

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Criminal Case No. 13-mj-01138-MEH

UNITED STATES OF AMERICA,

Plaintiff,

v.

1. ERIC JENSEN, and
2. RYAN JENSEN,

Defendants.

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**GOVERNMENT'S SENTENCING STATEMENT**

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The United States of America, by and through John F. Walsh, United States Attorney for the District of Colorado, and Jaime A. Pena, Assistant United States Attorney, submits its Sentencing Statement, as follows:

**1. THE CHARGES:** On September 24, 2013, the defendant Ryan Jensen was charged by a criminal information with 6 counts of Introducing an Adulterated Food into Interstate Commerce, and aiding and abetting same, as reflected in the Information (doc. 1).

**2. THE PENALTY RANGES:** The maximum statutory penalty for the violations of Title 21 U.S.C. § 331(a) (Introduction of an Adulterated Food into Interstate Commerce), on each count,<sup>1</sup> is a term of imprisonment of not more than 1 year, not more than a \$250,000 fine,<sup>2</sup> or both; 1 year supervised release;<sup>3</sup> and a \$25 special assessment fee.

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<sup>1</sup> The Court may impose concurrent or consecutive sentences after considering the factors in 18 U.S.C. § 3553(a). *See* 18 U.S.C. § 3584 (a) and (b).

<sup>2</sup> 18 U.S.C. § 3571(b)(4)

<sup>3</sup> 18 USC 3583(b)(3)

**3. THE PLEA OF GUILTY:** On October 22, 2013 Ryan Jensen pled guilty to all six counts of the Information before the Honorable Michael E. Hegarty, United States Magistrate Judge for the District of Colorado.

**4. THE FACTS ADDUCED AT PLEA OF GUILTY (in the plea agreement and hearing):**

a. The parties stipulated that the relevant conduct to the offenses began in or about June 2011 and continued until in or about September 2011. The parties also agreed in the plea agreement that the Government's evidence would be as follows:

1. The defendants, Eric Jensen and Ryan Jensen, were the primary principals in a farming operation known as Jensen Farms in Granada, Colorado. They were both in a position to, and had authority to, order regular and seasonal employees and workers to set up and maintain a conveyor system for the purpose of packing cantaloupes from the farm. As part of the business of Jensen Farms, a partnership in which the two primary partners were the defendants, the defendants set up and maintained a processing center where cantaloupes from the field were transported along a conveyor system. The conveyor system was supposed to clean the cantaloupes, cool the fruit, and ultimately result in the packaging of the cantaloupes for further distribution throughout the United States. The defendants had the responsibility and authority to maintain a clean and sanitary packing facility, which included maintaining the packing equipment at Jensen Farms in such a way that the cantaloupes produced, packed and shipped from Jensen Farms would be washed with sufficient anti-bacterial solutions so that the fruit was not adulterated in the process.

2. On or about May 16, 2011, the defendants entered into an agreement with Pepper Equipment Company to furnish the Jensen Farms packing facility located in Granada, Colorado with a conveyer system consisting of, in part, a fresh water sprayer,

brushes and felt rollers originally designed for use in harvesting potatoes. Upon the request of the defendants, this conveyer system was modified by Pepper Equipment Company with a catch pan in which to outfit a “chlorine spray”. Despite the modifications to the catch pan by Pepper Equipment Company, the defendants never set up the chlorine spray. The defendants were aware that cantaloupes could be contaminated with harmful bacterium, such as e-coli and salmonella, if not sufficiently washed. The chlorine spray, if used, would have reduced the risk of microbial contamination of the fruit.

3. On or about July 25, 2011, a food safety inspector acting on behalf of Primus Labs, a company hired by Jensen Farms from a list of auditors and audit schemas supplied by Frontera Produce, conducted an audit of the Jensen Farms packing facility. The audit resulted in a “superior” score of 96%.

