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PHILIP MORRIS USA INC.

13 UNITED STATES DISTRICT COURT
14 FOR THE NORTHERN DISTRICT OF CALIFORNIA

CW

C 08 4482

15 PHILIP MORRIS USA INC.,

CASE NO. C-_____

16
17 Plaintiff,

**COMPLAINT FOR INJUNCTIVE AND
DECLARATORY RELIEF**

18 vs.

19 CITY AND COUNTY OF SAN
20 FRANCISCO; BOARD OF
21 SUPERVISORS OF THE CITY AND
22 COUNTY OF SAN FRANCISCO; and
GAVIN NEWSOM, in his official capacity
as MAYOR of the City and County of San
Francisco,

23 Defendants.
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INTRODUCTION

1
2 1. This is an action by PHILIP MORRIS USA INC. (“PM USA”) against the CITY
3 AND COUNTY OF SAN FRANCISCO, its BOARD OF SUPERVISORS, and its MAYOR
4 (collectively “DEFENDANTS”), to declare null and void and enjoin enforcement of (1) San
5 Francisco Ordinance No. 194-08, entitled “Ordinance amending the San Francisco Health Code
6 by amending Section 1009.53 and adding Section 1009.60 and Article 19J, to prohibit pharmacies
7 from selling tobacco products” and (2) any of the amendments made to the San Francisco Health
8 Code by said Ordinance. (The challenged ordinance and code provisions will be collectively
9 referred to as “the Ordinance”.) The Ordinance imposes unconstitutional and unlawful
10 restrictions on PM USA’s ability to advertise and promote its lawful products in San Francisco.

11 2. When it takes effect on October 1, 2008, the Ordinance will prohibit the sale of
12 tobacco products in any retail store (such as a Walgreens or Rite Aid) that contains a licensed
13 pharmacy, except for “big box stores” (such as Costco) or general grocery stores (such as
14 Safeway). Although styled as merely a regulation of “sales,” the target of the Ordinance is the
15 display of cigarettes and accompanying cigarette *advertising* that invariably accompanies the
16 offering of such products for sale in the affected stores. Of the 60 stores that would be required to
17 cease cigarette sales under the Ordinance, all are participants in PM USA’s “Retail Leaders”
18 program, under which the cigarette retailer contractually agrees to display a specified amount and
19 format of PM USA advertising and promotional materials in or near the product-display area (the
20 format, size, and placement of which is also contractually specified). The Ordinance, on its face,
21 reflects DEFENDANTS’ aim to limit and suppress the cigarette advertising that currently exists
22 in the affected stores: citing a 2003 study showing that “84% of pharmacies selling cigarettes” in
23 San Francisco “displayed tobacco advertising,” the Ordinance announces that its purpose is to
24 avoid the “mixed message” of “tacit approval of the purchase and use of tobacco products” that
25 comes from the display of tobacco products and advertising in such stores.

26 3. If enforcement of the Ordinance is not enjoined, the affected retail stores will be
27 required to remove PM USA’s products—which means that they will also remove the
28 accompanying product displays and advertising and promotional materials—on or before

1 September 30, 2008. Because the affected 60 stores account for over 20% of PM USA's entire
2 sales volume in San Francisco, the Ordinance will not merely significantly reduce the amount of
3 physical retail space in San Francisco that is available for the display of PM USA advertising and
4 promotional materials, it will also take away what have proved to be some of the most convenient
5 and effective venues for reaching adult smokers in San Francisco. The substantial adverse impact
6 of the Ordinance on PM USA's advertising is significantly enhanced by the absence of equally
7 effective alternatives to the point-of-sale advertising that would be eliminated by the Ordinance.
8 Federal law prohibits cigarette advertising on radio or television, and the Master Settlement
9 Agreement with the California Attorney General (and 45 other State attorneys general) imposes
10 severe limitations on PM USA's ability to advertise outside of retail establishments. Point-of-sale
11 advertising has unique advantages in allowing PM USA to reach large numbers of adult smokers
12 who currently smoke competing brands of cigarettes.

