IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

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| UNITED STATES OF AMERICA | ) | |
| | ) | |
| v. | ) | |
| | ) | Crim. No. CR-2-93-46 |
| HAYTER OIL COMPANY, INC. OF GREENEVILLE, TENNESSEE d/b/a MARSH PETROLEUM COMPANY AND SONNY WAYNE MARSH, | ) | |
| | ) | |
| Defendants. | ) | |

**RESPONSE OF THE UNITED STATES OPPOSING DEFENDANT HAYTER OIL COMPANY'S MOTION FOR A BILL OF PARTICULARS**

Defendant Hayter Oil Company moves for a bill of particulars that demands the details of both the evidence against it and the government's theory of prosecution. While the defendant's demands exceed the proper scope of a legitimate bill of particulars, most of the information it seeks has already been provided in discovery, is available from other sources, or is contained in the indictment. For these reasons, defendant's motion is without merit and should be denied.

## I. FACTS

On July 21, 1993, a grand jury sitting in the Eastern District of Tennessee returned an indictment against defendant Hayter Oil Company and its president and owner, Sonny Wayne Marsh. The indictment charged them with conspiring to fix retail gasoline prices in the Greeneville, Tennessee area, in violation of the Sherman Antitrust Act. 15 U.S.C. § 1.

On August 24, 1993, defendant Marsh moved for a bill of particulars. On September 2, 1993, the government filed its response opposing Marsh's motion.

On September 14, 1993, defendant Hayter Oil Company moved for a bill of particulars. The five demands in the oil company's motion are virtually identical to the first five demands in Marsh's motion, with the exception that the oil company did not include Marsh's Demand 1(c) for co-conspirators' statements.

On September 16, 1993, defendant Marsh filed a reply to the government's opposition to his motion.

Defendant Hayter Oil Company's memorandum in support of its motion is, essentially, an edited version of defendant Marsh's memorandum in support of his motion, down to the assertion of a nonexistent "defendant's right to particularization." Hayter Oil Company Memorandum In Support at 3; Marsh Memorandum In Support at 4. Both memorandums depict this straightforward price-fixing conspiracy as an unbelievably complex case.

## II. ARGUMENT

Defendant Hayter Oil Company's attempt to preview the evidentiary details of the case of its participation in the Greeneville gasoline price fixing conspiracy should be rejected, as the company cannot establish that it needs to review the minutia of the government's case before it can understand the charge against it or avoid prejudicial surprise at trial.

For the convenience of the court, and because the defendants' motions and memorandums are virtually identical, the United States relies primarily upon its Response Opposing Defendant Marsh's Motion For A Bill Of Particulars to oppose the oil company's motion. The arguments set forth in opposition to defendant Marsh's motion are incorporated into this opposition as if fully set forth. This response will demonstrate why each of Hayter Oil Company's demands should be denied.

**A. The Court Has Already Found that the Indictment Sufficiently Apprises the Defendants of the Central Facts of the Charges Against Them**

The excessive nature of defendants' demands in their motions for a bill of particulars is made obvious by a review of the indictment, which, as the Court ruled in a previous case, fairly informs the defendants of the charges against them and the essential elements of a price-fixing conspiracy. In light of the sufficiency of the indictment, defendants' motions for a bill of particulars should be denied. United States v. Roya, 574 F.2d 386, 390-91 (7th Cir.), cert. denied, 439 U.S. 857 (1978).

Except for the names of the parties, the dates of the conspiracy and the geographic area of the market, the indictment in this case is virtually identical to the indictment in United States v. Appalachian Oil Company, et al., No. CR-2-91-78 (E.D. Tenn.) ("Appco"). Thus, it is essentially the same indictment that the Court has reviewed repeatedly and ruled to be legally sufficient. For example, in denying one defendant's motion to dismiss in Appco, the Court held that this indictment contains

the elements of the offense charged, fairly informs the defendants of the charges against which they must defend, and shows "the essential elements of a Sherman Act conspiracy." Report and Recommendation of April 6, 1992. (Attachment 1.) The Court explained that

> this case would be a much simpler matter if it involved an offense such as an assault or a theft which is accomplished at a very particular location in a relatively short period of time. **However, neither the enormity of the time span involved in this case nor the immense geographical area within which it took place should change the sufficiency requirements of the indictment charging the offense.** In the opinion of the undersigned, the indictment meets these tests.

