DISTRICT OF COLUMBIA COURT OF APPEALS

In the Matter of
MARK M. HAGER, ESQUIRE

No. 00-BG-995
Bar Docket No. 31-98

BRIEF *AMICUS CURIAE* OF HALT, INC. — AN ORGANIZATION OF AMERICANS FOR LEGAL REFORM IN SUPPORT OF DISBARMENT OF RESPONDENT FOR HIS MISCONDUCT

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Certificate Required by Rule 28(a)(1) of the Rules of the District of Columbia Court of Appeals

The undersigned, counsel of record for Amicus Curiae HALT, Inc., certifies the following listed parties appeared below:

Mark M. Hager, Esquire, Respondent
And his counsel:
Mark W. Foster, Esquire
Norman L. Eisen, Esquire
Hamilton P. Fox, III, Esquire

Amicus Public Citizen, by:
Brian Wolfman, Esquire
Alan B. Morrison, Esquire
Amanda Frost, Esquire

The Office of Bar Counsel, by:
Joyce E. Peter, Esquire
Elizabeth A. Herman, Esquire
John T. Rooney, Esquire

Amicus HALT, Inc.

These representations are made in order that the judges of this Court, *inter alia*, may evaluate possible disqualification or recusal.

_____
James C. Turner, Attorney of
Record for HALT, Inc.

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INTRODUCTION

The issue presented in this disciplinary proceeding is whether the Court of Appeals will allow an attorney who enriched himself by betraying his clients' trust to continue to practice in the District of Columbia. Through a covert agreement with the prospective defendant in a Moss-Magnuson Warranty Act lawsuit, Washington D.C. attorney and American University Law Professor Mark Hager accepted a secret payment of $225,000, while his clients received $10,000 to settle their claims. Report and Recommendation of the Board of Professional Responsibility ("Board Report"), 5-9. In short, Hager sold his clients' case and stole 95% of the proceeds for himself. This misconduct violates the most fundamental principles of professional responsibility — that an attorney owes undivided loyalty to a client[1] and will not steal or convert a client's

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[1] Comment [1] of D.C. Rules of Professional Conduct, Rule 1.3 states that:

> The duty of a lawyer, both to the client and to the legal system, is to represent the client zealously within the bounds of the law…. This duty requires the lawyer to pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer, and to take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client.

RESTATEMENT (THIRD) THE LAW GOVERNING LAWYERS (2000) §16(3)(2000) states that a lawyer must:

> comply with obligations concerning the client's confidences and property, avoid impermissible conflicting interests, deal honestly with the client, **and not employ advantages arising from the client-lawyer relationship in a manner adverse to the client**"(*emphasis added*)

See also Williams v. Reed, 3 Mason 405, 418 (C.C.Me. 1824)(In which Justice Story wrote: "When a client employs an attorney, he has the right to presume…that he has no engagements, which interfere, in any degree, with his exclusive devotion to the cause confided to him; that he has no interest, which may betray his judgment, or endanger his fidelity.").

financial assets.[2] This Court has provided unequivocal guidance that disbarment is the appropriate remedy in cases where an attorney has misappropriated a client's financial assets, In re Addams, 579 A.2d 190, 191 (D.C. 1990)(*en banc*), and *amicus curiae* HALT, Inc. respectfully urges that Hager be disbarred for his gross misconduct.

The salient facts in this matter fully justify disbarment. About five years ago, Hager agreed to represent a group of individuals in a potential lawsuit against Warner-Lambert, the makers of the anti-lice shampoo Nix. Board Report at 2, ¶2. After entering into an attorney-client relationship with these individuals, Hager met with Warner-Lambert and agreed to settle the potential case in return for refunds to his clients, a new label for Nix and a promise to convene an internal study on the product's effectiveness. Board Report at 5-8. In addition, Hager entered into a secret agreement, which he concealed from his clients, that paid him $225,000 in "fees." Board Report at 7, ¶13. This "settlement" agreement was executed without the knowledge of any of Hager's clients, none of whom ever authorized Hager to agree to such an agreement on their behalf.[3] Board Report at 9, ¶15. Hager and his co-counsel, in effect, accepted a $225,000 bribe not to proceed against Warner-Lambert.

