	5
III.	ISSUE.....	6
IV.	ARGUMENT.....	6
	A. The Legal Standard in the Federal Circuit for descriptiveness.....	6
	B. Applicant’s mark, taken as a whole, is not merely descriptive for clothing.....	8
	1. Intentional misuse of the term MAN in MANWEAR creates a unique and incongruous meaning.....	8
	2. MANWEAR is not a recognized name for clothing.....	11
	3. MANWEAR does not immediately tell the potential purchaser only what the Applicant’s goods or services are or what their function, characteristics or uses are.....	11
	4. MANWEAR is not in common usage as a description of the goods or services.....	13
	5. The Examining Attorney has not met the burden of proving MANWEAR descriptive.....	15
V.	CONCLUSION.....	15

TABLE OF AUTHORITIES

Cases

<i>Aktieselskabet af 21.November 2001 v. Fame Jeans Inc.</i> , 77 USPQ2d 1861 (TTAB 2006)	14
<i>Buti v. Impresa Perosa S.R.L.</i> , 139 F.3d 98, 45 USPQ2d 1985 (2nd Cir. 1998)	14
<i>Heatube Corporation</i> , 109 USPQ 423 (CCPA 1956)	8, 11, 13
<i>In re Abcor Dev. Corp.</i> , 588 F.2d 811, 200 USPQ 215 (CCPA 1978)	7
<i>In re Acquisition Solutions</i> , 2005 TTAB LEXIS 25 (TTAB 2005)	13
<i>In re American Greetings Corp.</i> , 226 USPQ 365 (TTAB 1985)	7
<i>In re Atavio</i> , 25 USPQ2d 1361 (TTAB 1992)	7
<i>In re Bright-Crest, Ltd.</i> , 204 USPQ 591 (TTAB 1979).....	7
<i>In re Colonial Stores Inc.</i> , 394 F.2d 549, 157 USPQ 382 (C.C.P.A. 1968).....	8
<i>In re Commerce Bancorp, Inc.</i> , 2006 TTAB LEXIS 248 (TTAB 2006)	12
<i>In re Conductive Systems, Inc.</i> , 220 USPQ 84 (TTAB 1983).....	8
<i>In re Gyulay</i> , 820 F.2d 1216, 3 USPQ2d 1009 (Fed. Cir. 1987)	7
<i>In re Home Builders Association of Greenville</i> , 18 USPQ2d 1313 (TTAB 1990).....	7
<i>In re Hutchinson Technology Inc.</i> , 852 F.2d 552, 7 USPQ2d 1490 (Fed. Cir. 1988).....	12
<i>In re IdaTech, LLC</i> , 2004 TTAB LEXIS 259 (TTAB 2004).....	12
<i>In re Morton-Norwich Prods., Inc.</i> , 209 USPQ 791 (TTAB 1981).....	8
<i>In re Patent & Trademark Services Inc.</i> , 49 USPQ2d 1537 (TTAB 1998).....	7
<i>In re Polo International Inc.</i> , 51 USPQ2d 1061 (TTAB 1999).....	7
<i>In re Shutts</i> , 217 USPQ 363 (TTAB 1983).....	8, 9, 11
<i>In re TMS Corp. of America</i> , 200 USPQ 57 (TTAB 1978).....	8
<i>In re Tower Tech., Inc.</i> , 64 USPQ2d 1314 (TTAB 2002)	7, 8, 12
<i>Linville v. Rivard</i> , 41 USPQ2d 1731 (TTAB 1996).....	14
<i>Mother's Restaurants Inc. v. Mother's Bakery, Inc.</i> , 498 F. Supp. 847, 210 USPQ 207 (W.D.N.Y. 1980).....	14

Statutes

15 U.S.C. § 1052 6

Other Authorities

dictionary.com..... 9, 10

Merriam-Webster Online Dictionary. 2009..... 9

I. INTRODUCTION.

Applicant has appealed to the Trademark Trial and Appeal Board from the final decision of the Examining Attorney refusing registration of the above-referenced mark.

