IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JOHN R. KABLER, JR.,	:	
	:	No. 1:19-CV-0395
Plaintiff,	:	
	:	Judge Rambo
v.	:	
	:	BRIEF IN SUPPORT
UNITED FOOD AND COMMERCIAL	:	OF COMMONWEALTH
WORKERS UNION, LOCAL 1776	:	DEFENDANTS'
KEYSTON STATE, et al.,	:	AMENDED MOTION
	:	TO DISMISS
Defendants.	:	
	:	(Electronically Filed)
		Complaint Filed 03/06/19
		Trial Date: Not set.

BRIEF OF COMMONWEALTH DEFENDANTS IN SUPPORT OF AMENDED MOTION TO DISMISS PLAINTIFF'S COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(1) and (6)

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I. INTRODUCTION

Defendants, Pennsylvania Liquor Control Board ("PLCB"), Thomas W. Wolf, Timothy Holden, Michael Newsome and Anna Marie Kiehl, in their official capacities (collectively, "Commonwealth Defendants"), by their undersigned counsel, respectfully submit this Memorandum of Law in support of their Amended Motion to Dismiss the Complaint of Plaintiff John R. Kabler, Jr. Plaintiff challenges whether portions of the Pennsylvania Public Employe Relations Act ("PERA"), 43 Pa. Cons. Stat. §§ 1101.101-1101.2301, and the Collective Bargaining Agreement between the Commonwealth and Defendants United Food and Commercial Workers Local 1776 ("UFCW 1776") are unconstitutional on their face and/or as applied to him under the First and Fourteenth Amendments to the United States Constitution. The dispute is moot, and should be dismissed with prejudice pursuant to Fed. R. Civ. P. 12(b)(1). Further, the Complaint should be dismissed as Plaintiff fails to state a claim upon which relief may be granted as to the Commonwealth Defendants pursuant to Fed. R. Civ. P. 12(b)(6).

Because Mr. Kabler is no longer a member of the Union and has no continuing dues deductions, there is no active controversy and the claims for prospective relief are moot. Moreover, any retroactive relief sought against the Commonwealth Defendants, sued only in their official capacities, is barred by the Eleventh Amendment to the United States Constitution. As more fully discussed below,

Plaintiff's Complaint fails to state a claim upon which relief may be granted and must be dismissed as a matter of law. Therefore, for any and all of the reasons set forth herein, Commonwealth Defendants respectfully request that the Complaint be dismissed, with prejudice.

II. PROCEDURAL HISTORY

Plaintiff, John R. Kabler, Jr., filed a Complaint on March 6, 2019, alleging that portions of PERA, 43 Pa. Cons. Stat. §§ 1101.101-1101.2301, and the Collective Bargaining Agreement ("CBA") between the Commonwealth and Union Defendants, UFCW 1776, are unconstitutional on their face and/or as applied to him under the First and Fourteenth Amendments to the United States Constitution.

On March 22, 2019, all Defendants filed an uncontested joint motion to extend the time within which to respond to the Complaint until April 29, 2019, which was granted by this Honorable Court. A second uncontested joint motion seeking a one-week extension was filed on April 26, 2019, to afford Defendants time to obtain information needed to respond properly to the Complaint, which was again granted by this Honorable Court.

On May 6, 2019, Commonwealth Defendants filed a Motion to Dismiss Plaintiff's Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and (6) to dismiss with prejudice all claims against the Commonwealth Defendants for lack of jurisdiction and failure to state a claim upon which relief may be granted. An Amended Motion

was then filed to clarify the factual bases of the Motion upon learning additional information. In support of Commonwealth Defendant's Amended Motion to Dismiss, Commonwealth Defendants now submit this Memorandum pursuant to Local Rule 7.5.

