

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

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|---|---|------------------------------------|
| In the Matter of: |) | |
| |) | |
| Taotao USA, Inc., |) | Docket No. CAA-HQ-2015-8065 |
| Taotao Group Co., Ltd., and |) | |
| Jinyun County Xiangyuan Industry Co., Ltd. |) | |
| |) | |
| Respondents. |) | |

**MOTION FOR ADDITIONAL DISCOVERY
THROUGH REQUESTS FOR PRODUCTION OF DOCUMENTS
AND INTERROGATORIES**

The Director of the Air Enforcement Division of the U.S. Environmental Protection Agency’s Office of Civil Enforcement (“Complainant”) files this Motion for Additional Discovery Through Requests for Production of Documents and Interrogatories (“Motion”). Complainant seeks discovery from the respondents in this proceeding, Taotao USA, Inc. (“Taotao USA”), Taotao Group Co., Ltd. (“Taotao Group”), and Jinyun County Xiangyuan Industry Co., Ltd. (“JCXI”) (collectively “Respondents”) relating to the following: (1) information about the economic benefit Respondents received from noncompliance that Complainant previously requested by letter on November 21, 2016, and which Respondents indicated they would provide once liability in this Proceeding was established; and (2) information necessary to assess the reliability of assertions made in an expert report on economic benefit and ability-to-pay that Respondents filed as a supplement to their prehearing exchange. Complainant’s counsel has conferred with Respondents’ counsel, who has indicated that Respondents oppose this Motion.

I. Applicable Authority

The Consolidated Rules of Practice provide that after the prehearing exchange of information, a party may move for additional discovery. 40 C.F.R. § 22.19(e)(1). The motion for discovery shall specify the method of discovery sought, provide the proposed discovery instruments, and describe in detail the nature of the information and/or documents sought. *Id.* The Presiding Officer may order additional discovery if it:

- (i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;

(ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and

(iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

Id.

II. Grounds for Motion

a. Complainant's Discovery Requests Seek Specific Information that Has Significant Probative Value on Disputed Issues of Material Fact Relevant to Penalty.

Complainant's Discovery Requests sought by this Motion are specifically tailored to seek information that is highly probative of disputed issues concerning the reasonableness of Complainant's economic benefit penalty calculation. Further, Complainant's Discovery Requests seek information needed to assess the reliability of statements and assumptions made in an expert report on economic benefit and ability-to-pay submitted by Respondents in their prehearing exchange. The description, bases for, and probative value of Complainant's Discovery Requests are described in detail as follows:

i. The Discovery Request Based Upon Complainant's November 21, 2016 Request for Information Are Highly Probative of Respondents' Economic Benefit from Noncompliance (Request 1).

In their initial Joint Prehearing Exchange, Respondents challenged Complainant's proposed assessment of penalty associated with economic benefit from noncompliance. Respondents' Joint PHX at 7. Particularly, Respondents challenged Complainant's use of a rule-of-thumb formula from the Agency's Clean Air Act Mobile Source Penalty Policy – Vehicle and Engine Certification Requirements ("Penalty Policy"). *Id.* However, in their initial Joint Prehearing Exchange, Respondents cited no evidence and provided no exhibits supporting their challenge.

In response to Respondents' challenge to Complainant's proposed economic benefit penalty calculation, Complainant, in a letter to Respondents dated November 21, 2016, requested that Respondents provide documents and information in Respondents' possession or control concerning the economic benefit Respondents obtained through noncompliance. CX174.

The information requested in Complainant's November 21, 2016 letter requested the Respondents provide the following information relating to vehicles identified in the Amended Complaint: (a) the revenue, cost, profit, and taxable income information as to manufacture and

sale of vehicles¹; (b) information relating to what Respondents' estimated revenue, cost, profit, and taxable income information if each vehicle had been equipped with a catalytic converter that met design specifications for such catalysts; (c) the amount it cost Taotao Group to purchase and install catalytic converters on two vehicles (identified by VIN number); and (d) United States market share information for Respondents' on-highway motorcycles and all-terrain vehicles for the period from 2012 to 2016. *Id.*

In response to Complainant's November 21, 2016 letter, Respondents declined to provide any information at that time that was responsive to Complainant's requests. CX181 at 4 to 7. In their response, Respondents did indicate, however, that they planned to provide information responsive to Complainant's requests relating to revenue, cost, taxable income information as to manufacture and sale of vehicles if, and when, liability was established. *Id.* at 4, 6 ("Respondents will supplement the information if, and when, liability is established"). However, to date, Respondents have not provided the requested information.

