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8 **STATE OF WASHINGTON**
KING COUNTY SUPERIOR COURT

9 STATE OF WASHINGTON,

10 Plaintiff,

11 v.

12 QUALITY LOAN SERVICE
13 CORPORATION OF WASHINGTON,

14 Defendant.

NO. 14-2-06236-2 SEA

MOTION FOR TEMPORARY
RESTRAINING ORDER

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16 The State of Washington, by and through counsel, moves the Court for a preliminary
17 injunction restraining Quality Loan Service Corporation of Washington ("QLS") from
18 conducting any trustee's sale in Washington pursuant to a Notice of Trustee's Sale issued,
19 posted, or recorded on or before February 14, 2014.

20 **I. INTRODUCTION**

21 QLS serves as foreclosing trustee for numerous servicers in Washington.
22 RCW 61.24.030(6) requires the trustee to maintain a continuous physical presence in the state
23 from the date it issues a Notice of Trustee's Sale to the date of the sale. As of February 14,
24 2014, QLS lacked such a physical presence: it had closed its Poulsbo office, and was not
25 available at its purported address in Seattle – an office suite in a locked building, for which
26 QLS was not listed in the tenant directory, and at which QLS explicitly refused to accept

1 service of process.

2 Trustees must strictly comply with the Deed of Trust Act, and courts must construe it
3 strictly in favor of borrowers. Moreover, it is a deceptive or unfair practice for a trustee to
4 render its physical offices inaccessible to borrowers or provide borrowers with incorrect
5 addresses. Borrowers need access to the trustee's street address to (a) serve lawsuits seeking to
6 restrain wrongful foreclosures, and (b) tender funds to cure default. It is unfair for a trustee to
7 conduct foreclosure sales where it has failed to strictly comply with RCW 61.24.030(6), or
8 where it has provided borrowers with inaccurate information concerning its street address and
9 where it may be served with process.

10 Because Washington homeowners will suffer irreparable harm if QLS is permitted to
11 conduct foreclosures pursuant to Notices of Trustee's Sales that are predicated on these unfair
12 and deceptive practices – including a failure to comply with RCW 61.24.030(6) and providing
13 inaccurate information to borrowers about its address – QLS should be enjoined and restrained
14 from conducting such sales.

15 II. FACTUAL BACKGROUND

16 QLS serves as a trustee on behalf of numerous lenders and financial institutions, and
17 conducts nonjudicial foreclosures on properties throughout Washington State, including in
18 King County. [Roesch Decl., Ex. 1-2.] Most of QLS's operations take place in Southern
19 California, rather than in Washington State – a practice that has contributed to its running afoul
20 of Washington's Consumer Protection Act in the past. *See Klem v. Washington Mutual Bank*,
21 176 Wn.2d 771, 295 P.3d 1179 (2013) (finding QLS violated CPA by falsely dating notarized
22 documents in California).

23 QLS previously maintained an office at 19735 10th Ave. NE, Suite N-200, Poulsbo,
24 WA 98370, which was listed on its Notices of Trustee's Sale. [See, e.g., Roesch Decl., Ex. 1.]
25 On February 13, 2014, paralegal Melissa Colletto attempted to visit QLS's Poulsbo office, but
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1 found it closed. [Colletto Decl., ¶ 2-3.] She was informed by an employee McCarthy &
2 Holthus, a law firm located there, that the QLS office at that location had closed down. [*Id.* at
3 ¶ 4.] On February 21, 2014, Jan Simonds, an investigator with Washington's Attorney
4 General's Office visited QLS's former Poulsbo office, and confirmed that QLS did not
5 maintain an office at the Poulsbo address. [Simonds Decl., ¶ 3.]

