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Recovering Assets in China: Practicalities and Pitfalls

Certain companies listed on U.S. stock exchanges have some or all of their principal assets located in the People's Republic of China (the PRC or China). Many of these companies have faced scrutiny in recent years from their shareholders, bondholders, other investors and the U.S. Securities and Exchange Commission. Such scrutiny arises out of a variety of difficulties, and some of these difficulties have resulted in the formation of special committees, SEC investigations or securities litigation. As a result, it is important to understand (1) the risks associated with investing in a company whose principal assets are located in the PRC, and (2) the risks associated with collecting a defaulted or troubled investment in such companies.

This article explores certain practical issues and common pitfalls faced by foreign investors in the PRC when attempting to recover on defaulted investments. As discussed below, the PRC's legal system and requirements are markedly different from the legal system in the United States. When faced with the need to collect money and assets in the PRC, investors quickly discover the formality and relatively undeveloped nature of the PRC legal system, making it difficult, time consuming and costly for investors to pursue legal action to recover monies. In addition, the manner in which investments are typically structured has the net effect of limiting an investor's ability to recover money. In order to prepare for these potential issues that arise when a PRC investment goes south, familiarity with the PRC way of doing business and pre-planning may greatly increase your chances of recovery.

The Importance of Understanding the Structure of PRC Investments: "Reverse Mergers" and "VIEs"

To appreciate the risk of recovery upon default, investors must fully understand the corporate structure and the assets from which the debt can be collected. Foreign investment in China often occurs indirectly. One common form of investment is through a "reverse merger," which typically occurs, for example, when a public company shell (PubCo)[1] acquires 100 percent of the stock of a company (or companies) that directly or indirectly own assets in China. Often, PubCo will indirectly acquire one or more PRC companies (PRC Subs) by acquiring 100 percent of the stock of another corporate shell (HoldingCo), which in turn owns 100 percent of the stock of the PRC Subs. This middle-tier holding company is often formed in another non-U.S. jurisdiction, such as the British Virgin Islands (BVI). Once this "reverse merger" structure is in place, the PubCo shell, whose only asset in this example is the stock in the non-U.S. HoldingCo, goes to the U.S. public market and raises debt – often, unsecured bond debt. The monies raised by the PubCo through the U.S. public market are then invested in the indirectly-owned PRC Subs. Thus, with this "reverse merger" structure, investors in PubCo are two tiers removed from the PRC Subs, which comprise the value of the PubCo's equity interest.

Another common form of investment in the PRC is the Variable Interest Entity (VIE), which represents about half of the PRC-based companies listed on the Nasdaq and New York Stock exchanges. Dena Aubin, *Investor risk lurks in legal structure of China IPOs – lawyers*, *Reuters*, June 23, 2013, available at http://www.reuters.com/article/2013/06/23/china-investments-idUSL2N0EM1PD20130623. VIEs are "designed to let companies bypass Chinese government bans on foreign ownership in some business sectors." *Id.* VIEs also do not result in direct ownership of PRC assets or companies. Rather, VIEs typically

[1] A PubCo need not actually be a U.S. company. A non-US company may indirectly trade on a U.S. stock exchange via American Depositary Receipts (ADRs), which are negotiable instruments that represent securities of a non-U.S. company but which are traded in the US financial markets. The securities of a foreign company represented by an ADR are referred to as "American Depositary Shares (ADSs).

involve a PubCo that owns a HoldingCo – the actual "variable interest entity" for which VIEs are named – which in turn owns a series of *contracts* with a PRC entity (effectively, a PRC Sub) that has a license to operate in a restricted sector. *Id.* This means that not only is a VIE's PubCo two steps removed from a PRC entity, neither the PubCo nor the HoldingCo holds any actual ownership interest in the PRC entity. Rather, the HoldingCo owns only contracts with the PRC entity that are meant to give the HoldingCo control over the PRC entity. As such, the VIE's "equity holders have a somewhat indirect financial interest in the revenue and earnings stream [of the PRC entity] and do not actually have a claim on the assets of the [PRC] company in question." Richard Pearson, *Looking at Chinese VIE's*, *Forbes*, available at http://www.forbes.com/sites/richardpearson/2012/10/18/looking-at-chinese-vies/.

