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No. _____

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In the Supreme Court of the United States

JAMES LAWRENCE MARSHALL, JOHN MICHAEL SENSER,
AND DANTE ANTHONY PASTORINI

Petitioners,

v.

NATIONAL FOOTBALL LEAGUE,

Respondent.

*On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit*

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a Rule 23(b)(3) class settlement that provides no guaranteed benefit to readily identifiable class members in exchange for the release of their damages claims satisfies the requirement of Rule 23(e)(2) that a settlement binding class members must be “fair, reasonable, and adequate.”

2. Whether Rule 23(e)(2) and principles of aggregate litigation require the district court, as a fiduciary, to evaluate the potential value of the damages claims released by class members.

PARTIES TO THE PROCEEDING BELOW

James Lawrence Marshall, Joseph Michael Senser, and Dante Anthony Pastorini were class-action plaintiffs in the district court proceeding, and appellants in the court of appeals proceeding.

The National Football League was defendant in the district court proceeding, and appellee in the court of appeals proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners James Lawrence Marshall, Joseph Michael Senser, and Dante Anthony Pastorini respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The court of appeals' opinion (App. 1) is reported at 787 F.3d 502 (8th Cir. 2015). The district court's opinion (App. 43) is unreported.

STATEMENT OF JURISDICTION

The court of appeals issued its opinion and entered judgment on May 21, 2015. The court of appeals entered a corrected opinion on June 16, 2015. (App. 1.) The court of appeals denied rehearing *en banc* on July 15, 2015. (App. 171.) U.S. Supreme Court Justice Samuel Alito extended the time in which to seek certiorari to November 12, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULES INVOLVED

Federal Rule of Civil Procedure 23(e)(2) provides, with respect to a proposed class-action settlement, as follows: "If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2).

PRELIMINARY STATEMENT

The district courts must ensure that every class-action settlement binding class members meets the requirements of fairness outlined in Federal Rule of Civil Procedure 23(e). The conventional Rule 23(b)(3) class-action settlement disburses settlement funds directly to all class members through a claims process until no further distributions can be made. The distribution of an entire settlement fund directly to third parties without first attempting to compensate class members violates fundamental principles of aggregate litigation.

As Chief Justice Roberts stated in *Marek v. Lane*, 134 S. Ct. 8 (2013), this Court is appropriately concerned about class-action settlements that provide for distributions of settlement funds only to third-party entities, without any guaranteed benefit to readily identifiable class members. This is that case.

This case is about the proper bounds of these fundamental principles of class-action settlements, pursuant to Rule 23(e). The Eighth Circuit Court of Appeals violated these principles when it endorsed a settlement that distributes the entire settlement fund to third parties, without any guaranteed benefit to the readily identifiable class members in exchange for the release of their claims, and without any valuation of each member's respective claims.

The Eighth Circuit's decision expands the power of class counsel, class representatives, and defense counsel to resolve class actions in ways that go well beyond what is permitted in any other circuit court. Allowing the Eighth Circuit's decision to stand will

eliminate important and well-established safeguards designed to protect the rights of all class members. Accordingly, Petitioners respectfully urge the Court to grant its petition for certiorari to address these questions of significant importance.

STATEMENT OF THE CASE

I. BACKGROUND

A. Plaintiffs' claims

In 2009, a class of former professional football players sued the National Football League ("NFL"), seeking to stop the NFL's continued unauthorized use of their identities to generate revenue and promote the NFL. (App. 321.) The retired players' claims included false endorsement under the Lanham Act, 15 U.S.C. § 1125, common law and statutory violations of the players' rights of publicity, and unjust enrichment. (App. 345–54.) The class action complaint alleged that the NFL used the players' names, images, likenesses, and identities from archival video footage, particularly in NFL Films productions, for decades, without providing the players fair compensation. (App. 329–40.)

