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7 Attorneys for Third-Party Defendant
8 SCOTTSDALE INSURANCE COMPANY

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA

11 SIERRA BAY CONTRACTORS, INC., a
12 California Corporation,

Plaintiff,

v.

15 WESTCHESTER SURPLUS LINES
16 INSURANCE COMPANY, a Georgia corporation,
and ROES 1 through 50, inclusive,

Defendants.

CASE NO. 3:10-CV-04611-RS

**STIPULATION TO ALLOW THIRD
PARTY DEFENDANT, SCOTTSDALE
INSURANCE COMPANY, TO FILE A
CROSS-CLAIM**

[PROPOSED] ORDER

[Fed. R. Civ. Proc. 15 (a)(2)]

18 WESTCHESTER SURPLUS LINES INSURANCE
19 COMPANY, a Georgia Corporation,

Third-Party Plaintiff,

v.

22 ASPEN SPECIALTY INSURANCE COMPANY,
a North Dakota Corporation; CONTINENTAL
23 CASUALTY INSURANCE COMPANY, an
Illinois Corporation; GEMINI INSURANCE
24 COMPANY, a Delaware Corporation; GREAT
AMERICAN ASSURANCE COMPANY, an Ohio
25 Corporation; GREAT AMERICAN INSURANCE
COMPANY, an Ohio Corporation; INTERSTATE
26 FIRE AND CASUALTY COMPANY, an Illinois
Corporation; LEXINGTON INSURANCE
27 COMPANY, a Delaware Corporation; LIBERTY
SURPLUS INSURANCE CORPORATION, a

Selman Breitman LLP
ATTORNEYS AT LAW

1 New Hampshire Corporation; NIC INSURANCE
2 COMPANY, a New York Corporation; OLD
3 REPUBLIC GENERAL INSURANCE
4 CORPORATION, an Illinois Corporation;
5 TRANSCONTINENTAL INSURANCE
6 COMPANY, an Illinois Corporation;
7 SCOTTSDALE INSURANCE COMPANY, an
8 Ohio Corporation; TRUCK INSURANCE
9 EXCHANGE, a California Corporation;
10 VIRGINIA SURETY COMPANY, an Illinois
11 Corporation,

12 Third-Party Defendants.

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14
15 Third-Party Plaintiff Westchester Surplus Lines Insurance Company ("Westchester") and
16 Third Party Defendant Scottsdale Insurance Company ("Scottsdale"), by and through their
17 respective counsel of record, hereby stipulate and agree to the following:

18 1. On or about April 22, 2011, Westchester filed a third party complaint for equitable
19 contribution against various additional insured carriers, including Scottsdale in the above-
20 captioned action.

21 2. On or about May 26, 2011, Scottsdale filed and served its answer to Westchester's
22 third-party complaint in the above-captioned action.

23 3. Scottsdale now seeks to assert a cross-claim in this action.

24 4. Federal Rule of Civil Procedure Rule 15 (a)(2) allows the filing of amendments to
25 pleadings, including to the answer in order to assert a cross-claim, through stipulation from the
26 opposing party. Federal Rule of Civil Procedure Rule 15 (a)(2) states in part:

27 a) Amendments Before Trial.

28 (2) *Other Amendments.* In all other cases, a party may
amend its pleading only with the opposing party's
written consent or the court's leave. The court
should freely give leave when justice so requires.

5. Westchester is the only party which has asserted a claim against Scottsdale in this
matter, and therefore Westchester is the only opposing party as to Scottsdale.

1 6. Westchester herein stipulates to allow Scottsdale to file a cross-claim in this matter.

2 7. Scottsdale's cross-claim is based on new developments that came to light during the
3 recent mediation before Bruce Edwards at JAMS in San Francisco, California on or about
4 December 2, 2011 in the above-captioned action.

5 8. Specifically, Scottsdale understood that the recent mediation was intended to
6 explore a global resolution of all claims in dispute between the parties, including coverage issues
7 in the above-captioned action and liability issues related to the underlying arbitration and
8 litigation.

