UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

ROBERT P. MAGYAR, Plaintiff, vs. JERRY KENNEDY, CLIFFORD PEACOCK, and CLEANAN J. WATKINS Defendants.	CIVIL ACTION NO. 12-5906 JP

ORDER

AND NOW, this _____ day of _____ 2013, upon consideration of the Motion to Dismiss or, in the Alternative, to Strike *Ad Damnum* Clauses of Defendants Jerry Kennedy, Clifford Peacock, and Cleanan J. Watkins, the Memorandum of Law in Support Thereof, and the opposition thereto, if any, it is hereby ORDERED as follows:

1. Defendants' Motion is granted.

2. Plaintiff's Amended Complaint is hereby dismissed with prejudice.

[in the alternative]

3. The *ad damnum* clauses of Counts 2 and 3 of the Amended Complaint are hereby stricken.

_____
HON. JOHN R. PADOVA
United States District Judge

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ROBERT P. MAGYAR, Plaintiff, vs. JERRY KENNEDY, CLIFFORD PEACOCK, and CLEANAN J. WATKINS Defendants.	CIVIL ACTION NO. 12-5906 JP

DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT OR, IN THE ALTERNATIVE, TO STRIKE *AD DAMNUM* CLAUSES

Defendants Jerry Kennedy, Clifford Peacock, and Cleanan J. Watkins, hereby move to dismiss the Amended Complaint in the above-captioned action pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure or, in the alternative, to strike *ad damnum* clauses pursuant to Rule 12(f) of the Federal Rules of Civil Procedure. In support of the Motion, Defendants rely upon the Memorandum of Law being filed contemporaneously herewith. Oral argument is requested.

Dated: December 21, 2012

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT OR, IN THE ALTERNATIVE, TO STRIKE *AD DAMNUM* CLAUSES

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I. PRELIMINARY STATEMENT

The Court should dismiss plaintiff's Amended Complaint. This case is about the Delaware Nation of Western Oklahoma (the "Tribe") which is a sovereign federally-recognized Indian tribe. The defendants in this case are the Tribe's Acting President (Mr. Watkins), the Tribe's Treasurer (Mr. Peacock) and the Chief Executive Officer of the Tribe's Economic Development Authority (Mr. Kennedy). It is well-settled that, because of the Tribe's sovereign immunity, neither the Tribe nor its officials are subject to this Court's jurisdiction. In the Amended Complaint, plaintiff Robert Magyar alleges he entered into two contracts with the Tribe. He then alleges that the defendants interfered with those contracts by firing him. However, the defendants all acted in their official capacity on behalf of the Tribe and they are not subject to suit in this Court.

In addition, even if plaintiff could overcome the constitutional sovereign immunity bar (which he cannot), the Court does not have subject matter jurisdiction because, on its face, the Amended Complaint does not meet the amount in controversy requirement of 28 U.S.C. § 1332. Mr. Magyar alleges damages of only $39,500 for non-payment of amounts owed for work done on behalf of the Tribe. Mr. Magyar's new defamation and libel counts (Counts Two and Three, respectively) do not push his damages over the required $75,000 threshold.

Finally, if the Court determines that the Second and Third Counts of the Amended Complaint should not be dismissed outright, the *ad damnum* clauses of those counts should be stricken. Mr. Magyar's unfounded assertion that he has been damaged in the amount of "One Million Dollars" by defendants' purported defamation and libel violates Local Rule 5.1.1 which prohibits a claim for unliquidated damages from containing any allegation as to a specific dollar amount. Local R.Civ.P. 5.1.1.

II. BACKGROUND

The Tribe is a federally-recognized Indian tribe headquartered in Anadarko, Oklahoma. Am. Compl., ¶ 5. *See also, The Delaware Nation v. Pennsylvania*, 446 F.3d 410, 415 (3d Cir. 2006), *cert. den.* 549 U.S. 1071 (2006). The Tribe currently has approximately 1,400 members. *Am. Compl.*, ¶ 5.

