UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case No. 03-20161 CIV-KING

MARIE JEANNE JEAN, in her individual capacity, and as parent and legal guardian for minors VLADIMY PIERRE and MICHELDA PIERRE, and LEXIUSTE CAJUSTE,

Plaintiffs,

v.

CARL DORÉLIEN, and LUMP SUM CAPITAL, LLC a Maryland limited liability company,

Defendants.

_____/

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT CARL DORÉLIEN'S MOTION TO DISMISS FAILURE TO JOIN INDISPENSABLE PARTIES

Plaintiffs Marie Jeanne Jean, in her individual capacity, and as legal guardian for minors Vladimy Pierre and Michelda Pierre, (collectively, "Plaintiffs"), hereby respond in opposition to Defendant Carl Dorélien's Motion to Dismiss Failure to Join Indispensable Parties (D.E. 59) (the "Motion") and state as follows:

I. INTRODUCTION

Defendant's Motion states that "Plaintiffs have failed to name of join [sic] the parties actually responsible for committing the acts giving rise to their cause of action i.e. the parties who tortured, killed, etc." (D.E. 59), paragraph 1. The supporting

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memorandum makes two arguments: that 1) "a finder of fact has no way of reasonably assigning liability for the acts committed unless those who committed them are parties hereto" and that 2) "No one can determine if the acts occurred, who committed them or why said persons committed them." (D.E. 59) at p.2. Defendant's Motion is incorrect and fails for many reasons.

First, Plaintiffs did not "fail" to join any other co-defendants; there are no other co-defendants that it was feasible to join.

Second, even if Plaintiffs could have joined the person or persons who actually shot Michel Pierre, under Rule 19(a), they did not have to. Those persons would be joint tortfeasors with the Defendant, and joint tortfeasors do not have to be joined.

Thus, Defendant's argument that "there is no way to assign liability" is a red herring in that it sets up a false requirement. There is no need to assign liability amongst joint tort-feasors — all are jointly and severally liable. Further, Defendant's other argument, that "No one can determine if the acts occurred, who committed them or why . . ." likewise sets up a false test for joinder. Under the claims alleged, for which Defendant is liable under a theory of command responsibility and under joint and several liability, Plaintiffs do not have to prove exactly who killed Michel Pierre. While Plaintiffs will have to prove their case regarding Defendant's role and responsibility, this is an issue of proof, not one concerning indispensable parties. The proposed parties are not necessary under a Rule 19 (a) analysis. Thus, Defendant's motion fails.

Alternatively, even if there were co-defendants who would be required to be parties if they could be joined, the fact that they cannot be joined should not, under the test in Rule 19(b), prevent this case from proceeding.

Finally, Defendant's motion, coming after the answer and as his fourth 12(b) motion, is procedurally barred.

Defendant Carl Dorélien was a Colonel in the Haitian Armed Forces and a member of the High Command of the military dictatorship that ruled Haiti during the three year period from October, 1991 to September, 1994. *Inter alia,* Plaintiffs allege that during that period, Dorélien planned, ordered, authorized, and permitted those over whom he exercised command responsibility to commit gross human rights violations, specifically the extrajudicial killing of Michel Pierre, the late husband of Plaintiff Marie Jeanne Jean and the father of her children, Plaintiffs Vladimy Pierre and Michelda Pierre, during the "***Raboteau Massacre.***"[1] (See Second Amended Complaint (D.E. 37), at paragraphs 15, 28)

II. MEMORANDUM OF LAW

A. There are no other co-defendants that could be joined; thus Plainitffs have not "failed" to do anything by not joining them.