9 9. Scottsdale issued general liability policies to Elite Plastering as a named insured.
10 Elite Plastering was the stucco and lathing subcontractor for Sierra Bay Contractors for both the
11 PE and MD Buildings at issue in the underlying arbitration and litigation. Elite Plastering used
12 another subcontractor, Service Lathing, for portions of the work performed for Sierra Bay
13 Contractors on the PE and MD Buildings. The subcontract agreement between Elite Plastering
14 and Service Lathing required Service Lathing to provide additional insured coverage to Elite
15 Plastering and Sierra Bay Contractors with respect to the PE and MD Buildings.

16 10. It is Scottsdale's position that a resolution of the global resolution of coverage and
17 liability issues related to Sierra Bay Contractors and Elite Plastering cannot be reached without the
18 participation of all insurers for Elite Plastering and its subcontractor, Service Lathing.

19 11. As a result, Scottsdale now wishes to file a cross-claim for declaratory relief and
20 equitable contribution against the other insurers for Elite Plastering and Service Lathing.

21 12. Scottsdale's cross-claim arises out of the same transaction, occurrence, or series of
22 transactions or occurrences already at issue in the above-captioned action.

23 13. Scottsdale's cross-claim would be in the interests of justice and would promote the
24 efficient resolution of all claims between the parties in the above-captioned action.

25 14. Accordingly, Westchester and Scottsdale hereby stipulate that Scottsdale may file a
26 cross-claim.

27 15. A copy of the cross-claim is attached hereto as Exhibit 1.

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16. The parties also stipulate that the cross-claim will be deemed filed on the date that this stipulation is filed.

17. Once the cross-claim is deemed filed, Scottsdale will serve parties to the cross-claim pursuant to applicable Federal Rules of Civil Procedure.

18. Good cause exists for this stipulation.

19. This stipulation may be executed in counterparts and will retain its full force and effect.

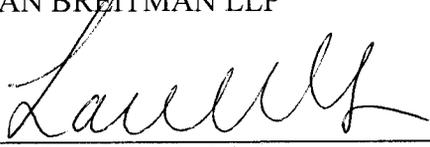
20. Facsimile signatures will be acceptable and binding with respect to the enforceability of this stipulation.

IT IS SO STIPULATED.

DATED: December 22 2011

SELMAN BREITMAN LLP

By: _____



Sheryl W. Leichenger
Lisa M. Lampkin
Laura R. Ramos

Attorneys for Third-Party Defendant, Scottsdale
Insurance Company

DATED: December ___ 2011

MORALES, FIERRO & REEVES

By: _____

Ramiro Morales
David A. Astengo

Attorneys for Defendant/Third-Party
Plaintiff, Westchester Surplus Lines
Insurance Company

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20. Facsimile signatures will be acceptable and binding with respect to the enforceability of this stipulation.

IT IS SO STIPULATED.

DATED: December __ 2011 SELMAN BREITMAN LLP

By: _____
Sheryl W. Leichenger
Lisa M. Lampkin
Laura R. Ramos
Attorneys for Third-Party Defendant, Scottsdale
Insurance Company

DATED: December 22 2011 MORALES, FIERRO & REEVES

By: _____
Ramiro Morales
David A. Astengo
Attorneys for Defendant/Third-Party
Plaintiff, Westchester Surplus Lines
Insurance Company

IT IS SO ORDERED.

12/22/11



EXHIBIT 1

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7 Attorneys for Third-Party Defendant
and Cross-Claimant SCOTTSDALE
8 INSURANCE COMPANY

9
10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA

12
13 SIERRA BAY CONTRACTORS, INC., a
California Corporation,

14 Plaintiff,

15 v.

16 WESTCHESTER SURPLUS LINES
17 INSURANCE COMPANY, a Georgia corporation,
and ROES 1 through 50, inclusive,

18 Defendants.

19
20 WESTCHESTER SURPLUS LINES
INSURANCE COMPANY, a Georgia
21 Corporation,

22 Third-Party Plaintiff,

23 v.

