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14 UNITED STATES DISTRICT COURT
15 CENTRAL DISTRICT OF CALIFORNIA

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19 KEVON GORDON, RONALD JONES,
20 RAYMOND BARNES, QUINCY
21 BROWN,

22 Plaintiffs,

23 v.

24 CITY OF MORENO VALLEY, a
25 Municipal Corporation; COUNTY
26 OF RIVERSIDE; RICK HALL,
27 CHIEF OF THE MORENO VALLEY
28 POLICE DEPARTMENT, in his
official capacity; KRISTY
UNDERWOOD, EXECUTIVE
OFFICER OF THE CALIFORNIA
BOARD OF BARBERING AND
COSMETOLOGY, in her official
capacity; STAN SNIFF, RIVERSIDE
COUNTY SHERIFF, in his official
capacity; TONY HEISTERBERG,
DENNIS LONGDYKE, LORI
MILLER, SETH HARTNETT,
ROBERT DUCKETT, MARIÓ
HERRERA, ERIC BREWER,
ANTHONY JOHNSON,
CHRISTOPHER GASTINGER,
RICHARD HUTSON, JOE BROWN,
XOCHI CARMARGÓ, ARLENE

) CASE NO. EDCV 09-688 SGL (SSx)
) NOTICE OF MOTION AND MOTION
) TO DISMISS FIRST AMENDED
) COMPLAINT; MEMORANDUM OF
) POINTS AND AUTHORITIES

) DATE: July 6, 2009
) TIME: 10:00
) ROOM: 1

1 BAUBY, and DOES 1-20, in their)
2 individual capacities,)
3 Defendants.)
4 Defendants)


5 Please take notice that on July 6, 2009, at 10:00 a.m., in courtroom 1,
6 defendants County of Riverside, Stan Sniff, and Rick Hall will move the court for
7 an order dismissing the following portions of the first amended complaint:

- 8 1. The third claim for relief.
- 9 2. The fourth claim for relief.
- 10 3. The fifth claim for relief.
- 11 4. The prayer for injunctive relief.

12 The motion shall be based on the attached memorandum of points and
13 authorities and arguments of counsel.

14 DATED: June 5, 2009

ARIAS & LOCKWOOD

16 By 
17 Christopher D. Lockwood
18 Attorneys for defendants County of
Riverside, Stan Sniff, Rick Hall

19 MEET AND CONFER COMPLIANCE

20 I sent a draft motion to dismiss the original complaint to plaintiffs' counsel
21 which included these same issues. After reviewing it, he decided to amend, and we
22 stipulated that no response was required to the original complaint.

23 After receipt of the first amended complaint I sent a meet and confer letter,
24 followed by another draft motion to dismiss. Plaintiffs' counsel declined to dismiss
25 the claims addressed in this motion.

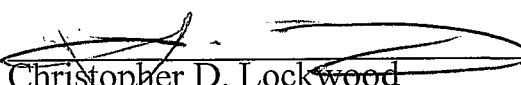
27 
28 Christopher D. Lockwood

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MEMORANDUM OF POINTS AND AUTHORITIES

I

SUMMARY OF ARGUMENT

This lawsuit is based on alleged events on a single day over a full year ago. Nevertheless, the first amended complaint contains two claims for relief which request injunctive relief asking for unspecified changes in policies. An injunction may be granted only if there is something ongoing or threatened which will cause irreparable injury absent an injunction. No ongoing conduct is alleged and there is no allegation of any likelihood of future injuries of any kind. These claims for relief and the corresponding prayer for injunctive relief should be dismissed.

The first amended complaint also contains a claim for declaratory relief. To the extent that claim seeks injunctive relief, it should be dismissed for the same reasons. The remaining portions duplicate the substantive causes of action and are completely redundant. The entire declaratory relief claim should be dismissed.

