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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CLEO WESTERFIELD,
Plaintiff,
v.
C/O GOMEZ, et al.,
Defendants.

Case No. CV 16-5957 DSF (SS)

**MEMORANDUM AND ORDER DISMISSING
FIRST AMENDED COMPLAINT WITH
LEAVE TO AMEND**

I.

INTRODUCTION

Plaintiff Cleo Westerfield ("Plaintiff"), a California state prisoner proceeding pro se, has filed a First Amended Complaint pursuant to 42 U.S.C. § 1983. ("FAC," Dkt. No. 12). Congress mandates that district courts perform an initial screening of complaints in civil actions where a prisoner seeks redress from a governmental entity or employee. 28 U.S.C. § 1915A(a). This Court may dismiss such a complaint, or any portion thereof, before service of process if the complaint (1) is frivolous or malicious, (2) fails to state a claim upon which relief can be granted, or

1 (3) seeks monetary relief from a defendant who is immune from such
2 relief. 28 U.S.C. § 1915A(b)(1-2); see also Lopez v. Smith, 203
3 F.3d 1122, 1126-27 & n.7 (9th Cir. 2000) (en banc). For the reasons
4 stated below, the First Amended Complaint is DISMISSED with leave
5 to amend.¹

6
7 **II.**

8 **FACTUAL ALLEGATIONS AND CLAIMS**

9
10 Plaintiff sues two employees of the California Men's Colony
11 ("CMC"), where he is currently housed. These defendants are
12 Correctional Officer Gomez and Registered Nurse ("RN") Yule.
13 Plaintiff sues Defendants in their individual and official
14 capacities. (FAC at 3).

15
16 The FAC summarily alleges that, on April 27, 2015, Plaintiff
17 slipped and fell in a pool of standing water in the prison kitchen.
18 (Id. at 5). Plaintiff was placed on medical leave for 125 days.²
19 (Id. at 5). However, on April 29, 2015, just "two days into the
20 lay in [sic]," Gomez, who "constantly harassed" Plaintiff,
21 instructed him to leave his cell and "go to the yard." (Id.).
22 Plaintiff told Gomez that he was feeling dizzy, taking medications
23 and had permission to stay in his cell because of his injury.

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25 ¹ A magistrate judge may dismiss a complaint with leave to amend
26 without the approval of a district judge. See McKeever v. Block,
932 F.2d 795, 798 (9th Cir. 1991).

27 ² Although not clearly alleged in the body of the FAC, various
28 attachments to the FAC indicate that Plaintiff suffered injuries
to his back and to the base of his neck. (See, e.g., FAC at 31).

1 (Id.). Gomez told Plaintiff that "she did not care and [to] get
2 up before she presse[d] [the] alarm." (Id.). Plaintiff then left
3 the cell, became dizzy, and lost consciousness. (Id.).
4

5 Plaintiff woke up on the floor, soaked in urine, as a nurse³
6 was yelling at him to get up because there was nothing wrong with
7 him. (Id.). The nurse told Plaintiff twice that he was going to
8 write him up for violations relating to this incident. (Id.). The
9 nurse laughed at Plaintiff for urinating in his clothes and told
10 other medical personnel about the incident. (Id. at 5-6).
11 Plaintiff responded by saying he would sue the nurse. (Id. at 5).
12

13 The specific grounds for Plaintiff's claims are unclear.
14 However, the FAC appears to allege that Defendants are liable for
15 violations of Plaintiff's rights under the Eighth Amendment (1)
16 not to be treated "inhumanely" and "to be free from cruel and
17 unusual punishment" and (2) "to have adequate medical care," as
18 well as state law claims for (3) intentional infliction of
19 emotional distress and (4) "p[e]rjury." (Id. at 5). Plaintiff
20 seeks monetary damages. (Id. at 6).
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26 ³ The FAC does not clearly identify Yule as the nurse who spoke to
27 Plaintiff when he regained consciousness. (FAC at 5-6). However,
28 because no other facts are alleged against any other medical
personnel, the Court will assume that Yule is the "nurse" described
in the FAC's statement of facts.

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III.

