

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

CLUB VISTA FINANCIAL SERVICES,  
L.L.C., a Nevada Limited Liability Company;  
THARALDSON MOTELS II, INC., a North  
Dakota corporation, and GARY D. THARALDSON,

Petitioners,

Case No. 57641

vs.

THE EIGHTH JUDICIAL DISTRICT COURT,  
COUNTY OF CLARK, STATE OF NEVADA,  
AND THE HONORABLE MARK R. DENTON,  
DISTRICT JUDGE,

Respondents,

and

SCOTT FINANCIAL CORPORATION, a  
North Dakota corporation; BRADLEY J. SCOTT;  
BANK OF OKLAHOMA, N.A., a national bank;  
GEMSTONE DEVELOPMENT WEST, INC., a  
Nevada corporation; ASPHALT PRODUCTS  
CORPORATION D/B/A APCO CONSTRUCTION,  
a Nevada corporation,

Real Parties in Interest

**FILED**

**JAN 28 2011**

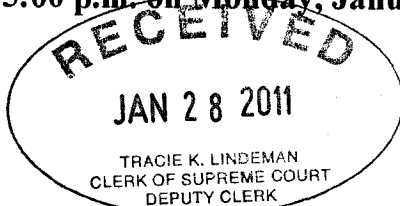
TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

**EMERGENCY MOTION UNDER NRAP 27(e) FOR STAY  
OF DISTRICT COURT'S ORDER ALLOWING DEPOSITIONS  
OF PETITIONERS' TRIAL COUNSEL**

**Action requested by Monday, January 31, 2011 at 5:00 p.m.**

Pursuant to NRAP 8 and 27(e), Petitioners hereby move for a stay of the district court's order entered on January 21, 2011, in which the district court authorized the depositions of Petitioners' trial counsel. In the alternative, Petitioners seek a stay of the action. Petitioners seek a stay pending this court's ruling on the concurrently-filed Petition for Writ of Mandamus or Prohibition.

The district court entered an order temporarily staying the order authorizing the disputed attorney depositions, but the district court's temporary stay is only in effect through 5:00 p.m. on Monday, January 31, 2011.



11-02817

1 The district court's order of January 21, 2011, allows the real parties in interest  
2 (Defendants) to take the depositions of Petitioners' trial attorneys regarding "factual issues  
3 going to the basis of Plaintiffs' case." 3 P.App. 565, lines 3-4. Petitioners contend this  
4 information is confidential, privileged and protected. If the depositions are not stayed, or if the  
5 action itself is not stayed, pending this court's review of the writ petition, Petitioners' attorneys  
6 may be required to testify as to protected information. This will cause irreparable harm, because  
7 the protected information would be irretrievable. See Schlatter v. District Court, 93 Nev. 189,  
8 193, 561 P.2d 1342, 1344 (1977).

9 This emergency motion is also based upon the following memorandum of points and  
10 authorities, and the writ petition being filed concurrently with this motion.

11 DATED: Jan. 28, 2011

12 Robert L. Eisenberg  
13 ROBERT L. EISENBERG (Bar No. 0950)  
14 Lemons, Grundy & Eisenberg  
15 6005 Plumas Street, Suite 300  
16 Reno, Nevada 89519  
17 775-786-6868  
18 Email: rle@lge.net

19 ATTORNEYS FOR PETITIONERS

20 **MEMORANDUM OF POINTS AND AUTHORITIES**

21 **I**

22 **Introduction**

23 Petitioners are the plaintiffs in a civil action involving more than \$100 million. This  
24 emergency motion seeks a stay of a district court order allowing Defendants to take the  
25 depositions of Petitioners' two lead trial attorneys. In district court proceedings, the Petitioners  
26 contended that the information Defendants are seeking from Petitioners' trial attorneys is  
27 privileged and protected. The district court disagreed, issuing an order on January 21, 2001,  
28 authorizing Defendants to take the disputed depositions.

