IN THE UNTIED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DOCKET NO. 11-17916

VIRGINIA VAN DUSEN, JOHN DOE 1 and JOSEPH SHEER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED PERSONS,

Plaintiffs-Appellants

v.

SWIFT TRANSPORTATION CO., INC., INTERSTATE EQUIPMENT LEASING, INC. CHAD KILLIBREW and JERRY MOYES,

Defendants-Appellees

On Petition from an Order of the United States District Court

For the District of Arizona

Case No. CV-10-899-PHX-JWS

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ARGUMENT

This case presents a question of statutory interpretation: whether the Federal Arbitration Act (FAA) requires a court to determine that a contract containing an arbitration provision is covered by the FAA before invoking § 4 of the Act to compel arbitration. The Defendants in their answering brief do not dispute that if the Drivers are found to be employees, the FAA does not cover this dispute and the arbitration provision is unenforceable by the district court. Nevertheless, Defendants assert that the district court has authority under the FAA to send the case to an arbitrator so that the arbitrator can decide whether the court has authority under the FAA to send the case to arbitration. As the panel that considered the Drivers' mandamus petition found, this argument "puts the cart before the horse." *In re Van Dusen,* 654 F.3d 838, 844 (9th Cir. 2011). The language of the FAA as interpreted by the Supreme Court in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401 (1967), and *Bernhardt v. Polygraphic Co.,* 350 U.S. 198 (1956), compels the conclusion that a court's authority to act under § 4 of the FAA arises only after the court first determines that the contract at issue is covered by the FAA and is not excluded pursuant to the § 1 exemption. *In re Van Dusen,* 654 F.3d at 844. A court simply cannot do what the district court did in this case: compel arbitration pursuant to § 4 and leave it to

the arbitrator to determine whether the FAA gave the court authority to act under § 4.

Defendants' answering brief never engages in a statutory analysis of the FAA. Instead, Defendants rely on a hodge-podge of out-of-context quotes and concepts taken from various arbitration cases to argue that it is proper for a court to act and leave it to an arbitrator to decide whether the court had authority to act. Patching together disparate quotations in this way hardly constitutes reasoned statutory analysis. Defendants' argument is unpersuasive and it should be rejected.

A. LAW OF THE CASE APPLIES

Defendants do not dispute that the mandamus merits panel considered and answered the question of whether the FAA required the District Court to decide the § 1 exemption before sending the case to arbitration. Instead, they argue that law of the case does not apply to the mandamus panel's ruling, citing *PowerAgent v. Electronic Data Systems,* 358 F.3d 1187, 1190-91 (9th Cir. 2004). In that case the defendant was seeking to bind the plaintiff to the results of the plaintiff's unsuccessful mandamus petition. This Court held that "[o]nly when the decision to deny the writ was on the merits does the law of the case doctrine apply to mandamus actions." *Id.* The Court noted that "the previous panel did address the merits of PowerAgent's argument, but only in the context of the special limitations on granting an extraordinary writ. *Id.* at 1191 (9th Cir. 2004). In contrast here, a

unanimous panel issued a published opinion which exhaustively examined the merits. In these circumstances, *Power Agent* does not preclude application of the law of the case doctrine. *See, e.g., United States v. Johnson,* 256 F.3d 895, 914 (9th Cir. 2001) (en banc) ("Where … it is clear that a majority of the panel has focused on the legal issue presented by the case before it and made a deliberate decision to resolve the issue, that ruling becomes the law of the circuit and can only be overturned by an en banc court or by the Supreme Court."); *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1186 (9th Cir. 2003).

B. *AT&T TECHS. V. COMMUNICATION WORKERS* DOES NOT SHED LIGHT ON THE PROPER INTERPRETATION OF SECTION 1

Defendants begin their analysis not with the language of the statute itself, as one might expect, but with a syllogism. Defendants point out that the merits of most of the Drivers' claims turn on whether the Drivers are employees of the Defendants. Defendants then cite *AT & T Techs. v. Communications Workers of America,* 475 U.S. 643, 650 (1986), for the proposition that "in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims." Defendants then conclude that the FAA cannot require a court to decide the § 1 exemption question because that would require the court to resolve merits questions raised by the Drivers' claims.

