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STATE OF WASHINGTON
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No. 97507-8

SUPREME COURT
OF THE STATE OF WASHINGTON

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SHARON KAY and JIM HOWE,

Respondents,

and

THOMAS and MARIE DICKENS,

Defendants,

vs.

KING COUNTY, a municipal corporation,

Petitioner.

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# RESPONDENT'S ANSWER TO PETITIONER'S PETITION FOR REVIEW

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## I. INTRODUCTION

On August 15, 2017, King County proposed to settle Sharon Kay's inverse condemnation claim by offering to buy her home for $552,000, subject to the parties being able to negotiate the specific terms of a real estate purchase and sale agreement. On October 13, 2017, following a three-week trial, the jury agreed with Kay's updated appraisal[1] and found the unimpaired value of Kay's home was $650,000, or almost 18% higher than King County's settlement offer. And it found that the County's operation of the Cedar Hills Regional Landfill had caused a taking or damaging, lopping off ten percent of the value of Kay's home or $65,000, but with Kay retaining title. Accordingly, including statutory prejudgment compensation, the total value of Kay's inverse judgment (the "Judgment") was over $681,000, or more than 23% higher than King County's conditional offer to buy her home on undisclosed and to-be-negotiated terms. Simply put, the County never offered to pay Kay any "damages"; rather the County merely offered to buy her property for $100,000 less than the jury determined it was worth.

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[1] Richard Hagger, Kay's appraiser performed an appraisal in October 2016 and valued her property at $570,000. CP 139. At trial nearly a year later Hagger testified that the King County real estate marketplace was one of the hottest in the country and that the value of Kay's property had increased significantly as a result.

But even before this Court gets to comparing the Judgment against the County's offer, it must first address the flaws in the County's offer. And that is that the supposed offer the County wants you to consider was no real offer at all. The County offered to purchase Kay's home for $552,000, but then made it subject to "agree[ing] on a mutually acceptable purchase and sale agreement and closing."[2] There was no indication of the type of deed Kay would provide, the payment terms, representations and warranties, closing conditions and timing, and a host of other matters the statute of frauds requires to make an offer valid. In fact, had the County's written offer been what the parties had agreed to at a mediation, it wouldn't even be enforceable under CR 2A.

There is simply no world, real or imagined, where Sharon Kay would have been better off accepting the County's conditional offer to sell her home for $552,000, when the jury valued it at $650,000. Had this been a regular eminent domain action, in which the County formally condemned Kay's home, there would be no question regarding Kay's entitlement to attorneys' fees and costs. But because this is an inverse condemnation action, the County asks this Court to re-write the relevant statute and remove from the Court's analysis any

[2] CP 101-102; Appendix A.

context or information other than two abstract numbers—the monetary amount the County offered and a single number from the Judgment—untethered from the rest of the Judgment, where the numbers came from, what they compensate for, how the jury derived them, or the ultimate outcome. That is not and should not be the law.

## II. STATEMENT OF CASE AND PROCEDURAL HISTORY

Plaintiff Sharon Kay and her long-time partner, Jim Howe, lived next to the 920-acre Cedar Hills Regional Landfill. After a disastrous pipe break in December 2013 that released millions of cubic feet of rancid landfill gas into the atmosphere, Kay and Howe were repeatedly gassed by operations at the Landfill, often requiring them to vacate their home.[3] In 2015, Kay and Howe brought multiple claims against King County, the owner and operator of the Landfill, including claims for nuisance, trespass, negligence, strict liability, and negligent infliction of emotional distress.[4] Kay, the sole owner of their home, also brought an inverse condemnation claim.[5] Kay and Howe subsequently dismissed the trespass, strict liability, and negligent infliction of emotional distress claims and went to trial in September of

[3] CP 24-33.

[4] Id.

[5] Id.

2017 on the claims for negligence, nuisance, and for Kay, inverse condemnation.

