UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROGER HALL, et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No.: 04-814 (RCL)
CENTRAL INTELLIGENCE AGENCY,	)	
Defendant.	)	

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' CROSS-MOTIONS

The Agency's renewed motion for summary judgment (ECF No. 248) explained in detail that, after twelve years of litigation, this third round of dispositive motions should be the last. The Court previously granted summary judgment in the Agency's favor regarding five of the seven Items at issue (ECF No. 187), and the Agency has now met its FOIA obligations with respect to the remaining two, *i.e.*, Items Five and Seven.

Plaintiffs see things differently. In their oppositions and cross-motions for summary judgment (ECF Nos. 258 and 259), they seek not only to keep the case alive, but also to expand its scope by asking the Court to order discovery and appoint a special master. Indeed, plaintiffs would have this Court revisit long-resolved issues including the sufficiency of the Agency's search terms based largely on unsupported, speculative declarations amounting to the proposition that plaintiffs subjectively *believe* additional responsive records exist. That, of course, is not the test – the question is whether the Agency has conducted a search reasonably calculated to identify all responsive records and released all segregable information not subject to an Exemption. Because it has done so, summary judgment is warranted in its favor.

I. THE AGENCY'S SEARCH MET FOIA REQUIREMENTS

The Agency's motion explained that a search for records is adequate if it was "reasonably calculated to uncover all relevant documents." *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (internal quotation marks omitted); *see Oglesby*, 920 F.2d at 68 ("[T]he agency must show that it made a good faith effort to conduct a search for the requested records, using methods which can be reasonably expected to produce the information requested."). A search is not inadequate merely because it failed to "uncover every document extant." *SafeCard Servs., Inc. v. S.E.C.*, 926 F.2d 1197, 1201 (D.C. Cir. 1991). It explained its search in detail (ECF No. 248 at 7-11), and it will not repeat those points here; instead, the Agency limits its discussion to addressing plaintiffs' criticisms of its efforts.

A. This Court Has Held That The Agency's Search Terms Were Adequate

Although certain issues remain undecided regarding the Agency's search, the search terms' adequacy is not among them – it has been resolved conclusively. In its 2012 Opinion, the Court "f[ound] that the original CIA search terms were 'reasonably calculated to uncover all relevant documents," and it therefore held that "a further search with . . . new terms is not required under FOIA." (ECF No. 187 at 21.) Plaintiffs appear to miss this point, as they now assert that "the Agency is well aware that other search terms are appropriate," and suggest that, "[f]or example, it could search using the names of facilities known to house American POWs." (ECF No. 258 at 15.) The Court should reject this argument, which amounts to a motion for reconsideration of the 2012 Opinion more than four years after the fact. *See* Fed. R. Civ. P. 60(c) (establishing that a motion for reconsideration under Rule 60(b) must be made "no more

than a year after entry of the . . . order"). The Agency's search terms were reasonably calculated to uncover all relevant documents and thus satisfied its FOIA obligations.

B. The Agency correctly declined to search its operational files

Although the Agency searched all files likely to contain responsive records, including the Agency Archives and Records Center ("AARC") and CIA Automatic Declassification and Release Environment ("CADRE"), its motion noted a specific exception – it did not search its operational files, which, it explained, are exempt from search and review pursuant to the CIA Information Act of 1984, 50 U.S.C. § 431(a). Plaintiffs challenge that assertion, arguing that the Agency has not shown that it conducted a "decennial review" of its operational files to determine whether they should be declassified, and also that Executive Order 12812 and Presidential Decision Directive NSC 8 required agencies to declassify and release records pertaining to POWs and MIAs files to the extent compatible with national security. (ECF No. 158 at 10-12.) Each argument lacks merit.

