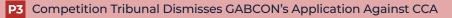
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P1 Competition Policy and Access to Health Care

P2 Consumers Complain Against Second Hand Motor Dealers







Issue No. 2 2020

COMPETITION POLICY AND ACCESS TO HEALTH CARE

The Competition and Consumer Authority of Botswana joined other competition agencies and consumer groups to commemorate World Competition Day on 5th December under the theme 'Competition Policy and Access to Health Care.' In a press statement to mark the day, the CCA said there couldn't have been a more apt theme at a time when the whole world is reeling from the devastating effects of the Covid-19 pandemic.

"The World Health Organisation (WHO) constitution envisages that the highest attainable standard of health is a fundamental right of every human being. It is conceivable that the primary goal of health care is to enable citizens to receive care services whenever needed and to deliver these services at a cost and quality that is prudent," the release said.

Universal access to health services is one of the most pressing issues that confront governments around the world, particularly in the Third World. Countries such as Botswana which have sparse populations strewn across the length and breadth of the country have a steep challenge to provide health services to all communities often traversing through difficult terrains. Disproportionate distribution of health services and health inequities, between districts, cities and rural communities are some of the greatest global challenges.

In a bid to surmount issues of universal access, inequities and quality service, various health care models are in use which include a combination of public, private for profit, private for non-profit and in Africa, Latin America and Asia there is even a provision for traditional medicine.

An efficient health system would not only be about infrastructure and trained medical personnel, it is substantially about the accessibility of the system, its responsiveness and the fairness of its financing. A cursory glance across most health systems will no doubt reveal that health is one of the most expensive services that gobble up a significant part of the budgets



of most nations. The Abuja Declaration of 2001 committed African countries to spend 15 percent of their national budgets on health care in a bid to shore up the fragile heath care systems. The fundamental question at this stage is whether nations can deliver a health care system that is accessible, responsive and fairly

Out of the milieu of health options available to deliver the very lofty health ideals, it would be improbable to deliver such a health system outside the ambit of competition. Without robust competition, health services will be skewed, remain the preserve of the few and will be devoid of consumer choice and quality service. The health services sector is one of the highly concentrated sectors of the economy often characterised by patent monopolies in drugs and medical devices. Patents or Intellectual Property Rights (IPR license) are largely insulated from competition for the duration of the IPR license. The effect of IPR licenses is that IPR holders often charge above competition or monopoly prices for their products. Competition generally provides protection against regulatory over-reach even over IPR holders, ensuring that new competitors are not prevented from unfairly entering the market.

A competitive health care will generally lead to lower prices, improve wider geographical footprint of health services and quality services as opposed to non-competitive health markets. Competition in health care services will lead to cost containment particularly in developing

countries where the health burden is financed predominantly through the already over-stretched public purse. Consumers, including the state, will reap benefits when there is robust competition and varied innovative solutions and choices offered.

Meanwhile, in a virtual address to staff to commemorate the day, the CEO, Ms. Tebelelo Pule, said the CCA recently did a research study on the pharmaceutical sector and hoped that the findings will help to bring about fair competition in the distribution, availability and price of medicines and drugs in the country's health care services.

"There is a national outcry about shortage of drugs in the public health systems and steep prices of drugs and medicines in the private health sector. As a competition and consumer regulator the public looks up to us to intervene and to bring about market efficiencies, especially markets that will yield competitive prices and other key consumer services," the CEO said.

Ever since the inception of the Competition and Consumer Authority (formerly Competition Authority), the Authority has since 2011 observed December 5th as World Competition Day (WCD). It was on 5th December 1980 when the United Nations Conference approved the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, hence competition agencies and consumer groups around the world commemorate WCD on this day.



CONSUMERS COMPLAIN AGAINST SECOND HAND MOTOR DEALERS

The Competition and Consumer Authority has received an influx of consumer complaints emanating from the sale and repair of used motor vehicles at a high rate due to the lower/affordable prices. It has been observed that consumers do not pay attention to the terms and condition of sale, and thus businesses take advantage of consumer ignorance and set contractual terms that exonerate them from any liability for repairing any defects that may arise at a later stage.

