

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

Owner-Operator Independent )  
Drivers Association, Inc. )  
1 N.W. OOIDA Drive )  
Grain Valley, Missouri 64029 )

Brian E. Kelley )  
3205 20<sup>th</sup> Avenue South )  
Great Falls, Montana 59405 )

Robert Lohmeier )  
5921 County Road C )  
Manitowoc, Wisconsin 54220-8801 )

Klint L. Mowrer )  
121 Montclair Drive )  
Kalispell, Montana 59901 )

J. Mark Moody )  
15692 Lawrence 2103 )  
Mount Vernon, Missouri 65712 )

Plaintiffs, )

vs. )

Raymond LaHood, in his official capacity as )  
United States Secretary of Transportation )  
1200 New Jersey Ave., S.E. )  
Washington, D.C. 20590 )

United States Department of Transportation )  
1200 New Jersey Ave., S.E. )  
Washington, D.C. 20590 )

Anne S. Ferro, in her official capacity as )  
Administrator of Federal Motor Carrier Safety )  
Administration )  
1200 New Jersey Ave., S.E. )  
Washington, D.C. 20590 )

Federal Motor Carrier Safety Administration )  
1200 New Jersey Ave., S.E. )  
Washington, D.C. 20590 )

The United States of America, )

Defendants. )

Civil Action No. 12-1158

**COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF  
AND DAMAGES  
JURY TRIAL DEMANDED**

**NATURE OF THE CASE**

1. For more than a decade, the U.S. Department of Transportation (“DOT”), through the Federal Motor Carrier Safety Administration (“FMCSA”), has operated and maintained a database purporting to contain information relating to the safety records of commercial truck drivers and motor carriers. This database is known as the Motor Carrier Management Information System or “MCMIS.”

2. By statute, the Secretary of Transportation is directed to ensure the accuracy of data in the MCMIS database before such data is disseminated to any prospective employer under FMCSA’s Pre-Employment Screening Program (“PSP”). The statute specifically provides that, before allowing a person access to data within the MCMIS database, the Secretary shall (1) ensure that any information that is released to such person will be in accordance with the Fair Credit Reporting Act, 15 U.S.C § 1681 *et seq.* and all other Federal law. 49 U.S.C § 31150(b)(1). Under this provision, the dissemination of information by the Secretary must also conform to the requirements of the Privacy Act, 5 U.S.C. § 552a(e)(6). Both the Fair Credit Reporting Act and the Privacy Act require such information to be accurate.

3. 49 U.S.C § 31150(b)(4) mandates that the Secretary of Transportation “provide a procedure for the [driver] to correct inaccurate information... in a timely manner.”

4. Plaintiffs, Brian E. Kelley, Klint L. Mowrer, and Robert Lohmeier are commercial truck drivers who were each issued a citation by a state enforcement official and who each then successfully challenged the state citation in a state court of competent jurisdiction. In each instance, the alleged violations of law were dismissed by the state court or the driver was found not guilty.

5. Plaintiff drivers then sought to remove reference to the alleged violations of law from the MCMIS database. Each Plaintiff driver provided proof to FMCSA, through a dispute resolution

system known as “DataQs,” that the alleged violations were dismissed by a state court or they were found not guilty.

6. Defendants verified that Plaintiff drivers’ alleged violations of law were each either dismissed by a state court or a verdict of not guilty found. Nevertheless, Defendants refused to remove the alleged violations from the MCMIS database.

7. Defendants continue to maintain the inaccurate/false records of “violations” in their database and continue to make these records available to prospective employers through the Pre-Employment Screening Program or “PSP”.

8. Plaintiffs have suffered legal wrongs because of the agency action complained of and are adversely affected or aggrieved by agency action within the meaning of 49 U.S.C § 31150; the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*; and the Privacy Act, 5 U.S.C. § 552a *et seq.*

#### **JURISDICTION AND VENUE**

9. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (Federal question jurisdiction) and 28 U.S.C. § 1346 (jurisdiction where the United States is a defendant). This action arises under the Safe, Accountable, Flexible, Efficient Transportation Equity Act, Pub. L. 109-59; Title IV, § 4117(a); 49 U.S.C. § 31150, the Privacy Act of 1974 (“Privacy Act”); 5 U.S.C. § 552a *et seq.*; and the Fair Credit Reporting Act (“FCRA”), 15 U.S.C. § 1681 *et seq.*

10. This Court has jurisdiction over Plaintiffs’ claims under the Privacy Act pursuant to 5 U.S.C. § 552a(g).

11. This Court has jurisdiction over Plaintiffs’ claims under the FCRA pursuant to 15 U.S.C. § 1681p and 28 U.S.C. § 1346(a)(2) (the “Little Tucker Act”).

12. This Court has jurisdiction to review final agency action pursuant to the Administrative Procedures Act: 5 U.S.C. §§ 702 (“[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is

entitled to judicial review thereof.”).

13. An actual justiciable controversy exists between Plaintiffs and Defendants. The requested relief is proper under 5 U.S.C. § 706. The challenged agency actions and failure to act are subject to this Court’s review under 5 U.S.C. §§ 702, 704 and 706.

14. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because Defendants reside and are headquartered in this District.

### **PARTIES**

15. Plaintiff Owner-Operator Independent Drivers Association (OOIDA) is a non-profit corporation organized under the laws of the State of Missouri with its place of business located in Grain Valley, Missouri. The purpose of OOIDA is to represent the interests of professional truck drivers and small business trucking companies before federal and state agencies, courts and legislative bodies. OOIDA has over 150,000 members residing in each of the fifty states.

16. OOIDA is acting herein in a representative capacity seeking only declaratory and injunctive relief on behalf of its members, including the Plaintiff drivers in this action. The interests it seeks to protect are germane to the purposes for which OOIDA exists.

17. Plaintiff Brian E. Kelley is a citizen of the State of Montana. Kelley is a professional truck driver and hauls freight in interstate commerce. Kelley is a member of OOIDA.

18. Plaintiff Klint L. Mowrer is a citizen of the State of Montana. Mowrer is a professional truck driver and hauls freight in interstate commerce. Mowrer is a member of OOIDA.

