



SEMINAR REFERENCE BOOK - 2018

Mergers - A Primer

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Seminar Reference Book

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I. INTRODUCTION

Merger activity continually changes. The number and value of mergers rise and fall from year to year and decade to decade, while the structures of the transactions and the reasons they are entered into change as well. One thing that does not change, however, is that the completion of a merger can involve a staggering number of details, both before and after the decision is made to enter into the transaction.

Before the decision is made to enter into a merger, the constituents engage in a process called due diligence. It is during this process that the parties decide whether they want to enter into the merger.

Once it has been decided that a business entity should enter into a merger, another complicated process begins - planning and completing the filings that will make the transaction legally binding, and that will make the records in state business entity filing offices accurately reflect all of the changes to the companies caused by the transaction.

Neglecting to file any required document, or neglecting to take one of the other steps involved in this process, can have serious consequences. These can include delaying the merger, causing a business entity to lose the right to its name, causing it to be penalized for doing business in foreign states without authority, or subjecting it to additional tax liability.

II. MERGERS OVERVIEW

A. Entities Discussed

In the past, when people spoke of mergers they were generally referring to a transaction involving corporations. Today, however, many unincorporated business entities are involved in mergers – both with the same type of business entity and with a different type of business entity. These unincorporated business entities include the limited liability company (LLC), limited partnership (LP), general partnership (GP) and limited liability partnership (LLP) – all of which are generally authorized by their governing statutes to enter into statutory mergers.

B. The Business Deal vs. the Statutory Merger

The business deal is a separate part of the acquisition process from the merger. The deal involves such issues as what is to be acquired, what is the purchase price, and what form of consideration is to be paid (i.e., cash, stock, or other property). Because the business deal is not statutory, there are few restrictions on its terms.

A statutory merger is not part of the business deal. Instead, it is a legal device that may be used to effectuate the deal.

C. Acquisitions Defined

Black's Law Dictionary defines an acquisition as "The act of becoming the owner of certain property; acquiring or procuring the property in anything. Taking with or without consent, especially a material possession obtained by any means." In terms of business entity law, an acquisition occurs when one business entity obtains all or part of another by one of several statutory or non-statutory means.

D. What is a Merger?

A merger is generally defined as a combination of two or more business entities in which the assets, businesses and liabilities of all the entities are transferred to one, which continues in existence, while all the others cease to exist.

Because it is a statutory transaction the requirements of the business entity laws of the parties' states of formation must be followed for the merger to become legally effective.

E. "Mergers" vs. "Acquisitions"

A merger is a statutory transaction that may be used to acquire another company. It is one method of acquisition but it is not the only method. There are also non-statutory and other statutory methods. The two main non-statutory methods are the share acquisition and the asset acquisition. The main statutory methods other than the merger are the exchange and the consolidation.

F. Share Acquisition

A share acquisition occurs when an acquirer purchases the shares of a corporation. The result of a share acquisition is that the acquired corporation becomes a subsidiary of the acquirer. (When the acquirer purchases the membership interests of an LLC, partnership interests of an

LP or GP, or ownership interests of another form of unincorporated business entity, the transaction is generally referred to as an interest acquisition.)

A main advantage of this transaction is the absence of statutory requirements - such as holding a shareholders' meeting. The acquirer simply contracts with the target's owners to buy their interests.

A main disadvantage is that the acquirer may have to deal with a large number of sellers. This can be time consuming and expensive. Another is that the owners of the target who refuse to sell are still around and entitled to vote, inspect records, and assert their other rights.

G. Asset Acquisitions

An asset acquisition occurs when one business entity purchases all, or substantially all of the target's assets, other than in the ordinary course of business. After the transaction is completed, the target retains its separate existence.

An asset acquisition differs from a share or interest acquisition in two significant ways. First, in an asset acquisition, the target does not become a subsidiary of the acquirer. Second, the purchase price is paid to the target business entity, not to the target's owners.

A principal advantage of an asset acquisition is that the acquirer does not assume the seller's liabilities. A principal disadvantage is that it is a complex transaction with many issues to deal with.

