SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JPS PARTNERS in its own right, and derivatively in the right of BINN and PARTNERS, LLC, Plaintiffs, -against- MORETON BINN, an individual, Defendant, and BINN and PARTNERS LLC, Nominal Defendant.	Case No.: 650430/2012 E Part 45, Hon. Melvin L. Schweitzer

MEMORANDUM OF LAW SUBMITTED IN SUPPORT OF PLAINTIFF JPS PARTNERS'S ORDER TO SHOW CAUSE

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Date: November 25, 2013

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Plaintiff JPS Partners ("JPS") submits this Memorandum of Law, together with the Affirmation of Rosanne E. Felicello dated November 25, 2013 ("Felicello Aff.") and the exhibits annexed thereto, in support of its Order to Show Cause granting a dissolution of nominal defendant Binn and Partners LLC ("Binn & Partners" or the "Company"), appointing a receiver or liquidating trustee to wind up the Company's affairs, ordering the clawback of assets improperly transferred to XpresSpa Holdings LLC, staying the pending "P-3 Round" of financing, and further relief.

I. PRELIMINARY STATEMENT

An event of dissolution has occurred pursuant to the terms of the relevant Operating Agreement.[1] The parties agree that the "[t]ransfer of substantially all of the assets of the Company" to any other entity without exception is an "event of dissolution" under the terms of the Operating Agreement. The Binn Defendants claim that Moreton Binn successfully amended the Operating Agreement to eliminate JPS Partners' right to dissolution upon a transfer of substantially all of the assets, but the purported amendment is ineffective because JPS Partners never gave their consent to the amendment, which, adverse to JPS Partners, varies the terms of the dissolution provision of the Operating Agreement to omit their right to dissolution of the Company upon the transfer of substantially all of the Company's assets. The Operating Agreement requires that any "amendment that . . . would, adverse to a Member, vary the terms of

[1] Undefined capitalized terms have the meaning assigned to them in the Amended Complaint, dated July 26, 2012.

Articles V [Article dealing with capital accounts & contributions], VI [Article dealing with profit, loss and distributions], VII [Article dealing with the transferability of units], or VIII [Article dealing with dissolution] shall require the written consent of any Member so affected." Because the purported amendment, if valid, would, adverse to JPS, vary the terms of Article VIII (Dissolution) of the Operating Agreement to eliminate their pre-existing right to dissolution upon transfer of substantially all of the assets out of the Company and their consent was never obtained in connection with the amendment, the purported amendment is without effect. Thus, under the terms of the Operating Agreement, an event of dissolution has occurred.

The Binn Defendants further claim that the transfer of substantially all of the assets from Binn & Partners to XpresSpa Holdings LLC, a newly created subsidiary, was merely a change of form, but not substance, and, thus, there was no effective transfer to a separate entity. Section 8 of the Operating Agreement defines any transfer of substantially all of the Binn & Partners assets to any other entity without exception as an Event of Dissolution. By requiring the dissolution of Binn & Partners when the assets are transferred out of the entity, this provision serves to protect the members of Binn & Partners from being separated from the assets that they invested in. No exception should be implied on a "related" company theory because the formal transfer of the spa business from Binn & Partners to XpresSpa Holdings LLC, without consideration circumvented the protection intended by the provision: JPS Partners was left behind as a member of Binn & Partners, a non-operating shell company with liabilities and nominal assets. The second, previously undisclosed transaction that flipped Binn & Partners to be the subsidiary and XpresSpa Holdings LLC to be the parent company further destroyed any rights JPS Partners would have to distributions from the spa business, which now resides in the parent company. Thus, the Binn Defendants are half right: it was a change of form, but one that substantively

stripped JPS Partners of both the object of their investment and the rights they had bargained for in connection with that investment.

In addition, in late October 2013, JPS was first asked to participate in the "P-3 Round" of financing. According to the terms provided in a memo from Moreton Binn, attached to the Affirmation of Rosanne Felicello as Exhibit O, if JPS chooses not to participate in the P-3 Round of financing they give up their priority in interest to members that do agree to participate, including Moreton Binn. This additional transaction is destructive and dilutive of JPS's membership interest and should be stayed.

