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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

KEVIN LIN,
Plaintiff,
v.
JONATHAN CAREY JACKSON and
JANE DOE JACKSON,
Defendants.

No. 20-2-06043-7 SEA

PLAINTIFF’S RESPONSE TO
DEFENDANT’S CR 35 MOTION

I. RELIEF REQUESTED

Plaintiff concedes that good cause for a CR 35 exam exists. The parties disagree on the terms and conditions of that exam.

II. STATEMENT OF FACTS

The defendant ran a red light and drove his car over plaintiff’s left foot while the plaintiff was in a crosswalk.

1 **III. HISTORY AND PROBLEMS PRESENTED BY CR 35 EXAMS**

2 CR 35 exams have an interesting history. In the “old days,” meaning about 20
3 years ago, CR 35 exams were rare. Physicians treated injured patients, and recorded
4 their findings and treatment in medical records. Plaintiff and defense attorneys
5 reviewed the medical records. Many cases settled without litigation, based on treating
6 physicians’ records documenting the nature and extent of the injury.

7 Sometimes, defense attorneys wanted more information from the treating
8 physician than the records provided. A defense attorney would ask the plaintiff’s
9 counsel to have the treating physician address an issue or two in a letter, typically
10 causation, which isn’t always found in treatment records. Occasionally a defense
11 attorney would note the treating physician’s deposition and ask more detailed
12 questions. The basic premise was that the treating physician medical records were
13 sufficient for resolving most cases.

14 All that went out the window when insurers reengineered their claims process,
15 beginning with Allstate in about 1995, when it implemented the recommendations of
16 McKinsey & Company, a large consulting company. At the time McKinsey &
17 Company was involved in a number of scandals.

18 Perhaps the most notorious of these was the sprawling insurance
19 scandal that became know as “the McKinsey documents,” in which
20 McKinsey revolutionized the insurance industry to maximize profits at
the expense of vulnerable policyholders.

21 In the early 1990’s, Allstate, then one of the country’s biggest auto
22 insurers and looking to pare down how much it was spending on claims,
hired McKinsey to do what McKinsey is best-known for doing: cut
costs. McKinsey dutifully developed a strategy to “radically alter our

1 whole approach to the business of claims” and boost company profits,
2 which Allstate implemented in 1995. Internal documents released years
3 later showed that McKinsey cast the claims process as a “zero-sum
4 economic game,” where “Allstate gains” and “others must lose,” as one
5 PowerPoint slide put it—the “others” being claimants who had suffered
6 the very misfortunes and disaster their insurance was meant to cushion¹.

7 Other insurers followed Allstate’s lead. As a part of “restructuring” their
8 claims process many insurers began to ask for a CR 35 exam in all, or nearly all cases.

9 What sprung up was at first was a cottage industry, and is now a full-fledged
10 industry, that provides insurers reliable paid-for testimony. Plaintiff’s counsel and
11 defense counsel know who they are, often retired or semi-retired physicians, who
12 charge exorbitant rates, and whose opinions rarely agree with physicians who have
13 actually treated the patient. Plaintiff’s lawyers joke that they can write such
14 physician’s reports before the exam ever occurs, because we know in advance what
15 opinion is coming from those who are highly paid by, beholden to, and virtually
16 employed by, insurers.

17 The harm to the system is substantial. Cases which used to settle, often pre-
18 filing, now are filed and go much further down the litigation road. The cost of
19 presenting claims goes up, both in defending against these paid-for opinions, but also
20 because the examiners, and the insurers who hire them, seek to pass on these
21 exorbitant costs on to plaintiffs. As they seek to do here.

22 ¹ <https://inthesetimes.com/article/mckinsey-insurance-scandal-before-buttigieg-joined#:~:text=McKinsey%20dutifully%20developed%20a%20strategy,which%20Allstate%20implemented%20in%201995.>

1 But even more harmful to the system, because of the reluctance to let the “I
2 word”² be said in a courtroom, is that the true relationship between these CR 35
3 examiners and the insurance industry is not exposed. Much of the benefit of modern
4 civil rules is found in transparency, sunlight, and allowing bias to be exposed. But not
5 in CR 35 exams.

