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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ROSLYN WILLIAMS, CHAIM LERMAN,
CHRISTINA GONZALEZ, and JAMES VORRASI,
Individually and on behalf of others similarly situated,

Plaintiffs

Case No.: 15-cv-07381 (SJ)(LB)

- against -

SECOND AMENDED CLASS
ACTION COMPLAINT

APPLE INC.,

JURY TRIAL DEMANDED

Defendant.

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Plaintiffs Roslyn Williams, Chaim Lerman, Christina Gonzalez, and James Vorrasi (collectively, "Plaintiffs"), individually and on behalf of the class of all those similarly situated as defined herein, by their undersigned counsel, complaining of the Defendant Apple Inc., alleges as follows:

NATURE OF THE ACTION

1. Plaintiffs and the Class bring this action against Apple Inc. for deceptive trade practices and false advertising in violation of New York General Business Law § 349 and § 350 and the New Jersey Consumer Fraud Act ("NJCF"), N.J.S.A. §§ 56:8-1, et seq. Plaintiffs and other owners of the iPhone 4s were harmed when their devices' software was updated to the newest version, iOS 9. The update significantly slowed down their iPhones and interfered with the normal usage of the device, leaving Plaintiffs with a difficult choice: use a slow and buggy

device that disrupts everyday life or spend hundreds of dollars to buy a new phone. Apple explicitly represented to the public that iOS 9 is compatible with and supports the iPhone 4s. This is also obvious from the fact that Apple made the software available for the iPhone 4s, but not for older versions of the iPhone.

2. This action centers upon Apple's negligent, reckless, or intentional omission or failure to disclose to plaintiffs, at the time they downloaded iOS 9, that the new operating system would materially slow down and/or otherwise interfere with the operation of plaintiffs' iPhone 4s. Apple advertised and represented at the moment before, or of, download that iOS 9 would improve performance of the plaintiffs' device, a statement Apple knew to be false.

PARTIES

3. Plaintiff Roslyn Williams is a New York resident who lives in Albany, NY.
4. Plaintiff Chaim Lerman is a New York resident who lives in Brooklyn, NY.
5. Plaintiff Christina Gonzalez is a New York resident who lives in New York, NY.
6. Plaintiff James Vorrasi is a New Jersey resident who lives in Morris Plains, NJ.
7. Defendant Apple Inc. is a California corporation with an address at 1 Infinite Loop Cupertino, CA 95014.

JURISDICTION AND VENUE

8. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1332(d) because at least one member of the putative class is a citizen of a State other than that of the citizenship of Apple, there are more than 100 class members, and the damages suffered and sought to be recovered herein total, in the aggregate, in excess of \$5,000,000, exclusive of interest and costs.

9. At all times material, Defendant has had purposeful and continuous, systematic contacts in or affecting the state of New York.

10. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(a) because Defendant, at all material times, have had continuous and systematic contacts in this district by actively doing business and perpetuating the deceptive business practices that are the subject of this lawsuit in this district. In addition, all facts and transactions related to Plaintiff Lerman's claims occurred in this District.

FACTS

11. Plaintiff Gonzalez owned an iPhone 4s and her iPhone's software was updated to iOS 9 after Apple released the software to the public on September 16, 2015. Immediately after the update, her phone crashed and froze completely, not allowing access to any functions whatsoever. Because her iPhone 4s was completely useless and she went one week without a phone at all, she was forced to purchase a new phone, the iPhone 6. Plaintiff Williams was also forced to buy a new phone, the iPhone 6s.

12. Plaintiffs Lerman and Vorrasi currently own an iPhone 4s. Their iPhones' software was updated to iOS 9 after Apple released iOS 9 to the public.

13. All Plaintiffs had their iPhone 4s updated to iOS 9 after it was released to the public on September 16, 2015. Plaintiff Vorrasi updated within the first or second week after the release. Apple has records, or other means, to prove the exact date and time of the update for each plaintiff.

