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18 UNITED STATES DISTRICT COURT  
19 EASTERN DISTRICT OF CALIFORNIA, FRESNO DIVISION

20 Charles Criswell, Levi Johnson, Samuel  
21 Camposeco, Adam Ibarra, and California  
22 Attorneys for Criminal Justice,

23 Plaintiffs,

24 vs.

25 Michael Boudreaux, in his official capacity as  
26 Sheriff of Tulare County,

27 Defendant.  
28

Case No. 1:20-cv-01048-DAD-SAB

**NOTICE OF MOTION AND MOTION TO  
FILE SUPPLEMENTAL PLEADING  
PURSUANT TO FED. R. CIV. P. 15**

Judge: Hon. Dale A. Drozd  
Date: April 6, 2021  
Time: 9:30 a.m.  
Crtrm.: 5

1 **TO THE COURT, THE PARTIES, AND THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE that on April 6, 2021, at 9:30 a.m., or as soon thereafter as the  
3 matter may be heard in Courtroom 5, via telephonic or videoconference, before the Honorable  
4 Dale A. Drozd, Plaintiffs Charles Criswell, Levi Johnson, Samuel Camposeco, Adam Ibarra, and  
5 California Attorneys for Criminal Justice will, and hereby do, move the Court for leave to file a  
6 supplemental Complaint.

7 This Motion is made pursuant to Federal Rule of Civil Procedure 15, and is based on this  
8 Notice of Motion and Motion, the Memorandum of Points and Authorities in Support of the  
9 Motion, the proposed Supplemental Complaint attached thereto as Exhibit A, the Proposed Order  
10 granting Plaintiffs' motion, the filings in this matter, any additional briefs filed, any oral argument  
11 heard by the Court, and such other matters as the Court deems proper.

12 On February 23, 2021, counsel for Plaintiffs, including Anne Decker, Lauren Harding,  
13 Omar Nouredin, Estalyn Marquis, and Ariel Teshuva, met and conferred with counsel for  
14 Defendant, Christopher Pisano, regarding this Motion and the proposed Supplemental Complaint.  
15 Plaintiffs and Defendant were unable to reach a resolution before filing. *See* Decl. of Lauren M.  
16 Harding.

17 DATED: February 25, 2021

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 In its December 22, 2020 order, the Court denied Plaintiffs’ preliminary injunction relating  
4 to unconstitutional conditions of confinement “without prejudice to plaintiffs moving for  
5 permission to serve a supplemental pleading” under Rule 15(d). *See* ECF No. 55 at 38-39.  
6 Accordingly, Plaintiffs bring this Motion for Leave to Supplement their Complaint to assert new  
7 factual allegations and claims to bring the Complaint up to date. Plaintiffs’ proposed Supplemental  
8 Complaint, attached as Exhibit A, includes additional allegations regarding the recent large-scale  
9 COVID-19 outbreak in the Tulare County Jails, along with additional allegations and claims  
10 relating to Defendant’s so-called “social distancing” policy. The additional claims assert that  
11 Defendant’s policy and practice of keeping Plaintiffs and proposed Class Members confined to  
12 their cells for up to 23 or 24 hours a day violates their Eighth and Fourteenth Amendment rights to  
13 exercise, their Fourteenth and Eighth Amendment rights to be free from punishment and  
14 prolonged solitary-like conditions, and their due process right to enforcement of minimum  
15 standards of confinement under Title 15 of the California Code of Regulations.

16 The proposed Supplemental Complaint is timely, brought in good faith, not prejudicial to  
17 Defendant, and introduces viable claims related to Defendant’s COVID-19 policies and practices  
18 that are closely related to the claims already alleged in the initial Complaint. In light of the Ninth  
19 Circuit’s liberal application of Federal Rule of Civil Procedure 15 to allow for supplemental  
20 pleadings, this Court should grant Plaintiffs’ motion. *See Keith v. Volpe*, 858 F.2d 467, 475 (9th  
21 Cir. 1988); *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981).

