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FORMAL	)	
OPINION	)	No. 13-02
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OF	)	AG Alpha No. GA AD AGBDW
	)	
JOHN W. SUTHERS	)	December 13, 2013
Attorney General	)	

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On July 17, 2013, Laura L. Manning, Director of the Division of Gaming of the Colorado Department of Revenue (the "Division") requested a formal legal opinion from this office regarding the permissibility of gambling via the Internet ("Online Gambling") under Colorado law and taxation of the same.

**QUESTIONS PRESENTED AND SHORT ANSWERS**

The Division presented the following questions:

*Question 1:* Can Online Gambling be considered limited gaming as defined in article XVIII, Section 9 of the Colorado Constitution ("Section 9")?

*Answer 1:* No. Online Gambling cannot currently be considered limited gaming as defined in Section 9.

*Question 2:* Would an amendment to the Colorado Constitution be required to authorize Online Gambling in Colorado?

*Answer 2:* Yes. An amendment to the Colorado Constitution would be required to authorize Online Gambling in Colorado.

*Question 3:* If Online Gambling is permitted under Colorado law and limited gaming, where is a bet placed? Is it where the person placing the bet is located or where the server or other hardware or software that determines the outcome of the bet is located?

*Answer 3:* Under Colorado law, a bet is placed where the person placing the bet is located. However, the location of the server or other hardware or software that determines the outcome of the bet would also be relevant to the permissibility of any Online Gambling under Colorado law.

*Question 4:* If limited gaming is expanded by constitutional amendment to include Online Gambling, would taxation of Online Gambling in Colorado require voter approval at a statewide election held pursuant to article X, Section 20(4)(a) of the Colorado Constitution?

*Answer 4:* Likely no. If Online Gambling is authorized by a vote of the people to occur within the existing limited gaming structure, then a separate TABOR vote regarding taxation of such gambling would likely not be required. Authorization of Online Gambling by some other form of constitutional amendment may raise different issues related to TABOR.

## BACKGROUND

Article XVIII, Section 2 of the Colorado Constitution (“Section 2”) generally prohibits lotteries and other games of chance, except for non-profit bingo or lotto and a state-supervised lottery.<sup>1</sup> Notwithstanding Section 2, in 1990 the voters approved Section 9 authorizing limited gaming in three locations in Colorado.<sup>2</sup> Since its adoption, Section 9 has been amended three times, twice by referendum in 1992 and 2002, and once by initiative in 2008.

In 1992, the voters approved a referred amendment to Section 9 requiring a local vote in favor of limited gaming in any city, town, or county which is granted constitutional authority on or after November 3, 1992 to conduct such gaming.<sup>3</sup> In 2002, the voters approved another referred amendment to Section 9, eliminating obsolete language contained in former subsections 9(5)(c) and (d) related to implementation of the original amendment. In 2008, the voters approved an initiated amendment to Section 9 which authorized local elections in the cities of Central, Black Hawk, and Cripple Creek to revise existing limits on the hours, types of games, and wager amounts involved in permissible limited gaming.<sup>4</sup>

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<sup>1</sup> Colo. Const. art. XVIII, § 2(1)-(4), (7); *see also* § 18-10-101, et seq., C.R.S. (generally prohibiting gambling and related conduct).

<sup>2</sup> Colo. Const. art. XVIII, § 9(1), (3)(a), 4(b), (7)(a)(II).

<sup>3</sup> *See* Colo. Const. art. XVIII, § 6.

<sup>4</sup> *See* Colo. Const. art. XVIII, § (7).

