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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOLENE HEACOCK,)	Case No. EDCV 10-01625-JEM
)	
Plaintiff,)	
)	MEMORANDUM OPINION AND ORDER
v.)	REVERSING DECISION OF THE
)	COMMISSIONER OF SOCIAL SECURITY
MICHAEL J. ASTRUE,)	AND REMANDING FOR FURTHER
Commissioner of Social Security,)	PROCEEDINGS
)	
Defendant.)	
_____)	

PROCEEDINGS

On November 1, 2010, Jolene Heacock (“Plaintiff” or “Claimant”) filed a Complaint seeking review of the decision by the Commissioner of the Social Security Administration (“Commissioner”) denying her application for Social Security disability insurance benefits and supplemental income benefits. On April 29, 2011, the Commissioner filed an Answer to the Complaint. On June 29, 2011, the parties filed a Joint Stipulation (“JS”) setting forth their positions and the issues in dispute.

Pursuant to 28 U.S.C. § 636(c), both parties consented to proceed before the undersigned Magistrate Judge. After reviewing the pleadings, transcripts, and administrative record (“AR”), the Court concludes that the Commissioner’s decision should be reversed and

1 the case remanded for further proceedings in accordance with this Memorandum Opinion
2 and Order and with law.

3 **BACKGROUND**

4 Plaintiff is a 54 year old female alleging disability beginning August 13, 2005, due to
5 stroke, carotid artery blockage, a blood clot behind the right eye, poor memory, and
6 depression. (AR 8, JS 2.) Plaintiff has not engaged in substantial gainful activity since that
7 date. (AR 327.)

8 Plaintiff's claims were denied initially and on reconsideration. (AR 8.) Plaintiff filed a
9 timely request for hearing, which was held on March 26, 2008, in San Bernardino, California
10 before Administrative Law Judge ("ALJ") Mason D. Harrell, Jr. (AR 8-19.) Medical expert
11 Samuel Landau, M.D., and vocational expert ("VE") Sandra M. Fioretti also testified. (AR 8.)
12 Plaintiff was represented by counsel. (AR 8.)

13 The ALJ issued an unfavorable decision on April 22, 2008 (the "Prior Decision"). (AR
14 8-19.) The Appeals Council denied review on June 21, 2008. (AR 1-3), Plaintiff appealed to
15 this Court. On December 12, 2008, United States Magistrate Judge Carolyn Turchin issued
16 an order vacating the Prior Decision and remanding for further proceedings (the "Remand
17 Order"), directing the ALJ to give further consideration to whether Plaintiff's inability to drive
18 would preclude the jobs cited by the VE and to address the inconsistency between the VE
19 testimony and the Dictionary of Occupational Titles ("DICOT") regarding the bench
20 assembler position. (AR 364-77.)

21 Following remand, the ALJ held a hearing on June 29, 2010 (AR 325), and issued an
22 unfavorable decision on August 12, 2010 (the "Post-Remand Decision"). (AR 325-32.) The
23 Prior Decision of April 22, 2008, was incorporated by reference in the Post-Remand Decision
24 (AR 325) and updated with new medical records. (AR 330.) The Appeals Council did not
25 review the ALJ's decision, which became the final decision of the Commissioner. See 20
26 C.F.R. § 404.984.

1 **DISPUTED ISSUES**

2 As reflected in the Joint Stipulation, the only issue Plaintiff raises as a ground for
3 reversal and remand is as follows: Whether the ALJ's determination that Plaintiff is capable
4 of performing the jobs of bench assembler and office helper is consistent with the ALJ's
5 residual functional capacity findings.

6 **STANDARD OF REVIEW**

7 Under 42 U.S.C. § 405(g), this Court reviews the ALJ's decision to determine whether
8 the ALJ's findings are supported by substantial evidence and free of legal error. Smolen v.
9 Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); see also DeLorme v. Sullivan, 924 F.2d 841, 846
10 (9th Cir. 1991) (ALJ's disability determination must be supported by substantial evidence and
11 based on the proper legal standards).