Id. at 3 (emphasis added).

The time span alleged in the Greeneville conspiracy is substantially smaller than the time span alleged in Appco. The geographical area involved in the Greeneville conspiracy is also smaller than the area alleged in Appco. The crime of fixing retail gasoline prices is the same in both cases, and involves some of the same participants. With respect to these components, the indictment in this case is even narrower than the indictment the Court approved in Appco. Consequently, defendants Hayter Oil Company and Sonny Marsh are not entitled to discover "the minutia of the government's case" that their motions would demand, because the indictment fairly informs them of the essential elements of the Sherman Act violation with which they are charged: "time, place, manner, means, and effect." Report and

Recommendation at 2; see also Roya, 574 U.S. at 390-91 (affirming denial of motion for bill of particulars in light of sufficient indictment); United States v. Valerio, 737 F. Supp. 844, 847 (E.D. Pa. 1990)(denying entire motion for bill of particulars because the indictment satisfied "the specificity requirements of Rule 7(c) of the Federal Rules of Criminal Procedure and the applicable law"); see generally the line-by-line review of the indictment in Response of the United States Opposing Defendant Marsh's Motion for a Bill of Particulars at 8-9.

Especially when viewed in light of this Court's previous Report and Recommendation, it cannot be disputed that the contents of the indictment, the discovery that the government has provided in this case and the other information that is available to the defendants fully informs them of the central facts of the charges against them, enables them to avoid unfair surprise at trial, and permits them to plead double jeopardy successfully in a subsequent case. Consequently, defendants' motions for bills of particular should be denied. See, e.g., United States v. Rosenthal, 793 F.2d 1214, 1227 (11th Cir. 1986), cert. denied, 480 U.S. 919 (1987); United States v. Amend, 791 F.2d 1120, 1125 (4th Cir.), cert. denied, 479 U.S. 930 (1986); United States v. Society of Independent Gasoline Marketers, 624 F.2d 461, 466 (4th Cir. 1979), cert. denied, 449 U.S. 1078 (1981); United States v. Birmley, 529 F.2d 103, 108 (6th Cir. 1976); United States v. Jones, 678 F. Supp. 1302, 1304 (S.D. Ohio 1988); United States v. Stroop, 121 F.R.D. 269, 272 (E.D. N.C. 1988).

## B. Defendants' Demands Exceed the Scope of a Legitimate Bill of Particulars

This section of the response reviews Hayter Oil Company's demands in detail and demonstrates why each one should be denied.

### 1. Hayter Demand 1(a)/Marsh Demand 1(a)

This demand seeks the evidentiary details of the identities of all co-conspirators. Defendants are not entitled to these details because, as the Sixth Circuit explained recently, "[a] defendant may be indicted and convicted despite the names of his co-conspirators remaining unknown, as long as the government presents evidence to establish an agreement between two or more persons, a prerequisite to obtaining a conspiracy conviction." United States v. Rey, 923 F.2d 1217, 1222 (6th Cir. 1991). Thus, defendants' Demand 1(a) should be rejected because the defendants do not require the evidentiary detail listed in this demand to understand the central facts of the charges against them, avoid unfair surprise at trial, or plead double jeopardy successfully in a subsequent prosecution.

Moreover, defendants know that three of the largest gasoline distributors in the Greeneville market -- J. Fred Myers and Greeneville Oil Company, Warren K. Broyles and Mountain Empire Oil Company, and Robert R. Leonard and Super Oil Company -- have pleaded guilty to fixing retail gasoline prices in the Tri-Cities and are cooperating with the government in this investigation. Defendants further know that Myers listed them as co-conspirators with whom he fixed prices in Greeneville. Defendants further

know that James C. Smith, former general manager of Mobil Oil distributor Bitner, Hunter & Long, has given a sworn statement in which he has admitted to fixing prices with, among other people, the defendants. (Attachment 2.) Defendants also know that besides themselves and the companies listed above, there are a few small gasoline distributors in the Greeneville market, and defendants know the identities of those distributors. Under these facts, defendants cannot begin to argue that they require a bill of particulars to learn the evidentiary details they seek in this demand.