19. Plaintiff Robert Lohmeier is a citizen of the State of Wisconsin. Lohmeier is a professional truck driver and hauls freight in interstate commerce. Lohmeier is a member of OOIDA.

20. Plaintiff J. Mark Moody is a citizen of the State of Missouri. Moody is professional truck driver and hauls freight in interstate commerce. Moody is a member of OOIDA.

21. Defendant United States Department of Transportation (“DOT”) is an agency of the

executive branch of the federal government, having responsibility for enforcing various federal transportation laws and regulations. DOT's headquarters are located in Washington, D.C.

22. Defendant Raymond LaHood is the Secretary of the U.S. Department of Transportation. Secretary LaHood is sued herein in his official capacity.

23. Defendant Federal Motor Carrier Safety Administration ("FMCSA") is a federal agency within the Department of Transportation. FMCSA's headquarters are located in Washington, D.C.

24. Defendant Anne S. Ferro is the Administrator of the FMCSA. Administrator Ferro is sued herein in her official capacity.

25. The United States of America is a sovereign state and has consented to be sued for damages pursuant to 28 U.S.C § 1346(a)(2).

#### **STATUTORY BACKGROUND**

26. The Secretary of Transportation has been directed by statute to "maintain an information system that will serve as a clearinghouse and depository about the licensing, identification, and disqualification of operators of commercial motor vehicles." 49 U.S.C. § 31309.

27. FMCSA maintains a database called the "Motor Carrier Management Information System" ("MCMIS"). MCMIS is a comprehensive record of safety performance and contains crash, census, inspection, and compliance review and enforcement information.

28. 49 U.S.C. § 31150(a)(1)-(3) authorizes the Secretary to provide access to a limited subclass of inspection reports maintained in the MCMIS database to persons conducting preemployment screening services for motor carriers under a program known as the Pre-Employment Screening Program or "PSP." This authorization limits access to: (1) commercial vehicle accident reports; (2) inspection reports that contain no driver-related safety violations; and (3) serious driver-related safety violation reports.

29. The statute defines “serious driver-related violation” to mean “...a violation by an operator of a commercial motor vehicle that the Secretary determines will result in the operator being prohibited from continuing to operate a commercial motor vehicle until the violation is corrected.” 49 U.S.C. § 31150(d).

30. Except as may be disclosed in commercial vehicle accident reports, Congress provided no authority under 49 U.S.C. § 31150(a) for the Defendants to provide access under the PSP program to inspection reports dealing with violations that the Secretary has not determined to be “serious driver-related inspection reports.” 49 U.S.C. § 31150(d).

31. The Motor Carrier Safety Assistance Program or “MCSAP” is a federal grant program that provides financial assistance to states to secure their assistance in promoting highway safety for commercial motor vehicles. 49 C.F.R. § 350.101.

32. States that participate in MCSAP must agree to adopt Federal Motor Carrier Safety Regulations (“FMCSRs”), or their equivalent, into state law and enforce them. 49 C.F.R. § 350.201. One enforcement activity conducted by the states under MCSAP is the roadside inspection of commercial motor vehicles and drivers to assess compliance with the motor carrier safety rules.

33. States that participate in MCSAP must also agree to ensure that accurate, complete and timely motor carrier safety data concerning their enforcement activities, including inspections, are collected and reported. 49 C.F.R. § 350.201(s). Participating states are thus obligated to submit data to the MCMIS database.

34. State officials conducting enforcement activities collect and submit data gathered during their motor carrier enforcement activities on documents called “inspection reports.”

35. The statute mandates that the Secretary shall “provide a procedure for the operator-applicant to correct inaccurate information in the System in a timely manner.” 49 U.S.C. §

31150(b)(4).

36. States that participate in MCSAP must also agree to “participate in a national motor carrier data correction system (DataQs).” 49 C.F.R. § 350.211(11); 49 C.F.R. § 350.201(s).

37. The Department of Transportation provides prospective employers access to MCMIS data through an agent, National Information Consortium Technologies, LLC (hereinafter “NICT”). The role of NICT is set forth in DOT Contract No: DTMC75-09-C-00026 and modifications to it.

38. FMCSA transmits MCMIS data to NICT on a monthly basis. This data contains the most current crash and inspection data available in MCMIS. From that transmitted data NICT creates PSP reports for prospective employers, drivers and any others who may be authorized to receive such data.

39. The Privacy Act requires that “[e]ach agency that maintains a system of records shall, . . . prior to disseminating any record about an individual to any person, . . . make reasonable efforts to assure that such records are accurate, complete, timely and relevant for agency purposes.” 5 U.S.C. § 552a(e)(6).

40. The Privacy Act permits an individual to bring a civil action against an agency when it fails to “maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights or opportunities of, or benefits to the individual that may be made on the basis of such record.” 5 U.S.C. § 552a(g)(1)(C).

41. The Fair Credit Reporting Act (“FCRA”) imposes the duty upon a consumer reporting agency that disseminates a report about an individual for employment purposes to “follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.” 15 U.S.C. § 1681a and 1681e(b).

42. The FCRA requires a consumer reporting agency, after notice of a dispute to the accuracy or completeness of a record in its database, to : (a) “conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate;” (b) “review and consider all relevant information submitted by the consumer;” and (c) “promptly delete . . . or modify” statements that are “inaccurate, or incomplete, or cannot be verified.” 15 U.S.C. § 1681i(a)(1), (4) and (5).

43. The FCRA requires that the subjects of database reports, after an unresolved dispute, have an opportunity to critique those reports by crafting a statement setting forth the nature of any dispute, and to have their statement published along with any later reporting of the contents of the database. 15 U.S.C. § 1681i(b).

44. FMCSA is a consumer reporting agency within the meaning of the FCRA. 15 U.S.C § 1681a(f).

45. The Privacy Act requires that the subjects of database reports have an opportunity to critique those reports, if a request to modify is rejected, by crafting a statement setting forth the nature of the dispute, and to have their statement published along with any later reporting of the contents of the database. 5 U.S.C. § 552a(d)(2) and (4).