6 QLS has issued Notices of Trustee's Sale for properties in Washington that listed
7 QLS's street address as 108 First Ave. South, Suite 202, Seattle, WA 98104. [*See, e.g.,*
8 Roesch Decl., Ex. 2.] On February 14, 2014, legal assistant Linda Duenas attempted to visit
9 QLS's office at the Seattle address to serve a lawsuit on QLS. [Duenas Decl., ¶ 3.] She found
10 the building locked, and was unable to enter. [*Id.*] Ultimately, she returned and gained entry
11 to the building when a person leaving for lunch allowed her into the lobby and summoned
12 another person, who stated that he was a QLS employee. [*Id.*] However, the QLS employee
13 refused to accept service for QLS at that address, and instructed Ms. Duenas that QLS had to
14 be served through CT Corporation in Olympia. Ms. Duenas took a picture of the exterior of
15 the building. [Duenas Decl., Ex. 1.]

16 On February 18 and 23, 2014, an investigator employed by the Attorney General's
17 Office went to QLS's listed address at 108 First Ave. South, Seattle, WA, 98104. [Simonds
18 Decl., ¶ 2.] She found that the building was locked, and could be accessed only if a tenant
19 allowed a person from the street in. [*Id.*] She took pictures of the building exterior. [Simonds
20 Decl., Ex. 1.] A sign in the lobby indicated that QLS had an office on the second floor. [*Id.*]
21 The building has a call box, which provided an electronic directory of tenants. QLS was not
22 listed as a tenant as of February 21. [Simonds Decl., ¶ 2.] As a result, a borrower searching
23 for QLS would not be provided with a number to call QLS from the street to gain access to the
24 building. In addition, a borrower who perused the electronic directory could reasonably reach
25 the conclusion that QLS did not maintain an office in the building. This is particularly true if
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1 they were unable to see the interior tenant directory, and noted that the building had empty
2 offices, which prominent signage on the exterior windows indicated was for lease. [Duenas
3 Decl., Ex. 1; Simonds Decl., Ex. 1.]

4 III. EVIDENCE RELIED UPON

5 The State relies on the declarations of Benjamin Roesch, Jan Simonds, Lesli Ashley,
6 Melissa Colletto, Linda Duenas, and Bob Ordal, and the exhibits attached thereto, and the
7 papers and pleadings on file in this case.

8 IV. ISSUES PRESENTED

9 Whether QLS should be temporarily restrained and preliminarily enjoined under the
10 Consumer Protection Act from conducting trustee's sales in Washington State pursuant to
11 Notices of Trustee's Sale issued, posted, or recorded on or before February 13, 2014, because
12 doing so would be an unfair and deceptive act or practice in trade or commerce.

13 V. ARGUMENT

14 A. Standard for Temporary Restraining Order and Preliminary Injunction

15 Ex parte TROs are governed by CR 65(b), which provides that:

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17 A temporary restraining order may be granted without written or oral
18 notice to the adverse party or his attorney only if (1) it clearly appears
19 from specific facts shown by affidavit or by the verified complaint that
20 immediate and irreparable injury, loss, or damage will result to the
21 applicant before the adverse party or his attorney can be heard in
22 opposition, and (2) the applicant's attorney certifies to the court in writing
23 the efforts, if any, which have been made to give the notice and the
24 reasons supporting his claim that notice should not be required. Every
25 temporary restraining order granted without notice shall be endorsed with
26 the date and hour of issuance; shall be filed forthwith in the clerk's office
and entered of record; shall define the injury and state why it is irreparable
and why the order was granted without notice; and shall expire by its
terms within such time after entry, not to exceed 14 days, as the court
fixes, unless within the time so fixed the order, for good cause shown, is
extended for a like period or unless the party against whom the order is
directed consents that it may be extended for a longer period.

1 For a preliminary injunction, the plaintiff need not prove, and the trial court need not
2 reach, the merits of the issues underlying the requirements for permanent injunctive relief –
3 instead, the focus is on likelihood of success on the merits. *Tyler Pipe Indus. v. Dep't of*
4 *Revenue*, 96 Wn.2d 785, 793, 638 P.2d 1213 (1982). A party seeking a preliminary injunction
5 must show (1) a clear legal or equitable right, (2) a well-grounded fear of immediate invasion
6 of that right, and (3) the acts complained of have or will result in actual and substantial injury.
7 *Rabon v. City of Seattle*, 135 Wn.2d 278, 284, 957 P.2d 621 (1998). “[S]ince injunctions are
8 within the equitable powers of the court, these criteria must be examined in light of equity,
9 including the balancing of the relative interests of the parties and the interests of the public, if
10 appropriate.” *Id.* No security is required from the State. CR 65(c).