Dealers usually invoke the terms of sale that limit their liability such as the 'voetstoots clause' which states that except for any guarantees or warranties stated in the contract of sale, the seller is not liable for any defects, patent or latent. Further, the involvement of third party agents who conspire with businesses to sell on their behalf, make it difficult for consumers to get redress when a complaint arises.

Used Goods

According to section 13 of the Consumer Protection Act, used goods are goods that have been previously supplied to a consumer. A supplier who offers used goods shall inform a consumer by placing a label on the goods indicating that they are used goods, and by placing a notice on the invoice issued to a consumer.

Unfair, Unreasonable or Unjust Contract Terms

Unfair contractual terms may include; the seller making a fraudulent misrepresentation, expressly denying the presence of a latent defect of which the seller is aware when asked, failing to disclose a defect, although not specifically asked about the defect, the seller making an innocent material misrepresentation, if the statement concerns the char-

acter or quality of the object and the statement is not true.

However, the seller can be held liable for latent defects, which are discovered later, if the seller knew of the defects and did not fully disclose them to the buyer or the seller making a fraudulent misrepresentation. Expressly denying the presence of a latent defects of which the seller is aware when asked; or failing to disclose a defect to the buyer, although not specifically asked about the defect is in breach of section 15 (1) of the Consumer Protection Act, 2018.

Disclaimer

A disclaimer is generally any statement intended to specify or delimit the scope of rights and obligations that may be exercised and enforced by parties in a legally recognised relationship in contrast to other terms for legally operative language. The term disclaimer usually implies situations that involve some level of uncertainty, waiver, or risk such as; no refund, no guarantee, goods not returnable. Motor dealers should desist from unfair disclaimers such as; no guarantee or warranty, which puts consumers at a disadvantage when a vehicle develops some defects.

Receipts/Invoices

Dealers must issue invoice to consumers as proof of purchase, and this is a legal right of a consumer and should be complied with. Receipts must contain all the necessary information which helps when there is a dispute over a malfunctioning item.

Pricing

Businesses deceive consumers by failing to mark

prices on their products. Failing to display prices on vehicles takes away the consumer's right to choose and make an informed decision, as they are not afforded the chance to compare prices. It is an offence not to price vehicles.

Implied warranty

Section 16 of the Consumer Protection Act 2018 gives the consumer power to return defective goods to a supplier within six months. A supplier shall repair or replace the defective goods, or refund the consumer the amount paid as consideration for the goods.

Consumer Responsibility

Consumers must research about the cars they want to buy, year of manufacture, number of previous users, and check if the registration certificate commonly known as blue book is commensurate with the engine number.

Consumer must also check/inspect the vehicle before making payment assisted by someone who has mechanical knowledge to assist. They should also understand the terms and conditions of the warrantees, and desist from signing blank documents.

Consumer Rights

Consumers have rights which protect them against deceptive conducts or practice. The right to redress/ have a fair settlement; the right to information about the condition of the vehicle, pricing, contracts, the right to choose from a variety of products; the right to be heard when expressing dissatisfaction about a vehicle; and the right to receive safe products that will not cause harm to the consumer.

GABCON'S APPLICATION AGAINST THE CCA DISMISSED BY THE COMPETITION AND CONSUMER TRIBUNAL

Presiding Tribunal Member and Vice

President Tendekani E. Malebeswa

The Competition and Consumer Tribunal has dismissed with costs an application to file supplementary affidavits by Gaborone Container Terminal (GABCON) in an abuse of dominance case lodged by the Competition and Consumer Authority. GABCON had made an application challenging the jurisdiction of the Tribunal on the basis that it was a statutory monopoly and therefore fell outside the ambit of the Competition Act.

Pronouncing its decision on 10th September, the Tribunal held that GABCON is not a statutory monopoly as it is not created by statute, and is therefore not protected by section 3 (3) (b) of the Competition Act, which exempts enterprises operating on the basis of a statutory monopoly in Botswana. GABCON was ordered to pay the costs of the Authority in the application.

Reading the decision, Presiding Tribunal Member and Vice President, Tendekani E. Malebeswa said "a statutory monopoly is created by statutory provisions excluding other enterprises from conducting or performing the reserved activities. GABCON is neither created by statute nor are any of its activities reserved solely to it by statute. It is a private company constitute under the Companies Act (Cap: 42.01)."