Under Section 9, the use of slot machines, the card games of blackjack and poker, and the games of roulette and craps may lawfully occur only within the commercial districts of the cities of Central, Black Hawk, and Cripple Creek.<sup>5</sup> Section 9 requires limited gaming to be conducted within structures or buildings located in these commercial districts which conform to certain architectural style and design requirements.<sup>6</sup> Section 9 also limits the amount of square footage of any structure or building that may be used for such gaming.<sup>7</sup>

With respect to the expansion of limited gaming beyond that authorized in the original amendment, Section 9 imposes two requirements. First, an expansion must be approved by a statewide vote amending the constitution.<sup>8</sup> Second, any such expansion must be approved by an affirmative vote of the majority of the electors of the city, town, or county in which limited gaming will occur.<sup>9</sup> Section 9 clarifies that a “city, town, or county” for purposes of limited gaming includes “all land and buildings located within . . . such city, town or, county or any political subdivision thereof” and includes the city and county of Denver.<sup>10</sup> To date, only the cities of Central, Black Hawk, and Cripple Creek have been granted constitutional authority for limited gaming.<sup>11</sup>

The Division is aware there may be an interest to legalize Online Gambling activity in Colorado through legislation and has requested this opinion in order to determine the scope of the constitutional restrictions as they apply to Online Gambling.

## ANALYSIS

### **I. Online Gambling<sup>12</sup> cannot be considered permissible limited gaming as defined in Section 9.**

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<sup>5</sup> Colo. Const. art. XVIII, § (3)(a), 4(b), 7(a)(II).

<sup>6</sup> Colo. Const. art. XVIII, § 3(b).

<sup>7</sup> Colo. Const. art. XVIII, § 3(c).

<sup>8</sup> Colo. Const. art. XVIII, § 9(6)(a).

<sup>9</sup> *Id.*

<sup>10</sup> Colo. Const. art. XVIII, § 9(6)(f).

<sup>11</sup> Colo. Const. art. XVIII, § 9(1), (3)(a).

<sup>12</sup> Following the federal Unlawful Internet Gambling Enforcement Act (“UIGEA”), for purposes of this opinion, Online Gambling means “to place, receive, or otherwise knowingly transmit a bet or wager by any means which involves the use, at least in part, of the Internet . . .” 31 U.S.C. § 5362(10)(A).

The plain language of Section 9 cannot reasonably be construed to include Online Gambling as permissible limited gaming. Rather, giving the language used its plain, natural, and popular meaning requires the conclusion that only traditional, casino-style gaming involving physically present patrons at specified locations is permitted. Authority that would be relevant in the case of ambiguity further supports the conclusion that limited gaming as defined in Section 9 does not include Online Gambling.

Section 9 defines limited gaming as “*the use of slot machines and the card games of blackjack and poker,*” as well as roulette and craps.<sup>13</sup> Section 9 authorizes such limited gaming to take place only in the existing cities of Central, Black Hawk, and Cripple Creek and further requires such gaming be “*confined to the commercial districts of said cities*” and “*conducted in structures which conform*” to certain style and design requirements.<sup>14</sup> Read together and giving the words used their plain, common, and ordinary meanings confirms that gaming patrons must be physically located within casino structures to engage in permissible limited gaming. Thus, it is clear that both the gaming patron and the slot machine being operated must be located in a pre-World War I style structure situated in the commercial district of Central, Black Hawk, or Cripple Creek. Further, remotely accessing a slot machine, even from a person’s home in the city of Central, Black Hawk, or Cripple Creek, is not permissible gaming under Section 9.

To the extent Section 9 might be deemed ambiguous on this point, the voters’ intent is controlling.<sup>15</sup> Giving the words in Section 9 their natural and commonly understood meaning as of 1990 when Section 9 was adopted, I must conclude that “the use of slot machines and the card games of blackjack and poker” does not mean the use of slot machines or the playing of virtual games using images of playing cards via the Internet. This conclusion is supported by language in the 1990 ballot proposal, which stated that under the proposed amendment legalized limited gambling would be “restricted to blackjack, poker, and slot machines” and confined to the commercial districts of Central, Black Hawk, and Cripple Creek.<sup>16</sup> The ballot

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<sup>13</sup> Colo. Const. art. XVIII, § 9(4)(b) (emphasis added).

<sup>14</sup> Colo. Const. art. XVIII, § 9(3)(a)-(b) (emphasis added).

<sup>15</sup> *Tivolino Teller House*, 926 P.2d at 1211 (interpretation of constitutional amendments adopted by initiative must give effect to the will of the people based on the natural and popular meaning of the words therein).

