IN THE SUPREME COURT OF THE STATE OF DELAWARE

KENNETH BENDFELDT, and BETTINA ROLOFF,	)	
Defendants-Below, Appellants,	)	
v.	)	No. 68, 2014
HSBC MORTGAGE CORPORATION, (USA)	)	
Plaintiff-Below, Appellee.	)	Superior Court - Kent County

APPELLANTS' REPLY BRIEF

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I. DEFENDANTS PRESENTED TWO VIABLE DEFENSES THAT WOULD HAVE CHANGED THE OUTCOME OF THE CASE. THEREFORE, THE COURT BELOW SHOULD HAVE VACATED THE DEFAULT JUDGMENT.

In the Superior Court, Defendants presented *inter alia*, two substantial defenses, either of which independently demonstrated that the Plaintiff was not the real party in interest. Since those defenses would have changed the outcome of the case, the Superior Court should have vacated the default judgment to permit the parties to litigate those issues.

To satisfy the Rule 60 prong, establishing whether the outcome would be changed if the judgment was vacated, the defendant need only demonstrate that there is "the possibility of a meritorious defense". *Williams v. Delcollo Elec. Inc*., 583 A.2d 787 (Del. Super. 1989). Evaluating the motion is not occasion for weighing the evidence, especially when there has been no evidentiary hearing.

In their Opening Brief ("Op. Brf."), Defendants discussed two, case-dispositive, errors of law made by the Court Below in *HSBC Mortgage Corporation (USA) v. Bendfeldt*, 2014 Del. Super. LEXIS 44 (Del. Super. 2014) ("the Order"). The first error was holding that mortgagor defendants do not have standing to challenge whether or not the foreclosure plaintiff had been assigned

the mortgage so as to become the real party in interest (*See* Op. Brf. 9-19). The second error was holding that mortgagor defendants could not challenge whether or not the foreclosure plaintiff was the real party in interest, because it did not own the note that the mortgage secured (*See* Op. Brf. 26-34).

Related thereto, the Superior Court abused its discretion by making factual findings, while failing to consider Defendants' submission showing that HSBC did not own the Mortgage or Note when it filed suit (*See* Op. Brf. 20-25). Had the Superior Court properly ruled that Defendants had standing and considered Defendants' submissions that HSBC was not the real party in interest, then the Court should have vacated the default judgment to permit the parties to litigate the issues at hand.

HSBC responds by misstating the record below, mischaracterizing Defendants' positions and by raising arguments not made in the Superior Court. Each of these positions will be addressed *infra*. First, HSBC mischaracterizes that Defendants have not argued that the outcome would be different had the Superior Court not committed errors (Appellee's Answering Brief ("Ans. Brf." 12)). In fact, the entire thrust of Defendants' discussion of the errors of law and the abuse of discretion in making factual findings demonstrates that there would be a changed outcome, i.e., that after opening the default, conducting discovery and

considering evidentiary submissions, the action would be dismissed, because Plaintiff is not the real party in interest.

A. THREE DISTINCT, LEGAL PRINCIPLES PERMIT A DEFENDANT TO CHALLENGE WHETHER THE PLAINTIFF IS THE REAL PARTY IN INTEREST.

Defendants discussed three separate bases for their right to challenge whether or not HSBC was the real party in interest. First, Plaintiff acknowledges the requirement of Rule 17 that every action shall be prosecuted in the name of the real party in interest, which is the party "who has the right sought to be enforced by the action. *Cammile v. Sanderson*, 101 A.2d 316, 318 (Del. Super. Ct. 1953)" (Ans. Brf. 13-14). There are two basic purposes for Rule 17, i.e., that a defendant may raise all defenses which he has against the real party and so that his payment to plaintiff will protect him in the event of another suit upon the same cause. *Id.* (*See* Op. Brf. 10-12).

Second, the Plaintiff in a *sci. fa. sur* mortgage must both have a legal interest in the mortgage and disclose assignments in its pleadings. 2 *Woolley on Delaware Practice*, § 1359 (*See* Op. Brf. 12-13). HSBC does not discuss *Woolley* or the court decisions which relied upon it.

