

Court of King's Bench of Alberta

**Citation: Royal Bank of Canada v Faissal Mouhamad Professional Corporation,
2024 ABKB 460**

Date: 20240729
Docket: 2203 12557
Registry: Edmonton

Between:

Royal Bank of Canada

Plaintiff

- and -

**Faissal Mouhamad Professional Corporation, McIvor Developments Ltd., 985842 Alberta
Ltd., 52 Dental Corporation, Delta Dental Corp, 52 Wellness Centre Inc, Paradise McIvor
Developments Ltd., Michael Dave Management Ltd., Faissal Mouhamad and Fetoun
Ahmad also known as Fetoun Ahmed**

Defendants

**Reasons for Decision
of the
Honourable Justice James T. Neilson**

[1] Pursuant to two receivership Orders, MNP Ltd. is the Court appointed Receiver and manager over the undertakings, real and personal property, and assets of Faissal Mouhamad Professional Corporation (“FMPC”), 52 Dental Corporation (“52 Dental”), Delta Dental Corp (“Delta Corp”), 52 Wellness Centre Inc (“52 Wellness”), Michael Dave Management Ltd. (“MDML”), and 985842 Alberta LTD. (“985”), and together with FMPC, 52 Dental, Delta Corp, 52 Wellness, and MDML (the “Companies”).

[2] The Receiver was appointed on September 16, 2022 by Justice Mah, relying on RBC's evidence which set out "numerous and significant payments from FMPC and 985 to Faissal Mouhamad, Fetoun Ahmad, related companies not obligated to RBC by way of guarantee, and creditors of other related entities".

[3] The effect of the transfer of property to related parties not obligated to RBC rendered FMPC insolvent, stripped it of almost all of its assets, purported to place collateral secured to RBC out of reach, and, but for section 51 of the *Personal Property Security Act*, RSA 2000, c.P-7 (the "PPSA"), would render RBC an unsecured creditor.

[4] All of the assets in this receivership having any commercial value have been liquidated. Net sale proceeds generated from the sale of real property owned by the Companies have been paid to those creditors having registered mortgages over such property. The net sale proceeds from the sale of two dental clinics are being held in trust by the Receiver.

[5] The Receiver applied for and was granted a Claims Procedure Order on February 14, 2023, authorizing the Receiver to administer a claims process for creditors claiming an interest in the personal property of the Companies.

[6] As the Receiver was unable to conclusively determine the validity, and enforceability and priority of some of the secured claims submitted in this claims process, the Receiver has brought an application to this Court for advice and direction. Specifically in this application, the Court is called upon to determine the priority as between RBC and Patterson Dental Canada Inc. ("Patterson") to the proceeds from the sale of personal property described as "the Leased Equipment". Justice Mah had decided to approve the asset sale but ordered that an amount of \$417,000.00 be held back from the sale proceeds in the stead of the Leased Equipment, to guarantee any claim or encumbrance attaching to it that could be asserted by Patterson.

[7] On June 13, 2023, Justice Little ordered interested parties to submit materials on the matters to be determined as part of the Receiver's application for advice and direction. Specifically, before this Court, advice and direction is sought as between RBC and Patterson for a declaration of entitlement to their competing priority claims.

[8] In this application, the Court is not considering the larger claims being asserted by RBC with respect to unauthorized transfer of assets by FMPC and 985.

The Receiver's application for advice and direction with respect to the disputed Patterson claim

[9] By way of background, FMPC and 985 each granted security to RBC, including general security agreements securing to RBC all of their present and after acquired personal property. The GSA's were perfected by registration at the Alberta Personal Property Registry ("APPR") on August 22, 2016.

[10] The collateral secured by the GSA's is all encompassing, and includes, without limitation, all present and future inventory, accounts receivable, money, equipment, intangibles and goodwill in which FMPC and 985 have an interest. FMPC and 985 covenanted and agreed with RBC not to sell, transfer, convey, lease, or otherwise dispose of any of their properties or assets other than in the ordinary course of business and on commercially reasonable terms, or with the prior written consent of RBC. RBC extended credit to FMPC for the purpose of providing financing to operate the business, including providing a revolving credit facility to be used by FMPC to meet its day-to-day operating expenses.

[11] Again, RBC through the Receiver pursued recovery resulting from the unauthorized transfer of the business, property, and unauthorized use of the FMPC operating line of credit.