When evaluated in the full context of this case, it is obvious that the only purposes that responding to this demand would serve would be to (i) freeze the government's case and (ii) provide defendants with the government's witness list. Thus, while defendants claim that this demand is necessary to help them build a defense, the Appco trial -- which defense counsel attended -- makes it clear that defendants seek to secure a pleading to use as a sword at trial. Bills of particular should be granted sparingly "to avoid 'freezing' the Government's evidence in advance of trial," United States v. Boffa, 513 F. Supp. 444, 485 9D. Del. 1980), and defendants cannot use a bill of particulars to obtain the government's witness list. United States v. Largent, 545 F. 2d 1039, 1043-44 (6th Cir. 1976), cert. denied, 429 U.S. 1098 (1977); United States v. Johnson, 504 F.2d 622, 628 (7th Cir. 1974)(per curiam); Lobue, 751 F. Supp. at 756. For these reasons, defendants' Demand 1(a) should be denied.

**2. Hayter Oil Demand 1(b)/Marsh Demand 1(b)**

This demand seeks the evidentiary details of the identities and acts of all co-conspirators in furtherance of the conspiracy, including the dates, times and places of each act, and the persons who performed the acts. While this sweep through the government's files would ease the defendants' burden in preparing their defense, this demand must be denied because "the ultimate test must be whether the information sought is necessary, not whether it is helpful." United States v. Matos-Peralta, 691 F. Supp. 780, 791 (S.D.N.Y. 1988). Moreover, because defendants do not need to know the names of all of their co-conspirators to be convicted of conspiracy, Rey, 923 F.2d at 1222, it follows that they do not need such information to understand the charges against them.

This demand should also be rejected because, as above, much of the evidentiary detail demanded is already available to the defendants. The indictment lists the conspiracy period and describes the market in detail. Additionally, the government first learned the identities of the Hayter Oil Company personnel who had authority to set retail prices during the subpoena period **from the defendants' document productions** to the grand juries that have investigated this case. Defendants' Demand 1(b) should be rejected because it is nothing but an attempt to have the government synthesize and correlate information that is available to them, despite the fact that defendants are not entitled to receive it.

### 3. **Marsh Demand 1(c)**

This demand, which Hayter Oil Company has submitted to the Court in a separate motion, seeks evidentiary minutia regarding co-conspirators' statements. This demand should be rejected because it conflicts with Federal Rule of Criminal Procedure 16 and the Jencks Act, 18 U.S.C. § 3500.

"Rule 16(a)(2), Fed.R.Crim.P., specifically excludes from pretrial discovery statements made by government witnesses or potential government witnesses except as provided by the Jencks Act, 18 U.S.C. § 3500." United States v. Jones, 678 F. Supp. 1302, 1303 (S.D. Ohio 1988); see also United States v. Presser, 844 F.2d 1275, 1283 (6th Cir. 1988). Additionally, the governing law further establishes that defendants cannot obtain pretrial discovery of co-conspirator's statements regardless of whether such statements are made by government witnesses or prospective government witnesses.

The circuits are unanimous in holding that a statement by a co-conspirator is a statement of a witness under the Jencks Act, and is not discoverable under Rule 16(a)(1)(A). Defendants in a number of cases have argued that because Federal Rule of Evidence 801(d)(2)(E) classifies co-conspirator statements as non-hearsay and attributes them on an agency rationale to each co-conspirator, the statements are "made by the defendant" and are discoverable under Rule 16(a)(1)(A). This argument has been uniformly rejected. In United States v. Roberts, 811 F.2d 257 (4th Cir. 1987)(en banc)(per curiam), the court held:

> The plain language of Fed. R. Crim. P. 16(a)(1)(A) pertains to the discovery of statements "made by the defendant." The rule does not mention and is not intended to apply to the discovery of statements made by co-conspirators. Such statements are more properly governed by the Jencks Act, 18 U.S.C. § 3500.
>
> When the statements of persons other than the defendant are sought, questions of witness safety necessarily arise. The phrase "witness safety" incorporates our concerns about those persons whose inculpatory statements may be introduced at trial. ...[T]he disclosure of co-conspirator statements may expose not only the declarant to threats and intimidation, but also those expected to testify at trial concerning the declarant's statements. This approach endangers government witnesses by circumventing the protections of the Jencks Act, and we reject it.

