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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

TIMOTHY P. DEMARTINI, et al.,  
Plaintiffs,  
v.  
MICHAEL J. DEMARTINI, et al.,  
Defendants.

No. 2:14-cv-2722-JAM-CKD

**FINDINGS OF FACT AND CONCLUSIONS  
OF LAW;**

**INTERLOCUTORY JUDGMENT**

The partition claim in the above-captioned case came before the Court for a bench trial on April 17 and 18, 2018. ECF Nos. 332 & 336. Plaintiffs seek partition of a piece of property in the County of Nevada, APN: 06-370-64, commonly known as 12757, 12759, and 12761 Loma Rica Drive ("Grass Valley Property"). The Court heard testimony and received evidence from the parties and ordered the matter submitted. The parties then filed proposed findings of fact and conclusions of law. ECF Nos. 354 & 355.

Having considered the evidence, trial briefs, and other submissions by the parties, the Court hereby makes the following findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

1 I. FINDINGS OF FACT

2 A. Facts Regarding Title and Ownership Interest

3 1. On May 24, 1977, a Deed was recorded in which Harold J.  
4 Gleason and Mildred L. Gleason, his wife, transferred 100% fee  
5 ownership interest in the Grass Valley Property to: (i) James P.  
6 DeMartini and Thelma L. DeMartini, his wife, as joint tenants, an  
7 undivided one-half interest, and (ii) Timothy P. DeMartini and  
8 Margie DeMartini, his wife, as joint tenants, an undivided one-  
9 half interest. Pl. Ex.1.

10 2. On October 17, 1977, a Deed was recorded in which James  
11 P. DeMartini and Thelma L. DeMartini, as joint tenants, and  
12 Timothy P. DeMartini and Margie DeMartini, as joint tenants,  
13 transferred 100% fee ownership interest in the Grass Valley  
14 Property to: (i) James P. DeMartini and Thelma L. DeMartini, his  
15 wife, as joint tenants, an undivided one-third interest, and  
16 (ii) Timothy P. DeMartini and Margie DeMartini, his wife, as  
17 joint tenants, an undivided one-third interest, and (iii) Michael  
18 J. DeMartini and Renate DeMartini, his wife, as joint tenants, an  
19 undivided one-third interest. Pl. Ex. 2.

20 3. Upon the death of James P. DeMartini, the Trustees of  
21 the Marital Trust under the Will of James P. DeMartini  
22 transferred James P. DeMartini's ownership interest in the Grass  
23 Valley Property to his surviving spouse, Thelma L. DeMartini.  
24 Pl. Ex. 3.

25 4. Thereafter, Thelma L. DeMartini by Grant Deed  
26 transferred her undivided one third interest in the Grass Valley  
27 to: (i) Timothy P. DeMartini and Margie DeMartini, his wife, as  
28 joint tenants, an undivided one-half interest, and (ii) Michael

1 J. DeMartini and Renate DeMartini, his wife, as joint tenants, an  
2 undivided one-half interest. Pl. Ex. 4

3 5. These four deeds show that as of December 28, 1984,  
4 Plaintiffs Timothy P. and Margie DeMartini, husband and wife and  
5 as joint tenants owned an undivided fifty percent interest in the  
6 Grass Valley Property, and Defendants Michael J. and Renate  
7 DeMartini, husband and wife and as joint tenants owned an  
8 undivided fifty percent interest in the Grass Valley Property.  
9 Pl. Exs. 1-4; Transcript 396:13-17.

10 6. On May 6, 2015, Timothy P. DeMartini executed a  
11 quitclaim deed disavowing an August 14, 2014, deed and deeding  
12 "any interest attempted to be transferred in the property  
13 referenced therein" back to the parties. Def. Ex. CCCCC036.

14 7. There is no other evidence that the property is owned  
15 by a partnership between the parties. Defendants' claim that a  
16 global partnership existed between the parties was adjudicated  
17 against Defendants in an earlier stage of this case. See ECF  
18 Nos. 232, 267, 345, & 347.

19 8. No evidence of any lien against or other interest in  
20 the Grass Valley Property was presented.

