COURT FILE NO.: 04-CV-2472
DATE: April 1, 2008

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	
BRENDA HALVORSEN and GABRIELE CARPET CENTRE LTD.	David S. Swift, for the Applicants
Applicants	
- and -	
JOSEPH MIKHAIL, MICHAEL LABA, M & J PROPERTY MANAGEMENT, ESSEX CONDOMINIUM CORPORATION NO. 47, 168975 CANADA INC., and 1318840 ONTARIO LIMITED o/a MIKHAIL HOLDINGS	Myron W. Shulgan, for the Respondents
Respondents	
	HEARD: September 13, 2007

REASONS ON COSTS

Gates J.:

1. Background:

[1] This application was commenced in 2004, pursuant to s.130 of the *Condominium Act*, 1998 S.O., C.19. for the appointment of an Inspector.

[2] The Respondents moved to strike the Application. However when the parties appeared on June 23, 2004 before Misener J. of this court, he ordered the trial of an issue and the Application was converted to a trial, with a date set for March 14, 2005.

[3] On the eve of trial the Respondents consented to the appointment of K.P.M.G. Forensic Inc., as Inspector. The essential terms and conditions of this appointment were set out in my Order of that date.

[4] Paragraph 7 of the Order provided that the Inspector Costs as well as the costs of the proceeding from its commencement, would be reserved to the court, to be dealt with following receipt of the report of the Inspector and subsequent submissions from counsel.

[5] This provides the factual matrix to the appearance before me, initially on the application of the Inspector to fix its fees and most recently, on January 16th and 18th, 2008, by the parties to argue the ultimate disposition of the costs issue.

[6] It is not disputed that the Applicants paid the sum of $38,934.63 to the Inspector directly. Following a hearing before me on October 5th, 2007, I fixed the Inspector's fees at $80,000.00 plus the $38,934.63 referred to, for a total of $118,934.63.

[7] These Reasons will now deal with the issue as to who has responsibility for the payment of these costs.

[8] The Applicants take the view the entire sum of $118,934.63 is to be paid by the Respondents (save and except the Condominium Corporation), on a joint and several basis whereas the Respondents oppose this.

[9] During the course of their submissions, counsel referred to the extensive affidavit of Brenda Halvorsen sworn March 12, 2004 and the Inspector's Report dated July 17, 2004.

2. Positions of the Parties

(a) The Applicants

[10] The Applicants say that 168975 Canada Inc. ("168") and 1318840 Ontario Limited ("131") are the personal corporations of Joseph and Lou Mikhail and that M. & J. Property Management is a partnership of Joe Mikhail and Michael Laba.

[11] They say that subsequent to the registration of the Declaration on October 4, 1994, the Condominium Corporation entered a property management contract with M & J which was to run for a period of two years but that, without any subsequent review for approval by the board, continued up to 2004. Further, Joe Mikhail signed the contract on behalf of the Condo Corporation on the one hand and M & J on the other.

[12] They say that 131, referred to as Mikhail Holdings, operated the only bank account between 1994 and 2002 for the Condominium Corporation, an account in the joint names of the Corporation and 131.

[13] The Applicants also say that a number of other Mikhail family members and business associates sit on the Board of the Condo Corporation; that Mikhail has failed to provide financial information; there has been a significant lack of disclosure with respect to the contracts entered into by the Condominium Corporation and third party business interests. Furthermore, there are discrepancies in the Reserve Fund with respect to the monies received and spent by the Condominium Corporation.

[14] The Applicants rely on s.130(1) of the *Condominium Corporation Act* which empowers any owner to apply to a justice of the Superior Court for an order appointing an Inspector, and if satisfied that the application is made in good faith and in the best interest of the applicants, the court may appoint an Inspector who has the powers of a commissioner under Part II of the *Public Inquiries Act*. The appointment requires the Inspector to provide a written report to the Applicant for the order and to the Corporation. The Court may make any order as to costs of the investigation that it deems proper.

[15] It is important to note that my Order of March 14, 2005 appointing the Inspector was made with the full consent of all the parties.

[16] In my view, therefore, the notions of good faith and the best interest of the Applicants becomes moot.

[17] The Applicants also say that they became concerned with many aspects of the operation and governance of the Condominium Corporation and that their concerns were shared by numerous other unit owners in the complex, some of which have been referred to previously.