On August 15, 2017, the County made its first and only written offer to Kay: $552,000 in exchange for fee-simple title of the entirety of Kay's property subject to "the parties . . . agree[ing] on a mutually agreeable purchase and sale agreement and closing," and the dismissal of her claim for inverse condemnation.[6] Kay did not accept the offer and the parties proceeded to trial.

At trial, the jury determined the County was indeed liable for inverse condemnation.[7] The jury received a Special Verdict Form that asked the jury to make specific factual findings of when the inverse condemnation commenced; the fair market value of Kay's property at the time of trial; together with any reduction in value caused by the County's actions. The jury determined that the taking started with the pipe break on December 7, 2013; that the unimpaired fair-market value of Kay's property was $650,000; and that the "impaired" value of her property was $585,000.[8] The jury awarded Kay inverse-condemnation damages equal to the difference between the property's

[6] CP 101-102; Appendix A.
[7] CP 68-73.
[8] *Id.*

fair market value and impaired value – $65,000.[9] The trial court added $31,221.37 of interest to the judgment.[10] On December 11, 2017, the Court entered the Judgment that reflected the jury's valuations and its verdict.[11]

Following the trial, Kay moved for an award of statutory attorneys' fees and costs under RCW 8.25.075(3).[12] The trial court summarily denied the motion without explanation, and Kay appealed.[13]

By a 3-0 decision, the Court of Appeals reversed the trial court on two independent grounds. First, it held that the County's offer to pay Kay $552,000 in return for dismissal of her claims and conveyance of her property was not a "qualifying offer" that could be compared to the final Judgment because the offer required Kay to transfer title to the County whereas the Judgment allowed Kay to keep her property.[14] Second, the Court of Appeals found that the value of the Judgment was "readily ascertainable" and was $681,221.37

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[9] *Id.*
[10] CP 74-77.
[11] *Id.*
[12] CP 78-89. Kay's motion sought only a determination of whether Kay was entitled to any attorneys' fees and costs and did not seek any specific amount of fees and costs, reserving that issue until the trial court ruled on whether Kay had an entitlement to any fees and costs.
[13] CP 158-159.
[14] Opinion at page 9.

whereas the County's offer was $552,000 meaning the final judgment easily exceeded the County's offer by more than 10 percent.[15]

## III. ARGUMENT

At its core, the question before the Court is: Does context matter?[16] It must.

There is simply no authority for – and no good reason why – courts should ignore the context, nature, and total value of the offers made and relief received when evaluating offers made under RCW 8.25.075(3). Ignoring the context and total value would lead to absurd results that are contrary to the statute's purpose.

Tellingly, the County's Petition does not allege that the Court of Appeals decision "is in conflict with a decision of the Supreme Court,"

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[15] Id. at page 12.

[16] In all similar situations, courts consider *all* aspects of the value of the offer – and the ultimate relief received – when determining whether the plaintiff recovered more or less than the offer at trial. *See, e.g.*, *Reiter v. MTA New York City Transit Auth.*, 457 F.3d 224 (2d Cir. 2006) (comparing monetary offer and judgment that included nonmonetary relief in the form of employment reinstatement under Rule 68); *Liberty Mut. Ins. Co. v. EEOC*, 691 F.2d 438, 439-42 (9th Cir. 1982) (considering offer of judgment consenting to an injunction against disclosure of information under Rule 68); *Lish v. Harper's Magazine Found.*, 148 F.R.D. 516, 520 (S.D.N.Y. 1993) (considering judgment's grant of authorial right to control publication and judicial determination of copyright violation). *See* Thomas L. Cubbage III, Note, *Federal Rule 68 Offers of Judgment and Equitable Relief: Where Angels Fear to Tread*, 70 Tex. L. Rev. 465, 475 (1991) (surveying court decisions involving the application of Rule 68 to equitable relief and articulating a set of criteria for evaluating the favorableness of equitable offers and judgments). *See also Mesa Forest Products, Inc. v. St. Paul Mercury Ins. Co.*, 73 Cal. App. 4th 324 (1999) (considering post-offer payments made by the defendant as part of relief received for Rule 68 purposes even though payment was not part of the judgment); *Mullenmaster v. Newbern*, 679 So.2d 1186 (Fla. Ct. App. 1996) (considering the value of the transfer of ownership of property for Rule 68 purposes).

