

Comment on AOR 2013-11

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August 27, 2013

Office of the General Counsel
Federal Election Commission
999 E Street N.W.
Washington, D.C. 20463

Re: AOR 2013-11

Dear General Counsel:

The campaign committee for Joe Miller, the Republican nominee for Alaska's US Senate seat in the 2010 general election, has filed Advisory Opinion Request 2013-11.¹ AOR 2013-11 presents the question whether Mr. Miller can legally use campaign funds to secure a debt he owes Alaska Dispatch, LLC,² as result of a court judgment entered against him,³ and/or to pay this Judgment

¹ Requestor Citizens for Joe Miller ("Miller Committee") is an FEC-registered campaign committee utilized by Miller, and the successor to his 2010 US Senate campaign committee, Joe Miller for US Senate.

² Alaska Dispatch is a news organization, employing over a dozen reporters and editors, that provides statewide coverage of Alaska news, features, commentary and related photojournalism through its on-line publication AlaskaDispatch.com.

³ A copy of this judgment ("Judgment") entered in Alaska Dispatch, LLC v. Fairbanks North Star Borough, Alaska Superior Court Case No. 4FA-10-02886CI (the "Litigation") on June 13, 2013, was filed with the FEC as part of Miller's AOR. The Judgment formalizes an award of attorney fees and costs to Alaska Dispatch arising from its successful suit for public access to documents concerning Miller. The court made an enhanced fee award against Miller, noting in its opinion, *inter alia*, that Miller engaged in unreasonable and inconsistent behavior throughout the litigation, made false representations, was guilty of vexatious or bad faith conduct, and had caused unnecessary delay and costs for Alaska Dispatch and for the Fairbanks North Star Borough ("Borough," or "FNSB"), the original defendant and other main party in the Litigation. A significant portion of the Judgment is attributable to Miller's unreasonable conduct of the Litigation below, characterized *inter alia* by unnecessary and wasteful litigation tactics. That conduct included such things as Miller's argument with the Borough about whether he could avoid providing an IRS Form W-9 in order to receive \$5,000 the Borough had agreed to pay him as a nuisance settlement—an argument that stretched over nearly four months and involved 111 pages of pleadings filed by Miller and the Borough, and court

should his appeal be unsuccessful, or whether this constitutes an impermissible personal use under 2 USC 439a and 11 CFR 113.2.

Alaska Dispatch, as the judgment creditor referred to in Miller's AOR, is the other party most directly affected by the FEC's ruling sought in this matter. Rather than pay the Judgment immediately, Miller deposited with the clerk of court \$94,083 of campaign funds belonging to the Miller Committee.⁴ He said it could be used to pay the Judgment, and that he was using it in lieu of posting bonds in connection with his anticipated appeal of the Judgment. Though Miller had known of this issue for a year or two before he used the campaign funds for these purposes, he did not seek an advisory opinion from the FEC on the legality of doing so in advance. This use of campaign funds raised a red flag, since there were obvious questions about its legality.

Alaska Dispatch does not object to being paid what it is due from Miller campaign funds, if and to the extent that this would be legal. The circumstances of the state court proceedings, however, demonstrate substantial questions about whether most of the Judgment can legally be paid for with campaign funds. These circumstances are noted in more detail below. Neither Miller nor the other parties to the Litigation believed during the Litigation that campaign funds could be used for the largest portion of the case, which occurred after the initial portion of the case concerning media access to public records about candidate Miller was over.⁵ This latter phase of the Litigation (which accounts for 65% of the Judgment at issue) involved only Miller's personal claims for money damages. It was pursued entirely after his election campaign had ended, when the media's claims for disclosure of public records had been resolved.⁶

orders—as well as a variety of more serious issues also not relating directly or even indirectly to his Senate campaign.

⁴ This \$94,083 was transferred from the Miller Committee's account to an Alaska state court to cover the Judgment and related, anticipated interest and court costs. The Miller Committee's check for this sum referred to in the June 27 Notice of Cash Deposit Miller filed with his AOR was dishonored by his bank, apparently through no fault of Miller or his campaign, and was replaced with a cashier's check for the same amount, paid for with funds from the same account.

