

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**DIGNITY HEALTH d/b/a ST. ROSE
DOMINICAN HOSPITALS**

and

Case 28-CA-094717

MICHAEL S. DELA PAZ, an Individual

**BRIEF IN SUPPORT OF ACTING GENERAL COUNSEL'S EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE' DECISION**

Respectfully submitted,

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I. INTRODUCTION

Counsel for the Acting General Counsel (CGC) litigated the discharge of employee Michael S. Dela Paz (Dela Paz) by Dignity Health d/b/a St. Rose Dominican Hospital (Respondent) on three theories of violation of the Act: for his protected concerted activities, for his violating Respondent's overly broad and discriminatory rule forbidding him from talking to other employees, and because of his Union activities. Administrative Law Judge Joel P. Biblowitz (the ALJ) correctly found that Respondent violated Section 8(a)(1) of the Act when it discharged Del Paz for violating its overly broad and discriminatory rule prohibiting him from contacting employees concerning two incidents with a co-worker. However, the ALJ rejected CGC's theories that Respondent discharged Dela Paz because of his protected concerted and Union activities. Since the evidence and the current case law support these additional theories of violations of the Act, CGC files these exceptions to the ALJ's decision and submits this brief in support of those exceptions.

II. STATEMENT OF FACTS

1. Background

Respondent operates a hospital located in Henderson, Nevada. The Environmental Services Department is responsible for ensuring the cleanliness of the facility. Environmental Services Manager Brad Duda (Duda) was in charge of this department during the relevant time period of June to July 2012.¹ Director of Environmental Services Lee Timothy (Timothy) supervised Duda. Respondent employed Dela Paz as an Environmental Services Technician II. His duties included maintaining the cleanliness of the hospital cafeteria and various public areas of the facility. Service Employees International Union, Local 1107 (the Union) represents Respondent's employees, including Dela Paz, who is a member.

¹ All dates refer to calendar year 2012 unless otherwise stated.

2. Cafeteria Incidents

On June 1 and June 4, Dela Paz interacted with his coworker, Habiba Araru (Araru), a cashier on the graveyard shift in Respondent's only cafeteria. (66:13-16; 67:18-21).² On June 1, Dela Paz observed Araru brush debris from the tables in the cafeteria onto the floor including a ketchup packet and tissue. (68:13-16). When he told her to pick them up, she responded that it was not her job. (68:68:15-18). Three days later, Dela Paz again encountered Araru as he purchased bowls of rice and hot dogs. Dela Paz became upset when Araru commented on his culinary choices as she stated that "you Filipino[s] don't know how to eat; hot dog[s] come with bread, not rice." (70:21-25, 71:1-4). Dela Paz told Araru that whatever was on his plate, he was paying for it. (71:6-11). According to his typed statement, Dela Paz cautioned Araru that she could be in big trouble if other Filipinos heard her and reported her. (RX 5). According to Araru's hand-written report dated June 4, Dela Paz said that he had already reported her to her boss. Later in her account, Araru claimed that Dela Paz said he would take care of her. (RX 2).

3. Suspension

On June 5, Duda called Dela Paz and informed him that he was being placed on administrative leave pending investigation. (22-23:2-16). During that conversation and after being suspended, Dela Paz acknowledged that an incident occurred. (23:12-22; 26:10-14). Duda instructed Dela Paz not to speak with anyone about the matter. (73:4-10; 95:5-10). Duda confirmed this directive in his email to Timothy: "Michael was also instructed that he was not to contact any hospital employees during his administrative leave." (RX 6).³

² References to the Transcript are (__:__) showing page or pages and line or lines, respectively. GCX__ refers to CGC's Exhibits. RX__ refers to Respondent's Exhibits. ALJD refers to the ALJ's decision showing page and lines.

³ Although Duda testified that he suspended Dela Paz on June 5, this email is dated June 7. Since Respondent met with Dela Paz on June 12, after suspending him for seven days without pay (GCX 5(a)), it appears the suspension began on June 5.