The Applicant filed its application to register the mark MANWEAR on January 11, 2008. This appeal is in response to the Denial of Request for Reconsideration mailed on June 2, 2009 in connection with the above-referenced Application and the Board's July 14, 2009 notice regarding assumption of proceedings. The United States Patent and Trademark Office Examining Attorney has made final the refusal to grant registration based on descriptiveness. The Applicant filed its notice of appeal from that final refusal on May 6, 2009.

The Applicant respectfully submits that its MANWEAR mark is distinctive. The Applicant therefore requests that the refusal of registration be withdrawn and that the mark be approved for publication and registration.

II. RELEVANT FACTS.

The Applicant's mark is MANWEAR for "men's clothing, namely, coats, jackets, vests, sweaters, t-shirts, shirts, jerseys, shorts, parkas, pullovers, wind-jackets, pants, raincoats; sportswear, namely, sweatsuits, leisure suits, jeans, sport jackets, overalls; underwear, namely, short and long sleeve tee-shirts, long johns, briefs, boxers; Men's leather clothing, namely, coats, jackets, vests, shorts, parkas, pants, raincoats; Men's fashion accessories, namely, ties, socks, caps, gloves, belts, wristband, watch wristband, hats, shoes and scarves" in Class 25.

The Applicant has separately applied to register the MANWEAR mark in Class 35 for "online retail stores featuring men's clothing and accessories and small leather goods from suppliers other than applicant," Serial No. 77/397,586, and in Classes 16 and 18 for "men's accessories, namely, money clips, folders used as travel organizers and memo holders" and

“men’s accessories, namely, briefcase-type portfolios, tote bags, compartment bags, namely, all purpose carrying bags with multiple compartments; Men’s small leather goods, namely, wallets, key chains, travel kits in the nature of shaving bags, travel bags, luggage, business card cases,” Serial No. 77/977,259. The Applicant has separately appealed the refusal of registration, based on descriptiveness, of the application in Class 35.

The Examining Attorney bases the finding of descriptiveness on (a) dictionary definitions of the component terms MAN and WEAR that comprise the Applicant’s mark, and (b) web pages which are asserted to show that “the wording in the mark was used to identify clothing for males.” The Applicant appeals this descriptiveness refusal, and asserts that its MANWEAR mark is not merely descriptive for clothing.

III. ISSUE.

The issue presented is whether the Applicant’s mark MANWEAR is merely descriptive as used in connection with men’s clothing.

IV. ARGUMENT.

A. The Legal Standard in the Federal Circuit for descriptiveness.

The Lanham Act § 2, 15 U.S.C. § 1052, provides the statutory framework for this response:

No trademark by which the goods of the Applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it:

...

(e) Consists of a mark which, (1) when used on or in connection with the goods of the applicant is merely descriptive or deceptively misdescriptive of them

The Lanham Act thus provides a positive grant of the right to register a trademark unless it is merely descriptive of the Applicant’s goods. The burden is therefore on the Patent and Trademark Office to demonstrate mere descriptiveness.

The test for determining whether a mark is merely descriptive is whether it immediately conveys information concerning a quality, characteristic, function, ingredient, attribute or feature of the goods in connection with which it is used, or intended to be used. *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987); *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 217-18 (CCPA 1978). Descriptiveness is not determined in the abstract, but in relation to the goods identified in the application, the context in which the mark is used, and the impact that it is likely to make on the average purchaser of such goods. *In re Polo International Inc.*, 51 USPQ2d 1061, 1062 (TTAB 1999); and *In re Bright-Crest, Ltd.*, 204 USPQ 591, 593 (TTAB 1979). In other words, the issue is whether someone who knows what the goods are will understand the mark to convey information about them. *In re Tower Tech., Inc.*, 64 USPQ2d 1314, 1316-1317 (TTAB 2002); *In re Patent & Trademark Services Inc.*, 49 USPQ2d 1537, 1539 (TTAB 1998); *In re Home Builders Association of Greenville*, 18 USPQ2d 1313, 1317 (TTAB 1990); *In re American Greetings Corp.*, 226 USPQ 365, 366 (TTAB 1985).

