

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

SC Court of Appeals

Letitia H. Verdin, Circuit Judge

C.A. No. 2012-CP-23-1735

Hidria USA, Inc.Appellant

v.

Delo, d.d., d/b/a *Slovenske Novice*Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE CIRCUIT COURT ERR IN FAILING TO FIND THAT DELO HAD SUFFICIENT MINIMUM CONTACTS TO ESTABLISH PERSONAL JURISDICTION?
2. ALTERNATIVELY, DID THE CIRCUIT COURT ERR IN FAILING TO FIND THAT SOUTH CAROLINA HAS PERSONAL JURISDICTION OVER DELO BASED ON THE “EFFECTS TEST”?

STATEMENT OF THE CASE

Hidria USA, Inc. (hereinafter “Hidria”) initiated this action against Delo, d.d., d/b/a *Slovenske Novice* (hereinafter “Delo”) by filing a Summons and Complaint in the Court of Common Pleas for Greenville County on March 7, 2012. (R. pp. 9-13). Delo filed a Motion to Dismiss on June 15, 2012. (R. pp. 14-26). Hidria filed an Amended Complaint on July 5, 2012 and Delo filed a Motion to Dismiss the Amended Complaint on July 23, 2012. (R. pp. 27-30; R. p. 31). While Delo’s Motion to Dismiss was pending, Hidria filed jurisdictional discovery on Delo. (R. pp. 32-35; R. pp. 36-38). Delo failed to answer the discovery and, on August 10, 2012, Hidria filed a Motion to Compel Delo to respond to the discovery or, in the alternative, to allow the parties to conduct jurisdictional discovery. (R. pp. 39-41).

The pending motions, Delo’s Motion to Dismiss and Hidria’s Motion to Compel, were heard by Judge Letitia Verdin on August 16, 2012. Judge Verdin, after hearing the arguments of the parties and reviewing Hidria’s discovery to Delo, issued an order on October 15, 2012, allowing the parties to conduct discovery on jurisdictional issues raised in Delo’s Motion to Dismiss and holding the Motion to Dismiss in abeyance until that discovery was complete. (R. pp. 1-2). Delo filed its answers to Hidria’s discovery

requests under seal. (R. pp. 1-7 (sealed); R. pp. 8-408 (sealed)). After review of Delo's discovery responses, Judge Verdin granted Delo's Motion to Dismiss the amended complaint for lack of personal jurisdiction. (R. pp. 3-6).

Hidria filed a Motion to Reconsider, Alter or Amend Judge Verdin's Order of Dismissal on January 18, 2013. (R. pp. 7-8). Judge Verdin, via a Form 4 Order, denied Hidria's Motion to Reconsider on February 27, 2013. (R. pp. 7-8). Hidria timely filed its Notice of Appeal on April 2, 2013.

STATEMENT OF FACTS

This action arises out of two false and defamatory articles published by Delo about Hidria, those articles alleging, among other things, that Hidria engaged in tax fraud. Hidria is a corporation incorporated in Delaware, but with its principal place of business and headquarters located in Greenville, South Carolina.¹ (R. p. 104, ¶ 3). Hidria, through its Tomas USA division, markets two-wheeled vehicles, conventionally thought of as "scooters", in the North American market. See, <http://www.tomasusa.com>. However, Hidria also provides parts and equipment to the North American automotive and HVAC industries. (R. p. 104, ¶ 3). Hidria maintains a 24,000-foot building in Greenville, serving as a corporate office, warehouse, and parts distribution center. <http://www.tomasusa.com>. It employs over four South Carolina residents at its Greenville facility.

¹ Hidria is affiliated with Hidria, d.d., a Slovenian company that provides innovation in the climate and automotive industries, both in Europe and worldwide.