[18] Some of the significant concerns raised by the Applicants include:

(i) Reserve Fund

(ii) Insurance

(iii) HVAC Agreement

(iv) Elevator

[19] Dealing with the Reserve Fund the Applicants point out that the *Condominium Act* as well as the Corporation's By-laws requires the establishment of one or more Reserve Funds to be maintained for major repairs and maintenance of the Condominium and its assets. Money for this is to be paid by every owner on a monthly basis as part of their monthly maintenance fees a part of which is to be consigned to a special Reserve Fund. The 1998 *Act* requires a minimum of 10% be deposited this way. However, they argue the Reserve Fund was never set up as required and that it was not until November 23rd, 1998, that the Directors of the Corporation notified the owners that there would be a Board meeting on November 29th, to consider the establishment of such a Reserve Fund which the Applicants note is more than 4 years late.

[20] Therefore, on November 15th, 2002 Joe Mikhail as well as Ms. Halvorsen and another unit holder Ms. Stewart, signed a proposal between the Corporation and the unit owners whereby separate bank accounts for the sole use of the Corporation and its business affairs would be opened with Mikhail and Halvorsen being the signators. Therefore the Reserve Fund was not created until 8 years after the Condominium commenced its existence.

[21] Prior to that the only account in use was the one maintained by 131/Mikhail Holdings into which all the monies flowed pertaining to the Condominium Corporation and which were

then co-mingled with monies of Mikhail Holdings. This has never been denied by the Respondents. This was also confirmed in the Inspector's Report.

[22] Both the 1990 and the 1998 *Condominium Acts* require a mandatory disclosure to perspective purchasers which must include information on the Reserve Funds balance by way of what are known as estoppel certificates. It would appear that between 1995 and 2002 Laba and Mikhail signed statements certifying the existence of a Reserve Fund which contradicts the investigations by the Applicants themselves and as well, the Inspector. There wasn't any Reserve Fund nor was there a Reserve Account. Furthermore, it appeared to the Inspector that the balances disclosed on the estoppel certificates from time to time were generally higher than the actual balance disclosed in the financial statements. It therefore concluded the information represented to potential unit purchasers was not supported by either cash in the Corporation's bank account or by the Reserve Fund set aside by the Board on the Corporation's Balance sheet. It was misleading.

[23] All of this information provides a useful context to the ultimate Application commenced in 2004, leading to the order of Misener J. on June 23rd, 2004.

[24] The Applicants also raise the Insurance issue which apparently arises out of a claim for wind damage sustained to the Corporation's building. Sometime in early 2003, Ms. Halvorsen became aware of such a claim. When she attended on Joe Mikhail at his office to discuss this, he provided her with some information on April 24th, and her investigations determined that a cheque payable by the insurer was made payable to Mikhail Holdings and the Condominium Corporation but was deposited in the account of the former. When the Inspector undertook its investigation of this issue, he reviewed the information provided, and concluded that various explanations provided by Joe and Lou Mikhail were both "confusing and inaccurate".

[25] This the Applicants say, is yet another reason they were becoming increasingly concerned as to the management and administration of the Corporation by the Respondents and this provided further justification for their Application for the appointment of an Inspector.

[26] Arising from the same issue, is one involving the retention by Mikhail of the sum of $7,000.00 from the roof repair insurance proceeds toward stucco repair on the building, the information about which had been withheld from the members for about 6 months. The interim financial statements of the Corporation as of February 2003 included an entry for the $7,000.00 referred to being transferred to the proposed contractor for the stucco work, but the year-end statements for that year dated June 30th do not include reference to any such an entry. The corporation's accountant, one Mr. Boggs could not provide an answer when requested. The Applicants say that no satisfactory explanation was ever given as to why the money simply disappeared from the financial statements or where it went, further darkening their suspicions.

[27] The third issue concerns an agreement negotiated by 168 to supply an HVAC/Alarm System. It was executed by Joe Mikhail on behalf of both the Corporation and 168 which granted his company a lease and maintenance agreement for a period of 10 years. The Inspector was not able to undertake a complete analysis of the actual costs incurred by 168 to install the HVAC

units, because of a lack of accounting records. At their preliminary estimate they estimated that the rate of return earned by 168, before financing costs would approximate 28%.