4. On or about July 25, 2011, Jensen Farms continued with an agreement with Frontera Produce to broker cantaloupes harvested from Jensen Farms under the brand name “Frontera Fresh Cantaloupe.” Accordingly, Frontera Produce purchased, marketed and sold cantaloupes from Jensen Farms and arranged shipping directly from the Jensen Farms packing facility. At all times between June 2011 and September 2011, the defendants knew that the cantaloupes they caused to be delivered from their packing facility in Colorado would enter interstate commerce.

5. Beginning on or about July 29, 2011, a retailer doing business in interstate commerce, or its representatives or agents, received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes*<sup>4</sup> (and adulterated because they were packed under

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<sup>4</sup>*Listeria monocytogenes* is the causal agent for the disease listeriosis. Infection with *Listeria monocytogenes* causes a spectrum of illness, ranging from febrile gastroenteritis to invasive disease, including sepsis and meningocencephalitis.

insanitary conditions which rendered them injurious to health) from the Jensen Farms packing facility and transported the adulterated cantaloupes to a distribution center in Denver, Colorado, for further delivery to places outside Colorado including Utah and Wyoming. This center subsequently distributed the adulterated Jensen Farms cantaloupes to stores located in Littleton, Denver, Colorado Springs, Thornton, Parker, Pueblo and Fruita, Colorado, thereby causing or contributing to the death of consumers S.A.; H.B.; H.J.; M.J.; M.N.; S.O.; L.T.; B.M.; and J.R.

6. Beginning on or about July 29, 2011, a retailer doing business in interstate commerce, or its representatives or agents, received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* (and adulterated because they were packed under insanitary conditions which rendered them injurious to health) from the Jensen Farms packing facility and transported the cantaloupes in interstate commerce to its distribution center in Cheyenne, Wyoming. The distribution center subsequently distributed the adulterated Jensen Farms cantaloupes to a store located in Sheridan, Wyoming thereby causing or contributing to the death of consumer J.L.

7. Beginning on or about August 1, 2011, a retailer doing business in interstate commerce, or its representatives or agents, received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* (and adulterated because they were packed under insanitary conditions which rendered them injurious to health) from the Jensen Farms packing facility and transported the cantaloupes in interstate commerce to a distribution

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Invasive listeriosis occurs predominantly in older adults and persons with impaired immune systems. Listeriosis in pregnant women is typically a mild “flu-like” illness, but can result in fetal death, premature labor or neonatal infection. The Centers for Disease Control and Prevention (CDC) reported in 1999 that, of all the foodborne pathogens tracked by the CDC, infection with *Listeria monocytogenes* had the second highest fatality rate (20%) and the highest hospitalization rate (90%). See P.S. Mead et al. *Food-Related Illness and Death in the United States, Emerging Infectious Diseases*, 5(5).607.610 (1999).

center in Corinne, Utah. The retailer in interstate commerce subsequently distributed the adulterated Jensen Farms cantaloupes to stores located in Idaho Falls, Idaho and Bozeman, Montana thereby causing or contributing to the death of consumers J.C and J.O.

8. Beginning on or about August 1, 2011, a retailer doing business in interstate commerce, or its representatives or agents, received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* (and adulterated because they were packed under insanitary conditions which rendered them injurious to health) from the Jensen Farms packing facility and transported the cantaloupes to a distribution center in Los Lunas, New Mexico. The retailer in interstate commerce subsequently distributed the adulterated Jensen Farms cantaloupes to stores located in Albuquerque, New Mexico; Hobbs, New Mexico; Gallup, New Mexico and Cortez, Colorado thereby causing or contributing to the death of consumers V.C.; R.G; P.R.; F.W.; J.M.; and J.R.

9. Beginning on or about August 1, 2011, a retailer doing business in interstate commerce, or its representatives or agents, received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* (and adulterated because they were packed under insanitary conditions which rendered them injurious to health) from the Jensen Farms packing facility and transported the cantaloupes to a distribution center in East Dallas, Texas. The retailer subsequently distributed the adulterated Jensen Farms cantaloupes to stores located in Dallas, Texas thereby causing or contributing to the death of consumer M.J.

