



GRETCHEN WHITMER  
GOVERNOR

STATE OF MICHIGAN  
DEPARTMENT OF LICENSING AND REGULATORY AFFAIRS  
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

ORLENE HAWKS  
DIRECTOR

[REDACTED]  
MI [REDACTED]

Date Mailed: July 23, 2019  
MOAHR Docket No.: 19-004249  
Agency No.: [REDACTED]  
Petitioner: [REDACTED]

**ADMINISTRATIVE LAW JUDGE:** Janice Spodarek

### **HEARING DECISION**

Following Petitioner's request for a hearing, this matter is before the undersigned Administrative Law Judge pursuant to MCL 400.9 and 400.37; 7 CFR 273.15 to 273.18; 42 CFR 431.200 to 431.250; 42 CFR 438.400 to 438.424; 45 CFR 99.1 to 99.33; and 45 CFR 205.10; and Mich Admin Code, R 792.11002. After due notice, a telephone hearing was held on June 11, 2019, from Lansing, Michigan.

Petitioner was represented by Attorney [REDACTED] of [REDACTED], Michigan.  
Witnesses for Petitioner were: None.  
Petitioner's Exhibits admitted into evidence were: None.

Respondent Department of Health and Human Services (Department or Respondent) was represented by Geraldine Brown, AAG.  
Witness for the Department: Mark Logan, FIM.

Respondent's Exhibits admitted into evidence: Exhibit A.37.

### **ISSUE**

Did the Department properly determine Petitioner's Divestment penalty?

### **FINDINGS OF FACT**

The Administrative Law Judge, based on the competent, material, and substantial evidence on the whole record, finds as material fact:

1. On [REDACTED], 2018, Petitioner filed a Medicaid (MA) application with the Michigan DHHS. Petitioner included a \$[REDACTED] promissory note written to Petitioner's daughter as part of the application.

2. On February 5, 2019, the Department determined that the daughter was not paying the loan back based on the payment schedule but rather paying it back “in large chunks” exhibited by a \$5,000 payment on December 10, 2018. Exhibit A.19-21. On February 5, 2019, the Department denied the application on the grounds that the note was countable. Petitioner was denied MA due to excess assets.
3. On February 20, 2019, Petitioner revised the promissory note and submitted it with a new application on [REDACTED] [REDACTED] 2019. The revised promissory note states that the note is non-salable and non-transferable.
4. On March 4, 2019, Petitioner filed a hearing request.
5. On March 29, 2019, the Department reversed its prior decision and issued a Health Care Coverage Determination Notice stating that notice on excess assets should be disregarded and that Petitioner is eligible for MA effective December 1, 2018, ongoing and that the promissory note of \$[REDACTED] is considered divestment due to it being non-salable and non-transferable. The penalty period was established from December 1, 2018, to August 22, 2019. The divestment includes an undisputed divestment of \$[REDACTED] plus the \$[REDACTED] promissory note divestment.
6. On April 12, 2019, Petitioner filed a hearing request.
7. On June 11, 2019, an administrative hearing was held.

### **CONCLUSIONS OF LAW**

The regulations governing the hearing and appeal process for applicants and recipients of public assistance in Michigan are found in the Michigan Administrative Code, MAC R 400.901-400.951. An opportunity for a hearing shall be granted to an applicant who requests a hearing because his or her claim for assistance has been denied. MAC R 400.903(1). Clients have the right to contest a department decision affecting eligibility or benefit levels whenever it is believed that the decision is incorrect. The department will provide an administrative hearing to review the decision and determine the appropriateness of that decision. BAM 600.

Clients have the right to contest a department decision affecting eligibility or benefit levels whenever they believe the decision is incorrect. The department provides an administrative hearing to review the decision and determine its appropriateness in accordance to policy. This item includes procedures to meet the minimum requirements for a fair hearing. BAM 600, p 1.

The Medical Assistance (MA) program is established by Title XIX of the Social Security Act, 42 USC 1396-1396w-5; 42 USC 1315; the Affordable Care Act of 2010, the collective term for the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152; and 42 CFR 430.10-.25. The Department (formerly known as the Department

of Human Services) administers the MA program pursuant to 42 CFR 435, MCL 400.10, and MCL 400.105-.112k.

