

**RAE Realty Holdings, LLC v 643 E. 11th St. Realty,  
LLC**

2011 NY Slip Op 31935(U)

June 20, 2011

Sup Ct, NY County

Docket Number: 102264/07

Judge: Eileen Bransten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. EILEEN BRANSTEN

PART 3

Index Number : 102264/2007

RAE REALTY HOLDINGS

vs

643 EAST 11TH STREET REALTY

Sequence Number : 004

SUMMARY JUDGMENT

INDEX NO. 102264/07  
MOTION DATE 4/8/11  
MOTION SEQ. NO. 004  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 3 were read on this motion ~~to~~ for summary judgment to dismiss.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED  
1  
2  
3

**FILED**

JUN 27 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE \_\_\_\_\_ FOR THE FOLLOWING REASON(S):

Dated: 6-26-11



HON. EILEEN BRANSTEN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

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Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 6-20-11



HON. EILEEN BRANSTEN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: I.A.S. PART 3  
-----X

RAE REALTY HOLDINGS, LLC and EAST  
VILLAGE DENTAL ASSOCIATE, PLLC,

Plaintiffs,

-against-

Index No. 102264/07  
Motion Seq. No.: 004  
Motion Date: 4/8/11

643 EAST 11th STREET REALTY, LLC, VARDO  
CONSTRUCTION CORP., DREYGO DEVELOPMENT  
LLC., 645 EAST 11th STREET CORP.,  
FINISHING TOUCH, WORKING REALTY, LTD.,  
TODD V. HOLOUBEK, AMY RICHTER, KATHLEEN  
PERKINS and SUZANNE ROSS,

Defendants.

-----X  
643 EAST 11th STREET REALTY, LLC and  
VARDO CONSTRUCTION CORP.,

Third-Party Plaintiffs,

**FILED**

**JUN 27 2011**

-against-

VACHRIS ENGINEERING, P.C.,

NEW YORK  
COUNTY CLERK'S OFFICE

Third-Party Defendant.

-----X  
**HON. EILEEN BRANSTEN, J.:**

Third-party defendant Vachris Engineering, P.C. ("Vachris") moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint, or, in the alternative, for partial summary judgment dismissing the plaintiffs' claims for loss of business and profits.

Plaintiff Rae Realty Holdings, LLC ("Rae Realty") is the owner of the commercial condominium unit "1G" ("Unit 1G"), located on the ground floor of 645 East 11th Street,

New York, New York (the "645 Property"). Plaintiff East Village Dental Associate, PLLC ("East Village Dental") is the tenant of Unit 1G and operates it as a dental office.

Plaintiffs allege that the construction of a six and one-half story condominium/apartment building at 643 East 11th Street, New York, New York (the "643 Project"), which is on the adjacent, west side of the 645 Property, undermined the 645 Property and caused the walls and floors of Unit 1G to shift and crack. Plaintiffs allege that the damage to Unit 1G occurred in or about May/June 2006, when defendants were underpinning the foundation that supports the 645 Property. Plaintiffs also allege that repair of the sidewalk in front of their storefront, which was initiated by their own condominium board, further damaged their unit. Plaintiffs allege that the combination of the damage to Unit 1G by both the 643 Project and the sidewalk repair, as well as the subsequent erection of scaffolding to protect the façade of the 645 Property, interfered with and diminished East Village Dental's business.

Defendant 643 East 11th Street Realty, LLC ("643 Realty") is the owner of the property and building at 643 East 11th Street. Defendant Drcygo Development LLC ("Dreygo") is the developer of the 643 Project. Both 643 Realty and Dreygo are wholly owned by Alessandro D'Amelio. Defendant Vardo Construction Corp. ("Vardo") was the general contractor for the 643 Project. Defendant 645 East 11th Street Realty Corp. ("645 Realty") is the condominium association for the 645 Property. Defendants Todd V.