13 4. The Supreme Court, in holding unconstitutional Massachusetts' prior efforts to
14 directly restrict tobacco advertising in retail stores (and elsewhere), held that the "First
15 Amendment ... constrains state efforts to limit advertising of tobacco products, because so long
16 as the sale and use of tobacco is lawful for adults, the tobacco industry has a *protected interest* in
17 communicating information about its products and adult consumers have an interest in receiving
18 that information." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 571 (2001) (emphasis added).
19 That DEFENDANTS here seek to eliminate PM USA's advertising from particular locations
20 through a sales restriction is insufficient to evade the strictures of the First Amendment. Under
21 established First Amendment principles, a regulation that purports to regulate only conduct, but
22 that imposes substantial incidental burdens on speech, may only be sustained if, *inter alia*, the
23 government seeks to regulate "for reasons unrelated to the communication of ideas." *Lorillard*,
24 533 U.S. at 569. The Ordinance clearly fails this test, because its announced purpose is to limit
25 and suppress "message[s]" of "tacit approval" of tobacco products that comes from the display of
26 cigarettes and cigarette advertising. Likewise, the Ordinance cannot be sustained as a "time,
27 place, and manner" restriction, because long settled First Amendment principles require that such
28 restrictions be *content-neutral* and unrelated to the suppression of communication. Here, the

1 stated aim of the Ordinance is to restrict messages about tobacco with which DEFENDANTS
2 disagree. Although DEFENDANTS have power to adopt appropriate regulations of tobacco sales
3 for reasons unrelated to the suppression of communication (e.g., to prevent access by youth, etc.),
4 the First Amendment forbids them from regulating tobacco sales based on antipathy to the
5 advertising that accompanies such sales.

6 5. For similar reasons, the Ordinance’s regulation of cigarette advertising is
7 preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331, *et seq.*
8 (“FCLAA”). As the Supreme Court has held, Congress in enacting FCLAA “crafted a
9 comprehensive federal scheme governing the advertising and promotion of cigarettes.” *Lorillard*,
10 533 U.S. at 541. FCLAA contains a “sweeping” preemption provision, *id.* at 542, which
11 preempts any “requirement or prohibition based on smoking and health” that is “imposed under
12 State law with respect to the advertising or promotion of any cigarettes” 15 U.S.C. § 1334(b).
13 Here, the Ordinance indisputably imposes “requirements or prohibitions” that are “based on
14 smoking and health.” Although styled as only a regulation of “sales,” the Ordinance plainly
15 imposes prohibitions “with respect to ... advertising or promotion” of cigarettes. In assessing the
16 line between nonpreempted regulation of “conduct” concerning cigarettes and preempted
17 regulation of cigarette advertising, the Supreme Court in *Lorillard* relied on the well-developed
18 body of First Amendment law that addresses the directly analogous question of classifying a law
19 as a regulation of conduct or a regulation of speech. 533 U.S. at 552. Because, as explained
20 above, the Ordinance would be treated as a regulation of speech for purposes of the First
21 Amendment, under *Lorillard* it should therefore be deemed to be a regulation “with respect to ...
22 advertising and promotion” for purposes of FCLAA. As such, all of the requirements of
23 § 1334(b) are met, and the Ordinance is therefore preempted.

24 6. The challenged Ordinance is unconstitutional and invalid, and its enforcement
25 threatens to cause imminent, substantial, and irreparable harm to PM USA and its customers. The
26 Ordinance should be preliminarily and permanently enjoined.

1 15. For example, PM USA and other tobacco manufacturers have not advertised in
2 radio or television since 1971, when a federal statute took effect making it “unlawful to advertise
3 cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction
4 of the Federal Communications Commission.” *See* 15 U.S.C. § 1335.

5 16. In November 1998, PM USA and other major tobacco companies entered into a
6 Master Settlement Agreement (“MSA”) with the Attorneys General of 46 states, five U.S.
7 territories, and the District of Columbia (the four states that did not sign the MSA had already
8 entered into similar settlements with PM USA and other tobacco companies). The MSA resulted
9 in wide-ranging restrictions on the advertising, promotion, and marketing of cigarettes and
10 smokeless tobacco products. In particular, the MSA:

- 11 • prohibits virtually all forms of outdoor advertising, including billboards, stadiums,
12 shopping malls, video game arcades, transit ads, and any exterior signage except on the
13 premises of retail stores that sell cigarettes;
- 14 • prohibits merchandise bearing cigarette brand names (so-called “branded items”);
- 15 • prohibits brand name sponsorship of concerts;
- 16 • places restrictions on brand name team sponsorships;
- 17 • places restrictions on marketing practices such as free product sampling;
- 18 • prohibits paid product placement in movies or television; and
- 19 • prohibits advertising and marketing that is targeted at minors.

