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WORKERS' COMPENSATION JUDGE  
HELENA, MONTANA

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IN THE WORKERS' COMPENSATION COURT OF THE STATE OF MONTANA

DEBRA STAVENJORD,

Petitioner,

v.

MONTANA STATE FUND,

Respondent.

WCC No. No. 2000-0207

**STATE FUND'S PETITION FOR  
RECONSIDERATION**

COMES NOW the Montana State Fund ("State Fund"), pursuant to Administrative Rule of Montana 24.5.337, and respectfully moves the Court for reconsideration of the Order Regarding Identification and Notification of Potential Beneficiaries, dated January 15, 2008 (2008 MTWCC 4). In support of the present motion, the State Fund states as follows:

**1. Background**

In *Stavenjord v. Montana State Fund*, 2006 MT 257, 334 Mont. 117, 146 P.3d 724 ("*Stavenjord II*"), the Montana Supreme Court held this Court "erred in determining that *Stavenjord I* created a common fund." *Stavenjord II*, ¶ 28. The Court remanded the case to this Court for a "determination of an appropriate procedure by which potential *Stavenjord* beneficiaries will be identified and notified of their interests related to increased *Stavenjord*-type PPD benefits." *Stavenjord II*, ¶ 31. The Supreme Court

DOCKET ITEM NO. 115

refused to reconsider its unanimous opinion declining to grant common fund status to this matter. (Order, Nov. 9, 2006.) In addition, after considering the arguments of *Stavenjord* in her Petition for Rehearing, the Court raised the bar on the remand directive. It indicated this Court should determine whether it is "impracticable or impossible for it to comply with" the remand Order. (Order 1.)

Upon remand, following a conference with the parties, the Court issued its Order Requesting Report of Proposed Procedure to Identify Potential Beneficiaries on December 6, 2006. (Docket No. 96.) In that Order the Court identified two issues for consideration: (1) the determination of an appropriate procedure by which potential *Stavenjord* beneficiaries will be identified and notified of their interests; and (2) whether it is impracticable or impossible to proceed without the assistance of a common fund counsel. (Docket No. 96 at ¶ 2.) The Court directed the State Fund to prepare a written report explaining the procedures it intends to follow in determining potential beneficiaries. Copies of the report were to be provided to the Court and to counsel for *Stavenjord*, Mr. Murphy.

On January 22, 2007, the State Fund filed its Report to Court Re: Identification and Notification. (Docket No. 97.) The report provided the Court with facts detailing the comprehensive identification and notification process for potential *Stavenjord* beneficiaries utilized by the State Fund. The report documented that it was not impossible or impracticable for the State Fund to properly identify and notify potential beneficiaries and common fund counsel was unnecessary.

On February 15, 2007, the Court issued an Order Inviting Amicus Curiae Briefing (Docket No. 98) allowing counsel for *Stavenjord* to file comments regarding the State Fund's Report. On March 30, 2007, *Stavenjord*'s counsel filed a Report Regarding the Need for a Common Fund. (Docket No. 102.) In that Report, counsel argued for a "global" proceeding involving all involved carriers and claimants and the need for common fund counsel. No material objection to the State Fund's identification and notification procedures was made.

On April 20, 2007, the State Fund filed its Response to *Stavenjord*'s Report Regarding Need for Common Fund. (Docket No. 106.)<sup>1</sup> In that Response the State Fund outlined the history of recent events in detail, the fact that it had provided a

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<sup>1</sup> The State Fund also filed a request for Judicial Notice/Inclusion in the Record on April 20, 2007 (Docket No. 105) documenting the verification of its identification and notification capabilities in a large class action approved by this Court and a State District Court. In addition, this Court has overseen several common fund cases in which the State Fund has gained experience and competence in identifying and notifying claimants of increased potential entitlement due to court decision.

comprehensive report, as directed, verifying that its procedures for identification and notification of *Stavenjord* beneficiaries did not even approach the "impracticable or impossible" standard set by the Supreme Court. The State Fund noted the obvious issue concerning standing of *Stavenjord*'s counsel, but agreed that he should be allowed to participate on a limited basis in the anticipated proceeding to review the remand directive. The State Fund also pointed out that *Stavenjord*'s Report was directed at insurers other than the State Fund while the remand order could only relate to the State Fund since no other carriers were parties to the proceeding.

