DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO City and County Building 1437 Bannock Street, Room 256 Denver, Colorado 80202	
Plaintiffs: ARTHUR KEITH WHITELAW, III; JOHN DERUNGS; KATHERINE K. MCCRIMMON; LAURA PITMON; DENISE SIGON f/k/a DENISE L. SAGER; ALAN SINGER and RITA SINGER v. **Defendants:** THE DENVER CITY COUNCIL (including the individual Council members in their official capacity: Albus Brooks, Charlie Brown, Jeanne Faatz, Christopher Herndon, Robin Kniech, Peggy Lehmann, Paul Lopez, Judy H. Montero, Chris Nevitt, Debbie Ortega, Jeanne Robb, Susan Shepherd, Mary Beth Susman); THE MANAGER OF COMMUNITY PLANNING AND DEVELOPMENT (Brad Buchanan, in his official capacity); THE DENVER PLANNING BOARD (including the individual Board members in their official capacity, Andy Baldyga, Jim Bershof, Shannon Gifford, Renee Martinez-Stone, Brittany Morris Saunders, Joel Noble, Susan Pearce, Arleen Taniwaki, Julie Underdahl, Frank Schultz and Chris Smith); THE CITY AND COUNTY OF DENVER; and CEDAR METROPOLITAN LLC (the Property Owner/zoning applicant).	**▲COURT USE ONLY▲** Case Number: 2015CV032427 Division: 269
Attorneys for The City Defendants Nathan Lucero, Atty. No. 33908 Tracy Davis, Atty. No. 35058 Assistant City Attorneys Denver City Attorney's Office Municipal Operations Section 201 W. Colfax Avenue, Dept. 1207 Denver, Colorado 80202 Telephone: (720) 913-3275; Fax (720) 913-3180 E-mail: nathan.lucero@denvergov.org E-mail: tracy.davis@denvergov.org	

CITY DEFENDANTS' MOTION TO DISMISS

The Denver City Council, including the individual Council members in their official capacity: Albus Brooks, Charlie Brown, Jeanne Faatz, Christopher Herndon, Robin Kniech, Peggy Lehmann, Paul Lopez, Judy H. Montero, Chris Nevitt, Debbie Ortega, Jeanne Robb, Susan Shepherd, and Mary Beth Susman (collectively, the "City Council"); the Manager of Community Planning and Development, Brad Buchanan, in his official capacity; the Denver Planning Board, including the individual Board members in their official capacity: Andy Baldyga, Jim Bershof, Shannon Gifford, Renee Martinez-Stone, Brittany Morris Saunders, Joel Noble, Susan Pearce, Arleen Taniwaki, Julie Underdahl, Frank Schultz and Chris Smith (collectively, the "Planning Board" or "Denver Planning Board"); and the City and County of Denver (all collectively, the "City" or "City Defendants"), through their undersigned attorneys and pursuant to C.R.C.P. 12(b)(1) and 12(b)(5), respectfully requests that the Court dismiss the Complaint because the Court does not have subject matter jurisdiction and Plaintiffs have not stated a claim for relief.

Certification Pursuant to C.R.C.P. 121, § 1-15: Counsel for the City certify that counsel conferred with counsel for Plaintiffs and Plaintiffs object to this Motion.

INTRODUCTION

On June 9, 2015, Denver's City Council voted to rezone a parcel located at 195 S. Monaco Parkway, which formerly was the home of the Mt. Gilead Church (the "Mt. Gilead Parcel"). The Plaintiffs object to the rezoning so sued all of the people and entities that were part of the rezoning process, regardless of their role. Importantly, however, the rezoning only altered

the zoning applicable to the Mt. Gilead Parcel; it did not prescribe what actually will be built there since no specific project has been approved to be built. *See*, *generally*, Complaint at ¶ 1.