14. Plaintiffs and members of the class were all subject to and viewed the following advertisement and statement (or a substantially identical statement) on the update page within the iPhone 4s that offers iOS 9 for download:

iOS 9
Apple, Inc.
1.3 GB

With this update your iPhone, iPad and iPod touch become more intelligent and proactive with powerful search and improved Siri features . . . And, built-in apps become more powerful with detailed transit information in Maps, a redesigned Notes app, and an all-new News app. And improvements at the foundation of the operating system enhance performance, improve security and give you up to an hour of extra battery life . . .

Below this message appears two links, one to “Learn More” and one to “DOWNLOAD AND INSTALL” the iOS 9 software.



The foregoing statement discussed only the advantages and improvements of iOS 9, but failed to disclose that iOS 9 materially slowed down and interfered with the functionality of the iPhone 4s. Apple had exclusive knowledge of the ill effects of iOS 9 on the performance of the iPhone 4s, information that plaintiffs had no means of obtaining.

15. It is impossible to download the software without seeing the statement/advertisement mentioned above.

16. After the update, Plaintiffs' iPhones were no longer functional for normal use. After the update, Plaintiffs' devices slowed down significantly, with delayed responses to touch interactions, application ("App" or "Apps") launches (Apple and third party Apps), and many other problems in all other aspects of the phone's performance, including crashes, freezes, App shutdowns or failure to launch apps, and difficulty or failure to make and receive calls. Basically, Plaintiffs' devices became slow and buggy, with significant usability problems during everyday use.

17. The update caused performance problems in all aspects of the iPhone's functionality, including core functions like the phone, email, text messages, contacts, etc.

18. Besides slowing down, the update caused crashes and freezes.

19. Upon information and belief, other class members also experienced the same or similar problems with iPhone 4s after updating to iOS 9.

20. Upon information and belief, Apple does not allow iPhone owners to revert their iOS 9 software to a previous, better functioning version of iOS. And Apple does not warn the consumer that the update is irreversible.

21. Plaintiffs and other class members were faced with a difficult decision: use a buggy, slow device that disrupts everyday life or spend hundreds of dollars to buy another smartphone.

22. As mentioned above, Plaintiff Gonzalez bought a new phone. Plaintiff Williams was forced to buy a new phone as well, the iPhone 6s, because her iPhone 4s was too slow and

buggy for daily use. The other Plaintiffs also have buggy, unusable phones but do not want to spend hundreds of dollars to buy new phones.

23. Apple's deceptive practices and misleading advertising caused harm and economic loss to the Plaintiffs and the class who lost use of a functional iPhone. Some class members were forced to purchase new smartphones to escape the frustrating, everyday experience of using a slow, buggy phone.

24. Plaintiffs and the class were subjected to Apple's deceptive practices and misleading advertising that are mentioned in this complaint. They were also subjected to many other Apple advertisements not mentioned in this complaint.

25. Upon information and belief, Apple is aware and has been aware for some time that the iPhone 4s's functionality and/or performance is negatively affected by iOS 9 (the negative effects being explained in this complaint). Upon information and belief, Apple was aware of this before iOS 9 was released as a result of internal testing and/or through other means. Plaintiffs and other consumers had no reasonable means of knowing this information, which is within the exclusive knowledge of Apple.

26. However, Apple did not and does not warn iPhone 4s owners of this potential problem in their advertising, website, update page inside these iPhones, or in any other medium.

27. In fact, Apple only touts the improvements of the new software over the previous version. For example, when advertising iOS online on its website, Apple writes, "What's new in iOS. iOS 9 is full of enhancements you'll appreciate every day. Your apps become more essential.... Siri can do more than ever, and new proactive suggestions help you get things done before you ask. And improvements at the foundation of the operating system enhance performance, battery life, and security. The more you do with iOS 9, the more you'll wonder

how you ever did without it.” <http://www.apple.com/ios/whats-new/> (last accessed December 2, 2015)

28. On that same webpage, Apple touts “Faster performance, improved security, convenient updates, and longer battery life.” (emphasis added) Thus, Apple explicitly advertises faster, better performance with its new iOS.

29. As mentioned above, Apple markets to consumers that they should update the software because, amongst other reasons, it has “improved security.” Consumers do not hesitate to have their software updated because a newer version of the software patches security risks found in the previous versions. In other words, not updating means that your phone is vulnerable to security attacks, hacks, and other internet/software dangers in this digital age.