As for the question whether the Agency conducted the required decennial review of its operational files, the answer is clear – it did, and plaintiffs offer no evidence to the contrary. In a supplemental declaration, Shiner explains that the Agency undertook a decennial review of the exempt operational files designations in 2015, and she explains the process by which it did so. *See* Supp. Decl. of Antoinette B. Shiner at ¶ 17 (Ex. 1 hereto).[1] Under 50 U.S.C. § 3141(a), the

[1] Despite the considerable detail in its 69 paragraphs spanning 35 pages, plaintiffs dismiss the Shiner Declaration on the implausible notion that it is "largely based on CIA boilerplate." Hall Opp. at 1 (ECF No. 259). They also criticize her statement that she makes her declaration "based on personal knowledge" while also stating that it is based on "information made available to me in my official capacity." *Id.* Finally, plaintiffs complain that it is not clear which facts she personally knows and which are based on "hearsay received from others." *Id.* These criticisms are misplaced. The D.C. Circuit "long ago recognized the validity of the affidavit of an individual who supervised a search for records even though the affiant has not conducted the search himself." *Pinson v. DOJ*, 160 F. Supp. 3d 285, 294 (D.D.C. 2016) (citing *Meeropol v. Meese*, 790 F.2d 92,

Director of the Central Intelligence Agency (DCIA) "may exempt operational files of the CIA" from the search and review requirements of the FOIA. Operational files are defined, in turn, to include certain files of the Directorate of Operations, the Directorate of Science & Technology, and the Office of Personnel Security that contain sensitive information about CIA sources and methods. *Id.* at ¶ 18. The DCIA implements his authority under 50 U.S.C. § 3141(a) by designating specific file series as exempt. In identifying the exempt file series, the DCIA and his advisers carefully consider whether files falling within each proposed series would perform the functions set forth in the statute. If a proposed file series would not perform one of the statutory functions, it would not be designated as exempt. The scope of each designated file series is defined in classified internal regulations and policies. *Id.* at ¶ 19. Shiner states under oath that, although she cannot provide additional details about the designated file series in an unclassified setting, they have been carefully and tightly defined to ensure that they serve the specific operational purposes. *Id.* Her sworn statement is presumed to be in good faith. *See* 2012 Mem. Op. at 5 (ECF No. 187) (citing *Ground Saucer Watch, Inc. v. CIA*, 692 F.2d 770, 771 (D.C. Cir. 1981). Plaintiffs have adduced no evidence that she is incorrect about the timing, scope, or thoroughness of the decennial review.[2] Consequently, the Agency correctly declined to search its operational files, which remain exempt.

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951 (D.C. Cir. 1986). For the same reason, "hearsay in FOIA declarations is often permissible." *Id.*; *see also Cunningham v. DOJ*, 40 F. Supp. 3d 71, 84 (D.D.C. 2014) ("[D]eclarations that contain hearsay in recounting searches for documents are generally acceptable.").

[2] To maintain the integrity of the Agency's exempted operational files, the CIA has an Agency-wide regulation that details procedures for designating or eliminating the designation of operational files. This regulation provides that at any time, the Deputy Director of CIA for Operations, the Deputy Director of CIA for Science and Technology, and the Director of Security may recommend to the DCIA that the DCIA add categories of operational files under their jurisdiction for designation as exempt from search, review, publication or disclosure under FOIA. The regulation also allows for eliminating previously designated categories of operational files. Such written recommendations must explain how the files meet the standards

Plaintiffs' argument about Executive Order 12812 is equally misconceived. They note that, in that Executive Order, President George H. W. Bush ordered that certain materials about POWs and MIAs be declassified where that could be done "without compromising United States national security." As plaintiffs further indicate, former CIA Director James Woolsey noted that review conducted pursuant to Executive Order 12812 had "included a thorough, exhaustive search of operational files, finished intelligence reports, memoranda, background studies and open source files." From here, however, their argument is not clear. To the extent that they are arguing that material made publicly available pursuant to this Order was omitted by the Agency, Shiner states that the CIA's search included the records. Supp. Shiner Decl. ¶ 21. If plaintiffs are instead claiming that Executive Order 12812 gives them a right of access independent of or in addition to FOIA, the text of the Order itself states otherwise – it provides that the Order "is not intended to create any right or benefit, substantive or procedural, enforceable by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person."