Holoubek, Amy Richter, Kathleen Perkins and Suzanne Ross (the “individual defendants”) are board members of 645 Realty who have been sued individually. Defendants Finishing Touch and Working Realty Ltd. are building management agencies that managed the 645 Property. Finishing Touch allegedly hired the contractor that repaired the sidewalk in front of East Village Dental.

Third-party defendant Vachris, the movant herein, is an engineering firm that was retained by 643 Realty on January 25, 2006, after a Stop Work Order was issued by the New York City Department of Buildings. Plaintiffs have not asserted any direct claims against Vachris.

In June or July 2005, 643 Realty purchased the vacant lot located at 643 East 11th Street for the purpose of building an apartment/condominium building. Vardo began excavation related to the 643 Project in or around December 2005. In January 2006, residents of the 645 Property called the New York City Department of Buildings (the “DOB”), complaining of “cracking” and “noises.”

On January 20, 2006, the DOB issued a “Stop Work Order” for the 643 Project. At that time, the DOB found hairline cracks in the west wall and cracks in the north wall of the 645 Property. Super Aff., Ex. A. The architect for the 643 Project, Anthony Morali, wrote, in a meeting report, that he visited the 643 Project site with the structural engineer at 9 AM on January 19, 2006, and ordered Vardo to immediately stop all work at the north-east lot

line, which was the corner of the 645 Property. *Id.* Morali wrote that the structural engineer requested temporary steel shoring to be applied immediately and to refill the existing site. When Morali returned at 3 PM on that same day, Vardo had not ceased excavation and cracks had appeared along the existing chimney and at the rear façade along the window openings of the 645 Property. *Id.* Morali recommended to 643 Realty that it hire Charles Vachris, an engineer and the owner of Vachris to supervise all excavation and shoring works. *Id.*

645 Realty hired their own engineer, Patrick Chen, to inspect the 645 Property. Chen's report, dated January 23, 2006, confirms the existence of cracks on the interior and exterior walls of the 645 Property. Fleming Aff., Ex. I.

On January 25, 2006, 643 Realty hired Vachris to inspect the site and determine what would be required to have the Stop Work Order lifted. Vachris designed an underpinning plan for the 643 Project and submitted the plan to the DOB. The DOB, in turn, lifted the Stop Work Order.

After the Stop Work Order was lifted, Vardo re-commenced work on the 643 Project. In or about the beginning of May 2006, Vardo commenced underpinning operations under the direction of Vachris. A Vachris-employed field inspector was present on a daily basis throughout the course of the underpinning of the building at 645 East 11th Street to perform inspections related to the underpinning. Flemming Aff., Ex. R. In addition, throughout the

course of the underpinning, Superior Consulting Corp. monitored the cracks that existed at the time that underpinning was commenced. Vachris contends that Superior noted only de minimis expansion of two cracks throughout the course of the entire project. Fleming Aff., Ex. T.

Plaintiffs allege that, over the Memorial Day weekend in 2006, 645 Realty hired an employee of Vardo to replace the sidewalk slabs in front of East Village Dental and the stoop holding up the storefront and building facade (the "Sidewalk Project"). Plaintiffs state that the Sidewalk Project was undertaken during the same time period that Vardo was underpinning and excavating the west wall of the 645 Property.

Plaintiffs further allege that, after Memorial Day, Dr. Jeffrey Krantz ("Krantz"), the owner of East Village Dental, noticed physical damage to his dental office, including: (1) shifting of the entire storefront and entry door; (2) shifting of all interior walls to such an extent that the doors no longer operated properly (3) damage to the foundation of the building that caused the building's floors to be significantly uneven; (4) damage to wall cabinets and base cabinets in the operatories as a result of the floors and walls being uneven; (5) damage to file cabinets in the reception area as a result of the floors and walls being uneven; (6) damage to all finished interior surfaces including the floors buckling, sheet rock walls cracking and bathroom tiles cracking and popping; (7) damage to the door thresholds and door frames; (8) damage to the ceiling as a result of the walls being uneven; and (9) damage to the plumbing systems.

