

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
In the Court of Common Pleas for the Fourteenth Circuit

Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2014-001524
Lower Court Case No. 2011-CP-07-3322

The Callawassie Island Members Club, Inc. Respondent,

v.

Ronnie D. Dennis and Jeanette Dennis Appellants.

SUPPLEMENTAL BRIEF OF APPELLANTS

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Since they last were before this Court, the Dennises continue to try to settle up the tab with the Hotel California. The parties now have moved from that dark desert highway and—in a shameless mixing of metaphors and record labels—are engaged in a *Hamilton*-like struggle for freedom as the scrappy American colonies versus the CIMC British crown.¹ All the Dennises seek is a fair fight at trial.

I. INTRODUCTION

On November 14, 2018, the South Carolina Supreme Court filed its Opinion in this case, reversing this Court's decision as to the two issues before it on certiorari, and remanding the case to this Court for its review of the remaining issues on appeal. Upon remand, the Dennises filed a *Motion for Leave to Submit Supplemental Briefs*, which this Court granted. Even if the Supreme Court did ultimately reject this Court's Hotel California metaphor as to the Club, it would be hard-pressed to deny that we have now found the passage back to the place we were before.

As the reader will soon gather, the purpose of this supplemental brief is to convey to the Court that the Supreme Court's decision in its *Dennis* Opinion did **not** resolve all of Appellants' numerous contentions of error on the part of the Circuit Court. The grounds set forth in this supplemental brief were previously raised to this Court, but they were not ruled upon. Although the Dennises presented numerous issues for its review,

¹ *Hamilton* (Invictus Sound 2015) ("I don't wanna fight/But I won't apologize for doing what's right"). (Weary of appellate brief-writing, we attorneys "just want to fight/not write.")

this Court initially found that two of the issues were dispositive; it therefore declined to address the remaining issues on appeal. The Supreme Court granted the Club's *Petition for Certiorari* as to those two issues. The issues argued below in this brief were not before the Supreme Court on certiorari, and the Supreme Court did not decide them. Therefore, the Appellants seek a ruling from this Court that summary judgment was not proper — as to these distinct issues — and that the case should be remanded for trial on their merits.

The second purpose of this brief is to request from this Court — particularly in light of the holding in the *Dennis* Opinion — a ruling that restricts the Club's damages to an amount not greater than the Dennises' equity membership contribution, which the Club has already received.

II. SCOPE OF DENNIS OPINION

When it seeks to evaluate the impact of the *Dennis* Opinion on the merits of the Dennises' remaining issues on appeal, this Court should be aware of the constraints of that Opinion, which is necessarily restricted to the questions that were before the Supreme Court on certiorari. "[A]ppellate courts, like well-behaved children, do not speak unless spoken to and do not answer questions that they are not asked." *Kennedy v. Retirement System*, 349 S.C. 531, 533, 564 S.E.2d 322 (2001) (quoting *State v. Austin*, 306 SC 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991)).

The Club asked the Supreme Court to answer **only two questions** as to this Court's decision on appeal in *Dennis*:

1. Did the Court of Appeals err in its *sua sponte* revision and judicial repeal of Code of Laws of South Carolina (1976), as amended, Section 33-31-620, ignoring uncontroverted key facts in the record and disregarding the language of subsection (b) of the statute?
2. Did the Court of Appeals err in concluding that the Dennises presented evidence of ambiguity, where the parties' written contract clearly stated that members of Petitioner, The Callawassie Island Members Club, Inc. (referred to herein as "CIMC" and "the Club") must fulfill the financial obligations of membership in CIMC until the reissuance of their membership?

