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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

THE UNITED STATES OF AMERICA; *ex rel.* Thomas Howard; Robert Weldy, Plaintiffs/Relators, vs. SHOSHONE PAIUTE TRIBES, DUCK VALLEY INDIAN RESERVATION, Defendant.	Case No. 2:10-cv-1890-GMN-PAL **DEFENDANT'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS**

The Shoshone-Paiute Tribes of the Duck Valley Reservation ("the Tribes") moved to dismiss on three grounds: (1) the Tribes have sovereign immunity, (2) Indian Tribes are not "persons" under the False Claims Act (FCA), and (3) relators did not meet the pleading standards

of Federal Rule of Civil Procedure 9(b). Docs. 15, 15-1. We respond to each point in relators' Opposition *seriatum*.[1]

I. THE CASE MUST BE DISMISSED FOR LACK OF JURISDICTION.

In their Opposition, relators assert that "[t]he United States government is the plaintiff" in this case, because "[i]n false claims act cases the relators bring an action on behalf of the United States government," and, therefore, "tribal sovereign immunity may not be interposed against the United States because the United States is a superior sovereign." Opposition at 5.

A. Sovereign Immunity Bars This Action.

Relators fundamentally misconstrue the doctrine of tribal sovereign immunity. Indian Tribes cannot be sued absent an unequivocal, clearly expressed waiver by the Tribe or specific abrogation by Congress.[2] The Tribes have not waived their immunity, and the False Claims Act does not abrogate that immunity.[3]

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[1] *Plaintiffs' Opposition to Defendant's Motion to Dismiss; and, in the Alternative, Countermotion to Treat Defendant's Motion as One for a More Definite Statement* (Doc. 23), filed April 30, 2012, at 5-10 ("Opposition").

[2] *Wasson v. Pyramid Lake Paiute Tribe*, 782 F. Supp. 2d 1144, 1148 (D. Nev. 2011); *see, e.g., Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998) ("As a matter of federal law, an Indian Tribe is subject to suit only where Congress has authorized the suit or the Tribe has waived its immunity.").

[3] *Kendall v. Chief Leschi School, Inc*., Slip Copy, No. C07-5220 RBL, 2008 WL 4104021 at *1 (W.D. Wash. Sept. 3, 2008) (citing *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 779 (2000) ("*Stevens*")); *accord Bly-Magee v. California*, 236 F.3d 1014, 1017 (9th Cir. 2001) (citing *Stevens* and dismissing FCA suit because "states and state agencies enjoy sovereign immunity from liability under the False Claims Act"); *United States. ex rel. Braun v. Seminole Tribe of Florida*, Order of Dismissal for Lack of Subject Matter Jurisdiction,

B. Relators Are Not the Government.

The relators are not "the sovereign" in a False Claim Act lawsuit. "Although a relator may sue in the government's name, the relator is not vested with governmental power."[4] Rather, the Supreme Court has described relators as mere beneficiaries of "a partial assignment of the Government's damages claim."[5] The Ninth Circuit elaborated: "the fact that relators sue in the name of the government is significant only with respect to their standing to sue; based on the terms of the statute, in no way does this fact otherwise affect the conduct of qui tam litigation."[6] Relators' status as partial federal assignees does not vest them with the "superior and plenary powers" that allow the federal government to sue Indian Tribes directly.[7] Stripped of pretense,

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Case No. 98-6580-CIV-LENARD, slip op. at 7 (S.D. Fla. Aug. 31, 1999), *aff'd*, 232 F.3d 215 (11th Cir. 2000) (table decision).

[4] *United States ex rel. Taxpayers Against Fraud v. General Elec. Co.*, 41 F.3d 1032, 1041 (6th Cir. 1994); *accord United States ex rel. Sanders v. Allison Engine Co.*, 364 F. Supp. 2d 716, 718 (S.D. Ohio 2005) (holding that "the qui tam plaintiff, or relator, is not vested with governmental power").

[5] *Stevens*, 529 U.S. at 773.

[6] *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 760 (9th Cir. 1993) (rejecting the argument that "qui tam relators are bound to fulfill the same type of public duty as government prosecutors" and holding that "relators pursue their claims essentially as private plaintiffs, except that the government may displace a relator as the party with primary authority for prosecuting an action"); *accord United States ex rel. Lamers v. City of Green Bay*, 924 F. Supp. 96, 98 (E.D. Wis. 1996) (when the Government declines to intervene, "[a]lthough the qui tam plaintiff is relieved of the burden of establishing standing, it does not follow that because the relator is suing in the name of the United States that his counsel represents the United States in this action").