Plaintiffs assert two claims for relief against the City. First, they request that the Court review the zoning code amendment adopted by the City Council pursuant to C.R.C.P. 106(a)(4). *See* Complaint at ¶¶ 84-92. Plaintiffs also request a declaratory judgment construing provisions of the Denver Revised Municipal Code ("DRMC") related to the zoning amendment. *Id.* at ¶ 95. Three of their declaratory judgment requests involve the interpretation of law at issue in the C.R.C.P. 106(a)(4) review and the fourth requests an order regarding ethics law. *Id.*

LEGAL STANDARD

A. C.R.C.P. 12(b)(1)

The Court can address questions of subject matter jurisdiction at any time during a lawsuit on a motion pursuant to Rule 12(b)(1). C.R.C.P. 12(h)(3); *Currier v. Sutherland*, 218 P.3d 709, 714 (Colo. 2009). Lack of subject matter jurisdiction requires dismissal. *Long v. Cordain*, 343 P.3d 1061, 1065 (Colo.App. 2014). The plaintiff has the burden of proving subject matter jurisdiction. *Bazemore v. Colorado State Lottery Div.*, 64 P.3d 876, 878 (Colo.App. 2002). Standing is a question of subject matter jurisdiction and it is a threshold that must be satisfied in order for the case to be decided on the merits. *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004).

B. C.R.C.P. 12(b)(5)

The Court can grant a motion to dismiss pursuant to Rule 12(b)(5) when the factual allegations cannot, as a matter of law, support a claim for relief. *See Lobato v. State*, 218 P.3d 358, 367 (Colo. 2009). When evaluating a motion to dismiss a complaint, the Court must

consider the facts as alleged, taking them as true, and viewing them in the light most favorable to the non-moving party. *See Walker v. Van Laningham*, 148 P.3d 391, 394 (Colo. App. 2006). However, "the court is not required to accept as true legal conclusions couched as factual allegations." *Western Innovations, Inc. v. Sonitrol Corp.*, 187 P.3d 1155, 1158 (Colo. App. 2008) (citing *Bell Atlantic. Corp. v. Twombly*, 550 U.S. 544, 560–62 (2007)). "Further, a complaint may be dismissed if the substantive law does not support the claims asserted." *Western Innovations*, *Inc.* 187 P.3d at 1158.

"In deciding whether to dismiss, the court may consider only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings, and matters of which the court may take judicial notice." See *Walker*, 148 P.3d at 397; *see also Yadon v. Lowry*, 126 P.3d 332, 336 (Colo. App. 2005). Courts may take judicial notice of a public record and of that which is common knowledge of the interested public. *See One Hour Cleaners v. Indus. Claim Appeals Office*, 914 P.2d 501, 504 (Colo. App. 1995); *Four-County Metro. Capital Improvement Dist. v. Board of County Com'rs*, 369 P.2d 67, 73 (Colo. 1962).

ARGUMENT

A. THE COURT LACKS SUBJECT MATTER JURISDICTION BECAUSE PLAINTIFFS DO NOT HAVE STANDING TO CHALLENGE THE REZONING

"[S]tanding is a threshold jurisdictional question" and must be addressed before the merits. *City of Greenwood Village v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 436 (Colo. 2000). "The proper inquiry on standing is whether the plaintiff has suffered injury in fact to a legally protected interest as contemplated by statutory or constitutional provisions. If he has not, standing does not exist, and the case must be dismissed. If he does, standing exists, and

the case must proceed to judgment on the merits." *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (Colo. 1977); *see also Wells v. Lodge Props., Inc.*, 976 P.2d 321, 324 (Colo. App. 1998).

The general rule with regard to standing to litigate the use of another's land is captured in the following excerpt:

> "…[T]his is the situation where a plaintiff claims that … another owner's land has been rezoned … to the plaintiff's detriment. These are the situations in which the courts have traditionally held that relief is available only to those who are 'persons aggrieved' … While the courts have used varied language in their attempts to define how standing is to be determined, the concept remains the same: *The functional test for determining aggrievement is two-fold: first, the party claiming aggrievement must successfully demonstrate a specific personal and legal interest in the subject matter of the decision as distinguished from a general interest such as is the concern of all members of the community as a whole and secondly, such party must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the decision.* The courts have generally held that one must have a direct interest in the subject matter of the litigation[.]."

ARDEN H. RATHKOPF, ET AL., RATHKOPF'S THE LAW OF ZONING AND PLANNING at §§63.13, (4th ed. 2014) (citing *Kolwicz v. City of Boulder*, 538 P.2d 482 (Colo. App. 1975) and *Fedder v. McCurdy*, 768 P.2d 711 (Colo. App. 1988), *cert. denied* (1989)) (emphasis added).

