UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. CHANCELLOR MEDIA CORPORATION and WHITECO INDUSTRIES, INC. and METRO MANAGEMENT ASSOCIATES Defendants.	Civil Action No. 1:98-CV02875 (Judge Kollar-Kotelly) COMPETITIVE IMPACT STATEMENT Filed: December 16, 1998

COMPETITIVE IMPACT STATEMENT

Plaintiff, the United States of America, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

Plaintiff filed a civil antitrust Complaint on November 25, 1998, alleging that a proposed acquisition of Whiteco Industries, Inc. and Metro Management Association (collectively "Whiteco") by Chancellor Media Corporation ("Chancellor") would violate Section 7 of the Clayton Act, 15 U.S.C. § 18. The Complaint alleges that Chancellor and Whiteco compete head-to-head-to sell outdoor bulletin advertising in seven counties: (1) Hartford County, Connecticut; (2) Shawnee County, Kansas; (3) Leavenworth County, Kansas; (4) Potter County, Texas; (5) Nolan County, Texas; (6) Westmoreland County, Texas; and (7) Washington County, Texas, (collectively "the Seven Counties"). Outdoor advertising companies sell advertising space, such as on billboards, to local and national customers. The outdoor advertising business in the Seven Counties is highly concentrated. Chancellor and Whiteco have a combined share of revenue ranging from about 48 percent to a virtual monopoly in the Seven Counties. Unless the acquisition is blocked, competition would be substantially lessened in the Seven Counties, and advertisers would pay higher prices.

The prayer for relief seeks: (a) an adjudication that the proposed transaction described in the Complaint would violate Section 7 of the Clayton Act; (b) preliminary and permanent injunctive relief preventing the consummation of the transaction; (c) an award to the United States of the costs of this action; and (d) such other relief as is proper.

Shortly before this suit was filed, a proposed settlement was reached that permits Chancellor to complete its acquisition of Whiteco, yet preserves competition in the Seven Counties where the transaction raises significant competitive concerns. A Stipulation and proposed Final Judgment embodying the settlement were filed at the same time the Complaint was filed.

The proposed Final Judgment orders Chancellor to divest outdoor bulletin advertising assets equal in number to, and having approximately the same market and rental value as, the outdoor bulletin advertising assets operated by Whiteco in each of the Seven Counties. In doing so, Chancellor may divest outdoor bulletin advertising assets currently owned by either Whiteco or Chancellor. Unless the plaintiff grants a time extension, Chancellor must divest these outdoor bulletin advertising assets within six (6) months after the filing of the Complaint in this action or within five (5) business days after notice of entry of the Final Judgment, whichever is later..

If Chancellor does not divest the outdoor bulletin advertising assets in the specified counties within the divestiture period, the Court, upon plaintiff's application, is to appoint a trustee to sell the assets. The proposed Final Judgment also requires that, until the divestitures mandated by the Final Judgment have been accomplished in Hartford, Washington and Westmoreland Counties, Chancellor, Whiteco and/or Metro shall take all steps necessary to maintain and operate the outdoor bulletin advertising assets as active competitors; maintain sufficient management and staffing,

and maintain sales and marketing of the outdoor bulletin advertising assets; and maintain the outdoor bulletin advertising assets in operable condition at current capacity configurations. In the remaining counties, Chancellor, Whiteco and/or Metro shall take all steps necessary to maintain and operate the outdoor bulletin advertising assets as active competitors, such that the sale and marketing of the assets shall be conducted separate from, and in competition with Chancellor's bulletin faces in the respective counties. Further, the proposed Final Judgment requires Chancellor to give the United States prior notice regarding certain future outdoor advertising acquisitions or agreements pertaining to the sale of outdoor bulletin advertising in the Seven Counties.

The plaintiff and the defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. THE ALLEGED VIOLATIONS

A. The Defendants

Chancellor, a large nationwide operator of media businesses, including outdoor advertising, is a Delaware corporation headquartered in Dallas, Texas. Chancellor conducts some outdoor advertising business through its subsidiary, Martin Media, L.P.

