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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

LOG CABIN REPUBLICANS, Plaintiff, v. UNITED STATES OF AMERICA AND ROBERT M. GATES, Secretary of Defense, Defendants.	Case No. CV04-8425 (VAP)(Ex) DEFENDANTS OPPOSITION TO PLAINTIFF'S *EX PARTE* APPLICATION FOR AN ORDER COMPELLING DEFENDANTS TO COMPLY WITH 30(b)(6) DEPOSITION NOTICE Discovery Cutoff: Mar. 15, 2010 Pretrial Conference: June 7, 2010 Trial: June 14, 2010

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INTRODUCTION

Plaintiff has applied *ex parte* for an order compelling Defendants to comply with its 30(b)(6) deposition Notice. Because the relief Plaintiff now seeks resulted entirely from counsel's own failure to promptly serve a Local Rule 37-1 stipulation, the emergency relief Plaintiff seeks should be denied. Plaintiff and the Government previously had agreed to proceed in a timely and orderly fashion with respect to their dispute regarding the 30(b)(6) deposition. But Plaintiff failed to proceed and was dilatory in pursuing relief. Upon entry of an order by the Court on March 4, 2010 declining to extend the discovery deadline, Plaintiff, recognizing that it is now out of time to obtain the 30(b)(6) deposition in light of its delay, has resorted to the *ex parte* process for relief. As explained below, *ex parte* relief is unavailable for self-made emergencies; such relief, instead, is reserved for extraordinary circumstances, which are not present here.

Even if Plaintiff's own failure to proceed in a timely fashion is not cause enough to deny the *ex parte* application, Plaintiff cannot carry its heavy burden of showing that the denial of *ex parte* relief would result in irreparable harm. The areas of testimony sought in the Notice are irrelevant to the claims and defenses that remain in this case, and each of the objections lodged by the Government to the Notice are entirely appropriate under Federal Rules of Civil Procedure 26 and 30. Plaintiff's application should be denied. Should the Court consider the matter nonetheless, it should enter an appropriate protective order in favor of the Government with respect to the areas of testimony identified in the Notice.

BACKGROUND

A. Procedural Background

Plaintiff Log Cabin Republicans ("LCR") brings a facial challenge to the constitutionality of the statute (10 U.S.C. § 654) and the Department of Defense's ("DoD's") implementing regulations generally prohibiting homosexual conduct in the military, commonly known as the "Don't Ask, Don't Tell" ("DADT") policy.

The DADT statute provides for separation from the military if a member of the armed forces has (1) "engaged in, attempted to engage in, or solicited another to engage in a homosexual act"; (2) "stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding . . . that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts"; or (3) "married or attempted to marry a person known to be of the same biological sex." 10 U.S.C. § 654(b)(1)-(3). The DoD implements the policy through the statute and implementing regulations, which are set forth in Directives. *See* Department of Defense Instruction 1332.14, *Enlisted Administrative Separations* (Aug. 28, 2008); Department of Defense Instruction 1332.30, *Separation Procedures for Regular and Commissioned Officers* (Dec. 11, 2008).

On June 9, 2009, this Court granted in part and denied in part the Government's motion to dismiss Plaintiff's claims. The Court dismissed Plaintiff's equal protection claim, but held that Plaintiff had stated a viable facial substantive due process claim following the Ninth Circuit's decision in *Witt* v. *Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008). In *Witt*, the Ninth Circuit found that the plaintiff's as-applied substantive due process challenge to the DADT statute could proceed in light of the Supreme Court's decision in *Lawrence* v. *Texas*, 539 U.S. 558 (2003), and would be governed by intermediate scrutiny. Because Plaintiff's suit here presents a facial challenge, the Court ruled

that Plaintiff could not avail itself of that standard and that its challenge to the policy would instead be governed by the lowest level of scrutiny–"rational basis." Op. 16-17.

