SC92401

IN THE SUPREME COURT OF MISSOURI

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801 SKINKER BOULEVARD CORP., et al.,

Appellants,

v.

DIRECTOR OF REVENUE,

Respondent.

On Petition for Review From
The Administrative Hearing Commission,
The Honorable Nimrod T. Chapel, Jr., Commissioner

RESPONDENT'S BRIEF

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF FACTS

The Director of Revenue highlights for the Court the essential facts for resolution of this appeal, including essential facts omitted by the appellants.

All three appellants in this case (collectively the "Taxpayers") sought refunds from the Department of Revenue for sales taxes paid or collected under § 144.020, RSMo.[1/] Appellant 801 Skinker Boulevard Corporation (the "Corporation"), a Delaware corporation that manages a group of 39 condos in St. Louis, Missouri, sought a refund for sales taxes under § 144.030.2(24)[2/]. (LF 2-4). The refund request was for taxes on gas and electricity used solely for the Corporation's common areas, not the residential areas. *Id.* The common areas, which were on separate meters, include the hallways, lobbies, elevators, entrances, parking areas, generator, and fire pump. (LF 260-62).[3/]

[1/] All references to the Revised Statutes of Missouri will be to the 2012 Cumulative Supplement unless otherwise noted.

[2/] Section 144.030 was amended in H.B. 1402, which was merged with S.B. 470 and S.B. 480 (2012), adding a new subdivision (4) to subsection 2 of § 144.030 and therefore renumbering the remaining subdivisions. Section § 144.030.2(23), with no substantive changes, was renumbered as § 144.030.2(24).

[3/] The condos at issue can be seen at http://www.highrises.com/st-louis/801-skinker-condos/, and include common areas such as "Covered and Secure Garage for

The gas and electricity at issue is used by the Corporation for heating, cooling, and lighting the common areas, and for the generator and fire pump. (LF 2, 261). The Corporation, not the individual residents, is legally required to pay for the common area gas and electricity. (LF 261). Yet, the Corporation has already recouped from its members the money paid for the gas and electricity for the common areas. (LF 543).

Appellants Laclede Gas Company ("Laclede") and Union Electric Company, d/b/a AmerenUE ("Ameren") also sought refunds for taxes collected on their sales to the Corporation. (LF 5-8). Once again, the sales taxes at issue are for gas and electricity solely for common areas. *Id.* The owner of each condo unit at 801 South Skinker Boulevard is responsible for the energy consumed in his or her own unit, and each owner has a separate meter. (LF 262). No sales taxes were collected or paid for gas and electricity used for the residences, only the common areas which are on separate meters. (LF 548).

Laclede and Ameren's rate classification for the gas and electricity the Corporation purchased for the common areas was rated "commercial" and not residential. (LF 262). The Missouri Public Service Commission has not approved a residential rate classification for the purchases of gas or

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2 vehicles, 24-hour Doorman, Fitness Room, Rooftop Patio, Walk-out Center & Board Room." *Id.*

electricity for the common areas by the Corporation. (LF 263). And neither Laclede nor Ameren has even contacted the Missouri Public Service Commission to request a change in the rate classification. *Id.*

SUMMARY OF THE ARGUMENT

The legislature repeated itself three times in three consecutive provisions of § 144.030.2(24). The message, therefore, must be important. And what did the legislature want to make so clear? The limited circumstances under which utility services – such as gas and electricity – for residential apartments or condominiums, including utility services for common areas, could be tax exempt:

- "Utility service through a single or master meter for residential apartments or condominiums, including service for common areas . . . ." § 144.030.2(24)(a) (emphasis added);
- "[S]ales to and purchases made by or on behalf of the occupants of residential apartments or condominiums through a single or master meter, including service for common areas . . . ." § 144.030.2(24)(b) (emphasis added); and
- "[E]ach person making domestic purchases on behalf of occupants of residential apartments or condominiums through a single or master meter, including service for common areas . . . ."

§ 144.030.2(24)(c) (emphasis added).

