

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

SCHUYLKILL HEALTH SYSTEM,	)	
TITUSVILLE AREA HOSPITAL, and	)	
WARREN GENERAL HOSPITAL, on behalf	)	
of themselves and all others similarly situated,	)	
	)	No. 12-cv-07065-JS
Plaintiffs,	)	
	)	Honorable Juan R. Sánchez
v.	)	
	)	
CARDINAL HEALTH 200, LLC, and	)	
OWENS & MINOR DISTRIBUTION, INC.,	)	
	)	
Defendants.	)	
_____	)	

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR
PRELIMINARY APPROVAL OF SETTLEMENT WITH DEFENDANT
CARDINAL HEALTH 200, LLC**

I. INTRODUCTION

Plaintiffs Schuylkill Health System, Titusville Area Hospital, and Warren General Hospital (collectively, “Plaintiffs”) respectfully move the Court for an Order preliminarily approving a settlement with Defendant Cardinal Health 200, LLC (“Cardinal”) to partially settle the claims of members of the proposed Settlement Class in this litigation.

II. BACKGROUND

Defendants Owens & Minor Distribution, Inc. (“O&M”) and Cardinal (collectively, “Defendants”) are by far the two largest distributors of medical and surgical products in the United States. This case concerns Defendants’ use of exclusionary bundled contracts with their acute-care hospital customers. Plaintiffs allege that Defendants employed these contracts in response to a competitive threat from Suture Express, a specialty distributor that focuses on two product categories, sutures and endomechanical (“endo”) products, with the aim of preserving their price premiums over Suture Express. Plaintiffs further allege that they and members of the class paid prices for suture and endo distribution services that were higher than they otherwise would have been absent Defendants’ restrictive contracts. The lawsuit seeks treble damages, injunctive relief, attorneys’ fees, and costs from Defendants.

III. THE SETTLEMENT AGREEMENT

After a mediation process supervised by Magistrate Judge Marilyn Heffley, followed by additional negotiations directly between counsel for the parties, Plaintiffs and Cardinal reached an agreement (the “Settlement Agreement” or “Agreement”) to settle this case.¹ The Settlement Agreement defines the proposed Settlement Class as follows:

¹ The details of the settlement negotiations are set forth in the Declaration of Brent W. Landau (“Landau Declaration”) submitted herewith. The Settlement Agreement is attached to the Landau Declaration as Exhibit A.

All acute care providers in the United States and its territories that purchased suture and endomechanical distribution services from Cardinal Health 200, LLC and/or Owens & Minor Distribution, Inc., or any of Defendants' divisions, subsidiaries, predecessors, or affiliates during the period from December 18, 2008 through August 20, 2015 (the "Class Period"), and excluding federal government entities, Defendants, and Defendants' divisions, subsidiaries, predecessors, and affiliates.

Agreement, ¶ 2. The Agreement provides for the payment of \$1.15 million (the "Settlement Amount") by Cardinal and requires Cardinal to establish the authenticity and admissibility of documents and/or data that it produced in the litigation.² *Id.* at ¶ 23. In exchange for this consideration, Plaintiffs have agreed to release Cardinal from claims concerning purchases of suture and/or endo distribution services.³ Defendants have the right and option to rescind the Settlement Agreement for the reasons described therein, including if class members representing a certain percentage of agreed upon total sales of the distribution of suture and endo products decide to exclude themselves from the Settlement Class.⁴ *Id.* at ¶¶ 15, 17.

IV. THE PROPOSED SETTLEMENT IS SUFFICIENTLY FAIR, REASONABLE AND ADEQUATE

When deciding preliminary approval, courts need only determine whether "the proposed settlement discloses grounds to doubt its fairness or otherwise obvious deficiencies such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys, and whether it appears to fall within the range of possible approval ... The analysis often focuses on whether the settlement is the product of 'arms-length

² All capitalized terms have the same meaning as in the Settlement Agreement.