In addition to the fact that this is no way to perform statutory analysis, Defendants' argument is grounded on a fundamental misreading of *AT & T Techs.* The issue in that case was whether the parties intended to arbitrate a dispute arising out of their collective bargaining agreement (CBA). There was no question that the CBA containing the arbitration provision was subject to the Labor Management Relations Act (LMRA) and that the court had power to compel arbitration pursuant to that Act. 475 U.S. at 646. The issue was simply whether the particular dispute fell within the terms of the parties' arbitration agreement. The court below had "acknowledged the 'general rule' that the issue of arbitrability is for the courts to decide unless the parties stipulate otherwise, but noted that [the Supreme] Court's decisions . . . caution courts to avoid becoming entangled in the merits of a labor dispute under the guise of deciding arbitrability." *Id.* at 647. Based on this concern, the court of appeals announced an 'exception' to the general rule and ordered the arbitrator to decide whether the dispute fell within the arbitration agreement because "deciding the issue would entangle the court in interpretation of substantive provisions of the collective bargaining agreement and thereby involve consideration of the merits of the dispute." *Id.*

The Supreme Court reversed. Although it reiterated that a court should not consider the merits of a dispute in deciding whether to compel arbitration, it made clear that what it meant by not examining the merits was that a court should not

pick and choose which matters to send to arbitration based on its own view of how meritorious the claim is. *Id.* at 650. That said, however, the Court reversed the Seventh Circuit and reaffirmed its prior holdings that the court, rather than the arbitrator should decide arbitrability (absent an agreement to the contrary) regardless of whether it involved an inquiry into the merits of the case. *Id.* at 651. In other words, the concern about courts avoiding deciding the merits of a claim is just that, a concern. But where a court must consider aspects of the merits to determine whether the FAA authorizes an order compelling arbitration, the Supreme Court made clear in *AT&T Techs.* that a court should not hesitate to do so. *See also Camping Constr. Co. v. Dist. Council of Ironworkers,* 913 F.2d 1333, 1339-1340 (9th Cir. 1990) (noting the "deceptively simple distinction between arbitrability and the merits" is "ill-suited" in certain cases).[1]

C. WHETHER THIS DISPUTE IS EXEMPT FROM THE FAA IS NOT A QUESTION OF ARBITRABILITY

Defendants next assert that the § 1 exemption question – i.e. whether the contract in this case is even covered by the FAA – is simply a question of arbitrability which the parties are free to delegate to an arbitrator. The Drivers do

[1] *Cf Wal-Mart Stores, Inc. v. Dukes*, __ U.S. __, 131 S. Ct. 2541, 2552 (2011) ("The necessity of touching aspects of the merits in order to resolve preliminary matters … is a familiar feature of litigation.").

not dispute that questions of arbitrability may be delegated, but the question here is not arbitrability. The Supreme Court defines "questions of arbitrability" as "whether *the parties* have submitted a particular dispute to arbitration." *Howsham v. Dean Witter Reynolds, Inc.,* 537 U.S.79, 83 (2002) (emphasis added). But the question here has nothing to do with what the parties agreed to; it is a question of whether the FAA grants the court power to act on the parties' contract. The mandamus panel quoted the *Howsham* definition of "questions of arbitrability" and noted,

> The question at issue here does not fit within that definition, however: Whatever the contracting parties may or may not have agreed upon is a distinct issue from whether the FAA confers authority on the district court to compel arbitration. The Court has never indicated that parties may delegate this determination to an arbitrator in the first instance: on the contrary, it has affirmed that, when confronted with an arbitration clause, the district court must first consider whether the agreement at issue is of the kind covered by the FAA. *See Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401 (1967) (resolving "first question" of whether a consulting agreement "evidenc[ed] transactions in 'commerce' ").