[28] The request for a disclosure by Mikhail of the rate of return earned by 168 was denied by him.

[29] Lastly, on October 9, 2003 the unit holders received correspondence from Mikhail indicating that elevator repairs had to be undertaken at a cost of $25,000.00 - $28,000.00 which would require a payment of $544.73 from each owner.

[30] The Applicants attempted to obtain documentation to support this claim, which was denied to them. Their own analysis calculated an estimate approximating $13,000.00. Subsequently at the December 2003 Board Meeting copies of 4 different quotes were provided by Mikhail, all of which had been obtained after the notice date of October 9th. The question therefore arose as to how he could know the costs of $25,000.00 - $28,000.00 in the absence of any estimates.

[31] The Declaration of the Condominium Corporation concerning common expenses and the obligation of the owners to contribute to the same is subject to the *Condominium Act* and no amendment to this Declaration can be made without a resolution of the Board of Directors at a meeting of the owners at which at least 80% approve the change. The Applicants say that at no time during their involvement with the Corporation has anyone ever raised this issue or held a meeting to discuss it. Furthermore, some time after 1999 the percentage per unit of these fees changed and continued to escalate to the point that by 2004 they had been increased in excess of 100% over the original charge, without any approval ever being requested or formally obtained from a meeting of the unit holders.

[32] At the December 2003 meeting the Corporation's accountant Mr. Boggs was asked why these changes were made but neither he nor Lou Mikhail, Joe Mikhail or Michael Labe, all of whom were present, would provide any answer.

[33] The Inspector's Report concluded that Ms. Halvorsen's analysis on this issue was correct and that the percentage of common expenses paid by the unit holders had been changed from time to time since the date of the original Declaration, without authority or approval.

2. Legal Submissions by Applicants

[34] Section 130(2) and (4) of the *Condominium Corporation Act* which provides for the appointment of an Inspector where an application is made in "good faith" and "in the best interest of the applicants", however, the consent Order of March 14, 2005, should not defer dealing with the issue of costs at this time.

[35] Furthermore, paragraph 7 of that Order clearly provides me with the discretion at this time to undertake this decision.

[36] The parties agree that the Condo Corporation, a Respondent here, should not be liable for any costs.

[37] Even where the expense of an Inspector may be burdensome to a Condominium Corporation, this is not the test referred to in s.130 which was meant to protect the unit holders who are concerned about the management of the Corporation in which they all have a significant investment at stake. See *Rohoman v. York Condominium Corporation No.141,* [2001] O.J. No.4927, Dambrot J.

[38] However because the parties agree that the Corporation is not to assume any responsibility, then the costs will otherwise be paid in accordance with my ultimate decision.

[39] The single issue facing the Court of Appeal in its decision in *York Condominium Corp. No. 460 v. Civobel Development Ltd.* [1982] O.J. No.131 (C.A.) was the fact that the Respondent had failed to establish the trust account under s.40(2) of the 1990 *Act,* sufficient to warrant an award of costs. In its decision, the court determined that the obligation for the establishment of the trust account is an absolute one and where that has not been carried out the onus is on the Respondent to show cause as to why an inspector should not be appointed to investigate and further, its costs be borne by the Respondent.

[40] While the 1990 *Act* refers to Trust Fund, the current legislation, (s.93(1)), requires the Corporation to establish and maintain one or more Reserve Funds. In my view, there is no difference in the trust nature of these two types of accounts. Furthermore, s.115(1) of the current *Act* requires that anyone who receives money on behalf of the Corporation including monies received from the unit owners as common expenses, must hold it, together with any interest earned, in trust in the performance by the Corporation of its duties.

[41] There can be no doubt but that this is a mandatory and not discretionary obligation. The failure to do so leaves the responsible parties with a clear obligation to account.

[42] In the case of *York Condominium Corporation No.482 v. Christiansen et al,* (2003) 02-CV231437 CM2 a decision of Himmel J. of this court, she too reviewed the positions and responsibilities of the parties under s.130(1) and s.115 of the *Act.* She concluded that the Respondents had received monies from the owners as contribution to common expenses and that accordingly the monies must be held in trust for the performance by the Corporation of its duties. Furthermore because of the omission by the Directors in failing to have current financial statements which resulted in additional costs to the Corporation in order to have its affairs regularized, the cost of the inspection was to be borne completely by the Respondents themselves.

