STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Larry B. Hyman, Jr., Circuit Court Judge

Appellate Case No. 2018-001159

Shaul Levy and Meir Levy,.....Respondents,

v.

Carolinian, LLC,.....Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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The Respondents respectfully submit this Return in opposition to Carolinian, LLC's Petition for Writ of Certiorari.

STATEMENT OF THE CASE

This is the second appeal arising from a dispute between the Respondents Shaul Levy and Meir Levy ("the Levys") and the Petitioner Carolinian, LLC, ("Carolinian"). The dispute stems from Carolinian's attempt to compel the Levys to sell the distributional interest in Carolinian that they obtained from Bhupendra Patel ("Patel") following a judicial foreclosure sale. In the first appeal, this Court interpreted the controlling law and ruled that Carolinian could not force the Levys to sell their distributional interest. The current appeal stems from an Order filed by the circuit court following this Court's remand of the case.

Despite Carolinian's suggestion to the contrary, the parties have not spent the time since this Court's decision arguing about what that decision means. The opinion and its ramifications were perfectly clear, as both the circuit court and the Court of Appeals have recognized. It is only Carolinian that has consistently refused to accept the impact of this Court's decision. That is the sole reason for this second appeal.

STATEMENT OF THE RELEVANT FACTS

Although the case has appeared in this Court once before on a completely different issue, it may be helpful to summarize what has already happened in the case and how this second appeal came about.

A. Original Trial Dispute

The Levys filed their Summons and Verified Complaint on July 23, 2012. The Complaint alleged the following causes of action: (1) declaratory judgment, and (2) a temporary restraining order and temporary and permanent injunction. [Appx. pp. 43-77.] On or around the

same date, the Levys also filed a request for a temporary restraining order and temporary injunction. [Appx. pp. 43-77.]

The Honorable Benjamin H. Culbertson signed an Order granting the Levys' Motion for a Temporary Restraining Order and Rule to Show Cause on July 27, 2012. Subsequently, Carolinian agreed to a temporary restraining order and/or injunction while the litigation was ongoing. As a result, the Honorable Larry B. Hyman signed a Consent Order on August 16, 2012, granting the Levys' motion for a temporary restraining order and injunction during the pendency of the case. [Appx. p. 15-16.]

Carolinian filed a Summons, Answer and Counterclaim on August 17, 2012. The Answer and Counterclaim denied the Levys' claims and requested a declaratory judgment as to its rights. [Appx. p. 79.] On August 31, 2012, the Levys filed a Reply to Carolinian's Answer and Counterclaim, in which the Levys denied Carolinian's entitlement to any judgment or other relief. [Appx. pp. 92-94.]

A non-jury trial took place on January 8, 2012, before the Honorable Steven H. John. The parties submitted a joint Stipulation of Facts for purposes of that trial. [Appx. pp. 236-241.] Both parties presented trial briefs in support of their respective positions. After considering arguments from counsel for both the Levys and Carolinian, Judge John took the matter under advisement. On January 23, 2013, Judge John issued an Order denying the Levys' requests for a declaratory judgment and a permanent injunction and granting declaratory relief in Carolinian's favor ("Judge John's Trial Order"). [Appx. pp. 17-26.] Judge John based his ruling on a legal conclusion that Carolinian's Operating Agreement permitted it to force a sale of the distributional interest the Levys had obtained from Patel via foreclosure. Due to that threshold ruling, the judge did not address the merits of the Levys' claims for injunctive relief.

The Levys filed a Rule 59(e) motion On February 4, 2013. [Appx. pp. 95-107.] The motion essentially asked Judge John to reconsider and reverse his previous decision. The Levys also filed a motion pursuant to Rule 62(b), SCRCP, requesting that the circuit court stay proceedings to enforce the judgment granted in Judge John's Trial Order. [Appx. pp. 81-90.] On February 15, 2013, Carolinian filed a Memorandum in Opposition to the Levys' Motion to Reconsider and Motion for Stay. [Appx. pp. 112-122.] The judge denied these motions by an order filed on February 22, 2013. The Levys then filed a timely appeal of Judge John's Trial Order.

