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BUSINESS REORGANIZATION & RESTRUCTURING DIGEST

Business Reorganization & Restructuring Digest focuses on exploring recent legal developments, trends and emerging issues in notable North American, European and cross-border restructurings.

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NORTH AMERICA

Confirmation of Momentive Performance Materials' Chapter 11 Plan Reveals Potential Cramdown Pitfalls for Secured Lenders

With declining liquidity and an unsustainable 17-times levered capital structure, Momentive Performance Materials, Inc., a maker of silicones and quartz products, and certain of its affiliates (collectively, the "Company" or "Debtors") hired Willkie in early 2014 to assist in the restructuring of Momentive's $4.4 billion in debt. Willkie and the Company's financial advisors successfully navigated Momentive through a complex chapter 11 process, achieving confirmation of their chapter 11 plan within five months of their initial bankruptcy filing. The confirmation process included disputes with senior secured lenders regarding the validity of a make-whole premium and the ability to "cramdown" senior creditors with below-market replacement notes.

BACKGROUND

After intensive first quarter negotiations, Momentive and the vast majority of holders of the Company's second lien notes agreed to the terms of a prenegotiated chapter 11 bankruptcy. The prenegotiated deal would reduce the Company's net leverage to less than five times EBITDA.

The Debtors filed for bankruptcy in April 2014 with a pre-negotiated plan of reorganization (the "Plan") proposing that: (a) holders of second lien notes would exchange their notes for equity in the reorganized company and have the opportunity to participate in a $600 million rights offering to purchase additional equity at a 15% discount, (b) holders of first lien notes and 1.5 lien notes would receive replacement notes in the full amount of their claims if they voted against the Plan (but could receive payment in full in cash if they agreed to vote in favor of the Plan and not litigate the validity of their make-whole claims), (c) general unsecured creditors would have their claims fully satisfied, and (d) the holders of senior subordinated notes would receive nothing on account of their notes.

On August 26, 2014, Judge Drain of the Bankruptcy Court for the Southern District of New York confirmed the Plan over the objection of the trustees for the first lien notes, the 1.5 lien notes, and the senior subordinated notes. Judge Drain ruled in favor of the Debtors on several disputes, including (a) whether a make-whole premium was due to holders of first lien notes and 1.5 lien notes; (b) the appropriate rate of interest for the replacement notes under the Bankruptcy Code and the Supreme Court's landmark decision in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004); and (c) whether the Debtors' senior subordinated notes were in fact subordinated to the Debtors' second lien notes under the terms of the subordinated notes indenture.

THE MAKE-WHOLE PREMIUM DISPUTE

Courts in a variety of jurisdictions, including the Second Circuit, have developed case law in recent years holding that lender claims for make-whole premiums in a bankruptcy will typically be disallowed unless the debt documents state explicitly that the premiums are payable after a bankruptcy acceleration. The rationale is that the debt accelerates upon a bankruptcy filing, typically under the explicit terms of the documents, and therefore the "prepayment" terms of the debt are not triggered because any post-acceleration payments are payments made after maturity (which has been moved up to the acceleration date), not prepayments. Lenders can contract around this issue by making sure the debt documents state explicitly that the make-whole is payable in connection with an acceleration. However, the Momentive indentures did not include such a provision.

Despite this, the trustees for the first lien notes and 1.5 lien notes insisted that a "make-whole" premium was due and payable by Momentive under the first and 1.5 lien indentures. The bankruptcy court disagreed, finding that the maturity dates of the notes were automatically accelerated upon the Debtors' filing, and that there was not otherwise a clear and unambiguous clause in the indentures requiring payment of the make-whole in bankruptcy. This decision was in line with the growing body of case law that makes clear that courts will only uphold make-wholes in bankruptcy if such payment was specifically contracted for in a bankruptcy scenario. More and more, since this line of cases has developed, indentures specifically speak to whether a "make-whole" premium will be due in bankruptcy. However, the Momentive indentures did not do so.