6 While we like to indulge in the comforting fantasy that all physicians are
7 unbiased, in fact some are not. Sometimes these CR 35 physicians, and the “panels”
8 that hire them out, use lawyers to seek to prevent discovery of relevant information,
9 make it prohibitively costly to obtain, or seek to punish plaintiff’s lawyers who dare to
10 try to expose the symbiotic³ relationship between insurers and many CR 35
11 examiners.

12 Approximately 15 years ago I started using a set procedure in anticipation of
13 the almost certain request for a CR 35 exam. I would send a proposed stipulation and
14 order to defense counsel early in the case, addressing the issues that seem to reoccur
15 in these exams. I did so because CR 35 examiners did the following to my clients:

16 Interrogated about the liability facts of the case.

17 Misrepresented the exams that they did, and the results.

18 Used “intake” forms that asked for clearly improper information.

19 Caused second depositions to occur because they refused to agree to be
20 deposed in their office, where their reference materials are.

21 _____
22 ² The “I word” is insurance.

³ There are 5 main symbiotic relationships. Plaintiff refers here to “mutualism” where both organisms
benefit from the association.

1 Administered psychological testing that was outside their area of
2 expertise.

3 Failed to produce a report within the 45-day time period set by CR 35, or
4 failed to produce a report at all.

5 Charged excessive fees.

6 Refused to permit videotaping of the examination, or requested that the
7 video be on a fixed tripod, and then stood between the camera and the
8 examinee.

9 Sought to charge extra for an audiotape or videotape.

10 Refused to provide forensic income (1099s), resulting in satellite
11 litigation over production of clearly relevant bias information.

12 Refused to permit plaintiff's counsel to examine their complete file which
13 they based their opinions on.

14 Provided wildly inaccurate information about the number of times they
15 work on behalf of defendants or insurers, knowing that plaintiff's counsel
16 likely couldn't obtain facts to challenge those statements.

17 Sought protective orders with huge financial penalties.

18 Took actions which resulted in satellite litigation, at considerable time
19 and expense to plaintiffs.

20 Before using the "stipulation and order procedure," my clients experienced
21 frequent disputes over the conduct of the exams, and "satellite litigation" over fees,
22 production of bias information, and location of depositions. It was not uncommon to
23 have to take the CR 35 examiner's deposition twice. Using the "stipulation and court
order procedure" flushes out issues and concerns, on both sides. I have not had a
problem with a single CR 35 exam when there has been a court order in place. This is
also the first time in 15 years that I have not been able to reach an agreement with

1 defense counsel concerning the terms and conditions of a CR 35 exam. I agree with
2 defense counsel that we have a good working relationship, and that we have had a
3 productive exchange of views. We just disagree how this CR 35 exam should occur.

4 Dawson Declaration, **Exhibit 2.**

5 **IV. A TRIAL COURT’S POWER TO SET THE TERMS AND CONDITIONS**
6 **OF A CR 35 EXAM**

7 A trial court has the discretion to set the terms and conditions of a CR 35 exam.

8 When the mental or physical condition...of a person...is in controversy,
9 the court...may order the party to submit to a physical examination by a
10 physician...The order may be made only on motion for good cause shown
11 and ...shall specify the time, place, manner, *conditions*, and scope of the
12 examination... CR 35 (A)(1) *Emphasis supplied.*

13 CR 26 also provides that the Court

14 “may make any order which justice requires...including one or more of
15 the following... (2) that the discovery may be had only on specified terms
16 and conditions... CR 26(c).

17 It is true that the Court generally cannot bind a person to an order where that
18 person hasn’t had notice, and an opportunity to be heard. That is not what we seek here.
19 This Court has the power to set reasonable conditions for a CR 35 exam. Likely State
20 Farm’s chosen examiner will agree. But if he does not, then State Farm has the option
21 of finding another examiner, one who will agree to reasonable conditions set by a
22 Court⁴.

23 _____
⁴ The discovery cutoff is January 18, 2021 so there is ample time to change examiners, if this examiner will not follow reasonable conditions set by the Court.

1 Here are the disputed terms and conditions of this specific CR 35 exam, and also
2 some conditions that are agreed, but not addressed by the moving party's proposed
3 order.

