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No. 81005-2

SUPREME COURT
OF THE STATE OF WASHINGTON

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TCAP CORPORATION, f/k/a
TRANSAMERICAN CAPITAL CORPORATION,

Respondent,

vs.

GEORGE GERVIN and JOYCE GERVIN

Appellants.

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STATE OF WASHINGTON
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BRIEF OF AMICUS CURIAE
401 GROUP, a limited partnership.

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401 Group is the limited partnership subject to the charging order at issue in this appeal. This amicus curiae brief is presented because the limited partnership's interests may be implicated by the Court's decision in this case. 401 Group agrees with the analysis in the Brief of Respondent Cadles at pages 24-31 demonstrating that the charging order against George Gervin may be foreclosed. 401 Group also agrees that the Writ of Execution is not defective because it directed the sale of Gervin's entire interest in the 401 Group partnership, and that once the foreclosure sale is held, Gervin will have no further interest in the partnership, as argued in Cadles' Brief at 18-24. This brief supplements and presents additional arguments in support of this position.

A. Washington Authorizes Foreclosure Of Limited Partnership Interests.

The vast majority of jurisdictions authorize foreclosure of limited partnership interests subject to a charging order. Gervin's primary argument against foreclosure is that the cases authorizing foreclosure construe the statutes of other states that include a provision, based on the Uniform Partnership Act (1914) § 6(2), providing that the general partnership statutes applied to limited partnerships except "in so far as the statutes relating to such

partnerships are inconsistent herewith." Former RCW 25.05.060(3), adopted in 1955 [Laws of 1995, ch. 15, § 25.04.060(3)], contained similar language, but was repealed by Laws of 1998, ch. 103, § 1308(6). Because of the repeal, Gervin asserts that those cases are distinguishable from the case before this Court, and are not persuasive authority. (See Brief of Appellant at 14)

Gervin acknowledges that the linkage provision in the limited partnership statute continues to apply: "In any case not provided for in this chapter, the provisions of the Washington revised uniform partnership act, or its successor statute, govern." RCW 25.10.660. Nevertheless, Gervin asserts that foreclosure is not now authorized because the former "not inconsistent" language in former RCW 25.04.060(3) means something different than the "in any case not provided for" phrase in RCW 25.10.660. For that reason, Gervin asserts that the majority rule holding that a creditor with a charging order on a limited partner's partnership interest may foreclose that charging order is not applicable. (Brief of Appellant at 13-15) But there is no reasonable basis for Gervin's assertion that the language of former RCW 25.04.060(3) and current RCW 25.10.660

have any different effect. This Court should adopt the majority rule permitting foreclosure of a limited partner's assignable interest.

The Uniform Partnership Act (UPA) and the Uniform Limited Partnership Act (ULPA) have been linked since their adoption in Washington. Former RCW 25.04.060(3), as adopted in 1955, stated that the Washington Uniform Partnership Act "shall apply to limited partnerships except insofar as the statutes relating to such partnerships are inconsistent herewith." Laws 1955, ch. 15, § 25.04.060(3). This language was derived from the Uniform Partnership Act as originally enacted in Washington in 1945, Laws 1945, ch.137, § 6(2), which in turn came from the Uniform Partnership Act (1914), § 6(2). 6 Pt. 1 U.L.A. 393 (2001).

RCW 25.04.060(3) remained in effect until repealed by Washington's adoption of the Uniform Partnership Act (1997) by Laws 1998, ch. 103, § 1308(6). As adopted in 1981 and as currently in effect, RCW 25.10.660 of the Washington Uniform Limited Partnership Act provides:

In any case not provided for in this chapter, the provisions of the Washington revised uniform partnership act, or its successor statute, govern.¹

Laws 1981, ch. 51, § 66. This language is similar to Section 1105 of the Uniform Limited Partnership Act (1976), which provided that “[i]n any case not provided for in this [Act] the provisions of the Uniform Partnership Act govern.” 6A U.L.A. 547 (2003). The comment to Section 1105, added by the 1985 amendments to the Uniform Limited Partnership Act, confirms that this section is, in effect, a duplication of Section 6 of the Uniform Partnership Act:

The result provided for in Section 1105 would obtain even in its absence in a jurisdiction which had adopted the Uniform Partnership Act, by operation of Section 6 of that act.

