

1-14-2016

# Eagle Equity Fund, LLC v. Titleone Corp Appellant's Reply Brief Dckt. 42850

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3 **IN THE SUPREME COURT OF THE STATE OF IDAHO**  
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6 \_\_\_\_\_ )  
7 EAGLE EQUITY FUND, LLC, an Idaho )  
8 limited liability company, )

9 Plaintiff-Appellant, )

10 vs. )

11 TITLEONE CORPORATION, and Idaho )  
12 corporation; and COREY BARTON HOMES, )  
13 INC., an Idaho Corporation, )

14 Defendants-Respondents, )

15 and )

16 FIDELITY NATIONAL TITLE COMPANY )  
17 (fka Land America Transnation, aka )  
18 Transnation Title & Escrow, Inc.), a Delaware )  
19 corporation; CHICAGO TITLE INSURANCE )  
20 COMPANY, a Nebraska or Florida )  
21 corporation (fka Ticor Title Insurance )  
22 Company, a California corporation); RBC )  
23 REAL ESTATE FINANCE, INC.; )  
24 ALLIANCE TITLE & ESCROW CORP., an )  
25 Idaho Limited Liability Company and JOHN )  
26 DOES III-X, unknown Individuals and/or )  
27 companies, )

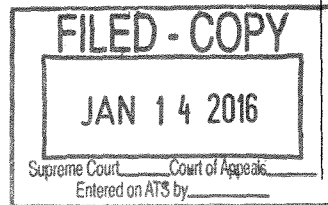
28 Defendants. )

SUPREME COURT NO. 2015-42850

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23 \_\_\_\_\_  
24 **APPELLANT'S REPLY BRIEF**  
25 \_\_\_\_\_

26  
27 Appealed from the District Court of the Fourth Judicial District of the State of Idaho,

28 In and for the County of Ada



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The Honorable Jason Scott, District Judge Presiding

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## **I. INTRODUCTION**

Eagle Equity Fund, LLC (“EEF”) through this reply brief will first address the Respondent’s Brief filed by TitleOne Corporation (“TitleOne”) and follow with a reply to the Respondent’s Brief filed by Corey Barton Homes, Inc. (“CBH”). For purposes of this appeal going forward, EEF agrees that I.C. §5-218(1) applies to EEF’s I.C. §45-1205 claim. EEF further agrees that its claim for general negligence was waived by EEF at trial. The two remaining claims against TitleOne that were dismissed by way of summary judgment, EEF’s I.C. §45-1205 claim and EEF’s claim for tortious interference with prospective economic advantage, will be addressed in this brief.

## **II. ARGUMENT - TITLEONE**

### **A. The District Erred When It Concluded That EEF Failed To Offer Competent Evidence Of Damages**

TitleOne accurately states that the determination of the issue of EEF’s damages is applicable to all of EEF’s claims and should be resolved first. TitleOne then argues that “EEF cannot prove what could have or would have happened had it participated [in the short sale]. Why, for instance, would it have spent more money on property that would not sustain its worth?” Respondent’s Brief, page 13. TitleOne has posed a question that requires the analysis of disputed material facts. That analysis should have been performed by a jury and not by the Court on summary judgment.

The trial court in its Memorandum, Decision and Order dated September 14, 2014 held the following:

It [EEF] offers no evidence that the property's value, as of the date of either the apparently improper reconveyance or the property's short sale, was sufficient to satisfy RBC's senior deed of trust. Without proof that the property's value, as of at least one

1 of those times, exceeded the amount owing to RBC, there is no  
2 proof that EEF's deed of trust was worth anything at any material  
time.