B. The settlement agreement

The settlement agreement provides for \$50 million to be earmarked as follows: (1) costs for creating a 501(c)(3) organization; (2) costs for creating a licensing agency; (3) attorney's fees; (4) settlement administration expenses; and (5) the NFL's fees and costs for litigation with class members who exclude themselves from the settlement class. (App. 7.)

The settlement agreement purports to provide two “benefits” to class members. First, the settlement requires that all settlement funds be distributed to a new third-party 501(c)(3) organization called the “Common Good Entity.” (App. 7.) The settlement then requires the Common Good Entity to distribute its funds only to other third-party charitable organizations, which the settlement does not identify. (App. 7–8.) Finally, the settlement states that those unidentified third-party charities may then use the funds for the benefit of class members. (App. 14.) The settlement prohibits the Common Good Entity and any of the other third-party recipients of settlement funds from making direct payments to class members. Instead, the settlement states that the ultimate third-party recipients of settlement funds will receive the funds for indirect or direct use for “Fund Charitable Uses.” (App. 49.) The settlement does not require these third-party recipients of settlement funds to use the funds in ways that relate to the rights that form the basis of class members’ claims or in ways that reflect or account for the value of class members’ claims.

The settlement agreement also requires the creation of a new licensing agency that will purportedly assist class members and non-class members in licensing their likenesses prospectively to unknown commercial entities. (App. 7.) The settlement prohibits the licensing agency from licensing class members’ likenesses to the NFL, which has historically used class members’ likenesses for profit. (App. 8.) Furthermore, the settlement does not guarantee that any class member will receive licensing revenue through the newly created licensing agency.

In exchange for its distribution of up to \$42 million to third-party entities and its creation of a licensing agency, the settlement agreement requires that class members abandon their claims regarding the NFL's unauthorized use of their likenesses for profit. (App. 33–34.) Class members must release their claims against, and covenant not to sue, the NFL for both past and future publicity-rights claims. (App. 65–66.)

II. PROCEEDINGS BELOW

A. Proceedings in the district court

After denying the NFL's request for partial summary judgment, on December 12, 2012, the district court appointed a single attorney as plaintiffs' lead settlement counsel to replace the existing lead counsel and to negotiate a potential settlement with the NFL. On March 18, 2013, the lead settlement counsel filed a second amended class-action complaint, naming fourteen new plaintiffs not previously involved in the case. (App. 273.) That same day, those new plaintiffs asked the district court to approve the proposed settlement. Over the opposition of appellants, the district court granted preliminary approval of the proposed settlement and certified a class under Rule 23(b)(3).

At the preliminary approval hearing, the district court expressed concern that the Eighth Circuit would reject the settlement as "violat[ing] the public policy issues that have been developed with respect to cy-pres funds." (App. 270.) The court also acknowledged that courts "are not very excited about cy-pres funds." (App. 240.)

At the final approval hearing, the district court again expressed doubts about the settlement, noting that the court was “struggling” with the issue of whether a settlement must provide “direct benefit to class members.” (App. 203.) The district court suggested that the settlement could become the first to be approved without guaranteeing any direct benefit to class members. (App. 203.) The district court also stated that it was “struggling” with whether it could approve the settlement despite not knowing the value of the claims, as the court had barred the class members from conducting discovery regarding damages. (App. 195.) The district court further indicated that it did not need to know the value of the claims, so long as the lawyers involved in the case had “made a decision that [the settlement amount] was sufficient.” (App. 208.)

On November 4, 2013, the district court granted final approval of the settlement agreement and confirmed certification of the settlement class under Rule 23(b)(3). (App. 43.) In granting final approval of the settlement, the district court acknowledged that the settlement was “unique” and “one-of-a-kind” and had “little precedent.” (App. 48–49.) The district court further acknowledged that if it granted final approval, “not only would [the order] be appealed, it *should* be appealed, I don’t make any bones about that.” (App. 201.)