H. Why Lawyers Like Statutory Mergers

1. *Effected by simple document* – The document that is filed to effect a merger is relatively simple, and its contents are specified by statute. Non-statutory transactions are effected by complex, contractual documents.
2. *No minority owners remain* - The owners of the merged business entities who disapproved of the transaction must turn in their ownership interests. Therefore, the survivor is not left with any disgruntled minority owners.
3. *Clarity of effect* – The results of a merger are prescribed by law and therefore are certain. The results include that the existence of every entity except the survivor ends, title to the property owned by the non-surviving entities is vested in the

survivor, the survivor assumes all the non-surviving entities' liabilities, and a proceeding pending against any non-survivor may be continued as if the merger did not occur, or the survivor may be substituted as the party.

4. *Statutory dissenters' rights* - The constituents' owners may be granted dissenters' rights by the governing business entity statute. The right to dissent is a right given to the owners of business entities, entitling them to receive payment of the appraised fair value of their ownership interests when an action that alters the character of their investment is taken without their consent. It is also known in some states as appraisal rights.

I. Mergers Can Be Complex

The process of completing a merger transaction can be cumbersome because there are so many steps that have to be taken before, during, and after the effective date of the merger - and because there are tricky timing issues involved in many of those steps.

Adding to the difficulty is that unless all of the constituents are of the same entity type, and from the same domestic state, the merger will have to be effected by complying with at least two merger statutes – which, in many cases, will be inconsistent. And not only are there different statutes to contend with, but each filing office has its own unpublished, administratively imposed policies. This can make multi-state merger transactions particularly challenging to handle.

III. TYPES OF MERGERS

A. General Merger

A “general” merger is one effected pursuant to the “general merger statute.” This is the basic merger provision of any business entity act. It is “general” in the sense that it applies to any merger, rather than a specific transaction, such as the merger of a wholly-owned subsidiary into its parent.

The general merger statutes provide a domestic entity with the authority to enter into a merger. They also set forth the type of business entities it may merge with or into. In addition, the

general merger statutes describe the documents that have to be filed to effect the merger, set forth who has to approve the plan of merger, prescribe the legal effect of the merger, state whether and when the plan may be abandoned or amended, and state whether dissenters' rights are available and how they can be obtained.

B. Parent-Subsidiary Mergers

1. Parent-Subsidiary Up-Stream Merger

A parent-subsidiary up-stream merger is a merger of a subsidiary business entity into its parent business entity, with the parent business entity surviving.

In order to simplify the procedure when there are no, or almost no minority shareholders, business corporation statutes authorize what is called a short-form merger. In general, only mergers where a parent corporation owns at least 90% of each class of voting stock of subsidiary corporation may be effected using the short-form procedure. Only a few statutes provide for short form mergers involving unincorporated entities.

Typically in a short-form merger, only the parent's board of directors has to approve the plan of merger. The subsidiary's board does not have to approve. In addition, neither the parent's shareholders nor the subsidiary's shareholders have to approve the plan. Approval of the subsidiary's shareholders is considered unnecessary because the parent owns enough shares to ensure approval. Approval of the parent's shareholders is unnecessary because the transaction will not materially change their interests.

2. Parent-Subsidiary Down-Stream Merger

A parent-subsidiary down-stream merger is a merger of a parent into its subsidiary. The subsidiary survives and the parent disappears. Some corporation statutes provide that where the parent owns at least 90% of the voting stock of the subsidiary, the subsidiary's board of directors is not required to approve the plan of merger. However, when the parent disappears, approval of the merger by the parent's shareholders will be required.

C. Triangular Mergers

A triangular merger involves three business entities - a parent (the acquirer), its subsidiary, and the entity to be acquired (the target). The subsidiary will be newly formed for the sole purpose of assisting the parent in acquiring the target.

In a triangular merger, the merger is between the subsidiary and the target. The acquirer is not a constituent to the merger. There are two kinds of triangular mergers – forward and reverse.

In a forward triangular merger, the target and subsidiary merge, with the subsidiary surviving and the target disappearing. The result of the transaction is that the target becomes a wholly-owned subsidiary of the acquirer. However, because the merger was between the target and the subsidiary, the acquirer does not assume the target's liabilities. Had the acquirer directly merged with the target, the acquirer would, by operation of law, have received its liabilities. This is the main reason for entering into a forward triangular merger - to allow the acquiring entity to acquire the target without assuming its liabilities.