30. Along the same lines, elsewhere Apple advertises, “Engineered to perform. At every level. Under-the-hood refinements bring you more responsive performance, easier updates, better battery life, and tighter security. So your device works that much better — for everything you do with it. <http://www.apple.com/ios/whats-new/#foundation> (last accessed December 2, 2015. Apple is affirmatively telling consumers that iOS 9 will make their iPhone 4s work better.

31. On that same page, Apple advertises, “Faster and more responsive. The apps in iOS 9 now take advantage of Metal, making more efficient use of the CPU and GPU to deliver faster scrolling, smoother animation, and better overall performance. Email, messages, web pages, and PDFs render faster.” Apple is affirmatively telling consumers that iOS 9 will make their iPhone faster and perform better.

32. And Apple promises more security improvements in iOS 9 on that same page: “Improved security. Keeping your devices and Apple ID secure is essential to protecting your

personal information — like photos, documents, messages, email, and so much more. iOS 9 advances security by strengthening the passcode that protects your devices, and by making it harder for others to get unauthorized access to your Apple ID account. These new security features are easy for you to use. But they make it much harder for anyone else to access your personal information.”

33. Similarly, in other marketing material on their website, Apple states, “And because iOS 9 is engineered to take full advantage of the advanced technologies built into Apple hardware, your devices are always years ahead.” <http://www.apple.com/ios/what-is/> (last accessed December 2, 2015). There, Apple also tells consumers that the iPhone and iOS 9 are **“Hardware and software made for each other. Because Apple makes both the hardware and the operating system for.... iPhone, everything is designed to work together.”** (emphasis added)

34. On that same page, Apple encourages consumers to update their iPhone whenever a new update comes out: “Easy to update. iOS updates are free. And they’re available to download wirelessly on your iPhone...the moment they’re released. Your device even alerts you when it’s time to get the latest version. So you won’t miss out on all the amazing features in new updates.”

35. Upon information and belief, many, if not all, consumers who update do so because of the numerous reminders that Apple sends them through their iPhone’s screen to update to iOS 9. Upon information and belief, the text of this reminder advises consumers to update and fails to mention any ill effects iOS 9 may have on the iPhone 4s.

36. Even if consumers wanted to avoid updating, they end up updating because the reminders do not stop.

37. On another webpage, Apple advertises: “Update the iOS software on your iPhone... Learn how to update your iOS device wirelessly or using iTunes. **iOS updates introduce new features that let you do even more with your iPhone.... Be sure to keep your devices updated so that you don't miss out on the latest features.**”

<https://support.apple.com/en-us/HT204204> (emphasis added)

38. On that same page, Apple explains, “Update your device wirelessly. If a message says that an update is available, tap Install Now.” iPhones provide popup and other types of notifications advising consumers to update.

39. On the software update screen in the iPhone, Apple did and does advise consumers that their iPhones will improve drastically through a prominent and conspicuous explanation of performance upgrades and new features. Apple fails to warn iPhone 4s owners, here or anywhere else in their advertising or updating process, that iOS 9 will significantly downgrade performance on their devices.

40. Apple explicitly advertises and advises consumers that the iPhone 4s is compatible with iOS 9. <https://www.apple.com/ios/whats-new/#compatibility> (last accessed December 2, 2015). This is also obvious from the fact that Apple pushes the update to and makes it available for download on the iPhone 4s, but not older iPhone models.

41. Even without any affirmative statement, the act of making iOS 9 available for download to iPhone 4s devices is deceptive because Apple omits a warning that it will negatively affect performance. The act of making iOS 9 available for download to iPhone 4s devices is a clear statement that iOS 9 is compatible with iPhone 4s. Consumers, including Plaintiffs, reasonably relied on Apple’s actions in assuming that iOS 9 is compatible with iPhone 4s.

42. Apple also encourages updates through promises of improved Apps, new functionality, better performance, and improved security.

