IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO
Court of Appeals No. 32,973

FIDENCIO (LENCHO) VILLALOBOS,

Plaintiff-Appellee,

vs.

NICHOLAS (NICK) VILLALOBOS and
VILLALOBOS CONSTRUCTION CO., INC.,

Defendants-Appellants.

APPEAL FROM THE THIRD JUDICIAL DISTRICT
COUNTY OF DONA ANA

Third Judicial District No. CV-2010-1360
THE HON. JAMES T. MARTIN

REPLY BRIEF

Respectfully Submitted,

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STATEMENT OF TRANSCRIPT CITATION FORMAT

The transcripts of the relevant hearings were stenographically transcribed. Citations are to the Transcript (Tr.), Volume number (Vol.) and page(s) where the information or testimony appears.

STATEMENT OF PAGE/WORD COUNT COMPLIANCE:

This Brief contains more than the permitted 15 pages. Counsel used the most recent version of Word Perfect with a proportionally spaced Times New Roman typeface in 14 point font. The body of the document consists of 4,389 words total.

TABLE OF AUTHORITIES

New Mexico Case Law Authority

New Mexico Rules and Statutory Authority

Defendants-Appellants Nick (Nick) Villalobos and Villalobos Construction Co., Inc. reply as follows to the arguments made in Plaintiff-Appellee Fidencio (Lencho) Villalobos' Answer Brief:

I. Response in Reply to Plaintiff's Characterization of Facts

Lencho insists that he was not bound by the contractual terms of the buy-sell agreement, and maintains that the District Court properly declined to apply the terms of the Buy-Sell Agreement to Lencho after he existed the Complany and ceased to participate in its operations. The terms of the Buy-Sell Agreement were clear and unambiguous, and provided the means to preserve and insure the viability and continuity of the Company in the event of a death, disability, termination from employment, or bankruptcy of any shareholder, or the involuntary disposition or intention of a shareholder to sell Company stock. [RP 53-71 (emphasis added)] There is no provision for exempting a shareholder from the terms and conditions of the Buy-Sell Agreement, which applied equally to any shareholder who intended or attempted to dispose of Company stock. [*Id.*] No shareholder was distinguished or favored over another with respect to application of the Buy-Sell Agreement. There was no evidence that the circumstances under which Plaintiff signed the Buy-Sell Agreement could properly lead to a supported finding that it was a contract of adhesion, nor that Plaintiff was in an "unequal bargaining position" when he signed. *Compare Guthmann v. La Vida Llena*, 103 N.M. 506, 510, 709 P.2d 675, 679 (1985).

The Buy-Sell Agreement provided that a shareholder seeking to dispose of his stock must first offer his stock for sale to Company, and must do so in a prescribed manner. [*Id.*] There is no evidence that Lencho ever offered his stock for sale to the Company. Lencho abandoned the Company after completing the Mora Project and never made any overture to Nick or the Company after he left.

Lencho's argument that the Buy-Sell Agreement was rightfully rejected because it was drafted by an attorney at the behest of Nick and the Company must be rejected. While ambiguities present in a contract should be construed the party who drafted it, *Smith v. Tinley*, 1984-NMSC-011, 100 N.M. 663, 665, 674 P.2d 1123, 1125, the terms of the Buy-Sell Agreement are clear and unambiguous, and require no interpretive assistance. By its express terms, application of the Buy-Sell Agreement was triggered not only by an intended disposition of stock, but also by any "attempted disposition" of stock. [*Id.*] An "attempted disposition" of stock was defined by the Buy-Sell Agreement as any act by a shareholder to dispose of his stock in the Company other than in accordance with all of the terms and conditions set forth in the Buy-Sell Agreement. [*Id.*] Lencho's departure from the company and his subsequent suit against Nick and the Company was an attempted disposition of his stock that fell within the terms of the agreement. The District Court erred in failing to enforce the parties bargained-for agreement.