If however, reasoning or imagination is required to determine the attributes or characteristics of the products associated with a mark, that mark is suggestive rather than descriptive. See *In re Atavio*, 25 USPQ2d 1361, 1362 (TTAB 1992). Even where individual terms are descriptive, combining them together may evoke a new and unique commercial impression. If each component retains its merely descriptive significance in relation to the goods, without the combination of terms creating a unique or incongruous meaning, then the resulting combination is also merely descriptive. See, e.g., *In re Tower Tech., Inc.*, 64 USPQ2d 1314, 1317-18 (TTAB 2002). However, a mark composed of a combination of merely descriptive components is registrable if the combination of terms creates a unitary mark with a unique, nondescriptive meaning, or if the composite has a bizarre or incongruous meaning as applied to the goods. See, *In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382 (C.C.P.A.

1968) (SUGAR & SPICE held not merely descriptive of bakery products); *In re Shutts*, 217 USPQ 363 (TTAB 1983) (SNO-RAKE held not merely descriptive of a snow removal hand tool).

The courts and TTAB have used the following three-part test to determine descriptiveness: (1) is the mark used as the name of the goods or services, (2) does the mark immediately tell the potential purchaser only what the goods or services are or what their function, characteristics or uses are, and (3) is the mark in common usage as a description of the goods or services? *Ex parte Heatube Corporation*, 109 USPQ 423 (CCPA 1956).

There is a narrow line between terms that are merely descriptive and those that are only suggestive. *In re Tower Tech., Inc.*, 64 USPQ2d 1314, 1316-1317 (TTAB 2002) (citing *In re TMS Corp. of America*, 200 USPQ 57 (TTAB 1978)). Any doubt as to whether a mark is descriptive or suggestive is resolved in favor of publication of the mark for opposition. *In re Conductive Systems, Inc.*, 220 USPQ 84, 86 (TTAB 1983); *In re Morton-Norwich Prods., Inc.*, 209 USPQ 791 (TTAB 1981).

B. Applicant's mark, taken as a whole, is not merely descriptive for clothing.

1. Intentional misuse of the term MAN in MANWEAR creates a unique and incongruous meaning.

As stated above, a mark composed of a combination of merely descriptive components is registrable if the combination of terms creates a unitary mark with a unique, nondescriptive meaning, or if the composite has a bizarre or incongruous meaning as applied to the goods. Here, the Examining Attorney relies heavily on dictionary definitions showing that the words MAN and WEAR have common, recognized meanings. The Applicant does not dispute those meanings. However, these definitions do not lead to the conclusion that the combination of the two words results in a descriptive term. The Examining Attorney's position would be correct IF

the Applicant's mark were MENSWEAR, which has a recognized definition: menswear; Function: noun; clothing for men (*Merriam-Webster Online Dictionary*. 2009.). However, by substituting MAN for MENS and thus intentionally diverting from use of menswear, the commonly understood term for men's clothing, the Applicant has created an obvious incongruity in the mind of the prospective customer. This results in exactly the type of "mental pause" the Board recognized as creating distinctiveness in the case of the SNO-RAKE mark at issue in *In re Shutts*, 217 USPQ 363 (TTAB 1983), where, the Board stated:

it would be rare (indeed, close to non-existent) in contemporary usage to request someone to "rake snow" from either a large or small surface or to refer to any long or short-handled snow removal tool (e.g., an auto windshield scraper) as a "rake" and evoke an understanding of this as a natural language usage. The concept of mere descriptiveness, it seems to us, must relate to general and readily recognizable word formulations and meanings, either in a popular or technical usage context, and should not penalize coinage of hitherto unused and somewhat incongruous word combinations whose import would not be grasped without some measure of imagination and "mental pause".

