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3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 WILLIAM ALBERT HARRISON,

7 Plaintiff,

8 v.

9 CAROLYN W. COLVIN, Acting
10 Commissioner of Social Security,

11 Defendant.

Case No. 3:14-cv-05981-KLS

ORDER REVERSING AND
REMANDING DEFENDANT'S
DECISION TO DENY BENEFITS

12 Plaintiff has brought this matter for judicial review of defendant's denial of his
13 application for disability insurance benefits. Pursuant to 28 U.S.C. § 636(c), Federal Rule of
14 Civil Procedure 73 and Local Rule MJR 13, the parties have consented to have this matter heard
15 by the undersigned Magistrate Judge. After reviewing the parties' briefs and the remaining
16 record, the Court hereby finds that for the reasons set forth below, defendant's decision to deny
17 benefits should be reversed and this matter should be remanded for further administrative
18 proceedings.
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20 FACTUAL AND PROCEDURAL HISTORY

21 On October 3, 2011, plaintiff protectively filed an application for disability insurance
22 benefits, alleging disability as of November 11, 2008, later amended to December 20, 2010. *See*
23 Dkt. 13, Administrative Record ("AR") 21. This application was denied upon initial
24 administrative review on January 13, 2012, and on reconsideration on May 1, 2012. *See id.* A
25 hearing was held before an administrative law judge ("ALJ") on March 25, 2013, at which
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ORDER - 1

1 plaintiff, represented by counsel, appeared and testified, as did plaintiff's wife and a vocational
2 expert ("VE"). *See* AR 37-70.

3 In a decision dated April 26, 2013, the ALJ determined plaintiff to be not disabled. *See*
4 AR 18-36. Plaintiff's request for review of the ALJ's decision was denied by the Appeals
5 Council on October 27, 2014, making that decision the final decision of the Commissioner of
6 Social Security (the "Commissioner"). *See* AR 4-7; 20 C.F.R. § 404.981. On December 18,
7 2014, plaintiff filed a complaint in this Court seeking judicial review of the Commissioner's final
8 decision. *See* Dkt. 3. The administrative record was filed with the Court on February 27, 2015.
9 *See* Dkt. 13. The parties have completed their briefing, and thus this matter is now ripe for the
10 Court's review.
11

12 Plaintiff argues defendant's decision to deny benefits should be reversed and remanded
13 for an award of benefits, or in the alternative for further administrative proceedings, because the
14 ALJ erred: (1) in failing to find that plaintiff's major depressive disorder was a severe impairment;
15 (2) in evaluating the medical evidence in the record; (3) in discounting plaintiff's credibility; (4)
16 in assessing plaintiff's residual functional capacity ("RFC"); (5) in posing hypotheticals to the
17 VE that did not incorporate all of the plaintiff's severe impairments, relying on evidence
18 contradicting the DOT, and failing to allow appropriate VE testimony; and (6) in failing to
19 properly assess plaintiff's pain. For the reasons set forth below, the undersigned agrees the ALJ
20 erred in evaluating the medical evidence in the record, and thus in assessing plaintiff's RFC and
21 finding him capable of performing other work, and therefore in determining plaintiff to be not
22 disabled. Also for the reasons set forth below, however, the undersigned recommends that while
23 defendant's decision to deny benefits should be reversed on this basis, this matter should be
24 remanded for further administrative proceedings.
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1 DISCUSSION

