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## This Week's Feature



## Gig Economy Companies Can't Thwart Class Certification with Shoddy Recordkeeping

By Emily Melvin

Gig economy companies increasingly face class action lawsuits brought by their workers. Uber, Lyft, Instacart, Doordash, and Amazon, to name a few, have confronted multiple lawsuits alleging the companies misclassified employees as independent contractors. While the merits of these claims are vigorously debated in the courtroom, legislature, and public arena, some courts may have quietly—and unintentionally—made it easier for workers to seek class certification for these claims.

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A promotional banner for a virtual seminar. On the left is a photo of a smiling man in a plaid shirt and vest standing in front of a white truck. To the right of the photo is the "dri" logo in blue, followed by "Trucking Law" in orange and "virtual seminar" in blue. Below the photo, the date "November 19, 2020" is written in blue, and "REGISTER TODAY" is written in blue and orange at the bottom right.

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- Employment and Labor Law Virtual Seminar, Thursday, November 12 and Friday, November 13, 2020
- Asbestos Medicine Virtual Seminar, Thursday, November 19 and Friday, November 20, 2020
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- Explain Your Case Visually, Tuesday, November 10, 2020, 12:00–1:00 pm CDT
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#### Quote of the Week

“And that’s the way it is.”

– [Walter Cronkite](#) (November 4, 1916 – July 17, 2009)

## This Week's Feature

# Gig Economy Companies Can't Thwart Class Certification with Shoddy Recordkeeping

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Gig economy companies increasingly face class action lawsuits brought by their workers. Uber, Lyft, Instacart, Doordash, and Amazon, to name a few, have confronted multiple lawsuits alleging the companies misclassified employees as independent contractors. While the merits of these claims are vigorously debated in the courtroom, legislature, and public arena, some courts may have quietly—and unintentionally—made it easier for workers to seek class certification for these claims.

## The Third Circuit Sets the Scene

In *Hargrove v. Sleepy's LLC*, No. 19-2809 (3d Cir. Sept. 9, 2020), a group of delivery drivers for Sleepy's brought suit against the New Jersey-based mattress company, alleging that it misclassified them as independent contractors and violated various employment laws in the process. Like Amazon's drivers, Sleepy's drivers were nonexclusive and could work for other companies when not delivering for Sleepy's. However, the New Jersey district court found that certain named drivers were indeed misclassified as independent contractors.

The plaintiffs then added additional drivers to the lawsuit and sought class certification. To do so, the drivers had to show that the class members were “currently and readily ascertainable” using an “administratively feasible” method relying on “objective criteria.” The drivers submitted thousands of pages of contracts, driver rosters, security gate logs, and pay statements obtained from Sleepy's as evidence. They claimed the documents could be cross-referenced to identify the class members. However, many of the records contained gaps, which Sleepy's claimed rendered them too unreliable and incomplete for class

certification purposes. The district court agreed and denied class certification to the drivers.

On appeal, the Third Circuit reversed the district court's denial of class certification, holding the trial court erred by denying class certification based on gaps in Sleepy's records.

The Third Circuit held that where an employer's lack of records makes it more difficult to ascertain the members of an otherwise objectively verifiable class, the employees in the class should not be penalized for the employer's faulty record keeping.

First, the Third Circuit found the evidence sufficient because a plaintiff need not identify all the members at the class certification stage. Instead, a plaintiff need only show that the class members *can be* identified or ascertained.

Second, and most importantly, the Third Circuit refused to reward Sleepy's for its inadequate record-keeping. The Third Circuit held that where an employer's lack of records makes it more difficult to ascertain the members of an otherwise objectively verifiable class, the employees

in the class should not be penalized for the employer's faulty record keeping.

According to the Third Circuit, to hold otherwise would contradict the United States Supreme Court decisions in *Tyson Foods, Inc. v. Bouaphakeo*, \_\_\_ U.S. \_\_\_, 136 S. Ct. 1036, 1040, 194 L.Ed.2d 124 (2016), and *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687, 66 S. Ct. 1187, 90 L. Ed. 1515 (1946). In those decisions, the Supreme Court held that an employee's wage claims against an employer should not suffer simply due to an employer's failure to maintain pay records that it is required to keep by law. The Third Circuit extended the same reasoning to the case at hand.