[12] On January 11, 2023, the Receiver applied before Justice Mah requesting approval by the Court of an asset sale and vesting Order encompassing equipment that had been sold by Patterson to Dr. Faissal Mouhamad in his personal capacity (the “Equipment”).

[13] Patterson challenged the Receiver’s application on the ground that the Equipment was always legally owned by Dr. Mouhamad personally and that the receivership order made by this Court on September 16, 2022 did not extend to Dr. Mouhamad’s personal assets. Therefore, Patterson asserted that the Equipment never formed part of the receivership’s assets and the Receiver had no right to sell the Equipment or distribute proceeds from its sale to the creditors of 52 Dental, Delta Dental Corporation and FMPC.

[14] However, part of the Equipment had been subject to a lease agreement between Dr. Mouhamad and 52 Dental entered into on May 4, 2022, the “Master Lease Agreement.” The resulting issue is whether Dr. Mouhamad would still be the legal and beneficial owner of the Leased Equipment following the conclusion of the Master Lease Agreement. The ultimate legal question before the Court is whether the Master Lease Agreement was intended to convey equity or a proprietary interest in the Leased Equipment, in other words, whether the Master Lease Agreement constitutes a true lease or a financing lease.

[15] Patterson sold the Equipment to Dr. Mouhamad, in his personal capacity by two sale and security Agreements (collectively the “Agreements”) described as follows:

- (a) The sale and security agreement numbered 731575 effective as of April 28, 2022 (the “731575 Agreement”);
- (b) The sale and security agreement 732002 effective as of May 3, 2022 (the “732002 Agreement”)

[16] The Agreements created security interests attaching to the Equipment sold under each of them until payment in full by Dr. Mouhamad of the balance of the purchase price provided in the Agreements for such Equipment, as well as interest.

[17] An initial payment was made toward the Equipment by applying credits that had been accrued with Patterson as part of one of its customer loyalty programs. These credits amounted to \$51,823.59. RBC takes the position that these credits were in fact the personal property of FMPC and not Dr. Mouhamad personally, and therefore constituted a fraudulent conveyance or preference. Otherwise, no funds have been paid by Dr. Mouhamad to Patterson pursuant to the Agreements in respect of the Equipment.

[18] In the affidavit of Claude Roberge filed in this action by RBC and affirmed on April 6, 2023, the deponent affirmed in paragraph 13 as follows: “

Dr. Mouhamad made an initial payment toward the Equipment by applying credits he had accrued with Patterson as part of one of its loyalty programs. This was the sole payment made to Patterson in relation to the Equipment such that any difference between the purchase price of the Equipment and the amount owing to Patterson with respect to the Equipment as of the date of the present affidavit is attributable to Dr. Mouhamad’s use of his credits under Pattersons loyalty program.

[19] However, in response to a request by the Receiver for further information from Patterson regarding the credits used as a down payment for the Equipment, the credits accumulated to the Patterson Advantage Account in the amount of \$51,823.59, matched the down payment paid for the Equipment referenced in the 731575 Agreement. The Patterson Rewards Agreement dated August 15, 2019 is in the name of FMPC, predating the opening of the 52 Dental clinic in Calgary by almost three years.

[20] I find that the Advantage Credits were earned through purchases by FMPC. The credits amounted to \$51,823.59 and were not earned through any prior purchases from Patterson by Dr. Mouhamad

[21] On May 4, 2022, Dr. Mouhamad entered into the Master Lease Agreement with 52 Dental. By this agreement, Dr. Mouhamad leased the Leased Equipment, the Equipment subject to 731575 Agreement, to 52 Dental.

[22] The Equipment subject to the 731575 Agreement was delivered on April 28, 2022 and was perfected pursuant to the provisions of the *PPSA* on May 9, 2022. The Equipment subject to the 732002 Agreement was delivered to Dr. Mouhamad on May 3, 2022 and was perfected pursuant to the provisions of the *PPSA* on May 9, 2022, thereby creating a purchase-money security interest with respect to the 732002 Agreement pursuant to section 22(1)(a)(i) of the *Act*.