4. Union Instructions

Later that day, during a bargaining meeting, Dela Paz spoke with a Union representative about his suspension. The Union filed a grievance and scheduled a meeting on the grievance. (73:16-25, 74:1-15). Union Vice President and Respondent's Senior Operating Room Buyer Cherie Mancini (Mancini) testified that she told Dela Paz to get witness statements about his interaction with Araru. (112:15-21). She also told him to get statements from coworkers "to vouch for you and your behavior and how you work in the hospital." (112:21-24).

5. Dela Paz' Witness Statements

Following Mancini's instructions, Dela Paz obtained three statements from employees: Ana Johnson, Rowena David and Shawn Johnson. (GCX 4(a)-(c)). Ana Johnson reported hearing a loud noise and then recounted what Dela Paz had told her about the June 4 encounter with Araru. (GCX 4(a)). Rowena David explained that she was writing "to support" Dela Paz and recounted that Araru was "infamous for her attitude, rudeness and for not accommodating customers['] needs and requests." (GCX 4(b)). Shawn Johnson wrote that Dela Paz was "a great person and one of the nicest people I know at [Respondent]" and that he was "a very positive and happy employee always in good spirits." (GCX 4(c)).

6. Dela Paz' Petition

Dela Paz also prepared a petition, dated June 11, addressed "To Whom It May Concern."

The petition reads:

If at one time or another, you ever had an encounter with [Araru], the cashier at the Cantina --- if she had ever been rude to you or if perhaps you had observed that she has treated someone else with disrespect or a sullen attitude, kindly sign your name on the attached paper in support of my signature campaign. (GCX 3(a)).

The second page is captioned "Signature Campaign in Support of Mike Sanchez" and contains signatures, work locations such as 1West and 4 East, and job titles such as RN or CNA. (GCX

3(b)). The ALJ found that Union Representative Mancini told Dela Paz to obtain these signatures. (ALJD p. 5, lines 24-25).

7. June 12 Meeting and Issuance of Discipline

On June 12, Dela Paz and his Union representative Debbie Miller met with Duda and Environmental Services Department Supervisor Pam Bylekie. (29:9-24). Dela Paz delivered to Duda his petition and his witness statements. (GCX 3 and 4; 30:3-5, 18-25, 31:1-24; 34:4-12). Union Vice President Mancini testified that these written statements were what she had advised Dela Paz to secure. (111:19-25; 113:21-23; 114:17-25, 115:1-13). After reviewing the petition and witness statements, Duda determined to “move forward,” that is, retroactively count Dela Paz’ time off as a suspension and return him to work. (30:4-7). He issued Dela Paz an Employee Counseling Report dated June 12,⁴ that noted the seven-day suspension and contained an “Action Plan For Opportunity” that required Dela Paz to maintain a “calm demeanor when interacting with coworkers and employees from other departments;” refrain from using “racially insensitive verbiage;” attend EAP to help deal with “performance issues, angry outbursts and threatening behavior;” and “follow chain of command.” The last point of the action plan provided that “[t]here will be ZERO tolerance of any perceived retaliation against coworkers.” (GCX 5(c)). Duda admitted thanking Dela Paz for the petition and testified that all he could do was place it in his file. (32:15-20).

8. Respondent’s Harassment and Retaliation Policies

Among the documents Duda issued to Dela Paz at the June 12 meeting was Respondent’s Policy/Procedure on Harassment in the Workplace. (46:22-25, 47:1-6; GCX 8). This Policy defines unlawful harassment at 3.3 as:

⁴ This discipline is not alleged as a violation of the Act.

inappropriate discriminatory treatment or pattern of conduct, and any resulting retaliation, based on race, color, religion, national origin, gender, age, disability, or other protected activity/criteria under the anti-discrimination statutes, i.e. unrelated to job performance, so objectively offensive as to alter the conditions of a victim's employment.

The Policy also defines retaliation at 3.4 as:

reprisal or adverse action taken against an employee for exercising his/her rights under the law, e.g. reporting inappropriate conduct or alleged unlawful employment practices or participating in any related investigation, proceeding or hearing.