In a reverse triangular merger, the subsidiary merges into the target, with the target surviving and the subsidiary disappearing. The acquirer receives all of the target's ownership interests and the target becomes a wholly-owned subsidiary of the acquirer. Both the acquiring and acquired business entities remain in existence and the acquirer does not assume the target's liabilities.

D. Multi-Entity Mergers

A multi-entity merger is a merger that involves at least two different types of business entities. This type of merger is also referred to as a cross-entity merger, inter-entity merger, or an inter-species merger.

When a merger involves different entity types, there are special considerations for the legal practitioner handling the filings. The first is to check for statutory authorization because not all business entity statutes allow mergers with all other business entity types. In addition, because corporations, LLCs, and partnerships are governed differently, issues such as how the plan of merger is to be adopted and approved, whether dissenters' rights are to be granted, and who has authority to execute documents, will generally be resolved differently for each constituent. Furthermore, the exchange of ownership interests – which is an issue that must be dealt with in all mergers - is particularly complex in multi-entity mergers because the ownership interests of the various entity types consist of different rights, powers, obligations, and liabilities.

IV. CONVERSIONS AND OTHER TRANSACTIONS

A. What is a Conversion?

A statutory conversion is a transaction with only one constituent that is used by one form of business entity to change to another form of business entity. In addition, some business entity laws provide that a domestic entity may convert to a foreign entity of the same type. In these states, the conversion transaction may be used to change a state of organization as well.

The conversion statutes generally use the term “converting entity” to refer to the constituent before the conversion. The terms “converted entity” or “resulting entity” are generally used to refer to the constituent post-conversion.

The statutes also set forth the legal effect of a conversion. In general, when a conversion goes into effect the converting entity continues to exist, without interruption, but in the organizational form of the converted entity, all property owned by the converting entity continues to be owned by the converted entity, the liabilities and obligations of the converting entity continue to be liabilities and obligations of the converted entity, and a proceeding pending by or against a converting entity may be continued by or against the converted entity.

The procedure for effecting a conversion generally requires the converting entity’s management to adopt a plan of conversion that is then approved by its owners. A certificate of conversion is then filed along with a formation document for the converted entity.

B. What is an Exchange?

An exchange is a statutory method of acquisition. In a share exchange, one corporation becomes the owner of all the outstanding shares of one or more classes of another corporation, in an exchange that is binding on all the shareholders of the acquired class of shares. An interest exchange is the same type of transaction involving the exchange of ownership interests in an unincorporated entity.

An exchange accomplishes the same end as, and can be used in place of, the reverse triangular merger. In an exchange the acquired entity does not go out of existence. It becomes a subsidiary of the acquirer. The advantage of the statutory exchange over the triangular merger is that there is no need to form a subsidiary to accomplish the transaction.

An exchange may also accomplish the same ends as a direct, non-statutory acquisition of ownership interests. The advantage of the statutory exchange is that the acquirer only has to obtain – in most cases - a majority vote for approval, with the exchange thereby becoming binding on all of the holders of the acquired class of ownership interests. In order for the acquired entity to become a wholly-owned subsidiary in a contractual acquisition, the acquirer would have to convince all of the owners to sell their interests.

An exchange is effected by a plan of exchange being drafted and adopted as prescribed by the governing statute and/or documents and a certificate of exchange being filed with the filing office.

C. What is a Consolidation?

A consolidation is a transaction in which two or more corporations or unincorporated business entities combine to form a new business corporation or unincorporated business entity. All of the business entities existing before the consolidation disappear as a result.

Consolidations are not authorized by all business entity statutes. Where it is authorized it is effected by the approval of a plan of a consolidation and the filing of a certificate of consolidation along with the resulting business entity's formation document. In addition, some merger statutes define a merger to include a transaction where all the constituents disappear and a new entity results.

V. PRE-TRANSACTION PLANNING ISSUES

The pre-transaction stage is the time period between approval of the decision to enter into the merger and the filing of the documents that make the transaction effective. There are a number of issues the parties have to deal with including those detailed below.

A. Good Standing Status

States may reject filings for business entities that are not in good standing. Consequently, one step that is generally taken before filing the documents to effect a merger is to check if all of the constituents are in good standing in their formation states and in the foreign states in which filings will be made.

