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17 Attorneys for Plaintiffs

18 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
19 **IN AND FOR THE COUNTY OF NAVAJO**

20 GORDON GROSS and LILIANA
21 GROSS, husband and wife; 854 PINE
22 CREEK, LLC, an Arizona limited liability
23 company; BALD EAGLE RETREAT,
24 LLC, an Arizona limited liability company;
25 1501 RAINBOW VIEW, LLC, an Arizona
26 limited liability company; LAKESIDE
27 FAMILY INVESTMENTS, LLC, an
28 Arizona limited liability company,
29 STEVEN A. KERNAGIS AND SANDRA
30 K. KERNAGIS, trustees of THE STEVEN
31 AND SANDRA KERNAGIS TRUST
32 DATED MARCH 17, 2014; THOMAS P.
33 ZEHRING AND JEANNETTE ROSE
34 ZEHRING, trustees of THE ZEHRING
35 LIVING TRUST DATED MARCH 1,
36 2001; and JEANNETTE ZEHRING,

37 Plaintiffs,

38 v.

39 THE SHORES AT RAINBOW LAKE
40 COMMUNITY ASSOCIATION, an
41 Arizona domestic nonprofit corporation,

42 Defendant.

No.: S0900CV202200042

COMBINED REPLY AND RESPONSE

Re: Defendant's Response to Motion for
Summary Judgment and Defendant's
Cross-Motion for Summary Judgment on
Same Issues

43 Plaintiffs (collectively, "Homeowners"), pursuant to the filed June 8, 2022 Notice,
44 stipulating to the filing of a combined Reply and Response to Defendant's Response to

1 Motion for Summary Judgment and Defendant’s Cross-Motion for Summary Judgment,
2 hereby Reply and Respond in support of their Motion for Partial Summary Judgment.
3 Plaintiffs maintain that the Court should grant partial summary judgment for liability on
4 Counts I (quiet title) and II (breach of the implied covenant of good faith) and respectfully
5 request that the Court deny Defendant’s Cross-Motion for Summary Judgment.

6 Defendant, incredibly, asks this Court to ignore the Supreme Court and rule in direct
7 contradiction to recent and dispositive authority. The wild nature of Defendant’s attempts
8 to persuade this Court to ignore the Supreme Court are best illustrated by the Response and
9 Counter-Motion, which primarily argued that this Court should ignore *Kalway*, choosing
10 to bury its analysis of the common law deep in its Response, only after staking out positions
11 which the Supreme Court expressly rejected.

12 **Memorandum of Points of Authorities**

13 **I. Introduction**

14 The Homeowners moved for partial summary judgment on grounds that the
15 Amendment is invalid and unenforceable under *Kalway*, because, as explained below,
16 *Kalway* applies whether or not Defendant complied with the Planned Communities Act,
17 A.R.S. § 33-1801, *et seq.* (“the Act”). In its Response, Defendant argues that *Kalway* does
18 not apply to this dispute because Defendant complied with the Act in passing the
19 Amendment. As the Homeowners have consistently argued, the legal issue is about the
20 enforceability of the Amendment, even if it garnered the requisite number of votes.¹
21 Whether an amendment is properly passed under the Act is but one aspect of determining
22 whether said amendment is actually enforceable under Arizona law. As the Supreme Court
23 held in *Kalway*, such amendments, even adopted by the number of votes required by the
24 Act, must pass the foreseeability analysis as set forth under the common law established in
25 *Kalway* and *Dreamland*.

26 _____
27 ¹ While the Motion concerns the enforceability of the Amendment under Arizona common
28 law, Plaintiffs have always disputed that the Amendment was adopted in compliance with
the Act. *See also*, Verified Complaint at ¶66.

1 Defendant does not dispute any of the material facts in Plaintiffs' Motion. Rather,
2 Defendant argues that *Kalway* and *Dreamland* are inapplicable because Defendant satisfied
3 the requirements of the Act. Such a position, however, would render the Supreme Court's
4 decision in *Kalway* inapplicable to almost any situation where an association has acted to
5 amend a community declaration so long as it complied with the Act. Moreover, the
6 Supreme Court has already rejected this position and reasoning in *Kalway*:

7 Arizona law permits the amendment of CC&Rs by a majority
8 vote if such voting scheme is specified in the original
9 declaration. A.R.S. § 33-1817(A). [But] § 33-1817(A) **does**
10 **not displace the common law, which prohibits some**
11 **amendments even if passed by a majority vote.**

12 *Kalway v. Calabria Ranch Hoa, LLC*, -- Ariz. Adv. Rep. -- 506 P.3d 18, 23, ¶10 (Ariz.,
13 Mar. 22, 2022) (emphasis supplied).

