Elizabeth M. Streit, Lead Trial Attorney
Jennifer S. Diamond, Trial Attorney
Rosemary Hollinger, Regional Counsel
Commodity Futures Trading Commission
525 West Monroe Street, Suite 1100
Chicago, Illinois 60661
312-596-0537
ES-2235
JD-5642
RH-6870

Paul Blaine
Assistant United States Attorney
for the District of New Jersey
Camden Federal Building & U.S. Courthouse
401 Market Street, 4th Floor
Camden, New Jersey 08101
856-757-5412
PB-5422

In The United States District Court
For The District Of New Jersey
Camden Vicinage

Commodity Futures Trading Commission, Plaintiff, vs. Equity Financial Group LLC, Tech Traders, Inc., Tech Traders, Ltd., Magnum Investments, Ltd., Magnum Capital Investments, Ltd., Vincent J. Firth, Robert W. Shimer, Coyt E. Murray, and J. Vernon Abernethy, Defendants.	Hon. Robert B. Kugler District Court Judge Hon. Ann Marie Donio Magistrate **Civil Action No: 04-1512 (RBK)** **Reply to Defendant Firth's Response to Plaintiff's Motion in Limine**

Plaintiff, Commodity Futures Trading Commission, through its attorneys, hereby respectfully responds to Defendant Firth's Response to Plaintiff's Motion in Limine to Deem Untimely Objections by Defendants Firth and Shimer in the Pretrial Order Waived ("Plaintiff's Motion in Limine"). For the reasons set forth below, Plaintiff is asking that Defendant Firth's Response to Plaintiff's Motion in Limine be stricken from the record as it is untimely, and in the alternative the objections made by Defendants Firth and Shimer in the Pretrial Order relating to foundation, hearsay, "incomplete," not best evidence, characterization, speculation, non-responsive answer to question, leading question, facts not in evidence, vagueness, confusing, witness not qualified to answer, as well as an objection to "tone" that could have been cured at the time of the deposition be deemed waived as supported by Plaintiff's Motion in Limine filed on July 30, 2007 (Docket Doc. 522).

I. Defendant Firth's Response to Plaintiff's Motion in Limine is Untimely and Should be Stricken From the Record

Defendant Firth filed his Response to Plaintiff's Motion in Limine on August 17, 2007 (Docket Doc. 533).[1] Pursuant to Magistrate Judge Donio's letter dated June 8, 2007, motions in limine were to be filed by four weeks prior to trial and "...any opposition thereto shall be filed one week thereafter." (Docket Doc. 509). Therefore, motions in limine were due to be filed on July 30, 2007, with responses due to be filed by August 6, 2007. Service of Plaintiff's Motion in Limine was sent to Firth by U.S. Mail on July 30, 2007, and again sent to Firth via email on August 1, 2007. Thus, at the very latest, the reply to Plaintiff's motion in Limine was due by August 8, 2007. Notably, Magistrate Judge Donio's June 8, 2007 letter was sent after motions in

[1] Defendant Firth states that he relies on Defendant Shimer's Response to Plaintiff's Motion in Limine. (Docket Doc. 530). Responses to Defendant Shimer's specific arguments are in Plaintiff's Response to Shimer's Response to Plaintiff's Motion in Limine filed separately with the Court.

limine were specifically discussed at the pretrial conference on June 5, 2007. Magistrate Judge Donio specifically asked each party whether they planned on filing a motion in limine. Firth knew Plaintiff was considering filing a motion in limine at the time of the pretrial conference. Since Defendant Shimer's Response to Plaintiff's Motion in Limine was filed after the deadline, it should be stricken from the record.

II. Defendant Firth's Reliance on the "Pro Se" Status Is Misplaced

Defendant Firth filed his *pro se* appearance on April 5, 2005. In arguing that Plaintiff's Motion in Limine should be denied, Defendant Firth relies on the argument that he should be absolved from following any rules of this Court or general rules of litigation because he is "*Pro Se*."[2] However, *pro se* litigants are not exempt from following the Federal Rules of Civil Procedure. *Posadas de Puerto Rico, Inc. v. Radin,* 856 F.2d 399, 401 (1st Cir.1988). *See also, Segarra v. Messina,* 153 F.R.D. 22, 30 (N.D.N.Y. 1994) (when determining if Rule 11 Sanctions should be issued, "It is now well settled that *pro se* status will not shelter a litigant from sanctions."). Moreover, Defendant Firth has filed over twelve documents in this action, including motions pursuant to Federal Rule of Civil Procedure 12(b) and 56, and Local Civil Rules 72.1 and 7.1, appeared at hearings, and even filed an appeal to the Third Circuit. A *pro se* litigant can be held to a higher standard when they have shown that they have the ability to find the law and make legal arguments. *See Cornett v. Bank of New York*, 1992 WL 88197, *6 (S.D.N.Y.1992) (Where *pro se* litigant filed a complaint and response to summary judgment, court held *pro se* litigant to a somewhat higher standard because he "has shown an ability to find the law and to make legal arguments") (attached hereto as Attach. A); *Roberts v. Walter E.*

[2] While Defendant Firth did not make these arguments himself, Defendant Shimer went into detail in his Response to Plaintiff's Motion in Limine as to Firth's incompetence and need to support his family. (Docket Doc. 530).

Heller & Co., 1986 WL 10383, *2 (N.D.Ill. 1986) (Defiance to the Court is not excused where "the *pro se* litigant has shown a working familiarity with legal research and proceedings under the federal rules.") (Attached hereto as Attach. B). Defendant Firth, through his filing of motions, replies, and briefs, has shown a working familiarity with legal proceedings, or at the very least, an ability to find the law and make legal arguments.[3] Defendant Firth should be held to abide by the Court's rules and Federal Rules of Civil Procedure. Thus, since Firth's Response to Plaintiff's Motion in Limine was filed long after the deadline, Defendant Firth's Response to Plaintiff's Motion in Limine shall be stricken.