JPS brings this Order to Show Cause to ask this Court to declare the dissolution of Binn & Partners and appoint a receiver or liquidating trustee to wind up the Company's affairs in accordance with the terms of the Operating Agreement and to claw back assets that were fraudulently transferred to XpresSpa Holdings LLC. Further, JPS requests that the Court stay the proposed P-3 Round of financing.

II. RELEVANT FACTS

The facts are taken from Affirmation of Attorney Rosanne E. Felicello Submitted In Support of Plaintiff JPS Partners's Order to Show Cause.[2]

The "transfer of substantially all of the assets of the Company" to any other entity without exception is an "event of dissolution" under the terms of the Operating Agreement. ¶ 22.

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[2] Citations to "¶" refer to the paragraphs of the Affirmation of Attorney Rosanne E. Felicello Submitted In Support of Plaintiff JPS Partners's Order to Show Cause.

Pursuant to the terms of the Transaction, as detailed in the relevant deal documents and summarized in Binn and Partners, LLC and Subsidiaries Consolidated Financial Statements For the Year Ended December 31, 2011, attached as Exhibit M to the Felicello Aff. ("2011 Financial Statement"), substantially all of the assets of Binn and Partners, LLC were transferred to XpresSpa Holdings, LLC. ¶¶ 24-26.

The Binn Defendants presented the purported Amendment to the Third Amended and Restated Operating Agreement of Binn and Partners, LLC (the "Amendment") in support of their motion to dismiss JPS's Amended Complaint. ¶ 27. The Amendment purports to alter Section 8.02 of the Operating Agreement to avoid liquidation of the Company upon the occurrence of an event of dissolution. ¶ 28. The Operating Agreement requires that any "amendment that . . . would, adverse to a Member, vary the terms of Articles V [Article dealing with capital accounts & contributions], VI [Article dealing with profit, loss and distributions], VII [Article dealing with the transferability of units], or VIII [Article dealing with dissolution] shall require the written consent of any Member so affected." ¶ 31 (emphasis added). Mr. Binn alone executed the purported amendment to the Operating Agreement, without obtaining consent from JPS Partners or any other members. ¶¶ 30.

By email on or about October 21, 2013, JPS Partners was notified of a new "P-3 Round" of financing. Attached as Exhibit O to the Felicello Aff. is a true and correct copy of the memo from Moreton Binn sent to JPS Partners by email that describes the P-3 Round of financing (the "P-3 Memo"). ¶ 32. In accordance with the terms set forth in the P-3 Memo, members of Binn & Partners who do not elect to participate in the P-3 Round by investing additional funds with the Company lose priority to those members who choose to participate. ¶ 33. If the P-3 Round of

financing is allowed to go forward as proposed, JPS Partners' interest will be further destroyed. ¶ 34.

III. ARGUMENT

CONTRACT INTERPRETATION

Contract interpretation is a matter of law. *Nat'l Union Fire Ins. Co. v. Robert Christopher Assocs.*, 257 A.D. 2d 1, 11, 691 N.Y.S.2d 35, 43 (1st Dep't 1999) (affirming grant of summary judgment to guarantor based on unambiguous guaranty). "[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Greenfield v. Philles Records*, 98 N.Y.2d 562, 569 (N.Y. 2002) (internal citation omitted). A contract is unambiguous if the language it uses has "a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" *Id.* at 569-570 (internal citation omitted). Here the applicable contract, the Operating Agreement, is unambiguous and, thus, should be enforced in accordance with its terms. *See* Decision on Mot. Seq. No.4, p. 9, attached as Ex. N to the Felicello Aff. "[I]t is common practice for the courts of this State to refer to the dictionary to determine the plain and ordinary meaning of words to a contract." *Mazzola v. County of Suffolk*, 533 N.Y.S. 2d 297, 297 (App. Div. 2d Dep't. 1998). *See also*, *Herbert v. Schodack Exit Ten, LLC*, 2013 N.Y. Slip Op. 040483 App. Div. 3rd Dep't. Decided & Entered June 6, 2013 (interpreting the term "commitment" in an operating agreement of an LLC by reference to Black's Law Dictionary [9th ed 2009] and Merriam-Webster On-Line Dictionary).