II. THE AGENCY'S WITHHOLDINGS MET FOIA REQUIREMENTS

A. Plaintiffs' complaints about "packaging" records are overstated and readily addressed.

Plaintiffs argue that several of the denied-in-full entries in the *Vaughn* index reference compilations or "packages" of documents that, plaintiffs assert, do not permit them to determine the dates of the individual records that are part of combined documents. Plaintiffs speculate that some of these individual records are older than 50 years, which could affect their current

for designation (or elimination) and must be approved by the DCIA. The regulation further provides that the Agency will notify Congress of all categories of files designated and any subsequent additions to or changes in those categories. Supp Shiner Decl. at ¶ 20.

classification. However, as explained below, none of the records at issue is older than 50 years and the Agency properly considered the appropriate procedural and substantive requirements of Executive Order 13526, which governs classification. *See* Supp. Shiner Decl. ¶ 3. Specific clarifications follow.

Item 6 on the index consists of a cover letter dated October 6, 1992, with 22 enclosures. The dates of the enclosures are 1992, 1980 and 1981. The Agency properly evaluated the proper classification in light of the fact that the documents are over 25 years old, and, as indicated in the initial declaration and *Vaughn* index, determined that certain information remains currently and properly classified. Whenever possible, the Agency attempted to maintain the integrity of the original documents located in the course of the searches for responsive records. Accordingly, the *Vaughn* index entries reflected the date of the final document, not each separate attachment. *Id.* at ¶ 4.

Item 20 on the *Vaughn* index is a memorandum and background material used by a senior Agency official to prepare for a briefing to a Senate committee. The document and the accompanying background material are dated 1991. The exemptions noted on the *Vaughn* index for this entry apply to the entire document. *Id.* at ¶ 5.

Item 21 is similar to Item 20 in that it is background material compiled ln preparation for a Senate committee briefing. All pages are dated 1991. Again, all of the noted exemptions ln the *Vaughn* index apply to the entire document. *Id.* at ¶ 6.

Item 23 is a draft statement an Agency official made to a Senate committee. This draft document is dated 1991 and all exemptions noted in the *Vaughn* index apply to each page of the document. *Id.* at ¶ 7.

Item 29 is the Agency's response to a Congressional request. The document consists of the Agency's responses to the request and certain enclosures that were included as part of those responses. All exemptions noted in the *Vaughn* index apply to the letters and enclosures. The enclosures are dated 1991 and 1979, respectively. The Agency's responses to Congress are dated February 11, 1992. *Id.* at ¶ 8.

Item 31 is similar to Item 29 in that it consists of letters to Congressional members in response to a request and enclosures referenced in the letters that were part of the Agency's response. This material is dated 1992 and the exemptions noted in the *Vaughn* index apply throughout. *Id.* at ¶ 9.

Item 36 is as described on the initial *Vaughn* index; detailed written responses to questions posed to the Agency by the Senate. The exemptions noted in the *Vaughn* index apply throughout the document, which is dated 1992. *Id.* at ¶ 10.

B. Plaintiffs fail to raise a genuine dispute of material fact concerning the Agency's applications of FOIA Exemptions 1, 3, 5, and 6.

The Agency's motion (at 14-31) explained in detail the legal standards and factual justifications for its withholdings under FOIA Exemptions 1, 3, and 6. It also stated the bases for its rigorous segregation analysis of each record at issue. The Agency incorporates those arguments here, and limits its discussion to plaintiffs' arguments against its approach.

1. The Agency correctly applied Exemption 1

Plaintiffs argue that the Agency incorrectly applied the Executive Order's standard for documents older than 25 years, rather than the correct provision for documents older than 50 years. However, as noted above, none of the documents for which the Agency claimed

Exemption 1 are 50 years or older.[3] Additionally, plaintiffs' claim that the Agency relied upon a "mosaic theory" for the classified information at issue is incorrect. In fact, Shiner is familiar with all of the information in this case and determined that the specific details for which Exemption 1 was asserted remain currently and properly classified standing alone – not based on a mosaic theory. Her initial declaration sets forth the rationale underlying these classification determinations. *See* Supp. Shiner Decl. ¶ 11.