[7] *United States v. Red Lake Band of Chippewa Indians*, 827 F.2d 380, 383 (8th Cir. 1987).

relators are private individuals pursuing a bounty. They have no implied or inherent "superior" authority to override the Tribes' sovereign immunity.[8]

That is most clear where, as here, the Government has declined to prosecute a False Claims Act suit. "[T]he Eleventh Amendment bars qui tam plaintiffs from instituting suits against the sovereign states in federal court."[9] This is because "[u]nless the United States commits its own resources—both personnel and money that are under its authority and control—private citizens should not be able to sidestep the Eleventh Amendment and hail the sovereign states into federal court."[10] This reasoning is equally forceful in the Tribal context, as Indian

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[8] *See, e.g.*, *United States ex rel. Foulds v. Texas Tech University*, 171 F.3d 279, 289 (5th Cir. 1999) (relator may have brought False Claims Act case "in the name of and on behalf of the United States," but "[i]n actuality, it is as plain as the sun that this suit was not commenced by the United States and that the United States has not intervened to prosecute the case."), and *id*. at 294 ("In sum, we hold that when the United States has not actively intervened in the action, the Eleventh Amendment bars qui tam plaintiffs from instituting suits against the sovereign states in federal court.") (citing, *inter alia*, *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997)).

[9] *Id.* at 294. *Accord Bell v. Dean*, Slip Copy, No. 2:09-CV-1082-WKW, 2010 WL 1856086 at *3 (M.D. Ala. May 4, 2010) (citing *Texas Tech* and holding that state sovereign immunity bars FCA actions against States when the Government does not intervene "simply on the basis that there was no clear statement [in the False Claims Act] that [such suits are] permitted"); *United States ex rel. Sanders*, 364 F. Supp. at 718 ("Where the Government declines to intervene, the relator is empowered as a private prosecutor. However, the relator's position is 'without tenure, duration, continuing emolument or continuous duties' with regard to being an agent or employee of the Government.") (citations omitted); *United States ex rel. Farrell v. SKF, USA, Inc.*, 32 F. Supp. 2d 617, 618 (W.D.N.Y. 1999) (United States is not a party litigant when it declines to intervene in a False Claims Act qui tam suit); *United States ex rel. Lamers*, 924 F. Supp. at 98 (describing (and rejecting) qui tam relators' argument that they were coequal to the Government as "confus[ing] the distinction between the United States being a party and the United States being the real party in interest").

[10] *Texas Tech University*, 171 F.3d at 293-94. As other courts have noted, treating cases in which the Government declines to intervene identically to those in which the Government does intervene "would effectively remove from the statute the government's ability to choose *not* to

Tribes are, first and "foremost, sovereign nations."[11] The Tribes' sovereign immunity bars this action.[12] This issue is dispositive, and provides a clear and distinct basis for dismissal of this action. FED. R. CIV. P. 12(b)(1).

C. Indian Tribes Are Not "Persons" Under the FCA.

Even if the Tribes' sovereign immunity had been waived or abrogated by Congressional action, relators would face another insurmountable problem: the False Claims Act does not apply to federally-recognized Indian Tribes, as Tribes (and States) are not "persons" subject to the statute. 31 U.S.C. § 3729(a)(1).[13] Relators do not contend otherwise. Instead, they recycle their argument that the United States is a "superior sovereign" and assert, scattershot, points irrelevant to the motion at bar.

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intervene" and that "Congress's intent in creating the option provision would be thwarted since the government counsel would have to expend government resources to respond to discovery requests from hundred's [sic] of private suits." *SKF, USA, Inc.*, 32 F. Supp. 2d at 618 (emphasis in original).

[11] *Am. Vantage Cos., Inc. v. Table Mountain Rancheria*, 292 F.3d 1091, 1096 (9th Cir. 2001).

[12] The Tribes' sovereign immunity would bar this action even if the Government intervened. The Government's decision not to intervene underscores the fact that relators' case is, at heart, a private action. *United States v. Menominee Tribal Enterprises*, 601 F. Supp. 2d 1061, 1068-69 (E.D. Wis. 2009) (holding that pursuant to *Stevens*, Tribes cannot be sued under the False Claims Act regardless of whether or not the Government intervenes) ("*Menominee*").