DISCUSSION

Under 28 U.S.C. § 1915A(b), the Court must dismiss the First Amended Complaint due to pleading defects. However, a court must grant a pro se litigant leave to amend his defective complaint unless "it is absolutely clear that the deficiencies of the complaint could not be cured by amendment." Akhtar v. Mesa, 698 F.3d 1202, 1212 (9th Cir. 2012) (citation and internal quotation marks omitted). It is not "absolutely clear" that at least some of the defects of Plaintiff's First Amended Complaint could not be cured by amendment. The First Amended Complaint is therefore DISMISSED with leave to amend.

A. Plaintiff's Official Capacity Claims Are Defective

Plaintiff sues Defendants for damages in both their official and individual capacities. (FAC at 3). However, Plaintiff's official capacity claims are barred by the Eleventh Amendment and cannot proceed.

Pursuant to the Eleventh Amendment, a state and its official arms are immune from suit under section 1983. Howlett v. Rose, 496 U.S. 356, 365 (1990); Brown v. Cal. Dept. of Corrections, 554 F.3d 747, 752 (9th Cir. 2009) ("California has not waived its Eleventh Amendment immunity with respect to claims brought under § 1983 in federal court"). "[A] suit against a state official in his or her official capacity . . . is no different from a suit

1 against the State itself.” Flint v. Dennison, 488 F.3d 816, 824-
2 25 (9th Cir. 2007) (citation omitted). Therefore, state officials
3 sued in their official capacity are generally entitled to immunity.
4 (Id. at 825).

5
6 Here, the Complaint requests only monetary damages. (FAC at
7 3, 6). Monetary damages are not a proper remedy in suits against
8 state officials in their official capacity. Thus, Plaintiff’s
9 official capacity claims are defective and must be dismissed.

10
11 **B. Plaintiff Fails To State A Claim For “Psychological Torment”**
12 **Or Intentional Infliction Of Emotional Distress**

13
14 Plaintiff broadly claims that his “right to not be treated
15 inhuman[e]ly” was violated because he was subjected to “the
16 intentional infliction of psychological torment.” (FAC at 5). It
17 is unclear whether Plaintiff is raising this claim against Gomez,
18 Yule, or both. Additionally, it is unclear whether Plaintiff is
19 attempting to allege a constitutional claim under the Eighth
20 Amendment or a state law tort claim for intentional infliction of
21 emotional distress. The FAC does not meet either standard and
22 therefore must be dismissed with leave to amend.

23
24 **1. Intentional Infliction Of “Psychological Torment” As An**
25 **Eighth Amendment Claim**

26
27 Infliction of suffering on prisoners that is “totally without
28 penological justification” violates the Eighth Amendment. Rhodes

1 v. Chapman, 452 U.S. 337, 346 (1981). “[T]he unnecessary and
2 wanton infliction of pain . . . constitutes cruel and unusual
3 punishment forbidden by the Eighth Amendment.” Whitley v. Albers,
4 475 U.S. 312, 319 (1986) (internal quotation marks and citation
5 omitted). “The alleged pain may be physical or psychological.”
6 Watison v. Carter, 668 F.3d 1108, 1112 (9th Cir. 2012). Where
7 psychological or emotional injuries are alleged, there must be a
8 “‘high probability of . . . severe psychological injury and
9 emotional pain and suffering’” to rise to the level of an Eighth
10 Amendment violation. Id. at 1113 (quoting Jordan v. Gardner, 986
11 F.2d 1521, 1525 (9th Cir. 1993) (en banc)). For example, the
12 “humiliation” suffered by a male inmate who complained that female
13 guards pointed, joked and “gawked” at him while he was showering
14 did not “rise to the level of severe psychological pain required
15 to state an Eighth Amendment claim.” Watison, 668 F.3d at 1113
16 (citing Somers v. Thurman, 109 F.3d 614, 616 (9th Cir. 1997)); see
17 also Grummett v. Rushen, 779 F.2d 491, 494 n.1 (9th Cir. 1985)
18 (prison policy allowing female guards to observe male inmates
19 disrobing, showering, using the toilet, and being strip-searched,
20 and allowing them to conduct pat-down searches including the groin
21 area, did not amount to “the type of shocking and barbarous
22 treatment protected against by the [E]ighth [A]mendment”).
23 Similarly, the routine “exchange of verbal insults between inmates
24 and guards” does not violate the Eighth Amendment. Somers, 109
25 F.3d at 622.