<sup>16</sup> *An Analysis of 1990 Ballot Proposals*, Legislative Council of the Colorado General Assembly, dated Sept. 6, 1990, at p.14.; see also *Tivolino Teller House*, 929 P.2d at 1214 (noting analyses provided in Legislative Council publications regarding proposed initiated amendments provide “important insight into the electorate’s understanding of the amendment when it was passed” and relying on the Council’s 1990 publication in interpreting Section 9).

proposal also described the proposed gaming as “casino-gambling” and distinguished the proposed amendment from a different proposal to “authorize licensees under the bingo law to use electronic or computerized devices or machines for the playing of poker,” which proposal had been rejected by the General Assembly.<sup>17</sup>

The conclusion that Online Gambling is not limited gaming under Section 9 is further supported by a prior decision of the Limited Gaming Control Commission (“Commission”), affirmed on appeal, rejecting a proposed game which combined elements of a slot machine and an authorized card game.<sup>18</sup> The Commission concluded that such a non-traditional combination of a card game and mechanical device “is antithetical to the intent of the voters in authorizing limited stakes gaming in Colorado.”<sup>19</sup>

## **II. An amendment to the Colorado Constitution would be required to authorize Online Gambling in Colorado.**

As explained above, the limited gaming authorized by Section 9, as an exception to the general prohibition on games of chance under Section 2, does not include Online Gambling. Rather, Section 9 defines permissible limited gaming to include traditional, casino-style gambling conducted in approved structures and confined to the commercial districts of Central, Black Hawk, and Cripple Creek.<sup>20</sup>

Section 2 provides that “the general assembly shall have no power to authorize lotteries for any purpose” except that certain “games of chance,” including not-for-profit bingo or lotto, and state-supervised lotteries are permitted.<sup>21</sup> Section 2 further provides that laws may be enacted supplementary to and in pursuance of, but not contrary to, the provisions governing permissible games of chance.<sup>22</sup> The Colorado Supreme Court has concluded that poker and similar wagering games are games of chance.<sup>23</sup>

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<sup>17</sup> *An Analysis of 1990 Ballot Proposals*, at p.16.

<sup>18</sup> Order, *In re 21 Superbucks Jackpot Feature*, Case No. DC 95004, dated Aug. 30, 1995, at p.6.; *Purcell v. Colo. Div. of Gaming*, 924 P.2d 1203, 1204-05 (Colo. App. 1996).

<sup>19</sup> Order, *In re 21 Superbucks Jackpot Feature*, at p.6.

<sup>20</sup> Colo. Const. art. XVIII, § 9(3)(a)-(c), (4)(b).

<sup>21</sup> Colo. Const. art. XVIII, § 2(1)-(4), (7).

<sup>22</sup> Colo. Const. art. XVIII, § 2(5).

<sup>23</sup> *Charnes v. Central City Opera House Ass’n*, 773 P.2d 546, 551 (Colo. 1989); *cf. Ginsberg v. Centennial Turf Club, Inc.*, 126 Colo. 471, 478, 251 P.2d 926, 929 (1952) (upholding statute authorizing pari-mutuel betting on racing events in part because element of chance is not controlling).

Section 9 imposes two requirements for an expansion of limited gaming beyond the limits imposed by the original amendment: First, an expansion must be approved by a statewide vote amending the constitution.<sup>24</sup> Second, an expansion must be approved by an affirmative vote of the majority of the electors of the city, town, or county in which limited gaming has been constitutionally authorized.<sup>25</sup> Section 9 clarifies that a “city, town, or county” for purposes of limited gaming includes “all land and buildings located within . . . such city, town or, county or any political subdivision thereof” and includes the city and county of Denver.<sup>26</sup>

The language of Sections 2 and 9 thus makes clear that any change to the scope of lawful gambling in Colorado, including any change that would expand the scope of permissible limited gaming under Section 9, cannot be made by the General Assembly alone; rather, it must be accomplished by constitutional amendment.<sup>27</sup> The conclusion that a vote of the people is necessary to expand the scope of limited gaming is consistent with the provisions of Section 9 requiring local elections on the legality of limited gaming and to revise limits applicable to such gaming even after constitutional authority has been granted.<sup>28</sup> This conclusion is also in keeping with historical practice, as the definition of limited gaming was previously expanded by initiative in 2008.<sup>29</sup>

