

TABLE OF CONTENTS

INTRODUCTION.....	1
STATEMENT OF THE CASE.....	2
ARGUMENT.....	3
A. Policy language.....	3
B. Standards of review.....	4
C. The Policy unambiguously covers diminished-value damages directly caused by a collision.....	4
D. Farmers' Limits of Liability clause does not exclude coverage for diminished-value damages directly caused by a collision.....	10
E. The trial court did not abuse its discretion in certifying the Class under CR 23.....	12
CONCLUSION	17

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Allstate Ins. Co. v. Peasley</i> , 131 Wn.2d 420, 424, 932 P.2d 1244 (1997)	10
<i>Babcock v. State</i> , 116 Wn.2d 596, 606, 809 P.2d 143 (1991)	6
<i>Boyd Motors, Inc. v. Employers Ins.</i> , 880 F.2d 270, 272 (10th Cir. 1989)	5, 11
<i>Brown v. Brown</i> , 6 Wn. App. 249, 253, 492 P.2d 581 (1971)	15
<i>Davis v. Farmers Ins. Co. of Ariz.</i> , 142 P.3d 17 (N.M. Ct. App. 2006)	8, 9, 12
<i>Dunmire Motor Co. v. Oregon Mut. Fire Ins. Co.</i> , 114 P.2d 1005 (Or. 1941)	11
<i>Eurick v. Pemco Ins. Co.</i> , 108 Wn.2d 338, 340, 738 P.2d 251 (1987)	11
<i>Farmers Ins. Co. v. Clure</i> , 41 Wn. App. 212, 215, 702 P.2d 1247 (1985)	11
<i>Gonzales v. Farmers Ins. Co. of Oregon</i> , 196 P.3d 1, 3 (Or. 2008)	passim
<i>Hyden v. Farmers Ins. Exch.</i> , 20 P.3d 1222, 1225 (Colo. Ct. App. 2000)	11
<i>Madden v. Nippon Auto Co.</i> , 119 Wash. 618, 206 P. 569 (1922)	5, 6, 9
<i>Matthews v. Penn-Am. Ins. Co.</i> , 106 Wn. App. 745, 765, 25 P.3d 451 (2001)	7, 10

<i>MFA Ins. Co. v. Citizens Nat'l Bank,</i> 545 S.W.2d 70, 72 (Ark. 1977).....	5, 11, 12
<i>Moeller v. Farmers Ins. Co. of Wash.,</i> 155 Wn. App. 133, 138, 229 P.3d 857, rev. granted, 169 Wn.2d 1001 (2010)	passim
<i>Rossier v. Union Auto. Ins. Co.,</i> 134 Ore. 211, 291 P. 498 (1930)	11
<i>Sitton v. State Farm Mut. Auto. Ins. Co.,</i> 116 Wn. App. 245, 63 P.3d 198 (2003).....	14, 15
<i>Smith v. Behr Process Corp.,</i> 113 Wn. App. 306, 54 P.3d 665 (2002).....	14, 15
<i>State Farm Mut. Auto Ins. Co. v. Mabry,</i> 556 S.E.2d 114, 119 (Ga. 2001)	5, 11, 12
<i>State v. Hubbard,</i> 103 Wn.2d 570, 573-74, 693 P.2d 718 (1985).....	6
<i>Stoops v. First Am. Fire Ins. Co.,</i> 22 S.W.2d 1038 (Tenn. 1930).....	11
<i>Weston v. Emerald City Pizza, LLC,</i> 137 Wn. App. 164, 151 P.3d 1090 (2007).....	14, 16
RULES	
CR 23	1, 12, 14
CR 23(a).....	13
CR 23(b)(3)	2, 13, 15
RAP 12.1(a).....	6
OTHER AUTHORITIES	
WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 640 (1993).....	7, 10

INTRODUCTION

On its Web site, Farmers claims that its auto insurance "helps . . . protect you . . . against financial loss in the event of an accident."¹ Farmers' site defines "loss" in part as "the amount of reduction in the value of an insured's property caused by a covered peril."² Yet Farmers argues here that "value" is irrelevant, so it can "repair" its insureds' property without paying for the "reduction in the value" caused by an accident. In Oregon, by contrast, Farmers never made its "values don't matter" argument, and Farmers' Oregon insureds may seek diminished value damages under identical Policy language. See *Gonzales v. Farmers Ins. Co. of Oregon*, 196 P.3d 1, 3 (Or. 2008). Insureds in Washington and Oregon speak the same language. This Court should affirm.