(Petitioner *The Callawassie Island Members Club, Inc.*'s *Brief on Appeal*, at p. 1, Statement of Issues on Appeal.) In answering the Club's questions, the Supreme Court was starkly divided, with two justices robustly dissenting. With respect to the issues before it on certiorari, the Supreme Court made the following specific holdings, which are now the law of this case:

1. Payment after resignation: "[Section 5.11 of the 2008 Plan] unambiguously provides the Dennises are obligated to continue to pay all membership dues, fees, and other charges after resignation until their membership is reissued."²
2. Parol evidence: "First, because we find the terms of the membership documents are unambiguous, no statements regarding the terms of those documents may be used to vary their otherwise clear meaning."³
3. Nonprofit Corporation Act: "The dues, fees, and other charges the Dennises owe fall into the 'commitments made' category. The 1994 Plan—which was in effect when the Dennises joined—and the 2008 Plan—which was in effect when the Dennises resigned—both provide that a member who resigns from the Club must continue to pay membership dues, fees, and other charges 'until his or her equity membership is reissued by the Club.' When the Dennises joined the club, they

² *Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 200, 821 S.E.2d 667, 670 (2018).

³ *Id.* at 203, 821 S.E.2d at 672.

made a commitment to continue to pay dues, fees, and other charges during the period of time after resignation and before reissuance of the membership. Therefore, we find the requirement that members continue to pay dues, fees, and other charges after resignation until their membership is reissued is not prohibited by section 33-31-620.”⁴

In its Opinion, the Supreme Court acknowledges that the Dennises raised other issues to this Court, which this Court did not rule upon.

Importantly, many of the undecided issues preserved by the Dennises for appellate review in their initial brief to this Court were independent grounds for reversal of the Circuit Court’s summary judgment order. Those issues, as identified below, have not yet been reviewed by any appellate court.

III. ARGUMENT

A. Remaining issues

In the *Final Brief of Appellants*, the Dennises identified multiple errors by the Circuit Court in their Statement of Issues on Appeal, some of which contain sub-points. Many of those issues were neither decided by this Court, nor were they reached in the Supreme Court’s *Dennis* Opinion.

[I.⁵ Did the Trial Judge err by failing to apply the proper legal standard in its granting of the Plaintiffs motion for summary judgment?]

Numerous issues relating to the proper legal standard, and the application of that standard to certain issues, were not previously reached by this Court. In this section of

⁴ *Id.* at 206, 821 S.E.2d at 673.

⁵ Heading numbering in [brackets] corresponds with the numbering in the *Final Brief of Appellants*, which was filed with this Court on January 26, 2015, and which is incorporated herein by reference.

their appellate brief, Appellants argued, for example, that the trial court (1) improperly shifted the burden of proof onto the Dennises (App. Br. at p. 4) and (2) failed to apply the “mere scintilla” standard (*id.* at p. 5; *see also id.* at p. 35 citing *Bell v. Progressive Direct Ins. Co.*, 407 S.C. 565, 575–576, 757 S.E.2d 399, 404 (2014) (“Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law” and “should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts.” (internal quotations and citations omitted))). Neither of those issues was affected by the *Dennis* Opinion, and each constitutes grounds for reversing the trial court’s order.

[II. Did the Trial Judge improperly grant summary judgment where the Appellants presented more than a mere scintilla of evidence showing a genuine issue of numerous material facts?]

[B. There is a genuine dispute as to the interpretation and application of the documents governing the relationship between the parties.]

In this section, the Dennises argued, *inter alia*, that genuine issues of fact exist as to whether they were treated disparately from other members, including when (1) the Club improperly refused to allow them to “swap memberships”⁶ with a willing Social member (App. Br. at pp. 15, 32), and (2) the Club improperly allowed dozens of other members to concede memberships (and it expelled members) but refused to do so for the Dennises (discussed *infra* Part III.C; *see also* App. Br. at pp. 20, 23, 31, 34). The Dennises also argued

⁶ Membership “swapping” was a Club practice permitted under the governing documents where a social member and a golf equity member would exchange memberships.

(3) that liability accrued only against the membership, not against the member (discussed *infra* Part III.B; see App. Br. at pp. 13, 14, 16, 18–19). When viewed against the “mere scintilla” standard and the requirement that all inferences be taken in favor of the Dennises, the trial court erred in granting summary judgment. These issues were not reached by the *Dennis* Opinion, and each constitutes grounds for reversing the trial court’s order.

[C. Evidence of representations made to the Appellants which support their defenses and/or which present claims for the Appellants which would also mitigate damages if awarded.]