In their First Motion to Supplement the Prehearing Exchange filed June 16, 2017, Respondents submitted an expert report prepared by Jonathan Shefftz ("Shefftz Report"), which provides Mr. Shefftz's opinion as to an alternative methodology for assessing economic benefit using various estimates of Respondents' avoided costs arising from the Clean Air Act ("CAA") violations found in the Presiding Officer's May 3, 2017 Order on Partial Accelerated Decision and Related Motions. *See* RX05 (the Shefftz Report). The Shefftz Report did not address Complainant's request for information letter dated November 21, 2016. Respondents also submitted a set of exhibits that comprised a disparate collection of reports, invoices, tables, and other documents, many written partially or completely in Chinese (RX014, RX015). Complainant notes that RX014 appears to contain invoices relating to cost of catalytic converters, and that RX015 appears to contain invoices and tables relating to catalytic converter costs. RX014 documents are entirely in what Complainant assumes is Chinese. RX015 contains invoices in Chinese, tables in Chinese, and several tables in English. Without further information, Complainant can only speculate as to the documents' relevancy to this matter, and cannot in any way make a meaningful evaluation.

Given that the penalty hearing in this Proceeding is set for mid-October, Complainant is foregoing its attempt to obtain much of the information originally requested from Respondents in November 2016, and instead is seeking discovery on gross profit, cost of goods, net revenue, cost, taxable income, and net income from the importation and/or sale of noncompliant vehicles by Taotao USA (Discovery Request 1). This information has significant probative value relating to the economic benefit obtained through the importation and sale of the uncertified vehicles identified in the Amended Complaint, and is further relevant to assessing reasonableness of the proposed penalty and its potential impact on Respondent's ability to continue in business.²

¹ The November 21, 2016 letter specifically requested as to Taotao Group and JXCI, the revenue, cost and profit information as to manufacture and sale of vehicles, and as to Taotao USA, the revenue and taxable income information as to sale of vehicles. The intention in both instances was to seek the bottom line of net income of both the Chinese companies and Taotao USA relating to the manufacture and sale of vehicles in violation in the Amended Complaint.

² Information regarding annual profits from Taotao USA's vehicle sales and importation business is clearly relevant to Taotao USA's ability to continue in business.

The importance of profits in consideration of economic benefit is addressed in the Penalty Policy. In discussing the rule-of-thumb estimate for economic benefit, the Penalty Policy notes that the economic benefit that results from the sale of uncertified vehicles or engines may have elements of both avoided costs and “Beyond BEN benefit” or “BBB.” Penalty Policy at 7. The Penalty Policy describes BBB as benefits that are not the result of avoided or delayed costs, but which reflect the benefits to the violator from business transactions that would not have occurred but for the illegal conduct, and/or the competitive advantage the violator obtained in the marketplace as compared to companies that have complied with the motor vehicle emission control laws and regulations. *Id.* The Penalty Policy provides that to adequately remove the economic incentive for violations that include BBB, normally it is appropriate to base the economic benefit component on the net profits from the improper transactions, *i.e.*, the amount the violator’s profits from the sale of uncertified vehicles or engines exceeded the amounts that would have resulted if the party had sold certified vehicles or engines. *Id.* Moreover, the Penalty Policy recognizes that it may be appropriate under the circumstances to treat the gross proceeds from the sale of noncompliant products as the measure of economic benefit. *Id.* n.9. The Penalty Policy further indicates that the BEN methodology is not designed to calculate BBB. *Id.* Thus, case-specific information concerning benefits Respondents obtained through the illegal activity at issue in this case is key to a robust consideration of BBB, which Discovery Request 1 is designed to obtain.