11 **B. Washington Consumers Have a Clear Legal and Equitable Right to be Free of**
12 **Unfair or Deceptive Trade Acts or Practices.**

13 The Legislature has established that Washington consumers have the right to be free of
14 deceptive or unfair trade acts or practices: “Unfair methods of competition and unfair or
15 deceptive acts or practices in the conduct of any trade or commerce are hereby declared
16 unlawful.” RCW 19.09.020. When bringing a CPA claim, the State must prove: (1) an unfair
17 or deceptive act or practice, (2) in trade or commerce, (3) that affects the public interest. *State*
18 *v. Kaiser*, 161 Wn. App. 705, 719, 254 P.3d 850 (2001).

19 An act or practice is deceptive if it has the capacity to deceive a substantial portion of
20 the public. *See Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785,
21 719 P.2d 531 (1986). Reliance by consumers and an intention to deceive are not necessary.

22 The Federal Trade Commission Act (“FTCA”) provides that “practice is unfair [if it]
23 causes or is likely to cause substantial injury to consumers which is not reasonably avoidable
24 by consumers themselves and is not outweighed by countervailing benefits.” 15 U.S.C. §
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1 45(n).¹ This standard was developed through agency decisions and case law in FTC
2 enforcement actions, since the FTCA does not provide for a private right of action by
3 consumers.² The Supreme Court's seminal case states that an "unfair" act is one that (a)
4 "without necessarily having been previously considered unlawful, [it] offends public policy as
5 it has been established by statutes, the common law or otherwise—whether, in other words, it
6 is within at least the penumbra of some common-law, statutory, or other established concept of
7 unfairness," (b) is "immoral, unethical, oppressive, or unscrupulous," or (c) "causes substantial
8 injury to consumers (or competitors or other business men)." *Federal Trade Comm'n v. Sperry*
9 *& Hutchinson, Co.*, 405 U.S. 233, 244 n. 5 (1972). This standard has been cited by
10 Washington cases with approval, and with some modification to accommodate Washington's
11 developed CPA jurisprudence, it fits well with the *Hangman Ridge* elements.

12 The Court should reject any requirement that an unfair act cause "substantial" injury,
13 and look instead to Washington's long-standing jurisprudence holding that the degree of injury
14 is not a determining factor. An "unfair or deceptive" act is the first element of a private CPA
15 claim, while the "injury" element is properly addressed in element four, *Hangman Ridge*, 105
16 Wn.2d at 784, and is not necessary for the State's CPA claim at all. Thus, it would be
17 redundant to incorporate an "injury" component into the standard for "unfairness." This
18 common-sense approach is consistent with the definition of "deceptive" acts, which does not
19 contain any "injury" requirement. *Bain*, 175 Wn.2d at 115-16. It is also consistent with the
20 requirement that the CPA be "liberally construed so that its beneficial purposes may be
21 served." RCW 19.86.920.

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23 ¹ The Legislature explicitly stated its intent that federal interpretations of consumer protection statutes
24 should guide interpretations of the CPA. RCW 19.86.920.

25 ² See, e.g., *Blake v. Federal Way Cycle Center*, 40 Wn. App. 302, 310, 698 P.2d 578 (1985), rev. den.
26 104 Wn.2d 1005 (1985) (quoting *Federal Trade Comm'n v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n. 5 (1972)).

1 Further, injury resulting from a deceptive act need only be slight to satisfy that element,
2 *e.g.*, *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 854, 792 P.2d 142 (1990), and there is
3 no reason to treat injury from unfair acts differently. A legal standard for “unfairness” that
4 would require a showing of “substantial” injury would also unwisely dilute the CPA’s broad
5 consumer protections.³ Instead, the “public interest” element effectively ensures that the
6 unfair practice has a substantial impact on Washington consumers overall. *See Hangman*
7 *Ridge*, 105 Wn.2d at 791 (public interest established by showing that many consumers were
8 affected or likely affected); RCW 19.86.093 (public interest established if conduct injured or
9 had capacity to injure other consumers). Finally, the “injury” aspect of a CPA claim is
10 irrelevant here, where the State seeks to enjoin an unfair or deceptive practice. *Kaiser*, 161
11 Wn. App. at 719.