B. The court of appeals' decision

The Eighth Circuit affirmed the district court's decision to approve the settlement. (App. 1.) In affirming the district court's decision, the Eighth Circuit relied primarily on representations that class counsel made during oral argument about evidence not in the record in its effort to justify the district court's findings (App. 32–33), although the court observed that “there was some evidence in the record on the value of the claims” (App. 32). The Eighth Circuit also relied on the “clearly stated purpose” of the \$42 million settlement funds to benefit the class to conclude that the \$42 million settlement funds, together with the licensing agency, provided sufficient value to the class to justify the release of the class members' claims under the terms of the settlement agreement. (App. 34.) However, the court of appeals also acknowledged that the settlement agreement does not lead to the direct distribution of any of the \$42 million settlement funds to any class member and does not guarantee that any specific class member will receive any benefit. (App. 16–17.)

The court of appeals denied Petitioners' request for rehearing *en banc*. (App. 171.)

REASONS FOR GRANTING THE PETITION

This case presents an ideal opportunity for the Court to address important questions regarding the boundaries of Federal Rule of Civil Procedure 23's mechanism for resolving class claims. Petitioners respectfully submit that the settlement endorsed by the Eighth Circuit has exceeded those boundaries and is impermissible under Rule 23.

The first question addresses the circumstances, if any, under which Rule 23 allows class-action settlement distributions solely to third parties where the class members are readily identifiable. The second question addresses the circuit split on the district court's fiduciary duty to value class members' claims in exchange for the release of those claims under the terms of a settlement agreement. Both of these questions merit the Court's review and provide the Court with an opportunity to provide much needed guidance to the lower courts on a recurring issue of substantial importance.

I. THE EIGHTH CIRCUIT'S ENDORSEMENT OF A SETTLEMENT AGREEMENT THAT PROVIDES NO GUARANTEE OF A BENEFIT TO READILY IDENTIFIABLE CLASS MEMBERS IN EXCHANGE FOR RELEASING THEIR CLAIMS VIOLATES FOUNDATIONAL PRINCIPLES OF AGGREGATE LITIGATION

The Eighth Circuit's decision endorses the distribution of an entire settlement fund directly to third-party entities without attempting to first compensate class members. This type of settlement is

unprecedented and falls well outside the boundaries of Rule 23.

A. This Court has not yet addressed the permissibility of Rule 23 third-party distributions when the class members are identifiable

A class settlement may not be approved unless it is “fair, reasonable, and adequate.” Fed. R. Civ. P. 23(e). The district court’s role in the settlement approval process is that of a “fiduciary who must serve as a guardian of the rights of absent class members.” *Grunin v. Int’l House of Pancakes*, 513 F.2d 114, 123 (8th Cir. 1975); accord *Reynolds v. Beneficial Nat’l Bank*, 288 F.3d 277, 279 (7th Cir. 2002); *In re Warner Comm’ns Sec. Litig.*, 798 F.2d 35, 37 (2d Cir. 1986).

This Court has not yet addressed the circumstances, if any, under which Rule 23 allows class-settlement distributions solely to third parties. However, the Court has signaled the need to address the frequency of such distributions as a feature of class settlements. In 2013, the Court was presented with a case involving the approval of a class settlement that distributed the majority of the settlement funds to a newly-created third party entity. See *Marek v. Lane*, 134 S. Ct. 8 (2013). Although the Court denied certiorari in *Marek v. Lane*, Chief Justice Roberts emphasized that the reason for denial was not for lack of concern regarding these types of settlements, but that petitioner’s challenge was too “focused on the particular features of the specific cy pres settlement at issue.” *Id.* Specifically, Chief Justice Roberts stated that:

Granting review of this case might not have afforded the Court an opportunity to address more fundamental concerns surrounding the use of such remedies in class action litigation, including when, if ever, such relief should be considered; how to assess its fairness as a general matter; whether new entities may be established as part of such relief; if not, how existing entities should be selected; what the respective roles of the judge and parties are in shaping a *cy pres* remedy; how closely the goals of any enlisted organization must correspond to the interests of the class; and so on.