### **FACTS**

#### **FMCSA’s Database of “Driver-Related Safety Violation Inspection Reports”**

46. Inspection reports of commercial vehicles and drivers are generally prepared by state law enforcement officers pursuant to the state’s responsibilities as grant recipients under the MCSAP program.

47. Inspection reports containing allegations of violations of safety statutes and/or regulations are transmitted by state enforcement agencies participating in MCSAP to FMCSA. These inspection reports are stored in the MCMIS database.

48. On information and belief, violations of state commercial vehicle safety laws or

regulations are treated as criminal offenses under the laws of most states.

49. Inspection reports submitted by state law enforcement officers to the MCMIS system contain data labeled and reported by MCMIS as “violations” of safety statutes and/or regulations even when: (a) the driver has not been given a citation alleging violation of state law; (b) there has been no judicial determination of guilt or non-guilt where a citation has been issued; or (c) there has been a judicial determination in favor of the driver resulting in the dismissal of charges or a verdict or determination of not guilty.

#### **FMCSA’s “DataQs” System**

50. In January 2011, FMCSA adopted a “User Guide and Manual: Best Practices for State Agency Users” for its DataQs system (hereinafter, “User Guide”). This User Guide was not published pursuant to notice and comment rulemaking.

51. “DataQs” is described by FMCSA as “the online system for drivers, motor carriers, Federal and State agencies, and others to file concerns about Federal and State data maintained in MCMIS and released to the public by FMCSA.” User Guide § 1.1 at 15.

52. According to the User Guide, “the State agency is responsible for reviewing and resolving all Request for Data Review (“RDRs”) or disputes pertaining to the collection and reporting of State-reported safety data into MCMIS.”

53. While FMCSA admits that it “maintains and disseminates” MCMIS data, FMCSA asserts that it has delegated all responsibility for the accuracy of any state-collected data to the state enforcement agencies who participate in the MCSAP grant program. User Guide at 12. The User Guide does not identify any legal authority for this delegation.

54. With regard to the accuracy of the data provided by the states to MCMIS, FMCSA itself undertakes no investigation, assessment, or evaluation of the accuracy of such data.

55. FMCSA considers a state’s decision regarding an RDR as the final decision regarding the

RDR. User Guide at § 2.32

**ALLEGATIONS WITH RESPECT TO INDIVIDUAL PLAINTIFF DRIVERS**

**Brian E. Kelley**

56. Brian E. Kelley is a professional commercial truck driver. On or about December 7, 2010, he was stopped in the State of Texas and inspected by a Texas law enforcement officer.

57. The State of Texas requires that the Director of the Department of Public Safety adopt regulations designed to promote the safe operation of commercial motor vehicles that are consistent with federal safety regulations. Tex. Transp. Code § 644.051(a)(2), (b) and (c). The FMCSRs have been incorporated by reference into the state regulations. 37 Tex. Admin. Code, Rule §§ 4.1 and 4.11.

58. A person who violates any of the safety rules adopted by the State of Texas commits a criminal offense. Tex. Transp. Code § 644.151(a). Such offense is considered a “Class C misdemeanor.” *Id.* at § 644.151(a).

59. The Texas officer issued Kelley a citation alleging that he had violated a Texas criminal statute (Texas DPS Commercial Vehicle Enforcement Citation CP#007390). The citation alleged that Kelley was “driving a commercial motor vehicle with a detectable amount of alcohol.”

60. The Texas law enforcement officer transmitted the inspection report of his allegations to the MCMIS database.

61. Kelley contested the citation in the Walker County, Texas Justice Court (Case No. 410-102838).

62. On February 3, 2011, in response to the motion of the district attorney, the court dismissed all charges against Kelley.

63. On or about March 8, 2011, Kelley requested in writing that the Texas Motor Carrier

Bureau remove the report of the December 7, 2010 alleged violation of law from the MCMIS database. The Motor Carrier Bureau declined to remove the report from MCMIS.

64. Kelley initiated a challenge to the continued presence in MCMIS of the December 7, 2010 inspection report by filing a RDR through FMCSA's DataQs system. The challenge was based primarily on the fact that the violation identified in the inspection report was dismissed by the Texas Court.

65. Upon receiving Kelley's RDR, FMCSA referred the challenge to the person designated by Texas to respond to DataQs challenges. The Texas DataQs responder, Mr. Rodney Baumgartner, rejected Kelley's challenge and communicated the denial of the challenge to FMCSA.

66. FMCSA undertook no investigation of its own regarding the merits of Kelley's DataQs challenge. FMCSA did not exercise any judgment of its own regarding the merits of Kelley's DataQs challenge.

67. Under its standard operating procedures, FMCSA will continue to retain the original December 7, 2010 inspection report in its MCMIS database for three years.

68. Prior to the adjudication of whether Kelley was guilty of the charges identified in the December 7, 2010 citation and out-of-service order, Kelley was presumptively innocent.

69. Subsequent to the February 3, 2011 dismissal of all charges identified in the December 7, 2010 citation by a court of competent jurisdiction, the assertion that Kelley had violated any commercial vehicle safety law or regulation identified in the December 12, 2010 citation became objectively false and inaccurate.

70. The failure of the FMCSA to delete from its MCMIS database the December 7, 2010 report of Mr. Kelley's "violation" of the law and out-of service order has caused Kelley to lose business opportunities. It has also resulted in the loss of income to Kelley.

**Robert Lohmeier**

71. Robert Lohmeier is a professional commercial truck driver. On or about May 19, 2010, at an inspection conducted by an Arizona law enforcement officer, Lohmeier was issued a citation for allegedly failing to wear a seatbelt and for violations of the Hours of Service regulations.

72. Failure to wear a seatbelt does not constitute a “serious driver-related violation” within the meaning of 49 U.S.C. § 31150(d).

73. The State of Arizona has enacted legislation which allows the Department of Transportation to adopt “reasonable rules it deems proper governing the safety operations of motor carriers.” Ariz. Rev. Stat. § 28-5204. Acting under this authority, the Arizona Department of Transportation has incorporated by reference into Arizona law 49 C.F.R. §§ 40, 379, 382, 383, 390, 391, 392, 393, 395, 397 and 399. Ariz. Admin. Code § 17-5-202.

