THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Daniel D. Hall, Circuit Court Judge

Appellate Case No. 202-000290

Eastwood Construction Partners, LLC and
Eastwood Development Corporation,..... Appellants,

v.

GHD Brooks Creek, a North Carolina Limited Liability Company, and AF-Brooks Creek, LLC, a North Carolina Limited Liability Company, GHD River Falls, a North Carolina Limited Liability Company, and AF-River Falls, LLC, a North Carolina Limited Liability Company, Greenhawk Corporation, Inc. and TRI Pointe Homes, Inc.,.....Respondents.

APPELLANTS' PETITION FOR REHEARING AND REHEARING *EN BANC*

Pursuant to Rules 219 and 221(a) of the South Carolina Appellate Court Rules, Appellants Eastwood Construction Partners, LLC and Eastwood Development Corporation ("Eastwood" or "Appellant") files this petition for rehearing and rehearing *en banc*. Appellant respectfully submits that rehearing or issuance of a new opinion reversing the Panel's decision is warranted. The grounds for this petition are that the Panel's opinion in this matter overlooked or misapprehended several matters of fact and law. This matter is of importance as it involves the statute of frauds as it pertains to the sale of land, South Carolina Rule of Civil Procedure 56, and the law of joint ventures.

In Unpublished Opinion No. 2024-UP-281 filed on July 31, 2024, a Panel of this Court affirmed the trial court's order granting Respondents' Motion for Partial Summary Judgment. The Panel found that the trial court did not err in concluding that there was no genuine dispute of material fact as to whether there was a contract between Eastwood and the Greenhawk entities ("Greenhawk") for the sale of two parcels of land in York County, South Carolina (the "Properties"). The Panel improperly concluded that the evidence, taken in a light most favorable to Eastwood, did not support an agreement on all the essential terms for the sale of land. In this way, the Panel misapprehended the facts and law and misapplied the standard under Rule 56 by focusing on the evidence supporting Respondents' position and ignoring material evidence supporting Appellants'. Finally, the Panel misapprehended the facts underlying Eastwood's argument that summary judgment was premature under Rule 56(f).

DISCUSSION

I. The Panel Misapprehended the Facts and Law When it Ignored Material Evidence Establishing an Agreement Between the Parties as to Price.

In concluding that there was no genuine dispute of material fact as to whether the Parties had a "meeting of the minds" on the essential terms of the contract for the sale of the Properties, the Panel misapprehended the facts and law by focusing on evidence supporting Respondents' position and ignoring material evidence supporting Appellants'.

Under the Rule 56 standard, summary judgment is proper only "if, ***viewing the evidence and inferences to be drawn therefrom in a light most favorable to the nonmoving party***, the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." *Woodson v. DLI Properties, LLC*, 406 S.C. 517, 528, 753 S.E.2d 428, 434 (2014) (emphasis added). Instead of following this standard and viewing the evidence in a light most

favorable to Eastwood, the Panel misapplied the standard and ignored the evidence that created a genuine dispute of material fact as to the key terms for price.

First, the Panel focused exclusively on testimony from Eastwood's 30(b)(6) witness, Joe Polite, that was damaging to Eastwood's position, all but ignoring the testimony by Polite that was favorable to Eastwood, and was consistent with the testimony of Greenhawk's former president, Craig Briner. By doing so, the Panel, in effect, made credibility determinations as to Polite's testimony, crediting portions damaging to Eastwood and discounting or disregarding portions favorable to Eastwood. Apart from the general obligation to consider all evidence in the light ***most favorable*** to Eastwood, a court is not permitted to make credibility determinations on a motion for summary judgment; that is left up to the trier of fact. *Kitchen Planners, LLC v. Friedman*, 432 S.C. 267, 281 n.2, 851 S.E.2d 724, 732 n.2 (Ct. App. 2020), *aff'd as modified*, 440 S.C. 456, 892 S.E.2d 297 (2023) ("[W]itness credibility is not a proper consideration in deciding a motion for summary judgment . . . ."); *David v. McLeod Reg'l Med. Ctr*., 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006) ("A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony . . . .").

