

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

DAVID F. EVANS, et al., *
*
Plaintiffs, *

vs. *

Case No. 1:07CV739

CITY OF DURHAM, NC, et al., *
*
Defendants. *

Winston-Salem, North Carolina
May 16, 2014
10 a.m.

RYAN MCFADYEN, et al., *
*
Plaintiffs, *

vs. *

Case No. 1:07CV953

DUKE UNIVERSITY, et al., *
*
Defendants. *

TRANSCRIPT OF STATUS CONFERENCE
BEFORE THE HONORABLE JAMES A. BEATY, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs:

1:07CV739

CHRISTOPHER N. MANNING, ESQUIRE
CHARLES DAVANT, IV, ESQUIRE
Williams & Connolly, LLP
725 12th Street, NW
Washington, DC 20005

CHRISTOPHER C. FIALKO, ESQUIRE
Rudolf Widenhouse & Fialko
225 East Worthington Avenue
Suite 200
Charlotte, NC 28203

1:07CV953

ROBERT C. EKSTRAND, ESQUIRE
Ekstrand & Ekstrand, LLP
811 Ninth Street, Suite 260
Durham, NC 27701

1 For the Defendants:

2 1:07CV739 & 1:07CV953 REGINALD B. GILLESPIE, JR., ESQUIRE
3 Wilson & Ratledge, PLLC
4 4600 Marriott Drive, Suite 400
5 Raleigh, NC 27612

6 LINWOOD E. WILSON, PRO SE
7 6910 Innesbrook Way
8 Bahama, NC 27503

9 1:07CV953 PAUL K. SUN, JR., ESQUIRE
10 Ellis & Winters, LLP
11 Post Office Box 33550
12 Raleigh, NC 27636

13 DIXIE T. WELLS, ESQUIRE
14 Ellis & Winters, LLP
15 333 N. Greene Street, Suite 200
16 Greensboro, NC 27401

17 DAN J. MCLAMB, ESQUIRE
18 BARBARA B. WEYHER, ESQUIRE
19 ALLISON J. BECKER, ESQUIRE
20 Yates McLamb & Weyher, LLP
21 Post Office Box 2889
22 Raleigh, NC 27602

23 Court Reporter: Lori Russell, RMR, CRR
24 P.O. Box 20593
25 Winston-Salem, North Carolina 27120

Proceedings recorded by stenotype reporter.
Transcript produced by Computer-Aided Transcription.

P R O C E E D I N G S

THE COURT: Counsel, the Court notes for the record this is a follow-up to an earlier hearing, a status conference report, held in this matter earlier in the year. The Court had given the parties additional time to consider this matter and determine whether or not any resolution could be made as between the various parties.

The Court will note that there are two separate cases for consideration today, the one being the case in 1:07CV739 involving the plaintiffs David Evans, Collin Finnerty, and Reade Seligmann versus the City of Durham and others. The second case is that of McFadyen versus Duke in 1:07CV953.

The Court is aware that certain actions have been taken with respect to some of the Defendants in the Evans matter and I'll address that one first. Then we'll see where we are with respect to the McFadyen case.

Mr. Manning, do you wish to be heard in terms of where we are in the Evans matter?

MR. MANNING: Yes, Your Honor, and good morning.

May it please the Court, as we informed the Court yesterday, we reached a resolution with the City of Durham defendants -- those were the two detectives, Detective Himan and Detective Gottlieb -- as well as the City of Durham itself. Those claims were dismissed yesterday. We also reached a resolution with Mr. Nifong yesterday and those

1 claims have been dismissed as well.

2 There's one remaining Defendant in the case. That's
3 Mr. Wilson. We spoke briefly before the hearing outside and
4 I believe we've reached an agreement to resolve the claim as
5 to him as well. And so subject to that agreement being
6 finalized, we'd be prepared to file a stipulation of
7 dismissal for Mr. Wilson as early as today, if not next
8 week.

9 THE COURT: Mr. Wilson, you're representing
10 yourself pro se. To the extent your matters were still
11 pending with respect to joining in a motion for judgment on
12 the pleadings as to the Defendants Gottlieb and Himan and
13 you filed separate motions to dismiss for various bases, are
14 you acknowledging to the Court at this time that your case
15 is to the point of being resolved and just waiting some
16 additional procedure matters in terms of dismissal?

