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17 *Counsel for Claimants and the Proposed Classes*

18 **NATIONAL ARBITRATION AND MEDIATION**

19 TERESA MEDINA and MORGAN THOMSON

NAM ID No. 238718

20 Claimants,

21 v.

Arbitrator David B. Van Etten

22 SPENCER GIFTS D/B/A SPIRIT HALLOWEEN,

23 Respondent.

24 **DECLARATION OF CHRISTOPHER M. MCNERNEY IN SUPPORT OF CLAIMANTS'**  
25 **UNOPPOSED MOTION FOR ATTORNEYS' FEES, COSTS, AND SERVICE AWARDS**

26 I, CHRISTOPHER M. MCNERNEY, declare as follows:

27 1. I am a partner at the firm of Outten & Golden LLP ("O&G") in New York, New  
28 York, and a member of its Class Action Practice Group. O&G is a 50+ attorney firm based in  
New York City, with additional offices in San Francisco and Washington, D.C., that focuses on  
representing plaintiffs in a wide variety of employment matters, including individual and class  
action litigation involving wage and hour, discrimination, and harassment claims, as well as  
contract and severance negotiations.

2. I am one of the lead attorneys responsible for prosecuting Claimants' claims.

1           3.       I make this declaration in support of Claimants’ Unopposed Motion for Settlement  
2 Approval. I have personal knowledge of the matters set forth herein and would so testify if called  
3 as a witness at trial.

4       **Background and Experience**

5           4.       I graduated *cum laude* from New York University School of Law in 2012. In  
6 2012-13, I clerked for the Honorable Sarah Netburn, a United States Magistrate Judge, in the  
7 Southern District of New York. Since joining O&G in 2013 I have exclusively represented  
8 plaintiffs in employment litigation and other employee rights matters, with a focus on  
9 representing employees in class action and impact litigation involving discrimination. I currently  
10 serve as plaintiffs’ counsel in numerous major class action lawsuits, including those involving  
11 challenges to the use of criminal history records for employment decisions. O&G is among the  
12 very few plaintiff-side firms that litigates “fair chance” hiring cases challenging employers’  
13 criminal history background check policies and practices.

14           5.       I was named one of the 2017 Trial Lawyers of the Year by Public Justice. I have  
15 written and spoken presented repeatedly for years on criminal history discrimination issues,  
16 including testifying before the New York City Counsel about proposed amendments to the New  
17 York City Fair Chance Act, and am a repeat contributor to *Collateral Consequences of Criminal*  
18 *Conviction Law, Policy and Practice*, a treatise on the law of criminal history discrimination  
19 (2018-19 ed.). I also was named one of the 2017 Trial Lawyers of the Year by Public Justice and  
20 have been recognized by various other organizations/publications including as one of the 2021  
21 Lawdragon 500 Leading Plaintiff Employment Lawyers.

22           6.       I have been repeatedly appointed as Class Counsel, including in the certified  
23 gender discrimination class action, *Chen-Oster v. Goldman, Sachs & Co.*, No. 10 Civ. 6950 (AT)  
24 (S.D.N.Y), as well as in many criminal history discrimination cases, including *Times v. Target*  
25 *Corp.*, No. 18 Civ. 2993 (S.D.N.Y.) (Title VII claims based on criminal history discrimination  
26 settlement); *Lee v. Hertz Corp.*, No. 18 Civ. 07481 (N.D. Cal.) (same); *Long v. Southeastern*  
27 *Pennsylvania Transportation Authority*, No. 16. Civ. 1991 (E.D. Pa.) (FCRA and Pennsylvania  
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1 Criminal History Record Information Act claims); *Keels v. Geo Group, Inc.*, No. 15 Civ. 6261  
2 (E.D.N.Y.) (FCRA claims under Section 1681b(b)(3)); *Pickett v. SIMOS Insourcing Solutions,*  
3 *Corp.*, No. 17 Civ. 1013 (N.D. Ill.) (FCRA claims under Section 1681b(b)(2) and (b)(3)). I also  
4 have litigated other criminal history discrimination cases to successful settlement, including  
5 *Gonzalez v. Pritzker*, No. 10 Civ. 3105 (S.D.N.Y.) (Title VII criminal history discrimination  
6 claims); and NAACP New York State Conference Metropolitan Council of Branches v. Philips  
7 Electronics North America Corporation, Index No. 156382/2015 (Sup. Ct. N.Y. Cnty.) (New  
8 York City Human Rights Law criminal history discrimination claims, brought and certified for  
9 settlement purposes as defendant class action).