Id. at 9. Chief Justice Roberts concluded that “[i]n a suitable case, this Court may need to clarify the limits on the use of such remedies.” *Id.*

This case presents the fundamental concerns identified by Chief Justice Roberts in *Marek*, and thus merits this Court’s review. Unlike the petition at issue in *Marek*, this petition presents an opportunity for the Court to consider the broader implications of whether Rule 23 allows distribution of class-settlement funds to a third party, rather than the narrow question of whether a particular *cy pres* settlement agreement is permissible under Rule 23. This case differs from *Marek* because the record here contains no indication that the settlement funds can be considered “unclaimed” to allow distribution exclusively to third parties. By endorsing a settlement agreement that distributes funds only to third parties without first attempting to directly compensate class members who are readily identifiable, the Eighth Circuit’s decision squarely presents the type of issues raised by Chief

Justice Roberts in *Marek* and warrants this Court's review.

B. Rule 23 does not permit the distribution of class-settlement funds in the manner approved in this case

No appellate court has approved a class-action settlement in which the settling parties agreed to distribute all funds to third parties without first seeking to compensate class members directly or demonstrating that such distribution would be impossible or infeasible. Rather, appellate courts have indicated that approval of such a settlement would violate fundamental principles of fairness that govern class-action settlements. *See, e.g., Keepseagle v. Vilsack*, 307 F.R.D. 233, 245 (D.C. Cir. 2014) (explaining that “the point of *cy pres* is to benefit the class as closely as possible, using third-parties only as vehicles for providing that benefit to the class when direct distribution is infeasible”); *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007) (citations omitted) (internal quotations omitted) (providing that *cy pres* remedies are appropriate “in circumstances in which direct distribution to individual class members is not economically feasible”).

Circuit courts have vacated settlements involving third-party distributions as inferior to direct distributions to class members. *See, e.g., In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 173 (3d Cir. 2013) (vacating the district court's approval of a settlement agreement and cautioning that “direct distributions to the class are preferred over *cy pres* distributions” because, among other reasons, Congress created

class-action lawsuits “to allow plaintiffs to recover compensatory damages for their injuries”); *see also In re Airline Ticket Comm’n Antitrust Litig.* (“*Airline I*”), 268 F.3d 619, 625–26 (8th Cir. 2002) (setting aside the district court’s approval of a *cy pres* distribution after discussing the controversial use of *cy pres* distributions and how “many [*cy pres*] distributions have been set aside as abuses of discretion”). The policy against third-party distributions protects class members from releasing their claims for a “benefit that is at best attenuated and at worse illusory.” *In re Baby Prods.*, 708 F.3d at 173.

The courts of appeal have approved distributions of class-settlement proceeds to third parties only in narrow circumstances not present here. Specifically, the circuit courts have permitted the distribution of class settlements to third parties only when such funds are “unclaimed” funds, such as when class members cannot be identified, to which no party has a legal right. *See In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 34 (1st Cir. 2009); *Airline Ticket Comm’n Antitrust Litig.*, 307 F.3d 679, 680–83 (8th Cir. 2002) (“*Airline II*”); *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1305 (9th Cir. 1990); *see also, e.g., In re BankAmerica Corp. Sec. Litig.*, 775 F.3d 1060, 1064 (8th Cir. 2015) (reversing district court’s approval of settlement agreement where “further distribution to the class was clearly feasible”). Such “unclaimed” funds generally arise only from two circumstances: (1) where class members are difficult to identify or change constantly; or (2) where funds remain after distributions to the class members. *Airline I*, 268 F.3d at 625 (8th Cir. 2002) (citing *Powell v. Georgia-Pac. Corp.*, 119 F.3d 703, 706–07 (8th

Cir. 1997)); *see also In re BankAmerica*, 775 F.3d at 1063–64 (describing the limited circumstances in which third-party distributions are permissible).