The Importance of Understanding Structural Governance Issues

While U.S. law provides for investor access to much information for publicly traded companies, the investors in a PubCo with assets largely in the PRC may have little to no insight into the activities of the PRC entities whose operations constitute the majority of their value. From a corporate governance perspective, the PRC entities will have their own boards of managers and their own management team. Typically, the PRC management team is controlled by the former owners of the PRC Subs, the ones who owned the PRC Subs before they were acquired or became controlled by the PubCo. The PRC management teams and PRC-level boards may pledge assets, take on loans or engage in other legal actions that are not brought to the level of the PubCo Board. This is made easier by the fact that the PRC entities control their own financial records, as well as access to those records.

While a PubCo Board can be entirely comprised of PRC representatives, in order to ensure some controls, it is helpful to have on the PubCo Boards truly independent board members who are based in the U.S. and familiar with U.S. public company requirements. The importance of independent board members is evident in the case of ShengdaTech, Inc. ShengdaTech was the result of a reverse merger into a U.S. PubCo. It indirectly owned five PRC subsidiaries. Through the U.S. public bond market, ShengdaTech raised more than $230 million in bond debt in 2008 and 2010. In March 2011, however, ShengdaTech's auditors discovered possible discrepancies in the company's financial records, and by summer 2011, various federal securities class actions had been filed. In August 2011, the company filed a Chapter 11 bankruptcy case to preserve assets for the bondholders, who were owed approximately $150 million.

ShengdaTech's Chapter 11 filing was authorized and directed by a special committee of the U.S. Board comprised solely of the independent directors, two of whom were based in the U.S. The special committee also removed and replaced ShengdaTech's management – which included the former owner of ShengdaTech's PRC subsidiaries – and obtained an order from the bankruptcy court preventing former management, including the majority shareholder and CEO of ShengdaTech, from changing the ShengdaTech's U.S. Board composition. These actions were all the more urgent because the former owner of the PRC subsidiaries had obtained control of a majority of ShengdaTech's U.S. publicly traded stock and was in the process of adding additional PubCo Board members immediately before the Chapter 11 filing. Absent the actions of these U.S. independent directors, ShengdaTech's PubCo Board composition would have been changed, ensuring that then-existing management maintained control of the company. If this had occurred, the bondholders' actions to recover their monies may have been thwarted.

Unfortunately, VIEs are not immune from such governance issues, either. For example, investors had to force VIE-structured education company Ambow Education Holding into liquidation in June 2013 after its PRC executive blocked an investigation into alleged financial wrongdoing. Dena Aubin, *Investor risk lurks in legal structure of China IPOs – lawyers*, *Reuters*, June 23, 2013, available at http://www.reuters.com/article/2013/06/23/china-investments-idUSL2N0EM1PD20130623.

Difficulties Recovering PRC Assets

In the event of default by PubCo, its investors typically will be able to look only to an equity interest in another legal entity, HoldingCo. However, this equity interest in HoldingCo will only have value to the extent that the PRC Subs have value, and recovery will only be possible to the extent the equity interest in the PRC Subs can be sold (or the value of any contract rights can be realized). That is, there are limitations in terms of the assets from which an investor can recover – the investor can look only to the value of entities over which the investor may not have full control or full knowledge. The situation for

VIEs is even bleaker than with reverse merger companies, however, as a VIE's only real assets are contracts with PRC entities, rather than ownership of the entities themselves. Given the complexities of reverse mergers and VIEs, it is important to recognize the limitations of recovery in the event of default. Some of those key limitations are addressed here.

The Importance of Controlling "Chops" and Business Licenses in China

The ability to recover on an investment in a PubCo with assets largely in China is tied significantly to the ability to control the PRC entities and their assets, including money, facilities, inventory, contracts and licenses. The ability to control the PRC entities depends, in turn, on controlling "chops" and business licenses.

In the U.S., signatures are typically used to validate documents, create binding contracts or execute corporate transactions. In striking contrast, however, the PRC principally relies on "chops" (or seals) to perform the same functions. Each chop is a physical object. Even if a signature on a document is authorized, the document will not be considered valid unless it has been physically stamped with the chop (chopped). Thus, in the PRC, whoever has the chops controls the PRC Subs, including their ability to perform transactions and to access and control corporate records and information, as well as bank accounts.