In December of 2011², and again in April of 2012, Hidria was targeted in defamatory articles published by *Slovenske Novice*. *Slovenske Novice* is a news publisher owned and operated by Delo. (R. pp. 142-151). *Slovenske Novice* publishes a “print” copy of its newspaper, but also maintains an internet website where articles are available to anyone accessing the site. See, <http://www.slovenskenovice.si>. (R. p. 2, ¶ 1 (sealed)). Although *Slovenske Novice* asserts that it has no “print” subscribers in South Carolina, it admitted that its website has been accessed by South Carolinians 833 times in the last three years. (R. pp. 3-4, ¶¶ 2, 8 (sealed)). Although Delo’s print newspapers and website are published in Slovene, the website articles are easily translated using a tool such as Google Translate.

Delo admits that it cannot provide the exact number of South Carolinians who read the defamatory articles at issue in this matter. (R. pp. 110-111, ¶¶ 22-25). However, it admits that it is possible that up to seven South Carolinians viewed the December article and up to three South Carolinians viewed the April article, based on information obtained by Google. (Id.). Further, Hidria submitted the affidavit of Domen Bockor, Hidria’s General Manager, who testified that the articles “were read by all of Hidria USA’s employees located in South Carolina” and “by many employees of Hidria USA’s customers in South Carolina.” (R. p. 105, ¶¶ 8-9).

The articles contain detailed information regarding Hidria’s facility and operations in Greenville, South Carolina. Delo denies that its reporter visited South Carolina to collect information for the articles. (R. pp. 5-6, ¶¶ 11, 12 (sealed)). The reporter admitted to correspondence with a Hidria employee, Darjan Lapanje, in

² Hidria initially alleged that the date of the article was November 12, 2011. However, it appears that Hidria mistakenly translated the European numeric date of the article, 11-12-11. Delo alleges that the article was published on December 11, 2011 and Hidria does not contest that date.

connection with gathering information for the April article. (R. p. 6, ¶ 13 (sealed)). Delo also admits that the reporter gathered information for both articles from websites maintained by South Carolina governmental entities, including (1) <http://www.greenvillecounty.org> and (2) <http://www.sos.sc.gov>. (R. pp. 5-6, ¶ 12 (sealed)). The reporter also used at least one commercial website to access information about Hidria's Greenville facility, <http://www.showcase.com>. (Id.).

ARGUMENTS

I. Standard of Review

Whether a South Carolina court can assert personal jurisdiction must be resolved on the facts of the case. State v. NV Sumatra Tobacco Trading Co., 379 S.C. 81, 88, 666 S.E.2d 218, 221 (2008). A trial court's decision to exercise or decline to exercise personal jurisdiction will be affirmed unless (1) unsupported by the evidence or (2) influenced by an error of law. Leggett v. Smith, 386 S.C. 63, 72, 686 S.E.2d 699, 704 (Ct.App. 2009) (citing Cockrell v. Hillerich & Bradsby Co., 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005)). In this case, the evidence presented to the court was sufficient to establish personal jurisdiction over Delo by South Carolina's courts. Further, Judge Verdin's order dismissing Hidria's action takes an erroneously narrow view of the test for personal jurisdiction and fails to apply the jurisdictional test set forth in Calder v. Jones, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984).

II. The Circuit Court erred in dismissing Hidria's action because Hidria produced sufficient evidence for the court's exercise of personal jurisdiction over Delo had the Court used the correct test.

The Circuit Court, in its Order of Dismissal, found that South Carolina's long-arm statute did not apply because Delo has not transacted any business in South Carolina. (R.

pp. 3-6). Specifically, the Circuit Court noted that *Slovenske Novice* “has no subscribers in South Carolina, does not solicit advertisers in South Carolina, has no bank accounts or registered agents in South Carolina, and has no record of ever sending agents or employees into this State in order to collect information for any publications.” (R. p. 6). However, because the Circuit Court used an incorrect standard for determining personal jurisdiction, it found insufficient evidence to meet that incorrect standard.

South Carolina law is clear that, with regard to personal jurisdiction, courts recognize both “specific” jurisdiction and “general” jurisdiction. Leggett v. Smith, 386 S.C. 63, 72, 686 S.E.2d 699, 704 (Ct.App. 2009) (citing Coggeshall v. Reprod. Endocrine Assoc. of Charlotte, 376 S.C. 12, 16, 375 S.E.2d 476, 478 (2007)).