The Court also held that Plaintiff's First Amendment challenge could proceed. The Court further held that the DADT statute was consistent with the First Amendment to the extent it permitted the military to use statements as admissions of a propensity to engage in homosexual acts. Op. 21-22. But the Court found that "[d]ischarge on the basis of statements not used as admissions of a propensity to engage in 'homosexual acts' would appear to be discharge on the basis of speech rather than conduct, an impermissible basis." Op. 23. The Court therefore permitted Plaintiff's First Amendment claim to proceed to the extent that the policy permitted discharge on the basis of speech alone. Op. 23-24.

In the wake of the Court's June 9th Order, the Government asked the Court to limit Plaintiff's discovery, given that Plaintiff's facial constitutional challenge does not depend on any particular facts. On July 24, 2009, the Court ruled that Plaintiff is entitled to discovery, Discovery Order 2, but did not rule on the appropriate scope of discovery at that time. At the most recent status conference, held on February 18, 2010, the Court stated that the scope of Plaintiff's discovery should be addressed in the context of discovery motions.

B. Plaintiff's 30(b)(6) Notice and Current Dispute

Undersigned counsel received a copy of Plaintiff's 30(b)(6) deposition Notice on January 14, 2010. While the certificate of service accompanying the Notice states that it was served *via* mail on December 21, 2009, it was not received *via* mail and apparently was somehow lost in the mail. Upon learning of the Notice from Plaintiff's counsel, and receiving a copy of the Notice *via* email, undersigned counsel informed Plaintiff's counsel that it would need additional time to consider the Notice and whether a witness could be produced.

On January 29, 2010, undersigned counsel sent Plaintiff a letter setting forth the Government's objections to the Notice. *See* Exhibit B to Pl's *Ex Parte* App. Because the Notice sought testimony regarding matters that are irrelevant to the claims and defenses that remain in this case, legal conclusions, and information that is not known or reasonably available to Defendants, the Government advised Plaintiff that it would move for the entry of an appropriate protective order if the Notice were not withdrawn.

Pursuant to Local Rule 37-1 and Federal Rule of Civil Procedure 26(c)(1), in the January 29, 2010 letter undersigned counsel requested a date to "meet and confer" should the Notice not be withdrawn and prior to the filing of any motion by Plaintiff. Counsel for the parties thereafter met and conferred on February 9, 2010. During that meeting, Plaintiff's counsel agreed to withdraw paragraph 5 of the Notice seeking testimony regarding "[t]he effect or lack of effect of *Lawrence v. Texas*, 539 U.S. 558 (2003) on the Policy, the application of the Policy, or the legality of the Policy." The parties were unable to reach agreement on any of the other areas in the Notice. At the conclusion of the meeting, counsel agreed that the parties would proceed by cross-motion, whereby Plaintiff would move to compel and the Government would seek a protective order regarding the testimony sought. In light of the fact that the Government had not received any written response from Plaintiff to its January 29, 2010 letter, the parties agreed that Plaintiff's counsel would initiate the process set forth in L.R. 37 by forwarding Plaintiff's portion of the stipulation setting forth a response to the Government's objections, and that the Government thereafter would respond according to the schedule set forth in L.R. 37.

Plaintiff's counsel then sent a letter dated February 11, 2010 proposing an expedited schedule whereby Plaintiff would forward Plaintiff's portion of the L.R. 37-1 stipulation by February 22, 2010 and the Government would respond on an expedited basis. The Government did not agree to that schedule, but undersigned

counsel suggested to counsel for Plaintiff on February 18, 2010 that the parties consolidate all discovery motions in one motion and request an extension of the discovery period to resolve all pending discovery motions. Counsel for Plaintiff objected to such a suggested procedure. Government counsel thus expected to receive Plaintiff's portion of the L.R. 37-1 stipulation on or before February 22nd, as agreed. But it never came–that is, until last Wednesday, March 3, 2010. Thus, after the parties agreed on February 9, 2010 that Plaintiff would forward its portion of the stipulation to initiate the process, Plaintiff did not do so until over three weeks later, on March 3, 2010.

