Statement to the New York City Council
Committee on Civil Service and Labor
Hearing on Proposed Intro. 658-A

By: James F. Hanley
Commissioner
NYC Office of Labor Relations

Date: February 28, 2012

Good morning Chairman Sanders and members of the Civil Service Labor Committee. My name is James Hanley, and I am the City's Commissioner of Labor Relations. I am here today to testify regarding the proposed amendment to the New York City Collective Bargaining Law that is currently before this Committee. The City opposes the proposed amendment to the law.

The New York City Collective Bargaining Law was enacted in 1967 as the result of a recommendation of a Tripartite Committee consisting of representatives of municipal unions, the City, and impartial members representing the public. When this became law, it included a provision requiring an individual or union bringing a grievance to the Office of Collective Bargaining to waive their right to seek review of the same underlying dispute in another forum. This intent is clear from the language of the provision, and it has not ever been amended since its enactment in 1967. Proposed Intro 658-A seeks to radically change the language and meaning of that provision.

If the proposed amendment were adopted, the waiver requirement would be narrowed and distorted such that it would no longer have any functional application. Under the proposed amendment, Grievants and Unions could freely pursue parallel litigation in other adjudicative forums even where there are common parties, common issues of fact, and common issues of law.

Under the proposed amendment, these common issues could be pending before an arbitrator at OCB and before a judge in court at the same time. This would result in duplicative litigation and potentially inconsistent findings in the two forums.

The waiver requirement has traditionally been enforced only where the parties are the same and the issues of fact and law are the same. The Board of Collective Bargaining since 1997 has recognized that certain federal claims, including claims under Title VII of the Civil Rights Act, or claims under the federal age discrimination law or federal disabilities law, are not subject to the waiver. The City does not dispute this interpretation. The proposed amendment, however, essentially nullifies the waiver requirement and would allow employees and Unions to proceed with duplicative litigation, the exact scenario the law was seeking to avoid when it was enacted.

It must be emphasized that for as long as the Collective Bargaining Law has been in existence, employees and Unions have not been foreclosed from exercising their rights in either forum. It simply requires, where the underlying dispute is the same, that a choice be made between the two forums. In fact, under longstanding case law and practice, an individual could initially file the claim in both court and at arbitration and satisfy the waiver requirement by withdrawing one action.

For these reasons, the City opposes Intro 658-A. Thank you for your time.

February 28, 2012

Statement of OCB General Counsel Steven C. DeCosta regarding the proposed amendment to the waiver provisions of the New York City Collective Bargaining Law – Proposed Int. No. 658-A

Good morning, Chairman Sanders, and members of the Civil Service and Labor Committee. My name is Steven DeCosta, and I am the Deputy Director and General Counsel of the New York City Office of Collective Bargaining ("OCB"). OCB is the impartial, non-mayoral administrative agency charged with administering and enforcing the provisions of the New York City Collective Bargaining Law, (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL"). It has been and is the policy of the agency not to support or oppose proposed amendments of the statute we administer (unless the amendment is one this agency specifically has requested), but, rather, to inform the Council of the agency's view of the significance and consequences of the proposed changes the Council is considering. Thus, this Statement is intended to provide information for the Council so that its members can consider the proposed amendment with a better understanding of its context and effect.

The Role of OCB

One of the statutory functions of OCB is to administer the grievance arbitration procedures that are found in the collective bargaining agreements that exist between the City and most of the municipal unions. The NYCCBL contains a statement favoring the use of arbitration:

> It is hereby declared to be the policy of the city to favor and encourage . . . the use of impartial and independent tribunals to assist in resolving impasses in contract negotiations, and final, impartial arbitration of grievances between municipal agencies and certified employee organizations.

NYCCBL § 12-302. To effectuate this policy, the law directs OCB to maintain a panel of impartial arbitrators and to establish arbitration procedures. NYCCBL § 12-312(a).

The Statutory Waiver Requirement

The NYCCBL also contains the following requirement, enforced by OCB, which is at the heart of proposed Int. No. 658-A:

> As a condition to the right of a municipal employee organization to invoke impartial arbitration under such provisions, the grievant or grievants and such organization shall be required to file with the director a written waiver of the right, if any, of said grievant or grievants and said organization to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award.

