

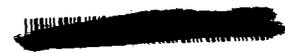
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02-20-2003

U.S. Patent & TMO/TM Mail Rcpt. Dt. #40

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

Drake Elvgren, an individual;
John T. Dillard, an individual; and
Louis K. Meisel, an individual;

Petitioners,

vs.

J. Daniel Vancas,

Registrant.

Cancellation No.: 92040459

Registration Nos.: 2095296 & 2097819

Marks: ELVGREN (STYLIZED)
and
ELVGREN (STYLIZED)

**PETITIONERS' REPLY TO REGISTRANT'S OPPOSITION TO PETITIONERS'
MOTION FOR SUMMARY JUDGMENT**

Petitioners reply to Registrant's Opposition to Petitioners' Motion for Summary Judgment (hereinafter "MSJ Opposition") and object to the Declaration of J. Daniel Vancas in Support of Registrant's Memorandum in Opposition to Petitioners' Motion for Summary Judgment (hereinafter "Vancas Declaration") filed by Registrant, J. Daniel Vancas.

INTRODUCTION STATEMENT

Registrant J. Daniel Vancas has filed opposition papers to Petitioners' Motion for Summary Judgment (hereinafter "MSJ") based wholly on the Vancas Declaration which is void. The Vancas

Declaration includes a variety of matters not based on personal knowledge as required by FRCP 56(e), statements which are provably false, and broad claims without any evidentiary support to wit: that the Petitioners' declarations are inadmissible, that *Petitioners* have not cooperated in discovery, and that the Petitioners' claims are barred by Res Judicata. Petitioners will stand on the declarations submitted with their MSJ which speak for themselves, as do the discovery documents submitted by both parties. Petitioners only respond to the inadmissibility and fraudulent nature of the Vancas Declaration, and the Registrant's erroneous claim of Res Judicata against the Petitioners.

ARGUMENTS

THE REGISTRANT'S DECLARATION IS NOT BASED ON PERSONAL KNOWLEDGE AS REQUIRED BY FRCP 56(e) AND IS THEREFORE NOT ADMISSIBLE

The Vancas Declaration is not based on personal knowledge as required by FRCP 56(e) and as such is not admissible. "Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matter stated therein." FRCP 56(e), *see also* TBMP § 528.05(b). The Vancas Declaration asserts claims and facts which are obviously not within the personal knowledge of the declarant, to wit: legal conclusions, assessments of what rights were possessed by *others*, and what facts *others knew*. A synopsis of these statements are as follows:

1. Vancas Declaration #1 - "During his lifetime, Elvgren had produced most of his artwork for B&B and had relinquished his pin-up rights, *copyright and trademark included*, to B&B. While B&B held various rights over Elvgren, *including copyright and the right to trademark*, B&B had let its (Elvgren) collection deteriorate and the market for Elvgren pieces nearly vanish." (emphasis added)

2. Vancas Declaration #2 - "In the course of my relationship with B&B, *it was discovered that while B&B had previously secured the Elvgren rights. . .*" "B&B on behalf of itself and all of its agents, representatives, licensees and others have acknowledged that these Trademark Registrations are valid and legally enforceable. In 1998, *and undergoing pressure from B&B licensees like Louis Meisel*, B&B filed suit. . ." (emphasis added)

3. Vancas Declaration #3 - "... Meisel knew about my rights and these Trademarks when they were registered. . ."

4. Vancas Declaration #4 - "... none of them have any independent rights to the Elvgren art or signature but instead derive any rights from B&B." "... Dillard began selling my "Pressing Details" with the trademarked logo. After the March 21, 2001 Settlement Agreement, Dillard starts removing the trademark."

5. Vancas Declaration #5 - "Petitioner John Dillard is another Brown & Bigelow licensee and has been since before the March 21, 2001 Settlement Agreement."

6. Vancas Declaration #6 - "... Drake Elvgren has no independent right to the Elvgren art logo, the Registered Trademarks, or the subject artwork. Gillette Elvgren conveyed his rights to Brown & Bigelow and Dow during his lifetime and at the time of his death did not convey such rights to the children of his first marriage, Drake Elvgren included."