On March 22, 2013, the Levys filed a Rule 62(c) motion. Roughly two weeks later, the Honorable Benjamin H. Culbertson filed a consent order granting that motion and restoring the Honorable Larry B. Hyman's Order granting TRO and Injunction during the pendency of the appeal. [Appx. pp. 28-30.]

B. <u>First Appeal</u>

The issue for the Levys' appeal was the trial court's determination that Carolinian could compel the purchase and sale of the Levys' distributional interest in Carolinian that they obtained from Carolinian's member, Bhupendra Patel, following a judicial foreclosure sale. After certifying the case for direct review, this Court conducted oral arguments on June 25, 2014. On September 3, 2014, the Court issued its opinion, *Levy v. Carolinian, LLC*, 410 S.C. 140, 763 S.E.2d 594 (2014), which reversed the trial court's ruling and found in the Levys' favor on the controlling legal issue. [Appx. pp. 31-38.] Carolinian filed a petition for rehearing, which the Court denied in an Order dated October 24, 2014. [Appx. pp. 39-40.] The Court then remitted the case to the Horry County Clerk of Court. [Appx. p. 41.]

C. Second Trial and Appeal

After the remittitur, the Horry County Clerk of Court's office originally placed the case on the non-jury trial roster for the week of January 5, 2015. However, during the roster meeting for this term, Judge John announced he would not hear any further argument on the case since he had ruled on the original trial dispute, and he decided to continue the matter to another term so that a different judge could handle the case. Neither side moved to dismiss the action at that roster meeting or at any subsequent time. Eventually, the case was scheduled for the non-jury term of court before the Honorable Larry B. Hyman during the week of May 12, 2015.

On May 12, 2015, Judge Hyman conducted a bench trial based on the same stipulated facts submitted at the original trial. After hearing arguments from counsel, Judge Hyman entered an Order granting the Levys some, but not all, of the injunctive relief they requested in their Verified Complaint. [Appx. p. 6-8.] On June 16, 2015, Carolinian filed a Motion for Reconsideration. [Appx. pp. 161-169.] Judge Hyman held a hearing on Carolinian's motion on November 15, 2015, and denied the motion in an Order filed on December 8, 2015. [Appx. pp. 9-14.] Carolinian responded by filing a timely notice of appeal.

The parties submitted briefs, and the South Carolina Court of Appeals conducted oral arguments on November 7, 2017. Four months later, on March 7, 2017, the Court of Appeals issued a unanimous, unpublished opinion (#2018-UP-099) in which it affirmed the trial court's decision in full. [Appx. pp. 310-313.] Carolinian filed a Petition for Rehearing on March 22, 2018. [Appx. pp. 314-323.] The Court of Appeals unanimously denied that petition in an Order filed on May 24, 2018. [Appx. pp. 343-344.] Carolinian then filed the current petition on June 21, 2018.

ARGUMENT

I. The Court of Appeals' decision does not warrant review by this Court under the standards set forth in Rule 242, SCACR.

According to the South Carolina Appellate Court Rules, "[a] writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR (emphasis added). The rule goes on to list five situations in which the granting of a writ of certiorari usually occurs. Those situations include cases where: (1) there are novel questions of law; (2) there is a dissent in the decision of the Court of Appeals; (3) the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court; (4) substantial constitutional issues are directly involved; and (5) a federal question is included, and the Court of Appeals' decision conflicts with a decision of the United States Supreme Court. Rule 242(b), SCACR. *See also* Toal, Vafai & Muckenfuss, *Appellate Practice in South Carolina* (2nd Ed.) at 276. The present case does not fall into any of those categories, and no "special and important" reason exists for this Court to review the Court of Appeals' decision. Therefore, the petition should be denied.

Four of the factors listed in Rule 242(b) are facially inapplicable and do not require extensive discussion. As Carolinian concedes, this appeal concerns the impact of this Court's previous decision in this specific case. Thus, it does not involve any novel issue of law.[1] In addition, there was no dissent in the Court of Appeals, and the case does not involve any constitutional issues or federal questions. Carolinian has not even argued otherwise. Thus, subsections (1), (2), (4) and (5) of Rule 242(b) are plainly not at issue here.