³ The full text of the proposed Release, including limitations thereof, is set forth in the Agreement. *Id.* at ¶¶ 13-14.

⁴ The agreed upon percentage is set forth in a Confidential Supplemental Agreement between the parties, which Plaintiffs can submit to the Court for *in camera* inspection at the Court's request.

negotiations.”⁵ *Thomas v. NCO Fin. Sys.*, No. CIV.A. 00-5118, 2002 WL 1773035, at *5 (E.D. Pa. July 31, 2002) (internal citations omitted).

In determining whether an antitrust settlement falls within a “range of reasonableness,” courts consider whether ““(1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected.”⁶ *Imprelis*, 2013 U.S. Dist. LEXIS 18332, at *7 (quoting *Linerboard*, 292 F. Supp. 2d at 638). Courts may also consider the amount of relief provided, *see, e.g., In re Auto. Refinishing Paint Antitrust Litig.*, 617 F. Supp. 2d 336, 344 (E.D. Pa. 2007), and commitments of settling defendants to provide information or cooperation that assists the class in prosecuting the action against non-settling defendants, *see e.g., Linerboard*, 292 F. Supp. 2d at 643.

Finally, courts should keep in mind that “settlement of litigation is especially favored by courts in the class action setting.” *In re Ins. Brokerage Antitrust Litig.*, 297 F.R.D. 136, 144 (D.N.J. 2013); *see also Gen. Motors Corp.*, 55 F.3d at 784 (holding that “[t]he law favors

⁵ The approval of class action settlements involves a two-step process: (1) preliminary approval; and (2) a fairness hearing, after notice to the class, to determine final approval of the proposed settlement. *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 562 (D.N.J. 1997); *In re Auto. Refinishing Paint Antitrust Litig.*, MDL NO. 1426, 2004 WL 1068807, at *1 (E.D. Pa. May 11, 2004); 4 NEWBERG ON CLASS ACTIONS § 11:25, at 38-39 (4th ed. 2002). At the preliminary approval stage, a court does not conduct a “definitive proceeding on fairness of the proposed settlement.” *In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1384 (D.C. Md. 1983); *see also In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995) (holding that the “preliminary determination establishes an initial presumption of fairness”); *In re Am. Inv. Life Ins. Co. Annuity Mktg. and Sales Practices Litig.*, 263 F.R.D. 226, 238 (E.D. Pa. 2009) (same). That determination must await the final hearing, at which the fairness, reasonableness, and adequacy of the settlement are more fully assessed. *See In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 638 (E.D. Pa. 2003).

⁶ The last factor, the percentage of objections, is premature at this stage. *In re Imprelis Herbicide Mktg., Sales Practices & Prods. Liab. Litig.*, No. 11-md-2284, 2013 U.S. Dist. LEXIS 18332, at *10 (E.D. Pa. Feb. 11, 2013).

settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation”); *Austin v. Pa. Dept of Corr.*, 876 F. Supp. 1437, 1455 (E.D. Pa. 1995) (explaining that “the extraordinary amount of judicial and private resources consumed by massive class action litigation elevates the general policy of encouraging settlements to ‘an overriding public interest’”).

As discussed below, all of the relevant factors—the terms of the settlement itself, the nature of the negotiations, the degree of discovery at the time of settlement, the experience of Class Counsel, and the risks of proceedings against Cardinal—support the conclusion that the Settlement falls within the range of possible final approvals and is entitled to the presumption of fairness, permitting notice to issue to the Class.

A. The Terms of the Agreement Support Preliminary Approval

As noted above, the Agreement requires that Cardinal pay \$1.15 million and cooperate with Plaintiffs by establishing the authenticity and admissibility of documents and data. Class Counsel have substantial experience litigating antitrust class actions and believe that the Settlement Amount is appropriate cash consideration for the discharge of the claims against Cardinal and is a favorable result of the Class. This determination is based in part on the risk and likely expense of continuing to litigate the claims against Cardinal.