The plain language of the statute is quite evident – in order for utility services for residential apartments and condominiums, including common areas, to be exempt from sales taxes, the utilities must be through a single or master meter. What is more, as a tax exemption the statutory language must be strictly construed against the Taxpayers. If there is any doubt as to the meaning of the statutory language, it must be construed against the Taxpayers. *Branson Properties USA, L.P. v. Dir. of Revenue*, 110 S.W.3d 824, 825 (Mo. banc 2003).

In this case, there is no dispute that the common areas were on a separate meter, not a single or master meter, and therefore were subject to taxes. The common areas were also treated as nonexempt by the utility companies and the Missouri Public Service Commission. Nevertheless, the Taxpayers attempt to ignore the plain language of the statute, despite its repetition. They claim that the use of the utilities is all that matters and that the "single or master meter" language is immaterial or simply describes the means to measure consumption. Yet, this argument would render the statutory language superfluous even though it was repeated three times. *See Hargis v. JLB Corp.*, 357 S.W.3d 574, 587 (Mo. banc 2011). The Taxpayers also fail to recognize that the statute already requires the utilities to be

metered in order to satisfy the exemption. § 144.030.2(24) (applying to "sales of metered water service, electricity," etc.).

The plain language of § 144.030.2(24) provides that common areas are subject to sales tax inasmuch as they are not on a single or master meter with the apartments or condominiums. Accordingly, the Administrative Hearing Commission correctly interpreted the statute and should be affirmed.

ARGUMENT

Standard of Review

A decision of the Administrative Hearing Commission ("Commission") must be affirmed if: "(1) it is authorized by law; (2) it is supported by competent and substantial evidence on the whole record; (3) mandatory procedural safeguards are not violated; and (4) it is not clearly contrary to the reasonable expectations of the General Assembly." *Brinker Mo., Inc. v. Dir. of Revenue*, 319 S.W.3d 433, 435 (Mo. banc 2010); § 621.193.

When the Commission has interpreted the law or the application of facts to law, the review is *de novo*. *State Bd. of Registration for the Healing Arts v. McDonagh,* 123 S.W.3d 146, 152 (Mo. banc 2003); *see also Brinker*, 319 S.W.3d at 435. ("Statutory interpretation is an issue of law that this Court reviews *de novo*."). In addition, the Commission's factual determinations "are upheld if supported by 'substantial evidence upon the whole record.'" *Concord Publ'g House, Inc. v. Dir. of Revenue,* 916 S.W.2d 186, 189 (Mo. banc 1996) (quoting *L & R Egg Co., Inc. v. Dir. of Revenue,* 796 S.W.2d 624, 625 (Mo. banc 1990)).

Here, the Commission's decision is supported by the record and the law, and should, therefore, be affirmed.

I. The Plain Language of the Tax Exemption in § 144.030.2(24), Which Must Be Strictly Construed Against the Taxpayers, Does Not Apply to the Condominium Common Areas in This Case. – Responding to Appellants' Points I and II.[4/]

Missouri law imposes sales tax on the "sales of electricity [or] gas . . . to domestic, commercial or industrial consumers." § 144.020.1(3) (emphasis added). Thus, utilities – even utilities sold to domestic consumers – are subject to sales tax. The legislature, however, provided for certain exemptions to the general sales tax on utilities. These exemptions are contained in § 144.030. The Taxpayers in this case have alleged that they are entitled to an exemption for "domestic use" of gas and electricity in condominium common areas under § 144.030.2(24). Appellants' Brief, p. 2 ("Appellants filed their Complaint . . . alleging that the utilities were purchased for domestic use . . . ."). They are not.

[4/] The Director makes no response to Appellants' Point III as Appellants Laclede and Ameren have openly asserted that they "could hardly keep any refund" and "801 will not allow Ameren or Laclede to receive a windfall." Appellants' Brief, p. 21.

The plain language of the tax exemption for "domestic use" in § 144.030.2(24), particularly when strictly construed against the Taxpayers, does not apply to the gas and electricity used in the condominium common areas which are on separate meters.

