

AGREEMENT

Under Section 106 of the
Town and Country Planning Act 1990
relating to land at Smithfield Livestock Market
Shrewsbury Road Oswestry

BETWEEN

(1) OSWESTRY TOWN COUNCIL

and

(2) OSWESTRY CATTLE AUCTIONS

and

(3) LIBERTY MERCIAN LIMITED

and

(4) SHROPSHIRE COUNCIL

Morgan LaRoche
PO Box 176
Bay House
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$$A = \frac{B}{C}$$

where:

“A” is the Average Operating Deficit;

“B” is the aggregate of the Indexed Operating Deficit applicable for each Review Period arising between the Opening Date and the relevant Sustainable Travel Payment Date; and

“C” is the number of years between the Opening Date and the relevant Sustainable Travel Payment Date

“Cinema”

means the cinema proposed as part of the Development

“Commencement of the Development”

means the carrying out of a Material Operation upon the Site exclusively referable to the Development as is to be permitted by the planning permission granted pursuant to the Application

“Commencement of the Foodstore”

means the carrying out of a Material Operation upon the Foodstore Site exclusively referable to the Foodstore as is to be permitted by the Planning Permission

“Connectivity Contribution”

£273,000.00 (two hundred and seventy three thousand pounds)

“Connectivity Works”	Works to improve connectivity between the Site and Oswestry town centre as decided by the Council in its absolute discretion including (by way of example but not by way of limitation works to create cycleways linking the Site to the existing local cycle network and/or works to road junctions to improve capacity)
“Daytime Hours”	08:00 to 19:30 on each day of the week subject to variation in accordance with any Action Plan
“the Development”	means the Development proposed by the Application
“Evening Hours”	19:30 to 23:00 on each day of the week subject to variation in accordance with any Action Plan
“Expert”	means a chartered accountant who is appointed (in default of agreement by the Council and the Operator) by the President of the Institute of Chartered Accountants in England and Wales
“Facility Improvement Contribution”	means the sum of ten thousand pounds (£10,000.00)
“Facility Improvement Works”	means the provision of bus shelters street benches, refuse bins or other facilities to improve the public realm linkage between Oswestry Town Centre and the Site
“Foodstore”	Means the retail foodstore proposed as part of the Development

“the Foodstore Site”

means that part of the Development which is to be used for a retail foodstore

“Index”

means the Consumer Prices Index or any official index replacing it and if there is any change to the methods used to compile the Index or if the reference base used to compile the Index changes then the calculation of the Index shall be made taking into account the effect of any such change

“Indexed Operating Deficit”

means for a Review Period the sum reached by applying the following formula:

$$A = B \times \frac{C}{D}$$

where:

“A” is the relevant Indexed Operating Deficit applicable to a Review Period;

“B” is the Operating Deficit for the relevant Review Period;

“C” is the Index as at the date two months prior to the final day of the relevant Review Period; and

“D” is the Index as at the date two months prior to the relevant Sustainable Transport Payment Date

"Market Operator"

means the operator of the Market

“Material Operation”	means any operation as defined in section 56 (2) and 56 (4) of the Act but shall not include operations in connection with marking out (on its own), surveying, ground investigation work, borehole investigation, archaeological excavation, site clearance, demolition, investigation for the purposes of assessing contamination, remedial action in respect of any contamination, diversion and laying of services and the erection of means of enclosure for the purposes of site security and/or display of advertisements
“Occupation”	means the first beneficial use of and occupation of the Foodstore (but this expression shall not include occupation for the purposes of construction or fitting-out or for marketing or security purposes)
“Off-Site Signage”	means signage on land outside the Site to identify public facilities available within Oswestry town centre
“Off-Site Signage Contribution”	means five thousand pounds (£5,000.00)
“On Site Signage”	means non-electronic signage to be provided at the Site which shall promote the facilities available in Oswestry town centre and/or provide directional information to Oswestry town centre