\* \* \* \*

3 Another argument EEF advances is that, had it known about the  
4 short sale, it might have negotiated to purchase the property itself.  
5 That could have happened in theory, but EEF offers no  
6 evidence of the price it would have had to pay to buy the property  
7 (presumably more than DAS paid for it, as a competition between  
8 DAS and EEF for the property probably would have driven  
9 up the price), nor does EEF offer evidence that the value of the  
property was higher than the price EEF would have had to pay for  
it. EEF does not show damages by simply presuming that, in the  
absence of the apparently wrongful reconveyance, it would have  
bought the property instead of DAS and resold it to Corey Barton  
Homes for a profit, just as DAS did. (R. at 003059-003060)

10 The trial court was focused entirely upon the value of the RBC first position Deed of Trust  
11 as the determining factor in its analysis of what damage EEF sustained. What the trial court  
12 missed is the concept that EEF's acquisition of RBC's first position Deed of Trust through the  
13 short sale would have then placed the EEF Deed of Trust in first position. The valuation analysis  
14 would then have focused on the amount of the EEF Deed of Trust (\$725,500) compared to the  
15 fair market value of the property. In that situation, EEF would have been fully secured. That is  
16 why evidence of what EEF would have done in connection with the short sale is relevant yet it  
17 was disregarded by the Court.

18 EEF submitted evidence to the trial court through the deposition testimony and Affidavit  
19 of Dan Thompson, principal of EEF, that if EEF had received notice of the short sale that EEF  
20 would have taken action to protect its security interest. Mr. Thompson's affidavit states the  
21 following:  
22

23 following:  
24 10. EQ[EEF] would have been interested in buying out the first  
25 position at the terms offered DAS, and would have paid more to  
26 protect its interests. There was never an intent to simply let the  
27 property go. (R. Vol. 1, p. 3300)

28 At the time of the sale from Galiano to DAS, 43 of the original 60 lots remained unsold in  
a development that had already been improved with roads and utilities. According to the

1 Affidavit of Edward Mason, Exhibit B, Cost Projections, approximately \$4.7 million had already  
2 been injected into the property for acquisition and improvements (R. Vol. 1, p. 2589 ¶¶ 4 and 9,  
3 Ex. B). In short, the development was an asset worth protecting. A review of the Ada County  
4 Assessors records shows that the assessed value of the lots in 2010 was about \$27,000 on average  
5 and in 2012 it increased to about \$29,000 on average. This equates to a total lot value of  
6 approximately \$1.16 million in 2010 and \$1.24 million in 2012. The trial court could take  
7 judicial notice of the Assessor's records. Moreover, additional profits could be made through the  
8 construction of homes on the lots and EEF was denied the opportunity to capture these profits as  
9 well. The point to be taken here is that EEF had substantial incentive to protect its second  
10 position Deed of Trust and the short sale by RBC created an opportunity for EEF to not only  
11 protect its security interest but to assume full ownership and control of the development for an  
12 amount that was one-third of the total amount of money already invested in the deal.  
13  
14

15 TitleOne correctly notes that the trial court disregarded EEF's evidence that it would have  
16 purchased the property at the short sale had it been given notice of the sale. The question of what  
17 action EEF would have taken if proper notice had been given is a material factual issue that was  
18 not appropriately resolved by summary judgment. The answer to that question is also not  
19 speculation. EEF would have made a business decision given the circumstances it faced. The  
20 particulars of that decision-making process should have been evaluated by a jury taking into  
21 consideration the credibility of Dan Thompson and the soundness of his reasoning. EEF was  
22 denied the opportunity to present evidence to a jury that it would have paid the \$860,000 (or  
23 more) that RBC was willing to accept to release its Deed of Trust. The fact that RBC was willing  
24 to accept \$860,000 to release its Deed of Trust is not speculation. It is a fact. It is also a fact that  
25 DAS immediately resold the lots to Corey Barton Homes at a profit. One does not need to  
26 speculate as to what deal could have been negotiated since it actually occurred and is part of the  
27  
28



1 record. Further evidence disregarded by the Court was that DAS would not have purchased the  
2 property, had it known of EEF's second position Deed of Trust, unless EEF's claims had been  
3 addressed in the deal. (See Eck Affidavit, ¶ 21, R. 001245) DAS would have needed EEF to  
4 agree to subordinate its Deed of Trust to the new Deed of Trust that DAS placed on the property.  
5 Otherwise, EEF would have been in first position ahead of DAS's lender.

