STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW DOCKET NO. CUM-24-360

DEUTSCHE BANK TRUST COMPANY AMERICAS, AS TRUSTEE FOR RESIDENTIAL ACCREDIT LOANS, INC., MORTGAGE ASSET-BACKED PASS-THROUGH CERTIFICATES, SERIES 2007-QA2,

Plaintiff-Appellant,

vs.

S. SHERMAN B. KENDALL A/K/A SHERMAN B. KENDALL, et al.

Defendants-Appellees.

ON APPEAL FROM JUDGMENT ENTERED BY THE SUPERIOR COURT FOR CUMBERLAND COUNTY DOCKET NO. PORSC-RE-17-303

REPLY BRIEF OF APPELLANT DEUTSCHE BANK TRUST COMPANY AMERICAS, AS TRUSTEE

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I. INTRODUCTION

Deutsche Bank's[1] principal brief established three points, each of which the Kendalls are unable to rebut:

First, the trial court erred when it determined that Deutsche Bank had failed to establish its standing to foreclose. In that regard, the Kendalls' Brief makes a lot of noise, but raises issues that are: (1) irrelevant to the issues before this Court, (2) unsupported by the law, or (3) unsupported by the **record evidence** before the trial court (and thus, before this Court). The Kendalls seem to believe that if enough noise is made, this Court will become distracted from the real issues in this appeal, as more fully set forth in Deutsche Bank's opening Brief, to wit, that Deutsche Bank established standing by showing it was the holder of the original note, indorsed to it, and that the Quitclaim Assignment to Deutsche Bank is the exact way this Court instructed to cure any defect in a MERS assignment.

Second, consistent with the same faulty notion, the trial court was not required to find that Homecomings was the beneficiary owner of the Mortgage when it executed the Quitclaim Assignment; and any adverse result from the errant notion is beside the law on the same issue. That is, post-Greenleaf standing can be proven by a Quitclaim Assignment to the foreclosing plaintiff. Indeed, the very purpose of standing in a foreclosure action is not to provide a defense to a borrower, but to make

[1] Capitalized terms shall have the same meaning as in Deutsche Bank's principal brief, unless otherwise noted.

sure a borrower cannot be subject to claims by two would-be claimants. That possibility was eliminated completely by Homecomings' execution of the Quitclaim Assignment.

Third, the trial court committed legal error in refusing to admit the Pooling and Servicing Agreement, the Mortgage Loan Schedule and the Assignment and Assumption Agreement, and the record shows the issue relating to inadmissibility was not waived by Deutsche Bank.

Fourth, and finally, the Kendalls' argument that this Court could and should affirm the trial court's judgment on another independent basis – suggesting that Deutsche Bank engaged in bad faith and dilatory tactics – is without legal or factual merit; and the Kendalls offered no evidence at trial on that theory.

II. ARGUMENT

A. Deutsche Bank Provided Competent Evidence of its Standing to Foreclose.

There is no dispute that the trial court made a preliminary finding that the evidence before it supported the conclusion that Deutsche Bank owned the mortgage. App. 28-29 (evaluating the mortgage, the quitclaim assignment and the power of attorney and stating: "Taken together, the exhibits appear to grant Ocwen Loan Servicing LLC the right to assign the Kendall's mortgage to Plaintiff on behalf of Homecomings Financial, LLC."). The Kendalls do not challenge this preliminary finding. Appellee's Brief ("Br.") at 29. From there, though, the trial court lost its

way when it considered Homecomings' bankruptcy proceeding, and then drew conclusions that are both factually and legally incorrect.

Adding to the confusion, the Kendalls now attempt to put forth four separate avenues for undermining the evidence before the trial court in an effort to distract this Court from the inescapable conclusion that Deutsche Bank did, in fact, provide competent evidence of its ownership of the Mortgage.