The trial court gave a rigorous testing to the class certification issue in a four-day hearing, finding the CR 23 criteria satisfied. The Court of Appeals found no abuse of discretion in this careful ruling, which is entirely consistent with Washington law. The predominant issues are whether diminished-value damage exists (facts) and is covered (law). Again, this Court should affirm.

¹ http://www.farmers.com/auto_insurance.html.

² *Id.* (simply "mouse over" the highlighted term "loss").

STATEMENT OF THE CASE

The appellate opinion accurately states the pertinent facts:

Moeller owned a 1996 Honda Civic CRX. Farmers insured the vehicle, covering loss from collision and comprehensive damage. After his vehicle sustained accident damage, Moeller notified Farmers. An adjuster inspected and elected to repair the vehicle. Farmers did not compensate Moeller for the vehicle's diminished value, that is, damage that cannot be repaired such as weakened metal.

Moeller filed a third amended class action complaint against Farmers and Farmers Insurance Exchange (collectively Farmers) on behalf of himself and all others similarly situated (collectively Moeller). In his complaint, Moeller alleged (1) breach of contract, (2) insurance bad faith, (3) failure to disclose information/CPA violation, and (4) failure to make prompt payment of claim.

At the crux of Moeller's complaint was Farmers' failure to restore his vehicle to its "pre-loss condition through payment of the difference in value between the vehicle's pre-loss value and its value after it was damaged, properly repaired and returned." Clerk's Papers (CP) at 435.

After four days of oral argument, the trial court certified a class under CR 23(b)(3). We denied Farmers' motion for discretionary review of that order.

Farmers moved for summary judgment, claiming (1) the policy did not cover diminished value and (2) its denial of the diminished value claim was reasonable as a matter of law, thus barring Moeller's bad faith and CPA claims. The trial court granted the motion.

Moeller v. Farmers Ins. Co. of Wash., 155 Wn. App. 133, 138, 229 P.3d 857 (footnote omitted), *rev. granted*, 169 Wn.2d 1001 (2010).

ARGUMENT

A. Policy language.

The appellate opinion accurately sets forth the relevant policy language (155 Wn. App. at 139-40 (citing CP 12, 19-20)):

DEFINITIONS

.....
Accident or occurrence means a sudden event, including continuous or repeated exposure to the same conditions, resulting in **bodily injury** or **property damage** neither expected nor intended by the **Insured person**.

.....
Damages are the cost of compensating those who suffer **bodily injury** or **property damage** from an **accident**.

.....
Property damage means physical injury to or destruction of tangible property, including loss of its use.

PART IV – DAMAGE TO YOUR CAR

Coverage G – Collision

We will pay for **loss** to **your Insured car** caused by **collision** less any applicable deductibles.

Additional Definitions Used in This Part Only

.....
2. **Loss** means direct and accidental loss of or damage to **your Insured car**, including its equipment.

Limits Of Liability

Our limits of liability for **loss** shall not exceed:

1. The amount which it would cost to repair or replace damaged or stolen property with other of like kind and quality, or with new property less an adjustment for physical deterioration and/or depreciation.

Payment of Loss

We may pay the **loss** in money or repair or replace damaged or stolen property.

B. Standards of review.

The appellate opinion properly sets forth the standards of review, including the appropriate standards for interpreting contracts and reviewing class certification, which are adopted here by reference. 155 Wn. App. at 140-41, 147. These standards are well established, well known to this Court, and unchallenged here, so they need not be repeated, beyond noting that the standard of review is *de novo* for summary judgment and contract issues, and abuse of discretion for class-certification issues. *Id.*

C. The Policy unambiguously covers diminished-value damages directly caused by a collision.

When, as here, insureds seek diminished-value coverage under a specific policy provision, the issue is not generally whether any insured under any insurance policy may recover for diminished value. See, e.g., *Moeller*, 155 Wn. App. at 142 n.4 (“The question presented is not whether *any* insured may recover for diminished value”); *Gonzales*, 196 P.3d at 3 (“This case does not call on the court to decide the principles applicable generally to diminished value claims in property damage disputes of all kinds”). Rather, the question is whether this insured may recover for diminished-value damage under this particular insurance policy. *Id.*