The sworn testimony of Greenhawk's Craig Briner and Eastwood's Rule 30(b)(6) designee confirm that both sides of the agreement knew how a price would be determined.

Craig Briner was a founding member and at the time was president of Greenhawk Corporation. (R. p. 948, DT p. 15, l. 24 – p. 16, l. 6; p. 975, DT p. 123, l. 4). He was also one of Greenhawk Development, LLC's three managers with full authority to enter into agreements with Eastwood. (R. pp. 1100 – 1101, DT pp. 31–32 ("Jackson Dep.")). Part of the reasoning for deciding to purchase the land and enter the agreement with Eastwood was that Eastwood would be buying

the lots, providing a source of income and return on investment. (R. p. 945, DT p. 37, l. 7 – p. 38, l. 1).

Throughout development, Eastwood and Greenhawk agreed that, after all costs were factored in, the lot prices would be calculated such that Greenhawk would receive a 20% return. (R. p. 958, DT p. 56, ll. 7 – 20; R. p. 972, DT p. 70, ll. 11–13; R. p. 963, DT p. 75, ll. 7–16; R. p. 972, ll. 11–16; R. p. 1300, DT p. 16, ll. 19–21; R. p. 1302, DT p. 23, ll. 18–21; R. p. 1306, DT p. 39, ll. 6–18; R. p. 1308, DT p. 49, ll. 8–12; R. pp. 1321-1322, DT p. 101, l. 12 – p. 102, l. 10). As Mr. Briner testified:

> Q. What was GreenHawk's I would say standard estimated markup over costs for a lot?
>
> THE WITNESS: Typically, we were trying to get sort of a 20 percent IRR number. Some were more, if we both cured it ourself. Some were less, if the risk was assumed to be less or the time frame was shorter than sort of normal takedown. But 20 IRR.
>
> Q. And how would you go about calculating that for any given project?
>
> A. Obviously, you start with the cost, the length of time that it would take to go ahead and sell those, typically in a takedown schedule, over a period of a couple three years, something like that typically.
>
> And use that time frame, and then the sales price, which frequently had escalators in them, given the time that it took to consume them.
>
> Q. And was that part of the analysis that would have been done at the initiation of a project to get Mr. Agarwal's approval and permission to make the acquisition and have it funded?
>
> A. Typically, yes.
>
> Q. To your recollection, was Mr. Dority or anybody else at Eastwood aware of GreenHawk's standard expected 20 percent IRR on its development projects?
>
> A. I think -- I think Joe Dority was aware of what we were trying to target, I'm pretty sure.

> Q. And was he aware that costs, you know, that the takedown schedule and price escalators would roughly be pegged so that GreenHawk would get a 20 percent rate of return on its money over the life of the takedown as far as you know?
>
> A. Yes.

(R. p. 958, DT p. 55, l. 6 – p. 56, l. 20).

After Mr. Dority left Eastwood in late 2016, Joe Polite became Eastwood's Vice President of Land. (R. p. 1202, DT p. 34, ll. 1–5). Polite concurred with Briner's testimony on the pricing of the lots:

> Q. So Eastwood's position right now at this deposition is it will pay whatever the confirmed net costs are that is GreenHawk's costs minus Eastwood's costs and will guarantee a 20 percent rate of return to GreenHawk on that number and it's compelled to accept that price and cannot back out. Is that Eastwood's testimony?
>
> A. I would say yes.
>
> Q. Okay. All right.
>
> A. If –
>
> Q. If what?
>
> A. No, if we all confirm the pricing and the costs, both parties together, we, being GreenHawk, if we confirm those prices, yes, we would be willing to purchase based on those costs.
>
> Q. You said pricing and costs. You said pricing and costs. As I understand your testimony costs determine the price, correct?
>
> A. Plus profit less our investment.

(R. pp. 1328 – 1329, DT p. 129, l. 12 – p. 130, l. 5).