In this section, the Dennises argued, *inter alia*, that genuine issues of fact exist as to whether the governing documents were properly changed (see App. Br. at pp. 30, 34–35) and whether certain members were allowed out of the Club, a benefit which the Club improperly denied to the Dennises and which harmed their ability to sell their membership (see *infra* Part III.C; see also App. Br. at pp. 31, 32). These issues were not reached in the *Dennis* Opinion, and each constitutes grounds for reversing the trial court’s order.

[III. Did the Trial Judge, in granting summary judgment, fail to take all reasonable inferences in the light most favorable to the Appellants and rely upon findings for which there was no evidence in the record supporting such finding, or for which the evidence available contradicts the findings made?]

In this section, the Dennises argued, *inter alia*, that the trial court erred in making specific findings that were not supported by evidence in the record and in granting summary judgment based on such unsupported findings (see, e.g., App. Br. at pp. 33–34). Both constitute grounds for reversing the trial court’s order.

[IV. Did the Trial Judge err in failing to properly apply South Carolina law and the Nonprofit Corporation Act, including, among other laws, S.C. Code Ann. § 33-31-302(18), § 33-31-610, and § 33-31-621(e)?]

In this section, the Dennises argued that the trial court improperly failed to consider—and incorrectly granted summary judgment in the teeth of—their defense based on *other* parts of the South Carolina Nonprofit Corporation Act, including S.C. Code § 33-31-610 and § 33-31-611. For example, § 33-31-610 states that:

All members have the same rights and obligations with respect to voting, dissolution, redemption, and transfer, unless the articles or bylaws establish classes of membership with different rights or obligations. All members have the same rights and obligations with respect to any other matters, except as set forth in or authorized by the articles or bylaws.

Section 33-31-611(c) states:

(c) Where transfer rights have been provided, no restriction on them is binding with respect to a member holding a membership issued before the adoption of the restriction unless the restriction is approved by the members and the affected member.

The Dennises' appellate brief argues that these provisions require all members to have the same rights and obligations with respect to transfer, but that the Dennises were treated differently from other members with regard to previous requests to transfer or concede their membership (*see* App. Br. at pp. 36–37; *see also supra*). Moreover, changes to the governing documents regarding transfer of memberships were not properly approved by the members and the affected members. (*See* App. Br. at pp. 30, 34–35; *see also* R. p. 204, line 11–p. 206, line 23 (testimony of board member Karen Norwood)). These issues, and these specific provisions of the Nonprofit Corporation Act, were not reached in the *Dennis* Opinion, and they constitute grounds for reversing the trial court's order.

[V. Did the Trial Judge improperly award damages to the Respondent, including the award of attorneys' fees and damages based upon an affidavit not served upon the Appellants, nor presented at the hearing, and upon which the Appellants were never allowed to [cross examine] the Respondent?]

In this section, the Dennises argued that the trial court improperly relied on late affidavits that were not properly served and did not contain the necessary information to support the trial court's order (App. Br. at pp. 39-40). As a result, the Dennises did not have a proper opportunity to contest those damages. *See, e.g., Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003) ("In determining whether summary judgment is appropriate, the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party. . . . Summary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery." (internal citations omitted)). The *Dennis Opinion* did not reach this issue, and it constitutes grounds for reversing the trial court's order.

* * *

The Dennises rely on the briefing in their Brief of Appellants for the arguments on the preserved issues summarized above. Certain other issues, however, call for special attention under the *Dennis Opinion*. They are discussed below.

B. The Dennises' liability must be strictly limited to their membership contribution.

While the measure of damages was not precisely before the Supreme Court on certiorari, its decision in *Dennis* has remarkable implications for the question of what damages are ultimately recoverable by the Club in the legion of lawsuits that it has filed against its members. Put simply, if the Club benefits from “unambiguous” terms in the governing documents, it must be bound by them, too.

The *Dennis* Opinion itself contains an underlying dialogue between the majority and the dissent, in which the justices discuss the potential repercussions of their decision on the liability of the many ill-fated members of the Callawassie Island Members Club. Justice Hearn, writing for the dissent, expresses concern that the Court’s decision might lead to the absurd – yet very real – result of perpetual, inescapable liability on the part of members, whose largely fictional “resignation” from the Club regrettably offers them no relief from the payment of dues, even when they are beyond the grave. *Dennis*, 425 S.C. at 212 n.6–7, 821 S.E.2d at 677 n.6–7.

