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The Honorable Kathaleen St. Jude McCormick
Chancellor
Court of Chancery
Leonard L. Williams Justice Center
500 North King Street, Suite 1551
Wilmington, Delaware 19801

Re: *Twitter, Inc.* v. *Elon R. Musk, et al.*, C.A. No. 2022-0613-KSJM

Dear Chancellor McCormick:

Twitter requests this Court's assistance in remedying two flagrant failures in Defendants' recent discovery conduct.

(1) Defendants have failed to produce non-privileged text messages sent to and from Elon Musk and his adjutant Jared Birchall during critical periods of the case. Twitter knows these text messages exist, because some have been produced by third parties and others are indicated by the production that has been made. Defendants have refused to explain this discovery failure. The documents have either been improperly destroyed or improperly withheld. In either event, Twitter is entitled to relief.

(2) In defiance of this Court's order, Defendants refused to respond accurately to basic interrogatories designed to identify persons who gained

knowledge of the matters at issue in this litigation through their communications with Musk. After the Court required Defendants to respond, they identified just four people with such knowledge, all of whom Twitter had previously identified to Defendants. Discovery made available to Twitter at the substantial completion deadline revealed obvious omissions in Defendants' supplemental response. When Twitter asked Defendants to explain omissions in their response, they supplemented their list to include 491 more people—a post-deadline data dump that confirms the inadequacy of Defendants' previous supplemental response. Twitter is entitled to relief to ensure it is not prejudiced by Defendants' violation of both the Court of Chancery Rules and an express order of this Court.

Defendants continue to litigate the case in a manner designed to thwart the Court's order of expedition, obscure the issues in dispute, and deprive Twitter of its right to enforce the merger agreement. Defendants have insisted on a unilateral program of discovery; have undertaken only minimal burden while imposing on Twitter vast countervailing burdens with no valid justification; have apparently prevailed upon affiliated third parties to cooperate in their program of delay and obfuscation; and now, after running out the discovery clock, have refused to produce even the most central documents in the case and have made a mockery of an express discovery order of the Court.

For these reasons, Twitter requests this Court's assistance.

BACKGROUND

The Court ordered expedition of this litigation on July 19. On July 28, the Court entered an Order Governing Case Schedule (the "Scheduling Order"). Dkt. 39. The Scheduling Order directed the parties to cooperate in a program of bilateral discovery to bring the case to trial on October 17. *Id.* ¶¶ 1, 15.

The parties immediately served initial requests for production and interrogatories. While Defendants demanded over 60 Twitter custodians, many of apparent marginal relevance to the case, they insisted that only two custodians under their control would possess relevant information—Elon Musk and Jared Birchall. To ensure the swift and orderly procession of discovery, Twitter accepted this questionable representation.

In the days that followed, in the course of developing a protocol for the collection and production of evidence from these files, Defendants represented that (1) they would collect all available messages from both Musk and Birchall, Ex. A; (2) they had not identified any "data loss issues" for either, Ex. B; and (3) they had no reason to believe that either custodian had automatic-deletion settings enabled on his devices, *id.* These representations assured Twitter that it would at least receive a complete production from the two custodians Defendants agreed to search.

At Defendants' request, Twitter proposed on August 5 a protocol for the review of any potentially responsive messages (including "SMS, iMessage, . . . Signal, and Telegram") sent or received by Musk or Birchall between January 1,

2022 and July 8, 2022. The proposal required Defendants to review: (1) for any given text chain, all messages exchanged within 24 hours of any message matching a broad set of terms, including "Twitter" and "mDAU"; (2) all messages exchanged with any of 37 specified individuals, including messages between Musk and Birchall; and (3) all messages sent or received between May 3 and May 16. Ex. C. Defendants agreed to the proposed protocol. Ex. D.

Late in the evening on August 5, Defendants served responses and objections to Twitter's discovery requests and to its interrogatories. The responses were facially deficient. As to document discovery, Defendants lodged boilerplate objections that obscured what they would produce. Ex. E. As to interrogatories, Defendants refused to supply even basic information, such as a comprehensive list of individuals with knowledge of key events. Ex. F.

On August 15, after Defendants made clear they would not remedy these deficiencies, Twitter moved this Court for an order requiring full and complete responses to its document requests and its interrogatories. Dkt. 159. Only in response to Twitter's motion, Defendants withdrew many of their document-production objections and pledged to produce non-privileged, responsive documents within their possession, custody, or control.