6A U.L.A. 547, comment § 1105 (2003).

In 1994, the Uniform Partnership Act was amended again, and the drafters deleted former Section 6(2) of the Uniform Partnership Act. As the Prefatory Note makes clear, the deletion was not intended as a substantive change to the linkage of the uniform partnership and limited partnership laws:

¹ The words “Washington revised” and “or its successor statute” were added by Laws 2000 ch. 169, § 9. Prior to the amendment, the statute was virtually identical to Uniform Partnership Act (1976) § 1105. 6A U.L.A. 547 (2003).

Partnership law no longer governs limited partnerships pursuant to the provisions of RUPA itself [UPA (1994)]. First, limited partnerships are not "partnerships" within the RUPA definition. Second, UPA Section 6((2), which provides that the UPA governs limited partnerships in cases not provided for in the Uniform Limited Partnership Act (1976)(1985) ("RULPA") has been deleted. *No substantive change in result is intended, however.* Section 1105 of RULPA already provides that the UPA governs in any case not provided for in RULPA, and thus the express linkage in RUPA is unnecessary. Structurally, it is more appropriately left to RULPA to determine the applicability of RUPA to limited partnerships. It is contemplated that the Conference [National Conference of Commissioners on Uniform State Laws (NCCUSL)] will review the linkage question carefully, although no changes in RULPA may be necessary despite the many changes in RUPA.

Revised Uniform Partnership Act (RUPA) Prefatory Note, 6 U.L.A. 4 (1995) (emphasis added); *see also*, RUPA Prefatory Note, 6 Pt. I U.L.A. 6 (2001).

In 1994, the National Conference of Commissioners on Uniform State Laws (NCCUSL) adopted a Revised Uniform Partnership Act (RUPA) and recommended adoption in all states. In 1996 the NCCUSL adopted amendments to RUPA to include provisions for limited liability partnerships, and recommended adoption of the amendments in all states. In response, Washington adopted RCW 25.05.010 *et. seq.*, the Washington Revised Uniform Partnership Act (WRUPA), and repealed most of RCW ch. 25.04,

including RCW 25.04.060(3), which contained the language making WUPA apply to limited partnerships to the extent not “inconsistent” with the limited partnership statutes. See, Substitute Senate Bill Report, SHB 2386, at 1; Laws of 1998, ch. 103, § 1308(6). As indicated by the Prefatory Note to the RUPA, however, there is no basis for believing that the repeal of RCW 25.04.060(3) was intended to have any substantive “results,” since, like UPA § 1105, RCW 25.10.660 still required application of the WUPA provisions in any case “not provided for” by the WULPA.

Gervin acknowledges that the majority of courts that have considered whether foreclosure of a limited partner’s interest subject to a charging order is permitted under statutes based on the UPA and ULPA have held that foreclosure is available, citing *Centurion Corp. v. Crocker National Bank*, 208 Cal.App.3d 1, 255 Cal. Rptr. 794 (1989); *Madison Hills Ltd. Partnership II v. Madison Hills, Inc.*, 35 Conn.App. 81, 644 A.2d 363, *cert. denied*, 231 Conn. 913 (1994); *Baybank v. Catamount Construction, Inc.*, 141 N.H. 780, 693 A.2d 1163 (N.H. 1997); *Lauer Construction, Inc., v. Schrift*, 123 Md.App. 112, 716 A.2d 1096, *cert. denied*, 352 Md. 310 (1998) (Brief of Appellants at 11-14). Gervin attempts to distinguish these majority-rule cases on the

grounds that they involve statutes based on the Uniform Partnership Act prior to its revision in 1994. Gervin cites only one case, ***Givens v. Nat'l Loan Investors, L.P.***, 724 So.2d 610 (Fla. Dist. Ct. App. 1998), to support a distinction between the "not inconsistent" and "not provided for" language. This is a distinction without a difference.

