

May 16, 2011

MEMORANDUM TO: Ronald K. Lorentzen  
Deputy Assistant Secretary  
for Import Administration

FROM: Christian Marsh  
Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for the Final Results of the  
Administrative Review of the Antidumping Duty Order on Honey  
from Argentina

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### Summary

We have analyzed the case briefs<sup>1</sup> of interested parties in the administrative review of the antidumping duty order on honey from Argentina. As a result of our analysis, we have made an adjustment to Patagonik's cost of production (COP), but note that this change has no effect on its final margin. See Memorandum from Gina K. Lee to Neal M. Halper, "Cost of Production and Constructed Value Calculation Adjustments for the Final Results - Patagonik S.A.," dated May 16, 2011. We have made no other changes to the margin calculations as discussed below. We recommend that you approve the Department of Commerce's (the Department's) positions described in the "Discussion of Interested Party Comments" section of this Issues and Decision Memorandum. Below is the complete list of the issues for which we received comment from parties:

1. Treatment of Customer-Requested Testing Expenses
2. Treatment of Blending of Honey Expenses
3. Zeroing Methodology

### Background

On January 14, 2011, the Department published the preliminary results of the 2008-2009 administrative review of honey from Argentina. See Honey from Argentina; Preliminary Results of Antidumping Duty Administrative Review, 76 FR 2655 (January 14, 2011) (Preliminary Results). This review covers three mandatory respondents, Compania Inversora Platense S.A.

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<sup>1</sup> No rebuttal briefs were filed by interested parties.

(CIPSA), Patagonik S.A. (Patagonik), and TransHoney S.A. (TransHoney); all three were exporters of honey from Argentina to the United States during the period of review (POR) of December 1, 2008, to November 30, 2009. In response to the Preliminary Results, CIPSA, Patagonik and TransHoney submitted case briefs on February 14, 2011. No rebuttal briefs were filed by any of the parties involved in this review.

#### Discussion of Interested Party Comments

##### **Comment 1: Treatment of Customer-Requested Testing Expenses**

CIPSA and TransHoney state that the Department improperly recharacterized the selling expense incurred for customer-requested testing as an indirect expense. Both companies argue that direct selling expenses are defined as expenses “that result from, and bear a direct relationship to, the particular sale in question,” and thus, such expenses should be treated as direct selling expenses. See CIPSA and TransHoney’s case briefs at 2, citing 19 CFR 351.410(c) and Statement of Administrative Action, accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103-316 (SAA), at 824-24 (1994), reprinted in 1994 U.S.C.A.N. 4044, 4163-64. Additionally, they claim that the Department’s only support for its decision is consistency with previous administrative reviews.

According to both CIPSA and TransHoney, the customer-required testing is incurred on a shipment-specific basis, and was reported as such by allocating the actual testing charge related to each export invoice that had such testing, over the quantity on the particular invoice. Furthermore, they allege that these expenses are only incurred after a purchase order is received from the customer, as part of preparing the particular shipment for export to a particular customer. Therefore, according to CIPSA and TransHoney, these expenses would not have been incurred at all if the sale was not made. See CIPSA and TransHoney’s case briefs at 3. In support of their request for recognizing quality testing as a direct selling expense, both respondents rely upon four cases: two concerning agricultural products and two concerning non-agricultural products. See CIPSA and TransHoney’s case briefs at 6 through 7 (referencing the Notice of Preliminary Results of Antidumping Duty Administrative Review, Notice of Partial Rescission of Antidumping Duty Administrative Review, Notice of Intent to Revoke in Part: Certain Individually Quick Frozen Red Raspberries from Chile, 72 FR 44112 (August 7, 2007) (Chilean Raspberries); Honey from the People’s Republic of China: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 70 FR 74764 (December 16, 2005) (Honey from the PRC); Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Germany: Preliminary Results of Antidumping Duty Administrative Review, 66 FR 51375, 51377 (October 9, 2001) (Germany Printing Presses); and Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors from the Republic of Korea, 63 FR 8934, 8935 (February 23, 1998) (Korean Semiconductors)).