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[1] The limited number of legal authorities cited in the parties' briefs further demonstrates this point.

This case also does not trigger subsection (3), although that appears to be the basis of Carolinian's petition. Carolinian claims the Court of Appeals' decision "conflicts" with this Court's ruling in the first appeal, but that is not accurate. The notion of "conflict," as contemplated in Rule 242(b), involves disputes of law, and it does not cover the present situation. This Court's holding in the first appeal involved the interpretation of a specific statute. Neither the circuit court nor the Court of Appeals interpreted that statute in a different way. Indeed, the question never arose because this Court's decision fully resolved it. Carolinian cannot credibly dispute this point. What Carolinian really argues is that it disagrees with how the other courts acted in light of this Court's ruling – an issue the Court's opinion did not raise and could not have addressed at that time. Therefore, the Court of Appeals' decision is not in conflict with anything this Court said or did in its opinion.

Granted, the elements listed in Rule 242(b) are not the exclusive bases for granting a writ of certiorari, but no other reasons exist for this Court to review the Court of Appeals' decision. Unlike the first appeal, which involved an issue of first impression regarding the interpretation of a statute, the current appeal has no possible impact on anyone other than the actual parties. The challenged decision involves only the Levys and Carolinian, and they alone have an interest in the case's outcome. Consequently, the Court of Appeals' opinion has no precedential value[2] and does not warrant this Court's attention.

Carolinian has failed to satisfy the threshold burden of demonstrating why this case qualifies for Supreme Court review under Rule 242(b), SCACR. Due to that shortcoming, the Court does not need to examine the merits of the issues Carolinian raises in its petition. Yet,

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[2] As an unpublished decision, the Court of Appeals' opinion already has no precedential value, even if it involved any legal issue that could potentially impact other parties, which it does not.

even if the Court conducts that analysis, the discussion below demonstrates that the petition should still be denied.

II. The second bench trial was necessary.

At the outset, it is important to understand the nature of the case that gave rise to this appeal. This was not a case in which one side asserted claims for relief and the other side merely denied the entitlement to that relief. Instead, both sides requested relief, and the determination of which party was entitled to receive it depended upon a central question of law – *i.e.* whether Carolinian could use the Operating Agreement to compel the Levys to sell the distributional interest they obtained from a Carolinian member pursuant to a statutory foreclosure. This critical question required a legal ruling, and it was the sole issue in the first appeal.

At the original bench trial, the court granted the declaratory judgment Carolinian requested. The trial court reached that result based on its legal decision that Carolinian's Operating Agreement allowed Carolinian to purchase the distributional interest, regardless of whether or not the Levys wanted or intended to sell it. Relying on that legal decision, the trial court determined Carolinian was entitled the relief it sought and the Levys were not. Specifically, the trial court's original Order allowed Carolinian to force the Levys to sell the distributional interest. The trial court did not, therefore, address the merits of the Levys' claims for injunctive relief. Rather, it just stated, in summary fashion, that any such claims were denied. Having decided the central legal issue in Carolinian's favor, the trial court had no reason to go any further or to reach the merits of the Levys' claims. Under the trial court's view of the law, the Levys would be forced to sell the distributional interest and, thus, their claims for injunctive relief became moot.

As a result, there were never any merits rulings on the Levys' claims for relief, and that remained true after this Court reversed the trial court on the legal issue. This meant a second bench trial was necessary, as it was the only way the Levys could obtain the affirmative relief they sought in their pleadings. By conducting the second bench trial, the court was not re-plowing any ground. Instead, the trial court was reaching and deciding issues that were not addressed in the first proceeding due to an error of law. That error concluded the original trial prematurely, which made further proceedings mandatory.

Carolinian claims the trial court did address, or at least rule on, the Levys' claims for relief at the conclusion of the first bench trial. For the reasons set forth above, that assertion is erroneous. Yet, even if the Court were to accept that premise for the sake of argument, it does not lead to the conclusion Carolinian proposes. A second bench trial was necessary regardless.