14 Insofar as Defendant is focused on majority vs. supermajority, it makes no
15 difference under *Kalway* and will matter under the Act only with respect to the
16 requirements of the declaration at issue. Defendant is asking this Court to depart from
17 recent, clear, and dispositive precedent set forth by the Supreme Court, based on no
18 legitimate reasoning as Defendant raises issues the Supreme Court already disposed of in
19 *Kalway*. Granting such a request not only results in serious public policy concerns and
20 violations of property owners' rights, it suggests that the Supreme Court has gone through
21 the trouble of considering *Kalway*, for over a year, all for naught.²

22 Alternatively, Defendant argues that the Amendment does pass scrutiny under
23 *Kalway* and *Dreamland* foreseeability standard, should the Court rightfully apply the same.
24 As explained below, Defendant is simply wrong in its application of the correct legal
25 standard.

26 Notwithstanding *Kalway*, and somewhat ironically, the Amendment fails under the
27 Act as a matter of law. Specifically, Defendant failed to satisfy A.R.S. 33-1817 (A)(2). The

28 ² Given that Defendant's positions are in direct opposition to *Kalway*, Plaintiffs urge the
Court to note the same as it will become relevant at the stage where fees are considered.

1 Court of Appeals has already held that, at least in a portion of the Shores, the intent was to
2 allow short-term leasing and no temporal restrictions on leasing. Therefore, with respect to
3 that portion of the Shores, unanimous consent would be required under *Dreamland* (and
4 now *Kalway*). Defendant never garnered unanimous consent in that Townhome portion of
5 the Shores and, therefore, unanimous consent of the other portion was required under
6 A.R.S. § 1817(A)(2). If a portion of the Community is being treated differently than
7 another, Arizona law requires the unanimous consent of all owners who will be governed
8 differently. *See* Ariz. Rev. Stat. § 33-1817 (A)(2).³

9 The Amendment is invalid and unenforceable under Arizona law. *Kalway* is not
10 only controlling, it is dispositive. Even if this Court were to agree with Defendant that the
11 Supreme Court should be ignored here, or that the Amendment satisfies *Kalway*, Defendant
12 cannot prevail given the statutory requirements set forth in the Act. Therefore, the
13 Homeowners respectfully request: (1) the Court grant Plaintiffs' Motion for Partial
14 Summary Judgment and (2) Deny Defendant's Cross-Motion for Summary Judgment.
15 Granting the Motion would resolve the liability on counts I and II, which would leave the
16 remedy under Count I, invalidity vs. blue-lining, and damages under Count II, to still be
17 resolved.

18 **II. Legal Analysis**

19 Given that Defendant does not dispute any of the material facts, the question is
20 whether the Amendment is valid and enforceable as a matter of law based on the
21 considerations in *Kalway*. Defendant primarily contends that, because it asserts to have
22 garnered a supermajority of votes approving the Amendment, that the Amendment is
23 therefore valid and enforceable under the Act. As noted above, the Supreme Court has
24 **expressly** stated that even where an amendment is made according to the voting scheme

25 ³ It is further curious that Defendant cites to *Horton* given the Court of Appeals finding
26 that unanimous consent of that portion of the Community was required to implement a
27 short-term leasing restriction and further found that the developer itself had intended and
28 participated in short-term leasing. *See Horton* at ¶21. Given this history, both factually
and legally, it is extremely unlikely that any prohibition of short-term leasing would have
been foreseeable, once again illustrating how clearly Defendant fails under *Kalway*.

1 specified in the original declaration, some amendments may still be prohibited under the
2 common law where the original declaration does not give sufficient notice of the possibility
3 of a future amendment. *Kalway* at ¶10. Defendant alternatively argues that the Amendment
4 does satisfy the common law foreseeability analysis as set forth in *Kalway* and *Dreamland*.