Finally, CIPSA and TransHoney note at page 5 of their case briefs, that by wrongly recharacterizing quality testing expenses as indirect, the Department upsets the “equivalent

basis” that courts have recognized as required by the statute and regulations for a fair “apple-to-apple” comparison of sales in the foreign home market and the U.S. market, where a “circumstances-of-sale” adjustment to normal value would be necessary to account for differences such as direct selling expenses incurred in both markets. Consequently, they suggest that by disregarding the increase in the comparison market price attributed to the shipment-specific, sale-specific export testing, the Department risks distorting the analysis and further creating unwarranted dumping margins.<sup>2</sup>

### **Department’s Position:**

The Department continues to find that expenses related to customer-requested testing of honey should be considered as indirect, rather than direct selling expenses. 19 CFR 351.410(c) states that direct selling expenses are those that result from, and bear a direct relationship to, the particular sale in question. Accordingly, we analyzed the chronology of the testing and ultimate sale by each of the respondents in this review<sup>3</sup> and although we recognize that such quality testing expenses have been reported on a sale-specific basis, the record indicates that testing expenses do not necessarily result from, nor relate directly to, individual sales. The record demonstrates that while the specific testing expenses can be tied to the lots of honey included in each sale, merchandise originally intended for a particular market/customer is not always attributable to that market/customer (*i.e.*, when the honey does not meet the quality standards required), and may be diverted to another customer/market (*i.e.*, that does not have those quality requirements). Furthermore, the evidence on the record of this review regarding customer-requested testing does not demonstrate that these expenses result from and bear a direct relationship to the sales in question within the meaning of 19 CFR 351.410(c). Moreover, neither respondent has provided enough record evidence in the instant review to support a change in the Department’s treatment of these expenses from previous reviews.

Moreover, CIPSA and Patagonik assert that absent a positive result of such a quality test the sale of subject merchandise would have not been made to that particular export customer; rather, it would have been sold to another market. Specifically, CIPSA clarifies at page 4 of its second supplemental questionnaire response, dated September 17, 2010, that “even though no export testing resulted in diverted sales, honey that failed to meet the standards imposed in customer requested testing would be sold in the domestic market, and the export customer would be provided with replacement drums.” Patagonik states in its section A supplemental questionnaire response, at A-2, dated May 18, 2010, that honey destined to export markets is tested for a number of specific contaminants (*i.e.*, for antibiotics or other substances that would be prohibited in export markets). On the other hand, according to Patagonik, drums sold to domestic markets are only tested for general contamination (*i.e.*, absence of toxic content), and no other specific testing is carried out prior to sale. Additionally, Patagonik states that “certain drums were initially identified for domestic, rather than export, sale at the time of intake from the supplier

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<sup>2</sup> Although Patagonik did not extensively address the categorization of customer-requested export testing expense as indirect, it argued that such characterization is incorrect as a matter of principle, and joined the arguments of CIPSA and TransHoney in their briefs. See Honey from Argentina: Case Brief of Patagonik S.A., dated February 14, 2011.

because of the unusually dark color of the honey but in some cases the decision could be based on the high HMF content of the honey (usually associated honey {with} from old crops). Because the honey was of a color which made it unsuitable for any of Patagonik's export customers, these drums were segregated from Patagonik's normal inventory and were not subjected to any additional testing, either at the time of intake or at the time of sale." See Patagonik's A, B & C supplemental questionnaire response, dated July 19, 2010, at 3.