1. The Kendalls point to no evidence before the trial court that Homecomings was dissolved.

First, the Kendalls continuously argue that Homecomings was dissolved. But, they point to **no evidence** before the trial court to support that conclusion. Deutsche Bank has repeatedly pointed to the absence of any such evidence and so, certainly, had the trial court been presented with evidence of **dissolution**, the Kendalls would have pointed to it for this Court's benefit. But, they did not. Instead, they repeatedly make reference to the fact that the parties stipulated that "Homecomings had ceased to do business in the State of Maine as of February 26, 2014." Br. at 13. But, ceasing to do business in one state – here, Maine -- is not the equivalent of a corporate entity's dissolution and the Kendalls have cited to no authority to suggest otherwise. *Compare* 13-C M.R.S.A. § 1401, et seq. (regarding corporate dissolution) with 13-C M.R.S.A. § 1521 (Withdrawal of Foreign Corporation). Nor does it draw any inference or conclusions that Homecomings was not operating elsewhere; for example, in one of the 49 other states that make up the

United States. If the filing of bankruptcy necessarily equated to some sort of dissolution, then one must conclude that General Motors, which filed bankruptcy in 2008, and Chrysler Motors, which did so in 2009, are both dissolved companies. This would be equally true of our favorite theme parks owned by Six Flags, which filed bankruptcy in 2010.

But, even if Homecomings is dissolved, the trial court explicitly acknowledged that (1) Delaware law supports the conclusion that a power of attorney remains in effect until a Certificate of Cancellation is filed; and (2) the trial court had received no evidence to support the conclusion that a Certificate of Cancellation had ever been filed with respect to Homecomings' purported dissolution. App. 30. In the absence of any evidence to support the conclusion that the power of attorney was no longer effective following the bankruptcy, the trial court's resulting determination that Deutsche Bank had failed to establish its ownership of the Mortgage was legally erroneous.

2. The trial court correctly took judicial notice of Exhibit K which provides further unrefuted evidence of the ongoing authority under the Power of Attorney.

Next, the Kendalls implore this Court to (1) find that the bankruptcy had the effect of dissolving Homecomings as an existing corporate entity – conveniently failing to point to any record evidence before the trial court to support that conclusion – but also (2) to ignore what actually transpired in the bankruptcy as evidenced by Deutsche Bank's Exhibit K. The Kendalls simply cannot have their

cake and eat it too. Either the bankruptcy (as a whole) was relevant to Homecomings' corporate existence and the effect of the Power of Attorney, or it wasn't.

Curiously, the Kendalls argue at various points in their brief that Exhibit K was inadmissible hearsay and/or not subject to judicial notice and/or that the trial court's decision to take judicial notice of Exhibit K did not serve the very purpose which it identified, to wit, "for the limited purpose of shedding light on the powers of attorney." App. 41. But, the trial court **did** ultimately decide to take judicial notice of Exhibit K for Deutsche Bank's stated intention of proving that the Power of Attorney was valid and effective following the bankruptcy. And, the Kendalls did not appeal the trial court's decision to take judicial notice of Exhibit K. Accordingly, that issue has not been preserved and is therefore not ripe for this Court to consider.

Most notably, the Kendalls do not dispute that Exhibit K provides unrefuted evidence in support of a determination that the Power of Attorney remained valid and effective following the bankruptcy **because it was a product of the bankruptcy**. Appellant's Opening Brief ("DB Br."), 21-22. It is for this reason that the Kendalls' reliance on *Matter of Maplewood Poultry Company*, 2 B.R. 550 (Bankr. D. Me. 1980) is misplaced. There, the court wrangled with the effect of the filing of a Chapter 11 bankruptcy petition on an already-existing power of attorney. But, it acknowledged that – as Deutsche Bank argued in its opening brief – powers of attorney "coupled with an interest" are excepted from the general premise that "contracts of agency are revoked upon bankruptcy." *Id.* at 553. More importantly, however, is the fact that

the Power of Attorney here was not in existence at the time that the bankruptcy petition was filed but, rather, was executed in response to and as a product of the bankruptcy itself. DB Br., 21-22.

In an effort to turn this Court's focus away from the substance of Exhibit K, the Kendalls simply argue that the trial court's decision to take judicial notice was not "for the truth of the matter asserted." Br. at 40, 47. In so doing, they purportedly rely on the proposition that "the First Circuit and **this Court** prohibit judicial notice of a government website for the truth of the matter asserted, when the subject matter can be reasonably disputed and the proponent fails to provide any information about it." Br. at 47. But, the Kendalls do not actually cite to any authority from **this Court** for that proposition. Instead, they rely on the Maine *Federal District* Court and the First Circuit, and in doing so fail to acknowledge that there is nothing in the record to suggest that the contents of Exhibit K were "reasonably disputed."