Mr. Magyar alleges that in 2009 and 2012, he entered into contracts with the Tribe pursuant to which he agreed to provide consulting services to a solar energy business owned by the Tribe and to an LED light manufacturing business owned by the Tribe. Am. Compl., ¶¶ 7-11, Exs. 1 and 2. Defendants dispute whether Mr. Magyar's alleged contracts were in fact valid but defendants do not dispute that between 2009 and June 2012, Mr. Magyar was paid handsomely.

Prior to June 21, 2012, non-party Kerry Holton was the Tribe's President. Am. Compl., Exh. 3. On June 21, 2012, the Tribe's Executive Committee voted to remove Mr. Holton from office. Am. Compl., Exh. 3 at 1 ("Plaintiff [Holton] was removed from Office of the President of the Delaware Nation on June 21, 2012, at a duly called meeting of the Executive Council of the Delaware Nation."). From June 21, 2012 to the present, defendant Watkins has been the Acting President of the Tribe. December 21, 2012 Declaration of Cleanan Watkins (the "Watkins Decl."), ¶ 1. On August 15, 2012, at a duly called meeting of the Tribe's Executive Committee, the Executive Committee voted 4-0 to terminate any consulting agreements it had with Mr. Magyar. A true and correct copy of the Resolution Terminating Consulting Agreement with Robert Magyar is attached to the Watkins Declaration as Exhibit A.

Defendants Watkins and Peacock acted in their official capacity as members of the Tribe's Executive Committee when they voted to terminate Mr. Magyar's relationship with the Tribe. Am. Compl. ¶ 12 ("At the time of the *coup*, Watkins and Peacock served as the Tribe's

lawfully elected Vice President and Treasurer respectively."). *See also* Watkins Decl. at ¶ 5; December 21, 2012 Declaration of Clifford Peacock (the "Peacock Decl.") at ¶ 3. Mr. Kennedy is not a member of the Tribe's Executive Committee. However, as Chief Executive Officer of the Tribe's Economic Development Authority, all of his interactions with Mr. Magyar were also taken in his official Tribal capacity. Am. Compl., ¶ 12 ("Defendant Kennedy served as the Executive Director, CEO and Controller of the Tribe's economic development arm, the Delaware Nation Economic Development Authority."). *See also* December 21, 2012 Declaration of Jerry Kennedy (the "Kennedy Decl.") at ¶ 2.

In mid-November 2012 – after Mr. Magyar filed his initial Complaint and after the defendants filed their first motion to dismiss – Mr. Peacock, acting in his capacity as a member of the Tribe's Executive Committee posted information and answered questions on a private non-public Facebook message board of a group of Tribal members called "Citizens of the Delaware Nation." Peacock Decl. at ¶5. Membership in the Citizens of the Delaware Nation Facebook group is by invitation only and only Tribal members can join. Peacock Decl. at ¶ 5. On November 26, 2012, in response to defendants first motion to dismiss, Mr. Magyar filed an Amended Complaint that included new counts for defamation (Count Two) and trade libel (Count Three).

III. ARGUMENT

A. The Court Does Not Have Subject Matter Jurisdiction Because The Tribe And Its Officials Have Sovereign Immunity

Plaintiff's Amended Complaint should be dismissed pursuant to Rule 12(b)(1). Defendants have sovereign immunity and thus this Court does not have jurisdiction over plaintiff's claims. It is well-settled that an Indian tribe is not subject to suit unless it has waived its sovereign immunity or Congress has expressly authorized the action. *Oklahoma Tax Comm'n*

v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505, 509 (1991) ("Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories. Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation."). *See also, Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1988); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Brown, et al. v. American Home Prod. Corp. (In re: Diet Drugs)*, 2000 U.S. Dist. LEXIS 15683, *10 (E.D. Pa. October 26, 2000) ("As quasi-sovereign nations, Indian tribes are immune from suit in state or federal court in the absence of congressional abrogation or tribal consent.").

