NOVO NORDISK PHARM. INDUS. v. CAROLINA POWER & LIGHT CO.

05 CVS 00154

SUPERIOR COURT OF NORTH CAROLINA, JOHNSTON COUNTY

March 30, 2007

Reporter
2007 NCBC Motions LEXIS 156 *

NOVO NORDISK PHARMACEUTICAL INDUSTRIES, INC., Plaintiff, vs. CAROLINA POWER & LIGHT COMPANY D/B/A PROGRESS ENERGY CAROLINAS, INC. and GREGORY POOLE EQUIPMENT COMPANY, Defendants; and CAROLINA POWER & LIGHT COMPANY D/B/A PROGRESS ENERGY CAROLINAS, INC., Third-Party Plaintiff, vs. AAA ELECTRICAL COMPANY, INC. and SQUARE D COMPANY, Third-Party Defendants.

Type: Motion

Counsel

[*1] SCOTT A. SCURFIELD, Bar No: 29722, Attorney for Defendant Gregory Poole, Equipment Company.

OF COUNSEL: MCANGUS, GOUDELOCK & COURIE, P.L.L.C., Raleigh, North Carolina.

Title

DEFENDANT GREGORY POOLE EQUIPMENT COMPANY'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Text

STATEMENT OF THE CASE

This case arises from a series of three electrical power interruptions occurring at the insulin manufacturing plant of Plaintiff Novo Nordisk Pharmaceutical Industries, Inc. ("Novo Nordisk"), one each on January 16, March 30, and July 23 of 2002. Novo Nordisk claims that the power interruptions resulted in significant financial losses in the form of product (insulin) rendered unusable because it was in the production cycle when power was lost, as well as lost profits occasioned by the "downtime" required to re-sanitize the production area and re-start the production process following the power interruptions. Novo Nordisk now seeks to recover its alleged losses from Carolina Power and Light Company d/b/a Progress Energy Carolinas, Inc. ("CP&L") and Gregory Poole Equipment Company ("GPEC"). Only Counts V and VI of the Complaint purported to state claims against GPEC, and **[*2]** Count VI has been withdrawn via Voluntary Dismissal. Therefore the only remaining claim against GPEC is a negligence claim as set forth in Count V of the Complaint.

The parties have engaged in limited discovery. The case was designated an "exceptional case" pursuant to Rule 2.1 (by consent and request of the parties) on January 19, 2007. It is presently before the Court on GPEC's Motion for Summary Judgment and similar cross-motions by Novo Nordisk and CP&L intended to resolve certain legal issues before engaging in further discovery. This Memorandum is in support of GPEC's Motion for Summary Judgment on those legal issues.

FACTS

GPEC incorporates the "Statement of Relevant Facts" as set forth in CP&L's Memorandum, and adds the following:

I. The Role of Gregory Poole Equipment Company

GPEC was a subcontractor to CP&L with respect to the three contracts between CP&L and Novo Nordisk. GPEC supplied CP&L with power generating and conditioning equipment and some of the services necessary to install and commission them (see, e.g., Exhibit A - Invoice and Purchase Order, pp. CP&L00784 - 788). *There was no contractual relationship between Novo Nordisk and GPEC at* **[*3]** *any time relevant to this lawsuit.* More specifically:

A. The "Temporary Solution" (as that term is defined in CP&L's Memorandum)

GPEC leased to CP&L two Caterpillar XQ2000 rental generators under the terms set forth in Exhibit B. The generators were used by CP&L for the on-site generation of electricity then sold by CP&L to their customer, Novo Nordisk, as part of the Temporary Solution. There was no contractual relationship between GPEC and Novo Nordisk with respect to the temporary generators.

B. The "Permanent Solution" (as that term is defined in CP&L's Memorandum)

GPEC sold CP&L the other equipment used by CP&L to implement the Permanent Solution. As further set forth in CP&L's Memorandum, the permanent back-up generators and switchgear portion of the Permanent Solution were governed by the Permanent PPS Contract. The uninterruptible power supply ("UPS") portion of the Permanent Solution was governed by a Managed Services Contract. Again, there was no contractual relationship between GPEC and Novo Nordisk with respect to any of the equipment incorporated into the Permanent Solution.