There are many kinds of chops. The most important chop is the Official Company Chop, providing the bearer the authority to conduct business activities and to legally bind the company. This chop is required on all official business documents, including contracts, company memoranda, bank account applications and documents filed with the government. *PriceWaterhouseCoopers, PWC: China Compass* (Spring 2009), at pp.15-16 *(Insight into company chops (Seals) in China*).

The Legal Representative Chop represents the signature of the PRC subsidiary's designated legal representative, who is often the PRC company's Board Chairman or CEO/General manager. This chop, usually used in combination with the Company Official Chop, is required for official documents, including applications for business licenses and tax certificates. *Id.* The Finance Chop is required for banking transactions, including withdrawals, transfers, and changes to account information. *Id.* The Contract Chop can be used in place of the Official Company Chop, but can only be used to execute contracts, while the Human Resources Chop is used for validating human resource activities, including execution of labor contracts and registering employees with governmental bodies. *Id.* Finally, some companies also have a Tax Invoice Chop for the purpose of validating their tax invoices. *Id.*

For investors in U.S.-traded companies that directly or indirectly own assets in China, the importance of chops becomes evident when attempting to collect upon default. The investor quickly learns that nothing can be done without the PRC Sub's chops and/or business licenses, as applicable. For example, in 2010, the investors in VIE-structured company GigaMedia, an online gaming company, lost control of its investment when its PRC executive refused to hand over business licenses and corporate chops. Dena Aubin, *Investor risk lurks in legal structure of China IPOs – lawyers*, *Reuters*, June 23, 2013, available at http://www.reuters.com/article/2013/06/23/china-investments-idUSL2N0EM1PD20130623.

Reverse-merger company ShengdaTech had a similar problem. ShengdaTech was able to gain control of the board of its direct subsidiary in the British Virgin Islands (that is, its "HoldingCo") simply through a shareholder vote by the special committee of the U.S. PubCo Board. Next, ShengdaTech worked to change the board and management at its PRC Subs by using the board that it had just installed at the HoldingCo to pass resolutions changing the boards and management of the PRC Subs, which were 100 percent owned by the HoldingCo. However, these resolutions affecting the PRC Subs were not formally recognized by the PRC government, PRC banks or others in the PRC because they were not "chopped." Because former PRC management had absconded with the chops, new chops could not be made. As such, despite being 100 percent shareholder of its PRC Subs, the HoldingCo had to commence litigation in China to obtain court recognition of the resolutions and a court order requiring the turnover of the missing chops. This litigation has been ongoing for approximately two years.

Because the person who controls the chops effectively controls a PRC company and its assets, there should be sufficient internal controls to protect the security, location and proper use of chops. For example, it is a good practice to have the legal representative sign and chop his or her own termination-related documents upon appointment (which documentation could be physically held by the non-PRC PubCo board), rather than running the risk that, as in the case of ShengdaTech, the chops are not located

or voluntarily turned over. *See* PriceWaterhouseCoopers, PWC: *China Compass* (Spring 2009), at pp.15-16. Similarly, a company should have internal controls regarding possession of its PRC business licenses, as chops will be required to obtain new copies of any businesses licenses. In addition, the original business license must be located (or definitively determined that it cannot be located) in order to obtain a replacement business license.

In short, until an investor has control and possession of the chops and business license of the PRC entity, the investor does not control the PRC entity – no matter how much stock of PubCo the investor controls. Therefore, for an investor with a direct or indirect equity interest in a PRC company, there likely is no value to that equity interest unless you can demonstrate control of the PRC Subs.

Bureaucratic Delays and Time-Consuming "Legalization" of Documents

Even with possession of the PRC Subs' chops, it can be unexpectedly time consuming to obtain the documents needed to institute an effective legal proceeding to recover assets or to take control of bank accounts or other assets of PRC Subs. PRC courts typically require that documents generated outside China, such as corporate resolutions by a holding or parent company, be first notarized and then apostilled by a Chinese embassy or consulate in the country of origin pursuant to the 1961 Hague Convention abolishing the Requirement of Legalization for Foreign Public Documents. *See, e.g.*, Dan Harris, *Litigating in China,* CHINA LAW BLOG, March 6, 2012, available at www.chinalawblog.com/2012/03/ litigation-in-china.html. Depending on the circumstances, other PRC government agencies or state owned enterprises, such as PRC banks, may also require the same procedure for non-PRC documents before agreeing to accept them as authentic or valid. While the formalization process is not necessarily complex, it can be time consuming and increase costs if there are many documents that need to be formalized in this way. Moreover, as the legalization process may take weeks, it is imperative that an investor who is waiting on such documents notify the court, bank or applicable governmental agency that this process is ongoing in order to attempt to prevent former management from moving assets or taking other actions in the meantime that would be prohibited by the legalized documents once they are ready.