NYCCBL § 12-312(d).

The language of this requirement, known as the waiver provision, has been in the NYCCBL since its enactment in 1967. OCB's Board of Collective Bargaining ("the Board") long-ago expressed the reason for this requirement:

> The purpose of the rule is to prevent multiple litigations of the same dispute and to assure that a grievant who elects to seek redress through the arbitration process will not attempt at another time to relitigate the matter in another forum.

Committee of Interns and Residents, 33 OCB 14, at 21-22 (BCB 1984); *PBA*, 23 OCB 8, at 4 (BCB 1979).

The key question raised in applying the waiver provision to each request for arbitration that is filed is, what is the meaning or scope of the term "underlying dispute?" Over the years, the Board in its decisions consistently answered this question in the following manner.

> A union renders a waiver invalid by submitting, to arbitration and in another forum, claims which arise from the same factual

> circumstances, involve the same parties, and seek a determination of common issues of law.

SSEU, Local 371, 59 OCB 30, at 13 (BCB 1997); *see also CWA, Local 1182*, 59 OCB 3, at 6 (BCB 1997); *UPOA*, 47 OCB 38, at 14 (BCB 1991); *UFA*, 47 OCB 20, at 14 (BCB 1991); *DC 37, Local 1549*, 43 OCB 50, at 10-11 (BCB 1989). Thus, the waiver standard has always required identity of parties, facts, and common questions of law.

In 2004, the Board clarified the continuing application of this standard to take account of evolving judicial case law which informed the Board's assessment of what kind of claims constituted "common issues of law."[1] In *UFA*, 73 OCB 3A (BCB 2004), the Board undertook a comprehensive review and analysis of the waiver requirement, including consideration of the decisions of the courts on the question whether "common questions of law" encompassed non-contractual claims. In that decision, after discussing all of the relevant Board and judicial precedents, the Board concluded and held that:

> . . . the scope of the OCB waiver is limited to contractual claims under the collective bargaining agreement. In other words, the "underlying dispute" referred to in the OCB waiver does not encompass all statutory, constitutional, or common law claims arising from the same factual circumstances. To the extent that our prior cases . . . are inconsistent, they are hereby overruled.

UFA, 73 OCB 3A at 13.

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[1] The Board's review also was triggered, in part, by its recognition that a few similar cases appeared to have had inconsistent outcomes. Compare *DC 37*, 39 OCB 28 (BCB 1987) (waiver violated where claim under Whistleblower Law was filed in court) with *CWA, Local 1180*, 59 OCB 3 (BCB 1997) (waiver not violated where Title VII claim was filed with EEOC).

This holding reflected a unanimous decision by the tripartite Board, and was not appealed by any party. This interpretation of the waiver provision was followed by the Board in later cases. *See, e.g., DC 37, Local 376*, 1 OCB2d 36, at 11 (BCB 2008).

Court Decisions Expand the Scope of the Waiver

In 2009, the Board's interpretation of the NYCCBL's waiver requirement was rejected by a court in a case in which OCB and its Board were not parties. In *Matter of Roberts v. Bloomberg,* 26 Misc.3d 1006 (Sup. Ct. N.Y. Co. 2009) (Tolub, J.), *affd.*, 83 A.D.3d 457 (1st Dept. 2011), *lv. denied*, 17 N.Y.3d 706 (2011), a Union, DC 37, raised claims of statutory and constitutional violations in State Supreme Court.[2] DC 37 simultaneously filed a request for arbitration of claimed contractual violations with OCB. Granting a motion by the City, the court dismissed the Union's statutory and constitutional claims, finding that the Union had "waived" the right to have them adjudicated in court when it submitted the OCB waiver that accompanied its request for arbitration. The dismissal was affirmed by the Appellate Division. The courts construed the waiver requirement's reference to the "underlying dispute" to include "the entire issue" including statutory and constitutional claims arising out of the same facts. The Appellate Division stated that, by submitting the OCB waiver,

> . . . petitioners agreed to arbitrate the entire dispute, not just contractual claims. Indeed, there is nothing in the statute or its legislative history to support petitioners' position that statutory or constitutional claims are exempt from the waiver.

