IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-57
L.T. Case Nos. 4D09-3587, 08-64365

STRAX REJUVENATION AND AESTHETICS INSTITUTE, INC.,

Petitioner,

vs.

DONNA SHIELD, et al.,

Respondent.

ON DISCRETIONARY REVIEW OF AN OPINION
OF THE FOURTH DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The issue presented in this Petition is whether the courts and litigants of this State are bound to accept the date on the time stamp provided by the clerk's office when court papers are filed, regardless of evidence presented showing an inaccuracy in the stamp. The Fourth District Court of Appeal held below that the date provided by a clerk is irrefutable, regardless of its inaccuracy, and even if the effect is to deprive a litigant of an appeal. Subsequent to the Fourth District's ruling and after this Court accepted jurisdiction, the Fifth District Court of Appeal issued an opinion expressly disagreeing with the decision below. *See Ocr-EDS, Inc. v. S&S Enters., Inc.*, 2010 WL 838164 (Fla. 5th DCA Mar. 12, 2010). Petitioner submits that this Court should follow the reasoning of the Fifth District and every other district court that has addressed the issue and reject the decision of the Fourth District.

The issue on review arose after Petitioner, Strax Rejuvenation and Aesthetics Institute, Inc. ("Strax"), filed a nonfinal appeal to the Fourth District Court of Appeal from a circuit court order denying Strax's motion to dismiss and compel arbitration. *See Strax Rejuvenation & Aesthetics Inst., Inc. v. Shield*, 24 So. 3d 666 (Fla. 4th DCA 2009); (R.1-7). After the appeal was filed, it was discovered that the Broward County Clerk of Court's time stamp reflected a filing date one day past the thirty-day time limit for invoking the district court's

jurisdiction. *Strax*, 24 So. 3d at 666. The Fourth District thereafter ordered Strax to file a conformed copy of the notice of appeal and any orders tolling the time for filing it. (R.8/10).

Strax filed a response and motion to have the Fourth District deem the notice timely filed based on sworn allegations that the notice of appeal had been timely filed with the clerk's office notwithstanding the clerk's time stamp. (R.39-59). Specifically, Strax provided affidavits from its counsel and the courier who physically delivered the notice of appeal to the clerk's office. Strax's counsel attested that she prepared the notice of appeal two days before its due date and placed it in a filing box at her firm so that it would be picked up by a courier and filed the next day. 24 So. 3d at 666-67; (R.58-59). The courier attested that he regularly picks up documents at Strax's counsel's law firm, and that he did so on the day in question, which was one day before the notice of appeal was due. (R.56-57). He further attested that he filed the notice of appeal with the Broward County clerk's office on the same day. (R.56).

Despite Strax's sworn allegations, the Fourth District denied its motion and dismissed the appeal as untimely based solely on the clerk's time stamp date. (R.61-65). Although the Fourth District recognized that other Florida appellate courts have expressly considered extrinsic evidence other than the clerk's time stamp to determine the date on which a notice of appeal was filed, it refused to

consider Strax's affidavits. Rather, it held that Florida Rule of Civil Procedure 1.080(e) establishes a bright-line rule for determining the date of a court filing, and that the clerk's time stamp can never be rebutted by other evidence. In so holding, the Fourth District stated:

> The clear and concise language of the 1984 amendment to rule 1.080(e) compels us to conclude that the supreme court intended to establish a bright line test. To be sure, interpreting rule 1.080(e) in a bright line fashion obviates the need to engage in any fact finding beyond the information stamped on the notice of appeal. … And, while we are cognizant of the fact that it is within the realm of possibility that the clerk's date stamp machine may, from time to time, produce an incorrect date, prudent attorneys and clerks always have the option of paying closer attention to such details before the jurisdictional time limit expires.

(R.64) (emphasis added).

The Fourth District certified conflict with decisional law from the Third District holding that the clerk's time stamp creates a rebuttable presumption as to the filing date that may be overcome with sworn testimony or other evidence. *Id.* *See Weintraub v. Alter*, 482 So. 2d 454 (Fla. 3d DCA 1986).[1] This Court thereafter accepted jurisdiction over the matter.

