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13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**
15 **SAN JOSE DIVISION**

16
17 BRIAN PINCUS, on behalf of himself and
all others similarly situated,

18 Plaintiff,

19 vs.
20

21 YAHOO! INC., a Delaware corporation,

22 Defendant.
23

Case No. 13-cv-5326

**CLASS ACTION COMPLAINT FOR
STATUTORY DAMAGES AND
INJUNCTIVE RELIEF FOR
VIOLATION OF CALIFORNIA'S
INVASION OF PRIVACY ACT (CAL.
PENAL CODE §§ 630 *et seq.*)**

JURY TRIAL DEMANDED

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1 Plaintiff Brian Pincus (hereinafter “Plaintiff”), through counsel Kaplan Fox & Kilsheimer
 2 LLP, individually and on behalf of the proposed class described below, brings this action for
 3 injunctive relief and statutory damages against Defendant Yahoo!, Inc. (hereinafter “Yahoo”)
 4 and alleges as follows:

5 **I. NATURE OF THE CLAIMS**

6
 7 *As of June 1, [2013] all Yahoo email users are required to upgrade to*
 8 *the company’s newest platform, which allows Yahoo to scan and analyze*
 9 *every email they write or receive. . . .*

10 *Gay and haven’t come out yet? Yahoo knows. Having an affair? Your*
 11 *spouse may not know – but Yahoo does. Any interests, ailments or*
 12 *projects you’d rather not share? You’re sharing them with Yahoo,*
 13 *perhaps forever. The new tracking policy affects more than just Yahoo*
 14 *account holders. Everyone who corresponds with a Yahoo email*
 15 *account holder will also have their own message content scanned,*
 16 *analyzed, and stored by Yahoo, even if they themselves have not agreed*
 17 *to Yahoo’s new terms of service.*

18 - Press Release issued by Start Page,
 19 a Yahoo competitor, May 30, 2013

20 1. This is a class action seeking injunctive relief and statutory damages against
 21 Yahoo for its unlawful interception of the contents of communications sent and/or received by
 22 U.S.-domiciled non-users of Yahoo’s email service (Yahoo! Mail) to and/or from users of the
 23 service from June 1, 2013 to the present in violation of Section 631 of California’s Invasion of
 24 Privacy Act (the “California Wiretap Act” or “CIPA”).

25 2. Commencing the first week of June 2013, Yahoo forced all Yahoo! Mail users to
 26 migrate to its new platform which, among other things, included scanning of all incoming and
 27 outgoing emails for content. Yahoo admits that the scanning is not limited to virus, malware and
 28 spam protection, but also enables the creation of digital dossiers populated with sensitive
 personal information to enhance Yahoo’s ability to serve targeted advertizing and increase its
 revenues.

3. Yahoo’s email scanning is not limited to communications among Yahoo
 customers; the practice also includes scanning emails to and from people who do not use

1 Yahoo's products and never consented to the interception nor to the inclusion of the information
2 in Yahoo's digital dossiers.

3 4. Unlike its federal "one party consent" counterpart, CIPA prohibits the
4 interception of communications unless *all parties* to the communication consent to the intercept.

5 5. CIPA explicitly provides for a private right of action for victims of such illegal
6 interception. It provides for injunctive relief to permanently restrain Yahoo from further
7 violations, and statutory damages for each class member in the amount of \$5,000.00 or three
8 times actual damages, whichever is greater.

9 **II. JURISDICTION AND VENUE**

10 6. This Court has subject matter jurisdiction over this action pursuant to the Class
11 Action Fairness Act ("CAFA"), 28 USC § 1332(d)(2), because Plaintiff brings class claims on
12 behalf of citizens of states different than Yahoo's states of citizenship, and the amount in
13 controversy exceeds \$5 million, and the proposed class contains in excess of 100 members.

14 7. This Court has personal jurisdiction over Defendant Yahoo because Yahoo is
15 headquartered in California and all relevant conduct occurred in California.

16 8. Venue is proper in this District because Defendant Yahoo is headquartered in this
17 District, in Sunnyvale.

