

<b>TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS</b>	§ § § § § §	<b>BEFORE THE STATE OFFICE</b>          <b>OF</b>          <b>ADMINISTRATIVE HEARINGS</b>
v.          <b>KRISTEN E. LINDSEY, D.V.M.</b>		

**RESPONDENT’S ORIGINAL ANSWER AND PLEA TO THE  
JURISDICTION, AND MOTION OF FRIVOLOUS CLAIMS**

Respondent Kristen E. Lindsey, D.V.M. (“Respondent” herein) submits this her Original Answer and Plea to the Jurisdiction, and Motion of Frivolous Claims, and would show:

1. Respondent generally denies all of the Texas Board of Veterinary Medical Examiners’ (“TBVME” herein) allegations.

2. The TBVME’s purported statutory authority to revoke Respondent’s license are set forth in:

Texas Occupations Code § 53.021(a): *“A licensing authority may suspend or revoke a license, disqualifying a person from receiving a license, or deny to a person the opportunity to take a licensing examination on the grounds that the person has been **convicted** of: (1) an offense that directly relates to the duties and responsibilities of the licensed occupation...”*

Texas Occupations Code § 801.402(4) (Texas Veterinary Licensing Act): *“A person is subject to disciplinary action under § 801.401 if the person: ...engages in dishonest or illegal practices in, or connected with, the practice of veterinary medicine or the practice of equine dentistry.”*

3. The TBVME relies upon the following TBVME Rules to revoke Respondent’s license:

TBVME Rule § 575.50(a): *“In a process under Chapter 53, Occupations Code, [TBVME] may suspend or revoke an existing license, disqualify a person from receiving a license, or deny a person the opportunity to be examined for a license because of a person’s **conviction** of a felony or misdemeanor if the crime directly relates to the duties and responsibilities of a veterinarian, a licensed veterinary technician, or an equine dental provider...”*

TBVME Rule § 575.50(e): *“Under Occupations Code § 801.402, a person is subject to denial of a license or to disciplinary action under Occupations Code § 801.401 if the person engages in illegal practices connected with the practice of veterinary medicine or the practice of equine dentistry.”*

TBVME Rule § 573.4: *No licensee shall commit any act that is in violation of the laws of the State of Texas, other states, or of the United States, if the act is connected to the licensee’s professional practice, including, but not limited to, the acts enumerated in § 575.50(e) of this title (relating to Criminal Convictions). A complaint, indictment, or conviction of a law violation is not necessary for the enforcement of this rule. Proof of the commission of the act while in the practice of, or under the guise of the practice of, either veterinary medicine or equine dentistry, is sufficient for action by the Board under this rule.*

4. TBVME alleges that Respondent shot an animal in the head with a bow and arrow, and that in doing so Respondent violated Texas Penal Code § 42.09 Cruelty to Non-Livestock Animals which provides, in relevant part, as follows:

*“Sec. 42.092. CRUELTY TO NONLIVESTOCK ANIMALS. (a) In this section:*

*...*

*(2) "Animal" means a domesticated living creature, including any stray or feral cat or dog, and a wild living creature previously captured. The term does not include an uncaptured wild living creature or a livestock animal.*

*(3) "Cruel manner" includes a manner that causes or permits **unjustified or unwarranted pain or suffering.***

*...*

*(8) "Torture" includes any act that causes **unjustifiable pain or suffering.***

*(b) A person commits an offense if the person intentionally, knowingly, or recklessly:*

*(1) tortures an animal or **in a cruel manner kills or causes serious bodily injury to an animal;***

*(2) **without the owner's effective consent, kills, administers poison to, or causes serious bodily injury to an animal;***

*...*

*d) It is a defense to prosecution under this section that:*

*(1) the actor had a reasonable fear of bodily injury to the actor or to another person by a dangerous wild animal as defined by Section 822.101, Health and Safety Code; or*

...