12 Substantial evidence means “‘more than a mere scintilla,’ but less than a
13 preponderance.” Saelee v. Chater, 94 F.3d 520, 521-22 (9th Cir. 1996) (quoting Richardson
14 v. Perales, 402 U.S. 389, 401 (1971)). Substantial evidence is “such relevant evidence as a
15 reasonable mind might accept as adequate to support a conclusion.” Richardson, 402 U.S.
16 at 401 (internal quotation marks and citation omitted).

17 This Court must review the record as a whole and consider adverse as well as
18 supporting evidence. Robbins v. Soc. Sec. Admin., 466 F.3d 880, 882 (9th Cir. 2006).
19 Where evidence is susceptible to more than one rational interpretation, the ALJ's decision
20 must be upheld. Morgan v. Comm'r of the Soc. Sec. Admin., 169 F.3d 595, 599 (9th Cir.
21 1999). “However, a reviewing court must consider the entire record as a whole and may not
22 affirm simply by isolating a ‘specific quantum of supporting evidence.’” Robbins, 466 F.3d at
23 882 (quoting Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989)); see also Orn v. Astrue,
24 495 F.3d 625, 630 (9th Cir. 2007).

25 **THE SEQUENTIAL EVALUATION**

26 The Social Security Act defines disability as the “inability to engage in any substantial
27 gainful activity by reason of any medically determinable physical or mental impairment which
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1 can be expected to result in death or . . . can be expected to last for a continuous period of
2 not less than 12 months.” 42 U.S.C. §§ 423(d) (1)(A), 1382c(a)(3)(A). The Commissioner
3 has established a five-step sequential process to determine whether a claimant is disabled.
4 20 C.F.R. §§ 404.1520, 416.920.

5 The first step is to determine whether the claimant is presently engaging in substantial
6 gainful activity. Parra v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). If the claimant is
7 engaging in substantial gainful activity, disability benefits will be denied. Bowen v. Yuckert,
8 482 U.S. 137, 140 (1987). Second, the ALJ must determine whether the claimant has a
9 severe impairment or combination of impairments. Parra, 481 F.3d at 746. An impairment is
10 not severe if it does not significantly limit the claimant’s ability to work. Smolen, 80 F.3d at
11 1290. Third, the ALJ must determine whether the impairment is listed, or equivalent to an
12 impairment listed, in Appendix I of the regulations. Id. If the impediment meets or equals
13 one of the listed impairments, the claimant is presumptively disabled. Bowen v. Yuckert, 482
14 U.S. at 141. Fourth, the ALJ must determine whether the impairment prevents the claimant
15 from doing past relevant work. Pinto v. Massanari, 249 F.3d 840, 844-45 (9th Cir. 2001).

16 Before making the step four determination, the ALJ first must determine the claimant’s
17 residual functional capacity (“RFC”).¹ 20 C.F.R. § 416.920(e). The RFC must account for all
18 of the claimant’s impairments, including those that are not severe. 20 C.F.R. §§ 416.920(e),
19 416.945(a)(2); Social Security Ruling (“SSR”) 96-8p. If the claimant cannot perform his or
20 her past relevant work or has no past relevant work, the ALJ proceeds to the fifth step and
21 must determine whether the impairment prevents the claimant from performing any other
22 substantial gainful activity. Moore v. Apfel, 216 F.3d 864, 869 (9th Cir. 2000).

23 The claimant bears the burden of proving steps one through four, consistent with the
24 general rule that at all times the burden is on the claimant to establish his or her entitlement

26 ¹Residual functional capacity (“RFC”) is what one “can still do despite [his or her]
27 limitations” and represents an assessment “based on all the relevant evidence.” 20 C.F.R.
28 §§ 404.1545(a)(1), 416.945(a)(1).

1 to benefits. Parra, 481 F.3d at 746. Once this prima facie case is established by the
2 claimant, the burden shifts to the Commissioner to show that the claimant may perform other
3 gainful activity. Lounsbury v. Barnhart, 468 F.3d 1111, 1114 (9th Cir. 2006). To support a
4 finding that a claimant is not disabled at step five, the Commissioner must provide evidence
5 demonstrating that other work exists in significant numbers in the national economy that the
6 claimant can do, given his or her RFC, age, education, and work experience. 20 C.F.R. §
7 416.912(g). If the Commissioner cannot meet this burden, then the claimant is disabled and
8 entitled to benefits. Id.

