IN THE SUPREME COURT OF THE STATE OF NEVADA

AARON L. KATZ,
Appellant,
vs.
INCLINE VILLAGE GENERAL IMPROVEMENT DISTRICT, A GENERAL IMPROVEMENT DISTRICT,
Respondent.

No. 71493

FILED

JAN 23 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.

Pickering, C.J.
Pickering

Parraguirre, J.
Parraguirre

Cadish, J.
Cadish

cc: Hon. Egan Walker, District Judge
Richard F. Cornell
Erickson Thorpe & Swainston, Ltd.
Washoe District Court Clerk

20-03158

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Electronically Filed
Feb 03 2020 03:24 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

No. 71493

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PETITION FOR EN BANC RECONSIDERATION

COMES NOW, Appellant, AARON L. KATZ, pursuant to NRAP 40A(a), who petitions this Court en banc for reconsideration of the Order of Affirmance filed November 21, 2019 ("OOA"), followed by the Order Denying Rehearing of January 23, 2020.[1]

Appellant contends that the holdings in the OOA on the below issues are contrary to prior published opinions of the United States Supreme Court and the US Court of Appeals for the Ninth Circuit. Further, the Panel's handling of the issue on

[1] The Petition for Rehearing, filed December 30, 2019, raised issues that Petitioner believed the Court overlooked or misapprehended. Thus, it did not raise the main issues regarding the First Amendment and Anti-S.L.A.P.P. presented here. Appellant concedes that, unlike a number of his other issues, the Panel did not overlook the issues of whether First Amendment principles and Nevada's Anti-S.L.A.P.P. statutes apply. Accordingly, those issues were not appropriate for a Rule 40 Petition. But they are appropriate for a Rule 40A Petition because they involve substantial precedential, constitutional and public policy issues.

Docket 71493 Document 2020-04667

whether Nevada's Anti-S.L.A.P.P. statutes apply here not only is contrary to the plain language of the statutes in question, but impacts anybody who wishes to petition a government in Nevada for redress of grievances with a complaint that is not a sham. The decision also deters citizens from making public records requests, in that it not only encourages governmental agencies to stonewall until the time of trial, but rewards them with an award of attorney's fees for doing so.

DATED this 3rd day of February, 2020.

Respectfully submitted,

RICHARD F. CORNELL, P.C.
150 Ridge Street, Second Floor
Reno, Nevada 89501

By: */s/RichardCornell*
Richard F. Cornell

1. NRS 18.010(2)(b) cannot apply to a lawsuit serving the public interest, pursuant to the First Amendment of the United States Constitution [where none of the Appellant's claims is baseless]. (AOB at 28-38; RAB at 39-45; ARB at 2-10; OOA at 2-3)

The issue is straightforward: Do the First Amendment principles of Noerr-Pennington[2] apply to a citizen who sues a governmental entity on various theories of declaratory and injunctive relief to address grievances of public concern,

[2] United Mine Workers of America v. Pennington, 381 U.S. 657, 664-65 (1965); E.R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 144 (1961)

loses, then is hit with a motion for attorney's fees per NRS 18.010(2)(b)?

The Panel answered this question in the negative based upon two cases: Vargas v. City of Salinas (2011) 200 Cal.App. 4th 1331, 134 Cal.Rptr. 3d 244 and Premier Electric Construction Co. v. National Electric Contractors Association, Inc., 814 F.2d 358, 373 (7th Cir. 1987), holding that attorney fees shifting statutes do not unconstitutionally burden the constitutional right to petition[3].

But those cases have been severely called into doubt by more modern Supreme Court and certainly Ninth Circuit principles. Noerr-Pennington applies, and thus immunizes Appellant from an award of attorney's fees, unless it is proven the citizen's declaratory and injunctive relief lawsuit was a "sham." In this case it was indisputably not a "sham," as defined by the United States Supreme Court. Therefore, Mr. Katz was absolutely immune from an award of any amount of attorney's fees.

We begin with a pithy, accurate summary of the governing law from White v.