Third, one permissible plea of avoidance is assignment of the cause of action. *Miller v. Pennymac Corp*., 77 A.3d 272, n.6 (Del. 2013), citing *Gordy v.*

Preform Building Components, Inc., 310 A.2d 893, 895-96 (Del. Super. 1973)(*See* Op. Brf. 13). HSBC does not dispute *Miller* or *Gordy*.

B. THE SUPERIOR COURT FAILED TO DISTINGUISH BETWEEN A CHALLENGE TO WHETHER THERE HAS BEEN A PROPER, TIMELY ASSIGNMENT, AS CONTRASTED WITH A CLAIM THAT ALL OF THE TERMS OF THE ASSIGNMENT WERE NOT MET.

HSBC defends the reasoning of the Court Below, which primarily relied upon *Citimortgage, Inc. v. Bishop*, 2013 Del. Super. LEXIS 95, 10-14 (Del. Super. 2013), that because the mortgagor is neither a party to the assignment, nor a third party beneficiary, it may not challenge the assignment.

HSBC does not respond to the discussion of the Delaware decisions (*See* Op. Brf. 14-15) which have analyzed whether or not there was a proper assignment, rather than summarily refusing to consider the issue under the rationale that the Defendants lack standing to make the challenge.

HSBC mischaracterizes Defendants' position to the extent that it states, "The Bendfeldts' (sic[1]) contention that the Assignment was not a valid and enforceable contract between MERS and HSBC and that, as a result, the Assignment did not confer standing upon HSBC, which is the bulk of their

[1]HSBC mistakenly refers to Kenneth Bendfeldt and Bettina Roloff as "the Bendfeldts".

contention, is similarly unavailing" (Ans. Brf. 20). Defendants do not challenge whether the terms of an assignment were met so as to make it enforceable, but rather that HSBC was not the owner of the Mortgage due to the timing of assignments and the issue of whether the alleged signatory was competent to execute the assignment (*See* Op. Brf. 16-18, 21-25).

HSBC mistakenly asserts that Defendants do not distinguish the *Bishop* line of cases (Ans. Brf. 22-23). In fact, as Defendants discussed in detail (*See* Op. Brf. 16-18), there is a crucial distinction between the position of the Defendants at bar and the mortgagors' challenge in *Bishop*. At its heart, there is a basic concept in standing, usually applied to the plaintiff in an action. Does (s)he have a legal interest in the matter being addressed? There is nothing abstract or theoretical in a foreclosure defendant's requiring that (s)he has been sued by the real party in interest. This right has been recognized in many ways. The plaintiff must be the party "who has the right sought to be enforced by the action," so that a defendant may raise all defenses which he has against the real party and so that his payment to plaintiff will protect him in the event of another suit upon the same cause. *Cammile v. Sanderson*. The Plaintiff in a *sci. fa. sur* mortgage must both have a legal interest in the mortgage and also disclose assignments in its pleadings. *Woolley*, § 1359.

If the original obligee no longer has a right in the instrument, it may not sue. 3 *Moore's Federal Practice* (1979), § 17.09. Conversely, "the transferee may not maintain the suit if the transfer was an invalid assignment, a mere sham, or power of attorney." *Id.* That is the flaw in the Court Below's conclusion that HSBC was the real party in interest since it was named in both the Note and Mortgage (Order, at 1), when the Court had documentation that HSBC had not yet been assigned the mortgage and had assigned its rights in the Note two years before.

Defendants' right is the mirror image of the one asserted by HSBC. "Since the Bendfeldts (sic) challenged HSBC's standing to obtain a default judgment, HSBC remained the proper party to address that challenge" (Ans. Brf. 18, n. 4). By the same token, since HSBC sued Defendants, they have the right to a determination that HSBC had the right to sue.

Unlike *Bishop,* Defendants in the case at bar are not attempting to analyze the terms of the assignment, so as to judge whether or not those terms were all met. This was the situation in federal cases relied upon by *Bishop* where mortgagors were asserting the right to enforce the terms of securitized trust agreements to which they were not a party. *Bishop* noted that in those cases, the lack of "a causal connection between the assignments and the injury complained of. Following this reasoning, a federal court in Georgia stated that '[t]he

assignment does not affect whether the security deed's power of sale can be exercised, it merely affects who can exercise it'". 2013 Del.Super. LEXIS 95, *6. That is exactly the point of the Defendants at bar, who may exercise the foreclosure claim?