⁵ During the Litigation, Miller represented through counsel that the \$170,000, more or less, that he spent on the second, post-campaign phase of the Litigation, was not paid for with campaign funds (even though he had several hundred thousand dollars in campaign funds on hand after the election was over). He also made a point of this on his blog when he settled with the Borough and former mayor. See, e.g., <http://joemiller.us/2012/06/borough-ex-mayor-admit-to-judgment-in-miller-vs-fnsb/> ("No senate campaign funds were used for legal fees or costs in this case after the post election litigation concluded in January 2011.") Opposing counsel had communicated about this understanding early on, during discussions about whether Miller might pay prevailing party attorney fees owed to the media then, without making them continue as parties through the entire second phase which all knew did not involve them.

⁶ For convenience and clarity, Alaska Dispatch refers at times herein to "Phase 1" and "Phase 2" of the Litigation, to distinguish between the distinct pre- and post-campaign portions of the court case—the former involving and completely disposing of media claims for access to public

Alaska Dispatch's principal interest here lies in ensuring that the Advisory Opinion to be issued by the FEC can be relied upon, which in turn depends on the extent to which it is based on an accurate disclosure of the underlying facts. Alaska Dispatch agreed in June that it was willing to forego execution on its Judgment while Miller sought an FEC Advisory Opinion on the legality of his use of campaign funds in this case, subject to minimal conditions. For this reason undersigned counsel for Alaska Dispatch wrote Miller's counsel at the outset, after Miller has used the campaign funds in question but before he sought this AOR, stating that Alaska Dispatch "needs assurance that the campaign funds used as security are unquestionably available for that purpose."

As you know, an advisory opinion is based on specifics set forth in the request for it, and limited to the facts or assumptions presented to the commission. Therefore it is imperative that the request fully and candidly disclose to the Commission all relevant facts, particularly those with respect to the different claims being pursued in 4FA-10-2886 CI before the end of the 2010 Senate campaign, and after 2010."⁷

records about Miller, and the latter involving only Miller's pursuit of his own tort and employment law-related claims. These terms were not used in the state court proceedings.

⁷ This request in July 2, 2013, correspondence was made in the following context:

... Ordinarily, as I understand it, the Commission meets less often in the summer than usual. Its calendar, available on the FEC website, shows they are only meeting on the Thursdays, July 11, July 25, and August 22 this summer. We are not interested in waiting months to get this resolved. However, we recognize that even if Mr. Miller immediately requests an advisory opinion, he has little control over when he will receive a response, and we are willing to accommodate your client if he chooses to go this route. Specifically, the Dispatch will take no steps to execute on its judgment, notwithstanding the absence of a court order approving a supersedeas bond, if you send me a copy of documents complying with FEC procedures and requirements 1) sent to the FEC on or before July 9, 2013, 2) by expedited delivery, 3) requesting an advisory opinion on whether Miller's senate campaign funds can be used to pay, or secure payment, of the entirety of the judgment in our case, and 4) requesting an expedited ruling on the request for advisory opinion. Mr. Miller's request for advisory opinion should clearly explain to the Commission the distinction between the claims addressed in the litigation before the election and after 2010, should provide the Commission with the name and contact information for counsel still representing parties in our case, and provide the Commission with copies of the court's May 16, 2013, decision and June 2013 judgment, and Miller's June 27 Notice of Cash Deposit. A copy of your filings demonstrating compliance with the foregoing should be served on counsel still representing parties in our case.

Miller largely failed to comply with these terms in filing his AOR. He did make a cursory, pro forma request for expedited consideration. However, he did not clearly explain in his AOR the distinction between the claims addressed in the litigation before and after the 2010 election campaign was over, and he did not provide the Commission in his AOR with the court's May 16, 2013, decision. Nor did he provide the Commission with the name and contact information of other counsel in the case, or provide other counsel with a copy of what he filed with the FEC as an AOR.

Alaska Dispatch is also interested in two other matters raised by Miller's AOR 2013-11:

- One is the policy implication of an FEC ruling granting Miller's request that all legal fees and costs associated with the Litigation, including those attributable to Phase 2, can be paid for with campaign funds. Should federal campaign funds be available as a ready and limitless source of money for launching tort suits against those who criticize or investigate a candidate, to punish them or discourage them from speaking out? Or, should candidates use their own funds, or funds from sources other than campaign donations, if they wish to bring suits for money damages against perceived political opponents or others who challenge or inconvenience them? Miller's AOR urges the FEC to adopt the first of these options—a problematic proposition.