A. Tax Exemptions are Strictly Construed Against the Taxpayers.

The issues in this case involve the interpretation of a revenue law – § 144.030.2(24). But § 144.030.2(24) is not just any revenue law; instead, it is a statutory exemption from sales and use taxes, which is subject to strict construction as follows:

> Tax exemptions are strictly construed against the taxpayer. An exemption is allowed only upon clear and unequivocal proof, and doubts are resolved against the party claiming it. Exemptions are interpreted to give effect to the General Assembly's intent, using the plain and ordinary meaning of the words.

Branson Properties USA, L.P. v. Dir. of Revenue, 110 S.W.3d 824, 825-26 (Mo. banc 2003) (internal citations ommitted). Put another way, this Court has held that "it is the burden of the taxpayer claiming the exemption to show

that it fits the statutory language exactly." *Cook Tractor Co., Inc. v. Dir. of Revenue*, 187 S.W.3d 870, 872 (Mo. banc 2006).

These standards for the application of a tax exemption have been repeated over and over by this Court. *See, e.g., Great S. Bank v. Dir. of Revenue*, 269 S.W.3d 22, 24 (Mo. banc 2008); *Dir. of Revenue v. Armco, Inc.*, 787 S.W.2d 722, 724 (Mo. banc 1990) (noting that "strict construction is mandated for statutes establishing conditions for claiming an exemption") (citing *Mo. Pub. Serv. Comm'n v. Dir. of Revenue*, 733 S.W.2d 448, 449 (Mo. banc 1987)). Yet, the Taxpayers in this case entirely ignore these standards or their associated burden. They focus their arguments on what they believe is "clearly meant" by the tax exemption in § 144.030.2(24), instead of what the language actually says. Appellants' Brief, p. 9.

A plain reading of the statutory language in this case, to say nothing of a strict construction of the language, does not yield the supposedly clear meaning the Taxpayers suggest. Therefore, they are not entitled to the exemption just as the Commission held.

B. The Plain Language of § 144.030.2(24) is Dispositive in Several Ways.

As with any statutory provision, "the primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain

language of the statute." *Akins v. Dir. of Revenue*, 303 S.W.3d 563, 565 (Mo. banc 2010) (citing *State ex rel. White Family P'ship v. Roldan*, 271 S.W.3d 569, 572 (Mo. banc 2008)). Courts have a duty to construe statutes in their plain, ordinary and usual sense. *Bosworth v. Sewell*, 918 S.W.2d 773, 777 (Mo. banc 1996). Where a statute contains no ambiguity, courts cannot look to any other rule of construction. *Id.*

Here, § 144.030.2(24), exempts "all sales of metered . . . electricity [and] gas . . . for domestic use." The legislature did not leave us guessing, however, as to what "domestic use" means in this context. The term "domestic use" is specifically and immediately defined in the statute:

> "Domestic use" means that portion of metered water service, electricity, electrical current, natural, artificial or propane gas, wood, coal or home heating oil, . . . which an individual occupant of a residential premises uses for nonbusiness, noncommercial or nonindustrial purposes. Utility service through a single or master meter for residential apartments or condominiums, including service for common areas and facilities and vacant units, shall be deemed to be for domestic use. Each seller shall establish and

> maintain a system whereby individual purchases are determined as exempt or nonexempt.

§ 144.030.2(24)(a). There are three important parts or sentences in this definition that are essential to consider, and which are dispositive in this case.

1. Common areas are not used by an "individual occupant," but by every occupant and even the Corporation.

The first part, or sentence, of the definition of "domestic use" limits the exemption to metered gas and electric utilities "which an individual occupant of a residential premises uses for nonbusiness, noncommercial or nonindustrial purposes." § 144.030.2(24)(a). Although the Taxpayers seek to apply the exemption to common areas in this case, this first sentence says nothing about common areas. *See Cook Tractor Co.*, 187 S.W.3d at 872 (holding the taxpayer must show the exemption "fits the statutory language exactly"). In fact, the language plainly applies only to an individual occupant's actual residence.