II. The Power Outages

The January 16 Power Outage **[*4]** was caused by a broken voltage sense lead wire in one of the Caterpillar XQ2000 portable (temporary) generators (the "Backup Generators" in the Complaint). They had been leased to CP&L by GPEC (Exhibit B). The root cause of the outage was a ring terminal (wiring) connection that came loose (broke), ultimately resulting in loss of power to the Novo Nordisk plant. (GPEC's Answers to Plaintiff's First Set of Interrogatories, Interrogatory #3 (Exhibit C); CP&L's Supplemental Responses to Plaintiff's First Set of Interrogatories, Interrogatory #3 (Exhibit D)). The provision of power to Novo Nordisk via the Backup Generators was governed by the Temporary PPS Contract.

The March 30, 2002 Power Outage was caused by an installation error by AAA Electrical, a subcontractor to CP&L for the installation of power conductors. More specifically, the busbar connections in the I/O cabinet of UPS #2 failed, causing loss of power. (Exhibits C and D). The installation and use of the UPS equipment by CP&L at the Facility was governed by the Managed Services Contract (Exhibit G).

The July 23, 2002 outage occurred when the main breaker in the Switchgear opened and the permanent backup generators failed **[*5]** to assume the load. A logic flaw in the PLC programming for the switchgear failed to call for the generators to pick up the load. (Exhibits C and D). The installation and use of the Switchgear by CP&L as part of the power backup system to the Facility was governed by the Permanent PPS Contract.

ARGUMENT

CP&L is submitting a Memorandum in support of its own separate Motion for Summary Judgment, so the undersigned will attempt to minimize repetition by simply incorporating by reference CP&L's Memorandum with respect to the general validity and enforceability of the limiting language in all three contracts. The separate specific issue for the Court's determination *with respect to GPEC* is whether the limiting language in the Novo Nordisk/CP&L contracts protects GPEC against the direct claims of Novo Nordisk even though GPEC was not a party to those contracts.

I. GPEC IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S CLAIMS ARISING FROM THE JANUARY 16, 2002 AND JULY 23, 2002 EVENTS BECAUSE THE PPS CONTRACTS WERE APPROVED BY THE NORTH CAROLINA UTILITIES COMMISSION IN A FORM CONTAINING LIMITATION OF LIABILITY PROVISIONS THAT EXPRESSLY APPLY TO SUBCONTRACTORS.

As confirmed **[*6]** in the September 10, 2001 letter from W.G. (Bill) Green of CP&L to John Pratt of Novo Nordisk (Exhibit E), the temporary installation of the two 2MW generators was made pursuant to a Premier Power Services Contract, specifically, the Temporary PPS Contract. That Contract is, by its own terms, an addendum to the original Service Agreement (Exhibit F) by which Novo Nordisk contracted with CP&L for electricity. Paragraph 9 of the Service Agreement (Exhibit F) provides:

"9. Customer shall be responsible for the installing and maintaining devices adequate to protect his equipment against irregularities and interruptions on Company's system, including but not limited to voltage fluctuations and single-phasing."

Furthermore, Paragraph 13 of the Service Agreement (Exhibit F) provides:

> "13. CONTINUANCE OF SERVICE AND LIABILITY THEREFOR
>
> "Company does not guarantee continuous service but shall use reasonable diligence at all times to provide an uninterrupted supply of electricity and having used reasonable diligence shall not be liable to Customer for damage, for failure in, or for interruptions or suspensions of, the same...."

Thus, dating back to the time when Novo **[*7]** Nordisk first bought electricity from CP&L, Novo Nordisk was on notice that CP&L was not guaranteeing it an uninterruptible supply of power, and that it had the responsibility to take whatever actions were necessary to guarantee that supply of power should the service from CP&L fail or be deficient.

The PPS Contracts actually contain three sub-parts:

> 1) the Premier Power Services Contract;
>
> 2) the Premier Power Customer Disclosure, and
>
> 3) the Premier Power Service (Experimental) Rider PPS-3.

The terms of the Premier Power Service (Experimental) Rider PPS-3 were approved by the North Carolina Utilities Commission as chronicled in CP&L's Memorandum.

