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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

IDAHO CONSERVATION LEAGUE and **NORTHWEST ENVIRONMENTAL DEFENSE CENTER**, Plaintiffs, v. **ATLANTA GOLD CORPORATION,** Defendant.	**Case No. 1:11-cv-161-MHW** **PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT (Dkt. No. 21)**

INTRODUCTION

In its Response Brief, Defendant Atlanta Gold Corp. ("AGC") seeks to escape culpability for its Clean Water Act ("CWA") violations by blaming others for its failure to take the steps necessary to comply with its NPDES Permit and protect Idaho's waters, and by raising long-rejected theories challenging the standing of Plaintiffs Idaho Conservation League and Northwest Environmental Defense Center (collectively, "ICL" or "Plaintiffs").

AGC's argument that it reasonably relied upon the 2005 Consent Decree to violate its NPDES Permit is not credible, as that decree in no way allows AGC to violate its Permit, nor would reliance on such an idea be reasonable. Plaintiffs have demonstrated standing, and AGC's arguments to the contrary have been roundly rejected by the courts. AGC does not contest ICL's calculation of 1,385 violations; and since ICL's opening brief, another 62 violations have accrued. For these reasons, this Court should grant ICL's motion for partial summary judgment.

LEGAL BACKGROUND

Because some of AGC's arguments rely on a misconception that private parties can "agree upon" and set the effluent limitations in a NPDES permit, a brief review of how effluent limitations are set is required. The NPDES permitting scheme is the primary means by which discharges of pollutants are controlled under the CWA. NPDES permits must include conditions that will ensure compliance with the CWA, including technology-based effluent limitations, any more stringent limitations necessary to meet water quality standards, and monitoring and reporting requirements. *See* 33 U.S.C. §§ 1342, 1311, 1318.

Section 402 of the CWA requires each discharger to meet minimum technology-based treatment requirements, including all applicable requirements under section 301 of the CWA. *Id.* § 1342(a)(1). Section 301, in turn, requires all discharges to achieve, at a minimum, "best

practicable control technology." *Id*. § 1311(b)(1)(A). Further, discharges of toxic pollutants must be treated pursuant to the "best available technology," *id*. § 1311(b)(2)(A), and other discharges must comply with "best conventional technology." *Id*. § 1311(b)(2)(E). EPA has responsibility for identifying these technologies and converting them into numeric effluent limitations in NPDES permits. *Id*. § 1314(b).

In addition to implementing technology-based controls, each point source discharger must achieve "any more stringent limitation necessary to meet water quality standards, treatment standards, or schedules of compliance . . . ." *Id.* § 1311(b)(1)(C). Thus, once water quality standards are established for a water body, any NPDES permit authorizing discharges of pollutants into that water body must ensure that the applicable water quality standard will be met. *Id.*, 40 C.F.R. §§ 122.4(d), 122.4(i), 122.44(d).

This is the analysis that EPA undertook in developing the Idaho Groundwater Remediation Discharge General Permit (later extended to AGC), as EPA explained in a Fact Sheet accompanying that permit. ICL Ex. 38[1] at internal page nos. 24–27. EPA explained that it set the arsenic limit at 10 ug/L "[b]ased on the performance of control technology" in use at the time. *Id.* at 44–45; *see also* ICL Ex. 39 at 5–6 (EPA again explaining how it utilized technology to set the arsenic standard in response to a question by the Idaho Mining Association).[2] EPA explained that it set the iron limit at 1000 ug/L based upon a variety of factors including water quality standards for "freshwater chronic" and "human health." ICL Ex. 38 at 46.

[1] ICL exhibits 34+ are attached to the Second Declaration of Kristin F. Ruether (filed herewith).

[2] The Mining Association also sought confirmation that the general permit would apply to mines, which EPA provided. *Id*. at 4.

FACTUAL BACKGROUND

AGC also mischaracterizes the 2005 Consent Decree. Prior to 2005, AGC operated the 900 Adit with no NPDES permit, despite a clear requirement for a permit. ICL Exs. 7–9 (agency letters from 1988, 1992, and 1994 stating permit was needed). Even more problematic was the lack of effective treatment of the Adit discharge. ICL Ex. 37 (1988 letter from AGC noting that Adit discharge "currently flows unrestricted into Montezuma Creek"); AGC Statements of Facts at 4 (only one settlement pond present in 1993).

