

IN THE COURT OF COMMON PLEAS OF CENTRE COUNTY, PENNSYLVANIA

GEORGE SCOTT PATERNO, as duly appointed representative of)
the ESTATE and FAMILY of JOSEPH PATERNO;)

RYAN MCCOMBIE, ANTHONY LUBRANO,)
AL CLEMENS, and ADAM TALIAFERRO, members of the)
Board of Trustees of Pennsylvania State University;)

PETER BORDI, TERRY ENGELDER,)
SPENCER NILES, and JOHN O'DONNELL,)
members of the faculty of Pennsylvania State University;)

WILLIAM KENNEY and JOSEPH V. ("JAY") PATERNO,)
former football coaches at Pennsylvania State University; and)

ANTHONY ADAMS, GERALD CADOGAN,)
SHAMAR FINNEY, JUSTIN KURPEIKIS,)
RICHARD GARDNER, JOSH GAINES, PATRICK MAUTI,)
ANWAR PHILLIPS, and MICHAEL ROBINSON, former)
football players of Pennsylvania State University,)
Plaintiffs,)

v.)

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION)
("NCAA"), MARK EMMERT, individually and as President of)
the NCAA, and EDWARD RAY, individually and as former)
Chairman of the Executive Committee of the NCAA,)

Defendants,)

and)

THE PENNSYLVANIA STATE UNIVERSITY,)
Nominal Defendant.)

Civil Division

Docket No. 2013-
2082

DEBRA C. HANEL
PROCLERK
CENTRE COUNTY, PA

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FILED FOR RECORD

**THE NCAA DEFENDANTS' PRELIMINARY OBJECTIONS TO
PLAINTIFFS' FIRST AMENDED COMPLAINT**

The National Collegiate Athletic Association (“NCAA”), Dr. Mark Emmert, and Dr. Edward Ray (collectively, “NCAA Defendants”) hereby preliminarily object to Plaintiffs’ First Amended Complaint (the “Amended Complaint”) pursuant to Pennsylvania Rule of Civil Procedure Number 1028, for the following reasons:

Objection Pursuant to Pa. R.C.P. No. 1028(a)(5) – Incapacity to Bring Count I

1. Only parties to a contract have standing to challenge the contract’s validity and obtain a finding that it is void *ab initio*.
2. The allegations focus on two purported contracts. The first alleged contract is the NCAA Constitution and Bylaws (“NCAA Bylaws”), and the second is the Consent Decree.
3. The Family and Estate of Joseph V. Paterno (the “Estate”) and Board of Trustees member Al Clemens (“Trustee Clemens”) are neither parties to the Consent Decree nor third-party beneficiaries. Indeed, they do not even allege as much.
4. The Estate and Trustee Clemens cannot use their alleged rights under the NCAA Bylaws to manufacture standing as to the Consent Decree.
5. They therefore cannot challenge the validity of the Consent Decree or

obtain a declaration that it is void.¹

WHEREFORE, the NCAA Defendants request that the Court hold that Plaintiffs do not have standing to obtain a declaration that the Consent Decree is void *ab initio*.

Objection Pursuant to Pa. R.C.P. No. 1028(a)(2) and 1028(a)(4) – Impertinent Material and Demurrer to Count I

6. Paragraphs 1 through 5 are incorporated by reference herein.
7. The Court’s January 7 Order (the “Order”) struck as impertinent Plaintiffs’ request for voidance of the Consent Decree because of their failure to join an indispensable party—the Pennsylvania State University (“Penn State” or the “University”).
8. The Amended Complaint fails to plead any facts that (even if true) are sufficient to support a finding that the Consent Decree is void *ab initio*.
9. Under Pennsylvania law, voiding a contract is extraordinary judicial

¹ Even if the Court were to find that the Estate and Trustee Clemens have sufficiently alleged standing or a basis to support this request for relief, they certainly are not entitled to invalidate the Consent Decree in its entirety. For example, neither the Estate nor Trustee Clemens can possibly claim any direct, immediate, or substantial injury resulting from Penn State’s agreement in the Consent Decree to accept a \$60 million fine, four-year post-season ban, four-year reduction in grants-in-aid, five-year probation, or its implementation of an Athletics Integrity Agreement. Similarly, they cannot claim any injury resulting from statements in the Consent Decree about Graham Spanier, Gary Schultz, or Timothy Curley.

relief that is authorized in only limited and extreme circumstances, such as fraud, mistake, or illegality.