On Sheet 3 of 4, the Premier Power Service (Experimental) Rider PPS-3 contains a paragraph entitled "Limitation of Liability" which provides:

> "Neither Company (CP&L) nor its employees, ***its subcontractors*** **[emphasis added],** or suppliers shall be liable for any direct, indirect, general, special, incidental, exemplary, or consequential loss or damage of any nature arising out of their performance or nonperformance hereunder. This provision shall apply whether such liability arises in contract, tort **[*8]** (including negligence), strict liability, or otherwise."

Thus, to summarize with respect to the PPS Contracts:

> . Novo Nordisk was advised from the inception of its relationship with CP&L as early as 1992 that CP&L did not guarantee an uninterrupted supply of electricity;
>
> . Novo Nordisk again in 2001 agreed to waive any right to damages arising out of power outages associated with the equipment covered by the PPS Contracts; and
>
> . The liability-limiting language in the PPS Contracts expressly and specifically extends to CP&L's subcontractors, of which GPEC was one.

GPEC redirects the Court's attention to the section of CP&L's Memorandum regarding the "filed rate doctrine." Clearly the liability-limiting provisions of the PPS Contracts are valid and enforceable as between Novo Nordisk and CP&L because they were, in effect, adopted by the Utilities Commission as law. That adoption included the express contract term excepting subcontractors like GPEC from responsibility for damages arising out of the performance of the PPS Contracts. Unless this Court recognizes what is in essence a collateral attack on a Utilities Commission proceeding, the inescapable conclusion **[*9]** is that GPEC must receive the same treatment as CP&L under the plain wording of the PPS Contracts and be granted summary judgment on that same basis.

II. GPEC IS ENTITLED TO SUMMARY JUDGMENT PRECLUDING OR LIMITING PLAINTIFF'S CLAIMS ARISING OUT OF THE MARCH 30, 2002 OUTAGE BECAUSE THE LIMITING LANGUAGE IN THE MANAGED SERVICES CONTRACT IS VALID, ENFORCEABLE, AND APPLICABLE TO GPEC AS CP&L'S SUBCONTRACTOR.

As further confirmed in CP&L's September 10, 2001 letter (Exhibit E) and in CP&L's Memorandum, the installation of the Caterpillar Rotary UPS backup system was covered by a Managed Services Contract (Exhibit G) that includes a warranty disclaimer in Paragraph 14 (p. 7) providing:

> "CP&L HEREBY EXPRESSLY DISCLAIMS ANY AND ALL WARRANTIES OF MERCHANTABILITY AND FITNESS FOR PARTICULAR PURPOSE, AND ANY WARRANTIES ARISING FROM COURSE OF DEALING OR USAGE OF TRADE. CUSTOMER UNDERSTANDS AND AGREES THAT ITS EXCLUSIVE REMEDIES FOR ANY FAILURE OF THE ASSETS [WHETHER OR NOT DUE TO OR RESULTING FROM CP&L'S NEGLIGENCE, WILLFUL MISCONDUCT, OR BREACH OF ITS

> OBLIGATIONS HEREUNDER] SHALL BE: A) THE PROMPT AND DILIGENT EFFORTS OF CP&L TO RESTORE THE EQUIPMENT TO OPERATION; AND B) **[*10]** MONETARY DAMAGES NOT TO EXCEED THE LIMITATIONS SET FORTH IN SECTION 18. ANY COMPENSATION OR RECOURSE OFFERED BY OR AVAILABLE AGAINST THE EQUIPMENT MANUFACTURER IN THE EVENT OF EQUIPMENT FAILURE SHALL BE PAID OR ASSIGNED DIRECTLY TO CUSTOMER."

Paragraph 18 (Exhibit G, p. 8), in turn, states:

> "Limitations of Liability. CP&L shall not be liable to CUSTOMER for any loss of use, loss of production, or any indirect, special, incidental, exemplary, punitive, multiple or consequential loss or damage of any nature arising out of the negligence or performance or nonperformance by CP&L. In no event shall CP&L's liability arising out of or in connection with the performance or nonperformance of the Managed Services exceed the total monthly payments made by CUSTOMER. The provisions of this Section 18 shall apply whether such liability arises in contract, tort (including negligence), strict liability, or otherwise."