This question turns on two inquiries: (1) whether coverage for “direct and accidental loss . . . or damage” includes diminished-value damage; and (2) if so, whether a “Limits of Liability” clause precludes recovery. See, e.g., *Moeller*, 155 Wn. App. at 142-46; *Gonzales*, 196 P.3d at 3-7; *Boyd Motors, Inc. v. Employers Ins.*, 880 F.2d 270, 272 (10th Cir. 1989). A third question – whether a car suffering certain types of damage in significant collisions can be returned to their pre-collision condition – is generally a question of fact that cannot be resolved on summary judgment. See, e.g., *Gonzales*, 196 P.3d at 7-8; *State Farm Mut. Auto Ins. Co. v. Mabry*, 556 S.E.2d 114, 119 (Ga. 2001); *MFA Ins. Co. v. Citizens Nat'l Bank*, 545 S.W.2d 70, 72 (Ark. 1977).

Indeed, Washington law recognizing that diminished value is a question of fact goes back almost 90 years, to the seminal case of *Madden v. Nippon Auto Co.*, 119 Wash. 618, 206 P. 569 (1922). *Madden* too arose out of a car collision. The trial judge disallowed examination of an expert witness regarding his opinion of the car’s value after the collision, and his opinion that “an automobile which has been injured in an accident and repaired has not the same value in the eyes of an intending purchaser as one not so injured, even though there may be no visible marks of the

injury on the automobile.” 119 Wash. at 619. This Court reversed, holding that presenting evidence on these issues was proper. Thus, this Court has long recognized that the existence of diminished-value damage is a question of fact.

But here, Farmers itself has not raised the issue whether diminished-value damage exists, either because it has no evidence to contradict Moeller’s experts, or because it would preclude summary judgment. See Petition at 1-2; BA 4-5.³ Moeller presented strong evidence that such damage is directly caused by a collision. See, e.g., BA 5-8. This third issue remains for trial under the appellate court’s opinion finding coverage for diminished-value damage. It is a jury question.

Returning to the first issue, Farmers’ “Collision” coverage unambiguously embraces diminished-value damage. *Moeller*, 155 Wn. App. at 142-44; *Gonzales*, 196 P.3d at 7. Farmers “will pay for **loss** to **your Insured car** caused by **collision** less any applicable deductibles.” CP 19. “**Loss** means direct and

³ *Amicus* NAMIC does raise this issue (see NAMIC Brief in Support of Petition for Review at 2-5) but courts disregard issues raised solely by *Amici*, particularly when, as here, they were not raised on summary judgment below. See, e.g., *Babcock v. State*, 116 Wn.2d 596, 606, 809 P.2d 143 (1991) (citing RAP 12.1(a); *State v. Hubbard*, 103 Wn.2d 570, 573-74, 693 P.2d 718 (1985)).

accidental . . . damage to **your Insured car**, including its equipment.” CP 19. Moeller’s car plainly suffered damage in an accidental collision. See, e.g., 155 Wn. App. at 142 n.6.

But “direct” and “damage” are undefined terms, so we may look for their plain meaning in a standard English dictionary. See, e.g., *Moeller*, 155 Wn. App. at 143-44; (citing *Matthews v. Penn-Am. Ins. Co.*, 106 Wn. App. 745, 765, 25 P.3d 451 (2001)). “Direct” means “without any intervening agency or step : without any intruding or diverting factor.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 640 (1993). “Damage” means “loss due to injury : injury . . . to . . . property” *Id.* at 571.

The Court of Appeals correctly concluded that Farmers’ broad coverage clause unambiguously embraces diminished-value damage. 155 Wn. App. at 143; accord *Gonzales*, 196 P.3d at 7. Such damage results directly from an accidental collision, with no intervening agency or diverting factor. *Id.* Although its Policy unambiguously covers diminished-value damage, Farmers fails to pay for this damage – the actual injury to its insureds’ property: it fails to pay for the damage that remains to their property (e.g., weakened metal) even after repairs are effected. *Id.* This Court should affirm the Court of Appeals on this crucial issue.