26
27 Plaintiff does not allege “shocking and barbarous” conduct by
28 either Defendant that would rise to the level of a constitutional

1 violation. Mere verbal harassment or abuse is not sufficient to
2 state a constitutional deprivation, even when the language is
3 vulgar and offensive. Oltarzewski v. Ruggiero, 830 F.2d 136, 139
4 (9th Cir. 1987). The FAC's vague allegation that "Gomez was
5 constantly harrassing [sic] Plaintiff" ever since he had contacted
6 "internal affairs" does not provide any basis for the Court to
7 conclude that Plaintiff even endured any psychological suffering
8 from Gomez's "harassment," much less that Gomez's harassment was
9 "shocking and barbarous." Similarly, to the extent that Yule
10 caused Plaintiff's "psychological torment" by laughing at Plaintiff
11 because he had urinated in his clothes and "telling other medical
12 personnel" about the incident, the FAC also fails to state a
13 constitutional claim against Yule. See Oltarzewski, 830 F.2d at
14 139. Therefore, to the extent that Plaintiff is attempting to
15 assert a constitutional claim for "psychological torment," the FAC
16 must be dismissed, with leave to amend.

17
18 **2. Intentional Infliction Of Emotional Distress As A State**
19 **Law Tort Claim**

20
21 Alternatively, it is possible that Plaintiff is attempting to
22 bring a state law tort claim for intentional infliction of
23 emotional distress. However, the FAC does not satisfy the
24 procedural requirements in a civil action for alleging state law
25 tort claims against government actors.

1 Under the California Government Claims Act ("CGCA"),⁴ a
2 plaintiff may not bring an action for damages against a public
3 employee or entity unless he first presents a written claim to the
4 local governmental entity within six months of the accrual of the
5 incident. See Mabe v. San Bernadino County, Dept. of Public Social
6 Services, 237 F.3d 1101, 1111 (9th Cir. 2001) (CGCA requires the
7 "timely presentation of a written claim and the rejection of the
8 claim in whole or in part" as a condition precedent to filing
9 suit); see also Cal. Gov't Code § 945.4 ("[N]o suit for money or
10 damages may be brought against a public entity . . . until a written
11 claim therefor has been presented to the public entity and has been
12 acted upon by the board, or has been deemed to have been rejected
13 by the board . . ."). Furthermore, a plaintiff must affirmatively
14 allege compliance with the CGCA's claims presentation requirement,
15 or explain why compliance should be excused. Mangold v. Cal. Pub.
16 Utils. Comm'n, 67 F.3d 1470, 1477 (9th Cir. 1995) ("Where
17 compliance with the [California] Tort Claims Act is required, the
18 plaintiff must allege compliance or circumstances excusing
19 compliance, or the complaint is subject to general demurrer.")
20 (internal quotation marks omitted).

21
22 "The failure to exhaust an administrative remedy is a
23 jurisdictional, not a procedural, defect." Miller v. United
24

25 ⁴ The short title "Government Claims Act" has been used
26 interchangeably in California cases with the title "Tort Claims
27 Act" to refer to the statutory scheme for presenting claims for
28 money damages against governmental entities. However, because the
California Supreme Court has expressed a preference for the title
"Government Claims Act," the Court will adopt that usage. See City
of Stockton v. Superior Court, 42 Cal. 4th 730, 741-42 (2007).

1 Airlines, Inc., 174 Cal. App. 3d 878, 890 (1985); see also Cornejo
2 v. Lightbourne, 220 Cal. App. 4th 932, 938 (2013) ("Ordinarily,
3 filing a claim with a public entity pursuant to the Claims Act is
4 a jurisdictional element of any cause of action for damages against
5 the public entity . . ."). To the extent that Plaintiff is
6 attempting to assert any state tort causes of action, the FAC does
7 not plead satisfaction of the CGCA claims presentation requirement
8 and fails to identify any evidence that Plaintiff exhausted his
9 remedies before filing suit.⁵ Accordingly, to the extent that
10 Plaintiff is attempting to assert a state law "intentional
11 infliction of emotional distress" claim, the claim must be
12 dismissed, with leave to amend. However, Plaintiff is cautioned
13 that he should not assert such a claim unless he can show that he
14 presented his tort claim to the appropriate agency prior to filing
15 suit or explain why exhaustion should be excused under the
16 particular circumstances of this case.