6  
7 EEF's Deed of Trust taking first position is significant because the proceeds from each lot  
8 sale would have been applied to reduce the principal amount of EEF's note with Galiano under  
9 the Master Credit Agreement. The 43 remaining lots in the development would have had to have  
10 a value of at least \$725,500 to render the EEF Deed of Trust and security interest fully protected.  
11 As we know, DAS quickly sold all of the lots to Corey Barton Homes for approximately \$1.13  
12 million. TitleOne admits that EEF offered "some evidence" of these sales which is somewhat  
13 disingenuous. The numbers were actually taken from DAS's Seller's Settlement Statements in  
14 the Corey Barton Homes transactions so the \$1.3 million figure is undisputed evidence (See R.  
15 002547-002562).  
16

17 The proceeds from the sales of the lots would have fully satisfied the EEF Deed of Trust if  
18 it was in first position. This evidence was ignored by the trial court and simply dismissed as mere  
19 speculation. EEF submits that the trial court erred when it resolved this factual issue in favor of  
20 TitleOne. Rather, the trial court should have given all reasonable inferences to EEF including  
21 that a jury could reasonably conclude that EEF would have taken action to protect its security  
22 interest and assumed first position. That conclusion would lead to a determination that EEF's  
23 security interest, after moving to first position, would have a value of \$725,500 since the property  
24 was clearly worth more than \$725,500 so EEF's security interest was fully protected. The loss of  
25 that security interest, therefore, resulted in damages to EEF in that amount.  
26  
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1 TitleOne cites the case of *Rooz v. Kimmel*, 55 Cal. App.4<sup>th</sup> 573 (Cal. D. Ct. App. 1997) in  
2 support of its contention that EEF's security interest had no value and hence no damage could  
3 have been sustained by its wrongful stripping. The *Rooz* case is particularly relevant here since  
4 the *Rooz* court did, in fact, engage in an analysis of what would have happened if the Deed of  
5 Trust in question had been properly recorded in a timely manner by the defendant Title Company  
6 (North American). To briefly summarize the pertinent facts of *Rooz*, Rooz received a Deed of  
7 Trust from Kimmel in the original amount of \$445,000 which was later increased to \$515,000 to  
8 be secured by the Redstone Building upon its acquisition. The \$445,000 Deed of Trust was  
9 initially secured by a building in Berkeley that Rooz had sold to Kimmel as part of an exchange  
10 agreement. Kimmel closed escrow on the Redstone Building with a purchase price of \$1.5  
11 million. A first Deed of Trust was recorded in the amount of \$975,000. North American delayed  
12 the recording of the Rooz Deed of Trust that was supposed to be in second position. During the  
13 delay, Kimmel encumbered the building with two additional Deeds of Trust totaling \$1,050,000.  
14 Rooz's Deed of Trust was then recorded in fourth position instead of second position.

15  
16  
17 The commercial real estate market declined and the second deed of trust holder foreclosed  
18 on the Redstone Building thereby extinguishing Rooz's fourth position Deed of Trust. Because  
19 Rooz believed Kimmel and North American had wrongly impaired his security on the \$515,000  
20 note, he sued them for breach of oral agreement, negligence, breach of fiduciary duty, fraud and  
21 civil conspiracy.  
22

23 The trial court found in favor of Rooz and calculated damages based upon the original  
24 amount of the \$445,000 Deed of Trust and then discounted the damages to present value. The  
25 trial court also used a value of \$1.9 million for the Berkeley building in its calculations. Rooz  
26 argued that the \$515,000 Deed of Trust should have been used in the calculation and that the  
27  
28

1 reduction to present value was erroneous. The Court of Appeal agreed with Rooz stating the  
2 following:

3 We conclude Rooz is correct on this point. Rooz agreed Kimmel  
4 could remove the \$445,000 deed of trust against the Berkeley  
5 property before Kimmel acquired title to the Redstone Building.  
6 Thus, neither Kimmel nor North American breached a contract or  
7 tort duty to Rooz when they recorded the reconveyance of the  
8 \$445,000 deed of trust against the Berkeley property. The breach  
9 came later, when Kimmel refused to permit North American to  
10 record the new \$515,000 deed of trust in second position on the  
11 Redstone Building. It was that breach that led to the impairment  
12 of Rooz's security by moving it from second to fourth position.  
13 Presumably, had Rooz been in second position, his \$515,000 note  
14 would have been fully secured (or at least better secured) when the  
15 Redstone Building was sold in foreclosure. *Rooz* at 595, emphasis  
16 added.

