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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

C.A. No.: 2011-CP-10-00387
Appellate Case No. 2016-001140

PCS Nitrogen, Inc. ..... Appellant,

vs.

Continental Casualty Company, Admiral Insurance Company, United States Fire Insurance Company, ACE Property & Casualty Insurance Company, Certain Underwriters at Lloyd's London, the Aviva Companies, the Winterthur Companies, Certain London Market Insurance Companies, Providence Washington Insurance Company (as Successor in Interest by way of Merger to Seaton Insurance Company, f/k/a Unigard Security Insurance, f/k/a Unigard Mutual Insurance Company), Berkshire Hathaway Specialty Insurance Company (f/k/a Stonewall Insurance Company), Lexington Insurance Company, Starr Indemnity & Liability Company (f/k/a Republic Insurance Company), First State Insurance Company, Century Indemnity Company (f/k/a California Union Insurance Company and Insurance Company of North America)..... Respondents.

PETITION FOR REHEARING

Pursuant to Rule 221, SCACR, Appellant PCS Nitrogen, Inc. ("PCS Nitrogen"), petitions the Court for rehearing of the opinion filed in this case on December 18, 2019. In its opinion, this Court affirmed the trial court's ruling regarding the applicability of the no-assignment clause in the Appellees' insurance policies to bar the assignment by Old Columbia Nitrogen to New

Columbia Nitrogen, PCS's predecessor, of its rights to coverage under insurance policies issued by the Appellees. PCS Nitrogen respectfully submits that Court overlooked or misapprehended the following points[1]:

I. "Loss" in a General Liability Insurance Occurs at the Time of Injury

The Court correctly recognized that the no-assignment clause in a general liability insurance policy does not preclude the post-loss assignment of rights under an insurance policy. *PCS Nitrogen, Inc. v. Cont'l Cas. Co.*, No. 2016-001140, 2019 WL 6884913, at *4 (S.C. Ct. App. Dec. 18, 2019) ("Although the policies included the aforementioned anti-assignment clause, the majority rule is that such clauses are generally only enforceable before a loss occurs."). The Court then addressed the issue: "at what point did the 'loss,' or as stated in the policy, the 'occurrence,' triggering coverage occur?" *Id.* at *5. The Court held that "loss" under the policies could not occur until the insured was subject to a final judgment:

> Because no actions were filed against Old CNC prior to the asset sale with New CNC, the loss insured against—as defined in the terms of these particular policies—had not yet occurred, and thus no vested claims existed.

Id.

In reaching its holding, the Court misapprehended South Carolina precedent, ignored the overwhelming majority of jurisdictions' holdings, and misconstrued the insurance policies at issue here.

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[1] PCS Nitrogen incorporates its Appellant's Brief and Reply Brief by reference herein. PCS Nitrogen believes each of its arguments should have been addressed and analyzed by this Court.

A. The Court misapprehended the reasoning of the Supreme Court in *Narruhn*.

The Court's holding misapprehended the Supreme Court's reasoning in *Narruhn v. Alea London Ltd.*, 745 S.E.2d 90, 94 (S.C. 2013). *Narruhn*'s discussion of anti-assignment clauses—and whether such clauses prohibit post-loss assignments—was focused on risk to the insurer. Risk is determined by the events giving rise to the insurer's liability—not the amount of a future verdict or judgment. The Supreme Court adopted this rationale by relying on the following explanation from *Couch on Insurance*:

> [T]he great majority of courts adhere to the rule that general stipulations in policies prohibiting the assignments of the policy, except with the consent of the insurer, apply only to assignments before loss, and do not prevent an assignment after loss, for the obvious reason that the clause by its own terms ordinarily prohibits merely the assignment of the policy, as distinguished from a claim arising under the policy, and the assignment before loss involves a transfer of a contractual relationship while the assignment after loss is the transfer of a right to a money claim. The purpose of a no assignment clause is to protect the insurer from increased liability, and **after events giving rise to the insurer's liability have occurred, the insurer's risk cannot be increased by a change in the insured's identity."**

Narruhn v. Alea London Ltd., 745 S.E.2d 90, 94 (S.C. 2013) (quoting 3 *Couch on Insurance* 3d S 35.8 (2011 Rev. Ed)) (emphasis added).

