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MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(City of St. Louis)

PRESTON ALEXANDER, *et al.*, Plaintiffs, vs. FLUOR CORPORATION, *et al.*, Defendants.	Cause No: 052-09567 Division No. 12
EMILY PEDERSON, *et al.*, Plaintiffs, vs. FLUOR CORPORATION, *et al.*, Defendants.	Cause No: 052-09856 Division No. 12
MATTHEW HEILIG, *et al.*, Plaintiffs, vs. FLUOR CORPORATION, *et al.*, Defendants.	Cause No: 052-09866 Division No. 12

DEFENDANTS' ALTERNATIVE MOTION FOR REDUCTION OF PUNITIVE DAMAGES AWARDS AS UNCONSTITUTIONALLY EXCESSIVE

As noted, in Defendants' other post-trial motions, the Court should grant judgment notwithstanding the verdict to Defendants Fluor Corporation, A.T. Massey Coal Company, and Doe Run Investment Holding Corporation or, in the alternative, grant a new trial. If JNOV and a

new trial are denied, and if the Court finds that punitive damages were warranted in this case under Missouri law, this Court should nevertheless substantially reduce the punitive damage awards because they are grossly excessive as a matter of federal and state constitutional law.

As the United States Supreme Court stated in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1519-20 (2003), "[t]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." Under the Supreme Court's punitive damages jurisprudence, the punitive damages awards against these Defendants totaling $320 million are unconstitutionally excessive and warrant substantial reduction by this Court.

The issue of whether a punitive damages award is unconstitutionally excessive "calls for the application of a constitutional standard to the facts of a particular case" and is therefore a question of law requiring a thorough, independent review by this Court. *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001). A trial court reviewing a constitutional challenge to a punitive damages award has a "mandatory duty to correct an unconstitutionally excessive verdict so that it conforms to the requirements of the due process clause." *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1331 (11th Cir. 1999) (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585 (1996)); *see also Ross v. Kansas City Power & Light Co.*, 293 F.3d 1041, 1049-50 (8th Cir. 2002) ("[T]he court's mandatory review of a punitive damages award does not implicate the Seventh Amendment."); *Cooper Indus.*, 532 U.S. at 431, 436 (trial court review of constitutional excessiveness is a question of law, which appellate courts review de novo). Thus, to the extent that a punitive damage award should be reduced based on constitutional principles, no alternative new trial is required.

This Court should review the punitive damage awards in this case in light of the three constitutional guideposts set forth by the United States Supreme Court in *BMW*: (1) the disparity, or ratio, between punitive and compensatory damages; (2) the degree of reprehensibility of the defendant's misconduct; and (3) the civil penalties authorized or imposed in comparable cases. *See BMW*, 517 U.S. at 574-75; *Campbell*, 123 S. Ct. at 1520; *Cooper Indus.*, 532 U.S. at 435. Under these guideposts, the multi-million dollar punitive damage awards in this case are unconstitutionally excessive and require substantial reduction by this Court to comport with due process.

A. Ratio.

Particularly in light of the substantial compensatory awards in this case, the high ratios of punitive-to-compensatory damages in this case – from a "low" of approximately 6.5 to 1 for Nathan Davis up to 16 to 1 for Austin Manning, with most over 8 to 1 and a combined overall ratio of over 8.4 to 1 ($38 million in compensatory damages and $320 million in punitive damages) – exceed the constitutionally permissible boundaries. In *Campbell*, the Supreme Court made clear that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Campbell*, 123 S. Ct. at 1524. The Court stressed that it has twice stated that a 4-to-1 ratio is "close to the line of constitutional propriety." *Id.* (citing *BMW*, 517 U.S. at 581; *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991)). Moreover, the Court in *Campbell* made plain that where, as in the present case, "compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.*

The principles enunciated by the Supreme Court in *Campbell* with respect to the ratio guidepost are not limited to economic damages cases, but apply with equal force to cases

involving physical injury, such as the present action. Accordingly, the Supreme Court remanded, for further consideration in light of *Campbell*, a products liability case involving serious physical injuries and death. *See Ford Motor Co. v. Smith* ("Smith"), 123 S. Ct. 2072 (2003).