10 7. O&G is experienced and nationally recognized for its expertise in litigating  
11 complex class and collective actions, like this one. *See, e.g., Capilupi v. People's United Fin.,*  
12 *Inc.*, No. 15 Civ. 5247, 2018 WL 4693588, at \*2 (E.D.N.Y. Sept. 27, 2018) (O&G attorneys “are  
13 well qualified, experienced, and have aggressively litigated this action, thereby demonstrating  
14 their adequacy as counsel for the class.”); *Strauch v. Computer Science Corp.*, 322 F.R.D. 157,  
15 No. 14 Civ. 956, 2017 WL 2829652, at \*24 n.15 (D. Conn. June 30, 2017) (in wage and hour  
16 litigation, finding that O&G “adequately represent[s] the interests of the putative class”), *motion*  
17 *to decertify denied*, 2017 WL 4683993 (D. Conn. Oct. 18, 2017); *Long v. HSBC USA Inc.*, No. 14  
18 Civ. 6233, 2015 WL 5444651, at \*9 (S.D.N.Y. Sept. 11, 2015) (O&G attorneys “have appeared  
19 in many major FLSA and state labor law cases”); *Puglisi v. TD Bank, N.A.*, No. 13 Civ. 637, 2015  
20 WL 574280, at \*4 (E.D.N.Y. Feb. 9, 2015) (“O & G has substantial experience prosecuting and  
21 settling nationwide wage and hour class and collective actions, and are well-versed in wage and  
22 hour law and class action law and are well-qualified to represent the interests of the class.”); *Perez*  
23 *v. Allstate Insurance Co.*, No. 11 Civ. 1812, 2014 WL 4635745, at \*25 (E.D.N.Y. Sept. 16, 2014)  
24 (appointing O&G as class counsel and noting that “O & G has the requisite experience in  
25 handling class actions . . . , are well versed in the applicable law, and have the resources  
26 necessary to represent the NYLL Class fairly and adequately”); *Jacob v. Duane Reade, Inc.*, 289  
27 F.R.D. 408, 423 (S.D.N.Y. 2013) (appointing O&G as class counsel because it has “experience in  
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1 handling class actions, sufficient knowledge of the pertinent law, and sufficient resources to  
2 commit to this representation”), *aff’d*, 602 F. App’x 3 (2d Cir. 2015); *Damassia v. Duane Reade,*  
3 *Inc.*, 250 F.R.D. 152, 165 (S.D.N.Y. 2008) (granting class certification and appointing O&G as  
4 class counsel); *Torres v. Gristede’s Operating Corp.*, No. 04 Civ. 3316, 2006 WL 2819730  
5 (S.D.N.Y. Sept. 29, 2006) (same); *Kelly v. Brooklyn Events Ctr., LLC*, No. 17 Civ. 4600, 2019  
6 WL 4316125, at \*2 (E.D.N.Y. Sept. 10, 2019) (O&G attorneys “are experienced class action and  
7 employment lawyers with good reputations among the class action and employment bars”);  
8 *Houser v. Pritzker*, 28 F. Supp. 3d 222, 248, 255 (S.D.N.Y. 2014) (appointing O&G class counsel  
9 in nationwide Title VII litigation and noting that O&G “bring[s] to the case a wealth of class  
10 action litigation experience”).

11 8. In addition to my own experience as a class action litigator in employment  
12 disputes, four other attorneys and three paralegals from O&G worked on this matter, each for at  
13 least five hours. Brief backgrounds for those attorneys and paralegals are below:

14 9. **Jahan C. Sagafi** is the Partner in charge of the O&G San Francisco office, where  
15 he represents employees in class actions asserting wage and hour, discrimination, and other  
16 claims. Mr. Sagafi also represents consumers challenging widespread deceptive business  
17 practices and discrimination, as well as plaintiffs in appeals of class actions in state and federal  
18 courts. Prior to joining O&G in 2013, he was a Partner at Lieff, Cabraser, Heimann & Bernstein.  
19 He graduated from Harvard College in 1994 and Harvard Law School in 2001 and clerked for the  
20 Honorable William W. Schwarzer of the Northern District of California.