In the case of TransHoney, there is no evidence on the record of this review with respect to the treatment of honey that fails such customer-required testing. TransHoney neither raised this issue, singled out this expense in order for the Department to address it at an earlier stage of the analysis nor voluntarily provided information that would support such a reclassification. In fact, when the Department requested that TransHoney describe in detail the company's channels of distribution, sales processes and selling expenses, TransHoney explained only that upon receipt at the warehouse, the honey is weighed and inspected, and that such intake testing and classification is performed by a third party. See TransHoney's section A response of the Department's questionnaire, at A-11 through A-12. In its first supplemental section A questionnaire response, dated June 9, 2010, at SA-9, TransHoney briefly states that "color testing as well as other official testing is performed after blending, as required by Argentine law and sometimes by customer request." Furthermore, there are some instances throughout TransHoney's responses in which the definition and description of processes appears to be inconsistent, more specifically with regard to testing the honey. TransHoney states in the Department's section A questionnaire response, at page A-11, that "the intake testing involves basic analysis to confirm purity (i.e., the absence of adulteration) and (b) color." Subsequently, in its first supplemental section A response, TransHoney affirms that "intake testing is performed at the time the drums are first brought to the warehouse (prior to blending). Color testing as well as other official testing is performed after blending, as required by Argentine law and sometimes by customer request."

Therefore, in light of CIPSA, TransHoney, and Patagonik's submitted information on the record –which did not demonstrate that customer-requested testing only resulted from, and bore a direct relationship to, a particular sale – we determine, pursuant to section 773(a)(6)(C)(iii) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.410(c), that the information on the record is not sufficient and cannot serve as a reliable basis for a reclassification of such expense. Accordingly, we have not deviated from the Department's standard practice of classifying the customer-requested testing expense as an indirect expense.

CIPSA and TransHoney cite Chilean Raspberries, Honey from the PRC, German Printing Presses, and Korean Semiconductors to suggest that our categorization of customer-requested testing of honey as an indirect selling expense, rather than treating it as a direct selling expense, is inconsistent with other proceedings' practice of classifying this expense. Although the first two cases involve agricultural products, the Department finds that they do not apply to the instant case because the cited cases are in no other way similar to the facts present in this case. Specifically, the cited cases do not specifically discuss whether the testing expense was (a) attributable to a government requirement or a customer preference (see Chilean Raspberries, 72

FR at 4112, 44117-18) and (b) comparable to the expenses related to customer-requested testing of honey that were examined in this review (see Honey from the PRC, 70 FR at 74764, 74771-72). Thus, in citing to these cases, CIPSA and TransHoney have not provided sufficient support for their argument that their testing expenses should be classified as direct selling expenses. In addition, the German Printing Presses and Korean Semiconductors cases do not explicitly address whether such customer-required testing should be categorized as direct selling expenses.

Lastly, in regard to respondents' request that a circumstance-of-sale adjustment to normal value would be necessary to account for differences such as direct selling expenses incurred in both markets, we note that in establishing the grounds for use of circumstances of sale adjustments, the Department has to determine whether applying this adjustment is appropriate under section 773(a)(6)(C)(iii) of the Act and 19 CFR 351.410. Furthermore, we note that in the calculation of normal value, it is the Department's practice to treat specific selling expenses as indirect expenses unless an interested party establishes that the expense is direct in nature and can demonstrate that those expenses were directly related to sales of the subject merchandise and were variable in nature. We find no such evidence on the record of this proceeding and thus have not made any changes to the normal value calculations applicable to this expense.

#### **Comment 2: Treatment of Blending of Honey Expenses**

CIPSA, as well as Patagonik, affirm that the expense of sale-specific blending performed at the customer's request, after the sale is confirmed and just before exportation is an expense that results from, and bears a direct relationship to, the particular sale in question. Thus, they argue this expense should properly be treated as a direct selling expense. See CIPSA's case brief at 9 and Patagonik's case brief at 2 and 3. Furthermore, both respondents contest the Department's exclusion of this expense from the calculation of normal value by stating they are a "selling company and exporter...not a manufacturer;" therefore, all of their expenses are selling expenses. They also argue that the latter fact is confirmed by considering that blending occurs after the sale is made; more specifically when the drums have been identified to a particular customer, have left the warehouse and are on their way to the port for export. See CIPSA's case brief at 10 and 11, and Patagonik's case brief at 7, respectively.