Similarly, a tribe's officials share the tribe's sovereign immunity when acting in their official capacity. *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040, 1043 (8th Cir. 2000); *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997) (tribal sovereign immunity extends to tribal officials against claims for activities undertaken in their official capacity); *Imperial Granite Co. v. Pala Tribe of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991) ("when tribal officials act in their official capacity and within the scope of their authority, they are immune.") (citations omitted). *See also, Brown*, 2000 U.S. Dist. LEXIS 15683, *10 ("an individual tribe member does not have sovereign immunity from suit in federal court unless he or she is a tribal official acting in an official capacity.") (emphasis added); *Stringer v. Chrysler (In re Stringer)*, 252 B.R. 900, 901 (Bankr. W.D. Pa. 2000) (tribe's officer entitled to sovereign immunity if the action is related to the officer's performance of official duties; tribe member not entitled to sovereign immunity if the subject of the action is not related to performance of official duties).

Here, all actions the defendants took with respect to Mr. Magyar were taken in their official tribal capacity. Mr. Magyar alleges that on August 3, 2012, Mr. Kennedy told Mr. Magyar "that he was terminated." Am. Compl., ¶ 14. Mr. Kennedy took that action in his capacity as Chief Executive Officer of the Tribe's Economic Development Authority. Kennedy Decl., ¶ 2. On August 15, 2012, the Tribe's Executive Committee then voted – unanimously – to approve that termination. *See* Watkins Decl., Exh. A. The Resolution Terminating Consulting Agreement with Robert Magyar provides:

> BASED ON THE FOREGOING, NOW THEREFORE BE IT RESOLVED, INCORPORATING THE ABOVE-STATED RECITALS, THAT THE Delaware Nation Executive Committee hereby approves the termination of the Consulting Agreement [ ] with Robert Magyar effective July 25, 2012, and the use of Mr. Magyar's services with any Delaware Nation entity hereinafter, including but not limited to Unami Solar, LLC and the Delaware National Economic Development Authority, LLC, including any and all grant applications relating to any tribal business endeavor.

Id. In short, Mr. Magyar's termination was done by the Tribe's officials acting in their official capacity. Watkins Decl. at ¶ 5; Peacock Decl. at ¶ 3.

Mr. Magyar has not, because he cannot, deny this. He alleges his contracts were with the Tribe. Amended Complaint, ¶¶ 13, 14. Logically, only the Tribe, or an official with Tribal authority, could terminate those contracts.

Although he does not clearly articulate it, what Mr. Magyar seems to really want this Court to do is opine on the propriety of the Tribal Executive Committee's ouster of former President Holton. For instance, Mr. Magyar alleges that defendants "enacted an illegal *coup d'etat*" (Am. Compl. ¶ 12), that defendants "illegally [took] power" (Am. Compl. ¶ 13), and that Mr. Kennedy acted "without . . . legal or official capacity and/or authorization" (Am. Compl. ¶ 14).

However, this Court does not have the jurisdiction to rule on an internal Tribal dispute between former Tribal President Holton (or his surrogate, Mr. Magyar) and the defendants. *Santa Clara Pueblo*, 436 U.S. at 59 (because of tribal sovereign immunity, federal courts do not have jurisdiction over intra-tribal governmental disputes).

In any event, Mr. Magyar's allegations regarding the Tribal Executive Committee's removal of President Holton are just wrong. Mr. Magyar's assertion that the Delaware Nation Tribal Court issued an injunction and reinstated Mr. Holton is flat out false. Am. Compl. ¶ 15. No injunction has been issued. A letter from the Court Clerk of the Delaware Nation District Court explaining that an injunction has not been issued is attached to the Watkin's Declaration as Exhibit C. Watkins Decl. at ¶ 1. To the contrary, Mr. Watkins is the current acting President of the Tribe.

In short, the defendants acted in their official capacity when they terminated the Tribe's contracts with Mr. Magyar. Because they acted in their official capacities the defendants have sovereign immunity and are immune from suit in this Court.

