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**FILED**  
**ALAMEDA COUNTY**

NOV 22 2010

CLERK OF THE SUPERIOR COURT

*M. Hayes*  
Deputy

7 Attorney for Defendant  
8 OAKLAND PORT SERVICES CORPORATION  
9 d/b/a AB TRUCKING (erroneously sued as AB  
10 TRUCKING, INC.)

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
12 FOR THE COUNTY OF ALAMEDA

13 LAVON GODFREY and GARY GILBERT, on  
14 behalf of themselves and all others similarly  
15 situated,

CASE NO. RG 08-379099

16 Plaintiffs,

**DEFENDANT'S MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
OPPOSITION TO PLAINTIFFS'  
MOTION FOR CLASS  
CERTIFICATION**

17 v.

18 OAKLAND PORT SERVICES  
19 CORPORATION d/b/a AB TRUCKING, and  
20 DOES 1 through 20, inclusive,

Date: December 3, 2010  
Time: 10:00 a.m.  
Place: Department 20  
Judge: Hon. Robert Freedman  
Action Filed: March 28, 2008

21 Defendants.

22 Defendant OAKLAND PORT SERVICES CORPORATION ("Defendant") hereby  
23 opposes the motion for class certification by Plaintiffs LAVON GODFREY and GARY  
24 GILBERT ("Plaintiffs"). Plaintiffs are now presenting their third such motion. The first was filed  
25 on December 15, 2009, eleven months after the January 23, 2009 filing of their First Amended  
26 Complaint. Hearing eventually was had on that motion on June 25, 2010 and the Court published  
27 an uncontested tentative ruling that became the ruling of the court, pointing out a number of  
28 failings in the Plaintiffs' motion under the First Amended Complaint, failings that have yet to be  
corrected by Plaintiffs and that persist to the present day in Plaintiff's third such motion.

1 Said the Court in its June 25, 2010 order, "Plaintiffs are directed to, essentially, start  
2 over." "Claims must be clearly articulated, class and subclasses clearly defined, and the  
3 evidentiary record supporting each claim clearly identified." The Court said it found the motion  
4 "to be deficient in many respects." The Court said the following about the one of those  
5 deficiencies:

6 "The Court is troubled . . . by the paucity of evidence regarding the  
7 work history of either of the named Plaintiffs with Defendant, and  
8 specifically, with the lack of a declaration from either of them.  
Indeed, the record is less than clear as to whether Gary Gilbert ever  
advanced to a paid position with Defendant."

9 At the time the Court stated the above, Plaintiffs were seeking class certification under  
10 the First Amended Complaint (FAC), the first of two such motions under that pleading.<sup>1</sup> They  
11 later filed a Second Amended Complaint (SAC) (on September 20, 2010) and now seek class  
12 certification (for the first time under that complaint and for the third time overall). Yet, they have  
13 failed, again, in their motion under the presently operative pleading (the SAC), to file a  
14 declaration either of Mr. Gilbert or of Ms. Godfrey. True, the Memorandum of Points and  
15 Authorities refers repeatedly to declarations from both of the Plaintiffs. (See Plaintiffs'  
16 Memorandum of Points and Authorities in Support of Their Motion for Class Certification  
17 ("Pls.' Memo.") at 2:15-16; 2:19-20; 2:24-25; 2:28; 7:28; 8:16; 8:18-19; 8:21; 8:26-9:2; 10:1;  
18 10:28; 11:4; 11:10; 11:22; 12:4; 12:28; 13:17; 14:22; 16:8-9½; 16:13; 16:15; 17:7; 19:21; 20:21-  
19 22.) But those purported declarations were neither served on the Defendant nor filed with the  
20 Court. (That they were filed previously cannot be grounds for their use without a request for  
21 judicial notice.) And in any event, none of the references to the purported Gilbert Declaration is  
22 ever cited even to address, much less make "clear" as the Court requested, "whether Gary Gilbert  
23 ever advanced to a paid position with Defendant." Still, the evidentiary record on this is unclear.