or "in conflict with a published decision of the Court of Appeals," or that its decision raises "a significant question of law under the Constitution" of Washington or the U.S.[17] Instead, King County, the largest county in the state that likely has more experience with eminent domain and inverse condemnation law than any other, argues that the Court of Appeals decision "imposes an unworkable situation"[18] that "allows the property owner to game the system and congest the courts."[19] This argument conveniently ignores the fact that in any eminent domain or inverse condemnation proceeding the County—or any other condemnor—is the master of its own destiny. It controls the activity that has or will cause a taking or damaging. It controls the decision of whether to initiate an eminent domain action or to deny any liability in response to an inverse condemnation claim. And most importantly, it entirely controls the offer to be evaluated under the statute. It determines the amount, what the amount is for and any conditions on the offer.

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[17] RAP 13.4(b)(1)-(3).

[18] Petition for Review, page 2.

[19] Id. at page 12.

## A. INVERSE CONDEMNATION DIFFERS SUBSTANTIALLY FROM EMINENT DOMAIN.

Over the last five decades the Washington legislature has codified various processes, procedures and duties regarding the exercise of eminent domain authority or the effect of inverse condemnation. In response to perceived unfairness to condemnees, in 1967 the Legislature passed RCW 8.25.070 and 8.25.075. Both are fee-shifting statutes. Their purpose is to encourage a fair settlement before trial and ensure that the agency that is involved in taking a property makes a good faith effort to settle.[20] The statutes also allow property owners who are forced to proceed to trial to recover their litigation expenses if the agency fails to make an adequate offer of compensation – defined to be no less than 10 percent below the fair market value established by the jury.[21]

RCW 8.25.070 applies to cases of traditional eminent domain. While similar to RCW 8.25.070, RCW 8.25.075(3) specifically applies to claims for inverse condemnation.[22] The statute authorizes attorney fees and cost for both the taking and damaging of real property:

> A superior court rendering a judgment for the plaintiff awarding compensation for the taking or damaging of

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[20] *City of Seattle v. McCoy*, 112 Wn. App. 26, 32, 48 P.3d 993 (2002).

[21] *Id.*

[22] *City of Snohomish v. Joslin*, 9 Wn. App. 495, 499, 513 P.2d 293 (1973).

> real property for public use without just compensation having first been made to the owner shall award or allow to such plaintiff costs including reasonable attorney fees and reasonable expert witness fees, but only if the judgment awarded to the plaintiff as a result of trial exceeds by ten percent or more the highest written offer of settlement submitted by the acquiring agency to the plaintiff at least thirty days prior to trial.[23]

The statute "clearly manifests a legislative intent that if a condemnor chooses to take property without instituting condemnation proceedings, the owner shall be reimbursed for his costs of litigation in obtaining his constitutionally guaranteed just compensation."[24] An award of reasonable attorney and expert witness fees is not discretionary when an owner's compensation, as determined by the jury and reduced to judgment, exceeds the condemnor' s highest written offer proffered at least 30-days prior to trial by at least 10 percent.[25]

In both traditional eminent domain and inverse condemnation cases, the two fee-shifting statutes contemplate a monetary offer. In traditional condemnation proceedings, where the condemnor seeks or has already obtained actual ownership of, or a more limited ownership right in, the property for a public use, "any settlement offer will

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[23] RCW 8.25.075(3).

[24] *Joslin*, 9 Wn. App. at 499.

[25] *State v. Forrest*, 78 Wn.2d 721, 722, 479 P.2d 45 (1971).

necessarily be an offer to purchase the specific property right at issue . . . Thus, when settlement discussions fail, a subsequently entered judgment will necessarily reflect the fair market value of the specific property right."[26] In such a case there is an easy "apples to apples" comparison between the offer and the jury's award. And the end result is that, in return for the payment of money, the condemnor receives conveyance and ownership of the specific interest in the property it sought.