5 As explained below, there is no standard by which Defendant prevails. Under the
6 appropriate applicable analysis set forth in *Kalway*, the Amendment is clearly invalid and
7 unenforceable as the Master Declaration does not give sufficient notice of the specific
8 modifications made by the Amendment. Under Defendant’s incorrectly suggested analysis,
9 namely, ignoring the Supreme Court and *Kalway* and relying wholly upon the Act,
10 Defendant cannot prevail as it failed to obtain the required unanimous consent under § 33-
11 1817(A)(2).

12 **A. Defendant’s disconnect with the Supreme Court and *Kalway*.**

13 As noted above, Defendant has staked out positions which are directly contrary to
14 the Supreme Court by arguing: (1) *Kalway* imposes an impossible burden upon
15 associations seeking to amend community declarations and (2) *Kalway* is inapplicable to
16 the instant dispute due to the requirements of the Master Declaration with regard to voting
17 for amendments. *See* Response and Cross-Motion at p.2 and 7; 3-13 and 17. As explained
18 below, these contentions are clearly and concisely addressed by the Supreme Court in
19 *Kalway* and, therefore, are easily disposed of.

20 **1. Defendant is wrong that *Kalway* requires “warning”.**

21 Defendant asserts that the Homeowners’ claim *Kalway* “prohibits virtually any
22 amendment to a set of Declarations unless next to each provision in the original Declaration
23 appears a warning stating, “this specific provision is subject to further amendment.” While
24 such a statement is an obvious strawman of the Homeowners’ position, the Supreme Court
25 addressed Defendant’s “concern”, which is little more than the slippery slope fallacy, in
26 *Kalway*:

27 The restriction itself does not have to necessarily give notice
28 of the particular details of a future amendment; that would
rarely happen. Instead, it must give notice that a restrictive of
affirmative covenant exists and that the covenant can be
amended to refine it, correct an error, fill in a gap, or change it

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in a particular way. But future amendments cannot be “entirely new and different in character,” untethered to an original covenant.

Kalway v. Calabria Ranch Hoa, LLC, -- Ariz. Adv. Rep. -- 506 P.3d 18, 23, ¶17 (Ariz., Mar. 22, 2022) (citations omitted).

The Supreme Court has clearly addressed Defendant’s contention: there need not be explicit language or a “warning” that the restriction might later be amended. Rather, notice must be given to the property owner, at the time they took title to their property, that a restrictive or affirmative covenant exists and that such covenant may be refined, corrected if in error, gaps filled in where ambiguous, or changed in a particular way (in a way which is not entirely untethered to the original covenant). Here, for all the reasons discussed in Plaintiffs’ Motion and as discussed in *Horton v. Hartsook*, there is not appropriate notice that there could be an amendment as to temporal restrictions upon leasing. Defendant’s contention not only misstates the Homeowners’ position, but ignores what the Supreme Court has set out rather clearly and concisely.

2. Defendant is wrong that *Kalway* does not apply where an amendment is passed by a 67% majority.

Defendant contends that *Kalway* is inapplicable to the instant dispute because it did not deal with a dispute where the amendment in question had been passed by a 67% majority as required by the Master Declaration here. While the factual and background portions of *Kalway* (both the Supreme Court and Court of Appeals opinions) only indicate a “majority” vote to amend occurred, whether the consenting contingent constitutes 51% or 67% is irrelevant.

The Act provides that the declaration may be amended by “an affirmative vote or written consent of the number of owners or eligible voters specified in the declaration.” A.R.S. § 33-1817(A)(1). However, assuming arguendo that the Amendment was passed in compliance with the Act, that is, by garnering the necessary votes as indicated by the Declaration and asserted by Defendant to have been obtained, such circumstance is irrelevant to the present inquiry. The Supreme Court stated in *Kalway*:

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Arizona law permits the amendment of CC&Rs by a majority vote if such voting scheme is specified in the original declaration. A.R.S. § 33-1817(A). But § 33-1817(A) **does not displace the common law, which prohibits some amendments even if passed by a majority vote.**