1. <u>None of the Plaintiffs have suffered an injury in fact</u>

The injury prong to standing requires "a concrete adverseness which sharpens the presentation of issues that parties argue to the courts." *Ainscough*, 90 P.3d at 856, *quoting City of Greenwood Village*, 3 P.3d at 437 (internal quotations omitted). An injury-in-fact may be tangible or intangible, but the remote possibility of a future injury or an injury that is overly indirect or incidental to the challenged action is insufficient to establish standing. *See id.*

> [I]n the context of administrative action, [Colorado courts] have held that the injury-in-fact element of standing does not require

> that a party undergo actual injury, as long as the party can demonstrate that the administrative action threatens to cause an injury-in-fact. What is required for an injury-in-fact, therefore, is that the alleged injury be sufficiently direct and palpable to allow a court to say with fair assurance that there is an actual controversy for judicial resolution.

O'Bryant v. Pub. Utilities Comm'n of State of Colo., 778 P.2d 648, 653 (Colo. 1989) (internal citations omitted).

Plaintiffs assert the rezoning has injured them by:

a. reducing their property values (Complaint at ¶ 7.a.);
b. obstructing their views "around Crestmoor Park" (*id.* at ¶ 7.b.);
c. additional vehicular traffic "from new residents using Cedar Avenue as a cut-through" to avoid Monaco Parkway (*id.* at ¶ 7.c.); and
d. "losing the protections of the Denver Zoning Code" because it can no longer be relied upon (*id.* at ¶ 7.d.).

In addition, Plaintiffs assert that Ms. Pitmon, who owns the Crestmoor Learning Center located across Cedar Avenue at 225 S. Monaco Parkway will be harmed because the "creation of an apartment building next to a pre-school creates security risks for the children at the facility" and apartment residents will be parking on East Cedar, South Locust and "other nearby streets" thereby inconveniencing students' parents and staff members. *Id.* at ¶ 7.e. Finally, Plaintiff's assert that Ms. Sigon, who lives in townhomes near the Mt. Gilead Parcel, "will have a new building towering over them to the east and south" with noise and "a loss of privacy" in addition to increased traffic and parking. *Id.* at ¶ 7.f.

First, all of these harms are speculative, based on assumptions about the potential uses and structures for the Mt. Gilead Parcel after the rezoning, and are not harms caused by the rezoning at issue. The City Council's approval of the rezoning of the Mt. Gilead Parcel did not approve any particular development project, the details of which will only come through a *future*

site plan review process. *See* Denver Zoning Code ("DZC") §12.4.10.11.B ("Approval of an official zone map amendment does not automatically confer any rights to development or construction.")[1]. Thus, Plaintiffs are merely guessing that there will be a "high-density apartment building" built at some point in the future on the Mt. Gilead Parcel and that this building will cause increased traffic and on-street parking difficulties, and will harm their views of Crestmoor Park. *See Olson v. City of Golden*, 53 P.3d 747, 752 (Colo.App. 2002) ("A claimed injury that, as here, is presently speculative and that cannot be determined until a remote time in the future, is not sufficiently direct and palpable to support a finding of injury in fact."). Thus, Plaintiffs have not established an injury-in-fact *from the rezoning*. *See Ainscough*, 90 P.3d at 856.

Second, a general interest "theoretically shared by tens of thousands of residents" of Denver is insufficient to establish an injury in fact. *Kolwicz v. City of Boulder*, 538 P.2d 482, 483 (Colo. App. 1975). Here, Plaintiffs allege injuries such as increased traffic, parking difficulties, noise, and damage to their views that would inure to all members of the public, and not just themselves. Indeed, none of the Plaintiffs alleges an injury that is *specific to that Plaintiff* as opposed to any other member of the public. Further, Plaintiffs do not allege that their rights have been impaired or threatened, since they have asserted no basis for having a right to street parking, limited access for others to City streets near their homes or to unimpeded views. *Also id.*

Even Ms. Pitmon, while a business owner rather than a resident, alleges the same injuries that the other Plaintiffs do except for the addition of the vague and unsupported allegation that

[1] If the Court does not have ready access to the Denver Zoning Code, Defendants will provide a copy of the cited provisions upon request.