To address this problem, ICL filed a citizen suit in 2005 challenging AGC's discharge of pollutants from the 900 Level Adit to Montezuma Creek without a permit. ICL Ex. 12 at 1 (Consent Decree). The Consent Decree resolved that action by providing that AGC "shall submit a new or revised application" to EPA for a NPDES permit. *Id*. at ¶ 6. In turn, "ICL release[d] Atlanta Gold from all claims alleged in the Complaint" (i.e., discharging without a permit). *Id*. at ¶ 10. It also provided that AGC would construct a treatment system described in Exhibit 1 of the decree, and that "[p]rovided that Atlanta Gold implements the measures generally described in Exhibit 1 to this Decree, ICL shall be required to bring a new civil action to redress any violation of the Clean Water Act allegedly committed by Atlanta Gold after December 1, 2005." *Id*. at ¶ 5.

Contrary to AGC's implication, *see* AGC Resp. Br. at 11–12, the Consent Decree did not state what the effluent limitations in the future Permit would be. As noted, the ability to set effluent limitations in permits rests with EPA, not private parties.

Nor was the design of the Pilot Water Treatment Facility ("PWTF") set in stone by the decree, as AGC repeatedly implies. AGC Resp. Br. at 11–14. To the contrary, the decree explicitly provided for upgrades to the PWTF if required to meet water quality standards.

Changes to the design were permitted if they "ensure full compliance with applicable water quality standards." ICL Ex. 12 at ¶ 5. And the decree's Exhibit 1 provided that "[a]dditional technologies for treating the adit waters will be incorporated if required. These could include additional ponds, wetlands, filtrations, or other technologies."). *Id*. at 14.

Sure enough, changes were required, as the PWTF has proved inadequate to meet the effluent limitations in AGC's Permit. AGC itself recognizes this: following almost every DMR, it submits a "Noncompliance Report," suggesting ways in which it could improve the PWTF to achieve compliance, including constructing a permanent facility. *E.g.*, ICL Ex. 16 at 4, 7, 10, 13. In fact, AGC informed EPA in 2010 that it purchased a more sophisticated "coagulation-sedimentation treatment plant" to replace the PWTF. ICL Ex. 35. Thus, AGC's statement that "Plaintiffs' alternative is no PWTF" is absurd and contradicted by its own repeated statements. AGC Resp. Br. at 7. Like EPA, ICL does not care *how* AGC achieves compliance, or whether it calls its treatment facility "temporary," "permanent," or anything else. But under the Clean Water Act, noncompliance is not an option.

Finally, AGC mischaracterizes the nature of this action. It states that ICL brings this citizen suit against AGC "for constructing, operating and maintaining the very facility they agreed AGC should build." AGC Resp. Br. at 11. This is not accurate. ICL brings this suit against AGC for violating the terms of its NPDES Permit every month since August 2009 and discharging high levels of arsenic and iron into Montezuma Creek. Compl. at 16.

ARGUMENT

I. ICL'S CLAIMS ARE NOT BARRED BY ESTOPPEL OR WAIVER.

AGC's argument that it "reasonably relied" upon the Consent Decree or statements allegedly made during the negotiation of that decree for permission to violate its Permit is not credible. This argument is contradicted by the plain language of the decree itself. The alleged statements are unsupported and inaccurate, and any supposed reliance on such statements as permission to violate one's Permit would be inherently unreasonable. AGC's argument that the decree waived ICL's ability to enforce the Permit is also plainly inconsistent with the decree.

One component of estoppel is that "reliance must have been reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary's conduct was misleading." *Heckler v. Commt'y Health Svcs. of Crawford County, Inc*., 467 U.S. 51, 62 (1984) ("*Heckler*"). Here, AGC cannot even establish that any misleading statements were made; nor would reliance upon any assurance that it could violate the Clean Water Act be reasonable.