43. Upon information and belief, Apple has touted high adoption rates of iOS 9 on its website, press releases, and in its famous keynote addresses (video streams and live events) for its new products and software. For example, Apple's Press Release of September 21, 2015 (weeks before the iPhone 6S, the newest iPhone, was released) proudly proclaimed, "Apple also announced the fastest iOS adoption ever, with more than 50 percent of devices already using iOS 9." <http://www.apple.com/pr/library/2015/09/21iPhone-6s-iPhone-6s-Plus-Arrive-on-Friday-September-25.html> (last accessed December 2, 2015).

44. Moreover, Apple explicitly uses the promise of future updates for years as a selling point that induces new iPhone purchases. For example, on the iPhone's homepage (<http://www.apple.com/iphone/> last accessed December 2, 2015), there's a hyperlink under the heading "Why iPhone." When clicking on that link, the consumer is transferred to another webpage (titled: "Why there's nothing quite like iPhone) where Apple promises the consumer, **"And whenever there are shiny, new software updates with shiny, new features, you should be able to sit back, relax, and know your phone will get them. And be compatible with them. For years. For free."** <http://www.apple.com/iphone/why-theres-iphone/> last accessed December 3, 2015 (emphasis added). Upon information and belief, Apple has made similar statements in its advertising materials in the past.

45. Apple clearly wants and encourages everyone to update to the latest iOS version because it helps its image, marketing position, ability to sell new devices, and bottom line.

46. iPhone owners buy Apps from Apple and third parties in Apple's official App Store. Upon information and belief, each App purchase benefits Apple through a commission or fee (for third party Apps) or the complete purchase price (for an Apple App).

47. Some Apps are essential to some iPhone users because they've integrated them into everyday life or business or because they provide important functionality they may not find elsewhere, or that they could find on another smartphone only with new app purchases.

48. The same is true with music, movies, and other media and services/products purchased through Apple or iPhone, which are compatible and available only on the iPhone or other Apple products. Upon information and belief, such media and other services/products purchased cannot be accessed through other smartphones.

49. When iPhone 4s owners are faced with the dilemma of continuing to use a slow, buggy phone or spend hundreds to buy a new phone, Apple often benefits because consumers will often buy a new iPhone to keep their investment in the App ecosystem. If they buy any other smartphone, they lose the use of all the Apps they purchased and must buy other Apps on the competitor smartphone, incurring a double loss (loss of Apps and payment for new Apps). Upon information and belief, a large number of iPhone 4s owners purchase newer versions of the iPhone for this reason, enriching Apple in the process.

50. Furthermore, iPhone owners will buy a newer iPhone when faced with the choice because it is familiar and they can easily transfer their information, media, contacts, and apps without a major disruption in usage. There is no learning curve and no delays and trouble that accompany new information input. Indeed, two of the named Plaintiffs purchased newer iPhones after their 4s's became essentially unusable. Thus Apple stands to benefit financially when older iPhones are slowed down and owners are forced to purchase a new phone.

51. To complicate matters, many customers must commit to a new 2-year agreement (or other long-term agreement) with Apple and/or wireless carriers such as Verizon, Sprint, T-Mobile, AT&T, or other carriers in order to purchase the new phone.

52. This agreement or process is often done with Apple itself, over the phone or through a physical store, where Apple sets up service with the carrier. Consumers thus face more purchases and obligations as a result of iOS 9 on their devices. Upon information and belief, Apple benefits financially when setting up such new service contracts (further investigation is required on this matter).

53. As a result of Apple's above-mentioned deceptive practices and false advertising, Plaintiffs and other class members were harmed by losing normal use of their iPhone 4s and/or being forced to purchase a new smartphone as the only alternative to living with a slow, buggy, and disruptive device.

54. Apple's statements and advertisements were materially misleading because while it encouraged upgrading to iOS 9, Apple failed to warn iPhone 4s owners of possible performance degradation.

55. It is impossible for consumers to miss Apple's widespread, ubiquitous advertising net. The advertisements are in New York, New Jersey, and the rest of the country, through seemingly every medium possible, including billboards, magazines, and the Internet. The advertisements and statements included in this complaint are only samples: discovery will reveal more relevant statements and advertisements.

56. Plaintiffs and class members were all subjected to the same false, misleading and deceptive practices and advertising as Apple designed and promoted iOS 9 for the iPhone to be

marketed and distributed in a uniform fashion in New York and New Jersey and to be adopted by iPhone 4s owners.