17 MR. WILSON: Yes, sir. As to the Evans case, yes,
18 sir.

19 THE COURT: All right, sir.

20 Anything further, Mr. Wilson or Mr. Manning concerning
21 Evans? If what you're presenting to the Court is correct,
22 and I have no reason to doubt that, then all the matters
23 that were involved in the Evans case would be disposed of by
24 your announcement today.

25 MR. MANNING: That's correct, Your Honor.

1 THE COURT: All right, sir. To that extent, the
2 Court would ask again of Mr. Wilson, do you understand that,
3 to the extent it's been announced there has been some
4 resolution of your matters, that would be the only thing
5 awaiting the Court's determination, receiving a dismissal?
6 There would not be any additional proceedings regarding any
7 defenses that you have asserted or motions you have
8 asserted.

9 MR. WILSON: Yes, sir.

10 THE COURT: You acknowledge that at this time?

11 MR. WILSON: I do, sir.

12 THE COURT: With that, that completes the matter
13 of Evans versus Durham and others. I certainly appreciate
14 your diligence in working toward a speedy resolution in that
15 matter.

16 MR. MANNING: Thank you, Your Honor.

17 THE COURT: With that, unless you have some reason
18 to stay, I would be glad to excuse you at this point.

19 MR. MANNING: I don't believe we have anything
20 further, Your Honor. Thank you.

21 THE COURT: All right.

22 Mr. Wilson, as you're acknowledging, you will stay for
23 the purposes of the McFadyen matter.

24 MR. WILSON: I'm sorry. I didn't understand.

25 THE COURT: You will stay for purposes of the

1 McFadyen matter since you are involved in that.

2 MR. WILSON: Yes.

3 (Mr. Manning, Mr. Davant, and Mr. Fialko left the
4 courtroom.)

5 THE COURT: In terms of the McFadyen matters,
6 again, we have not had as much resolution as far as I know,
7 but I'll let the parties tell me where you are.

8 In my review of the matters, it would appear that
9 what's currently before the Court -- and the Court may be
10 prepared to consider some of that fairly shortly. But it
11 would appear that Claim 18 against Defendants Brodhead,
12 Steel, Dzau, and one other defendant that is still before
13 the Court -- that's Burness, I believe -- and Duke
14 University and Duke Systems. Count 21, the breach of
15 contract relating to disciplinary policies to the extent
16 it's alleged Duke did not follow their own policies -- back
17 to Count 18, it would appear it's an obstruction of justice
18 claim, except for Mr. Wilson, which seemed to be tied to the
19 criminal investigation. That and Ms. Levicy is tied to the
20 criminal matter; but as to the other defendants that I
21 named, it seems to be an allegation relating to civil
22 obstruction of justice or affecting civil remedies. As I
23 indicated, Count 21, breach of contract relating to
24 disciplinary matters; Count 24, fraud against the Defendants
25 Graves, Dean, Drummond, Smith, and Duke University to the

1 extent there is an allegation that -- representation that
2 certain matters had not been presented to the state
3 attorney -- state attorney and investigators; Count 41, to
4 the extent there's some still some constitutional claim
5 against the City.

6 As you address that from the Plaintiffs' perspective,
7 you can acknowledge whether or not those are the matters
8 based upon your understanding and we'll just go from there.
9 Yes, sir.

10 MR. EKSTRAND: Yes, sir. Your Honor, Bob Ekstrand
11 on behalf of the Plaintiffs. I think you have essentially
12 the gist of what's remaining. I believe, in addition, there
13 are -- there is a -- the negligent hiring retention --

14 THE COURT: Yes, sir.

15 MR. EKSTRAND: -- claim against --

16 THE COURT: In Count 32.

17 MR. EKSTRAND: Yes, sir.

18 THE COURT: I did not include that one.

19 MR. EKSTRAND: Yes, sir. And with respect to the
20 obstruction of justice, you're correct that there are --
21 there's more than one factual basis for that and I think
22 you've articulated the two that are going forward. There
23 are pending motions with respect to Count 1, which is a -- a
24 Section 1983 claim for -- arising out of the same facts that
25 give rise to the obstruction of justice claim and the state

1 constitutional claim. Beyond that, Your Honor, you have
2 the -- you have articulated everything that we have in our
3 material going forward.