83 A.D.3d at 458.

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[2] The Union's court claims included alleged violations of the notice of contracting-out provisions of Local Law 35 and the merit-and-fitness provisions of Art. V, § 6 the State Constitution.

The court's ruling not only rejected the Board's well-established interpretation of the scope of the waiver, but also ignored a consistent body of Board case law which holds that, absent specific reference in a collective bargaining agreement, claimed violations of statutory or constitutional provisions are not subject to arbitration. *Committee of Interns and Residents,* 61 OCB 39, at 8 (BCB 1998); *DC 37*, 61 OCB 28, at 9 (BCB 1998); *IBEW, Local 3*, 59 OCB 8, at 4 (BCB 1997); *IBEW, Local 3*, 31 OCB 18, at 6 (BCB 1983).[3]

Consequences of the Court's Ruling

Several consequences will flow from the ruling of the court in *Matter of Roberts v. Bloomberg.* First, where a union wishes to adjudicate and/or enforce claims arising out of a single set of facts but based on the violation of rights derived from both a collective bargaining agreement and a statutory/constitutional provision, it must elect only one forum in which to proceed. Moreover, this choice of forum may involve the relinquishment of certain rights. If a union decides to proceed only in court, seeking enforcement of statutory and/or constitutional rights, the court will not hear claimed violations of a collective bargaining agreement, a matter the parties have agreed should be submitted only to arbitration.[4] Alternatively, if a union decides

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[3] The Appellate Division decision also disregarded the fact that the waiver provision had been read in exactly the way the Board has applied it in not one but three federal court decisions. *Scheiner v. New York City Health and Hospitals*, 152 F. Supp. 2d 487 (S.D.N.Y. 2001) (Koeltl, U.S.D.J.); *Khamba v. SSEU Local 371*, No. 97 CIV. 4461 (DLC), 1999 WL 58924 (S.D.N.Y. Feb. 5, 1999) (Cote, U.S.D.J.), affd., 225 F.3d 646 (2d Cir. 2000); and *Giles v. City of New York*, 41 F. Supp. 2d 308 (S.D.N.Y. 1999) (Motley, U.S.D.J.). The Appellate Division dismissed those decisions as involving individual, as opposed to union claims, a distinction not found in the statute.

[4] A case illustrative of this situation has already occurred. In *United Marine Division, Local 333, ILA*, 4 OCB2d 37 (BCB 2011), the Union had litigated and received a decision on an improper

to proceed only in arbitration before OCB, seeking enforcement of its contractual rights, it risks a finding that any attendant statutory and/or constitutional claims are not submissible to an arbitrator. In other words, the union may have to choose which rights to enforce and which rights to lose for lack of a forum.

A second consequence of this ruling is that unions and their members who are under the jurisdiction of the NYCCBL are placed in a specially disadvantaged position. Public employees and their unions in New York State outside the coverage of the NYCCBL, *i.e.,* under the coverage of the State Taylor Law (N.Y. Civil Service Law, Article 14), are not required to submit a waiver of rights as a condition precedent to going to arbitration. Therefore, the *Matter of Roberts v. Bloomberg* ruling has no application to them. They remain free to litigate their statutory and/or constitutional claims in court, even after arbitrating their contractual claims. *See, e.g., Wharton v. Town of North Hempstead*, 22 Misc.3d 83, 84 (App. Term., 9th & 10th Dists. 2009).

The Proposed Amendment – Int. No. 658-A

The proposed amendment would modify the statutory waiver language by replacing the "underlying dispute" with "determination of the alleged contractual dispute." The amendment also would insert a new sentence stating:

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practice charge under the NYCCBL (*United Marine Division, Local 333*, 2 OCB2d 44 (BCB 2009), which was affirmed by the courts (*Matter of City of New York v. Bd. of Coll. Barg.*, Index No. 400177/10 (Sup. Ct. N.Y. Co. Oct. 7, 2010)(Schlesinger, J.)). The Union then sought to arbitrate a related claim based on its collective bargaining agreement. The Board held, under constraint of *Matter of Roberts v. Bloomberg,* that the contractual claim was the same "underlying dispute" as the improper practice charge, so that the waiver submitted was invalid and the contractual claim could not be submitted to arbitration.