Unfortunately, the Board of Professional Responsibility failed to apply this court's guidance in recommending only a year suspension for Hager's misconduct,

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[2] D.C. Rules of Professional Conduct, Rule 1.15 (requiring attorneys to safeguard their client's property and prohibiting misappropriation or commingling of client funds) and Rule 1.7(b)(4)(representing clients in a matter when attorney's professional judgement was or reasonably might have been adversely affected by his…interests in third party and/or by his own financial business or property interests). *See also* RESTATEMENT (THIRD) THE LAW GOVERNING LAWYERS §16(3)(2000).

[3] Engaging in settlement negotiations without the authorization of the client is a clear violation of D.C. Rules of Professional Conduct, Rule 1.2(a)(failure to abide by clients'

tantamount to giving the thoroughly unrepentant Hager a "slap-on-the-wrist." It would do great damage to the integrity of the profession for the court here to follow suit and choose a less meaningful sanction for a lawyer who so completely refuses to accept responsibility for his actions.

Damning as these undisputed facts are, Hager continues to demonstrate absolutely no comprehension of how reprehensible his behavior has been. In fact, in the most recent edition of *American Jurist* magazine (copy attached), a periodical distributed free to law students nationwide, Hager continues his effort to avoid accepting responsibility for his misconduct by concocting a new legal theory that his clients were merely "intended third party beneficiaries" to the secret agreement with Warner-Lambert. Cecilia Duran, Mark Hager Battles Board of Ethics, American Jurist, November/December 2001 at 24-25. Equally revealing, in this same publication, Hager dismisses the charges against him, calling this "a case of prosecutorial overreach." Id. at 24. Finally, Hager demonstrates his utter lack of contrition, accusing the Bar Counsel of "pounding me as a terrible villain." Id. at 25. [4]

In the face of Hager's blatant contempt for the disciplinary process and his refusal to acknowledge, much less accept, responsibility for his misconduct, this court cannot allow him to continue to prey upon the unsuspecting citizens of the District of Columbia. Hager's abandonment and betrayal of his clients, and his continued failure to

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decisions concerning objectives of representation and whether to accept offer of settlement).

[4] Further demonstrating his disregard for loyalty to his clients, at one point during the disciplinary proceedings against him, Hager offered that when he entered into negotiations with Warner-Lambert, he was not the attorney for any of the 50 individuals he agreed to represent. The Hearing Committee summarily rejected this argument which

acknowledge his wrongdoing or to make restitution for his wrongs, make him not only a continued threat to legal consumers, but also demonstrate that he is not fit to practice law in the District of Columbia.

The continuing dishonesty of respondent, as well as relevant ethics decisions previously rendered by this court underscore the need for a meaningful punishment for Hager; one that not only insures that no future client will be victimized by his misconduct, but also sends an unequivocal message to all attorneys that such behavior will not be tolerated. Hager should be disbarred from the practice of law in the District of Columbia.

ARGUMENT

This Court stated that the purpose of imposing sanctions "is to protect the public and the courts, to maintain the integrity of the profession and to deter other attorneys from engaging in similar misconduct." In re Pierson, 690 A.2d 941, 960 (D.C. 1997). All three of these aims support disbarment of the respondent: first, the public needs to be protected from Hager; second, a clear message must be sent to all lawyers in the District of Columbia that selling a client's lawsuit for personal gain will invoke meaningful sanctions; and third, the integrity of the legal profession must be preserved by showing the general public how seriously the legal community considers the fiduciary responsibilities of lawyers to their clients.

Hager has now apparently abandoned. Board Report at 12, ¶24, *citing* Committee Report

I. Hager's lack of remorse for his misconduct requires that he be disbarred as a protective measure to prevent him from similarly victimizing other clients.