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1 The irreparable harm from the district court's order -- if the depositions are allowed to  
2 go forward -- is obvious. Protected testimony will be irretrievable, and Petitioners will have no  
3 adequate remedy.

4 The district court granted a temporary stay through 5:00 p.m. on Monday, January  
5 31, 2011. This court's immediate consideration is therefore warranted.

6 II

7 Statement of Facts

8 **A. The underlying lawsuit**

9 This civil lawsuit arises out of a complex financial transaction involving construction of  
10 a project known as ManhattanWest, in Las Vegas. Defendants were lenders in a \$100 million  
11 participation loan, with important pre-funding conditions. 1 P.App. 116-17. If any of these  
12 conditions precedent were not met, the loan would not be funded. *Id.* Defendants had the  
13 obligation to ensure that the conditions precedent were satisfied before loan funds were  
14 advanced. *Id.*

15 Petitioners were participants and/or guarantors on the loans. *Id.* Petitioners contend that  
16 Defendants funded the loans without ensuring that the conditions precedent were satisfied. 1  
17 P.App. 1-56. In the fall of 2008, the borrower defaulted and construction was halted. 1 P.App.  
18 117. Petitioners retained the law firm of Morrill & Aronson to investigate the transaction, to  
19 provide legal advice, and to file a lawsuit if deemed appropriate. *Id.* On January 13, 2009,  
20 attorneys K. Layne Morrill and Martin A. Aronson filed a complaint in Clark County District  
21 Court, with local counsel. 1 P.App. 117. A First Amended Complaint was filed on July 1, 2009.  
22 1 P.App. 1. The lawsuit alleges, among other things, that Defendants made fraudulent and  
23 negligent misrepresentations regarding the loan transactions; that Defendants breached fiduciary  
24 duties; and that Defendants committed other torts and breaches of contract. 1 P.App. 36-56.

25 During the two years since the lawsuit was filed, the parties have been very actively  
26 engaged in discovery. In addition to traditional written discovery (NRCP 16.1 production;  
27 interrogatories; and requests for production of documents), there have been more than 50 days  
28 of depositions of more than 25 parties and non-parties in eight states; more than 1 million pages

1 of documents have been produced by the parties; and documents have been subpoenaed and  
2 received from more than 50 non-parties. 1 P.App. 118.

3 The 15-day trial is scheduled for March 8, 2011. 1 P.App. 118. The discovery cutoff was  
4 November 15, 2010. *Id.*

5 **B. Defendants' attempt to take depositions of Petitioners' trial attorneys**

6 Shortly before the discovery cutoff, defense counsel informed Petitioners' trial attorneys  
7 that he wanted to take the depositions of attorneys Morrill and Aronson, to find out the  
8 attorneys' knowledge of facts alleged in the complaint. 1 P.App. 152-53. Attorneys Morrill and  
9 Aronson are Arizona residents, but they were admitted pro hac vice in Nevada for this case; yet  
10 Defendants did not seek the depositions in Nevada or through process in the Nevada action.  
11 Instead, in mid-October of 2010, Defendants filed an action in Maricopa County, Arizona, to  
12 obtain Arizona deposition subpoenas for attorneys Morrill and Aronson. 1 P.App. 127.  
13 Defendants also served a Notice of Deposition in the Maricopa County action, for the attorney  
14 depositions to take place in Phoenix on November 11 and 12, 2010 (five days before the  
15 discovery cutoff in the Nevada action). 1 P.App. 135-36, 47-48.

16 As expressly indicated in the subpoenas that Defendants obtained from the Maricopa  
17 County court, any person served with such a subpoena has the right to file an objection in the  
18 Arizona court, pursuant to the Arizona Rules of Civil Procedure. 1 P.App. 128-29. After being  
19 served with the subpoenas, attorneys Morrill and Aronson asserted an objection by filing a  
20 motion to quash the subpoenas, or for a protective order. 1 P.App. 113. They contended that  
21 all relevant documents (more than one million pages) had already been produced in the  
22 litigation; that numerous percipient witnesses had already been deposed; and that ten expert  
23 reports had been served (five on each side), with expert depositions scheduled at that time. 1  
24 P.App. 118. Petitioners argued that defense counsel's true purpose in taking the depositions of  
25 attorneys Morrill and Aronson was to pry into what Plaintiffs' attorneys have learned about the  
26 case, and to obtain privileged information. 1 P.App. 118-19. Petitioners pointed out that  
27 attorneys Morrill and Aronson were not involved in the underlying loan transactions; that they  
28 were not percipient witnesses to any of the relevant events leading to the lawsuit; and that their