As this Court determined at the end of the first appeal, a fundamental legal error tainted the original bench trial and the rulings that came from it. The trial court misinterpreted the controlling statute and, based on that misreading, concluded that Carolinian was acting lawfully in its attempts to coerce the sale of the distributional interest. Based on that conclusion, the trial court believed the Levys were not entitled to any relief.

The problem with this argument is obvious. The trial court's basic premise, that Carolinian acted lawfully, was wrong. This Court concluded the applicable statute did not permit Carolinian to force the Levys to sell the distributional share. The Court's correction of that legal error "flipped" the entire case. Based on that ruling, the Levys were the ones entitled to relief, not Carolinian. Thus, even if the judge in the first bench trial did rule on the Levys' claims for relief by denying them, any such rulings were null and void after this Court's decision. The foundation for every decision by the trial court at the first hearing was necessarily its

erroneous interpretation of the statute. When this Court removed that foundation, any other rulings built on it could no longer stand. At that point, the original bench trial ceased to have any effect, and new proceedings were necessary. Thus, no error occurred when the trial court conducted the second hearing after the case was remanded.

To accept Carolinian's position is to conclude that the Levys were correct on the controlling law, but were not entitled to any relief under that law. The trial court rejected that erroneous proposition, and the Court of Appeals correctly affirmed that decision. Carolinian has not identified any reason why those rulings were incorrect or why they present issues of such importance that this Court should review them. Therefore, Carolinian's petition should be denied.

III. The Court of Appeals correctly concluded the trial court had jurisdiction to conduct the second hearing.

Carolinian next claims the Court of Appeals erred in affirming the result below because the trial court lacked "jurisdiction" to conduct further proceedings after this Court's opinion. This is essentially the same position as the one presented in Carolinian's first argument heading, albeit in slightly different terms. Carolinian claims the hearing before Judge Hyman was a "second bite at the apple" for the Levys, but that is not true.

As discussed above, the original hearing before Judge John produced only an erroneous legal ruling, which this Court corrected. The judge never considered the merits of the Levys' requests for affirmative relief, including a permanent injunction. The Levys' Complaint plainly set forth those requests for relief, but the judge did not reach them based on his interpretation of the law. Thus, the Levys never got a first bite at the apple at that original hearing. After the judge ruled against the Levys on the threshold legal issue, that apple was taken away. It did not

reappear until this Court reversed the legal ruling and a second hearing was scheduled. That new proceeding was the Levys' first and only bite at the apple.

Carolinian argues that this Court's decision gave the Levys everything they sought in this action, but that is also inaccurate. This Court found the trial court erred in its interpretation of the controlling law. The Court did not address the ramifications of the correct interpretation on the parties because that issue was not before the Court. The trial court had not ruled on the Levys' request for relief, meaning there was nothing more for this Court to review. As a result, the case necessarily went back to the trial court for further proceedings. This was the only possible outcome because the Levys were still entitled to their day in court for purposes of their claims for injunctive relief. As previously discussed, the only other possibility is an absurd result where the Levys are correct on the law, but not entitled to any relief based on that law. The Court of Appeals' decision prevents that illogical and unfair result.

Despite Carolinian's attempts to characterize it as such, this was not a basic declaratory judgment case in which the parties disagreed about a legal issue and only asked the court to decide which side was correct. The parties certainly disagreed about the controlling law, but the Levys also claimed they were entitled to a permanent injunction based on their interpretation of the law. The injunction is what the Levys really wanted. A favorable ruling on the legal issue was simply the means to that end. Accordingly, this Court's decision was only a first step for the Levys. That decision gave the Levys what they needed in order to get what they wanted. It was then up to the trial court on remand to determine the nature and extent of the injunctive relief to which the Levys were entitled. This is why the second hearing was not just proper but also necessary, which, in turn, demonstrates why the trial court had jurisdiction to proceed. The

Court of Appeals accurately grasped this vital point, and Carolinian's arguments to the contrary are without merit. Therefore, Carolinian's petition should be denied.