*(e) It is a defense to prosecution under Subsection (b)(2) or (6) that:*

*(1) the animal was discovered on the person's property in the act of or after injuring or killing the person's livestock animals or damaging the person's crops and that the person killed or injured the animal at the time of this discovery;*

*(f) It is an exception to the application of this section that the conduct engaged in by the actor is a generally accepted and otherwise lawful:*

*(1) form of conduct occurring solely for the purpose of or in support of:*

*(A) fishing, hunting, or trapping; or*

*(B) wildlife management, wildlife or depredation control, or shooting preserve practices as regulated by state and federal law..."*

5. TBVME must, therefore, prove that Respondent intentionally, knowingly, or recklessly – **and in connection with her veterinary practice:**

- i) killed the animal in a cruel manner (meaning Respondent caused unjustified or unwarranted pain or suffering); or
- ii) killed an animal owned by a person and without the owner's effective consent (TBVME alleges that Claire and Bill Johnson owned the animal killed).

TBVME must also disprove Respondent's defenses that:

- iii) Respondent killed the animal on her property after the animal injured Respondent's livestock animal(s) or damaged Respondent's crops; and
- iv) Respondent's actions were generally accepted and lawful hunting, wildlife management, or wildlife and/or depredation control.

6. TBVME avers that its Rule § 575.50 (*Criminal Convictions*) (f)(5) establishes that animal cruelty (§575.50(f)(5)) is a crime that "*relates to and [is] connected with the practice of veterinarians...*", and that the TBVME may, therefore, prosecute this disciplinary action under Texas Occupations Code § 801.401 because Respondent's alleged actions are "*illegal practices connected with the practice of veterinary medicine*". The TBVME further asserts that, per

TBVME Rule 573.4. it may revoke Respondent's license irrespective of an indictment or conviction for the underlying and alleged "animal cruelty" criminal activity.

7. Texas Occupations Code § 801.002 defines *Veterinary Medicine* and the *Practice of Veterinary Medicine* as follows:

"(5) 'Practice of veterinary medicine' means:

(A) the diagnosis, treatment, correction, change, manipulation, relief, or prevention of animal disease, deformity, defect, injury, or other physical condition, including the prescription or administration of a drug, biologic, anesthetic, apparatus, or other therapeutic or diagnostic substance or technique;

(B) the representation of an ability and willingness to perform an act listed in Paragraph (A);

(C) the use of a title, a word, or letters to induce the belief that a person is legally authorized and qualified to perform an act listed in Paragraph (A); or

(D) the receipt of compensation for performing an act listed in Paragraph (A).

...

(7) 'Veterinary medicine' includes veterinary surgery, reproduction and obstetrics, dentistry, ophthalmology, dermatology, cardiology, and any other discipline or specialty of veterinary medicine."

8. TBVME alleges that Respondent killed a cat with a bow and arrow in a rural area. It is undisputable that the alleged action occurred on Respondent's property, and that the animal was free-roaming in the area and had no collar or tags, and no indication of ownership. It is indisputable that Respondent did not: i) provide veterinary services to the subject animal; ii) charge any client for any services to the subject animal; iii) have a veterinary relationship with the subject animal or its "owner"; iv) utilize any veterinary equipment, medicine, expertise, training, education, modalities, or techniques in conjunction with Respondent's interaction with the subject animal. It is further undisputed that the actions on the part of Respondent and that are the basis of

the TBVME's charges (to-wit: shooting an animal with a bow and arrow) are actions which: v) do not require any veterinary training or expertise to administer or to perpetrate; vi) are regularly and commonly administered and perpetrated by persons with no veterinary training or expertise; and vii) entailed the use of non-veterinary instrumentalities which may be purchased and used by any person without any professional license or regulatory compliance or oversight.

9. The sole basis of TBVME's contention that Respondent's actions were connected with the practice of veterinary medicine is that, according to TBVME:

*"...Respondent captioned the photo (on Facebook) as follows: 'My first bow kill lol. The only good feral tomcat is one with an arrow through its head. Vet of the year award... gladly accepted...'*

*...Respondent documented her actions and presented them to the public as an exemplary veterinarian, deserving of a 'Vet of the Year Award.' For these reasons, Respondent's actions are connected with her professional practice and were committed under the guise of the practice of veterinary medicine..."*

