

IN THE SUPREME COURT OF FLORIDA

CASE NO.: SCO2-502

KENNETH FRIEDMAN, M.D.,
Petitioner,

v.

HEART INSTITUTE OF PORT ST. LUCIE, INC.,
a Florida corporation;
RAYTEL MEDICAL CORP.,
a Delaware corporation,
and **DAVID WERTHEIMER,**

Respondents.

On Review from the Fourth District Court of Appeal
CASE NO.: 4D01-3526

PETITIONER'S REPLY BRIEF

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SUMMARY OF ARGUMENT

The only issue before this court is how a lower court should handle a motion to stay a prejudgment creditor's action under the Florida Uniform Fraudulent Transfer Act, Fla. Stat. §726.101 (FUFTA) pending resolution of an underlying dispositive dispute. Both parties agree that there are recognized dangers to invasion of constitutionally protected private financial information that necessarily accompany FUFTA-specific discovery. Petitioner has shown existing protections to be inadequate given the irreparable harm of such discovery, necessitating a threshold balancing test before a prejudgment creditor is allowed to proceed with invasive financial discovery. Without such protections, “[a] more powerful weapon of oppression could not be placed at the disposal of unscrupulous litigants.” (US Supreme Court, quoting *Wait*). Respondent argues that existing protections are adequate. Respondent's position creates a major loophole in this Court's discovery protections for constitutionally protected private financial information.

There are only two cases identified by either party that address how a court should handle such a motion to stay, and they are in conflict: the case below *Friedman v. HIPSL*, 806 So.2d 625 (Fla. 4th DCA 2002) (*Friedman*), and *Rosen v Zoberg*. 680 So.2d 1050 (Fla. 3d DCA 1996) (*Rosen*). Respondent urges the Court adopt the reasoning of *Friedman*, while Petitioner urges adoption of the reasoning of *Rosen*.

Respondent does not express disagreement with Petitioner's analysis that the reasoning of the Fourth DCA's decision in *Friedman* would take away a trial court's discretion to grant any motion for stay of a FUFTA claim. *Friedman's* reasoning

would, as a practical matter, require any such motion to stay be automatically denied – no matter how frivolous the prejudgment claimant’s FUFTA claim. Respondent urges adoption of the Fourth DCA’s non-discretionary analysis. *Respondent* at 25.¹

Respondent also does not challenge Petitioner’s argument that, if the reasoning of *Friedman* were applied to the facts of *Rosen*, the Third DCA could not have performed a balancing analysis (as Petitioner advocates here), and would not have found that the trial court abused its discretion in failing to stay the FUFTA claim. Instead, the Third DCA would have allowed the FUFTA claim to proceed.

Respondent and Petitioner don’t disagree on additional key points, namely:

- 1) a creditor with a prejudgment claim may “bring” a FUFTA action at any time based on that prejudgment claim, and this would toll the FUFTA statute of limitations, *Respondent* at 10.
- 2) a FUFTA claim added to an existing case automatically makes relevant constitutionally protected financial information that might otherwise not have been relevant, *Respondent* at 18.
- 3) by adding a FUFTA claim, an unscrupulous litigant can use invasive discovery of constitutionally protected private information of family and business associates (e.g, third party, LeMieux), to pressure settlement, no matter how frivolous those claims may be, *Respondent* at 20-21 and
- 4) without the grant of a motion for stay of an an unscrupulous FUFTA claim, the only theoretical remedies against an unscrupulous FUFTA litigant from proceeding would be concern of possible post-discovery monetary sanctioning of the party and potentially its attorneys, counter-suits for malicious prosecution and abuse of process. *Respondent* at 21.

As to this last point, Respondent ignores that such post-discovery remedies, which are based on whether a claim has merit, will be unenforceable in these circumstances. Such determination won’t occur if the case settles, and since the

¹Petitioner’s Initial Brief is cited as: “*Petitioner* at ____”; Respondent’s Answer Brief as “*Respondent* at ____;” Petitioner’s Amended Appendix cited as “*Petitioner’s App.*, at ____.”

strong fear of invasive FUFTA discovery will severely pressure the debtor (either directly or through parties targeted by such discovery) to settle, such settlement will preclude a decision on the merits and, in turn, these remedies. This Court has found that post-discovery remedies cannot compensate the injured party for the irreparable damage from disclosure of constitutionally protected financial information.