9. Dela Paz' Actions after the June 12 Meeting

Thereafter, Dela Paz took special measures to abstain from any contact with Araru, changing his work schedule to avoid cleaning in Araru's work area until she left work. (76-77:17-4, 81:5-13). Dela Paz continued to add signatures to his petition, as nurses asked him if they could sign. (80:18-22; 81:14-22; GCX 11). His final version of the petition contains over 20 employee signatures. (GCX 11). Dela Paz never approached Araru with the petition or communicated with her about the actions he was taking. (81:5-13).

10. Dela Paz' Interaction with Wild and Petition Presentation to Timothy

On June 16, Dela Paz approached Director of Food Nutrition Bradley Wild (Wild), Araru's supervisor. (101-02:17-1). Dela Paz mentioned the dispute he had with Araru and provided Wild with some documents. (GCX 3; RX 5). Wild notified Timothy on that same day, June 16, that he had interacted with Dela Paz. On June 18, Dela Paz delivered the petition with additional signatures to Timothy. (82:7-25; GCX 11). Timothy warned Dela Paz that his act of obtaining signatures on his petition might result in his termination. (83:5-11; ALJD p. 5, lines 10-11). This was the first time Respondent advised Dela Paz that his petition might result in discipline. (48:5-17).

On June 20, Duda and Timothy requested that Wild provide a written statement regarding the interaction that occurred on June 16, between Wild and Dela Paz. (104:6-13, GCX 9).

Wild's statement described an occasion on which an employee of Respondent found a copy of the petition and brought it to Timothy's attention. It also described how Dela Paz had presented his petition to Wild, "showing how many other staff members in the hospital have had similar concerns with my staff member." (GCX 9).

11. Dela Paz' Discharge

On July 3, Respondent discharged Dela Paz. (56:19, 59:10-12, 60:6-13; GCX 10).

Respondent's Record of Counseling shows that Respondent discharged Dela Paz for his "performance." Specifically, the counseling record asserts that Dela Paz had "failed to meet this expectation" of his action plan that called for "zero tolerance for any retaliation against the employee with whom he had the altercation" and for "blatant insubordination." (GCX 10(a)).

During examination by CGC, Duda first insisted that the sole reason for discharging Dela Paz was his action in approaching Wild regarding his discipline. (53-54:19-8, 54-55:17-6, 59:15-20).

However, the Record of Counseling generated by Duda (60:7-13) states:

Since returning from his suspension, he has continued to actively pursue measures to have the other employee disciplined. He has approached *coworkers and management* alike in an attempt to smear the reputation of the other employee and try to get her fired. (GCX 10(a), emphasis added).

When CGC asked Duda why he mentioned coworkers in the document, Duda explained that since Wild was not Dela Paz' manager, he would be considered a coworker. (58:18-20). When CGC posed the next logical question of why both coworkers and management were mentioned, Duda conceded that the petition was a factor in Dela Paz' termination but not the determining factor. (60:16-24). CGC sought to discover why the document refers to multiple measures taken by Dela Paz resulting in his discharge if the petition was not a determining factor. (59:21-24). Duda, after a brief comment on the rules of English grammar, responded that he was not responsible for generating the document. (59-60:21-1). Notwithstanding his prior testimony,

Duda then admitted that he was responsible for generating the final copy, which he approved. (60:7-15).

As to “smearing her reputation,” Duda claimed that Dela Paz told Wild he “had information about her that he would gladly provide.” (61:12-15). Wild did not testify to this alleged statement, and his report to Duda and Timothy of his interaction with Dela Paz makes no mention of this alleged statement. (102:1-25, 103:1-5; GCX 9). It does recount how the document Dela Paz gave to him on June 16, had “several more signatures” as compared to the one found by the unit manager at the nurses’ station on June 13. (GCX 9). As to Dela Paz trying to get Araru fired, Duda conceded that Dela Paz’ petition made no request that Araru get in trouble or be disciplined. (50:1-6).

