

**BEFORE THE  
INTERNATIONAL CENTRE FOR SETTLEMENT OF  
INVESTMENT DISPUTES**

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**RAILROAD DEVELOPMENT CORPORATION**

**Claimant**

**v.**

**THE REPUBLIC OF GUATEMALA**

**Respondent**

**ICSID Case No. ARB 07/23**

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**CLAIMANT'S REQUEST FOR SUPPLEMENTATION AND  
RECTIFICATION OF AWARD**

**10 August 2012**

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## CLAIMANT'S REQUEST FOR SUPPLEMENTATION AND RECTIFICATION OF AWARD

### I. INTRODUCTION AND SUMMARY OF ARGUMENTS

1. Pursuant to and in accordance with Article 49(2) of the ICSID Convention and Rule 49 of the ICSID Arbitration Rules, Claimant Railroad Development Corporation respectfully submits its request for supplementation and rectification of the award rendered on June 29, 2012 in *Railroad Development Corporation (RDC) v. Republic of Guatemala*, ICSID Case No. ARB/07/23 (the “Award”).

2. Article 49(2) of the ICSID Convention provides that

The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide any question which it had omitted to decide in the award, and shall rectify any clerical, arithmetical or similar error in the award.

3. The purpose of a supplementary decision under Article 49(2) is to provide a remedy for questions that were put before the Tribunal during the proceedings on the merits but were not addressed or decided in the Award.<sup>1</sup> In order to warrant a supplemental decision, the omitted questions must concern an issue that materially affects the award.<sup>2</sup> Examples of such material questions would include the inadvertent omission of an item in the calculation of damages or of a factor determining costs.<sup>3</sup>

4. Article 49(2) further states that the Tribunal “shall rectify any clerical, arithmetical or similar error in the award.” Thus, whereas a supplemental decision under Article 49(2) is discretionary, the rectification of any error in the award is obligatory.<sup>4</sup> Typical errors which are subject to rectification include computational errors with respect to set-off, interest and cost allocation calculations.<sup>5</sup>

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<sup>1</sup> **CL-189**, *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Claimant’s Request for Supplementary Decision (8 July 2008), ¶ 13.

<sup>2</sup> **CL-27**, Christoph H. Schreuer, *The ICSID Convention: A Commentary* 853 ¶ 40 (2d ed. 2009).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 853 ¶ 38.

<sup>5</sup> **CL-190**, Maria Hauser-Morel & Jan Heiner Nedden, *Correction and Interpretation of Arbitral Awards and Additional Awards*, POST AWARD ISSUES: ASA SPECIAL SERIES NO. 38. 19, 25 (Pierre Tercier ed., 2011).

5. Claimant's request for supplementation and rectification concerns certain omissions and errors the Tribunal made in quantifying and calculating the compensation it awarded Claimant in the Award. First, with regard to the \$6,576,861 in sunk investment costs the Tribunal awarded Claimant, the Award does not address whether Claimant is entitled to recover a reasonable rate of return on those investment costs from the dates of investment up to the date of Respondent's breach. The Tribunal failed to address this claim even though Claimant presented it to the Tribunal and, notably, the damages experts presented by both parties are in agreement that inclusion of a reasonable rate of return on the amounts invested is necessary to put Claimant back in the same position it would have been absent Respondent's breach. Addressing this claim now is necessary if the Tribunal is to achieve its stated intent "to compensate [Claimant] fully for the injury suffered."<sup>6</sup>

6. Second, the Tribunal made two arithmetical errors in the Award that should be rectified with regard to its award of 82% of the net present value (NPV) of FVG's existing real estate leases measured over their remaining life as of the date of *Lesivo*, less 82% of the actual rents received by FVG from the date of *Lesivo* until payment of the Award. First, the Tribunal miscalculated the NPV of FVG's existing real estate leases to be \$4,121,281.62, when, in fact, the correct amount is \$6,818,865 when the Tribunal's 17.36% discount rate is applied. Second, the Tribunal erred in not using the same valuation methodology for both the additions and set-offs to this head of damages, i.e., the Tribunal failed to apply the same 17.36% discount rate it utilized to determine the NPV of FVG's existing real estate leases to the actual rent amounts received by FVG since the date of *Lesivo*.