The court acquires specific jurisdiction over a cause of action arising from a defendant’s contacts with the state through the long arm statute. S.C. Code Ann. § 36-2-803 (Supp. 2008); Cockrell, 363 S.C. at 491, 611 S.E.2d at 508. “Because South Carolina treats its long-arm statute as co-extensive with the due process clause, the sole question becomes whether the exercise of personal jurisdiction would violate due process. Cockrell, 363 S.C. at 491, 611 S.E.2d at 508.

Leggett, 386 S.C. at 72, 686 S.E.2d at 704. “General” jurisdiction, in contrast, is acquired where the defendant has “continuous and systematic” contacts with South Carolina, even though those contacts are not directly related to the claims against it. Cockrell, 363 S.C. at 495, 611 S.E.2d at 510. These contacts must be “substantial” and justify haling the defendant into court in that jurisdiction even though its activities in that jurisdiction did not give rise to the cause of action. International Shoe Co. v. Washington, 326 U.S. 310, 318, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

South Carolina acquired “specific” jurisdiction over Delo based on Delo’s sufficient contacts with the State. Hidria concedes that South Carolina’s courts did not

acquire “general” jurisdiction over Delo. Nevertheless, the Circuit Court, in its Order of Dismissal, confused the two types of personal jurisdiction in holding that it did not acquire personal jurisdiction over Delo. First, the Circuit Court erroneously held that Delo did not subject itself to South Carolina’s jurisdiction because Delo did not “transact business” in South Carolina, as the court believed is required by the long arm statute. South Carolina’s long arm statute provides, in relevant part:

(A) A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person’s:

(1) transacting any business in this State;

* * * *

(3) commission of a tortious act in whole or in part in this State;

(4) causing tortious death or injury in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State.

S.C. Code Ann. § 36-2-803 (Supp. 2012).

Thus, the court’s focus on whether Delo “transacts business” in or derives revenue from South Carolina does not address whether Delo committed defamation in South Carolina, clearly a basis for personal jurisdiction under the long arm statute. Delo’s publication of the defamatory articles in its print edition, which is, according to Delo, limited to subscribers in Europe, does not amount to defamation in South Carolina. However, its publication of the defamatory articles to its website, which is admittedly not restricted to viewers outside of South Carolina, constitutes a tort committed in South Carolina. Delo admitted that its website was viewed by South Carolinians at least 833

times in the last three years and that the articles in question may have been viewed by up to ten South Carolinians. The fact that Delo published its articles to its website in Slovenia is of no consequence. It published the articles to the world, which obviously includes South Carolina, when it posted them to its website.

Thus, the Circuit Court's focus should have been on the application of the Due Process test for personal jurisdiction. Under a Due Process analysis, the court must determine whether minimum contacts exist between the defendant and the forum state and whether the forum state's exercise of personal jurisdiction "offends traditional notions of fair play and substantial justice." Cockrell, 363 S.C. at 491, 611 S.E.2d at 508. In determining whether minimum contacts exist, courts apply a two-prong test: (1) the defendant must have the requisite minimum contacts with the forum state in order for the court to exercise "power" over it and (2) the exercise of personal jurisdiction must be reasonable or "fair". Southern Plastics Co. v. Southern Commerce Bank, 310 S.C. 256, 260, 423 S.E.2d 128, 131 (1992).

Rather than examining whether Delo had the requisite minimum contacts with South Carolina, the Circuit Court examined only whether Delo transacts business in South Carolina.³ In fact, this Court has held that the "requisite minimum contacts" required by the first prong of the Due Process analysis is a low threshold. In Leggett v. Smith, 386 S.C. 63, 686 S.E.2d 699 (Ct.App. 2009), this Court held that South Carolina acquired personal jurisdiction over a New York insurance company that was not licensed to do business in South Carolina and did not issue policies to South Carolina residents.

