

LEAD1
ASSOCIATION ™

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**“LEAD1 FBS ATHLETIC
DIRECTOR REPORT”**

PRESENTED BY



TEAMWORKS

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The Unblocked Blitz: Is Ohio v. NCAA the Case that Changes the Legal View of College Sports?

Bennett Speyer & Robert Boland; Shumaker, Loop & Kendrick

Taking an NCAA eligibility case was not on either of our list of New Year's resolutions, less than three months ago. But on February 1, we were doing just that in *Clayton v. NCAA*, walking into New York State Supreme Court in Bronx County, on behalf of a 26-year-old college basketball player named Dejuan Clayton looking to play an eighth season, after several years of medical hardship, and multiple waiver denials from the NCAA. This was a case we had declined taking less than two months earlier.

What changed?

It was the issuance of a temporary restraining order in *Ohio v. NCAA*, which ultimately became a preliminary injunction in the Federal District Court for the Northern District of West Virginia, in a case brought by seven states' attorneys general. The U.S. Department of Justice has now joined this group of bi-partisan attorneys general, making this a potential game changer on how courts view NIL, the right of an athlete to be able to participate, and how the NCAA's eligibility rules will likely need to pass through some version of the Rule of Reason just as amateurism rules must.

Since the *Ohio v. NCAA* order, we are hearing from our institutional clients that they have been under far greater pressure from athletes and their families regarding pursuing eligibility waivers. This is why it is so important that you are aware of the ruling's potential to permanently change the legal view of athletes, their NIL rights, their relationship with the NCAA, and of course, their relationship with you, institutionally.

In that regard, the *Ohio* injunction functionally recognizes three things. First, an athlete may suffer an irreparable harm under antitrust law if he or she misses a single game because of an eligibility limitation. Second, in *Ohio*, the court signaled that eligibility rules are now open to antitrust challenge, much the way amateurism rules became targets after *O'Bannon* and *Alston*. Third, rules that restrain or interfere with athlete's NIL rights are likely to get significant scrutiny.

Institutions are not the NCAA. You don't have similar antitrust liability. Many of you will likely be pleased that the NCAA may have to simplify its eligibility rules and waiver processes, since they are now more subject to antitrust challenge. It may mean you will consider supporting some of your athletes as they contest eligibility rules. But you should also be aware of what the ruling in *Ohio v. NCAA* may mean toward your own policies on participation and NIL access. As a result, *Ohio v. NCAA* stands to be an important case for LEAD1 athletic directors to know and watch. As we indicated to LEAD1, we'd be happy to brainstorm potential athletic policy modifications with each of you as this case plays out.

Bennett Speyer, Esq. *is partner and co-chair of the Hospitality, Leisure, & Sports Industry Sector Group at Shumaker.*

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Navigating Compensation and Control Post-Dartmouth Ruling – Considerations for FBS ADs

Todd S. Shumaker; Church Church Hittle + Antrim

Two months ago, the National Labor Relations Board in Boston declared Dartmouth University men’s basketball players to be employees. Less than a month ago, the team voted to unionize. Many questions remain unresolved: Will the NLRB determination be reversed on appeal or through other legal challenges? How will the NLRB in California decide a similar question involving football, men’s basketball and women’s basketball players against the University of Southern California, the Pac-12, and the NCAA? How could these federal decisions impact public institutions under state labor laws? Will a potential change in the administration in November affect how these matters are adjudicated? Instead of ruminating on the “what ifs” of what is to come, though, now is a reasonable time to digest the Dartmouth decision to consider what concepts like “compensation” or “control” may look like on your campuses.

The NLRB viewed compensation expansively in its decision, identifying such benefits as preferential admission to the University; complimentary admissions; apparel; academic, career and medical support; travel, lodging, per diem and food during travel; and room, board, and parking during interterm. Notably, Dartmouth does not provide athletic scholarships, and the NLRB consequently did not factor grants-in-aid, cost of attendance, or academic success money into its analysis on compensation. If these benefits continue to be considered “compensation” for athletes, institutions will have little opportunity to avoid such a finding without eliminating significant support for its athletes.