57. Plaintiffs and the rest of the class relied on Apple's misleading statements and/or advertisements (including omissions) in updating to iOS 9 with the fair and reasonable expectation of receiving equal or better performance and/or new features and functionality.

58. At all relevant times, Apple knew its statements and advertisements to be materially misleading. Their statements and advertisements were false due to negligent, reckless, and/or intentional conduct.

59. Apple omitted a warning or disclaimer to iPhone 4s owners to the effect that iOS 9 will degrade overall performance and usability. Apple had a duty to warn consumers about the effect of iOS 9 on the performance of the iPhone 4s.

60. Plaintiffs and class members suffered the same or similar harm as a direct result of Apple's material misrepresentations and concealment of true material facts, leading the consumer to download and install a product that was hailed as offering a substantial upgrade, faster performance, enhanced reliability, enhanced features, and greater functionality and capability, when in fact such was false.

CLASS ACTION ALLEGATIONS

61. This action is brought on behalf of named Plaintiffs and as a Class Action pursuant to Rules 23(b)(1),(2), (3) and 23(c) of the Federal Rules of Civil Procedure on behalf of the following proposed "Class" or "Class Members":

New York Class: All individuals and entities in New York who currently own or have owned an iPhone 4s that was updated to iOS 9 (or later versions of iOS 9).

New Jersey Class: All individuals and entities in New Jersey who currently own or have owned an iPhone 4s that was updated to iOS 9 (or later versions of iOS 9).

62. Numerosity: The members of the Class are so numerous and geographically diverse that joinder of all of them is impracticable. While the exact number and identities of members of the Class are unknown to Plaintiff at this time and can only be ascertained through appropriate discovery, Plaintiff believes and avers that there are at least thousands of class members.

63. Commonality: Plaintiff and Class Members' claims derive from a common core of salient facts and share many of the same legal claims. There are questions of fact or law common to members of the Class which predominate over any questions affecting any individual members, including, but not limited to, the following:

- a. Whether it was an unfair or deceptive business practice in violation of consumer protection laws when Apple made various statements and advertisements to iPhone 4s owners regarding iOS 9 (some of said statements and advertisements appearing in this complaint);
- b. Whether it was deceptive advertising in violation of consumer protection laws when Apple made various statements and advertisements to iPhone 4s owners regarding iOS 9 (some of said statements and advertisements appearing in this complaint);
- c. Whether it was an unfair or deceptive business practice in violation of consumer protection laws when Apple omitted facts and/or disclaimers to owners of iPhone 4s regarding the adverse effect of iOS 9 on the performance of the iPhone 4s;
- d. Whether it was deceptive advertising in violation of consumer protection laws when

Apple omitted facts and/or disclaimers to owners of iPhone 4s regarding the adverse effect of iOS 9 on the performance of the iPhone 4s; and

e. Whether it was an unfair or deceptive business practice in violation of consumer protection laws when Apple made iOS 9 available for download to iPhone 4s owners;

64. Typicality: Plaintiffs' claims are typical of the claims of other members of the Class in that Plaintiff's claims arise from the same course of deceptive conduct by Apple that affects Class Members. Plaintiffs, like other Class Members, were harmed by Apple's statements, advertisements, and the degraded functionality of their device. Plaintiffs, like other Class Members, were harmed by Apple's failure to warn iPhone 4s owners that iOS 9 will significantly and negatively affect the functionality and performance of their device.

65. Adequacy: Plaintiffs will fairly and adequately protect the interests of the Class. Plaintiffs' claims are coextensive with, and not antagonistic to, the claims of other Class Members. Plaintiffs are willing and able to vigorously prosecute this action on behalf of the Class. Plaintiffs' attorneys are competent and experienced in the area of representative and class actions.

66. Plaintiffs bring this action under Rule 23(b)(3) because common questions of law and fact predominate over issues that are individual to members of the Class. The proposed Class is sufficiently cohesive to warrant class and representative treatment. Upon information and belief, Defendants have the technology and records that would permit Plaintiffs a plausible class-wide method for proving the case. Certification under Rule 23(b)(3) is also appropriate because a class action is superior to other available methods for the fair and efficient adjudication of this

action. The expense of litigating each Class Member's claim individually would be so cost prohibitive as to deny Class Members a viable remedy. Plaintiffs envision no unusual difficulty in the management of this action as a class action.