4 THE COURT: Count 1, as I recall, involved a
5 question of whether or not you had earlier conceded that
6 that would go away as a result of the Court of Appeals'
7 decision after the Supreme Court had made some
8 determination. Was that the essence of Count 1?

9 MR. EKSTRAND: That is the essence of Count 1.

10 THE COURT: All right, sir. As a summary matter,
11 anything the Defendants wish to say at this point?

12 MR. SUN: May it please the Court, Paul Sun for
13 the Duke defendants. Your Honor has outlined the case --
14 the claims that remain. There is as to Count 18, and
15 Mr. McLamb will address it for his client, a motion for
16 judgment on the pleadings. But those -- those claims
17 recited by the Court are the ones that we understand remain
18 in the case. Thank you.

19 MR. MCLAMB: Dan McLamb, Your Honor. I concur
20 with Mr. Sun and Mr. Ekstrand. We have 12(c) motions
21 pending with respect to Counts 18 and 32 on behalf my
22 clients.

23 THE COURT: Have you made any particular filings
24 with respect to that, Mr. McLamb, at this point? It would
25 appear that there's a question over what basis the

1 constitutional claim remains if there's been some
2 disposition of all individual City defendants.

3 MR. MCLAMB: Let me see if I follow the Court.
4 Count 18 is the obstruction of justice claim. Count 32 is
5 the negligent retention claim.

6 THE COURT: And I may have been speaking of the
7 City. That's my question for the City next.

8 MR. MCLAMB: Okay.

9 THE COURT: But to the extent -- did you have
10 anything further with respect to Count 18 to the extent
11 that's --

12 MR. MCLAMB: It's been fully briefed, Your Honor,
13 and I think we're awaiting the Court's decision.

14 THE COURT: All right. Thank you.

15 Yes, I believe I --

16 MR. GILLESPIE: Your Honor --

17 THE COURT: -- was looking at my notes on the
18 City, but I'll let you respond to that.

19 MR. GILLESPIE: Good morning, Your Honor. Reggie
20 Gillespie for the City.

21 The only claim against the City in this case is a state
22 law claim under the North Carolina Constitution. That's
23 Count 41. As to Count 41, the City is the only defendant as
24 to that claim. So the City is here for one claim. It's a
25 state law claim. It's Count 41.

1 THE COURT: Have you filed something particularly
2 with respect to that?

3 MR. GILLESPIE: Yes, sir.

4 THE COURT: Is that currently before the Court?

5 MR. GILLESPIE: Yes, Your Honor. We filed a
6 motion for judgment on the pleadings as to that count and
7 the Plaintiffs filed a response on Tuesday of this week.

8 THE COURT: All right, sir.

9 So generally where are we in terms of any efforts to
10 try to resolve this matter? Where are we at this point,
11 Mr. Ekstrand?

12 MR. EKSTRAND: Your Honor, unfortunately at the
13 same spot. When we left here last, there was a 60-day
14 window where we expressed our interest in discussing any
15 settlement. We actually raised the idea of having all the
16 Defendants join in the discussion together for the first
17 time. We've already gone down that path with the Duke
18 defendants but not yet with the City in the last discovery
19 proceeding on the fraud claim and the breach of contract
20 claim. In the interim, we have -- we have not had any
21 discussion. We've raised it, but we've instead received
22 three different motions that we've had to respond to and
23 haven't had any conversations about settling it during that
24 time. So we're still in the same place, still open to
25 discussion.

1 THE COURT: In terms of just generally -- and the
2 Court, as I said, fairly shortly will make some rulings.
3 But particularly as to Mr. Wilson in terms of the counts
4 that remain against him, the Court is concerned -- even
5 though you identified Count 5 as being the one that you were
6 conceding, Count 1 seemed to be at issue as well.

7 But in terms of Count 18 in particular, if it involves
8 obstruction of justice, similar conduct that Gottlieb and
9 Himan were involved in, the Court's analysis -- even though
10 Gottlieb and Himan may be out of the case at this point, the
11 Court's analysis of Mr. Wilson's case may, of necessity,
12 discuss Gottlieb and Himan even though they're out just
13 because of his motion to join in to that. Just to make you
14 aware of that.