THE CRAMDOWN DISPUTE

Because of the weakness of the indentures' make-whole provisions, as an incentive to avoid litigation, the Company proposed a chapter 11 plan that offered payment in cash to holders of first and 1.5 lien notes if they declined to pursue make-whole litigation and accepted the Plan as a class. On the flip side, if they voted against the Plan as a class, holders would instead receive cramdown replacement notes at the treasury rate + 1.50% for the first liens and the treasury rate + 2.00% for the 1.5 liens. The first and 1.5 lien holders chose to roll the dice, rejected the Plan, and then litigated the terms of the replacement notes themselves in addition to the make-whole.

The first and 1.5 lien trustees asserted that the Plan's interest rates on the replacement notes were too low, and that the "cramdown" provisions of the Bankruptcy Code required that a debtor provide a "market" rate of interest on any replacement notes given to secured lenders — particularly in a case, as in Momentive, where there was clear evidence of the market rate, as The Debtors had already received commitments for third-party financing to cash out the noteholders in the event that they had accepted the cash option under the Plan.

The Bankruptcy Court disagreed that a market rate was required, explaining that the Plan's proposed rates of interest largely complied with the requirements laid down by the Supreme Court in the landmark case on cramdown interest rates (albeit in the chapter 13 context), *Till v. SCS Credit Corp.* The Bankruptcy Court extensively analyzed *Till* and explained that *Till* did not require that a bankruptcy court look to the market to help it determine what the rate of interest would be on a similar loan. Judge Drain explained that looking to the market is not part of the analysis, because the market rate of interest necessarily includes an element of profit to lenders, which is inappropriate under section 1129(b).

In *Till*, the Supreme Court calculated the cramdown rate of interest by starting with a risk-free rate (in *Till*, the prime rate was used) and suggested that an additional spread of 1-3%, depending on the risk of payment default for the replacement debt, would be an appropriate interest rate on "cramdown" replacement notes. Unlike *Till*, Momentive proposed using the treasury rate, rather than the prime rate, as a starting point due to the fact that the replacement notes under the Plan were seven-year securities. While the court found that the treasury rate of interest was an appropriate risk-free rate due to the long-term nature of the replacement notes (explaining that prime rate was typically only used for short-term lending), it did rule that starting from the treasury rate meant that the 1-3% spread suggested by *Till* would have to be adjusted slightly upwards. To that end, the court required the Debtors to adjust the rate of interest on the replacement first lien notes and the replacement 1.5 lien notes by 0.50% and 0.75%, respectively, in order for the Plan to be confirmed. Subsequent to such adjustment, the court entered an order confirming the Plan.

NOTEHOLDERS' REQUEST FOR A "DO-OVER"

After they lost on both the make-whole and the cramdown issues, holders of first and 1.5 lien notes asked the Bankruptcy Court for a "do-over" by filing a motion seeking to change their Plan votes from "rejecting" to "accepting," to belatedly select the cash-out option under the Plan. The Debtors objected on the basis that the holders already forced the Company to incur significant legal costs, and now that everyone knew the outcome of the litigation, the cash deal was no longer on the table. The Bankruptcy Court agreed. Various appeals of the order confirming the Plan are currently pending in the Southern District of New York.

OBSERVATIONS

The make-whole portion of Judge Drain's decision simply adds on to the many cases requiring debt documents to be explicit if a make-whole is due in bankruptcy, and does not break new ground.

However, the cramdown portion of the decision unsurprisingly has become a focus for many investors, who may not have previously considered a debtor's ability to rewrite their senior secured debt on below-market terms under section 1129(b) of the Bankruptcy Code, when "in-the-money" senior secured lenders had otherwise considered themselves in a solid position for a par recovery. Future debtors may well consider this cramdown replacement note approach, since not only could they issue replacement debt potentially at a rate lower than what they would receive from exit lenders, but they would also entirely eliminate the significant upfront fees charged by exit lenders. In the future, senior secured creditors should consider this possibility in debt pricing, and should also consider organizing and ensuring that they have an open dialogue with the debtors during the restructuring so that they can negotiate the terms of their recovery rather than assuming they will be taken out at par in cash. Death-trap voting options, like the one evident in Momentive's plan, should also be carefully considered by investors prior to voting, as a bankruptcy court may not be inclined to allow investors to later backtrack on their votes absent an agreement with the debtor.