In *Smith*, the Supreme Court vacated a punitive damages award of $15 million, which was five times the amount of compensatory damages, despite evidence that the defendant had known of a dangerous design defect in its transmission system for several years prior to the manufacture of the vehicle that migrated into reverse gear while parked and "slowly crushed" the decedent. *See Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483, 486, 492-94, 496 (Ky. 2002), vacated *sub nom. Ford Motor Co. v. Smith*, 123 S. Ct. 2072 (2003). The Supreme Court's remand of *Smith* makes clear that a 5-to-1 ratio may well not pass constitutional muster even in a case involving physical injuries and death. The ratios in the present cases are unconstitutional under the principles announced in *Campbell*.

Applying the due process principles discussed in *State Farm,* the Missouri Court of Appeals in *Lynn v. TNT Logistics North America,* 275 S.W.2d 304, 311 (Mo. App. 2008) remitted a $6.75 punitive damage award to $3.75 million. The Court of Appeals in *Kelly v. Bass Pro Outdoor World, LLC.,* 245 S.W.3d 841 (Mo. App. 2007) reversed a $2.8 million punitive damage award (based on a $4300 compensatory award) as excessive in violation of constitutional due process rights. In *JCB, Inc. v. Union Planters Bank, N.A.*, 539 F.3d 862 (8th Cir. 2008), the Court reduced a $1, 087,500 punitive damages award to $108,750. The Eighth Circuit also applied the principles of *Gore* and *State Farm* to remit awards in *Diesel Machinery v. B.R. Lee Industries, Inc.,* 418 F.3d 820 (8th Cir. 2004) (affirming district court's remittitur of

$4.335 million to $2.66 million) and *Conseco Finance Servicing Corp. v. North American Mortgage Company,* 381 F.3d 811 (8th Cir. 2004) ($17 million to $7 million).

An Iowa federal district court observed that even where a defendant's conduct has been highly reprehensible such that the defendant has intentionally and maliciously caused physical harm (which is not the case here), a single-digit ratio is the outer limit that a punitive award cannot exceed and still be constitutional. *See Eden Elec., Ltd. v. Amana Co., L.P.*, 258 F. Supp. 2d 958, 974 (N.D. Iowa 2003). Likewise, an Illinois federal district court, applying the constitutional principles set forth in *Campbell* and *BMW*, reduced a punitive damages award to an amount four times the compensatory award, where the defendants had inflicted a "malicious and premeditated battery . . . upon a defenseless victim." *Waits v. City of Chicago.*, No. 01 C 4010, 2003 WL 21310277 at *4, *6-*7 (N.D. Ill. June 6, 2003).

The ratios in this case cannot survive constitutional scrutiny under *Campbell* and the other authorities cited above. The compensatory damages in these cases were substantial, with nine Plaintiffs receiving $2.5 million or more, five more receiving over $2 million, one receiving over $1.6 million, and the remaining Plaintiff, who died of unrelated causes and had no future damages, receiving $1.25 million. Just looking at the awards against Fluor, the ratios for the separate awards range from 5 to 1 (Nathan Davis) to 12 to 1 (Austin Manning), all excessive under the guidelines of State Farm and Campbell. Accordingly, this case falls under the *Campbell* rule that where "compensatory damages are substantial" a 1-to-1 punitive-to-compensatory damage ratio is constitutionally mandated. *See Campbell*, 123 S. Ct. at 1524; *see also id.* at 1526 (holding that a $145 million punitive damages award was unconstitutional in light of the substantial $1 million compensatory damages award, and that application of the

constitutional guideposts "likely would justify a punitive damages award at or near the amount of compensatory damages").

Based on the ratio to compensatory awards, these punitive damage awards are excessive and must be reduced.