By quoting the above section of *Couch* and the cases cited therein, the Supreme Court recognized that "loss" equates to the "events giving rise to the insurer's liability," not, as the Court found here, a final judgment or agreement establishing the insured's liability. The rule in *Narruhn* makes sense: Once the events giving rise to liability have occurred, the risk facing the insurer is the same regardless of whether or not the policy rights were assigned to another party.

The *Narruhn* court also relied on *Illinois Tool Works, Inc. v. Commerce & Indus. Ins. Co.*, 962 N.E.2d 1042 (Ill. App. Ct. 2011). The court in *Illinois Tool Works* adopted the same rationale about risk articulated in *Couch*: "The risks do not change or increase after the period

expires or if an assignee rather than the named insured seeks coverage for losses. The final dollar amount of the defense/liability might be in question under a third-party policy but the underlying risk is the same." *Id.* at 1054. Based on that reasoning, the court in *Illinois Tool Works* held that the "loss" was not a final judgment or the filing of a lawsuit; rather, "loss" was the event giving rise to coverage:

> [W]e find the "loss" here was not the Enssle suit, which was filed in 2003 and a defense to which could, therefore, not have been assigned in 1998 since the suit did not yet exist. Rather, the loss was Binks' contamination of the Enssles' property, an occurrence for which Binks had bought defense and indemnification coverage.

Id. at 1055. The Supreme Court's guidance in *Narruhn* shows that "loss" happens when events give rise to the insurer's liability. The Court ignored *Narruhn*'s guidance on post-loss assignments. Under the reasoning of *Narruhn*, the assignment of coverage rights here was valid because the events giving rise to coverage had occurred before the assignment and the risk to the insurers was fixed.

B. The Court ignored the overwhelming majority of cases addressing the post-loss assignment of insurance rights.

Narruhn is not alone. Nearly all courts have held that the relevant event giving rise to coverage is the event from which the loss arises, not an entry of a judgment fixing the amount of damage for that event. Most recently, the Supreme Courts of California and New Jersey addressed this precise issue, both courts explicitly holding that "loss" occurs at the time of injury or property damage, and both courts repudiated the argument that a final dollar amount must be fixed to be assignable.

In *Fluor Corp. v. Superior Court*, 354 P.3d 302 (Cal. 2015), the California Supreme Court surveyed the law throughout the United States and noted the majority rule that "loss" occurs at the time of injury or property damage:

> [T]he majority common law rule that under third party liability policies, "loss" arises at the time of the "occurrence" that results in injury or damage, even though the dollar amount of that loss may be unknown and unknowable until much later, and allow assignment of the right to invoke coverage at any time after that loss.

Fluor Corp. v. Superior Court, 354 P.3d 302, 332 n.51. In *Fluor*, the court also noted, in a discussion of past cases, that "we repeatedly employed and equated the term 'loss,' not with a judgment or settlement for a sum of money ... but as synonymous with occurrence of bodily injury and property damage.... Plainly ... we did not contemplate that loss occurred only upon judgment or approved settlement for a sum of money." *Id.* at 328–29 (citing *Montrose Chem. Corp. v. Admiral Ins. Co.*, 913 P.2d 878 (Cal. 1995)).

The New Jersey Supreme Court also held that "loss" occurs at the time of the event giving rise to coverage. *Givaudan Fragrances Corp. v. Aetna Cas. & Sur. Co.*, 151 A.3d 576 (N.J. 2017). The court in *Givaudan* rejected the insurers' argument that "a post-loss claim becomes assignable only when there has been a judgment against the insurer or a settlement between the insured and the insurer." *Id.* at 582. The court held instead that a loss occurs when the event giving rise to coverage takes place:

> We begin by noting that the policies at issue are occurrence policies. They provide coverage based upon liability for an occurrence to which the policy applies. . . . As such, the relevant event giving rise to coverage is the loss event, not the entry of a judgment fixing the amount of damage for that event.