24  
25 <sup>1</sup> The Plaintiffs attempted class certification a second time under the FAC but that, too, was not  
26 successful, filing that second motion on July 19, 2010. On the August 20, 2010, the hearing on  
27 the motion was commenced and the court published a tentative ruling that was contested,  
28 whereupon the Court dropped the motion, continuing the hearing to October 7, 2010 (when it  
would be dropped and a "revised Motion for Class Certification" was to be filed "no later than  
November 22, 2010"). The motion presently before the Court is that "revised Motion," one that  
does not include newly filed and served declarations of Plaintiffs Lavon Godfrey and Gary  
Gilbert. Plaintiffs' do not request that the Court take judicial notice of the earlier declarations.

1 The Declaration of Lisl R. Duncan In Support of Plaintiffs' Motion for Class  
2 Certification ("Duncan Decl.") sets forth as Exhibits D and E, respectively, "excerpts from the  
3 reporter's transcript[s] of the deposition[s] of Plaintiff Lavon Godfrey [and] \* \* \* Plaintiff Gary  
4 Gilbert." (See Duncan Decl. at 2:15-19, ¶¶ 6, 7.) Neither the Defendant nor the Court has the  
5 obligation to cull through those excerpts to shoulder Plaintiffs' burden of citing where in those  
6 excerpts evidence may exist to clarify whether Gary Gilbert ever advanced to a paid position  
7 with Defendant. The *only* reference in the attached excerpts from the Gilbert Deposition  
8 transcript that even mentions what he was ever paid was a response he gave to the request that he  
9 state "what the contents [were] of [his] conversation with [his] brother," to which he said: "That  
10 I drove at AB Trucking for roughly two months or so without getting paid." (Duncan Decl. at Ex.  
11 E, p. 10, lines 4-7.)

12 Said the Court further in its June 25, 2010 order:

13 Plaintiffs' evidentiary presentation in support of . . . the "No  
14 Wages Received Class [*sic*]" includes a one-line excerpt from the  
15 deposition of Gary Gilbert, the proposed representative of this  
16 subclass, as well as excerpts from Bill Aboudi's deposition  
17 regarding "unpaid trainees." Also included, but not discussed, is a  
18 copy of a document that was an exhibit to the Gilbert deposition  
19 entitled "Oakland Port Services Corporation Truck Driver Training  
20 Program Trainee Participations and Release of Liability  
21 Agreement." It is not clear to the Court whether Plaintiffs are  
22 asserting that this document, which purports to confirm the  
23 understood absence of an "employment relationship" is ineffective  
24 because it conflicts with otherwise applicable statutory authority  
25 and/or IWC Wage Order No. 9(4), or something else.

26 In Pls.' Memo, again, Plaintiffs fail to reveal whether they assert that the document entitled  
27 "Oakland Port Services Corporation Truck Driver Training Program Trainee Participations and  
28 Release of Liability Agreement" is or is not ineffective as in conflict with statutory law. The  
furthest Plaintiffs go, even now in their third motion, is only to state that "[w]hether or not this  
agreement is valid in light of statutory authority and Wage Order 9(2) is a common question to  
all individuals classified as trainees." (Pls.' Memo., at 10:13.) It is one thing for Plaintiffs to state  
that the question is a common question to all proposed subclass members and another thing to  
reveal which answer to that question it is that Plaintiffs actually assert. They do not say, again.

1 Said the Court further in its June 25, 2010 order:

2 [T]he only evidence submitted by Plaintiffs on the issue of whether  
3 the Oakland Living Wage Ordinance applies to Defendant is the  
4 statement by Bill Aboudi in his deposition that Defendant operates  
5 a facility on City property. This cannot be considered "substantial"  
6 evidence on this issue for purposes of class certification.  
7 Accordingly, unless Plaintiffs are able to present further evidence  
8 on this issue, the proposed "Living Wage Class" should be  
9 withdrawn from the Motion.