21 B. Facts Regarding Waiver

22 1. The parties signed a settlement agreement with Gordon  
23 and Linda Mulay, and affiliated individuals, dba Electronic  
24 Carbide Process and Electronic Carbide Inc. (collectively "ECI")  
25 in October of 2008. Def. Ex. II (pages 1-5). ECI leased 12757  
26 Loma Rica Drive from the parties and a dispute later arose  
27 concerning damage to the premises. ECI agreed to pay the parties  
28 \$16,000.00 for a general release, as set forth in paragraph 3 of

1 the agreement, of claims between the parties. The release "does  
2 not include, and expressly excludes, any known or unknown claims  
3 [the DeMartinis] may have for environmental contamination caused  
4 by ECI's occupation of the premises." Def, Ex. II, ¶ 3.

5 2. The Settlement Agreement states that the parties and  
6 "ECI further acknowledge that ECI represents and [the DeMartinis]  
7 accepts ECI's representation that ECI is informed and believes  
8 that any environmental impacts related or relating to the lease  
9 and/or occupancy of the premises of [the DeMartinis] by ECI have  
10 or will dissipate without mitigation." Def. Ex. II, ¶ F.

11 3. The Settlement Agreement contains a paragraph stating  
12 that the Agreement sets forth the entire Agreement between the  
13 parties and that there are no additional or supplemental  
14 agreements between them related in any way to the matters  
15 addressed in the Agreement unless specifically included or  
16 referred to in the Agreement. Def. Ex. II, ¶ 12. It also states  
17 that, in executing the Agreement, the parties did not rely on any  
18 representation or any statement made by any of the parties or by  
19 any of the parties' representatives with regard to the subject  
20 matter, basis or effect of the Agreement other than those  
21 specifically stated in the written Agreement. Def. Ex. II, ¶ 8.

22 4. The Settlement Agreement does not contain an express  
23 waiver of the right to partition.

24 C. Facts Regarding Manner of Partition

25 1. Characteristics of the Grass Valley Property

26 a. The Grass Valley Property is roughly 57,000 square  
27 feet. Transcript 501:1-2. The parcel is rectangular in shape.  
28 Pl. Ex. 21, pp. 18-26.

1           b.     The Grass Valley Property has access to one public  
2 road to the north, Loma Rica Drive. Transcript 275:22-276:2,  
3 522:3-4, 525:17-24; Pl. Ex. 21, pp. 18-26.

4           c.     Two commercial buildings are constructed upon the  
5 Grass Valley Property. Pl. Ex. 21, p. 19.

6           d.     12759 Loma Rica Drive is the mailing address for  
7 one of the two buildings on the Grass Valley Property and both  
8 the 12757 and 12761 addresses represent the mailing addresses for  
9 the second building on the Grass Valley Property. Transcript  
10 349:2-6, 345:21; Def. Ex. XXX.

11          e.     The two buildings on the Grass Valley property are  
12 oriented North - South, with the 12759 building being to the  
13 North and bordering Loma Rica Drive, and the building housing  
14 both the 12757 and 12761 addresses to the South. Transcript  
15 349:2-5, 500:15-17; Def. Ex. XXX. Access to the 12757/12761  
16 building on the Grass Valley Property is across the driveway and  
17 parking area of the 12759 building. Transcript 508:23-509:1.

18          f.     Mr. Ketcham, a real estate appraiser, testified  
19 about his appraisal of the Grass Valley Property. Mr. Ketcham  
20 measured the gross footprint area of the two buildings to be  
21 13,200 square feet. Transcript 280:6-7. The northern building  
22 is 6,000 square feet but has some interior improvements that  
23 provide second floor usage, increasing the area by another 1,200  
24 square feet. Transcript 283:12-16. The appraiser did not  
25 include this 1,200 square feet in his rentable area calculation.  
26 The southern building is about 7,200 square feet.

27          g.     Mr. Ketcham appraised the property's value, as of  
28 November 28, 2016, at \$785,000. Transcript 304:10-11.

1           h.     In making his appraisal report, Mr. Ketcham was  
2 not informed or aware of any environmental, structural, flooding,  
3 septic, water, soil, or roof problems. Transcript 311:14-20,  
4 319:21-24, 320:6-24. He was not aware of the Settlement  
5 Agreement entered into with Electronic Carbide Process, Inc.  
6 Transcript 320:6-16.