Plaintiffs commenced this action in February, 2007. Plaintiffs assert a cause of action against 643 Realty, Vardo and Dreygo for negligence (first cause of action), against 645 Realty, Finishing Touch and Working Realty for negligence (second cause of action) and against the individual defendants for breach of fiduciary duty (third cause of action).

Thereafter, defendants 643 Realty and Vardo asserted cross claims against 645 Realty, Dreygo, Finishing Touch, Working Realty and the individual defendants for indemnification and/or contribution. 643 Realty and Vardo then commenced a third-party action against Vachris, setting forth claims for common-law indemnification (first cause of action), contractual indemnification (second cause of action), contribution (third cause of action) and breach of contract for failure to procure insurance (fourth cause of action). 645 Realty, Working Realty and the individual defendants then asserted a cross claim against Vachris for indemnification and/or contribution.

Vachris moves for summary judgment dismissing the third-party complaint and the cross claim against. Vachris contends that there is no proof in the record that Vachris committed any professional negligence that proximately caused damage to the plaintiffs' property. In this regard, Vachris contends that its involvement in the 643 Project arose after the damage already existed at 645 East 11th Street and that the third-party plaintiffs have not presented any evidence of professional negligence. Moreover, inasmuch as the plaintiffs seek relief for damages based on the theory of the loss of lateral support, Vachris asserts that

there is no cause of action against it since it was neither the owner of the neighboring land nor the contractor who performed the excavation.

Vachris moves to dismiss all claims for common-law indemnification on the ground that the third-party plaintiffs' liability, if any, would be based on their own wrongdoing in relation to their role in excavation operations and they are therefore not entitled to indemnification from Vachris. Vachris also moves to dismiss the third-party claim for contractual indemnification since there is no contract providing for indemnification.

#### Analysis

It is well settled that on a motion for summary judgment, it is not the court's role to pass upon issues of credibility. *Mirchel v. RMJ Sec. Corp.*, 205 A.D.2d 388, 390 (1st Dep't 1994). Rather, the court's function is issue finding, not issue determination. *Cruz v. American Export Lines*, 67 N.Y.2d 1, 13 (1986). All evidence must be viewed in the light most favorable to the opponent of the motion, giving it the benefit of every favorable inference. *Cortale v. Educational Testing Serv.*, 251 A.D.2d 528 (2d Dep't 1998).

#### Completed Work

Vachris contends that it became involved in the 643 Project only after damage had already been done to the 645 Property. However, Krantz's deposition testimony indicates that the damage to Unit 1G may have occurred over Memorial Day weekend, during the time period when Vachris was supervising the underpinning work on the 645 Property. This allegation is repeated in the deposition testimony of Alessandro D'Amelio:

Q Do you know if, subsequent to February 15, 2006, at any time after that, if there was additional damage done to 645 East 11th Street?

A To the building itself?

Q The building, anywhere on the building.

A Yes.

Q Yes, you're aware that there was additional damage?

A Yes, I'm aware that that building had additional damage.

Q Do you know when additional damage occurred to 645 East 11th Street?

A Memorial Day weekend, Sunday and Monday. They probably suffered damage on Tuesday.

Q Of what year?

A 2006, I believe.

Q What damage do you believe they sustained after that weekend?

A The front of their building shifted.

Q If you could describe for me how it shifted. I don't mean the mechanism, I mean your observations of what shifted

A What I think caused –

Q No, what you observed.

A What I observed was the front of their building, the step that went into the doctor's office popped in a downward motion.

Fleming Aff., Ex. N, March 12, 2009 Deposition transcript of Allesandro D'Amelio, at 56:12-57:16.

Vachris next contends that, at the time that this work was performed, no underpinning had commenced within 10 to 12 feet of the front of the Premises. Plaintiffs allege, however, that between May 26, 2006 and June 22, 2006, Vardo excavated and underpinned 20 locations on the west wall of 645 East 11th Street, under the supervision and direction of Vachris. According to plaintiffs, half of the underpinned locations were directly under East Village Dental and nine of those 10 locations were completed between May 26, 2006 and June 6, 2006.