7. Vancas Declaration #7 - "... people like the Petitioners and others are taking the logo and are improperly placing it on various product which include images that were never created by Elvgren. As shown by the threats and misconduct of Louis Meisel, he is seeking exclusive control of a market and through punitive action of his own making he seeks the exclusion of his competition."

Because none of these statements are based on personal knowledge, they are not admissible under FRCP 56(e). "Affidavits which are inadequate under Rule 56(e) must be disregarded." *G. D. Searle & Co. v Chas. Pfizer & Co.* (1956, CA7 Ill) 231 F2d 316, 318, 109 USPQ 6.

"Rule 56(e) states that 'supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.' Thus, statements outside the affiant's personal knowledge or statements that are the result of speculation or conjecture or merely conclusory do not meet this requirement." *Stagman v. Ryan*, 176 F.3d 986, 995, 1999 U.S. App. LEXIS 8578, 161 L.R.R.M. (BNA) 2204, 138 Lab. Cas. (CCH) P58637, 51 Fed. R. Evid. Serv. (CBC) 1549, 51 Fed. R. Evid. Serv. (CBC) 1551 (7th Cir. Ill. 1999)

Accordingly, the entire Vancas Declaration is not admissible for the above reason alone.

STATEMENTS CONTAINED IN THE VANCAS DECLARATION ARE FALSE

The Registrant's entire claim of trademark rights are based on the Vancas Declaration and its proffered "settlement agreement" with B&B, attached as Exhibit A to the Declaration. In fact,

many statements and claims contained in the Vancas Declaration relating to B&B have been rejected by B&B as “in error”, “inaccurate”, and “false”.¹ B&B has refuted claims in the Vancas Declaration that Gil Elvgren relinquished trademark rights to B&B, (Smith Declaration No. 2) that the market for Elvgren pieces had nearly vanished, (*Id.* No. 3) that Vancas had B&B’s permission to apply for trademarks on the Elvgren mark(s), (*Id.* No. 5) that B&B filed a lawsuit against Vancas “under ongoing pressure from B&B licensees like Louis Meisel”, (*Id.* No 6) that the alleged settlement agreement acknowledged on behalf of B&B’s “licensees” that the Elvgren trademark registrations were valid, (*Id.* No. 7) and that the agreement released claims against Vancas from *licensees* of B&B.

In fact, the lawsuit against Vancas was brought against him by B&B primarily because Vancas was infringing the Elvgren copyrights owned by B&B, (*Id.* No. 6) and because Vancas was using the Elvgren trademarks “in an attempt to prevent B&B from reproducing Elvgren art with respect to which B&B owned valid and enforceable copyrights . . .” (*Id.* No. 5) This is precisely the type of conduct that Vancas was engaged in against the Petitioners, in regard to their trade in Elvgren art which was in the public domain.

**EXHIBITS TO THE VANCAS DECLARATION ARE NOT ADMISSIBLE
AS REQUIRED UNDER FRCP 56(e)**

The Vancas Declaration’s Exhibits are not admissible because they are not sworn or certified copies as required under FRCP 56(e). FRCP 56(e) provides in part: “Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.” See for example, Exhibit A to the Vancas Declaration. This “settlement agreement” is devoid of any court stamp indicating its approval by the presiding judge or proving its authenticity. Where numerous papers were referred to in each of supporting affidavits, but no sworn or certified copy of

¹ Declaration of William D. Smith, Jr. (“Smith Declaration”) attached herewith and incorporated by reference as Exhibit 1, Nos 7; 2; 3; and generally throughout.

