THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Thomas Russo, Circuit Court Judge

Appellate Case No. 2016-001632
Case No. 2011-CP-10-5774

Pavilion Development Corp. & Larry McNair ..... Appellants,

v.

Nexsen Pruet, LLC..... Respondent,

v.

DC & Sons, LLC..... Counterclaim Defendant.

REPLY

Pursuant to Rule 240(f), SCACR, Respondent Nexsen Pruet, LLC, ("Nexsen Pruet") hereby replies to the response to the motion to dismiss the appeal. The appeal should be dismissed for the following reasons.

1. To begin, the motion to dismiss is not "an improper successive motion" as Appellants argue. (Resp. p. 1.) This is the first time Nexsen Pruet has filed the motion to dismiss in this Court. Nexsen Pruet initially filed the motion in the Court of Appeals, and at the same time filed a motion to transfer specifically requesting that the case be transferred to this Court and the motion to dismiss be decided by this Court. (Ex. A.) Appellants *agreed* that the motion to dismiss should be decided by this Court "because

the motion involves the meaning and effect of this Court's decisions." (Ex. B.) The fact that the Court of Appeals ruled on the motion to dismiss before this Court ruled on the motion to transfer should not deprive Nexsen Pruet of the ability to have this Court decide the motion, particularly when Appellants agreed that this Court should. Nexsen Pruet is not aware of any rule or case law preventing it from re-filing the motion in this Court under these circumstances, and Appellants do not cite any.

Because the motion to dismiss was decided before this case was transferred to this Court, and because this Court granted the motion transfer, which specifically requested that this Court decide the motion to dismiss, the motion to dismiss should be decided by this Court.[1]

2. The order on appeal is not an immediately appealable order because it is not a final judgment ending the case. The order simply denies a motion to amend a complaint, which is not an immediately appealable order. *See, e.g.*, *Tatnall v. Gardner*, 350 S.C. 135, 138, 564 S.E.2d 377, 379 (Ct. App. 2002) (holding that an order denying a motion to amend pleadings is not immediately appealable). The order that ended this case as initially filed was this Court's opinion dated August 15, 2015. By denying the motion to amend the complaint, the circuit court simply complied with this Court's opinion. The circuit court was bound by that decision and therefore could not allow Appellants to amend the complaint when this Court had already determined that the proper remedy was dismissal without prejudice.

[1] The Court of Appeals did not, as Appellants contend, hold that "this appeal should be decided on the merits after full briefing, completion on of [sic] the Record on Appeal, and oral argument." (Resp. pp. 1 – 2.) Instead, the Court of Appeals simply denied the motion.

3. Appellants should not be given yet another opportunity to keep this case alive when summary judgment was granted in favor of Nexsen Pruet on the ground that the case was proceeding pursuant to an assignment of a legal malpractice claim that was void as against public policy, and there has been no showing that the assignment has been voided or that the case is being pursued by Pavilion Development Corp. ("Pavilion") and Larry McNair ("McNair") as the real parties in interest. Indeed, Pavilion and McNair continue to be represented by the same counsel who represented their adversary, DC & Sons, in the case below. This is precisely why dismissal was the appropriate remedy. The only way to know that this case is a genuine legal malpractice case is for the case as filed to be dismissed, and a new case filed along with a showing (by affidavit or otherwise) that Appellants are the real parties in interest. Nexsen Pruet further submits this should be done upon advice of independent counsel and not the same counsel who represented the party to whom the legal malpractice claim was assigned. [2]

In any event, Appellants had the opportunity to obtain the relief they seek here, both on appeal and after the Supreme Court issued its opinion, and both times the Court denied the relief. On appeal, Appellants argued that if the Court "f[ound] fault with the assignment, that it be voided, but the case otherwise be allowed to proceed as even a dismissal without prejudice will result in Nexsen Pruet claiming the statute of limitations

