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15 Attorneys for Plaintiff
16 Center For Biological Diversity, Inc.

17 IN THE UNITED STATES DISTRICT COURT
18 FOR THE NORTHERN DISTRICT OF CALIFORNIA

19 _____
20 CENTER FOR BIOLOGICAL DIVERSITY, INC.

21 Plaintiff,

22 v.

23 FPL GROUP, INC.; FPL ENERGY, LLC; ESI BAY
24 AREA GP, INC.; ESI BAY AREA, INC.; NEG
25 MICON A/S; GREP BAY AREA HOLDINGS,
26 LLC; GREEN RIDGE POWER LLC; ALTAMONT
27 POWER LLC,

28 Defendants.

Case No. C-04-0312-CW

**COMPLAINT
FOR VIOLATIONS OF
CALIFORNIA BUSINESS
AND PROFESSIONS CODE
SECTIONS 17200 et seq.,
17500 et seq.; LANHAM
ACT, 15 U.S.C. § 1125;
UNJUST ENRICHMENT**

**DEMAND FOR JURY
TRIAL**

Plaintiff CENTER FOR BIOLOGICAL DIVERSITY, INC. on its own behalf and on behalf of its members, its staff, and the general public, brings this action against

1 defendants under California Business and Professions Code sections 17200 et seq., 17500
2 et seq.; the Lanham Act, 15 United States Code section 1125; and the common law of
3 unjust enrichment, and alleges as follows:

4 **NATURE OF THE ACTION**

5 1. This is a complaint against defendants for their wanton, repeated, and
6 ongoing killing of thousands of birds, including Golden Eagles, Red-tailed Hawks,
7 American Kestrels, owls, and other protected birds, in flagrant violation of the Bald Eagle
8 and Golden Eagle Protection Act, the Migratory Bird Treaty Act, and the California Fish
9 and Game Code. Defendants' killing of birds occurs as a regular and continuing part of the
10 process of generating electricity using thousands of wind turbine generators owned and/or
11 operated by the defendants or entities they control at Altamont Pass in Alameda and Contra
12 Costa Counties, California. These repeated and continuing criminal and civil violations of
13 federal and state wildlife protection laws by defendants in the ordinary course of their
14 businesses are actionable under California's Unfair Competition Law, California Business
15 and Professions Code sections 17200 et seq. Certain defendants have in addition made
16 untrue or misleading statements by falsely asserting that they have complied with these
17 federal and state wildlife laws and are responsible environmental stewards, statements for
18 which they are liable under California Business and Professions Code sections 17200 et
19 seq., 17500 et seq., and 17580.5, and under the Lanham Act, title 15 United States Code
20 section 1125. On behalf of itself, its members and staff, and the general public, plaintiff
21 seeks declaratory, injunctive, and restitutionary relief to remedy these violations and to
22 prevent violations from occurring in the future.

23 **JURISDICTION AND VENUE**

24 2. This Court has jurisdiction over this action by virtue of title 28 United States
25 Code sections 1331, 1338(a), 1338(b), 1367 and title 15 United States Code section
26 1121(a).

27 3. Independently, this Court has jurisdiction over this action under title 28
28 United States Code section 1332 by virtue of diversity of citizenship between the parties.

1 Plaintiff is a nonprofit corporation incorporated in New Mexico and having its principal
2 place of business in Arizona. The defendants are all citizens of states other than New
3 Mexico or Arizona, as appears above. The amount in controversy exceeds \$75,000.

4 4. Venue is proper in this District pursuant to title 28 United States Code
5 section 1391 because a substantial part of the events giving rise to this action occurred in
6 this judicial district. The Altamont Pass wind turbine generators are located within this
7 district in Altamont and Contra Costa Counties.

8 **INTRADISTRICT ASSIGNMENT**

9 5. Plaintiff requests assignment to the San Francisco Division. A substantial
10 part of the events and omissions giving rise to these claims has occurred in Alameda and
11 Contra Costa Counties. Accordingly, under Local Rule 3-2 (c), (d), this action is
12 appropriate for assignment to the San Francisco Division or the Oakland Division.

13 **PLAINTIFF**

14 6. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY, INC. (the “Center”) is
15 a nonprofit corporation dedicated to the preservation, protection, and restoration of
16 biodiversity, native species, ecosystems, and public lands and resources.