22 **II. FACTUAL AND PROCEDURAL BACKGROUND**

23 **A. Class Action Complaint**

24 On July 29, 2020, Plaintiffs filed the current action on behalf of themselves and similarly  
25 situated persons in the Tulare County Jails.<sup>1</sup> *See* ECF No. 1. Plaintiffs alleged that Defendant  
26

27 <sup>1</sup> The terms “Tulare County Jails” or “Jails” refer to the five detention facilities managed by the  
28 Tulare County Sheriff’s Office: Bob Wiley Detention Facility (BWDF), Main Jail, Men’s  
Correctional Facility, Adult Pretrial Facility (APTF), and South County Detention Facility.

1 Michael Boudreaux maintained unconstitutional conditions at the Jails by knowingly failing to  
2 take reasonable and available measures to respond to the COVID-19 pandemic. Among other  
3 arguments, Plaintiffs alleged Defendant failed to issue face masks to incarcerated persons,  
4 implement and enforce an appropriate social distancing policy, release incarcerated people to  
5 allow for social distancing, or implement a COVID-19 testing procedure. *See, e.g.*, Compl. ¶¶ 16,  
6 90, 101, 103. Plaintiffs’ requested injunctive relief included that individuals who had or were  
7 exposed to COVID-19 be “properly quarantined in a non-punitive setting, with continued access  
8 to showers, recreation, mental health services, reading materials, commissary, phone and video  
9 visitation with loved ones, communication with counsel, and personal property.” *See* Compl. p.47  
10 at ¶ 14. Plaintiffs also sought an order requiring Defendant immediately to take actions to release  
11 Medically Vulnerable people using his powers under California Government Code § 8658, which  
12 allows Defendant to release incarcerated persons in his custody in emergencies. *See id.* at ¶ 121  
13 and p.46 ¶ 1.

14 **B. Temporary Restraining Order**

15 On September 2, 2020, the Court issued a Temporary Restraining Order (“TRO”) and  
16 provisionally certified a class. *See* ECF No. 26. In addition to other relief relating to Defendant’s  
17 legal visitation policies, the Court ordered Defendant to: adopt a mask policy; memorialize an  
18 isolation, quarantine, and observation policy “including [Tulare County Sheriff’s Department’s]  
19 policy for conducting COVID-19 testing”; and provide the Court with a report detailing TCSD’s  
20 COVID-19 testing to date. *Id.* at 48.

21 The Court also ordered Defendant to “[a]dopt a policy designed to reduce contacts between  
22 incarcerated people in all common areas, including (but not limited to) bathrooms, day rooms,  
23 yards, and pill lines, and allow for the possibility of social distancing by inmates.” *Id.* at 47-48. In  
24 response to the Court’s Order, Defendant filed his social distancing policy, which provided:

25 Inmates are reminded to socially distance (six feet apart) while in the day room and  
26 yard areas and must wear their issued face masks and shields while in the day room  
27 and yard areas. Staff will continue to allow only the number of inmates out to  
program at one time that allows for six feet of distance in the day rooms and the  
yard areas.

28

1 See ECF No. 27-1 at 3. Defendant’s policy said nothing about keeping inmates in their Jail cells  
2 for 23 to 24 hours per day.

3 **C. Motion for Preliminary Injunction**

4 On November 3, 2020, Plaintiffs filed a motion for preliminary injunction. See ECF No.  
5 44. Plaintiffs requested that the Court order Defendant to implement a constitutionally adequate  
6 testing policy, take additional precautions to mitigate the increased risk of harm to Medically  
7 Vulnerable persons in the Jails, and implement a constitutional social distancing policy that allows  
8 residents to exercise one hour per day. *Id.* On December 22, 2020, the Court denied Plaintiffs’  
9 motion for preliminary injunction “without prejudice to plaintiffs renewing their request if  
10 sufficient evidence of changed conditions and the adequacy of defendant’s response thereto  
11 becomes available.” See ECF No. 55 at 40 n.18.

12 The Court further determined that Plaintiffs’ request for a constitutional social distancing  
13 policy was not properly alleged in their Complaint, and denied Plaintiffs’ preliminary injunction  
14 motion “without prejudice to plaintiffs moving for permission to serve a supplemental pleading”  
15 under Rule 15(d). See *id.* at 38-39. The Court wrote that its “denial of this request should not be  
16 construed as a decision on the substance of the parties’ arguments, which the court has not reached  
17 or evaluated.” *Id.* at 39.