4 **V. WHAT IS A REASONABLE FEE TO CHARGE PLAINTIFF FOR THE**
5 **DEPOSITION OF THE CR 35 EXAMINER?**

6 State Farm is a multibillion-dollar company.⁵ It chooses to be in the business
7 of insurance and adjusting claims. It can afford to choose, and to pay its chosen CR
8 35 examiners. Plaintiff is a young man working in the tech industry in Seattle.

9 Some generic factors that a Court may consider when conditioning a CR 35
10 exam on the payment of a reasonable fee include: 1) that the insurer chose to be in in
11 business of insuring and adjusting claims; 2) the plaintiff did not choose to be injured,
12 that was thrust upon him by the admitted wrongful conduct of the State Farm insured;
13 3) State Farm gets to choose the examiner, the plaintiff does not; 4) the relative
14 financial ability of the parties; 5) that in a deposition the CR 35 examiner is just being
15 paid for his time, to answer questions, not for an operating room or other overhead; 6)
16 any other factors that bear on what is a fair amount to charge a plaintiff per hour⁶.

17 The only information submitted by the defense about this specific CR 35
18 examiner is a fee schedule. For depositions, this examiner "Requires prepayment for
19 time reserved" at \$1,000 per hour, and won't even schedule the deposition without
20 that payment. Dawson Declaration, **Exhibit 1**. The issue for this Court isn't what this

21 ⁵ <https://newsroom.statefarm.com/2019-state-farm-financial-results/>

22 ⁶ Had defense counsel submitted other information about this examiner, other than just a fee schedule,
23 plaintiff could have responded. If additional information about this specific examiner is later submitted,
plaintiff has no opportunity to respond.

1 examiner seeks to charge others (at least according to his fee schedule), but what is a
2 reasonable fee under the circumstances. Setting a reasonable fee, which this examiner
3 is free to accept or reject, avoids the need for a motion just to get the examiner's
4 deposition scheduled.

5 Plaintiff proposed paying the State Farm CR 35 examiner more than eight dollars
6 per minute for his time in deposition (\$500 per hour). Proposed language:

7 That if plaintiff's counsel takes the deposition of the examiner, then examiner shall
8 charge no more than \$500 per hour for the amount of time actually taken for the
9 deposition, as reported by the court reporter.

9
10 **VI. WHETHER A CR 35 EXAMINER MAY CHARGE FOR HIS DEPOSITION
11 PREPARATION TIME**

11 The custom in this community is that each side pays their own experts for the
12 time their expert prepares for his deposition. The reason is simple. I can't control
13 whether the CR 35 examiner does no preparation for his deposition (like some) or takes
14 10 hours to review records in great detail, and then submits a bill to us for \$10,000.
15 Then we are involved in satellite litigation over the charges.

16 I have only been asked to pay a defense examiner's prep time two or three times
17 in 40 years. The reason this issue has rarely come up is probably simple, plaintiffs have
18 the burden of proof and tend to call more experts at trial than the defense. In this case
19 plaintiffs will likely call four experts at trial. If the rule really is that each side pays for
20 the deposition prep time of the other side's experts, then State Farm would likely be
21 asked to pay, on average, four times as much for expert deposition prep time, again
22 increasing the chances of satellite litigation.

1 The custom in the community that each side pays their own expert's prep time is
2 a good one, resulting in the use of an appropriate time to prepare, but not more.

3 Proposed language:

4 That neither the plaintiff nor defendant shall be charged for records review, or any
5 other deposition preparation by the other side's experts.

6 **VII. WHETHER A CR 35 EXAMINER NEEDS TO PRODUCE HIS FORENSIC**
7 **INCOME DOCUMENTATION**

8 This battle was fought in the past, but rarely anymore. Courts typically order
9 production of a CR 35 examiner's forensic income. This is done via the production of
10 IRS Form 1099's for forensic work, information that a physician is required to
11 compile for their tax returns, can be saved in PDF format, and is easily produced.

12 Yet, some physicians attempt to charge \$500 for production of a few pages of records.

13 Other physicians seek to impose draconian terms in return for production of
14 basic bias information, namely the amount of money they are paid for forensic work.