1 knowledge of facts in the case was obtained solely through their investigations and from  
2 information obtained from their clients. 1 P.App. 118-12.

3 The Maricopa County Superior Court held a hearing on November 19, 2010, at which the  
4 judge granted the motion to quash and/or for a protective order. 2 P.App. 231, 268.

### 5 **C. Further proceedings in Clark County**

6 After the Arizona court quashed the deposition subpoenas, the Special Master assigned  
7 to this case in Clark County issued a recommendation for an order compelling attorneys Morrill  
8 and Aronson to be deposed. 1 P.App. 81. Specifically, the Special Master recommended that  
9 Petitioners' attorneys may be deposed "regarding factual issues that are at issue in this lawsuit,  
10 including all factual issues referenced in the Plaintiffs' Complaint." 1 P.App. 84, lines 20-21.

11 Petitioners objected to the Special Master's recommendation (1 P.App. 58), and  
12 Defendants filed a response. 3 P.App. 334. On January 21, 2011, the district court issued an  
13 order overruling petitioners' objections and affirming the Special Master's recommendations.  
14 3 P.App. 563. The district court's order allows defense counsel to take the depositions of  
15 attorneys Morrill and Aronson, and the order allows the depositions to delve into "factual issues  
16 going to the basis of Plaintiffs' case." 3 P.App. 565, lines 3-4. As noted above, the district  
17 court stayed its decision until 5:00 p.m. on Monday, January 31, 2011. See attached  
18 Declarations of Martin A. Muckleroy and Terry A. Coffing.<sup>1</sup>

## 19 **III**

### 20 **Argument**

21 **A. This court should enter a stay on an emergency basis, to avoid**  
22 **irreparable harm.**

23 Pursuant to NRAP 8(a)(2), this court may stay district court proceedings, pending the  
24 outcome of a petition for an extraordinary writ, if the moving party shows that the district court

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25  
26 <sup>1</sup> As of this time, the district court has not entered a written order regarding the  
27 temporary stay, and a minute order has apparently not been prepared yet. Nonetheless, the  
28 declarations of Mr. Muckleroy and Mr. Coffing are based on their personal knowledge of the  
judge's ruling at the hearing on January 24, 2011.

1 denied a motion for a stay or failed to afford the relief requested. In the present case, Petitioners  
2 requested the district court to stay the depositions pending the outcome of a petition for an  
3 extraordinary writ in this court. Although the district court granted a temporary stay, the district  
4 court did not grant the full relief requested. Instead, the district court granted a stay only until  
5 5:00 p.m. on Monday, January 31, 2011. The district court did not state its reasons for granting  
6 only a temporary stay.

7 To obtain emergency relief in this court, a moving party must certify that such relief is  
8 needed to avoid irreparable harm. NRAP 27(e)(1). Petitioners request this court to issue an  
9 immediate stay of the district court's order allowing defense counsel to take the depositions of  
10 Petitioners' trial attorneys. If Petitioners' trial attorneys are required to testify regarding the  
11 facts and evidence on which they relied in drafting the allegations of their 56-page complaint  
12 (1 P.App. 1-56), thereby revealing their thought processes and their behind-the-scenes activities,  
13 their testimony cannot be retrieved. The harm will be irrevocable even if this court ultimately  
14 grants the petition and issues a writ. See Schlatter, 93 Nev. at 193, 561, P.2d at 1344  
15 (confidential medical information cannot be retrieved once it is disclosed); *Wardleigh v. District*  
16 *Court*, 111 Nev. 345, 350-51, 891 P.2d 1180, 1183-84 (1995) (deposition of former attorney for  
17 plaintiffs could result in irretrievable disclosure of privileged information).