Kalway v. Calabria Ranch Hoa, LLC, -- Ariz. Adv. Rep. – 506 P.3d 18, 23, ¶10 (Ariz., Mar. 22, 2022)

The Supreme Court clearly intended that *Kalway* apply to all cases where an amendment garnered the votes required by the declaration and the Act. Once it has been determined that the amendment in question was passed in the manner required by the Act, the next step in the inquiry is to determine whether that amendment is prohibited under the Arizona common law. *Id.*

Whether the votes actually obtained by the association consenting to the amendment in question total 67% or 51% is irrelevant; what matters is whether the votes obtained satisfy the requirements of the original declaration, which is the standard actually set forth by the Act with regard to amending declarations. If such is the case, as Defendant asserts here, then the next step in the analysis should be considering whether the amendment is prohibited under the common law.

Rather than rely upon *Kalway*, Defendant relies upon the unpublished Court of Appeals case in *Nicdon 10663 LLC v. Desert Mt. Master Ass’n*, No. 1 CA-CV-20-0129, 2021 WL 1691532, 2021 Ariz. App. Unpub. LEXIS 489. For obvious reasons, the Court should be guided by the more recent and controlling opinion set forth *Kalway* than an unpublished Court of Appeals case.

B. *Kalway* and *Dreamland* prohibit the Amendment.

In the interest of avoiding redundancy, the Homeowners’ will not repeat the extensive analysis contained in the Motion with respect to the Amendment under the foreseeability standard set forth by *Dreamland* and affirmed by the Supreme Court in *Kalway*. That analysis is sufficiently set forth in their Motion for Partial Summary

1 Judgment. Suffice it to say here that the Homeowners maintain their position that the
2 Amendment enacts entirely new restrictions, untethered to the original covenants contained
3 in the Master Declaration with respect to temporal restrictions and term definitions.

4 Defendant argues that the Amendment does, in fact, satisfy *Kalway* and *Dreamland*.
5 Defendant’s argument lies upon its assertion that the affirmative covenants and restrictions
6 contained in the Master Declaration provided sufficient notice that (1) a temporal
7 restriction upon the potential lease terms entered into by the property owners could be
8 imposed where no such temporal restriction existed before and (2) the total re-definition of
9 “Single-Family” with respect to *only one provision of the entire Declaration*.

10 **1. Foreseeability of the temporal restriction**

11 As has been established both in the Homeowners’ and Defendant’s briefings, the
12 foreseeability analysis under *Kalway* asks whether the original declaration gave sufficient
13 notice that the challenged amendment thereto could be amended in the manner being
14 objected to. Therefore, the Court must ask here: did the Master Declaration provide
15 sufficient notice that the HOA could impose a temporal limit on lease term duration?

16 Defendant argues that the Master Declaration contained “many restrictive or
17 affirmative covenants regarding leases, leasing, and tenants” *See* Response and Counter-
18 Claim at p.11, line 11. Contrary to Defendant’s assertion, the original Section 2.30 was
19 very limited as to both restrictive and affirmative covenants:

- 20 (1) owners could not lease less than the entire lot; and
- 21 (2) upon leasing a lot, the owner was required to “promptly” notify the
22 HOA of the commencement date, termination date, and names of the
23 lessees.

24 *See* Motion for Preliminary Injunction, pg. 5 and Master Declaration at p. 22.

25 While we can debate whether the two (or, in fairness to Defendant, potentially three)
26 restrictions amounts to “many” as Defendant asserts, but such discussion is unnecessary to
27 illustrate how untethered the Amendment’s entirely new temporal restriction truly is.

28 It is important to note that Section 2.30 did not, in any cognizable way, impose any
restrictions or guidelines upon what lease term duration was permissible. There is no

1 express or implied restriction upon the property owner with respect to how long of a lease
2 term they were allowed to enter into. Rather, the only covenants imposed were a restriction
3 against leases of less than the entire property and an affirmative covenant to report
4 particular information to the Association. The Association, under the Master Declaration,
5 had **no power at all** to impose restrictions or covenants upon the owner with respect to
6 how long the owner was required to lease their property.