12 **C. QLS Is Invading the Rights of Washington Consumers.**

13 **1. Failure to maintain a “physical presence” in Washington State.**

14 RCW 61.24.030(6) provides that one “requisite to a trustee’s sale” is “[t]hat prior to
15 the date of the notice of trustee’s sale and continuing thereafter through the date of the trustee’s
16 sale, the trustee must maintain a street address in this state where personal service of process
17 may be made, and the trustee must maintain a physical presence and have telephone service at
18 such address.” Lenders and trustees are required to comply strictly with the Deed of Trust Act.
19 *See Albice v. Premier Mortg. Servs., Inc.*, 174 Wn.2d 560, 567, 276 P.3d 1277 (2012). In
20 addition, the Deed of Trust Act must be construed strictly in favor of borrowers. *Id.*

21 QLS’s office in Poulsbo was closed on or before February 13, 2014. [Colletto Decl., ¶
22 2-4; Simonds Decl., ¶ 3.] At least one person – and likely others – attempting to affect
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24 ³ This standard also would ignore the FTCA’s plain language that an act is unfair if it “causes or is likely
25 to cause substantial injury to consumers” – plural. 15 U.S.C. § 45(n) (emphasis added). The FTCA defines
26 fairness in terms of injury to consumers as a whole, and notably, the definition does not require a showing of
actual consumer injury, but just a “likelihood” of substantial injury to consumers.

1 personal service on QLS at that address was unable to do so. [Colletto Decl., ¶ 2-4.] At the
2 same time, QLS's purported office at 108 First Ave. South, Suite 202, Seattle, WA 98104 was
3 not accessible to the borrowers, and QLS refused to accept service at that location. [Duenas
4 Decl., ¶ 3; Simonds Decl., ¶ 2.] These were the two street addresses in Washington that QLS
5 listed on its Notices of Trustee's Sale. [See Roesch Decl., Ex. 1-2.] QLS failed to maintain a
6 street address in Washington where personal service of process may be made, and at which
7 QLS itself maintains a physical presence and telephone service.

8 Under Washington law, a foreclosing trustee owes a duty of good faith to borrowers.
9 See RCW 61.24.010(4). Lenders and trustees must also comply strictly with the Deed of Trust
10 Act. See *Albice v. Premier Mortg. Servs., Inc.*, 174 Wn.2d 560, 276 P.3d 1277 (2012). The
11 Washington Supreme Court had described the trustee's power to sell a borrower's property –
12 often the family home – as “incredible” and “awesome.” *E.g., Klem v. Washington Mut. Bank*,
13 176 Wn.2d 771, 295 P.3d 1179 (2013). It is an unfair practice under the Consumer Protection
14 Act, and a breach of the trustee's duty of good faith to the borrower, for a trustee to exercise
15 the “incredible” and “awesome” power to sell a borrower's property when it knows or should
16 know that it has not strictly complied with the Deed of Trust Act.

17 **2. Deceptive or unfair acts and practices concerning QLS's Poulsbo address.**

18 QLS issued Notices of Trustee's Sales that listed its address as 19735 10th Ave. NE,
19 Suite N-200, Poulsbo, WA 98370. [*E.g., Roesch Decl., Ex. 1.*] However, as of at least
20 February 13 and 21, 2014 it was impossible for borrowers to access this QLS office to affect
21 personal service or speak with a representative of QLS because it had been closed. [Colletto
22 Decl., ¶ 2-4; Simonds Decl., ¶ 3.] Thus, the street address that QLS provided to borrowers in
23 the foreclosure process became, at some point on or before February 14, 2014, false, incorrect,
24 and useless to the borrower – prior to the trustee's sale.