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EUROPE

The Graham Review on UK Pre-Packs

A pre-packaged sale (or "pre-pack") in UK insolvency proceedings is an "*arrangement under which the sale of all or part of a company's business or assets is negotiated with a purchaser prior to the appointment of an administrator and the administrator effects the sale immediately on, or shortly after, his appointment*" (Statement of Insolvency Practice 16, issued by the Insolvency Practitioners' Association on November 1, 2013) ("**SIP 16**").

A pre-pack is frequently used by senior secured creditors. It is similar in concept to a section 363 sale under chapter 11 of the U.S. Bankruptcy Code, although a UK pre-pack is not specifically legislated for under the Insolvency Act 1986. A UK pre-pack is usually not approved or supervised by the court; instead it is carried out by the court-appointed administrators of the company, who are themselves officers of the court and who must act in the best interests of all of the company's creditors.

In addition, although administrators are required by SIP 16 (which forms part of their professional guidelines) to disclose certain information about a pre-pack to creditors in a subsequent communication, there is no opportunity for creditors to obtain such information and/or object to the pre-pack before it is carried out. The perceived absence of court involvement and lack of transparency has given the process a bad reputation in the UK, despite the undeniable usefulness of pre-packs as restructuring mechanisms that can be implemented relatively quickly and efficiently, minimize insolvency stigma and value-loss to the business, save jobs and leave behind creditors who are clearly underwater. Some of the creditors who have been left behind — notably landlords (represented by the British Property Federation), the Pensions Regulator and the UK tax authorities — have led the calls for reform. Recent newsworthy failures such as the collapse of the electrical retailer Comet in 2012, whose purchasers left behind £26 million in unpaid taxes and also left the taxpayer with a bill of £23 million to compensate employees for a defective employee redundancy consultation, have exacerbated the criticism of pre-packs.

There has also been increased scrutiny of how banks treat companies that they characterize as distressed or underperforming, with allegations made that frequently the banks are too eager to engineer a default and take control of the assets or business themselves (commonly via a pre-pack) in order to make a profit. Most recently, this led RBS to announce the closure of its Global Restructuring Group this year, following a critical report by Lawrence Tomlinson and the initiation of a separate investigation by its regulator, the Financial Conduct Authority.

In light of the above controversies, in 2013 the Department of Business, Innovation and Skills commissioned financial and accounting expert Teresa Graham CBE (who is an experienced accountant and served on the government's Deregulation Advisory Panel for two decades) to undertake an independent review of pre-packs. Graham reported back in June 2014, with a number of recommendations for reform. Although Graham does not advocate banning pre-packs outright (stating that "there is a place for pre-packs in the UK's insolvency landscape"), she makes six specific recommendations, which she suggests should be adopted voluntarily by the industry.

Two of the Graham recommendations focus specifically on pre-packs involving "connected" parties, because these have been empirically shown to be less likely to deliver a return to creditors and more likely to fail within the first three years. "Connected" is given a wide meaning, but notably does not extend to capture a sale to a secured lender who holds, as security for the granting of the loan (with related voting rights) and as part of its normal business activities, one-third or more of the shares in both the insolvent company and the new company, i.e., a share charge or "stock pledge." Such a connection will not be a pre-pack involving "connected" parties for the purpose of the recommendations. Graham notes that this is to avoid causing unnecessary damage to the restructuring of larger companies and groups of companies.

The six Graham recommendations are as follows:

1. **Pre-pack pool.** On a voluntary basis, connected parties should approach a "pre-pack pool" before the sale and disclose details of the deal, for a pool member to opine on. There is no prescription as to what material the pool member will require in order to comment on the

deal – that will be for the party approaching them to decide. The aim is to create independent scrutiny while retaining overall secrecy. It is anticipated that pool members (independent experienced businesspeople) will spend no more than half a day reviewing the documents they are provided with, and will then issue a statement on the reasonableness of the proposed sale. If the statement is negative, the deal can still proceed, although the fact that it was negative will have to be disclosed in the administrators' SIP 16 statement.

2. **Viability review**. On a voluntary basis, connected parties should complete a "viability review" on the new company, stating how it will survive for at least the next 12 months and what it will do differently from the old company so the business does not fail again. The outcome of the review will be included in the administrators' SIP 16 statement.