> This subdivision shall not be construed to limit the rights of public employees or public employee organizations to submit any statutory or other claims to the appropriate administrative or judicial tribunal.

These changes would narrow the scope of the required waiver back to what existed under the Board's decisions prior to the ruling in *Matter of Roberts v. Bloomberg*. Unions would be required to waive the right to submit the contractual dispute to any other forum, but would not be required to waive any statutory or "other" claims. This would appear to be consistent with the Board's holding in *UFA*, 73 OCB 3A (BCB 2004), and its later decisions prior to *Matter of Roberts v. Bloomberg*. Presumably, such change would not affect any currently-pending cases but would establish a clear standard for future cases.

A couple of hypothetical examples may be instructive. Consistent with the Board's decisions prior to *Matter of Roberts v. Bloomberg*, and if Int. No. 658-A is enacted, a union that has a claim that an employee was not paid the correct contractual hourly rate, or was not paid a differential provided in the contract, could execute the required waiver and submit the dispute to arbitration at OCB, but would be barred from litigating the same contractual claim in an action in court. However, a union representing an employee who believed he or she was wrongfully disciplined for discriminatory reasons could execute the required waiver and submit to arbitration the question of guilt or innocence of the disciplinary charges, while still preserving the right to litigate the question of discrimination on the basis of race, gender, age, disability, etc., in the courts or in an appropriate administrative forum (e.g., the EEOC).

I would be pleased to answer any questions the Members of the Committee on Civil Service and Labor may have about the proposed change to the NYCCBL.

Testimony on behalf of District Council 37, AFSCME before the New York City Council Committee on Civil Service and Labor concerning passage of Intro 658-A

Good morning. My name is Mary O'Connell, and I am General Counsel to District Council 37 of AFSCME. I thank you for the opportunity this morning to speak to you concerning our position in favor of the passage of Intro 658-A, a local law to amend the New York City Collective Bargaining Law in order to clarify that statute's provision requiring submission of a waiver as a condition to arbitrate a contract grievance. This important issue concerns all unions covered by the NYCCBL.

As I am sure you are aware, DC 37 represents 121, 000 members, the vast majority of whom are employees of the City of New York or one of its related boards, authorities or corporations. As such, the City and this union (along with other City unions) are subject to the provisions of the New York City Collective Bargaining Law (12-300, et seq. of the Administrative Code). This statute ensures that employees of the City of New York and other covered employees enjoy the right to organize and bargain collectively. The statute also contains provisions related to representation of public employees, improper practices of both employers and unions, impasse procedures, and

pertinent to our discussion this morning, the arbitration of contract grievances – the means by which the parties resolve alleged violations of their collective bargaining agreements.

Section 12-312(d) of the NYCCBL currently states:

As a condition to the right of a municipal employee organization to invoke impartial arbitration under such provisions, the grievant or grievants and such organization shall be required to file with the director a written waiver of the right, if any, of said grievant or grievants and said organization to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award.

Since at least 1992, when the Board of Collective Bargaining clarified its prior decisions, this provision was interpreted by the Board of Collective Bargaining and understood by both employers and labor organizations to mean that a grievant and union, in order to avail themselves of the binding arbitration procedure contained in the collective bargaining agreement and administered by the Office of Collective Bargaining, would have to agree to not take the contract violation to a court for adjudication. It did **not** foreclose the union or the employee from asserting other claims – such as a violation of a statute - in the appropriate judicial or administrative forum. For example, to use an individual's case, an employee may be terminated, and he and the union wish to take his case – for wrongful discipline – to arbitration under the

contract. The individual may have other rights under various statutes arising from the same wrongful conduct of the employer. For example, the employer may have been motivated by a discriminatory reason in violation of state or local anti-discrimination statutes. To give another example, a union activist may be the victim of employer discipline. Given the circumstances, it may be appropriate to challenge the discipline not only through a grievance, but also take exception to the employer's anti-union actions through the filing of an improper practice charge with the Office of Collective Bargaining, alleging that the actions violated both the employee's and the union's rights under the NYCCBL.