7 Defendant admits that Section 2.30 “did not distinguish between short-term and
8 long-term leasing” but goes on to argue that because Section 2.18 restricted all homes
9 within the Community to “exclusively single family residential use”, the Master
10 Declaration prohibits “transient lodging” because “transient lodging” was not considered
11 “exclusively single family residential use” because the Master Declaration failed to exempt
12 “transient lodging” expressly in the manner that leasing was exempted. *See* Response and
13 Cross-Motion at p.11, lines 15-20.

14 Defendant is essentially arguing that because the Master Declaration failed to
15 exempt “transient lodging” from the definition of “Residential Use”, the Homeowners’
16 were put on sufficient notice that the Association could later impose a restriction
17 prohibiting leases of a particular duration, even where there was **no such restriction**
18 **whatsoever** with regard to lease term duration.

19 To be clear: the **only** connection between “Residential Use”, “Single Family”, and
20 leasing, as contemplated by the Master Declaration, is that leasing was **expressly included**
21 as a use falling under the Master Declaration’s definition of “exclusively to Single Family
22 residential use.” There was no mention of lease term restriction, whether temporal or
23 otherwise, of any kind to be found in Section 2.30 beyond the requirement that the entire
24 lot be leased if the owner chose to lease his property.

25 The original Section 2.30 contained no temporal restriction upon leasing. To the
26 extent the Amendment contains a temporal restriction upon leasing, such is clearly invalid
27 under *Kalway* as it creates an entirely new and different in character to anything in the prior
28 Declaration. The only affirmative covenant imposed by the Master Declaration with

1 respect to leasing was that the owner must report the lease commencement and termination
2 date and lessee names to the Association. To argue otherwise is to simply ignore the clear
3 and plain text of the Master Declaration.

4 The fact that there is mention of leasing and obligations to give notice with respect
5 to such leases does not provide notice that a temporal restriction upon leasing could be
6 imposed. The Court of Appeals already recognized this, at least with respect to a portion
7 of the Community, in *Horton v. Hartsook*. If Defendant is correct that the mere mention of
8 the word leasing is sufficient notice, then *Kalway* would have no actual meaning or
9 application in reality.

10 Defendant asks the Court to reach the conclusion that the Court of Appeals reached
11 in *Horton* with respect to the pre-Amendment Declarations, claiming that such
12 Declarations expressly defined, permitted, restricted, limited, and governed leading and
13 tenants' use of the Lots in the Community. *See* Response and Cross-Motion at p.3; 19-22.
14 Defendant fails to recognize that the Court of Appeals in *Horton* reached the conclusion
15 that unanimous consent was required because there was **no notice** of potential temporal
16 restrictions upon leasing and because there was a history of short-term leasing in the
17 Community.

18 **2. The re-definition of "Single-Family" is not foreseeable.**

19 As set forth by the Supreme Court in *Kalway*, the original provision must give notice
20 that a restrictive or affirmative covenant exists and that it could be "amended to refine it,
21 correct an error, fill in a gap, or change it in a particular way." *See Kalway* at ¶17. However,
22 "future amendments cannot be entirely **new and different in character, untethered to an**
23 **original covenant.**" *Id.*

24 Defendant argues that the re-definition of "Single Family" by the Amendment, *with*
25 *respect to only one provision of the Declaration* was reasonably foreseeable because "the
26 phrase "exclusively to Single Family residential use" was otherwise referenced in the
27 original Declarations and "a later amendment **defining or redefining the term** was
28 reasonably foreseeable. *See* Response and Cross-Motion at p.13, lines 4-6.

1 Defining a term that was previously undefined is not the same thing as redefining
2 something that was already specifically defined, and even further, is not the same as
3 redefining something with respect to only one provision of the declaration. While the
4 Supreme Court found that the original declaration's mention of "Garage" in *Kalway*
5 provided sufficient notice that a later amendment defining the term was reasonably
6 foreseeable, such is not the case here. While the HOA in *Kalway* provided a definition for
7 a previously undefined-but-referenced term, Defendant provided a definition which is only
8 applicable to **one provision** of the Declaration. While it might be reasonably foreseeable
9 that an undefined, referenced term would later be defined for purposes of the entire
10 declaration, it simply is not reasonably foreseeable that Defendant would define "Single
11 Family" with respect to only one provision of the Declaration.