2 The determination of the Commissioner that a claimant is not disabled must be upheld by
3 the Court, if the “proper legal standards” have been applied by the Commissioner, and the
4 “substantial evidence in the record as a whole supports” that determination. *Hoffman v. Heckler*,
5 785 F.2d 1423, 1425 (9th Cir. 1986); *see also Batson v. Commissioner of Social Security Admin.*,
6 359 F.3d 1190, 1193 (9th Cir. 2004); *Carr v. Sullivan*, 772 F.Supp. 522, 525 (E.D. Wash. 1991)
7 (“A decision supported by substantial evidence will, nevertheless, be set aside if the proper legal
8 standards were not applied in weighing the evidence and making the decision.”) (citing *Browner*
9 *v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1987)).
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11 Substantial evidence is “such relevant evidence as a reasonable mind might accept as
12 adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (citation
13 omitted); *see also Batson*, 359 F.3d at 1193 (“[T]he Commissioner’s findings are upheld if
14 supported by inferences reasonably drawn from the record.”). “The substantial evidence test
15 requires that the reviewing court determine” whether the Commissioner’s decision is “supported
16 by more than a scintilla of evidence, although less than a preponderance of the evidence is
17 required.” *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). “If the evidence
18 admits of more than one rational interpretation,” the Commissioner’s decision must be upheld.
19 *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984) (“Where there is conflicting evidence
20 sufficient to support either outcome, we must affirm the decision actually made.”) (quoting
21 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971)).¹
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25 ¹ As the Ninth Circuit has further explained:

26 . . . It is immaterial that the evidence in a case would permit a different conclusion than that
which the [Commissioner] reached. If the [Commissioner]’s findings are supported by
substantial evidence, the courts are required to accept them. It is the function of the
[Commissioner], and not the court’s to resolve conflicts in the evidence. While the court may
not try the case de novo, neither may it abdicate its traditional function of review. It must

1 I. The ALJ's Evaluation of the Medical Evidence in the Record

2 The ALJ is responsible for determining credibility and resolving ambiguities and
3 conflicts in the medical evidence. *See Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998).
4 Where the medical evidence in the record is not conclusive, "questions of credibility and
5 resolution of conflicts" are solely the functions of the ALJ. *Sample v. Schweiker*, 694 F.2d 639,
6 642 (9th Cir. 1982). In such cases, "the ALJ's conclusion must be upheld." *Morgan v.*
7 *Commissioner of the Social Security Admin.*, 169 F.3d 595, 601 (9th Cir. 1999). Determining
8 whether inconsistencies in the medical evidence "are material (or are in fact inconsistencies at
9 all) and whether certain factors are relevant to discount" the opinions of medical experts "falls
10 within this responsibility." *Id.* at 603.

12 In resolving questions of credibility and conflicts in the evidence, an ALJ's findings
13 "must be supported by specific, cogent reasons." *Reddick*, 157 F.3d at 725. The ALJ can do this
14 "by setting out a detailed and thorough summary of the facts and conflicting clinical evidence,
15 stating his interpretation thereof, and making findings." *Id.* The ALJ also may draw inferences
16 "logically flowing from the evidence." *Sample*, 694 F.2d at 642. Further, the Court itself may
17 draw "specific and legitimate inferences from the ALJ's opinion." *Magallanes v. Bowen*, 881
18 F.2d 747, 755 (9th Cir. 1989).

20 The ALJ must provide "clear and convincing" reasons for rejecting the uncontradicted
21 opinion of either a treating or examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir.
22 1996). Even when a treating or examining physician's opinion is contradicted, that opinion "can
23 only be rejected for specific and legitimate reasons that are supported by substantial evidence in
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26 scrutinize the record as a whole to determine whether the [Commissioner]'s conclusions are
rational. If they are . . . they must be upheld.

Sorenson, 514 F.2d at 1119 n.10.

1 the record.” *Id.* at 830-31. However, the ALJ “need not discuss *all* evidence presented” to him or
2 her. *Vincent on Behalf of Vincent v. Heckler*, 739 F.2d 1393, 1394-95 (9th Cir. 1984) (citation
3 omitted) (emphasis in original). The ALJ must only explain why “significant probative evidence
4 has been rejected.” *Id.*; *see also Cotter v. Harris*, 642 F.2d 700, 706-07 (3d Cir. 1981); *Garfield*
5 *v. Schweiker*, 732 F.2d 605, 610 (7th Cir. 1984).