[43] There can be no doubt from the facts that Joe Mikhail, especially as President and a Director would be fully aware of the obligation to create a Reserve Fund and to report to the unit holders. He co-mingled corporation funds with his own. He should not have done so. He signed the HVAC agreement on behalf of the Corporation and as an owner of the maintenance company. He should have disclosed this on a timely basis. He did not.

[44] Directors of a Corporation have a positive, not passive duty to perform their obligations honestly and to the best of their ability to ensure that the owners are fully aware of the affairs of their Corporation and to give them the right to inspect records relating to those affairs. See: *McLean v. Metropolitan Toronto Condominium Corporation No. 647,* Lang J. In that case Lang J. ordered that the costs of the Inspector be borne by the Respondents personally, jointly and severally.

[45] The Applicants say that the order they seek is essentially the same one in substance, as the consent order of March 14, 2005 and that various delays by the Respondents from April 2004 to March 2005 was for no cogent reason. Finally on the eve of the trial set for March 14th, 2005 the Respondents consented to the Order endorsed by me. Therefore during that period of time therefore, the Applicants say they should recover their costs on the substantial indemnity basis.

[46] They next say that the period from March 14th, 2005 to the date of the Inspector's Report of July 23rd, 2007 a period of 27 months as opposed to the original 3, estimated, was caused by the actions of the Respondents in failing to provide the information required. A further Order had to be obtained from me on June 7th, 2005 to provide additional time to the Inspector.

[47] The Applicant's position on delay and failure to produce documentation by the Respondents, is supported by the Inspector.

[48] The Applicants take the position that save and except the Condominium Corporation the Respondents should reimburse the Inspector directly, by analogy to a Sanderson Order, with the caveat that because of his limited involvement, the Respondent Laba should not be responsible to the same extent as the others.

[49] The Applicants argue that they should not pay any of this because the application they brought was for the benefit of the Corporation and all its unit holders and that, the Respondents all consented to the order appointing the Inspector, with the costs considerations referred to in para. 7 in the first place.

[50] They say that numerous requests made by Ms. Halvorsen which all were met with refusal either on a timely basis or at all, to produce the records is contrary to s.55 of the *Condominium Corporation Act* and as such, amounts to a "wrongdoing" by the Respondents.

[51] The wrongdoing, the Applicants say, includes:

(i) Failure by the Respondents to insure the Corporation maintained one or more Reserve Funds solely for the maintenance and repair of the Corporations common elements, a failure in light of a mandatory obligation, a failure which lasted for a period of 8 years.

(ii) Inaccurate estoppel certificates.

(iii) Co-mingling of Reserve money with other of the Respondents' personal accounts.

(iv) Ignoring the mandatory obligation under the *Act* to keep a Reserve Fund in the first place.

[52] Therefore, in general terms the Applicants say that the Respondents have failed in their obligations of stewardship and management of the Corporation and that their various dealings which were not at arms length with their own corporations were all without adequate or timely disclosure.

[53] Their wrongdoing was based on not only to what they did, but also what they refused or failed to do that caused the Applicants to seek the relief in question. The onus of explanation for the inactivity, refusal or indifference to provide and carry out the obligations on behalf of the Corporation, rests with the individual Respondents and not with the Applicants.

[54] The conclusions and findings of the Receiver effectively substantiated the Applicant's concerns.

[55] They further argue that the *Act* requires that no less than 10% of the common fees be deposited each month, but this was not done; while the Condominium Corporation's Declaration can only be changed by a vote of 80% of the owners called for a meeting for this purpose, there was never any such meeting called nor was there ever any approval in writing or otherwise made for the numerous changes created by the Respondents.

[56] The Inspector's Report which supports the efforts of the Applicants and confirms that wrongdoing has been demonstrated therefore entitles them to their costs, both the legal costs and the Inspector's costs and that payment for same should be joint and several by all the Respondents except the Condominium Corporation, save and except Laba as mentioned in para. 48.

[57] The Applicants' costs are broken into three areas:

(i) Costs up to March 14th on a substantial indemnity basis.

(ii) Legal costs during the Inspection.

(iii) Additional costs of the Inspector ($118,893.63) previously described.