The Tribunal further held that, even if GABCON, just like Botswana Railways, had been created by statute, it would have to be subjected to a rigorous test to determine whether the condemned conduct falls within its core statutorily mandate services and not in ancillary services.

"The Authority has to demonstrate

whether GABCON is dominant in both the upstream and downstream markets, or in either of them, and if it is, whether it is abusing its dominant position. This can only be done at the full hearing of the referral. Therefore, the Tribunal has jurisdiction to hear the referral," Mr. Malebeswa said.

Regarding the effects of GAB-CON's conduct on competition, the Tribunal noted that "its conduct shows that it has high market power in the business of hauling containers; and the

barriers to entry do not only affect the private hauliers but customers too, because they do not have a choice in who provides them with haulage services, as GABCON forces and controls the direction of the haulage business. The conduct by GABCON signals abuse of dominance through refusal to deal." The background to the matter is that on 6th June, 2017, the Competition Authority received a complaint from a group of private hauliers who alleged that GABCON had imposed restrictions preventing them from efficiently servicing their customers. The private hauliers complained that GABCON's behaviour negatively affected their businesses in that it had forcefully taken some of their customers, forced them to share deliveries with it, and coerced their customers to engage it for deliveries. They alleged that if this behaviour by GABCON continued without intervention, they would be forced to exit the market and close shop

The Authority instigated an investigation against GABCON and subsequently referred the case to the Competition Commission on 26th November 2018. In response to the referral, GABCON raised points in limine on 10th and 21st December 2018 respectively, alleging amongst other

things that the Authority's referral was irregular, the proceedings were a nullity (based on numerous reasons put forward).

The Authority opposed the points in limine raised by GABCON, and the Parties appeared before the Competition Commission on 19th March 2019, for argument. On 28th May 2019, the Competition Commission handed down its decision and dismissed all the points in limine that were raised by

GABCON.

When the matter was now ripe to proceed to the merits of the cases, GAB-CON yet again, now before the Competition and Consumer Tribunal, made an application to be allowed to file further supplementary fidavits and to raise a point that they are operating on the basis of a statutory monopoly and cannot be subjected to Competition Regulation as per section 3 (3) (b) of the Competition Act.



CCA's Obed Rankwe during the raid



Inspection On Cellphones Type Approval Certification Compliance

The Competition and Consumer Authority joined the Botswana Communications Regulatory Authority (BOCRA) and the Botswana Police Service on a mission to inspect cellphone businesses to check type approval or compliance certification in Molepolole village.

The inspection was carried from the 24th to 29th September which covered 18 businesses. Out of the 18 businesses inspected, 13 did not comply, three (3) were compliant while two (2) were not selling cellphones thereof.

Out of the businesses inspected, 239 cellphones of different models were confiscated for none compliance with type approval certification. Businesses that were not in compliance were charged P2000.00.

The inspection revealed that most businesses are not fully compliant with type approval certification. Such businesses were advised to liaise with BOCRA for the requisite certification.

CCA AND BOTSWANA BUREAU OF STANDARDS ENHANCE COOPERATION WITH MOU

The Competition and Consumer Authority (CCA) and the Botswana Bureau of Standards (BOBS) signed a memorandum of understanding on 23rd September 2020 to enhance cooperation.

The CCA is established under Section 4 of the Competition Act No. 4 of 2018 with the principal objective of the prevention of, and redress for anti-competitive practices in the economy as well as the removal of constraints on the free play of competition in the market. Further, CCA is mandated to protect the rights of consumers against unfair business practices and to implement the Consumer Protection Act 2018.

The Competition Act and the Consumer Protection Act empower the CCA to among others; undertake market inquiries, conduct surveys on consumer behaviour, consumption patterns, market prices, quality of products and business practices, and to cause the testing of products on the market to ensure that specifications, performance, quality and safety standards are adhered to.

BOBS is established under Section 3 of the Standards Act Cap 43:07 with the mandate of promoting standardisation and quality assurance in industry and commerce.

