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UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

PNC BANK, N.A., a National Association,  
as successor in interest to National City  
Bank,  
  
Plaintiff,  
  
v.  
  
BELINDA L. SMITH, in personam;  
JACOB WINDING, in personam;  
B & B DREAMIN', Hull No.  
GMKD283C505 (the "Vessel"), its  
engines, machinery, appurtenances, etc.,  
in rem,  
  
Defendants.

No. 2:10-cv-1916-JAM-EFB PS

ORDER AND  
FINDINGS AND RECOMMENDATIONS

AND RELATED COUNTER-CLAIMS.

This action is before the court on plaintiff's motion to dismiss defendant Smith's counterclaim pursuant to Federal Rule of Civil Procedure 12(b)(6).<sup>1</sup> ECF No. 78. Defendant Smith opposes the motion. ECF No. 82. Smith also moves to strike the affidavit of Brian J. Lutton, which plaintiff submitted in support of its motion to dismiss. For the reasons stated herein, Smith's motion to strike is denied and it is recommended that plaintiff's motion to dismiss

<sup>1</sup> This case was referred to the undersigned pursuant to Eastern District of California Local Rule 302(c)(19) and 28 U.S.C. § 636(b)(1).

1 be granted.<sup>2</sup>

2 I. PROCEDURAL HISTORY

3 Plaintiff PNC Bank (hereafter “PNC Bank”) filed a verified complaint in rem and in  
4 personam for foreclosure of a vessel owned by defendant owner Belinda Smith (defendant B & B  
5 DREAMIN’, Hull No. RGMKD283C505), on July 20, 2010. ECF No. 1. On September 10,  
6 2010, the court issued an order authorizing an in rem arrest warrant for the vessel. ECF No. 11.  
7 The warrant was served and, on March 30, 2011, an order was entered confirming the vessel’s  
8 arrest and appointing National Maritime Services as substitute custodian of the vessel, ECF No.  
9 19.

10 Smith filed an answer to the complaint, ECF No. 31, and defendant Winding filed an  
11 answer and counterclaim, ECF No. 32. PNC Bank has filed an answer to Winding’s  
12 counterclaim. ECF No. 35.

13 PNC Bank filed a motion for summary judgment on its complaint, seeking an order  
14 providing that: (1) PNC Bank has a first priority security interest in the Vessel; (2) defendant  
15 Smith is in default of her obligations to plaintiff; (3) PNC Bank is entitled to possession of the  
16 Vessel; (4) PNC Bank is entitled to a deficiency judgment against Smith pursuant to 46 U.S.C.  
17 § 1325(b)(2)(A); and (5) PNC Bank is entitled to a judgment against Smith for attorney’s fees and  
18 costs. ECF No. 39. PNC Bank also sought summary judgment on defendant Winding’s  
19 counterclaims for declaratory relief, conversion, and/or negligence. Specifically, PNC Bank  
20 sought an order providing that (1) defendant Winding’s interest in the Vessel is subordinate to  
21 that of PNC Bank; (2) PNC Bank is not liable to Winding for conversion; (3) PNC Bank is not  
22 liable to Winding for tort; and (4) PNC Bank is not liable to Winding for attorney’s fees or court  
23 costs. PNC Bank’s motion for summary judgment was denied on March 18, 2013. ECF Nos. 56,  
24 62.

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27 <sup>2</sup> The motions were submitted without appearance and without argument pursuant to  
28 Eastern District of California Local Rule 230(g).

1 On April 1, 2013, Smith filed a motion for leave to file an amended answer in order to  
2 assert counterclaims against PNC Bank.<sup>3</sup> ECF No. 65. That motion was granted (ECF No. 76)  
3 and on June 28, 2013, Smith filed her amended answer and counterclaim, ECF No. 77. PNC  
4 Bank now moves to dismiss Smith's counterclaim. ECF No. 78.

5 II. FACTUAL BACKGROUND

6 Smith's counterclaim, standing on its own, provides little, if any, context as to the  
7 overarching dispute between the parties in this action. Because the counterclaim is not drafted to  
8 stand on its own, to understand it requires reference to the allegations contained in PNC Bank's  
9 complaint. PNC Bank alleged in that complaint that the vessel B & B DREAMIN', Hull No.  
10 MKD283C505, its engines, machinery, appurtenances, etc. ("Vessel") was owned by defendant  
11 Belinda Smith. Compl., ECF No. 1 ¶ 2. It is undisputed that it was purchased on credit and  
12 encumbered. On July 12, 2005, Smith executed and delivered to National City a written Fixed  
13 Rate Promissory Note and Security Agreement- Multi-State Dealer (hereinafter the "Note") in the  
14 principal sum of \$336,653.69 plus interest for the purchase of the Vessel. *Id.* ¶ 5. The Note was  
15 secured by a Preferred Ship Mortgage ("Mortgage") on the Vessel. *Id.* The Mortgage was duly  
16 recorded at the National Vessel Documentation Center against the Vessel on August 18, 2005 as a  
17 Preferred Mortgage. *Id.* ¶¶ 5, 6, Exs. 3, 5.