II

SUMMARY OF PLAINTIFFS' ALLEGATIONS

Plaintiffs allege that on April 2, 2008, officers of the "City of Moreno Valley Police Department,"¹ acting in conjunction with State and local inspectors, conducted "raid-style" inspections of several barbershops. (¶ 3) Plaintiffs allege that five of the six barbershops inspected on that date were owned by, and catered to, African-Americans. (¶ 4, 19)

Plaintiffs also allege that "MVPD officers" had inspected one of the barbershops in late 2007 or early 2008 and again in early 2008. (¶ 26) During the first of these inspections, officers questioned employees and customers, ran warrant

¹There is no City of Moreno Valley police department, but simply a substation of the Sheriff's Department of the County of Riverside. See paragraphs 13 and 14 of the first amended complaint.

1 checks, and searched the house of one barber with his consent. (¶ 27) During the
2 second of these inspections, officers did a cursory visual inspection, collected
3 identifications, and ran warrant checks. (¶ 28) There is no allegation that the prior
4 inspections targeted any group of barbershops.

5
6 **III**

7 **SUMMARY OF CLAIMS FOR RELIEF**

8 1. Violation of the equal protection clause of the 14th amendment based on
9 selective enforcement based on race. The only relief expressly listed in this claim is
10 damages, but the prayer includes injunctive relief which may be based in part based
11 on this claim.

12 2. Violation of the 4th amendment by unreasonable searches. Again, the only
13 relief expressly listed in this claim is damages, but the prayer includes injunctive
14 relief which may be based in part on this claim.

15 3. Violation of California Constitution, Article I, § 7, for injunctive relief
16 only.

17 4. Violation of California Constitution, Article I, § 13 for injunctive relief
18 only.

19 5. Declaratory relief, apparently based on both state and federal law.
20

21 **IV**

22 **PORTIONS OF A COMPLAINT WHICH DO NOT STATE A CLAIM FOR**
23 **RELIEF MAY BE DISMISSED**

24 F.R.Civ.P. Rule 12(b)(6).

25 ///

26 ///

27 ///

28 ///

V

**THE THIRD AND FOURTH CLAIMS FOR RELIEF AND THE PRAYER
FOR INJUNCTIVE RELIEF SHOULD BE DISMISSED**

The third and fourth claims seek injunctive relief based on California law. The prayer also seeks injunctive relief; it is not clear whether this is limited to the third and fourth claims and whether it is based only on California law or also on federal law.

There are no allegations of any ongoing conduct and no allegation that plaintiffs have any reasonable basis for believing that anything will occur in the future absent an injunction. There is no basis for injunctive relief under either federal or California law.

A. ALLEGATIONS OF THE THIRD AND FOURTH CLAIMS

In the third claim, plaintiffs allege: the actions of “defendants” violated the right to be free from unreasonable searches under Article I, § 13 of the California Constitution. (¶ 48) The use of “threats, intimidation and coercion” violated “rights guaranteed to Plaintiffs by the United States and California Constitutions.” (¶ 49)

In the fourth claim, plaintiffs allege: “Defendants” violated the equal protection provisions of Article I, § 7 of the California Constitution. (¶ 51) The use of “threats, intimidation and coercion” violated “rights guaranteed to Plaintiffs by the United States and California Constitutions.” (¶ 52)

Neither of these claims requests any type of relief. However, both are labeled as seeking injunctive relief only, and the prayer includes the following:

As to Defendants Hall and Sniff, an injunction prohibiting racial profiling and the conduct of administrative searches as described herein. (First amended complaint, 12/26/-27)

The third and fourth claims are only brought against defendants Underwood, Hall and Sniff.

1 **B. FEDERAL LAW**

2 Although these claims are based solely on state law, plaintiffs cannot bring
3 them in federal court unless they have standing to do so. Settled law holds that they
4 lack standing.

5 City of Los Angeles v. Lyons, 461 U.S. 95 (1983), is directly on point. In
6 that case the plaintiff alleged that he had been stopped by city officers and for no
7 reason whatsoever they used a chokehold on him. The district court granted an
8 injunction against the use of chokeholds and the Ninth Circuit affirmed. The
9 Supreme Court reversed and held that the claim for injunctive relief should have
10 been dismissed based on lack of standing to assert it.