Hager misappropriated his clients' case, effectively stealing $225,000 of their money by accepting a payoff from their opponents. Board Report at 6, ¶13. This Court has established that such misappropriation requires disbarment. In re Addams, 579 A.2d 190, 191 (D.C. 1990)(en banc). Nor is there any mitigation in this case — Hager shows no remorse or understanding of what he did wrong, he has not returned the money he stole and his case is consistently undermined by his lack of honesty to his clients and to the disciplinary system. Such a flagrant display of contempt for the basic tenets of loyalty to clients[5] and protection of client property[6] demands disbarment to protect the legal consumers of the District of Columbia.

A. Hager violated D.C. Ethics Rules in misappropriated the potential value of his clients' lawsuit against Warner-Lambert

Hager accepted a payoff from Warner-Lambert totaling $225,000. Board Report at 6, ¶13. This amount was not a percentage of any settlement agreement executed in favor of Hager's clients, but instead was a flat fee Hager negotiated with the company. Id. at 8, ¶14. Not one of Hager's clients ever received anything more than a refund of the purchase price of Nix. Id. at 7, ¶13. Hager sold the value of his clients' case for his own

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at 7-8.

[5] D.C. Rules of Professional Conduct, Rule 1.3 (a lawyer has a duty to protect his client's interests and represent them with zeal and competence) and Rule 1.7(b)(4)(representing clients in a matter when attorney's professional judgement was or reasonably might have been adversely affected by his…interests in third party and/or by his own financial business or property interests). *See also* RESTATEMENT (THIRD) THE LAW GOVERNING LAWYERS §16(3)(2000).

[6] D.C. Rules of Professional Conduct, Rule 1.15 (requiring attorneys to safeguard their client's property and prohibiting misappropriation or commingling of client funds).

monetary gain, then settled and accepted a secret bribe from Warner-Lambert to conceal what he had done.

At the inception of any representation, the client entrusts his or her lawyer to protect the value of a potential lawsuit. As Bar Counsel stresses, Hager's misconduct "encompasses precisely the fear that clients' have that their attorneys will be 'bought off' by opposing counsel, or that their attorneys will use their clients' case to surreptitiously profit from the representation." Bar Counsel Brief at 38. Selling your clients' case to their opponent is tantamount to misappropriating their money.[7]

This court has provided clear guidance about the appropriate sanctions in cases of misappropriation:

> [I]n virtually all cases of misappropriation, **disbarment will be the only appropriate sanction** unless it appears that the misconduct resulted from nothing more than simple negligence." In re Addams, 579 A.2d 190, 191 (D.C. 1990)(en banc)(emphasis added).

It is clear from the facts that Hager's actions were not merely negligent; indeed, his lack of remorse demonstrates not only that he acted intentionally, but also that he believed, and apparently *still* believes, that his actions were defensible.

B. Mark Hager is entirely unrepentant for his misconduct and his attempts to show mitigating circumstances to explain his actions are irrelevant given his complete lack of contrition.

In making its initial recommendation for a three-year suspension of Hager's law license, The D.C. Board on Professional Responsibility Ad Hoc Hearing Committee recognized that:

> The record counsels in favor of a substantial period of suspension. The proven offenses at issue are serious, including questions of honesty, with multiple victims

[7] The Hearing Committee recognized this fact in stating that Hager's "misconduct stands in disciplinary parity with trust account misappropriation." Committee Report at 16.

> of multiple offenses. Respondent's conduct prejudiced the rights of approximately 90 identifiable people, including 50 clients. Respondent accepted a secret $225,000 payment from his clients' opponent under the condition that he abandon his clients. **He exhibits no remorse and no acceptance of responsibility; indeed, Respondent still does not appear to grasp the nature or import of his conduct**. Report and Recommendation of the Hearing Committee ("Committee Report"), 15 (emphasis added).

The Committee also recognized that Hager "traded on his status as a law professor" and concluded that "[h]e is teaching the next generation of lawyers and should be setting a better example for them." Committee Report at 15. Yet, despite these findings, the Committee failed to correctly apply this Court's ruling in Addams, instead adopting "a more tempered approach" because "[b]ar counsel is not seeking a substantial suspension, and Respondent's character evidence offers some hope that the conduct will not be repeated." Committee Report at 16.