Participating states must provide at least seven categories of medical services to persons determined to be eligible Medicaid recipients. 42 USC §1396a(a)(10)(A), 1396d(a)(1)-(5), (17), (21). One of the seven mandated services is *nursing facility services*. 42 USC §1396d(a)(4)(A).

For medical assistance eligibility, the Department has defined an asset as “any kind of property or property interest, whether real, personal, or mixed, whether liquid or illiquid, and whether or not presently vested with possessory rights.” NDAC 75-02-02.1-01(3). Under both federal and state law, an asset must be “actually available” to an applicant to be considered a countable asset for determining medical assistance eligibility. *Hecker*, 527 N.W.2d at 237 (*On Petition for Rehearing*); *Hinschberger v. Griggs County Social Serv.*, 499 N.W.2d 876, 882 (N.D.1993); 42 U.S.C. § 1396a(a)(17)(B); 1 J. Krauskopf, R. Brown, K. Tokarz, and A. Bogutz, *Elderlaw: Advocacy for the Aging* § 11.25 (2d ed. 1993). Yet, “actually available” resources “are different from those *in hand*.” *Schweiker v. Gray Panthers*, 453 U.S. 34, 48, 101 S.Ct. 2633, 2642, 69 L.Ed.2d 460 (1981) (emphasis in original). NDAC 75-02-02.1-25(2) explains: Only such assets as are actually available will be considered. Assets are actually available when at the disposal of an applicant, recipient, or responsible relative; when the applicant, recipient, or responsible relative has a legal interest in a liquidated sum and has the legal ability to make the sum available for support, maintenance, or medical care; or when the applicant, recipient, or responsible relative has the lawful power to make the asset available, or to cause the asset to be made available. Assets will be reasonably evaluated.... See also 45 C.F.R. § 233.20(a)(3)(ii)(D).

As noted in *Hecker*, if an applicant has a legal ability to obtain an asset, it is considered an “actually available” resource. The actual-availability principle primarily serves “to prevent the States from conjuring fictional sources of income and resources by imputing financial support from persons who have no obligation to furnish it or by overvaluing assets in a manner that attributes non-existent resources to recipients.” *Heckler v. Turner*, 470 U.S. 184, 200, 105 S.Ct. 1138, 1147, 84 L.Ed.2d 138 (1985).

The focus is on an applicant's actual and practical ability to make an asset available as a matter of fact, not legal fiction. See *Schrader v. Idaho Dept. of Health and Welfare*, 768 F.2d 1107, 1112 (9th Cir.1985). See also *Lewis v. Martin*, 397 U.S. 552, 90 S.Ct. 1282, 25 L.Ed.2d 561 (1970) (invalidating California state regulation that presumed contribution of non-AFDC resources by a non-legally responsible and non-adoptive stepfather or common law husband of an AFDC recipient's mother).

Determining whether an asset is “actually available” for purposes of medical assistance eligibility is largely a fact-specific inquiry depending on the circumstances of each case. See, e.g., *Intermountain Health Care v. Bd. of Cty. Com'rs*, 107 Idaho 248, 688 P.2d 260, 264 (Ct.App.1984); *Radano v. Blum*, 89 A.D.2d 858, 453 N.Y.S.2d 38, 39 (1982); *Haynes v. Dept. of Human Resources*, 121 N.C.App. 513, 470 S.E.2d 56, 58 (1996).

Interpretation of the “actually available” requirement must be “reasonable and humane in accordance with its manifest intent and purpose....” *Moffett v. Blum*, 74 A.D.2d 625, 424 N.Y.S.2d 923, 925 (1980). That an applicant must sue to collect an asset the applicant has a legal entitlement to usually does not mean the asset is actually unavailable. See, e.g., *Wagner v. Sheridan County S.S. Bd.*, 518 N.W.2d 724, 728 (N.D.1994); *Frerks v. Shalala*, 52 F.3d 412, 414 (2d Cir.1995); *Probate of Marcus*, 199 Conn. 524, 509 A.2d 1, 5 (1986); *Herman v. Ramsey Cty. Community Human Serv.*, 373 N.W.2d 345, 348 (Minn.Ct.App.1985). See also *Ziegler v. Dept. of Health & Rehab. Serv.*, 601 So.2d 1280, 1284 (Fla.Ct.App.1992) At issue here is the methodology utilized in determining the availability of an individual's “resources” for purposes of evaluating his or her eligibility. SSI recipients, and thus SSI-related “medically needy” recipients, may not retain resources having a value in excess of \$2,000. 42 U.S.C. § 1382(a)(1)(B).