#### Professional Negligence

In response to Vachris's argument that the third-party plaintiffs have not demonstrated any professional negligence, 643 Realty and Vardo submit the affidavit of Shawn Z. Rothstein, P.E.. Mr. Rothstein, an engineer, states that Vachris did not appropriately follow good engineering practice or certain provisions of the New York City Administrative Code.

Rothstein states that, according to the New York City Building Code, the soil under the underpinning piers for the 645 Property was required to be inspected by an architect or engineer after excavation and immediately prior to construction:

§ 27-723. Subgrade for footings, foundation piers, and foundation walls.

The soil material directly underlying footings, foundation piers, and foundation walls *shall be inspected by an architect or engineer after excavation and immediately prior to construction of the footings*. If such inspection indicates that the soil conditions do not conform to those assumed for purposes of design and described on the plans, or are unsatisfactory due to disturbance, then additional excavation, reduction in allowable bearing pressure, or other remedial measures shall be adopted, as required. A copy of a report or reports of such inspection or inspections describing the conditions found and any necessary modification of the design, and bearing the signature of the architect or engineer making the inspections, shall be filed with the commissioner . . . .

Administrative Code of the City of N.Y., Title 27, Chapter 1, Subchapter 11, Article 13  
(emphasis added).

Rothstein states that the Vachris Field Reports do not indicate that Vachris had an engineer inspect the subgrades of the subject building for all or most of the underpinning piers that were installed. According to Rothstein, Vachris's field representative at the site, Anthony Beggato, was a carpenter and a licensed welder but not an engineer or architect.

Rothstein further states that, in violation of the "As-Built Drawings" and recognized good engineering practice, load transfer operations were not performed on numerous piers. In addition, in violation of the "As-built Drawings" and good engineering practice, an underpinning pier did not return around the corner at 11th Street for the underpinning of the 645 Property.

In response to this affidavit, Vachris asserts that Rothstein has misread the Administrative Code and that the relevant section is 27-715, which provides as follows:

§ 27-715. General requirements.

Where support of adjacent structures or properties is required, such support may be provided by underpinning, sheeting, and bracing, or by other means acceptable to the commissioner. Except as specifically permitted otherwise, underpinning piers, walls, piles, and footings shall be designed and installed in accordance with the applicable provisions of this subchapter relating to piers, walls, piles, and footings used in new construction *and shall be inspected as provided in section 27-724 of article thirteen of this subchapter*

Administrative Code of the City of N.Y., Title 27, Chapter 1, Subchapter 11, Article 11  
(emphasis added).

Section 27-724, in turn, provides that:

§ 27-724. Construction required for or affecting the support of adjacent properties or buildings.

Except in cases where a proposed excavation will extend less than ten feet below the legally established grade, all underpinning operations and the construction and excavation of temporary or permanent cofferdams, caissons, braced excavated surfaces, or other constructions or excavations required for or affecting the support of adjacent properties or buildings shall be subject to controlled inspection. The details of underpinning, cofferdams, caissons, bracing, or other constructions required for the support of adjacent properties or buildings shall be shown on the plans or prepared in the form of shop or detail drawings and shall be approved by the architect or engineer who prepared the plans.

Administrative Code of the City of N.Y., Title 27, Chapter 1, Subchapter 11, Article 13.

According to Vachris, these sections of the Building Code only require that the underpinning operations are subject to controlled inspection. Vachris contends that it complied with these sections. Vachris points to the testimony of its principal, Charles Vachris in support. Mr. Vachris testified that, consistent with the Building Code, the sub-grade controlled inspection is separate and different from underpinning inspections, and any observations of the sub-grade at the location of underpinning piers would be encompassed within underpinning inspections. Cambareri Aff., Ex. A, at 29-30. Mr. Vachris does not, however, indicate that the observations of the sub-grade at the location of the underpinning piers was performed by himself or another engineer or architect.