Courts have accorded significant weight to the opinion of class counsel. *See, e.g., In re Gen. Instruments Sec. Litig.*, 209 F. Supp. 2d 423, 431 (E.D. Pa. 2001); *Stewart v. Rubin*, 948 F. Supp. 1077, 1087 (D.D.C. 1996) (“A court should defer to the judgment of experienced counsel who have competently evaluated the strength of the proof.”); *McGuinness v. Parnes*, No. 87-2728-LFO, 1989 WL 29814, at *1 (D.D.C. Mar. 22, 1989) (“While the evaluation of the fairness and adequacy of a settlement such as this is anything but a scientific process, there is nothing about this Settlement suggesting that the Court should second-guess the product of the

negotiations between the skilled and conscientious lawyers who represented parties on both sides of this litigation.”); *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 410 F. Supp. 659, 667 (D. Minn. 1974) (“The recommendation of experienced antitrust counsel is entitled to great weight.”).

B. The Negotiation Process Supports Preliminary Approval

As discussed in the accompanying Landau Declaration, the settlement process here involved negotiations indirectly through a mediator as well as direct negotiations between the parties’ counsel. *See* Landau Decl. at ¶¶ 4-7. Because the settlement is the result of arm’s length negotiations between Class Counsel and counsel for Cardinal, all of whom are experienced and capable in complex class action and antitrust matters, it is entitled to deference from the Court. *See In re CIGNA Corp. Sec. Litig.*, No. 02–8088, 2007 WL 2071898, at *2 (E.D. Pa. July 13, 2007) (noting that a presumption of fairness exists where parties negotiate at arm’s length, assisted by a mediator); *Gates v. Rohm & Haas Co.*, 248 F.R.D. 434, 439, 444 (E.D. Pa.2008) (stressing the importance of arm’s length negotiations and highlighting the fact that the negotiations included “two full days of mediation”); *In re Auto. Refinishing Paint Antitrust Litig.*, No. MDL 1426, 2003 WL 23316645, at *6 (E.D. Pa. Sept. 5, 2003) (preliminarily approving class action settlement that “was reached after extensive arms-length negotiation between very experienced and competent counsel”).

C. The Extent of Discovery Supports Preliminary Approval

Fact discovery was nearly complete when the parties agreed to settle. Landau Decl. at ¶ 8. At that time, Defendants collectively had produced over 150,000 pages of documents, much of which had already been reviewed by Class Counsel. Plaintiffs had also reviewed over 40 deposition transcripts from the *Suture Express* case and deposed two Suture Express employees, including the CEO. *Id.* Additionally, Plaintiffs were just one day away from filing their class

certification papers and expert report. Accordingly, the amount of discovery completed supports a finding that the Settlement is within the range of reasonableness. *Imprelis*, 2013 U.S. Dist. LEXIS 18332 at *9-10 (finding settlement within range of reasonableness where “[a] considerable amount of preliminary discovery was conducted, . . . the hiring and consultation of several experts, and a deposition of [Defendant’s] product manager”).

D. The Expense and Uncertainty of Continued Litigation Against Cardinal Supports Preliminary Approval.

The settlement is particularly reasonable given the inherent risks in moving forward with litigation towards trial. It has been often observed that “[a]n antitrust class action is arguably the most complex action to prosecute.” *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d at 639 (citation omitted); *see also Weseley v. Spear*, 711 F. Supp. 713, 719 (E.D.N.Y. 1989) (noting that antitrust class actions are “notoriously complex, protracted, and bitterly fought”).