³ The Circuit Court's Order of Dismissal makes a conclusory holding that Delo "does not have and has not had traditional minimum contacts with the State of South Carolina which would allow this Court to exercise personal jurisdiction over the Defendant" However, the Court fails to support this holding and, in fact, overlooks evidence of Delo's contacts with South Carolina.

The insurer issued a personal automobile liability policy to a New York couple that covered, among other autos, a Ford Escort. Leggett, 386 S.C. at 70, 686 S.E.2d at 703. The Escort was used by the couple's son who attended college at Coastal Carolina University in South Carolina. Id. During the policy period, the son became a South Carolina resident and acquired title of the car from his father. Id. Although he inquired into insuring the Escort with a South Carolina licensed insurer, he failed to do so before becoming involved in an accident with a motorcyclist in South Carolina. Leggett, 386 S.C. at 70-71, 686 S.E.2d at 703.

The motorcyclist brought a declaratory judgment action against the insurer to establish liability coverage for the Escort. Leggett, 386 S.C. at 71, 686 S.E.2d at 704. The New York insurer argued that South Carolina had no personal jurisdiction over it based on its lack of contacts in South Carolina. Leggett, 386 S.C. at 72, 686 S.E.2d at 704. Both the trial court and the Court of Appeals disagreed. Leggett 386 S.C. at 71-72, 686 S.E.2d at 704. While the insurer issued no policies to South Carolinians, the Court of Appeals held that the mere facts that (1) the policy's coverage territory included South Carolina and (2) the insurer had been advised that the Escort was being garaged in South Carolina was sufficient to establish the required minimum contacts for establishing personal jurisdiction. Leggett, 386 S.C. at 75-76, 686 S.E.2d at 706.

The facts in the case before this Court are similar. Although Delo does not appear to transact business in South Carolina, its publication of the articles to its website and its notice that South Carolinians view its website results in the requisite minimum contacts. In addition, the Circuit Court overlooked evidence that defamation did, in fact, occur in South Carolina. Domen Bockor, in his affidavit, testified that Hidria's South Carolina

employees read the articles and that some employees of Hidria's customers also read the articles. Thus, Hidria produced evidence of Delo's requisite minimum contacts with South Carolina, meeting the "power" prong of the Due Process analysis.

Likewise, Hidria produced sufficient evidence to satisfy the "fairness" prong of the Due Process analysis, a prong not even addressed by the Circuit Court.

In order to determine whether the exercise of jurisdiction over a foreign defendant meets the fairness prong, the court must consider the following: (1) the duration of the activity of the nonresident within the state; (2) the character and circumstances of the nonresident's acts; (3) the inconvenience resulting to the parties by conferring or refusing to confer jurisdiction over the nonresident; (4) the state's interest in exercising jurisdiction.

Power Prods. and Servs. Co. v. Kozma, 379 S.C. 423, 432, 665 S.E.2d 660, 665 (Ct.App. 2008) (citing Cockrell, 363 S.C. at 492, 611 S.E.2d at 508). The facts of this case, as admitted by Delo, show that the duration of its activity in South Carolina was long-standing. It admitted that it was aware of at least 833 views of its website by South Carolinians over the last three years. The articles Delo published to its *Slovenske Novice* website, easily translated into English, targeted Hidria, a South Carolina corporation, and Delo's reporter admitted to using information gathered from South Carolina websites, such as Greenville County's and the South Carolina Secretary of State's, in writing her defamatory articles, thus taking advantage of South Carolina information sources.