The mandate encompasses promotion of standardisation and quality assurance in industry and commerce, with the aim of improving product quality, industrial efficiency and productivity, and the promotion of trade, so as to achieve optimum benefits for the public generally, particularly with regard to the health, safety, welfare, and protection of the consumer. Under Section 3(2), BOBS is mandated amongst others to: Prepare, modify or amend and publish Botswana standards and any



The CEO of the CCA Ms. Tebelelo Pule, and the Acting Managing Director of BOBS Mr. Keeper Morgan at the MOU signing ceremony on 23rd September 2020

codes, make arrangements for, or provide facilities for, the examination and testing of commodities, grant, renew, suspend or cancel licences for use of standards marks; provide testing on behalf of Government, of locally manufactured or imported commodities, to determine compliance with the Act.

Further, BOBS administers the Weights and Measures Act 2006 and its associated Regulations of 2007 with a view to secure consumer protection. This is done through the regulation of weighing and measuring instruments used in trade.

Under section 43 of the Consumer Protection Act, the CCA is mandated to establish a mechanism through which it can maintain regular contact with other regulators on the exercise of its mandate.

Similarly, under section 3(2) (h) of the Standards Act, BOBS is expected to co-operate with the Government or any local authority or public body, or with the representatives of any industry or any person, with the aim of securing the adoption and practical application of standards.

To that end, the CCA and BOBS found it prudent to enter into a MoU for purposes of discharging their respective functions.

Among others, the MoU is intended to enable the two organisations to assist each other with data collection and analysis, inspection of business and products to ensure good quality for consumers, and the examination and testing of goods for compliance with the Standards and Consumer Protection laws.

KNOW YOUR COMPETITION ACT - PART VII

Exemptions and Assessment Criteria

- 33. (1) Where the Authority finds, on investigation, that an agreement other than a horizontal agreement or a vertical agreement prohibited by sections 25 and 27 (1) respectively prevents or substantially lessens competition, the Authority may, subject to section 35, grant an exemption from the prohibition if it can be reasonably expected that there will be offsetting benefits for the public directly attributable to the agreement in the form of —
- (a) the maintenance of lower prices, higher quality or greater choice for consumers;
- (b) the promotion or maintenance of the efficient production, distribution or provision of goods and services;

- (c) the promotion of technical or economic progress in the production, distribution or provision of goods and services;
- (d) the maintenance or promotion of exports from Botswana or employment in Botswana;
- (e) the strategic or national interest of Botswana in relation to a particular economic activity;
- (f) the provision of social benefits which outweigh the effects on competition;
- (g) the agreement occurring within the context of a citizen empowerment initiative of Government; or
- (h) the agreement in any other way enhancing the effectiveness of the Government programmes for the development of the economy of Botswana, including the

- programmes of industrial development and privatisation; Provided that the prevention or lessening of competition is proportionate to the benefits for the public and does not allow the enterprises concerned to eliminate competition completely in respect of a substantial part of the goods or services in question.
- (2) Subject to section 35, the Authority may also grant an exemption to a category of agreements where it is satisfied that the agreements are unlikely to lead to a substantial lessening of competition, or that one or more of the circumstances specified in subsection (1) (d) to (h) exist or are reasonably expected to exist in relation to those agreements.

- 34. Where —
- (a) the Authority determines that the information on which an exemption was based is materially incorrect;
- (b) there is a material change in the circumstances regarding an exemption; or
- (c) an enterprise does not comply with any of the conditions on which an exemption is granted, the Authority may, subject to section 35, revoke the exemption.
- 35. The Authority shall
 - (a) consult interested parties; and
 - (b) consider any representation made by such parties, before it grants an exemption or revokes an exemption.

KNOW YOUR CONSUMER PROTECTION ACT - PART IV

Information on Goods and Services

Information to be Provided in Plain and Understandable Language

- 10. A supplier shall —
- (a) provide information which is accurate, clear and complete in relation to goods and services offered to consumers; and
- (b) provide information about goods or services that includes —
- (i) the characteristics of the goods or services,
- (ii) the price of the goods or services,
- (iii) the instructions to use the goods or services,
- (iv) the warnings as to any risks in the maintenance of the goods or services, and
- (v) the terms for the supply of the goods or services.

Display of Price of Goods and Services

- 11. (1) A supplier shall not display goods or services without displaying the price of the goods or services, and the price shall be displayed —
- (a) in Pula currency;
- (b) in clear and legible letters on the goods or services; and
- (c) in a prominent position where the goods or services are being supplied.
- (2) The price of goods or services shall be deemed to have been adequately displayed if a written indication on the price is —
- (a) annexed to, printed, stamped or located upon the goods or services sold;

- (b) represented in a manner which may reasonably be inferred that the price is the price applicable to the goods or services in question; or
- (c) published in relation to the goods and services in a catalogue, brochure or any publication presented to a consumer at a particular time.
- (3) A supplier shall not charge a consumer more than the price indicated or displayed for goods or services.