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[3] The holding assumes NRS 18.010(2)(b) is a "fee shifting statute," like NRS 18.010(1), 18.010(2)(a), and 17.117(10)(c). Appellant does not agree. It is a codification of a malicious prosecution or abuse of process tort, relative to attorney fees incurred in defending a lawsuit, available to the very few victorious defendants who are "maliciously prosecuted" or suffer "an abuse of legal process" as more particularly defined. Applied to our scenario, it is a sanction for petitioning for redress of grievances in a manner that the government and the courts do not like. The "warning" that a true fee shifting statute would give surely cannot "warn" the prospective public interest litigant that, in Nevada, the First Amendment is dead!

Lee, 227 F.3d 1214, 1231-32 (9th Cir. 2000):

> "The Supreme Court has described the right to petition as 'among the most precious of the liberties safeguarded by the Bill of Rights' and 'intimately connected, both in origin and in purpose, with the other First Amendment rights to free speech and free press.' [cite omitted] It is 'cut from the same cloth as the other guarantees of [the First] Amendment, and is an assurance of a particular freedom of expression.' [cite omitted]
>
> The Court has further established that the right to petition extends to all departments of the government, including...**the courts.**" [cite omitted] While the Noerr-Pennington doctrine originally arose in the anti-trust context, it is based on and implements the First Amendment right to petition and therefore, with one exception we discuss infra (See: Section I.B.3.b.), **applies equally in all contexts** [cite omitted].
>
> The Noerr-Pennington doctrine ensures that those who petition the government for redress of grievances remain immune from liability for statutory violations, **notwithstanding the fact that their activity might otherwise be proscribed by the statute involved.** [cite omitted] Noerr-Pennington is a label for a form of First Amendment protections; **to say that one does not enjoy Noerr-Pennington immunity is to conclude that one's petitioning activity is unprotected by the First Amendment.** With respect to petitions brought in the courts, the Supreme Court has held that a lawsuit is unprotected only if it is a "sham" – i.e., 'objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits,' [cites omitted].
>
> In Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 56, 113 S.Ct. 1920 (1993), the Supreme Court rejected the contention that regardless of a lawsuit's objective merit an antitrust defendant can be found liable if the plaintiff showed that it brought the suit for a 'predatory motive.' See: 508 U.S. at 55-56. **Both requirements must be met to establish antitrust liability: 'an objectively reasonable effort to**

> **litigate cannot be sham regardless of subject intent.'** Id. at 57. Furthermore, proof of a lawsuit's objective baselessness is the 'threshold prerequisite': a court may not even consider the defendant's allegedly illegal objective unless it first determines that his lawsuit was objectively baseless. Id. at 55, 60-61, 113 S.Ct. 1920," (emphasis added).

Emphasizing the underscored points of White v. Lee, the Ninth Circuit restated another applicable principle: immunity from liability under Noerr-Pennington **extends to conduct incidental to a lawsuit or ancillary to litigation**. Theme Productions, Inc. v. News Am Marketing, 546 F.3d 991, 1006-07 (9th Cir. 2008). And at 546 F.3d at 1007, the Ninth Circuit declares: There is simply no reason that a common law tort doctrine can any more permissibly abridge or chill the constitutional right of petition than can a statutory claim such as antitrust. Noerr-Pennington **applies to state law claims such as tortious interference with prospective economic advantage.**

In fact, Noerr-Pennington immunity applies to **common law torts such as malicious prosecution and abuse of process**. Main Street at Woolich, LLC v. Ammons Supermarket, Inc., 165 A.3d 821 (N.J. Super 2017), citing Nader v. Democratic National Committee, 555 F. Supp. 2d 137, 157 (D.D.C. 2008) and Whelan v. Abell, 48 F.3d 1247, 1254 (D.C. Cir. 1995).