“Opening Date”	means the date the Foodstore opens for trade to the public
“Operating Costs”	means the expenditure incurred by the Operator in the provision of the Shuttle Bus Service and the Park & Ride Scheme (including without limitation the cost of repair and maintenance of the facilities used and the cost incurred in the purchase or lease of any bus delivering the Shuttle Bus Service but excluding the initial capital expenditure incurred in providing the Shuttle Bus Service and/or the Park & Ride Scheme infrastructure during construction of the Development or extra-ordinary set up costs)
“Operating Days”	means each day of the week subject to variation in accordance with any Action Plan
“Operating Deficit”	means the amount that the Operating Costs exceeds the Operating Income for the twelve month period covered by relevant Operating Statement (and where the Operating Income for the relevant twelve month period exceeds the Operating Costs then the Operating Deficit shall be a negative figure) as specified in an Operating Statement
“Operating Income”	means the income received by the Operator from the operation of both the Shuttle Bus Service and the Park & Ride Scheme

“Operating Statement”	<p>(including without limitation any advertising income received from the use of the infrastructure utilised)</p> <p>means a written statement to be provided by the Operator to the Council within 10 Working Days of the end of each Review Period and which statement shall be in a format previously approved by the Council (such approval not to be unreasonably withheld or delayed)and which shall detail the Operating Costs and the Operating Income for the previous Review Period so as to enable the calculation of the Operating Deficit for such Review Period</p>
“Operator”	<p>means the person carrying on the business of a foodstore retailer at the Foodstore being the operator of the Shuttle Bus Service and the Park and Ride Scheme from time to time and who shall either hold a freehold interest or leasehold interest in the Foodstore Site</p>
“Owners”	<p>means both the Freehold Owner and the Leasehold Owner and “Owner” shall mean either of them (as the context requires)</p>
“Park & Ride Scheme”	<p>the park and ride scheme proposed as part of the Development to comprise a minimum of 90 (ninety) car parking spaces and to operate for a period of twenty years from the Opening Date or until the Park & Ride Scheme and /</p>

	or the Shuttle Bus Service cease and determine in accordance with the provisions of this Agreement (if earlier)
“Park & Ride Site”	that part of the Development which is to be used for a Park & Ride scheme
“Payer”	means the party who paid the relevant contribution to the Council in accordance with the terms of this Agreement
“Plan 1”	means the plan marked Plan 1 annexed hereto
“Plan 2”	means the plan marked Plan 2 annexed hereto
Plan 3	means the plan marked Plan 3 annexed hereto
“the Planning Obligations”	means the planning obligations set out in the Schedules to this Agreement
“Planning Permission”	means the planning permission to be granted pursuant to the Application in the form attached to this Agreement
“Practically Complete”	means the practical completion of construction of the Cinema so that it is ready for fitting out by the relevant occupier for its beneficial use and occupation and “Practically Completed” shall have a corresponding meaning
“Registered Service”	means a registered local bus service pursuant to the Transport Act 1985
“Review Period”	means each successive period of twelve

“Shuttle Bus Service”	months from and including the Opening Date means a bus service (to be free to all users during Daytime Hours) which is to be provided in accordance with the details set out in the First Schedule
“the Site”	means the land at Smithfield, Shrewsbury Road, Oswestry shown edged red on Plan 1
“Sustainable Transport Payment Date”	means each of the third, fifth, tenth and fifteenth anniversaries of the Opening Date and “Sustainable Transport Payment Date” shall mean any one of them
“Sustainable Transport Facilities”	means such facilities as the Council may in its reasonable discretion decide promote the provision of a sustainable transport linkage between the Site and Oswestry town centre
“Sustainable Transport Payment”	means the sum calculated in accordance with the following formula: $A = B \times C$ <p>Where:</p> <p style="padding-left: 40px;">A is the Sustainable Transport Payment</p> <p style="padding-left: 40px;">B is the Average Operating Deficit for the period from the Opening Date until the relevant Sustainable Transport Payment Date</p>

C is the number of years remaining from the relevant Sustainable Transport Payment Date until the 20th anniversary of the Opening Date

“Working Days”

means days on which banks in the City of London are open to the public

RECITALS:

- (1) The Freehold Owner is the freehold owner of the Site under title number SL180437
- (2) The Leasehold Owner is the Leasehold Owner of the Site under title number SL184584
- (3) The Council is the local planning authority for the purposes of the Act for the area within which the Site is situate and by whom the Planning Obligations are enforceable
- (4) By Agreement dated 4th April 2008 the Developer has agreed to acquire the long Leasehold interest to part of the Site and by the Application the Leasehold Owner and the Developer have applied to the Council for planning permission to develop the Site by carrying out the Development
- (5) On 28 October 2010 by its Strategic Planning Committee the Council resolved to grant planning permission in respect of the Development subject to the obligations in this Deed and the conditions set out in the Planning Permission
- (6) The parties have agreed to enter into this Deed