## **II. THE AWARD SHOULD BE SUPPLEMENTED TO INCLUDE A REASONABLE RATE OF RETURN ON CLAIMANT'S SUNK INVESTMENT COSTS**

7. In the Award, the Tribunal found that Respondent breached the minimum standard of treatment under Article 10.5 of CAFTA with respect to Claimant's investment. As part of the full reparation for Respondent's breach, the Tribunal determined that Claimant is entitled to recover, *inter alia*, (a) \$6,576,861 on account of its sunk investment in Phases I and II of the railway rehabilitation; and (b) 82% of \$4,121,281.62 (i.e., \$3,379,450.93), which represents the net present value (NPV) of FVG's existing real estate leases measured over their

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<sup>6</sup> Award ¶ 267.

remaining life as of the date of *Lesivo*, less 82% of the rents paid to FVG under such leases post-*Lesivo* until payment by Respondent of the awarded compensation.<sup>7</sup>

8. With regard to the \$6,576,861 in compensation awarded for Claimant's sunk investment costs, the Tribunal did not include or address in the Award a key component in the calculation of this item of damages: a rate of return that should have been applied to Claimant's investment costs from the dates of investment to the date of *Lesivo*. This rate of return should have been factored into the awarded investment costs in order to place Claimant in the same position it would have been absent Respondent's breach.

9. Claimant's claim that it should recover a reasonable rate of return on its sunk investment costs as part of its full reparations was specifically presented by Claimant in its Memorial on the Merits,<sup>8</sup> Reply on the Merits<sup>9</sup> and at the hearing on the merits.<sup>10</sup> The claim was also raised and discussed extensively by both Claimant's and Respondent's damages experts. In his first expert report, Claimant's damages expert, Louis Thompson, opined that the nominal value of Claimant's lost investment should be adjusted forward to its real value as of the date of *Lesivo* by using three possible rates of return: (i) a constant 10 percent interest rate; (ii) the regulatory cost of capital as prescribed by the U.S. Surface Transportation Board (STB) for use in calculating allowable costs in revenue adequacy proceedings; or (iii) the Consumer Price Index in Guatemala.<sup>11</sup> Claimant's discount/interest rate expert, Dr. Shannon Pratt, likewise opined that "[j]ust as the lost profits need to be adjusted for the time value of money so to [sic] do the sunk costs in that they should be adjusted forward to the date of breach."<sup>12</sup> Dr. Pratt thus recommended that, in order to return Claimant to the same financial position it would have been in absent Respondent's breach, the Tribunal gross up the value of Claimant's sunk investment

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<sup>7</sup> Award ¶ 277. The Tribunal also awarded Claimant \$1,350,429 for operating the railroad for another year after the *Lesivo* Resolution, which permitted an orderly closure of the railroad service. This amount is not at issue in this request for supplementation and rectification.

<sup>8</sup> See Memorial on Merits, ¶¶ 185-87.

<sup>9</sup> See Reply on Merits, ¶ 552.

<sup>10</sup> See, e.g., Claimant's Closing Argument, slides 123, 125-26.

<sup>11</sup> Expert Report of L. Thompson ¶¶ 61-64, Table 12.

<sup>12</sup> Expert Report of S. Pratt, p. 12.

costs by a weighted average cost of capital (WACC) of 12.9%, which is the same rate he recommended be applied to Claimant's lost profits/discounted cash flow valuation.<sup>13</sup>

10. Although Respondent's damages expert, Dr. Pablo Spiller, disagreed with the proposed rates of return that Claimant's experts recommended be applied to Claimant's sunk investment costs, Dr. Spiller nevertheless *agreed* with Claimant's experts on the underlying economic concept that, where a compensation award is measured by actual investment costs (also called "net capital contributions (NCC)"), those investment costs "should be brought forward to the date of [breach] at a rate equal to the theoretical return these investments would have had in the absence of the breach."<sup>14</sup> Dr. Spiller explained the economic basis for including an appropriate rate of return on a claimant's net capital contributions in an academic article he co-authored with Dr. Manuel Abdala:

[The net capital contribution] method is based on historic documented figures related to direct investments (in the form of equity or debt) carried out by shareholders of the concession, net of historic distributions (dividends or interests paid out). *The underlying concept is that investors have the right to recover their capital contributions to the firm, making a return equal to the opportunity cost of capital. . . .* To estimate compensation values, it is assumed that investments by shareholders *will provide profitability equal to its expected return*, adjusted by business risk and net of dividend payments, interests and/or other compensations to equity and debt contributions that shareholders might have done before expropriation.<sup>15</sup>

11. Another leading authority on economic damages in international investment arbitration, Mark Kantor, agrees with Dr. Spiller that full compensation for sunk investment costs should also include a rate of return on those costs:

If the arbitral panel determines that, in the circumstances, the proper measure of compensation should be based on recovery of an investor's "sunk investment costs," that calculation comprises two elements: (i) the amount of sums invested;

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<sup>13</sup> *Id.* at p.13. In his rebuttal report, Mr. Thompson adopted and applied Dr. Pratt's recommended 12.9% rate to calculate the real value of Claimant's lost investment through the date of *Lesivo*. See Rebuttal Report of L. Thompson ¶ 6, Table One.

<sup>14</sup> Rebuttal Report of P. Spiller ¶ 30. See also First Expert Report of P. Spiller ¶ 74 ("Unlike the DCF approach, the NCC provides a 'background looking' damages estimate by focusing on the actual contributions made by the investor, *plus an expected return*, minus the actualized value of all cash distributions received by the investors, such as dividends, interest payments, or others.") (emphasis added), ¶ 77 ("the NCC approach . . . imputes a return to invested capital").

<sup>15</sup> **LECG-07**, M. Abdala & P. Spiller, *Damage Valuation of Indirect Expropriation in Public Services*, 14 Am. Rev. Int'l Arb. 457-58 (2003) (emphasis added).

and (ii) *the rate of return to be awarded on the invested sum* from the investment date until the award date.<sup>16</sup> . . . [W]hen a tribunal awards “sunk investment costs” it is seeking to place the investor back in the same position as if the lost investment had never been made (the reliance interest). If that investment had not been made, then the investor would of course have placed the invested sum instead in a different investment, not put the money under its proverbial mattress. The rate of return from the investment date to the award date reimburses the investor for the sums the investor would have earned from the alternative investment during that period of time.<sup>17</sup>

12. Arbitral tribunals have also affirmed this fundamental economic principle. In *Santa Elena v. Costa Rica*, the tribunal noted that “where an owner of property has at some earlier time lost the value of his asset but has not received the monetary equivalent that then became due to him, the amount of compensation should reflect, at least in part, the additional sum that his money would have earned, had it, and the income generated by it, been reinvested each year at generally prevailing rates of interest.”<sup>18</sup>

13. The tribunal in the *Himpurna* case also recognized that, when it comes to measuring damages, awarded sunk investment costs are simply the other side of the coin to future lost profits and, therefore, should be grossed up to the date of breach just as lost profits are discounted to the date of breach:

[Respondent] argues that to make the claimant whole means to return no more than actual amounts expended, without “escalation”. Here again, the argument is vain [sic]. *Just as lost profits must be discounted because the nominal amount of revenues earned in the future have a lesser present value, so it would be untrue to say that the claimant is made whole by awarding amounts today which are nominally identical to those it spent in the past.* This is not a matter of “escalation” in any other sense of the word than pure value maintenance.<sup>19</sup>

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<sup>16</sup> The Tribunal has already awarded Claimant pre-award interest at six-month LIBOR plus two percentage points on its sunk investment costs from the date of the *Lesivo* Resolution (August 25, 2006) to final payment of the Award. Award ¶ 283(4). Thus, the Award need only be supplemented with regard to the rate of return that should be applied to Claimant’s awarded sunk investment costs from the dates of investment to the date of the *Lesivo* Resolution.