[1] The Fourth District noted in its opinion that Strax had not sought to have the trial court correct the record pursuant to rule 1.540(a), Fla.R.Civ.P., in regard to the filing date. (R.63, n.1). Strax has preserved its ability to do so, if need be, by filing a motion to correct the record in the trial court during the pendency of this proceeding. The motion has not been heard.

SUMMARY OF ARGUMENT

The Fourth District's opinion improperly places the fate of all Florida litigants filing jurisdictional papers solely in the hands of the clerk who receives the filing. In holding that the date on the clerk's time stamp is irrebuttable, the Fourth District ignored the common law set forth by every other Florida district court and numerous other jurisdictions, and misconstrued Civil Procedure Rule 1.080. As the Fifth District recently explained in expressly disagreeing with the Fourth District's decision below, the interests of due process and fundamental fairness require a continued application of the rule that has always been applied. A clerk's mistake should not be charged to an innocent litigant when there is evidence showing that a mistake was made. This Court should therefore reverse the Fourth District's opinion below.

ARGUMENT

THE FOURTH DISTRICT ERRED IN HOLDING THAT RULE 1.080(e) ESTABLISHES A BRIGHT LINE RULE FOR DETERMINING THE DATE OF A COURT FILING.

The Fourth District Court of Appeal wholly misconstrued Florida Rule of Civil Procedure 1.080(e) in holding that the clerk's time stamp on a document creates an irrebuttable presumption as to the date of filing, regardless of evidence to the contrary. The plain language of the rule does not bind courts and litigants in that respect. Moreover, the interests of fundamental fairness strongly dictate

against the Fourth District's ruling, as even the Fourth District acknowledged that its holding could potentially deprive innocent litigants of their right to an appeal based solely on a clerk's mistake.

A. Rule 1.080(e) Does Not Establish A Bright-Line Test.

The Fourth District was incorrect in holding that rule 1.080(e) establishes an iron-clad date of filing that can never be rebutted with competent evidence to the contrary. Significantly, in rendering its opinion, the Fourth District misconstrued language in the current version of rule 1.080(e), and the reason for why the rule was amended to include such language.

Rule 1.080(e) provides as follows:

> **(e) Filing Defined.** The filing of papers with the court as required by these rules shall be made by filing them with the clerk, except that the judge may permit papers to be filed with the judge, in which event the judge shall note the filing date before him or her on the papers and transmit them to the clerk. The date of filing is that shown on the face of the paper by the judge's notation or the clerk's time stamp, whichever is earlier.

The Fourth District interpreted the second sentence of the rule to establish a bright-line test for determining the date on which court papers are filed. In holding that only the clerk's time stamp may be considered, the Fourth District noted that prior to the addition of that sentence in 1984, "at least two courts permitted a party to rebut the presumption that the clerk's time stamp reflects the actual date a paper was filed with the clerk of the trial court." *Id.* at 667 (discussing decisions from

the 1st and 3rd Districts). The Fourth District concluded that the 1984 amendment to rule 1.080(e) was intended to overrule these decisions, and that "the supreme court intended to establish a bright line test" for determining the date of filing. *Id.* at 668.

The Fourth District's interpretation of this Court's intent when it amended rule 1.080(e) is patently incorrect and contrary to the case law leading up to the amendment. The Comments to the rule and the case law show without question that rule 1.080(e) was amended to clarify the date on which the ten-day period for filing an authorized motion for new trial or rehearing begins to run. There is no suggestion in the history of the amendment that it was ever intended to change the common law rule regarding the presumption of correctness for clerks' time stamps and replace it with a bright-line rule.

Specifically, the Court Commentary to the 1984 amendment to rule 1.080(e) explains as follows:

> The committee is recommending an amendment to rule 1.530(b) to cure the confusion created by *Castro v. Castro*, 404 So. 2d 1046 (Fla. 1980) [sic].[2] That recommendation requires an amendment to rule 1.080(e) specifying that the date of filing is that shown on the face of the paper.