10. Plaintiffs certainly do not allege fraud, mistake, or illegality.

11. The Estate and Trustee Clemens allege that by entering into the Consent Decree with Penn State, the NCAA violated rights that it allegedly owes to them under a separate contract—the NCAA Bylaws.

12. Pennsylvania law does not support the proposition that a private party's breach of one contract can serve as the basis for finding that a separate contract is void *ab initio*.

13. And Plaintiffs' suggestion that the Consent Decree was somehow procured by duress is neither their argument to make (it would be Penn State's argument, but Penn State does not contest the Consent Decree), nor does it come close to meeting the standard for voiding a contract due to duress. *Sheppard v. Frank & Seder Inc.*, 307 Pa. 372, 376, 161 A. 304, 306 (1932) (holding that a contract can be void *ab initio* for duress only if such duress is "extreme" and of a "*forcible or terrorizing* character;" even duress of a "less degree," including that which would "overcome the mind and will of a person of ordinary firmness," is insufficient (emphasis added) (citation omitted)).

WHEREFORE, the NCAA Defendants ask the Court to deny Plaintiffs' request for a declaratory judgment that the NCAA-imposed Consent Decree was unauthorized, unlawful, and void *ab initio*.

Objection Pursuant to Pa. R.C.P. No. 1028(a)(5) and 1028(a)(4) – Incapacity to Bring Count I and Demurrer to Count I

14. Paragraphs 1 through 13 are incorporated by reference herein.

15. The Estate and Trustee Clemens lack standing to assert their breach of contract claim against the NCAA because they are neither parties to Penn State's membership agreement with the NCAA, nor third-party beneficiaries of that agreement.

16. Plaintiffs claim that the NCAA Bylaws provide that the NCAA and its members intended to bestow procedural rights related to the NCAA sanctions process on "involved individuals." Am. Compl. ¶ 37.

17. First, the involved individual classification does not apply because the Consent Decree was not the product of the traditional enforcement process. Instead, it is a bilateral agreement between the NCAA and Penn State, which the NCAA entered into pursuant to the Executive Committee's authority to act on matters of association-wide import. *See* NCAA Academic and Membership Affairs Staff, 2011-12 NCAA Division I Manual art. 4.1.2(e) (2011) ("Manual"), attached as Ex. A to Am. Compl. As such, whether Plaintiffs would have been treated as involved

individuals in the traditional enforcement process is beside the point.

18. Second, the NCAA maintains that the term “involved individual” is plain and unambiguous, and did not apply to Trustee Clemens or Coach Paterno—neither of whom ever received a notice of significant involvement in violations, as set forth in the definition of an “involved individual,” or were sanctioned in any way.

19. In any event, there are independent legal reasons why neither Coach Paterno nor Trustee Clemens can assert a breach of contract claim which were not addressed by the Court in its January 7 Order and which do not require the Court to address any “fact questions” that may exist about the term “involved individual.”

The Estate

20. As a matter of law, Coach Paterno cannot qualify as an involved individual under the NCAA Bylaws because he never became an involved individual before passing away (if at all).

21. Plaintiffs themselves allege that Coach Paterno was an involved individual only as a result of the statements in the Freeh Report and Consent Decree. Am. Compl. ¶ 119.

22. But Coach Paterno died on January 22, 2012, well prior to the release of the Freeh Report on July 12, 2012 and the execution of the Consent Decree on July 23, 2012. At the time of his death, therefore, Paterno was not an involved individual.

23. An involved individual's rights—such as notice, the opportunity to attend hearings, and the chance to submit written information to assist the NCAA in its investigation—contemplate only living individuals. It was impossible for the NCAA to extend these rights to Coach Paterno after his death.

24. Even if Coach Paterno had somehow become an involved individual before his death, the Estate cannot assert those rights.

