

IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,916

Third District Court No. 84-1431

FRANKLIN B. BYSTROM, etc.,
et al.,

Petitioners,

vs .

S.F. WHITMAN, et al.,

Respondents.

REPLY BRIEF OF PETITIONER
FRANKLIN B. BYSTROM
AS PROPERTY APPRAISER OF DADE COUNTY
ON THE MERITS

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SUMMARY OF THE ARGUMENT

The Florida Legislature has expressly authorized post-assessment production of property records and financial records where necessary to determine the propriety of property assessments. This is an action to determine the propriety of the 1981 assessment of the Bal Harbour Shops. Therefore, production of property records and financial records relating to the Bal Harbour Shops is appropriate and reasonable in this action.

The Property Appraiser considered all three approaches to valuation in preparing the assessment. Property records and taxpayer records are relevant as direct evidence, rebuttal and impeachment regarding value. The scope of property assessment discovery is co-extensive with all other civil discovery. The trial court did not abuse its discretion in ordering production of the relevant documents.

The district court decision imposes an unwarranted restriction on property appraisers' ability to ensure that all property is assessed at fair market value. The decision of the district court is in violent conflict with decisions of this Court which hold that a party to an action has the right to discover any evidence, not privileged, that may be relevant to the subject matter of the action. The decision of the district court should be reversed.

PRELIMINARY STATEMENT

This brief is submitted on behalf of Petitioner Franklin B. Bystrom, as Property Appraiser of Dade County, in reply to the Brief of Respondents. References to appendices refer to appendices of Bystrom's initial brief on the merits. Such references will be designated by the letter of the appendix, followed by page number. All emphasis is supplied by counsel.

Ordinarily, it would not be necessary for a petitioner to respond to respondents' statement of the facts. A statement of the facts is supposed to be "clear and straightforward", to use the taxpayers' characterization from their jurisdictional brief, a neutral factual statement. Unsuccessful in its attempt to defeat this Court's jurisdiction, however, the taxpayers proceeded in their brief on the merits to rewrite their statement of the facts, replete with argument and conjecture as to the mental impressions of the Property Appraisal Adjustment Board Special Master. This is highly inappropriate, because the appellate rules prescribe that argument shall appear in a separate section of the brief. In their brief, the taxpayers have so distorted the facts, ranged so far afield from the record presented to the trial court and included so much speculation and conjecture in their so-called statement of the case and of the facts as to necessitate a response.

Unable to adequately defend the district court's decision on its merits, the taxpayers here argue that the Property

Appraiser misrepresented that the cost, market and income approaches to valuation were considered in arriving at the preliminary assessment. (Br.2). Although it is wholly unnecessary in this appeal of a pretrial discovery matter for the Court to determine which approaches to valuation were considered or used by the Property Appraiser, the taxpayers' contention that only the income approach was considered is simply untrue. The Supplemental Appendix attached to this brief contains replacement cost approach calculations and comparable sales data considered by the Property Appraiser in preparing the 1981 assessment of the luxury Bal Harbour Shops mall.

In support of their contentions, the taxpayers attached a purported "Income Analysis Sheet prepared by Frank Jacobs" (Br.4), to the taxpayers' response to the Property Appraiser's motion for rehearing in the district court. Undersigned counsel has consulted with Mr. Jacobs and is assured by Mr. Jacobs that this page was not prepared by Jacobs, is not in Jacobs' hand, and does not accurately reflect the calculations prepared by Jacobs for the Property Appraiser.^{*/}
The very capitalization rate which the taxpayers attempt to foist upon this Court (and insist is the only issue remaining in this cause (Br.20)) is not even the capitalization

* Contrast, e.g., the taxpayers' three percent vacancy factor, Respondents' Appendix G-9, with the five percent vacancy rate which the Property Appraiser testified to before the Property Appraisal Adjustment Board. (A.31).

rate submitted by Jacobs to the Property Appraisal Adjustment Board. Cf. The Appraiser's 10½ percent overall rate, A.31, with the taxpayers' purported 10 percent rate. (Br.5). The taxpayers' explanation of the purported 10 percent rate as representing a 7.94 percent rate added to millage of 2.06 is totally fallacious. (Id.)/

Jacobs' income analysis document was not before the trial judge or before the district court at the time of the challenged decision on production of taxpayer and property documents, either as actually prepared by him or as fictionalized by the taxpayers. The taxpayers have thus gone far afield in attempting -- thus far successfully -- to block the taxing authorities' access to crucially relevant documents relating to all three approaches to value.