25 QLS's representations concerning its Poulsbo address had the capacity to deceive a
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1 substantial portion of the public – i.e., each borrower or junior lienholder who received a
2 Notice of Trustee’s Sale listing the Poulsbo address, and whose property had not been
3 foreclosed at the time QLS shut that office. Indeed, at least one consumer (through a law
4 office) unsuccessfully attempted to affect personal service on QLS at the Poulsbo address in
5 reliance on QLS’s Notice of Trustee’s Sale. [Colletto Decl., ¶¶ 2-4.] There is no evidence that
6 QLS sent a notice or correspondence to borrowers apprising them of the closure of the Poulsbo
7 office. It was unfair or deceptive for QLS to change its address in mid-foreclosure without
8 informing consumers who might need to serve a lawsuit and motion to restrain the trustee’s
9 sale, *see* RCW 61.24.130, or tender funds to cure the default. *See* RCW 61.24.090.

10 **3. Deceptive or unfair acts and practices Regarding QLS’s Seattle Address.**

11 QLS also issued Notices of Trustee’s Sales that listed its address as 108 First Ave.
12 South, Suite 202, Seattle, WA 98104. [See Roesch Decl., Ex. 2.] However, as of February 14,
13 2014 through February 21, borrowers could not access QLS’s office to affect personal service
14 or speak with a representative of QLS because the building was locked. [Duenas Decl., ¶ 3;
15 Simonds Decl., ¶ 2.] Persons seeking access to the building had to be “buzzed in” by a tenant.
16 [Simonds Decl., ¶ 2.] However, on at least February 18 and 23, 2014 QLS was not listed in
17 the building’s tenant directory, and no telephone number for QLS’s purported office was
18 posted at the building to gain access. [Simonds Decl., ¶ 2.]⁴ Thus, the address that QLS
19 provided to borrowers in the foreclosure process was false, incorrect, and useless to the
20 borrower.

21 First, QLS’s failure to ensure that it was listed in the building’s electronic tenant
22 directory was *deceptive*, because it had the capacity to deceive borrowers into believing that
23 QLS did not maintain an office at that location. [Simonds Decl., ¶ 2.] Borrowers confronted
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25 ⁴ It appears that QLS took action to remedy this discrete issue at approximately 11:40 on February 26,
26 2004. [Ashley Decl., ¶¶ 2-5.]

1 with the locked exterior of the building – particularly in light of the real estate broker’s signs
2 up in the window, [Duenas Decl., Ex. 1; Simonds Decl., Ex. 1,] would be discouraged from
3 further investigation, and potentially deceived into believing that QLS had not physical
4 presence in the building.

5 Second, QLS’s failure to ensure that it was at all times listed in the tenant directory,
6 with a corresponding number that consumers could call to be “buzzed” into the building,
7 [Simonds Decl., ¶ 2,] also *unfairly* denied consumers access to its physical location. For
8 purposes of serving a lawsuit, tendering payment, or speaking with a QLS representative,
9 standing outside the building did consumers no good – they needed to get to QLS’s actual
10 office. Because consumers had no means to get QLS to let them into the building they would
11 have to either (a) break in, or (b) persuade another tenant to let them into the locked building to
12 search for a tenant not listed in the electronic directory.

13 Third, even when a borrower’s representative is lucky enough to gain access to the
14 building via an employee leaving for lunch, QLS explicitly refused to accept service of process
15 at 108 First Ave., Suite 202, [Duenas Decl., ¶ 3,] despite listing that location as its street
16 address on its Notices of Trustee’s Sale. [Roesch Decl., Ex. 2.] It is deceptive and unfair to
17 provide borrowers with a street address in a Notice of Trustee’s Sale, and then refusing to
18 accept service at that address. Moreover, because QLS does not accept service at this location,
19 it does not satisfy the requirement of RCW 61.24.030(6).