9 THE ALJ'S DECISION

10 In the Post-Remand Decision, the ALJ determined at step one of the sequential
11 process that Plaintiff has not engaged in substantial gainful activity since August 13, 2005,
12 the alleged onset date. (AR 327.)

13 At step two, the ALJ found that Plaintiff has the following medically determinable
14 severe impairments:

15 . . . history of transient ischemic attacks (TIA) and stroke in August 2005;
16 obesity; a possible seizure disorder; an organic mental disorder; a
17 depressive disorder; and premigraine visual disturbance.

18 (AR 327.)

19 At step three, the ALJ determined that Claimant does not have an impairment that
20 meets or medically equals any of the listed impairments in 20 C.F.R. Pt. 404, Subpt. P,
21 Appendix 1. (AR 328.)

22 The ALJ then found that Plaintiff has the RFC to perform light work with the following
23 exceptions:

24 . . . out of an 8-hour period, she can stand and/or walk for 2 hours and sit
25 for 6 hours with normal breaks every 2 hours. The claimant has to get up
26 slowly from a seated position. She would miss work once, sometimes
27 twice a month- The usual seizure precautions apply. The claimant can
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1 climb stairs but cannot climb ladders, ropes, or scaffolds. She cannot
2 work at heights, balance, operate motorized equipment or work around
3 dangerous, moving machinery. Mentally, due to alleged confusion and
4 memory problems, the claimant can perform simple, repetitive low stress
5 jobs requiring less than occasional contact with the public as well as
6 interpersonal contact with co-workers and supervisors. The claimant
7 cannot drive a motor vehicle and needs an extra 20 minute break once a
8 month.

9 (AR 328-29.) In determining Plaintiff's RFC, the ALJ made an adverse credibility finding (AR
10 329) that is not challenged here.

11 At step four, the ALJ found that Claimant is unable to perform her past relevant work
12 as a grocery clerk and waitress. (AR 331.) The ALJ, however, determined at step five that
13 there were other jobs in the national economy that Plaintiff could perform. (AR 331-32.)
14 These include office helper and bench assembler. (AR 332.)

15 Hence, the ALJ concluded that Plaintiff was not disabled within the meaning of the
16 Social Security Act. (AR 332.)

17 **DISCUSSION**

18 Plaintiff does not dispute the ALJ's determination of her impairments, RFC or
19 credibility. Plaintiff contends that the ALJ's step five determination that she can perform the
20 jobs of bench assembler and office helper is not supported by substantial evidence.
21 Specifically, she contends that the ALJ's RFC precluding jobs that require driving conflicts
22 with the job requirements for the office helper job set forth in DICOT. She also contends that
23 the VE's testimony conflicts with DICOT in regard to the bench assembler position because it
24 requires use of power tools precluded by the ALJ's RFC.

25 Plaintiff's first contention regarding the office helper job is meritless, but Plaintiff is
26 correct that the VE testimony conflicts with DICOT on the bench assembler job and fails to
27 provide a reasonable explanation for the conflict. Remand is required.

1 **A. Relevant Law**

2 The Commissioner bears the burden at step five of the sequential process to prove
3 that Plaintiff can perform other work in the national economy, given his RFC, age, education,
4 and work experience. 20 C.F.R. § 416.912(g); Silveira v. Apfel, 204 F.3d 1257, 1261 n.14
5 (9th Cir. 2000); 20 C.F.R. § 416.912(g). There are two ways to meet this burden: (1) the
6 testimony of a VE, or (2) reference to the Grids. Lounsbury, 468 F.3d at 1114; Osenbrock v.
7 Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001). When a claimant suffers only exertional
8 limitations, the ALJ must consult the Grids. Lounsbury, 468 F.3d at 1115. A nonexertional
9 impairment, however, may limit the claimant’s functional capacity in ways not contemplated
10 by the Grids. Tackett v. Apfel, 180 F.3d 1094, 1002 (9th Cir. 1999). Thus, when a claimant
11 suffers from both exertional and nonexertional limitations, the ALJ must first determine
12 whether the Grids mandate a finding of “disabled.” Id. at 1116; Cooper v. Sullivan, 880 F.2d
13 1152, 1155 (9th Cir. 1989). If so, the claimant will be awarded benefits. Cooper, 880 F.2d at
14 1155. If not, the ALJ must use the Grids as a framework for decision-making in determining
15 how much the nonexertional limitations limit the range of work permitted by the exertional
16 limitations. Tackett, 180 F.3d at 1102. In such instances, the ALJ must obtain the testimony
17 of a vocational expert to determine if there are jobs in the national economy that the claimant
18 can perform. Tackett, 180 F.3d at 1102; Osenbrock, 240 F.3d at 1162.