To date, no evidentiary hearing has been held in this cause. No court has yet been called upon to make any factual findings or to reach any legal conclusions regarding the valuation of the subject property, since this is the ultimate issue to be aired at trial after all discovery has been completed. The taxpayers' tardy attempt to limit **the scope** of discovery by manufacturing a record to place before the appeals courts should not be viewed with favor.

ISSUE PRESENTED FOR REVIEW

WHETHER BY MISINTERPRETING THE PLAIN LANGUAGE OF SECTION 195.027 (3), FLORIDA STATUTES, AND OTHERWISE MISCONSTRUING AND MISAPPLYING THE ACCESS TO TAXPAYER RECORDS STATUTE, THE DISTRICT COURT ERRED AS A MATTER OF LAW IN RULING THAT PROPERTY RECORDS AND TAXPAYER RECORDS ARE NOT SUBJECT TO DISCOVERY IN THIS PROPERTY ASSESSMENT ACTION.

ARGUMENT

BY MISINTERPRETING THE PLAIN LANGUAGE OF SECTION 195.027 (3), FLORIDA STATUTES, AND OTHERWISE MISCONSTRUING AND MISAPPLYING THE ACCESS TO TAXPAYER RECORDS STATUTE, THE DISTRICT COURT ERRED AS A MATTER OF LAW IN RULING THAT PROPERTY RECORDS AND TAXPAYER RECORDS ARE NOT SUBJECT TO DISCOVERY IN THIS PROPERTY ASSESSMENT ACTION.

The adversary parties in this proceeding each invoke §195.027 (3), Florida Statutes (1981), in support of their position. Under the plain language of that statute, the taxing authorities are clearly entitled to post-assessment production of taxpayers' financial records. By reading the statute to preclude rather than to authorize post-assessment production of pertinent records, the district court applied an erroneous rule of law. This deprived the taxing authorities of their statutory entitlements and procedural due process rights to compel production of relevant property records and taxpayer records.

By its plain language, §195.027 (3) requires disclosure of taxpayer records where "necessary to make a determination of the proper assessment as to the particular property in question." Any tax assessment proceeding brought pursuant to §194.171, including the instant cause, is plainly a proceeding "to make a determination of the proper assessment as to the particular property in question."

Moreover, as persuasively argued in the brief of Amicus Curiae, C. Ray Daniel, as Property Appraiser of Hillsborough County, and the Florida Property Appraisers' Association, Br. 17-31, specification of disclosure of taxpayer financial records to the Department of Revenue and the Auditor General irrefutably demonstrates that the Legislature intended such disclosure to be made after the preliminary assessment was prepared by the property appraiser. This is patently true since the review functions of the Department of Revenue and the Auditor General in property tax administration occur only after the property appraiser has submitted the preliminary tax rolls for state approval. See generally District School Board of Lee County v. Askew, 278 So.2d 272 (Fla. 1973).

Additionally, as this Court said long ago in Van Pelt v. Hilliard, 75 Fla. 792, 78 So. 693 (1918), statutes should be construed in light of the manifest purpose to be achieved by the legislation. The manifest purpose of §195.027(3) is clear from the plain language and the legislative history of the act. During its 1972 session, this Court decided Palm Corporation v. Homer, 261 So.2d 822 (Fla. 1972), stating that there was no statutory requirement that a property owner make a disclosure of his income figures in relation to a property assessment. 261 So.2d at 823. In the legislative session immediately after the Palm Corporation decision, the Legislature enacted the "access to taxpayer records"^{1/} provision of the Florida Property Assessment Administration

^{1/} The title of an enactment is evidence of its legislative intent. State v. Webb, 398 So.2d 820, 824 (Fla. 1981).

and Finance Law. Chapter 73-172, §2, Laws of Florida. Thus, the rule enunciated in Palm Corporation, upon which the taxpayers here rely, "'There is no requirement for the property owner to make such revelation...'" (Br. 34), was abrogated in 1973 by enactment of §195.027(3).