- The other matter of interest here is why or how someone subject to FEC reporting requirements can receive and/or spend sums apparently totaling between \$150,000 - \$200,000 for campaign-related activities without the source of these funds, or any details of their expenditure, appearing in FEC filings or other public records.⁸ Since Miller now claims, contrary to the positions previously asserted in court filings and on his website, that these expenditures were for campaign-related matters, Alaska Dispatch encourages the Commission in its AO to help the public understand why such allegedly campaign-related income and expenses need not be reflected in public filings.⁹

Nonetheless, Alaska Dispatch continued to cooperate with him by voluntarily foregoing execution on the Judgment pending a ruling by the Commission.

⁸ Miller said he spent \$10,000 each month to pursue his tort and employment law claims in the post-campaign portion of the Litigation, from the time his 2010 campaign ended through 2012, the year he settled his personal claims against his former employer for \$5,000. (Literally, the last time he disclosed information about fees was in March 2012 discovery responses, when he said he was spending at this rate. There is no reason to believe that abated in the remaining three months before he settled, and he has continued to incur fees since, but the March 2012 disclosure in the context of the Litigation is the last time he clearly addressed the matter.) The source of these funds is not known because Miller failed to comply with discovery requests concerning them, and by settling he avoided the court order entered days before requiring disclosure about his legal fees and how paid by whom they were paid. There does not appear to be any public record of where Miller got the \$150,000 - \$200,000 (or whatever the actual sum was) that he spent pursuing these personal claims, nor any public record of how, why or to whom he paid out these sums. Whether or not this is otherwise a problem in terms of public disclosure requirements, the fact that Miller did not include any of these payments on his campaign finance disclosure statements would seem more consistent with his former position that Phase 2 of the Litigation did not relate to his campaign than with his present position that it did and can all be paid for with campaign funds.

⁹ It is possible, of course, that Alaska Dispatch and other news media covering Mr. Miller's political activities have simply not looked in the right place. However, their failure to find this information, despite diligent efforts—coupled with the fact that Miller's settlement of his tort claims enabled him to avoid the court's contemporaneous order that he disclose this information in the Litigation—suggest that no such filings have been made. Statutes and regulations governing disclosure of campaign contributions and expenditures, as well as previous FEC AOs, would seem to indicate that the information in question should have been disclosed. Hopefully, the Commission's response to the pending AOR may shed light on this.

As Miller's AOR 2013-11 appears not to adequately address the relevant facts, Alaska Dispatch requests that the FEC consider *in rem* set forth herein. With this, the Alaska courts and parties involved can proceed with the assurance that the FEC's ruling is based on a full and fair disclosure of facts, and can be relied upon accordingly.

There would appear to be four possible outcomes from Miller's AOR, based on the known facts. Alaska Dispatch does not express an opinion about which option the FEC should find appropriate. Its interest is only in having a ruling it and the Alaska courts can rely upon. The apparent options are:

- 1) Miller can pay his debt to Alaska Dispatch, in its entirety, with campaign funds when his appeal is concluded, and in the meantime can use campaign funds to pay associated bonds and all other legal expenses, and secure his obligation to pay the judgment debt.
- 2) Use of campaign funds to pay any of the fees and expenses associated with the Alaska Litigation would constitute an impermissible personal use.
- 3) All of the fees and costs directly attributable to the candidate's campaign can be paid for with campaign funds, and no fees and costs not directly attributable to the candidate's campaign can be paid for at all with campaign funds. The permissible and impermissible uses must be apportioned as indicated in previous advisory opinions such as AO 2003-17 [James Treffinger], at 7 (campaign funds could be used to pay for the portion of legal fees incurred for dealing with counts relating directly to the federal campaign; candidate could pay 45% of the legal expenses incurred in his defense using campaign funds, since nine of twenty counts of indictment were found to be directly related to campaign). *See also*, AO 2005-11 [Randall "Duke" Cunningham] at 4, ("The use of campaign funds to pay for Representative Cunningham's representation in legal proceedings regarding any allegations that are not related to his campaign activity or duties as a Federal officeholder would constitute an impermissible personal use.")
- 4) Various activities and transactions that occurred prior to the candidacy, or that occurred since but do not relate directly to the campaign may fall into a category that "would be, at most, 50% payable by the [campaign] Committee," in accordance with advisory opinions such as AO 1998-1 [Earl Hilliard], at 5-6, and FEC AO 1997-12 [Jerry Costello], at 6.