The Buy-Sell Agreement was also triggered upon termination from employment of a shareholder. [*Id.*] A shareholder terminating employment was required

to commence the procedure for disposition of stock by offering the stock first to the Company and then, absent purchase by the Company, to other shareholders. [*Id.*]

Lencho's argument that Nick never attempted to pay for Lencho's interests is simply wrong; it is undisputed that, in mid-August 2008, Nick initiated a process to buy out Plaintiff's interest, if any, in the Company. [Tr. Vol. II, p. 298 – 299; Plaintiff's Exhibit 8; RP 324-325] By October 2008, Lencho admits he had abandoned the Mora Project and any role in construction work bid upon, awarded to, or performed by the Company. [Tr. Vol. II, pp. 300 – 301; 305 - 306] After October 2008, Lencho did not exercise or attempt to exercise any continuing role in the management, finances, or labors of the Company. [Tr. Vol. II, pp. 312 - 313] Lencho did not receive or request any meeting notices of the shareholders, officers, or directors. [Tr. Vol. II, pp. 301 – 302] He did not request any corporate records or financial information about the Company. After October 2008, Lencho made no attempt to communicate with Nick or the Company for any reason.

The obligations of contact and communication must go in both directions, particularly where, as here, the parties have organized their relationship contractually. Lencho's position that he had no obligation to conform his actions to the terms of the Buy-Sell Agreement, and that the burden of communication and clarification of the parties' relationship rested upon Nick and the Company is wrong.

Lencho's Answer fails to note that, in April 2009, only six months after abandoning his relationship with the Company, Lencho filed a district court action in Sandoval County, requesting the dissolution of the Company pursuant to NMSA 1978, Section 53-16-16. He also requested an accounting and damages based on the alleged misappropriation of corporate assets by Nicholas Villalobos. Lencho did not argue or prove that the Buy-Sell Agreement was obtained through any fraud, duress, or mistake of material fact; the Complaint never addressed the Buy-Sell Agreement or its provisions. Lencho asserted two claims: 1. for dissolution of the Company under NMSA 1978, Section 53-16-16, and 2. for an accounting and damages for misappropriation of corporate assets by Nick. No equitable relief was pleaded. Lencho's argument that the parties always knew they were invoking the equitable powers of the District Court is not supportable in light of the pleadings Lencho filed.

Lencho's Answer fails to address the fact that, during the proceedings for determination of the value of Lencho's interest, Lencho voluntarily withdrew [Tr. Vol. III, p. 299-300], and the Court granted a directed verdict on Plaintiff's Count I for misappropriation and unlawful conversion of corporate assets, specifically noting that Lencho had produced no evidence of damages due to any misappropriation of corporate assets, financial improprieties, or mismanagement. [RP 684-686; Tr. Vol. III, p. 300 – 303 (emphasis added)]

Following the close of evidence on Count II (the petition for dissolution of the Company under NMSA 1978, Section 53-16-16), in response to Defendants' closing arguments against dissolution of the Company pursuant to Section 53-16-16, and for enforcement of the Buy-Sell Agreement, Lencho invoked *McCauley v. Tom McCauley*, 104 N.M. 523, 724 P.2d 232 (Ct.App. 1986), and requested that the District Court allow Lencho to amend his Complaint to request that the District Court exercise its equity jurisdiction and order the purchase of Plaintiff's shares. [Tr. Vol. IV, pp. 216 - 217]

The District Court granted the amendment and – citing *McCauley* – established the District Court's own valuation [RP 751-755], rejecting the valuation formula set forth in the Buy-Sell Agreement, and the valuations calculated by the two accounting experts based on the terms of the Buy-Sell Agreement and generally accepted accounting principles. The District Court established the valuation of Plaintiff's stock as $599,082.50, based upon a valuation date of December 31, 2008.

In establishing its own valuation of Plaintiff's shares, the District Court concluded that, while the Buy-Sell Agreement was "applicable in general, it would be unconscionable for valuation of Plaintiff's stock." [*Id.*] This was the sole finding of unconscionability, and it is manifestly insufficient to sustain the District Court's complete disregard for the Buy-Sell Agreement. The District Court disregarded the contract rate of interest in the Buy-Sell Agreement, and established the rate of

interest based on a prime rate. [*Id.*] Although the experts testified the commercially reasonable prime rate would have been 3.5% annually between 2008 and 2012, the District Court awarded prejudgment interest at the rate of 9.5 % computed on the entire valuation amount. [*Id.*] The Court also calculated that interest from February 2008, on the entire stock value determined by the District Court as of December 31, 2008, rather than the investment of $252,632.22 made in February 2008. [*Id.*] This essentially rewarded Lencho three time: first, returning is initial investment after Lencho participated in the Company for less than a year; second, giving Lencho a return on the investment that was tied to gross value rather than net value of the Company; and third, giving Lencho a rate of return in the form of interest that no other investor could reasonably have anticipated, and that was at odds with the parties' written agreement.