By 1995, Florida had adopted the 1994 RUPA. 1995 Fla. Laws ch. 95-242 (Fla. Stat. § 620.81001 et. seq.). The ***Givens*** court held that foreclosure was not available to a creditor; the creditor's only remedy was to collect whatever it could from the charging order:

The statute . . . provides that to the extent so charged the judgment creditor has "*only* the rights of an assignee of the partnership interest." Because the statute says that a judgment creditor has only the rights of an assignee of the partnership interest, it necessarily follows that the creditor may not resort to judicial foreclosure of the partnership interest. Nothing in the Revised Uniform Limited Partnership Act authorizes foreclosure of the charged interest and foreclosure is inconsistent with the statute's limitation upon the creditor's remedies.

Givens, 724 So.2d at 611 (quoted in Brief of Appellants at 16).

This analysis reveals two important points. First, the court states that foreclosure is "inconsistent" with the limited partnership statute's limitation on the creditor's remedies. The ***Givens*** court

apparently would have found that foreclosure was not a permitted remedy even under the “not inconsistent” test that Gervin asserts applied under statutes based on Section 6 of the UPA (1914), like former RCW 25.04.060(3). The holding of the Florida court did not depend on any purported difference between the “not inconsistent” and “in any case not provided for” phrases in the two statutes.

Second, the Florida court clearly misread the intent of the drafters of the Uniform State Laws. As the drafters have made clear, the point of “only,” in the phrase providing that a judgment creditor has “*only* the rights of an assignee of the partnership interest,” is to protect the partnership from any attempt by the judgment creditor to participate in management:

A charging order does redirect some of a partnership’s distribution stream but, in doing so, intrudes only marginally into the affairs of the enterprise and its other owners. The various uniform partnership acts differ somewhat in how they state this point, but since 1976 all versions of ULPA have followed the same paradigm. Under Section 703 of the Revised Uniform Limited Partnership Act (RULPA) (1976), “the judgment creditor [with a charging order] has only the rights of an assignee of the partnership interest,” is not actually an assignee, and owns no part of the charged interest. Even an actual assignee is entitled “to receive, to the extent assigned, *only* the distribution to which the assignor would be entitled,” and even an actual “assignment of a partnership interest does not . . . entitle the assignee to become or to exercise any rights of a partner.” *Id.* §703.

(emphasis added). A fortiori, the holder of a charging order has no right to meddle in the conduct of the partnership's activities. Moreover, the granting of a charging order has no effect whatsoever on the management rights of the debtor partner whose economic rights are subjected to the charging order.

Kleinberger, et al., *Charging Orders And The New Uniform Limited Partnership Act Dispelling Rumors of Disaster*, 18-JULY/AUG Prob. & Prop. 31 (2004) (emphasis in original).

Moreover, courts interpreting the "exclusive remedy" language in the statutes understand that the exclusivity relates to the judgment creditor's access to partnership property, that the remedy limitation affects how a judgment creditor may "attach" a partner's economic rights, and that the language does not preclude the court from ordering additional remedies:

In sum, in the overwhelming majority of jurisdictions, a charging order on a limited partnership interest may be foreclosed by order of the court, and neither that foreclosure nor the resulting judicial sale will interfere with the legitimate interests of the partnership and the other partners.

Charging Orders, Prob. & Prop. at 33-34.

Washington's Revised Limited Partnership Act is to be construed to effectuate its general purpose "to make uniform the law with respect to the subject of this chapter among the states enacting it." RCW 25.10.620. Foreclosure of limited partnership

interests subject to a charging order was the norm prior to the 2001 revision of the Uniform Limited Partnership Act, and the 2001 revision now expressly provides for foreclosure. See, 2001 (RULPA), § 703(b).² 6A U.L.A. 81 (2003). For the reasons stated above and in Cadles Brief at 24-30, this Court should adopt the majority rule and hold that the WUPA's foreclosure remedy in RCW 25.05.215 is available to a creditor who has obtained a charging order against a limited partner pursuant to RCW 25.10.410.

