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| DISTRICT COURT, DENVER COUNTY, COLORADO<br>1437 Bannock Street<br>Denver, Colorado 80202 | DATE FILED: September 15, 2023 11:12 AM<br>FILING ID: 3247BCC17A7D6<br>CASE NUMBER: 2023CV32701 |
| **STEVE STAEGER,**<br>**MULTIMEDIA HOLDINGS CORPORATION d/b/a KUSA-TV,**<br><br>Plaintiffs,<br>**v.**<br><br>**GINGER WHITE BRUNETTI**, in her official capacity as the Executive Director of the Arts and Venues Department of the City and County of Denver,<br><br>**TAD BOWMAN**, in his official capacity as the Venue Director of the Red Rocks Amphitheater,<br><br>Defendants. | **▲ COURT USE ONLY ▲**<br><br>Case No.: 2023-cv-<br><br>Division: |
| **Attorney for Plaintiffs:**<br>Steven D. Zansberg, #26634<br>Law Office of Steven D. Zansberg, LLC<br>100 Fillmore Street, Suite 500<br>Denver, CO 80206<br>(303) 564-3669 – phone<br>(720) 650-4763 – facsimile<br>steve@zansberglaw.com | |

**COMPLAINT AND APPLICATION FOR AN ORDER TO SHOW CAUSE PURSUANT TO § 24-72-204(5), C.R.S.**

Plaintiffs Steve Staeger and Multimedia Holdings Corporation d/b/a/ KUSA-TV, by and through their undersigned counsel, for their Complaint and Application for Order to Show Cause, hereby state as follows:

## INTRODUCTION

This is a civil action under the Colorado Open Records Act ("CORA"). The Plaintiffs, Steve Staeger, a news reporter at Denver television station KUSA-TV, (and his employer, the owner of that station) request that an Order to Show Cause be directed to the Defendants, the custodians of the public records at issue, to appear and to show cause why those records should not be made available to Plaintiffs for inspection.

The public records in question are a set of "writings" – electronic communications – sent by and to public officials (the Executive Director of Denver's Arts and Venues Department[1] and the Venue Director for the Red Rocks Amphitheater) directly related to official governmental business. Specifically, the public records at issue discuss the circumstances at a city-owned and operated performance venue on the evening of June 21, 2023, when a severe hailstorm pummeled thousands of concertgoers there, who were given only ten minutes warning to seek shelter. That tragic incident, in which approximately 100 members of the public sustained physical injuries (seven of them requiring hospitalization) and thousands of others were traumatized, appropriately garnered both local and nation media coverage. *See, e.g.,* https://www.youtube.com/watch?v=dFXuDtSEvZg; https://www.cnn.com/videos/us/2023/06/22/red-rocks-hail-storm-colorado-cprog-orig-mb.cnn.

That evening, as the storm approached and then arrived on the scene, and the next day, it is believed that the Defendants exchanged "writings" (text messages) with eachother and with other members of the City staff in which public business was discussed: how City employees and officials should respond to an imminent public health crisis, and what steps to take to prevent similar recurrences in the future.

Both the Defendants and their employer, the City and County of Denver, have refused to produce those public records in response to Plaintiffs' request under Colorado's Open Records Act ("CORA") on the ground that those writings were exchanged exclusively on a privately-funded communications device owned by the Defendants. In this lawsuit, Plaintiffs ask the Court to apply existing Colorado law which recognizes that "public records" are all writings (regardless of physical form or characteristics) in which public officials discuss public business, and that the means of communication (private paper stationery, or "privately" owned email accounts or devices) and/or their physical location are irrelevant to that determination.

## JURISDICTION AND PARTIES

1. This Court has jurisdiction over the claims herein under §§ 24-72-204(5) of CORA, § 24-72-201, *et* seq., C.R.S (2023). On information and belief, the public records that are the subject of this action can be found in this judicial district.

2. Both Plaintiffs, Steve Staeger and Multimedia Holdings Corporation, are a "persons" as defined by § 24-72-202(3), C.R.S.

[1] According to the City and County of Denver's official website, "Denver Arts & Venues is the City and County of Denver agency responsible for operating some of the region's most renowned facilities, including Red Rocks Amphitheatre . . ."