B. Reprehensibility

In assessing the constitutionality of the punitive awards, this Court also should consider "'the degree of reprehensibility of the defendant's conduct.'" *Campbell*, 123 S. Ct. at 1521 (quoting *BMW*, 517 U.S. at 576-77). The Court should not consider the degree of reprehensibility of some other related entity's conduct. *See id.* Although necessarily requiring consideration of the evidence, the reprehensibility inquiry is nevertheless a question of law for this Court. *See Johansen*, 170 F.3d at 1331 ("[T]he court, not the jury, has the responsibility for determining [the] constitutional limit" for punitive damage awards); *Ross*, 293 F.3d at 1049-50 ("[t]he court's mandatory review of a punitive damages award does not implicate the Seventh Amendment.") The reprehensibility factor also supports the conclusion that these awards are excessive.

The factors to be considered in evaluating the degree of reprehensibility include whether "the harm caused was physical as opposed to economic; the tortuous conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." *Campbell*, 123 S. Ct. at 1521.

In this case, there was no evidence at trial that Defendants "targeted" Plaintiffs or that Plaintiffs had any "financial vulnerability." *See id.* The record also fails to establish that

Defendants acted with reckless disregard for Plaintiffs' health and safety. All three Defendants were found liable based on their status as partners in a general partnership. None of the three Defendants was involved in the operation of the smelter, or the environmental compliance activities in which the smelter company was engaged. A.T. Massey and DRIH were companies that simply held a portion of the partnership interest owned by St. Joe, their ultimate parent. DRIH had no active employees. To the extent Fluor had any involvement in approving budgets for St. Joe with regard to smelter operations, it never rejected any request for funds related to environmental issues. There also is no evidence that Fluor, A.T. Massey, or DRIH knowingly violated any industry or regulatory standards, much less that they did so knowing that they were creating a high significant risk of injury to these Plaintiffs. Moreover, during most of the partnership time period (1986-1994), the level of concern for blood was 25 ug/dl, above the blood lead levels of Plaintiffs.

In addition to the lack of evidence that Defendants were responsible for or actually controlled the operation of the smelter, these Defendants were partners for a very limited time. The smelter has been operating for 120 years. The smelter had been operated by a stand-alone, self-sufficient company for more than 90 years before any partnership was even formed. That same company continued to operate the smelter during the period that these Defendants were indirectly involved, and up to the present day, more than 17 years after these Defendants ceased any involvement. Fluor was a partner for less than a day in 1990, and was assessed $240 million in punitive damages. A.T. Massey was a partner for less than 5 months and was assessed $48 million in punitive damages. According to Plaintiffs, DRIH (a partner for approximately five years) was completely controlled by Fluor and had no employees and no contact with the partnership, and yet still was assessed $32 million in punitive damages. Like the lack of

involvement in operating the smelter, the brief time Defendants had any ownership interest in the smelter calls for substantial remittitur.

The evidence, including evidence improperly excluded by the Court, also does not support Plaintiffs' claim that Defendants turned a blind eye to any potential risks associated with the operation of the smelter. To the extent Fluor had any role in the approval of budgets with regard to the smelter, the uncontradicted evidence was that every request for funding made by Doe Run with regard to control of lead emissions or other safety measures was approved. The Doe Run Company Partnership Committee, which, at times, included some Fluor officers sitting as designated representatives of St. Joe, approved millions of dollars in environmental expenditures, both pursuant to and outside of SIPs, to deal with lead emission and pollution issues. At no time did the partnership committee, from November 1986 to May 25, 1990, decline or refuse to approve an Authorization for Expenditure for environmental and/or pollution control improvements. And subsequently, for the time period of May 25, 1990 through April 1994, Fluor approved every Authorization for Expenditure submitted by Doe Run for environmental improvements and pollution controls. Prior to and throughout the time period that Fluor owned St. Joe, was briefly a partner in the Doe Run Partnership, or owned other partners in the Doe Run Company partnership, either St. Joe or Doe Run were operating pursuant to and complying with State Implementation Plans prepared and approved by the State of Missouri and Environmental Protection Agency pursuant to provisions of the Clean Air Act and National Ambient Air Quality Standard promulgated for lead in 1978. Because both St. Joe and Doe Run were complying with each of the three SIPs that were applicable during the 13-year time period of Fluor's interest in St. Joe/Doe Run, by law they were in compliance with the requirements of that law. Neither the EPA nor MDNR ever identified Fluor, AT Massey or DRIH as responsible

