No. 96853-5

SUPREME COURT
OF THE STATE OF WASHINGTON

FIRESIDE BANK f/k/a FIRESIDE THRIFT CO.

(CAVALRY INVESTMENTS, LLC – Appellant of Record)

Appellant,

vs.

JOHN W. ASKINS and LISA D. ASKINS,

Respondents.

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. INTRODUCTION

This appeal concerns the trial court's erroneous ruling that Appellant Cavalry Investments, LLC "violated RCW 19.16.250(21) by attempting to collect, through applications for writs of garnishment, amounts of money greater than allowed by law" and its subsequent denial of Cavalry's motion to reconsider. CP 427 ("Violation Finding"); CP 462-63. The trial court's rulings were procedurally improper and unsupported by any competent evidence.

The trial court made its initial Violation Finding in response to a post-judgment CR 60 "show cause" motion brought by Respondent John Askins. By this motion, Askins sought affirmative relief based on an internal account statement that Cavalry's attorney had sent to his attorney (the "April 7 Email"). Askins argued the April 7 Email showed that Cavalry had attempted to and did collect unauthorized amounts by its past actions in the garnishment proceeding.[1]

Despite the declarative language of the trial court's Violation Finding as quoted above—the undisputed record reflects that the trial court did not (and could not) identify a single application for writ of

[1] On appeal, the Askins argued that the April 7 Email was itself an "attempt to collect a debt" and violated the CAA. Respondents' Response Brief at 18-27. The April 7 Email only listed account activity prior to Cavalry's acquisition of the Judgment. CP 297; CP 372; CP 389.

garnishment that sought an improper or unauthorized account. Similarly, the trial court never made a factual determination as what amount was due under the Judgment at any given point in time. "I haven't done the math," the Judge acknowledged.[2]

In short, Askins improperly used CR 60 to litigate an alleged CAA violation without actually asserting a claim or being subject to the requisite burden of proof. And the trial court further erred because, in addition to procedural improprieties, there was no competent evidence to support its rulings.

Accordingly, the Court of Appeals reversed. In doing so, the Court of Appeals held that the trial court could not properly issue the Violation Finding, and provide affirmative relief, under CR 60. The Court of Appeals also recognized the trial court's "reliance" on the April 7 Email in its ruling. The Court of Appeals noted that the April 7 Email might have evidentiary value but because it was communication between counsel, the email itself could not violate the CAA.

In their Petition, the Askins now argue that the Court of Appeals' Opinion leaves judgment debtors without recourse if a creditor has

[2] RP 14:15.

collected or seeks to collect unauthorized amounts by garnishment. Under existing and well-settled Washington law, this is not so.

The Washington legislature has specifically provided that individuals may assert CPA claims for violation of the CAA. And aggrieved judgment debtors regularly do just that by filing suit against creditors based on alleged conduct in garnishment proceedings. Judgment debtors can also controvert a garnishment writ answer or move to quash a garnishment writ application if they believe the creditor is not entitled to collect the amount sought by writ or application. These multiple avenues for practical and effective relief are well-settled and unremarkable.

At root, the Askins Petition seeks to preserve the trial court's factually-unsupported ruling as means to provide judgment debtors with a novel fast-track procedure to litigate CAA claims without having to assert a claim, engage in discovery, or—importantly—meet a plaintiff's burden of proof. There is no basis to change the law in this way, particularly where doing so would contravene fundamental notions of due process.

This Court should deny the Petition, which does not satisfy any aspect of RAP 13.4(b).

II. COUNTERSTATEMENT OF THE CASE

A. The Judgment.

In August 2004, the Askins purchased a sport utility vehicle ("SUV") by entering into a retail installment contract and security agreement ("Agreement"). CP 4-7. Pursuant to the Agreement, the Askins borrowed $13,713.44 at an annual interest rate of 18.95%. CP 4. If the Askins timely made all payments due, they would pay a total of $21,487.20 over the life of the loan. CP 4-5.

The Askins pledged the SUV as collateral to secure their repayment of the loan. The Agreement was contemporaneously assigned to Fireside Thrift Co. CP 5.