In the alternative, Defendant Firth's deposition objections made in the Pretrial Order relating to foundation, hearsay, "incomplete," not best evidence, characterization, speculation, non-responsive answer to question, leading question, facts not in evidence, vagueness, confusing, witness not qualified to answer, as well as an objection to "tone" that could have been cured at the time of the deposition should be deemed waived as they are untimely. But for his own deposition, Defendant Firth never attended depositions during this discovery process.[4] As stated in Plaintiff's Motion in Limine filed on July 30, 2007, Firth was properly noticed for all of the depositions. One cannot force a party to participate in litigation.[5] Once the notices of depositions were sent, it was up to Defendant Firth to bring up any issues he had with

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[3] Defendant Firth has clearly been able to find the law and make legal arguments as he cites to Federal Rules of Civil Procedure and case law in his filings with the Court. (*See* Docket Doc. 160, 231, 335, 379, 392, and 393). The competency of legal resources he has sought out is not at issue.

[4] Plaintiff has never tried to prevent Defendant Firth from supporting his three children, who are now in their early to mid-twenty's. Every party was allowed to appear at depositions by telephone (and staff representatives from Plaintiff agency often appeared by phone for out-of-town depositions), and deposition dates were changed based on party availability. Defendant Firth never stated that dates weren't acceptable, nor did he ask to appear by telephone.

[5] Firth had no intention of ever attending the Collis deposition. (Ex. 1).

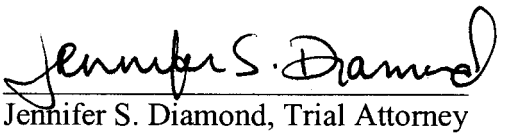
attendance. Defendant Firth's willful conduct in not attending depositions should not be rewarded. "If a *pro se* litigant ignores a discovery order, he is and should be subject to sanctions like any other litigant." *Moon v. Newsome*, 863 F. 2d 835, 837 (11th Cir. 1989). Defendant Firth failed to object to the depositions in a timely manner. Waiving technical objections made after the depositions is appropriate here.

III. CONCLUSION

As explained above, Defendant Firth should not be considered above the law. For the reasons stated above, Plaintiff respectfully requests that this Court strike Defendant Firth's Response to Plaintiff's Motion in Limine, or, in the alternative, deem objections in the Pretrial Order made by Defendant Shimer that could have been cured during the time the deposition was taking place waived because of their failure to object in a timely manner.

Date: August 20, 2007

Respectfully submitted,



Jennifer S. Diamond, Trial Attorney
(312) 596-0549
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Rosemary Hollinger, Regional Counsel
Commodity Futures Trading Commission
525 West Monroe Street, Suite 1100
Chicago, Illinois 60661

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SERVICE

The undersigned non-attorney, Anne Smith, does hereby certify that on August 20, 2007 she caused a true and correct copy of the foregoing ***Reply to Defendant Firth's Response to Plaintiff's Motion in Limine*** to be served upon the following persons via electronic mail and Federal Express:

On behalf of Equity Financial Group,
Samuel Abernethy
Menaker and Hermann
10 E. 40th St., 43rd Floor
New York, NY 10014
SFA@mhjur.com

Defendant Robert W. Shimer, pro se
Robert W. Shimer
1225 West Leesport Rd
Leesport, Pennsylvania 19533
rwshimer@enter.net

Defendant Vincent J. Firth, pro se
Vincent J. Firth
3 Aster Court
Medford, NJ 08055
triadcapital@comcast.net

Anne Smith
Anne Smith, Secretary

Attachment A

Westlaw.

Not Reported in F.Supp.
Not Reported in F.Supp., 1992 WL 88197 (S.D.N.Y.)
(Cite as: Not Reported in F.Supp.)

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Cornett v. Bank of New York
S.D.N.Y.,1992.
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United States District Court, S.D. New York.
Delco L. CORNETT, Plaintiff,
v.
The BANK OF NEW YORK, and The Bank of New York (DELAWARE) Defendants.
No. 91 Civ. 0605 (CSH).

April 17, 1992.

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

***1** Plaintiff in this action is seeking recovery of damages allegedly incurred as a result of defendants' violation of the Fair Debt Collection Act, 15 U.S.C. § § 1692, 1692k(d) (1982), their breach of a written agreement, and defendants' intentional infliction of emotional distress or prima facie tort. In Plaintiff's Memorandum of Law in Opposition to Summary Judgment dated November 25, 1991 ("Plain.Mem.2d"),[FN1] he also raises a claim based on defendants' alleged violation of the Fair Credit Reporting Act, 15 U.S.C. § § 1681m-1681n (1982) ("the Fair Credit Reporting Act"). Defendants have counterclaimed for the outstanding balance allegedly remaining in plaintiff's credit card account and for Rule 11 sanctions. Defendants have moved for summary judgment on plaintiff's claims relying primarily on the defense of *res judicata.* They also seek summary judgment on their counterclaims. For the following reasons, defendants' motion for summary judgment is granted both as to plaintiff's claims and as to defendants' counterclaims.

BACKGROUND

In December 1986, Delco Cornett ("Plaintiff") and Long Island Trust Company ("LITCO") entered into a settlement of a lawsuit between them. The settlement required LITCO to provide a Visa credit card to plaintiff despite the possible existence of negative information about plaintiff in any credit report. Plain.Mem.2d at 2. The credit card which LITCO issued to plaintiff had a credit limit of $400.00. Defendants' Memorandum of Law in Support of Summary Judgment dated September 30, 1991 ("Def.Mem.") at 3.

In January 1987, LITCO was acquired by Bank of New York who assigned all of LITCO's credit card accounts to Bank of New York (Delaware), a subsidiary of Bank of New York. Def.Mem. at 3; Plain Mem.2d at 2. Bank of New York and Bank of New York (Delaware) ("Defendants") informed plaintiff that use of his credit card after February 14, 1987 would constitute acceptance of the terms of defendants' credit card agreement ("the Agreement"). Def.Mem. at 4. Plaintiff continued to use his credit card after that date. *Id.* The Agreement contains the following provisions:

11. LATE CHARGES If you do not make the Required Minimum Payment within 5 days after it becomes due, we may assess and you are responsible to pay, in addition to any Finance Charge, a late charge for each payment that is over due....