[2] Nexsen Pruet briefed this same issue on appeal the first time around, citing the following authority in support: *Edens Techs., LLC v. Kile Goekjian Reed & McManus, PLLC*, 675 F. Supp. 2d 75, 86 (D.D.C. 2009) (finding that if the client re-files the malpractice claim, the case must not be controlled in any way by the assignee and the client must not be represented by attorneys associated with the assignee); *Davis v. Scott*, 320 S.W.2d 87, 91, 92 (Ky. 2010) (finding that the client could reassert his claim "only upon showing that the attempted assignment is no longer in place and that he is the real party in interest").

has run even though the new suit without the assignment would be filed in the names of the now Plaintiffs." (Ex. C.) This argument was made in Appellants' opening brief and reply, and this Court held that dismissal without prejudice was the proper remedy.

After this Court issued its opinion, Appellants could have filed a petition for rehearing asking once again that the Court grant leave to amend the complaint in the present case, but Appellants failed to timely do so.

In sum, Appellants should not be permitted to continue pursuing this case as filed. That is what the Supreme Court determined when it held that the proper remedy is dismissal without prejudice.

4. Appellants have not been deprived of a "substantial right" to bring an action against Nexsen Pruet for legal malpractice. (Resp. p. 5.) Appellants still have the right to bring an action against Nexsen Pruet for legal malpractice, should they choose to do so as the real parties in interest.[3] No court, not even Judge Nicholson, whom Appellants quote in their response, has ruled that the statute of limitations has expired. *Id.* Although Judge Nicholson made a comment about the statute of limitations, he ended up recusing himself and did not make any rulings. For the sake of completeness, however, the full colloquy between counsel for Nexsen Pruet and Judge Nicholson is as follows:

> MS. CUNDARI: They have a remedy. Their remedy is filing a new case.
>
> THE COURT: But they really don't because the statute has run.

[3] It is difficult to imagine why Pavilion and McNair would choose to pursue a legal malpractice claim against Nexsen Pruet when as part of the settlement in the case against DC & Sons, McNair obtained a full release of all liability, and Pavilion is an entity that was formed for the purpose of purchasing a piece of property that was never purchased.

> MS. CUNDARI: We haven't gotten there yet. We haven't even raised that defense yet. We are sort of getting ahead of ourselves. Until they file a new case as the real parties in interest we submit represented by new counsel who are independent [sic]. As you know this case, this very issue was argued at the Supreme Court in both briefs. The opening brief they filed as well as their reply brief. They said court, do not – if you dismiss this case without prejudice it will essentially end the case. You know what the Supreme Court said? Dismissal without prejudice. So that's what you're bound by, Your Honor, is the Supreme Court opinion. The remitter [sic] does not attach that order. It only attaches the opinion saying dismissal without prejudice. The case is over.

(Ex. D.)

Accordingly, nothing is preventing Appellants from filing a new case, other than their own determination that the statute of limitations has expired.

5. Contrary to what Appellants argue, it is not implicit in this Court's August 15, 2015 opinion that Appellants should be given a reasonable amount of time to amend their complaint. (Resp. p. 7.) As explained above, the issue of whether Appellants should be given a reasonable amount of time to amend their complaint was before the Court, and the Court ruled that the proper remedy was dismissal without prejudice.

Further, if Appellants truly believed that the Supreme Court implicitly ruled that Appellants should be permitted time to amend the complaint, Appellants had no reason to file a motion after the opinion was issued specifically requesting that the Court grant leave to amend the complaint. Appellants filed the motion because the Supreme Court's opinion did not grant such relief and instead held that the proper remedy was dismissal without prejudice.