In July 2007, Fireside Bank f/k/a/ Fireside Thrift Co. ("Fireside") filed suit against the Askins for breach of contract for defaulting on the loan. CP 1-7. The Askins did not answer, appear, or otherwise respond to the complaint. CP 10-11; CP 385:18. Accordingly, the trial court entered an Order of Default against the Askins. CP 10-11.

On September 28, 2007, the trial court entered Judgment against the Askins (the "Judgment"). CP 12-14. The Judgment awarded Fireside $10,244.80, which consisted of principal, prejudgment interest, attorney's fees, and costs. CP 13. The Judgment also provided for post-judgment interest at a rate of 18.95%. *Id.*

B. Garnishments on the Judgment.

The Askins did not make any effort to satisfy the Judgment and Fireside initiated garnishment proceedings. From 2008 through 2012, Fireside issued periodic writs for garnishment in an attempt to collect on the Judgment.[3] Simple interest of 18.95% per annum continued to accrue. CP 12-14.

Fireside assigned the Judgment to Cavalry in July in 2012. CP 297. In February 2013, Cavalry collected $984.80 on the Judgment from a Judgment and Order to Pay funds that were garnished from Mr. Askins' then employer, WSU. CP 300-303; CP 315-316. Cavalry issued three garnishment writs in 2013 and collected a total of $215.42 in response to those writs. CP 325-329; CP 337-339; CP 342-346. Cavalry did not issue any writs for garnishment in 2014.

In February 2015, Cavalry filed a Writ of Garnishment, which sought to garnish the Askins' accounts at US Bancorp. CP 354-358. US Bancorp did not file an answer to that writ. No further action was taken.

In August 2015, Cavalry filed a Writ of Garnishment for Continuing Lien on Earnings against Colfax Cemetery Dist. 6, the then-

[3] The garnishment writs are in the record at: CP 17-19; CP 25-27; CP 60-62; CP 74-76; CP 93-97; CP 122-126; CP 136-140; CP 158-162; CP 180-184; CP 213-217; CP 236-240; CP 249-253; CP 268-272; CP 281-285.

employer of John Askins (the "August 2015 Writ"). CP 359-363. Colfax Cemetery Dist. 6 did not file an answer to the August 2015 Writ.

C. John Askins Asserts the Judgment Has Been Satisfied.

In November 2015, an attorney representing John Askins sent a letter to Cavalry's counsel demanding release of the August 2015 Writ. CP 374-375. The letter stated that "it is unclear if interest, costs, fees and principle [sic] total a sum greater than the amount previously garnished, and, if not, what the remaining principle [sic] balance should be." CP 374. The attorney wrote that he "intend[s] to do a full accounting of the prior garnishment to answer these questions." *Id.*

Cavalry thereafter released the August 2015 Writ in full. CP 364-365. Although there was no longer any pending writ of garnishment, Askins' counsel sent another letter to Cavalry's counsel in February 2016. CP 377-378. In this letter, the attorney asserted that "it is clear to me that the underlying judgment is fully satisfied[.]" CP 378. The attorney did not explain how he had arrived at this clarity and he made no mention having done any "accounting" as represented in his November 2015 letter. He demanded that Cavalry agree the Judgment had been satisfied in full and file a satisfaction of judgment accordingly. *Id.*

In response, Cavalry's counsel sent Askins' counsel several documents: writs of garnishment and orders to pay as filed with the court,

counsel's internal payment activity report, and a "rough estimate" account statement for the time period 2007-2012 (*i.e.*, the time period before the Judgment was assigned to Cavalry) to illustrate how the Askins could owe money under the Judgment due to the accrual of post-judgment interest (the April 7 Email). CP 372; CP 380-381; CP 407:20-408:5. Cavalry's counsel also discussed with Askins' counsel how the post-judgment interest rate and modest garnishments amounts over time resulted in a continued balance on the Judgment. CP 380-381; CP 407:20-408:5.

Although Askins' counsel did not perform (or have performed) any accounting to determine whether and how much the Askins owed under the Judgment at that time, he nonetheless concluded that the Judgment must have been satisfied. CP 380-381.