IV. A justiciable controversy existed because the parties remained in an adversarial relationship.

Carolinian argued below that no justiciable controversy existed after this Court's decision because there was no longer an adversarial relationship with the Levys. It is not entirely clear that Carolinian has raised that issue in its current petition or that it seeks review of the Court of Appeals' ruling that an adversarial relationship still exists. However, to the extent Carolinian has raised that issue, its arguments must fail.

Carolinian's position on this issue is more than a little suspect given that Carolinian has been engaged in active litigation against the Levys for years and that it continues to fight the Levys in the courts. That undeniable fact alone demonstrates an adversarial relationship, but as the Court of Appeals recognized, all of the circumstances presented in the trial court, taken as a whole, also support that conclusion.

The Levys own the distributional interest associated with Patel's membership in Carolinian. Carolinian would obviously prefer that the Levys did not. This creates a state of perpetual conflict that underlies the parties' relationship, even if it does not always rise to the surface. The existence of this conflict creates a constant risk of Carolinian seeking ways to undermine or circumvent the Levys' ownership of the distributional interest. This is simply the reality the Levys face when a hostile entity is responsible for making any distributions to which the Levys are entitled. The trial court properly acknowledged this point, as did the Court of Appeals.

Carolinian argued below that evidence of some new, active misconduct on its part was necessary at the second trial in order for a "case or controversy" to exist for purposes of the Levys' claims for relief. This assertion is incorrect for several reasons.

First, in touting its supposed good behavior[3] towards the Levys over the long course of this case, Carolinian fails to mention one crucial fact: It has been subject to an order granting a temporary restraining order and injunction during the life of this case. [Appx. pp. 28-29.] This fact not only casts doubt on Carolinian's argument, but it also supports the trial court's decision and the Court of Appeals' affirmance. It is reasonable to conclude that if Carolinian has "behaved" during this case (and, again, the Levys do not concede that point), it has done so because it is subject to a court order. The trial court's rulings after the second bench trial kept the protections of that previous order in place and made them permanent. Thus, the Levys have not been forced to see what Carolinian might do if it were not enjoined from certain types of conduct, and both lower courts properly concluded that the Levys should not have to find out.

Second, the stipulated facts presented at the first hearing, and also at the second, already show an adversarial relationship. If nothing else, those facts demonstrate that the Levys hold an interest related to Carolinian that the latter does not want them to have, and that Carolinian has taken steps to take that interest away from the Levys. Although Carolinian's initial efforts on that front were ultimately unsuccessful, that does not mean the two sides are no longer adversaries. Thus, even without any additional facts, the record for the second hearing still reveals a dispute between the parties. If such a relationship existed at the first trial – which Carolinian appeared to concede in its previous arguments – then it also existed at the second.

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[3] The Levys do not believe Carolinian has acted fairly or in good faith towards them or their interest, and nothing in this argument should be construed as an admission to the contrary. The Levys expressly reserve any and all rights to seek redress for any actionable conduct by Carolinian that has occurred during this case, is still occurring, or may occur in the future.

Third, Carolinian ignores the fact that a "cold war" is still a conflict. Even if the Court were to accept Carolinian's representation that it is not currently taking any overt steps to harm the Levys' interest, that would not make the two sides willing partners, and it certainly would not make them allies. It would not even make them co-existing neutrals. Based on the history shown in the stipulated facts, and reinforced by the length of this litigation, the two sides have been, and will continue to be, adversaries. The order challenged in this appeal was necessary to create a détente, and it remains vital to maintaining and preserving that détente.

Fourth, the record at the second hearing does not contain any evidence that the parties' relationship had changed to any significant degree. At that hearing, counsel for the Levys expressed concern about the potential for Carolinian to abuse its power over the distributional interest if the court did not grant injunctive relief. The court acknowledged this risk and the validity of the Levys' worries. Although Carolinian's attorney stated that his client would obey the law, the context of that representation was somewhat limited. Carolinian's idea of "obeying the law" appears to have been a promise not to do what this Court had already forbidden (i.e. forcing a sale of the distributional interest). But as the arguments in the trial court demonstrate, that one tactic was not the only action Carolinian could take to diminish or otherwise interfere with the distributional interest. The injunctions were aimed not at the "frontal assault" involved in the first appeal, but at other, more covert tactics Carolinian could use. The stipulated facts showed a likelihood that Carolinian would attempt to use such tactics unless the court acted to prevent them, and that remained just as true at the second trial.