11 It goes without saying that those who seek to invoke the
12 jurisdiction of the federal courts must satisfy the threshold requirement
13 imposed by Art. III of the Constitution by alleging an actual case or
14 controversy. [Citations]. Plaintiffs must demonstrate a "personal stake
15 in the outcome" in order to "assure that concrete adverseness which
16 sharpens the presentation of issues" necessary for the proper resolution
17 of constitutional questions. [Citation] Abstract injury is not enough.
18 The plaintiff must show that he "has sustained or is immediately in
19 danger of sustaining some direct injury" as the result of the challenged
20 official conduct and the injury or threat of injury must be both "real
21 and immediate," not "conjectural" or "hypothetical." [Citations]

22 . . .

23 No extension of O'Shea and Rizzo is necessary to hold that
24 respondent Lyons has failed to demonstrate a case or controversy with
25 the City that would justify the equitable relief sought. [Footnote]
26 Lyons' standing to seek the injunction requested depended on whether
27 he was likely to suffer future injury from the use of the chokeholds by
28 police officers. Count V of the complaint alleged the traffic stop and

1 choking incident five months before. That Lyons may have been
2 illegally choked by the police on October 6, 1976, while presumably
3 affording Lyons standing to claim damages against the individual
4 officers and perhaps against the City, does nothing to establish a real
5 and immediate threat that he would again be stopped for a traffic
6 violation, or for any other offense, by an officer or officers who would
7 illegally choke him into unconsciousness without any provocation or
8 resistance on his part. The additional allegation in the complaint that
9 the police in Los Angeles routinely apply chokeholds in situations
10 where they are not threatened by the use of deadly force falls far short
11 of the allegations that would be necessary to establish a case or
12 controversy between these parties.

13 In order to establish an actual controversy in this case, Lyons
14 would have had not only to allege that he would have another
15 encounter with the police but also to make the incredible assertion
16 either (1) that all police officers in Los Angeles always choke any
17 citizen with whom they happen to have an encounter, whether for the
18 purpose of arrest, issuing a citation, or for questioning, or (2) that the
19 City ordered or authorized police officers to act in such manner.
20 Although Count V alleged that the City authorized the use of the
21 control holds in situations where deadly force was not threatened, it
22 did not indicate why Lyons might be realistically threatened by police
23 officers who acted within the strictures of the City's policy. If, for
24 example, chokeholds were authorized to be used only to counter
25 resistance to an arrest by a suspect, or to thwart an effort to escape, any
26 future threat to Lyons from the City's policy or from the conduct of
27 police officers would be no more real than the possibility that he would
28 again have an encounter with the police and that either he would

1 illegally resist arrest or detention or the officers would disobey their
2 instructions and again render him unconscious without any
3 provocation. [Footnote]

4 . . .

5 Lyons fares no better if it be assumed that his pending damages
6 suit affords him Art. III standing to seek an injunction as a remedy for
7 the claim arising out of the October 1976 events. The equitable remedy
8 is unavailable absent a showing of irreparable injury, a requirement
9 that cannot be met where there is no showing of any real or immediate
10 threat that the plaintiff will be wronged again -- a "likelihood of
11 substantial and immediate irreparable injury." [Citation] The
12 speculative nature of Lyons' claim of future injury requires a finding
13 that this prerequisite of equitable relief has not been fulfilled.

14 Absent a sufficient likelihood that he will again be wronged in a
15 similar way, Lyons is no more entitled to an injunction than any other
16 citizen of Los Angeles; and a federal court may not entertain a claim
17 by any or all citizens who no more than assert that certain practices of
18 law enforcement officers are unconstitutional. [Citations] This is not
19 to suggest that such undifferentiated claims should not be taken
20 seriously by local authorities. Indeed, the interest of an alert and
21 interested citizen is an essential element of an effective and fair
22 government, whether on the local, state, or national level. [Footnote]
23 A federal court, however, is not the proper forum to press such claims
24 unless the requirements for entry and the prerequisites for injunctive
25 relief are satisfied.

26 In Hodgers-Durgin v. DeLaVina, 199 F.3d 1037 (9th Cir. en banc 1999), the
27 Ninth Circuit emphasized another element any plaintiff must meet in order to obtain
28 injunctive relief. In that case two plaintiffs, both of whom are American citizens,

1 alleged that when they were improperly stopped by Border Patrol agents. They
2 sought injunctive relief against future stops by Border Patrol agents. The court
3 assumed without deciding that standing had been shown, but found no basis for
4 injunctive relief since there was no showing of irreparable injury.