NOW THIS DEED WITNESSES as follows:-

1. This Deed is made in pursuance of Section 106 of the Act and all other enabling provisions in order to secure the Planning Obligations.
2. The Planning Obligations are planning obligations for the purposes of Section 106 of the Act and shall be binding upon and enforceable against the Owners and the Developer

and any person deriving title to the Site or the relevant part of it through or under the Owners and the Developer or either of them as the case may be

3. This Agreement shall come into effect on the date hereof but the Planning Obligations shall become effective only on Commencement of the Development. Within five Working Days following the entering into of this Agreement the Council shall procure the issuing of the Planning Permission
4. The Council hereby agrees that where in accordance with the provisions of any of the Schedules any proposals or other matters are submitted to the Council for its approval agreement or consent (“the Proposals”) then the Council will:
 - (i) consider the Proposals and issue its approval agreement consent or otherwise within fifteen (15) Working Days of the date of submission or during such extended period as may be agreed between the parties in writing
 - (ii) not unreasonably withhold or delay its approval and shall have regard only to relevant planning considerations in reaching its decision
 - (iii) issue its approval or otherwise in writing and in the case of a refusal or an approval subject to conditions state the reasons for such decision
5. This Agreement is a local land charge and shall be registered as such
6. IT IS HEREBY AND DECLARED as follows:-
 - 6.1 No person shall be liable for breach of any obligation contained in this Deed after he shall have parted with all interest in the Site or the relevant part that is bound by a Planning Obligation but without prejudice to liability for any subsisting breach of obligation prior to parting with such interest
 - 6.2 Nothing in this Deed shall prohibit or limit the right to develop any part of the Site in accordance with any planning permission (other than a permission granted pursuant to the Application) granted (whether or not on appeal) after the date of this Deed
 - 6.3 The expressions “the Council” “the Owners” and “the Developer” shall include their respective successors in title and assigns

- 6.4 The headings and sub-headings in this Deed are for convenience only and shall not be taken into account in the construction and interpretation thereof
- 6.5 If any individual clause or paragraph in this Deed is subsequently held to be unenforceable by a Court the parties agree that the offending clause or paragraph shall cease to be binding and will be severed from the Deed **PROVIDED HOWEVER THAT** the severing of such a clause or paragraph shall not affect the continuing enforceability of the remainder of the Deed
- 6.6 The provisions of the Schedules to this Agreement shall apply as if they were set out within the main body of this Deed and the parties each agree with the other to comply with their respective obligations in the said Schedules
- 6.7 The Parties hereby acknowledge and declare that the Planning Obligations have been entered into by the Developer with the consent of the Owners and that the Site shall be bound by the obligations contained in this Deed provided that neither of the Owners shall have any liability under this Deed unless the Council shall have first used all reasonable endeavours to enforce the Planning Obligations against the Developer and the Operator (as relevant) and required them to rectify the relevant breach and despite using such endeavours the relevant breach of Planning Obligation remains subsisting
- 7.
- 7.1 Any notice required to be given under this Deed shall be in writing and shall be delivered personally or sent by pre-paid first class post or facsimile transmission
- 7.2 The address for service of any such notice as aforesaid shall in the case of service upon any of the respective parties be upon the respective party at its address aforesaid or such other address for service as shall have been previously notified in writing by the respective party to the other party
- 7.3 A notice under this Deed shall be deemed to have been served as follows:-
- (i) if personally delivered at the time of delivery