On the concept of “control,” the NLRB cited Dartmouth’s Student-Athlete Handbook, conference rules, and NCAA bylaws as sources outlining the control the University exercises over athletes. While many of these policies set guardrails around what is permissible, they also allow for flexibility within that space. Consider, for instance, how expectations for athletes at your institution compare to those of students involved in other clubs or extracurricular activities. While NCAA bylaws identify maximum weekly countable activity hours, for example, they do not require programs to max those hours out. Similarly, rules may permit schools to exempt from their count some hours involving travel, non-countable team activities or other commitments in which players are expected to participate. Even if some hours may not count in a CARA calculation, they count for the athletes who are expected to sacrifice their own time to participate in those activities. Nothing prevents a school from affording players *more* autonomy in the use of their time.

Which leads to the most important takeaway from Dartmouth: consider what is important to the athletes on each of your teams and how you may be able to accommodate the interests of coaches, players, and the athletic department as a whole on a team-by-team basis. Use anonymous surveys, end of year meetings, informal conversations with student leaders, and exit meetings to help identify how you can better serve your athletes. Athletes have long desired to have a stronger voice in college sports and empowering them now – and educating your coaches and staff on unionization and unfair labor practices – best situates your department for what is yet to come.

Next Moves After the NLRB's Dartmouth Men's Basketball Decision

Chris Bayh, Charity Seaborn and Dan Cohen; Barnes & Thornburg

On February 5, 2024, NLRB Regional Director Laura Sacks issued a ruling that Dartmouth's men's basketball players are "employees," permitting them to vote to unionize. What are the ramifications and next steps for litigation surrounding student-athletes as employees?

Dartmouth

For Dartmouth, it's more litigation. After Dartmouth's men's basketball student-athletes voted to unionize on March 5, Dartmouth announced that its "only remaining option" was to refuse to bargain with them, as it was "the only lever Dartmouth has to get [the NLRB's decision] reviewed by a federal court." It's an aggressive strategy, as Dartmouth's refusal to bargain will likely trigger an unfair labor practice charge, initiating an administrative NLRA process that could lead to a federal lawsuit.

Dartmouth also may appeal Sacks' decision through the NLRB, but it may have to collectively bargain while that appeal moves forward. The men's basketball players may ask Dartmouth to bargain over wages, hours, health care, discipline, support services, and other employment subjects. Those topics will have different meanings in the athletics context and may include discussions about practice, playing time, travel, etc. It would be whole new ball game.

Meanwhile, the unintended consequences of employment status continue to be potentially widespread – and mostly unknown. Have the four international students on Dartmouth's team jeopardized their F-1 visas and ability to remain Dartmouth students? U.S. immigration regulations limit the types of employment under F-1 student visas and the number of hours they can "work." What are the tax consequences of employment status, and how many of the numerous benefits already received by the players could be recast as taxable income?

USC and Beyond

The next school in the NLRB's sights is the University of Southern California. If non-scholarship, Ivy League basketball players are employees in the NLRB's eyes, then what ruling awaits high-profile, scholarship football players at USC?

The USC case bears watching for other reasons, though. The NLRA applies only to private employers, and thus excludes state universities. However, instead of just pursuing (private) USC, the NLRB is arguing for "joint employer" liability over the (private) NCAA and Pac-12. If successful, that would theoretically open the door to a subsequent, incremental NLRB effort to target public universities through "joint employment" by the private NCAA, thus making an end run around public-entity immunity to the NLRA.

Title IX Still Applies

With men's basketball at the bargaining table, Dartmouth may need to bring twice as many chairs.

Title IX has no labor exception. Any negotiated benefits that go to a men's basketball union likely must be equitably provided to the women's team—whether unionized or not. As we contemplate the potential for football unionization, schools should prepare to replicate any bargained-for

changes for female student-athletes at the school, including wages that could be categorized as “financial assistance... connected to a student’s athletic participation,” regardless of the latter’s potential non-union status.

If the unionization of athletes continues, ADs will need to coordinate with university HR and Title IX offices to mitigate violations under the NLRA and Title IX.

NCAA Enforcement Positioning and NIL Injunction – What ADs Should Know

Kayla Williams, Clint Speegle; Lightfoot, Franklin & White

On February 23, 2024, the Eastern District Court of Tennessee enjoined the NCAA from enforcing its Interim NIL Policy, Bylaws, and any other authorities over a student-athlete’s ability to negotiate NIL compensation with third-party collectives until the *State of Tennessee and Commonwealth of Virginia v. NCAA* case is resolved.

