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INTERIM CLASS COUNSEL

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

IN RE: NUTELLA DECEPTIVE SALES PRACTICES & MARKETING LITIGATION

ATHENA HOHENBERG & LAURA RUDE-BARBATO, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

FERRERO U.S.A, INC., a foreign corporation,

Defendant.

CASE NO. 3:11-CV-00205-H-CAB

JUDGE: Hon. Marilyn L. Huff

PLAINTIFFS' OPPOSITION TO FERRERO'S *EX PARTE* MOTION FOR POSTPONEMENT AND DISCOVERY STAY

Date: N/A
Time: N/A

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INTRODUCTION

Ferrero's *ex parte* motion requests the Court "postpone Ferrero's deadline to respond to the consolidated complaint . . . and general discovery deadlines until venue issues in this action are resolved." (Mot. at 0.[1]) Since, if *this Court* "decides that transfer of the consolidated action is not warranted, Ferrero will petition the Judicial Panel on Multidistrict Litigation . . . to consolidate pretrial proceedings" in New Jersey (*id.* at 2), Ferrero's motion in effect asks the Court to (a) postpone the entire action indefinitely, and (b) issue a protective order and thereby stay discovery indefinitely. As discussed below, both remedies are unwarranted.

Ferrero seeks such delay based on the purported inequity in having to respond to the pending suits before venue is decided, and purported efficiency in waiting until a single forum is selected. But Ferrero did not disclose that it is subject to an Order requiring it to respond to the New Jersey *Glover* Complaint no later than April 25. This plainly belies Ferrero's justification for relief.

RELEVANT FACTS

A. The First-Filed California Actions & Copycat New Jersey Actions

Plaintiff Athena Hohenberg filed her lawsuit against Ferrero on February 1, 2011, and Laura Rude-Barbato filed hers three days later, on February 4. Both mothers filed in this District because both live here and were subject to Ferrero's deceptive advertising here. Both suits included claims under California's Unfair Competition Law, False Advertising Law, and Consumer Legal Remedies Act, as well as claims for Breach of Express and Implied Warranties under California law. Rude-Barbato's complaint also included a New Jersey statutory claim.

About a month later, on or about February 27, two copycat actions were filed in New Jersey. First, Claudia Metcalf filed an action against Ferrero in New Jersey state court. Ms. Metcalf's complaint alleges she purchased Nutella in a Flemington, New Jersey Shop Rite in June 2010. (*See Metcalf* Compl., *Hohenberg* Dkt. No. 20-2, at ¶ 4.) Flemington is also the location of Ms. Metcalf's attorney, William J. Metcalf, whose practice primarily involves insurance coverage litigation and

[1] The text of Ferrero's memorandum in support of its motion (Dkt. No. 21-1) begins on the page preceding page 1.

counseling, and defense of professional liability claims. *See* http://wmetcalflawfirm.com/attorney/profile-william-j-metcalf-esq. The *Metcalf* Complaint asserts claims for (a) breach of the New Jersey Consumer Fraud Act, (b) breach of express warranty pursuant to N.J.S.A. 12A:2-313, (c) breach of implied warranty pursuant to N.J.S.A. 12A:2-314(1) & (2), and Unjust Enrichment (*see id.* at 12-16), is limited to a putative class of solely New Jersey residents (*id.* at ¶ 33), invokes no federal question, and Ferrero has not sought to remove it to federal court. Thus, *Metcalf* is irrelevant.

Second, Marnie Glover filed an action against Ferrero in the District of New Jersey. (*See* Dkt. No. 20-1.) That action was brought by Christopher Burke, a San Diego class action attorney with Scott+Scott LLP.[2] Ms. Glover asserts claims against Ferrero for violations of the New Jersey Consumer Fraud Act and for Breach of Express and Implied Warranties under New Jersey state law. Ferrero's California attorneys have all appeared in the New Jersey action *pro hac vice*. (*See* Declaration of Jack Fitzgerald, dated March 30, 2011 ("Fitzgerald Dec."), at ¶ 2 & Ex. A.)