Under the mandate of §195.027(3), the "access to taxpayer records" statute, the Department of Revenue promulgated Rule 12D-1.05, Florida Administrative Code, a copy of which is Supplemental Appendix B to this brief. Inclusion of specific types of documents in the access to financial records regulation assumes their relevancy. See Bystrom v. Equitable Life Assurance Society of the United States, 416 So.2d 1133, 1139 (Fla. 3d DCA 1982), pet. for rev. denied, 429 So.2d 5 (Fla. 1983). The items listed in the Property Appraiser's request for production (App. C) track the language of the Department of Revenue's access to financial records rule (See Supplemental Appendix B of this brief):

"1. Profit and loss statements for the subject property for 1980, 1981 and 1982." Rule 12D-1.05(1), Florida Administrative Code, expressly grants the Property Appraiser, the Department of Revenue, and the Auditor General access to financial records of taxpayers where "reasonably necessary" to determine the proper assessment of the property in question.

"2. Portions of personal income tax returns relating to the operation of the subject property, including supporting schedules." The narrowness of this request in comparison to the broader scope of Rule 12D-1.05(1)(c)2, Florida Administrative Code, evinces the Property Appraiser's respect for the private nature of the financial records requested.

Administrative Code. Representations of property value by an owner are discoverable and admissible at trial over hearsay objections as admissions against interest. See Annot., 7 ALR 2d 791, 814. The value of the subject property listed in the taxpayers' financial statements, see A. 41, may well impeach their contention that the Board did not reduce the assessment of the Bal Harbour Shops to a level below fair market value. (Answer, A.5, ¶10).

"6. Mortgage note(s) and all other instruments, such as loan applications, executed in connection with mortgages on the property in effect as of January 1, 1981." Rule 12D-1.05(1)(c)6, Florida Administrative Code. Mortgages reflect lenders' estimates of the value of property pledged as collateral. Lenders limit loans to amounts secured by the mortgaged property. This protects lenders in the event of default. Mortgages therefore necessarily involve estimates of value of the subject property. Moreover, this Court has said:

When a sale has actually occurred each party to the transaction has prima facie made his own appraisal of the individual property based on his needs, his ability to pay, the price at which like properties are offered and other relevant factors. Each party has backed up his appraisal by paying or receiving the price finally negotiated. In reaching an agreement the parties influence the price negotiations of later buyers and sellers of similar properties. Therefore, in this context the price at which property is sold as indicated by documentary stamps on the instrument is prima facie evidence of its value. See Fla.Stat., §§201.01 and 201.02, F.S.A.

Southern Bell Telephone & Telegraph Co. v. County of Dade, 275 So.2d 4, 9 (Fla. 1973). It is equally true that when a property has been mortgaged, each party to the transaction has appraised the individual property based on his needs, has exchanged a (lien) interest in the property for

consideration, and has documented the amount of the transaction with documentary stamps.

Courts reviewing ad valorem tax assessments have consistently held that evidence of the amounts and terms of mortgage loans may be probative of fair market value. See, e.g., Rock Creek Plaza-Woodner Ltd. v. District of Columbia, 466 A.2d 857 (D.C. App. 1983); Rock-Time, Inc. v. Finance Administrator, 426 N.Y.S. 2d 773 (1980); Trinity Place Co. v. Finance Administrator, 424 N.Y.S. 2d 433 (1980).

The Property Appraiser assessed the Bal Harbour Shops for 1981 at \$18,101,841. Mortgages on the subject property total at least \$21,000,000. The scope of discovery is not so restricted as to preclude the Property Appraiser from obtaining documentation of mortgage loans predicated at least in part on the value of the property in 1981. The taxpayers' expert testified at the Board that construction loans were made for the purpose of expanding the Bal Harbour Shops.

(A.41). Discovery relating to such construction loans reflects actual cost approach expenses relating to the subject property. Such data is not only discoverable, but is admissible at trial. See Calder Race Course, Inc. v. Overstreet, 363 So.2d 631 (Fla. 3d DCA 1978).