The preliminary injunction effectively accomplished three things: (1) forced the NCAA to halt the initiation of any new, and pause any ongoing, NCAA investigations of third-party NIL collectives and NIL activities; (2) restrained the NCAA from enforcing Bylaw 12.11.3.2 (“Rule of Restitution”); and (3) ensured that there will be no penalties for third-party collective/NIL conduct that occurs while the injunction is in place.

So, here’s what ADs should know:

- 1. Institutional staff members, including coaches, are still prohibited from negotiating NIL offers and deals on behalf of prospective and current student-athletes.**

The injunction has no effect on the NCAA’s Bylaws which prohibit pay-for-play, institutional payments, and quid-pro-quo. As such, staff members and coaches must continue to carefully monitor their recruiting and transfer portal activities to remain compliant with NCAA Bylaw 12.1.4.

- 2. Relevant state law is not impacted by the injunction.**

The effects and scope of NIL-related state laws vary across the nation. Although the NCAA is prohibited from enforcing its NIL-related legislation, states are not. Therefore, all interested parties, including student-athletes and collectives, should be aware of the parameters of relevant state law.

- 3. Communication remains key.**

It remains unclear how NCAA Enforcement Staff will proceed following the expiration of the injunction. Therefore, consistent communication with the institution’s compliance office and university counsel will be key to understanding how to navigate each unique situation and circumstance as soon as it may arise. For any investigation stayed by the injunction, it is important to clearly and consistently communicate the NCAA’s Responsibility to Cooperate, which includes a responsibility to proactively preserve relevant materials.

From an AD's Perspective - Understanding the Stakes of the House Case

Mike Perrin; Winstead PC

I have sat in the big chair, so I know many issues have varying timelines, decision-makers, and stakeholders. At least one monumental situation could totally disrupt intercollegiate athletics. It merits your heightened attention.

I speak, of course, about IN RE: COLLEGE ATHLETE NIL LITIGATION, the class action seeking damages and injunctive relief (consolidation of the *House* and *Oliver* cases) against the NCAA and five conferences. Pretrial activities continue, with trial set for January 27, 2025.

The case file and media reporting are my sole sources of information. As a long-time trial lawyer, I see this litigation as possibly the first major turning point, long before other pending matters are decided.

With great lawyers and firms involved, legal positions and orders are of the quality to be expected. All parties and positions will continue to be well-represented.

This was filed before NIL took effect, before the Supreme Court opinion in *Alston*, and before the NCAA “interim” NIL policy became effective on July 1, 2021.

The enormity of the potential damages sought by class plaintiffs against the NCAA and the conference defendants could be the nuclear event forcing changes in athletics much sooner than the slow approach of decision-makers on other fronts.

The continued thriving of many athletic programs after now almost three years of NIL tends to disprove many scenarios and arguments previously held. NIL did not destroy collegiate sports. But, joint and several liability for huge damage amounts, against the NCAA and conferences, could totally disrupt the college athletic enterprise.

Can Private Equity Score in College Sports? Why a “NewCo” Path Might be Inevitable

Greg Marino & Kathleen Downes; Foley & Lardner

Private equity’s meteoric growth over the past decade hit a major downturn in 2023, as surging interest rates contributed to a roughly 40% diminution in deal activity. While the private investment market has cooled, investor interest in the world of professional sports—most recently in minority positions taken in soccer giants Paris Saint-Germain, Liverpool and Chelsea, as well as the NHL’s Tampa Bay Lightning—remained relatively buoyant, as investors continue to find value in sports partnership and ownership deals, especially internationally. Still, in a media rights environment where “cord-cutting” has destabilized long-term broadcast revenue projections, and where acquisition prices continue to rise despite the cost of borrowing, many wonder whether private equity’s interest in professional sports is [yesterday’s news](#), and whether and how **college** sports could represent private equity’s next frontier in institutional sports investment.

Increasing Prominence of Private Funds in Professional Sports

Private equity funds are typically attracted to companies with strong cash-flow and inherent value, but inefficient management. Professional sports teams traditionally characterized this asset

profile, as soaring broadcast revenues buoyed “mom-and-pop” style business practices that might be revitalized and streamlined with Wall Street know-how.