74. A person who violates any motor carrier safety regulations in Arizona is subject to a civil penalty. Ariz. Rev. Stat. § 28-5238. A person served with a civil traffic complaint shall admit or deny the allegations of the complaint. Ariz. Rev. Stat. § 28-1596. The State is required to prove the violation charged by a preponderance of the evidence.

75. The Arizona law enforcement officer transmitted the inspection report containing his accusations against Lohmeier to the MCMIS database.

76. On October 14, 2010, Lohmeier appeared before the Winslow Justice City Court in Navajo County, Arizona to contest the May 19, 2010 citations.

77. On October 14, 2010, the court dismissed all of the charges against Lohmeier.

78. On or about May 25, 2011, OOIDA filed an RDR through FMCSA’s DataQs system on behalf of Lohmeier challenging the continued presence in MCMIS of the May 19, 2010 “violation” of law. Lohmeier’s challenge was based on the court’s dismissal of all charges

against him.

79. FMCSA forwarded the challenge to the Arizona Department of Public Safety (“DPS”).

80. On or about May 25, 2011, the Arizona DPS, per Ursula Miller, denied Lohmeier’s challenge, stating that “We are not changing this. The court system is independent of the inspection process and this [inspection] was done properly.” Miller continued, “One more thing – court adjudication does not necessarily mean that we will remove the violation from the inspection report.”

81. FMCSA undertook no investigation of its own regarding the merits of Lohmeier’s DataQs challenge. FMCSA did not exercise any judgment of its own regarding the merits of Lohmeier’s DataQs challenge.

82. Under its standard procedures, FMCSA will continue to maintain the May 19, 2010 “violation” of the law in its MCMIS database.

83. Prior to the adjudication of whether Lohmeier was guilty of the violations identified in the May 19, 2010 citation, Lohmeier was presumptively innocent.

84. Subsequent to the October 14, 2010 dismissal of all violations identified in the May 19, 2010 citation by a court of competent jurisdiction, the assertion that Lohmeier had violated any law or regulation identified in the May 19, 2010 citation was objectively false and inaccurate.

85. The failure of the FMCSA to delete from its MCMIS database the report of a May 10, 2010 “violation” of a statute or regulation by Lohmeier, has caused Lohmeier to lose business opportunities. It has also resulted in the loss of income to Lohmeier.

**Klint L. Mowrer**

86. Klint L. Mowrer is a professional commercial truck driver. On or about March 22, 2010, Mowrer was inspected in Maryland by Inspector Hedrick, a Maryland state law enforcement officer.

87. Acting under the authority of Md. Code Ann. Transp. § 16-820, Maryland's Transportation Administration has incorporated by reference "[t]he federal motor carrier safety regulations contained in 49 C.F.R. §§ 40, 382,383, 387, 390-393, and 1572" into Maryland law. Md. Regs. Code 11 § 21.01.02.

88. Under Maryland law, it is a misdemeanor for any person to violate any of the provisions of the Maryland Vehicle Law. Md. Code Ann, Transp. § 37-101(a).

89. Hedrick issued Mowrer a citation for the violation of the Maryland Criminal Code for "fail[ing] to comply with local law; rear drag link has more than 1/8" play by hand pressure." (Citation No. 960BDIMR11392.2).

90. The citation issued to Plaintiff Mowrer did not identify any "serious driver-related violation" within the meaning of 49 U.S.C. § 31150(d).

91. At the time of the citation, Inspector Hendrick submitted his inspection report containing the alleged violation to FMCSA's MCMIS database.

92. Mowrer contested the citation in the District Court of Maryland for Garrett County (Case No. 8930BDI).

93. On July 22, 2010, the court received Mowrer's plea of "not guilty" and tried the case.

94. Upon the conclusion of the trial, the court entered a verdict of "not guilty" and dismissed the charge against Mowrer.

95. Mowrer filed a DataQs challenge to the report in MCMIS of the alleged "violation" of law.

96. FMCSA forwarded Mowrer's challenge to the State of Maryland, which in turn referred the challenge to the law enforcement officer who performed the inspection and issued the citation.

97. In reply to Mowrer's DataQs challenge, Roni Moyer, on behalf of the State of Maryland, stated: "Mr. Mowrer: At the time of the inspection the Officer still found the violation(s) to be present. The violation(s) will not be removed. Please contact inspector [sic] Hedrick at our Finzel scale facility if you have any questions or concerns."

98. FMCSA undertook no investigation of its own regarding the merits of Mowrer's DataQs challenge. FMCSA did not exercise any judgment of its own regarding the merits of Mowrer's DataQs challenge.

99. FMCSA continues to report that Mr. Mowrer had a "violation" of law on March 22, 2010 in its MCMIS database.

100. Prior to the adjudication of whether Mowrer was guilty of the charges identified in the March 22, 2010 citation, Mowrer was presumptively innocent.

101. Subsequent to the July 22, 2010 dismissal of all charges identified in the March 22, 2010 citation by a court of competent jurisdiction, the assertion that Mowrer had violated any law or regulation identified in the March 22, 2010 citation became objectively false and inaccurate.

102. The failure of the FMCSA to delete from its MCMIS database the reference to the citation as a "violation" of statute or regulation by Mowrer, has caused Mowrer to lose business opportunities. It has also resulted in the loss of income to Mowrer.

**J. Mark Moody**

103. On or about June 6, 2012, Plaintiff Moody was directed to submit to a North American Standard Level 2 inspection at a weigh station in or near Mitchellville, Iowa while traveling westbound on Interstate 80. The inspecting officer was Justin Mack, Badge No. T175.

104. Moody's inspection lasted between 45-60 minutes. During the inspection, Officer Mack asked if Moody was feeling well. Moody replied that his stomach was feeling "a little queasy." Actually, at the time of the inspection, Moody was experiencing excess gas but was embarrassed to disclose this personal discomfort to Mack.