The majority directly addresses and mollifies the dissent’s concern, explicitly limiting its holding by emphatically “*not* deciding whether the governing documents could support perpetual liability under these or any other facts.” *Id.* at 202, 821 S.E.2d at 672 (emphasis in original).

It is for this Court, then, to make the decision on damages – and perpetual liability – that the Supreme Court majority did not. The Dennises seek a ruling from this Court that it was error for the Circuit Court to award damages to the Club in the amount of \$51,131.76, because, properly, the Club’s recovery must be limited to (and offset by)

the amount of the Dennises' membership contribution. Such a holding by this Court is supported by the Club's governing documents, as well as by the Supreme Court's decision. The interpretation of an unambiguous contract is a question of law, and this Court may construe the membership documents at issue in this case *de novo*, without deference to the trial court's findings. *Bennett & Bennett Constr., Inc. v. Auto Owners Ins. Co.*, 405 S.C. 1, 4, 747 S.E.2d 426, 427 (2013).

The *Dennis* Opinion determined that the governing documents that were before it in the Record are not ambiguous. 425 S.C. at 202, 821 S.E.2d at 672 (declining to consider whether its opinion renders a "harsh result," because "the governing documents are unambiguous"). Since that is the case as to those provisions, this Court should look to those unambiguous provisions for the answer to the majority's question of "whether the governing documents could support perpetual liability," whereby resigned Club members must pay dues, far into the distant future, to infinity and beyond. *Id.* The unequivocal answer is that the documents support no such thing. By their own express terms, the governing documents confine a member's ultimate liability to the Club to the loss of a return on his or her membership contribution.

The intricate workings of membership in the Club are set forth in the Plan for the Offering of Memberships, which has been amended over the years, but in some ways remains consistent. See 425 S.C. at 199, 821 S.E.2d at 670 ("There is no evidence [in the particular record before the Court in *Dennis*] that the various amendments to the documents were in any way contrary to the Bylaws, Plan, and Rules in place at the time

of the amendments.”).⁷ Membership in the Club works in this way: if a person is offered (in the Club’s sole discretion) the privilege of becoming an equity member, he or she must purchase the membership by making a “membership contribution” in the amount required by the Club (in the Dennises’ case, that amount was \$31,000). (R. p. 87). If, in the future, an equity member no longer wishes to be a member, one option⁸ is that he or she may indicate an intent to resign from the Club. Upon this tendered resignation, the membership is optimistically placed by the Club on a resale list, to be purchased by some other person who aspires toward membership. When such a prospective buyer has been found – if the Club approves of that person, in its sole discretion – the membership is re-issued by the Club, and the former member is entitled to receive from the Club a reimbursement of his or her original contribution.⁹ . . . At least, this is how the documents cheerfully imagine the process will go.¹⁰

⁷ The specific governing documents that were before the Supreme Court in *Dennis*, beginning with the 1994 Plan for the Offering of Memberships, may be found starting on R. p. 447, followed by other governing documents, including certain By-Laws, Rules, and excerpts from various amendments.

⁸ The Record shows that other exit options include (1) expulsion and (2) conceding the membership back to the Club. (See, e.g., *supra* Part III.B-C & App. Br. at pp. 20, 23, 31, 34.)

⁹ “Each person who desires to acquire an equity membership must deliver or mail to the Club a completed and signed Application for Membership, a Membership Purchase Agreement, and a check (in U.S. funds) for the required membership contribution.” (R. p. 450). “If an equity member resigns from the Club . . . then the resigned membership will . . . be placed on the waiting list to be reissued by the Club” (R. p. 460). “Repayment of Membership Contribution.” (R. p. 461).

¹⁰ In reality, there is no market for memberships in the Callawassie Island Membership Club, and the placement of a membership on the resale list amounts to perpetual financial purgatory.

