

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

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	:	
RECORDED BOOKS, LLC,	:	Civil Action No. 8:07-cv-01427-DKC
	:	
Plaintiff/Counterclaim Defendant,	:	
	:	
v.	:	<u>REPLY TO FIRST AMENDED</u>
	:	<u>COUNTERCLAIMS</u>
	:	
OCLC ONLINE COMPUTER LIBRARY	:	JURY TRIAL DEMANDED
CENTER, INC. d/b/a NETLIBRARY,	:	
	:	
Defendant/Counterclaim Plaintiff.	:	
-----	X	

Plaintiff Recorded Books, LLC (“Recorded Books”), by and through its undersigned attorneys, files this Reply to First Amended Counterclaims filed by Defendant OCLC Online Computer Library Center, Inc. d/b/a NetLibrary (“NetLibrary”) (collectively, the “Parties”), and in response to the corresponding numbered paragraphs of NetLibrary’s First Amended Counterclaims states as follows:

I. INTRODUCTION

1. Recorded Books admits that the case at issue concerns, but is not necessarily limited to, a distribution system to offer library patrons downloadable electronic audiobooks. On information and belief, Recorded Books admits that NetLibrary creates and supports electronic platforms for the distribution of electronic content (like audiobooks). Recorded Books admits that it owns or licenses thousands of audiobook titles. Recorded Books denies the remaining averments contained in paragraph 1 of NetLibrary’s First Amended Counterclaims.

2. Recorded Books denies the averments contained in paragraph 2 of NetLibrary’s First Amended Counterclaims.

3. Recorded Books denies the averments contained in paragraph 3 of NetLibrary's First Amended Counterclaims.

4. Paragraph 4 of NetLibrary's First Amended Counterclaims states a legal conclusion to which no response is required. To the extent a response is required, Recorded Books denies the averments contained in paragraph 4 of NetLibrary's First Amended Counterclaims.

II. PARTIES

5. On information and belief, Recorded Books admits the averments contained in paragraph 5 of NetLibrary's First Amended Counterclaims.

6. Recorded Books admits that audiobooks can be defined as recordings of books read aloud. Recorded Books admits that e-audiobooks can be defined as digital file versions of audiobooks that are available for download on computers and other devices. Recorded Books is without knowledge or information sufficient to form a belief as to the truth of, and therefore denies, the remaining averments contained in paragraph 6 of NetLibrary's First Amended Counterclaims.

7. Recorded Books admits the averments of paragraph 7 of NetLibrary's First Amended Counterclaims.

8. Recorded Books admits that it is one of the world's largest independent publishers of unabridged audiobooks. Recorded Books admits that it produces and owns or licenses thousands of audiobook recordings. Recorded Books is without knowledge or information sufficient to form a belief as to the truth of, and therefore denies, the remaining averments contained in paragraph 8 of NetLibrary's First Amended Counterclaims.

III. JURISDICTION AND VENUE

9. Paragraph 9 of NetLibrary's First Amended Counterclaims states a legal conclusion to which no response is required.

10. Paragraph 10 of NetLibrary's First Amended Counterclaims states a legal conclusion to which no response is required.

11. Recorded Books admits that personal jurisdiction over Recorded Books exists in this District.

12. Recorded Books admits the averments contained in paragraph 12 of NetLibrary's First Amended Counterclaims.

13. Paragraph 13 of NetLibrary's First Amended Counterclaims states a legal conclusion to which no response is required. To the extent that paragraph 13 of NetLibrary's First Amended Counterclaims purports to characterize the contents of a written document, Recorded Books refers the Court to that document for its true and accurate contents. Recorded Books denies such characterizations inconsistent with the contents of the referenced document and refers to the document cited in paragraph 13 of NetLibrary's First Amended Counterclaims. To the extent a response is required, Recorded Books denies the averments contained in paragraph 13 of NetLibrary's First Amended Counterclaims.

IV. GENERAL ALLEGATIONS

14. Recorded Books admits the averments contained in paragraph 14 of NetLibrary's First Amended Counterclaims.

A. Nature of the eContent Production and Distribution Agreement

15. Paragraph 15 of NetLibrary's First Amended Counterclaims states a legal conclusion to which no response is required. To the extent that paragraph 15 of NetLibrary's First Amended Counterclaims purports to characterize the contents of a written document, Recorded Books refers the Court to that document for its true and accurate contents. Recorded Books denies such

characterizations inconsistent with the contents of the referenced document and refers to the document cited in paragraph 15 of NetLibrary's First Amended Counterclaims.