D. The Askins' CR 60 Show Cause Motion.

In June 2016, Askins filed a Motion for Order to Show Cause (the "Show Cause Motion") pursuant to Civil Rule 60. CP 366-406. There was no pending writ of garnishment or collection activity; the August 2015 Writ had previously been released in full. CP 364-365.

By the Show Cause Motion, Askins asked the trial court for various forms of relief: (a) to find that Cavalry had violated RCW 19.16.250(21) by collecting or attempting to collect "unlawful amounts,"

(b) to deem the Judgment satisfied, (c) to sanction Cavalry, and (d) to award fees and costs. CP 396.

The essence of Askins' argument was that it was "impossible" for it to be "lawfully true" that the Judgment was not satisfied and still had a balance eight years after entry and notwithstanding fourteen garnishment payments. CP 382. Askins did not provide an accounting or any other evidence of the Judgment balance as reflected by the court's docket—*e.g.,* no evidence regarding writs of garnishment; and no evidence of garnishment payments received, costs and fees awarded, and interest accrued as provided for by the Judgment.

The Askins' Show Cause Motion relied on the following: (1) a declaration by John Askins, which does not concern the amount owed under the Judgment; (2) the April 7 Email between counsel; and (3) three letters from the Askins' counsel to Cavalry's counsel, which demanded that Cavalry enter full satisfaction of the Judgment.

Askins then made arguments based on a misreading of or alleged errors in the April 7 Email to show that Cavalry had attempted to or did collect unlawful amounts. CP 382-396.

E. The Trial Court's Erroneous Order

On July 15, 2016, the trial court held a hearing on the Show Cause Motion. RP 1-17. Askins' counsel presented argument without an

evidentiary record of what was due, what was requested, or what was paid. RP 3-9. Askins' counsel failed to present any accounting to show that (1) the Judgment was satisfied, or (2) any improper cost or charge was ever requested or collected. *Id.*

Askins' counsel stated that Mr. Askins' "position had never been that this [the Judgment] has been fully satisfied through the garnishments; it's been it might be, we just don't know." RP 12:1-3. The trial court, in turn, acknowledged that "I just – I haven't done the math[.]" RP 14:15.

Without reference to the court docket or Cavalry's actual collection attempts by writs of garnishment—and without making any finding regarding how much Cavalry was entitled to collect under the Judgment as of the relevant date of each of its past garnishment writ applications—the court summarily concluded that "thousands of dollars in garnishment fees [were] imposed", "unauthorized attorney's fees [were] improperly charged", "there was never a judgment for any of these costs," and "[i]nterest was compounded." RP 14:1-2; RP 14:16-18.

In its written order, the trial court ruled that Cavalry had "violated RCW 19.16.250(21) by attempting to collect, through applications for writs of garnishment, amounts of money greater than allowed by law." CP 427. The Violation Finding did not identify which application for writs of garnishment the trial court found to violate RCW 19.16.250(21) or what

amount Cavalry had attempted to collect that was greater than allowed by law. *Id.* The trial court further ordered the Judgment "stripped to principle [sic]" and "[b]ecause the plaintiff has collected an amount greater than the principle [sic], the plaintiff is ordered to immediately enter a satisfaction of judgment."[4] *Id.*

F. The Trial Court's Erroneous Denial of Cavalry's Motion for Reconsideration.

On July 21, 2016, Cavalry filed a Motion for Reconsideration. CP 428-431. Cavalry argued there was no evidence or reasonable inference to justify the Violation Finding and it should be vacated under CR 59(7). *Id.*

The trial court denied Cavalry's motion and, in doing so, expanded its prior ruling. CP 462-463. Again, however, the trial court did not identify which applications for writs of garnishment it found violated RCW 19.16.250(21) or what amount Cavalry had attempted to collect that was greater than allowed by law. *Id.*

G. The Court of Appeals Opinion.

Cavalry appealed to Division III of the Court of Appeals. Cavalry argued the trial court's rulings were unsupported by any relevant evidence and were procedurally improper. In particular, Cavalry argued that:

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[4] The trial court cited RCW 19.16.450 as its authority for "stripping" the Judgment. CP 473.