18 Smith also executed a second Promissory Note Secured By A Marine Vessel Called B&B  
19 Dreamin' (Straight Note-Interest Only) (hereinafter "Note 2") on July 11, 2005, in favor of  
20 defendant Winding in the amount of \$110,000.00. *Id.* ¶ 7. A Preferred Ship Mortgage  
21 (hereinafter the "Winding Mortgage") securing Note 2 was allegedly recorded by Winding on or  
22 about May 29, 2009. *Id.* ¶ 8.

23 In November 2009, PNC Bank merged with National City. *Id.* ¶ 9. As a result, PNC  
24 Bank assumed all of the deposits and loans of National City and thereby PNC Bank became the  
25 holder and owner of Note and Mortgage on the Vessel. *Id.* ¶¶ 9, 10. PNC Bank's complaint

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26 <sup>3</sup> At the March 20, 2013 Rule 16 scheduling conference, Smith stated that she wanted to  
27 amend her answer and file a counterclaim. The Rule 16 scheduling order instructed her that she  
28 must either submit a stipulation and proposed order for leave to do so, or file a motion for leave to  
amend. She was to do so on or before April 1, 2013. ECF No. 64 at 2.

1 alleges that Smith defaulted under the Note and Mortgage by failing to make monthly payments  
2 due on August 10, 2008, and all payments accruing thereafter. *Id.* PNC Bank elected to charge  
3 off the account in April 2009, and accelerate the entire balance due under the Note and Mortgage.  
4 *Id.* ¶ 11. Therefore, according to PNC Bank, there is now due and owing to PNC Bank under the  
5 Note the principle sum of \$288,648.57, plus interest. *Id.* ¶ 13. In or about June 2009, PNC Bank  
6 repossessed the Vessel for the purpose of re-marketing same in order to apply the net proceeds to  
7 the balance owing under the Note and Mortgage. *Id.* ¶ 14.

8 Smith disputes PNC Bank's version of the facts in her amended answer and counterclaim.  
9 She alleges that PNC Bank repossessed the Vessel on June 1, 2009 (ECF No. 77 ¶ 3) and at the  
10 time of the repossession, defendant Winding was utilizing the Vessel pursuant to a contractual  
11 agreement between Smith and Winding. *Id.* Smith further alleges that she was never in default  
12 under the Note and Mortgage and had not heard from National City in over two years. *Id.* ¶ 6.  
13 Smith further alleges that she did not owe National City any money. *Id.* She contends that the  
14 arrest of the Vessel was wrongful because she had paid the amount owed under the Note and  
15 therefore was not in default. *Id.* ¶ 10.

16 III. MOTION TO STRIKE

17 In spite of having filed this motion under Rule 12(b)(6) rather than Rule 56, PNC Bank  
18 submitted the affidavit of Brian J. Lutton in support of its motion to dismiss. ECF No. 79. Mr.  
19 Lutton's declaration is submitted as evidence to refute the allegations in Smith's counterclaim,  
20 which of course cannot be done on a Rule 12(b)(6) motion.

21 On August 19, 2013, Smith filed a motion to strike the affidavit. ECF No. 84. Smith  
22 argues that many of the paragraphs of Lutton's affidavit, as well as the attached exhibits, lack  
23 foundation, lack proper authentication, constitute inadmissible hearsay, and are argumentative,  
24 vague, and misleading. *Id.* at 1-4. Because the affidavit may not be considered on a Rule  
25 12(b)(6) motion to dismiss for failure to state a claim, the motion to strike is superfluous and is  
26 denied.

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1 PNC Bank could have moved for summary judgment on Smith’s counterclaim pursuant to  
2 Rule 56, and submitted whatever materials were necessary to support such a motion.<sup>4</sup> Rather  
3 than doing so, PNC Bank chose to attack the counterclaim under Rule 12(b)(6), challenging the  
4 sufficiency of its allegations to state a claim. The court may not consider evidence outside the  
5 pleading in addressing PNC Bank’s motion to dismiss. *See United States v. Ritchie*, 342 F.3d  
6 903, 907 (9th Cir. 2002) (“When ruling on a Rule 12(b)(6) motion to dismiss, if a district court  
7 considers evidence outside the pleadings, it must normally convert the 12(b)(6) motion into a  
8 Rule 56 motion for summary judgment, and it must give the nonmoving party an opportunity to  
9 respond.”). Counterclaimant Smith has not been given notice that PNC Bank would be seeking  
10 summary judgment and, accordingly, the court is not converting this motion to a motion pursuant  
11 to Rule 56. Accordingly, the court’s consideration of the motion is limited to the allegations of  
12 the counterclaim.