("Martin"), a limited partnership headquartered in Dallas, Texas. Martin sells outdoor advertising in many states throughout the United States, including in each of the Seven Counties. In 1997 Chancellor's total revenues from outdoor advertising were approximately $78 million.

Whiteco is a Nebraska corporation headquartered in Merrillville, Indiana. Whiteco sells outdoor advertising in 32 states, including in each of the Seven Counties. In 1997, its revenues from outdoor advertising were approximately $6.9 million.

B. Description of the Events Giving Rise to the Alleged Violations

On August 30, 1998, Chancellor entered into an Asset Purchase Agreement with Whiteco, Chancellor agreed to purchase certain assets of Whiteco used or useful in the outdoor advertising business of Whiteco in the United States. The transaction is valued at approximately $930 million.

Chancellor and Whiteco compete for the business of advertisers seeking to obtain outdoor advertising space in the Seven Counties. The proposed acquisition of Whiteco by Chancellor would eliminate that competition in violation of Section 7 of the Clayton Act.

C. Anticompetitive Consequences of the Proposed Transaction

The Complaint alleges that the sale of outdoor advertising in the Seven Counties constitutes a relevant product market and a line of commerce, and that each county constitutes a relevant geographic market and section of the country for antitrust purposes.

Advertisers select outdoor advertising based upon a number of factors including, inter alia, the size of the target audience (individuals most likely to purchase the advertiser's products or services), the traffic patterns of the audience, and other audience characteristics. Many advertisers seek to reach a large percentage of their target audience by selecting outdoor advertising on highways and roads where vehicle traffic is high, so that the advertising will be frequently viewed by the target audience, or where the vehicle traffic is close to the advertiser's location. When different firms own outdoor advertising spaces that can efficiently reach that target audience, advertisers benefit from the competition among outdoor advertising providers, who offer better prices or services. Many local and/or national advertisers purchase outdoor advertising because outdoor advertising space is less expensive and more cost-efficient than other media at reaching the advertiser's target audience with the type of advertising message that the advertiser prefers to deliver.

Outdoor advertising has prices and characteristics that are distinct from other advertising media. An advertiser's evaluation of the importance of these characteristics

depends on the type of advertising message the advertiser wishes to convey and the price the advertiser is willing to pay to deliver that message. Many advertisers who use outdoor advertising also advertise in other media, including radio, television, newspapers and magazines, but use outdoor advertising when they want a large number of exposures to consumers at a low cost per exposure. Because each exposure is brief, outdoor advertising is most suitable for highly visual, limited information advertising.

For many advertising customers, outdoor advertising's particular combination of characteristics makes it an advertising medium for which there are no close substitutes. Such customers who want or need to use outdoor advertising would not switch to another advertising medium if outdoor advertising prices increased by a small but significant amount. Although some local and national advertisers may switch some of their advertising to other media, rather than absorb a price increase in outdoor advertising space, the existence of such advertisers would not prevent outdoor advertising companies in the Seven Counties from profitably raising their prices a small but significant amount. At a minimum, outdoor advertising companies could profitably raise prices to those advertisers who view outdoor advertising as a necessary advertising medium for them, or as a necessary advertising complement to other media. Outdoor advertising companies negotiate prices individually with advertisers. During individual price negotiations between advertisers and outdoor advertising companies,

advertisers provide the outdoor advertising companies with information about their advertising needs, including their target audience and the desired exposure. Outdoor advertising companies thus have the ability to charge advertisers differing rates based in part on the number and attractiveness of competitive outdoor advertising companies that can meet a particular advertiser's specific target needs. Because of this ability to price discriminate among customers, outdoor advertising companies may charge higher prices to advertisers that view outdoor advertising as particularly effective for their needs, while maintaining lower prices for other advertisers.