10 In Pls.' Memo, again, Plaintiffs fail to present substantial evidence on the issue of whether the  
11 Oakland Living Wage Ordinance applies to Defendant. Rather than present only the one  
12 statement by Bill Aboudi in his deposition that Defendant operates a facility on City property  
13 (Pls.' Memo., at 13:23-24), Plaintiffs now add to that statement a number of additional  
14 references to evidence of what the address is of that property (Pls.' Memo., at 13:25-14:2) and to  
15 its characterization as a "space assignment" (Pls.' Memo., at 14:2-7.) But on the actual question  
16 of whether the Oakland Living Wage Ordinance applies to Defendant, the Plaintiffs offer only  
17 the promise of *future proof* on that question:

18 Plaintiffs anticipate deposing a representative of the Port to explain  
19 the documentation describing AB 's relationship with the Port,  
20 including Exhibit L, in order to address the factual inquiries raised  
21 by this claim. Drivers in this subclass share a common interest in  
22 that AB's payroll records for the statutory period show that drivers  
23 were paid less than the OLW rate and that the vast majority of  
24 drivers did not receive health benefits. (See Exh. B, Ex. 2-4.)  
25 Whether drivers were entitled to the OLW, is a legal inquiry that  
26 will be common to all drivers.

27 (Pls.' Memo., at 14:7-12.) So, Plaintiffs tell the Court that the question whether the Oakland  
28 Living Wage applies to Defendant is a *legal* inquiry that will be addressed *in the future* by  
deposition testimony elicited *at some time in the future*. As such, it is admittedly absent insofar  
as concerns this, Plaintiffs' third class certification motion. And, to boot, that the Plaintiffs are  
supposedly representatives of this subclass of victims of the supposed non-payment of the  
Oakland Living Wage Ordinance, the Plaintiffs rely on the unserved, unfiled Gilbert Declaration.  
(Pls.' Memo., at 13:17.)

///

1 Notwithstanding this Court took great pains to provide written guidance to the Plaintiffs,  
2 after their earlier unsuccessful attempts to certify a class and subclasses, they still fail to present  
3 the evidence and showing necessary as previously outlined by this Court.

4 **I. THE CLASS CERTIFICATION MOTION OUGHT TO BE DENIED AT**  
5 **PRESENT IN ANY EVENT OWING TO THE FACT THAT THE PLEADINGS**  
6 **ARE NOT YET AT ISSUE**

7 As this Court pointed out in its August 20, 2010 Minutes, "Since a determination of  
8 whether common questions predominate necessarily includes an examination of 'the issues  
9 framed by the pleadings . . .' (*Hicks v. Kaufman and Broad Home Corporation* (2001) 89 Cal.  
10 App. 4th 908, 916.) With the Second Amended Complaint presently under attack by way of a  
11 demurrer (and given the fact that, as shown above, some of the subclasses clearly have not been  
12 shown to qualify for class treatment), it is difficult if not impossible for this Court to determine at  
13 this time whether common questions predominate.

14 **II. THE PLAINTIFFS HAVE ABANDONED THE WAGES OWED AT**  
15 **DISCHARGE OR QUITTING SUBCLASS**

16 Although the Plaintiffs include in their SAC a "Wages Owed at Discharge or Quitting  
17 Subclass" (*see* SAC at ¶ 37(6)), they do not propose any such subclass in their notice of motion  
18 or in their Memorandum of Points and Authorities. (*See* Plaintiffs' Notice of Motion and Motion  
19 for Class Certification ("Notice & Motion") at 2:6-21; Pls.' Memo., at 1:13-2:6.)<sup>2</sup> This subclass  
20 should not be certified.

21 **III. THE PLAINTIFFS HAVE FAILED TO ESTABLISH WITH SUBSTANTIAL**  
22 **EVIDENCE THE NUMEROSITY OF THE PUTATIVE CLASS**

23 Although the Plaintiffs *argue* the law concerning numerosity (*see* Pls.' Memo., at 6:10-  
24 19), Plaintiffs present woefully inadequate *evidence* of numerosity. The only evidence they cite  
25 is the fact that, as they argue it, "Defendants' payroll records reflect an average of 12 'employee'  
26 drivers at any given time period" and "[t]he statutory period covers at least the four years prior to

27 <sup>2</sup> Plaintiffs *argue* in favor of such a subclass (*see* Pls.' Memo., at 16:26-17:15), but they give no  
28 notice of any intention to pursue certification of the subclass. Such argument, absent notice, is  
inappropriate. And the only evidence in support of their inappropriate argument is, in any event,  
the unserved, unfiled Gilbert Declaration. (*See* Pls.' Memo., at 17:7.)