- (ii) if posted at the expiration of 48 hours after the envelope containing the same was delivered into the custody of the Postal Authority within the United Kingdom
 - (iii) if sent by facsimile transmission at the time of successful transmission and in proving such service it shall be sufficient to prove that personal delivery was made or that the envelope containing such notice was properly addressed and delivered into the custody of the Postal Authority in a first class pre-paid envelope (as appropriate) or that the facsimile was successfully transmitted on a tested line as the case may be
8. In this Deed for the avoidance of doubt:
- (i) the singular shall include the plural the masculine shall include the feminine and vice versa unless the context otherwise requires
 - (ii) any reference to the doing or taking of any action shall include causing or permitting such action
 - (iii) references to persons shall include bodies of persons whether corporate or incorporate
9. If the Planning Permission is quashed revoked or otherwise withdrawn or (without the consent of the Owners and the Developer) is modified in any material respect by any statutory procedure or expires before the Commencement of the Development then the Planning Obligations shall cease to have effect.
10. In the event of:-
- (i) the non-implementation of the Planning Permission so that it expires; or
 - (ii) satisfaction of the Planning Obligations having been performed or otherwise discharged

this Deed shall be discharged and be of no further effect and upon receipt of a written request from the Developer or from an Owner the Council shall issue written confirmation thereof and

shall forthwith effect the cancellation of all entries made in the register of local land charges in respect of this Deed.

11. This Deed shall not create any right enforceable by any person not a party to it except that it may be enforced by the successors in title and assigns of the parties and by any successor to the Council's statutory function and any Operator
12. For the avoidance of doubt no Planning Obligation shall be enforced other than against a freehold or long leasehold (here meaning a party which has an unexpired term of more than 30 years) owner from time to time of the Site except that the Council shall first use all reasonable endeavours to enforce the Planning Obligations against the Developer and the Operator (as relevant and irrespective of the interest that they may have in the Site) and require them to rectify the relevant breach and despite using such endeavours the relevant breach of Planning Obligation remains subsisting
13. Community Infrastructure Levy
 - 13.1 For the purposes of this clause "CIL" means a tax tariff or charge introduced by the Council pursuant to regulations enabled by the Planning Act 2008 but any subsequent proposed legislation to fund the delivery of infrastructure known as the "Community Infrastructure Levy" or known by any other name.
 - 13.2 If after the date of this Agreement a CIL is introduced that is applicable to the Development then the parties to this Agreement will use reasonable endeavours to agree variations to this Agreement with the intent that:
 - 13.2.1. The planning benefit secured by this Agreement should continue to be secured and delivered; and
 - 13.2.2. The Developer nor the Owner should not be in a position where they are in a financially worse position because of CIL in respect of the obligations contained in the Schedules than they would be if they performed the obligations in this Agreement and no CIL had been introduced.

14. The Developer covenants with the Council that it will on or before the date of this Agreement pay £[] towards the Council's reasonable legal costs in connection with the preparation and completion of this Agreement.

15. This instrument shall take effect as a Deed.

IN WITNESS whereof the parties hereto have executed this Agreement as a deed delivered the day and year first above written

THE FIRST SCHEDULE

Shuttle Bus Facility

Part 1

1. The Owners and the Developer covenant with the Council so as to bind the Foodstore Site to procure prior to any Operator commencing to operate the Shuttle Bus Service a deed of covenant from such Operator in favour of the Council to observe and perform the provisions on the Operator set out in Part 2 of this First Schedule (provided always that the deed of covenant from the initial Operator shall be delivered to the Council prior to the Opening Date) as follows:

Part 2

- (i) the Operator shall provide for a period of 20 years from the Opening Date a Shuttle Bus Service in accordance with the provisions of this Schedule for use by the public from the Opening Date;
- (ii) the Shuttle Bus Service will operate from the Development to Oswestry Town Centre along the route as shown on Plan 2 or such alternate route as is agreed pursuant to the Action Plan and during the Evening Hours along the route as shown on Plan 3 or such alternate route as is agreed pursuant to the Action Plan;
- (iii) the Shuttle Bus Service will operate on the Operating Days during Daytime Hours free of charge at the frequency of 20 minute intervals and during Evening Hours in accordance with a charging regime designed to encourage the use of the Shuttle Bus Service (and which charging regime shall be approved by the Council) at a frequency of 30 minute intervals or at such alternate frequencies as are agreed pursuant to the Action Plan;
- (iv) the Shuttle Bus Service shall be provided through a single midi size (29 seater) bus (or such other size bus approved by the Council following a request by the Operator or agreed pursuant to the Action Plan) to be no more than five years old with a two bus driver service;
- (v) the Shuttle Bus Service shall operate as a Registered Service unless otherwise agreed by the Council;