Additionally, case law in New York State has been clear that a waiver, in order to be effective, must be clear, explicit and unequivocal and not depend upon implication or subtlety *Waldron v. Goddess,* 61 N.Y.2d 181, 183-184 (1984). The federal courts have also held that a waiver filed pursuant to the NYCCBL was not a waiver of a statutory claim (see, eg. *Scheiner v. New York City Health and Hospitals Corporation,* 152 F.Supp.2d 487 (S.D.N. Y. 2001).

Up until recently, that employee was able to fully address the employer's wrongful conduct in such forums as appropriate. Likewise, the union was able to address wrongful actions of the employer not only through

asserting its rights under the collective bargaining agreement, but also enforcing statutory provisions or agency rules or regulations which may have been violated.

This long standing right and practice was turned on its head in 2009 in a decision entitled *Roberts v. Bloomberg,* 26 Misc.3d 1006, Sup. Ct. N. Y. County (2009), aff'd 83 A.D.3d 457 (2011), leave to appeal denied, 17 N.Y.3d 706 (2011). In that case, the DC37 sought to challenge the layoff of several hundred employees of the New York City Housing Authority. At the same time the union challenged the layoff as a violation of the merit and fitness provisions of the New York State Constitution, as in bad faith and arbitrary and capricious, as well as being a violation of Local Law 35, the union also filed a Request for Arbitration with the New York City Office of Collective Bargaining seeking to enforce Section 11 of our collective bargaining agreement which requires the employer to engage in a specific process with the union before letting a contract which may adversely affect employees. The state supreme court found that by submitting the alleged violation of the collective bargaining agreement to arbitration, the union waived its rights pursue its statutory claims which arose as a result of the City's and the Housing Authority's actions. The court relied upon a finding that the term

"underlying dispute" meant all claims that arose from the same set of operative facts. The Appellate Division, First Department affirmed the lower court decision, agreeing that the statutory language was clear, and distinguished the cases in which there was no waiver to individual employment cases.

Intro 658-A will serve to correct this misinterpretation of the NYCCBL. It will make clear that which had been the parties' understanding and practice: that when an employer takes an action which the union believes to violate its collective bargaining agreement and some other statute, the union will be able to seek redress for its members in arbitration for contractual claims and the appropriate judicial or administrative forum for other claims.

Let me be clear: the union is not seeking two bites of the apple to litigate its contract claims in multiple forums. By the same token, the union and its members should not be deprived of the ability to redress statutory or constitutional violations if they file a request for arbitration. The union and its members should be able to use as many arrows in its quiver as it can protect jobs and enforce hard earned protections.

It should also be noted that the remedies for contractual violations may not be the same as remedies which the union could secure for statutory or

constitutional violation. For example, under Section 11 of our economic agreement, the union has the ability to engage in a process by which it can make a proposal to keep work in-house. Ultimately, however, the City retains the ability to decide whether to contract out work. On the other hand, were a court to find layoffs to be in bad faith, we would request the court to order the employees reinstated with back pay.

As I know the Council has noted, a waiver provision like that contained in the NYCCBL does not exist in the New York State Taylor Law. To not amend the NYCCBL to clarify its meaning would be to countenance a two tier system, with New York City employees unable to pursue their statutory or constitutional claims. Such a result is simply unjustifiable.

Further, the alternative – foregoing arbitration - is equally troublesome. As I am sure the Council is aware, New York State's public policy favors arbitration as a just, economical and efficient means by which to resolve disputes under the collective bargaining agreement. That policy will be undermined if the NYCCBL is not amended to clarify that which has been in place since at least 1997 – that submission of the waiver pursuant to the NYCCBL will not foreclose pursuit of statutory, constitutional or other claims which arose out of the same action of the employer.

Once again, thank you for allowing me to speak in favor of Intro 658-A and I would be happy to answer any questions.