16. Paragraph 16 of NetLibrary's First Amended Counterclaims states a legal conclusion to which no response is required. To the extent that paragraph 16 of NetLibrary's First Amended Counterclaims purports to characterize the contents of a written document, Recorded Books refers the Court to that document for its true and accurate contents. Recorded Books denies such characterizations inconsistent with the contents of the referenced document and refers to the document cited in paragraph 16 of NetLibrary's First Amended Counterclaims.

17. To the extent that paragraph 17 of NetLibrary's First Amended Counterclaims purports to characterize the contents of a written document, Recorded Books refers the Court to that document for its true and accurate contents. Recorded Books denies such characterizations inconsistent with the contents of the referenced document and refers to the document cited in paragraph 17 of NetLibrary's First Amended Counterclaims.

18. Recorded Books denies the averments contained in paragraph 18 of NetLibrary's First Amended Counterclaims.

19. Paragraph 19 of NetLibrary's First Amended Counterclaims states a legal conclusion to which no response is required. To the extent that paragraph 19 of NetLibrary's First Amended Counterclaims purports to characterize the contents of a written document, Recorded Books refers the Court to that document for its true and accurate contents. Recorded Books denies such characterizations inconsistent with the contents of the referenced document and refers to the document cited in paragraph 19 of NetLibrary's First Amended Counterclaims.

20. Paragraph 20 of NetLibrary's First Amended Counterclaims states a legal conclusion to which no response is required. To the extent that paragraph 20 of NetLibrary's First

Amended Counterclaims purports to characterize the contents of a written document, Recorded Books refers the Court to that document for its true and accurate contents. Recorded Books denies such characterizations inconsistent with the contents of the referenced document and refers to the document cited in paragraph 20 of NetLibrary's First Amended Counterclaims.

21. Paragraph 21 of NetLibrary's First Amended Counterclaims states a legal conclusion to which no response is required. To the extent that paragraph 21 of NetLibrary's First Amended Counterclaims purports to characterize the contents of a written document, Recorded Books refers the Court to that document for its true and accurate contents. Recorded Books denies such characterizations inconsistent with the contents of the referenced document and refers to the document cited in paragraph 21 of NetLibrary's First Amended Counterclaims.

22. To the extent that paragraph 22 of NetLibrary's First Amended Counterclaims purports to characterize the contents of a written document, Recorded Books refers the Court to that document for its true and accurate contents. Recorded Books denies such characterizations inconsistent with the contents of the referenced document and refers to the document cited in paragraph 22 of NetLibrary's First Amended Counterclaims.

B. Length of the Agreement

23. To the extent that paragraph 23 of NetLibrary's First Amended Counterclaims purports to characterize the contents of a written document, Recorded Books refers the Court to that document for its true and accurate contents. Recorded Books denies such characterizations inconsistent with the contents of the referenced document and refers to the document cited in paragraph 23 of NetLibrary's First Amended Counterclaims.

24. Paragraph 24 of NetLibrary's First Amended Counterclaims states a legal conclusion to which no response is required. To the extent that paragraph 24 of NetLibrary's First Amended Counterclaims purports to characterize the contents of a written document, Recorded Books

refers the Court to that document for its true and accurate contents. Recorded Books denies such characterizations inconsistent with the contents of the referenced document and refers to the document cited in paragraph 24 of NetLibrary's First Amended Counterclaims.

25. Recorded Books admits the averments contained in paragraph 25 of NetLibrary's First Amended Counterclaims.

26. Recorded Books denies the averments contained in paragraph 26 of NetLibrary's First Amended Counterclaims.

27. Recorded Books denies the averments contained in paragraph 27 of NetLibrary's First Amended Counterclaims.

28. Recorded Books denies the averments contained in paragraph 28 of NetLibrary's First Amended Counterclaims.

29. Paragraph 29 of NetLibrary's First Amended Counterclaims states a legal conclusion to which no response is required. To the extent that paragraph 29 of NetLibrary's First Amended Counterclaims purports to characterize the contents of a written document, Recorded Books refers the Court to that document for its true and accurate contents. Recorded Books denies such characterizations inconsistent with the contents of the referenced document and refers to the document cited in paragraph 29 of NetLibrary's First Amended Counterclaims.