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23 ⁵ Attachments to the FAC reflect Plaintiff's attempt to exhaust the
24 internal prison grievance process. (See FAC at 38-41). However,
25 the claim presentation requirement under the CGCA is separate from,
26 and is not satisfied by, internal prison grievance processes. See
27 Hendon v. Ramsey, 528 F. Supp. 2d 1058, 1069-70 (S.D. Cal. 2007)
28 ("Although Plaintiff has demonstrated successfully that he utilized
the prison grievance process to exhaust his federal claims by
filing an inmate appeal, and has attached documentation in the
form of his CDC 602 form and administrative responses, these
documents do not satisfy the CTCA [California Tort Claims Act] with
respect to his state law negligence claims.").

1 **C. Plaintiff Fails To Allege A Deliberate Indifference Claim**
2 **Against Either Defendant**

3
4 It is also possible that Plaintiff is attempting to state a
5 constitutional claim for deliberate indifference to his serious
6 medical needs. To state an Eighth Amendment claim based on a
7 prisoner's medical treatment, the prisoner must demonstrate that
8 the defendant was "deliberately indifferent" to his "serious
9 medical needs." Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir.
10 2006); see also West v. Atkins, 487 U.S. 42, 49 (1988). To
11 establish a "serious medical need," the prisoner must demonstrate
12 that "failure to treat a prisoner's condition could result in
13 further significant injury or the 'unnecessary and wanton
14 infliction of pain.'" Jett, 439 F.3d at 1096 (citation omitted);
15 see also Morgan v. Morgensen, 465 F.3d 1041, 1045 (9th Cir. 2006)
16 (the existence of a serious medical need is determined by an
17 objective standard).

18
19 To establish "deliberate indifference" to such a need, the
20 prisoner must demonstrate: "(a) a purposeful act or failure to
21 respond to a prisoner's pain or possible medical need, and (b) harm
22 caused by the indifference." (Id.). Deliberate indifference "may
23 appear when prison officials deny, delay or intentionally interfere
24 with medical treatment, or it may be shown by the way in which
25 prison physicians provide medical care." (Id.) (citations
26 omitted). The defendant must have been subjectively aware of a
27 serious risk of harm and must have consciously disregarded that
28 risk. See Farmer v. Brennan, 511 U.S. 825 (1994). An "isolated

1 exception" to the defendant's "overall treatment" of the prisoner
2 does not state a deliberate indifference claim. Jett, 439 F.3d at
3 1096.

4
5 The FAC fails to state a deliberate indifference claim.
6 First, the FAC's vague allegation that Plaintiff slipped and was
7 placed on "medical leave" does not sufficiently describe a "serious
8 medical need." Second, the FAC does not adequately allege that
9 Yule was subjectively aware of Plaintiff's alleged serious medical
10 need and deliberately chose to ignore it, putting him at risk of
11 injury.⁶ The FAC fails to explain whether Plaintiff needed medical
12 care when he woke up after fainting, what kind of care he needed,
13 or even if Yule failed to provide that care. Third, the FAC does
14 not show that Plaintiff suffered any harm from either Defendant's
15 alleged acts or failures to act. Even though Plaintiff allegedly
16 fainted after Gomez forced him to evacuate his cell, the FAC does
17 not state whether he harmed himself when he fainted. It is also
18 unclear whether Plaintiff suffered any harm at all once he awoke
19 and Yule saw him. Accordingly, to the extent that Plaintiff is
20 attempting to assert a deliberate indifference claim against one
21 or both Defendants, the claim must be dismissed, with leave to
22 amend.