Id. at 591. This conclusion, as in *Narruhn*, was based on an analysis of risk to the insurer: "[P]ost-loss assignments do not further the purpose of the anti-assignment clause, which is to protect the insurer from increased liability, because, after the events giving rise to the insurer's liability have occurred, the insurer's risk cannot be increased by a change in the insured's identity." *Id.* at 591 (internal quotations marks and citations omitted). The court explained:

> Here, the right to insurance coverage for the "occurrence" of environmental contamination was assigned to Fragrances after the policies had expired. The loss event occurred during the policy periods. The risk of exposure that was contractually undertaken by the insurer occurred prior to the assignment, and it occurred due to the actions or inactions of the entity that the insurer insured when that loss event occurred. Accordingly, we hold that this assignment after the insured-against occurrence took place and after the conclusion of the policy period is an assignment of a post-loss claim.

Id. at 591–92 (internal citations omitted). In reaching this result, the *Givaudan* court explicitly held that it did not matter that the assigned post-loss claims had not been "reduced to judgment." *Id.* at 592 ("The fact that the environmental claim will require time to sort out liability and damages resulting therefrom does not alter our conclusion. Other claims involving losses that have occurred, but which cannot be determined with precision, do not alter the conclusion that the assignment must be honored.").

Nearly all courts nationwide have held that an assignment of insurance rights is valid if it takes place after the event giving rise to coverage—even if the liability has not been reduced to a judgment. *See In re Viking Pump, Inc.*, 148 A.3d 633, 652 (Del. 2016) ("The Excess Insurers' potential liability arose at the time of injury. That the precise amount of liability was not identifiable at the time of assignment did not alter the Excess Insurers' obligation to insure the risks for which they contracted."); *Illinois Tool Works,* 962 N.E.2d at 1055 ("[W]e find the 'loss' here was not the Enssle suit, which was filed in 2003 and a defense to which could, therefore, not have been assigned in 1998 since the suit did not yet exist. Rather, the loss was Binks' contamination of the Enssles' property, an occurrence for which Binks had bought defense and indemnification coverage."); *Williams v. Am. Sec. Ins. Co.,* No. 16-6254, 2017 WL 4347673, at *2 (E.D. Pa. Sept. 29, 2017) ("The assignable right accrues at the date of loss, even though payment may not yet be due.").

As recognized in *Narruhn*, the focus is on risk, not on the amount of any future verdict. *See Public Utility Dist. No. 1 of Klickitat County v. International Ins. Co.*, 881 P.2d 1020, 1027 (Wash. 1994) ("After the events giving rise to the insurer's liability have occurred, the insurer's risk cannot be increased by a change in the insured's identity. The assignments in this case occurred long after the activities giving rise to liability."); *Illinois Tool Works,* 962 N.E.2d, at 1054 ("The risks do not change or increase after the period expires or if an assignee rather than the named insured seeks coverage for losses."); *In re Archdiocese of Saint Paul & Minneapolis*, 579 B.R. 188, 201(Bankr. D. Minn. 2017) ("Allowing an insured to assign its right to the proceeds of an insurance policy after a loss has occurred does not hurt the insurer or increase its financial exposure because its obligation become fixed when the loss occurred."); *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.* 861 N.E.2d 121, 129 (Ohio 2006) ("The losses are fixed at the time of the occurrence. We see no reason to deviate from the standard rule on this issue, and thus we hold that the chose in action as to the duty to indemnify is unaffected by the anti-assignment provision when the covered loss has already occurred."); *Parker's Classic Auto Works, Ltd. v. Nationwide Mut. Ins. Co.*, 215 A.3d 1084, 1086 (Vt. 2019) ("An anti-assignment clause is meant to protect the insurer from unaccounted risk posed by an assignee, designated unbeknownst to the insurer, before a covered loss occurs."); *Egger v. Gulf Ins. Co.*, 903 A.2d 1219, 1229 (Pa. 2006) ("Accordingly, we determine that whether or not the assignment was made prior to the jury verdict is irrelevant, as the obligation of Gulf to provide excess coverage, in the event of damages exceeding the limits of the primary policy, arose on the date of the occurrence in 1997. The assignment changed only the identity of the party who was entitled to recover under the Gulf policy, in the event an excess verdict was obtained.").