III. FACTS RELEVANT TO THE PENDING MOTION

Only the facts pertinent to Commonwealth Defendants' Motion are herein provided. A more expansive factual narrative regarding this matter is contained in Union Defendants' Brief. Defendant Thomas W. Wolf is the Governor of the Commonwealth of Pennsylvania. Timothy Holden is the Chairman of the PLCB. Michael Newsome is the Secretary of the Office of Administration. Anna Marie Kiehl is the Chief Accounting Officer for the Commonwealth of Pennsylvania and Deputy Secretary for the Officer of Comptroller Operations. All Commonwealth Defendants have been sued in their official capacities only.

Plaintiff is employed by the PLCB as a Liquor Store Clerk. (Complaint, ¶ 27.) Pursuant to statute, the PLCB regulates Pennsylvania's beverage alcohol industry and is empowered to appoint, fix the compensation and define the powers and duties of managers, officers, inspectors, examiners, clerks and other employees as required. 47 Pa. Cons. Stat. § 2-207. The PLCB is subject to PERA, which extends collective bargaining rights and obligations to Pennsylvania public employers.

In pertinent part, PERA provides that:

> It shall be lawful for public employes [sic] to organize, form, join or assist in employe organizations or to engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid and protection or to bargain collectively through representatives of their own free choice and such *employes shall also have the right to refrain from any or all such activities*, except as may be required pursuant to a maintenance of membership provision of a collective bargaining agreement.

43 Pa. Cons. Stat. § 1101.401 (emphasis added). PERA further provides that, "'[m]aintenance of membership' means that all employes who have joined an employe organization . . . must remain members for the duration of a collective bargaining agreement . . . with the proviso that any such employe . . . may resign from such employe organization during a period of fifteen days prior to the expiration of any such agreement." 43 Pa. Cons. Stat. § 1101.301(18)). Such dues deductions and maintenance provisions "are proper subjects of bargaining with the proviso that as to the latter, the payment of dues and assessments while members, may be the only requisite employment condition." 43 Pa. Cons. Stat. § 1101.705.

Pursuant to the provisions of PERA, the Commonwealth of Pennsylvania entered into a CBA with United Food and Commercial Workers Union, Local 23, which later became the United Food and Commercial Workers Union, Local 1776 Keystone State. The terms of the CBA wholly adhere to PERA in general, and specifically in regard to the "Maintenance of Membership and Dues Checkoff" provisions, noted above. Specifically, Section A of the CBA provides that:

> Each employee who is or becomes a member of the Union shall maintain such membership for the duration of this Agreement provided that such employee may resign from the employee organization within the 15 days prior to the expiration of this Agreement upon written notice by certified mail, (return receipt requested) to the Employer and the Union.

(Complaint, ¶ 23; Exhibit A to Complaint.)

Article 4 of the CBA includes provisions regarding dues deductions and states:

> The Employer agrees to deduct dues and initiation fees, as defined in Article III, Section 301, Paragraph 11 of Act 195. Said deductions shall be made from the wages upon proper written authorization from the employee. The Union shall certify to the Employer the amount of Union dues to be deducted biweekly, and dues at this rate shall be deducted for each biweekly pay period for which the member is paid. Dues shall also be deducted from back pay awards and from pay received to supplement workers' compensation to the extent monies are available after appropriate deductions are made.

(Complaint, ¶ 23; Exhibit A to Complaint.) Article 4, Section C states that, "[t]he Employer further agrees to deduct from the wages of employees having executed the authorization in Section B of this Article an annual assessment, if any, upon certification of the assessment by the Union to the Employer." (Complaint, ¶ 8; Exhibit A to Complaint.) None of these CBA provisions violate PERA or what is permitted under Commonwealth law.

Plaintiff has been employed as a Liquor Store Clerk by PLCB since on or about April 10, 2017. (Complaint, ¶ 27.) Plaintiff became a member of UFCW 1776 in May 2017. (Complaint, ¶ 31; Exhibit B to Complaint.) On or about July 17, 2018,

Plaintiff sent a letter to the Commonwealth and UFCW requesting that UFCW 1776 permit him to revoke his membership and to thereafter discontinue his payment of membership dues. (Complaint, ¶ 32.) Despite Plaintiff's request contradicting the plain language of the controlling CBA, UFCW 1776 notified Plaintiff on or about April 2, 2019, that he was no longer a member of the union and his dues deductions would cease effective April 10, 2018. (Declaration of Andrew Gold, ¶ 3; Exhibit A to Declaration.)

