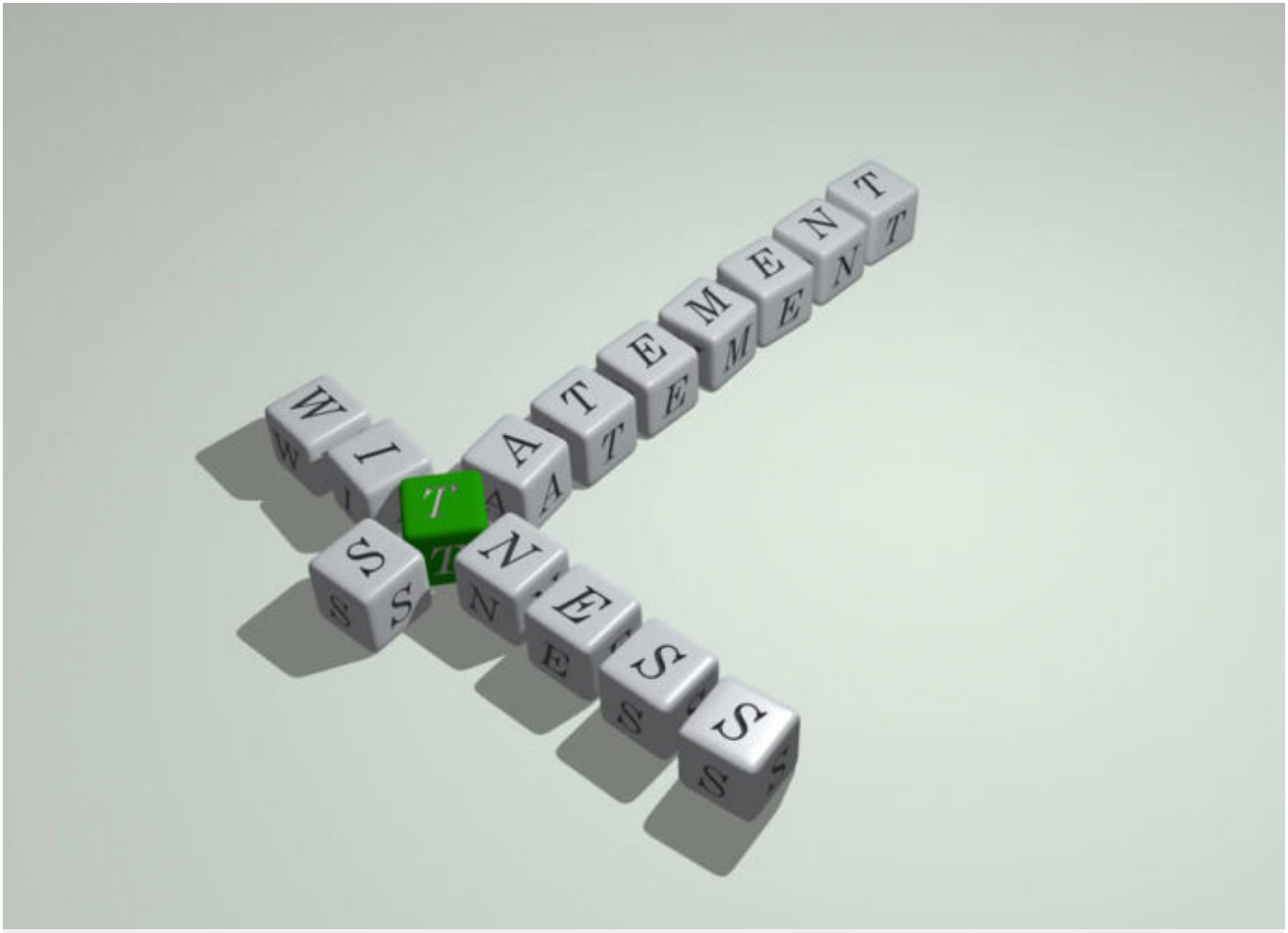

Pisane izjave svedoka u parničnom i arbitražnom postupku/ Written statements of witnesses in civil and arbitration proceedings