In *Castro*, this Court was called upon to determine the meaning of the phrase "entry of judgment" as governed by rule 1.530(b), which at the time required

[2] *Castro* is actually a 1981 opinion.

motions for rehearing to be served "not later than 10 days after the . . . entry of judgment." 404 So. 2d at 1047. This Court determined that "entry" was not synonymous with "rendition," but rather referred to the recording of a judgment in the official records. *Id.* at 1048. This meant that, in many instances, the time for filing a motion for rehearing would not begin to accrue until well after the judgment was filed with the clerk of court.

The *Castro* decision was roundly criticized. The year after the opinion was issued, two Justices dissented in an opinion of this Court and stated: "We made a mistake in *Castro v. Castro*, 404 So. 2d 1046 (Fla. 1981), and this case gives us a vehicle to correct that error. The time for filing a petition for rehearing should commence to run when the judgment sought to be reheard is filed with the clerk of court." *Grabarnick v. Fla. Homeowners Assoc. of N. Broward, Inc.*, 419 So. 2d 1065, 1067 (Fla. 1982) (McDonald, J. and Alderman, C.J., dissenting).

The following year, the First District likewise acknowledged the confusion resulting from *Castro* and urged an amendment to the pertinent rules of civil procedure. *Pruitt v. Brock*, 437 So. 2d 768 (Fla. 1st DCA 1983). After discussing the *Grabarnick* dissent, the First District explained:

> . . . The fact that confusion and controversy still exists even after *Castro* is evidenced by two recent decisions addressing the issue of when a *jury verdict* is rendered for purposes of a timely motion for new trial. *See Menfi v. Exxon Co.*, 433 So. 2d 1327 (Fla. 3d DCA 1983); *Culpepper v. Britt*, 434 So. 2d 31 (Fla. 2d DCA 1983). Although we find it unnecessary to consider the wisdom of *Castro* in

> determining the issue before us, we would repeat the recommendation of the Fourth District Court of Appeal, made some ten years ago, to the effect that "the several rules which require the filing, serving or moving, with time deadline and jurisdiction in [the] balance, should be clarified with minute specificity by the rulemaking authority, and hopefully with a degree of uniformity to the end that the reader and user will know precisely what is required." …

Id. at 772 n.2.

This Court's response to the confusion following *Castro* was a 1984 amendment to rule 1.530(b), wherein the phrase "entry of judgment" in reference to the start of the ten-day period for serving rehearing motions was replaced with the "date of filing of the judgment." *In re Amendments to Rules of Civil Procedure*, 458 So. 2d 245, 255-56 (Fla. 1984). In order to conform the new language in rule 1.530(b) to the definition of "filing," rule 1.080(e) was modified to add the sentence (on which the Fourth District relied below): "The date of filing is that shown on the face of the paper by the judge's notation or the clerk's time stamp, whichever is earlier." *Id.* at 247-48.

Thus, as shown, the Court's reasoning for adding the "time stamp" language to rule 1.080(e) was never associated with an intent to establish a bright line test for determining the accuracy of the time stamp.

As the Fourth District recognized in its opinion below, other district courts have **not** interpreted the amended rule 1.080(e) in the manner advanced by the

Fourth District here. After rule 1.080(e) was amended in 1984, the Third District Court of Appeal in *Weintraub v. Alter*, 482 So. 2d 454 (Fla. 3d DCA 1986), held:

> A notice of appeal is generally deemed filed on the date it is actually filed with the clerk of the trial court. The date is *presumptively* shown by the filing date which the clerk of the trial court stamps on the face of the notice – although this is not a conclusive showing and may be rebutted by other evidence.

Strax, 24 So. 3d at 668 (discussing *Weintraub*) (emphasis added by the *Strax* court). Thus, even after the amendment to the rule, the Third District has held that the clerk's date stamp is merely presumptive of the date of filing.

In accordance with *Weintraub* and all of the other district court decisions declining to impose a bright-line test regarding the effect of the clerk's time stamp,[3] in response to the Fourth District's decision below, on March 12, 2010, the Fifth District withdrew an order denying a motion to dismiss an appeal as untimely and substituted an opinion explaining its disagreement with the Fourth District's ruling in the instant case. *Ocr-EDS, Inc. v. S&S Enters., Inc.*, 2010 WL 838164 (Fla. 5th DCA Mar. 12, 2010).