18 **D. Large-Scale COVID-19 Outbreak**

19 Also in December 2020, there was a COVID-19 outbreak in the Bob Wiley Detention  
20 Facility. In total, 60 out of 75 residents of one housing unit (called “Mod-22”) tested positive for  
21 COVID-19—a shocking 80% positivity rate. Plaintiffs notified the Court of the Mod-22 outbreak  
22 on December 21, 2020—the next business day after Plaintiffs learned about the outbreak. See ECF  
23 No. 52. Defendant notified the Court of the outbreak a full two weeks after he learned about it and  
24 only after Plaintiffs asked Defendant about the outbreak. See ECF No. 53.

25 Although the Court’s preliminary injunction order came after these events, the Court  
26 explained in its order that it had not based its decision on the Mod-22 outbreak. The Court wrote  
27 that the parties have “not had an adequate opportunity to consider and discuss these latest  
28 developments and the actions that TSCD is taking in response. Thus, the court concludes that it is



1 premature for it to weigh in regarding these recent developments or to evaluate the adequacy and  
2 reasonableness of defendant’s response to them.” ECF No. 55 at 40 n.18.

3 **III. LEGAL STANDARD**

4 Under Rule 15(d) of the Federal Rules of Civil Procedure, “[o]n motion and reasonable  
5 notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out  
6 any transaction, occurrence, or event that happened after the date of the pleading to be  
7 supplemented.” Rule 15(d) motions should be “liberally construe[d]” in favor of granting the  
8 motion. *See Keith*, 858 F.2d at 475. To promote economical and speedy disposition of a  
9 controversy, Rule 15(d) also permits bringing new claims in a supplemental complaint. *Id.* at 473.

10 When considering whether to allow a supplemental complaint, courts consider “the  
11 relatedness of the original and supplemental complaints; whether allowing the supplementation  
12 would serve the interests of judicial economy; whether there is evidence of delay, bad faith or  
13 dilatory motive on the part of the movant; whether amendment would impose undue prejudice  
14 upon the opposing party[;] and whether amendment would be futile.” *See Flores v. City of Tulare*,  
15 No. 10-CV-00394-AWI-BAM, 2011 WL 5240428, at \*2 (E.D. Cal. Nov. 1, 2011). Each of these  
16 factors weighs strongly in favor of granting Plaintiffs’ Motion.

17 **IV. ARGUMENT**

18 **A. The Proposed Supplemental Complaint Relates to the Original Complaint and**  
19 **Would Serve the Interests of Judicial Economy**

20 The proposed Supplemental Complaint addresses the same concerns as the original  
21 Complaint: the health and safety of the incarcerated individuals in the Jails, and whether  
22 Defendant’s COVID-19 policies and practices in the Tulare County Jails are constitutional. *See*  
23 *Gilman v. Davis*, No. CIV. S-05-830LKKGGH, 2009 WL 577768, at \*8 (E.D. Cal. Mar. 4, 2009)  
24 (supplemental complaint shared “same concern” as the original complaint relating to the  
25 diminution of availability of parole for a life prisoner); *see also Keith*, 858 F.2d at 475 (allowing  
26 supplementation when there was “clearly a relationship among the claims in this action and the  
27 claims in the original action”). For instance, the original Complaint alleges that Defendant  
28 operates the Jails in an unconstitutional manner by failing to implement an adequate social

1 distancing policy. *See* Compl. at p.27 (“Defendant has Prevented Incarcerated People from  
2 Practicing Social Distancing, One of the Most Important and Simplest Methods of Preventing the  
3 Spread of COVID-19.”). Based on those allegations in the original Complaint and in response to  
4 the mandate in this Court’s September 2, 2020 TRO to implement a social distancing policy,  
5 Defendant drafted a social distancing policy that “reminded” inmates to socially distance (six feet  
6 apart) while in the day room and yard areas. *See* ECF 27-1 at 3.