B. After Foreclosure, Gervin Will Have No Partnership Interest.

Gervin argues that the Writ of Execution is overly broad and should be quashed because RCW 25.05.215(2) only permits foreclosure of the partner's "transferable interest." (Brief of Appellants at 17-19; Reply Brief at 9, 13-16) Gervin uses the term

² The 2001 RULPA is now a "stand alone" statute and not linked to either the UPA or the RUPA. Prefatory Note, The Act's Overall Approach. 6A U.L.A. 2 (2003). Section 703(b) of the 2001 RULPA is taken from the 1994 RUPA, and incorporates the 1994 RUPA foreclosure language. Section 504(b) of the 1994 (and 1997) UPA provides: "A charging order constitutes a lien on the judgment debtor's transferable interest in the partnership. The court may order a foreclosure of the interest subject to the charging order at any time. The purchaser at the foreclosure sale has the rights of a transferee." 6 U.L.A. 71 (1995); 6 Pt. 1 U.L.A. 160 (2001). The ULPA (2001) § 703(b) states: "A charging order constitutes a lien on the judgment debtor's transferable interest. The court may order a foreclosure upon the interest subject to the charging order at any time. The purchaser at the foreclosure sale has the rights of a transferee." 6A U.L.A. 81 (2003). Current RCW 25.05.215(2) is identical to 1994 RUPA § 504(b).

“transferable interest” of a partner in a partnership, as defined in RCW 25.05.205. The “transferable interest” in the general partnership statute, RCW 25.05.205, is substantially equivalent to the rights of an assignee as defined in the limited partnership statute, RCW 25.10.400(1)(c).³ However, RCW 25.10.410, which permits a charging order on a partner’s “partnership interest” as defined in RCW 25.10.010(10), provides that the charging order gives the creditor only the rights of an “assignee.” This brief thus more correctly refers to the rights of the creditor acquired by the charging order as an “assignee interest” rather than “transferable interest” as used in RCW 25.05.205 and RCW 25.05.215.

Gervin is wrong in asserting that the Writ of Execution improperly lists partnership interests in excess of the assignee’s interest. First, no matter what the Writ says, the purchaser at the foreclosure sale cannot acquire any direct relationship to the partnership beyond the right to obtain allocations of profits and

³ RCW 25.05.205 states: “The only transferable interest of a partner in the partnership is the partner’s share of the profits and losses of the partnership and the partner’s rights to receive distributions. The interest is personal property.” RCW 25.10.400(1)(c) states: “An assignment entitles the assignee to share in such profits and losses, to receive such distribution or distributions, and to receive such allocation of income, gain, loss, deduction, or credit or similar item to which the assignor was entitled to the extent assigned . . .”

losses, and distributions, as provided by RCW 25.10.400(1)(c) and RCW 25.10.410, as a result of the sale. In this regard, the Writ at issue is similar to the notice of sale in *Tupper v. Kroc*, 88 Nev. 146, 494 P.2d 1275 (1972) (cited in Reply Brief at 9).

In *Tupper*, a limited partner obtained a judgment against Tupper, the general partner, on several promissory notes. The trial court entered a charging order directing the sheriff to sale of "all of Tupper's 'right, title and interest' in three partnerships and to apply the proceeds to the unsatisfied judgment." *Tupper*, 494 P.2d at 1277. The limited partner was the purchaser at the sale.

Tupper moved to set aside the sale on the grounds that his partnership interest being sold was inadequately described in the notice of sale. The Nevada court rejected that argument, holding that the notice was adequate because:

Anyone reading or relying on the notice of sale was, as a matter of law, deemed to understand that by statute the sale of Tupper's interest in the partnerships consisted of a sale of his share of the profits and surplus, and no more. NRS 87.240; NRS 87.260; NRS 87.280.

Tupper, 494 P.2d at 1279. As in *Tupper*, anyone purchasing Gervin's interest in the partnership interest would understand that the purchaser was acquiring only the rights as to the partnership

itself of an assignee – to share in profits and losses, and receive distributions and tax allocations, as provided by RCW 25.10.400 and RCW 25.10.410.

Under Gervin's interpretation, no rights or causes of action may be sold to satisfy the judgment against him if they arise from his association with the partnership except for the economic rights subject to the charging order. For example, Gervin claims that the foreclosure sale cannot extend to his allegation that he was not offered a right of first refusal when in 2003 a partnership interest was sold, and that Washington law does not allow the sale of more than Gervin's "economic rights" in the partnership. (Reply Brief at 15-16) But while it is true that the court cannot order a sale of a partner's rights to participate in management under the partnership agreement, that limitation does not protect the debtor partner from having other valuable economic claims associated with the partnership sold to satisfy a creditor's judgment.