In *Ocr-EDS*, as in this case, the Fifth District had issued an order to show cause as to why the appeal should not be dismissed as untimely where the time stamp on the notice of appeal reflected a date that fell outside of the thirty-day

[3] *See Pettigrew & Bailey v. Pickle*, 429 So. 2d 340 (Fla. 3d DCA 1983); *Knee v. Smith*, 313 So. 2d 117 (Fla. 1st DCA 1975); *Mills v. Avon Park Motor Co.*, 223 So. 2d 802 (Fla. 2d DCA 1969); *Hood v. State*, 163 So. 2d 893 (Fla. 1st DCA 1964).

filing period. In response, as in this case, the appellant submitted two affidavits, one from a secretary in the appellants' office who attested to timely filing the notice of appeal by overnight mail and attached shipping records showing the same, and one from an employee at the clerk's office who confirmed that the office had received the Federal Express package on the date shown.

In rejecting *Strax*'s holding, which would have required dismissal of the appeal, the Fifth District explained:

> Florida cases addressing this issue prior to *Strax* held that appellate jurisdiction is determined by the date that a notice of appeal (or other jurisdictional filing) is actually received by the clerk of court, even if the clerk-stamped filing date indicates a belated filing.

Id. at *1. The Fifth District went on to reject the Fourth District's interpretation of rule 1.080(e), concluding:

> This reading of the rules also conforms with the long-standing principle that "[w]hile our procedural rules [should] provide for an orderly and expeditious administration of justice, we must take care to administer them in a manner conductive to the end of justice." . . . A rule that would deny a citizen who has timely sought an appeal his or her right to appeal based on a proven mistake by a clerk's office employee is not consistent with justice or due process.

Id. at *2 (citation omitted). Thus, instead of dismissing the appeal, the Fifth District relinquished the matter to the circuit court with directions that the trial judge conduct an evidentiary hearing to determine whether the appellants' notice of appeal was timely received, "as Appellants' evidence suggests." *Id.*

As Florida's First, Second, Third and Fifth District Courts of Appeal have held, the date reflected by a clerk's time stamp creates a rebuttable presumption of the date on which a court paper was filed. A clerk's mistake in this respect may be proven by the presentation of evidence establishing that the clerk's time stamp is incorrect.

B. Public Policy Compels the Rejection of the Fourth District's Ruling.

The Fifth District's decision, and the decisions by the other district courts allowing consideration of evidence establishing a different filing date than that of the clerk, are fully in accord with the law of numerous other jurisdictions holding that public policy dictates that a notice of appeal is filed when it is received by the clerk of court for the purpose of being filed, the time stamp the clerk places on it is merely presumptive evidence of the date of filing, and an appellant cannot always be responsible for ensuring that the clerk properly stamps and files the notice.

The federal courts have long recognized that the act of filing a notice of appeal is complete when it is received by the clerk. Although Federal Rule of Civil Procedure 5(d) does not include the "time stamp" language of rule 1.080(e), the public policy analysis in these cases nevertheless demonstrates that the same result is mandated in Florida. As the United States Third Circuit explained in *United States v. Solly*, 545 F.2d 874 (3d Cir. 1976), in finding the term "filing" to mean the date of receipt by the clerk's office rather than the date it is docketed by

the clerk's personnel, "[o]therwise, the timeliness of the filing would be under the control of the personnel of the clerk's office rather than the appellant." *Id.* at 876. *See also Silverton v. Valley Transit Cement Co.*, 237 F.2d 143, 145 (9th Cir. 1956) (where notice of appeal was delivered on January 17th but was stamped "filed January 25," appellant overcame presumption of correctness of clerk's time stamp by submitting attorney's affidavits showing that notice was received by the clerk on or before the January 18th deadline; "[a] litigant's rights cannot be injuriously affected by the failure or neglect of the clerk to do his duty"), *citing Brady v. J.B. McCrary Co.*, 244 F. 602, 605 (S.D. Fla. 1917); *see also Da'Ville v. Wise*, 470 F.2d 1364, 1365 (5th Cir. 1973) (denying motion to dismiss appeal where notice of appeal was due by January 3rd but was stamped "Filed, January 4," where clerk's practice suggested that there was a "strong possibility" that notice was timely received by clerk's office).