10. Respondent's caption to her Facebook/posting was flippant and facetious. Respondent's comments – while terribly offensive to many people – were frivolous and represent neither a factual nor legal basis for connecting Respondent's underlying actions to the practice of veterinary medicine. Respondent's flippant Facebook comments reflect very poor judgment on the part of Respondent with respect to the extent and breadth of the social media audience, but her comments do not transform the underlying actions that would otherwise not be the practice of veterinary medicine into any modality of veterinary medicine. Respondent's actions in shooting a feral animal on her property (which had attacked her domestic animals) represents an action which in the context of Texas Occupations Code 53.022:

- i) has no relationship to a veterinary license (and requires no veterinary license education, training, or experience);
- ii) is not more likely or more opportunistic because the actor is a licensed veterinarian; and

- iii) has no relationship to the ability, capacity or fitness of the actor to perform the duties and discharge the responsibilities of a licensed veterinarian.

11. The actions on the part of Respondent set forth in the TBVME's Formal Complaint and which are the basis of the charges alleged were not connected with the practice of veterinary medicine. As such, TBVME does not have authority to prosecute the charges set forth, and the State Office of Administrative Hearings does not have jurisdiction of the charges alleged.

12. Respondent avers that the subject cat was a feral cat which, given the existing and extensive rabies outbreak in Washington and Austin Counties<sup>1</sup>, was likely to be rabid, and which was getting into the horse feed of Respondent's horses and attacking Respondent's domesticated cats. Rabies is an extremely dangerous and extremely contagious disease that can be transmitted to other animals and to humans through, among other ways, contact with the saliva of a diseased animal. Rabies is always fatal to animals, and usually fatal to humans. There is no cure or treatment for rabies. More cats are infected with rabies than any other pet in the United States; in 2013, nearly 250 cats were diagnosed with rabies – almost three times higher than the number of rabid dogs.<sup>2</sup> According to the U.S. Center for Disease Control and Prevention, if a person exposed

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<sup>1</sup> See Brenham Banner-Press articles:

4/23/15 *Rabies Found in Skunk, Fox*

5/20/15 *Rabid Skunk Found In City*

5/29/15 *Fifth Case of Rabies Confirmed*

5/30/15 *Rabies Cases Already Top 2014*

<sup>2</sup> According to the *Journal of the American Veterinary Medical Association* (November 15, 2014, Vol. 245, No. 10, Pages 1111-1123):

Domestic animals accounted for 7.96% (467/5,865) of all reported rabid animals in 2013... **The most frequently reported rabid domestic animals were cats (*Felis catus*; 247 [52.9%])**, followed by dogs (*Canis lupus familiaris*; 89 [19.1%]), cattle (*Bos taurus*; 86 [18.4%]), horses and mules (*Equus* spp; 31 [6.6%]), sheep and goats (*Capra* spp; 9 [1.9%]), and other domestic animals (3 swine and 2 llamas [1.1%]). **The most frequently submitted domestic animals for rabies diagnostic testing were cats (23,264 [48.9%]) and dogs (21,274 [44.7%])**, followed by cattle (1,299 [2.7%]), horses and mules (867 [1.8%]), and sheep and goats (550 [1.2%])... **Cats have represented the majority of rabid domestic animals since 1992**... Pennsylvania reported the greatest number of rabid cats (40

to rabies is not treated quickly, the person with first experience symptoms that resemble the flu, along with pain or a prickling or itching sensation at the site of the bite. Within days, rabies illness progresses to anxiety, confusion, agitation, delirium, hallucinations, insomnia and abnormal behavior. By the time such symptoms appear, the disease is nearly always fatal. There have been only about 10 documented cases of people surviving clinical rabies. Officials urge the public not to “adopt” feral animals, or to try to nurse sick or injured feral animals. According to the Texas Department of Health, Austin and Washington Counties were suffering from – and continue to suffer from – an extensive outbreak of rabies, and at least one local resident was undergoing rabies treatment in June 2015 after contact with a rabid animal:

*Austin County Sherriff’s Office report: “As an aside Dr. Buenger informed me that a nearby resident of the area near Dr. Lindsey had recently submitted a skunk that had been killed by his dogs and left on the front porch. The head of the skunk was submitted for rabies testing and had tested positive for rabies...” (0018)*