JPS Partners respectfully submit that this Court is empowered to interpret the meaning of the Operating Agreement. The Court should hold that the amendment varied the terms of the Operating Agreement, adverse to JPS Partners, because it eliminated their pre-existing right to dissolution of the Company upon the transfer of substantially all of the Company's assets to another entity. Thus, the February 2012 Amendment that was entered into without the consent of JPS Partners is ineffective against them. The Court should order the immediate dissolution of Binn and Partners, LLC and appoint a receiver or liquidating trustee to wind up the Company's affairs in accordance with the terms of the Operating Agreement and claw back any assets that were improperly transferred to XpresSpa Holdings LLC.

A. AN EVENT OF DISSOLUTION OCCURRED AT THE TIME OF THE TRANSACTION WHEN THE COMPANY TRANSFERRED SUBSTANTIALLY ALL OF THE ASSETS OF THE COMPANY TO XPRESSPA HOLDINGS, LLC.

Section 8.01 of the Operating Agreement provides that "[t]he Company shall . . . be dissolved upon the occurrence of . . . (b) [t]he Transfer of substantially all of the assets of the Company." Operating Agreement, attached as Ex.G to the Felicello Aff. There is no dispute that a "Transfer of substantially all of the assets of the Company" to XpresSpa Holdings, LLC, a Delaware entity, occurred on February 22 or 23, 2012. *See* XpresSpa Holdings, LLC & Subsidiaries Consolidated Financial Statements for the Period From Inception (January 11, 2012) to December 31, 2012, Note 1(A), attached as Exhibit L to the Felicello Aff. ("2012 Financial Statement") and Binn and Partners, LLC and Subsidiaries Consolidated Financial Statements For the Year Ended December 31, 2011, Note 17, attached as Exhibit M to the Felicello Aff. ("2011 Financial Statement").

In support of their motion to dismiss, the Binn Defendants presented the Court with a purported Amendment to the Third Amended and Restated Operating Agreement of Binn and Partners, LLC (the "Amendment"). Felicello Aff., Ex. H. On its face, the Amendment purports to modify the Operating Agreement so that even if an event of dissolution occurs, the dissolution does not trigger liquidation if the Company continues to hold Restricted Assets.[3] *Id.* This Amendment is not mentioned anywhere in the 2011 Financial Statement even though note 12 to the 2011 Financial Statement discusses the terms of the applicable Operating Statement at least three times, as well as the February 2012 amendments to the guarantor agreement. Ex. M to Felicello Aff. (2011 Financial Statement) at note 12. The Amendment is signed by Moreton Binn and does not mention consent by any of the other members of the Company.

Although the Operating Agreement provides Mr. Binn the right to amend its terms, his right to unilaterally amend the Operating Agreement is expressly limited. Specifically, any "amendment that . . . would, adverse to a Member, vary the terms of Articles V [Article dealing with capital accounts & contributions], VI [Article dealing with profit, loss and distributions], VII [Article dealing with the transferability of units], or VIII [Article dealing with dissolution] **shall require the written consent of any Member so affected.**" Section 9.07 of the Operating Agreement, attached as Exhibit G to the Felicello Aff. [emphasis added]. Because the Amendment varied the terms of Article VIII, the consent of JPS was required unless the variation in terms was not adverse to JPS. "Adverse" is defined as "actively opposed," "failing to promote one's interests or welfare," or "in an opposite or opposing direction or position." Webster's II New College Dictionary, Third Ed., 2005. The Merriam-Webster On-Line Dictionary provides a

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[3] The term "Restricted Assets" is defined in the Amendment.