To safeguard against prejudgment creditor FUFTA abuse, when presented with a motion for stay of a prejudgment creditor's FUFTA claim, a trial court should be required to perform an initial balancing analysis in advance of allowing any discovery of sensitive financial information. Such analysis should balance factors such as the need for the specific discovery requested, the likelihood of prevailing on the underlying claim, the potential waste of judicial resources, and the effects on constitutionally protected privacy rights. None of these factors requires advance discovery of constitutionally protected information. The "likelihood" of success factor would have been necessary (but not sufficient) to prove prior to being granted any interim relief, thus no prejudice would arise by having to prove it before sensitive discovery is allowed to proceed. Such a preliminary balancing analysis allows a trial court to protect in advance all parties' interests, avoid waste, and close a major loophole that unscrupulous prejudgment creditors would have under *Friedman*,

Petitioner respectfully requests that this Court find an abuse of discretion by the trial court below in its failure to perform such a balancing analysis, and reverse. In the alternative, Petitioner respectfully requests that the Court remand to the trial court for performance of a balancing test conforming to the proposed requirements.

ARGUMENT

I. THE UFTA IS NEITHER UNIFORM IN ITS INTERPRETATION NOR INTENDED TO BLINDLY “PROTECT” ANY AND ALL CREDITORS WHO ALLEGE A CONTINGENT CLAIM

This is a case of first impression not only for the highest court in Florida, but for all the highest courts in all states that have adopted the Uniform Fraudulent Transfer Act (UFTA).² Neither this nor any of the other highest courts in any UFTA state has determined how a trial court should address a motion for stay of a prejudgment creditor’s UFTA claim, where such claim is based on a pending, unresolved, dispositive claim. Nor have those courts addressed how to protect innocent third parties and alleged debtors from the “powerful weapon of oppression” of a prejudgment remedy being “placed at the disposal of unscrupulous litigants.” Wait, *Fraudulent Conveyances*, § 73, at 110-111 (cited by *Grupo Mexicano v. Alliance Bond Fund, Inc., et. al.*, 527 U.S. 308, 330 (1999)).

A. THERE IS A CLEAR SPLIT IN FLORIDA, NON-FLORIDA CASES PROVIDE LITTLE GUIDANCE, AND THERE IS LITTLE UNIFORMITY IN UFTA APPLICATION ON RELATED POINTS

Florida’s courts are clearly split on the instant issue, with only the *Friedman* and *Rosen* cases directly addressing the treatment of a motion to stay a prejudgment creditor’s FUFTA claim pending resolution of the underlying claim. Specifically, the Fourth DCA in *Friedman* below said that the trial court has, in effect, no discretion

²Because there are variations in the actual implementation of the UFTA, “FUFTA” shall be used to refer to Florida’s version of the UFTA statute, § 726.101, et. seq., Fla. Stat.

but to deny a motion to stay a FUFTA claim pending the resolution of the underlying claim because:

a stay of the fraudulent transfer proceedings would preclude the trial court from granting relief under section 726.108 pending the outcome of the claim for damages.

Friedman, at 627

The Court in *Rosen* reached the opposite conclusion:

Additionally, we hold that the trial court abused its discretion in denying Rosen's motions to stay [FUFTA claim] *Rosen II*. The record demonstrates that resolution of *Rosen I* is dispositive of *Rosen II*. If Rosen does not prevail in *Rosen I*, she is not a creditor, and there is no basis for setting aside the transactions attacked in *Rosen II*. A stay is the proper vehicle to avoid a waste of judicial resources...On remand, the court shall enter an order staying this action pending resolution of *Rosen I*.

Rosen, 680 So. 2d at 1052
(citations omitted).

Respondent fails to rebut Petitioner's argument that the Fourth DCA's *Friedman* analysis effectively removes all discretion of the trial court in handling a motion to stay a prejudgment creditor's FUFTA claim -- because grant of any stay would "preclude the trial court from granting relief under Fla. Stat. §726.108 pending outcome of the claim for damages." *Friedman* at 627. Respondent barely refers to the broadbrush *Friedman* analysis, ignores its practical effect, and its inconsistency with *Rosen*. Without specifically addressing the issues, Respondent urges the Court to adopt the *Friedman* case analysis. *Respondent* at 25.