1 the filing of the Complaint.” (Pls.’ Memo., at 6:19-20, 28.) They cite this characterization of the  
2 evidence in support of their otherwise unsubstantiated assertion that “[t]he potential class here  
3 consists of over 50 drivers, more than justifying class treatment.” (Pls.’ Memo., at 6:19-20.)

4 But does that evidence support that assertion? For all one knows, if there is “an average  
5 of 12 ‘employee’ drivers at any given time period,” those 12 “employee” drivers may, in fact, for  
6 all the Court knows, be the same 12 drivers over the entire statutory period. Plaintiffs provide  
7 insufficient evidence to bridge the logical leap they make from the number 12 to the number 50.  
8 All the Plaintiffs do is leave the Court to wonder whether the number 12 is “many.”

9 **IV. THE PLAINTIFFS HAVE FAILED TO ESTABLISH WITH SUBSTANTIAL**  
10 **EVIDENCE THAT ALL DRIVERS EMPLOYED IN THE STATUTORY PERIOD**  
11 **WERE NOT PROVIDED MEAL PERIODS**

12 Although the Plaintiffs *argue* that “all drivers employed in the statutory period were not  
13 provided meal periods as required by law” (Pls.’ Memo., at 8:15-16), the evidence they provide  
14 is woefully inadequate to substantiate that assertion. They cite unserved, unfiled Godfrey and  
15 Gilbert Declarations as evidence that “all” drivers were not provided meal periods. (*See* Pls.’  
16 Memo., at 8:16-17.) Whether Mr. Gilbert and Ms. Godfrey were omniscient so as to testify about  
17 “all” drivers is a question not answered by the argument and the absence of their declarations, in  
18 any event, does not help answer either that question or help at all to substantiate the assertion  
19 made.

20 The same is true of the argument that *one* driver was not allowed to use the break room.  
21 (*See* Pls.’ Memo., at 8:19-21.) What is cited concerning that *one* driver? Ms. Godfrey’s unserved,  
22 unfiled declaration. (*Id.*)

23 Ditto the argument about the “common practice” regarding drivers eating in trucks. (Pls.’  
24 Memo., at 8:25-26.) It is the Godfrey and Gilbert Declarations and the Godfrey deposition  
25 transcript that is cited concerning the “common practice.” (Pls.’ Memo., at 8:26-9:2.) No  
26 foundation is laid to substantiate how it is that Ms. Godfrey is sufficiently omniscient to be  
27 competent to testify about 12 (or 50) drivers on this point. Plaintiffs’ counsel argues there is  
28 “uniform treatment” (*id.*, at 9:3) of drivers on this account, but no evidence establishes it.

1 **V. THE PLAINTIFFS HAVE FAILED TO ESTABLISH WITH SUBSTANTIAL**  
2 **EVIDENCE THE EXISTENCE OF THE PUTATIVE INACCURATE WAGE**  
3 **STATEMENTS SUBCLASS**

4 Although the Plaintiffs *argue* there exists an inaccurate wage statements subclass, they  
5 cite but one item in support, namely, Ex. 13 to the Aboudi deposition transcript. (*See* Pls.’  
6 Memo., at 17:25.) They cite that as support for the assertion that “wage statements . . . do not  
7 show the beginning and ending date of the pay period on the statement.” (Pls.’ Memo., at 17:24-  
8 25.) Exhibit 13 consists of *one* wage statement that shows the check date of “7/06/07” for Lavon  
9 Y. Godfrey and the “Period” of “Biweekly.” One could quote the Court from its June 25, 2010  
10 Order in response to this showing here: “This cannot be considered ‘substantial’ evidence on this  
11 issue for purposes of class certification.” One might ask, is Exhibit 13, which by Plaintiffs’  
12 attorneys’ *argument* one would *surmise* constitutes only *one* such wage statement, actually a  
13 wage statement as contemplated by the laws that require the “beginning and ending date of the  
14 pay period on the statement”? We have it on no better authority than Plaintiffs’ counsels’  
15 assertion that it is. As far as sworn testimony, however, the selected excerpts from the Bill  
16 Aboudi deposition transcript end at page 189, where testimony is elicited as to Exhibit 4; exhibits  
17 with higher numbers do not appear on any of the prior pages and there are no subsequent pages.  
18 (Page 180 of the selected transcript pages is the only other page on which an exhibit is  
19 mentioned, and that is Exhibit No. 3.) For all the Court knows, Exhibit 13 is simply an after-the-  
20 fact printout of a check stub, not a wage statement (the document is a void copy of a printout) of  
21 *one* such document, whatever it is. None of the other assertions in Pls.’ Memo., regarding wage  
22 statements, is supported by any citation to any evidence whatsoever. (*See* Pls.’ Memo., at 17:16-  
23 27.)