#### 13 IV. MOTION TO DISMISS

14 Smith purports to assert four counterclaims against PNC Bank: (1) wrongful arrest of  
15 vessel, (2) wrongful foreclosure of a vessel pursuant to Federal Rule of Civil Procedure 64, (3)  
16 violation of the Fair Debt Collection Practices Act (“FDCPA”), and (4) interference with  
17 economic advantage. ECF No. 77 at 9-12. PNC Bank moves to dismiss these claims for failure  
18 to state a claim. ECF No. 78.

##### 19 A. Rule 12(b)(6) Standards

20 To survive dismissal for failure to state a claim pursuant to Rule 12(b)(6), a complaint  
21 must contain more than a “formulaic recitation of the elements of a cause of action”; it must  
22 contain factual allegations sufficient to “raise a right to relief above the speculative level.” *Bell*  
23 *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “The pleading must contain something more . .  
24 . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of  
25 action.” *Id.* (quoting 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1216, pp. 235-

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26 <sup>4</sup> However, as noted, PNC Bank previously moved for summary judgment on its  
27 complaint and Winding’s counterclaim. ECF. No. 39. That motion was denied based on Smith  
28 and Winding’s affidavits, signed under penalty of perjury, which disputed PNC Bank’s version of  
the facts in material ways. *See* ECF No. 56 at 8-11.

1 236 (3d ed. 2004)). “[A] complaint must contain sufficient factual matter, accepted as true, to  
2 ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949  
3 (2009) (quoting *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when plaintiff pleads  
4 factual content that allows the court to draw the reasonable inference that the defendant is liable  
5 for the misconduct alleged.” *Id.* Dismissal is appropriate based either on the lack of cognizable  
6 legal theories or the lack of pleading sufficient facts to support cognizable legal theories.  
7 *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990).

8 In considering a motion to dismiss, the court must accept as true the allegations of the  
9 complaint in question, *Hospital Bldg. Co. v. Rex Hosp. Trs.*, 425 U.S. 738, 740 (1976), construe  
10 the pleading in the light most favorable to the party opposing the motion, and resolve all doubts in  
11 the pleader’s favor. *Jenkins v. McKeithem*, 395 U.S. 411, 421, *reh’g denied*, 396 U.S. 869  
12 (1969). The court will “presume that general allegations embrace those specific facts that are  
13 necessary to support the claim.” *Nat’l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 256  
14 (1994) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

15 Pro se pleadings are held to a less stringent standard than those drafted by lawyers.  
16 *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir.  
17 1985). The Ninth Circuit has held that the less stringent standard for pro se parties is now higher  
18 in light of *Iqbal* and *Twombly*, but the court still continues to construe pro se filings liberally.  
19 *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010). However, the court’s liberal interpretation of  
20 a pro se litigant’s pleading may not supply essential elements of a claim that are not plead. *Pena*  
21 *v. Gardner*, 976 F.2d 469, 471 (9th Cir. 1992); *Ivey v. Bd. of Regents of Univ. of Alaska*, 673 F.2d  
22 266, 268 (9th Cir. 1982). Furthermore, “[t]he court is not required to accept legal conclusions  
23 cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the  
24 facts alleged.” *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994). Neither  
25 need the court accept unreasonable inferences, or unwarranted deductions of fact. *W. Mining*  
26 *Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

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1           B. Smith's Claims

2                   1. Wrongful Arrest of Vessel

3           Smith claims that PNC Bank wrongfully arrested the Vessel because Smith had already  
4 paid the amount owed under the Note and therefore she was not in default under the Note and  
5 Mortgage. ECF No. 77 ¶ 10. Smith further claims that she did not owe National City any money  
6 and that she had not heard from National City in over 2 years. *Id.* ¶ 6. PNC Bank argues that  
7 Smith's claim for wrongful arrest of the Vessel should be dismissed because Smith has failed to  
8 show that PNC Bank acted with malice, bad faith or gross negligence. ECF No. 78 at 7.