24 ASPEN SPECIALTY INSURANCE COMPANY,
a North Dakota Corporation; CONTINENTAL
25 CASUALTY INSURANCE COMPANY, an
Illinois Corporation; GEMINI INSURANCE
26 COMPANY, a Delaware Corporation; GREAT
AMERICAN ASSURANCE COMPANY, an Ohio
27 Corporation; GREAT AMERICAN INSURANCE
COMPANY, an Ohio Corporation; INTERSTATE
28 FIRE AND CASUALTY COMPANY, an Illinois
Corporation; LEXINGTON INSURANCE

CASE NO. 3:10-CV-04611-RS

**THIRD-PARTY DEFENDANT AND
CROSS-CLAIMANT SCOTTSDALE
INSURANCE COMPANY'S CROSS-
CLAIM**

1 COMPANY, a Delaware Corporation; LIBERTY
2 SURPLUS INSURANCE CORPORATION, a
3 New Hampshire Corporation; NIC INSURANCE
4 COMPANY, a New York Corporation; OLD
5 REPUBLIC GENERAL INSURANCE
6 CORPORATION, an Illinois Corporation;
7 TRANSCONTINENTAL INSURANCE
8 COMPANY, an Illinois Corporation;
9 SCOTTSDALE INSURANCE COMPANY, an
10 Ohio Corporation; TRUCK INSURANCE
11 EXCHANGE, a California Corporation;
12 VIRGINIA SURETY COMPANY, an Illinois
13 Corporation,

14 Third-Party Defendants.

15 SCOTTSDALE INSURANCE COMPANY, an
16 Ohio Corporation,

17 Cross-Claimant,

18 v.

19 AMERICAN SAFETY INDEMNITY
20 COMPANY an Oklahoma Corporation;
21 NAVIGATORS SPECIALTY INSURANCE
22 COMPANY, formally known as NIC Insurance
23 Company, a New York Corporation; GEMINI
24 INSURANCE COMPANY, a Delaware
25 Corporation; LEXINGTON INSURANCE
26 COMPANY, a Delaware Corporation; and ROES
27 1 through 20, inclusive,

28 Cross-Defendants.

Comes Now Third-Party Defendant and Cross-Complainant Scottsdale Insurance Company ("Scottsdale") and hereby submits this Cross-Claim pursuant to Federal Rule of Civil Procedure, Rules 13(g)-(h), 15 and 20, as follows:

THE PARTIES

1. Scottsdale was at all times herein mentioned, and currently is, a corporation organized and existing under the laws of the State of Ohio, and duly authorized to transact business in the State of California.

2. Scottsdale is informed and believe, and based thereon allege, that cross-defendant American Safety Indemnity Company ("American Safety") is an Oklahoma Corporation who was

1 at all times herein mentioned duly authorized to transact insurance business in the State of
2 California.

3 3. Scottsdale is informed and believe, and based thereon allege, that cross-defendant
4 Navigators Specialty Insurance Company, formally known as NIC Insurance Company
5 (hereinafter "Navigators"), is a New York Corporation and was at all times herein mentioned duly
6 authorized to transact insurance business in the State of California.

7 4. Scottsdale is informed and believe, and based thereon allege, that cross-defendant
8 Gemini Insurance Company ("Gemini") is a Delaware Corporation and was at all times herein
9 mentioned duly authorized to transact insurance business in the State of California.

10 5. Scottsdale is informed and believe, and based thereon allege, that cross-defendant
11 Lexington Insurance Company ("Lexington") is a Delaware Corporation and was at all times
12 herein mentioned duly authorized to transact insurance business in the State of California.

13 6. Scottsdale alleges that the true names and capacities, whether individual, corporate,
14 associate or otherwise, of the cross-defendants named herein as ROES 1 through 20, are unknown
15 to Scottsdale, who therefore sues said cross-defendants by such fictitious names. Scottsdale will
16 seek leave to amend this cross-claim to show the cross-defendants' true names and capacities when
17 the same have been ascertained. Scottsdale is informed and believes, and thereon alleges, that
18 ROES 1 through 20 are in some manner legally responsible for the claims and liabilities alleged in
19 this cross-claim.

20 7. Scottsdale may hereinafter collectively refer to American Safety, Navigators,
21 Gemini, Lexington, and ROES 1 through 20, collectively, as the "Cross-Defendants."