The Ninth Circuit in Theme Productions cited Sousa v. DirectTV, Inc., 437 F.3d 923, 936-38 (9th Cir. 2006), which extended immunity to private presuit

demand letters, and noted that BE&K Construction Co. v. NLRB, 536 U.S. 516, 524-26, 122 S.Ct. 2390, 2395-96, 153 L.Ed. 2d 499 (2002) is consistent with that view.

None of this can be harmonized with Vargas. There, the California Court of Appeals refused to apply Noerr-Pennington to the fee-shifting provision of Anti-S.L.A.P.P. because the Court considered itself bound by Equilon Enterprises, LLC v. Consumer Cause, Inc. (2002) 29 Cal. 4th 53, 62, which distinguished Professional Real Estate Investors and held that holding applied only to antitrust litigation.

In fact, Vargas cannot be reconciled with either People ex rel Harris v. Aguayo (2017) 11 Cal.App. 5th 1150, 1160-61, 218 Cal.Rptr. 3d 221, 231-32 or Tichinin v. City of Morgan Hill (2009) 177 Cal.App. 4th 1049, 1065, 99 Cal.Rptr. 3d 661, 674. Noerr-Pennington immunizes legitimate efforts to influence a branch of government from virtually all forms of civil liability. Noerr-Pennington is a broad rule of statutory construction under which laws are construed so as to avoid burdening the constitutional right to petition.

Based upon everything the Ninth Circuit has since said, the Equilon holding is incorrect. The Ninth Circuit is correct. Vargas (and Equilon Enterprises) should be disapproved as a constitutionally improper reading of the First Amendment. Accord:

Mercatus Group, LLC v. Lake Forest Hospital, 641 F.3d 834 (7th Cir. 2011) [Noerr-Pennington doctrine extended to misrepresentations to the public if negligently made or if immaterial to the issues in the proceeding].

Premier Electric is even easier to distinguish. Its holding is that the First Amendment does not afford immunity for an award of damages based on cost of litigation aimed at preventing an extrinsic violation of antitrust law. As noted in Premier, so long as the violation of the Sherman Act may be established without regard to the point of view embodied in the "petitioning" activity, the Constitution does not prevent the assignment as damages of the full injury inflicted.

Since neither Mr. Katz nor IVGID sued each other for money damages, Premier Electric simply has no applicability. If the Noerr-Pennington doctrine applies to common law tort causes of action occurring in the process of exercising First Amendment rights[4], and if Noerr-Pennington immunity extends to conduct incidental to a lawsuit or ancillary to litigation, per Theme Promotions it certainly applies to a motion for attorney's fees brought under NRS 18.010(2)(b).

As argued in the AOB at 46-50, the gravamen of IVGID's NRS 18.010(2)(b) motion is the tort of malicious prosecution – an action which a governmental agency is barred from bringing against a private citizen. As noted therein, the elements of an

[4] Jourdan River Estates, LLC v. Favre, 278 So.3d 1135, 1152 (Miss. 2019), and cases cited therein.

NRS 18.010(2)(b) motion are the same as for malicious prosecution or abuse of process. If Noerr-Pennington immunizes a citizen who petitions government for redress of grievances for common law tort actions, then it should immunize Mr. Katz from the consequences of an NRS 18.010(2)(b) motion – unless IVGID can establish that his lawsuit was a "sham." However, IVGID did not nor cannot so establish. As noted at AOB at 31-37, every one of Mr. Katz's asserted claims for relief was grounded upon some statutory or case law authority. And as established at AOB 52-53, 16-17, and 19-22, neither IVGID nor the court below ever argued, much less established, that any of Mr. Katz's claims was frivolous – i.e., baseless. That being so, under Noerr-Pennington his motive was and is irrelevant.