A business entity is generally considered in good standing if it is duly formed (in the case of a domestic entity) or duly qualified (if a foreign entity) and all fees and taxes have been paid and annual reports filed.

A corporation or unincorporated entity may fall out of good standing for a number of reasons such as the failure to file an annual report and/or pay franchise taxes.

If an entity is not in good standing, steps should be taken to restore it to good standing status. If the entity is suspended, good standing may be restored by filing all delinquent reports and paying all taxes and penalties due. However, if it has been dissolved or revoked, it may not only have to comply with the delinquent requirement and pay penalties and interest, but it may also have to apply to the state for reinstatement.

B. Tax Status Issues

Another step that is often taken before filing the documents to effect the transaction is to determine whether the constituents are up to date in their state tax payments. This is particularly important for any entities that will no longer exist after the transaction as the states do not want entities disappearing while still owing taxes.

Some states simply require a business entity to be current in its state tax payments. However, other states require a tax clearance - which is a certificate stating that a business entity has no taxes due.

To obtain a tax clearance a request is made to the appropriate tax department or departments. Tax clearances can sometimes take a long period of time to obtain. Therefore, it is important to determine, in advance, if one is necessary. A failure to do so can delay the filing.

C. Name Issues

1. Name Availability

Almost every business entity law provides that a domestic or foreign entity cannot use a name unless it is available. That is, that the name does not conflict with a name already on record in the state.

Name availability issues often arise in merger transactions. For example, the surviving entity may choose to take the name of the discontinuing entity or combine the entities' names. Sometimes a merger results in the surviving entity

transacting a different kind of business or doing business in new locations and the survivor may want to change its name to indicate these changes. When this happens, it will first have to be determined if the new name is available for use in the surviving or new entity's home state and in every other state in which it will be qualified as a foreign entity.

2. Name Protection

If the constituent to the merger finds that the name it wants is available, the next step should be to protect the name. That is, to make sure that no other entity takes the name before the constituent can file the document that makes the name its own.

The most commonly used mechanism to protect a name is a name reservation. Most business entity statutes permit the reservation of a name for a short period of time. The period generally ranges from 30 days to one year depending upon the statute, although 120 days is a commonly seen period. Some statutes permit an entity to renew a reservation when the reservation period expires. Some do not.

Another device for protecting a name is a name registration. Name registration is generally used by a corporation to preserve the right to its legal name in a foreign state in which it has not yet qualified, but in which it may decide to qualify in the future. Name registrations are intended to provide long term protection. They are generally effective for one year and are renewable indefinitely.

3. Options if Name Not Available

If the name a business entity wants to use following a transaction is not available, one step that can be taken is to try to obtain the holder of record's consent to use the name. The states will generally authorize the use of an unavailable name if the holder consents in writing and agrees to change its name as soon as practicable.

If an entity is attempting to qualify in a foreign state, or amend its qualification document to reflect a new name, and its legal name is not available, most states will require it to adopt and do business under a "fictitious" name that is available in the state.

4. Trademark Search

Another availability issue has to do with trademarks. If the business entity name chosen by the survivor to a merger has been trademarked, the entity may find itself receiving a Cease & Desist letter or having to defend itself in a trademark suit.

To avoid this problem, the entity should consider a trademark search. In a trademark search, federal and state trademark registration records are searched, as well as sources such as business name listings, telephone directories, and the Internet. This search should reveal whether there are any trademarks, trade names or service marks that conflict with the constituent's chosen name.

5. Domain Names

It is not unusual for a business entity's domain name to reflect its business name. Consequently, if a business entity changes its name following a merger, it may also wish to change its domain name to reflect its new legal name. If so, the entity will first have to determine if the desired domain name is available by checking with a domain name registration company. It is advisable to perform a trademark search to determine if there are other parties with rights to the domain name.

6. Voluntary Assumed Name

Additional filings may be necessary if the party existing following the merger decides to do business under an assumed name. An assumed name is any name other than the one under which a statutory entity was formed.

Most states have statutes that require business entities doing business under an assumed name to make a public filing. Some states require the filing to be made with a state agency while others require filings to be made with county clerks or recorders in the counties where business is conducted.