CIPSA explains that it purchases a finished product and usually sells the drums as received, which are already packed. Patagonik states that it purchases a finished product already packed and ready for export from its suppliers (the beekeepers). However, both declare that sometimes a customer will also request the blending of the drums. Accordingly, CIPSA and Patagonik blend the honey which involves "pouring the honey out of the drums into a vat, and then putting it back into the same drums." *Id.* at 10 and 7, respectively. Thus, they insist there can be no question that blending is a direct selling expense and must be treated as a circumstance-of-sale adjustment to normal value.

CIPSA challenges the Department's decision to not include the cost of transport as a deductible expense even though CIPSA acknowledged that blending is performed by the same service provider that delivers the drums to the port and, as requested by the Department, split the portion

of the fee paid for inland freight to port.

Patagonik states that originally it reported its blending expenses as a production cost (asserting it should be treated as a direct selling expense) but reluctantly removed it and reported this expense as part of the beekeeper cost of production, as requested by the Department in this instant review. See Patagonik's case brief at 2. Furthermore, Patagonik claims that the Department's only explanation for such a decision is its intent to be consistent with Patagonik's previous new shipper review and the 2006-2007 administrative review. See Patagonik's case brief at 3.

Additionally, CIPSA and Patagonik provide the analogy that the cost of blending is similar to a repacking expense (i.e., a direct selling expense) in which the differential between the higher cost incurred for blended containers and unblended containers would be preserved, and would not be disregarded. They cite Antifriction Bearings (Other Than Tapered Order Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, 63 FR 33320 (June 18, 1998) in which the Department recognized repacking as a direct selling expense that respondents incurred on behalf of certain sales and were deducted pursuant to section 772(d)(1)(B) of the Act.

In addition, both respondents contend that in completely ignoring the cost of blending the honey (borne by the exporter and passed on to the customer) just by declaring that there are no costs of production in this instant review, the Department would consent to an apparent but entirely false dumping margin. See CIPSA's case brief at 13 and Patagonik's case brief at 9.

Finally, both CIPSA and Patagonik suggest that if the Department does not recognize blending as a selling expense, because it has been identified as a manufacturing cost, it should then modify its product characteristics and add blending as a new matching characteristic, allowing for a difference in merchandise adjustment where a non-blended U.S. container is matched to a blended comparison market container. They further argue that blending is a real commercial product characteristic with clear physical differences, a verifiable cost, and price differential. Id. at 14, 9 and 10, respectively.

### **Department's Position:**

We continue to find that expenses related to blending the honey should be considered as a cost of manufacturing. Although the timing of the process of blending is not dispositive of its proper characterization, i.e., whether blending should be treated as a COP or as a selling expense, we first address the parties' arguments with respect to timing. In reviewing Patagonik's chronology of the distribution process, blending, and ultimate sale of the honey, we found instances in which the process of blending the honey was performed in advance of the sale, which directly contradicts Patagonik's claims that such expenses are selling expenses. As noted in Patagonik's Section B&C questionnaire response, at page B-18 dated May 7, 2010, "most drums are ... blended in anticipation of expected European orders. At the time of sale Patagonik has AZUL select the necessary drums and prepare them for export. If sufficient blended drums are not

available to fill a U.K. order, AZUL will blend the required amount in its homogenization facilities.” Furthermore, Patagonik states that “blending is normally made after order from the importer but may sometimes be done prior to the customer order for Patagonik’s convenience in order to reduce the time lag between order and shipment. Thus, blending usually takes place after Testing and Maintenance in Warehouse, but may be just before, or just after, the order.” See Patagonik’s Section B&C first supplemental questionnaire response, dated June 14, 2010, at BC-11 to BC-12.

Although CIPSA asserts that blending has been performed on a shipment and sale specific basis, there is no evidence on the record to support CIPSA’s claim that its blending expenses should be treated as selling expenses. CIPSA also seems to propose that depending on the Department’s analysis (i.e., whether there is a COP analysis or not), the expense related to blending the honey would be treated differently. It specifically states that “the Department has considered homogenization as a cost of production where it has done a full cost of production exercise. In a case such as the present where costs of production are not being collected, analyzed, or considered, CIPSA’s blending process is appropriately treated as a direct selling expense, like testing, warehousing, transport, or any other circumstance of sale expense that is directly related to the sale. In order to recognize the different and significant expense related directly to homogenized drums (which is (sic) turn reflected in an increased price to the customer), homogenization must be recognized as a direct selling expense. Otherwise it will simply vanish from the antidumping calculation.” See CIPSA’s first supplemental questionnaire, dated August 2, 2010, at 31 and 32.