Continuing this litigation against Cardinal would entail a lengthy and expensive legal battle. This case does not follow a Department of Justice investigation or any public indictment. Additionally, Cardinal has asserted various defenses, and a jury trial (assuming the case proceeded beyond pretrial motions) might well turn on questions of proof, making the outcome inherently uncertain for both parties. *Linerboard*, 292 F. Supp. 2d at 639; *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 475-76 (S.D.N.Y. 1998) (“Antitrust litigation in general, and class action litigation in particular, is unpredictable.”). Moreover, even after trial is concluded, there could be one or more lengthy appeals. *In re Remeron End-Payor Antitrust Litig.*, No. Civ. 02-2007, 2005 WL 2230314, at *17 (D.N.J. Sept. 13, 2005). The degree of uncertainty supports preliminary approval of the proposed Settlement Agreement. *See In re Chambers Dev. Sec. Litig.*, 912 F. Supp. 822, 838 (W.D. Pa. 1995).

V. CERTIFICATION OF THE PROPOSED SETTLEMENT CLASS IS WARRANTED

It is well-established that a class may be certified for purposes of settlement. *In re Pet Food Prods. Liability Litig.*, No. 07-2867, 2008 WL 4937632, at *3 (D.N.J. Nov. 18, 2008) (“Class actions certified for the purposes of settlement are well recognized under Rule 23.”); *In re Ikon Office Supplies Inc. Sec. Litig.*, 194 F.R.D. 166, 188 (E.D. Pa. 2000) (class certified for purposes of settlement of securities class action). In the case of settlements, “tentative or temporary settlement classes are favored when there is little or no likelihood of abuse, and the settlement is fair and reasonable and under the scrutiny of the trial judge.” *In re Prudential Sec. Inc. Ltd. P’ships Litig.*, 163 F.R.D. 200, 205 (S.D.N.Y. 1995) (internal quotation and citation omitted). Here, Cardinal has stipulated to certification of a settlement class as against it.

Rule 23 governs the issue of class certification for both litigation and settlement classes. A settlement class should be certified where the four requirements of Rule 23(a)—numerosity, commonality, typicality and adequacy—are satisfied, and when one of the three subsections of Rule 23(b) is also met. *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 527-30 (3d Cir. 2004). The Settlement here is fair, reasonable, and non-abusive, and the requirements of Rule 23 are met.⁷ Therefore the Settlement Class should be certified by the Court.

A. This Case Satisfies The Prerequisites Of Rule 23(a)

1. The Settlement Class is sufficiently numerous

Rule 23(a)(1) requires that the class be so numerous that joinder of all members is impracticable, considering the size of the proposed class, the geographic location its members, and the expediency of joinder. *Marsden v. Select Med. Corp.*, 246 F.R.D. 480, 484 (E.D. Pa.

⁷ Plaintiffs incorporate by reference the arguments in their Memorandum in Support of Plaintiffs’ Motion for Class Certification (ECF No. 132).

2007). Here, there are estimated to be over 3,500 members of the Class dispersed throughout the nation. Singer Rpt. ¶ 156 n. 276 (ECF No. 132). Accordingly, the numerosity requirement is satisfied. *Stewart v. Abraham*, 275 F.3d 220, 226-27 (3d Cir. 2001) (finding 40 class members sufficient).

2. There are common questions of law and fact

Rule 23(a)(2)'s "commonality threshold is low." *Gates v. Rohm & Hass Co.*, 265 F.R.D. 208, 215 (E.D. Pa. 2010), *aff'd*, 655 F.3d 255 (3d Cir. 2011); *see also Rodriguez v. Nat'l City Bank*, 726 F.3d 372, 382 (3d Cir. 2013). Only one common issue of fact or law suffices. *In re Prudential Ins. Co. Am. Sales Practices Litig.*, 148 F.3d 283, 310 (3d Cir. 1998). Here, common issues abound, including: (a) whether O&M had market power; (b) whether Cardinal had market power; (c) whether Defendants had the ability to exclude competition and/or artificially inflate prices; (d) whether Defendants foreclosed substantial competition; (e) the boundaries of the relevant distribution markets; and (f) the proper measure of damages. Accordingly, the commonality requirement of Rule 23(a)(2) is met.