22 **JURISDICTION AND VENUE**

23 8. This Court has original jurisdiction under 28 U.S.C. § 1332, over this matter, as the
24 plaintiff Sierra Bay Contractors, Inc. ("Sierra Bay") filed suit against defendant Westchester
25 Surplus Lines Insurance Company ("Westchester"), and Sierra Bay and Westchester are citizens of
26 different states, and the amount in controversy between them in the present action exceeds
27 seventy-five thousand dollars (\$75,000), exclusive of costs and interest.

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1 that is excess to the insurance afforded to Elite and Sierra Bay by other insurers, including
2 Scottsdale, and that the Navigators has a duty to respond to the Alameda Action and/or Arbitration
3 Action under the NIC Policies without any right to contribution from Scottsdale.

4 **THE GEMINI POLICIES**

5 27. Scottsdale is informed and believes, and based thereon alleges, that Gemini issued
6 one or more insurance policies that provide general liability coverage to Service Lathing,
7 including, but not limited to, Policy Nos. VCGP016818 (effective from December 12, 2008 to
8 December 12, 2009) and VCGP018031 (effective December 12, 2009 to December 12, 2010)
9 (hereinafter, the "Gemini Policies").

10 28. Scottsdale is informed and believes, and based thereon alleges, that the Gemini
11 Policies agree to pay those sums that an insured becomes legally obligated to pay as damages
12 because of "property damage" caused by an "occurrence," provided that the "property damage"
13 occurs during the Gemini Policies.

14 29. Scottsdale is informed and believes, and based thereon alleges, that the Gemini
15 Policies include the same or a substantially similar definition of "property damage" and
16 "occurrence" as the Scottsdale Policies.

17 30. Scottsdale is informed and believes, and based thereon alleges, that the Gemini
18 Policies include one or more endorsements which confer additional insured status on Elite and
19 Sierra Bay for the claims at issue in the Alameda Action and/or Arbitration Action.

20 **THE LEXINGTON POLICIES**

21 31. Scottsdale is informed and believes, and based thereon alleges, that Lexington
22 issued one or more insurance policies that provide general liability coverage to Elite, including,
23 but not limited to, Policy Nos. 1142696 (effective from November 14, 2003 to November 14,
24 2004), 1143942 (effective from November 14, 2004 to November 14, 2005) and 7506898
25 (effective from November 14, 2006 to November 14, 2007) (hereinafter, the "Lexington
26 Policies").

27 32. Scottsdale is informed and believes, and based thereon alleges, that the Lexington
28 Policies agree to pay those sums that an insured becomes legally obligated to pay as damages

1 because of "property damage" caused by an "occurrence," provided that the "property damage"
2 occurs during the Lexington Policies.

3 33. Scottsdale is informed and believes, and based thereon alleges, that the Lexington
4 Policies include the same or a substantially similar definition of "property damage" and
5 "occurrence" as the Scottsdale Policies.

6 34. Scottsdale is informed and believes, and based thereon alleges, that the Lexington
7 Policies include one or more endorsements which confer additional insured status on Sierra Bay
8 for the claims at issue in the Alameda Action and/or Arbitration Action.

9 **THE UNDERLYING ACTIONS**

10 35. On or about March 2009, the Chabot-Las Positas Community College District
11 initiated the Arbitration Action concerning the "defective work in the construction of the Multi-
12 Disciplinary Building and the Physical Education Complex" at Las Positas Community College.

13 36. On or about July 27, 2009, Sierra Bay filed an Answering Statement and
14 Counterclaim Request which named Elite as a respondent in the Arbitration Action.

15 37. On or about January 11, 2010, Chabot Las Positas Community College District
16 filed the Alameda Action concerning the defective work in the construction of the Multi-
17 disciplinary building and the Physical Education Complex at Las Positas Community College.

18 38. On or about March 2, 2010, Sierra Bay was named as a cross-defendant in the
19 Alameda Action.

20 39. On April 23, 2010, Sierra Bay filed a cross-complaint against Elite in the Alameda
21 Action.

22 40. As of September 9, 2010, the Arbitration Action was stayed as to claims relating to
23 the MD Building.