18 Accordingly, Petitioners have satisfied the "irreparable harm" requirement of NRAP  
19 27(e)(1), thereby justifying relief on an emergency basis.

20 **B. Petitioners are entitled to a stay pursuant to NRAP 8(c)**

21 Pursuant to NRAP 8(c), this court will consider the following factors in deciding whether  
22 to issue a stay pending a writ petition: (1) whether the object of the writ petition will be  
23 defeated if the stay is denied; (2) whether the petitioner will suffer irreparable or serious injury  
24 if the stay is denied; (3) whether the real party in interest will suffer irreparable or serious injury  
25 if the stay is granted; and (4) whether the petitioner is likely to prevail on the merits in the writ  
26 petition.

1                   **1. The object of the writ petition will be defeated if the stay is**  
2                   **denied and the depositions go forward.**

3                   Until this court decides whether to consider the writ petition, the district court's order  
4 should be stayed, and the depositions of attorneys Morrill and Aronson should be stayed. If the  
5 depositions go forward, the entire object of the writ petition -- which is to seek relief from the  
6 district court's order and to prevent the improper depositions of Petitioners' attorneys -- will be  
7 defeated. This is beyond debate.

8                   **2. Petitioners will suffer irreparable harm if a stay is denied.**

9                   Without a stay, Petitioners' trial attorneys will be required to submit to depositions.  
10 Defense counsel will be allowed to inquire as to the thought process of attorneys Morrill and  
11 Aronson in drafting the complaint. Specifically, defense counsel will be allowed to inquire as  
12 to the evidence and facts on which attorneys Morrill and Aronson relied in formulating the  
13 allegations of their complaint. Defense counsel will also presumably be allowed to inquire as  
14 to the nature and scope of the pre-complaint investigation performed by Petitioners' attorneys;  
15 the extent to which the attorneys accepted or rejected various evidence; the weight to which the  
16 attorneys gave various evidence; the sources from which the attorneys gathered their evidence;  
17 and other similarly intrusive areas of inquiry. If Petitioners' trial attorneys are required to  
18 answer such questions, Petitioners will be irreparably harmed because the information will be  
19 disclosed, and the information cannot be retrieved.

20                   **3. Defendants will suffer little or no harm if a stay is granted.**

21                   Defendants will not suffer any significant harm if the district court's order is stayed.  
22 Defendants have already taken dozens of depositions, and the parties have produced more than  
23 one million documents in discovery. Additionally, Defendants have engaged in traditional  
24 discovery, including the propounding of numerous contention interrogatories. These  
25 interrogatories requested Petitioners to identify all material facts concerning the allegations of  
26 the complaint. 2 P.App. 275-310. Through NRCP 16.1 disclosures and other productions of  
27 documents in discovery, Petitioners have provided Defendants with every document known to  
28 be relevant to the claims and defenses in this lawsuit; and Petitioners have disclosed the name

1 of every witness to the underlying events involving the loan/guarantee disputes at issue in this  
2 lawsuit. Defendants will suffer no harm if this court stays the depositions of Petitioners'  
3 attorneys pending the outcome of this writ proceeding.

4 **4. Petitioners are likely to prevail on the merits of the writ petition.**

5 As discussed in great detail in the writ petition, courts rarely grant permission for one  
6 party to take the deposition of the opposing party's attorney. There are strong public policy  
7 reasons for the reluctance of courts to grant such discovery, as also discussed in further detail  
8 in the writ petition. In the only Nevada case dealing with a similar issue, this court issued a writ  
9 precluding the attorney deposition. See Wardleigh, supra.

10 In the present case, the writ petition will establish that Defendants have already obtained  
11 all discoverable information and evidence in this lawsuit. Defense counsel seeks the depositions  
12 of Petitioners' trial attorneys solely to harass Petitioners, to obtain information regarding  
13 Petitioners' attorneys' thought processes, to interfere with trial preparation for a March 8, 2011  
14 trial date, and perhaps to obtain a basis for disqualification of Petitioners' attorneys at trial.