20 These restrictions on tobacco marketing were incorporated into judicially enforceable Consent
21 Decrees in the courts of each settling State, including California.

22 17. PM USA has also limited its tobacco product advertising in other ways. In 2000,
23 PM USA significantly limited the number of magazines in which it placed advertisements, so as
24 to avoid placing advertisements in magazines that had substantial youth readership. At the same
25 time, PM USA ceased advertising on the back covers of any magazine. Notably, the California
26 Attorney General brought suit in March 2001 against a competing cigarette manufacturer that
27 initially declined to adopt restrictions on its print advertising that were similar to those adopted by
28 PM USA in 2000. The California Attorney General’s suit contended that the competing cigarette

1 manufacturer's continued advertising in certain magazines constituted "targeting" of youth in
2 violation of the MSA and its accompanying California Consent Decree. The trial court ultimately
3 enjoined the manufacturer, and the injunction was affirmed on appeal. *See People ex rel. Lockyer*
4 *v. R.J. Reynolds Tobacco Co.*, 116 Cal. App. 4th 1253 (2004).

5 18. At the present time, PM USA does not advertise its tobacco products in
6 newspapers or magazines at all.

7 19. The MSA and its accompanying Consent Decrees, however, allow certain forms of
8 advertising to be displayed on the property of retail establishments, whether such advertising is
9 located indoors or outside. Such on-site brand advertising (which is subject to a size limitation
10 and certain other restrictions under the MSA and its accompanying Consent Decrees) constitutes
11 an important means for PM USA to communicate with adult smokers. Such advertising serves to
12 supply adult smokers with pertinent information such as price and other brand attributes, to foster
13 brand loyalty, and to encourage adult smokers of other brands to try or switch to the advertised
14 brands. On-site advertising provides an important means by which PM USA competes with other
15 manufacturers of tobacco products.

16 20. On-site advertising of tobacco products also constitutes an important means by
17 which retail stores compete for the business of adult smokers, who frequently purchase items
18 other than tobacco products. To compete for adult smoker business, it is important to
19 communicate to adult smokers that they can purchase popular brands of cigarettes advertised at
20 the retail store. Advertisements for tobacco products often trigger the kind of spontaneous
21 purchase decisions that get adult smokers inside the store.

22 21. The vast majority of PM USA branded cigarettes that are sold at retail in San
23 Francisco are sold through retailers who participate in the Retail Leaders program. Through
24 Retail Leaders—which offers retailers financial benefits for participating—PM USA has
25 encouraged hundreds of thousands of retailers throughout the United States to responsibly
26 merchandise cigarettes in their stores. Among other things, the Retail Leaders Agreement
27 requires all participating retailers to merchandise all cigarettes in a non-self-service manner (even
28 in states that lack this requirement under state law); it limits indoor PM USA signage to a location

1 within 48 inches of the cigarette fixture; it offers financial incentives to remove cigarettes and
2 cigarette signage from areas of the store; and it requires retailers to participate in the We Card
3 responsibility program, which trains store personnel on how to prevent youth access to cigarettes.

4 **The Challenged Ordinance**

5 22. On August 5, 2008, Defendant BOARD OF SUPERVISORS OF THE CITY AND
6 COUNTY OF SAN FRANCISCO passed, and on August 7, 2008, Defendant MAYOR GAVIN
7 NEWSOM signed and approved, Ordinance No. 194-08. Ordinance No. 194-08 adds to the San
8 Francisco Health Code a new Article 19J, which is entitled "PROHIBITING PHARMACIES
9 FROM SELLING TOBACCO PRODUCTS" and which comprises Sections 1009.91 through
10 1009.99 of said Code. Section 1009.92 provides that "No person shall sell tobacco products in a
11 pharmacy, except as provided in Sec. 1009.93." Section 1009.91, in turn, defines a "Pharmacy"
12 as follows:

13 a retail establishment in which the profession of pharmacy by a pharmacist
14 licensed by the State of California in accordance with the Business and Professions
15 Code is practiced and where prescriptions are offered for sale. A pharmacy may
16 also offer other retail goods in addition to prescription pharmaceuticals. For
17 purposes of this Article, 'pharmacy' includes retail stores commonly known as
18 drugstores.