17 7. The Center brings this action on behalf of itself, its adversely affected
18 members and staff, and the general public.

19 8. The Center has approximately 8,000 members, many of whom reside in
20 California. The Center’s members and staff regularly use lands and waters throughout the
21 western and southwestern portion of the United States, including those lands and waters
22 within the ranges of the bird populations and the individual birds that frequent the vicinity
23 of Altamont Pass and the Altamont Pass Wind Resource Area, for observation, research,
24 aesthetic enjoyment, and other recreational, scientific, educational, and spiritual activities.
25 The Center’s members and staff have researched, studied, observed, and sought protection
26 for the bird populations and the individual birds that frequent the vicinity of Altamont Pass
27 and the Altamont Pass Wind Resource Area. The Center’s members and staff derive
28 scientific, recreational, conservation, spiritual, and aesthetic benefits from the existence in

1 the wild of the bird populations and the individual birds that frequent the vicinity of
2 Altamont Pass and the Altamont Pass Wind Resource Area.

3 9. In particular, the Center has members and staff who are domiciled in or visit
4 the San Francisco Bay Area, including eastern Alameda and Contra Costa Counties, and
5 who observe, enjoy, study, and derive spiritual and aesthetic satisfaction from the Golden
6 Eagles, Red-tailed Hawks, American Kestrels, Burrowing Owls, and birds of other species
7 that inhabit or pass through the Altamont Pass Wind Resources Area and that are being
8 killed, injured, or otherwise harmed by defendants' activities.

9 10. The Center maintains an office in Oakland, California.

10 11. The Center has members and staff who are citizens of the State of California.

11 12. The Center, its members, and its staff, as well as other users of electricity
12 supplied by Pacific Gas & Electric Company, are also consumers of the electricity
13 generated by the wind turbine generators located around Altamont Pass.

14 **DEFENDANTS**

15 13. Defendant FPL GROUP, INC. ("FPL Group") is a corporation incorporated
16 in Florida with its principal place of business in Florida.

17 14. Defendant FPL ENERGY, LLC ("FPL Energy") is a limited liability
18 company organized under the laws of Delaware with its principal place of business in
19 Florida. It is a wholly owned subsidiary of defendant FPL GROUP, INC.

20 15. Defendant ESI BAY AREA GP, INC. is a corporation incorporated in
21 Florida with its principal place of business in Florida, and is a wholly owned subsidiary of
22 defendant FPL Energy. Additionally, ESI BAY AREA GP, INC. is also sued in its
23 capacity as general partner of WINDPOWER PARTNERS 1989, LP; WINDPOWER
24 PARTNERS 1990, LP; WINDPOWER PARTNERS 1991, LP; WINDPOWER
25 PARTNERS 1991-2, LP; WINDPOWER PARTNERS 1992, LP; all of which are
26 California limited partnerships.

1 25. The area in which the Altamont Pass Wind Resource Area and the Altamont
2 Pass wind turbine generators are located has the highest known density of breeding pairs of
3 Golden Eagles in the world.

4 26. Golden Eagles are “fully protected birds” under the California Fish and
5 Game Code. Cal. Fish & Game Code § 3511. They have also been designated a “species
6 of special concern” by the California Department of Fish and Game.

7 27. Since the 1980s when wind turbine generators were first erected in the
8 Altamont Pass Wind Resource Area, it has been known that in the process of generating
9 electricity the Altamont Pass wind turbine generators kill and injure eagles, hawks, owls,
10 and other raptors, as well as non-raptor birds.

11 28. Since the 1980s, tens of thousands of birds have been killed by the wind
12 turbine generators in the Altamont Pass Wind Resource Area, including hundreds of
13 Golden Eagles, thousands of hawks, and hundreds of other raptors.

14 29. It has also been known for at least ten years that the Altamont Pass wind
15 turbine generators have far higher bird kill rates than wind turbine generators at other
16 locations.