Klinedinst v. CACH, LLC, 2014 Del. Super. LEXIS 80 (Del. Super. 2014) comprehensive discusses the duty to review assignments to determine the present owner of an obligation is contained in. It begins, "Central to the decision in this matter is the legal premise that a plaintiff with an assignment has the burden to show the assignment in order to establish it is the proper party to bring the action." (citing *Citimortgage v. Bishop*, *et al.)*. In reversing the Court of Common Pleas' summary judgment order, the Superior Court discusses the several banking entities that seem to have had an interest in the account and holds that an evidentiary hearing is needed to establish the real party in interest. Since there is no legal distinction between the need to determine the real party in interest of a note, mortgage or credit card account, one can see the proverbial "slippery slope" that is created if we deny the defendant the right to challenge who is entitled to sue him.

C. PLAINTIFF WAS NOT THE REAL PARTY IN INTEREST DUE TO THE TIMING OF MORTGAGE ASSIGNMENTS.

Because the Superior Court held that Defendants did not have standing to

challenge the assignment of the Mortgage, it did not address the specific problems with the assignments.

HSBC does not dispute that it had not been assigned the mortgage when it filed the *scire facias sur* mortgage on November 6, 2009; an assignment to a **different** entity, "HSBC Mortgage Corp.", was not allegedly executed until November 11, 2009 (Ans. Brf. 7; c.f. App. A9 and A34).

HSBC neither filed the action as an assignee of the mortgage - as required by *Woolley*, § 1359 - nor amended its pleadings to allege that it was an assignee after the November 11 assignment. It took a default judgment based upon the inaccurate premise that it was the original mortgagee. Even at the time of the default, the assignment had not been made to HSBC Mortgage Corp. (USA).

As noted at Op. Brf. 22-23, with the several assignments, HSBC Mortgage Corp (USA) only held the mortgage for minutes to hours on August 23, 2012, over two years after it took a judgment. By assigning the mortgage, as contrasted with the judgment, to third parties, it gave them the right to foreclose (subject to defenses raised herein).

HSBC cites *Smith v. Guest*, 16 A.3d 920 (Del. 2011) for the proposition that standing may change over time. That case involved a custody dispute in which the General Assembly amended the statute.

D. DEFENDANTS PRESENTED INFORMATION THAT THE ASSIGNMENTS WERE NOT VALID BECAUSE THEY WERE EXECUTED BY PERSONS NOT ENTITLED TO DO SO.

HSBC misstates that Defendants do not dispute the validity of the assignment (Ans. Brf. 16). In fact, Defendants challenge both the timing and the validity of the assignments (*See* Op. Brf. 24-25).

Was the assignment executed by a person who was entitled to do so? The information provided by the Registrar of Deeds in Massachusetts (App. A45) and the Securitization Audit (App. A77) say no. Both Alfonso Green, whose name is on the first assignment, and Michael Peter, named on later ones, were alleged robo-signers or surrogate signers, i.e., persons who regularly do not have the authority to execute the documents which they sign (*See* Op. Brf. 24).

1. HSBC Raises a New Argument, Not Presented in the Superior Court, That the Only Basis for Challenging an Assignment Is the Credibility of the Witness Thereto.

HSBC did not raise before the Superior Court the argument that the only contestable issue was whether the assignment was attested to by a credible witness. HSBC's only pleading addressing Defendants' arguments was styled Plaintiff's Supplemental Brief (App. B1). HSBC now incorrectly argues that if a mortgagor has standing to challenge the validity of an assignment, there is only one basis for doing so, *viz*., whether it is properly witnessed and it transfers all

rights (Ans. Brf. 23).

Our courts have not so restricted their consideration of challenges to an assignment (*See* Op. Brf. 14). In one of the cases that HSBC cites, *U.S. Bank Nat'l Ass'n v. Gilbert*, 2014 Del. Super. LEXIS 20, *9-10 (Del. Super. 2014), Judge Young refused to award the mortgagee Plaintiff summary judgment where *inter alia,* there was a dispute as to who was the present owner of the mortgage.

HSBC also asserts for the first time that the MERS assignment was valid, because it was attested to by one credible witness, Brenda Petruzzo.