6. Contrary to what Appellants argue, the circuit court did not find or hold

that Appellants are "absolutely entitled" to amend the complaint under the rules. (Resp. pp. 4, 6.) Instead, the circuit court recognized that while ordinarily that may be true, that was not the scenario before the court. The scenario before the circuit was that parties were trying to use Rule 15 to amend a complaint when summary judgment had already been granted and affirmed by the Supreme Court. The circuit court stated as follows:

> **MR. EPTING**: Well, let me ask you this question, Judge. Two cases were tendered to you and I know that you are a busy man, but Rule 15 says that if -- an amendment should be allowed because justice requires it.
>
> **THE COURT**: Let me stop you right there. **If it wasn't a scenario that I've got to deal with where I've got a court who affirmed summary judgment, which, as we all know, ends the case, and I'm being asked to ignore that and allow the case to go forward and grant the amendment, but for that**, you are absolutely right. I don't even think we're here. I don't think they are going to oppose your Rule 15 motion. You're absolutely entitled to it. That's not – it's not that simple. It's not that easy, as you know. So you are entitled to Rule 15, **but for all this other stuff you have here**.

(Ex. E.) (Emphasis added.)

7. Nexsen Pruet should not be forced to brief, argue, and defend yet another appeal in a case that Nexsen Pruet won on appeal the first time around and that continues to pursued by an entity (DC & Sons) that has never been a client of the law firm. Because no substitution of parties has taken place, and no showing has been made that the assignment is no longer in place and Pavilion and McNair are the real parties in interest, it would be unjust to allow this appeal to proceed and to require Nexsen Pruet to continue defending a case brought and controlled by an entity that Nexsen Pruet did not owe any duties to and from whom Nexsen Pruet is immune from suit. *See Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Solutions*, 388 S.C. 394, 400, 697 S.E.2d 551, 554

(2010) (stating that "an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client").

CONCLUSION

The motion to dismiss should be granted. To allow Appellants to continue this action, which has been tainted since its inception, is unjust and procedurally unsound. Additional briefing is not necessary to determine what the Supreme Court meant by "dismissal without prejudice." Accordingly, this Court should dismiss the appeal and instruct Appellants that if they wish to pursue this action as the real parties in interest, they must do so by filing a new action upon the advice of new and independent counsel.

SOWELL GRAY ROBINSON STEPP & LAFFITTE, LLC

By: _____

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Attorneys for Respondent Nexsen Pruet LLC

March 6, 2017
Columbia, South Carolina

Exhibit A to Reply

Appellate Case No. 2016-001632

THE STATE OF SOUTH CAROLINA
In the Supreme Court of South Carolina

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Thomas Russo, Circuit Court Judge

Appellate Case No. 2016-001632
Case No. 2011-CP-10-5774

Pavilion Development Corp. & Larry McNair ..... Appellants,

v.

Nexsen Pruet, LLC ..... Respondent,

v.

DC & Sons, LLC ..... Counterclaim Defendant.

MOTION TO TRANSFER

Pursuant to Rule 204(b), SCACR, Respondent Nexsen Pruet LLC seeks an order transferring this case to the Supreme Court of South Carolina. This case should be transferred because the issue on appeal relates directly to the Supreme Court's opinion dated August 12, 2005, and order dated September 3, 2015. Additionally, this Court should decide the motion to dismiss being filed today (and attached hereto) because the motion involves the meaning and effect of the Supreme Court's decisions.

This is the second appeal in this legal malpractice case. The first appeal involved the novel question of whether a legal malpractice claim may be assigned to an adversary in litigation. In the underlying action, the circuit court found that the assignment of a legal malpractice claim to an

adversary violated public policy, granted summary judgment in favor of Nexsen Pruet, and dismissed the case with prejudice. Appellants appealed this decision, and prior to oral argument, the case was transferred to the Supreme Court of South Carolina pursuant to Rule 204(b), SCACR. Accordingly, the South Carolina Court of Appeals did not hear or decide any issues in the first appeal.

Following oral argument, the Supreme Court issued an opinion affirming summary judgment in favor of Nexsen Pruet but modifying the dismissal to be without prejudice. (Mot. to Dismiss, Ex. C.) Sixteen days later after the Supreme Court issued its opinion, Appellants filed a motion requesting additional time "on remand" to amend the complaint. (Mot. to Dismiss, Ex. D.) The Supreme Court construed the motion as a petition for rehearing and denied the motion because it was untimely. (Mot. to Dismiss, Ex. E.) Additionally, the Supreme Court stated the "motion should be addressed by the trial court in the first instance." *Id.*

Seizing upon this language, Appellants filed a motion to amend the complaint and substitute parties in the circuit court. Nexsen Pruet took the position that the case is over, having been dismissed (albeit without prejudice) by the Supreme Court. The circuit court agreed, and denied the motion. (Mot. to Dismiss, Ex. A.) This ruling is now on appeal.