2. The Agency correctly applied Exemption 3

Plaintiffs argue that the Agency broadly asserted Exemption 3 in conjunction with Section 6 of the CIA Act. However, Exemption 3 was applied narrowly and only asserted to withhold the names, official titles, and offices of CIA employees. Notably, the language of Section 6 of the CIA Act does not restrict its application to current Agency personnel. *Id.* at ¶ 12.

Plaintiffs also argue that the intelligence sources and methods protected by the National Security Act, 50 U.S.C. § 3024(i)(1), should no longer apply to information contained in the documents because the records and the events discussed therein are older. However, the National Security Act recognizes the inherent sensitivity of revealing sources and methods of intelligence collection and, consequently, does not place temporal limitations on their protection. Shiner states that, to the extent that Exemption 1 was asserted for the same material withheld pursuant to the National Security Act, the information remains currently and properly classified for the reasons discussed in her initial declaration. *Id.* at ¶ 13.

[3] Document No. C00005776 (Released-in-Part *Vaughn* index, No. 1) is dated 1961, but the Agency did not apply Exemption 1 to any information in this record.

3. The Agency correctly applied Exemption 5

a. The FOIA Improvement Act of 2016 is inapplicable.

Plaintiffs allege that the Agency incorrectly applied Exemption 5 because Section 2(2) of the FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538, 540 (enacted June 30, 2016), provides that Exemption 5 "shall not apply to records created 25 years or more before the date on which the records were requested." *See* AIM Opp. at 18 (ECF No. 258). But they miss a critical point: the FOIA Improvement Act applies only to requests filed after the Act's effective date, *i.e.*, after June 30, 2016. *See* § 6, 130 Stat. 538, 545 ("This Act, and the Amendments made by this Act, . . . shall apply to any request for records . . . made after the date of enactment of this Act."). Because plaintiffs' request was filed in 2003, the FOIA Improvement Act is inapplicable and the Agency's analysis is correct.

b. Plaintiffs' accusations of "extreme wrongdoing" are misplaced.

Plaintiffs fare no better by accusing the Agency of "extreme wrongdoing," a claim that, they urge, should vitiate any claim to deliberative privilege over the records in question. They attempt to support this hyperbolic position, *inter alia*, through declarations. One, by James Sanders, contains virtually nothing that Mr. Sanders himself observed; instead, it describes and extensively quotes a 1991 Report by the Senate Committee on Foreign Relations, news media reports, and statements from Henry Kissinger, all of which purport to describe the geopolitics of the 1970s as applied to POWs. Mr. Sanders's personal observations appear to be limited to an isolated statement that he "agree[s] with the Report's observations about the government's motivations to declare POWs dead." Sanders Decl. at ¶ 11 (ECF No. 258-2). This basis of knowledge violates the rule that "[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and

show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4).

Another declaration, by Mark Sauter, is hopelessly riddled with speculation. He relates that his "research indicates the CIA has failed to produce POW/MIA documents falling into four categories." Sauter Decl. at ¶ 2 (ECF No. 258-3). He buttresses this claim by asserting that the Agency informed the U.S. Senate Select Committee on POW/MIA Affairs in 1992 that it had "no information" indicating that U.S. POWs were sent to the Soviet Union during the Korean War, but it later declassified documents pertaining to that subject. *Id.* at ¶ 4. He opines that "it appears likely others like them remain secret to this day" (*id.*), and that "[t]he CIA apparently continues to withhold POW/MIA documents, including some more than 60-years-old." *Id.* at ¶ 6. Sauter then describes records relating to defector Dr. Dang Tan that he "believe[s] exist." (*id.* at ¶ 9), and states that, "[b]ased on reported sightings released by DoD and other U.S. agencies, including some still listed as classified, I believe there is a strong possibility CIA has reports from before 1975 and after 1982 concerning alleged American POWs in North Korea" (*id.* at 11). It continues in a similar vein, describing his view that, based on what he has learned during his career, there are other records that "almost certainly exist" but have not been produced.