25. An involved individual's procedural rights are distinctly personal and do not survive death and therefore cannot be exercised by an Estate. By its terms, the procedural rights afforded to involved individuals are intended to afford individuals who are alleged to have been significantly involved in violations of NCAA rules with notice and an opportunity to “present *their* explanation of the alleged violations” and to answer questions “in order to determine the facts of the case.” Manual arts. §§ 32.8.7.3; 32.8.7.6 (emphasis added). Those rights cannot be sensibly exercised by the Estate.

Trustee Clemens

26. Likewise, Trustee Clemens cannot—as a matter of law—be an involved individual. Trustee Clemens is a member of the Penn State Board of Trustees. Although the Consent Decree refers generally to the shortcomings of the Board of Trustees discussed in the Freeh Report, Trustee Clemens is not individually identified anywhere in the Consent Decree. The Consent Decree does not single out

Trustee Clemens for criticism or suggest that he personally violated any NCAA rules.

27. By its plain meaning, an “involved individual” under the NCAA Rules refers only to actual persons, not a governing body or other entity, like the Board of Trustees.

28. Even if a governing body could assert rights as an involved individual on the basis of the Consent Decree, it would be the Board of Trustees in its entirety—*i.e.*, the entity named in the Consent Decree—not Trustee Clemens. And the Board of Trustees has not sought to challenge the conclusions in the Freeh Report that were repeated in the Consent Decree.

NCAA’s Construction Is Reasonable

29. Further, even if there were some ambiguity, the NCAA’s interpretation of an “involved individual” should prevail.

30. The Court recognized that the NCAA’s construction of the term is reasonable, and, under well-settled law, a voluntary association’s “practical and reasonable” construction of its Bylaws must be given deference. *See Musicians’ Protective Union Local No. 274 v. Am. Fed’n of Musicians*, 329 F. Supp. 1226, 1236 (E.D. Pa. 1971) (“The practical and reasonable construction of the Constitution and by-laws of a voluntary organization by its governing board is binding on the membership and will be recognized by the courts.” (citation omitted)).

WHEREFORE, the NCAA Defendants ask the Court to dismiss Count I because Coach Paterno and Trustee Clemens lack standing to bring this claim and for failure to state a claim.

Objection Pursuant to Pa. R.C.P. No. 1028(a)(4) – Demurrer to Count II

31. Paragraphs 1 through 30 are incorporated by reference herein.

32. Plaintiffs Jay Paterno and William Kenney’s (the “Former Coaches”) tortious interference claim must be dismissed because it is entirely derivative of their defamation claim.

33. Under Pennsylvania law, a separate cause of action cannot be asserted based on the alleged effect of defamatory statements.

34. The entirety of Plaintiffs’ allegations boil down to alleged harms arising from the statement in the Consent Decree that “some coaches, administrators, and football program staff members ignored the red flags of Sandusky’s behavior...” These allegations cannot support a claim for tortious interference.

35. In addition, Plaintiffs have failed to cure the pleading deficiencies that led the Court to dismiss the tortious interference claim in its January 7 Order.

36. Plaintiffs plead no facts which would support a finding that there existed a “reasonable probability” that “a contract [would] arise.” Order 21. Plaintiffs’ allegations that they applied for open positions and had interviews with prospective employers do not create a reasonable probability that they would be

hired.

37. Plaintiffs fail to specify a prospective contract that, *but for* the NCAA Defendants' conduct, had a reasonable probability of coming to fruition. Plaintiffs' failure to connect a single contract to the Consent Decree is fatal to their claim.

38. Plaintiffs have not alleged any facts that plausibly suggest the Consent Decree alone was the reason they were not hired by these schools, NFL teams, or media companies. Indeed, numerous media outlets also quoted the Freeh Report and disseminated the same statements that the NCAA quoted in its Consent Decree.

39. Moreover, Plaintiffs have failed to allege that the NCAA Defendants acted with the requisite intent. The Former Coaches do not fall into the category of "some coaches" referenced in Consent Decree. And even if it is possible that someone would erroneously infer that the statement about "some coaches" applies to the Former Coaches, that is not sufficient to show that the NCAA Defendants acted with intent and for the purpose of interfering with any potential job opportunities.

40. Lastly, the NCAA Defendants maintain and preserve their argument that Plaintiffs have failed to negate the inference of privilege.

WHEREFORE, the NCAA Defendants ask the Court to dismiss Count II for failure state a claim.