[58] They point out that in the *Christiansen* case Himmel J. exercised her discretion under s.130 and ordered that the cost of the investigation and inspection were to be borne by the Respondents on a joint and several basis except for Laba, as noted because he was only on the Board for one year. Laing J. made a similar Order in the *McLean* case.

(b) The Respondents

[59] They say that entitlement to costs does not automatically mean an Inspector should get its costs because the test for entitlement to an appointment of an Inspector under the *Condominium Act* is very low; it is there, in effect, "just for the asking" by an owner.

[60] One should look therefore at the utility and the results of an investigation before considering any entitlement to costs; in other words the Applicant should prove some kind of wrongdoing.

[61] They distinguish the *Civobel* case because there, the Condo Corporation itself applied, against the Declarent because it appeared that the Condo Corp. did not know what was in the Reserve account.

[62] They say that all of the financial statements 1999-2006 were audited statements with no suggestion by the Inspector that these statements were not reliable and this distinguishes this case from *Civobel* where the court found the condo corporation did not even know what the fund was, but here it did.

[63] They argue therefore that *Civobel* stands for the proposition that mere entitlement alone to an Inspector, doesn't automatically mean that costs should flow from that. However, they acknowledge that paragraph 7 of my Order of March 14, 2005 provides that costs from the commencement shall be reserved to the court.

[64] They also acknowledge that the Reserve Fund and the monies kept were not in accordance with the *Condominium Act* which became mandatory in 1999; nothing was done by them about this until 2002.

[65] However they say that this information really wasn't uncovered by the Inspector; rather it was readily apparent, all along but the Applicants did nothing about it.

[66] Therefore, the Applicants must show that the Inspection has been of some utility or usefulness to the Corporation and must involve something which is uncovered for the first time as opposed to being previously known beforehand.

[67] However this ignores the intangible benefit accruing to all the other unit holders in the Corporation as a result of the Applicants' efforts.

Decision

[68] In my view the Respondents were grossly delinquent in organizing the Corporation as required, since 1999. Therefore it was reasonable for the Applicants when putting this information together with the other problems previously outlined, to request an Inspector to ensure that there were no other problems in the Corporation that should have been addressed.

[69] In other words, the Applicants could only act on what they knew or were trying to find out and for this reason they requested, and the Respondents all consented, to the appointment of an Inspector in the hope that it would be able to delve into the affairs of the Corporation to ensure either; that all was right; or to correct what might otherwise appear to be wrong, but which the Applicants could determine by themselves.

[70] In other words, there was on the facts before me, ample basis for suspicion or concern by the Applicants.

[71] The initial suspicion of the Applicants was heightened as Halvorsen deposed in her Affidavit, on numerous occasions because the requests being made to Joe Mikhail, Lou Mikhail or Laba, for information, were either ignored or, the information was not produced.

[72] The means or manner by which the information was eventually uncovered (either as a result of the Inspector or the Applicants themselves) shouldn't disentitle them to their costs.

[73] As Dambrot J. said in *Rohaman* the test is not whether the inspection might prove to be burdensome but rather it's meant to protect the unit holders and when their concerns are sufficient to justify an inspection, then the Corporation – in this case the individual Respondents – must bear the costs.

[74] The Respondents categorize the Applicants as being disgruntled owners who were bringing this Application for their own purposes because they were not prepared to accept the evidence provided by Mikhail. However this ignores the reality that there are a number of un-contradicted instances referred to by Halvorsen in her Affidavit where information was requested and either ignored or rejected.

[75] While the Respondents argued that my March 14, 2005 Order is not an admission by them of any entitlement to costs, I reject this submission and refer again to paragraph 7, which clearly states, "Inspector costs as well as the costs of this proceeding from its commencement shall be reserved to the court to be dealt with following receipt of the Inspector's Report".

[76] I am satisfied that much of the delay here arose because the information being requested was not forthcoming from the Respondents and this resulted in the Inspector being granted at least two extensions of the time within which the inspection was to be completed.

[77] I conclude that the Respondents were not dealing properly with the Corporation and had they been forthcoming with the information requested from time to time, there would not have been any necessity for the intervention by an Inspector. It was really their non-compliance and subterfuge that really invited the appointment of an Inspector. Therefore they must pay the costs.