20 Fourth, if QLS wishes to rely upon its registered agent for service of process in
21 Olympia to satisfy the “physical presence” requirement of RCW 61.24.030(6) – which the
22 Attorney General does not concede is adequate under the statute⁵ – it must inform borrowers of
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24 ⁵ Such an argument by QLS would be unavailing for several reasons. First, the plain language of RCW
25 61.24.030(6) specifically requires the *trustee* to maintain the street address, physical presence, and telephone
26 61.24.040(f) (“the trustee or its authorized agent shall sell the property at public auction to the highest bidder”).
Second, Washington corporations must generally appoint an agent for service of process, so if the Legislature

1 that fact in its Notices of Trustee's Sale, rather than listing street addresses in Poulsbo and
2 Seattle. It is a 60-mile drive from Seattle to Olympia, and a 73-mile drive from Poulsbo to
3 Olympia. Even if CT Corp. could satisfy QLS's obligations under RCW 61.24.030(6), it is
4 unfair and deceptive for QLS not to inform borrowers of CT Corp.'s existence, role, and
5 address in the Notices of Trustee's sale, and instead direct borrowers to abandoned and/or
6 useless locations more than an hour's drive away from CT Corp.'s office.

7 **D. Without a Temporary Restraining Order and Preliminary Injunction,**
8 **Washington Consumers Will Suffer Actual, Substantial, and Irreparable Injury.**

9 Trustee's sales conducted in violation of Washington's Deed of Trust Act affect two
10 distinct types of Washington consumers. First, improper trustee's sales irreparably injure
11 homeowners, whose properties are foreclosed. These homeowners lose title to their property,
12 RCW 61.24.050, may be evicted from their homes, experience negative credit ratings, and
13 waive certain claims, including the ability to challenge the validity of the trustee's sale.
14 *Frizzell v. Murray*, ___ Wn.2d at ___, 313 P.3d 1171, 1174 (2013); RCW 61.24.127(2).
15 Foreclosure is therefore an actual, substantial, and irreparable injury to these consumers.

16 Second, foreclosure by a senior deed of trust also eliminates the security interest of
17 junior lienholders. Thus, junior lienholders – such as home equity and other lenders – face the
18 same irreparable harm from improper foreclosure sales and inaccurate Notices.

19 Third, trustee's sales conducted in violation of Washington's Deed of Trust Act may be
20 voided by courts in certain circumstances. *Albice v. Premier Mortg. Servs., Inc.*, 174 Wn.2d
21 560, 276 P.3d 1277 (2012). In these cases, another group of consumers – those who purchased
22 the property at foreclosure – are also affected, and the transaction will be unwound, with
23 numerous potential consequences, such as lost investment opportunities, lost time spent
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25 intended for a registered agent to be sufficient, RCW 61.24.030(6) would be entirely unnecessary. In fact, the
26 Deed of Trust Act is more specific, and requires the trustee *itself* to be available for service of process.

1 working on or improving the property, and other losses.

2 **E. The State is Likely to Succeed on the Merits.**


3 The State is likely to prevail on the merits. QLS's failure to inform borrowers of its
4 mid-foreclosure move was deceptive and unfair toward those borrowers whose Notices of
5 Trustee's Sale provided QLS's Poulsbo address. QLS's failure to ensure that it was listed in
6 the tenant directory for the building at 108 First Ave. S in Seattle and refusal to accept service
7 at that address was similarly deceptive and unfair, since that was the address it provided to
8 borrowers. Finally, QLS has recorded numerous Deeds of Trust affected by these problems.
9 [Ordal Decl., ¶ 2.]

10 **VI. CONCLUSION**

11 QLS has violated the Deed of Trust Act's "physical presence" requirement. It also
12 acted unfairly and deceptively toward borrowers by directing borrowers, in its Notices of
13 Trustee's Sales, to locations in Poulsbo and Seattle that it had either closed, or which were
14 inaccessible and where it refused to accept service or deal with borrowers. The State therefore
15 respectfully requests that the Court restrain QLS from conducting trustee's sales pursuant to
16 Notices of Trustee's Sale that listed its street address as either in Poulsbo or Seattle, or
17 pursuant to Notices of Trustee's Sale that were issued, posted, or recorded on or before
18 February 14, 2014.

19 Dated this 26th day of February, 2014.

20
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