15 That happened here. Defense counsel stated:

16 In follow-up to my voicemail this morning, Dr. Toomey has agreed to produce
17 three prior years of financial records subject to a protective order with fairly
18 severe consequences (in line with a HIPAA violation, i.e., **a baseline \$50k fine to**
19 **you.**) if said records are made public or otherwise disclosed. *Emphasis supplied.*

20 My response was:

21 David, with all respect, I am not going to sign a protective order with a \$50K
22 fine. Not going to happen. Dawson Declaration, **Exhibit 3** at pages 1-2.

23 I did agree to keep confidential the 1099 information. In "the old days" an
attorney's word was accepted. If that is not sufficient, I am not opposed to the entry of an

1 appropriate order by the Court. The penalty will be facing a Court having violated its order,
2 not a \$50,000 fine and satellite litigation with a CR 35 examiner. Having never been
3 sanctioned or held in contempt in 40 years of practice, I think Dr. Toomey's financial
4 information is safe with me.

5 Proposed language:

6 That examiner shall provide plaintiff's counsel with all Form 1099's, or
7 other official documentation or billings for examiner's income for the years
8 2015 through 2019 for conducting forensic examinations and records
reviews, and shall provide that documentation to plaintiff's counsel by ten
days before the CR 35 exam.

9 **VIII. THE LOCATION OF THE DEPOSITION**

10 Surprisingly, this has been a significant issue in past CR 35 examiner
11 depositions, and apparently is not agreed here. Plaintiffs' counsel wants to know what
12 medical resources the CR 35 examiner reviewed to write his report, and what his
13 personal medical references say about the injuries involved, if those references were not
14 consulted. This avoids the situation where the deposition is taken and the expert "can't
15 recall" what references he reviewed, or what reference materials he owns that address
16 the subjects of the exam, resulting in a second deposition.

17 Proposed language:

18 That the location of the deposition shall be the examiner's office, or other
19 location where his medical references are found, unless otherwise agreed
20 between counsel.

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1 **IX. WHEN AND HOW THE PLAINTIFF CAN INSPECT THE CR 35**
2 **EXAMINER'S FILE**

3 CR 35 examiners sometimes refuse to permit examination of the file that they
4 reviewed and based their opinions on. Proposed Language:

5 That examiner shall at the time of examiner's deposition, or earlier if requested,
6 make all files and records related to plaintiff's examination available for review
7 by plaintiff's counsel.

8 **X. REASONABLE CONDITIONS, BELIEVED TO BE AGREED, BUT NOT**
9 **IN THE MOVING PARTY'S PROPOSED ORDER**

10 Plaintiff's counsel understands that the following are not opposed by the
11 defense, or its selected examiner.

12 **A. PRESENCE OF AN OBSERVER**

13 The rules permit an observer at a CR 35 exam. Plaintiff understands that State
14 Farm's chosen CR 35 examiner does not oppose the attendance of a nurse at the exam.

15 Proposed Language:

16 That plaintiff may have a representative present at the examination at no
17 additional charge.

18 **B. NO ADDITIONAL TESTING**

19 Plaintiff understands that its CR 35 examiner does not intend to do psychological
20 testing. Proposed language:

21 That the exam by the examiner shall be limited to inquiry in the field of expertise
22 of the examiner. The examiner shall not conduct an inquiry or examination in
23 fields outside his or her expertise (i.e. psychiatric, psychological, etc.).

That no psychiatric or psychological tests shall be administered. No invasive tests
shall be done.

1 **C. NO ADDITIONAL SCANS TO BE DONE**

2 Defendant’s Motion states:

3 “In addition, Dr. Toomey may request that plaintiff undergo a CT scan
4 of his left foot to verify solid union of the fusion.

Motion at 6:10.

5 Defense counsel first inquired if there was a recent CT scan on October 21, 2020.

6 We responded the same day:

7 David, there was a CT done 7/17/2020. It is attached, starting on page
8 11. Dawson Declaration, **Exhibit 4.**

9 We have also asked the records retrieval company to obtain the actual scans
10 (not just the report) and provide them to the defense. The Court should not order a
11 duplicative scan, without some showing that the CR 35 examiner has reviewed the
12 scan that was done, and stating a basis why additional testing should be done.