[13] *Stevens*, 529 U.S. at 780 n.9 and 787 ("[T]he FCA, both as originally enacted and as amended, far from providing the requisite affirmative indications that the term 'person' included States for purposes of *qui tam* liability, indicate[s] quite the contrary."); *Menominee*, 601 F. Supp. 2d at 1068 (concluding that "Tribes are not 'persons' under § 3729(a)"); *Kendall v. Chief Leschi School, Inc., supra* n.3.

First, relators assert that *Menominee*[14] incorrectly held that "a sovereign could not be a person within the meaning of the false claims act" because "the United States will always be a litigant in a False Claims Act case" and the Tribes have "no sovereignty as against the United States." Opposition at 7. Relators' argument confuses Tribal sovereign immunity with statutory interpretation. *Menominee* followed the Supreme Court's holding in *Stevens* that sovereign entities are not "persons" as defined in the False Claims Act. As the Ninth Circuit explained in *Stoner v. Santa Clara County Office of Education*:[15]

> *Stevens* based its holding that neither a state nor a state agency were "persons" within the meaning of § 3729 on the following canons of statutory construction related to state sovereignty: (1) the presumption that the term "person" does not include the sovereign; (2) the rule that Congress must clearly state its intention to subject states to liability; (3) the presumption against imposition of punitive damages on governmental entities; and (4) "the ordinary rule of statutory construction that if Congress intends to alter the usual constitutional balance between States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute."[16]

This statutory analysis is completely different from the sovereign immunity analysis in the cases cited by relators.[17] And, relators cite those cases incorrectly. *Kiowa Tribe of*

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14 *United States v. Menominee Tribal Enterprises, supra* n.12.

15 502 F.3d 1116 (9th Cir. 2007).

16 *Id.* at 1121 (internal citations omitted).

17 Even if Indian Tribes were subject to the FCA, the Tribes would still enjoy immunity from this suit. *See supra* notes 3 and 12 and accompanying text; *accord Stevens*, 529 U.S. at 787 ("We of course express no view on the question whether an action in federal court by a *qui tam* relator against a State would run afoul of the Eleventh Amendment, but we note that there is 'a serious doubt' on that score.") (citation omitted); *United States ex rel. Ali v. Daniel, Mann, Johnson & Mendenhall*, 355 F.3d 1140, 1145 (9th Cir. 2004) (States immune from FCA suits under *Stevens*); *Bly-Magee v. California, supra* n.3 (same).

Oklahoma, which relators describe as holding "[i]t is well settled federal law that a Tribe may waive its sovereign immunity," in fact resoundingly reaffirmed that "Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation. Congress has not abrogated this immunity, nor has petitioner waived it, so the immunity governs this case."[18]

Similarly, relators very briefly argue that sovereign immunity does not apply when Tribes operate "a quasi, or completely, commercial enterprise," Opposition at 7, citing *Colorado v. Cash Advance and Preferred Cash Loans*[19] for the proposition that the "Tribes are not permitted 'to operate in a commercial capacity without legal constraint.'"[20] The case actually held that the two involved Indian Tribes were "immune from any action—criminal, civil, or injunctive—the Attorney General may bring in a Colorado court . . . ."[21] The appellate court remanded for hearing the separate question of whether two defendant corporations "are arms of the respective Tribes," in which case the corporations would also be "immune from any enforcement action, unless their immunity has been waived."[22]

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18 523 U.S. 751, 760 (1998).

19 205 P.3d 389 (Colo. Ct. App. 2008).

20 *Id.* at 399 (citation omitted).

21 *Id.* (further holding that "although the Tribes may be generally subject to regulation for off-reservation conduct, Tribal sovereign immunity carries with it immunity from enforcement actions 'absent a clear waiver by the Tribe or congressional abrogation.'") (citing *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991)).

22 *Id.* at 406.

Here, of course, relators are suing the Tribes themselves.[23] They are not suing a separate corporation or other legal entity. Under either *Kiowa Tribe of Oklahoma* or *Colorado v. Cash Advance*, the Tribes are immune from suit.

Last, relators absurdly characterize health care services provided through the Tribes' Indian Self-Determination and Education Assistance Act Compact with the Secretary as "a quasi, or completely, commercial enterprise." Opposition at 7. Providing health care to Tribal members is a core governmental function of the Tribes and the United States and is not a commercial activity at all.[24] Similarly, relators' argument that the Tribes do not have sovereign immunity because the allegedly false claims occurred "within a building believed to be owned by the federal government, not a building owned by the tribe" is entirely without merit. Opposition at 7. An Indian Tribe does not lose its sovereign immunity simply because it performs a self-determination contract for health services in a federal facility.[25]

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[23] *N.b.*, relators continue to confusingly assert that "[t]he Defendant . . . *is a reservation* operated by the Shoshone-Paiute Tribes, a federally-recognized Indian Tribe." Opposition at 2 (emphasis added). The "Duck Valley Reservation" is a geographic area and not a proper defendant in any action – relators might have as well sued "Lake Powell" or "the Great Basin." If relators do in fact mean to sue "the reservation," the case should be dismissed forthwith for failure to state a claim against the Tribes. FED. R. CIV. P. 12(b)(6).