<sup>17</sup> **LECG-10**, M. Kantor, *Valuation for Arbitration: Compensation Standards, Valuation Methods, and Expert Evidence*, p. 56 (2008) (emphasis added).

<sup>18</sup> **CL-154**, *Compañía del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award (17 Feb. 2000), ¶ 104.

<sup>19</sup> **CL-146**, *Himpurna Cal. Energy Ltd. v. PT (Persero) Perusahaan Listrik Negara*, 25 Y.B. Comm. Arb. 13 (4 May 1999), ¶ 274.

14. Thus, by failing to include a rate of return on Claimant's \$6,576,861 in sunk investment costs from the dates of investment to the date of *Lesivo*, the Tribunal failed to address and include in the Award a claim that was specifically raised by Claimant and that the parties, their damages experts (including Respondent's own expert), and legal authorities *all* agree should have been awarded to Claimant in order "to compensate it fully" for its lost investment. Accordingly, the Tribunal should supplement the Award to address this claim and award Claimant this fundamental and necessary component of its damages.

15. In terms of what rate of return should be applied to Claimant's sunk investment costs, Claimant submits that the Tribunal should use a 17.36% rate in order to be consistent with the discount rate it employed to determine the NPV of the future income stream of FVG's existing leases. Regardless of what rate of return the Tribunal ultimately chooses to apply, the rate should be compounded for the same reasons the Tribunal awarded compound pre-award interest from the date of *Lesivo*.<sup>20</sup>

16. In order to assist the Tribunal in supplementing the Award, Claimant has prepared **Annex 1**. Annex 1 is an Excel spreadsheet file which sets forth calculations of the escalated value of Claimant's awarded sunk investment costs to the date of *Lesivo* using a range of proposed rates of return. Annex 1 shows that, under the Tribunal's 17.36% WACC rate, Claimant should recover \$14,199,805 in accrued interest on its sunk investment costs. Under the 9.34% "coerced loan" rate, Claimant should recover \$5,894,578 in accrued interest.<sup>21</sup> Finally, if the Tribunal decides to award a rate of return equal to six-month LIBOR plus two (i.e., the same rate it has awarded for the pre-award period after Respondent's breach), Claimant should recover \$3,086,856 in accrued interest.<sup>22</sup>

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<sup>20</sup> See Award ¶ 281.

<sup>21</sup> See Expert Report of S. Pratt, p. 14, Ex. 11. Dr. Pratt's "coerced loan" rate is also consistent with the 10% rate proposed by Mr. Thompson in his first expert report.

<sup>22</sup> Of course, the Tribunal can also choose to use a different rate of return and plug that number into the Annex 1 spreadsheet to determine the amount of accrued interest due Claimant under that rate.



### III. THE TRIBUNAL MISCALCULATED THE NPV OF FVG'S EXISTING REAL ESTATE LEASES AND FAILED TO DISCOUNT THE ACTUAL RENTS PAID TO FVG POST-*LESIVO*

#### A. The Tribunal's Miscalculation of the NPV of FVG's Existing Real Estate Leases

17. As an additional component of Claimant's full reparation for Respondent's breach, the Tribunal awarded Claimant 82% of the NPV of FVG's projected rents from the real estate leases it entered into prior to the *Lesivo* Resolution, less 82% of the actual rents FVG has received from the date of *Lesivo* until Respondent's payment of the Award.<sup>23</sup> Based upon a 12.9% discount rate, Claimant's expert, Mr. Thompson, calculated the NPV of FVG's existing rental income over the remaining 42 years of the Usufruct to be \$10,751,437.<sup>24</sup> The Tribunal, however, found Claimant's 12.9% discount rate to be too low and instead utilized a discount rate of 17.36%.<sup>25</sup> Applying this discount rate, the Tribunal found the NPV of FVG's existing real estate leases to be \$4,121,281.62, 82% of which is \$3,379,450.93.<sup>26</sup>