15 Defendants have made no showing to justify the extremely unusual and intrusive  
16 discovery they are requesting. For the reasons set forth in the petition, there is a high likelihood  
17 that the petition will be granted and Defendants will not be allowed to take the depositions of  
18 Petitioners' attorneys.

19 **IV**

20 **Conclusion**

21 For the foregoing reasons, Petitioners request the court to stay the district court's order  
22 of January 21, 2011, which allows defense counsel to take the depositions of Petitioners'

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1 attorneys. Or in the alternative, Petitioners seek a stay of the district court action pending this  
2 court's decision on the writ petition.

3 DATED: Jan. 24, 2011

4 Robert L. Eisenberg  
5 ROBERT L. EISENBERG (Bar No. 0950)  
6 Lemons, Grundy & Eisenberg  
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3 **CERTIFICATE PURSUANT TO NRAP 27(e)**

4 I, ROBERT L. EISENBERG, declare as follows:

5 1. I am a partner in Lemons, Grundy & Eisenberg, counsel for Petitioners in the writ  
6 petition which is the subject of the emergency motion to which this certificate is attached.

7 2. The telephone numbers and office addresses of the attorneys for the parties are as  
8 follows:

9 K. Layne Morrill  
10 Martin A. Aronson  
11 John T. Mossier  
12 MORRILL & ARONSON, P.L.C.  
13 One East Camelback Road, Suite 340  
14 Phoenix, AZ 85012  
15 602-650-4121  
16 Attorneys for Petitioners

17 Martin Muckleroy  
18 COOKSEY, TOOLEN, GAGE, DUFFY & WOOG  
19 3930 Howard Hughes Parkway, Suite 200  
20 Las Vegas, Nevada 89169  
21 702-949-3100  
22 Attorneys for Petitioners

23 J. Randall Jones  
24 Mark M. Jones  
25 Matthew S. Carter  
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4 Attorneys for APCO

5 P. Kyle Smith  
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6 10161 Park Run Drive  
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7 702-385-6000  
Attorneys for Gemstone Development West, Inc.

8  
9 3. Emergency relief is needed because the district court refused to grant a full stay  
10 pending resolution of the writ petition. Instead, the district court only granted a temporary stay.  
11 The temporary stay will expire at 5:00 p.m. on Monday, January 31, 2011.

12 4. At a district court hearing, in which Petitioners requested the stay pending the  
13 outcome of a writ petition, Defendants and the district judge were informed that Petitioners  
14 would be filing the writ petition. Additionally, I have been informed by local counsel in Las  
15 Vegas that the district judge and all parties will be served with copies of the emergency motion  
16 by hand delivery today.

17 DATED: Jan-28, 2011

18   
19 ROBERT L. EISENBERG (Bar No. 0950)  
20 Lemons, Grundy & Eisenberg  
21 6005 Plumas Street, Suite 300  
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**Marquis Aurbach Coffing**

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**Morrill & Aronson, P.L.C.**

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*Attorneys for Plaintiffs*

**DISTRICT COURT****CLARK COUNTY, NEVADA**

CLUB VISTA FINANCIAL SERVICES, L.L.C.,  
a Nevada limited liability company,  
THARALDSON MOTELS II, INC., a North  
Dakota corporation; and GARY D.  
THARALDSON,

Plaintiffs,

vs.