67. Plaintiffs also brings this action under Rule 23(b)(2) because Defendant has acted or refused to act on grounds generally applicable to all members of the Class, thereby making final injunctive relief concerning the Class as a whole appropriate. In the absence of appropriate injunctive relief, Defendant will continue its unfair and deceptive practices. Defendant's uniform conduct towards Plaintiff and the other members of the Class makes certification under Rule 23(b)(2) appropriate.

COUNT I

(On Behalf of the New York Class: Violation of New York General Business Law § 349)

68. Plaintiffs repeat and reallege the foregoing allegations. This cause of action is brought by the New York Plaintiffs and the New York Class.

69. Apple's conduct was consumer oriented because Apple falsely advertised, made materially misleading statements, and negligently, recklessly or knowingly omitted/failed to disclose material information to consumers throughout New York regarding the performance of its products and software.

70. By reason of the foregoing and as a result of Apple's conduct, Plaintiffs and the Class have been harmed economically and by losing use of a functional iPhone. They are entitled to recover damages and attorney's fees pursuant to NY GBL § 349.

COUNT II

(On Behalf of the New York Class: Violation of New York General Business Law §350)

71. Plaintiffs repeat and reallege the foregoing allegations. This cause of action is brought by the New York Plaintiffs and the New York Class.

72. Apple's advertisements were false and misleading in a material way, via affirmative statements and omissions (Apple failed to reveal facts material in light of such representations or conduct).

73. By reason of the foregoing and as a result of Apple's conduct, Plaintiffs and the Class are entitled to recover damages and attorney's fees pursuant to NY GBL § 350.

COUNT III

(On Behalf of the New Jersey Class: Violation Of The New Jersey Consumer Fraud Act, N.J.S.A. §§ 56:8-1, et seq.)

74. Plaintiffs repeat and reallege the foregoing allegations. This cause of action is brought by Plaintiff Vorrasi and the New Jersey Class.

75. Apple, as mentioned in this complaint, practiced an unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing concealment, suppression, or omission of a material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of its iPhone 4s and the offer and download or advertisement of the iOS 9 software, "or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby" N.J.S.A. § 56:8-2.

76. Apple's conduct was consumer oriented because Apple falsely advertised and made materially misleading statements to consumers throughout New Jersey regarding the performance of its products and software. Apple also failed to properly warn consumers of the negative effects of iOS 9 on the performance of the iPhone 4s.

77. Apple's conduct caused an ascertainable loss. Plaintiffs and other class members lost use of a functional iPhone 4s. The loss can be calculated by valuing the loss at the fair

market value of the iPhone, the replacement cost of the phone, or the money Plaintiffs paid to purchase it. Some Class Members were forced to pay more money to buy another smartphone.

78. Apple's conduct caused this loss because Plaintiffs would not have downloaded iOS 9 if Apple advertised truthfully, made truthful statements to consumers, properly warned them of the negative impact the software has on the performance of the iPhone 4s, or did not provide the software for download to iPhone 4s devices.

79. By reason of the foregoing and as a result of Apple's conduct, Plaintiffs and the Class have been harmed economically and by losing use of a functional iPhone. They are entitled to recover damages and attorney's fees pursuant to the New Jersey Consumer Fraud Act.

JURY TRIAL DEMANDED

Plaintiffs hereby demand a jury trial.

WHEREFORE, Plaintiff and the Class demand judgment against Apple Inc. on the First, Second, and Third causes of action with:

- An award of damages, trebled, or the maximum amount otherwise allowed under the three causes of action, whichever is greater;
- An order enjoining Apple's unlawful practices and requiring corrected advertisements and disclaimers in connection with IOS 9 or any later versions of IOS issued; and
- An award of attorney's fees.

Dated: March 28, 2016

BRONSTEIN, GEWIRTZ
& GROSSMAN, LLC

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/s/ Peretz Bronstein

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