All property, both real and personal, of a judgment debtor is liable to execution unless exempted by law. RCW 6.17.090. If Gervin has causes of action against the partnership or the partners, those causes of action are personal property rights subject to execution:

Thus, the charging order was created as a tool for "entity asset protection" not "partner asset protection," and that is still the rule. As a California court has explained, charging orders "are not intended to protect a debtor partner against claim of his judgment creditors where no legitimate interest of the partnership, or the remaining or former partners, is served." . . . "While limited partnerships were not created to assist creditors, but to enable persons to invest their money without being liable for partnership debts for more than their contribution, . . . neither were they intended to protect a partner's interest in the partnership against legitimate personal creditors."

Charging Orders, Prob. & Prop. at 31, quoting **Taylor v. S & M Lamp Co.**, 190 Cal. App. 2d 700, 708, 12 Cal. Rptr. 323, 328 (1961); **Bank of Bethesda v. Koch**, 44 Md. App. 350, 354, 408 A.2d 767, 770 (1979).

Additionally, there is nothing in Title 25 RCW which prevents the sale of claims against the partnership, as the sale would be of purely economic rights, and not of voting or other rights and powers of the foreclosed upon limited partner. The sale would not interfere with the management or operation of the partnership. For that reason, the sale is permitted by Title 25 RCW, and consequently by RCW 6.32.085(2), which then permits the court to enter an order "directing the sale of the partnership interest in the same manner as personal property is sold on execution."

C. Once The Foreclosure Sale Is Held, Gervin Will No Longer Have Any Rights As A Partner.

Cadles is right that, once Gervin's limited partnership interest is sold at foreclosure, Gervin will no longer have any interest in the partnership. (Cadles' Brief at 23-24) Gervin asserts that even if his partnership interest is sold at a foreclosure sale, he will still retain all rights as a limited partner except for the rights to receive profits and losses, distributions, and tax allocations pursuant to RCW 25.10.400 and RCW 25.10.410. (Reply Brief at 16) This assertion is based on a misreading and misapplication of the laws governing general partnerships, is not supported by RCW ch. 25.10 governing limited partnerships, and would place limited partnerships in the undesirable and unworkable position of having limited partners with no economic interest in the partnership.

RCW 25.10.410 permits the court to charge "the partnership interest of the partner" with payment of the unsatisfied amount of the judgment, with interest. RCW 25.10.010(10) defines "partnership interest" as "a partner's share of the profits and losses of a limited partnership and the right to receive distributions of partnership assets." Consistent with this definition, a creditor who

obtains a charging order has only the rights of an "assignee of the partnership interest":

An assignment entitles the assignee to share in such profits and losses, to receive such distribution or distributions, and to receive such allocation of income, gain, loss, deduction, or credit or similar item to which the assigner was entitled, to the extent assigned.

RCW 25.10.400(1)(c). Upon assignment of all of a partner's "partnership interest," the partner ceases to be a partner and ceases to "have the power to exercise any rights or powers of a partner." RCW 25.20.400(1)(d).

Gervin admits that if foreclosure is permitted, the sale can transfer all of his economic interests in the limited partnership. (Reply Brief at 13-14) Since those economic rights constitute his "partnership interest," the term used in RCW 25.10.410 and as defined in RCW 25.10.010(10), if all of those rights are transferred by a foreclosure sale, Gervin will cease to be a partner. Not only will Gervin lose his economic rights, but he will lose the ability to exercise any rights as a partner.

Gervin suggests that these statutes apply differently to a creditor who acquires all the economic rights of an assignee than to an assignee in a voluntary assignment of the partner's interest. (Reply Brief at 9) There is no statutory basis for this distinction.

Instead, the statutes use the term "assignee" without qualification. Both a voluntary assignee and a judgment creditor assignee are entitled only to the former partner's economic interests under RCW 25.10.400(1)(c), and neither can become a limited partner unless provided in the partnership agreement or with the consent of all the other partners. RCW 25.10.420.