The Complaint alleges that Chancellor's proposed acquisition of Whiteco would lessen competition substantially in the sale of outdoor advertising in each of the Seven Counties. The proposed transaction would create further market concentration in already highly concentrated markets, and Chancellor would control a substantial share of the outdoor advertising revenues in these markets. Using a measure of market concentration called the Herfindahl-Hirschman Index ("HHI"), explained in Appendix A annexed hereto, post acquisition:

a. In Hartford County, Connecticut, Chancellor's share of the outdoor advertising market, based on advertising revenues, would increase to 100 percent. The approximate post-merger HHI would be 10000, representing an increase of about 4992.

b. In Shawnee County, Kansas, Chancellor's share of the outdoor advertising market, based on advertising revenues, would increase to about 48 percent. The approximate post-merger HHI would be 5008, representing an increase of about 1144.

c. In Leavenworth County, Kansas, Chancellor's share of the outdoor advertising market, based on advertising revenues, would increase to about 60 percent. The approximate post-merger HHI would be 4130, representing an increase of about 832.

d. In Potter County, Texas, Chancellor's share of the outdoor advertising market, based on advertising revenues, would increase to about 82 percent. The approximate post-merger HHI would be 6959, representing an increase of about 1050.

e. In Nolan County, Texas, Chancellor's share of the outdoor advertising market, based on advertising revenues, would increase to about 76 percent. The approximate post-merger HHI would be 6049, representing an increase of about 1920.

f. In Westmoreland County, Pennsylvania, Chancellor's share of the outdoor advertising market, based on advertising revenues, would increase to about 71 percent. The approximate post-merger HHI would be 5454 representing an increase of about 2516.

g. In Washington County, Pennsylvania, Chancellor's share of the outdoor advertising market, based on advertising revenues, would increase to about 88 percent. The approximate post-merger HHI would be 8888 representing an increase of about 1560.

In each of the Seven Counties, Chancellor and Whiteco compete head-to-head and, for many local and/or national advertisers buying space, they are close substitutes for each other. During individual price negotiations, advertisers that desire to reach a certain audience can help ensure competitive prices by "playing off" Whiteco against Chancellor. Chancellor's acquisition of Whiteco will end this competition. After the acquisition, such advertisers will be unable to reach their desired audiences with equivalent efficiency without using Chancellor's outdoor advertising. Because advertisers seeking to reach these audiences would have inferior alternatives to the

merged entity as a result of the acquisition, the acquisition would give Chancellor the ability to raise prices and reduce the quality of its service to some of its advertisers in each of the Seven Counties.

New entry into the advertising market in response to a small but significant price increase by the merged parties in any of these markets is unlikely to be timely and sufficient to render the price increase unprofitable.

For all of these reasons, plaintiff concludes that the proposed transaction would lessen competition substantially in the sale of outdoor advertising in the Seven Counties, eliminate actual and potential competition between Chancellor and Whiteco, and result in increased prices and/or reduced quality of services for outdoor advertisers in each of the Seven Counties, all in violation of Section 7 of the Clayton Act.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment would preserve existing competition in the sale of outdoor advertising space in Seven Counties. It requires the divestiture of bulletin faces equal in number to, and having approximately the same market and rental value as, the number of faces operated by Whiteco in the Seven Counties. Exempt from the divestiture are the 23 bulletin faces located on I-70 west of Exit 4 in Washington County, Pennsylvania. This relief maintains the level of competition that existed premerger and ensures that the affected markets will suffer no reduction in competition

as a result of the merger. Advertisers will continue to have alternatives to the merged firm in purchasing outdoor advertising. Finally, the ownership structure is maintained in that the number of competitors who may compete for advertisers' business will remain unchanged.