7         The proposed Supplemental Complaint alleges Defendant has not followed his own social  
8 distancing policy as written, but has instead imposed an inhumane lockdown on Plaintiffs and  
9 proposed Class Members that deprive them of their constitutional rights—including their right to  
10 exercise, to be free from undue punishment, to be free from cruel and unusual conditions, to  
11 receive due process—and to the minimum standards of confinement under Title 15. *See, e.g.,* Ex.  
12 A ¶¶ 27-64. In other words, the allegations and claims in the Supplemental Complaint directly  
13 relate to Defendant’s response to Plaintiffs’ original Complaint.

14         The proposed Supplemental Complaint also raises allegations relating to the December  
15 2020 outbreak in the Bob Wiley Detention Facility. *See, e.g.,* Ex. A ¶¶ 9-26. Sadly, the original  
16 Complaint anticipated such an outbreak and that Defendant’s response would be inadequate. *See,*  
17 *e.g.,* Compl. ¶ 18 (noting the clear “warning signs” of an impending COVID-19 outbreak and  
18 providing “Defendant is simply not prepared to handle a COVID-19 outbreak of any scale”). The  
19 Supplemental Complaint relates to the allegations and claims in the original Complaint by  
20 describing in more detail the ways in which Defendant’s response to the outbreak has been not  
21 only inadequate, but also unconstitutional, and thus brings the allegations up to date. *See, e.g.,* Ex.  
22 A ¶¶ 9-26. These allegations support the same Fourteenth and Eighth Amendment claims in the  
23 original Complaint. *See* ECF No. 1, Compl. at p.42 (Count I), p.43 (Count II).

24         Because the proposed Supplemental Complaint “is a discrete and logical extension of the  
25 original claims in this case,” consolidating the claims in the same action would promote judicial  
26 economy. *See Flores*, 2011 WL 5240428, at \*2 (allowing supplementation when both the original  
27 and supplemental pleadings challenged the conduct of the Tulare Police Department as violations  
28 of plaintiffs’ civil rights). “Indeed, to require these claims be brought as separate actions would be

1 a disservice to judicial economy, which is properly served when ‘the entire controversy between  
2 the parties could be settled in one action.’” *Id.* (citation omitted).

3 **B. The Supplemental Complaint Is Timely and Brought in Good Faith**

4 Plaintiffs’ proposed Supplemental Complaint is timely and brought in good faith. Plaintiffs  
5 bring this Motion before the deadline set by Magistrate Judge Boone to file an amended  
6 complaint. *See* ECF No. 42 (Scheduling Order). There is no “evidence of delay, bad faith or  
7 dilatory motive.” *Flores*, 2011 WL 5240428 at \*2. Furthermore, there can be no genuine  
8 accusation of bad faith, as Plaintiffs are pursuing the very path outlined by the Court in its  
9 December 22, 2020 Order. *See* ECF No. 55 at 38-39 (denying claim “without prejudice to  
10 plaintiffs moving for permission to serve a supplemental pleading” under Rule 15(d)).

11 **C. Granting Plaintiffs’ Supplemental Complaint Will Not Prejudice Defendant**

12 Defendant cannot show that the Supplemental Complaint will prejudice him. Courts find  
13 no prejudice when an amendment would not increase the costs borne by the defendant, impede the  
14 defendant’s ability to defend against the original claims, or render the discovery already conducted  
15 moot. *See Gilman* , 2009 WL 577768, at \*6 . Similarly here, all of the discovery to date relating to  
16 Defendant’s COVID-19 practices and policies is relevant to Defendant’s response to the recent  
17 COVID-19 outbreak and his failure to implement a constitutional social distancing policy.  
18 Because the original Complaint and Supplemental Complaint share the “same concern,”  
19 Defendant cannot show that expanding the scope of the claims to include his response to the Mod-  
20 22 outbreak and his response to the Court’s September 2, 2020 Order would substantially increase  
21 his costs in defending the action.

22 **D. The New Allegations and Claims in Plaintiffs’ Supplemental Complaint Are**  
23 **Not Futile**

24 A proposed supplemental pleading is only “futile” if there is “no set of facts that can be  
25 proved . . . that would constitute a valid claim.” *Flores*, 2011 WL 5240428, at \*3.<sup>2</sup> But “denial on

26 <sup>2</sup> The standard for amendment parallels that for supplemental pleadings. *See Cruz v.*  
27 *Munoz*, No. 114CV01215SABPC, 2019 WL 448262, at \*2 (E.D. Cal. Feb. 5, 2019) (“Generally,  
28 district courts use the same standard in deciding whether to grant or deny a motion for leave to  
supplement or whether to grant or deny a motion for leave to amend a complaint or answer.”).