And finally, Paragraph 25 (Exhibit G, pp. 12 - 13) states:

> "Subcontracting and Assignment. Neither party shall assign this Contract to any other party without the prior written consent of the other Party. However, CP&L shall be permitted to assign **[*11]** this Contract to any parent, subsidiary or affiliate without the consent of CUSTOMER. **It is understood and agreed that, while the obligations of CP&L under this Contract may be primarily performed by subcontractors** [emphasis added], CP&L remains responsible for the activities of its assignees and subcontractors to the extent such activities are directly related to the performance of CP&L's obligations under the Contract."

Thus, in the Managed Services Contract Novo Nordisk *expressly* waived any right to recover *all* types of damages for CP&L's failure to perform under that contract other than a refund of the monies paid for electrical service, as well as *any* right to seek *any* remedy other than "direct" damages. Furthermore, Novo Nordisk expressly acknowledged that CP&L's obligations were to be performed by subcontractors, of which GPEC became one.

GPEC again (as it did in support of its Rule 12 Motion) directs the Court's attention to *Moore v. Coachmen Industries, Inc., 499 S.E. 2d 772, 129 N.C. App. 389 (1998)*. In *Moore,* the plaintiffs were the owners of a recreational vehicle (RV) manufactured by two defendants, Coachman Industries, **[*12]** Inc. (Coachman) and Sportscoach Corporation of America ("Sportscoach"). A third defendant, MagneTek, Inc. ("MagneTek") manufactured a power converter that was a component part of the RV. While the plaintiffs were operating the RV, they turned on the generator and the fan for the RV's air conditioner. Soon thereafter a fire was detected inside the RV. The plaintiffs were able to park the RV along the road and exit the vehicle, but the entire RV and other personal property inside it were lost in the fire. It was later determined that the fire was caused by a defect in the MagneTek converter.

The RV owner-plaintiffs sued both the manufacturers and MagneTek for negligence and breach of express and implied warranties. MagneTek moved for summary judgment as to the negligence claim, relying on the economic loss rule and the written limitations in the warranties covering the RV. MagneTek's motion for summary judgment was granted and the plaintiffs appealed.

The manufacturer's limited warranty covering the RV stated in part that the manufacturer would make any necessary repairs because of defects in the material or workmanship and that it would replace any defective part at no cost to the **[*13]** owners, but that the manufacturer *would not be liable for incidental or consequential damages* including loss of personal property. MagneTek argued that the limitations in the manufacturer's warranty extended to MagneTek. The trial court and the Court of Appeals agreed, holding that a remote supplier/manufacturer of a component part that is integrated into a finished product may be protected by a limited warranty covering the finished product even though the limited warranty made no express reference to parts suppliers and remote manufacturers.

The Court of Appeals first explained that a manufacturer was not allowed to claim that a defective product was not covered under the warranty simply because the

malfunction was due to a defective part supplied by a component manufacturer. *Id. at 779*. Further, while the ultimate seller or manufacturer may be able to expressly exclude some or all of its express or implied warranties, it may be difficult or even impossible for a component manufacturer to do the same. *Id.* The *Moore* court noted other courts' conclusions that:

> "because component part suppliers cannot effectively disclaim implied warranties, and **[*14]** purchasers have no expectation that component part suppliers will respond to defects in finished products, a purchaser cannot recover for economic loss from a component supplier under breach of the implied warranty of merchantability."

The court further explained that a component supplier's inability to disclaim implied warranties was particularly important since the privity requirement for warranty claims had been abolished. While the "finished product" manufacturers can easily disclaim their warranties, the component manufacturer/supplier may not have the economic power to require the "finished product" manufacturers to include the component manufacturer within the warranty *or in the disclaimers in the contract. Id.* (emphasis added).

For these reasons, the Court concluded that MagneTek, as a component manufacturer, was, as a matter of law, covered by the warranties and disclaimers made by the finished product manufacturer. Since MagneTek was covered by the limitations of implied warranties, plaintiffs' claims against MagneTek alleging breach of implied warranty were barred.