3. **Revised SIP 16**. SIP 16 should be redrafted as annexed to Graham's report, to incorporate her recommendations.

4. **Marketing**. Although it is accepted that marketing cannot be carried out in some circumstances, in such cases, the reasons must be clearly explained in the administrators' SIP 16 statement. All marketing of businesses that are pre-packed should comply with key principles of good marketing, and any deviation from those principles must also be brought to creditors' attention.

5. **Valuations**. Valuations must be carried out by a valuer who holds professional indemnity insurance.

6. **Monitoring**. Monitoring of SIP 16 compliance should be taken up by the "Recognised Professional Bodies" (these include the various accountants' and insolvency practitioners' associations, as well as the Law Society), instead of the Insolvency Service.

On balance, we are of the view that the recommendations put forward by Graham are a measured response to some of the concerns raised in respect of pre-packs. However, it remains to be seen how well certain of the recommendations (and in particular the pre-pack pool) will operate in practice. There will no doubt be a few teething issues in the initial stages as the industry begins to implement Graham's recommendations.

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Evolution Rather Than Revolution: Reform of French Insolvency Proceedings

A reform of French insolvency proceedings was introduced on March 12, 2014 affecting all insolvency proceedings commencing after July 1, 2014 and delivering an overall positive effect for both creditors/third parties and debtors.

IMPROVEMENT OF CREDITORS' AND THIRD PARTIES' POSITIONS

Introduction of a pre-packaged asset sale plan (*plan de cession*)

Prior to the reform, an asset sale plan could only be implemented during recovery or liquidation proceedings (with continuation of business activity). However, the benefit to a third party of presenting an asset sale plan (in order to purchase the assets of the debtor along with some employees, typically leaving behind most liabilities) was typically outweighed by the damage that the debtor's business suffered as a result of spending a number of months in formal insolvency proceedings. To combat this, the reform provides that within the framework of confidential *conciliation* proceedings the debtor may request the President of the court (after hearing the opinion of participating creditors) to entrust the *conciliator* with the task of preparing an asset sale plan. The preparation of the asset sale plan can then be "front-loaded" by being conducted in the context of the *conciliation* proceedings with implementation then taking place within the context of recovery or liquidation proceedings. It offers a new tool for debtors and practitioners to prepare, in the context of confidential proceedings (which is less harmful to the business), not only a future safeguard or recovery plan but also the ability to sell the business as a going concern to a third party by limiting the time spent under public recovery or liquidation proceedings.

The ability for creditors to present their own safeguard or recovery plan when creditors' committees are formed

To date, the creditors' ability to take control of a debtor in safeguard or recovery proceedings has been limited by the fact that the debtor benefits from the exclusive right to prepare a draft safeguard plan, which is then submitted to a vote of the creditors through the creditors' committees (and the general meeting of all noteholders, if applicable). In practice, the creditors' ability to take control of a debtor was, therefore, possible only after long negotiations during *conciliation* or safeguard proceedings (as notably happened in the SAUR and CPI matters). The reform now provides that, in addition to the draft safeguard or recovery plan prepared by the debtor, creditors may also prepare their own safeguard or recovery plan. The creditors' committees (and, if applicable, the general meeting of all noteholders) then vote on each draft safeguard plan and the court makes its decision after the vote.

In the event that the creditors' recovery plan envisions a change of shareholders, getting shareholder approval will remain essential because the shareholders remain able to refrain from voting in favor of the sale of their shares or any capital increase required by the proposed transaction. During the preparatory work on the reform provisions, there was some discussion as to whether an "expropriation" of the former shareholders' shares should be included, but this idea was ultimately dropped. However, this new power for creditors to present their own safeguard or recovery plan will certainly lessen the power of the threat that debtors have used for many years in pre-insolvency amicable proceedings (*mandat ad hoc/ conciliation*) that if a deal is not done consensually, the court will implement a 10-year rescheduling plan. As a result of the reform, creditors are now empowered to draw up their own "Plan B."