SCOTT FINANCIAL CORPORATION, A  
North Dakota corporation; BRADLEY J.  
SCOTT; BANK OF OKLAHOMA, N.A., a  
national bank; GEMSTONE DEVELOPMENT

Case No.: A-09-579963-C  
Dept. No.: XIII  
(Consolidated with A608563; A609288)

**DECLARATION OF  
TERRY A. COFFING, ESQ.**

1 WEST, INC., a Nevada corporation; ASPHALT  
2 PRODUCTS CORPORATION, dba APCO  
3 CONSTRUCTION, a Nevada Corporation; DOE  
4 INDIVIDUALS 1-100, ROE BUSINESS  
5 ENTITIES 1-100,

6 Defendants.

7 **DECLARATION OF TERRY A. COFFING, ESQ.**

8 STATE OF NEVADA )  
9 ) ss.  
10 COUNTY OF CLARK )

11 Terry A. Coffing, Esq. as counsel for Plaintiffs Club Vista Financial Services, L.L.C.,  
12 Tharaldson Motels II, Inc. and Gary D. Tharaldson in Case Number A-09-579963-C filed in the  
13 Eighth Judicial District Court, in the County of Clark, State of Nevada, hereby submits this  
14 Declaration affirming as follows:

15 1. I am duly licensed to practice law in the State of Nevada. I am the President and  
16 Managing Partner of the law firm of Marquis Aurbach Coffing. I have personal knowledge of  
17 the facts stated herein, except for those stated upon information and belief and, as to those, I  
18 believe them to be true. I am competent to testify as to the facts stated herein in a court of law.

19 2. That in open court on January 24, 2011, I submitted an oral motion to the Court  
20 asking for a stay of the Decision and Order entered on January 21, 2011 on Special Master's  
21 Recommendation Compelling the Deposition of Attorneys K. Layne Morrill and Martin A.  
22 Aronson to Testify as to the Allegations in Plaintiffs' Complaint and Morrill and Aronson's  
23 objections thereto.

24 3. The Court took the oral motion under advisement and thereafter granted a stay of  
25 the Decision and Order and the depositions of Attorneys K. Layne Morrill and Martin A.  
26 Aronson until 5:00 p.m. on January 31, 2011.

27 4. That I have executed a proposed order to this effect, same having been submitted  
28 to, reviewed, and approved by counsel for defendants, and have submitted the same to the

1 Honorable Mark R. Denton for his signature.

2 5. I declare under the penalty of perjury under the laws of the State of Nevada (NRS  
3 53.045), the foregoing is true and correct.

4 Dated this 27<sup>th</sup> day of January, 2011.

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8 TERRY A. COFFING, ESQ.  
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DECLARATION OF MARTIN A. MUCKLERROY

Martin Muckleroy, under penalties of perjury hereby declares:

1. I am one of the attorneys of record for Plaintiffs in *Club Vista Financial Services, LLC, et al. v. Scott Financial Corporation, et al.*, Clark County Eighth District Court, Cause No. A579963.

2. I was present in open Court on January 24, 2010 and make this declaration of my own personal knowledge.

3. At the request of Terry Coffing, co-counsel for Plaintiffs, Judge Denton, from the bench, granted a temporary stay of the Decision and Order dated January 21, 2011 and electronically filed on 01/21/2011 at 04:06:26 p.m.

4. The temporary stay granted by Judge Denton expires at 5:00 p.m. on Monday, January 31, 2010.

Dated this 21<sup>st</sup> day of January, 2011.

  
Martin A. Muckleroy

1 CERTIFICATE OF SERVICE

2 Pursuant to NRAP 25, I certify that I am an employee of COOKSEY, TOOLEN, GAGE  
3 DUFFEY, W & G and that on this 28 day of JANUARY, 2011, I caused to be hand delivered, a  
4 true copy of the foregoing to:

5 Honorable Mark R. Denton  
6 Department 13  
7 Eighth Judicial District Court  
8 Clark County  
9 200 Lewis Avenue  
10 Las Vegas, Nevada 89155

11 Martin Muckleroy  
12 COOKSEY, TOOLEN, GAGE, DUFFY & WOOG  
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16 Mark M. Jones  
17 Matthew S. Carter  
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23 Ann Marie McLoughlin  
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P. Kyle Smith  
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and sent via U.S. Mail to:

K. Layne Morrill  
Martin A. Aronson  
John T. Mossier  
MORRILL & ARONSON, P.L.C.  
One East Camelback Road, Suite 340  
Phoenix, AZ 85012



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