[24] Congress has recognized provision of health care to American Indians and Alaska Natives as "consonant with and required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people." 25 U.S.C. § 1601(1). The Tribes operate the health clinic and federal health care programs under authority of the Indian Self-Determination Act, Pub. L. No. 93-638, as amended, 25 U.S.C. § 450 *et seq*., and the Indian Health Care Improvement Act, Pub. L. No. 94-437, as amended, 25 U.S.C. § 1601 *et seq*.

[25] *Pink v. Modoc Indian Health Project, Inc.*, 157 F.3d 1185, 1189 (9th Cir. 1998). Location of an activity is simply immaterial to sovereign immunity. *Kiowa Tribe of Oklahoma*, *supra* n.2, at 760 ("Tribes enjoy immunity from suits on contracts, whether those contracts

Relators' attempts to distinguish *Menominee* conflate sovereign immunity and statutory interpretation jurisprudence, and run directly counter to both Supreme Court and Ninth Circuit precedent. The Tribes are sovereign entities and are therefore not "persons" under the False Claims Act. This issue is dispositive, and provides a clear and distinct basis for dismissal of this action. FED. R. CIV. P. 12(b)(1) and (6).

II. THE COMPLAINT MUST BE DISMISSED UNDER RULE 9(b).

Relators agree that FCA defendants must be able to "'defend against the charge and not just deny that they have done anything wrong.'" Opposition at 8 (quoting *United States ex rel. Williams v. Martin-Baker Aircraft Co., Ltd.*, 389 F.3d 1251, 1259 (D.C. Cir. 2004)). The courts have made clear that to meet this standard the complaint "must identify 'the who, what, when, where, and how' of the misconduct charged."[26] The court in *Williams*, cited by relators, described the Rule 9(b) pleading requirement as follows: "the pleader [must] state the time, place and content of the false misrepresentations, the fact misrepresented and what was retained or given up as a consequence of the fraud . . . [and] . . . identify individuals alleged involved in the fraud."[27] Furthermore, the relator must specify why the false statement is material to the payment decision of the government.[28] *Williams* additionally points out that Rule 8(a) applies to

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involve governmental or commercial activities and whether they were made on or off a reservation.").

[26] *United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011).

[27] *Williams*, 389 F.3d at 1256 (citations omitted).

[28] *United States v. Bourseau*, 531 F.3d 1159, 1170-71 (9th Cir. 2008).

suits brought under the False Claims Act,[29] and both the Supreme Court and the Ninth Circuit have held that Rule 8(a) requires the pleadings to state "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [the misconduct alleged]."[30] The complaint fails to meet these standards.

No particularity is provided in the Opposition. Relators simply repeat the complaint's extraordinarily broad and uninformative allegations. Opposition at 8-9. These allegations do not identify any alleged false claims whatsoever. For example, the Opposition repeats verbatim the complaint's allegation that the Tribes' "continued to report to the United States government that it had a hospital and not a clinic which resulted in additional funding Defendant would not have otherwise been entitled to from the United States government." *Id.* This allegation provides no information about any particular transaction, any particular service or any individuals involved.[31] Nor do relators explain why describing the health facility as a "hospital" or a "clinic" is relevant or material to claims submitted to the Government. As the Tribes pointed out in their opening memorandum, Doc. 15-1 at 9, tribal health programs have redesign authority under the Indian Self-Determination and Education Assistance Act.[32] Relators do not respond to this point of

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29 *Williams*, 389 F.3d at 1256.

30 *Cafasso*, 637 F.3d at 1055 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

31 *Williams*, 389 F.3d at 1257 (complaint does not satisfy Rule 9(b) where it fails to "identify with specificity who precisely was involved in the fraudulent activity").