3. Defendant Ginger White Brunetti is the Executive Director of Arts and Venues for the City and County of Denver, Colorado,[2] and is a custodian of the public records that are the subject of the Plaintiffs' CORA request.

4. Defendant Tad Bowman is the Venue Director for the Red Rocks Amphiteater (and also the Denver Coliseum),[3] and is a custodian of the public records that are the subject of the Plaintiffs' CORA request.

5. Venue for this civil action is proper in this District under Rules 98(b)(2) and (c)(1) of the Colorado Rules of Civil Procedure and under § 24-72-204(5), C.R.S.

## APPLICABLE LAW

6. Under the CORA, any person may request to inspect and/or obtain a copy of a public record. *See* § 24-72-203(1)(a), C.R.S. CORA guarantees access to records of public business so that "the workings of government are not unduly shielded from the public eye." *Int'l Bhd. of Elec. Workers Local Union 68 v. Denver Metro. Major League Baseball Stadium Dist.,* 880 P.2d 160, 165 (Colo. App. 1994).

7. A public record is any "writing" that is "made, maintained or kept by . . . any. . . political subdivision of the state . . . *for use* in the exercise of functions required or authorized by law or administrative rule." *See* § 24-72-202(6)(a)(I), C.R.S. (emphasis added).

8. "Writings" are defined, unambiguously, as "mean[ing] and includ[ing] *all* books, papers, maps, photographs, cards, tapes, recordings, or *other documentary materials, regardless of physical form or characteristics*. 'Writings' includes *digitally stored data, including without limitation electronic mail messages*, but does not include computer software." § 24-72-202(7), C.R.S. (emphasis added)

9. Importantly, for this case in particular, the actual location of a writing – in a "personal filing cabinet" at the home of a public employee, in a hand-written diary or journal kept in a locked nightstand drawer at home, or a "private" repository of electronic communications – is irrelevant to the question whether the document in question is a public record. *See e.g., Wick Communications Co. v. Montrose Cty. Bd. of Cty. Commrs*., 81 P.3d 360 (Colo. 2003) (hereinafter "*Wick*").

10. In *Wick*, the Colorado Supreme Court held that the private diary of a county's airport manager was not a public record subject to CORA. It did so by finding that the

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[2] Accordingly to an online bio, "White's current position as executive director of Denver Arts & Venues involves managing a $90 million budget that includes management of the Denver Performing Arts Complex, McNichols Building, Red Rocks Amphitheatre, Denver Coliseum, Colorado Convention Center, Denver's Public Art Program, and citywide cultural programs."

[3] According to an online bio, Mr. Bowman "works with a staff that manages the . . . facility operations" at the Red Rocks Amphitheater.

county official had not "made, maintained, or kept" the diary *while acting in his official capacity*; looking at the content of the document at question, the Court determined that "the diary was made in Hunt's individual capacity and not in his official one," and also, crucially, the diary "was not used in the daily functioning of his office." *Wick*, 81 P.3d at 366. Announcing the rule that applies to all writings in the sole possession of public officials, the Court declared "*If Hunt holds the document in his official capacity* as County Manager, then *the document is clearly a public record*" of the County. *Id*., 81 P.3d at 364 (emphasis added).

11. Indeed, applying similarly worded public records statutes, courts in at least fourteen states (Alaska, Arizona, Arkansas, California, Florida, Illinois, New York, Ohio, Pennsylvania, Texas, Vermont, Virginia, Washington, and Wyoming) and the District of Columbia have held that so long as the *content* of an e-mail, text message, or other electronic communication sent or received by a government employee relates to the conduct of governmental business, it is subject to those states' open records acts; the actual physical *location* of such a writing is immaterial.[4]