"security risks for the children at the facility" will be created by the apartment building Plaintiffs speculate will be built. Complaint at ¶ 7.e. These alleged "security risks" are not identified and are highly speculative and, therefore, should not be enough to allege an injury in fact.

2. Plaintiffs also lack a legally protected interest

If the Court concludes that any of the Plaintiffs have alleged an injury in fact, then Plaintiffs also must meet the second prong of the standing test – whether the plaintiff's injury is to a "legally protected right." *City of Greenwood Village*, 3 P.3d at 437; *O'Bryant*, 778 P.2d at 654. This prong has a constitutional standard and a prudential standard. The Court must consider whether the legal basis for the claim derives from a legally protected right or interest that arguably has been abridged by the challenged action. *O'Bryant*, 778 P.2d at 653. "There must be a provision in the constitution, common law, or a statute, regulation, or code, independent of C.R.C.P. 106(a)(4) ... that confers upon [Plaintiffs] a legally protected interest." *Reeves v. City of Fort Collins*, 170 P.3d 850, 852 (Colo.App. 2007); *see, e.g.*, *Wimberly*, 570 P.2d at 539.

None of the Plaintiffs have a legally protected right under the United States or Colorado constitutions, nor is there a City ordinance conferring standing on them. C.R.C.P. 106(a)(4) does not confer any legally protected interest for purposes of establishing standing. *See Reeves*, 170 P.3d at 852. Therefore, none of the Plaintiffs have satisfied the constitutional test.

Further, some of the Plaintiffs, Whitelaw, DeRungs, McCrimmon, and Mr. and Mrs. Singer each own property that is *not* adjacent to the Mt. Gilead Parcel and, therefore, cannot meet the prudential test either. *See* Complaint at ¶6.a., b., c., and f. Colorado common law recognizes that a property owner has a "legally protected interest in protecting its property from

adverse effects caused by legally deficient zoning of *adjacent property." Wells*, 976 P.2d at 324 (emphasis added). Colorado courts have not recognized the same legally protected interest for non-adjacent landowners. *See id.*; *Reeves*, 170 P.3d at 853 (non-adjacent landowners—"a class of individuals who otherwise may not have a legally protected interest under common law"—had standing to challenge project *only* because municipal code specifically conferred standing); *Bedford v. Board of County Comm'rs of San Miguel Cnty.*, 584 P.2d 90, 91 (Colo. App. 1978) (plaintiff who owned apartment unit adjacent to rezoned land had standing; however, plaintiffs who owned property 3 miles away "had no interests of a special nature affected by the zoning resolution, and accordingly, they lacked standing to bring the action").

Therefore, these Plaintiffs do not have standing on this basis also but Defendants admit for this Motion only that Plaintiffs Sigon and Pitmon might own "adjacent" property for the purposes of standing and, therefore would have standing if the Court finds they have suffered an injury in fact.

B. THE RULE 106(a)(4) CLAIMS AGAINST THE MANAGER OF COMMUNITY PLANNING AND DEVELOPMENT (BRAD BUCHANAN) AND THE DENVER PLANNING BOARD SHOULD BE DISMISSED PURSUANT TO RULE 12(b)(5)

Plaintiffs' claims against the Manager of Community Planning and Development in his official capacity ("Manager") and the Denver Planning Board, including its members in their official capacities (collectively, "Planning Board"), should be dismissed because they did not make the decisions being complained of and, therefore, Plaintiffs have not and cannot state a claim for relief against them.

The final decision on review in Plaintiffs' claim for review under Rule 106(a)(4) was made by the City Council. Neither the Manager nor the Planning Board has the power to change

the zoning of a parcel. City Charter § 3.2.9; § 12-17(8) (Department of Community Planning and Development to "advise" the mayor and City Council on proposed zoning amendments); DZC § 12.2.1.2 (City Council responsible for final action regarding map amendments and text amendments); DZC § 12.2.2 (Planning Board "shall review and make recommendations to the authority responsible for final action" regarding map amendments and text amendments); DZC § 12.2.3.4 (Manager "shall review and make recommendations to the City Council" on map amendments and text amendments). Neither the Planning Board nor the Manager are responsible for final action on map amendments and text amendments and the City Council only is required to "consider" the Planning Board's and the Manager's recommendations. City Charter § 3.2.9; DZC §§ 12.2.1.2B, 12.2.2.2, 12.2.2.3.B, 12.2.4.2 and 12.4.11.3.G. Plaintiffs admit as much, when they assert that the City Council decided to rezone the Mt. Gilead Parcel at a public hearing. *See* Complaint at ¶ 2.