17 30. Defendants each conduct one or more of the following activities: a) own
18 Altamont Pass wind turbine generators; b) operate Altamont Pass wind turbine generators;
19 or c) have an ownership interest in or control, directly or indirectly, an entity that owns or
20 operates Altamont Pass wind turbine generators. Those defendants that have an ownership
21 interest in or control, directly or indirectly, an entity that owns or operates Altamont Pass
22 wind turbine generators, on information and belief have aided and abetted those entities,
23 have acted as joint venturers with those entities, have used those entities as their agents,
24 have acted in concert with those entities, have conspired with those entities, have acted
25 with reckless disregard as to the actions of those entities, have furnished the means used by
26 those entities in their activities, have induced the activities of those entities, have benefited
27 from the activities of those entities, have acted with knowledge of the activities of those
28 entities, and have ratified the activities of those entities.

1 31. Defendants are now proceeding ahead with plans to replace existing wind
2 turbines at the Altamont Pass with new and larger wind turbines, and have received
3 permission from Alameda County to begin doing so. This turbine replacement program is
4 referred to as “repowering.” Defendants, however, have not taken steps as part of their
5 repowering program to reduce the numbers of birds that will be killed by these new
6 turbines nor are they planning any other remediation such as habitat preservation to
7 preserve and enhance the bird populations whose members they are killing and will
8 continue to kill in the future.

9 32. Each defendant is, and for more than the past five years has been, aware that
10 the Altamont Pass wind turbine generators cause at the least hundreds of bird deaths and
11 injuries annually in the course of their normal operation to produce electricity for sale.
12 Sources of information documenting bird kills of which defendants are aware include
13 scientific studies sponsored by the California Energy Commission and the National
14 Renewable Energy Laboratory of the United States Department of Energy. In addition,
15 defendants collect and report dead birds their employees happen to find to the United
16 States Fish and Wildlife Service of the Department of the Interior under a “Wildlife
17 Response and Reporting Program.”

18 33. Defendants have no federal or state permit, license, or other authorization to
19 take, injure, kill, harm, harass, molest or disturb birds by means of wind turbine generators.

20 34. Defendants have no federal or state permit, license, or other authorization to
21 take, injure, kill, harm, harass, molest, or disturb birds within or in the vicinity of the
22 Alameda Pass Wind Resource Area.

23 35. Defendants have no federal or state permit, license, or other authorization to
24 take, injure, kill, harm, harass, molest, or disturb birds in Alameda or Contra Costa
25 Counties.

26 36. The Altamont Pass wind turbine generators produce electricity that is sold in
27 commerce.

1 37. Defendants are receiving and have received revenues from the sale of
2 electricity produced by their Altamont Pass wind turbine electric generating activities.

3 38. Under federal and state law, defendants compel Pacific Gas and Electric
4 Company to purchase the electricity produced by the Altamont Pass wind turbine
5 generators, and can compel it to do so at above-market rates, depending on the market
6 price.

7 39. Defendants are receiving and/or have received federal and state tax benefits
8 as a result of their Altamont Pass wind turbine electric generating activities.

9 40. Defendants are receiving and/or have received government grants, subsidies,
10 and other benefits as a result of their Altamont Pass wind turbine electric generating
11 activities.

12 **FIRST CLAIM FOR RELIEF (Against All Defendants)**
13 **Violation of California Business and Professions Code Section 17200 et seq.**

14 41. The Altamont wind turbine generators have caused the taking, killing,
15 injuring, harming, harassing, molesting, or disturbing of birds of the following species,
16 among others:

- 17 Golden Eagle
- 18 Red-tailed Hawk
- 19 Rough-legged Hawk
- 20 Ferruginous Hawk
- 21 Northern Harrier
- 22 Prairie Falcon
- 23 American Kestrel
- 24 Burrowing Owl
- 25 Barn Owl
- 26 Great Horned Owl
- 27 Long-eared Owl
- 28 Raven

1 Turkey Vulture

2 42. These birds are the common property of all Californians. Cal. Fish & Game
3 Code, § 1600. They are protected against harm by the federal Bald and Golden Eagle
4 Protection Act, the federal Migratory Bird Treaty Act, the California Fish and Game Code,
5 and/or the California Penal Code, and regulations promulgated thereunder.