105. At the conclusion of the inspection, Moody was issued two separate citations:

1. Citation No. T01 T157 120611 121145 0. (Record of Duty Status not current. Reference: Fed/Admin Code: 395.8F1)
2. Citation No. T01 T157 120611 121104 9. (Operating a CMV while ill – Drivers Admission. Reference Fed/Admin Code: 392.3\_

Each citation issued to Moody contained a Schedule of Fine that showed as follows:

Scheduled Fine	\$50.00	
Criminal Surcharge	\$17.50	
Court Cost	<u>\$60.00</u>	
Total Fines		<u>\$127.50</u>
Bond Amount	\$161.25	

106. Under standard operating procedures, the State of Iowa transmits an inspection report to the MCMIS database which reports the June 6, 2012 citations issued to Moody as "violations" of law.

107. Moody is currently contesting the allegations against him by Officer Mack. A criminal proceeding is currently pending against Moody at the Jasper County Courthouse, 101 First Street North, Room 104, Newton, Iowa 50208.

108. Prior to an adjudication of the charges pending in the Iowa Court, Moody is presumptively innocent.

109. Under its standard operating procedures, it is FMCSA's practice to receive reports of alleged violations and make those reports available under its PSP program for three years.

110. On information and belief, FMCSA currently maintains a record of the June 6, 2012 citations issued to Moody in its MCMIS database and makes available or causes to be made available such record to potential employers under its PSP program.

111. The Secretary of Transportation has never designated a violation of 49 C.F.R. § 392.3 referenced in Citation No. T01 T157 120611 121104 9 as a “serious driver-related violation” within the meaning of 49 U.S.C. 31150(d).

112. The Secretary of Transportation has never designated a violation of 49 C.F.R. § 395.8(f)(1) referenced in Citation No. T01 T157 120611 121145 0 as a “serious driver-related violation” within the meaning of 49 U.S.C. 31150(d).

113. Defendants’ conduct in making available under their preemployment screening program a record that Mr. Moody committed these two “violations” of law on June 6, 2012 threatens to cause Moody to lose business opportunities and also threatens to cause him loss of income.

**OOIDA’s Appeal to FMCSA and FMCSA’s Final Agency Action**

114. On or about July 8, 2011, OOIDA President Jim Johnston wrote to FMCSA Administrator Anne S. Ferro. In his letter, Johnston specifically requested that the inspection reports challenged by OOIDA members Kelley, Lohmeier and Mowrer “be removed from all FMCSA databases.”

115. After receiving no response from FMCSA, Johnston wrote again to Administrator Ferro on November 18, 2011, pointing out that “for these drivers, the damage that this system has done is immediate and continuing. These drivers, and others like them, deserve immediate relief from being tagged by FMCSA with legally unsubstantiated and unproven violations of the safety rules.”

116. Administrator Ferro replied to Mr. Johnston by letter dated February 17, 2012. In her letter, Administrator Ferro refused to remove the reports of violations of law challenged by

Kelley, Lohmeier and Mowrer from the FMCSA database. Administrator Ferro stated that she forwarded the DataQs challenges “to the FMCSA division administrators in the respective states for review.”

117. In a letter dated May 29, 2012, Administrator Ferro wrote a second letter to Johnston reporting back the “findings” of the FMCSA Division Administrators regarding the DataQs challenges. According to Administrator Ferro, the FMCSA Division Administrators from Maryland, Arizona and Texas reviewed the respective challenge and, in each case, the Division Administrator refused to remove the reported “violation” of law from the MCMIS database.

118. Administrator Ferro’s letter of May 29, 2012 to Johnston constitutes Final Agency Action with respect to Kelley, Lohmeier and Mowrer’s DataQs challenges.

### **CLAIMS FOR RELIEF**

#### **COUNT I**

#### **Denial of Plaintiff Drivers’ DataQs Challenges Following Their Exoneration by Courts of Competent Jurisdiction Violates 49 U.S.C. § 31150(b)(1) and Is Actionable Under the Administrative Procedures Act, 5 U.S.C. § 702(2)(A) and (D).**

119. Plaintiffs incorporate and re-allege ¶¶ 1-118, above.

120. The facts and circumstances that give rise to the issuance of citations to drivers by state enforcement personnel are the same as the facts and circumstances that support transmittal of inspection reports to the MCMIS database that refer to such citations.

121. The DataQs challenges filed by Plaintiffs Kelley, Lohmeier and Mowrer informed Defendants that the allegations of regulatory violations made against them were either dismissed by a court of competent jurisdiction or were tried resulting in a verdict of not guilty.

122. Defendants have refused to delete from MCMIS database reports of “violations” of statutes and regulations by Plaintiff drivers and continue to make such data available under the PSP program even though Defendants have actual knowledge that each of the Plaintiff drivers

were exonerated by a court of competent jurisdiction.

123. By failing to remove the false and inaccurate reports of alleged violations from the MCMIS system, and by continuing to provide persons with access to such records through the PSP program, Defendants have acted contrary to:

- (a) the standards set forth in the Fair Credit Reporting Act, which imposes upon Defendants the duty to “follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates” and to refrain from disseminating or causing to be disseminated data that they know to be inaccurate; and
- (b) the standards set forth in the Privacy Act which requires Defendants to “maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights or opportunities of, or benefits to the individual that may be made on the basis of such record.” 5 U.S.C. § 552a(g)(1)(C); and,
- (c) the standards set forth in 49 U.S.C. § 31106(a)(3)(F) which requires Defendants to “ensure to the maximum extent practical [that] all data is complete, timely and accurate across all information systems.”

124. Plaintiffs have no adequate remedy at law.

125. Defendants’ failure to remove the false, inaccurate or incomplete records of “violations” of law from the MCMIS database following dismissal of charges of such violations or findings of not guilty by courts of competent jurisdiction and their actions in continuing to make such data available violates 49 U.S.C. § 31150(b)(1) and is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law in violation of the Administrative Procedures

Act, 5 U.S.C. § 706(2)(A) and (D).

**COUNT II**

**Defendants' Release of Inspection Reports Covering Violations Other Than Serious Driver-Related Violations Exceed Their Authority Under 49 U.S.C. § 31150(a) and Is Actionable Under the Administrative Procedures Act, 5 U.S.C. § 706 (2)(A), (C) and (D)**

126. Plaintiffs incorporate and re-allege ¶¶ 1-125, above.

127. By statute the Defendants are authorized to provide persons conducting preemployment screening services for the motor carrier industry with access to “Serious driver-related safety violation inspection reports.” 49 U.S.C. § 31150(a)(3).