Interestingly, and as the Kendalls otherwise note, this Court **has** weighed in on the issue of judicial notice in *Seymour v. Seymour*, 2021 ME 60, in which it stated that a court may take judicial notice of information on a website "for either of two purposes: solely to take notice that the information appears on the website or for the truth of the matter asserted on the website." *Id.* at ¶ 10. It further acknowledges that M.R. Evid. 201(b) "authorizes a court to take judicial notice of adjudicative facts 'not subject to reasonable dispute'", that M.R. Evid. 201(c)(2) **mandates** that a court take judicial notice of an adjudicative fact that is not reasonably subject to dispute and that

courts "routinely take judicial notice of information on official government websites", identifying an adjudicative fact as "a fact relevant to the particular proceeding." *Id.* at ¶¶ 11, 12.

In light of this Court's holding in *Seymour*, the Kendalls' argument necessarily fails in two respects. First, and as argued above, they did not appeal the trial court's decision to take judicial notice of Exhibit K and therefore any argument challenging the scope of the trial court's judicial notice is not properly before this Court. Second, as with the balance of the Kendalls' arguments, they have pointed to **no evidence** for this Court to determine that the filings in Homecomings' bankruptcy were or could be "reasonably disputed." It is for this reason that the Kendalls' reliance on *Cabral v. L'Heureux*, 2017 ME 50, ¶ 11, is similarly misplaced, where there has been no showing that Deutsche Bank had asked the trial court to take judicial notice of "disputed evidence" via the bankruptcy records. Accordingly, the Kendalls' attack on the evidentiary value of Exhibit K is wholly without merit.

3. The Consent Agreement is irrelevant to the facts and circumstances of this case.

As their third avenue of attack, the Kendalls attempt to undermine the validity of the Quitclaim Assignment by hanging their hat on the entry of a Consent Agreement with Ocwen Loan Servicing, LLC ("Ocwen") two years following the execution of the Quitclaim Assignment. But, that argument can only have the effect of distracting this Court from the unrefuted record evidence. The Consent

Agreement makes reference to facts and circumstances unrelated to those before the trial court and, by extension, before this Court.

Unlike the circumstances surrounding the Aegis entities as identified in the Consent Agreement, the Kendalls have failed to point to any evidence before the trial court that Homecomings was dissolved at the time that the Quitclaim Assignment was executed under the Power of Attorney. And, unlike the circumstances surrounding the Aegis entities, there is a wealth of competent, unrefuted evidence to support the conclusion that the Power of Attorney was not only effective following the bankruptcy proceedings, but it was in fact **a product of** the bankruptcy proceedings. DB Br., 21-22.

Having failed to establish that there is any evidentiary value to the Consent Agreement under the circumstances of this case, the Kendalls cannot use it to try to bolster their argument that the Power of Attorney did not grant Ocwen the ongoing authority to execute the Quitclaim Assignment on behalf of Homecomings.

4. Deutsche Bank met its burden of proof in establishing that it was the holder of the Mortgage.

The Kendalls finally beg this Court to determine that Deutsche Bank was required to prove that their loan was within that pool of loans that were covered by the Power of Attorney, thus authorizing Ocwen to execute the Quitclaim Assignment on Homecomings' behalf.

This argument is fatally flawed, in that it seeks to impose a burden of proof greater than the "preponderance of the evidence" standard which applies in foreclosure actions. *MTGLQ Investors, L.P. v. Alley*, 166 A.3d 1002, 1005 (Me. 2017) (overruled on other grounds). The following facts, as articulated in Deutsche Bank's opening brief, remain unrefuted:

1. After origination, Homecomings indorsed the Note and delivered it to Residential Funding Company, LLC, which indorsed the Note and delivered it to "Deutsche Bank Trust Company Americas as Trustee." A76-A81; 11/2/2023 Trial Tr. 124:14-128:13. Deutsche Bank Trust Company Americas as Trustee subsequently indorsed and delivered the Note via an affixed allonge to Deutsche Bank). *Id.*
2. Homecomings executed a Quitclaim Assignment of the Mortgage in favor of Deutsche Bank, which was recorded on August 11, 2017 in Book 34229, Page 268 of the Cumberland County Registry of Deeds (the "Quitclaim Assignment"). A109-A110; 11/2/2023 Trial Tr. 146:16-148:3. The Quitclaim Assignment was signed by Homecomings through its attorney-in-fact, Ocwen, in accordance with the Power of Attorney, which gave Ocwen the authority to, among other things, "execut[e] assignments of mortgages." A255-A259; 11/28/2023 Trial Tr. 49:19-51:3.