13. OTHER CHARGES (A) Overlimit Charge. We will bill you $15 on your billing date for any billing period in which your account is more than $1 over your credit line....

15. DEFAULT Everyone who uses a Card ... agree[s] that all amounts owing to us shall, at our option, become immediately due and payable without notice or demand if any of the following events occur: (A) a Required Minimum Payment is not made when due; ... (C) the credit available for your use is exceeded; ... (E) any term or condition of this Agreement is breached by you.... If we declare that all amounts owing under this Agreement are immediately due and payable, your authorization to use the Card and Account are terminated....

***2** Affidavit of Suellen Galish Attached to Defendants' Notice of Motion for Summary Judgment dated September 30, 1991 ("Galish Aff.") Exhibit J.

In December 1988, the balance in plaintiff's account exceeded his $400 credit limit and remained above that amount through February 1989. Def.Mem. at 5. Accordingly, defendants terminated plaintiff's account in early March 1989 and reduced plaintiff's credit line to $0.00. *Id.* at 6. At this time, plaintiff had an outstanding balance of $491.85, Plain.Mem.2d Exhibit 10, which defendants sought to

Attach. A

collect. Def.Mem. at 6. This balance included some $15 late charges and overlimit fees as well as an $18 annual membership fee apparently charged in December 1988 for the following year. Galish Aff.Exhibit C at 22-23.

In an attempt to have his card reinstated, plaintiff paid $205 on March 15, 1989. However, after determining that plaintiff was not creditworthy, on March 24, 1989, defendants denied plaintiff's request for a reinstatement. Def.Mem. at 6. Plaintiff claims that defendants failed to provide him the name of the company which supplied that report. Plain.Mem.2d at 4. Defendant has provided a copy of the form letter which they supply to all parties to whom they deny credit. Affidavit of Joseph T. Desmond Exhibit C.

As a result of the $205 payment, plaintiff's outstanding balance was reduced to $291.62. However, he has not made any payments since that time and as a result of late fees and finance charges, the balance outstanding has increased to $390.80 as of November 1989. *Id.* Accordingly, defendants and their collection agency, American Credit Bureau ("ACB"), made approximately sixteen phone calls to plaintiff's residence. Plaintiff never took any of the phone calls and never returned any of the messages which were left for him. *Id.* at 7. On November 7, 1989, defendants assigned plaintiff's account to ACB. *Id.* Plaintiff alleges that on January 26, 1990, a representative of ACB, Robert Anderson, called him and left a message including the words "Pay your bill" with the desk clerk at the hotel where he resides. Galish Aff.Exhibit I; Plain.Mem.2d at 6.

In April 1990, plaintiff filed suit against defendants in the New York County Small Claims Part of the New York Civil Court. Def.Mem. at 7. At trial in August 1990, plaintiff testified that he was basing his suit on the fact that defendants had made harassing phone calls to him concerning his Visa account and that Robert Anderson had left the message "pay your bill" with the desk clerk at plaintiff's residence. Plaintiff sued on three theories: 1) Robert Anderson's message violated the Fair Debt Collection Act;

2) the phone calls made by defendants and ACB constituted harassment; 3) and the overlimit fees, late fees, and annual membership fees had been improperly charged to his account.

Each of these issues was discussed by the Small Claims Court Judge during the course of the trial. The judge entered judgment on August 13, 1990 in the amount of $18.00 plus interest and disbursements for a total of $24.23. Affidavit of Robert J. Kochenthal Attached to Defendants' Notice of Motion for Summary Judgment dated August 15, 1991 ("Kochenthal Aff.") Exhibit D. Two weeks later, defendants paid plaintiff the amount of the judgment. Kochenthal Aff.Exhibit E.

***3** Approximately five months later, on January 25, 1991, plaintiff filed this action. Galish Aff.Exhibit F. The complaint states that defendants violated the Fair Debt Collection Act because of the message which Robert Anderson left with the desk clerk at plaintiff's residence, that defendants failed to comply with their written agreement with plaintiff by denying him a new Visa card, and that the several phone calls which defendants made to plaintiff constituted harassment. Plaintiff also alleged in his Memorandum of Law in Opposition to Summary Judgment that defendants had violated the Fair Credit Reporting Act. Although this allegation was not included in the complaint, in light of plaintiff's *pro se* status and in light of the fact that defendants had opportunity to and did respond to this claim, I will treat this claim as an amendment to the Complaint. *Haines v. Kerer*, 404 U.S. 519, 520-21 (1971).

Defendants have raised several defenses chief among which is *res judicata*. They have also made three counterclaims: 1) that plaintiff has an outstanding balance of $390.80 on his closed credit card account; 2) that plaintiff has violated Fed.R.Civ.P. 11 and accordingly sanctions including costs and attorneys' fees should be imposed against him; and 3) that an injunction should issue prohibiting plaintiff from commencing further legal action against defendants because he has used the courts in the past as a way to harass defendants as part of a personal vendetta.

DISCUSSION

The standard for deciding a motion for summary judgment is provided by Fed.R.Civ.P. 56(c). It provides that summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Under Local Rule 3(g), all material facts alleged by defendant in their motion for summary judgment on plaintiff's claims are admitted by plaintiff except whether the claims raised by plaintiff have been previously adjudicated.

The doctrine of *res judicata* is a doctrine of judicial economy necessary to the litigants and to society and which puts an end to the cause of action which cannot thereafter be brought again into litigation. *In re Teltronics Servs.*, 762 F.2d 185, 190 (2d Cir.1985). A federal court is required to give preclusive effect to the judgment of a state court if the other courts in that state would be required to do so. *Manfra v. Koch*, 666 F.Supp. 637, 640 (S.D.N.Y.1987), *aff'd*, 868 F.2d 1267 (2d Cir.1988).