Simply put, if NRS 18.010(2)(b) permits awards of attorney's fees based only upon "motive," Noerr-Pennington does not. Per Article VI, Clause II of the United States Constitution, Noerr-Pennington trumps NRS 18.010(2)(b) in this regard.[5]

2. Nevada's Anti-S.L.A.P.P. statutes should apply to this situation. IVGID cannot circumvent their reach by filing a motion for attorney's fees instead of a separate lawsuit or counterclaim for abuse of process, and thus deprive Appellant of his NRS 41.650-41.670 rights. (AOB at 38-45; RAB at 45-52; ARB at 10-16; OOA at 3-4)

Relative to Anti-S.L.A.P.P., this case raises two issues of first impression: 1)

[5] To be clear, Mr. Katz has never contended that NRS 18.010(2)(b) is unconstitutional. Rather, he has contended that the statute simply does not apply in the context of a declaratory and injunctive relief lawsuit against a governmental agency that is not a sham lawsuit.

Does a post-judgment motion for attorney's fees [by a government, following a public interest lawsuit for declaratory and injunctive relief and a judgment for the government] constitute a "complaint" within the meaning of NRS 41.660(7)(a)? 2) Must a defendant file a special motion to dismiss in order to secure Anti-S.L.A.P.P. protections?

The Panel answered these questions "no" and "yes." Appellant submits, however, that a reading of the governing statutes in light of the public policy surrounding Anti-S.L.A.P.P. mandates the answers be the opposite.

Let us review the pertinent statutes:

> NRS 41.650: A person who engages **in a good faith communication** in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern is immune from **any** civil action for claims based upon the communication.
> ...
>
> NRS 41.660(1)(a): "If an action is brought upon a person based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern:
>
> a) the person against whom the action is brought **may** file a special motion to dismiss...
> ...
>
> NRS 41.660(7)(a): "As used in this section: 'Complaint' means any action brought against a person based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern,

including, without limitation, a counterclaim or cross-claim.

...

NRS 41.665: "The Legislature finds and declares that:

1) NRS 41.660 provides certain protections to a person against whom an action is brought, if the action is based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern.

2) When a plaintiff must demonstrate a probability of success of prevailing on a claim pursuant to NRS 41.660, the Legislature intends that in determining whether the plaintiff 'has demonstrated with prima facie evidence a probability of prevailing on the claim' the plaintiff must meet the same burden of proof that a plaintiff has been required to meet pursuant to California's Anti-Strategic Lawsuits Against Public Participation law as of June 8, 2015."

As to the first question, the broad language in NRS 41.650 and 41.660(7) must lead to a judicial conclusion that a complaint, in the form of the initial pleading which is issued with a summons and upon which process is served, is not necessary to trigger Anti-S.L.A.P.P. Basically, any proceeding that – as here – can result an executable money judgment would be sufficient to trigger Anti-S.L.A.P.P. protections. Indeed, that is the import of Hawxurst v. Austin's Boat Tours, 550 S.W.3d 220, 226 (Tex. Civ. App. 2008). If the statute is to be interpreted so as to provide protections to a person against whom an "action is brought based upon a good faith communication in furtherance of the right to petition," then NRS 41.660(7) should be interpreted to mean within its scope is a post-judgment motion

that leads to an executable money judgment.

Next, does NRS 41.660 really mean that if an action is brought upon a person based upon a good faith communication in furtherance of his right to petition, and he does not specifically label his pleading as a "special motion to dismiss" and/or does not file his pleading within 60 days of service of process, he has forever waived his right to complain about retaliation against the exercise of his right to petition?

To so hold is to champion form over substance. But equity regards substance and not form in the interest of real justice, unhampered by too great adherence to technicality. Reno Club v. Young Investment Company, 64 Nev. 312, 336, 182 P.2d 1011, 1022 (1947).

To so construe the governing statutes as creating a waiver of First Amendment protection is to effectuate an unconstitutional result. When a statute is susceptible to both a constitutional and an unconstitutional interpretation, this Court is obliged to construe the statute so that it does not violate the Constitution. Whitehead v. Nevada Commission on Judicial Discipline, 110 Nev. 874, 883, 878 P.2d 913, 919 (1994) and cases cited therein.