Concededly, *Moore* is a products liability case while the case at bar is not. However, the **[*15]** concepts laid out by the Court of Appeals are just as valid in our case as they were in *Moore,* and the same reasoning should apply. As in *Moore,* our case involves the delivery of a finished good (here, a more-reliable power supply) created through the assembly of constituent parts (here, a rotary UPS and switchgear system) supplied by subcontractors (GPEC being one), and a lack of privity between the subcontractor (GPEC) and the plaintiff. The positions of GPEC here and of MagneTek in the *Moore* situation are substantially identical, and therefore the result should be the same.

Furthermore, not only was CP&L *able* to limit its own liability (as was Coachmen in the *Moore* case), CP&L did, in fact, limit its liability to Novo Nordisk in the Managed Services Contract (see above). However, there being no contractual relationship between Novo Nordisk and GPEC, there was no mechanism for GPEC to likewise limit its liability to Novo Nordisk. Contrary to the argument made by Plaintiff's counsel at the Rule 12 hearing, it is not reasonable to assume that GPEC or any other subcontractor could have bypassed CP&L and sought a separate agreement directly with Novo Nordisk **[*16]** limiting its liability. There is no evidence that such an arrangement was possible or had ever been made on other occasions.

This issue was considered by Judge Gore and the Johnston County Court at the Rule 12 stage, before discovery fleshed out some of the facts surrounding the issue. At that time, Novo Nordisk argued that: 1) non-parties cannot avail themselves of an exculpatory clause in a service contract, and 2) the *Moore* case is inapplicable because it is a product liability case decided under the UCC. Novo Nordisk cited three cases in its brief in opposition to GPEC's Motion to Dismiss, but none of them are applicable to the case at bar. Specifically:

> 1) Novo Nordisk cited *E.E.O.C. v. Waffle House, Inc., 534 U.S. 279, 122 S.Ct. 754, 151 L.Ed. 755 (2002)* for the proposition that "It goes without saying that a contract cannot bind a nonparty." *Waffle House* involved an employment dispute between an employer and an employee. The holding in *Waffle House* was that "[a]n agreement between an employer and an employee to arbitrate employment-related disputes does not bar the EEOC from pursuing victim-specific judicial relief, such as backpay, reinstatement, **[*17]** and damages, in an ADA enforcement action." In other words, an employee's contractual waiver of his right to sue the employer does not keep the E.E.O.C. from suing the employer on the employee's behalf. When viewed in that context, the holding has little if any relevance to the matter at bar.
>
> 2) Novo Nordisk cited *Garbish v. Malvern Federal Savings & Loan Ass 'n, 358 Pa.Super. 282, 517 A.2d 547 (1986)*, for the proposition that an exculpatory clause in a building agreement is unenforceable against a non-party to the agreement when the agreement did not list the non-party and was not signed by the non-party. *Garbish* arose in the context

of a mortgagee bank acting as a fiduciary in collecting and paying out its own mortgage funds as well as the customer's separate funds to tradesmen and suppliers building the customer's house. The holding was that the mortgagee bank cannot rely on a provision of its loan agreement with the customer absolving itself of liability when it negligently fails to fulfill the duty it took on to manage the funds. Again, in that context, the holding has little if any relevance to the matter at bar.

3) Novo Nordisk cited another Pennsylvania **[*18]** case, *Topp Copy Products, Inc. v. Singletary, 533 Pa. 468, 626 A.2d 98 (1993)*, for the proposition that "[A]n exculpatory clause is valid where three conditions are met … [including that] … each party must be a free bargaining agent to the agreement so that the contract is not one of adhesion." *Topp Copy* arose in the context of a commercial property lease. The issue in that case was whether a commercial landlord can insulate himself from liability in the lease by specific language saying as such, and the Court answered that it could. The case actually stands for the proposition that exculpatory clauses are, in fact, enforceable under proper circumstances, holding that "[i]t is generally accepted that an exculpatory clause is valid where three conditions are met. **First,** the clause must not contravene public policy. **Secondly,** the contract must be between persons relating entirely to their own private affairs and **thirdly,** each party must be a free bargaining agent to the agreement so that the contract is not one of adhesion." [emphasis added] The exculpatory clause at issue in *Topp Copy* passed that "three-prong test" and was allowed **[*19]** to stand, and to protect the landlord from liability to the tenant for damages resulting from a water leak in the subject building that damaged the tenant's personal property.