In summary, relevant facts complementing or putting in context those submitted by Miller, include the following:

The Judgment that Miller has used campaign funds to pay for arises from Litigation with two distinct phases, one before and one after Miller's US Senate campaign. (Of the Judgment amount, 35% is attributable to the first phase, and 65% to the second phase).

- "Phase 1" The first phase of the Litigation was simply a public records suit filed in October 2010 by Alaska Dispatch, joined by other news organizations, against the Fairbanks North Star Borough. The news organizations sought access to Borough records relating to Miller's tenure there as an assistant borough attorney. Their interest in these records arose from Miller's candidacy for Alaska's US Senate. Because of opposition from Miller, the Fairbanks North Star Borough did not release public records that he claimed should be kept confidential. Alaska Dispatch was forced to sue to obtain these records. Miller intervened to try and keep the public from learning before the election about misconduct he had engaged in before he became a candidate. He was unsuccessful in

his attempt to conceal what he had done.¹⁰ The judge assigned to the case found his arguments to be without merit, and, after an in camera review, ordered the public release of the documents at issue. The documents revealed that a couple years earlier, while working as a lawyer for the Borough, Miller had snuck onto the computers of his legal department co-workers while they were out to lunch, in order to rig a political poll Miller was conducting to help himself oust the Republican Party's chairperson. Miller accidentally deleted work-in-progress, passwords, or other materials from his colleague's computers in trying to cover his tracks, and then repeatedly lied about the incident until his misconduct was revealed.¹¹ Miller chose not to appeal the ruling that the documents were public and should have been disclosed under the state's public records laws. The documents were disclosed on October 26, 2010. A few weeks later, Miller lost the general election to the incumbent Republican US Senator, Lisa Murkowski, who ran as a write-in candidate after Miller defeated her in the primary. The portion of the underlying litigation having to do with the plaintiffs' public records request was over by October 26, 2010. The election campaign was over soon after Miller was defeated in the general election in November 2010.

• *"Phase 2"* Since the public records the suit was filed to obtain had been released, and Miller's Senate campaign was over, it appeared that the litigation should also be over. However, half a year later Miller declared his intention to pursue personal claims he had filed to recover money from his former employer and the Borough's former mayor (who was not a party to the case until Miller brought him in by filing tort claims against him because he thought the mayor had caused some of his troubles by talking with the press). Miller's claims were made through a cross-claim and third-party claim asserted when he entered the case. Both the court and Miller recognized that this second phase of the litigation involved no claims by or against the news media that had pursued public records in the initial phase.¹²

¹⁰ Miller made a number of formal admissions in the litigation in response to discovery requests from the Borough, including that he knew when he declared his candidacy for US Senate in 2010 that members of the public would be interested in his background, education, life history, employment experience, and employment history, and that voters have a right to know about each of these things. He admitted to workplace misconduct, to being dishonest about this misconduct, and to being disciplined for this misconduct. He further admitted that he agreed voters should have a right to know if a candidate for the US Senate was dishonest when questioned during a workplace investigation, and that he agreed that voters should have a right to know if a candidate for the US Senate was disciplined by an employer as a result of admitted workplace misconduct. And, he admitted that he had told others that he was not eligible for rehire with the FNSB and that he had been disciplined by his former employer, the Borough.

¹¹ Miller was disciplined at the time, but continued to work for the Borough. He resigned from his employment with the Borough in September 2009, and was no longer employed there when he announced his candidacy for US Senate in April 2010.