New-money priority is strengthened

New money priority granted in the framework of *conciliation* proceedings is strengthened in the event of subsequent safeguard or recovery proceedings. Until now, a priority ranking has been granted to new money creditors with respect to the proceeds of a subsequent sale of assets completed pursuant to recovery proceedings. The reform provisions provide that, in addition, within the framework of a safeguard or recovery plan, a creditor benefiting from new-money priority must be paid the entire amount of its secured claim on the date of implementation of such safeguard or recovery plan. In other words, it is not possible for the company to reschedule the repayment of the new money over a number of years, as is potentially the case for amounts owed to other creditors.

Filing a proof of claim is facilitated

The deadline for filing a proof of claim remains the same (i.e., two months from the publication of the opening judgment, four months if the creditor is located outside France) but there will no longer be any uncertainty as to the identity and the authority of the person submitting the proof. Creditors are now entitled to ratify the filing made in their names by a third party until such time as the judge is obliged to accept or reject the claim, i.e., several months after the opening of proceedings.

The second main simplification applies with respect to a creditor who fails to file a proof of claim within the deadline. Until now, a second filing period was only available for a period of up to six months after publication of the opening judgment and where the creditor was able to prove that the debtor *intentionally* failed to mention the claim to the creditor's representative, which was very difficult to prove in practice. The reform removes the willful misconduct element and therefore a second filing period will be available if a creditor can prove, as a matter of fact, that its claim was not mentioned by the debtor to the creditor's representative irrespective of whether such failure was intentional.

IMPROVEMENT OF THE DEBTOR'S POSITION

Wider scope for pre-packaged safeguard proceedings

Until the reform was implemented, pre-packaged safeguard proceedings were limited to financial restructurings within the framework of accelerated financial safeguard proceedings, applicable only to financial creditors. The reform does not remove accelerated financial safeguard proceedings, but they have been re-categorized to form only one type of a wider group of proceedings called accelerated safeguard proceedings. The purpose of the accelerated safeguard proceedings is to implement, within the framework of creditors' committees (and if applicable, the general meeting of all noteholders), any restructuring (effected by a safeguard plan) that was not completed during the *conciliation* period due to the lack of unanimity among creditors. The accelerated safeguard proceedings may not last more than three months and, in contrast to the accelerated financial safeguard proceedings, trade creditors will be included within the plan.

A welcome measure for the financing of safeguard proceedings

Previously, safeguard and recovery proceedings were subject to a common rule for the financing of day-to-day business activities after the commencement of the proceedings: trade creditors had to be paid cash on delivery (regardless of pre-existing contractual terms of payment), which had a negative impact on the working capital of the debtor. This rule has been removed for safeguard proceedings (but remains in place for recovery proceedings) so that pre-existing contractual terms continue to apply in safeguard proceedings notwithstanding any previous payment default or the opening of proceedings.

Further protection granted to the debtor under *mandate ad hoc* and *conciliation* procedures

The reform provides that any contractual term that modifies the contract to the debtor's detriment in the event of the opening of *mandate ad hoc* and *conciliation* proceedings is deemed void (e.g., the acceleration of the debt based on the sole opening of *mandat ad hoc* or *conciliation* proceedings would not be possible, but it would remain possible if other events of default have occurred). Notably, this means that the triggering of the usual insolvency events of default in credit agreements would be deemed void on the opening of such proceedings. In addition, any contractual term requiring that the debtor pay the creditors' professional advisory fees on the opening of such proceedings is also deemed void in respect of 25% of the total amount of such fees (this percentage having been fixed arbitrarily by a decree). Finally, any agreement rescheduling debt that is completed under *conciliation* proceedings may not provide for the compounding of interest.

Improved monitoring of the *conciliation* agreement reached at the end of *conciliation* proceedings

Prior to the reform, if a creditor sued the debtor individually for payment of its claim during *conciliation* proceedings, the debtor had the right to petition the President of the Commercial Court who opened the *conciliation* proceedings to obtain a grace period (i.e., a deferral or a rescheduling of the due dates of payment obligations over a maximum period of two years). The ability to petition the President of the Commercial Court was limited to the duration of the *conciliation* proceedings, which meant that it was no longer available during the subsequent implementation of the *conciliation* agreement. The reform now provides that if, during the implementation of a *conciliation* agreement, a creditor who is party to the *conciliation* proceedings sues the debtor individually for payment of a claim that was not included in the *conciliation* agreement, then the President of the Commercial Court retains jurisdiction to defer or otherwise reschedule the due dates of the payment obligations for such claim over a maximum period of two years. In addition, to monitor the implementation of the *conciliation* agreement, the reform provides that the *conciliator* may be appointed at the end of the *conciliation* period as a "special representative for the implementation of the agreement" (*mandataire à l'exécution de l'accord*).