Plaintiff argues that state law requires that the judgments of the Small Claims Court not be given *res judicata* effect. Plaintiff's Memorandum of Law in Opposition to Summary Judgment dated August 29, 1991 ("Plain.Mem. 1st"). He cites the New York City Civil Court Act which states:

A judgment obtained under this article may be pleaded as res judicata only as to the amount involved in the particular action and shall not otherwise be deemed an adjudication of any fact at issue or found therein in any other action or court.

***4** McKinney's Cons. Laws of N.Y., Book 29A, City Civil Court Act § 1808 (1989). Accordingly, plaintiff claims that the judgment entered by the Small Claims Court should have no effect on these proceedings. However, the New York courts have read this statute as referring to collateral estoppel. In other words, judgments of the Small Claims Court will have claim preclusion effect but not issue preclusion effect. *See* Siegel, Practice Commentary, McKinney's Cons. Laws of N.Y., Book 29A, City Civil Court Act § 1808 p. 303 (1989); *accord Chang v. Chiariello*, 114 Misc.2d 186, 188-90, 450 N.Y.S.2d 993, 996 (N.Y.Civ.Ct.1982); *Rosen v. Parking Garage, Inc.*, 40 Misc.2d 178, 179, 242 N.Y.S.2d 677, 678 (N.Y.Civ.Ct.1963); *Levins v. Bucholtz*, 208 Misc. 597, 600, 145 N.Y.S.2d 79, 83 (App. Term 1st Dep't 1955), *aff'd*, 2 A.D.2d 351, 155 N.Y.S.2d 770 (App.Div. 1st Dep't 1956). Although a small claims plaintiff will not be allowed to bring the same action against the defendant a second time in another court, that defendant is not barred from bringing a subsequent suit against the small claims plaintiff. *See Czora v. Ahrens*, 74 Misc.2d 601, 603, 344 N.Y.S.2d 621, 622-23 (N.Y.Civ.Ct.1973); *Stern v. Hausberg*, 22 A.D.2d 669, 253 N.Y.S.2d 447, 449 (A.D. 1st Dep't 1964).

Applying this to the instant case, the counterclaims of defendants against plaintiff are not barred by *res judicata*. However, *res judicata* is a valid defense to plaintiff's claims if defendants can establish that its elements are present. Under New York law, the elements of *res judicata* are: 1) a final judgment on the merits; 2) an identity of the parties or their privies; and 3) an identity of the issues in both suits. *Id.* In the case at bar, it is clear that there was a final order entered by the Small Claims Court. Kochenthal Aff. Exhibit D. Furthermore, the parties are identical. The only question remaining is whether the issues before this Court are the same issues as were before the state court.

It is clear that the Small Claims Court heard arguments before it concerning defendants' alleged violation of the Fair Debt Collection Act and their alleged harassment. *See* Galish Aff. Exhibit C at 12-17, 19-20. Accordingly, these two issues cannot be re-litigated before this Court and summary judgment must therefore granted to defendants as to these two issues.

Plaintiff has, however, brought two potentially new issues into question in this suit: 1) the legitimacy of defendants' denial of his request that his credit card be reinstated and 2) their possible violation of the Fair Credit Reporting Act. I discuss first the question of the effect of the prior lawsuit on these two claims.

New York law provides that "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories ..." *O'Brien v. Syracuse*, 54 N.Y.2d 353, 357, 429 N.E.2d 1158, 1159, 445 N.Y.S.2d 687, 688 (1981). To give direction in determining whether a claim arose out of the same "transaction or series of transactions", the Court of Appeals has stated that the question should be guided by "how the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether ... their treatment as a unit conforms to the parties' expectations or business understanding or usage". *Smith v. Russell Sage College*, 54 N.Y.2d 185, 192-93, 429 N.E.2d 746, 749, 445 N.Y.S.2d 68, 71 (1981) (citations omitted).

***5** Under these rules, it is clear that any claim which plaintiff has against defendants arising out of their breach of the written agreement arises out of the same transaction or series of transactions. Accordingly, *res judicata* bars this Court from considering that claim and summary judgment is granted as to this claim as well.

As to plaintiff's final claim that defendants violated the Fair Credit Reporting Act by not informing him of the name of the credit reporting company on whose report they relied in denying him a new credit card, it is not as clear that this claim arose under the same transaction or series of transactions. There are strong arguments on both sides of this issue.

However, on this motion for summary judgment, I find that this question is immaterial because even if *res judicata* does not apply, plaintiff has failed to sufficiently allege a violation of the Act. Plaintiff cites only sections 1681m, n, and p. Section 1681m establishes the requirement that those who are denied credit due to reliance on a credit report must be provided the name of the company which supplied that report. Section 1681p provides that the appropriate United States district court will have jurisdiction to adjudicate claims arising under this Act. Finally, section 1681n provides that

Any consumer reporting agency or user of information which willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of (1) any actual damages sustained by the consumer as a result of the failure; (2) such amount of punitive damages as the court may allow; and (3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

Plaintiff has made no allegations that would support a finding of willful noncompliance by the defendants and so I must find against him on this count.

I note that plaintiff failed to cite section 1681o which provides for liability if the noncompliance with the requirements of the Fair Credit Reporting Act was negligent. This section only allows for compensatory damages, however; it is apparent that plaintiff failed to cite this section for that very reason. Even if he had cited this section though, I would still find for the defendants because plaintiff has made no allegations supporting a finding of actual damages caused by defendants' failure to provide the required information.

Thus, all of plaintiff's claims must fail and defendants' motion for a summary judgment is granted as to these claims.

Turning to defendants' counterclaims, I first address their contention that plaintiff owes them $390.80 plus interest on his credit card account. Plaintiff acknowledges that as of February 1989 defendants showed him as having an outstanding balance of $491.85. He then paid $205.00 toward that balance but has not paid anything since. Due to late fees and finance charges the balance has increased to $390.80. The only part of this balance which plaintiff has disputed is that which is comprised of the late fees and overlimit fees. However, the Agreement between defendants and plaintiff expressly states that late fees will be charged for "each payment that is overdue." Galish Aff. Exhibit J at ¶ 11. The Agreement also provides that there will be an overlimit fee for each billing period for which the account is over the approved limit. *Id.* at ¶ 13. Plaintiff has shown no reason why the amount claimed by defendants is not the correct amount which should be paid to them. Accordingly, I grant summary judgment for defendants on their counterclaim for $390.80 as the outstanding debt owed by plaintiff.