similar definition: "acting against or in a contrary direction," "opposed to one's interests," "causing harm" and "opposite in position." Merriam-Webster On-Line Dictionary <<http://www.merriam-webster.com/dictionary/adverse>> (last visited July 1, 2013). Removing JPS's right to a dissolution is opposed to their interest, fails to promote their welfare and is opposite of their position because whatever rights JPS had were eliminated. Thus, as previously recognized by this Court, the consent of JPS was required to vary the terms of the Operating Agreement to eliminate JPS's right to dissolution upon transfer of substantially all of the assets of the Company. *See* Decision on Mot. Seq. No. 4, p.7 (noting that Mr. Binn's unilateral right to amend the Operating Agreement is "limited in certain cases such as when a member is adversely affected by an amendment relating to dissolution of the company. In such cases, written consent of the affected member is required."). The term "adverse" must be interpreted consistent with the objective meaning of the term (i.e. the elimination of pre-existing rights) and not based on the Binn Defendants' subjective belief of the relative virtue of their conduct. *Ashwood Capital, Inc. v. OTG Management, Inc.*, 99 A.D.3d 1, 948 N.Y.S.2d 292 (App. Div. 1st Dep't. 2012) ("[I]n order to determine the contracting parties' intent, a court looks to the objective meaning of contractual language, not to the parties' individual subjective understanding of it.")

Consistent with the requirements of Section 9.07 of the Operating Agreement, when Mr. Binn first proposed the Transaction to JPS Partners and the other minority members, he included a "Unanimous Consent" form for their signature, in apparent recognition that unanimous consent would be required to effect the Transaction without leading to a dissolution of the Company. (Copy of consent attached as Exhibit K to Felicello Aff.) It was only after JPS Partners resisted the Transaction that the Binn Defendants apparently decided to proceed without obtaining written consent for either the amendment *or* the Transaction.

The Binn Defendants have not proffered any proof that JPS, or any other members of Binn & Partners, provided consent for the Amendment. Rather, Mr. Binn alone executed the purported amendment to the Operating Agreement, without obtaining consent from JPS Partners or any other members:

> **Plaintiff's Fourth Interrogatory**
>
> Name all of the members of Binn and Partners LLC who consented to the February 2012 Amendment to the Third Amended and Restated Operating Agreement of Binn and Partners LLC.
>
> **Response to the Fourth Interrogatory**
>
> Binn and Partners objects to this demand on the grounds that is [sic] overly broad, unduly burdensome, seeks the production of information that is neither relevant to the claims or defense of any party, and not reasonably calculated to lead to the discovery of admissible evidence. Without waiving said objection and without waiving the General Objections, **Moreton Binn as manager of Binn and Partners, executed the February 2012 Amendment to the Third Amended and Restated Operating Agreement of Binn and Partners LLC.** Moreover, as clearly indicated within the Operating Agreement in effect at the time of the execution of the Amendment, member consent was not required in order for the amendment to be executed. [emphasis added]

The complete response to Plaintiff's First Set of Interrogatories is attached as Exhibit I to the Felicello Aff.

The Binn Defendants have taken the position that it was appropriate for Mr. Binn to unilaterally amend the Operating Agreement without consent from the other members because a right to dissolution did not exist at the time of the Amendment. This Court has held that this argument is "without merit" because it "ignores the plain meaning of the Operating Agreement." *See* Decision on Mot. Seq. No.4, p. 8.

The Binn Defendants have also argued that by eliminating the members' right to dissolve the Company, the purported amendment to the Operating Agreement allowed the business to continue to operate, and, thus, could not have been adverse. In addition to failing to address the plain meaning of the Operating Agreement, this argument fails because Binn & Partners has not continued to operate. By the terms of the Transaction, the entire spa business was transferred to XpresSpa Holdings LLC, Exhibit K to Felicello Aff., and according to the memo Mr. Binn circulated on October 21, 2013, "there are no funds at the Binn and Partners level." Exhibit O to Felicello Aff. Thus, because Binn & Partners has ceased all operations and the business operates exclusively through XpresSpa Holdings, LLC, Binn & Partners should be dissolved in accordance with the Operating Agreement.

Because this Court has full authority to interpret the Operating Agreement as a matter of law and because the plain meaning of the Operating Agreement requires consent of JPS prior to an amendment that would, adverse to a member, vary the terms of Article VIII (Dissolution), no genuine issue of material fact is in dispute and the Court should declare the dissolution of Binn & Partners, appoint a receiver or liquidating trustee to wind up the Company's affairs pursuant to Article VIII of its Operating Agreement and claw back assets that have been fraudulently transferred to XpresSpa Holdings LLC. *See also, Ficus Investments Inc. v. Private Capital Management LLC,* 2009 N.Y. Misc. LEXIS 2391; 241 N.Y.L.J. 42 (Sup. Ct. N.Y. Co. Feb. 23, 2009), quoting *Matter of Extreme Wireless, LLC,* 299 A.D.2d 549, 550, 750 N.Y.S.2d 520 (2d Dep't 2002) ("[I]t is clear that '[t]he appropriateness of an order of dissolution of a limited liability company is vested in the sound discretion of the court hearing the petition.'").