At the February 18, 2010 status conference, the Court suggested that it might consider extending the trial date in this case by 60 days. On March 4, 2010, however, the Court entered an order ruling that the March 15, 2010 discovery cut-off would not be extended and that the trial date would go forward as scheduled on June 14, 2010. Plaintiff, who just one day earlier had forwarded its portion of the stipulation, then realized it had waited too long to have the motion heard before the March 15 discovery cutoff. Seeking to remedy its own misstep, Plaintiff has now pursued relief through an *Ex Parte* application. The Government opposes the application and asks that (1) the application be denied as improper; and, if it is considered, (2) that the Court enter an appropriate protective order for the reasons set forth below with respect to the areas identified in the 30(b)(6) Notice of deposition.

ARGUMENT

I. Standard for *Ex Parte* Relief

In her standing order, Judge Phillips specifically advises that "this Court allows *ex parte* applications solely for extraordinary relief." Docket Entry 68, pg 5. Judge Phillips also counsels parties to become familiar with *Mission Power Eng'g Co. v. Continental Cas., Co.*, 883 F.Supp. 488 (C.D. Cal. 1995). The Court in *Mission Power* reviewed the rampant abuse of *ex parte* applications and set forth the stringent standard parties must meet to justify *ex parte* relief. The party seeking relief must establish that it "is without fault in creating the crisis that requires *ex parte* relief, or that the crisis occurred as a result of excusable neglect." *Id*. at 492. And if it is able to make that showing, the party must then show that its cause "will be irreparably prejudiced if the underlying motion is heard according to regular noticed motion procedures." *Id*. Plaintiff fails to make either of the showings required by *Mission Power*.

II. *Ex Parte* Relief Is Unavailable to Remedy Plaintiff's Self-Made Emergency

It is Plaintiff who has created the situation that prompts it now to seek *ex parte* relief. Had Plaintiff timely initiated the process for cross motions agreed upon by the parties, this matter could have been addressed and resolved before the discovery deadline through the regular noticed motion procedures. If Plaintiff had served its portion of the L.R. 37-1 stipulation on or before February 22, 2010, as it stated it would in its February 11, 2010 letter, *see* Exhibit C to Pl's Ex Parte App., the Government could have sent its portion of the stipulation on March 1, 2010, and reply briefs could have been submitted the following week (by March 8, 2010), leaving the Court time to consider the parties' cross-motions to compel and for a protective order. But Plaintiff failed to forward its portion of the stipulation in a timely fashion as promised, and waited until March 3, 2010 to send its portion of the stipulation.

Ex parte procedures are not intended to be used by counsel to remedy a crisis of their own making. Indeed, the Court in *Mission Power* cited to Judge Rymer's warning that "[e]x parte applications are not intended to save the day for parties who have failed to present requests when they should have." *Id*. at 493 (citation omitted). Plaintiff is trying to use its *ex parte* application to save the day because it failed to initiate cross motions when it should have and as it agreed to do when counsel for the parties met and conferred on February 9, 2010. Because Plaintiff created this crisis by the unexplained delay of counsel, it cannot now show that it will be irreparably harmed if it cannot bring its motion. The extraordinary *ex parte* relief Plaintiff now seeks can and should be denied on this ground alone.

II. Denying Plaintiff *Ex Parte* Relief Will Not Cause Irreparable Harm

Plaintiff is correct that it no longer has time to bring its motion in light of the Court's discovery deadline, but Plaintiff cannot show that its cause will be irreparably prejudiced if the underlying motion is not heard. As set forth more fully below, Plaintiff's 30(b)(6) Notice improperly calls for the Government to provide a witness to testify about subjects that are not relevant to the claims and defenses that remain in this case. The Notice is also inappropriate because, in many respects, it seeks information that is not even in the Executive Branch's control. Still other areas have been exhaustively covered in the Government's responses to Plaintiff's requests for admission, document requests, and interrogatories and, thus, have (or could have) been addressed through less burdensome forms of discovery. Because Plaintiff's underlying motion would likely be denied, and because Plaintiff has had the opportunity to gather information using other discovery devices, Plaintiff cannot show that its case will be irreparably prejudiced if *ex parte* relief is denied.