Objection Pursuant to Pa. R.C.P. No. 1028(a)(4) – Demurrer to Count V

41. Paragraphs 1 through 40 are incorporated by reference herein.

42. Under well-established Pennsylvania law, a conspiracy claim does not lie without a valid underlying civil claim.

43. Plaintiffs have not properly stated any other civil cause of action, and therefore no conspiracy claim can be asserted in this action.

44. At minimum, only four of the Plaintiffs in this action—the Estate, Trustee Clemens, and the Former Coaches—have even asserted any claim other than civil conspiracy. Accordingly, only those four Plaintiffs are even theoretically eligible to assert a civil conspiracy claim. The additional Plaintiffs, including members of the Board of Trustees, faculty members, and former football players—to the extent they are still parties to the litigation—are only parties to the civil conspiracy claim and therefore should be dismissed from this case as a matter of law.

45. In addition, Penn State is an indispensable party to Plaintiffs' civil conspiracy claim because one of the remedies Plaintiffs seek is a "declaratory judgment that ... the NCAA-imposed Consent Decree was unauthorized, unlawful, and void *ab initio*." Am. Compl. ¶ 169.

46. This relief would deprive Penn State of its rights under the Consent Decree, and therefore the claim must be dismissed because the Court cannot grant "declaratory relief...without Penn State's presence as a party to this suit." Order 10.

47. The NCAA Defendants also continue to maintain and preserve their arguments that Plaintiffs' civil conspiracy claim is barred by the gist of the action doctrine, and Plaintiffs failed to aver facts which establish the elements of conspiracy.

WHEREFORE, the NCAA Defendants ask the Court to dismiss Count V for failure state a claim.

Objection Pursuant to Pa. R.C.P. No. 1028(a)(4) – Demurrer to Count IV

48. Paragraphs 1 through 47 are incorporated by reference herein.

49. Plaintiffs' claim for defamation is premised on two allegedly defamatory statements contained in the Freeh Report, critical of Trustee Clemens and the Former Coaches, that were repeated by the NCAA in the Consent Decree.

50. Plaintiffs cannot maintain a defamation claim based on these statements for three reasons. Although the Court previously overruled the NCAA Defendants' objections on defamation, a "trial judge may always revisit his own prior pre-trial rulings in a case without running afoul of the law of the case doctrine." *Clearwater Concrete & Masonry, Inc. v. W. Phila. Fin. Servs. Inst.*, 2011 PA Super 64, 18 A.3d 1213, 1216 (2011). The NCAA Defendants respectfully request the Court do so here, as its own legal conclusions in the January 7 Order suggest that the defamation claims should be dismissed, and because the Court did not explicitly address certain arguments previously raised by the NCAA.

51. First, this Court has explained that to state a claim for defamation, a plaintiff “must show a reasonable person would identify him as a target of the defamatory statement.” Order 14. The Court specifically noted that “a group consisting of 25 or more members is too large to support a defamation claim.” *Id.* at 15.

52. Neither of the alleged defamatory statements even mentions any of the Plaintiffs or could reasonably be interpreted as referring to them.

53. Both the statements concern groups that consist of 25 or more members which, as this Court correctly held, is too large to support a defamation claim.

54. The statement that allegedly defames Trustee Clemens refers generally to the “Board of Trustees,” which consists of 32 members.

55. The statement that allegedly defames the Former Coaches refers to “[s]ome coaches, administrators and football program staff members.” Am. Compl. ¶ 155 (emphasis added). Yet, Penn State’s publicly-available Football Yearbooks from 1998 and 2001 respectively list 31 and 38 football program coaches, administrators, and staff members.

56. Additionally, a reasonable person would have understood that the statement about which the Former Coaches complain does not apply to the Former Coaches. As the Court stated in its January 7 Order, people are likely to investigate whom statements are about when they are made in the course of a publicized event.

Order 16-17. If that is the case, the public would have realized that the Freeh Report explains that several staff members and football coaches observed Sandusky showering with young boys, including specifically identifying one coach who testified in open court that he observed this activity but did not find the practice to be improper. But it never names or references the Former Coaches.

57. Second, the defamation claim fails because Plaintiffs have not alleged facts sufficient to demonstrate that the NCAA acted with malice.