- there is no evidence Cavalry attempted to or did collect any amount it was not authorized to collect under the Judgment;

- the past garnishment writ applications themselves showed that Cavalry only attempted to collect the fees and costs expressly allowed by statute;

- the April 7 Email between counsel was not an "attempt to collect a debt"; and

- the trial court improperly granted affirmative relief and shifted the burden of proof on a CR 60 post-judgment motion.

The Askins, in turn, argued that the trial court correctly found that the April 7 Email was "an attempt to collect a debt", that Cavalry had attempted to collect more than amounts shown on that internal account statement, and that Cavalry could be held liable for Fireside's conduct before the Judgment was assigned to Cavalry. The Askins also argued the trial court had properly issued a violation finding and deemed the Judgment satisfied on a post-judgment motion under CR 60(b).

The Court of Appeals reversed the trial court. In doing so, it addressed two issues. First, the Court of Appeals recognized that the trial court had relied upon the April 7 Email between counsel. Op. at 3, 5-8. Although the Court reversed for the reasons discussed below, it followed Ninth Circuit FDCPA law to conclude the April 7 Email itself cannot violate the CAA because it is a communication between counsel. *Id.* at 5-

8. When creditor's counsel is communicating with debtor's counsel, the debtor is protected by his or her attorney rather than the CAA. *Id.* at 7.

Second, the Court held that a CR 60 show cause motion is not a proper method for litigating an alleged violation of the CAA. Op. at 8-10. While CR 60(b) provides the Askins with a means to establish that the Judgment had been satisfied, they did not attempt to do so. Op. 9. Instead, "they sought to show a violation of the CAA, invoke the remedy of RCW 19.16.450, and, once applying that remedy, claim that the judgment was satisfied." Op. at 9. This approach improperly allowed the Askins to litigate a CPA claim without filing one. *Id.*

III. ARGUMENT

A. CR 60 Is Not A Proper Vehicle to Litigate Affirmative Claims and the Court of Appeals' Holding Does Not Warrant Review.

1. The Askins' Motion was Pursuant to Rule 60.

As an initial matter, the Askins assert that Court of Appeals erred because "no CR 60(b) motion was before the [trial] court." Pet. at 1-2 (Issues Presented for Review No. 2). But this assertion is contradicted by the plain language of the Askins' motion itself, which requests an "order

to show cause in accordance with Civil Rule 60." CP 403-404 (emphasis supplied).[5] There is no basis for review based on lack of a CR 60 motion.

2. Debtors Have Redress for Alleged CAA Violations.

In accordance with Washington law—and consistent with federal law—the Court of Appeals reiterated that a post-judgment CR 60(b) motion is an improper means to litigate affirmative claims: "Rule 60(b) is available only to set aside a prior judgment or order; courts may not use Rule 60(b) to grant affirmative relief in addition to the relief contained in the prior order or judgment." Op. at 8 (citations omitted).[6]

The Askins now argue that this uncontroversial statement of law operates to deprive judgment debtors of all recourse if a creditor attempts to collect unauthorized amounts by garnishment. Pet. at 7-12, 17-18. The Askins suggest that a post-judgment "show cause" motion was the only mechanism available to them. But this argument disregards existing and well-established avenues for relief and does not support review.

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[5] *See also* Op. at 8 ("The Askins brought the show cause hearing under CR 60 to establish a satisfaction of judgment and other affirmative relief.").

[6] The trial court's Violation Finding also violates basic due process. *See, e.g.*, *Conerly v. Flower*, 410 F.2d 941, 944 (8th Cir. 1969) (a court's discretion under Rule 60(b) "does not mean that a court may circumvent due process or the Seventh Amendment and award damages or make findings without an evidentiary trial on the merits.").

a. Judgment Debtors Can Seek Affirmative Relief under the CPA.