Respondent cites many cases from other states for propositions that are irrelevant to the issues before this Court. None of the cited cases deal with the issue of how to handle a motion to stay a prejudgment creditor's UFTA claim where the underlying claim is dispositive and remains unresolved. As shown below, the cases

cited by Respondent (some of which pre-date the UFTA) deal with such unrelated issues as the statute of limitations, the ability to file an UFTA action, and issues under the UFTA's predecessor statutes and common law. Moreover, for the issues those cases do address, there typically is no blanket uniformity among the other states with regard to how UFTA is to be applied for prejudgment creditors.

Respondent's argument is replete with self-serving contentions, such as "[t]he history underlying the UFTA and Florida law governing discovery indicates that remedies available under the Act should be construed in favor of creditors...." and its purpose is to "protect creditors, not debtors." *Respondent* at 6-7 and 8-10. Respondent misguidedly cites in support for these principles *Weil v Long Island Savings Bank, FSB*, 77 F. Supp. 2d 313 (E.D.N.Y. 1999); *Gulf Insurance Co. v Clark*, 20 P. 3d 780, 786 (Mont. 2001); and *Levy v. Markal Sales Corp.*, 724 N.E. 2d 1008 (Ill. App. Ct. 2000). In *Weil, supra*, the district court decision involved only the narrow question of whether a debtor could bring a UFTA cause of action against a creditor. *See, Weil* at 324-325. In *Gulf, supra*, the Court found that the UFTA, in some respects, strengthened debtor's rights, as that court interpreted the UFTA to significantly limit the time a creditor had to sue, as compared to the previously effective law of fraudulent conveyance. The non-uniformity of views on this UFTA issue alone is illustrated by contrasting *Gulf, supra*, with *Cortez v. Vogt*, 60 Cal. Rptr. 2d 841 (Cal. App. 4th 1997), which determined that the UFTA did not affect when the statute of limitations would run out. *See also, Levy, supra*, for similar reasoning to *Gulf*.

Respondent claims that: "[i]t is well settled that FUFTA provides a creditors

with remedies prior to the rendering of a final judgment.” (sic). *Respondent* at 6 and 10. While the FUFTA can be read to provide the right of a prejudgment creditor to file an FUFTA action, the question of whether some or all of such remedies or other provisions are available to a given prejudgment creditor can vary from state to state. Respondent fails to address the fact that the FUFTA provisions, including its remedies section, is buffered with requirements for the application of “principles of law and equity” and, as this Court has found, the state constitution. *Compare, e.g., Fla. Stat. §726.108 and §726.111*, with analogous provisions of other states, and see discussion *infra.*; also, *Havoco v. Hill*, 790 So.2d 1018 (Fla. 2001).

The US Supreme Court provides some guidance why this Court should be wary about Respondent’s argument that FUFTA’s remedies be made available to any and all prejudgment creditors without the balancing of interests, as Petitioner advocates. The US Supreme Court observed in *Grupo*, in deciding whether to craft its own remedy for non-judgment creditors:

“there are weighty considerations on the other side as well, the most significant of which is the historical principle that before judgment (or its equivalent) an unsecured creditor has no rights at law or in equity in the property of his debtor. As one treatise writer explained:

‘A rule of procedure which allowed any prowling creditor, before his claim was definitely established by judgment, and without reference to the character of his demand, to file a bill to discover assets, or to impeach transfers, or interfere with the business affairs of the alleged debtor, would manifestly be susceptible of the grossest abuse. A more powerful weapon of oppression could not be placed at the disposal of unscrupulous litigants.’ Wait, *Fraudulent Conveyances*, § 73, at 110-111.”
Grupo, supra, at 330.

Thus, there is a well recognized problem with affording, unchecked and without meaningful procedural protections, any and all prejudgment creditors the types of

FUFTA discovery and remedies that Respondent would urge this Court to give them.