This price agreement within the Eastwood-Greenhawk unwritten contract was borne out by the numerous "pro formas" sent from Greenhawk to Eastwood that show a projected IRR near 20% for both Properties. (R. pp. 1018 – 1028; 1033). Greenhawk included Eastwood in meetings and discussions where the pro forma analysis was discussed. (R. p. 962, DT p. 72, ll. 2–8). In other

words, after all costs were accounted for, Eastwood would pay a lot price and on a schedule that allowed Greenhawk to reach the 20% IRR mark. (R. pp. 1328-1329, DT p. 129, l. 12 – p. 130, l. 5; R. p. 958, DT p. 56, ll. 7 – 20; R. p. 962, DT p. 70, ll. 11–13; R. p. 963, DT p. 75, ll. 7–16; R. p. 972, DT p. 112, ll. 11–16).

Greenhawk's internal documents from 2016 confirmed that Eastwood was the intended buyer of the lots and that the costs, and cost increases, were the prohibiting factor in having a final lot sales price. (R. pp. 1115 - 1139). Even after this lawsuit began, Briner confirmed to Greenhawk that lot pricing had been delayed because of increased costs. (R. pp. 1153 - 1154). However, Briner was also clear that the agreement to price lots at 20% over costs had never changed:

> Q. And was there ever any change in the discussion with Eastwood about the 20 percent internal rate of return expectation on the project?
>
> A. Not to my knowledge.
>
> Q. And was there ever a point in time that you recall anyone at Eastwood saying that they would not be willing to accommodate a purchase price for River Falls that would provide GreenHawk with that 20 percent rate of return?
>
> A. I don't think we ever got -- no, no.

(R. p. 963, DT p. 75, ll. 7-16).

Briner, who was the decision-making authority for Greenhawk at the critical time the agreement was entered into, agrees with Eastwood that the price for the lots would be whatever it took to earn Greenhawk a 20% IRR. The only reasonable inference to draw from the concurrence of this evidence, much less the inference in Eastwood's favor, is that a price term had been set that was sufficiently definite so as to constitute a meeting of the minds. *See, Trident Const. Co. v. Austin Co.*, 272 F. Supp. 2d 566, 576 (D.S.C. 2003), *aff'd sub nom. Trident Constr. Co. v. Austin Co.*, 93 F. App'x 509 (4th Cir. 2004) (quoting *McPeters v. Yeargin Const. Co.*, 290 S.C. 327, 350 S.E.2d 208, 211 (1986)) ("Where a contract does not fix a definite price, there must be a definite

method for ascertaining it."); *Edens v. Laurel Hill, Inc.*, 271 S.C. 360, 364, 247 S.E.2d 434, 436 (1978). A percentage of profits is a definite method of determining price. *See, Consignment Sales, LLC v. Tucker Oil Co.*, 391 S.C. 266, 271, 705 S.E.2d 73, 76 (Ct. App. 2010) ("Here, the parties agreed on a price term: $20,000 and 50% of the 'net profits' generated by each supply contract."); *Barry v. Liddle, O'Connor, Finkelstein & Robinson*, 98 F.3d 36, 40 (2d Cir. 1996) (analyzing New York law); *Ross v. Ross*, 170 N.H. 331, 339, 172 A.3d 1069, 1076–77 (2017) ("For example, a writing that does not explicitly state the agreed-upon price may satisfy the statute of frauds if the contract prescribes a method, such as a future appraisal, which will necessarily result in the determination of the price."); *Headstart Bldg., LLC v. Nat'l Centers for Learning Excellence, Inc.*, 2017 WI App 81, ¶ 20, 379 Wis. 2d 346, 360, 905 N.W.2d 147, 154; *Wakelam v. Hagood*, 151 Idaho 688, 693, 263 P.3d 742, 747 (2011) ("[A] seller can agree that, rather than stating a definite purchase price, the land sale contract provide a definite method to determine the purchase price, such as being established by an appraiser, by arbitrators, or by the successful bidder at an absolute auction.").

As Mr. Polite, Eastwood's 30(b)(6) designee, summarized when asked:

> Q. So Eastwood's position right now at this deposition is it will pay whatever the confirmed net costs are that is GreenHawk's costs minus Eastwood's costs and will guarantee a 20 percent rate of return to GreenHawk on that number and it's compelled to accept that price and cannot back out. Is that Eastwood's testimony?
>
> A. I would say yes.