But Defendants continued to defend their deficient interrogatory answers. They argued that it was appropriate for them to omit from their responses any

"friends and acquaintances" with whom Musk had discussed the Merger. Dkt. 168 at 17. That disclosure, Defendants told the Court, was unnecessary because text messages with those individuals would "themselves be produced in party discovery." *Id.*

The Court rejected that argument, holding:

> Even assuming that Musk has many friends and family members . . . [it] is difficult to conclude . . . that requiring Defendants to respond to an ordinary-course interrogatory listing persons with knowledge . . . is disproportionate to the needs of any case, particularly a case that concerns a $44 billion merger.

Dkt. 221 at 5. Accordingly, the Court ordered Defendants to supplement their interrogatory responses to "identify all persons with knowledge of or involvement in key issues and events." *Id.*

Pursuant to this Court order, Defendants submitted supplemental responses to Twitter's interrogatories three days later. Ex. G. Defendants identified just four additional individuals "with whom Mr. Musk discussed Twitter/the Merger": Steve Jurvetson, Jason Calacanis, Joe Lonsdale, and David Sacks. *Id.* at 12. This response was calculated to provide Twitter with exactly no additional information. Twitter was already aware of these four individuals and had previously asked Defendants in a specific interrogatory whether Musk had communicated with each about the Merger. Ex. H at 10-11. Defendants also identified a number of "investors approached by Morgan Stanley on Defendants' behalf regarding an equity

investment," apparently drawn from a spreadsheet that Morgan Stanley had produced during the weeks since Defendants' initial interrogatory response. Ex. G at 6-12. Defendants thus left Twitter to believe that no further individuals had knowledge of the transaction or Musk's relevant actions.

Defendants' production on the substantial completion deadline of August 29 has revealed their continuing refusal to play by the rules:

Disappearing texts. Five minutes before the deadline for substantial completion of document production in this litigation on August 29, Defendants finally produced their first tranche of non-email communications—663 messages sent or received by Musk. Two hours later, after the completion deadline, Defendants produced 303 more of Musk's messages and 302 of Birchall's. Defendants have certified that this production is substantially complete, yet it contained:

- just four text messages sent or received on May 6, the date on which Musk allegedly realized that Twitter's disclosures were either "reckless" or "intentionally misleading," Dkt. 42 ¶¶ 10-11;[1]
- zero messages to or from Musk during the four days that followed that purported realization; and

[1] Three of these messages are correspondence with rapper Sean "Puff Daddy" Combs. The last is a benign greeting from Twitter CFO Ned Segal. Ex. I at 3.

- zero text messages to or from Musk between June 1 to June 7, the days preceding and following Musk's decision to assert that Twitter had breached the merger agreement.

These gaps in the production are notable because they correspond precisely to the period when Musk apparently developed buyer's remorse and set into action his scheme to escape the merger agreement.

The Court can be confident the production was incomplete because other parties have produced messages to and from Musk during this time period that Musk should have produced. For example, Morgan Stanley produced a series of texts between Musk and his banker Michael Grimes from the evening of May 8. That production included the following exchange:

From	To	Time	Message
Musk	Grimes	6:54PM	Let's slow down just a few days
Musk	Grimes	6:54PM	Putin's speech tomorrow is extremely important
Musk	Grimes	6:55PM	It won't make sense to buy Twitter if we're heading into WW3
Grimes	Musk	6:58PM	Understood. If the pace stays rapid [both Patrick O'Malley and Kristina Salen] are good enough to get job done for the debt. Then you hire [a] great [CFO] for go forward. But will pause for May 9 Vladimir and hope for the best there.

			We can take stock of where things look after that

Ex. J.

This exchange was followed thirty minutes later by still more texts in which Musk indicated that he intended to conduct "due diligence"—even though he expressly disclaimed any diligence before signing and agreeing to a no-diligence merger:

From	To	Time	Message
Musk	Grimes	7:24PM	An extremely fundamental due diligence item is understanding exactly how Twitter confirms that 95% of their daily active users are both real people and not double-counted
Musk	Grimes	7:27PM	If that number is more like 50% or lower, which is what I would guess based on my feed, then they have been fundamentally misrepresenting the value of Twitter to advertisers and investors
Musk	Grimes	8:36PM	To be super clear, this deal moves forward if it passes due diligence, but obviously not if there are massive gaping issues.