B. Ferrero Agrees to Respond Within 20 Days After Plaintiffs File the Master Consolidated Complaint

Anticipating consolidation of the California actions, on February 23 the parties filed a Joint Motion and Stipulation for an Order Extending Defendant's time to respond to the anticipated consolidated complaint. In that filing, Ferrero agreed to file its response to the Master Consolidated Complaint within 20 days after its filing.[3] (Dkt. No. 6.)

C. The Court Consolidates the First-Filed Actions and Appoints Interim Class Counsel

Five days later, on February 28, Plaintiffs filed their Motion to Consolidate and Appoint Interim Counsel. (Dkt. No. 8.) Ferrero did not oppose the motion, but on March 14 filed a response alerting the Court to the New Jersey actions filed two weeks earlier, and stating its intention to file a motion to transfer venue. (Dkt. No. 9 at 2.) In response, Plaintiffs argued that the existence of the New

[2] Beckwith & Wolf LLP, a New Jersey bankruptcy and real estate firm, is apparently serving as local counsel.

[3] Ferrero's instant motion mistakenly asserts its response is due April 6. (Mot. at 0.) Because Plaintiffs filed the Master Consolidated Complaint on March 23, Ferrero's response is actually due April 12.

Jersey actions bolstered the need for their appointment as interim counsel. (Dkt. No. 10 at 2.) With Ferrero's caveats in mind and aware of the New Jersey actions, on March 22 the Court consolidated the *Hohenberg* and *Rude-Barbato* actions and appointed their counsel Interim Class Counsel. Plaintiffs filed the Master Consolidated Complaint the next day. (Dkt. No. 11.)

The Master Consolidated Complaint states the same California causes of action as the original actions, but states no claims arising under New Jersey law. Plaintiffs seek to represent two putative classes—a restitution class, for individuals who purchased Nutella beginning January 1, 2000, and an injunctive relief class. (*See* Master Consolidated Compl. ¶ 119.) The *Glover* case, by contrast, seeks to represent a single class of Nutella purchasers beginning eight years later, on January 1, 2008.

D. The *Hohenberg* Plaintiffs and Ferrero Engage in Substantial Discovery and Case Management Negotiations

Discovery is well under way in this action, even though Ferrero has labored to avoid it, including inexplicably refusing to participate in Rule 26(f) obligations and reporting, even after promising to do so. (*See* Fitzgerald Dec. ¶¶ 4-14.) As a result, Plaintiffs are scheduled to take the deposition of Ferrero's President and CEO, Bernard Kreilmann, whose declaration supports Ferrero's transfer motion, on April 14. (*See* Dkt. No. 19-2.)

Plaintiffs' Opposition to Ferrero's transfer motion is currently due on April 18, just two business days after the deposition is scheduled. It would be nearly impossible, and certainly very costly, for Plaintiffs to take that deposition, have the transcript expedited (at a next-day delivery cost of $3.50 per transcript page), and process Ferrero's discovery, all in time to oppose it's motion by April 18.

Therefore, during the parties' meet-and-confer call, Ferrero generally agreed to push back the hearing date on its motion to accommodate discovery. In light of that, Interim Counsel contacted the Court, which advised counsel that the dates of May 16, 23, and 30 were all open. Interim Counsel then contacted Ferrero to agree on a date, stating that while "[w]e are OK with any of those dates, [we] would prefer the 23 or 30 since that would give us a little more time to process the deposition. Please let us know which date you prefer." (Fitzgerald Dec. Ex. F.) Ferrero responded that the date should be moved only one week, to May 9, even though that was not one of the open dates the Court's clerk

provided Interim Counsel, since that "should give [Plaintiffs] plenty of time after the April 14 deposition" to respond to the transfer motion. (*Id.*)[4] Thus, while Ferrero acknowledges the need for and has agreed to provide substantial venue-related discovery, it is nevertheless pushing Plaintiffs to complete briefing on the motion without a fair, reasonable and adequate time to process the discovery for use in their Opposition.