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7 In general, more weight is given to a treating physician’s opinion than to the opinions of
8 those who do not treat the claimant. *See Lester*, 81 F.3d at 830. On the other hand, an ALJ need
9 not accept the opinion of a treating physician, “if that opinion is brief, conclusory, and
10 inadequately supported by clinical findings” or “by the record as a whole.” *Batson*, 359 F.3d at
11 1195; *see also Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002); *Tonapetyan v. Halter*,
12 242 F.3d 1144, 1149 (9th Cir. 2001). An examining physician’s opinion is “entitled to greater
13 weight than the opinion of a nonexamining physician.” *Lester*, 81 F.3d at 830-31. A non-
14 examining physician’s opinion may constitute substantial evidence if “it is consistent with other
15 independent evidence in the record.” *Id.* at 830-31; *Tonapetyan*, 242 F.3d at 1149.

16
17 Plaintiff asserts that the ALJ erred in improperly discrediting the opinions of Dur Huang,
18 M.D., plaintiff’s primary care provider. The undersigned agrees. On March 2012, Dr. Huang
19 completed a physical residual functional capacity assessment, in which he opined that plaintiff’s
20 pain and other symptoms would frequently be severe enough to interfere with the attention and
21 concentration needed to perform even simple work tasks. *See* AR 416. Dr. Huang also found
22 plaintiff could sit no more than 20 minutes at a time and for about two hours total in a work day,
23 could stand no more than 15 minutes at a time and less than two hours total in a work day, and
24 will need to shift positions at will and take unscheduled work breaks. *See* AR 416-17. Dr. Huang
25 stated that plaintiff could only rarely lift and carry less than ten pounds, could occasionally twist,
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1 and could never stoop, crouch, climb ladders, or climb stairs. *See* AR 417-18. Ultimately, Dr.
2 Huang opined that plaintiff would likely miss more than four days of work per month due to his
3 impairments. *See* AR 418. Dr. Huang completed another functional assessment in February 2013,
4 in which he made substantially similar findings. *See* AR 432-36.

5 The ALJ gave Dr. Huang’s March 2012 opinion little weight, finding Dr. Huang “seemed
6 to base” his opinion “totally on the 2008 MRI.” *See* AR 30. The ALJ also found that recent x-
7 rays did not support the opinion and that plaintiff’s reports of daily activities were inconsistent
8 with Dr. Huang’s opinion. *See id.* Lastly, the ALJ found “Dr. Huang’s treatment notes do not
9 show that he ever performed a complete physical examination” to determine plaintiff’s
10 functional capacity. *See id.* The ALJ therefore decided to give more weight to the opinion of
11 examining physician Dr. Katherine Moreno, M.D. *See id.* The ALJ gave Dr. Huang’s February
12 2013 opinion “the same weight for the same reasons because there is no objective evidence that
13 [plaintiff’s] condition has changed,” stating further that “Dr. Huang had even recommended less
14 frequent follow-ups and strongly encouraged regular exercise and weight loss,” in his treatment
15 notes, “which strongly indicates that [plaintiff’s] condition was stable despite [his] allegations of
16 worsening.” *Id.*

17 When evaluating the weight to be given to a treating doctor, if the ALJ does not give
18 controlling weight to the treating source’s opinion, the ALJ will “apply the factors listed in
19 paragraphs [20 C.F.R. § 404.1527](c)(2)(i) and (c)(2)(ii) of this section, as well as the factors in
20 paragraphs [20 C.F.R. § 404.1527](c)(3) through (c)(6) of this section in determining the weight
21 to give the opinion.” 20 C.F.R. § 404.1527(c)(2). Such factors include the length of the treatment
22 relationship; the frequency of examination; the nature and extent of the treatment relationship;
23 supportability of the opinion; consistency of the opinion; specialization of the doctor; and, other
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1 factors, such as “the amount of understanding of [the] disability programs and their evidentiary
2 requirements.” 20 C.F.R. § 404.1527(c).