23 **VI. THE PLAINTIFFS HAVE FAILED TO ESTABLISH WITH SUBSTANTIAL**  
24 **EVIDENCE THE TYPICALITY OF THEIR CLAIMS**

25 Although their counsel assert that “[l]ike the putative class members, Plaintiffs worked  
26 out of the Port, were under the control of Bill Aboudi, received assignments following the same  
27 protocol and performed the same duties” (Pls.’ Memo., at 19:19-21), the only “evidence” they  
28

1 cite in support of this assertion are the unserved, unfiled Declaration of Lavon Godfrey and the  
2 unserved, unfiled Declaration of Gary Gilbert. (*See* Pls.' Memo., at 19:21.)

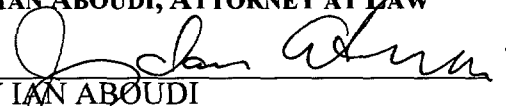
3 **CONCLUSION**

4 Based on the foregoing, it is apparent that Plaintiffs' motion is premature, given the  
5 pendency of the demurrer to the SAC and Plaintiffs fail to establish whether Gary Gilbert ever  
6 advanced to a paid position with Defendant; fail to reveal whether they assert that the document  
7 entitled "Oakland Port Services Corporation Truck Driver Training Program Trainee  
8 Participations and Release of Liability Agreement" is or is not ineffective as in conflict with  
9 statutory law; offer only the promise of future proof on the question of whether the Oakland  
10 Living Wage Ordinance applies to Defendant; have abandoned the wages owed at discharge or  
11 quitting subclass; fail to establish with substantial evidence the numerosity of the putative class;  
12 fail to establish with substantial evidence that all drivers employed in the statutory period were  
13 not provided meal periods; fail to establish with substantial evidence the existence of the putative  
14 inaccurate wage statements subclass; and fail to establish with substantial evidence the typicality  
15 of their claims. Their motion for class certification should be denied.

16 Dated: November 22, 2010

Respectfully submitted,

17 **JAY IAN ABOUDI, ATTORNEY AT LAW**

18   
19 **JAY IAN ABOUDI**  
20 Attorney for Defendant  
21 OAKLAND PORT SERVICES  
22 CORPORATION d/b/a AB TRUCKING  
23 (erroneously sued as AB TRUCKING, INC.)  
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26  
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1 complaint is ambiguous in that it demands possession because of expiration of a fixed-term  
2 lease, yet demands rent and has a three-day notice to pay rent or quit attached.

3           6.       Plaintiff, at all times relevant to his claims in this matter, and at all times during  
4 the term of the contracts alleged in the complaint, had substantially and materially breached his  
5 obligations under those contracts, and/or any other contract between Plaintiff and Defendant. By  
6 such breach, Defendants are excused from any performance claimed or actually due Plaintiff  
7 under such contracts.

8           7.       Plaintiff has breached the implied warranty of habitability. Defects included but  
9 are not limited to the following: bath faucet leaks; peeling floor tile; ceiling leaks through light  
10 fixture; loose windows; inadequate weatherproofing at windows; defective electrical wiring;  
11 cracks at balcony; sliding door falls off; mold and mildew contamination; insect infestation;  
12 holes under cabinets; trash and debris in common areas.

13           8.       Plaintiff has brought this action in retaliation for Defendants' assertion of rights  
14 under the law, including but not limited to: (1) complaining about the habitability defects and  
15 requesting repairs; (2) reporting habitability defects to the City of Oakland; and (3) exercising  
16 her right to withhold rent until repairs are made.

17           9.       Within 180 days of the alleged service of the three-day notice to terminate  
18 tenancy and the service of the complaint in this matter, Defendant complained about the  
19 habitability defects, reported habitability defects to the City of Oakland and exercised her right to  
20 withhold rent until repairs are made.