[23] Once RBC was able to determine the quantum of payments made to Delta Corp., Dr. Mouhamad and Ms. Fetoun were made from FMPC, and in light of the eroding revenues without explanation for where they went or if they were still being paid to FMPC, RBC amended its registration at the Alberta PPR respecting FMPC out of an abundance of caution as follows:

- (a) July 21, 2022: RBC added Dental Corp. and 52 Dental as additional debtors;
- (b) August 17, 2022: RBC added Fetoun Ahmad and Dr. Mouhamad as additional debtors.

[24] Patterson further perfected its security interest in the Equipment subject to the 731575 Agreement, preventively as against 52 Dental on January 4, 2023 when it came to learn of the existence of the Master Lease Agreement, pursuant to section 22(1)(a)(ii) of the *Act*.

[25] Patterson also further perfected its security interest in the Equipment subject to the 732002 Agreement as against 52 Dental on January 10, 2023 when it was notified by the Receiver that such Equipment was present and being used by 52 Dental. Patterson had previously been informed by the receiver that this Equipment was not in 52 Dental's possession.

Issues

[26] The following issues are before this Court:

- A. Does the interest of RBC or the interest of Patterson in the Leased Equipment rank prior to all other creditors?
- B. Does the Master Lease Agreement constitute a true lease or a financing lease?
- C. Were the Advantage Credits the personal property of FMPC and conveyed to Dr. Mouhamad without consideration to FMPC?

A. Does the interest of RBC or the interest of Patterson in the Leased Equipment rank prior to all other creditors?

[27] Patterson perfected its security interest in the Equipment subject to the 731575 Agreement on May 9, 2022, and subject to the 732002 Agreement on May 9, 2022 by registration under the Personal Property Registry.

[28] However, RBC asserts that it ranks in priority to Patterson given that FMPC and 985 had each granted security to RBC, including general security agreements securing to RBC all of their present and after acquired property, the security interests having been perfected by registration on August 22, 2016. RBC concedes that Patterson has a valid PMSI in the equipment subject to the 732002 Agreement, being registered within 15 days of the agreement. However, RBC submits that Patterson's interest in the equipment of Dr. Mouhamad and 52 Dental was registered on July 5, 2022, after 15 days of the date of the agreement, and that RBC has priority over the equipment pursuant to its registered interest in all present and after acquired personal property of FMPC and then 52 Dental, registered on August 22, 2016.

[29] RBC submits, however, that there had been an unauthorized transfer of collateral by the debtor, invoking section 51 of the *PPSA*. RBC submits that sections 51(2) and (3) of *PPSA* are intended to preserve the rights, remedies, and priority of a secured creditor where a debtor has transferred secured property out of the ordinary course of business and without the creditor's consent, or where the debtor has changed their name. Upon having knowledge that secured property has been transferred by the debtor, or their name has changed, the secured party has 15 days to submit a financing change statement, registering the transferee or new name as the debtor to the Alberta Personal Property Registry in order to maintain its priority against subsequent security interests. If the secured party does not register within the 15-day period of gaining knowledge of the transfer or name change, their security interests will be subordinated, *inter alia* to other perfected security interests registered after the 15-day period. Section 51 is a priority rule and not a perfection rule.

[30] RBC submits that it added Dental Corp., 52 Dental, Fetoun Ahmad and Dr. Mouhamad as additional debtors under its security within 15 days of discovering large unauthorized transfers out of FMPC, and before Patterson perfected its security interest as against 52 Dental. RBC submits, therefore, that its secured interest is given priority to Patterson's security interests by operation of section 51 of the *PPSA*.

[31] Section 51 of the *PPSA* provides as follows:

Transfer of debtors' interests in collateral or change of debtors' names

...

(2) Where a security interest is perfected by registration and the secured party has knowledge of

(a) information required to register a financing change statement disclosing the transferee as the new debtor, where all or part of the debtor's interest in the collateral has been transferred, or

(b) the new name of the debtor, where there has been a change in the debtor's name,

the security interest in the transferred collateral, where clause (a) applies, and in the collateral, where clause (b) applies, is subordinate to the interests referred to in subsection (3).