As a result, the State Fund asserted that, because of the direction on rehearing, the remand task to this Court would now appropriately be stated, as follows:

We remand this case to the WCC for further proceedings to include the determination whether it is impracticable or impossible for the Montana State Fund to implement an appropriate procedure by which potential *Stavenjord* beneficiaries will be identified and notified of their interests related to increased *Stavenjord*-type PPD benefits.

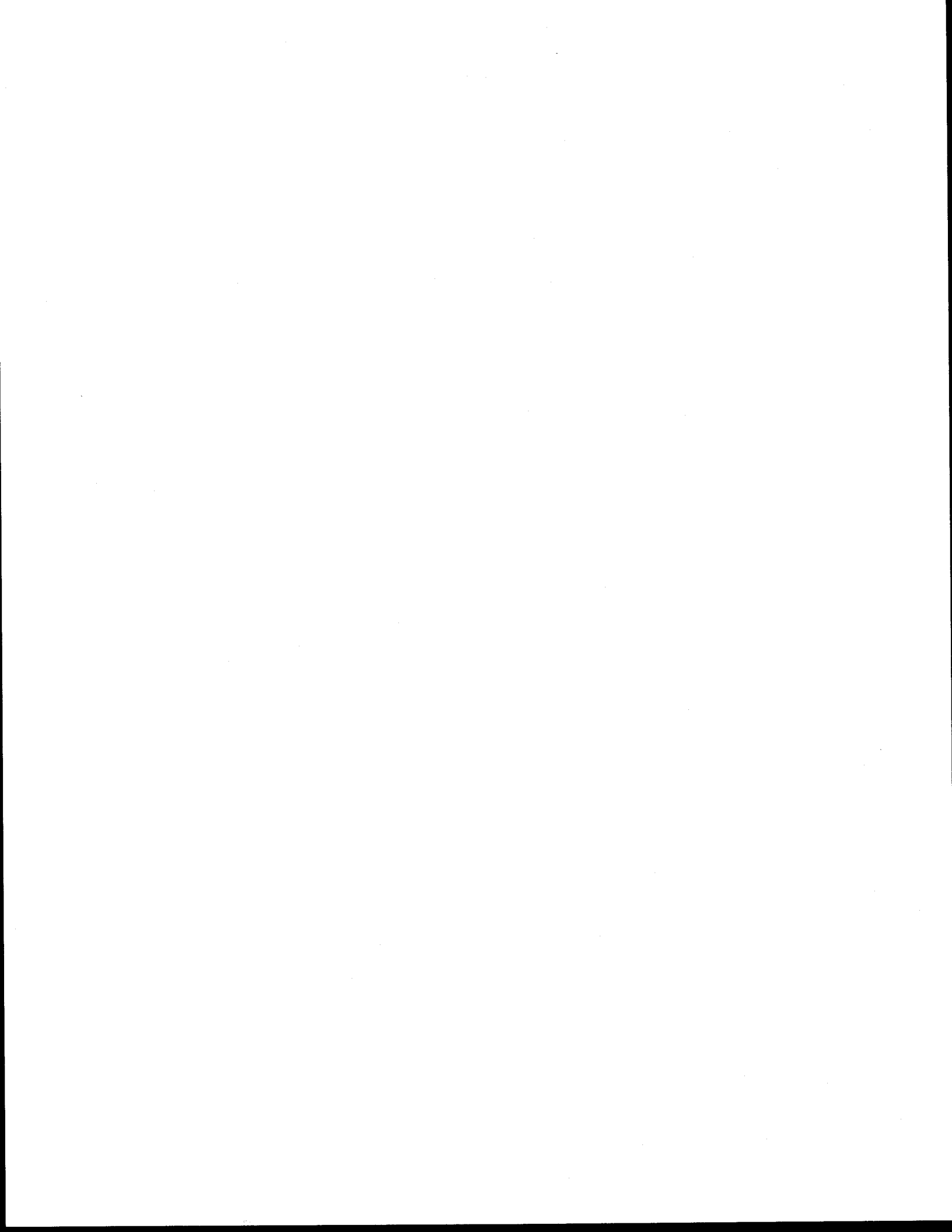
Docket No. 106 at 4. Following discussions with counsel for the parties, the Court set a conference on the matter for April 26, 2007 at the State Fund offices. The Court's Minute Entry described the scope of the proceeding, as follows:

The Court advised that at the conference, **the Court and Mr. Murphy will direct questions to the State Fund about its methodology for identification and notification of potential *Stavenjord* claimants.**