The Examining Attorney refers to the manner in which the term MENSWEAR is used to refer to clothing for men, essentially arguing that MAN should be viewed as the equivalent of MENS when paired with the term WEAR. However, the very definitions attached as evidence by the Examining Attorney disprove this. Thirty definitions of MAN are listed in dictionary.com as cited by the Examining Attorney:

- noun 1. an adult male person, as distinguished from a boy or a woman.
- 2. a member of the species *Homo sapiens* or all the members of this species collectively, without regard to sex: prehistoric man.
- 3. the human individual as representing the species, without reference to sex; the human race; humankind: Man hopes for peace, but prepares for war.
- 4. a human being; person: to give a man a chance; When the audience smelled the smoke, it was every man for himself.
- 5. a husband.
- 6. a male lover or sweetheart.
- 7. a male follower or subordinate: the king's men. He's the boss's number one man.
- 8. a male employee or representative, esp. of a company or agency: a Secret Service man; a man from the phone company.

9. a male having qualities considered typical of men or appropriately masculine: Be a man. The army will make a man of you.
10. a male servant.
11. a valet.
12. enlisted man.
13. an enthusiast or devotee: I like jazz, but I'm essentially a classics man.
14. Slang. male friend; ally: You're my main man.
15. a term of familiar address to a man; fellow: Now, now, my good man, please calm down.
16. Slang. a term of familiar address to a man or a woman: Hey, man, take it easy.
17. one of the pieces used in playing certain games, as chess or checkers.
18. History/Historical. a liegeman; vassal.
19. Obsolete. manly character or courage.
20. the man, Slang. a. a person or group asserting authority or power over another, esp. in a manner experienced as being oppressive, demeaning, or threatening, as an employer, the police, or a dominating racial group.
b. a person or group upon whom one is dependent, as the drug supplier for an addict.
Also, the Man.

- verb (used with object)
21. to furnish with men, as for service or defense.
 22. to take one's place for service, as at a gun or post: to man the ramparts.
 23. to strengthen, fortify, or brace; steel: to man oneself for the dangers ahead.
 24. Falconry. to accustom (a hawk) to the presence of men.

–interjection 25. Slang. an expression of surprise, enthusiasm, dismay, or other strong feeling: Man, what a ball game!

- Idioms
26. as one man, in complete agreement or accord; unanimously: They arose as one man to protest the verdict.
 27. be one's own man, a. to be free from restrictions, control, or dictatorial influence; be independent: Now that he has a business he is his own man.
b. to be in complete command of one's faculties: After a refreshing nap he was again his own man.
 28. man and boy, ever since childhood: He's been working that farm, man and boy, for more than 50 years.
 29. man's man, a man who exemplifies masculine qualities.
 30. to a man, with no exception; everyone; all: To a man, the members of the team did their best.

Of these 30 definitions, none refers in any way to MAN being understood to refer to an item used or worn by a man. Contrast this to the three definitions of MENS or MEN'S listed by dictionary.com:

1. a range of sizes in even and odd numbers for garments made for men.

2. a garment in this size range.
3. the department or section of a store where these garments are sold.

The Applicant asserts that MANWEAR presents exactly the type of incongruity recognized by the Board in *Shutts*. Just as one would not “rake” snow, the average person, as demonstrated by the definitions listed above, will not understand “man” to mean clothing sizes, garments or store departments. It is only with some measure of imagination or mental pause that one would understand MANWEAR to relate to clothing. Therefore, MANWEAR is a suggestive mark.

2. MANWEAR is not a recognized name for clothing.

Whether the proposed mark is a recognized name for the relevant goods or services is one prong of the descriptiveness analysis. *Ex parte Heatube Corporation*, 109 USPQ 423 (CCPA 1956). MANWEAR is not a recognized name for the Applicant’s clothing products. One component of the evidence made of record by the Examiner consists of 213 internet articles and web pages that relate in some way to men’s clothing. A close examination of these items reveals that there is not even one instance where the term “manwear” is used, much less used as the name for male clothing or related retail services. Clearly, the term “menswear” is commonly used and understood in this way, but MANWEAR is not.

3. MANWEAR does not immediately tell the potential purchaser only what the Applicant’s goods or services are or what their function, characteristics or uses are.