After decades of resistance, pro sports teams and leagues in the U.S. began welcoming private equity investments over the past few years, as fund-backed [ownership](#) now exists in more than 30 combined MLB, NBA, NHL and MLS franchises. The NFL, which currently does not allow institutional ownership of teams, has recently signaled a new approach, with the [league](#) recently announcing the formation of a special committee to liberalize rules that might allow private equity fund ownership in teams. Internationally, private equity ownership of professional sports clubs is even more widespread—more than one-third of the European soccer clubs in the “Big Five” leagues have [financial backing](#) from private funds or venture capital firms, while CVC Capital Partners owned Formula 1 racing between 2006 and 2017, before selling to Liberty Media.

A “NewCo” Approach?

While private equity firms and professional sports entities are now accepted dance partners in the team/league ownership space, institutional investors and sports entities have recently begun to pair off in more indirect ways—via the creation of “spin-off” media rights companies that investors can buy in whole or in part. Typically, a rightsholder such as a league or team assigns certain assets (e.g., future broadcast rights) into a “NewCo” which might be owned and operated in part by a private equity fund. This spin-off model allows sports entities to retain ownership of their underlying assets (the team itself, for example), while unlocking an infusion of “bird in the hand” cash in exchange for control of long-run revenue. Ligue 1 and La Liga (France and Spain’s top professional soccer league, respectively) have created a version of the spin-off vehicle, as has Premiership and 6 Nations Rugby and even Spanish soccer giant FC Barcelona. These media spin-offs have satisfied the leagues’ need for guaranteed, short-run cash, and private equity’s confidence in its ability to improve operations and create a viable product, even in a disrupted industry like sports media. Looking across the sports-business landscape in the United States, there is perhaps no better example of a disrupted sports industry in need of funding than college sports—could this be a match made in deal-making heaven?

College Sports: A Diamond in the Rough?

For the past several years, the business and legal landscape of college sports has been roiling and transforming, with the NCAA’s ongoing antitrust battles, conference implosion and realignment, NIL gray marketeering, and the potential labor organizing and wage-eligible employee status of student-athletes. These underlying dynamics and state of flux may well make college sports an attractive business for institutional investors. Many universities and conferences have valuable intellectual property, established brand recognition, rabidly loyal fan bases, and multiple streams of revenue—including long-term media rights deals. These potentially significant assets nevertheless betray an uncertain financial future for schools, where declining enrollment has limited tuition revenue, and where a fracturing media rights environment could limit future media rights revenue. With college budget shortfalls on the horizon, private equity may already see enticing investment opportunity.

But in what form? It is difficult to imagine a world where institutional investors *acquire* interests in individual colleges or athletic departments. For one thing, colleges and universities typically

operate as tax-exempt 501(c)(3) entities, and have neither the will nor the ability to be acquired by for-profit private equity funds. Further, most public colleges are controlled by state agencies, which typically cannot legally partner with for-profit companies. Spinning off a school's media rights into a private equity aligned NewCo, however, could potentially avoid these obstacles.

Indeed, as schools and athletic departments eye moves to conferences bearing more lucrative media rights deals, private equity could provide the outlet for those with an immediate need for capital (e.g., for facility construction or conference exit fees). In such case, the school could spin-off certain intellectual property and media rights into a NewCo venture, seeking to attract tens/hundreds of million dollars in private equity funding. Much like La Liga or Ligue 1 in Europe, the private equity-backed NewCo would have the right to sell against the school's assets, which conceivably could include naming rights, media rights and apparel licensing. Such an arrangement would seem to satisfy the necessary conditions for a classic private equity deal—an undervalued entity leveraging its valuable underlying assets and potential long-term returns for the cash needed to scale its growth.

The Road Ahead

Many FBS programs are in search of safe and more lucrative ports in a media-rights driven maelstrom that has already destroyed major conferences (see Pac-12) and might be willing to sell tomorrow's rights for today's cash. With all the disruption, and a weakening of traditional central authorities (i.e., NCAA), it is hardly inconceivable that independent college brands, aligned with or organized by private equity backers might pursue economic opportunities in unprecedented ways. However the road takes shape in college athletics, one fundamental truth emerges: private equity has an appetite for cash-strapped sports ventures holding potentially valuable media assets, and FBS ADs should consider the potential impact and opportunity of private equity investment.