In an apartment or condominium setting there are unquestionably places that are used by individual occupants as a residential premises – their apartment or condo – and there are also places used by all occupants or even

third parties – the common areas. Indeed, common areas are used in this case by a "24-hour Doorman," the Corporation's employees and contractors, as well as all the occupants of the condominiums. Had the legislature wanted to extend the "domestic use" exemption to all common areas in a building it could have easily included those terms in the first sentence of § 144.030.2(24)(a). For example, right after "residential premises" it could have put in a clause such as: "including common areas and facilities," just as it did in the second sentence of § 144.030.2(24)(a). But the legislature did not. Indeed, the fact that common areas are specifically included in the second sentence suggests that the legislature did not intend to include them in the first sentence. *See Harrison v. MFA Mut. Ins. Co.*, 607 S.W.2d 137, 146 (Mo. banc 1980) (applying the maxim *expressio unius est exclusion*); *State ex rel. Angoff v. Wells*, 987 S.W.2d 411, 416 (Mo. App. W.D. 1999) (finding that the inclusion of a provision in one part of a statute and its omission from another was an intentional exclusion).

Moreover, the legislature used the terms "individual occupant" for a reason. Had the legislature wanted to include common areas and facilities that multiple occupants of apartments or condominiums use, it could have dropped the term "individual" and replaced it with "all occupants" or just "occupants." Once again, it did not. Yet, in support of their claims, the

Taxpayers argue that they are entitled to the "domestic use" exemption "so long as the **use** made of the utility service is for a nonbusiness, noncommercial or nonindustrial purpose." Appellants' Brief, p. 9 (emphasis in original). This is not accurate. While the sentence certainly does address "uses," the Taxpayers entirely miss the essential limitation of this sentence – it is limited to uses by "an individual occupant." And in fact, the gas and electricity used in this case by the individual occupants for their actual condominiums was tax exempt, just as the first sentence of § 144.030.2(24)(a) provides.

Of course, it is possible to strain the meaning of "individual occupant" to suggest that common areas are used by many individual occupants. But that would render the use of the term "individual" completely superfluous, which is contrary to the canons of statutory interpretation. *Hyde Park Hous. P'ship v. Dir. of Revenue*, 850 S.W.2d 82, 84 (Mo. banc 1993) (quoting *State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 765 S.W.2d 626, 628 (Mo. App. W.D. 1988) ("It is presumed that the legislature intended that every word, clause, sentence, and provision of a statute have effect. Conversely, it will be presumed that the legislature did not insert idle verbiage or superfluous language in a statute.")). Such a strained interpretation would not comport with the strict construction that must be afforded this statutory language.

The gas and electricity "which an individual occupant of a residential premises uses" plainly does not include common areas and facilities used by multiple occupants or third-parties.

2. For common areas to be exempt, the condominiums must be on a "single or master meter."

In the second part or sentence of the definition of "domestic use," in contrast to the first sentence, the legislature actually provided for a tax exemption that includes common areas, but not in a way that applies in this case. To be clear, there is no dispute that the individual condos in this case are each on separate meters and are all tax exempt. The only issue, therefore, is whether the common areas of the Corporation, which are on separate meters, qualify for the tax exemption. They do not, based on the plain language of the statute.

The second sentence of § 144.030.2(24)(a) gives a specific exemption that includes common areas. In this sentence the legislature provided that utility service "for residential apartments or condominiums, including service for common areas and facilities and vacant units, shall be deemed to be for domestic use," but only under one scenario – if it is "through a single or master meter." *Id.* (emphasis added).

At the outset it is worth noting that the legislature used the word "deemed" to qualify the exemption in the second sentence. This is important because it recognizes that the circumstances identified in the second sentence – "utility service through a single or master meter for residential apartments or condominiums, including service for common areas and facilities and vacant units" – are not typically considered "domestic use." Indeed, the Commission aptly noted this very point, setting forth the definition of "deem" as follows: "to treat (something) as if (1) it were really something else, or (2) it has qualities it does not have." Black's Law Dictionary 477 (9th ed.) (LF 552 (quoting G.C. Thornton, *Legislative Drafting* 99 (4th ed. 1996) ("'Deem' has been traditionally considered to be a useful word when it is necessary to establish a legal fiction either positively or negatively by 'deeming' something not to be what it is . . . All other uses of the word should be avoided.")).