Because the present appeal relates directly to the Supreme Court's prior opinion and order, Nexsen Pruet respectfully requests that this case, along with the motion to dismiss being filed today, should be transferred to the Supreme Court. It is the interest of judicial economy for the Supreme Court to determine what the Court meant when it dismissed the case without prejudice, and later issued an order stating that the "motion should be addressed by the trial court in the first instance."

The Supreme Court is familiar with the facts and procedural history of this case and the issue on appeal relates directly to the interpretation of the language in the Supreme Court's order and opinion. Accordingly, the Supreme Court is in the better position to decide both the issue raised in the motion to dismiss and the merits of the appeal should the motion to dismiss be denied.

For these reasons, the motion to transfer the case should be granted.

SOWELL GRAY STEPP & LAFFITTE, LLC

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Attorneys for Respondent Nexsen Pruet LLC

November 21, 2016
Columbia, South Carolina

Exhibit B to Reply

Appellate Case No. 2016-001632

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas for the Ninth Circuit

The Honorable Thomas Russo, Circuit Court Judge

CASE NO. 2011-CP-10-05774
APPELLATE CASE NO. 2016-001632

PAVILION DEVELOPMENT CORP. & LARRY MCNAIR,.....Plaintiff/ Appellant,

v.

NEXSEN PRUET, LLC.....Defendant/ Respondent,

AND

DC & SONS, LLC .....Counterclaim Defendant.

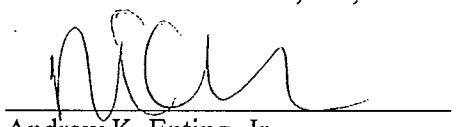
APPELLANTS' CONSENT TO RESPONDENT'S MOTION TO TRANSFER

Appellants Pavilion Development Corp. ("Pavilion") and Larry McNair consent to the motion to transfer pursuant to Rule 204(b) SCACR and agree that the case should be transferred as the sole issue on appeal is whether the lower court erred in its interpretation of this Court's order dated September 3, 2015 entered in this case. Appellants also agree that this Court should decide the motion to dismiss filed by Nexsen Pruet (Opposition Attached hereto) because the motion involves the meaning and effect of this Court's decisions.

[signature on following page]

Respectfully submitted by:

ANDREW K. EPTING, JR., LLC



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On this 12 day of December, 2016
Charleston, SC

Exhibit C to Reply

Appellate Case No. 2016-001632

ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas for the Ninth Circuit

J.C. Nicholson, Jr. Circuit Court Judge

Case No.: 2011-CP-10-5774
Appellate Case No.: 2013-002796

Pavilion Development Corp. & Larry McNair,
Appellants,

v.

Nexsen Pruet, LLC, Defendant

v.

DC & Sons, LLC, Counterclaim Defendant,

Of Which Nexsen Pruet, LLC is the Respondent.

FINAL BRIEF OF APPELLANT

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ATTORNEYS FOR APPELLANT

McNair, both former clients of Nexsen Pruet could proceed as pled. The invalidity of the assignment does not undermine the validity of the malpractice claim, and this comports with the general law of assignment. See 6 AM. JUR. 2D Assignments § 155 (2004).See also *Postal Instant Press v. Jackson*, 658 F. Supp. 739, 741 (D. Colo. 1987) ("Once an assignment is made, all interests and rights of the assignor are transferred to the assignee. However, if the assignment is invalid or incomplete, the assignor may maintain a suit in his own name.")