3. The October 21, 2013 Power of Attorney was recorded with the Cumberland County Registry of Deeds on July 5, 2017 in Book 34136, Page 162. A255-A259.

Each of these documents were admitted as evidence, collectively supporting the conclusion that Deutsche Bank is the entity intended, and entitled, to enforce both the Note and the Mortgage. 11/28/2023 Trial Tr. 40:10--50:21. That, in and of itself, should operate to satisfy Deutsche Bank's burden of proof, when there was nothing put on the other side to tip the scale of justice the other way.

Moreover, each of the Mortgage, Quitclaim Assignment and Power of Attorney were notarized. In that regard, this Court's holding in *U.S. Bank National Association, as Trustee v. Beedle*, 2020 Me. 84, ¶ 17 is instructive. There, this Court vacated the trial court's ruling that the foreclosing plaintiff had failed to prove standing based on its failure to provide proof of a merger, stating:

> The signature on the notarized document, reading "Bank of America, N.A. SBM [successor by merger] to Fleet National Bank," is itself evidence establishing that there was a merger between Fleet and BOA, and Beedle does not contend otherwise. Thus, the court misapprehended the nature of Beedle's objection and consequently erred when it concluded that "proof of the merger is the missing link in the ownership chain."

Id. Similarly here, the Quitclaim Assignment, executed by Ocwen under the Power of Attorney given by Homecomings, was notarized and thus was "itself evidence" establishing that Ocwen was exercising its rights and authority under the Power of Attorney to execute the Quitclaim Assignment. A109-A110. And, the Power of

Attorney was notarized, thus constituting further evidence establishing that Ocwen had the right to execute the Quitclaim Assignment. A255-A259.

Much like the defendant in *Beedle*, the Kendalls did not offer up any evidence to suggest that Ocwen *did not* have the right to execute the Quitclaim Assignment under the Power of Attorney that was before the trial court. Rather, and much like the defendant in *Beedle*, the Kendalls simply ask this Court to infuse a more stringent "beyond a reasonable doubt" evidentiary standard, obligating Deutsche Bank to tie up any conceivable "loose end," even when the evidence that has been presented is, and remains, substantively unrefuted.

As with *Beedle*, this Court should not be so swayed.

B. The Quitclaim Assignment was Effective to Transfer Homecomings' Remaining Interest in the Mortgage to Deutsche Bank.

Much like their other arguments, the Kendalls' reliance on this Court's decision in *Deutsche Bank Nat'l Tr. Co. v. Wilk*, 2013 ME 79, ¶ 12 – in an apparent effort to undercut Deutsche Bank's argument that the Quitclaim Assignment was effective to transfer Homecomings' remaining interest in the Mortgage – is similarly misplaced. There, this Court found that the timing of the executed assignments of mortgage was such that when the mortgage was purportedly assigned to the foreclosing plaintiff, the assignor did not yet have an interest in the mortgage to convey, rendering the assignment into the foreclosing plaintiff a nullity.

Here, and as argued *supra*, the unrefuted evidence supports the conclusion that the bankruptcy court specifically authorized the transfer of assets as well as the power of attorney to facilitate the transfer of those assets. DB Br., 21-22. To the extent that Homecomings determined that it had inadvertently (and unknowingly) retained an interest in the Mortgage following this Court's decision in *Bank of America v. Greenleaf*, 2014 ME 89 ("*Greenleaf I*"), the effect of the bankruptcy was to authorize a transfer of that asset away from Homecomings. The Quitclaim Assignment, executed under the Power of Attorney, did just that.

C. Deutsche Bank Did Not Waive the Admissibility of the PSA Documents.

The Kendalls' suggestion that Deutsche Bank waived any argument pertaining to the admissibility of the PSA Documents fairs no better. Here, they argue that Deutsche Bank's failure to argue for their admissibility in its Closing Argument, and later, in its Post Judgment Motion, constituted a waiver. But, that contention is factually, and thus legally, inaccurate.