The District Court added prejudgment interest to the entire valuation of the stock beginning in February 2008, despite the fact that the stock valuation was calculated as of December 31, 2008. [*Id.*] The District Court made no findings that the Buy-Sell Agreement was unconscionable as to the specified contract rate of interest. [*Id.*]

The District Court finally ruled that the entire valuation for the stock, plus the prejudgment interest calculated from February 2008, were immediately due and payable. The District Court made no finding that the Buy-Sell Agreement's provision for a five year payment period was unconscionable.

II. ARGUMENT AND AUTHORITY IN REPLY:

A. The Court erred in denying Defendants' Amended Motion for Partial Summary Judgment as to Count II: Petition for dissolution under NMSA 1978, Section 53-16-16.

Viewing all of the evidence in a light most favorable to Lencho, as must be done on summary judgment, the District Court found that Lencho was a shareholder, as Lencho had argued. It was uncontroverted that Lencho signed the Buy-Sell Agreement. Therefore, the terms of the Buy-Sell Agreement controlled Lencho's ability to dispose of his shares and precluded any right to compel dissolution of the Company. Lencho's Answer speaks vaguely of the fact that an attorney identified with Nick and the Company drafted the agreement, but makes no allegation or proof of fraud or unconscionability. The agreement had express provisions for calculation payment of a shareholder's value in the Company upon dissolution. The Court also had the undisputed evidence of the termination of the parties' working relationship in October 2008, and the fact that after 2008, Lencho had no involvement in the Company. The material facts before the District Court were not in dispute, only the determination of the legal conclusions to be drawn therefrom.

Lencho insists that the Buy-Sell Agreement had no effect on the parties' actions upon Lencho's termination of his relationship with the Company. In signing the Buy-Sell Agreement, Plaintiff agreed that any involuntary dissolution of the Company was waived. Paragraph 7 of the Buy-Sell Agreement provided:

> Upon termination (for any reason other than his/her death or disability) of the Corporation's employment of a Shareholder, such former employee Shareholder shall be obligated to sell all his/her Stock.

[RP 275-4] Paragraph 7 of the Buy-Sell Agreement expressly provides that a shareholder employee, upon termination of the employment relationship, shall be obligated to sell his stock in the Company. Lencho established that he was a shareholder. Lencho specifically agreed that his sole remedy and recourse was that he was "obligated to sell" all his stock in the Company at a price and on terms specified by the Buy-Sell Agreement. Where parties have ordered their relationship contractually, allowing Lencho to avoid all of the requirements of the Buy-Sell Agreement, and avoid the corresponding valuation of his stock according to the Buy-Sell Agreement, by disregarding the required offer to either the Company or to Nick was error and must be reversed. The applicability and enforceability of the Buy Sell Agreement as a matter of law, and its disposition of the parties' relationship should have been decided summarily in favor of its application.

B. The District Court erred in failing to enforce the Buy-Sell Agreement in the absence of sufficient evidence of unconscionability in the valuation provisions of the Buy-Sell Agreement.

Under New Mexico principles of contract law, a finding of unconscionability may be based on either procedural or substantive unconscionability, or a combination of both. *Rivera v. Am. Gen. Fin. Servs.*, 2011-NMSC-033, ¶ 47, 150 N.M. 398, 259 P.3d 803, 816. To analyze whether a contract is substantively unconscionable, the court looks to the terms of the contract itself and considers whether the terms of

the agreement are commercially reasonable, fair, and consistent with public policy. *Id.*, at ¶ 45, 150 N.M. 398, 259 P.3d 803. The threshold for unconscionability in New Mexico is high, and unconscionability traditionally relates to contracts that violate broad public policy across numerous contracts. In *State ex rel. Highway & Transp. Dep't v. Garley*, 1991-NMSC-008, 111 N.M. 383, 389, 806 P.2d 32, 38 our Supreme Court enforced a condemnation clause of lease, noting that "[t]he doctrine of unconscionability was intended to prevent oppression and unfair surprise, not to relieve a party of a bad bargain." *Id.*