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[4] *See McLeod v. Palin*, 286 P.3d 509, 515 (Alaska 2012) ("[U]sing private email accounts is no more an obstruction of access to public records than communicating through paper letters."); *Griffis v. Pina Cnty*., 156 P.3d 418, 421 (Ariz. 2007); *Bradford v. Dir., Emp't Sec. Dep't*, 128 S.W.3d 20, 27–28 (Ark. Ct. App. 2003) ("Emails transmitted between Bradford and the governor that involved the public's business are subject to public access under the Freedom of Information Act, whether transmitted to private email addresses through private internet providers or whether sent to official government email addresses over means under the control of the State's Division of Information Services."); *City of San Jose v. Superior Ct*., 389 P.3d 84 (Cal. 2017); *Vining v. Dist. of Columbia*, 2014 D.C. Super LEXIS 13 (D.C. Super. 2014) (holding that emails residing in a Commissioner's personal email account were the public records of the Commission on which she served); *State v. City of Clearwater*, 863 So. 2d 149, 152 (Fla. 2003) ("[W]henever a written record of the transactions of a public officer is [prepared or generated], it is not only his right, but his duty, to keep that written memorial, . . . and, when kept, it becomes a public document – a public record – *belonging to the office, and not to the officer.*") (emphasis added) (citation omitted); *City of Champaign v. Madigan*, 992 N.E.2d 629 (Ill. App. Ct. 2013) (applying state's open meetings law); *Matter of Smith v. N.Y. State Office of the Attorney Gen*., No. 3670-08, NYLJ 1202555064972, at *1 (N.Y. Sup. Ct. Apr. 30, 2012) ("[T]he OAG has both the responsibility and the obligation to gain access to the private e-mail account of former Attorney General Spitzer to determine whether the documents contained therein should be disclosed to petitioner in accordance with its FOIL request."); *State ex rel. Glasgow v. Jones*, 894 N.E.2d 686, 691 (Ohio 2008) ("[Representative] Jones concedes that e-mail messages created or received by her in her capacity as state representative . . . constitute records subject to disclosure . . . regardless of whether it was her public or her private e-mail account that received or sent the e-mail messages."); *Paint Twp. v. Clark*, 109 A.3d 796, 809 (Pa. Commw. Ct. 2015) (holding that text messages on public official's private cell phone were public records, and noting that if "[c]ouncil members [were permitted] to conduct business through personal email accounts to evade the RTKL, the law would serve no function and would result in all public officials conducting public business via personal email") (citation omitted); *Mollick v. Twp. of*

Courts applying the federal Freedom of Information Act have similarly held that electronic communications stored in government employees' personal (non-government) accounts are "agency records" that must be retrieved from such repositories and provided to a FOIA records requester. *See, e.g., Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145 (D.C. Cir. 2016); *Hunton & Williams LLP v. U.S. Envtl. Prot. Agency*, 248 F. Supp. 3d 220, 237-38 (D.D.C. 2017); *see also Inter-Cooperative Exch. v. U.S. DOC*, 36 F.4th 905, 915 & n.7 (9th Cir. 2022) (remanding for trial court to order former federal employee to conduct a second search of his personal cell phone, using more specific search terms, to locate and produce responsive agency records).

12. California's Supreme Court held that email messages discussing public business prepared by a town's Mayor and stored exclusively in a "private" email account, are public records of the municipality where he is employed. In so holding, that court wrote that "[a] writing is commonly understood to have been prepared by the person who wrote it. If an agency employee prepares a writing that substantively relates to the conduct of public business, that writing would appear to satisfy the Act's definition of a public record." "*A writing prepared by a public employee conducting agency business has been 'prepared by' the agency* within the

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*Worcester*, 32 A.3d 859, 872–873 (Pa. Commw. Ct. 2011) ("[A]ny emails that meet the definition of 'record' under the RTKL, *even if they are stored on the Supervisors' personal computers* or in their personal email accounts, would be records of the Township.") (emphasis added); *Adkisson v. Paxton*, 459 S.W.3d 761, 773 (Tex. Ct. App. 20__) (holding that individual Commissioner must "release e-mails retained in his personal e-mail accounts that are related to his office or role as Commissioner and that have a connection with, refer to, or concern County business"; such records belong to the county, because "as Commissioner, he is responsible for maintaining public information created or received by him or by his employees or his office—no matter where that information is physically created or received—*for the County*") (emphasis in original); *Toensing v. AG of Vt*., 178 A.3d 1000, 1003 (Vt. 2017) (holding that communications stored on private email and text messaging accounts are public records, because the "purpose [of the public records act] would be defeated if a state employee could shield public records by conducting business on private accounts"); *Burton v. Mann*, 74 Va. Cir. 471 (2008) ("[T] he e-mail correspondence sought in this case indicates the use of both public and private databases, the status of which is not determinative of the issue of disclosure."); *Nissen v. Pierce County*, 183 Wn.2d 863, 877, 880-881 (Wash. 2015) (holding that "work related" text messages sent or received from a public employee's personal cell phone are public records); *O'Neill v. City of Shoreline*, 240 P.3d 1149, 1155 (Wash. 2010) (ordering city to search deputy mayor's home computer for e-mail records after concluding that "[i]f government employees could circumvent the [Public Records Act] by using their home computers for government business, the PRA could be drastically undermined"); *Cheyenne Newspapers, Inc. v. Bd. of Trs. Sch. Dist. No. One,* 384 P.3d 679, 680 (Wyo. 2016) ("Because school board members use their personal email addresses to conduct school board business, the request required a search and retrieval of emails from personal email accounts of the board members").