Rule 19(a) begins, "A person who is subject to service of process . . ." and then goes on to name those who must be joined. Thus, the threshold inquiry under Rule 19 is whether the absent persons are "subject to service of process." If they are not, then they do not have to be joined under Rule 19(a). Dorélien states that Plaintiffs have failed to join "the parties actually responsible for committing acts giving rise to their cause of action, i.e. those who tortured, killed, etc." (D.E. 59), at paragraph 1. However, he does not allege or offer any proof that any of these people are in the United States and subject

[1] Plaintiffs also bring a claim for relief from fraudulent transfer pursuant to Florida's *Uniform Fraudulent Transfer Act*, Section 726.01, Florida Statutes, et seq., arising in large part from Dorélien's attempt to assign and transfer a Florida Lottery prize that he won while he was living in South Florida through Defendant Lump Sum Capital, LLC (LSC) and ultimately to his son, Karl Steven Dorelien, for no value. In the Motion, Dorélien does not assert that there are indispensable parties relating to the fraudulent transfer count who have not been joined.

to service of process. These people presumably live in Haiti and are not subject to service of process. It was the Defendant, by trying to take haven in the United States after his illegal regime was deposed, who subjected himself to this Court's jurisdiction and the laws of the United States designed to address human rights abuses. It is no failure of Plaintiffs that Dorelien's subordinates cannot be joined in this action.

B. Even if those who actually shot Michel Pierre could be joined, they would not have to be joined under Fed. R. Civ. P. 19.

Under Rule 19, "a person who is subject to service of process and whose joinder will not deprive the Court of jurisdiction over the matter" shall be joined if certain conditions are met. Such a person shall be joined if: (1) in the person's absence complete relief cannot be accorded *among those already parties*; or (2) the absent person claims an interest relating to the subject matter of the action *and* disposition of the case will either (i) impair or impede the absent person's ability to protect that interest or (ii) subject any named parties to substantial risk of incurring multiple or inconsistent obligations. Fed. R. Civ. P. 19(a).

The burden of proving that a party is "necessary"[2] under Rule 19(a) falls on the defendant. Bodner v. Banque Paribas, 114 F.Supp.2d 117, 137 (E.D.N.Y., 2000) (citing King v. Pine Plains Central School District, 918 F.Supp. 772 (S.D.N.Y. 1996)). See also Ratner v. Scientific Resources Corp., 53 F.R.D. 325, 329 (S.D.Fla. 1971).

[2] It is important to clarify the meaning of "necessary" as it is used to refer to Rule 19(a). It can be defined as "should be joined if feasible." Thus, a person is only "necessary," meaning that he has to be joined under Rule 19(a), if it is first determined that he *can* be joined. What to do in situations where a person that should be joined cannot be joined is the subject of Rule 19(b), which determines whether such a person is "indispensable," i.e. whether the action should or should not proceed in the person's absence.

1. The persons who actually killed Michel Pierre would, if joined, be joint tortfeasors with Defendant; thus, even if they could be joined, it would not be necessary to join them under Rule 19(a).

Even if the persons who actually killed Michel Pierre could be served and brought within the jurisdiction of the Court, they still would not be necessary parties because they are joint tortfeasors. Multiple persons who are responsible for involvement in the same human rights abuse(s) are joint tortfeasors. See Bodner, 114 F.Supp.2d at 136; Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 351-52 (S.D.N.Y. 2003); National Coalition Gov't of the Union of Burma v. Unocal, Inc., 176 F.R.D. 329, 357-58 (C.D. Cal. 1997); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1552 (N.D. Cal. 1987). See also Morrison v. General Motors Corp., 428 F.2d 952, 953 (5th Cir. 1970) (quoting Uniform Joint Tort Feasors Act for definition of joint tortfeasor as "two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them"). Joining the unnamed individuals who actually killed Michel Pierre would merely increase the number of tortfeasors jointly and severally liable for Plaintiffs' injuries.

As a rule of law, joint tortfeasors are not necessary parties for purposes of Rule 19. "It has long been the rule that it is not necessary for all joint tortfeasors to be named as defendants in a single lawsuit." Temple v. Synthes Corp., Ltd., 498 U.S. 5, 7 (1990). See also MS Dealer Serv. Corp. v. Franklin, 177 F.3d 942, 946 (11th Cir. 1999); Talisman Energy, 244 F. Supp. 2d at 351-52; Bodner, 114 F.Supp.2d at 136; Unocal, 176 F.R.D. at 357-58; Forti, 672 F. Supp. at 1552. Since all potential additional defendants would merely be joint tortfeasors, they are not necessary parties required to be joined under Rule 19. Therefore the Motion should be denied.