***6** Plaintiff has not responded to defendants' motion for Rule 11 sanctions. In spite of the liberal reading and leniency given to *pro se* parties, *Haines v. Kerer*, 404 U.S. at 520-21, nothing prohibits a court from imposing Rule 11 sanctions where the party has not met the standards of Rule 11. *Burnett v. Grattan*, 468 U.S. 42, 50 n. 13 (1984). Rule 11 provides that a party's signature on a paper filed with the court constitutes a certification that the signer has read the paper and that

to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry it is well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for an improper purpose, such as to harass ...

Plaintiff has shown an ability to find the law and to make legal arguments. Accordingly, he may be held to a somewhat higher standard than other *pro se* parties. *See Roberts v. Walter E. Heller & Co.*, 1986 WL 10383 (N.D.Ill.1986); *cf. Walter T. Martin, Inc. v. Peoples Gas Light & Coke Co.*, 1986 WL 2089 (N.D.Ill.1986) (refusing to impose sanctions on *pro se* party because its failure to state a claim was attributable to ignorance rather than an improper purpose such as harassment). It appears that plaintiff has filed this suit solely to harass the defendants and that he had no basis in law or fact on which could rely to sustain his claims, particularly in view of the fact that he had already litigated the major issues of

this case. Accordingly, I award the defendants $500 in sanctions, for which they may also have judgment, as a deterrent against future unreasonable litigation.

CONCLUSIONS

For the foregoing reasons, I grant defendants' motion for summary judgment both as to plaintiff's claims against them and as to their counterclaim for $390.80 against plaintiff. I also award defendants $500 as sanctions against plaintiff. Defendants are directed to settle a judgment consistent with this Opinion on seven (7) days' notice within twenty (20) days of the date of this Opinion.

It is SO ORDERED.

FN1. Because of a death in the family, defendants' counsel who was primarily responsible for this case was unable to submit defendants' motion for summary judgment on or before the final date for all motions to be submitted. Defendants filed a partially completed motion for summary judgment with a request that they be given extra time to file a completed motion. This request was granted. As a result, there are two motions for summary judgment and two sets of papers in support and in opposition thereto. Those documents associated with the first motion will be noted by "1st" and those associated with the second motion will be noted by "2d".

S.D.N.Y.,1992.
Cornett v. Bank of New York
Not Reported in F.Supp., 1992 WL 88197 (S.D.N.Y.)

END OF DOCUMENT

Westlaw.

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April 17, 1992.

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HAIGHT, District Judge:

***1** Plaintiff in this action is seeking recovery of damages allegedly incurred as a result of defendants' violation of the Fair Debt Collection Act, 15 U.S.C. § § 1692, 1692k(d) (1982), their breach of a written agreement, and defendants' intentional infliction of emotional distress or prima facie tort. In Plaintiff's Memorandum of Law in Opposition to Summary Judgment dated November 25, 1991 ("Plain.Mem.2d"),[FN1] he also raises a claim based on defendants' alleged violation of the Fair Credit Reporting Act, 15 U.S.C. § § 1681m-1681n (1982) ("the Fair Credit Reporting Act"). Defendants have counterclaimed for the outstanding balance allegedly remaining in plaintiff's credit card account and for Rule 11 sanctions. Defendants have moved for summary judgment on plaintiff's claims relying primarily on the defense of *res judicata*. They also seek summary judgment on their counterclaims. For the following reasons, defendants' motion for summary judgment is granted both as to plaintiff's claims and as to defendants' counterclaims.

BACKGROUND

In December 1986, Delco Cornett ("Plaintiff") and Long Island Trust Company ("LITCO") entered into a settlement of a lawsuit between them. The settlement required LITCO to provide a Visa credit card to plaintiff despite the possible existence of negative information about plaintiff in any credit report. Plain.Mem.2d at 2. The credit card which LITCO issued to plaintiff had a credit limit of $400.00. Defendants' Memorandum of Law in Support of Summary Judgment dated September 30, 1991 ("Def.Mem.") at 3.

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13. OTHER CHARGES (A) Overlimit Charge. We will bill you $15 on your billing date for any billing period in which your account is more than $1 over your credit line....

15. DEFAULT Everyone who uses a Card ... agree[s] that all amounts owing to us shall, at our option, become immediately due and payable without notice or demand if any of the following events occur: (A) a Required Minimum Payment is not made when due; ... (C) the credit available for your use is exceeded; ... (E) any term or condition of this Agreement is breached by you.... If we declare that all amounts owing under this Agreement are immediately due and payable, your authorization to use the Card and Account are terminated....

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In December 1988, the balance in plaintiff's account exceeded his $400 credit limit and remained above that amount through February 1989. Def.Mem. at 5. Accordingly, defendants terminated plaintiff's account in early March 1989 and reduced plaintiff's credit line to $0.00. *Id.* at 6. At this time, plaintiff had an outstanding balance of $491.85, Plain.Mem.2d Exhibit 10, which defendants sought to

Attach. A

collect. Def.Mem. at 6. This balance included some $15 late charges and overlimit fees as well as an $18 annual membership fee apparently charged in December 1988 for the following year. Galish Aff.Exhibit C at 22-23.

In an attempt to have his card reinstated, plaintiff paid $205 on March 15, 1989. However, after determining that plaintiff was not creditworthy, on March 24, 1989, defendants denied plaintiff's request for a reinstatement. Def.Mem. at 6. Plaintiff claims that defendants failed to provide him the name of the company which supplied that report. Plain.Mem.2d at 4. Defendant has provided a copy of the form letter which they supply to all parties to whom they deny credit. Affidavit of Joseph T. Desmond Exhibit C.