"7. Appraisals made on the subject property in 1980, 1981 or 1982." Rule 12D-1.05 (1)(c)9, Florida Administrative Code. On December 16, 1982, the mortgagee of the subject property increased a November 21, 1980 mortgage from \$13,700,000 to \$21,000,000. Undoubtedly, the mortgagee certainly had at least one fair market value appraisal prepared to justify such a quantum increase in the outstanding debt secured by the Bal Harbour Shops. A mortgage appraisal on such a

property would necessarily involve all three approaches to value. The Appraisal of Real Estate (8th Ed.), 53-54, 497-505. The income approach to value featured in the mortgagee's appraisal would involve review of the actual income of the subject property for 1981, the most recent fiscal and calendar year, as well as the selection of an appropriate capitalization rate (id., Chapter 16) an issue which even the taxpayers agree remains to be adjudicated by the trial court. (Br. 24).

Such a mortgage appraisal would be probative with respect to the property's value. Mortgage appraisals of the subject property are admissible where not excessively remote in time from the assessment date. Whitman v. Overstreet, 230 So.2d 46 (Fla. 3d DCA 1969).

Production of such appraisals has been stipulated to by the taxpayers (Reply to Response to Petition for Writ of Certiorari at 1) and could be dispositive where, as here, the indebtedness alone exceeds the Board-reduced valuation by nearly \$5,000,000. Such assertions of value intended to be relied upon by third persons impeach any assertions by the taxpayers in this litigation that the fair market value of the subject property is less than the fair market value communicated to the mortgagee. In addition to being the objective of a mortgage appraisal, fair market value is, of course, the same standard which governs the property appraiser's annual assessment of property. E.g., Walter v. Schuler, 176 So.2d 81 (Fla. 1965).

The compellability of this par excellence evidence of value, a fee appraiser's expert estimate, may be reviewed by this Court, Fla.R.App.P. 9.040(a), now that the taxpayer

has unilaterally purported to rescind its stipulation to produce such appraisals. See App.F. To the extent that such appraisals suggest the value of the Bal Harbour Shops as of the assessment date, the appraisals establish a benchmark below which the taxpayer may not go in advancing its argument for reduced assessment. See Don Luigi's Ristorante, Inc. v. Independent Fire Insurance Company, 460 So.2d 405, 406 (Fla. 4th DCA 1984).

"8. Balance sheets showing the income with respect to the subject Property for all of calendar year 1981."

"9. Complete public accountant's statement(s) for all of calendar year 1981 reflecting the subject property's gross income (from all sources) together with itemized fixed and operating expenses incurred during the same period."

"10. Documents showing in detail sales (in dollars) per square foot of leasable area during all months of calendar year 1981."

"11. A complete rent roll as of January 1, 1981, including rental rate per square foot of leasable area; all lease origination and expiration dates (options); all tenant contributions to operating expenses; all percentage and overage rents with related lease terms; and copy of a typical lease."

Requests for production 8 through 11 will reveal precisely the "expense ratio" and "rentals" on which the Board purportedly based its reduction of the Bal Harbour Shops assessment. This is also the data which the Special Master was dismayed and "disturbed" that the taxpayers failed to provide to the Board (A.38, 39-40).

As in the trial court and on appeal, the taxpayers persisted throughout the Property Appraisal Adjustment Board proceeding in their game of blind man's buff. At no time did they disclose any income, expense or rental data, A.27-46. Instead they maintained their "posture where they do not tell anybody anything." (A.40). 2/

2/In truth, the taxpayers persist in this proceeding only in pursuit of their own pecuniary interest. These taxpayers have no reluctance to disclose the Bal Harbour Shops leases and financial arrangements with lessees when it serves their purpose. See allegations of and leases attached to following complaints filed in the trial court:

S.F., W.F. & D.A. Whitman, A General Partnership v. KCF, Inc. of Bal Harbour, Case #81-14418 CA18
Whitman Partnership v. KCF, Inc. Case #81-22092 CA10
Whitman Partnership v. Tiberio, Inc., Case #82-21464 CA 1
Whitman Partnership v. Cafe L'Ambiance Restaurant Francois, Case #83-824 CC24
Whitman Partnership v. The Twenty-Four Collection, Inc. Case #83-10869 CA13
Whitman Partnership v. Uomo Moda Designers Corp. Case #83-17290 CA03
Whitman Partnership v. Mario Valentino Fashions, Inc., Case #83-23024 CA28
Whitman Partnership v. Golden Razor of Bal Harbour, Inc. Case #83-43778 CA 18
Whitman Partnership v. The Tennis Set, Inc., Case #83-45251

The taxpayers submit business records to the trial court when it is to their advantage, but attempt to shield their records from consideration by the trial court when this serves their advantage. Such is the heritage of these particular taxpayers in the Dade community. See Whitman v. Ovestreet, 230 So.2d 46 (Fla. 3d DCA 1969).