Finally, there is the Declaration of Bob Smith, a former United States Congressman and Senator from New Hampshire who served on the Senate Select Committee on POW/MIA Affairs. He describes the Senate Select Committee's investigations and asserts that, as part of those investigations, he "personally h[as] seen hundreds of classified documents that could and should be released as they pose no national security risk." Smith Decl. at ¶ 8 (ECF No. 258-4). His view apparently was not shared by the "bureaucrats" or Senators McCain and Kerry, with

whom Smith "fought . . . to the point of exhaustion." *Id.* at ¶ 9. Smith states that he "spoke to a high ranking former member of the KGB" about one of the documents released by the Agency in this case, and that the former KGB member "told [Smith] point blank that the document is real" although he "would never state this publicly, for obvious reasons." *Id.* at ¶ 17. He concludes with a blanket assertion that "[the Agency is] still holding documents that should be declassified." *Id.* at ¶ 20.

These declarations are insufficient to prove that the Agency either has acted in bad faith or failed to meet its FOIA obligation, which is to conduct a reasonable search of all locations likely to contain responsive records and to release all segregable portions of those records that do not fall within a listed Exemption. In words directly applicable here, the D.C. Circuit has instructed that "[a]gency affidavits are accorded a presumption of good faith, *which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents.*" *SafeCard Servs., Inc. v. SEC*, 926 F.3d 1197, 1200 (D.C. Cir. 1991) (emphasis added) (internal quotation marks omitted). Such speculative claims are all that the declarants offer. Even Senator Smith's statements that he has seen documents that – in his apparently unshared view – "should be declassified" is far short of identifying specific documents that (i) the Agency has located and (ii) currently are subject to release to the public.

The flaw in plaintiffs' position is that "FOIA is not a wishing well; it only requires a reasonable search for records an agency actually has." *DiBacco v. U.S. Army*, 795 F.3d 178, 191 (D.C. Cir. 2015) (rejecting challenge to search that "did not produce certain materials [plaintiff] believes exist and had hoped to find"). Consequently, "[m]ere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search." *SafeCard*, 926 F.2d at 1201. Indeed, even if plaintiffs were to identify a specific

document or documents that they believe a reasonable search would have found, that alone likely would be insufficient to withstand summary judgment. *See Iturralde v. Comptroller of Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003) ("[I]t is long settled that the failure of an agency to turn up one specific document in its search does not alone render a search inadequate."). That is because "particular documents may have been accidentally lost or destroyed, or a reasonable and thorough search may have missed them." *Id.* (citation omitted).

As always, "the adequacy of a FOIA search is generally determined not by the fruits of the search, but by the appropriateness of the methods used to carry out the search." *Id.* (citing *Steinberg v. Dep't of Justice*, 23 F.3d 548, 551 (D.C. Cir. 1994). Here, the Agency has described its search in exacting detail; thus, "the burden is on [plaintiff] to identify specific additional places the agency should now search." *Hodge*, 703 F.3d 575, 580 (D.C. Cir. 2013); *see also Iturralde*, 315 F.3d at 315 (affirming grant of summary judgment for the agency where the appellant/plaintiff failed to identify particular offices or files where an allegedly missing document might have been found). Plaintiffs have not carried that burden – beyond the locations searched, they have identified only the Agency's operational files, which, as discussed above, are exempt from the FOIA. Consequently, it is insufficient merely to offer speculative declarations opining that additional documents likely exist. Even if they did – a proposition as to which there is no evidence – it would not mean the search was unreasonable. In fact, in its 2012 Opinion (ECF No. 187), the Court held that the Agency's search *was* reasonable as to Items 3, 4, 6, and 8, and that the search terms were sufficient as to the two Items that remain. In that context, it is clear that the Agency's search has involved reasonable efforts and good faith, even if the results might not have met plaintiffs' wishes.

