



(3) **May 14, 2001 Agreed Temporary Orders Pursuant to "Mediation Agreement on Temporary Orders Until March 22, 2001:**

*Minimizing Disruption*

IT IS ORDERED that to minimize disruption of the children's education, daily routine, and association with friends, Avian Ann Biedermann and Kenneth Kyle Biedermann shall:

1. Refrain from engaging in conduct designed to alienate the children against the other parent;
2. Abide by the "Parent's Foals, Agreement and Guidelines Relating to the Children," attached hereto as Appendix 2. (See immediately below)

\* \* \* \* \*

[Appendix 2]

Kyle and Avian agree to attempt at all times, to act in a manner consistent with the following goals, which Kyle and Avian believe to be in their children's best interest:

- \* to provide the children with an emotional environment in which each is free to continue to love the other parent and to spend time with the other parent;
- \* to encourage good feelings from the children about the other parent and their extended family, if any;
- \* to plan together as parents rather than through the children;
- \* to not take sides or take issue with decisions or actions made by the other parent, especially in front of the children;
- \* to present a united front on the handling of any problems with the children;
- \* to use discretion as to the time and frequency of phone calls to the children;
- \* to behave discreetly with other people in the children's presence; and,

\* \* \* \* \*

Kyle and Avian agree that it is in the best interest and welfare of the children that the children be accorded rights and as such are third-party beneficiaries of this agreement and stipulation between their parents. Both parents acknowledge the following rights of the children, to wit:

- \* the right to a continuing relationship with both parents;
- \* the right to know and appreciate what is good in each parent without one parent degrading the other;
- \* the right to have a relaxed, secure relationship with both parents without being placed in a position to manipulate one parent against the other.

\* \* \* \* \*

*Temporary Injunction as to Children*

The Court finds that, based on the public policy considerations stated in section 153.001 of the Texas Family Code, it is in the best interests of the children that the following temporary injunction be issued and related orders be entered.

IT IS ORDERED that Avian Ann Biedermann and Kenneth Kyle Biedermann and their agents, servants, employees, attorneys, and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise are temporarily enjoined from:

1. Molesting or disturbing the peace of the children or of any other party.

\* \* \* \* \*

*Temporary Injunction*

The Court finds that the parties have agreed that the existing restraining order shall remain in effect and to the entry of the following temporary injunctions while this case is pending.

The temporary injunction granted below shall be effective immediately and shall be binding on Avian Ann Biedermann and Kenneth Kyle Biedermann;

on their agents, servants, employees, and attorneys; and on those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise. The requirement of a bond is waived.

3. Placing one or more telephone calls, anonymously, at any unreasonable hour, in an offensive and repetitious manner, or without a legitimate purpose of communication.

(4) **May 14, 2001 Temporary Orders hearing:**

[p.7] MS. BERGMAN: Our office, the office - Law Offices of John Nichols, will call Dr. Jack Ferrell in San Antonio and set up appointments for custody evaluation, the parties and the children.

[p. 10] THE COURT: All right, then this is the agreement you have worked out this morning?

MR. HALM: That is correct, Your Honor.

THE COURT: The Court will consider that a Rule 11 Agreement and proceed on it.

(5) **May 31, 2001 Telephonic Conference:**

[p. 12] THE COURT:... I think the main thing is this discussion business; and all the family members are included, the parents, and any other aunts and uncles, and so forth, and friends of the family are not to discuss this matter with the children.

(6) **June 4, 2001 Rule 11 Agreement for Additional Temporary Orders:**

Pursuant to Rule 11, Tex. R. Civ. P., Avian Ann Biedermann, Petitioner, and Kenneth Kyle Biedermann, Respondent, through their respective attorneys of record, agree to additional temporary orders as follows:

(3) The Parties agree and IT IS ORDERED that Dr. Jack G. Ferrell, 14310 Northbrook Dr., Suite 120, San Antonio, Texas 78232, 210-499-5025, 210-499-5825 facsimile, is appointed to interview, examine, evaluate, and consult with the parties and the children and the children to prepare a custody evaluation to be filed with the Court on or before August 1, 2001. The parties further agree and IT IS ORDERED that the earliest available appointments for the parties and the children shall be made through the Law Offices of John Nichols and notices sent to Allen J. (Jody) Halm forthwith.