7           2.     Subdivision

8           a.     Plaintiffs did not present any admissible evidence  
9 concerning subdivision of the property. The Court accepted Mr.  
10 Ketcham as an expert regarding issues related to the appraisal.  
11 Transcript 294:10-16. However, because Mr. Ketcham was not  
12 disclosed as an expert regarding division of the property and did  
13 not provide a report regarding division of the property, the  
14 Court did not permit him to opine on subdivision. Transcript  
15 296:23-25, 298:25-300:8, 300:23-301:22, 303:12-22, 306:12-19,  
16 307:23-308:2, 380:14-19.

17           b.     Defendant Michael J. DeMartini presented a plan to  
18 subdivide the property into a northern and southern subdivision,  
19 resulting in subdivisions of approximately 28,000 square feet  
20 each, with each parcel containing its own existing infrastructure  
21 (i.e. one commercial building). Transcript 500:1-501:15. 507:17-  
22 20, 252:14-20.

23           c.     Michael J. DeMartini has observed several  
24 instances of contamination on the property over the years—caused  
25 by different tenants of the buildings—and believes there may  
26 still be potential environmental contaminants on the site.  
27 Transcript 348:24-355:19.

28           d.     Contamination to the southern portion of the

1 property is of particular concern. Electronic Carbide Process  
2 was a long-term tenant of the DeMartinis. Transcript 346:3-8.  
3 It began occupying 12757 Loma Rica Drive (the southern building)  
4 near the end of 1998 and continued to occupy 12757 and 12761  
5 until around 2005. Transcript 346:16-347:9. The company engaged  
6 in some heavy manufacturing which may have resulted in  
7 environmental contamination. The DeMartinis entered into a  
8 Settlement Agreement with Electronic Carbide Process in relation  
9 to damage to the property and possible environmental  
10 contamination. Transcript 358:3-362:3. If the property were  
11 sold the possible environmental damage could affect the value of  
12 the property. Transcript 362:25-362:3.

13 e. Michael J. DeMartini stated that if the properties  
14 were subdivided, he would take the southern portion "because of  
15 the high environmental problems." Transcript 500:15-17.

16 f. Plaintiffs want to sell the property. Transcript  
17 458:23-459:6.

18 g. Michael J. DeMartini has developed two partition  
19 plans: the first plan would be to subdivide the property; the  
20 second would be for the Defendants to buy out the Plaintiffs and  
21 take 100% ownership of the property. Of these two options, he  
22 would prefer to buy out the Plaintiffs. Transcript 499:15-  
23 505:14.

24 h. Michael J. DeMartini is a civil engineer with  
25 experience subdividing properties. Transcript 500:3, 509:8-  
26 510:24. Michael J. DeMartini opined that dividing the property  
27 into two could be a simple process that could take up to eight  
28 months. Transcript 507:3-509:7.

1           i.    The physical characteristics of the Grass Valley  
2 Property would require an access agreement and easement between  
3 the two owners if the Grass Valley Property were to be equitably  
4 split, requiring agreements as to parking, access, and  
5 maintenance. Transcript 343:17-344:16.

6  
7   II.    CONCLUSIONS OF LAW

8    A.    Right to Partition

9           1.    A partition action may be commenced and maintained by a  
10 co-owner of personal property or by an owner of an estate of  
11 inheritance, an estate for life, or an estate for years in real  
12 property where such property or estate therein is owned by  
13 several persons concurrently or in successive estates. C.C.P.  
14 § 872.210. To the extent necessary to grant the relief sought or  
15 other appropriate relief, the court shall upon adequate proof  
16 ascertain the state of the title to the property and determine  
17 the status and priority of all liens upon the property. C.C.P.  
18 §§ 872.620, 872.630.

19           2.    The four deeds show that as of December 28, 1984,  
20 Plaintiffs Timothy P. and Margie DeMartini, husband and wife and  
21 as joint tenants owned an undivided fifty percent interest in the  
22 Grass Valley Property, and Defendants Michael J. and Renate  
23 DeMartini, husband and wife and as joint tenants owned an  
24 undivided fifty percent of the Grass Valley Property.