The regulations governing the determination of eligibility provide that resources mean cash or other liquid assets or any real or personal property that an individual (or spouse, if any) owns and could convert to cash to be used for his support and maintenance. If the individual has the right, authority or power to liquidate the property, or his share of the property, it is considered a resource. If a property right cannot be liquidated, the property will not be considered a resource of the individual (or spouse).20 C.F.R. § 416.1201(a).

After the Medicaid program was enacted, a field of legal counseling arose involving asset protection for future disability. The practice of “Medicaid Estate Planning,” whereby “individuals shelter or divest their assets to qualify for Medicaid without first depleting their life savings,” is a legal practice that involves utilization of the complex rules of Medicaid eligibility, arguably comparable to the way one uses the Internal Revenue Code to his or her advantage in preparing taxes. See generally *Kristin A. Reich, Note, Long-Term Care Financing Crisis-Recent Federal and State Efforts to Deter Asset Transfers as a Means to Gain Medicaid Eligibility*, 74 N.D. L.Rev. 383 (1998). Serious concern then arose over the widespread divestiture of assets by mostly wealthy individuals so that those persons could become eligible for Medicaid benefits. *Id.*; see also *Rainey v. Guardianship of Mackey*, 773 So.2d 118 (Fla. 4th DCA 2000). As a result, Congress enacted several laws to discourage the transfer of assets for Medicaid qualification purposes. See generally *Laura Herpers Zeman, Estate Planning: Ethical Considerations of Using Medicaid to Plan for Long-Term Medical Care for the Elderly*, 13 *Quinnipiac Prob. L.J.* 187 (1988). Recent attempts by Congress imposed periods of ineligibility for certain Medicaid benefits where the applicant divested himself or herself of assets for less than fair market value. 42 U.S.C. § 1396p(c)(1)(A); 42 U.S.C. § 1396p(c)(1)(B)(i); *Fla. Admin. Code R. 65A-1.712(3)*. More specifically, if a transfer of assets for less than fair market value is found within 36 months of an individual's application for Medicaid, the state must withhold payment for various long-term care services, i.e., payment for nursing home room and board, for a period of time referred to as the penalty period. *Fla. Admin. Code R. 65A-1.712(3)*. Medicaid does not, however, prohibit eligibility altogether. It merely penalizes the asset transfer for a certain period of time. See generally *Omar N. Ahmad, Medicaid Eligibility Rules for the Elderly Long-Term Care Applicant*, 20 *J.*

*Legal Med. 251 (1999). [Thompson v. Dep't of Children & Families, 835 So.2d 357, 359-360 (Fla App, 2003).]*

In *Gillmore* the Illinois Supreme Court recognized this same history, noting that over the years (and particularly in 1993), Congress enacted certain measures to prevent persons who were not actually “needy” from making themselves eligible for Medicaid: In 1993, Congress sought to combat the rapidly increasing costs of Medicaid by enacting statutory provisions to ensure that persons who could pay for their own care did not receive assistance. Congress mandated that, in determining Medicaid eligibility, a state must “look-back” into a three- or five-year period, depending on the asset, before a person applied for assistance to determine if the person made any transfers solely to become eligible for Medicaid. See 42 U.S.C. § 1396p(c)(1)(B) (2000). If the person disposed of assets for less than fair market value during the look-back period, the person is ineligible for medical assistance for a statutory penalty period based on the value of the assets transferred. See 42 U.S.C. § 1396p(c)(1)(A) (2000). [*Gillmore*, 218 Ill 2d at 306 (emphasis added).]

See, also, *ES v. Div. of Med. Assistance and Health Servs.*, 412 NJ Super 340, 344; 990 A.2d 701 (2010) (Noting that the purpose of this close scrutiny while “looking back” is “to determine if [the asset transfers] were made for the sole purpose of Medicaid qualification.”).