10. Beginning on or about August 2, 2011, a retailer doing business in interstate commerce, or its representatives or agents, received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* (and adulterated because they were packed under

insanitary conditions which rendered them injurious to health) from the Jensen Farms packing facility and transported the cantaloupes to a distribution center in Houston, Texas. The retailer subsequently distributed the cantaloupes to stores located in Houston, Texas, Bossier City, Louisiana and Beaumont, Texas, thereby causing or contributing to the death of consumers D.F. and F.G.

11. Beginning on or about August 3, 2011, a retailer doing business in interstate commerce, or its representatives or agents, received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* (and adulterated because they were packed under insanitary conditions which rendered them injurious to health) from the Jensen Farms packing facility and transported the cantaloupes to a distribution center in Hutchinson, Kansas. The retailer subsequently distributed the adulterated Jensen Farms cantaloupes to stores located in Wichita, Kansas; Omaha, Nebraska; Manhattan, Kansas and Springfield, Missouri thereby causing or contributing to the death of consumers D.B; D.H.; D.W.; W.P.; J.K.; and D.Y.

12. Beginning on or about August 3, 2011, a retailer doing business in interstate commerce, or its representatives or agents, received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* (and adulterated because they were packed under insanitary conditions which rendered them injurious to health) from the Jensen Farms packing facility and transported the cantaloupes in interstate commerce to a distribution center in North Platte, Nebraska. The retailer subsequently distributed the adulterated Jensen Farms cantaloupes to a store located in Chadron, Nebraska thereby causing or contributing to the death of consumer G.D.

13. Beginning on or about August 3, 2011, a company doing business in interstate commerce, or its representatives or agents, received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* (and adulterated because they were packed under insanitary conditions which rendered them injurious to health) from the Jensen Farms packing facility and transported the cantaloupes to a processing facility in Denver, Colorado. The company subsequently distributed the adulterated Jensen Farms cantaloupes to various grocery stores in Denver and Colorado Springs, Colorado, thereby causing or contributing to the death of consumers S.J.; M.H.; and J.D.

14. Beginning on or about August 4, 2011, a retailer doing business in interstate commerce, or its representatives or agents, received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* (and adulterated because they were packed under insanitary conditions which rendered them injurious to health) from the Jensen Farms packing facility and transported the cantaloupes to a distribution center in Oklahoma City, Oklahoma. The retailer subsequently distributed the adulterated Jensen Farms cantaloupes to a grocery store located in Mustang, Oklahoma thereby causing or contributing to the death of consumer W.B.

15. Beginning on or about August 10, 2011, a company, or its agents or representatives, received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* (and adulterated because they were packed under insanitary conditions which rendered them injurious to health) from the Jensen Farms packing facility and transported the cantaloupes to Kansas City, Missouri. The adulterated cantaloupes were subsequently delivered to a company in Kansas City, Kansas for further distribution thereby causing or contributing to the death of consumer P.S.

16. Beginning on or about August 14, 2011, a retailer doing business in interstate commerce, or its representatives or agents, received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* (and adulterated because they were packed under insanitary conditions which rendered them injurious to health) from the Jensen Farms packing facility and transported the cantaloupes to a company in Valparaiso, Indiana. That company subsequently distributed the adulterated cantaloupes to stores located in Elkhart, Indiana, thereby causing or contributing to the death of consumer D.D.

17. Beginning on or about August 15, 2011, a company, or its agents or representatives, received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* (and adulterated because they were packed under insanitary conditions which rendered them injurious to health) from the Jensen Farms packing facility and transported the cantaloupes to a distribution center in Baton Rouge, Louisiana. The adulterated Jensen Farms cantaloupes were subsequently sold to a store located in Baton Rouge, Louisiana thereby causing or contributing to the death of consumer E.B.