19 23. Ordinance 194-08 also amends Section 1009.53 of the San Francisco Health Code
20 to provide that pharmacies "prohibited from selling tobacco products under Article 19J" may not
21 be issued permits to sell tobacco. Section 1009.95 of said Code, as added by Ordinance 194-08,
22 provides that any existing permits to sell tobacco issued to pharmacies "shall expire on September
23 30, 2008, and shall not be renewed if sales of tobacco by that pharmacy are prohibited" by the
24 Ordinance.

25 24. Section 1009.93 of the San Francisco Health Code, as added by Ordinance 194-08
26 provides that the "prohibition against tobacco sales at pharmacies in Section 1009.92 shall not
27 apply" to "General Grocery Stores" and "Big Box Stores." The Ordinance defines a "General
28 Grocery Store" by reference to Section 790.102(a) of the San Francisco Planning Code, which
defines the term as an "individual retail food establishment" that exceeds 5,000 square feet,
"[o]ffers a diverse variety of unrelated non-complementary food and non-food commodities,"

1 prepares no more than minor amounts of food for immediate on-site consumption, and markets
2 most of its merchandise at retail prices. The Ordinance defines a "Big Box Store" as a "single
3 retail establishment occupying an area in excess of 100,000 gross square feet."

4 25. In support of Ordinance 194-08, Defendant BOARD OF SUPERVISORS made
5 several express "[f]indings" that were included in Section 1 of Ordinance 194-08. One such
6 finding is that, "[i]n a 2003 study of San Francisco pharmacies' merchandising of cigarettes, 84%
7 of pharmacies selling cigarettes displayed tobacco advertising." Another finding is that
8 "[t]hrough the sale of tobacco products, pharmacies convey tacit approval of the purchase and use
9 of tobacco products," and "[t]his approval sends a mixed message to consumers who generally
10 patronize pharmacies for health care services."

11 26. DEFENDANTS have recently confirmed, in related litigation concerning the
12 Ordinance, that the purpose of the Ordinance is to limit and suppress "implicit message[s] that
13 smoking is acceptable." In a pending suit brought by Walgreen Co. against DEFENDANTS in
14 San Francisco Superior Court, Walgreen Co. alleges that the exemption for Big Box Stores and
15 General Grocery Stores lacks any rational basis and therefore violates the Equal Protection
16 Clauses of the U.S. and California Constitutions. In their written opposition to Walgreen's
17 motion for a preliminary injunction, filed on September 18, 2008, DEFENDANTS stated that the
18 rationale of the Ordinance is that "drug stores should not be selling tobacco, because when health-
19 promoting businesses sell tobacco, it sends an implicit message that smoking is acceptable" and
20 that the exception for Big Box Stores and General Grocery Stores was rational because the retail
21 stores covered by the Ordinance "send[] that implicit message of acceptability more strongly than
22 the sale of cigarettes by big box stores or grocery stores, even if those stores too have pharmacies
23 in them."

24 **PM USA Will Be Significantly and Irreparably Harmed by the Ordinance**

25 27. When the prohibitions of the Ordinance take effect on October 1, 2008,
26 approximately 60 retail stores in San Francisco that currently sell PM USA cigarettes and that are
27 covered by the Ordinance will be required to cease selling tobacco products, and they will remove
28 the displays of PM USA products and any accompanying advertising or promotional materials.

1 All of these 60 retail stores are participants in PM USA's Retail Leaders program, and they
2 therefore currently contain and display PM USA cigarette advertising and promotional materials
3 in accordance with the terms of that program. Because the affected 60 stores account for over
4 20% of PM USA's entire sales volume in San Francisco, the Ordinance will not merely
5 significantly reduce the amount of physical retail space in San Francisco that is available for the
6 display of PM USA advertising and promotional materials, it will also take away what have
7 proved to be some of the most convenient and effective venues for reaching adult smokers.