3. The Representative Plaintiffs' claims are typical of those of the Settlement Class

Rule 23(a)(3)'s typicality requirement is met where class members' claims "arise from the same alleged wrongful conduct" and are based upon "the same general legal theories." *Warfarin*, 391 F.3d at 532. Each representative alleges that it, like all Class members, paid artificially inflated prices for suture and endo distribution services and seeks to recover overcharge damages. Accordingly, the Rule 23(a)(3) typicality requirement is satisfied.

4. The Representative Plaintiffs will fairly and adequately protect the interests of the Class

Rule 23(a)(4) requires that the "[t]he representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The Court's inquiry "is to determine

that the putative named plaintiff has the ability and the incentive to represent the claims of the class vigorously . . . and that there is no conflict between the individual's claims and those asserted on behalf of the class.” *In re K-Dur Antitrust Litig.*, 686 F.3d 197, 223 (3d Cir. 2012) *vacated on other grounds*. Each named Plaintiff, just like each member of the Class, is a direct purchaser of suture and endo distribution services from Defendants, and each named Plaintiff has the same interest in (a) establishing Defendants violated the antitrust laws, (b) proving the violations inflated suture and endo distribution prices, and (c) maximizing the amount of damages. Adequate representation under Rule 23(a)(4) is therefore satisfied.

B. Plaintiffs' Claims Satisfy The Prerequisites Of Rule 23(b)(3)

Rule 23(b)(3) authorizes class certification if “the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.”⁸ Fed. R. Civ. P. 23(b)(3). Rule 23(b)(3) is “designed to secure judgments binding all class members, save those who affirmatively elect[] to be excluded,” where a class action will “achieve economies of time, effort, and expense, and promote . . . uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.” *Amchem*, 521 U.S. at 614-15. Certification of the proposed Settlement Class under Rule 23(b)(3) will serve these purposes.

1. Common legal and factual questions predominate

The Rule 23(b)(3) predominance requirement “tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” *Sullivan v. DB Inv., Inc.*, 667

⁸ Since this is a settlement class, the Court need not examine the manageability of the class at trial. *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 306 (3d Cir. 2005) (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)).

F.3d 273, 297 (3d Cir. 2011) (quoting *Ins. Brokerage*, 579 F.3d at 266); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008); see also *In re Mercedes-Benz Antitrust Litig.*, 213 F.R.D. 180, 186 (D.N.J. 2003) (“Predominance requires that common issues be both numerically and qualitatively substantial in relation to the issues peculiar to individual class members.”). A plaintiff seeking certification of an antitrust class action must show that common or class-wide proof will predominate with respect to: “(1) a violation of the antitrust laws... , (2) individual injury resulting from that violation, and (3) measurable damages.” *Hydrogen Peroxide*, 552 F.3d at 311; *Danny Kresky Enter. Corp. v. Magid*, 716 F.2d 206, 209-10 (3d Cir. 1983); *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 156 (3d Cir. 2002).

The Rule 23(b)(3) test of predominance is “readily met” in antitrust cases.⁹ *Amchem*, 521 U.S. at 625. As in other antitrust cases, each element of Plaintiffs’ claims—proof of the violation, antitrust injury, and damages—will be proven with classwide evidence. Accordingly, common or class-wide proof predominate in this case.

2. A class action is superior to other methods of adjudication

“The superiority requirement asks the court to balance, in terms of fairness and efficiency, the merits of a class action against those of alternate available methods of adjudication.” *Prudential Ins. Co.*, 148 F.3d at 316. Here, a class action is superior to other available methods for the fair and efficient adjudication of class claims, “because litigating all of these claims in one action is far more desirable than numerous separate actions litigating the

⁹ As the Third Circuit explained in *Ins. Brokerage*, “because the ‘clear focus’ of an antitrust class action is on the allegedly deceptive conduct of defendant and not on the conduct of individual class members, common issues necessarily predominate.” 579 F.3d at 267; see also *Sullivan*, 667 F.3d at 299 (finding that *Wal-Mart Stores Inv. v. Dukes*, 131 S. Ct. 2541 (2011) bolstered a finding that common issues predominated in an antitrust case where the answers to the questions of alleged anticompetitive conduct and the harm it caused are common as to all class members).

same issues.” *Ins. Brokerage*, 579 F.3d at 259.