6 43. By participating as described above in the taking, killing, injuring, harming,
7 harassing, molesting, or disturbing birds with the Altamont Pass wind turbine generators
8 without permit, license, or authorization, defendants have violated California and federal
9 wildlife laws, including criminal provisions of those laws. These violations include
10 California Fish and Game Code sections 2000, 3503.5, 3511, 3513, 3800, 12000,
11 California Penal Code section 597, California Code of Regulations sections 472, 509;
12 title 16 United States Code section 668 (the Bald Eagle and Golden Eagle Protection Act);
13 title 16 United States Code section 703 (the Migratory Bird Treaty Act); title 50 Code of
14 Federal Regulations sections 10.13, 21.11, 22.11.

15 44. These violations by defendants of California and federal wildlife laws in the
16 course of their business operations are unlawful business acts or practices under California
17 Business and Professions Code section 17200.

18 45. These violations by defendants of California and federal wildlife laws are
19 unfair business acts or practices under California Business and Professions Code section
20 17200.

21 46. Defendants' receipt of federal and state tax benefits for activities associated
22 with electricity production by the Altamont Pass wind turbine generators are unfair
23 business acts or practices under California Business and Professions Code section 17200.

24 47. Defendants' receipt of government grants, subsidies, or other benefits for
25 activities associated with electricity production by the Altamont Pass wind turbine
26 generators are unlawful business acts or practices under California Business and
27 Professions Code section 17200.

1 48. Defendants' receipt of government grants, subsidies, or other benefits for
2 activities associated with electricity production by the Altamont Pass wind turbine
3 generators are unfair business acts or practices under California Business and Professions
4 Code section 17200.

5 49. By these unlawful and unfair business acts and practices, defendants have
6 engaged in unfair competition within the meaning of California Business and Profession
7 Code section 17200 et seq., and are subject to the relief available under that statute.

8 50. Plaintiff, its members and staff, and the general public have been injured by
9 defendants' acts of unfair competition.

10 51. These violations are continuing and will continue unless enjoined by this
11 Court.

12 **SECOND CLAIM FOR RELIEF (Against All Defendants)**
13 **Unjust Enrichment**

14 52. Defendants have been unjustly enriched by the revenues they have received
15 from sale of the electricity generated by the Altamont Pass wind turbine generators, by the
16 government subsidies they have received by generating that electricity, and by the tax
17 benefits they have received by generating that electricity.

18 53. Plaintiffs have no adequate remedy at law for defendants' unjust enrichment.
19 Equity requires that defendants disgorge these ill-gotten gains.

20 **THIRD CLAIM FOR RELIEF (Against Defendant FPL Entities)**
21 **Violation of California Business and Professions Code Sections 17200 et seq., 17500 et**
22 **seq.**

23 54. Defendant FPL entities have represented to the public that FPL Group and its
24 subsidiaries and associated entities comply with all environmental laws and regulations in
25 their wind energy production activities and are responsible environmental stewards. This
26 representation is untrue and misleading.

27 55. On its website, FPL Group displays a "Code of Conduct," applicable to all
28 FPL Group companies, which asserts: "Any Code of Conduct should begin with the
principle that we will always abide by and obey all laws and regulations which are

1 applicable to our business. We will not depart from the letter and spirit of the law: not to
2 make a profit; not to keep a plant running; not to keep a customer happy; not to protect a
3 fellow employee.”

4 56. The FPL Group “Code of Conduct” also asserts under the heading
5 “Environmental commitment”: “It has been, and will continue to be, the intent of all FPL
6 Group companies to conduct their business in an environmentally responsible manner. As a
7 manifestation of this intent, FPL has adopted a ‘Commitment to the Environment’ in which
8 it undertakes to: Comply with the spirit and intent, as well as the letter, of environmental
9 laws, regulations and standards. Incorporate environmental protection and stewardship as
10 an integral part of the design, construction, operation and maintenance of its facilities. . . .
11 Conduct periodic self-evaluations, report performance and take appropriate action. FPL
12 has also implemented an Environmental Assurance Program to assure compliance with all
13 environmental laws and regulations and the fulfillment of its environmental commitment.”

14 57. In the “Our Environment” page of its website, defendant FPL Group asserts:

15 (a) “We believe meeting the demand for cost-effective production of electric
16 power must go hand-in-hand with preserving, protecting and enhancing our
17 environment. . . . We are committed to comply with the spirit and intent, as
18 well as the letter of environmental laws, regulations and standards[,]
19 incorporate environmental protection and stewardship as an integral part of
20 the design, construction, operation and maintenance of our facilities . . . , and
21 conduct periodic self-evaluations and report performance.”