Unless plaintiff grants an extension of time, the divestitures must be completed within six (6) months after the filing of the Complaint in this matter or within five (5) business days after notice of entry of this Final Judgment by the Court, whichever is later. Until the divestitures take place in Hartford, Washington and Westmoreland Counties, defendants must maintain and operate the advertising assets as active competitors; maintain sufficient management and staffing, maintain sales and marketing of the advertising assets; and maintain the advertising assets in operable condition at current capacity configurations. In the remaining counties, defendants must maintain and operate the advertising assets as active competitors; such that the sales and marketing of the assets is conducted separate from, and in competition with the Chancellor's bulletin faces in the respective counties.

The divestitures must be to a purchaser or purchasers acceptable to the plaintiff in its sole discretion. Unless plaintiff otherwise consents in writing, the divestitures shall include all the assets of the outdoor advertising business being divested, and shall be accomplished in such a way as to satisfy plaintiff, in its sole discretion, that such assets can and will be used as viable, ongoing commercial outdoor advertising

businesses. In addition, the purchaser or purchasers must intend in good faith to continue the operations of the outdoor advertising businesses as were in effect in the period immediately prior to the filing of the Complaint, unless any significant change in the operations planned by a purchaser is accepted by the plaintiff in its sole discretion. This provision is intended to ensure that the outdoor advertising businesses to be divested remain competitive with Chancellor's other outdoor advertising businesses in the Seven Counties.

If defendants fail to divest these outdoor advertising assets within the time periods specified in the Final Judgment, the Court, upon plaintiff's application, is to appoint a trustee nominated by plaintiff to effect the divestitures. If a trustee is appointed, the proposed Final Judgment provides that defendants will pay all costs and expenses of the trustee and any professionals and agents retained by the trustee. The compensation paid to the trustee and any persons retained by the trustee shall be both reasonable in light of the value of the advertising assets, and based on a fee arrangement providing the trustee with an incentive based on the price and terms of the divestitures and the speed with which they are accomplished. After appointment, the trustee will file monthly reports with the plaintiff, defendants and the Court, setting forth the trustee's efforts to accomplish the divestitures ordered under the proposed Final Judgment. If the trustee has not accomplished the divestitures within six (6) months after its appointment, the trustee shall promptly file with the Court a

report setting forth (1) the trustee's efforts to accomplish the required divestitures, (2) the reasons, in the trustee's judgment, why the required divestitures have not been accomplished and (3) the trustee's recommendations. At the same time the trustee will furnish such report to the plaintiff and defendants, who will each have the right to be heard and to make additional recommendations.

The proposed Final Judgment contains provisions to ensure that these outdoor advertising assets will be preserved, so that the advertising assets remain viable competitors after divestiture.

The proposed Final Judgment requires Chancellor to provide at least thirty (30) days' notice to the Department of Justice before acquiring more than a de minimis interest in any assets of, or any interest in, another outdoor advertising company in the Seven Counties. Such acquisitions could raise competitive concerns but might be too small to be reported otherwise under the Hart-Scott-Rodino ("HSR") premerger notification statute. Moreover, Chancellor may not agree to sell outdoor advertising space for any other outdoor advertising company in the Seven Counties without providing plaintiff with notice. Thus, this provision in the proposed Final Judgment ensures that the Department will receive notice of and be able to act, if appropriate, to stop any agreements that might have anticompetitive effects in the Seven Counties.

The relief in the proposed Final Judgment is intended to remedy the likely anticompetitive effects of Chancellor's proposed transaction with Whiteco in the

Seven Counties. Nothing in this Final Judgment is intended to limit the plaintiff's ability to investigate or to bring actions, where appropriate, challenging other past or future activities of defendants in the Seven Counties.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The plaintiff and the defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the plaintiff has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the

plaintiff written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the Federal Register. The plaintiff will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the response of the plaintiff will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

Craig W. Conrath
Chief, Merger Task Force
Antitrust Division
United States Department of Justice
1401 H Street, NW; Suite 4000
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and that the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

Plaintiff considered, as an alternative to the proposed Final Judgment, a full trial on the merits of its Complaint against defendants. Plaintiff is satisfied, however, that the divestiture and other relief contained in the proposed Final Judgment will preserve viable competition in the sale of outdoor advertising space in the Seven Counties. Thus, the proposed Final Judgment would achieve the relief the government would

have obtained through litigation, but avoids the time, expense and uncertainty of a full trial on the merits of the Complaint.