As a result of the $205 payment, plaintiff's outstanding balance was reduced to $291.62. However, he has not made any payments since that time and as a result of late fees and finance charges, the balance outstanding has increased to $390.80 as of November 1989. *Id.* Accordingly, defendants and their collection agency, American Credit Bureau ("ACB"), made approximately sixteen phone calls to plaintiff's residence. Plaintiff never took any of the phone calls and never returned any of the messages which were left for him. *Id.* at 7. On November 7, 1989, defendants assigned plaintiff's account to ACB. *Id.* Plaintiff alleges that on January 26, 1990, a representative of ACB, Robert Anderson, called him and left a message including the words "Pay your bill" with the desk clerk at the hotel where he resides. Galish Aff.Exhibit I; Plain.Mem.2d at 6.

In April 1990, plaintiff filed suit against defendants in the New York County Small Claims Part of the New York Civil Court. Def.Mem. at 7. At trial in August 1990, plaintiff testified that he was basing his suit on the fact that defendants had made harassing phone calls to him concerning his Visa account and that Robert Anderson had left the message "pay your bill" with the desk clerk at plaintiff's residence. Plaintiff sued on three theories: 1) Robert Anderson's message violated the Fair Debt Collection Act;

2) the phone calls made by defendants and ACB constituted harassment; 3) and the overlimit fees, late fees, and annual membership fees had been improperly charged to his account.

Each of these issues was discussed by the Small Claims Court Judge during the course of the trial. The judge entered judgment on August 13, 1990 in the amount of $18.00 plus interest and disbursements for a total of $24.23. Affidavit of Robert J. Kochenthal Attached to Defendants' Notice of Motion for Summary Judgment dated August 15, 1991 ("Kochenthal Aff.") Exhibit D. Two weeks later, defendants paid plaintiff the amount of the judgment. Kochenthal Aff.Exhibit E.

***3** Approximately five months later, on January 25, 1991, plaintiff filed this action. Galish Aff.Exhibit F. The complaint states that defendants violated the Fair Debt Collection Act because of the message which Robert Anderson left with the desk clerk at plaintiff's residence, that defendants failed to comply with their written agreement with plaintiff by denying him a new Visa card, and that the several phone calls which defendants made to plaintiff constituted harassment. Plaintiff also alleged in his Memorandum of Law in Opposition to Summary Judgment that defendants had violated the Fair Credit Reporting Act. Although this allegation was not included in the complaint, in light of plaintiff's *pro se* status and in light of the fact that defendants had opportunity to and did respond to this claim, I will treat this claim as an amendment to the Complaint. *Haines v. Kerer*, 404 U.S. 519, 520-21 (1971).

Defendants have raised several defenses chief among which is *res judicata*. They have also made three counterclaims: 1) that plaintiff has an outstanding balance of $390.80 on his closed credit card account; 2) that plaintiff has violated Fed.R.Civ.P. 11 and accordingly sanctions including costs and attorneys' fees should be imposed against him; and 3) that an injunction should issue prohibiting plaintiff from commencing further legal action against defendants because he has used the courts in the past as a way to harass defendants as part of a personal vendetta.

DISCUSSION

The standard for deciding a motion for summary judgment is provided by Fed.R.Civ.P. 56(c). It provides that summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Under Local Rule 3(g), all material facts alleged by defendant in their motion for summary judgment on plaintiff's claims are admitted by plaintiff except whether the claims raised by plaintiff have been previously adjudicated.

The doctrine of *res judicata* is a doctrine of judicial economy necessary to the litigants and to society and which puts an end to the cause of action which cannot thereafter be brought again into litigation. *In re Teltronics Servs.*, 762 F.2d 185, 190 (2d Cir.1985). A federal court is required to give preclusive effect to the judgment of a state court if the other courts in that state would be required to do so. *Manfra v. Koch*, 666 F.Supp. 637, 640 (S.D.N.Y.1987), *aff'd*, 868 F.2d 1267 (2d Cir.1988).

Plaintiff argues that state law requires that the judgments of the Small Claims Court not be given *res judicata* effect. Plaintiff's Memorandum of Law in Opposition to Summary Judgment dated August 29, 1991 ("Plain.Mem. 1st"). He cites the New York City Civil Court Act which states:

A judgment obtained under this article may be pleaded as res judicata only as to the amount involved in the particular action and shall not otherwise be deemed an adjudication of any fact at issue or found therein in any other action or court.

***4** McKinney's Cons. Laws of N.Y., Book 29A, City Civil Court Act § 1808 (1989). Accordingly, plaintiff claims that the judgment entered by the Small Claims Court should have no effect on these proceedings. However, the New York courts have read this statute as referring to collateral estoppel. In other words, judgments of the Small Claims Court will have claim preclusion effect but not issue preclusion effect. *See* Siegel, Practice Commentary, McKinney's Cons. Laws of N.Y., Book 29A, City Civil Court Act § 1808 p. 303 (1989); *accord Chang v. Chiariello*, 114 Misc.2d 186, 188-90, 450 N.Y.S.2d 993, 996 (N.Y.Civ.Ct.1982); *Rosen v. Parking Garage, Inc.*, 40 Misc.2d 178, 179, 242 N.Y.S.2d 677, 678 (N.Y.Civ.Ct.1963); *Levins v. Bucholtz*, 208 Misc. 597, 600, 145 N.Y.S.2d 79, 83 (App. Term 1st Dep't 1955), *aff'd*, 2 A.D.2d 351, 155 N.Y.S.2d 770 (App.Div. 1st Dep't 1956). Although a small claims plaintiff will not be allowed to bring the same action against the defendant a second time in another court, that defendant is not barred from bringing a subsequent suit against the small claims plaintiff. *See Czora v. Ahrens*, 74 Misc.2d 601, 603, 344 N.Y.S.2d 621, 622-23 (N.Y.Civ.Ct.1973); *Stern v. Hausberg*, 22 A.D.2d 669, 253 N.Y.S.2d 447, 449 (A.D. 1st Dep't 1964).