There was no finding by the District Court that the terms or circumstances of the Buy-Sell Agreement were unconscionable when the parties entered into it, nor when Plaintiff left the employ of the Company at the end of 2008. Lencho's Complaint did not refer to the Buy-Sell Agreement nor plead any grounds for equitable relief from it. Even assuming that the Buy-Sell Agreement and the other shareholder documents was prepared by an attorney for Nick and the Company, this does not lead – as Lencho's Reply suggests – to a determination of unconscionability.

Lencho requested a court-ordered dissolution under NMSA 1978, Sec. 53-16-16 to avoid the Buy-Sell Agreement, despite its clear applicability. As set forth above and in the Brief in Chief, the Buy-Sell Agreement expressly restricted any "disposition" of stock in the Company, and also expressly restricted any "attempted disposition" of stock outside the Buy-Sell Agreement. The Buy-Sell Agreement

established the parties' agreed method for valuation of the stock and should have been enforced by the District Court.

C. The District Court erred by failing to enforce the parties' contractual rate of interest, set forth in the Buy-Sell Agreement, in the absence of sufficient substantial evidence or a legal conclusion that the interest rate in the Buy-Sell Agreement was unconscionable or otherwise unenforceable.

As with the Buy-Sell Agreement, Lencho insists that the Court was not bound to enforce the parties' intent expressed in the agreement with regard to the contract rate of interest. Lencho relies almost entirely on an argument that Nick and the Company somehow failed to address the contract rate of interest and therefore failed to preserve the issue for this Court's review.

Defendants-Appellees raised, briefed and argued the issue of enforcement of all of the terms of the Buy-Sell Agreement, not merely some of the terms. Throughout the proceedings below, Nick and the Company's position was that Pparties to a contract agree to be bound by its provisions and must accept the burdens of the contract along with the benefits. When a contract was freely entered into by parties negotiating at arm's length, the duty of the courts is ordinarily to enforce the terms of the contract which the parties made for themselves. *Nearburg v. Yates Petroleum*, 1997-NMCA-069, ¶ 31, 123 N.M. 526, 943 P.2d 560. "Great damage is done where businesses cannot count on certainty in their legal relationships and strong reasons must support a court when it interferes in a legal relation-

ship voluntarily assumed by the parties." *United Wholesale Liquor v. Brown-Forman Distillers*, 108 N.M. 467, 471, 775 P.2d 233, 237.

New Mexico courts do not have discretion to interfere with contractual rights and remedies which go to the heart of the bargain. *Winrock Inn Co. v. Prudential Ins. Co.*, 1996-NMCA-113, ¶ 36, 122 N.M. 562, 928 P.2d 947. Courts will allow equity to interfere only when well-defined equitable exceptions justify deviation from the parties' contract. *Nearburg,* 1997-NMCA-069, ¶ 31. New Mexico courts have consistently enforced clear contractual obligations. *United Properties v. Walgreen Properties*, 2003-NMCA-140, ¶ 7.

The purpose of prejudgment interest is to "compensate a plaintiff for the lost opportunity to use the money owed between the time the plaintiff's claim accrued and the time of judgment". *Pub. Serv. Co. v. Diamond D Constr.*, 2001–NMCA–082, ¶ 52, 131 N.M. 100, 33 P.3d 651. The Buy-Sell Agreement established an interest rate to accrue on the unpaid purchase price, which shall be based on the lowest prime rate charged by any bank in Las Cruces, and pursuant to Section 2(f) of the Buy-Sell Agreement. [Def's Exh. A-6] The undisputed evidence from the Court's Rule 11-706 expert Randy Travis and CPA Sam Baca was that the lowest prime rate of interest charged by banks in Las Cruces, New Mexico in 2008 - 2012 was 3.5 % per annum. [Tr. Vol. IV, p. 71 - 72] There was no evidence to support the District Court's imposition of a 9.375% pre-judgment interest rate, in light of

the contractual provision – which the Court did not find to be unconscionable – and the undisputed testimony.