In re Van Dusen, 654 F.3d at 844. Defendants respond to the above quoted passage with a citation to a district court of Alabama case which they claim stands for the proposition that parties may stipulate to FAA coverage. *Staples v. The Money Tree, Inc.,* 936 F.Supp 856, 858 (M.D. Ala. 1996). Apart from the fact that a district court decision from Alabama is not controlling, the *Staples* court, in fact,

made its own determination of whether the contract involved interstate commerce; its comments regarding the parties' ability to stipulate to coverage under the Act were mere dicta and contain no analysis.

Defendants also quote *United Steelworkers of America v. American Mfg. Co.,* 363 U.S. 564, 567-568 (1960), to the effect that the court's role is limited to deciding whether "the party seeking arbitration is making a claim which on its face is governed by the contract." But in that case there was no dispute that the CBA containing the arbitration clause was covered by the LMRA and that the court had the power to compel arbitration so there was no reason to discuss the court's role in determining coverage questions.

1. Defendants' Reliance on *Rent-A-Center* Is Misplaced

Defendants' primary support for treating the coverage question like a question of arbitrability rests on their analysis of *Rent-A-Center West, Inc. v. Jackson,* 130 S.Ct. 2772 (2010). In that case, the Court held that the plaintiff's challenge to the unconscionability of the contract as a whole could be referred to the arbitrator because the contract contained a delegation clause giving the arbitrator "exclusive authority to resolve any dispute relating to the . . . enforceability . . . of [the] Agreement." *Id.* at 2777. Defendants contend that this result somehow demonstrates that parties may also delegate statutory coverage

questions to an arbitrator. This argument fundamentally misconstrues the holding in *Rent-a-Center.*

To understand *Rent-a-Center* it is important to first understand *Prima Paint Corp.,* 388 U.S. 395, the case that *Rent-a-Center* is based upon. *Prima Paint* began by reaffirming the holding in *Bernhardt,* 350 U.S. 198, that the stay provisions of FAA § 3 apply only to the kinds of contracts specified in §§1 and 2 of the Act and that it is for the court to determine whether the contract at issue is covered by those sections. *Prima Paint,* 388 U.S. at 401. Once the Court found that the contract at issue was covered by the FAA, it then turned to the central issue in the case: "whether a claim of fraud in the inducement of the entire contract is to be resolved by the federal court, or whether the matter is to be referred to the arbitrators." *Id.* at 402. The Court concluded that the answer lay in the wording of § 4 of the Act which instructs a court "to order arbitration to proceed once it is satisfied that 'the making of *the agreement for arbitration* or the failure to comply (with the arbitration agreement) is not in issue.'" *Id.* at 403 (emphasis added). From this language the Court concluded that "if the claim is fraud in the inducement of the arbitration clause itself – an issue which goes to the making of the *agreement to arbitrate* – the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of *the contract* generally." *Id.* at 403-404 (emphasis added). In

other words, once a court has determined that the contract at issue falls within §§ 1 and 2, the Supreme Court interprets § 4 as requiring a court to treat the arbitration provision within the contract as severable and only consider validity/enforceability challenges (e.g. unconscionability), directed to the arbitration provision itself. If the contract is covered by the Act and the court is satisfied that the specific arbitration provision is valid/enforceable, then the court is authorized to compel arbitration under § 4.

Rent-a-Center simply applies the logic of *Prima Paint* to a delegation clause within a contract. The contract at issue in *Rent-a-Center* was a stand-alone arbitration contract but the majority held that that made no difference to the *Prima Paint* analysis. 130 S.Ct. at 2779. There was no question that the arbitration contract fell within the coverage of §§ 1 and 2 of the Act. The Court then focused on the delegation clause contained within the arbitration contract. 130 S.Ct. at 2777. In the Court's view, this delegation provision was, itself, a severable arbitration provision within the contract, no different from the arbitration provision discussed in *Prima Paint.* It was "simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." 130 S.Ct. at 2777-2778. Accordingly, just as in *Prima Paint,* the Court held that an unconscionability challenge aimed directly at the validity of the delegation clause

would have to be resolved by the court, but an unconscionability challenge directed to the arbitration contract as a whole could be delegated to the arbitrator. *Id.* at 2778-79. Because the plaintiff in *Rent-a-Center* only raised unconscionability as to the contract as a whole, the delegation clause was enforceable and the district court's order compelling arbitration was upheld. *Id.* at 2779.

