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NO. OP 19-0085

IN THE SUPREME COURT OF THE STATE OF MONTANA

::

BNSF RAILWAY COMPANY,

Petitioner,

-vs-

THE ASBESTOS CLAIMS COURT OF THE STATE OF MONTANA, THE HONORABLE AMY EDDY, PRESIDING JUDGE,

Respondent.

::

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF SUPERVISORY CONTROL REGARDING NONPARTY DEFENSES

On Review from the Asbestos Claims Court of the State of Montana, Cause No. AC-17-0694
Hon. Amy Eddy

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I. Montana Code Annotated Section 27-1-703(6) permits Petitioner to assert that W.R. Grace ("Grace") caused Respondents' damages.

This Court should reverse the ACC's purely legal error in ruling that Mont. Code Ann. § 27-1-703(6) does not apply in this case. A jury must determine whether Grace's activities caused injury to Respondents. Just as a physician must rule out other causes to conduct a proper differential diagnosis, the jury in this case must weigh Grace's activities as an injury causing agent. Montana law allows for just such a determination. Grace is a settled party under the plain language of Montana's non-party statutory constructs.

Mont. Code Ann §27-1-703(6)(a) provides:

> In an action based on negligence, a defendant may assert as a defense that the damages of the claimant were caused in full or in part by a person with whom the claimant has settled or whom the claimant has released from liability.

(emphasis added). As discussed in Ex. L *Petition*, *Defendant's Notice of Supplemental Authorities to Brief in Opposition to Respondents' Motion for Summary Judgment*, Grace's Chapter 11 reorganization created, by order of the U.S. Bankruptcy Court, a trust intended to compensate all then-present and future Libby asbestos claimants and settle Grace's liabilities as to those claimants. *See generally*

Ex. L *Petition*. The seminal documents[1] of those proceedings cast no doubt on this intent.

For example:

The Trust Agreement itself states, "The . . . Trust is intended to qualify as a 'qualified settlement fund' within the meaning" of applicable regulations promulgated under the Internal Revenue Code. *See* Personal Injury ("PI") Trust Agreement (Ex. A *Petition* at Ex. L, p. 2). It also provides that the purpose of the trust is to "assume all liabilities and responsibilities for all PI Trust claims." *Id.*, § 2.1; *see also id.*, § 1.4(c) ("No provision herein or in the [Trust Distribution Plan"] shall be construed or implemented in a manner that would cause the PI Trust to fail to qualify as a 'qualified settlement fund.'"); *see also id.*, § 7.2(b)(i)(A) (further

[1] Respondents contend these documents are not properly before this Court, because they were not accompanied by an affidavit, and they are hearsay. *Response*, p. 7, n. 6. These documents, however, are on file in – and were the subject of – a matter of public record in federal court. *See, e.g.*, *Hutt v. Md. Cas. Co. (In re W.R. Grace & Co.)*, Nos. 01-01139 (KG), 14-50867 (KJC), 2016 Bankr. LEXIS 3754 (Bankr. D. Del. Oct. 17, 2016) *aff'd* 900 F.3d 126 (3d Cir. 2018). Thus, as a matter of comity with the U.S. Bankruptcy Court, Petitioner requests that this Court take judicial notice of the documents cited in Ex. L *Petition*. *Golden v. Northern Pac. Ry*. (1909), 39 Mont. 435, 447-48 (1909) (recognizing that the Montana supreme court may take judicial notice of the actions of a federal court); *see also Response*, p. 6, n. 5 ("Grace's . . . bankruptcy history is an established matter of record throughout these proceedings before the Asbestos Court.") (emphasis added). For these same reasons, the documents carry "comparable circumstantial guarantees of trustworthiness" to Montana's hearsay exceptions and are therefore not hearsay. Mont. R. Evid. 803(24). They are also documents of the type regularly kept and regularly recorded by the Bankruptcy Court in the course of its activities as a public office. Mont. R. Evid. 803(8).

illustrating the trust's purpose as a settlement fund for all present and future Libby asbestos claimants: "[The PI Trust shall terminate upon] the date on which the Trustees . . . deem it unlikely that new asbestos claims will be filed against the PI Trust.").