24 41. Scottsdale is informed and believes, and based thereon alleges, that Elite's defense
25 and indemnity in the Arbitration Action and Alameda Action was tendered numerous insurers,
26 including Scottsdale and the Cross-Defendants.

27 42. Scottsdale agreed to provide Elite with a defense in the Arbitration Action and
28 Alameda Action regarding the MD Building claims pursuant to complete reservation of rights.

1 43. Scottsdale is informed and believes, and thereon alleges, that American Safety has
2 either ignored or denied Elite's tender of defense and indemnity in the Arbitration Action and
3 Alameda Action, and that American Safety has refused to provide Elite with a defense or
4 indemnity in the Arbitration Action and Alameda Action.

5 44. Scottsdale is informed and believes, and thereon alleges, that Navigators has either
6 ignored or denied Elite's tender of defense and indemnity in the Arbitration Action and Alameda
7 Action, and that Navigators has refused to provide Elite with a defense or indemnity in the
8 Arbitration Action and Alameda Action.

9 45. Scottsdale is informed and believes, and thereon alleges, that Gemini has either
10 ignored or denied Elite's tender of defense and indemnity in the Arbitration Action and Alameda
11 Action, and that Gemini has refused to provide Elite with a defense or indemnity in the Arbitration
12 Action and Alameda Action.

13 46. Scottsdale is informed and believes, and thereon alleges, that Lexington initially
14 accepted the tender of defense and indemnity made on behalf of Elite in the Arbitration Action and
15 Alameda Action, but that Lexington has since asserted to Scottsdale that Lexington intends to
16 withdraw coverage under the Lexington Policies for Elite in the Arbitration Action and Alameda
17 Action regarding the MD Building claims.

18 47. Scottsdale is informed and believes, and thereon alleges, that Roes 1 through 20
19 have either ignored or denied Elite's tender of defense and indemnity in the Arbitration Action and
20 Alameda Action, and that Roes 1 through 20 have refused to provide Elite with a defense or
21 indemnity in the Arbitration Action and Alameda Action.

22 48. Scottsdale is informed and believes, and based thereon alleges, that Sierra Bay's
23 defense and indemnity in the Arbitration Action and Alameda Action was tendered numerous
24 insurers, including Scottsdale and the Cross-Defendants.

25 49. Scottsdale agreed to provide Sierra Bay with a defense as an additional insured in
26 the Arbitration Action and Alameda Action regarding the MD Building claims pursuant to
27 complete reservation of rights.

28

1 **THIRD CAUSE OF ACTION**

2 **(Equitable Contribution Regarding Defense Expenses Against All Cross- Defendants)**

3 66. Scottsdale re-alleges and incorporates by this reference all preceding paragraphs
4 above, in their entirety, as though fully set forth herein.

5 67. Scottsdale is informed and believes, and based thereon alleges, that Scottsdale and
6 the Cross-Defendants are co-insurers of Elite and Sierra Bay for purposes of the Arbitration
7 Action and Alameda Action, such that the defense obligations relative to Elite and Sierra Bay in
8 connection with the Arbitration Action and Alameda Action should be borne by each based upon
9 an equitable allocation.

10 68. Scottsdale is informed and believes, and based thereon alleges, that Cross-
11 Defendants have failed and refused, and continue to fail and refuse, to contribute and/or reimburse
12 Scottsdale for their fair share of the defense incurred, continuing to be incurred, and/or to be
13 incurred in the future, on behalf of Elite and Sierra Bay in the Arbitration Action and Alameda
14 Action.

15 69. Scottsdale is informed and believes, and based thereon alleges, that Cross-
16 Defendants should be required to reimburse Scottsdale for their fair share of the defense incurred,
17 continuing to be incurred, and/or to be incurred in the future, on behalf of Elite and Sierra Bay in
18 the Arbitration Action and Alameda Action, including interest.

19 **FOURTH CAUSE OF ACTION**

20 **(Equitable Contribution Regarding Indemnity Against All Cross- Defendants)**

21 70. Scottsdale re-alleges and incorporates by this reference all preceding paragraphs
22 above, in their entirety, as though fully set forth herein.