> The Assignment . . . was attested to and notarized by notary Brenda Petruzzo. (A34). The Bendfeldts (sic) do not challenge Ms. Petruzzo's notarization or that the Assignment transferred all of MERS's rights in the Property to HSBC.

(Ans. Brf. 15).

HSBC misstates the record. When one inspects the Assignment upon the bank relies (App. A34), it is clear that Brenda Petruzzo was not a witness to notarization; she was an employee of HSBC's former law firm in Leesburg, Virginia, who prepared the assignment. It was allegedly executed in Minnesota, by a robo-signer, Alfonzo Green. HSBC presented no evidence regarding the alleged witness to his signature, and the Superior Court made no finding that the assignment was properly witnessed. That would have been a matter to determine

after evidentiary submissions.

2. HSBC Raises New Arguments Under Rule 60.

With regard to the standard for evaluating Rule 60(b) motions, HSBC raises two arguments that it did not make in the Superior Court (App. B1), and which the Superior Court did not address in its Order. HSBC now argues that Defendants have not established that the default judgment was a result of excusable neglect, or that HSBC would not suffer substantial prejudice if the judgment were re-opened (Ans. Brf. 12). HSBC did not argue below either that the bank would suffer any prejudice, much less substantial, if the default judgment were to be re-opened (App. B1).

As to excusable neglect, HSBC begins by misstating that Defendants do not dispute that they were properly served with the Complaint (Ans. Brf. 1, 7). In fact, as they did in the Superior Court, Defendants denied that they were properly served (*See* Op. Brf. 1).

The Superior Court did not hold that Defendants' motion was lacking on either of those points. Appellants appeal to challenge actual, adverse rulings, not theoretical ones that the trial court might have made.

II. BECAUSE DEFENDANTS PRESENTED A VIABLE DEFENSE, I.E., THAT PLAINTIFF DID NOT OWN THE NOTE WHICH THE MORTGAGE SECURES, THE COURT BELOW SHOULD HAVE VACATED THE DEFAULT JUDGMENT.

The Superior Court held, "Second, the Court does not address Defendants' challenge to Plaintiff's standing based on the Note, because *scire facias sur* mortgage actions are based upon the mortgage, not the Note". Order, at 1.

A. LEGALLY AND FACTUALLY THE MORTGAGE IS DEPENDENT UPON THE RIGHTS IN THE NOTE.

Neither the Court Below nor HSBC address legal authority regarding the relationship between the note and mortgage or the facts of this matter. The mortgage and a note or bond secured by it are considered part of one transaction and, where possible, construed together in order to gain the intentions of the parties. 55 *Am.Jur.2d*, Mortgages, § 176 (1971); 59 *C.J.S.*, Mortgages, § 156 (1949).

In Delaware, the mortgage creates no interest in the land but is merely "a high security" for the payment of the debt. 2 *Woolley on Delaware Practice*, § 1353. *Metropolitan Life Ins. Co. v. Monroe Park*, 442 A.2d 503, 509, (Del. Super. 1982), rev'd *sub nom Monroe Park v. Metropolitan Life Ins. Co.*, 457 A.2d 734 (Del. 1983)[on holding that Metropolitan could still foreclose]. *Accord Wedderien v. Collins*, 937 A.2d 140 (Del. 2007).

Woolley's instructs that the *sci. fa. sur* mortgage requires both a breach of the mortgage **and** of the note:

> By the mortgage, the mortgagor binds his land specified in the mortgage and obligates to pay a certain sum of money or to perform some act therein named. If he fails to keep the covenant contained in the mortgage, and breaks the condition of the bond upon which the mortgage is founded, the mortgagee is entitled to recover upon the obligation according to the terms.

Woolley, § 1358.

Factually, Plaintiff's Complaint is completely reliant upon the right to collect upon the note:

> ¶3. On May 3, 2007, Defendant(s) executed and delivered to Plaintiff a note (the "Note"), secured by a mortgage (the "Mortgage") on the Property. A certified copy of the Mortgage is attached hereto as Exhibit A and incorporated herein by reference.
>
> ¶4. The Note is in the original principal sum of $283,500.00 and is payable at a rate of interest of 6.25% per annum with installments of interest, principal and escrow, if applicable of $1866.61 payable on the 1st day of each month beginning June 1, 2007, until May 1, 2037, when the Note is due and payable.
>
> ¶5. The Note provides that upon Defendant's failure to pay when due any obligation or any portion thereof when due, the loan shall be in default and Plaintiff, after thirty days notice and opportunity to cure, may accelerate the sum secured by the Mortgage and may foreclose upon the Property for the collection of the obligation together with the costs of suit and attorney's fees plus all sums hereinafter expended in preservation of the property and Plaintiff's security.