The plain meaning of the second sentence is that utilities sold through a single or master meter for residential apartments or condominiums, which may include common areas, are deemed to be for domestic use. Thus, there are two prerequisites to exempting utilities for common areas under this provision: (1) utilities are sold through a single or master meter and (2) utilities are for residential apartments or condominiums.

The Taxpayers completely ignore the plain language of this sentence,

especially the requirement of a "single or master meter." Indeed, the Taxpayers repeatedly call the requirement of a single or master meter completely "immaterial" and argue that it is just "a means to measure consumption." Appellants' Brief, p. 16. This disregards not only the specific language requiring a "single or master meter," but also other language of the statute. The statute, for example, already requires that the utilities be metered in order to qualify for the exemption: § 144.030.2(24) begins by stating "all sales of metered water service, electricity, [and] gas . . . for domestic use"; and § 144.030.2(24)(a) begins by stating "'Domestic use' means that portion of metered water service, electricity, [and] gas . . . ." (emphasis added). If the utilities are already required to be metered, then the "single or master meter" language must, and does, mean more.

In accordance with the plain language of the statute, the utilities for the common areas are deemed to be for domestic use only if the utilities for the common areas are on a "single or master meter" as the utilities for the apartments or condominiums. Because the Taxpayers have admitted that the utilities for the common areas are on separate meters from the condominiums, they cannot claim the utilities are deemed to be for domestic use.

3. The sellers of the gas and electric in this case – Laclede and Ameren – determined the purchases were nonexempt.

The final sentence in the definition of "domestic use" turns to the treatment attributed to the transaction by the sellers, in this case Laclede and Ameren. It provides that the "seller shall establish and maintain a system whereby individual purchases are determined as exempt or nonexempt." § 144.030.2(24)(a). Here, the sellers did in fact determine how the sales would be treated. Both Laclede and Ameren classified the rates for the sales of gas and electricity used for the common area as "commercial" and, therefore, non-exempt. Thus, the Taxpayers themselves, classified the common areas as non-exempt.

Connected to the last sentence in the definition of "domestic use" are similar provisions in subparagraph (b) of § 144.030.2(24). Subparagraph (b) provides an exemption from sales tax for sales of utilities under the residential rate classification ("residential rate exemption"). The first sentence of subparagraph (b) provides that the utility seller (*e.g.*, Laclede or Ameren) "shall determine whether individual purchases are exempt or nonexempt based upon the seller's utility service rate classifications as contained in tariffs on file with and approved by the Missouri public service

commission." According to the invoices submitted as part of the record, Laclede and Ameren both sold the utilities at issue (the common area utilities) under the utility service rate classification for "commercial" and not "residential." (LF 398-444).

Subparagraph (b) further provides that "Sales and purchases made pursuant to the rate classification 'residential' . . . shall be considered as sales made for domestic use and such sales shall be exempt from sales tax." Accordingly, the plain language of this section establishes that if the utility service rate classification is "residential," then the sales of electricity shall be for domestic use and exempt from sales tax under § 144.030.2(24). *See Hyde Park*, 850 S.W.2d at 85 (finding that sales of utilities under a residential rate were automatically exempt without considering whether the use of the utilities was for domestic purposes). Conversely, those sales under the rate classification "commercial," as in this case, are nonexempt.

To make the issue certain, the legislature provided that the "rate classification and the provision of service thereunder shall be conclusive as to whether or not the utility must charge sales tax." § 144.030.2(24)(b) (emphasis added). Here, the Missouri Public Service Commission has not approved a residential rate classification for the purchase of gas or electricity for the common areas in this case. (LF 263). Neither Laclede nor Ameren

has even contacted the Missouri Public Service Commission to request a change in the rate classification. *Id.*

Based on the plain meaning of these provisions, the common areas in this case are not eligible for the tax exemption in § 144.030.2(24). The Taxpayers' refund claims, therefore, should be denied and the Commission affirmed.

II. The Surrounding Provisions of the Statute Support the Commission's Conclusion That the Common Areas in This Case are Not Exempt From Sales and Use Taxes.