The Limitations of PRC Civil Litigation

PRC civil proceedings are quite different from those in the United States. First, unlike the United States where a case is commenced by the filing of a lawsuit, in China, a case generally must be "accepted" by the court and is not considered filed until it is accepted by the court. Nanping Liu & Michelle Liu, J*ustice Without Judges: The Case Filing Division in the People's Republic of China*, 17 U.C. DAVIS J. INT'L L. & POL'Y 283 (2011); *see also* Donald C. Clarke, *Case Acceptance in Chinese Courts*, March 24, 2012, available at http://lawprofessors.typepad.com/china_law_prof_blog/2012/03/case-acceptace-in-chinese-courts.html. The decision whether to accept a case is made solely by the judge. Clarke, Case Acceptance in Chinese Courts. Thus, although the U.S. does allow the parties to argue whether the plaintiff's case warrants a trial in the context of the motion to dismiss or motion for summary judgment, the PRC proceedings are markedly different at such an early stage. *Id.* For example, the judge may require the plaintiff to modify the case with additional evidence or to seek modified relief before the case is accepted, as there is no formal discovery process during the proceeding, if accepted.

During this pre-acceptance stage of the lawsuit, the defendant is not involved or notified about the case. Once the case is accepted by the court, which may be a multi-week or multi-month process, the defendant will be served by the court, either by personal service or, if personal service is not possible, by publication notice. *Id.* Once the defendant is served, the case proceeds in a manner similar to U.S. proceedings where the defendant defends itself through jurisdictional challenges or otherwise and ultimately participates in a trial.

At trial, typically the plaintiff will be successful, given that all evidence proving up the case had to be presented to the judge in order to obtain acceptance of the case in the first place. However, once a judgment in China has been obtained, the "[l]ack of enforcement of court decisions continues to be a major problem" due to, among other things, "local protectionism, continued intervention in cases by party-state officials and administrative departments, an undeveloped credit system, and weak punishment for non-compliance with court orders." *Liebman, China's Courts: Restricted Reform*, 2007 CHINA Q. at 626. Local party organizations oversee court appointments, court presidents are often primarily chosen for political reasons, and within the "Party hierarchy, the President of the Supreme

People's Court continues to rank well below the Minister of Public Security, a pattern generally replicated at local level." *Id.*

There is possible special concern for VIEs. As noted previously, a VIE-structure company's principal asset is contracts with PRC companies. VIEs are structured this way because they are designed to bypass PRC bans on foreign ownership in certain business sectors. Dena Aubin, *Investor risk lurks in legal structure of China IPOs – lawyers*, *Reuters*, June 23, 2013, available at http://www.reuters.com/article/2013/06/23/china-investments-idUSL2N0EM1PD20130623. In October 2012, however, China's Supreme People's Court ruled that "certain contracts meant to 'conceal illegal intentions' were invalid." *Id.* As such, "[t]o the extent a VIE contract structure is designed to circumvent the requirements of Chinese law, such contracts [could be found] void." *Id.* Such a ruling would mean that investors can lose the only assets of value in their investment.

That said, litigating in China is still possible and potentially very worthwhile – even though discovery is extremely limited and a plaintiff will essentially need to have all of the evidence required to prove liability prior to filing suit. *See generally* Dan Harris, *Litigating in China*, CHINA LAW BLOG, March 6, 2012, available at www.chinalawblog.com/2012/03/litigation-in-china.html. Moreover, while every company should always consult with its own local counsel regarding use of the PRC legal system under its own particular circumstances, it may be worth filing tort actions to attempt to recover company assets. For example, if a PubCo realizes that its PRC Sub's chops are missing, the PubCo may be able to change the legal representatives of the PRC Sub through resolutions and then institute a tort action to recover the chops on the grounds that the current representative is being denied their possession by the old representative. Similarly, depending on the circumstances, an action for civil fraud may be possible. While these cases may move slowly and enforcement of any judgment may be questionable, these cases can create pressure to force resolution of the dispute and force recovery of some or all of the defaulted investment.