21 10. **Amy Maurer** has worked on this matter with me as an Associate. She has been a  
22 member of the firm’s Class Action Practice Group since May 2021. Prior to joining the firm, Ms.  
23 Maurer was a fellow at the National Center for Law and Economic Justice, where she represented  
24 plaintiffs in class action litigation. She received her B.A. from Washington University in St.  
25 Louis in 2012, and her J.D. from Harvard Law School in 2019. Since 2019, Ms. Maurer has  
26 exclusively represented plaintiffs and claimants in civil rights and employment litigation.  
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1           11.     **Laura Iris Mattes** was an Associate at O&G in the Class Action Practice Group  
2 from 2016 to 2021. She graduated from the University of California, Berkeley School of Law in  
3 2015 and clerked for the Honorable William Orrick III of the United States District Court,  
4 Northern District of California. She joined O&G’s San Francisco office in 2016, where she  
5 litigated employment matters on behalf of plaintiffs.

6           12.     **Jarron McAllister** joined O&G in October 2022 an Associate in the Class Action  
7 Practice Group. He received his A.B. from Princeton University in 2016, and his J.D. from the  
8 University of Pennsylvania Law School in 2020. Prior to joining the firm, Mr. McAllister was a  
9 Penn Law Fellow at the National Center for Law and Economic Justice and clerked for the  
10 Honorable Robin M. Meriweather on the District of Columbia District Court.

11           13.     **Sara Olson** is a Special Projects Coordinator at O&G. Prior to her current  
12 position, she joined O&G in May 2016 as a paralegal. Ms. Olson earned a Paralegal Certificate  
13 from Pace University and a B.A. in Politics, Philosophy, and Economics from The King’s  
14 College. Previously, Ms. Olson worked as a researcher for Expert Network Group and as an  
15 academic scholar for a United Nations former Socio-Economic Affairs Advisor.

16           14.     **Rania Tootla** is a paralegal at O&G. Prior to joining O&G in June 2018, Rania  
17 attended the University of Michigan, where she received University Honors and earned a B.A. in  
18 Women’s Studies and Political Science. Rania’s previous experiences include serving as a  
19 student investigator for the Washtenaw County Public Defender’s Office in Ann Arbor, MI and  
20 working as an office assistant at Tootla & Associates, healthcare specialists in Waterford, MI.

21           15.     **Konnie Dominguez** was a paralegal at O&G from November 2018 to July  
22 2021. Prior to joining O&G, she worked at Dechert LLP in the Financial Services Group and  
23 graduated from Wesleyan University with a B.A. in Biology. Ms. Dominguez is currently a 2024  
24 J.D. candidate at Cardozo School of Law at Yeshiva University.

25     **Overview of Investigation and Litigation**

26           16.     Claimants’ counsel conducted a thorough initial investigation, which included  
27 corporate research regarding Spencer’s business locations, business entities, and past federal and  
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1 state litigation, along with factual and legal research regarding the underlying merits of  
2 Claimants' claims, possible defenses, the proper measure of damages, and the likelihood of class  
3 certification. Claimants' counsel also interviewed the Claimants, and other impacted individuals.  
4 This investigation enabled Claimants' counsel to ascertain whether Spencer's Disclosure form  
5 violated the FCRA and the ICRAA and whether there was a class-wide violation.

6 17. Before initiating this arbitration, Teresa Medina reached out to Spencer to discuss  
7 settlement. The Parties were unable to resolve their claims despite extensive discussions at that  
8 point.

9 18. On June 3, 2020, Ms. Medina filed an Arbitration Demand, alleging that Spencer  
10 violated Section 1681(b)(b)(2) of the FCRA and Section 1786.16(a)(2) of the ICRAA. On  
11 August 5, 2020, Spencer answered, generally denying each of Ms. Medina's allegations and  
12 pleading various affirmative defenses.