While Delo may argue that it would be inconvenienced if haled into court in South Carolina, Hidria would likewise be inconvenienced if it had to prosecute its claims in a foreign country. Despite Hidria's corporate affiliations with Hidria, d.d., Hidria is an American, not a Slovenian, corporation. Its General Manager is a resident of South Carolina, and Hidria will rely on the testimony of its South Carolina employees and

South Carolina clients in proving both the publication of the defamatory articles and the damage to its reputation. Because the witnesses to the damage to Hidria's reputation are South Carolina residents, there is less inconvenience in maintaining the action in South Carolina than in forcing Hidria to pursue Delo in Slovenia. Finally, South Carolina's interest in exercising jurisdiction over this action is self-evident: a South Carolina corporation has been defamed in South Carolina. South Carolina has an interest in providing relief for its corporate citizens when they are defamed by nonresidents. See, Leggett, 386 S.C. at 76-77, 686 S.E.2d at 706 (finding a similar interest in protecting South Carolinians from nonresident insurance companies who refuse to pay claims).

The Circuit Court's erroneous focus on whether Delo "transacts business" in South Carolina and improper application of the two-pronged Due Process analysis led it to overlook sufficient evidence of Delo's minimum contacts in South Carolina and the inequity resulting from forcing a South Carolina resident corporation to pursue its claims in a foreign country, though it suffered injury in South Carolina. Hidria produced evidence that Delo published its defamatory articles to its website, with the knowledge that its website was viewed by South Carolinians. It produced evidence that the articles were read by South Carolinians and that Hidria suffered damage to its reputation in South Carolina. Even Delo cannot deny that the articles may have been viewed by South Carolinians, as its own analysis revealed up to seven views of the December article and up to three views of the April article. Finally, Delo admits to the use of South Carolina-based websites to gather information for its defamatory articles. Taken together, Hidria satisfied both the minimum contacts requirement and the fairness requirement of the Due

Process analysis. As such, the Circuit Court erred in dismissing its action for lack of personal jurisdiction.

III. Alternatively, if Delo lacks sufficient minimum contacts with South Carolina, the Circuit Court erred in dismissing Hidria's complaint because personal jurisdiction over Delo was acquired because it intentionally targeted Hidria in South Carolina.

In Calder v. Jones, 465 U.S. 783, 104 S.Ct. 1482, 79 L.Ed.2d 804 (1984), the United States Supreme Court held that a defendant's alleged targeting of a plaintiff in California, a state where the defendant lacked sufficient minimum contacts for personal jurisdiction, did not prohibit California from acquiring personal jurisdiction. The defendant, actress Shirley Jones, a resident of California, brought an action against the National Enquirer magazine, its president/editor and its reporter alleging that she had been defamed in an article published by the magazine. Calder, 465 U.S. at 785. The magazine, with a fairly substantial subscription base in California, did not contest personal jurisdiction. Id. However, the president/editor and reporter did.

The president/editor testified that he was a Florida resident and he had only visited California twice – once for a pleasure trip prior to the article's publication and once to testify in an unrelated matter. Calder, 465 U.S. at 786. The reporter testified that he visited California 6 to 12 times per year for business. Calder, 465 U.S. at 785. However, he testified that he did not visit California in connection with his preparation of the article on Ms. Jones and that all his research was done by telephone calls to sources in California. Calder, 465 U.S. at 785-86.

The California trial court held that it did not acquire personal jurisdiction over the president/editor and reporter, but the California Court of Appeals reversed, holding that although the individual defendants likely did not have sufficient minimum contacts in

California, the allegation that the defendants intended to cause tortious injury to Ms. Jones in California was sufficient to invoke jurisdiction. Calder, 465 U.S. at 786-87. The California Supreme Court declined to hear an appeal, but the United States Supreme Court granted the president/editor's and reporter's petition for writ of certiorari. Calder, 465 U.S. at 787-88.

The president/editor and reporter argued that, as individuals, they were not responsible for the effect of the article, published by their employer, in California. Calder, 465 U.S. at 789. They drew an analogy to a welder who works on a boiler in Florida that is subsequently sold to a buyer in California and explodes there. Id. However, the Supreme Court, drawing a sharp distinction between negligent and intentional conduct, disagreed:

Petitioners' analogy does not wash. Whatever the status of their hypothetical welder, petitioners are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California. Petitioner South wrote and Petitioner Calder edited an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the National Enquirer has its largest circulation. Under the circumstances, petitioners must "reasonably anticipate being haled into court there" to answer for the truth of the statements made in their article. An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California.