First, AGC's argument is contradicted by the plain language of the decree.[3] Again, the decree says nothing about what the effluent limits in any future permit would be (nor could it). And the decree vitiates AGC's argument that ICL promised it would never enforce a future permit—regardless of egregious violations—by stating: "*ICL shall be required to bring a new civil action* to redress any violation of the Clean Water Act allegedly committed by Atlanta Gold after December 1, 2005." ICL Ex. 12 at ¶ 5 (emphasis added). Thus, the decree specifically provided for future CWA enforcement. Likewise, AGC's argument that it supposedly believed

[3] AGC's estoppel defense also fails because co-plaintiff NEDC was not part of the prior litigation. AGC asserts that NEDC "certainly had actual or constructive knowledge of ICL's actions." AGC Resp. Br. at 14. But "knowledge" is not one of the six exceptions to the rule against non-party preclusion, and AGC fails to discuss, let alone establish, that any of them apply. *Taylor v. Sturgell*, 553 U.S. 880 (2008) (reviewing the six exceptions and rejecting doctrine of "virtual representation"). AGC did not rely upon any action by NEDC.

the PWTF would forever be adequate is plainly contradicted by the provisions providing that changes to the facility need to "ensure full compliance with *applicable* water quality standards," *id*., and that "[a]dditional technologies for treating the adit waters will be incorporated *if required*. These could include additional ponds, wetlands, filtrations, or other technologies." *Id*. at 14 (emphases added). These provisions show that both parties recognized that the applicable standards were likely to change over time, and that the PWTF would need to, as well. As noted, AGC itself recognizes this, as it has repeatedly acknowledged that modifications and replacement is necessary. AGC's argument fails due to this inconsistency with the decree. *See Conn. Fund for the Env't v. Upjohn*, 660 F. Supp. 1397, 1412 (D.Conn 1987) ("*Upjohn*") (reliance unreasonable in CWA case when defendant's claimed belief "flies in the face" of the language of the order at issue).

Second, AGC's allegation that ICL made misleading "representations" during the Consent Decree negotiations fails. The decree itself includes a clause that any statements made by the parties during its negotiations are not admissible in future actions. ICL Ex. 12 ¶ 3; Motion to Strike (filed herewith). Further, AGC's source for these representations is Mr. Simmons, AGC Resp. Br. at 12, who was *not even present* at the negotiations. *See* ICL Ex. 36. ICL Program Director Justin Hayes, who was present, explains that AGC's characterizations of ICL's statements are utterly false and that ICL never stated or implied what the arsenic standard would be, that the decree would satisfy all of ICL's concerns into the future, or that ICL would not enforce any future permit. 2nd Decl. of Justin Hayes (filed herewith).

Third, it would have been inherently unreasonable for AGC to believe that it had an agreement that allowed it to violate its NPDES permit. Compliance with NPDES permits is fundamental to the CWA. As the case cited by AGC in its estoppel argument put it, in rejecting

estoppel: "Non-compliance with an effluent limitation is a violation of the law. Defendant could not reasonably have relied on statements to the contrary." *Upjohn*, 660 F. Supp. at 1412 (internal citation omitted) (also noting "defendant was expected to know the effect of the limits contained in [its] permit and could not reasonably rely on the conduct of the state agents to the contrary.").[4] *See also Heckler*, 467 U.S. at 63 ("those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law.").

AGC's claim that it has relied on a belief that it would never need to upgrade its facility or come into compliance with its Permit, despite years of warnings to the contrary and opportunities to do so, is simply not credible or supported by the facts. *See id*. at 62 (party did not suffer a detrimental change in position when it was "merely induced to do something which could be corrected at a later time."). Finally, allowing AGC to continue to discharge high amounts of arsenic and iron into the water would be run strongly against the public interest. For these reasons, AGC's estoppel and waiver arguments fail.

II. PLAINTIFFS HAVE STANDING.

Plaintiffs' opening brief established their Article III standing to bring this CWA action, based on ICL's extensive involvement with the 900 Adit and the long-standing use of both Montezuma Creek and the Middle Fork Boise River by Plaintiffs' members, who are injured by AGC's discharges in violation of its Permit.[5] ICL Opening Br. at 11–13 (citing Declarations of Justin Hayes and Jon Robison). Plaintiffs demonstrate the three required elements of standing –

[4] This Court also rejected estoppel because the defendant failed to challenge its Permit. "Having failed to do so then, it is precluded from doing so now." *Id*. at 1412. The same is true here.