The documents make the following statements, which clearly govern a member's expectations as to the amount of his liability to the Club:

- An equity member who has resigned from the Club will be obligated to continue to pay dues and food and beverage minimums to the Club until his or her equity membership is reissued by the Club. **These dues will accrue against and be deducted from the amount to be paid to the resigned member upon reissuance of his or her resigned membership.**

(R. p. 462) (emphasis added) (1994 Plan).

- An equity member will be entitled to receive upon the reissuance of his or her resigned equity membership an amount equal to the greater of: (a) the membership contribution which the resigned member paid to the Club or (b) eighty percent of the membership contribution paid by the purchaser of the resigned member's membership. **The Club will be entitled to deduct from the amount to be paid to the resigned member any amount which the resigned member owes to the Club.**

(R. p. 461) (emphasis added) (1994 Plan).

- An Equity Member who is on the waiting list to sell his/her membership will be obligated to continue to pay to the Club all dues, fees, and other charges associated with his/her membership until his/her Equity Membership is reissued by the Club. **Any unpaid dues, fees, and other Charges . . . will be deducted from the amount to be paid to the resigned member upon the reissuance of his/her resigned Equity Membership.**

(R. p. 522-523) (2008 Plan) (emphasis added).

- Any equity member may resign from the Club by giving written notice to the Secretary. **Dues, fees and charges shall accrue against a resigned equity membership** until the resigned equity membership is reissued by the Club.

(R. p. 485) (1994 Bylaws) (emphasis added).

- After the purchaser [of a resigned membership] becomes an equity member and upon receipt of his or her membership contribution, the Club shall promptly remit the amount due to the resigned member

as provided by Section 9(b) of this Article **less any amount which the resigned member owes to the Club.**

(R. p. 487) (1994 By-laws) (emphasis added).

- The Club shall have a lien **against each membership** for any unpaid annual dues or other charges made by that member of the Club. . . All such liens may be foreclosed by the Club, in an action at law or in equity. . . .

(R. p. 489) (1994 Plan) (emphasis added).

- In accordance with the By-Laws, the Club shall have a lien **against each membership** for any unpaid dues or other charges

(R. p. 517) (2001 Rules) (emphasis added).

- Article XI, Delinquencies, The Club shall have a **lien against each membership** for any unpaid assessments, fees, annual dues, or other charges

(R. p. 525) (2009 By-Laws) (emphasis added).

These unambiguous provisions are unmistakable in their effect: dues, fees, and charges accrue against a resigned equity **membership**—and not against the member personally. In fact, the clear language of the documents evidences an intent by the Club to seek recourse for unpaid dues against the **value of the membership**. Ultimately, the Club may reclaim the **membership** through foreclosure, and recoup its lost dues from the membership contribution when it is reissued. (R. p. 489). It is clear that, in the end, a member only may be liable up to the amount of their already-paid equity contribution (\$31,000 for the Dennises).

Indeed, the *Dennis* Court nodded toward such a determination. Justice Hearn, writing for the dissent, construed that “unpaid dues and fees accrue against membership only, rather than on an ongoing basis against the member personally;” therefore, she

conveyed her concern about “taking the majority’s view to its logical end” to “create unlimited liability where none previously existed.” 425 S.C. at 210, 821 S.E.2d at 676. The majority’s reply to the dissent’s concern is telling: “In response to the ‘logical end’ argument . . . the summary judgment we affirm is for less than four years of unpaid dues. We are *not* deciding whether the governing documents could support perpetual liability under these or any other facts.” *Id.* at 202, 821 S.E.2d at 671-672 (emphasis in original).

Pursuant to the express terms of the Club’s governing documents, the trial court erred in ordering damages in excess of the Dennises’ equity contribution, and in not providing for a setoff for their equity contribution. This Court is free to construe the force and effect of unambiguous contracts, and to hold that the plain language of the governing documents operates to restrict any recovery by the Club to an amount not greater than Appellant’s already-paid equity contribution of \$31,000. *Dennis* at 203, 821 S.E.2d at 672 (citing *Jordan v. Sec. Grp., Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993) (“Where the language of a contract is plain and capable of legal construction, that language alone determines the instrument’s force and effect.”)); *see also Bennett*, 405 S.C. at 4, 747 S.E.2d at 427.