Finally, the Third Circuit rejected Sleepy's argument that it acted in good faith when it failed to keep complete records for the proposed class members because it thought they were independent contractors. The Third Circuit emphasized that allowing employers to thwart class

## This Week's Feature

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actions with this argument would incentivize employers to keep incomplete records to avoid potential lawsuits.

### Uncertainty for Gig Economy Companies

*Hargrove* begs the question: Did the Third Circuit just make it easier for plaintiffs to certify class actions? The answer is not so straightforward. *Hargrove* may simply soften the edges around the Third Circuit's stricter-than-most class certification standards by opening the door for litigants with incomplete evidence.

Historically, federal courts held that a class is ascertainable if it is clearly defined by objective criteria. *Mullins v. Direct Dig., LLC*, 795 F.3d 654, 657 (7th Cir. 2015). In 2013, the Third Circuit created a circuit split when it added the requirement that the method of identifying class members be "administratively feasible." *Carrera v. Bayer Corp.*, 727 F.3d 300, 308 (3rd Cir. 2013). This standard has been dubbed the "heightened standard" of ascertainability and has been adopted by only a handful of courts. Circuits rejecting the heightened standard argue that it upsets the balance of interests codified in Rule 23 of the Federal Rules of Civil Procedure. See, e.g., *In re Petrobras Sec.*, 862 F.3d 250, 265 (2d Cir. 2017). Indeed, the Third Circuit has rejected class certification in cases where other circuits might grant it.

*Hargrove* gave the Third Circuit a chance to show that the heightened standard has some muscle to it. The Third Circuit meticulously distinguished this case from its own adverse precedent. For instance, it observed that would-be class members in prior cases proposed identifying the class with records that had yet to be sought in discovery, which the Third Circuit found insufficient. Plaintiffs in other cases relied primarily on affidavits, which the court also found insufficient. In contrast, here, the Sleepy's drivers were "stacks away from such a dearth of documents" and their reliance on affidavits was secondary.

So, what does this mean for gig economy class actions? It is unclear whether other circuits will adopt a per se rule that purported class members are not to be penalized for an employer's insufficient recordkeeping. While *Hargrove* may be limited to its facts, employers should take heed that the Third Circuit's reasoning may resonate with other courts.

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**Emily M. Melvin** is an associate with **Ellis & Winters LLP** in Greensboro, North Carolina. Her law practice focuses primarily on complex commercial litigation. Ms. Melvin has been a member of DRI since 2019.

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## Systemic Racism Exists; Acknowledge It

By Vernon M. McFarland



Many have the mindset that they are personally above racism or over racism. They say things like, “I don’t see color,” “I don’t have a racist bone in my body,” or my personal favorite, “I have a black friend.” Even so, failing to acknowledge that systemic racism exists doesn’t mean it’s not an everyday reality for millions of Black Americans. We can no longer hide our heads in the sand and say it isn’t our fault. We must all be proactive in resolving the patent unfairness and bias in our society that are caused by systematic racism.

I was born in Natchez, Mississippi, in a hospital named after the former president of the confederate states—Jefferson Davis Memorial Hospital. I grew up in a suburb of Jackson, Mississippi, a city named after the nation’s seventh president, who was pro-slavery. In Mississippi, we celebrate Robert E. Lee Day, a confederate general and slave owner, on Martin Luther King, Jr., Day. My grandparents lived through Jim Crow. My parents grew up in segregated Mississippi. Despite these experiences, their faith in God never wavered. They instilled in me to keep God first, be good to others, and to work hard for what I want.

I attended a public school in Mississippi that was overwhelmingly white at the time. I was usually one of two black students in the gifted and accelerated classes. During my teenage years, I was somewhat willfully ignorant to racism, similar to many white people I now know. I knew what racism was. I knew that some white people didn’t like me simply because I’m Black, but I always looked for the best in people.