Absent class action certification, the Court may be faced with dozens of individual lawsuits, all of which would arise out of the same set of operative facts. By proceeding as a class action, resolution of common issues alleged in one action will be a more efficient use of judicial resources and bring about a single outcome that is binding on all class members. Also, as in most antitrust lawsuits, potential plaintiffs are likely to be geographically dispersed. As such, the realistic alternative to a class action is many scattered lawsuits with possibly contradictory results for some plaintiffs and Defendants. These very issues led the Supreme Court to acknowledge that the unique qualities of antitrust litigation often mean that a class action is superior to individual lawsuits. *Amchem*, 521 U.S. at 617.

VI. THE COURT SHOULD APPOINT HAUSFELD LLP AS SETTLEMENT CLASS COUNSEL

Hausfeld LLP seeks to be appointed as Settlement Class Counsel. The firm is willing and able to vigorously prosecute this action and to devote all necessary resources to obtain the best possible result. The work done to date supports the conclusion that they should be appointed as Class Counsel for purposes of the Settlement. Thus, the firm meet the criteria of Rule 23(g)(1)(C)(i). *Cf. Farley v. Baird, Patrick & Co., Inc.* No. 90 Civ. 2168 (MBM), 1992 WL 321632, at *5 (S.D.N.Y. Oct. 28, 1992) (“[c]lass counsel’s competency is presumed absent specific proof to the contrary by defendants”); *see also* Declaration of Brent W. Landau in Support of Plaintiffs’ Motion for Class Certification (ECF No. 132) (setting forth qualifications of the Hausfeld LLP attorneys).

VII. THE COURT SHOULD PERMIT NOTICE CONSISTENT WITH THE PROPOSED NOTICE PLAN

Plaintiffs propose that the notice be given to Settlement Class members through both direct mailed notice and published notice in the forms attached as Exhibits 1 and 2 to the

Settlement Agreement. *See* Ex. A to Landau Decl. And as required by Rule 23(c)(2)(B), the proposed forms of notice state in plain, easily understood language the nature of the action, the definition of the class certified, the class claims, issues, or defenses, that a class member may enter an appearance through counsel if the member so desires, that the Court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and the binding effect of a class judgment on class members. *Id.* The notices also advise Class members that Class Counsel intend to seek the full Settlement Amount for reimbursement of expenses and payment of future litigation expenses, and that Class Counsel are not seeking attorneys' fees from this settlement.¹⁰ *Id.* Accordingly, the Court should permit notice to issue consistent with the proposed notice plan, on a schedule as set forth in the proposed order. .

VIII. CONCLUSION

For the reasons set forth above, Plaintiffs request that the Court: (1) preliminarily approve the Settlement Agreement; (2) certify the proposed Settlement Class; (3) appoint Hausfeld LLP as Settlement Class Counsel; and (4) permit the issuance of notice consistent with the proposed notice plan.

¹⁰ As will be discussed in more detail in a forthcoming motion, which will be filed sufficiently in advance of the deadline for Class members to opt out of or object to the settlement, such payments are regularly awarded and paid out of settlement funds. *See, e.g., Linerboard*, 292 F. Supp. 2d 631, 643 (E.D. Pa. 2003) (noting that a partial "settlement provides class plaintiffs with an immediate financial recovery that ensures funding to pursue the litigation against the non-settling defendants"); *In re Chocolate Confectionary Antitrust Litig.*, No. 1:08-MDL-1935 (M.D. Pa. Dec. 12, 2011) (awarding entirety of settlement fund from a partial settlement to plaintiffs for purposes of paying future expenses reasonably incurred in the ongoing prosecution of the class action).

Dated: September __, 2015

Respectfully submitted,

/s/ Brent W. Landau

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