In addition, on March 29 Plaintiffs served a third-party deposition and document subpoena in Beaverton, Oregon, on Connie L. Evers, a registered dietitian and purported children's nutrition expert, who is a spokesperson and research consultant for Nutella. (*Id.* ¶ 9 & Ex. F.) Evers has been assisting Ferrero spread the message that Nutella is a healthy breakfast option for children and, indeed, is the direct and cited source of many of Ferrero's false claims. (*See* Master Consolidated Complaint ¶¶ 82-88.) In fact, it is Evers' purported nutritional expertise and advice which underlies the entire "Nutella is a healthy breakfast for kids" campaign that Plaintiffs challenge. Thus, she is a key third-party witness.

But Evers' testimony is also relevant to the question of whether venue in California is proper. Ms. Evers lives in and practices out of Oregon, which is therefore likely the source of many of Ferrero's false claims and deceptive advertisements. And, one week ago, Nutella's nutritional spokesperson was in Orange County telling California mothers to feed Nutella to their children for breakfast. *See* http://www.feltstories.com/2011/03/nutella-party-with-registered-dietitian.html.[5]

F. Ferrero Files a Motion to Transfer Venue

On March 24, Ferrero filed a motion to transfer venue pursuant to 28 U.S.C. § 1404(a). (Dkt. No. 19.) Ferrero asserts venue should be transferred to New Jersey because (a) the "factual nexus of the case" is purportedly there and (b) New Jersey "will result in the greatest convenience for the parties and witnesses . . . ." (Dkt. No. 19-1 at 1.)

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[4] Plaintiffs advised Ferrero this was not an open Court date and asked for clarification. Ferrero responded, saying that the Court had told Ferrero May 9 was open. Thus, it appears the parties received conflicting information. In any event, Ferrero has agreed to continue the hearing to May 16. Therefore, pending the Court's decision on this motion, the parties will likely file a joint motion seeking a continuance. (*See id.*)

[5] *See also* video of the same, *at* http://www.youtube.com/watch?v=gocrTJN0DPw.

Plaintiffs vigorously dispute Ferrero's position and will oppose the motion to transfer on several grounds. For example, Plaintiffs are generally aware Ferrero has physical locations, employees, and partners scattered throughout the United States, and all Nutella sold in the United States is manufactured in Canada. Plaintiffs also believe California is the largest market for Nutella, and that Ferrero conducts substantial business in this state. However, as Ferrero has acknowledged and agreed, Plaintiffs need and are entitled to, and should receive, full venue discovery before being required to respond to the transfer motion.

LEGAL STANDARD

Ferrero's motion fails to identify the legal standard for both the imposition of an indefinite stay and a protective order staying discovery. "The right to proceed in court should not be denied except under the most extreme circumstances." *Commodity Futures Trading Comm'n v. Chilcott Portfiolio Mgmt., Inc.*, 713 F.2d 1477, 1484 (10th Cir. 1983) (quoting *Klein v. Adams & Peck*, 436 F.2d 337, 339 (2d Cir. 1971)). "The proponent of a stay bears the burden of establishing its need." *Clinton v. Jones*, 520 U.S. 681, 708 (1997) (citation omitted). "If there is even a fair possibility that the stay for which [the movant] prays for will work damage to someone else," the movant "must make out a clear case of hardship or inequity in being required to go forward." *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962). When determining whether to issue a stay, courts in this circuit must weigh

> the possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof and questions of law which could be expected to result from a stay.

Lockyer v. Mirant Corp., 398 F.3d 1098, 1110 (9th Cir. 2005).

In addition, the Federal Rules permit a court to issue a protective order, upon a showing of good cause, to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c)(1); *see generally Seven Springs L.P. v. Fox Capital Mgmt. Corp.*, 2007 U.S. Dist. LEXIS 32068, at *2-6 (E.D. Cal. Apr. 18, 2007). "[S]tays of the normal proceedings of a court matter should be the exception rather than the rule. As a result, stays of all discovery are generally disfavored . . . ." *Chimney Rock Pub. Power Dist. v. Tri-State Generation & Transmission Ass'n, Inc.*, 2011 U.S. Dist. LEXIS 26922 (D. Colo. Mar. 4, 2011) (citation omitted). In

seeking a protective order to stay a case indefinitely, the moving party "has the burden to demonstrate particular and specific demonstration[s] of fact, as distinguished from conclusory statements . . . ." *Seven Springs*, 2007 U.S. Dist. LEXIS, at *3 (internal quotations and citation omitted).