Authors:

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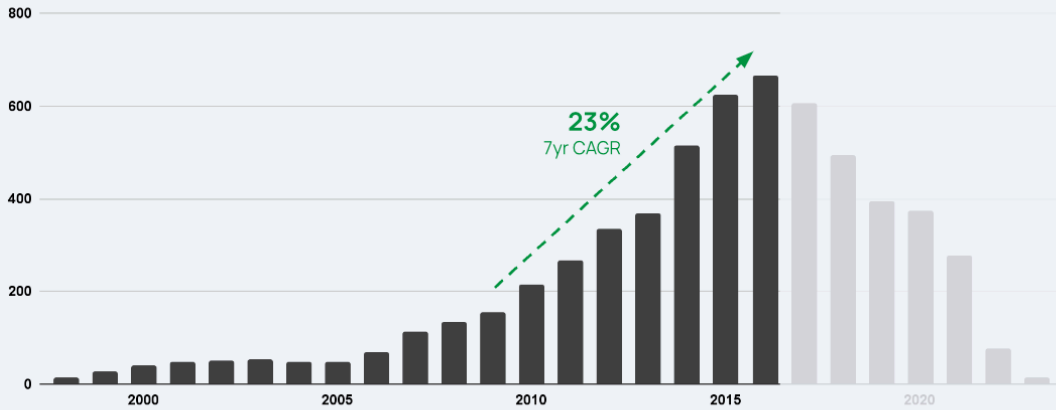
How Digital Transformation Can Help FBS ADS “Meet the Moment”

Kevin Barefoot; Teamworks

The desire for organizations to digitally transform themselves has accelerated over the last several decades as they seek to enhance performance in an efficient way. Likewise, the *ability* for companies to digitally transform has also become easier. Access to point solutions that solve specific operational problems greatly increased during a startup boom in the early 2010's.

In our world of elite athletics, the number of new, privately funded sports tech companies increased drastically from 2005-2016, creating a deluge of competing offerings.

Sports Tech Companies Founded since 2000



CAGR: Compound Annual Growth Rate | Source: Global SportsTech VC Report (Dec. 2023), by SportsTechX

Over time, market crowding and shrinking access to capital created a predictable outcome. After rapid growth and a funding peak in 2016, the rate of sports tech start-up launches rapidly decreased to a 20-year low by 2023.

Sports Tech Companies Founded since 2000



CAGR: Compound Annual Growth Rate | Source: Global SportsTech VC Report (Dec. 2023), by SportsTechX

Over the past seven years, while sports tech start-ups experienced contraction, another trend emerged: market consolidation. In part, consolidation stemmed from the market's demand for more nimble, interconnected technology infrastructures vs individual, disconnected solutions. This led tech companies to pivot to strategic acquisition and product integration to deliver value.

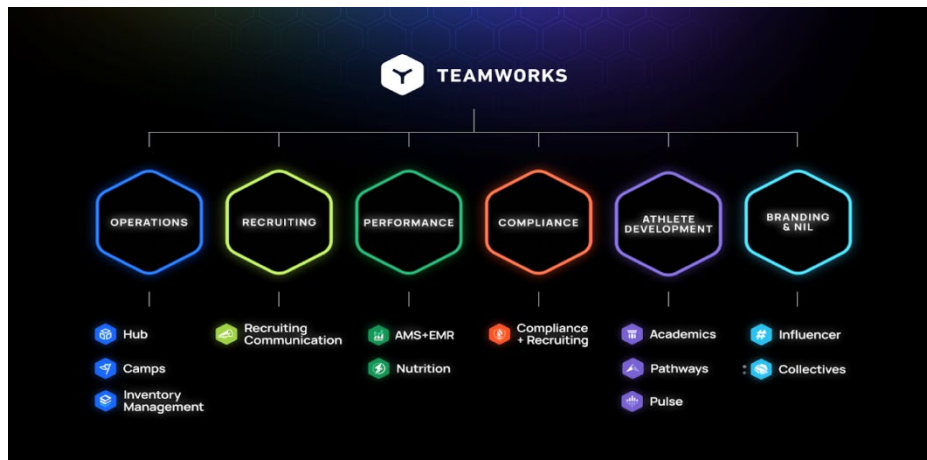
Case in point, global sports tech M&A activity surged to over \$10 billion in 2023, surpassing double the highest mark of the preceding five years. This surge in market consolidation and product integration reshaped how large, diverse organizations perceived the role of technology—not only as a means to enhance stakeholder experience but also to actively reduce costs and headcount. During a January 2024 earnings call, CitiGroup CFO Mark Mason remarked:

“We invested over \$12 billion in technology in 2023. Beyond transformation, our technology investments are also focused on digital innovation, new product development, client experience enhancements, and areas that support our infrastructure.”

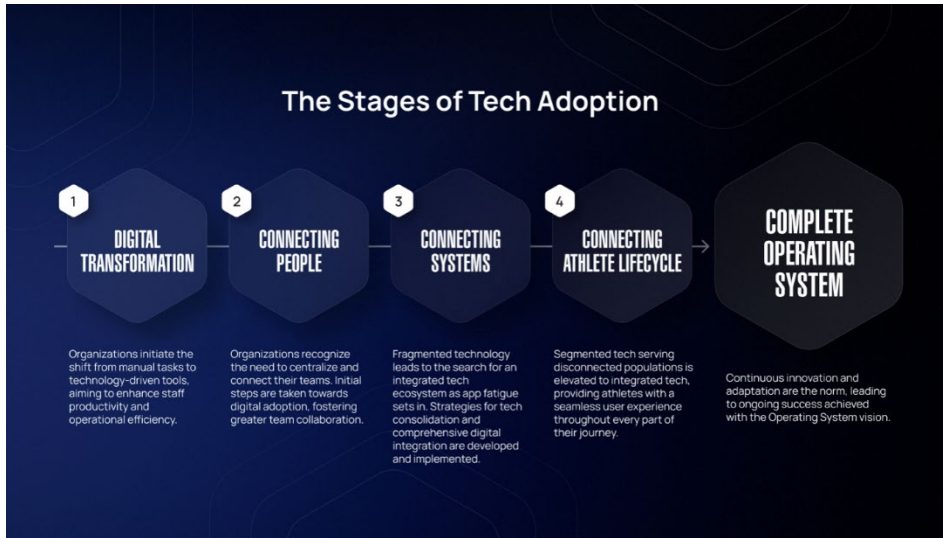
Teamworks has embarked on a journey to reshape how elite sports organizations approach technology investment. We emphasize that technology shouldn't be viewed as an accessory. As with CitiGroup, it should be viewed as a catalyst to advance organizational goals while also better serving your customers: student-athletes, fans, donors, staff, and coaches.

In that regard, with sweeping changes continuing to occur in college athletics, including NIL, the transfer portal, recruiting changes, litigation, new health and safety requirements, and more, FBS athletic departments must be able to meet the moment. Recognizing the dynamic nature of the market, Teamworks has structured our technology into six major categories that FBS athletic departments should consider for investment: (1) Operations; (2) Recruiting; (3) Performance; (4) Compliance; (5) Athlete Development; and (6) Branding & NIL.

The graphic below outlines the products we offer, [which we announced today](#), all align under one Teamworks brand. These products are intuitively organized within these six categories, and integrated for FBS departments to easily navigate to their functional use.



As you can further see in the graphic below, digital transformation has the power to streamline communications, enhance collaboration, and optimize performance in the high-pressure world of intercollegiate athletics. We recognize that athletic departments are at different stages of this transformation, with varying needs and circumstances.



We'd welcome the opportunity to consult with you on your own digital transformation, as a way to meet complex challenges head on. Feel free to reach out to me to further discuss how Teamworks can help you 'meet the moment.'



Thurs., April 11	LEAD1 Board of Directors Meeting	Virtual
Tues., June 11 - Wed., June 12	LEAD1 Spring Meeting at NACDA Convention	Las Vegas, NV
Sun., Sept. 22 - Tues., Sept. 24	LEAD1 Annual Fall Meeting	Washington, DC
Mon., Sept. 23	LEAD1 Board of Directors Meeting	Washington, DC

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