> ¶6. Defendants have failed to pay the monthly installments of the Note when due. Payment was demanded of Defendants and Defendants were informed of Plaintiff's intention to accelerate the balance due if the arrearages were not paid. Defendants have not paid the arrearages.
>
> ¶7. Defendants owe to Plaintiff the principal sum of $277,060.14, together with interest after March 1, 2009, together with late charges totaling $610.96, together with Plaintiff's reasonable attorney's fees and the costs of this action, and other amounts due under the Note, all to be levied out of the premises described in the Mortgage.

(App. A9).

Therefore, HSBC bases all of its rights upon a breach of the Note. If it had no right to collect upon the Note, because it was assigned to another entity, then it would have no basis for enforcing the mortgage. Judge Young refused to award the mortgagee Plaintiff summary judgment where it could not prove that it held the Note. *U.S. Bank Nat'l Ass'n v. Gilbert*, 2014 Del. Super. LEXIS 20, *9-10 (Del. Super. 2014).

B. IF DIFFERENT PARTIES WERE PERMITTED TO ENFORCE THE MORTGAGE AND THE NOTE, THEN THE BORROWER WOULD BE SUBJECT TO DOUBLE LIABILITY AND INCONSISTENT VERDICTS.

As reasoned in *Cammile v. Sanderson*, one purpose of Rule 17 is to protect defendants from multiple liability. 3 *Moore's Federal Practice* (2013), §17.10[2]. The difficulty with the holding of the Court Below and HSBC's position is

reinforced by HSBC's argument, "It is well settled in Delaware that notes and mortgages are separate documents that can be separately enforced ***" (Ans. Brf. 28). Based upon the trail of assignments of the Note at bar, a different entity than HSBC could bring suit against Defendants for breach of the Note.

C. COURTS THROUGHOUT THE COUNTRY HAVE HELD THE PARTY WHICH OWNS THE MORTGAGE BUT NOT THE NOTE MAY NOT FORECLOSE.

Defendants cited decisions from courts in many states refusing to allow a party to foreclose unless it owned the Note (*See* Op. Brf. 28-32). Part of that reasoning was that if a court allowed a party to foreclose which did not have an interest in the Note, the borrower could be subjected to double liability, since the note-holder could later sue (*Id.*).

HSBC dismisses in a footnote that it is "of no moment" what other states hold (Ans. Brf. 29, n.7[2]). However, in a matter of first impression, this Court frequently cites the reasoning from courts of other states. That is especially true when those decisions rely upon respected treatises, which Delaware courts also regularly rely upon, *i.e. Restatement (Third) of Property (Mortgages)* and *Powell on Real Property* (*See* Op. Brf. 28-89).

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[2]HSBC relies upon authority from courts outside Delaware (Ans. Brf. 31).

D. THE COURT BELOW ERRED AS A MATTER OF LAW BY FINDING THAT PLAINTIFF WAS THE REAL PARTY IN INTEREST BECAUSE IT WAS NAMED ON THE NOTE AND MORTGAGE.

The Court Below both erred as a matter of law and abused its discretion in making a factual finding, "First, Plaintiff is the real party in interest, because the Mortgage and the Note in this case both clearly list HSBC Mortgage Corporation as the lender, with the Note also having been signed by Plaintiff (sic)" (Order, 1).

Legally, the finding ignores the very basic standing principle that an original party may divest itself of its rights.

> The effect of the real party in interest provision, in respect to assignments, is that if by the substantive law an interest could be and was transferred by an assignment, as suit on the assigned chose in action must be brought in the name of the transferee.
>
> * * *
>
> Thus if the plaintiff has assigned away all his right, title and interest in a contract, he may not maintain an action for its breach. On the other hand, the transferee may not maintain the suit if the transfer was an invalid assignment, a mere sham, or power of attorney.