13 19. The Parties engaged in limited discovery. Spencer also sought written and  
14 testimonial discovery from Ms. Medina, which she opposed on relevance grounds.

15 20. On October 18, 2020, after motion briefing and oral argument, the Arbitrator  
16 granted Ms. Medina's motion for protective order against Spencer's deposition and discovery  
17 requests.

18 21. The Parties then briefed cross-motions for summary judgment.

19 22. On January 29, 2021, after oral argument, the Arbitrator granted Ms. Medina's  
20 motion for summary judgment, and denied Spencer's motion for partial summary judgment. The  
21 Arbitrator held that Spencer's disclosure form "violates the FCRA and the ICRAA because it is  
22 neither standalone nor clear." In addition, the Arbitrator held that Spencer "[w]illfully violated  
23 the FCRA," finding that "[t]he plain language of the FCRA and ICRAA put Spencer on notice  
24 that its form violated the law." Because Spencer's violations were willful, the Arbitrator found  
25 Ms. Medina is entitled to statutory damages, punitive damages, and attorney's fees and costs.  
26 The Arbitrator awarded to Ms. Medina \$35,000, plus interest and attorney's fees and costs. The  
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1 matter was then stayed before the Parties could brief Claimant’s entitlement to fees and costs, to  
2 allow for further settlement discussions.

3 23. After Ms. Medina’s favorable arbitration decision, the Parties reengaged in class-  
4 wide settlement discussions, with Ms. Medina and Morgan Thomson as Named Claimants. Ms.  
5 Medina agreed to delay the receipt of her arbitration award until settlement of these class claims.  
6 On March 9, 2021, the Parties entered into a tolling agreement, agreeing to toll the statutes of  
7 limitations for the Affected Parties’ FCRA and ICRAA claims from January 29, 2021, and  
8 agreeing to mediate Claimants’ claims.

9 24. The Parties subsequently agreed to attend a full-day mediation before Dina  
10 Jansenson, an experienced mediator. In advance of mediation, Spencer provided information  
11 relevant to class-wide discovery, including the class size and the size of the subset of the class  
12 located in California. Claimants used the discovery to calculate damages on a class-wide basis.  
13 Prior to the mediation, Claimants provided a detailed mediation statement to Ms. Jansenson, and  
14 Spencer.

15 25. The Parties participated in a full-day mediation session with Ms. Jansenson on July  
16 19, 2021, and a subsequent half-day mediation session with Ms. Jansenson on August 27, 2021.  
17 Through that mediation, and subsequent negotiations with Ms. Jansenson’s assistance, the Parties  
18 reached a settlement in principle, resulting in a term sheet fully executed on February 17, 2022.

19 26. Throughout the settlement discussion period, Class counsel spoke with Class  
20 Members about the Class Notices, which were sent out on October 28, 2022, and provided  
21 general legal advice related to this action. No Class Members have objected to Class counsel’s  
22 requested fee award to this date.

23 27. The Parties then negotiated the Settlement Agreement, which was fully executed  
24 on August 29, 2022. Ex. 1 (“Settlement Agreement”). The Settlement Agreement is attached as  
25 **Exhibit 1** to this Declaration.

1 **The Settlement**

2 28. This proposed settlement provides a Gross Settlement Amount of \$1,805,000 for  
3 the benefit of approximately 15,028 Class Members. Settlement Agreement § 1.18. This is a  
4 substantial recovery for the claims at issue and the litigation risks the case entails.

5 29. Based on the Net Settlement Fund amount of approximately \$1,074,408.44 (*i.e.*,  
6 after deducting attorneys' fees and expenses, Service Awards to Named Claimants, and the  
7 Settlement Administrator's fees and expenses of \$96,500 from the Gross Settlement Fund), and  
8 without accounting for the claims rate, and assuming 100% participation, this settlement results in  
9 payments of approximately \$56 per National FCRA Class Member and about \$169 per California  
10 ICRAA Class Member. The final per-person amount will likely increase after the claims process.