Inverse condemnation is significantly different. While it is conceivable that a total taking may occur in an inverse condemnation case – for example if the government action diminishes the property value to zero – generally a property is merely damaged or devalued by government action. When that happens, the damages are equal to the amount the property has diminished in fair market value.[27] A successful plaintiff remains the owner of his or her devalued property and is awarded damages as compensation for the diminished fair-market value.[28] The decline in value of the property is measured at the time of trial.[29]

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[26] Opinion at page 4.

[27] *Peterson v. Port of Seattle*, 94 Wn.2d 479, 482-83, 618 P.2d 67 (1980).

[28] Id.

[29] Id.

In practice, in a trial of an inverse condemnation claim, the alleged condemnor usually denies that its actions have resulted in *any* inverse condemnation of a property interest, while the condemnee will argue that the condemnor has damaged or taken some, most, or all of the value of its property. Thus, unlike an eminent-domain action, where the specific property interest at issue is known,[30] in an inverse condemnation claim the parties are fighting not only about liability but about the amount of the property interest taken or damaged and its value. If the jury finds anything less than a total taking, the owner receives damages for the diminished value of the property but still retains full title and ownership.

## B. OFFERS FOR INVERSE CONDEMNATION DAMAGES ARE DIFFERENT THAN OFFERS FOR THE PURCHASE OF PROPERTY UNDER EMINENT DOMAIN.

Given these important distinctions between eminent domain and inverse condemnation, offers made in the context of an eminent domain proceeding are significantly different in kind. In eminent domain, the condemnor admits it wants the property, both parties know the exact property interest at issue, and the fight is only over valuation.

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[30] For example, for County—initiated condemnations, the County must submit a petition "in which the land, real estate, premises, or other property sought to be appropriated ***shall be described with reasonable certainty.***" RCW 8.08.610.

But in an inverse condemnation action the government is not seeking any property interest and, as in this case, hotly contesting that its conduct has caused an inverse condemnation. Moreover, an inverse condemnation plaintiff is simply asking for damages without any transfer of a property interest to the condemnor, and thus the condemnor' s offer should be for payment of damages only. Adding a condition requiring that the owner transfer title to his or her property to the government completely changes both the nature and value of the offer. How can one know the value of an offer without considering the value and nature of a condition (i.e. transfer of title) to the offer?

### C. The County's reading of RCW 8.25.075(3) under these circumstances would produce absurd results that are contrary to the purpose of the statute.

Chapter 8.25 RCW is intended to ameliorate the inherent disparity between a condemnor and condemnee and it is intended to encourage a fair settlement. But the County wants you to read it in a way that will coerce settlements and lead to absurd results. Consider this scenario: A governmental entity seeks to acquire a corner of a large parcel for a transportation project. The value of the large parcel is $1,000,000, and the value of the corner being condemned is only $100,000. The condemnor could – and should, if the County is correct -- make a lowball offer to pay $500,000 for the entire parcel, with

complete confidence that (1) the owner will never agree to sell the entire parcel for that amount, and (2) a jury will never value the partial taking of the corner at more than that. Consequently, regardless of how well the condemnee does at trial in valuing the condemned corner, she or he will never be able to recover fees and costs. In sum, adopting the County's rationale would only incentivize every condemnor in a partial takings situation to "game the system."[31]

A reasonable reading of the statute requires an analysis of what constitutes "the highest written offer of settlement submitted...," RCW 8.25.075(3); in other words, what was really offered and how is it valued? And if there are conditions to the offer, they too must be considered to determine the action this case the offer was for an exchange of money for a valuable parcel of real property with improvements. These specific characteristics constitute the County's "highest written offer" and cannot be ignored or disregarded under a plain reading of the statute.