This conclusion ignores Hager's refusal to accept responsibility for his misconduct. As long as Hager fails to do so, this court has a duty to act forcefully to protect the public and preserve the integrity of the legal profession. It must offer the public more than just a mere "hope" that Hager's conduct will not be repeated — this Court must provide an assurance that sanctions will prevent Hager's misconduct from occurring again. Contrary to the Hearing Committee's conclusion, as long as Hager continues to refuse to accept responsibility for his actions, no amount of mitigation will lessen the need for the public being protected from him.[8]

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[8] The 2001 Federal Sentencing Guideline Manual §3E1.1 explicitly recognizes the importance of contrition, allowing for substantial reduction if the defendant demonstrates responsibility for his or her acts. Demonstration of responsibility includes honest admission of guilt, voluntary resignation from the office held during commission of acts and voluntary payment of restitution. Hager has done none of the above acts.

While the Board was clearly cognizant of the depth and breadth of Hager's misconduct, it mistakenly relied on character evidence to mitigate fears of future misconduct by Hager. In fact, Hager's disciplinary record prior to this case is only one of four factors required to avoid disbarment established in a misappropriation case. This court listed those factors as follows: 1) an admission of wrongdoing; 2) full cooperation with disciplinary authorities; 3) prompt return of the disputed funds and 4) an unblemished record of professional conduct. In re Reback, 513 A.2d 226, 233 (D.C. 1985)(en banc). Further, this Court has made it clear that these four factors only curtail disbarment "if they are especially strong…and substantially outweigh any aggravating factors as well." Pierson, 690 A.2d at 959 (D.C. 1997).[9] In addition, the only recognized mitigation in disbarment cases is where the attorney's misconduct was the result of a chronic addiction to drugs or alcohol. [10] *See* In re Kersey, 520 A.2d 312 (D.C. 1987); In re Temple, 596 A.2d 585 (D.C. 1991).

Regarding Hager's record of professional conduct, it is important to remember that in considering Hager's qualifications to take on this representation, the Hearing Committee noted that his "real world legal experiences were limited in nature."

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[9] University of Connecticut Law Professor Leslie C. Levin has also noted that, when considering sanctions for lawyer misconduct, mitigating factors "are reflexively — and inconsistently — invoked by the courts, even though some of these factors would appear to deserve little, if any, consideration." Leslie C. Levin, The Emperor's New Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions, 48 Am. U.L. Rev. 1, 16 (1998).

[10] This court, in Pierson, has also made it clear that if an accused attorney is guilty of acts of dishonesty, the mitigating circumstances necessary to overcome the presumption of disbarment are even higher. Hager's repeated lack of honesty both to the Board of Responsibility and to his clients sets an extremely high burden to overcome the disbarment presumption. 690 A.2d at 959 (D.C. 1997). *See also* In re Robinson, 583 A.2d 691, 692 (D.C. 1990)(An attorney was unable to overcome the presumption of

Committee Report at 3, ¶7. Hager has only engaged in a limited part-time law practice while working as a law professor and had no previous experience with class-action litigation. Id. Thus, his record of professional conduct is greatly limited. Further, his most substantial representation, his handling of the case described here, resulted in this disciplinary action. Far from offering mitigation, Hager's professional record of conduct actually counsels in favor of strong sanctions.

In addition, there are aggravating factors present here — Hager has shown no contrition or even understanding of his misconduct and has kept his half of the $225,000. In contesting this matter, Hager has done everything but state that he would engage in such behavior again if given the chance. A few kind words from character witnesses are surely not sufficient to rebut the volumes of contempt, both for his clients and for the disciplinary system, that Hager has actually presented in this case.

C. Given Hager's clear violation of ethics rules and his complete lack of contrition or sufficient mitigating factors, he must be disbarred to protect against future misconduct.