parties for purposes of complying with the NAAQS or any other environmental regulations. Additionally, neither agency ever negotiated with Fluor, AT Massey or DRIH with respect to SIPs and pollution control issues. The evidence simply does not support any argument that Fluor's or its subsidiaries were ignoring or flouting state and federal standards and regulations. Plaintiffs' claim that Fluor should have done more does not support a $240 million punitive damages award against Fluor.[1]

Finally, the sixteen separate awards violate defendants' due process rights because they constitute sixteen punitive damage awards for the exact same conduct. The United States Supreme Court has stated that multiple punitive damages awards for the same conduct may be a due process violation. *See State Farm v. Campbell,* 538 U.S. 408, 423 (2003). This includes orders to pay punitive damages in successive cases based on the same conduct. *See Huu Nam Tran v. Metropolitan Life Ins. Co.*, 2006 WL 1437376 at * 2 (W.D. Pa. 2006); *Zachair, Ltd. v. Driggs*, 762 A.2d 991, 1002 (Md. Ct. App. 2000) (multiple punitive awards may be unlawfully duplicative if they "have their basis in one continuous course of conduct."). Each of the sixteen awards for each plaintiff is based on the same partnership status by the same defendants for the same time period.

In sum, consideration of the reprehensibility guidepost underscores the need for this Court to substantially reduce the unconstitutionally excessive punitive damage awards in this case.

C. Comparable Penalties

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[1] Plaintiffs do not even claim that A.T. Massey or DRIH did or failed to do anything. The punitive damage awards against A.T. Massey's and DRIH's are based solely on their status as partners in the Doe Run Partnership, and not the knowledge or conduct of these two defendants.

Under the "comparable penalties" guidepost, this Court "should accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue." *BMW*, 517 U.S. at 583 (citations and internal quotation marks omitted). Application of this guidepost reveals that the punitive awards in the case at bar are unconstitutionally excessive.

The Missouri Legislature has expressly limited the criminal fines that may be assessed against corporations. *See* Mo. Rev. Stat. § 560.021. For an offense defined by the Missouri Crimes and Punishment Code, the maximum penalty for any felony is $10,000 or any higher amount not exceeding double the corporation's gain from the commission of the offense. See Mo. Rev. Stat. § 560.021(1). Defendants' alleged conduct in this case is not the subject of any Missouri criminal statute, and "the remote possibility of a criminal sanction does not automatically sustain a punitive damages award." *Campbell*, 123 S. Ct. 1525.

The punitive damage awards in this case also dwarf any penalty that might have been imposed against the partnership or any partner for the operation of the smelter. Missouri has environmental penalty provisions such as section 260.425 RSMo, which provides for $10,000 per day penalties for violation of hazardous waste laws and Section 643.151 RSMo which provides for $10,000 per day penalties for violation of air pollutions laws. Imposing a penalty on Defendants under this standard for every day the partnership owned the smelter would result in a penalty of about $29 million, less than ten percent of the punitive damages awarded in this action. The Clean Air Act allows civil penalties of up to $25,000 per day per violation. 42 U.S.C. § 7413(b). Even had Plaintiffs proven that the smelter was in violation of air emission requirements for every day of the eight years the Doe Run Company Partnership owned the smelter (as discussed above, there was no such evidence), the maximum civil penalty under section 7413(b) would have been $73 million, less than a quarter of the total punitive damages

awarded against Fluor, A.T. Massey, and DRIH. In 2010, Doe Run entered into a Consent Decree with the EPA and MDNR related to violations of prior Administrative Orders and violations of state and federal statutes over a 10-year period. The total penalty was $7 million – $ 3.5 million to EPA and $3.5 million to MDNR. Considering that these Defendants did not even operate the smelter and the duration of their partnership interests, these "comparable" penalties directed to actual operating entities exposes how extraordinarily excessive these punitive damage awards are.