But in responding to *Amici* AIA & PCIAA, Farmers claims that in the “one case where the insurer did argue that diminished value is not covered under a ‘direct and accidental loss’ clause, the court agreed with the insurer.” Answer to AIA/PCIAA at 2 (citing *Davis v. Farmers Ins. Co. of Ariz.*, 142 P.3d 17 (N.M. Ct. App. 2006)). *Moeller* is obviously to the contrary. And in *Gonzales*, the Supreme Court of Oregon recently noted that Farmers’ Policy “defines loss broadly: ‘direct and accidental loss of or damage to [the] insured car.’” 196 P.3d at 7.

While *Gonzales* says Farmers did not dispute that its Policy “is broad enough to include diminished value,” that is because its collision-coverage clause is so unambiguously broad that Farmers could not reasonably argue otherwise. *Id.* Farmers’ decision to instead take unreasonable positions solely with its Washington insureds does not render its identical coverage language any narrower. Diminished value damages are plainly encompassed within Farmers’ broad coverage clause.

Moreover, the New Mexico Court of Appeals’ analysis in *Davis* is inapposite. That court considered only “loss in market value” – *i.e.*, “stigma” damages, which *Moeller* is not claiming – it did not consider non-repairable damages directly caused by a

collision, which Moeller is claiming. Compare **Moeller**, 155 Wn. App. at 142 (“Moeller does not seek stigma damages”) with **Davis**, 142 P.3d at 20 (“While the vehicle’s reputation might suffer after a collision, any ‘damage to’ the truck must be ‘direct’ under Plaintiff’s policy” (emphasis supplied)). Here, a collision directly caused diminished-value damage such as weakened metal. **Davis** was answering a question not presented here.⁴

In responding to *Amicus* NAMIC, Farmers claims that the Court of Appeals “created a new category of covered ‘loss’ that is supported neither by Moeller’s insurance policy nor by Washington law.” Answer to NAMIC, at 1. It ignores this Court’s 1922 **Madden** decision discussed above, and the plain language of its Policy. It also cites numerous inapposite cases. Compare *id.* at 1-4, with Moellers’ Reply at 18-25 & nn. 3-7 (explaining in detail why all of Farmers’ authorities are inapposite). There is no need to repeat all of those distinctions here.

Moeller’s loss is covered. This Court should affirm and remand for trial unless Farmers unequivocally excludes the coverage Moeller purchased.

⁴ The same is true of other cases Farmers has cited in its briefing throughout this case. See, e.g., Moeller’s Reply, 25-26.

D. Farmers' Limits of Liability clause does not exclude coverage for diminished-value damages directly caused by a collision.

The Court of Appeals also rejected Farmer's claim that its Limits of Liability clause eliminates the coverage Moeller purchased under Farmers' broad collision-coverage clause. **Moeller**, 155 Wn. App. at 144-46. Applying standard dictionary definitions, the appellate court analyzed the phrase, "repair or replace damaged . . . property with other of like kind and quality" *Id.* In construing this phrase against the insurer, the appellate court followed well established Washington law. *Id.* (citing, e.g., **Allstate Ins. Co. v. Peasley**, 131 Wn.2d 420, 424, 932 P.2d 1244 (1997); **Matthews**, 106 Wn. App. at 765). This Court should affirm.

Farmers' Policy limits its liability to "[t]he amount which it would cost to repair or replace damaged . . . property with other of like kind and quality, or with new property less an adjustment for physical deterioration and/or depreciation." CP 20. While "repair" and "replace" are unambiguous, "like," "kind" and "quality" are undefined terms that together mean "the same as or similar to" the "fundamental nature" and "degree of excellence." **Moeller**, 155 Wn. App. at 145 (quoting WEBSTER'S, *supra*, at 1243, 1310, 1858). Thus, once it chose to repair Moeller's property, Farmers promised

to return it to the same or a similar degree of excellence – the same quality as before the collision. *Id.* The Court of Appeals correctly found this a reasonable interpretation of the language. *Id.*