19 Typically, the best source of how a job is generally performed in the national
20 economy is DICOT. Pinto, 249 F.3d at 845. DICOT raises a presumption as to job
21 classification requirements. Johnson v. Shalala, 60 F.3d 1428, 1435 (9th Cir. 1995). An ALJ
22 may accept vocational expert testimony that varies from DICOT, but the record must contain
23 “persuasive evidence to support the deviation.” Id. The ALJ has an affirmative responsibility
24 to ask whether a conflict exists between a VE’s testimony and DICOT. SSR 00-4p, 2000 WL
25 1898704, *4 (S.S.A.); Massachi v. Astrue, 486 F.3d 1149, 1153 (9th Cir. 2007). If there is a
26 conflict, the ALJ must obtain a reasonable explanation for the conflict and then must decide
27 whether to rely on the VE or DICOT. Id. Failure to do so, however, can be harmless error
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1 where there is no actual conflict or the VE provides sufficient support to justify a variation
2 from DICOT. Id. at 1154 n.19.

3 **B. The ALJ's Step Five Determination That Plaintiff**
4 **Can Perform The Job Of Office Helper Is Supported**
5 **By Substantial Evidence**

6 In this case, the ALJ could not rely on the Grids in making his step five determination
7 because Claimant's nonexertional limitations eroded the light occupational base. (AR 332.)
8 See Moore, 216 F.3d at 869. The ALJ correctly observed that when the claimant has
9 nonexertional limitations, the Grids are used as a framework for decision-making and a VE
10 must be consulted to determine the extent these limitations erode the unskilled light
11 occupational base, citing SSR 83-12 and 83-14. (AR 331-332.) SSR 83-12 provides that
12 "where the extent of erosion of the occupational base is not clear, the adjudicator will need to
13 consult a vocational resource." SSR 83-14 provides that where the nonexertional impairment
14 significantly erodes the occupational base, "the remaining portion will guide the decision."

15 Thus, the ALJ was required to take the testimony of a VE and did. Id. An ALJ may
16 rely on a VE's response to a hypothetical question containing all of a claimant's limitations
17 found credible by the ALJ and supported by substantial evidence. Bayliss v. Barnhart, 427
18 F.3d 1211, 1217-18 (9th Cir. 2005.) Here, the ALJ presented the VE with all of Plaintiff's
19 limitations. The VE found that Plaintiff could perform the job of office worker eroded by 60%
20 and bench assembler eroded by 85%.

21 In the Prior Decision, the ALJ's RFC contained a limitation precluding operation of
22 motorized equipment. (AR 12.) The ALJ did not include Dr. Moore's specific limitation on
23 operating a motor vehicle which the Prior Decision regarded as not necessarily the same as
24 the restriction on operating motorized equipment. (AR 368-69.) There was no explanation
25 for why Dr. Moore's limitation was omitted from the RFC. (AR 369.) Thus, the Prior Decision
26 held that "because the hypothetical posed by the ALJ to the VE did not include a driving
27 restriction, it is impossible to tell whether the office helper jobs that the VE found Plaintiff
28

1 could perform include jobs that require driving.” (AR 370.) Accordingly, remand was
2 ordered.