Irrespective of the arguments discussed above, however, and consistent with our determinations in previous reviews, we find that the homogenization process is appropriately considered further processing that is part of the production continuum because it alters the purity, consistency, and appearance of the honey. Homogenization is a process in which the honey is blended to disperse any contaminants that are present in order to ensure the production of a product which results in acceptable levels of quality. Homogenized honey is the result of a manufacturing process beyond the production of honey in its non-homogenized state.

The Department notes that typically such blending activities are carried out by the middlemen rather than the exporter itself. See Patagonik’s section B response, at B-18 and C-20, section B&C first supplemental response at BC-11 through 12, TransHoney’s section B response at B-20 and C-22, and CIPSA’s first supplemental questionnaire response at 7 through 8. It is the Department’s practice to classify middlemen activities as part of the COP because these costs cannot be attributable as selling expenses for one company and as part of the cost of production for another company, depending on whether there is a sales-below-cost allegation. See Honey from Argentina: Final Results of New Shipper Review, 72 FR 19177 (April 17, 2007) (Honey New Shipper Review), and accompanying Memorandum from Angela Strom to Neal Halper, “Cost of Production Adjustments for the Preliminary Results-Patagonik Beekeeper Respondents,” dated November 16, 2006, at 3.

In past segments of this proceeding, we found it appropriate to include in the COP costs incurred to blend honey. See Honey from Argentina: Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke in Part, 73 FR 24220 (May 2, 2008), and accompanying Issues and Decision Memorandum at Comments 1 and 4, Honey from Argentina: Final Results of Antidumping Duty Administrative Review and Determination to Revoke Order in Part, 74 FR 32107 (July 7, 2009), and accompanying Issues and Decision Memorandum at Comment 5. For all of the above stated reasons, we are continuing to classify homogenization expenses as a manufacturing cost for these final results.

With regard to CIPSA and Patagonik's suggestion that the Department should modify its matching characteristics, in general the Department refrains from revising the model-match criteria unless there is considerable and compelling evidence that the current model-match criteria are not reflective of the merchandise in question, there have been industry changes to the product that merit a modification, or there is some other compelling reason present which requires a change. See Notice of Final Results of the Twelfth Administrative Review of the Antidumping Duty Order on Certain Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea, 72 FR 13086 (March 20, 2007), and accompanying Issues and Decision Memorandum at Comment 1. In reviewing all three respondents' submitted information, we find respondents failed to provide information concerning blending in the form and manner mentioned above. Accordingly, we are not able to consider a revision of the model-match criteria at this late stage of the review.

In sum, the Department has continued to classify blending expenses as a part of Patagonik's COP. As there were no COP analyses for CIPSA and TransHoney, we have continued to disregard these expenses from our dumping analyses of these companies.

### **Comment 3: Zeroing Methodology**

Patagonik argues that the Department's zeroing policy created a small positive margin (de minimis) in the Preliminary Results since the Department sets negative margins to zero prior to performing the weighted-average margin calculation. Patagonik further argues that without zeroing, its dumping margin would have been negative. See Patagonik's case brief at 11 and 12.

According to Patagonik, the Department's zeroing methodology is "patently unfair, forbidden by WTO Appellate Body rulings, is not required by U.S. statute, and ... has finally been officially abandoned by the Department." Id. at 11. Thus, according to Patagonik, the Department should bring its practice in line with the United States obligations under international law, and calculate the final results without zeroing out negative margins. Id. at 12.

## Department's Position:

We have not changed our calculation of the weighted-average dumping margin as suggested by the respondent for these final results of review.