III. ARGUMENT

A. Dela Paz Engaged in Protected Concerted Activity (Paragraph 5(a) of Complaint, GCX 1(e))

1. Legal Standard

The ALJ correctly found that one of the reasons for Respondent discharging Dela Paz was his contacting other employees and exercising his Section 7 right to obtain their support. (ALJD p. 6, lines 28-31). There is little doubt as to this finding. Duda had previously instructed Dela Paz not to approach coworkers during his suspension.⁵ However, and as noted in Record of Counseling generated by Duda when he discharged Dela Paz, “[s]ince returning from his suspension, he has continued to actively pursue measures to have the other employee disciplined [and] has approached coworkers and management alike....” (GCX 10(a)). However, the ALJ

⁵ Duda never retracted his June 5 rule to Dela Paz and discharged him for violating this rule on July 3. The ALJ properly considered this rule which was within the Section 10(b) period of the initial charge filed on December 11. (GCX 1(a))

found that these actions were not mutual but individual as to Dela Paz alone. This finding is contrary to the evidence and the current case law.

Here, Dela Paz' petition activities, both circulating it among coworkers and obtaining signatures as well as presenting it to Duda and Wild, are protected concerted activities. In *Oakes Machine Corp.*, 288 NLRB 456 (1988), the Board found that an employer violated the Act by discharging its employee for engaging in protected concerted activity. In that case, an employee sent a letter to the employer's parent company requesting that the company remove a company official from his position. The employee's letter reflected multiple employees' dissatisfaction with the official in question and their belief that the official's actions affected their working conditions. The Board found that the letter was "clearly concerted activity within the meaning of Section 7" of the Act. *Id.* More recently, the Board found a violation of Section 8(a)(1) when an employer discharged employees for comments they made on a coworker's Facebook page. *Hispanics United of Buffalo, Inc.*, 359 NLRB No. 37, slip op. at p. 1 (2012). The employees commented in response to that coworker's criticism of their job performance. *Id.* In *Hispanics United*, the Board found that the employees, in responding to their coworker's criticism, were uniting in common cause to defend themselves, and that their actions constituted protected concerted activity. *Id.* at p. 2. The Board has long held that protected concerted activity includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers Industries (Meyers II)*, 281 NLRB 882, 887 (1986).

2. Dela Paz' Activities Were Concerted

As in *Hispanics United* where one employee, through her Facebook post, alerted coworkers of another employee's complaint about coworkers not helping enough and solicited

her coworkers' view of this criticism, Dela Paz, through his petition, asserted that Araru was rude, sullen and disrespected others, and he solicited coworkers' agreement with these comments. As in *Hispanics United*, when coworkers here signed Dela Paz' petition, they made "common cause" with Dela Paz, and their actions were concerted under *Meyers I*, because they were undertaken with...other employees." *Meyers Industries*, 268 NLRB 493 (1983), remanded sub non. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985). They were also concerted under *Meyers II*, because coworkers were taking the first steps towards group action in signing a petition first presented to Duda on June 12, and then given to Wild on June 16. *Meyers Industries*, 281 NLRB 882 (1986), sub non. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987).

3. Dela Paz' Activities Were Protected

As the Board made clear in *Hispanics United*, the Act protects employee discussions about their job performance. *Id.* at slip op. p.2 and cases cited at footnote 11. Respondent considered that Dela Paz' activities involved his job performance since performance was the stated reason for his discharge. Araru's act of brushing debris onto the cafeteria floor created more work for Dela Paz who was responsible for cleaning the floor. Araru's general behavior irked other employees besides Dela Paz because she, as cashier, was the gateway through which employees must pass to obtain food. Her actions affected the working terms and conditions of Dela Paz and other of Respondent's employees. Although Araru is not a supervisor as in *Oakes*, the *Oakes* decision did not rely on supervisory status in finding the activity there in question to be protected. Rather, the Board looked to the group belief that mismanagement of the company "had a detrimental effect upon their working conditions." *Id.* at 456. Here, over 20 employees made common cause with Dela Paz concerning dissatisfaction with their working conditions and made known that dissatisfaction to Respondent as they complained about a coworker.

The ALJ's reliance on *Holling Press, Inc.*, 343 NLRB 301 (2004) to support his dismissal of the protected nature of Dela Paz's petition is misplaced. In that case, the charging party had filed a charge with a state agency, complaining that she was a victim of sexual harassment. As explained by the Board, the charging party's purpose in filing her charge "was to benefit herself alone." *Id.* at 303. By contrast, here Dela Paz' purpose in preparing and circulating the petition was to make common cause with other employees concerning their shared complaints about a coworker's behavior and the effect that behavior had upon their working conditions in the coworker's role as the gatekeeper to the cafeteria. There was nothing individual about the complaints in the Dela Paz petition where he asked other employees if the coworker "had ever been rude" to them or if they had observed that the coworker treating "someone else with disrespect or a sullen attitude." Moreover, the captioned of the second page of the petition urging support for Dela Paz should not be read in isolation since there is no evidence that it was this page alone presented to employees for signatures.