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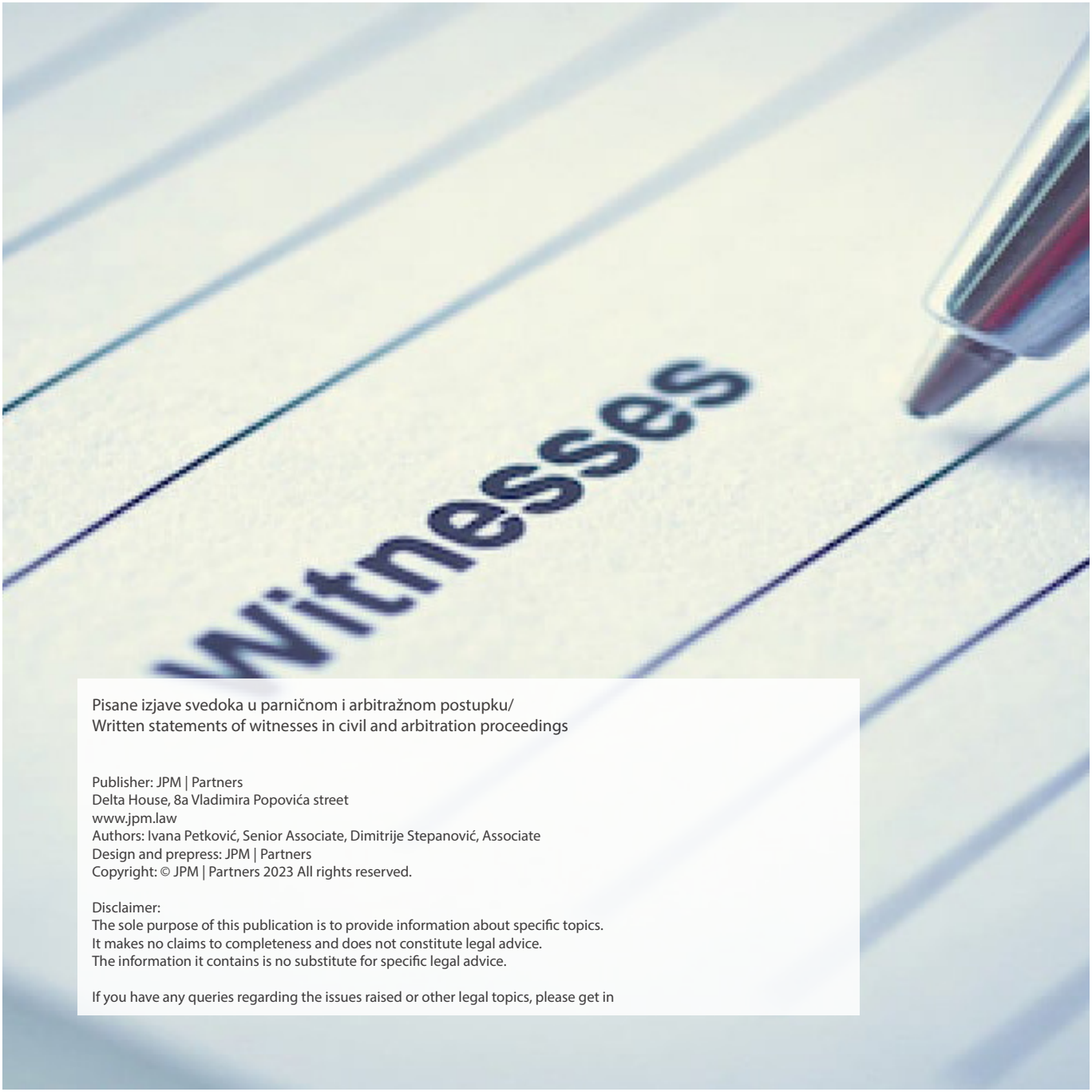

Pisane izjave svedoka u parničnom i arbitražnom postupku/
Written statements of witnesses in civil and arbitration proceedings

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Prema pozitivnim propisima u Republici Srbiji, svaka stranka je dužna da iznese činjenice i predloži dokaze na kojima zasniva svoj zahtev ili kojim osporava navode i dokaze protivnika. Dokazivanje obuhvata sve činjenice koje su važne za donošenje odluke. Kako u parničnom, tako i u arbitražnom postupku, najčešća dokazna sredstva su isprave i svedočenja.

Pisana izjava svedoka predstavlja dokazno sredstvo – ispravu sastavljenu od strane svedoka u kojoj iznosi svoja saznanja o činjenicama i događajima koji su relevantni za sudski spor.

Pisane izjave svedoka uvedene su u uporednoj praksi kao zamena za direktno ispitivanje svedoka, a u cilju efikasnijeg vođenja postupka. U domaćem zakonodavstvu ono je uvedeno Zakonom o parničnom postupku iz 2011. godine, kao alternativa ,,klasičnom svedočenju''.

According to positive regulations in the Republic of Serbia, each party shall present the facts and propose the evidence on which it bases its request or with which it disputes the allegations and evidence of the opponent. The evidence includes all the facts relevant to making a decision. Both in civil and arbitration procedures, the most common means of evidence are documents and testimonies.