9           “The arrest of a vessel in admiralty is an inconvenience to which the owner must submit  
10 as one caused by the exercise of a legal right on the part of the plaintiff.” *Stevens v. F/V Bonnie*  
11 *Doon*, 655 F.2d 206, 209 (9th Cir. 1981) (citations omitted). To recover damages for the  
12 wrongful arrest of a vessel, a party must show that the arrest was done with malice, bad faith, or  
13 gross negligence. *Id.*; *Frontera Fruit Co. v. Dowling*, 91 F.2d 293, 297 (5th Cir. 1937) (“The  
14 gravamen of the right to recover damages for wrongful seizure or detention of vessels is the bad  
15 faith, malice, or gross negligence of the offending party.”).

16           Here, Smith fails to alleged specific facts which, if true, demonstrate that PNC Bank  
17 wrongfully caused the arrest of the vessel, let alone with malice, bad faith, or gross negligence.  
18 Although Smith has, in the context of opposing summary judgment, made general allegations that  
19 she paid the mortgage, the text of the counterclaim omits any such direct allegation. Instead,  
20 Smith states that PNC Bank “has refused, without cause, to admit that Defendants Belinda Smith  
21 have [sic] paid the Promissory Note . . .” and that the note was not in default. The omission of a  
22 direct allegation that the Note was in fact paid, and the omission of facts which if taken as true  
23 would demonstrated when and how, and with what funds, the Note was paid is not without  
24 context. Smith was previously made well aware of the significant factual dispute between the  
25 parties over precisely these circumstances when the summary judgment motion was litigated. As  
26 drafted, her “First Claim For Relief” fails to assert facts, which if proven, would demonstrate that  
27 the Note was actually paid and that PNC Bank knew it was paid yet caused the arrest of the  
28 vessel anyway. Her claim fails to satisfy the plausibility standard under *Twombly*, 550 U.S. at

1 555; and *Iqbal*, 129 S. Ct. at 1949. Accordingly, this claim must be dismissed with leave to  
2 amend.

3 2. Wrongful Foreclosure of Vessel Pursuant to Federal Rule of Civil Procedure 64

4 Under this cause of action, Smith alleges that PNC Bank’s own admissions show that it  
5 foreclosed on the Vessel on June 1, 2009, but did not initiate this action until July 20, 2010. ECF  
6 No. 77 ¶ 18. Smith appears to contend that this conduct violated Federal Rule of Civil Procedure  
7 64. *See id.* ¶¶ 17-19. Beyond that, the claim is unintelligible. Smith does not explain how the  
8 time between PNC Bank’s repossession of the Vessel and its initiation of this lawsuit amounts to  
9 a claim for wrongful foreclose. Further, it is unclear how this purported cause of action relates to  
10 Federal Rule of Civil Procedure 64. Further, the rule itself provides no cause of action. It simply  
11 states that “[a]t the commencement of and throughout an action, every remedy is available that,  
12 under the law of the state where the court is located, provides for seizing a person or property to  
13 secure satisfaction of the potential judgment. But a federal statute governs to the extent it  
14 applies.” Fed. R. Civ. P. 64(a). Rule 64 codifies the “long-settled federal law providing that in  
15 cases in federal court . . . state law is incorporated to determine the availability of prejudgment  
16 remedies for the seizure of person or property to secure satisfaction of the judgment ultimately  
17 entered.” *Granny Goose Foods, Inc. v Bhd. Of Teamsters & Auto Truck Drivers Local No. 70 of*  
18 *Alameda Cnty.*, 415 U.S 423, 436 n. 10 (1974). While the court did issue an order authorizing an  
19 arrest of the Vessel, ECF No. 11, as noted with respect to the first cause of action, Smith has not  
20 alleged facts, which if true, demonstrate that this foreclosure action is “wrongful.”

21 As this claim is incomprehensible, it must be dismissed. The dismissal should be with  
22 leave to amend to afford Smith an opportunity to cure the defects, if she can do so in good faith.

23 3. Fair Debt Collection Practices Act

24 Smith appears to allege that PNC Bank violated the FDCPA by stating that the original  
25 loan was for \$336,653, when the amount of the loan was significantly less. ECF No. 77 ¶ 23.  
26 Smith claims that this was misrepresentation and violated 15 U.S.C. § 1692f. PNC Bank argues

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1 that this claim should be dismissed because PNC Bank does not qualify as a debt collector under  
2 the FDCPA.<sup>5</sup> ECF No. 78 at 9.