TESTIMONY OF ROBERT J. BURZICHELLI
BEFORE CITY COUNCIL COMMITTEE CONCERNING
PASSAGE OF INTRO. 658-A

Good morning. My name is Robert J. Burzichelli, a member of the Law Firm of Greenberg Burzichelli Greenberg. My firm serves as general counsel to the New York City Municipal Labor Committee. ("MLC").

Thank you for the opportunity to appear before you today on behalf of the MLC and to present its position in favor of the passage of Intro 658-A, a local law to amend the New York City Collective Bargaining Law.

As background, the Municipal Labor Committee ("MLC") is an unincorporated association of New York City municipal labor organizations that currently represents approximately 300,000 active and retired New York City municipal workers and about 100 unions. The MLC is organized under the NYC Administrative Code and was created pursuant to an agreement of March 31, 1966, signed by representatives of the City of New York and many employee organizations of the day.

Given the MLC's wide membership and its long history in labor relations, we feel that it is our duty to bring to your attention the importance of enacting Intro 658-A.

As testified to by District Council 37's General Counsel Mary O'Connell, recent court decisions have significantly changed unions' and their members' legal rights to pursue arbitration under their respective collective bargaining agreements. I will not bore the Council with a repeat of the legal analysis outlined by Ms. O'Connell since the MLC is in complete agreement with DC 37's position on this matter.

Instead, what I want to highlight is the fact that Intro 658-A will restore labor relations to the status quo as it had existed for decades regarding arbitration and a union's ability to protect its rights under its collective bargaining agreement. Intro 658-

A is needed to restore the balance of power between unions and the City in the conduct of labor relations.

The court's recent interpretation of the law, if not corrected, will have a chilling effect on unions' decisions to utilize arbitration. If Intro 658-A is not passed, unions will avoid arbitration since in order to enter the arbitral forum the union must now waive redress for all other violations of rights they have under City, State and Federal laws.

Further, the new policy without Intro 658-A will deter individual union members from utilizing the arbitration process to protect their own contractual rights. For example, if a worker now decides to go to arbitration to challenge her wrongful termination, she would waive her right to pursue any claims under State and Federal Civil Rights and Anti-Discrimination Laws. Since an arbitrator does not have jurisdiction to decide civil rights issues or provide the same relief under the Civil Rights Laws as a court of competent jurisdiction, that worker will be effectively stripped of her rights. As such, the arbitration process for disciplinary matters will largely be abandoned and instead, the courts will be flooded with those issues. This is in direct contravention of New York's policy favoring alternative dispute resolution.

For decades, labor and the City have conducted labor relations with the understanding that contractual rights would be arbitrated and other legal rights were to be decided in judicial forums. The arbitration process provided labor and management with an opportunity to settle their disputes in an informal process before arbitrators experienced in labor relations. Now, that process is compromised to the point of paralysis. If unions and their members are forced to forego arbitration, and head to courts of law, it will be time consuming, expensive, and result in a great deal of uncertainty for both labor and the City. A truly no win situation.

On behalf of the MLC, I strongly urge the Council to enact this important piece of legislation and return the conduct of labor relations in the City of New York back to the status quo.

THE COUNCIL
THE CITY OF NEW YORK

Appearance Card

I intend to appear and speak on Int. No. 658-A Res. No. ______
☒ in favor ☐ in opposition

Date: ______

(PLEASE PRINT)

Name: Robert J. Burzchelli
Address: 100 Church St Ste 846 NY NY 10007
I represent: NYC Municipal Labor Committee
Address: ______

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Appearance Card

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☒ in favor ☐ in opposition

Date: 2-28-12

(PLEASE PRINT)

Name: Mary J. O'Connell
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Date: 2/28/12

(PLEASE PRINT)

Name: Steven DeCosta
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I represent: Office of Collective Bargaining
Address: same

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Appearance Card

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☐ in favor ☐ in opposition

Date: ______

(PLEASE PRINT)

Name: James F. Hanley.
Address: 40 Rector St.
I represent: Off. of Lab. Rel. - City of NY
Address: ______

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