3 First, substantial evidence does not support the ALJ’s finding that Dr. Huang’s March
4 2012 opinion was based solely on the 2008 MRI. On the RFC questionnaire, Dr. Huang did
5 identify the 2008 MRI as a test result that shows plaintiff’s medical impairments. *See* AR 415.
6 However, Dr. Huang also identified other “positive objective signs” of plaintiff’s pain, including
7 reduced range of motion, positive straight leg raising, tenderness, muscle spasm, and muscle
8 weakness. AR 416. Dr. Huang’s treatment notes, furthermore, support the existence of those
9 objective signs, noting as well plaintiff’s need to alternate between sitting and standing due to
10 pain. *See* AR 304, 306, 308, 312, 315, 317, 319, 321, 323, 325, 329, 331-35. Dr. Huang also
11 repeatedly opined that plaintiff was unable to return to light work. *See, e.g.,* 304, 306, 315, 323,
12 331. As such, the ALJ erred in finding Dr. Huang “seemed to base” his March 2012 opinion
13 “totally” on the 2008 MRI. AR 30.

16 Second, the fact that more recent x-rays may have “showed only the beginning of
17 osteoarthritis and osteopenia,” is not on its own a legitimate reason for discounting the medical
18 opinion of plaintiff’s treating physician. AR 30. The ALJ fails to explain how those more recent
19 x-rays necessarily contradict the earlier MRI test result. *See* AR 404, 419. The ALJ, therefore,
20 appears to have improperly relied on his own lay opinion here. *See Whitney v. Schweiker*, 695
21 F.2d 784, 788 (7th Cir. 1982) (ALJ should avoid commenting on meaning of objective medical
22 findings without supporting medical expert testimony); *Gonzalez Perez v. Secretary of Health*
23 *and Human Services*, 812 F.2d 747, 749 (1st Cir. 1987) (ALJ may not substitute own opinion for
24 that of physician); *McBrayer v. Secretary of Health and Human Services*, 712 F.2d 795, 799 (2d
25 Cir. 1983) (ALJ cannot arbitrarily substitute own judgment for competent medical opinion).

1 Third, substantial evidence does not support the ALJ's discrediting Dr. Huang's opinion
2 because of inconsistencies with plaintiff's reported daily activities. It is true that an ALJ may use
3 inconsistency between a physician's assessed limitations and a claimant's daily activities as a
4 factor in weighing that physician's opinion. *See Morgan*, 169 F.3d at 601-02 (upholding
5 rejection of physician's opinion that claimant suffered from marked limitations in part because
6 claimant's reported activities of daily living contradicted that conclusion). Here, however, the
7 function reports in the record and plaintiff's own testimony as well as that of his wife, fail to
8 reveal any inconsistency between plaintiff's daily activities and the limitations assessed by Dr.
9 Huang. *See* AR 47-50, 55, 59-61, , 224-29, 235-40, 242. Even plaintiff's reports to examining
10 physicians Katherine Moreno, M.D., and Jesse Markman, M.D., upon which the ALJ also relies,
11 fail to shed any real light on the frequency or extent to which plaintiff has engaged in activities
12 of daily living. AR 276, 406.