In sum, the punitive damage awards in this case are unconstitutionally excessive and should be reduced, as a matter of law, to amounts no more than the compensatory damage awards. Because "compensatory damages are substantial," *Campbell* dictates that a 1-to-1 punitive-to-compensatory damages ratio represents the "outermost limit of the due process guarantee." *Campbell*, 123 S. Ct. at 1524. The reprehensibility and comparable penalties guideposts underscore the excessive and arbitrary nature of these punitive damage awards, and the need for this Court to reduce them to their constitutional maximum. Therefore, in accordance with its "mandatory duty to correct an unconstitutionally excessive verdict," *Johansen*, 170 F.3d at 1331, this Court should reduce the punitive damage awards to an amount no more than equal to the compensatory damages, so that there will be at most a ratio of one to one.

D. Defendants' Financial Condition.

Fluor's and Massey Energy's wealth may not be relied upon to uphold the constitutionality of the grossly excessive punitive damage awards in this case. The United States Supreme Court has made clear that a defendant's wealth is irrelevant to a court's determination, under the constitutional guidelines set forth in *BMW* and *Campbell*, of whether a punitive

damages award in a particular case exceeds due process limits. *See Campbell*, 123 S. Ct. at 1525 ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.") (citing *BMW*, 517 U.S. at 585).[2]

This Court permitted Plaintiffs, through their expert Robert Johnson, to present evidence regarding Defendants' condition that went well beyond that authorized by constitutional guidelines, as well as the explicit limitations of the Missouri statutes. *See* § 510.263, RSMo; *Campbell*, 123 S. Ct. at 1525. In addition to evidence of their net worth, Mr. Johnson testified to and presented evidence regarding Fluor's and Massey Energy's (1) total revenue; (2) cash on hand; (3) revenue generated per day; (4) net income; (5) dividends paid to shareholders; (6) free cash paid to certain parties; (7) cash flow data; (8) stock repurchases; (9) capital expenditures; (10) available lines of credit; (11) stock market valuation; and (12) value of treasury stock. Mr. Johnson further testified, based on this financial data, as to what amounts Fluor and Massey Energy could lose without affecting the operations of their business. The amounts requested for punitive damages by Plaintiffs were based entirely on what it would take for Fluor and Massey Energy to take notice of the judgment in light of these financial figures.

Any reliance upon evidence of Fluor's overall net worth to justify the punitive awards is improper in this case, when Fluor was a partner for one day twenty-one years prior to the verdict and has had no relationship to the smelter since 1994. Moreover, to the extent Fluor's wealth

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2 *See also Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991) ("the factfinder must be guided by more than the defendant's net worth."); *see also Pulla v. Amoco Oil Co.*, 72 F.3d 648, 659 n.16 (8th Cir. 1995) (opinion of retired Justice White, sitting by designation) ("[A] defendant's wealth cannot alone justify a large punitive damages award"); *Cont'l Trend Res., Inc. v. OXY USA Inc.*, 101 F.3d 634, 641 (10th Cir. 1996) ("From the [*BMW*] Court's statements we conclude that a large punitive award against a large corporate defendant may not be upheld on the basis that it is only one percent of its net worth or a week's corporate profits.").

may be considered as a factor in the amount of punitive damages, this Court should consider only the revenue attributable to the sales of the lead operations of Fluor in Missouri, or to the amount Fluor received when it sold the lead operations in 1994. Instead, the Court improperly permitted Plaintiffs to present financial evidence well beyond Fluor's net worth. *See* Defendants' Motion to Limit Testimony of Witness Johnson.