Even assuming *arguendo* that Farmers’ “values don’t matter” interpretation – all we have to do is glue it back together – were reasonable, the Court of Appeals correctly construed any ambiguity against Farmers. *Id.* at 145-46; accord, e.g., ***Eurick v. Pemco Ins. Co.***, 108 Wn.2d 338, 340, 738 P.2d 251 (1987) (citing ***Farmers Ins. Co. v. Clure***, 41 Wn. App. 212, 215, 702 P.2d 1247 (1985)). The Supreme Court of Oregon recently reached the same conclusion about this same language in ***Gonzales***. 196 P.3d at 4-7 (citing ***Dunmire Motor Co. v. Oregon Mut. Fire Ins. Co.***, 114 P.2d 1005 (Or. 1941); ***Rossier v. Union Auto. Ins. Co.***, 134 Ore. 211, 291 P. 498 (1930); and ***Stoops v. First Am. Fire Ins. Co.***, 22 S.W.2d 1038 (Tenn. 1930)). The Court of Appeals’ decision is well supported. Accord ***Mabry***, 556 S.E.2d at 122-23; ***Hyden v. Farmers Ins. Exch.***, 20 P.3d 1222, 1225 (Colo. Ct. App. 2000); ***Boyd***, 880 F.2d at 272; ***MFA***, 545 S.W.2d at 71.

In responding to *Amici*, Farmers attempts to distinguish some of these cases, and itself cites numerous inapposite cases. See Farmers’ Answers to *Amici*. The parties have thoroughly

briefed the many alleged distinctions. Bottom line, Farmers claims one “apposite” case where it raised the same arguments and the New Mexico Court of Appeals agreed with it, *Davis, supra. Id.* Yet as discussed above, that court (like the many other cases Farmers cites) was addressing “stigma” or “reputational” damage – a “market value” claim – not the weakened metal and other physical damage directly caused by a collision for which Moeller seeks coverage here. See also Farmers’ Answer to NAMIC, at 2 n.1 (citing “market value” cases). While Farmers and its *Amici* now attempt to argue that no unrepairable direct physical damage exists, that is a jury question. See, e.g., *Gonzales*, 196 P.3d at 7-8; *Mabry*, 556 S.E.2d at 119; *MFA*, 545 S.W.2d at 72. This Court should affirm the Court of Appeals and remand for trial.

E. The trial court did not abuse its discretion in certifying the Class under CR 23.

After conducting a rigorous four day hearing, the trial court issued a detailed and careful ruling certifying a class under CR 23. CP 1569-83. The Court of Appeals closely examined each of Farmers’ cross-appeal claims, finding no abuse of discretion. *Moeller*, 155 Wn. App. at 146-51. This Court should affirm and remand for trial.

Farmers tacitly concedes the trial court's CR 23(a) rulings that Moeller meets the numerosity, commonality, typicality, and adequacy of representation factors. *Id.* at 146. The trial court certified the Class under CR 23(b)(3), finding that common questions of fact or law predominate over questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. CP 1577-81. The Court of Appeals found no abuse of discretion. *Moller*, 155 Wn. App. at 148-50.

Specifically, the trial court addressed the four factors in CR 23(b)(3)(A) – (D). CP 1577-81. It first found that while individual plaintiffs have expressed no interest in controlling the prosecution of the action, the Defendants “will be able to present any relevant information to the Court and jury,” so a class action is preferable. CP 1578. Second, it found that no other litigation affects this action. *Id.* Third, it found that no evidence was presented against litigating in its jurisdiction. *Id.*

On the fourth factor – trial management – the trial court noted that this was a “heavily disputed” issue that it “seriously considered” as a “significant factor” in its decision. CP 1578-79. It noted that neither the large number of class members nor Farmers’

claim of “difficulty in obtaining data on them” can defeat certification unless such management problems “make a class action less fair and efficient than other available techniques.” CP 1579.

Ultimately, the trial court found a class action necessary (*id.*):

Here, the only conceivable method to adjudicate or resolve this case is through a class action, as the de minimis size of individual claims would leave policyholders without practical recourse, absent class treatment, to address the contract construction (legal) and damages (fact) issues.