2. Dorelien is liable through his command responsibility; his liability as a commander is total, and does not depend on the identification or the naming as defendants of those under his command.

This case is also based on the doctrine of command responsibility. Under this theory of liability, a commander can be held liable for human rights abuses committed by his subordinates when he knew or should have known that abuses were being committed but did nothing to prevent them or punish those responsible. Ford v. Garcia, 289 F.3d 1283, 1288 (11th Cir. 2002). In their Complaint, Plaintiffs have alleged that units of the Haitian Armed Forces were the perpetrators of the Raboteau Massacre in which Michel Pierre was killed. Second Amended Complaint (D.E. 37) at paragraphs 15, 17. Plaintiffs have further alleged that at all relevant times Dorélien maintained legal authority and effective control over the members of the Armed Forces who were carrying out the abuses, id. at paragraphs 27-28, that he knew or should have known that these troops were committing abuses, id. at paragraph 26, and that he failed to prevent the abuses or punish his subordinates, id. at paragraph 27. Plaintiffs have sufficiently pled Dorélien's liability as a commander.

Defendant's argument, that "[n]o one can determine if the acts occurred, who committed them or why . . .," is irrelevant to a determination of what parties must be named in this lawsuit. The identification of the names of specific members of the Armed Forces is unnecessary and does not change the analysis under the command responsibility doctrine. It would be ridiculous to require the identification and naming as parties all members of a military unit, or even those who actually fired the fatal shot(s), in the context of a lawsuit seeking redress against a superior officer for an extrajudicial killing during a massacre alleging command responsibility and joint and several liability. Under

such a rule, if one member could not be identified because he wore a mask, or, if in the fog of the massacre it could not be determined who fired which shot, the commander would be immune from liability. Such a rule fails on its face. Further, where would the inquiry stop? Would it be necessary to have as parties every link in the military chain of command? Clearly, such a rule is not the law, as is evidenced by the many cases that have been successfully brought under the command responsibility doctrine and imposing joint and several liability. See section 3(a) below.

3. Complete relief can be provided by Dorélien alone; and none of the other proposed co-defendants claim an interest in the action.

Even if the Court finds that the absent persons are subject to service of process (which they are not), the Motion should still be denied under Rule 19(a). For a party subject to service of process, Rule 19(a) requires his joinder only if complete relief *among the parties* cannot be accorded without his addition or if he claims an interest relating to the subject of the action, under certain conditions.

a. Complete relief among those already parties is possible.

"'Complete' relief refers to relief as between the persons already parties, not as between a party and the absent person whose joinder is sought ...." United States v. County of Arlington, 669 F.2d 925, 929 (4th Cir. 1982). There is nothing that the addition of any other party will add to the relief that can be accorded between Dorélien and the Plaintiffs by this action. The addition of a party will not make Plaintiffs relief against Dorélien any more or less.

Indeed, verdicts assessing monetary damages against individual military commanders have provided relief from the commanders to victims. See, e.g.,

Mushikiwabo v. Barayagwiza, 1996 WL 164496 (S.D.N.Y. 1996) (awarding $500,000 in pain and suffering damages per each relative that the individual plaintiff lost, in addition to $6 million in punitive damages for each relative lost per plaintiff for political leader's responsibility for killings); Xuncax v. Gramajo, 886 F. Supp. 162, 197-98 (D. Mass. 1995) (awarding from $ 500,000 - $3 million in compensatory damages to each plaintiff for military commander's responsibility for summary execution, torture, arbitrary detention, and/or cruel, inhuman and degrading treatment); Paul v. Avril, 901 F. Supp. 330, 335-36 (S.D. Fla. 1994) (awarding from $ 2.5 - $ 3.5 million in compensatory damages to each of six plaintiffs for military dictator's responsibility over arbitrary detention, torture, and cruel, inhuman or degrading treatment). This case against Dorélien alone should likewise proceed, as the addition of the other proposed defendants in this action would in no way impact on the relief they obtain from Dorelien. To rule otherwise would result in denying Plaintiffs the one forum in which they can get relief.

b. The proposed co-defendants have not claimed an interest in this action.