15 Do you wish to be heard since -- you've already briefed
16 that somewhat, but do you wish to be heard to the extent the
17 Court is indicating to you that whatever ruling it might
18 have made with respect to Gottlieb and Himan, may also
19 affect the Court's consideration in Mr. Wilson's case?

20 MR. EKSTRAND: Your Honor, I think -- the only
21 thing I'd what to emphasize is that we did want to have
22 conversations with all the Defendants about their status in
23 the case. Mr. Wilson is included in those. We still would
24 like to do that and we'll -- you know, we intend to have
25 that conversation with Mr. Wilson to the extent that the

1 Court leaves open that claim against him before we do -- I'm
2 sorry. If the Court were to eliminate that claim against
3 him before we do, obviously that will resolve the case
4 against him, but we still have every intention to have a
5 conversation with him about his continuing status in the
6 case.

7 But as to the substance, you know, what the Fourth
8 Circuit has ruled with respect to police officers being sued
9 for obstruction of justice, we've briefed that fully and I
10 think our point is essentially there's a limited holding to
11 police officers and obstruction of justice. I don't think
12 that Mr. Wilson qualifies. I also don't think that our
13 North Carolina Supreme Court would carve out that exception.
14 I don't think they've carved it out in the first place, but
15 I don't think that they would extend what the Fourth Circuit
16 has ruled to apply to assistants, to district attorneys who
17 are involved in the obstruction of justice.

18 THE COURT: Are we talking about initiation or are
19 we talking about participation at this point?

20 MR. EKSTRAND: Participation.

21 THE COURT: Do you think that's still open after
22 the *Farm Bureau* case?

23 MR. EKSTRAND: I do. I do. I think under -- yes,
24 I do. I think that his participation in the ongoing
25 conspiracy as a latecomer is still a viable theory.

1 THE COURT: All right. Counsel, to the extent
2 I've opened the door for some discussion of that -- and it
3 may involve Ms. Levicy as well. To the extent that -- Count
4 18 as relates to that allegation or factual pattern, I've
5 opened the door. Mr. Ekstrand, I'll hear from the others as
6 well. I know you've filed briefs, but I'm giving you this
7 opportunity if you wish to follow up somewhat, particularly
8 in view of the argument the Plaintiff is now making.

9 MR. SUN: May it please the Court, let me
10 advise -- because the Court asked about settlement
11 discussions. As we advised the Court before, we did go
12 through and the Court is aware of a mediation process; and
13 our mediator, Mr. Harkavy, declared an impasse. But at the
14 Court's encouragement at the last status conference hearing,
15 we contacted Mr. Harkavy promptly and invited him to
16 reinitiate discussions because that's the -- that's the best
17 way we thought to see if there were discussions worth having
18 and we've heard nothing in that regard substantively in
19 response to that. So I wanted to let the Court know that.

20 And with the Court's permission, I think Mr. McLamb is
21 the one properly to address the county team legal arguments
22 for Your Honor. Thank you.

23 THE COURT: Mr. McLamb, I keep passing over you.
24 I'll hear from you.

25 MR. MCLAMB: And you can hear from me, Your Honor,

1 only to the extent you ask that you need to hear from me. I
2 do think we fully briefed our position on that. Was there a
3 particular question that the Court has?

4 THE COURT: No, sir. Just giving you an
5 opportunity to respond to anything Mr. Ekstrand might have
6 added.

7 MR. MCLAMB: No, sir. I'm content. I'll be happy
8 to address any questions you have, but I think we've argued
9 that in our briefs. I don't hear anything specific from him
10 that relates to our arguing that motion.

11 THE COURT: Yes, sir. Anything further,
12 Mr. Gillespie?

13 MR. GILLESPIE: Well, Your Honor, Count 18 is not
14 directed to the City, so I don't have anything to add or
15 subtract from that. The Court did have a question earlier I
16 think relating to -- I want to make sure I fully answer the
17 Court's question as to Count 41, at least I've attempted to,
18 as far as its status. Did the Court have a question about
19 that? That is the only count pending against the City.

20 THE COURT: Yes, sir. All right. Nothing else
21 appearing, I've indicated, to the extent the matter is
22 remaining, what the trial date may be. In the interim, to
23 the extent there's any need for discovery matters, you
24 should take care of that before that time. The trial date
25 has been set. As to any matters remaining, the Court may

1 continue to rule on this matter.