1 this ground is rare and courts generally defer consideration of challenges to the merits of a  
2 proposed [supplemental] pleading until after leave to [supplement] is granted and the  
3 [supplemental] pleading is filed.” *Id.* The proposed supplemental claims here are properly alleged  
4 and not “futile.”

5         *First*, Plaintiffs have adequately stated claims for violation of their constitutional rights to  
6 exercise. *See* Ex. A (proposed Counts VI and VII). Numerous courts have granted similar claims  
7 by both pretrial detainees and prisoners alleging a detention facility consistently failed to provide  
8 outdoor exercise. *See Pierce v. Cnty. of Orange*, 526 F.3d 1190, 1212 (9th Cir. 2008) (90 minutes  
9 per week of exercise for pretrial detainees a violation of the Fourteenth Amendment by “not  
10 giv[ing] meaningful protection to this basic human necessity”); *Keenan v. Hall*, 83 F.3d 1083,  
11 1089 (9th Cir. 1996) (“Deprivation of outdoor exercise violates the Eighth Amendment rights of  
12 inmates confined to continuous and long-term segregation.”); *Spain v. Procunier*, 600 F.2d 189,  
13 199-200 (9th Cir. 1979) (affirming order requiring one hour of exercise five days per week);  
14 *Davenport v. DeRobertis*, 844 F.2d 1310, 1315 (7th Cir. 1988) (same); *Lopez v. Smith*, 203 F.3d  
15 1122, 1132-33 (9th Cir. 2000) (en banc) (finding that a prisoner who was denied access to outdoor  
16 exercise for six-and-one-half weeks had a cognizable Eighth Amendment claim). Courts therefore  
17 resoundingly agree that prisoners and detainees can state a claim by alleging, as Plaintiffs do here,  
18 a systematic failure to provide detainees or inmates outdoor exercise for at least five to seven  
19 hours per week. *See Salvador Venegas v. Stan Sniff*, No. 5:18-CV-02293-JLS (SHK), 2020 WL  
20 6723353, at \*6 (C.D. Cal. Sept. 8, 2020) (noting that the “Ninth Circuit recently clarified that a  
21 ‘minimum of five to seven hours of exercise time per week for inmates confined [in administrative  
22 segregation] was clearly established by [the Ninth Circuit’s] cases.’”).

23         *Second*, Plaintiffs have adequately stated a new claim that Defendant’s so-called “social  
24 distancing” policy amounts to unconstitutional punishment for pretrial detainees. *See* Ex. A  
25 (proposed Count VIII). Courts recognize that solitary or restrictive housing practices can amount  
26 to punishment in violation of pre-trial detainees’ substantive due process under the Fourteenth  
27 Amendment right. *See Stevenson v. Carroll*, 495 F.3d 62, 69 (3d Cir. 2007) (pretrial detainee  
28 stated claim for violation of substantive due process when detainee allegedly held in excessively

1 restrictive security housing unit (SHU)); *Williamson v. Stirling*, 912 F.3d 154, 181 (4th Cir. 2018)  
2 (genuine issue of fact existed as to whether pretrial detainee placed in solitary confinement for 3.5  
3 years amounted to punishment); *cf. Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 791 (9th Cir. 2014)  
4 (statute violated substantive due process by being excessive in relation to its stated purpose of  
5 managing the flight risk posed by undocumented immigrants). Like the claims in those suits,  
6 Plaintiffs properly allege that Defendant’s lockdown policy is excessive to its stated purpose of  
7 preventing COVID-19 transmission in the Jails. Even with a lockdown, Defendant has been  
8 unable to contain the spread of COVID-19, with a large-scale outbreak in the Bob Wiley  
9 Detention Facility in December 2020. *See* Ex. A at ¶ 54. Defendant’s likely excuse that this  
10 lockdown is “temporary” and thus short lived is also plainly wrong—the lockdown has continued  
11 since *at least* September 2020 (i.e., for at least six months) with no end in sight.

