

ORIGINAL

NO. 66428-0-I

IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION I

KING COUNTY SUPERIOR COURT,

Appellant,

v.

ENCARNACIÓN IGNACIO AND KARLA FARRAS,

Respondents.

**AMICUS CURIAE MEMORANDUM OF ALLIED DAILY
NEWSPAPERS OF WASHINGTON, WASHINGTON
NEWSPAPER PUBLISHERS ASSOCIATION and
WASHINGTON COALITION FOR OPEN GOVERNMENT**

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I. INTRODUCTION

This case presents the alarming proposition that the courts of Washington may alter electronic records for the purpose of misleading the public. At issue is an order designed to create a false impression: that two renters who were sued for eviction were never sued. This court-devised pretense is based on the notion that the public cannot be trusted with the truth. This is an affront to the open administration of justice guaranteed by Article I, Section 10 of the Washington Constitution. If upheld, the order would erode public confidence in the accuracy and forthrightness of court records, and defeat a key purpose of Article I, Section 10 to inspire trust in the justice system.

The Superior Court Management Information System, or SCOMIS, allows the public to search for cases by party name or case number. To find out for the first time if a person has been a criminal defendant or civil litigant, a SCOMIS user must enter the person's name. Thus, if a party's name is erased from a SCOMIS record of a case, that case is hidden as if it never existed – which was the stated purpose of the name-concealing motion in this case.

While there may be exceptional cases when a proven threat of imminent, serious harm justifies such an extraordinary barrier to public

information, this is not such a case. Renters Ignacio Encarnación and Karla Farias merely stated a generalized fear that, because one apartment manager allegedly rejected their rental application based on records of their eviction suit, others would do the same. To set such a low threshold would invite similar erasure motions in all kinds of commercial disputes.

More importantly, the court wrongly presumed that there is no public value in learning about the existence of a case in the absence of an actual eviction. In reality, the vast majority of eviction suits and actions of any kind are settled without any determination of liability. To limit public access to only those cases in which culpability is proven would shroud most of the justice system in secrecy. It would encourage culpable defendants to insist on concealing allegations as a condition of settlement, buying not only plaintiffs' silence but the court system's as well. And if landlords, lenders and employers believe that SCOMIS records will be erased once suits are dropped, they will rely more heavily on credit reporting agencies which do not tell the whole story.

If the courts want to use SCOMIS to help renters, they should provide more information – stating the outcomes of eviction cases – not less. As a California court aptly noted when holding that the state of California could not constitutionally prevent credit agencies from

reporting eviction actions, there is an “overarching public interest...in the dissemination of truth.”

II. INTEREST OF AMICI

Allied Daily Newspapers of Washington (Allied), Washington Newspaper Publishers Association (WNPA), and Washington Coalition for Open Government (WCOG) appreciate the Court’s invitation to appear as amici here. Allied is a non-profit trade association representing 25 daily newspapers in Washington. WNPA is a non-profit trade association representing 140 weekly community newspapers in this state. WCOG is a non-profit statewide organization dedicated to promoting and defending the public’s right to know about the conduct of public business and matters of public interest. These three nonpartisan organizations advocate for public access to government records, including court records, and for government accountability to the citizens of this state.

Amici’s members often use SCOMIS as a source of information about issues of public interest. Newspapers’ ability to fully inform readers will be impaired if names of any litigants can be hidden based on speculative, generalized fears of harm. Allied, WNPA and WCOG often participate as amici in cases involving Article I, Section 10 because of

their strong interest in applying a strict standard for concealing court records and protecting the public's ability to monitor the justice system.

III. DISCUSSION

A. No Statute Authorizes Destruction of SCOMIS Records.

Allied, WNPA and WCOG agree with appellant King County Superior Court that removal of names from SCOMIS constitutes destruction of a record, and therefore is prohibited. GR 15(h) (destruction must be expressly authorized by statute); Brief of Appellant, p. 9 (“Redacting a party's name from court records severs the party's connection to an underlying case and effectively results in the destruction of records because court personnel and the public can never find a reference to the case once the parties' names are severed from the cause number”). Because King County has thoroughly briefed this issue, amici do not repeat those arguments here. RAP 10.3(e).