A. The Requested Testimony Is Irrelevant to the Claims and Defenses that Remain

Plaintiff's demand that Defendants produce "officers, directors, managing agents and other persons" to provide testimony regarding the rationality of the Policy, *see* Notice ¶'s 4 and 8, is beyond the scope of appropriate discovery. It is well-established in this Circuit (and others) that a witness cannot be called upon to testify as to a legal conclusion. *United States v. Crawford*, 239 F.3d 1086, 1090 (9th Cir. 2001), *Evangelista v. Inlandboatmen's Union of Pac*., 777 F.2d 1390, 1398 n.3 (9th Cir. 1985); *Quicksilver, Inc. v. Kymsta Corp*., 247 F.R.D. 579, 585 (C.D. Cal. 2007).

The Ninth Circuit already has recognized, moreover, that the Government "has no obligation to produce evidence to sustain the rationality of [the] statutory classification" set forth in DADT. *Philips v. Perry*, 106 F.3d 1420, 1425 (9th Cir. 1997)(quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993), which, in turn, quotes *FCC v. Beach Communications*, 508 U.S. 307, 313 (1993)). Such a legislative choice is not subject to "factfinding" – and may be based on "rational speculation unsupported by evidence and empirical data." *Phillips*, 106 F.3d at 1425 (quotations and citations omitted). "[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Id*. (same). Indeed, it is well-settled in this and other Circuits that judicial deference is greatest when, as here, legislative action is taken under the "congressional authority to raise and support armies and make rules and regulations for their governance[.]" *Id*. It is especially true given that the statute was "extensively considered by Congress in hearings, committee and floor debate." *Id*.

The Ninth Circuit already has observed that Congress and the military appropriately found that the statute was "necessary to further military effectiveness by maintaining unit cohesion, accommodating personal privacy and

reducing sexual tension." *Phillips*, 106 F.3d at 1429. Discovery into these subjects is thus improper. And even if inquiry were appropriate, Judge Noonan specifically recognized in his concurring opinion in *Philips* that permitting judges to weigh the merits of such a policy requires courts "to take from the President and assign to [themselves] a responsibility for a supervision of military discipline unknown to the Constitution and our traditions and beyond [their assigned] roles as judges of the United States." *Id*. at 1430. Such judgments regarding the needs of the military are to be based solely upon the professional judgment of Congress and the military and are not amenable to factual or "empirical" proof. *Id*. at 1432.

Given this well-settled precedent, Defendants object to designating witnesses to speak to legal questions or to testify about the rational bases that have already been found to support the statute. Defendants clearly have stated in this case that they intend to defend the statute by relying on its text and legislative history. Defendants do not plan to call witnesses to testify concerning the rational bases of the statute–the text and legislative history set forth above are more than sufficient in that regard–and the Government should not be forced to provide such witnesses to Plaintiff.

Contrary to Plaintiff's assertion (Pl's *Ex Parte* App., at 7-8), *Philips* is dispositive of the type of discovery that is appropriate. While *Philips* did not address discovery, it did address the Government's burden under rational basis review and found the privacy and sexual tension rationales more than sufficient to satisfy the Government's burden; it also found that such a showing is not amenable to factual of empirical proof. To defeat summary judgment, Plaintiff now has the burden to show that these bases–privacy and sexual tension–are not valid.[1]

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[1] Plaintiff also argues that the holding in *Philips* is "arguably limited" by the Supreme Court's decision in *Lawrence*. Pl's *Ex parte* Application, at 7. But the

Plaintiff's facial challenge to a legislative Act "is the most difficult challenge to mount successfully because the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745(1987) (addressing standard of proof for a facial substantive due process challenge, as here). Under this standard of review, the Government has the burden to show at least one appropriate constitutional application or "plainly legitimate sweep." *Washington v. Glucksberg*, 521 U.S. 702, 739-40, and n. 7, (Stevens, J., concurring in judgment) (1997); *see also Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008) (quoting *Glucksberg*). The Government has done so by pointing to the privacy and sexual tension rationales identified in *Philips*. The burden now shifts to Plaintiff under Fed. R. Civ. P. 56 to rebut the Government's showing, and the testimony Plaintiff seeks in its Notice would not aid Plaintiff in its attempt to make that required showing because, as explained above, the judgment of the political branches are inappropriate subjects for factual or empirical inquiry.