any such paper was attached to or served with either affidavit, all references to such papers should have been disregarded on motion for summary judgment. *Washington v. Maricopa County*, 143 F.2d 871, 872, 1944 U.S. App. LEXIS 3208 (9th Cir. Ariz. 1944) Therefore, in addition to this Exhibit being stricken from the record, all references in the MSJ Opposition to that Exhibit should also be disregarded by the Board upon consideration of this motion. "A substantial amount of authority indicates that the failure to attach a certified copy as required by Rule 56(e) precludes consideration of the portions of the affidavit to which an objection has been made." *Monroe v. Board of Education*, 65 F.R.D. 641, 1975 U.S. Dist. LEXIS 14201, 20 Fed. R. Serv. 2d (Callaghan) 499 (D. Conn. 1975) As such, the Vancas Declaration's Exhibits are not admissible and should not be considered by the Board by virtue of their submission as unsworn and uncertified attachments to the Vancas Declaration. In addition, all references to those stricken Exhibits in the MSJ Opposition should also be stricken from the record and not considered by the Board.

**THE REGISTRANT'S CLAIMS OF RES JUDICATA, LACHES AND
WAIVER ARE COMPLETELY WITHOUT MERIT**

Although the Registrant claims laches and waiver, he submits no argument, evidence or facts to support those claims. The Registrant clings instead to its proffered "Settlement Agreement" as binding on the Petitioners as Res Judicata by making unsupported statements that Petitioners are licensees of and in privity with Brown & Bigelow. Privity of a particular contract with an entity does not bind one through the doctrine of Res Judicata as if it were the real party in interest. The Registrant would submit that if Petitioners purchased a Ford truck, that any cases litigated by Ford Motor Co. and any third party would be binding on the truck buyer. This contention, of course, is ridiculous and wholly without merit.

Assuming arguendo that the settlement agreement proffered by the Registrant was proper before the Board, and that it was valid as to the parties, it would still have no effect on the instant petition to cancel. On page 8 of Registrant's MSJ Opposition, the Registrant claims that:

"Pursuant to paragraphs 4 and 10 of the Settlement Agreement, Brown & Bigelow, Inc. acknowledged on behalf of itself and on behalf of all of its successors, assigns, licensees and others (*Petitioners included*) that the Elvgren Trademark Registrations of Daniel Vancas are valid and legally enforceable." (Emphasis supplied)

That statement is false, provable by Registrant's "Exhibit A" to the Vancas Declaration². Paragraph 4 of the document contains a single sentence regarding the trademark's status, to wit: "B&B acknowledges that the Trademark Registrations are valid and legally enforceable." Paragraph 10 is a general waiver on the part of B&B, and

"any of its parent and subsidiary and affiliated corporations, as well as their respective present and former shareholders, officers, directors, employees, agents, representatives, attorneys, insurers, indemnitors, successors and assigns. . ."

Nowhere contained in this document is any language binding "licensees and others," nor could there be because "licensees and others" of B&B may not be bound by litigation to which they are not a party, nor an agreement to which they are not a signatory. Further, the Registrant is aware that two of the Petitioners have never had any relationship with B&B. Submitted with Registrant's MSJ Opposition as Exhibits to the O'Connor Declaration, in response to the interrogatory "State your relationship with Brown & Bigelow. . ." Petitioner Louis Meisel responded, "I have been authorized by Brown & Bigelow, Inc. through contract to produce two books containing Gillette Elvgren artwork that is copyrighted by them." [O'Connor Declaration, Exhibit C, No. 5] This is the extent of Meisel's contact with B&B. Petitioners Dillard and Elvgren responded to the same interrogatory, "I have no relationship with Brown & Bigelow, Inc." [O'Connor Declaration, Exhibit

² See also Smith Declaration, Nos. 7-8.

D, No. 5; and Exhibit E, No. 5] These statements were based on the personal knowledge of the Petitioners, and attested to. Thus, Meisel was in privity of contract with B&B only for the purposes of producing his two books, and Petitioners Elvgren and Dillard had no relationship with B&B. Despite knowing of the Petitioners' non-existent relationship with B&B, the Registrant invented his own facts and then attested to them under penalty of perjury in the Vancas Declaration.

RES JUDICATA DOES NOT APPLY IN THIS CASE

A federal action may be barred by res judicata where an earlier lawsuit involved the same claim sued upon in the present action; and involved the same parties or persons in privity of interest with them; and resulted in a final judgment on the merits. *Blonder-Tongue Lab. v. University of Illinois Found.*, 402 U.S. 313, 28 L. Ed. 2d 788, 91 S. Ct. 1434, 169 U.S.P.Q. (BNA) 513 (1971).