(7) **July 5, 2001 Modification Hearing:**

[pp. 111 & 112] MR. RUDKIN: I was going to raise one additional matter. I met with the children and in my perspective, these children are nine down to five years old. They have way too much knowledge - - -

THE COURT: Of what's going on?

MR. RUDKIN: - - - the buzz words and consternation and fighting back and forth with mom and dad, lawyers and this and that. I would request that there be an admonition that neither party discuss in any fashion, shape, or form the litigation process, court proceedings, anything to do with this matter.

THE COURT: That's an Order of the Court, should not be discussed or even mentioned other than the fact that if you have to, that we will be deciding it before school time, but it's very important; and financial conditions and so forth, I think the children should not be involved in this process.

If either parent - I find out either parent is making comments, derogatory comments or such about the other parent, this Court will certainly take sanctions against the person making the comments. It's very important, and I think - and I think the grandparents, this would also apply. I think the grandparents can do a lot on both sides, a lot to kind of ease the pressure of the children.

In direct response to Respondent's blatant and repeated violations of this Court's orders the Court entered into the "Emergency Sua Sponte Order" on August 20, 2001. Emergency Sua Sponte Order in pertinent part states:

THEREFORE, the Court does make and enter the following Orders which are effective immediately for the protection of said minors and for their best interest.

- (1) The original Petitioner, AVIAN ANN BIEDERMANN, the natural Mother, shall be the sole temporary managing Conservator of the four minor children with all the power, authority, duties, etc., as provided by law.
- (2) Until further Orders of the Court, the natural Father, KENNETH KYLE BIEDERMANN, the original Petitioner, shall have no contact or communication, **in any manner, way, form or fashion** with said minors until further Orders of this Court. Moreover, said Father shall not go, for any reason, within one hundred (100) yards of the original Petitioner's residence and/or where a reasonable person would anticipate said minors being at such time, including schools,

churches, etc.

- (3) Any and all Orders and agreements heretofore made in this case, not in conflict with this Order, or that does not violate [sic] the intent or spirit of this Order, shall remain in full force and effect.
- (4) The Father shall not contact and/or attempt to contact, in any manner, the Mother, except by or through her attorney, the attorney ad litem in this case, Dr. Jack Ferrell or such party the said Dr. Jack Ferrell shall designate in writing.

The strong, direct language of the Sua Sponte Order was necessary in this case because Respondent, Kenneth Kyle Biedermann, has repeatedly violated this Court's Orders. These blatant violations illustrate Respondent's lack of concern for his daughter's emotional well-being and this Court's authority.

## II.

Dr. Jack Ferrell is the court approved psychological and child custody evaluator on this case. Dr. Ferrell has prepared a 16 page initial report which has been filed with this Court after the evaluation period. In his report Dr. Ferrell states:

- A. He has evaluated Kyle and Avian Biedermann and the four Biedermann children. [p. 1]
- B. The evaluation period covered four months (April 17, 2001 to August 14, 2001). [p. 1]
- C. The evaluation consisted of:
  - (1) development of social history
  - (2) home visit evaluations
  - (3) the administration of psychological tests
  - (4) review of specific documents, including medical reports and other health care
  - (5) the CASA Report
  - (6) school records
  - (7) collateral reports and anecdotal data. [p. 1]

- D. Kyle Biedermann "did not fill out this form" when asked to describe his relationship with Kyla Biedermann, age 9. [p. 10]
- E. Kyla Biedermann related: "we" think mom has problems and then relates material or allegations reported by the father or suggested to her by him. She clearly is the father's biggest advocate and apparently discuss his feeling regarding the divorce often. [p. 10]
- F. Issues about the father sleeping nude with the children were also addressed and the Court Ordered that he not sleep with the children at all. He did not during the trip to Florida, but did permit one child each night to sleep in a bed right next to his in his room as a special treat. He reported that he did so because the children wanted to and they would have been unhappy if he had not. He failed to appreciate that perhaps this was not an altogether appropriate manner in which to address the Court's Order, nor was the children's desire sufficient to abdicate (minimally) his responsibility in this regard. He appears to at times push the envelope and may have difficulty in some areas with respect to boundaries, which does concern this examiner. [p. 14]
- G. Kyle Biedermann ... must cease and desist from further alienation of the children. [p. 16]

The audio taping of the conversations by Petitioner, Avian Ann Biedermann, has previously been discussed in front of and addressed by Judge Sherrill. It was recommended at the August 15, 2001 hearing by Dr. Ferrell to Judge Sherrill and Petitioner, Avian Ann Biedermann, that Petitioner continue to record Respondent's conversations with the minor children as a part of Respondent's "recovery" plan.