Ferrero has failed to meet its burden with respect to both forms of relief it requests; therefore, its *ex parte* motion should be denied.

ARGUMENT

A. FERRERO HAS SHOWN NO HARDSHIP OR INEQUITY IN BEING REQUIRED TO RESPOND TO THE COMPLAINT

1. Because the New Jersey Court Ordered Ferrero to Respond to the *Glover* Complaint by April 25, Ferrero's Claim of Prejudice is Not Credible

Ferrero asserts this case should be halted indefinitely so that Ferrero is "not [ ] required to press forward with litigation in the interim, including filing responses to the competing complaints and engaging in general (*i.e.*, non-venue related), discovery with multiple plaintiffs." (Mot. at 3.) This justification rings hollow because Ferrero is subject to a Consent Order in the District of New Jersey requiring its response to the *Glover* Complaint by April 25, 2011. (Fitzgerald Dec. ¶ 2 & Ex. A.) Ferrero failed to disclose this to the Court.

Notably, Ferrero filed the Consent Order agreeing to respond to the New Jersey action on March 21. Two days later, Ferrero advised Plaintiffs of its intention, in the event *this Court* declines to transfer the case to New Jersey, to petition to the JPML for such transfer. Thus, Ferrero almost certainly knew, when it agreed to respond to the *Glover* Complaint by April 25, that it would file a motion for MDL transfer to New Jersey if this Court does not transfer the case there. Nevertheless, Ferrero has not sought the same indefinite stay of the New Jersey action that it seeks here, revealing Ferrero's true interest is not to delay litigation while the venue is decided generally, but to delay *this action* before *this Court*, while it pushes to litigate the New Jersey action in front of a court it presumably believes is friendlier.

2. Ferrero Knew it Would Move for Transfer and, if Unsuccessful, for MDL Treatment When it Agreed to Respond to this Action by April 12

While Ferrero's transfer motion mentions the New Jersey actions, it does not assert—nor could it—that the existence of those actions justifies transfer. Rather, Ferrero's transfer motion is based on (a) the factual nexus of New Jersey to the action, and (b) the purported convenience of the witnesses.

Ferrero was well aware of these circumstances when it agreed on February 23 to respond to the Master Consolidated Complaint within 20 days after its filing. Having bargained once for an extension with full knowledge of the facts it contends justifies transfer, and having agreed to respond to the Master Consolidated Complaint on a date certain as part of that bargain, it would be unfair if Ferrero's transfer motion could now aid the Defendant in avoid its fully-informed agreement. Respectfully, the Court's authority should not be so invoked.

3. Ferrero Overstates Its Burden in Responding to Two Dissimilar Complaints

Ferrero labors to paint a complicated procedural posture, but the reality is that there are only two relevant cases—this one and *Glover*. While the cases are based on similar facts, their legal theories are divergent, with the *Hohenberg* Plaintiffs' claims rising entirely under California law, and *Glover's* under New Jersey law. Moreover, to the extent there is overlap, this would only simplify Ferrero's response to both. If Ferrero truly did believe the two cases caused it such burden, though, it would have moved to stay or dismiss the New Jersey case under the first-filed rule, or at least sought the same stay it seeks here. Instead, Ferrero seems intent on pushing that case forward by invoking this Court's authority to halt this action indefinitely.

B. FERRERO HAS SHOWN NO GOOD CAUSE JUSTIFIYING AN INDEFINITE DISCOVERY STAY

1. The Motion Practice & Discovery Will Be Required Regardless of Where the Case Proceeds

This Court has already appointed Plaintiffs' counsel Interim Class Counsel. Doing so "clarifie[d] responsibility for protecting the interests of the class during precertification activities, such as . . . making and responding to motions, conducting any necessary discovery, moving for class

certification, and negotiating settlement . . . ." Manual for Complex Litig. § 21.11 (4th 2004). Indeed, this Court held "counsel appears to be well qualified to represent the interests of the purported class and to manage this litigation." (Dkt. No. 11 at 4.) Further to these responsibilities, Interim Class Counsel has already, on behalf of Plaintiffs and the Classes, engaged in the substantial discovery discussed above.