B. THE OPERATING AGREEMENT DOES NOT PROVIDE AN EXCEPTION FOR TRANSFERS TO SUBSIDIARIES

That the transfer of substantially all of the assets of Binn & Partners was to a subsidiary is not relevant to the analysis of whether dissolution occurred under the terms of the Operating Agreement. In fact, the dissolution provision of the Operating Agreement is intended to prevent the very gamesmanship that occurred here – separating the member investors from the assets of the entity that they invested in by moving the assets to a new entity without providing adequate compensation. *See Barasch v. Williams Real Estate Co., Inc.*, 33 Misc. 3d 1219(A), 939 N.Y.S.2d 739 (N.Y. Sup. Ct. 2011) (finding a transfer of "substantially all of the assets" when transfers were made to subsidiaries where the transferor company did not retain property or assets to continue the operation of part of the business). Any amendment to the Operating Agreement that eliminated JPS Partners's existing right to dissolution of the Company upon transfer of substantially all of the Company's assets and, hence, caused JPS Partners's investment interest to be left in an empty shell with no continuing operations or business purpose is necessarily "adverse," under the plain meaning of that term. *See also In the matter of the Dissolution of Seagroatt Floral Company, Inc.*, 78 N.Y.2d 439, 444 (N.Y. 1991) (explaining that Section 1104-a of the Business Corporation Law, which gives minority shareholders in close corporations the right to petition for dissolution "on any of several enumerated grounds, including oppressive acts by the directors or those in control of the corporation" provides minority interest holders with protection from oppressive conduct by majority interests).

C. AS A RESULT OF THE DISSOLUTION, THE COMPANY MUST BE LIQUIDATED PURSUANT TO THE OPERATING AGREEMENT & THE COURT SHOULD APPOINT A RECEIVER OR LIQUIDATING TRUSTEE TO WIND UP THE COMPANY'S AFFAIRS

Pursuant to NY Limited Liability Company Section 701(a), "A limited liability **company is dissolved** and its affairs **shall be wound up** upon . . . (2) the happening of **events specified in the operating agreement** . . ." (emphasis added). Under the terms of the Operating Agreement, the Transaction was an "event of dissolution." Specifically, Section 8.01 of the Operating Agreement states "Events of Dissolution. The Company **shall** . . . **be dissolved** upon the occurrence . . . [of] (b) [t]he **Transfer of substantially all of the assets** of the Company." (emphasis added). The Operating Agreement does not include any exceptions for transfers to wholly-owned subsidiaries. A transfer to any other entity is an "event of dissolution." The terms of the Operating Agreement provide that upon the occurrence of an event of dissolution, the "Members shall proceed with reasonable promptness to liquidate the Company and wind up its affairs." Operating Agreement, Ex. G to Felicello Aff. at Section 8.02. Mr. Binn, as manager of Binn and Partners, LLC has not taken any steps to liquidate the Company and wind up its affairs.

Alternatively, New York's Limited Liability Company Law provides that "[u]pon cause shown" the Court "may wind up the limited liability company's affairs upon application of any member, or his or her legal representative or assignee, and in connection therewith may appoint a receiver or liquidating trustee." NY LLC Law § 703(a). Plaintiff has shown that Binn and Partners, LLC should be dissolved as of the date of the Transaction pursuant to the terms of the Operating Agreement. The Binn Defendants have prevented the dissolution from taking effect. Thus, Plaintiff has shown "cause" for the Court to dissolve the Company and appoint a receiver or liquidating trustee to wind up its affairs.