18 **III. THE PARTIES**

19 9. Plaintiff Brian Pincus is a citizen of the State of California. Plaintiff maintains a
20 non-Yahoo email address and is not otherwise a Yahoo customer. On numerous occasions since
21 June 1, 2013 Plaintiff sent emails to users of Yahoo! Mail, and upon information and belief,
22 Yahoo intercepted the email and scanned for content. Plaintiff did not consent to the
23 interception.

24 10. Defendant Yahoo is a Delaware corporation based in Sunnyvale, CA.

25 **IV. BACKGROUND AND BASIS OF DEFENDANT'S LIABILITY**

26 11. Among other businesses, Yahoo operates a web-based electronic communications
27 service called "Yahoo! Mail" which allows customers to register and use @yahoo.com,
28 @ymail.com and @rocketmail.com email addresses.

1 12. Yahoo operates one of the world’s largest such web-based email services,
2 competing primarily with Microsoft (using @outlook.com and @hotmail.com email addresses)
3 and Google (using the @gmail.com address). Yahoo claims more than 275 million Yahoo! Mail
4 customers globally.

5 13. Although Yahoo does not charge money for its email service, it is not “free.”
6 Users pay for the service with their personal information. In exchange for the “free” email
7 service, users must agree to a complicated “terms of service” that allows Yahoo to build a
8 “digital dossier” of personal information gathered across multiple platforms. The dossier
9 includes obvious personal information volunteered by the user to Yahoo, such as the user’s name
10 and email address, but it also includes less obvious information gathered by Yahoo often without
11 the knowledge of the user, for instance through surveillance technologies such as cookies and
12 tracking pixels.

13 14. Yahoo uses the information gathered from users to serve “targeted” advertising.
14 The more accurate Yahoo’s information is, the more it can charge advertisers to deliver relevant
15 ads. Advertising now accounts for 75% of Yahoo’s total revenues.

16 15. Because Yahoo’s revenue model is so fundamentally dependent on advertising,
17 and because it can increase revenues by building more accurate dossiers, it is strongly
18 incentivized to gather as much personal information on users no matter how sensitive – or illegal.
19 In June 2011, Yahoo announced that it would soon be upgrading to a new email platform, and
20 announced for the first time that it would scan the content of incoming and outgoing emails in
21 pursuit of ever-greater advertising revenues.

22 16. After some delay, on December 11, 2012, Yahoo CEO Marissa Mayer announced
23 that “new” Yahoo! Mail was ready for launch, but users could keep “classic” Yahoo! Mail
24 during the transition. In April 2013, Yahoo announced that it would retire “classic” Yahoo! Mail
25 on or about June 1, 2013, and all Yahoo users would be forced to use the new platform and
26 accept the new terms of service. In a Help Center entry called “Do I have to upgrade to the new
27 Yahoo! Mail?”, the company explained (emphasis added):
28

1 Beginning the week of June 3, 2013, older versions of Yahoo! Mail
2 (including Yahoo! Mail Classic) will no longer be available. After
3 that, you can access your Yahoo! Mail only if you upgrade to the
4 new version. When you upgrade, you will be accepting our
5 Communications Terms of Service and Privacy Policy. **This**
6 **includes the acceptance of automated content scanning and**
7 **analyzing of your communications content.**

8 17. Yahoo's terms of service are an opaque document, complicated exponentially by
9 the fact that it is supplemented by no fewer than 36 "additional" documents incorporated by
10 reference plus a separate privacy policy. For "new" Yahoo! Mail (which, as stated above, is the
11 only Yahoo! Mail as of June, 2013), the relevant additional terms of service is called "Yahoo
12 Global Communications Additional Terms of Service for Yahoo Mail and Yahoo Messenger"
13 (hereinafter, the "Yahoo! Mail ATOS"). In the Yahoo! Mail ATOS, Yahoo admits that all
14 incoming and outgoing communications are scanned, and not just for spam and virus filtering,
15 but for building ever more detailed digital dossiers so Yahoo can make more money. This
16 admission appears in Section 1.C. of the Yahoo! Mail ATOS (emphasis added below), and
17 Yahoo also admits that content, not just metadata, are scanned, and also admits that the
18 intercepted data are stored in addition to being scanned:

19 **1.c.** Please note that your Yahoo Messenger account is tied to your
20 Yahoo Mail account. Therefore, your use of Yahoo Messenger and
21 all Yahoo Messenger services will be subject to the TOS and laws
22 applicable to the Applicable Yahoo Company in Section 10.
23 **Yahoo's automated systems scan and analyze all incoming**
24 **and outgoing communications content sent and received from**
25 **your account (such as Mail and Messenger content including**
26 **instant messages and SMS messages) including those stored**
27 **in your account to, without limitation, provide personally**
28 **relevant product features and content, to match and serve**
targeted advertising and for spam and malware detection and
abuse protection. By scanning and analyzing such communications
content, Yahoo collects and stores the data. Unless expressly
stated otherwise, you will not be allowed to opt out of this feature. If
you consent to this ATOS and communicate with non-Yahoo users
using the Services, you are responsible for notifying those users
about this feature.

29 18. Importantly, Yahoo also implicitly admits in Section 1.C. above that
30 communications from non-Yahoo customers are scanned and stored. But Yahoo never got
31 consent from these non-Yahoo customers for the interception.

1 19. Several commentators noticed the issue with communications to or from non-
2 Yahoo users at about the time of the forced upgrade. For example, Sarah Downey at leading
3 online privacy software company Abine noted in a June 3, 2013 blog entry called “7 tips to deal
4 with Yahoo’s TOS update that lets them snoop on your emails and chats”:

5 There’s another privacy issue, too: Yahoo doesn’t just scan the
6 email of Yahoo Mail users, but also the email of *anyone who*
7 *corresponds with them*. That’s right: even if you don’t use Yahoo
8 Mail but you email someone who does, Yahoo can scan *your*
9 communications.

10 20. Ms. Downey also noted that Yahoo’s computerized scanning might also be
11 supplemented by human reading:

12 It’s not only a computerized system looking through your email;
13 occasionally it’ll be a real person. Why? Because Yahoo is combing
14 through your emails not only to figure out what you’re talking about
15 to target you with ads, but for “abuse protection.” Although “abuse”
16 is vague, it could mean violations of Yahoo’s Terms (like sending
17 spam or links to copyrighted content) or unlawful behavior. If
18 Yahoo’s system is anything like the others that currently exist (like
19 on Facebook), once the system flags something as abusive, it
20 could escalate to a real person.

21 21. Yahoo scans the incoming emails during transit prior to placing them into storage.
22 Likewise, Yahoo scans outgoing emails after being sent by Yahoo! Mail users in the course of
23 delivering the emails to non-Yahoo! Mail servers; they are not scanned while in storage.

24 22. Yahoo is not required by any law to scan emails for content for advertising
25 purposes nor is Yahoo required to store the scanned data; it is not necessary for the provision of
26 the service. Prior to the class period, Yahoo was able to provide a “free” email service without
27 such scanning and storing.

28 23. The scanning is also not in the ordinary course of business for free email
providers. Even today one of Yahoo’s biggest competitors (Microsoft) proudly advertizes that it
refuses to engage in Yahoo-type scanning behavior in the provision of its free hotmail and
outlook email services.

 24. On Yahoo’s email information webpage, in the FAQ reproduced below (emphasis
added), Yahoo again admits that its systems “scan and analyze all incoming and outgoing”

1 emails for content; the purpose goes far beyond virus and malware protection, and no effort is
2 made to weed out emails coming from or going to non-Yahoo email addresses. Yahoo also
3 admits that it may share data taken from these emails with third-parties (an admission repeated in
4 the Privacy Policy), again with no effort made to exclude content taken from communications
5 with non-Yahoo email users:

6 **Yahoo Mail FAQ**

7 **1. What are “relevant ads” as they relate to Yahoo Mail?**

8 To make our ads more relevant and useful for you, we make
9 educated guesses about your interests based on your activity on
10 Yahoo’s sites and services, as well as provide ads that are
11 contextually relevant to the page they are being served with. **When**
12 **you use the new Yahoo Mail our automated systems scan and**
13 **analyze all incoming and outgoing communications content**
14 **sent and received from your account** (such as Mail and
15 Messenger content including instant messages and SMS
16 messages) to detect, among other things, certain words and
17 phrases (we call them "keywords") within these communications.
18 This might result in ads being shown to you in Mail for products and
19 services that are related to those keywords. In addition, these
20 keywords may contribute to the interest categories we assign to
21 your browser for interest-based ads that we show throughout the
22 Yahoo Ad Network. No additional ads are shown to you, just more
23 relevant ads.