meaning of [the Act] even if the writing is prepared using the employee's personal account." And, that is true regardless of where, physically, that writing is housed, stored, or located:

> We . . . hold that documents otherwise meeting CPRA's definition of "public records" do not lose this status because they are located in an employee's personal account. *A writing retained by a public employee conducting agency business has been "retained by" the agency* within the meaning of [the Act] *even if the writing is retained in the employee's personal account*.
>
> . . . Under the City's interpretation of CPRA, a document concerning official business is only a public record if it is located on a government agency's computer servers or in its offices. . . . However, we have previously stressed that **a document's status as public or [not] does not turn on the arbitrary circumstance of *where* the document is located.**

*City of San Jose v. Superior Ct*., 389 P.3d 848, 855-856 (Cal. 2017) (emphases added).

13. Washington's Supreme Court had earlier reached the same conclusion: "We hold that records an agency employee prepares, owns, uses, or retains on a private cell phone within the scope of employment . . . can qualify as public records if they contain any information that refers to or impacts the actions, processes, and functions of government." *Nissen v. Pierce County*, 183 Wn.2d 863, 877, 880-881 (Wash. 2015).

14. Under the CORA, a "custodian" of a public record is defined to include "any authorized person *having personal custody and control of the public records in question*." § 24-72-202(1.1), C.R.S. (emphasis added).

15. Under the CORA, a custodian of public records is required to provide access to them unless "[s]uch inspection would be contrary to any state statute" or is otherwise exempted from disclosure by one of the narrow exemptions in section 204(3)(a) of the CORA. *See* § 24-72-204(1)(a), C.R.S.

16. Any person whose request for access to a public record is denied may apply to the District Court, in the District in which such record can be found, for an Order to Show Cause directing the custodian of the public record to show cause why the record should not be made available for public inspection. *See* § 24-72-204(5), C.R.S. Prior to filing such suit, the applicant must provide the records custodian with advance written notice (either fourteen days or three days, if the need for speedy resolution is justified through a factual recitation) in order to be eligible to recover attorneys' fees. *Id.*

17. Upon the filing of such an Application, the Court must schedule the hearing on an Order to Show Cause at the "earliest time practical." *See id.*

18. At that hearing, once the requester establishes a *prima facie* basis for concluding that the requested record is "likely a public record," the burden shifts to the custodian to demonstrate why the refusal to provide access to the requested public record(s) is not "improper." *See Denver Publ'g Co. v. Bd. of Cty. Comm'rs*, 121 P.3d 190, 199 (Colo. 2005).

19. Under the CORA, following a Show Cause Hearing, if the Court finds that the requested public records should be made available to the plaintiff(s) for public inspection, it *shall* order that those records be made available for public inspection; moreover, in such circumstances, the Court *must* award the public records custodian (or his/her employer) to pay the plaintiff's reasonable attorneys' fees and costs. *See Denver Publ'g Co.*, 121 P.3d at 199.