As Complainant has noted in its prehearing exchange, Complainant, using the relevant EPA Penalty Policy, applied a rule-of-thumb estimate of economic benefit valuation of \$15 per violating vehicle. *See* Complainant’s Initial Prehearing Exchange and Fourth Motion to Supplement the Prehearing Exchange. Complainant used the Penalty Policy’s rule-of-thumb estimate for economic benefit in lieu of calculating economic benefit through application of company-specific data, as such data was not available to Complainant.³ Respondents have challenged Complainant’s economic benefit calculation, but to support their challenge have only produced the Shefftz Report, which assesses economic benefit only through the narrow lens of application of the BEN model.⁴ Respondents have not addressed BBB either in the Shefftz Report or elsewhere in their prehearing exchange. Thus, information obtained from Respondents on vehicle costs and profits will supply the record for this Proceeding with information necessary to appropriately consider and quantify BBB in this case.

- ii. The Discovery Requests Seek Information Needed to Assess the Validity and Reliability of Data Relied Upon by Jonathan Shefftz in the Preparation of His Opinion and Expert Report.

The Shefftz Report states that Mr. Shefftz “reviewed numerous documents in the public docket, discussed certain aspects of the case with legal counsel for Respondents, conducted independent research for various economic inputs, and reviewed additional documents provided by Respondents as cited” when preparing the Report. RX004 at 4. However, the only document

³ The Penalty Policy explains that the rule of thumb is appropriate to use when information regarding the actual economic benefit is not available. Penalty Policy at 4

⁴ In the Shefftz Report, Mr. Shefftz indicates that he used an economic benefit calculation methodology that is the same approach that the U.S. EPA’s BEN model employs. Shefftz Report at 7.

from Respondents cited in the Shefftz Report is an Addendum titled “Spreadsheet provided by Respondents relied upon for Table 6, specifically ‘cost of catalyter’ [sic] and ‘price of coc ratios’ columns.” *Id.* at 18–19. Thus, Complainant is requesting the production of all documents that Mr. Shefftz considered or relied upon in developing his opinion. This includes documentation with respect to catalytic converter costs and pricing, which is a key element underlying Mr. Shefftz’s opinion on economic benefit (Discovery Request 2). Complainant further requests information relating to communications Mr. Shefftz had with personnel or representatives of Respondents relevant to the factual assertions and opinions made the Shefftz Report (Discovery Request 3); the production of spreadsheets in electronic, native, unlocked format that were used to develop the tables included in or referred to by Shefftz Report (Discovery Request 4); documents and communications considered or relied upon to develop the “coc ratio” column in an addendum table included in the Shefftz Report (Discovery Request 5); descriptions in English of information conveyed by documents in Respondents’ prehearing exchange at RX014 and RX015, which are written in part in Chinese and in part in English but are potentially relevant to the development of Mr. Shefftz’s economic benefit calculation (Discovery Request 6); a description of the business or other relationships Respondents have with the catalytic convertor supplier, Nanjing Yingsi Weier, that is identified in RX015 (Discovery Request 7); and information with respect to catalytic converter suppliers other than Nanjing Yingsi Weier and price quotes Respondents may have received concerning compliant catalytic converters (Discovery Request 8). This information will allow both Complainant and Presiding Officer to fully assess the weight and reliability of the factual assertions, data, and opinions included in the Shefftz Report.

b. The Discovery Requests Will Neither Unreasonably Delay the Proceeding nor Unreasonably Burden the Respondents.

Respondents were apprised of Complainant’s information requests associated with Discovery Request 1 in November 2016 and indicated to Complainant at the time that they would provide responsive information on gross profit, cost of goods, net revenue, cost, taxable income, and net income once liability has been established. CX181 at 4, 6. Respondents should therefore be able to provide such information. Respondents stated they would provide cost of catalytic converter information once sales receipts and invoices are located. CX181, at 5. This Motion and Discovery Requests merely seeks to hold Respondents accountable with respect to Respondents’ prior responses and representations made therein. All of Complainant’s Discovery Requests are tailored to obtain information related to key issues associated with Respondents’ economic benefit that should have already been researched by Respondents or are already readily available to them. The Discovery Requests call for Respondents to provide responses to the Requests no later than September 22, 2017, or another date ordered by the Presiding Officer, which provides more than four weeks from the date of this Motion for Respondents to compile their responses. Thus these Discovery Requests will not provide an undue burden to Respondents nor delay the Proceeding.