Similarly, numerous state courts have determined that a time stamp should not be dispositive of the date of filing. For instance, the Illinois Supreme Court has concluded that a document is filed when it is delivered to the proper officer for endorsement, noting: "'Delivery alone has been held to constitute filing since the person filing has no control over the officer who receives the documents'." *Madigan v. Ill. Commerce Comm'n*, 899 N.E.2d 227, 234-35 (Ill. 2008). In rejecting an argument that a pleading is filed when an acting officer "accepts" the

document, the court explained, "[a]long with the parties' responsibility to adhere to deadlines…comes the assurance that a filing will be deemed filed when submitted, even if not checked for compliance until later." *Id.*

The Supreme Court of Missouri has also held that a clerk's file stamp on a notice of appeal is not conclusive as to when the notice was filed. *Labrier v. Anheuser Ford, Inc.*, 621 S.W.2d 51, 54 (Mo. 1981). In *Labrier*, the check for the docket fee was paid on December 20, 1978, and the judge's docket sheet contained an entry made by the clerk on December 20, 1978 that the fee had been deposited. *Id.* However, the notice of appeal was stamped "Filed on December 27, 1978." *Id.* The court concluded that "the record, while somewhat inconsistent, indicates that the notice of appeal was taken to the proper office" and was thus timely, regardless of the later ministerial act of stamping the notice. *Id.*

Other courts have similarly concluded that a time stamp merely creates a rebuttable presumption that a document was filed on the date stamped. *See*, *e.g.*, *Reese v. City of Atlanta*, 545 S.E.2d 96, 97 (Ga. Ct. App. 2001) ("It is the date of delivery to the clerk's office that constitutes the date of filing, even if the clerk erroneously stamps a later date as the filing date."); *Wallace v. Wallace*, 708 So.2d 1190, 1191 (La. Ct. App. 1998) ("A pleading is filed in an action when it has been delivered to the clerk of court for that purpose. … The clerk's failure to endorse and file the motion is not imputable to the mover."); *Ennis v. Kmart Corp.*, 33 P.3d

32, 36 (N.M. Ct. App. 2001) (finding New Mexico law to be consistent with federal law holding that a document is deemed filed when it is delivered to the clerk, because "[a] person filing an instrument should not be responsible for the failure of a receiving public official to perform his duty"), *citing Thorndal v. Smith, Wild, Beebe & Cades*, 339 F.2d 676, 679 (8th Cir. 1965).[4]

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[4] *See also Ark. Game & Fish Comm'n v. Eddings*, 2009 WL 1704422, __ S.W.3d __ (Ark. Jun. 18, 2009) (noting case law holding that clerk's file stamp is merely "evidence of filing"); *Doyle v. Jones*, 2008 WL 2433719, *2 (N.D. Okla. Jun. 12, 2008) ("under Oklahoma law, a document is filed when it is received by the court clerk and courts can consider other evidence besides the file-stamp date when determining the filing date"), *citing Burger v. Scott*, 317 F.3d 1133, 1140 (10th Cir. 2001); *Rhoades v. Harris*, 735 N.E.2d 6, 8 (Ohio Ct. App. 1999) (a file-stamped date is presumed to be the date of filing, but "that presumption can be refuted by evidence showing that the clerk received the documents on a different date"); *Indus. Indem. Co. v. Indus. Accident Comm'n*, 213 P.2d 11, 17 (Cal. Ct. App. 1950) (where petition for review was deposited on August 12th but not stamped until next morning, petition was deemed filed on August 12th); *State v. Hess*, 622 N.W.2d 891, 901 (Neb. 2001) ("The entry of filing by the clerk is the best evidence of the date of filing and is presumed to be correct until the contrary is shown."); *Cederberg v. City of Inver Grove Heights*, 686 N.W.2d 853, 857 (Minn. Ct. App. 2004) (where "it is undisputed that appellant's appeal papers were received by the district court on June 9, his appeal was timely, even though his papers were not stamped 'filed' until June 24, 2003); *Lambert v. Kelly*, 270 So. 2d 532, 535 (La. 1972) (finding that filing date was not the date notated by the clerk, making motion for new trial timely filed); *Resch v. Briggs*, 856 N.Y.S.2d 317 (N.Y. App. Div. 2008) (while presumption exists that the date a pleading is stamped is actual filing date, presumption can be rebutted with evidence that the pleading was filed on an earlier date); *Jamar v. Patterson*, 868 S.W.2d 318, 319 (Tex. 1994) (the filing date is the date a document is tendered or otherwise put under the custody and control of the clerk, as opposed to the date stamped by the clerk); *Boston Old Colony Ins. Co. v. Int'l Rectifier Corp.*, 284 N.W.2d 93, 98 (Wis. 1979) (holding that a notice of appeal may be considered as filed on the date it is actually received by the clerk when that date is different from the date stamped on the notice).