Applying this to the instant case, the counterclaims of defendants against plaintiff are not barred by *res judicata*. However, *res judicata* is a valid defense to plaintiff's claims if defendants can establish that its elements are present. Under New York law, the elements of *res judicata* are: 1) a final judgment on the merits; 2) an identity of the parties or their privies; and 3) an identity of the issues in both suits. *Id.* In the case at bar, it is clear that there was a final order entered by the Small Claims Court. Kochenthal Aff. Exhibit D. Furthermore, the parties are identical. The only question remaining is whether the issues before this Court are the same issues as were before the state court.

It is clear that the Small Claims Court heard arguments before it concerning defendants' alleged violation of the Fair Debt Collection Act and their alleged harassment. *See* Galish Aff. Exhibit C at 12-17, 19-20. Accordingly, these two issues cannot be re-litigated before this Court and summary judgment must therefore granted to defendants as to these two issues.

Plaintiff has, however, brought two potentially new issues into question in this suit: 1) the legitimacy of defendants' denial of his request that his credit card be reinstated and 2) their possible violation of the Fair Credit Reporting Act. I discuss first the question of the effect of the prior lawsuit on these two claims.

New York law provides that "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories ..." *O'Brien v. Syracuse*, 54 N.Y.2d 353, 357, 429 N.E.2d 1158, 1159, 445 N.Y.S.2d 687, 688 (1981). To give direction in determining whether a claim arose out of the same "transaction or series of transactions", the Court of Appeals has stated that the question should be guided by "how the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether ... their treatment as a unit conforms to the parties' expectations or business understanding or usage". *Smith v. Russell Sage College*, 54 N.Y.2d 185, 192-93, 429 N.E.2d 746, 749, 445 N.Y.S.2d 68, 71 (1981) (citations omitted).

***5** Under these rules, it is clear that any claim which plaintiff has against defendants arising out of their breach of the written agreement arises out of the same transaction or series of transactions. Accordingly, *res judicata* bars this Court from considering that claim and summary judgment is granted as to this claim as well.

As to plaintiff's final claim that defendants violated the Fair Credit Reporting Act by not informing him of the name of the credit reporting company on whose report they relied in denying him a new credit card, it is not as clear that this claim arose under the same transaction or series of transactions. There are strong arguments on both sides of this issue.

However, on this motion for summary judgment, I find that this question is immaterial because even if *res judicata* does not apply, plaintiff has failed to sufficiently allege a violation of the Act. Plaintiff cites only sections 1681m, n, and p. Section 1681m establishes the requirement that those who are denied credit due to reliance on a credit report must be provided the name of the company which supplied that report. Section 1681p provides that the appropriate United States district court will have jurisdiction to adjudicate claims arising under this Act. Finally, section 1681n provides that

Any consumer reporting agency or user of information which willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of (1) any actual damages sustained by the consumer as a result of the failure; (2) such amount of punitive damages as the court may allow; and (3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

Plaintiff has made no allegations that would support a finding of willful noncompliance by the defendants and so I must find against him on this count.

I note that plaintiff failed to cite section 1681o which provides for liability if the noncompliance with the requirements of the Fair Credit Reporting Act was negligent. This section only allows for compensatory damages, however; it is apparent that plaintiff failed to cite this section for that very reason. Even if he had cited this section though, I would still find for the defendants because plaintiff has made no allegations supporting a finding of actual damages caused by defendants' failure to provide the required information.

Thus, all of plaintiff's claims must fail and defendants' motion for a summary judgment is granted as to these claims.

Turning to defendants' counterclaims, I first address their contention that plaintiff owes them $390.80 plus interest on his credit card account. Plaintiff acknowledges that as of February 1989 defendants showed him as having an outstanding balance of $491.85. He then paid $205.00 toward that balance but has not paid anything since. Due to late fees and finance charges the balance has increased to $390.80. The only part of this balance which plaintiff has disputed is that which is comprised of the late fees and overlimit fees. However, the Agreement between defendants and plaintiff expressly states that late fees will be charged for "each payment that is overdue." Galish Aff. Exhibit J at ¶ 11. The Agreement also provides that there will be an overlimit fee for each billing period for which the account is over the approved limit. *Id.* at ¶ 13. Plaintiff has shown no reason why the amount claimed by defendants is not the correct amount which should be paid to them. Accordingly, I grant summary judgment for defendants on their counterclaim for $390.80 as the outstanding debt owed by plaintiff.

***6** Plaintiff has not responded to defendants' motion for Rule 11 sanctions. In spite of the liberal reading and leniency given to *pro se* parties, *Haines v. Kerer*, 404 U.S. at 520-21, nothing prohibits a court from imposing Rule 11 sanctions where the party has not met the standards of Rule 11. *Burnett v. Grattan*, 468 U.S. 42, 50 n. 13 (1984). Rule 11 provides that a party's signature on a paper filed with the court constitutes a certification that the signer has read the paper and that

to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry it is well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for an improper purpose, such as to harass ...

Plaintiff has shown an ability to find the law and to make legal arguments. Accordingly, he may be held to a somewhat higher standard than other *pro se* parties. *See Roberts v. Walter E. Heller & Co.*, 1986 WL 10383 (N.D.Ill.1986); *cf. Walter T. Martin, Inc. v. Peoples Gas Light & Coke Co.*, 1986 WL 2089 (N.D.Ill.1986) (refusing to impose sanctions on *pro se* party because its failure to state a claim was attributable to ignorance rather than an improper purpose such as harassment). It appears that plaintiff has filed this suit solely to harass the defendants and that he had no basis in law or fact on which could rely to sustain his claims, particularly in view of the fact that he had already litigated the major issues of

this case. Accordingly, I award the defendants $500 in sanctions, for which they may also have judgment, as a deterrent against future unreasonable litigation.

CONCLUSIONS

For the foregoing reasons, I grant defendants' motion for summary judgment both as to plaintiff's claims against them and as to their counterclaim for $390.80 against plaintiff. I also award defendants $500 as sanctions against plaintiff. Defendants are directed to settle a judgment consistent with this Opinion on seven (7) days' notice within twenty (20) days of the date of this Opinion.

It is SO ORDERED.