17 The Court of Appeal concluded that it was appropriate to consider what would have  
18 happened if Rooz's Deed of Trust had been recorded in second position rather than fourth  
19 position. This was not speculation. It was an analysis of what would have happened absent the  
20 improper recording of the Deed of Trust. Here, the trial court should have considered what would  
21 have happened if EEF was notified of the short sale. The evidence before the court was that EEF  
22 would have negotiated with RBC and paid what DAS paid or more to protect its security interest.  
23 EEF was not willing to just let the property go.

24 From a practical standpoint, EEF had already invested \$725,500 into the property.  
25 Galiano had likewise invested \$4.7 million to acquire the land and install utilities and roads in the  
26 development. There was significant value in the project. There were 43 bare lots ready for sale.  
27 Moreover, EEF had the ability to ride out the downturn in the market and it was prepared to do so  
28 (R 001967). Due to the actions of TitleOne, EEF was denied the opportunity to assume first  
position. All of this evidence creates material issues of fact that were simply not appropriately  
resolved by way of summary judgment. Furthermore, the trial court actually gave the benefit of  
all inferences to TitleOne rather than EEF, the non-moving party, which is further error. It should

1 also be noted that all of the California cases cited by TitleOne involved full trials, not summary  
2 judgment proceedings. Here, EEF was wrongfully denied the opportunity to present this evidence  
3 to a jury.

4 EEF respectfully submits that the trial court erred when it dismissed as speculation evidence  
5 that EEF would have acquired the RBC Deed of Trust thereby assuming first position on its own  
6 Deed of Trust. The trial court further erred when it concluded that EEF's security interest had no  
7 value such that EEF suffered no cognizable damage as a result of TitleOne's wrongful  
8 reconveyance. As stated above, if EEF had taken over first position, then lot sales that actually  
9 occurred provided more than enough proceeds to fully repay the Galiano loan. EEF's security  
10 interest would have been protected and EEF would have been made whole. Accordingly, EEF  
11 requests that the trial court's granting of summary judgment be reversed and that the case be  
12 remanded back to the trial court for further proceedings including a jury trial.  
13  
14

15 **B. Assuming That the Three-Year Statute of Limitations Period Set Forth in I.C. § 5-**  
16 **218(1) Applies to EEF's I.C. §45-1205 Claim, the Trial Court Erred In Determining**  
17 **When the Statute Accrued.**

18 TitleOne is also correct in its statement that the trial court ultimately dismissed all of EEF's  
19 claims based upon a determination that no proof of cognizable damages was shown. However,  
20 Judge Wilpur did conclude that I.C. §5-218(1) applied to EEF's I.C. §45-1205 claim and that the  
21 statute of limitations began to accrue on the date of the wrongful reconveyance rather than on the  
22 date that EEF suffered actual damage. It is submitted that the trial court erred in its determination  
23 of the accrual date of the statute of limitations.

24 EEF was not damaged by the wrongful reconveyance until May 12, 2012, when Galiano sold  
25 the property to DAS without notice to EEF thereby stripping EEF of its security interest. Prior to  
26 the sale, the wrongful reconveyance could have been corrected with no harm being suffered by  
27 EEF had EEF been aware of it. It was the sale and loss of its security interest (damages) that  
28

1 completed EEF's cause of action and triggered the running of the statute of limitations. The  
2 accrual date should therefore be May 12, 2012, the date of the sale to DAS by Galiano. With this  
3 accrual date, the EEF §45-1205 cause of action would be timely.

4 TitleOne misses the mark when it argues that there is no discovery rule exception associated  
5 with I.C. § 5-218(1). EEF is not asserting that a discovery rule applies in this case. Rather, EEF  
6 contends that the tortious conduct engaged in by TitleOne is continuing in nature and that the  
7 cause of action under I.C. §45-1205 does not accrue until actual damage is suffered. This same  
8 rationale was applied by this Court in *Streib v Veigel*, 109 Idaho 174 (1985). In other words, it  
9 was not the wrongful reconveyance that caused actual damage. The reconveyance was the  
10 negligent act that lead to the damage and was continuing in nature. The operative event that  
11 resulted in the loss of EEF's security interest was the short sale by Galiano to DAS. At that point,  
12 and only at that point, was EEF harmed.