B. This Court Should Not Relax the Standard For Name Erasures.

Contrary to the American Civil Liberties Union (ACLU) amicus arguments, this Court should *not* relax standards for eviction defendants to erase names from SCOMIS. Brief of ACLU, pp. 4, 15-18. Rather, if this Court holds that name erasure is not a prohibited destruction of records, it should clarify that the standard outlined in Indigo Real Estate Services v.

Rousey, 151 Wn.App. 941, 948 (2009), requires giving more weight to the public interest than the trial court gave here.

In Rousey, a renter brought an uncontested motion to redact her full name from SCOMIS based on the same arguments presented here – she had settled an eviction suit without being evicted, and she feared that merely being associated with the suit would jeopardize future rental opportunities. Id. at 944-945. The trial court denied the motion. Id. at 945. On appeal, this Court held that SCOMIS is a court record subject to both GR 15 and Article I, Section 10 restrictions on redaction, and remanded the case for application of the proper standards. Id. at 950-951. This Court did *not* hold that eviction defendants who avoid eviction are entitled to remove names from SCOMIS, nor should it do so now.

1. This Court correctly recognized that GR 15 alone does not adequately protect the public interest.

Under GR 15, a court may redact a record if the specific redaction “is justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the court record.” GR 15(c)(2). This Court properly recognized that GR 15 alone does not sufficiently protect the public interest in open court records because it does not include the constitutional requirement to demonstrate a serious and imminent

threat to an important interest justifying closure. State v. Waldon, 148 Wn.App. 952, 967 (2009); Rousey, 151 Wn.App. at 948.

2. The constitutional test relies on facts, not presumptions.

Under the five-part Ishikawa test,¹ the moving party must show a need for redaction or sealing and “state the interests or rights which give rise to that need.” Rousey, 151 Wn.App. at 948. “If closure and/or sealing is sought to further any right or interest besides the defendant’s right to a fair trial, *a serious and imminent threat* to some other important interest must be shown.” Id. at 948 (italics added).²

The ACLU urges this Court to retreat from Rousey and to hold broadly that renters “situated similarly” to Mr. Encarción and Ms. Farias may redact their names from SCOMIS. Brief of ACLU, pp. 15-18 (“There is no need...for individualized consideration by a judge in each instance”). In other words, instead of starting with a presumption of openness, courts would presume that public access to SCOMIS poses a serious threat.

This indiscriminate approach already has been rejected. In Allied Daily Newspapers of Washington v. Eikenberry, 121 Wn.2d 205 (1993),

¹ Referring to Seattle Times v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982).

² The test also requires: an opportunity for the public to object; analysis of whether the method of curtailing access is the least restrictive possible and effective in protecting the threatened interest; weighing the competing interests of the secrecy proponent and the public; and an order that is no broader in application or duration than necessary to serve its purpose. Id. at 949.

the Washington Supreme Court struck down a statute designed to conceal names of all child rape victims without an individualized analysis of each case. The five-part test *must* apply individually to the facts of each case.

Allied recognized a compelling interest in protecting a child victim from further harm and ensuring the child's privacy, and said "these interests on an individualized basis may be sufficient to warrant court closure." Id., 121 Wn.2d at 211. However, the child's age, maturity, understanding, desires, the nature of the crime, and the interests of the parents may tip the balance in favor of public access. Id. at 211-12. Explaining the danger of presuming the public interest must yield in every case, the Court said, "Openness of courts is essential to the courts' ability to maintain public confidence in the fairness and honesty of the judicial branch of government as being the ultimate protector of liberty, property and constitutional integrity." Id. at 211.

The same principle applies here. Rousey correctly held that courts must decide on a case-by-case basis whether to erase a renter's name from SCOMIS records of eviction suits. Rousey, 151 Wn.App. at 952.

[T]he court has identified by rule particular records and information to which access is restricted. These include certain health care and financial records filed in family law and guardianship cases. Notably, *the court has not established similar general restrictions for unlawful detainer proceedings*. Instead it has emphasized by rule

and decision that requests to restrict access to court records and information *must be decided on a case-by-case basis*, starting with the presumption of openness.