This statutory “look-back” period, noted in *Gillmore* and *Thompson* and contained within 42 USC 1396p(c)(1), requires a state to “look-back” a number of years (in this case five) from the date of an asset transfer to determine if the applicant made the transfer solely to become eligible for Medicaid, which can be established if the transfer was made for less than fair market value. See 42 USC 1396p(c)(1); DHS Program Eligibility Manual (BEM) 405, pp 1, 4; see also *Gillmore*, 218 Ill 2d at 306.

“Less than fair market value means the compensation received in return for a resource was worth less than the fair market value of the resource.” BEM 405, p 6. A transfer for less than fair market value during the “look-back” period is referred to as a “divestment,” and unless falling under one of several exclusions, subjects the applicant to a penalty period during which payment of long-term care benefits is suspended. See, generally BEM 405, pp 1, 5-9. “Congress's imposition of a penalty for the disposal of assets or income for less than fair market value during the look-back period is intended to maximize the resources for Medicaid for those truly in need.” *ES*, 412 NJ Super at 344. See also *Mackey v Department of Human Services, Michigan Court of Appeals, Docket No. 288966, decided September 7, 2010.*

Pertinent department policy dictates:

Assets must be considered in determining eligibility or SSI related categories. Assets mean cash, any other personal property and real property. BEM, 400 pp 1-2. Countable assets cannot exceed the applicable asset limit. Not all assets are counted. Some assets are counted for one program but not for another program. BEM 400, pp 1-3.

The department is to consider both of the following to determine whether and how much of an asset is countable: An asset is countable if it meets the availability test and is not excluded. The department is to consider the assets of each person in the asset group. BEM, 400, pp 1-3.

Asset eligibility exists when the asset groups countable assets are less than or equal to the applicable asset limit at least one day during the month being tested. BEM, 400, p 7. An application does not authorize MA for future months if the person has excess assets on the processing date.

The SSI related MA asset limit for SSI related MA categories that are not Medicare savings program or QDWI is \$2000.00 for an asset group for one person and \$3000.00 for an asset group of 2 people. BEM 400, p 8.

An asset must be available to be counted. Available means that someone in the asset group has the legal right to use or dispose of the asset. BEM 400, p 10. The department is to assume an asset is available unless the evidence shows that it is not available.

BEM, Item 405, states:

Divestment results in a penalty period in MA, **not** ineligibility. Divestment is a type of transfer of a resource and not an amount of resources transferred. BEM 405, p 1.

Divestment means a transfer of a resource (see RESOURCE DEFINED below and in glossary) by a client or his spouse that are all of the following:

- Is within a specified time; see LOOK-BACK PERIOD in this item.
- Is a transfer for LESS THAN FAIR MARKET VALUE;
- Is not listed below under TRANSFERS THAT ARE NOT DIVESTMENT

See Annuity Not Actuarially Sound and Joint Owners and Transfers below and BEM 401 about special transactions considered transfers for less than fair market value. BEM 405, p 1.

During the penalty period, MA will **not** pay the client's cost for:

- LTC services.
- Home and community-based services.
- Home Help.
- Home Health. BEM, 405, p 1.

**Resource means all the client's and his spouse's assets and income.** It includes all assets and all income, even countable and/or excluded assets, the individual or spouse receive. It also includes all assets and income that the individual (or their spouse) were entitled to but did **not** receive because of action by one of the following:

- The client or spouse.
- A person (including a court or administrative body) with legal authority to act in place of or on behalf of the client or the client's spouse.

- Any person (including a court or administrative body) acting at the direction or upon the request of the client or his spouse. BEM, 405, pp 1-2.

Transferring a resource means giving up all or partial ownership in (or rights to) a resource. Not all transfers are divestment. Examples of transfers include:

- Selling an asset for fair market value (not divestment).
- Giving an asset away (divestment).
- Refusing an inheritance (divestment).
- Payments from a **MEDICAID TRUST** that are **not** to, or for the benefit of, the person or his spouse; see BEM 401 (divestment).
- Putting assets or income in a trust; see BEM 401.
- Giving up the **right** to receive income such as having pension payments made to someone else (divestment).
- Giving away a lump sum or accumulated benefit (divestment).
- Buying an annuity that is **not** actuarially sound (divestment).
- Giving away a vehicle (divestment).
- Putting assets or income into a Limited Liability Company (LLC).
- Purchasing an asset which decreases the group's net worth and is not in the group's financial interest (divestment).