11 30. Actual damages would be challenging to prove for all class members, because the  
12 violation at issue is arguably technical, and many Class Members were not denied employment  
13 based on their background check. Additionally, every Class Members has an arbitration  
14 agreement with Spencer that includes a class action waiver. Bringing individual arbitrations for  
15 each Class Member would be risky, costly, time consuming, and there would be no guarantee of  
16 recovery.

17 **Named Claimants**

18 31. Ms. Medina has worked with Class counsel since November 2019, pursuing her  
19 individual claims in arbitration and later became a Named Claimant in this class-wide arbitration.  
20 Then, Ms. Thomson joined as a Named Claimant in February 2021.

21 32. The Named Claimants are adequate class representatives. They have no conflicts  
22 of interest with the National FCRA or California ICRAA Class Members, and they are  
23 represented by experienced counsel.

24 33. Ms. Medina and Ms. Thomson made themselves available for numerous fact-  
25 gathering conversations with counsel, provided the documents that form the central evidence in  
26 this case, reviewed the Complaint for factual accuracy, and provided testimony for mediation.

27 34. Further, Ms. Medina had already been awarded a significant amount of money in  
28



1 her individual arbitration, and her decision to act as a Named Claimant in this action allowed the  
2 Class Members to receive damages that they otherwise would not have received. The Parties  
3 likely would not have been able to settle this action without Ms. Medina’s participation.

4 35. The Named Claimants have undertaken risk and devoted significant time and  
5 effort for the benefit of the Settlement Class Members in this action without compensation.

6 **Attorneys’ Fees and Costs**

7 36. Class counsel requests \$600,166.67 in fees for work expended on achieving  
8 this settlement and \$12,426.19 in costs. Ex. 2 (“Costs Summary”). The Parties agreed to this  
9 fee and cost structure in the Settlement Agreement. Settlement Agreement § 1.18.

10 37. Class counsel undertook to prosecute this action without any assurance of  
11 payment for their services, litigating the case on a wholly contingent basis in the face of  
12 significant risk. Any lawyer undertaking representation of large numbers of affected employees  
13 in wage and hour actions inevitably must be prepared to make a tremendous investment of time,  
14 energy, and resources. Due also to the contingent nature of the customary fee arrangement,  
15 lawyers are asked to be prepared to make this investment with the very real possibility of an  
16 unsuccessful outcome and no fee of any kind. Class counsel stood to gain nothing in the event  
17 the case was unsuccessful.

18 38. Class counsel spent approximately 623.5 attorney and paralegal hours through  
19 November 21, 2022, investigating, arbitrating, mediating, and negotiating this settlement. A  
20 summary of these hours is provided below. Multiplying these hours by the hourly rate of each  
21 attorney and paralegal results in a lodestar amount of \$288,588.50. Considering the requested fee  
22 amount, the lodestar multiplier is 2.08.

23 39. The below charts provide the attorney and staff fees for this action thus far:  
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**Medina & Thomson v. Spencer Gifts D/B/A Spirit Halloween, NAM ID No. 238718  
OUTTEN & GOLDEN LLP**

**Attorneys**

<b>Name</b>	<b>Initials</b>	<b>Position</b>	<b>O&amp;G Rate</b>	<b>Hours</b>	<b>O&amp;G Total</b>
Jahan C. Sagafi	JCS	Partner	\$990.00	35.7	\$35,343.00
Christopher M. Mc Nerney	CMM	Partner	\$600.00	178.1	\$106,860.00
Iris Mattes	LIM	Associate	\$375.00	164.5	\$61,687.50
Amy Maurer	AMA	Associate	\$365.00	175.3	\$63,984.50
Jarron D. McAllister	JDM	Associate	\$325.00	19.8	\$6,435.00
<b>Attorney Subtotal</b>				<b>573.4</b>	<b>\$274,310.00</b>

  

<b>Staff</b>					
<b>Name</b>	<b>Initials</b>	<b>Position</b>	<b>O&amp;G Rate</b>	<b>Hours</b>	<b>O&amp;G Total</b>
Sara Olson	SXO	Paralegal	\$ 285.00	7.4	\$2,109.00
Rania Tootla	RXT	Paralegal	\$ 285.00	5.6	\$1,596.00
Konnie Dominguez	KD	Paralegal	\$ 285.00	37.1	\$10,573.50
<b>Staff Subtotal</b>				<b>50.1</b>	<b>\$14,278.50</b>

40. Regarding requested reimbursement for costs, O&G has disbursed \$12,426.19 to settle this matter. A summary of O&G’s costs is attached as **Exhibit 2** to this Declaration. These expenses include electronic research, meals, mediation fees, postage, printing, copying, court transcripts, document management/hosting, vendor fees, and messenger fees. Class counsel’s expenses were incidental, necessary, and in line with costs charged to individual clients who pay-out-of-pocket.