Thus, *Rent-a-Center* is simply a specific application of the *Prima Paint* rule. Nothing in *Rent-a-Center* in any way alters the fundamental statutory analysis laid down by *Bernhardt* and *Prima Paint* that coverage questions under the FAA (including whether the contract at issue is exempt under § 1) are to be decided by the Court. Once coverage has been determined by the Court, challenges to the validity of the specific arbitration provision at issue (whether it is an arbitration agreement in a contract about something else, or a delegation provision within a larger arbitration contract) must be decided by the court. Challenges to the validity of the contract as a whole, and any other questions of arbitrability may then be referred to the arbitrator if the parties' agreement so provides. But this case turns on whether the FAA applies to this arbitration contract, not whether the contract as a whole is unconscionable.

2. Defendants' Reliance on *Fadal Machining Centers* Is Misplaced

Defendants next rely on *Fadal Machining Centers v. Compumachine,* No. 10-55719, 2011 WL 6254979 (9th Cir. Dec. 15, 2011), to argue that the § 1

exemption question is a question of jurisdiction and that arbitrators have "jurisdiction" to decide the coverage question. *Fadal* is easily distinguishable. In *Fadal* the court made the initial determination that the FAA applied when it determined that the invoices and the conditions of sale referred to in the invoices created a contract with an arbitration provision. The only remaining issue was whether the particular dispute was covered by the arbitration agreement contained in the contract– i.e. an arbitrability question regarding the scope of the agreement. *Id*. at *2. The parties agreed to delegate that issue to the arbitrator. Because there was a contract covered by the FAA with a valid arbitration provision, the court had full authority under § 4 of the FAA to compel the parties to submit the scope question to an arbitrator pursuant to the delegation agreement. Thus *Fadal* stands for the unremarkable proposition that parties may delegate questions regarding the scope of their arbitration agreement.

Defendants focus on the fact that if the arbitrator in *Fadal* were to find that the dispute did not fall within the scope of the arbitration agreement he would, technically, be without jurisdiction to enter a decision. The district court pointed out that that problem was resolved by the AAA's Commerical Arbitration Rules that give an arbitrator "power to rule on his own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement." *Id.* at *2. But the issue here has nothing to do with whether the

arbitrator has "jurisdiction" to render a decision about the § 1 exemption; the question is whether the district court has authority under § 4 to send the case to an arbitrator without first deciding that the contract at issue is covered by the FAA. The extent of the arbitrator's jurisdiction is simply irrelevant to that question.[2]

3. *Green v. SuperShuttle* and *Reid v. SuperShuttle* Are Not Persuasive

Defendants argue that this Court should follow *Green v. SuperShuttle,* 653 F.3d 766 (8th Cir. 2011), in which the Eighth Circuit upheld a decision referring a § 1 exemption question to an arbitrator to decide. As pointed out in the Drivers opening brief, the analysis in *Green* is very limited. The parties in *Green* did not argue, nor did the court cite, the two cases that control the outcome of the question – *Bernhardt* and *Prima Paint.* Given the utter absence of analysis, there is no reason for this Court to follow *Green* over the more carefully reasoned decision by the mandamus panel in this case.

Defendants also cite *Reid v. SuperShuttle Int'l., Inc.,* No. 08-cv-4854, 2010 WL 1049613 (E.D.N.Y. Mar. 22, 2010), but that case does not even address the

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[2] Nor is the district court's jurisdiction at issue. In *Fadal,* the district court had diversity jurisdiction, 2011 WL 6254979 at *1, and there is no question that the district court in this case has federal question jurisdiction. Defendants claim that the *Van Dusen* mandamus panel "treated the parties' dispute regarding the Section 1 exemption as one of jurisdiction." But the Court did no such thing. The *Van Dusen* mandamus panel was clear that the question is one of the "authority" granted by FAA and whether that authority may be exercised without first determining that the contract falls within the coverage of the FAA.

coverage issue. While an exemption issue may have been present in the case the plaintiff drivers apparently did not raise it and the court did not consider it.