(R. p. 1328, DT p. 129, ll. 12–19).

The Panel misapprehended both the material evidence and the appropriate legal standard when it came to the price term of the Parties' agreement and made inappropriate credibility determinations. When accounting for all the material evidence and drawing all inferences in

Eastwood's favor, there was sufficient evidence to create a genuine dispute of material fact as to the price Eastwood and Greenhawk had agreed Eastwood would pay for the Properties.

II. The Panel Misapprehended the Law and the Facts as to Takedown Schedule and Time.

As with the material evidence supporting Eastwood's contention that the price was set at 20% IRR for GHD, the Panel also misapprehended the facts and law regarding evidence of time. The Panel erroneously concluded that time was an essential element of the contract and that there was no agreement on time because there was no agreed takedown schedule.

First, the timing of a property sale is not, as a matter of law, an essential term—instead, the essential terms are price and description. *See, Speed v. Speed*, 213 S.C. 401, 409, 49 S.E.2d 588, 592 (1948); *Fici v. Koon*, 372 S.C. 341, 346, 642 S.E.2d 602, 604 (2007); *Honorage Nursing Home of Florence, S.C., Inc. v. Florence Convalescent Ctr., Inc.*, 367 S.C. 108, 115, 623 S.E.2d 853, 856 (Ct. App. 2005). As noted by the Supreme Court in *Speed v. Speed*, two writings were sufficient, when read together, to supply all the essential terms of a contract for the sale of land:

> But when the two letters are considered together, all the essential terms of the contract, ***the amount of the purchase money, the name of the vendor and vendee, and the location and identity of the property to be sold***, can all be definitely and certainly learned from the writings relied upon. They show internal evidence of their unity."

Speed, 213 S.C. at 409, 49 S.E.2d at 592 (emphasis added). Indeed, the *Speed* Court expressly rejected the argument that time was an essential element for a land sale contract:

> The general rule, however, sustained by many authorities, is that time is not of the essence of a contract to convey land unless made so by its terms expressly, or by implication from the nature of the subject matter, the object of the contract, or the situation or conduct of the parties. In the case of an executory contract for the sale of land, where the time for the execution of the conveyance or transfer is not limited as in the case at bar, the law implies that it is to be done ***within a reasonable time***; and the failure to incorporate in the memorandum such a statement does not render it insufficient.

Id. at 412–13, 49 S.E.2d at 593 (emphasis added).

Furthermore, one fact is conclusive when it involves the sale of lots in a subdivision: no lot can be conveyed until the local government authority approves the final plat of the subdivision and the plat is recorded. Thus, government action was a precondition to setting the time for delivery of the lots, and therefore the time for performance by Eastwood. Additionally, Briner testified that there would be only a single takedown, not a schedule of takedowns in series. (R. pp. 1037 - 1062). As a matter of law, therefore, Eastwood would be required to purchase the lots within a "reasonable time" after the plat was recorded. *Speed*, 213 S.C. at 412-13, 49 S.E.2d at 593.

Eastwood and Greenhawk had a custom or practice regarding takedown schedules, and "a contract [will not] fail for indefiniteness when the gaps that the parties have left 'may be implied from custom and usual forms and former course of dealing.'" *S. Fire & Cas. Co. v. Teal*, 287 F. Supp. 617, 622 (D.S.C. 1968), *aff'd*, 406 F.2d 1330 (4th Cir. 1969) (quoting *Carolina Aviation v. Glens Falls Ins. Co.*, 214 S.C. 222, 230, 51 S.E.2d 757, 761 (1949)). The Panel misapprehended both the law and the material evidence supporting Greenhawk's and Eastwood's custom and practice regarding takedown schedules. Greenhawk and Eastwood's agreements in other developments show the takedown schedules are often changed during the course of development. (R. p. 1334, DT p. 153, ll. 1–17; R. pp. 1079 - 1085).

Takedown schedules between Greenhawk and Eastwood changed in the past, and that customary gap should not have served as a basis for the Panel's decision. *S. Fire & Cas.*, 287 F. Supp. at 622.