There were no objections to Dr. Ferrell's proposed "recovery" plan or that Petitioner continue to record Respondent's conversations with the children by any of the attorneys or Judge Sherrill. The lawyers in the room at the time were: John Nichols, Pamela Bergman, Kurt Rudkin, and Jody Halm. As Respondent's Attorney of Record, Jody Halm failed to make a timely objection to Petitioner's audio taping the conversations in question, to the admissibility of the audio tapes, or to the continuation of Petitioner's recording the conversations.

### III.

Petitioner, Avian Ann Biedermann, consented to the interceptions on behalf of her minor children. Respondent, Kenneth Kyle Biedermann, impliedly consented to the interceptions by his prior knowledge of the taping and his failure to timely raise an objection to the admissibility of the audio tapes. Therefore, the recorded telephone conversations of

Kenneth Kyle Biedermann and the minor Biedermann children were legally obtained and are admissible.

In Respondent's Motion to Strike Brief in Support of Emergency Sua Sponte Order, he claims the conversations were illegally tape recorded and, therefore, they should be inadmissible. Respondent fails to state any authority to substantiate his claim of illegality.

Respondent also claims the audio tapes were withheld in violation of Discovery, but as of this date, there have been no formal requests for discovery from Respondent. The parties have only engaged in informal discovery. Sanctions for Abuse of Discovery cannot be given if the parties have not engaged in the formal discovery process.

A party who objects to the admissibility of evidence on the grounds that it was illegally obtained must show that the federal or state statutes require it to be excluded. Otherwise, the evidence must be admitted. *Sims v. Cosden Oil & Chemical Co.*, 663 S.W.2d 70 (Tex. App.—Eastland 1984, writ ref'd n.r.e.). In this case neither the federal wiretapping statute nor Texas Civil Practice and Remedies Code sections 123.001 to 124.004 require the audio tapes in question to be inadmissible.

The admissibility of evidence is moderated by Texas Rules of Civil Evidence 402. Rule 402 provides that "(a)ll relevant evidence is admissible, except as otherwise provided by constitution, by statute, by these rules or by other rules prescribed pursuant to statutory authority." Tex. R. Civ. Evid. 402; see *Sims v. Cosden Oil & Chemical Co.*, 663 S.W.2d 70 (Tex. App.—Eastland 1984, writ ref'd n.r.e.).

Interceptions or audio tapes from telephone conversations are only found to be in violation of the federal and state wiretapping statutes (illegal) if one of the parties has not consented to their obtainment. In this case, under the doctrine of vicarious consent, Petitioner, Avian Ann Biedermann, consented to the interception of her minor daughters' telephone conversation on their behalf.

In this case, Petitioner has consented on behalf of her minor children and Respondent has impliedly consented to the audio taping through his prior knowledge of the interception and his failure to timely raise an objection to the admissibility of the audio tapes. The doctrine of vicarious consent involves the parent or guardian's consent to allow the taping of minor children's telephone conversations. *Pollock v. Pollock*, 154 F.3d 601 (6th Cir. 1998); *Thompson v. Dulaney*, 838 F. Supp. 1535 (D. Utah 1993); *Silas v. Silas*, 680 So. 2d 368 (Ala. Civ. App. 1996); *Wagner v. Wagner*, 64 F. Supp. 2d 895 (U.S.D.C. Minn. 1999); *Campbell v. Price*, 2 F. Supp. 2d 1186 (E.D. Ark. 1998).

This case can be distinguished from the numerous cases involving spousal wiretapping. In the spousal-wiretapping cases the main issue is the lack of any party's consent, thus violating Federal and State Wiretapping statutes.



A. *The Federal Wiretapping Statute*

The federal wiretap statute prohibits the interception and use of illegally intercepted communications. 18 U.S.C. § 2510.