Someone should have the right to bring the claim as the law abhors a wrong without a remedy. *See State ex rel. Daniel v. Strong*, 185 S. C. 27, 43, 192 S. E. 671, 678 (1937). If the lower court's order is affirmed, no party has the ability to sue Nexsen Pruet for its malpractice.

CONCLUSION

The assignment at issue was one of proceeds and not claims, and in any event does not violate the public policy of this state. Appellants respectfully request that if this Court finds fault with the assignment, that it be voided, but the case otherwise be allowed to proceed as even a dismissal without prejudice will result in Nexsen Pruet claiming the statute of limitations has run even though the new suit without the assignment would be filed in the names of the now Plaintiffs.

[signatures on following page]

ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas for the Ninth Circuit

J.C. Nicholson, Jr. Circuit Court Judge

Case No.: 2011-CP-10-5774
Appellate Case No.: 2013-002796

Pavilion Development Corp. & Larry McNair,
Appellants,

v.

Nexsen Pruet, LLC, Defendant

v.

DC & Sons, LLC, Counterclaim Defendant,

Of Which Nexsen Pruet, LLC is the Respondent.

FINAL REPLY BRIEF OF APPELLANT

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assignment would be void, but the underlying action would survive."); *Kommavongsa v. Haskell,* 149 Wash.2d 288, 318, 67 P.3d 1068, 1083 (2003) (Holding the proper remedy for an invalid assignment of a legal malpractice claims is to void the assignment and allow the legal malpractice lawsuit to "proceed in the normal course, as between the proper parties thereto."; See also *Joos v. Drillock,* 127 Mich. App. 99, 100, 338 N.W.2d 736, 737 (1983).

CONCLUSION

The assignment at issue was one of proceeds and not claims, and in any event does not violate the public policy of this state. Appellants respectfully request that if this Court finds fault with the assignment, that it be voided, but the case otherwise be allowed to proceed as even a dismissal without prejudice will result in Nexsen Pruet claiming the statute of limitations has run even though the new suit without the assignment would be filed in the names of the now Plaintiffs.

Respectfully Submitted By:

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By _____

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Attorneys for Appellants

Dated this 3 day of November, 2014
Charleston, South Carolina

Exhibit D to Reply

Appellate Case No. 2016-001632

STATE OF SOUTH CAROLINA — COURT OF COMMON PLEAS

COUNTY OF CHARLESTON — 2011-CP-10-05774

PAVILION DEVELOPMENT CORP. & LARRY MCNAIR,

PLAINTIFFS,

VS.

NEXSEN PRUET,

DEFENDANT.

TRANSCRIPT OF RECORD

MARCH 30, 2016
CHARLESTON, SC

B E F O R E:

HONORABLE J.C. NICHOLSON, JUDGE.

A P P E A R A N C E S:

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Attorney for the Plaintiff

ELIZABETH VAN DOREN GRAY, ESQUIRE
TINA CUNDARI, ESQUIRE
Attorneys for the Defendant

Ruth C. Weese, RDR
Official Court Reporter
Ninth Judicial Circuit

don't think that's correct. I don't think the Supreme Court has dumped this issue back in your lap.

THE COURT: What does that last sentence mean? That's my question. I'm not sure Mr. Epting is not right in his interpretation of what it means.

MS. CUNDARI: That sentence needs to be read consistently with the opinion which dismisses the case without prejudice. So you can do that by saying yes, that motion perhaps is to be heard, those issues, that motion about whether the statute of limitations applies, whether a real party interest is really suing now. But not this court in this case. By another trial court on another day in a new case. They have a remedy. Their remedy is filing a new case.

THE COURT: But they really don't because the statute has run.

MS. CUNDARI: We haven't even gotten there yet. We haven't even raised that defense yet. We are sort of getting ahead of ourselves. Until they file a new case as the real parties in interest we submit represented by new counsel who are independent. As you know this case, this very

issue was argued at the Supreme Court in both briefs. The opening brief that they filed as well as their reply brief. They said court, do not -- if you dismiss this case without prejudice it will essentially end the case. You know what the Supreme Court said? Dismissal without prejudice. So that's what you're bound by, Your Honor, is the Supreme Court opinion. The remitter does not attach that order. It only attaches the opinion saying dismissal without prejudice. This case is over.