¹² See, e.g., Intervenor Joseph Miller's October 22, 2012, Opposition to Alaska Dispatch's Motion for Attorney Fees, (at 3-4), in which Miller argued against awarding Alaska Dispatch attorney fees for the second portion of the lawsuit, noting to the court that "After the documents were released by the FNSB on October 26, 2010, the litigation continued on only Mr. Miller's cross-claims and third-party claim against FNSB and Mr. Whitaker," to which Alaska Dispatch "was never a party." Miller underscored this by pointing out that when he first filed his cross-claims against the

The primary question presented by AOR 2013-11 would seem to involve only these "Phase 2" claims, and whether Senate campaign funds can be used in connection with Miller's prosecution of those personal claims seeking money.¹³

Specifically, Miller's Cross-Claim against his former employer, the Fairbanks North Star Borough ("Borough"), Mr. Miller asserted two counts, both seeking money from the Borough. The first was a claim for tort damages, the second for indemnification. ("The present claims by [news media] Plaintiffs against Intervenor [Miller] arise out of his employment with the Fairbanks North Star Borough and therefore the Borough is required to fully indemnify Intervenor for all fees and costs incurred in defending against Plaintiffs' demands." Miller Cross-Claim, ¶10.) In Phase 2, Miller also moved to file an amended complaint adding a count for breach of the implied covenant of good faith and fair dealing in his employment contract with the Borough, again seeking money damages on this additional theory against his former employer.

Borough and third-party claim against former mayor Whitaker, the Borough moved to sever these claims from the media Plaintiff's claims for records disclosure, and that "On November 4, 2010, the Court denied the FNSB's motion to sever, ordering that: 'Currently it appears to the Court that the documents issue is resolved.'" (Id. at 3.)

¹³ In Phase 1 of the litigation, Miller used campaign funds to voluntarily intervene for the purpose of trying to conceal, or at least prevent timely disclosure of, public records that might affect voters' attitudes by exposing serious misdeeds he committed before declaring his candidacy. It may be that that he should not have used campaign funds for this, and if so even the 35% of the Judgment attributable to this "Phase 1" cannot be paid for now with campaign funds. That is for the FEC to determine. In fairness, however, as noted in an Alaska Dispatch filing made in the state court, counsel for Alaska Dispatch and Miller discussed a couple years ago that one advantage for Miller of informally agreeing to pay Alaska Dispatch the fees to which it was then entitled would have been that Miller did not need to risk getting an adverse ruling on this question. This conversation, affirmed in a declaration submitted with the aforementioned superior court filing, occurred in the context of Miller's counsel trying to discourage Alaska Dispatch from pursuing its right to recover fees, in part by arguing that FEC law might not allow even these "Phase 1" fees to be paid from campaign funds. No one at the time sought or obtained a formal FEC Advisory Opinion about the propriety of using campaign funds to pay legal expenses associated with the pre-election litigation in this case. That said, undersigned counsel for Alaska Dispatch did obtain informal "advice" from the FEC to the effect that use of campaign funds to pay for fees and costs incurred by either side in the pre-election portion of the case would have been appropriate, while payment of legal fees and costs to either side from campaign funds in the post-election portion of the case most likely would not be. Either portion of this informal advice could be wrong, of course, and could not be relied upon as would have been the case had a formal AO been sought. However, given that counsel for Alaska Dispatch discussed this matter with Miller's litigation counsel, and believes both sides were operating on the same assumptions with respect to this, Alaska Dispatch is not going to take a different position now as to the propriety of using campaign funds to pay for the 35% of the Judgment attributable to the campaign-related, pre-2011 portion of the case. (And it is happy to be paid the other 65% from campaign funds, if that is what Miller prefers to do, so long as the FEC says this is legal.)

Various filings by Miller indicate that these personal claims did not directly relate to his Senate campaign. The following are a sampling of numerous examples:

- Miller opposed the Borough's summary judgment motion on the indemnification claim by arguing:

The claim must necessarily arise out of Miller's employment with the Borough. Miller could have run for Senate without ever having worked for the Borough, and that occurrence alone would not have generated the issues presently before this Court. The mere existence of his political campaign is in no way dispositive of the issue. By contrast, there are other potential reasons why the newspaper might have asked for a Borough employee's reconia, completely unrelated to any political campaign.

See September 19, 2011 Miller Opposition to Borough Summary Judgment Motion on Cross Claim for Indemnification, at 8.