First, the Kendalls admit that the Court took the admissibility of the PSA Documents under advisement at the time of trial. Br. at 15-16; 11/28/2023 Trial Tr. 11:2-22 ("I'm going to have to think a little bit about whether it's an official document that the Court can take judicial notice of."). Moreover, immediately preceding the decision to take the matter under advisement, the trial court and the parties engaged in an extensive dialogue regarding the admissibility of the PSA documents.

11/2/2023 Trial Tr. 186:20-196:8. Accordingly, any issue regarding the admissibility of the PSA Documents was properly preserved on appeal, via the parties' dialogue with the trial court on the record. *See*, *State v Hanscom*, 446 A.2d 415, 416-417 (Me. 1982) (reviewing the trial transcript and determining that issue was properly preserved on appeal). This is particularly true where there is nothing in the record to suggest that the trial court specifically asked for additional briefing with respect to the admissibility of those exhibits.

Second, the record is clear that the trial court did not issue its determination regarding the admissibility of the PSA documents, as well as Exhibit K, until its July 15, 2024 order. App. 37 ("The court did not admit these exhibits at trial but instead took them under advisement and did not reach their admissibility…") In fact, in its opening Post-Judgment Motion, Deutsche Bank explicitly acknowledged that the trial court had not rendered its decision on the admissibility of those exhibits which it took under advisement following trial and asked it to do so. App. 53, FN 1. Having already preserved the issue for appeal through the in-court dialogue regarding the admissibility of the PSA documents, there was nothing Deutsche Bank needed to do, where the Court had not yet rendered a decision on that issue. Accordingly, any "failure" to reiterate its position on the admissibility of the PSA Documents in its

Closing Argument and in its opening Post-Judgment Motion are without consequence to the issue of preservation.

D. The Kendalls Have Provided No Basis on the Record Before this Court that Affirmance in the Alternative is Appropriate.

Finally, the Kendalls spend an inordinate amount of time arguing that this Court should affirm the trial court's judgment on an alternate basis, but without any evidentiary or legal support for this proposition.

First, the Kendalls argue that the lawsuit was time barred by the six-year statute of limitations for a suit under the Note. But, Deutsche Bank did not sue the Kendalls for personal liability under a breach of the Note. Rather, it sued to foreclose the Mortgage. And, the applicable statute of limitations for a mortgage foreclosure is twenty years. *Johnson v. McNeil*, 2002 ME 702, ¶¶ 13-15 (citing to the 20 year statute of limitation under 14 M.R.S.A. § 6104 and holding "the running of the period of limitations during which the provisions of the note may be enforced does not eliminate the existence of the debt obligation itself, nor does it abrogate the mortgage securing the debt or affect the foreclosure remedies available to the mortgagee.")[2] Thus, Deutsche Bank's foreclosure is not time-barred.

[2] To the extent that the Kendalls attempt to suggest that a previously filed foreclosure action implicates a lender's ability to reforeclose after the passage of 6 years, their argument is explicitly undercut by this Court's decisions in *Greenleaf I*, supra and *Finch v. U.S. Bank*, 2024 ME 2, where this Court confirmed that a lender may have the opportunity to reforeclose following a previously failed foreclosure.

The Kendalls next argue that this Court should affirm the trial court's issuance of a judgment in their favor as a result of what they describe as Deutsche Bank's "dilatory tactics." But, voluntarily dismissed foreclosures alone, without evidence of intentional conduct by a foreclosing lender to cause unnecessary delay, are not enough to win the day. Importantly, there is no evidence presented at trial regarding **why** the prior foreclosures were dismissed, and accordingly, without more, there is no basis for this Court to summarily determine that Deutsche Bank engaged in conduct which should necessitate the entry of an adverse merits ruling. Accordingly, it should decline to do so.

The Kendalls then turn to 14 M.R.S.A. § 6113, which falls similarly short. 14 M.R.S. § 6113, enacted in 2019, imposes a duty to "act in good faith toward an obligor in the servicing of an obligation secured by a mortgage and in any foreclosure action relating to such an obligation." 14 M.R.S. § 6113(2). "Good faith" means "honesty in fact and the observance of reasonable commercial standards of fair dealing." 14 M.R.S. § 6113(1)(A). But, any claim that the underlying foreclosure judgment may be affirmed in the alternative under a 6113 claim fails in two significant respects.