B. The Government's Remaining Objections Are Proper

Defendants' other objections to Plaintiff's 30(b)(6) Notice are proper and provide still further grounds to deny Plaintiff *ex parte* relief. The Notice seeks testimony regarding: (1) how the policy has been applied to women, other so-called non-combat-assigned service members, and service members deployed overseas to combat theatres since 2001; (2) reports, studies, or analyses of third-party contractors and Congress addressing the DADT policy; (3) the recruiting and hiring practices of third-party contractors; and (4) other matters that already

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Ninth Circuit has evaluated the rational basis standard in the context of both substantive due process and equal protection since *Lawrence* and rejected any contention that *Lawrence* requires a "more searching review" absent a suspect classification. *Ileto v. Glock*, 565 F.3d 1126, 1141 (9th Cir. 2009). In rejecting Plaintiff's equal protection claim, Judge Philips found no suspect classification.

have been exhaustively addressed in response to Plaintiff's requests for production of documents, requests and admission, and interrogatories (*e.g.*, the deployment of gay or lesbian members, statistical information regarding the policy, polling regarding the policy, and the fiscal impact of the policy). As discussed below, the Government appropriately and timely lodged objections to each of these areas of testimony.

1. Plaintiff Lacks Standing to Challenge the Application of the Policy to Women, And Evidence on that Subject Is Not Relevant

The Notice seeks testimony regarding the application of the DADT policy to women in the United States Armed Forces to purportedly show that the policy disproportionately impacts women. *See* Notice ¶ II.1. Testimony regarding the impact of the policy on women is not relevant – and not likely to lead to the discovery of admissible evidence. Plaintiff lacks standing to bring such a claim; the only members Plaintiff has identified among its membership are two men: Alexander Nicholson and an anonymous male, "John Doe." Plaintiff has not identified any women among its membership who have been purportedly affected by the policy. Because Plaintiff's associational standing extends only to the type of harm suffered by its members, *see Hunt v. Washington State Apple Adver. Comm'n v. Advertising Comm'n*, 432 U.S. 333, 343 (1977) (recognizing that associational Plaintiff's standing only extends to matters for which "members would otherwise have standing to sue in their own right[]"), it lacks associational standing to challenge the policy's impact on women.

Such a claim of disparate treatment, moreover, is an equal protection, not a substantive due process, challenge. The Court already has dismissed Plaintiff's equal protection claim in its June 9, 2009 order and, to the extent Plaintiff is somehow positing a misapplication of the statute and implementing regulations, such a theory falls far outside of Plaintiff's facial due process claim, which necessarily presumes the proper application of the statute and regulations.

Rather than addressing these arguments, Plaintiff claims that testimony about the application of the Policy to women is relevant to whether there is "a rational nexus between the Government's interest in combat unit cohesion and the exclusion of gays and lesbians from non-combat positions." Plaintiff's *Ex Parte* App. at 7. But this argument is inapposite in the context of Plaintiff's facial challenge because, as explained, to survive summary judgment Plaintiff now must show that the policy is unconstitutional in *all* of its applications.

2. Defendants Cannot Produce an Officer or Agent to Testify About Information that is in the Possession of Congress or Other Third Parties

Plaintiff's Notice also improperly demands that Defendants name a deponent to testify about a variety of matters that are not known or reasonably available to Defendants. That is an inappropriate use of Fed. R. Civ. P. 30(b)(6). *See Kay Beer Distrib., Inc. v. Energy Brands, Inc.*, 2009 WL 3170886, *4 (E.D. Wis. 2009) (plaintiff "misinterprets the scope of the duties placed on corporate representatives under Rule 30(b)(6). The person designated does not become a private investigator of the party noticing the deposition–he is only required to provide testimony 'about information known or reasonably available to the organization.'"); *Dravo Corp. v. Liberty Mut. Ins. Co.*, 164 F.R.D. 70, 76 (D. Neb. 1995) ("If [defendant] does not possess such knowledge as to so prepare [its proffered 30(b)(6) witness] or another designate, then its obligations under Rule 30(b)(6) obviously cease, since the rule requires testimony only as to "'matters

known or reasonably available to the organization,'" quoting Fed. R. Civ. P. 30(b)(6)).

