

FEDERAL CIVIL ENFORCEMENT COMMITTEE NEWSLETTER

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EDITOR'S NOTE

Dear Committee Member:

In this issue we have two timely articles, the first about the revised Policy Guide to Merger Remedies, issued in June 2011 by the Department of Justice, the second reporting on the June 2011 FTC round table discussion on tools to prevent patent hold-up in standard-setting organizations. This issue marks the start of a new “ABA year,” as new Antitrust Section leadership has rotated in this month. We are looking forward to the new year, including the Fall Forum, scheduled for November 17, 2011 in Washington, D.C. Information about the Fall Forum and other upcoming events will appear soon on the Committee’s website and listserve. As a new member of the Committee’s leadership and editor of the Committee’s newsletter, I look forward to providing you with bi-monthly reports on recent DOJ and FTC developments. I welcome your suggestions for newsletter topics and your contributions in drafting articles.

Dorothy Fountain, Editor

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by Frank Y. Qi*

DOJ Updates Merger Remedies Guide to Reflect Changing Merger Landscape

On June 17, 2011, the DOJ [issued](#) an updated [Policy Guide to Merger Remedies](#), its first update since the release of the [original guide](#) in 2004. According to [AAG Christine Varney](#), the update was driven by the DOJ's recognition of an evolution toward transnational mergers and complex vertical transactions. In the same way that the [2010 Horizontal Merger Guidelines](#) aligned agency policy with practice and also provided the DOJ and FTC with more tools to analyze competitive effects, the updated remedies guide better reflects remedies filed in recent DOJ cases and lends the Division more flexibility in tailoring creative and comprehensive remedies to each case's facts and theories of harm. Most notably, the updated policy guide indicates a greater willingness to consider conduct and behavioral remedies where transactions present vertical dimensions. The remedies guide also makes changes to the DOJ's approach to structural remedies and specifically notes the availability of equitable remedies. Lastly, it places principal responsibility for enforcing consent decrees in the recently created Office of the General Counsel.

DOJ More Willing to Seek Conduct Remedies to Address Vertical Concerns

The policy guide's prior iteration cautioned against the use of conduct remedies, recognizing the ease of evading enforcement as well as the high cost of government monitoring. Yet in recent high-profile mergers such as Ticketmaster/Live Nation, Comcast/NBCU, Google/ITA, and GrafTech/Seadrift, the DOJ placed conduct

remedies in the consent decrees to address each acquisition's vertical issues. These four cases employed a range of behavioral remedies, including: (1) firewalls; (2) mandatory licensing; (3) tying prohibitions; (4) an MFN prohibition; (5) an anti-retaliation provision; (6) relinquishing management rights; and (7) limiting exclusive contracts. The updated guide appears to ratify the DOJ's recent behavioral approaches to vertical transactions by stating that effective merger remedies may include both structural and conduct provisions. It notes that conduct relief can be uniquely effective when a structural remedy would eliminate the merger's potential efficiencies, but that without a remedy, the proposed merger would be anticompetitive. The policy guide continues to recognize that the DOJ will pursue a structural remedy in the vast majority of horizontal mergers. It also notes, however, that in a merger with both horizontal and vertical dimensions, a combination of structural and conduct provisions may be necessary.

Updated Guide Also Marks Shift In Approach to Structural Remedies

In a move that aligns the DOJ's structural remedies policy more closely with FTC policy, the DOJ now may require either an upfront buyer or a "crown jewel" provision where a divestiture involves less than an existing business. These provisions often require the addition of generally more valuable assets to the initial divestiture package in the event that those assets are unable to be sold to a viable purchaser within a certain period. Under the revised policy guide, a "crown jewel" provision may be required if there is any uncertainty over whether an acceptable buyer can be found for the divestiture package. With respect to fix-it-first remedies, the policy guide states that the DOJ will not endorse a fix-it-first remedy if the remedy necessitates monitoring or ensnares the buyer and seller in post-closing entanglements.

In an additional shift from 2004, the updated guide endorses the use of a monitoring trustee.

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Recognizing that a monitoring trustee with industry experience can reduce the burden on the DOJ and the parties while still ensuring that the parties adhere to the consent decree, the DOJ abandoned its previous view that it should rarely appoint monitoring trustees.