(3) Where subsection (2) applies, the security interest in the transferred collateral, where subsection (2)(a) applies, and in the collateral, where subsection (2)(b) applies, is subordinate to

(a) an interest, other than a security interest in the collateral, arising in the period from the expiry of the 15th day after the secured party first has knowledge of the information referred to in subsection (2)(a) or of the new name of the debtor, as the case may be, to, but not including, the day the secured party amends the registration to disclose the transferee of the collateral as the new debtor, or to disclose the new name of the debtor, as the case may be, or takes possession of the collateral,

(b) a perfected security interest in the collateral registered or perfected in the period referred to in clause (a), or

(c) a perfected security interest in the collateral registered or perfected after the secured party first has knowledge of the information referred to in subsection (2)(a) or of the new name of the debtor, as the case may be, and before the expiry of the 15th day referred to in clause (a), if, before the expiry of the 15 days,

(i) the registration of the security interest first mentioned in subsection (2) is not amended to disclose the transferee of the collateral as the new debtor or disclose the new name of the debtor, as the case may be, or

(ii) the secured party does not take possession of the collateral.

[32] However, on the facts of this case I find that section 51 of the *PPSA* does not apply given that the purchaser from Patterson pursuant to the Agreements was Dr. Mouhamad who was not, at that time, a “debtor” under RBC’s registered security. The Equipment was not collateral under RBC’s security. Dr. Mouhamad was and remained the debtor of Patterson. Furthermore, the Leased Equipment was therefore not “after acquired property” of any of the debtors at the time of the sales by Patterson to Dr. Mouhamad, as perfected as a security interest by registration on May 9, 2022. Section 51, therefore, does not apply to grant priority to RBC to the secured interest of Patterson to the Leased Equipment sold to Dr. Mouhamad. Rather, Patterson’s

perfected security interest under the 731575 Agreement and 732002 Agreement has priority over any security interest subsequently perfected by RBC as against Dr. Mouhamad.

[33] The issue, then, is whether the Master Lease Agreement between Dr. Mouhamad and 52 Dental is a true lease or a financing lease. If the former, then the Leased Equipment remains the property of the lessor, Dr. Mouhamad, and does not form part of the receivership proceedings against the debtors of RBC. If the latter, then RBC submits that the Leased Equipment, under a financing lease, constitutes the property of 52 Dental and is subject to the registration of the secured interests of RBC as against 52 Dental and Dr. Mouhamad on July 22, 2022 and August 17, 2022 respectively. These predate the registration by Patterson of any interest it has 52 Dental, on January 4, 2023 and January 10, 2023 respectively.

B. Is the Master Lease Agreement constituting a true lease or a financing lease?

i. The provisions of the Master Lease Agreement

[34] Master Lease Agreement #0405202252 Dental is between 52 Dental Corporation as lessee and Faissal Mouhamad as lessor. The contract start date was 04.05.2022, and the contract end date is 03.05.2029. The Equipment address is #100, 3505 52 St, Calgary.

[35] The lease requires 84 payments, with a monthly payment of \$8338.78 plus GST, the first payment becoming due on November 4, 2022. The equipment being leased is itemized in the appended equipment schedule, being the Equipment that Dr. Mouhamad had purchased from Patterson.

[36] The lease provides that the lessee will pay rent as described, and will pay provincial sales tax, goods and services tax and /or harmonized sales tax and other taxes applicable to the equipment and the lease agreement. The lease does not refer to any required security deposit.

[37] The lease provides that the lessee is leasing the equipment “as is” and the lessor does not make any warranty or representation whatsoever with respect to equipment.

[38] The lessee certifies that the equipment will be used solely for lawful business purposes. The equipment will remain personal property and will not be affixed or attached to any lands or buildings without the lessor’s prior written consent. Any replacements, alterations or improvements to the equipment will form part of the equipment and immediately become the property of the lessor.

[39] The lease refers to a purchase option available if no unremedied default exists. The lessee will have an option to purchase the equipment. However, the lease does not specify a purchase option date or purchase option price. Rather, the purchase option price and purchase option date are to be determined by the lessor. The purchase option can be exercised by the lessee giving 60 days notice to the lessor.