23 71. Scottsdale is informed and believes, and based thereon alleges, that Scottsdale and
24 the Cross-Defendants are co-insurers of Elite and Sierra Bay for purposes of the Arbitration
25 Action and Alameda Action, such that the indemnity obligations relative to Elite and Sierra Bay in
26 connection with the Arbitration Action and Alameda Action should be borne by each based upon
27 an equitable allocation.

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Selman Breitman LLP
ATTORNEYS AT LAW

1 Defendants regarding defense expenses incurred, and continuing to be incurred, for the Arbitration
2 Action and Alameda Action.

3 80. Scottsdale is informed and believes, and based thereon alleges, that Elite and/or
4 Sierra Bay have suffered a loss for which the Cross-Defendants are liable, including the amounts
5 Scottsdale has paid and continues to pay for defense in the Arbitration Action and Alameda
6 Action.

7 81. Scottsdale is informed and believes, and based thereon alleges, that Scottsdale
8 stands in the shoes of Elite and Sierra Bay, and pursuant to principles of subrogation, Scottsdale
9 may assert in this action all claims that Elite and Sierra Bay could have asserted if Scottsdale had
10 not provided a defense in the Arbitration Action and Alameda Action.

11 82. Therefore, Scottsdale is informed and believes, and based thereon alleges, that
12 Scottsdale is entitled to subrogation from the Cross-Defendants for all sums paid for defense on
13 behalf of Elite and/or Sierra Bay in the Arbitration Action and Alameda Action. Justice requires
14 that the Cross-Defendants reimburse Scottsdale for all amounts paid to defend Elite and/or Sierra
15 Bay in the Arbitration Action and Alameda Action, including interest.

16 **SIXTH CAUSE OF ACTION**

17 **(Subrogation Regarding Defense Expenses Against All Cross- Defendants)**

18 83. Scottsdale re-alleges and incorporates by this reference all preceding paragraphs
19 above, in their entirety, as though fully set forth herein.

20 84. Scottsdale is informed and believes, and based thereon alleges, that the Scottsdale
21 Policies are excess to the coverage afforded to Elite and Sierra Bay by the Cross-Defendants.

22 85. Scottsdale is informed and believes, and based thereon alleges, that the policies
23 issued by the Cross-Defendants provide Elite and Sierra Bay with primary and non-contributory
24 coverage for the Arbitration Action and Alameda Action,.

25 86. Scottsdale is informed and believes, and based thereon alleges, that upon refusal of
26 the Cross-Defendants to defend Elite and/or Sierra Bay, Scottsdale has paid, continues to pay, or
27 will pay indemnity owed by the Cross-Defendants for the Arbitration Action and Alameda Action.

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1 2. On the Second Cause of Action, for a declaration that the Cross-Defendants had,
2 and continue to have, a duty to indemnify Elite and Sierra Bay in the Arbitration Action and
3 Alameda Action.

4 3. On the Third Cause of Action, for a proportionate share of the amounts Scottsdale
5 has expended, or will expend, in the defense of Elite and Sierra Bay in the Arbitration Action and
6 Alameda Action, plus interest.

7 4. On the Fourth Cause of Action, for a proportionate share of the amounts Scottsdale
8 has expended, or will expend, to indemnify Elite and Sierra Bay in the Arbitration Action and
9 Alameda Action, plus interest.

10 5. On the Fifth Cause of Action, for full reimbursement of the amounts Scottsdale has
11 expended, or will expend, in the defense of Elite and Sierra Bay in the Arbitration Action and
12 Alameda Action, plus interest.

13 6. On the Sixth Cause Of Action, for full reimbursement of the amounts Scottsdale
14 has expended, or will expend, to indemnify Elite and Sierra Bay in the Arbitration Action and
15 Alameda Action, plus interest.

16 7. For costs of suit incurred herein.

17 8. For such other relief as the Court deems proper.

18 DATED: December 20, 2011

SELMAN BREITMAN LLP

19
20 By: 

SHERYL W. LEICHENGER
LISA MARTIN LAMPKIN
LAURA R. RAMOS

Attorneys for Third-Party Defendant and Cross-Complainant SCOTTSDALE INSURANCE COMPANY

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