Id. at 952 (italics added). In short, the facts matter. Id.³

If this Court holds that any settled eviction suit can be hidden from SCOMIS searches, regardless of the facts, landlords will lack the truthful information necessary to identify which rental applications merit scrutiny. Truly bad renters – not just innocent ones - will escape scrutiny. And the public will no longer trust SCOMIS to tell the truth. Fostering mistrust of courts defeats the purpose of Article I, Section 10. Dreiling v. Jain, 151 Wn. 2d 900, 903-04 (2004) (“Justice must be conducted openly to foster the public’s understanding and trust in our judicial system and to give judges the check of public scrutiny”). In sum, this Court should decline to adopt a broad presumption that settled eviction cases may be concealed.

³ Allied, WNPA and WCOG wish to avoid a narrow ruling based on the facts of this case. However, this footnote calls attention to a factual issue which was overlooked in prior briefing because it illustrates why a fact-specific analysis is important.

In ordering removal of the renters’ names from SCOMIS, the trial court incorrectly found: “Upon the filing of this action...Defendants’ Ignacio Encarción and Norma Karla Farias’s names were listed in the Court’s information system as the defendants in an unlawful detainer action.” CP 727-28. Actually, the renters’ actual names were *not* listed. CP 287-293. SCOMIS identified “N. Karla Farras,” not Norma Karla Farias, as the defendant. CP 291, 293. In fact, the evidence showed that the only “Farias” listed in SCOMIS was Carlos Farias, a plaintiff in a wrongful death case. CP 291. Also, the record shows that Ignacio Encarción’s name was backwards, as if Ignacio was his last name. CP 287, 289.

The fact that SCOMIS did not accurately identify the renters undermines the court’s conclusion that SCOMIS presented a serious and imminent threat to their ability to obtain housing. CP 730. A landlord would have to assume that Farras really is Farias, and Ignacio really is Encarción, which is highly improbable, particularly regarding Farias.

C. Public Interest Does Not Depend on a Finding of Liability.

A major flaw in the trial court's reasoning is that, if a defendant is not found culpable, the public's interest is diminished. CP 730. To embrace such reasoning is to invite concealment of the vast majority of cases of all kinds, since relatively few - only 7,868 of 753,082 proceedings statewide in 2010 - are resolved by trial or summary judgment determining liability.⁴ The trial court's reasoning encourages culpable defendants to make sealing a condition of settlement – in effect, to buy silence about allegations - subverting the purpose of Article I, Section 10 to show how the justice system works. It also contradicts the admonition in Rufer v. Abbott Laboratories, 154 Wn.2d 530 (2005), that Article I, Section 10 applies to *all* court filings and activities, not just results.

As previously noted, the right [to the open administration of justice] is not concerned with merely whether our courts are generating legally sound *results*. Rather, we have interpreted this constitutional mandate as a means by which the public's trust and confidence in our *entire judicial system* may be strengthened and maintained.

Rufer at 548-49 (italics in original).

1. The merits were not decided and cannot be the basis for concealment.

⁴ See "Caseloads of the Courts of Washington" at:
<http://www.courts.wa.gov/caseload/?fa=caseload.showReport&level=s&freq=a&tab=&fileID=trlyr> and
<http://www.courts.wa.gov/caseload/?fa=caseload.showReport&level=s&freq=a&tab=&fileID=hrgyr>.

In ordering King County to remove the renters' names from SCOMIS, the trial court stated that they "raised a meritorious defense," and that their lack of culpability is the reason why their interest in secrecy outweighs the public interest in open court records. CP 728, 730. Actually, this case settled out of court when the landlords paid the renters to move out. CP 41-42. The merits were never decided.

Amici take no position as to whether the landlords had a right to eviction in this case. The point is that there was no adversarial process determining the merits one way or the other, and it is error to equate settlement with exoneration.⁵ This Court should clarify that unchallenged assertions of a meritorious defense are not sufficient grounds to conceal.

To hold otherwise is to erect an impossible barrier to public access. After a settlement, plaintiffs have no reason to debate the merits and may be contractually obligated to remain silent. If public access to a settled lawsuit depends on proving the plaintiff's claims, a third party must step into the plaintiff's shoes. Such a requirement would vitiate Article I, Section 10 by forcing proponents of openness to spend their own resources to litigate issues that the parties themselves declined to litigate.