The reason that only “unclaimed” funds may be distributed to third parties is because class members have property rights in the proceeds, which serve as consideration for the class members’ release of their claims. *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 474 (5th Cir. 2011) (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807–08, 812–13 (1985)). Only when no party has a remaining legal right to settlement proceeds may the proceeds be distributed to a third party. *See Powell*, 119 F.3d at 706–07.

These conditions are missing in the present case, where class members are finite in number and have been identified. As a result, the Eighth Circuit’s decision presents a departure from commonly understood principles governing the approval of class-action monetary settlements. The decision below endorses class settlement agreements that provide no guaranteed benefit to any class member.

Although the settlement endorsed below purports to provide two benefits to class members, no class member is guaranteed to realize any benefit. First, the settlement prohibits direct payment to individual class members, instead establishing a common good entity that must distribute funds to unidentified, third-party charitable organizations. These organizations, in turn, will offer benefits to either class or non-class members unrelated to the value of the class member’s claims or the subject matter of litigation.

In addition, the settlement requires the creation of a new licensing agency to assist class members and non-class members to license their likenesses prospectively to entities other than the defendant in the litigation, the NFL. The NFL itself obtains a license in perpetuity simply by virtue of the settlement. Neither the district court nor the Eighth Circuit made findings as to what value the licensing agency's efforts constituted to the class.

Because the settlement directs that funds be paid to third parties, which then directs benefits or payment based upon principles untethered to the injury or value of the claims, any potential value to the class is remote and unknowable. Accordingly, neither the district court nor the Eighth Circuit could properly assess the fairness and adequacy of the settlement to determine whether the "benefits" received by the class members were fair compensation for the claims they released, as Rule 23 requires. Distributing all class-settlement proceeds to third parties without attempting to compensate class members directly for releasing their claims falls well outside the boundaries of Rule 23. The Eighth Circuit's failure to follow well-established class action principles in this case undermines the rights of class members and merits this Court's review.

II. THE EIGHTH CIRCUIT'S DECISION CREATES A SPLIT IN THE CIRCUITS ON THE FIDUCIARY DUTIES OF DISTRICT COURTS TO VALUE CLASS MEMBERS' CLAIMS PRIOR TO GRANTING APPROVAL OF SETTLEMENT AGREEMENTS

This decision further divides the circuits on the issue of the fiduciary duties of district courts to analyze the value of potential claims before approving a settlement. In this case, the district court did not require the parties to put any evidence in the record of the value of the class members' claims. Without a record demonstrating the potential value of the class's collective injury, a district court cannot fulfill its most basic fiduciary obligations to the class in determining whether a proposed settlement is fair, reasonable, and adequate. The lower court, in turn, deprived the court of appeals of the ability to assess the reasonableness of the district court's decision. By failing to address the district court's responsibility to assess the value of class members' claims prior to granting approval of the settlement, the Eighth Circuit departs from the rulings of other circuit courts. Absent this Court's intervention, the decision below will all but eliminate the judiciary's role in ensuring the fair treatment of all class members, especially those absent from the litigation, in class settlements.

A. The courts are divided

Although Federal Rule of Civil Procedure 23 requires the district court to ensure the fairness, adequacy, and reasonableness of class settlements, courts of appeals have interpreted this standard differently in describing the duties of district courts within the context of class-action settlement

agreements. In this case, the Eighth Circuit endorsed the district court's failure to analyze the value of potential claims before approving a settlement. Because the district court approved a settlement agreement without any damages discovery to determine the value of the class members' claims, the district court, as the class members' fiduciary, could not compare the settlement amount and the potential value of the class members' past and future claims. The Eighth Circuit's decision transfers the district court's responsibilities under Rule 23 to the defendant and class counsel to a degree beyond that endorsed by any other circuit.

Other circuit courts require district courts, in executing their fiduciary role on behalf of the class, to conduct a detailed evaluation of the value of class claims before granting final approval. For example, the Third Circuit has adopted a balancing test to evaluate the fairness, reasonableness, and adequacy of a class settlement that includes an analysis of "the range of reasonableness of the settlement fund in light of the best possible recovery." *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975) (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974)); see also *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 592–95 (3d Cir. 2010) (providing that "a district court's primary role is to determine whether the settlement is fundamentally fair, reasonable and adequate" and that "a district court acts as a fiduciary, guarding the claims and rights of the absent class members").