Similarly, Mr. Peacock is immune from Counts Two and Three of the Amended Complaint for his postings on the Citizens of the Delaware Nation Facebook page. Again, membership in the Citizens of the Delaware Nation Facebook group is by invitation only and only Tribal members of the group can see posts made on the Citizens of the Delaware Nation Facebook page. Peacock Decl. at ¶ 5. Mr. Peacock's posts on the Citizens of Delaware Nation Facebook page were made in his capacity as the Tribe's Treasurer to keep Tribal group members informed regarding actions taken by the Tribe's Executive Committee. Peacock Decl. ¶ 5.

Ultimately, the Tribe has not waived its sovereign immunity. A court cannot find waiver of immunity by inference or implication. Instead, to be enforceable a tribe's waiver of immunity

must be clear and unequivocal. *C&L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001); *Santa Clara Pueblo*, 436 U.S. at 58.

In this case, there is no allegation in the Amended Complaint of any waiver of sovereign immunity. Nor could there be – the Tribe expressly reserved its sovereign immunity rather than waived immunity in its dealings with Mr. Magyar. For instance, in the September 7, 2009 Consulting Agreement between Mr. Magyar and the Tribe, the parties expressly agreed that "Nothing in this agreement shall constitute a written waiver of the Nation's sovereign immunity." *See* Am. Compl., Exhibit 1, at 2.

The Court should dismiss plaintiff's Amended Complaint pursuant to Rule 12(b)(1). The defendants have sovereign immunity and are not subject to suit in this Court.

B. The Court Does Not Have Subject Matter Jurisdiction Because Plaintiff Cannot Satisfy The Amount In Controversy Requirement

Even if Mr. Magyar could overcome the sovereign immunity hurdle (which he cannot), the Court should still dismiss the Amended Complaint because diversity jurisdiction does not exist. Pursuant to 28 U.S.C. Section 1332, the United States district courts have original jurisdiction over suits between citizens of different states only when the matter in controversy exceeds the sum or value of $75,000, exclusive of interests or costs. 28 U.S.C. § 1332. The relevant time for determining whether the amount in controversy is satisfied is at the commencement of the action. *Freeport-McMoRan, Inc. v. K N Energy*, 498 U.S. 426, 428 (1991); *Meritcare Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214, 217-18 (3d Cir. 1999).

In this case, on the face of the Amended Complaint, plaintiff cannot satisfy the amount in controversy requirement of Section 1332. Mr. Magyar alleges that in 2009 he entered into an agreement with the Tribe in which he agreed to serve as the Operations Manager of a solar energy business owned by the Tribe called Unami Solar LLC ("Unami"). Am. Compl., ¶ 7. Mr.

Magyar alleges that he was entitled to $7,750 per month for his Unami work. Am. Compl., ¶ 16.[1] Mr. Magyar alleges that the "Defendants prevented the Tribe from paying Plaintiff the agreed-upon [$7,750] monthly fee in June and July 2012. . . ." Am. Compl., ¶ 16. Thus, in total, Mr. Magyar alleges he is owed $15,500 based on defendants' interference with his Unami agreement. *Id.*

In addition, Mr. Magyar alleges that in 2012 he entered into an agreement with the Tribe to serve as the interim CEO of Lenape Lighting and Manufacturing – an entity "engaged in LED light manufacturing and distribution." Am. Compl., ¶ 10. Mr. Magyar alleges that he was entitled to "$3,500 per month for his Lenape work. . . ." Am. Compl., ¶ 7. The Lenape agreement had a term of six months running from April 9, 2012 to October 9, 2012. Am. Compl., ¶ 18. Mr. Magyar alleges defendants started "interfere[ing] with" the Unami contract and the Lenape contract after assuming power in June 2012. Am. Compl., ¶¶ 12, 13. Thus, Mr. Magyar's claim is for four months pay under the Lenape agreement at $3,500[2] per month – or $14,000. Mr. Magyar claims he is also entitled to a $10,000 "success fee." Am. Compl., ¶ 18. Altogether, Mr. Magyar alleges he is owed $24,000 based on defendants' interference with the Lenape agreement. Am. Compl., ¶¶ 17, 18.