First, the alleged settlement agreement resulted from a lawsuit filed against the Registrant for *Copyright Infringement*. Because this case was primarily about copyright infringement, and the deceptive trade practices of the Registrant³, it did not consider whether or not the Registrant had trademarked the signature of a dead artist that he had no relationship with, by virtue of a fraudulent trademark application.

Second, there is no privity of interest between the Petitioners and B&B. As held by one court, and affirmed by the federal circuit:

“[T]here is no definition of "privity" which can be automatically applied to all cases involving the doctrines of res judicata and collateral estoppel. Privity requires, at a minimum, a substantial identity between the issues in controversy and showing the parties in the two actions are really and substantially in interest the same. Accordingly, 'privity has been held to exist in the following relationships: concurrent relationship to the same property (i.e. trustee and beneficiary), successive relationship to the same property (i.e. seller and buyer); or representation of the interests of the same person.'” (internal citations omitted) *Martin v. United States*, 30 Fed. Cl. 542,

³ See Smith Declaration, No. 6.

550, 1994 U.S. Claims LEXIS 14 (1994), Affd. *Martin v. United States*, 41 F.3d 1519, 1994 U.S. App. LEXIS 38745 (Fed. Cir. 1994)

In the case at bar, even taking the Registrant's claims at face value, the Petitioners would still not be in privity with B&B for the purposes of res judicata. Here, the Registrant claims that Petitioners are bound by res judicata because of their privity with B&B as "licensees" of B&B. As illustrated above, this claim does not meet the minimum requirements for a court to hold that the Petitioners are in privity with B&B. The California State case cited by the Registrant (*Citizens for Open Access to Sand*) involved a governmental organization which was authorized by statute to represent the public, and the privity between this organization and the public, thus is not applicable. The single federal case cited by the Registrant (*in re Medomak Canning*) involved a court upholding the notion that a party was in privity with that own party's trustee, and thus bound by a court's approval of an agreement submitted by that trustee. This case also has no application to support the Registrant's claim of res judicata against the Petitioners.

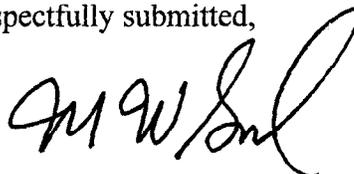
Third, assuming arguendo that the proffered settlement was considered a final judgment *on the merits*, it would still not apply in the case at bar. It has been raised in the MSJ that the Registrant falsified his application for the Elvgren marks. This fact has not been refuted by the Registrant in its MSJ Opposition. Because it has not been established or even argued by the Registrant that a private party may bestow rights upon another to commit fraud on the U. S. Patent and Trademark Office ("USPTO"), this requirement is not met, as it was never litigated or decided by any court.

CONCLUSION

In conclusion, Registrant's MSJ Opposition and the Vancas Declaration which purportedly supports it is for the most part, inadmissible under FRCP 56 because it does not comply with the rules regarding admissibility of evidence under the Federal Rules of Civil Procedure. Registrant is

attempting by gamesmanship to continue the fraud that it has committed on the USPTO. and the public, which issues he has not even addressed in his MSJ Opposition. There are no genuine issues of material fact which have been raised by Registrant before this Board. Petitioners respectfully request that the Motion for Summary Judgment in favor of the Petitioners be granted, and that the Elvgren marks possessed by the Registrant be cancelled.