D. Pre-Transaction Qualifications

Qualification is the process by which a statutory business entity receives authority to do business in a state other than its state of organization. This process is also sometimes referred to as registration, particularly in the case of unincorporated entities. If a merger will result in a constituent doing business in a foreign state where it was not doing business previously, then that constituent will have to qualify in that state.

The question of whether the entity will have to qualify revolves around the issue of what constitutes “doing business” in a state. Most statutes have a list of activities that do not constitute doing business. Few, however, list activities that do constitute doing business.

The determination of whether an entity is doing business in a state generally requires an analysis of all of the entity’s activities in, and contacts with the state, an examination of the relevant statutes, case law, and administrative opinions, and a legal opinion as to whether those activities and contacts constitute “doing business” in light of those statutes, cases, and administrative opinions.

A foreign business entity doing business in a state without authority is subject to monetary penalties. In some cases, the individuals doing business on its behalf may be penalized as well. In addition, the entity will not be allowed to file or maintain a lawsuit or proceeding in any court in the state until it qualifies.

E. Timing Issues

One of the main problems facing legal professionals who handle merger filings is timing all of the pre-transaction steps. However, there are several mechanisms available to help with this problem.

One possible technique is to start with a projected effective date and determine when to do the pre-transaction work based on that date. One problem with this technique is that documents delivered for filing on a certain day may not actually be filed until days or weeks later due to filing office backlogs or filing rejections. To better the chances of multiple documents being effective on the same day a filer may set forth a delayed effective date in the documents. Nearly all states permit documents to set forth a delayed effective date. This can allow for more certainty in timing the pre-transaction steps such as reserving names and ordering supporting documents.

Pre-clearing documents is another way to avoid the delays caused by unanticipated rejections. For a fee, some filing offices will review documents in advance of filing and determine whether or not they meet state requirements.

In addition, most filing offices, for an additional fee, will expedite the handling of filed documents. Depending upon the state, this means that the documents will be reviewed within a few hours or days after receipt. This is a useful device to avoid backlog problems.

F. Authentication

If a transaction will require documents to be used in foreign countries, then these documents may have to be authenticated. Documents subject to authentication include notarized instruments such as powers of attorney and instructions for transferring ownership interests, as well as certified documents such as certificates of good standing or certified copies of filed documents. Authentication is required to prove that the notary or public official had the power to notarize or certify the document.

There are two ways to authenticate a document, depending upon whether the country in which it will be used is a participant in the Hague Convention. If a document is to be used in a Hague Convention country, it is only necessary to request a certificate called an Apostille from the secretary of state in the state where the notary or certifying official was located. However, if the country does not participate in the Hague Convention it is necessary to submit the document to the secretary of state of the jurisdiction in which the document was notarized or certified, then to the United States Secretary of State, and finally to the consulate or embassy for the country in which the document will be used.

G. Pre-Transaction Notification under the Hart-Scott-Rodino Act

The Hart-Scott-Rodino Antitrust Improvement Act of 1976 (HSR Act) requires entities involved in mergers or acquisitions that are large enough to meet jurisdictional thresholds to file a Notification and Report Form with the Federal Trade Commission and the Department of Justice. The transaction may not be consummated for a designated period of time after giving notice. During that period, the federal agencies will review the transaction to see if it violates antitrust laws. Severe monetary penalties may be imposed on parties failing to report a transaction.

H. Drafting the Primary Merger Documents

During the pre-transaction stage a plan of merger needs to be drafted. The required contents of the plan of merger are set forth in the statutes. Generally, the plan of merger must contain the name of each business entity planning to merge and the name of the surviving entity into which the others will merge; the terms and conditions of the merger; and the manner and basis of converting the ownership interests of each business entity into ownership interests in the survivor or any other business entity, cash or other property.

The plan of merger has to be approved. How approval is to be obtained generally differs depending upon the entity type. In the case of corporate constituents, the board of directors of

each party and the shareholders of the disappearing corporations usually have to approve the plan. In general, the shareholders of the surviving corporation do not have to approve the plan because their corporation continues to exist and the nature of their investment is not fundamentally changed. However, if the merger significantly alters the nature of the shareholders' investment, approval may be necessary.

In the case of unincorporated entities, a merger may be approved in any manner and by any vote provided for in the governing agreement. Many statutes have default rules that will apply in the absence of a provision in the agreement.