The Court of Appeals rested its affirmance primarily on three key cases, ***Weston v. Emerald City Pizza, LLC***, 137 Wn. App. 164, 151 P.3d 1090 (2007); ***Smith v. Behr Process Corp.***, 113 Wn. App. 306, 54 P.3d 665 (2002); and ***Sitton v. State Farm Mut. Auto. Ins. Co.***, 116 Wn. App. 245, 63 P.3d 198 (2003). ***Weston*** requires a “rigorous analysis” by the trial court, albeit under a liberal construction of CR 23. 137 Wn. App. at 168. ***Smith*** explains that liberal construction is proper because CR 23 “avoids multiplicity of litigation, ‘saves members of the class the cost and trouble of filing individual suits[,] and . . . frees the defendant from the harassment of identical future litigation.’” 113 Wn. App. at 318. As here, class actions generally “provide a procedure for vindicating claims which, taken individually, are too small to justify individual legal action but which are of significant size and importance if taken as a group.”

Id. at 318-19 (quoting ***Brown v. Brown***, 6 Wn. App. 249, 253, 492 P.2d 581 (1971)).

In ***Sitton***, as here, the trial court certified a class under CR 23(b)(3) and the appellate court affirmed that ruling. But unlike here, that trial court went on to grant “plaintiffs’ motion to bifurcate the trial and adopted a plan for two trial phases,” the first to determine whether the insurer “implemented a program designated to deny, limit, or terminate [insureds’] PIP claims,” whether this was bad faith, and “aggregate damages.” 116 Wn. App. at 250. The second “inchoate” phase would “address issues of individual damages.” *Id.* The ***Sitton*** court held that the adopted trial plan violated due process because it deprived the defendants of their right to present any liability defenses and relieved the plaintiffs of any duty to prove causation. 116 Wn. App. at 258-60.

But the trial court in this case has not adopted any trial plan. Rather, it has unequivocally stated that no trial plan “should” or “will” deprive Farmers of its defenses or alleviate the plaintiffs’ burden to established liability, causation or damages. CP 1581. This case is not like ***Sitton***, except that both cases were properly certified under CR 23(b)(3).

In responding to *Amicus* NAMIC, Farmers argues that the Court of Appeals' analysis of the trial court's class certification is "cursory, at best." Farmers' Ans. to NAMIC at 3. Of course, the appellate court simply applies an abuse of discretion analysis to the trial court's rigorous examination. **Weston**, 137 Wn. App. at 167-68. But the appellate opinion is careful and thorough, not cursory.

Farmers also repeats its false claim that Moeller "admits" some class members have no claim. Farmers' Ans. to NAMIC at 3. As noted in detail in the Moeller's Answer to the Petition for Review, Farmers is incorrect because (a) no such "admission" ever occurred, (b) *de minimis* damage is not no damage, and (c) the trial court can easily manage this issue at trial. See Ans. at 13-15.

Farmers further claims that the appellate opinion "contains a footnote quoting the trial court's description of Moeller's trial plan" Farmers' Ans. to NAMIC at 3 (citing 155 Wn. App. at 150 n.14). Yet that quote is expressly explaining the plaintiff's "preliminary plan of how to proceed," not even a proposed trial plan, much less an adopted trial plan. While it is true that the appellate court does not go on *ad nauseam* about this non-issue, it does say, "[w]e see nothing in the record indicating that the trial court abused its discretion on this point." 155 Wn. App. at 150 n.14. Since the only

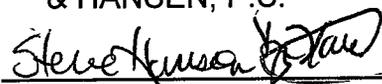
issue on appeal is whether the trial court acted within its broad discretion in certifying the class, this is the only required analysis.

CONCLUSION

For the reasons stated above and in the other briefing, this Court should affirm and remand for trial.

RESPECTFULLY SUBMITTED this 3rd day of September, 2010.

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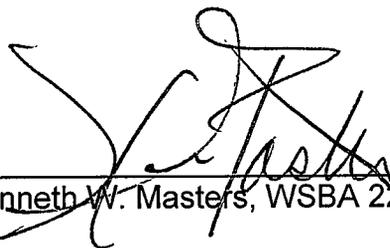
CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **ANSWER TO PETITION FOR REVIEW** postage prepaid, via U.S. mail on the 3rd day of September 2010, to the following counsel of record at the following addresses:

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