In addition to the plain language of § 144.030.2(24)(a), which defines "domestic use" for purposes of the tax exemption, the statute provides additional support for the conclusion reached by the Commission in this case. The context of the statute and the surrounding provisions can provide meaning to the provisions at issue. *See, e.g., State ex rel. Burns v. Whittington*, 219 S.W.3d 224, 225 (Mo. banc 2007) (considering the "context of the entire statute in which it appears") (citing *American Healthcare Mgmt., Inc. v. Dir. of Revenue*, 984 S.W.2d 496, 498 (Mo. banc 1999) *and Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15, 19 (Mo. banc 1995)). Here, the context and surrounding provisions are clear. In both subparagraphs (b) and (c) of § 144.030.2(24), the tax treatment of common areas is consistent with

subparagraph (a).

As discussed above, the statute provides for a tax exemption for common areas, but only if made "through a single or master meter." § 144.030.2(24)(a). This same concept is repeated twice more in the statute. In subparagraph (b), the legislature provides that "sales and purchases made by or on behalf of the occupants of residential apartments or condominiums through a single or master meter, including service for common areas and facilities and vacant units, shall be considered as sales made for domestic use and such sales shall be exempt from sales tax." § 144.030.2(24)(b) (emphasis added). Again, the sales are only "considered" or "deemed" to be for "domestic use" if they are through a single or master meter.

Similarly, in subparagraph (c) of § 144.030.2(24), the legislature provided that a purchaser such as the Corporation can seek a refund for "purchases on behalf of occupants of residential apartments or condominiums through a single or master meter, including service for common areas and facilities and vacant units." § 144.030.2(24)(c) (emphasis added). The language – "through a single or master meter" – certainly has meaning, particularly when it is repeated three times in consecutive provisions. Had the legislature wanted to make common areas exempt from sales taxes regardless of the circumstances, it could have easily provided for such

exemption. Indeed, the legislature could have entirely omitted the "single or master meter" language altogether and accomplished the result advocated by the Taxpayers in this case. Yet, each of the three subparagraphs in § 144.030.2(24) makes clear that in order for the gas and electricity used for common areas to be tax exempt, it must be purchased through a single or master meter.

In disregard of the plain language of the provision at issue, and the surrounding provisions of the statute, the Taxpayers cite *Hyde Park Hous. P'ship v. Dir. of Revenue*, 850 S.W.2d 82 (Mo. banc 1993), and argue that "the exemption is based on the end use of the utility service, even though the service may be master-metered or the purchaser is not the consumer." Appellants' Brief, p. 12. The Taxpayers have not accurately described *Hyde Park* or disclosed the true facts of the case, which did not involve any arguments regarding whether common areas should be tax exempt. Quite the contrary. The taxpayers in *Hyde Park* were actually paying sales tax on the purchases of utilities for the common areas. This Court noted in the case that the Commission found that the taxpayers in *Hyde Park* "had paid tax on the utilities used in the common areas and had not requested refunds from the Director." *Id.* at 83-84 (noting that "[f]rom this determination, [the taxpayers] do not seek review").

The Taxpayers also rely on *American Healthcare Mgmt., Inc. v. Dir. of Revenue*, 984 S.W.2d 496 (Mo. banc 1999) to support their refund claims in this case. Once again, they miss the mark. In *American Healthcare*, the issue was whether the electricity purchased by a nursing home was for domestic use and eligible for the exemption under § 144.030.2(24). The Director argued that the exemption in § 144.030.2(24)(a) only applied to apartments or condominiums, and not nursing homes. There was no discussion of common areas. This Court concluded that "[n]ursing homes are residential facilities and are apartments under the common dictionary definition." *American Healthcare*, 984 S.W.2d at 498. As such, the case provides no support for the Taxpayers' claims.

The surrounding statutory provisions and the case law support the very conclusion reached by the Commission in this case. Accordingly, the Taxpayer's claims should be rejected and the Commission's decision affirmed.

CONCLUSION

For the foregoing reasons, the Administrative Hearing Commission's decision should be affirmed.

Respectfully submitted,

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CERTIFICATION OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was filed and served electronically via Missouri CaseNet, on October 25, 2012, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 4,968 words.

/s/ *Jeremiah J. Morgan*
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