18. Beginning on or about August 26, 2011, a company, or its agents or representatives, received pallets of cantaloupes adulterated with the bacterium *Listeria monocytogenes* (and adulterated because they were packed under insanitary conditions which rendered them injurious to health) from the Jensen Farms packing facility and transported the cantaloupes to a company in Buffalo, New York. That company subsequently distributed the adulterated Jensen Farms cantaloupes thereby causing or contributing to the death of consumers L.L. and G.S.

19. On or about September 2, 2011, the Colorado Department of Public Health and Environment (“CDPHE”) notified the CDC and subsequently the U.S. Food and Drug



Administration (“FDA”) of a significant increase from the average number of listeriosis cases reported in Colorado each month. Subsequent investigation by CDPHE determined that all patients infected with listeriosis reported eating cantaloupe prior to the onset of symptoms. The ensuing CDPHE and FDA investigation led investigators to perform an inspection of the Jensen Farms packing facility on September 10, 2011.

20. During the September 10, 2011 inspection, FDA sampled cantaloupes from cases on four pallets in the cold storage at the Jensen Farms packing facility. FDA conducted laboratory analyses, including pulsed-field gel electrophoresis (“PFGE”), on these samples. According to the CDC, PFGE is a reliable technique used by scientists to generate a DNA fingerprint for a bacterial isolate. Five of the ten cantaloupes FDA analyzed were positive for *Listeria monocytogenes*. The PFGE analysis determined that five of the ten cantaloupes analyzed from Jensen Farms matched strains of *Listeria monocytogenes* identified in all of the infected patients identified herein.

21. FDA also collected environmental swabs from various locations and surfaces throughout the Jensen Farms packing facility. FDA conducted laboratory analyses which determined that 13 of the 39 total environmental swabs were positive for outbreak strains of *Listeria monocytogenes*. These positive swabs were taken from different locations throughout the washing and packing areas in the Jensen Farms packing facility, all of which were either food contact surfaces or areas adjacent to food contact surfaces.

22. Around September 14, 2011, the defendants attempted to voluntarily recall shipments of cantaloupes.

23. On October 18, 2011, FDA issued a warning letter to the defendants in which the FDA concluded the “*significant percentage of [environmental] swabs that tested positive for outbreak strains of Listeria monocytogenes demonstrates widespread contamination throughout your facility and indicates poor sanitary practices in the facility.*”

24. According to James R. Gorny, Ph.D., who at the time was Senior Advisor for Produce Safety, Center for Food Safety & Applied Nutrition at the FDA, Jensen Farms significantly deviated from industry standards by failing to use an anti-microbial, such as chlorine, in the packing of their cantaloupes during the summer of 2011. Dr. Gorny added that the conveyer that the defendants used to process and pack the cantaloupes spread contamination and essentially “inoculated” the cantaloupes with *Listeria monocytogenes*. Dr. Gorny opined that the Primus Labs representative that conducted the pre-harvest inspection of Jensen Farms was seriously deficient in their inspection and findings.

25. The CDC has reported that a total of 147 people had outbreak-associated illnesses and were infected with any of the five outbreak-associated subtypes of *Listeria* tied to Jensen Farms. These persons lived in 28 states. The CDC has also reported a total of 33 deaths from outbreak-associated cases of listeriosis and one woman pregnant at the time of illness had a miscarriage. Further, ten other deaths not specifically attributed to listeriosis occurred among persons who had been infected with an outbreak-associated subtype.<sup>5</sup>

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<sup>5</sup> According to the Mayo Clinic, symptoms of listeriosis may begin a few days after consumption of contaminated food, but it may take as long as two months before the first signs and symptoms of infection begin.

b. In addition to the facts and evidence adduced in the plea agreement, the parties agreed to the following oral supplemental factual basis at the plea hearing:

“In addition to the stipulated facts in the respective plea agreements, the factual basis on which this plea is based is as follows:

In the summer and fall of 2011, the defendants, acting together produced and processed cantaloupes at a farm in Granada, Colorado. The farm is known as “Jensen Farms.”