- (vi) the Operator shall prior to commencement of the Shuttle Bus Service undertake an advertising campaign in respect of the introduction of the Shuttle Bus Service in a form approved by the Council.
- (vii) the Operator shall during the operation of the Shuttle Bus Service maintain travel data indicating in the number of passengers using the Shuttle Bus Service and on each anniversary of the Opening Date shall make available that travel data to the Council.
- (viii) Upon each anniversary of the Opening Date a representative of the Operator and the Council shall within 15 Working Days of such anniversary date meet to review the previous year's travel data and to identify whether the effectiveness and use of the Shuttle Bus Service is satisfactory or could be improved.
- (ix) If as a result of the review meeting it is decided that the effectiveness and/or use of the Shuttle Bus Service could be improved the Operator and the Council shall within 15 Working Days agree (both parties acting reasonably) an action plan to improve the effectiveness and usage of the Shuttle Bus Service and the Operator shall thereafter implement the agreed Action Plan provided always that the cost of implementing the Action Plan (other than in relation to any agreed advertising campaign) shall not increase the Operating Costs incurred during the previous twelve month period and the cost of any advertising campaign agreed as part of the Action Plan shall not exceed the Advertising Budget.
- (x) The Operator shall within 10 Working Days of each anniversary of the Opening Date supply to the Council the Operating Statement. Within 15 Working Days of receipt of the Operating Statement the Council shall confirm whether or not they agree with the information supplied in the Operating Statement and in the event that they fail to revert with written confirmation of any points of dispute within 15 Working Days of receipt of the Operating Statement then they shall be deemed to have approved the Operating Statement as a fair and accurate statement of the Operating Costs and Operating Income for the relevant 12 month period. In the event that the Operator and the Council fail to resolve any dispute as to the content of the Operating Statement within 20 Working Days of the same arising then either party may refer the matter for determination by the Expert. The Expert shall act as an expert and his decision will be final and binding on the parties. The Expert would consider all written representations

made on behalf of the Council and/or the Operator which are delivered to him within such period as he stipulates (having regard to the parties wish for a quick determination) and the Expert will be instructed to use all reasonable endeavours to give his decision as speedily as possible. The Expert's fees and the costs of his appointment will be payable by the parties in such proportions as he determines or in default of such determination equally between them.

- (xi) Within one month of a Sustainable Transport Payment Date arising either the Operator or the Council can request in writing to the other party that the provision of the Shuttle Bus Service and the Park & Ride Scheme cease to have effect upon the payment by the Operator to the Council of the Sustainable Transport Payment.
- (xii) The party receiving the request for the making of Sustainable Transport Payment shall have a period of 15 Working Days (in the case of the Operator) or two calendar months (in the case of the Council) ("**the Acceptance Period**") to confirm whether or not in its absolute discretion it agrees to the Sustainable Transport Payment being made.
- (xiii) In the event that the receiving party does agree within the Acceptance Period to the Sustainable Transport Payment being made then:
 - a) Within 10 Working Days of such party providing written confirmation to the other party of its agreement to the Sustainable Transport Payment being made (or, if later, within 10 Working Days of the date upon which the sum of the Sustainable Transport Payment is agreed by the Council and the Operator) then the Operator shall pay the Sustainable Transport Payment to the Council; and
 - b) Upon the date of receipt of the Sustainable Transport Payment all obligations in this First Schedule (as regards the Shuttle Bus Service) (other than paragraph (xiv) below) shall immediately cease and determine and have no further effect and all obligations in the Sixth Schedule (as regards the Park & Ride Scheme) shall immediately cease and determine and have no further effect if the Council cease to operate a shuttle bus service during the Daytime Hours that links the Park & Ride Scheme with Oswestry Town Centre at no less a frequency of bus services than the most recent frequency of linkage agreed under the Action Plan
- (xiv) Upon receipt of the Sustainable Transport Payment the Council shall use the same solely for the purposes of the provision of Sustainable Transport Facilities. In the event that the Council has not fully utilised the Sustainable Transport Payment for the provision

of Sustainable Transport Facilities within the period from the receipt of the payment to the 20th anniversary of the Opening Date any unused amount of the Sustainable Travel Payment shall be returned to the Payer. In the event that the Sustainable Transport Payment is utilised to continue a shuttle bus service linking the Foodstore Site to Oswestry Town Centre the Operator shall procure the grant of a licence for the Council to continue to utilise the bus lay-bys and other shuttle bus facilities provided at the Foodstore Site

- (xv) For the avoidance of doubt if the receiving party does not agree pursuant to paragraph (xii) above to the request for a Sustainable Transport Payment to be made to the Council then the provisions of this First Schedule and in the Sixth Schedule shall continue with full force and effect.