Plaintiff demands testimony regarding reports, research, and analysis conducted by third parties regarding the experience of foreign nations in permitting gay and lesbian service members to openly serve in the military, and other studies that analyze the policy more generally. *See* Notice, ¶'s II.6, 7. Plaintiff's *Ex Parte* Application, at 8-12. These reports were conducted by third parties or Congress (in the case of the General Accountability Office), and thus any questioning is more appropriately directed to such parties or Congress, not the Executive Branch.

While Plaintiff's *ex parte* application contends that the Government must produce a witness to address the analysis and conclusions set forth in reports, research, and analysis conducted by third-parties (Pl's Ex Parte App., at 8-9), it is unclear what type of testimony Plaintiff seeks. To the extent Plaintiff seeks testimony concerning the validity of any research that the Government may undertake or has commissioned, the Secretary of the Department of Defense announced on February 2, 2010 before the Senate Armed Services Committee that he has established a working group to review the DADT policy, which review will occur over the course of the next year. *See* http://www.jcs.mil/speech.aspx?id=1322. The Government, therefore, is not in a position to designate an officer or agent to testify about such matters. Moreover, given the review process that is currently underway, information regarding the working group would be inherently deliberative and, therefore, privileged in any event. To the extent Plaintiff's request seeks additional information from organizations outside of DoD that have studied the policy, Plaintiff should use the procedures

set forth in Rule 45.[2]

Plaintiff's suggestion (Pl's *Ex Parte* App., at 10), that the Executive Branch could designate an employee of Congress to address the findings of the GAO should similarly be rejected. *See, e.g.,* Wright & Miller, Federal Prac. & Proc. s 2210, fn 16, Possession, Custody, or Control (2010) ("An agency of the Executive is not required to produce documents in the possession of Congress. The fact that both the agency and Congress are parts of the United States government is not controlling." (citing *United States v. Davis*, 140 F.R.D. 261, 263 (D.R.I. 1992)); *see also Bowsher v. Synar*, 48 U.S. 714, 722 (1986) (explaining that the Legislative and Executive Branches are separate and wholly independent).

3. Plaintiff Seeks Information That Has or Should Have Been Sought Through Other Means

In paragraphs 1, 2, 3, 9, 10, 12, 13, 14, 15, 16 of the Notice, Plaintiff seeks information about the application of the policy to different groups. As an initial matter, a demand for testimony regarding the application of the policy is improper in light of Plaintiff's litigation decision to pursue a facial, not an as-applied challenge. But even if that were ignored, Plaintiff has propounded myriad requests for admission, interrogatories, and documents on this subject, and the Government has provided Plaintiff with thousands of pages of responsive information and documents. Seeking the same information through a 30(b)(6) witness is "unreasonably cumulative [and] duplicative." Fed. R. Civ. P. 26(b)(2)(C)(I).

In paragraph 17 of the Notice, Plaintiff asks for a 30(b)(6) witness to

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[2] The same objections apply to the demand that the Government produce a witness to testify about the recruiting and hiring practices of private contractor corporations. Notice, ¶ II.11. The referenced practices are those of contractors–not the Government–and, thus, any request for such testimony should have been pursued by Plaintiff from such contractors directly pursuant to Rule 45.

provide the "identity of the person or persons primarily responsible for the administration of the Policy." This information likewise could more easily be sought through interrogatories, which would be "more convenient, less burdensome, [and] less expensive." Fed. R. Civ. P. 26(b)(2)(C)(I).

CONCLUSION

Plaintiff created this situation by failing to serve a timely joint stipulation following the February 9th "meet and confer" that would have initiated the agreed upon cross-motions. Plaintiff cannot and should not now be permitted to use an *ex parte* application procedures to cure its failure. Moreover, Plaintiff will not be irreparably prejudiced if its motion to compel is not heard because its motion to compel is without merit as a matter of both procedure and substance.

Respectfully submitted,

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