30. Paragraph 30 of NetLibrary's First Amended Counterclaims states a legal conclusion to which no response is required. To the extent that paragraph 30 of NetLibrary's First Amended Counterclaims purports to characterize the contents of a written document, Recorded Books refers the Court to that document for its true and accurate contents. Recorded Books denies such characterizations inconsistent with the contents of the referenced document and refers to the document cited in paragraph 30 of NetLibrary's First Amended Counterclaims.

31. Paragraph 31 of NetLibrary's First Amended Counterclaims states a legal conclusion to which no response is required. To the extent that paragraph 31 of NetLibrary's First Amended Counterclaims purports to characterize the contents of a written document, Recorded Books refers the Court to that document for its true and accurate contents. Recorded Books denies such characterizations inconsistent with the contents of the referenced document and refers to the document cited in paragraph 31 of NetLibrary's First Amended Counterclaims.

32. Paragraph 32 of NetLibrary's First Amended Counterclaims states a legal conclusion to which no response is required. To the extent that paragraph 32 of NetLibrary's First Amended Counterclaims purports to characterize the contents of a written document, Recorded Books refers the Court to that document for its true and accurate contents. Recorded Books denies such characterizations inconsistent with the contents of the referenced document and refers to the document cited in paragraph 32 of NetLibrary's First Amended Counterclaims.

33. Paragraph 33 of NetLibrary's First Amended Counterclaims states a legal conclusion to which no response is required. To the extent that paragraph 33 of NetLibrary's First Amended Counterclaims purports to characterize the contents of a written document, Recorded Books refers the Court to that document for its true and accurate contents. Recorded Books denies such characterizations inconsistent with the contents of the referenced document and refers to the document cited in paragraph 33 of NetLibrary's First Amended Counterclaims.

C. Performance Under the Agreement

34. Recorded Books denies the averments contained in paragraph 34 of NetLibrary's First Amended Counterclaims.

35. Recorded Books admits that the first library subscribers received access to the e-audiobook database in February 2005. Recorded Books denies the remaining averments contained in paragraph 35 of NetLibrary's First Amended Counterclaims.

36. Recorded Books denies the averments contained in paragraph 36 of NetLibrary's First Amended Counterclaims.

37. Recorded Books denies the averments contained in paragraph 37 of NetLibrary's First Amended Counterclaims.

38. Recorded Books denies the averments contained in paragraph 38 of NetLibrary's First Amended Counterclaims.

D. Termination of the Agreement

39. Recorded Books admits that it terminated the Agreement by letter of counsel dated April 20, 2007. Recorded Books denies the remaining averments contained in paragraph 39 of NetLibrary's First Amended Counterclaims.

40. Recorded Books denies the averments contained in paragraph 40 of NetLibrary's First Amended Counterclaims.

41. Recorded Books denies the averments contained in paragraph 41 of NetLibrary's First Amended Counterclaims.

42. Recorded Books admits that it terminated the Agreement due to NetLibrary's violations of Sections 1(d)(i), (ii), (iii), and (v) of Exhibit B to the Agreement, Section 3(b) of Schedule B-1 to the Agreement, and Section 1(a) of Exhibit C to the Agreement. Recorded Books denies the remaining averments contained in paragraph 42 of NetLibrary's First Amended Counterclaims.

43. Recorded Books denies the averments contained in paragraph 43 of NetLibrary's First Amended Counterclaims.

44. Recorded Books denies the averments contained in paragraph 44 of NetLibrary's First Amended Counterclaims.

45. Recorded Books denies the averments contained in paragraph 45 of NetLibrary's First Amended Counterclaims.

46. Recorded Books denies the averments contained in paragraph 46 of NetLibrary's First Amended Counterclaims.

47. Recorded Books denies the averments contained in paragraph 47 of NetLibrary's First Amended Counterclaims.

48. Recorded Books denies the averments contained in paragraph 48 of NetLibrary's First Amended Counterclaims.

49. Recorded Books denies the averments contained in paragraph 49 of NetLibrary's First Amended Counterclaims.

50. Recorded Books denies the averments contained in paragraph 50 of NetLibrary's First Amended Counterclaims.

51. Recorded Books admits that NetLibrary sent Recorded Books a letter dated April 30, 2007. Recorded Books denies the remaining averments contained in paragraph 51 of NetLibrary's First Amended Counterclaims.