13 **D. NO FORMS TO BE FILLED OUT OR INTERROGATION ABOUT
14 FAULT**

15 This is supposed to be a history and physical exam, not a deposition. Proposed
16 language:

17 That plaintiff shall not be asked to fill out any forms at the examination, other than
18 the Machaon COVID-19 Pandemic—Reception and Claimant Disclosure Form,
19 attached as Exhibit 5 to the Declaration of Bob Dawson re Plaintiff’s Response to
20 Defendant’s Motion to Compel a CR 35 Exam, nor will examiner ask any
21 questions about who is at fault for the December 11, 2019, pedestrian/motor
22 vehicle collision. Such restriction does not limit questions about physical
23 dynamics of the collision that may be relevant to the injury.

 The form is attached as **Exhibit 5** to the Dawson Declaration.

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E. COVID PRECAUTIONS

This is one area where I am told that all counsel and the examiner have agreed, but the terms should be in the Court Order, given that the plaintiff is being compelled to attend an in-person exam with increased risk of sickness or death.

The Machaon Notice says as much by overreaching and asking the plaintiff to sign an acknowledgement that:

I understand and accept that there is an increased risk of contracting the COVID-19 virus during the IME/CR-35 exam.

I understand and accept the additional risk of contracting COVID-19 from contact at this office.

Dawson Declaration, **Exhibit 6**.

Proposed Covid language:

All attendees including all examinees, examiner, and other ancillary personnel, such as videographers, legal nurse consultants, legal representatives, interpreters, and all other person that will be participating in IMEs/CR 35 exams will be required to wear a facial mask and gloves at all times within the office. If needed, a mask and gloves will be provided.

During the check in process, questions will be given in writing to examinees and other relevant personnel to disclose any symptoms of COVID-19 including sore throat, cough, chest pain, difficulty breathing, and temperature above 100 degrees. If any of these symptoms are present then the exam will be discontinued so that the affected person can see their family physician or present to an urgent care center for COVID-19 testing.

No more than two people will be allowed in the reception area at any one time, adhering to 6-ft social distance guidelines. Individuals not directly involved in the examination will be asked to wait in the Medical Dental lobby.

At the conclusion of every examination, the reception area and exam room will be cleaned in preparation for the next examinee.

1 Dr. Toomey, or other CR 35 examiner, shall wear fresh scrubs before
2 examining Kevin Lin.

3 **F. REPORT TO BE PROVIDED NO LATER THAN 45 DAYS AFTER THE**
4 **EXAM**

5 CR 35 examiners, or defense counsel, sometimes refuse to produce CR 35 reports.
6 Plaintiff proposes the following language, based on CR 35 (b).

7 That defense counsel shall deliver to plaintiff's counsel a copy of the
8 detailed written report of the examiner setting out the examiner's findings,
9 including results of all tests made, diagnosis and conclusions, regardless of
10 whether the examiner will be called to testify at trial.

11 That the examiner's report shall be delivered to plaintiff's counsel within 45
12 days of the examination.

13 **G. VIDEOTAPING**

14 The defense selected a specific CR 35 examiner. Plaintiff selected a specific legal
15 nurse consultant. That nurse consultant was unwilling to attend the exam in person, due
16 to the risk of Covid. She proposed that she attend by Zoom. As was set out in the email
17 exchange between counsel (Dawson **Exhibit 3**, page 2) the nurse had taken part in two
18 recent CR 35 exams by Zoom. She had the examiner set up his laptop to show the exam,
19 and the nurse recorded the exam by Zoom. The nurse said that in those two prior exams
20 she only had to tell the doctor a couple times to move the laptop. It was not a big deal.
21 Plaintiff's offered to take the risk of the technology not working and all the doctor had to
22 do was set up the laptop.

23 That proposal was flat rejected by Dr. Toomey, opting for a more expensive
process, one that required an additional participant take the risk of an in-person exam. In

1 response the plaintiff selected a new nurse consultant, one who was willing to take the
2 risk of the in-person exam. While we are unhappy with the doctor’s lack of cooperation
3 with the Zoom request, we will drop our request to videotape.