[5] In turn, the plaintiff groups ICL and NEDC have standing because their members have standing to sue in their own right, the interest at stake (water) is germane to the group's purposes, and neither the claim asserted nor the relief requested requires the participation of members. *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 181 (2000) (citing *Hunt v. Wash. State Apple Advertising Comm'n*, 43 U.S. 333, 343 (1977)).

injury, causation, and redressability. *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 181–88 (2000). AGC's arguments are based on theories that have been roundly rejected by the courts.

A. Plaintiffs' members have suffered an injury in fact.

Plaintiffs' standing declarations articulate the long-term direct and personal involvement of the members, and explain in detail the injuries they have suffered as a result of AGC's discharges of effluent at concentrations well above the levels permitted in its Permit. Mr. Hayes and Mr. Robison both explain that they regularly visit and recreate on or near both Montezuma Creek and the Middle Fork Boise River. Robison Decl. ¶¶ 4–12; Hayes Decl. ¶¶ 19–23. They both explain in detail how AGC's discharges injure them. Mr. Hayes explains that he "absolutely avoid[s] recreating or having any contact with Montezuma Creek, as [he] would be fearful for [his] health." *Id*. ¶ 25. He explains this is because the creek is visibly orange[6] and devoid of aquatic life, because he has reviewed AGC's DMRs and extensive scientific information about the impacts of arsenic exposure, and because "the permit effluent limits were set for a reason: to protect human and aquatic health." *Id*. ¶¶ 23–24. He also explains that he avoids recreating in the Middle Fork Boise River in the downstream vicinity of the confluence with Montezuma Creek, particularly eating fish, because of the pollution. *Id*. ¶ 26. And he worries "about the chronic impacts of the heavy metals on the fish and other aquatic life in the Middle Fork Boise," which he cares about and wants to recover. *Id*. ¶ 29. *See also* Robison Decl. ¶¶ 13–20 (similar concerns and avoidance).

Such personal testimony about direct impacts suffered by organization members who regularly use the areas affected by a discharge establishes injury in fact. *Laidlaw*, 528 U.S. at

[6] AGC argues that the red mud in the treatment ponds indicates the treatment is working. AGC Resp. Br. at 7. This ignores the relevant issue that the discharge flowing *out* of the treatment pond, as well as Montezuma Creek itself, are also orange. Iron is a pollutant and AGC consistently exceeds its Permit's iron effluent limit. *See* 33 U.S.C. 1362(6) (defining pollutant).

181–184. In fact, the declarations cited with approval in *Laidlaw* contained very similar statements about use and avoidance of the river in question. *E.g.*, *id.* at 183 (member "had canoed approximately 40 miles downstream of the Laidlaw facility and would like to canoe . . . closer to Laidlaw's discharge point, but did not do so because he was concerned that the water contained harmful pollutants.").

AGC argues that Plaintiffs cannot be injured because AGC believes that the Middle Fork Boise River was meeting its water quality standards in 2007. AGC Resp. Br. at 3. This argument first fails because it ignores that Plaintiffs testified to injuries based on their use of not only the Middle Fork Boise, but also of Montezuma Creek. Montezuma Creek is not meeting applicable water quality standards, and AGC's discharge regularly increases the concentration of arsenic in that creek manyfold, causing the above-described injuries to Plaintiffs' interests in Montezuma Creek. *E.g.*, ICL Ex. 16 at 14–15 (May 2011 DMR showing that the PWTF discharge increased arsenic levels in Montezuma Creek about seven-fold, from 26 ug/L upstream of the facility to 175 ug/L downstream).