B. THE TERMS OF THE UFTA CAN AND HAVE BEEN OVERRIDDEN BY STATE SPECIFIC CONSIDERATIONS

Respondent argues that “public policy arguments that clearly misconstrue the underlying intent of a uniform act” should be rejected and that the “plain meaning of its terms control.” *Respondent* at 10. Neither the words nor intent of the FUFTA support Respondents’ argument that the door be left open for unscrupulous prejudgment FUFTA litigants. Respondent fails to reconcile its position with FUFTA’s incorporation by reference of state “principles of law and equity,” *etc.*, and with this Court’s prior determination that the terms of the FUFTA cannot be applied in isolation and must yield to Florida’s constitution. *See, e.g.*, Fla. Stat. § 726.108(a) and 726.111, and *Havoco, supra*, 790 So.2d 1018, 1029 (Agreeing that the legislature, in enacting FUFTA, is powerless to affect the rights provided under the homestead exemption through statutory enactments; “Express or implied provisions of the Constitution cannot be altered, contracted or enlarged by legislative enactments.” (Citations omitted))

Respondent also fails to address what “plain meaning” it gives to the terms of the FUFTA that provide for principles of equity and law to coexist “unless displaced” (*see, e.g.*, Fla. Stat. §726.111); or which provide that its provisions are subject to the “limitations” of Fla. Stat. §726.109 (*see, e.g.*, Fla Stat. §726.108(1)), and must be applied in accordance with “applicable law” (*see, e.g.*, Fla. Stat. §726.108(1)(b)), and are “subject to applicable principles of equity” (*see, e.g.*, Fla. Stat. §726.108(1)(c)).

With all of these conditions and constraints referencing state laws, there is no

FUFTA language whose plain meaning prevents this Court from requiring a threshold test for prejudgment creditor FUFTA claimants before allowing them to target invasive financial discovery at alleged prejudgment debtors, such as Petitioner, and alleged third party transferees, such as LeMieux.

Respondent's analysis also fails to identify any FUFTA language that dictates how a prejudgment creditor must proceed to seek one of the remedies afforded in Section 726.108(1). The FUFTA simply says a court can grant these remedies, but how a particular type of FUFTA claimant might get those remedies, and when, is left to this Court's construction. For example, the subsection (a) begins with stating that the remedies available in an "action for relief against a transfer or obligation under this [Act], a creditor may obtain..." If read literally, the suit may only be "against a transfer or obligation." Contrast the unclear words of subsection of Section 726.108(1) with the clearer words of remedies for those with judgments in hand (see, subsection (2) which states "(2) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds."), and also the clearer words of the UFTA's predecessor, the Uniform Fraudulent Conveyance Act at Section 10 (e.g., "...he may proceed in a court of competent jurisdiction against any person whom he could have proceeded had his claim matured, and the court may..."). Finally, other potential ambiguities of Section 726.108 are left to interpretation when applying the statutory language to a prejudgment case where the final "net" amount possibly owed cannot be determined (e.g., what amount would be "necessary to satisfy a creditor's claim" if that claim has not be determined with certainty, and/or there are set-offs in the form of affirmative

defenses, counterclaims, and/or other suits by the debtor against the creditor), or to what extent can an attachment be made if the “thing” that has been transferred is cash, or if a remedy is “subject to the applicable principles of equity.” (typically requiring the exhaustion of legal remedies) In sum, contrary to Respondent’s expansive claims, the isolated words of Section 726.108(1) of the FUFTA are far from clear as to their meaning and/or intent, nor how they apply to prejudgment creditors. These words do not stand alone, and must be read together with the state constitution, other state laws, and court-prescribed procedures and interpretations.

Finally, Respondent argues that a stay at this point would bar Respondent’s rights to prejudgment remedies under FUFTA. *See, Respondent* at 18. This is an academic point, as Respondent has not filed a motion seeking any such remedies.

II. CONSTITUTIONAL RIGHT TO PRIVACY MUST TRUMP FRIVOLOUS FUFTA CLAIM PROCEEDINGS AGAINST ALLEGED CREDITORS AND INNOCENT THIRD PARTIES, WHO CURRENTLY HAVE NO EFFECTIVE PROTECTIONS

Respondent argues that the constitutional privacy rights of parties and non-parties, such as LeMieux, must yield to allow any contingent creditor’s right to perform invasive financial discovery of the creditor and innocent third parties.