- "The Borough alleges in its Motion for Summary Judgment that the public records request triggering this litigation arose out of Mr. Miller's U.S. Senate Campaign, not Mr. Miller's good faith performance of his employment duties as a Borough employee. ... What the Borough fails to appreciate is the [news media's] claims exclusively 'arise' out of Mr. Miller's employment with the Borough because those claims are for the release of employment records created and maintained by the Borough during that time period. The time of the occurrence at issue is the time of creation of Mr. Miller's employment record, and therefore the [news media's] claim arises directly out of Mr. Miller's employment with the Borough." (*Id.* at 11-12.)
- In his April 18, 2012, Opposition to (former FNSB Mayor) Jim Whitaker's Motion to Dismiss Third-Party Complaint, Miller argues:

"(A)ny and all parties who played a part in either challenging Mr. Miller's right to privacy or violating it illegally in their quest to make his borough personnel records a part of the public discussion during his candidacy should be a party to this litigation." (at 26) He also asserts: "Therefore exhaustion of administrative remedies is not a defense in this action, because Mr. Miller is making a claim in tort against an individual who violated both Mr. Miller's constitutional rights as well as borough code, not against an agency based on that agency's decision making process." (*Id.* at 28) And, "Furthermore, even if Mr. Miller filed an ethics complaint against Mr. Whitaker, the Borough does not have authority to award Mr. Miller damages to remedy the tortious harm caused by the former Mayor's violation of Mr. Miller's privacy interests." (*Id.* at 29).

- In his May 3, 2012, reply to the Borough's Objection to Proposed Amended Answer, Cross-Claim and Third Party Claim, Miller argues for his breach of implied covenant of good faith and fair dealing claim by asserting (at 13-14):

"The true nature of the issue in contention" is "basic contract law. What promises were made, which ones were kept, which were not, and who was damaged in the process. To say that no issues related to unfulfilled promises made as part of a *prior* employment relationship can be litigated at a later time is a position which is not supported by Alaska law" (Emphasis in original).

• In its May 17, 2012, Reply to Miller's Opposition to Motion to Compel, the Borough asserts (at 3):

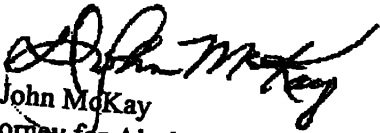
"(Miller) cannot be indemnified for legal fees his campaign paid and he cannot be indemnified for fees his campaign spent on prosecuting his personal cross-claims. FNSB is therefore entitled to know exactly how much Miller himself has spent on legal fees and the amount for which he claims he should be indemnified. FNSB repeatedly requested this discovery. Miller said he would produce it and failed to follow through."

The Borough asserted in its April 24, 2012, memorandum in support of motion to compel discovery, *inter alia*, that Miller should be required to provide copies of FEC reports, which Miller had claimed neither he nor entities associated with him had: "Miller's FEC forms will establish exactly how much of his legal fees were paid by his campaign. Fees paid by the campaign are not subject to indemnification (and, more important, should not be used at all to pay for Miller's personal claims.)" (at 26) Miller gave incomplete and evasive answers to discovery requests from the Borough seeking information about what he or his campaign had spent on the Litigation and the source of such funds. Among other things, he claimed that neither he nor entities acting on his behalf had documents reflecting payment to legal counsel for the Litigation, or copies of reports filed with the FEC relating to his 2010 Senate campaign, or other campaign-related information. The judge noted shortly before Miller settled with the Borough and Whitaker that as Miller's campaign was not a party to the Litigation, his claims for indemnity could only be for what he was claiming he was owed personally. Miller settled his personal claims against his former employer, and his personal injury claim against the former Borough mayor, for a nuisance amount within days after the judge ordered him to disclose information about his attorney fees, including who was paying them, and whether his campaign was involved. That information had long been requested by the Borough through discovery, and does not appear to be available in FEC or other public databases. Nowhere in the record of the Litigation does Miller appear to take issue with or rebut the Borough's position that his cross-claims against the Borough were "personal" claims of Miller that could not be paid for with campaign funds.

Alaska Dispatch appreciates the FEC's consideration of the foregoing facts. If you need further or corroborating information and documents, feel free to contact undersigned counsel. We look forward to the Commission's prompt determination as to what, if any, percentage of the Judgment or other legal fees and costs associated with the Litigation may be paid for with Senate campaign funds, and to the Commission's guidance on the related questions noted above.

Thank you.

Sincerely,


D. John McKay
Attorney for Alaska Dispatch, LLC

DJM/jd

cc: William J. Olson
Attorney for Citizens for Joe Miller
Thomas Wickwire
Attorney for Joe Miller
Gregory Fisher
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