"12. Acquisition information, including: date of purchase; purchase price; copy of purchase contract and/or option to purchase; copy of closing statement of purchase (if purchased after January 1, 1979)." Section 195.027(6), Florida Statutes (1981); Rule 12D-1.05(1)(c)8, Florida Administrative Code; Southern Bell, 275 So.2d at 9.

"13. Mortgage information, including: date of mortgage(s); mortgage interest rate(s); terms of mortgage(s); balance(s) due as of January 1, 1981, and as of the date of purchase, if purchased after January 1, 1979." Rule 12D-1.05(1)(c)8, Florida Administrative Code.

"14. Any other documents which you believe or contend support the reduction in assessed value approved by the Property Appraisal Adjustment Board for 1981." The taxpayers at bar have obtained a 10 percent assessment reduction on their enclosed luxury shopping mall. The Board ordered this \$1,810,185 reduction based on the following explicit factual finding:

Expense ratio warrants change as reflected below -- expenses should approximate 20 percent -- rental tend to high side less 10 percent. (App. D ¶6B).

Although the taxpayers failed to produce evidence excluding every reasonable hypothesis of a legal assessment, Homer v. Dadeland Shopping Center, Inc., 220 So.2d 834 (Fla. 1970), Rule 12D-10.03(3), Florida Administrative Code, the Board nonetheless ordered the reduction on the purported basis of high expenses and

low rentals. Now that the taxing authorities seek discovery of the actual expenses and rentals, the taxpayers claim that such data is irrelevant! (Br. 36-38). Cf. §193.011(7), Florida Statutes (1981).

The actual expenses and income of the Bal Harbour Shops have been placed in issue by the Board's reduction. The requested property records and taxpayer records are therefore discoverable in this proceeding. Herein, the district court's decision effectively denies the trial court the very information necessary to show that the Bal Harbour Shops was not assessed in excess of its fair market value. Whether the property assessment exceeds fair market value is, after all, the gravamen of any tax assessment action. Equitable, 416 So.2d at 1138.

Herein, the district court found that the taxpayer had "conceded" the correctness of the income figure hypothesized by the Property Appraiser. (B.5, 464 So.2d t 185). To reach its conclusion that the trial judge had abused his discretion in permitting the discovery requested, the district court found that the requested "records are not relevant because they are probative only of the income earned from the ownership of the property, an issue which is not being litigated." (B.5, 464 So.2d at 185). This conclusion **is** erroneous. Even if (as urged by the taxpayers) the propriety of the capitalization rate used by Property Appraiser were the only issue before the trial court (Br. 23), the court would have to consider that application of an income capitalization rate depends

on assumptions regarding the projected income and expenses. Direct capitalization is a method used to convert a single year's estimate of income into a value indication in the income capitalization approach. The Appraisal of Real Estate (8th Ed.), at 387. When expectations vary regarding the rate at which income is capitalized, expectations regarding income and expenses may vary. Therefore any adjustment of the "cap" rate could require adjustment of the income and expense projection.

In light of the recent decision of this Court in Blake v. Xerox Corporation, 447 So.2d 1348 (Fla. 1984), and the above authorities on the relevance of the requested records, the conclusion that actual income is not at issue in this tax assessment case is reversible error. As noted even in the Palm Corporation decision, the taxpayer must present evidence of actual income and of every other legal hypothesis of valuation in order to affirmatively overcome the property appraiser's presumption of correctness. 261 So.2d at 826 (Ervin, J., dissenting).

The purpose of discovery is to provide a mechanism for making relevant information available to the litigants and to the trial court:

Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.