Id. at 258-59; see also United States v. Orr, 825 F.2d 1537, 1541 (11th Cir. 1987)(following Roberts). Similarly, the District of Columbia Circuit has ruled that

> the phrase "statements made by the defendant" does not include statements made by co-conspirators of the defendant, even if those statements can be attributed to the defendant for purposes of the rule against hearsay. Once appellant's imaginative reading of 16(a)(1)(A) is rejected, no other authority is suggested for this type of discovery order. Under our law, the adversary system is "the primary means by which truth is uncovered." [Citation omitted.] We decline to extend the defendant's right to discovery beyond that required by statute or the Constitution. We note that this result is in agreement with every other circuit that has examined the question.

United States v. Tarantino, 846 F.2d 1384, 1418 (D.C. Cir.)(per curiam), cert. denied, 488 U.S. 840 (1988). Notably, the Sixth Circuit Court of Appeals cited both Roberts and Orr with approval in Presser, 844 F.2d at 1285. Thus, defendants' demand for their co-conspirators' statements should be rejected.

**4. Hayter Oil Demand 1(c)/Marsh Demand 1(d)**

This demand seeks the identities of the Hayter Oil Company agents who allegedly worked with the other conspirators to fix retail gasoline prices in Greenville. This demand should be rejected because it seeks information that the defendants possess -- information identifying personnel in Hayter Oil Company who had authority to set retail gasoline prices during the subpoena period. Again, the government first learned this information from the defendants' document productions to the grand juries that investigated this case. Therefore, Hayter Oil Company's Demand 1(c) and Marsh's Demand 1(d) should be rejected.

**5. Hayter Oil Company Demand 2(a)/Marsh Demand 2(a)**

This demand seeks the evidentiary detail of the dates, times, places and persons present when and where each defendant and co-conspirator entered into and engaged in the conspiracy. This demand should be rejected because it seeks evidentiary detail to which the defendants are not entitled. See United States v. Lobue, 751 F. Supp. 748, 756-57 (N.D. Ill. 1990)(denying entire motion for bill of particulars, including demands for names of unindicted co-conspirators, locations of alleged conversations, witnesses to those conversations, and

other evidentiary details); United States v. Matos-Peralta, 691 F. Supp. 780, 791-92 (S.D.N.Y. 1988)(denying entire motion for bill of particulars, including demands for particulars as to the formation of the conspiracy, the entry of particular co-conspirators into the conspiracy); United States v. Persico, 621 F. Supp. 842, 868 (S.D.N.Y. 1985)(denying particulars demanding details of "the means by which it is claimed [the defendants] performed acts in furtherance of the conspiracy," "the evidence which the government intends to adduce to prove their criminal acts," and "[d]etails as to how and when the conspiracy was formed [and] when each participant entered it"); United States v. Climatemp, Inc., 482 F. Supp. 376, 389-90 (N.D. Ill. 1979), aff'd, 705 F.2d 461 (7th Cir.)(table), cert. denied, 462 U.S. 1134 (1983)(denying particulars demanding, among other things, "details of conspiratorial meetings, what was said at each meeting, and all the acts of the co-conspirators tending to connect" them to the conspiracy). Moreover, much of the information sought in this demand is in the indictment, which fairly informs the defendants of the essential elements and facts of the charged conspiracy. Consequently, defendants' Demand 2(a) should be denied.

**6. Hayter Oil Company Demand 2(b)/Marsh Demand 2(b)**

This demand largely seeks the same evidentiary detail listed in Demand 2(a), including the details of when the defendants entered the conspiracy, the agents by which Hayter Oil Company acted as a member in the conspiracy, the length of time

they remained in the conspiracy, and when they withdrew from the conspiracy. Withdrawal, of course, is an affirmative defense, and even if the defendants hope to establish it at trial, they cannot demand that the government help them prove now.

Otherwise, the indictment contains the dates of the conspiracy period, and the defendants' document productions originally supplied the government with the names of the Hayter Oil Company personnel who had authority to set retail gasoline prices during the conspiracy period. Thus, defendants' Demand 2(b) should be rejected because it seeks evidentiary detail that is contained in the indictment, that the defendants already possess, or that relates to the affirmative defense of withdrawal.