Respectfully submitted,



Date: February 20, 2003

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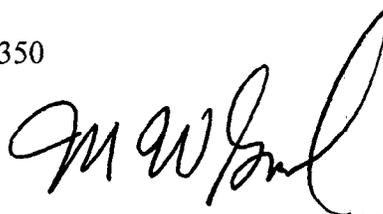
Attorneys for Petitioners,

DRAKE ELVGREN,
JOHN T. DILLARD, and
LOUIS K. MEISEL

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing PETITIONERS' REPLY TO REGISTRANT'S OPPOSITION TO PETITIONERS' MOTION FOR SUMMARY JUDGMENT was mailed FIRST CLASS mail, postage prepaid, this 20th day of February, 2003 to Registrant's counsel:

Mark A. O'Connor, Esq.
HORAN, LLOYD LAW OFFICES
499 Van Buren Street
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Mark W. Good

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

Drake Elvgren, an individual;
John T. Dillard, an individual; and
Louis K. Meisel, an individual,

Petitioners,

v.

J. Daniel Vancas,

Respondent.

Registration Nos. 2095296, 2097819
Cancellation No. 92040459

Marks: "ELVGREN" (Stylized)
and
"ELVGREN" (Stylized)

**DECLARATION OF
WILLIAM D. SMITH, JR.**

William D. Smith, Jr. declares as follows:

1. I am the Executive Vice President of Brown & Bigelow, Inc. ("B&B"), and I have personal knowledge of all matters set forth in this Declaration.

2. I have read the February 3, 2003 Declaration of J. Daniel Vancas in Opposition to Petitioners' Motion for Summary Judgment ("the Vancas Declaration"), and find that it is inaccurate in a number of important respects. For example, Paragraph 1 of the Vancas Declaration contains a statement that Gil Elvgren ("Elvgren") "relinquished his pin-up rights, copyright and trademark included, to B&B." The fact is that Elvgren did create a significant body of "pin-up art" exclusively for B&B. The ownership and copyrights with respect to all art that Elvgren created for B&B belongs to B&B, not Elvgren. However, Elvgren never assigned or otherwise relinquished to B&B any other copyrights or trademarks associated with his art.

3. Paragraph 1 of the Vancas Declaration contains a false statement that "B&B had let its (Elvgren) collection deteriorate and the market for Elvgren pieces nearly vanish." The fact

is that B&B has always been very active in marketing and licensing its Elvgren art. In 1995 and 1996, B&B and Vancas entered into License Agreements, pursuant to which B&B, subject to certain defined restrictions, granted Vancas a license to reproduce on canvas and watercolor paper a limited number of specified Elvgren illustrations. Vancas was only one of a number of B&B's Elvgren licensees, and B&B maintained a very active business in Elvgren art that was entirely separate from its relationship with Vancas.

4. Paragraph 2 of the Vancas Declaration contains a statement that "B&B ... failed to register the trademark to Elvgren signature logos." As owner of copyrights to numerous Elvgren illustrations, all of which were signed by Elvgren, B&B, of course, had the right to reproduce those illustrations, including the signatures found on the illustrations. However, as stated above, Elvgren never transferred or assigned to B&B any other trademark rights, and B&B therefore neither owned nor failed to register any "trademark to Elvgren signature logos."

5. Paragraph 2 of the Vancas Declaration contains a statement that Vancas "trademarked" certain Elvgren signature logos "after obtaining the consent of B&B." Nothing could be further from the truth. In fact, Vancas never disclosed to B&B his intention to apply for any trademark registrations, and certainly never obtained B&B's consent to do so. When B&B subsequently learned that Vancas had applied for and obtained certain trademarks with respect to the Elvgren signatures, and that he was using those trademarks in an attempt to prevent B&B from reproducing the Elvgren art with respect to which B&B owned valid and enforceable copyrights, B&B commenced a lawsuit against Vancas and others before the United States District Court for the District of Minnesota (Court File No. 98-2281 JRT/FLN) ("the B&B Lawsuit"). In the B&B Lawsuit, B&B sought, among other things, to cancel Trademark

Registration Nos. 2,095,296 and 2,097,819 ("the Vancas Trademark") on the grounds that the Vancas Trademarks were "issued on the basis of a trademark application in which Defendant Vancas falsely represented that he is the owner of the Elvgren Art and Elvgren's name."