The Trust Distribution Plan confirms this intent. It provides in its preamble that its procedures: "provide for resolving all Asbestos PI Claims . . . including, without limitation, all asbestos-related personal injury and death claims caused by conduct of, and/or exposure to products for which, W.R. Grace & Co. and/or the other Debtors (collectively referred to as "Grace"), and their predecessors, successors, and assigns, have legal responsibility." *See* Trust Distribution Plan (Ex. L *Petition* at Ex. B, p. 1); *see also id.*, § 1.1 (further illustrating intent that trust would function as a settlement for all present and future claimants: "[These procedures are] designed to provide fair, equitable and substantially similar treatment for all PI Trust Claims <u>that may presently exist or may arise in the future</u>.") (emphasis added); *see also id.*, § 2.1 ("The goal of the PI Trust is to treat all claimants equitably. This TDP furthers that goal by setting forth procedures for processing and paying Grace's several share of the unpaid portion of the value of asbestos personal injury claims . . . <u>with the intention of paying all claimants over time</u> as equivalent a share as possible of the value of their claims based on historical values for substantially similar claims in the tort system.")(emphasis added).

The Confirmed Chapter 11 Joint Plan of Reorganization also unequivocally provides in its preamble, "**THIS PLAN PROVIDES . . . FOR THE ISSUANCE OF INJUNCTIONS THAT . . . RESULT IN THE CHANNELING OF ALL ASBESTOS PERSONAL INJURY CLAIMS . . . INTO TRUSTS AND/OR A CLAIMS FUND**." Joint Plan of Reorganization (Ex. L *Petition* at Ex. C, p. 1)(emphasis original). The preamble also states, "This Plan constitutes a settlement of all Claims and Demands against the Debtors." *Id.* The plan further defines "Asbestos Claims" as including "any and all Asbestos PI Claims . . . and any and all Demands related thereto." *Id.*, § 1.1(8), p. 4 (emphasis added). It also defines "Asbestos PI Claim" as "a Claim . . . Indirect PI Trust Claim . . . Grace-Related Claim, or Demand against, or any present or future debt, liability, or obligation of any of the Debtors." *Id.*, § 1.1(34)(i), p. 11 (emphasis added). The plan further defines "Indirect PI Trust Claim" as including "any Claim or remedy, liability, or Demand against the Debtors, now existing or hereafter arising." *Id.*, § 1.1(144), p. 29 (emphasis added). The plan reiterates:

> The purpose of the Asbestos PI Trust shall be, among other things[, to] . . . assume all liabilities of the Debtors with respect to all Asbestos PI Claims; [and] . . . qualify at all times as a "qualified settlement fund" for federal income tax purposes within the meaning of the treasury regulations issued pursuant to [the Internal Revenue Code].

Id., § 7.2.1(i), (iv), p. 63 (emphasis added).

Nevertheless, Respondents argue the plain language of Mont. Code Ann. §27-1-703(6)(c) shows the statute would not apply. *Response*, p. 5. This reading ignores the contingent language of that subsection.

Mont. Code Ann. §21-1-703(6)(c) provides:

> Except for persons who have settled with or have been released by the claimant, comparison of fault with any of the following persons is prohibited:
>
> (i) a person who is immune from liability to the claimant;
>
> (ii) a person who is not subject to the jurisdiction of the court; or
>
> (iii) any other person who could have been, but was not, named as a third party.

Mont. Code Ann. §27-1-703(6)(c)(emphasis added). Respondents argue that, by virtue of Grace's bankruptcy, "Grace is plainly within the terms" of subsection 703(6)(c). *Response*, pp. 5-8. However, Respondents overlook the subsection's very first clause: "Except for persons who have settled with or have been released by the claimant[.]" Mont. Code Ann. §27-1-703(6)(c)(emphasis added). This clause explicitly allows Petitioner to refer to Grace's negligence, because the United States Bankruptcy Court has established a framework for Grace to settle with all Libby asbestos claimants, including Respondents. The issue of what dollar amount to which these particular claimants will settle is immaterial to the statutory analysis

under Mont. Code Ann. §27-1-703(6); the Bankruptcy Court proceedings are unequivocal that the Grace Trust is a qualified settlement fund.