Effectiveness of PRC Criminal Proceedings

While fraud is recognized both in the civil and criminal context under PRC law, a criminal case may be rejected, but a civil case accepted, on the basis of the same facts because the intent required to prove criminal fraud is higher. Henry (Litong) Chen & Carlo Carani, *Civil Fraud v. Criminal Fraud: Criminal Proceedings Not a Silver Bullet to Resolve Business Disputes in China*, BLOOMBERG LAW REPORTS (2010). However, if accepted, the mere existence of a criminal case will remove the burden of proof from the plaintiff, who can then "leverage the state's power to investigate and collect evidence critical to the legal dispute. Facts already accepted as evidence in criminal proceedings are generally automatically accepted by the [civil] court and do not require an additional acceptance for civil proceedings." *Id.* at 5. A criminal action thus has the potential to generate cooperation from otherwise non-responsive wrongdoers and facilitate recovery of value.

On the other hand, a criminal action can cause a similar civil action to be suspended pending the outcome of the criminal trial, thus delaying any recovery that would have been realized on the civil side. *Id.* Moreover, "law enforcement agencies are susceptible to inappropriate influence by concerned parties. . . . [L]ocal individuals and enterprises generally have stronger relationships with local governments and can leverage their relationships to affect governmental decisions to their favor," including the local police. *Id.* at 6. As such, "[f]or foreigners that wish to invest in China, a strong relationship with local authorities is one of the cardinal requirements." *Id.*

U.S. Courts Can Provide Only Limited Relief

Given the difficulties and delays of enforcing of U.S. judgments in the PRC, it often makes sense to sue a PRC company or individual in the U.S. only if that person or company has assets in the U.S. or in a country that recognizes U.S. judgments. Dan Harris & Rebecca Carlson, Suing Chinese Companies: T*he New Wave*, BLOOMBERG LAW REPORTS (2011), available at www.harrismoure.com/news-events/publications/bloomberg-law-reports-suing-chinese-companies-new-wave. In addition, if a PRC entity is sued in the U.S., service of process generally will be more time-consuming than normal because it must comply with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, and service by mail is ineffective. *Id*; http://travel.state.gov/content/travel/english/legal-considerations/judicial/country/china.html. This process can take over six months.

Moreover, even suing a PRC company or individual in the U.S. will not likely yield the broad discovery to which U.S. attorneys are accustomed. PRC companies "often consider compliance to be optional," Harris & Carlson, *Suing Chinese Companies, and the PRC* "does not permit American attorneys in China to take depositions for use in foreign courts. Participation in such activity could result in the arrest, detention or deportation of the American attorneys and other participants." U.S. Dept. of State, China Judicial Assistance.

Notwithstanding these limitations, pursing litigation in the U.S. can be beneficial to attempt to recover any U.S. assets or to place pressure on management to force a deal addressing repayment of the defaulted investment.

Bankruptcy Rule 2004 Proceedings Can Help Gather Information

If the U.S. PubCo that owns assets in the PRC files for bankruptcy, Bankruptcy Rule 2004 proceedings may assist in gathering information about the PRC Subs and their various assets. Bankruptcy Rule 2004(a) states that on "motion of any party in interest, the court may order the examination of any entity." FED. R. BANKR. P. 2004(a). Courts permit the examination as long as it relates to "acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate . . . ." FED. R. BANKR. P. 2004(b). Thus, "Rule 2004 examinations are appropriate for revealing the nature and extent of the bankruptcy estate . . . and for 'discovering assets, examining transactions, and determining . . . wrongdoing." *In re Enron Corp.*, 281 B.R. 836, 840 (Bankr. S.D.N.Y. 2002). In fact, because courts have consistently held that the range of discoverable subject matter in a Rule 2004 examination is "'unfettered and broad,'" *In re Dinubilo*, 177 B.R. 932, 939 (E.D. Cal. 1993), the scope of inquiry can even "'legitimately be in the nature of a 'fishing expedition.'" *Northmount Assocs. v. W & S Invs., Inc.*, No. 91-35830, 1993 WL 18272, *2 (9th Cir. 1993).