4. Dela Paz' Activities Were At the Direction of the Union

The Union advised Dela Paz to acquire documentary support in defense of his position and in support of his grievance. Mancini stated that Dela Paz did so. In collecting witness statements and forming the petition, Dela Paz was reasonably acting on the Union advice. The Union instructed Dela Paz to take this action with an eye toward the grievance process and arbitration. There is no dispute that grievance proceedings occurred. Further, he presented the witness statements and petition at his disciplinary meeting on June 12. There is no evidence that the Union disavowed the witness statements or petition when presented at this meeting. In this posture, Duda could reasonably assume that the Union had directed Dela Paz to gather witness statements and signatures vouching for his character and behavior. By collecting witness

statements and signatures on his petition, Dela Paz was engaged in union activity. This activity related directly to the collective-bargaining agreement's provisions regarding grievances and arbitration.

B. Respondent Unlawfully Discharged Dela Paz

1. Respondent Discharged Dela Paz Because of His Protected Concerted Activity (Paragraphs 5(h) and 5(i) of Complaint, GCX 1(e))

On July 3, Respondent discharged Dela Paz. Contrary to claims made during trial, Dela Paz' discharge was due to his protected concerted activity in forming the petition, securing signatures on the petition, collecting statements from coworkers and presenting those documents to Respondent. Duda offered a convoluted claim that Respondent discharged Dela Paz only because he approached Wild. His explanation that Wild was the "coworkers" referred to in the discharge document is not plausible for three reasons: it is unheard of to designate a manager a coworker simply because the manager is not a particular employee's supervisor; there is no reason to mention coworkers in order to include Wild when management is also mentioned (Wild being a manager); and a single individual is rarely referred to in a plural sense. The wording in the discharge document clearly refers to the petition formed by Dela Paz and the coworkers' statements he collected in connection with it.

Respondent's concern with the petition is further evinced by Wild's email statement. Wild deemed it noteworthy that a copy of Dela Paz' petition was found at a nurses' station. In the statement, Wild goes on to report that Dela Paz delivered a similar petition to him three days later. He examined both documents sufficiently to note that there were more signatures on the second petition he received. Timothy and Duda deemed these facts of significance in that they requested that Wild provide a written statement detailing the occurrences. Respondent clearly viewed the petition as objectionable.

Even considering this a dual-motive case based on the recitals of Respondent's discharge document such that the analysis under *Wright Line*, 251 NLRB 1083 (1980) applies, the evidence shows Dela Paz' petition activities were the motivating factor in Respondent's decision to discharge him. Further, Respondent has not established that it would have discharged him regardless of these petition activities. Dela Paz engaged in protected concerted activities by obtaining employee signatures on his petition and presenting the petition to Respondent. Respondent had knowledge of these activities and referenced them in the discharge document as it described Dela Paz approaching "coworkers and management alike." Respondent harbored animus towards these activities as Timothy warned Dela Paz on June 18 that he could be fired for obtaining additional signatures on the petition. Finally, the recitals in Respondent's discharge document establish the pretextual nature of the discharge. While the document states that Dela Paz "has continued to actively pursue measures to have [Araru] disciplined" and to "try to get her fired," there is no evidence that Dela Paz' activities sought to have Araru fired or even disciplined. Dela Paz' documents made no such requests, and Duda offered no evidence otherwise. The discharge document also states that Dela Paz attempted "to smear the reputation of [Arura]." Duda simply made up this claim when he referred to the alleged cryptic remark of Dela Paz to Wild that he had information on Araru that he would gladly provide. Wild did not support this claim either in his testimony or his written account of his interaction with Dela Paz. Even assuming, for the sake of argument, that Dela Paz made this statement to Wild, telling someone that you have information about another person that you will gladly provide hardly establishes slander.