Indeed, courts evaluating the exact same circumstance agree. In *MCI Sales and Serv. v. Hinton,* 329 S.W. 3d 475 (Tex. 2010), the Texas supreme court applied a statute very similar to Montana's and held that a fund created in order to compensate people injured as a result of the bankruptcy debtor's negligence was a settlement, therefore allowing the jury to consider evidence of the bankruptcy debtor's conduct in an ongoing action against other defendants. *Id.* at 505.

Accordingly, the ACC erred when it held that Petitioner may not discuss Grace's activities pursuant to Mont. Code Ann. §27-1-703(6).

II. The ACC's reading of this Court's decision in Faulconbridge was overly broad; it effectively abrogates Respondents' burden of proving that Petitioner's conduct was a substantial factor to Respondents' alleged injuries.

Where there are multiple alleged sources of a plaintiff's injuries, the plaintiff must show that a given defendant's conduct was a substantial factor in causing the injury before that defendant may be held liable. This Court has explained:

> In those cases where there are allegations that the acts of more than one person combined to produce a result . . . we acknowledge that the recommended cause-in-fact instruction would be confusing and misleading. Therefore, in those cases, we recommend continued use of the substantial factor instruction.

Busta v. Columbus Hosp. (1996), 276 Mont. 342, 371 (emphasis added).

The ACC in this case ruled:

> BNSF points to the conduct of Grace to argue BNSF did not cause the Plaintiffs' injuries. BNSF argues that the conduct of Grace is not being admitted to apportion liability to Grace, or to point to an empty chair, but instead to argue Grace was the substantial factor in causing the Plaintiffs' injuries, not BNSF. *Faulconbridge* establishes, however, that in the context of facts such as those presently before the Court, this is a distinction without a difference. Arguing that a non-party is a cause of a plaintiff's injuries is an impermissible attempt to apportion liability to that non-party.

Ex. D *Petition*, p. 3 (citing *Faulconbridge*, ¶81)(emphasis added).

This purely legal error is an overbroad and incorrect reading of *Faulconbridge*; it ignores – and abrogates entirely – the substantial factor doctrine that this Court has repeatedly recognized as valid, because it eliminates evidence of an alternate, substantial contributing factor from being introduced. The Order, and Respondents' argument, incorrectly conflate liability and causation in the jury's assessment of these cases.

It is true that in Montana, "conduct of an unnamed third party is generally not admissible to apportion liability." *Faulconbridge*, ¶ 77 (emphasis added). However, outside of Mont. Code Ann. §27-1-703(6), Petitioner would not seek to "merely diminish [the defendant's] own responsibility, for this would constitute an attempt to apportion fault to a non-party." *Faulconbridge*, ¶81 (emphasis added). Rather, Petitioner seeks to put on evidence refuting Respondents' burden of proving

Petitioner's activity was a substantial contributing factor to their injuries; Petitioner, in short, seeks to negate Respondents' proof of causation.

Here, Respondents allege that Grace's activities caused their injuries. *See* Ex. B *Petition*, p. 5, ¶ 17; Ex. G *Petition*. There can be no dispute that "there are allegations that the acts of more than one person combined to produce a result." *Busta*, 276 Mont. at 371. Thus, instructing the jury that the proper test for causation is whether Respondents' injuries would not have occurred "but-for" Petitioner's negligence is confusing and misleading. Instead, the jury must be instructed that in order to prove causation, Respondents must show that Petitioner's conduct was a substantial factor in producing Respondents' alleged injuries. *Id.*; *see also* MPI 2d 2.08 ("Negligence – Causation (Multiple Cause)")(2003).