Hickman v. Taylor, 329 U.S. 495, 507, 67 S.Ct. 385, 91 L.Ed. 451 (1947). Thus the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons

rather than to expose the facts and illuminate the issues. The taxpayers' position is this appeal is not intended to enlighten the court, but to prejudice the court against the taxing authorities.

In order to limit discovery in the case at bar, the taxpayers have attempted to persuade this Court that only the judgment exercised by the Property Appraiser in selecting an income capitalization rate is at issue.

(Br. 23). The ultimate issue in this case, however, as in every property assessment case, is whether the property has been assessed in excess of its fair market value.

"The assessment may be defended by the presentation of any legally competent and relevant evidence proving or tending to prove the fair market value of the property." Equitable, 416 So.2d at 1138, citing Homer v. Connecticut General Life Insurance Company, 213 So.2d 490, 492 (Fla. 3d DCA 1968). Accord, Whitman v. Overstreet, 230 So.2d 46 (Fla. 3d DCA 1969). This is true because it is "the amount of the assessment, not the manner of arriving at it," which is at issue. Connecticut General, at 492.

Thus the defense of the Property Appraiser's preliminary assessment and rebuttal to and impeachment of the taxpayers' case is not limited to materials prepared in conjunction with the preliminary assessment. See, e.g., Palm Corporation, 261 So.2d at 826, (revenue and expense data not disclosed to tax assessor admitted at trial); Equitable, 416 So.2d at 1140 (income of entire

tax year admissible at trial); County of Volusia v. Union Camp Corporation, 302 So. 2d 160 (Fla. 1st DCA 1974) (taxpayer records subject to post-assessment production); Greenwood v. Firstamerica Development Corporation, 265 So.2d 89 (Fla. 1st DCA 1972) (same); Hecht v. Tax Assessor, 32 Fla. Supp. 114 (Fla. 11th Cir.Ct. 1969), aff'd sub nom. Hecht v. Dade County, 234 So.2d 709 (Fla. 3d DCA 1970) (trial court rejected taxpayers' assertion that tax assessor is bound by his own opinions of value and cannot bring in outside appraiser to support the ultimate conclusion of the value of the property); Connecticut General, 213 So.2d at 492 (district court authorized post-assessment discovery of income tax, mortgage, insurance, and income and expense records even where assessment prepared without them).

The Property Appraiser's requests for production clearly meet the threshold requirement of relevancy. Evidence sought during discovery need not be admissible at trial -- it can simply be one link in a chain which leads to evidence which will ultimately be utilized at trial. Connecticut General, 213 So.2d at 492. The court must be careful not to deprive a party of discovery that is reasonably necessary to afford a fair opportunity to develop and prepare a case. The district court lost sight of this principle of due process.

There must come an end to the shell game here being orchestrated by the taxpayers. For this Court to approve the decision of the district court would constitute judicial retrogression undermining the whole purpose of the rules of civil procedure. It would inevitably lead back to the "poker hand" concept of litigation, rewarding artifice and camouflage. The taxing authorities do not believe the rights of the parties and the public interest should be determined in such a murky atmosphere. It is essential to the achievement of justice that all discoverable evidence be brought to light so that the trial court and the parties may prepare for trial with full knowledge of the facts. Wright and Miller, Federal Practice and Procedure: Civil §2015 (1970), citing Boldt v. Sanders, 111 N. W. 2d 225, 227-28 (Minn. 1961).

CONCLUSION

Based on the foregoing argument and authorities, this Honorable Court is respectfully requested to reverse the decision of the district court of appeal and remand the cause with instructions to quash the writ of certiorari and to reinstate the order of the trial court compelling production of documents subject to the confidentiality protections provided by the trial judge.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Reply Brief of Petitioner were furnished by mail this 10th day of December, 1985, to: Stuart L. Simon, Esquire, Fine Jacobson Schwartz Nash Block & England, P.A., 2401 Douglas Road, Miami, Florida 33134; J. Terrell Williams, Assistant Attorney General, Room LL04, The Capitol, Tallahassee Florida 32301; Larry Levy, Esquire, P.O. Box 82, Tallahassee, Florida 32302; and to John M. Hathaway, Esquire, P.O. Drawer 1537, 149 West Marion Avenue, Punta Gorda, Florida 33950.

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