Starting in middle school, the feeling that I was being tolerated, but not accepted, began to grow in my spirit. I saw Confederate flags flown with pride by my “friends,” who were adamant that they weren’t racist and that the flag was simply their heritage. I learned that many of the “great” men after whom buildings were named and statues erected believed that I would be considered merely prop-

erty and subhuman. I listened to classmates say things like, “you’re not like the other Blacks.” I realized that classmates and neighbors were children or grandchildren of KKK members. I overheard racist jokes and slurs. I saw fights between Blacks and whites caused by racist taunts, yet the harsher (or sometimes only) punishment was served upon the Black child. As the world showed itself to me, I began to realize that racism was real. While segregation and Jim Crow laws had changed, many people’s hearts and minds had not.

Justice should be blind,  
but it is not. Tell a Black  
man walking into a  
courthouse named after  
a segregationist with  
Confederate statues out  
front that his pleas for  
justice will be heard.

In high school, my experiences with racism became more pronounced. I overheard teammates calling opposing players the “n” word. When confronted by me or on their own volition, things like, “I was just trying to get under their skin,” “I’m not racist,” “I would never call you that,” “It’s just part of the game,” were used to justify the racist slur.

I graduated from high school third in my class. I was voted most likely to succeed and served as president of various organizations. I ultimately attended Mississippi State University on the Schillig Scholarship, a full scholarship and the top honor for an incoming freshman.

While interning in college, I finally saw what the “wrong side of the railroad tracks meant”—the Black side. The Black side had a school, and the white side had a school. The Black school was always lacking, while the white school had an abundance of resources. My mentor explained that although he lived on the white side of town and his kids went to the white school with a handful of other Blacks, no one would sell him a house. He could only lease or rent a home for his growing family. The company for which I interned provided me an apartment on the white side. I recall visiting friends on the Black side of town. When I crossed the railroad tracks heading back to my apartment, I would regularly have a police escort home. I worked in other southern towns and I can give you other examples, but so can many other Black people you know.

## DRI Voices

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After earning a degree in Industrial and Systems Engineering, I attended law school at the University of Mississippi. I am currently a partner at Forman Watkins & Krutz LLP. I'm a married father of four children; I'm actively involved in my church; and I'm a proud American. Yet, when I walk outside my law firm, my house, or my church, I'm seen as a Black male and perceived negatively by some for no other reason than the color of my skin. Unlike my white counterparts, I spend a significant amount of my time combating microaggressions while dispelling white people's negative perceptions of me to make them feel comfortable in my presence. Personally, it's exhausting; professionally, it's disappointing; spiritually, it's dampening.

These negative perceptions follow me inside the courtroom. Justice should be blind, but it is not. Tell a Black man walking into a courthouse named after a segregationist with Confederate statues out front that his pleas for justice will be heard. Tell him that justice awaits him in front of a judge whose daddy's granddaddy owned slaves. Justice is colored; it is colored by race, money, influence, power, and the media. This bias is innate in our society and historically propagated by those in power to retain and perpetuate that power. I've come to believe that it may be in our nature to discriminate. However, in the greatest country in the world, we must neutralize the effects of systemic bias and racism. We don't have any more excuses. We know better and should do better.

No one is born with bias or racist views. They are taught to us by our families, our experiences, the media, and even our faith leaders. Although I wish we could press a button and undo this programming, whether overt or

subconscious, it may be too late for some of us—and others don't want to change. Instead, those who want to fix the issue must be intentional in seeing color and eliminating the effects of bias and racism on our society. We must be intentional, because for far too long we were intentional in using color to the detriment of the “colored.”

If you operate in the American system, then you must take active steps to overcome the bias inbred in it. Most importantly, we must teach our children that there is one human race, and skin color is merely a physical characteristic, not an indicator of character. We must enlighten them about the truth of America's treatment of my ancestors and the results of that treatment on Black people in America. If we do not, then systemic bias and racism will continue to perpetuate themselves. They will continue to incubate in our souls; grow in our children; and thrive in the systems we create, the businesses we operate, and the laws we promulgate.