**THE FACTS THAT GAVE RISE TO THE WRITINGS AT ISSUE**

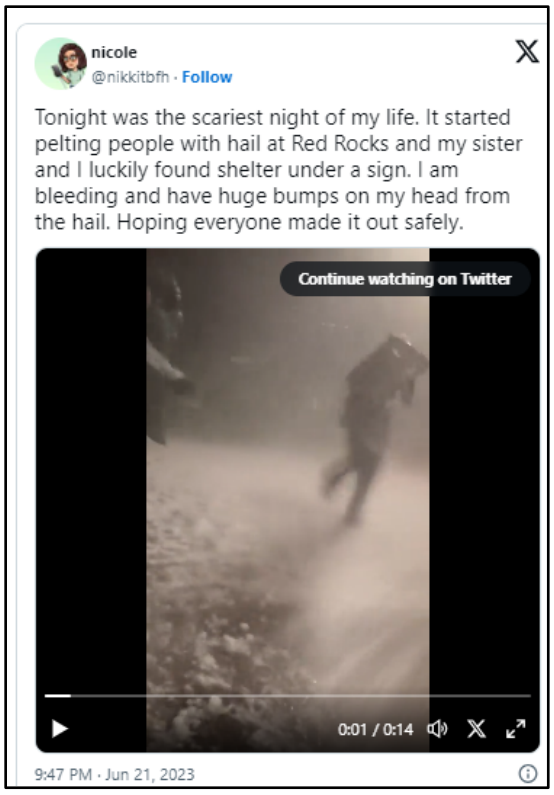
20. On the evening of June 21, 2023, a sudden and severe hailstorm beset the greater Denver metropolitan region.

21. That evening, singer Louis Tomlinson (a former member of the popular music band "One Direction") was scheduled to perform a concert at Red Rocks Amphitheater.

22. According to the number of scanned tickets held by those entering the arena, approximately 5,975 members of the general public were in attendance.

23. Because of the sudden onset of the hailstorm, and the extremely short notice to evacuate before the downpour of "golf-ball sized" hail, nearly 100 concert attendees sustained physical injuries; seven of them were hospitalized. *See, e.g.,* Kyle Harris, "Red Rocks Amphitheatre's Big June Hail Storm: A Timeline of how the Chaotic Night Unfolded," Denverite (Aug. 7, 2023) (reporting that "People broke bones, suffered head injuries and tripped over hail. They stumbled back from the venue to pummeled cars, only to be stuck in traffic, looking through broken windshields. Some were taken to the hospital."), https://denverite.com/2023/08/07/red-rocks-ampitheatre-hail-storm-louis-tomlinson/#:~:text=Medical%20crews%20at%20Red%20Rocks,from%20cuts%20to%20broken%20bones.&text=Aug.,%2C%202023%2C%202%3A08%20p.m.; Chuck Murphy and Matt Bloom, "Dozens Injured, 7 Hospitalized After Intense Hail Storm Interrupts Red Rocks Concert," Colo. Pub. Radio (Jun. 22, 2023), https://www.cpr.org/2023/06/22/dozens-injured-seven-hospitalized-intense-hail-storm-interrupts-red-rocks-concert/.

24. Numerous attendees posted videos of their horrific experience on social media. One such posting appears below:




The video recording embedded therein, https://twitter.com/i/status/1671726663728775168, dramatically captures the harrowing screams of those fleeing the barrage of solid ice balls, trying to avoid slipping and falling on the amphitheater's concrete steps and/or being trampled by others desperately in search of shelter.

25. Both at the time that this unfortunate set of events was unfolding, and in the immediate hours thereafter, Defendant – whose job responsibilities with the City and County of Denver included ensuring the safety of the public at Red Rocks Amphitheater – exchanged electronic communications (a/k/a "writings") *with other employees of the City and County of Denver*, in which public business was discussed, namely, (a) how to respond to the ensuing dire threat to public safety, and, then (b) how to ensure that similar injuries do not result from future such meteorological events.

26. Pursuant to Section 6.0 of Memorandum 143-B to Executive Order Number 143 (Revised Apr. 9, 2021), all writings created and/or maintained by any public employee of the City and County of Denver in the performance his or her official duties are "City and County Records" which automatically *belong to* the City and County of Denver:

> **6.0** Ownership of Records:
> City and County Records are the Property of the City and County of Denver. No City and County of Denver official or employee has, by virtue of his or her position, any personal or property right to such

> records even though *they may have created, developed or compiled them*. The unauthorized destruction, removal, or use of City and County Records is prohibited.[5] (emphasis added)

**PLAINTIFFS' REQUEST AND DEFENDANT'S DENIAL**

27. On June 30, 2023, Mr. Staeger formally asked both Defendants, individually, to inspect the following writings (public records):

> Any text messages you sent and received regarding city business on 6/21/23 and 6/22/23.
>
> - If you used a private phone to conduct city business, your text messages are still subject to public disclosure.