24 **2. How does Yahoo Mail message analysis work?**

25 While many features in the Yahoo Mail are new, the underlying
26 technology that supports them is the same as the automated
27 systems that already scan and analyze your inbox for spam,
28 viruses, malware, and phishing scams. This technology looks for
patterns, keywords, and files in Mail, Messenger, and other
communications content. In order to bring you the newest Yahoo
Mail, **Yahoo’s automated systems will scan and analyze all**
incoming and outgoing email, IM, and other communications
content sent and received from your account in order to
personalize your experience. This will result in both product
enhancements as well as more relevant advertising in addition
to a safer, less cluttered Mail experience.

29 **3. How are the new features in Yahoo Mail related to Yahoo** 30 **Messenger?**

31 We know in your connected life you frequently cross devices as
32 well as communication mediums. With that in mind, Yahoo Mail and
33 the new Yahoo Messenger version 11 (to find your version, go to
34 Help -> About) work together better than ever. Yahoo Mail and
35 Yahoo Messenger share a common search platform. This means
36 you may now archive Yahoo instant messages along with your mail
37 messages on Yahoo servers and search them together (including
38 Voice Mail, SMS, and more) from a wide variety of devices and
computing systems.

1 4. **Does Yahoo Mail automatically share my messages with**
2 **anyone else?**

3 Your messages are shared only with the people you want. Yahoo
4 may anonymously share specific objects from a message with
5 a 3rd party to provide a more relevant experience within your
6 mail. For example, Yahoo may share a package tracking number
7 with the shipping company so that you can easily see when your
8 package will arrive, or may share your flight number with your
9 airline to enable flight notifications within your inbox.

10 5. **Can I use Yahoo Mail and still opt-out of interest-based ads?**

11 Yes. Yahoo Mail respects your choice to opt out of interest-based
12 ads. Keep in mind, your opt-out will also apply to certain other
13 products we offer including scanning communications content for
14 advertising purposes, receiving interest-based content, and the
15 receipt of data from partner sites for our analytics products.
16 Depending on your locale, you can easily exercise this choice here,
17 or find it via links within Yahoo Mail and footer and icon links where
18 available throughout Yahoo.

19
20 25. Ms. Downey at Abine also raised the alarm on June 3rd about Yahoo's new
21 policy of sharing scanned content with third-parties:

22 Keep in mind that Yahoo's privacy issues don't end with email
23 scanning. Yahoo has a vast network of data selling partners and
24 affiliates. When you use Yahoo services, you aren't just sharing
25 with Yahoo: you're sharing with hundreds of third party companies
26 you've never heard of. And some of these partners are pretty
27 sensitive. For example, Yahoo's Privacy Policy notes that "Yahoo!
28 advertisers include financial service providers (such as banks,
 insurance agents, stock brokers and mortgage lenders) and non-
 financial companies (such as stores, airlines, and software
 companies)."

29 26. Yahoo is headquartered in California, and developed and implemented the new
30 scanning practices in this action in California. Yahoo profited from these actions in California.
31 In addition, some of the unlawful interception of communications to and from non-Yahoo! Mail
32 users occurred in California, as noted by Yahoo in its Terms of Service (emphasis added):

33 **7. INTERSTATE NATURE OF COMMUNICATIONS ON YAHOO!**
34 **NETWORK**

35 When you register with Yahoo!, you acknowledge that in using the
36 Yahoo! Services to send electronic communications (**including but**
37 **not limited to email**, search queries, sending messages to Yahoo!
38 Chat or Yahoo! Groups, uploading photos and files to Flickr, and
 other Internet activities), you will be causing communications to be
 sent through Yahoo!'s computer networks, **portions of which are**

1 located in California, Texas, Virginia, and other locations in the
2 United States and portions of which are located abroad. As a result,
3 and also as a result of Yahoo!'s network architecture and business
4 practices and the nature of electronic communications, even
5 communications that seem to be intrastate in nature can result in
6 the transmission of interstate communications regardless of where
7 you are physically located at the time of transmission. Accordingly,
8 by agreeing to this TOS, you acknowledge that use of the service
9 results in interstate data transmissions.