IV. QUESTIONS INVOLVED

A. Whether the dispute is moot, depriving this Court of jurisdiction over the matter.

Suggested answer: Yes; because Plaintiff has been made whole, there is no live controversy, and no meaningful prospective relief may be entered, the matter must be dismissed for lack of jurisdiction.

B. Whether Plaintiff has failed to sufficiently plead any claim upon which relief may be granted against the Commonwealth Defendants.

Suggested answer: Yes; because Plaintiff cannot seek retrospective relief against the Commonwealth Defendants, and there is no ongoing conduct to enjoin, the Complaint must be dismissed, with prejudice, for failure to state a claim upon which relief may be granted.

V. ARGUMENT

A. Standard of Review

Parties may move to dismiss a complaint for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. If a court finds it lacks subject matter jurisdiction over a complaint, the court must dismiss the action. Fed. R. Civ. P. 12(h). Jurisdictional challenges may come in two forms: facial challenges and factual challenges. *United States ex rel. Atkinson v. Pa. Shipbuilding Co.*, 473 F.3d 506, 514 (3d Cir. 2007). Facial challenges dispute whether a pleading sufficiently states a claim for relief as a matter of law on its face. *Id*. Factual challenges, on the other hand, may incorporate evidence outside the pleadings to determine if the claims "comport with the jurisdictional prerequisites . . . ." *Id*.

In order "[t]o survive a motion to dismiss [pursuant to Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation omitted). That is, "all well-pleaded allegations of the complaint must be taken as true and interpreted in the light most favorable to the [plaintiff], and all inferences must be drawn in [its favor]." *PG Pub. Co. v. Aichele*, 705 F.3d 91, 97 (3d Cir. 2013) (quoting *McTernan v. City of York*, 577 F.3d 521, 526 (3d Cir. 2009). Although "courts generally consider only the allegations contained in the complaint, exhibits attached to the complaint and matters of public record," *Pension*

Ben. Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993), may also be considered, as well as "documents that a defendant attaches as an exhibit to a motion to dismiss if they are undisputedly authentic and the [plaintiff's] claims are based [on them]." *Estate of Roman v. City of Newark*, 914 F.3d 789, 796 (3d Cir. 2019) (internal quotations omitted) (alterations in original).

When a plaintiff brings suit against a State in federal court, it is necessary to examine whether the action is barred by the doctrine of sovereign immunity. *See Pennhurst State Sch. v. Halderman*, 465 U.S. 89, 101 (1984). The Eleventh Amendment "limits the grant of judicial authority in [U.S. Const.] Art. III" due to "the problems of federalism inherent in making one sovereign appear against its will in the courts of the other." *Id.* at 98. Unless a plaintiff can show that Congress has abrogated Eleventh Amendment immunity, the state in question has consented to be sued, or that the plaintiff seeks only prospective injunctive and declaratory relief to end an ongoing violation of federal law, a claim against a state in federal courts may not proceed. *Pa. Fed. of Sportsmen's Clubs, Inc. v. Hess*, 297 F.3d 310, 323 (3d Cir. 2002).

B. <u>Plaintiff's claims are moot</u>.

The inability of courts to review claims that are moot "derives from the requirement of Article III of the Constitution[,] under which the exercise of [courts'] judicial power depends[,] [of] the existence of a case or controversy." *New Jersey*

Tpk. Auth. v. Jersey Cent. Power & Light, 772 F.2d 25, 30-31 (3d Cir. 1985) (citations omitted). In order to avoid dismissal for mootness, "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Id*. (citations omitted). A case is moot where "(1) the alleged violation has ceased, and there is no reasonable expectation that it will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Id.* at 31.