The Binn Defendants should not benefit from the improper delay of the dissolution and liquidation caused by their failure to comply with the terms of the Operating Agreement. The appointed receiver or liquidating trustee should be directed to wind up the Company's affairs,

including the satisfaction of its liability to Lilac Ventures Master Fund Ltd. and distribute the remaining assets of Binn & Partners in accordance with the terms set forth in Article VIII (Dissolution) of the Operating Agreement. Further, the Court should direct the receiver or liquidating trustee to claw back the company's assets that were transferred after or at the same time as the event of dissolution, i.e., the Transaction, so that he/she can pay Company liabilities and make distributions to unitholders in accordance with Section 8.02 of the Operating Agreement.

D. THE INTEREST OF JPS PARTNERS HAS BEEN FURTHER DESTROYED BY THE IMPROPER FLIPPING OF BINN & PARTNERS LLC FROM BEING THE PARENT COMPANY TO BECOMING THE SUBSIDIARY OF XPRESSPA HOLDINGS LLC

According to the memo provided in connection with the proposed P-3 transaction, the transferee of the Company's assets, the new entity, XpresSpa Holdings LLC, is now the parent company of Binn & Partners LLC. *See* Exhibit O to the Felicello Aff. As indicated on page 4 of Exhibit O, XpresSpa Holdings, LLC and subsidiaries is now described as "Formerly Binn and Partners, LLC and Subsidiaries." JPS Partners was not previously provided with any notice that this change had occurred. In subordinating JPS Partners' interest to a subsidiary, the Binn Defendants eliminated any possibility for JPS Partners to receive any distributions resulting from the spa business assets that have been transferred to XpresSpa Holdings. In addition to eliminating any possibility of distributions, the improper flip also eliminated JPS Partners's myriad rights under the Operating Agreement. Now that the spa business is located at the parent company, the new operating agreement of the parent company (XpresSpa Holdings) governs the spa business. The rights of JPS Partners have been effectively eliminated. The Binn Defendants improperly executed this transaction, after they were on notice of JPS Partners's claims.

Thus, the transaction flipping Binn and Partners LLC from the parent company position to a subsidiary position of XpresSpa Holdings LLC was a fraudulent conveyance pursuant to N.Y. DEBT. CRED. LAW 273 (A), 274, and 276. JPS Partners seeks all equitable and legal relief as the Court deems proper to undo this improper transaction.

E. THE P-3 ROUND OF FINANCING SHOULD BE STAYED

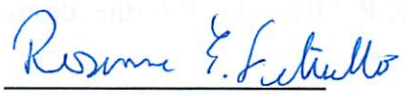
The proposed P-3 Round of financing should be stayed because by its terms it is further destructive of JPS Partners's membership interests because those members who participate in the P-3 Round receive priority over the original investment made by JPS Partners. Tellingly, the P-3 Round was not presented to the board of Binn and Partners LLC, but was, instead, presented to the members of Binn and Partners LLC individually as an opportunity to participate directly. As stated in the memo describing the proposed transaction, "there are no funds at the Binn and Partners level available to invest in the P-3 Round." Exhibit O to Felicello Aff. Thus, the only opportunity for JPS Partners to receive the same priority available to Moreton Binn and the other direct investors in XpresSpa Holdings would be to agree to invest new funds in the P-3 Round. *Id.* Because the P-3 Round will further destroy JPS Partners's interest in the spa business, the transaction should be stayed pending dissolution of Binn and Partners LLC.

IV. CONCLUSION

An event of dissolution has occurred pursuant to the Operating Agreement. The Binn Defendants' attempt to avoid this result by unilaterally amending the Operating Agreement to strip JPS's right to dissolution is without effect. The Court should order the immediate dissolution of Binn & Partners and appoint a receiver or liquidating trustee to wind up the Company's affairs in accordance with Section 8 of the Operating Agreement and to claw back assets that have been fraudulently transferred to XpresSpa Holdings LLC. Given that current management already treats Binn & Partners as a non-entity, the Court should dissolve the Company and appoint a receiver or liquidating trustee to wind up the Company's affairs. Further, by flipping Binn & Partners LLC to be the subsidiary company rather than the parent, the Binn Defendants have stripped JPS Partners of all of their rights to have any control over the fate of their investment. Thus, this flip was improper and should be effectively undone. Further, the P-3 Round of financing should be stayed.

Dated: November 25, 2013
New York, NY

Respectfully submitted,



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