8 28. The impact of this substantial reduction in the number of retail locations that will
9 carry PM USA point-of-sale advertising and promotional materials is magnified by the lack of
10 equally effective alternatives for PM USA to communicate with adult smokers, especially
11 smokers of competing brands of cigarettes. Under the MSA, outdoor advertising of tobacco
12 products is generally limited only to retail stores that sell tobacco products. Retail stores
13 generally do not and will not display indoor advertising for products that they do not sell and that
14 are only sold by competing retailers. Federal law prohibits cigarette advertising on radio and
15 television. The California Attorney General, in a suit against a competing cigarette manufacturer,
16 obtained an injunction that the proscriptions of the MSA required that manufacturer to remove its
17 cigarette advertising from numerous magazines.

18 **CLAIMS FOR RELIEF**

19 **FIRST CAUSE OF ACTION**

20 **(First Amendment)**

21 29. PM USA incorporates and re-alleges each and every allegation contained in
22 paragraphs 1 through 28, inclusive, as though fully set forth herein.

23 30. The Ordinance will substantially limit, infringe upon, and interfere with PM
24 USA's ability to communicate to adult smokers truthful and nonmisleading information
25 concerning its tobacco products.

26 31. The Ordinance's prohibition on sales of tobacco products in retail stores
27 containing pharmacies has the effect of prohibiting and suppressing in such stores, and is intended
28 to prohibit and suppress, the point-of-sale advertising and promotion that accompany the

1 availability of such products for sale. Because such stores conduct a significant volume of
2 commerce in San Francisco, and in the aggregate are visited by thousands of adult consumers
3 every day, the Ordinance will substantially restrict adult consumers' exposure to PM USA's
4 advertising and promotion of their products. The severity of these restrictions on the available
5 locations for PM USA advertising and promotional materials is substantially exacerbated by the
6 lack of equally effective and available alternatives.

7 32. The Ordinance's substantial burdens on PM USA's speech cannot be justified
8 under the First Amendment.

9 33. The Ordinance cannot be sustained under the First Amendment on the ground that
10 it is a regulation of conduct that has at most an incidental burden on expressive activity. For a
11 regulation to be sustained on such grounds, the regulation, and the governmental interests
12 advanced in support of it, must be unrelated to the suppression of free expression. That is not the
13 case here, because, *inter alia*, DEFENDANTS have conceded that a central purpose of the
14 Ordinance is to limit and suppress implicit messages that smoking is acceptable. The Ordinance
15 on its face also confirms that DEFENDANTS are fully aware that the overwhelming proportion
16 of the retail stores affected by the Ordinance carry cigarette advertising on the premises. In
17 addition, in enacting the Ordinance, DEFENDANTS have failed to demonstrate, and cannot
18 demonstrate, that the Ordinance promotes a substantial and legitimate governmental interest and
19 that the Ordinance is an appropriately narrowly tailored means of advancing such an interest.

20 34. The Ordinance also cannot be sustained under the First Amendment on the ground
21 that it is a content-neutral "time, place, and manner" restriction. For a regulation to be sustained
22 on such grounds, the regulation must not be based on the content of the message, must be
23 narrowly tailored to serve a significant governmental interest, and must leave open ample
24 alternatives for communication. The Ordinance does not satisfy any of these requirements.

25 35. The Ordinance cannot be sustained under the First Amendment on the ground that
26 it is a permissible regulation of commercial speech. PM USA's advertising and promotional
27 activities in retail stores are truthful and nonmisleading. In enacting the Ordinance,
28 DEFENDANTS have failed to demonstrate, and cannot demonstrate, that the Ordinance promotes

1 a substantial and legitimate governmental interest and that the Ordinance is an appropriately
2 narrowly tailored means of advancing such an interest. On the contrary, the Ordinance limits and
3 suppresses PM USA's speech based on DEFENDANTS' hostility to its content.

4 36. The Ordinance violates the First Amendment, as made applicable to the States and
5 their political subdivisions by the Fourteenth Amendment.

6 37. PM USA has no adequate remedy at law.

7 SECOND CAUSE OF ACTION

8 (Preemption)

9 38. PM USA incorporates and realleges each and every allegation contained in
10 paragraphs 1 through 37 of this Complaint as though fully set forth herein.