The second prong of the *Ex parte Heatube Corporation* test for descriptiveness is whether the proposed mark immediately tells the potential purchaser only what the Applicant’s services, or the function, characteristics or uses of those services, are. As the dictionary definitions of the terms MAN and WEAR made of record by the Examining Attorney demonstrate, both are terms that are susceptible to an extraordinary range of different meanings. To prove that terms with this variety of meanings combine to form a term that immediately

informs the potential purchaser of a single meaning is a difficult task, and the evidence provided by the Examining Attorney fails to meet this burden of proof. *See, In re Hutchinson Technology Inc.*, 852 F.2d 552, 7 USPQ2d 1490, 1493 (Fed. Cir. 1988), (“Technology” is a very broad term which includes many categories of goods. The term “technology” does not convey an immediate idea of the “ingredients, qualities, or characteristics of the goods” listed in Hutchinson’s application.).

The Examining Attorney asserts that MANWEAR indicates a genre of clothing for males or related retail services. While this could certainly be said of “menswear,” the evidence of record fails to support the contention that “menswear” and “manwear” are synonyms or otherwise understood to have the same meaning. The Examining Attorney refers to terms for various genres of clothing, as listed in the Trademark ID Manual, to assert that customers familiar with other types of wear will readily understand MANWEAR to refer to clothing for a man. However, by listing head wear, infant wear, ski wear, etc., the ID Manual shows that no parallel understanding exists for the term MANWEAR.

In this context, the term MAN does not have a single recognized significance. As such, it is similar to the following terms:

“technology,” held to have a broad, general meaning in connection the mark “HUTCHINSON TECHNOLOGY” for electronic components, *In re Hutchinson Technology Inc.*, 852 F.2d 552, 7 USPQ2d 1490, 1493 (Fed. Cir. 1988); and in connection with the mark “TOWER TECH” for heat transfer equipment, *In re Tower Tech*, 64 USPQ2d 1314 (TTAB 2003) (not citable as precedent);

“commerce,” held not to have an immediate association with banking services in connection with the mark “Commerce Bank,” *In re Commerce Bancorp, Inc.*, 2006 TTAB LEXIS 248 (TTAB 2006) (not citable as precedent);

“advanced” and “solutions,” held to be “general, vague terms, and each term has several meanings, more than one of which could relate to the identified goods and services” in connection with the mark “ADVANCED FUEL CELL SOLUTIONS” for power generation equipment, *In re IdaTech, LLC*, 2004 TTAB LEXIS 259 (TTAB 2004) (not citable as precedent); and

“solutions,” held to be a general, broad term in regard to training services in connection with the mark ACQUISITION SOLUTIONS TRAINING INSTITUTE; *In re Acquisition Solutions*, 2005 TTAB LEXIS 25 (TTAB 2005) (not citable as precedent).

Under the rationale applied by the Board in these cases, the combined term MANWEAR cannot be held to have a single immediately recognized meaning in the context of the Applicant’s retail services.

4. MANWEAR is not in common usage as a description of the goods or services.

Whether the proposed mark is in common usage as a description of the goods or services is the third prong of the *Ex parte Heatube Corporation* test. In this case, the evidence of record wholly fails to show common usage of MANWEAR. The Examining Attorney has made of record excerpts from numerous internet sites and articles in an attempt to support usage. Those excerpts consist of the following:

(a) 213 internet articles and websites attached to the Final Office Action dated November 6, 2008, which include uses of “menswear,” “men wear,” and related terms, without a single use of the term “manwear.”

It is self-evident that if the term “manwear” is not even used in these articles, they cannot be evidence of common use.

(b) Pages from the internet showing limited use of the term “manwear” in websites of foreign companies, attached to the Final Office Action dated November 6, 2008, consisting of references to seride s.r.l. of Italy, Oceanus Industrial Limited of China, Alex Hollywood Tailoring, apparently of Turkey, Shanghai Tianqiang Textile Co., Ltd. of China, Merter Ready To Wear & Textile Importers of Turkey, and a business apparently named A3 Shop, location not defined.