D. The District Court erred in failing to enforce the contractual payment term of five (5) years, set forth in the Buy-Sell Agreement, for payment of the stock purchase price by the Company, in the absence of sufficient substantial evidence or a legal conclusion that the contractual term was unconscionable or otherwise unenforceable.

The Buy-Sell Agreement contained a provision allowing the existing shareholder to receive payment for the value of his interest as follows:

> At least twenty-five percent (25%) of the purchase price determined pursuant to Paragraph 2(e) of the Stock being acquired by each purchaser shall be paid by certified or cashier's check upon the closing, and any balance shall be evidenced at such time by each purchaser's several negotiable promissory note(s), each note secured by the stock purchased by the obligor under such note, payable in five (5) equal annual installments. . . .

As with the interest rate provision, there was no finding of fact from the District Court that the payment terms were unconscionable, and review establishes that they are not. Notwithstanding this provision in the parties' Buy-Sell Agreement, and despite the fact that there was no evidence to support a finding of unconscionability of this provision, the District Court ordered the entire amount it calculated was owed to Plaintiff, including all amounts of prejudgment interest in an amount more than double that deemed commercially reasonable, were ordered paid immediately. Again, the District Court's disregard for the terms of the Buy-Sell Agree-

ment is unsupported by the evidence and constitutes an impermissible judicial intrusion on the parties' contractual agreement and expectations.

E. The District Court erred in exercising equitable discretion under Section 53-16-16 in the absence of sufficient substantial evidence of any oppressive conduct by a majority shareholder as to a minority shareholder and in the absence of sufficient substantial evidence that Plaintiff made any effort to have a role in the Company prior to seeking its dissolution.

New Mexico decisions have long relied on the proposition that courts may not rewrite obligations that parties have freely bargained for themselves in the absence of grossly inequitable conduct. *Winrock Inn*, 1996–NMCA–113, ¶ 36. "Equity jurisdiction has never given the judiciary a roving commission' to do whatever it wishes in the name of fairness or public welfare." *United Properties,* 2003-NMCA-140, ¶ 19. A court should not interfere with the bargain reached by the parties unless the court concludes based on sufficient substantial evidence that the policies favoring freedom of contract ought to give way to one of the well-defined equitable exceptions. *Nearburg*, 1997–NMCA–069, ¶ 31.

Equitable relief was not available to relieve Lencho of his contractual agreements with Nick and the Company, particularly where, as here, Lencho made no effort to resolve this matter contractually before resorting to the Courts for interference and relief. Lencho had access to an attorney, but testified he chose not to avail himself of opportunities to question the attorney regarding the documents he was signing in February 2008. [Tr. Vol. III, pp. 12 – 22] Lencho signed the Buy-Sell Agreement willingly and adduced no evidence of duress or coercion. [*Id.*] He

worked as a project manager and supervisor on the Mora Project, but left that position to pursue other opportunities, including his own successful business enterprise.

Lencho was entitled to get out of the Company what he put in—payment for the value of his labor as the project manager and supervisor on the Mora Project and the return of his capital investment of a little more than $250,000.00. The contract is clear, and the actions of Nick do not support allowing a court to step in and provide equitable relief beyond standard legal remedies. The district court erred in resorting to its equitable jurisdiction and must be reversed.

F. The District Court' Reliance on *McCauley v. Tom McCauley & Son* was erroneous.

Following the trial, the District Court rejected Plaintiff's prayer for dissolution and instead fashioned alternate remedies by invoking its equitable jurisdiction, citing *McCauley v. Tom McCauley & Son*, 104 N.M. 523, 724 P.2d 232 (Ct.App. 1986). *McCauley* is inapplicable where a written Buy-Sell Agreement signed by the parties governs dissolution or attempted dissolution. There was no evidence of minority shareholder oppression resulting in damages, and no evidence of unconscionability. Prior to closing argument on December 17, 2012, Plaintiff made no effort to amend his Complaint or to assert a claim other than for statutory dissolution. [Tr. Vol. IV, pp. 217 – 218] There was no assent by Defendants to the Court's eleventh hour amendment, and Defendants consistently argued that the Buy-Sell Agreement and the other contractual documents controlled.