Therefore, there is no final decision of the Manager, the Planning Board and its members to be reviewed pursuant to C.R.C.P. 106(a)(4) and Plaintiffs have not stated a claim for relief against them.

C. THE RULE 57 CLAIM SHOULD BE DISMISSED PURSUANT TO RULE 12(b)(6) TO THE EXTENT IT IS SUBSUMED IN THE RULE 106(a)(4) CLAIM

A Rule 106(a)(4) or certiorari claim is the exclusive means of reviewing whether the City Council properly undertook its decision to rezone the Mt. Gilead Parcel. *See Seaman v. City Council of City of Littleton*, 537 P.2d 1084, 1085 (Colo.App. 1975) ("A declaratory judgment action is available to review matters not reviewable by certiorari."); *Best v. La Plata Planning Com'n*, 701 P.2d 91 (Colo.App. 1984) (determining whether a zoning authority properly applied state or local law to a specific property involves consideration of whether it abused its discretion or exceeded the bounds of its jurisdiction, and "[i]t is axiomatic that the exclusive means of resolving this issue is a certiorari proceeding under C.R.C.P. 106(a)(4)"); *Friends of the Black Forest Regional Park, Inc. v. Board of County Com'rs of County of El Paso*, 80 P.3d 871 (Colo.App. 2003) (the exclusive remedy for one challenging a rezoning is judicial review pursuant to C.R.C.P. 106(a)(4) but declaratory judgment may proceed contemporaneously for matters not considered under Rule 106(a)(4)).

Three of the requests for relief identified in Plaintiffs' Rule 57 claim seek the interpretation of City ordinances and the Zoning Code related to the zoning decision at issue in the Rule 106(a)(4) claim and do not raise issues based on other laws or rights. *See* Complaint at ¶ 95(a), (b) and (d). Plaintiffs' request in ¶ 95(a) seeks a declaration that the City should have considered adverse traffic and parking impacts from a proposed rezoning and that the City "made a mistake of law" in contending that it should not. This is an issue of the substantive law applied by the City Council when if made its final decision on the rezoning and questions of the law applied are addressed in Rule 106(a)(4) proceedings.

Plaintiffs' request in ¶ 95(b) seeks a declaration that the City erred in "implementing the Protest Petition procedure" that affected the votes required in the City Council for the rezoning. This is an issue of the substantive law and the procedure that applied to the City Council's vote. *See Burns v. City Council of the City and County of Denver*, 759 P.2d 748 (Colo.App. 1988) (holding that including city owned property within the 200 foot perimeter of area proposed for rezoning for purposes of computing whether a protest had been made by 20% of owners within the 200 foot perimeter was neither arbitrary nor capricious). Thus, this issue also could be raised and addressed in the Rule 106(a)(4) claim as it relates to whether the City Council exceeded its jurisdiction or abused its discretion.

Plaintiffs' request (d) asserts that the approval of the zoning change is unlawful "spot zoning." Complaint at ¶ 95(d). To determine whether a particular action is spot zoning, the "test is whether the change in question was made with the purpose of furthering a comprehensive zoning plan or designed merely to relieve a particular property from the restrictions of the zoning regulations." *Clark v. City of Boulder*, 362 P.2d 160, 162 (Colo. 1961). If the rezoning is for the purpose of furthering a comprehensive zoning plan or because there are changed conditions in the area, the rezoning is not spot zoning. *See King's Mill Homeowners Ass'n, Inc. v. City of Westminster*, 557 P.2d 1186, 1191 (Colo. 1976). As with (a) and (b), this claim relates solely to the City Council's decision to rezone the Mt. Gilead Parcel. Effectively, Plaintiffs argue in (d) that the City Council exceeded its authority in rezoning the Mt. Gilead Parcel. Thus, C.R.C.P. 106(a)(4) is the exclusive means of reviewing the City Council's decision and the Rule 57 claim should be dismissed.