58. The statement about which Trustee Clemens complains was accepted by the Board of Trustees.

59. Plaintiffs fail to plead any facts to show that the NCAA possessed obvious reasons to doubt the truth of the statements about the Board or demonstrate that the NCAA acted in reckless disregard for the truth.

60. Likewise, the Former Coaches cannot establish that the NCAA acted with actual malice in repeating that “*some* coaches, administrators and football program staff members ignored the red flags of Sandusky’s behaviors and no one warned the public about him.” Am. Compl. ¶ 155.

61. The Commonwealth of Pennsylvania has filed criminal charges against *some* University administrators and staff for concealing information about suspected child abuse involving Jerry Sandusky. Therefore, the statement in question is either true regarding *some* coaches, or at minimum, not obviously false.

62. Lastly, Plaintiffs' defamation claim fails for the additional and independent reason that the two statements are expressions of the NCAA's opinion, based on facts that were publicly disclosed, *i.e.*, the Freeh Report.

WHEREFORE, the NCAA Defendants ask the Court to dismiss Count IV for failure state a claim.

Objection Pursuant to Pa. R.C.P. No. 1028(a)(4) – Demurrer to Count III

63. Paragraphs 1 through 62 are incorporated by reference herein.

64. The Amended Complaint alleges that statements in the Consent Decree commercially disparaged Coach Paterno and the Estate. Although the Court partially overruled the NCAA Defendants' objections on commercial disparagement, the NCAA Defendants respectfully request the Court revisit its prior holding, in part because certain arguments were not explicitly addressed. *Clearwater Concrete & Masonry, Inc.*, 18 A.3d at 1216.

65. The challenged statements are statements of opinion. The specific references to Coach Paterno in the Consent Decree are quoted verbatim from the final opinions of the Freeh Report, which were premised on the facts disclosed in the Report. *See* Consent Decree 3-4. The claim for disparagement is not actionable because all of the underlying facts upon which the opinions are premised were disclosed to the public.

66. Further, the Estate cannot bring a survival action for tort liability that

accrues after the decedent's death. As a matter of Pennsylvania law, tort claims that had not accrued at death do not survive to the Estate.

67. Lastly, the NCCA Defendants request that the Court reconsider its statement that *Menefee v. Columbia Broadcasting System Inc.*, 458 Pa. 46, 329 A.2d 216 (1974), "made clear ... that the commercial interest need not be a product or service." Order 18-19.

68. A claim for damage to one's reputation, rather than to one's commercialized business interest, is not actionable in a claim for commercial disparagement.

69. *Menefee* is distinguishable from the present matter. Although the *Menefee* court held that the decedent had an intangible property interest in his broadcasting personality, the decedent's broadcasting personality was his career—he was a radio personality. In contrast, the Estate's claim focuses on purported harm to Coach Paterno's property interest in his *name and reputation*. This is nothing more than an attempt to state a defamation claim on behalf of a deceased person and cannot be the basis for a claim of commercial disparagement.

70. The NCAA Defendants continue to maintain and preserve their argument that the Estate failed to allege any facts showing some direct pecuniary loss that would not have occurred but for the publication of the allegedly disparaging statements.

WHEREFORE, the NCAA Defendants ask the Court to dismiss Count III for failure to state a claim.

Objection Pursuant to Pa. R.C.P. No. 1028(a)(2) – Failure of a Pleading to Confirm to Law or Rule of Court

71. Paragraphs 1 through 70 are incorporated by reference herein.

72. Rule 1024 of the Pennsylvania Rules of Civil Procedures requires verification of “[e]very pleading containing an averment of fact not appearing of record in the action.”

73. The Amended Complaint avers facts not appearing in the record.

74. The Amended Complaint does not contain a verification.

75. As such, this is a blatant violation of Pa.R.Civ.P. 1024(a).

WHEREFORE, the NCAA Defendants ask the Court to dismiss Plaintiffs’ Amended Complaint for failure to conform to law or rule of court.

Objection Pursuant to Pa. R.C.P. No. 1028(a)(1) – Lack of Personal Jurisdiction Over Dr. Emmert and Dr. Ray

76. Paragraphs 1 through 75 are incorporated by reference herein.

77. Defendants Mark Emmert (“Dr. Emmert”) and Edward Ray (“Dr. Ray”) object to the Amended Complaint on the grounds that this Court lacks personal jurisdiction over them, and they should therefore be dismissed from this action.