25           3.    Between the Plaintiffs and the Defendants, the property  
26 is held in tenancy in common. See Cal. Civ. Code § 686 ("Every  
27 interest created in favor of several persons in their own right  
28 is an interest in common, unless acquired by them in partnership,



1 for partnership purposes, or unless declared in its creation to  
2 be a joint interest, as provided in Section 683, or unless  
3 acquired as community property." ).

4 4. Except as provided in Section 872.730, partition as to  
5 concurrent interests in the property shall be as of right unless  
6 barred by a valid waiver. C.C.P. §§ 872.710. Section 872.730  
7 addresses the application of the right to partition to  
8 partnerships.

9 5. The Court previously determined that there is no global  
10 partnership between the parties. See ECF Nos. 232, 267, 345, &  
11 347.

12 6. The evidence does not show that the property is owned  
13 by a partnership. The only evidence indicating that a  
14 partnership may have had an interest in the property at some  
15 point is the quitclaim deed dated May 6, 2015, which refers to a  
16 prior quitclaim deed executed on August 14, 2014. The August  
17 14th deed purported to transfer Michael J. DeMartini's interest  
18 in the property to "DeMartini & Sons," a partnership. However,  
19 the referenced deed was not entered into evidence, nor was its  
20 validity, which is suspect, otherwise established. The Court  
21 therefore finds there to be no valid partnership interest in the  
22 property.

23 7. "[T]he right of partition may be waived by contract,  
24 either express or implied." Am. Med. Int'l, Inc. v. Feller, 59  
25 Cal. App. 3d 1008, 1014 (Ct. App. 1976). For instance, a waiver  
26 may be implied where parties invested in property which was  
27 subject to a long-term lease, acquired for the purpose of long  
28 term investment income, and sold to them with such guaranteed

1 income. See Pine v. Tiedt, 232 Cal. App. 2d 733 (Ct. App. 1965);  
2 see also Feller, 59 Cal. App. 3d at 1016 ("We conclude that  
3 defendants' assertion with respect to implied waiver of the right  
4 of partition has merit. It appears to be uncontroverted that  
5 defendants were persuaded to invest on the premise that there  
6 would be a long-term lease of the real property which would  
7 assure a secure and permanent source of income to them during the  
8 life of the lease[.]"). Or, a waiver may be implied where co-  
9 owners enter into a contract concerning the operation of the co-  
10 owned properties, at least for as long as the operating  
11 agreements are effective. See Thomas v. Witte, 214 Cal. App. 2d  
12 322 (Ct. App. 1963).

13 8. The evidence does not establish that Plaintiffs waived  
14 their right to seek partition of the Grass Valley Property.  
15 Defendants argue that the Settlement Agreement waived Plaintiffs'  
16 right to partition, but the Settlement Agreement does not contain  
17 an express waiver of such right. The releases in the agreement  
18 concern claims between the DeMartinis and ECI, not claims between  
19 the DeMartinis themselves. Additionally, the Settlement  
20 Agreement does not imply a waiver. The Agreement does not  
21 demonstrate a clear intention by the parties to continue doing  
22 business together or to refrain from selling the property.  
23 Again, the Agreement concerned claims between the DeMartinis and  
24 ECI and was not an agreement between the DeMartinis concerning  
25 how the property would be operated moving forward.

26 9. Defendants did not present any other evidence  
27 sufficient to establish implied waiver. No long term leases or  
28 written operational agreements were introduced. The parties'

1 vague intentions as to how they would use the property do not  
2 establish an implied waiver of Plaintiffs' right.

3 10. In conclusion, the Court finds:

4 a. Plaintiffs Timothy P. and Margie DeMartini,  
5 husband and wife and as joint tenants own an undivided fifty  
6 percent interest in the Grass Valley Property, and Defendants  
7 Michael J. and Renate DeMartini, husband and wife and as joint  
8 tenants own an undivided fifty percent interest of the Grass  
9 Valley Property.

10 b. No other persons have any interest in the real  
11 property. There are no liens against the property.

12 c. Plaintiffs are entitled to partition.