The substantial factor analysis is a necessarily relative one; the jury must determine whether a given defendant's conduct, *vis à vis* that of another allegedly responsible party, was a substantial factor in causing the plaintiff's alleged injury. *Busta*, 276 Mont. at 371 ("In those cases <u>where there are allegations that the acts of more than one person combined to produce a result</u> . . .")(emphasis added). By precluding Petitioner from putting on evidence of Grace's activities despite Respondents' own allegations of wrongdoing on the part of <u>both</u> Grace and Petitioner, the ACC has effectively abrogated the substantial factor doctrine and absolved Respondents of the burden of proving causation in this case. To deprive a

jury's assessment of Grace's operation in Libby, Respondents' own allegations, Grace's representations Petitioner, an assessment of the mining operation and the fundamentally different asbestos content in its waste material is to suborn a legal fiction. Grace was engaged in open pit mining of raw ore, trucking the raw ore into town, and, by various avenues, causing the raw ore to contaminate the Libby community. *See, e.g.*, Ex. B *Petition*, ¶¶ 17, 20-21, 40, 45-46; **Exhibit O**, Depo. Traci Barnes 36:23-37:19 (Jul 17, 2018)(describing piles of vermiculite in people's gardens that he rode his bike through as a child, asbestos contamination in schools and in at least one of his homes, and agreeing that those exposures were "wholly unrelated" Petitioner's activities). Petitioner carried ore that was certified by the MDEQ as being clean in 1974, its properties around town revealed either no asbestos at all or levels well below the permissible exposure limits, and it voluntary engaged in cleanup efforts to get the testing results as close to zero as possible. **Exhibit P**, Third Affidavit of Roger Sullivan (Jan 4, 2019), Exs. 91, 95. Grace was the overwhelming source of asbestos emissions in Libby that could have caused Respondents' injuries. There is significant evidence refuting substantial factor causation in this case that must be allowed. Petitioner does not seek to apportion liability; it seeks to provide the jury with an accurate and complete understanding of the relevant causative factors.

III. Petitioner sufficiently pleaded its defense of superseding intervening cause.

Respondents argue that Petitioner's defense pleading was insufficient because it did not include the words "superseding intervening cause," but they provide no legal authority that such exact, talismanic language is required. *Response*, p. 9. To the contrary, in *Faulconbridge* this Court examined a defendant's pleading with language strikingly similar to that in Petitioner's answer and found it to be sufficient:

> [T]he State included as an affirmative defense in its initial answer that <u>any damages the Faulconbridge suffered 'are the result of the active and primary negligence or fault on the part of the [S]tate's co-defendants and plaintiffs[.]'</u>
>
> The pleadings put the Faulconbridges on <u>sufficient notice</u> of the State's intent to seek to establish intervening superseding cause, so that <u>no unfair surprise resulted</u>.

Faulconbridge v. State, 2006 MT 198, ¶¶ 83-84 (emphasis added); *compare* Ex. C *Petition*, pp. 5-6 (Respondents' "damages . . . may have been contributed to and/or caused, by the carelessness or negligence of persons, corporations, or entities other than Defendants.").

Respondents correctly recognize that the touchstone inquiry is whether the opposing party has had sufficient notice of the defendant's intent to pursue the superseding intervening cause defense. *Faulconbridge*, ¶¶ 83-84; *Response* p. 9 (citing *Chandler v. Madsen (1982)*, 197 Mont. 234, 241). There is no question

Respondents have been made well aware of Petitioner's causation evidence and position.

Throughout this case, Petitioner has averred that Grace's conduct was the true cause of Respondents' alleged injuries. *See, e.g.*, **Exhibit M**, Reports of Dr. John Kind re: Barnes, Braaten, and Flores, pp. 5-6, § 4.2 ("The activities of the W.R. Grace Corporation resulted in the widespread contamination of residential areas of Libby, Montana with [Libby Amphibole asbestos].")(Ex. 4-C *Petitioner's Expert Disclosures*); **Exhibit N**, Petitioner's Expert Disclosures (Oct. 26, 2018), § 6 (opinions of Dr. Sicilia). Respondents therefore cannot in good faith argue they were surprised by Petitioner's intent to establish that Grace was one of, if not the primary "person[], corporation[], or entit[y] other than Defendants" contemplated in Petitioner's answer. *See also* **Exhibit O** at 19:24-25, 21:3-24:1 (inquiring as to whether Barnes's may have been exposed due to activities on or near Grace properties or due to his father's employment with Grace).

Petitioner has not hidden its efforts to explore Grace's role in causing Respondents' injuries; any suggestion to the contrary is flatly wrong and constitutes purely legal error on the part of the ACC.

IV. The ACC reversibly erred when it found that there was no genuine issue of material fact regarding the evidence supporting Petitioner's superseding intervening cause defense.