2 And I may have made inadvertent reference to *Farm*
3 *Bureau* h\as relates to these matters, but I believe that
4 related to the malicious prosecution charge in terms of the
5 elements there.

6 All right. Gentlemen, anything further? Gentlemen or
7 ladies, anything further?

8 MR. GILLESPIE: Your Honor, I just wanted the
9 Court to be aware, with regard to the City's participation
10 and role in this case, this case was stayed as to the City
11 until just recently. There's been no discovery whatsoever
12 as to the count asserted against the City.

13 We view the City's -- the case against the City on a
14 decidedly different track than the remainder of this case;
15 and based on that and for other reasons, we have filed a
16 motion to sever the count as to the City. That motion was
17 filed a few weeks ago. I don't think the deadline for
18 response has run yet. I simply wanted the Court to be aware
19 of that. From the City's perspective, like I said, we think
20 we're on a very different track. An October trial date is
21 certainly not feasible from our perspective. We think the
22 appropriate resolution for that is for a severance, and so
23 we have filed a motion and brief in support of that.

24 THE COURT: Yes, sir, I'll hear from you.

25 MR. EKSTRAND: We will -- we'll brief the motion

1 to sever, our opposition to it, but I think, Your Honor,
2 this case has been alive and at notice to the City. They've
3 had notice of all the allegations for quite some time. I
4 think that an October trial date will, I'm sure, test all of
5 us, but we stand prepared to proceed through discovery and
6 do what we need to do so that we are ready. We expect all
7 the Defendants to do the same to the extent the Court --

8 THE COURT: Will your response in writing be
9 substantially different than that, Mr. Ekstrand, in terms of
10 motion to sever?

11 MR. EKSTRAND: Hopefully it will be a little more
12 articulate, but we will oppose it and we'll deal more with
13 the authorities with respect to severing a defendant at this
14 stage.

15 THE COURT: I was trying to give you a hint. If
16 you said you've said enough, then I'm prepared to rule on
17 that at this time. I've considered what the Defendant City
18 has said, but this matter has been ongoing for some time and
19 I would not intend to sever the City.

20 You'll just have to pick up speed a little bit in terms
21 of filing any discovery that you need to file. You can
22 pursue that with the magistrate judge to the extent you need
23 expedited discovery. But just since you're all here, for
24 the record, I would deny your motion to sever.

25 MR. GILLESPIE: Your Honor, we certainly respect

1 and appreciate the Court's consideration. We hope the Court
2 would look at the reasons for it. In this court, Middle
3 District itself, severance is appropriate to avoid confusion
4 and prejudice; and we think we've made the case for that in
5 our motion and brief; and we hope the Court would take a
6 look and consider that before it denies the motion. We
7 obviously yield gracefully to whatever ruling this Court
8 makes, and we'll respect and adhere to that.

9 But we are in a position, we believe, of prejudice
10 given the way the case is. It's not our fault that the
11 Plaintiffs made a -- filed a 428 page, 1,300 allegation
12 complaint that largely has been disposed of. It took seven
13 years to do that, but ultimately the bulk of this case has
14 gone away as to the City. There's never been anything going
15 forward on discovery, so we do want an opportunity to defend
16 ourselves. Again, though, we respect and yield gracefully
17 to whatever ruling this Court makes.

18 THE COURT: I will review it and particularly will
19 give -- how much time do you need to file any additional
20 response, Mr. Ekstrand? I would want to expedite that so
21 the Court could consider this matter in a timely fashion.

22 MR. EKSTRAND: If you could give me until -- well,
23 through Wednesday, I believe I could have it fully briefed
24 to you by then.

25 THE COURT: All right, sir. The Court will delay

1 any formal ruling, but just giving you an indication of how
2 the Court feels at this point in terms of this matter having
3 been continued against all the parties. There's been no
4 surprises here in terms of what the arguments are, but if --
5 with the Plaintiff agreeing to have until Wednesday, the
6 21st, to file its response, then the Court will allow that
7 as an expedited time frame and would consider formally the
8 motion to sever at that time.