To permit the General Assembly to authorize Online Gambling in the absence of a vote of the people would be inconsistent with the voters’ understanding and intent in enacting Section 9, as evidenced by the 1990 ballot proposal. This proposal includes a section titled “History of gambling law in Colorado,” which explains that gambling is generally prohibited by the Colorado Constitution and has been legalized in only limited circumstances by “the General Assembly and the voters.”<sup>30</sup> The section also discloses that “a proposed constitutional amendment similar to this initiated proposal” was rejected by the General Assembly during the

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<sup>24</sup> Colo. Const. art. XVIII, § 9(6)(a).

<sup>25</sup> *Id.*

<sup>26</sup> Colo. Const. art. XVIII, § 9(6)(f).

<sup>27</sup> Section 9(6) also indicates that a retraction of the scope of limited gaming would likewise be accomplished by a statewide vote amending the constitution. *See* Colo. Const. art. XVIII, § 9(6)(b) (limited gaming shall be lawful following a successful local election “so long as the city, town, or county remains among those with constitutional authority for limited gaming within their boundaries.”)

<sup>28</sup> Colo. Const. art. XVIII, § 6(a), (7)(a); *see also Zaner v. City of Brighton*, 917 P.2d 280, at 283 (Colo. 1996) (constitution must be construed as a whole and to harmonize different parts, if possible).

<sup>29</sup> Colo. Const. art. XVIII, § 9(7)(a)(II) (adding roulette and craps).

<sup>30</sup> *An Analysis of 1990 Ballot Proposals*, at p.15.

current year's legislative session,<sup>31</sup> further demonstrating that a constitutional amendment is, and was understood by the voters in 1990, to be the proper means by which lawful gambling might be authorized or expanded.

The ballot proposal from 1992, which imposed a local election requirement on the expansion of limited gaming, further clarifies the voters' understanding that a constitutional amendment has always been required for an expansion of gambling in the first instance. Specifically, the proposal states, "Adoption of this amendment would require local approval of gambling in addition to statewide approval. This requirement would begin with any gambling proposals that may be adopted in the 1992 election. *Approval for extending limited gambling is now accomplished by statewide vote on the ballot question of amending the Colorado Constitution which lists the areas in which gambling is permitted.* No local vote is currently required."<sup>32</sup> In sum, based on the plain language of the Colorado Constitution, together with other sources indicative of the intent of the voters, I conclude that the legalization of Online Gambling in Colorado would require a constitutional amendment.

**III. Because a bet is placed where the person placing the bet is located, both the bettors and equipment involved in Online Gambling must be present in constitutionally authorized physical locations.**

It has been suggested that the General Assembly might expand limited gaming to include Online Gambling by clarifying that a bet is placed where the equipment involved in Online Gambling is located, rather than where the bettor is located.

A commonsense reading of the plain language of Section 9, however, requires the conclusion that a bet is placed where the person placing the bet is located. The conclusion that a bet is placed at the bettor's location is also supported by related statutory and regulatory provisions as well as persuasive authority from other jurisdictions. However, the location of the server or other hardware or software that determines the outcome of the bet remains relevant to the permissibility of Online Gambling under Colorado law.

Section 9 defines limited gaming as "*the use of slot machines and the card games of blackjack and poker,*" as well as roulette and craps.<sup>33</sup> Section 9 authorizes

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<sup>31</sup> *Id.* at p.16.

<sup>32</sup> *An Analysis of 1992 Ballot Proposals*, Legislative Council of the Colorado General Assembly, Sept. 3, 1992, at p.4.