21           10.       The three-day notice to pay rent or quit is defective because it fails to comply  
22 with the Oakland Just Cause for Eviction Ordinance, Measure EE. The allegations in the notice  
23 and complaint are not made in good faith.

24           11.       The three-day notice to pay rent or quit is defective in that it overstates the  
25 amount of rent due. Defendant has paid and Plaintiff has accepted rents demanded in the notice  
26

1 and complaint.

2 12. The three-day notice to pay rent or quit is defective in that it overstates the  
3 amount of rent due. Notice and complaint demand monies other than rent.

4 13. Plaintiff has waived their right to bring this action based on the three-day notice to  
5 pay rent or quit. Defendant has paid and Plaintiff has returned rents demanded in the notice and  
6 complaint.

7 14. Plaintiff has waived their right to bring this action based on the three-day notice to  
8 pay rent or quit. Plaintiff has established a pattern and practice of accepting partial rent  
9 payments throughout the month.

10 15. Plaintiff has waived their right to bring this action based on the three-day notice to  
11 pay rent or quit. Plaintiff has served Defendant multiple, conflicting and superseding notices to  
12 pay rent or quit.

13 16. Plaintiff is guilty of unclean hands, which conduct extinguishes the right to legal  
14 and/or equitable relief. Plaintiff has refused to provide Defendant with an elevator key, a  
15 mailbox key and a front door key.

16 17. Plaintiff is unlawfully discriminating against Defendant in violation of the laws  
17 and constitutions of the United States and California. Plaintiff is discriminating against  
18 Defendants on the basis of her race/national origin.

19 18. By filing and serving this action, Plaintiff is acting in violation of California Code  
20 of Civil Procedure §425.16.

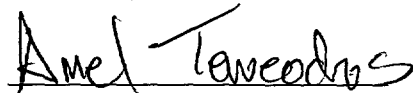
21 19. The complaint, and the notice of termination upon which it is based, fail to state  
22 the ground upon which Plaintiff seeks to recover possession, and therefore violates California  
23 Civil Code 1942.5.

1 WHEREFORE Defendant prays for judgment as follows:

- 2 A. That Plaintiff take nothing;
- 3 B. For costs of suit, and reasonable attorney's fees;
- 4 C. For court ordered repairs and cure habitability defects, with appropriate court
- 5 monitoring and rent reduction under CCP Section 1174.2; and
- 6 D. For such other and further relief to which Defendant is entitled as is demonstrated by
- 7 proof at the time of trial, and as the Court may deem just and proper.
- 8

9 DATED: November 19, 2010

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12 AMEL TEWEODROS

13 Defendant in Pro Per

14 VERIFICATION

15 I, the undersigned, declare:

16 I am a party to the above entitled matter; the foregoing document is true of my own

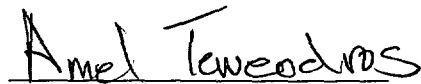
17 knowledge, except as to the matters which are therein stated on my information and belief, and

18 as to those matters I believe them to be true.

19 I declare under penalty of perjury, and the laws of the State of California, that the foregoing is

20 true and correct.

21 DATED: November 19, 2010

22 

23 AMEL TEWEODROS

24 Defendant in Pro Per

1  
2 PROOF OF SERVICE

3 The undersigned hereby declares: I am a resident of or employed in the county where the  
4 following mailing took place, and my name, and residence or business address are as follows:

5 Name: Monique Farris  
6 Address: 1611 Telegraph Avenue, Suite 726  
7 Oakland, CA 94612

8 Documents Served: Defendant's Answer to Complaint.

9 On November 19, 2010, I served a copy of the foregoing, on the following persons, by placing it  
10 in a sealed envelope addressed to those persons, with postage fully paid, and then placing the  
11 envelope in the mail at the following place: Oakland, CA.

12 Persons served: John Beverly and Claudette Beverly  
13 145 17<sup>th</sup> Street, #402  
14 Oakland, CA 94612

15 I declare that the above is true, under penalty of perjury and the laws of the state of California.

16 Dated: November 19, 2010

17 Monique Farris  
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