This Court has defined a superseding intervening cause as "an unforeseeable event that occurs after the defendant's original act of negligence . . . [which] will generally serve to cut off defendant's liability." *Faulconbridge*, ¶ 81 (quoting *Whiting v. State* (1991), 248 Mont. 207, 216). The ACC erred when it concluded that, even if Petitioner adequately pled its superseding intervening cause defense, it nonetheless failed to present any evidence on which to ground the defense. Ex. D *Petition*, p. 3. In so ruling, the ACC entered its own findings that (1) Grace's conduct was foreseeable Petitioner, and (2) the conduct of the two entities was "primarily contemporaneous." *Id.* In reaching those conclusions, the ACC ignored Petitioner's evidence entirely and resolved genuine factual issues. This was reversible error. *Major*, 233 Mont. at 27-28 ("[F]acts simply are not decided when summary judgment is granted.").

A. The ACC reversibly erred when it found that Grace's conduct was "primarily contemporaneous" with Petitioner's alleged conduct.

First, in finding that Grace's and Petitioner's conduct was "primarily contemporaneous," the ACC conflated decades of alleged conduct on the part of both Grace and Petitioner, treating all such alleged conduct as one contemporaneous causative act. Even Respondents treat Grace's and Petitioner's conduct as separate and distinct acts. For instance, Respondent Tracie Barnes alleges several different

sources of asbestos exposure in different locations during different periods of time. Those allegations include individual, specific conduct on the part of Grace and Petitioner ranging in time from the 1940s to the early 2000s. Ex. B to *Complaint*, p. 3, ¶ 14, p. 17, ¶ 70.

Moreover, the evidence contradicts the ACC's conclusion that Petitioner's conduct was contemporaneous with that of Grace. A jury could conclude that Petitioner's negligence, if any, ended in 1974 and Respondent Tracie Barnes was injured by Grace's negligence occurring after that date. The Montana Department of Environmental Quality ("MDEQ") reported that as of 1974, after inspection by the Montana Department of Health and Environmental Sciences ("MHES"), Grace's "wet process" for milling the vermiculite removed any asbestos such that "it should not be a problem in the product" that was ultimately tendered Petitioner for transport. The MDEQ noted that this finding was corroborated by testing data that showed asbestos levels to be below the then-applicable worker exposure limit of 5.0 fibers per cubic centimeter. Ex. J *Petition*, p. 9, ¶ 10 (citing Ex. J. *Petition* at Ex. K, p. 6). In his application to the Grace settlement trust, Barnes claimed his exposure extended past December 5, 1980. Ex. G *Petition*, p. 4.

If the asbestos was removed from the vermiculite ore by 1974, rendering the product Petitioner shipped benign, then the jury could find that Petitioner was negligent only prior to 1974. And based upon Respondent Barnes' application to

the Grace settlement trust, the jury could find that Grace's injurious negligence occurred after 1980, from its mining operations, dumping mine waste in town, offering it for use in town facilities like the school track, or the host of other ways in which Grace impacted the Libby community in the 1980's. Ex. G *Petition*. This all would have occurred after Petitioner's supposed negligence.

This is just one example of the many evidentiary nuances the ACC summarily glossed over in finding Grace's conduct "primarily contemporaneous" with that of Petitioner. *See* Ex. D *Petition*, p. 3. It was improper to do so at the summary judgment stage. *Major*, 233 Mont. at 27-28 ("[F]acts simply are not decided when summary judgment is granted.").

B. The ACC erred when it found that Grace's conduct was foreseeable Petitioner.

The ACC also erred when it concluded that "the conduct [Petitioner] complains of on the part of the [*sic*] Grace was foreseeable to [Petitioner]." *Id.* In reaching this finding, the ACC again ignored evidence and improperly resolved genuine issues of material fact at the summary judgment stage. *Major*, 233 Mont. at 27-28 ("[F]acts simply are not decided when summary judgment is granted."). "Typically, determinations of foreseeability in the context of intervening cause involve questions of fact properly reserved for the jury." *Larchick v. Diocese of Great Falls-Billings*, 2009 MT 175, ¶48.