*Austin County Sherriff’s Office report: “On Tuesday, 5-5-15, I INV Riddle spoke with Larry Dierking who lives at 9582 Club Road in Brenham, TX. Mr. Dierking’s residence is approximately one mile from Dr. Lindsey’s residence and Mr. Dierking is the person who had turned in a skunk that he found on his back deck. This skunk was confirmed to have rabies and is the same case that had been reported to me by Dr. Buenger. Mr. Dierking also told me that this is the second rabid skunk he has found on his property. Mr. Dierking stated that there appears to be a problem in the area because of the numbers of sightings of nocturnal animals during daylight hours. These include skunks and coyotes in particular...” (0022-23)*

*Austin County Sherriff’s Office report: I also contacted the Texas Department of Health and Humans Services who is the reporting agency for rabies cases. I learned that there are currently seven confirmed rabies cases in Washington County and one in Austin County.” (0023)*

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[16.2%]), followed by Virginia (37 [15.0%]), Maryland (25 [10.1%]), **Texas (23 [9.3%])**, and North Carolina (20 [8.1%])...

<http://avmajournals.avma.org/doi/full/10.2460/javma.245.10.1111>

13. The rabies problem is so severe in Washington and Austin Counties that both counties require that all animals be rabies vaccinated every year (note, however, that “Tiger” – the cat that TBVME alleges Respondent killed – had not been rabies vaccinated within one year as of the date of the incident alleged, and as required by Washington and Austin County regulations).

14. It is standard practice – and, in fact, legally required in some circumstances – that animals suspected of carrying rabies are killed (even before or without laboratory confirmation that the animal actually has rabies<sup>3</sup>). The practice of eradicating feral animals – especially feral animals which are suspected of transmitting rabies – is common and prevalent in rural communities. The practice is also common and prevalent in Washington and Austin Counties.

Austin County Sherriff’s Office report: *“Russell Honerkamp had skunk acting like it had rabies. Shot it in head and could not be tested for rabies.”* (0118)

Austin County Sherriff’s Office report regarding call from Dawn Weiss: *“April 20, 2015: Took dog out on leash. Fox jumped on the dog... son shot fox.”* (0171)

15. In many jurisdictions of the United States, hunting stray cats is legal and permitted. In Wyoming, for example, citizens are permitted to hunt stray cats all year with very little restriction. [W.S. 23-1-101(a)(viii)(A); W.S. 23-3-103].

16. Even the Johnsons – the purported owner of the alleged cat killed<sup>4</sup> – did not originally believe that it was appropriate to prosecute Respondent for any crime given the circumstances:

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<sup>3</sup> The only means of confirming rabies infection is examination of the animal’s brain, which necessarily entails killing the animal.

<sup>4</sup> Although the Johnsons now claim that they owned “Tiger”, the evidence establishes that the Johnsons:

- i) never took “Tiger” to a veterinarian for any veterinary examination, treatment, or evaluation;
- ii) never had “Tiger” vaccinated for rabies, heartworms, etc.; and
- iii) never provided “Tiger” with any collar, tags, or other identification.



Austin County Sherriff's Office report: "...The female caller identified herself as Claire Johnson the owner of the cat named Tiger. Ms. Johnson stated that she and her husband had been out of town and had seen the postings on the internet of what had occurred. Ms. Johnson stated that she was appalled at the posts and had stopped reading them because they had become so outrageous and out of control...

...Ms. Johnson said that she had only had Tiger for about a month after the previous owners had to move back to the Houston area due to health issues...

..Ms. Johnson told me that she and her husband had gone out of town on Wednesday, 4-15-15, and that before leaving they had noticed that Tiger had not eaten. She stated that it was very unusual for Tiger to miss a meal but that he had not eaten his food before they left. I noted that this would indicate that Tiger had not been at the Johnson residence since Tuesday when he last ate. Ms. Hemsell's statement indicates that she put food in Tiger's bowl on Wednesday 4-15-15, while Ms. Johnson stated that he had food in his bowl when they left to go out of town.