22 (b) “Every major decision we make includes careful consideration to its
23 environmental impact. It is our policy that the Board of Directors reviews
24 company environmental strategies and performance[,] operating divisions’
25 business plans include environmental performance as a key component[,] we
26 regularly conduct environmental audits of our facilities and operations[,]
27 environmental factors make up a big part of company ‘due diligence’
28 research[,] employees are trained in many aspects of environmental

1 awareness and management, and employee performance evaluations consider
2 whether environmental targets have been completed successfully.”

3 (c) “We look for ways to improve our operations to minimize impacts on
4 wildlife near our facilities.”

5 58. Defendant FPL Energy makes the following assertions on its website:

6 (a) “To ensure the growing demand for power is met in the most
7 environmentally responsible manner, FPL Energy is committed to . . .
8 minimizing impacts to local . . . wildlife[,] complying with the spirit, not just
9 the letter, of environmental laws, regulations and standards that govern our
10 operations, and incorporating environmental protection and stewardship into
11 the design, construction, operation and maintenance of all of our facilities.”

12 (b) “Within FPL Energy and throughout FPL Group as a whole, our
13 environmental advocacy extends to each employee: We make it our
14 responsibility to restore and maintain the natural environment surrounding
15 our facilities and elsewhere. . . . FPL Group’s environmental auditors
16 scrutinize processes, communications and training methods to identify
17 opportunities for improvement.”

18 (c) “Each FPL Energy project, regardless of the type of fuel we use, strives to
19 minimize environment impacts. We pride ourselves in complying not only
20 with the letter of the many environmental regulations we encounter on the
21 national, state and local level but, more importantly, with the spirit of these
22 requirements.”

23 59. These representations by the defendant FPL Entities are untrue or misleading
24 because they do not disclose the illegal taking, killing, injuring, harming, harassing,
25 molesting, or disturbing of eagles, hawks, owls, and other birds by the Altamont Pass wind
26 turbine generators.

27 60. Defendant FPL Entities knew or in the exercise of reasonable care should
28 have known that their statements were untrue or misleading. Defendant FPL Entities assert

1 they engage in extensive environmental auditing of their operations, including review of
2 environmental performance by the FPL Group Board of Directors. Further, FPL Group’s
3 Chief Executive Officer and Chairman (and former President of FPL Energy) Lew Hay has
4 stated, “I believe it’s wholly irresponsible and unacceptable for corporate leaders such as
5 those at Enron to say they did not know -- or suggest it was not their duty to know -- about
6 the operations and activities of their company.” He has further stated, “Meeting the
7 demand for cost-effective production of electric power *can* go hand-in-hand with
8 sustaining, protecting and enhancing our beautiful and fragile environment ... and, in our
9 view, it *must*. Future generations will be affected by how we act today” (Emphasis
10 original.)

11 61. These untrue and misleading statements are a fraudulent business act or
12 practice within the meaning of California Business and Profession Code section 17200.

13 62. These untrue and misleading statements are unfair, deceptive, untrue, or
14 misleading advertising within the meaning of California Business and Profession Code
15 section 17200.

16 63. These untrue and misleading statements also violate California Business and
17 Profession Code section 17500.

18 64. These untrue and misleading statements also are untruthful, deceptive, or
19 misleading environmental marketing claims that violate California Business and Profession
20 Code section 17580.5.

21 65. By these untrue and misleading statements, defendant FPL Entities have
22 engaged in unfair competition within the meaning of California Business and Profession
23 Code section 17200 et seq., and are subject to the relief available under that statute.

24 66. By these untrue or misleading statements, defendant FPL Entities have
25 violated California Business and Profession Code section 17500 et seq., and are subject to
26 the relief available under that statute.

1 67. By these untrue or misleading statements, defendant FPL Entities have
2 violated California Business and Profession Code section 17580.5, and are subject to the
3 relief available under that statute.