128. Except as may be disclosed in commercial vehicle accident reports, Congress created no authority under 49 U.S.C. § 31150(a) for the Defendants to provide access under the PSP program to inspection reports dealing with violations that the Secretary has not determined to be “serious driver-related inspection reports.” 49 U.S.C. § 31150(d).

129. The Statute defines a “serious driver-related violation” as “...a violation by an operator of a commercial motor vehicle that the Secretary determines will result in the operator being prohibited from continuing to operate a commercial motor vehicle until the violation is corrected.” 49 U.S.C. § 31150(d).

130. The Secretary has not issued a determination that identifies individual violations that are “serious driver-related violations” within the meaning of 49 U.S.C. §§ 31150(a)(3) and (d).

131. Because the Secretary has never identified specific violations that are “serious driver-related violation[s]” there are no inspection reports within the MCMIS database that presently qualify for release under 49 U.S.C. § 31150(a)(3).

132. Defendants regularly identify for release to persons conducting preemployment screening services violations or allegations of violations of Federal Motor Carrier Safety Regulations that have never been determined by the Secretary to be serious driver-related violations.

133. The only existing federal regulations the violation of which might potentially satisfy the definition of “serious driver-related safety violation” are violations for which a driver out-of-service order is authorized by the Secretary.

134. Defendants have accepted for incorporation in the MCMIS database and have granted access to persons conducting preemployment screening services numerous reports covering “violations” that do not involve violations for which the Defendants have previously authorized driver out-of-service orders.

135. The dissemination of inspection reports covering alleged violations of law not determined by this Secretary to be “serious-driver related violations” under circumstances where motor carriers are entitled only to receive “serious driver-related safety violation inspection reports” is deceptive and it substantially prejudices the rights of Plaintiff drivers and others similarly situated.

136. Plaintiffs have no adequate remedy at law.

137. Defendants’ conduct with respect to Plaintiffs Kelley, Lohmeier, Mowrer and Moody violates 49 U.S.C. § 31150(a)(3) by providing access to inspection reports that do not deal with serious driver-related violations. Defendants’ conduct is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law and is in excess of statutory authority in violation of the Administrative Procedures Act, 5 U.S.C § 706 (2)(A), (C) and (D).

**COUNT III**

**Defendants' Actions Providing Access Data That Does Not Satisfy  
Statutory Standards for Accuracy Violate 49 U.S.C. § 31150(b)(1) and  
Are Actionable Under the Administrative Procedures Act, 5 U.S.C. §  
706(2)(A), (C) and (D)**

138. Plaintiffs incorporate and re-allege ¶¶ 1-137, above.

139. The MCMIS database is populated with statements provided by state enforcement agencies who participate in the MCSAP program.

140. States participating in the MCSAP program transmit data to the MCMIS database that include allegations of violations of state criminal statutes dealing with commercial vehicle safety made during roadside inspections. Such transmissions are made *prior* to any judicial resolution of whether drivers are guilty of the charges specified in the citations and inspection reports.

141. Under the U.S. Constitution, persons alleged to have violated criminal laws are presumptively not guilty.

142. Inspection reports made available under the PSP program fail to disclose that information provided does not report judicial determinations as to whether drivers have been found guilty of violating state statutes or regulations.

143. Persons using Defendants' PSP program are unable to determine from the reports produced whether the enforcement activity described in the MCMIS database refers merely to allegations of violations of regulations or to judicial determinations of guilt with respect to such allegations.

144. An event identified as a "violation" of state or federal law must be predicated upon an adjudication that the individual is guilty of the offense identified.

145. Defendants, by releasing or causing to be released inspection reports from the MCMIS database that do not identify serious driver-related violations and/or do not distinguish between allegations of violations of law from judicial determinations of actual violations: (a) have failed

to “ensure, to the maximum extent practical [that] all the data is complete, timely, and accurate across all information systems...” as required by 49 U.S.C. § 31106(a)(3)(F); (b) have failed to maintain records concerning individuals “with accuracy, relevance and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights or opportunities or benefits to the individuals that may be made on the basis of such records required by the Privacy Act, 5 U.S.C. § 552a(g)(1)(c); and, (c) have failed to “follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual” as required by the FCRA, 15 U.S.C. § 1681e(b).

146. Defendants have provided access to information in the MCMIS database with respect to Plaintiffs Kelley, Lohmeier, Mowrer and Moody without ensuring that the information to be released is in accordance with the FCRA, the Privacy Act and 49 U.S.C. § 31106(a)(3)(F).

147. Plaintiffs have no adequate remedy at law.

148. Defendants’ conduct with respect to Plaintiffs Kelley, Lohmeier, Mowrer and Moody violates the standards for accuracy established in 49 U.S.C. § 31150(b)(1). Defendants’ conduct is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law and in excess of statutory authority in violation of the Administrative Procedures Act, 5 U.S.C § 706 (2)(A),(C) and (D).

#### **COUNT IV**

#### **Defendants’ Unauthorized Delegation to State Enforcement Agencies of Their Statutory Responsibilities Under 49 U.S.C § 31150(b)(1) and (4) Is In Excess of Statutory Jurisdiction, Authority or Limitations or Short of Statutory Right in Violation of the Administrative Procedures Act, 5 U.S.C. § 706(2)(A), (C) and (D)**

149. Plaintiffs incorporate and re-allege ¶¶ 1-148, above.

150. Before providing persons conducting preemployment screening of drivers with access to data in the MCMIS database, the Secretary of Transportation is required by statute to “provide a procedure for the operator-applicant to correct inaccurate information in the system in a timely

manner.” 49 U.S.C. § 31150(b)(4).

151. 49 U.S.C. § 31150(b)(1) imposes upon the Secretary standards for accuracy and completeness contained in the FCRA, the Privacy Act and other applicable federal law.

152. Section 31150 (b)(1) does not authorize the Secretary to delegate his responsibility to ensure accuracy and completeness of inspection reports released under the PSP program.