...Ms. Johnson stated that they had no desire to pursue any charges against Dr. Lindsey. She told me that she understood that the cat was on Dr. Lindsey's property and that they were very sorry that this had happened and felt that Dr. Lindsey had suffered enough. Ms. Johnson stated that her husband is an attorney and they are very aware of the laws of Texas and people's rights to protect their animals and property. She understood that if the cat was indeed Tiger, that he was not supposed to be outside of his own property..." (0019-20)

17. The Austin County District Attorney thoroughly investigated the same allegations.

On 6/24/15, the Austin County Grand Jury rendered a no-bill<sup>5</sup> as to the same allegations, and concluded that:

- i) The same evidence that TBVME now relies upon was insufficient to establish probable cause to believe that Respondent killed the animal in a cruel manner; and
- ii) the same evidence was insufficient to identify an owner of the cat.

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The indicia of the Johnson's ownership of Tiger is limited to leaving their food outside in a bowl.

<sup>5</sup> The Austin County Grand Jury no-bill means that the Grand Jury determined that there was insufficient evidence to establish probable cause that Respondent violated Texas Penal Code § 42.092.

18. Respondent avers that TBVME's charges are, therefore, barred by res judicata, collateral estoppel, and issue preclusion.

19. In addition, the cat that TBVME alleges Respondent killed has conclusively been proven not to have been "Tiger". The TBVME Formal Complaint alleges that the cat killed was an orange male cat named "Tiger" owned by Bill and Claire Johnson, and which was a patient of the Washington Animal Clinic. According to the Washington Animal Clinic records<sup>6</sup> and the Austin County Sheriff's Office investigation, "Tiger" had been neutered – the cat that Respondent is alleged to have shot, however, had testicles (and clearly had not been neutered). According to the Austin County District Attorney and the Austin County Sheriff's Office, there was evidence of several other feral cats in the immediate area matching "Tiger's" appearance:

*Austin County District Attorney report: "...Although one witness believes the cat to be a pet named "Tiger", three different area residents had fed similar looking cats at one time or another that had no collar and had strayed..." (0006-7)*

*Austin County Sheriff's Office report: "On Sunday, 04-19-15, I, Lt. D. Fischer went to the area surrounding 10874 New Wehdem Road where the incident occurred to speak with individuals who may have knowledge of the event. I checked an area approx. 1/2 of a mile from 10874 New Wehdem and located four potential residences. 10534 New Wehdem at approx. 1645 hrs., and met with the homeowner Daniel Michael Cleary III, DOB 10-11-43. Upon pulling onto the property I observed several cats running on the property and one was an orange and white cat..."*

*... Mr. Cleary told me that the cat she possibly killed could have been one of his cats and that some of his cats are feral. According to Mr. Cleary if it was his cat that was pictured on the facebook posting he was not angry and would not want any criminal charges pursued..." (0016)*

*See 4/11/15 Daniel McCleary statement: "I live across the street from the vet who killed the cat. Although I have never met her personally, I have not experienced any problems with her. I do have several cats, and some are feral. This cat might have been one of mine. I am not angry about this if it is."*

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<sup>6</sup> According to the Washington Animal Clinic records, "Tiger" was owned by (and had been neutered at the request of) Nico Praggman. See also Austin County Sheriff's Office report: "Tiger is a neutered orange tabby..." (0011). See Amy Hemsell Statement 4/17/15: "I, Amy Hemsell, am a pet sitter for Clare Johnson who is the owner of Tiger... He has been neutered." (0032)

20. Respondent avers that Respondent's alleged actions were motivated by her good-faith and reasonable belief that the cat was feral and likely rabid; Respondent's actions were a generally accepted and otherwise lawful form of conduct for the purpose of or in support of wildlife management, and/or wildlife or depredation control.

21. Respondent avers that Respondent did not cause or permit unjustified or unwarranted pain or suffering – the American Veterinary Medical Association Guidelines, in fact, provide that killing an animal by gunshot or a bolt to the head is humane when done correctly.<sup>7</sup>

22. Respondent avers that the cat Respondent allegedly killed was not owned by the Johnsons, and was a feral animal which did not have an "owner".

23. Respondent avers that Respondent's alleged actions were reasonably necessary to protect Respondent's own pets and livestock from attack and from rabies exposure.