Several exceptions to the general prohibition against use of intercepted oral and wire communications exist. Section 2511(2)(d) of the federal statute provides that it is not unlawful for a person to intercept an oral or wire communication where this person is one of the parties to the communication or where one of the parties has given prior consent to such an interception. 18 U.S.C. § 2511 (2)(d).

The court in *Pollock v. Pollock* extended the consent exception in holding that a parent may vicariously consent on behalf of a minor child to the interception of a communication as long as the parent can demonstrate "a good faith, objectively reasonable basis for believing that it is necessary and in the best interest of the child." *Pollock*, 154 F.3d at 610; see also *Thompson*, 838 F. Supp. 1535; see also *Silas*, 680 So. 2d 368; see also *Wagner*, 64 F. Supp. 2d 895; see also *Campbell*, 2 F. Supp. 2d 1186.

In *the Anonymous* case, a father audio taped his eight-year-old little boy's conversations with the child's mother. *Anonymous v. Anonymous*, 558 F.2d 677 (2d Cir. 1977). The Court likened the audio taping to listening to the conversation on another extension, which is not prohibited by the federal wiretapping statute. *Anonymous*, 558 F.2d 677.

B. *Texas State Statutes*

Texas Civil Practice and Remedies Code applies only to interceptions of communications that are not consented to. In this case, the communications were audio taped with the consent of the primary custodian, Avian Ann Biedermann, on behalf of her minor children. The doctrine of vicarious consent is directly applicable to this case. Texas Civil Practice and Remedies Code sections 123.001 to 124.004, therefore, are not applicable in the case at hand.

The audio tapes of Kenneth Kyle Biedermann's telephone conversations with the minor Biedermann girls were not illegally intercepted. Respondent argues that the tapes were illegally intercepted because Kenneth Kyle Biedermann's permission was not directly obtained prior to the interception.

Respondent fails to cite any authority for his blanket statement that the "telephonic transcriptions" were "obtained illegally."

Purely verbal communications, which are not transmitted by wire or cable, are not

covered under the Texas statutes. Tex. Civ. Prac. & Rem. Code §§ 123.001-124.004; Texas Penal Code Ann. § 16.02. Several of the audio tapes recorded by Petitioner, Avian Ann Biedermann, captured in-person (not telephone) conversations between her and Respondent, Kenneth Kyle Biedermann. These conversations are clearly admissible and their legality should not be in question.

Respondent states that "there is no exception presently recognized under Texas law to allow an illegally recorded telephone conversation to be admissible as evidence." This is an inaccurate statement of the law by Respondent. Texas has recognized an exception for the admissibility of illegally intercepted telephone conversations. In *Cummings v. Jess Edwards*, the Court held illegally-taped telephone conversations may be used for impeachment purposes, provided the recording satisfies a seven-point test for admissibility. *Cummings v. Jess Edwards*, 445 S.W.2d 767, 773 (Tex. Civ. App.—Corpus Christi 1969, writ ref'd n.r.e.). This seven-point test requires that the offering party demonstrate:

1. that the recoding device was capable of taking testimony;
2. that the operator of the device was competent;
3. the authenticity and correctness of the recording;
4. that changes, additions, or deletions have not been made;
5. the manner of the preservation of the recording;
6. the identity of the speakers; and
7. that the testimony elicited was voluntarily made without any kind of inducement.

*Cummings*, 445 S.W.2d at 773. The admissibility of Conversations obtained in violation of the federal wiretapping statute have long been held to be admissible the purpose of impeachment. *Jacks v. State*, 394 N.E.2d 166 (1979).

If a party to the communication consents to the interception or if a person who is a party to the communication intercepts the communication it is not a violation of the state or federal statutes. Courts have recognized a general exception to the blanket prohibition of spousal wiretaps: when the intercepting party is a party to or has consented to the interception the wiretap is allowed. *Kotrla v. Kotrla*, 718 S.W.2d 853, 855 (Tex. App.—Corpus Christi, 1986, writ ref'd n.r.e.).

The state interception of communications statute does not prohibit audio taping conversations as long as one party consents to the taping. *Kotrla*, 718 S.W.2d at 855. In this case one party has consented to the interception. Petitioner, Avian Ann Biedermann, consented on behalf and in representation of her minor children. Only one party to the conversation needs to consent for the audio taping under both the federal and state statutes. This criteria has clearly been met in this case. One party has consented under the doctrine of vicarious consent.