DOJ Willing to Seek Other Equitable Remedies Such as Disgorgement

The “panoply” of remedies available to the DOJ extends beyond conduct and structural fixes to equitable remedies such as disgorgement. The updated remedies policy guide cites the DOJ’s recent success in seeking and obtaining disgorgement in an action brought under Section 1 of the Sherman Act in [United States v. Keyspan](#). The guide also notes that under appropriate circumstances, the Division also may consider seeking disgorgement in consummated merger challenges either instead of or in addition to unwinding the transaction. This is especially true where other available remedies are limited such that the defendant otherwise would be able to retain its unlawful profits absent disgorgement. This stance puts the DOJ in further alignment with the FTC’s [policy statement](#) on monetary equitable remedies.

Remedy Enforcement Centralized in the Office of General Counsel

In a push to ensure the effective enforcement of remedies, the updated guide places principal responsibility for enforcing consent decrees in the DOJ’s Office of General Counsel. Previously, the staff attorney who reviewed the transaction had the tasks of both drafting the consent decree and overseeing the remedy. This major organizational change aligns the DOJ’s Office of General Counsel with the FTC’s Compliance shop, where evaluation and oversight of merger remedies are completed separate from the investigative staff.

By focusing enforcement efforts in the Office of General Counsel, the DOJ seeks to promote uniformity and develop best practices in

crafting effective remedies, and to conduct *ex post* reviews of remedy effectiveness. The updated merger policy guide also establishes as a best practice collaboration with regulatory agencies when mergers involve companies in regulated industries. Moreover, the policy guide highlights the importance of DOJ’s awareness of the approaches of international and state competition authorities in order to promote cohesive remedies, to the extent possible. All of this is more easily achieved by a centralized remedies section.

“Touchstone Principle” Remains Unchanged

The updated Policy Guide to Merger Remedies provides greater flexibility, giving the DOJ a “broad range” of remedies that may enable more deals to gain clearance while still preserving the merger’s efficiencies and protecting competition. Some observers have noted that the lack of bright-line rules may make it more difficult to predict which remedies the DOJ will deem appropriate for a specific merger, and that the DOJ may be tempted to overdesign remedies. Despite some fundamental shifts in the DOJ’s approach, its “touchstone principle” in evaluating remedies remains unchanged: successful merger remedies “must effectively preserve competition in the relevant market.”

by Theresa Stadheim *

FTC Round Table Discussion: Tools to Prevent Patent “Hold-Up” in SSOs

The FTC recently conducted [roundtable discussions](#) on tools to prevent patent “hold-up” in standard-setting organizations. These discussions were part of a larger FTC project to examine the legal and policy issues surrounding the potential for patent hold-up

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when patented technologies are included in collaborative standards.

Some Background

Standard-setting organizations (SSOs) are groups that meet to adopt uniform standards for a set of goods or services. They often are comprised, in part, of competitors within an industry. The purpose of many SSOs is to make interoperable competing products, such as those in the communications industry and the electronic media industry. The standard-setting process entails evaluating members' contributions on their technical merits. From this analysis, the SSO selects a set of technologies as the industry standard.

Some standards involve patented technologies that can be used only with permission of the patent owner. Special problems can arise with the use of patented technologies because the patent owner in theory could gain significant market power, giving it the ability to "hold up" the use and adoption of the standard. Hold-up can subvert the competitive process of choosing among technologies and undermine the integrity of standard-setting activities. Consumers can be harmed if manufacturers are able to pass on higher costs resulting from hold-up or if the possibility of hold-up prevents the development or adoption of industry standards.

The FTC is studying three ways to prevent hold-up: (1) improving patent disclosure rules of SSOs; (2) clarifying the commitments given by patent holders to license users of the standard on reasonable and non-discriminatory (RAND) terms; and (3) encouraging *ex ante* licensing negotiations by patent holders, before the standard is adopted. The following is a summary gleaned from the June 21, 2011 round table discussions directed to these issues.