41. The hours expended in this matter are reasonable for similar actions and they were complied from contemporaneous time records maintained by each attorney and paralegal.

42. Class counsel used a small team of core attorneys to minimize duplication of efforts and maximize billing judgment and made every effort to have the work performed by the attorney or paralegal with the lowest hourly rate who was able to perform it effectively.

43. In addition, Class counsel proactively removed any attorneys, paralegals, or staff who worked less than five hours on this matter.

44. The requested fee is not based solely on time and effort already expended. It is also meant to compensate Class counsel for time that will be spent administering the settlement

1 moving forward. In Class counsel's experience, overseeing the final steps of the settlement  
2 process will require an ongoing substantial commitment. Class counsel anticipates incurring  
3 significant additional fees interacting with the settlement administrator and fielding Class  
4 Members' questions. Class counsel's lodestar will also grow as they continue to finalize the  
5 settlement, prepare for the Final Approval Hearing, and handle Class Member Questions after  
6 approval.

7 45. Class counsel takes on difficult cases like this one because we believe that they are  
8 important. We take seriously our responsibility to push the law in a direction favorable for  
9 employees. We continue to do so despite several major, very expensive losses in class cases over  
10 the years. Like this case, we believed that each of these cases was meritorious but understood the  
11 risks. For example, in *Pippins v. KPMG LLP*, No. 11 Civ. 377, 2012 WL 6968332 (S.D.N.Y.  
12 Nov. 30, 2012), a professional exemption case on behalf of junior auditors on which O&G was  
13 counsel, we lost on summary judgment and on appeal after O&G spent \$2,298,699.45 in lodestar.  
14 In *Clarke v. JPMorgan Chase Bank, N.A.*, No. 08 Civ. 2400, 2010 WL 1379778 (S.D.N.Y. Mar.  
15 26, 2010), the court granted summary judgment against Plaintiff, holding that IT workers were  
16 exempt under the computer professional exemption. O&G, which was one of three co-counsel  
17 firms, spent \$631,985.00 in lodestar and \$15,428.39 in out-of-pocket expenses in that case alone.  
18 O&G also represented the Plaintiff in *Glatt v. Fox Searchlight Pictures, Inc.*, No. 11 Civ. 6784  
19 (S.D.N.Y.) and *Wang v. Hearst Corp.*, No. 12 Civ. 793 (S.D.N.Y.), among the first unpaid intern  
20 lawsuits in the Second Circuit. Both cases have been hard fought by the firm, including on an  
21 appeal to the Second Circuit that was decided against the interns. Nonetheless, these cases raised  
22 awareness among the general public of the issues surrounding unpaid interns, and spawned  
23 dozens of similar lawsuits brought by other firms.

24 46. O&G has also invested substantial resources in other risky cases that resulted in no  
25 recovery. In *Barenboim v. Starbucks Corp.*, 21 N.Y.3d 460 (2013), we lost at the New York  
26 Court of Appeals after investing \$2,142,764.75 in lodestar and \$70,925.40 in out-of-pocket  
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1 expenses. In *LaMarca v. The Great Atlantic & Pacific Tea Co.*, the Defendants filed for  
2 bankruptcy after the firm had invested \$2,953,808.95 in lodestar.

3 47. Prosecuting this action precluded Class counsel from accepting other potentially  
4 profitable work.

5 **Exhibits**

6 48. Attached as **Exhibit 1** is the Parties' Settlement Agreement.

7 49. Attached as **Exhibit 2** is a true and accurate summary of the costs incurred by  
8 Claimants' counsel in prosecuting this action.

9  
10 DATED: November 28, 2022

By:

/s/ Christopher M. McNerney

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