18. The Tribunal's NPV calculation is erroneous. The correct NPV of FVG's existing lease income using a 17.36% discount rate is **\$6,818,865**, not \$4,121,281.62. The correct NPV can be ascertained through a simple input change to Mr. Thompson's damages model, which is Exhibit 1 to his Rebuttal Report. As discussed above, that model used a 12.9% discount rate/cost of capital to determine the NPV of FVG's existing rental income over the remaining 42 years of the Usufruct. The 12.9% discount rate is set forth in cell B5 of the "Total Claim" spreadsheet of the model. Total Claim cell B5 is linked to, *inter alia*, the NPV formulas set forth in the "Real Estate" spreadsheet, including the NPVs of FVG's existing real estate leases (cells C54 through G54 and cell I54). If the 12.9% discount rate in Total Claim cell B5 is changed in the model to 17.36%, the NPVs of FVG's existing real estate leases in the Real Estate spreadsheet are reduced accordingly to reflect this higher discount rate. The effect of applying the Tribunal's 17.36% discount rate to Mr. Thompson's NPV calculations is as follows:

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<sup>23</sup> Award ¶¶ 277, 283(2).

<sup>24</sup> Reply on the Merits ¶ 520 (citing Rebuttal Report of L. Thompson, Ex. 1 (Real Estate Spreadsheet)).

<sup>25</sup> Award ¶ 274.

<sup>26</sup> Award ¶¶ 277, 283(2).

Easement/Lease	NPV	NPV
	@ 12.90% discount rate	@ 17.36% discount rate
1. Planos y Puntos/Gesur	\$736,675	\$524,423
2. Texaco Guatemala	33,690	24,446
3. Zeta Gas	3,924	2,904
4. Genor	238,099	172,634
5. COBIGUA/Chiquita	8,775,988	5,375,278
6. Short-Term Rentals	963,061	719,180
<b>TOTAL</b>	<b>\$10,751,437<sup>27</sup></b>	<b>\$6,818,865<sup>28</sup></b>

19. Thus, as Mr. Thompson’s model demonstrates, using a discount rate of 17.36%, the Tribunal should have awarded Claimant **\$5,591,469.30** (82% of \$6,818,865) for the NPV of FVG’s existing real estate leases.

**B. The Tribunal Erred by Not Discounting the Actual Rents Received by FVG Since the *Lesivo* Resolution**

20. In addition to correcting its calculation of the NPV of FVG’s existing real estate leases, the Tribunal should also correct the basis for its calculation of the amount that must be deducted from that NPV calculation to determine the actual amount of compensation due Claimant for this item of damage.

21. In the Award, the Tribunal described the deduction that must be made from the NPV of FVG’s existing real estate leases as “82% of the rents paid to FVG under [its existing real estate] leases post-*Lesivo* and until payment by Respondent of the awarded compensation.”<sup>29</sup> Thus, while the Tribunal required FVG’s projected real estate income over the remaining 42

<sup>27</sup> See Rebuttal Report of L. Thompson, Ex. 1 (Real Estate Spreadsheet) (showing NPV values @ 12.90% discount rate/cost of capital).

<sup>28</sup> See **Annex 2**, L. Thompson Real Estate Spreadsheet showing NPV values @ 17.36% discount rate/cost of capital.

<sup>29</sup> Award ¶¶ 277, 283(2).

years of the Usufruct to be discounted at 17.36% to its NPV as of the date of *Lesivo*, it did *not* require that the set-off amount comprised of FVG's actual rental income received since the date of *Lesivo* be similarly discounted to its NPV as of the date of *Lesivo*.

22. The Tribunal's failure to require the discounting of the actual rents received by FVG since the date of *Lesivo* is a computational error. By discounting FVG's projected real estate income over the remaining term of the Usufruct, but not similarly discounting the amount that is to be deducted from this amount, the Tribunal has created an apples-to-oranges calculation, where the plus side of the equation has been valued as of the date of *Lesivo* (August 25, 2006), while the set-off amount – the total actual rental payments received to date – have been valued as of the respective dates the payments were received by FVG from September 2006 to the present.