As a result, Plaintiffs have not stated a claim for relief pursuant to Rule 57, at least with regard to the relief they request in Complaint at ¶ 95 (a), (b) and (d).

D. PLAINTIFFS HAVE NOT STATED A CLAIM FOR RELIEF REGARDING THE ALLEGED BIAS OF THE CITY COUNCIL AND ITS INDIVIDUAL MEMBERS

Plaintiffs assert they are entitled to an injunction because the City Council members received campaign contributions from lobbyists and lawyers who represent zoning applicants and, therefore, its decision was the result of bias and had the appearance of impropriety. Complaint at ¶¶ 2(c), 95(c). "There is a presumption of integrity, honesty, and impartiality in favor of those serving in quasi-judicial capacities" and the challenger has the burden of rebutting this presumption. *Soon Yee Scott v. City of Englewood*, 672 P.2d 225, 227 (Colo.App. 1983)

However, even assuming the <u>facts</u> pled by Plaintiffs are true, Plaintiffs have not pled sufficient facts to support any claim that the City Council's decision the result of improper bias. *See Western Innovations, Inc.*, 187 P.3d at 1158 ("the court is not required to accept as true legal conclusions couched as factual allegations."). Plaintiffs' do not identify any donations from or other actions related any individuals or entities that allegedly caused the conflict of interest. They do not identify any City Council members who were biased or the basis for their assertion the member was biased. Plaintiffs also do not allege how the City Council members who voted *against* the rezoning could have been biased against them. *See* Complaint at ¶ 50 (identifying Mr. Herndon as not present and Mr. Lopez, Ms. Ortega, Ms. Robb and Ms. Susman as "no" votes). Rather, Plaintiffs allegations related to this claim include many paragraphs citing case law, ordinances, and rules related to conflicts of interest and ethics in various situations, not all of which even apply here. *See* Complaint at ¶¶ 63-69, 76-81. Thus, Plaintiffs have not asserted

sufficient facts to rebut the presumption that the City Council acted with integrity, honesty, and impartiality in the rezoning decision and have not stated a claim.

Further, allowing Plaintiffs' claim to move forward would encourage the idea that every quasi-judicial rezoning (or other) decision made by the City Council is subject to challenge merely because a City Council member may have received a campaign contribution from lobbyists or lawyers whose clients have an interest in the subject matter, whether specific to the decision or generally.

If the Court concludes that Plaintiffs have alleged sufficient facts to state a claim that the City Council was biased and that this bias affected their votes, Plaintiffs' argument essentially alleges that the City Council abused its discretion, or exceeded its jurisdiction in exercising its quasi-judicial authority. Therefore, the issue should be considered as part of the C.R.C.P. 106(a)(4) review and the Rule 57 claim should be dismissed on this basis also. *See Seaman*, 537 P.2d at 1085; *Best*, 701 P.2d 91; *Friends of the Black Forest Regional Park, Inc.*, 80 P.3d 871.

CONCLUSION

For the reasons discussed above, all Plaintiffs' claims should be dismissed because the Court does not have subject matter jurisdiction. If the Court concludes that it does have subject matter jurisdiction over some or all of the claims, then the claims against the Manager of Community Planning and Development (Brad Buchanan) and the Denver Planning Board (including its individual members) should be dismissed. Plaintiffs' claim pursuant to Rule 57 also should be dismissed for the reasons discussed above.

THEREFORE, Defendants respectfully request that the Court dismiss the Complaint pursuant to C.R.C.P. 12(b)(1) and (5).

Respectfully submitted this 27th day of July, 2015.

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ATTORNEYS FOR THE CITY DEFENDANTS

In accordance with C.R.C.P. 121§1-26, a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.

CERTIFICATE OF SERVICE

I certify that on this 28th day of July, 2015, a true and correct copy of the foregoing **Motion to Dismiss** was served electronically by ICCES or U.S. Mail, first-class postage prepaid, properly addressed to the following:

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