The Seventh Circuit has similarly emphasized the district court's fiduciary responsibility to evaluate the value of the settlement to the class claims. See *Pearson*

v. NBTY, Inc., 772 F.3d 778, 780–81 (7th Cir. 2014) (quoting *Reynolds v. Beneficial Nat’l Bank*, 288 F.3d 277, 280 (7th Cir. 2002)) (reversing the district court’s approval of a class-action settlement where the settlement amount had “barely any connection to the settlement’s value to the class”); *see also Eubank v. Pella Corp.*, 753 F.3d 718, 720–21, 723 (7th Cir. 2014) (stressing the need for “intense judicial scrutiny of proposed class action settlements” and concluding that the approved settlement “should have been disapproved on multiple grounds,” including its failure to “quantify the benefits to class members”); *Reynolds*, 288 F.3d at 279, 283, 289 (emphasizing the importance of district courts to “exercise the highest degree of vigilance in scrutinizing proposed settlements of class actions” and describing the role of the district judge in the settlement phase of a class action as a “fiduciary of the class, who is subject therefore to a high duty of care that the law requires of fiduciaries”).

Unlike the Eighth Circuit, other circuit courts have held district courts to a fiduciary standard to protect the interests of class members and to ensure that fundamental class-action principles are preserved. This case highlights this departure from other circuits, creating a circuit split about the requirements imposed on district courts in assessing proposed class action settlement agreements.

The Eighth Circuit’s decision directly contradicts the Seventh and Third Circuits on this issue. (App. 1.) Although the Eighth Circuit claims that the “most important consideration” in the district court’s analysis is balancing the strength of the plaintiffs’ case against the value of the settlement, the Eighth Circuit stops

short of requiring that the district court engage in any substantive analysis of the potential value of the class claims. (App. 22, 28–37.) The Eighth Circuit does not engage in any lengthy analysis of the district court’s discussion of the case value, and merely states that to require the district court to make detailed factual findings would often be “difficult.” (App. 29–33.)

The Ninth Circuit has adopted a similar approach to the Eighth Circuit, in direct contrast to the approach adopted by the Third Circuit and Seventh Circuit. In *Lane v. Facebook, Inc.*, the Ninth Circuit upheld the district court’s approval of a \$9.5 million settlement agreement after finding that the record “convincingly establishe[d] that the district court accounted for the potential value of the [c]laims of some class members.” *Lane v. Facebook, Inc.*, 696 F.3d 811, 825 (9th Cir. 2012) (citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998)). In affirming the district court’s decision, the Ninth Circuit reasoned that district courts are not required to find specific monetary values corresponding to each of the class members’ claims or compare the value of those claims to the settlement award. *See Lane*, 696 F.3d at 823. The Ninth Circuit further reasoned that the Rule 23(e) standard “does not require detailed analysis of the statutes or causes of action forming the basis of the plaintiff class’s claims, and it does not require an estimate of the potential value of those claims.” *Id.* at 826.

This case warrants review due to the Eighth Circuit’s endorsement of an unprecedented settlement agreement that provides no direct benefit to class members and distributes all funds directly to third-party entities. Thus, resolving the circuit split

presented in this case will provide valuable guidance to lower courts struggling to apply the fiduciary requirements of district courts in increasingly unchartered territories.

B. The issue is important and timely for review

This case raises questions regarding the propriety of approving Rule 23(b)(3) class settlements where all settlement funds are distributed to third parties without guaranteeing class members any benefit. The scope of the district court's responsibilities to value class members' claims before approving a settlement depends on which circuit's rule prevails. To prevent confusion among the district courts and courts of appeal, this Court should grant review of this important and timely question and clarify the scope of the district court's responsibilities under Rule 23.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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