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**Vernon McFarland** is a partner in **FormanWatkins'** Jackson, Mississippi, office and is licensed in Illinois, Mississippi, Missouri, and Montana. Mr. McFarland received his law degree from the University of Mississippi School of Law and is a member of DRI, the Mississippi Bar, NBA, and the Magnolia Bar Association. He is a Mid-South Super Lawyer Rising Star and member of the Leadership Greater Jackson Class of 2016–2017. Mr. McFarland's primary practice areas are toxic tort litigation, commercial litigation, and professional liability. He is a member of the firm's Pro Bono and Recruiting Committees and serves the community through his church and other charitable organizations.

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## DRI Members Among Foley & Mansfield New Leadership Appointments



*Diane Babbitt, Demetra Arapakis Christos, Lisa Lamm Bachman, and Andrew Sharp.*

Foley & Mansfield announced on October 27 several new leadership appointments to take place on January 1, 2021. Partners are stepping into new roles on the executive committee, compensation committee, and in a new role as New York managing partner.

“Foley & Mansfield has always been committed to providing our attorneys and staff with the chance to grow as leaders. We are pleased to have these talented colleagues ready to take on challenging new roles and we congratulate them on this important and well-deserved leadership achievement,” said Kyle Mansfield, Managing Partner of the Firm. “Each of them exemplifies our core values of excellence, professionalism and collegiality—and I know that they will make exemplary contributions to the management of the Firm.”

DRI members who are among the new firm leaders include the following:

- [Diane Babbitt](#) – Executive Committee Member – Seattle/Portland
- [Demetra Arapakis Christos](#) – Executive Committee Member – Chicago/Detroit
- [Lisa Lamm Bachman](#) – Compensation Committee Member – Minneapolis

Ms. Babbitt and Ms. Christos will succeed Detroit partner and DRI member William Osantowski, whose term on the executive committee will end at the end of this year. Ms. Bachman will succeed Chicago partner and DRI member Robert Brummond, who is stepping down from the compensation committee.

Foley & Mansfield also announced that DRI member [Andrew Sharp](#) of the firm’s Walnut Creek, California, office had been elected partner.



## And the Defense Wins

### Chris Kenney and David Kerrigan



DRI members [Chris Kenney](#) and [David Kerrigan](#), partners at **Kenney & Sams PC** in Boston, successfully defended Helen Brady, a Republican congressional candidate, at trial and on appeal against a political challenge to her ballot access for the primary election.

In a case of first impression, driven by COVID-19 and emergency “stay at home orders,” the Massachusetts Supreme Judicial Court (SJC) permitted congressional candidates to obtain electronic signatures (as opposed to traditional in-person “ink” signatures) on nomination sheets for access to the primary election ballot. Kenney & Sams’ client, a Republican candidate for the Ninth Congressional District, was challenged by the state Democratic Party on the bases that her electronic signatures were allegedly defective or fraudulent, or were collected without following the electronic process approved by the court. Given the pandemic and impending election, the dispute was placed on a “rocket docket” for expeditious adjudication.

The State Ballot Law Commission (SBLC) set trial on eleven days’ notice. The trial was held in person before a five person “jury” of commissioners. Mr. Kenney and Mr.

Kerrigan focused their arguments on equity and equal protection grounds.

The commission ruled in favor of the Democratic Party. Mr. Kenney and Mr. Kerrigan then immediately appealed. The SJC scheduled appellate briefs to be filed within ten days and set oral arguments for the day after briefs were filed. Oral arguments were conducted telephonically to the full bench. The SJC ruled three days later; on June 13, the SJC reversed the SLBC and ordered that the primary election ballots be printed with the Kenney & Sams’ client’s name on them the next day, June 14, just in time for the primary election.