Vachris also submits in support of its argument the affidavit of its expert, Robert Alperstien. Mr. Alperstien, an engineer, avers that “the Building Code does not require that the soil under the 645 East 11th Street building for the underpinning piers be inspected by an engineer or architect immediately prior to construction.” Cambareri Aff., Ex. A, ¶ 3.

Notwithstanding Mr. Alperstien’s opinion, section 27-723 of the Building Code does, in fact, provide that “the soil material directly underlying footings, foundation piers, and foundation walls shall be inspected by an architect or engineer after excavation and immediately prior to construction of the footings.” Mr. Alperstien’s interpretation to the contrary thus may be seen as contradicted by the Building Code. Accordingly, the third-party plaintiffs and cross claimants have sufficiently raised an issue of fact as to whether Vachris was negligent.

### Professional Negligence

Next, Vachris asserts that the third-party plaintiffs have not presented evidence that Vachris's professional negligence caused the damage to the 645 Property. However, the third-party plaintiffs have presented the affidavit of Stephanie L. Walkup, an engineer, in support of their argument. Mr. Walkup specifically states that "the damages sustained to [the 645 Property] . . . were caused by a failure to properly excavate and underpin the structure during the construction activities undertaken by the defendants at the adjacent lot at 643 East 11th Street" (Evans Aff., Ex. I, ¶ 3). Third-party plaintiffs therefore raise a sufficient issue of material fact on this issue to avoid summary judgment dismissing the claim.

Vachris further contends that no cause of action exists against it for loss of lateral support, as Vachris was neither the owner of the neighboring land nor the owner who performed the excavation. However, Vachris misstates the law. "Liability for injury to lateral support of land may be 'enforced against an owner, his agent or licensee, or any other person by whom the injury was caused.'" *Kimberly-Clark Corp. v Power Auth. of State of N. Y.*, 35 A.D.2d 330, 337 (4th Dep't 1970), quoting *Gordon v. Automobile Club of Am.*, 101 Misc. 724, 727 (Sup. Ct., NY County 1916), *aff'd* 180 App. Div. 927 (1st Dep't 1917). Vachris's cited cases stand only for the proposition that an adjoining landowner must prove that its damages proximately resulted from the excavator's failure to take proper precautions, and are thus non-dispositive. See *Cohen v. Lesbian & Gay Community Servs. Ctr., Inc.*, 20 A.D.3d 309 (1st Dep't 2005); *Coronet Props. Co. v. L/M Second Ave.*, 166 A.D.2d 242 (1st Dep't 1990).

### Third-Party and Cross Claims

Vachris further moves to dismiss 643 Realty's and Vardo's third-party claims against Vachris for contribution and common-law and contractual indemnification, as well 645 Realty's, Working Realty's and the individual defendants's cross claim against Vachris for indemnification and/or contribution.

#### *Indemnification*

Common-law indemnification requires two elements: first, that the proposed indemnitor's negligence contributed to the causation of the accident; and second, that the party seeking indemnity was free from negligence. *Martins v. Little 40 Worth Assoc., Inc.*, 72 A.D.3d 483, 484 (1st Dep't 2010), citing *Correia v. Professional Data Mgt.*, 259 A.D.2d 60, 65 (1st Dep't 1999).

645 Realty and Vardo contend that they were working under Vachris's direct supervision and were not negligent in the performance of their duties. In addition, this court determined above that there are issues of fact as to whether Vachris was negligent. 645 Realty and Vardo have raised sufficient issues of fact such that summary judgment on this cause of action would be premature. Vachris's reliance on *Trump Vil. Section 3 v. New York State Hous. Fin. Agency*, 307 A.D.2d 891 (1st Dep't 2003) is misplaced. In *Trump*, the court dismissed the cross claims for indemnification because it found that the movant, who had provided financing for a construction project, had no obligation other than financing and

could not be held liable in negligence. The court further determined that the codefendants had not established that the plaintiff's claims against them sought to hold them vicariously liable for the movant's breach of duty. Here, no determination as to Vachris's negligence, or lack of negligence has been made, nor has the court determined that the third-party plaintiffs and/or cross claimants cannot establish that they are being held vicariously liable for Vachris's negligence.