In the unlikely event this case is transferred to New Jersey, Interim Class Counsel's responsibilities will continue uninterrupted. But even if another firm later makes a motion to replace interim counsel, Judge Wolfson is likely to afford this Court's appointment of Interim Class Counsel great deference, especially in light of the following: (a) that Interim Class Counsel filed the first-filed and second-filed actions; (b) that *Glover* is a copycat action; (c) that the Master Consolidated Complaint is far more detailed, involves many more allegations of wrongdoing, involves an additional class, and involves a far greater class period; and (d) that Interim Class Counsel will have already performed substantial discovery by the time any such motion is filed.

Moreover, in light of these factors, even if the case was transferred to New Jersey and the court changed the counsel structure, it is highly unlikely Interim Counsel would be ousted altogether. Far more likely would be coordination between the two sets of Plaintiffs' counsel, both of whom are located in San Diego (indeed, Mr. Weston and Mr. Burke used to work together). Thus, any discovery that proceeds in the interim will be useful, accessible, and non-duplicative regardless of the venue.

2. Ferrero's Attempts to Transfer the Case are Strategic and Unlikely to Succeed

In light of (a) Ferrero's obligation to respond to the New Jersey *Glover* Complaint by April 25 and its failure to seek the same indefinite stay there, (b) its inexplicable delay tactics with respect to the 26(f) meeting and report, (c) its unwillingness to provide Plaintiffs a reasonable time for venue-related discovery to Oppose the transfer motion, and (d) its threat to file an MDL consolidation motion if this Court does not transfer the case to New Jersey, it seems probable Ferrero's *ex parte* motion is motivated primarily by the desire to be in front of what it perceives as a friendlier district court. This is insufficient justification to stay all discovery indefinitely.

Moreover, it is unlikely the JMPL would initiate an MDL on these facts, where there are only two cases pending, and where the counsel for all parties in both actions are in California. *See, e.g.*,

Wise v. Blair LLC, 2010 U.S. Dist. LEXIS 11633 (S.D. Ill. Feb. 10, 2010) (where defendant moved before Panel to consolidate five pending actions, denying stay and stating, "[w]ith a relatively small number of cases to consolidate . . . it is uncertain whether the JPML will grant [Defendant's] motion."); *In re Toyota Motor Corp. Prius Hid Headlamp Prods. Liab. Litig.*, 2010 U.S. Dist. LEXIS 128416, at *1-2 (J.P.M.L. Nov. 30, 2010) ("Given that there are only three actions pending in two districts, and the coordinated Central District of California actions are at a more advanced stage of proceedings, movants have failed to convince us that there are sufficiently complex or numerous questions of fact shared among these actions to justify Section 1407 transfer . . . ."); *In re Anthracite Coal Antitrust Litig.*, 436 F. Supp. 402, 403 (J.P.M.L. 1977) (where inconvenience of counsel would impinge on convenience of parties or witnesses, Panel may consider factor in decision to transfer).

In any event, Ferrero certainly has not made the case that MDL transfer is likely, and so its request for an indefinite discovery stay should be denied. *See Callahan v. Vertrue Inc.*, 2009 U.S. Dist. LEXIS 24674, at *2 (S.D. Cal. Mar. 19, 2009) ("Nor do the parties establish that the MDL Panel will likely transfer this action to another district. As a result, their conclusory assertion that a stay will serve judicial economy is speculative at best. Accordingly, their motion for a stay is denied."). *See generally Falk v. GMC*, No. C 07-1731, 2007 U.S. Dist. LEXIS 80864, at *2-5 (N.D. Cal. Oct. 22, 2007) ("Nothing requires that an action be stayed when a motion to consolidate and transfer is pending [before the Panel].")

Moreover, the MDL Rules themselves disfavor such stays. Rule 1.5 of the Rules of the Judicial Panel on Multidistrict Litigation states:

> The pendency of a motion, order to show cause, conditional transfer order or conditional remand order before the Panel concerning transfer or remand of an action pursuant to 28 U.S.C. § 1407 does not affect or suspend orders and pretrial proceedings in the district court in which the action is pending and does not in any way limit the pretrial jurisdiction of that court.