D. THE SEVERABILITY RULE OF *PRIMA PAINT* HAS NO APPLICABILITY IN THIS CASE

Defendants attempt to use the severability rule of *Prima Paint* to argue that the exemption question, which concerns a contract as a whole, should be treated in the same way as a challenge to the unconscionability of a contract as a whole – a challenge which, under *Prima Paint*, may be sent to an arbitrator. As *Prima Paint* itself makes clear, however, the "first question" a court must answer is whether the contract is covered by the Act. 388 U.S. at 401. It is only after finding that the contract is covered by the Act, that a court may turn to the question of the validity/enforceability of the arbitration provision. It is at that point that *Prima Paint's* interpretation of § 4 allows a court to sever the question of enforceability of the arbitration provision from the question of the enforceability of the contract as a whole. To apply this severability rule, which only arises after § 4 comes into play, would do violence to the structure and language of the FAA, and directly contradict the holding in *Prima Paint* that the court must decide coverage by the statute as the "first question."

E. DEFENDANTS' OTHER ARGUMENTS ARE WITHOUT MERIT

1. This Case Is Not About Arbitrability

Defendants circle back to their claim that this case is merely about a question of arbitrability when they accuse the Drivers of conflating two issues – who decides arbitrability and whether a dispute is actually arbitrable. They quote *First Options* for the proposition that the answer to both questions turns on what the parties agreed. That may be true with respect to questions of arbitrability, but as explained above, the issue here is not one of arbitrability. The Drivers argument has nothing to do with "whether *the parties* have submitted a particular dispute to arbitration," *Howsam,* 537 U.S. at 83 (emphasis added), or who should decide what the parties agreed to. The issue here is whether the FAA confers authority on the court to act on the parties' agreement whatever it is. That is an antecedent question which the court must resolve before anyone, court or arbitrator, can turn to the question of whether the dispute is arbitrable and who decides arbitrability.

2. Bernhardt Is Controlling

Defendants claim that *Bernhardt* "is old law that is inapplicable in the modern context" because it predates recent cases like *Rent-A-Center* which address the use of delegation clauses in arbitration contracts. But as is explained above in the discussion of *Rent-A-Center,* a delegation clause is simply "an additional, antecedent agreement the party seeking arbitration asks the federal court to

enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." 130 S.Ct. at 2777-2778. In other words, a delegation clause is an arbitration provision just like any other arbitration provision appearing in a contract. *Bernhardt*'s holding that §§1-4 of the Act must be read together and that there is no authority under §3 unless and until the contract at issue has been determined to fall within the coverage of §1 and 2 applies to a contract with a delegation clause in precisely the same way as it applies to a contract with an arbitration provision. In desperation, Defendants claim that *Bernhardt* did not determine *who* should decide the coverage question, but it clearly did. By holding that the coverage question must be decided before there is authority to compel arbitration under § 4, the only entity that can make the coverage determination is the court. 350 U.S. at 201-202. *Prima Paint* reaffirmed that when it stated that the coverage question was the "first question" to be answered. 388 U.S. at 401.

3. Defendants' Criticisms of the Mandamus Panel Decision Are Without Merit

The Mandamus Panel found that Defendants' argument – that the court could compel arbitration first and let the arbitrator decide later whether the court had authority under the FAA to do so – "puts the cart before the horse." *In re Van Dusen,* 654 F.3d at 844. Defendants criticize that analysis arguing that delegation clauses always 'put the cart before the horse' in that they allow a court to compel