In this case Petitioner, Avian Ann Biedermann, is not recording Respondent's telephone conversations with anyone else but the minor daughters. The oldest child in this case is nine-years-old and is unable to consent to the audio taping for herself. She is too young to understand all of the ramifications involved in this case, so the Petitioner consented for her. The Petitioner only consented to the audio taping after she had a reasonable good faith belief that the taping was necessary. In the later audio tapes, Kenneth Kyle Biedermann impliedly consented to the interceptions because he knew and acknowledged that the conversation was being taped.

Therefore, consent is not an issue in this case.

### C. *The Doctrine of Vicarious Consent*

Courts across the country have held that a parent or guardian's consent is sufficient to allow the taping of the minor children's phone conversation, even if the parent or guardian was not a party, if the parent or guardian had an objectively reasonable good faith belief that the taping was necessary. *Pollock*, 975 F. Supp. 974; *Thompson*, 838 F. Supp. 1535; *Silas*, 680 So. 2d 368; *Campbell*, 2 F. Supp. 2d 1186; *Wagner*, 64 F. Supp. 2d 895.

As long as a parent has the good faith belief that recording is in the child's best interest, the parent may vicariously consent on behalf of the child to the recording of the child's cell phone conversations. *Pollock*, 154 F.3d 601; *Thompson*, 838 F. Supp. 1535; *Silas*, 680 So. 2d 368; *Campbell*, 2 F. Supp. 2d 1186; *Wagner*, 64 F. Supp. 2d 895.

The custodial parent's good faith concerns for the minor child's best interest may, without liability under the Federal Wiretapping Statute, empower the parent to intercept the child's conversations with the non-custodial parent. *Campbell*, 2 F. Supp. 2d 1186. There may be limited instances where a parent may give vicarious consent on behalf of a minor child to the taping of telephone conversations where that parent has a good faith, objectively reasonable basis for believing that the minor child is being abused, threatened, or intimidated by the other parent. *Silas*, 687 So. 2d 368; *Wagner*, 64 F. Supp. 2d 895.

Avian Biedermann began audio taping the conversations only after the children became hostile towards her. The Biedermann girls were engaging in behavior contrary to their normal dispositions. Petitioner observed the girls hide with the telephone on numerous occasions, only to discover they had been talking with Respondent, Kenneth Kyle Biedermann. The girls state legal terms and knowledge of the divorce proceedings that they would not have known, unless someone directly told them.

Prior to Petitioner audio taping the telephone conversations, Kenneth Kyle Biedermann was observed on several occasions obtaining an erection when he picked up his daughters. Avian Ann Biedermann's sisters also witnessed this display of sexual arousal by Kyle Biedermann. During the first social study Kenneth Kyle Biedermann did not deny the accusation stating that he would obtain an erection when picking up his children. The children began exhibiting outcries of sexual misconduct through little comments they would make. Ferrell's admonishment about sleeping naked w/ the girls.

Avian Biedermann is concerned for the emotional and physical well-being of her daughters. She began recording the children's telephone conversations with their father to determine whether Kenneth Kyle Biedermann was abusing, threatening, or manipulating their children.

In this case the tapes were not illegally obtained. Avian Ann Biedermann vicariously consented to the audio taping of conversations in question for her minor daughters. The doctrine of vicarious consent is directly applicable to this case. Avian Ann Biedermann is currently the primary custodial parent and she consented to the audio taping on behalf of her young minor daughters.

On June 16, 2001, the oral deposition of Petitioner, Avian Ann Biedermann, was taken. During Petitioner's deposition, Allen Halm, representing Respondent, asked Petitioner if she had ever recorded Respondent's telephone conversations with the Biedermann children. Petitioner answered that she had. Respondent has been on notice that Petitioner was audio taping his conversations with the children since at least June 16, 2001.

Respondent now argues that the audio tapes, both before June 16, 2001 and thereafter, were illegally obtained because Respondent did not consent to the interception. Respondent makes this argument without any authority to validate his blanket statements of the applicable law. Respondent has known that Petitioner was audio taping the conversations since June 16, 2001. Therefore, he has impliedly consented to the audio taping since at least June 16, 2001.