The absurdity of the County's proffered interpretation is amply demonstrated by the facts in this case. According to the County, an

[31] Washington Courts have long noted the potential for abusive governmental conduct involving condemnations. These include, for example, "unwarranted delay coupled with a[n] affirmative action by the condemning authority resulting in a decrease in property value, actual encouragement of neighborhood deterioration by the condemning authority, direct interference by the condemning authority to prevent development by the landowner, [and] other abusive conduct." *Lange v. State*, 86 Wn.2d 585, 588, 547 P.2d 282 (1976).

offer by the County to Kay to purchase her entire property for $90,000 would have cut off her entitlement fees because the County's offer was within 10 percent of the inverse damages total of $96,221.37. This is ridiculous. [32] The Court should avoid interpreting RCW 8.25.075(3) in a manner that would produce absurd results that are contrary to the statute's purpose.[33]

### D. Adopting the County's position would DESTROY THE ABILITY OF CONDEMNEES TO RECOVER attorneys' fees in inverse condemnation and partial takings cases.

If the County's position is adopted, it will inevitably nullify the ability of a plaintiff to recover attorneys' fees and costs in cases involving partial takings and inverse condemnation. Simply put, taking that tool out of the condemnee' s tool box and eliminating the risk of attorneys' fees and costs for the condemnor fundamentally alters the playing field of eminent domain and inverse condemnation law to the profound detriment of condemnees.

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[32] Another way to look at this issue would be from the following perspective: The County offered Kay $552,000 for a property that the jury determined could be sold in its impaired state for $585,000. This means the County offered to pay Kay no damages. Obviously $0 is not within 10 percent of $96,221.37.

[33] Courts are not required to, and should not, read statutes in a manner that would lead to absurd results. *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 421, 443, 395 P.3d 1031 (2017) (courts can avoid a literal reading of a statute if it leads to strained, unlikely, or absurd consequences); *Univ. of Wash. v. City of Seattle*, 188 Wn.2d 823, 834, 399 P.3d 519 (2017) ("We may resist a plain meaning interpretation that would lead to absurd results.").

King County argues that a court must be myopic, and cannot look beyond the dollar amount of the offer. But in reality, the County wants to rewrite the relevant portion of the statute to say:

> A superior court. . . shall award or allow to such plaintiff costs including reasonable attorney fees and reasonable expert witness fees, but only if the dollar amount of the judgment awarded to the plaintiff as a result of trial exceeds by ten percent or more the highest written monetary offer of settlement, submitted by the acquiring agency to the plaintiff at least thirty days prior to trial, regardless of the property interest at issue or conditions imposed on the offer.

To the County, the meaning and legal effect of an offer to purchase Kay's entire property for $552,000 is identical to an offer of $552,000 to purchase only a 10% interest in Kay's property. Stated differently, had the County offered to buy Kay's entire property for $90,000 she would not be entitled to fees or costs under the County's interpretation. Moreover, it would not matter to the County if its offer was conditioned on being paid out over the course of 10 years, or even 20 years, with or without interest. And it would not matter if the offer-imposed conditions, such as an indemnity for environmental damages, an assignment of insurance benefits, or a non-compete clause. The ***only*** thing that matters to King County is the "number," as a stand-alone, abstract thing, untethered to any property interest, condition of the offer or context in which it occurs. This is absurd. The "highest

offer" can only mean the one that provides the greatest value to the plaintiff.

## E. WHEN AN OFFER IS MADE TO PURCHASE PROPERTY, THE OFFER CANNOT BE DIVORCED FROM THE UNDERLYING PROPERTY INTEREST.

The statutory scheme of RCW 8.25 also supports Kay's request for fees and costs. A condemnor in an inverse condemnation case can make two types of offers—an offer to purchase all or a portion of the property at issue for its fair-market value or an offer to pay damages for the diminished value of his or her property. Indeed, King County claims to have made both types of offers in this case.[34]

Importantly, RCW 8.25.010 provides that a pretrial statement of compensation may be made at least 30 days prior to trial, "showing the amount of total just compensation to be paid" for the "property, ***or any interest therein***" that is the subject of the action (emphasis added). This requires the court to consider the property interest the