FN1. Because of a death in the family, defendants' counsel who was primarily responsible for this case was unable to submit defendants' motion for summary judgment on or before the final date for all motions to be submitted. Defendants filed a partially completed motion for summary judgment with a request that they be given extra time to file a completed motion. This request was granted. As a result, there are two motions for summary judgment and two sets of papers in support and in opposition thereto. Those documents associated with the first motion will be noted by "1st" and those associated with the second motion will be noted by "2d".

S.D.N.Y.,1992.
Cornett v. Bank of New York
Not Reported in F.Supp., 1992 WL 88197 (S.D.N.Y.)

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Attachment B

Westlaw.

Not Reported in F.Supp.
Not Reported in F.Supp., 1986 WL 10383 (N.D.Ill.)
(Cite as: Not Reported in F.Supp.)

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Roberts v. Walter E. Heller & Co.
N.D.Ill.,1986.
Only the Westlaw citation is currently available.

United States District Court, N.D. Illinois, Eastern Division.

Fred A. ROBERTS, Plaintiff,
v.
WALTER E. HELLER & CO., Defendant.

No. 86 C 260.

Sept. 15, 1986.

MEMORANDUM OPINION

JOHN F. GRADY, D.J.:

***1** Before the court is the motion of *pro se* plaintiff Fred A. Roberts ("Roberts") to reconsider our order dismissing his amended complaint. Also before the court is the motion of defendant Walter E. Heller & Co. ("Heller") for attorneys' fees pursuant to Fed.R.Civ.P. 11. For the reasons stated below, plaintiff's motion is denied and we give Roberts leave to file objections to Heller's fee petition.

FACTS

On April 29, 1986 we dismissed Roberts' "rambling and disjointed" amended complaint. Memorandum Opinion at 1. We found that the complaint failed to satisfy Rules 8 and 9 of the Federal Rules of Civil Procedure, and we will not again attempt to parse through the amended complaint to lay out its allegations. We gave Roberts leave to file a second amended complaint by June 16, 1986, but we warned him that we were staying proceedings on Heller's request for sanctions pursuant to Rule 11. Instead of filing a second amended complaint within 45 days as directed, however, Roberts filed this "Motion For Reconsideration Plaintiff's [sic] Amended Complaint" on June 16, 1986. He now asks us to consider the memorandum he previously filed in response to Heller's motion to dismiss to constitute his second amended complaint. He says the memorandum contains "all of the arguements [sic] required under both Rules 8 and 9...." He further states that the "complicated financial relationship" between himself, his bankrupt company and Heller "cannot be nor should it be detailed in a complaint."

Initially we note that Roberts' request for reconsideration fails to meet the requirements of Rule 60. Second, Roberts fails to comprehend the purposes and importance of pleadings and complaints. His allegations *must* be contained in a complaint sufficient to put a defendant on notice so that the defendant can plead a defense. While we have always kept in mind the Supreme Court's admonition that we should read *pro se* complaints "liberally," *Haines v. Kerner*, 404 U.S. 519, 520-21 (1971), "[e]ven prisoners proceeding *pro se* must adhere to the rudimentary dictates of civil procedure." *Holsey v. Collins*, 90 F.R.D. 122, 128 (D.Md.1981), *quoting Arey v. Harris*, No. 74-2360, slip op. (4th Cir. June 17, 1975). Read liberally, Roberts' complaint simply did not meet the notice pleading requirements of Rule 8 and the particularity requirements of Rule 9. And, even if we were to consider his answer to Heller's motion to dismiss to be an amended complaint (which we technically cannot do under Rule 12), it does not address the numerous deficiencies we noted in our earlier opinion. *See also Pavilones v. King*, 626 F.2d 1075, 1078 (1st Cir.1980), *cert. denied*, 449 U.S. 829 (1980) (court examined numerous letters in addition to *pro se* complaint and determined that they were hopelessly general). Therefore, we deny Roberts' motion for reconsideration and we reaffirm our earlier dismissal of his complaint.

Heller has renewed its request for Rule 11 fees in response to Roberts' motion for reconsideration. So far, Roberts has not filed an objection to this request. There is no question that a court can impose fees and costs under Rule 11 against a *pro se* litigant where a complaint has been filed for an improper purpose. *See Burnett v. Grattan*, 468 U.S. 42 (1984); *Hildeford v. Peoples' Bank*, 776 F.2d 176 (7th Cir.1985); *Walter T. Martin, Inc. v. The Peoples Gas Light & Coke Co.*, No. 85 C 9728 (McGarr, J.) (dictum) (available on LEXIS). Although we are reluctant to impose fees against a *pro se* litigant, especially one in prison, we are willing to impose fees in this instance unless persuaded otherwise. Roberts' complaints have merely been transparent attempts to either relitigate issues previously decided against him or to seek revenge against the defendants for his being in jail. [FN1] Moreover, rather than attempt to cure his complaint as we asked him to do, he now comes before the court and states that facts sufficient to put Heller on notice "cannot be nor

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should [they] be detailed in a complaint." We cannot excuse such recalcitrance where, as here, the *pro se* litigant has shown a working familiarity with legal research and proceedings under the federal rules. We therefore give Roberts leave to file objections to Heller's request for fees by October 13, 1986.

CONCLUSION

***2** Plaintiff's motion for reconsideration is denied. Plaintiff is directed to file objections to defendant's fee petition by October 13, 1986.

FN1. As we noted in our earlier opinion, Roberts is serving a five-year prison sentence based on fraudulent acts he committed during bankruptcy proceedings he described in his amended complaint. Heller's lawyers apparently brought his fraudulent actions to the attention of the United States Attorney's Office; Roberts amended his original complaint to include these lawyers as defendants, apparently correcting an oversight he made in his original complaint. Roberts completely failed to mention these bankruptcy proceedings or prior state court proceedings between himself and Heller. A review of some of the documents previously submitted by Heller showed that many of the issues Roberts attempted to raise in this action were previously litigated.

N.D.Ill.,1986.
Roberts v. Walter E. Heller & Co.
Not Reported in F.Supp., 1986 WL 10383 (N.D.Ill.)

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