And NRS 41.660(1) certainly is susceptible to a constitutional interpretation. The operative word in NRS 41.660(1)(a) is may. The person against whom the action is brought **may** file a special motion to dismiss. The statute does not say:

"**must** file a special motion to dismiss." So, for example, if an action is brought against a person based upon his good faith communication in furtherance of his right to petition, but it is not obvious that is the case until time of trial, an interpretation that the person lost his Anti-S.L.A.P.P. rights simply because he filed his motion after trial effectuates a result that violates the First Amendment right to petition. Rather, the statute simply means that if a defendant is going to make a pre-trial Anti-S.L.A.P.P. attack, he must do so within 60 days after service of the complaint.

The use of the word "may" in a statute is generally permissive, while the use of the word "not" disallows discretion. State v. Second Judicial District Court, 134 Nev. 783, 789 n. 7, 432 P.3d 154, 160 n. 7 (2018), and cases cited therein.

And to champion form over substance in this instance runs contrary to NRS 41.665(1). After all, when a motion which would lead to a money judgment is labeled "motion," wouldn't the logical pleading in response thereto be labeled "opposition"[6]? And this Court, to effectuate justice, will do such things as re-label an appeal in reality an extraordinary petition where appropriate. See: Clark County Liquor and Gaming Licensing Board v. Clark, 102 Nev. 654, 657-58, 730 P.2d 443, 446 (1986), and cases cited therein. Why then can't an opposition to a motion for attorney's fees therefore be considered "re-labeled" as a "special motion to

[6] See: District Court Rule 13(3); WDCR 12(2).

dismiss"?

Certainly, if we are not to champion "form over substance," then that should be the equitably and constitutionally correct result.

Next, the Panel summarily held that Appellant's actions for declaratory and injunctive relief was not "in good faith." But that result cannot legally be correct. Clearly, Anti-S.L.A.P.P. immunity encompasses First Amendment immunity, although it is not confined thereto. See: Delucchi v. Songer, 133 Nev. Ad. Op. 42, 396 P.3d 826, 830 (2017). Thus, Noerr-Penington applies in this context. And per Noerr-Penington and per the cites to the record at page 8, below, a lack of good faith in this context cannot lawfully be proven by "harassment." To the extent that the Panel held or even implied otherwise, that disposition must be revisited en banc.

Finally, the Panel refused to apply NRS 41.650's plain language because of its view Nevada's anti-SLAPP statutes provide nothing more than a "procedural mechanism for parties to seek dismissal of meritless lawsuits that chill free speech." (OOA:3). In support the Panel points to Coker v. Sassone, 135 Nev. Adv. Op. 2, 432 P.3d 746, 748 (2019). Coker did not involve a suit between a citizen and his government, but simply involved the appeal of the denial of a NRS 41.660 special motion to dismiss. So to the extent the OOA suggests the purpose of NRS 41.650 "immunity" is the same as a NRS 41.660 special motion to dismiss (i.e., as a

"procedural mechanism...to seek dismissal of meritless lawsuits that chill free speech"), it is surplusage and should be disregarded. NRS 41.650 immunity has nothing directly to do with the filing a special motion to dismiss a meritless lawsuit. For even if a special motion to dismiss is denied, that does not negate NRS 41.650's grant of absolute immunity (ARB:14-16).

Moreover, the OOA disregards longstanding rules for interpreting statutes. Given "the plain language of" NRS 41.650, it means what it says." Stubbs v. Strickland, 129 Nev. 146, 297 P.3d 326, 329 (2013). Given conduct privileged under Anti-S.L.A.P.P. is defined by statute [Shapiro v. Welt, 133 Nev. Ad. Op. 6, 389 P.3d. 262, 267 (2017)], it must be given its statutory definition. Delucchi v. Songer, Id.

3. Respondent's NRS 18.010(2)(b) motion, insofar as Appellant's NPRA cause of action is concerned, conflicts with the policy behind NRS 239.011(2). For this reason the subject fee award should have been vacated. (AOB:65-66, 66-68; RAB:60-62; ARB:27-29, 29-32; OOA:5)

Unlike the first two issues, this one was not addressed in the OOA, but was at pp. 5-7 of the Petition for Rehearing. It also significantly impacts public interest.