Likewise, none of the proposed co-defendants have claimed an interest in this action. Defendant points to no one who has claimed an interest in this action. No one has.

Summary of Rule 19(a) analysis

In sum, Plaintiffs were not required to join any other persons as parties to this action because there are no such other persons subject to service of process. Defendant's proposed co-defendants, the person or persons who actually killed Michel Pierre, are not alleged to be subject to service.

But, assuming *arguendo* that the individuals who actually killed Michel Pierre were subject to service of process, they still would not be necessary parties because: they are joint tortfeasors and Dorélien is liable because of his command responsibility; complete relief among those already parties can be afforded without adding the proposed additional defendants; and, the proposed additional defendants have not claimed an interest in this action. Further, because, the proposed persons are not necessary under the Rule 19(a) as discussed in Sections 1, 2 and 3 above, "the court need not consider whether dismissal under Rule 19(b) is warranted." Associated Dry Goods Corp., 920 F.2d at 1123. Therefore, Defendant's Motion should be denied.

C. Even if the Court determines that other persons would be necessary parties such that their joinder would be mandated if they were subject to service of process, they are not so indispensable that the case should be dismissed.

If there exists a person who would be required to be joined under Rule 19(a), if he were subject to service of process and if his joinder would not deprive the court of jurisdiction over the subject matter, but his joinder is not feasible because, for example, he is not subject to service of process, a court must then decide whether in "equity and good conscience" the case may proceed or whether it must be dismissed because the person is "indispensable." Fed. R. Civ. P. 19(b). The factors that inform this decision are:

> [F]irst, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

The first factor calls for an assessment of the prejudicial effect to the person who cannot be joined or those already parties of a judgment rendered in the absence of the person who cannot be joined. Doty v. St. Mary Parish Land Co., 598 F.3d 885, 887 (5th Cir. 1979). This requires the court to consider the extent to which the judgment may "as a practical matter impair or impede [the person's] ability to protect his interest in the subject matter." Id. (quoting Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 110 (1968)). This must be determined on a case by case basis. See Patterson, 390 U.S. at 118 ("Whether a person is 'indispensable,' that is, whether a particular lawsuit must be dismissed in the absence of that person, can only be determined in the context of particular litigation.")

The person or persons who actually fired the shot(s) that killed Michel Pierre will not be prejudiced by not being a party to this lawsuit. Their absence means they do not risk liability in a U.S. court for extrajudicial killing and crimes against humanity. A judgment against Dorélien would not have any collateral legal impact on them. In fact, one can assume that they do not wish to be parties to this action. As for Plaintiffs, they certainly will not be prejudiced, as they can attain complete relief from Dorélien alone for Dorélien's role. And, Dorélien will not be prejudiced, as he is jointly and severally liable, as well as liable for his command responsibility. His liability will be total regardless of how many other parties are joined.

The second factor requires a consideration of the extent to which any prejudice to absent or named parties may be minimized by limiting or restructuring the relief granted. See Doty, 598 F.2d at 887. As there is no prejudice, this factor is irrelevant.

The third factor looks at whether a judgment rendered in the party's absence will be adequate. See id. at 888. A judgment rendered in the absence of those who actually killed Michel Pierre will be adequate to provide relief to Plaintiffs. As discussed above, a money judgment against Dorélien alone will sufficiently compensate Plaintiffs for Defendant's acts.

Finally, under the fourth factor, Plaintiffs will have no remedy if the action is dismissed. Plaintiffs have already briefed this issue extensively in their Memorandum of Law in Opposition to Defendant Carl Dorélien's Motion to Dismiss Improper Venue. (D.E. 69). There are no simply adequate remedies available in Haiti. Dorélien's paramilitary accomplices from the early 1990s have regained power through a violent uprising. As a result of the *coup d'etat*, Dorélien was released from prison without legal process.