10 27. To the extent any interceptions physically occurred on servers or networks outside
11 of California, they were still under the control of Yahoo in California and the interception
12 occurred at the direction of Yahoo in California.

13 28. In addition, Yahoo was only able to effect the interception because it had access
14 to the emails pursuant to a contract governed exclusively by California law. As set forth below,
15 the cause of action in this complaint arose out of a relationship wholly governed by California
16 law. Below is the relevant portion of the Yahoo Terms of Service:

17 *Choice of Law and Forum.* You and Yahoo! each agree that the
18 TOS and the relationship between the parties shall be governed by
19 the laws of the State of California without regard to its conflict of law
20 provisions and that any and all claims, causes of action or disputes
21 (regardless of theory) arising out of or relating to the TOS, or the
22 relationship between you and Yahoo!, shall be brought exclusively
23 in the courts located in the county of Santa Clara, California or the
24 U.S. District Court for the Northern District of California. You and
25 Yahoo! agree to submit to the personal jurisdiction of the courts
26 located within the county of Santa Clara, California or the Northern
27 District of California, and agree to waive any and all objections to
28 the exercise of jurisdiction over the parties by such courts and to
venue in such courts.

29 **V. STATUTE OF LIMITATIONS**

30 29. Yahoo first announced in May 2011 that its new upgraded Yahoo! Mail service
31 might begin to scan incoming and outgoing emails for content for the purpose of targeted
32 advertising. In a litigation in California state court challenging the announced scanning, Yahoo
33 provided a sworn declaration dated November 15, 2012 and filed November 29, 2012 that the
34 scanning was not occurring (yet). *See Sutton v. Yahoo! Inc.*, Civ. 12-02973 (Cal. Super. Ct.,
35 Marin County, Declaration of Yahoo Engineering Manager Amir Doron, Nov. 29, 2012). Yahoo
36 repeated this testimony in an amended declaration dated November 25, 2012 and filed
37 November 30, 2012. The case was withdrawn.

1 30. On December 11, 2012, Yahoo CEO Marissa Mayer announced that the new
2 upgraded service would finally begin rolling out, but users would have the right to keep their
3 “classic” Yahoo! Mail accounts during a brief transition period.

4 31. On June 1, 2013, Yahoo ended the transition period and migrated all Yahoo! Mail
5 users to the new service.

6 32. Upon information and belief, Plaintiff’s communications with Yahoo! Mail users
7 were not intercepted by Defendant Yahoo until June 1, 2013, and thus Plaintiff’s claims have
8 been brought within the relevant statute of limitations. However, even if Yahoo intercepted
9 some communications prior to the June 1, 2013 forced upgrade, the unlawful interceptions could
10 not have begun prior to November 30, 2012 (or at least Plaintiff did not know nor could have
11 known of any interception) and thus these claims are still timely.

12 **VI. CLAIM FOR RELIEF UNDER CALIFORNIA PENAL CODE § 630 *et seq.***

13 33. Plaintiff repeats and realleges each and every allegation contained above.

14 34. California Penal Code § 631(a) makes it unlawful, by means of any machine,
15 instrument or contrivance, to purposefully intercept the content of a communication over any
16 “telegraph or telephone wire, line, cable or instrument,” or to read or attempt to read or learn the
17 contents of any such communications without the consent of all parties to the communication.

18 35. Email communications are communications within the meaning of Section 631.

19 36. During the proposed class period, Yahoo intercepted the content of email
20 communications from or to class members without their consent using incoming and outgoing
21 email servers which qualify as machines, instruments or contrivances.

22 37. Yahoo admitted that it intercepted the content of communications in the emails to
23 or from non-Yahoo! Mail users, read them for content, retained the content, and shared the
24 content with third parties.

25 38. Neither Plaintiff nor members of the proposed class consented to the
26 interceptions.

27 39. Neither Plaintiff nor members of the proposed class consented to the storage of
28 any scanned content following the interception.

1 40. Neither Plaintiff nor members of the proposed class consented to the sharing of
2 any content with third parties.

3 41. Yahoo is not a party to the communications between Yahoo! Mail users and class
4 members.

5 42. Yahoo is a “person” within the meaning of CIPA.

6 43. Plaintiffs and members of the class were injured by Yahoo’s unlawful
7 interception.