[78] With respect to Laba, he says that because he was only on the Board for the year 1995/96 he should not be targeted to fully pay on a joint and several basis all of the costs. I agree with this.

[79] I am satisfied that the evidence clearly establishes that the Respondents were fully aware of all of their obligations in dealing with and looking after the interests of the Corporation. There were positive duties which they chose to reject or ignore. It does not therefore entitle them now to attempt to saddle the Applicants with a duty of pursuing their statutory rights as unit holders in the corporation. The duty of disclosure, fair dealing, due diligence and compliance with statutorily mandated business practices rested, at all times with them and therefore any failure to do so rests squarely with them. Further engaging in profitable commercial activities through

their personal corporations with the Condominium creates a real perception of a conflict of interest which is heightened by the fact there was never any disclosure either to the owners or the Board – at least until they were challenged on this. Mixing condominium money with their personal corporate accounts in face of an absolute duty to create and maintain a Reserve Fund no doubt fuels that perception.

[80] The Respondents deny their conduct amounts to a wrongdoing.

[81] I note from the Concise Oxford Dictionary that wrongdoing is defined as:

(i) Not the right thing; not that which is required, intended or proper; not suitable.

[82] There is a very precise negative connotation to this and one which in considering what the Respondents from the evidence have done or not done, would, in my view amount to wrongdoing by them.

[83] One does not answer an obligation by suggesting that the beneficiary of that obligation has the primary duty to signal a breach and pursue it to correction.

[84] They also argue that in order to hold Joe Mikhail personally liable, then one would have to pierce the corporate veil and they rely on the *Trans America Life Insurance Company of Canada v. Canada Life Assurance Company* (1996) 28 O.R.(3d) 423. I adopt the reasoning in that case that this can occur when "it is just and equitable to do so". In the context of the fact here, I conclude that where necessary or appropriate the corporate veils of the various corporations owned or controlled by the Respondents can be pierced as I am satisfied would be just and inequitable in this case to do so.

[85] Therefore, after reviewing all of the evidence I am satisfied that the Applicants should have their costs as follows:

(i)	Up to appointment of the Inspector; October 22, 2003 to March 14, 2005, on the partial indemnity scale including disbursements -	$29,372.18
(ii)	March 15, 2005 to August 15, 2007 on the partial indemnity scale, including disbursements -	$15,538.58.
	Total	$44,910.76
(iii)	Cost previously awarded to Inspector -	$80,000.00
	Fees paid directly by Applicants -	$38,934.63
	Total	$118,934.63

[86] I turn now to the question of who bears responsibility for the payment of this. The Respondents frequently argued that the Applicants shall assume payment of the $38,934.63 paid initially to the Receiver.

[87] I disagree. What they did, as I have concluded, was undertaken because of a systemic failure by the Respondents to comply with their absolute obligations under the *Act* and, the manner in which they operated the entire enterprise. Not only were the unit holders essentially kept in the dark they were living under a growing perception that all was not right. Hence the Inspector's appointment for that the payment of costs must be addressed.

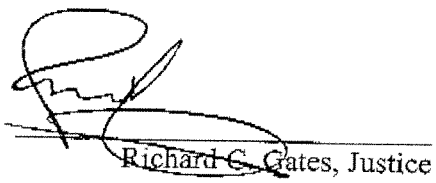
[88] I see no reason for the Applicants to solely assume responsibility for the $38,934.63 when, just as with the $80,000.00 awarded to the Inspector, it was done for the benefit of all owners.

[89] The responsibility therefore will, on a joint and several basis, except for the Condominium Corporation and Michael Laba, be to reimburse the Applicants forthwith for the $38,934.63 they spent and the Respondents shall pay the Inspector directly its $80,000.00.

[90] Because of his relatively limited involvement, the Respondent Laba will pay the sum of $12,500.00.

[91] Furthermore, the Respondents except for the Corporation and Laba shall pay the Applicants their costs which I hereby fix at $44,910.76.

[92] While the Applicants have not raised the issue of costs on this hearing on Costs, I choose to exercise my discretion and fix them at $10,000.00 payable as indicated on a joint and several basis by the Respondents except the Corporation and Laba.



Richard C. Gates, Justice

Released: April 1, 2008

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REASONS FOR JUDGMENT

Gates J.

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