23. The Tribunal's miscalculation is perhaps best illustrated by the fact that the NPV of FVG's projected rental income includes, *inter alia*, the real estate income FVG has *actually* earned since 2007.<sup>30</sup> Thus, as currently stated in the Award, the calculation of this item of damage discounts on the plus side of the equation the actual real estate income FVG has earned since *Lesivo*, but does not similarly discount *the exact same amounts* on the subtraction side of the equation. By not discounting the set-off amounts, Claimant has been denied full reparation for this item of damage.

24. Indeed, if there is no discounting and the Award is not paid by Respondent until 2015, then the absurd result will obtain that Claimant will likely *owe* Respondent money for this item of damage, as Claimant's share of FVG's actual non-discounted real estate income since the date of *Lesivo* will by then likely *exceed* Claimant's share of the NPV of FVG's lost future real estate income.<sup>31</sup> The Tribunal certainly could not have intended such an incongruous result, where Respondent could potentially *profit from* Claimant's mitigation of its damages.

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<sup>30</sup> See Rebuttal Report of L. Thompson, Ex. 1 (Real Estate Spreadsheet) (showing that the NPV calculation of "FVG Leases Prior to *Lesivo*" includes actual rents paid under such leases from 2007-10).

<sup>31</sup> FVG's total projected non-discounted real estate income from September 2006 through 2015 is \$8,362,382, which exceeds the \$6,818,865 discounted NPV of FVG's projected real estate income over the remaining 42 years of the Usufruct. See **Annex 3**, Non-Discounted Lease Income Spreadsheet.

25. Accordingly, an accurate calculation of the net amount of compensation owed Claimant for its lost future rental income requires that *both* sides to the equation be valued in the same manner, i.e., *as of the date of Lesivo* using the same discount rate of 17.36%. **Annex 3** sets forth a corrected computation of Claimant's net lost rental income as of June 2012 by (i) using the corrected NPV of FVG's existing real estate leases (\$6,818,865); (ii) subtracting the NPV of the rents received by FVG from September 2006 through June 2012 (\$2,146,502); and (iii) calculating Claimant's 82% share of the difference, which results in a total compensation of \$3,831,338 for this item of damage through June 2012.<sup>32</sup>

#### IV. CONCLUSION AND RELIEF REQUESTED

26. For the foregoing reasons, Claimant respectfully requests that the Tribunal grant its request for supplementation and rectification of the Award and grant the following relief:

- a. That the Tribunal supplement the Award to include, as additional compensation to Claimant, a reasonable rate of return, compounded annually, on Claimant's awarded sunk investment costs of \$6,576,861, calculated from the dates of investment to the date of *Lesivo* (August 25, 2006)<sup>33</sup>;
- b. That the Tribunal rectify and amend paragraphs 277 and 283(2) of the Award by correcting its calculation of 82% of the NPV of FVG's existing real estate leases measured over their remaining life as of the date of *Lesivo*, so that Claimant is awarded \$5,591,469.30 rather than \$3,379,450.93; and
- c. That the Tribunal rectify and amend the Award to require that the actual rents received by FVG since the date of *Lesivo* be discounted and valued as of the date of *Lesivo* at a discount rate of 17.36% before this amount is deducted from the NPV of FVG's existing real estate leases.

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<sup>32</sup> See **Annex 3**, Total Claim Spreadsheet. The amount Respondent owes for this item of damage will obviously change up until Respondent pays the Award.

<sup>33</sup> Claimant would also note that, per paragraph 283(4) of the Award, if the Tribunal grants this requested supplemental relief, the compensation amount consisting of Claimant's sunk investment costs plus compound interest up to the date of *Lesivo* should be further compounded at the LIBOR +2% interest rate from the date of *Lesivo* up to the date of payment of the Award. See **CL-190**, Hauser-Morel & Nedden, *Correction and Interpretation of Arbitral Awards and Additional Awards* 35 ("If an additional award awards new damages, and if interest was sought in this respect in the course of the arbitration, interest may be due on these new damages.").

Respectfully submitted,



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