Respondent's claim in the discharge document that Dela Paz' actions amounted to "blatant insubordination" followed Dela Paz presenting his petition and witness statements to

Duda on June 12. Duda had no problem with Dela Paz' actions then and even thanked him for the documents. It was not until June 18, after Dela Paz had obtained additional signatures on his petition and presented it to Wild, that Timothy warned Dela Paz he could be fired for his activities. By that time, the die was cast, and Respondent had decided to discharge Dela Paz, relying upon actions it previously had tacitly approved.

Finally, there is no evidence that Dela Paz' actions amounted to retaliation under Respondent's Policy/Procedure on Harassment in the Workplace. His petition and union activities were not reprisals or adverse actions taken against Araru for exercising her rights under the law. If anything, Respondent violated its own policy on retaliation by discharging Dela Paz for exercising his rights under the Act, under either the ALJ's theory that Dela Paz was obtaining the support of fellow employees as protected by Section 7 of the Act or under CGC additional theory that Dela Paz was engaged in protected concerted activities.

2. Respondent Discharged Dela Paz Because of His Union Activity (Paragraphs 5(h) and 5(k) of Complaint, GCX 1(e))

Union Vice President Mancini instructed Dela Paz to obtain witness statements about his interaction with Araru and to get statements from coworkers, vouching for him and his behavior and how he worked in the hospital. Dela Paz obtained three such statements that he presented to Duda on June 12. As found by the ALJ, Mancini also told Dela Paz to obtain employee signatures. Dela Paz' efforts to secure statements and signatures as instructed by the Union, coupled with his presentation of the petition and employee statements to Duda with the Union's presence and acquiescence at the June 12 disciplinary meeting, leads to the conclusion that Duda was aware that Dela Paz was acting pursuant to the Union's instructions. When Respondent subsequently discharged Dela Paz for following these instructions, it also discharged him for his union activities.

C. Respondent Threatened Employees With Discharge for Engaging in Protected Concerted Activities (Paragraph 5(c) of Complaint, GCX 1(e))

1. Legal Standard

An employer violates Section 8(a)(1) of the Act if it threatens to discharge employees for their protected concerted activities. See, e.g., *Alton H. Piester, LLC*, 353 NLRB 369, 370-371 (2008).

2. Respondent Threatened Dela Paz With Discharge Over His Petition Activities.

On June 18, when Dela Paz delivered to Timothy an updated petition with additional signatures, Timothy warned Dela Paz that he could be discharged for this activity. This testimony was not refuted. This overt threat explicitly forbade Dela Paz from engaging in protected concerted activity in such a manner that it chilled employees' Section 7 rights. The threat was carried out on July 3, when Respondent discharged Dela Paz.

IV. CONCLUSION

Respondent violated Section 8(a)(1) of the Act when it instructed Dela Paz not to speak to anyone, including the Union, regarding his suspension, and then subsequently discharged him for violating this instruction. Dela Paz engaged in union activity when he sought witness and credibility statements and signatures from his coworkers. These statements were to be used by the Union in connection with grievance proceedings, and therefore, they relate directly to Union activity and the collective-bargaining agreement. Duda could reasonably conclude that the Union so instructed Dela Paz since it had, in fact, done so, and since it did not disavow those instructions when Dela Paz presented the statements and the petition in the disciplinary meeting held on June 12. Dela Paz engaged in protected concerted activity when he formed and distributed a petition, whose purpose was to bring to Respondent's attention the behavior of a

coworker whose performance affected the working conditions of other employees. Finally, Respondent threatened Dela Paz with discharge for engaging in Union and protected concerted activity when Timothy told Dela Paz he could be fired for his petition. CGC respectfully submits that the Board should find these additional theories of violations with respect to the discharge of Dela Paz and find that Respondent threatened him with discharge for these activities.

Dated at Las Vegas, Nevada this 18th day of October, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the **BRIEF IN SUPPORT OF ACTING GENERAL COUNSEL'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE' DECISION** in Case 28-CA-094717 was served via E-Gov, E-Filing, and electronic mail, on this 18th day of October 2013, on the following:

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