#### Keep The Defense Wins Coming!

Please send 250–500 word summaries of your “wins,” including the case name, your firm name, your firm position, city of practice, and email address, in Word format, along with a recent color photo as an attachment (.jpg or .tiff), highest resolution file possible (*minimum* 300 ppi), to [DefenseWins@dri.org](mailto:DefenseWins@dri.org). Please note that DRI membership is a prerequisite to be listed in “And the Defense Wins,” and it may take several weeks for *The Voice* to publish your win.

## VAM 5K Supports Operation Gratitude

Thank you so *much* to all of you who participated in the **Virtual Annual Meeting 5K** in support of [Operation Gratitude](#). Thanks to the following people, we raised approximately \$9,000 that will be used for care packages and other ways to support members of the military and first responders wherever they serve. The VAM 5K was brought to you by DRI for Life, the DRI Philanthropic Activities Committee, and the DRI Veterans Network.



### VAM Virtual 5K Participants

- |                      |                       |
|----------------------|-----------------------|
| David A. Anderson    | Jeanne F. Loftis      |
| Elizabeth R. Bain    | R. Jeffrey Lowe       |
| Elizabeth Sorenson   | Ryan J. Lucinski      |
| Brotten              | Ann H. MacDonald      |
| Eileen E. Buholtz    | Tara Martens Miller   |
| Paul C. Catsos       | Lisa J. McCraw        |
| James L. Chapman IV  | Stacy Linn Moon       |
| Jeffrey A. Curran    | Emily R. Motto        |
| Dessi N. Day         | Shannon M. Nessier    |
| Kristen Elizabeth    | Rebecca A. Nickelson  |
| Dennison             | Margaret C. O'Neill   |
| Baxter D. Drennon    | William H. Oldach III |
| Gillian Egan         | Lana A. Olson         |
| Laura Emmett         | Claire E. Parsons     |
| Heather Russell Fine | Elizabeth K. Peck     |
| Scott Day Freeman    | Shannon N. Proctor    |
| Stanley E. Graham    | Melissa K. Roeder     |
| Susan E. Gunter      | William H. Selde      |
| Gary L. Howard       | Erik W. Snapp         |
| Carolyn M. Husmann   | Dwight W. Stone II    |
| Damon Kamvosoulis    | John Parker Sweeney   |
| Beth A. Lochmiller   | Sara M. Turner        |

## Cedar Grove Board of Education Receives 2,250 Masks from O’Toole Scrivo Law Firm



Last month, during a town council meeting, councilman Joe Zichelli presented the Cedar Grove (NJ) Board of Education with 2,250 masks donated by Cedar Grove-based law firm **O’Toole Scrivo**.

“I am going to take a quote from the book of David Schoner: it is all about the kids,” said Mr. Zichelli. “And I know the BOE, myself, and my council colleagues, the school administration and teachers, and Kevin (O’Toole) and Tom (Scrivo) want to see the kids of Cedar Grove return to school safely and in a manner conducive to learning. It is because of the excellent relationship that exists between the governing body and the board of education that we can facilitate such a generous donation in such a timely manner that permits distribution of these masks to our students.”

“The Cedar Grove BOE appreciates this generous donation from O’Toole Scrivo,” said Christine Dye, Board of Education President. “We are so fortunate for our continued collaborations with Councilman Zichelli and all members of the Town Council, as this strong relationship benefits Cedar Grove as a whole, especially our students.”

“DRI Cares” content is coordinated by **James Craven** of Wigin and Dana LLP and **Rebecca Nickelson** of Sinars Slowikowski Tomaska LLC. To submit items for upcoming issues, please contact them at [jcraven@wigin.com](mailto:jcraven@wigin.com) and [rnickelson@sinarslaw.com](mailto:rnickelson@sinarslaw.com).

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## DRIKids

## Evelyn Good

**Why is it important to help other people who need our help?**

Because they're old. And because God wants us to.

**Tell me something about you that you think I might not know.**

My little sister is good around other people and terrible at home.

**What's a memory that makes you happy?**

Playing with Winston (*Parents' Note: Winston was our Olde English Bulldog. He was two when Evelyn was born, and we lost him in April 2019*).

**Do you think animals can talk?**

Yes, we just can't always understand them.