Ex. K.

None of these messages—among many others produced by third parties—were included in Musk's production. And there are many more that Twitter knows

of (some of which are summarized in the margin)[2] and no doubt many others Twitter has no way of knowing about.

The production did, however, include mysterious exchanges in which third parties appeared to converse with nobody at all. For example, on June 17, Robert Steel, a banker at Perella Weinberg Partners had the following "exchange" with Musk:

From	To	Time	Message
Steel	Musk	9:57AM	Good am Elon. Congrats on the good engagement with the TWTR team yesterday Do you have a few minutes to discuss the idea we discussed and outlined above ? Thx Bob
Steel	Musk	10:15AM	Ok. Got it. We will plan to catch up then. You get the logic of the contingent value right. It makes TWTR responsible for proving the number of genuine accounts. Reach out anytime if you want to catch up generally or discuss this idea more specifically Thx, safe travels and we will speak next week

[2] *See*, *e.g.*, Ex. L (May 3 message from Musk to Grimes discussing debt financing, absent from Musk's production); Ex. M (email reflecting messages between Musk and Marc Andreessen discussing co-investment, absent from Musk's production); Ex. N (messages between Robert Swan and Musk discussing Twitter's operations, absent from Musk's production); Ex. O (messages between Birchall and Randall Glein discussing co-investment, partially produced).

Ex. I at 5. No response from Musk was produced by Defendants. (Nor did Musk identify Steel in his interrogatory responses as someone with relevant knowledge, as elaborated below.)[3]

Implausible (un)responsiveness. Beyond these egregious omissions, Defendants' production also suggested that Defendants deployed artificially narrow responsiveness criteria in their production. Defendants undertook to review a population of more than 50,435 emails and attachments for Musk and Birchall, identified by search terms designed to identify relevant documents. Ex. P (last hit report provided by Defendants, before the inclusion of additional terms). Of that review set, Defendants have produced just 1,660 custodial documents.[4] That computes to an implausibly low responsiveness rate of just 3%. As a matter of comparison, Twitter produced 36,899 custodial documents, reflecting a responsiveness rate of roughly 17%.

Among the apparent omissions in Defendants' production: Every single email that Musk sent or received on May 6, save for an email from Musk forwarding a press inquiry to Birchall. Notably, ***Musk's financial and legal advisors also delayed***

[3] Musk's production also contains other suspicious sequences. Between April 25 and May 5, Musk and long-time associate David Sacks exchanged 16 text messages, many about Twitter. Those messages end abruptly after Musk texted: "Best to be low-key during transaction." Ex. I at 3.

[4] Defendants also re-produced several hundred documents that Twitter shared during the merger process, leading to a grand total of 2,065 documents in defendants' production.

production of all substantive communications from that date, leaving Twitter with an underdeveloped documentary record concerning the day when Musk purportedly discovered that Twitter had deceived him.

Also missing are any communications between Defendants and government regulators or their data scientists, topics that were the subject of prior motion practice before the Court. Dkt. 159 at 20-22; Dkt. 160 at 15-19. It remains to be seen whether Defendants are withholding all of these documents on a claim of work-product protection—notwithstanding the Court's warning that this would "raise a red flag," Dkt. 246 at 14 n.40—or whether their production is delayed for some other reason.

Again, based on third party productions, Twitter knows that there are responsive emails among the missing documents. For example, two different third parties have produced a June 10 email in which Musk's advisor Robert Swan provided Birchall a substantive update on the "key workstreams" Swan was pursuing to arrange transaction financing. Ex. Q; Ex. R. Defendants did not. Twitter is not presently moving to compel with respect to this deficiency, pending review of Defendants' privilege log, due to be served on September 5.

Interrogatory abuse. Notwithstanding these evident gaps, Defendants' production still revealed deficiencies in Musk's interrogatory responses.