153. The procedure adopted by Defendants to correct inaccurate information included in MCMIS database is called the “DataQs” system.

154. Defendants have unlawfully delegated to the individual states that originate data all responsibility for ascertaining the accuracy of data included in the MCMIS database in response to DataQs challenges. Defendants treat a determination made by an individual state to be the final determination regarding a DataQs challenge.

155. Defendants have imposed no standards or requirements on individual states for ascertaining the accuracy or completeness of data in response to a driver challenge under the DataQs system.

156. The record made by the States of Texas, Arizona and Maryland in denying the DataQs challenges of Plaintiffs Kelley, Lohmeier and Mowrer, respectively, evidence no attempt to measure the accuracy or completeness of the data transmitted by them under standards imposed by the FCRA, the Privacy Act or other applicable federal statutes.

157. Defendants undertake no independent investigation, assessment or evaluation of data at the federal level with respect to a driver challenge to the accuracy or completeness of the data reported in the MCMIS system.

158. Plaintiffs have no adequate remedy at law.

159. Defendants, by unlawfully delegating their statutory responsibilities to individual states, or by delegating such responsibilities without ensuring that statutory standards for accuracy and

completeness are met, and by accepting the decisions of the individual states denying the DataQs challenges of Plaintiffs Kelley, Lohmeier and Mowrer, have violated their responsibilities under 49 U.S.C. § 31150(b)(1)(4). Defendants' conduct is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law and is in excess of statutory authority in violation of the Administrative Procedures Act, 5 U.S.C § 706 (2) (A), (C) and (D).

**COUNT V**  
**Defendants' Actions Violate the**  
**Fair Credit Reporting Act**

160. Plaintiffs incorporate and re-allege ¶¶ 1-159, above.

161. Defendants' release of information under the PSP program is subject to the Fair Credit Reporting Act. 49 U.S.C. §§ 31150(a) and (b)(1).

162. FMCSA is a "consumer reporting agency" under the FCRA. 15 U.S.C. § 1681a(f).

163. The FCRA imposes the duty upon a consumer reporting agency that disseminates consumer-related information to "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." 15 U.S.C. § 1681e(b).

164. The FCRA requires a consumer reporting agency, after notice of a dispute as to the accuracy or completeness of a record in its database, to : (a) "conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate;" (b) "review and consider all relevant information submitted by the consumer;" and (c) "promptly delete . . . or modify" statements that are "inaccurate, or incomplete, or cannot be verified." 15 U.S.C. § 1681i(a)(1), (4) and (5).

165. The FCRA requires those maintaining records about consumers to allow consumers who dispute such records to "file a brief statement setting forth the nature of the dispute." In any subsequent dissemination of the report, the fact that the report is disputed must be noted together

with a summary of the consumer's [driver's] position. 15 U.S.C. § 1681i(b) and (c).

166. Defendants have violated the Fair Credit Reporting Act by failing to include notations in the MCMIS database that individual reports are disputed as well as failing to include a summary of the driver's position with respect to his dispute. 15 U.S.C §§ 1681c(f) and 1681i(c).

167. FMCSA has violated the FCRA by improperly delegating its statutory responsibilities to individual states without ensuring that the required level of accuracy is met. Defendants have failed to conduct a reasonable investigation to determine whether disputed information is accurate and have failed to review directly and consider all relevant information submitted by Plaintiff drivers.

168. FMCSA, by disseminating data purporting to be "violations" of statutes and regulations when in fact the records are comprised solely of allegations of such violations, has failed to follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates, as required under the FCRA. 15 U.S.C. § 1681e(b).

169. FMCSA has refused to delete Plaintiffs Kelley, Lohmeier and Mowrer's "violations" of statutes and regulations from the MCMIS system, and continues to provide access to such reports through the PSP program, even though FMCSA has actual knowledge that each of the charges addressing the alleged violations of the Plaintiff drivers were either dismissed by a court of competent jurisdiction or the driver was found not guilty of the charges alleged.

170. By failing to remove the false and inaccurate violation reports from its database, and by continuing to disseminate records of such through the PSP program, FMCSA has violated its duty under the FCRA to "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." Further, FMCSA has violated the standards enunciated in the FCRA by disseminating data that it knows to be

inaccurate, false and misleading. 15 U.S.C. § 1681e(b).

171. FMCSA acted willfully when it failed to adopt reasonable procedures to assure maximum possible accuracy concerning the individuals about whom its consumer reports relate.

172. FMCSA acted willfully and negligently when it disseminated false, inaccurate, imprecise, incomplete and misleading consumer reports to third parties through the PSP.

173. As a result of FMCSA's willful violations of the FCRA, FMCSA is liable to Plaintiffs in the statutory damage amount of "not less than \$100 and not more than \$1000." 15 U.S.C. § 1681n(a)(1)(A).

**COUNT VI**  
**Defendants' Actions Violate the Privacy Act**

174. Plaintiffs incorporate and re-allege ¶¶ 1-173, above.

175. Defendants' MCMIS system constitutes "a system of records" under the Privacy Act.

176. Defendants' release of information from the MCMIS database under the PSP program is subject to the Privacy Act. 49 U.S.C. §§ 31150(a) and (b)(1).

177. The Privacy Act, requires that "[e]ach agency that maintains a system of records shall . . . , prior to disseminating any record about an individual to any person . . . , make reasonable efforts to assure that such records are accurate, complete, timely and relevant for agency purposes." 5 U.S.C. § 552a(e)(6).

178. Plaintiffs have exhausted all required and available administrative remedies, including filing challenges through the DataQs system, to remove the false and inaccurate violation reports in the MCMIS system.

179. Prior to making records related to Plaintiff drivers available to persons conducting pre-employment screening, Defendants failed to make reasonable efforts to assure that such records were accurate and complete.

180. Defendants had actual knowledge that the records contained in the MCMIS database

concerning the alleged “violations” by Plaintiffs Kelley, Lohmeier and Mowrer were each dismissed or resulted in a not guilty verdict by a state court of competent jurisdiction.

Notwithstanding this knowledge, Defendants have continued to make available the records of Plaintiff drivers Kelley, Lohmeier and Mowrer through FMCSA’s PSP program.