15 Finally, the fact that Dr. Huang never performed a "complete" physical examination of
16 plaintiff, as characterized by the ALJ, is not a specific and legitimate reason for discrediting the
17 opinion of the treating physician. While Dr. Moreno may have performed a more comprehensive
18 one-time examination of plaintiff (*see* AR 405-09), the record shows Dr. Huang has repeatedly
19 examined plaintiff resulting in the objective findings supportive of the limitations he assessed as
20 discussed above. *See, e.g.*, AR 304, 306, 308, 312, 315, 317, 319, 321, 323, 325, 329, 331-35. It
21 is also not clear what the ALJ means by a "complete" physical examination, nor is there any
22 requirement that a treating physician perform one before his or her opinion is entitled to be given
23 the proper weight its due. That is, given Dr. Huang's treatment relationship with plaintiff and the
24 many physical examinations he performed, it was error for the ALJ to have given greater weight
25 to the opinion of Dr. Moreno.
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2 In addition, because the ALJ stated she was rejecting Dr. Huang’s February 2013 opinion
3 for the same reasons she was rejecting the March 2012 opinion, the ALJ erred here as well. That
4 Dr. Huang may have recommended less frequent follow-ups and strongly encouraged plaintiff to
5 engage in regular exercise and weight loss, furthermore, does not necessarily indicate Dr. Huang
6 did not believe plaintiff was as limited as he found or necessarily contradict Dr. Huang’s opinion
7 with respect thereto, even if the ALJ is correct that such recommendations suggest that plaintiff’s
8 condition had become stable. Thus, this too was not a proper reason for giving “little weight” to
9 Dr. Huang’s more recent opinion.
10

11 II. The ALJ’s Assessment of Plaintiff’s Residual Functional Capacity

12 Defendant employs a five-step “sequential evaluation process” to determine whether a
13 claimant is disabled. *See* 20 C.F.R. § 404.1520. If the claimant is found disabled or not disabled
14 at any particular step thereof, the disability determination is made at that step, and the sequential
15 evaluation process ends. *See id.* If a disability determination “cannot be made on the basis of
16 medical factors alone at step three of that process,” the ALJ must identify the claimant’s
17 “functional limitations and restrictions” and assess his or her “remaining capacities for work-
18 related activities.” Social Security Ruling (“SSR”) 96-8p, 1996 WL 374184 *2. A claimant’s
19 RFC assessment is used at step four to determine whether he or she can do his or her past
20 relevant work, and at step five to determine whether he or she can do other work. *See id.*
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23 Residual functional capacity thus is what the claimant “can still do despite his or her
24 limitations.” *Id.* It is the maximum amount of work the claimant is able to perform based on all
25 of the relevant evidence in the record. *See id.* However, an inability to work must result from the
26 claimant’s “physical or mental impairment(s).” *Id.* Thus, the ALJ must consider only those

1 limitations and restrictions “attributable to medically determinable impairments.” *Id.* In assessing
2 a claimant’s RFC, the ALJ also is required to discuss why the claimant’s “symptom-related
3 functional limitations and restrictions can or cannot reasonably be accepted as consistent with the
4 medical or other evidence.” *Id.* at *7.

5 The ALJ in this case found that plaintiff had the RFC to perform:

6 **light work as defined in 20 CFR 404.1567(b), that is work involving lifting no**
7 **more than twenty pounds at a time with frequent lifting or carrying of**
8 **objects weighing up to ten pounds. In addition, he is able to occasionally**
9 **climb ramps and stairs, but no ropes, ladders, or scaffolds. He can**
10 **occasionally balance, stoop, crouch, crawl, kneel, and reach overhead. He**
11 **should avoid hazards and vibrations. He will need to alternate sitting and**
12 **standing every 30 minutes.**

13 AR 26 (emphasis in original). However, because as discussed above the ALJ erred in evaluating
14 the medical opinion evidence in the record, the ALJ’s RFC assessment does not completely and
15 accurately describe all of plaintiff’s capabilities. Accordingly, here too the ALJ erred.

16 III. The ALJ’s Findings at Step Five

17 If a claimant cannot perform his or her past relevant work, at step five of the disability
18 evaluation process the ALJ must show there are a significant number of jobs in the national
19 economy the claimant is able to do. *See Tackett v. Apfel*, 180 F.3d 1094, 1098-99 (9th Cir. 1999);
20 20 C.F.R. § 404.1520(d), (e). The ALJ can do this through the testimony of a vocational expert
21 or by reference to defendant’s Medical-Vocational Guidelines (the “Grids”). *Osenbrock v. Apfel*,
22 240 F.3d 1157, 1162 (9th Cir. 2000); *Tackett*, 180 F.3d at 1100-1101.