<sup>33</sup> Colo. Const. art. XVIII, § 9(4)(b) (emphasis added).

such limited gaming to take place only in the existing cities of Central, Black Hawk, and Cripple Creek and further specifies that such gaming must be “*confined to the commercial districts of said cities*” and must be “*conducted in structures which conform . . . to the architectural styles and designs that were common to the areas prior to World War I.*”<sup>34</sup> Section 9 also limits the amount of square footage of any structure or building that “*may be used for limited gaming.*”<sup>35</sup> Read together and using the plain, common, and ordinary meanings for the words in these provisions,<sup>36</sup> it is clear that the propriety of limited gaming turns on the location of gaming patrons, or those placing the bets, and not merely the location of gaming devices that might be accessed remotely, such as computer servers or other hardware.

To use a slot machine or conduct a game of blackjack or poker in an approved structure and in a manner that is confined to the commercial district of a particular city requires that all participants in the game be physically present. Accordingly, the location of the gaming patron, or person placing the bet, is determinative of the propriety of limited gaming in Colorado.

This conclusion is consistent with enactments of the General Assembly and the Commission, which is charged with resolving ambiguities in Section 9.<sup>37</sup> As defined in the Limited Gaming Act, “bet” means “an amount *placed as a wager* in a game of chance.”<sup>38</sup> The verb “to place” means, among other things, to give an order for something.<sup>39</sup> The term “wager” is not defined by statute, but has been defined by the Commission as “a sum of money, electronic promotional credit or thing of value risked on an uncertain occurrence.”<sup>40</sup> Thus, a bet is placed under Colorado law when a person gives an order for a sum of money or other thing of value to be risked on an uncertain occurrence. This bet is logically placed at the location of the person giving such an order.

The conclusion that a bettor’s location is where a bet is placed is also supported by persuasive authority from other jurisdictions. For example, under the federal Unlawful Internet Gambling Enforcement Act (“UIGEA”), the term “bet or wager” is defined as “*the staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance,*”

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<sup>34</sup> Colo. Const. art. XVIII, § 9(3)(a)-(b) (emphasis added).

<sup>35</sup> Colo. Const. art. XVIII, § 3(c) (emphasis added).

<sup>36</sup> *Tivolino Teller House v. Fagan*, 926 P.2d 1208, 1211 (Colo. 1996) (courts must give words in constitutional amendments adopted by the people their natural and popular meaning).

<sup>37</sup> *Id.* at 1212.

<sup>38</sup> § 12-47.1-103(3), C.R.S. (emphasis added).

<sup>39</sup> See *The American Heritage Dictionary*, 946 (2d College Ed.1991)

<sup>40</sup> Dep’t of Revenue Reg. No. 207-1, 1 Code Colo. Regs. 47.1-106(29).



and includes “any instructions or information pertaining to the establishment or movement of funds *by the bettor or customer* in, to, or from an account with the business of betting or wagering.”<sup>41</sup> The UIGEA prohibits a gambling business from knowingly accepting certain financial instruments from a person who places a bet over the Internet if such gambling is illegal at the “*physical location of a bettor or gambling business.*”<sup>42</sup> Similarly, the federal Wire Act supports the conclusion that the bettor’s physical location is where a bet is placed by providing a safe harbor only for transmissions of wagering information where betting is legal both in the place of origin and the destination of the transmission.<sup>43</sup> In addition, other state courts have concluded that the act of entering a bet and transmitting information related thereto via the Internet constitutes illegal gambling under the laws of the state where the person entering the bet is located.<sup>44</sup>

While I conclude that a bettor’s location is the location where a bet is placed under Colorado law, I also find the location of any server or other hardware or software used in Online Gambling would be relevant to the permissibility of such gambling under Colorado law. The Limited Gaming Act requires that all limited gaming be confined to the existing commercial districts of the cities of Central, Black Hawk, and Cripple Creek.<sup>45</sup> The statute further specifies that “[a]ll gaming devices shall be located within the licensed premises of a business.”<sup>46</sup> Thus, both the bettors and any devices involved in limited gaming would need to be present in an authorized location unless a constitutional amendment modified the current language to allow for devices, such as servers, be located beyond the authorized commercial districts.

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<sup>41</sup> 31 U.S.C. § 5362(1)(A), (D).