4 68. Plaintiff, its members and staff, and the general public have been injured by
5 defendants' untrue or misleading statements. For example, by their untrue and misleading
6 statements, defendant FPL entities have concealed from the public and misled the public
7 about their illegal acts, thereby forestalling public concern and governmental action that
8 would hold them legally accountable for their actions and stop them from producing
9 electricity by illegally killing golden eagles, hawks, and other birds. The effect of these
10 statements thus is to force plaintiff, its members and staff, and the general public to be
11 unwilling consumers of electricity illegally produced by the defendant FPL entities, to
12 unwillingly subsidize defendant FPL entities' illegal conduct (including through tax
13 credits, electricity payments, and governments grants derived from consumer electricity
14 payments, and other subsidies and benefits), and to suffer the harm of an environment with
15 fewer birds.

16 69. These violations are continuing and will continue unless enjoined by this
17 Court.

18 **FOURTH CLAIM FOR RELIEF (Against Defendant FPL Entities)**
19 **Violation of the Lanham Act, Title 15 United States Code Section 1125**

20 70. As described above, defendant FPL entities have represented to the public
21 that FPL Group and its subsidiaries and associated entities comply with all environmental
22 laws and regulations in their wind energy production activities and are responsible
23 environmental stewards.

24 71. As described above, these representations are false and misleading because
25 they do not disclose the illegal taking, killing, injuring, harming, harassing, molesting, or
26 disturbing of eagles, hawks, owls, and other birds by the Altamont Pass wind power
27 turbine generators.
28

1 persons acting or claiming to act on behalf thereof or in concert therewith, in any manner,
2 directly or indirectly, to mitigate and remediate the environmental consequences of their
3 bird-killing and bird-harming activities;

4 G. That, pursuant to California Business and Professions Code sections 17203
5 and 17535, the Court permanently enjoin and restrain defendant FPL Entities, and each of
6 them and their officers, directors, agents, employees, successors, assignees, subsidiaries,
7 transferees, and all other persons acting or claiming to act on behalf thereof or in concert
8 therewith, in any manner, directly or indirectly, from any further untrue, deceptive,
9 misleading statement regarding their compliance with environmental laws or regulations,
10 or regarding their environmental stewardship;

11 H. That, pursuant to the Lanham Act, title 15 United States Code section 1125,
12 the Court permanently enjoin and restrain defendant FPL Entities, and each of them and
13 their officers, directors, agents, employees, successors, assignees, subsidiaries, transferees,
14 and all other persons acting or claiming to act on behalf thereof or in concert therewith, in
15 any manner, directly or indirectly, from any further untrue, deceptive, misleading statement
16 regarding their compliance with environmental laws or regulations, or regarding their
17 environmental stewardship;

18 I. That, pursuant to California Business and Professions Code section 17202,
19 the Court impose all applicable penalties, forfeitures (including forfeiture of the wind
20 turbines and other equipment, instrumentalities and apparatuses used to commit these
21 offenses), and penal laws upon defendants, including those provided in California Fish and
22 Game Code sections 2014, 2583, 12000, 12002, 12008, 12010, 12057, and 12159.5;
23 California Penal Code section 597; California Business and Professions Code sections
24 17500, 17581; and title 16 United States Code sections 668, 668b, 707.

25 J. That, pursuant to California Business and Professions Code sections 17203,
26 17535 the Court direct restitution of all money and property defendants have acquired by
27 means of their unfair competition, including but not limited to revenues from the sale of
28 electricity, federal and state tax benefits, and federal and state monetary subsidies and other

1 benefits for their wind turbine generation activities;

2 K. That the Court direct an accounting to determine all gains, profits, savings,
3 and advantages by which defendants have unjustly enriched themselves as a result of their
4 wrongful acts (including but not limited to revenues from the sale of electricity, federal and
5 state tax benefits, and federal and state monetary subsidies and other benefits for their wind
6 turbine generation activities), direct defendants to disgorge those sums, and impose a
7 constructive trust on those sums for the purpose of remediating the harm caused by
8 defendants' activities;

9 L. That the Court award plaintiff its costs of suit, including reasonable
10 attorneys' fees; and

11 M. That the Court award such other and further relief as may appear necessary
12 and appropriate.

13 DATED: January 12, 2004

14 s/

15 Richard R. Wiebe

16 Attorney for Plaintiff
17 Center for Biological Diversity

18 **DEMAND FOR JURY TRIAL**

19 Plaintiff hereby demands trial by jury for all claims so triable.
20

21 DATED: January 12, 2004

22 s/

23 Richard R. Wiebe

24 Attorney for Plaintiff
25 Center for Biological Diversity
26
27
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