Product Labelling, Trade Descriptions and Reconditioned Goods

- 12. (1) A supplier selling a product to a consumer shall attach a label on the product as required by the mandatory safety standards on labelling of goods for the relevant class of goods set by the Botswana Bureau of Standards or any other international body recognised by the Botswana Bureau of Standards.
- (2) A supplier shall not apply a trade description to goods that is likely to mislead consumers as to any matter expressed in the description.
- (3) A supplier shall not alter or remove a trade description or trade mark applied to any goods in a manner calculated to mislead consumers.
- (4) A supplier who offers any goods

that -

- (a) have been reconditioned, rebuilt or re-made; and
- (b) bear the trade mark of the original producers, shall label the goods, stating clearly that the goods have been reconditioned, rebuilt or remade, as the case may be.

Used Goods

- 13. (1) A supplier who offers used goods shall inform a consumer that the goods sold are used goods by —
- (a) placing a label on the goods that indicates that such goods are used goods; and
- (b) placing a notice on the invoice issued to a consumer.
- (2) For the purposes of this section, "used goods" means goods that have previously been supplied to a consumer, but does not include goods that have been returned to the supplier in terms of any provision of this Act.
- (3) A supplier who —
- (a) contravenes this section; or
- (b) sells or offers for sale, used goods that are not safe for use, commits an offence and shall be liable, upon conviction, to a fine not exceeding P50 000 or to imprisonment for a term not exceeding three years, or to both.



A plenary session on the 1st day of the 2020 ICN virtual conference on 14 $^{\rm th}$ September

ICN HOLDS 2020 ANNUAL CONFERENCE VIRTUALLY

The annual International Competition Network (ICN) conference was held on 14th to 17th September 2020. The virtual conference, a first for the ICN, was originally planned as an in-person conference in Los Angeles in May, but could not take place due to the corona virus pandemic.

The ICN includes 140 competition agencies from 129 jurisdictions and provides a forum for competition agencies to address enforcement and policy issues of common interest. The conference was open to all ICN member agencies, as well as Non-Governmental Advisors (NGAs), competition experts from international organisations, the legal, business, academic, and consumer communities – and interested members of the general public.

Topics discussed at the conference included; Competition Advocacy in the Digital Age, Digital Strategy of Competition Agencies, Digital Mergers, Unilateral Conduct Remedies, Particularly in Digital Markets, Big Data and Cartelisation.

The digital age represents new challenges not only for enforcement, but also for advocacy, and panelists presented concrete examples and approaches to address specific competition advocacy challenges arising from digital markets, such as data privacy, consumer empowerment, and technical industry knowledge.

The session on the Digital Strategy of Competition Agencies focused on how digitalisation is affecting the design and make-up of competition authorities.

Topics included the creation of digital teams and units, the recruitment of non-traditional staff, new demands on staff to be tech-savvy, and innovative approaches implemented to make competition agencies "digitally ready," the ICN said.



The CEO of the CCA, Ms. Tebelelo Pule addressing the ICN Virtual Conference on 15th September 2020

At the last annual ICN conference, digitalisation and the evolution of merger analysis was a major topic for discussion. Since then, there have been further developments in the analysis, and digital mergers are still drawing much attention from agencies and NGAs. Speakers on the Digital Mergers session at the virtual conference explored how agencies are dealing with mergers in digital markets, and discussed key issues such as characteristics of digital mergers (network effects, non-price effects, nascent competition, and conglomerate mergers), notification thresholds, market definition, the counterfactual, theories of harm, and merger remedies in the digital economy.

The Unilateral Conduct session discussed objectives, design and the implementation and monitoring of remedies, including injunctive relief and interim measures in unilateral conduct cases in digital

markets.

The ICN noted that the collection and processing of large volumes of data is a defining feature of today's digitalised economy, and with the increasing role of big data on business strategies, everyone from competition enforcers and lawyers to academics and economists have sought to assess its impact in cartel enforcement. Conference panelists discussed whether big data and algorithms can be used to implement new forms of cartels or to facilitate market coordination, and whether competition law is well-equipped in the fight against cartels in the digital era.