First Panel: Patent Disclosure Rules

Bill Cohen from the FTC's Office of the General Counsel, moderating the first panel on patent

disclosure rules, posed the question of whether patent non-disclosure indeed is a serious problem in SSOs. Andrew Updegrave of Gesmer Updegrave, who has worked with SSOs for 30 years, stated that he has encountered the issue approximately once every two years. Naomi Voegtli of SAP noted that SAP makes a blanket statement up front that it will license any of its patents on RAND terms, implying that any patent non-disclosure on the part of SAP would have no effect on the SSO. Voegtli further noted that the overhead for SAP would be huge if it were required to disclose specific patent numbers or applications that might read on a standard, because SAP has at least one thousand such patents or applications.

Dr. Anne Layne-Farrar of Compass Lexecon followed Voegtli comments with a caution: difficulty of compliance with disclosure rules could result in over-disclosure, which could lead standards implementers to conclude that too many licenses might be required to implement the standard. Further, companies may not participate in an SSO if they have to dedicate too much time and effort to identify all possible disclosures.

Amy Marasco of Microsoft stated that the definition of patent non-disclosure is important. She pointed to the FTC's consent decree against [Dell](#), which suggested that the FTC favored a "disclose it or lose it" rule. Marasco was concerned that a company inadvertently could fail to disclose a patent and that such a hard-and-fast rule could chill standard-setting activity.

Timing of Patent Disclosure

Cohen next asked the panel about the optimal time during the standard-setting process at which a patent disclosure should occur. Jorge Contreras, a Senior Lecturer in Law and Acting Director of the Intellectual Property Program at Washington University of St. Louis School of Law who currently is a visiting professor at American University Washington College of Law, and John Kelly, President of the JEDEC

Solid State Technology Association, both favored disclosing as early as possible. According to Kelly, JEDEC requires disclosure 30 days prior to a vote on a standard concerning a given patent, to allow the standards committee to decide whether the patent in question is essential or whether a workaround or other alternative is possible.

Industry innovators cautioned that disclosure should not be required to be made too early. For instance, Larry Bassuk of Texas Instruments stated that disclosure by holders of large numbers of patents would be difficult, if not impossible, without knowing what the standard is, especially for companies with thousands of patents that would require constant searching by patent attorneys.

Bassuk noted, however, that many companies present a technology for consideration by the SSO immediately after the company files a patent application directed to that technology. Therefore, any proposal made to the SSO already has been filed in a patent application. Bassuk concluded by agreeing with Kelly's 30-day rule; disclosure at the 30-day point should be less onerous as, having presented them to the SSO, companies know which of their patents and patent applications are at issue.

Empirical research data from the European Telecommunications Standards Institute (ETSI) on timing of disclosure show that the majority of disclosures were made *ex post*. Layne-Farrar cautioned that the link, if any, between timing of disclosure and hold-up might not be strong. Other panel members noted that *ex post* disclosure is against ETSI policy as of 2005, but data shows that it does still occur.

Reading Upon a Standard as a Trigger for Patent Disclosure

When asked how the panelists define the extent to which a patent must read upon a standard before a requirement to disclose the patent is triggered, Kelly stated that he reads the [Rambus](#) case to mean that a patent must

be essential to the standard to trigger a disclosure requirement. Kelly believes the Federal Circuit considered any other triggering criterion to be too nebulous. Kelly noted that both the American National Standards Institute (ANSI) and JEDEC currently follow this standard, and likely other large SSOs do so as well. Michele Herman, of Davis Wright Tremaine, mentioned that even this criterion can be nebulous and does not reduce the amount of work required by patent attorneys. For instance, workarounds, or other commercially feasible alternatives that would make a party's patent non-essential, might be possible.

Gil Ohana of Cisco Systems mentioned that an SSO's incentive to write an air-tight disclosure policy might be lessened because the SSO is not the party that would be sued were an issue to arise. At the same time, however, a good disclosure policy is important to the members and may encourage participation in the SSO.

With regard to the last issue of the patent disclosure panel – how SSOs should deal with evolving claims in patent applications that read upon a potential standard – Sandy Block of IBM opined that the disclosure should be based upon the specification, and not upon the claims, because any claims could be added later as long as they had support in the specification.

Second Panel: Licensing Term Disclosure Rules

Contreras discussed his report on the experiences of two SSOs, [VITA](#) and [IEEE](#), which sought and obtained business review letters in which the DOJ stated that it would view SSO rules mandating disclosures of licensing terms as part of the standards process under a rule of reason standard. According to Contreras, the initial fear relating to the requirement that all patent holders disclose licensing terms was that such a disclosure requirement would discourage participation in an SSO. Contreras, however,

found only one case of a member leaving an SSO because of a requirement to disclose licensing terms.