Specific measures to improve the financial situation of a distressed debtor

The reform also provides that from the commencement of safeguard or recovery proceedings, any portion of the debtor's share capital that has not been paid up becomes immediately due and the creditors' representative is empowered to recover such sums. In addition, after the commencement of safeguard or recovery proceedings and where interest continues to accrue on a debt, such interest may not be compounded.

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CROSS-BORDER

U.S. Supreme Court Denies Petition for *Certiorari* in *Jaffe v. Samsung*, Bolstering U.S. License Holders' Rights Against Foreign Debtor

On October 6, 2014, the United States Supreme Court issued an order denying a petition for a writ of *certiorari* in *Jaffe v. Samsung*, also known as the *Qimonda* case. In denying the writ, the Supreme Court let stand a decision of the United States Court of Appeals for the Fourth Circuit[1] affirming the decision of the Bankruptcy Court for the Eastern District of Virginia[2] to grant non-debtor licensees important and valuable rights under section 365(n) of the Bankruptcy Code in an ancillary case pending under chapter 15 of the United States Bankruptcy Code.

Qimonda, a German company that manufactured semiconductor devices, was the subject of an insolvency proceeding in Germany. Qimonda's principal assets were approximately 10,000 patents, of which approximately 4,000 were U.S. patents that had been licensed to third parties. In addition to a request for U.S. recognition of the German proceeding as a "foreign main proceeding," the insolvency administrator simultaneously sought bankruptcy court enforcement of Qimonda's rejection, under German law, of Qimonda's patent licenses.

The U.S. bankruptcy court, and the Fourth Circuit on appeal, refused to give force and effect to such rejection in the United States because application of German executory contract law would frustrate the statutory protection afforded to licensees of United States patents by section 365(n) and could undermine the United States' fundamental public policy of promoting technological innovation. Qimonda's foreign representative appealed to the United States Supreme Court. In seeking *certiorari*, Qimonda's insolvency administrator argued that the Fourth Circuit's decision threatened the United States' interests in international relations by discouraging reciprocal cooperation by other nations, and that allowing the decision to stand would discourage foreign representatives from invoking chapter 15 in the future.[3]

The Supreme Court's refusal to grant *certiorari* will likely lead to the Fourth Circuit's *Qimonda* decision's more heavily influencing the manner in which U.S. bankruptcy courts and other courts of appeal approach similar requests for extension of comity to foreign insolvency laws. Further, the Fourth Circuit's ruling lends further credence to the theory that chapter 15, and its "universalist" underpinnings, is being applied by U.S. bankruptcy courts in a "territorial" manner. As such, foreign representatives seeking to take full advantage of the benefits afforded by a chapter 15 filing must continue to, and in some cases further, respect that a U.S. bankruptcy court will not act as a "rubber stamp" for orders of foreign courts, even those seated in jurisdictions with well-developed insolvency jurisprudence.

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[1] *Jaffe v. Samsung Elec. Co. Ltd. (In re Qimonda AG)*, 737 F.3d 14 (4th Cir. 2013).

[2] *In re Qimonda AG*, 462 B.R. 165 (Bankr. E.D. Va. 2011).

[3] *Petition for a Writ of Certiorari in Jaffe v. Samsung Electronics Co. Ltd.*, No. 13-1324, 2014 WL 1725846 (U.S. Apr. 30, 2014).

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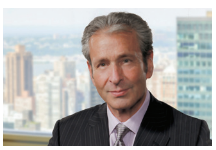

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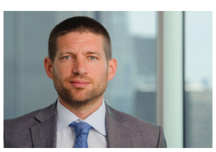

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