Also see Joint Owners and Transfers for examples. BEM 405, p 2.

Department policy states that it is **not** divestment to transfer a homestead to the client's:

- Spouse; see Transfers Involving Spouse above.
- Blind or disabled child; see Transfers Involving Child above.
- Child under age 21.
- Child age 21 or over who:
  - Lived in the homestead for at least two years immediately before the client's admission to LTC or BEM 106 waiver approval, **and**
  - Provided care that would otherwise have required LTC or BEM 106 waiver services, as documented by a physician's (M.D. or D.O.) statement.
- Brother or sister who:

Is part owner of the homestead, and

Lived in the homestead for at least one year immediately before the client's admission to LTC or BEM 106 waiver approval. BEM 405, pp 10-11.

Policy also states that the uncompensated value of a divested resource is

- The resource's cash or equity value.
- Minus any compensation received.
- The uncompensated value of a promissory note, loan, or mortgage is the outstanding balance due on the "Baseline Date" BEM 405, p 15.

Policy states that there is no minimum and no maximum limit on the penalty period for divestment. BEM 405, p 12.

As to computing the penalty period, policy states that the Department is to compute the penalty period on the total uncompensated value of all resources divested. When totaled, the Department is to then divide the total uncompensated value by the average monthly private LTC cost in Michigan for the client's baseline date. This result gives the number of full months for the penalty period. The fraction remaining is multiplied by 30 to determine the number of days for the penalty period in the remaining partial month. BEM 405, pp 12-13.

The Department is not to apply the penalty period to any month that an individual is not eligible for Medicaid and actually in LTC (or home health, home help, or the MIChoice Waiver program). BEM 405, p 13. LTC Costs are listed in BEM 405, pp 13-14, for each calendar year.

Policy states that the department can cancel a divestment penalty if either of the following occurs before the penalty is in effect:

- All the transferred resources are returned and retained by the individual.
- Fair market value is paid for the resources.

Policy further states that the Department can recalculate the penalty period if either of the following occurs while the penalty is in effect:

- All the transferred resources are returned.
- Full compensation is paid for the resources.

Use the same per diem rate originally used to calculate the penalty period.

Once a divestment penalty is in effect, return of, or payment for, resources **cannot** eliminate any portion of the penalty period already past. However, the caseworker must recalculate the penalty period. The divestment penalty ends on the later of the following:

- The end date of the new penalty period.
- The date the client notified you that the resources were returned or paid for. BEM, 405, pp 15-16.



With regards to promissory notes/loans and divestment policy, applicable asset policy is found in BEM 400 which states:

A promissory **note** is a written promise to pay a certain sum of money to another person at a specified time. Promissory notes are loans. The promissory note may call for installment payments over a period of time (installment note) or a single payment on a specified date. The note is an asset to the lender. The value of the note is the outstanding balance due as of the date of application for long term care, home help, waiver services, or home health services.

All money used to purchase a promissory note or loan, **are** transfers of assets. They are a transfer of assets for less than fair market value unless the following are also true:

- 1) The repayment schedule is actuarially sound; and
- 2) The payments are made in equal monthly amounts during the term of the agreement with no deferral of payments and no balloon payments; and
- 3) The note must prohibit the cancellation of the balance upon the death of the lender.

See *BEM 405, Uncompensated Value* to determine the value of any promissory note or loan as a transfer for less than fair market value.

**Bona Fide Loans:** A loan is bona fide if it meets all the following requirements:

It is enforceable under state law.

The loan agreement is in effect at the time of the transaction.

The borrower acknowledges an obligation to repay.

The loan document includes a plan for repayment.

The repayment plan is feasible.

Count principal payments from a bona fide loan or promissory note are the return of the principal as an asset in the month received. Payment of interest on a bona fide loan and all payments from a loan or promissory note which is not bona fide is countable unearned income.

The estate recovery program needs to know about a promissory note for the state to recover Medicaid expenses.