When a Nevada citizen makes a public records request, and the governmental agency to which it is addressed "stonewalls" to the point where the citizen's only remedy is to bring a lawsuit and go to trial on its request, with the requested documents not being produced until the time of trial - and in camera no less - that

agency violates the Public Records Act (NPRA). Without the citizen's lawsuit, the issues cannot be resolved.

Moreover, where as here the district court announces a rule of law for determining whether a governmental record is "public," which involves a balancing of policies on a case-by-case basis, how can any requestor know in advance whether s/he has requested examination of a disclosable public record short of a lawsuit?

Given here there were NPRA violations, per authorities such as Neighborhood Alliance of Spokane County v. County of Spokane, 261 P.3d 119, 126, 131 (Wash. 2011) and State ex. rel. Kesterson v. Kent State University, 126 N.E. 3d 895, 907-08 (Ohio 2018), the requestor (here, Appellant) is actually entitled to attorney's fees, regardless of whether s/he ultimately secures a concealment judgment.

But nothing in NRS Ch. 239 grants the court authority to award attorney's fees to the governmental agency – much less $60,405.20, as here - which successfully defends a public records concealment action after initially refusing to produce anything. Nor should it. Such an award simply chills the public and encourages the governmental agency in the future to act in secrecy. As Kesterson notes, public records are the people's records. The officials in whose custody they happen to be are merely trustees for the people. Open government serves the public

interest and our democratic system. Id., 126 N.E. 3d at 901.

The chilling effect of making the right to attorney's fees mutual in NPRA litigation was considered and rejected by the Legislature. The legislative history for NRS 239.011(2) demonstrates the Legislature expressly refused to make the right to attorney's fees in NRS 239.011(1) litigation mutual because of its chilling effect[7].

The Panel did not address these issues. It should and it should agree with Kesterson. Such a ruling would be consistent with the general principle of Semenza v. Caughlin Crafted Homes, 111 Nev. 1089, 1096, 901 P.2d 684, 688 (1995) and Bobby Berosini, Ltd. v. PETA, 114 Nev. 1348, 1354, 971 P.2d 383, 387 (1998). Simply put, and putting aside the fact NRS 239.011(2) precludes an award of attorney's fees in favor of a governmental agency which prevails in NPRA litigation, a cause of action which survives multiple summary dismissal motions and ends up being adjudicated after a full trial on the merits can neither be frivolous nor harassing, regardless of what the trial court concludes in its ultimate decision.

For these reasons, then, the Court en banc should rehear this case on these issues.

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7 See Assembly Committee on Government Affairs' sub-committee meeting of May 7, 1993, page 44 of legislative history. (https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1993/AB365,1993.pdf)

DATED this 3rd day of February, 2020.

Respectfully submitted,

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Reno, Nevada 89501

By:*/s/RichardCornell*
Richard F. Cornell

ATTORNEY'S CERTIFICATE OF COMPLIANCE

I, RICHARD F. CORNELL, hereby certify that this Petition for Rehearing complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6), because:

1. This petition is prepared in proportionally spaced typeface using Microsoft Word 8 in 14 point font in Times New Roman.

2. I further certify that this Petition complies with the page or type volume limitations of NRAP 40(b)(3) and is not in excess of the standard 4,667 words, to wit: 3,893 words.

3. Finally, I hereby certify that I have read this Petition en banc Reconsideration, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the petition regarding matters on record to be supported by a reference to the page and the volume number. I understand that I may be subject to sanctions in the event that the accompanying petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 3rd February, 2020.

/s/RichardCornell
Richard F. Cornell
Nevada Bar No. 1550

CERTIFICATE OF MAILING

The undersigned certifies that they are an employee of the Richard F. Cornell, P.C., and that on the 30 day of February, 2020, they served a true and correct copy of the foregoing document upon opposing counsel, as set forth below, by way of the court's E-flex filing system:

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