Even though the conviction and civil judgment against Dorélien remain in effect under Haitian law, they are now for all practical purposes unenforceable there. (D.E. 69 and Ex. "A" thereto, Declaration of Brian Concannon, Jr., at pp.2-3, paragraphs 3-7) Dorelien can have it annulled simply by requesting a new trial (D.E. 42, affidavit of Mario Joseph), which he can do with no risk because a new trial in Haiti will never happen. Under the new regime, none of the Raboteau victims will dare to attempt enforcement of the money judgment in Haiti or to testify against Dorélien if he requests a new trial (D.E. 69 at 10-12 and Exhibits thereto). Their lives will be in danger if they do. Id. Indeed, just two weeks ago the Haitian judge who presided at the Raboteau trial was attacked and beaten by armed men acting on behalf of the paramilitary leaders. (D.E. 69

at 10-12 and Exhibits thereto). In January, forces opposed to the Aristide government set fire to the house of the case's chief prosecutor. Id.

Moreover, Haiti presumably does not have jurisdiction over Defendant Lump Sum Capital,[3] and it is not capable of exercising jurisdiction over Dorélien. Plaintiffs' claim against Lump Sum Capital is asserted pursuant to Florida's *Uniform Fraudulent Transfer Act* in connection with assets located in Florida, particularly Dorélien's lottery prize or the proceeds from the assignment of the prize. Even if Plaintiffs could file suit against Dorélien in Haiti, a Haitian court would still lack jurisdiction over this cause of action and thus over the entire case, and there would be no way to effectuate the judgment against the bulk of the Defendant's assets. There is simply no adequate remedy for Plaintiffs if this action is dismissed. Thus, the Rule 19(b) factors weigh heavily in favor of proceeding with this case in the absence of any other parties.

D. Dorélien's Motion is barred as untimely by Fed. R. Civ. P. 12(b).

Dorélien's Motion to Dismiss Failure to Join Indispensable Parties made pursuant to Rule 12(b)(7), Federal Rules of Civil Procedure, is barred as untimely because, according to Rule 12(b), Dorélien was only entitled to assert failure to join indispensable parties by motion, in response to the original complaint. Rule 12(b) provides in pertinent part:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: ... (3) ***failure to join a party under Rule 19*** ... . ***A motion***

[3] Lump Sum Capital is a Maryland limited liability company doing business in Florida, with its principal place of business in Bethesda, Maryland. (See Second Amended Complaint (D.E. 37), at ¶8.)

> ***making any of these defenses shall be made before pleading if a further pleading is permitted.*** ...

Fed. R. Civ. P. 12(b) (emphasis added). The requirement of Rule 12(b) that "a motion making any of these defenses shall be made before pleading if a further pleading is permitted," means that a defendant has only one chance to assert the defense of indispensable parties by motion, and that is in response to the initial complaint. If a defendant fails to assert the defense by motion at that time, his right to do so is waived, and he may assert the defense only in his answer. Dorélien declined to serve any defensive motion to Plaintiffs' original complaint. Instead, he raised the issue of joinder in his first Answer and Affirmative Defenses. (D.E. 11) at p. 6, paragraph 40 (raising affirmative defense for failure to join indispensable parties "in that Plaintiffs did not join the Armed Forces of Haiti" and others responsible as defendants.) Dorélien may not now assert the defense of failure to join indispensable parties by motion to dismiss.

E. Dorélien's Motion is barred by Fed. R. Civ. P. 12(g).

In the alternative, Dorélien's Motion to Dismiss Failure to Join Indispensable Parties pursuant to Rule 12(b)(7), Federal Rules of Civil Procedure is barred by Rule 12(g), Federal Rules of Civil Procedure, which prohibits serial motions asserting defenses under Rule 12(b). Here, the Motion is the fourth of four motions to dismiss filed by Dorélien pursuant to Rule 12(b). Dorélien's Rule 12(b) motions are:

(1) Dorélien's Motion to Dismiss: Lack of Jurisdiction Over the Person and Insufficiency of Service of Process, Insufficiency of Process (D.E. 52);
(2) Dorélien's Motion to Dismiss Improper Venue (D.E. 53); and
(3) Dorélien's Motion to Dismiss Improper Venue Re: Lottery Winnings (D.E. 58);
(4) Dorélien's Motion to Dismiss Failure to Join Indispensable Parties (D.E. 59).