Calder, 465 U.S. at 789-90 (internal citations omitted).

South Carolina has not expressly addressed the "effects" test set forth in Calder.⁴

However, the Fourth Circuit Court of Appeals, in an attempt to clarify Calder, enunciated

⁴ This Court rejected the "effects test" in connection with a creditor's attempt to file a default judgment obtained in Alabama in South Carolina. Pitts v. Fink, 389 S.C. 156, 698 S.E.2d 626 (Ct.App. 2010). In that case, however, the allegation against the defendant arose out of a contractual disagreement, not an intentional tort as required by the "effects test" set forth in Calder v. Jones.

a three-part test in Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc., 334 F.3d 390, 398 n. 7 (4th Cir. 2003): (1) the defendant committed an intentional tort; (2) the plaintiff felt the brunt of the harm in the forum state, such that the forum can be said to be the focal point of the harm; and (3) the defendant expressly aimed his tortious conduct at the forum, such that the forum can be said to be the focal point of the harm. This test, which is not binding on this Court, significantly narrows the holding in Calder and should not be adopted by South Carolina.

Calder did not require a plaintiff to show that the forum state is the “focal point of the harm” or that the defendant “expressly aimed his tortious conduct at the forum”. Rather, Calder merely required the plaintiff to show that it bore the brunt of its injury in the forum state and that the defendant should reasonably have been aware that the plaintiff would sustain injury in the forum state. The Fourth Circuit’s test incorrectly appears to require that the defendant target the forum state, rather than a citizen of the forum state. Under Calder, it is sufficient that the plaintiff was the target of the defendant’s intentional tortious conduct, felt the brunt of the harm resulting from the defendant’s conduct in the forum state, and the defendant should have reasonably been aware that the plaintiff would be injured in the forum.

In this case, Delo’s intentionally tortious conduct satisfies the “effects test” as set forth in Calder. Delo is alleged to have committed an intentional tort – defamation of Hidria. Delo, by its own admission, was aware that Hidria was a South Carolina resident, having its principal place of business in Greenville. Indeed, its articles contain extensive information about Hidria’s facility and business in Greenville, obtained, at least in part, from South Carolina-based websites, such as Greenville County’s and the South Carolina

Secretary of State's. Therefore, when Delo, through the *Slovenske Novice* articles published on the internet, defamed Hidria, it knew that Hidria would feel the brunt of the defamation in South Carolina, where it resides, employs South Carolina residents and maintains business relationships. Knowing that its conduct intentionally caused harm to Hidria in South Carolina, Delo had reason to expect to be haled into a South Carolina court to account for its conduct. As such, even if the Circuit Court correctly held that Delo lacked the sufficient minimum contacts to invoke personal jurisdiction in South Carolina, Hidria satisfied the Calder "effects test", and the Circuit Court erred in not finding personal jurisdiction on that basis.

CONCLUSION

For the foregoing reasons, this Court should reverse the Circuit Court, find that South Carolina has personal jurisdiction over Delo, and remand this matter for trial.

Respectfully submitted,

March 21, 2014



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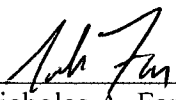
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RULE 211, SCACR CERTIFICATION
FINAL BRIEF OF APPELLANT

I, Nicholas A. Farr, Esquire, hereby certify that the *Final Brief of Appellant* complies
with the requirements of Rule 211(b) of the South Carolina Appellate Court Rules.



Nicholas A. Farr, Esquire

Greenville, South Carolina

March 28, 2014

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Letitia H. Verdin, Circuit Judge

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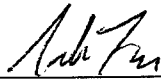
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PROOF OF SERVICE

The undersigned hereby certifies that he is the attorney for the Appellant, Hidria USA, Inc., in the above-referenced matter and that he served the Final Reply Brief of Appellant and Final Brief of Appellant upon the attorney for the Respondent, by hand delivering the same on March 28, 2014, addressed as follows:

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