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26 ⁶ The FAC's allegations, liberally construed, that Plaintiff told
27 Gomez that he was feeling dizzy, was on medication, and had a
28 medical "lay in" may be sufficient to show Gomez's subjective
awareness that Plaintiff suffered from some medical condition. It
is questionable, however, whether these bare bones allegations show
that Gomez was aware of a "serious" medical need.

1 **D. Plaintiff Cannot State A Claim For Perjury Against Either**
2 **Defendant**

3
4 Plaintiff alleges without explanation or context that one or
5 more of the Defendants is liable for "p[e]rjury." Under both
6 federal and state law, "[t]he factual predicates of perjury are:
7 (1) that the defendant gave false testimony under oath
8 (2) concerning a material matter (3) with the willful intent to
9 provide false testimony, rather than as a result of confusion,
10 mistake, or faulty memory." United States v. Jimenez, 300 F.3d
11 1166, 1170 (9th Cir. 2002) (citing United States v. Dunnigan, 507
12 U.S. 87, 94 (1993)); see also Hussein v. Barrett, 820 F.3d 1083,
13 1089 (9th Cir. 2016) ("Under California law, the elements of
14 perjury include a willful statement under oath of any material
15 matter which the witness knows to be false."). Perjury is a
16 criminal offense, and a private plaintiff may not raise criminal
17 claims in a civil lawsuit. See Johnson v. Wennes, 2009 WL 1228500,
18 at *4 (S.D. Cal. May 5, 2009) ("[A]n individual may not bring
19 criminal charges against someone by filing a complaint in this
20 Court."). Furthermore, even if there were a civil "perjury" cause
21 of action, the FAC does not identify what false statements
22 Defendants made, much less allege that they made them under oath
23 with the intent to provide false testimony. Thus, to the extent
24 that Plaintiff is attempting to state a "perjury" claim, the claim
25 is both not cognizable and unsupported and must be dismissed.

1 **E. Plaintiff Fails To State A Claim For Retaliation**

2
3 Plaintiff alleges that Gomez was constantly harassing him
4 "ever[] since the internal affairs was contacted." (FAC at 5).
5 It is possible that Plaintiff is attempting to state a retaliation
6 claim. The Ninth Circuit has set forth the minimum pleading
7 requirements for a § 1983 claim alleging that prison employees have
8 retaliated against an inmate for exercising a First Amendment
9 right:

10
11 Within the prison context, a viable claim of First
12 Amendment retaliation entails five basic elements:
13 (1) An assertion that a state actor took some adverse
14 action against an inmate (2) because of (3) that
15 prisoner's protected conduct, and that such action
16 (4) chilled the inmate's exercise of his First Amendment
17 rights, and (5) the action did not reasonably advance a
18 legitimate correctional goal.

19
20 See Rhodes v. Robinson, 408 F.3d 559, 567-568 (9th Cir. 2005)
21 (footnote omitted). The prisoner must establish a specific link
22 between the alleged retaliation and the exercise of a
23 constitutional right. See Pratt v. Rowland, 65 F.3d 802, 807-08
24 (9th Cir. 1995).

25
26 The FAC fails to state a retaliation claim. The FAC does not
27 describe who contacted internal affairs or why. Even assuming that
28 Plaintiff contacted internal affairs for something relating to

1 Gomez, the FAC does not describe the "harassment" that Gomez
2 purportedly inflicted on Plaintiff or even affirmatively state that
3 the harassment was in retaliation for his contacting internal
4 affairs. The FAC does not establish a specific link between
5 Plaintiff's exercise of his First Amendment rights and the alleged
6 retaliation. Accordingly, to the extent that Plaintiff is
7 attempting to raise a retaliation claim against Gomez, the claim
8 must be dismissed, with leave to amend.