Voluntary cessation of an official activity or policy satisfies the first element of mootness where the likelihood that a defendant will resume the same allegedly unlawful conduct is speculative. *Thompson v. United States Dep't of Labor*, 813 F.2d 48, 51 (3d Cir. 1987). For instance, in *Marcavage v. Nat'l Park Service*, a protester who was arrested and issued a citation for violating a term or condition of a permit for protesting on a sidewalk that was not designated as a First Amendment area under Independence National Historical Park regulations alleged that his arrest violated his First, Fourth, and Fourteenth Amendment rights. 666 F.3d 856, 857-858 (3d Cir. 2012). The United States Court of Appeals for the Third Circuit affirmed the dismissal of his claims for declaratory and injunctive relief, holding that the violation could not reasonably be expected to recur given subsequent changes to the regulations and the plaintiff's failure to overcome the presumption that the regulatory changes were made in good faith. *Marcavage*, 666 F.3d at 861. A

plaintiff "cannot reasonably be expected to suffer another . . . violation" when that alleged violation depends on her taking affirmative steps. *See Sands v. N.L.R.B.*, 825 F.3d 778, 784-85 (D.C. Cir. 2016) (holding that case was moot when plaintiff was not likely to return to work at former employer and subsequent change of law prohibited alleged violation against other employees).

Post-*Janus* cases concerning voluntary cessation of the collection of agency fees are particularly instructive. *See Janus v. Am. Fed'n of State, Cty., and Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018). In both *Lamberty v. Conn. State Police Union*, and *Danielson v. Inslee*, state agencies voluntarily ceased collecting agency fees from employees that were not members of the unions representing them in collective bargaining following the Supreme Court's decision in *Janus*. No. 15-378, 2018 WL 5115559 at *3 (D. Conn. Oct. 19, 2018); No. 18-05206, 2018 WL 3917937 at *1 (W.D. Wash. Aug. 16, 2018). In both cases, courts found that, in light of *Janus*'s holding, there was no reasonable likelihood that the states would resume collecting agency fees, satisfying the first element of mootness. *Lamberty*, 2018 WL 5115559 at *8-9; *Danielson*, 2018 WL 3917937 at *3.

Here, there can be no reasonable expectation that PLCB will resume deducting union dues from Plaintiff's wages in the future. As soon as PLCB was notified that Plaintiff had been released from his membership agreement with UFCW, it stopped collecting union dues. Unlike the plaintiffs in Connecticut and Washington in

Lamberty and *Danielson*, respectively, Plaintiff voluntarily joined the union and gave his consent before any dues or agency fees were deducted, and he would have to sign another authorization before dues could be withheld again. The terms of the CBA between PLCB and UFCW 1776 provides that union dues may only be deducted from employees' wages "upon proper written authorization." Thus, under the CBA, PLCB is constrained from collecting any dues or fees in the future *unless Plaintiff first decides to authorize their collection*. Nor has Plaintiff offered any evidence that he is in imminent danger of being subjected to an agency fee now that he is no longer a member of the Union, as the Commonwealth has withheld agency fees since the Court's decision in *Janus*. Given the presumption of good faith afforded government actors–which Plaintiff does not question, or offer any evidence to rebut–any allegation that PLCB will recommence collecting union dues after the Complaint is dismissed is factually impossible, unless Plaintiff himself becomes a member, authorizes dues deductions, changes his mind again, requests resignation and is denied that request–an attenuated and highly unlikely possibility.

The second element of mootness examines whether adjudication of an issue can provide a plaintiff with any actual relief. *See Matter of Kulp Foundry, Inc.*, 691 F.2d 1125, 1128-29 (3d Cir. 1982); *Int'l Broth. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers v. Kelly*, 815 F.2d 912, 915 (3d Cir. 1987). Plaintiff seeks declaratory and injunctive relief, as well as monetary damages. To

the extent that Plaintiff seeks any retroactive relief, his claims are barred as to the Commonwealth Defendants by the Eleventh Amendment to the United States Constitution. *Pennhurst State Sch.*, 465 U.S. at 102-03 ("When a plaintiff sues a state official alleging a violation of federal law, the federal court may award an injunction that governs the official's future conduct, but not one that awards retroactive monetary relief."). Plaintiff's Complaint, thus, only seeks prospective relief against the Commonwealth Defendants. It is clear, however, that there is no ongoing or imminent violation for which Plaintiff is entitled to prospective relief.