24. Respondent avers that the cat allegedly killed was discovered on Respondent's property in the act of or after injuring Respondent's animals or damaging Respondent's crops, and Respondent acted at the time of her discovery and in reasonable defense and protection of her animals.

25. Respondent avers that her actions were protected speech, and that TBVME's action is revoking Respondent's professional license based on Respondent's protected speech is unconstitutional and a denial of due process of law.

#### Counterclaim

26. As stated in the TBVME's Formal Complaint, there has been – and continues to be – a social-media driven firestorm of condemnation against Respondent based in large part on false

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<sup>7</sup> The American Veterinary Medical Association guidelines state that physical methods of killing animals such as gunshot or bolt to the head can be humane when done correctly. (A.V.M.A. Guidelines for the Euthanasia of Animals, 2013 Ed., at 11-12). When performed properly, the animal may exhibit involuntary movements but is unaware and unable to experience pain. (A.V.M.A. Guidelines for the Euthanasia of Animals 2013 Ed., at 16).

and incendiary information (including, specifically, that the cat killed was a domestic cat named “Tiger” when, as stated, the evidence conclusively proves that the cat killed was not “Tiger”). Most of the social media commentators and agitators are strong proponents of “animal rescue” and strong critics of lethal means of wildlife management and control. Unfortunately, many of those condemning Respondent are also so extreme and irresponsible in the views as to advocate – or even directly threaten – criminal retaliation and violence against Respondent (there have been death and rape threats against Respondent and her attorneys, and vandalism of Respondent’s property). Many of the “lynch mob” have sent vile and obscene emails to Respondent and her lawyers for the purpose of harassing and tormenting Respondent and her lawyers.<sup>8</sup>

27. The firestorm of condemnation directed against Respondent has clearly influenced and precipitated<sup>9</sup> the TBVME to prosecute this action against Respondent despite: i) conclusive evidence that the cat killed was not “Tiger”; ii) the fact that it is common practice for landowners in rural communities to use lethal means to eradicate suspected rabid feral animals in order to protect themselves and their healthy animals; and iii) the lethal means that TBVME alleges Respondent used is AMVA approved and is one of the most humane methods to euthanize that is commonly used.

28. TBVME’s prosecution is frivolous, unreasonable, and without foundation. Respondent, therefore, seeks and is entitled to recover her reasonable attorneys’ fees, expenses, and costs pursuant to and as provided by Texas Civil Practices and Remedies Code Chapter 105.

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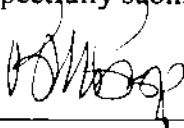
<sup>8</sup> The vile, obscene, and harassing emails constitute criminal violations of Texas Penal Code § 42.07 – the perpetrators of the criminal harassment directed against Respondent apparently believe that Texas criminal statutes should be applied and enforced as harshly as possible against Respondent, but ignored as to them.

<sup>9</sup> The TBVME has, since the publicity regarding Respondent, also proposed changing its rules to allow multiple – and unlimited – separate disciplinary prosecutions against licensees where there are multiple complainants and even though the multiple complaints are based on the same core facts. This proposed rule changes TBVME’s historical practice and policy, would subject licensees to prohibitively expensive defense costs, would be duplicitous and extremely inefficient and costly to the tax payers, and is apparently directed at ensuring that Respondent surrenders her license in lieu of the cost of defending (even successfully) against multiple prosecutions.

Respondent intends to submit a motion to the court to recover Respondent's costs, expenses, and attorneys' fees if the TBVME's action is dismissed or judgment awarded to Respondent. Respondent prays that Petitioner's claims be dismissed, or alternatively, that the Administrative Law Judge find no violation of the Texas Veterinary Medicine Licensing Act and deny the relief sought.

Respectfully submitted,

By: \_\_\_\_\_

  
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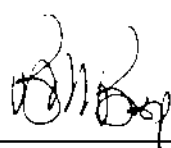
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ATTORNEY FOR RESPONDENT  
KRISTEN E. LINDSEY, D.V.M.

**CERTIFICATE OF SERVICE**

I certify that a true copy of the above was served on the attorney of record or party via email on 10/14/2015.

Michelle Griffin  
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