8 44. Yahoo intercepted the communications knowingly and willfully and in fact has
9 admitted to it.

10 45. Yahoo’s acts in violation of CIPA occurred in the State of California because
11 those acts resulted from business decisions, practices and operating policies that Yahoo
12 developed, implemented and utilized in California which are unlawful and constitute criminal
13 conduct in Yahoo’s state of residence and principal place of business. Yahoo profited in the State
14 of California. Yahoo also intercepted some of the class members’ communications in California
15 and used at least some devices located in California.

16 46. As a result of Yahoo’s violations of Section 631, Plaintiff and the Class are
17 entitled to relief under Section 637.2:

- 18 (i) Preliminary and injunctive relief;
- 19 (ii) Appropriate declaratory relief;
- 20 (iii) Monetary damages per class member of \$5,000.00 or three times actual
21 damages, whichever is greater; and
- 22 (iv) Reasonable attorneys’ fees and costs.

23 **VII. CLASS ACTION ALLEGATIONS**

24 47. Plaintiff brings this action as a class action pursuant to Federal Rules of Civil
25 Procedure 23(a) and 23(b)(3) on behalf of a class of all U.S.-domiciled persons who are not
26 Yahoo customers and who sent emails to or received emails from a Yahoo! Mail user using a
27 @yahoo.com, @ymail.com or @rocketmail.com email address from June 1, 2013 to the present
28 (the “Class”). Excluded from the Class are Defendant, any parent, subsidiary, affiliate or

1 controlled person of the Defendant, as well as the officers and directors (and their immediate
2 family) of any such person. Also excluded is any judicial officer assigned to this case.

3 48. The members of the Class are so numerous that joinder of all members is
4 impracticable. While the exact number of Class members is unknown to Plaintiff at the present
5 time and can only be ascertained through appropriate discovery, Plaintiff believes that there are
6 in excess of one million members of the Class located throughout the United States. It would be
7 impractical to join the class members individually.

8 49. Plaintiff's claims are typical of the claims of the members of the Class. Plaintiff
9 and all members of the Class have sustained injuries because of Defendants' unlawful activities
10 alleged herein and are entitled to identical statutory damages. Plaintiff has retained counsel
11 competent and experienced in class actions and internet privacy litigation and intends to pursue
12 this action vigorously. The interests of the Class will be fairly and adequately protected by
13 Plaintiff. Plaintiff has no interests which are contrary to or in conflict with those of the Class that
14 Plaintiff seeks to represent.

15 50. A class action is superior to all other available methods for the fair and efficient
16 adjudication of this controversy. Plaintiff knows of no difficulty to be encountered in the
17 management of this action that would preclude its maintenance as a class action.

18 51. Common questions of law and fact exist as to all members of the Class and
19 predominate over any questions solely affecting individual members of the Class. Among the
20 many questions of law and fact common to the Class are:

- 21 (a) whether emails are communications within the meaning of CIPA;
- 22 (b) whether Yahoo intercepts emails in transit;
- 23 (c) whether Yahoo used a "machine, instrument or contrivance;"
- 24 (d) whether Yahoo obtained consent from non-Yahoo! Mail users or was
25 otherwise "authorized" to intercept the emails;
- 26 (e) whether Yahoo intercepted "content," and
- 27 (f) whether Yahoo acted "willfully."
- 28

1 **VIII. PRAYER FOR RELIEF**

2 WHEREFORE, Plaintiff prays for judgment as follows:

- 3 (a) That this matter be declared a proper class action pursuant to F.R.C.P. 23;
4 (b) That the Plaintiff be appointed Class Representative;
5 (c) That Plaintiff's counsel be appointed lead counsel pursuant to Rule 23(g);
6 (d) That the Court enter judgment against Defendant for the cause of action

7 alleged against it and for class damages;

8 (e) That the Plaintiff be awarded statutory damages as provided by California
9 law, plus interest, along with litigation costs reasonably incurred and attorneys fees, and
10 equitable/injunctive relief as the Court may deem proper.

11 **IX. JURY DEMAND**

12 Plaintiff, individually and for the Class he seeks to represent, demands trial by jury on
13 each and every triable issue.

14 DATED: November 15, 2013

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16 By: /s/ Laurence D. King

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