13 TitleOne's negligent act of wrongfully reconveying EEF's Deed of Trust is analogous to the  
14 negligent preparation of a tax return that was at issue in *Streib*. It was not until the tax return was  
15 audited by the IRS and certain deductions were disallowed that the client suffered actual damage.  
16 The audit with attendant damage completed the tort and it was at that time that the statute of  
17 limitations accrued.

18 It is noteworthy that TitleOne makes no effort to rebut or otherwise distinguish the *Streib* case  
19 cited by EEF in its Opening Brief. Perhaps this should be viewed as a concession by TitleOne  
20 that the reasoning and logic employed by the Court in *Streib* controls in this case. The analysis  
21 that this Court applied in *Streib* is equally applicable here. Different types of professionals  
22 preparing and filing documents that are subsequently found to be inaccurate resulting in damage  
23 to the client in some form, i.e. disallowed deductions and penalties or the loss of a security  
24 interest. In both cases, actual damage occurred after the preparation and filing of the erroneous  
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1 document. In *Streib*, the statute of limitations began running at the time of the IRS audit. Here,  
2 the statute of limitations should be deemed to have commenced running at the time of the sale by  
3 Galiano to DAS which resulted in the stripping of EEF's security interest.

4 Accordingly, it is respectfully submitted that the trial court erred in its determination that the  
5 statute of limitations accrued on the date of the wrongful reconveyance rather than when EEF  
6 suffered actual harm. EEF therefore requests that the trial court's ruling be reversed and that this  
7 case be remanded back to the trial court with instructions that the applicable statute of limitations  
8 commenced running at the time of the sale of the property by Galiano to DAS.

10 **C. EEF's Claim for Tortious Interference With Prospective Economic Advantage Was**  
11 **Dismissed by the Trial Court on the Sole Ground That EEF Suffered No Damage**

12 The trial court dismissed EEF's cause of action for tortious interference on the sole basis that  
13 EEF failed to prove any cognizable damages. The court did not rule on any other grounds so  
14 TitleOne's arguments addressing the remaining elements of the tort are not germane to this  
15 appeal. EEF therefore reasserts all of the arguments raised in its briefing addressing the errors  
16 committed by the trial court in its holding that EEF suffered no damage.

18 **D. The Prevailing Party on this Appeal is Entitled to Recover its Attorney's Fees**  
19 **Pursuant to I.C. §12-120(3).**

20 The gravamen of the claims asserted in this case deals with a commercial transaction under  
21 *Great Plains Equip v. Northwest Pipeline Corp.*, 136 Idaho 466, 471, 36 P.3d 218, 223 (2001).  
22 The prevailing party on the appeal should be awarded its attorney's fees.

23 **III. ARGUMENT – COREY BARTON HOMES**

24 **A. DAS and CBH Had Inquiry Notice of Defects in the Chain of Title Such that DAS**  
25 **Should Not Be Deemed a Bona Fide Purchaser and CBH Should Not Have Been**  
26 **Afforded the Protection of the Shelter Rule.**

27 In connection with EEF's Motion to Amend its complaint, the trial court held as follows:  
28

1 As discussed above, DAS is a "bona fide purchaser" of the  
2 property, with the right to convey it free and clear of unknown  
3 claims, including EEF's claimed lienholder interest. As also  
4 discussed above, DAS's transferees and all subsequent transferees  
5 are protected by the "shelter rule," absent evidence supporting a  
6 conclusion that one of the shelter rule's exceptions applies.  
7 Accordingly, the transferees also own the property free and clear of  
8 EEF's claimed lienholder interest. EEF's quiet-title claim is  
9 therefore futile. Permission to amend is denied. (R. 003133)