The Hearing Committee concluded that Hager must not be allowed to victimize any more clients, stating flatly that Hager's actions "call into question his fitness to practice law" and that his lack of remorse places "the public at risk for a repeat performance." Committee Report at 15. The Board's reliance on the testimony of the character witnesses in its decision for moderation begs the question: what possible value do character witnesses offer the court when the accused continues to deny that he ever did anything wrong? Given that both the Board Report and the Hearing Committee Report fully acknowledged the impropriety of Hager's actions and further noted his

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disbarment for a misappropriation of a relatively minor amount of money despite a strong

distinct lack of remorse for his behavior, it is unreasonable to now choose a path of moderation in sanctioning this misconduct.

If moderation is sought merely to allow for future rehabilitation, it should be noted that Hager could be reinstated to the Bar at a later time should he come to finally demonstrate a proper grasp of his wrongdoing. By no means, however, should the public be forced to suffer through more of Hager's ethical misconduct while waiting for him to finally accept responsibility for his reprehensible acts. As Stanford University Professor and former President of the American Association of Law Schools Deborah L. Rhode recently noted regarding attorney discipline, "[r]edemption may always be possible in theory, but consumers should not have to depend on it in practice." Rhode, In the Interests of Justice 165 (2000).

Moreover, a 1997 D.C. Court of Appeals case dealing with very similar accusations of deceit and neglect by an attorney toward his clients resulted in disbarment of the attorney involved. In re Foster, 699 A.2d 1110 (D.C. 1997). Foster was disbarred primarily for the "cruel and cynical manner" in which he handled two different client's custody cases. He failed to file pleadings or attend scheduled hearings and he lied to his clients. Id. at 1110. He also was dishonest with the Hearing Board and Hearing Committee and refused at one point to participate in any disciplinary proceedings. Id. at 1110. The court's response to the attorney's misconduct there was very similar to the Committee's reaction here:

> [the Respondent's acts] portray an attorney who deliberately abdicated his professional responsibilities and the duties owed his clients without regard to the consequences…and then contemptuously thumbed his nose at the legal system

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showing of mitigating circumstances because of an incident of "knowing dishonesty.").

> when called upon to account for his deplorable conduct. Foster, 699 A. 2d at 1110.

While Foster behaved in reprehensibly to his clients, at no point did he ever accept a payoff to abandon them. He was ordered to make restitution to two of clients, a total amounting to $1700. While hardly a negligible sum, this amount is far short of the $225,000 Hager stole, which he never returned. The circumstances of this case, being far more egregious, demand disbarment, the sanction properly applied in Foster.[11] Based on previous decisions by this court, disbarment is the only proper sanction.

II. Public policy demands a swift disbarment of Hager to protect the integrity of the legal profession and to deter similar conduct by other lawyers.

Perhaps no circumstance tests the efficacy of a self-regulating legal discipline system more than when that system is faced with sanctioning an attorney clearly guilty of egregious misconduct. Approaching sanctions in such cases with "moderation" justifiably gives the appearance that lawyers are loath to punish other lawyers and calls into question the very basis for attorney self-regulation. This is to say nothing of the damage it does to the public's faith in lawyers as advocates worthy of their complete trust.

Over two decades ago, Washington D.C. journalist and public interest advocate Phillip M. Stern stated the problem very simply in his landmark expose Lawyers On Trial, arguing that:

> [T]he legal profession, in essence, is answerable to no one. It writes its own rules and enforces (or fails to enforce) them as it sees fit. [C]omplaints against…

[11] In another case, Matter of Duesterdick, No. D-9-75 (D.C. Aug. 15, 1975), a lawyer was disbarred for allowing a limitations period to run in a negligence case and for giving false testimony to the hearing committee. If allowing a client's case to lapse is worthy of disbarment, so should be stealing the case for one's own financial gain.

> lawyer[s]…will be passed upon by your attorney's brethren in the profession. Hardly the most objective of judges. Stern, Lawyers On Trial xvii (1980).

Stern elaborated:

> Lawyers have proven utterly incapable of disciplining each other. "…[T]he general impulse is to protect a brother—even a knavish one—rather than protect the public." Stern, Lawyers On Trial at 95 (quoting a conversation with an unnamed law professor).