52. Recorded Books denies the averments contained in paragraph 52 of NetLibrary's First Amended Counterclaims.

53. Recorded Books denies the averments contained in paragraph 53 of NetLibrary's First Amended Counterclaims.

54. Recorded Books denies the averments contained in paragraph 54 of NetLibrary's First Amended Counterclaims.

E. Conduct By Recorded Books

55. Recorded Books denies the averments contained in paragraph 55 of NetLibrary's First Amended Counterclaims.

56. Recorded Books denies the averments contained in paragraph 56 of NetLibrary's First Amended Counterclaims.

57. Paragraph 57 of NetLibrary's First Amended Counterclaims states a legal conclusion to which no response is required. To the extent that paragraph 57 of NetLibrary's First Amended Counterclaims purports to characterize the contents of a written document, Recorded Books refers the Court to that document for its true and accurate contents. Recorded Books denies such characterizations inconsistent with the contents of the referenced document and refers to the document cited in paragraph 57 of NetLibrary's First Amended Counterclaims. Recorded Books denies the remaining averments contained in paragraph 57 of NetLibrary's First Amended Counterclaims.

58. Recorded Books denies the averments contained in paragraph 58 of NetLibrary's First Amended Counterclaims.

59. Recorded Books admits that it has alleged that NetLibrary violated Section 1(a) of Exhibit C to the Agreement when it entered into agreements with other content providers that allow those providers to contribute audiobook content. Recorded Books denies the remaining averments contained in paragraph 59 of NetLibrary's First Amended Counterclaims.

F. Recorded Books' Conduct Since Termination

60. Recorded Books denies the averments contained in paragraph 60 of NetLibrary's First Amended Counterclaims.

61. Recorded Books denies the averments contained in paragraph 61 of NetLibrary's First Amended Counterclaims.

62. Recorded Books denies the averments contained in paragraph 62 of NetLibrary's First Amended Counterclaims.

63. Recorded Books denies the averments contained in paragraph 63 of NetLibrary's First Amended Counterclaims.

64. Recorded Books admits that it sent an e-mail to library subscribers on May 4, 2007 stating that Recorded Books had terminated its relationship with NetLibrary and that

subscriptions for the Recorded Books/NetLibrary service would need to be renewed by May 18, 2007.

Recorded Books denies the remaining averments contained in paragraph 64 of NetLibrary's First Amended Counterclaims.

65. Recorded Books denies the averments contained in paragraph 65 of NetLibrary's First Amended Counterclaims.

66. Recorded Books denies the averments contained in paragraph 66 of NetLibrary's First Amended Counterclaims.

67. Recorded Books denies the averments contained in paragraph 67 of NetLibrary's First Amended Counterclaims.

68. Recorded Books denies the averments contained in paragraph 68 of NetLibrary's First Amended Counterclaims.

69. Recorded Books denies the averments contained in paragraph 69 of NetLibrary's First Amended Counterclaims.

70. Recorded Books denies the averments contained in paragraph 70 of NetLibrary's First Amended Counterclaims.

71. Recorded Books denies the averments contained in paragraph 71 of NetLibrary's First Amended Counterclaims.

72. Recorded Books denies the averments contained in paragraph 72 of NetLibrary's First Amended Counterclaims.

73. Recorded Books denies the averments contained in paragraph 73 of NetLibrary's First Amended Counterclaims.

74. Recorded Books denies the averments contained in paragraph 74 of NetLibrary's First Amended Counterclaims.

75. Recorded Books denies the averments contained in paragraph 75 of NetLibrary's First Amended Counterclaims.

76. Recorded Books denies the averments contained in paragraph 76 of NetLibrary's First Amended Counterclaims.

COUNT I – BREACH OF CONTRACT

77. In response to paragraph 77 of NetLibrary's First Amended Counterclaims, Recorded Books repeats and restates all previous responses of its Reply to First Amended Counterclaims as and for this paragraph, as if fully set forth herein.