Ironically, the Managed Services Contract does, in fact, fit the "three-prong test" adopted by the Pennsylvania state courts to determine whether "exculpatory clauses" are enforceable. Clearly the clause does not contravene public policy. Secondly, the contract clearly relates only to the private affairs of the parties, as it pertains only to the supply of backup electricity to a privately-owned manufacturing facility rather than the utility's more general service to its customers at large. And finally, as explained in CP&L's Memorandum, there was no inequity of bargaining power here with respect to the services covered by the Managed Service Contract; they were not regulated services and could have been provided by entities other than CP&L. The Managed Services Contract was an arms-length transaction between sophisticated commercial entities. The contract cannot reasonably be characterized as a "contract of adhesion." Thus, the limiting language in the Managed Services Contract passes Pennsylvania's "three-prong **[*20]** test" and would be found enforceable under Pennsylvania law.

More importantly, none of the cases cited in Novo Nordisk's Rule 12 brief address the central issue of whether a subcontractor can enforce liability-limiting contract language against the other party to the upper-tier contract. The undersigned has not located any case law on point as to that specific issue other than *Moore*. The *Moore* case, while concededly not identical the case at bar, provides sound reasoning why a subcontractor should be allowed to enforce such a provision.

If the *Moore* rationale is applied and the Managed Services Contract enforced as written, then Novo Nordisk cannot pursue any claim for "loss of use, loss of production, or any indirect, special, incidental, exemplary, punitive, multiple or consequential loss or damage of any nature..." At most, Novo Nordisk is limited on the March 30, 2002 outage to a claim for its product (insulin) directly lost in the course of that power outage and a refund of some portion of its power bill. Obviously no such refund claim could be made against GPEC because GPEC did not supply Novo Nordisk with electricity. Therefore, Novo Nordisk's claim against GPEC **[*21]** for anything more than its direct product loss attributable to the March 30, 2002 outage should be barred.

If Novo Nordisk's theory of liability against GPEC under the Managed Services Contract is given effect by this Court, then all subcontractors downstream from the general will have to bypass the general and any other higher-tier subcontractors and seek a waiver of liability directly from the project owner, or risk being exposed to liability to the owner for claims the owner expressly waives as against the general contractor. That situation does not comport with the way business is done in the real world, or with common sense, or with applicable case law, and this Court should reject it.

Conclusion

As discovery has revealed, this lawsuit is an attempt by Novo Nordisk (or more accurately, their business interruption insurance carrier) to recover the very type of "losses" it expressly agreed to waive from the first time it contracted with CP&L for the supply of electricity in 1991, and then again when it entered into the three contracts at issue in 2001. Novo Nordisk's claim against GPEC is an attempt to circumvent those waivers by pursuing CP&L's subcontractor for the **[*22]** same claims it expressly waived, and therefore cannot recover, from CP&L. GPEC, as CP&L's subcontractor, is just as entitled as CP&L to have the contracts enforced as they are written.

Quite simply, Novo Nordisk expressly waived any right it may have otherwise had to proceed against CP&L for any losses resulting from power interruptions beyond a refund of its power bill. That waiver was factored into the price Novo Nordisk paid for the services it received. The waiver extends to GPEC as CP&L's subcontractor by the plain wording of the PPS Contracts and by the law applicable to the Managed Services Contract.

There is no genuine issue of material fact on these points. Therefore, this Court should grant summary judgment in favor of GPEC.

This the 30th day of March, 2007.

/s/ [Signature]
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CERTIFICATE OF COMPLIANCE

I hereby certify that DEFENDANT GREGORY POOLE EQUIPMENT COMPANY'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT filed with **[*23]** the North Carolina Business Court on this date complies fully with BCR 15.8 in that it contains no more than 7,500 words.

This the 30th day of March, 2007.

/s/ [Signature]
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon all counsel of record by depositing a copy of the same in an official depository of the U.S. Mail in a postage-paid envelope addressed as follows:

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This the 30th day of March, 2007.

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[SEE EXHIBIT A IN ORIGINAL]

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