32 25 U.S.C. § 458aaa-5(e) ("(e) Redesign and consolidation. An Indian tribe may redesign or consolidate programs, services, functions, and activities (or portions thereof) included in a funding agreement under section 458aaa-4 of this title and reallocate or redirect funds for such programs, services, functions, and activities (or portions thereof) in any manner which the Indian

law, and provide no explanation or support for their assertion that the Tribes received "additional funding [they] would not have otherwise been entitled to" from the Government as a result of any specific claims, whether related to program redesign or to any other cause whatsoever.

Similarly, relators simply copy and repeat the complaint's allegation that the Tribes filed claims for reimbursement for treatment of individuals who were not "a descendant of a member of a recognized tribe." Opposition at 9. First, providing health care services to non-Indians is not a violation of law. ISDEAA Section 813 allows tribal health programs to provide services to non-Indians.[33] Second, again, this allegation does not describe a single false claim alleged to have been provided. There are no specific dates given, no providers identified, no description of any service whatsoever.

Finally, relators briefly argue that the pleading requirements should be relaxed to permit discovery, based on a passage in *United States ex rel. Lee v. Smithkline Beecham, Inc.* that notes that "Rule 9(b) may be relaxed to permit discovery in a limited class of corporate fraud cases where the evidence of fraud is within a defendant's exclusive possession."[34] Opposition at 8.

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tribe deems to be in the best interest of the health and welfare of the Indian community being served, only if the redesign or consolidation does not have the effect of denying eligibility for services to population groups otherwise eligible to be served under applicable Federal law.").

[33] 25 U.S.C. § 1680c(c)(2) (stating that "the governing body of the Indian tribe or tribal organization providing health services under such contract or compact is authorized to determine whether health services should be provided under such contract or compact to individuals who are not eligible for such health services under any other subsection of this section or under any other provision of law").

[34] *United States ex rel. Lee v. Smithkline Beecham, Inc.*, 245 F.3d 1048, 1052 (9th Cir. 2001) (citing *Deutsch v. Flannery*, 823 F.2d 1361, 1366 (9th Cir. 1987) (shareholder action) and *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1439 (9th Cir. 1987) (stock purchaser action)).

That exception does not apply here. First, the complaint contains no allegation that any information is in the exclusive possession of the defendant.[35] Indeed, such an assertion would be contrary to relators' allegation that they were previously employed by the Tribes' health facility and discovered the alleged fraud while employed there. Opposition at 3.[36] Second, the Ninth Circuit has declined to apply this approach to a qui tam action brought against a health care entity.[37] Third, even if this limiting principle were applied here, the allegations in the complaint fail to satisfy the requirement that they "include the misrepresentations themselves with particularity and, where possible, the roles of the individual defendants in the misrepresentations."[38]

In sum, relators' allegations amount to no more than "mere conclusory allegations of fraud [which] are insufficient" to allow relators to proceed under Rule 9(b).[39] As the Ninth

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[35] A plaintiff still must: (1) specifically allege that the defendant controls the necessary information, and (2) include a statement of the facts upon which the information and belief is based. *California ex rel. Mueller v. Walgreen Corp.*, 175 F.R.D. 631, 635 (N.D. Cal. 1997).

[36] *See also Lee*, 245 F.3d at 1052 (rejecting application of relaxed pleading requirement to employee of defendant).

[37] *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 999 (9th Cir. 2010).

[38] *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989).

[39] *Id.* In addition to the points noted *supra*, relators repeat the complaint's allegation that the Tribes used an outdated billing package and billed Medicare and Medicaid for physician visits when patients saw nurses or "unlicensed physicians." Opposition at 9. Again, these allegations are insufficient in that they provide no detail about the nature or time of the services, the amount of the bills, or the individual providers or other staff involved in the care or the bills. *United States ex rel. Polansky v. Pfizer, Inc.*, Slip Copy, No. 04-cv-0704 (ERK), 2009 WL 1456582, at *5 (E.D.N.Y. May 22, 2009).

Circuit held in *Cafasso*, discovery in this matter is inappropriate under Rule 8(a) since the complaint fails to state "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence" of any misconduct.[40]

CONCLUSION

For the foregoing reasons, and for those expressed in the Tribes' Memorandum in Support of Motion to Dismiss, Doc. 15-1, the Tribes respectfully request that this action be forthwith dismissed with prejudice.

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[40] *United States ex rel. Cafasso v. Gen. Dynamics C4 Sys., Inc.*, *supra* n.30, at 1055 (quoting *Bell Atlantic Corp. v. Twombly*, *supra* n.30, at 545).

Dated this 9th day of May 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of May 2012, I electronically filed the foregoing "**DEFENDANT'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS"** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following via their email addresses:

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