For instance, as discussed in the *Petition for Writ of Supervisory Control*, the ACC relied heavily upon disputed testimony that during the 1970s, Grace placed placards on Petitioner's railcars that contained a warning regarding the material's asbestos content. *Petition*, pp. 12-13. However, witnesses involved in the handling and transport of the railcars testified that no placards were placed on the railcars. *See, e.g.*, Ex. J *Petition*, p.7, ¶ 8, p. 8, ¶¶ 8-9, p. 15 (citing testimony of BNSF employee Mitchell Cuffe, *Wetsch v. BNSF*, No. DV-16-1146, Tr. 06/06/2018, 636:1-10, Ex. J *Petition* at Ex. G; deposition of former BNSF employee James Kampf, *Watson v. BNSF*, No. ADV-10-0740, 57:6-19, Ex. J *Petition* at Ex.; and deposition of former BNSF employee Robert Barker, *Watson v. BNSF*, No. ADV-10-0740, 83:6-18, 84:4-11, Ex. J *Petition* as Ex. J.; *Major*, 233 Mont. at 27-28 ("[F]acts simply are not decided when summary judgment is granted.").

In addition, Grace certified in bills of lading provided Petitioner pursuant to a duty imposed by federal law that the product it tendered Petitioner was safe. Ex. J *Petition*, p. 7, ¶¶ 6-7, p. 15 (citing bill of lading Grace provided Petitioner, dated Feb. 26, 1982 that represented the vermiculite ore was not hazardous and did not requiring placarding (Ex. J *Petition* at Ex. H); *see, e.g.*, 35 Stat. 1088, § 235 ("It shall be unlawful for any person to deliver, or cause to be delivered to any common carrier engaged in interstate or foreign commerce . . . any explosive, or other dangerous article . . . <u>without informing the agent of such carrier in writing of the true character</u>

thereof, at or before the time such delivery or carriage is made.") (emphasis added); *Union P.R. Co. v. United States*, 125 Ct. Cl. 390 (1953)("This is to certify that the above articles are properly described by name and are packed and marked and are in proper condition for transportation according to the regulations prescribed by the Interstate Commerce Commission.")(quoting compliant certification in shipper's bill of lading)(emphasis added).

Thus, it cannot then reasonably be said that despite Grace's apparent and professed compliance with federal law requiring accurate and truthful disclosure of the contents of a shipment, Petitioner somehow should have known that Grace was lying in violation of federal law.

At the very least, the issue of foreseeability is a genuine factual issue, and it is one uniquely reserved for the factfinder under Montana law. *Larchick*, ¶ 48. The ACC therefore reversibly erred when it took the issue away from the jury, ignored the evidence, and issued its own finding of fact. *Major*, 233 Mont. at 27-28 ("[F]acts simply are not decided when summary judgment is granted.").

CONCLUSION

Grace is a settled party within the meaning of Mont. Code Ann. §27-1-703(6)(a). The ACC committed purely legal error when it misapplied the statute's plain language and held that Petitioner may not discuss Grace's conduct under that statute. That conclusion was erroneous and should be reversed.

The ACC committed another purely legal error when it held that Petitioner failed to properly plead its superseding intervening cause defense, and that Petitioner had failed to produce sufficient evidence supporting the defense. That conclusion should also be reversed.

Finally, the ACC committed purely legal error when it precluded Petitioner from introducing evidence of Grace's activities to negate Respondents' contention that Petitioner's conduct was a substantial factor in causing Respondents' injuries. The ACC misread this Court's prior decisions and applied them in such an overbroad way that it effectively abrogated the substantial factor doctrine. That conclusion should also be reversed.

Respectfully submitted this 20th day of March, 2019.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this Reply Brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double spaced; and the word count calculated by Microsoft Word 2016 is 3949 words excluding the table of contents, table of authorities, certificate of service and certificate of compliance.

Respectfully submitted this 20th day of March, 2019.

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CERTIFICATE OF SERVICE

I, Kimberly Witt on behalf of Chad M. Knight, hereby certify that on this 20th day of March, 2019, I served a true and accurate copy of REPLY MEMORANDUM IN SUPPORT OF PETITION FOR WRIT OF SUPERVISORY CONTROL LREGARDING NONPARTY DEFENSES on the following:

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