Ohana noted that the Next Generation Mobile Networks SSO initially made a strong effort to attain predictability regarding licensing costs for 4G telecommunications, but that the group scaled back efforts because of antitrust concerns. Nevertheless, more certainty was associated with licensing terms for 4G telecommunications than that which existed for the 3G standard-setting projects.

Michael Hartogs of Qualcomm noted that a difficulty with mandatory disclosures is that they create a tendency to make a worst-case disclosure, such that the overall licensing terms seem quite steep. Ultimately, however, companies negotiate amongst themselves and the licensing terms become much more reasonable. Michael Lindsay of Dorsey & Whitney, representing IEEE, mentioned that parties, in fact, might low-ball their royalty rates to ensure that their patents are incorporated in the standard. In this same vein, Ohana noted that a company may disclose very low license rates because it stands to benefit more from a standard.

Marasco discussed the experiences of ETSI, which decided that requiring mandatory *ex ante* disclosure of licensing terms was not justified when balancing the costs and the benefits of that policy, including the additional work required to comply with the policy. Herman confirmed that *ex ante* discussion of licensing terms did not resolve any issues in an SSO in which her client was involved; the SSO prohibited *ex ante* discussion of license terms because such a discussion resulted in too many delays in the standard-setting process.

Ohana concluded the second panel's discussion by noting that many of the most pervasive standards today have royalty-free licensing terms. Therefore, he expressed the view that joint negotiation or discussion likely will not depress royalty rates or lead to less

innovation. All parties to a standard will benefit if the standard is widely adopted, and reduced royalty rates may result in a standard being adopted more widely. In his view, an antitrust rule of reason analysis of *ex ante* disclosure of licensing terms should take into account the idea that lower royalty rates probably do not negatively affect the level of innovation in an industry.

Third Panel: RAND Royalty Commitments

Suzanne Michel, then of the FTC but subsequently hired by Google, moderated the panel on RAND royalty commitments. She began by asking the panelists to define the role of a RAND commitment in promoting standardization. The general consensus among panelists was that a RAND commitment allows companies to feel secure in participating in an SSO, as companies know their engineers may talk with engineers of competing companies and know that they can use the standard on reasonable terms. The RAND commitment therefore guarantees the ability to access the standard's technology.

Enforceability of a RAND Commitment

In response to the question of how the RAND commitment is enforceable, Bassuk noted that, if contract law is the basis for enforcement of RAND, the question of what comprises consideration arises. Bassuk was uncertain whether the mere inclusion of a company's patent in the standard could be deemed consideration.

Several other panelists noted that reputational factors or peer pressure could be used to enforce the RAND commitment. Parties to an SSO are often major companies in a given industry, and none wants to be viewed as a company that fails to honor its commitments. The risk that a loose RAND commitment could "feed the patent trolls" persists, however.

Lindsay pointed out that the third-party beneficiary idea is important to enforcement of RAND. The party most likely to be interested

in RAND is an implementer of the standard. The implementer may not be a party to the RAND contract, if there is one. The SSO itself, however, may add a clause to the RAND contract to the effect that the SSO may seek to enforce the RAND contract.

The Meaning of “Reasonable” in the Context of a RAND Commitment

Sarah Guichard of Research in Motion mentioned that the determination of whether a licensing term is “reasonable” should be based on what the next alternative patent would have been. Several panelists noted that the meaning of RAND is weakened because litigation often is required to resolve any issues. Lindsay noted that the IEEE defined reasonable rates as “rates that a willing licensor and a willing licensee would agree to in an arm’s length transaction, in a competitive environment, prior to the adoption of the standard.” Layne-Farrar noted that the rates may depend on so many factors, such as whether a party wants an entire package or just one patent, that determination of the “reasonable rate” is nearly impossible.

RAND Commitments and Patent Infringement

With regard to how a RAND commitment affects a patent owner’s ability to seek an injunction in a patent infringement case, Herman cautioned against a complete prohibition against litigation, because a party may offer a patent on RAND terms after the patent has been disclosed, but the other party may refuse even RAND terms. Bassuk stated that litigation would be helpful if negotiations on RAND terms were to stall, in which case a judge could be asked to determine RAND terms.