[40] The lease also provides that the lessee will return the equipment to the lessor upon the termination of the lease agreement, at the lessee’s cost to a location directed by the lessor, in the same condition as it was delivered, ordinary wear and tear excepted.

ii. Applicable legal principles

[41] A true lease is a lease whereby the lessee pays for the use of the lessor’s property. It is a bailment contract: *Connacher Oil and Gas Limited (Re)*, 2017 ABQB 769 at para 14; (*Re*) *843504 Alberta Ltd.[Skyreach]*, 2011 ABQB 448 at para 54; *Royal Bank v Cow Harbour*

Construction Ltd. 2012 ABQB 59 [*Cow Harbour #2*] at para 44. A financing lease on the other hand, entails a debtor not merely using the lessor’s property, but also earning equity in the property with each payment. It is a “security agreement disguised as a lease”: *Connacher (Re)*, *supra* at para 14, (*Re*) 843504, *supra* at para 55.

[42] The Alberta Court of Queen’s Bench in *Connacher (Re)* summarizes the principles from case law to determine the nature of a lease:

[15] The principles that this Court applied in the Cow Harbour cases, and that Topolniski J applied in Skyreach, apply with equal force to the case at bar. Thus, it might be useful to provide those principles, without specific attribution to the cases from which those principles arise.

- For a court to determine whether it is dealing with a true lease or a financing lease, it must look to the substance of the arrangement between the parties rather than the form of the arrangement
- The court must examine a number of factors, some of which are contained in the document itself, some of which relate to the manner in which the parties effected their arrangement, and some of which deal with the nature of the parties themselves
- No one factor is determinative, although some might be more indicative of the nature of the lease
- The objective of a court’s analysis is to determine the parties’ intent at the time they entered into their arrangement, and the document itself may help in that determination
- Courts must show particular deference to the wording of the document where the parties are sophisticated commercial parties
- A court must interpret an agreement as at the date it was made, as the exercise is intended to discern the intention of the parties at the time the contract was formed

[43] Alberta Courts have also referred to a non-exhaustive list of 16 factors found in the British Columbia case of *Smith Brothers Contracting Ltd. (Re) (Trustee of)*, 1998 CanLII 3844 (BC SC) to determine the nature of a lease.

[44] In considering the weighing of primary and secondary factors used to determine the nature of a lease, the Alberta Courts in (*Re*) 843504 *supra* at para 62, *Connacher supra* at para 18 and *Royal Bank of Canada v. Cow Harbour Construction Ltd.*, 2012 ABQB 59 at para 55 have cited the following passage by Michael E. Burke, *Ontario Personal Property Security Act Reform: Significant Policy Changes* (2009) 48 Can Bus LJ 289 at 291-292:

Although Canadian Courts will refer to various factors as being relevant in their determination as to the characterization of a lease, they rarely indicate the relative weight given by them to each of the indicia or factors.

It is possible, however, to make the following generalizations from the case law.

First, from the universe of factors or indicia that have been mentioned in the *jurisprudence*, some factors or indicia (referred to in this paper as “primary factors”) are clearly more important than other factors or indicia (referred to in this paper as “secondary factors”), second, the presence of a primary factor in a lease will often be determinative of the characterization of the agreement. Third, secondary factors generally have a corroborative value and are not in and of themselves determinative of the characterization. Accordingly, the presence of a number of secondary factors that are indicative of a characterization that is contrary to the characterization indicated by the primary factor will not be sufficient to overturn the weighting given by a court to the primary factor. Fourth, in those situations, where the primary factor is ambiguous or absent then the relative weighting given by a court to the secondary factors will be relevant in determining the characterization of the lease in question.

[45] In *(Re) 843504 Alberta Ltd*, the Court summarized the following as “primary factors” cited by Mr. Burke at paragraph 63:

[43] The author identifies (at pp 292-294) the following as “primary factors:”

- (a) Relevance of the purchase option price - whether the purchase option price is nominal or reflective of fair market value.
- (b) Mandatory purchase options - whether there is a mandatory purchase option that obligates the lessee to purchase the equipment at the end of the term.
- (c) Open-end leases/guaranteed residual clauses - whether the lessee is liable for any deficiency in the sale of the equipment at the end of the term.
- (d) Sale-leaseback transactions- whether the transaction is structured as a sale and leaseback.

[46] Furthermore, the Court in *(Re) 843504 Alberta Ltd, supra*, summarized the “secondary factors” enumerated by Mr. Burke at paragraph 65:

[45] The following are the “secondary factors” described by M.E. Burke in “Ontario Personal Property Security Act Reform: Significant Policy Changes” at 295-298:

- (a) The ability to replace/exchange Leased Equipment is indicative of a true lease.
- (b) The lessor’s ability to accelerate payments and the residual value are generally inconsistent with a true lease. However, it is equally consistent with a true lease if the acceleration clause limits the lessor’s damages to the present value of the remaining rents,

plus the present value of the residual value at the end of the term, minus the value of net proceeds from a sale of the assets. If the acceleration clause is more narrowly crafted, it favours a security lease.