9 MR. SUN: Your Honor, may I address two other
10 points briefly with regard to the trial?

11 THE COURT: Yes, sir.

12 MR. SUN: One, with respect I think to both
13 parties, we would benefit to the extent the Court is able to
14 give us a specific trial date. I'll speak first for the
15 Duke defendants and Mr. Ekstrand can certainly speak for his
16 clients. There are, obviously, a number of individual
17 defendants remaining on the specific counts, including the
18 president of the university; and so just for planning
19 purposes -- and I know the Court has other things to balance
20 as well, but I'd ask that too. Again, I know Mr. Ekstrand
21 can speak to that, but he's got a client -- one of his
22 clients, at least the last I knew, was in the military. So
23 those kind of things take some planning and the like. So to
24 the extent the parties could ask for that, we would.

25 And then, second, Your Honor, as the Court has -- has

1 acknowledged in going through this process and setting up
2 the sequence of events, the -- the pending motion on the
3 Count 18, obstruction of justice claim, will obviously
4 affect what discovery goes forward. And so, again, the
5 Court has recognized that in the way it's sequenced things.
6 We're set up with our 26(f) conference with Judge Peake next
7 Friday and I -- again, the parties would clearly benefit
8 from guidance from the Court on -- to the extent we get
9 further comments from the Court on the claims that are going
10 forward and specifically Count 18.

11 Thank you, Your Honor.

12 THE COURT: All right, sir. Mr. Wilson.

13 MR. WILSON: Yes, sir. In respect to my Count 18,
14 just a clarification. The motions that have been filed on
15 that, are they to be heard today or at another time or --

16 THE COURT: As indicated at the suggestion of the
17 other parties, the Court is in the process of making a
18 determination as to those claims and will be filed as a part
19 of the order. Everyone may not have come prepared today for
20 argument -- any specific argument on that, but the Court
21 will be prepared shortly to enter an order as to all matters
22 that are pending.

23 MR. WILSON: All right. Thank you, sir.

24 THE COURT: Anything further, counsel?

25 MR. GILLESPIE: Your Honor, with regard to the

1 City's pending judgment for motion on the pleadings, I just
2 want to make the Court aware that is almost ripe for
3 consideration. I certainly could today, if the Court wanted
4 to, provide a reply orally. We can formally file a reply
5 shortly on that as well, however the Court wants to proceed,
6 but we do want the Court to be aware we do have a
7 dispositive Rule 12(c) motion pending.

8 THE COURT: All right, sir. Has the -- I'll let
9 you proceed as you're proceeding now and I'll consider that
10 to the extent I need to do anything further as a part of a
11 written order to you.

12 MR. GILLESPIE: I take it you want me to go ahead
13 and file a written response.

14 THE COURT: Yes, sir.

15 MR. GILLESPIE: Yes, sir, Your Honor. We'll be
16 glad to do that.

17 THE COURT: Anything further, counsel?

18 MR. SUN: Nothing for the Duke defendants, Your
19 Honor. Thank you.

20 THE COURT: Mr. McLamb.

21 MR. MCLAMB: Nothing further, Your Honor. I would
22 echo Mr. Sun's comments. Obviously, my involvement in the
23 case is on those two claims, 18 and 32, so the Court's
24 ruling will have a big impact on what I do in the next few
25 months.

1 THE COURT: All right, sir. Thank you very much.
2 Counsel, again, thank you for reporting back to the
3 Court. We will proceed as we have been. I understand you
4 have a meeting with or hearing before Judge Peake. It is my
5 intention to address those matters in a timely fashion so
6 that you can know what's before you at that time. Anything
7 further?

8 MR. MCLAMB: Nothing here, Your Honor.

9 THE COURT: We'll be in recess until further
10 notice.

11 MR. EKSTRAND: Thank you, Your Honor.

12 (Proceedings concluded at 10:32 a.m.)
13

14 C E R T I F I C A T E

15 I, LORI RUSSELL, RMR, CRR, United States District Court
16 Reporter for the Middle District of North Carolina, DO
HEREBY CERTIFY:

17 That the foregoing is a true and correct transcript of
18 the proceedings had in the within-entitled action; that I
19 reported the same in stenotype to the best of my ability and
thereafter reduced same to typewriting through the use of
Computer-Aided Transcription.

20

21



Date: 6/16/14

22

Lori Russell, RMR, CRR
Official Court Reporter

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24

25