- c. The Information Sought is Most Reasonably Obtainable from Respondents and Respondents Have Refused to Provide Such Information Voluntarily.

The information requested is not ascertainable but from Respondents. Respondents' counsel has objected to the filing of this Motion.

III. Requested Relief.

Complainant respectfully requests that the Presiding Officer issue an order directing the Respondents in this matter to respond to the interrogatories and requests for production of documents filed and served as Attachment A to this Motion. The interrogatories and requests for production of documents are specifically tailored to address the highly probative issues of the appropriateness of the economic benefit penalty sought by Complainant and assessing the veracity and reliability of the Shefftz Report. Directing Respondents to respond to the interrogatories and requests for production of documents will neither unreasonably delay this proceeding nor unreasonably burden the Respondents. Finally, the Discovery Requests seek information that is most reasonably obtained from Respondents.

For the foregoing reasons, Complainant requests that the Presiding Officer order Respondents to respond to the Interrogatories and Requests for Production of Documents filed and served as Attachment A to this Motion. Complainant requests that Respondents be required to serve and to file their responses on a rolling basis as information becomes available, with a final due date not later than by September 22, 2017.

Respectfully Submitted,

8/25/17

Date



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**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of:)
)
Taotao USA, Inc.,) **Docket No. CAA-HQ-2015-8065**
Taotao Group Co., Ltd., and)
Jinyun County Xiangyuan Industry Co., Ltd.)
)
Respondents.)

**MOTION FOR ADDITIONAL DISCOVERY THROUGH
REQUESTS FOR PRODUCTION OF DOCUMENTS AND INTERROGATORIES
ATTACHMENT A**

Pursuant to 40 C.F.R. § 22.19(e) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, Complainant hereby propounds these Interrogatories and Requests for Production of Documents to respondents Taotao USA, Inc. (“Taotao USA”), Taotao Group Co., Ltd. (“Taotao Group”), and Jinyun County Xiangyuan Industry Co., Ltd. (“JCXI”) (collectively “Respondents”). Complainant requests that the full and complete answers, in writing and sworn or certified under penalty of law, be served on Complainant’s counsel and filed via email with the U.S. Environmental Protection Agency’s Office of Administrative Law Judges by September 22, 2017.

GENERAL INSTRUCTIONS

1. Format and Service. Produce all information in conformance with 40 C.F.R. Part 22 and the Presiding Officer’s Orders pertaining to service. Provide all spreadsheets in electronic format. Provide all narrative responses in English. Responsive Documents that are not in English should be translated into English, and provide a copy of both the untranslated and translated documents. Label sales receipts and invoices in a manner that identifies the relevant engine family. For each document produced, provide the number of the request(s) to which it responds. Where a response includes a quantity with units of measure, specify the units of measure.

2. Certification. Respondents shall accompany their responses to these Discovery Requests by a signed State of Certification certifying the truth and completeness of each response in the format provided under Attachment B to Complainant’s Motion for Additional Discovery Through Interrogatories and Requests for Production of Documents.

3. Ambiguities. If, in responding to these Discovery Requests, Respondents encounter any ambiguities when construing a request, interrogatory, or definition, the response shall set forth the matter believed to be ambiguous and the construction used in responding.

4. Scope of Discovery Requests. These Discovery Requests are directed to the above-named Respondents and cover all information in Respondents' possession, custody, or control. Unless otherwise noted that the Request seeks information dated at or created or during any other time, these Discovery Requests seek information dated or created starting on January 1, 2011 and continuing through the present.

5. Entire Documents. If a portion of any Document is responsive to any request, produce the entire Document, including all appendices, tables, and attachments.

6. Documents Already Produced: If a Request calls for the production of a Document that has already been produced to Complainant or is in the prehearing exchanges, in lieu of producing the Document again, Respondents may identify such Document has been produced, and provide information sufficient for Complainant to identify and locate such Document. If such Document previously provided was written in Chinese, provide an English translation.