9
10 **F. The Complaint Violates Federal Rule Of Civil Procedure 8**

11
12 Federal Rule of Civil Procedure 8(a)(2) requires that a
13 complaint contain "'a short and plain statement of the claim
14 showing that the pleader is entitled to relief,' in order to 'give
15 the defendant fair notice of what the . . . claim is and the
16 grounds upon which it rests.'" Bell Atlantic v. Twombly, 550 U.S.
17 544, 555 (2007) (quoting Fed. R. Civ. P. 8(a)). Rule 8 may be
18 violated when a pleading "says too little" and "when a pleading
19 says too much." Knapp v. Hogan, 738 F.3d 1106, 1108 (9th Cir.
20 2013) (emphasis in original); see also Cafasso, U.S. ex rel. v.
21 Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1058 (9th Cir. 2011)
22 (a complaint violates Rule 8 if a defendant would have difficulty
23 understanding and responding to the complaint)); McHenry v. Renne,
24 84 F.3d 1172, 1179-80 (9th Cir. 1996) ("[C]onfusing complaints
25 . . . impose unfair burdens on litigants and judges.").

26
27 Here, the FAC violates Rule 8 because Plaintiff does not
28 identify what, exactly, the nature of each of his claims is, and

1 specifically identify the Defendant against whom each claim is
2 asserted. Without more specific information, Defendants cannot
3 respond to the First Amended Complaint. See Cafasso, 637 F.3d at
4 1058. In addition, because Plaintiff is not required to provide
5 evidence supporting his claims at this stage of the litigation,
6 the numerous exhibits attached to the Complaint are unnecessary.
7 Plaintiff cannot simply attach documents to his complaint and
8 expect the Defendants to guess their meaning.

9
10 Accordingly, the First Amended Complaint is dismissed with
11 leave to amend. Should Plaintiff choose to file a Second Amended
12 Complaint, he is advised to clearly identify the nature of each of
13 the legal claims he is bringing, the specific facts giving rise to
14 each claim, the and specific Defendant or Defendants against whom
15 each claim is brought.

17 IV.

18 CONCLUSION

19
20 For the reasons stated above, the First Amended Complaint is
21 dismissed with leave to amend. If Plaintiff still wishes to pursue
22 this action, he is granted **thirty (30) days** from the date of this
23 Memorandum and Order within which to file a Second Amended
24 Complaint. In any amended complaint, Plaintiff shall cure the
25 defects described above. **Plaintiff shall not include new**
26 **defendants or new allegations that are not reasonably related to**
27 **the claims asserted in prior complaints.** The Second Amended
28 Complaint, if any, shall be complete in itself and shall bear both

1 the designation "Second Amended Complaint" and the case number
2 assigned to this action. It shall not refer in any manner to any
3 prior complaint. Plaintiff shall limit his action only to those
4 Defendants who are properly named in such a complaint, consistent
5 with the authorities discussed above.

6
7 In any amended complaint, Plaintiff should confine his
8 allegations to those operative facts supporting each of his claims.
9 Plaintiff is advised that pursuant to Federal Rule of Civil
10 Procedure 8(a), all that is required is a "short and plain statement
11 of the claim showing that the pleader is entitled to relief."
12 **Plaintiff is strongly encouraged to utilize the standard civil**
13 **rights complaint form when filing any amended complaint, a copy of**
14 **which is attached.** In any amended complaint, Plaintiff should make
15 clear the nature and grounds for each claim and specifically
16 identify the Defendants he maintains are liable for that claim.
17 Plaintiff shall not assert any claims for which he cannot allege a
18 proper factual basis.

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1 Plaintiff is explicitly cautioned that the failure to timely
2 file a Second Amended Complaint, or failure to correct the
3 deficiencies described above, will result in a recommendation that
4 this entire action be dismissed with prejudice for failure to
5 prosecute and obey Court orders pursuant to Federal Rule of Civil
6 Procedure 41(b). Plaintiff is further advised that if he no longer
7 wishes to pursue this action, he may voluntarily dismiss it by
8 filing a Notice of Dismissal in accordance with Federal Rule of
9 Civil Procedure 41(a) (1). A form Notice of Dismissal is attached
10 for Plaintiff's convenience.

11
12 DATED: April 12, 2017

13
14 /s/
15 SUZANNE H. SEGAL
16 UNITED STATES MAGISTRATE JUDGE

17 THIS MEMORANDUM IS NOT INTENDED FOR PUBLICATION, NOR IS IT INTENDED
18 TO BE INCLUDED IN OR SUBMITTED TO ANY ONLINE SERVICE SUCH AS WESTLAW
19 OR LEXIS.
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