3 In the Post-Remand Decision, the ALJ made the “no driving” restriction specific in the
4 RFC. (AR 329, 330-31.) At the Post-Remand hearing, the VE clarified that, when she
5 eroded the office helper job by 50% at the prior hearing, she regarded the restriction against
6 operating motorized equipment to include no driving. (AR 352.) She then increased the
7 erosion to 60% to account for the low stress requirement. (AR 354.) She also indicated that
8 neither the officer worker or the bench assembler jobs require driving. (AR 355.) The
9 erosion to 60% for the office worker job with all restrictions would leave 600 jobs regionally.
10 (AR 332, 353.)

11 The VE’s opinion was reasonable. The DICOT job description for the office worker
12 position provides as follows:

13 Performs any combination of following duties in business office of
14 commercial or industrial establishment: Furnishes workers with clerical
15 supplies. Opens, sorts, and distributes incoming mail, and collects, seals,
16 and stamps outgoing mail. Delivers oral or written messages. Collects
17 and distributes paperwork, such as records or timecards, from one
18 department to another. Marks, tabulates, and files articles and records.
19 May use office equipment, such as envelope-sealing machine, letter
20 opener, record shaver, stamping machine, and transcribing machine.
21 May deliver items to other business establishments [DELIVER, OUTSIDE
22 (clerical) 230.663-010]. May specialize in delivering mail, messages,
23 documents, and packages between departments of establishment and be
24 designated Messenger, Office (clerical). May deliver stock certificates
25 and bonds within and between stock brokerage offices and be designated
26 Runner (financial).

27 DICOT 239.567-010; 1991 WL 672232 (G.P.O.)

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1 As the VE observed, driving is not required to perform office helper jobs (“May deliver
2 items to other business establishments”). (Emphasis added.) Driving does not appear to be
3 a consequential task of the office helper job. Most of the job’s requirements do not involve
4 driving and many delivery functions would occur within the same building, and involve no
5 driving. The VE’s testimony, then, is supported by the DICOT job description and is
6 persuasive evidence that explains any deviation from or inconsistency with the DICOT office
7 helper job description based on the “no driving” restriction.

8 Plaintiff also asserts that the office helper job may require use of an electric letter
9 opener which would conflict with the motorized equipment/dangerous machinery limitation in
10 Plaintiff’s RFC. Again, however, the VE’s job erosion percentage plainly encompasses the
11 RFC’s limitations to no motorized equipment or work around dangerous machinery. (AR
12 352.) The VE’s opinion was reasonable and supported by the DICOT job description. The
13 description does not even say whether the operation of the letter opener is by hand or
14 machine. The task is not mandatory (“May use office equipment) and does not appear to be
15 a significant aspect of the job. The VE’s opinion for any variation from DICOT is persuasive
16 evidence.

17 The VE’s testimony constitutes substantial evidence in support of the ALJ’s step five
18 finding that Plaintiff can perform 40% of office helper jobs. Moore, 216 F.3d at 869-70. The
19 ALJ was entitled to rely on it. Bayliss, 427 F.3d at 1217-18.

20 **C. The ALJ’s Step Five Determination That Plaintiff**
21 **Can Perform The Job Of Bench Assembler Is Not**
22 **Supported By Substantial Evidence**

23 In the Prior Decision, remand also was ordered as to the bench assembler job. (AR
24 372.) The DICOT job description for the bench assembler occupation provides as follows:

25 Assembles parts to form yard and garden care equipment components,
26 such as reels, steering handles, and gear boxes, following specifications
27 and using handtools and power tools: Fits parts of components together
28 and fastens them with bolts and cotter pins, using handtools and
pneumatic impact wrench. Seats inserts, such as bearings and grease

1 seals in hubs and sleeves, using power press. Rivets reel blades to hubs
2 on reel shaft, using pneumatic clinching gun, and sets rivets, using rivet
3 press [RIVETING-MACHINE OPERATOR (any industry) I]. May be
4 designated according to part assembled as Reel Fabricator (agric.
5 equip.).

6 DICOT 706.684-042; 1991 WL 679055 (G.P.O.). The bench assembler job can require use
7 of power tools, a pneumatic impact wrench, a pneumatic clinching gun and a rivet press. Id.
8 The use of motorized equipment appears central to the job. DICOT, however, indicates
9 moving mechanical parts are not present. Id.