A violation of the CAA is a *per se* violation of Washington's Consumer Protection Act (CPA). RCW 19.16.440; *Evergreen Collectors v. Holt*, 60 Wn. App. 151, 803 P.2d 10 (1991); *see also Campion v. Credit Bureau Services, Inc.*, 2000 WL 33255504 (E.D.Wash. 2000) (finding violation of the CAA and therefore finding as a matter of law that defendants violated CPA). If a judgment debtor believes that a creditor has collected or attempted to collect unauthorized amounts through a garnishment writ (thus violating the CAA), he or she can file suit against the creditor and assert a CPA claim for damages and injunctive relief. RCW 19.16.440; RCW 19.86.020; RCW 19.86.090.

The Askins acknowledge the available option of a CPA claim but argue: (1) asserting one is "completely beyond the means of the vast majority of judgment debtors" (Pet. at 9); and (2) regardless, how to address alleged violations based on post-judgment actions in a garnishment proceeding presents a novel question. Neither is true.

First, the CPA is explicitly structured to encourage individuals to bring claims even if damages would be small or a plaintiff may not have financial means to pursue them. RCW 19.86.090 (providing for the recovery of actual damages, exemplary damages, attorney's fees and costs,

and injunctive relief); *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 852, 792 P.2d 142 (1990) (legislature provided private right of action through CPA to encourage individuals to bring suit to enforce the act); *see also Evergreen Collectors*, 60 Wn. App. at 157 (plaintiff debtors were entitled to reasonable attorney's fee pursuant to RCW 19.86.090 and for attorney's fees on appeal for creditor's violation of the CAA).

"The policy behind the statutory award of fees is aimed at helping the victim file suit and ultimately serves to protect the public from further violations." *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 568, 825 P.2d 714 (1992). This is why, for example, plaintiffs can recover attorneys' fees even if where damages are nominal. *Ewing v. Glogowski*, 198 Wn. 515, 524-25, 394 P.3d 418 (2017) (trial court's consideration of remedial nature of the CPA and its purpose supported fee award materially larger than damages recovered).

Second, that an alleged basis for CAA violation occurs within a garnishment proceeding does not present a novel issue nor does this context leave judgment debtors without redress. Judgment debtors can and regularly do assert CPA claims against creditors based upon actions garnishment proceedings. *See, e.g. Gray v. Suttell Associates*, 2016 WL 409706, *8-9 (E.D.Wash. 2016) (denying summary judgment on debtor's CPA claim based on violation of the CAA for purported illegal

garnishment of plaintiff's wages); *Mandelas v. Gordon*, 2010 WL 2639846 (W.D.Wash. 2010) (denying motion to dismiss plaintiff's CPA claim based on violation of the CAA by actions in garnishment proceeding); *Campion*, 2000 WL 33255504.[7]

b. Debtors Can Challenge Garnishment through Controversion or a Motion to Quash.

Petitioners err in their assertion that "the question, what can a debtor do when a creditor obtains writs of garnishment based on affidavits with inaccurate balance information?" is a matter of "first impression." Pet. at 10. As noted above, a debtor may bring a claim under the CAA and CPA. But one does not have to initiate a new action.

The garnishment statute itself provides for more immediate and direct means of challenge. If a garnishee answers the garnishment writ, or upon expiration of the time for the garnishee to do so, the judgment debtor can controvert that answer or note the matter for a hearing to determine if

[7] In *Gray v. Suttell*, for example, Plaintiff Dane Scott asserted a CPA claim based on, among other things, the alleged wrongful collection of attorneys' fees in a garnishment proceeding, among other things. 2012 WL 1067962, at *6–7. The Askins cite *Gray* in their Petition (at 3, 10, 11, and 14), but make no mention of the issues in the case or the court' ruling, *e.g.*, that the case illustrates one example of a judgement debtor's recourse for alleged violation of the CAA by a creditor's actions in a garnishment proceeding. *N.b.*, the Askins' counsel also represented the plaintiffs in *Gray*.

there is an issue for trial. RCW 6.27.210; RCW 6.27.220; *Sprinkle v. SB&C, Ltd.*, 472 F.Supp.2d 1235, 1244 (W.D.Wash. 2006).