The audio tape recordings were made on Petitioner's home telephone and have been distributed to Respondent's attorney, Scott Monroe, Ad litem, Kurt Rudkin, and Dr. Ferrell, and one copy of the April 3, 2001 transcript to this Court, with Jody Halm's, Respondent's counsel at the time, approval and agreement. A client is bound by the actions of his attorney. *Portnow v. Berg*, 593 S.W. 2d 843, 845 (Tex. Civ. App.—Houston [1st Dist.] 1980, no writ); *In re Users Sys. Serv., Inc.*, 22 S.W.2d 331, 335 (Tex. 1999).

The audio taping of the conversations by Petitioner, Avian Ann Biedermann, has previously been discussed in front of and addressed by Judge Sherrill. It was recommended at the August 15, 2001 hearing by Dr. Ferrell to Judge Sherrill and Petitioner, Avian Ann Biedermann, that Petitioner continue to record Respondent's

conversations with the minor children as a part of Respondent's "recovery" plan. There were no objections to Dr. Ferrell's proposed "recovery" plan or that Petitioner continue to record Respondent's conversations with the children by any of the attorneys or Judge Sherrill. The lawyers in the room at the time were: John Nichols, Pamela Bergman, Kurt Rudkin, and Jody Halm. As Respondent's Attorney of Record, Jody Halm failed to make a timely objection to Petitioner's audio taping the conversations in question, to the admissibility of the audio tapes, or to the continuation of Petitioner's recording the conversations.

The admissibility of the audio tapes has, therefore, already been addressed by this court. There were no objections from Respondent's counsel, the Attorney Ad Litem, Petitioner's counsel or the presiding Judge. The time for objection as to the admissibility of the audio tapes has already passed. Finding the tapes in question to be admissible, Petitioner, Avian Ann Biedermann, was instructed to continue taping the conversations. The Court did not violate the federal wiretapping statute or the Texas wiretapping statute in allowing Petitioner to present the August 3, 2001 transcript as evidence. Respondent failed to object to the admissibility of the audio taped conversations and now Respondent has waived his objection by failing to timely raise it.

The Brief in Support of Emergency Sua Sponte Order does not contain illegally obtained evidence. Respondent completely neglected to include any supporting authority for his claims of illegality and inadmissibility. The issue of admissibility and illegality of the interceptions has already been decided by this Court at the August 15, 2001 hearing. Respondent, through his Attorney of Record, failed to timely object to the audio tapes at the hearing when the issue was raised.

Petitioner, Avian Ann Biedermann, consented to the interceptions on behalf of her minor children. Respondent, Kenneth Kyle Biedermann, impliedly consented to the interceptions by his prior knowledge of the taping and his failure to timely raise an objection to the admissibility of the audio tapes. Therefore, the recorded telephone conversations of Kenneth Kyle Biedermann and the minor Biedermann children were legally obtained and are admissible.

#### IV.

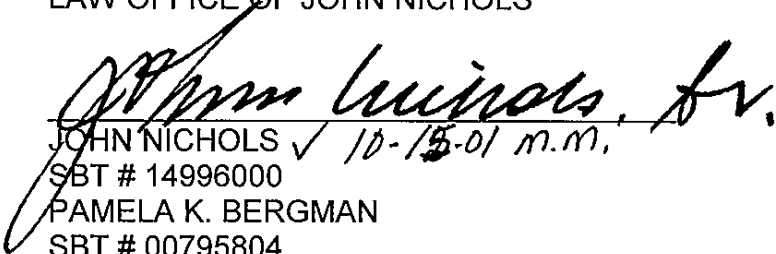
#### Prayer

Petitioner prays that the Court continue to hold the audio taped conversations of Respondent, Kenneth Kyle Biedermann, and the minor Biedermann children to be admissible.

Petitioner prays that this Court denies Respondent's Motion to Strike Brief in Support of Emergency Sua Sponte Order.

Respectfully submitted,

LAW OFFICE OF JOHN NICHOLS

  
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### Certificate of Service

I certify that a true copy of the above was served on each attorney or party in accordance with the Texas Rules of Civil Procedure on this the 10 day of October, 2001.

  
JOHN NICHOLS

Attorney for Avian Ann Biedermann

Respectfully submitted,

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