The written statement of the witness presents evidence – a document made by a witness in which he presents his knowledge about the facts and events relevant to the court proceeding.

Written statements of witnesses were introduced in comparative practice as a substitute for direct examination of witnesses, with the aim of conducting the proceeding more efficiently. In domestic legislation, it was introduced by the Civil Procedure Law in 2011, as an alternative to "regular testimony".

Prema odredbama važećeg Zakona o parničnom postupku svedoci po pravilu daju svoje izjave usmeno, neposredno na ročištu. Svedok po pozivu suda lično pristupa na ročište u sudu gde se poziva da iznese sve što mu je poznato o činjenicama o kojima treba da svedoči, a zatim sud i stranke u postupku mogu da mu postavljaju pitanja radi proveravanja, dopune ili razjašnjenja.

Zakon o parničnom postupku predviđa mogućnost da se izvede dokaz čitanjem pisane izjave svedoka, u kojoj se navode saznanja o bitnim spornim činjenicama, odakle su mu one poznate i u kakvom je odnosu sa strankama u postupku.

Pisana izjava svedoka mora da bude overena u sudu ili od strane lica koje vrši javna ovlašćenja. Pre davanja izjave, lice koje uzima izjavu mora da upozori svedoka sa pravima i dužnostima svedoka propisanim ovim zakonom. O izvođenju dokaza čitanjem pisane izjave svedoka sud odlučuje rešenjem protiv kojeg nije dozvoljena posebna žalba.

According to the provisions of the current Civil Procedure Law, as a rule, witnesses give their statements orally, directly at the hearing. Upon summons of the court, the witness personally attends the court hearing, where he is invited to present everything of his knowledge about the facts of which he is to testify, after which the court and the parties in the proceeding may ask questions for verification, supplementation or clarification.

The Civil Procedure Law provides the possibility to present the evidence by reading the statement of a witness in which he presents the knowledge of the important disputed facts, where he knows them from and what is his relationship to parties in the proceeding.

The written statement of the witness must be certified in court or by the person exercising public authority. Before giving the statement, the person taking the statement must warn the witness about the rights and duties he possesses by this law. The court decides on the presentation of evidence by reading the written statement of the witness, against which a separate appeal is not allowed.

Za razliku od uporedne prakse gde izjava svedoka zamenjuje direktno ispitivanje svedoka, kada stranka u postupku pred srpskim sudom predloži da se umesto saslušanja pročita pisana izjava svedoka to u najvećem broju slučajeva podrazumeva da svedok neće biti na raspolaganju sudu za postavljanje dodatnih pitanja, kao ni suprotnoj strani za unakrsno ispitivanje.

In contrast to the comparative practice where the witness statement replaces the direct court examination of the witness when a party in the proceeding before the Serbian court proposes that the written witness statement be read instead of the direct hearing, that in most cases means that the witness will not be at disposal to the court to ask additional questions, as well as to the opponent for cross-examination.

Ovakav način izvođenja dokaza značajno umanjuje mogućnost suprotnoj strani da se izjasni o navedenom dokazu, kao i sudu da neposredno oceni dokaznu snagu svedočenja. Iz navedenog razloga srpski sudovi retko koriste mogućnost da izvode dokaz čitanjem pisane izjave svedoka.

This way of presenting evidence significantly diminishes the possibility of the opponent stating the said evidence, as well as for the court to directly evaluate the probative value of the testimony.

Nasuprot parničnom postupku gde pisana izjava svedoka predstavlja izuzetak, u arbitražnom postupku ona prestavlja pravilo. Način izvođenja ovog dokaza je u arbitražnoj praksi mnogo bliži uporednoj praksi nego praksi domaćih sudova.

Contrary to the adversarial procedure where a written statement of a witness represents an exception, in the arbitration procedure, it represents the rule. The manner of presenting this evidence in arbitration practice is much closer to comparative practice than to the practice of domestic courts. .

U arbitražnom postupku se na samom početku stranke i arbitražno veće dogovaraju oko pravila koja će se primenjivati za izvođenje dokaza, kao i raspored po kojem će stranke predavati svoje podneske. Arbitražno veće zatim sastavlja prvi procesni zaključak u kojem su sadržana dogovorena pravila. Neretko se stranke dogovore i oko korišćenja dopunskih pravila za izvođenje dokaza, kao što su na primer Pravila dokazivanja u međunarodnoj arbitraži Međunarodne unije advokatskih komora (IBA Rules on Taking Evidence in International Arbitration). Pored procesnih pravila, arbitražno veće sastavlja i vremenski plan sprovođenja postupka koji unapred predviđa rokove u kojima će stranke predavati svoje podneske, kao i dan ili više dana kada će biti održano ročište.