Further, with respect to Plaintiffs' injuries based on their use of the Middle Fork Boise River, this same argument was rejected by the Supreme Court in *Laidlaw*, where the defendant argued that "there had been no demonstrated proof of harm to the environment" from its mercury discharge violations. 528 U.S. at 181 (internal quotation omitted). The Court held that "[t]he relevant showing for purposes of Article III standing, however, is not injury to the environment but injury to the plaintiff. To insist upon the former . . . is to raise the standing hurdle higher than the necessary showing for success on the merits in an action alleging noncompliance with an NPDES permit." *Id.* The Court further confirmed the "reasonableness of the fear" that led the affiants to "refrain[] from use of the [] River and surrounding areas" due to the defendant's

"continuous and pervasive illegal discharges of pollutants into a river." *Id*. at 184. Plaintiffs' members' fears relating to the Middle Fork Boise River are likewise reasonable here, in light of the fact that Montezuma Creek joins the Middle Fork only about a mile downstream of the PWTF, the toxic nature of the metal pollutants at issue, and AGC's pervasive illegal discharges.

B. Plaintiffs' injuries are traceable to the actions of AGC.

Plaintiffs' injuries are traceable to the actions of AGC. Again, AGC's own monitoring shows that AGC's discharges regularly increase the arsenic concentration of Montezuma Creek manyfold. *E.g*., Ex. 16 at 14–15 (May 2011 DMR). AGC argues that Plaintiffs' injuries are not attributable to AGC because there is another site that also leaks pollutants downstream of the PWTF on Montezuma Creek. AGC Resp. Br. at 8. The argument fails on the facts, as Plaintiffs' members visit Montezuma Creek *at* the PWTF site, which is upstream of the other facility. Robison Decl. ¶¶ 6–12. Even if Plaintiffs' only use was downstream from this other site, this argument has been thoroughly rejected by the courts.

"[T]he threshold requirement of 'traceability does not mean that plaintiffs must show to a scientific certainty that defendant's effluent . . . caused the precise harm suffered by the plaintiffs' in order to establish standing." *Natural Res. Def. Council v. Sw. Marine, Inc*., 236 F.3d 985, 995 (2000) ("*Sw. Marine*") (quoting *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp*., 204 F.3d 149, 161 (4th Cir. 2000)(en banc)). "[R]ather than pinpointing the origins of particular molecules, a plaintiff must merely show that a defendant discharges a pollutant that *causes or contributes* to the kinds of injuries alleged in the specific geographic area of concern." *Id.* (emphasis added). Thus, plaintiffs need not show that the defendant's actions are the *sole cause* of their injuries, but only "that there is a substantial likelihood that defendant's conduct caused plaintiffs' harm." *Pub. Interest Research Group of N.J., Inc. v. Powell Duffryn*

Terminals Inc., 913 F.2d 64, 72 (3rd Cir. 1990) ("*Powell Duffryn*") (internal quotation omitted). In turn,

> this likelihood may be established by showing that a defendant has 1) discharged some pollutant in concentrations greater than allowed by its permit 2) into a waterway in which the plaintiffs have an interest that is or may be adversely affected by the pollutant and that 3) this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs.

Idaho Rural Council v. Bosma, 143 F.Supp.2d 1169, 1176 (D.Id. 2001) (quoting *Powell Duffryn*, 913 F.2d at 72).

Here, AGC does not deny that it has discharged pollutants in concentrations greater than allowed by its Permit. ICL Exs. 16–18 (DMRs). Plaintiffs' members' declarations establish that they have interests in enjoying clean water, aquatic life, and water contact recreation in and around Montezuma Creek and the Middle Fork Boise River. Hayes Decl. ¶¶ 10–29, Robison Decls. ¶¶ 4–20. Heavy metal pollution directly causes and contributes to their described injuries. The declarations describe Plaintiffs' reduced enjoyment of Montezuma Creek that stems from the visible iron pollution and lack of aquatic life, and avoidance of Montezuma Creek and the portion of the Middle Fork Boise River near the confluence with the creek due to concerns over the heavy metal pollution. *Id*. These facts easily meet the test. *See Idaho Rural Council v. Bosma*, 143 F.Supp.2d at 1176 (test met where plaintiffs described injuries caused by challenged dumping, and accepting allegations as true for purpose of summary judgment); *Powell Duffryn*, 913 F.2d at 73 (causation met where affiants noticed oily or greasy sheen on water, and defendant had discharged oil and grease in excess of Permit limits). For this reason, AGC's argument that Plaintiffs' injuries are not traceable to AGC fails.[7]

[7] AGC's remaining causation arguments (regarding increased Adit flow and the PWTF's removal of some pollutants) appear to be further complaints about its Permit, and are irrelevant to standing.