Respondent doesn’t dispute Petitioner on certain key points, namely:

- 1) a creditor with an prejudgment claim may “bring” a FUFTA action at any time based on that prejudgment claim, and this would toll the FUFTA statute of limitations, *Respondent at 10*.
- 2) a FUFTA claim added to an existing case automatically makes relevant constitutionally protected financial information that might otherwise not have been relevant, *Respondent at 18*.

- 3) by adding a FUFTA claim, an unscrupulous litigant can use invasive discovery of constitutionally protected private information of family and friends (e.g, third party, LeMieux), to pressure settlement, no matter how frivolous those claims may be, *Respondent* at 20-21 and
- 4) without the grant of a motion for stay of a FUFTA claim, the only theoretical remedies against an unscrupulous FUFTA litigant from proceeding would be the theoretical concern of post-discovery monetary sanctioning of the party and potentially its attorneys, counter-suits for malicious prosecution and abuse of process. *Respondent* at 21.

However, Respondent's position that the threat of post-disclosure sanctioning of attorneys, suits for malicious prosecution and abuse of process, would be an effective deterrent to an unscrupulous litigant defies logic. As noted, Respondent concedes that such discovery is necessarily invasive, and would likely violate the rights of privacy of the alleged creditors and innocent third parties (such as LeMieux) who are alleged transferees. But Respondent takes the position that the constitutional right to privacy must yield to the unfettered prosecution of any FUFTA claim. *Respondent* at 19-21. Because FUFTA creates an automatic "relevance" for constitutionally protected personal data, unscrupulous FUFTA litigant's pre-judgment discovery (such as Respondent's) would go unchecked by the traditional "relevancy" and "balancing" tests established by this Court (*see, e.g., Rasmussen v. South Florida Blood Service, Inc.*, 500 So. 2d 533 (Fla. 1987) Once discovery of protected information has occurred, the "cat is out of the bag." (*Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097, 1100 (Fla. 1987)) Knowing this, and with no effective pre-disclosure protection for himself, and his family and business associates ("alleged transferees"), the alleged pre-judgment debtor would be placed under considerable artificial pressure to settle the case simply to protect constitutionally

protected information of the alleged debtor and third party transferees – succumbing to this “powerful weapon of oppression.” (*Grupo* (quoting *Wait*)). Once the main suit is settled to prevent this devastating damage from disclosure, Respondent’s claims of potential post-discovery remedies evaporate, because the settlement prevents the merits of the underlying claims from reaching the trial court. Clearly, there is no practical merit to Respondent’s argument that the threat of sanctions or existing discovery rules are enough to disarm unscrupulous litigants who seek to bring FUFTA claims to harass alleged debtors and their third party transferees – as illustrated by the invasive discover (asking for income tax statements and details of all financial transactions over multiyear periods)and remedies (appointment of receiver over all assets, etc) sought by Respondent in this case. *See, Petitioner App.* at pages 24-27 and 30-38.

III. THE ROSEN CASE IS CLEAR THAT THE STAY HAD TO REMAIN IN EFFECT “PENDING RESOLUTION” OF THE UNDERLYING CLAIM

Respondent argues that *Rosen* is distinguishable from *Friedman* because the FUFTA claim in *Rosen* was brought in a separate case. *Respondent* at 12. This distinction does not make for a meaningful difference for determining the better view of how a trial court should handle a motion to stay a prejudgment creditor’s FUFTA claims. A balancing of interests is still required . The situations are more materially similar than different – both involved prejudgment claims and the grant of either motion to stay would “preclude the trial court from granting relief under section 726.108 pending the outcome of the claim for damages”. *Friedman* at 627.

As with *Rosen*, the FUFTA claims were not filed below by Respondent until long after the original contract dispute case was filed by Respondent. Also, “resolution of” the original contract case of Respondent “is dispositive of” the FUFTA case filed by Respondent. Under the theory of *Friedman*, both creditors were entitled to relief under section 726.108. As with *Rosen*, a stay of the FUFTA claims filed by Respondent would avoid the extensive pre-trial discovery that Respondent seeks, which discovery would 1) violate the constitutional right to privacy of both third party LeMieux and Respondent, 2) clutter the motions and appellate calendars with complex disputes that will inevitably be raised in such invasive discovery, 3) add additional time required at trial, and 4) confuse a jury with irrelevant issues in Respondent’s already complex original case.