7. Documents Withheld. Whenever Respondents withhold from production a Document that is responsive to these Discovery Requests, provide the following information.

- a. If Respondents are withholding the Document under a claim of privilege (including without limitation the work product doctrine), provide the information set forth in Fed. R. Civ. P. 26(b)(5), including the type, general subject, and date of the Document, and such other information as is sufficient to identify the Document, including, where appropriate, the author, addressee, custodian, and any other recipient of the Document, and where not apparent, the relationship of the author, addressee, custodian, any other recipient to each other, in a manner that, without revealing the information claimed to be protected, will enable the Complainant to assess the applicability of the privilege or protection claimed.
- b. If Respondents are withholding a Document for any reason other than a claim of privilege, state the reason(s) for withholding.

8. Singular/Plural. Words used in the plural shall also be taken to mean and include the singular. Words used in the singular shall also be taken to mean and include the plural.

9. Verbs. All verbs shall be construed to include all tenses.

10. Confidential Business Information ("CBI"). You are entitled to assert a business confidentiality claim covering all or part of the information you submit in response to this letter, in accordance with the procedures described in the CBI regulations, 40 C.F.R. Part 2, Subpart B. To assert a business confidentiality claim, Respondents must place on (or attach to) all information asserted as business confidential either a cover sheet, stamped or typed legend, or other suitable form of notice employing language such as "confidential business information" at the time Respondents submit the response.

DEFINITIONS

1. “All” or “any” shall mean “any and all” and shall be all inclusive.
2. The words “and” and “or” shall be construed conjunctively or disjunctively as necessary to make the request inclusive rather than exclusive.
3. “Consultant” means any person who has advised Respondents or who has acted as agent on behalf of Respondents, whether or not for consideration.
4. “Respondents” means Taotao USA, Inc., Taotao Group Co., Ltd., and Jinyun County Xiangyuan Industry Co., Ltd., and includes, without limitation, Respondents’ officers, employees, agents, servants, representatives, counsel, consultants, contractors, experts, subcontractors or other persons directly or indirectly employed by Respondents or anyone else, past or present, acting on behalf of or otherwise subject to Respondents’ control.
5. The terms “Document” and “Documents” are defined to be synonymous in meaning and equal in scope to the usage of the term “Documents” in Fed. R. Civ. P. 34(a) and include(s) the term “writing” and electronically stored information (“ESI”). The terms “writings,” “recordings,” and “photographs” are defined to be synonymous in meaning and equal in scope to the usage of those terms in Fed. R. Evid. 1001. A draft or non-identical copy is a separate Document within the meaning of the term “Document.”
6. “Person” means the plural as well as the singular, and shall include without limitation, individuals, associations, partnerships, and corporations or other form of legal entity.
7. “Relate” or “relating” means discuss, describe, refer to, reflect, contain, analyze, study, report on, comment on, evidence, comprise, constitute, set forth, consider, recommend, concern, depict, describe, or allude to.
8. “Certificate of Conformity” or “COC” shall mean the certificate issued by EPA under section 206 of the Act, 42 U.S.C. § 7525.
9. “Taotao USA” shall mean Respondent Taotao USA, Inc.
10. “Taotao Group” shall mean Respondent Taotao Group Co., Ltd.
11. “JCXI” shall mean Respondent Jinyun County Xiangyuan Industry, Co., Ltd.
12. “Shefftz Report” shall mean the expert report prepared by Jonathan S. Shefftz and provided in Respondents’ prehearing exchange for this Proceeding.