78. Dr. Emmert and Dr. Ray asserted this same objection in response to the

original complaint. *See* Memorandum in Support of Defendants' Preliminary Objections (Jul. 23, 2013) 74-90 ("Mem. in Supp. of Prelim. Objs."). On August 21, 2013, the Court entered an order stating that after deciding on all other preliminary objections, it "will set a separate schedule for the objections relating to personal jurisdiction as necessary." Scheduling Order (Aug. 21, 2013) 1. The Amended Complaint does not allege any new grounds for the Court to exercise personal jurisdiction over Dr. Emmert and Dr. Ray. Accordingly, Dr. Emmert and Dr. Ray do not here repeat at length their previously asserted objections on this issue. However, for the avoidance of any doubt, Dr. Emmert and Dr. Ray hereby object to the Amended Complaint on the grounds that the Court lacks personal jurisdiction over them, and incorporate by reference the arguments previously set forth in support of their position. *See* Mem. in Supp. of Prelim. Objs. 74-90.

79. As demonstrated more fully in the NCAA Defendants' prior preliminary objections and supporting brief (which is incorporated by reference hereto), this Court lacks personal jurisdiction over Dr. Emmert and Dr. Ray for the following reasons:

80. Plaintiffs assert only specific jurisdiction over Dr. Emmert and Dr. Ray,

and only in their personal, rather than corporate capacities.²

81. Specific jurisdiction is proper only when the defendant's contacts with the forum state are purposeful and voluntary and give rise to the cause of action.

82. Jurisdiction over corporate officers in their personal capacities for the alleged commission of a tort can only be exercised based on actions taken within the forum state.

83. Plaintiffs fail to plead that Dr. Emmert or Dr. Ray ever set foot in Pennsylvania over the course of their allegedly tortious actions.

84. Even if jurisdiction over corporate officers for actions outside the state was available, this Court would lack specific jurisdiction with respect to Plaintiffs' particular claims.

85. Regarding Plaintiffs' claim that Dr. Emmert and Dr. Ray interfered with contractual relations, Plaintiffs do not allege any facts indicating that Pennsylvania was the "focal point" of the harm suffered by the tortious activity alleged.

86. Regarding the claims for commercial disparagement and defamation,

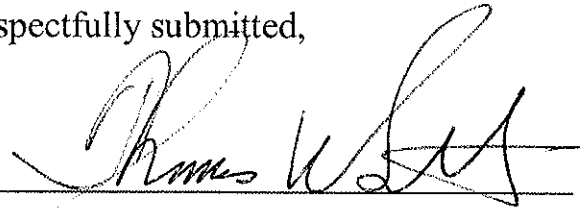
² To the extent Plaintiffs are attempting to assert general jurisdiction over Dr. Emmert and Dr. Ray, they fail to plead any facts suggesting that Dr. Emmert or Dr. Ray maintain continuous and systematic contacts with Pennsylvania.

Plaintiffs fail to allege that the statements were “expressly aimed” at causing harm in Pennsylvania.

87. Lastly, regarding the claim for civil conspiracy, Plaintiffs’ bald allegations that the NCAA Defendants conspired with a former federal judge and Director of the FBI to deprive Plaintiffs of their rights are not adequate to serve as the basis for personal jurisdiction over Dr. Emmert and Dr. Ray. Plaintiffs also point to no aspect of the supposed conspiracy that took place in Pennsylvania.

WHEREFORE, Defendants ask the Court to dismiss all claims against Dr. Emmert and Dr. Ray for lack of personal jurisdiction.

Respectfully submitted,



Date: March 17, 2014

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CERTIFICATE OF SERVICE

I, Thomas W. Scott, hereby certify that I am serving the foregoing Preliminary Objections to Plaintiffs' First Amended Complaint by First Class Mail and email to:

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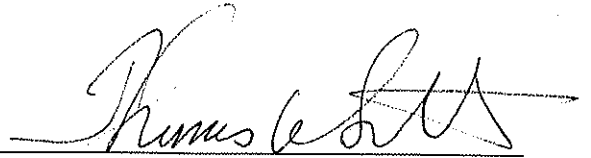
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