For courts adhering to the majority rule[2]—that post-loss assignment can be made in spite of anti-assignment clauses—only one jurisdiction has interpreted "loss" in a similar manner to the Court here. The one outlier is the Indiana Supreme Court. *See Travelers Cas. & Sur. Co. v. United States Filter Corp.*, 895 N.E.2d 1172, 1180 (Ind. 2008) (holding that "for an insured loss to generate an assignable coverage benefit, the loss must be identifiable with some precision"). This Court relied on *Travelers* in reaching its decision, but courts across the country have rejected the reasoning and holding of *Travelers*. It has not been adopted by any out-of-state courts since it was decided. *See Givaudan*, 151 A.3d at 590 ("[I]n the years since *Traveler's Casualty* was decided, no out-of-state case has followed its holding that a "loss must be identifiable with some precision and must be fixed, not speculative."); *Fluor*, 354 P.3d at 327 n.46 ("In the intervening nearly seven years, this aspect of the Indiana Supreme Court's decision has been followed by no out-of-state decision and by only one lower court of that state, in related litigation.").[3]

The Court's reliance on *Traveler's* was misplaced, as was its failure to acknowledge the vast majority of cases that equate "loss" with the event giving rise to coverage.

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[2] A small minority of states "enforce consent-to-assignment clauses even more strictly ... by failing to recognize any post-loss exception to those clauses (even, apparently, as to claims that ... have been reduced to a money judgment)." *Fluor*, 354 P.3d at 327 n.46 (citing four cases from minority jurisdictions). The South Carolina Supreme Court—and this Court's own decision here—have opted for the majority rule that permits post-loss assignment of insurance coverage benefits. *PCS Nitrogen, Inc.*, 2019 WL 6884913, at *4.

[3] This Court also inappropriately relied on *Del Monte Fresh Produce (Hawaii), Inc. v. Fireman's Fund Ins. Co.*, 183 P.3d 734, 746–47 (Haw. 2007), a case from the minority of jurisdictions that rigidly enforce consent-to-assignment clauses and prohibit even post-loss assignments without insurer consent. This Court's opinion—relying on *Narruhn*— rejected the minority view and stated that "the majority rule is that [anti-assignment] clauses are generally only enforceable before a loss occurs." *PCS Nitrogen, Inc.*, 2019 WL 6884913, at *4. Given this rejection of the minority view, it is unclear what value *Del Monte* can have to the Court's conclusion.

C. The Court misconstrued the policies at issue.

The Court misinterpreted the policies' no-action clause. Under the policies, the no-action clause does not require the insurer to pay third-party claimants until there has been a final judgment against the insured:

> No action shall lie against the company, unless, as condition precedent thereto, there shall have been full compliance with all of the terms of this policy, *nor until the amount of the insured's obligation to pay shall have been finally determined by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.*

Id. at *4. This Court misconstrued that clause to mean that a "loss" equates to a final judgment: "Old CNC was not entitled to coverage '*until the amount of the insured's obligation to pay shall have been finally determined by judgment against the insured....*'" *Id.* at *5. The Court's interpretation is wrong for three reasons.

First, the Court's seeming truism is incorrect as a matter of insurance law: the insured is entitled to coverage, such as for defense costs, before there is a final judgment. *See* 7A Couch on Ins. § 105:8A ("A no-action clause does not bar an insured's cause of action against the insurer for failure to defend the injury action....").

Second, the provision is not relevant to the issue of when "loss" occurs under the policies. The above-quoted provision was a standard no-action clause in the 1973 standard Insurance Services Office, Inc. (ISO) CGL policy. Insurance Coverage of Construction Disputes § 5:9 (2d ed.). The provision was intended to:

- "prevent the damaged third party from suing the insurer directly";
- "to prevent the insured from making collusive settlements with the damaged party at the expense of the insurer"; and
- "to avoid prejudicing the defense of the case by allowing the jury to know that the insured has coverage."

Id.