⁵ In general, when a suit is settled voluntarily, it does not mean the suit had no merit. Rather, it suggests that the defendant perceived a risk of losing, and that the parties wanted to avoid costs of a trial.

This concern is especially compelling here, where a public agency – King County Superior Court – would be forced to expend scarce taxpayer resources untangling a dispute between private parties just to vindicate a public right of openness. In fact, King County did not attempt to prove the merits of the case. CP 295 (accepting the renters’ statement of facts). In sum, if Article I, Section 10 is to maintain its vitality, public access to court records cannot depend on finding that a defendant is culpable if the parties have declined to litigate that question.

2. Settled cases provide valuable information to the public.

The lack of a judgment on the merits does not make cases any less interesting or important. In Re Marriage of Treseler and Treadwell, 145 Wn. App. 278, 282, 285 (2008) (rejecting the notion that the public has no interest in a record unless it is “used by the court to make a decision”). On the contrary, when private settlements prevent the courts from acting on societal problems, the need for public awareness is greater. The public interest is especially strong if a settled case involves a recurring issue, a prominent person, or a vulnerable victim. For example, an executive may be accused of sexual harassment in successive suits, or a defective toy design may injure one child after another. The public cannot protect its interests if defendants may erase their names from SCOMIS, blocking

access to court files, simply because they avoided judgment.⁶ And imagine the voters' anger if, after electing a politician or judge, they learned that the courts had concealed the candidate's name from SCOMIS records which would have invited scrutiny of his or her character.

Mere allegations raise red flags that are important to the public's ability to safeguard its interests.⁷ See, e.g., Ammons v. Wash. Dept. of Social and Health Services, 648 F.3d 1020, 1032-33 (9th Cir. 2011) (hospital manager had a duty to monitor an employee even though he was officially exonerated of allegations that he molested a minor patient, and the manager should have taken steps to prevent abuse of a second patient). The public oversight protected by Article I, Section 10 includes evaluating whether an exonerated defendant may threaten a public interest.

Moreover, landlords believe that the mere filing of a suit is significant because it shows that "a landlord elected to take the time and expense to file." CP 23. In this case, for example, the apartment manager

⁶ Public access to evidence of prior incidents can be important to compensating victims in negligence or product liability suits which require proof that the defendant had notice of the danger. See, e.g., RCW 7.72.030 (likelihood of harm at the time of manufacture is an element of product liability); Musci v. Graoch Associates Ltd. Partnership No. 12, 144 Wn.2d 847, 859 (2001) (plaintiff in unsafe premises suit must prove landlord had notice of dangerous condition).

⁷ Bellevue John Does 1-11 v. Bellevue School Dist. No. 405, 164 Wn.2d 199 (2008), cited by respondents, has no bearing here because it involved allegations made to an agency and not claims filed in court. CR 11(a) ensures that court claims are well grounded in fact and law, whereas anyone can make an unfounded allegation to a school district. Also, Article I, Section 10 did not apply in Bellevue John Does 1-11.

knew about the “favorable outcome” of the suit, but allegedly rejected all renters with a history of being sued. Brief of Respondents, p. 6. Perhaps such a policy reflects a lack of resources to investigate each applicant’s litigation history, or an assumption that landlords always have good reasons to file eviction suits. Whatever the reason, it is not the courts’ job to interfere with the private, lawful practices of non-parties by withholding truthful public information.

Moreover, landlords are aware that “the vast majority of filed unlawful detainer suits are resolved prior to an actual court hearing.” CP 23. Thus, they must rely on settled cases for most of the available clues about which renters’ applications warrant further investigation. If the courts start redacting renters’ names just because their eviction suits are dropped, the public will stop trusting SCOMIS. And landlords will be forced to rely more heavily on credit reporting agencies collecting records at the time of filing, which will defeat the purpose of SCOMIS erasures to hide the existence of suits, and also will promote tenant screening based on incomplete information. In sum, because records of settled cases have information useful to protecting public interests, this Court should reverse the order and clarify that the public interest does *not* depend on finding a defendant to be culpable.