12 *Third*, Plaintiffs’ new Eighth Amendment claim (proposed Count IX) is properly plead.  
13 Courts have long recognized that prolonged solitary confinement, especially when accompanied  
14 by little or no access to exercise or recreation, may result in violation of the Eighth Amendment’s  
15 prohibition on cruel and unusual punishment. *See Davis v. Ayala*, 576 U.S. 257, 287 (2015)  
16 (Kennedy, J., concurring) (“One hundred and twenty-five years ago, this Court recognized that . . .  
17 solitary confinement bears ‘a further terror and peculiar mark of infamy.’”) (internal citation  
18 omitted). The deleterious physical and psychological effects of prolonged solitary confinement are  
19 well understood. *See id.* at 289 (“[C]ommon side-effects of solitary confinement include anxiety,  
20 panic, withdrawal, hallucinations, self-mutilation, and suicidal thoughts and behaviors.”) (citations  
21 omitted). Thus, “even the permissible forms of solitary confinement might violate the Eighth  
22 Amendment if [i]mposed inappropriately, or for too long a period.” *Jackson v. Meachum*, 699  
23 F.2d 578, 582 (1st Cir. 1983) (quotation marks and citation omitted). While short, temporary  
24 lockdown conditions may be permissible in response to an emergency, indefinite and prolonged  
25 lockdown conditions, like the ones in effect at Tulare County Jails, “themselves risk becoming  
26 Eighth Amendment violations.” *Foster v. Commissioner of Correction*, 484 Mass. 698, 731 (2020)  
27 (holding that prolonged solitary confinement of incarcerated people in response to the risk of  
28 COVID-19 could result in a violation of the Eighth Amendment). Rather than enacting and

1 enforcing a constitutional policy allowing for social distancing in the Jails, Defendant has imposed  
2 indefinite and prolonged lockdown conditions in response to COVID-19, despite being placed on  
3 notice of the risk of suicide and mental and physical health concerns exacerbated or even caused  
4 by the lockdown.

5 *Fourth*, Plaintiffs have adequately alleged a due process violation (proposed Count X)  
6 based on Plaintiffs' liberty interest in the minimum regulatory standards under Title 15 of the  
7 California Code of Regulations, including section 1065, which provides a minimum of three hours  
8 of exercise per week. Cal. Code Reg., tit. 15, § 1065. Plaintiffs allege that they have a state-created  
9 liberty interest in these minimum standards of confinement codified in Title 15, which Defendant  
10 has arbitrarily denied. Plaintiffs also have alleged a liberty interest in avoiding indefinite detention  
11 absent procedural safeguards, such as periodic review and compliance with the procedural  
12 guidelines enumerated in Title 15. Plaintiffs further allege that Defendant has failed to comply  
13 with Title 15's requirement that Defendant seek permission from the Board of State and  
14 Community Corrections in order to deviate from the regulation's typical mandates during an  
15 emergency.

16 *Finally*, Plaintiffs have exhausted the new claims in the proposed Supplemental Complaint  
17 under the Prison Litigation Reform Act of 1995 (PLRA). Plaintiffs have filed several grievances  
18 relating to Defendant's so-called "social distancing" policy by requesting relief from Defendant's  
19 severely limited out-of-cell time and programming policies. *See* ECF No. 46-14 (Ibarra  
20 grievance); ECF No. 46-15 (Benavidez grievance); ECF No. 46-16 (Lehne grievance). The  
21 allegations relating to the Mod-22 outbreak raise no new claims and relate back to the claims in  
22 the original Complaint. *See* Compl. at p.42 (Count I), p.43 (Count II). The Court has already  
23 determined that, given "deputies' refusal to consistently provide grievance forms without  
24 screening the grievances and the deputies' intimidation of inmates who spoke with the ACLU,"  
25 administrative remedies were "effectively unavailable" under the PLRA. ECF No. 26 at 30-31.

26 **V. CONCLUSION**

27 For the foregoing reasons, Plaintiffs' motion for leave to supplement their Complaint with  
28 the Supplemental Complaint attached as Exhibit A should be granted.

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DATED: February 25, 2021

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