C. A favorable decision from this Court would redress ICL's injuries.

Finally, Plaintiffs' injuries will be redressed by a favorable decision. Consistent with the CWA's purpose to restore the integrity of the nation's waters, "[w]here a plaintiff complains of harm to water quality because a defendant exceeded its permit limits, an injunction will redress that injury at least in part." *Powell Duffryn*, 913 F.2d at 73. "Plaintiffs need not show that the waterway will be returned to pristine condition in order to satisfy the minimal requirements of Article III." *Id*. Thus, "[a] plaintiff who seeks injunctive relief satisfies the requirements of redressability by alleging a continuing violation or the imminence of a future violation of an applicable statute or standard." *Sw. Marine*, 236 F.3d at 995. As discussed in ICL's Response Brief, ICL did allege continuing violations, and that allegation has subsequently been proven true by AGC's own DMRs. ICL Resp. Br. at 9–10. An injunction requiring AGC to comply with the terms of its Permit and the Clean Water Act would therefore redress ICL's injuries. An award of civil penalties would also redress the attested injuries because it would deter AGC from future violations of its Permit and the Clean Water Act. *Laidlaw*, 528 U.S. at 185–87. For these reasons, AGC's arguments on redressability are not relevant.

III. AGC HAS ACCRUED 62 ADDITIONAL VIOLATIONS.

AGC does not contest ICL's calculation of 1,385 violations. This calculation was based upon the available DMRs at the time, which addressed Permit compliance through June 2011. Since then, AGC has submitted two additional DMRs to EPA, dated August 12 and September 12, 2011, addressing Permit compliance in July and August 2011, respectively. ICL Exs. 27b, 34. These two new DMRs establish an additional 62 violations.

The July 2011 DMR admits four exceedances of the arsenic effluent limitation and four of the iron limitation. ICL Ex. 27b at 1–2. The August 2011 DMR admits five exceedances of

the arsenic effluent limitation and five of the iron limitation. ICL Ex. 34 at 1–2. This totals 18 violations for which the DMRs are "conclusive evidence." *Sierra Club v. Union Oil Co*., 813 F.2d 1480, 1492 (9th Cir. 1987).

Additionally, a preponderance of the evidence again indicates that AGC violated the arsenic and iron effluent limitations every day during July and August 2011. The DMRs again report the daily maximum and monthly average flow volume, and do not indicate that the facility ever ceased discharging, which AGC would be required to indicate. ICL Ex. 1 at ECF page no. 29 (Permit). The reported arsenic levels of 652 and 677 ug/L are over 65 times the allowed limits; the reported iron levels of 8,670 and 10,100 ug/L are over 8 times the allowed limits. ICL Ex. 27b at 1–2, ICL Ex. 34 at 1–2. AGC did not indicate that the monitoring results were unrepresentative. ICL Ex. 27b at 3, ICL Ex. 34 at 3. Therefore, AGC violated its permit twice per day (for arsenic and iron) for the period of July 1–August 31, 2011, a period of 62 days. Subtracting the 18 violations directly admitted in the DMRs, AGC is liable for an additional 44 violations. Adding these 62 new violations to the 1,385 previously addressed brings the total to 1,447 violations.[8]

CONCLUSION

For the foregoing reasons, ICL respectfully requests that the Court grant its motion for partial summary judgment, establishing AGC's liability for 1,447 violations of the CWA.

DATED this 12th day of October, 2011. Respectfully submitted,

/s/ Kristin F. Ruether
Kristin F. Ruether
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[8] Another DMR is likely to be submitted in mid-October. When ICL obtains this, it will submit it to the Court with any needed update of the number of violations.

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of October, 2011, I caused the foregoing REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT to be electronically filed with the Clerk of the Court using the CM/ECF system, which sent a Notice of Electronic Filing to the opposing counsel of record listed below:

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