*See* **Exhibit A**.

28. On July 6, 2023, Defendants, through an employee at Denver Arts and Venues, denied Plaintiffs' CORA request, and asserted that

> Text messages are not records made, maintained, or kept by the City and are not subject to disclosure under Colo. Rev. Stat. Secs. 24-72-101 to 24-72-402 et. seq. Therefore, nothing will be produced in response to your request.

*See* **Exhibit B**.

29. On July 6, 2023, Mr. Staeger urged the Defendants to reconsider their blanket denial decision, and provided them with Colorado case law supporting Plaintiffs' position that the text messages at issue are, in fact, public records. *See* **Exhibit C**.

30. On July 7, 2023, Defendants again denied Plaintiffs' CORA request, stating

> Mr. Staeger, the City disagrees with your interpretation of the facts and holding of the cited case. We have provided the City's position and have no further comment at this time.

*See* **Exhibit D**.

31. On July 10, 2023, undersigned counsel provided written notice of the Plaintiffs' intent to file this Application for an Order to Show Cause pursuant to § 24-72-204(5), C.R.S. *See* **Exhibit E**.

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[5] Section 2.1 of Executive Order 143 (Revised) defines "City and County Data" as "*[a]ll* written and electronic documents, . . . communications, . . . or other materials that would constitute a 'record' under the Colorado Open Records Act." (emphasis added).

32. On July 28, 2023, Denver's City Attorney's Office notified Plaintiffs that Defendants would not make available to Plaintiffs any of their electronic writings, discussing public business, that Plaintiffs had requested, stating

> The subject text messages were made from the employee's personal cell phone. The City and County of Denver does not have access to, nor does it maintain or keep, employee texts made from personal cell phones regardless of the subject matter of those texts. Accordingly, as the records are not maintained or kept by Denver, they are not documents subject to CORA.

*See* **Exhibit F.**

## FIRST CLAIM FOR RELIEF

(Application for Order to Show Cause)

33. Plaintiffs incorporate by reference all of the allegations and statements in the foregoing Paragraphs, as if fully set forth herein.

34. Pursuant to § 24-72-204(5), C.R.S., the Plaintiffs are entitled to – and hereby formally apply for – the entry of an Order to Show Cause, directing that the Defendants to appear and show cause why the public records that were sought by the Plaintiff under the CORA should not be disclosed to them.

35. As required by the CORA, the Court should set the date of the show cause hearing at "the earliest time practical."

36. Upon completion of the hearing on the Order to Show Cause, the Court should enter and order directing the Defendants to provide the Plaintiffs with the public records they requested to inspect.

37. In addition, as provided for in the CORA, the Court should enter an Order directing the Defendants to pay the Plaintiffs their reasonable attorney's fees and costs for being compelled to file and litigate this lawsuit to avail themselves of their rights thereunder.

38. The proposed Order to Show Cause is attached hereto.

## PRAYER FOR RELIEF

WHEREFORE, pursuant to § 24-72-204(5), C.R.S., Plaintiffs pray that:

A. The Court enter an Order directing the Defendants to show cause why they should not permit Plaintiffs to inspect and copy the requested Public Records as described in this Complaint and Application for Order to Show Cause;

B. The Court conduct a hearing pursuant to such Order "at the earliest practical time" at which the Court may make the Order to Show Cause absolute;

C. At the conclusion of the hearing on the Order to Show Cause, the Court enter an Order directing the Defendants to disclose the public records at issue to the Plaintiffs;

D. At the conclusion of the hearing on the Order to Show Cause, the Court enter an order directing the Defendants to pay Plaintiffs their reasonable attorneys' fees and costs, pursuant to § 24-72-204(5), C.R.S.;

E. Enter such further and additional relief as the Court deems just and proper.

Dated: September 15, 2023

By /s/ Steven D. Zansberg

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