Following approval of the plan, a document - generally known as articles or a certificate of merger - is filed with the filing office in each constituent's state of organization. The required contents of the articles of merger differ from state to state and entity to entity.

I. Drafting the Primary Documents for Conversions and Other Transactions

In the case of a conversion the primary documents are a plan of conversion, articles or a certificate of conversion, and the formation document of the converted entity. The contents of the documents and the method of approval of the plan are set forth in the statutes and/or governing documents of the parties. It should be remembered that although a conversion involves one entity, it involves two statutes – the one under which the entity was formed, and the one that will govern the entity after the conversion is affected. Therefore, both statutes should be consulted.

Exchanges and consolidations are also effected by the drafting and approval of a plan and the filing of articles or a certificate with the filing office. As with mergers and conversions the statutes authorizing these transactions should be consulted to determine the required content of the primary documents.

VI. POST-TRANSACTION FILING ISSUES

After the primary documents have been filed, and the transaction has gone into effect, there may still be some details to take care of. These details consist mainly of filings needed to make sure the business entity filing office records reflect the changes resulting from the transaction.

A. Name Change Filings

If a business entity's name will change filings will have to be made to change the name on the records of its domestic state and all foreign states in which it will continue to be qualified to do business.

In the case of the domestic state, generally, the name change will be set forth in the primary document, and no further action will be necessary. If not, however, the formation document would have to be amended in the post-transaction stage.

In the case of a foreign state, changing a foreign business entity's name generally requires the filing of an application to amend the qualification document. Many state laws provide that the application has to be accompanied by a certificate from the home state evidencing the name change.

B. Foreign Post-Merger Filings

In a merger there will be at least one constituent that will no longer exist as a result of the transaction. If the disappearing constituents were qualified to do business in one or more foreign states, a filing will have to be made in those states. This filing will notify the filing offices that the foreign constituent has been discontinued due to a merger, and that it should be removed from the state's records. In most cases this removal is done by a procedure called withdrawal. It requires the filing a certificate of withdrawal and the payment of all taxes due. Tax clearances are required in some states before the withdrawal can become effective.

If the survivor needs to be qualified that may also be done after the merger goes into effect.

In addition, some business entity laws provide that whenever a qualified foreign entity is a survivor in a merger, it must file evidence of the merger. Some of these laws also require the filing to be made within a certain period of time after the effective date of the merger.

C. Foreign Post-Conversion Filings

A business entity that converts to a different form of business entity does not disappear. Nevertheless it has gone through a fundamental change and must notify any foreign states where it was qualified as one type of entity, that it is now a different type of entity.

In some states the converting entity must be removed from the records, generally through a withdrawal, with the converted entity then having to qualify to do business in the state.

There are some states, however, that will accept evidence of the conversion to correct their records and indicate the change to the entity, without requiring withdrawal of the converting entity and qualification of the converted entity.

D. Correcting Documents

Sometimes the documents filed to complete a merger contain an incorrect statement. If so, it may be possible to correct the document in the post-transaction stage by the filing of articles of correction.

Articles of correction generally have to describe the document, or a copy of the document has to be attached, specify the inaccuracy to be corrected, and correct the inaccuracy. Some statutes restrict the type of information that may be corrected in this manner. They may provide, for example, that an entity's name or purposes may not be changed by filing articles of correction.

E. Common Reasons for Rejected Filings

On occasion a document delivered for filing in connection with a merger will be rejected by the state filing office. Among the common reasons for rejections are (1) improper execution, (2) illegibility, (3) incorrect fee, (4) missing attachment, (5) use of incorrect form, (6) incorrect number of copies, and (7) improper method of delivery.

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- *Business Entity Choice, Combination and Conversion*
- *The Limited Liability Company*
- *Statutory Filings for Multi-Entity Merger, Exchange, Consolidation, and Conversion*
- *Delaware's Business Entity Laws*
- *The Corporation vs. The LLC – A Comparison*
- *Service of Process – A Primer for Business Entities*
- *The Series LLC*
- *LLC Law Today & Beyond*
- *What's in a Name – Selecting and Protecting a Business Entity's Names*

Ms. Feldman is a graduate of the Boston University School of Law and is admitted to practice law in New York and Massachusetts.

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