4 **XI. THAT THE CR 35 EXAMINER HAS BEEN ADVISED OF THIS COURT**
5 **ORDER**

6 Having a CR 35 examiner be aware of the reasonable conditions the Court sets for
7 a CR 35 exam really helps avoid problems. Proposed language:

8 That defense counsel shall advise examiner of the above conditions for the
9 CR 35 exam, and make sure examiner agrees to all conditions, and to this
10 Court’s Orders regarding the examination of Kevin Lin’s body.

11 **XII. EVIDENCE RELIED UPON**

12 Plaintiff relies upon the Declaration of Bob Dawson and the attached Exhibits.

13 **XIII. LEGAL AUTHORITY**

14 CR 35, especially the part that says that the Court’s order compelling a CR 35
15 exam “shall specify the ... conditions ... of the examination.” CR 35(a)(1).

16 CR 26, especially the part that says that the Court “may make any order which
17 justice requires...including one or more of the following... (2) that the discovery may
18 be had only on specified terms and conditions... CR 26(c).

19 **XIV. CONCLUSION**

20 Plaintiff respectfully requests that the Court enter plaintiffs proposed Order.

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I certify that this memorandum contains less than 4200 words, in compliance with the Local Civil Rules.

DATED at Seattle, Washington, November 2, 2020.

DAWSONBROWN^{PS}

By: s/ Robert K. Dawson
Robert K. Dawson, WSBA #8881
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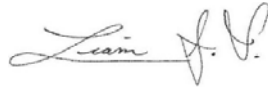
CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that the preceding document was served on the date stated below to the persons at the following addresses by the methods indicated:

David M. Reeve
REED McCLURE
Financial Center
1215 Fourth Ave., Ste. 1700
Seattle, WA 98161
Attorney for Defendants

- U.S. mail postage prepaid
- Fax
- Hand delivery
- Email
- E-Service via the King County eFiling Application

Dated at Seattle, Washington, this 2nd day of November, 2020.



Liam J. Sgarlat
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w:\clients\lin, kevin\pldgs-discovery\pleadings\drafts\plaintiff's reply to defense cr 35 motion.docx

King County Superior Court Clerk's Office E Filing Confirmation Receipt

Case Number: 20-2-06043-7 SEA
Case Title: LIN VS JACKSON
Submitted By: Robert Dawson
Bar Number: 8881
User ID: dawsonrk
Submitted Date/Time: 11/2/2020 1:56:22 PM
Received Date/Time: 11/2/2020 1:56:22 PM
Total Cost: \$0.00

DOCUMENTS

Document Type: RESPONSE OF PLAINTIFF RE DEFENDANT'S MOTION TO COMPEL
CR 35

File Name: Plaintiff's Response to Defendant's Motion to Compel CR 35 Exam.pdf

Cost: \$0.00

Document Type: DECLARATION OF ROBERT K. DAWSON RE PLAINTIFF'S
RESPONSE TO MOTION

File Name: Declaration of Bob Dawson Re Plaintiff's Response to Defendant's
Motion to Compel CR 35 Exam (with Exhibits).pdf

Cost: \$0.00

Printed On: 11/2/2020 1:56:31 PM

SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR
THE COUNTY OF KING

LIN

vs.

JACKSON

Case No.: 20-2-06043-7 SEA

CERTIFICATE OF E-SERVICE

(AFSR)

I, Robert Dawson, certify that I initiated electronic service of the following document(s) on the parties listed below who have consented to accept electronic service via the King County eFiling Application. Service was initiated on November 02, 2020 at 01:56:49 PM.

Document(s):

1. RESPONSE OF PLAINTIFF RE DEFENDANT'S MOTION TO COMPEL CR 35
2. DECLARATION OF ROBERT K. DAWSON RE PLAINTIFF'S RESPONSE TO MOTION

Parties:

1. Robert Dawson, Attorney for Petitioner/Plaintiff
email: dawson@dawson-brown.com
2. Suzanna Shaub, Attorney for Respondent/Defendant
email: sshaub@rmlaw.com

Executed this 2nd day of November, 2020.

s/ Robert Dawson
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