<sup>42</sup> *Interactive Media Entm’t & Gaming Ass’n Inc. v. United States*, 580 F.3d 113, 117 (3d Cir. 2009) (emphasis added); *see also* 31 U.S.C. § 5362(10)(A).

<sup>43</sup> 18 U.S.C. § 1084(b); *see also United States v. Cohen*, 260 F.3d 68, 74 (2d Cir. 2001) (concluding safe harbor not applicable because appellant’s gambling business received telephone and internet transmissions from patrons located in New York, where gambling is illegal).

<sup>44</sup> *See, e.g., People ex rel. Vacco v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844, 859-860 (N.Y. Sup. Ct. 1999); *L.E. Servs., Inc. v. State Lottery Comm’n*, 646 N.E.2d 334, 342-43 (Ind. App. 1995); *see also Cohen*, 260 F.3d at 74-75 (approving bet per se jury instruction as follows: “If there was a telephone call or an internet transmission between New York and [a gambling business] in Antigua, and if a person in New York said or signaled that he or she wanted to place a specified bet, and if a person on an internet device or telephone said or signaled that the bet was accepted, this was the transmission of a bet within the meaning of [the Wire Act].”)

<sup>45</sup> § 12-47.1-105, C.R.S.

<sup>46</sup> § 12-47.1-509(2), C.R.S.

**IV. If limited gaming is expanded by constitutional amendment to include Online Gambling in authorized physical locations and under the existing tax structure, then taxation of such gambling would not require prior voter approval under article X, Section 20(4)(a) of the Colorado Constitution.**

Article X, section 20 of the Colorado Constitution, also known as the Taxpayer's Bill of Rights ("TABOR"), was an initiated constitutional amendment approved by the voters in 1992. The principal purpose of TABOR is to require that the voters decide the necessity for the imposition of new tax burdens.<sup>47</sup> To that end, subsection 4(a) of TABOR ("Subsection 4") requires voter approval for certain government tax increases, including "any new tax, tax rate increase . . . or tax policy change directly causing a net tax revenue gain to any district."<sup>48</sup> As with Section 9, TABOR must be interpreted so as to give effect to the people's intent in adopting the amendment.<sup>49</sup>

Section 9(5)(a) provides for a tax of up to a maximum of 40 percent of the adjusted gross proceeds of limited gaming. Accordingly, section 12-47.1-601, C.R.S., imposes a tax on the adjusted gross proceeds of permissible limited gaming, which tax is to be set by rule promulgated by the Commission. The Commission has promulgated Rule 47.1-1401, which provides that each retail licensee conducting or offering to conduct limited gaming is liable for and must pay a limited gaming tax to the Department of Revenue in accordance with the schedule stated therein.

The tax on limited gaming has existed since the adoption of Section 9 in 1990, prior to the adoption of TABOR. Consistent with this opinion, Online Gambling could occur if limited gaming under Section 9 is expanded via a vote of the people to include such gambling, or if Online Gaming is approved via a vote of the people in some other form. If Online Gambling was so authorized to occur within the existing limited gaming structure, then a separate vote of the people regarding taxation of such gambling would likely not be required. Authorization of Online Gambling by some other form of constitutional amendment may raise different issues related to TABOR.

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<sup>47</sup> *In re Submission of Interrogatories on Senate Bill 93-74*, 852 P.2d 1, 4 (Colo. 1993).

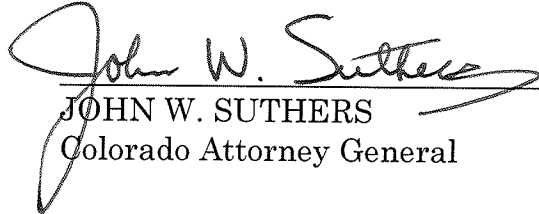
<sup>48</sup> Colo. Const. art. X, § 20(4)(a).

<sup>49</sup> *Huber v. Colo. Mining Ass'n*, 264 P.3d 884, 889 (Colo. 2011).

## CONCLUSION

I conclude that a constitutional amendment is the only lawful means by which to expand limited gaming to include Online Gambling.

Issued this 13<sup>th</sup> day of December, 2013.

  
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