10 As determined in the Prior Decision, there appears to be an inconsistency between
11 Plaintiff's RFC precluding operation of motorized equipment and the DICOT job requirements
12 for the bench assembler position. (AR 372.) The ALJ's RFC had precluded Plaintiff from
13 operating motorized equipment or working around dangerous moving machinery. (AR 12.)
14 The bench assembler job plainly requires working with power tools. DICOT 706.684-042;
15 1991 WL 679055 (G.P.O.). The Prior Decision also was concerned that the power tools
16 "may have potentially dangerous moving parts." (AR 372.) Nonetheless, the VE, eroding the
17 job base by 75%, testified that Plaintiff could perform "some work as a bench assembler."
18 (AR 50.) The VE said her testimony was consistent with DICOT (AR 51), but as the Prior
19 Decision observed, the VE did not provide any further explanation or elaboration. (AR 372.)
20 The Prior Decision then held that the DICOT job requirements for the bench assembler job
21 appear to be inconsistent with Plaintiff's RFC and that the VE failed to provide any support or
22 explanation for how Plaintiff could perform 25% of available bench assembler jobs. (AR
23 372.)

24 The Post-Remand Decision does not address or remedy the defect. On remand, the
25 VE increased the erosion for the bench assembler job to 85% because of the addition of the
26 low stress restriction. (AR 356.) The 85% erosion would leave 400 jobs regionally. The VE,
27 however, once again offered no explanation for the inconsistency between her testimony and
28 the DICOT job description for the bench assembler job. The ALJ did not inquire of the VE if

1 her testimony varied from DICOT or obtain an explanation for the variation. There was no
2 specific discussion at the hearing of motorized equipment (other than driving), certainly
3 nothing that would rise to the level of “persuasive evidence.” The ALJ did not address the
4 bench assembler issue in his Post-Remand Decision or even acknowledge it as a basis for
5 remand. The ALJ, in short, repeated the same error.

6 The Commissioner does not address or even mention the Prior Decision remand on
7 the bench assembler job. Instead, the Commissioner argues that the ALJ was entitled to rely
8 on the VE testimony which eroded the job base for the operation of motorized equipment.
9 This assertion conflicts with the Prior Decision and essentially is an implicit argument that the
10 Prior Decision was wrong or should be disregarded or that the VE’s testimony that Plaintiff
11 can perform 15% of bench assembler jobs is sufficient without more.

12 The Prior Decision was correct. There was insufficient explanation for the variance
13 between the VE testimony about the bench assembler job and the DICOT job requirements.
14 Unlike the office helper jobs, which mostly do not involve driving, the DICOT job description
15 makes clear that operating motorized equipment is central to the bench assembler job,
16 enough so that the VE was required to offer more than a bare job erosion percentage. The
17 VE’s opinion was not a reasonable or sufficient explanation for the variation from DICOT nor
18 constitutes persuasive evidence for it. The ALJ’s step five determination on the bench
19 assembler job is not supported by substantial evidence.

20 **D. Disposition**

21 The Commissioner has had two opportunities to carry his step five burden to prove
22 that Plaintiff can perform the bench assembler position. On remand, both the ALJ and VE
23 failed to address the Post-Remand Decision on that occupation. Another remand on the
24 issue is not warranted.

25 What remains is the office helper position, 60% eroded with 600 jobs regionally. The
26 Court is concerned whether 600 jobs regionally is sufficient to conclude that Plaintiff is not
27 disabled. Even adding the 400 bench assembler jobs, the Court would have the same
28 concern. The ALJ decision does not address this issue and the parties do not address it in

1 their Joint Stipulation. The Court therefore will remand the case solely on the sufficiency of
2 600 jobs regionally to establish non-disability.

3 **ORDER**

4 IT IS HEREBY ORDERED that the decision of the Commissioner of Social Security is
5 REVERSED and that this action be remanded for further proceedings in accordance with
6 Memorandum Opinion and Order and with law.

7 LET JUDGMENT BE ENTERED ACCORDINGLY.

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9 DATED: July 22, 2011

/s/ John E. McDermott
JOHN E. MCDERMOTT
UNITED STATES MAGISTRATE JUDGE

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