10 The basis for the trial court's denial of EEF's motion to amend was that DAS was a bona  
11 fide purchaser and that CBH was protected by the shelter rule. It is submitted that the trial court  
12 erred in these findings and that EEF's motion to amend should have been granted. EEF presented  
13 evidence to the court that subsequent to the February 11, 2010 unauthorized full reconveyance  
14 recorded by TitleOne, EEF was requested to execute two additional partial reconveyances which  
15 were then recorded. These three reconveyances were part of the public record at the time of the  
16 short sale. The trial court concluded that the two subsequent partial reconveyances were not  
17 related to the property purchased by DAS and could not furnish the basis for a duty on DAS's  
18 part to inquire about the validity of the full reconveyance. (R. 003128). It is submitted that the  
19 trial court erred in this ruling.

20 EEF, after the recording by TitleOne of the full reconveyance, technically had no interest  
21 in the property that could be the subject of a subsequent partial reconveyance. The fact that two  
22 such partial reconveyances were, in fact, recorded showed a glaring irregularity in the chain of  
23 title to the property that triggered a duty on DAS's part to inquire about the irregularity regardless  
24 of whether or not the lots involved in the two partial reconveyances were being purchased by  
25 DAS. It certainly put DAS on notice that EEF was in the chain of title.

26 A review of the deeds going from Galiano to DAS and then from DAS to CBH is also  
27 indicative of DAS's knowledge that it was not obtaining clean title from Galiano. Galiano  
28

1 provided DAS with a General Warranty Deed (R. 001316). That deed contains the following  
2 language:

3 Grantor does hereby covenant to and with Grantee, and its  
4 successors and assigns forever, that **Grantor is owner in fee**  
5 **simple** of the Premises; that **Grantor has a good right to convey**  
6 **the fee simple**; that the Premises is free from any and all liens,  
7 claims, encumbrances or other defects of title except the Permitted  
8 Exceptions; that Grantor shall and will warrant and defend the quiet  
9 and peaceful possession of said Premises by Grantee, and its  
10 successors and assigns forever, against all other claims whatsoever;  
11 and that Grantor and its heirs and assigns will, on demand of the  
12 Grantee or its heirs or assigns, execute any instrument necessary for  
13 the further assurance of the title to the Premises that may be  
14 reasonably required. (R. 001317)

15 DAS, on the other hand, provided CBH with Special Warranty Deeds for each of the lot  
16 sales that significantly reduced DAS's representations as to the validity of the title that was  
17 passing. Each of the Special Warranty Deeds contains the following language:

18 Grantor makes no covenants or warranties with respect to title,  
19 express or implied, other than as expressly stated herein. Grantor is  
20 the owner of the Premises and has not conveyed the same estate to  
21 any person other than Grantee and that such estate is at the time of  
22 the execution of this instrument free from encumbrances done or  
23 made directly by Grantor and any encumbrances of record. (R.  
24 002906)

25 If DAS truly believed there were no problems with title, then why did it not give CBH a  
26 General Warranty Deed with the same representations that Galiano provided in the deed to DAS?  
27 Why did CBH accept Special Warranty Deeds? The reasonable inference is that DAS knew it  
28 was not receiving clean title and it was protecting itself by giving CBH watered down deeds.  
This evidence was ignored by the court. In fact, the court gave DAS and CBH favorable  
inferences rather than giving the inference to EEF. Moreover, the court decided disputed material  
issues of fact that should have been left for a jury. For these reasons, it is submitted that the trial  
court erred in denying EEF's motion to amend.



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**B. CONCLUSION**

For all of the foregoing reasons, as well as those stated in Appellant's Brief, EEF respectfully requests that this Court reverse the trial court's orders granting summary judgment to TitleOne and denying EEF's motion to amend its complaint and remand this case back to the trial court for further proceedings including trial by jury.

RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of January, 2016.

The Eagle Law Center

By:



Paul R. Mangiantini  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

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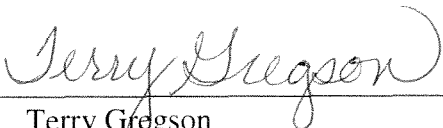
I hereby certify that on this 14<sup>th</sup> day of January, 2016, I caused true and correct copies of this document to be served on the following individual by US Mail.

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By:   
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