III. The Panel Misapprehended the Facts and Law Regarding Eastwood and Greenhawk's Joint Venture.

The record before the Panel contained evidence that created a genuine dispute of material fact on the issue of whether Eastwood and Greenhawk were joint venturers. However, the Panel misapprehended this evidence and again failed to properly apply the Rule 56 standard.

"A joint enterprise exists where there are two or more persons united in the joint prosecution of a common purpose under such circumstances that each has authority, express or implied, to act for all in respect to the control of the means and the agencies employed to execute such common purpose." *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 147, 425 S.E.2d 764, 774 (Ct. App. 1992) (citing *Long v. Carolina Baking Co.*, 190 S.C. 367, 3 S.E.2d 46 (1939)). "Further, in order to constitute a joint enterprise, there must be a common purpose and community of interest in the object of the enterprise and an equal right to direct and control the conduct of each other with respect thereto." *Id.* (citing *Spradley v. Houser*, 247 S.C. 208, 146 S.E.2d 621 (1966)). Joint venturers also share in profits and losses. *See*, *Mid-S. Mgmt. Co. Inc. v. Sherwood Dev. Corp.*, No. 2004-UP-611, 2004 WL 6337256, at *1 (S.C. Ct. App. Dec. 7, 2004) (noting that agreement provided for allocation of profits and losses).

The record contained substantial evidence that Eastwood and Greenhawk were working for a common purpose. Eastwood expended its own funds for the joint benefit of the project and then made what was essentially a gratuitous assignment of the contracts to buy both Properties to Greenhawk. (R. pp. 175 - 177).

Even more compelling, for no consideration from Greenhawk, Eastwood transferred a sliver of land for which it paid $55,741, which was essential, according to SCDOT, for proper ingress and egress to the River Falls project. (*See,* Helms Settlement Statement, (R. pp. 1389 – 1390); Deed from Caroline Helms to Eastwood Development Corp. (R. pp. 1402 – 1406);

Quitclaim Deed from Eastwood to Greenhawk. (R. pp. 1407 - 1410)). Not only did Eastwood pay dearly for the sliver of land, Eastwood also agreed to build the Seller an improved driveway, with a security gate, and granted her an easement to the River Falls entrance road. (*See,* Helms Purchase and Sales Agreement (R. pp. 1391 - 1392, ¶3)). Eastwood is not in the habit of giving away land—it made this transfer because it expected Greenhawk to comply with the unwritten contract and sell Eastwood developed lots.

Eastwood also provided a coordinator for early development. Joe Dority was Greenhawk's uncompensated man on the ground in Tega Cay. (R. p. 959, DT p. 59, ll. 11–14; R. p. 959, DT p. 60, ll. 1–6; R. p. 969, DT p. 99, ll. 2–6). He worked to coordinate engineering services, wetland services, and meetings with Tega Cay officials. He directed efforts for Greenhawk and Eastwood.

Pro formas were regularly exchanged between Greenhawk and Eastwood and sensitive financial information shared as they worked to finalize pricing and costs. (R. p. 962, DT p. 72, ll. 2–8). There was also an agreement to share profits and losses. Greenhawk and Eastwood agreed that Greenhawk would receive a 20% return for the lots after factoring in their costs. This equation would ensure that both parties shared in the financial burden or windfall in a way that was predetermined.

For these reasons, there was, at a minimum, a genuine dispute of material fact as to whether Greenhawk and Eastwood were joint venturers as to the River Falls and Brooks Creek properties. It was error for the Panel to affirm summary judgment on this claim.

IV. The Panel Misapprehended the Facts Regarding Appellant's Rule 56(f) Arguments.

Finally, the Panel misapprehended the facts related to Eastwood's argument that summary judgment was premature.

> Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

Rule 56(f), SCRCP.

Rule 56(f) exists because "[s]ummary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *See, Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003). A party arguing that further discovery is needed before summary judgment can be granted "must advance a good reason why the time was insufficient under the facts of the case, and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact." *Guinan v. Tenet Healthsystems of Hilton Head, Inc.*, 383 S.C. 48, 53–54, 677 S.E.2d 32, 36 (Ct. App. 2009).