The judgment debtor can also file a motion to quash an outstanding garnishment writ. *Blair v. GIM Corp., Inc.*, 88 Wn. App. 475, 480, 945 P.2d 1149 (1997) (judgment debtor can use controversion procedure or file a motion to quash a garnishment to attack validity of an underlying judgment or the ability to collect it); *see also Lindgren v. Lindgren*, 58 Wn. App. 588, 794 P.2d 526 (1990) (affirming quashing of garnishment writ where default judgment was vacated as void for service issues).

As with the assertion of a CPA/CAA claim, the statutory process for challenging garnishment writs encourages meritorious challenges. If a judgment debtor prevails in challenging the garnishment sought by the creditor, the debtor is entitled to attorneys' fees and costs. RCW 6.27.230; *Blair* 88 Wn. App. at 484.

B. The Court's Narrow Holding Regarding the April 7 Email Between Counsel Does Not Warrant Review.

The Court of Appeals also held that the April 7 Email between counsel does not violate the CAA because it is a communication between a debtor's attorney and a creditor's attorney. Op. at 5-7. This ruling does also not warrant review. Indeed, the Askins make no argument regarding

the Court's actual holding.[8] Instead, they ask this Court to review a ruling the Court of Appeals did not make, and they include an inapposite and self-contradicting argument regarding the trial court's use of the April 7 Email below. Neither supports granting review.

First, the Askins assert that the Opinion "modifies" RCW 19.16.250(21) regarding what constitutes an attempt to collect a debt to include only "communications". Pet. at 2, 12-15. But the Opinion does not state or hold that only communications can constitute an attempt to collect a debt. *See* Opinion.[9] And the Court did not imply any such fining in concluding that consumers are protected by their attorneys rather than the CAA with respect to correspondence between counsel. *Id.* at 5-8. The Court should decline to review the Opinion based on a ruling the Court of Appeals did not make.

Second, the Askins argue "the trial court never found that the April 7 email was the basis of a violation" and therefore the Court should review the Opinion. Pet. at 15-16. As a preliminary matter, the Askins' current

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[8] The Askins' fourth Issue for Review states: "Did the Court of Appeals err by holding that communications in an attempt to collect can never violate the CAA if the 'communication' was directed at a consumer's attorney?" Pet. at 2.

[9] The Askins' argument on this point does not cite to the Opinion.

argument is contrary to the position they took before the Court of Appeals. There, the Askins argued as follows:

> The April 2016 email and amortization attempted to collect amounts Cavalry was not entitled to when it sought payment of both attorney fees and costs not awarded, as well as attorney fees and costs significantly higher than allowed by law. RCW 6.27.090(2); RCW 19.16.250(21).[10]

Regardless, the Court of Appeals recognized the distinction between use of the April 7 Email in an evidentiary capacity and the assertion that it could be an independent CAA violation. Op. at 7 ("The communication may still be of evidentiary value in subsequent litigation, but it does not constitute a prohibited communication to a debtor."). Given the trial court's "heavy reliance" on the April 7 Email below, the Court of Appeals appropriately noted this distinction for any future consideration of that email. *Id.* at 7-8.

IV. CONCLUSION

Judgment debtors have clear procedural mechanisms for challenging garnishment proceedings. Under the applicable statute, debtors may controvert a writ application or seek to quash an existing writ. Additionally, or in the alternative, a judgment debtor may assert an

[10] Respondents' Response Brief at 2, 26.

affirmative claim for relief under the CPA for alleged violations of the CAA in garnishment proceedings.

The Court of Appeals' Opinion does not change existing vehicles to challenge garnishments. The Court declined to create a backdoor procedure through CR 60 that would allow a judgment debtor to obtain affirmative relief without litigating a properly-asserted claim under the appropriate burden of proof. The Court of Appeals also properly noted the distinction between the evidentiary use of a communication between counsel and a claim that such communication itself constitutes a violation of the CAA. The Petition does not state a viable basis for review under RAP 13.4(b) and this Court should deny the Petition.

DATED: March 18, 2019.

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I hereby certify, under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.

DATED this 18th day of March 2019, at Seattle, Washington.

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March 18, 2019 - 4:52 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	96853-5
Appellate Court Case Title:	Fireside Bank, fka Fireside Thrift, Co. v. John W. Askins and Lisa D. Askins
Superior Court Case Number:	07-2-00204-7

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