DISCOVERY REQUESTS

1. For each engine family identified in Counts 1 through 10 of the Amended Complaint, for vehicles imported or sold by Taotao USA, provide the following values, by year, from 2011 through 2015:
 - (a) Gross profit from vehicles sold;
 - (b) Cost of goods sold;
 - (c) Net revenue from vehicles sold;
 - (d) Other income associated with importing vehicles;
 - (e) Total income associated with vehicles;
 - (f) Deductions associated with vehicles;
 - (g) Taxable income associated with vehicles;
 - (h) Tax owed associated with vehicles;
 - (i) Tax overpayment associated with vehicles.
 - (j) Net income.
2. Produce all Documents that Mr. Shefftz considered or relied upon in preparation of the Shefftz Report or his expected opinion testimony, including but not limited to documents Mr. Shefftz considered or relied upon relating to catalytic converter costs and pricing information.
3. Identify any officer, manager, staff, Consultant, or other agent of Respondents that Mr. Shefftz communicated with in development of his opinion for this case or considered in the preparation of his report. Describe in detail all communications provided to Mr. Shefftz relating to catalytic converter costs and pricing information. For each such person identified, describe in detail the information that was conveyed to Mr. Shefftz.
4. Produce all spreadsheets in electronic, native, and unlocked format that were developed or prepared to publish the tables in the Shefftz Report. In addition, produce the spreadsheet in electronic, native, and unlocked format that is entitled "Penalty/Catalytic Converter Chart" (RX016).
5. Produce all Documents considered or relied upon by Respondents and fully specify and relate all communications between Respondents or Respondents' Consultants and catalytic converter suppliers conducted to prepare the values in the "price of coc ratio" columns in the table included in "Addendum: Spreadsheet provided by Respondents relied upon for Table 6, specifically "cost of catalyster" (sic) and "price of coc ratio" columns" in the Shefftz Report.
6. With regard to the untranslated Documents written in Chinese that are included in Respondents' prehearing exchange (RX014 and RX015), identify, describe and explain with particularity, by page, the specific information conveyed in each Document, and explain how the Documents correlate to each other. Identify the origin of each such Document and specify in detail the information from the Documents that were considered for the preparation of the Shefftz Report.

7. Describe existing business or other relationships Respondents have with Nanjing Yingsi Weier.
8. For the period of January 1, 2015 to the present, identify all catalytic converter suppliers contacted by Respondents or Respondents' Consultants for pricing quotes associated with catalytic converters that meet specifications identified in Respondents' application for COCs and/or requirements for meeting vehicle certification compliance with COCs, and for each such catalytic converter supplier, describe the catalytic converter specifications provided to the supplier for the price quote and the price quote the supplier has provided to Respondents or Respondents' Consultants. Produce all Documents related to communications between Respondents or Respondents' Consultants and each such supplier relating to the price quote.

Respectfully Submitted,

8/25/2017

Date



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**UNITED STATES
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)
Respondents.)

**MOTION FOR ADDITIONAL DISCOVERY THROUGH
INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS
ATTACHMENT B**

Statement of Certification

You are submitting the enclosed responses and Documents in response to Complainant's Motion for Additional Discovery Through Interrogatories and Requests for Production of Documents filed In the Matter of: Taotao USA, Inc., Taotao Group Co., Ltd., and Jinyun County Xiangyuan Industry Co. Ltd.

I certify that I am fully authorized by _____ [corporate affiliation] to provide the above information on its behalf to EPA.

I certify under penalty of law that I have examined and am familiar with the information in the enclosed documents, including all attachments. Based on my inquiry of those individuals with primary responsibility for obtaining the information, I certify that the statements and information are, to the best of my knowledge and belief, true and complete. I am aware that there are significant penalties for knowingly submitting false statements and information, including the possibility of fines or imprisonment pursuant to 18 U.S.C. §§ 1001 and 1341.

Date: _____

Name (Printed): _____

Signature: _____

Title: _____

CERTIFICATE OF SERVICE

I certify that the foregoing Motion for Additional Discovery Through Interrogatories and Requests for Production of Documents in the Matter of Taotao USA, Inc., et al., Docket No. CAA-HQ-2015-8065, was filed and served on the Presiding Officer this day through the Office of Administrative Law Judge's E-Filing System.

I certify that, with Respondents' counsel's consent, an electronic copy of this Response was sent this day by e-mail to the following e-mail addresses for service on Respondents' counsel: William Chu at wmchulaw@aol.com, and Salina Tariq at stariq.wmchulaw@gmail.com.

8/25/17

Date

MJP

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