3 The purpose of the FDCPA is to “prohibit debt collectors from engaging in unfair and  
4 deceptive practices in the collection of consumer debts, and to require debtors to act fairly into  
5 entering into and honoring such debts.” See 15 U.S.C. § 1692. The FDCPA applies only to a  
6 “debt collector,” defined as “a person who uses any instrumentality of interstate commerce or the  
7 mails in any business the principal purpose of which is the collection of any debts, or who  
8 regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be  
9 owed or due another.” 15 U.S.C. § 1692a. The FDCPA expressly excludes from this definition  
10 any person collecting or attempting to collect a debt originated by that person. 15 U.S.C.  
11 § 1692a(6)(F)(ii). Moreover, “[t]he law is well-settled that creditors, mortgagors, and mortgage  
12 servicing companies are not debt collectors and are statutorily exempt from liability under the  
13 FDCPA.” *Costantini v. Wachovia Mortg. FSB*, 2009 WL 1810122, at \*3 (E.D. Cal. June 24,  
14 2009) (internal alterations omitted) (quoting *Hepler v. Wash. Mut. Bank, F.A.*, 2009 WL 1045470  
15 at \*4 (C.D. Cal. Apr.17, 2009)).

16 Here, Smith’s factual allegations fail to show that plaintiff is a “debt collector” as the term  
17 is defined in 15 U.S.C. § 1692a. Accordingly, Smith’s FDCPA claim must be dismissed with  
18 leave to amend.

#### 19 4. Intentional Interference with an Economic Advantage

20 Smith alleges that she had a contractual relationship with Winding as to the Vessel. ECF  
21 No. 77 ¶ 26. She says that PNC Bank’s foreclosure and seizure of the Vessel intentionally  
22 disrupted the contract entered into between Smith and Winding. *Id.* ¶ 27. Smith contends that  
23 she suffered damages as a result of the interference. *Id.* ¶ 28. PNC Bank argues that Smith’s  
24 claim fails because she has failed to allege facts showing that PNC Bank had knowledge of the  
25 contract between Smith and Winding. ECF No. 78. PNC Bank also argues that Smith fails to  
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27 <sup>5</sup> PNC Bank also argues that this claim should be dismissed because Smith’s allegations  
28 are unfounded and not supported by documentation. Again, PNC Bank disregards the role of a  
Rule 12(b)(6) motion and conflates the applicable standard with that under Rule 56.

1 allege facts demonstrating that PNC Bank intended to cause the result of interfering with Smith  
2 and Winding's contract.

3 "To prevail on a cause of action for intentional interference with prospective economic  
4 advantage in California, a plaintiff must plead and prove (1) an economic relationship between  
5 the plaintiff and some third party, with the probability of future economic benefit to the plaintiff;  
6 (2) the defendant's knowledge of the relationship; (3) the defendant's intentional acts designed to  
7 disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the  
8 plaintiff proximately caused by the defendant's acts." *Reeves v. Hanlon*, 33 Cal. 4th 1140, 1152,  
9 n. 6 (2004) (citation omitted).

10 Smith's conclusory allegations are insufficient to state a claim for intentional interference  
11 with an economic advantage. She has only alleged that she entered into a contract with defendant  
12 Winding, and that plaintiff interfered with this contract by seizing the Vessel. Smith has failed to  
13 allege facts demonstrating that PNC Bank had knowledge of Smith's contractual relationship with  
14 Winding. Furthermore, there are no allegations showing that PNC Bank acted with the intent to  
15 disrupt her relationship with Winding. Accordingly, Smith's claim for intentional interference  
16 with an economic advantage must be dismissed with leave to amend.

17 V. CONCLUSION

18 Accordingly, it is ORDERED that defendant Smith's motion to strike, ECF No. 84, is  
19 denied as superfluous. The court is not considering the Declaration of Brian J. Lutton, ECF No.  
20 79, in ruling on this Rule 12(b)(6) motion.

21 Further, it is RECOMMENDED that:

22 1. Plaintiff's (PNC Bank's) motion to dismiss defendant Smith's counterclaims, ECF No.  
23 78, be granted;

24 2. Defendant Smith's counterclaims be dismissed in their entirety with leave to amend;

25 and

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1           3. Defendant Smith be given 30 days from the date of any order adopting these findings  
2 and recommendations to file an amended pleading curing the deficiencies identified herein.

3           These findings and recommendations are submitted to the United States District Judge  
4 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days  
5 after being served with these findings and recommendations, any party may file written  
6 objections with the court and serve a copy on all parties. Such a document should be captioned  
7 “Objections to Magistrate Judge’s Findings and Recommendations.” Failure to file objections  
8 within the specified time may waive the right to appeal the District Court’s order. *Turner v.*  
9 *Duncan*, 158 F.3d 449, 455 (9th Cir. 1998); *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

10 DATED: March 6, 2014.

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12 EDMUND F. BRENNAN  
13 UNITED STATES MAGISTRATE JUDGE  
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