As set forth above, and in the Appellants’ previous briefs to this Court, the governing documents expressly do *not* support perpetual liability. As a matter of law, they limit liability to a finite amount. Appellants respectfully request that this Court hold that—on remand to the Circuit Court for trial—the maximum damages the Club may claim must be confined to the amount of the member’s equity contribution (here, the \$31,000 already paid).

C. The Record shows that the Dennises were disparately treated and improperly denied benefits that were provided to other similarly-situated members.

As discussed in the Brief of Appellant and in *supra* Parts [II.B]–[II.C], one of Appellants’ defenses (and claims against the Club) is that the Club allowed dozens of other members to concede their memberships, but improperly refused that treatment to Appellants. (See App. Br. at pp. 20–21, 23, 31, 34). The Record shows, for example:

- The resale list catalogues at least 36 members who were allowed to concede their memberships. (R. p. 93). That list states that those memberships are back in the “membership pool,” meaning they belong to the Club, not to the members who forfeited them.
- Club board member James Carling testified as follows: “Q. And what does it mean to concede their membership? A. Basically turn their membership back in.” (R. p. 134, lines 3–5).
- Club membership director Lindsey Cooler testified as follows: “Q. Okay. What would it mean to concede a membership? . . . A. To give back to CIMC. . . Q. —if any member concedes a membership, what’s your understanding of what that means for them going forward? Do they have any further obligations to the club? . . . [A.] To my knowledge they do not.” (R. p. 215, lines 5–25).
- The Record shows that numerous other members were allowed to concede or leave the Club:
 - R. p. 96: “I am happy to inform you your application to concede from the Callawassie Island Members Club, Inc. has been accepted.”

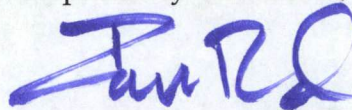
- R. p. 98: "Therefore, CIMC is willing to accept return of this membership to CIMC as part of a negotiated settlement, which also includes payment of the equivalent of one years' due's \$8,672, subject to your agreement that this transaction shall remain confidential."
- R. p. 99: "As a summary, Mrs. Brice has agreed to pay \$3,500 to the Club and relinquish her membership in the Club in exchange for a release of any and all claims the Club might have against Mrs. Brice."
- R. p. 103: Allowing McBee Butcher to leave the Club at the end of the year.
- R. p. 104: "Therefore, CIMC is willing to accept return of this membership to CIMC as part of a negotiated settlement which also includes payment of the equivalent of one year's dues \$6,524, subject to your agreement that this transaction shall remain confidential."
- R. p. 105: "It is the clubs [sic] intention to allow you to cede your membership back to the club as part of a negotiated settlement."

In addition to the important issue of improper disparate treatment of members under S.C. Code § 33-31-610 (*see supra* Part [IV]), there are genuine issues of material fact as to whether the Club (a) has changed its membership rules regarding concession without proper approval (*see also* App. Br. at pp. 34-35), and (b) restricted the transfer of memberships without the restriction properly being "approved by the members **and** the affected member." S.C. Code § 33-31-611(c) (emphasis added) (discussed in *supra* Part [IV] and App. Br. at pp. 36-37). The *Dennis* Opinion did not reach these issues, and each constitutes grounds for reversing the trial court's order.

IV. CONCLUSION

Many thousands of words have been spent, before many courts and judges, trying to make sense of the Club's documents and practices. That is a mess of the Club's own making, and the law requires that evidence be construed against the Club on summary judgment. Regardless of the Supreme Court's determination of two issues involved in this case, summary judgment was not proper as to numerous other issues, as set forth above and in the Dennises' original appellate brief to this Court. The Dennises respectfully request that this Court reverse the Circuit Court's erroneous grant of summary judgement as to those issues, and that it remand this case for trial on their merits. Further, the Dennises request a ruling from this Court that the Club would be bound by the provisions within its own governing documents, which limit its recourse against its members to its ability to retain their membership contribution.

Respectfully submitted,



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