13 B. Manner of Partition

14 1. "The manner of partition may be 'in kind'—i.e. physical  
15 division of the property—according to the parties' interests as  
16 determined in the interlocutory judgment." Cummings v. Dessel,  
17 13 Cal. App. 5th 589, 597 (Ct. App. 2017) (internal citation  
18 omitted). "Alternatively, if the parties agree or the court  
19 concludes it 'would be more equitable,' the court may order the  
20 property sold and the proceeds divided among the parties." Id.  
21 (quoting the C.C.P. § 872.820). "The third option, 'when the  
22 interests of all parties are undisputed or have been  
23 adjudicated,' and the parties agree, is partition by appraisal."  
24 Id. (quoting C.C.P. § 873.910).

25 2. "As a rule, the law favors partition in kind, since  
26 this does not disturb the existing form of inheritance or compel  
27 a person to sell his property against his will." Richmond v.  
28 Dofflemyer, 105 Cal. App. 3d 745, 757 (Ct. App. 1980). "The

1 presumption is that land held in common tenancy can be equitably  
2 divided between the parties by allowing each a tract in  
3 severalty, equal to his interest in the whole, measured by  
4 value." Id. "A sale cannot be decreed in partition merely to  
5 advance the interests of one of the owners; before ordering a  
6 sale, the court must ascertain that the interests of all will  
7 thereby be promoted." Butte Creek Island Ranch v. Crim, 136 Cal.  
8 App. 3d 360, 368 (Ct. App. 1982). "Forced sales are strongly  
9 disfavored." Richmond, 105 Cal.App.3d at 757.

10 3. "The burden of proof is on one endeavoring to force a  
11 sale as against unwilling co-owners to prove that the case is not  
12 a proper one for partition in kind." Richmond, 105 Cal. App. 3d  
13 at 757. In this case the burden of proof falls on Plaintiffs to  
14 overcome the presumption and show that a partition by sale will  
15 be more equitable.

16 4. There are two types of evidence that have been held  
17 sufficient to justify a partition sale of property rather than  
18 physical division. "The first is evidence that the property is  
19 so situated that a division into subparcels of equal value cannot  
20 be made. . . . In order to meet this test the party desiring a  
21 partition sale must show that the land cannot be divided." Butte  
22 Creek Island Ranch, 136 Cal. App. 3d at 364. "The second type of  
23 evidence which supports a partition sale rather than physical  
24 division is economic evidence to the effect that, due to the  
25 particular situation of the land, the division of the land would  
26 substantially diminish the value of each party's interest." Id.  
27 at 367. "The generally accepted test in this regard is whether a  
28 partition in kind would result in a cotenant receiving a portion

1 of the land which would be worth materially less than the share  
2 of the money which could be obtained through sale of the land as  
3 a whole." Id.

4 5. Plaintiffs desire to partition the property because of  
5 disagreements with Defendants in co-owning the property. Though  
6 Plaintiffs desire partition by sale, Plaintiffs failed to meet  
7 their burden in showing that partition in kind is not achievable  
8 or equitable. They did not show that subdividing the property  
9 could not result in parcels of equal value or that the division  
10 of land would substantially diminish the value of each party's  
11 interest.

12 6. Defendants do not want to sell the property.

13 7. The Court finds that partition in kind is the more  
14 equitable result in this case. The rectangular shape of the  
15 Property lends itself to division across the middle (west to  
16 east), resulting in a northern subdivision and a southern  
17 subdivision of roughly equal shape. Each subdivision would  
18 contain one commercial building. Although the southern building  
19 has a greater gross footprint area, the northern building has a  
20 loft that provides an additional 1,200 square feet of space. The  
21 potential environmental contamination in the southern subdivision  
22 could decrease its value, but Michael J. DeMartini, the party  
23 preferring partition in kind, stated he would take that  
24 subdivision. The Court therefore finds the Grass Valley Property  
25 may be equitably subdivided and orders partition in kind.

26 8. The California Code of Civil Procedure directs the  
27 Court to appoint a referee to divide the property. C.C.P.  
28 § 873.010. However, California courts have construed the section

1 "to require the appointment of a referee only where it is  
2 determined that a referee is necessary or would be desirable or  
3 helpful and that it should not be so strictly construed as to  
4 require the expense and time-consuming services of a referee  
5 where the court has adequate evidence before it to render its  
6 decision." Richmond, 105 Cal. App. 3d at 755.