The waste of judicial resource concerns of *Rosen*, any entitlement to Section 726.108 relief, plus the violations of the right to privacy of innocent third parties, would occur whether Respondent’s FUFTA claims were handled in a separate suit, or in the same suit, as the underlying claim.³ This is supported by *Rosen’s* requiring a stay of *Rosen II* until after *Rosen I* was resolved with finality, not simply until *Rosen I’s* stay was lifted. If the separate trial were the only issue for this “waste” factor considered by the *Rosen* court, the *Rosen* court would have also required (or at least suggested that) both *Rosen* cases be consolidated, as well, once the original stay was

³ The Circuit Court judge’s analysis failed to factor in these other pretrial judicial costs, such as those identified here, which are actually more burdensome to the judicial system than the separate trial costs (which may likely occur in this case, anyway), alone.

lifted – which it did not do. A fact the Circuit Court judge failed to reconcile with the instant case. *Petitioner’s App.*, at 104, lines 15-16. Respondent cites *Invo Florida Inc. v. Somerset Venturer Inc.*, 751 So. 2d 1263 (Fla. 3d DCA 2000) for the proposition that the Third DCA allows prejudgment creditor’s FUFTA claims to proceed to finality. *Respondent* at 13 and 24. To the contrary, in reversing a summary judgment dismissing a FUFTA claim, the *Invo* court ruled only that the FUFTA claim was not barred by the economic loss rule.. There was no motion for stay before the *Invo* court, nor did the court consider whether the FUFTA claim was required to proceed once filed. *Invo* bolsters the waste of judicial resources issues as it observes that different facts must be proven for a FUFTA claim, as compared to its underlying contract claim. Respondent also cites *Cook v. Pompano Shopper, Inc.* 582 So. 2d 37 (Fla. 4th DCA 1991) for the proposition that FUFTA protects contingent and non-contingent creditors. *Respondent* at 13-14, and 24. Again. *Cook* did not involve a motion for stay, but a motion to dismiss a FUFTA claim. *Cook* simply ruled that “a ‘claim’ under the Act may be maintained even though ‘contingent’ and not yet reduced to judgment.” *See, Cook, supra*, at 40. Petitioner does not dispute that a FUFTA claim may be filed by a contingent creditor.

The fact that a FUFTA claim may be *maintained* provides no guidance on how a motion to stay of a prejudgment creditor’s FUFTA claim should be handled by the trial court. If a stay is granted, the filed FUFTA claim, while stayed, serves, among other purpose, to toll the statute of limitations (*See, Gulf* (“all that is required to toll the statute of limitations is the filing of a [UFTA] complaint.”) and provides notice to potential transferors and transferees. Respondent also improperly relies upon *Money*

v. Powell, 139 So. 2d 702 (Fla. 2d DCA 1962). *Respondent* at 13. *Money* involved a properly plead FUFTA claim, which the court classified as a “suit in equity,” that was brought after the initial judgment was returned unsatisfied and was simply an “alternative” to “filing of a creditor’s bill or execution and levy on the alleged fraudulent property.” *Money* at 703.

CONCLUSION

Petitioner respectfully requests this Court find an abuse of discretion by the trial court in failing to balance the interests, and reverse the trial court’s denial of Petitioner’s motion to stay HIPSL’s FUFTA claim. In the alternative, Petitioner respectfully requests that the Court remand the issue to the trial court to hold a hearing conforming to the balancing test set forth in Petitioner’s Initial Brief

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served by U.S. Mail this 31st day of January, 2003 on Plaintiff, THE INSTITUTE, and Third Party Defendants. RAYTEL and WERTHEIMER, by serving Stephen Navaretta, Esq. 1100 S.W. St. Lucie West Blvd., Suite 203, Port St. Lucie, Florida 34986 and Andrew C. Hall, Esq., 1428 S. Brickell Avenue, Suite 800, Miami, Florida 33131.

CERTIFICATE OF COMPLIANCE

I certify that the foregoing petition complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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