Thus, on the face of the Amended Complaint, Mr. Magyar alleges he is owed $39,500 based on defendants' interference with Unami and Lenape agreements. Mr. Magyar is far short of the $75,000 amount in controversy requirement.

[1] Importantly, Mr. Magyar claims the document he attached to his Amended Complaint as Exhibit 1 governs the terms of his work for Unami. Am. Compl., ¶ 7, Exh. 1. According to that document, Mr. Magyar was entitled to only $7,000 "as a one-time payment for services rendered to date . . . ." Am. Compl., Exh. 1 at 1. That document simply does not say Mr. Magyar is entitled to $7,750 per month. However, defendants recognize that for purposes of this motion, the Court will accept Mr. Magyar's allegations as true.

[2] In paragraph 18 of the Amended Complaint, Mr. Magyar incorrectly states that the Lenape agreement was worth $4,500 per month. This appears to be a typographical error. Mr. Magyar's pay was $3,500 per month. Am. Compl., ¶ 17; Exh. 2 at 1.

New Counts Two and Three do not bring Mr. Magyar over the $75,000 amount in controversy threshold. In fact, new Counts Two and Three do not quantify Mr. Magyar's damages at all. In Count Two, Mr. Magyar alleges unspecified "emotional distress, pain, anguish, humiliation and embarrassment," (Am. Compl., ¶ 62), "financial detriment and loss," (Am. Compl., ¶ 63), and an entitlement to punitive damages (Am. Compl., ¶ 61). But Mr. Magyar does not point to any specific business that he has lost. As set forth below, Mr. Magyar violated Local Rule 5.1.1 by asserting a specific dollar amount claimed ("One Million Dollars") in the *ad damnum* clause of Count Two and that clause should be stricken. However, the key for determining whether Mr. Magyar has satisfied the amount in controversy requirement of 28 U.S.C. § 1332 is that he has not pled any facts that would suggest he has suffered any damage at all.

The same is true of Count Three. There, Mr. Magyar alleges in boilerplate fashion that Mr. Peacock's statements "have diminished and will further diminish the value of Plaintiff's professional reputation and/or the marketability of his services." Am. Compl., ¶ 69. Mr. Magyar also alleges that he is entitled to punitive damages. Am. Compl., ¶¶ 70, 71. But again, Mr. Magyar has not pled any facts that show he has actually suffered any damage based on Mr. Peacock's alleged libel.

In *Correctional Medical Care, Inc. v. Gray*, 2008 U.S. Dist. LEXIS 6596 (E.D. Pa. January 30, 2008), Judge Yohn determined that the plaintiff there had not satisfied the amount in controversy requirement of Section 1332. He noted that while "[t]he courts 'generally accept a party's good faith allegation of the amount in controversy, [ ] where a defendant or the court challenges the plaintiff's allegations regarding the amount in question, the plaintiff who seeks the assistance of the federal courts must produce sufficient evidence to justify its claims.'" *Id.* at *11

(quoting *Columbia Gas Transmission Corp. v. Tarbuck*, 2 F.3d 538, 541 (3d Cir. 1995)). In *Correctional Medical Care*, the court rejected plaintiff's rote recitation of Section 1332 and held "[b]ecause plaintiffs fail to allege a factual amount in controversy in excess of $75,000, the court lacks diversity jurisdiction. . . ." *Id.* at 12 (emphasis added).

Mr. Magyar's new defamation and libel claims and his new claims for punitive damages are not enough to automatically confer jurisdiction. Rather, "when it appears that . . . a [punitive damages] claim comprises the bulk of the amount in controversy and may have been colorably asserted solely or primarily for the purpose of conferring jurisdiction, that claim should be given particularly close scrutiny." *Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1046 (3d Cir. 1993) (citing *Zahn v. Int'l Paper Co.*, 469 F.2d 1033, 1033-34, n.1 (2d Cir. 1972), *aff'd*, 414 U.S. 291 (1973)).