As part of the processing of the cantaloupes, the cantaloupes were processed at a packing shed owned and controlled by the defendants.

During the packing process, the fruit came in contact with listeria monocytogenes because neither the fruit nor the equipment was properly cleaned. Listeria monocytogenes is a potentially deadly bacteria that causes a condition known as listeriosis.

The defendants then shipped the cantaloupes as described in the Information to places inside and outside Colorado, on the dates alleged in the Information.

The infected fruit caused at least 33 deaths of persons suffering from listeriosis, as described in the Information.”

**5. THE VICTIMS AND RESTITUTION:** Restitution is discretionary pursuant to the Victim Witness Protection Act 18 U.S.C. § 3663. *United States v. Guthrie*, 64 F.3d 1510, 1514 (10<sup>th</sup> Cir. 1995); USSG § 5E1.1. This Court has full discretion whether to impose an order of restitution, taking into consideration: (1) the victims’ losses as a result of the offense, (2) the defendant’s financial resources, and (3) any other factors the Court deems appropriate. 18 U.S.C. §§ 3556,

3663(a)(3), 3664, and U.S.S.G. § 5E1.1. The parties recognize that determining exact restitution amounts in a complex case such as this is a challenge. Some of the “other” factors the Court may consider in the instant case are (1) the difficulty of determining the exact amount of restitution, (2) the party to whom restitution is owed; for example, an insurance carrier may step into the shoes of a claimant if they paid medical expenses, (3) the payment of insurance proceeds by insurance carriers to some of the victims/families through the Chapter 11 bankruptcy, (4) the assignment by the defendants of any interest they may have in litigation with third parties, and (5) whether the individual claims are sufficiently tied to the defendants’ conduct to merit an award of restitution.

In the plea agreement, the parties agreed to restitution in order to ensure the Court had discretion to award restitution, if it deems appropriate:

“The parties agree that pursuant to 18 USC 3663(a)(3) and Section V(H) below, the defendant will pay restitution, jointly and severally with his co-defendant, as ordered by the Court to any victim of the offenses to which the defendant is pleading guilty and any other persons directly and proximately harmed as a result of the introduction into interstate commerce of adulterated food by the defendant. The parties agree that the Court may consider all relevant conduct, whether charged or not, in determining the victims and assessing restitution. The parties also agree and understand that the Court may, in its discretion, make this restitution obligation a part of any term of probation or supervised release, if applicable.”

**6. SENTENCING COMPUTATION:** The Government contends the following calculations of the plea agreement, consistent with the advisory United States Sentencing Guidelines (USSG) and the calculations of the United States Probation Office, are appropriate under our facts:

“A. The base guideline provision applicable to these types of offenses is U.S.S.G. §

2N2.1 which applies to violations of statutes or regulations dealing with any food. U.S.S.G. § 2N2.1 provides for a base offense level of 6. Therefore, the base offense level is 6.

B. If the offenses of conviction involve the “...permanent, life-threatening, or serious bodily injury of more than one victim...” Chapter Three Part D relating to multiple counts is applicable. Pursuant to Chapter 3, § 3D1.4, an additional 5 level increase is appropriate because the counts relate to separate instances and victims. Therefore the base offense level becomes 11.

C. Pursuant to U.S.S.G. § 3E1.1(a), defendant has clearly demonstrated acceptance of responsibility. A two-level downward adjustment results in an offense level of 9.”

Thus, the government agrees with the judgment of the United States Probation Office on the applicable offense level and criminal history. The government also ultimately agrees with the recommended sentence of 5 years probation for the reasons stated below.

**7. RECOMMENDATION:** Consistent with the sentencing factors described in 18 U.S.C. § 3553(a), the Government makes the following analysis and recommendation. Additionally, pursuant to 18 U.S.C. § 3561(c)(2) , the Court may sentence this defendant to a term of up to 5 years probation, and may impose conditions it deems appropriate after applying the factors in 18 U.S.C. § 3553(a). The Court may impose concurrent or consecutive sentences after considering the factors in 18 U.S.C. § 3553(a), discussed below. *See* 18 U.S.C. § 3584 (a) and (b).