Notably, the cases plaintiffs cite regarding bad faith do not support their argument that the Agency has somehow waived its Exemption 5 privilege. *See, e.g., In re Sealed Case*, 121 F.3d 729, 746 (D.C. Cir. 1997); *Alexander v. FBI*, 186 F.R.D. 154 (D.D.C. 1999); *ICM Registry, LLC v. U.S. Department of Commerce*, 538 F. Supp. 2d 133 (D.D.C. 2008). Those cases establish that where there is concrete, specific evidence of extreme government misconduct, the deliberative process privilege does not shield predecisional communications. However, as the *ICM* court observed, "this exception to the (b)(5) exemption has never been applied in a holding at the Circuit level, nor has the scope of 'misconduct' been clearly defined." 538 F. Supp. 2d at 133. In *Alexander*, 186 F.R.D. at 164, this Court held that there was no privilege where documents related to misuse of a government personnel file to discredit a witness in an ongoing investigation of the Clinton administration – clearly an illegal use of a government record. Similarly, in *Tax Reform Research Group v. IRS*, 419 F. Supp. 415, 426 (D.D.C. 1976), the Court held that there was no privilege where documents concerned recommendation to use the IRS's powers in a discriminatory fashion against enemies of the Nixon administration.

Plaintiffs' allegations here would not amount to illegal acts of the sort recognized in case law regarding bad-faith vitiation of privilege. Plaintiffs "aver that the CIA is covering up its participation in knowingly leaving POWs in Southeast Asia post-1973 Operation Homecoming." AIM Opp at 27 (ECF No. 258). Notably, however, they fail to identify any crime allegedly committed or law allegedly violated, much less any concrete reason to believe that the documents at issue here would reveal that criminality. It is relatively commonplace for FOIA requesters to believe subjectively that the documents they seek will reveal agency wrongdoing, at least if "wrongdoing" is defined broadly to include unpublicized acts that the requester considers distasteful. Nevertheless, cases vitiating the Exemption 5 privilege on grounds of government

misconduct are vanishingly rare, and plaintiffs have not met the standard here. Their only concrete argument is that the Agency may have incorrectly asserted the privilege over documents that are impermissibly old, an assertion refuted *supra*.

4. The Agency correctly applied Exemption 6

As a general matter, the Agency used Exemption 6 sparingly and applied it only to protect names of low-level government employees, congressional staffers, and military personnel. Shiner reasonably determined that these individuals have a privacy interest in this information. For example, release of this information could subject them to harassment, intimidation, or unwanted contact. Conversely, Shiner was unable to ascertain, and plaintiffs have failed to identify, any countervailing qualifying public interest in disclosure of this information. Specifically, the disclosure of these names would not contribute to the public's understanding of government operations or activities. Shiner further notes that the CIA did not assert Exemption 6 to redact information about deceased individuals or individuals presumed to be deceased because of their inclusion on the U.S. Department of Defense's Primary Next of Kin (PNOK) list of POW/MIAs. *Id.* at ¶ 14.

Plaintiffs claim that in two documents, Items 6 and 69 of the released-in-part *Vaughn* index, the Agency redacted the name of a deceased individual and the signature of a U.S. Senator. For Item 6, plaintiffs incorrectly allege that the signature of Sandy Berger, who died during the pendency of this case, was redacted – it was not. In contrast, for Item 69, the Agency agrees with plaintiffs' observation regarding the signature; it has removed the redaction and re-released the document to plaintiffs.

III. REFERRALS TO NSA

In its 2012 Order, the Court directed the CIA to follow up on seven responsive documents it had referred to other agencies – one of which was referred to the National Security Agency (NSA). The Agency has confirmed with NSA that this referred record, Document No. C00800075, was processed and sent to plaintiffs. Plaintiffs do not contest receiving this record, but now claim that CIA has not adequately justified the NSA's redactions to the document. In fact, however, this NSA document was already addressed in NSA's *Vaughn* index filed in support of CIA's last motion for summary judgment. *See* Declaration of Diane M. Janosek, Deputy Associate Director for Policy and Records for the NSA (ECF No. 185-1 at 10). The justification for the redactions to Document No. C00800075 are discussed on page six of the inventory, which accompanies NSA's declaration. *See* Supp. Shiner Decl. ¶ 16.

CONCLUSION

For the reasons set forth above, summary judgment should be granted in favor of the CIA, and plaintiffs' cross-motions should be denied. There is no cause for discovery or appointment of a special master; to the contrary, this case should be at an end. As always, the Agency will produce any records for *in camera* inspection that the Court requests, as it stands by its application of the Exemptions.

Respectfully Submitted,

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