3 *Moore's Federal Practice* (1979), §17.09. Just because HSBC was the original obligee does not mean that it owned the Note at the time of the filing of the action or that it presently owns the Note.

Procedurally, the Superior Court abused its discretion by only considering Plaintiff's argument that it presently had the Note, without considering contrary

information submitted by Defendants. *Keener v. Isken*, 58 A.3d 407 (Del.Supr. 2013) (reversing and remanding). The securitization audit traced public records to establish that over two years before the foreclosure action was filed, the Note was transferred to parties other than the Plaintiff (*See* Op. Brf. 32-34).

HSBC cites *Davis v. 913 Mkt. St. P'ship*, 1996 WL 769326 (Del. Super. 1996) for the proposition that a note is a separate matter and not part of the foreclosure (Ans. Brf. 29). However, in *Davis* the foreclosure defendant was trying to raise a setoff, asserting that the **plaintiff** had signed a note in favor of the defendant. It had nothing to do with whether the plaintiff owned the note which its mortgage secured.

HSBC's reliance on *Harmon v. Wilmington Trust Co.*, 1995 Del. LEXIS 220 (Del. 1995) (Ans. Brf. 28) is similarly misplaced, where Harmon attempted to offset credits on rents collected by the bank. The Court explained, "The note represents Harmon's debt to Wilmington Trust while the mortgage "is a conveyance of [his] estate, by way of pledge for the security of [his] debt, and to become void on payment of it." *Handler Const. v. CoreStates Bank, N.A.*, Del. Supr. 633 A.2d 356, 363 (1993) (quoting 4 Kent, *Commentaries on American Law* *135)." *Id.* *Harmon* and *Handler* demonstrate Defendant's point. Since the mortgage is pledge for payment of the debt and would be void if the debt is paid,

one cannot determine HSBC's rights if payments were due to a third party, as a result of the assignment of the Note and right to payment.

Again, had the Court properly applied the law and considered Defendants' submissions, then it should have concluded that they had a justiciable defense that Plaintiff was not the real party in interest.

1. HSBC Presents a New Argument, Not Made in the Superior Court, That the Uniform Commercial Code, Impacts Whether HSBC Owns the Note.

In an argument not raised in the Superior Court (*See* App. B1-B9), HSBC asserts that the Uniform Commercial Code gives HSBC the right to enforcement of the Note because it is in their possession (Ans. Brf. 30). Once again the determination of the facts would depend upon an evidentiary hearing comparing the path of assignments of the Note detailed in public records compared with Plaintiff's assertion and the circumstances of its possession of the Note[3].

2. HSBC Presents a New Argument, Not Made in the Superior Court, That Securitization Audits Are Not Credible.

Of the new arguments brought in this court which were not raised in the Superior Court, the most prejudicial is HSBC's generalization that securitization audits are unreliable (Ans. Brf. 33). Then, without having submitted any facts into

[3] Plaintiff did not fully respond to Defendants' discovery. On January 30, 2014, the Court granted Defendants' Motion to Compel (App. A1).

the record of the contents of other audits, HSBC makes the unsupported claim that Securitization Audit Pro LLC's (SAPL) securitization audit is "a mirror image of those described above" (Ans. Brf. 34). In litigation, there are frequently disputes between experts. Following HSBC's logic, a court could find that all medical experts are unreliable, because there are findings that some medical experts gave unreliable opinions.

HSBC did not argue to the Superior Court, or to this Court, that any court or administrative agency ever criticized SAPL as being unreliable. Had HSBC done so, then the usual process of expert depositions and an evidentiary hearing could have been followed to determine if there was support for that position.

Most importantly, HSBC never addressed the very specific information set forth in SAPL's securitization audit, citing governmental sources, as to each step of assignments of the Note, that deprived HSBC of any rights in the loan (*c.f.* Plaintiff's Superior Court Supplemental Brief (App. B1) to the securitization audit (*See* Op. Brf. 3-34; Audit, pp. 7, 9-10, 17; A52, 54-55, 62)).

CONCLUSION

Because the Court Below erred in applying the improper standard for considering a motion for relief from judgment, in refusing to consider arguments that Plaintiff did not own the Mortgage and Note, and in making factual findings without considering Defendants' submissions, which would have changed the outcome of the action, this Court should reverse and remand with instruction that the default judgment be vacated.

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