First, the Kendalls have no viable claim under 14 M.R.S.A. § 6113 where that statute was enacted in 2019 and this matter was commenced in April of 2018. *See*, 1 M.R.S.A. § 302 ("Actions and proceedings pending at the time of the passage, amendment or repeal of an Act or ordinance are not affected thereby."); *Bank of Maine, N.A. v. Weisberger*, 477 A.2d 741, 745-746 (Me. 1984) Second, there has been

no showing that Deutsche Bank conducted itself in a manner contrary to that contemplated by Section 6113.

To the extent that the Kendalls attempt to convince this Court that Deutsche Bank's alleged bad faith was the product of its pursuit of this foreclosure, the unrefuted evidence belies the conclusion that the Power of Attorney was not effective to authorize Ocwen to execute the Quitclaim Assignment. Similarly, and as argued in Section A(3), the Kendalls' reliance upon the Consent Agreement to suggest that Ocwen engaged in any prohibited behavior in relation to its execution of the Quitclaim Assignment under the authority of the Power of Attorney is without merit or evidentiary support.

The Kendalls next argue that claim preclusion or res judicata should apply here. That is simply wrong. "Res judicata 'bars the relitigation of claims if: (1) the same parties or their privies are involved in both actions; (2) a valid final judgment was entered in the prior action; and (3) the matters presented for decision in the second action were, or might have been, litigated in the first action.'" *U.S. Bank, N.A. v. Tannenbaum*, 126 A.3d 734, 736 (Me. 2015). This appeal flows directly from the entry of the *only* judgment against Deutsche Bank in relation to the Note and Mortgage and thus, there has been no attempt to relitigate. Accordingly, any argument about Deutsche Bank's rights in a future anticipated lawsuit is flawed in two respects. First, the issue is not ripe for adjudication in this appeal. And second, the implication that there has been an adjudication on the merits, where the trial court

ruled that Deutsche Bank failed to prove ownership of the Mortgage stands in stark contrast with this Court's mandate in *Bank of America v Greenleaf*, 2015 ME 127, ¶¶2, 4, 9 ("*Greenleaf II*") and *Finch*, supra at ¶ 32, FN 9, that such an adjudication must result in a dismissal without prejudice.

Finally, although the Kendalls try to creatively argue that Deutsche Bank could have standing but not establish its ownership in the mortgage, that proposition is contrary to this Court's holding in *Greenleaf I*, supra at ¶ 12. And, as this Court acknowledged in *Beedle*, supra, the Kendalls' admissions that Deutsche Bank has standing (Br. at 20: "DB made a colorable claim of right to the mortgage through the 2013 POA and the 2017 Quitclaim Assignment, sufficient to establish standing"; Br. 28: "As a threshold matter, DB had standing to bring this action") constitutes an admission by the Kendalls that Deutsche Bank is also the mortgagee. *Beedle*, supra at ¶ 17, FN 6 ("Additionally, in his opposition to U.S. Bank's motion for reconsideration of the judgment, Beedle stated that he was not challenging U.S. Bank's standing. Because, to have standing, a plaintiff in a foreclosure action must own the mortgage, *see Greenleaf* , 2014 ME 89, ¶ 12, 96 A.3d 700, this must be seen as an additional acknowledgment by Beedle that U.S. Bank is the mortgagee.")

Having failed to establish any factually and legally cognizable basis for affirmance under an alternate theory, this Court should give no consideration to the Kendalls' arguments in that vein.

III. CONCLUSION

For all the foregoing reasons, as well as those in Deutsche Bank's opening brief, the Court should vacate the February 7, 2024 Judgment, and remand this matter to the trial court with an instruction to enter judgment in favor of Deutsche Bank.

Respectfully submitted,

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February 26, 2025

CERTIFICATE OF SERVICE

I, Brett L. Messinger, certify that on the date indicated below, I have sent one copy of the within Reply Brief of Appellant to each of the parties listed below by United States Mail, first-class, postage prepaid addressed as listed below:

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