11 39. The Ordinance is null and void by reason of Article VI, Section 2 of the United
12 States Constitution ("Supremacy Clause") in that the Ordinance is preempted by the Federal
13 Cigarette Labeling and Advertising Act ("FCLAA").

14 40. Congress enacted FCLAA as a "comprehensive Federal program ... with respect
15 to any relationship between smoking and health." 15 U.S.C. § 1331(1).

16 41. To ensure that the public is "adequately informed about any adverse health effects
17 of cigarette smoking," *id.*, § 1331(1), FCLAA requires each package of cigarettes, and each
18 cigarette advertisement, to carry one of four rotating health warnings, *see id.*, § 1333.

19 42. FCLAA further explicitly provides that: "No requirement or prohibition based on
20 smoking and health shall be imposed under State law with respect to the advertising or promotion
21 of any cigarettes the packages of which are labeled in conformity with the provisions of this
22 chapter." *Id.*, § 1334(b).

23 43. All of PM USA's tobacco products properly advertised and sold in San Francisco
24 conform to the requirements of FCLAA.

25 44. The Ordinance imposes under State law requirements or prohibitions based on
26 smoking and health with respect to the advertising and promotion of cigarettes which are
27 packaged in conformity with FCLAA. The Ordinance is therefore preempted and, under the
28 Supremacy Clause, is null and void.

1 45. PM USA has no adequate remedy at law.

2 **THIRD CAUSE OF ACTION**

3 **(Equal Protection)**

4 46. PM USA incorporates and realleges each and every allegation contained in
5 paragraphs 1 through 45 of this Complaint as though fully set forth herein.

6 47. The distinctions drawn by the Ordinance as to the stores in which tobacco products
7 may be sold, and as to which products may or may not be sold in which retail locations, are
8 irrational, arbitrary, and invidious in violation of the Equal Protection Clause of the Fourteenth
9 Amendment. As a practical matter there is little or no meaningful distinction between grocery
10 stores with pharmacies, which are exempt from the Ordinance, and retailers such as Walgreens
11 and Rite Aid, whose cigarettes are sold behind sales counters in the large convenience store area
12 at the opposite end of the store from the pharmacy counter, but which are nevertheless covered by
13 the Ordinance. Indeed, the vast majority of customers and sales at such covered retailers have
14 nothing to do with the stores' pharmacies.

15 48. In particular, the Equal Protection Clause forbids a State or political subdivision
16 from relying, as DEFENDANTS have done in enacting and threatening to enforce the Ordinance,
17 upon legislative classifications that are based, in purpose and effect, on an entity's exercise of its
18 rights under the First Amendment and applicable federal law.

19 49. PM USA has no adequate remedy at law.

20 **FOURTH CAUSE OF ACTION**

21 **(42 U.S.C. § 1983)**

22 50. PM USA incorporates and realleges each and every allegation contained in
23 paragraphs 1 through 49 of this Complaint as though fully set forth herein.

24 51. By enacting and threatening to enforce the Ordinance, DEFENDANTS have
25 unlawfully and substantially deprived PM USA of rights secured by the United States
26 Constitution and federal law.

27 52. Defendants are "persons" under 42 U.S.C. § 1983 who have acted under color of
28 state law to deprive PM USA of rights secured by the United States Constitution and federal law.

1 PRAYER FOR RELIEF

2 WHEREFORE, PM USA prays that this Court grant it the following relief:

- 3 1. A judgment declaring the Ordinance to be unconstitutional, preempted by federal
4 law, and null and void;
- 5 2. A preliminary injunction enjoining DEFENDANTS and their agents from taking
6 any action under or to enforce the Ordinance.
- 7 3. A permanent injunction enjoining DEFENDANTS and their agents from taking
8 any action under or to enforce the Ordinance.
- 9 4. An award of PM USA's reasonable attorneys' fees and costs; and
- 10 5. Such additional or different relief as the Court deems just and proper.

11 DATED: September 24, 2008

MUNGER, TOLLES & OLSON LLP

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13 By: 

14 Hojoon Hwang

15 Attorneys for Plaintiff PHILIP MORRIS USA INC.
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