181. Defendants include data in the MCMIS database that relate to violations that do not satisfy the statutory definition of “serious driver-related violation.” The inclusion of such records constitutes a failure to assure “that such records are accurate, complete and... relevant for agency purposes” within the meaning of the Privacy Act, 5 U.S.C. § 552a(e)(6).

182. Defendants, through their officials, agents and/or employees intentionally or willfully failed to maintain records concerning Plaintiff drivers with such accuracy, relevance, timeliness and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights or opportunities of Plaintiff drivers that may be made on the basis of such records as required by 5 U.S.C § 552a(g)(1)(C).

183. Though FMCSA purports to have a mechanism compliant with the Privacy Act requirement to provide a means for drivers to file critiques of the statements in MCMIS (See 49 C.F.R. § 10.45), FMCSA does not incorporate that mechanism into DataQs procedures, does not inform drivers accessing DataQs of that mechanism or of the right to use it, and the MCMIS database contains no data field to capture, maintain and report driver critiques of the MCMIS records.

184. Defendants violated their own regulation when they failed to inform Plaintiffs Kelley, Lohmeier and Mowrer of their right to file a concise statement of their reasons for disagreement after Defendants denied their DataQs challenges.

185. FMCSA has made no provision within the structure of the MCMIS database or the PSP system for drivers’ comments to be noted and a summary of those comments included in the

report that is released.

186. Defendants' violations of the Privacy Act with respect to the dissemination of records are ongoing and continuing.

187. As a direct and proximate cause of each of the violations of the Privacy Act by Defendants, intentional or willful disclosures and dissemination of false, inaccurate and misleading records maintained by Defendants have occurred, and false, inaccurate and misleading information about Plaintiffs have been disseminated to third parties.

188. As a direct and proximate cause of each of the intentional and willful violations of the Privacy Act by Defendants, Plaintiffs have suffered an "adverse effect," within the meaning of 5 U.S.C. § 552a(g)(1)(C) and (D), including but not limited to direct and indirect injury to Plaintiffs' reputation, damage to career, loss of income and pecuniary losses.

189. By reason of the foregoing, the Court should order Defendants, pursuant to 5 U.S.C. § 552a(g)(2)(A), to remove all violation reports that are false, inaccurate, incomplete or misleading.

190. By reason of the foregoing, the Court, pursuant to 5 U.S.C. § 552a(g)(4), should award damages to Plaintiffs resulting from Defendants' intentional and willful violations of the Privacy Act.

#### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs request that this Court enter a declaratory judgment pursuant to 28 U.S.C. § 2201(a) in their favor holding that:

A. Providing access under the PSP program to information from the MCMIS database related to the Plaintiff drivers following their exoneration by courts of competent jurisdiction violated the drivers' rights under 49 U.S.C. § 31150(b)(1), the FCRA and the Privacy Act;

B. Providing access to inspection reports in the MCMIS database for disclosure under its PSP program prior to a judicial determination of a driver's guilt violates Defendants' statutory

responsibility to ensure that all data in FMCSA's information systems is complete and accurate within the meaning of 49 U.S.C. § 31106(a)(3)(F);

C. Designation of inspection reports in the MCMIS database for disclosure under the PSP program without identifying whether such inspection reports deal with citations issued by inspecting officers or with judicial determinations of guilt with respect to such citations violates Defendants' statutory responsibilities under 49 U.S.C. §§ 31150(b)(1) and 31106(a)(3)(F);

D. Providing access to information contained in the MCMIS database for disclosure under the PSP program without ensuring that the release of such information is in accord with the FCRA and the Privacy Act violates 49 U.S.C. § 31150(b)(1);

E. Making inspection reports from the MCMIS database available for disclosure under the PSP program where such reports do not deal with violations determined by the Secretary to be "serious driver-related safety violations" is in excess of statutory authority under 49 U.S.C. § 31150(a) and is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

F. Delegation of responsibility to individual states for ensuring the accuracy and completeness of all data maintained in the MCMIS database is in excess of Defendants' statutory authority under 49 U.S.C. § 31150(b)(1) and (4) and violates the Administrative Procedures Act, 5 U.S.C. § 706(2)(A), (C) and (D);

G. Failure of Defendants to undertake themselves any investigation, assessment or evaluation of the accuracy or completeness of data maintained in the MCMIS database in response to a challenge under DataQs system by Plaintiff drivers is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

FURTHER, Plaintiffs request that his Court enter an order to:

H. Compel Defendants to purge from the MCMIS database any inspection reports identifying alleged violations of law for which there has been no judicial determination of drivers' guilt under state law;

I. Compel Defendants to purge from the MCMIS database all inspection reports dealing with alleged violations of law which a court of competent jurisdiction has dismissed or entered a verdict of not guilty in favor of the driver;

J. Compel Defendants to purge from the MCMIS database all inspection reports other than commercial motor vehicle accident reports dealing with violations of safety regulations where the Secretary has made no determination that the violation constitutes a "serious driver-related violation" as provided for 49 U.S.C. § 31150(a)(3) and (d);

K. Enjoin and restrain Defendants, their agents, employees and all persons acting in concert or participation with them from making available for dissemination records of driver violations or alleged violations without such records including reference to any dispute by a driver of an alleged violation and a brief summary of the driver's reasons for such a dispute;

L. Enjoin and restrain Defendants, their agents, employees and all persons acting in concert or participation with Defendants from disseminating any false, inaccurate, incomplete or misleading inspection reports to third parties.

FURTHER, Plaintiffs request that this Court:

M. Award Plaintiffs Kelley, Lohmeier, Mowrer and Moody damages for violating Plaintiffs' rights under the Privacy Act in an amount not less than \$1,000 for each and every violation of the Privacy Act;

N. Award Plaintiff drivers Kelley, Lohmeier, Mowrer and Moody statutory damages for violating their rights under the FCRA;

- O. Award Plaintiffs their costs of litigation, including reasonable attorneys' fees; and
- P. Order such other relief as the Court may deem just and proper.

**JURY TRIAL DEMANDED**

Respectfully submitted,



DATE: July 13, 2012

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