Terminating all of a limited partner's interest in the partnership upon a foreclosure sale of all of his economic interests is good policy. Under Gervin's contrary reading of the statutes, after the sale of all of a limited partner's partnership interest, the foreclosed partner would nevertheless continue as a limited partner even though he or she would no longer have any equity in the partnership. But at that point, the foreclosed partner has no financial interest in the outcome of the management or business of the partnership, cannot be relied upon to act in the best interests of either the partnership or the remaining partners who do have equity interests, and may actually, as in this case, have interests adverse to the partnership and the remaining partners.

Gervin's interpretation would force the partnership and solvent partners to remain associated with someone who may actually be adverse to the partnership, and who has no financial

stake whatsoever in the success of the partnership's business. However, RCW 25.10.400(1)(d) prevents this result by terminating all of the former limited partner's rights and powers in the partnership upon the sale of all of his partnership interest, *i.e.* his economic rights.

Permitting a partner whose interest is sold at foreclosure to continue as a partner following the sale would create another anomaly. Following foreclosure, the partners have the option to admit the purchaser at the sale as a limited partner. RCW 25.10.420(1). If the limited partnership does so, then the purchaser acquires the rights and powers, and is subject to the duties and obligations, of a limited partner. Under Gervin's interpretation of the statutes, at that point the foreclosed partner and the new limited partner are both limited partners in the partnership, even though their limited partner status was or is derived from the same economic interests. This result would be awkward at best. It is avoided by interpreting RCW 25.10.400(1)(d) to mean what it says, that the assignment of all of the partner's economic rights by the foreclosure sale terminates the partner's interest in the partnership.

Gervin cites a single case in which the court held that a foreclosure sale did not terminate a partner's right to participate in

management of the partnership. *Tupper v. Kroc*, 88 Nev. 146, 494 P.2d 1275 (1972) (cited in Reply Brief at 9). As discussed in Section B of this brief, *supra* at 12, in *Tupper* the general partner's interest in three limited partnerships was sold at foreclosure. The Nevada court held that, under N.R.S. 87.240, the general partner had the right to manage the partnership once a receivership was discharged. *Tupper*, 494 P.2d at 1280. However, N.R.S. 87.240 is based upon § 24 of the Uniform Partnership Act (1914). 6 Pt. 2 U.L.A. 291 (2001). For this reason, *Tupper* is distinguishable from this case governed by RCW ch. 25.10, which is based upon the Revised Uniform Limited Partnership Act (1976).

Finally, given the differing interests of a foreclosed partner from the partnership and the remaining partners once a charging order attaches, this Court should adopt a reading of the statutes that facilitates speedy resolution of the ownership of partnership interests through foreclosure once a creditor's charging order attaches. In the instant case, for instance, the partnership has had to deal with Gervin's efforts to impede collection of Cadles' debt for a dozen years. The process has been costly, disruptive, and remains a burden on the partnership's business. The Superior Court has found that Gervin had engaged in unnecessary and

frivolous litigation. (See Cadles Br. at 40-43) Only by allowing the foreclosure to go forward now, and holding that once the foreclosure sale is held Gervin will cease to have any interest as a partner, can this Court fulfill the statute's intent to create the charging order mechanism as a tool for "entity asset protection," not "partner asset protection."

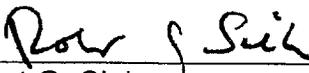
D. Conclusion.

Amicus urges the Court to hold that Washington authorizes foreclosure of limited partnership interests, and that after foreclosure, Gervin will have no partnership interest and no rights as a partner.

Dated this 11th day of February, 2008.

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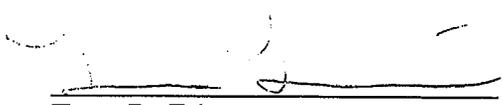
The undersigned declares under penalty of perjury, under the
BY RONALD R. CARPENTER
laws of the State of Washington, that the following is true and correct:

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That on February 11, 2008, I arranged for service of the
foregoing Brief Of Amicus Curiae 401 Group to the court and counsel
for the parties to this action as follows:

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DATED at Seattle, Washington this 11th day of February,
2008.


Tara D. Friesen

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