23 An ALJ’s findings will be upheld if the weight of the medical evidence supports the
24 hypothetical posed by the ALJ. *See Martinez v. Heckler*, 807 F.2d 771, 774 (9th Cir. 1987);
25 *Gallant v. Heckler*, 753 F.2d 1450, 1456 (9th Cir. 1984). The vocational expert’s testimony
26 therefore must be reliable in light of the medical evidence to qualify as substantial evidence. *See*

1 *Embrey*, 849 F.2d at 422. Accordingly, the ALJ’s description of the claimant’s disability “must
2 be accurate, detailed, and supported by the medical record.” *Id.* (citations omitted). The ALJ,
3 however, may omit from that description those limitations he or she finds do not exist. *See*
4 *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001).

5 At the hearing, the ALJ posed hypothetical questions to the vocational expert containing
6 substantially the same limitations as were included in the ALJ’s RFC assessment. *See* AR 63-65.
7 In response, the vocational expert testified that an individual with those limitations – and with
8 the same age, education, and work experience as plaintiff – would be able to perform other jobs.
9 *See id.* Based on the testimony of the vocational expert, the ALJ found plaintiff capable of
10 performing other jobs existing in significant numbers in the national economy. *See* AR 31-32.
11 Again, however, because the ALJ erred in evaluating the medical evidence and thus in assessing
12 the plaintiff’s RFC, the hypothetical question did not completely and accurately describe all of
13 plaintiff’s capabilities. Therefore, the ALJ’s step five determination is not supported by
14 substantial evidence and is in error.

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17 **IV. This Matter Should Be Remanded for Further Administrative Proceedings**

18 The Court may remand this case “either for additional evidence and findings or to award
19 benefits.” *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996). Generally, when the Court
20 reverses an ALJ’s decision, “the proper course, except in rare circumstances, is to remand to the
21 agency for additional investigation or explanation.” *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th
22 Cir. 2004) (citations omitted). Thus, it is “the unusual case in which it is clear from the record
23 that the claimant is unable to perform gainful employment in the national economy,” that
24 “remand for an immediate award of benefits is appropriate.” *Id.*

25 Benefits may be awarded where “the record has been fully developed” and “further
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1 administrative proceedings would serve no useful purpose.” *Smolen*, 80 F.3d 1273 at 1292;
2 *Holohan v. Massanari*, 246 F.3d 1195, 1210 (9th Cir. 2001). Specifically, benefits should be
3 awarded where:

4 (1) the ALJ has failed to provide legally sufficient reasons for rejecting [the
5 claimant’s] evidence, (2) there are no outstanding issues that must be resolved
6 before a determination of disability can be made, and (3) it is clear from the
7 record that the ALJ would be required to find the claimant disabled were such
8 evidence credited.

9 *Smolen*, 80 F.3d 1273 at 1292; *McCartey v. Massanari*, 298 F.3d 1072, 1076-77 (9th Cir. 2002).

10 Here, because issues still remain in regard to the medical evidence in the record concerning
11 plaintiff’s physical functional capabilities, and therefore his ability to perform other jobs existing
12 in significant numbers in the national economy, remand for further consideration of those issues
13 is warranted.

14 CONCLUSION

15 Based on the foregoing discussion, the Court hereby finds the ALJ improperly concluded
16 plaintiff was not disabled. Accordingly, defendant’s decision to deny benefits is REVERSED
17 and this matter is REMANDED for further administrative proceedings in accordance with the
18 findings contained herein.

19 DATED this 20th day of July, 2015.

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23 Karen L. Strombom
24 United States Magistrate Judge
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