Section 771(35)(A) of the Act defines “dumping margin” as the “amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.” Outside the context of antidumping investigations involving average-to average comparisons, the Department interprets this statutory definition to mean that a dumping margin exists only when NV is greater than export price (EP) or constructed export price (CEP). As no dumping margins exist with respect to sales where NV is equal to or less than EP or CEP, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The Court of Appeals for the Federal Circuit (CAFC) has held that this is a reasonable interpretation of the statute. *See, e.g., Timken Co. v. United States*, 354 F.3d 1334, 1342 (Fed. Cir. 2004) (Timken).

Section 771(35)(B) of the Act defines “weighted-average dumping margin” as “the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer.” The Department applies these sections by aggregating all individual dumping margins, each of which is determined by the amount by which NV exceeds EP or CEP, and dividing this amount by the value of all sales. The use of the term “aggregate dumping margins” in section 771(35)(B) of the Act is consistent with the Department's interpretation of the singular “dumping margin” in section 771(35)(A) of the Act as applied on a comparison-specific level and not on an aggregate basis. At no stage of the process is the amount by which EP or CEP exceeds the NV permitted to offset or cancel out the dumping margins found on other sales.

This does not mean that non-dumped sales are disregarded in calculating the weighted-average dumping margin. It is important to note that the weighted-average margin will reflect any non-dumped merchandise examined during the period of review: the value of such sales is included in the denominator of the weighted-average dumping margin, while no dumping amount for non-dumped merchandise is included in the numerator. Thus, a greater amount of non-dumped merchandise results in a lower weighted-average margin.

The CAFC explained in Timken that denial of offsets is a “reasonable statutory interpretation given that it legitimately combats the problem of masked dumping, wherein certain profitable sales serve to mask sales at less than fair value.” Timken, 354 F.3d at 1343. As reflected in that opinion, the issue of so-called masked dumping was part of the policy reason for interpreting the statute in the manner interpreted by the Department. No U.S. court has required the Department to demonstrate “masked dumping” before it is entitled to invoke this interpretation of the statute and deny offsets to dumped sales. *See, e.g., Timken*, 354 F.3d at 1343; *see also NSK Ltd. v. United States*, 510 F.3d 1375 (Fed. Cir. 2007).

We note that the use of zeroing in administrative reviews is currently subject to comment from outside parties, and any proposed revision has not been finalized and, more importantly, has not yet been implemented. As Patagonik is aware, World Trade Organization (WTO) panel reports are not self-executing, and the Department's recent invitation to comment on revisions in its zeroing methodology is not a final implementation of its plans. See Antidumping Proceedings: Calculation of the Weighted Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings, 75 FR 81533 (December 28, 2010) (Calculation of AD Margin); see also Notice of Final Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Canada, 69 FR 68309 (November 24, 2004), and accompanying Issues and Decision Memorandum at Comment 8 ("Congress made clear that reports issued by WTO panels or the Appellate Body 'will not have any power to change U.S. law or order such a change.'" (citing the SAA, accompanying the Uruguay Round Agreements Act, H.R. 5110, H.R. Doc. No. 316, Vol. 1, 103rd Cong. 2d Session, at 660)). Furthermore, the Department's recent invitation to comment on its proposed zeroing methodology is an invitation to comment, and absent a final rule, the results of any such revisions are purely speculative in nature. In any case, the proposed rule suggests that any final rule would be prospective in nature and apply only for reviews in which preliminary results are due more than 60 days after publication of the final rule margins. See Calculation of AD Margin, 75 FR at 81535. Therefore, it would be presumptuous of the Department to prejudge the implementation of any final rule with respect to zeroing when the process has not yet been completed.

**Recommendation**

Based on our analysis of the comments received, we recommend adopting the positions set forth above. If these recommendations are accepted, we will publish the final results, including the final dumping margins for all companies subject to this review in the Federal Register.

Agree\_\_\_\_\_

Disagree\_\_\_\_\_

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Ronald K. Lorentzen  
Deputy Assistant Secretary  
for Import Administration

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Date