12 **C. Even if *Kalway* is inapplicable or the Amendment satisfies *Kalway*, the**
13 **Amendment is still invalid under the Planned Communities Act.**

14 Defendant asserts that it has complied with the Act in its passing of the Amendment
15 through, allegedly, garnering the number of votes required by the Master Declaration to
16 amend the same. Additionally, as noted above, Defendant has asked this Court to make the
17 same findings that the Court of Appeals made in *Horton*. This assertion and request present
18 a problem for Defendant: the findings of the Court of Appeals in *Horton* clearly show that
19 Defendant failed to satisfy A.R.S. § 1817(A)(2) in passing the Amendment. Setting aside
20 the number of votes, Defendant failed to garner unanimous consent of the property owners
21 to which the Amendment applies, which is required where an amendment applies to fewer
22 than all of the lots or less than all of the property that is bound by the declaration.

23 The Court of Appeals has already held that the Townhome Declaration could not be
24 interpreted to include a durational restriction upon lot leasing. *Horton v. Hartsook*, 2009
25 WL 2244503, 2009 Ariz. App. Unpub. LEXIS 974 (App. 2009). The Court reasoned
26 (among other reasons) that because the Townhome Declaration indisputably allowed
27 owners to lease their properties and imposed essentially no restrictions upon leasing (other
28 than to provide notice), the exclusion of any language or provisions restricting lease

1 provision indicated an intent to allow short-term leasing. With regard to interpreting
2 whether the Amendment can be applied in the Townhome Community, the Court need not
3 strain to determine the intent of the parties as that determination has already been noted by
4 the Court of Appeals in *Horton*.

5 To be clear, *Horton v. Hartsook* establishes that the drafters of the Townhome
6 Declaration intended to not only allow short-term leasing but to specifically exclude the
7 possibility of restricting lease duration. See *Horton* at ¶¶15, 16, and 20. As a result, the
8 inquiry as to validity of the Amendment under Dreamland must necessarily conclude that
9 the Amendment would be invalid as to the Townhome Community. Any conclusion
10 otherwise would allow the Master Association to unreasonably alter the nature of the
11 Townhome Declaration by using the generic amendment power under the Master
12 Declaration, where the direct amendment to the Townhome Declaration would require
13 unanimous consent under *Dreamland*.

14 Thus, the Amendment, without the unanimous consent of the Townhome owners, is
15 not applicable to the Townhomes and the Amendment applies to fewer than all of the lots
16 or less than all the property bound by the Master Declaration.⁴ A.R.S. § 1817(A)(2) clearly
17 requires the unanimous written consent of all property owners who will be governed by
18 such an amendment. Here, that would require the unanimous consent of all Shores property
19 owners. While Defendant has not claimed that is garnered such unanimous consent, any
20 future claim of such consent is clearly false as evidenced by the eight Shores property
21 owners who have brought this lawsuit.

22 **III. Conclusion**

23 Recent, on-point, and dispositive authority from the Supreme Court is clear: the
24 Amendment is invalid under Arizona law as the original Master Declaration failed to
25 provide sufficient notice that leases could later be restricted in duration. The HOA has gone
26 beyond the bounds of what is allowable under Arizona law by enacting entirely new and

27 ⁴ As noted in the Homeowners' Complaint and Motion for Preliminary Injunction, the
28 Townhome properties are subject to the Master Declaration.

1 unforeseeable restrictions and covenants. This entire analysis, as affirmed and set forth by
2 the Supreme Court, is in place to protect a minority of homeowners from being stripped of
3 property rights that they thought they were entitled to when they purchased their property.
4 Without this protective framework, homeowners could be stripped of property rights they
5 reasonably anticipated holding. Therefore, liability should be granted on Counts I and II as
6 set forth above with a determination of remedy to be made subject to further briefing and
7 hearing.

8 DATED this 5th day of July, 2022.

9
10 DYER BREGMAN & FERRIS, PLLC.

11 BY /s/ Stockton D. Banfield

12 Stockton D. Banfield
13 Charles M. Dyer
14 Attorneys for Plaintiffs

15 WONG & CARTER, PC.

16 BY /s/ Joseph R. Rainey

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18 Matthew A. Klopp
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22 This 5th day of July, 2022.

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