In this case, Mr. Magyar's defamation and libel claims are tenuous at best. Mr. Peacock made the statements attached as Exhibits 4 and 5 to the Amended Complaint on a closed, private members-only Facebook page for a Facebook group called Citizens of the Delaware Nation. Peacock Decl., ¶ 5. There are only seventy members of the Citizens of the Delaware Nation Facebook group. Peacock Decl., ¶ 5. One must be a member of the Tribe to join the Facebook group. Peacock Decl., ¶ 5. Mr. Magyar is not a member of the Citizens of the Delaware Nation Facebook group. The Tribe has already fired Mr. Magyar and the Tribe is not going to hire Mr. Magyar again. The only people who have seen Mr. Peacock's purportedly defamatory and libelous postings are, at most, the seventy Tribal members of the group. In short, Mr. Magyar has not lost and will not lose any business. His business relationship with the Tribe is already over.

Ultimately, Mr. Magyar has not and cannot satisfy the amount in controversy requirement. This Court does not have diversity jurisdiction and the Amended Complaint should be dismissed pursuant to Rule 12(b)(1).

C. The Court Should Strike The *Ad Damnum* Clauses Of Counts Two And Three of The Amended Complaint

Finally, in the event the Court does not dismiss Counts Two and three, the *ad damnum* clauses of those counts should be stricken. Local Rule of Civil Procedure 5.1.1 states

> No pleading asserting a claim for unliquidated damages shall contain any allegation as to the specific dollar amount claimed, but such pleadings shall contain allegations sufficient to establish the jurisdiction of the court, to reveal whether the case is or is not subject to arbitration under Local Rule 53.2, and to specify the nature of the damages claimed e.g., 'compensatory,' 'punitive,' or both.

Local R. Civ. P. 5.1.1.1.

The *ad damnum* clauses of Counts Two and Three of the Amended Complaint both fancifully assert Mr. Magyar is claiming "an amount in excess of One Million Dollars." Courts in this district have consistently rejected such attempts to plead specific dollar amounts for unliquidated damages. *Jodek Charitable Trust, R.A. v. Vertical Net Inc.*, 412 F. Supp.2d 469, 484 (E.D. Pa. 2006) (quoting *Rototherm Corp. v. Penn Linen & Uniform Serv., Inc., 1997 U.S. Dist. LEXIS 10057, at *18 (E.D. Pa. Jul. 3, 1997)* (quoting *Doe v. Provident Life and Acc. Ins. Co.*, 936 F. Supp. 302, 209 (E.D. Pa. 1996). Thus, in *Jodek*, Judge Brody stated "[t]o the extent that Plaintiff's Ad Damnum clause requests 'compensatory damages in an amount in excess of Sixty Million dollars ($60 MM) (USD),' it violates Local Rule 5.1.1 and must be stricken." *Id.* at 484.

As set forth above, Counts Two and Three of the Amended Complaint should be dismissed with prejudice. But if they are not, the *ad damnum* clauses of those counts should be stricken in accordance with Local Rule 5.1.1.

IV. CONCLUSION

Plaintiff's Amended Complaint should be dismissed. The Tribe and its officials – Mr. Watkins, Mr. Peacock and Mr. Kennedy – are cloaked in sovereign immunity and not subject to suit in this Court. Further, the Amended Complaint by its own terms does not satisfy the amount in controversy requirement. Diversity jurisdiction does not exist. However, if Counts Two and Three of the Amended Complaint are not dismissed, the *ad damnum* clauses of those counts should be stricken.

Dated: December 21, 2012

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CERTIFICATE OF SERVICE

I, Matthew J. Borger, certify that I served a true and correct copy of Defendants' Motion to Dismiss, Defendants' Memorandum of Law in Support Thereof, the Declaration of Jerry Kennedy in Support Thereof, the Declaration of Clifford Peacock in Support Thereof, and the Declaration of Cleanan J. Watkins in Support Thereof upon counsel of record on the date indicated below via U.S. First Class Mail:

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