5 Nonetheless, even if we assume that plaintiffs have asserted
6 sufficient likelihood of future injury to satisfy the "case or
7 controversy" requirement of Article III standing to seek equitable
8 relief, we find that plaintiffs are not entitled to equitable relief because
9 of the second, alternative ground advanced in Lyons: "The equitable
10 remedy is unavailable absent a showing of irreparable injury, a
11 requirement that cannot be met where there is no showing of any real
12 or immediate threat that the plaintiffs will be wronged again - a
13 'likelihood of substantial and immediate irreparable injury.'" [Citation
14 and footnote]

15 The Supreme Court has repeatedly cautioned that, absent a threat
16 of immediate and irreparable harm, the federal courts should not enjoin
17 a state to conduct its business in a particular way. [Citations] In
18 O'Shea, the Court focused on considerations of federalism, explaining
19 that "the need for a proper balance between state and federal authority
20 counsels restraint in the issuance of injunctions against state officers
21 engaged in the administration of the States' criminal laws in the
22 absence of irreparable injury which is both great and immediate."
23 [Citation] Of particular concern in that case was maintaining the
24 delicate balance between "federal equitable power and State
25 administration of its own law," [citation], and determining whether the
26 relief sought "would disrupt the normal course of proceedings in the
27 state courts . . . [and] would require for its enforcement the continuous
28 supervision by the federal court over the conduct of [state officers] in

1 the course of future criminal trial proceedings[.]" [Citation] As the
2 Court explained in O'Shea, "[a] federal court should not intervene to
3 establish the basis for future intervention that would be so intrusive
4 and unworkable." [Citation]

5 . . .

6 In Lyons, O'Shea and Rizzo, the Supreme Court required the
7 plaintiffs to show a likelihood of substantial and immediate irreparable
8 injury in order to give appropriate consideration to the values of
9 federalism. It is not clear from the Supreme Court's opinions that
10 separation of powers concerns counsel against injunctive relief as
11 strongly as do federalism concerns, but it is at least clear that they are
12 relevant and significant. . . .

13 We hold that Mr. Lopez and Ms. Hodgers-Durgin have not
14 demonstrated a sufficient likelihood of injury to warrant equitable
15 relief. Mr. Lopez drives between 400 and 500 miles a week and sees
16 Border Patrol agents nearly every day. Ms. Hodgers-Durgin drives
17 between Rio Rico and Nogales at least four or five times a week and
18 sees Border Patrol agents "all over the place" whenever she travels.

19 Yet Mr. Lopez and Ms. Hodgers-Durgin were each stopped only once
20 in 10 years. Based on plaintiffs' own factual record, we believe that it
21 is not sufficiently likely that Mr. Lopez or Ms. Hodgers-Durgin will
22 again be stopped by the Border Patrol. In the absence of a likelihood of
23 injury to the named plaintiffs, there is no basis for granting injunctive
24 relief that would restructure the operations of the Border Patrol and
25 that would require ongoing judicial supervision of an agency normally,
26 and properly, overseen by the executive branch. 199 F.3d at 1042-
27 1044.

28 ///

1 **C. CALIFORNIA LAW**

2 California law also provides that an injunction cannot be issued absent an
3 ongoing problem in need of enjoining. Intel Corp. v. Hamadi, 30 Cal.4th 1342,
4 1352 (2003) (“in order to obtain injunctive relief the plaintiff must ordinarily show
5 that the defendant's wrongful acts threaten to cause *irreparable* injuries, ones that
6 cannot be adequately compensated in damages”); East Bay Municipal Utility
7 District v. California Department of Forestry & Fire, 43 Cal.App.4th 1113, 1126
8 (1996) (“An injunction properly issues only where the right to be protected is clear,
9 injury is impending and so immediately likely as only to be avoided by issuance of
10 the injunction”); Russell v. Douvan, 112 Cal.App.4th 399, 401 (2003)
11 (“Consequently, injunctive relief lies only to prevent threatened injury and has no
12 application to wrongs that have been completed. [Citation.] It should neither serve
13 as punishment for past acts, nor be exercised in the absence of any evidence
14 establishing the reasonable probability the acts will be repeated in the future. . .
15 .‘Thus, to authorize the issuance of an injunction, it must appear with reasonable
16 certainty that the wrongful acts will be continued or repeated.’ [Citation]”).