6. Paragraph 2 of the Vancas Declaration contains a statement that the B&B Lawsuit was commenced "under ongoing pressure from B&B licensees like Louis Meisel." That statement is not accurate. The fact is that B&B commenced the B&B Lawsuit primarily for reasons unrelated to the Vancas Trademarks. B&B had learned that Vancas was reproducing B&B's copyrighted Elvgren images, selling those images and representing himself to be either the "owner" or "licensee" of those images long after the termination of his license agreements with B&B. The B&B Lawsuit was commenced to enjoin Vancas from continuing to infringe upon B&B's copyrights and other deceptive trade practices, without any pressure or input from Mr. Meisel or any of B&B's other Elvgren licensees.

7. B&B and Vancas ultimately agreed to settle the B&B Lawsuit. Pursuant to that agreement, which was memorialized in writing, Vancas stipulated to all requested injunctive relief and made a very substantial damages payment to B&B. The written Settlement Agreement contains a representation by Vancas that the Vancas Trademarks "are valid and enforceable, and that he is the sole owner of the Trademark Registrations." Based upon that representation, B&B acknowledged "that the Trademark Registrations are valid and legally enforceable." To the extent that Paragraph 2 of the Vancas Declaration suggests that B&B made that acknowledgement on behalf of its "licensees" or any party other than B&B, it is in error. B&B made the acknowledgement for itself only, and in reliance upon the express representation by Vancas that the Vancas Trademarks were "valid and enforceable." By virtue of the settlement,

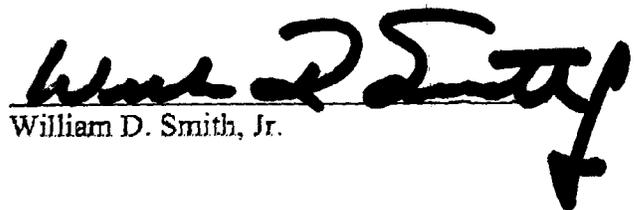
the issue of whether or not the Vancas Trademarks were valid was never litigated to a final judgment by the Court.

8. Paragraph 2 of the Vancas Declaration ends with a statement that the Settlement Agreement pursuant to which the B&B Lawsuit was resolved includes a "release" of "all claims by B&B and its licensees, agents and others." That statement is not accurate. The Settlement Agreement does contain mutual release provisions, pursuant to which B&B and Vancas each released the other from various claims. However, the release that Vancas received from B&B was, by its express terms, granted by B&B, "for itself and any of its parent and subsidiary and affiliated corporations, as well as their respective present and former shareholders, officers, directors, employees, agents, representatives, attorneys, insurers, indemnitors, successors and assigns." While requested by Vancas, B&B refused to sign a release on behalf of its "licensees," because B&B certainly had no authority to release any claims that its licensees might have had against Vancas.

9. There are many other statements contained in the Vancas Declaration that are also false, but that I am not addressing this Declaration. By my silence, I do not intend to convey agreement with any statements contained in the Vancas Declaration.

I declare under penalty of perjury that the foregoing Declaration is true and correct.

Dated: February 10, 2003.


William D. Smith, Jr.

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I, ANGELA RAMIREZ, hereby certify that this document is being deposited with the United States Postal Service as Express Mail, postage prepaid, in an envelope addressed to BOX TTAB, NO FEE, COMMISSIONER FOR TRADEMARKS, 2900 CRYSTAL DRIVE, ARLINGTON, VA 22202-3513

Signature: Angela Ramirez
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Date of Deposit: FEBRUARY 20, 2003

02-20-2003

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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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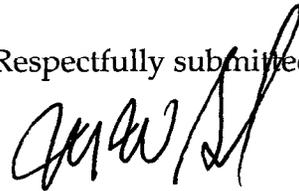
In connection with the above-referenced trademark registration cancellation proceedings, transmitted herewith are the following:

(1) Petitioners' Reply to Registrant's Opposition to Petitioners' Motion for Summary Judgment (10 pages), along with Exhibit 1 (4 pages); and

(2) Postcard.

Please date-stamp the enclosed postcard and return same to the undersigned in acknowledgment of receipt of all transmitted materials.

Respectfully submitted,



Mark W. Good

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