A plaintiff must demonstrate "sufficient immediacy and reality" of harm to obtain declaratory judgment under the Declaratory Judgment Act. *Golden v. Zwickler*, 394 U.S. 103, 108-09 (1983); 28 U.S.C. § 2201. Where it is "highly unlikely" that a challenged policy will be applied to the plaintiff again, declaratory relief is inappropriate. *Versarge v. Township of Clinton*, 984 F.2d 1359, 1369-70 (3d Cir. 1993). In *Versarge*, a volunteer firefighter sought declaratory judgment that an article of a volunteer fire department's constitution prohibiting the use of "insulting language to an officer in command . . . any conduct calculated to bring disgrace on the [volunteer fire department], or divulg[ing] any transactions or business of same to persons not members" violated the First Amendment. 984 F.2d at 1362-63. Because it was highly unlikely the terminated firefighter would ever again be a member of the volunteer fire company, declaratory judgment was

therefore inappropriate. *Id.* at 1369-70. The court commented that because the chance that the provision would ever be applied to him again was so remote, his claim lacked "sufficient immediacy and reality" to permit a declaratory judgment order, "even if the infirmity did not exist when the action was initiated." *Id.* (internal citations omitted).

Similarly, abstract injury is insufficient to demonstrate that a plaintiff is entitled to injunctive relief. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). A plaintiff must show that he is likely to suffer future injury from a defendant's conduct to obtain injunctive relief. *Roe v. Operation Rescue*, 919 F.2d 857, 864 (3d Cir. 1990). Past wrongs alone do not amount to the real and immediate threat of injury required to obtain injunctive relief. *Lyons*, 461 U.S. at 103; *see also Lundy v. Hochberg*, 91 F. App'x 739, 743 (3d Cir. Oct. 22, 2003) (holding that an attorney was not entitled to seek injunction against a former partner for unauthorized practice of law because there was no risk of future injury where re-forming the partnership was highly unlikely).

Plaintiff was released from his membership agreement, and no further dues deductions have been taken since his release. As in *Versarge* and *Lundy*, it is highly unlikely that Plaintiff will ever again be a member of UFCW 1776, be subjected to Article IV of the CBA, or the challenged provisions of PERA; thus, the only circumstances under which such scenarios could occur is if Plaintiff himself chooses

to rejoin UFCW 1776 and reauthorize dues deductions. Any threat of injury he might identify is simply too conjectural for declaratory judgment or injunctive relief to be appropriate.

C. Plaintiff's claims against the Commonwealth Defendants are barred by the Eleventh Amendment.

Eleventh Amendment sovereign immunity bars citizens from bringing an action in federal court against a state. *Pennhurst State Sch.*, 465 U.S. at 100. That bar extends to suits against departments or agencies of the state having no existence apart from the state. *Laskaris v. Thornburgh*, 661 F.2d 23, 25 (3d Cir. 1981). The United States Court of Appeals for the Third Circuit recognizes three principal exceptions to Eleventh Amendment immunity: congressional abrogation; waiver by the state; and suits against individual state officers for prospective injunctive and declaratory relief to end an ongoing violation of federal law. *Pa. Fed. of Sportsmen's Clubs, Inc.*, 297 F.3d at 323.

Section 1983 does not abrogate Eleventh Amendment immunity or subject states to suits for money damages. 42 U.S.C. § 1983; s*ee Burns v. Alexander*, 776 F. Supp. 2d 57, 72 (W.D. Pa. 2011) (citing *Quern v. Jordan*, 440 U.S. 332, 342-43 (1979) and *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 62-71 (1989)). The Commonwealth of Pennsylvania has expressly declined to waive its Eleventh Amendment immunity. 42 Pa. Cons. Stat. § 8521.