THE SECOND SCHEDULE

Signage

The Owners and the Developer covenant with the Council:

1. To pay Off-Site Signage Contribution to the Council prior to Occupation, such payment to be used by the Council for the provision of Off-Site Signage.
2. In the event that the Council do not provide the Off-Site Signage within three years of receipt by the Council of the Off-Site Signage Contribution the Council shall repay the Off-Site Signage Contribution to the relevant Payer.
3. To provide the On-Site Signage prior to Occupation and thereafter to maintain it in good repair and condition in accordance with a scheme approved by the Council and provided always that such scheme:
 - 3.1 shall provide for signage to be provided at four (or such alternate number approved by the Council) locations within the Site; and
 - 3.2 shall provide for the On-Site Signage to be illuminated.
 - 3.3 shall be designed so that the information on such On-Site Signage will inform users from time to time of the Shuttle Bus Service or the Park & Ride Scheme, the Foodstore or the Cinema and other leisure elements of the Development of the time table for the Shuttle Bus Service and make provision for including details of the facilities available and forthcoming events within Oswestry town centre.

THE THIRD SCHEDULE

Facility Improvements

1. The Owner and the Developer covenant to pay the Facility Improvement Contribution to the Council prior to the carrying out of a Material Operation to construct the Foodstore on the Foodstore Site
2. In the event the Facility Improvement Works are not carried out by the Council within two years of receipt of the Facility Improvement Contribution the Council shall repay the Facility Improvement Contribution to the relevant Payer.

THE FOURTH SCHEDULE

Cinema Development

1. The Owners and the Developer covenant with the Council that prior to Occupation the Cinema shall be Practically Completed.

THE FIFTH SCHEDULE

Connectivity Contribution

1. The Owners and the Developer covenant with the Council that prior to Commencement of the Foodstore there shall be paid to the Council the Connectivity Contribution
2. In the event that the Council have not utilised the whole of the Connectivity Contribution in carrying out Connectivity Works within three years of receipt of the Connectivity Contribution then the Council shall repay the balance of the Connectivity Contribution to the relevant Payer.

THE SIXTH SCHEDULE

Park & Ride Charging and Foodstore Car Parking Provisions

Part 1

1. The Owner and the Developer covenant with the Council so as to bind the Park & Ride Site and the Foodstore Site to procure prior to any Operator commencing to operate the Park & Ride Scheme a deed of covenant from such Operator in favour of the Council to observe and perform the provisions of the Operator set out in Part 2 of this Sixth Schedule (provided always that the deed of covenant from the initial Operator shall be delivered to the Council prior to the Opening Date) as follows:-

Part 2

2. The Operator shall operate the Park & Ride Scheme on the Park & Ride Site on each day of the week (unless otherwise approved by the Council) in accordance with a car parking charging regime designed to encourage the use of the Park & Ride Scheme for long term parking by commuters to Oswestry Town Centre and which charging regime shall be approved by the Council.
3. The Operator shall procure that the public car park within the Foodstore Site shall be operated in accordance with a scheme ensuring that users of the Development shall be entitled to five hours free car parking within such public car park

Executed as a Deed by)
OSWESTRY TOWN COUNCIL by)
the affixing of its)
common seal in the presence of:)

.....
Mayor

.....
Deputy Mayor

EXECUTED as a Deed by)
JOHN HOPLEY BRERETON)
in the presence of:)

EXECUTED as a Deed by)
ALLEN THOMAS GITTINS)
in the presence of:)

EXECUTED as a Deed by)
CHRISTOPHER JOHN SHEPPARD))
in the presence of:)

EXECUTED as a Deed by)
DAVID ROY JONES)
in the presence of:)

SIGNED as a Deed by)
LIBERTY MERCIAN LIMITED)
acting by a director and its)
secretary (or two directors))

.....
Director

.....
Director/Secretary

Executed as a Deed by)
SHROPSHIRE COUNCIL by the)
affixing of its)
common seal in the presence of:)

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