The Applicant does not dispute the fact that material from the internet is acceptable as competent evidence. However, this particular evidence has absolutely no probative effect with respect to the question of descriptiveness in the United States. It is recognized in the context of trademark usage that “use of a mark in a foreign country does not give rise to rights in the United

States if the goods or services are not sold or rendered in the United States.” *Buti v. Impressa Perosa S.R.L.*, 139 F.3d 98, 45 USPQ2d 1985 (2nd Cir. 1998); *Mother’s Restaurants Inc. v. Mother’s Bakery, Inc.*, 498 F. Supp. 847, 210 USPQ 207 (W.D.N.Y. 1980); *Linville v. Rivard*, 41 USPQ2d 1731 (TTAB 1996), *aff’d*, 133 F.3d 1446, 45 USPQ2d 1374 (Fed. Cir. 1998); *Aktieselskabet af 21.November 2001 v. Fame Jeans Inc.*, 77 USPQ2d 1861 (TTAB 2006). It follows from these authorities that if foreign usage cannot create trademark use in US commerce, then it similarly cannot show that a term is commonly used as the name of goods or services in the United States. The Examining Attorney’s statement that these web pages “clearly show use of the term MANWEAR to refer to a genre or category of clothing for a man” ignores both the *de minimus* number of overseas uses the Examiner was able to locate, and the fact that not a single example of use of MANWEAR by a US manufacturer or retailer is of record.

(c) pages from the websites momcentral.com and gabsmash.blogspot.com.

The momcentral.com evidence is an article titled “Where Have All the Mommies Gone?...Long Time Passing” from June 22, 2006, in which the following textual matter appears: “When I think of Jessica Simpson’s very public divorce from Nick Lachey, I immediately think of her father, Joe Simpson, a former preacher, who now walks the red carpets behind his daughter, wearing slick, metrosexual manwear, smiling from ear to ear, fully enjoying what his daughter’s success has afforded him.” The gabsmash.blogspot.com evidence is a posting from October 9, 2005 regarding “Tim & Faith” in which the following comment is posted by a person identified only as “x”: “His jeans look like metrosexual manwear not country singer gear.” The Applicant submits that these entries wholly fail to show that “manwear” is commonly used as the name of the Applicant’s services. First, neither is a trademark usage; rather these are textual references to clothing. Second, finding only two examples of use in the United States is clearly a *de minimus* showing that falls far short of establishing common usage. This evidence has

absolutely no probative value of the issue of descriptiveness, other than to support the Applicant's position that MANWEAR is not in common use in the United States.

5. The Examining Attorney has not met the burden of proving MANWEAR descriptive.

As stated above, any doubt as to whether a mark is descriptive or suggestive is resolved in favor of publication of the mark for opposition, and the burden is on the Patent and Trademark Office to demonstrate mere descriptiveness. In denying the Applicant's request for reconsideration, the Examining Attorney attempts to shift this burden, concluding "the applicant sets forth no specifics or evidence to support a unique non-descriptive meaning or what specific imagination, thought or perception is required on the part of the consumer." In response, the Applicant submits that it has in fact demonstrated above that intentional misuse of the term MAN in MANWEAR, rather than the conventional term MENSWEAR, creates a term that requires a prospective customer to exercise imagination, thought or perception to reach a conclusion regarding the Applicant's goods. More to the point, however, the Applicant has no such burden as is stated by the Examiner. What the Applicant has shown regarding the Examiner's position is that the evidence of record, consisting of dictionary definitions showing the relevant terms have dozens of meanings, internet articles discussing "menswear" etc. that do not even mention the Applicant's mark, use of the term "manwear" by several clothing companies in China and Turkey, and two textual blog site uses of "manwear," falls far short of proving descriptiveness. Since the Examining Attorney has not met his burden of proof, the refusal of registration must be reversed.

V. CONCLUSION

Applicant's mark is not merely descriptive for men's clothing. It is an incongruous, suggestive mark that is not commonly used or understood to relate in any way to these goods.

The evidence of record falls far short of meeting the Examiner's burden of proving descriptiveness. Accordingly, the Applicant submits that its Application is in condition for allowance, and requests that the refusal of registration be reversed and that the mark be promptly approved for publication and registration.

Respectfully submitted,

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