"In other words, a district judge should not automatically stay discovery, postpone rulings on pending motions, or generally suspend further rulings upon a parties' motion to the MDL Panel for transfer and consolidation." *Rivers v. Walt Disney Co.*, 980 F. Supp. 1358, 1360 (C.D. Cal. 1997) (citing Manual For Complex Litigation (Third), at 252 (1995)); *see also Jazwiak v. Stryker Corp.*, 2010 U.S.

Dist. LEXIS 8103 (M.D. Fla. Jan. 11, 2010) (denying motion to stay pending Panel decision on motion to transfer).

C. A STAY WOULD PREJUDICE PLAINTIFFS, THE PUTATIVE CLASSES, AND HARM THE GENERAL PUBLIC

1. The Indefinite Stay Ferrero Requests Would Prejudicially Delay the Action and Allow Ferrero to Continue to Advertise Flavored Icing as a Healthy Option for Children's Breakfasts

The stay Ferrero requests would be indefinite since it depends on the resolution of a future potential motion before the JPML, but would almost certainly be no less than nine months.

Before even getting to the MDL motion, Ferrero's motion for transfer will need to be resolved. Before that can happen, Plaintiffs must obtain substantial discover and Ferrero's motion for transfer will have to be continued to accommodate that discovery.

Assuming the Court declines to transfer, Ferrero is promising to file an MDL transfer motion. The JPML met today in San Diego. Its next meeting dates are May 16, July 28, and September 27. Given the posture of Ferrero's Motion to Transfer and required briefing schedule for Ferrero's promised MDL motion, the September 27 hearing date is most likely, meaning a decision would likely come in late October or early November. Thus, if Ferrero's *ex parte* Motion is granted, it likely will have been successful in delaying its response to the complaint for about 9 months. In the meanwhile, Ferrero will continue to advertise that hazelnut flavored icing is healthy for children for breakfast, including by sending its purported children's nutrition expert, Connie Evers, into California to advise California mothers to feed their children Nutella.

2. It is More Sensible to Resolve the Pleadings Before Determining Venue

Because there are only two cases pending against Ferrero, and because they assert different claims under different state laws, Plaintiffs respectfully suggest the most efficient procedure would be for both this Court and the New Jersey district court to resolve the respective pleadings *before* determining any remaining venue issues, for three reasons. First, the motion to dismiss either action might resolve or moot the venue question if either case is dismissed, or even if some of the individual claims are dismissed. Second, and most importantly, Plaintiffs are entitled to substantial discovery

before being required to respond to the venue motion. Although Plaintiffs could, if absolutely necessary, be prepared to oppose the transfer motion on April 25 as Ferrero insists, doing so will require break-neck speed and significant expense in expediting depositions transcripts, and would likely affect the ability of Plaintiffs to fully and fairly oppose the motion. Third, if the New Jersey case is transferred to California or the California case to New Jersey and pleadings are not yet decided, one court will be tasked with deciding whether the complaints state claims under both states' laws. While this is certainly within the ken of the courts, it nevertheless is reasonable to expect a California court would be more familiar with California law and a New Jersey court with New Jersey law, so resolution of the individual pleadings now would promote judicial efficiency, and would permit the transferee court—if there ever is one—the benefit of the other court's familiarity and analysis.

In light of Ferrero's obligation to respond to the Master Consolidate Complaint by April 12, and its obligation to respond to the *Glover* Complaint by April 25, Plaintiffs respectfully suggest the Court may find it more efficient to continue the hearing on Ferrero's motion to transfer for long enough to be able to resolve the pleadings before deciding venue issues. This would enable Plaintiffs to take full venue discovery in an orderly manner at a fair pace, and to process what they learn, before responding to the venue motion. The Court could then use the intervening time to decide Ferrero's motion to dismiss, which raises purely legal issues and, unlike its transfer motion, does not require any discovery.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court deny Ferrero's *Ex Parte* Motion and continue the hearing on Ferrero's Motion to Transfer.

Dated this 30th day of March, 2011 By: /s/ Jack Fitzgerald

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