The South Carolina Supreme Court has explained that a no-action clause merely limits the ability of third parties—those injured by the insured—from recovering against the insurer until a final judgment has been reached in a suit between the insured and the third party. *Sexton v. Harleysville Mut. Cas. Co.*, 130 S.E.2d 475, 479 (S.C. 1963) (explaining that "the recovery of a judgment against the insured was a condition precedent to [a third-party injured party's] right of recovery against the insurer," and therefore "***the injured party had no right*** of action by garnishment to proceed against the insurer to collect under the policy, without obtaining a judgment ***against the insured***." (emphasis added)). *See also Paxton & Vierling Steel Co. v. Great Am. Ins. Co.*, 497 F. Supp. 573, 582 (D. Neb. 1980) ("The typical no action clause is pertinent only in regulating direct actions brought by claimants against insurance companies on the basis of the insured's liability."). The no-action clause does not relate to when "loss" occurs.

Third, the Court's interpretation conflates the timing of payments—when an insurer is obligated to pay for loss—with when "loss" occurs. Other courts have rejected similar attempts by insurers to link timing of final judgment with the date of loss. *Givaudan*, 151 A.3d at 582 (rejecting insurers' argument that "a post-loss claim becomes assignable only when there has been a judgment against the insurer ...."); *In re Viking Pump, Inc.*, 148 A.3d at 652 (Del. 2016) ("We do not find persuasive the Excess Insurers' argument that the anti-assignment provisions bar the transfers because 'the asbestos personal-injury claims for which Viking and Warren now seek coverage were in no sense "fixed" or "measurable" at the time of the purported assignments because they had yet to be asserted.'"); *Arrowood Indem. Co. v. Atl. Mut. Ins. Co.*, 96 A.D.3d 693, 695 (N.Y. App. Div. 2012) ("Travelers' contention—that since the plaintiffs in the

underlying action did not sue until after the sale, no 'chose in action' existed at the time that could have been assigned by St. Louis to Kerry—is unavailing.").

Courts hold that "loss" occurs at the time of injury regardless of when payment may be due. *See, e.g., One Call Prop. Servs. Inc. v. Sec. First Ins. Co.*, 165 So. 3d 749 (Dist. Ct. App. 2015). In *One Call*, the insurer relied on a policy provision that "[l]oss will be paid" after "entry of a final judgment" to argue that "at the time the assignment was executed, the insured had nothing to assign because at that time there were no benefits due and owing to the insured under the policy." *Id.* at 753–54. The court held that the "provision falls far short of creating a contractual bar to assignment" because the provision "merely addresses the timing of the payment." *Id.* at 754. The court therefore held "that an assignable right to benefits accrues on the date of the loss, even though payment is not yet due under the loss payment clause." *Id.* The no-action clause here was not a bar to assigning coverage rights *after* the events giving rise to coverage.

II. The Court Misunderstood the Factual Evidence Regarding the Assignment of Certain Policies with Consent of the Insurer and Improperly Made Factual Findings

Narruhn, the other courts across the country, and the commentators have all recognized that the transfer of a currently in-force insurance policy cannot be effective without the insurer's consent. *See Narruhn*, 745 S.E.2d at 94. To allow such an assignment would change the risk for which the insurer had contracted. *Givaudan*, 151 A.3d at 583 ("[A]nti-assignment clauses aim to prevent the insurer from bearing an unanticipated risk...."). The record evidence here demonstrates that Old CNC sought the consent to assignment from an insurer whose policy was in effect at the time of the asset transfer. Yet the Court appears to rely on the request for consent and a closing checklist as evidence that New CNC believed it needed insurer consent to assign rights under policies that had expired before the date of the asset transfer. *PCS Nitrogen*, 2019

WL 6884913, at *2 ("Prior to the closing of the asset sale, Old CNC composed a checklist of tasks that needed to be completed before or on the date of closing."). The Court misapprehended the evidence about which there is no record testimony. The Court's mention of and possible consideration of that evidence is improper.