Once his initial Motion to Dismiss (D.E. 52) was filed, Rule 12(g) precluded all later Rule 12(b) motions, including Dorélien's Motion to Dismiss Improper Venue (D.E. 53), the Motion to Dismiss Improper Venue Re: Lottery Winnings (D.E. 58), and this Motion. See Fed. R. Civ. P. 12(g); Skrtich v. Thornton, 280 F.3d 1295, 1306 (11th Cir. 2002) ("Rule 12(g) specifically prohibits a party that has previously filed a motion to dismiss from filing a second pre-answer motion to dismiss raising an omitted defense that could have been presented in the first motion to dismiss..."); Albany Ins. Co. v. Almacenadora Somex, S.A., 5 F.3d 907, 909-910 (5th Cir. 1993).

In Albany Ins. Co., the defendants (Coello and Grupo Sanfer) filed Rule 12(b) motions to dismiss for lack of personal jurisdiction; then nine days later, they filed motions to dismiss for improper venue under Rule 12(b)(3). Albany Ins. Co., 5 F.3d at 908. The Fifth Circuit Court of Appeals held that Defendants' second motion to dismiss for improper venue was barred by Rule 12(g):

> Coello and Grupo Sanfer each filed a motion to dismiss, alleging one or more of the defenses in Rule 12(b). Each, however, omitted from their first motion an objection to venue based on the forum clauses. Thus, according [to] the consolidation requirement of Rule 12(g), they too were not permitted to make a further motion seeking enforcement of the forum clauses.

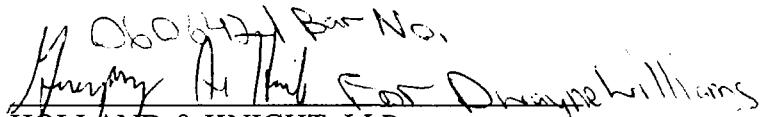
Id., at 910 (citation omitted). Like the defendants in Albany Ins. Co., Dorélien waived the right to challenge failure to join parties by motion pursuant to Rule 12(b)(7) when he failed to assert that defense in his first Motion to Dismiss (D.E. 52).

III. CONCLUSION

The Motion should be denied. Plaintiffs did not fail to join anyone. There are no persons whom it would be necessary to join, even if they could be joined. Indeed, the proposed co-defendants need not be joined because they are joint tortfeasors with Dorélien; as a matter of law, it is not necessary to join joint tortfeasors. Moreover, even if they could be joined, Plaintiffs are able to receive complete relief even in their absence, and no other persons have asserted an interest in the subject matter of this action. Thus, even if the proposed other parties could be joined it would not be necessary to join them. Given that, there is no need to look at whether the action can go on in their absence—it can. However, if the Court finds that the proposed other defendants would have to be joined if they could be joined, then the factors outlined in Rule 19(b) weigh strongly in favor of continuing with the case in their absence. This action is not prejudicial to the parties or the other proposed defendants who actually committed the acts, and, most significantly, the Plaintiffs will not have an adequate remedy if this action is dismissed.

WHEREFORE, Plaintiffs request that Defendant Carl Dorélien's Motion to Dismiss Failure to Join Indispensable Parties be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Plaintiffs' Response in Opposition to Defendant Carl Dorélien's Motion to Dismiss Failure to Join Indispensable Parties (D.E. 59), was served by fax and U.S. Mail this 16th day of April, 2004 to: Kurt R. Klaus, Esq., Law Offices of Kurt R. Klaus, Jr., 3191 Coral Way, Suite 402-A, Miami, FL 33145, attorney for Defendant Carl Dorélien; Scott M. Behren, Esq., 2200 North Commerce Parkway, Suite 202, Weston, Florida 33326, attorney for Defendant Lump Sum Capital, LLC.

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