An adversarial relationship continues to exist between the parties, as both lower courts correctly recognized. The record is more than sufficient to support that conclusion, and

Carolinian has not presented any compelling reason for further appellate review. Therefore, to the extent this issue is included in Carolinian's petition, the Court should reject it.

V. Carolinian did not preserve its substantive challenges to the injunctions.

Carolinian argued below that the record in the trial court did not support any decision to grant injunctive relief. The Levys argued that Carolinian failed to preserve that issue for review by the Court of Appeals. Carolinian appears to have acknowledged that point by not including any explicit arguments to that effect in its current petition. However, to the extent the petition could be construed as attempting to raise this issue, all such arguments remain unpreserved.

"Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-780 (2004). Here, Carolinian did not assert any substantive challenges to the injunction in the trial court. As the transcript from the hearing on May 12, 2015, demonstrates, Carolinian devoted its entire argument to the proposition that no justiciable controversy existed and the trial court should not issue any kind of order in light of this Court's decision. Those arguments were based on matters of procedure and jurisdiction; they had nothing to do with the substantive issue of whether the record established a need for injunctive relief in the Levys' favor. Carolinian simply did not raise that issue at the hearing following the remand from this Court.

Carolinian previously cited passages from the second hearing and claimed those quotations demonstrate substantive challenges to the injunctions being sought.[4] However, the hearing transcript, taken as a whole, demonstrates that Carolinian's arguments were procedural and jurisdictional, not substantive. But even if anything in that hearing amounted to a

[4] The absence of those record citations from the current petition further supports that argument that Carolinian has abandoned this issue.

substantive challenge, the issue still would not be preserved because the law requires that an issue be raised and ruled upon in the trial court. *Elam, supra.*

Here, the trial court did not rule on any substantive challenges that Carolinian might be deemed to have made. The trial court's Order briefly recounted the action's procedural history and then expressly adopted the reasoning of this Court's decision. The Order then listed the trial court's four declarations and the four parts of the injunction it granted. The trial court did not address any arguments that the injunction lacked a proper factual basis or was otherwise unsupported in the record. Again, the simple reason for this omission is that Carolinian had not previously made those arguments, which meant there was no need for any rulings on them.

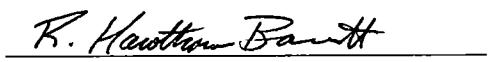
Carolinian also failed to raise this issue in the Rule 59(e) motion it filed in response to the Order. Carolinian might have hinted at the argument during the hearing on the motion, but it never asserted any substantive challenges to the injunction with the requisite specificity. Furthermore, even if the arguments at the hearing had been specific, Carolinian could not properly have asserted them at that juncture, having failed to raise them in the first hearing. *See Dixon v. Dixon*, 362 S.C. 388, 289, 608 S.E.2d 849, 855 (2005) (issue raised for the first time in a post-trial motion is not preserved for appeal).

The Court of Appeals correctly concluded that Carolinian failed to preserve any substantive challenges to the requested injunctive relief, and the current petition does not directly raise this issue. Therefore, to the extent Carolinian's petition seeks further review of this issue, it should be denied.

CONCLUSION

For the reasons stated above, the Court should deny Carolinian's petition and allow the Court of Appeals' decision to remain intact.

Respectfully submitted,



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PROOF OF SERVICE

The undersigned, an attorney in this matter for the Respondents, certifies that I have this **23rd day of July, 2018**, served a copy of the **Return to Petition for Writ of Certiorari** upon counsel for the Petitioner by causing it to be deposited in the United States mail with sufficient postage attached, addressed to: David B. Miller, Esq. and Benjamin A. Baroody, Esq.; Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, P.A.; P.O. Box 357; Myrtle Beach, SC 29578.

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