**a. Reflects the Seriousness of the Offense, Promotes Respect for the Law and Provides a Just Punishment for the Offense.**

An extensive protracted probationary sentence of five years addresses these issues. Without a doubt, any offense that results in 33-40 deaths is a serious offense which must be given careful consideration by a sentencing court. However, the

seriousness of the offense is tempered in this case by the lack of a willful, intentional or knowing state of mind. These defendants were at worst negligent or reckless in their acts and omissions.

Further, this prosecution can fairly be characterized as unusual under a historical retrospective view of the enforcement efforts of the relevant statutes. The government was compelled to exercise its enforcement discretion in large part because of the devastating results associated with this case. The prosecution itself, especially coupled with a significant probationary sentence, promotes respect for the law.

Although reasonable minds may differ as to what a reasonable and just sentence might be under the circumstances, this Honorable Court should consider not only the devastating results of the conduct, but also the mitigating nature of the defendants' conduct after discovering the fruit from their farm was tainted. Almost immediately after learning that their fruit was tainted, the defendants sought to voluntarily recall the fruit in September 2011. Unfortunately, much of the damage was already done. Thereafter, in or around November 2011, counsel for the defendants offered cooperation and assistance in the investigation which ultimately resulted in the underlying charges in this case. Even after being charged, the defendants addressed many of the victims and their families in an attempt to provide the victims a sense of comfort and closure. This step was extraordinary in that the defendants essentially waived constitutional protections in favor of addressing sensitive victim issues. As a result the government believes a 5 year probationary period addresses these factors.

**b. Affords Adequate Deterrence to Criminal Conduct.** The Government's recommended sentence will deter others and encourage strict compliance with the

food safety statutes. The Government has already seen a significant difference in which food safety is viewed as a result of this prosecution. A recognition that shoddy compliance with food safety standards and statutes potentially exposes those in the distribution chain to criminal liability has been taken seriously by the food industry in light of this prosecution. A sentence to an extensive period of Court supervision will only amplify the message of deterrence to the food industry. The sentence recommended by the Government addresses this issue.

c. **Protects the Public from Further Crimes of the Defendant.** The defendants are sensitive to the devastation and injury they have caused. The government believes the defendants are remorseful and will not engage in any criminal conduct in the future; in fact, this experience has made the defendants ultra-sensitive to the consequences of ensuring food safety. Court supervision will ensure the public is protected from any further conduct that may constitute a crime.

d. **Provides the Defendant with the Needed Educational or Vocational Training, Medical Care, or Other Correctional Treatment in the Most Effective Manner.** The Government believes the defendants are intelligent and reasonably well educated. This factor should not weigh heavy in the Court's determination.

e. **Need to Avoid Unwarranted Sentencing Disparity among Defendants with Similar Records Guilty of Similar Conduct.** The Government believes the applicable Guidelines range does exactly that—it avoids disparate sentencing between defendants engaged in similar conduct with similar criminal histories.

f. **The Need to Provide Restitution to Victims.** In this case, restitution is discretionary and is addressed above. To the extent restitution is granted, the

government believes a term of probation will give the defendants the best opportunity to pay restitution.

The Government recommends a sentence of **60 months probation**, a \$150.00 special assessment, and restitution in the amounts and pursuant to the terms ordered by the Court, if any.

WHEREFORE, the government requests a sentence by this Honorable Court in the manner set out above.

Respectfully submitted,

JOHN F. WALSH  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 17th day of January, 2014, I electronically filed the foregoing **GOVERNMENT'S SENTENCING STATEMENT** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

Forrest W. Lewis  
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and I hereby certify that I have mailed or served the document or paper to the following non-CM/ECF participants in the manner (mail, hand-delivery, etc.) indicated by the non-participant's name:

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\_\_\_\_\_  
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