7 9. In the course of trial the Court learned that Defendant  
8 Michael J. DeMartini has a background in engineering and in  
9 subdividing properties. Michael J. DeMartini has already drafted  
10 a plan for partitioning the property. The Court, sitting in  
11 equity, finds it would be economically advantageous to all  
12 parties in this action to permit Michael J. DeMartini to submit a  
13 proposed plan for partition. He should review California Code of  
14 Civil Procedure §§ 873.210, et seq., to ensure proper execution  
15 of this task. If his proposal is not acceptable to the Court,  
16 the Court will appoint a referee to divide the property and the  
17 parties will be required to pay the referee's compensation and  
18 reasonable expenses. C.C.P. §§ 873.010, et seq.

19 10. Defendants expressed an interest in buying out the  
20 Plaintiffs at an appraised value. The Court cannot, however,  
21 order such a sale. Section 873.910, et seq., of the California  
22 Code of Civil Procedure provides for Partition by Appraisal.  
23 Partition by appraisal must be agreed to by the parties in  
24 writing and filed with the clerk of court. C.C.P. § 873.920.  
25 The Court cannot order partition by appraisal if the parties have  
26 not agreed to that procedure in writing. See Cummings v. Dessel,  
27 13 Cal. App. 5th 589, 601 (2017).

28 11. Following this interlocutory order, the parties may

1 agree to partition by appraisal and apply to the Court for  
2 approval of the agreement. C.C.P. § 873.930(a). If the Court  
3 finds the agreement complies with Section 873.920 and that the  
4 terms and conditions are equitable, it will approve the agreement  
5 and stay any pending division of the property. C.C.P.  
6 § 873.930(b).

7  
8 III. ORDER

9 **IT IS HEREBY ORDERED that:**

10 1. The Grass Valley Property, commonly known as 12757,  
11 12759, and 12761 Loma Rica Drive, Grass Valley, California, and  
12 more particularly described below, shall be partitioned in kind  
13 and divided between Plaintiffs and Defendants in proportion to  
14 their fifty percent interest in the property. The property shall  
15 be divided into a northern subdivision and a southern subdivision.

16 APN #06-370-64

17 Parcel 3, as shown on the Parcel Map for Harold  
18 Gleason, being a portion of Lot 13, Loma Rica  
19 Industrial Park in the Northwest 1/4 of Section 30,  
20 Township 16 North, Range 9 East, M.D.B. & M., as filed  
in the office of the Nevada County recorder on April  
26, 1977, in Book 11 of Parcel Maps, at Page 125.

21 Excepting therefrom all minerals, gas, oil, and mineral  
22 deposits of every kind and nature located below a depth  
23 of 75 feet beneath the surface of all of the above-  
24 described real property, together with all necessary  
25 and convenient rights to explore, develop, produce,  
26 extract and take the same, subject to the express  
27 limitation that the foregoing exception and reservation  
shall not include any right to entry upon the surface  
of said land, as reserved by the Quitclaim Deed dated  
September 29, 1958, recorded August 7, 1959, in Book  
266, Page 22, Official Records, Nevada County Records,  
executed by Idaho Maryland Mines Corporation, a Nevada  
corporation to Loma Rica Industrial Park, a California  
corporation.

28 ///

1 The described property is commonly known as: 12757,  
2 12759 and 12761 Loma Rica Drive, Grass Valley, CA  
3 95945; APN 06-370-64-000.

4 2. Michael J. DeMartini is to submit a proposed plan for  
5 subdivision by June 30, 2018. The parties are encouraged to  
6 reach an agreement on the proposal and should file a statement  
7 reflecting an agreement if one is reached. The plan should, at a  
8 minimum, include specific tasks that will need to be accomplished  
9 and dates those tasks will be completed. The partition in kind  
10 must be completed no later than June 30, 2019, or the Court will  
11 appoint a referee to carry out its Order. Should the parties not  
12 agree, Plaintiffs' objections to the proposal are due July 15,  
13 2018. No hearing on the proposal will be set at this time.

14 3. If Defendants fail to timely submit a proposal, the  
15 Court will appoint a referee to subdivide the property.

16 4. Nothing in this Order precludes the parties from  
17 agreeing to partition by appraisal and filing the appropriate  
18 documentation with the Court.

19 IT IS SO ORDERED.

20 Dated: May 30, 2018

21   
22 JOHN A. MENDEZ,  
23 UNITED STATES DISTRICT JUDGE  
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