Docket No. 107, Apr. 23, 2007 (emphasis added). The Court's Minute Entry regarding the conference verified the purpose and scope of that proceeding that actually occurred:

**The purpose of the conference was to discuss the State Fund's methodology for identification and notification of potential *Stavenjord* claimants and whether it is impracticable or impossible for this Court to comply with the Montana Supreme Court's remand order without the assistance of a Common Fund counsel.**

Docket No. 108, Apr. 26, 2007 (emphasis added). A record of the conference was prepared. (Docket No. 111.) It is clear from the record that the State Fund accepted the remand direction and its charge from the Court, preparing extensive materials and testimony to verify its methodology for identification and notification of potential



Stavenjord beneficiaries. In fact, the process was verifiably over inclusive. The witnesses and exhibits presented in the proceeding were subject to the scrutiny and examination of the Court and counsel for both the State Fund and Stavenjord under oath in virtually identical fashion as any proceeding before this Court.

Upon the conclusion of the hearing it was clear the State Fund had verified and expanded upon the data and positions previously outlined documenting its compliance with the remand direction.

## 2. Order

The Court issued its Order following the conference effectively acknowledging the unique remand situation presented by the Supreme Court in this matter. It concluded that "potential Stavenjord beneficiaries," as outlined in the remand directions, are not limited to State Fund claimants because there could be no rational basis to limit the precedent to just one insurer. As a result, the Court concluded it was not capable of complying with the remand order because the "several hundred other workers' compensation insurers in Montana who may have claimants entitled to Stavenjord-type benefits" were not before the Court and therefore an analysis of their implementation procedures was not possible. Docket No. 113 at ¶ 12.

In arriving at its conclusions, however, the Court observed:

It was obvious to me that State Fund expended considerable effort in arriving at a procedure to identify potential *Stavenjord* beneficiaries. **If my duty was to determine an appropriate procedure by which potential *Stavenjord* beneficiaries insured by State Fund were to be identified and notified, then State Fund has set forth a procedure which appeared to be well thought-out and reasonable.**

Docket No. 113 at ¶ 12 (emphasis added). The Court went on to note that the State Fund had fully cooperated in the remand process and willingly submitted itself to the jurisdiction of the Court. The concern for the Court, however, was the obvious fact that no other insurer was before the Court and jurisdiction of non-parties was absent. For that reason, in the Court's mind the entire process was stalled and unable to be completed.

## 3. Request for Reconsideration

The State Fund takes the same position as the Court in relation to other carriers. As noted in its Response to Stavenjord's Report:

The only insurer party to the litigation is the State Fund. It has documented and will confirm its ability to properly identify and notify claimants as required by the Supreme Court. It is not in a position, nor is it required, to speak for other insurers. The factual scenarios applicable to other carriers in regard to identification and notification are company specific and likely have as many permutations as the hundreds of insurers not a party to this action.

Docket No. 106 at 5. That fact is just as true today as it was when the Response was filed. However, that does not change the position or status of the State Fund in this proceeding, nor does it preclude the Court from making specific findings regarding the State Fund's identification and implementation procedure.

Using the Court's words, it was the "duty" of the Court on remand "to determine an appropriate procedure by which potential *Stavenjord* beneficiaries insured by *State Fund* were to be identified and notified." Docket No. 113 at ¶ 12. This is the case even though there are legitimate concerns relative to non party insurers. This does not preclude the Court from issuing findings and conclusions relative to the record and evidence regarding the State Fund. It is axiomatic that a Court has the power to issue rulings based on proceedings directed first by an appellate court and then the Court itself.

The State Fund has been a party to this proceeding since it was filed in 1999. It has proceeded through two appeals. At the direction of the Supreme Court and this Court on remand it expended considerable time and resources documenting its position that it was able to properly identify and notify potential *Stavenjord* beneficiaries with claims for which it was responsible. There is no question that the Court had and has jurisdiction of the State Fund regardless of the status of the payment of benefits to *Debra Stavenjord*. There is a separate and unrelated issue regarding whether her counsel has standing, not whether the Court has jurisdiction over the State Fund.