Florida should continue to follow the law that it has applied for many years, and that of numerous other jurisdictions, which holds that the clerk's time stamp on a filing is not dispositive of the filing date. As the Fifth District recognized in *Ocr-EDS*, public policy and due process concerns require no less. Moreover, there is no legitimate danger that a ruling that is in accord with the Fifth District would radically alter the law in Florida and open the flood gates to challenges to untimely appeals; to the contrary, a reversal by this Court would maintain the status quo, which has been well-managed by the circuit and appellate courts up to this time.

In addition, this Court can take judicial notice of the well-publicized fact that the courts of this state in recent years have suffered profound budget cuts, many of them directly affecting the staffing and administration of the offices of the clerk throughout the state. *See, e.g., In re Amendments to the Fla. Rules of Civil Procedure – Mgmt. of Cases Involving Complex Litig.*, 15 So. 3d 558, 564 (Fla. 2009) (Polston, J., dissenting) (noting problems faced by "overburdened judges, clerks, and their staffs in a time of unprecedented budget cuts") (citing response submitted by Florida Bar Civil Procedure Rules Committee); Gary Blankenship, *Court Requests More Judges, Plus the Return of Funds, Support Staff*, FLA. BAR NEWS, Mar. 15, 2010, at 1 (discussing widespread impact of recent budget cuts on

Florida court systems and case processing times).[5] With fewer resources dedicated to those in charge of assuring that court papers are properly time-stamped, delays and mistakes are inevitable. To be sure, *Ocr-EDS* suggests that this indeed may be occurring. 2010 WL 838164 at *1 (legal secretary attested that clerk who received notice of appeal advised her that "the inputting of the docket was delayed about one week").

Although the Fourth District panel suggested that "prudent attorneys and clerks always have the option of paying closer attention to such details before the jurisdictional time limit expires," 24 So. 3d at 668-69, *OCR-Eds* shows that this is not always enough. Litigants, particularly those filing out-of-town papers, do not always have the ability to insure that a paper will be time-stamped when it is received, even when they follow up with the clerk's office.

It would be fundamentally unfair to deem time stamps by the clerks of court as dispositive of the filing date, even where there is competent evidence to the contrary. Clerks are not infallible, and litigants should not be forced to bear the burden of their mistakes.

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[5] This Court may take judicial notice of legislative budget cuts and their potential effect on the courts. *See* § 90.202(5) (providing that courts may take judicial notice of official legislative acts). *Accord Rouse v. Hopkins*, 66 So. 2d 42 (Fla. 1953 (en banc) (Court took judicial notice of the volume of divorce cases heard by circuit court judges in Dade County in determining whether Court would uphold statute permitting such cases to be transferred to juvenile and domestic court).

CONCLUSION

WHEREFORE, based on the foregoing, this Court should quash the decision of the Fourth District Court of Appeal below and remand with instructions to reinstitute the appeal based on the affidavits submitted or, alternatively, pending a determination of when Strax's notice of appeal was received by the Broward County Clerk of Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail and U.S. Mail on this **5th** day of **April, 2010** to: Michael Seth Cohen, Esq., Alhambra International Center, Suite 550, 255 Alhambra Circle,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

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