The Court also should not consider the net worth of Massey Energy (which it improperly allowed Plaintiffs to present to the jury, over Defendants' objection), the parent company of A.T. Massey Coal, which is a Defendant in this case. The improper consideration of evidence regarding the net worth of Massey Energy further supports the conclusion that the punitive damages award against Massey Energy is unconstitutionally excessive.

Any use of wealth to ratchet up the punitive damages award in this case raises serious due process concerns of notice. "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Campbell*, 123 S. Ct. at 1520 (quoting *BMW*, 517 U.S. at 574)). The fact that a defendant "is a large corporation . . . does not diminish its entitlement to fair notice." *BMW*, 517 U.S. at 585. The constitutional concept of notice is eviscerated if a company is to be deemed to be on notice that a very large award might be imposed merely because it is a very large company. The constitutional notice required is notice of the severity of the penalty that may be imposed for particular conduct, as is shown by the fact that the concept of notice is integrally related to the three *BMW* guideposts, all of which focus on the defendant's conduct – not on its size or wealth. *See BMW*, 517 U.S. at 574 (holding that each of the three guideposts "indicates that BMW did

not receive adequate notice of the magnitude of the sanction that Alabama might impose" for failing to disclose to customers that a new car had been repainted before sale).

In the present case, there can be no doubt that the $320 million punitive damages awards are unconstitutionally excessive because Defendants could not have had fair notice of an award that would far outstrip the value of the lead operations in Missouri, which were sold to a third party in 1994 for less than $140 million, and when a multi-million dollar reserve for environmental matters was left in the company for the new owner.

Permitting this punitive award to stand would amount to an end-run around *BMW* and the Due Process Clause by automatically deeming large corporations to have had "fair notice" of virtually any monetary punishment that a jury conceivably could impose. Subjecting national corporations to open-ended punishment solely because of their financial status is plainly improper and threatens to nullify the constitutional safeguards established under the United States Supreme Court's punitive damages jurisprudence. Limiting consideration of wealth evidence to the profits generated by the specific conduct at issue comports not only with due process, but with the purposes of punitive damages, which are "to punish the defendant and deter future wrongdoing." *Cooper Indus.*, 532 U.S. at 432. Closely linking the punishment to the profits from the specific misconduct avoids the risk that corporations will be deterred from engaging in socially beneficial activities altogether. *See In re the Exxon Valdez*, 270 F.3d 1215, 1244 (9th Cir. 2001) ("Every large company knows that it cannot exercise absolute control over all its employees, so if there is too much risk in performing some activity, the entire activity may be avoided as a preferable alternative to bearing potentially infinite costs of avoiding the harm, and society would lose the benefit of the productive activity.") In addition, the notice requirements for due process are also violated in this case because defendants have been found

liable for punitive damages based on the knowledge of the conduct and knowledge of the partnership and not based on their own knowledge and conduct.

Defendants' also incorporate by reference the arguments and authorities in their alternative motion for remittitur as to punitive damages.

E. Conclusion.

In sum, the punitive awards in this case, which far exceed any arguably comparable penalties and total almost twice what the lead operations were sold for in 1994 are unconstitutionally excessive. Moreover, consistent with constitutional due process guarantees that impose a substantive limits on the amount of a punitive damages award, these disproportionate awards may not be upheld on the basis of Defendants' wealth. Due process requires a substantial reduction in the amount of the punitive damages awards in this case to no more than the amounts of the compensatory damage awards as reduced by the amounts of settlements with other defendants and as further reduced in accordance with Defendants' motion for remittitur of compensatory damages.

WHEREFORE, Defendants pray for the Court to require a substantial reduction in the amount of the punitive damages awards in this case to no more than the amounts of the compensatory damage awards.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was delivered by email and first class mail to counsel of record this 14th day of September, 2011, to:

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