This Court has the jurisdiction to determine disputes under the Workers' Compensation Act. Mont. Code Ann. § 39-71-2905. It has a broad range of enumerated statutory powers within that jurisdiction not limited specifically to quantification of benefits under the Act. Mont. Code Ann. § 39-71-2901. It is obligated to follow the directions of the Supreme Court on remand of cases following the conclusion of an appeal and has specific jurisdiction to do so. ("The Workers' Compensation Court properly followed our instructions on remand and we, therefore, hold that the court did not exceed its jurisdiction on remand by increasing *Carroll's* disability award from 35% to 60%." *Carroll v. Wells Fargo Armored Serv. Corp.* (1990), 245 Mont. 495, 498, 802 P.2d 618, 620.) In fact, this Court is obligated to carry out the remand directions of the Supreme Court. Mont. R. App. P. 19(1)(c) ("The supreme

court's decision . . . may require that district court to apply the supreme court's ruling in further proceedings consistent with the supreme court's decision.").

Clearly, from a legal and practical standpoint, the Court had jurisdiction over the State Fund in the post remand proceedings. It was acting under the direction of the Supreme Court, it proceeded to exercise its power over an insurer in ongoing litigation with continuing issues (review of identification and implementation matters, potential right to reassert claim for common fund, etc.) and, pursuant to statutory powers, directed the conduct of litigants before it. From a practical standpoint, had the State Fund refused to comply with the various post remand orders of this Court it is clear that the Court could, should and would have exercised its authority over it. The Court had jurisdiction and several proceedings over several months were conducted with no objection from any party.

The Court properly questions whether it has jurisdiction over the other carriers not a party to this action. That is not the focus of present considerations. The Court did have jurisdiction over the State Fund and is most capable of formulating specific findings and conclusions regarding it based upon post remand filings and proceedings. This will insure the record of this matter is complete.

The State Fund responded to each and every direction of the Court and provided comprehensive information regarding the identification and implementation issues. The Court has already found that the process "was well thought out and reasonable" and, it is respectfully submitted, can and should reconsider the prior order by adding a short supplemental set of findings and conclusions, exactly what it would do following any evidentiary procedure.

The State Fund submits that the following supplemental additions to the Court's previous Order, based on the hearing of April 26, 2007, are appropriate:

**Findings of Fact:**

1. The State Fund has provided written documentation regarding its efforts to identify and notify potential Stavenjord beneficiaries. The information was explained and expanded upon in the evidentiary hearing of April 26, 2007. The record properly verifies the State Fund's identification and notification procedure is well thought out and reasonable.

2. The purpose of the noted hearing was to discuss the State Fund's methodology for its procedure of identification and notification of potential Stavenjord claimants and whether it is impracticable or impossible for this Court to comply with the Montana Supreme Court's remand order without the assistance of

a Common Fund counsel. The post remand record indicates that, as to the State Fund, the identification and notification procedure is appropriate. The Court is able to determine that, as to the State Fund, it is not impossible or impracticable for it to make such determination or carry out the remand direction. Likewise, this Court is able to make the determination that Common Fund counsel is not necessary to assist or participate in the process of identification and notification of potential Stavenjord beneficiaries on State Fund claims.

**Conclusions of Law:**

1. The Court has complied with the remand direction in relation to the State Fund, the only workers' compensation carrier involved in this proceeding. It was not impossible for the Court to determine whether the State Fund had established an appropriate procedure by which potential Stavenjord beneficiaries would be identified and notified of their interests related to increased Stavenjord PPD benefits.

2. The State Fund established an appropriate procedure by which potential Stavenjord beneficiaries would be identified and notified of their interests related to increased Stavenjord PPD benefits.

3. The assistance of Common Fund counsel is not necessary in relation to the State Fund's identification and notification of potential Stavenjord beneficiaries of their interests related to increased Stavenjord PPD benefits.

**4. Conclusion**

The State Fund complied with the directions of this Court and provided extensive documentation of its procedure to identify and notify potential Stavenjord beneficiaries of additional entitlement. The Court verified, upon review of the entire record, that the State Fund's procedure was appropriate. Specific acknowledgment of that fact and the conclusions that flow therefrom is within the jurisdiction of this Court.

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Nothing in this request for reconsideration would modify the Court's discussion regarding other carriers besides the State Fund and Stavenjord and her counsel continue to be free to pursue appropriate relief in that regard.

DATED this 4<sup>th</sup> day of February, 2008.

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By

  
Bradley J. Luck

### CERTIFICATE OF MAILING

The, the undersigned, of GARLINGTON, LOHN & ROBINSON, PLLP, Attorneys for Respondent/Insurer hereby certifies that on this 4 day of February, 2008, she mailed a copy of the foregoing STATE FUND'S PETITION FOR RECONSIDERATION, postage prepaid, to the following:

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