Early last week, the Court ordered Musk to identify each individual with whom he had substantive communications about the Merger. Musk defied that

Order. Musk never revealed his discussions with Steel regarding a potential contingent value right transaction structure for Twitter, for example. Nor had he disclosed his communications with other relevant individuals featured in his text messages, including Michael Kives of K5 Global;[5] Ari Emanuel of Endeavor; and Adeo Ressi of VC Lab. These communications were all revealed by Musk's (inadequate) substantial-completion document production.[6]

The morning after that production, Twitter sent a letter to Defendants, identifying these deficiencies in their supplemental interrogatory responses and requesting a prompt explanation. Ex. S.

At 11:58 p.m. on August 31, Defendants responded by serving another supplement to their interrogatory responses. Ex. T. That supplemental response came after the deadline for substantial completion of written discovery; more than four weeks after the deadline for Defendants' response to the interrogatories; and more than a week after the Court had ordered Defendants to provide a complete response.

The supplemental response was amazing. In it, Defendants identified ***491*** knowledgeable individuals that had been omitted from all previous responses. *Id.*

[5] Defendants disclosed that their bankers had spoken with Mr. Kives about potential co-investment, but notably omitted him from the list of individuals with whom Musk himself had discussed the transaction.

[6] Ex. I at 2-3.

According to Defendants, this massive data dump was "based on communications produced by Defendants," and appears to consist of every individual whose communications with Musk have been produced by Defendants to date. *Id.*

* * *

At 12:37 a.m. on September 1, Defendants sent Twitter a cursory letter purporting to address the deficiencies in their production. Ex. U. Defendants did not even attempt to explain the messages missing from their production. They offered only to "investigate Plaintiff's complaints" and "promptly" produce any texts "found to have been inadvertently withheld." *Id*. at 2. Addressing their deficient interrogatories, Defendants pointed to their latest revision, stating that Twitter had asked them "to supplement their interrogatory responses based on text messages and other documents already within [Twitter]'s possession." *Id.* at 3.

During the 38 hours that Defendants took to prepare that perfunctory message, they had filed a motion for further briefing on one of their motions to compel, Dkt. 320, and a motion asking the Court to reconsider one of its earlier discovery rulings, Dkt. 335. Having received no satisfactory response from Defendants and with the substantial completion deadline passed and depositions underway, Twitter believed itself constrained to file this motion.

ARGUMENT

I. Twitter is entitled to relief for Defendants' failure to produce significant text messages.

Defendants represent that they have produced all custodial text messages identified under the parties' agreed-upon messaging protocol. That should have included, at minimum, all responsive messages between Musk and Birchall, all responsive messages between Musk and Michael Grimes, and all responsive texts that Musk or Birchall sent or received between May 3 and May 16. But the production did not include these communications. As detailed above, the productions of other parties show that there are significant gaps in Defendants' production.

When Twitter alerted Defendants to these critical deficiencies, they did not correct them. Instead, they waited nearly two days, then offered to "investigate" the matter and afterwards "promptly" produce anything "inadvertently withheld." Ex. U at 2.

Defendants' production leads to two possible conclusions: (1) Defendants' review process is so defective that it cannot be trusted; or (2) Musk and Birchall deleted relevant evidence despite anticipating this litigation. Because of Defendants' lack of transparency, Twitter cannot know which is the case but in either event requests the Court's intercession to prevent further prejudice.

Defendants claim they may have "inadvertently withheld" messages. *Id.* This is not credible. The missing texts are all centered on key periods in the case, especially the period when Musk was changing his mind about the deal. That cannot be put down to coincidence. Moreover, the omissions cannot reasonably be explained by inadvertence. As noted above, Defendants have failed to produce May 8 text messages in which Musk instructed his Morgan Stanley banker to "slow down" consummation of the merger because of concerns about the Ukraine war. Had Defendants implemented the agreed-upon review protocol, that message would have been reviewed for production by their counsel—both because it was sent during the May 3 to May 16 time range and because it was sent to an individual specifically designated for review by Twitter. Any good-faith review of that document would have led to its prompt production, not just because it is highly relevant to the issues in this litigation but because it is clearly responsive to Twitter's request for all communications relating to the Merger. But it was not produced.

When Twitter previously moved for an order holding that Defendants had waived their discovery objections, it expressed concern, based on the conduct of discovery to that point, that Defendants would continue to engage in precisely this type of hide-the-ball misconduct. Dkt. 159 at 9-3. The Court agreed that Defendants' behavior was "suboptimal," but was "willing to credit Defendants for arriving at more reasonable fallback positions." Dkt. 221 at 3. The Court also

invited Twitter to "renew its generalized request in the event Defendants' behavior persists." *Id.* at 4.