In his Answer, Lencho acknowledges he was not a minority shareholder. As a 50% shareholder in the Company, Lencho had the same right and opportunity to notice corporate meetings, maintain and access corporate records, and participate equally in the management, obligations and risks of the business. Lencho adduced no evidence that he attempted these contractual remedies before running to Court and commencing a civil proceeding dissolution and damages that both Plaintiff and the District Court noted were unsupported.

The Buy-Sell Agreement expressly set forth the method for the disposition of Plaintiff's stock and for payment to be receive by the Plaintiff for stock sold to the Company or to another shareholder. *McCauley* simply does not stand for the proposition that a court can disregard the agreements and contracts of parties and fashion a remedy that the court believes appropriate. The District Court's disregard of the parties' agreement and imposition of its unwarranted equitable jurisdiction went far beyond the authority granted in *McCauley.* Nothing in *McCauley* suggests that an equal shareholder may disregard agreements and contractual arrangements and allow a Court to fashion other remedies. Even assuming that the amounts due to Lencho under the Buy-Sell Agreement were lower than anticipated by Lencho at the time he entered into them, there is no evidence of unconscionability to support the District Court's actions in this case. The District Court erred as a matter of law in invoking its equitable jurisdiction under *McCauley* on the facts of the instant case, and should be reversed.

G. The District Court's valuation coupled with an award of pre-judgment interest impermissibly duplicated the compensation award to Plaintiff; the District Court erred in applying an interest rate as of February 2008, when the valuation date was established as December 31, 2008.

The determination of prejudgment interest fails to distinguish between the different components of the judgment, which originate on different dates[1]. The Judgment includes, in part, valuation of Plaintiff's stock interest in the Company as of December 31, 2008. This is the date the District Court determined to value the Company. Yet the Judgment computes and includes pre-judgment interest on this valuation not from December 31, 2008, but from February 2008, a date the Court rejected for purposes of valuation. Because of this error, the Judgment incorrectly includes interest for ten (10) months on the Stock valuation that was effective December 31, 2008.

The valuation of December 31, 2008 incorporates Lencho's return on his stock interest through December 31, 2008. The rate of return, the expectation of financial gain, and the appreciation of Lencho's financial interest in the Company are included in the December 31, 2008 valuation. Calculating and awarding pre-judgment interest between February and December 31, 2008 duplicates the amount Lencho could reasonably have expected to earn based on his investment in the Company in February 2008.

1 Appellant stands by the representation of preservation made in the Brief in Chief, and specifically refers the Court to Record Proper 763-773.

In February 2008, it is undisputed that Lencho made a $252,000 capital investment in the Company. If the District Court may award pre-judgment interest on an award, the time of the valuation for purposes of the judgment must be equivalent. If the date of valuation of the Company is February 2008, the undisputed evidence is that, as of February 2008, Plaintiff had invested only $250,000 in the Company, and the prejudgment interest award must be calculated based on that figure.

If the District Court's determination of December 31, 2008 as the proper date of valuation is to be upheld, then pre-judgment interest can only be calculated from the date of the valuation. To do otherwise duplicates the recovery by allowing Plaintiff the benefit of both ten months of investment return (reflected by the valuation amount as of December 31, 2008) and ten months of pre-judgment interest compensating Plaintiff for the lost opportunity during that period. *See Security Pacific v. Signfilled Corp.*, 1998-NMCA-046, 125 N.M. 38, 45, 956 P.2d 837, 844 (granting interest as well as awarding the return of mobile home and diminution in value would result in duplicate recovery).

Lencho's argument that Nick and the Company "waived" their argument regarding prejudgment interest by accepting the rate of interest on the truck is not supportable. Nick and Company were unable to obtain a supersedeas bond, and paid Lencho the judgment amount subject to this appeal. The acceptance of the offset for the truck, in addition to being *de minimis* in light of the overall sum pay-

able to Lencho, was made in light of this appeal as well. The Court should reject Lencho's waiver argument.

CONCLUSION:

For the foregoing reasons, and as more fully argued in the Brief in Chief, the decision of the District Court must be overturned and the judgment in favor of Plaintiff set aside. The case should be remanded to the District Court with instructions to implement the remedies and calculations of interest set forth in the Buy-Sell Agreement and in accordance with New Mexico law.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of February 2015, a true and correct copy of the foregoing was sent via U.S. Mail, postage prepaid, to:

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