17 **D. APPLICATION OF THE LAW TO THE FIRST AMENDED**
18 **COMPLAINT**

19 Under federal law, a plaintiff lacks standing to seek injunctive relief based on
20 past events absent a basis for believing that the plaintiff will be injured in the future
21 by the same defendant as a result of similar events. Under both federal and
22 California law, an injunction may not be issued absent (1) an ongoing or reasonably
23 threatened violation of the plaintiff’s rights which (2) is likely to cause irreparable
24 injury and (3) which would be remedied by an injunction.

25 None of these basic elements are met. The last acts alleged in the complaint
26 were on April 2, 2008, more than a year ago. There is no allegation of any ongoing
27 problem. There are no allegations of any basis for believing that the plaintiffs are at
28 all likely to suffer any future injuries of any kind.

1 In short, plaintiffs lack standing to seek injunctive relief and no facts are
2 alleged to support injunctive relief. The third and fourth claims for relief, along
3 with the prayer for injunctive relief, should be dismissed.

4
5 **VI**

6 **THE FIFTH CLAIM FOR RELIEF SHOULD BE DISMISSED**

7 The fifth claim seeks declaratory relief under a vague combination of federal
8 and California law. Other than incorporation of the allegations of prior claims, the
9 entire allegations are:

10 There is a real and actual controversy between Plaintiffs and
11 Defendants regarding whether Defendants may take actions as alleged
12 herein. Plaintiffs contend that Defendants have violated the
13 Constitution and laws of the United States and California. Plaintiffs
14 anticipate that Defendants will deny these contentions. Plaintiffs fear
15 that they will again be subjected to such unlawful and unconstitutional
16 actions. They seek a judicial declaration that Defendants' conduct has
17 deprived, and continues to deprive, Plaintiffs of their rights under the
18 Constitution and laws of the United States. (§ 54)

19 The fifth claim does not specify which defendants against whom declaratory
20 relief is sought. This claim also fails under both federal and California law.

21 **A. TO THE EXTENT THIS CLAIM SEEKS INJUNCTIVE RELIEF, IT**
22 **SHOULD BE DISMISSED FOR THE SAME REASONS AS THE THIRD**
23 **AND FOURTH CLAIMS**

24 This claim seeks a declaration that "Defendants' conduct . . . continues to
25 deprive, Plaintiffs of their rights under the Constitution and laws of the United
26 States." They contend they "fear that they will again be subjected to such unlawful
27 and unconstitutional actions." This appears to be an inartful way of requesting an
28 injunction against some unspecified ongoing conduct.

1 No ongoing conduct is alleged; again, the last alleged event is April 2, 2008,
2 more than a year ago. To the extent this is a request for an injunction against future
3 conduct based on past events, that request should be dismissed for the same reasons
4 that the third and fourth claims should be dismissed. See In re Iraq and Afghanistan
5 Detainees Litigation, 479 F.Supp.2d 85, 118-119 (D.D.C. 2007) (request for
6 declaratory relief based on past conduct must meet the same showing of a likely
7 future injury as for injunctive relief). Past actions are not a basis for declaratory
8 relief absent a reason to believe there will be similar actions in the future.
9 American Dietetics Co. v. Celebrezze, 317 F.2d 658 (2nd Cir. 1963); Durovic. v.
10 Palmer, 342 F.2d 634 (7th Cir. 1965).

11 **B. CALIFORNIA LAW**

12 Code of Civil Procedure § 1060 authorizes a court to grant declaratory relief
13 concerning rights under a contract, with respect to real property or watercourses, or
14 “his or her rights with respect to another.” However, a court should not grant
15 declaratory relief “where its declaration or determination is not necessary or proper
16 at the time under all the circumstances.” Code of Civil Procedure § 1061.

17 Under California law, the law applicable to selective enforcement and to
18 search and seizure is essentially the same as federal law. Baluyut v. Superior Court,
19 12 Cal.4th 826, 831-832 (1996) (citing state and federal cases about selective
20 enforcement interchangeably); People v. Gemmell, 162 Cal.App.4th 958, 963
21 (2008) (the 4th amendment and California Constitution, article I, § 13 provide
22 similar guarantees concerning searches).