**7. Hayter Oil Company Demand 2(c)/Marsh Demand 2(c)**

This demand seeks to know "in what way" the defendants conspired to restrain interstate commerce. This information is in the indictment, though perhaps not in the detail defendants would prefer. Therefore, defendants' Demand 2(c) should be denied.

**8. Hayter Oil Company Demand 3/Marsh Demand 3**

This broad demand seeks information regarding the dates, times, places and persons present when the agreements were made, whether the agreements were written or oral, and any documents evidencing the agreements. Requests 3(a), (b) and (d) seek evidentiary detail to which the defendants are not entitled, though information regarding the dates, times, places and terms

of the oral agreements is in the indictment in a manner that fairly informs the defendants of the charge against them. Therefore, defendants' Demands 3(a), (b) and (d) should be denied. Regarding Request 3(c), the government is unaware, at this time, of any writings that evidence the conspirators' agreements to fix retail gasoline prices in Greeneville.

**9. Hayter Oil Company Request 4/Marsh Demand 4**

This broad demand again seeks the times, dates, places and participants in any discussions of retail gasoline prices, the substance of those discussions, any written documents reflecting those discussions, details regarding the other things the defendants did to further the conspiracy, the details of any agreements on retail gasoline prices, and documents that reflect changes in retail gasoline prices.

The government has produced to the defendants all documents it possesses that reflect changes in retail gasoline prices. The remainder of the demand should be rejected because it seeks "the minutia of the government's case," though much of the evidentiary detail sought in the demand is contained in the indictment in a manner that fairly informs the defendants of the charges against them. And as developed above, defendants know or have access to much of the information sought in the demand, especially information that relates to the gasoline distributors who have already pleaded guilty to fixing prices in Greeneville and Johnson City. Consequently, defendants' Demand 4 should be denied.

**10. Hayter Oil Company Demand 5/Marsh Demand 5**

This demand seeks information regarding how the defendants' conspiracy to fix retail gasoline prices affected interstate trade and commerce. This demand should be rejected, as defendants -- Phillips 66 distributors -- have access to the transcripts from the Appco trial, in which Phillips 66 personnel explained how Phillips 66 gasoline is refined in Texas, shipped through an interstate pipeline to Knoxville, Tennessee, where distributors like the defendants pick up the gasoline in tankers and ship it via interstate highways to Greeneville, Tennessee. Testimony at that trial -- which defense counsel attended -- proved how the gasoline remains in interstate commerce from Texas to Knoxville.

**C. Defendants' Have Failed to Establish Their Entitlement to the Minutia of the Government's Case**

Defendants' motions fail to establish that the defendants cannot conduct their own investigation into this case unless the Court grants their demands. Defendants cannot make this showing under the facts of this case, though in their attempt, they have made several potentially confusing claims in their multiple memorandums that the government feels compelled to attempt to clarify below.

First, the defendants' claim that the discovery documents were not made available to them until September 2, 1993, is erroneous. Marsh Reply Memorandum at 7. As the attached letters show, the government transmitted the Stipulated Protective Order

to the defendants on August 17, 1993, and the discovery documents were in the United States Attorneys' office in Greeneville on August 24, 1993. Defendants, however, did not look at the documents for the first two weeks they were in Greeneville. (Attachment 3.) Defendants' claimed need for information about their case wilts when it is evaluated within the context of their approach to reviewing the discovery documents.

Defendants' mischaracterization of the materials the government has provided pursuant to Giglio v. United States, 405 U.S. 150, 154-55, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972) is groundless. Defendants complain that they have received only "copies of plea agreements." Reply at 8. Defendants' real complaint, however, is that they have received only what they are entitled to receive under Giglio, and not all that they wish to receive.

Defendants' complaints regarding the government's discussion of the parties' conference on August 4, 1993, fails to address the critical point that the government made it clear in that meeting that it expects to prove its case in three days and that this case is not as complex as defendants claim. Defendants' response to the impact of the amendments to Rule 16 on precedent by referring to other amendments to Rule 7 is a non sequitur.