Kada je reč o svedocima, stranke u arbitražnom postupku se uobičajeno dogovaraju da će se izjave svedoka dostavljaju u pisanom obliku. Izjave svedoka se podnose kao prilog podnescima koji se predaju po unapred dogovorenom rasporedu, što je najčešće i po nekoliko meseci pre zakazanog ročišta.

In the arbitration procedure, at the verybeginning, the parties and the arbitral tribunal agree on the rules that will be applied for the presentation of evidence, as well as the schedule according to which the parties will submit their submissions. The arbitral tribunal then prepares the initial procedural order containing the agreed rules. Often, the parties also agree on the use of supplemental rules for the presentation of evidence, such as the Rules on Taking Evidence in International Arbitration of the International Bar Association (IBA Rules on Taking Evidence in International Arbitration). In addition to procedural rules, the arbitral tribunal also prepares a timetable for the conduct of the proceedings, which includes deadlines for the parties to submit their submissions, as well as the date or dates on which a hearing will be held.

When it comes to witnesses, it is customary for the parties in arbitration proceedings to agree that witness statements will be submitted in written form. Witness statements are submitted as attachments to the submissions, which are filed according to a pre-agreed schedule, often several months before the scheduled hearing.

Procesnim zaključkom se najčešće definiše koje elemente izjava svedoka mora da sadrži. Ovo pitanje regulišu i Pravila dokazivanja u međunarodnoj arbitraži Međunarodne unije advokatskih komora, koja propisuju da pisana izjava svedoka mora da sadrži:

- puno ime i adresu svedoka, izjavu o trenutnoj i prošloj povezanosti sa bilo kojom od strana u postupku (ako postoji), i opis njegovog ili njenog porekla, kvalifikacija, obukama i iskustvu, ukoliko mogu biti relevantni za spor ili za sadržaj izjave;
- potpun i detaljan opis činjenica kao i odakle su one svedoku poznate, kao i dokumenta na koja se svedok poziva (ukoliko već nisu u spisima predmeta);
- izjavu o jeziku na kojem se izjava svedoka sastavljena i jezik na kojem će svedok biti saslušan na ročištu;
- potvrdu istinitosti izjave; i
- datum i mesto davanja izjave i potpis svedoka.

The procedural order usually defines the elements that witness statements must contain. This issue is also regulated by the Rules on Taking Evidence in International Arbitration of the International Bar Association, which prescribe that a written witness statement must include:

- Full name and address of the witness, a statement regarding their current and past connections with any of the parties in the proceedings (if any), and a description of their background, qualifications, training, and experience, to the extent they may be relevant to the dispute or the content of the statement;
- Complete and detailed description of the facts and the source of the witness's knowledge, as well as the documents to which the witness refers (if they are not already in the case file);
- Statement regarding the language in which the witness statement is drafted and the language in which the witness will be examined at the hearing;
- Confirmation of the truthfulness of the statement; and
- Date and place of giving the statement and the witness's signature.

Za razliku od parničnog postupka, svedok koji je dao pisanu izjavu je dostupan i pojavljuje se na ročištu. Procesnim zaključkom se najčešće predviđa da slučaju da je određeni svedok pozvan, a ne dođe bez opravdanih razloga, arbitražno veće neće uzeti u obzir tu pisanu izjavu. Time se stvara određen vid obaveze za stranku da obezbedi prisustvo svedoka.

Na početku saslušanja prvo stranka koja ga je predložila ima mogućnost da postavi svedoku pitanja ukoliko je potrebno razjasniti neke nedoumice iz pisane izjave. Svedoka zatim unakrsno ispituje suprotna strana.

Nakon unakrsnog ispitivanja sledi ponovno direktno ispitivanje koje je ograničeno na teme iz unakrsnog ispitivanja. Saslušanje svedoka se završava ponovnim unakrsnim ispitivanjem, koje je ograničeno na teme iz ponovnog direktnog ispitivanja. U svakom trenutku tokom saslušanja arbitražno veće može da postavi pitanja svedoku.

In contrast to a civil procedure, a witness who has given a written statement is available and appears at the hearing. The procedural conclusion usually provides that if a certain witness is called but does not come without a valid reason, the arbitral tribunal will not take that written statement into account. This creates a certain obligation for the party to ensure the presence of the witness.