23 Under California law, a request for declaratory relief which simply overlaps
24 with a claim for damages or injunctive relief should be dismissed, because
25 resolution of the substantive claim inherently resolves the claim for declaratory
26 relief as well. Weststeyn Dairy 2. v. Eades Commodities Co., 280 F.Supp.2d 1044,
27 1090 (E.D.Cal. 2003) (“They do not show that declaratory relief would be different
28 from the rights that will be determined by decision on their substantive claims and

1 entitlement to money damages, the ultimate remedy they seek. Plaintiffs do not
2 establish what rights and duties need to be declared that will not be resolved by
3 their other claims. Defendant is entitled to summary judgment on the declaratory
4 relief claim.”); Travers v. Loudon, 254 Cal.App.3d 926 (1967) (action for
5 declaratory relief was properly dismissed when damages afforded a complete
6 remedy); Gafcon, Inc. v. Ponsor & Associates, 98 Cal.App.4th 1388, 1404 (2002)
7 (“Because declaratory relief operates prospectively only, rather than to redress past
8 wrongs, Gafcon's remedy as against Ponsor lies in pursuit of a fully matured cause
9 of action for money, if any exists at all”); Roberts v. Los Angeles Bar Association,
10 105 Cal.App.4th 604, 619 (2003) (declaratory relief is not a proper remedy when
11 only past actions are at issue); Gulf Ins. Co. v. First Bank, 2008 U.S. Dist. Lexis
12 53563, * 15-16 (E.D. Cal. 2008) (declaratory relief dismissed because it presented
13 no issues that would not be resolved by the substantive claims).

14 **C. FEDERAL LAW**

15 28 U.S.C. § 2201 limits declaratory relief to actual and present controversies.
16 Even then, a district court has discretion whether to grant declaratory relief.
17 Xoxide, Inc. v. Ford Motor Co., 448 F.Supp.2d 1188 (C.D. Cal. 2006) (“Under both
18 California and federal law, the Court is vested with discretion in determining
19 whether declaratory relief is necessary or proper given the particular circumstances
20 presented to the Court.”).

21 A claim for declaratory relief should be dismissed when it duplicates a
22 substantive claim for damages which will fully resolve the issues. Pantry, Inc. v.
23 Stop-N-Go Foods, Inc., 777 F.Supp. 713, 717-718 (S.D. Ind. 1991); Jerome-
24 Duncan, Inc. v. Auto-By-Tel, LLC, 989 F.Supp. 838, 840 (E.D.Mich. 1997); C & S
25 Management, LLC v. Superior Canopy Corp., 2008 U.S. Dist. Lexis 100800, * 30-31
26 (N.D. Inc. 2008).

27 The Seventh Amendment guarantees the right to trial by jury. When there are
28 some issues triable to the court and some to the jury, all common factual issues

1 must be tried to the jury first, and the court is then bound by the jury's
2 determination. It is a direct violation of the Seventh Amendment to reverse the
3 order of trial. Beacon Theaters, Inc. v. Westover, 359 U.S. 500 (1959); Dairy Queen,
4 Inc. v. Wood, 369 U.S. 469 (1962); Shum v. Intel Corp., 499 F.3d 1272, 1276 (Fed.
5 Cir. 2007); Lytle v. Household Mfg, Inc., 494 U.S. 545, 553 (1990).

6 The Seventh Amendment requires the substantive claims to be resolved in
7 advance of the declaratory relief claim. The resolution of the substantive claims
8 will inherently resolve the declaratory relief claim.

9

10

CONCLUSION

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12

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For all the foregoing reasons, it is respectfully submitted that the third,
fourth, and fifth claims should be dismissed, and that the prayer for injunctive relief
should be dismissed.

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DATED: June 5 2009

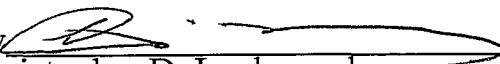
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By 
Christopher D. Lockwood
Attorneys for defendants County of
Riverside, Stan Sniff, Rick Hall

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