Finally, as the exchange of pleadings over the defendants' motions makes clear, the discretionary, fact-specific nature of the decision of whether to order the government to provide a bill of particulars affects the strength of the applicability of

precedent to that decision. Nevertheless, it is ironic that both defendants rely on a case that compels the denial of their motions, United States v. Roya, 574 F.2d 386, 390-91 (7th Cir.), cert. denied, 439 U.S. 857 (1978). There, the appellate court affirmed the district court's denial of the defendant's motion for a bill of particulars because, as in this case, the indictment charged the defendant in a manner that "set[] forth the elements of the offense charged and sufficiently apprise[d] the defendant of the charges to enable him to prepare for trial." 574 F.2d at 391. Notably, the contested portion of the indictment in Roya merely tracked the applicable statutory language, whereas this indictment fairly informs the defendants of the essential elements of the Sherman Act violation with which they are charged.

Curiously, defendant Marsh characterizes United States v. Birmley, 529 F.2d 103 (6th Cir. 1976) as irrelevant to this case, Reply at 16, when he relied on that same decision to support his motion. Marsh Memorandum In Support at 5. Similarly, both defendants cite the decision in Harlem River Consumers Cooperative, Inc. v. Associated Grocers of Harlem, Inc., 371 F. Supp. 701 (S.D.N.Y.), aff'd, 493 F.2d 1352 (2d Cir. 1974)(per curiam), which involves the denial of a motion for further preliminary injunctive relief in a civil case. Finally, defendants discuss United States v. Climatemp, Inc., 482 F. Supp. 376 (N.D. Ill. 1979), aff'd, 705 F.2d 461 (7th Cir.)(table), cert. denied, 462 U.S. 1134 (1983) and United States v. Deerfield

Specialty Papers, Inc., 501 F. Supp. 796 (E.D. Pa. 1980) as if they have not yet received any information about their case, when in fact they have already received or could easily obtain much of the same type of information that was disclosed to the defendants in those cases.

Defendants never address the long-established rule that in conspiracy cases generally, the government is not required to disclose "the precise details that a defendant and his alleged co-conspirators played in forming and executing a conspiracy or all the overt acts the Government will prove in establishing the conspiracy." United States v. Boffa, 513 F. Supp. 444, 485 (D. Del. 1980). Consequently,

> [a] bill of particulars may not be used to compel the government to provide the essential facts regarding the existence and formation of a conspiracy. Nor is the government required to provide defendants with all overt acts that might be proven at trial. Nor is the defendant entitled to a bill of particulars with respect to information which is already available through other sources such as the indictment or discovery or inspection.

United States v. Rosenthal, 793 F.2d 1214, 1227 (11th Cir. 1986), cert. denied, 480 U.S. 919 (1987)(citations omitted); see also United States v. Rey, 923 F.2d 1217, 1222 (6th Cir. 1991)("defendant may be indicted and convicted despite the names of his co-conspirators remaining unknown"). Defendants also fail to address the implication of the fact that the rule limiting the amount of information the government must disclose before trial regarding the formation and operation of a conspiracy applies

with special force to this case, because conviction for price fixing does not require proof of overt acts. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59, 60 S. Ct. 811, 84 L. Ed. 1129 (1940); Nash v. United States, 229 U.S. 373, 378, 33 S. Ct. 780, 57 L. Ed. 1232 (1913). Defendants' motion should be denied because they are not entitled to particulars about events that do not have to be alleged or proved.

## III. CONCLUSION

Defendants have the heavy burden in this motion of persuading the Court that despite being fully informed of the charges against them by the indictment, and despite receiving the discovery in this case, and despite all of the other information that is available to them from sources other than the government's files, they must have the evidentiary detail and minutia of the government's case that they demand before they can understand the charges against them and avoid prejudicial surprise at trial. The defendants have not demonstrated such a

need because it does not exist. For the foregoing reasons, the defendants' motions for a bill of particulars should be denied.

DATED: September ___, 1993 Respectfully submitted,


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**CERTIFICATE OF SERVICE**

This is to certify that on September 24, 1993 the Response Of The United States Opposing Defendant Hayter Oil Company's Motion For Discovery Of Its Employees' Statements was served on the following counsel by sending photocopies of the response to them via Federal Express overnight delivery service to the following addresses:

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