The Panel misapprehended the facts about discovery in the trial court for three reasons. First, as described above, the Panel misapprehended the facts and law as it pertained to a genuine dispute of material fact on the issue of whether there was a contract between Greenhawk and Eastwood. Because evidence from Eastwood ***and*** Greenhawk confirmed a pricing mechanism for the Properties, and because time is not an essential term, there was a genuine dispute of material fact as to the contract. For that reason, further discovery would have aided Eastwood in better illuminating the terms of the contract and supporting its claims.

Second, the Panel misapprehended the importance of the outstanding discovery. The incomplete discovery includes essential testimony and documents from Greenhawk decision makers, not trivial matters. Eastwood did not have a chance to depose Greenhawk's founder and president, Sajjan Agarwal, prior to the December hearing. (R. p. 419, ¶23 ("Bradley Aff.")). This left a critical gap in Eastwood's discovery prior to summary judgment—there is no dispute that

Mr. Agarwal is the final decision maker, financial backer, and leader of Greenhawk. (*See, e.g.*, Briner Dep. (R. p. 948, DT p. 15, ll. 17–20; DT p. 16, ll. 16–19; R. p. 949, DT p. 18, ll. 20–25)). Indeed, even though Mr. Briner was President of Greenhawk in 2013/14, he still had to get approval from Sajjan Agarwal to buy land, including River Falls and Brooks Creek. (R. p. 949, DT p. 19, ll. 14–17). A deposition of the most important decision maker at the conception of the Eastwood-Greenhawk is no "fishing expedition," but is instead the type of specific, essential discovery that should have delayed summary judgment.

Furthermore, prior to the December hearing,[1] Greenhawk also failed to comply with the terms of its informal agreement with Eastwood to search the email account of Sajjan Agarwal, Greenhawk's founder and current president,[2] for responsive documents. On June 3, 2021, Eastwood issued a subpoena to the Agarwal Family III, LLC. (R. pp. 421 - 432). Greenhawk[3] moved for a protective order and to quash the subpoena, and Judge Hall heard the motion on August 24, 2021. At Judge Hall's suggestion, Eastwood and Greenhawk entered into an informal agreement. (R. p. 417, ¶16.)

Third, the Panel misapprehended the timeline that explained Eastwood's inability to receive this critical discovery prior to the summary judgment hearing. Mr. Agarwal's importance was not revealed until the deposition of Craig Briner in August 2021. (R. p. 417, ¶15). This was less than four months prior to the summary judgment hearing. Additionally, Eastwood had served a subpoena duces tecum on a related entity seeking documents from Mr. Agarwal in June 2021.

[1] Following the December 10, 2021, hearing, Greenhawk did produce some handwritten notes taken by Mr. Agarwal.
[2] (Briner Dep., R. p. 948, DT p. 15, ll. 17–23; R. p. 951, DT p. 26, ll. 6–8).
[3] Though the subpoena was issued to Agarwal Family III, LLC, Greenhawk is the only entity who has responded in any way, further evidence that Agarwal and Greenhawk are so interwoven that no practical distinction can be made.

(R. p. 417, ¶¶14, 16). No comprehensive production was ever made. (R. p. 418, ¶18). In short, the Panel misapprehended the facts when it concluded that Eastwood had not been diligent in pursuing this critical discovery.

Eastwood diligently pursued discovery from Greenhawk's founder and leader—it was error on the Panel's part to affirm the trial court's decision to grant summary judgment before this discovery was completed.

CONCLUSION

This Court should grant rehearing or rehearing *en banc* in this matter because:

1. The Panel misapprehended facts and law relating to the material evidence regarding Eastwood and Greenhawk's pricing agreement;

2. The Panel misapprehended facts and law relating to the timing of performance under the contract;

3. The Panel misapprehended facts and law relating to the material evidence regarding Eastwood and Greenhawk's joint venture; and

4. The Panel misapprehended the facts related to Eastwood's need to conduct further, limited discovery.

[Signature block to follow]

Respectfully submitted,

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