(c) A full payment lease may be indicative of either form of lease, depending on the language of the provision.

(d) A security deposit is indicative of a security lease.

(e) A substantial down payment is indicative of a security lease.

(f) Covenants relating to maintenance, insurance and risk of loss can be indicators of either type of lease. They are weak evidence of a security lease.

(g) Whether the lessor uses different forms for different types of transactions may be some evidence of intention.

[47] In determining whether the Court is dealing with a true lease or financing lease, the Court must look to the substance of the arrangement between the parties rather than the form of the arrangement: *Connacher supra* at paragraph 15. I am of the view that, in substance, the Master Lease Agreement is a true lease. It provides for the payment of rent to the lessor. The Equipment will remain personal property, not affixed or attached to any lands or buildings without the lessor's prior written consent, and any replacements, alterations, or improvements to the Equipment will form part of the Equipment and immediately become the property of the lessor. There is no specified purchase price or purchase option date, these to be determined by the lessor upon receiving notice from the lessee. The lessee will return the Equipment to the lessor on the termination of the Lease Agreement, at the lessee's cost to a location directed by the lessor, in the same condition as it was delivered.

[48] In my opinion, these are all hallmarks of a true lease, rather than a financing lease.

[49] There is no provision in the Master Lease Agreement conveying equity to the lessee in the Leased Equipment. The lease does not provide for a security deposit, which could be indicative of a security lease. Nor does the lease require a substantial down payment, indicative of a security lease. These are covenants requiring the lessee to pay maintenance, insurance and risk of loss which would be weak evidence of a security lease, but these also can apply to a true lease. Upon default, the balance of the rental payments are accelerated but I am of the view that this is consistent with a true lease. Over the course of the term of the lease, the aggregate rental greatly exceeds the purchase price payable by the lessor to Patterson.

[50] In conclusion, I find that the Master Lease Agreement is a true lease. Furthermore, Dr. Mouhamad at all times, since the formation of the last Master Lease Agreement, has retained title as well as legal and beneficial ownership of the Leased Equipment. Therefore, the Leased Equipment does not form part of the Receivership and the proceeds from their sale must be distributed to the secured creditors of Dr. Mouhamad in his personal capacity, subject to the treatment of the Advantage Credits dealt with below.

[51] Pursuant to the provisions of the *Act*, Patterson's security interests arising out of each of the Agreements rank prior to the security interests of all other creditors, including but not limited to Royal Bank of Canada, as against Dr. Faissal Mouhamad in his personal capacity. Whereas

Patterson perfected its security interests against Dr. Mouhamad through registration respectively, on July 5, 2022 and May 4, 2022 (the later interest furthermore constituting a purchase money security interest) Royal Bank registered its interest against Dr. Mouhamad on August 17, 2022.

C. Were the Advantage Credits the personal property of FMPC and conveyed to Dr. Mouhamad without consideration to FMPC?

[52] I find that the Advantage Credits attributed to the Equipment sale by Patterson to Dr. Mouhamad were the personal property of FMPC, having been accumulated pursuant to Patterson's Advantage Agreement as the result of previous purchases by FMPC. There is no evidence of any consideration conveyed by Dr. Mouhamad to FMPC to purchase or assign those credits to his own use. The credits ought to have been made available to the creditors of FMPC, including RBC. Accordingly, I direct that, from the proceeds of the sale currently held in trust, namely \$417,000, the sum of \$51,823.59 be paid to the order of RBC as the secured creditor of FMPC. The balance of the sale proceeds, namely \$365,176.41, to be paid to the order of Patterson.

[53] As Patterson was substantially successful in the result, the costs of this application will be paid by the Royal Bank of Canada to Patterson Dental Canada Inc., under single column 3 of schedule C of the *Rules of Court*.

Heard on the 6th of December, 2023.

Dated at the City of Edmonton, Alberta this 29th day of July, 2024.

James T. Neilson
J.C.K.B.A.

Appearances:

Susy M. Trace
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Lindsay Amantea
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