78. Recorded Books admits the averments contained in paragraph 78 of NetLibrary's First Amended Counterclaims.

79. Recorded Books admits the averments contained in paragraph 79 of NetLibrary's First Amended Counterclaims.

80. Recorded Books denies the averments contained in paragraph 80 of NetLibrary's First Amended Counterclaims.

81. Recorded Books denies the averments contained in paragraph 81 of NetLibrary's First Amended Counterclaims.

82. Recorded Books denies the averments contained in paragraph 82 of NetLibrary's First Amended Counterclaims.

**COUNT II – DECLARATORY RELIEF
(28 U.S.C. § 2201 and F.R.C.P. 57)**

83. In response to paragraph 83 of NetLibrary's First Amended Counterclaims, Recorded Books repeats and restates all previous responses of its Reply to First Amended Counterclaims as and for this paragraph, as if fully set forth herein.

84. Recorded Books denies the averments contained in paragraph 84 of NetLibrary's First Amended Counterclaims.

85. Recorded Books denies the averments contained in paragraph 85 of NetLibrary's First Amended Counterclaims.

86. Recorded Books denies the averments contained in paragraph 86 of NetLibrary's First Amended Counterclaims.

87. Recorded Books admits the existence of a controversy between NetLibrary and Recorded Books. Recorded Books denies the remaining averments contained in paragraph 87 of NetLibrary's First Amended Counterclaims.

COUNT III – SPECIFIC PERFORMANCE

88. In response to paragraph 88 of NetLibrary's First Amended Counterclaims, Recorded Books repeats and restates all previous responses of its Reply to First Amended Counterclaims as and for this paragraph, as if fully set forth herein.

89. Recorded Books denies the averments contained in paragraph 89 of NetLibrary's First Amended Counterclaims.

90. Recorded Books denies the averments contained in paragraph 90 of NetLibrary's First Amended Counterclaims.

91. Recorded Books denies the averments contained in paragraph 91 of NetLibrary's First Amended Counterclaims.

92. Recorded Books denies the averments contained in paragraph 92 of NetLibrary's First Amended Counterclaims.

93. Recorded Books denies the averments contained in paragraph 93 of NetLibrary's First Amended Counterclaims.

94. Recorded Books denies the averments contained in paragraph 94 of NetLibrary's First Amended Counterclaims.

**COUNT IV – BREACH OF COVENANT OF GOOD FAITH
AND FAIR DEALING**

95. In response to paragraph 95 of NetLibrary's First Amended Counterclaims, Recorded Books repeats and restates all previous responses of its Reply to First Amended Counterclaims as and for this paragraph, as if fully set forth herein.

96. Recorded Books admits the averments contained in paragraph 96 of NetLibrary's First Amended Counterclaims.

97. Recorded Books admits the averments contained in paragraph 97 of NetLibrary's First Amended Counterclaims.

98. Paragraph 98 of NetLibrary's First Amended Counterclaims states a legal conclusion to which no response is required.

99. Recorded Books denies the averments contained in paragraph 99 of NetLibrary's First Amended Counterclaims.

100. Recorded Books denies the averments contained in paragraph 100 of NetLibrary's First Amended Counterclaims.

101. Recorded Books denies the averments contained in paragraph 101 of NetLibrary's First Amended Counterclaims.

**COUNT V – TORTIOUS INTERFERENCE
WITH PROSPECTIVE ECONOMIC ADVANTAGE OR ECONOMIC RELATIONSHIP**

102. In response to paragraph 102 of NetLibrary's First Amended Counterclaims, Recorded Books repeats and restates all previous allegations of its Reply to First Amended Counterclaims as and for this paragraph, as if fully set forth herein.