Day Two of the ICN Virtual Conference featured the Agency Effectiveness Working Group (AEWG) Plenary with a focus on the Digital Strategy of Competition Agencies. The mandate of the AEWG is to identify key elements of a well-functioning competition agency and good practices for strategy and planning, operations, and enforcement tools and procedures.

Botswana's Competition and Consumer Authority, co-chairs the Agency Effectiveness Working Group. Before the start of the plenary, the CEO of the Competition and Consumer Authority, Ms. Tebelelo Pule, was featured giving an overview of Botswana's perspective on agency effectiveness. Botswana hosted a two-day workshop of the AEWG in Gaborone March 2016.

The four day ICN virtual conference was hosted by the U.S. Department of Justice Antitrust Division and the U.S. Federal Trade Commission. The Hungarian Competition Authority will host the 2021 ICN annual conference.

Source: ICN, DoJ, CCA

facebook

FTC SUES FACEBOOK FOR ILLEGAL MONOPOLISATION

The United States Federal Trade Commission (FTC) on December 9th sued Facebook, alleging that the company is illegally maintaining its personal social networking monopoly through a years-long course of anti-competitive conduct. This follows a lengthy investigation in cooperation with a coalition of attorneys general of 46 states, the District of Columbia, and Guam, the FTC said.

The complaint alleges that Facebook has engaged in a systematic strategy—including its 2012 acquisition of upand-coming rival Instagram, its 2014 acquisition of the mobile messaging app WhatsApp, and the imposition of anti-competitive conditions on software developers, to eliminate threats to its monopoly.

"This course of conduct harms competition, leaves consumers with few choices for personal social networking, and deprives advertisers of the benefits of competition," says the FTC.

The FTC is seeking a permanent injunction in federal court that could, among other things: require divestitures of assets, including Instagram and WhatsApp; prohibit Facebook from imposing anti-competitive conditions on software developers; and require Facebook to seek prior notice and approval for future mergers and acquisitions.

"Personal social networking is central to the lives of millions of Americans," said Ian Conner, Director of the FTC's Bureau of Competition. "Facebook's actions to entrench and maintain its monopoly deny consumers the benefits of competition. Our aim is to roll back Facebook's anticompetitive conduct and restore competition so that innovation and free competition can thrive."

According to the FTC's complaint, Facebook is the world's dominant personal social networking service and has monopoly power in a market for personal social net-

working services. This unmatched position has provided Facebook with staggering profits. Last year alone, Facebook generated revenues of more than \$70 billion and profits of more than \$18.5 billion.

Meanwhile, Facebook pushed against The FTC's lawsuit saying the two acquisitions of Instagram in 2012 and WhatsApp in 2014 were intended to provide better products for the people who use them, and they unquestionably did. "Both of these acquisitions were reviewed by relevant antitrust regulators at the time. The FTC conducted an in-depth "Second Request" of the Instagram transaction in 2012 before voting unanimously to clear it. The European Commission reviewed the WhatsApp transaction in 2014 and found no risk of harm to competition in any potential market. Regulators correctly allowed these deals to move forward because they did not threaten competition. Now, many years later, with seemingly no regard for settled law or the consequences to innovation and investment, the agency is saying it got it wrong and wants a do-over. In addition to being revisionist history, this is simply not how the anti-trust laws are supposed to work." Facebook said.

Meanwhile, lawmakers from the US House of Representatives accused Facebook, Amazon, Google and Apple of "abuses of monopoly power" in a 449-page report released on 6th October 2020. The House Judiciary Antitrust Subcommittee drew its conclusions after a 16-month investigation that culminated in an hours-long hearing with Facebook's Mark Zuckerberg, Amazon's Jeff Bezos, Apple's Tim Cook and Google's Sundar Pichai in July 2020.

The report calls for restructuring and several other changes to rein in the companies.



Office Closure Notice

The Competition and Consumer Authority (CCA) offices will be closed during the festive period from Monday 21st December and will resume operations on Monday 4th January 2021.

Members of the public, including consumers and the business community can access some of our services online. For urgent and emergency services we can be reached at the following contacts:

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