D. Names Are Public Even When Privacy Concerns are Greatest.

The Washington Supreme Court adopts the rules governing this state's courts. GR 9. In adopting GR 15, the Supreme Court embraced the sound principle that even when privacy concerns are most compelling, identities of the parties are of such importance that they must remain publicly available through SCOMIS.

GR 15(c)(4) provides that names of the parties must remain in public indices even when an *entire* court file is sealed. GR 15(c)(4) says:

The existence of a court file sealed in its entirety, unless protected by statute, is available for viewing by the public on court indices. The information on the court indices is limited to the case number, *names of the parties*, the notation 'case sealed,' the case type and cause of action in civil cases...

(italics added.) Thus, even when safety or privacy concerns are so great as to require concealing every word of every pleading in a case, *the names of the parties are still public information.*

The same principle is reflected in GR 15(d). When a court vacates a criminal conviction and orders records sealed, the "public court indices" still must show "the adult or juvenile's name" as well as the case number, case type, and the notation "vacated." GR 15(d). If the courts can use the notation "vacated" or "case sealed" in an index, surely they can place a "no eviction" notation in SCOMIS as an alternative to erasing the

defendants' names. Accordingly, this Court should hold that it is better to give more information than less, and that the least restrictive method of protecting the renters' housing interests is to add a notation to SCOMIS instead of removing the renters' names.

E. State v. McEnry is Dispositive Here.

In State v. McEnry, 124 Wn.App. 918, 920 (2004), a man obtained an order sealing the entire court file of his drug and firearm case after his convictions were vacated. The Court reversed the sealing order because McEnry merely speculated that an open file would harm his future employment and housing, and because the public interest was not considered. Id. at 926.

The renters argue that "McEnry dicta strongly suggests that...a tenant who depends on the rental market and whose housing prospects are diminished by a court record may have cause to seal it." Brief of Respondent, p. 23. Actually, the Court merely noted that "McEnry conceded that potential loss of housing...was 'not an issue' because he owns his home." McEnry, 124 Wn.App. at 926. This does not mean McEnry could have sealed his file if he was a renter. It means there is no serious and imminent threat to housing when the fear of harm is

speculative, as in this case where the renters had *no pending application* with a landlord who threatened to reject them based on the eviction suit.

The other relevant principle in McEntry is that the public still has a legitimate interest in court records even when the person who seeks privacy has been officially exonerated. Significantly, McEntry's criminal court file was open to public scrutiny although RCW 9.94A.640 released him "from all penalties and disabilities resulting from the offense."

McEntry, 124 Wn.App. at 926. The statute even gave McEntry the right to say he was never convicted. RCW 9.94A.640(3). But Article I, Section 10 prevents the courts from being complicit in that falsehood. McEntry at 927. In sum, for these reasons, McEntry requires reversal here.

F. There Was No Evidence that Erasing the Renters' Names From SCOMIS Would Stop Landlord Rejections.

Trial courts should not erase renters' names from SCOMIS without ensuring it would actually accomplish the intended purpose - preventing landlords from learning they were sued. Rousey, 151 Wn.App. at 953.

The [Rousey] record is silent as to when private tenant screening services first acquire the identity of parties to a pending unlawful detainer action. If this information is first retrieved either at the time of filing or entry of the order of dismissal, the relief requested by Rousey may not accomplish her goal nor that of similarly situated tenants in the future. Evidence from a tenant screening service as to when this information is collected and how it is disseminated could inform the trial court about this issue.

Id. Despite this guidance, the trial court here made no finding as to whether the renters' names appeared in previously compiled credit reports. CP 727-733. This error warrants reversal. Rousey, 151 Wn.App. at 953.⁸

G. Government May Not Suppress Truthful Reporting of Suits.

U.D. Registry, Inc. v. State of California, 34 Cal.App.4th 107, 109-110, 40 Cal.Rptr.2d 228 (Cal. App. Div. 2, 1995), dealt with a California statute which prohibited credit reporting agencies from reporting eviction suits "unless the lessor was the prevailing party." Under the statute, cases resolved by settlement could not be reported unless the tenant agreed to the reporting. Id. The court struck down the statute as unconstitutional, holding that a state may not suppress the dissemination of concededly truthful information simply because of fears regarding the effect of the information. Id. at 109. The court explained that credit reports are not commercial speech and are protected by the First Amendment, stating:

Section 1785.13, subdivision (a)(3) seeks to limit the free flow of information for fear of its misuse by landlords.... 'There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them...'