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[34] King County claims it made two offers—one for $450,000 that was not contingent on the sale of property and another for $552,000 that was contingent on Kay selling the County her entire property. The $450,000 offer was never reduced to writing and thus is not a qualifying offer under RCW 8.25.075(3) and cannot be considered. But the County's offer merely serves to highlight the difference between an offer to pay damages versus an offer to buy property and supports Kay's argument that any offer must be viewed in its context. If the County had made a $450,000 offer that was not contingent on the transfer of property (which it did not, as set forth in Respondent Kay's Motion to Strike), such an offer could have been compared to the $96,221.37 of inverse condemnation damages and no fees would be awarded. This is because it would have created an apples-to-apples comparison to the damage award. No property would change hands under the offer and no property changed hands under the Judgement. Such an offer to pay damages could simply be compared to the award for damages.

offer was based upon and the value of the highest written offer for that specific property interest when the court compares the offer to the judgment. When the condemnor' s offer is to purchase property, the statute does not permit a condemnor to divorce the property interest from the offer, nor does it permit the Court to ignore the property interest when comparing the offer to the judgment. The offer is not a thing in and of itself. It is an offer for something and that something must be included in the comparison.

## F. THE COUNTY'S ARGUMENT DEMONOSTRATES THE ABUSE THAT IS LIKELY TO OCCUR UNDER ITS READING OF THE STATUTE.

The County does not appear to dispute the argument that upholding the trial court's order would effectively destroy the ability of condemnees like Kay to recover attorneys' fees in any inverse-condemnation and partial takings cases. Kay ultimately did better at trial by rejecting the County's offer, and the County does not dispute this. The County also does not dispute that had Kay accepted the County's offer she would have done much worse.

The County implicitly acknowledges that it, and other government agencies, can make bad offers that will put condemnees in worse positions ***and*** render the fee-shifting provisions of RCW 8.25.075(3) null and void at the same time. As the County stated below:

> Had the jury determined a total taking had occurred and assessed that Kay's property had no economic value and that the County was required to compensate her for the entire value, and the jury would have determined the value of Kay's property was $650,000, the jury's award would have exceeded by more than 10% the County's $552,000 offer. If that had happened, RCW 8.25.075(3) would apply and fees and costs would be appropriate.[35]

In other words, King County admits it made a bad offer to purchase property for far less than it was worth. But because it was in the context of an inverse condemnation action where a jury can find less than a total taking, the County claims it wins. The Court should not analyze RCW 8.25.075(3) in a manner that is contrary to the purpose of the statute, would result in bad policy, and would produce such absurd results.

## IV. CONCLUSION

Reversing the Court of Appeals decision would effectively end the ability of condemnees to recover attorneys' fees in inverse-condemnation and partial takings cases. If the County prevails, every defendant in future actions would simply do what the County did in this case: Offer to purchase the entire property for less than it is worth instead of offering to pay damages. No condemnee in their right mind would sell for less than the property is worth, and the partial-taking damages would be less than the "offer", thus cutting off fees. The

[35] King County's Brief of Respondent, Court of Appeals No. 77935-4-1, pp. 10-11.

Court should not analyze RCW 8.25.075(3) in a manner that is contrary to the purpose of the statute.

At base, the County made a bad offer. Kay rejected it and did more than 10 percent better at trial. For this and the other reasons discussed above, she requests that the Court affirm the unanimous decision of the Court of Appeals.

Dated this 3rd day of September, 2019.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By: _____

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## CERTIFICATE OF SERVICE

I, Savanna L. Stevens, hereby certify and declare under penalty of perjury under the laws of the State of Washington that on September 3, 2019, I caused a true and correct copy of the foregoing document to be served upon the following counsel of record in the manner indicated.

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

Dated this 3rd day of September, 2019.

s/Savanna L. Steven
Savanna L. Stevens
Legal Assistant

## GORDON THOMAS HONEYWELL LLP

## September 03, 2019 - 4:52 PM

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