The newly-discovered inadequacy in Defendants' discovery effort shows that Defendants have no intention of voluntarily complying with the rules (or this Court's orders). To avoid further prejudice to Twitter, the Court should exercise its "broad discretion" to remedy discovery misconduct by ordering Defendants to produce to Twitter, subject to an appropriate clawback right, all of Musk and Birchall's text messages that do not contain personally identifiable information. *Monier, Inc.* v. *Boral Lifetile, Inc.*, 2010 WL 2285022, at *3 (Del. Ch. Feb. 24, 2010).[7] This remedy is appropriate: if Defendants have abused their discretion by choosing not to produce important discovery in the context of this expedited litigation, and in the context of the minimal discovery burden they have arrogated for themselves, they should be deprived of that discretion and Twitter should be able to determine for itself what evidence is relevant.

To the extent Defendants did not produce any messages because Musk deleted them, a different remedy is in order. As Defendants have conceded, Musk anticipated litigation after his supposed realization on May 6 of supposed concerns regarding Twitter's operations. Dkt. 168 at 6. From that date forward, Musk had an "affirmative duty to preserve evidence that might be relevant to the issues in th[is]

[7] Twitter is willing to promptly enter a stipulation and proposed order under D.R.E. 510(f) to ensure the preservation of any privilege.

lawsuit." *Kan-Di-Ki, LLC* v. *Suer*, 2015 WL 4503210, at *29 (Del. Ch. July 22, 2015). At no time in the parties' extensive meet-and-confer meetings did Defendants' counsel indicate that relevant evidence had been destroyed. That failure would violate Defendants' discovery obligations. So too would the selective deletion of inculpatory documents.

The appropriate remedy for that misconduct would likely be an adverse inference that the missing messages undermined Defendants' counterclaims and defenses. That sanction is available where a party has acted to "intentionally or recklessly destroy evidence" and the aggrieved party can make "some showing that the allegedly destroyed evidence . . . supported [its] position." *TR Invs., LLC* v. *Genger*, 2009 WL 4696062, at *17 (Del. Ch. Dec. 9, 2009), *aff'd*, 26 A.3d 180 (Del. 2011). Third-party discovery has already demonstrated that the missing messages include evidence supporting Twitter's claims in this litigation—including at least one series of messages showing that Musk's actual motivation for slow-rolling and then terminating the transaction was his concern over geopolitical instability. Ex. J.

To develop the record on this point, the Court should order that Defendants immediately submit an affidavit setting out the information that should have been in their September 1 letter—a detailed explanation of what was lost, when, how, and why. In addition, if messages have indeed been lost, Defendants should be required to submit Musk and Birchall's phones for forensic examination, to evaluate whether

it is possible to recover any deleted or destroyed messages. Lastly, Defendants should be required to gather and produce phone-company records of text messages sent or received by Musk and Birchall. With that record, the Court will be in a position to evaluate the appropriateness of sanctions.

II. Twitter is entitled to relief for Defendants' improper responses to Twitter's interrogatories.

In its Scheduling Order, the Court directed that "[d]iscovery should not be . . . withheld in an effort to . . . extract unreasonable benefits from the opposing party" and that each party must "use best efforts to comply with its discovery obligations." Dkt. 39 ¶ 6.

Among those discovery obligations is a mandate to identify sources of potentially relevant information. *See* Ct. Ch. R. 26(b)(1). To ensure that Defendants complied with that requirement, Twitter served several threshold interrogatories requiring Defendants to identify individuals who substantively communicated with them about the Merger, among other topics, or who otherwise have knowledge about it. These were ordinary-course interrogatories, but here they took on particular importance: Because Defendants have identified just two party custodians, Twitter needed the requested information to guide its third-party discovery.

Defendants have mounted an elaborate effort to deprive Twitter of the benefit of that discovery. This began with Defendants' facially deficient initial response, which omitted banks that signed Musk's debt and margin loan commitments,

counsel to various interested parties, and the individuals who attended diligence meetings on Musk's behalf. Confronted with these deficiencies, Defendants delayed for a full week before dribbling out a bit more information. Twitter was thus forced to seek relief from the Court. In an order after briefing, the Court held that Defendants had deprived Twitter of vital information and ordered Defendants to serve supplemental responses. Dkt. 221 at 5. Defendants waited three days, then shrugged that order off and served another minimally incremental disclosure.