⁸ The renters acknowledge that tenant screening companies commonly develop lists of eviction defendants for later use by landlords. CP 6-7; Brief of Respondents, p. 19.

Id. at 115-116 (citations omitted).

In sum, credit agencies have a First Amendment right to report truthful information about eviction filings. Accordingly, erasing the information from SCOMIS will not prevent landlords from learning about such suits, but will foreclose communication necessary for public trust.

H. The Legislature Wants Landlords to Know About Suits.

Washington’s Fair Credit Reporting Act of 1993, which has never been challenged on constitutional grounds,⁹ purports to limit which “items of information” may be reported by credit reporting agencies. RCW 19.182.040(1). The act says a consumer report may not include “suits and judgments that, from date of entry, antedate the report by more than seven years.” RCW 19.182.040(1)(b). This reflects a policy that landlords *should* know about eviction suits filed within the past seven years. Also, the Legislature does not limit reporting based on *results* of suits, reflecting a policy that mere filings are important. As long as an agency reasonably ensures accuracy, it may report suits regardless of outcome. RCW 19.18.060(2).

Moreover, RCW 59.18.580, which prohibits rejection of a tenant based on status as a domestic violence victim, allows “adverse housing

⁹ The only published opinion construing the Act affirmed dismissal of a defamation suit. Van Hoven v. Pre-Employee.com, Inc., 156 Wn.App.879, 884 (2010).

decisions based on other lawful factors within the landlord's knowledge." If the Legislature wanted to prohibit landlords from rejecting tenants based on eviction suits that are dismissed, it would have said so. In sum, this Court should decline to adopt policies which the Legislature has rejected.

I. The Constitutional Right to Privacy Does Not Apply To Electronic Court Records.

Article I, Section 7 says: "No person shall be disturbed in his private affairs...without authority of law." Courts have recognized two kinds of protected privacy interests: 1) autonomous decisionmaking involving issues of marriage, procreation, family, child rearing and education; and 2) nondisclosure of "intimate" personal information, but only when there is no legitimate government interest in disclosure. O'Hartigan v. Dep't. of Personnel, 118 Wn.2d 111, 117 (1991).

Listing litigants' names in SCOMIS reveals nothing of an intimate nature and serves a legitimate government interest, the open administration of justice guaranteed by Article I, Section 10. Accordingly, neither Rousey nor any other published opinion holds that Article I, Section 7 prohibits court clerks from disclosing that a party has been sued.¹⁰ Such a holding would be nonsensical, since the information is not obtained

¹⁰ The renters cite Allied for the proposition that Article I, Section 7 protects the "privacy" interests at issue here. Brief of Respondents, p. 15. But Allied involved child rape, an intimate personal matter, not applications for rental housing.

through a warrantless intrusion into a party's home or private activities. Rather, the court system passively receives the names of litigants when suits are filed. The government is not disturbing any private affairs.

Moreover, if this Court holds for the first time that Article I, Section 7 extends to non-intimate matters such as landlord-tenant disputes, as the respondents and ACLU propose, the courts will face similar name-erasure motions in all kinds of commercial cases. A consumer who settles a collection suit by paying the debt could assert a privacy interest in preventing future creditors from learning about the suit. A merchant who rejects goods, and is sued by the seller, could argue a privacy interest in preventing other sellers from knowing about the suit. A corporate executive who successfully defends against a discrimination suit could assert a privacy interest in hiding the suit from future employers. In sum, names of defendants in eviction suits are not entitled to privacy protection.

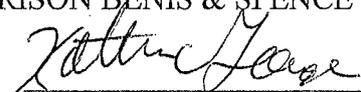
IV. CONCLUSION

For the foregoing reasons, the Court should reverse the trial court.

Dated this 19th day of December, 2011.

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on December 19, 2011, I caused delivery of a copy of the Amicus Curiae Memorandum of Allied, WNPA and WCOG to the following:

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