The Effect of RAND Commitments in the Sale of a Patent

The consensus of the panelists was that the RAND commitment generally should “travel”

with the patent upon the sale of the patent. Ohana referred to the law-and-economics cheapest cost avoider concept. In the case of patent purchasers, a patent purchaser should have the burden of conducting due diligence to discover whether any of the patents were licensed under a RAND commitment.

As to the issue of what should happen to the RAND commitment if a patent holder does not seek royalties when the standard is formulated, but then sells the patent, the panelists mentioned the [N-Data](#) case. In that case, the patent holder asked for a nominal royalty, but other parties did not pay even that royalty, perhaps because of an unspoken agreement that the patent holder would not attempt to enforce the patent. Later, however, the patent was sold and the new owner demanded much higher royalties, raising the question of whether the parties who did not pay for the original license were entitled to buy a license at the original patent owner’s nominal royalty rate. Lindsay opined that the party that purchased the patent should not be able to increase the value of the patent by cleansing it of the RAND commitment.

Summary and Conclusion

Regarding patent disclosure policies in SSOs, the trend appears to be for parties to make a blanket statement that any patents will be licensed on RAND terms. For some SSOs, this could limit the importance of patent disclosure policies because parties are assured that any and all patents will be licensed on reasonable terms. With regard to *ex ante* disclosure of licensing terms, SSOs apparently take differing approaches to such policies, but the trend is to prohibit or discourage *ex ante* negotiations because negotiations slow the standard-setting process. Royalty-free licensing is becoming more common in some SSOs, further limiting the importance of or need for *ex ante* disclosure of licensing terms in those cases.

Competition Roundup: Other Significant FTC and DOJ Actions Since July 1

August:

- DOJ [sues to block](#) AT&T's proposed acquisition of T-Mobile, alleging that the transaction would reduce competition for mobile wireless telecommunications across the United States
- FTC issues [report](#) on how authorized generic drugs affect the pharmaceutical market
- DOJ obtains [guilty plea](#) and \$200,000 criminal fine from California aftermarket auto lights distributor in global conspiracy to fix prices
- DOJ announces [settlement](#) with divestiture of low-speed synchronous electric motors business in investigation of General Electric's acquisition of Converteam
- DOJ issues [business review letter](#) to Producers Guild of America, will not challenge proposed use of voluntary certification system for film producers
- DOJ obtains [guilty plea](#) from Iowa ready-mix concrete company for price-fixing and bid-rigging
- DOJ obtains [guilty plea](#) from three New Jersey investors for rigging bids at municipal tax lien auctions
- Eighth Circuit [affirms](#) decision in *FTC v. Lundbeck*, in which district court ruled that FTC failed to prove two drugs were in the same relevant product market
- DOJ announces [settlement](#) with divestiture in investigation of Regal Beloit's acquisition of A.O. Smith's electric motor business
- FTC's Bureau of Competition issues [advisory opinion letter](#) stating that the Council of Better Business Bureau's accountability program is unlikely to harm competition

- DOJ obtains [guilty plea](#) and \$200,000 criminal fine from Nautilus Hyosung for submitting altered documents in an HSR filing and in response to requests for documents in a merger investigation
- DOJ obtains [guilty plea](#) from real estate investor for bid-rigging and mail fraud at public foreclosure auctions
- DOJ obtains [guilty plea](#) from former owners of airline fuel supply and flight management services companies as part of investigation into fraud and anticompetitive conduct in the airline charter services industry
- FTC [modifies](#) Part 3 Rules of Practice to streamline the adjudicative process
- FTC staff submits [comment](#) regarding proposed New York Assembly Bill 5502-B; states that it would reduce competition and likely lead to higher prescription drug costs
- DOJ Attorney General Eric Holder [appoints](#) Sharis Arnold Pozen as Acting Assistant Attorney General of the Antitrust Division
- DOJ announces [settlement](#) with divestiture to resolve litigation against VeriFone's acquisition of Hypercom

July:

- FTC and DOJ sign antitrust [memorandum of understanding](#) with China's three antitrust agencies to promote communication and cooperation
- FTC announces [proposed settlement](#) in investigation of Perrigo's proposed acquisition of Paddock, requiring sale of six generic drugs to Watson Pharmaceuticals
- FTC chairman Jon Leibowitz issues [statement](#) regarding Senate Judiciary Committee mark-up of legislation to stop anticompetitive "Pay-for-Delay" drug patent settlements

- FTC [announces](#) settlement with divestiture in investigation of Cardinal Health's acquisition of nuclear pharmacies from Biotech
- DOJ [indicts](#) executive of Taiwan aftermarket auto lights manufacturer for participation in price-fixing conspiracy, as part of its continuing investigation into the aftermarket auto lights industry
- FTC administrative law judge [issues](#) ruling that North Carolina dental board illegally blocked non-dentists from providing teeth-whitening services
- DOJ obtains [guilty plea](#) from Michigan businessman in its ongoing probe into fraud and anticompetitive conduct in the E-Rate program
- Court orders [18-month prison sentence](#) for Washington business owner for participating in conspiracy to defraud the United States and making false claims on government contract
- DOJ obtains [guilty plea](#) from Iowa ready-mix concrete company for participation in a price-fixing conspiracy
- DOJ obtains [admission](#) from JPMorgan Chase of competitive conduct by former employees in the municipal bond investments market and agreement to pay \$228 million to federal and state agencies
- FTC takes steps to [enhance](#) its longstanding regulatory review program to promote public participation and reduce burden on business
- FTC and DOJ announce [changes](#) to the HSR Form, including new Item 4(d), which requires the submission of three new categories of documents
- DOJ's Assistant Attorney General Christine Varney announces her [resignation](#) from the Antitrust Division
- FTC [approves](#) Tops Markets' application to divest three supermarkets to Hometown Markets' approves modified final order governing divestiture of remaining four supermarkets

Consumer Protection Roundup: Other Significant FTC Actions Since July 1

August:

- FTC [shuts down](#) operators of deceptive government grant scheme
- FTC obtains [settlement](#) with marketers falsely claiming to be affiliated with federal assistance programs; operators in one case required to pay \$1.8 million
- FTC [settles](#) charges against debt relief operation that made bogus claims about eliminating consumers' debt
- FTC Commissioner Rosch [delivers](#) speech on information and privacy to Technology Policy Institute Aspen Forum
- Second Circuit issues [decision](#) in *FTC v. Bronson Partners*, holding that district court had power to award restitution and did not err in order disgorgement in deceptive advertising case involving weight loss products
- FTC obtains [\\$50,000 fine](#) from mobile apps developer to settle charges of violating children's privacy rule
- FTC [charges](#) marketers with tricking people who applied for payday loans

July:

- FTC releases [reports](#) on cigarette and smokeless tobacco advertising and promotion
- FTC [obtains](#) temporary restraining order and preliminary injunction against operators of fake “yellow pages” scam
- FTC [testifies](#) to Congress on consumer protection and the rent-to-own industry
- FTC obtains [\\$4.8 million judgment](#) against deceptive marketer that tricked payday loan applicants into buying pre-paid debit cards
- FTC [sues](#) two funeral homes for failing to provide price lists; undercover inspections in eight states find violations of FTC’s funeral rule
- FTC issues [final policy statement](#) on collecting debts of the deceased
- FTC returns nearly [\\$108 million](#) to 450,000 homeowners overcharged by Countrywide for loan servicing fees
- FTC issues [report](#): “Forty Years of Experience with the Fair Credit Reporting Act”
- FTC [requires](#) Internet marketer to stop selling cosmetic contact lenses without prescriptions
- FTC issues [new rule](#) strengthening consumer protections against deceptive mortgage advertisements
- FTC [obtains](#) temporary restraining order and preliminary injunction against operators of timeshare property resale scam
- FTC issues [statement](#) that it will not enforce provisions of its Mortgage Assistance Relief Services rule against real estate professionals assisting financially distressed consumers in obtaining short sales
- FTC [testifies](#) to Congress on protecting consumers’ privacy
- FTC [seeks](#) public comment on care labeling rule for clothing
- FTC, Federal Reserve Board issue [final changes](#) to risk-based pricing rule

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