arbitration even though the arbitrator may later determine that the contract containing the arbitration provision was unconscionable and unenforceable. Defendants' insistence that this result also 'puts the cart before the horse' reflects their continued misunderstanding of *Prima Paint.* As explained above, *Prima Paint* holds that once a contract has been found to be covered by the FAA, § 4 is worded in such a way as to give the court power to sever the arbitration provision within the contract and compel arbitration as long as the court is satisfied that the arbitration provision is valid and enforceable – i.e. not unconscionable. The fact that the arbitrator may later find that the entire contract is unconscionable and send the case back to district court may seem anomalous but that is a result of the wording of §4 as interpreted by the Court.[3] Even if the contract as a whole is ultimately found to be unconscionable and the case returned to the district court, the district court's initial decision to send the case to arbitration would still have been the proper procedure under the FAA because, pursuant to *Prima Paint*, the parties may agree to have an arbitrator decide the unconscionability of the contract as a whole. It is only if a court compels arbitration under § 4 without first deciding

[3] The interpretation of § 4 adopted in *Prima Paint* may seem strained, and even the Supreme Court has commented that "the notion that a party may be bound by an arbitration clause in a contract that is nevertheless invalid may be difficult for a lawyer – or any person – to accept, but this is the law of *Prima Paint*." *Rent-a-Center,* 130 S.Ct. at 2787.

whether the FAA even applies to the contract that the court acts without authority and "puts the cart before the horse."

4. Requiring the Court to Determine Coverage Does Not Produce Absurd Results

Defendants argue that requiring the court to determine FAA coverage as an initial matter will lead to absurd results because it would mean that seamen, railroad workers, and other workers directly involved in interstate transportation (i.e. those whose contract may be covered by the § 1 exemption) would never be able to arbitrate disputes. There are several answers to that proposition. First, parties may voluntarily arbitrate any issue. The § 1 exemption does not prohibit arbitration; it merely limits the ability of certain employers and employees to invoke the power of federal courts to compel arbitration if one or the other balks. Second, and more importantly, the fact that a court must determine the exemption question before an employer of seamen, railroad workers, and interstate transportation workers can compel arbitration is a choice that Congress made. It is a policy choice, no doubt a compromise of competing interests, that is no more or less absurd than Arizona's decision to exempt all contracts of employment from arbitration. Ariz. Rev. Stat. §12-1517. Defendants' belief that the choice made by Congress is absurd does not give this Court license to rewrite the FAA to fit Defendants' view of a more rational world.

Defendants push this point noting that different courts analyzing the same contract might reach different results, sending some drivers to arbitration and adjudicating the claims of others. That may be true, but that is simply a function of the court system in which we operate. Different arbitrators reach different results when analyzing the same contract too.

F. THE LEGISLATIVE HISTORY DOES NOT SUPPORT DEFENDANTS' ARGUMENT

Finally Defendants cite the legislative history of § 4 of the Act to argue that trials under § 4 relate only to the "making" of the arbitration agreement, 9 U.S.C. § 4, which Defendants claim is limited to trials about the physical execution of the "paper." The Defendants' reading of the legislative history is indefensibly narrow, but the issue is irrelevant. The threshold question here is not about whether an agreement was "made" for purposes of § 4, the question is whether the contract at issue falls within the § 1 exemption to the FAA. If it does, then the legislative history makes clear that the district court has no power under §§ 3 and 4 to stay the action or to compel arbitration. *See* S.Rep. No. 68-536, at 2 (1924) (stating that § 1 defines the contracts to which "the bill will be applicable.").

CONCLUSION

For all of the foregoing reasons, the district court erred in compelling arbitration under § 4 of the FAA before it determined whether the contract at issue

was exempt from the FAA under § 1. Accordingly, this Court should vacate the court's order compelling arbitration and remand the case to the district court to determine the § 1 exemption question.

Respectfully submitted this 30th day of April, 2012.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Ninth Circuit 32-1, I certify that this Plaintiffs-Appellants' Reply Brief is proportionally spaced, has a typeface of 14 points, and contains 4,607 words.

Dated this 30th day of April, 2012.

By: s/Susan Martin

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 30, 2012.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated this 30th day of April, 2012.

MARTIN & BONNETT, PLLC

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