THE COURT: What's your interpretation of that sentence there?

MS. CUNDARI: My interpretation of that sentence is that the issues raised in that motion are for the trial court on another day in another case. That's the only way it can be read to be consistent with dismissal without prejudice.

THE COURT: Assuming Mr. Epting is right, I think he has got a motion to amend the complaint as well as add substitute parties, I believe it is a substitute parties motion, right?

MR. EPTING: Yes, sir.

THE COURT: Obviously you want to substitute a real party in interest?

Exhibit E to Reply

Appellate Case No. 2016-001632

STATE OF SOUTH CAROLINA	) COURT OF COMMON PLEAS
	)
COUNTY OF CHARLESTON	) Case No(s).:2011CP1005774
	)
Pavilion Development Corp.,	)
	)
Plaintiff,	)
	)
-VS-	) TRANSCRIPT OF RECORD
	)
Nexsen Pruet, LLC,	)
	)
Defendant.	)
	)

June 02, 2016
Charleston, South Carolina

B E F O R E:

HONORABLE THOMAS A. RUSSO, Judge.

A P P E A R A N C E S:

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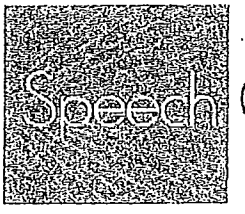
Attorney for the Plaintiff

TINA M. CUNDARI, Esquire
Attorney for the Defendant

Teresa B. Johnson, CVR-M, CM
Certified Court Reporter
P.O. Box 2812
Greenville, S.C. 29602

Records are taken and produced via



matter how I rule, if I rule this way, you're going to appeal this decision.

MR. EPTING: Yes.

THE COURT: Should.

MR. EPTING: Yes.

THE COURT: If I rule your way, they're going to appeal this decision. They should. So the Court is going to have to deal with it.

MR. EPTING: Well, let me ask this question, Judge. Two cases were tendered to you and I know you are a busy man, but Rule 15 says that if -- an amendment should be allowed because justice requires it.

THE COURT: Let me stop you there. If it wasn't a situation that I've got to deal with where I've got a court who affirmed a summary judgement, which, as we all know, ends the case, and I'm being asked to ignore that and to allow the case to go forward and grant the amendment, but for that, you're absolutely right. I don't even think we're here. I don't think they're going to oppose your Rule 15 motion. You're absolutely entitled to it. That's not -- it's not that simple. It's not that easy, as you know. So you are entitled to

Rule 15, but for all this other stuff you have here.

MR. EPTING: Yeah. Well, Judge, I -- as I have said, I have no idea.

THE COURT: I don't either.

MR. EPTING: I just would say to you if you are reading tea leaves about what did they intend ---

THE COURT: I know.

MR. EPTING: --- don't have you have to come back to the last tea leaf and they say this motion, the one I gave you, that they filed, should be heard before the trial court. And if they didn't intend that you have any authority to do that, why would they say you have to hear it first? Once we get to you have to hear it first, aren't we really back to just the question isn't this just a simple Rule 15?

I mean, I understand, Judge. I've understood it. I believe when we filed what I call the *Spence* motion, that they would solve all this, but they didn't, and so lucky people like you gets stuck with it. Thanks for your time, Judge.

THE COURT: Thank you, sir.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Thomas Russo, Circuit Court Judge

RECEIVED
MAR -6 2017
S.C. SUPREME COURT

Appellate Case No. 2016-001632
Case No. 2011-CP-10-5774

Pavilion Development Corp. & Larry McNair ..... Appellants,

v.

Nexsen Pruet, LLC..... Respondent,

v.

DC & Sons, LLC..... Counterclaim Defendant.

PROOF OF SERVICE

I certify that on March 6, 2017, I served the Reply in support of motion to dismiss by electronic mail on the following:

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March 6, 2017