III. If PCS Is the Successor to Old CNC by De Facto Merger, the Policies Would Transfer by Operation of Law

At the trial court, PCS Nitrogen argued that the issue of de facto merger raised issues of fact which precluded summary judgment. Nevertheless, the trial court granted summary judgment on the basis of its determination that PCS Nitrogen was not the de facto successor to Old CNC, despite that fact that the United States District Court had previously held that PCS Nitrogen *was* the de facto successor to Old CNC.[4] PCS Nitrogen argued that questions of fact precluded summary judgment. As discussed in PCS Nitrogen's principal brief, the fact that PCS Nitrogen assumed liabilities *supports* the finding of de facto merger. Appellant's Final Br. at 20. The trial court held the opposite and, in so doing, misstated the holdings of the cases it cited. *Id.*

In footnote 7 of this Court's opinion, the Court stated that it is declining to address the argument that PCS Nitrogen succeeded to Old CNC's insurance rights as the de facto successor to Old CNC. The Court asserted that "the cases PCS Nitrogen cites do not address the question of insurance coverage, and it is unclear how a finding of successor liability under a de facto merger theory would provide access to coverage rights under Respondents' policies." *PCS Nitrogen*, 2019 WL 6884913, at *5 n.7. The Court's statement misunderstands the argument. The issue of the transfer of insurance coverage is not complicated. If PCS Nitrogen is the successor to Old CNC, then all the rights and obligations of Old CNC would transfer to PCS

[4] The de facto merger issue was not decided by the Fourth Circuit.

Nitrogen, including its rights to insurance coverage. 19 C.J.S. Corporations § 899 ("A new corporation created by consolidation or merger succeeds to all the rights, powers, and privileges of the original corporations, including causes of action and contract rights."). Since this is a basic principle of corporate law, PCS Nitrogen did not believe it necessary to identify cases specifically applying the principle to the insurance context. But such cases do exist. *See, e.g., Total Waste Mgmt. Corp. v. Commercial Union Ins. Co.*, 857 F. Supp. 140, 150 (D.N.H. 1994) (explaining that "courts have found insurance coverage is transferred by operation of law" because "a surviving corporation in a merger transaction succeeds to the rights and benefits belonging to the merged corporation") (collecting cases).

IV. The Decisions of the District Court and the Fourth Circuit Did Not Involve Old CNC's or PCS's Operations, Conduct, or Policies

In footnote 6, the Court suggested that decisions by the United States District Court for the District of South Carolina and the Fourth Circuit in a "related matter" addressed the pollution exclusion and ruled adversely to PCS Nitrogen. *PCS Nitrogen*, 2019 WL 6884913, at *2 (citing *Ross Dev. Corp. v. PCS Nitrogen, Inc.* 526 App'x 299 (4th Cir. 2013). That case involved PCS' claims against the prior owner of the Charleston property, not Old CNC's operations at the facility. And the decision regarding insurance coverage and the pollution exclusion related to the policies pursuant to which Ross was seeking coverage—not the Old CNC policies. To the extent footnote 6 can be read as a determination on the pollution exclusion with respect to the Old CNC policies, the Court must reconsider because those policies and Old CNC's conduct was not at issue in the *Ross* litigation.

CONCLUSION

For these reasons and those contained in its briefs, PCS Nitrogen urges the Court to grant rehearing in this matter, reverse the circuit court's order on Respondent's motion for summary judgment, and remand this matter to the circuit court.

Dated: January 2, 2020

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I certify that I have served the Appellant's Petition for Rehearing on all attorneys of record by depositing a copy of it in the United States Mail, postage prepaid, on January 2, 2020, addressed to all attorneys as shown below:

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January 2, 2020

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: *PCS Nitrogen, Inc. v. Continental Casualty Company, et al.*
Appellate Case No. 2016-001140

Dear Ms. Kitchings:

Enclosed for filing, please find an original and seven (7) copies of Appellant's *Petition for Rehearing* in the above-referenced matter, together with our Proof of Service of same. Also enclosed is our firm's $50 check to cover the cost of the filing fee. Please return clocked copies to me via our courier.

If you have any questions, please give me a call.

Thank you for your assistance in this matter.

Sincerely,

HAYNSWORTH SINKLER BOYD, P.A.

Wm. Howell Morrison by Robert S. Kittle w/ consent

Wm. Howell Morrison

WHM/jmb
Enclosures

cc: Michael H. Ginsberg (via email only)
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