The third exception to Eleventh Amendment immunity allows an action to proceed where a complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective. *Pa. Fed. of Sportsmen's Clubs, Inc.*, 297 F.3d at 324. However, even where a complaint properly invokes the exception, there must be "a close official connection" between the state official and the enforcement of the law in order for the exception to apply to a Commonwealth defendant. *See Ex parte Young*, 209 U.S. 123, 156 (1908). A sufficient connection exists where the defendant has a duty to enforce a challenged law or regulation, not merely a general power to review or approve it. *Plaza at 835 W. Hamilton Street LP v. Allentown Neighborhood Improvement Zone Dev. Auth.*, No. 15-6616, 2017 WL 4049237, at *7 (E.D. Pa. Sept. 12, 2017) (citing *Rode v. Dellarciprete*, 845 F.2d 1195, 1208 (3d Cir. 1980); *1st Westco Corp. v. School Dist. of Phila*., 6 F.3d 108, 112–116 (3d Cir. 1993)).

Assuming, *arguendo*, that the Commonwealth Defendants have a sufficient connection to the challenged statutory and contractual provisions, there is no reasonable likelihood that any challenged provision of PERA or the CBA will be applied to the Plaintiff. Again, Plaintiff was released from his membership agreement with UFCW 1776, and thereafter the Commonwealth stopped deducting dues from his wages. The only way any challenged provision of PERA or the CBA could ever be applied to Plaintiff in the future is if he voluntarily enters into a new

membership agreement with UFCW 1776. No injunction this Court could enter against would provide relief to Plaintiff.

None of the Commonwealth Defendants has a connection to the enforcement of the challenged provisions of PERA or the CBA that would create a sufficient nexus to except them from Eleventh Amendment immunity. However, even if they did, any chance that any of the provisions would be applied against Plaintiff is speculative at best. Therefore, all Commonwealth Defendants are shielded from any liability in the instant action by the Eleventh Amendment.

D. Plaintiff has, regardless of the threshold jurisdictional question, failed to state a claim upon which relief may be granted.

Taking Plaintiff's allegations as true, pursuant to the Fed. R. Civ. P. 12(b)(6) standard, he nevertheless has failed to plead facts sufficient to establish his entitlement to relief. The First Amendment "protects the right of an individual to speak freely, to advocate ideas, to associate with others, and to petition his government for redress of grievances." *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 286 (1984) (quoting *Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S. 463, 464 (1979)). Whatever Plaintiff's reasons are for changing his mind regarding his union membership, even taking all of the allegations in the Complaint as true, the Commonwealth Defendants did nothing but withhold union dues *upon Mr. Kabler's request*. Regardless of the circumstances of Plaintiff's request, PERA specifically protects Plaintiff's right to speak, advocate, associate, and petition his

employer regardless of his union membership–no waiver is required when no right is violated in the first place.

Plaintiff's procedural due process claim is similarly without merit. As Plaintiff correctly alleges in his Complaint, "[a]t the core of procedural due process jurisprudence is the right to advance notice of significant deprivations of liberty or property and to a meaningful opportunity to be heard." *Abbott v.* Latshaw, 164 F.3d 141, 146 (3d Cir. 1998). The goal of due process is to "protect[] against erroneous or arbitrary seizures" either through prior notice or other sufficient procedure. *Id.* The court in *Abbott* contended with facts involving a conspiracy between a private individual and a Constable to "take a van from [the individual's] former husband." *Id.* at 143. The individual, the Constable, and three police officers, in fact, seized the van and, it can be inferred, did so without his authorization. *Id.* Despite the rather remarkable facts, the case itself is unremarkable for its holding regarding procedural due process. Even assuming Plaintiff has a property interest in his wages, it is unclear how the Commonwealth Defendants' withholding and remitting of union dues *at Plaintiff's request* could be characterized as a "deprivation" entitling him to procedural due process protections. Regardless, PERA provides all process Plaintiff could be due, explicitly describing Plaintiff's rights and providing that he need not be a member of the Union.

VI. CONCLUSION

For the reasons set forth above, the Commonwealth Defendants respectfully request that this Honorable Court dismiss the Complaint with prejudice.

Dated: May 17, 2019

Respectfully Submitted,

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