VII. STANDARD OF REVIEW UNDER THE APPA FOR PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty (60) day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." In making that determination, the Court may consider --

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered and any other considerations bearing upon the adequacy of such judgment;
>
> (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e).

As the United States Court of Appeals for the D.C. Circuit held, this statute permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient and

whether the decree may positively harm third parties. See United States v. Microsoft, 56 F.3d 1448, 1461-62 (D.C. Cir. 1995).

In conducting this inquiry, " [t]he Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process."[1] Rather,

> [a]bsent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." United States v. BNS, Inc., 858 F.2d 456, 462 (9th Cir. 1988), citing United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981); see also Microsoft, 56 F.3d at 1460-62. Precedent requires that

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[1] 119 Cong. Rec. 24598 (1973). See United States v. Gillette Co., 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. See H.R. Rep. 93-1463, 93rd Cong. 2d Sess. 8-9 (1974), reprinted in U.S.C.C.A.N. 6535, 6538.

> the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[2]

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.' "[3]

The relief obtained in this case is strong and effective relief that should fully address the competitive harm posed by the proposed transaction.

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[2] Bechtel, 648 F.2d at 666 (citations omitted) (emphasis added); see BNS, 858 F.2d at 463; United States v. National Broadcasting Co., 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); Gillette, 406 F. Supp. at 716. See also Microsoft, 56 F.3d at 1461 (whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'") (citations omitted).

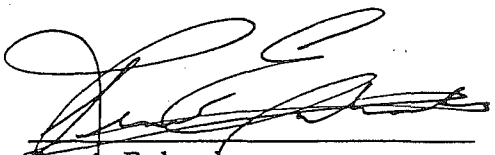
[3] United States v. American Tel. and Tel. Co., 552 F. Supp. 131, 151 (D.D.C. 1982), aff'd. sub nom. Maryland v. United States, 460 U.S. 1001 (1983), quoting Gillette, 406 F. Supp. at 716 (citations omitted); United States v. Alcan Aluminum, Ltd., 605 F. Supp. 619, 622 (W.D. Ky. 1985).

VIII. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the plaintiff in formulating the proposed Final Judgment.

Dated: December 16 , 1998

Respectfully submitted,



Renée Eubanks

Merger Task Force
U.S. Department of Justice
Antitrust Division
1401 H Street, NW; Suite 4000
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EXHIBIT A
DEFINITION OF HHI AND CALCULATIONS FOR MARKET

"HHI" means the Herfindahl-Hirschman Index, a commonly accepted measure of market concentration. It is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of thirty, thirty, twenty and twenty percent, the HHI is 2600 ($30^2 + 30^2 + 20^2 + 20^2 = 2600$). The HHI takes into account the relative size and distribution of the firms in a market and approaches zero when a market consists of a large number of firms of relatively equal size. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

Markets in which the HHI is between 1000 and 1800 points are considered to be moderately concentrated, and those in which the HHI is in excess of 1800 points are considered to be concentrated. Transactions that increase the HHI by more than 100 points in concentrated markets presumptively raise antitrust concerns under the Merger Guidelines. See *Merger Guidelines* § 1.51.

Certificate of Service

I, Renée Eubanks hereby certify that, on December __, 1998, I caused the foregoing document to be served on defendants Whiteco Industries, Inc., Metro Management Associates, and Chancellor Media Corporation by having a copy mailed, first- class, postage prepaid, to:

Steven H. Schulman
Bruce J. Prager
Latham & Watkins
1001 Pennsylvania Ave., NW
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Counsel for Chancellor Media Corporation

Charles Biggio
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