Just last year, Stanford University Professor Deborah Rhode noted of the same pervasive public concern about legal ethics, stating that:

> [T]he public's … principal complaints about attorneys' character involve integrity. Only a fifth of those surveyed by the American Bar Association felt that their lawyers could be described as "honest and ethical." … On matters such as…unresponsive disciplinary structures…the public is not ambivalent, and its concerns are not unwarranted. Rhode, In the Interests of Justice 4-5 (2000).

Equally telling are University of Connecticut Law Professor Leslie C. Levin's critique of lawyer discipline, which recently appeared in the American University Law Review:

> [T]he sanctions imposed on lawyers are often light and inconsistent. Private sanctions — the lightest form of discipline — are imposed almost twice as much as any other type of sanction. Lawyers often receive several private admonitions before they receive any public discipline. If a lawyer is suspended from practice, the period of suspension is frequently so brief that it does not interrupt a lawyer's practice. In many of these cases, **sanctions fail to achieve the primary goal of lawyer discipline, which is protection of the public**. Leslie C. Levin, The Emperor's New Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions, 48 Am. U.L. Rev. 1, 3 (1998)(emphasis added).

Failing to impose meaningful sanctions on attorneys like Hager for their misconduct feeds the public's mistrust of the legal profession. If this court accepts the nominal sanction of only a year suspension it will greatly increase public mistrust of the legal profession. Put simply, the public will correctly ask: if accepting a bribe to abandon your client's case isn't worthy of disbarment, what is?

This court has stressed these very concerns in previous ethics decisions. As stated in Addams, disbarment is necessary in misappropriation cases to ensure that "there not be an erosion of public confidence in the integrity of the bar." 579 A.2d at 197-198. This court reaffirmed this guiding principal in Pierson, stating that the presumption of disbarment is necessary because misappropriation violations "'strike at the core of the attorney-client relationship' by undermining the public's faith that attorneys will fulfill their duties as fiduciaries in handling funds entrusted to them by their clients." Pierson at 958, *citing* In re Dulansey, 606 A.2d 189, 190 (D.C. 1992).

Unfortunately, the Hearing Committee exhibited reluctance to take such strong action, arguing that the "disbarment rule in misappropriation cases has been subject to much criticism" and that it is "doubtful that the Board or the Court would be eager to create another class of disbarment offenses, particularly where (as here) Bar Counsel has not urged the sanction." Committee Report at 17. This apparent reticence to impose disbarment in a case where the facts are clear, the respondent is unrepentant and the relevant precedent requires the strongest sanctions, fuels public distrust of lawyer self regulation. In essence, the attorney discipline system appears to be "bending over backwards" to avoid impose meaningful sanctions on Hager. If the Hearing Committee considers Hager's actions "on parity" with misappropriation, and those guilty of misappropriation are subject to disbarment, the facts and the law demand the same result here.

This case does not deal with the mere mishandling of funds. This case deals with the mishandling of the value of an entire case. In every sense, Hager stole more than just money. He stole his clients' faith in the sanctity of the attorney-client relationship.

Repairing this tear at the fabric of the legal system requires more than a mere suspension to even begin to restore the public's flagging faith in the American legal system.

CONCLUSION

Attorney misconduct does serious damage to the credibility of the legal profession. It victimizes legal consumers and feeds the ongoing mistrust that these consumers feel toward the profession as a whole. The legal system will never fully protect legal consumers and regain public confidence unless it deals forcefully with the deceitful actions of lawyers like Mark Hager by imposing thorough and meaningful sanctions.

Amicus Curiae HALT submits that the unconscionable behavior of Professor Hager must be met with disbarment. In the absence of such an unequivocal response, not only will Hager's future clients stand to be victimized, but also the whole of the legal profession will again confirm its apathy toward the protection of legal consumers.

Hager's deliberate betrayal of his clients' trust could not possibly strike more directly at the core of a lawyer's duties. It appears that all levels of the disciplinary system are clearly mindful here of their responsibility to uphold the public's faith in the legal profession's ability to police itself. Given that this faith has been in decline for many years and given Hager's reprehensible conduct, any recommendation for a mere suspension falls far short of that which is required of it. The Board should therefore disbar Mark M. Hager.

Respectfully Submitted,

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