**What is the hardest thing about being a kid?**

I can't drive a car to go where I want to go.

**If you could make one rule that everyone in the world had to follow, what rule would you make?**

That everyone be free.

**What do you want to be when you grow up?**

A foster parent to animals.

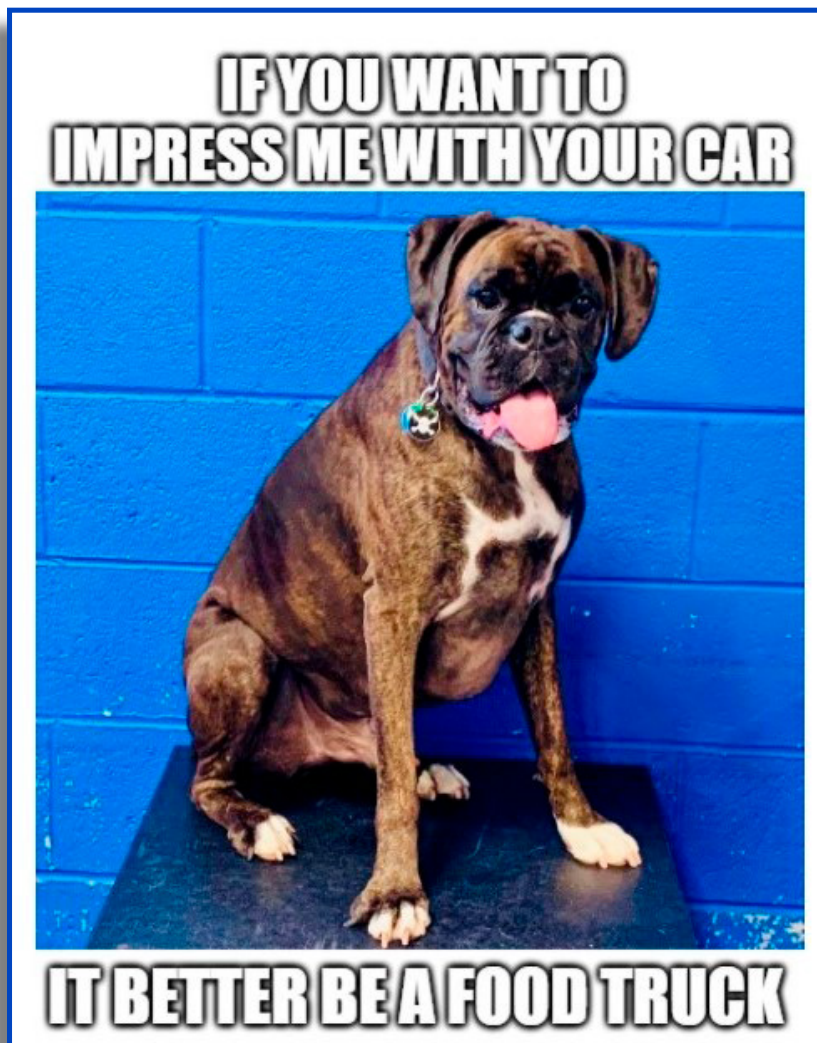
**How can you make the world a better place?**

No littering.

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*Evelyn Good is nine years old and is featured with her sister, Brooklyn. Their parents are Paul and [Mandy Good](#). Mandy is a lawyer at [Crowley Fleck Attorneys](#) in Cheyenne, Wyoming.*





## Dutch

**Dutch C. Burns** lives with his family in Chicago. His dad, **Thomas J. Burns**, is a partner in the Chicago office of **Foley & Mansfield PLLP**.

“DRI Pets” content is coordinated by **Allison Laffey** of Laffey Leitner & Goode LLC and **Elizabeth Bain** of Williams Kastner. To submit items for upcoming issues, please contact them at [alaffey@llgmke.com](mailto:alaffey@llgmke.com) and [ebain@williamskastner.com](mailto:ebain@williamskastner.com).

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## Quote of the Week

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“And that’s the way it is.”

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