Although purely PRC entities – including a PubCo's PRC Subs – may be out of reach, because Rule 2004 proceedings are so broad, an investor in a bankrupt PubCo may be able to obtain information about PRC entities if they have a U.S. presence. That is, an investor – or the PubCo itself – may be able to use Rule 2004 proceedings to obtain information located in China that would normally require a chop to obtain because the PRC entity with the information also has a U.S. presence. While this approach is not infallible, parties have prevailed on this theory in the past. *See, e.g.*, *Dietrich v. Bauer*, 2000 WL 1171132, *4 (S.D.N.Y. Aug. 16, 2000) ("This Court has jurisdiction over a foreign corporation doing business in New York. This rule applies to a bank that maintains and operates a branch here."); *Bank of Tokyo -Mitsubishi, Ltd., New York Branch v. Kvaerner*, 671 N.Y.S.2d 902, 904-05 (Sup. Ct. N.Y. County 1998) ("[I]f a party subject to the court's in personam jurisdiction controls a foreign corporate entity, the party, by virtue of its control, should be obligated to produce any and all appropriate discovery under its aegis, . . . wherever the [discovery] may be located").

Impact of PRC Privacy and Secrecy Laws

Finally, PRC banking and secrecy laws constitute another hurdle in obtaining financial information regarding a U.S.-traded PubCo with assets in the PRC. Specifically, there are a number of PRC laws that, for example, require PRC banks to safeguard the legal rights and interests of depositors generally, to keep secret the deposits of corporate depositors, and not to freeze accounts unless the request comes from an authorized PRC governmental entity. (*See, e.g.*, Law of the People's Republic of China on Commercial Banks (Commercial Bank Law) Art. 6; Measures for the Administration of Renminbi Corporate Deposit Arts. 24, 28.) Banks that violate these provisions are potentially subject to punishment. (*See, e.g.*, Commercial Bank Law Arts. 73, 78; Criminal Law of the People's Republic of China Art. 253(A); Provisions on the Administration of Financial Institutions' Assistance in the Inquiry into, Freeze or Deduction of Deposits.) As such, a PRC bank will most likely object to providing information regarding corporate assets or deposits, much less freezing a PRC bank account, even if there is a U.S. court order requiring as much.

In addition, auditors of PubCos with assets in China have also refused to produce their audit work papers to the SEC or others investigating or pursuing litigation based upon PRC privacy and secrecy laws. For example, in 2012, the SEC instituted proceedings against the PRC affiliates of auditing giants KPMG, PriceWaterhouseCoopers, BDO, and Ernst & Young, over their refusal to produce documents in response to SEC investigations on the grounds that producing the requested documents would cause them to violate the PRC's laws. Feng Jianmin, *Auditors' Chinese branches accused of breaking U.S. law*, SHANGHAI

DAILY, Dec. 5, 2012. In January 2014, an SEC Administrative Law Judge ruled that those firms should be suspended from auditing U.S.-listed companies for six months. Michael Rapoport, *China Units of Big-Four Firms Appeal Audit Ban: Ruling Suspended Them From Auditing U.S.-Traded Clients for Six Months*, WALL STREET JOURNAL, Feb. 12, 2014, available at http://online.wsj.com/news/articles/SB10001424052702303704304579379410335942436. Their February 2014 appeal of that ruling remains pending. *Id.*

Thus, investors must be prepared to navigate these privacy and secrecy laws, which can cause additional hurdles and delay for investors when their investment goes south.

Conclusion

In short, to protect down-side risk and facilitate recovery of assets in the event an investment "goes south" – whether via litigation or otherwise – investing in a U.S.-listed company with PRC assets or subsidiaries requires both a working knowledge of the PRC legal and business environment, and advance planning to implement the internal controls necessary to protect the chops and licenses that are key to control. Potential investors should take care to research these issues with respect to a particular company before investing and/or require the company to adequately address these issues prior to investing. Absent such preparations, navigating U.S. and PRC laws to achieve a recovery on a defaulted investment will be expensive and time consuming – but not impossible.

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