103. Recorded Books denies the averments contained in paragraph 103 of NetLibrary's First Amended Counterclaims.

104. Recorded Books denies the averments contained in paragraph 104 of NetLibrary's First Amended Counterclaims.

105. Recorded Books denies the averments contained in paragraph 105 of NetLibrary's First Amended Counterclaims.

106. Recorded Books denies the averments contained in paragraph 106 of NetLibrary's First Amended Counterclaims.

107. Recorded Books denies the averments contained in paragraph 107 of NetLibrary's First Amended Counterclaims.

108. Recorded Books denies the averments contained in paragraph 108 of NetLibrary's First Amended Counterclaims.

109. Recorded Books denies the averments contained in paragraph 109 of NetLibrary's First Amended Counterclaims.

110. Recorded Books denies the averments contained in paragraph 110 of NetLibrary's First Amended Counterclaims.

111. Recorded Books denies the averments contained in paragraph 111 of NetLibrary's First Amended Counterclaims.

112. Recorded Books denies the averments contained in paragraph 112 of NetLibrary's First Amended Counterclaims.

COUNT VI – UNFAIR COMPETITION

113. In response to paragraph 113 of NetLibrary's First Amended Counterclaims, Recorded Books repeats and restates all previous responses of its Reply to First Amended Counterclaims as and for this paragraph, as if fully set forth herein.

114. Recorded Books denies the averments contained in paragraph 114 of NetLibrary's First Amended Counterclaims.

115. Recorded Books denies the averments contained in paragraph 115 of NetLibrary's First Amended Counterclaims.

116. Recorded Books denies the averments contained in paragraph 116 of NetLibrary's First Amended Counterclaims.

117. Recorded Books denies the averments contained in paragraph 117 of NetLibrary's First Amended Counterclaims.

118. Recorded Books denies the averments contained in paragraph 118 of NetLibrary's First Amended Counterclaims.

119. Recorded Books denies the averments contained in paragraph 119 of NetLibrary's First Amended Counterclaims.

**COUNT VII – COLORADO CONSUMER PROTECTION ACT
(Colo. Rev. Stat § 6-1-101, et seq.)**

120. In response to paragraph 120 of NetLibrary's First Amended Counterclaims, Recorded Books repeats and restates all previous responses of its Reply to First Amended Counterclaims as and for this paragraph, as if fully set forth herein.

121. Recorded Books denies the averments contained in paragraph 121 of NetLibrary's First Amended Counterclaims.

122. Recorded Books denies the averments contained in paragraph 122 of NetLibrary's First Amended Counterclaims.

123. Recorded Books denies the averments contained in paragraph 123 of NetLibrary's First Amended Counterclaims.

124. Recorded Books denies the averments contained in paragraph 124 of NetLibrary's First Amended Counterclaims.

125. Recorded Books denies the averments contained in paragraph 125 of NetLibrary's First Amended Counterclaims.

RELIEF REQUESTED

Recorded Books denies that NetLibrary is entitled to any of the relief requested in its prayer for relief.

FIRST AFFIRMATIVE DEFENSE

126. NetLibrary's First Amended Counterclaims, and each and every Count of NetLibrary's First Amended Counterclaims, fail to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

127. NetLibrary's claims are barred by the doctrines of laches, estoppel, and acquiescence.

THIRD AFFIRMATIVE DEFENSE

128. NetLibrary's claims are barred by the doctrine of unclean hands.

FOURTH AFFIRMATIVE DEFENSE

129. NetLibrary has waived its claims against Recorded Books.

FIFTH AFFIRMATIVE DEFENSE

130. NetLibrary's claims are barred because it breached the Agreement.

SIXTH AFFIRMATIVE DEFENSE

131. NetLibrary has suffered no damages by virtue of any of Recorded Books' actions.

SEVENTH AFFIRMATIVE DEFENSE

132. NetLibrary's claims are barred by the Agreement's damages limitation clause.

Dated: August 31, 2007

Respectfully submitted,

RECORDED BOOKS, LLC

By its attorneys,

/s/ R. David Hosp
David L. Permut (15111)
GOODWIN PROCTER LLP
901 New York Avenue, N.W.
Washington, DC 20001
202.346.4000 (tel.)
202.346.4444 (fax)

-and-

R. David Hosp (admitted *pro hac vice*)
Robert D. Carroll (admitted *pro hac vice*)
GOODWIN PROCTER LLP
Exchange Place
Boston, MA 02109
617.570.1000 (tel.)
617.523.1231 (fax)

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on August 31, 2007.

/s/ R. David Hosp

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