#### *Contractual Indemnification*

In order to for 643 Realty and Vardo to recover on their claim for contractual indemnification, the contract between the parties must clearly express or imply from the language and purpose of the agreement, as well as the surrounding facts and circumstances, that Vachris intended to indemnify these third-party plaintiffs. *See Martins v. Little 40 Worth Assoc., Inc.*, 72 A.D.3d 483, *supra*. 643 Realty and Vardo have acknowledged that Vachris had no written contract containing a contractual indemnity provision. *Evans Aff.*, ¶ 64. The third-party plaintiffs' second cause of action for contractual indemnification is therefore dismissed.

#### *Contribution*

Contribution is the proportionate sharing of loss by joint tortfeasors. In contrast to the claim for contractual indemnification, a claim for contribution does not require an agreement between wrongdoers, the basis of Vachris's argument for summary judgment. *See Rosado*

*v. Proctor & Schwartz*, 66 N.Y.2d 21, 24 (1985). Vachris has not shown that no material issue of genuine fact exists with regard to this claim. Thus, Vachris's motion for summary judgment dismissing this claim must be denied.

*Lost Business and Profits*

Finally, Vachris moves for summary judgment dismissing plaintiffs' claims for loss of business and profits.

Plaintiffs allege that, as a result of the damage done to Unit 1G, East Village Dental suffered a substantial drop-off in new and existing patients and a drop-off in the quality of its patients. Krantz Aff., ¶ 22. In support of this claim, Krantz submits his tax returns for the years 2004 through 2007. During that period of time, his gross receipts went from a high in 2005 of \$289,185, to a low of \$283,105 in 2007— a difference of \$6,080, a 2.1% decline in business.

Plaintiffs further allege that Rae Realty suffered financial loss by losing an additional tenant, Dr. David Richter, who maintained a podiatry practice in the commercial unit prior to the damage. An October 11, 2007 letter from Dr. Richter, annexed to plaintiffs' papers in opposition, states that he would terminate his lease, effective November 15, 2007. Dr. Richter also states, in part, that:

The final straw is that the combination of the garbage bin, cracked facade, cracked concrete, undermined storefront [*sic*] have made the front of the building look like a beat up tenement and it has attracted vagrants who are staying in front of the

building, sleeping, urinating, and generally chasing away my clientele. I cannot continue in this manner

Super Aff., Ex. I.

Similarly, Krantz testified during his deposition that the decline in his business was due to garbage bins being placed in front of the building in 2004, two years prior to the commencement of construction:

Q. When did you last have an associate with respect to your practice under East Village Dental?

A. I had to let him go in 2004—about a month after the garbage bins were placed, that's when we slowed down

....

Flemming Aff., Ex. K, December 10, 2008 Deposition Transcript of Jeffrey Kantz, 17:12-17.

Plaintiffs' allegations indicate that their loss of business may have been caused by either the condominium association in placing the garbage bins in front of the dental office, or by erecting the scaffolding, or by the defendants' involved in the 634 Project damaging their condominium unit. Plaintiff's allegations are sufficient to raise issues of fact, and at this stage of the pleadings, to avoid a motion for summary judgment to dismiss the complaint.

*Rae Realty Holdings, LLC et ano v.  
643 East 11th Street Realty, LLC et al.*

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Accordingly, based upon the foregoing, it is

ORDERED that the motion by third-party defendant Vachris Engineering, P.C. for summary judgment dismissing the third-party complaint and all cross claims against it is granted only to the extent that the third-party claim for contractual indemnification is dismissed; and it is further

ORDERED that the remainder of the action is severed and shall continue.

This constitutes the decision and order of the court.

Dated: New York, New York  
June 20, 2010

ENTER

  
Hon. Eileen Bransten, J.S.C.

**FILED**

**JUN 27 2011**

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