At the beginning of the hearing, the party that proposed the witness has the opportunity to ask the witness questions if it is necessary to clarify any ambiguities from the written statement. The opposing party then cross-examines the witness.

After cross-examination, there is a re-direct examination, which is limited to the topics covered in cross-examination. The witness's testimony ends with a re-cross examination, which is limited to the topics covered in the re-direct examination. At any time during the hearing, the arbitral tribunal may ask the witness questions

Dakle, u parničnom postupku svedok najčešće daje svoju izjavu usmeno, na ročištu. Prednost ovakvog davanja izjave je u tome što sud iz držanja svedoka, načina na koji daje izjavu i odgovara na pitanja, može da oceni kredibilnost svedoka i dokaznu vrednost njegovog svedočenja.

Sa druge strane, ovakav način izvođenja dokaza ograničava mogućnosti kako suda, tako i suprotne strane da se pripremi za saslušanje svedoka.

Sud može da se pripremi samo na osnovu dokaza koji se nalaze u spisima, dok zastupnik suprotne strane pored toga može da se konsultuje sa samom strankom i eventualno drugim licima koja imaju neposredna saznanja o činjenicama o kojima će se svedok izjašnjavati.

Ipak, uvek svedok uvek može da iznese neke činjenice koje ni sud, ni suprotna stranka nisu mogle da predvide.

Pisana izjava svedoka u parničnom postupku se retko koristi kao dokazno sredstvo.

In a civil procedure, a witness usually gives an oral statement at the hearing. The advantage of giving an oral statement is that the court can assess the witness's credibility and the probative value of their testimony based on their demeanour, the way they give their statement, and how they answer questions.
On the other hand, this method of presenting evidence limits the court's and the opposing party's ability to prepare for the witness's testimony.

The court can only prepare based on the evidence in the case file, while the opposing party's representative can consult with the party and other individuals who have direct knowledge of the facts on which the witness will testify.

Nonetheless, a witness can always present some facts that neither the court nor the opposing party could have anticipated.

In civil proceedings, a written statement by a witness is rarely used as evidence.

Za razliku od uporedno-pravne prakse gde ona predstavlja zamenu za direktno ispitivanje, u našem pravu se izjava svedoka najčešće dostavlja ukoliko taj svedok neće biti dostupan sudu. Imajući u vidu da sud nije u mogućnosti da neposredno ispita kredibilnost svedoka a suprotna strana da svojim pitanjima tu kredibilnost dovede u pitanje, dokazna snaga ovakve isprave je značajno umanjena.

Situacija je drugačija u arbitražnoj praksi. U arbitražnim postupcima stranke i arbitražno veće dogovaraju pravila dokazivanja, a najčešće se predviđa da će svedoci dati pisanu izjavu. Izjave svedoka se podnose prema unapred dogovorenom rasporedu, što je i po nekoliko meseci pre zakazanog ročišta.

Ovakav način predavanja izjave svedoka ostavlja suprotnoj strani dovoljno vremena pribavi i preda pisane dokaze ili izjave svojih svedoka kojima će pobijati iznete činjenice. Osim toga, suprotnoj strani su poznate činjenice o kojima će se svedok izjašnjavati, pa je u mogućnosti da se bolje pripremi za unakrsno ispitivanje na ročištu.

Unlike in comparative law practice where it serves as a substitute for direct examination, in our law, a witness statement is usually submitted if that witness will not be available to the court. Considering that the court is not able to directly examine the witness's credibility and the opposing party cannot question that credibility with their questions, the probative value of such a document is significantly reduced.

The situation is different in arbitration practice. In arbitration proceedings, the parties and the arbitral tribunal agree on the rules of evidence, and it is most often provided that witnesses will give a written statement. Witness statements are submitted according to a pre-agreed schedule, which is even several months before the scheduled hearing.

This way of submitting a witness statement gives the opposing party enough time to obtain and submit written evidence or statements from their witnesses to challenge the facts presented. In addition, the opposing party is aware of the facts on which the witness will testify, so they can better prepare for cross-examination at the hearing.

Upoređivanjem načina izvođenja dokaza svedočenjem u parničnom postupku i u arbitražnoj praksi, može se izvesti zaključak da arbitraža stvara bolje uslove strankama da se bolje pripreme za samo svedočenje i samim tim ubrzaju postupak u skladu sa načelom ekonomičnosti postupka.

By comparing the ways of presenting evidence through witness testimony in civil proceedings and arbitration practice, it can be concluded that arbitration creates better conditions for the parties to prepare for the testimony itself and thus speed up the proceedings in accordance with the principle of procedural economy.

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