Please send a copy of the promissory note to the estate recovery unit at: [MDHHS-EstateRecovery@michigan.gov](mailto:MDHHS-EstateRecovery@michigan.gov). [BEM 400, p 46.](#)

Jointly owned assets are assets that have more than one owner. For joint cash and retirement plans the Department must count the **entire** amount unless the person claims and verifies a different ownership. Then, each owner's share is the amount they own. BEM 400, page 11. An asset is unavailable if all the following are true, and an owner **cannot** sell or spend his share of an asset:

Without another owner's consent.  
The other owner is not in the asset group.  
The other owner refuses consent.

BEM 400, pp 11-12.

Department policy dictates that an arm's length transaction is one between two parties who are not related and who are assumed to have roughly the same bargaining power. By definition, a transaction between two relatives is not an arm length transaction. (Bridges Policy Glossary (BPG)), p 25.

Last, under certain circumstances hardship may be an issue where a divestment penalty incurs.

**Department policy defines UNDUE HARDSHIP as:**

Waive the penalty if it creates undue hardship. Assume there is no undue hardship unless you have evidence to the contrary. Undue hardship exists when the client's physician (M.D. or D.O.) says:

- Necessary medical care is not being provided, and
- The client needs treatment for an emergency condition.

A medical emergency exists when a delay in treatment may result in the person's death or permanent impairment of the person's health. BEM 405, p 16.

Here, Petitioner argues that the promissory note meets the 3 requirements in BEM 405 and thus is not divestment. Petitioner further argues that the promissory note states that the note provides for striking the non-salable clauses and the remaining provisions enforced by contract.

The Department does not dispute that the three provisions listed above under BEM 405 are met. Rather, the Department argues that nevertheless, law and policy still require

that any transfer meet the full fair market value requirement or otherwise divestment is triggered.

After a careful review of the credible and substantial evidence of record, the undersigned finds that the transfer here was for the purpose to make Petitioner eligible for Medicaid and while retaining assets that the law requires be used first to pay for Medicaid before being eligible to federal payments for long term care by federal tax monies. The transaction was not at an arm's length. Stating that the note could strike the non-saleable provision does not make the transfer an arm's length transfer. The countable note was transferred for less than the FMV as it was deemed non-saleable and nontransferable. Assets cannot be given to a 3<sup>rd</sup> party, labeled non-saleable, then not counted while the federal government pays for LTC despite the holdings of the applicant. Medicaid has a strict means-test and limits on the amount of assets an individual may retain and still qualify for Medicaid. While CMS may have clarified its provisions of promissory notes, the provisions did not change:

In order to prevent improper use of promissory notes, loans, or mortgages, section 6016(c) of the LDRA amended section 1917(c)(1) of the Act by adding a new subparagraph (l) containing additional rules related to the purchase of these instruments.

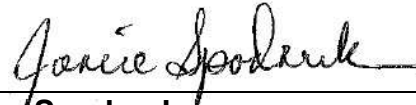
CMS's explanation of the law clearly states that these rules are additional and intended to avoid sham transactions in which payment "was neither expected nor enforced." Again, nothing in these statements suggest that it is no longer necessary to meet the central Medicaid principle that all transactions must be for full fair market value or they are a divestment for which a divestment penalty must be imposed. 42 USC 1396p(c)(1).

**DECISION AND ORDER**

Accordingly, the Department's decision that the transfer of \$30,888.00 as a promissory note is a divestment under these facts is hereby

**AFFIRMED.**

JS/dh



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**Janice Spodarek**  
Administrative Law Judge  
for Robert Gordon, Director  
Department of Health and Human Services

**NOTICE OF APPEAL:** A party may appeal this Order in circuit court within 30 days of the receipt date. A copy of the circuit court appeal must be filed with the Michigan Office of Administrative Hearings and Rules (MOAHR).

A party may request a rehearing or reconsideration of this Order if the request is received by MOAHR within 30 days of the date the Order was issued. The party requesting a rehearing or reconsideration must provide the specific reasons for the request. MOAHR will not review any response to a request for rehearing/reconsideration.

A written request may be mailed or faxed to MOAHR. If submitted by fax, the written request must be faxed to (517) 763-0155; Attention: MOAHR Rehearing/Reconsideration Request.

If submitted by mail, the written request must be addressed as follows:

Michigan Office of Administrative Hearings and Rules  
Reconsideration/Rehearing Request  
P.O. Box 30639  
Lansing, Michigan 48909-8139

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