Defendants' tactics were not subtle. Instead of timely answering the interrogatories, they knowingly supplied Twitter with less information than Twitter already had obtained from the documentary record, thus rendering their interrogatories useless as an instrument of discovery. With document discovery now substantially complete, Defendants have alighted on an alternative approach: dumping upon Twitter an undifferentiated index of 491 names and anonymous Twitter usernames.

What is unmistakeable is that Defendants have refused to respect the rules. During the discovery period, Defendants served an interrogatory response that was ludicrously under-inclusive—notwithstanding a direct order of the Court—leaving Twitter no means to pursue the third-party discovery to which it was entitled in the limited time allowed. After the discovery period closed, Defendants served a supplemental response that was ludicrously over-inclusive—leaving Twitter neither

the time nor the specific information needed to chase down necessary evidence. Defendants' flimsy supplemental response of August 26 was plainly inadequate, as last night's data dump confirms. But the August 31 data dump is also inadequate, as it reflects no attempt to supply to Twitter an informed view of persons with knowledge. This is the opposite of discovery—it is hide-the-ball. Even worse, it is knowing defiance of a court order.

At no time during Defendants' sequence of interrogatory responses did they ever undertake their obligation to attempt, in good faith, to actually provide the information requested. *See, e.g.*, *Van De Walle* v. *Unimation, Inc*, 1985 WL 11545, at *2-3 (Del. Ch. Mar. 20, 1985) (a party must answer interrogatories "in good faith," and the propounding party should not be forced to "wait indefinitely for such scraps of information as [the opposing party] might dole out"). Musk has always known whom he communicated with about the transaction. He has simply chosen not to respond. And now that any possibility of further third-party discovery has been foreclosed, both by deadline and by practical reality, that tactic has achieved its aim.

Twitter should not have to bear the prejudice of Defendants' wise-guy tactics. Since defense counsel have proven unwilling or unable to elicit the necessary threshold information from Musk, that task must fall to Twitter's counsel. The Court should order Defendants to make Musk available, within the week, for a deposition targeted on the topics for which he has been unable to provide Delaware-compliant

interrogatory responses. Defendants should be ordered to bear all costs. And, for the avoidance of doubt, that deposition should be in addition to the thorough fact deposition of Musk—one of only two witnesses Defendants have made available—to which Twitter is otherwise entitled. In addition, because Twitter's ability to conduct third-party deposition has been compromised by Defendants' refusal to comply with Delaware practices, Twitter should be relieved of any deadlines that the Scheduling Order imposes on third-party discovery.

It is unfortunate that Defendants' conduct has necessitated this remedial request. Twitter does not make it lightly. Since July 19, Twitter has been working hard to provide Defendants with expansive and appropriate discovery to bring the case to trial. For their part, however, Defendants have been working hard to thwart the Court's order of expedition and Twitter's right to a prompt day in Court. Twitter respectfully asks the Court for assistance in its effort to respect the Scheduling Order and the Court of Chancery Rules governing discovery and to present the case for prompt trial.

CONCLUSION

For the foregoing reasons, this Court should issue sanctions punishing Defendants for their discovery misconduct, through an order that: (1) requires Defendants to produce to Twitter, subject to an appropriate clawback right, all of Musk and Birchall's messages from the relevant period that do not contain personally identifying information; (2) requires Defendants to supply a sworn

affidavit detailing whether, when, how, and why messages were deleted from Musk and/or Birchall's mobile devices; (3) if Defendants identify data loss on any of Musk or Birchall's mobile devices, requires Defendants to submit those devices for forensic examination and data recovery; (4) requires Defendants to undertake efforts to obtain and produce phone-company records concerning the text messages that Musk and Birchall sent or received during the relevant period; (5) requires Defendants to make Musk available within the week for a deposition concerning their interrogatory responses, with Defendants bearing costs for the deposition; and (6) suspends all third-party discovery deadlines as to Twitter.

Respectfully,

/s/ Kevin R. Shannon

Kevin R. Shannon (No. 3137)
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